IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Nos. 71-827, 71-830

HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,

Petitioners,

—v.—

TRANS WORLD AIRLINES, INC.,

Respondent.

TRANS WORLD AIRLINES, INC.,

Cross-Petitioner,

—v.—

HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

Volume I

	PAGE
List of Relevant Docket Entries	A-x
TWA Complaint [Doc. 1]	A-1
Order Referring This Action to Judge Metzner for All Purposes, dated August 31, 1961 [Doc. 42]	A-33

PAGE

Opinion and Order of December 5, 1961 [Doc. 50] .. A-35

Pretrial Order, February 7, 1962 [Doc. 59] A-36

Toolco's Answer and Counterclaims [Doc. 63] A-41

Holliday's Answer [Doc. 83] A-99

Pretrial Order, July 12, 1962 [Doc. 101] A-116

Pretrial Order, September 21, 1962 [Doc. 122] A-118

Pretrial Order, January 10, 1963 [Doc. 144] A-122

Pretrial Order, January 19, 1963 [Doc. 146] A-127

Opinion and Order of Special Master dated January 22, 1963, Exhibit C to Bromley Affidavit dated February 15, 1963 [Doc. 179] A-133

Exhibit A to the Affidavit of John F. Sonnett, dated February 1, 1963 [Doc. 166] A-143

Exhibits B and C to the Affidavit of John F. Sonnett, dated February 1, 1963 [Doc. 167] A-226

Pretrial Order, February 1, 1963 [Doc. 168] A-253

Opinion and Order, February 7, 1963 [Doc. 173] A-255

Toolco's Notice of Position, dated February 8, 1963 [Doc. 174] A-268

Transcript of Pretrial Hearing, February 8, 1963 [Doc. 188] A-270

Transcript of Pretrial Hearing, May 2, 1963 [Doc. 204] A-309

Opinion and Order, dated May 3, 1963 [Doc. 191] A-317

Opinion and Order of May 3, 1963 Granting Additional Defendants' Motion to Dismiss (memorandum endorsed on motion papers dated February 15, 1963) [Doc. 179B] A-323

PAGE

Judgment of the Court of Appeals on Interlocutory Appeal, Entered July 10, 1964 [Docket No. 28405] [Doc. 478] A-324

Judgment of the Court of Appeals Affirming Dismissal of the Counterclaims, Entered July 10, 1964 [Docket No. 28406] [Doc. 479] A-326

Opinion of the Court of Appeals in Dockets No. 28405 and No. 28406 [Doc. 478] A-328

Opinion and Order of Special Master J. Lee Rankin, dated July 30, 1965 [Doc. 481] A-357

Opinion and Order of Judge Metzner, dated November 16, 1965 [Doc. 487] A-396

Transcript of Hearing Before Judge Metzner on December 30, 1965 [Doc. 498] A-400

Opinion and Order of Judge Metzner Denying Defendants' Motion for a Pre-Hearing Order, dated January 4, 1966 [Doc. 496] A-422

Order by Judge Metzner of January 4, 1966 Designating Herbert Brownell as Special Master in Place of J. Lee Rankin [Doc. 497] A-424

Volume II

Excerpts from Testimony at Damage Hearing of Robert W. Rummel [Docs. 554-2 through 554-10] A-425

Testimony at Damage Hearing of John B. Connelly [Doc. 554-11] A-977

Volume III

Excerpts from Testimony at Damage Hearing of Edward J. Morehouse [Docs. 554-13, 554-14] A-1209

Excerpts from Testimony at Damage Hearing of Edward Wemple [Docs. 554-15 through 554-18, 554-32] A-1243

PAGE

Excerpts from Testimony at Damage Hearing of John C. Biegler [Doc. 554-19] A-1527

Volume IV

Excerpts from Testimony at Damage Hearing of Gene M. Woodfin [Docs. 554-23, 554-24] A-1567

Excerpts from Testimony at Damage Hearing of Nathan S. Simat [Docs. 554-25, -26, -27, -28, -30, -31] A-1575

Excerpts from Testimony at Damage Hearing of L. John Eichner [Docs. 554-31, -32] A-1727

Testimony at Damage Hearing of Van Court M. Hare, Jr. [Doc. 554-32] A-1773

Excerpts from Pretrial Deposition of Robert W. Rummel [Docs. 224, 225, 226] A-1797

Excerpts from Pretrial Deposition of Charles C. Tillinghast [Docs. 210 through 222] A-1850

Excerpts from Pretrial Deposition of Emmett O. Cocke [Docs. 228, 231, 233, 235] A-1913

Jones v. *Uris Sales Corp.*—Master's Report [not a part of the Record herein] A-1934

Volume V

Notice of Filing of Report of Special Master dated September 21, 1968 [Doc. 509] A-1965

Report of Special Master, Filed September 21, 1968 [Doc. 508] A-1966

Defendants' Objections to the Report of the Special Master, dated November 1, 1968 [Doc. 511] A-1967

Opinion and Order, Filed December 23, 1969, Adopting and Confirming the Report of the Special Master [Doc. 519] A-2027

PAGE

Opinion and Order of April 13, 1970 Awarding Attorney's Fee and Costs [Doc. 530] A-2060

Final Judgment Entered April 14, 1970 [Doc. 531] .. A-2073

Volume VI

Toolco's Notice of Motion to Dismiss TWA's Complaint, August 8, 1961 [Doc. 22] A-2075

Order by Judge Herlands, dated August 14, 1961 [Doc. 25] A-2077

Transcript of Pretrial Hearing Before Judge Metzner, September 6, 1961 [Doc. 47] A-2078

Pretrial Order of Judge Metzner, September 7, 1961 [Doc. 44] A-2112

Transcript of Pretrial Hearing Before Judge Metzner, October 2, 1961 [Doc. 48] A-2115

Pretrial Order of Judge Metzner, December 18, 1961 [Doc. 354] A-2138

Toolco's Notice of Motion Before Special Master J. Lee Rankin, February 15, 1962 [Doc. 66] A-2140

Transcript of Pretrial Hearing Before Judge Metzner, February 23, 1962 [Doc. 79] A-2141

Orders of Special Master J. Lee Rankin, April 17, 1962, contained in excerpts from transcript of deposition of Charles C. Tillinghast, Jr. [Doc. 217] A-2176

Interrogatory Propounded by TWA to Toolco, May 4, 1962 [Doc. 89] A-2197

Interrogatory Propounded by TWA to Raymond M. Holliday, May 4, 1962 [Doc. 90] A-2203

Transcript of Pretrial Hearing Before Judge Metzner, May 17, 1962 [Doc. 96] A-2206

PAGE

Portion of Transcript of Proceedings Before Special Master J. Lee Rankin, June 4, 1962 [Doc. 218] A-2233

TWA's Notice of Motion and Affidavit of John F. Sonnett, June 25, 1962 [Doc. 305] A-2234

Affidavit of John R. Hupper, July 2, 1962 [Doc. 315] A-2240

Transcript of Pretrial Hearing Before Judge Metzner, July 12, 1962 [Doc. 107] A-2245

Pretrial Order of Judge Metzner, July 23, 1962 [Doc. 103] A-2267

Pretrial Order of Judge Metzner, July 24, 1962 [Doc. 93] A-2268

Transcript of Pretrial Hearing Before Judge Metzner, July 26, 1962 [Doc. 113] A-2270

Affidavit of Robert G. Zeller, August 28, 1962 with Exhibits A-K [Doc. 110] A-2283

Memorandum Reviewing the History of TWA's Application for Permission to Propound an Interrogatory of Hughes Tool Company Concerning the Location of Howard R. Hughes, August 30, 1962 [Doc. 106] A-2297

Transcript of Pretrial Hearing Before Judge Metzner, September 6, 1962 [Doc. 355] A-2305

Affidavit of John F. Sonnett, September 14, 1962, and Exhibits C and D thereto [Doc. 117] A-2316

Portions of Transcript of Proceedings Before Special Master J. Lee Rankin, September 15, 1962 [Doc. 226] A-2382

Transcript of Pretrial Hearing Before Judge Metzner, September 19, 1962 [Doc. 129] A-2391

Portions of Transcript of Discovery Proceedings Before Special Master J. Lee Rankin, October 25, 1962 [Doc. 226] A-2428

PAGE

Transcript of Pretrial Hearing Before Judge Metzner, October 29, 1962 [Doc. 184] A-2438

Notice of Motion by Toolco, December 4, 1962, for Leave to Depose Sessel and Wadsworth [Doc. 338] A-2461

Transcript of Proceedings Before Special Master J. Lee Rankin, December 14, 1962 [Doc. 237] A-2462

Transcript of Proceedings Before Special Master J. Lee Rankin, December 28, 1962 [Doc. 237] A-2514

Transcript of Pretrial Hearing Before Judge Metzner, January 9, 1963 [Doc. 185] A-2523

Transcript of Proceedings Before Special Master J. Lee Rankin, January 14, 1963 [Doc. 237] A-2571

Notice of Motion by Toolco, January 14, 1963 [Doc. 145] A-2574

Transcript of Pretrial Hearing Before Judge Metzner, January 17, 1963 [Doc. 186] A-2576

Notice of Motion by Toolco, January 22, 1963 [Doc. 147] A-2602

Transcript of Proceedings Before Special Master J. Lee Rankin, January 23, 1963 [Doc. 237] A-2603

Notice of Motion by Toolco, January 25, 1963 [Doc. 152] A-2615

Transcript of Pretrial Hearing Before Judge Metzner, January 28, 1963 [Doc. 187] A-2616

Letter of Chester C. Davis to Judge Metzner, January 29, 1963 [Doc. 448] A-2642

Letter of Chester C. Davis to Special Master J. Lee Rankin, February 4, 1963 [Doc. 458] A-2645

Letter from John F. Sonnett to Chester C. Davis, February 5, 1963 [Doc. 459] A-2647

PAGE

Notice of Motion by Toolco, February 6, 1963 [Doc. 170] A-2648

Affidavit of Nazeeh Habashy, February 6, 1963 [Doc. 172] A-2649

Transcript of Pretrial Hearing Before Judge Metzner, February 6, 1963 [Doc. 187] A-2650

Affidavit of Bruce Bromley, February 15, 1963 [without exhibits] [Doc. 179] A-2676

Affidavit of William C. Chanler, February 15, 1963 [Doc. 179] A-2689

Order to Show Cause dated February 16, 1963, and Affidavit of John F. Sonnett, February 15, 1963 [Doc. 180] A-2692

Transcript of Pretrial Hearing Before Judge Metzner, February 21, 1963 [Doc. 189] A-2704

Order of the Court of Appeals for the Second Circuit dated June 6, 1963, Granting Leave to Appeal and Staying Damage Hearing Pending Appeal .. A-2736

Orders of the Supreme Court of the United States, dated November 16, 1964 Granting Writs of Certiorari A-2737

Orders of the Supreme Court, dated March 8, 1965, Dismissing the Writs of Certiorari as Improvidently Granted in *Hughes Tool Company et al.* v. *Trans World Airlines, Inc.*, Nos. 443 and 501 .... A-2738

Opinion of the Court of Appeals dated September 1, 1971, in Docket Nos. 34902, 35114, Affirming with Modifications the Judgment of the District Court A-2739

Orders of the Court of Appeals, dated September 28, 1971, Denying Petitions for Rehearing and Rehearing *in banc* A-2799

Volume VII

PAGE

Excerpts from Transcript of Deposition of Charles C. Tillinghast, Jr. [Excerpts from Docs. 54, 210, 211, 216, 221] A-2800

Vol. 11 of Defendants' Exhibits to Deposition of Charles C. Tillinghast, Jr. (consisting of Exhibit 11, with subparts 11-A through 11-T, inclusive) [Doc. 238] A-3220

Opinions and Orders of the Civil Aeronautics Board with respect to the Hughes Tool Company—TWA Control Relationship, as follows:

(a) CAB Opinion and Order No. 3210, October 17, 1944 (officially reported at 6 C.A.B. 153) [not a part of the Record herein] A-3297

(b) CAB Order No. 4437, January 26, 1946 .... A-3307

(c) CAB Order No. E-922, October 29, 1947 .... A-3309

(d) CAB Opinion and Order No. E-1735, June 30, 1948 (officially reported at 9 C.A.B. 381) [not a part of the Record herein] A-3311

(e) CAB Opinion and Order No. E-4701, October 6, 1950 (officially reported at 12 C.A.B. 192) [not a part of the Record herein] A-3333

(f) CAB Opinion and Order No. E-16195, December 29, 1960 (officially reported at 32 C.A.B. 1363) A-3403

List of Relevant Docket Entries

In the District Court, June 1961-January 1963

Date	Proceedings
June 30, 1961	Filed complaint and issued summons.
June 30, 1961	Filed order directing that issuance of process, complaint and all other papers filed herein be kept under seal, etc.—MacMahon, J.
July 5, 1961	Filed affidavit and show cause order —leave to plaintiff to take deposition of Howard R. Hughes—returnable July 5, 1961. Marshal's return annexed—Served E. W. Hoeppner, Sales Manager Hughes Tool Co., July 5, 1961.
July 5, 1961	Filed plaintiff's memorandum of points and authorities in support of motion pursuant to Rule 26(a) FRCP.
July 31, 1961	Filed affidavit of Chester C. Davis in support of application of Toolco for adjournment of plaintiff's motion (exhibits).
August 2, 1961	Filed plaintiff's notice to take deposition of Howard R. Hughes.
August 3, 1961	Filed plaintiff's notice to take deposition of Hughes Tool Co., etc.
August 3, 1961	Filed defendant Hughes Tool Co.'s notice to take depositions of James F. Oates, Jr. and Grant Keehn.
August 3, 1961	Filed defendant Hughes Tool Co.'s notice to take deposition of Harry C. Hagerty and Gordon P. Jenkins.

List of Relevant Docket Entries

Date	Proceedings
August 3, 1961	Filed defendant Hughes Tool Co.'s notice to take deposition of Ben-Fleming Sessel and Robert A. Kerr.
August 9, 1961	Memo endorsed on notice of motion filed July 5, 1961—Motion Denied. This is an Order. No Settlement is necessary.—Murphy, J.
August 9, 1961	Filed affidavits, exhibits, complaint and notice of motion for an order dismissing complaint, etc.—returnable August 29, 1961.
August 9, 1961	Filed defendant Hughes Tool Co.'s memorandum in support of motion to dismiss complaint.
August 14, 1961	Filed plaintiff's proposed schedule for taking of depositions.
August 14, 1961	Filed Opinion #27139 granting defendant's motion for priority of taking depositions by Hughes Tool Co.—Herlands, J.—mailed notices of entry August 14, 1961.
August 14, 1961	Filed affidavit of Chester C. Davis under Rule 9(f).
August 17, 1961	Filed affidavit, exhibits and notice of motion for an order directing defendant Hughes Tool Co. to produce—returnable August 22, 1961.
August 17, 1961	Filed plaintiff's Points and authorities in support of its motion to produce.
August 18, 1961	Filed plaintiff's notice to take deposition of Howard R. Hughes.

List of Relevant Docket Entries

Date	Proceedings
August 18, 1961	Filed plaintiff's amended notice re: depositions in compliance with decision of Herlands, J. August 14, 1961, etc.
August 22, 1961	Filed defendant Hughes Tool Co.'s notice to take deposition of Bankers Trust Co.
August 22, 1961	Filed defendant Hughes Tool Co.'s notice to take deposition of Prudential Insurance Co.
August 22, 1961	Filed defendant Hughes Tool Co.'s notice to take deposition of Irving S. Olds.
August 22, 1961	Filed defendant Hughes Tool Co.'s notice to take deposition of Ernest R. Breech.
August 22, 1961	Filed defendant Hughes Tool Co.'s notice to take deposition of Morgan Guaranty Trust Co.
August 22, 1961	Filed Supplemental notice of taking deposition of Warner Mendel by defendant Hughes Tool Co.
August 23, 1961	Filed affidavit, exhibits and notice of motion to assign this case to a judge for all purposes, etc.—Returnable August 21, 1961 in Chambers before Ryan, J.
August 23, 1961	Memorandum endorsed on notice of motion filed August 23, 1961 adjourning hearing thereon to August 29, 1961 at 11 A.M. or the further order of the Court—Ryan, J.

List of Relevant Docket Entries

Date	Proceedings
August 23, 1961	Filed affidavit, exhibit and order adjourning motion of Hughes Tool Co. for dismissal and summary judgment to September 5, 1961 to be heard thereafter on a date to be set by further order of this Court, adjourning depositions, and staying proceedings until August 29, 1961—Ryan, J.
August 24, 1961	Filed copy of above order of August 23, 1961 with admission of service.
August 31, 1961	Filed order referring action to Metzner, J. for all purposes—Ryan, J.
September 1, 1961	Filed plaintiff's notice of true copy of order of Ryan, Ch. J., August 31, 1961.
September 5, 1961	Memorandum endorsed on notice of motion filed August 9, 1961 referring motion to Judge Metzner—Cashin, J.
September 5, 1961	Memorandum endorsed on notice of motion filed August 17, 1961 referring motion to Judge Metzner—Cashin, J.
September 8, 1961	Filed pre-trial order on discovery, depositions and motions for summary judgment—Metzner, J.
October 2, 1961	Before Metzner, J.—Pre-trial conference held.
October 17, 1961	Filed transcript of record of proceedings of September 6, 1961.

List of Relevant Docket Entries

Date	Proceedings
November 2, 1961	Filed transcript of stenographer's minutes of proceedings of October 2, 1961.
December 5, 1961	Filed Opinion #27343 granting motion for production and inspection as indicated herein—Settle order—Metzner, J.
January 12, 1962	Filed affidavit of service by Frank O'Connell on defendant Raymond M. Holliday January 10, 1962.
January 24, 1962	Filed Volume #1 of deposition of Charles C. Tillinghast, Jr.
January 24, 1962	Filed Volume #2 of deposition of Charles C. Tillinghast, Jr.
January 24, 1962	Filed one envelope containing Exhibits to Charles C. Tillinghast, Jr. deposition.
January 25, 1962	Filed plaintiff's notice of taking deposition of Howard R. Hughes, etc.
February 8, 1962	Filed Pre-Trial order narrowing and formulating issues and appointing J. Lee Rankin as Special Master, 36 West 44th Street, New York City, to act in connection with depositions and other discovery proceedings, etc.—Metzner, J. mailed notice.
February 14, 1962	Filed affidavit, exhibits and order bringing in additional parties as defendants and amending title of action as indicated herein. Issued summons on counterclaim—Metzner, J.

List of Relevant Docket Entries

Date	Proceedings
February 14, 1962	Filed Answer to complaint and its counterclaims herein of defendant Hughes Tool Co.
February 19, 1962	Filed Opinion #27581. The motion is denied. So ordered. Metzner, J. mailed notice.
February 21, 1962	Filed affidavit and notice of motion for ruling pursuant to Rule 26, deposition of plaintiff be concluded prior to commencement, etc. before the Special Master.
February 26, 1962	Filed Notice of Motion for order revising the schedule of depositions, etc.—Returnable before Judge Metzner, February 23, 1962 at 11:00 A.M. (also for judgment dismissing the counterclaims).
February 26, 1962	Filed Notice of Motion for order granting Dillon, Read & Co. an additional defendant on counterclaims extension of time, to reply to counterclaims etc.—Returnable before Judge Metzner, February 23, 1962 at 11:00.
February 26, 1962	Filed notice of taking deposition of defendant Hughes Tool Co. by H. R. Hughes on February 8, 1962.
February 26, 1962	Filed notice of motion for order revising the schedule of depositions and for judgment dismissing counterclaims, etc. returnable/forthwith Before Judge Metzner.
February 28, 1962	Filed transcript of record of proceedings on February 23, 1962.

List of Relevant Docket Entries

Date	Proceedings
March 1, 1962	Filed affidavits, exhibits and notice of motion before Special Master on March 2, 1962 for a ruling that defendant Hughes Tool Co. is entitled to protective relief re: production of financial statement.
March 5, 1962	Memo endorsed on notice filed February 26, 1962. Motion disposed of by pre-trial order of this date. Metzner, J. (Dillon, Read).
March 5, 1962	Memo endorsed on motion filed February 26, 1962. Motion disposed of by pre-trial order of this date. Metzner, J. (Equitable, Metropolitan, Oates and Hagerty).
March 6, 1962	Filed Pre-Trial order setting dates for further hearings, etc. Metzner, J.
March 6, 1962	Memo endorsed on motion filed February 26, 1962. Motion disposed of by pre-trial order of this date. Metzner, J. (Irving Trust and Sessel).
March 22, 1962	Filed affidavit and order of Special Master J. Lee Rankin binding parties by provisions herein (see order).
March 26, 1962	Filed Answer to complaint by defendant Raymond M. Holliday.
April 4, 1962	Filed affidavit and notice of motion before the Special Master returnable April 6, 1962, to declare certain documents privileged or not called for, etc.

List of Relevant Docket Entries

Date	Proceedings
April 16, 1962	Filed defendant Hughes Tool Co.'s Memorandum in opposition to motion of plaintiff to strike or dismiss counterclaims one through five and to dismiss or for summary judgment as to counterclaim six.
April 18, 1962	Before Metzner, J., hearing held on motion to strike.
May 3, 1962	Filed transcript of proceedings of April 18, 1962.
May 4, 1962	Filed plaintiff's Trans World Airlines Inc.'s interrogatories to defendant Hughes Tool Co.
May 4, 1962	Filed plaintiff's Trans World Airlines Inc.'s interrogatories to defendant Raymond M. Holliday.
May 10, 1962	Filed pre-trial order. Metzner, J.
May 11, 1962	Filed Oath of Special Master, J. Lee Rankin.
May 11, 1962	Filed affidavit and notice of motion for review of opinion of Special Master returnable before Judge Metzner.
May 11, 1962	Filed defendant's memorandum of law in support of Hughes Tool Co. application for review of Special Master's ruling of the attorney-client privilege.
May 17, 1962	Hearing held on motion in opposition to application of defendant Hughes Tool Co. for review of a decision of the Special Master. Decision reserved. Metzner, J.

List of Relevant Docket Entries

Date	Proceedings
June 8, 1962	Filed affidavit and notice of motion before Metzner, J. at time and place to be fixed by him for review and reversal of so much of order of Special Master, rendered June 4, 1962, as overrules Hughes Tool Co.'s objections to interrogatories, etc.
June 12, 1962	Filed transcript of record of proceedings for May 17, 1962.
June 12, 1962	Filed transcript of record of proceedings for May 7, 1962.
July 11, 1962	Filed Memorandum of Hughes Tool Co. supporting application for review.
July 12, 1962	Filed Memorandum of defendant Hughes Tool Co. in opposition to application of Trans World Airlines Inc. for reversal of ruling of Special Master re applicability of Rule 4 to this action.
July 12, 1962	Filed pre-trial order modifying ruling of Special Master re interrogatories on defendant Hughes Tool Co. appeal (modified as indicated and as modified is sustained). (see order) So ordered. Metzner J. Mailed notice.
July 12, 1962	Memo endorsed on motion filed June 8, 1962 — Disposed of in accordance with pre-trial order dated today. Metzner, J. Mailed notice.

List of Relevant Docket Entries

Date	Proceedings
July 12, 1962	Hearing held before Metzner, J. (Held on motion for review and reversal of Special Master order overruling Toolco objections to interrogatories.)—Decision reserved.
July 19, 1962	Filed Notice of Motion for an order clarifying and modifying pre-trial order as stated, affidavit of mailing attached.
July 23, 1962	Memo endorsed on Application for clarification of order of July 12, 1962 — Application denied. So ordered. Metzner, J. Mailed notice.
July 24, 1962	Memo endorsed on Motion filed May 11, 1962; Court sustains ruling of Special Master. If there are any specific documents concerning which the defendant desires specific rulings as to admissibility they may be submitted to Special Master pursuant to directions appearing on p. 4391 of transcript and in letter of May 2, 1962 as modified by letter of May 3, 1962. So ordered. Metzner, J. Mailed notice.
July 26, 1962	Filed affidavit in support of application of Hughes Tool Co. for an order enlarging time in which to answer to interrogatories.
July 26, 1962	Memo endorsed on affidavit filed July 26, 1962—Motion granted to extent that time of defendant to answer plaintiff's interrogatories to August 27, 1962. So ordered. Metzner, J. Mailed notice.

List of Relevant Docket Entries

Date	Proceedings
July 27, 1962	Filed plaintiff's Memorandum reviewing the history of TWA's application for permission to propound interrogatories to Hughes Tool Co. concerning location of Howard R. Hughes.
August 1, 1962	Filed transcript of Stenographer's Minutes of proceedings of July 12, 1962.
August 21, 1962	Filed notice of taking deposition of Howard R. Hughes.
August 24, 1962	Filed authorization to accept service for Howard R. Hughes to Mr. Chester C. Davis.
August 29, 1962	Filed plaintiff's affidavit and notice of motion for answers to certain interrogatories returnable September 6, 1962. Before Metzner, J. Rm. 1105 at 11:30.
September 5, 1962	Filed affidavit of Chester C. Davis, in opposition to plaintiff's Rule 37 motion.
September 6, 1962	Filed transcript of record of proceedings for July 26, 1962.
September 6, 1962	Before: Metzner, J.—Hearing held on plaintiff's motion for answers to interrogatories. Decision reserved.
September 7, 1962	Filed affidavit of John F. Sonnett, in reply to affidavit of Chester C. Davis.
September 13, 1962	Filed affidavits, exhibits and affidavit of Chester C. Davis, in rebuttal to affidavit of John F. Sonnett.

List of Relevant Docket Entries

Date	Proceedings
September 17, 1962	Filed affidavit, exhibits of John F. Sonnett, in reply to portions of affidavit of Chester C. Davis of September 13, 1962, etc.
September 18, 1962	Filed plaintiff's notice of hearing [sic] from Special Master's ruling, as directed to TWA's appeal from so much of ruling of September 15, 1962, at 10:30 A.M. on September 19, 1962 in Room 906.
September 19, 1962	Filed notice of defendant Hughes Tool Co. of application of review and to reverse oral order of Special Master of September 15, 1962.
September 20, 1962	Filed defendant Hughes Tool Co.'s notice of application for review.
September 24, 1962	Filed Pre-Trial Order re: deposition of Howard R. Hughes. Metzner, J.
September 26, 1962	Filed affidavit and notice of motion for an order directing Special Master to conduct pre-trial hearings, returnable before Metzner, J. September 28, 1962, at 10:00 A.M. in chambers.
October 11, 1962	Filed show cause order to dismiss the counterclaims of Hughes Tool Co. and staying proceedings as to defendant Breech, etc. Metzner, J. returnable October 15, 1962, at 11:00 A.M.
October 24, 1962	Filed transcript of record of proceedings for September 19, 1962.
November 2, 1962	Filed plaintiff's notice of taking deposition.

List of Relevant Docket Entries

Date	Proceedings
November 8, 1962	Filed memorandum of Hughes Tool Co. in support of the rulings of the Special Master rendered October 25, 1962.
November 14, 1962	Filed further interrogatories by defendant Hughes Tool Co. to plaintiff.
December 21, 1962	Filed affidavit and notice of motion for review of order of Special Master, etc. returnable before Judge Metzner, time and place to be fixed.
January 3, 1963	Filed defendant Toolco's Notice of Motion for review of order of Special Master entered December 28, 1962 denying application for a direction as indicated and request for Court to fix schedule for filing papers in support or opposition to this motion.
January 3, 1963	Filed defendant Toolco's Notice of Motion re: order of Special Master entered December 28, 1962.
January 8, 1963	Filed application of plaintiff for leave to withdraw notice of appeal from order of Special Master.
January 8, 1963	Filed affidavit in support of application of Toolco to take deposition.
January 8, 1963	Filed affidavit in support of application of Toolco for review of order of Special Master rendered December 28, 1962.
January 10, 1963	Filed Order disposing of Ruling of Special Master. So ordered. Metzner, J. Mailed notice January 11, 1963.

List of Relevant Docket Entries

Date	Proceedings
January 18, 1963	Filed affidavit and Notice of Motion for order that deposition of Howard R. Hughes may be taken as indicated, etc.
January 18, 1963	Filed Opinion No. 28550. Unless counsel for defendant indicates by noon January 22, 1963 a desire to change designated place, deposition shall proceed in U. S. Courthouse in Los Angeles. So ordered. Metzner, J. Mailed notice of entry—January 21, 1963.
January 22, 1963	Filed Notice of Motion for order that deposition of Howard R. Hughes shall not be taken in this action until after final adjudication of aforesaid motion to dismiss, etc. Returnable February 8, 1963.
January 22, 1963	Filed Stipulation and Order extending time for production of documents to January 23, 1963. Metzner, J.
January 22, 1963	Filed Notice of Appeal—Mailed copies January 23, 1963 to Cahill, Gordon, Reindel & Ohl; Cravath Swaine & Moore; Winthrop Stimson Putnam & Roberts; Dunnington, Bartholow & Miller; Chadbourne Parke Whiteside & Wolff; and J. Lee Rankin.
In the Court of Appeals, January-March 1963	
January 22, 1963	Filed preliminary record (certified copy of notice of appeal).
January 22, 1963	Filed motion for stay.

List of Relevant Docket Entries

Date	Proceedings
January 23, 1963	Filed motion to dismiss appeal.
January 23, 1963	Filed motion papers and order denying motion for a stay.
January 23, 1963	Filed motion papers on motion to dismiss appeal.
January 23, 1963	Filed judgment (dismissing appeal).
February 8, 1963	Issued Mandate (judgment).
March 13, 1963	Filed transcript of minutes of argument of appeal.
In the District Court, January-July 1964	
January 25, 1963	Filed plaintiff's notice of withdrawal of motion and application for extension of time.
January 25, 1963	Filed notice of motion for review of the order of Special Master of January 22, 1963.
January 25, 1963	Filed reply of additional defendant Metropolitan Life Insurance Co. to counterclaims.
January 25, 1963	Filed reply of additional defendant Equitable Life Assurance Society to counterclaims.
January 25, 1963	Filed reply of additional defendant Harry C. Hagerty to counterclaims.
January 25, 1963	Filed reply of additional defendant James F. Oates, Jr. to counterclaims.
January 25, 1963	Filed reply of additional defendants Irving Trust Co. and Ben-Fleming Sessel to counterclaims.

List of Relevant Docket Entries

Date	Proceedings
January 26, 1963	Filed notice of motion of additional defendants to adjudge defendant Hughes Tool Co. to be in civil contempt, etc. Returnable before Metzner, J.
January 26, 1963	Filed plaintiff's affidavit re: motion of additional defendants, etc.
January 28, 1963	Filed notice of application for order directing additional defendant Tillinghast to answer counterclaims of defendant Hughes Tool Co.
January 28, 1963	Filed affidavit of John F. Sonnett, in opposition to motion.
February 1, 1963	Filed memorandum of defendant Hughes Tool Co. in support of motion to dismiss.
February 1, 1963	Filed appendix to memorandum of defendant Hughes Tool Co. in support of motion to dismiss.
February 1, 1963	Filed Pre-Trial order, Metzner, J.
February 2, 1963	Filed TWA's Memorandum in support of its complaint.
February 2, 1963	Filed affidavit in opposition to pending motion of Hughes Tool Co. re: jurisdiction.
February 2, 1963	Filed folder marked Exhibit A.
February 2, 1963	Filed folder marked Exhibits B & C.
February 5, 1963	Filed reply of additional defendant Dillon, Read & Co. to counterclaims of defendant Hughes.

List of Relevant Docket Entries

Date	Proceedings
February 6, 1963	Filed Notice of Motion for order that all further proceedings be stayed pending entering of final order by Civil Aeronautics Board with respect to Complaint of Hughes Tool Co. and Request for Investigation, etc. Returnable February 8, 1963.
February 6, 1963	Filed reply memorandum of Hughes Tool Co. supporting its motion to dismiss.
February 6, 1963	Filed memo endorsed on motion filed January 18, 1963. Upon consideration of defendants' brief filed on February 1, 1963 in support of the motion to dismiss, the answering brief of plaintiff filed on February 2, 1963 in opposition, defendants reply brief filed at noon today and the oral argument on said motion, the motion to dismiss is denied. A formal opinion giving the reasons of the court will follow. So ordered. Metzner, J. signed February 6, 1963 at 6:05 P.M.
February 7, 1963	Filed Opinion No. 28588 defendant Hughes Tool Co. motion to dismiss is denied. Toolco's application for stay of all deposition-discovery proceedings pending an application for stay to Court of Appeals granted, etc. So ordered. Metzner, J. Mailed notice February 8, 1963.
February 8, 1963	Filed notice of position (defendant Hughes Tool Co.).

List of Relevant Docket Entries

Date	Proceedings
February 11, 1963	Filed true copy of USCA judgment dismissing appeal for lack of jurisdiction.
February 11, 1963	Filed Reply of plaintiff Trans World Airlines, Inc. to counterclaims of defendant Toolco.
February 13, 1963	Filed Reply of additional defendant Charles C. Tillinghast, Jr. to counterclaims of defendant Hughes Tool Co. CPW&W
February 13, 1963	Filed affidavit and Notice of Motion returnable before Judge Metzner re: order granting reargument, etc. CGD
February 18, 1963	Filed motion returnable February 21, 1963 before Judge Metzner for dismissal, etc. CS&M
February 18, 1963	Filed affidavit and Show Cause Order to amend complaint, etc. Returnable February 21, 1963 before Judge Metzner.
February 21, 1963	Filed notice of amendment to notice of motion of Hughes Tool Co. CCD
February 21, 1963	Filed Memo endorsed on motion filed February 6, 1963; to stay proceedings; Motion denied. See page 56 of transcript of hearing held on February 8, 1963. So ordered, Metzner, J. Mailed notice February 25, 1963 (dated February 12, 1963).

List of Relevant Docket Entries

Date	Proceedings
February 21, 1963	Filed memo endorsed on motion filed January 26, 1963; motion deemed withdrawn in view of motion by same additional defendants. Returnable February 21, 1963—Metzner, J.
February 25, 1963	Filed affidavit of Chester C. Davis with copies of Exhibits A to C attached.
February 25, 1963	Filed memo endorsed on motion filed February 13, 1963; motion for reargument denied, motion for order referring stated questions denied; motion for order making certain orders of the CAB part of record is denied. Metzner, J. Mailed notice February 26, 1963.
February 25, 1963	Filed memo endorsed on motion filed February 21, 1963; this motion brought on to amend motion of February 13—is denied. So ordered. Metzner, J. Mailed notice February 26, 1963.
March 6, 1963	Filed transcript of record of proceedings for October 29, 1962.
March 6, 1963	Filed transcript of record of proceedings for January 9, 1963.
March 6, 1963	Filed transcript of record of proceedings for January 17, 1963.
March 6, 1963	Filed transcript of proceedings of January 28, and February 6, 1963.
March 6, 1963	Filed transcript of proceedings of February 8, 1963.

List of Relevant Docket Entries

Date	Proceedings
March 6, 1963	Filed transcript of proceedings of February 21, 1963.
April 29, 1963	Filed memorandum of Hughes Tool Co. in opposition to the motion of TWA.
May 2, 1963	Before Metzner, J.—Pre-Trial hearing held.
May 3, 1963	Filed Opinion #28826. A judgment by default shall be entered in favor of TWA against Toolco and counterclaims asserted by Toolco shall be dismissed with prejudice. Damages to be awarded to TWA referred to Special Master. An immediate appeal from this order is justified, etc. So ordered, Metzner, J.
May 3, 1963	Filed memo endorsed on motion filed February 18, 1963. See opinion this date. Metzner, J.
May 28, 1963	Filed Opinion #28882. The sixth counterclaim of the Answer of Toolco, plaintiff's motion for summary judgment is granted, defendants' motion is denied. So ordered. Metzner, J. Mailed notice May 29, 1963.
May 28, 1963	Filed judgment that each and every counterclaim asserted in answer and counterclaims of the defendant Hughes Tool Co., except the sixth counterclaim is dismissed as against plaintiff with prejudice. Metzner, J. Judgment entered May 28, 1963. Clerk. Mailed notice

List of Relevant Docket Entries

Date	Proceedings
May 28, 1963	Filed judgment that additional defendants on counterclaims, Equitable Life; Metropolitan Life; Irving Trust Co.; Dillon, Read & Co.; Ben-Fleming Sessel; James F. Oates, Jr.; Harry C. Hagerty; and Charles C. Tillinghast, Jr. dismissing with prejudice this action and each of the counterclaims herein as to additional defendants with costs and disbursements in favor of said additional defendants against Hughes Tool Co. to be taxed by the Clerk, etc. Metzner, J. Judgment entered May 28, 1963. Clerk. Mailed notice May 29, 1963.
June 11, 1963	Filed defendants' notice of appeal—mailed copy to Cahill, Gordon, Reindel & Ohl, 80 Pine Street, New York, N. Y.
June 25, 1963	Filed transcript of record of proceedings of May 2, 1963.
June 26, 1963	Filed defendant's (Hughes Tool Co.) notice of appeal—mailed copies to Cahill, Gordon, Reindel & Ohl and attorneys Cravath, Swaine & Moore and attorneys Winthrop Stimson Putnam & Roberts and attorneys Dunnington Bartholow & Miller and attorneys Chadbourne Parke Whiteside & Wolff. (Mailed this date.)
July 31, 1963	Filed deposition of Tillinghast, Volumes 3 through 11. Filed deposition of Tillinghast, Volumes 12 through 15.

List of Relevant Docket Entries

Date	Proceedings
	Filed: Volume 16, deposition of Leslie.
	Volumes 17 through 20, deposition of Rummel.
	Volume 21, deposition of Cocke.
	Volumes 22, 23, deposition of Leslie.
	Volume 24, deposition of Cocke.
	Volume 25, deposition of Leslie.
	Volume 26, deposition of Cocke.
	Volume 27, deposition of Leslie.
July 31, 1963	Filed: Volume 28, deposition of Cocke.
	Volumes 29 and 30, Oral arguments.
	Defendants Exhibits 1 through 369. (Filed individually) except for 344.
	Plaintiff's Exhibits 1, 2 and 3.
	TWA Exhibits A through E.
	Document Exhibit 1.
	Metropolitan Equitable Exhibit 1.
	Special Master's Exhibits 1 through 11.
	TWA Exhibits 4 through 8.
August 1, 1963	Filed: Memorandum of Defendant Hughes Tool Co.
	Memorandum of Defendant Hughes Tool Co.
	Reply memorandum of plaintiff in support of motion.
	Brief with respect to defendant Hughes Tool Co. Claimed defenses.
	Notice of settlement (plaintiffs).
	Plaintiff's memorandum in support of order.
August 1, 1963	Filed copy of proposed order by J. Lee Rankin, Special Master.

List of Relevant Docket Entries

Date	Proceedings
August 1, 1963	Filed additional defendants' notice to take deposition.
August 1, 1963	Filed additional defendants' notice to take deposition.
August 1, 1963	Filed additional defendants' notice of motion for order pursuant to Rule 34.
August 1, 1963	Filed Memorandum of Certain Additional defendants in support of application.
August 1, 1963	Filed Plaintiff's memorandum in support of order of depositions.
August 1, 1963	Filed notice of motion to strike interrogatories.
August 1, 1963	Filed copy of motion to strike answer.
August 1, 1963	Filed notice of motion to strike answer of Hughes Tool Co.
August 1, 1963	Filed affidavit of K. F. Glenn.
August 1, 1963	Filed affidavit of Richard Grey.
August 1, 1963	Filed affidavit of Chester C. Davis.
August 1, 1963	Filed Hughes Tool Co. memorandum in opposition to motion for discovery.
August 1, 1963	Filed notice of motion re: taking of deposition, etc.
August 1, 1963	Filed plaintiff's memorandum in opposition to application, etc.
August 1, 1963	Filed Hughes Tool Co. notice of application.

List of Relevant Docket Entries

Date	Proceedings
August 1, 1963	Filed Hughes Tool Co. motion for a direction.
August 1, 1963	Filed motion to commence deposition of Hughes.
August 1, 1963	Filed motion (confidential) to produce.
August 1, 1963	Filed Special Master's Order (confidential).
August 1, 1963	Entered this date, originally filed October 13, 1962, defendant Toolco's interrogatories to plaintiff.
August 1, 1963	Entered this date order originally filed December 18, 1961. Ordered to produce. Metzner, J.
August 1, 1963	Entered this date, originally filed October 23, 1962, transcript of record of proceedings for September 6, 1962.
August 9, 1963	Filed notice that the record on appeal has been certified to the U.S.C.A. for 2nd Circuit this 9th day of August, 1963.
August 24, 1963	Filed: Notice of Motion of Toolco before Judge Metzner for review of order of Special Master overruling Toolco's objections to TWA interrogatories, dated June 7, 1962. Proposed form of stipulation and order submitted by TWA—re: service of process on Howard Hughes, dated July 31, 1962.

List of Relevant Docket Entries

Date	Proceedings
September 24, 1963	Filed:
	Additional defendants' proposed form of order and judgment re: dismissal of Toolco's counterclaims with prejudice, dated February 1963.
	Proposed form of order submitted by TWA covering entry of a default judgment and dismissal of Toolco's counterclaims with prejudice, dated March 1963.
	Letter from Sonnett to Judge Metzner, enclosing copy of CAB's "Petition for Enforcement", etc., dated April 9, 1963.
	Letter from Sonnett to Judge Metzner, enclosing order of CAB No. E 19473, dated April 11, 1963.
	Notice that annexed proposed form of judgment order covering granting of default judgment will be submitted for settlement, signature and entry, dated May 8, 1963.
September 27, 1963	Filed notice that the supplemental record on appeal has been certified to the U.S.C.A.
October 16, 1963	Filed notice that the record on appeal has been certified to the U.S.C.A. this date.
November 1, 1963	Filed stipulation and order—Motion of additional defendant Ernest R. Breech to dismiss the counterclaims of defendant Hughes Tool

List of Relevant Docket Entries

Date	Proceedings
	Co. be and the same hereby is withdrawn—Defendant Breech is deemed to have appeared in this action—Toolco is taking the same position with respect to additional defendant Breech as it has taken with respect to the other additional defendants.—Any judgment dismissing Toolco's counterclaims as against Breech by reason of the positions taken by Toolco shall be governed by the determination of the U.S.C.A. to the same extent and with the same force and effect as though Breech were a party to said appeal—Metzner, J.
November 1, 1963	Filed Judgment—in favor of additional defendant on counterclaims Ernest R. Breech dismissing with prejudice and without costs this action and each of the counterclaims of the defendant Hughes Tool Co. as to said additional defendant—Metzner, J.—Judgment Entered. November 1, 1963—Clerk. (Mailed notices November 6, 1963.)
July 8, 1964	Filed U.S.C.A. Judgment with opinion attached—The D.C. is found to have had jurisdiction of the action and that the orders of the Civil Aeronautics Board do not constitute a good defense to the antitrust claim of the plaintiff. Judgment Entered July 10, 1964. Clerk—entered and mailed notice—July 10, 1964.

List of Relevant Docket Entries

Date	Proceedings
July 8, 1964	Filed U.S.C.A. Judgment with opinion attached—The orders of the D.C. is affirmed with exception of the said order dealing with the second counterclaim. Further ordered, adjudged and decreed that the second counterclaim be and it hereby is dismissed for lack of jurisdiction (opinion attached)—Judgment Entered—July 10, 1964. Clerk—entered and mailed notice July 10, 1964.

In the Court of Appeals, May 1963-June 1965 [No. 28405]

May 13, 1963	Filed motion for leave to appeal under Rule 1292 (b).
May 17, 1963	Filed 4 tw copies answer to petition for leave to appeal; and exhibits in support.
June 6, 1963	Filed motion papers (endorsed) and order granting leave to appeal and stay.
August 2, 1963	Filed order extending time to file record on appeal to 8/9/63 of appeal of 6/11/63 and appeal of 6/26/63.
August 6, 1963	Filed motion to docket appeals separately.
August 8, 1963	Filed motion papers and order granting leave to docket separately the appeals of 6/11/63 and 6/26/63; appellants may file separate briefs and appendices in each appeal; and argument of the two appeals shall be heard at the same time.

List of Relevant Docket Entries

Date	Proceedings
August 9, 1963	Filed record (original papers of District Court) (& in 28406).
August 12, 1963	Filed order (and in 28406).
September 4, 1963	Filed application and order granting leave to file appellants brief not to exceed 80 pages.
September 9, 1963	Filed 24 copies appendix, appellants (Hughes Tool Co. and Raymond M. Holliday)—Vol. I.
September 9, 1963	Filed 24 copies appendix, appellants (Hughes Tool Co. and Raymond M. Holliday)—Vol. II.
September 9, 1963	Filed brief, appellants (Hughes Tool Company and Raymond M. Holliday).
September 26, 1963	Filed order granting leave to file appellee's brief not to exceed 80 pages.
September 27, 1963	Filed supplemental record (original papers of District Court) (& in 28406).
September 30, 1963	Filed brief, appellee's (Trans World).
October 15, 1963	Filed application and order (endorsed) granting leave to file reply brief, appellants—of 30 pages).
October 15, 1963	Filed reply brief, defendants-appellants.
October 16, 1963	Filed supplemental record (original papers of District Court) (& in 28406).

List of Relevant Docket Entries

Date	Proceedings
November 12, 1963	Filed order granting leave to file rejoinder brief in behalf of appellee, (Trans World).
November 12, 1963	Filed rejoinder brief, appellee (Trans World).
November 13, 1963	Argument heard (by: Lumbard, Kaufman and Hays CJJ).
November 20, 1963	Filed rebuttal brief, appellants (Hughes Tool Co., and Raymond M. Holliday).
June 2, 1964	Jurisdiction found in the District Court, etc., Lumbard, Ch.J. (& in 28406).
June 2, 1964	Filed judgment.
July 7, 1964	Issued Mandate (opinion and judgment).
August 6, 1964	Original and supplemental records returned to District Court (& in 28406).
August 17, 1964	Received recalled original record from District Court (and in 28406).
August 19, 1964	Certified appendix and proceedings to Chester C. Davis.
August 26, 1964	Certified original record to Chester C. Davis (& in 28406).
September 1, 1964	Filed notice of filing of petition for writ of certiorari.
September 16, 1964	Filed notice of filing of petition for writ of certiorari (& in 28406).

List of Relevant Docket Entries

Date	Proceedings
November 20, 1964	Filed certified copy of order of Supreme Court granting petition for writ of certiorari (& in 28406).
November 20, 1964	Filed certified copy of order of Supreme Court granting petition for writ of certiorari.
March 10, 1965	Filed opinion of Supreme Court (& in 28406).
April 5, 1965	Filed certified copy of order of the Supreme Court dismissing writ of certiorari (& in 28406).
May 18, 1965	Original record received from Supreme Court (& in 28406).
June 3, 1965	Original and supplemental records returned to District Court.
June 8, 1965	Filed receipt of return of original & supplemental (2) record to District Court.
In the Court of Appeals, May 1963-June 1965 [No. 28406]	
August 2, 1963	Filed order extending time to file record on appeal to 8/9/63 of appeal to 6/11/63 and appeal of 6/26/63.
August 6, 1963	Filed motion to docket appeals separately.
August 8, 1963	Filed motion papers & order granting leave to docket separately the appeals of 6/11/63 and 6/26/63; appellants may file separate briefs & appendices in each appeal; and argument of two appeals shall be heard at same time.

List of Relevant Docket Entries

Date	Proceedings
August 9, 1963	Filed record (original papers of District Court) (Filed in 28405).
August 12, 1963	Filed order (filed in 28405).
September 9, 1963	Filed application and order (endorsed) granting leave to file appellant's brief not to exceed 54 pages.
September 9, 1963	Filed 24 copies appendix, appellant's (Hughes Tool Company).
September 9, 1963	Filed brief, appellant's (Hughes Tool Company).
September 27, 1963	Filed supplemental record (original papers of District Court) (filed in 28405).
September 30, 1963	Filed 24 copies appendix, appellee's (Trans World) (& in 28405).
September 30, 1963	Filed brief, appellee's (Trans World) (& in 28405).
October 1, 1963	Filed application and order (endorsed) granting leave to file a joint brief for additional defendants-appellees not to exceed 69 pages (filed in 28405).
October 1, 1963	Filed 24 copies appendix to joint brief, additional defendants-appellees (& in 28405).
October 1, 1963	Filed joint brief, defendants-appellees (& in 28405).
October 15, 1963	Filed application and order (endorsed) granting leave to file reply brief, appellant, of not more than 45 pp (& in 28405).

List of Relevant Docket Entries

Date	Proceedings
October 15, 1963	Filed reply brief, defendant-appellant (Hughes Tool) (& in 28405).
October 16, 1963	Filed second supplemental record (original papers of District Court) (& in 28405).
November 13, 1963	Argument heard (by: Lumbard, Kaufman and Hays CJJ).
June 2, 1964	Judgment Affirmed, except second counterclaim—Dismissed, Lumbard, Ch.J. (filed in 28405).
June 2, 1964	Filed judgment.
June 17, 1964	Filed petition for rehearing and petition for rehearing in banc.
July 6, 1964	Petition for Rehearing denied, Per Curiam.
July 6, 1964	Filed order denying petition for rehearing.
July 6, 1964	Petition for Rehearing in banc denied, Per Curiam.
July 6, 1964	Filed order denying petition for rehearing in banc.
July 7, 1964	Issued Mandate (opinion and judgment).
August 6, 1964	Original & supplemental records returned to District Court (filed in 28405).
August 17, 1964	Received recalled original record from District Court (filed in 28405).
August 19, 1964	Certified appendix and proceedings to Chester C. Davis.

List of Relevant Docket Entries

Date	Proceedings
August 26, 1964	Certified Original record to Chester C. Davis (filed in 28405).
September 16, 1964	Filed notice of filing of petition for writ of certiorari (filed in 28405).
November 20, 1964	Filed certified copy of order of Supreme Court granting petition for writ of certiorari (filed in 28405).
March 10, 1965	Filed opinion of Supreme Court (filed in 28405).
April 5, 1965	Filed certified copy of order of the Supreme Court dismissing writ of certiorari (filed in 28405).
May 18, 1965	Original record received from Supreme Court (filed in 28405).
June 3, 1965	Original and supplemental records returned to District Court.
June 8, 1965	Filed receipt of return of original & supplemental (2) record to District Court (filed in 28405).
In the District Court, September 1965-August 1970	
September 7, 1965	Filed memorandum of plaintiff in support of its motion to review failure of Special Master to make certain interim findings of fact.
September 7, 1965	Filed appendices to brief of plaintiff September 7, 1965.
September 21, 1965	Filed defendants' memorandum in opposition to plaintiff's motion to review Special Master's Refusal to make certain anticipatory findings.

List of Relevant Docket Entries

Date	Proceedings
September 23, 1965	Filed plaintiff's notice of motion before Metzner, J. on August 31, 1965 for a review and reversal of the Opinion, etc. of the Special Master dated July 30, 1965.
September 24, 1965	Filed plaintiff's reply memorandum in support of its motion to review Special Master's Refusal to make certain interim Findings of Fact.
September 30, 1965	Filed defendants' supplemental memorandum in opposition to plaintiff's motion to review Special Master's refusal to make certain findings.
November 16, 1965	Filed Opinion #31817—The matter is returned to the Special Master to proceed in accordance with these views. So ordered—Metzner, J.—mailed notice.
December 21, 1965	Filed defendants' (Hughes Tool et ano.) notice of motion for pre-trial order—Returnable before Metzner, J. on December 30, 1965.
December 21, 1965	Filed brief of defendants Hughes Tool et ano. in support of motion.
December 29, 1965	Filed plaintiff's memorandum in opposition to defendants' motion for pre-hearing order.
December 29, 1965	Filed exhibits to TWA's memorandum of December 29, 1965.
December 29, 1965	Filed excerpts from Hughes Tool Co. 1959 and 1960 Federal Income Tax returns, etc.

List of Relevant Docket Entries

Date	Proceedings
January 5, 1966	Filed Opinion #31936—defendants' motion for a pre-hearing order is denied. So ordered—Metzner, J.—mailed notice.
January 5, 1966	Filed order—the order of this Court dated March 3, 1963 is amended to the extent of designating Herbert Brownell, Esq. of 25 Broadway, New York City, as Special Master in place of J. Lee Rankin—Metzner, J.—mailed notices.
February 1, 1966	Filed transcript of record of proceedings of December 30, 1965.
February 4, 1966	Filed order—Provisions of the order dated May 10, 1962 providing for payment of compensation to the Special Master are made applicable to the new Special Master, except the payment shall be apportioned equally between TWA and Hughes Tool Co.—Metzner, J.
February 7, 1966	Filed Oath of Special Master.
April 1, 1966	Filed transcript of record of proceedings of September 30, 1965.
August 31, 1966	Filed Consent Order—*All Boeing Documents* received in evidence in this action shall *be maintained in a sealed file in the custody of this Court* or its clerks and none of the same shall be made available for examination by any person except by order of this Court upon good cause shown, etc.—Metzner, J.

List of Relevant Docket Entries

Date	Proceedings
December 2, 1966	Filed order re: documents—Consented to—Metzner, J.
September 21, 1968	Filed report of Herbert Brownell, Special Master.
September 21, 1968	Filed notice of filing Special Master's Report. Mailed copies to: Cahill, Gordon, Sonnett, Reindel & Ohl and Donovan, Leisure, Newton & Irvine and Chester C. Davis.
November 1, 1968	Filed defendants' objections to Special Master's Report.
November 1, 1968	Filed plaintiff's (TWA) objections to report of Special Master, memorandum in support of objections and motion to modify and, as modified, to confirm report.
November 15, 1968	Filed appendix to memorandum in support of defendants' objections to Special Master's Report.
November 15, 1968	Filed memorandum in support of defendants' objections to Special Master's Report.
December 2, 1968	Filed defendants' Hughes Tool & Raymond Holliday Notice of Motion—objecting to the findings and conclusions.
December 2, 1968	Filed defendants' memorandum in opposition to plaintiff's objections to report of Special Master.
December 2, 1968	Filed plaintiff's memorandum in answer to memorandum in support of defendants' objections.

List of Relevant Docket Entries

Date	Proceedings
January 20, 1969	Filed transcript of record of proceedings September 27, 1968—Metzner, J.
December 23, 1969	Filed Opinion #36406— • • • Conclusion—The report of the Special Master awarding damages in sum of $137,611,435.95 pursuant to 15 U.S.C. Sec. 15 is confirmed—So Ordered. Metzner, J.
December 31, 1969	Filed plaintiff's affidavit, applications and notice of motion for an order determining and awarding to Trans World Airlines, Inc., its cost of suit including attorney's fee, directing clerk to enter judgment in favor of Trans World against defendant Hughes Tool Co. and Raymond M. Holliday in amount of $137,611,435.95 plus cost of suit, including reasonable attorney's fees as determined and awarded by Court. Returnable January 21, 1970.
December 31, 1969	Filed plaintiff's memorandum with respect to interest.
January 16, 1970	Filed Defendants' memorandum in opposition to plaintiff's application for counsel fees, cost of suit and pre-judgment interest.
January 16, 1970	Filed affidavit of James V. Hayes, attorney for defendants Hughes Tool Co. and Raymond M. Holliday

List of Relevant Docket Entries

Date	Proceedings
	in opposition to plaintiff's application for an order awarding to plaintiff. Attached are exhibits and affidavit by Chester C. Davis.
January 21, 1970	Filed supplemental affidavit of Dudley B. Tenney; supplemental affidavit of Marshall H. Cox, Jr. and affidavit of Lee H. Lasher.
January 21, 1970	Filed TWA's reply memorandum.
January 30, 1970	Filed defendants' Hughes Tool Co. and Raymond M. Holliday affidavit and notice of motion for order granting partial new trial and reopening the case.
January 30, 1970	Filed defendants' memorandum in support of motion for a partial new trial.
February 9, 1970	Filed plaintiff's Memorandum in response to defendants' motion for a partial new trial.
February 11, 1970	Filed defendants' reply memorandum.
April 13, 1970	Filed Memorandum Endorsed on motion papers filed January 30, 1970, "This motion is denied—So Ordered: Metzner, J." Mailed notice.
April 13, 1970	Filed Exhibits A, B, C.
April 13, 1970	Filed affidavit of Chester C. Davis, attorney for defendant Hughes Tool Co. in opposition to plaintiff's motion for order determining and awarding to TWA its costs of suit herein, including a reasonable attorney's fee and directing Clerk to enter judgment.

List of Relevant Docket Entries

Date	Proceedings
April 13, 1970	Filed Opinion #36691 by Metzner, J.—"Plaintiff moves for award of reasonable attorneys fees and costs of suit.—Reasonable attorneys fee in this case is $7,500,000. Plaintiff requests $2,230,602, as the costs of suit—This request is accordingly denied. Judgment shall be entered accordingly. So Ordered: Metzner, J." Mailed notice.
April 14, 1970	Filed Judgment #70623—That the plaintiff Trans World Airlines, Inc. recover of the defendants Hughes Tool Co. and Raymond M. Holliday, the sums of $137,611,435.95 as damages, $7,500,000.00 as a reasonable attorney's fee and $336,705.12 as costs, for a total amount of $145,448,141.07, together with interest thereon at the rate of 6% as provided by law—Metzner, J. Judgment entered April 14, 1970—Clerk. Mailed notice ENT: April 16, 1970.
April 30, 1970	Filed Transcript of record of proceedings dated January 21, 1970.
May 5, 1970	Filed defendants' memorandum in support of application for a stay of execution pending appeal.
May 5, 1970	Filed affidavit and Order that the plaintiff Show Cause before Metzner, J. on May 11, 1970 why an order should not be entered granting a stay, pending appeal, of execution of the judgment entered on April 14, 1970. Metzner, J. Mailed notice.

List of Relevant Docket Entries

Date	Proceedings
May 5, 1970	Filed defendants' Notice of Appeal —$5.00. Copy mailed to Cahill, Gordon, Sonnett, Reindel & Ohl.
May 5, 1970	Filed Bond for Undertaking for costs on appeal in sum of $250 by National Surety Corp.
May 8, 1970	Filed plaintiff's Memorandum in Opposition to defendants' application for stay of execution without adequate bond.
May 11, 1970	Filed Bond for Undertaking for costs in the sum of $250 by U. S. Fidelity and Guaranty Co.
May 11, 1970	Filed plaintiff's Notice of Appeal— $5.00. Copy mailed to Donovan Leisure Newton & Irvine.
June 3, 1970	Defendant moves to have transcripts of the proceedings sealed— motion granted. Motion submitted after argument. Metzner, J.
June 5, 1970	Filed Transcript of hearing before Court on June 3 relating to defendants' motion for stay of execution of judgment. Transcript is sealed by order of Court and not to be opened unless further order of the Court. So Ordered: Metzner, J.
June 6, 1970	Filed Transcript of record of proceedings, dated May 11, 1970.
June 11, 1970	Filed letter from Toolco's counsel dated June 3, 1970, with financial information submitted to the Court at the hearing on June 3, 1970. This envelope to be opened only upon order of the Court. June 10, 1970—Metzner, J.

List of Relevant Docket Entries

Date	Proceedings
June 10, 1970	Filed Memorandum of plaintiff in opposition to continued stay of execution without security.
June 10, 1970	Filed letter from Cahill, Gordon, Sonnett, Reindel & Ohl to Metzner, J., dated May 19, 1970.
June 10, 1970	Filed letter from Chester Davis, dated May 19, 1970 to Metzner, J.
June 10, 1970	Filed Opinion #36856 by Metzner, J. " • • • Counsel are directed to meet in continuous session and appear before the court on June 16 in Room 1106 at 10:30 A.M. in form that any needed resolution of disputes can easily be disposed of. So Ordered: Metzner, J." Mailed notice.
June 16, 1970	Filed Consent Order that the execution of the judgment in favor of TWA entered on April 14, 1970 be stayed pending the determination by the U. S. Court of Appeals for the 2d Circuit with provision as indicated. Metzner, J.
June 18, 1970	Filed Consent Order that the time for transmitting the record on appeal to the Court of Appeals for the 2d Circuit be extended to the 7th day of July, 1970. Metzner, J.
June 22, 1970	(Filed April 13, 1970) Entered letter from Cahill, Gordon, Sonnett, Reindel & Ohl to James V. Hayes of Donovan Leisure Newton & Irvine dated December 31, 1969.

List of Relevant Docket Entries

Date	Proceedings
June 25, 1970	Filed Order that Letter of Credit as indicated is to be filed by July 12, 1970 and Clerk is to retain said letter until jndgment becomes final, etc. under conditions indicated. Metzner, J. Mailed notice.
July 1, 1970	Filed Box (a) containing transcripts of damage hearings before Special Master numbered 554-1 thru 554-16 inclusive.
July 1, 1970	Filed Box (b) containing transcripts of damage hearings before Special Master numbered 554-17 thru 554-32 inclusive.
July 2, 1970	Filed stipulation and order that time to transmit record on appeal shall be extended from July 7, 1970 to July 21, 1970. So Ordered: Weinfeld, J.
July 2, 1970	Filed stipulation and order that the following enumerated documents be deemed docketed in the action and part of the record on appeal as indicated. So Ordered: Weinfeld, J.
July 10, 1970	Filed Stipulation that the record on appeal shall be retained in the district court until such time as the Court of Appeals or any party shall request transmittal of said record or parts thereof.
July 10, 1970	Filed Bond dated June 26, 1970 that defendants Hughes Tool Co. & Raymond Holliday are held and firmly bound unto the above named Trans World Airlines, Inc. in sum of $161,447,686.59.

List of Relevant Docket Entries

Date	Proceedings
July 10, 1970	Filed Letter of Credit and documentation dated July 1, 1970.
July 13, 1970	Filed Notice that the record on appeal has been certified but not transmitted to U.S.C.A. for 2d Circuit this 13th day of July, 1970, by virtue of document #557 which provides for the retainment of the documents in the District Court until any party requests the transmittal of said record or any parts thereof.
August 26, 1970	Filed Transcript of record of proceedings, dated June 25, 1970.
August 26, 1970	Filed Transcript of record of proceedings, dated May 20, 1970.
August 26, 1970	Filed Transcript of record of proceedings, dated April 29, 1970.
August 26, 1970	Filed Transcript of record of proceedings, dated June 16, 1970.
In the Court of Appeals, 1970-1972	
May 7, 1970	Filed statement of docket entries and copy of notice of appeal (Hughes Tool Co. & Holliday).
May 13, 1970	Filed statement of docket entries and copy of notice of appeal (Trans World Airlines, Inc.).
May 14, 1970	Received docket fee.
July 2, 1970	Filed order deferring appendix re 30(C); plaintiff-appellant's brief filed by 8-3-70; defendants-appellants' brief to 10-15-70; plaintiff-

List of Relevant Docket Entries

Date	Proceedings
	appellant's reply brief by 12-1-70; defendants-appellants' reply brief by 12-22-70; joint appendix by 12-31-70; copies of previously filed briefs by 1-15-71; further extension of defendants-appellants brief to 1-15-70, in the event of such further extension, the times for filing the further briefs shall be extended by the same number of days.
August 4, 1970	Filed application and order granting leave to file appellant's brief not to exceed 83 pages.
November 11, 1970	Filed order granting leave to file appellant's brief not to exceed 230 pages, and four annexes not to exceed 80 pages.
December 10, 1970	Filed order that Plaintiff-Appellant's reply brief shall be filed by 1-29-71; Defendant-Appellants' reply brief filed 21 days after filing of Plaintiff-Appellant's reply brief; joint appendix shall be filed 30 days after Plaintiff-Appellant's reply brief, and copies of previously filed briefs, revised to refer to pages of the joint appendix, shall be filed 45 days after filing of Plaintiff-Appellant's reply brief.
January 18, 1971	Filed order granting motion for leave to file an over-size reply brief.
February 9, 1971	Filed stipulation and order (endorsed) extending time to file defendant-appellants reply brief to

List of Relevant Docket Entries

Date	Proceedings
	2-26-71; Joint appendix filed by 3-3-71; copies of previously filed briefs, revised to refer to pages of the Joint appendix filed by 15 days after filing of Joint appendix.
February 25, 1971	Filed order granting motion for leave to file oversized reply brief in excess of 25, but not more than 55, printed pages and one annex not to exceed 40 pages (& in 35114).
March 4, 1971	Filed order extending time to file Joint appendix to 3-5-71 and copies of previously filed briefs, revised to refer to pages of appendix extended to 15 days after filing of joint appendix (& in 35114).
March 5, 1971	Filed joint appendix (Volumes I thru VII) with proof of service (& in 35114).
March 22, 1971	Filed answering brief, appellant (Trans World Airlines, Inc.) (& in 35114).
March 22, 1971	Filed brief, appellant (Trans World Airlines, Inc.) (& in 35114).
March 22, 1971	Filed brief, appellants (Hughes Tool Co. & Holliday) (& in 35114).
March 22, 1971	Filed reply brief, appellants (Hughes Tool Co. & Holliday) (& in 35114).
May 7, 1971	Argument heard (by: Smith, Kaufman & Hays, CJJ) (& in 35114).
June 15, 1971	Filed minutes of argument of appeal (& in 35114).

List of Relevant Docket Entries

Date	Proceedings
September 1, 1971	Judgment affirmed as modified, Kaufman, CJ (& in 35114).
September 1, 1971	Filed judgment (& in 35114).
September 15, 1971	Filed motion for allowance of costs with proof of service (& in 35114).
September 15, 1971	Filed petition for rehearing and rehearing en banc with proof of service (& in 35114).
September 17, 1971	Filed affidavit in opposition to motion for allowance of costs with proof of service (& in 35114).
September 28, 1971	Filed order denying petition for rehearing (& in 35114).
September 28, 1971	Filed order denying petition for rehearing en banc (& in 35114).
September 28, 1971	Filed motion to stay issuance of mandate with proof of service (& in 35114).
September 29, 1971	Filed order granting motion to allow costs to Trans World Airlines, Inc. the sum of $68,725.51, to be taxed against Hughes Tool Company (& in 35114).
October 7, 1971	Filed order granting motion to stay issuance of mandate, etc. (& in 35114).
October 13, 1971	Filed motion to renew and amend motion for stay of mandate with proof of service (& in 35114).
October 18, 1971	Filed order denying motion to renew and amend motion to stay mandate; etc. (& in 35114).

List of Relevant Docket Entries

Date	Proceedings
October 20, 1971	Certified original record & proceedings for: Donovan, Leisure, Newton & Irvine, Esqs. (& in 35114).
November 1, 1971	Filed receipt by Supreme Court of original record (& in 35114).
November 30, 1971	Filed copy of notice of Supreme Court granting motion to stay mandate (& in 35114).
February 28, 1972	Filed certified copy of order of Supreme Court granting writ of certiorari (Hughes) (& in 35114).
February 28, 1972	Filed certified copy of order of Supreme Court granting petition for writ of certiorari (Trans World) (& in 35114).

A-1

TWA Complaint

[Doc. 1]

[CAPTION] Civil Action No. 61-2324

COMPLAINT

Plaintiff, by its attorneys, Cahill, Gordon, Reindel & Ohl, for its complaint herein against the above-named defendants, respectfully alleges:

FIRST CLAIM

I.

Nature of Claim and Jurisdiction of Court

1. This complaint is filed and this action instituted against defendants under Sections 4, 12 and 16 of the Clayton Act (15 U.S.C. §§ 15, 22 and 26 (1958)) in order to declare, to prevent and restrain, and to recover damages resulting from, the violation by defendants, as hereinafter alleged, of Section 1 of the Sherman Act (15 U.S.C. § 1 (1958)), of Section 2 of the Sherman Act (15 U.S.C. § 2 (1958)), of Section 3 of the Clayton Act (15 U.S.C. § 11 (1958)), and of Section 7 of the Clayton Act (38 Stat. 731, 15 U.S.C. (1946 Ed.) § 18).

II.

Description of Parties

2. Plaintiff (hereinafter sometimes called "TWA") is a corporation organized in 1934 and existing under the laws of the State of Delaware and maintains its principal executive offices in the City of New York. TWA is the only air carrier authorized under Certificates of Public Convenience and Necessity granted by the Civil Aeronautics Board to

provide both transcontinental and transatlantic scheduled air transportation in the interstate and foreign commerce of the United States, and is now providing such transportation, in competition at various points with various other United States-Flag and foreign-flag air carriers.

3. Defendant Hughes Tool Company (hereinafter sometimes called "Toolco") is a corporation organized and existing under the laws of the State of Delaware, has assets of several hundred million dollars, transacts business within the Southern District of New York, and was and is engaged in interstate commerce, *inter alia,* since in or about 1939 in the development, manufacture and acquisition of aircraft and related equipment from the manufacturers thereof in various states and in the sale and lease of such aircraft to air carriers in various other states for use in interstate and foreign commerce.

4. Defendant Howard R. Hughes (hereinafter sometimes called "Hughes") was, throughout the period of the matters hereinafter complained of, and is an officer and the sole stockholder of Toolco and directed, controlled and dominated its activities.

5. Defendant Raymond M. Holliday (hereinafter sometimes called "Holliday") for some years past was and is the chief operating officer of Toolco in charge of TWA affairs and since 1959 and to date has been a director of TWA.

6. Atlas Corporation, named herein as a co-conspirator but not as a defendant (hereinafter called "Atlas"), is a corporation organized in 1936 and existing under the laws of the State of Delaware. Northeast Airlines, Inc., a corporation organized and existing under the laws of the State of Massachusetts (hereinafter called "Northeast"), is an

air carrier engaged in the business of providing scheduled air transportation in interstate commerce, and for some years past has been and is now controlled by Atlas, by means, *inter alia,* of the ownership by Atlas of 58% of the stock of Northeast. The defendant Hughes for some years past has had the beneficial ownership of Voting Trust certificates issued with respect to 11% of the Common Stock of Atlas.

III.

Commerce Involved

7. The trade and commerce involved in this action concerns:

(a) The furnishing of aircraft by sale, lease or other means in interstate commerce of the United States to TWA and other air carriers for use in air transportation in interstate and foreign commerce of the United States, as "aircraft", "air carrier" and "air transportation" are defined in 49 U.S.C. § 1301.

(b) The furnishing of jet-powered aircraft by sale, lease or other means in interstate commerce of the United States to TWA and other air carriers for use in air transportation in interstate and foreign commerce of the United States.

(c) The furnishing of aircraft by sale, lease or other means in interstate commerce of the United States to TWA for use in the business of air transportation in interstate and foreign commerce of the United States.

(d) The furnishing of aircraft—by sale, lease or other means in interstate commerce of the United States—used by scheduled United States-Flag air carriers between certain pairs of cities in the United States, such pairs of cities being those pairs of cities between which in each instance TWA provides more

than 60% of the scheduled air transportation which is provided by all United States-Flag air carriers.

(e) The furnishing of aircraft—by sale, lease or other means in interstate commerce of the United States—used by scheduled United States-Flag air carriers between certain pairs of cities in the United States, and between the United States and certain foreign cities, such pairs of locations being those pairs of locations between which in each instance TWA provides the only scheduled air transportation provided by United States-Flag air carriers.

(f) The financing in interstate commerce of the United States of the acquisition by sale, lease or other means of aircraft for use by TWA in air transportation in interstate and foreign commerce of the United States.

8. The nature and extent of such trade and commerce with respect to TWA is more fully described as follows:

(a) TWA has, since its organization in 1934, operated a domestic air carrier system between certain cities in the United States. The scheduled air transportation provided by TWA in the United States has been and is a substantial proportion of that provided by all air carriers within the United States. During the periods set forth below, TWA provided the percentages set forth below of all scheduled passenger miles provided by all domestic scheduled trunk air carriers within the United States:

Year 1955	14.9%
Year 1956	15.1%
Year 1957	14.9%
Year 1958	15.0%
Year 1959	16.3%
Year 1960	15.2%

(b) Since 1946, TWA has operated an international air transportation system between the United States and certain cities in Europe, Africa and Asia. The scheduled air transportation provided by TWA between the United States and certain foreign cities has been and is a substantial proportion of that provided by all United States-Flag air carriers and of that provided by all air carriers. During the periods set forth below, TWA provided the percentages set forth below of all passenger miles provided by scheduled United States-Flag air carriers between the United States and foreign cities:

	% of U. S.-Flag
Year 1955	13.6%
Year 1956	12.9%
Year 1957	12.0%
Year 1958	12.5%
Year 1959	9.5%
Year 1960	12.5%

(c) In its operations, TWA has used, and is using, both in its domestic operations and in its international operations, a substantial proportion of all of the aircraft, both jet-powered and otherwise, operated by all scheduled air carriers operating within the United States, by all of the United States-Flag scheduled air carriers operating between the United States and foreign cities and by all of the scheduled air carriers operating between the United States and foreign cities.

(d) TWA provides and has provided a substantial proportion of the scheduled transportation in jet-powered aircraft provided by all carriers within the United States, by all United States-Flag air carriers between the United States and foreign cities and by all air carriers between the United States and foreign cities. In 1959, TWA provided over 1.1

billion passenger miles of scheduled jet air transportation.

(e) The requirements of TWA for commercial jet-powered aircraft constitute and have constituted a separate and distinct market for United States aircraft manufacturers by reason, *inter alia*, of design and flight characteristic requirements, fleet and operating requirements, and the structure of the domestic and foreign routes of TWA.

(f) TWA constitutes and has constituted a substantial proportion of the market for the various types of commercial aircraft made by United States aircraft manufacturers. For example, during the period 1958 through 1960, TWA purchased and leased jet-powered aircraft for amounts aggregating substantially in excess of $100,000,000, which aircraft were manufactured by manufacturers in various states of the United States.

(g) TWA constitutes and has constituted a substantial proportion of the market for the various types of commercial jet-powered aircraft, both long-range and otherwise, made by United States manufacturers. For example, TWA currently has more than $150,000,000 worth of jet-powered aircraft on order.

(h) TWA constitutes and has constituted a dominant portion of a substantial market for aircraft, that is, the market for aircraft for use between certain pairs of United States cities and between the United States and certain foreign cities. In 1959, TWA provided the only scheduled air transportation between certain pairs of United States cities, such transportation amounting to 332,000,000 passenger miles accommodating 391,000 passengers and accounting for approximately 7.8% of the total number of domestic passenger miles supplied by TWA in 1959. In 1959, TWA provided between 90% and

100% of the passenger miles of scheduled air transportation between certain pairs of United States cities, such transportation by TWA amounting to over 680,000,000 passenger miles accommodating over 1,000,000 passengers and accounting for approximately 16.0% of the total number of domestic passenger miles supplied by TWA in 1959. In 1959, TWA provided between 80% and 90% of the passenger miles of scheduled air transportation between certain pairs of United States cities, such transportation by TWA amounting to over 331,000,000 passenger miles accommodating 649,000 passengers and accounting for approximately 7.8% of the total domestic passenger miles supplied by TWA in 1959. In 1959, TWA provided between 70% and 80% of the passenger miles of scheduled air transportation between certain pairs of United States cities, such transportation by TWA amounting to 417,000,000 passenger miles accommodating 412,000 passengers and accounting for approximately 9.8% of the total domestic passenger miles supplied by TWA in 1959. In 1959, TWA provided between 60% and 70% of the passenger miles of scheduled air transportation between certain pairs of United States cities, such transportation by TWA amounting to 218,000,000 passenger miles accommodating 251,000 passengers and accounting for 5.1% of the domestic passenger miles provided by TWA in 1959. Thus, in 1959, TWA provided more than 60% of the passenger miles between certain pairs of United States cities, such transportation by TWA amounting to almost 2 billion passenger miles accommodating more than 2.7 million passengers and accounting for 46.5% of the domestic passenger miles provided by TWA in 1959. TWA is the only United States-Flag air carrier which is now authorized to provide scheduled air transporation of passengers between the United States and any of the following cities: Athens, Geneva, Zurich, Milan, Algiers, Tunis, Cairo, Tel

Aviv, Dahran, Bombay and Colombo. Long-range aircraft are used by TWA between the United States and the above-named foreign cities; all other aircraft used by TWA are usable between one or more of the pairs of United States cities between which TWA provides the only scheduled air transportation. TWA in 1959 provided the following percentages of the scheduled air transportation measured by number of transatlantic passengers provided by all air carriers between the United States and the three principal ports of entry (London, Paris and Lisbon) into Europe, Africa and Southwest Asia: United States-London, 11%; United States-Paris, 17%; United States-Lisbon, 32%.

(i) In 1960, operating revenues of TWA were substantially in excess of $300,000,000; net income was in excess of $6,000,000. During the first quarter of 1961, TWA had an operating loss of approximately $13,000,000 and a net loss of approximately $9,000,000.

IV.

The Offenses Charged

9. Beginning in or about the year 1939 and continuing up to and including the date of the filing of this complaint, the defendants, Atlas and other persons acting for each of them have been and are now engaged in:

(a) A combination and conspiracy to restrain interstate and foreign commerce of the United States in violation of Section 1 of the Sherman Act;

(b) A combination to restrain interstate and foreign commerce of the United States in violation of Section 1 of the Sherman Act by providing financing of the acquisition by plaintiff of aircraft, including jet-powered aircraft, only upon the condition that plaintiff acquire all such aircraft from defendant Toolco;

(c) A combination to restrain interstate and foreign commerce of the United States in violation of Section 1 of the Sherman Act by requiring plaintiff to boycott all suppliers of aircraft, including jet-powered aircraft, except defendant Toolco;

(d) A combination and conspiracy to monopolize a substantial segment of the interstate and foreign trade and commerce of the United States in violation of Section 2 of the Sherman Act;

(e) An attempt to monopolize a substantial segment of the interstate and foreign trade and commerce of the United States in violation of Section 2 of the Sherman Act;

(f) Sales and leases of jet-powered aircraft on the condition, agreement and understanding that the purchaser or lessee shall not buy or lease the goods of a competitor or competitors of the vendor or lessor, in violation of Section 3 of the Clayton Act; and

(g) Acquisitions of the stock of a corporation in violation of Section 7 of the Clayton Act.

10. Each act of the defendants and Atlas hereinafter alleged was done in furtherance of the offenses charged in the preceding paragraph and was a part thereof and was done with the primary purpose of restraining and monopolizing the trade and commerce described above. It was the intent of the defendants and Atlas, *inter alia:*

(a) That Toolco would become a dominant source of supply of jet-powered aircraft to air carriers;

(b) That the defendants would seize control over TWA and its business and use such control for their own purposes;

(c) That Toolco would become the sole source of supply of jet-powered aircraft to TWA;

(d) That defendants would have TWA as a captive market and would supply the requirements of TWA for aircraft, including jet-powered aircraft, upon terms advantageous to themselves;

(e) That the requirements of TWA for aircraft, including jet-powered aircraft, would be enlarged for the benefit of defendants and Atlas by various means;

(f) That suppliers of aircraft to TWA other than the defendants would be boycotted and foreclosed from the trade and commerce hereinbefore alleged;

(g) That defendants would supply TWA with the aircraft essential to its business only on the condition that TWA would accept such financing arrangements relating to the aircraft as the defendants dictated, and in turn that defendants would allow TWA to procure financing essential for the acquisition of the aircraft it needed only on the condition that TWA would accept such aircraft as the defendants dictated; and

(h) That the defendants and Atlas would obtain substantial profits for themselves, at the expense of TWA and other air carriers, as the result of restrictions upon competition in the trade and commerce hereinbefore alleged.

V.

Acts Committed Prior to December 1960

11. Commencing in or about the year 1939 and at various times thereafter, Toolco, pursuant to an understanding with and at the direction of Hughes, acquired Common Stock of TWA. By such acquisitions, Toolco acquired more than 78% of such Common Stock. The purpose and the effect of the acquisitions so made and the use by defendants of the stock so acquired have been to foreclose competing

suppliers of aircraft from the opportunity for supplying aircraft to TWA.

12. Since in or about 1955 one of the most important single factors in the operation of and competition among air carriers engaged in air transportation in interstate and foreign commerce has been the prospect, introduction and eventual utilization of jet-powered aircraft.

13. By 1955, aircraft manufacturers (including Boeing Company, hereinafter called "Boeing", and Douglas Aircraft Company, Inc., hereinafter called "Douglas") had prepared—to the general knowledge of the air carrier industry—plans and drawings and otherwise had undertaken preparations for the manufacture by themselves of jet-powered aircraft intended for use by air carriers. Beginning in or about 1955, many air carriers devoted substantial efforts of their own (a) to determining whether the jet-powered aircraft then being developed by Boeing, Douglas or others could be best utilized by them in their respective operations, and (b) to obtaining jet-powered aircraft suitable for their needs, including the participation by them in the design of such aircraft. Boeing and Douglas each contemplated the manufacture of and did ultimately manufacture jet-powered aircraft for short-range flights and for medium and long-range flights suitable for the respective needs of such air carriers.

14. Prior to 1955, defendants and General Dynamics Corporation (hereinafter called "Convair") entered into an arrangement for the joint development of a jet-powered aircraft to be manufactured by Convair and to be supplied by the defendants to air carriers, including TWA. In furtherance of that arrangement, the defendants required TWA to provide to the defendants and Convair the use of

TWA's highly skilled engineering and other personnel, who were to participate and did participate in the design and development of the aircraft to be manufactured by Convair. It was the intention of defendants that TWA would serve as a captive market for such aircraft which Toolco would procure to supply to TWA and other air carriers. A jet-powered aircraft, designated as Model 18, was so designed. In 1955, the defendants and Convair concluded that the continued development of, and manufacture of, Model 18 was not in their respective self-interests, and the program for its development and production was then abandoned.

15. Prior to May 1, 1956, the defendants also entered into a plan under which Toolco would itself commence the manufacture of a jet-powered aircraft with design and range characteristics making it suitable for use on both domestic and transatlantic routes. The defendants intended that Toolco would furnish this aircraft, to be known as the "Golden Arrow", by sale, lease or other means both to TWA and to other air carriers. Activities looking to such manufacture by Toolco of the "Golden Arrow" were actively pursued until in or about mid-1956, and were thereafter abandoned by the defendants.

16. In or about October 1955, at approximately the time of the decision to abandon the Model 18, the first firm order for jet-powered aircraft was placed with a United States aircraft manufacturer by a United States-Flag air carrier; that order was placed with Boeing by Pan American World Airways, Inc., TWA's principal international competitor. In the ensuing month and a half, principal United States and foreign air carriers—including major competitors of TWA—placed orders for jet-powered aircraft with Boeing or Douglas. These air carriers ordered 59 jet-powered aircraft from Boeing and 95 jet aircraft from Douglas, which orders were scheduled for delivery in 1959 and 1960.

17. During this period when other United States-Flag air carriers were placing orders for jet-powered aircraft, and thereafter, the defendants caused and directed TWA to forego making any arrangements for the acquisition, by sale, lease or otherwise, of any jet-powered aircraft. In or about February 1956, the defendants arranged for Toolco to place orders for 15 jet-powered aircraft with Boeing. Thereafter, the defendants arranged for Toolco to place orders with Boeing for an additional 18 jet-powered aircraft. In or about April 1956, the defendants arranged for Toolco to place orders for at least 30 Model 880 jet-powered aircraft to be manufactured by Convair.

18. The purchase orders placed by Toolco with Convair and Boeing reserved to Toolco the privilege of assigning to TWA the right to acquire the jet-powered aircraft so purchased. Despite repeated requests by TWA, Toolco refused throughout the period of 1956 to 1960 to assign to TWA the rights to acquire such aircraft. In or about June, 1959, defendants caused six of the Boeing jet-powered aircraft then on order by Toolco to be diverted to the principal transatlantic competitor of TWA.

19. During the period 1956 to 1960, the defendants required Convair to make certain changes in the design of Model 880 aircraft on order by Toolco, but the defendants prevented TWA from arranging with Convair for certain design modifications which were desired by TWA and which would not have interfered with the scheduled dates of delivery. During the year 1960 the defendants also prevented and restricted TWA from making acceptance and test flights from time to time of various specific Convair Model 880 aircraft then on order with Convair by Toolco.

20. During the period 1959 to 1960, defendants arranged for the lease to TWA by Toolco of certain jet-powered air-

craft on a day-to-day basis. Such aircraft were the first and only jet-powered aircraft made available to TWA by the defendants during the years 1955 to 1960 and the number of aircraft so leased by Toolco to TWA was inadequate for the needs of TWA. Such leases were given on a continuing condition, agreement and understanding that TWA would not purchase or lease aircraft from any other potential supplier thereof. The effect of such continuing condition, agreement and understanding was to foreclose, to all potential suppliers of jet-powered aircraft to TWA other than defendants, the opportunity for selling or leasing jet-powered aircraft to TWA.

21. Prior to May 1960, the exact date being unknown to TWA, Atlas, with knowledge of the conspiracy and other violations of antitrust laws herein alleged, then joined with the defendants in said violations, and agreed to cause Northeast to submit to TWA a proposed agreement of merger upon terms advantageous to the defendants and Atlas and disadvantageous to TWA. The purposes of defendants and Atlas in proposing such a merger were

(a) To enlarge TWA's requirements for new aircraft, and thereby to enlarge the demand in the market from which the defendants had foreclosed and would continue to foreclose all other suppliers, and

(b) For Atlas to obtain stock of TWA on terms advantageous to Atlas and its stockholders, including defendant Hughes.

Northeast is a substantial air carrier operating under certificates of public convenience and necessity and serving the East Coast of the United States and Canada. In 1959 Northeast's revenue passenger miles totaled 519,000,000 and its total assets exceeded $35,000,000.

22. In November 1960, while the proposal for merger was pending, the defendants arranged for the lease by Convair to Northeast of six of the Convair Model 880 aircraft which Toolco had ordered from Convair. Among the aircraft so leased to Northeast were three aircraft which Toolco previously by an agreement with TWA of May 9, 1960, had assigned to TWA.

23. Subsequent to the acquisition of stock by Toolco in TWA, defendants for reasons of self-interest continuously refused to allow equity financing by TWA except on condition that, as a result of any such financing, Toolco would be enabled to increase its equity position in TWA and instead caused TWA to obtain funds chiefly by means of debt financing. TWA was thus rendered unable to seek the financing it needed for the acquisition of aircraft except upon the approval of defendants. The purpose of the defendants in rendering TWA dependent upon them for such assistance in financing as defendants might choose to provide, and the effects thereof, were, among other things,

(a) to create and maintain control in the defendants of the business of financing the purchase of aircraft for use by TWA, and

(b) to strengthen defendants' control over the acquisition of aircraft by TWA.

24. From 1955 until December, 1960, the defendants used their power over the financing of aircraft thus obtained to compel TWA to acquire aircraft of the type and in the manner dictated by the defendants and used their power over TWA's acquisition of aircraft, obtained as hereinbefore alleged, to compel TWA to obtain financing for the acquisition of such aircraft of the type and in the manner dictated by the defendants.

25. At least as early as 1955, the needs of United States air carriers for the extensive financing required for acquisition of jet-powered aircraft were recognized throughout the air carrier industry and by others, including the defendants.

26. In 1955 and continuously thereafter until December, 1960, the defendants, pursuant to and in furtherance of their plan to control TWA in a manner advantageous to themselves, directed TWA to make no efforts itself to obtain financing necessary for the acquisition of jet-powered aircraft required for the needs of TWA.

27. Commencing in the year 1955 and continuing thereafter, various other air carriers, including competitors of TWA, made appropriate arrangements for the financing of jet-powered aircraft. In 1955 and 1956 various United States air carriers were able to obtain funds at a cost (or interest rate per annum) in 1955 of 4%, and in 1956 at costs ranging from 4¼% to 4¾%.

28. In 1955 and thereafter for a period of several years, the defendants discussed with others various proposals for the financing of jet-powered aircraft, but the defendants did not make arrangements for such financing nor allow TWA to make such arrangements until December 1960, at which time the prevailing cost of funds (or interest rates) for debt financing was approximately 6-6½%.

VI.

The Financing and Acquisition of Jet Aircraft by TWA in and since December 1960

29. In connection with TWA's acquisition from Toolco in December 1960 of certain jet-powered aircraft and the rights to obtain certain additional jet-powered aircraft from Boeing and Convair and in connection with other

financial transactions between TWA and Toolco, TWA delivered to Toolco a note dated December 30, 1960 for $100,000,000, carrying an interest rate of 6½%, which note was subordinated to the indebtedness of TWA to various banks and insurance companies for additional funds needed by TWA for the purchase of these aircraft.

30. As part of the arrangements with Toolco above described, TWA agreed to offer to its stockholders not less than $100,000,000 of its subordinated income debentures, with attached warrants to purchase common stock of TWA; the debentures were subordinated to TWA's senior indebtedness to banks and insurance companies. Toolco agreed to purchase, not later than three business days after expiration of the subscription offer, a principal amount thereof equal to the excess of $100,000,000 over the principal amount purchased by others in the offering; Toolco also was given the option to purchase, not later than three business days after the expiration of the subscription offer, all or any part of the debentures not purchased by stockholders pursuant to the subscription offer.

31. As part of the arrangements with Toolco and with banks and insurance companies as above described, Toolco, TWA and three Voting Trustees (Ernest R. Breech, Irving S. Olds and defendant Holliday) executed an agreement dated as of December 15, 1960. The agreement provided that the TWA stock owned and to be owned by Toolco would be placed in a Voting Trust, pursuant to which the Voting Trustees, acting by a majority vote, were empowered to exercise their sole and absolute discretion in respect of the TWA stock deposited with them and accordingly were authorized to elect directors who would be in control of TWA's management and policies.

32. The creation of the Voting Trust above described was required by the financial institutions as a condition to making loans to TWA of $165,000,000 also needed for the purchase of the aforesaid aircraft, and which loans were evidenced by a like amount of senior notes of TWA.

33. The Voting Trust, in which Toolco's TWA stock has been deposited pursuant to the terms of the Voting Trust, provides in Article Thirteenth thereof that it shall terminate on December 15, 1970, unless previously terminated or extended as provided therein.

34. Thereafter and in early 1961, at a meeting of stockholders of TWA, the Voting Trustees, by majority vote, and other stockholders of TWA entitled to vote duly elected a Board of Directors of TWA and said Board of Directors elected a new President of TWA.

35. In March 1961, after careful consideration of TWA's requirements for additional jet-powered aircraft, the officers of TWA who were concerned with such matters unanimously recommended to the Board of Directors of TWA that TWA's immediate needs for jet-powered aircraft would best be served by the acquisition of 20 aircraft, Boeing Model 707 131-B, and 6 aircraft, Boeing Model 707 331-B. The Board of Directors authorized the purchase of such aircraft. On April 30, 1961, TWA and Boeing agreed on the purchase of these aircraft, with related spare parts and equipment, for delivery in 1962 at an ultimate cost estimated at approximately $187,500,000. Of this amount, TWA expects to provide approximately $40,500,000 from its own funds and to borrow $147,000,000. The borrowing is currently being negotiated with certain insurance companies and banks.

VII.

Acts Committed Subsequent to 1960

36. On and after December 31, 1960, the defendants, despite the execution of the Voting Trust above described and the deposit of Toolco's TWA stock in said Trust, continued and renewed the offenses described in Paragraphs 9 through 28 above, as hereinafter alleged.

37. Since during the month of May 1961, the defendants have insistently demanded of TWA that TWA not purchase from Boeing the aircraft described above, but instead that TWA purchase from Toolco 13 Convair Model 990 aircraft which Toolco had previously agreed to purchase from Convair, despite the decision of TWA's Board of Directors, which was known to defendants, that such Convair aircraft are not as suitable for TWA's needs as the aircraft which TWA wishes to purchase and is purchasing from Boeing.

38. During the month of May 1961, defendants wrongfully attempted to coerce TWA into purchasing Convair aircraft from Toolco by maliciously asserting for the first time (a) that TWA might have an obligation to purchase such aircraft from Toolco, (b) that the management of TWA would be derelict in its duty to Toolco if it failed to make such purchases, (c) that TWA's management was without authority to reach decisions on behalf of TWA with respect to such purchases or alternatives thereto, and (d) that the proposed purchases of aircraft from Boeing were not in the interest of TWA. Defendants also sent telegrams and other urgent messages to TWA, threatening TWA, its directors, the Voting Trustees and the financial institutions lending money to TWA with the institution of

a suit or suits against TWA, its management, its directors and the Voting Trustees unless TWA decided to purchase and did purchase the Convair aircraft.

39. During the month of May 1961, the defendants also warned Boeing that its contract with TWA was not binding upon TWA. The defendants hereby maliciously sought to interfere with, to impair and to disrupt the contractual relationship, known to the defendants, between Boeing and TWA, to the advantage of defendants and disadvantage of TWA.

40. The agreements made in December 1960, relating to the financing of TWA's purchase of jet aircraft, required, among other things, that TWA make, not later than May 31, 1961, a public offering of rights to purchase its subordinated income debentures with common stock warrants. In accordance with the provisions of those agreements, the Board of Directors of TWA approved the filing with the Securities and Exchange Commission of a Registration Statement relating to the proposed public offering and such Registration Statement was filed with the Securities and Exchange Commission on March 30, 1961.

41. TWA, in order to comply with its obligation to make the proposed public offering prior to May 31, 1961 as agreed, requested the Securities and Exchange Commission to accelerate the effective date of the Registration Statement to May 18, 1961. Thereupon defendants filed objections with the Securities and Exchange Commission to the request of TWA and demanded that the proposed offering be deferred on the ground, among others, that Toolco had decided for the first time on May 10, 1961 to make a public distribution of the debentures which were being offered by TWA and which were to be acquired by Toolco pursuant to the provisions of the prior agreements.

42. Defendants further demanded that certain amendments be made to the Registration Statement in order to set forth, among other things, certain contentions of defendants then made for the first time by defendants, including, among others:

(a) that notwithstanding the admitted legal power of the Voting Trustees to act, the Voting Trust could not be given effect according to its terms so as to enable TWA to be operated independently of the wishes of the defendants;

(b) that Toolco's position was that it had been compelled to enter into the Voting Trust under conditions which would warrant an immediate termination of the Voting Trust;

(c) that Toolco was considering an attempt to enjoin the consummation of the Boeing purchase transaction above described or taking action for damages against the persons responsible for the Boeing agreements; and

(d) that there might be some basis upon which Toolco could assert an equitable right to sell to TWA the Convair aircraft previously ordered by Toolco.

43. After considering the contentions so advanced by defendants, the Securities and Exchange Commission accelerated the effective date of the Registration Statement, as amended, so as to make the Registration Statement effective on May 24, 1961.

44. After the effective date of the Registration Statement and while the public offering was in progress, the defendants publicly announced that they proposed to sell up to 85% of the rights to purchase subordinated debentures which defendants were obligated to acquire under the terms of the aforesaid agreements, with the result that there was a substantial decrease in the prices at which such rights could be sold and were sold to the public.

45. The contentions made by the defendants as alleged in Paragraph 42 above and the public announcement made by the defendants as alleged in Paragraph 44 above were made for the purpose and with the intention that they would receive wide public circulation, would substantially decrease the prices at which the aforesaid rights could be sold to the public, and would thereby impair and discourage TWA's efforts to obtain financing from sources other than the defendants, and would enable the defendants to continue to condition the furnishing of financing to TWA by defendants upon TWA's acquiring jet-powered aircraft only from defendant Toolco.

46. Defendants also warned the insurance companies and banks from which TWA was then attempting to arrange the immediate borrowing of $30,000,000 of short-term funds and the borrowing of $147,000,000 of secured funds required for the purchase of the Boeing aircraft as hereinabove alleged, that the Voting Trust was invalid and that any such financing by them would be invalid. Such warnings were made by defendants maliciously and wilfully and with the intent and purpose of disrupting and discouraging TWA's efforts to obtain such financing. As a result of such warnings, at least one of the proposed lenders has completely withdrawn from all negotiations for the proposed financing, and TWA's efforts to obtain such financing have been handicapped.

47. In and since the month of May 1961, defendants and Atlas, with knowledge of the conspiracy and offenses hereinabove alleged, have demanded that TWA accept the proposed merger with Northeast on the terms previously directed by the defendants, which terms were and are not advantageous to TWA but which if consummated would be in the interests of the defendants and Atlas. The defend-

ants have sought the merger on such terms for the purpose of increasing their total direct and indirect stock ownership in TWA and of increasing the number of aircraft to be supplied by them to TWA, by enlarging the business of TWA.

48. The stock of TWA acquired by defendant Toolco has thus been used by the defendants since December 31, 1960 in an effort to restrain, restrict and control TWA. Despite the existence of the Voting Trust, the defendants and Atlas have attempted to require TWA to obtain aircraft exclusively from the defendants, to prevent TWA from obtaining aircraft essential to its business from Boeing, to prevent TWA from obtaining financing for the acquisition of such aircraft except on terms dictated by defendants, to require TWA to merge with another airline upon terms disadvantageous to TWA, to enlarge the defendants' indirect stock interest in TWA and to regain control over TWA and its entire business.

VIII.

Effects of Offenses

49. As the result of the offenses hereinabove alleged,

(a) Competition among aircraft manufacturers and others in the furnishing of aircraft by sale, lease or other means to TWA and other air carriers has been restrained and monopolized.

(b) Competition among aircraft manufacturers and others in the furnishing of jet-powered aircraft by sale, lease or other means to TWA and other air carriers has been restrained and monopolized.

(c) Competition among aircraft manufacturers and others in the furnishing of aircraft by sale, lease or other means to TWA has been restrained and monopolized.

(d) Competition among aircraft manufacturers and others in the furnishing of aircraft by sale, lease or other means for use by scheduled air carriers between those cities in the United States, and between the United States and those foreign cities, between which points TWA provides the only scheduled air transportation by a United States-Flag air carrier, has been restrained and monopolized.

(e) Competition among aircraft manufacturers and others in the furnishing of aircraft by sale, lease or other means for use by scheduled air carriers between those cities in the United States, between which cities TWA provides more than 60% of the scheduled air transportation provided by United States-Flag air carriers, has been restrained and monopolized.

(f) Competition among United States-Flag scheduled air carriers and among all scheduled air carriers has been, is now being and will be injured.

(g) As a result of past, present and prospective injuries to the second largest United States-Flag air carrier operating outside of the United States, the national interest of the United States has been and is being injured.

50. TWA has been immediately injured in its business by Toolco's acquisition of TWA's stock, in that TWA has been denied the right freely to acquire aircraft necessary to its operations and has received such aircraft as were made available to it in an untimely manner. TWA has further been immediately injured in its business by Toolco's denial to TWA of the authority or opportunity to acquire jet-powered aircraft from any person or corporation other

than Toolco. Unless the relief TWA requests is granted, it will suffer further and irreparable injury.

51. TWA has been further and immediately injured in its business in that defendants have supplied TWA with aircraft, including jet-powered aircraft, essential to its business upon the condition that TWA accept such financing arrangements relating to such aircraft as the defendants chose to dictate, and further in that defendants have allowed TWA to procure financing essential for the acquisition of aircraft only upon the condition that TWA would accept such aircraft as the defendants dictated, and unless the relief TWA requests is granted TWA will suffer further and irreparable injury.

52. TWA has further been injured in the following manner:

(a) TWA was prevented from obtaining jet-powered aircraft and was deprived of opportunity for adequate use of jet-powered aircraft during the years 1958, 1959, 1960 and to date with a resultant loss in profits. That loss may be substantially increased as a result of defendants' continuing actions heretofore described.

(b) TWA was foreclosed from the opportunity for early sales of its obsolescent piston engine aircraft, causing loss to TWA.

(c) TWA was foreclosed from obtaining financing on more advantageous terms than those available to it in December 1960 and thereby suffered a loss by virtue of the greater cost of borrowing it ultimately experienced.

(d) TWA's ability to obtain financing for its needs was substantially impaired.

(e) TWA's good will in its business of serving passengers throughout the world was diminished.

53. As additional results of the offenses hereinabove alleged, TWA further has been immediately and irreparably injured in that:

(a) TWA's ability to obtain debt and equity financing for its future financial needs has been seriously impaired.

(b) TWA's efforts to obtain both short-term and long-term financing for the purchase of the Boeing aircraft which it has contracted to buy have been seriously handicapped.

(c) TWA's ability to obtain both short-term and long-term financing for the jet-powered aircraft which it should order in the near future has been impaired.

(d) TWA's ability at this time safely to order additional jet-powered aircraft which it urgently needs has been handicapped.

(e) The date when additional jet-powered aircraft will be available to and will be in use by TWA has been deferred.

(f) The period of disruption caused by the transition from non-jet to jet operation has been extended.

(g) The coordination of the change from non-jet to jet operations has been disrupted over an extended period of time.

(h) The management and business of TWA has been disrupted over an extended period of time.

54. As a result of the foregoing, TWA has been injured in its business and property in an amount estimated to be in excess of $35,000,000, and which amount may become substantially greater as a result of defendants' continuing violations as heretofore described.

55. TWA has no adequate remedy at law.

SECOND CLAIM

I.

Nature of Claim and Jurisdiction of Court

56. Plaintiff's claim arises from the violations by the defendants of Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. In all other respects, the nature of the claim, the jurisdiction of the Court and the descriptions of the parties and of the commerce involved are as hereinbefore alleged in Paragraphs 1 through 8 hereof and such Paragraphs are hereby realleged.

II.

Offenses Charged

57. Since on or about December 31, 1960 and continuing to the date of the filing of this complaint, the defendants, Atlas and others acting for each of them have been and are now engaged in a combination and conspiracy to restrain and monopolize and an attempt to monopolize a substantial segment of the interstate and foreign commerce of the United States in violation of Sections 1 and 2 of the Sherman Act, and defendant Toolco has used the stock of TWA acquired by Toolco so as to restrain commerce and tend to create a monopoly in a line or lines of commerce in violation of Section 7 of the Clayton Act.

58. Each act of the defendants and Atlas hereinafter alleged was done in furtherance of the offenses charged in Paragraph 57, was a part thereof and was done with the purpose and intent as hereinbefore alleged in Paragraph 10 hereof, and Paragraph 10 is hereby realleged.

III.

Background of the Offenses

59. Paragraphs 11 through 35 hereof are hereby realleged as the background of the offenses charged.

IV.

Acts Committed

60. Paragraphs 36 through 48 hereof are hereby realleged.

V.

Effects of Offenses

61. As results of the offenses hereinabove alleged, TWA has been immediately and irreparably injured as and in the manner hereinbefore alleged in Paragraph 53 hereof, and such Paragraph is hereby realleged.

62. If the defendants continue the offenses hereinbefore alleged and succeed in their purpose and plan, the further results and effects thereof will be those heretofore alleged as already having occurred in Paragraphs 49, 50, 51 and 53, and such results and effects are hereby reallaged as prospective results and effects.

63. As a result of the offenses complained of, TWA has been injured in its business and property in a substantial

amount which cannot be accurately calculated at this time. Such damages will, as a result of the defendants' continuing violations of the antitrust laws, be substantially increased in the very near future.

64. Unless the relief TWA requests is granted, it will suffer immediate, further and irreparable injury. TWA has no adequate remedy at law.

THIRD CLAIM

I.

Nature of Claim and Jurisdiction of Court

65. Plaintiff's claim arises out of the facts previously alleged in support of the claims hereinbefore stated, and this Court has jurisdiction to grant all relief available under such facts since this Court has jurisdiction, as hereinbefore alleged in Paragraphs 1 and 56, to determine each of the claims hereinbefore stated and arising out of the facts alleged.

II.

Description of Parties and Background of Acts Committed

66. The description of the parties involved is as hereinbefore alleged in Paragraphs 2 through 6 hereof and the background of the acts committed is as alleged in Paragraphs 29 through 35, and such Paragraphs are hereby realleged.

III.

Acts Committed

67. From and after December 31, 1960, the defendants have maliciously and wilfully injured the business of TWA

by acts alleged in Paragraphs 37 through 48 hereof, which Paragraphs are hereby reallaged.

IV.

Effects of Acts

68. TWA has been injured as and in the manner hereinbefore alleged in Paragraph 53, which Paragraph is hereby realleged.

69. TWA has been injured in the amount of approximately $10,000,000. Such damages will, as a result of defendants' continuing wrongful acts, be substantially increased in the near future.

70. Unless the relief TWA requests is granted, it will suffer immediate, further and irreparable injury. TWA has no adequate remedy at law.

PRAYER

WHEREFORE, plaintiff prays that this Court order, adjudge and decree:

I.

With Respect to the First and Second Claims Stated Hereinbefore,

(1) That the defendants and Atlas have violated Sections 1 and 2 of the Sherman Act, Section 7 of the Clayton Act; and, with respect to the first claim only, Section 3 of the Clayton Act;

(2) That the defendants divest themselves of all right, title or interest in the stock of plaintiff;

(3) That the defendants pay to the plaintiff $105,000,000, three-fold the damages sustained by plaintiff, together with costs and attorneys' fees;

(4) That the defendants, their officers, agents, servants, employees, attorneys and all persons in active concert or participation with them who receive actual notice of this injunction be perpetually enjoined (a) from attempting to exercise control or domination over the activities of TWA, directly or indirectly, (b) from threatening suit against TWA, its management or its directors either because of the failure of any of them to act in any manner sought by the defendants or because of the action of any of them in any manner not sought by the defendants, and (c) from acquiring or holding any interest, beneficial or otherwise, direct or indirect, in the stock of plaintiff;

(5) That the defendants, their officers, agents, servants, employees, attorneys and all persons in active concert or participation with them who receive actual notice of this injunction be during the pendency of this suit enjoined (a) from attempting to exercise control or domination over the activities of TWA, directly or indirectly, and (b) from threatening suit against TWA, its management or its directors either because of the failure of any of them to act in any manner sought by the defendants or because of the action of any of them in any manner not sought by the defendants; and

II.

With Respect to the Third Claim Stated Hereinbefore,

(1) That defendants pay to plaintiff compensatory damages in the amount of $10,000,000, and such other and further punitive and exemplary damages as to this Court may seem just and proper;

(2) That the defendants, their officers, agents, servants, employees, attorneys and all persons in active concert or participation with them who receive actual notice of this injunction be, at first during the pendency of this suit, and thereafter perpetually, enjoined (a) from attempting to exercise control or domination over the activities of TWA, directly or indirectly, (b) from interfering with any contract made and entered by TWA and from threatening suit against TWA, its management or its directors either because of the failure of any of them to act in any manner sought by the defendants or because of the action of any of them in any manner not sought by the defendants, and (c) from otherwise interfering with, obstructing or harassing TWA, directly or indirectly, in any activity done by TWA pursuant to the authority vested in its officers and directors; and

III.

That the plaintiff have such other and further relief as to this Court may seem just and proper.

Dated: New York, New York,
June 30, 1961.

CAHILL, GORDON, REINDEL & OHL

By /s/ JOHN T. CAHILL
John T. Cahill, Partner

By /s/ JOHN F. SONNETT
John F. Sonnett, Partner

Attorneys for Plaintiff
80 Pine Street
New York 5, New York

Order Referring this Action to Judge Metzner for All Purposes, Dated August 31, 1961

[Doc. 42]

[CAPTION] 61 Civ. 2324

The above action is hereby referred to the Honorable Charles M. Metzner, United States District Judge, for all purposes.

Dated: August 31, 1961.

/s/ SYLVESTER J. RYAN
Sylvester J. Ryan
Chief Judge

Opinion and Order of December 5, 1961

[Doc. 50]

[CAPTION] 61 Civ. 2324

METZNER, D.J.:

Plaintiff moves pursuant to Fed. R. Civ. P. 34 for the production and inspection of certain documents. Dispute exists as to the time when the documents shall be produced and as to three categories of requested documents. The first category refers to loans (item I(e)). The second category refers to balance sheets and profit and loss statements for the years 1939 through 1960 (item V(a)). The third category refers to federal income tax returns for the years 1939 to date (item V(b)).

The order of priority of deposition proceedings has already been set. Consequently, while a motion pursuant to Rule 34 may be made at any time, it does not follow that the order granting such a motion should vary previously [fol. 711] established schedules under Rule 26. *Holt* v. *The James Sheridan*, 12 F.R.D. 72 (S.D.N.Y. 1951); *Technical Tape Corp.* v. *Minnesota M. & M. Mfg. Co.*, 18 F.R.D. 318 (S.D.N.Y. 1955). The documents should be produced prior to the dates scheduled for the taking of the depositions noticed by plaintiff.

The complaint states claims of conspiracy in violation of the antitrust statutes. The scope of proof is quite broad in these cases and under the liberal federal rules wide latitude is permitted in the deposition-discovery proceedings. Rule 34 must be read in conjunction with Rule 26, which permits testimony which is "reasonably calculated to lead to the discovery of admissible evidence." The financial data sought by this motion come within the "rule of relevancy"

as applied to the allegations of the complaint. Income tax returns are not protected by privilege. *Konczakowski* v. *Paramount Pictures, Inc.*, 19 F.R.D. 361 (S.D.N.Y. 1956).

Defendant may request relief pursuant to Rule 30(b) upon the settlement of the order to be entered hereon.

Motion granted. Settle order.

Dated: New York, N. Y., December 5, 1961.

Charles M. Metzner, U. S. D. J.

Pretrial Order, February 7, 1962

[Doc. 59]

[CAPTION] 61 Civ. 2324

ORDER

Pretrial conferences were held in this cause on January 10, 1962 and January 23, 1962, wherein the following proceedings were had.

• • •

II.

The deposition of the plaintiff by Charles C. Tillinghast, Jr., shall be continued and the depositions of the other witnesses shall be commenced in accordance with the schedule annexed hereto. The Special Master hereinafter appointed may vary this schedule upon application of either party if in his opinion the circumstances require such variance.

III.

Upon the consent of counsel for the plaintiff and the defendant Hughes Tool Company, the Court was empowered to appoint a Special Master. J. LEE RANKIN, ESQ., of 36 West 44th Street, New York 36, New York is hereby appointed Special Master to act in connection with the depositions and other discovery proceedings undertaken by any person now a party or any person who may hereinafter become a party, with the following powers: to preside over and supervise the conduct of depositions and in connection therewith to rule on such objections to questions, whether heretofore made or to be made, as have not been reserved by stipulation of the parties to the time of trial; to rule

on objections, whether heretofore made or to be made, with respect to the production of documents; to make any and all other rulings which may be required pursuant to the provisions of Rules 26 to 37, and 45, of the Federal Rules of Civil Procedure and such other rules as may from time to time become applicable.

IV.

Any action taken or ruling made by said Special Master shall be subject to review by the Honorable Charles M. Metzner, United States District Judge for the Southern District of New York, upon timely application with reasonable notice.

V.

The Special Master shall be reimbursed for such expenses as are reasonably and necessarily incurred by him and the compensation of the Special Master is to be fixed at $60.00 per hour. Such reimbursement and compensation are to be taxed as costs at the conclusion of this action; provided, however, that until the taxation of costs the compensation of the Special Master is to be paid at monthly intervals, fifty per cent (50%) by plaintiff Trans World Airlines, Inc., and fifty per cent (50%) by defendant Hughes Tool Company, and provided, further, that such payments shall be subject to reallocation among any additional parties who may hereafter be joined and who may participate in the depositions.

VI.

Defendant Hughes Tool Company shall file its answer to the complaint herein upon the day following the completion, in accordance with the annexed schedule, of the deposition of plaintiff by Charles C. Tillinghast, Jr., Robert W. Rummel and E. O. Cocke.

Pretrial Order, February 7, 1962

VII.

The deposition of plaintiff by A. V. Leslie, in view of his present illness, is adjourned without date and shall be re-scheduled by the Special Master upon reasonable notice by the defendant at an appropriate time in light of the health of the witness and at a date not in conflict with the annexed schedule.

VIII.

Any request for a change in the date fixed for the production of writings and other material by the defendant Hughes Tool Company, presently set for March 15, 1962 by order of this Court dated December 18, 1961, shall be made to the Special Master.

So Ordered.

Dated: New York N. Y.
February 7, 1962

/s/ Charles M. Metzner
Charles M. Metzner
U. S. D. J.

Pretrial Order, February 7, 1963

SCHEDULE OF DEPOSITIONS

I.

Depositions Noticed by Defendant Hughes Tool Company

Date	Deponent	Time and Location of Depositions
13, 1962	Trans World Airlines, Inc. By: Charles C. Tillinghast, Jr. R. W. Rummel E. O. Cocke	10 a.m. 80 Pine St. New York, N. Y.
20, 1962	Charles Thomas	10 a.m. The Irvine Ranch 13042 Myford Rd. Tustin, Calif.
21, 1962	Bank of America By: Keith Carver Robert Gordon	10 a.m. Clerk's Office U. S. Court House Los Angeles, Calif.
27, 1962	Bankers Trust Company By: E. F. Ebert	10 a.m., Room 3113 120 Broadway New York, N. Y.
27, 1962	Morgan Guaranty Trust Co. of New York By: John Schroeder	2 p.m., Room 3113 120 Broadway New York, N. Y.
28, 1962	The Mellon Bank By: Frederick Gwinner Ralph Ehler	10 a.m. Clerk's Office U.S. District Court Pittsburgh, Pa.
r. 1, 1962	Ben-Fleming Sessel Robert A. Kerr Irving Trust Company By: Ben-Fleming Sessel Robert A. Kerr	10 a.m., Room 3113 120 Broadway New York, N. Y.
r. 8, 1962	Frederic H. Brandi Arthur L. Wadsworth Dillon, Read & Co., Inc. By: Frederic H. Brandi Arthur L. Wadsworth	10 a.m., Room 3113 120 Broadway New York, N. Y.
r. 15, 1962	James F. Oates, Jr. Grant Keehn Equitable Life Assurance Society of the United States By: James F. Oates, Jr. Grant Keehn	10 a.m., Room 3113 120 Broadway New York, N. Y.
r. 15, 1962	Warner Mendel	10 a.m., Room 3113 120 Broadway New York, N. Y.

Date	Deponent	Time and Location of Deposition
Mar. 23, 1962	Harry C. Hagerty Gordon P. Jenkins Metropolitan Life Insurance Company By: Harry C. Hagerty Gordon P. Jenkins	10 a.m., Room 3 120 Broadway New York, N.
Mar. 29, 1962	Irving S. Olds	10 a.m., Room 3 120 Broadway New York, N.
Apr. 5, 1962	Ernest R. Breech	10 a.m., Room 3 120 Broadway New York, N.
Apr. 12, 1962	Boeing Company By: William M. Allen J. O. Yeasting	10 a.m. Clerk's Office U.S. District C Seattle, Wash.
Apr. 19, 1962	Prudential Insurance Company of America By: Monroe Chappelear	10 a.m., Room 3 120 Broadway New York, N.

II.

Depositions Noticed by Plaintiff Trans World Airlines, Inc.

Apr. 23, 1962	Howard R. Hughes	10 a.m. Beverly Hills H Beverly Hills, C
May 8, 1962	Hughes Tool Company By: Raymond Holliday	10 a.m., 18th Fl 80 Pine Street New York, N.
May 16, 1962	Hughes Tool Company By: M. E. Montrose	10 a.m., 18th Fl 80 Pine Street New York, N.
May 22, 1962	Hughes Tool Company By: C. H. Price	10 a.m., 18th Fl 80 Pine Street New York, N.
May 25, 1962	Hughes Tool Company By: C. S. Johnson	10 a.m., 18th Fl 80 Pine Street New York, N.
May 31, 1962	Hughes Tool Company By: H. E. Rogers	10 a.m., 18th Fl 80 Pine Street New York, N.
June 4, 1962	Hughes Tool Company By: C. Collier	10 a.m., 18th Fl 80 Pine Street New York, N.

Toolco's Answer and Counterclaims

[Doc. 63]

[CAPTION] 61 Civ. 2324

Defendant Hughes Tool Company (hereinafter "Toolco") for its answer to the complaint and for its counterclaim herein states:

Answering the First Claim for Relief

1. Toolco denies each and every allegation of paragraphs 7, 9, 10, 22, 23, 24, 26, 36, 37, 38 and 44 through 55 inclusive of the complaint.

2. Toolco admits the allegations contained in paragraphs 2, 6, 25, 29, 30, 32, 33, 34 and 40 of the complaint.

3. Toolco admits that it is a corporation organized and existing under the laws of the State of Delaware and that it has assets of several hundred million dollars and except as so admitted denies each and every allegation of paragraph 3 of the complaint.

4. Toolco admits that Howard R. Hughes (hereinafter "Hughes") has been its sole stockholder from a time prior to January, 1939 to the present, that from a time prior to January, 1939 to December, 1960, he was an officer of Toolco, and except as so admitted denies each and every allegation of paragraph 4 of the complaint.

5. Toolco admits that Raymond M. Holliday has been for some years past, and now is, an officer of Toolco, that since 1959 he has been, and now is, a director of Trans World Airlines, Inc. (hereinafter "TWA"), and except as so admitted denies each and every allegation of paragraph 5 of the complaint.

6. Toolco admits that TWA has, since its organization in 1934, operated a domestic air carrier system between certain cities in the United States, that since 1946 TWA has operated an international air transportation system between the United States and certain cities in Europe, Africa and Asia, that during the period from 1958 through 1960, TWA purchased and leased jet-powered aircraft for amounts aggregating substantially in excess of $100,000,000, which aircraft were manufactured by manufacturers in various states in the United States, that in 1960 operating revenues of TWA were substantially in excess of $300,000,000 and net income after taxes in excess of $6,000,000, that in 1959, TWA provided the only scheduled air transportation between certain pairs of United States cities, and, except as so admitted, denies that it has knowledge or information sufficient to form a belief as to the allegations of paragraph 8 of the complaint.

7. Toolco admits that commencing in or about the year 1939 and at various times thereafter it acquired common stock of TWA, that as at December 31, 1960, the amount of stock so acquired amounted to approximately 78.2% of such common stock, and except as so admitted denies each and every allegation of paragraph 11 of the complaint.

8. Toolco admits that commencing in 1958 jet-powered aircraft became one of the most important factors in the competitive operations of air carriers, and except as so admitted denies each and every allegation of paragraph 12 of the complaint.

9. Toolco admits that by 1955 aircraft manufacturers (including Boeing Airplane Company (hereinafter "Boeing") and Douglas Aircraft Company, Inc. (hereinafter "Douglas"), had prepared to the general knowledge of the air carrier industry plans and drawings and otherwise

had undertaken preparations for the manufacture of jet-powered aircraft intended for use by air carriers, that many air carriers beginning in 1955 devoted substantial efforts to determining what, if any, jet aircraft they should acquire and to obtaining jet aircraft suitable to their needs, that Boeing and Douglas contemplated and did ultimately manufacture jet-powered aircraft for long range and medium range flights, and except as so admitted denies each and every allegation of paragraph 13 of the complaint.

10. Toolco admits that General Dynamics Corporation, Convair Division (hereinafter "General Dynamics"), on its own account as one of the four major domestic aircraft manufacturers, commenced a program prior to 1955 for the design, development and manufacture of a jet-powered transport aircraft designated the Model 18, that such program never proceeded past the preliminary design stage and was terminated in 1955 by General Dynamics, and except as so admitted denies each and every allegation of paragraph 14 of the complaint.

11. Toolco admits that prior to May 1, 1956, it considered the manufacture of a jet-powered aircraft with design and range characteristics suitable for use on both domestic and transatlantic routes, that Toolco contemplated that if it did manufacture this aircraft it would furnish the same to TWA and other air carriers, that it abandoned consideration of manufacture of such an aircraft prior to mid-1956, and except as so admitted denies each and every allegation of paragraph 15 of the complaint.

12. Toolco denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 16 of the complaint.

13. Toolco admits that in January 1956 Toolco entered into an agreement with Boeing for the purchase of eight

Model 707-131 jet-powered aircraft with an option to purchase seven additional such aircraft, that in 1956 Toolco exercised its option to purchase such additional aircraft and also placed an order for eighteen long-range Boeing jet transports, and that in June of 1956 Toolco committed for the purchase of thirty Convair 880 aircraft from General Dynamics, and except as so admitted denies each and every allegation of paragraph 17 of the complaint.

14. Toolco admits that purchase orders placed by Toolco with General Dynamics and Boeing gave Toolco the right to assign to TWA the right to acquire the jet-powered aircraft ordered by Toolco, and that Toolco released six of the long-range Boeing jet transports on order in a transaction with Boeing and Pan American World Airways, Inc. which was recommended and approved by the management of TWA, and except as so admitted denies each and every allegation of paragraph 18 of the complaint.

15. Toolco admits that during the period 1956 to 1960 changes were made in the design and configuration of the Model 880 Convair aircraft ordered by Toolco and except as so admitted denies each and every allegation of paragraph 19 of the complaint.

16. Toolco admits that in the period 1959 and 1960 Toolco leased to TWA certain jet-powered aircraft on a day-to-day basis, that such aircraft were the only jet-powered aircraft flown on TWA's scheduled routes during said years, and except as so admitted denies each and every allegation of paragraph 20 of the complaint.

17. Toolco admits that on or about May 17, 1960, Northeast Airlines, Inc. (hereinafter "Northeast") submitted to TWA a proposed agreement for the merger of Northeast with and into TWA, that Northeast is a substantial air car-

rier operating under certificates of public convenience and necessity and serving the east coast of the United States and Canada, that upon information and belief in 1959 Northeast's revenue miles totaled 519,000,000 and its total assets exceeded $35,000,000, and except as so admitted denies each and every allegation of paragraph 21 of the complaint.

18. Toolco denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 27 of the complaint.

19. Toolco admits that subsequent to 1955 it discussed with various persons various proposals for the financing of jet-powered aircraft and except as so admitted denies each and every allegation of paragraph 28 of the complaint.

20. Toolco admits that as part of the arrangements with certain banks and insurance companies, Toolco, TWA and three Voting Trustees (Ernest R. Breech, Irving S. Olds and Holliday) executed an agreement dated as of December 15, 1960, which provided that the TWA stock owned and to be owned by Toolco would be placed in a voting trust (hereinafter "the Voting Trust"), and except as so admitted denies each and every allegation of paragraph 31 of the complaint.

21. Toolco denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 35 of the complaint.

22. Toolco admits that on or about May 31, 1961, it sent a telegram to Boeing that set forth certain positions of Toolco and except as so admitted denies each and every allegation of paragraph 39 of the complaint.

23. Toolco admits that TWA requested the Securities and Exchange Commission to accelerate the effective date

of its Registration Statement to May 18, 1961, and that Toolco opposed such acceleration by reason of certain deficiencies in said Registration Statement, and except as so admitted denies each and every allegation of paragraph 41 of the complaint.

24. Toolco admits that pursuant to the direction of the Securities and Exchange Commission its counsel set forth in a letter to the Securities and Exchange Commission and TWA a statement as to the respects in which TWA's Registration Statement might be deficient, that in said letter it was stated to be the position of Toolco that it was compelled to enter into the Voting Trust under conditions which would warrant a termination of the Voting Trust otherwise than in accordance with the terms of the arrangements under which it was created, that it was further stated in said letter that Toolco had requested its counsel to investigate the possibility of enjoining the Boeing purchase transaction or of taking action on behalf of TWA against the persons responsible for any commitments incurred or damages suffered by TWA in connection with such program, and except as so admitted denies each and every allegation of paragraph 42 of the complaint.

25. Toolco admits that after TWA's Registration Statement had been twice amended subsequent to the sending of the aforesaid letter, the Securities and Exchange Commission accelerated the effective date of the Registration Statement as so amended so as to make the Registration Statement effective on May 24, 1961, and except as so admitted denies each and every allegation of paragraph 43 of the complaint.

Answering the Second Claim for Relief

26. Toolco denies each and every allegation of paragraphs 56 through 64, inclusive, of the complaint except in so far as such paragraphs reallege prior paragraphs of the complaint. As to such realleged paragraphs Toolco repeats to the same extent as if herein fully set forth each and every denial or admission which it has made with respect to the paragraphs so realleged.

Answering the Third Claim for Relief

27. Toolco denies each and every allegation of paragraphs 67 through 70, inclusive, of the complaint except in so far as such paragraphs reallege prior paragraphs of the complaint. As to such realleged paragraphs Toolco repeats to the same extent as if herein fully set forth each and every denial or admission which it has made with respect to the paragraphs so realleged.

As a First and Complete Defense to the Complaint and Each Claim for Relief Alleged Therein:

28. The complaint, and each of the claims for relief alleged therein, fail to state a claim upon which relief can be granted.

As a Second and Complete Defense to the Complaint and Each Claim for Relief Alleged Therein:

29. The alleged facts set forth in the complaint do not constitute violations by Toolco of Section 1 of the Sherman Act (15 U. S. C. § 1 (1958)), of Section 2 of the Sherman Act (15 U. S. C. § 2 (1958)), of Section 3 of the Clayton Act (15 U. S. C. § 11 (1958)), or Section 7 of the Clayton Act (38 Stat. 731, 15 U. S. C. § 18 (1946 Ed.)), and since

plaintiff TWA and defendant Toolco are both Delaware corporations, this Court lacks jurisdiction over the subject matter of the action and over each of the claims for relief alleged in the complaint.

AS AND FOR A THIRD AND COMPLETE AFFIRMATIVE DEFENSE TO THE COMPLAINT AND EACH CLAIM FOR RELIEF ALLEGED THEREIN:

30. Since both Toolco and TWA are Delaware corporations, the jurisdiction of this Court, if any, depends upon the alleged violations of the antitrust laws contained in plaintiff TWA's complaint.

31. Toolco is a corporation primarily engaged in the manufacture and sale of equipment for the oil well drilling industry. It has at no time manufactured commercial transports and its sole activities with respect to the sale or lease of aircraft to commercial airlines (except for the sale of two DC-6 aircraft originally acquired by Toolco for its own use) have arisen from its efforts to assist TWA in obtaining flight equipment adequate to its needs. It has at no time been in the business of selling or leasing any flight equipment to any airline and the only occasions on which it has made equipment ordered by it available to any airline other than TWA have been when certain equipment ordered for the use and benefit of TWA has proved to be in excess of the needs or capabilities of TWA.

32. Toolco first acquired an interest in TWA in 1939 when the airline industry was in its infancy. By the end of 1942 it had acquired approximately 45% of the total outstanding shares of TWA. Thereafter, it acquired additional shares of TWA until it had acquired more than 78% of said shares.

33. The control of TWA by Toolco and the acquisition of more than 78% of the common stock of TWA by Toolco were subject to and approved by orders of the Civil Aeronautics Board (hereinafter "the Board") under Section 408 of the Federal Aviation Act of 1958 (49 U.S.C. § 1378) or the identical provisions of Section 408 of the Civil Aeronautics Act of 1938. Section 414 of the Federal Aviation Act of 1958 (49 U. S. C. § 1384) exempts and relieves any person affected by any such order from the operation of the antitrust laws and of all other restraints or prohibitions made by or imposed under authority of law in so far as may be necessary to enable such person to do anything authorized, approved or required by such order.

34. The initial acquisition of a controlling interest in TWA by Toolco was approved by the Board, under Section 408 of the Civil Aeronautics Act of 1938, as consistent with the public interest, in an opinion and order dated October 17, 1944. Said order provided that such approval would be effective so long as commercial transactions between TWA and Toolco were limited to those involving complete items of property the price of which did not exceed $200 each, with the further limitation that the total annual expenditures involved in such commercial transactions by either party should not exceed $10,000.

35. In 1950 the Board approved under said Section 408 the further acquisition of control of TWA by Toolco subject to the same conditions contained in the aforesaid 1944 order. In so doing, the Board approved the exercise by Toolco of complete control over the business and affairs of TWA, including equipment and financing, and found that the continuing interest of Toolco in TWA appeared essential to the best interest of the carrier and the public.

36. Since the date of the Board's 1944 order no commercial transactions between Toolco and TWA have taken place except as authorized by said order or except after a modification of said order upon a finding by the Board under said Section 408 that the proposed transaction was consistent with the public interest.

37. Toolco from the time of its initial acquisition of an interest in TWA has on various occasions assisted TWA in acquiring flight equipment adequate to its needs and in financing such flight equipment. TWA also acquired flight equipment directly from various manufacturers without assistance from Toolco. Orders of the Board specifically approved as not inconsistent with the public interest all transactions between TWA and Toolco with respect to the acquisition or financing of flight equipment.

38. The complaint does not allege any violation of the Federal Aviation Act of 1958 or of the orders of the Board under Section 408 thereof.

39. The only act alleged in the complaint with respect to the period prior to 1961 which was not specifically approved by the Board was a proposal that Northeast be merged with and into TWA. Such a merger proposal was, however, within the contemplation of the Board in approving control of TWA by Toolco. The merger proposal was, moreover, specifically conditioned upon the approval of the Board under the applicable provisions of the Federal Aviation Act of 1958, including Section 408 thereof, and upon approval by a majority of the stockholders of TWA other than Toolco voting at a meeting called to approve such a merger.

40. In December, 1960, as a result of the demands and unlawful activities of certain lending institutions and

others, Toolco was compelled to place in a voting trust the shares of common stock of TWA which it owned. By reason of such voting trust Toolco no longer controls TWA. All of the activities of Toolco alleged in the complaint with respect to the period subsequent to 1960 were taken on the advice of counsel for Toolco solely for the purpose of protecting Toolco's interests as beneficiary under said voting trust and as equitable owner of more than 78% of the stock of TWA.

41. By reason of the facts herein alleged, this Court lacks jurisdiction of the subject matter of the complaint and over the subject matter of each alleged claim for relief contained therein.

As and for a First Counterclaim Against TWA and Against Additional Defendants The Equitable Life Assurance Society of the United States, Metropolitan Life Insurance Company, Irving Trust Company, Dillon, Read & Co. Inc., Ernest R. Breech and Charles C. Tillinghast, Jr.

42. Toolco is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Houston, Texas. All of its common stock is owned by Hughes, a leading aviator and aeronautical engineer who for many years has been interested in the development of commercial aviation in the United States.

43. Plaintiff TWA is a corporation organized and existing under the laws of the State of Delaware with its principal executive offices in the City of New York. TWA is and for many years has been the country's third largest domestic and second largest international air carrier. At all times hereinafter mentioned from 1947 to December,

1960, Toolco owned a majority of TWA's capital stock and nominated a majority of TWA's directors. Since December, 1960 Toolco has been the equitable owner of in excess of 78% of the capital stock of TWA which stock was placed in a voting trust in December, 1960.

44. Additional defendants The Equitable Life Assurance Society of the United States (hereinafter "Equitable") and Metropolitan Life Insurance Company (hereinafter "Metropolitan") are corporations organized and existing under the laws of the State of New York with their principal places of business in the City of New York. Metropolitan is the country's largest insurance company with admitted assets of approximately $17 billion. Equitable is the country's third largest insurance company with admitted assets of approximately $10 billion. From 1947 to December, 1960 Equitable was the sole holder of TWA's senior indebtedness other than bank debt. At all times since December, 1960 Equitable and Metropolitan have been the holders of all such senior indebtedness of TWA.

45. Additional defendant Irving Trust Company (hereinafter "Irving") is a trust company organized and existing under the banking laws of the State of New York with its principal place of business in the City of New York. Irving is and for many years has been one of TWA's principal commercial bankers, has made loans and participated with other lending institutions in making loans to TWA and has undertaken on behalf of TWA to bring together lending institutions for the purpose of participating in loans to TWA. Irving for many years prior to 1961 maintained a similar banking relationship with Toolco.

46. Additional defendant Ernest R. Breech (hereinafter "Breech") is, upon information and belief, a citizen of the

State of Michigan. From December, 1960, until his resignation on or about January 26, 1962, he was one of the two voting trustees selected by Equitable and Metropolitan with respect to 5,221,301 shares of TWA's capital stock owned by Toolco which were placed in a voting trust in December 1960. Breech is and at all times since April 27, 1961 has been the Chairman of the Board of Directors of TWA.

47. Additional defendant Charles C. Tillinghast, Jr. (hereinafter "Tillinghast"), a citizen of the State of New York, is and at all times hereinafter mentioned since April 17, 1961, has been the president and chief executive officer of TWA.

48. Additional defendant Dillon, Read & Co. Inc. (hereinafter "Dillon Read"), on information and belief, is a corporation organized and existing under the laws of the State of New York with its principal place of business in the City of New York. Dillon Read is engaged in the investment banking business and is and since early 1959 has been the principal financial adviser to TWA.

49. This counterclaim is asserted pursuant to Rule 13(a) of the Federal Rules of Civil Procedure and arises out of the subject matter of TWA's claims herein.

50. In 1960 Equitable and Metropolitan, together with a group of commercial banks headed by Irving, demanded as a condition to their providing any financing to TWA that Toolco place in a lender-controlled voting trust prior to any default all shares of TWA stock which it owned. Such financing was required by TWA in order for it to acquire jet aircraft theretofore ordered by Toolco for the benefit of TWA. In order to insure that such needed jet equipment would be acquired by TWA and for reasons which included the difficulty, if not impossibility, of obtaining such financing elsewhere, Toolco was compelled to yield to such

demands but only upon the express agreement and understanding that:

(a) The Voting Trust would terminate upon the repayment of the obligations in connection with which it was created; and

(b) Toolco would have the right to terminate the Voting Trust by purchasing all such obligations at the principal amount thereof together with accrued interest and, in addition, by paying to Metropolitan and Equitable a premium to be initially 22% of the principal amount of such obligations acquired by them.

51. Thereafter, in December 1960, pursuant to the aforesaid agreement Toolco, TWA, Equitable, Metropolitan, Irving and others entered into a series of transactions for the financing of the acquisition of the jet flight equipment ordered by Toolco for the benefit of TWA. In connection therewith and the purchase by Equitable and Metropolitan of $92,800,000 principal amount of TWA's 6½% Equipment Mortgage Sinking Fund Notes due December 31, 1972 (hereinafter the "Series A Sinking Fund Notes") and the borrowing by TWA of $72,800,000 from banks headed by Irving, which borrowing was evidenced by 6% Equipment Mortgage Serial Notes due December 31, 1961—December 31, 1964 (hereinafter the "Series A Serial Notes"), Toolco, TWA, Equitable, Metropolitan, Irving and others entered into a series of transactions and agreements by which the 5,221,301 shares of TWA's common stock were placed in the Voting Trust and Metropolitan and Equitable designated Breech and Irving S. Olds as two of the three voting trustees with respect to said stock. By the terms of said agreements:

(a) Metropolitan and Equitable, as the holders of a majority in principal amount of the Series A Sinking Fund Notes and Series A Serial Notes,

acting through Irving as agent for the lenders, have, and at all times since December, 1960, have had, the absolute right and power to remove the two lender-named voting trustees, or either of them, and to designate and remove from time to time the successor of either of said voting trustees.

(b) The Voting Trust is to continue, as to all shares of TWA beneficially owned by Toolco, for a period of 10 years from its inception, unless sooner terminated in accordance with the terms of said agreements; and Toolco covenanted, so long as it should be the owner of any voting trust certificates, further to extend the Voting Trust, at the request of Irving as agent, for such additional period not exceeding the maximum period then permitted by the law of Delaware as should be specified in such request.

(c) The Voting Trust shall terminate (i) upon consent of Irving as agent acting at the direction of the holders of a majority in amount of the Series A Serial Notes and Series A Sinking Fund Notes, or (ii) upon cancellation and discharge of the Indenture of Mortgage securing said Notes, i.e., upon the payment or prepayment of said Notes, or (iii) upon the exercise by Toolco of an option to purchase, after December 31, 1961, all but not less than all of the Series A Sinking Fund Notes and Series A Serial Notes at a price equal to the principal amount thereof plus accrued interest and, in addition thereto, a premium which is initially 22% of the principal amount of the Series A Sinking Fund Notes, namely, $20,416,000.

52. By reason of the agreements and transactions entered into in December, 1960, and the Voting Trust then created, Equitable and Metropolitan, together with other lending institutions including Irving, acquired and now possess control over the business and affairs of TWA. They have the right and power at any time to remove and

select a successor to either or both of the voting trustees whom they have chosen. The majority voting trustees who are thus subject to their control in turn have the absolute right and power under the by-laws of TWA at any time to reconstitute TWA's Board of Directors without cause by altering the number of directors, by removing the entire Board of Directors at will, and subject to certain qualifications, by removing one or more directors.. The majority voting trustees have used the power so given to them to reconstitute TWA's Board of Directors and the members of said Board of Directors as presently constituted have been chosen in accordance with the wishes and with the approval of Metropolitan and Equitable.

53. Since the creation of the Voting Trust and the reconstitution of TWA's Board of Directors, TWA, Breech, Tillinghast, Irving, Metropolitan, Equitable and Dillon Read entered upon a course of conduct designed and calculated to prevent Toolco from regaining control of TWA, to perpetuate the Voting Trust and to interfere with the right of Toolco to terminate the Voting Trust in accordance with the rights of Toolco to terminate the Voting Trust in accordance with the terms of the agreements made in December 1960. Among the actions taken in furtherance of these objectives were the following:

(a) In or about March, 1961, Breech selected Tillinghast to be TWA's president and chief executive officer. Prior to his selection Tillinghast had had no experience in the airline industry but he had acted as counsel for a corporation of which Breech was the chief executive officer. Upon information and belief, prior to his acceptance of the presidency of TWA, Tillinghast consulted with Breech and thereafter with representatives of Equitable, Metropolitan and Irving as to steps which could be taken

to make it impossible for Toolco to terminate the Voting Trust and regain control of TWA in the foreseeable future and Dillon Read participated in conversations and suggestions as to how Tillinghast could be satisfied that Toolco would be unable to terminate the Voting Trust.

(b) Thereafter, TWA entered into an employment contract with Tillinghast pursuant to recommendations made by Breech. This contract provides that Tillinghast will be employed as TWA's chief executive officer for a minimum of five years upon terms such that upon his retirement or discharge at any time following the termination of the Voting Trust (or upon his retirement at any other time after five years) he shall receive a pension for ten years, said pension being in the amount of $50,000 per year until he reaches age 65 and $30,000 per year thereafter. Tillinghast is now 50.

(c) Shortly after Tillinghast's election as president, TWA entered into agreements with Boeing for the purchase of additional jet aircraft from Boeing although, upon information and belief, the number of such aircraft which TWA agreed to acquire is in excess of TWA's needs and financial capabilities. The aggregate cost of such jet aircraft and related equipment is in excess of $187,500,000. In order to finance such purchases, TWA through Dillon Read proposed to enter into agreements with Metropolitan, Equitable and the banking group headed by Irving to supply an additional $147,000,000 of senior debt. Metropolitan, Equitable and Irving agreed to supply such financing only upon terms designed and calculated to perpetuate the Voting Trust and to preclude Toolco from regaining control of

TWA in accordance with the agreements made in December, 1960.

(d) In May 1961, Toolco learned of such proposed action between TWA and the lending institutions which control TWA. Toolco notified TWA, the voting trustees and the lending institutions of its concern at the self-dealing implicit in such negotiations. Toolco requested that it be informed as to the details of the contemplated financing of the Boeing purchases. TWA refused to furnish such information to it.

(e) Thereafter, in August 1961, TWA, upon information and belief, entered into agreements with Metropolitan and Equitable and with Irving and its associated banks, by the terms of which:

(i) TWA agreed to sell and Equitable and Metropolitan agreed to purchase, subject to certain conditions, an aggregate of $107,000,000 principal amount of additional sinking fund notes bearing interest at 6% and maturing on December 1, 1977 (hereinafter the "Series B Sinking Fund Notes");

(ii) Irving and the banking group which it headed agreed to lend to TWA, subject to certain conditions, an additional $40,000,000 to be evidenced by additional serial notes bearing interest at 5½% and maturing serially from December 31, 1963 through December 31, 1966 (hereinafter the Series B Serial Notes);

(iii) As required by its agreements with Metropolitan, with Equitable and with Irving and its

associated banks, TWA entered into a supplemental indenture by the terms of which the holders of a majority in principal amount of the Series B Sinking Fund Notes and Series B Serial Notes, namely, Metropolitan and Equitable, may demand payment from TWA of the principal of all said Notes ($147,000,000) together with accrued interest upon the happening of any of the following events, whether or not such events have come about or been effected by operation of law or pursuant to or in compliance with any judgment, decree or order of any court or any order, rule or regulation of any administrative or governmental body:

(a) the Voting Trust agreement shall have terminated for any reason whatsoever other than a termination by Irving as agent, prior to the payment in full of all the outstanding Series A Sinking Fund Notes and Series A Serial Notes at the voluntary request of the holders (other than Toolco or a Toolco affiliate) of a majority in amount of such outstanding Notes;

(b) the rights of the holders (other than Toolco or affiliates of Toolco) of a majority of the outstanding Series A Sinking Fund Notes and Series A Serial Notes, acting through Irving as agent, to remove and fill vacancies in the office of the two voting trustees appointed by Irving as agent shall have terminated for any reason whatsoever other than a termination by the voluntary action of such holders of a majority of the Series A Sinking Fund Notes and Series A Serial Notes; or

(c) all the outstanding Series A Sinking Fund Notes and Series A Serial Notes shall be owned by Toolco or by any affiliate of Toolco, or by Toolco and any affiliate of Toolco.

Neither TWA nor any of the lending institutions sought or obtained the consent of Toolco to such agreements.

54. The employment contract between Tillinghast and TWA in so far as it requires TWA to pay to Tillinghast an annuity upon the termination of the Voting Trust whether or not in accordance with its terms is without consideration and represents a waste of the corporate assets of TWA.

55. The supplemental indenture into which TWA entered in August 1961, in so far as it permits the accelerations of the maturity of the Series B Sinking Fund Notes and the Series B Serial Notes constituted and constitutes unjustified self-dealing between TWA and those now in control of TWA, was and is contrary to and in violation of the agreements or obligations of TWA, Metropolitan, Equitable and Irving made or incurred at and prior to the time the Voting Trust was created and constituted and constitutes an unjustifiable interference with the rights of Toolco to effect the termination of the Voting Trust in accordance with said agreements. In connection with TWA's 1961 financing Dillon Read, upon information and belief, received substantial payments, the exact amount of which is presenty unknown to Toolco.

56. Upon information and belief, TWA, Breech, Tillinghast, Metropolitan, Equitable and Dillon Read will, unless enjoined by this Court, continue to engage in a course of conduct designed and calculated to perpetuate the Voting Trust, to prevent its termination in accordance with its

terms and to perpetuate the control of Metropolitan and Equitable and of Breech and Tillinghast over the business and affairs of TWA.

57. Additional defendants Breech, Tillinghast, Metropolitan, Equitable, Irving and Dillon Read are necessary parties in order that complete relief may be granted to Toolco.

58. By reason of the foregoing Toolco has suffered substantial damages and is threatened with irreparable injury.

59. Toolco has no adequate remedy at law.

As and For a Second Counterclaim Against TWA and Against Additional Defendants Metropolitan, Equitable and Irving

60. Toolco repeats and realleges each and every allegation of paragraphs 42 through 48, inclusive, and 50 through 56, inclusive, hereof.

61. Jurisdiction of this Court arises from the violations of Section 408 of the Federal Aviation Act of 1958 (49 U. S. C. § 1378) herein alleged. Said Section 408 makes it unlawful for any person engaged in any phase of aeronautics to acquire control of any air carrier in any manner whatsoever unless such acquisition of control is approved by the Board and further makes it unlawful for any such person to continue to maintain control of any air carrier which has been acquired in violation of said Section 408.

62. At all time since 1955 Metropolitan and Equitable have been and are now persons engaged in a phase of aeronautics within the meaning of said Section 408 by reason of activities which include the following:

(a) Upon information and belief, at all times since 1955 the major airlines of the United States have been and are now dependent upon Equitable, Metropolitan and Prudential Life Insurance Company of America (hereinafter "Prudential"), the country's second largest insurance company, for long-term senior financing and said insurance companies have dominated, and now dominate, the supplying of such financing to the major air carriers of the United States. This dominance has arisen in part from the historic interest of said insurance companies in airline financing, in part from the recognition and enforcement of the traditional lender concept and in part from the vast amounts of financing required by the major airlines, particularly in connection with the acquisition of jet flight equipment. Upon information and belief, since 1955 none of the country's five largest air carriers have arranged any senior financing other than bank financing without the participation therein of one or more of said three insurance companies.

(b) Metropolitan is, and, upon information and belief, for many years has been, the country's largest supplier of financing to air carriers. As at December 31, 1960 it held obligations of said carriers in a principal amount in excess of $288 million. Included in such obligations were those of four of the country's five largest air carriers, including TWA.

(c) Equitable is, and, upon information and belief, for many years has been, the country's third largest supplier of financing to air carriers. As at December 31, 1960 it held obligations of said carriers in a principal amount in excess of $188 million, including obligations of TWA.

(d) As at December 31, 1960, Metropolitan held senior obligations of air carriers other than TWA in a principal amount in excess of $250 million and

Equitable held such obligations in a principal amount in excess of $144 million.

(e) As at December 31, 1960, Metropolitan held in excess of 46% and Equitable in excess of 28% of the senior long-term debt of the country's five largest air carriers.

63. In December 1960 by the creation of the Voting Trust and the agreements made in connection therewith, Metropolitan and Equitable acquired control of TWA within the meaning of Section 408 of the Federal Aviation Act of 1958. Neither Equitable nor Metropolitan sought or obtained the approval of the Board pursuant to said Section 408 to such acquisition of control of an air carrier and Metropolitan and Equitable have continued to maintain and perpetuate their control of TWA without Board approval.

64. As more fully alleged in paragraph 53 hereof, in August 1961 Metropolitan and Equitable, together with Irving and its associated banks, agreed with TWA to supply to TWA an additional $147 million of senior financing upon terms and conditions calculated to perpetuate the Voting Trust and the control of Equitable and Metropolitan over the business and affairs of TWA. No approval of the Board was sought or obtained to this further consolidation of control by Metropolitan and Equitable.

65. By reason of the facts herein alleged, the acquisition and maintenance of control of TWA by Metropolitan and Equitable through the Voting Trust and the consolidation of that control by giving to Metropolitan and Equitable the power to accelerate indebtedness of TWA upon termination of the Voting Trust was and is unlawful under Section 408 of the Federal Aviation Act of 1958 and the creation and continued existence of the Voting Trust was and is contrary to the public policy of the United States.

66. TWA, Equitable, Metropolitan and Irving are necessary parties to this second counterclaim in order that Toolco may be afforded full and proper relief hereunder.

67. Toolco has no adequate remedy at law.

AS AND FOR A THIRD COUNTERCLAIM AGAINST TWA AND AGAINST ALL ADDITIONAL DEFENDANTS

68. Toolco repeats and realleges each and every allegation of paragraphs 42 through 48, inclusive, 50 through 55, inclusive, and 62 hereof.

69. Upon information and belief, additional defendants James F. Oates, Jr. (hereinafter "Oates") and Harry C. Hagerty (hereinafter "Hagerty") are citizens of the State of New York; Oates is, and at all times hereinafter mentioned since 1955 has been, the president of Equitable and is and has been since said date in a position to determine or influence its lending policies; Hagerty at all times hereinafter mentioned since 1955 until December 31, 1961 was the Vice Chairman of the Board of Directors of Metropolitan and was during such period in a position to determine or influence its lending policies.

70. Additional defendant Ben-Fleming Sessel (hereinafter "Sessel") is a citizen of the State of Connecticut. He is, and at all times hereinafter mentioned since 1955, has been the Senior Vice President of Irving and a director of TWA. He was originally nominated as a director of TWA by Toolco.

71. Toolco asserts this counterclaim derivatively in the right of TWA and its stockholders. It has made no demand upon the directors or the stockholders of TWA to bring this claim for the reasons that the directors are under the domination and control of the additional defendants, that more

than 78.2% of the stock of TWA is held in the Voting Trust, that a majority of the voting trustees of such stock are subject to the control of the additional defendants and that demand would be futile.

72. Jurisdiction of this Court over this counterclaim arises from the violations by the additional defendants of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2) and of Section 7 of the Clayton Act (15 U.S.C. § 18) hereinafter alleged.

73. The trade or commerce among the several States which is the subject matter of this counterclaim includes:

(a) The furnishing in interstate commerce by lending institutions of senior financing to the major airlines of the United States; and

(b) The furnishing in interstate commerce by lending institutions of senior long-term financing to the major airlines of the United States.

74. The requirements of the major airlines for senior financing constitute and have constituted a separate and distinct market for lending institutions for reasons which include the following:

(a) The large amounts of moneys required;

(b) The large amounts of moneys required at a particular time; and

(c) The nature of the security for such financings, namely, jet and other aircraft which have a limited useful life and which may become obsolete in a relatively few years.

75. The requirements of the major airlines for long-term senior financing constitute and have constituted a separate and distinct market from the total requirements of

the major airlines for senior financing for the reason that banking institutions which have furnished a substantial portion of the senior short-term financing do not act as suppliers of long-term financing. As used herein, the term "long-term financing" means debt financing maturing more than five years from its creation and the term "short-term financing" means debt financing maturing within five years of its creation.

76. TWA constitutes and has constituted a substantial proportion of the market for the supplying of long-term and short-term financing to the major airlines of the United States. For example, in 1960 Equitable and Metropolitan supplied to TWA $92.8 million in long-term financing and Irving and a banking group which it headed supplied $72.2 million in short-term financing and in 1961 TWA agreed to sell to Metropolitan and Equitable, and Metropolitan and Equitable agreed to purchase, an additional $107 million of long-term debt securities and Irving and, with one exception, the same banking group agreed to lend on a short-term basis an additional $40 million.

77. The violations of the antitrust laws hereinafter more fully alleged include the following:

(a) A combination and conspiracy to restrain interstate commerce by preventing TWA from acquiring (i) senior long-term financing from others than Equitable and Metropolitan except with the consent and acquiescence of Equitable and Metropolitan and (ii) senior short-term financing from others than Irving and such banking institutions as it permitted to participate in such financing, all in violation of Section 1 of the Sherman Act.

(b) A combination and conspiracy to attempt to monopolize and to monopolize a substantial segment

of the interstate trade and commerce of the United States by attempting to monopolize and monopolizing the supplying of senior long-term financing to the major airlines of the United States, all in violation of Section 2 of the Sherman Act.

(c) An agreement in restraint of interstate trade and commerce of the United States, to refuse to supply financing to TWA or Toolco so long as TWA was, is or shall be controlled by Toolco, all in violation of Section 1 of the Sherman Act.

(d) A combination and conspiracy to restrain interstate commerce by preventing TWA from obtaining long-term or short-term senior financing except at interest rates fixed in advance by agreement among lending institutions, all in violation of Section 1 of the Sherman Act.

(e) An agreement in restraint of interstate trade and commerce of the United States between and among lending institutions, including Equitable and Metropolitan and others, to the effect that (i) none of such lenders would supply financing to any major airline without the consent of the traditional senior lender to that airline, and (ii) in the event that the traditional senior lender to an airline refused to supply financing except upon particular terms, none of the other of such lenders would supply financing to that airline upon any terms, all in violation of Section 1 of the Sherman Act.

(f) The acquisition by Equitable, Metropolitan and other lending institutions, through voting trustees, of legal title to more than 78.2% of the capital stock of TWA, in violation of Section 7 of the Clayton Act.

(g) The refusal of Irving and the refusal of other lending institutions, whether acting alone or in concert, to extend credit to Toolco or Hughes except

upon condition that Hughes as sole stockholder of Toolco, and Toolco as controlling stockholder of TWA, agree to grant to such lending institutions an exclusive market for senior financing through the placing of Toolco's TWA stock in a lender-controlled voting trust, all in violation of Section 1 of the Sherman Act.

78. During the period from 1939 through 1955, Toolco through the use of its credit and resources, from time to time assisted TWA in the acquisition of piston-engined aircraft which TWA did not have the financial resources to acquire but which were necessary to enable TWA to maintain its competitive position on its authorized routes and to expand its operations pursuant to new authorizations of additional routes. In 1955 TWA and Toolco recognized that in order for TWA to maintain its competitive position it would require a fleet of jet-powered aircraft substantially as soon as its principal competitors and that orders for such equipment should not be delayed. TWA did not and would not have the financial resources or credit to order any jet aircraft prior to the end of 1958 at the earliest. Toolco, therefore, in 1956, in accordance with practices previously followed when the acquisition of needed aircraft was beyond TWA's then capabilities, used its own credit and resources to place orders for the acquisition of a fleet of jet aircraft from Boeing and General Dynamics for use by TWA. Prior to the execution of these contracts the type of equipment, the form of the contracts and the specifications of the aircraft were approved in detail by the operating and engineering personnel of TWA; and thereafter TWA's representatives supervised their manufacture, testing and delivery.

79. Toolco's total commitments in connection with TWA's jet equipment program exceeded $300 million.

Toolco and TWA recognized that even if Toolco had desired to do so, it could not supply permanent financing for such a fleet. By reason of the vast amount of financing required, such permanent financing could be accomplished only with the participation of one or more principal suppliers of long-term financing to the major airlines, namely Equitable, Metropolitan and Prudential.

80. By 1956 Equitable had established itself as TWA's traditional senior lender, holding $40 million in principal amount of TWA's 3¾% Equipment Mortgage Sinking Fund Bonds (hereinafter "the Sinking Fund Bonds") due December 1, 1969. Upon information and belief, prior to 1956, lending institutions, including Metropolitan, Equitable and Prudential, entered into an understanding and agreement that (i) none of such lending institutions would supply financing to an airline except with the consent of the traditional senior lender to that airline and (ii) if the traditional senior lender to an airline refused to supply such financing except upon particular terms none of such lending institutions would supply financing on any terms. By reason of such agreement and understanding, Equitable's position as traditional senior lender to TWA made Equitable's support a necessity if the permanent financing of TWA's jet equipment program were to be accomplished.

81. Toolco discussed with Equitable in 1958 Equitable's requirements as to the permanent financing of TWA's jet equipment program. In such discussions Equitable indicated that:

(a) Since in Equitable's view, TWA's financial condition had not improved sufficiently so that TWA could independently finance the required jet fleet,

Toolco would either have to supply a substantial portion of such financing itself or be responsible for the obligations incurred by TWA;

(b) Equitable would require that as a condition to its participation in any TWA financing Toolco agree that Toolco's stock interest in TWA would be placed in a lender-controlled voting trust but only in the event of a default by TWA; and

(c) As a part of any financing TWA's Sinking Fund Bonds which Equitable held would have to be refunded.

82. The discussions with Equitable during 1958 were unsatisfactory to Toolco, primarily because Equitable did not appear prepared to participate in financing TWA's jet program unless Toolco assumed substantial permanent obligations. In early 1959 Dillon Read was retained to prepare plans for the permanent financing of TWA's jet equipment program. Dillon Read advised Toolco and TWA that since Equitable was TWA's traditional senior lender, Equitable's support and participation was essential to the development of any permanent financing. Dillon Read further advised Toolco and TWA that under prevailing conditions an offering of equity securities by TWA would be inadvisable.

83. In view of the apparent difficulties to independent financing by TWA, Toolco, in cooperation with TWA, developed a plan for permanent financing through a leasing arrangement. Dillon Read undertook to and did develop a proposal for such an arrangement on terms which they presented as advantageous to TWA. TWA did not accept this proposal since Equitable would not support such a leasing plan.

84. Toolco had reason to believe that the public acceptance of jet aircraft and the consequent improvement in the earnings of TWA would place TWA in a position independently to finance its jet equipment program. Early in 1959 Boeing commenced the delivery of jet aircraft ordered by Toolco. As such aircraft were received, they were placed in service by TWA under temporary leases pending permanent financing by TWA. TWA was thus enabled to place jet aircraft in transcontinental service substantially at the same time as one of its principal domestic competitors and considerably in advance of its other principal domestic competitor. After this early introduction of jet equipment TWA realized earnings before taxes in excess of $17.4 million in 1959 and in excess of $15.2 million in 1960.

85. Toolco financed the acquisition of jet aircraft leased to TWA out of its own cash resources until they were all but exhausted. Thereafter, such jet aircraft were financed largely through loans from Irving, TWA's and Toolco's lead bank, and other banks. Such loans were made available to Toolco until early in 1960. Although Irving informed Toolco in 1959 that it had exhausted its legal loan limit, its consents to subsequent loans continued to be required by reason of the terms of its existing loans. In 1959 Toolco advised Irving that such interim credit should not be terminated without giving Toolco adequate lead time either to arrange other interim credit or to consummate a plan for the permanent financing of TWA.

86. Upon information and belief, at some time in or about March 1960, the exact time being unknown to Toolco, Equitable, Irving and other lending institutions, Dillon Read and Oates, Sessel and others entered into an under-

standing and conspiracy (the persons who either at its inception or from time to time thereafter joined such conspiracy being hereinafter called "the conspirators") to the following effect:

(a) Equitable and Irving would use their respective positions as traditional senior lender and lead bank to TWA and the conspirators would use all economic and other power at their disposal to obtain and maintain control of TWA for their mutual advantage, including the use of TWA as a market for the supplying of senior financing upon terms advantageous to the lenders.

(b) The conspirators would permit to participate in supplying senior financing to TWA only those whom they selected and would use their concerted efforts to prevent other lending institutions from participating in any TWA senior financing except with the consent of Equitable as to long-term senior financing and of Irving as to short-term senior financing and then only on terms satisfactory to Equitable and Irving.

(c) The conspirators would agree among themselves as to the interest rate to be paid by TWA for senior short-term and long-term indebtedness and would refuse to advance any financing to TWA except after its acceptance of such predetermined interest rates.

In furtherance of said conspiracy and pursuant to said understanding the conspirators took the actions hereinafter set forth.

87. Following the refusal of Equitable to support a leasing plan, Toolco with the knowledge and assistance of TWA entered into negotiations with aircraft manufacturers for assistance in the financing of not only TWA's then

planned jet fleet but also of additions thereto. Irving learned of such negotiations early in 1960. Thereafter, Irving and other banks which had advanced money to Toolco, without prior notice to Toolco, advised Toolco on March 5, 1960 that they would no longer supply any short-term credit for the purpose of paying for further deliveries of jet equipment for TWA. The payment of rentals due from TWA to Toolco under the leases of jet aircraft by Toolco to TWA would have provided at least a partial alternative source of moneys to Toolco to be used in making payments for jets thereafter to be delivered. Equitable refused to permit TWA to make any such payments.

88. In March 1960, TWA and Toolco agreed to support a plan, later known as the "Dillon Read Plan", which contemplated that Equitable and one or more other insurance companies would supply permanent senior long-term financing, Irving and associated banks would supply short-term and interim senior financing to TWA and Toolco would accept $100 million of subordinated debt of TWA in payment, *pro tanto*, of TWA's obligations to Toolco and also establish a revolving credit in favor of TWA in the amount of $50 million. Equitable agreed to participate in such financing but only on condition that Toolco and TWA agree:

(a) To the acceleration of the maturity of $31,000,000 principal amount of TWA's Sinking Fund Bonds due in 1969 held by Equitable so that such bonds would mature at the same time as the interim bank debt and to an increase in the interest rate on the Sinking Fund Bonds to that on the interim bank debt;

(b) To a guarantee by Toolco of the payment of said Bonds;

(c) To the interest rate for the permanent financing supplied by the insurance companies being one-half of 1% greater than for the bank financing; and

(d) To the execution of an agreement which would provide that in the event of certain defaults, including a default as a result of a change of management, the TWA stock owned by Toolco would be placed in a voting trust controlled by the lenders.

Dillon Read advised Toolco that no alternative to the acceptance of the Dillon Read Plan and the requirements of Equitable appeared feasible. Relying upon this advice Toolco on or about March 28, 1960, agreed to accept said Plan and requirements.

89. Thereupon Irving on behalf of TWA undertook to form a banking group for the purpose of providing interim and short-term financing to TWA. Prior to Toolco's acceptance of the Dillon Read Plan, Dillon Read had advised Toolco and TWA that the interest rate on the permanent bank financing would be in the neighborhood of five or five and one-half per cent. Sessel, on behalf of Irving, advised TWA and Toolco that negotiations as to interest rate would have to await the formation by it of a banking group and represented to Toolco and to TWA that when a banking group was formed, Toolco and TWA would have a full opportunity to negotiate the interest rate. Thereafter, Metropolitan, after consultation with Equitable and with Equitable's approval, agreed to supply the portion of the long-term financing not being supplied by Equitable, and Metropolitan and Equitable agreed among themselves that the interest rate on such financing would be 6½%. Upon information and belief, this interest rate was in excess of that on any other financing theretofore or thereafter supplied by Equitable to any other corporation in 1961. When

Irving formed its banking group, the members thereof, upon information and belief, after consultation with Equitable and Metropolitan, agreed among themselves and with Metropolitan and Equitable that the interest rate on the short-term financing would be 6%. Thereafter, Irving refused to negotiate or to permit Toolco or TWA to negotiate the rate of interest with the banking group which it had formed. Upon information and belief, Irving and Dillon Read in violation of their respective fiduciary obligations to TWA each concealed from TWA and Toolco that other commercial banks were interested in participating in such bank financing upon other and more favorable terms to TWA. By reason of such concealment and since no acceptable alternative to the Dillon Read Plan appeared feasible, TWA was compelled to accept the 6% interest rate on the bank financing and the 6½% rate on the insurance company financing.

90. In May 1961, Equitable and Metropolitan and Irving and its associated banks committed themselves to the Dillon Read Plan but under conditions which permitted them to withdraw their commitment in the event of a change in TWA's management. Prior to the making of this commitment Charles S. Thomas (hereinafter "Thomas"), TWA's then president, upon information and belief, had advised Dillon Read and other of the conspirators that he would remain as president of TWA only if he were given a substantial increase in salary and a lifetime retirement annuity. Although the conspirators, prior to committing themselves to the Dillon Read Plan, thus knew of Thomas's plans and the resulting uncertainty as to his tenure, neither Dillon Read nor any of the conspirators informed Toolco or TWA thereof until after Toolco without knowledge of Thomas's planned demands (i) had committed

itself to the Dillon Read Plan; (ii) had guaranteed interim loans to be made to TWA up to $40 million pursuant to an agreement between TWA and Irving and its associated banks, said loans to be used by TWA for the jet equipment program and to repay existing bank loans; and (iii) had guaranteed the Sinking Fund Bonds of TWA held by Equitable, the maturity of which was accelerated to the same date as that of the interim bank financing. The maturity of such interim debt was fixed as the initial closing date under the Dillon Read Plan. The closing was originally scheduled for May 31, 1960 but was postponed to June 23, 1960 and thereafter, at the request of Equitable, to July 23, 1960.

91. On information and belief, prior to July 23, 1960, the precise date being unknown to Toolco, Metropolitan and Hagerty joined the conspiracy hereinabove alleged and, to insure the success thereof, the conspirators entered into a further agreement and understanding to the following effect:

(a) The conspirators, and each of them, would refuse to lend moneys to TWA or Toolco so long as Toolco controlled TWA;

(b) The conspirators, and each of them, would refuse to finance or otherwise deal with TWA or Toolco or Hughes except upon condition that Toolco place its stock in TWA in a lender-controlled voting trust;

(c) The conspirators would use their concerted efforts to obtain and maintain control of TWA and to foreclose all other lenders from the opportunity of supplying financing to TWA except with their consent.

92. Prior to July 23, 1960, but after Toolco was firmly committed to the Dillon Read Plan, after it had guaran-

teed $54,500,000 principal amount of TWA's indebtedness and after loan agreements had been executed permitting the lenders to withdraw from their commitments in the event of a change in management deemed by them to be adverse, Thomas, upon information and belief, after consultation with the knowledge and approval of the conspirators, for the first time demanded, on threat of resignation, a substantial increase in salary and lifetime retirement annuity of $50,000 per year. Toolco refused to recommend to TWA the acceptance of such demands under pressure of the financing but itself offered Thomas equivalent benefits. Thomas insisted that his demands should be met by TWA and upon information and belief, was supported in said demands by the conspirators.

93. Thereafter, on July 21, 1960, Toolco advised representatives of the lending institutions that Thomas, having finished the two years of service to which he was committed, intended to resign. Toolco proposed to the lenders that the financing proceed as planned upon the understanding that if a president of TWA acceptable to the lenders had not been found within 90 days Toolco would place its TWA stock in a lender-controlled voting trust. Representatives of Metropolitan and Equitable tentatively accepted this proposal but it was thereafter rejected by the conspirators. Upon information and belief, the decision to reject the proposal was made jointly by Oates and Hagerty. The conspirators thereafter refused to acquiesce in any plan which would permit Toolco to name the president of TWA. When a compromise between Thomas and Toolco appeared probable, Thomas consulted Oates and Hagerty. Upon information and belief, they advised Thomas not to accept any compromise but to resign. Thomas did so. Immediately upon his resignation the conspirators claimed that there had been an adverse change in TWA's management

and, exercising the out which they had insisted be included in the loan agreements, cancelled the lenders' commitments to TWA under said agreements.

94. Thereupon the conspirators entered upon a course of conduct designed and calculated to compel Toolco to place its TWA stock in a lender-controlled voting trust and to give to the conspirators control of TWA:

(a) The conspirators agreed to proceed with the Dillon Read Plan if, but only if, by September 1, 1960, Toolco placed its TWA stock in a voting trust prior to any financing. The maturity of the TWA debt which Toolco had guaranteed was extended to September 1.

(b) Irving insisted as a condition to its consent to the extension of the maturity of the interim bank debt that TWA accept no further deliveries of jet aircraft.

(c) Although Toolco repeatedly offered to recommend a president for TWA acceptable to the lenders and although Toolco proposed for their consideration several qualified executives and offered to consider any alternative suggestions the lenders might make, the conspirators refused to consider any of Toolco's proposals or make any alternative suggestions.

(d) Irving was requested by Toolco to formulate and implement a new financing plan which would not require Toolco to place its TWA stock in a lender-controlled voting trust. Irving through Sessel agreed with Toolco to use its best efforts to formulate such a plan. During August and September, 1960, Irving represented to Toolco that it was diligently engaged in doing so. When Toolco sought to participate in negotiations and discussions which Irving represented were in progress, Irving further

represented to Toolco that such participation would be inadvisable and did not permit Toolco to participate therein. By such representations, Irving led and induced Toolco to refrain from making any efforts to secure financing for TWA elsewhere or to obtain for itself financing required to repay its obligations to Irving and others incurred for the benefit of TWA.

(e) Upon information and belief, Irving refused to permit several large banks which were not a part of the Irving banking group as previously formed to participate in formulating and implementing a financing program although Irving knew that such banks were prepared to participate therein. Irving concealed from TWA and Toolco the willingness of such banks to participate in a banking group without a voting trust.

(f) The conspirators realized that any extended delay in the arrangement of permanent financing would cause a substatnial delay in the delivery of Convair aircraft to TWA and that the damage which would result from such a delay created pressure upon Toolco and TWA to yield to their demands.

(g) Irving finally presented to Toolco a plan on September 26, 1960 (hereinafter "the Bankers' Plan"). Irving knew or should have known that the Bankers' Plan as submitted could not be effectuated. The Bankers' Plan contemplated that General Dynamics would participate in the financing to the extent of $40 million but as Irving knew or should have known General Dynamics did not have the available resources to extend a $40 million credit. Toolco accepted the Bankers' Plan in order to avoid the damage to TWA which would result from a delay in arranging financing for the Convair aircraft.

(h) General Dynamics sought to obtain the support of Prudential, its traditional senior lender, in

order to supply the $40 million credit which the Bankers' Plan contemplated. Upon information and belief, Prudential consulted one or more of the conspirators and thereupon refused to give the required support. Toolco thereupon made arrangements to relieve General Dynamics of a substantial part of General Dynamics' commitment under the Bankers' Plan by itself supplying an additional $30 million to be realized through the liquidation of assets unrelated to TWA. It negotiated, prepared, executed and delivered to Irving a plan which was substantially identical to the Bankers' Plan except for this change.

(i) On October 6, 1960 Irving and its associated banks met, avowedly to consider Toolco's proposal. A representative of Equitable attended this meeting. Upon information and belief, prior to the presentation of Toolco's plan, Sessel advised the banks that Hughes had stated that a voting trust would be preferable to receivership and thereupon the banks agreed that they would not consider Toolco's proposal and that in order to pressure Toolco and Hughes into a voting trust they would inform Toolco's representatives that (i) no more loans would be made to TWA without an immediate voting trust agreement, (ii) the banks would proceed with the Dillon Read Plan if the insurance companies would also do so, (iii) should Toolco and Hughes not accept the Dillon Read Plan with a lender-controlled voting trust, Irving and the other banks would set off at the opening of business on October 7 deposit balances against outstanding loans to TWA and Toolco and (iv) the banks' decision was final, no more plans would be considered and Toolco and Hughes would have until 5:00 P. M. Eastern Daylight Saving Time to accept the banks' demands.

(j) In midafternoon Toolco's representatives were called into the meeting. Pursuant to the agree-

ment theretofore made, Sessel, as spokesman, stated to Toolco that its proposal was totally unacceptable and refused to permit any discussion thereof. He further stated that the banking group would not require Toolco to place its TWA stock in a lender-controlled voting trust. He demanded that before 5:00 P.M. EDT Toolco agree by written document executed by its then president, Hughes, to accept the Dillon Read Plan with such a voting trust. He stated that if the demands of the banks were not met he would place Toolco in receivership. He further threatened that unless Toolco agreed to a lender-controlled voting trust he would collect summarily the substantial indebtedness owed to Irving by Hughes personally which had no relationship to TWA or Toolco, which debt was not yet due but the maturity of which could be accelerated, and proceed immediately with a private foreclosure of Hughes' stock in Toolco which had been pledged as security for Hughes' debt to Irving.

(k) Prior to 5:00 P.M. Toolco acceded to the demands of Irving provided that TWA be given the right to refund without premium or penalty the senior indebtedness to be provided to TWA and that Toolco be entitled to purchase all such indebtedness at 100% of the principal amount plus accrued interest. Irving and the other banks agreed to such a provision and a representative of Equitable who was present at the meeting accepted it in principle.

(l) Thereupon Metropolitan after consultation with other of the conspirators demanded for the first time that Toolco's right to acquire the bank and insurance company debt and thus terminate the Voting Trust be subject to the payment of a penalty to be initially 22% of the principal amount of the insurance company debt, plus accrued interest, i.e., $20,416,000. This punitive and unprecedented demand was designed solely for the purpose of preserving the lender-controlled voting trust.

(m) Toolco promptly submitted to Equitable an alternative proposal which contemplated a voting trust but reserved to Toolco a right to purchase the senior notes for 100% of their principal amount plus accrued interest. In order to replace the participation of Metropolitan and to reduce Equitable's participation to an amoutn not greater than its existing loan to TWA, Toolco, in this proposal, committed to take $67.3 million of the sinking fund notes. Although this proposal afforded the lending banks an improved security position, Irving peremptorily refused to consider the plan on the ground that it and its associated banks did not want to do business with Hughes.

(n) Thereafter, on October 19, 1960, Equitable and Metropolitan, with full knowledge of the pressure upon Toolco and TWA to accept any demands in order that Convair aircraft might be delivered to TWA as soon as possible, stated in identical terms to Toolco and TWA their willingness to reinstate the Dillon Read Plan, provided that (i) Toolco agree to place its TWA stock in a lender-controlled voting trust; (ii) Toolco consent to a penalty in the initial amount of 22% on $92,800,000 as a condition to termination of the Voting Trust by the refinancing of the loans to TWA; (iii) the by-laws of TWA (providing for reconstitution of the TWA Board of Directors by a majority of the stockholders at any time without cause) remain unchanged; and (iv) no employment contract be made with an executive officer of TWA providing for tenure of office beyond the date of the next annual election of officers. The additional demands thus made were designed and calculated to give to the conspirators the power to determine the management of TWA, including its chief executive officer, to reconstitute the Board of Directors of TWA at will, and to manage and control the business and affairs of TWA in such manner as they should determine.

(o) Also on October 19, 1960, Irving made a similar proposal to TWA and Toolco. Irving stated (i) that acceptance of Metropolitan's and Equitable's proposals was a prerequisite to any commitment by it and its participating banks, and (ii) that in the event it, as agent for the other lending banks, did not have Toolco's unconditional agreement in writing to its proposal by October 21, 1960, Irving and the other lending banks would enforce their rights of collection of TWA's debts by all available remedies, including the right of set-off.

(p) Toolco received the October 19 letters on Friday, October 21. Toolco endeavored to negotiate a reduction of the 22% premium but the conspirators remained adamant. Thereupon, Toolco entered into an oral understanding with Irving that on Monday, October 24, a full quorum of TWA's Board of Directors would be asked to pass upon the financing after the Toolco nominee directors had been notified that they could no longer assume that they were being indemnified by Toolco. On the basis of this understanding with Irving, Toolco accepted the October 19 demands of the lending institutions.

(q) Irving refused to honor its agreement to permit TWA's full Board of Directors to consider the October 19 proposals. Toolco, therefore, on October 22, 1960, notified the lenders that it no longer considered itself bound by its conditional acceptance thereof. Toolco also notified Irving that it would seek to find other sources of financing to replace Irving and its banking group. Thereupon Irving and certain members of said banking group commenced offsetting TWA and Toolco balances against TWA's debt to such banks. At the same time, widespread publicity was given in the press and otherwise to accounts of Toolco's withdrawal of its conditional acceptance of the October 19 proposals. Said accounts were false and misleading and calculated to

injure the reputation of Toolco. Upon information and belief, such false and misleading publicity emanated from Irving and Sessel, was known to them to be false and misleading and was designed by them to preclude TWA or Toolco from finding any source of financing for TWA's jet equipment program other than Irving and its associated banks and Metropolitan and Equitable and then only upon terms which included a lender-controlled voting trust.

(r) Thereafter, Toolco endeavored to develop an alternative plan for financing TWA's requirements. Toolco's efforts to develop such a plan were unsuccessful for reasons which included (i) the unwillingness of other lending institutions to finance TWA without the approval and support of Equitable, TWA's traditional senior lender, (ii) the control and domination by Metropolitan, Equitable and Prudential of the market for major airline financing, and (iii) the attitude of the financial community which was based on erroneous assumptions of fact arising from the false and misleading statements of Irving and Sessel. Faced with no alternative by reason of the unlawful conduct of the conspirators, Toolco on November 30, 1960, committed itself to accept the lender-controlled voting trust, the additional demands of the conspirators and the Dillon Read Plan.

95. Thereafter, in December, 1960, the necessary transactions and agreements to effectuate the Dillon Read Plan, to place the common stock of TWA owned by Toolco in a lender-controlled voting trust, and to comply with the additional demands of the conspirators were effected. By the terms of such agreements, the conspirators acquired and now possess the power to control the business and affairs of TWA. In furtherance of the conspiracy herein-

above alleged the conspirators since December, 1960 have used the power so acquired:

(a) To install a management of TWA which is responsive to them rather than to the owners of TWA;

(b) To prolong and perpetuate their control of TWA by (i) prolonging and perpetuating the Voting Trust and (ii) frustrating the option which they gave to Toolco in December, 1960 to regain control of TWA by acquiring, upon the payment of applicable penalties, all the Series A Sinking Fund Notes and Series A Serial Notes;

(c) To impose upon TWA commitments which extend beyond the term of the Voting Trust and which are not related to the repayment of the loans in connection with which the Voting Trust was created;

(d) To gain for themselves financial advantage at the expense of TWA through making additional loans to TWA under conditions which are not competitive; and

(e) To maintain TWA as a captive market for additional senior financing.

Breech, notwithstanding the fiduciary duty which he owed to Toolco as the equitable owner of the 78.2% of TWA's stock which he held in trust, while serving as voting trustee and as Chairman of the Board of Directors of TWA has participated in the acts and course of conduct by which such objectives have been attained; Tillinghast who was elected president of TWA in the manner hereinabove alleged has furthered the efforts of the lending institutions to maintain control of TWA through the voting trustees; and Breech and Tillinghast joined the conspiracy hereinabove alleged.

96. Since December 1960, the conspirators have done or caused to be done the following in furtherance of said conspiracy:

(a) On February 28, 1961, TWA's Board of Directors was reconstituted so that a majority of said Board consisted of persons of the conspirators' choosing. Thereafter, on April 27, 1961, the TWA Board of Directors was further reconstituted by removing therefrom all directors who represented the interests of Toolco, with the single exception of Holliday, the voting trustee named by Toolco. Breech caused himself to be elected chairman of TWA's Board of Directors as so reconstituted.

(b) The conspirators selected Tillinghast to be TWA's president and chief executive officer and, upon information and belief, at or about the time of his selection explained to him the nature of the conspiracy and the contemplated course of conduct which would prevent Toolco from regaining control of TWA. The conspirators thereafter caused TWA to enter into a contract by which upon Tillinghast's retirement at any time following the termination of the Voting Trust and whether or not he has rendered any services to TWA (or upon his retirement at any other time after five years) he shall receive a pension for ten years, said pension being in the amount of $50,000 per year until he reaches age 65 and $30,000 per year thereafter, all as more fully alleged in paragraph 53 hereof.

(c) The conspirators have failed for reasons unrelated to any proper corporate or business purpose of TWA, to take advantage of opportunities to strengthen TWA's business. One of such opportunities which they have failed to pursue is that of a merger of Northeast into TWA. Because of TWA's route structure the traffic on its routes for many years has decreased sharply in the winter months. To

remedy this seasonal imbalance Toolco in 1960 entered into negotiations with Atlas Corporation, the controlling stockholder of Northeast, looking toward a merger of Northeast with and into TWA. Northeast by reason of its east coast route to Florida has a sharp seasonal imbalance which is the reverse of that of TWA. Such negotiations, which were carried on with the knowledge of TWA, culminated in May, 1960 in an agreement of merger which Atlas Corporation and Toolco agreed to recommend to the Board of Directors of Northeast and TWA, respectively. Under the merger agreement, the merger was subject to Board approval and to approval by a majority of the shareholders of TWA other than Toolco. Breech and Olds, with full knowledge of the agreement thus made by Toolco with Atlas Corporation, failed to recommend the merger to the TWA Board of Directors and the conspirators failed to take action to consummate a merger with Northeast either on the terms negotiated by Toolco or on other appropriate terms, notwithstanding the suggestion made by Toolco in May, 1961 that it was willing to discuss with TWA the possibility of Toolco's assuming any financial risk that such a merger might otherwise impose upon TWA and notwithstanding the recommendations of TWA's operating personnel that such a merger was in the best interests of TWA.

(d) For reasons unrelated to any interest of TWA, the conspirators refused to grant Toolco's request for a one week's postponement in an offering by TWA of $111,235,900 principal amount of subordinated debentures with warrants attached. This offering was being made to TWA's stockholders pursuant to agreements made in December, 1960 at the time of the creation of the Voting Trust. The purpose of the offering was to refund an interim note of $100 million which was accepted by Toolco in payment of obligations of TWA to it. By the terms of said agreements the entire proceeds of the offering

would be paid to Toolco, which had agreed to purchase all unsubscribed debentures up to a principal amount of $100 million, unless Toolco exercised an option to subscribe to all the debentures to which others did not subscribe. Toolco desired a postponement of the offering in order that it might make a simultaneous secondary offering of both the debentures which it was obligated to purchase and those which it had the option to purchase. Such a secondary offering would have permitted TWA to obtain an additional $11,235,900 in junior capital and Toolco to obtain $100 million in cash. Upon information and belief, the conspirators refused Toolco's request for a week's delay in order to prevent Toolco from obtaining cash resources which might be used to purchase the Series A Sinking Fund Notes and Series A Serial Notes and thus to terminate the Voting Trust.

(e) The conspirators entered into agreements with Boeing for the purchase of additional jet aircraft from Boeing, even though, upon information and belief, the number of aircraft which TWA agreed to acquire was in excess of TWA's needs and financial capabilities. The total cost of such additional jet equipment is in excess of $187,500,000 and a primary purpose of the conspirators in entering into this program was, upon information and belief, to create a need for additional financing for TWA upon terms which would perpetuate their control of TWA.

(f) Toolco made various proposals to TWA which would have provided additional capital to TWA. One of such proposals would have guaranteed to TWA an additional $100 million of equity capital and was conditioned solely upon the termination of the Voting Trust. The conspirators refused to entertain any of such proposals upon their merits and rejected or allowed such proposals to expire without any negotiations with respect thereto.

(g) On June 30, 1961, the conspirators caused TWA to file its complaint in the instant action in which TWA seeks, among other relief, to divest Toolco of its interest in TWA.

(h) Thereafter, without the approval by or consultation with Toolco or approval by the other stockholders of TWA, the conspirators caused TWA to enter into agreements with Metropolitan, with Equitable and with Irving and its associated banks for the supplying of $147 million of additional financing to TWA. As more fully alleged in paragraph 53 hereof, the conspirators in connection with said additional financing caused to be executed a Supplemental Indenture giving to Metropolitan and Equitable the right to accelerate the maturity of said $147 million of indebtedness in the event the Voting Trust were to terminate whether in accordance with its terms or otherwise or in the event Toolco were to exercise the option given to it in December, 1960, to acquire the Series A Sinking Fund Notes and Series A Serial Notes upon the payment of the applicable penalty.

97. During the years in which Toolco nominated a majority of the directors of TWA, namely from 1947 through 1960, the business of TWA grew steadily. From 1947 through 1960 TWA's operating revenues grew more than four times. In 1960 TWA had earnings before taxes in excess of $15,000,000. During the years from 1947 through 1960 TWA realized earnings before taxes of $95,600,000.

98. By reason of the unlawful conspiracy and acts hereinabove alleged:

(a) TWA's jet equipment program was disrupted and the delivery of jet aircraft which had been or-

dered by Toolco from General Dynamics for the benefit of TWA was delayed;

(b) TWA has been compelled to obtain financing upon unfavorable terms and at higher interest rates than it would have otherwise had to pay;

(c) TWA's assets have been wasted;

(d) TWA has lost valuable opportunities;

(e) The business and affairs of TWA have steadily deteriorated.

Upon information and belief, TWA in 1961 lost in excess of $30 million without regard to accelerated depreciation on piston aircraft and before applicable tax credits, or an adverse change from 1960 in excess of $45 million. TWA's present management estimated in September, 1961 that by March, 1962 TWA, which started 1961 with a favorable cash balance of more than $40,600,000, would have a cash deficit of $2,500,000.

99. By reason of the foregoing, TWA has suffered and is continuing to suffer substantial damages in its business and property, the exact amount of which is presently unknown to Toolco but which is, upon information and belief, estimated to be in excess of $45 million, which amount may become substantially greater as a result of the conspirators' continuing unlawful activities.

100. TWA is threatened with irreparable injury.

101. All additional defendants are necessary parties to this counterclaim in order that complete relief may be granted.

AS AND FOR A FOURTH COUNTERCLAIM AGAINST TWA AND AGAINST ALL ADDITIONAL DEFENDANTS

102. Toolco repeats and realleges each and every allegation of paragraphs 42 through 48, inclusive, 62, 69, 70 and 73 through 97, inclusive, hereof.

103. Jurisdiction of this Court over this counterclaim arises from the violations of the antitrust laws herein alleged.

104. Since the creation of the Voting Trust, TWA, under and by reason of the control of the conspirators over its business and affairs, has participated in the acts and course of conduct by which the conspiracy has been furthered, as hereinabove more fully alleged.

105. By reason of the facts herein alleged, Toolco has suffered and is continuing to suffer substantial damages in its business and property, the amount of which is presently estimated to be in excess of $77 million, which amount may become substantially greater as a result of the conspirators' continuing unlawful activities.

106. Toolco is threatened with irreparable injury.

107. TWA and the additional defendants are necessary parties to this counterclaim in order that complete relief may be granted.

108. Toolco has no adequate remedy at law.

AS AND FOR A FIFTH COUNTERCLAIM AGAINST TWA AND AGAINST ALL ADDITIONAL DEFENDANTS

109. Toolco repeats and realleges each and every allegation of paragraphs 42 through 48, inclusive, 62, 69, 70 and 73 through 97, inclusive, hereof.

110. Jurisdiction of this Court is ancillary to its jurisdiction over the third and fourth counterclaims heretofore alleged in that this Court has jurisdiction to grant all available relief upon the facts therein alleged.

111. During 1960 Equitable, Metropolitan, Irving, Hagerty, Oates and Sessel, together with others, entered into a conspiracy to deprive Toolco of its voting rights with respect to TWA stock owned by it and thus to deprive Toolco of control of TWA. They made their demands for a lender-controlled voting trust not for the purpose of protecting any legitimate interest which they might have as lending institutions but rather for the purpose of injuring, maliciously and wilfully, Toolco and Hughes. In order to coerce and compel Toolco to place its TWA stock in such a lender-controlled voting trust, they, acting in concert, took or caused to be taken the actions alleged in paragraphs 90 through 94 hereof.

112. After Toolco, by reason of the wrongful activities of the conspirators, had been coerced and compelled to place its 78.2% stock interest in TWA in the Voting Trust, Breech and Tillinghast joined in the conspiracy hereinabove alleged and since January 1961, the conspirators, acting in concert and in furtherance of the objects of the conspiracy, have engaged in a course of conduct designed and calculated to interfere with Toolco's rights as the equitable owner of over 78% of the stock of TWA, to maintain and perpetuate the Voting Trust and the control over TWA which the conspirators unlawfully acquired, and to manage the business and affairs of TWA in the interests of the conspirators and not in the interests of the owners of TWA. TWA, under the control of the conspirators, has participated in said course of conduct and the acts in furtherance of the conspiracy more fully alleged in paragraph 96 hereof.

113. Among the objectives of the conspiracy has been the creation and perpetuation of a voting trust for a period beyond that permitted by applicable law. Under Section 218 of the Delaware Corporation Law the maximum term for which a voting trust of a Delaware corporation may be created is ten years and a voting trust may be extended for an additional term of ten years only in the last year of said voting trust and then only in the manner provided in said Section 218. The conspirators required that Toolco agree in December, 1960 to extend the Voting Trust at the request of Irving as agent for the holders of TWA's Series A Sinking Fund Notes and Series A Serial Notes for an additional term not to exceed the maximum permitted by Delaware law and since the creation of the Voting Trust have sought to perpetuate the Voting Trust as hereinabove alleged without the consent or acquiescence of Toolco.

114. As a result of the acts of the conspirators hereinabove alleged, Toolco has suffered damages in an amount presently estimated to be in excess of $77 million.

115. The continuation of the conspiracy herein alleged will result in irreparable injury to Toolco.

116. Toolco has no adequate remedy at law.

117. TWA and all additional defendants are necessary parties to this counterclaim in order that complete relief may be granted.

AS AND FOR A SIXTH COUNTERCLAIM AGAINST TWA

118. Toolco repeats and realleges each and every allegation of paragraphs 42, 43 and 50 hereof.

119. As a part of the transactions in December 1960 by which TWA's jet equipment program was financed, Toolco accepted TWA's interim subordinated note in the amount

of $100 million and TWA agreed to refund said note from an offering of subordinated income debentures and to pay interest on said note at the rate of 6½% per annum to the date of refunding.

120. TWA refunded said interim note on June 13, 1961 but failed and refused to pay interest to the date of such refunding on the entire principal amount of said note.

121. The amount of such interest which TWA failed and refused to pay is $72,089.55 and such amount remains due payable to Toolco by TWA.

Prayer for Relief

WHEREFORE, Toolco prays judgment dismissing the complaint herein and further prays that this Court order, adjudge and decree:

With Respect to the First Counterclaim

1. That Equitable, Metropolitan and Irving be perpetually enjoined from accelerating the maturity of any indebtedness of TWA by reason of the termination of the Voting Trust.

2. That the employment contract between Tillinghast and TWA in so far as it relates to the payment of any pension or annuity be declared void and of no effect and that TWA be perpetually enjoined from paying any annuity or pension to Tillinghast thereunder.

3. That TWA, Breech, Tillinghast, Metropolitan, Equitable, Dillon Reed and Irving be perpetually enjoined from taking any action which is designed or would have the effect

of preventing the termination of the Voting Trust in accordance with its terms.

4. That TWA, Breech, Tillinghast, Metropolitan, Equitable, Dillon Read and Irving account to Toolco for all damages suffered by Toolco by reason of the acts alleged in the First Counterclaim.

With Respect to the Second Counterclaim

1. That Equitable and Metropolitan have acquired control of TWA in violation of Section 408 of the Federal Aviation Act of 1958.

2. That Equitable, Metropolitan and Irving take all requisite action to terminate the Voting Trust.

3. That TWA recognize Toolco as the owner for all purposes of the shares of TWA's stock deposited in the Voting Trust and that Toolco is entitled to exercise all the rights of a stockholder of TWA with respect thereto.

4. That Equitable, Metropolitan and Irving, and each of them, be perpetually enjoined from accelerating the maturity of any indebtedness of TWA by reason of the termination of the Voting Trust.

With Respect to the Third Counterclaim

1. That the additional defendants have violated Sections 1 and 2 of the Sherman Act.

2. That Metropolitan and Equitable have violated Section 7 of the Clayton Act.

3. That the Voting Trust is invalid and void.

4. That TWA recognize Toolco as the owner for all purposes of the shares of TWA's stock deposited in the Voting

Trust and that Toolco is entitled to exercise all the rights of a stockholder of TWA with respect thereto.

5. That Equitable, Metropolitan and Irving take all requisite action to terminate the Voting Trust.

6. That Equitable, Metropolitan and Irving, and each of them, be perpetually enjoined from accelerating the maturity of any indebtedness of TWA by reason of the termination of the Voting Trust.

7. That Equitable, Metropolitan and Irving, and each of them, be perpetually enjoined from refusing to deal with TWA while it is controlled by Toolco.

8. That the additional defendants be perpetually enjoined from interfering in any way with the exercise by Toolco of its rights as a stockholder of TWA.

9. That the additional defendants pay to TWA $135 million, three-fold the damages sustained by TWA, and pay to Toolco its costs, attorneys' fees and expenses.

With Respect to the Fourth Counterclaim

1. That TWA recognize Toolco as the owner for all purposes of the shares of TWA's stock deposited in the Voting Trust and that Toolco is entitled to exercise all the rights of a stockholder of TWA with respect thereto.

2. That Equitable, Metropolitan and Irving take all requisite action to terminate the Voting Trust.

3. That Toolco may at any time acquire the Series A Sinking Fund Notes and Series A Serial Notes at the principal amount thereof plus accrued interest and without the payment of any premium or penalty.

4. That Equitable, Metropolitan and Irving, and each of them, be perpetually enjoined from accelerating the

maturity of any indebtedness of TWA by reason of the termination of the Voting Trust.

5. That the additional defendants Equitable, Metropolitan and Irving, and each of them, be perpetually enjoined from refusing to deal with Toolco and with TWA while it is controlled by Toolco.

6. That the additional defendants pay to Toolco the sum of $231 million, three-fold the damages sustained by Toolco, together with costs and attorneys' fees.

With Respect to the Fifth Counterclaim

1. That TWA recognize Toolco as the owner for all purposes of the shares of TWA's stock deposited in the Voting Trust and that Toolco is entitled to exercise all the rights of a stockholder of TWA with respect thereto.

2. That Equitable, Metropolitan and Irving take all requisite action to terminate the Voting Trust.

3. That Toolco may at any time acquire the Series A Sinking Fund Notes and Series A Serial Notes without the payment of any premium or penalty.

4. That Equitable, Metropolitan and Irving, and each of them, be perpetually enjoined from accelerating the maturity of any indebtedness of TWA by reason of the termination of the Voting Trust.

5. That the additional defendants pay to Toolco damages in the amount of $77 million.

With Respect to the Sixth Counterclaim

1. That Toolco recover damages in the amount of $72,089.55 together with interest from and including June 13, 1961.

TOGETHER WITH Toolco's costs and disbursements and such other, further and different relief as to the Court shall seem just and proper.

Dated: New York, N. Y.
February 12, 1962.

/s/ CHESTER C. DAVIS

Chester C. Davis
Attorney for Defendant
Hughes Tool Company
120 Broadway
New York 5, N. Y.

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

RAYMOND M. HOLLIDAY, being duly sworn, deposes and says that he resides at Houston, Texas; that is Executive Vice President of Hughes Tool Company, a corporation, defendant herein; and that he has read the foregoing answer and counterclaims and knows the contents thereof and that the same are true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to such matters believes them to be true.

/s/ RAYMOND M. HOLLIDAY

Subscribed and sworn to before me this 12th day of February, 1962.

/s/ DALLAS KELLER
Notary Public in and for
Los Angeles County, California

My commission expires July 23, 1963

Holliday's Answer

[Doc. 83]

[CAPTION] 61 Civ. 2324

Defendant Raymond M. Holliday (hereinafter "Holliday") by his attorney, Chester C. Davis, for his answer to the complaint herein states:

ANSWERING THE FIRST CLAIM FOR RELIEF

1. Denies each and every allegation of paragraphs 7, 9, 10, 22, 23, 24, 26, 36, 37, 38 and 44 through 55 inclusive of the complaint.

2. Admits the allegations contained in paragraphs 2, 6, 25, 29, 30, 32, 33, 34 and 40 of the complaint.

3. Admits that Hughes Tool Company (hereinafter "Toolco") is a corporation organized and existing under the laws of the State of Delaware and that it has assets of several hundred million dollars, and except as so admitted denies each and every allegation of paragraph 3 of the complaint.

4. Admits that Howard R. Hughes (hereinafter "Hughes") has been the sole stockholder of Toolco from a time prior to January, 1939 to the present, that from a time prior to January, 1939 to December, 1960, he was an officer of Toolco, and except as so admitted denies each and every allegation of paragraph 4 of the complaint.

5. Admits that he has been for some years past, and now is, an officer of Toolco, that since 1959 he has been, and now is, a director of Trans World Airlines, Inc. (hereinafter "TWA"), and except as so admitted denies each and every allegation of paragraph 5 of the complaint.

6. Admits that TWA has, since its organization in 1934, operated a domestic air carrier system between certain cities in the United States, that since 1946 TWA has operated an international air transportation system between the United States and certain cities in Europe, Africa and Asia, that during the period from 1958 through 1960, TWA purchased and leased jet-powered aircraft for amounts aggregating substantially in excess of $100 million, which aircraft were manufactured by manufacturers in various states in the United States, that in 1960 operating revenues of TWA were substantially in excess of $300 million and net income after taxes in excess of $6 million, that in 1959, TWA provided the only scheduled air transportation between certain pairs of United States cities, and, except as so admitted, denies that it has knowledge or information sufficient to form a belief as to the allegations of paragraph 8 of the complaint.

7. Admits that commencing in or about the year 1939 and at various times thereafter Toolco acquired common stock of TWA, that as at December 31, 1960, the amount of stock so acquired amounted to approximately 78.2% of such common stock, and except as so admitted denies each and every allegation of paragraph 11 of the complaint.

8. Admits that commencing in 1958 jet-powered aircraft became one of the most important factors in the competitive operations of air carriers, and except as so admitted denies each and every allegation of paragraph 12 of the complaint.

9. Admits that by 1955 aircraft manufacturers (including Boeing Airplane Company (hereinafter "Boeing") and Douglas Aircraft Company, Inc. (hereinafter "Douglas")) had prepared to the general knowledge of the air

carrier industry plans and drawings and otherwise had undertaken preparations for the manufacture of jet-powered aircraft intended for use by air carriers, that many air carriers beginning in 1955 devoted substantial efforts to determining what, if any, jet aircraft they should acquire and to obtaining jet aircraft suitable to their needs, that Boeing and Douglas contemplated and did ultimately manufacture jet-powered aircraft for long range and medium range flights, and except as so admitted denies each and every allegation of paragraph 13 of the complaint.

10. Admits that General Dynamics Corporation, Convair Division (hereinafter "General Dynamics"), on its own account as one of the four major domestic aircraft manufacturers, commenced a program prior to 1955 for the design, development and manufacture of a jet-powered transport aircraft designated the Model 18, that such program never proceeded past the preliminary design state and was terminated in 1955 by General Dynamics, and except as so admitted denies each and every allegation of paragraph 14 of the complaint.

11. Admits that prior to May 1, 1956, Toolco considered the manufacture of a jet-powered aircraft with design and range characteristics suitable for use on both domestic and transatlantic routes, that Toolco contemplated that if it did manufacture this aircraft it would furnish the same to TWA and other air carriers, that it abandoned consideration of manufacture of such an aircraft prior to mid-1956, and except as so admitted denies each and every allegation of paragraph 15 of the complaint.

12. Denies that he has knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 16 of the complaint.

Holliday's Answer

13. Admits that in January 1956 Toolco entered into an agreement with Boeing for the purchase of eight Model 707-131 jet-powered aircraft with an option to purchase seven additional such aircraft, that in 1956 Toolco exercised its option to purchase such additional aircraft and also placed an order for eighteen long-range Boeing jet transports, and that in June of 1956 Toolco committed for the purchase of thirty Convair 880 aircraft from General Dynamics, and except as so admitted denies each and every allegation of paragraph 17 of the complaint.

14. Admits that purchase orders placed by Toolco with General Dynamics and Boeing gave Toolco the right to assign to TWA the right to acquire the jet-powered aircraft ordered by Toolco, and that Toolco released six of the long-range Boeing jet transports on order in a transaction with Boeing and Pan American World Airways, Inc. which was recommended and approved by the management of TWA, and except as so admitted denies each and every allegation of paragraph 18 of the complaint.

15. Admits that during the period 1956 to 1960 changes were made in the design and configuration of the Model 880 Convair aircraft ordered by Toolco and except as so admitted denies each and every allegation of paragraph 19 of the complaint.

16. Admits that in the period 1959 and 1960 Toolco leased to TWA certain jet-powered aircraft on a day-to-day basis, that such aircraft were the only jet-powered aircraft flown on TWA's scheduled routes during said years, and except as so admitted denies each and every allegation of paragraph 20 of the complaint.

17. Admits that on or about May 17, 1960, Northeast Airlines, Inc. (hereinafter "Northeast") submitted to TWA

a proposed agreement for the merger of Northeast with and into TWA, that Northeast is a substantial air carrier operating under certificates of public convenience and necessity and serving the east coast of the United States and Canada, that upon information and belief in 1959 Northeast's revenue miles totaled 519,000,000 and its total assets exceeded $35 million, and except as so admitted denies each and every allegation of paragraph 21 of the complaint.

18. Denies that he has knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 27 of the complaint.

19. Admits that subsequent to 1955 Toolco discussed with various persons various proposals for the financing of jet-powered aircraft and except as so admitted denies each and every allegation of paragraph 28 of the complaint.

20. Admits that as part of the arrangements with certain banks and insurance companies, Toolco, TWA and three Voting Trustees (Ernest R. Breech, Irving S. Olds and Holliday) executed an agreement dated as of December 15, 1960, which provided that the TWA stock owned and to be owned by Toolco would be placed in a voting trust (hereinafter "the Voting Trust"), and except as so admitted denies each and every allegation of paragraph 31 of the complaint.

21. Admits that in March 1961, after consideration of TWA's requirements for additional jet-powered aircraft, some officers of TWA recommended to the Board of Directors of TWA that TWA's needs for jet-powered aircraft would best be served by the acquisition of 20 aircraft, Boeing Model 707 131-B, and 6 aircraft, Boeing Model 707 331-B. The Board of Directors authorized the purchase of such aircraft. On April 30, 1961, TWA and Boeing agreed

on the purchase of these aircraft, with related spare parts and equipment, for delivery in 1962 at an ultimate cost estimated at approximately $187,500,000, and that TWA arranged for the borrowing of $147 million in 1961 from certain insurance companies and banks and except as so admitted denies the allegations of paragraph 35 of the complaint.

22. Admits that on or about May 31, 1961, Toolco sent a telegram to Boeing that set forth certain positions of Toolco and except as so admitted denies each and every allegation of paragraph 39 of the complaint.

23. Admits that TWA requested the Securities and Exchange Commission to accelerate the effective date of its Registration Statement to May 18, 1961, and that Toolco opposed such acceleration by reason of certain deficiencies in said Registration Statement, and except as so admitted denies each and every allegation of paragraph 41 of the complaint.

24. Admits that pursuant to the direction of the Securities and Exchange Commission Toolco's counsel set forth in a letter to the Securities and Exchange Commission and TWA a statement as to the respects in which TWA's Registration Statement might be deficient, that in said letter it was stated to be the position of Toolco that it was compelled to enter into the Voting Trust under conditions which would warrant a termination of the Voting Trust otherwise than in accordance with the terms of the arrangements under which it was created, that it was further stated in said letter that Toolco had requested its counsel to investigate the possibility of enjoining the Boeing purchase transaction or of taking action on behalf of TWA against the persons responsible for any commitments in-

curred or damages suffered by TWA in connection with such program, and except as so admitted denies each and every allegation of paragraph 42 of the complaint.

25. Admits that after TWA's Registration Statement had been twice amended subsequent to the sending of the aforesaid letter, the Securities and Exchange Commission accelerated the effective date of the Registration Statement as so amended so as to make the Registration Statement effective on May 24, 1961, and except as so admitted denies each and every allegation of paragraph 43 of the complaint.

ANSWERING THE SECOND CLAIM FOR RELIEF

26. Denies each and every allegation of paragraphs 56 through 64, inclusive, of the complaint except in so far as such paragraphs reallege prior paragraphs of the complaint. As to such realleged paragraphs Holliday repeats to the same extent as if herein fully set forth each and every denial or admission which he has made with respect to the paragraphs so realleged.

ANSWERING THE THIRD CLAIM FOR RELIEF

27. Denies each and every allegation of paragraphs 67 through 70, inclusive, of the complaint except in so far as such paragraphs reallege prior paragraphs of the complaint. As to such realleged paragraphs Holliday repeats to the same extent as if herein fully set forth each and every denial or admission which he has made with respect to the paragraphs so realleged.

AS A FIRST AND COMPLETE DEFENSE TO THE COMPLAINT:

28. The complaint, and each of the claims for relief alleged therein, fails to state a claim upon which relief can be granted.

Holliday's Answer

AS A SECOND AND COMPLETE DEFENSE TO THE COMPLAINT:

29. The facts alleged in the complaint do not constitute violations by Toolco, Holliday or Hughes, of Section 1 of the Sherman Act (15 U.S.C. § 1 (1958)), of Section 2 of the Sherman Act (15 U.S.C. § 2 (1958)), of Section 3 of the Clayton Act (15 U.S.C. § 11 (1958)), or of Section 7 of the Clayton Act (38 Stat. 731, 15 U.S.C. § 18 (1946 Ed.)), and since plaintiff TWA and defendant Toolco are both Delaware corporations, this Court lacks jurisdiction over the subject matter of the motion [*sic*] and over each of the claims for relief alleged in the complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

30. Since 1944 the control of TWA by Toolco, the acquisition by Toolco of more than 78% of the common stock of TWA, and all commercial transactions between Toolco and TWA including all transactions relating to financing or the acquisition of equipment were subject to and approved by orders of the Civil Aeronautics Board (hereinafter "Board") under Section 408 of the Federal Aviation Act of 1958 (49 U.S.C. § 1378) or the identical provisions of Section 408 of the Civil Aeronautics Act of 1938. Accordingly, pursuant to Section 414 of the Federal Aviation Act of 1958 (49 U.S.C. § 1384) Toolco is exempt and relieved from the operation of the antitrust laws and of all other restraints or prohibitions made by or imposed under authority of law in so far as may have been necessary to enable it to do anything authorized, approved or required by said orders of the Board.

31. The only act alleged in the complaint with respect to the period prior to 1961 which was not specifically approved by the Board was a proposal that Northeast be merged with and into TWA. Such a merger proposal was,

however, within the contemplation of the Board in approving control of TWA by Toolco. Moreover, said proposal was specifically conditioned upon the approval of the Board under the applicable provisions of the Federal Aviation Act of 1958, including Section 408 thereof, and upon approval by a majority of the stockholders of TWA other than Toolco voting at a meeting called to approve such a merger.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

32. Holliday adopts, repeats and realleges the allegations of paragraphs 42-48, 50-52, 69-70, 78-85, 87-90, 92-94 of Toolco's answer and counterclaims as though fully set out herein.

33. Neither Toolco, Holliday, nor Hughes ever had any obligation, contractual or otherwise, to acquiesce in, or consent to, the terms and conditions insisted upon by the lending institutions in connection with the 1960 financing as hereinabove described.

34. Toolco, Holliday and Hughes were justified in resisting the demands of the lending institutions that the terms and conditions demanded by said lending institutions as a prerequisite to supplying financing be met and in attempting to obtain financing on more reasonable terms. The damage sustained by TWA as a result of delay in obtaining financing was caused solely and exclusively by the insistence of the lending institutions on the terms and conditions hereinabove described, without any improper conduct on the part of Toolco, Holliday or Hughes contributing thereto.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

35. Holliday adopts, repeats and realleges, to the same extent as though fully set forth herein, the allegations contained in paragraphs 42-48, 50-53, 55, 62, 69-70, 73-76, 78-98 of Toolco's answer and counterclaims.

36. The damages, if any, alleged in the complaint to have been sustained by TWA resulted from the unlawful acts of the additional defendants and were proximately caused by them and did not result from any improper conduct on the part of defendants Holliday, Toolco or Hughes.

37. TWA's inability to obtain financing prior to 1960 and the delay in its jet equipment program occasioned thereby, was caused by and was a result of the unlawful acts of the additional defendants in violation of Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. Such unlawful acts include the following:

(a) A combination and conspiracy to restrain interstate commerce by preventing TWA from acquiring (i) senior long-term financing from others than Equitable and Metropolitan except with the consent and acquiescence of Equitable and Metropolitan and (ii) senior short-term financing from others than Irving and such banking institutions as it permitted to participate in such financing.

(b) A combination and conspiracy to attempt to monopolize and to monopolize a substantial segment of the interstate trade and commerce of the United States by attempting to monopolize and monopolizing the supplying of senior long-term financing to the major airlines of the United States.

(c) An agreement in restraint of interstate trade and commerce of the United States, to refuse to supply financing to TWA or Toolco so long as TWA was, is or shall be controlled by Toolco.

(d) A combination and conspiracy to restrain interstate commerce by preventing TWA from obtaining long-term or short-term senior financing except at interest rates fixed in advance by agreement among lending institutions.

(e) An agreement in restraint of interstate trade and commerce of the United States between and among lending institutions, including Equitable and Metropolitan and others, to the effect that (i) none of such lenders would supply financing to any major airline without the consent of the traditional senior lender to that airline, and (ii) in the event that the traditional senior lender to an airline refused to supply financing except upon particular terms, none of the other of such lenders would sully [*sic*] financing to that airline upon any terms.

(f) The acquisition by Equitable, Metropolitan and other lending institutions, through voting trustees, of legal title to more than 78.2% of the capital stock of TWA.

(g) The refusal of Irving and the refusal of other lending institutions, whether acting alone or in concert, to extend credit to Toolco or Hughes except upon condition that Hughes as sole stockholder of Toolco, and Toolco as controlling stockholder of TWA, agree to grant to such lending institutions an exclusive market for senior financing through the placing of Toolco's TWA stock in a lender-controlled voting trust.

38. Upon information and belief, at some time in or about March of 1960, the additional defendants entered

into a combination and conspiracy with the intent and purpose that:

(a) Equitable and Irving would use their respective positions as traditional senior lender and lead bank to TWA and the conspirators would use all economic and other power at their disposal to obtain and maintain control of TWA for their mutual advantage, including the use of TWA as a market for the supplying of senior financing upon terms advantageous to the lenders.

(b) The conspirators would permit to participate in supplying senior financing to TWA only those whom they selected and would use their concerted efforts to prevent other lending institutions from participating in any TWA senior financing except with the consent of Equitable as to long-term senior financing and of Irving as to short-term senior financing and then only on terms satisfactory to Equitable and Irving.

(c) The conspirators would agree among themselves as to the interest rate to be paid by TWA for senior short-term and long-term indebtedness and would refuse to advance any financing to TWA except after its acceptance of such predetermined interest rates.

As a result of said conspiracy, and without any fault on the part of Toolco, Holliday or Hughes, the financing of TWA's jet equipment program was delayed and the acquisition of jet equipment by TWA was impeded.

39. In furtherance of and pursuant to the conspiracy hereinabove alleged, the additional defendants:

(a) Caused TWA to enter into a contract of employment with Tillinghast, more fully described in paragraph 53 of Toolco's answer and counterclaims.

(b) Caused TWA to enter into agreements in 1961 for the borrowing of additional funds amounting to $147,000,000 for the purpose of maintaining and perpetuating their control over TWA under circumstances which amount to self-dealing and breach of fiduciary obligations as more fully described in paragraph 53 of Toolco's answer and counterclaims.

(c) Caused TWA to file its complaint in this action in which TWA seeks, among other things, to divest Toolco of its interest in TWA.

40. The damage, if any, sustained by TWA as a result of the unfavorable terms and conditions of the 1960 financing, including the higher interest rate it was required to pay, resulted solely and exclusively from the unlawful acts and conspiracy hereinabove described and were not caused by any improper conduct on the part of Toolco, Holliday or Hughes.

41. TWA's impaired ability to obtain financing, if any, results solely and exclusively from the unlawful acts and conspiracy hereinabove described and by reason of the fact that the lending institutions are using TWA as a captive market for financing and engaging in self-dealing in arranging TWA's financing and was not caused by any improper conduct on the part of Toolco, Holliday or Hughes.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

42. If the allegations of the complaint relating to the acts alleged to have been committed by Toolco, Holliday and Hughes and the statements alleged to have been made by them subsequent to 1960 are true, such acts and state-

ments were not wilful and malicious but were justifiable, and true and made for the purpose of protecting Toolco's and TWA's legitimate interests. None of such acts or statements caused any injury or damage to TWA but any injury or damage sustained by TWA was proximately caused by the unlawful acts of the additional defendants.

43. Holliday adopts, repeats and realleges the facts contained in paragraphs 42-48, 50-55, 62-70 and 73-96 of Toolco's answer and counterclaims as though fully set forth herein.

44. The statements alleged in paragraph 46 of the complaint to have been made by Toolco, Holliday and Hughes that the Voting Trust was invalid, if made, were not made wilfully and maliciously but were justifiable and true by reason of the following facts and circumstances:

(a) Additional defendants Metropolitan and Equitable are persons engaged in phases of aeronautics within the meaning of Section 408 of the Federal Aviation Act by reason of activities which, upon information and belief, have constituted them, together with The Prudential Insurance Company of America (hereinafter "Prudential"), the largest suppliers of airline financing in the country upon whom the major airlines of the United States are depended for long-term senior financing. Said insurance companies have dominated, and now dominate, the supplying of such financing to the major air carriers of the United States. In December, 1960 by the creation of the Voting Trust and the agreements made in connection therewith, Metropolitan and Equitable acquired control of TWA within the meaning of Section 408 of the Federal Aviation Act of 1958. Neither Equitable nor Metropolitan sought or obtained the approval of the Board pursuant to said Section 408 to such acquisition of control of an air carrier and Metropolitan and

Equitable have continued to maintain and perpetuate their control of TWA without Board approval. In August 1961 Metropolitan and Equitable, together with Irving and its associated banks, agreed with TWA to supply to TWA an additional $147 million of senior financing upon terms and conditions calculated to perpetuate the Voting Trust and the control of Equitable and Metropolitan over the business and affairs of TWA. No approval of the Board was sought or obtained to this further consolidation of control by Metropolitan and Equitable. By reason of the facts herein alleged, the acquisition and maintenance of control of TWA by Metropolitan and Equitable through the Voting Trust and the consolidation of that control by giving to Metropolitan and Equitable the power to accelerate indebtedness of TWA upon termination of the Voting Trust was and is unlawful under Section 408 of the Federal Aviation Act of 1958 and the creation and continued existence of the Voting Trust was and is contrary to the public policy of the United States.

(b) Said Voting Trust is further invalid because entered into as a result of acts, combinations and conspiracies in violation of the antitrust laws of the United States as hereinabove alleged.

(c) Said Voting Trust is further invalid because accomplished and maintained as a result of an unlawful conspiracy to divest Toolco of control of TWA for the benefit of the additional defendants and as a result of the breach of fiduciary obligations by various of the additional defendants.

45. The demand that TWA's 1961 registration statement be revised was not wrongful and was not made wilfully and maliciously for the purposes alleged in paragraphs 45 and 67 of the complaint but was justifiable [*sic*] made for the purpose of correcting errors and omissions in said registration statement and in order to protect Toolco and TWA.

Holiday's Answer

46. The request by Toolco for a deferral of the public offering of TWA's debentures was not made for the purpose of wilfully and maliciously injuring the business of TWA but was made for the purpose of permitting Toolco to make a simultaneous secondary offering of both the debentures which it was obligated to purchase and those which it had the option to purchase. Such a secondary offering would have permitted both Toolco and TWA to realize a substantial amount of cash which could have permitted the refunding of the 1960 financing and the termination of the Voting Trust. Upon information and belief the conspirators' refusal to grant Toolco's request for a one week delay was not in the best interest of TWA but was to the detriment of TWA and in order to prevent the realization of sufficient cash resources which might be used to refund the 1960 financing and thus to terminate the Voting Trust.

47. The suggestion by Toolco, Holliday or Hughes that TWA accept a proposed merger with Northeast was not made for the purposes alleged in paragraphs 47 and 67 of the complaint but was made because such a merger would be advantageous to TWA. Such a merger was recommended to TWA's Board of Directors by Toolco and TWA's operating personnel advised that such a merger was in the best interests of TWA. Toolco advised that it was willing to discuss with TWA the possibility of Toolco's assuming any financing risk that such merger might otherwise impose upon TWA.

48. The statements alleged in paragraph 46 of the complaint to have been made by Toolco, Holliday or Hughes relating to the purchase of Boeing aircraft and the 1961

financing thereof, if made, were not made wilfully or maliciously but were justifiable and true.

WHEREFORE, Holliday demands judgment dismissing the complaint, together with costs and disbursements.

Dated: New York, N. Y., March 26, 1962.

/s/ CHESTER C. DAVIS
Attorney for Defendant
Raymond M. Holliday
120 Broadway
New York 5, N. Y.
DIgby 9-0660

Pretrial Order, July 12, 1962

[Doc. 101]

[CAPTION] 61 Civ. 2324

PRETRIAL ORDER

A pretrial conference was held today on the respective appeals by the plaintiff and defendant Hughes Tool Company from rulings of the Special Master.

1. Defendant Hughes Tool Company appeals from a ruling of the Special Master overruling Toolco's objections to interrogatories propounded to it by plaintiff. After hearing counsel and reading the papers submitted in support of and in opposition to the appeal, the ruling of the Special Master is modified as indicated below and as modified is sustained.

Interrogatory No. 1 is modified by striking the words "or attorney". It is further modified by limiting any knowledge, information or belief of a director to such knowledge, information or belief which said director has acquired as a director of the defendant Toolco.

As to Interrogatory No. 4, the defendant need not make any answer thereto insofar as any of the named persons in this interrogatory are former employees or consultants. However, the defendant in its answer to this Interrogatory No. 4 shall indicate which of said persons are former employees or consultants. Insofar as consultants are concerned, the term shall embrace those persons who are in normal usage considered as independent contractors.

Interrogatory No. 7 refers to employees, agents and/or representatives of Toolco. The information requested by this interrogatory shall be furnished as to such persons only if those persons performed services of a personal nature or otherwise for Hughes individually and if such

services were compensated for by the defendant and not by Hughes personally.

The dates referred to in the interrogatories shall be computed from the date of this order.

2. Plaintiff has appealed from a ruling of the Special Master denying the motion of the plaintiff for an order determining that rule 4 of the Civil Rules of the United States District Court of the Southern District of New York is applicable in the instant case. After hearing argument of counsel and reading the papers in support of and in opposition to this motion, the appeal is disposed of as follows:

Irrespective of rule 4, the court has the power to vary any order heretofore entered fixing priority of deposition-discovery proceedings. In view of the number of days which the defendant Toolco has devoted to the deposition of Tillinghast, the president of the plaintiff, defendant is directed to complete that deposition on or before July 25th, 1962. It shall commence taking the depositions of the other noticed individuals immediately thereafter. Plaintiff may renew its motion before the Special Master on September 20th, 1962 if at that time it is advised that the depositions scheduled upon the completion of the Tillinghast deposition are not moving as expeditiously as possible, and that any further delay in the taking of the depositions of the defendant would be prejudicial to the plaintiff.

So Ordered.

Dated: New York, N. Y.
July 12, 1962

Charles M. Metzner /s
U.S.D.J.

Pretrial Order, September 21, 1962

[Doc. 122]

[CAPTION] 61 Civ. 2324

PRETRIAL ORDER

A pretrial conference was held on September 19th, 1962 upon a notice from the attorneys for the plaintiff that it was appealing from so much of the Special Master's ruling of September 15th, 1962 as denied the plaintiff the right to proceed with the deposition of Howard R. Hughes on September 24th, 1962. After hearing counsel for the plaintiff, the defendant Hughes Tool Company and the additional defendants, and after reading the transcript of the hearing before the Special Master on September 15th, 1962, the appeal is disposed of as follows.

Sometime prior to July 12th, 1962 the Special Master evidenced his serious concern about whether or not Howard R. Hughes would be available as a witness in this proceeding if and when his deposition was properly reached under the orders of the court. This concern of the Special Master was not aroused in connection with any application by the plaintiff to interfere with the priority of deposition previously determined by order of the court dated February 7th, 1962 as amended by the order of March 5th, 1962. In order to resolve that problem prior to the time of requesting Howard R. Hughes to appear as a witness, the Special Master afforded the Tool Company alternative procedures. Either it was to answer certain interrogatories as to the whereabouts of Howard R. Hughes, in order to facilitate the service of a witness subpoena, or counsel for the Tool Company was to provide satisfactory proof that he was authorized to accept service of the subpoena on behalf of Howard R. Hughes.

Interrogatories were framed by the plaintiff and served upon the Tool Company which thereafter were amended by order of the court dated July 12th, 1962. Subsequently, by order dated July 26th, 1962, the time for the Tool Company to answer the interrogatories was fixed for August 27th, 1962. Counsel for the Tool Company then served and filed with the court a document which he asserted gave him the authority to accept service of the witness subpoena on behalf of Howard R. Hughes. At this time the court reserves for future determination any question raised by the plaintiff regarding the authenticity of that document.

Pursuant to the document filed with the court, Chester C. Davis, counsel for the Tool Company, accepted service of a witness subpoena on behalf of Howard R. Hughes on September 6th, 1962. That subpoena was issued out of the United States District Court for the Southern District of California upon the notice by the attorneys for the plaintiff served upon Chester C. Davis, which stated that the deposition of Howard R. Hughes as a witness would be taken at the United States District Courthouse for the Southern District of California in Los Angeles on September 24th, 1962. The return of the marshal, indicating service upon Chester C. Davis in Los Angeles, was accompanied by an affidavit by Mr. Davis stating that he had been authorized in writing by Howard R. Hughes to accept such service.

Pursuant to the order of the court dated July 12th, 1962 and the suggestion made by the court at a hearing held on September 6th, 1962, the plaintiff moved before the Special Master on September 15th, 1962 for permission to suspend the taking of the depositions by the Tool Company in order to permit plaintiff to commence taking the deposition of Howard R. Hughes on September 24th, 1962, and that the suspension of the taking of depositions by the Tool Com-

pany be continued until the deposition of Howard R. Hughes was completed. The Special Master denied the application of the plaintiff.

However, in connection with this denial the Special Master directed Chester C. Davis to write to Howard R. Hughes and inform him that the Special Master considered that the subpoena is binding upon Mr. Hughes and that he is subject to appear pursuant to that subpoena on September 24th, 1962 or at any other date fixed by the court. The Special Master stated for reasons set forth in the record that unless Howard R. Hughes communicated with him by today, Friday, September 21st, 1962 he would consider that Mr. Hughes has acquiesced in this interpretation and that if Mr. Hughes subsequently either attacked the validity of the subpoena or failed to appear pursuant to that subpoena on September 24th, 1962, or at any future time that the court might direct for the taking of the deposition of Mr. Hughes pursuant to that subpoena, he, the Special Master, would consider the imposition of sanctions upon the Tool Company, and that he would entertain a motion to strike the answer of the Tool Company and enter judgment against it.

Without passing upon the power of the Special Master to grant the entry of such judgment, the court adopts the interpretation and conditions expressed by the Special Master. Any determination by the Special Master on an application for a default judgment would, of course, be reviewable upon appeal to the court.

On the hearing of this appeal the court inquired of Chester C. Davis as to whether he had followed the directions of the Special Master. Mr. Davis advised the court that he had written to Howard R. Hughes on Monday, September 17, 1962, and enclosed the pages of the transcript of the hearing before the Special Master on September

15th, 1962 which contained the views of the Special Master. Howard R. Hughes has neither communicated with the Special Master nor the court as of 5:30 p.m. today, which is the end of the business day. Therefore, I find that Mr. Hughes has acquiesced in the interpretation and conditions expressed by the Special Master.

The Special Master has presided over the deposition proceedings practically since their inception. The propriety of plaintiff's application is peculiarly within his competence. He is aware of the court's views contained in the last paragraph of the order of July 12th, 1962. Plaintiff has not made an adequate showing at this time that the ruling of the Special Master within this framework is in error. I approve and affirm the ruling of the Special Master denying the application of the plaintiff to proceed with the deposition of Howard R. Hughes on September 24th, 1962 to the extent that the return date of September 24th, 1962 contained in the subpoena served upon Howard R. Hughes is adjourned by order of this court to October 29th, 1962 at the same time and place. The Tool Company may apply to the Special Master on October 22nd, 1962 for a further adjournment of the date now fixed for the deposition of Howard R. Hughes.

Chester C. Davis is directed to notify Howard R. Hughes of this determination before 9 p.m. tonight, Eastern Daylight Time, both by telephonic communication and by mailing a copy of this order air mail special delivery to Howard R. Hughes.

So Ordered.

Dated: New York, N. Y.
September 21, 1962

/s/ Charles M. Metzner
U. S. D. J

Pretrial Order, January 10, 1963

[Doc. 144]

[CAPTION] 61 Civ. 2324

PRETRIAL ORDER

A pretrial conference was held on January 9th, 1963 to consider various matters brought to the court's attention by notices of appeals from rulings of the Special Master. These matters are disposed of as follows:

1. The appeal by TWA, pursuant to a telephonic request, to review an order of the Special Master adjourning the deposition of Howard R. Hughes to February 11th, 1963 is withdrawn by counsel for TWA pursuant to an application filed January 8th, 1963.

2. The appeal by Hughes Tool Company dated January 3rd, 1963 seeking to review an order of the Special Master dated December 28th, 1962 denying Toolco's application to examine Ben-Fleming Sessel and the Irving Trust Company by Sessel and Arthur L. Wadsworth and Dillon, Read & Co. by Wadsworth is denied and the ruling of the Special Master is affirmed. The court adopts the statement of the Special Master appearing on page 11 of the transcript of proceedings before the Special Master dated December 28th, 1962, which states:

> "I do not think it [the depositions of Sessel and Wadsworth] would advance the proper administration of this case since it would in my judgment inevitably branch out into the issues of the counterclaims, or result in such continuous controversy as to the exact limits of such issues that it might interfere with the taking of Mr. Hughes' deposition at the time and place fixed."

Pretrial Order, January 10, 1963

The court has previously indicated that priority of deposition is not sacrosanct, and even without the adoption as of July 1st, 1962 of rule 4 of the Civil Rules of this district the court has the power to alternate the taking of depositions by the parties.

During a ten-month period the defendant has conducted over 80 days of depositions of the plaintiff, which have consumed over 10,000 pages of testimony. It will have substantially completed the deposition of the plaintiff this month with the testimony of Cocke and Leslie. It has then scheduled the depositions of other witnesses, including Sessel and Wadsworth, which can consume a very long period of time. The deposition of Howard R. Hughes by the plaintiff and the additional defendants should now go forward. This deposition was originally scheduled for September 24th, 1962 and then adjourned to October 29th, 1962. It has now been adjourned to February 11th, 1963 and this date will be adhered to in the absence of extraordinary circumstances. The complicated nature of this action necessitates long and involved deposition-discovery proceedings and it is only fair that plaintiff be allowed to proceed without waiting for the defendant to complete its deposition proceedings. This is especially true where the plaintiff claims that 75% of the proof necessary to sustain its claim is obtainable from Hughes personally.

Furthermore, the completion of such deposition will advance materially the date when the court could meaningfully entertain the various motions which Mr. Davis has indicated he would like to press for a dismissal of the complaint and for summary judgment. It will also facilitate an intelligent ruling upon Toolco's application pursuant to rule 16 of the Federal Rules of Civil Procedure and the sufficiency of TWA's compliance with interrogatories served

on October 11th, 1962 and the further interrogatories served on November 13th, 1962.

The court concurs in the ruling of the Special Master contained in his order of December 28th, 1962 clarifying his order of October 25th, 1962, directing that Howard R. Hughes appear on February 11th, 1963 for deposition in Los Angeles. The return date of the subpoena served on September 6th, 1962 as adjourned by order of this court dated September 21st, 1962 and the notice to take deposition are adjourned to February 11th, 1963 at the same time and place. The provisions of the order of this court dated September 21st, 1962 are reaffirmed and reiterated, and Mr. Davis is directed to notify Howard R. Hughes of the directions of the court contained in this order by telephonic communication and by written communication to be made and sent by 5 p.m. on January 11th, 1963.

3. The motion by Hughes Tool Company, pursuant to rule 16 of the Federal Rules of Civil Procedure, to authorize the Special Master to conduct pretrial conferences, with recommendations to the court for the form and terms of a pretrial order defining and limiting the legal and factual issues in this case, is denied without prejudice to a renewal 30 days after the completion of the deposition of Howard R. Hughes.

4. The appeal by Hughes Tool Company dated September 19th, 1962 from an order of the Special Master made on September 15th, 1962 which requires Hughes Tool Company to produce for inspection and copying by opposing counsel, prior to a further definition of the issues, the documents with respect to which Hughes Tool Company claims attorney-client privilege is denied and the order of the Special Master is affirmed.

Pretrial Order, January 10, 1963

A reading of the briefs and the oral argument would indicate that the application under advisement is in fact a reargument of the order of this court dated July 24th, 1962. At that time the court indicated that it had reviewed the opinion of the Special Master which appeared in the transcript at pages 4361-4391 and the letters of the Special Master dated May 2nd, 1962 and May 3rd, 1962. The court concurred with the opinion of the Special Master and directed that if there were any specific documents concerning which Hughes Tool Company desired specific rulings they should be submitted to the Special Master.

At pages 122 et seq. of the transcript of September 15th, counsel for the Hughes Tool Company stated that he had made available to the Special Master the documents concerning which the defendant was asserting the attorney-client privilege. Counsel went on to state that the documents were made available for a ruling by the Special Master not as to whether they would be normally covered by the attorney-client privilege, but "whether or not the attorney-client privilege had been waived." He then went on to say at page 124 that:

> "What is developing is simply the question of the procedure to be followed in obtaining rulings of the Special Master with respect to individual documents, applying the principles of law announced by the Special Master and affirmed by Judge Metzner, and the only area which I am aware constitutes a difference of opinion, perhaps, is whether those documents are to be produced at this time on the ground that prior to this time there had been a waiver of the privilege."

Documents heretofore submitted to the Special Master shall be made available to all parties by noon on January 14th, 1963. If there are any additional documents to which the defendant Hughes Tool Company asserts a non-waived

attorney-client privilege, such documents shall be submitted for a ruling to the Special Master by noon of January 14th, 1963 and a list thereof furnished at the same time to counsel for all parties.

5. The appeal by TWA, pursuant to a telephonic request, to review an order of the Special Master denying its motion to quash or strike interrogatories served by Toolco on October 11th, 1962 is denied except that the order of the Special Master is modified to the extent that TWA shall answer the interrogatories within 60 days after the completion by TWA of its deposition of Howard R. Hughes. Objection to specific interrogatories shall be made to the Special Master within 55 days after the completion of the deposition of Howard R. Hughes.

6. The appeal by TWA dated December 20th, 1962 from an order of the Special Master appearing in the transcript of the proceedings before the Special Master on December 3rd, 1962 is denied except that the order of the Special Master is modified to the extent that TWA shall answer the interrogatories within 60 days after the completion by TWA of its deposition of Howard R. Hughes. Objection to specific interrogatories shall be made to the Special Master within 55 days after the completion of the deposition of Howard R. Hughes.

So Ordered.

Dated: New York, N. Y.
January 10, 1963

/s/ Charles M. Metzner
U. S. D. J.

A-127

Pretrial Order, January 19, 1963

[Doc. 146]

[CAPTION] 61 Civ. 2324

PRETRIAL ORDER

Defendant Hughes Tool Company (referred to as Toolco) has moved for an order pursuant to rule 30(b) of the Federal Rules of Civil Procedure that the deposition of Howard R. Hughes be taken on written interrogatories or, in the alternative, that if such relief pursuant to rule 30(b) is denied that the motions of Toolco to dismiss the complaint or for summary judgment pursuant to rules 12(b) and 56(b) be brought on for hearing and determination. The motion further requests that the order of this court dated January 10th, 1963 be stayed until the determination of the motions to dismiss or for summary judgment.

This case was assigned to me for all purposes by the Chief Judge on August 31, 1961 pursuant to rule 2 of the General Rules of this court. After the disposition of several preliminary matters concerning production of documents and scheduling, Toolco commenced taking depositions of the plaintiff in February 1962. The parties requested that a Special Master be appointed to supervise the deposition proceedings and the court designated J. Lee Rankin for this purpose. Since that time over 80 sessions have been held and over 10,000 pages of testimony have been taken.

Sometime prior to July 12th 1962 the Special Master indicated his serious concern about whether or not Howard R. Hughes would be available as a witness in this proceeding if and when his deposition was reached. Without detailing the subsequent events, all of which are set forth in

the order of this court dated September 21, 1962, the problem seemed to have been resolved when counsel for Toolco filed with the court a document purportedly signed by Howard R. Hughes authorizing said counsel to accept service of a witness subpoena on behalf of Howard R. Hughes. Plaintiff attacked the authenticity of this authorization. Counsel for Toolco flew to Los Angeles and accepted service of a witness subpoena from a Deputy United States Marshal for the Southern District of California at 7 a.m. (10 a.m. New York time) on September 6th, 1962, the morning of the hearing before this court on paintiff's claim of forgery. The disposition of that matter has been held in abeyance. The subpoena provided for the appearance of Howard R. Hughes at the United States District Courthouse in Los Angeles on September 24th, 1962.

Subsequently, plaintiff moved before the Special Master to suspend the taking of depositions by Toolco in order to permit plaintiff to commence taking the deposition of Hughes pursuant to the subpoena. The Special Master denied this application and this court affirmed that ruling by its decision and order of September 21st to the extent that the deposition was adjourned to October 29th, 1962. Leave was given Toolco to make application to the Special Master for a further adjournment if in its opinion this was necessary. Such application was made on October 22nd, 1962 and the Special Master adjourned the return date of the subpoena to February 11th, 1963. The court has affirmed that ruling. During the months of September, October, November and December, Toolco has proceeded with its deposition of the plaintiff.

On December 28th, 1962 defendant Toolco made application to the Special Master to take the deposition of two additional witnesses which if granted would have necessitated a further adjournment of the Hughes deposition. The Spe-

cial Master denied this application and the ruling of the Special Master was affirmed by the court in its decision and order of January 10th, 1963.

Counsel for Toolco has repeatedly indicated since the assignment of this case to me that motions theretofore made to dismiss the complaint and for summary judgment would be noticed for argument, but agreed that they were premature.[1]

The present motion appears to be another attempt to put off the deposition of Hughes. As I stated in my order of January 10th,

> "The complicated nature of this action necessitates long and involved deposition-discovery proceedings and it is only fair that plaintiff be allowed to proceed without waiting for the defendant to complete its deposition proceedings. This is especially true where the plaintiff claims that 75% of the proof necessary to sustain its claim is obtainable from Hughes personally.
>
> "Furthermore, the completion of such deposition will advance materially the date when the court could meaningfully entertain the various motions which Mr. Davis has indicated he would like to press, for a dismissal of the complaint and for summary judgment. It will also facilitate an intelligent ruling upon Toolco's application pursuant to rule 16 of the Federal Rules of Civil Procedure and the sufficiency of TWA's compliance with interrogatories served on October 11th, 1962 and the further interrogatories served on November 13th, 1962."

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[1] Transcript of pretrial conference September 6, 1961, pp. 25-28, 40-41.
Transcript of pretrial conference October 2, 1961, pp. 10, 23.
Transcript of pretrial conference February 23, 1962, pp. 58-59.
Transcript of pretrial conference September 19, 1962, p. 39.
Transcript of pretrial conference January 9, 1963, p. 17.

Because of the issues involved in this litigation and the nature of the proof sought from Hughes, the use of written interrogatories would be a wholly unsatisfactory procedure. Contemplated answers to specific interrogatories may not be forthcoming, which would render meaningless subsequent questions. Answers given might suggest further questions to sufficiently probe for the facts, but such questions would not appear in the interrogatories. None of the grounds asserted or implied are sufficient in this case to justify proceeding initially by written interrogatories. Consequently, the first branch of the motion, seeking relief pursuant to rule 30(b), is denied.

As I have indicated above in the quotation from the January 10th order, it would appear to the court that the case is not in a posture for a meaningful disposition of the motions to dismiss the complaint or for summary judgment. The motion papers filed before the assignment of the case pursuant to rule 2, which I assume are the motions Toolco is now bringing on for hearing, were predicated upon the grounds that the complaint fails to state a claim upon which relief can be granted, that this court lacks jurisdiction of the subject matter of the action, and that there is no genuine issue as to any material fact. More specifically, it is stated that the transactions complained of were subject to and approved by orders of the CAB under section 408 of the Federal Aviation Act of 1958 and therefore pursuant to section 414 of that act there is an exemption from the operations of the antitrust laws, that if there is any question as to the scope or the enforcement of the above orders, they are matters within the exclusive jurisdiction of the CAB, and finally that the activities of Toolco subsequent to 1960 which are alleged to have constituted a

malicious and willful interference with TWA's business were taken on advice of counsel.

The court, of course, cannot prevent defendant Toolco from pressing these motions at this time. However, since counsel for the defendant has been contemplating the motions for more than a year and a half, he obviously does not need the six weeks which he requests for the preparation of his papers. Counsel for plaintiff has indicated that he will cooperate in relieving defendant of a schedule with regard to motions pending in a companion action in Delaware, so as to free counsel for the defendant to devote his efforts entirely to these motions. As I indicated to counsel in an informal conference on January 16th, I will fix the date of February 1st, 1963 at noon for defendant to file all additional papers in support of its motions, and plaintiff shall be given until noon of February 8th, 1963 for answer. If upon reading defendant's papers the court is of the opinion that there is doubt as to its preliminary observations that these motions are premature, it will advise counsel of a short adjournment of the deposition of Hughes. In the meantime, this deposition shall go forward as ordered, on February 11th, 1963.

The order of January 10th will not be stayed pending a determination of the motions to dismiss and for summary judgment. The documents which the court has directed be turned over to the plaintiff shall be furnished as provided in the order of January 10th, 1963 except that the date of January 14th, 1963 as fixed in paragraph 4 of that order is amended to read "January 22nd, 1963".

At the hearing before the Special Master on January 17th, counsel for defendant was reluctant to indicate whether he desired to hold the deposition at some place

other than the United States Courthouse in Los Angeles. As counsel for the plaintiff and the additional defendants have indicated, they are amenable to cooperate in any reasonable request of counsel for the defendant, but it is necessary that advice of a change be given so that necessary arrangements can be made. Consequently, unless counsel for the defendant indicates by noon on January 22nd, 1963 a desire to change the designated place, the deposition shall proceed in the United States Courthouse in Los Angeles.

So Ordered.

Dated: New York, New York
January 19, 1963

/s/ Charles M. Metzner
U. S. D. J.

Opinion and Order of Special Master, January 22, 1963, Appendix C, Annexed to Affidavit of Bruce Bromley, February 15, 1963

[Doc. 179A]

[CAPTION]

[APPEARANCES]

• • •

Defendants Equitable Life Assurance Society of the United States, Metropolitan Life Insurance Company, James F. Oates, Jr. and Harry C. Hagerty moved for an order pursuant to Rule 34 of the Federal Rules of Civil Procedure directing the defendant, Hughes Tool Company, to produce and to permit said additional defendants to inspect and copy each of the documents designated in the schedule annexed to the affidavit of John R. Hupper and attached to said motion, subject to whatever protective relief under the protective order of March 21, 1962 the Special Master might deem proper. In the schedule referred to the documentary evidence requested consisted of various writings in the possession, custody or control of Hughes Tool Company and any concern or person associated at any time with Hughes Tool Company, including its sole stockholder, pertaining to the period from 1939 to date and relating directly or indirectly to:

(a) Dividends or other payments made to Toolco's stockholder or any discussions or decisions made as to whether or not to pay dividends to Toolco's stockholder.

(b) Any accumulation or retention of earnings or profits by Toolco.

(c) Any conferences or communications with any official or agent of the Internal Revenue Service or any other government official, agent or agency relating to the payment of, or failure to pay, dividends by Toolco or to the retention or accumulation of earnings or profits by Toolco.

(d) Any penalty, assessment or deficiency, or any possibility of such, made by, or discussed with, the Internal Revenue Service or any governmental official, agent or agency, by reason of any accumulation or retention of taxable earnings or profit by Toolco.

(e) Any justification made or considered by Toolco for the retention or accumulation of taxable earnings or profits with respect to Section 531 of the Internal Revenue Code (Section 102 of the 1939 Code).

(f) The desirability of financing Trans World Airlines, Inc. ("TWA") or Northeast Airlines, Inc. ("NEA") equipment needs through debt or equity from the standpoint of Toolco, TWA, NEA or any other person.

(g) The desirability or undesirability of TWA or NEA maintaining any particular debt-equity ratio or any particular capital structure, from the standpoint of Toolco, TWA, NEA or any other person.

(h) The desirability or effect of any TWA or NEA dependency upon Toolco's financial resources or the financial effect of permitting TWA or NEA to be dependent upon Toolco's financial resources, from the standpoint of Toolco, TWA, NEA or any other person.

(i) The depreciation taken or available to be taken by Toolco or TWA or NEA for internal accounting, income tax or any other purpose on any flight equipment acquired or to be acquired.

(j) The Final Accounting and Debenture Purchase Agreement, including Exhibit A thereto, between TWA and Toolco dated July 21, 1960 and the computations reflected therein.

(k) The Final Accounting and Debenture Purchase Agreement, including Exhibit A thereto, between Toolco and TWA dated December 29, 1960 and the computations reflected therein.

(l) The Final Accounting and Debenture Purchase Agreement, including Exhibit A thereto, between Toolco and TWA dated December 30, 1960 and the computations reflected therein.

(m) The letter agreement dated May 9, 1960 between Toolco and TWA entitled "Purchase of Boeing Model 707-131 and 707-331 Jet Aircraft and Convair Model 880 Jet Aircraft".

(n) The determination of the amount of rental payments to be made by TWA to Toolco for Boeing 707-131's and Boeing 707-331's leased by Toolco to TWA in 1959 and 1960.

(o) The method of accounting for all such rental payments internally, for income tax or for any other purpose.

(p) Any and all moneys borrowed by Toolco and the interest rate thereon.

(q) Any and all interest or interest factors charged to TWA by Toolco and the method used for computing such interest or interest factors.

(r) Any capital gains realized by Toolco on the sale of any flight equipment.

(s) Any gain of any sort realized by Toolco on the sale of any flight equipment.

(t) The desirability and financial effect of any method of selling or purchasing or financing or leas-

ing any aircraft by Toolco or TWA or NEA, from the standpoint of Toolco, TWA, NEA, or any other person.

(u) All payments made by Toolco to manufacturers or others in connection with the procurement of aircraft.

(v) All Toolco Federal Income Tax Returns, including all supporting schedules, for the years 1961 and 1962.

(w) All Toolco financial statements for 1961 and its quarterly statements for 1962, including all supporting schedules.

In accordance with the practice in this case, the plaintiff and the additional defendants Irving Trust Company and Ben-Fleming Sessel, Dillon, Read & Co. Inc. and Charles C. Tillinghast, Jr., joined in the motion and requested that if such documents were required to be produced under the motion for such other additional defendants, that they also be required to be produced for them and that they be permitted to inspect and copy each of the documents designated in the schedule annexed to the affidavit of John R. Hupper.

In support of the motion, Mr. Hupper sets forth in his affidavit that the documents requested are directly related to the allegations set forth in Toolco's counterclaims and the fact that such documents probably exist recently came to the attention of the moving defendants through a preliminary study of the Toolco's financial statements and income tax returns previously produced for inspection and copying pursuant to orders of the Court and the Special Master.

The proof further claims that a study of such tax returns and financial statements caused it to appear that Toolco

may have taken advantage of its dominance over the affairs of TWA to profit at TWA's expense and to arrange transactions between itself and TWA so as to achieve tax and other benefits for itself at TWA's expense, and that proof of such facts would controvert the allegations of the counterclaims to the effect that Toolco's participation in the financial arrangements involving TWA were designed to benefit TWA and were in its best interest. Mr. Hupper also asserted that such proof would confirm the justification for the moving defendants' unwillingness to lend many millions of dollars to finance the acquisition of aircraft for use by TWA without assurances that TWA would control such aircraft and that TWA would have a management in which said defendants had confidence.

An example given is the sale by Toolco to TWA on December 30, 1960 of 19 Boeing 707 aircraft, which TWA had been forced to lease from Toolco at rates of $2500 per day and more, and in some instances for more than a year, as a result of Toolco's previous refusal to agree to the consummation of arrangements whereby TWA might purchase such aircraft. It is also asserted that Toolco, through complex financial arrangements completed on December 30, was able to profit directly from the sale of the Boeing aircraft to TWA in an amount in excess of $11,000,000.

Mr. Hupper also states that it appears from Toolco's tax returns that it was able to reap substantial benefits through its ability to take for tax purposes accelerated depreciation on the 19 Boeing 707 aircraft leased by it to TWA, and that because of Toolco's insistence on a leasing program TWA was deprived of the benefits of such depreciation. It is further stated that TWA was finally permitted to purchase the aircraft from Toolco in December 1960, but at that time depreciation was credited to TWA in calculating the pur-

chase price on a straight-line basis, rather than in accordance with the accelerated computation employed by Toolco.

Mr. Hupper also asserts that it appears in connection with the sale of jet planes to TWA that Toolco was able for tax purposes to convert substantial amounts of ordinary income into capital gain, in part by offsetting depreciation charges against Toolco's ordinary income while the Tool Company was leasing the planes to TWA and then reducing Toolco's cost basis by the amount of such depreciation when calculating its capital gain on the sale of the planes and a like procedure was followed in converting interest charges to capital gains. It is asserted that these items of capital gain resulting from such action appeared to involve millions of dollars.

It is also stated in the affidavit that according to the evidence available Toolco has for many years arranged TWA's equipment transactions so as to achieve substantial tax savings for it irrespective of TWA's best interest, and an example is given from the testimony of Mr. Rummel regarding Mr. Hughes' insistence that a contract for a certain Lockheed 1694 aircraft be completed in December 1954 over the objection of Mr. Rummel that specifications for the aircraft had not been sufficiently developed to make a firm contract advisable.

It is also asserted that Toolco's financial statement for 1954 shows a $17,000,000 payment made by it to Lockheed on account of such aircraft, and that since the net income of Toolco, after taxes, for 1954 was in excess of $20,000,000, the payment of the $17,000,000 in that year was for the purpose of obviating Mr. Hughes' Section 102 tax problem and that except for such arrangements, possibly to the detriment of TWA, very substantial penalties might well have been assessed against Toolco under Section 531 of the Internal Revenue Code (Section 102 of the 1939

Code). Mr. Hupper states that although it is impossible from the limited information now available to ascertain the exact amount of such benefits which Toolco obtained from this and similar transactions involving TWA's equipment needs, the total may well exceed $25,000,000 as it now appears.

It is also asserted that the detailed information requested in the schedule is of crucial importance in connection with the forthcoming examination of Mr. Hughes scheduled for February 11, 1963.

Toolco objected to the granting of the motion on two grounds; one that until the court has ruled upon its motion to dismiss the complaint on the ground of lack of jurisdiction and other grounds described in its motion to dismiss, and until the court ruled upon the motion to dismiss the counterclaims made by the plaintiff, which latter motion is now under submission, the motion for production of these documents should be denied.

The motion was argued at length before the Special Master on January 17, 1963 and at that time after extended argument, the Special Master took a submission of the motions and opposition thereto and stated that he would rule upon them after Judge Metzner had decided the questions then before him. These were a motion in the alternative by Toolco for an order pursuant to Rule 30(b) of the Federal Rules of Civil Procedure that the deposition of Howard R. Hughes be taken on written interrogatories, or in the alternative that if such relief pursuant to Rule 30(b) was denied, that the motions of Toolco to dismiss the complaint or for summary judgment pursuant to Rules 12(b) and 56(b) be brought on for a hearing and determination, and that the order of the court dated January 10, 1963 requiring certain documents to be turned over to the

plaintiff be stayed until the determination of the motions to dismiss or for summary judgment.

On January 19, 1963 Judge Metzner ruled on the aforesaid motions of Toolco and denied the application to take the deposition of Howard R. Hughes on written interrogatories, agreed to taking a submission of the motion to dismiss and a motion for summary judgment in accordance with the schedule set for the 1st of February, and denied the application to stay the order of January 10th for the production of documents, except that he modified the date of January 14th to be extended to January 22nd.

The Special Master finds that good cause has been shown for the production of the documents requested and that the motion of the respective parties should be sustained and the documents described in the schedule attached to the motion be produced for inspection and copying by the plaintiff and all of the additional defendants.

It is quite apparent that the documentary evidence requested is relevant to the inquiries in this case. The claim that Toolco's 102 problems and the profits that Toolco obtained by reason of its relations with TWA in the procurement and financing of equipment is not a novel contention in this case. It was asserted a number of months ago by the plaintiff in these proceedings.

It is also obvious that the materials now requested might be important and quite necessary in illuminating, explaining and supporting information either partially or fully set forth in the financial statements and the income tax returns of Toolco that Judge Metzner ordered Toolco to produce in his order of December 18, 1961, calling for their production for March 15, 1962.

While it is recognized that the effort to produce such information by the Tool Company at this time is a burden,

it is not under all of the circumstances an unreasonable one and in fact in view of the importance of such materials to this litigation, it is found that the requirement to produce it is in fact reasonable.

The importance of having the requested documentary materials prior to the taking of the deposition of Mr. Hughes is obvious. It would appear that employees and counsel at Houston, Texas, who have for many years represented Toolco generally, as well as in its tax matters, could assist in the production to such an extent that the burden upon Mr. Chester C. Davis and his associates in connection therewith should not be great.

Concerning the objection that the production be denied until the disposition of the motion to dismiss the complaint or for summary judgment and the motion to dismiss the counterclaims is ruled upon, such suggestions do not appear to have validity, and especially so on consideration of the rulings of the court and the practice that has been followed of requiring production in this litigation. Such rulings and practice demonstrates the position of the court throughout to have been to give each and all parties every reasonable opportunity to secure documentary evidence that might be relevant or lead to relevant evidence either for the party taking depositions at the time or to those not taking depositions to prepare themselves for the time when they would have their turn. There is nothing about the motion to dismiss the complaint, or for summary judgment, or for a motion to dismiss the counterclaims that should interfere with such an approach to the development of the essential facts in this litigation.

The Special Master back as far as October 25, 1962 in setting the deposition of Howard R. Hughes over to February 11, 1963 referred to the fact that there would be ample

opportunity in the interim for Toolco "to present whatever motions it cared to to the court with regard to the jurisdiction of the court over the subject matter and elements of primary jurisdiction or other legal issues of that character • • •". In view of the time that has expired since that date the presentation now of such motions should not be allowed to interfere with the taking of Mr. Hughes deposition on the date assigned and the opportunity of counsel in examining Mr. Hughes to be fully informed by such material as is described in the schedule attached to the motions which is under the custody and control of the Tool Company or other persons described in said motion.

It is, therefore, ordered that subject to and in accordance with the protective order of the Special Master of March 21, 1962, the motion is sustained and the defendant Hughes Tool Company is ordered to produce the documents described in the schedule attached to the motion on January 30, 1963.

It is further ordered that any review of this order be taken by filing papers in the United States District Court for the Southern District of New York before 5:00 P. M., January 25, 1963.

Dated: New York, New York
22nd day of January, 1963.

J. Lee Rankin
Special Master

Exhibit A to the Affidavit of John F. Sonnett dated February 1, 1963

[Doc. 166]

EXHIBIT A 1

CREDIT MEMORANDUM

Los Angeles Main Office #600
June 4, 1957

HOWARD R. HUGHES
TRANS WORLD AIRLINES

On June 4, 1957 I talked over the telephone with Ben-Fleming Sessel, Senior Vice President of Irving Trust Company, New York. I told Sessel that we had received from one of his associates a letter relating to the TWA matter, copy of which had been sent to Noah Dietrich and we wondered what the situation was in that respect. He said that there had not yet been any official announcement regarding Dietrich and accordingly his bank was simply following instructions contained in the loan agreements.

An official of the National Bank of Commerce of Houston had become aware of a change in signature cards, leaving Dietrich out and had talked with Sessel in an effort to determine what was going on.

Sessel said that Dietrich was in New York and would have dinner with him on the 5th. Sessel felt that the conversation was to relate to personal rather than official matters. Howard Hughes has told Sessel not to do anything about Dietrich for the time being. Dietrich is still on the TWA board but according to Hughes, "not for long."

Sessel has passed along to Hughes all of the things that he, Sessel, and we have agreed upon concerning the future

handling of the account as to which Hughes has requested that the matter be left to him. (Sessel comments, "Whatever that means".)

Sessel said that the TWA offering would go through and and that while he would much prefer having a definitive firm take-out or firm guarantee by Hughes Tool on our $10 million six months loan to TWA, he feels that the over-all situation is such that Hughes "will have to feel an obligation" to see that the $10 million is paid.

Sessel says that Hughes has in mind buying some Viscounts to the tune of $15 million for the planes plus about $7 million for spare engines and parts. The purchase might be by Hughes Tool Company or might be by TWA with the Hughes Tool Company guaranteeing. If the purchase were made it would be made under the British Government arrangement whereby a purchaser pays 20% down and credit is given for the remaining 80% if properly supported, and in this case, the support could be the Hughes Tool Company guarantee. Hughes asked Sessel whether the banks would be interested and Sessel's reply was that Hughes should get TWA's present deal out of the way first and the banks would not be interested in talking about anything until it is settled.

Sessel raised the point with which we agreed that $22 million probably would not buy enough planes of a type completely new to TWA to justify the setting up of servicing facilities. Hughes apparently wants to replace TWA's Martins which are said to be substantially worn out.

Exhibit A 1

HOWARD R. HUGHES
TRANS WORLD AIRLINES

June 4, 1957
Page 2.

We discussed the so-called "special loan" to Howard Hughes which revolved around Hughes' contract with RKO Teleradio. It will be recalled that we had told the Irving Trust Company that we would be happy to participate in the loan provided Howard Hughes was entirely agreeable to it. Sessel told me today that we had not been given a piece of the loan *because Hughes did not want us in on it.* It will be recalled that a part of this deal contemplated Hughes delivering prints of the film "Jet Pilot" to Teleradio by June 1. Sessel said that on Friday, May 31, someone with RKO-Pictures, he didn't know exactly who, telephoned to Technicolor and told them not to release prints of "Jet Pilot". It will be remembered that Hughes had given his word that this picture would be delivered and that RKO Teleradio had said that unless the picture were delivered they wouldn't make payments on the contract. Sessel concluded that there is a "clear breach of faith" somewhere.

I asked him whether this conduct of Hughes might bear out Dietrich's statement that "Hughes is a bad boy" to which Sessel replied that he thought not.

/s/ ROBERT L. GORDON
Vice President

cc: Keath L. Carver
T. C. Deane
R. G. Hawley

A-146

EXHIBIT A 2

March 11, 1958

MR. RADU IRIMESCU
FLOYD B. ODLUM

Gardner, Austin and Lane were here over the weekend and we discussed proposals A, B and C. I agreed to go along with proposal B, if approved by the Directors, including yourself, and Stretch.

However, I pointed out that Hughes had repeatedly said he would make some concession to help us if we could pick up all or a substantial part of the Viscount planes and asked whether the Viscounts, at least for service from Washington north, might not be a better deal, if obtainable on lease, than proposal B with the Convairs. Gardner, Austin and Lane made calculations and came up with the belief that figure-wise the Viscounts would give us a much better showing and of course from the standpoint of putting us over as a first rate company would be much better than the Convairs.

Since then I have talked to Howard Hughes and he indicated that he very likely could find a buyer of the planes who would rent them to Northeast. Convair indicated to Gardner and Austin that they also could probably find a buyer for these Viscounts who would lease them to Northeast, conditioned of course in this case on our ordering 880's. I asked Convair this morning to forget a followup of this for a few days because Hughes is working on it and asked that for a few days we not discuss it with anybody, including the British and I would not want to have wires crossed just at this time.

F. B. O.

cc: MR. GARDNER

EXHIBIT A 3

Show to Stretch. Northeast

NEA—Viscounts
Irimescu—transmitted by phone

3/17/58

Hughes told me today he progessing well with Viscount lease matter and expects to reach point by end this week where he can put principal who is to buy planes in direct touch with Northeast for preparation of lease.

FLOYD ODLUM

EXHIBIT A 4

THE BARCLAY
111 East 48th Street
New York

March 18, 1958

Dear Floyd:

Jim, Rem and I have just come from a talk with Radu during which we talked to you about training costs on Viscounts. This was part of a general discussion about what course to follow.

After leaving Indio we called at San Diego, Lockheed and went up to Boeing. The primary purpose of our trip to Boeing was to check up on figures we had been given and give Austin a chance to see the airplane.

On the way home we put together various possible combinations and the enclosed projections are the result.

Yesterday Bristol called to say the Brittania would be certificated April 7th. That is reason for the Bristol projections. I can only say that all three of us were very impressed by Boeing's progress, their airplane and figures based on real experience. Much as it may hurt I'm sure these airplanes are going to win almost immediate acceptance. If I had my choice of all deals it would be early delivery of 3 707-150's even if we don't increase our fleet at all between now and July, 1959. I think Jim still thinks we should do a Convair 240 lease deal in the interim.

We are waiting anxiously for word from Mr. Hughes reference the Viscounts. Since financing the Boeing looks impractical at moment the Viscount is second choice.

Many thanks again for your hospitality when we were in Indio.

Sincerely,

GEORGE GARDNER

EXHIBIT A 5

7-28-59

Carver 7-28-59 I called at his request 8:01 Pan Am deal closed. Has money—Boeing said to have consented.

H.H. Hasn't paid Boeing

H.H. Doesn't intend to pay Boeing—feels Boeing has held him up.

H.H. feels he has done a better job moneywise than if he had done the aircraft deal.

Convair has agreed voluntarily to reduce order from 30 to 20 & return deposits provided he will discontinue negotiations with Capital Air Lines on 6 planes.

Hughes says Sessel is his representative & has severed his connection with Irving—(all news to us.)

B OF A.—GORDON

EXHIBIT A 6

July, 1959

NORTHEAST AIRLINES, INC.
Logan International Airport
Boston 28, Mass.

Re: Purchase by Northeast of three (3) Convair Model 880 jet aircraft.

Gentlemen:

This letter will evidence the recent discussions between Hughes Tool Company ("Hughes") and Northeast Airlines, Inc. ("Northeast") undertaken with a view toward the acquisition by Northeast, either directly from Hughes or from General Dynamics Corporation (Convair Division) ("Convair"), of three (3) of the Model 880 Convair aircraft now covered by the Purchase Agreement between Hughes and Convair dated September 10, 1956, as amended.

Hughes does hereby indicate its willingness to transfer to Northeast, either in the form of an assignment to Northeast of Hughes' contractual rights with Convair under the aforementioned purchase agreement insofar as same pertain to the three Model 880 aircraft hereinafter identified, or in the form of a sale of the aircraft upon or subsequent to the delivery thereof by Convair to Hughes. Northeast, by its acceptance of this letter of intent, shall thereby evidence its willingness to acquire said three (3) Model 880 aircraft. The respective obligations of Hughes and Northeast to sell and purchase said aircraft shall, however, be subject to the parties' agreement to a form of definitive contract, which contract the parties shall endeavor to negotiate and execute within thirty (30) days next following Northeast's acceptance of this letter of intent, and which contract shall contain, among other necessary provisions, substantially the following terms:

Exhibit A 6

1. *Identification of Aircraft.* The three (3) Model 880 Convair aircraft (hereinafter referred to as "The Aircraft") shall be those now designated by Convair as the 23rd, 26th, and 30th such aircraft covered by the Purchase Agreement between Hughes and Convair dated September 10, 1956 (hereafter referred to as the "Convair Contract"), and which are required by the provisions of the Convair Contract to be delivered to Hughes during the months of August and September, 1960.

2. *Configuration.* The Aircraft shall conform in every respect to the Specifications which prescribe the configuration and physical characteristics of such of the aircraft covered by the Convair Contract as, prior to delivery to Northeast of The Aircraft, shall have been delivered to Trans World Airlines, Inc. ("TWA") by Hughes or by Convair; provided, however, that in the event of any changes to the Specifications made by Hughes or TWA, pursuant to agreement with Convair, subsequent to the date on which Northeast's obligation to purchase The Aircraft becomes firm and unconditional, such changes shall not, without the consent of Northeast, be embodied in The Aircraft unless and except to the extent that Convair shall so require.

3. *Price.* The price of The Aircraft shall depend upon the form in which The Aircraft or the rights thereto are transferred from Hughes to Northeast, as follows:

(a) If the Hughes-Northeast transfer shall be effected by the assignment of Hughes' contractual rights relative to The Aircraft, the consideration for such transfer shall be the sum of the following:

(i) Northeast's assumption of all obligations and liabilities of Hughes in favor of Convair applicable or properly allocable to The Aircraft,

(ii) the payment by Northeast to Hughes of the sum of $2,626,650 (representing the install-

ment payments heretofore made by Hughes to Convair with respect to The Aircraft),

(iii) interest on said sum of $2,626,650 at the rate of 5% per annum from the date of Hughes payment of the aforesaid mentioned sum to Convair (such amount of interest being hereinafter referred to as "Capitalized Interest"),

(iv) such portion of Hughes reasonable expenses incurred in administering the Convair Contract as is directly attributable or properly allocable to The Aircraft (hereinafter referred to as "Hughes' Administrative Expenses"),

(v) in the event by reason of the application of the de-escalation clause of the Convair Contract the price per airplane to Northeast is less than $3,733,000, an amount equal to three times that by which $3,733,000 exceeds the price per airplane to Northeast.

(b) If the Hughes-Northeast transfer is effected by a sale from Hughes to Northeast of The Aircraft upon or subsequent to delivery thereof from Convair to Hughes, the consideration for such transfer shall be the payment by Northeast to Hughes of the sum of the following:

(i) An amount equal to the total purchase price paid by Hughes to Convair for The Aircraft, but in no event less than $3,733,000 per airplane;

(ii) the Capitalized Interest; and

(iii) Hughes Administrative Expenses.

4. *Payment.* In the event that all other amounts (e.g. Capitalized Interest and Hughes' Administrative Expenses) owing by Northeast to Hughes are paid in cash at the time of the execution of the assignment by Hughes to Northeast of the applicable part of the Convair Contract, or at the time of the delivery by Hughes to Northeast of The Aircraft, whichever

the case may be, and in the further event there shall not then be due and unpaid any obligations owing from Hughes to Convair with respect to The Aircraft, Hughes will agree that Northeast may defer its reimbursement to Hughes of a substantial part (the exact amount to be set forth in the definitive contract) of Hughes' $2,626,650 down payment to Convair for The Aircraft. The amount of such deferred reimbursement shall be evidenced by a promissory note executed by Northeast in favor of Hughes and delivered concurrently with the payment of the cash consideration. Said note shall provide for such term, interest rate, and number and frequency of installments as may be agreed upon between Hughes and Northeast and consented to by The Chase Manhattan Bank. Hughes will consent to such reasonable subordination provisions as may be required by The Chase Manhattan Bank, to the end that the repayment of Northeast's note to Hughes may not interfere materially with Northeast's repayment to The Chase Manhattan of the loan or loans arising under the Credit Agreement of September 30, 1955, as amended July 15, 1958.

5. *Consent of Third Parties.* The definitive contract shall by its own terms provide that the effectiveness thereof shall be made expressly subject to and conditioned upon such consents as may be necessary from the Civil Aeronautics Board, Convair, The Chase Manhattan Bank, and Irving Trust Company as trustee under those certain Equipment Trust Certificates issued by Northeast pursuant to Agreement of July 15, 1958.

6. *Necessary Extension of Northeast's Route Certificate.* The definitive contract shall provide that same may be terminated by either party thereto without obligation or liability to the other at any time subsequent to December 15, 1959, if on or before December 15, 1959 there shall not have been issued and become final and unappealable an order of the Civil Aeronautics Board, or such other governmental agency then having jurisdiction in the premises, by

which Northeast is granted, with respect to its route between New York, New York and Miami, Florida, an appropriate Certificate of Public Convenience and Necessity which shall be either (a) permanent, or (b) effective on a temporary basis through a date not earlier than November 1, 1968.

7. *Customer Furnished Equipment and Related Spares.* Northeast will purchase from Hughes, in addition to The Aircraft, such spare parts, spare engines, and items of equipment which constitute "Customer Vended Equipment" under the terms of the Convair Contract, as shall, prior to the date on which Northeast's obligation to purchase The Aircraft becomes firm and unconditional, have been purchased by Hughes for installation in or in support of The Aircraft. The price to be paid by Northeast for such related equipment shall be an amount equal to Hughes' cost thereof plus interest at the rate of 5% per annum calculated from the date of each of respective outlays therefor to the date of payment by Northeast.

If the foregoing basic terms appear to be generally in accordance with our prior discussions, and if Northeast desires to continue negotiations for a definitive contract along the lines hereinabove set forth, kindly so indicate by executing the enclosed copy hereof in the space provided below and returning such executed copy to us.

Very truly yours,

HUGHES TOOL COMPANY

by .....
Vice President

ACCEPTED THIS DAY OF JULY, 1959:

NORTHEAST AIRLINES, INC.

.....
President

EXHIBIT A 7

STRAIGHT TELEGRAM

FEBRUARY 18, 1960
(BY PHONE TO WU)

DAVID A. STRETCH
1050 FIFTH AVENUE
NEW YORK, N. Y.

THE FOLLOWING IS STATUS RESPECTING CONVAIR JET EQUIPMENT FOR NORTHEAST AIRLINES MOST OF WHICH IS ALREADY WELL KNOWN TO YOU. FIRST WE HAVE COMPLETED NEGOTIATIONS WITH CONVAIR FOR SIX PLANES WITH DELIVERY STARTING NEXT FEBRUARY OR MARCH AND CONTRACTS NOW BEING DRAWN. SECOND I AM IN DIRECT NEGOTIATION WITH HOWARD HUGHES TO SUBSTITUTE FROM FOUR TO SIX OF HIS EARLY DELIVERY CONVAIR JETS FOR EQUAL NUMBER OF OUR LATER DELIVERIES AND SUCH NEGOTIATIONS ARE WELL ADVANCED. THIRD WE ARE IN EARLY STAGE OF NEGOTIATION WITH DELTA TO SUBSTITUTE SOME OF THEIR EARLY DELIVERIES IF HUGHES DOES NOT DO SO. FOURTH WE HAVE CONVAIRS COMMITMENT THAT THEY WILL SUBSTITUTE THE PLANES FOR EARLIER DELIVERY TO CAPITAL AIRLINES IF FOR ANY REASON CAPITAL DOES NOT GO THROUGH WITH THEIR PURCHASE. FIFTH WE ARE THEREFORE IN DIRECT NEGOTIATIONS WITH ALL PARTIES CONCERNED WHO HAVE ANY CONVAIR JETS FOR DELIVERY EARLIER THAN THE ONES WE ARE GETTING AND NEED NO HELP IN THESE RESPECTS AND FURTHER I BELIEVE YOU HAVE BEEN IN DIRECT CONTACT WITH THE CAPITAL AIRLINES PERSONNEL ABOUT THESE SAME MATTERS.

FLOYD B. ODLUM.

CHARGE ATLAS CORPORATION

EXHIBIT A 8

DRAFT
15 February 1960

Northeast Airlines, Inc.
Logan International Airport
Boston 28, Massachusetts

Gentlemen:

Reference is made to the Letter Agreement dated 22 January 1960 between Northeast Airlines, Inc. (hereinafter called "Northeast") and General Dynamics Corporation (hereinafter called "GD") covering the lease by GD of six (6) Convair 880 aircraft to Northeast and to letter to Northeast dated 22 January 1960 and signed on behalf of GD by Mr. J. V. Naish, President - Convair Division, relating to certain adjustment of the aircraft delivery dates if Hughes Tool Company, prior to 15 February 1960, agreed to defer the delivery of any of the Convair 880 aircraft to be delivered under its contract with GD.

Said Letter Agreement provides, among other things, that in the event the conditions set forth in paragraph 2. thereof have not been accomplished on or before 15 February 1960 and a mutually satisfactory Lease Agreement between the parties has not been completed, executed and received by GD prior to 15 February 1960, then said Letter Agreement is void and of no further force and effect. Northeast has requested that GD extend the date by which said Lease Agreement is to be so executed and GD for and in behalf of the considerations hereinafter set forth is agreeable to so extend said date as follows.

GD hereby agrees (1) to amend said Letter Agreement by deleting the words and figures "15 February 1960" wherever the same appears in paragraph 3. of said Letter Agreement and to insert in place thereof the words and figures "15 March 1960" and (2) to extend from February

Exhibit A 8

15, 1960 to March 15, 1960 the date appearing in said separate letter pertaining to adjustment of delivery dates.

In consideration of the extension set forth above, Northeast agrees that if the conditions set forth in paragraph 2. of said Letter Agreement have not been satisfied and the Lease Agreement referred to in paragraph 3. of said Letter Agreement has not been completed, executed and received by GD prior to 15 March 1960, or such later date as may be agreed to in writing between Northeast and GD it will pay to GD fifty percent (50%) of GD's actual costs paid or incurred with respect to said six (6) Convair 880 aircraft during the period of 15 February 1960 to 15 March 1960, provided, however, that the total amount payable by Northeast to GD hereunder shall not exceed $50,000.

Except as amended hereby, all other terms and conditions of the Letter Agreement and separate letter referred to in the first paragraph hereof shall remain in full force and effect.

If the understandings and arrangements herein set out are acceptable to Northeast, please so indicate by executing two (2) copies of this letter in the space below provided for your signature and by delivering to GD said copies, thus constituting this an agreement between us.

Yours very truly,

GENERAL DYNAMICS CORPORATION

s/ J. V. NAISH
President—Convair Division

Accepted and agreed to
as of the 15th day of February 1960

NORTHEAST AIRLINES, INC.

By .....

Title .....

EXHIBIT A 9

4:50 PM

3-19-60 HRH pp. 3

Trying to get figures compiled. Can he talk now. 1st of all wants to talk to me as a friend in a difficult time. i.e., divorced from the Bank. May think he is vacillating. You know how I work but won't divorce myself from Bank. I will respect confidence but this big secret may be not repeatable to others. Can he explain on a hypothetical basis? Ans. Yes. He wants to be conscientious. Will ask us to take his word. He will do exactly what he promised—this is thinking out loud.

The big piece of information—very secret—no whisper—H. is confident that he can about say that it is almost agreed that he concluded a merger with N.E. Airlines. Has made a deal OK to Odlum & Stretch (new head of N.E.). This takes CAB approval but Odlum waited until CAB stat. on mergers which fits this merger. Talks with CAB have given Odlum off the record OK of a merger with Amer. or TWA. (United has never sought this but Amer. has.) H. feels there is a substantially better than 50-50% of OK by CAB. H. believes merger will be Ok'd & they will get So. transcontinental route approval. This will be "Tops" in route system.

This would be a common stock exchange deal. N.E. was trying to lease 6—600's for Miami route—so much economy from merger (Ticket offices—terminal facilities—advertising, etc.) This deal is 80% done. In any event will take over on an operating basis almost at once.

Next—a separate deal but simultaneously—now going on—another deal—This is simpler but not as sure. i.e., a 40% chance of completing. For practical purposes so far he is in accord with Odlum to leave Atlas on 22

EXHIBIT A 10

on vacation

10-13-60

10-13-60

pp 1

at 2:30 I called R L G because H R H called me (a) 11:45 AM Bob said he talked to H R H this AM—Told him of decision—Met. agreed to go only if D. R. plan thru as drawn —Really TWA could refund with points but Tool Co could not apparently Equit. told Met. this is too tough—so now Tool Co can purchase notes after 1st year (a) 124% of par reducing ¼% per ¼. Now a wire from Equit that stand by extended to Monday.

Bob told HRH we were sympathetic but there appeared to be nothing we can do. What he wants is a few days, then he can dispose of 880's (½ of them anyway) Wants to pay Equit & Banks & get some time to finance the plane purchases. Bob mentioned Tool Co debt to us and to Irving Trust & this must be taken care of

RLG said if Equit stands by for a week & Irv stand by for 60 days we can take another look—but no hopes expressed.

RLG then went over it against with NB & Shanley & concluded couldn't put together another unsound plan on piece work basis. end talk 3:10

Needed		220 M
Restricted by TWA	8.5	
Cancel 13—880 & get Credit	58	66.5
Se need to finance		153 5
Crown	30	
Convair	10	40
B of A 45		
Chase 35	= 115 M	
1st 35		113.7

22 M's not covered—Nor are 600's—get out 6 to NE

EXHIBIT A 11

Hughes 11/14/60 1:30 pm 11-14-60

N/E matter completely resolved
Re: getting Naish's consent to cancel 7 planes, prefers to let it wait until mid afternoon until after the N/E matter resolved in every detail in Convair legal Dept.

Forrester came on the line

Will give 7 indep directors out of 18—to preserve the subsidiary concept

Quoted Equitable as having told Cook that they'll go on any one 3 basis:

1. Full voting trust if they put new money in.
2. 5 yr. schedule w/o voting trust or change in mgmt provided it is part of a type of 9/26 program
3. (?) Immediate payment of somewhere between $8 & 16 mm and continue for 6 mos to 1 yr on the balance.

Our present plan better than either 2 or 3

Forrester wants Eq. to go longer than 5 yrs. Hughes discouraged this, inasmuch as it might upset the apple cart

Let Crown break the trail—Forrester & Hughes concur

Hughes suggest he will put the 7 independent members in, but don't tell it to Crown or Eq. Use it only as a counter offer.

He will Naish's answer on 7-880 cancellation to Keath tonight

B. of A. Gordon

EXHIBIT A 12

9-9-60

TWA Financing Plan

Memorandum of understanding relative to TWA financing reached among the so-called TWA Bank group on Friday, September 9, 1960, all of the banks being represented except Security-First National Bank, Los Angeles; California Bank, Los Angeles; and National Bank of Commerce, Houston, whose approval and agreement were obtained by telephone either concurrently with or subsequent to the meeting of the banks.

The following funds are to be provided:

Balance of cost of 19—CV 880's	$ 64,753,000
Balance of cost of 6—CV 600's	24,947,000
Interim bank loans	27,000,000
Equitable loan to be continue as is	—
	$116,700,000

Under this proposed plan, Equitable Life Assurance Society would continue its present matured loan without immediate reduction but on monthly amortization over a five-year period beginning immediately. Equitable would release to the extent of $15,000,000 its present hold on rentals on aircraft owing by TWA to the Hughes Tool Company. Equitable's loan would continue to be guaranteed by the Hughes Tool Company and such guarantee would be supported by collateral mentioned hereafter pari passu with the other lenders, including the Convair Division of General Dynamics Corporation. Interest rate 6%.

Exhibit A 12

Funds to accommodate the above financing would be supplied by the following banks and by Convair:

Irving Trust Company	$13,500,000
Bank of America	13,500,000
Bankers Trust Company	13,500,000
Mellon National Bank & Trust Co.	13,500,000
Security-First National Bank	8,000,000
First National Bank of Boston	5,000,000
California Bank	2,400,000
National Bank of Commerce	700,000
Convair	35,000,000

The following assumptions and/or conditions underly the plan, which admittedly is barely adequate to accomplish what needs to be done and then on only a stopgap basis, it being understood that TWA and Hughes Tool Company will as soon as possible arrange permanent financing:

1. There are 4—CV 880's on order by Hughes Tool Company and 7—CV 22M's from the Capital Airlines deal similarly on order, the financing of none of which is contemplated in this plan, tacitly or otherwise or in any other financing plan. On the contrary, it is understood that the Hughes Tool Company will dispose of these planes so as to relieve themselves of liability therefor well within any time limitations prescribed by the purchase agreements. It is understood also that arrangements have been made on a

contingent basis, by Howard R. Hughes or Hughes Tool Company, but not by TWA, for the purchase of an additional 7—CV 600's for which no financing has been approved and no indication of intention to finance has been given. Howard R. Hughes or Hughes Tool Company is to agree to make proper disposition of those planes also within the limitation of the terms prescribed for their purchase.

2. It is intended that the existing airplane loans of Hughes Tool Company will continue in a reduced amount as set forth below. The entire financing is to have the approval of the CAB to the extent that such approval can be obtained. Because it is intended that this financing is stopgap financing only and that as soon as practicable and possible full refinancing of the fleet would be brought about on a long term basis, all of the lenders, including Equitable would agree to permit prepayment of their loans in full without penalty, irrespective of the rate of interest at which such refunding may be made.

3. The Convair Division of General Dynamics Corporation would carry up to $35 million of the financing on a basis pari passu with the lenders as to the collateral but with payment deferred until the banks shall have been paid.

4. TWA is to pay to the Tool Company $15 million on accrued airplane rentals and the Hughes Tool Company is to use the said $15 million to reduce its airplane loans made by Irving Trust Company and Bank of America, $3 million and $12 million respectively.

Exhibit A 12

5. The bank loans would be written at 6% interest with equal monthly amortization (or the equivalent modified to be compatible with season income patterns) sufficient to liquidate the indebtedness over a five-year period. There would be a provision for a contingent earnings sinking fund equivalent to 75% of net earnings of TWA, after taxes, to be applied on latest maturities. There would be a commitment commission on the unused portion of the bank commitment equivalent to ½ of 1% per annum, payable quarterly.

6. The management clause and provision for voting trust called for in the Dillon Read plan would continue as part of the new financing.

7. All aircraft are to be held in the name of TWA. Aircraft now held by Hughes Tool Company and leased to TWA would be sold to TWA on a conditional sales contract. The collateral held by Tool Company banks would be assignment of such conditional sales contract in lieu of chattel mortgages and payments on said conditional sales contract would be only such amounts as would be necessary to meet the payments on the bank loans secured thereby until such time as the bank loans would be repaid.

B. of A.—GORDON

Exhibit A 12

8. Hughes Tool Company would subordinate to lenders its entire present investment in the airplane program except for the amount of $15,000,000 permitted to be paid by TWA to the Tool Company for repayment to Irving Trust Company and Bank of America.

9. There are to be no aircraft purchases or leases or commitments relating to purchase or lease, et cetera, by or for TWA or Hughes Tool Company or any other company or individual which would involve TWA or Hughes Tool Company, either directly or indirectly, without the written consent of the lenders, including Equitable Life Assurance Society, holding at least 66⅔% of outstanding obligations under this plan.

10. There would be no merger or plans to merge, no consolidation or plans to consolidate, or other similar or dissimilar deals involving TWA or Hughes Tool Company, without the written consent of the lenders, including Equitable Life Assurance Society, holding at least 66⅔% of outstanding obligations under this plan.

11. There would be no borrowings by TWA or Hughes Tool Company without the written consent of the lenders, including Equitable Life Assurance Society, holding at least 66⅔% of outstanding obligations under this plan.

12. Loan agreements in connection with the new financing would follow for control purposes the loan agreements prepared under the Dillon Read plan.

These would include, but not be limited to, working capital limitations and guaranties thereof by Hughes Tool Company.

13. No action will be taken by the lenders in connection with anything requiring the approval of Mr. Hughes unless approval thereof by Mr. Hughes shall have been first received by the lenders in writing.

14. Howard Hughes Medical Institute would furnish its financial statements regularly to Bank of America to be held in confidence by them and Bank of America would indicate to the lending banks whether in its opinion the $18,000,000 note held as collateral is regarded by them as being good collateral.

Subject to the foregoing assumptions and/or conditions, the essence of this financing plan is as follows:

Hughes Tool Company debt to Irving Trust Company would be reduced $3 million and its debt to Bank of America would be reduced $12 million to the following figures:

Hughes Tool Company then owing to Irving Trust Company	$14,286,666
Hughes Tool Company then owing to Bank of America	34,782,011
	$49,068,677

B. of A.—GORDON

Exhibit A 12

This indebtedness would be collateralized by the following:

First liens on:
- 11-Boeing 707—131's
- 4-Boeing 707—331's
- H.H.M.I. note approximately $18 million
- Approximately 5¼ million shares TWA stock owned by Hughes Tool Company
- Hughes Tool Company real estate comprising approximately 1,300 acres in Culver City, California; approximately 25,000 acres in Las Vegas, Nevada; approximately 16,000 acres in Tucson, Arizona; and approximately 88 acres in Houston, Texas.

New TWA bank loans aggregating $83,600,000 and Convair loans for $35,000,000 to be collateralized as follows:

First liens on:
- 6—CV 600's
- 20—CV 880's
- 7—Boeing 707—331's

The above bank loans of $83,600,000, Convair loan of $35,000,000 and the Equitable loan of $27,000,000 are to be guaranteed by the Hughes Tool Company. To support its guarantee Hughes Tool Company will provide a second lien on all of the collateral listed above which is held to secure bank loans to the Tool Company aggregating $49,068,677.

B. of A.—GORDON

EXHIBIT A 13

Discuss with Hughes. 9-18-60 7:05 pm I called

Q. How many of the 4 extra CV 880's does TWA need and you will approve their buying provided they can be financed?— A. Two only— Get rid of them later if possible. Hold out 2-880's for Tool Co. to dispose of as they see fit. A good trading position for Hughes. Convair wants 2 of them for N/W as an inducement for N/W to buy 600's

Q. Will you pass this word along to them as they can figure accordingly? A. If any of the 4 get to TWA & are withdrawn for Convair—might be subject to some smart lawyers attack. Prefer to hold all four out. If necessary to complete financing will give up 2-880's.

Q. If necessary to firm up the financing will you immediately release them. A. Yes.

Q. I understand from Keath that TWA doesn't want the 22m's and you don't want TWA to have them. Is my understanding correct? A. Hughes thinks it would be a mistake to commit TWA to take them. Would prefer to hold them out. TWA may want them later if the 880 advertising program gets hot.

Q. How do you propose to relieve the Tool Company of the obligation of $25,750,000 in connection with the 22m's & how soon can this be done? A. 1. Wants to start negotiation with Convair for another 17-600's to total 30 in all. these to be financed by Convair. Can't be resolved until the 880 gets into service & catches on with the public. The 17-600's would presume disposal of 15-131's. Convair to finance the 4-880 & the 7-22m's in addition to the new 17-600's Collect $50 million from charity on R/E purchase & pay-off of 18 million note—on borrowing basis.

B. of A.—Gordon

EXHIBIT A 14

10-24-60

Hughes 10/24/60 9:45 am he called

asked how many sails we'd have to cut adrift

Told him about Houston bank report—Cook out trying to get loan on oil properties

Says NY (?) trying to get him into court this afternoon—Cook says an effort to get Hughes Tool Co & TWA into receivership this afternoon—Cook now talking to Keehn to call him off

Hughes had Crown's atty talk to Crown to ask him to go to his bank this afternoon. Said he wouldn't like it but would do so.

Drury to come in to see us to firm up conditions precedent

Forrester is supposed to be here or on the way here representing Merrill Lynch.

Has talked with Jack Naish.

Naish has had an inquiry from the Air force for 7—880's and an inquiry from a company which would lease another 7 to Nat'l Airlines

Wants our permission to let Hughes Tool Co. commit firm for 6—600's so the first 6—880's for N/E can be firmed up by Convair—The 600's would be deliverable in next July & August. He can't see how the possibility of a receiver would affect anything Tool Co. might do in the purchase of 600's for alternate use by TWA. I told him this would have a vital affect.

How would the 600 deal affect his net position? HRH says only in this way a) at present committed for 6—880's & increased about $4—5,000,000 in cancellation of 6—600's. If N/E could finance the 6—880's then Hughes Tool Co. would be better off than if they could not cancel the 600 order Would be worse off to the extent of cancellation costs.

B. of A.—Gordon

EXHIBIT A 15

10-27-60 Called HRH 9 PM

he called back & will call me in AM

10-28-60 He called 8:30

TWA BD meets this AM.—Told Cook what is in air—So Cook have Board authorize Leslie to seek financing based on a group of Bks headed by B of A.—Told him all eggs in 1 Basket—no blunders—don't do anything w/o of A OK.

HRH told Cook (11 of 18 directors there) to make resolution at once that since meeting called to consider financing but deal blew up now only routine purposes but something must be done. Cook said call for full Board as soon as can get there—Ben objected—wanted to know when—adjourned to 4:30 Mon P.M. (Ben wanted TWA resolution to favor DR plan & put onus on Tool Co. for rejection)

Sent work to M.L. at once as Forrester & Linniss not out here yet.

Nat'l Bk of Comm. give legal-limit & small banks feel it is resolved & could put group together but can't do it now. Total debt about 12,000,000—can get 4½ sq need 7½ for his personal. Can get latter out of Oil—partners name Thayer—Sessel—Leslie & Wright voted against Rays motion & Maestre abstained.

Leslie wants to be Pres (Talked to Cook this AM)

Has OK'd sale of 7 planes to Nat'l & 7 to Govt.

9:10—RLG got on phone—went over suggested program thoroughly HRH—demurred on going East (1) health—maybe OK (2) Convinced Sessel & group determined to get control of TWA & doesn't want to tell his details to "enemy"

B. of A.—Carver

EXHIBIT A 16

but Howard has proposed that down payments on 880's be applied to first airplanes taken.

He doesn't know whether any progress being made on 14-880's.

Nat'l. Airlines deal seems to be moving faster than the air force deal.

He will let us know of any developments. If Crown won't go for M. L. Hughes will ask for his suggestions & let us know—we may then make suggestions.

Hyland 11/7/60 He called 9:55 am

Gave such assurances as we could to encourage his support.

B. of A.—GORDON

EXHIBIT A 17

11-11-60 11-11-60 pp 2

HRH says Bautzer will agree that Crown knew before he ever came West that money would not go to G. D.

Crown talked on basis that 880's

NE deal—1 point unresolved. Crown to arbitrate it. Naish has HRH's complete authority to sell 14 planes—(in spite of what Naish told Gully & the Col:)

What do you want on 880's? Up to G.D.? Prefer to see them go to TWA but can't finance them.

If GD sees D.R. plan won't go thru & bankruptcy alternative, then must find a way to help TWA. HRH is sure that G.D. must help—did help Capital—N.E. etc.

HRH is to call me

If Crown welches in this deal, this will be the 5th one and none of them HRH's fault.

Says (1) Told Crown in Chicago

(2) Crown knew & talked about paying off Equity & getting their collateral—

(3) Re-applying deposit on some planes & easier to finance balance

So he knew 1st 880's go to NE & hoping to unlock 6-880's for TWA if deposit were applied. So knew no money for G. D.

HRH Gets confidential (Convair wants me to take Dillon Reed deal to get cash for planes—but pretend not to keep in HRH's good graces.

If Crown deal goes then G.D. won't sue him for contract performance.) So they mustn't know that B of A became agent bank & accept terms on basis of last occasion but during period of closure reserve right to get around vote trust

B. of A. CARVER

EXHIBIT A 18

10-19-60 6 P.M. HRH. called.

Amplifier attached to wire outlet with hand phones for me.

He will go into Receivership first
after I said we wouldn't
give him 30 MM loan

Thinks he can get Gov't help—
Pay the Banks the TWA loan
Tender Equit. a proposal for repay't of their loan
HRH will contend Equit has no real right to immediate payt. (no consideration for change in agreement—Will give 1st pay't along with it.)

Will offer a shorter pay off—as collateral. If they then throw TWA in receivership it is up to them.

Will offer all 880 for sales at once.

Glass or Austin as Pres. at once.

Go along on Boeing until 600 come along—making best of what we have has always been OK in the long run (1649 as example) 15-120 can go to fan engines if needed. Sell 880 & get some money back. Henry Crown has said again he wants to go into deals with HRH—Wants us to look at collateral for his loan. • • • Will (1) send some one in to see RLG in the A.M.

(2) who should be President?

We will accept either as previously stated—as I
~~Glass~~
remember it Austin might be the better of the 2 as of now because he has been a Pres.—Potentially Glass maybe be the better but we have no strong ideas on subject.

B. of A.—CARVER

EXHIBIT A 19

11-1-60

He related his long conversation with Crown. Said he made it clear that maybe the D-R plan would be best for G D but he was quite sure he'd let the Co. go into receivership rather than the D-R plan. Told Crown he'd buy all his future planes (near future, I think he meant) from Convair. Also, that if a receivership were the result, a receiver would have to buy competitively.

Gave Crown an out but Crown said he wanted to go ahead and would call Pace & correct some statements. Told him of Counsel's opinion re: the loan of $12,000,000 from HHMI to HT Co. Loan should run to the end of the present lease or maybe a year before—3 to 4 years at 6%—or could be shorter term, whatever terms bank decides.

Property will be that now under lease from Ht Co. to _____ Drury should know this. Cook to ask Drury to tell us. Asked if it looked like we could put the deal together. I said it looked like it was getting closer.

H. told me that Crown has a letter from 1st N/B of Chi regarding his N/W rather than a statement. Hughes expects us to take the Equitable note (which Crown will buy) as additional collateral.

He will give us a letter re: the Tool Co. TWA debentures & will make a deal with M-L the same as the HHMI deal & Forrester will give us the necessary assurances. Hughes still a little nervous vis a vis G.D. Warned that they might try to upset the Crown deal. He plans to "level with Naish".

B. of A. Gordon

EXHIBIT A 20

Keath 3:30

Hughes does not want the D-R deal now. Cook to call within half hour and read letter he and Cook have been preparing for Equitable.

Next Tuesday Bd. will meet. Sessel's resignation will be requested—Glass may be put in as president. Exec. offices to be moved to L.A. etc. (may be only for publicity) (Keath will be at Frontier 9-1487.)

No problem on R/E deal between Tool Co. and HAC.

Says we can have complete reliance on him in future dealings with him.

Naish is working on plane deal to get rid of 880's & 22M's.

Trying also to firm up the N/E deal but will have to firm up the 6-600 deal.

Have learned his lessons will not ask us to finance Convairs for him. Will keep 880's only if someone comes along with financing of them.

Asking us to

Do $30 MM Crown deal to pay off Eq or $40 MM HHMI Crown deal. Is meeting to work on Irving deal. Be at office at 10 a.m. tomorrow.

3:55 p.m.

EXHIBIT A 21

BEFORE THE

CIVIL AERONAUTICS BOARD

Docket No. 1182

In the Matter of the Application of

HUGHES TOOL COMPANY

for approval under Section 408 of the Civil Aeronautics Act of 1938, as amended, of the acquisition of control of

TRANS WORLD AIRLINES, INC.

MOTION OF TRANS WORLD AIRLINES, INC. FOR APPROVAL OF TRANSACTIONS WITH HUGHES TOOL COMPANY

TRANS WORLD AIRLINES, INC. (hereinafter referred to as "TWA") respectfully moves that the Board enter an order herein modifying its Order Serial No. 3210, issued October 17, 1944, as amended, approving the acquisition of control of TWA by Hughes Tool Company (hereinafter referred to as "Hughes"), so that the terms of such order will not restrict the right of TWA to purchase from Hughes Tool Company up to 25 jet powered aircraft suitable for operation by TWA on both its domestic and international routes.

1. Thorough studies have been made by TWA of the characteristics of all jet aircraft available in this country and abroad. None of these aircraft has the range desirable for all-year around operations across the Atlantic so as to permit non-stop services in both directions under the extreme conditions frequently encountered on that route.

2. During the past few years important new developments have occurred affecting jet aircraft which make it possible to design aircraft at this time that are superior

in performance, safety and economy to the commercial aircraft now being constructed, the designs for which were initially laid down four or five years ago.

3. Hughes Tool Company has indicated to TWA that, subject to approval of the Board, it is willing to construct jet transport aircraft for TWA's use, taking into account the most recent design developments, on terms that are at least as favorable in every respect as those that can be secured from any manufacturer for a similar aircraft. Deliveries of such aircraft will commence in 1961. The aircraft will be used interchangeably on TWA's international and domestic routes.

4. Hughes Tool Company has advised TWA that it is willing to sell such aircraft to any other airline at the same price as sold to TWA.

5. Hughes Tool Company has also advised TWA that the aircraft would be constructed by the Aircraft Division of Hughes Tool Company in a new factory to be located in accordance with the recently announced policy of the Air Force to insure the widest possible dispersal of aircraft production facilities.

WHEREFORE, Trans World Airlines, Inc. respectfully prays that the Board enter an order herein modifying the Board's Order Serial No. 3210, as amended, so that the terms of such order will not restrict the right of TWA to acquire from Hughes Tool Company the aircraft as referred to above, and providing such other and further relief as may be appropriate.

Respectfully submitted,

TRANS WORLD AIRLINES, INC.

By Warren Lee Pierson
Chairman of the Board

May 10, 1956

EXHIBIT A 22

UNITED AIRCRAFT CORPORATION
EAST HARTFORD 8, CONNECTICUT

OFFICE OF THE
PRESIDENT

April 5, 1957

Mr. Howard R. Hughes, President
Hughes Tool Company—Aircraft Division
Florence Avenue at Teale Street
Culver City, California

Dear Howard:

Following your telephone call to me this week we have discussed among ourselves your request for Pratt & Whitney Aircraft's assistance and cooperation in selling the excess J57 and J75 engines which you have on order.

It has, of course, been our practice when a customer has in his possession more Pratt & Whitney Aircraft engines than he requires, to do all possible in assisting such a customer in their sale. However, in your case, you do not now possess more engines than you need, but rather you have on order some 200 more engines than you require for TWA. There is no necessity of your taking delivery of these engines, because we have offered you the privilege of a no-charge cancellation if requested immediately, and have also told both TWA and your representatives that we would agree at this time to an assignment of these 200 engines to Boeing.

As you will no doubt recall, your orders for a total of 300 engines were placed by your representatives just prior to our price deadline on February 15, 1956. We remonstrated with your representatives because of the large quantity of engines desired to be purchased, and pointed out that TWA could not possibly need such a great quantity of engines, and that our analysis of Boeing's orders

indicated to us that Boeing had already ordered installation engines covering TWA. However, there was no time prior to the deadline to check TWA's actual requirements, and in the interest of permitting acceptance of your orders prior to the deadline, we accepted them with the understanding with your representatives that any duplicating orders would be cancelled following a reconciliation of actual requirements.

Now you apparently are contemplating going through with this rather large order and marketing these engines in competition to Pratt & Whitney Aircraft. You further ask our cooperation and assistance in disposing of these engines. As I told you during our phone conversation, complying with your request would place us in a pretty untenable position. If we were to assist you in disposing of your speculative order of some 200 engines, we would certainly be encouraging others of our good customers to similarly speculate, which would place us in a completely impossible position.

I hope that you can be sympathetic to our point of view and understand that we must refuse your request. I hope that on further consideration of this matter you can accept at this time either our offer to cancel on a no-charge basis, or our offer to accept an assignment of these excess engines to Boeing.

Again I should like to urge you on your next trip East to pay us a visit in Hartford and see both our development and production facilities. We have some very excellent tools for the work at hand and think we are doing a good job on both the J57 and the J75. I am sure that with your extensive aviation background you would find such a visit interesting.

Sincerely yours,

BILL
W. P. GWINN
President

WPG:rga

EXHIBIT A 23

LB017

WESTERN UNION

TELEGRAM

L LLU062 HL PD AR=TDL PWS SEATTLE WASH APR 15
HOWARD HUGHES=
7000 ROMAINE ST HOLLYWOOD CALIF=
WITH REGARD TO AN ASSIGNMENT BY HUGHES TOOL TO BOEING OF ITS CONTRACT TO PURCHASE JET ENGINES WE ARE SETTING FORTH HEREINAFTER OUR PROPOSAL WITH RESPECT TO SUCH ASSIGNMENT.

¶ 1. HUGHES TOOLS COMPANY REPRESENTS THAT IT HAS A FIRM CONTRACT WITH PRATT AND WHITNEY FOR THE PURCHASE AND SALES OF MODEL JT3C-4 AND MODEL JT4A-3 PRATT AND WHITNEY AIRCRAFT ENGINES TOTALLING TWO HUNDRED SUCH

=END 1=

(copy sent Air Express to Raymond Cook in New York 4/16/57
copy sent to Cook's Houston office—airmail—4/16/57
copy to Bill Gay
read to R. W. Rummel by telephone—4/16/57
original to Operations—4/16/57)

Exhibit A 23

WESTERN UNION

TELEGRAM

L L LLU062 LONG SHEET 2=

ENGINES IN THE AGGREGATE, THAT BY THE TERMS OF SAID CONTRACT THE PRICES FOR SUCH ENGINES ARE $145,000 FOR EACH MODEL JT3C-4 ENGINE AND $210,000 FOR EACH MODEL JT4A-3 ENGINE, THAT HUGHES TOOL COMPANY HAS THE RIGHT TO ASSIGN ITS INTEREST IN SAID CONTRACT.

¶ 2. HUGHES TOOL COMPANY AGREES TO ASSIGN TO BOEING ITS RIGHT UNDER SAID CONTRACT TO PURCHASE ALL 200 OF SAID ENGINES SUBJECT TO THE FOLLOWING CONDITIONS=

¶ /A/ BOEING WILL ACQUIRE JT-3C-4 ENGINES SUBJECT TO PARAGRAPH 2 /F/ BELOW AND WILL PAY TO HUGHES TOOL COMPANY THE AMOUNT OF $10,000=

END 2=

Exhibit A 23

WESTERN UNION

TELEGRAM

L LLU062 LONG SHEET 3=

FOR EACH OF FIFTY JT3C-4 ENGINES. THIS AMOUNT TOTALING $500,000 WILL BE PAID ON THE SAME PAYMENT SCHEDULE THAT WOULD BE IN FORCE HAD HUGHES TOOL COMPANY ORDERED THE ENGINES AT THE DATE HEREOF AND TO THE DELIVERY SCHEDULE OF THE HUGHES TOOL COMPANY AGREEMENT WITH PRATT AND WHITNEY. IT IS UNDERSTOOD AND AGREED THAT THE $10,000 PER ENGINE WHICH BOEING AGREES TO PAY TO HUGHES REPRESENTS THE DIFFERENCE BETWEEN THE CONTRACT PRICE AND THE PRESENT SELLING PRICE OF SUCH JT3C-4 ENGINES AND HUGHES TOOL COMPANY AGREES

THAT IN=
END 3=

Exhibit A 23

WESTERN UNION

TELEGRAM

L LLU062 LONG SHEET 4=

THE EVENT THAT THE SELLING PRICE OF ANY ENGINES WHICH WOULD HAVE BEEN PURCHASED AS OF THE DATE OF ACCEPTANCE OF THIS AGREEMENT FROM PRATT AND WHITNEY IS REDUCED PRIOR TO THE DATE THE FINAL PAYMENT IS DUE UNDER THE HUGHES TOOL COMPANY AGREEMENT THE PAYMENT BY BOEING TO HUGHES TOOL COMPANY WILL BE REDUCED IN A LIKE AMOUNT.

I /B/ BOEING WILL, IMMEDIATELY UPON ACCEPTANCE BY HUGHES OF THIS OFFER, PAY TO HUGHES A SUM EQUAL TO THE AMOUNT OF PAYMENTS HERETOFORE MADE TO PRATT & WHITNEY BY HUGHES ON=

END 4=

Exhibit A 23

WESTERN UNION

TELEGRAM

L LLU062 LONG SHEET 5=

ACCOUNT OF THE PURCHASE OF SAID ENGINES PURSUANT TO THE TERMS OF THE CONTRACT BETWEEN HUGHES AND PRATT & WHITNEY.

¶ /C/ BOEING WILL AGREE TO MAKE ALL FUTURE PAYMENTS TO PRATT & WHITNEY REQUIRED BY THE TERMS OF THE CONTRACT BETWEEN HUGHES TOOL COMPANY AND PRATT & WHITNEY AND TO SAVE HUGHES TOOL COMPANY HARMLESS FROM ANY LIABILITY WITH RESPECT THERETO.

¶ /D/ THE ASSIGNMENT TO BOEING OF HUGHES TOOL COMPANY'S INTEREST IN THE CONTRACT BETWEEN HUGHES TOOL COMPANY AND PRATT & WHITNEY WILL PROVIDE THAT BOEING WILL HEREAFTER BE CONSIDERED=

END 5=

Exhibit A 23

WESTERN UNION

TELEGRAM

L LLU062 LONG SHEET 6=

TO BE THE PURCHASER UNDER SAID CONTRACT AND THAT HUGHES TOOL COMPANY WILL HAVE NO FURTHER INTEREST THEREIN, AND THAT PRATT AND WHITNEY WILL AGREE THAT NO LESS FAVORABLE TERMS AND CONDITIONS WILL APPLY TO THESE ENGINES THAN WOULD APPLY UNDER BOEING'S EXISTING CONTRACT WITH PRATT & WHITNEY.

¶ /E/ THAT PRATT & WHITNEY APPROVE THE ASSIGNMENT CONTEMPLATED HEREBY.

¶ /F/ THAT PRATT & WHITNEY WILL APPROVE REALLOCATION OF THE ENGINES BETWEEN JT3C-4 AND JT4A-3 IN ACCORDANCE WITH THE EXCHANGE OF TELEGRAMS IN AUGUST 1956 BETWEEN

END 6=

Exhibit A 23

WESTERN UNION

TELEGRAM

L LLU062 LONG SHEET 7—

BOEING AND PRATT & WHITNEY RELATING TO THE ASSIGNMENT OF THE HUGHES TOOL COMPANY AGREEMENT.

¶ THIS OFFER WILL REMAIN OPEN FOR ACCEPTANCE BY HUGHES TOOL COMPANY UNTIL APRIL 17, 1957. FAILURE TO ACT ON THIS PROPOSAL PRIOR TO MIDNIGHT, APRIL 17, WILL REQUIRE OUR OBTAINING ENGINES ELSEWHERE. PLEASE INDICATE YOUR POSITION BY WIRE.

WILLIAM M ALLEN PRESIDENT BOEING AIRPLANE CO—

EXHIBIT A 24

CREDIT MEMORANDUM 10-26-56

Los Angeles Headquarters
October 26, 1956

HOWARD HUGHES

Ben Sessel called yesterday, stating that he had attended the TWA Board meeting in Los Angeles on Wednesday. Apparently at that time Lloyd Wright introduced a motion instructing Noah Dietrich to be prepared to recommend the name of a new president for TWA at the next Board meeting. Failing that, Lloyd said he would introduce his own candidate. This was conveyed to Noah Dietrich, who was home ill, who then talked with Howard Hughes. Hughes apparently stated he felt the Board was pressing him, but that if they felt such action was proper, they should so vote. As a result the action was passed.

Ben then referred to a letter addressed to the banks, requesting authority to purchase three more Boeing 707's. Bob Gordon and I had discussed this preliminarily early in the week, and were prepared to give approval provided the documentation was satisfactory. Surprisingly, Ben had prepared a letter, which, in effect, stated that the banks were concerned about the expansion of purchases without financing, that the projection was out of date but that a substantial cash deficit was anticipated in the near future; therefore, the banks would withhold their consents until permanent financing had been arranged.

When we inquired what steps he would suggest in the event Mr. Hughes went forward anyway, there was no satisfactory solution available. We then reviewed our general philosophy; namely, that Mr. Hughes is difficult to control and his actions are irritating, but that it seemed wise to go along on minor matters, and not come to a "showdown" unless the matter is of considerable con-

sequence and we are sure of our ground. It was suggested, for example, that he probably would be taking on $15,000,000 worth of new 707's under this program, but, on the other hand, might well be selling $25,000,000 or $30,000,000 worth of surplus jet engines. Ben then stated this is just about what he will do, and that he will sell the engines at a net profit of $15,000 an engine. I also mentioned that these three new planes would give TWA a plane for training purposes several months before any of its competitors would have one, and that as a result of trading the engine commitments, TWA would be in a most satisfactory position as against its competition in obtaining the new jet planes.

In view of this, we suggested to Ben that the letter be rewritten to show that we do approve of the acquisition of the three new planes, but that we recommend Hughes Tool arrange their long term financing as soon as is practical; that they provide us with new projections that are realistic in relation to their revised purchase and operating schedules, and that they reduce their other commitments by at least the $15,000,000 of new plane orders that are being placed.

Ben seemed to be in accord with this and agreed to call this morning. Bob Kerr called Bob Gordon about the matter and had redrafted a letter, which, however, was still quite critical and on the negative side. After discussions with Nolan Browning and Tom Deane, Bob drafted an entirely new proposed letter, which is being sent to the Irving Trust Company today. Presumably Bob Kerr will let Bob Gordon know on Monday or Tuesday if our suggested letter meets with Ben Sessel's concurrence.

s/ KEATH L. CARVER,
Vice President

EXHIBIT A 25

HUGHES TOOL COMPANY

AIRPLANE PROGRAM PAYMENTS FORECAST

* * *

NOTE:

Hughes Tool Company purchased 300 engines from Pratt & Whitney of which 140 were subsequently assigned to Boeing Airplane Company. Under the assignment Boeing agreed to pay Hughes ½ of the difference between Hughes' contract cost and Pratt & Whitney's present sales price, but not to exceed $5,000 for each of 100 small engines (JT3C-4) and $7,500 for each of 40 large engines (JT4A-3), totaling $800,000, of which $40,000 has been received by Hughes. The figures in the above schedule do not include the $800,000.

EXHIBIT A 26

"Since engines were generally in short supply, at least during the initial period, or it was thought they would be, because everybody, Douglas, Lockheed—excuse me—Douglas and Boeing, was clamoring for engines, and engine availability . . . ." (Tr. Rummel-962) (R-13,608)

EXHIBIT A 27

FOR IMMEDIATE RELEASE 2/7/56

News from . . .

TWA
TRANS WORLD AIRLINES

HUGHES BUYS BOEING
JETS FOR TWA

Los Angles, February 7—Howard Hughes today announced the purchase of eight jet-stratoliner airplanes from Boeing Airplane Company by the Hughes Tool Company which in turn will make the airplane available to its subsidiary, Trans World Airlines.

"This is the first step in providing TWA with jet airplanes," Hughes said. He added that, all told, 30 jet aircraft would be ordered for TWA "during the next few months."

Boeing has contracted to deliver the eight airplanes, which cost approximately $4½ million each, during April, May, June, July and August of 1959.

Discussions are being had with the Boeing Airplane Company concerning additional airplanes for deliveries following these, the announcement said.

The jet-stratoliner model 120 has a top speed in excess of 600 miles per hour and a maximum cruising speed of 575 miles per hour. This, Hughes said, will reduce the flying time from Los Angeles to New York to four hours and fifteen minutes.

The planes will be equipped with an advanced type of engine silencer which will increase passenger comfort and reduce the take-off noise level.

Exhibit A 27

Mr. Hughes said that the planes on order from Boeing would be equipped with four Pratt & Whitney jet engines.

The jet-stratoliner is 134½ feet in over-all length, has a wing span of 130 feet, 10 inches, and will carry a pay load of 31,500 pounds.

GG:cr . . . 020756

—TWA—

EXHIBIT A 28

Sessel 10/8/58 11:12 a.m.

He called me.

Said he called Bill Gay last night and followed through as per yesterdays agreement. Gay said not to write letter or wire that he had better ask Hughes to get in touch with us immediately.

At TWA meeting both Cook and Holliday present. Neither had heard from Hughes—pointed out that Hughes Tool has not yet agreed to furnish jet planes to TWA.

Re: discussion of purchase of jet simulators by Tool Co. for use by TWA—Cook said Hughes Tool Co. had NO intention of selling or leasing their stuff (jet planes implied) to TWA—just as Sessel was explaining this (several TWA directors had immediately jumped on Cook) our telephone line appeared to open up (a click like a lifted receiver) whereupon we terminated the conversation at once. Sessel said matter could wait.

He closed by saying that nothing had happened since his call to Gay.

B of A GORDON

EXHIBIT A 29

HUGHES TOOL COMPANY
EXECUTIVE OFFICES
TWENTY-SECOND FLOOR GULF BUILDING
HOUSTON 2, TEXAS

November 1, 1957

Mr. Carter L. Burgess, President
Trans World Airlines, Inc.
380 Madison Avenue
New York, New York

Re: Purchase of Spares and Customer Furnished Equipment for Jet Aircraft

Dear Mr. Burgess:

Hughes Tool Company has ordered a number of Boeing Model 707-131, Boeing Model 707-331 and Convair Model 880 jet aircraft. For various reasons Hughes Tool Company can not yet commit itself to TWA with respect to these aircraft, either as to type or number; but, on a basis to be determined later, it is expected that some jet aircraft will be made available to TWA. Hughes Tool Company proposes, therefore, that TWA handle the purchase of spares and customer-furnished equipment for these jet aircraft under substantially the same procedure which was followed last year for piston equipment. Specifically we propose that TWA act as a special agent for Hughes Tool Company for the purchase of (a) customer-furnished equipment which may be specified in the purchase contracts and (b) spare parts and equipment which in the judgment of TWA would be necessary for the operation of the jet airplanes by TWA.

Exhibit A 29

By letter dated November 21, 1956, Mr. John A. Collings, then Executive Vice President of TWA, notified the undersigned that TWA's estimated costs for CFE and spares under the several purchase contracts (less engines but including "ground support equipment") would be $52,357,000.00. We suggest that the estimate be reviewed and (with reasonable itemization) either verified or revised on the basis of current information. Until we have approved the revised estimate, and in any event until further notice, TWA's authority to make purchases on behalf of Hughes Tool Company under these contracts will be limited to the following:

1. Spare Parts less Engines:

Boeing Model 707-131	$10,000,000.00
Boeing Model 707-331	$10,000,000.00
Convair Model 880	—NONE—
2. Ground Support Equipment	—NONE—
	HCT: HOUSTON
3. Customer Furnished Equipment	$ 3,500,000.00
TOTAL	$23,500,000.00

Within the limits of the monetary authority stated above, TWA is authorized to execute and deliver purchase orders in the name of Hughes Tool Company. The undersigned should be furnished with a copy of all purchase orders, and all amendments to purchase orders materially affecting price, but need not be furnished with miscellaneous correspondence in the administration of the purchases. When deliveries are made to the satisfaction of TWA, statements approved by TWA should be transmitted to the undersigned for payment. For planning

purposes we should also be furnished with any schedules or estimates prepared by TWA relevant to deliveries and payment dates.

For the time being, we prefer not to authorize any purchase commitments in connection with the Convair 880 program. When it becomes necessary to place orders for any material quantities of spares or CFE for the Convair aircraft either to protect delivery or price advantages, please notify us promptly and we will obtain either authority or instructions concerning such purchases.

We assume that the purchasing activities contemplated by this proposal will be conducted by TWA personnel regularly engaged in such work and that the additional overhead expenses thereby incurred by TWA will not be significant enough to justify a separate accounting. In the event that for any reason TWA does not ultimately use any of these aircraft, Hughes Tool Company will reimburse TWA on some reasonable basis for such overhead costs.

If this proposal is acceptable to TWA, please so acknowledge on the copy attached.

Yours very truly,

C. H. PRICE

CHP:bp

Approved on Nov. 11, 1957
TRANS WORLD AIRLINES, INC.

By Carter L. Burgess
President

cc: Mr. George Spater
Mr. R. W. Rummel
Mr. R. A. Cook

EXHIBIT A 31

Telephone Conversation JAC—RWR

Management position (RWR) 1956

1. Not interested at $4,000,000.00

2. Thinks it is best airplane for TWA if purchased in realm of $3,100,000.00

3. Thinks market is limited but on information that PAA will buy 30 thinks Convair may sell 150 ships and therefore recommends going forward with the deal provided contract is changed to exclude "fundamentally dissimilar" and substitute "outgrowth of design"

4. If contract is not so changed recommend not purchasing these aircraft

Added items—CAA insured for $20,000 to $25,000 but would not hang deal up on this.

EXHIBIT A 33

12/30/59—Ben Sessel

1) Holliday swaying Sessel & B. of A. revised HTC figures Holliday advised Ben they show crisis for Jan. 7 or 11 when next Boeing is due to be delivered in amount of about $2,500,000.00—needed.

Next three months HTC will need $29,000,000.00—HTC then plan $2,000,000.00 & spares TWA is buying up to 31+

2) Bill Gay called Sessel to ask him whether he believed HH understands B. of A. isn't putting up any more money. Asked Sessel to ask Carver to call HH. Sessel said Carver would not call HH again or this was his opinion.

3) Charlie Thomas called—very upset about Lockheed discussions. Sessel advised Thomas to tell HH TWA won't take Electras. Thomas said he couldn't do this. Decided to wait until January 7, Directors meeting.

4) Sessel would pass on to Gay word that we were working on a revised plan which he thought sounded very interesting because it would add up to a less potential dilution. Gay is to pass this word on to HH in hopes he may call Brandi.

EXHIBIT A 35

HOLLIDAY, RAYMOND

Mon., 2/20/61

3:30 p.m. Regarding GE engines—have been advised by GE that if HTCO wants to cancel the ten excess CJ805's it must do so by Monday 2/20.

4:00 p.m. Advised.

7:30 p.m. Cancel the engines provided we have the privilege to reinstate.

Regarding the Convair negotiations: I urge as follows: Regarding the claim that I would take AAL specs for the model 600's—this is true as to the original specs and at no time have I indicated any hesitation or uncertainty concerning the acceptance of the original AAL specs. At no time did I say that HTCO would take any subsequent change orders placed by AAL without approval of same first.

Convair's argument "why obtain TWA's opinion regarding 3% of the airplanes when TWA will not accept the other 97% is completely improper for the following reasons:

It is not up to Convair to decide whether TWA will accept the so-called 97% of the airplanes. This has never been a matter for discussion. However I obtain TWA's acceptance to this is my own problems; most likely HTCO will control TWA when that matter comes up.

In any event, it is not Convair's worry; the 97% is HTCO's problem.

Now, regarding the 3%; Convair is mistaken in saying it is HTCO's fault that this matter was not resolved because HTCO failed to give decisions; this is an invalid and improper decision which Convair is seeking to take; for this reason we do not want these 3% of changes. We have

a signed specification and that specification is the airplane we want. Failure by HTCO to accept changes ordered by AAL simply means by omission that HTCO has elected to take the airplanes without any changes and contractually unless you and R. Cook have permitted a default by failure to make payments, Convair is obligated to give us the airplane in accordance with the original specifications.

If Convair says HTCO has failed to give a decision with respect to the change orders the answer is simply we failed to order the changes when offered and therefore I say again we elected not to take the changes and this is the way we want the airplane. Convair has no right whatsoever to bill HTCO for the 70 thousand dollars. HTCO demands the airplanes according to the original specifications and does not want any of the changes.

At no time have we agreed to take blanket changes by AAL or any of them for that matter and I do not want them. In other words, Convair wants an answer regarding the change orders and here it is: The answer is no regarding all change orders regarding the original specs. Quite obviously Convair wants HTCO to accept these change orders in the interest of saving Convair money which naturally results from making the HTCO plans identical with the AAL planes. If Convair went ahead and put some of these changes into the HTCO planes it was done not because Convair thought we wanted them and not because Convair was uncertain as to whether we wanted them but simply because Convair wanted to

EXHIBIT A 36

7/11/60

Hughes has a razzle-dazzle deal on 600's.

Has orders for 4-880's. If Convair can sell these to others H. T. gets a substitute order (first call) on 4-600's. Tool Co. is supposed to lease 6-880's to N/E—Don't know whether these include the above 4—think not. In any event, gets either the 600's or 880's.

Total cost of 600's is $26,061,768.00

Hughes has credit in these of $6,515,442.00 from cash payment & some finegeling(?)

Additional cash outlay $19,546,326.00 payable as follows:

7-31-61	$3,257,721.00	1 plane del.
8-31-61	6,515,442.00	2 planes del.
9-30-61	6,515,442.00	2 planes del.
10-31-61	3,257,721.00	1 plane del.

Holliday in process of working out a cash flow sheet, through Sept. 1960—why no further. Holliday says can't go further. Kerr smells a rat—thinks may contravene HT loan agreement.

Holliday told Ben today that $25,000,000.00 will fill bill for time being. Kerr confesses he is lost—wants to sit down with Holliday & find out just what intentions re: plane purchases.

Thinks someone should talk straight with Hughes re plans. Thinks maybe we should all sit down together.

B. of A. GORDON

EXHIBIT A 37

11-7-60

I was at home—RLG called about 11:30

11-7-60

RLG & NB called me. Crown deal appears to be "on" HRH thinks 50,000 shrs.—Crown 1,500,000—now down to 500,000 shrs.—HRH wants a ceiling & right to buy Crown's option. Bob suggested Merrill Lynch as an arbitrator.

Bob talked to Kerr already (Kerr & Ben are not together on this—maybe a moratorium)

Cook in San Diego to close NE deal—HRH gave in to G. D. on price on 600's. No progress on sale of 14-880's. If Crown won't go Merrill as arbitrator HRH will call Bob.

Pat called RLB & Bob encouraged him to go ahead. Tucson appraiser (Valley Bk.)

		Val. over $10,000,000
11,000 acres—	raw land—	$10,000,000
Houston	14,450	
CC	53,000,000	

Greg called—Ready to draw agreement—Crown wants us there. All in complete agreement. Time at 2:30 Bob told Kerr who will tell Grant Keehn

---

10 PM HRH called—I was in bed—want to arbitrate—I told him Crown protested & we feel better to settle now—he seemed irritable & adamant. I told him to call us am.

B. of A. CARVER

EXHIBIT A 38

Questions—ask Howard Hughes
Equipment Program

In 4 mos from 8-29-60 H says that he plans to sell 15-131's to Amer. Airlines & take their position in 600's.

He may cancel 880 order checked 720's in flight, 880 is faster than 720's. He wants theirs if he can raise more.

1. **Who is to own the planes? (20-25-30—880's)**
   he doesn't care—TWA OK
   ordered 30 & 7 Capital—last are 22 M i.e. improved 880—option of 1 more.
2. **How is it planned to finance their purchase?**
3. **Thirty 880's were ordered originally. TWA was to take 20. Hughes Tool Company was to retain 5. What about the other 5?**
4. **What does the Tool Company intend to do with the five 880's (or 10 as the case may be)?**
   6 to go to NE—H H will buy 6-600 to replace these—
   i.e. with 11-880's—trade them or cancel
5. **How are the five 880's (or the 10) to be financed?**
6. **What about the 880's in the Capital deal?**
   a) **How many are there? (7).**
   b) **Is it planned to integrate all or any portion of these into TWA?**

Exhibit A 38

7. Are any of the original 30—CV880's intended for Northeast Airlines?
Convair will lease to N East

8. If so, how is it expected that these will be financed, by whom and when?

30—880's
6—N E
24—N East. planes—of financing covers 20 of these.

B. of A. CARVER

EXHIBIT A 39

9-15-60

OK
RLG

9-15-60

H.H. had a battle with Ray Cook about not getting. into the meetings etc. Finally HH said he is fed up on this thing. Jack Naish said no one trying to put the deal together—Jack said. Cook left out—Leslie in hospital & representation not adequate. —H. has said Cook & Holliday should represent him. Result—he has full authority—gave him news in full detail with authority to act. has given 2 days to get some action.

H. again off of Ben S.—I diverted—

Ironic that. HH equity control is real bad yet TWA has 880 & Amer & United have Electras. TWA only big line that. hasnt Electra's. H.H. says this accident not related to others but the public doesn't.

H.H. would prefer not to finance the 6-600's. but let Tool Co do it at a later date—Maybe 600's wont ever go to T.W.A.—6 not enough to do anything with

Prefer to do only 880's.

Capital—will do 10,000,000 with GD for 3½ years—HH still is not convinced he can't insist on 7 years—

Exhibit A 39

They dealt with atty since fired by Cook's firm.
Will get some money out of charity 1 way or another—maybe a loan 7 repay $18,000,000.

9-15-60—Bob Kerr told RLG that figures & new plan will go out tonight so should have Friday

Cook called Bob about HH's talk. H feels Cook should be in the discussions more—(Kept out by design.)

B. of A. CARVER

EXHIBIT A 41

AMENDMENT No. 1

to

Purchase Agreement dated 10 November 1960

by and between

GENERAL DYNAMICS CORPORATION
(Convair Division)

and

HUGHES TOOL COMPANY

THIS AGREEMENT (hereinafter called "Amendment No. 1") entered into as of this 22nd day of February 1961, by and between GENERAL DYNAMICS CORPORATION, a Delaware corporation, having an office (Convair Division) at San Diego, California (hereinafter called "Convair") and HUGHES TOOL COMPANY, with its general offices at Houston, Texas (hereinafter called "Buyer"):

WITNESSETH:

WHEREAS, Buyer and Convair have entered into a Purchase Agreement dated 10 November 1960 relating to the purchase and sale of six (6) Convair 600 aircraft (said Purchase Agreement hereinafter referred to as the "Agreement"); and

WHEREAS, Buyer and Convair now desire to amend said Agreement to provide for the purchase and sale of seven (7) additional Convair 600 aircraft; and

WHEREAS, Convair's Detail Specification Report No. ZD 30-010 dated 1 August 1958, Revision 4, dated 16 November

1960, together with Addendum III dated 3 May 1960 referred to in the Agreement does not properly describe the aircraft which are the subject matter of this Agreement; and

WHEREAS, Buyer and Convair desire to amend said Agreement to properly describe said aircraft and to otherwise reflect the agreement of the parties hereto;

NOW, THEREFORE, in consideration of the mutual covenants herein contained, the parties hereto agree to and do hereby amend the Agreement as follows:

1. By deleting paragraph (a) of Article 1 in its entirety and substituting in lieu thereof the following new paragraph (a):

   "(a) Six (6) Convair 600 aircraft (hereinafter called "Group A Aircraft") and seven (7) Convair 600 aircraft (hereinafter called "Group B Aircraft"), both groups sometimes hereinafter collectively called "Aircraft". Such Aircraft shall be manufactured by Convair in accordance with the terms of this Agreement and Convair's Detail Specification Report No. ZD 30-010 dated 1 August 1958, Revision 4 dated 16 November 1960, together with Addendum III dated 3 May 1960 and Report ZM-645 dated 11 January 1961, revised 21 February 1961 (hereinafter collectively called "Detail Specification") as set forth in Exhibit A attached hereto and made a part hereof, as the same may be modified pursuant to Article 5 hereof."

2. By deleting Article 2(a)(1) in its entirety and substituting in lieu thereof the following new Article 2(a)(1):

Exhibit A 41

"(1) The Aircraft shall be tendered for delivery to Buyer, serviced except for fuel, ready for flight, not later than the last day of the month set forth in the following schedule:

Group A Aircraft

Month of Delivery	Number of Aircraft
December 1961	One (1)
January 1962	Three (3)
February 1962	Two (2)

Group B Aircraft

February 1962	One (1)
March 1962	Three (3)
April 1962	Three (3)"

3. In Article 3, paragraph (a), by deleting the figure "$26,061,768" and inserting in lieu thereof the following figure: "$56,467,164".

4. By deleting Article 3(b) in its entirety and inserting in lieu thereof the following new paragraph (b):

"(b) Payments. The total price of the Aircraft purchased hereunder shall be paid as follows:

(1) An initial installment payment applicable to Group A Aircraft in the amount of $3,257,721, receipt of which is hereby acknowledged.

(2) Two (2) additional installment payments applicable to Group A Aircraft as follows:

Amount	Due Date
$2,606,176.80	February 1, 1961
$2,606,186.80	May 1, 1961

The above installment payment due February 1, 1961 may be made in the form of a negotiable promissory note bearing interest at the rate of six percent (6%) per annum payable to Convair and due and payable June 1, 1961.

(3) An initial installment payment in the amount of $5,827,700.90, together with interest thereon at six percent (6%) per annum from February 1, 1961 until paid, applicable to Group B Aircraft, upon execution of this Amendment No. 1. Said installment payment may be made in the form of a negotiable promissory note bearing interest at the rate of six percent (6%) per annum dated February 1, 1961 payable to Convair and due and payable June 1, 1961.

(4) Two (2) additional installment payments applicable to the Group B Aircraft as follows:

Amount	Due Date
$2,153,715.55	June 1, 1961
$2,153,715.55	November 1, 1961

(5) The balance of the Base Price of each Aircraft increased or decreased as the case may be by Change Orders, if any, pursuant to Article 5 hereof upon tender of delivery in accordance with Article 2 hereof, of each of the Aircraft manufactured in accordance with the terms of this Agreement and the Detail Specification."

Exhibit A 41

Except as specifically amended hereby, all terms and conditions of the Agreement shall remain in full force and effect.

Executed in quadruplicate the day and year first above written.

GENERAL DYNAMICS CORPORATION

By .....

Title President—Convair Division

Attest:

HUGHES TOOL COMPANY

By C. H. PRICE

Title Vice President

.....

Assistant Secretary

EXHIBIT A 42

12-13-54 Ben Sessel

———in L.A.

HH may have a 102 problem proposes now contract to buy 75 MM in planes from Lockheed (way ahead of DC-7) 3 MM cost each.
Standby 2½ or 3 yrs—for 35 MM thereafter TWA will take down
wants to confine it to bank in the personal loan
Irving will take 12 500 M only if planes are certificated or could be leased or sold to TWA

EXHIBIT A 44

December 23, 1954

CONFIDENTIAL

TELEPHONE CONVERSATION WITH MR. HUGHES THE EVENING OF DECEMBER 22, 1954

Last evening, December 22, was the climax of several months' intensive activity which resulted in Lockheed signing contractual papers for the acquisition of twenty-five (25) Lockheed Model 1449A type aircraft by the Hughes Tool Company, with right of assignment to TWA by Hughes Tool, without Lockheed's consent.

It became apparent early in negotiations that the Model 1449A as proposed by Lockheed will be fundamentally uneconomical because the fuselage size will not permit carrying enough payload to produce sufficient revenue to have a reasonable break-even load factor. Seating capacity is virtually the same as previous models, while operating costs are substantially higher. Balancing this to some extent is the higher speed of the airplane which will tend to promote the sale of more seats than would otherwise be the case.

I have steadfastly maintained, and pointed out to TWA Management, who has concurred, and personally to Mr. Hughes, as well as to Lockheed representatives, that I believe the airplane as proposed to be an unsound project, primarily because of over-all economical aspects. I have also pointed out ways whereby this condition could be rectified by LAC making it an attractive, worthwhile project.

Numerous discussions were held with Lockheed representatives re operating costs during which period Lockheed raised its operating-cost-per-hour estimate from $486.92 to

$541.95, TWA's cost-per-hour estimate being $615.58. This compares to $410.39 for the Douglas DC-7C. These cost figures included here are for domestic operation only.

During the evening of December 22, Lockheed centered its activities in the small walnut-lined conference room downstairs to the left of the lobby at the Beverly Hills Hotel, Hughes Tool Company occupying the Promenade Room to the right of the lobby. Hughes Tool representatives were Ray Cook and Mickey West. TWA observers and commenters were Harry L. West, Ralph L. Ellinger, Edward S. McCarthy and the writer. Lockheed representatives were Leonard Schwartz, Kirk Yost, Walter Wayman, Ben Brundred and Rodgers Donaldson.

I explained a second time to Ray Cook in the Polo Lounge immediately following dinner why any present deal should be made contingent upon final resolution of the specification satisfactory to both parties, why risk associated with CAA certification warranted special contractual protection, and that Hughes Tool should not consider Lockheed's price for the airplane firm because of the very incomplete airplane specifications. My personal estimate of airplane price relayed to Mr. Cook was that each airplane would cost approximately three million dollars when delivered, rather than the $2,690,817.00 stated in the Contract.

The discussions with Ray Cook and Mickey West continued in the Promenade Room, during which time I pointed out that Contract LD-111 between TWA and Lockheed was handled in precisely the manner I was recommending in this instance, and that I estimated that this handling resulted in saving TWA a million and a half dollars in that instance. I also stated that much more would likely be saved in this instance if the same procedure were followed. In my opinion, LAC, if pushed, would have agreed to this

contingency. LAC's willingness to go along with this condition was confirmed by Kirk Yost following the signing. He stated that LAC had approached Hughes several days earlier urging that no papers be signed until specifications were agreed upon and that Mr. Hughes turned this down.

During the discussions, Leonard Schwartz came to the door and advised Ray Cook that Mr. Hughes was on the telephone and wanted to talk to him. Cook asked that I accompany him to the telephone in the Lockheed quarters, which I did. Cook pointed out to Hughes that I had serious objections to the form of contract being proposed and urged Hughes to discuss these points with me. Mr. Hughes, who was calling from Palm Springs, where he had arrived late that afternoon, elected to talk to me.

Howard opened the conversation by asking what I had done about the price of seats. As background information, several weeks ago Mr. Damon mentioned in a telephone conversation with Hughes that Lockheed's price was less passenger seats. Mr. Hughes asked me a day or so after his conversation with Mr. Damon if Mr. Damon's statement was correct. I replied that it was my understanding that it was, but that I would re-check the specification status and determine whether seats were still called out as C.F.E. I advised him about one day later that seats were not included. That followed a conversation with Leonard Schwartz during which time Leonard explained how Lockheed had arrived at this position. I relayed all this to Mr. Hughes, after which he instructed me to follow pricing carefully in order to advise him later of how Lockheed had arrived at its final price, and whether or not I considered it fair. The morning of the 22nd Mr. Hughes instructed me by telephone to insist that LAC include passenger seats in the quoted airplane price. In reply to

Exhibit A 44

Hughes' direct question the evening of December 22, I stated I had talked to Schwartz about the seat price again, and that he had maintained his position. He then talked to Leonard Schwartz, who pointed out to Howard he was a little unhappy that this item should come up at this time, particularly in view of his earlier conversation with me on this subject. Leonard then advised Howard how Lockheed had determined that passenger seats were not part of the airplane price. The statements were essentially parallel with his earlier conversation with me, which I had relayed to Howard. Howard then talked to me again and stated that Leonard had explained how the price was arrived at, and he was satisfied.

I pointed out again, as I had done before on several occasions, including the morning of the 22nd, that the airplane specification, in my opinion, was not sufficiently complete to be suitable for use as a contractual instrument, and that I felt the most practical way to proceed in order to have the best possible negotiating position was to make the deal contingent upon resolution of specifications mutually agreeable to both parties by a date, such as March 1, or better yet, April 1, that being the estimated time required to do a reasonably complete job. I suggested the contract price could be tied to the specification as currently developed and made subject to additional reasonable costs or credits as specification resolution advanced. Mr. Hughes flatly rejected this proposal on the basis that he felt he must wind the deal up right away, and that he trusted Lockheed, that he believed Lockheed would do a good job, that he believed Lockheed would be fair because they knew that if they weren't we would not buy additional aircraft from them, that he felt I should be reasonable in my requests to Lockheed. I pointed out that what I was suggesting was exactly the form used

in Contract LD-111 which resulted in a much better airplane for both TWA and Lockheed, and that the situation worked smoothly. He repeated that he felt he must conclude arrangements and that he thought Lockheed would do a good job and that the existing form of contract should be used.

I then pointed out to Mr. Hughes that in my opinion the airplanes would cost about three million dollars by the time they are delivered and that we were subject to high cost increases because of the pricing activities that Lockheed would indulge in as permitted by the proposed form of contract. Hughes stated that he had a verbal agreement with Bob Gross and Leonard Schwartz that Lockheed would not sell airplanes to others at a lesser price than to Hughes Tool, and that this agreement embraced the concept that if small quantities of airplanes were sold to other customers, that price differential in view of the relative quantities between such customers and Hughes Tool would be considered to exist in that appropriate price reductions from Lockheed would be considered part of his verbal agreement, and that for this reason he was not worried about the price.

I mentioned I felt the contract permitted unnecessary customer risk re CAA certification. He said with respect to CAA certification that he felt we should not raise this issue any further because Lockheed would do a good job in this regard.

I pointed out to Mr. Hughes that Lockheed intended to exclude the "Hell, No!" list of items, the accomplishment of which I felt was vital to building a successful airplane. Typical items included were lengthening the fuselage by a hundred and twenty inches to permit carrying additional payload, installation of four-wheel type main landing gears

to permit use at otherwise restricted airports, further evaluation of structural characteristics in light of possible negative torque control failure, installation of power plant water injection, etc. Howard said he thought Lockheed would be willing to consider these items, and that they would be fair in their evaluation. He also stated that he felt Lockheed would cooperate fully. He asked that I contact him personally later on regarding any items that I felt Lockheed was being unreasonable on, and that he would handle those directly with Gross.

In closing the conversation with me, Howard again stated he trusted Lockheed and thought they would do a good job.

Following this conversation, papers were promptly executed by Lockheed and sent by special Hughes messenger to Houston to be available for the Hughes Tool Company Board Meeting today.

Mr. Hughes had negotiated a side letter agreement with Mr. Schwartz and Mr. Gross relating to the basic economy of the airplane. It stated in essence that the operating cost would have to be shown to be reduced by seven percent (7%) below the Lockheed estimated cost figure by March 1, or either party could cancel the contract.

s/ R. W. RUMMEL

RWR:JC

EXHIBIT A 45

5/25/61

Re: TWA—Notes of Meeting with Chester Davis

FHB & I met with Mr. Chester Davis at his request. He talked with us for over an hour. Most of his speech covered the events of the period since May 10th—and was largely a repetition of what he had stated in the May 19th letter. He emphasized his desire to get relations back on a satisfactory basis between him and his firm and his firm and Lehman. Other remarks which were, or may be, significant include the following:

1) He emphasized that he had a letter from HH personally appointing him as V. P. & General Counsel for HTC. He said he had made it clear to HH that this empowers him to make commitments for the HTC which would be fully backed up by HTC Board approval when necessary. He offered to show us the letter.

2) In response to a direct question from FHB, he said HTC was going right ahead in accordance with its agreements with TWA to accept the Sub. Debs. which it is obligated to take upon conclusion of the offering to stockholders.

3) He said that we should know that his client had every intention of doing everything he could to "bust up the Boeing deal".

4) He indicated that he believed most of the other "positions taken" in his letter could be removed—that certainly HH had no objection to our efforts as financial advisor or our raising funds for TWA (but not for the Boeings). He emphasized this point by asking why TWA couldn't raise the new funds on "open account" and

then later decide what kind of planes it would buy. I explained that this simply wasn't a feasible way to finance in amounts of this size for an airline, even if TWA wanted to do it that way.

5) He volunteered that his client was worried most of all by the "Cahill study".

6) He said that he had insisted on the disclosure of HTC's possible positions vs TWA at this time for disclosure in the R.S. because if these disclosures were not made, HTC was liable as an underwriter and would therefore be effectively barring itself from raising the positions later if it allowed the R.S. to become effective without disclosing "its positions".

7) He asked if our three firms would be willing to sit down with him and Holliday to discuss a secondary on HTC's Sub. Debs. after they had them—say on or around June 15th. I replied that we had already advised Milner we would not say now that we would not be willing to discuss this matter at a future date but that what we would be willing to do at that time would depend on the situation existing at that time.

I emphasized that he was not in any way to construe my remarks as indicating that we would be willing to undertake this job for HTC. I emphasized that we were acting as investment bankers for TWA and that by his own statements at this meeting and in his letter of May 19th he had made it clear that HTC was taking an adversary position against TWA—threatening suits and stating positively that their objective was to "bust up the Boeing deal". Under these circumstances I asked him how we would possibly undertake the job for HTC. He said of course the situation

might be corrected by June 12th. I said that was of course possible and that was why I was not taking the position that we would not be willing to take a new look at the situation in the future. I said however that our position could only be changed if both we and TWA were satisfied with the changes which had taken place in their position.

8) Just as he was leaving he indicated that HH would feel much better if he could persuade the voting trustees to allow him more representation of the Board by men of more stature than HTC's previous representatives. I pointed out the voting trustees had originally tried to work on a cooperative basis—the HTC representatives had not cooperated and that in any event this was not a matter in which we as investment bankers for TWA had any part.

EXHIBIT A 46

9-13-60

12

Hughes 4:30 he called Around 9/13/60

Leslie getting in men right away to work on the figures. Take $15,000,000 if that would buy 3-22M's—When Convair would have to finance.

Told him physically impossible to get bank clearance in time to present to Equitable in time for Tuesday meeting.

6:40 pm: Talked to Sessel & told him about talks with Hughes, everything but name of X & terms of contract. $22,000 deal, etc. Leslie on & $15,000,000 deal.

Things to resolve with Keath:

I feel we shouldn't buy anything unless absolutely supported by figures. B of A being made to look bad on $15,000,000 payment requirement. We should be ready to state whether we will stand pat or offer an alternative, depending on what the figures show.

There are at least 3 alternatives:

1. Go along with the Tool Company loans only and get into the TWA picture as running room develops. This would make the other banks happy. I don't like it much.

2. Accept the 22M vs 880 deal as proposed by Hughes, provided the figures make sense. This would give us an immediate pay down and would provide for extra payments on TWA loan as 880's are sold or better would necessitate reduced financing for TWA on 600's because of the introduction of new money into TWA from sale of 880's to others. This presents the possibility that the 880's may not be sold as planned.

EXHIBIT A 47

FORRESTER, WM. A. JR.

Fri., 10/28/60

12:30 p.m. (Per Opr) Get him on the line.

INFO They talked.

2:00 p.m. Call him back and tell him that for his information that Charlie Thomas negotiated and developed the deal with Dillon Read financing plan without my authority or encouragement from me; he forced it down my throat then at a Board meeting at which time he created a coalition of my directors and turned them against me and faced me with a mass resignation of all but one of the TWA directors. I have never liked this plan; I have never been in favor of this plan; I have fought it from the very beginning and I am still fighting it and I assure you that if it is employed it will be over my dead body and if you would like to come up with any suggestions of an alternative plan or any way whatsoever by which I can avoid being forced into the Dillon Read program, I would be most grateful. It is very flattering for you to say that you don't think I have ever been forced to do anything and maybe there was a time when this might have been a fairly accurate statement, but I assure you it is not true today and has not been true concerning this Dillon Read program from its inception. I have fought it hammer and tong from the very first day that I ever heard of it.

2:30 p.m. Ans: Advised.

Mon., 10/31/60

Exhibit A 47

11:50 a.m. Must speak to HRH.

INFO Omit; they talked.

Wed., 11/2/60

8:20 a.m. Tell HRH I would like to talk to him. I think I've got a plan on a second problem of his which he asked me to think about and I think it will have a bearing on the first problem.

Wed., 11/9/60

12:25 p.m. (Per Holiday) Anxious to talk; at Mr. Gordon's request, Forrester is meeting with Gordon in the morning, and must talk before then.

2:15 p.m. Tell him that I have been on this deal with Crown and the Convair people this entire day and I am not going to be able to talk to him until tomorrow.

EXHIBIT A 48

12-4-60

At my option & keep secret.
When deal is done—then at our discretion we will return it to him. (Ask Hugo—do I take as officer or personally?)
His plan to try to get them to go w/o signing because if hazard to Trustee so try to do it w/o signing—If can't do it

(1) Execute Bills document & get it in NY by 9 AM Monday. This will be done.

(2) Our 2 documents depends on Irv. action. That we hold it in Trust is confidential. (Tell Greg) Has read all of the documents and he says if I make a representation to Irving he will go ahead

(3) At our meeting both of us will attend.

(4) When Doc delivered RLG will not be there.

3 things came to HRH attention this week—anti-DR.—

(1) 102 Tax situation—It is real bad & 3 weeks before year end. —M L is better—have c/h of Board & only need to get 1 man (Nixon?) so he would have to set out at once to refinance.

(2) Very Confidential—Will be a bill introduced & will pass Gov't financing of Air Lines similar to Feeder line financing.

(3) Another Tax matter

end talk 10:55

B. of A. Carver

Exhibits B and C to the Affidavit of John F. Sonnett dated February 1, 1963
[Doc. 167]

EXHIBIT B: A. V. Leslie's "TWA, An Appreciation"

TWA EXHIBIT 9

March 1960

TWA

An appreciation—

Background—

During 1956 Hughes Tool Company acting through Howard R. Hughes, placed orders for 18 Boeing 331, 15 Boeing 131 and 30 Convair Model 880 jet airplanes—(stated at the time, and reported many times since, to be for TWA use) plus spares and spare engines (somewhat later) in the order of 4.4 million. Total commitment was approximately 300.1 million.

R. W. Rummel, then Chief Engineer and now Vice President Planning of TWA and who is understood to be on Toolco's payroll, as well, acted for Hughes in negotiating the contracts and specifications and placing the orders for spares provisioning etc. for Toolco account.

It was stated by Hughes at the time the orders were placed (among others the writer) that TWA was not to concern itself with the financing of this equipment as he through Toolco, would find initially the required funds.

The first deliveries of this equipment, the 15 Boeing 131's took place during the period January—October 1959. Hughes not having arranged permanent financing, Toolco borrowed short term funds from Bank of America—Irving, using the airplanes as collateral and they in turn were leased to TWA on a day to day basis cancellable by either party on one day's notice. CAB granted approval of this

arrangement as required under the Toolco control case of 1944 for a period until June 30, 1959 on the general understanding that within the period, permanent financing would be arranged.

Such leases also required the consent of the Equitable Life Assurance Society holders of TWA's 3¾'s 1969 of which 34 million were outstanding at that time (and 31 million at present). Equitable indicated that it would not approve such leases. Even so, the lease agreements were executed by Toolco—TWA but no lease payments have been made to Toolco; due to lack of necessary consent and accruals at year end were 8.3 million.

The planning of the Finance Department had assumed that the provisioning spares and spare engines for the program would be provided for in the long term financing package. Failing this however, Toolco during May 1959 requested that TWA purchase the 15 million of 131 spares required and this was done from current cash.

In this connection in May and July, CAB granted approval for continuance of lease to September 30, 1959 and for TWA to purchase Toolco spares and engines. On September 30, CAB extended right to lease the 15 Boeing 131 planes "until permanent financing arrangements are completed".

During November deliveries against the Boeing 331 contract commenced and five have been leased to date of March 9. Motion filed with CAB November 6, 1959 and granted 29 January 1960, providing for lease of 8 Boeing 331 and 8 Convair 880 planes and purchase of spares and engines therefor on order by Toolco. No time limit was placed on such leases.

The spares orders by Toolco for 12 Boeing 331's was 8.4 million, for engines 8 million and for 30 Convair 880's spares, 2.5 and engines 9 million. Some 5 million more of

Convair spares must be ordered by either TWA or Toolco to place this fleet in operation.

During mid 1959 with lack of financing, Hughes achieved agreement with TWA (as the result of a study by Rummel) that it did not require the full block of airplanes on order. Thereafter 6 of the order for 18 Boeing 331's was sold to Pan American with proportionate spares and engines and TWA was given to understand it would receive but 20 of the 30 Convair 880's on order.

Thus TWA's present planning is predicated on a substantially lower number of planes than was thought necessary during 1956. The initial planning of TWA's jet needs appears to have been a matter of decision between Hughes and Rummel—approved by TWA and not an initial appraisal of needs by TWA concurred in by Toolco.

Failing long term financing Toolco has been able to handle the plan to date:

(1) By pledging 18 of the 20 planes (15 Boeing 131's—5 Boeing 331's) against short term bank loans from Bank of America—Irving.

(2) By sale of 6 Boeing 331's to Pan American.

(3) By inducing TWA to purchase the Boeing 131 spares and spare engines, 15 million and to purchase 20 Boeing 331 spare-engines; 4.3 million—a total of 19.3 out of cash working funds.

(4) By delaying the delivery of Convair 880's through the device of having them removed from the production line before completion. Three should by now be available to TWA for training. It is understood that contract delivery dates have been allowed to be set forward from March and April to May—which will delay scheduled service until July—missing the peak traffic month of June.

Exhibit B

(5) By putting forward the contract date for delivery of Boeing 331 airplanes—concomitant with the Pan American sale of February delivery date airplanes to April and March airplanes to May.

As of this writing, the banks appear to have refused to loan more funds (and may be up to their loan limit) and as of March 10;

(a) Two Boeing 331's which have been accepted for delivery for Toolco's account by TWA engineers are resting at Boeing since February 29, and March 4 without funds made available by Toolco for this purchase. Balance required approximately 8.2 million. Next plane is due for delivery April 24.

(b) A Link Simulator for the Convair 880 under Toolco order has been accepted for delivery by TWA Engineers without funds provided by Toolco. Balance of Purchase price requirement—$375,000.

(c) Some 4.9 million of Boeing 331 spares and 7 million of Convair spares under Toolco order have been delivered to TWA depots. From the dunning received and passed on to Toolco—a major portion must be overdue in payment—with an additional 2.5 million scheduled for delivery during March.

Under present circumstances it is impossible for TWA to make any forward plans—for placing in service of the 20 Convair 880's and 7 Boeing 331's which were anticipated to produce a major part of system earnings during 1950.

Management of TWA is caught in a dilemma:

When and if the airplanes are delivered, trained staff must be on the payroll in all departments to care for the increased activity. Yet, there can be no justification for

the costs of such staffing and purchase of needed spares by TWA on its own account if the equipment is not to be made available and on a timely basis.

Without the equipment it is probable that TWA will be financially embarrassed by the year end—since 1960 in any event, has been forecast as a year of but modest profit.

Despite the situation which exists with Toolco unable to meet obligations during the next six months of some 125 million of which some 30 million is due in the next 60 days, information has come to hand that Hughes is negotiating for a further large fleet of Convair jet airplanes of the 600 model.

Financing Negotiations to date.

During October of 1958, Hughes employed First Boston Corporation on a fee basis of $25,000 per month to devise a plan for financing the TWA-Toolco jet program (Apparently the firm was suggested to Hughes by officials of Lockheed. Studies were made by this firm through December 1958. At that time George Woods, Chairman of First Boston, informed Hughes by telephone conversation that their work had progressed to a point that a face to face discussion and decision for definitive action was indicated. Hughes is said to have refused to meet Woods and First Boston then bowed out of the picture.

During February 1959 Hughes commissioned Dillon Read (along with Lazard-Lehman) to work up a financing plan with compensation entirely out of underwriting fee, if done. Finance Department worked closely with the Dillon Read group on the development of a plan which was passed upon as to Revenue and Earnings potential through 1961, by Coverdale and Colpitts.

Exhibit B

This has been called the May 18 plan. Hughes found fault with this plan and a number of variations were prepared, none of them acceptable to him. The last one was dated during August 1959 and since that time Dillon Read has done nothing. Nor has any other group.

Despite the passage of time and building up of a foreseeable financial crisis, TWA has not been given freedom to seek such financing with assurance of minimum equity supplied by Toolco necessary to support the practical maximum of debt.

As the situation stands, Toolco has run out of cash funds and bank credits with 125 million jet program requirements yet to be met, while TWA has spent some 53 million of its funds in provisioning ground support equipment, training and rentals with planes held only on a day to day basis.

It would be a euphemism to say that Toolco's immediate financial position is precarious.

To develop the argument

Assume Toolco shows a net profit after taxes from its Tool Division of	5,000,000
In addition	
Assume Toolco is borrowing 90 million at an assumed rate of 6% to carry airplanes etc. or annually	5,400,000
It is leasing airplanes to TWA at rentals per year of approximately	20,000,000
Against these planes it can take depreciation of	12,000,000
Which produces a nominal profit of	8,000,000
Using interest as an offset to profit	5,400,000
Net Profit on Lease account	2,600,000
Income tax at 50%	1,300,000
Net profit	1,300,000

Exhibit B

However, since it is not receiving in cash any of the lease rentals due to lack of Equitable's consent, the net cash drain would appear as follows:

(1) Net profit of Tool Div.		5,000,000
Less interest on Borrowings ..	5,400,000	
Income tax payable on profit not received	1,300,000	6,900,000
Cash drain for year		1,900,000

All this with a current minimum cash position, loaned up and 125 million of near term capital contracts to be paid for.

Assumed position of parties at interest:

Hughes-Toolco Banks

The banks concerned Bank of America-Irving, appear to have belatedly recognized the seriousness of the situation and have refused to make further loans without a firm long term financing plan. It may be presumed they keep as fully informed as need be and are forcing receivership for Toolco for certainly it is insolvent. They must believe that this is the only course that will lead to a solution of a problem which has developed as a result of their complacence in granting credit with no plans for repayment.

These loans appear to be money good in liquidation comprising jet aircraft pledged, having a cost of roundly 100 million—78% of TWA stock pledged with a market value upwards of 70 million, or total realizable collateral value of say 150-170 million, plus a general creditor position.

Exhibit B

Equitable Life Assurance Society Position

Equitable the chief creditor of TWA, as holder of 31 million 3¾s 1969 wrote Hughes strong letters during 1958 and 1959, expressing their concern at the lack of a financing program. They had indicated to TWA in this connection that they would be helpful in a sound program. No replies to these letters have been received to date.

On November 25, 1959, TWA paid Toolco—12 million on a note which became due as its working capital exceeded 27,000,000, which occurred at the October month end. Equitable took exception to this payment of TWA funds (even though deemed a valid demand by Toolco—according to TWA counsel) and have reserved the right to declare a default. They question also the accrual of lease rentals on jet airplanes by TWA in favor of Toolco, inasmuch as the leases have not been approved by them and again have reserved the right in this instance, also to declare a default.

In a recent meeting of Cowie, Vice President Equitable, Cook, Personal attorney of Hughes, and the writer, Cowie indicated Equitable would not be inclined to agree to any financing plan in connection with which TWA used any of its funds to pay off Toolco investment in the jet program i.e., that this should remain in TWA as Equity support of any borrowings required.

On its face such a stand would prevent Toolco paying off its bank loans except by sale of this additional stock, some 110 million.

They are well aware of the pressure which is placed upon Toolco by its non-receipt of jet lease rentals accruing at a 20 million annual rate.

In a recent luncheon meeting of the writer with Grant Kheen, Executive Vice President, Equitable, he stated that he would not entertain the submitting of any financing pro-

gram which did not carry approval of and necessary commitment by Hughes to carry through.

They recently refused to approve negotiation of lease of the unpaid for planes at Boeing on basis would only delay solution of overall problem.

Boeing certainly must be increasing its bank borrowings as a result of Toolco non payment. Their banks National City lead, Morgan Guaranty et al may counsel declaring a default—to free Boeing to sell to other customers or deal with TWA direct.

Boeing Position

Unknown—Toolco now owes them 8.2 million for 2B 331s not picked up and it is understood that there are overdue payments in excess of 1 million on spares delivered to TWA, for Toolco account. The 3rd airplane is scheduled for delivery about April 24.

Convair Position

Convair is eager to sell airplanes and apparently somewhat naive in dealing with Hughes.

(1) They have allowed time to take the first three of Toolco-TWA 880s off the production line in a manner which delays Toolco's necessity of payment (and harms TWA by denying it the use of the plans for its training).

(2) They have agreed to a delaying of delivery dates from March and April to May of some 5 planes (Exact number not known).

Exhibit B

(3) Despite the precarious financial situation of Toolco as set forth in this paper, General Dynamics president is currently discussing with Hughes the purchase of an additional block of Convair 600 model. The number is stated nominally 20 to 40—i.e. in dollar terms $100,000,000 to $200,000,000.

Convair is slated to have a training 880 ready for delivery to TWA March 14—no funds appear available for payment.

One might expect this would modify General Dynamics Convair rosy view of the situation when it will be in the same situation as Boeing. Again General Dynamics—Convair would be forced to draw on bank credits to cover non-payment—and prospect of non-payment against the balance of the contract.

Chase Bank—are the lead in General Dynamics—others are in—for example, Bankers Trust—who criticize the lack of information which has been provided about General Dynamics affairs. Chase may also counsel defaulting the contract and proceeding against Toolco.

TWA Counsel.

Chadbourne appears to be extremely concerned about TWA Management lack of diligence in making clear to Hughes the adverse effect on TWA through the lack of jet financing. They are proposing a letter to Hughes that Toolco give TWA an option to purchase the planes and equity support amounting to his current investment in the program and authorize TWA to work out its own problems. Chadbourne's apparent concern is the probability of successful minority stockholder action against TWA management and directors as well as Toolco—and Hughes if plane deliveries are not made on schedule due to lack of funds.

Exhibit B

TWA President's position.

The President has had talks with Blyth and Company—Specifically Donald McDonnell (who is a director of General Dynamics)—concerning a plan which would finance the current jet program—plus 20 additional Convair 600s (at about 100,000,000) Blyth was asked to determine from General Dynamics the amount of subordinated debt they would take to make a plan feasible.

The plan supplied to McDonnell was Finance Department's No. 11. This plan was hurriedly put together as to the revenue side by Planning and costed out as to expenses by Finance. It is considered by the writer over optimistic as to revenues. For example—Coverdale and Colpitts would probably knock it down substantially as to revenue and profit.

Hughes is understood not to know of this TWA-Blyth talk.

Hughes

Hughes is known to be talking with Johnson, General Dynamics President about purchase of additional Convair airplanes of the 600 series.

He is known to be talking with Keath Carver about loans and getting nowhere.

He is working on a program for TWA advertising with TWA's agency—Foote, Cone and Belding. Meanwhile TWA had had no newspaper or magazine advertising since February 11. It is improbable that F.C. & B would release any advertising if so directed by TWA without Hughes approval.

Exhibit B

C.A.B.

The C.A.B. have been complacent about the lack of financing to date.

However, default by Toolco on its contracts is bound to come to light shortly and it will be compelled to review Hughes control. If his control has worked a hardship on the company and its minority stockholders, it probably would deny his holding of stock voting rights. This would result in a new Board of Directors for TWA, made up of minority stockholders. There are no sizable blocks. Although much stock is in street names—probably not more than 10,000 shares in any individual holding. —Merrill Lynch—largest street name holder.

TWA position

From a recitation of fact and surmise concerning the magnitude of the problem and the stake and relative position of the parties at interest, what should be expected and anticipated.

(1) Toolco-TWA jointly have resources at their disposal to finance the current jet program and this without a diminution of Toolco-78% control.

(2) Despite this Hughes unwillingness to face the problem, leaves no time for a plan to be devised before the creditors move in.

(3) No insurance or banking group would finance TWA unless TWA were defended against Hughes in the future—that the current situations might not again occur.

Exhibit B

(4) TWA current Board of Directors are straw men—and thus will take no action unless forced to by Counsel. Counsel in turn are forced to demand action of the Board to protect their professional standing—or failing action to resign.

(5) Toolco banks will loan Hughes no more money.

(6) Equitable will not allow a transfer of loans to Toolco over to loans to TWA in connection with jet programs.

(7) Aircraft manufacturers have major funds involved which can only be paid off through TWA operation of the planes. Finally, Toolco is insolvent and headed for early receivership. This would be caused by small vendors to Toolco upon public knowledge of his inability to pick up planes when?—within two weeks or by March 20.

Action indicated upon appointment of a receiver for Toolco and Hughes individually.

(1) Banks would immediately move to reduce collateral to possession—i.e., Leases would be denounced and Marshals ordered to seize planes, wherever they might be. This would be first step in negotiating a new lease with TWA with banks as owners of airplanes. As far as TWA is concerned at this point, Bank of America-Irving are adversaries, therefore

(2) TWA would immediately confer with Equitable as to advisability of appointing a receiver for TWA. This might be indicated for a short period.

(a) To defend TWA against unreasonable lease agreement with banks.

(b) To provide: a rallying point where all parties at interest could be brought together.

Exhibit B

(3) Equitable has a poor collateral position and will probably be required to put up additional funds to work out of situation. Therefore they are the key. Possible they might put up funds and take control without receiver.

(4) TWA should, with Equitable, immediately bring together Boeing, Convair-Pratt and Whitney and General Electric.

Suggest that they all declare defaults on contracts to free them up to work out a plan of permanent financing and still retain their progress payments.

(5) TWA with Equitable should sue Toolco-Hughes for damages—implied contract default.

Sue against payment by TWA of 12,000,000 on ground this was demanded with receivership of Toolco anticipated.

(6) Plan should be based upon each party at interest taking slow motion money to extent of 50%.

A possibility

Program—30 Convair—12 Boeing 331s—15 Boeing 131s —Spare Engines etc. 385 million market value—securities to be issued.

	Cash	Bank Loan	Ins. Co. New	Inc. Deb.	Equity
Banks—80 MM		61-66	66-76	61-76	
Hold 20 planes as collateral for Toolco loan—Sell to TWA at 100 MM		unsec.			
Cost approx. 110 MM		50		50	
Convair—30 880s 128 MM					
Less progress payments 28—net 100 MM	50			50	

Exhibit B

	Cash	Bank Loan	Ins. Co. New	Inc. Deb.	Equity
Boeing 7-331s @ 299 Less progress payments 5 net 24 MM	12			12	
General Electric 58 engines 9 MM	4.5			4.5	
Pratt and Whitney 20 engines 4 MM	2.0			2.0	
TWA to fund purchase of spares to be delivered	10.0				
Toolco					
Lease Rentals to date Dec. 1, 1960—note plus interest				13.0 6.4	
Spares hitherto delivered to TWA				5.0	
Total	78.5	50	78.5	118.5	24.4

Cash is provided from new insurance company loan of 78.5

Amortization of Debt

50 Bank Loans—Ins. Co. Loans—15 yrs	Unsecured 61–66	Per A 10 MM
78.5 Insurance Co. loans 5¾%	66–76	
Unsecured Negative pledges 5–15 years		7.85 MM
27 Equitable new rate 5¾% 1–8 years	61–76	3.0 plus

Exhibit B

118.5 Junior Debt 2% fixed 1-15 yrs. 7.9

3% noncum. after $1 per share on stock and if working capital over 35 MM

Payable only if earned and working capital over 35 MM cumulative as to max. 15%

Debt Mat. Fixed	61-66	Years 66-69	70-76
Bank	10.0		
Equitable	3.0	3.0	
Ins. Cost.		7.85	7.85
Total per year	13.0	10.85	7.85
Junior Debt	7.9	7.90	7.9
Total per year	20.9	18.75	15.75

Depreciation on Irt. equip. approx 30—Piston 20 initial years.

Program 30 Conv. 880s
15 Boeing 131s
12 " 331s
57 Total Value—385 mill.

Pro forma Capitalization

Capitalization as of total issuance of debt about Sept. 30, 1960

* Equitable (3¾s) 5¾s 69	27
* Insurance Loan 5¾ 76	78.5
** Bank Loans Serial 61-66 5½%	50.0
	155.5

Exhibit B

Income Debentures 2% Fixed—5% max.	118.5
Equity	
At Present	117.0
New to Toolco	24.0
Total Equity	141.0
Total Capitalization	375.

Senior Debt % of Junior Debt plus Equity 60%

* Redo—secured by general mortgage

** unsecured

What kind of a beating does Hughes take—

Bank Loans of	80MM
Banks sell TWA Equip.	
Banks get a TWA	
Credit worth	50
Banks—Sell Inc. Debs. 50M @ 60	30

They are home and free and Hughes is free of 80MM bank loans.

He has lost	
Convair down payment	29
Boeing " "	4
	33
Lease rentals	13.0
TWA obligation	5.8
Spares Purchases	5.0
Total	56.8
He receives in TWA stock	24.0
Net Loss	32.8

and control of TWA

Exhibit B

CAB

CAB

Set up meeting with CAB to explain situations from TWA's point of view—Keep Equitable informed.

Minority Stockholders

Talk with Merrill Lynch—Forrester and get them to organize a minority stockholders group—and a new Board of Directors — favorable to TWA management — Keep Equitable informed.

Above all—A party at interest meeting—venue preferably Equitable offices—Not to break up until a firm commitment.

Note A. Probable that Equitable would agree to increase participation to 50 MM or by 23 MM—if so need only 55.5 new insurance money—Let Merrill Lynch handle.

Note B—Possibly roll over 50 MM/Bank of America-Irving with a 50 MM headed by Morgan Guaranty—Mellon-Bankers Trust—Pay off Bank of America—Irving Note

Management

E.O.C.—Entirely qualified as Overall Operating Executive—In any case need capable financial officer—which exists.

Notes March 11

Thomas sending to Sessel copy of his plan—envisioning financing of plus 20 600 Convair planes

Exhibit B

It has been planned to have Keath Carver to present this to Hughes as his (Carver's) plan.

Thomas talked with Johnson, G.D. yesterday and he appeared agreeable—though hedge clausedthat he would need to talk with Convair's Johnson—has been talking with Hughes about a 30-880—30-600 plan

Hughes has said to Sessel he was devising a plan and no one else should get in act. This was for 30-30 and he would guarantee acceptance by TWA.

Link Simulator passed for acceptance by TWA and Toolco notified yesterday. This requires $375,000 payment by Toolco.

EXHIBIT C: Affidavit of J. William Bew

[CAPTION] 61 Civ. 2324

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

J. WILLIAM BEW, being duly sworn, deposes and says:

I am J. William Bew, Manager, Equipment Specifications and Acceptance, of plaintiff Trans World Airlines, Inc. (TWA). I make this affidavit in opposition to defendants' motion to dismiss the complaint in the above-entitled action.

In June of 1957 I was designated as Special Representative of the Hughes Tool Company (Toolco) and stationed at the San Diego, California plant of Convair Division of General Dynamics Corporation (Convair). My specific job was to administer the Purchase Agreement between Convair and Toolco for the purchase of Convair 880 aircraft as Toolco's factory representative. Throughout the period described in this affidavit I remained stationed at the Convair plant and performed the duties outlined above. Throughout the period of my employment at Convair I received my instructions from and carried out the orders of a number of persons associated with or controlled by Hughes and Toolco and Howard Hughes personally. It is my belief that Mr. Hughes personally decided all major questions of policy.

As of mid-1959, the Convair production line for 40 Convair Model 880 aircraft, 10 of which were scheduled for delivery to Delta and intermingled with those to be delivered to Toolco, was on schedule and deliveries were expected to commence in the fall of 1959.

Exhibit C

In September 1959, the TWA test flight crew was stationed in San Diego, California, preparatory to making test and acceptance flights of Convair 880 aircraft.

Under normal production line sequence, the Convair aircraft moved from primary assembly point to final assembly point and then to the flight line. Following flights by Convair, the aircraft would be tendered for delivery, contemplating final inspection and test flights by the customer.

The production line sequence was that subs or subassemblies flowed toward the line where they were mated in this order: wing halves mated, overwing barrel section, forward fuselage section, aft fuselage section, engines and pylons, empenage or tail section, then finally to where interior and paint were applied. The ship then moved out of the hangar to be weighed, systems checked out, taxi test, production flight test, FAA ticket, tender of delivery, customer inspection, pre-flight and acceptance flights.

On June 9, 1959, I advised TWA by teletype that Convair's production line was on schedule and that aircraft would proceed to Field Operations as scheduled. However, I also advised that Convair had, in my opinion, already used up the cushion time factor planned for development modifications.

On July 30, 1959 inspectors employed by Toolco arrived at the scene and observed the progress of various aircraft.

On August 6, 1959, the Toolco inspectors began to show a particular interest in aircraft Nos. 5 and 6.

During this period there were approximately 15 aircraft on the floor of the Convair plant. Thus, aircraft No. 15 had reached the stage of production whereby wing and overwing barrel had been mated.

Exhibit C

The first four aircraft (Nos. 1-4) were to be placed in a test program to enable the necessary certification by the FAA. Hence, it was assumed that Toolco aircraft Nos. 1, 2 and 3 would be worked into the delivery schedule at a later date. Aircraft No. 4 was to be delivered to Delta.

Aircraft Nos. 5 and 6 were scheduled for delivery as Toolco aircraft in November and December 1959 while Nos. 8, 9 and 10 were scheduled for delivery in January and February 1960. Aircraft No. 7 was scheduled for delivery to Delta in January 1960.

These delivery schedules had been set forth in Amendment No. 1 to the original Purchase Contract. This Amendment was to schedule deliveries as between Toolco and Delta. It apparently was not signed by Toolco although a related amendment was signed by Delta.

On October 5, 1959, Toolco placed aircraft No. 5 under guard.

On October 11, 1959, I was directed not to ever indicate any final acceptance of any aircraft.

On October 12, 1959, I advised TWA that aircraft No. 5 remained unmoved from the weighing scales where it had been placed on October 9th. Convair refused to work on the aircraft while it was in this location and on Mr. Hughes' orders the Toolco inspectors did not allow it to be moved.

Before aircraft No. 6 was placed under Toolco guard, a new prototype seat was installed by Convair. Later, after Toolco guards took control of the plane neither Convair nor TWA were able to board the aircraft for any purpose, including the removal of the prototype seat. Hence, continued development and production was stalled. Despite repeated requests of Toolco representatives, Convair was unable to remove the prototype seat and another prototype had to be developed.

Exhibit C

In December, 1959, Toolco guards at the Convair San Diego plant took control of aircraft Nos. 5, 6 and 8, placed ropes around such aircraft, and all work on such aircraft stopped. It was anticipated that these planes would be the first tendered to Toolco for delivery.

On December 7, 1959, I advised TWA that these aircraft had been taken over by Toolco guards and that neither TWA nor Convair personnel could get aboard them. As a result of the placing of guards and ropes around these planes, my department was unable to board them. Hence, TWA was unable to finish its necessary inspections and Convair could not complete the outstanding work.

Throughout January 1960, I was directed to ask that Convair advise me of all contemplated demonstration flights on 880 aircraft. In addition, I was directed to tighten up control over the use of flight test aircraft.

On January 31, 1960, aircraft No. 7 was delivered to Delta Airlines.

In February, 1960, Hughes caused aircraft Nos. 5, 6 and 8 to be placed in bailment, thus removing them from Convair control. Aircraft No. 9 was placed under the control of Toolco guards so that no further work could be performed on it by Convair or inspections made by TWA. Aircraft No. 9 was subsequently bailed and all these aircraft were towed away from the Convair plant.

On February 12, 1960, I received instructions from Mr. Gay, an associate of Mr. Hughes, that only authorized and necessary personnel should be allowed on board the flight test aircraft. This direction was extremely difficult to accomplish and Convair stated that curtailment of demonstration flights would make it difficult for them to promote sales. It should be noted that the rebate proviso to the Original Purchase Agreement provided that each additional

sale of an 880 aircraft or models derived therefrom would operate to lower the price of the Toolco 880's.

On February 15, 1960, representatives of American Airlines and Braniff Airways requested a ride on No. 5 aircraft. Our general directive to Convair was that all such requests should be refused and I understood from Mr. Owens, another Toolco representative, that this request was refused.

On February 22, 1960, I was instructed to place an agent on guard at each aircraft which might be used for flight to prevent the demonstration of any such aircraft to would-be purchasers.

By this time Hughes had assumed direct control of all early deliveries and put them under guard.

On February 22 and 23, 1960, TWA's representatives at Convair were ordered to refrain from participating in any discussions with Convair or any one else in regard to delivery schedules.

On March 1, 1960, I advised Mr. Price, the chief Toolco representative and also Mr. Gay that action should be taken to preserve the engines on aircraft Nos. 6 and 8. No action was taken, and at least as to No. 6, the engines became corroded. The Toolco guards would not even allow General Electric employees to take care of the engines.

Throughout the month of March, 1960, and continuing thereafter, Toolco personnel made a sustained effort to stop demonstration flights of Convair 880 aircraft.

In March, 1960, aircraft Nos. 13, 14, 15, 18 and 19, being the next Toolco aircraft in production (Nos. 16 and 17 being for Delta), were pulled out of production and stored on the Convair flight line.

Aircraft No. 5 was to be used for testing purposes and as part of Convair's FAA air worthiness certificate proce-

dures. Under the bailment agreement it was to be returned to Convair in March. It was not redelivered by Toolco until September 13, 1960.

In March, 1960 Toolco obtained a change in the scheduled delivery dates by Amendment No. 4 to the agreement between Toolco and Convair. This provided that deliveries should not commence until May, 1960.

In May, 1960, Convair received the FAA air worthiness certificate by use of such aircraft as still remained within its control. Aircraft No. 10 was delivered to TWA as a training aircraft on May 18. An agreement providing for the assignment of 20 Convair 880's to TWA was not confirmed by Hughes and Hughes continued to exercise control over all 880 aircraft on order by Toolco.

Aircraft Nos. 11 and 16 were delivered to Delta on May 4 and on May 6th respectively.

The Assignment Agreement purported to assign to TWA aircraft Nos. 8, 20 and 22. These aircraft were subsequently delivered to Northeast Airlines.

On June 6, 1960, I was advised by Mr. Rummel, another Special Representative of Toolco, that no tests were to be made on Toolco's aircraft either by Convair or by TWA.

In June 1960, aircraft No. 20 was flown by TWA. Such flights were stopped by Toolco. Aircraft No. 20 was then stored.

Aircraft No. 17 was delivered to Delta on June 2, 1960.

The status of aircraft as of this time was as follows: Nos. 24, 12 and 25 had been flown by Convair, No. 22 was in Field Operations being prepared for flight and Nos. 26 and 27 had been moved out of the hangar and system checks were being conducted.

Exhibit C

During July and August work on Toolco aircraft was slowed down. Convair began taking weekends off. At TWA's insistence Convair conducted engine modifications, dropping engines for up-dating, fuel consumption flight tests, and single hydraulic system flap operation. In general, TWA attempted to have Convair up-date the aircraft.

Following the withdrawal of Mr. Thomas as President of TWA, the morale at Convair hit rock bottom. Shortly thereafter Hughes arrived personally and flew aircraft Nos. 3 and 26. Hughes gave instructions that no further acceptance flights should be flown except as he directed. He wished to be present when all such acceptance flights were made.

During this period aircraft Nos. 12, 22, 23, 25, 26 and 27 were tendered by Convair for acceptance flights. Following the refusal by Toolco to allow such flights these aircraft were stored making a total of 12 aircraft in storage in various stages of completion.

Aircraft Nos. 21 and 29 were delivered to Delta on July 5 and August 5, respectively.

During September and October of 1960, Convair tendered aircraft Nos. 28 and 30 for acceptance flights and upon refusal such aircraft were placed in storage. Convair ceased work on all aircraft on order by Toolco and began a substantial layoff of personnel. Aircraft Nos. 33, 34, 35 and 39 were pulled off the production line in October, 1960 and work stopped.

Aircraft Nos. 36 and 38 were delivered to Delta on October 1, and October 10, respectively.

The four bailed aircraft were finally returned from bailment by October 21, 1960.

Had Amendment No. 1 to the original Purchase Contract been adhered to all thirty aircraft would have been delivered to Toolco by the end of September, 1960.

Exhibit C

In November of 1960 Mr. Raymond Cook came to California and entered discussions with Mr. Digges of Convair which resulted in the reduction of Toolco's order of 880 aircraft from 30 to 24, thus making possible the Convair lease of Nos. 5, 8, 12, 20, 22 and 23 to Northeast Airlines and the firm order by Toolco of 6 Convair 990 aircraft in American Airlines configuration. Mr. Cook designated the aircraft which Northeast was to acquire. These aircraft were delivered to Northeast between November 1960 and January 28, 1961.

In December of 1960 Toolco assigned 19 Model 880 aircraft to TWA, one 880 aircraft having been previously purchased by TWA with its own funds in May of 1960. Of the 19 aircraft assigned only 16 had been designated by number and the remaining three were designated in 1961 out of the seven 880 aircraft still on order by Toolco.

Deliveries of Convair 880 aircraft to TWA commenced in January 1961 and were completed on October 13, 1961.

During the period outlined above I was aware that Convair was putting into production numbers of Model 22 M and 600 (990) jet aircraft . Although I was aware of some interest on the part of Mr. Hughes in regard to these aircraft, I received strict instructions not to inspect, discuss or even recognize the fact that they were on the production line.

/s/ J. William Bew
J. William Bew

(Sworn to on January 31, 1963.)

Pretrial Order, February 1, 1963

[Doc. 168]

[CAPTION] 61 Civ. 2324

PRETRIAL ORDER

A pretrial conference was held in the above action on January 28th, 1963 at 5 p.m.

Four matters were presented to the court for consideration:

1. A motion by the defendant Hughes Tool Company, returnable February 8th, 1963 at 4 o'clock, to adjourn the deposition of Howard R. Hughes presently scheduled for February 11th, 1963 until after a final adjudication of said defendants' motion to dismiss the complaint. This motion was advanced for argument to January 28th, and on the record of the pretrial conference, the attorney for Hughes Tool Company withdrew the motion.

2. A motion by the plaintiff Trans World Airlines to withdraw its motion to dismiss the counterclaims, except that portion of said motion which attacks the second counterclaim for failure to state a claim and the motion for summary judgment with respect to the sixth counterclaim. This motion is granted and plaintiff is directed to file its reply to the counterclaims of defendant Hughes Tool Company within ten days after the conclusion of the deposition of Howard R. Hughes.

3. A motion by the additional defendant Charles C. Tillinghast, Jr. for leave to answer the counterclaims of the defendant Hughes Tool Company ten days after the conclusion of the deposition of Howard R. Hughes. This motion is granted.

Pretrial Order, February 1, 1963

4. A motion by the defendant Hughes Tool Company to review an order of the Special Master dated January 22nd, 1963 requiring the defendant Hughes Tool Company to produce for inspection and copying the so-called tax documents. As to the nine boxes of papers which the court is informed may contain pertinent documents in relation to the request to produce, the defendant Hughes Tool Company is directed to send them today to counsel for the plaintiff, who shall make arrangements for producing copies thereof for the plaintiff and the additional defendants. If the defendant Hughes Tool Company contends for some reason or other that said documents are not subject to production, then the nine boxes shall be sent today to the Special Master, who shall rule upon any objections that the defendant shall make to the production of specific documents. Any other documents subject to the notice and affidavit of January 9th, 1963 shall be produced on a daily basis on or before February 11th, 1963.

So Ordered.

Dated: New York, N. Y.
February 1st, 1963

Charles M. Metzner /s
U. S. D. J.

Opinion and Order, February 7, 1963

[Doc. 173]

[CAPTION] 61 Civ. 2324

METZNER, District Judge.

Defendant Hughes Tool Company (Toolco) moves to dismiss the complaint pursuant to rules 12(b) (1) and 12(b) (6) of the Federal Rules of Civil Procedure on the grounds that the court lacks jurisdiction over the subject matter and that the complaint fails to state any claim upon which relief can be granted. The original notice of motion was filed on August 9th, 1961 and in addition to the grounds now urged requested summary judgment pursuant to rule 56 of the Federal Rules of Civil Procedure. In effect, the present notice of motion brings on for hearing the original motion.

In its brief Toolco has stated,

> "At the suggestion of the Court (Transcript of pre-trial conference of September 6, 1961, pp. 50, 52) Toolco agreed to postpone the motions and thereafter commenced its pre-trial examination of TWA."

The opinion of this court of January 19th, 1963 sets forth the numerous occasions on which counsel for Toolco agreed that the motion as originally filed was not ripe for determination. Consequently, it was not a suggestion of the court, to which Toolco courteously agreed, that the matter be postponed. Rather it was an understanding by counsel that under the decisions of this circuit summary judgment in this type of case should not be considered until the deposition proceedings are completed. (See also *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464, 473 [82 S.

Ct. 486, 7 L.Ed. 2d 458] (1962)). The grounds now urged under rule 12(b) existed and were adverted to in the original notice of motion. Since counsel for Toolco has indicated he was prepared at that time to argue the matter, he could just as well have submitted it then, instead of requesting on January 14th, 1963 that the motion now be heard, when the taking of the deposition of Howard R. Hughes is imminent. Furthermore, the Special Master on October 25th, 1962 granted the second adjournment of this deposition, from October 29th to February 11th, 1963, and stated that the long adjournment of more than three months was in order to allow Toolco's counsel sufficient time to make whatever motions he thought were necessary.

On January 14th, 1963, when Toolco moved that its motion to dismiss be set down for hearing, it also requested that TWA first proceed by written interrogatories directed to Hughes, instead of by oral deposition. This request was formally denied on January 19th, 1963, after a pretrial conference held on January 17th.

Counsel for Toolco continually relates the taking of the deposition to a determination of the motion to dismiss. As I have indicated before, this deposition depends not only on the existence of alleged valid claims against Toolco, but on Toolco's counterclaims for $385,000,000 against plaintiff and the additional defendants.[1]

[1] On the morning of the argument of this motion (February 6th, 1963) Toolco filed another notice of motion returnable February 8th, 1963 requesting that all further proceedings with respect to the counterclaims be stayed pending a disposition by the Civil Aeronautics Board of a "Complaint of Hughes Tool Company and Request for Investigation" which had been filed that day with the CAB. The only document attached to the notice of motion is a copy of the complaint filed with the CAB, seeking relief under sections 408, 409, 411 and 1002 of the Federal Aviation Act. That complaint names all of the additional defendants in the action pending in this court and also Pan American World Airways, Inc. and Juan T. Trippe. It

So much for the underbrush. Now as to the merits of the motion, there is no doubt that the complaint on its face sets forth a claim against the defendant and is not subject to dismissal under rule 12(b)(6).

Briefly, the plaintiff, TWA, charges that Toolco, Hughes, and Holliday, named defendants, and Atlas Corporation have combined and conspired to restrain, and have attempted to monopolize, interstate and foreign commerce of the United States in the furnishing of jet aircraft and/or nonjet aircraft by sale, lease or other means, to TWA, and to TWA and other air carriers, in violation of sections 1 and 2 of the Sherman Act and sections 3 and 7 of the Clayton Act. It more specifically alleges that the defendants and Atlas combined to restrain commerce by providing financing of the acquisition by TWA of aircraft only upon the condition that TWA acquire all such aircraft from Toolco, and that they required TWA to boycott all suppliers of aircraft except Toolco, in violation of section 1 of the Sherman Act; and that sales and leases of jet-powered aircraft were made on the condition that the purchaser or lessee would not buy or lease the goods of a competitor of the vendor or lessor, in violation of section 3 of the Clayton Act. The complaint also charges that acquisitions of the stock of a corporation were made in violation of section 7 of the Clayton Act.

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sets forth some of the allegations contained in the counterclaims and also makes reference to the proposed merger of TWA and Pan Am. It further alleges that Trippe, the dominant force in Pan Am, also has been in the position to influence the policies of Metropolitan Life Insurance Company, a large lender to TWA and one of the additional defendants in this action. Thus, the conspiracy alleged in the counterclaims has been enlarged by including Pan Am and Trippe. Jurisdiction of the CAB is predicated upon a claim that the decision in *Pan American World Airways, Inc.* v. *United States,* 31 U. S. L. Week 4124 (U. S. Jan. 14, 1963) (Nos. 23, 47) [371 U. S. 296, 83 S. Ct. 476, 9 L. Ed. 2d 325], grants the CAB primary jurisdiction.

The first claim is concerned with acts allegedly committed during and prior to December 1960 which, it is claimed, violate all of the above mentioned statutes. The second claim deals with events occurring subsequent to December 1960 which are alleged to violate sections 1 and 2 of the Sherman Act and section 7 of the Clayton Act. For these claims, plaintiff seeks treble damages, divestiture, and an injunction. The third claim charges that the defendants have wilfully and maliciously damaged the business of TWA by the acts alleged in the prior claims, and seeks damages and an injunction under the common law.

Defendant Toolco urges that the complaint be dismissed because the control by Toolco over the plaintiff was authorized by the CAB and was thereby exempted from the antitrust laws. The other ground urged is that the subject matter of the complaint is within the exclusive primary jurisdiction of the CAB.

Toolco indicates that it has withdrawn its motion for summary judgment. However, its brief relies on matter outside the complaint to justify dismissal on the ground that the acts done by Toolco were pursuant to the exercise of control over TWA authorized by the CAB and therefore exempt from the antitrust laws. Dismissal under rule 12(b)(6) is not warranted, though summary judgment might be available. *Putnam* v. *Air Transport Ass'n of America*, 112 F. Supp. 885 (S.D.N.Y. 1953). The defendant appears to be in a procedural dilemma. Since defendant has raised the issue of exemption in its third affirmative defense, the court will consider this branch of the motion as one for judgment on the pleadings pursuant to rule 12(c). Matters dehors the complaint may be considered on the branch of the motion seeking dismissal for lack of subject matter jurisdiction. *Cohen* v. *American Window*

Glass Co., 126 F. 2d 111, 114 (2d Cir., 1942); *Central Mexico Light & Power Co.* v. *Munch*, 116 F. 2d 85 (2d Cir., 1940); *Moore* v. *Gorman*, 75 F. Supp. 453 (S.D.N.Y. 1948).

Toolco relies on the 1944 and 1950 orders of the CAB permitting Toolco to acquire control of TWA. 6 CAB 153; 12 CAB 192. These orders were issued pursuant to section 408(5) of the Civil Aeronautics Act of 1938,[2] which makes it unlawful without CAB approval for "any person engaged in any other phase of aeronautics to acquire control of any air carrier in any manner whatsoever". Toolco was considered as one engaged in a phase of aeronautics because of its activities in the development of aircraft and accessories.

Section 414 of the Federal Aviation Act, 49 U.S.C. § 1384, provides that

> "Any person affected by any order made under sections 408 [49 U.S.C. § 1378] • • • shall be, and is hereby, relieved from the operations of the 'antitrust laws' • • • and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order."

It is Toolco's contention that all the acts complained of by TWA are immunized from claims of violations of the antitrust laws because of section 414. This leads to an examination of what action was approved by the orders issued pursuant to section 408(5) and what is the scope of the exemption provided by the words "insofar as may be

[2] This section is now 49 U.S.C. § 1378(5). The Federal Aviation Act of 1958, 72 Stat. 737, 49 U.S.C. § 1301 et seq., superseded the Civil Aeronautics Act of 1938, 52 Stat. 973, making no changes relevant to the problem before the court.

necessary to enable such person to do anything authorized, approved, or required by such order", in section 414.

Statutory authority granted regulatory agencies to give exemption from the application of the antitrust laws is not unusual.[3] But the Supreme Court has clearly stated that immunity from the antitrust laws is not to be lightly implied. *California* v. *Federal Power Comm'n*, 369 U. S. 482, 485 [82 S.Ct. 901, 8 L.Ed. 2d 54] (1962). Regulated Industries are not per se exempt from the antitrust laws. *United States* v. *Borden Co.*, 308 U.S. 188, 198-199 [60 S.Ct. 182, 84 L.Ed. 181]. And it is elementary that repeals by implication are not favored. *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 456 [65 S. Ct. 716, 89 L.Ed. 1051] (1945). In the latest decision by the Supreme Court, *Pan American World Airways, Inc.* v. *United States, supra* note 1, which will be discussed in detail below, the Court stated that the regulatory scheme here in question would not be read as designed completely to displace the antitrust laws "absent an unequivocally declared congressional purpose so to do." 31 U.S.L. Week at 4126. [371 U. S. at 305, 83 S. Ct. at 482]. It went on to say that the antitrust problems "expressly entrusted to [the CAB] encompass only a fraction of the total." *Ibid.*

The orders of 1944 and 1950 relied on by Toolco merely approved the acquisition of control of TWA by Toolco.

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[3] See, e.g., 47 U.S.C. § 222(b) (1) (telegraph mergers approved by the Federal Communications Commission); 47 U.S.C. § 221(a) (telephone mergers approved by FCC); 46 U.S.C. § 814 (rate fixing and other agreements between water carriers approved by the Federal Maritime Board); 49 U.S.C. § 5 (railroad mergers approved by the Interstate Commerce Commission); 49 U.S.C. §§ 5a-b (agreements between carriers involving rates approved by ICC); 15 U.S.C. § 18 (exempting from the operation of section 7 of the Clayton Act transactions approved within their statutory authority by the CAB, FCC, Federal Power Commission, ICC, FMB, Secretary of Agriculture, and, in some cases, the Securities and Exchange Commission).

The antitrust violations that could possibly be present in such acquisition—that it was a contract in restraint of trade prohibited by section 1 of the Sherman Act, or was an attempt to monopolize prohibited by section 2 of the Sherman Act, or was an acquisition of stock prohibited by section 7 of the Clayton Act—were within the contemplation of the approval orders and protected by the exemption provided by section 414. *Cf. United States* v. *Southern Pac. Co.*, 290 Fed. 443 (D.Utah 1923). These orders did not give Toolco a license to engage in other acts that normally may be forbidden by the antitrust laws. What has been approved and exempted is the fact of "acquisition of control" not activities engaged in by the controlling party subsequent to acquisition, which may be illegal.

I have found no case and none has been cited to me which interprets the words "necessary to enable such person to do anything authorized, approved, or required by such order", or similar exemptive language in other statutes, in a way that will sustain Toolco's position. In *Putnam* v. *Air Transport Ass'n of America, supra,* the plaintiff was attacking a claimed boycott by the defendants. The court in applying section 414 stated that the boycott was "the inevitable result" of the agreement sanctioned by the CAB which by its terms permitted the defendants to choose with whom they would deal. This is far different from the immunization claimed by Toolco. Congress could not have intended that restraints or attempts to monopolize, subsequent to an order allowing acquisition of control, were necessary to enable Toolco to do anything authorized or approved by the order.

One more point merits discussion under this branch of the motion. The second claim for relief is based on acts alleged to have been committed by the defendants and Atlas subsequent to December 1960. In December 1960 TWA

moved before the CAB for modification of the original order of 1944 as amended. Approval was also sought

> "under section 408 * * * for the transactions contemplated under the financing plan. Similarly sought is approval * * * under section 409 of the Act, of the interlocking relationships arising out of the designation of Raymond M. Holliday, as a representative of Toolco, and of Ernest R. Breech and Irving S. Olds as representatives of the banks and institutional investors, to serve as Voting Trustees under a Voting Trust set up for the Toolco-TWA stock."

This relief was requested in connection with the jet aircraft financing transactions which resulted in Toolco's putting its 78% stock interest in TWA under a voting trust, which in effect gave control of TWA to the lenders who are named as additional defendants in this action.

On December 29th, 1960 the CAB entered its order on this motion (Order No. E-16195). In the course of the opinion, the CAB said at page 6:

> "Under these circumstances, we think it clear that Board action to facilitate TWA's acquisition of jet equipment is in the public interest. At the same time, however, it is evident that Toolco's control of TWA, as exercised through Hughes, has presented substantial problems requiring the Board's attention.
>
> "In short, and without further description of these problems, the Board wishes to make clear the fact that it would anticipate the proper filing of an application under section 408 of the Act and the obtaining of the approval of the Board before Toolco would attempt to reassume control over TWA.[19] It is clear that such approval would not be

> forthcoming without a searching inquiry into the public interest factors affecting this control.[20]"

Footnote 19 in the above quotation reads as follows:

> "The Option Agreement requires Toolco, in exercising the option, to provide a satisfactory opinion of counsel that the exercise of the option, by purchase of the notes, does not require governmental or regulatory approval or that such approval has been granted and is in force. No such provision could, of course, preclude dissolution of the voting trust after the ten-year term has expired. Nonetheless, it is clear that Toolco should not resume direct control at that time unless prior approval of the Board is sought and obtained."

It is clear from this opinion that the CAB does not look upon Toolco as controlling TWA after December 1960. Thus, anything done by Toolco subsequent to that date has not been approved by orders of the CAB and certainly no exemption exists as to the second claim.

We come now to the question of "primary jurisdiction" which is defendant's second ground for dismissal of these claims. In discussing the primary jurisdiction of the CAB in relation to this complaint, there is some overlap with the discussion as to the effect of an order issued under section 408(5) and the extent of the exemption granted by section 414. In this case we are concerned primarily with whether there exists exclusive primary jurisdiction in the CAB without regard to whether or not it has taken any action in relation to a particular transaction. *Cf. Far East Conference* v *United States*, 342 U.S. 570 [72 S.Ct. 492, 96 L.Ed. 576] (1952).

Defendant places great reliance upon the recent decision of the Supreme Court in *Pan American World Airways,*

Inc. v *United States, supra,* popularly known as the *Panagra* case. In determining the scope of this decision we must first go to the next to the last sentence of the majority opinion, which reads:

> "We think the narrow questions presented by this complaint have been entrusted to the Board and that the complaint should have been dismissed." 31 U. S. L. Week. at 4129 [371 U.S. at 313, 83 S.Ct. at 486].

The Court was dealing with section 411 of the act, 49 U.S.C. § 1381, which gives the CAB jurisdiction over "unfair or deceptive practices" and "unfair methods of competition" by air carriers. The acts charged to be antitrust violations were limitations of routes, divisions of territories, and the relation of a common carrier to air carriers, which the Court stated were "precise ingredients of the Board's authority in granting, qualifying, or denying certificates to air carriers, in modifying, suspending, or revoking them, and in allowing or disallowing affiliations between common carriers and air carriers." 31 U. S. L. Week at 4126 [371 U.S. at 305, 83 S.Ct. at 482]. The Court went on to say:

> "It would be strange, indeed, if a division of territories or an allocation of routes which met the requirements of the 'public interest' as defined in § 2 were held to be antitrust violations. It would also be odd to conclude that an affiliation between a common carrier and an air carrier that passed muster under § 408 should run afoul of the antitrust laws. Whether or not transactions of that character meet the standards of competition and monopoly provided by the Act is peculiarly a question for the Board, subject of course to judicial review • • •." 31 U. S. L. Week at 4127 [371 U.S. at 309, 83 S.Ct. at 484].

If we substitute in this quotation the words "acquisition of control of any air carrier by any person engaged in any other phase of aeronautics" in place of "an affiliation between a common carrier and an air carrier", we have presented the fact situation upon which Toolco relies. However, the acts complained of by TWA are acts allegedly done by the controlling party after the acquisition had been approved, not only to the detriment of the carrier in question, but to other carriers and to competitors of the controlling party. This in my view is the distinguishing factor between this case and the *Panagra* case. While the acts charged here could be proper subjects for consideration by the Board in determining whether control of TWA by Toolco was in the public interest,[4] they are not the type of acts over which the Board has exclusive primary jurisdiction. They are not within the contemplation of the regulatory powers granted the CAB. *Cf. Georgia* v *Pennsylvania R. R., supra.*

Furthermore, the Board has no power to award damages, and we do not reach the statement of the Court in the *Panagra* case to the effect that since the Board's essential regulatory powers deal with the division of territories, etc., then Congress must have intended to give it authority that was ample to deal with the evil at hand. Rather, the statement by the Court that a court has jurisdiction under the antitrust laws if the agency has no power to grant relief is controlling here. 31 U. S. L. Week at 4128 n. 19. [371 U.S. at 313 n. 19, 83 S.Ct. at 486 n. 19].

It is also clear that once a regulatory agency has acted the court is competent to consider and determine the scope of the exemption claimed. *River Plate & Brazil Conferences* v *Pressed Steel Car Co.*, 227 F.2d 60 (2d Cir., 1955);

[4]See CAB Order No. E-16195 quoted at page 13 [p. A125] *supra.* [214 F. Supp. at 110-11]

Putnam v *Air Transport Ass'n of America, supra.* The cases of *American Airlines* v *Standard Air Lines,* 80 F. Supp. 135 (S.D.N.Y. 1948) and *United States* v *Railway Express Agency,* 89 F. Supp. 981 (D.Del. 1950), relied on by Toolco, are not in point.

In addition to the determination that as a matter of law the Board does not not have exclusive primary jurisdiction over the acts alleged in the complaint, the practical aspects of this case make especially apposite the statement in the *River Plate* case, *supra,* to the effect that a reference to the agency would be "useless and time-consuming" (227 F.2d at 63). Over 10,000 pages of testimony have already been taken by Toolco in deposition proceedings and over one and a quarter million documents have been produced in these proceedings by all parties. If there is any policy that would favor referral, it is not present in this case. See *Atlantic Coast Line R. R.* v *Riss & Co.,* [105 U.S. App. D.C. 380] 267 F.2d 657, 658 (D.C. Cir. 1958).

Consequently, the motion to dismiss is denied. The application made upon oral argument for a certificate pursuant to 28 U.S.C. § 1292(b) was denied at that time. Toolco's application for a stay of all deposition-discovery proceedings pending an application for a stay to the Court of Appeals was granted on the oral argument to the extent that all deposition-discovery proceedings are stayed until 5 p. m. February 8th, 1963 to allow Toolco time to request a stay from the Court of Appeals beyond that time.

So ordered.

Dated: New York, New York
February 7, 1963

[The above opinion also appears at 214 F. Supp. 106]

Opinion and Order, February 7, 1963

The above opinion is filed pursuant to the order of the court entered on February 6th, 1963, which was endorsed on the back of the notice of motion dated January 14, 1963 and which reads as follows:

> "Upon consideration of defendant's brief filed on 2/1/63 in support of the motion to dismiss, the answering brief of plaintiff filed on 2/2/63 in opposition, defendant's reply brief filed at noon today, and the oral argument on said motion, the motion to dismiss is denied. A formal opinion giving the reason of the court will follow. So ordered.

Feb. 6, 1963 at 6:05 p.m.

/s/ CHARLES M. METZNER
U. S. D. J.

Toolco's Notice of Position, dated February 8, 1963

[Doc. 174]

[CAPTION] 61 Civ. 2324

NOTICE OF POSITION

SIRS:

PLEASE TAKE NOTICE that upon:

(1) the decision of this Court of February 6, 1963 denying Hughes Tool Company's ("Toolco") motion to dismiss the complaint;

(2) the decision of the Court of February 6, 1963 denying the application of Toolco for a determination which would permit a discretionary review at this time by the Court of Appeals pursuant to the provisions of Title 28, U. S. C. § 1292(b);

(3) the enormous expenses which would be incurred by Toolco directly, and indirectly as the 78% owner of plaintiff Trans World Airlines, Inc. ("TWA") in further pre-trial and trial proceedings and the belief of Toolco that such expenses would exceed the amount of damages provable by plaintiff under the complaint;

(4) the position of Toolco that it may not be properly subjected to further discovery proceedings by plaintiff or the additional defendants at this time; and

(5) all proceedings to date;

Toolco hereby elects, subject only to whatever judicial relief it may hereafter obtain, to rest on the merits of its positions as heretofore taken so that it may avoid the

burdens and expenses involved in further pre-trial and trial proceedings prior to the time that an appellate court has the opportunity to rule upon the decisions and orders heretofore made herein.

Dated: New York, New York
February 8, 1963.

Yours, etc.,

CHESTER C. DAVIS, Esq.
Attorney for Defendant
Hughes Tool Company
120 Broadway
New York 5, N. Y.

To: CAHILL, GORDON, REINDEL & OHL
80 Pine Street
New York 5, New York

cc: Honorable J. Lee Rankin
Special Master

[All other Counsel]

Transcript of Pretrial Hearing, February 8, 1963

[Doc. 188]

[CAPTION] 61 Civ. 2324

Before: Hon. CHARLES M. METZNER, District Judge.
New York, February 8, 1963, 5:00 p.m.

[APPEARANCES]

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The Court: This hearing has been called at the request of Mr. Sonnett, I understand, based on Mr. Davis' communication with the Special Master, which is contained in a letter to me from Mr. Davis, stating that Toolco had elected to rest on the merits of its positions and decided not to proceed with the deposition in California. Attached to that letter is a notice of the position of the defendant Tool Company.

Mr. Sonnett, do you want to start off by telling the Court why you requested this conference?

Mr. Sonnett: Yes, your Honor. The difficulty I have had with the documents to which your Honor has referred is that I don't understand them, I don't know what they mean. I do not know whether this consists of a representation to the Court that Mr. Davis has been authorized by his client to apply for leave to withdraw his answer and consent to the entry of a default judgment for the relief requested in the complaint, in which event, if it were that, I would have a position to express; or I don't know whether on the other hand it means that they are just proposing to take no further action on behalf of the Tool Company in the case and that they will not be present accordingly for Mr. Hughes deposition on Monday; and since he has been noticed and is under subpoena to appear as a witness, I think

if they do not appear on Monday I would regret not having the pleasure of their company but the attendance of the Hughes Tool Company at that deposition is not at all necessary of course. They can waive their right to cross examination of Mr. Hughes if they so elect.

Not knowing what this document means, and since we are all prepared to go, indeed, I have six or eight people out there—I have had for five or six days—and since Judge Hall would certainly want to know whether there is going to be any change in the date, and since I see no reason in these documents for any change in the date, unless the proposal is to enter a default judgment, it seemed to me desirable to try to clarify it by a hearing before your Honor today.

If it is an application for the withdrawal of the answer and for leave to have a default noted by the Tool Company, TWA would move for the entry of a default judgment for the relief in the complaint.

I would have an application by way of amendment on the prayer for damages because of their counterclaims, which allege that the damage to TWA was $45 million, our complaint alleged we thought it was in excess of thirty-five. Our investigation to date satisfies us that the $45 million damage figure is correct, so we would move for leave to amend the damage prayer and for a default judgment with the relief sought in the complaint, if in fact what they are proposing to your Honor is that their default in this case be noted.

If it is not that, I don't know what it is. That is my problem, your Honor.

The Court: Mr. Davis?

Mr. Davis: Your Honor, I think that it might be desirable for the record for me to particularly call to your attention a ruling of the Special Master in connection with

this notice for the taking of the deposition of Mr. Hughes in California and my acceptance of the subpoena. It has a bearing on what I am about to say with respect to the decision of the Tool Company and their understanding of the consequences which have been explained to my client.

I am referring to page 99 of the transcript of a hearing before the Special Master on September 15, 1962. Since I don't know that your Honor has that before you, may I read it? It isn't very long.

The Special Master stated at that time:

> "I feel that there is such a close connection between Mr. Hughes, as evidenced by some of the documents that I have seen, and the fact that he is the sole owner of the Hughes Tool Company, that the Hughes Tool Company is responsible for Mr. Hughes with regard to this subpoena, and its validity and whether it is an authorized act, and I advise and instruct counsel for the Hughes Tool Company to write Mr. Hughes and inform him about my construction of this subpoena, and that I will consider it an express waiver if he fails to communicate with the Court promptly and advise of any other construction of the subpoena, either as to its validity or when he should be required to appear, and if at any future time in this case Mr. Hughes should claim that the the service of such subpoena was not authorized, not a valid instrument, not binding as I am construing it, I shall entertain a motion to strike the answer of the Hughes Tool Company and enter judgment against it in this proceeding."

Before I go further, your Honor, may I say that the acceptance of the subpoena on behalf of Mr. Hughes was valid, never was questioned, and I also followed the directions of the Special Master.

Transcript of Pretrial Hearing, February 8, 1963

May I continue now?

"It is very difficult for me to try to do equity to all the parties in this proceeding. Everyone claims he wants to be first.

"I recognize what the Court has said about the validity of the subpoena in Los Angeles, or assert in any way, shape or form that he is not now personally subject to that subpoena, he must do so by a written communication to you.

"I ask that you include in that direction also a response to the question of documents, because it is also a subpoena duces tecum. I think we are entitled to have a report directly from Mr. Hughes to you on that subject, since there is nobody speaking for Mr. Hughes individually as counsel present."

And then he continued as follows:

"I will incorporate in my direction to counsel for the Hughes Tool Company"—

Now I am reading at page 181 of the same day, September 15, 1962, by the Special Master:

"I will incorporate in my direction to counsel for the Hughes Tool Company the order that if Mr. Hughes does not accept the interpretation I place upon the subpoena, and the authority for service of that subpoena, and the requirement to produce documents under it, that he so inform the Special Master by Friday of next week.

"I am imposing that responsibility for giving that notice upon counsel for the Hughes Tool Company, because I am piercing the corporate veil as to the Hughes Tool Company, and I am bringing what I hope is clear notice of very substantial sanctions, not against Mr. Hughes, but against the Hughes Tool Company, in case there should be at some later date a claim of lack of authorization or failure to respond

to the subpoena because of any such claims, either as to personal appearance when the Court would order, or as to the production of documents."

I don't think that the balance is pertinent to the point that I am making.

The Hughes Tool Company is aware of those rulings of the Special Master, and the Tool Company did not seek a review of those rulings of the Special Master by the Court and accepted in effect the responsibility placed upon it by that ruling.

I have also had occasion to describe to my client, the Hughes Tool Company, the sanctions available under the Rules by reason of a respectful declination or election to stand on the questions of law which have been decided to date and not to proceed any further with respect to discovery proceedings. I have particularly called to their attention the provisions of 37(d)—Rule 37(d)— of the Federal Rules, with respect to the sanctions which could be applied by the Court on the Tool Company.

Now your Honor, following the decision of the Court of February 6th denying the motion to dismiss on the grounds there presented, and the further decision of the Court to deny the application of Tool Company for a determination which would have given the Tool Company an opportunity —so the Court of Appeals have granted the request—to obtain a review of those orders, the Tool Company concluded and advised me that, based upon the expenses which have occurred to date and which it believes it will incur, both directly and indirectly as a 78 per cent owner of TWA, those determinations by the Court amount, so far as they are concerned, to a very substantial money judgment, as a practical matter.

They further stated, and advise me, that they do not believe that under the allegations of this complaint TWA would be likely to be able to prove damages by reason of this alleged course of conduct; that that would not be equal to—or, rather, put it the other way, that these expenses that they anticipate they believe would equal, if not exceed, what they believe are the maximum amount of damages that TWA would be able to prove.

Accordingly, I was instructed to take the position that I have indicated by this notice of position.

Now, if there is any question about the language that is to be used to effectuate what the determination by the Tool Company is, I am perfectly prepared to clarify it in any way possible.

There is only one thing I want to make perfectly clear on the record. The purpose of the position of the Tool Company, which it is taking, is to have an opportunity to obtain a review on the questions of law involved based upon the proceedings had to date; and, therefore, I have tried to prepare a piece of paper which would not preclude or prejudice the rights of the Tool Company to such an appellate review.

The Tool Company does want to rest on the merits of its position, and it does so fully aware of the sanctions which the Court, in its discretion, may impose upon the Tool Company; and if there is anything I can say that will further clarify what the effect is of the position which the Tool Company is taking, I am prepared to do so.

Now, obviously Mr. Sonnett, I am sure, is much more learned in these matters than I am, and he states the alternatives in a manner which of course I cannot accept, but there would be no point whatever in my taking the position which I am taking in behalf of the Tool Company if I did

it in such a manner as to deprive my client of an opportunity to obtain a review; and therefore we do not consent in the sense of requesting the Court to strike our pleadings or take any other action, but we are fully aware—my client is fully aware—that by insisting on a right to obtain a review on the legal questions which have been decided to date, and should it develop that they are in error, as indicated by your Honor's decisions and rulings, as a consequence they may be deprived of further defending on the merits, other than on the question of damages.

I don't know if there is anything else I can say that would help to clarify the situation. I tried to indicate as soon as I could, after the decision of the Court on February 6th. I called Mr. Rankin the next morning to advise him orally of the decision which had been made and I asked him to make that information available to the Court and to all counsel. I did ask him, however, to request counsel not to make any statements to the press with respect to that position until I was able to formulate it in words which would more or less satisfy me.

I may say, your Honor, that, working with Mrs. Lea and Mr. Cox, I had a great deal of difficulty in formulating anything that they would agree with. Apparently no matter how I tried to say it somebody was always thinking, well, if you said it this way this might happen or that might happen. At least I have been unable to find any particular precedent for something exactly like this.

The decision of the Supreme Court in the Procter & Gamble case was called to my attention, where there, of course, the government was the plaintiff, and they tried to expedite the reviewability of a determination by the Court requiring the government to produce documents by in effect inviting or suggesting to the Court an amendment to the order requiring the production to include a provision that,

upon the failure to produce the documents, the complaint would be dismissed.

Apparently the question developed procedurally up until the time it got to the Supreme Court, which was whether or not the government was then precluded from objecting to the form of order or amendment that it had submitted to the court. The Supreme Court held for the government's position that they were merely taking a procedure to avoid, I believe the expression is, "an unseemly contempt."

Well, we are trying in a way to do the same thing, but obviously I am not requesting the Court to do anything. I am merely taking a legal position on behalf of my client so as to obtain, for the reasons stated in that notice, an order or determination which is either reviewable by its terms or which the Court may feel warrants a certification under 1192(b) [1292(b)] so as to give me an opportunity to obtain a review.

I don't know if there is anything else I can say by way of explanation, your Honor, in view of what has developed.

The Court: Well, it seems to me that even though the Court did not grant you a certificate under 1292(b) you could have applied to the Court of Appeals for mandamus and, in conjunction with that application, have requested the Court to grant you a stay. I would think that the review afforded you by mandamus would be the same review that the Court of Appeals would give to any certificate I might have issued under 1292(b), because the court does not automatically take the case on appeal until the court itself has agreed with the granting of the certificate by the District Court judge. But you have not done that.

Mr. Davis: Yes, your Honor, I gave very careful and deep consideration, to be sure, in a very short period of

time, and that was my initial reaction, as your Honor well knows, when your Honor announced his decision on February 6th.

But I find myself confronted with this dilemma: the denial of my request for the statement in the opinion of the Court as to (a) the existence of the substantial question and (b) that the determination of that question would expedite the disposition of the action placed me in about as poor a position as I could conceive of to obtain a writ from the ground that they were unusual circumstances existing here which required resort to that extreme remedy.

In any event, within the time until today I did not think that I could prepare an adequate application which would give me any reasonable hope to expect the granting of a stay, and I so advised my client to that effect.

And therefore, with the very clear indications that your Honor was unwilling to consider any postponement of the date of February 11th, even assuming that I filed my writ, which would not become returnable until the next motion day of the court, which is next Monday, I concluded, I believe soundly—but I have been wrong certainly on a number of occasions—

The Court: So have I.

Mr. Davis: —here that I have no basis for a stay.

Now, if your Honor will recall—that is, I recall—when I sought to obtain a stay at a time when I thought I had some fairly persuasive grounds—that was in connection with the documents covered by the attorney-client privilege —I found that in order to even approach the Court of Appeals for a stay there would have to be some appeal pending before it.

I filed a notice of appeal, and at that time I had some authority to support my position, that the determination

of the waiver of the attorney-client privilege was a legal determination of a collateral matter unrelated to the merits of the lawsuit, which therefore had that sense of finality to it under the doctrine, I believe, expressed by Mr. Justice Jackson.

My opponents made a motion to dismiss that appeal on the ground that it was not an appealable, reviewable order, and I tried to cover that position, but it was announced in the morning that they got a delay until later that day and indicated that they were going to bring on on that same day a motion to dismiss my notice of appeal. I tried to cover by a writ of prohibition and mandamus.

Then Judge Bromley, apparently knowing the procedure better than I did, took the position that apparently you have to obtain leave before you file a writ of prohibition and mandamus. Well, I have been through one of those before without obtaining any leave just by filing it to see what determination the court made.

In any event, the court on that occasion concluded that my notice of appeal was to be dismissed, considering the question non-reviewable, denied leave to file the writ of prohibition and, of course, denied the stay; but at that point there was nothing for them to stay to protect their jurisdiction.

So that so far as obtaining a stay of incurring the burden and expense of moving out to California and then undertaking what is their [*sic*] contemplated, I had to advise my client that I had no alternative; and then based upon, as I say, an estimate, an analysis of the amount of expenses that would be incurred, assuming that we continued with the trial on the merits, both in pretrial proceedings as contemplated and at the trial, together with the fact that we indirectly stand 78 per cent of the expenses that TWA is

incurring, and based upon the fact that the Tool Company at least believes that, assuming for this purpose there is a violation of the antitrust laws and having controlled or dictated the type of equipment or financing that TWA entered into, the question is how was TWA injured—and after all, we were 78 per cent owner at the time, and I know that my friend Mr. Sonnett has some very interesting theories about how those damages built up, including the fact that we made money by one or two tax savings; but I don't follow that reasoning in the concept of damages that would result from these various allegations—in any event, rightly or wrongly, the Tool Company concluded that to stand the burden and expense that would be involved, being in the peculiar position of paying both the expenses of the plaintiff, or 78 per cent of them, and its own defense, the inability to obtain a review at this time is tantamount, as far as they were concerned, to a very substantial sum of money, and it is several million dollars, your Honor, that they concluded was involved, more than $5 million, your Honor.

I resisted the figure that they came up with, and I am trying to get a further idea of how they arrived at that figure, but I have been assured, upon checking and double checking, that that is the minimum that would be involved, and before attempting to address itself as to the probable amount that TWA would be spending.

Under those circumstances, the Tool Company felt that, as a business decision, it would be preferable to stand on the validity or the merits of our positions to date, and to then obtain some form of reviewable order, depending, of course, on the type of determination that the Court may make by reason of the position being taken by the Hughes Tool Company.

Transcript of Pretrial Hearing, February 8, 1963

The Court: Do I understand your statement to the Court, which is not embraced within your notice of position, which is the only official document I have from you, your letter of transmittal—

Mr. Davis: I am sorry, I can't hear you, your Honor. I am very bad today.

The Court: Well, I will raise my voice, Mr. Davis.

The only document before the Court is the notice of position. Do I understand you to say that embraced within the contemplation of this notice of position is your informing the Court that Mr. Hughes will not appear for deposition on Monday, February 11th?

Mr. Davis: That is correct, your Honor.

The Court: And therefore the plaintiff may take whatever proceedings it is advised to take by way of sanctions under Rule 37?

Mr. Davis: That is correct, your Honor.

The Court: What about the counterclaims?

Mr. Davis: On the counterclaims, your Honor, as your Honor will recall, I have a motion pending to stay—not to dismiss but to stay—those counterclaims until after a determination has been made by the CAB pursuant to a petition —application filed before the CAB, and your Honor will recall that you put over the hearing on that motion to February 18th at the request of Mr. Hupper.

Now, the position of the Tool Company with respect to these additional defendants is comparable, but let me make one thing clear for the record, your Honor, in case it may not be in the forefront of your mind.

The notice for the taking of depositions of the Tool Company, or of Mr. Hughes, was by TWA, it was not by the additional defendants.

Now, it is true that your Honor did say in a prior order, when the Court set forth the order in which depositions would be taken, as you recall, that the Tool Company would have the right to continue and complete the taking of the depositions of those listed on the schedule limited to the issues of the complaint, to be followed by the depositions by TWA, in which the additional defendants could, if they so desired, participate, and then they would have the right to complete whatever depositions they were entitled to take on the counterclaims, and then, finally, the Tool Company could continue with such further deposition proceedings as it was then advised it could take.

As your Honor, I am sure, realizes even better than I do, my understanding of the decision of the Court of February 6th is that it recognized that the acquisition of control of an air carrier by someone engaged in a phase of aeronautics was clearly within the scope of Section 408 and the powers of the CAB to regulate.

The Court went on further and, as I understand the opinion, indicated its conclusion that that did not carry to the exercise of that control, or at least not to all phases of the exercise of that control.

My understanding of your Honor's decision is clearly that at least the acquisition of control under 408 is clearly within the competence of the CAB.

I respectfully submit further, and I believe I adverted to that on February 6th, whether or not a person is engaged in a phase of aeronautics, where the word of art is used under Section 408, is peculiarly within the expertise of the CAB.

Now, the counterclaims allege and depend upon a determination that these additional defendants are in fact engaged in a phase of aeronautics as the CAB finds it to be,

and that their acquisition of control of TWA was a violation of 408.

I respectfully submit that in the Panagra decision they give us no choice, as we understand that decision, but to obtain a determination by CAB as to whether or not that conduct, that acquisition of control, was or was not something which they are prepared to find in the public interest and to which they are prepared to give exemption from the antitrust laws, because the very issue in Panagra was the contention that there had been conduct in violation of the antitrust laws prior to any approval by CAB. In fact, CAB, as in the Panagra decision, concluded that it did not have the power or the means to regulate the conduct there involved, and the majority concluded that the complaint was to be dismissed, or presumably, upon appropriate proceedings before the CAB; and should the CAB conclude that the conduct of Pan American and Grace was outside of the public interest or their willingness to approve it, then presumably a proper antitrust claim would then be assertable.

I also read the minority opinion and the two dissenters as not agreeing with the majority on the question of primary jurisdiction.

In any event, it is the position of the Tool Company that the counterclaims may not be effectively pursued at this time in this form, and the relief we are requesting in that regard, and which I was hoping to prepare myself to argue on February 18th, was to obtain from the Court an appropriate order which I believe is by leaving the matter docketed but staying all further proceedings therein until after the preliminary questions have been decided.

Your Honor will note that in the application to the CAB we are requesting expeditious treatment.

The Court: I cannot follow you on your argument, Mr. Davis, in the first place, because I think it is clear that by virtue of my decision the CAB does not have exclusive primary jurisdiction in this matter.

Secondly, your first counterclaim is predicated on self-dealing between TWA and the additional defendants.

Your second counterclaim does state it is predicated on Section 408 of the Federal Aviation Act.

Your third counterclaim is the ordinary, simple derivative stockholders suit based on violations of the antitrust laws.

And the fourth counterclaim seems to be a claim for individual relief predicated on the activities set forth in the third counterclaim.

So I do not see how these counterclaims come within the jurisdiction of the CAB.

Mr. Davis: Your Honor, the thing that comes within the jurisdiction of the CAB is the legal effect of what the CAB presumably has the power to do, and that is to determine that to the acquisition of control, which is underlying the capability of obtaining any relief from the Court, confronted with the necessity of first having a preliminary determination by the CAB as to whether or not the acquisition of the control, which is what involves self-dealing, whether or not the violation of 408 and whether or not the alleged violation of the antitrust laws by the conduct that allegedly was engaged in, gives me, or whether or not the CAB, by finding, as they may find, that the acquisition of the control was within the public interest and grant them immunity under 414.

I read your Honor's decision—you are more of an expert than I am—to hold that there is no question about the exclusive, much less primary, jurisdiction of CAB to

apply 408 with respect to the acquisition of control. Where I understand that we lost your Honor was in connection with the question as to whether or not the CAB had exclusive or primary jurisdiction to evaluate the conduct following the acquisition of control by reason of the manner in which the control was exercised.

The Court: Well, I disagree with your interpretation of my opinion. But let's get back to the third counterclaim, which is a simple derivative minority stockholders suit based on violations of the antitrust laws.

Mr. Davis: And if the CAB should determine, based upon this application now pending before it, that the acquisition of control by these additional defendants was in the public interest, they could grant them immunity from the antitrust laws under 414.

The Court: Well, are you saying you came into court a year ago to sue the additional defendants and now you say, well, now, why, we are suing the additional defendants here for a money judgment. Maybe you don't have jurisdiction, Mr. Southern District. We are going down to Washington to see if what we claim is wrong is really all right.

Mr. Davis: Your Honor, the situation at the time we filed these counterclaims was, and I believe a number of people believe, that the granting of exemption by the CAB could only apply when the CAB acted. And thereafter, it was my understanding, and I believe it was the understanding of a great many members of the bar more learned than I am in this field—I am talking now of the aviation field particularly—that prior to the Panagra decision the exemption from the antitrust laws was predicated upon affirmative action by the CAB.

Now, there has been no affirmative action taken by the CAB with respect to the acquisition of control by these additional defendants. It was not until the Panagra decision came down that I was confronted with the fact that even though the CAB had not acted, and as the court, as I read the Supreme Court majority opinion, stated, it would be odd, I believe is the expression, that something which the CAB could find to be in the public interest and could grant exemption under the antitrust laws should run afoul of the antitrust laws and that the two systems collide, because what position can we be in if the conduct of the past can be, shall I say, blessed by the CAB? What kind of time, money and effort am I spending here trying to establish factually a violation of the antitrust laws if then the next day, or while I am doing this, the CAB, not necessarily at my instance but at the instance of the additional defendants, on its own motion should determine that the acquisition of control over this air carrier was in the public interest.

When the Panagra decision came down I found that the only alternative that I had, since I know how they would like to dispose of these kinds of claims, was for me to file an application with the CAB requesting them to take appropriate action, and I did that by a petition which annexes this very counterclaim, to explain to them, as I believe my petition does, that it was the belief of the Tool Company that it was necessary to obtain such a determination before we would be free to pursue our relief in the courts.

I also pointed out to your Honor that it would be impossible for me to take any other position and still maintain my position with respect to the complaint against the Tool Company. I wish to be sure that I lost before your Honor but I hope at some point I may have an opportunity

to a review before an appellate court on that, and I certainly am not going to take any inconsistent positions.

Now, I respectfully submit to your Honor that the determination that was made by your Honor with respect to the both legs of the decision relating to our motion to dismiss the counterclaim—I am referring to our motion on the basis of approval in fact by the CAB, and then our basis of primary jurdisdiction with respect to the conduct subsequent to approval—there is also inherent, as Mr. Hupper, I believe, was arguing on February 6th, that the nature of the conduct claimed, which we claim has been a violation of the antitrust law by these defendants, is not the same as the conduct which is claimed under the complaint even though they arise out of the same transaction.

In other words, this complaint and counterclaim all relate to the acquisition and financing of aircraft by TWA. On the one hand the TWA, under the present management, is claiming that the Tool Company, notwithstanding the fact that every transaction between the Tool Company and TWA was in fact approved, which they admit, by the CAB, nevertheless the manner in which we dictated the acquisition of their aircraft and financing precluded it being done some other way and was a violation of the antitrust laws.

We, on the other hand claim that these aircraft that were acquired and the manner in which they were financed were in fact dictated and controlled by these additional defendants, and ever since back in 1945, I believe, when the Equitable became the first senior lenders it was in a position to veto any financial transaction by TWA for any acquisition of aircraft.

But the conduct that is brought about is different. Whether or not the financing of any airline or the obtaining of equity money is monopolizing the market is a question,

to be sure, but I don't see how the Tool Company can be expected to spend the time and money to prosecute these claims here if the CAB should turn around and say, oh, we think what these additional defendants have done is in the public interest, your Honor, and in your own opinion you quote in part, to be sure—not the part that we referred to in the 1960 order—

The Court: You look at footnote 20. I put it at footnote 19.

Mr. Davis: In mine it was 20.

The Court: Mine was 19.

Mr. Davis: Did it supersede 19?

The Court: No, I don't think so.

Mr. Davis: Well, in any event, your Honor, that is the position of the Tool Company with respect to these additional defendants. And, to be sure, after we have what I hope will be a fuller argument of the question on the 18th, your Honor may make some determination at that time with respect to how you want to dispose of these counterclaims.

But so far as this current February 11th date is concerned, the right of the additional defendants to participate in any depositions is dependent upon the right of TWA and based upon their notice, and I have indicated the Tool Company has taken an irrevocable position at this time which puts the plaintiff to whatever relief they are entitled to based upon that position.

Mr. Bromley: Your Honor, Mr. Davis has now told you twice, and I think he said this three times before, that my right to examine Toolco through Hughes is some way dependent on TWA's right, and he has told you four times that I have never served a notice to examine Toolco through Hughes.

You know, I think, full well, because I have said it many times, that it was nearly a year ago, to wit, on February

13, 1962, that the clients represented by me, the additional defendants represented by me, served an appropriate notice under the appropriate rule to examine Toolco through Hughes, and we are entitled to have him there on Monday for that purpose, and unless Mr. Davis tells your Honor that he is now prepared to consent to a dismissal of his counterclaim with prejudice, then we are entitled to go ahead on Monday.

Of course, some of the other additional defendants served the same notice. Mr. Chanler's clients and Mr. Stewart's clients served the same notice. So I don't understand his constant repetition of a statement that Mr. Davis must know is not true, that is to say, that we have no independent right to examine Hughes, and he has not yet said whether Hughes is going to show up on Monday in response to that notice or not.

Mr. Davis: Your Honor, apparently Judge Bromley has misunderstood me or—

Mr. Bromley: I don't think I misunderstood you. You said it twice.

Mr. Davis: I never claimed that the additional defendants did not have an independent right to examine anyone they saw fit to examine. What I meant to say, if I did not say that that way, was that the notice for the taking of Mr. Hughes' deposition, which has been adjourned or put over until February 11th, and the subpoena, which I accepted on behalf of Mr. Hughes, relates to a notice for the taking of a deposition of Mr. Hughes, was served upon us or filed in California by TWA and not by the additional defendants. I was not intending to convey the impression that you are not in possession of some independent rights.

The Court: I have a distinct recollection—if I have a minute, I will find it—that in one of my pretrial orders I indicated that on the adjourned date, after TWA had finished

its deposition proceedings of Mr. Hughes, the additional defendants would be entitled to proceed with their deposition. That is in an order of the Court.

Mr. Bromley: That's right. The occasion for that was an appeal from our notice, from the special master's decision with respect to our notice.

Mr. Davis: I believe, your Honor, that you may be referring to the March 8th order, because that is the one, I believe, that set out the order in which the various interests were to have the right to take depositions. I believe that is my recollection.

I don't have the March 8th order with me, your Honor, but if you have that before you you may find that that is what you have in mind.

The Court: I have it.

I am sorry, I can't find it offhand, but I have a distinct recollection.

Mr. Chanler: On January 10th, your Honor.

Mr. Bromley: Entered and filed March 6, 1962, your Honor.

The Court: Page 4?

Mr. Bromley: Page 4, yes, sir.

The Court:

> "The defendant Hughes Tool Company may continue the deposition scheduled, limited, however, to evidence which bears on plaintiff's claims against Hughes Tool Company. Since the special master has been presiding over the depositions on a day-to-day basis, he will see to the application of this limitation, and upon completion of this phase of defendant's depositions the plaintiff shall proceed with its depositions in the order provided in the pretrial order of February 7, 1962. The additional defendants may participate in such depositions conducted

by the plaintiff and in furtherance of their own deposition proceedings, or may separately schedule such depositions to follow upon the completion of plaintiff's depositions."

Mr. Bromley: That is what I referred to, yes, sir.

The Court: Do you wish to add anything else, Judge Bromley?

Mr. Bromley: Yes, sir.

I think it is important to call your attention to the fact that later on, in January, 1963, on page 3 of that order of your Honor's, at a pretrial hearing held on January 9th, you said:

"The deposition of Howard R. Hughes by the plaintiff and the additional defendants should now go forward."

The Court: That is not on page 3, is it, Judge Bromley?

Mr. Bromley: Page 3, the middle of that long paragraph, sir, beginning: "During the 10-month period the defendant has conducted over 80 days. . ."

The Court: Yes, I knew I had made some reference to it in the January 10th order.

Mr. Bromley: That is it.

So I intend to go to California tomorrow, and I would like the Special Master to be there Monday morning so that I may note an appropriate default under my notice, and I am sure—

Mr. Chanler: I join in that request.

Mr. Stewart: And I join in that request.

Mr. Harrell: Similarly on behalf of Mr. Tillinghast.

Mr. Sonnett: May I briefly advert to your Honor's question about the counterclaim, counterclaim 3.

In all of the procedural maneuvering that appears to be going on I think it well to recall what your Honor said many months back, which was that the plaintiff should not be lost sight of in the maze of pleadings or the complexity of the pleadings that have resulted.

The TWA position is a very simple one. From the outset, and every time, in orders, notices, the subpoena that was issued by the court in California, the forged authorization, the ratification, the representations made by Mr. Davis to the Court there and here, it was represented that Mr. Howard R. Hughes, as a witness, was subject to the jurisdiction of that court for his deposition to be taken for use in this proceeding on behalf of TWA.

TWA's right to depose him, both on the complaint and answer, since the complaint still stands denied, and on the counterclaims, we think, is perfectly clear. Indeed, it has been ordered repeatedly by this Court.

I am not aware that there was any counsel in this room representing Howard R. Hughes, and TWA has not taken the position and will reserve the question of whether the Hughes Tool Company can or cannot produce Mr. Howard R. Hughes, and we are not particularly concerned because that is why we used the witness subpoena in the first place, to be sure he would be there.

The Tool Company asserted a counterclaim, among others, for $45 million. Its counterclaim 3 purports to be on behalf of TWA and its 13,000 stockholders, and another 5,000 stockholders in Street names, so it purported to assert a cause of action for $45 million on behalf of TWA.

It also asserted a cause of action in its own right against TWA, among others, for $45 million.

I think it must be borne in mind, your Honor, that the Tool Company and these other defendants, including Holliday—who, by the way, is not a party, apparently, to any of

these proceedings—it is he who is a defendant and he should be participating—I think it would be well to recall that these defendants controlled the operations of TWA in all respects, and they knew everything that happened and why it happened, who did it and how much it cost and what the results were.

When they see fit to represent to this Court, as they have in the counterclaim, that TWA was injured to the tune of $45 million, I am happy to report to this Court that their estimate, based on the hard work that we have done since this case was filed, involving the use of Coverdale & Colpitts as experts, leads us to believe that, without touching any tax benefits that they derived by reason of their violation of law—before reaching that—TWA's damages are $45 million-plus.

For Mr. Davis to stand here and with tongue in cheek say to this Court that the expenses of this litigation and of these depositions are so great—even, by the way, if they flew to California on TWA they would get 78 per cent of the profits of the flight—that the expenses are so great that they won't participate in discovery proceedings is obviously absurd.

I deny that Mr. Davis has any authority to state to your Honor definitively or otherwise what Hughes will or will not do on Monday morning. I don't think he can commit that man to his behavior at all.

He can say to you, if he is authorized to say it, that the Tool Company won't be there, but on behalf of TWA I say to your Honor that is completely immaterial.

I think this kind of strategy such as has been tried in the past, as I understand it what they are trying to do is to create some record so that a default in appearance Monday by Hughes is a default by the Hughes Tool Company, and therefore they would insist that TWA then make a motion

under Rule 37(d), and it requires a motion, and we haven't made it and I am not sure we will ever make it, but it does require a motion, to ask your Honor to then enter a default judgment based on what? Based on their inability to produce him? I don't intend to proceed that way at all. I see no reason for changing the rules of practice at the behest of any individual.

We have, I submit to your Honor, TWA has, a right under your orders, under the processes of this court and the processes of the court in California, to the sworn evidence of this man.

Now, if there is any reason he cannot appear, let him say so. But we have a right to that evidence.

Who knows, if he is persuasive enough, he might persuade me that there is something in his derivative counterclaim. Up to date I haven't seen that to be true, but he might. And I have got a right to examine him.

In so far as the other counterclaims are concerned, certainly TWA has a right to defend itself against claims for millions of dollars by the Hughes Tool Company arising or said to arise out of the action in the counterclaims.

I think that the attempt to evade the question of the merits of this case by such procedural gimmicks as this is all too transparent. They cannot declare an anticipatory default. There is nothing in the rule that says that. If he wants to default, withdraw his answer and let's have a default judgment. If he doesn't, let him default on Monday if he has an application to produce Hughes on Monday.

So far as TWA is concerned, the obligation on Monday is for Hughes to appear personally, and we will take whatever action is necessary to see that he does, if he doesn't appear.

This is, as TWA sees it, another stall or attempted stall. It is an attempt to bait us away from getting at the merits of the controversy by offering us some phony maneuver for a partial default judgment, unlimited damages. The damages I think we will collect in this case are $135 million. That is the amount that they alleged we were hurt, tripled, and we will prove it.

We will also establish our right to the divestiture that we seek in this complaint.

These sorts of maneuvers do not reach that point at all. They will try to foreclose us from the sort of record that I want to present to your Honor, whether it is on default or trial, so that you will conclude, as I have, that the only proper remedy for the violations of law here, in addition to damages, is a divestiture of this stock. That is the only cure for this situation.

This is an effort to lead us down a garden path to some very unsatisfactory results. I think we should go forward on Monday.

The Court: Mr. Davis, have you or Hughes Tool Company directed Mr. Howard Hughes not to appear on Monday?

Mr. Davis: No, your Honor, I am not aware of any direction, certainly none that was emanating from me.

The Court: Suppose Mr. Hughes shows up on Monday.

Mr. Davis: Well, I am perfectly prepared to stipulate that the place of the deposition be here rather than in California and to make this the place, and we will note the default of his appearance. There is no question about that determination.

I do know that Mr. Hughes, by reason of the direction of the Special Master, has been informed of what I read to your Honor earlier.

Your Honor, before I proceed to further answer your question, may I correct Mr. Sonnett, which I am sure he has said inadvertently because the notice for the taking of deposition which we are talking about of September 6, 1962, reads—this was addressed to the Special Master and that is what was granted and affirmed by your Honor—

The Court: What date are you referring to?

Mr. Davis: The notice of motion of TWA dated September 6, 1962, which is the subject of this discussion, by Cahill, Gordon, Reindel & Ohl. Let me read it:

> "Please take notice that upon the pleadings here, and all prior proceedings herein, including the pretrial hearing held September 6, 1962, before the Hon. Charles M. Metzner, United States District Judge, the undersigned will move before the Hon. J. Lee Rankin, Special Master, on the 11th day of September 1962 at 10:00 A.M. or as soon thereafter as counsel can be heard,
>
> "(a) For an order that plaintiff Trans World Airlines, Inc. may commence the taking of the deposition of Howard R. Hughes at the United States Courthouse, Foley Square, New York, on September 24, 1962, and continue such deposition from day to day until completed,
>
> "(b) For an order directing that defendant Hughes Tool Company produce said Howard R. Hughes at the time and place aforesaid for the purpose of such deposition. . ."

Now, I do not understand Mr. Sonnett's statement that what we are talking about is what he has been describing.

Mr. Sonnett: Reread paragraph (a).

Mr. Davis: I understand that, and that was changed from New York to California, and that is when I took the trouble of going out because I thought you were then taking

the position that a notice of subpoena could not be served in New York and you were refusing to serve it in New York.

The point I am making is that you did take the position that it was the responsibility of the Tool Company to produce Mr. Hughes, and the Tool Company has taken the position that it has taken.

I am perfectly prepared to have a proceeding, if it will help your record, Mr. Sonnett, on Monday, if that is the date that you want. We can do it in this courtroom, you can do it in my office, you can do it in Mr. Rankin's office, and there you can note the fact that the Tool Company is failing in refusing to produce Mr. Hughes, and then you can have your record and you can take your remedy on it.

I do not understand what remedy it is that the TWA is seeking when it has the opportunity to prove these damages that you claim you can establish against the Tool Company, and I don't understand the statement and what the purpose is of TWA saying that it does not want to proceed in that manner.

My purpose of course is to obtain something which will enable me to get a review on the law as to whether or not you are entitled to be here in the first place. And then I am prepared, if I am wrong in that regard, to pay the consequences to the extent to which you are able to prove damages.

Mr. Sonnett: May I briefly respond, your Honor, because I think—although again I have trouble understanding, Mr. Davis can talk so much and say so little—I think that he said to your Honor that he accepted the subpoena which was issued out of the Los Angeles court for the production of Hughes as an individual. I think he has admitted that he filed papers with the marshal out there, saying he was authorized to accept the service of the subpoena on behalf of Howard R. Hughes as an individual. I think he

admits that he made that representation to this Court when we were dealing with the forged authorization matter and in an effort to blunt it, and I don't know yet whether Mr. Hughes has seen fit to issue instructions to this board of directors of the tool company or whether he hasn't about this matter. There is no counsel here speaking for him, and I haven't any illusions personally that anything Mr. Davis says is going to produce Mr. Hughes anywhere at any time unless Mr. Hughes decides to comply with the process of the court, and he is under that process.

This is only an attempt to create another procedural diversion. If there is going to be a default on Monday, let there be a default, that is within their power, it is within Mr. Hughes' power—but I know of no procedure for anticipatory defaults—otherwise let him withdraw his answer and let's have a judgment on the complaint for the relief we seek.

The Court: Well, I understand one of the reasons we are having this conference is to discuss an anticipatory default so that people don't go to a great deal of trouble and effort running out to California and coming back the same day.

Mr. Sonnett: I have people out there who have been there for six or seven days, about six people in an office, ready to go.

The Court: And there are a lot of people who are not out there, and I have been given to understand that this conference was called for the purpose of discussing this anticipatory default and to notice Judge Hall that he should discontinue any arrangement efforts he is making for this deposition to take place. It was done on the basis of Mr. Hughes not going to appear. Let us not have everybody running out there.

Now, Mr. Davis says that as far as the defendant Hughes Tool Company is concerned, they will admit today that Mr.

Hughes will not appear on Monday and that as a result you may then take whatever steps you wish to pursuant to Rule 37.

I would also like Mr. Davis to state for the record that if by chance Mr. Hughes should appear at the courthouse on Monday, despite what has transpired here this afternoon, that that will be no defense to any proceeding taken by TWA.

Mr. Davis: I will so state, your Honor.

Mr. Sonnett: We are going to have people there in any event, your Honor, with respect to whatever you direct, and I mean that only in this sense, that I don't think Mr. Davis can call the turn on Mr. Hughes' movements any more than I can. There is process outstanding from that court, the courthouse is arranged, the amplifiers are in, the place is swept. We had a report this afternoon there are people out there with files all ready to go.

I think he either will show up or not show up. It is that simple.

The Court: Mr. Davis is telling you he is not going to show up, and Mr. Davis has been the conduit through whom the orders of the Court have been transported to Mr. Hughes, and one of those orders was that if Mr. Hughes did not show up the Court would entertain a motion for a default judgment and an assessment of damages.

If Mr. Davis now tells you that Mr. Hughes is not going to show up, and even if he is going to show up he is not going to use it as a defense to any motion in this court pursuant to Rule 37, I would think that takes care of that phase of the case.

I am bothered about the counterclaims.

Mr. Bromley: So am I.

The Court: I think the plaintiff, in so far as his complaint is concerned, is amply protected by the record made

here this afternoon, and you may then move for your default judgment.

But the counterclaim problem bothers me, and I do not see, Mr. Davis, how you can do anything else but take a dismissal with prejudice on your counterclaims, otherwise the additional defendants are perfectly justified in going out to California and noting the default of Mr. Hughes and coming back and moving for a dismissal with prejudice.

Mr. Davis: Well, as your Honor undoubtedly recalls, there is already a motion pending by these additional defendants to dismiss these counterclaims with prejudice returnable February 18th.

The Court: That is on a different basis.

Mr. Davis: I understand that.

The Court: That is just another reason why—

Mr. Davis: I am perfectly prepared to state, if that will facilitate the procedural matters, that the Tool Company, in so far as these counterclaims are concerned, does not intend to pursue litigating those counterclaims in this court until after there has been a determination by the CAB, and if that has been—

The Court: You don't have any control of that. Once you instituted your action—and you are in the position of a plaintiff in that regard—the defendants acquired priority of deposition. You cannot come in now and say, "I am not going to push this; I am going to sit back and wait a while, and you, Mr. Defendant, have to wait for me."

Once you initiated that proceeding by way of counterclaim and the defendants have their right to proceed, you cannot tell them to stop.

Mr. Davis: Your Honor, I can only take a position I do not consent to any order that the Court may issue at the instance of these additional defendants for whatever reason they advance.

I believe that I have called to your Honor's attention all that occurs to me at the moment which should be called to your attention, and you can be certain that I haven't had very much time to prepare on this, although in my conversation with Mr. Rankin yesterday it was not clear to me just exactly what would be involved here, except that the question of whether or not he were to go to Los Angeles was involved, and there is no question he called to my attention—

The Court: He may want to take a flight out there to note a default. I don't know.

Mr. Davis: I would be perfectly happy to do the same thing with respect to the additional defendants if your Honor rules that under the prior orders of the Court, notwithstanding my different construction of them, they are entitled independently of TWA to commence taking depositions on February 11th.

All I can do is say those will be the orders of the Court; and if they, like, Mr. Sonnett, would like to have a notation on the record of the position of the Tool Company and the failure of Mr. Hughes to appear, they can have that also, and then they can make whatever application they want which will produce whatever order the Court will grant them.

The Court: Judge Bromley, Mr. Davis has now said—and I call upon you simply because you appear first in the list of additional defendants as I recall them; I meant no offense to your colleagues—

Mr. Bromley: You did not do it on account of my age either.

The Court: Oh, never. Some day the same thing may happen to me.

You have heard Mr. Davis' suggestion, and if I can reiterate it, there is no necessity of your going out to

Los Angeles to note Mr. Hughes' default—or, rather, to take Mr. Hughes deposition because he is not going to show up; that if he does show up and you are not there, this is no defense by them to any motion by you for a dismissal with prejudice of the counterclaims.

Since essentially this is a Hughes Tool Company matter, a dismissal with prejudice of the counterclaims, I would think, sufficiently protects the additional defendants, and if I am wrong on that I would like to know.

Mr. Bromley: First I would like to be made clear that this failure to appear, this declaration of refusal to appear, is a refusal to appear pursuant to the notices of the additional defendants of on or about February 13, 1962, to examine the Toolco by Hughes, and is a failure to appear with respect to the subsequent orders issued by your Honor with respect to those notices.

He has not made that clear.

The Court: Do you understand that, Mr. Davis?

Mr. Davis: Your Honor, I will answer it very briefly. It is a position based upon all proceedings to date. That includes all the notices that were served from time to time, all the determinations and decisions by the Court, and all the positions that the Tool Company has taken, so that it is based upon everything that has occurred to date, including the positions I have taken today.

The Court: Well, now they get a little complicated, because Judge Bromley says the prior proceedings of the Court and the notices are one way and you have argued the opposite way today.

Mr. Bromley: That's right.

The Court: So we are not clear.

Mr. Davis: All I meant by that, your Honor, was that up to this noting of default they want to make an application to your Honor as to whether or not they are entitled

to whatever relief they seek, and I suppose at that time I will make perhaps no better an argument than I made today with respect to what their rights were under whatever has occurred, and if your Honor rules at that time—unless you want to make a ruling now, then that will be the ruling now and whatever record I have will be whatever has been decided.

The Court: Well, I purposely put over the motion, your motion, as served on Wednesday, returnable today, to stay all proceedings on the counterclaims pending a determination by the CAB on the ground that the issue of appearance or non-appearance was involved in your main motion to dismiss the claims, and that if the Court of Appeals were to grant a stay of my order, that it would be stayed for all purposes.

And I think I stated on the record, did I not, Mr. Hupper, that this is an extension of the stay to the claim extended to the additional defendants?

Mr. Hupper: Your Honor, I was so rash as to raise the subject and you hit me right over the head.

The Court: Well, you are an advocate and you are entitled to that.

Mr. Davis has not seen fit to apply for a stay and therefore the proceedings are to go forward.

Now Mr. Davis says, "Well, there is no point of going out to California on the claim because Mr. Hughes is not going to show up."

We might as well then consider the motion at this time for a stay of the proceedings on the counterclaims and deny that stay, and from then on we come to the question of what is the state of the record, come Monday, if Mr. Hughes does not appear; and, as I understand it, even if he does appear, it will make no difference.

Mr. Davis: That's correct, your Honor.

The Court: Because if he appears, as far as the Hughes Tool Company is concerned, he has not appeared and they will not use his appearance as any defense to a motion made by the additional defendants for a judgment of dismissal with prejudice.

I want to point out to you, Mr. Davis, that Mr. Hughes' appearance on February 11th was not solely in conjunction with the deposition to be conducted by TWA but was also in conjunction with the counterclaims which you have asserted against TWA and the additional defendants; that notices to take that deposition were properly served; that the Court fixed an order of priority of deposition and indicated when the deposition of Mr. Hughes would go forward in so far as the additional defendants were concerned, and that was reiterated in the pretrial order of this Court on January 10th. So that if Mr. Hughes is not appearing—and even if he does appear, as far as we are concerned in this litigation, he has not appeared, on your concession—then the appearance is in default and in violation of the notices and the prior orders of this Court.

Judge Bromley, you may proceed on February 11, if you wish to wait until that time—and it is too late for you to make the application tonight—for a judgment of dismissal of the counterclaims with prejudice.

Is there anything else left on that?

Mr. Bromley: Only one more thing before I forget it.

Your Honor's stay of the tax documents having expired an hour and 25 minutes ago—

The Court: That is a third ground.

Mr. Bromley: A third ground—I ask for their production to the special master, who is here in the courtroom.

Where are the documents, Mr. Davis?

Transcript of Pretrial Hearing, February 8, 1963

The Court: You might as well make your record, Mr. Davis.

Mr. Davis: I restate my position, Mr. Bromley.

The Court: You are not producing the tax documents?

Mr. Davis: That is correct, your Honor.

The Court: We can consider those in the same category or you embrace them within your refusal of not going forward with any further deposition discovery proceedings?

Mr. Davis: That is correct, your Honor.

The Court: So there is outstanding therefore the default of Mr. Hughes on Monday, the failure to produce the tax documents, and the failure to produce the documents which you claim are governed by the attorney-client privilege and as to which the Court says the privilege has been waived.

I think on the latter you have a motion returnable February 18th.

Mr. Bromley: Yes, your Honor, which was intended to embrace all of these defaults which I thought he would make.

The Court: Do you wish to adjourn the motion now returnable on February 18th, or some more convenient time, at which time all of these things could be brought up? In other words, Judge Bromley, this is being done piecemeal. The record is now set for you to take whatever action you wish to take on the counterclaims and for Mr. Sonnett to take whatever action he wishes to take on the claims based on the default of Mr. Hughes on Monday.

Secondly, you have the failure to produce the tax documents, which is an individual and separate ground for proceeding; and you have the failure to produce the attor-

ney-client documents, which are a separate and individual ground for proceeding.

However, only one of those has been noticed to the Court, and that was your notice for February 18th. My only question is shall we now on the record adjourn that motion without date so that all of your proceedings can come on at one time?

Mr. Bromley: Yes, I am ready now or at any time you say. I am willing to put it over as you suggest.

The Court: I will leave it up to you to renotice the motion.

Mr. Bromley: That's right. I will accept that responsibility and do so.

Mr. Davis: Your Honor, will the special master undertake to advise the court in California, Judge Hall, of the result of today's proceedings?

The Court: Will you do that, Mr. Rankin?

Mr. Rankin: Yes, your Honor.

Mr. Sonnett: On that point, your Honor, is the record clear, as I think it is, but I want to be doubly sure, that there is no stay with respect to TWA's deposition of Mr. Hughes on Monday in California?

The Court: No. I am afraid, Mr. Sonnett, that we have agreed here—at least I think we have—that there is no point in your going out to California on Monday because Mr. Hughes is not going to appear, and that Toolco says that since he is not going to appear, and if he does appear in order to protect what he may feel are individual problems regarding failure to appear, you are still free to make application under Rule 37 for a dismissal or for a judgment on your complaint.

Mr. Sonnett: I am sure that binds Toolco but it doesn't bind Mr. Hughes.

The Court: Suppose that is so. That is the only part you have in the lawsuit right now.

Mr. Sonnett: So that therefore your Honor's direction today is without prejudice to whatever rights TWA may have to enforce the subpoena in California directed to Mr. Hughes.

The Court: What do you mean by that?

Mr. Sonnett: Well, we may see fit to seek some way of attempting to induce Mr. Hughes to appear and testify.

The Court: I see no reason for that at the present time.

Mr. Sonnett: At the present time I can't see anything very clearly except to be sure I can't see Monday very clearly.

The Court: Well, if you feel that as far as you are concerned, TWA, I will continue the stay of the deposition for that purpose only. If you want to have it lifted at some time in the future you may come in and apply to have it lifted solely for that purpose and none other. In other words, the understanding of the Court is that you have now an anticipatory default for failure to appear which will ripen at 10 o'clock Monday, February 11th, on consent of Hughes Tool Company, the only defendant here with the responsibility, I assume, to answer in mondy [*sic*] damages to your claim. And then you are free to move for a dismissal—I mean for a judgment on your claim.

Mr. Sonnett: If Mr. Davis accepts what your Honor has just said, I have no problem about Monday. I wish he would say yes or no to that.

The Court: Do you understand what I just said, Mr. Davis?

Mr. Davis: I understood what you said, your Honor, a long time ago, and I thought I made myself quite clear on the record, and I don't understand how Mr. Sonnett wants to take testimony—

The Court: Now, Mr. Davis, we have a simple question, yes or no?

Mr. Davis: I understand everything you said, your Honor.

The Court: And the answer is yes?

Mr. Davis: That's correct, your Honor.

Mr. Sonnett: Thank you.

The Court: All right.

(Adjourned sine die.)

Transcript of Pretrial Hearing, May 2, 1963

[Doc. 204]

The Court: At the time of the last conference in this matter, which was held on February 21, the Court suggested to counsel that perhaps they could get together on a judgment that would be appealable without the necessity of time-consuming hearings, which would only add to the enormous expense already incurred by the parties to this litigation. It was the hope of the Court that this would expedite the final disposition of the issues involved here.

About the 1st of March I was informed that the parties were unable to agree upon a form of judgment. Consequently, the whole matter is still open for adjudication.

I think that counsel are entitled to an explanation of the delay in disposing of this matter. As you are well aware, the Court was engaged in a criminal trial that commenced on December 7 and was finally concluded with a jury's verdict the day before yesterday, after five months of trial. Despite this long courtroom engagement, the Court has endeavored to stay abreast of the cases, such as this, that have been assigned to it for all purposes pursuant to Rule 2.

In the instant case we have had seven pretrial conferences during January and February, which Mr. Sonnett, I think, called the night court proceedings in TWA against Howard Hughes. Of course, during that time there were a number of opinions and memoranda and pretrial orders that had to be gotten out at night and weekends. In addition, during that same period I had the Alexander against Korvette antitrust suit in which there were a number of conferences from five till ten o'clock at night. Luckily, that ended in a settlement last week, which I don't suppose is possible in this lawsuit. And I had the minority stockholders suit against General Motors and duPont, in which two opinions have been handed down during the same period.

So this is the first chance I have had to come back to this litigation.

Mr. Davis, I have read your brief very carefully. The great problem I have with it, is I don't think it comes to grips with the point which is so evident here. I intend to hand down a formal opinion in which I will state that there is a finding of a deliberate and wilful default in this case, and predicated upon that fact I can't quite follow the arguments that you are making in your briefs. So I want to call upon you first to say anything in clarification of your position.

Mr. Davis: I will be glad to, your Honor. I am prepared to proceed on that assumption, and the question now is what findings of fact and conclusions of law may the Court properly make which will put the case in a posture for a determination of damages, if any can be proven, by reason of the findings of fact and conclusions of law which the Court makes.

Now, so far as the conclusion of law is concerned, we have the prior decisions of the Court which unquestionably held that under this complaint as framed a plaintiff could prove a state of facts which would constitute a violation of antitrust laws outside the scope of the Federal Aviation Act. Now, the question is based upon the entire record, because I think it is easily established that under the decisions that whatever sanctions are to be applied under 37 and the kind of default which permits the Court to find an admission of any kind—

The Court: I don't think there is any question of admission here. You didn't admit anything. You wilfully defaulted under 37(b)(2)(iii). I am going to direct a default judgment.

Mr. Davis: I understand that.

Transcript of Pretrial Hearing, May 2, 1963

The Court: The facts of the complaint are admitted, not in the sense of an admission saying, "Yes, I did it," but they are true, and the only thing left is how much.

Mr. Davis: Whether or not you go to the extreme position under 37(d), rather than 37(b)(2)(iii), which relates to the production of documents, I believe, anyway, I have been thinking in terms of 37(d) rather than 37(b)(2)(iii) which basically are the same effect.

The Court: The words are the same, judgment by default against that party.

Mr. Davis: Now, the question is, your Honor, what findings of fact and conclusions of law can be made under this record as it exists. You cannot ignore the admissions of the plaintiff that exist on the record.

The Court: I don't think we reach that point. The plaintiff has been prevented from proceeding because you have failed deliberately to produce the one person whom they needed to adequately proceed on their lawsuit.

Mr. Davis: So they claim. Taking that claim, now, the question is what damages can be established based upon what conduct. Certainly, the plaintiff can establish what his case is without the necessity of Mr. Hughes to some extent. Certainly, he can prove the commerce that presumably has been affected. Certainly, the plaintiff can say what has happened to him.

All I am saying is that admittedly the plaintiff now is to be given an opportunity, and to the extent that he can show, "I would be able to prove this; this is my testimony. It is not complete because. . . ." And the Court has said that is so. So we will assume and admit that had he had Mr. Hughes, Mr. Hughes would have admitted all the things he tries to prove. You can't go beyond that. I heard Judge Bromley yesterday say if they had Mr. Hughes he could

prove that he fired Mr. Thomas. Mr. Thomas is available. We are not to be punished. If the plaintiff wants to rest upon the record today, fine; there is nothing I can do about it. But if he wants an opportunity to establish what we did, after all, damages could be established with respect to what? Not a conclusion of law. The damages that the plaintiff is entitled to have to be related somehow or other to something that the Tool Company did.

Now, whatever Mr. Hughes' intentions were, still the plaintiff has to say this is what we did to TWA and "We want damages." And the question is what did we do which is a violation of the antitrust laws. I don't see how we can avoid that no matter how we approach it.

The effort that we tried to make in our brief was to point out, and that is where the time that we needed that was consumed, was in establishing what was established by the pleadings and the testimony to date on the assumption, the very assumption that your Honor postulated a moment ago, that all our denials were to be deemed stricken, and assuming that was the proper and fair relief to which the plaintiff was entitled to as a result of what has taken place today, admittedly, it is a matter within the discretion of the Court.

We call the attention of the Court to what cases we are able to find that even for that purpose there ought to be a hearing, not merely the ipse dixit is sufficient, but whether there is evidence to establish what it is that they have been deprived of proving by reason of the position taken by the Tool Company.

The Court: Mr. Davis, you were abundantly clear here on February 8th after I had waited for the time to expire for your application for a stay in the Court of Appeals. I think on February 6th I gave until February 8th at five

o'clock to apply for a stay in the Court of Appeals. You didn't do it, for whatever reason involved is immaterial. But you didn't do it and you stated to this Court that you would deliberately not produce Mr. Hughes or that he would not appear and this was the result of a business judgment.

Mr. Davis: That is correct, your Honor.

The Court: And you advised your client, you said, of all the sanctions that could be imposed for this deliberate flouting of the order of this Court.

Now, with that record the only thing left is to find out how much you owe the plaintiff and to strike your counterclaim. You cited some cases here which just are not in point, one in this Circuit, Gill v. Stolow, 240 F. 2d 669, an opinion given in 1957, and in the very last part of the second sentence, which you have quoted here, there is this language, ". . . and general principles cannot justify the denial of a party's fair day in court except upon a serious showing of wilful default."

I think this record is clear that this is a wilful, deliberate default, and you said you take it after advising your client. You say it is a result of a business judgment arrived at by your client. And you say you are doing this because you want to quickly review the correctness of my opinion denying your motion to dismiss the complaint.

Secondly, in the case of Bernat v. Pennsylvania Railroad they say, "In a case where the refusal to produce a document makes it impossible for the plaintiff to prepare or present his case, a default judgment would be the proper remedy." In that case the statement given by a plaintiff to an insurance company investigating an accident is not comparable to the production of Mr. Hughes in this case, who, I think, is the motivating factor of everything that

went on during the times alleged in the complaint. So I am completely unpersuaded. I see no reason to continue the hearing, Mr. Davis, unless there is anything more you have to say that is embraced in this document you handed me after six weeks of effort.

I will direct that a default judgment be entered, that the matter be referred to the Special Master forthwith for a hearing on the amount of damages. You can arrange with the Special Master for the dates to proceed with that. I will retain the jurisdiction and determination of the issue of the divestiture. The counterclaims will be stricken and judgment entered for the additional defendants, and I will enter a formal opinion tomorrow to that effect.

Mr. Sonnett: Would your Honor include TWA in the disposition of the counterclaims with prejudice since TWA also joined in the motion to dismiss those counterclaims?

The Court: I will do so.

Mr. Davis: Your Honor, excepting to your Honor's decision, may I inquire if there is a possibility that your Honor will contemplate the entry of a judgment in which your Honor will be referring the matter to the Special Master for the determination of damages which your Honor would be prepared to certify for purposes of a discretionary review by the Court of Appeals.

The Court: If that will expedite the determination of the issue I will do so. However, I will think about it overnight.

As I understand your point here, you will pay TWA all the money they are entitled to if it is determined that I do have, and when I say "I", I mean the Federal Court for the Southern District of New York, jurisdiction over this case?

Mr. Davis: At this point, your Honor, the question is whether we are prepared to pay TWA whatever we owe TWA, if anything, based upon whatever conduct the Court has found by reason of everything that has happened to date which your Honor is prepared to hold constitutes in a defined or undefined way a violation of the antitrust laws. That would permit us, I think, to achieve at least the other objective that we have.

Mr. Sonnett: Your Honor, I am informed that the clerk of the Circuit Court of Appeals will not docket for hearing before the summer recess any matter at this time, except by special direction of the Circuit Court of Appeals. While I am sure that I would happily join in any review of your Honor's decisions, it seems to me that any attempt to procure a review prior to the final judgment will not succeed at this time unless the Circuit Court decides to set this down specially.

Mr. Davis: We always have to get the Circuit Court to agree to a date.

The Court: They have ten days in which to act on the application. If I were to grant the 1292(b) you must apply within ten days to the Court of Appeals to have the matter come up.

Mr. Sonnett: I am speaking only as to the question whether this matter can be heard.

The Court: You will know that within ten days. They will let you know whether you are coming up or not. You can argue with them that it would be wasting time if you are going to be held till the Fall.

Mr. Davis: I understand, your Honor, in any event, the dismissal of the counterclaims will be in the form of a

54(b) judgment which will be appealable, anyway, and we might be able to get both things up together.

The Court: It doesn't make much sense for one to go up without the other.

Mr. Davis: A form of judgment referring the matter to the Special Master for determination of damages on whatever ground rules to be established which would be certified would permit us to go.

The Court: I will think about that overnight.

A-317

Opinion and Order, May 3, 1963

[Doc. 191]

[CAPTION] 61 Civ. 2324

METZNER, D. J.:

The plaintiff Trans World Airlines, Inc. (TWA) has moved for an order pursuant to rules 37(b)(2)(iii), 37(d) and 55(b)(2) of the Federal Rules of Civil Procedure directing the entry of a judgment by default against the defendant Hughes Tool Company (Toolco). It requests that a hearing be held to determine the amount of damages to be paid by Toolco for the injuries alleged in the complaint, and that Toolco divest itself of all of its right, title and interest in the stock of TWA. The motion also seeks leave to increase the *ad damnum* clause following paragraph 70 of the complaint, from $105,000,000 to $135,000,000. It further seeks a dismissal of the counterclaims with prejudice. The motion further requests that Toolco, its officers and employees, or anyone acting in concert with them, be enjoined from instituting any action based upon the counterclaims set forth in the answer of Toolco and from instituting any proceeding before an administrative agency of the United States in which TWA is a party and which is based upon the allegations of the counterclaims. Finally, it is requested that the claims asserted by TWA against the defendant Holliday be severed from these proceedings.

Toolco owns 78% of the stock of TWA and Howard R. Hughes owns all of the stock of Toolco. It is clear that during all of the times covered by the complaint the management of TWA was controlled by Hughes personally.

The deposition of Hughes was originally scheduled for September 24th, 1962 and was adjourned by the court to

October 29th, 1962. On October 25th the Special Master adjourned the deposition of Hughes to February 11th, 1963. On December 28th, 1962 the Special Master stated that when this adjournment was granted there was no doubt that it was the intention and expectation that the deposition would start on the adjourned date and proceed until it was concluded according to law.

In the pretrial order of January 10th, 1963 the court affirmed this ruling of the Special Master, and stated that the date of February 11th, 1963 would be adhered to in the absence of extraordinary circumstances. The order of January 10th also directed Toolco to produce certain documents as to which it claimed an attorney-client privilege. The order pointed out that Toolco's opposition to producing such documents was in fact a reargument of the order of this court dated July 24th, 1962 which denied the claim of privilege.

The order of January 10th also denied Toolco's application to proceed at that time with the examination of two witnesses on the ground that such deposition would interfere with the taking of the Hughes deposition scheduled for February 11th.

On January 15th counsel for Toolco moved for an order that the Hughes deposition be taken on written interrogatories, or, in the alternative, that the motion to dismiss the complaint, pending since August 9th, 1961, be brought on for hearing. On January 16th Toolco's counsel was informed that he would be given until February 1st to submit all papers in support of his motion to dismiss. On January 19th Toolco's motion to take Hughes' deposition in writing was denied. The court, however, allowed counsel for Toolco time to indicate whether he desired the place of deposition to be changed for the convenience of Hughes. No such request was ever made.

Opinion and Order, May 3, 1963

On January 23rd the Court of Appeals denied Toolco's application for a stay of the orders of January 10th and 19th.

On February 1st, on Toolco's appeal from an order of the Special Master, the court affirmed that order, and directed that Toolco produce certain tax documents to TWA on a daily basis up to February 11th.

On February 6th a hearing was held on Toolco's motion to dismiss the complaint. The motion was denied from the bench with an indication that the formal opinion would be filed the following day. The denial of the motion embraced a finding that the court had jurisdiction of the claims. Toolco was granted a stay of deposition-discovery proceedings until 5 p.m. on February 8th, to afford it an opportunity to apply to the Court of Appeals for a further stay pending an application for a writ of mandamus.

The formal opinion of February 7th, denying Toolco's motion to dismiss the complaint, pointed out that the grounds urged for a dismissal existed and were adverted to in the original notice of motion filed on August 9th, 1961, and served several weeks prior to the assignment of this case for all purposes, pursuant to rule 2. The court indicated that counsel for Toolco could just as well have argued the motion at the inception of the litigation, instead of waiting until the taking of the deposition of Hughes was imminent.

A pretrial conference was held on Friday, February 8th, at 5 p.m., on information that counsel for Toolco was not going to proceed with the deposition proceedings of Hughes on the following Monday. Toolco did not apply to the Court of Appeals for a stay pending an application for a writ of mandamus, but, rather, submitted a "Notice of Position" to the court at the time of the hearing. In essence, this docu-

ment stated that because of the enormous expenses that would be incurred in further pretrial and trial proceedings, which in Toolco's belief would exceed the amount of damages provable by TWA under the complaint, Toolco decided to rest on the merits of its position, so that the Court of Appeals would have an opportunity to rule upon the propriety of the denial of the motion to dismiss the complaint.

At the hearing counsel for Toolco stated that he had advised his client of the sanctions available to TWA under rule 37, and that by insisting upon a right to obtain a review of the legal questions involved in the proceedings to date Toolco understood that it might be deprived of further defending on the merits. Counsel referred to this as a "business decision."

Counsel for Toolco specifically stated that Hughes would not appear for deposition on February 11th and that if it were necessary to clarify the record everyone could gather on the following Monday (February 11th) to

> "note the fact that the Tool Company is failing in (sic- and?) [sic] refusing to produce Mr. Hughes, and then you can have your record and you can take your remedy on it."

Counsel also stated that he did not intend to further litigate the counterclaims until after a determination of a complaint filed by Toolco with the Civil Aeronautics Board on February 6th which includes some of the allegations of the counterclaims.

Embraced within the refusal to proceed with the deposition of Hughes is the refusal to obey the orders of the court directing Toolco to produce the documents referred to above.

On the basis of this record TWA made the motion now before the court. It is clear that the deposition of Hughes

is essential for the proper presentation of TWA's case. It is also clear that the failure of Hughes to appear on February 11th for his deposition was the result of a clear and studied determination by Toolco after all efforts to postpone the appearance of Hughes had failed. The default was deliberate and willful and justifies the court in entering a default judgment as provided in rule 37(b)(2)(iii) and 37(d). A judgment by default shall be entered in favor of TWA against Toolco, and the counterclaims asserted by Toolco against TWA shall be dismissed with prejudice.

That branch of the motion seeking to increase the *ad damnum* clause from $105,000,000 to $135,000,000 is granted. This is not a case where a party has defaulted in appearance. Here issue was joined and adversary proceedings continued in the pretrial stages of this litigation. The damages originally asserted were unliquidated and TWA is entitled to recover for whatever damage it can show it suffered. Furthermore, Toolco will be represented at the hearings necessary to assess damages under rule 55(b)(2). Rule 54(c); *Peitzman* v. *City of Illmo*, 141 F.2d 956 (8th Cir. 1944); *cert. denied*, 323 U.S. 718 (1944; *cf. Riggs, Ferris & Geer* v. *Lillibridge*, Docket No. 27814, 2d Cir., April 10, 1963.

Before entering the final judgment a hearing must be held to determine the amount of damages to be awarded TWA since the damages are unliquidated. Therefore, pursuant to rule 55(b)(2), the question of the amount of the damages to be paid by Toolco to TWA is referred to J. Lee Rankin, the Special Master heretofore designated by the court, who has presided over the deposition-discovery proceedings for the past year.

TWA has also requested that Toolco divest itself of its 78% stock interest in TWA. The propriety of granting this prayer for relief will be determined by the court.

Opinion and Order, May 3, 1963

The determination of the application by TWA for an injunction will be held in abeyance pending the entry of the final judgment.

The application to sever the action against Holliday has been withdrawn on his election to be individually bound by the defaults of Toolco. Consequently, the application for a default judgment is deemed to include a request for similar relief against this defendant, and the disposition of this motion as to Toolco is also dispositive as to Holliday.

I am of the opinion that this order involves a controlling question of law (see *Pan American Airways, Inc.* v. *United States*, 371 U.S. 296 (1963)) as to which there is a substantial ground for difference of opinion. Enormous expense has already been incurred in this litigation, and the hearings before the Special Master on the question of damages, with a potential recovery of $135,000,000 on the first two claims and $10,000,000 on the third claim, may well be prolonged. An immediate appeal from this order is justified, since it may materially advance the ultimate termination of this litigation.

So Ordered.

Dated: New York, New York
May 3, 1963

Charles M. Metzner /s
U. S. D. J.

[The above opinion also appears at 32 F.R.D. 604.]

Opinion and Order of May 3, 1963 Granting Additional Defendants' Motion to Dismiss (Memorandum Endorsed on Motion Papers Dated February 15, 1963)

[Doc. 179 B]

Trans World Airlines v. *Hughes, 61 Civ. 2324*

For all of the reasons stated in the opinion and order entered on the companion motion by Trans World Airlines, Inc. for a default judgment and dismissal of the counterclaims with prejudice, this motion by the additional defendants is granted. The counterclaims alleged against these additional defendants are dismissed with prejudice and final judgment is directed to be entered accordingly, pursuant to F.R.C.P. 54(b) on the ground that there is no just reason for delay.

So Ordered.

Dated: New York, New York
May 3, 1963

/s/ Charles M. Metzner
U.S.D.J.

Judgment of the Court of Appeals on Interlocutory Appeal, Entered July 10, 1964 (Docket No. 28405)

[Doc. 478]

[CAPTION]

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, at the United States Courthouse in the City of New York, on the day of June, one thousand nine hundred and sixty-four.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
Circuit Judges.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the said District Court be and it hereby is found to have had jurisdiction of the action

Judgment of Court of Appeals on Interlocutory Appeal, Entered July 10, 1964 (Docket No. 28405)

and that the orders of the Civil Aeronautics Board do not constitute a good defense to the antitrust claim of the plaintiff.

A. DANIEL FUSARO
Clerk

A true copy,

A. DANIEL FUSARO
Clerk

Judgment of the Court of Appeals Affirming Dismissal of the Counterclaims, Entered July 10, 1964 (Docket No. 28406)

[Doc. 479]

[CAPTION]

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, at the United States Courthouse in the City of New York, on the second day of June one thousand nine hundred and sixty-four.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
Circuit Judges.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and it hereby is affirmed with the exception of the said order dealing with the second counterclaim.

Judgment of the Court of Appeals Affirming Dismissal of the Counterclaims, Entered July 10, 1964
(Docket No. 28406)

Further ordered, adjudged and decreed that the second counterclaim be and it hereby is dismissed for lack of jurisdiction.

A. DANIEL FUSARO
Clerk

A true copy,

A. DANIEL FUSARO
Clerk

Opinion of the Court of Appeals in Dockets No. 28405 and No. 28406

[Doc. 478]

[CAPTION]

Before:

LUMBARD, *Chief Judge*,
KAUFMAN and HAYS, *Circuit Judges*.

Docket No. 28405

Interlocutory appeal, under 28 U. S. C. §1292(b), from an order of the United States District Court for the Southern District of New York, Charles M. Metzner, *J.*, which granted default judgment in favor of the plaintiff because of the defendants' failure to produce the managing agent of one defendant for examination and their failure to produce certain papers and documents. 32 F. R. D. 604 (S. D. N. Y. 1963).

Pursuant to an order of this court of June 6, 1963, the appeal is limited to two questions: (1) Whether the district court had jurisdiction of the action, and (2) Whether the exercise of its regulatory power by the Civil Aeronautics Board in the premises by issuance of orders permitting defendants to act as defendants acted constitutes a good defense to the antitrust claims of the plaintiff.

The court finds that the district court had jurisdiction of the action and that the CAB orders do not constitute a good defense to the antitrust claims of the plaintiff.

Docket No. 28406

Appeal from orders of the United States District Court for the Southern District of New York, Charles M. Metzner, J.,

which dismissed with prejudice the defendants' first five counterclaims and which granted summary judgment in favor of the plaintiff on the sixth counterclaim, because of the defendants' failure to produce the managing agent of one defendant for examination and their failure to produce certain papers and documents.

Affirmed with respect to all but the second counterclaim. The second counterclaim is dismissed for lack of jurisdiction.

LUMBARD, *Chief Judge:*

These separate appeals, heard together, are from two orders of the United States District Court for the Southern District of New York in the same case. In the first appeal, No. 28405, the defendants, Hughes Tool Company (Toolco) and Raymond M. Holliday, Toolco's chief financial officer, attack the validity of an order which granted default judgment in favor of the plaintiff, Trans World Airlines, Inc., because of the defendants' failure to produce Toolco's managing agent, Howard R. Hughes, for examination and their failure to produce certain papers and documents. 32 F. R. D. 604 (S. D. N. Y. 1963). In the second appeal, No. 28406, Toolco attacks an order which dismissed with prejudice its first five counterclaims against TWA and a group of additional defendants and an order of the same date which granted summary judgment in favor of TWA on the sixth counterclaim.

TWA's complaint charged the defendants with a variety of violations of the antitrust laws as well as with having committed willful and malicious injury to TWA's business, and sought divestiture of Toolco's interest in TWA, injunctive relief, and money damages, trebled with respect to the

antitrust violations. On May 3, 1963, Judge Metzner ordered the entering of a default judgment in favor of TWA against Toolco[1] but referred to a special master the issue of damages, on TWA's claim of $35,000,000 which the antitrust statute would treble, and retained for further consideration the question of divestiture. Judge Metzner did certify under 28 U. S. C. §1292(b) that immediate appeal was justified inasmuch as a controlling question of law was involved and hearings on the question of damages might be prolonged. We granted leave to appeal limited to two questions: first, whether the district court lacked jurisdiction of the treble damage action by reason of primary jurisdiction over these matters residing in the Civil Aeronautics Board; and second, whether the issuance of certain orders by the CAB permitting the defendant to take certain actions constitutes a good defense to the antitrust action. Thus the propriety of the court's entering a default judgment against the defendants with respect to the complaint is not before us and we consider it only in connection with the court's dismissal of the five counterclaims asserted by the defendants. The second appeal is taken as of right from a final judgment which dismissed Toolco's first five counterclaims and granted summary judgment to TWA on the sixth counterclaim.

Background of the Litigation

An understanding of the issues requires a preliminary statement of certain background facts set forth in the pleadings and which on this record and in view of the default of the defendants we must take as established.

[1] Due to the relationship of the parties, the district court accepted the election of defendant Holliday, an officer and director of Toolco, to be bound by Toolco's decision to forego further discovery proceedings.

Opinion of the Court of Appeals in Dockets No. 28405 and No. 28406

Commencing about five years after TWA was organized in 1934, Toolco, which at all times has been 100 percent owned and controlled by Howard Hughes, began to purchase TWA common stock, and by 1944 it held 45 percent of this stock. By 1958 Toolco had increased to 78 percent its interest in TWA's common stock; from 1944 until December 1960 it nominated a majority of TWA's directors.

Since 1955 the commercial air industry has largely converted to the use of jet aircraft. TWA's competitors began in that year to aid in the development of and to purchase jet planes. Prior to 1955 Toolco had entered into an arrangement with the General Dynamics Corporation (Convair) for the joint development of jet aircraft, but in that year the two companies terminated the arrangement. Toolco had also entered into a plan whereby it would develop and manufacture its own jet aircraft for sale or lease to TWA and its competitors. That plan was abandoned during 1956. During this period, Toolco arranged for the purchase on its own account of jet aircraft from Convair and the Boeing Company, these arrangements providing that Toolco could assign to TWA its rights to such aircraft.

Despite repeated requests by TWA, Toolco refused to assign any planes to TWA during the period 1956 to 1960. The only jet-powered aircraft which the defendants permitted TWA to use during this period were leased on a day-to-day basis by Toolco to TWA during 1959 and 1960 on the condition that TWA would not purchase or lease aircraft from any other potential supplier.

At some time prior to May 1960 Toolco and Atlas Corporation, which owns a controlling stock interest in Northeast Airlines, entered upon a plan to have Northeast propose to TWA a merger of the two air carriers. In November 1960, while the proposed merger plan was pending,

Toolco diverted to Northeast six of the Convair jet aircraft which by previous agreement it had assigned to TWA.

The defendants pursued a continuous policy of refusing to permit TWA to undertake equity financing except on the condition that Toolco increase its equity position in TWA; as a result TWA was limited to obtaining funds through debt financing. When in 1960 Toolco and Hughes finally agreed to outside financing for TWA, the cost of such financing had risen greatly and the financing could be arranged only on less favorable terms than had theretofore been available, terms which had been secured by TWA's competitors. Under the 1960 financing arrangement Toolco's stock in TWA was placed in a voting trust.[1a] The CAB approved this financing arrangement and the voting trust on December 29, 1960, finding that these arrangements were in the public interest. Thereupon, the Metropolitan Life Insurance Company and the Equitable Life Assurance Society loaned TWA $92,800,000 and a group of banks for which the Irving Trust Company acted as agent loaned TWA $72,000,000. In March 1961 TWA's Board of Directors authorized the purchase of 26 Boeing jet aircraft. Thereafter the defendants continued their attempts to have TWA purchase from Toolco jet aircraft which Toolco had previously agreed to purchase from Convair. The defendants have also continued to press their demand for

[1a] The commitments of the various lending institutions had been conditioned upon the continuation of satisfactory TWA management. The lenders reserved the right to insist upon a voting trust during the term of the loan in the event of a change in TWA management which they deemed to be adverse to TWA's credit position. When Charles Thomas abruptly resigned as president of TWA in July 1960 the lenders offered to effect the transaction if Toolco agreed to place its stock in TWA in a voting trust. In December 1960 Toolco executed the voting trust agreement.

a merger of TWA and Northeast and have otherwise, despite the existence of the voting trust, attempted to prevent TWA from acquiring jet aircraft other than from Toolco.

THE FIRST APPEAL—Docket No. 28405

TWA's complaint alleges that the facts heretofore stated constitute violations of the Sherman and Clayton antitrust acts, insofar as the defendants have attempted to monopolize a substantial segment of interstate and foreign commerce and trade, have required that TWA boycott all suppliers of aircraft other than Toolco, and have agreed to provide financing and to sell aircraft to TWA on the condition that TWA not purchase or lease the goods of a competitor. The defendants assert that the Civil Aeronautics Board possesses primary jurisdiction over these matters and in the exercise of its powers has approved all of the transactions alleged in the complaint and thereby immunized the defendants from the operation of the antitrust laws. Judge Metzner held that nothing in the Federal Aviation Act precludes the district court from asserting jurisdiction in this case and that the CAB's approval of various transactions between TWA and Toolco did not confer immunity upon the defendants from the operation of the antitrust laws. We agree.

The proposition has so often been stated that it has become hornbook law that immunity from the operation of the antitrust laws is not lightly to be inferred from the enactment of a regulatory statute. See *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439 (1945). Yet Congress may effect such a design through explicit enactment of an immunizing

provision, and Congress has done so on occasion.[2] Under §408(a)(6) of the Federal Aviation Act, 49 U. S. C. §1378(a)(6), no person engaged in any phase of aeronautics[3] may lawfully acquire control of any air carrier without the prior approval of the CAB. Section 411 empowers the Board to order any air carrier to cease and desist from "unfair or deceptive practices or unfair methods of competition." Section 414 of the Act provides that any person affected by any order made under § 408[4] "shall be, and is hereby, relieved from the operation of the 'antitrust laws' . . . and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order."

In attempting to ascertain the extent of the antitrust immunity conferred by the Aviation Act we do not explore wholly uncharted territory. In *Pan American World Airways, Inc.* v. *United States*, 371 U. S. 296 (1963) (*Panagra*), a case upon which all parties in this litigation principally rely, the Supreme Court considered the extent to which the Aviation Act has granted the CAB jurisdiction over matters involving the commercial aviation industry which might otherwise constitute antitrust violations.

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[2] See, e.g., Clayton Act §16, 38 Stat. 737 (1914), as amended, 15 U. S. C. §26 (1958); Shipping Act §15, 39 Stat. 734 (1916), 46 U. S. C. §814 (1958); Interstate Commerce Act §5a(9), 62 Stat. 473 (1948), 49 U. S. C. §5b(9) (1958).

[3] In *Transcontinental & Western Air, Inc., Control by Hughes Tool Company*, 6 C. A. B. 153 (1944), the Board determined that Toolco was engaged in a phase of aeronautics and thus subject to Board action under §408.

[4] Section 414 applies to 49 U. S. C. §1379 (interlocking relationships) and 49 U. S. C. §1382 (pooling and other agreements) as well as to §408.

Opinion of the Court of Appeals in Dockets No. 28405 and No. 28406

Pan American, a major airline in interstate and foreign commerce, and W. R. Grace & Co., a common carrier, were charged in a civil action brought by the United States with violations of the antitrust laws arising from their relations with Panagra, an airline which had been formed by Pan American and Grace, each of which owned 50 percent of its stock. The government's complaint alleged restraints of trade in that Pan American and Grace had agreed that Panagra would have the exclusive right to traffic along the west coast of South America free of Pan American competition and that Pan American would enjoy the exclusive right to traffic in other areas in South America and between the Canal Zone and the United States; that Pan American and Grace had conspired to monopolize and did monopolize air commerce between the eastern coastal areas of the United States and western coastal areas of South America and Buenos Aires; and that Pan American had exercised its 50 percent control over Panagra to prevent it from securing authority from the CAB to extend its service from the Canal Zone to the United States.

The district court found a single violation in Pan American's activities with regard to the extension of Panagra's routes and ordered divestiture of Pan American's stock interest in Panagra. On direct appeal from the district court, the Supreme Court reversed the lower court judgment on the ground that the questions presented by the government's complaint had been entrusted to the CAB and the district court therefore lacked jurisdiction in the premises.

Noting that those aspects of antitrust problems entrusted to the Board are "but a fraction of the total," the Court emphasized that the limitation of routes, the division of territories, and the relation of common carriers to air

carriers are "basic to [the] . . . regulatory scheme" of the Federal Aviation Act and that the acts charged in the government's complaint are "precise ingredients of the Board's authority." The term "unfair methods of competition" in §411, the Court noted, must gather meaning from the context of the regulatory scheme envisioned in the Act, and it would be strange if the "public interest" standard incorporated into §411[5] was deemed satisfied by the Board as to a particular transaction and yet that transaction was violative of the antitrust laws; it would be equally strange for a transaction approved under §408 by the Board to be adjudged subsequently to be in violation of the antitrust laws.

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[5] Title 49 U. S. C. §1302 provides:

"In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

"(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

"(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

"(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(e) The promotion of safety in air commerce; and

"(f) The promotion, encouragement, and development of civil aeronautics."

The striking dissimilarities between the operative facts in *Panagra* and those in the instant case as well as the whole tenor of the Supreme Court's opinion compel us to the conclusion that the district court properly asserted jurisdiction in this cause. The relationship between the allegedly unlawful activities in *Panagra* and the scope of the Board's powers to deal with such activities was direct. Under 49 U. S. C. §1371, it is the specific function of the CAB to certify airlines to operate on a particular route between terminal points directed by the Board. The unlawful division of territories and allocation of routes with which Pan American, Grace and Panagra were accused were therefore directly within the ambit of powers explicitly granted the Board by the Congress. To permit the courts to intrude into this area would have been, as the Court noted, to permit the erection of an independent yet parallel body of law in direct contravention of the regulatory scheme embodied in the Aviation Act.

By contrast, in the instant case TWA's complaint alleges transactions which are unrelated to any specific function of the CAB. The Board is explicitly entrusted with the duty of considering for approval any potential acquisition of control over an air carrier by a person engaged in any phase of aeronautics; and to the extent of such approval—, but only to that extent—the Act grants immunity from the operation of the antitrust laws. Surely Congress did not contemplate that CAB approval of an acquisition would be tantamount to approval of every transaction which might be entered into by the controlling party. The focus of the Board's powers in this sphere is the acquisition itself rather than the broad range of activities into which the controller may enter thereafter. Thus the plaintiff's complaint

enumerates a variety of transactions over which the Board is given no explicit jurisdiction by the Act: an attempt to monopolize a substantial segment of interstate and foreign air commerce, imposition by the defendants on TWA of the condition that the airline not purchase or lease aircraft from any supplier other than Toolco, and the tying of financing of aircraft acquisitions with the purchase of such aircraft from Toolco.

Nowhere in the Act is the Board specifically charged with the duty of monitoring each transaction which is ultimately effected between the carrier and its controller once an acquisition is approved. The Board concededly may condition its approval of a control acquisition upon such terms as it may find to be just and reasonable, and thereby retain a continuing jurisdiction over the activities of the controlling party.[6] In the exercise of this supplementary power the Board may investigate and regulate certain aspects of transactions effected between an air carrier and the controlling party. But the existence of this power—which was employed in approving Toolco's acquisition of control over TWA—hardly supports the defendants' claim that Congress placed the regulation of everything which might flow from such transactions within the exclusive jurisdiction of the CAB. The issue here is not whether the CAB may consider such matters but rather whether the

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[6] Section 408 provides, in pertinent part:

"Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe . . ."

federal courts have been excluded from their consideration by Congress. There is virtually no limit to the nature and variety of the transactions which fall within this category. In the absence of an explicit congressional mandate entrusting such transactions exclusively to the Board we can find no basis for declaring the federal courts to be without jurisdiction in such matters.

In *Panagra* the Civil Aeronautics Board could have considered the activities of Pan American under its broad power set out in §411 of the Act to "investigate and determine whether any air carrier . . . has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation . . . ," a provision to which the Supreme Court explicitly adverted in holding that the matters there in dispute had been specifically entrusted by Congress to the Board. By contrast, the Board enjoys no such power to deal with the allegedly unlawful activities of Hughes and Toolco, inasmuch as §411 is applicable solely to "any air carrier, foreign air carrier, or ticket agent." The limited applicability of §411 merely underscores the limited jurisdiction conferred by Congress upon the Board to deal with the multifarious antitrust problems which may arise in the management and operation of the commercial air industry. Moreover, it is not even clear that the Board any longer possesses any jurisdiction over the activities of Hughes and Toolco, even under §408 of the Act, inasmuch as the voting trust arrangement adopted in 1960 appears to have ousted Hughes and Toolco from control over the operations of TWA, such control being a prerequisite to the Board's acting under §408.

We are reinforced in our conclusion by the Supreme Court's recognition of the limitations of its holding in

Panagra. Characterizing the questions presented in the government's complaint as "narrow" ones, the Court, as we have noted, emphasized that the antitrust problems entrusted by the Act of the Board "encompass only a fraction of the total." The activities here drawn into issue by TWA's complaint fall without the ambit of that small fraction of antitrust problems placed within the Board's exclusive jurisdiction.

The Aviation Act itself bears testimony that matters such as those with which we are here concerned were not intended to be placed without the competence of the federal judiciary. Title 49 U. S. C. §1506 declares that "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." Moreover, the Act fails to empower the Board to grant the very relief principally sought by the plaintiff in this action—the award of money damages, trebled under the mandate of the antitrust laws.

Even if we were to view as the subject of judicial discretion the question whether the CAB is to be given primary jurisdiction in the consideration of activities such as those here alleged, we could find no compelling reason to adopt such a course on the facts presented. While the entire regulatory scheme of the Federal Aviation Act demands that the Board be given great latitude in fashioning public policy with regard to the development of the commercial air industry through the acquisition of control over air carriers—and the Board possesses a substantial expertise in these matters—there is no such necessity for a uniformity of policy with regard to the consideration of the validity of individual transactions effected between an air carrier and its controller which are alleged to be

unlawful under the antitrust laws. Nor is the Board any more qualified to consider such charges than the federal courts, which daily encounter and resolve antitrust problems. The disposition of such matters by the courts would not intrude upon the Board's function of fashioning the broad framework of control for the commercial air industry. We can thus find no warrant for adopting the position that the subject matter of this litigation was entrusted by Congress to the exclusive jurisdiction of the Civil Aeronautics Board.

Nor do we find any merit in the defendants' alternative contention that the Civil Aeronautics Board, in approving Toolco's acquisition of control over TWA and certain specific transactions thereafter, immunized the defendants from the operation of the antitrust laws as to all the ramifications of these transactions. Title 49 U. S. C. §1384 extends such immunity only "insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order." As Judge Metzner noted, the Board's approval of acquisition of control by Toolco over TWA did not carry with it approval of every transaction which Toolco might choose to effect in the exercise of its control. To give §408 such a carte blanche effect would be to pervert the entire regulatory structure of the Aviation Act. Nor can any of the activities with which Toolco stands charged be deemed to have been necessary to the exercise of its control relationship.

In its original grant of approval of the acquisition of control over TWA by Toolco,[1] the Board restricted commercial transactions between the two companies to "transactions involving complete items of property, the price of

[1] *Transcontinental & Western Air, Inc., Control by Hughes Tool Company*, 6 C. A. B. 153 (1944).

which does not exceed $200 each, with the further limitation that the total annual expenditure involved in such commercial transactions by either party shall not exceed $10,000." Over the years the Board has occasionally modified this order to permit specific intercompany transactions. In 1959 and 1960 the Board issued five such modification orders approving the specific transactions involving the acquisition of jet aircraft which are the subject matter of this litigation. In each case, however, the Board's order states merely the specific terms of the transaction and none of the accompanying conditions which allegedly were foisted upon TWA.[8] Order No. E-13873, issued on May 15, 1959, for example, states that the modification "is desired to permit TWA to lease on an individual basis up to eleven Boeing 707-131 aircraft from Hughes as they become available, as well as to acquire from Hughes at Hughes' actual cost a supply of spare parts, not to exceed $3,500,000 in value, which are needed for the operation of these aircraft. In addition, modification is requested to permit the lease by Hughes of up to thirty spare jet engines to TWA." The Board stated in its order that the proposed arrangements did not violate the purpose of the original restriction in the control approval and that the modification ordered was just and reasonable and in the public interest; but the Board was careful to emphasize that its action should not be deemed a determination for rate-making purposes of the reasonableness of the transactions. There is no indication whatsoever—or any reason to believe—that the Board had been given any indication of the conditions which had been attached to Toolco's

[8] See Order No. E-13542, February 26, 1959; Order No. E-13873, May 15, 1959; Order No. E-14169, July 1, 1959; Order No. E-14504, September 30, 1959; Order No. E-14877, January 29, 1960.

agreements with TWA. The Board's approval extended only to the individual transactions involved in these orders, not to the whole range of activities which over a period of years constituted the backdrop against which these transactions were effected. There is thus no cause to hold that these individual and narrow Board orders immunized the defendants from the operation of the antitrust laws with respect to activities not specifically ruled upon by the Board.

The defendants maintain that in any event the complaint fails to state facts sufficient to establish the jurisdiction of the district court. They claim that the allegations of antitrust violations in the complaint are wholly conclusory and that the specific transactions alleged to have been effected by the defendants do not state a cause of action under the antitrust laws. We do not agree. We cannot say that the specific transactions alleged in TWA's complaint—that Toolco refused to finance aircraft acquisitions by TWA unless TWA agreed to purchase planes from no supplier other than Toolco; that Toolco required TWA generally to boycott all other suppliers of aircraft; that the defendants have attempted through various means to monopolize a substantial segment of interstate and foreign air commerce—are on their face insufficient to support a claim of antitrust violations, a claim which surely falls within the jurisdiction of the district court. The allegations state the outlines of a tying arrangement, an economic boycott of the defendants' competitors, and an attempt to monopolize commerce, all unlawful under the antitrust statutes. It would be particularly inappropriate to find these allegations insufficient to establish the district court's jurisdiction inasmuch as the defendant denied the plaintiff the right through pre-trial discovery to add more

detail and substance to the allegations set forth in the complaint. "[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley* v. *Gibson*, 355 U. S. 41, 47 (1957). See *Dioguardi* v. *Durning*, 139 F. 2d 774 (2 Cir. 1944); *Knudsen* v. *Torrington Co.*, 254 F. 2d 283 (2 Cir. 1958). Of course the Federal Rules apply with equal force to suits under the antitrust laws. *Nagler* v. *Admiral Corp.*, 248 F. 2d 319, 322-23 (2 Cir. 1957). We are satisfied that the complaint sufficiently states a cause of action and establishes the district court's jurisdiction.

THE SECOND APPEAL—Docket No. 28406

The defendants also appeal, as of right, from orders of the district court which dismissed with prejudice their first five counterclaims asserted against TWA and a group of additional defendants and which granted summary judgment in favor of TWA on a sixth counterclaim, because of the defendants' failure to produce Hughes for examination and their failure to produce certain papers and documents. The additional defendants are the three major lending institutions which participated in the 1960 financing and voting trust agreements, certain of their officers, the incumbent president and chairman of the board of directors of TWA, and an investment banking concern which since early in 1959 has served as TWA's principal financial adviser.

The proper consideration of this appeal requires a chronological exposition of the lengthy and complicated pre-trial proceedings engaged in by the parties. Late in 1961 Judge

Metzner was assigned to serve as a judge for all purposes in this litigation under General Rule 2, General Rules of the United States District Courts for the Southern and Eastern Districts of New York. By order of February 7, 1962, Judge Metzner confirmed a series of prior orders which had awarded Toolco priority in the conduct of pretrial discovery, and he then appointed J. Lee Rankin, Esq. as Special Master to supervise the conduct of the discovery proceedings.

Shortly after the filing of the answer and counterclaims on February 12, the Special Master granted Toolco's motions to have the additional defendants produce a multitude of documents. On March 5, Judge Metzner modified the February 7 order so as to limit Toolco's priority in discovery to evidence which bore on the plaintiff's claims against Toolco. The March 5 order stated that "The additional defendants may participate in such depositions conducted by plaintiff, in furtherance of their own deposition proceedings, or may separately schedule such depositions to follow upon the completion of plaintiff's depositions." The court further ordered that upon the completion of the additional defendants' deposition proceedings Toolco could complete its own deposition proceedings.

On February 16, the Special Master had granted the motion of the additional defendants for the production of certain documents by Toolco. Toolco withheld certain of these documents on a claim of attorney-client privilege. After full consideration, the Special Master ordered the production of these documents on April 17. After affirmance by the district court of this order and of a second order to produce issued by the Special Master, and denial of review by this court, counsel for Toolco, in a letter to Judge Metz-

ner on January 23, 1963, declared that Toolco would refuse to comply with any of these orders.

Meanwhile, on September 6, 1962, counsel for Toolco had accepted a subpoena calling for Hughes' personal appearance as a witness returnable on September 24, 1962. The district court later set October 29 as the date for the Hughes deposition. The court went on to adopt as its own a prior decision of the Master that in view of the close connection between Hughes and Toolco, Toolco would be responsible for Hughes' actions with respect to the subpoena, and that if Hughes failed to communicate with the Special Master he would be deemed to have acquiesced in this interpretation. No communication from Hughes was received by the Master.

On October 25, 1962, the Master granted Toolco's motion to adjourn the Hughes deposition, but set February 11, 1963, as a firm date therefor. By order of January 10, 1963, the district court affirmed the setting of this date, stating that "this date will be adhered to in the absence of extraordinary circumstances." Shortly thereafter, Toolco moved to hold the Hughes deposition on written interrogatories and to bring on for hearing its motion, pending since August 8, 1961, to dismiss the complaint for failure to state a claim upon which relief may be granted. On January 19, 1963, the district court denied the first motion.

In preparation for the Hughes deposition, the additional defendants had moved on January 9, 1963, for the production by Toolco of certain income tax returns, revenue agents' reports, accountants' work sheets and other documents which would allegedly substantiate a claim that Toolco and Hughes had been motivated by a desire to reap tax benefits at TWA's expense in their dealings with TWA concerning the acquisition of a jet-powered fleet of air-

craft. On January 22, 1963, the Master ruled that the documents were relevant to the issues in the case and that their production would not place an unreasonable burden upon Toolco. On February 1, the district court affirmed the order to produce, but Toolco failed to produce the documents, despite repeated demands by TWA and the additional defendants.

On February 6, 1963, five days before the scheduled Hughes deposition, Toolco filed a complaint with the Civil Aeronautics Board charging the additional defendants with violations of the Federal Aviation Act. On the same day Toolco moved the district court for a stay of all proceedings on the counterclaims pending disposition by the CAB of the Toolco complaint, on the ground that under the Supreme Court's decision in *Panagra*, filed on January 14, 1963, the Board possessed exclusive jurisdiction over the subject matter of the counterclaims. On February 6 the district court denied Toolco's motion to dismiss the complaint, 214 F. Supp. 106 (S. D. N. Y. 1963), and on February 8 it denied Toolco's motion for a stay of all proceedings on the counterclaims.

On February 8 counsel for Toolco informed the district court that Toolco had made a "business decision" not to proceed further with discovery proceedings, but rather to rest on the merits of the positions theretofore taken and seek judicial review thereof. Consequently, counsel for Toolco stated, Hughes would fail to appear for the deposition ordered for February 11. He further stated that Toolco was aware of the sanctions which could be imposed by the district court for such a willful and deliberate failure to proceed with the scheduled discovery proceedings.

The inevitable consequence of Toolco's default in producing Hughes as a witness and in producing the documents

as the court had directed was that on May 3 the district court granted the motions of TWA and the additional defendants for dismissal of the counterclaims with prejudice, under Rule 37(b)(2)(iii) and Rule 37(d) of the Federal Rules of Civil Procedure. From the final judgments entered pursuant to that decision, and from a final judgment entered the same day granting TWA's motion for summary judgment on the sixth counterclaim, Toolco appeals.

Inasmuch as the sixth counterclaim raises issues unrelated to the first five counterclaims, we shall treat the sixth counterclaim separately.

The First Five Counterclaims

The appellants raise several contentions: first, that the district court should have granted their motion for a stay of all proceedings on the counterclaims pending disposition of the complaint which the defendants had filed with the CAB; second, that the district court should have granted the defendants a voluntary dismissal of the counterclaims without prejudice; and third, that the district court orders which directed Hughes to appear for deposition as noticed by the additional defendants, and which directed Toolco to produce the tax documents and the documents involving the attorney-client privilege, were improper.

That there was no cause for granting a stay of all proceedings on the counterclaims appears clear from the nature of these counterclaims. The first counterclaim alleges that the additional defendants and the present management of TWA improperly sought to perpetuate their control over TWA by preventing termination of the voting

trust according to its terms. The second charges that Metropolitan and Equitable had acquired control over TWA in violation of §408 of the Aviation Act. The third counterclaim is brought derivatively on behalf of TWA and asserts that the additional defendants and the present TWA management have conspired in violation of the antitrust laws to monopolize the supplying of financing to air carriers. The fourth restates the allegations of the third counterclaim and alleges that Toolco has suffered damages in excess of $77,000,000. Finally, the fifth counterclaim charges a common law conspiracy to interfere with Toolco's rights as the owner of 78 percent of the stock of TWA and to extend the duration of the voting trust beyond the period permitted by the applicable Delaware statute.

In the light of the views we have above expressed regarding the first appeal, it is plain that all of these counterclaims save the second fall beyond the scope of the CAB's exclusive jurisdiction. They deal with alleged misconduct on the part of the lending institutions in their dealings with TWA and Toolco and in no respect with matters specifically entrusted to the Board in the Act. Acts such as those alleged in all but the second counterclaim may properly be made the subject of an action in a federal district court. Inasmuch as the Board possessed no exclusive jurisdiction as to these claims, the defendants presented no adequate basis for a stay of proceedings.

As for the second counterclaim—which alleges a violation by the additional defendants of §408 of the Aviation Act—the Board clearly possesses exclusive jurisdiction. Under that section, the Board is empowered to investigate alleged violations, and the district court was without power to adjudicate this issue. The court should have dismissed

this counterclaim for lack of jurisdiction, and we direct the modification of the judgment below accordingly.

The defendants maintain that the district court should have granted a voluntary dismissal without prejudice of the counterclaims. It suffices merely to note that at no juncture in the proceedings below did the defendants request that the court grant such relief. Indeed, the very purpose for the defendants' "business decision" to terminate all pre-trial discovery was to gain judicial review of the positions which the defendants had taken below.

Finally, the defendants contend that the district court's dismissal with prejudice of the counterclaims was invalid because the discovery orders upon which the district court based its order under Rules 37(b)(2)(iii)[9] and 37(d)[10] were improper.

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[9] Rule 37 provides:

"(b) Failure to Comply With Order.

"(2) *Other Consequences.* If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

"(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party . . ."

[10] Rule 37 provides:

"(d) Failure of Party to Attend or Serve Answers. If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party."

We think it clear beyond any question, in light of all the circumstances here presented, that the deposition of Hughes was necessary to all aspects of this litigation, and his willful and deliberate default constituted a sufficient basis under Rule 37 for the dismissal of the counterclaims with prejudice. Hughes has at all times been the sole owner of Toolco and the guiding light behind all the transactions between Toolco and TWA. Both TWA and the additional defendants had the right to depose Hughes. Although the defendants contend that the February 11, 1963 deposition was to be held solely for the benefit of TWA, Judge Metzner's order of February 7, 1962 made clear that the additional defendants could schedule separate deposition proceedings of their own, or in the alternative participate in TWA's deposition proceedings. On February 14, 1962, the additional defendants served notices to examine Toolco by Hughes, its managing agent. The additional defendants had the right under Judge Metzner's order to treat as their own the Hughes deposition scheduled for February 11, and it is abundantly clear from the record that they did so.

When Hughes chose not to appear for this deposition—which action was taken deliberately and with full knowledge of the sanctions available to the additional defendants under Rule 37—Judge Metzner was fully justified in entering judgments dismissing the counterclaims against TWA and the additional defendants. The sanction of judgment by default for failure to comply with discovery orders is the most severe sanction which the court may apply, and its use must be tempered by the careful exercise of judicial discretion to assure that its imposition is merited. However, where one party has acted in willful and deliberate disregard of reasonable and necessary court orders and the

efficient administration of justice, the application of even so stringent a sanction is fully justified and should not be disturbed. See *Nasser* v. *Isthmian Lines*, 2d Cir., Docket No. 28591, April 6, 1964; *Link* v. *Wabash Railroad Co.*, 370 U. S. 626 (1962); *Gill* v. *Stolow*, 240 F. 2d 669 (2 Cir. 1957).

Hughes' deposition was absolutely essential to the proper conduct of the litigation. Yet he and Toolco seized upon every opportunity to forestall this event. To this end they demanded the production of a multitude of documents by TWA and the additional defendants and secured successive adjournments of the deposition. Indeed, Hughes and Toolco seemed to look upon the entire discovery proceedings as some sort of a game, rather than as a means of securing the just and expeditious settlement of the important matters in dispute. It was only at the very eve of the Hughes deposition—after the other litigants had been put to much delay and expense—that the defendants made a "business decision" to terminate discovery.

Hughes' conduct is particularly intolerable in a large and complex litigation such as this one. The protracted antitrust suit taxes the energies and resourcefulness of each party to the litigation; and it consumes much time of the court and the special masters it appoints. Tactics such as Hughes' serve only to frustrate the implementation of the discovery machinery devised by the federal judiciary to expedite the handling of such complex litigation. See Handbook of Recommended Procedure for the Trial of Protracted Cases, Report of the Judicial Conference Study Group on Procedure in Protracted Litigation, 25 F. R. D. 351 et seq. (1960).

In the light of all these circumstances, the district court was not obliged to employ sanctions less severe than the dismissal of the counterclaims with prejudice. Whatever lesser sanctions might have sufficed with regard to the documents withheld by the defendants, it seems to us that a dismissal of the counterclaims was appropriate, in view of Hughes' intransigence after intensive and expensive discovery proceedings already protracted for more than one year.

We are also of the view that the other two discovery orders were properly issued. After careful examination of the documents, both the Special Master and the district court determined that the attorney-client privilege claimed by the defendants as to the first group of documents had been waived as the result of the defendants' pleading advice of counsel as a defense and as the result of two affidavits, one of which was submitted to the CAB by Raymond A. Cook, one of Toolco's attorneys. As the Master noted, the Cook affidavit purports to be based upon information received by Cook as Attorney for Toolco and in many respects parallels the allegations made in the answer and counterclaims. The district court properly held that under these circumstances the affidavit constituted a waiver by Toolco of the attorney-client privilege. As for the documents concerning income tax information, there can be little question of the relevance of this material to the litigation. The additional defendants might well have based a defense to the counterclaims upon a showing that Toolco's and Hughes' activities with regard to the financing of aircraft acquisitions by TWA were motivated by a desire to reap income tax benefits for Hughes at the expense of TWA.

Of course, the test of relevance for discovery purposes is less stringent than that applied to the admissibility of evidence at trial. Moore, Federal Practice ¶34.10. The district court properly ordered the production of the tax documents.

The Sixth Counterclaim

The December 1, 1960 financing agreement required the subordination of prior indebtedness of TWA to Toolco, to be achieved through the issuance by TWA of interim subordinated notes in payment *pro tanto* of the prior indebtedness. TWA was then obliged to offer to its stockholders the right to purchase, at least at par, $100 million worth of subordinated debentures. The interest on both the interim notes and the debentures was set at 6½ percent. Toolco agreed to purchase the "principal amount" of the unsubscribed debentures within three business days of the close of the subscription offering. The agreement further provided that "TWA shall . . . refund the Interim Subordinated Notes . . . upon the purchase by Hughes [Toolco] of [the] Subordinated Debentures . . . and Hughes shall accept such Subordinated Debentures in any such refunding of the Interim Subordinated Notes up to the aggregate principal amount of Subordinated Debentures which Hughes is so obligated to purchase." The transaction was to be completed by TWA's turning over to Toolco the cash received from the subscription offering in addition to accrued and unpaid interest on the interim notes to the date of refunding.

The subscription offering expired on June 8, 1961. On June 13, three business days thereafter, TWA delivered

to Toolco some $19 million in cash received in the offering and nearly $81 million in unsubscribed debentures, totalling $100 million, the amount of the interim notes. TWA also paid Toolco interest on the $100 million to June 8 and interest on the $19 million through June 12. TWA paid no interest on the $81 million from June 8 through June 12 on the ground that it was substituting interest-bearing debentures for the interim notes.

In its sixth counterclaim, Toolco contends that under the terms of the financing agreement, TWA was obliged to pay interest on the interim notes to the date of refunding, June 13, and that TWA's failure to pay such interest resulted in Toolco's paying more than par value for the subordinated debentures, in violation of the terms of the agreement. We agree with Judge Metzner who found that "based on the overall arrangements between the parties, . . . it was their intention to substitute the debentures for the interim notes and that payment of double interest for the five days was not the intendment of the parties." The fact that the subordinated debentures were issued as of June 8 and bore interest from that date, in the same amount as the interim notes, indicates that the exchange for the notes was to be effective as of that date. The provision for having the closing three business days thereafter was merely to afford time for the preparation for that transaction. The most plausible reading of the financing agreement would seem to be one which eliminates the double interest for the period between June 8 and June 13 which Toolco now seeks. Judge Metzner properly granted summary judgment to TWA on this counterclaim.

Conclusion

As to the first appeal, we find that the district court had jurisdiction of the action and that the Civil Aeronautics Board orders do not constitute a good defense to the anti-trust claim of the plaintiff.

The orders of the district court in the second appeal are affirmed with the exception of the order dealing with the second counterclaim. The second counterclaim is dismissed for lack of jurisdiction.

[The above opinion also appears at 332 F.2d 602.]

Opinion and Order of Special Master J. Lee Rankin, dated July 30, 1965

[Doc. 481]

[CAPTION] 61 Civ. 2324

This matter comes on before the undersigned Special Master by designation of the Hon. Charles M. Metzner, District Judge, in his order of May 3, 1963. After entering a default judgment against the defendants in that order, he directed that "before entering the final judgment a hearing must be held to determine the amount of damages to be awarded TWA since the damages are unliquidated. Therefore, pursuant to Rule 55(b)(2), the question of the amount of the damages to be paid by Toolco to TWA is referred to J. Lee Rankin, the Special Master heretofore designated by the Court who has presided over the deposition-discovery proceedings for the past year."

The default judgment was granted in favor of the plaintiff because of the defendants' failure to produce the managing agent of one defendant for examination, and the failure to produce certain papers and documents in response to the Court's order. The plaintiff, Trans World Airlines, Inc. (TWA), has moved for an order that the Special Master enter interim findings of fact in this cause in substantially the form annexed to its motion and labeled, Exhibit A.

A brief history of the litigation is important to an understanding of the issue now to be decided. The default was appealed to the Court of Appeals of the Second Circuit where pursuant to the Order of the Court on June 6, 1963, the appeal was limited to two questions: (1) Whether the District Court had jurisdiction of the action, and (2) Whether the exercise of its regulatory power by the Civil Aeronautics Board in the premises by issuance of orders permitting defendants to act as defendants acted, consti-

tutes a good defense to anti trust claims by plaintiff. The Court of Appeals, in an opinion of June 2, 1964 by the Hon. Edward Lumbard, Chief Circuit Judge, held that the District Court had Jurisdiction of the action and that the CAB orders did not constitute a good defense to the anti trust claims of the plaintiff.

In the same appeal the action of the District Judge in dismissing with prejudice the defendants' first five counter-claims and granting summary judgment in favor of the plaintiff on the sixth counter-claim because of the defendants' failure to produce Howard R. Hughes for examination and for not producing certain papers and documents was affirmed as to all but the second counter-claim which was dismissed for lack of jurisdiction.

Thereafter, a petition of certiorari was granted by the Supreme Court of the United States to review the action of the lower court. On March 8, 1965 that proceeding was remanded with an order by the Court that the writ be dismissed because it had been improvidently granted.

In support of its motion the plaintiff asserts that an essential preliminary to the presentation of evidence at the inquest on damages is an order formalizing the basic findings derived from the proceedings up to date and in particular from the defendants' deliberate default. Plaintiff asserts that its evidence will consist principally of expert testimony as to the extent of the injury it suffered, and that the findings requested, based on the allegations of the complaint, are the foundation on which such expert evidence will rest. Plaintiff urges that it was intended by Judge Metzner in the Order of May 3, 1963 referred to above, that his decision would act as a final adjudication in TWA's

favor as to the correctness of all of the allegations of the complaint other than allegations as to the exact amount of damages. Plaintiff also asked "only interim findings strictly based upon the complaint" and merely "as a basis for the submission of its further evidence as to the amount of its damages" which, added to the allegations of the complaint, would fill out "a cause of action." Fifty-four separate interim findings are thus tendered for adoption under plaintiff's motion.

The position of the defendants is that their default does not consitute an admission of any conclusions of law or conclusions of fact. They further contend that it does not admit allegations that are contrary to information which courts take judicial notice of, such as federal agency records like those of the Civil Aeronautics Board or records in the office of the clerk of the Court. They also assert that the default does not admit that the allegations of the complaint constitute a cause of action. The defendants do concede, however, that there has been a determination in this case that the complaint is sufficient and that it is not now open to them to argue that issue.

In addition to the foregoing, defendants urge that even defaulting defendants are entitled to introduce matters outside of the complaint, discrediting the truth of its allegations. This, they assert, they may do by means of materials such as records of administrative proceedings, corporate records, deposition testimony and, in some cases, new material.

It has been suggested in support of the motion that it is the law of the case that the allegations of the complaint are to be taken as true and the court, therefore, has no power

to reexamine them because of prior rulings in this action. While it is recognized that the principle of the "law of the case," does apply "to everything decided, either expressly or by necessary implication," *Munro* vs. *Post* 102 F.2d 686, 688 (2nd Cir. 1939), the rule is one which the courts have adopted to advance the orderly conduct of their work and is not inflexible. The rule does not require a court to follow the reasons given earlier by another member of the same court, if it is found that the prior decision was erroneous. See *Dictograph Products Company* vs. *Sonotone Corp.*, 230 F.2d 131 (2nd Cir. 1956), and *Munro* vs. *Post* Supra. In any event it is not a limitation on the power of the courts, but merely expresses a practice. Holmes, J. in *Messenger* vs. *Anderson*, 225 U.S. 436, 444.

Because of the nature of the assignment of a Special Master, the writer would not assume to depart from a ruling of Judge Metzner if he had made it clear that the default in this case was to be different from the ordinary default. The Special Master does not conceive that Judge Metzner either held or intended that the default which he entered in this proceeding would be different from the ordinary default in other proceedings. However, there is a special factor here that must be taken into account in connection with this default, and that is the failure of Howard R. Hughes to testify at the designated time and place. That failure seriously affects the proof that would be available otherwise to the plaintiff from such testimony.

Because of this factor, it is important to review briefly the occasion for the entry of the default in this action. On February 8, 1963 the defendant Toolco served a "Notice of Position" in which it refused to comply with the Court's orders providing for the taking of the deposition of Howard

Opinion and Order of Special Master J. Lee Rankin, dated July 30, 1965

R. Hughes and the supplying of certain documentary evidence or to proceed further with discovery under the plaintiff's complaint. During that day the action of the defendant Toolco was explained and elaborated by its counsel at a hearing. Counsel then advised the court that the action being taken reflected a deliberate decision *of the client* (emphasis supplied), made with full awareness of the consequences. In this regard he said:

> "I have also had occasion to describe to my client, the Hughes Tool Company, the sanctions available under the rules by reason of respectful declination or election to stand on the questions of law which have been decided and not to proceed any further with respect to discovery proceedings. I have particularly called to their attention the provisions of 37 (d)—Rule 37 (d)—of the Federal Rules, with respect to the sanctions which could be applied by the court on the Tool Company." (Tr. of Feb. 8, 1963, p. 9)

Further explanation was given of this position by counsel when he stated that:

> "The Tool Company does want to rest on the merits of its position and it does so fully aware of the sanctions which the court, in its discretion, may impose upon the Tool Company; and if there is anything I can say that will further clarify what the effect is of the position which the Tool Company is taking, I am prepared to do so." (Tr. of Feb. 8, 1963, p. 11)

Counsel again recognized the consequences of the action and that he had advised his client of the same in the following statement:

> ". . . my client is fully aware . . . that by insisting on a right to obtain a review on the legal questions

> which have been decided to date, and should it develop that they are in error, as indicated by your Honor's decisions and rulings, as a consequence they may be deprived of further defending on the merits, other than on the question of damages." (Tr. of Feb. 8, 1963, p. 12)

The position of Toolco as to the effect of the default was further emphasized when counsel for the plaintiff expressed a desire to proceed with the deposition of Howard R. Hughes notwithstanding Toolco's announced intention to default. Counsel for Toolco, however, urged the court that such action was completely unnecessary in light of the record which he was making. In this regard he said:

> "I do not understand what remedy it is that TWA is seeking when it has the opportunity to prove these damages that you claim you can establish against the Tool Company, and I don't understand the statement and what the purpose is of TWA saying that it does not want to proceed in that manner.
>
> "My purpose, of course, is to obtain something which will enable me to get a review on the law as to whether or not you are entitled to be here in the first place. And then I am prepared, if I am wrong in that regard, to pay the consequences to the extent to which you are able to prove damages." (Tr. of Feb. 8, 1963, p. 46)

Relying upon these representations Judge Metzner directed counsel for the plaintiff not to proceed further saying:

> "Mr. Davis is telling you he is not going to show up, and Mr. Davis has been the conduit through whom the orders of the Court have been transported to Mr. Hughes, and one of these orders was that if Mr. Hughes did not show up the Court would entertain

a motion for a default judgment and an assessment of damages.

"If Mr. Davis now tells you that Mr. Hughes is not going to show up, and even if he is going to show up he is not going to use it as a defense to any motion in this Court pursuant to Rule 36, I would think that takes care of that phase of the case. * * * I think the plaintiff, in so far as his complaint is concerned, is amply protected by the record made here this afternoon and you may then move for your default judgment." (Tr. of Feb. 8, 1963, pp. 49-50)

In accordance with the Court's direction, the plaintiff moved on February 16, 1963 for the entry of a default judgment in its favor. The motion was brought on by an order to show cause. In opposition, the defendants filed a memorandum on April 29, 1963 urging that it was the Court's responsibility to determine the factual support for the complaint on the basis of "facts which cannot be denied", and "admissions of record" and to require the plaintiff to establish its allegations of fact including violation of the anti trust laws before taking action upon them. The plaintiff in its memorandum of May 1, 1963 contended that the defendants by their own acts had forfeited the right to make such contentions. On May 2, 1963, Judge Metzner had a hearing on these matters and in that hearing said, in part:

"Mr. Davis, I have read your brief very carefully. The great problem I have with it, is I don't think it comes to grips with the point which is so evident here. I intend to hand down a formal opinion in which I will state that there is a finding of a deliberate and wilful default in this case, and predicated upon that fact I can't quite follow the arguments that

> you are making in your briefs. So I want to call upon you first to say anything in clarification of your position." (Tr. pp. 4-5)

It was the position then of counsel for Toolco that the defendants' action did not amount to an admission of the complaint's truth in its entirety and therefore defendants were entitled to contest the allegations of the complaint "based upon the entire record". With regard to this, the Court said:

> "I don't think there is any question of admissions here. You didn't admit anything. You willfully defaulted under 37 (b) (2) (iii). I am going to direct the default judgment.
>
> "Mr. Davis: I understand that.
>
> "The Court: The facts of the complaint are admitted, not in the sense of an admission saying, 'Yes, I did it,' but they are true, and the only thing left is how much." (Tr. p. 6)

There was a further colloquy with a reference by the Court to what had occurred on Feb. 8, 1963 and then the Court said:

> "Now with that record, the only thing left is to find out how much you owe the plaintiff and to strike your counter-claim. You cited some cases here which just are not in point. One in this circuit, *Gill* vs. *Stolow*, 250 F.2d 669, an opinion given in 1957, and in the very last part of the second sentence, which you have quoted here there is this language, '. . . and general principles cannot justify the denial of a party's fair play in court except upon a serious showing of wilful default.'
>
> "I think this record is clear that this is a wilful deliberate default, and you said you'd take it after advis-

ing your client. You say it is a result of a business judgment arrived at by your client. And you say you are doing this because you want to quickly review the correctness of my opinion denying your motion to dismiss the complaint.

"Secondly, in the case of *Bernat* vs. *Pennsylvania RR.* they say, 'In a case where the refusal to produce a document makes it impossible for the plaintiff to prepare or present his case, a default judgment would be the proper remedy.' In that case the statement given by a plaintiff to an insurance company investigating an accident is not comparable to the production of Mr. Hughes in this case, who, I think, is the motivating factor of everything that went on during the times alleged in the complaint. So I am completely unpersuaded. I see no reason to continue the hearing, Mr. Davis, unless there is anything more you have to say than is embraced in this document you handed me after six weeks of effort.

"I will direct that a default judgment be entered, that the matter be referred to the Special Master forthwith for a hearing on the amount of damages. You can arrange with the Special Master for the dates to proceed with that. I will retain the jurisdiction and determination of the issue of divestiture. The counter-claims will be stricken and judgment entered for the additional defendants, and I will enter a formal opinion tomorrow to that effect. (Tr. pp. 10-11)

The formal opinion and order of May 3, 1963 is recorded in 32 Federal Rules Decisions 604.

The default having been entered for the reasons indicated above, the question remains as to its effect. The default is an admission implied by law as a result of the default, which thereupon dispenses with any proof of the facts alleged in the complaint, except as to unliquidated damages. The

default not only has the legal effect of an admission of the allegations, but precludes any showing of defensive matters in regard thereto except as to damages. When the damages are not liquidated, there is no admission as to the damages by reason of the default, and proof thereof is required. (See 3 Freeman, Law of Judgments, Secs. 1281-1282, pp. 2662-2664 (Tuttle's Ed. 1925).)

The defendants have raised the issue of the legal sufficiency of the complaint prior to this hearing, and the complaint has been held to be legally sufficient by both Judge Metzner and the Court of Appeals. In this regard, Judge Metzner in his opinion denying Toolco's motion to dismiss held:

> "Now as to the merits of the motion, there is no doubt that the complaint on its face sets forth a claim against the defendant and is not subject to dismissal under Rule 12(b)(6)." (214 F. Supp. at 108)

The Court of Appeals in rejecting a like argument stated:

> "The defendants maintain that in any event the complaint fails to state facts sufficient to establish the jurisdiction of the district court. They claim that the allegations of anti trust violations in the complaint are wholly conclusory and that the specific transactions alleged to have been effected by the defendants do not state a cause of action under the anti trust laws. We do not agree." (332 F.2d at 610-611)

The Court of Appeals also said in this regard:

> "We are satisfied that the complaint sufficiently states a cause of action and establishes the District Court's jurisdiction." (332 F.2d at 611)

Opinion and Order of Special Master J. Lee Rankin, dated July 30, 1965

It has been argued by the defendants that even though the courts have held that the complaint is legally sufficient and that it states a cause of action the Special Master must determine again that a cause of action has been established in the process of fixing the amount of damages. They urge that there is a difference between a complaint under the Civil Rules of Procedure in the Federal Courts, because of the nature of notice pleading and a claim for relief which is denominated a "cause of action".

Such contentions have been rejected by the federal courts. The courts have recognized that notice pleading has been substituted in the federal court system for the former requirement that the complaint state a cause of action. Thus it is established law that if the pleading presents a prima facie case which satisfies the requirements of the rules as sufficient, that is all that is required. See *Nagler* vs. *Admiral Corp.*, 248 F.2d 319 (2d Cir. 1957) pp. 324, 326. The essential requirement under the Rules is that the pleader show in the complaint that he is entitled to relief. 2, Moore's Federal Practice, Sec. 8.13, pp. 1704-05 and Sec. 2.05 (2), p. 359. See also *Conley* vs. *Gibson*, 355 U.S. 41, p. 47 where the court said:

> "The respondents also argue that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal is therefore proper. The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' (Reciting Rule VIII (a) (2)) that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it

> rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and other pre-trial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. Following the sample guide of Rule VIII (f) that 'all pleadings shall be so construed as to do substantial justice,' we have no doubt that petitioner's complaint adequately set forth a claim and gave the respondents fair notice of its basis.'"

And also in *Radovich* vs. *National Football League*, 352 U.S. 445 where the court said:

> "Furthermore, Congress itself has placed the private anti trust litigant in a most favorable position through the enactment of Section V of the Clayton Act. *Emich Motors Corp., The General Motors Corp.*, 340 U.S. 558 (1951). In the face of such a policy this court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws."

See also *U.S.* vs. *Employment Plasterers Assn.*, 347 U.S. at p. 188, where the court considered the consequences where the complaint charged several times that the effect of all of the local restraints alleged was to restrain interstate commerce. In noting that the lower court had held that there were no allegations of fact showing this and therefore the complaint was insufficient the court said:

> "Whether these charges be called 'allegations of fact' or 'mere conclusions of the pleader,' we hold that they must be taken into account in deciding whether the government is entitled to have its case tried."

See also the like effect, *U.S.* vs. *Employing Lathers Assn.*, 347 U.S. 198.

All parties agree that *Thomson* vs. *Wooster*, 114 U.S. 104 (1885) is the leading case by the Supreme Court of the United States on the effect of a default. It is recognized in that decision that upon the entry of a decree *pro confesso* all matters alleged with sufficient certainty are admitted. However, it is as to those matters not adequately alleged with regard to certainty, or subjects which from their nature and the course of the court proceedings require an examination of details imposing an obligation on the complainant to furnish proof, that differences arise.

As stated by the defendants, the plaintiff is entitled to having findings "according to what is proper to be decreed" but that also includes the right to the legal benefits proceeding from the default. *U.S.* vs. *Fong*, 182 F. Supp. 446 (N.D.Cal. 1959), 300 F.2d 400 (9th Cir. 1962), *Cert. Denied*, 370 U.S. 938 (1962) is instructive regarding the handling of a damage proceeding after a default. It must be remembered, however, that in that action the court did not determine whether the four counts of the complaint each stated a cause of action, until the hearing on damages. It expressly reserved that question to be determined at the later date. It then decided that the first three counts did not state claims upon which relief could be granted and it also held that the fourth count could not borrow from the other counts to make up any deficiencies in that count. The fact that in this proceeding the plaintiff has already obtained a ruling that its complaint is legally sufficient under the law is an important distinction.

While conclusions of law are for the court in the determination of any judgment to be awarded and it thus decides

whether the damages proved did in fact flow from the violations of law alleged, the defendants after their default no longer have the right to contest whether the asserted violations did in fact occur. They are limited to pointing out such information or evidence as may be in the record where the court should take judicial notice of records or facts which show that the allegations could not be true.

When the plaintiff has pleaded a "statement of claim" showing that he is entitled to relief (F.R.C.P. Rule VIII (a)), he may yet be unable to prove the case alleged. But that is not a problem in a default where the allegations are, in legal effect, admitted. Defaulting defendants are allowed to raise questions as to allegations contrary to judicially known facts because when a pleader states matter as facts which is out of harmony with that which the court judicially knows, such averments in the pleading are disregarded. *Greeson* vs. *Imperial Irrigation District*, 59 F.2d 529 (9th Cir. 1932); *Interstate Natural Gas Company* vs. *Southern California Gas Company*, 209 F.2d 380 (9th Cir. 1953). See also In Re: *Woodmar Realty Company*, 294 F.2d 785 (7th Cir. 1961), *Cert. Denied*, 369 U.S. 803 (1962) and *Glen Coal Company* vs. *Dickenson Fuel Company*, 72 F.2d 885 (4th Cir. 1934).

Pioche Mines Consolidated, Inc. vs. *Dolman*, 333 F.2d 257 (9th Cir. 1964) while a Rule 37 default case, did not allow the defendant to contest the allegations of the complaint. It did permit the defendant to dispute ownership in the damage hearing because the plaintiff was required to identify the corporate assets involved in the alleged diversion by the defendant. The court applied the rule which should be given effect here that the plaintiff was to be given the benefit of all reasonable inferences from the evidence tendered.

Opinion and Order of Special Master J. Lee Rankin, dated July 30, 1965

Thus, at this stage of the case, the court is obligated to arrive at a judgment and that judgment must be just. Therefore, whenever a court would take judicial notice of the proceedings of public bodies such as the Civil Aeronautics Board or other Federal commissions or the files of the court or any similar matters and such records and information would satisfy the court that any allegation of the complaint or any part of an allegation could not be true, the court is not required by reason of the default to accept such allegation, or such part of it.

The effect of information appearing in the record up to this date, or as hereafter developed, bearing upon the truth of the allegations of the complaint, is somewhat different. Where such evidence clearly shows that the allegation or part of an allegation could not possibly be true, the court will not stultify itself by accepting such allegation or part of it in the face of such evidence. Where, however, the evidence merely may tend to show that the allegation may not be maintained and the defendants by reason of the nature of their default have materially interfered with the plaintiff's ability to produce evidence which might support the allegation or disprove such record evidence, the court is not required to reject the allegations. Such a result would reward the defendants for their interference with the processes of the court.

For the reasons indicated the defendants, at this point, do not have the right to produce evidence to try to establish in any manner that the allegations of the complaint other than as to damages cannot be maintained. That opportunity was given up by their decision to default. The rights of plaintiff resulting from the default should not be taken away by any refinements and legalistic reasoning or any

considerations that do not reach to the level of necessary and proper requirements for a fair and just hearing on the question of damages.

On the other hand, it should not be forgotten that the court in entering a judgment of default is performing "a judicial act". *Pope* vs. *United States*, 323 U.S. 1. Furthermore, Rule 55(b) (2) under which the court directed that this hearing be held recognizes that such is the nature of the responsibility, at this point in the default proceeding, by stating:

> "If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as to it seems necessary and proper . . ."

It is within the framework described that the Special Master must proceed. Recognizing that it is his duty on behalf of the court to be satisfied of the liability of the defendants, as well as of the proof, according to law, of the amount of damages claimed, he must also be satisfied by a preponderance of the evidence that any damages were proximately caused by the violations of law alleged in the complaint. Therefore, in the belief that the damage portion of the trial will be advanced by his doing so, the Special Master has sustained a considerable portion of the plaintiff's motion and has adopted certain findings requested, but only on an interim basis, for the purposes of the hearings on damages. He is reserving the right, however, before such hearings are closed to modify any or all of said interim findings if he finds it desirable or necessary

in order that justice may be promoted in this case. The Special Master has also declined to adopt certain interim findings proposed in the motion. The findings adopted are set forth in Exhibit AA attached to this opinion and order and made a part hereof as fully as if set out herein.

The failure to adopt, at this time, any proposed finding is not a determination by the Special Master that such finding is false, or disproved, or that it will not be fully established by the close of the hearings on damages. Such proposed findings have not been adopted at this time because in each instance they appear directly or indirectly to have a bearing upon the question of damages, and may be affected either partially or wholly by the evidence which is adduced in proof of damages herein.

The failure to now adopt such proposed interim findings, is not to be construed as placing such findings at issue, except to the limited extent that there is any information of which a court would take judicial notice, or there is evidence in the record which would prove such findings to be false or there may be evidence properly adduced as a part of these hearings on damages which would establish such findings to be false and is brought to the attention of the Special Master before the hearings close. The defendants are not allowed by the present refusal to adopt such tendered findings to contest them on the merits as they could do if there had been no default.

The plaintiff is given the right to renew its request for such additional findings before the close of the evidence on damages.

Dated: New York, New York
July 30, 1965

J. Lee Rankin,
Special Master

EXHIBIT AA

Interim and Tentative Findings of Fact

[CAPTION] 61 Civ. 2324

Before Hon J. Lee Rankin, Special Master

Exhibit AA

Interim and Tentative Findings of Fact

CONTENTS

		Findings
I.	Nature of Claims and Jurisdiction of Court	1
II.	Identity of Parties	2–6
III.	The Commerce Involved	7–8
IV.	The Offenses Charged	9
V.	Acts Committed Prior to December, 1960	10–25
VI.	The Financing and Acquisition of Jet Aircraft by TWA in and Since December, 1960	26-32
VII.	Acts Committed Subsequent to 1960	33–40

Exhibit AA

Interim and Tentative Findings of Fact

[CAPTION] 61 Civ. 2324

Before HON J. LEE RANKIN, Special Master

Upon the complaint, the opinion and order of the United States District Court, Southern District of New York per Hon. Charles M. Metzner, U.S.D.J., dated May 3, 1963, the motion of TWA dated May 10, 1965 and all prior proceedings had herein, the following interim and tentative findings of fact are hereby adopted.

For convenient reference, the paragraph numbers of the complaint have been retained in these interim and tentative findings.

I. *Nature of Claims and Jurisdiction of Court*

1. (a) The complaint was filed and this action instituted against defendants under Sections 4, 12 and 16 of the Clayton Act (15 U.S.C. §§ 15, 22 and 26 (1958)) in order (with respect to plaintiff's "First Claim") to declare, to prevent and restrain, and to recover damages resulting from, the alleged violation by defendants, of Section 1 of the Sherman Act (15 U.S.C. § 1 (1958)), of Section 2 of the Sherman Act (15 U.S.C. § 2 (1958)), of Section 3 of the Clayton Act (15

U.S.C. § 11 (1958)), and of Section 7 of the Clayton Act (38 Stat. 731, 15 U.S.C. (1946 Ed.) § 18).

(b) Plaintiff's "Second Claim" arises from the alleged violations by the defendants of Sections 1 and 2 of the Sherman Act. In all other respects, the nature of the claim, the jurisdiction of the Court and the descriptions of the parties and of the commerce involved are as hereinbefore and hereinafter detailed in Findings 1 through 8 hereof with respect to plaintiff's "First Claim".

(c) Plaintiff's "Third Claim" arises out of the facts alleged in support of the first two claims, and invokes the Court's pendent jurisdiction.

II. *Identity of Parties*

2. (a) Plaintiff Trans World Airlines, Inc. (hereinafter sometimes called "TWA") is a corporation organized in 1934 and existing under the laws of the State of Delaware and maintains its principal executive offices in the City of New York.

(b) TWA is the only air carrier authorized under Certificates of Public Convenience and Necessity granted by the Civil Aeronautics Board to provide both transcontinental and transatlantic scheduled air transportation in the interstate and foreign commerce of the United States, and during the times referred to in the complaint was and is now providing such transportation, in competition at various points with various other United States-Flag and foreign-flag air carriers.

Exhibit AA

Interim and Tentative Findings of Fact

3. (a) Defendant Hughes Tool Company (hereinafter sometimes called "Toolco") at all times referred to in the complaint was and is a corporation organized and existing under the laws of the State of Delaware, had at the time the complaint was filed, assets of several hundred million dollars and transacts business within the Southern District of New York.

(b) Toolco was and is engaged in interstate commerce, *inter alia*, since in or about 1939 in the acquisition of aircraft and related equipment from the manufacturers thereof in various states and in the sale and lease of such aircraft in various other states for use in interstate and foreign commerce.

4. Defendant Howard R. Hughes (hereinafter sometimes called "Hughes") throughout the period of the matters complained of, was and is the sole stockholder of Toolco and has directed, controlled and dominated its activities. Until approximately December 30, 1960 he was an officer of Toolco.

5. Defendant Raymond M. Holliday (hereinafter sometimes called "Holliday") for some years past was and is the chief operating officer of Toolco in charge of TWA affairs and since 1959 and at the time of the filing of the complaint was a director of TWA.

6. (a) Atlas Corporation (hereinafter called "Atlas") is a corporation organized in 1936 and existing under the laws of the State of Delaware. While it is designated in the complaint as a co-conspirator, it is not a defendant.

(b) Northeast Airlines, Inc., a corporation organized and existing under the laws of the State of Massachusetts (hereinafter called "Northeast"), is an air carrier engaged in the

business of providing scheduled air transportation in interstate commerce. At the time the complaint was filed in this action Northeast was controlled by Atlas, by means, *inter alia*, of the ownership by Atlas of 58% of the stock of Northeast.

(c) At the time the complaint was filed, the defendant Hughes for some years past had had the beneficial ownership of Voting Trust certificates issued with respect to 11% of the Common Stock of Atlas.

III. *The Commerce Involved*

7. The trade and commerce involved in this action concerns:

(a) The furnishing of aircraft by sale, lease or other means in interstate commerce of the United States to TWA and other air carriers for use in air transportation in interstate and foreign commerce of the United States, as "aircraft", "air carrier" and "air transportation" are defined in 49 U.S.C. §1301.

(b) The furnishing of jet-powered aircraft by sale, lease or other means in interstate commerce of the United States to TWA and other air carriers for use in air transportation in interstate and foreign commerce of the United States.

(c) The furnishing of aircraft by sale, lease or other means in interstate commerce of the United States to TWA for use in the business of air transportation in interstate and foreign commerce of the United States.

(d) The furnishing of aircraft—by sale, lease or other means in interstate commerce of the United States—used by scheduled United States-Flag air carriers between certain pairs of cities in the United States, such pairs of cities being those pairs of cities

between which in each instance TWA provides more than 60% of the scheduled air transportation which is provided by all United States-Flag air carriers.

(e) The furnishing of aircraft—by sale, lease or other means in interstate commerce of the United States—used by scheduled United States-Flag air carriers between certain pairs of cities in the United States, and between the United States and certain foreign cities, such pairs of locations being those pairs of locations between which in each instance TWA provides the only scheduled air transportation provided by United States-Flag air carriers.

(f) The financing in interstate commerce of the Unites States of the acquisition by sale, lease or other means of aircraft for use by TWA in air transportation in interstate and foreign commerce of the United States.

8. The nature and extent of such trade and commerce with respect to TWA is more fully described as follows:

(a) TWA has, since its organization in 1934, operated a domestic air carrier system between certain cities in the United States. The scheduled air transportation provided by TWA in the United States has been and is a substantial proportion of that provided by all air carriers within the United States. During the periods set forth below, TWA provided the percentages set forth below of all scheduled passenger miles provided by all domestic scheduled trunk air carriers within the United States:

Year 1955	14.9%
Year 1956	15.1%
Year 1957	14.9%
Year 1958	15.0%
Year 1959	15.3%
Year 1960	15.2%

(b) Since 1946, TWA has operated an international air transportation system between the United States and certain cities in Europe, Africa and Asia. The scheduled air transportation provided by TWA between the United States and certain foreign cities has been and is a substantial proportion of that provided by all United States-Flag air carriers and of that provided by all air carriers. During the periods set forth below, TWA provided the percentages set forth below of all passenger miles provided by scheduled United States-Flag air carriers between the United States and foreign cities:

	% of U.S. Flag
Year 1955	13.6%
Year 1956	12.9%
Year 1957	12.0%
Year 1958	12.5%
Year 1959	9.5%
Year 1960	12.5%

(c) In its operations, TWA has used, and is using, both in its domestic operations and in its international operations, a substantial proportion of all of the aircraft, both jet-powered and otherwise, operated by all scheduled air carriers operating within the United States, by all of the United States-Flag scheduled air carriers operating between the United States and foreign cities and by all of the scheduled air carriers operating between the United States and foreign cities.

(d) TWA provides and has provided a substantial proportion of the scheduled transportation in jet-powered aircraft provided by all carriers within the United States, by all United States-Flag air carriers between the United States and foreign cities and by all air carriers between the United States and foreign cities. In 1959, TWA provided over 1.1 billion passenger miles of scheduled jet air transportation.

(e) The requirements of TWA for commercial jet-powered aircraft constitute and have constituted a separate and distinct market for United States aircraft manufacturers by reason, *inter alia,* of design and flight characteristic requirements, fleet and operating requirements, and the structure of the domestic and foreign routes of TWA.

(f) TWA constitutes and has constituted a substantial proportion of the market for the various types of commercial aircraft made by United States aircraft manufacturers. For example, during the period 1958 through 1960, TWA purchased and leased jet-powered aircraft for amounts aggregating substantially in excess of $100,000,000, which aircraft were manufactured by manufacturers in various states of the United States.

(g) TWA constitutes and has constituted a substantial proportion of the market for the various types of commercial jet-powered aircraft, both long-range and otherwise, made by United States manufacturers. For example, TWA at the time the complaint herein was filed had more than $150,000,000 worth of jet-powered aircraft on order.

(h) TWA constitutes and has constituted a dominant portion of a substantial market for aircraft, that is, the market for aircraft for use between certain pairs of United States cities and between the United States and certain foreign cities. In 1959, TWA provided the only scheduled air transportation between certain pairs of United States cities, such transportation amounting to 332,000,000 passenger miles accommodating 391,000 passengers and accounting for approximately 7.8% of the total number of domestic passenger miles supplied by TWA in 1959. In 1959, TWA provided between 90% and 100% of the passenger miles of scheduled air transportation between certain pairs of United States cities, such transportation by TWA amounting to over 680,000,000 passenger miles accommodating

over 1,000,000 passengers and accounting for approximately 16.0% of the total number of domestic passenger miles supplied by TWA in 1959. In 1959, TWA provided between 80% and 90% of the passenger miles of scheduled air transportation between certain pairs of United States cities, such transportation by TWA amounting to over 331,000,000 passenger miles accommodating 659,000 passengers and accounting for approximately 7.8% of the total domestic passenger miles supplied by TWA in 1959. In 1959, TWA provided between 70% and 80% of the passenger miles of scheduled air transportation between certain pairs of United States cities, such transportation by TWA amounting to 417,000,000 passenger miles accommodating 412,000 passengers and accounting for approximately 9.8% of the total domestic passenger miles supplied by TWA in 1959. In 1959, TWA provided between 60% and 70% of the passenger miles of scheduled air transportation between certain pairs of United States cities, such transportation by TWA amounting to 218,000,000 passenger miles accommodating 251,000 passengers and accounting for 5.1% of the domestic passenger miles provided by TWA in 1959. Thus, in 1959, TWA provided more than 60% of the passenger miles between certain pairs of United States cities, such transportation by TWA amounting to almost 2 billion passenger miles accommodating more than 2.7 million passengers and accounting for 46.5% of the domestic passenger miles provided by TWA in 1959. TWA is the only United States-Flag air carrier which is now authorized to provide scheduled air transportation of passengers between the United States and any of the following cities: Athens, Geneva, Zurich, Milan, Algiers, Tunis, Cairo, Tel Aviv, Dahran, Bombay and Colombo. Long-range aircraft are used by TWA between the United States and the above-named foreign cities; all other aircraft used by TWA are usable between one or more

of the pairs of United States cities between which TWA provides the only scheduled air transportation. TWA in 1959 provided the following percentages of the scheduled air transportation measured by number of transatlantic passengers provided by all air carriers between the United States and the three principal ports of entry (London, Paris and Lisbon) into Europe, Africa and Southwest Asia: United States-London, 11%; United States-Paris, 17%; United States-Lisbon, 32%.

(i) In 1960, operating revenues of TWA were substantially in excess of $300,000,000; net income was in excess of $6,000,000. During the first quarter of 1961, TWA had an operating loss of approximately $13,000,000 and a net loss of approximately $9,000,000.

IV. *The Offenses Charged*

9. Beginning in or about the year 1939 and continuing at least up to and including the date of the filing of the complaint, the defendants, and other persons acting for each of them were engaged in:

(a) A combination and conspiracy to restrain interstate and foreign commerce of the United States;

(b) A combination to restrain interstate and foreign commerce of the United States by providing financing of the acquisition by TWA of aircraft, including jet-powered aircraft, only upon the condition that TWA acquire all such aircraft from defendant Toolco;

(c) A combination to restrain interstate and foreign commerce of the United States by requiring TWA to boycott all suppliers of aircraft, including jet-powered aircraft, except defendant Toolco;

(d) A combination and conspiracy to monopolize a substantial segment of the interstate and foreign trade and commerce of the United States;

(e) An attempt to monopolize a substantial segment of the interstate and foreign trade and commerce of the United States;

(f) Sales and leases of jet-powered aircraft on the condition, agreement and understanding that the purchaser or lessee shall not buy or lease the goods of a competitor or competitors of the vendor or lessee; and

(g) Acquisitions of the stock of a corporation.

V. *Acts Committed Prior to December, 1960*

10. (a) Commencing in or about 1939 and at various times thereafter, Toolco, pursuant to an understanding with and at the direction of Hughes, acquired common stock of TWA.

(b) As a result of these acquisitions, Toolco acquired more than 78% of TWA's common stock.

11. Since in or about 1955 one of the most important single factors in the operation of and competition among air carriers engaged in air transportation in interstate and foreign commerce has been the prospect, introduction and eventual utilization of jet-powered aircraft.

12. (a) By 1955, aircraft manufacturers (including Boeing Company, hereinafter called "Boeing", and Douglas Aircraft Company, Inc., hereinafter called "Douglas") had prepared—to the general knowledge of the air carrier industry—plans and drawings and otherwise had under-

taken preparations for the manufacture by themselves of jet-powered aircraft intended for use by air carriers.

(b) Beginning in or about 1955, many air carriers devoted substantial efforts of their own (i) to determining whether the jet-powered aircraft then being developed by Boeing, Douglas or others could be best utilized by them in their respective operations, and (ii) to obtaining jet-powered aircraft suitable for their needs, including the participation by them in the design of such aircraft.

(c) Boeing and Douglas each contemplated the manufacture of and did ultimately manufacture jet-powered aircraft for short-range flights and for medium and long-range flights suitable for the respective needs of such air carriers.

13. (a) In or about October, 1955, at approximately the time of the decision to abandon the Model 18, the first firm order for jet-powered aircraft was placed with a United States-aircraft manufacturer by a United States-Flag air carrier; that order was placed with Boeing by Pan American World Airways, Inc., TWA's principal international competitor.

(b) In the ensuing month and a half, principal United States and foreign air carriers—including major competitors of TWA—placed orders for jet-powered aircraft with Boeing and Douglas. These air carriers ordered 59 jet-powered aircraft from Boeing and 95 jet-powered aircraft from Douglas, which orders were scheduled for delivery in 1959 and 1960.

14. (a) During this period when other United States-Flag air carriers were placing orders for jet-powered aircraft, and thereafter, the defendants caused and directed

TWA to forego making any arrangements for the acquisition, by sale, lease or otherwise, of any jet-powered aircraft.

(b) In or about February, 1956, the defendants arranged for Toolco to place orders for 15 jet-powered aircraft with Boeing.

(c) Thereafter, the defendants arranged for Toolco to place orders with Boeing for an additional 18 jet-powered aircraft.

(d) In or about April, 1956, the defendants arranged for Toolco to place orders for at least 30 Model 880 jet-powered aircraft to be manufactured by Convair.

15. (a) The purchase orders placed by Toolco with Convair and Boeing reserved to Toolco the privilege of assigning to TWA the right to acquire the jet-powered aircraft so purchased.

(b) Despite repeated requests by TWA, Toolco refused throughout the period 1956 to 1960 to assign to TWA the rights to acquire such aircraft.

16. (a) During the period 1956 to 1960, the defendants required Convair to make certain changes in the design of Model 880 aircraft on order by Toolco.

17. (a) During the years 1959 and 1960, defendants arranged for the lease to TWA by Toolco of certain jet-powered aircraft on a day-to-day basis.

(b) These leased aircraft were the first and only jet-powered aircraft made available to TWA by the defendants during the years 1955 to 1960.

(c) The number of aircraft so leased to TWA by Toolco was inadequate to the needs of TWA.

18. Northeast is a substantial air carrier operating under certificates of public convenience and necessity and serving the East Coast of the United States and Canada. In 1959 Northeast's revenue passenger miles totaled 519,000,000 and its total assets exceeded $35,000,000.

19. (a) In November, 1960, while the proposal for merger was pending, the defendants arranged for the lease by Convair to Northeast of six Convair Model 880 jet aircraft which Toolco had on order from Convair.

(b) Among the six Convair jet aircraft leased to Northeast were three which had previously been assigned to TWA by Toolco in an agreement dated May 9, 1960.

20. (a) Instead of allowing equity financing by TWA the defendants caused TWA to obtain funds chiefly by means of debt financing.

(b) As a result TWA was rendered unable to seek needed financing for the acquisition of aircraft except upon the approval of defendants.

(c) The defendants' conduct rendered TWA dependent upon them for such assistance in financing as defendants might choose to provide.

21. (a) From 1955 until December, 1960, the defendants used their power over the financing of aircraft thus obtained to compel TWA to acquire aircraft of the type and in the manner dictated by the defendants.

(b) From 1955 until December, 1960, the defendants used their power over TWA's acquisition of aircraft to compel TWA to obtain financing for aircraft acquisitions of the type and in the manner dictated by defendants.

22. At least as early as 1955, the needs of United States air carriers for the extensive financing required for acquisition of jet-powered aircraft were recognized throughout the air carrier industry and by others, including the defendants.

23. Despite this, the defendants in 1955 and continuously thereafter until December, 1960, directed TWA to make no efforts itself to obtain financing necessary for the acquisition of jet-powered aircraft which TWA required for its needs.

24. (a) Commencing in 1955 and continuing thereafter, various other air carriers, including competitors of TWA, made appropriate arrangements for the financing of jet-powered aircraft.

(b) In 1955 and 1956 various U.S. air carriers were able to obtain funds at a cost (or interest rate per annum) of 4% in 1955 and costs ranging from 4¼% to 4¾% in 1956.

25. (a) Although, in 1955 and thereafter, the defendants discussed with others various proposals for the financing of jet aircraft they failed to make arrangements for such financing and refused to allow TWA to make any such arrangements for itself until December, 1960.

(b) By December, 1960 the prevailing cost of funds for debt financing had risen to 6-6½%.

Exhibit AA

Interim and Tentative Findings of Fact

VI. The Financing and Acquisition of Jet Aircraft by TWA in and Since December, 1960

26. In connection with TWA's acquisition from Toolco in December, 1960 of certain jet-powered aircraft and the rights to obtain certain additional jet-powered aircraft from Boeing and Convair and in connection with other financial transactions between TWA and Toolco, TWA delivered to Toolco a note dated December 30, 1960 for $100,000,000, carrying an interest rate of 6½%, which note was subordinated to the indebtedness of TWA to various banks and insurance companies for additional funds needed by TWA for the purchase of these aircraft.

27. As part of the arrangements with Toolco above described, TWA agreed to offer to its stockholders not less than $100,000,000 of its subordinated income debentures, with attached warrants to purchase common stock of TWA; the debentures were subordinated to TWA's senior indebtedness to banks and insurance companies. Toolco agreed to purchase, not later than three business days after expiration of the subscription offer, a principal amount thereof equal to the excess of $100,000,000 over the principal amount purchased by others in the offering; Toolco also was given the option to purchase, not later than three business days after the expiration of the subscription offer, all or any part of the debentures not purchased by stockholders pursuant to the subscription offer.

28. (a) As part of the arrangements with Toolco and with banks and insurance companies as above described, Toolco, TWA and three Voting Trustees (Ernest R. Breech,

Irving S. Olds and defendant Holliday) executed an agreement dated as of December 15, 1960.

(b) The agreement provided that the TWA stock owned and to be owned by Toolco would be placed in a Voting Trust, pursuant to which the Voting Trustees, acting by a majority vote, were empowered to exercise their sole and absolute discretion in respect of the TWA stock deposited with them and accordingly were authorized to elect directors who would be in control of TWA's management and policies.

29. The creation of the Voting Trust above described was required by the financial institutions as a condition to making loans to TWA of $165,000,000 also needed for the purchase of the aforesaid aircraft, and which loans were evidenced by a like amount of senior notes of TWA.

30. The Voting Trust, in which Toolco's TWA stock has been deposited pursuant to the terms of the Voting Trust, provides in Article Thirteenth thereof that it shall terminate on December 15, 1970, unless previously terminated or extended as provided therein.

31. Thereafter and in early 1961, at a meeting of stockholders of TWA, the Voting Trustees, by majority vote, and other stockholders of TWA entitled to vote duly elected a Board of Directors of TWA and said Board of Directors elected a new President of TWA.

32. (a) In March, 1961, after careful consideration of TWA's requirements for additional jet-powered aircraft, the officers of TWA who were concerned with such matters unanimously recommended to the Board of Directors of

TWA that TWA's immediate needs for jet-powered aircraft would best be served by the acquisition of 20 aircraft, Boeing Model 707 131-B, and 6 aircraft, Boeing Model 707 331-B.

(b) The Board of Directors of TWA authorized the purchase of these aircraft.

(c) On April 30, 1961, TWA and Boeing agreed on the purchase of these aircraft, with related spare parts and equipment, for delivery in 1962 at an ultimate cost estimated at approximately $187,500,000.

(d) Of this amount, TWA expected to provide approximately $40,500,000 from its own funds and to borrow $147,000,000. At the time the complaint was filed the borrowing was being negotiated with certain insurance companies and banks..

VII. Acts Committed Subsequent to 1960

33. (a) In and after May, 1961, the defendants insistently demanded of TWA that it not purchase the Boeing aircraft but instead purchase from Toolco 13 Convair Model 990 aircraft which Toolco had agreed to purchase from Convair.

(b) Defendants made these demands despite the knowledge that the Board of Directors of TWA had decided that the Convair aircraft were not as suitable for TWA's needs as the Boeing aircraft.

34. Defendants also sent telegrams and other urgent messages to TWA, threatening TWA, its directors, the Voting Trustees and the financial institutions lending money to TWA with litigation against TWA, its manage-

ment, its directors and the Voting Trustees unless TWA purchased the Convair aircraft from Toolco.

35. The agreements made in December, 1960, relating to the financing of TWA's purchase of jet aircraft, required, among other things, that TWA make, not later than May 31, 1961, a public offering of rights to purchase its subordinated income debentures with common stock warrants. In accordance with the provisions of those agreements, the Board of Directors of TWA approved the filing with the Securities and Exchange Commission of a Registration Statement relating to the proposed public offering and such Registration Statement was filed with the Securities and Exchange Commission on March 30, 1961.

36. (a) TWA, in order to comply with its obligation to make the proposed public offering prior to May 31, 1961 as agreed, requested the Securities and Exchange Commission to accelerate the effective date of the Registration Statement to May 18, 1961.

(b) Thereupon defendants filed objections with the Securities and Exchange Commission to the request of TWA and demanded that the proposed offering be deferred on the ground, among others, that Toolco had decided for the first time on May 10, 1961 to make a public distribution of the debentures which were being offered by TWA and which were to be acquired by Toolco pursuant to the provisions of the prior agreements.

37. Defendants further demanded that certain amendments be made to the Registration Statement in order to set forth, among other things, certain contentions of defend-

ants then made for the first time by defendants, including, among others:

(a) that notwithstanding the admitted legal power of the Voting Trustees to act, the Voting Trust could not be given effect according to its terms so as to enable TWA to be operated independently of the wishes of the defendants;

(b) that Toolco's position was that it had been compelled to enter into the Voting Trust under conditions which would warrant an immediate termination of the Voting Trust;

(c) that Toolco was considering an attempt to enjoin the consummation of the Boeing purchase transaction above described or taking action for damages against the persons responsible for the Boeing agreements; and

(d) that there might be some basis upon which Toolco could assert an equitable right to sell to TWA the Convair aircraft previously ordered by Toolco.

38. After considering the contentions so advanced by defendants, the Securities and Exchange Commission accelerated the effective date of the Registration Statement, as amended, so as to make the Registration Statement effective on May 24, 1961.

39. After the effective date of the Registration Statement and while the public offering was in progress, the defendants publicly announced that they proposed to sell up to 85% of the rights to purchase subordinated debentures which defendants were obligated to acquire under the terms of the aforesaid agreements.

Exhibit AA

Interim and Tentative Findings of Fact

40. Defendants warned the insurance companies and banks from which TWA was then attempting to arrange the immediate borrowing of $30,000,000 of short-term funds and the borrowing of $147,000,000 of secured funds required for the purchase of the Boeing aircraft that the Voting Trust was invalid and that any such financing by them would be invalid.

Dated: New York, New York
July 30, 1965

J. LEE RANKIN
J. Lee Rankin,
Special Master

Opinion and Order of Judge Metzner, Dated November 16, 1965

[Doc. 487]

[CAPTION] 61 Civ. 2324

METZNER, D. J.:

Plaintiff seeks review of so much of an opinion and order of the Special Master as fails to adopt some of the proposed interim findings of fact requested by the plaintiff.

It is unnecessary to detail the long, drawn-out history of this complicated antitrust litigation. The present problem arose after the court directed the entry of a judgment by default pursuant to Fed. R. Civ. P. 37(b)(2)(iii) and 37, and appointed a Special Master pursuant to rule 55(b)(2) to determine the amount of damages.

The plaintiff, in an attempt to facilitate the hearings before the Special Master, submitted proposed interim findings of fact to formalize the basic findings which it considered flowed from the default. The plaintiff disagrees with some of the views expressed by the Special Master in his opinion and with so much of his order striking portions of the proposed findings.

In the main I agree with the exposition by the Special Master of the law and procedures to be followed by him in assessing the damages in this case. There appears to be some ambiguity in one portion of his opinion which may need clarification.

He states that:

> "For the reasons indicated the defendants, at this point, do not have the right to produce evidence to try to establish in any manner that the allegations of the complaint other than as to damages cannot be maintained."

Opinion and Order of Judge Metzner, dated November 16 1965

The opinion goes on to state:

> "Recognizing that it is his duty on behalf of the court to be satisfied of the liability of the defendants, as well as of the proof, according to law, of the amount of damages claimed, he must also be satisfied by a preponderance of the evidence that any damages were proximately caused . . ."

The reference to a duty "to be satisfied of the liability of the defendants" may, in light of the first quotation above, indicate a conflict in approach, although a reading of the entire opinion does not warrant such a conclusion.

The order referring this matter to the Special Master pursuant to the authority of Fed. R. Civ. P. 55(b)(2) was intended to embrace this portion of the rule:

> "If, in order to enable the court to enter judgment . . . it is necessary to . . . determine the amount of damages . . . the court may . . . order such references as it deems necessary and proper".

Liability is not an issue for the Special Master except in a very limited sense. The sufficiency of the complaint has already been established by the denial of defendant's motion to dismiss. 214 F. Supp. 106 (S.D.N.Y. 1963), *aff'd*, 332 F.2d 602 (2d Cir. 1964), *writ of cert. dismissed*, 380 U.S. 248 (1965). By virtue of the default the defendant has admitted the truth of the well-pleaded allegations of the complaint. *Thomson* v. *Wooster*, 114 U.S. 104 (1885).

Allegations are not well pleaded if they are shown to be indefinite or erroneous by other statements in the complaint *(Thomson* v. *Wooster, supra);* or where they are contrary to facts of which the court will take judicial notice *(Glenn*

Coal Co. v. *Dickinson Fuel Co.*, 72 F.2d 885, 889 (4th Cir. 1934)); or where they are not susceptible of proof by legitimate evidence (*Cohen* v. *United States*, 129 F.2d 733 (8th Cir. 1942), *Greeson* v. *Imperial Irr. Dist.*, 59 F.2d 529 (9th Cir. 1932)); or where they are contrary to uncontroverted material in the file of the case (*Interstate Nat. Gas Co.* v. *Southern Calif. Gas Co.*, 209 F.2d 380, 384 (9th Cir. 1953), *In re Woodmar Realty Co.*, 294 F.2d 785 (7th Cir. 1961), *cert. denied*, 369 U.S. 803 (1962)). However, it may be shown by plaintiff, in the context of this case, that some matters of which the court may take judicial notice should not be so noticed. See McCormick, Evidence § 330 (1954). Where file material is involved, if the plaintiff did not have full opportunity to meet or controvert such material, then it should not be used to nullify the allegation. If evidence merely tends to show that an allegation is not true, the allegation must be taken as true in this default. Finally, the plaintiff is entitled to the benefit of all reasonable inferences from the evidence tendered.

Attempts by defendant to escape the effects of its default should be strictly circumscribed. It should not be afforded an opportunity to litigate what has already been deemed admitted in law. In the absence of an exceedingly strong showing that an allegation is untrue under the rules set forth above, the allegation stands as admitted.

The Special Master stated that the failure to adopt any proposed finding is not a determination that such finding

> "is false, or disproved, or that it will not be fully established by the close of the hearings on damages."

Such proposed findings are not at issue except to the limited extent noted above. The Special Master specifically stated that

> "the defendants are not allowed by the present refusal to adopt such tendered findings to contest them on the merits as they could do if there had been no default."

The matter is returned to the Special Master to proceed in accordance with these views. So ordered.

Dated: New York, N. Y.
November 16, 1965

CHARLES M. METZNER
U. S. D. J.

[The above opinion also appears at 38 F.R.D. 499]

Transcript of Hearing Before Judge Metzner on December 30, 1965

[Doc. 498]

[CAPTION]

New York, December 30, 1965;
11:30 o'clock a.m.

[APPEARANCES]

The Court: It is your motion, Mr. Hayes.

I have read the papers so I am familiar with the seven inches that you have submitted on this motion. You may start.

Mr. Hayes: May it please the Court, I have prepared an outline of argument here which I finished last night after analyzing plaintiff's brief.

I would like to state a few basic considerations to begin with, and the first is that any judgment that is eventually entered here must be based on findings and conclusions of law, and those findings and conclusions must show that Toolco acted in violation of the antitrust laws, otherwise there can be no recovery.

Now, the complaint has been held to be sufficient on its face, and we are not challenging those holdings in this motion. I want to emphasize that.

When the Courts upheld both your Honor and the Court of Appeals, they accepted, as they were bound to accept, the allegations in Paragraph 3 of the complaint that Toolco was a manufacturer and supplier of aircraft to air carriers, including the plaintiff.

It also alleged that the acts of the defendants constituted restraints on competition among aircraft manufacturers.

Those allegations were in the complaint and had to be accepted.

If, however, Toolco is not a manufacturer, not a supplier, and not in competition with aircraft manufacturers, it seems to me quite obvious that there can be no restraint of trade and no antitrust violation.

This very allegation in Paragraph 3 the plaintiff describes as a "keystone allegation," and we agree that it is a keystone allegation. Without it the arch collapses.

Another basic consideration is that by the default well-pleaded fact allegations are deemed admitted, and your Honor has set down the rules in your opinion of last month which bind the defendants with respect to the challenging of factual allegations.

The plaintiff says in its brief that "we do not attack any allegation as indefinite."

I can only conclude that the plaintiff did not read our brief very carefully because in the early part of it we point out the allegation that Toolco was a manufacturer and supplier of aircraft, and that it was indefinite and ambiguous because aircraft is defined in another paragraph of the complaint as including any device that could fly or that could be used in navigation in the air.

Now, if jet aircraft was not meant by that allegation, by the use of the word "aircraft" the allegation is meaningless. It could be, for example, similar to the situation of a suing parent which was engaged in the manufacture of motorcycles but which had a subsidiary which was engaged in car-rental hire, and which compelled its subsidiary to use only cars of General Motors manufacture, and to contend in the complaint, or to allege that the parent was a supplier of motor vehicles.

Transcript of Hearing Before Judge Metzner on December 30, 1965

Of course it was a supplier of motor vehicles, and both motorcycles and automobiles are motor vehicles, but they are not the same commodity by any means.

If, on the other hand, aircraft was intended to mean jets, our position is that the allegation is false and must be rejected, and we base the falsity and the rejection on the application of judicial notice in accordance, strictly we believe, within the limits set in your opinion, on public records and on the record in this case.

In Mr. Rummel's testimony, in the course of his deposition, Mr. Williams, who was present during that time, on behalf of the plaintiff, announced first that he didn't intend to cross-examine, and at the conclusion of the deposition he announced that he had no cross-examination.

It also appears from the deposition that from time to time Mr. Rummel reviewed the transcript and made sundry corrections in the transcript. Mr. Rummel is presently an officer of the plaintiff.

We submit that under Rule 26, therefore, the statements made then, if contradictory of or explanatory of any of the allegations of the complaint but be deemed to be admissions of the plaintiff.

As far as the public records are concerned, I was amused to find them referred to as a meaningless potpourri of the records. This springs from the plaintiff's obvious dislike of the concept of judicial notice of public records. They do not cite any case having to do with judicial notice. They seek to support their position with respect to the limit on the Court as to judicial notice by reference to Learned Hand's decision in the famous Evergreen case which has to do with collateral estoppel. It does not mention judicial notice.

Even without any special statute on this subject, the Court should notice the proceedings of an administrative

body in the Federal Government, but here we have something else.

Section 1103 of the Federal Aviation Act specifically provides that all contracts, agreements, understandings and arrangements filed with the Board, and statistics, tables and figures contained in the annual report or other reports of air carriers shall be preserved as public records and shall be received as prima facie evidence of what they purport to be for the purpose of investigation by the Board and in all special proceedings.

You have a specific provision of the very statute on which we are relying, so that when we cite CAB records we are reciting prima facie evidence in a judicial proceeding.

To begin with, the indefiniteness that I mentioned with respect to the allegations of aircraft on any hearing that we held here, because of the very indefiniteness of the allegation, there will be a burden on the plaintiff to prove by evidence that it was jet aircraft that was being supplied by Toolco or manufactured by Toolco in competition with the aircraft manufacturers.

But here, with this default, and pursuant to the doctrine of judicial notice, this Court must accept prima facie that Toolco never sold or leased a plane to anyone other than TWA, which is, indeed, rather a strange dealership, when you consider the allegations in the complaint, because since 1939 they have been engaged in this conspiracy, and they have never sold a plane to anybody; they never leased a plane to anybody since 1939. A pretty unsuccessful dealership—except, of course, for TWA.

What we have done in our brief, or what we have attempted to do, was to present to your Honor in a very careful and in a very accurate way an analysis of the allegations of the complaint itself and of the fact which we submit

the Court judicially knows from public records and from the depositions.

The plaintiff would sweep that all under the rug. The plaintiff begins with the assumption that Paragraph 3 is a well pleaded fact allegation.

Proceeding from that assumption, it also assumes that Toolco is a competitive factor in the aircraft industry.

Let me treat first with the legal propositions involved.

The plaintiff talks about a boycott. It cites the Radiant Burner's case and the Yellow Cab case. The Radiant Burner's case is a conspiracy action brought by a manufacturer of burners who is not a member of one of the associations. I think it was the American Gas Association, if I remember the name correctly. But it was a trade association made up of manufacturers of gas burners for public utilities, and they had adopted certain standards.

The plaintiff's gas burners were claimed, by the defendants, not to meet the standards. The action was decided on a complaint. The complaint alleged that the standards were not objective standards but were designed to exclude it as a competitor of the defendants from the market because one the defendants, or various of them, refused to supply gas into installations where the plaintiff's burners were installed.

Here we have a clear exclusion by a group of defendants of a competitor, one who was actually selling the same product in competition with what they were selling. They cite the Caloric case. I don't know why. The Caloric case is the famous linen rug case. In that case there was a legal monopoly enjoyed by the defendant. It had a series of distributorships around the United States which distributed the linen rugs. One of the distributors, if I remember rightly, was located in Chicago, and he decided one year that he would put in a bid to the United States Government. Prior

to that none of the distributors had ever bid for government business, only the defendant had.

Wait, I am in the wrong case. I am sorry. I am terribly sorry. I got off on the wrong case, your Honor.

The Caloric case was the one having to do with Caloric Broadway Stores. I am sorry for that slip of memory, your Honor.

There a retailer was excluded by manufacturers from carrying the products which its competitors were allowed to carry. Again, there was an exclusion of it disenabling it to compete with its competitors.

Yellow Cab is perhaps the most interesting of all. Yellow Cab was obviously the case upon which this complaint was built. It is referred to constantly by the plaintiff in his brief.

Yellow Cab was a situation where the parent owned cab companies in 44 cities. It was also a manufacturer of cabs, selling cabs in competition with General Motors, Ford, Chrysler, what-have-you. It insisted that according to the—again, this was cited on the complaint—that its subsidiaries buy cabs only from it, from nobody else, but it was making cabs and selling them and its insistence constituted an exclusion by the parent of all other manufacturers of cabs, but there was a competitive aspect of it in each instance. In each one of these cases a competitor was excluded from the market.

There has not been a single case, there is not a single case cited in plaintiff's memorandum, which does not involve the denial of access to the market of a competitor—every single one of them without exception.

Plaintiff asserts that TWA was coerced from dealing with any supplier of aircraft or financing except Toolco. This statement in the brief goes beyond the allegations of the complaint, because it suggests that it also supplied financing.

The complaint even does not say that. All the complaint says is that Toolco dictated the financing, not that it supplied it. But is assumes rather as well as claims that plaintiff did supply the aircraft. Again, they mention Yellow Cab. Yellow Cab has no application to our case unless Toolco was a manufacturer and supplier of aircraft in competition. That is the Yellow Cab case. It is not our case.

They mentioned National City Lines. That was a case where the National City Lines, a bus operating company or a holding company owning a bunch of bus operating companies, sought investments I think always in preferred stock, although I am not sure of that detail, but I think it was preferred stock, from manufacturers of buses, of tires, gas and oil and so on, making an agreement in each instance that the bus lines would buy the products of the various investors only from those investors, and each of the investors knew that such an agreement was being made by the parent with each of the other investors, and obviously each of them knowing of the agreement, the Court inferred a conspiracy, quite properly. But in each instance there were bus companies competitors with the investor, who were excluded, tire manufacturers who were excluded, gas and oil suppliers who were excluded and so on.

Section 3 is perhaps the strangest of all of the allegations here or the claims here. We are met with the statement in the brief that the applications to the CAB were filed at Toolco's direction. I don't know where plaintiff gets that. It is not in the complaint. It seems to us in ordinary common sense that if the condition alleged in the complaint existed, somebody in TWA should know about it. If it existed only in the mind of some executive of Toolco, it wasn't a condition; it had to be agreed to.

Now, the applications that were submitted to the CAB were signed by officers. One was signed by the president

at the time. The other four set forth in our brief were signed by vice presidents.

Now, the plaintiff does not like these applications because they don't disclose any condition and thus deny the allegation of the complaint. And they are prima facie evidence.

Now, we must conclude from the position plaintiff is taking here that either the condition was not known to plaintiff's officers, in which event it wasn't a condition at all because it could not have been agreed to, or that these officers made misrepresentations to the CAB. We don't like to think that and we don't think it. We think we may rely on the CAB records as the prima facie evidence that they are under the statute.

Now, in every case plaintiff cites under Section 3, again there has been excluded a competitor who was prepared to sell the product, which the purchaser from the one imposing the condition had agreed to buy only from his seller. The Tires, Batteries, Accessories cases are the most common, where the oil company supplied gasoline and oil to the service stations on condition that they would buy either from it or directly from the supplier, in which event they usually got a rake-off of some kind, some sort of an override, on the tires and the batteries and the accessories that would be sold at the service station. And if they elected, for example, Goodyear tires and their deal was with Goodyear, Goodrich couldn't sell; General Tire couldn't sell; Seiberling couldn't. There was an exclusion of a competitor engaged in the sale of the very product which was tied.

But most interesting we think is the language the complaint uses. It doesn't use the statutory language. The language of the complaint is that the condition was that TWA would not purchase or lease from any other potential supplier. Now, that is really a masterpiece of vagueness. The assumption of course and the inference, or

intended inference, are they are airplane manufacturers, and also that Toolco was a competitor of theirs. These are the inferences that the reader of the complaint is expected to draw.

What the Act says, however, is that the conditions be that the purchaser shall not use or deal in goods of the competitors of the lessor. Of course, plaintiff very well knew, even assuming that Toolco was a competitor of the manufacturers that TWA was using the goods of its competitors; they were using Boeing airplanes, they were using Convair airplanes, so they couldn't use the statutory language. So they invented this nice weasel wording to make it sound like Section 3 although it does not in fact read on Section 3.

So far as the monopolization claim is concerned, again they go back to Yellow Cab. I am not going to repeat Yellow Cab. Again I make only the point that Yellow Cab is meaningless unless the parent had competitors who were excluded.

Then we get down to the particular sections. It is interesting to note that Section 3 is disposing of it in a footnote. Plaintiff refrains from discussing it since it relates only to the prayer for injunctive relief, which your Honor has reserved to yourself. If that be so, I don't understand why the plaintiff was so aggrieved at the Master's failure to find, with respect to the second claim, the allegation that there was a violation of Section 7, because the Master had only damages in front of him. But I fully understand the plaintiff's failure to discuss Section 7.

First of all, there is your Honor's own opinion as to the depositions in which you held quite specifically there was an immunity bath with respect to the acquisition itself. Further, Section 7 deals only with acquisitions. Toolco's

acquisition is immune from attack. It has no reference whatever to abusive control after acquisition.

Section 7 does not cover that, and finally, as your Honor has held and been followed by various other courts, no damages can flow from a violation of Section 7. So I fully understand the bashfulness of the plaintiff with respect to any discussion of Section 7.

Then we come to conspiracy. They complain that we complain that Atlas' acts are not shown in detail. We make no complaint. If they had some acts to allege, they could have alleged them.

All we pointed out is that the only allegations having to do with Atlas, aside from obviously wrong ones, that Atlas was engaged in acquisitions of stock, meaning TWA's stock, or that Atlas made sales on condition when Atlas does not sell anything having to do with airplanes. We point out that the only allegations in the complaint having to do with Atlas were a proposed merger, which was never consummated. It is a matter of history. The merger itself, as we have shown to your Honor—the merger agreement is only an agreement to merge—was subject to approval of the minority stockholders of plaintiff and of the CAB. If the CAB disapproved, it couldn't happen. If the CAB did approve, it would have to be on the basis that it was in the public interest and immunity would attach.

We fail to understand how an agreement to do something, which can't be accomplished without the approval of an administrative agency set up to administer the particular act involved and never consummated, can possibly constitute the parties to the agreement conspirators to violate the antitrust laws because Atlas is not alleged to have done anything else, taking every allegation of the complaint.

Transcript of Hearing Before Judge Metzner on December 30, 1965

So what we are left with is a corporate defendant and its officers, one of whom is the sole stockholder, to wit, Toolco, Hughes, Holliday. That is what is left.

The plaintiff seeks to meet this by references to various cases where conspiracies were held to exist among affiliated corporations. We all know that rule of law. Affiliated corporations may be conspirators, and I might point out that in every one of those cases—take, for example, Timkin. The parent and a subsidiary were all engaged in the same line of business. They were engaged in price-fixing or allocation of markets or what-have-you. They were separate corporate entities, and the courts have held that corporations, though related, may be parties to a conspiracy. But no court has ever held there is a conspiracy, civil conspiracy, in violation of the antitrust laws between a corporation and its own officers, and it couldn't. It would be ridiculous because the officers act for the corporation.

Plaintiff attempts to distinguish the Nelson Radio case as applying only to those acting in a corporate capacity, and suggests, without any facts whatsoever, although the complaint reeks with allegations, that this whole conspiracy was for the benefit of Toolco, that somehow or other Hughes had a separate independent capacity. No fact basis for this assertion of the plaintiff.

Concededly, the complaint alleges, and it is true, Hughes was the sole stockholder of Toolco, and he dominated it—no question about it. What is significant to us is that an identical situation was presented in the Goldman Theatres case, which we cite in our brief, a decision by the Third Circuit, where Goldman—I think it is the Goldlawr case as it appears in the books—where Goldman, like Hughes, was the 100 per cent stockholder, and the conspiracy was

alleged to be between the corporation and himself and some other officers. The Third Circuit, relying on the Nelson case, said there could be no such conspiracy.

I would like to hear plaintiff's reply to the Goldlawr case.

But to get back, the whole legal discussion assumes, is based on the assumption, that Toolco is a competitor supplying jet aircraft to air carriers generally. They make the statement that we can't show this, this just isn't true. That is precisely what our brief does show. You must remember that the airlines of the United States operate in a fish bowl. The facts as to their operation are public knowledge. Their acquisitions are public knowledge.

For example, part of this meaningless potpourri that the plaintiff likes to dismiss are the Form 41 reports, which every airline must file. There is included an analysis of those reports in the papers before your Honor, and they show that Toolco never sold or leased a plane to anyone but the plaintiff.

Now, plaintiff does not discuss these Form 41 reports. It can't answer them. Impossible to answer them, so the best way is to forget about them and say you can't take judicial notice of them.

It is, indeed, a strange dealer in jet aircraft, an awfully strange competitor, who never sold or leased a plane in competition with the manufacturers whose trade is claimed to be restrained.

The record of the case shows that the planes were ordered to TWA configuration and specification; that TWA had representatives in the factories during their construction.

If we look at the complaint itself, we don't even find an allegation in the complaint of a factual nature other than the general allegation of paragraph 3, which I say is in-

definite because of the use of the word "aircraft," that Toolco ever manufactured a jet plane or ever sold or leased a jet plane to anyone but TWA. Instead, we are treated to a series of 12 wholly unrelated instances set forth in the brief and as the brief says, set forth in the brief to the Supreme Court.

Except for the so-called Boeing diversion and the Convair lease to Northeast, they deal with plans or intentions or negotiations—that is all they talk about—to deal with contracts by Toolco to buy planes, which, incidentally, never actually took place. The deals were never consummated.

One, however, does assert that Toolco actually supplied Vickers Viscount planes to Northeast. That is a flat allegation, a flat statement in the brief. It is not in the complaint. That statement is false. It is not sustained even by the documents which plaintiff cites. The record of the case shows that TWA seriously considered buying Vickers Viscounts back in, I think it was, 1957. The deal fell through because TWA decided that it didn't want Vickers Viscounts.

Hughes had apparently—and I am talking about what Mr. Rummel said—felt that he had a moral obligation to Vickers because he had apparently—apparently I say; you have to infer this from the testimony—apparently felt that he told them substantially in substance that TWA would buy the planes and TWA decided not to have them. So then he endeavored to find a purchaser for the planes, and Vickers sold them directly to Northeast, as is obvious from the Form 41 reports filed with the CAB. So the only allegation of a sale, the only suggestion of a sale in the 12 instances the public record again shows is false. Vickers planes were sold directly to Northeast. Toolco never owned them and never could have sold.

Another one deals with the purchase of 300 airplane engines from Pratt & Whitney. It is clouded with mystery in plaintiff's brief. No mystery about it. There again, reference to Rummel's testimony shows that at the time the 300 engines were bought, Pratt & Whitney was about to have a price increase in February of 1956. Rummel advised or suggested or urged—I don't know what is exactly the right word to use—Mr. Hughes said it would be a good idea to buy the engines before there was a price increase. At that time, in February 1956, no one knew how many planes, jet planes, TWA was going to have eventually. But if they were to have 50, 300 was exactly the right number because these were engines that were used in Boeings, and for each plane, the Boeing having four engines, there are usually two spares, so it would have been precisely the right number for 50 Boeings.

Now, they had not been ordered at this time. I think only eight Boeings at this time had actually been ordered. There is no mystery about this.

Mr. Rummel also testified he thought it was pretty much the right amount. Now, it developed they didn't need them later because later Convairs were ordered and Convair uses the General Electric engine. So Hughes Tool Company found itself with excess engines and it sold them to Boeing, who purchased them from Toolco.

This complaint does not deal, however, with sales of engines. It deals with sales of aircraft. That is what the complaint alleges. So we are left with the so-called Pan Am diversion of the Northeast lease.

Under the contract with Boeing, Toolco could not assign its rights to anyone other than TWA without Boeing's consent. That was essential. Incidentally, the same thing is in the Convair contract. Boeing consented. Now, if there is anybody whose trade could possibly be claimed to be restrained here, Boeing consented.

TWA did not need the extra planes or did not want them at the time, as we pointed out in a prior argument before your Honor. It got rid of them by having Pan American take over the contract, and incidentally, Pan Am also I believe bought some of those engines which were to go with the planes. The same is true of the Convair deal. Convair entered into agreement with the Hughes Tool Company whereby Hughes Tool Company was released on the purchase of the six planes.

Convair, the one whose trade is supposed to have been restrained, consented, and then it leased the planes to Northeast. So that even here we have no sale of a plane by Toolco to Pan Am or to Northeast. What we have is Toolco in one instance, with the consent of the manufacturer, disposing of its contract to Pan American, and the consent was necessary; and the other, the manufacturer and Toolco agreeing to release Toolco of the obligation, and the manufacturer releasing them.

Incidentally, I might mention in passing that it is perfectly apparent from the CAB control orders which we have presented to your Honor, that if Toolco ever did become or tried to become a supplier of aircraft, it would need CAB approval. But it never was, and it never sought the approval. It did once contemplate manufacture, which fell through in a few months. An application was made. It was later dismissed as moot because the plans were not carried through. But plaintiff tries to make a point here by saying in all these transactions, the engines, the Pan Am, the Northeast deal, Toolco made a profit.

As far as antitrust law is concerned, the only short answer to that is: So what? Take the engines, for example. They had bought them in February 1956, just before a price increase, and they sold them I think the middle of 1957

sometime. They had no obligation to sell them at their cost. Boeing was perfectly willing to pay the price for them. Boeing was the one who wanted them, and they sold them to Boeing.

Talking about profits, the making of a profit does not make one an antitrust violator.

Now, the simple fact is, as we assert in our brief—and we assert it very carefully, your Honor, very carefully, and based on most objective evidence, and the plaintiff cannot deny the evidence—Toolco never competed with any aircraft manufacturer in the sale of planes to anybody.

You will pardon what must be now boresome repetition, but it sold and leased planes only to the plaintiff.

It is perfectly true it dominated the plaintiff's procurement policies and financing policies, but you can't build an antitrust violation on a parent's domination of its subsidiary. That is not Yellow Cab at all.

But now we have a coup de grace delivered in the brief. Toolco earned $25 million by leasing planes to plaintiff. To say this is not a dealer is ridiculous in light of this. Plaintiff did not say that each of those leases, under which a total of $25 million rent accumulated, were approved by the CAB, each and every one of them.

Plaintiff also does not deny what we state in the papers before you, that all but a very small part, a million or less of that $25 million, was not paid to Toolco, the parent, until the financing was concluded at the end of December 1960. In short, Toolco took down the planes. With its own funds, it paid for the planes. It leased them to TWA. TWA operated them and paid no rent. Now, this is what a parent with a 78 per cent interest in a subsidiary would do. It is not what any dealer or supplier does.

As I said, there can be no judgment here without a finding that Toolco is a manufacturer in competition with a sup-

plier. This Court simply cannot make such a finding on the basis of the facts known to it.

If I may paraphrase your Honor in a question you addressed to Mr. Sonnett back in September, we have presented here a complete existing record both from the depositions and from matters of public record, that the allegation of Paragraph 3, if it means jets, is false. That is what we have done. We have done it very carefully; we have done it very objectively.

On the facts now before it, this Court would look ridiculous if it found as a fact that Toolco is a manufacturer or a supplier of aircraft in competition with the manufacturers.

I stress Toolco is still in court. The default has not thrown it out of court.

The Court: Yes, but a very tenuous string, and Mr. Hayes, I am going to stop you because you have been going for forty-five minutes.

I have listened very carefully to you, and the only question going through my mind is why was there a default? Why didn't you go into court and get a judgment on the merits?

Just listening to you, I find you want to throw the default out and start over again.

Mr. Sonnett, I will hear you.

Mr. Sonnett: If it please the Court, we filed our brief yesterday, and you said you read our papers, and I take it that meant our brief.

The Court: Yes, I read it at 7:00 o'clock last night sitting right over there.

Mr. Sonnett: I have nothing to add to what is in our brief.

The Court: All right. Motion submitted.

Mr. Hayes: May I just answer your Honor's question?

The Court: Yes.

Mr. Hayes: This is not in the record, but it is well known.

The default took place because of the failure of Mr. Hughes to appear for a deposition primarily.

The Court: As a result of a deliberate business judgment.

Mr. Hayes: Right, correct.

Mr. Sonnett: With two other instances.

Mr. Hayes: Yes, I know. I said primarily. Everybody knows Mr. Hughes' passion for privacy, whether we like it or not.

The Court: Well, beyond that, Mr. Hayes, I offered in an off-the-record discussion to provide for protecting Mr. Hughes' passion for anonymity by having the deposition taken any place he wanted, as secret as he wanted it to be, and then I was asked not to publish it, so I never published it, but that is a fact.

Mr. Hayes: I am aware of this, your Honor.

All I can say, your Honor, is that this Court is under an obligation to render a just judgment despite the default.

The Court: The Court is going to render a just judgment, and however this Master finds the amount of damages to be, I will review it based on any exceptions you take to it. But all I am saying is that the burden of your argument as it hits me sitting here is that there has got to be a judgment for the defendant, and I wonder why you didn't try the case if there has to be judgment for the defendant.

Mr. Hayes: Your Honor, that is the burden of my argument. There is no question about it, and I submit that there should be a judgment for the defendant.

I submit that since on the facts now before the Court, it cannot be found as a fact that Toolco was competing with the manufacturers and suppliers under the well-pleaded allegation rule that you laid down, that the first order of business should be a determination as to whether or not that fact is true. That is the burden of our motion.

The Court: I understand it, but the way you put the motion is you turn the shoe around, and you say: We want a fact found, and you, Mr. Plaintiff, who are sitting there with a default judgment in your hand, must come forward and prove that this fact is false.

You are the one who is in default, Mr. Hayes, not the plaintiff.

Mr. Hayes: Correct.

The Court: They have a default judgment with everything that flows from it, and the burden is on you, within the narrow limitations of my order of November, to possibly have the Master find that certain facts do not exist.

But the way you place the motion: You come forward, Mr. Plaintiff; you prove; the burden is on you, Mr. Plaintiff, to prove that this is false.

It is a little difficult for me to accept that concept.

Mr. Hayes: I am sorry. Maybe I haven't made myself clear; maybe our brief didn't make it clear.

We submit that we have met the burden. We ask the Court now to make a finding of fact, based on the facts of record, and of which it must take judicial notice, of which it is bound as prima facie evidence, that Toolco is not a manufacturer or supplier.

The Court: Your proposed pre-hearing order asks me to order the plaintiff to come forward with the records and the facts which plaintiff contends preclude the entry of the following finding of fact, which of course is the finding of fact in your favor.

Transcript of Hearing Before Judge Metzner on December 30, 1965

Mr. Hayes: I think we have met the burden, your Honor, by giving you prima facie evidence that the allegations were false.

The Court: I am afraid, Mr. Hayes, that this is going to have to go on before the Master within the order as I laid down in November, and you will produce evidence to him within the limitations of that order.

Mr. Sonnett: May I say one thing, Judge? I was, I think, very patient in listening to this rehash for forty-five or fifty minutes of what has been said before, and I don't like to be unpleasant at this season of the year, what with the holidays and everything, but—

The Court: Well, then, let's not be.

Mr. Sonnett: Yes.

But I don't think this Court needs to be protected by me or by Mr. Hayes. The Court of Appeals and the Supreme Court had no difficulty with this Court's decisions in this case, and I expect to hear Mr. Hayes making this same argument to the Supreme Court when this case gets back up there.

The Court: I have no doubt that you will be back up there again, with the way this is going, but I think that the Master's order, with my modification contained in the order of November 16th, lays out the ground rules, and I think they are clear.

It is difficult to pass upon each particular facet that may come up. You can only lay down general rules of procedure. The Master will have to take each individual matter as it comes up and determine each matter individually.

So I will, within the next week, dispose of this motion, and I will also appoint a successor to the Special Master, Mr. Rankin, who has notified me that he will no longer be able to preside as Special Master in this case.

Transcript of Hearing Before Judge Metzner on December 30, 1965

Mr. Sonnett: Judge, I would like to again suggest and request that you consider taking the damage hearing yourself, if I may say just briefly, and I know it is getting close to lunch time, because I think we are going to be running back to you anyway repeatedly. I think that we are going to make haste very slowly. I think that the appearance before you today is a fair sample of what we are going to run into. I think that obviously you are going to have to review the entire record that is made before the Master, and of course you will, so that I think that the extent of that record and what ought to be in it and what ought not be in it, and the applications of your Honor's rulings, are things that you could dispose of much more readily than any master could, and we are going to have to educate a new master.

If you saw fit to do this, I would propose that we package our entire direct case and be prepared to submit it to you and to the defense—well, I am going into the hospital January 9th, and will be out for the balance of January, but we will be in a position to submit our case in writing, with narrative form evidence, and all the rest of it, by roughly, the third week in February or thereabouts.

I would hope that you would entertain the idea of our submitting that to you and to the defense, and then giving them a reasonable time to study it and prepare for cross, and then we would produce the witnesses before you for cross, which you could control, and we would get the thing done.

The case is now four years old. We have been up and down to the Court of Appeals and the Supreme Court. We are going, otherwise, to have to come back to you repeatedly.

The Court: I don't think you are going to have to come back repeatedly, Mr. Sonnett. Both you and Mr. Hayes are excellent and able lawyers, and I am sure that you are going to conduct yourselves as such.

Transcript of Hearing Before Judge Metzner on December 30, 1965

I don't blame Mr. Hayes for making this motion. He is an advocate, and he thinks the best way to present his case is this way, and so he has done it.

I think when you get back to the Master, this is a classic case for the appointment of a special master, so I will appoint somebody who is capable, and I hope he is as capable as Mr. Rankin is and was in this case, and then we will proceed along the usual route.

Mr. Sonnett: Well, I am sorry that we can't do it before the Court directly because, while I agree it is a typical case for the appointment of a special master to assess damages, this case, as you will know, is far from being a typical case.

The Court: I know that, and this is not the reason I am doing it, but my calendar is jammed up. I go into the motion part on Monday, and you know what the motion part is in this court.

I have a Rule II antitrust case set for trial in May, and I have other assignments to dispose of, so I just can't reach you.

Mr. Hayes: May I make one suggestion, your Honor? Unless you, on reflection, decide to change your mind and see the wisdom of my approach, which I think is absolutely sound and which is not merely an advocate playing advocate and that is that you direct the Master, as his first order of business, to inquire as to whether or not Allegation 3 of the complaint can be found as a fact.

The Court: No, I won't circumscribe the Master that way, Mr. Hayes.

As I said, I am sure he is going to be a capable man who can handle the matter, and who is expert enough to handle it properly.

Happy New Year, gentlemen.

Mr. Sonnett: The same to you.

Mr. Hayes: And a Happy New Year to you, sir.

(Hearing concluded.)

Opinion and Order of Judge Metzner Denying Defendants' Motion for a Pre-Hearing Order, dated January 4, 1966

[Doc. 496]

[CAPTION] 61 Civ. 2324

METZNER, D. J.

Defendant has moved for a pre-hearing order calling upon the plaintiff to set forth the facts supported by the record or by matters judicially noticeable or by evidence which the plaintiff is prepared to offer, upon which plaintiff would rely to preclude the entry of the following finding of fact:

> The facts before this Court establish that at no time during the period covered by the complaint herein were the defendants, or any of them, engaged in the manufacture or supply of commercial transport aircraft in competition with any manufacturer or supplier of such aircraft.

The defendant then requests that if this proposed finding of fact is supported notwithstanding the material set forth in the plaintiff's offer of proof, the finding of fact shall be made and the case dismissed as a matter of law.

A 7-inch stack of affidavits, briefs and supporting documents has been submitted in connection with this motion. After reading them and listening to defendant's extensive argument, one wonders why the case was never defended on the merits, if all that defendant contends for is true. At this late date, after the complaint has been sustained and a default judgment entered, with appeals to the Court of Appeals and a writ of certiorari dismissed by the Supreme Court, defendant now, in effect, seeks summary judgment in

its favor. It asks that plaintiff come forward to negative a fact which defendant asserts as true. The shoe is on the other foot. The plaintiff has a judgment in its favor and the only limitation thereon has been spelled out in the order of the Special Master dated July 30, 1965 and the order of this court dated November 16, 1965. Together they outline the procedures to be followed before the Special Master, where the matter is properly pending. The court cannot conceive of any further reason for delay in proceeding before the Special Master until the hearings are completed.

Motion denied. So ordered.

Dated: New York, N. Y.
January 4, 1966

CHARLES M. METZNER /s
U. S. D. J

Order of Judge Metzner of January 4, 1966 Designating Herbert Brownell as Special Master in place of J. Lee Rankin

[Doc. 497]

[CAPTION] 61 Civ. 2324

J. Lee Rankin, Esq., having requested permission to be relieved of his duties as Special Master in the above entitled matter, it is hereby

ORDERED that the order of this court dated May 3rd, 1963 is amended to the extent of designating Herbert Brownell, Esq., of 25 Broadway, New York, N. Y., as Special Master in place of said J. Lee Rankin.

Dated: New York, N. Y.
January 4, 1966

CHARLES M. METZNER
U.S.D.J.

INDEX

Volume I

	PAGE
List of Relevant Docket Entries	A-x
TWA Complaint [Doc. 1]	A-1
Order Referring This Action to Judge Metzner for All Purposes, dated August 31, 1961 [Doc. 42]	A-33
Opinion and Order of December 5, 1961 [Doc. 50]	A-35
Pretrial Order, February 7, 1962 [Doc. 59]	A-36
Toolco's Answer and Counterclaims [Doc. 63]	A-41
Holliday's Answer [Doc. 83]	A-99
Pretrial Order, July 12, 1962 [Doc. 101]	A-116
Pretrial Order, September 21, 1962 [Doc. 122]	A-118
Pretrial Order, January 10, 1963 [Doc. 144]	A-122
Pretrial Order, January 19, 1963 [Doc. 146]	A-127
Opinion and Order of Special Master dated January 22, 1963, Exhibit C to Bromley Affidavit dated February 15, 1963 [Doc. 179]	A-133
Exhibit A to the Affidavit of John F. Sonnett, dated February 1, 1963 [Doc. 166]	A-143
Exhibits B and C to the Affidavit of John F. Sonnett, dated February 1, 1963 [Doc. 167]	A-226
Pretrial Order, February 1, 1963 [Doc. 168]	A-253
Opinion and Order, February 7, 1963 [Doc. 173]	A-255
Toolco's Notice of Position, dated February 8, 1963 [Doc. 174]	A-268
Transcript of Pretrial Hearing, February 8, 1963 [Doc. 188]	A-270
Transcript of Pretrial Hearing, May 2, 1963 [Doc. 204]	A-309

PAGE

Opinion and Order, dated May 3, 1963 [Doc. 191] A-317

Opinion and Order of May 3, 1963 Granting Additional Defendants' Motion to Dismiss (memorandum endorsed on motion papers dated February 15, 1963) [Doc. 179B] A-323

Judgment of the Court of Appeals on Interlocutory Appeal, Entered July 10, 1964 [Docket No. 28405] [Doc. 478] A-324

Judgment of the Court of Appeals Affirming Dismissal of the Counterclaims, Entered July 10, 1964 [Docket No. 28406] [Doc. 479] A-326

Opinion of the Court of Appeals in Dockets No. 28405 and No. 28406 [Doc. 478] A-328

Opinion and Order of Special Master J. Lee Rankin, dated July 30, 1965 [Doc. 481] A-357

Opinion and Order of Judge Metzner, dated November 16, 1965 [Doc. 487] A-396

Transcript of Hearing Before Judge Metzner on December 30, 1965 [Doc. 498] A-400

Opinion and Order of Judge Metzner Denying Defendants' Motion for a Pre-Hearing Order, dated January 4, 1966 [Doc. 496] A-422

Order by Judge Metzner of January 4, 1966 Designating Herbert Brownell as Special Master in Place of J. Lee Rankin [Doc. 497] A-424

Volume II

Excerpts from Testimony at Damage Hearing of Robert W. Rummel [Docs. 554-2 through 554-10] A-425

Testimony at Damage Hearing of John B. Connelly [Doc. 554-11] A-977

Volume III

PAGE

Excerpts from Testimony at Damage Hearing of Edward J. Morehouse [Docs. 554-13, 554-14] A-1209

Excerpts from Testimony at Damage Hearing of Edward Wemple [Docs. 554-15 through 554-18, 554-32] A-1243

Excerpts from Testimony at Damage Hearing of John C. Biegler [Doc. 554-19] A-1527

Volume IV

Excerpts from Testimony at Damage Hearing of Gene M. Woodfin [Docs. 554-23, 554-24] A-1567

Excerpts from Testimony at Damage Hearing of Nathan S. Simat [Docs. 554-25, -26, -27, -28, -30, -31] A-1575

Excerpts from Testimony at Damage Hearing of L. John Eichner [Docs. 554-31, -32] A-1727

Testimony at Damage Hearing of Van Court M. Hare, Jr. [Doc. 554-32] A-1773

Excerpts from Pretrial Deposition of Robert W. Rummel [Docs. 224, 225, 226] A-1797

Excerpts from Pretrial Deposition of Charles C. Tillinghast [Docs. 210 through 222] A-1850

Excerpts from Pretrial Deposition of Emmett O. Cocke [Docs. 228, 231, 233, 235] A-1913

Jones v. *Uris Sales Corp.*—Master's Report [not a part of the Record herein] A-1934

Volume V

Notice of Filing of Report of Special Master dated September 21, 1968 [Doc. 509] A-1965

Report of Special Master, Filed September 21, 1968 [Doc. 508] A-1966

PAGE

Defendants' Objections to the Report of the Special Master, dated November 1, 1968 [Doc. 511] A-1967

Opinion and Order, Filed December 23, 1969, Adopting and Confirming the Report of the Special Master [Doc. 519] A-2027

Opinion and Order of April 13, 1970 Awarding Attorney's Fee and Costs [Doc. 530] A-2060

Final Judgment Entered April 14, 1970 [Doc. 531] .. A-2073

Volume VI

Toolco's Notice of Motion to Dismiss TWA's Complaint, August 8, 1961 [Doc. 22] A-2075

Order by Judge Herlands, dated August 14, 1961 [Doc. 25] A-2077

Transcript of Pretrial Hearing Before Judge Metzner, September 6, 1961 [Doc. 47] A-2078

Pretrial Order of Judge Metzner, September 7, 1961 [Doc. 44] A-2112

Transcript of Pretrial Hearing Before Judge Metzner, October 2, 1961 [Doc. 48] A-2115

Pretrial Order of Judge Metzner, December 18, 1961 [Doc. 354] A-2138

Toolco's Notice of Motion Before Special Master J. Lee Rankin, February 15, 1962 [Doc. 66] A-2140

Transcript of Pretrial Hearing Before Judge Metzner, February 23, 1962 [Doc. 79] A-2141

Orders of Special Master J. Lee Rankin, April 17, 1962, contained in excerpts from transcript of deposition of Charles C. Tillinghast, Jr. [Doc. 217] A-2176

Interrogatory Propounded by TWA to Toolco, May 4, 1962 [Doc. 89] A-2197

PAGE

Interrogatory Propounded by TWA to Raymond M. Holliday, May 4, 1962 [Doc. 90] A-2203

Transcript of Pretrial Hearing Before Judge Metzner, May 17, 1962 [Doc. 96] A-2206

Portion of Transcript of Proceedings Before Special Master J. Lee Rankin, June 4, 1962 [Doc. 218] A-2233

TWA's Notice of Motion and Affidavit of John F. Sonnett, June 25, 1962 [Doc. 305] A-2234

Affidavit of John R. Hupper, July 2, 1962 [Doc. 315] A-2240

Transcript of Pretrial Hearing Before Judge Metzner, July 12, 1962 [Doc. 107] A-2245

Pretrial Order of Judge Metzner, July 23, 1962 [Doc. 103] A-2267

Pretrial Order of Judge Metzner, July 24, 1962 [Doc. 93] A-2268

Transcript of Pretrial Hearing Before Judge Metzner, July 26, 1962 [Doc. 113] A-2270

Affidavit of Robert G. Zeller, August 28, 1962 with Exhibits A-K [Doc. 110] A-2283

Memorandum Reviewing the History of TWA's Application for Permission to Propound an Interrogatory of Hughes Tool Company Concerning the Location of Howard R. Hughes, August 30, 1962 [Doc. 106] A-2297

Transcript of Pretrial Hearing Before Judge Metzner, September 6, 1962 [Doc. 355] A-2305

Affidavit of John F. Sonnett, September 14, 1962, and Exhibits C and D thereto [Doc. 117] A-2316

Portions of Transcript of Proceedings Before Special Master J. Lee Rankin, September 15, 1962 [Doc. 226] A-2382

PAGE

Transcript of Pretrial Hearing Before Judge Metzner, September 19, 1962 [Doc. 129] A-2391

Portions of Transcript of Discovery Proceedings Before Special Master J. Lee Rankin, October 25, 1962 [Doc. 226] A-2428

Transcript of Pretrial Hearing Before Judge Metzner, October 29, 1962 [Doc. 184] A-2438

Notice of Motion by Toolco, December 4, 1962, for Leave to Depose Sessel and Wadsworth [Doc. 338] A-2461

Transcript of Proceedings Before Special Master J. Lee Rankin, December 14, 1962 [Doc. 237] A-2462

Transcript of Proceedings Before Special Master J. Lee Rankin, December 28, 1962 [Doc. 237] A-2514

Transcript of Pretrial Hearing Before Judge Metzner, January 9, 1963 [Doc. 185] A-2523

Transcript of Proceedings Before Special Master J. Lee Rankin, January 14, 1963 [Doc. 237] A-2571

Notice of Motion by Toolco, January 14, 1963 [Doc. 145] A-2574

Transcript of Pretrial Hearing Before Judge Metzner, January 17, 1963 [Doc. 186] A-2576

Notice of Motion by Toolco, January 22, 1963 [Doc. 147] A-2602

Transcript of Proceedings Before Special Master J. Lee Rankin, January 23, 1963 [Doc. 237] A-2603

Notice of Motion by Toolco, January 25, 1963 [Doc. 152] A-2615

Transcript of Pretrial Hearing Before Judge Metzner, January 28, 1963 [Doc. 187] A-2616

Letter of Chester C. Davis to Judge Metzner, January 29, 1963 [Doc. 448] A-2642

PAGE

Letter of Chester C. Davis to Special Master J. Lee Rankin, February 4, 1963 [Doc. 458] A-2645

Letter from John F. Sonnett to Chester C. Davis, February 5, 1963 [Doc. 459] A-2647

Notice of Motion by Toolco, February 6, 1963 [Doc. 170] A-2648

Affidavit of Nazeeh Habashy, February 6, 1963 [Doc. 172] A-2649

Transcript of Pretrial Hearing Before Judge Metzner, February 6, 1963 [Doc. 187] A-2650

Affidavit of Bruce Bromley, February 15, 1963 [without exhibits] [Doc. 179] A-2676

Affidavit of William C. Chanler, February 15, 1963 [Doc. 179] A-2689

Order to Show Cause dated February 16, 1963, and Affidavit of John F. Sonnett, February 15, 1963 [Doc. 180] A-2692

Transcript of Pretrial Hearing Before Judge Metzner, February 21, 1963 [Doc. 189] A-2704

Order of the Court of Appeals for the Second Circuit dated June 6, 1963, Granting Leave to Appeal and Staying Damage Hearing Pending Appeal .. A-2736

Orders of the Supreme Court of the United States, dated November 16, 1964 Granting Writs of Certiorari A-2737

Orders of the Supreme Court, dated March 8, 1965, Dismissing the Writs of Certiorari as Improvidently Granted in *Hughes Tool Company et al.* v. *Trans World Airlines, Inc.*, Nos. 443 and 501 .... A-2738

Opinion of the Court of Appeals dated September 1, 1971, in Docket Nos. 34902, 35114, Affirming with Modifications the Judgment of the District Court A-2739

PAGE

Orders of the Court of Appeals, dated September 28, 1971, Denying Petitions for Rehearing and Rehearing *in banc* A-2799

Volume VII

PAGE

Excerpts from Transcript of Deposition of Charles C. Tillinghast, Jr. [Excerpts from Docs. 54, 210, 211, 216, 221] A-2800

Vol. 11 of Defendants' Exhibits to Deposition of Charles C. Tillinghast, Jr. (consisting of Exhibit 11, with subparts 11-A through 11-T, inclusive) [Doc. 238] A-3220

Opinions and Orders of the Civil Aeronautics Board with respect to the Hughes Tool Company—TWA Control Relationship, as follows:

(a) CAB Opinion and Order No. 3210, October 17, 1944 (officially reported at 6 C.A.B. 153) [not a part of the Record herein] A-3297

(b) CAB Order No. 4437, January 26, 1946 .... A-3307

(c) CAB Order No. E-922, October 29, 1947 .... A-3309

(d) CAB Opinion and Order No. E-1735, June 30, 1948 (officially reported at 9 C.A.B. 381) [not a part of the Record herein] A-3311

(e) CAB Opinion and Order No. E-4701, October 6, 1950 (officially reported at 12 C.A.B. 192) [not a part of the Record herein] A-3333

(f) CAB Opinion and Order No. E-16195, December 29, 1960 (officially reported at 32 C.A.B. 1363) A-3403

Excerpts from Testimony at Damage Hearing of Robert W. Rummel

[Tr. 145] * * * The Special Master: Mr. Rummel, we received your affidavit into evidence and the plan is to commence cross-examination this morning after you are sworn.

Do you want to administer the oath?

ROBERT W. RUMMEL, called as a witness by defendants, being first duly sworn by the [Tr. 146] Notary Public (William Blitz), testified as follows:

Mr. Sonnett: Mr. Special Master, before we begin, there are a couple of minor corrections which we have noted, and I think it would be well to note now.

There is a typo on page 1 of the statement under the heading "Qualifications." The seventh line down reads "Since 1942." That should be "Since 1943."

On pages 9 and 17, on page 9 after that indented paragraph, the paragraph beginning "TWA did not receive the 63-plane fleet on March 5, 1959 . . ." et cetera—that same reference is made on page—

Mr. Hayes: I am not sure that I get what this is. What is the change?

Mr. Sonnett: The date, I am going to give it to you on two pages at the same time. It is the same date.

March 5, 1959, that reference on page 9 and again on page 17, beginning at the second full paragraph, a reference to the same date.

As to that date, when the statement was prepared we believed we could establish that to be the precise date, but we are unable to do that with precision. Having explored it with the witness, we be- [Tr. 147] lieve in both cases instead of that date of March 5th, it should be early in 1959, which is the closest we could come to it.

The Special Master: Early in 1959?

Mr. Sonnett: Early in 1959.

The Special Master: Any objection?

Mr. Hayes: I would like an inquiry as to what "early in 1959" means? Does that mean January or February or April or May or March, or what does it mean?

Mr. Sonnett: You can—

Mr. Hayes: We had great precision here before. It was sworn to by the witness. Now, we find that precision has disappeared. What does "early" mean? I don't know what it means.

Mr. Sonnett: I think whenever you get around to it or if you want to do it, if you want to ask the witness, he will tell you.

The Special Master: I suggest we make the change.

Mr. Hayes: I object to the change. This is a sworn statement that has been submitted and admitted in evidence by Mr. Special Master. I object to the change now.

[Tr. 148] The Special Master: I will overrule the objection. We will make the change and it will be subject, of course, to cross-examination.

Mr. Hayes: I have stated my objection.

I can't help but comment, after all of the years of preparation that the plaintiff has had, we are met, a month or more after the statement has been submitted, with a change of this character.

Mr. Sonnett: Our aim is accuracy always, Counsel. We will continue to make corrections in the interests of the truth, as long as we have to.

The Special Master: Start the cross-examination.

Mr. Hayes: We understand, of course, that it is not necessary to take exceptions to any of your rulings.

The Special Master: I think that's a perfectly proper statement.

Mr. Hayes: We have various objections that were made, Mr. Special Master, and there have been no rulings on them.

The Special Master: No, I am going to defer the ruling at least until after the cross-examination of Mr. Rummel.

* * * * *

[Tr. 215] * * * A. Broadly, yes, I think so.

Q. Is broadly supposed to limit it? In your answer you said "broadly, yes." If there is any limitation I want to know what the limitation is.

A. No, I would certainly call it engineering in its broad application.

Q. You stayed with Commonwealth until you went with TWA?

A. Yes.

Q. June 21, 1943. You said you were senior engineer. What did that mean, Mr. Rummel?

A. That was the job classification.

Q. Were there other senior engineers?

A. Yes.

Q. How many?

A. I don't know. Relatively few, but I don't know how many.

Q. Did you have superiors there?

A. Certainly.

Q. Who was your superior?

A. The vice president of engineering.

Q. Was there a chief engineer at TWA at the time?

A. Yes.

[Tr. 216] Q. Was he a superior of yours, too?

A. No.

Q. He was not?

A. No.

Q. Can you describe how the echelon operated?

A. Well, the chief engineer is in charge of all of the other engineering except mine. I reported to the vice president.

Q. Of what kind of engineering was the chief engineer in charge?

A. Airline maintenance engineering, plus the war contracts that TWA had at that time.

Q. What kind of war contracts were those?

A. Oh, we had one relating to power plant fuels. I was indirectly concerned with that.

Q. As senior engineer, what were your duties?

A. As I say, the senior engineer is a job classification.

Q. Right.

A. My duties consisted in—consisted primarily of apprising management of future fleet possibilities, forecasting the relative worth and exploring airplane conversion possibilities, that is, looking at war production to see if they potentially could be made into reasonable [Tr. 217] transport aircraft, economic characteristics and so on.

Q. By future fleet possibilities, do you mean anything more than the possibility of converting warplanes into transport planes for commercial use?

A. Yes.

Q. What do you mean beyond that?

A. Well, it included such things as looking at new airplanes as well.

Q. What new airplanes were there to look at in 1943?

A. Well, the post war Constellation was at least a gleam in the eyes at that time, and certainly some work was being done. The Budd Conestoga was a warplane, the Curtiss-Wright CW-20 which was the intended commercial version of the C-46, that one was eligible either for conversion or new production, and that was true in some of the other cases. That's all that comes to mind.

Q. You mentioned that the post war Constellation was a gleam in the eye at the time.

Was Lockheed at that time making warplanes?

A. Yes.

Q. Was the gleam the hope that the warplane could be converted or not?

A. Part of it.

Q. In part it was?

[Tr. 218] A. Well, I can tell you that Lockheed was more interested in selling new airplanes than in converting them.

Q. Was your job the evaluation from an engineering standpoint of the possibility of converting warplanes or of looking at any possible new planes that might be on the market post war?

A. Engineering and economic.

Q. By economics again do you mean the cost analysis of the operation of the airplane?

A. Well—

Q. Or do you mean something other than that? I am not sure. That's the way you defined it before.

A. That's an important part of the economic considerations and it certainly included that.

Q. Did it include anything else?

A. Well, practicality of application of the planes to the routes in terms of payload range and that effect on operating costs.

None of these things meant much without being related to potential revenues.

Broadly, as I said, it was—the charge was to keep management apprised of how they should look and what the primary directions should be that they should move in [Tr. 219] later with respect to fleet acquisitions.

Q. Did you render reports to management?

A. Yes.

Q. To whom in management did you render the reports?

A. Well, my boss was J. C. Franklin, vice president of engineering. Reports went to him and to others in top management.

Q. Did they consult with you and you consult with them?

A. There was a great deal of work back and forth, yes.

• • • • •

[Tr. 229] The Special Master: Does that include the number of planes, as well as the type and size of plane?

The Witness: Yes, sir, it does. And the number of planes might vary with the type, size, application of the planes.

By Mr. Hayes:

Q. Back in 1943 and until 1956 when you became vice president—engineering, you were dealing entirely, were you not, with piston planes?

Mr. Sonnett: Excuse me a minute.

A. I am not clear on that.

Mr. Sonnett: Excuse me. I may have misheard. Would you read that back?

(The question was read.)

A. No.

Q. Pardon me. I slipped. Until 1955, you were dealing entirely, were you not, with piston type planes?

A. No.

Q. When did you first depart from dealing with piston type planes?

A. I assume by "dealing", you mean considering; is that correct?

Q. I mean planning. What you talk about is fleet [Tr. 2301] planning. Whatever you meant by fleet planning, Mr. Rummel.

A. We gave technical consideration which usually is a prelude to specific fleet planning to jet airplanes from approximately 1956—19—excuse me 1946 onward.

Q. Did you plan to acquire any of those planes?

A. Well, we gave consideration from time to time to the acquisition of jets, yes.

Q. Did you recommend any acquisitions of jet airplanes prior to 1955?

A. No.

Q. So I will confine my question to the period up to 1955. Up to that time, you had made no recommendations as to the acquisition of jet airplanes; is that correct?

A. I want to be sure we are entirely clear, because—

Q. So do I.

A. (continuing)—it's a case where a categorical answ could be perhaps a bit misleading.

Q. Let us not do that.

A. Well, that's why I am taking the time. But at o point, as I testified in the earlier proceeding, we certain gave very serious consideration to moving into jet develo ments, to the extent that we gave it serious consid-[Tr. 23 eration which I distinguish from a specific recommendati to finally procure, sign a contract. So in terms of specifi of procurement, the answer would be no.

Q. Do I understand your testimony to mean that wh you talked about being in charge of new aircraft studies a future fleet planning, you were not talking there in yo statement about recommendations? You were talki merely about investigations or inquiries or research, y might make as to planes as to which you might never ma a recommendation for acquisition?

A. Well—

Q. Is that correct or not?

A. Not really, no. It is an over-simplification.

Q. Tell me what is right.

A. Throughout this period, various recommendatio were made to management as to what management shou seriously be interested in and what it should not be inte ested in, including various appraisals of various possibil ties of fleet acquisitions.

Q. I am speaking of recommendations by you and yo staff to acquire planes. I think you have testified that pri to 1955 you did not recommend the acquisition of any je

A. Yes, and I said I would clarify that.

[Tr. 232] Q. Take your time. Clarify it, Mr. Rumme because it is not clear to me. I am sorry.

A. Well, I will certainly try to be just as clear as I know how. Perhaps I am drawing too fine a line here.

What I am saying is that from 1946 onward, we considered all sorts of jet possibilities and actively explored them from time to time, both in TWA and on occasion with Mr. Hughes' participation.

As to a specific recommendation that we, in fact, procure during that early phase, while we gave it serious consideration, we concluded in every case that I could think that we would not, in fact, procure.

Q. But that falls—that activity of yours—I will put it in the form of a question.

Does that activity—that consideration given to possibilities fall within what you stated that your duties were, to wit, future fleet planning?

A. Yes, I think so.

Q. It does?

A. Yes.

Q. That is what I wanted to get clear.

So future fleet planning entailed more than merely leading to recommendations for acquisition of planes? It included also studies of possibilities, though you might [Tr. 233] never make a recommendation for acquisition?

A. Well, we usually studied before we recommended.

Q. What I am trying to get clear, Mr. Rummel, is whether by future fleet planning you meant studies which eventuated in a recommendation to acquire or you meant all studies whether they eventuated in a recommendation for acquisition or not?

A. Well, all studies, because—when we began some of these things, I couldn't tell what I'd finally come out with.

• • • • •

[Tr. 274] * * * Q. In connection with your future fleet planning, would you and your group make recommendations or studies rather—I withdraw the recommendations—as to the effect of increasing the number of flights between different points or decreasing them?

A. Well, not in detail usually, no.

[Tr. 275] Q. Did you assume that the existing schedules would be maintained?

A. Oh, no.

Q. What did you assume in making your studies?

A. We'd assume that the industry would grow and that we would grow with it if we had the equipment to grow with it. It was a case of trying to come in with an appropriate premise as to type and number of equipment.

Q. Would anybody make recommendations as to whether there should be increases as to the number of flights between points?

A. I'm quite sure they did and I suspect that most of that came from the traffic function.

Q. Mr. Fellows or some other such group under Mr. Cocke?

A. Yes.

Q. You did not generate those recommendations?

A. No, although we pointed out—I pointed out areas of service that I thought new airplane designs could provide as a function of their characteristics.

Q. Recommendations for increases in frequency, more flights between points, might necessitate additional aircraft, might it not?

A. Yes.

[Tr. 276] Q. Did you consider what the reaction of competitors on those routes might be if TWA increased its frequencies?

A. Yes, broadly speaking we would try to take that into account.

Q. What do you mean by "broadly speaking we might try to take it into account"?

A. Broadly speaking we would try to take it into account. I mean, that broadly speaking we'd assume that if we provided service to the point where they needed to be defensive, that they probably in the end would be defensive.

Q. By defensive, do you mean that they would increase their frequencies as well?

A. Yes.

Q. Is that what you mean?

A. Yes.

Q. Did you have anything to do with developing the financial side of the cost of acquiring aircraft, the net profit results and so on and making recommendations based on the financing?

A. On the finance?

Q. Yes.

A. No, sir.

Q. That was outside your function?

[Tr. 277] A. Yes, sir.

Q. You had nothing to do with that?

A. That's right.

• • • • •

Q. It was Mr. Martin's suggestion to me that it might have been Mr. Hobbs who made the revenue projections in Mr. Leslie's department. Does that mean anything to you?

A. Well, I knew a Mr. Hobbs, but I don't recall the situation clearly enough to testify that he did or did not do the revenue projections.

Q. Up to the time you were elected vice president—engineering, on March 24, 1956, Mr. Rummel, to whom had you reported as chief engineer?

A. To John A. Collings.

Q. How long had you been reporting to Mr. Collings?

A. From the time Mr. Koepnick left.

Q. Would you spell Mr. Koepnick's name?

A. K-o-e-p-n-i-c-k.

Q. When was that?

[Tr. 278] A. Well, when I became—let's see. I became chief engineer when Mr. Koepnick left the company.

Q. That was in August 1949?

A. Yes.

Q. Is that the time that Mr. Collings came in?

A. Oh, no, he had been there. That's the time I reported to Mr. Collings.

Q. That is what I should have asked. I am sorry, Mr. Rummel.

A. Yes.

Q. What was Mr. Collings' position?

A. Initially, vice president of operations. Later, executive vice president.

Q. Was he executive vice president or vice president—operations when you became vice president—engineering?

A. Operations.

Q. When did he become executive vice president?

A. I don't exactly recall at this moment.

Q. Who was president—I have now left the period ending December 31, 1954—up to January 1956, do you recall?

A. From the time I joined the company you mean?

Q. No, going back. It was Mr. Damon, wasn't it?

A. Yes.

[Tr. 279] Q. How long had he been president?

A. He was president, as I recall it, about five years.

Q. There was an interregnum after Mr. Damon's death until Mr. Burgess became president, was there not?

A. Yes.

Q. For about a year?

A. About.

Q. Who was the top executive in the company during that period?

A. Mr. Collings.

Q. Was there a managing operating committee?

A. I believe there was for a while. Mr. Pierson, Mr. Collings, I believe Mr. Leslie.

Q. Mr. Cocke?

A. I think so. There were a number of these committees from time to time and I am not entirely sure who was on that particular one, but I believe it was those four.

I believe Harry Rogers of the Toolco during an interval before Burgess became president headed up the management operating committee, if I recall correctly.

Q. Was Mr. Pierson chairman throughout the whole period?

[Tr. 280] A. I can't say.

Q. You don't remember?

A. I did at the time certainly, but I just don't recall.

Q. You have no present recollection?

A. No.

Q. Mr. Burgess became president somewhere early in 1957, did he not?

A. Yes.

Q. Shortly thereafter, did Mr. Collings leave?

A. Yes.

Q. Whom did you report to when you were then vice president of engineering after Mr. Burgess became president?

A. Mr. Burgess.

Q. He left the company a year or so later, did he not?

A. Just approximately a year later, yes.

Q. Then Mr. Thomas became president in mid-1958.

A. There was an interval when we had no president.

Q. That's right.

A. Yes, it is true that Thomas was the next president.

Q. To whom did you report in the interval between [Tr. 281] Mr. Burgess and Mr. Thomas?

A. Another committee.

Q. Who were the members of that committee, do you remember?

A. I'm quite sure Mr. Pierson chaired the committee and I believe it consisted of Cocke and Leslie and Pierson.

Q. After Mr. Thomas became president, to whom did you report?

A. Mr. Thomas.

Q. I forgot to ask you this: After you became vice president—engineering, did you still carry on the same duties that you described with respect to new aircraft studies and future fleet planning?

A. Yes.

Q. How long did you continue those duties?

A. I still am.

Q. Same duties?

A. Well, plus some more.

Q. But you still have those duties?

A. Yes.

Q. You state that in 1958 you became chairman of the TWA Jet Planning Committee.

What was the Jet Planning Committee?

[Tr. 282] A. Well, it was a committee whose charge was to prepare the airline for the implementation of jets by planning activities that needed to be undertaken to make ready for the jets.

Q. When was the Jet Planning Committee organized?

A. I believe the idea of the Jet Planning Committee resulted in organization action in 1957 some time.

Q. Who set it up?

A. Management.

Q. Who in management?

A. As I recall it, Mr. Collings set it up. Well, now, let me think. I'm not clear whether Collings—well, let me—yes, Collings was still there. It might have been the fall of 1956 or thereabouts.

And he set up a jet planning study group which led to the committee. I assume that Mr. Collings discussed it with his associates, but I believe that he was the one that initially set it up.

• • • • •

[Tr. 305] • • • Q. At the same time that you were chairman of this Jet Planning Committee—that is the name, is it not?

A. Yes, sir.

Q. —you were also supervising the contracts at Boeing and at Convair, is that correct?

A. Well, I was supervising those parts of the contracts over which I had jurisdiction, yes.

Q. You said that you were employed by the Hughes Tool Company as a consultant and special representative in connection with the acquisition of jet aircraft from Boeing and General Dynamics, the acquisition of engines from Pratt & Whitney and General Electric. I had authority to commit funds under Toolco's contracts. The Toolco factory representatives of Boeing and Convair reported to me as

special representative of Toolco responsible for the technical administration of the Toolco contracts with such manufacturers.

A. Yes.

Mr. Sonnett: I am sure that counsel's failure to read one sentence intervening there was inadvertent.

Mr. Hayes: It was not inadvertent, Mr. Sonnett. Let me conduct my own cross-examination. It has nothing to do with the question I am going to pose to [Tr. 306] the witness.

Mr. Sonnett: The fact that he reported directly to Howard Hughes has nothing to do with this examination?

Mr. Hayes: It has nothing to do with this examination.

Mr. Sonnett: You neglected to read that.

Mr. Hayes: I did neglect to read it very deliberately. I wish you not interrupt. I am reading those parts of the statement that have to do with the question I wish to address.

Mr. Sonnett: Then I might indicate that you are not reading at all. The witness was not looking at it and you were purporting to read. In fairness to the witness, let him read it.

Mr. Hayes: I am sick and tired of these charges of unfairness and everything else. And I promise you, Mr. Special Master, I will control my Irish temper in the future regardless of—

The Special Master: I have an Irish grandmother, too. So let's all do it.

Mr. Hayes: I only wish another Irishman would exercise similar control.

Mr. Sonnett: I had an Irish mother and French [Tr. 307] father and you can make what you like out of that.

The Special Master: I can see we are in for trouble all around here.

Q. Just what was your authority in connection with the position as special representative of Hughes Tool Company and as consultant?

A. My specific authority in covering the Boeing, Convair, General Electric, Pratt & Whitney contracts amounted to—totaled as I recall it now, approximately 19 or 20 million dollars. That is, I could authorize change orders involving the technical configuration of the plane and the engines in amounts not to exceed that in aggregate. That was divided between these four different projects.

I was authorized to agree to and sign changes to the contract, I believe, in all areas excepting those relating to airplane delivery and things like progress payments. I had no authority to disburse funds.

And additionally, I had through the plant representatives surveillance of the aircraft during their course of construction.

Additionally, through them, I was responsible for accepting the airplanes, technically, when tendered for delivery.

[Tr. 308] And additionally, I was responsible for the detailed configuration of the planes to the extent that they could be configured in detail to our requirements.

Q. To whose requirements?

A. TWA's.

Q. These planes you are talking about now are the 30 Convairs, the eighteen 331s and the fifteen 131s?

A. Plus the spare engines.

Q. The spare engines from Pratt & Whitney and General Electric?

A. Yes, sir.

Q. You mentioned four projects. I do not know what you mean. I mean Boeing—

A. I really should have said four manufacturers.

Q. These were all planes ordered for TWA's eventual use?

A. Well, that seemed to be the general belief at the time.

Q. So far as you knew they were?

A. Yes, I thought they were.

Q. You said you had authority to spend what was it, 19 million dollars?

A. That's the number I recall.

Q. Was this one grant of authority whereby you were [Tr. 309] authorized to—

A. No, as I indicated, this was divided between the various projects.

Q. How was it divided if you would tell us, please? Or is the $19 million the amount of the change orders that you did sign?

A. No, I did not use all of it.

Q. Would you please explain how this comes about?

A. Well, it came about, I guess, primarily because I felt there should be specific limits attached to my authority. And in consultation with these people—

Q. With who?

A. The Hughes Tool people.

Q. Who?

A. Oh, I believe—I believe Ray Cook was involved at times, I think Chuck Price, and quite possibly, I don't specifically recall this, possibly Ray Holliday.

I think it was primarily those two. I had recommended that limits be established and that it be done formally.

Q. When was this conversation or these conversations?
A. This was after it became clear from Hughes that I was to administer this work.

[Tr. 310] This would have been relatively shortly after the contracts were signed.

Q. When you say from Hughes, you mean Mr. Howard Hughes?

A. Yes.

Q. You don't mean Hughes Tool Company?

A. I mean Mr. Howard Hughes.

Q. Let us keep these things clear.

A. I will try. Mr. Howard Hughes.

This was finally done through an exchange of correspondence between the Hughes Tool Company and my boss, Mr. Collings. They requested that I so act and he acquiesced in a letter and the limits thereby became established.

Q. What were the limits?

A. Well, very honestly I don't remember exactly how they were broken down.

I can give you my impression of what they were.

Q. Give me your best recollection, please.

A. Well, I think it was—the amount—it was on the basis of so many dollars per JT-3 and so many dollars per JT-4, so many dollars per GE engine and so many dollars for each of the planes in terms of authority to commit funds.

[Tr. 311] It is these limits in detail that I don't remember at the moment, but this is how it worked.

Additionally, I had proposed a limit per change which—if, which exceeded, would require—that is per airplane change. I don't recall that this applied to the engines. A dollar limit per change which, if exceeded, would require the consent, approval of the Hughes Tool Company.

And as I say at the time I didn't think that a completely open ended thing was really what I should have.

With specific limits, if I worked within the limits, then obviously I'd be within known limits. This is what I wanted and that's why I recommended that be set up.

Q. What is the JT-3 you mentioned?

A. That is the engine that powers the 131 type airplane. It is a Pratt & Whitney engine.

Q. Boeing 131?

A. Yes, sir.

Q. Is that a long range engine?

A. Well, the plane was good for transcontinental service. It was not particularly good or optimum for international service.

Q. Could it fly non-stop New York-Paris, the JT-3?

[Tr. 312] A. Depending—it could, yes, depending on conditions.

Q. You mean if it had a good tail wind?

A. Well, if meteorological conditions were favorable, then it could fly.

Q. Could it fly west reliably?

A. Not reliably.

Q. It would need to stop for refueling if flying west, is that correct?

A. Well, by reliability, I would interpret you mean scheduling reliability, that is completing sufficiently frequently.

Q. Certainly.

A. The answer would be yes.

Q. What is the JT-4?

A. That is the Pratt & Whitney engine that powers the Boeing 331 type airplane.

Q. That is a more long range engine?

A. Well, the plane is a long range plane. The engine is neither long nor short.

Q. But I mean it gives the plane the ability to fly long range?

A. Yes, sir. Well, it, in combination with the plane, provide that ability. It is a different plane.

[Tr. 313] Q. The 131s use the JT-3 engines?

A. Yes, sir.

Q. The 331s used JT-4 engines?

A. Yes, sir.

Q. What plane used the GE engines?

A. The Convair 880.

Q. That is General Electric, GE, is it not?

A. Yes, sir.

Q. Do you recall now what the limits were of your authority with respect to changes, change orders with respect to any one of those three engines?

A. No, actually I don't. It was that amount which I thought was sufficient to cover them, but I don't remember at the moment.

Q. Do you recall the limits of your authority with respect to change orders to the Boeing 131s?

A. No, the number that comes to mind is something like $50,000 a plane, but I can't really be sure of that now.

Q. You mean per plane, you mean per each of the 15 planes?

A. Yes. I say, I am not completely sure.

Q. Do you recall your authority with respect to the Boeing 331s?

[Tr. 314] A. Not exactly, no.

Q. Do you recall what authority you had with respect to the Convair 880s?

A. No, but now that I think a little bit, I'm not sure that the plane wasn't more like 150,000. I'm really not that positive at the moment. No, I don't remember.

Q. You mentioned that up to a certain amount per plane you had complete authority, and per engine you had complete authority and could sign change orders.

A. Within the framework of the definitions as applicable to each project, yes.

Q. But if you went beyond that state of authority you would need the consent of the Hughes Tool Company?

A. Per change.

Q. Per change?

A. Yes.

Q. Were there occasions when you needed the consent of the Hughes Tool Company?

A. Yes.

[Tr. 315] Q. Would you care to tell us what those occasions were?

A. Well, one was the installation of wing leading edge devices on the Convair 880.

Q. Would you describe what a leading edge device is, Mr. Rummel?

A. Well, these particular devices were slats.

Q. Just slats?

A. Slats. There may have been some changes in the flap linkage, but as I recall it it was installation of slats.

Q. Where were they installed?

A. Where?

Q. Yes.

A. On the wing leading edge.

Q. You mean the front edge of the wing?

A. Yes, sir. I'm sorry, the front edge. We call it the leading—the thing that enters first.

Q. Did the Tool Company give consent or did they not?

A. They did not.

Q. How much of the cost was that to be?

A. Well, it has been a long time. I think that it was around $30,000 a plane, but I'm really—I wouldn't [Tr. 316] want to testify that's what it was. That's a number that seems to come to mind.

But it probably is on that order. Maybe 30 to 40. I'm not that sure.

Q. What was the purpose of making that change so far as you were concerned?

A. To improve the low speed handling characteristics of the plane.

Q. Were any Convair 880s manufactured with leading edge devices?

A. Yes.

Q. Which ones?

A. The 880Ms.

Q. No, I am talking about the 880s.

A. Oh, no, sir.

Q. The Delta planes did not have leading edge devices?

A. They did not.

Q. Were there any other 880s that did have leading edge devices?

A. Yes, the 880Ms.

Q. No, 880s, not 880ms, just 880s.

A. Well, I don't know of any 880s other than one of the experimental 880s which was the investigation and [Tr. 317] development vehicle for leading edge slats and for a while it had them on. But I don't know of any 880 finally certificated and delivered with such devices.

Q. That's right. That's what I wanted to know.

How much time did you spend during the manufacture of the Boeing aircraft at the Boeing plant?

A. Oh, just occasional trips.

Q. How often?

A. I don't know.

When there was some particular purpose for being there, I would think—well, in the early stages more than in the later stages of construction, although at the final stages when the airplanes were initially nearing completion, I was there more often again.

Q. You had a factory representative there, did you not?

A. Yes.

Q. On whose payroll was the factory representative?

A. TWA's.

Q. Who was the factory representative at Boeing?

A. Ed Zak.

Q. What were his duties?

A. His duties were to insure that the plane complied with the procurement specifications, to watch design details [Tr. 318] in order to make sure that designs were optimized to our requirements, keeping in mind now, if you will—

A. By "our" do you mean TWA?

A. TWA's.

—TWA's requirements automatically were the Hughes Tool's requirements. That was part of the basic charge that I had.

So, Ed's job was to insure that the airplane detail was good even in areas not embraced categorically by the specifications. There are many things that a spec cannot cover in detail.

So through his inspection for us, through inspection of mockups, through bringing their experts in, you would insure better that the airplane in fact would be a good airplane and a desirable airplane for TWA services

Additionally, he was responsible for conducting acceptance inspection, including the flight test of the vehicle from the customer's point of view.

He then on signal would effect—

Q. On signal from whom?

A. Well, he then on signal would effect delivery of the airplane, and the signal would either come through me or directly from either Mr. Hughes or Hughes Tool [Tr. 319] representatives to him.

Q. What representatives?

A. Well, I'm—I said either one. I know there are—from Ed there were conversations between Mr. Hughes and Mr. Zak on occasion.

My clearance—that is, I wasn't authorized to accept deliveries. And the deliveries would be effected on word either from Mr. Hughes or through his West Coast office—

Q. You mean Tool Company's West Coast office?

A. Well, no, through Bill Gay's office.

Q. He was an officer of Hughes Tool Company, was he not?

A. He wasn't then, I don't believe.

Q. Are you sure?

A. Well, I say I don't believe he was then, no. No, I'm not that sure, but I don't think so. Not in—

Q. You don't know who employed him at the time from your own knowledge?

A. What, Mr.—

Q. Mr. William Gay?

A. Hughes.

Q. Was it Mr. Hughes or Hughes Tool Company or don't you know?

[Tr. 320] A. If you are asking me who signed his paychecks, I don't know that.

Q. That's what I am asking you.

A. I don't know.

Q. You don't know?

A. I know he reported—he did much work direct for Mr. Hughes.

Q. Pardon?

A. He did work, much work direct for Mr. Hughes and reported Mr. Hughes' views and confirmations when it was appropriate for him to do so.

Q. You really don't know who his employer was, do you?

A. I don't know categorically if it was Hughes Tool or Mr. Hughes. I would assume if I had to assume which you are not asking me to do it was Hughes Tool.

Q. I didn't ask you to assume.

A. I know. I'm sorry.

Q. The only reason I asked you these questions is that you spoke of him like Mr. Hughes' personal employee.

A. Well, he, for practical purposes, I think he was.

[Tr. 321] Q. But you don't know?

A. I don't know who signed his checks, no.

Q. All right. Carry on.

What was this signal that had been given? You said that you had no authority to accept deliveries.

A. No.

Q. You mentioned a signal. What signal had to be given?

A. Well, the signal was word to go ahead.

Q. Go ahead and so?

A. Accept delivery.

Q. To whom did Mr. Zak report?

A. To Mr. Rourke.

Q. Mr. Rourke was one of your men, was he not?

A. Mr. Rourke reported to me.

Q. Was Mr. Zak on the payroll of the Hughes Tool Company?

A. No.

Q. You were, were you not, Mr. Rummel?

A. Yes.

Q. Part of your compensation was received from Hughes Tool Company and part from TWA during this period?

A. That is correct, yes.

Q. Your superiors at TWA were aware of this?

[Tr. 322] A. Certainly.

Q. But Mr. Zak was never on the Hughes Tool Company payroll?

A. Not to my knowledge.

Q. He reported to Mr. Rourke, you said?

A. Yes.

Q. Did he report to you directly as a matter of routine?

A. No, he reported to Mr. Rourke.

Q. Let me direct your attention, Mr. Rummel, to page 3 of your statement.

Before I do, let me ask you if there was any factory representative there other than Mr. Zak at Boeing.

A. Well, Mr. Zak was the man in charge of that office. There were other representatives there.

Q. Who were they?

A. Well, Mr. Guy joined Mr. Zak during the course of the execution of the contracts.

Q. Was he a TWA employee?

A. Yes.

Q. To whom did he report?

A. Mr. Zak.

Mr. Zak had a secretary.

Q. TWA employee?

[Tr. 323] A. Yes, they were all TWA employees.

Q. Did the Toolco have any factory representative at Boeing?

A. I don't know. Not as such. Not to my knowledge.

Q. How about Convair, did you have a factory representative there?

A. Yes.

Q. Who was the factory representative there?

A. William Bew.

Q. Was he a TWA employee

A. Yes.

Q. Did he receive any compensation from the Tool Company?

A. Not to my knowledge.

Q. To whom did he report?

A. To Mr. Rourke.

Q. Did the Tool Company have any factory representative at Convair?

A. Well, there were Tool Company people stationed at Convair from time to time.

Q. Factory representatives?

A. Well, I'm not—I wasn't sure what they were doing.

Q. Did they do the work that a factory representative [Tr. 324] does during the construction of an airplane.

A. Like I say, I'm not—I don't know exactly what they did.

Q. You mean you were not there?

A. Pardon?

Q. You were not there?

A. Not at all times.

Q. When you were there, did they do any of the work that a factory representative would be expected to do?

Mr. Sonnett: Wouldn't it be easier to ask him what they did do? I don't think it has been defined yet as to what counsel means by a factory representative, what his customary duties are.

Mr. Hayes: He has already told us what a customer factory representative does. He described it in detail with Mr. Zak.

Mr. Sonnett: You have not asked him yet what these Tool Company people—

Mr. Hayes: May I conduct my own examination, please?

Mr. Sonnett: You may, but you can go a little faster if you will give the witness some definition.

Mr. Hayes: I will decide on the speed too, [Tr. 325] if you don't mind.

Mr. Sonnett: You won't decide that alone. I think you are going to have a little help from the Special Master on that subject.

The Special Master: What was the question?

(The question was read.)

A. My answer was that I don't know what all they did.

Q. Your answer is you don't know?

A. Yes.

Q. I direct your attention, as I started to say, Mr. Rummel, to page 3 of your statement, the sentence beginning three lines from the bottom, "I had authority to commit funds under Toolco contracts and the Toolco factory representatives at Boeing and Convair reported to me as special representative of Toolco."

A. That's right.

Q. How do you reconcile that with the testimony you have just given? Who are these factory representatives you are talking about in your statement?

A. Well—

Q. Are they Zak and Bew?

A. Yes, they are.

Q. You just testified they were TWA people and they [Tr. 326] reported to Rourke.

A. That's right.

Q. Who was not a factory representative, was he?

A. No, that's right.

Q. How do you reconcile the statements, Mr. Rummel?

A. Very simple. The contracts are between the Hughes Tool Company and Boeing and the Hughes Tool Company and Convair. Hughes appointed me his representative to implement the parts of the contract that I described. The specific monetary charges were set up between Tool Company and TWA with the understanding that TWA would, and this is in the exchange of correspondence between the companies would configure the airplanes to TWA's requirements and that in expectation the theory was in expectation of our receiving the airplanes the cost would not be accrued or paid by the Tool Company only to be handed back later. We just went on the basis of TWA paying them as being the simpler procedure.

Q. The fact of the matter is, is it not, that Zak and Bew did not report to you, they reported to Rourke?

A. Rourke reported to me.

Q. To whom did they report? You testified Rourke, did you not?

[Tr. 327] A. They reported directly to Rourke and Rourke reported to me.

Q. You did not say that in your statement, did you?

Mr. Sonnett: If that is a question, I object to it.

Mr. Hayes: I think it is a perfectly proper question, Mr. Special Master.

The Special Master: He said that in response to your question today.

Mr. Hayes: I am sorry.

The Special Master: He said that in response to your question today.

Mr. Hayes: Correct.

A. Well, the only authority that they could have had as Tool Company representatives was an extension of my authority through Rourke to them.

Q. Aren't you drawing a conclusion when you speak of them as Tool Company representatives?

A. I don't think so.

Q. You are not doing a little arguing or briefing here when you call them Tool Company representatives?

A. Not intentionally. I'm only trying to state the facts as I knew them.

[Tr. 328] Q. Did you prepare this sentence? Is this your language?

A. I sent through so many drafts I can't be sure, but I suspect so. That's what I would have said.

Q. You are sure it was not prepared by counsel?

A. Well, I think one sentence versus the other it's pretty hard to say but this is what I would have said and this is what I would say now. Maybe I should have said more to explain it.

• • • • •

[Tr. 351] • • • Q. Are you sure that the name of the group which you headed was not changed to Jet Planning Staff when it was organized?

A. I don't recall that kind of a change. It certainly would appear here that during an interval it was called the Jet Planning Staff.

Q. During what interval?

A. I don't know. I don't remember.

Q. What appears here—isn't this true, Mr. Rummel—is that you presided—taking Defendants' Exhibits 1 and 2 for identification—at a meeting which was referred to as the Jet Planning Staff and that you sent out copies of the minutes to members of the Jet Planning Staff and Jet Planning Group, as well as Mr. Pierson?

Isn't that all that appears in these documents?

A. That certainly appears so.

Q. There is no mention of a Jet Planning Committee?

A. No, I don't see any mention.

Q. Could it be that your recollection was a bit in- [Tr. 352] accurate when you prepared the statement, the prepared statement that in 1958 you became chairman of the Jet Planning Committee?

A. I don't think so. It is not inaccurate with respect to the functions, purposes and operations of this committee, group or staff.

Q. I am talking about the name.

A. My recollection—best recollection was and is that it was called the Jet Committee and I am a bit mystified now to see the term "Staff" used in this particular meeting.

Q. You have no explanation as to why it was called "Staff" and you called it "Committee" in your testimony?

A. No, I don't.

Q. Just what was the function of the Jet Planning Staff, of which you were chairman?

A. Well, looking at this, it would appear the staff or the committee were synonymous.

Q. Would you answer the question, please?

[Tr. 353] Mr. Sonnett: I submit that's an answer, Mr. Brownell.

The Special Master: Will you read it back, please?

(The question was read.)

The Special Master: The question is on the function of the—

Mr. Hayes: Exactly.

Mr. Sonnett: The witness has already testified as to the function of the committee.

The Special Master: He testified yesterday as to the function of the committee.

Mr. Sonnett: As counsel must realize there is a later reference to this Jet Planning Committee as well as to staff. This is just waste of time.

The Special Master: The answer is that they were synonymous.

Have you anything to add to your answers of yesterday as to the functions of the committee?

The Witness: No, sir, I can't think of any omissions.

By Mr. Hayes:

Q. Did this Jet Planning staff have anything to [Tr. 354] do with the acquisition of airplanes as such?

A. No.

Q. Did they have anything to do as to how many airplanes should or should not be acquired at any particular time?

A. No, not really.

Q. What was their purpose?

A. The purpose was to, as I indicated yesterday—

The Special Master: The witness has said he has nothing to add to his testimony of yesterday as to functions of the committee.

Mr. Hayes: I understand but Mr. Brownell, this is cross-examination. I am not bound by any answer he gives.

The Special Master: To a reasonable degree.

Mr. Hayes: May I have the question answered?

The Witness: Would you read it, please?

(The question was read.)

A. —plan and prepare for the airline for the use of jet aircraft.

Q. Did they get information from some other sources as to what jet aircraft they were to plan for?

A. Other than what?

[Tr. 355] Q. From sources outside the committee.

A. Oh, yes.

Q. From whom did they get that information?

A. From various sources.

Q. Can you tell us who it was?

A. Well, of course, it was common knowledge as to the number of airplanes that were on order.

The organization and function of the jet staff was discussed between myself and Mr. Hughes prior to my taking on the job as chairman. And policies were discussed at that time, minutes of the proceedings, copies of the jet plans and premises and data of this general type were also provided to the Tool Company and representatives, and generally everyone was fully informed as to the basis on which the planning was proceeding with respect to the assumption of how many airplanes we would ultimately receive, is concerned.

Q. At this time in 1958, how many airplanes were being planned for?

A. At that time, I believe it would have been eighteen 331s, fifteen 131s. Those are both Boeings.

And 30 Convairs.

* * * * *

[Tr. 379] * * * By Mr. Hayes:

Q. You testified that in March 1958 the Jet Planning Staff was looking forward toward 18 331s, 15 131s and 30 Convair 880s.

Later, the Jet Planning Staff learned, did they not, that TWA would receive only 12 331s, is that correct?

A. Yes.

Q. At that time were the plans of the Jet Planning Staff adjusted so that they would be considering only 12 331s?

A. As I recall, they were adjusted in due course.

Q. Were they consulted in any way as a group in connection with the change from 18 to 12?

A. You mean was the group asked whether or not it was a good idea?

Q. Were they consulted in any way?

A. Well, I don't recall the thing having been placed before the committee as such. Whether individuals were contacted or consulted is a good question.

[Tr. 380] Q. No, I am talking about the group.

A. I don't recall.

Q. There came a time when the group learned that the number of Convairs that TWA would receive would be 20 rather than 30, did there not?

A. Yes.

Q. The plans of the Jet Planning Staff then adjusted to 20 Convairs rather than 30.

A. They subsequently were adjusted to reflect 20.

Q. In connection with the change from 30 to 20 Convairs, was the Jet Planning Staff consulted as a group?

A. I don't recall the Jet Planning Staff having been consulted as a group.

* * * * *

[Tr. 383] * * * Q. Can you tell us or do you have any recollection as to who prepared that particular document?

A. I don't specifically categorically recall what the group consisted of. This relates to dates that service will commence. To arrive at such dates more than prospective airplane deliveries had to be considered. Things like flight training and so on. And suitable groups would participate in those considerations and come to this position.

Q. What is the number of that exhibit again? I have forgotten.

The Special Master: R-15.

Q. Do you have any present recollection as to who in fact prepared Exhibit R-15?

A. Except to the extent that I just described it, no. Many of us participated in this kind of thing.

Q. I show you TWA Exhibit R-16 which is also [Tr. 384] headed on the same kind of page, "TWA Jet Plans and Premises," dated July 22, 1959, and at the bottom there is indicated "Origin, Planning and Research."

Can you tell us who prepared that document?

A. No, my present belief is that this document was arrived at in substantially the same way as the others.

Q. You cannot identify the individuals involved?

A. No, not specifically.

Q. I show you TWA Exhibits R-12 and R-13, both dated in 1959, the first in March and the second in July.

The first does not show point or origin and the second shows origin to be Planning and Research.

I ask you if you can advise us who prepared those documents and would your answer if I asked the same questions concerning those as I did with respect to Exhibits R-15 and R-16 be the same?

A. These two premises relate to delivery dates of the Convair 880.

The delivery information essentially, as I recall it did come from my group who were familiar with the Hughes contracts and also what we believed the delivery expectancy to be through our having been fairly familiar with what was going on at the factory.

[Tr. 385] Just why one has Planning and Research indicated as the origin and the other piece of paper does not, I don't know at this point in time.

Q. As to those two, you cannot tell us who prepared them?

A. Well, I undoubtedly participated in the preparation of it, but as to precisely who put the pencil on this form, I don't know.

Q. In the preparation of both of them you participated?

A. Oh, I'm sure that I participated in things like this. I did not intend to imply that I didn't partcipate in the others either.

I certainly gave the eye to, I guess, every premise.

* * * * *

[Tr. 432] * * * By Mr. Hayes:

Q. You testified on yesterday to a degree, which was not exhausted by any means, the position you occupied as special representative of the Toolco in connection with the contracts at Boeing and at Convair. Do you recall that?

A. Yes.

Q. You mentioned, I believe, that you had authority to sign change orders within limits, which you could not recall as to amounts. Do you recall that?

A. Yes.

Q. Those change orders that you had authority to make, were those change orders that you decided on yourself?

A. Not in every instance, no.

Q. Who else would be in on the decisions?

A. Well, a good many people.

Q. Who are they? I thought you were going to tell us the names.

[T. 433] A. Well, the technical ones were—either generated in or reviewed by various groups in the company who would form recommendations. And some of these people were in my own department, some in other departments, depending upon what the subject matter was.

Q. Can you identify these people, Mr. Rummel?

A. Well, there were lots of such people. It would become involved from time to time. I could give you a few examples, perhaps.

Q. Why don't you do that?

A. I don't think I can presume to list all the people's names who were involved in all of those years of jet acquisition activity.

Mr. Gordon Granger, for example, with respect to Doppler provisions, just as an example. In performance matters, in the earlier part, to the extent that the performance matters may have borne on operational considerations, Paul Frederickson would have been contacted.

Anything involving cabin services, including food and beverage would have been cleared with that part of the company relating—whose charge it was to work in that area and I don't recall the name of the individual.

Changes involving changes in spare parts and provisions were called to the attention of Mr. Shaunty and Mr. [Tr. 434] Reynard.

Q. I didn't get the first name.

A. Shaunty and Mr. Reynard. Any changes involving changes in maintenance and overhaul procedures of any consequence were called to the attention of Mr. Dunn or Mr. Jordan.

Q. Who?

A. Jordan.

Q. Jordan?

A. Yes. Possibly Mr. Walstrom, for their recommendations when appropriate. Similarly, other technical matters were pretty well either handled directly or when others were involved, those others were consulted.

We had a practice of pricing out all price changes.

Mr. Hayes: Is this a good time to recess for five minutes, Mr. Brownell?

The Special Master: Did you finish?

The Witness: These, I think, are examples. As I say, I don't want to leave the impression that these are all the people that were involved, because it depended—it was a sort of a working relationship that varied from time to time and depended on the occasion. Man were involved. So I think my answer, sir, is yes.

[Tr. 435] The Special Master: All right, we will recess for five minutes.

(Whereupon, a short recess was taken.)

The Special Master: Are you ready?

By Mr. Hayes:

Q. You mentioned, Mr. Rummel, the names of certain people which is not an exhaustive list of those you consulted with in connection with change orders that you signed in connection with the aircraft contracts.

Were you talking about Boeing's contracts in that connection?

A. Broadly, yes.

Q. You were the Toolco representative in connection with all of the contracts that had been made for the jets with Boeing and Convair, were you not?

A. Well, I was the representative on the specific contracts that I mentioned earlier, that is, the eighteen 331 Boeings, the fifteen 131 Boeings and the thirty Convairs.

Q. That's right. Those are the ones I referred to. You were the special representative of the Tool Company in connection with the administration of those contracts, were you not?

A. Yes.

[Tr. 436] Q. Were these change orders that were designed for changes and improvements in the airplane, aircraft?

A. The ones we adopted—

Q. That is what I mean.

A. (continuing)—we thought were improvements, yes.

Q. These people you mentioned, were all those TWA employees?

A. Yes.

Q. The others that you could not remember, did you have in mind further TWA employees?

A. Yes, that's what I had in mind, although quite obviously change orders were discussed at length with the manufacturing personnel, again on occasion and depending upon the subject.

Some originated within TWA, some the manufacturer and some were suggested to us.

Q. Did you discuss change orders with any representatives of Hughes Tool Company?

A. Well, yes, from time to time various ones were mentioned or discussed with some representatives.

Q. With what representatives?

A. Oh, I think on occasion with Mr. Cook, possibly Mr. Price, Bill Gay. It's—that's all I recall.

Q. Did you have any discussions with respect to change [Tr. 437] orders with Mr. Hughes?

A. It's likely that I did. I endeavored to have several discussions with Hughes, without success.

Q. Did you endeavor to get Mr. Hughes' advice in any way in connection with the manufacture of the planes?

A. We had many, many—well, the answer is yes, we had many technical discussions back and forth through the years on many, many facets of the jet plane design.

Q. I am thinking now of the administration of these particular contracts which began in 1956, and from there until the end of 1960, with specific reference to the change orders, did you work at all with Mr. Hughes in connection with those matters?

A. With respect to the change orders that I specifically approved, at the moment I don't recall having worked directly with him, although in the early days of the jets we exchanged many, many views in order to come to a common ground, if you like, on various design approaches, which were then generally pursued.

Q. You are speaking now of the period before the contracts were entered into?

A. Yes. Well, not—yes, but not necessarily limited to that. For example, safety aspects were an item of almost continuous interest.

[Tr. 438] Q. To whom?

A. To Mr. Hughes. And there were many discussions of the pros and cons of various aspects of design in various kinds of airplanes.

Q. Did Mr. Hughes have substantial knowhow with respect to the construction of airplanes and the design of airplanes?

A. Well, in my opinion he did.

Q. Pardon?

A. In my opinion, he did, yes.

Q. In preparation for entering into these contracts and in the configuration of the planes and so on, did you work closely with Mr. Hughes as well as TWA employees?

A. Yes, in many of the performance, payload range, economic projections were reviewed with Mr. Hughes and many were prepared specifically at his request, and these were discussed with him.

Q. With respect to these change orders that you made and administration of the contracts, were you concerned primarily with TWA's interest in that regard?

A. Yes, the basic charge was to configure airplanes so they would be suitable for TWA operation.

Q. So far as you were concerned, did you feel that anything you did as special representative of the Tool Com- [Tr. 439] pany was in anyone's interest, other than TWA's interests?

A. Well, in those days, it seemed to me that the interests of the Tool Company and TWA's interests were the same. So it seemed to me that in configuring the airplanes to TWA's desires in accordance with the directives from Hughes, that I was also serving the Hughes interests.

Q. In what fashion were you serving the Hughes interests?

A. I was complying with his wishes.

Q. But his wishes were to have the best planes for TWA, is that right?

A. I think so.

Q. So that ultimately you were looking at TWA's best interests?

A. As I say, I found the interests of the two parties indistinguishable in my sphere of activity.

Q. And in configuring these airplanes, to use your phrase, and in entering into the change orders and in administering the contracts, are you conscious of ever having done anything contrary to TWA's interests?

A. I don't know of anything. I didn't get the airplanes configured totally, as I wanted, but I guess I never really expected to.

[Tr. 440] Q. I don't know what you mean by that. Would you explain that you did not get them totally configured as you wanted them? Please explain that.

A. Well, simply there were occassions wherein it wasn't possible that that be done. Leading edge devices might have been such a case in the case of Convair.

Q. Any other instances? You mentioned that yesterday. We don't need to go over it again.

A. Yes, well, actually it was an extraneous comment. Actually, I shouldn't have offered it.

Q. Substantially, you got what you were looking for, is that correct, as to character and configuration of the airplanes?

A. Well, I think they are pretty good planes.

Q. Does that answer mean yes to my question?

A. Yes.

Q. If the contracts had been placed by TWA directly rather than Toolco, would you have been doing the same kind of work that you now do in supervising?

A. I would certainly think so.

Q. I mean your duties were the same, no matter who signed the contract with the aircraft manufacturers?

A. That is correct, yes.

Mr. Sonnett: Would you read that question [Tr. 441] back to me?

(The record was read)

Q. You mentioned yesterday, Mr. Rummel, that you did not recall what your authority was with respect to change orders per airplane. Do you remember that?

A. Yes.

Q. I don't know whether this will help or not, but if you will look at your deposition at page 993—and I will

tell you the doubt is in my mind whether you are refering to Boeings or Convairs or both—you mention that you were limited to $30,000 in airplane change. You mentioned it in connection with the leading edge device which you said would have cost more than $30,000 per airplane. What I don't know is whether the $30,000 was just for Convairs or the $30,000 was also for Boeings.

Can you help us in that regard?

A. Well, I at the moment don't recall $30,000, but I certainly would have no reason to doubt my prior testimony and it would have applied to the maximum cost per airplane per change—

Q. Each change?

A. (continuing)—that I set up initially as a limit. It would not apply to the gross—

Q. No, I understand it. Each change could be $30,000—

[Tr. 442] A. (continuing)—aggregate dollars of changes per plane per contract.

Q. My sole question now, I saw a note on this, Mr. Rummel, was whether you have any recollection whether the $30,000 was limited to the Convairs or was it also the limit on the Boeings?

A. I don't know, but I don't recall any reason for those kinds of numbers being different. I just don't remember.

Q. What were the mechanics in handling change orders? What mechanical process did you go through when you had to handle change orders?

A. Well, the change orders were written by the manufacturers and submitted to us for approval.

Q. There would be some prior conversations of some kind, I suppose, before the final order was written?

A. You mean leading to the development of the change order?

Q. That is right.

A. Oh, yes.

Q. In the case of Boeing, who would consult with Boeing in respect of the nature of the change order? Would it be you?

A. In some cases I would myself. In other cases, [Tr. 443] people working for me would.

In other cases still others, but in all cases the change order activities were coordinated through my department.

Q. The people who would speak in the case of Boeing were all TWA people who would discuss these change orders with them before the change order was written up?

A. Generally so. There may have been cases in which some Tool Company people sat in on some of the hotter meetings, but I am a little vague at the moment on that. I think that occurred at a time or two.

Q. Was the same procedure followed at Convair?

A. Not the—broadly, the same procedure. The detail procedure at Convair was somewhat different than at Boeing.

Q. There, again, would Convair write up the change order after prior conferences with you or some of your people in TWA and then submit it to be signed by you? Would that generally be the procedure?

A. Those changes which were formalized as part of the contract, yes, I think that was generally the case.

Q. By talking of change orders, I am only speaking of change orders that became effective. I am not talking about changes that were talked about and never executed.

A. The hesitation is only because reports came back [Tr. 444] that requests for changes in some instances had been made to Convair which I wasn't familiar with and from Tool Company representatives.

I don't recall those having been formalized, though, in the contracts for which I was responsible.

Q. You mean there were change orders that were made directly by the Tool Company; is that what you are saying?

A. The changes that we have been discussing so far are those in my interpretation of your question that I was authorized to sign which excluded, as I indicated previously, all matters of delivery and those things relating to disbursement of funds and the like. So I am trying to answer your questions in the way in which I believe you intend them, and those with which I was charged.

Q. You were also special representative at Pratt & Whitney and General Electric, I believe you testified?

A. Yes.

Q. That was in connection with the acquisition of engines for the jets, was it not?

A. Spare enginees for the jets.

Q. Spare engines?

A. Yes.

Q. Do you recall when those contracts were entered into?

[Tr. 445] A. Well, they were actually, as I recall it, the purchase orders were preceded by a number of wire exchanges. The initial wire exchanges occurred, I believe, some time during the fall of 1955, I think—I am a little vague here—for the Pratt & Whitney engines, and later for the 880 engines, General Electric engines, I should say.

Q. Were the orders for the aircraft placed before the orders for the spare engines were placed?

A. Probably so. By aircraft, you mean the Boeings; is that correct?

Q. I am speaking first of the Boeings.

A. I don't believe so.

Q. You thing the engines were ordered before the aircraft?

A. I think there is an exchange of wires which had the effect of holding engine price prior to placing the airplane order, yes, I am quite sure of that.

Q. How about the Convairs, were the aircraft ordered before the spare engines were ordered?

A. No. I think the spare engines were ordered at least after the agreement to agree or the initial agreement was signed with Convair. There is an agreement of June and one later on in the year and the final agreement being, of course, later on.

[Tr. 446] Mr. Hayes: I would like to have marked as Defendants' Exhibits for identification 4, 5, 6 and 7 respectively, a letter dated February 14, 1956, from Hughes Tool Company, signed by Raymond Holliday, addressed to Pratt & Whitney of United Aircraft, relating to JT4A-3 turbojet engines.

(Letter dated February 14, 1956, from Hughes Tool Company, by Raymond Holliday, to Pratt & Whitney of United Aircraft, marked Defendants' Exhibit 4 for identification as of this date.)

Mr. Hayes: As Exhibit 5, a letter dated February 14, 1956, from Hughes Tool Company, signed by Raymond Holliday, addressed to Pratt & Whitney, relating to JT3C-4 jet engines.

(Letter dated February 14, 1956, from Hughes Tool Company, by Raymond Holliday, to Pratt & Whitney, marked Defendants' Exhibit 5 for identification as of this date.)

[Tr. 447] Mr. Hayes: As Exhibit 6, telegram dated February 15, 1956, from Hughes Tool Company by Raymond Holliday to Pratt & Whitney.

(Telegram dated February 15, 1956, from Hughes Tool Company by Raymond Holliday to Pratt & Whitney,

marked Defendants' Exhibit 6 for identification, as of this date.)

Mr. Hayes: As Exhibit 7, a letter dated September 7, 1956 from United Aircraft to Hughes Tool Company accepted by Hughes Tool Company.

(Letter dated September 7, 1956 from United Aircraft to Hughes Tool Company accepted by Hughes Tool Company, marked Defendants' Exhibit 7 for identification, as of this date.)

Mr. Hayes: As Exhibit 8, a letter dated September 7, 1956 of which we have only a copy unsigned from United Aircraft Corporation to R. W. Rummel of TWA.

(Unsigned copy of letter dated September 7, 1956 from United Aircraft Corporation to R. W. Rummel of TWA, marked Defendants' Exhibit 8 for identification, as of this date.)

By Mr. Hayes:

Q. Mr. Rummel, I hand you Defendants' Exhibits 4 to 8 for identification, and I ask you if that group of documents represented by those exhibits so far as you [Tr. 448] can recall contain the contracts for the purchase of the spare engines from Pratt & Whitney.

Mr. Sonnett: Would the Special Master inquire of the witness whether he ever saw any of these before and if so which? I think it might shorten things up a little.

The Special Master: Mr. Rummel, have you seen these before?

The Witness: I can't be entirely sure. Probably I have.

Q. You certainly saw Defendants' Exhibit 8 before, did you not, Mr. Rummel?

A. I would certainly assume that I had.

Q. You administered the contract with Pratt & Whitney?

A. I administered the Pratt & Whitney contracts in the same way that I administered the engine contracts, that is, the authority I had was for making changes to the engines. I didn't administer the other aspects.

The Special Master: Financing?

The Witness: No.

Q. I notice there are three different kinds of engines referred to in these papers. Maybe you can tell [Tr. 449] us what they are.

A. I haven't read the last two. Should I—

Q. I am sorry. I beg your pardon. I thought you finished.

A. I've read through.

Q. There were three different engines I noticed that were ordered. On February 14th, order 1 was for 30 engines referred to as JT3C-4 and 180 engines designated as JT4A-3, and on Febuary 15th, telegram order 90 more—there are only two kinds of engines—90 more of the second group.

A. Yes.

Q. What is the difference between those engines, Mr. Rummel?

A. JT4A-3 engines powered the international Boeing Model 331 type aircraft.

Q. Is that the same as the J75?

A. The J75 was the military designation for the forerunner engine. So this is a—essentially the same but still a derivative engine of the J75.

Q. And the JT-3 was what?

A. The JT3 would be as to the J57 as to JT4 was to the J75.

Q. Which was not generally speaking an [Tr. 450] intercontinental engine?

A. That is correct, sir.

That powered the 131 type Boeing which as we indicated yesterday was somewhat marginal for international operation.

Q. I notice there are a total of 300 engines ordered. What was the reason for ordering that number?

A. It is a long story.

Mr. Sonnett: Will the Special Master inquire whether the witness knows or not, if he knows the reason?

The Special Master: What was the question again?

(The question was read.)

The Special Master: Do you know what the reason was?

The Witness: Well, I can report my understanding of the reasons as they existed at the time. What motivated Hughes truly I can't presume to really know.

The Special Master: With that limitaion do you want to press the question?

Mr. Hayes: Yes, sir, I do.

The Witness: Well, the initial order of [Tr. 451] JT3 type engines was for that number of engines which we believed to be appropriate to support a fleet of 15 131s.

The initial order of JT4 engines is a little more obscure as to the reason for the large number.

The number embraced—well, let's say came from a number of considerations as I then understood it.

I might say the selection of the JT4 as being the one to buy in large quantities as opposed to the JT3 was insofar as I knew it at the time the result of a personal appraisal on my part for Mr. Hughes. It was a studied appraisal of which engine as a type would have the longer useful life and the greatest prospects for application to aircraft.

At this—well, then I say this time, these letters I should point out that I have in front of me followed the initial exchange of wires by some time that I referred to yesterday. The exact amount I just don't recall now. It would fall out of the records somewhere, I'm sure, if someone was willing to chase it.

And the large numbers were as I then know it secured with these possibilities in mind. One was in the event Convair produced an airplane that made use of [Tr. 452] these engines that we would not find the delivery of the airplanes limited by the availability of engines. We would have had the engines on order.

Secondly, for over a fairly extended period, we were working with Avro of Canada who had proposed the development of a supersonic type transport which would use six of these kind of engines.

Now, this supersonic proposal went through a series of developmental stages, as a proposal. And that's why it took such a period of time.

Additionally, as I recall it, consideration either was being given at this time or was shortly to be given to the possibility that Hughes would manufacture aircraft in which it might use these engines.

Now, these were impressions that I had at the time as to the reasons for these engines, and I am

not confident that I am reflecting what went on in Hughes' mind.

The Special Master: You made that clear.

The Witness: So in summary, the 180 engines fell out of sort of a matrix of possibilities.

Now, the additional 90, as far as I have ever known were solely Mr. Hughes' proposal which [Tr. 453] was not handled through me, but I believe through Raymond Cook on the eve of the Pratt & Whitney deadline. Great pressures had been exerted on Pratt & Whitney by myself and by others in the Tool Company to obtain the best engine delivery positions that could be obtained. Pratt resisted this.

And as I understand it, the 90 were thrown in on this 5 per cent down payment base in order to obtain from Pratt & Whitney any more desirable positions than would have been obtained had the order been limited to the 180. And that's how it got to be 300, I believe, very late one night and rather quickly.

Q. Who is Bill Gwinn?

A. Bill Gwinn is now president of the Pratt & Whitney Corporation and if memory serves correctly at that time he was general manager of Pratt & Whitney.

Q. You negotiated these contracts with Mr. Gwinn, did you not, or at least participated in the negotiations?

A. It was pretty much as I just described it. I initially after talking to Hughes as I mentioned yesterday, approach Gwinn, initially in an effort, [Tr. 454] as I recall it, to get the deadline extended, or to get the payment reduced. I don't recall all the details now.

And then I continued to deal with Gwinn and I think Len Mallet with respect to the initial grouping of engines. I don't recall the number JT4s being 180 initially. I don't

recall what it was, but I think it was considerably less. It later became a larger number.

Perhaps initial wires might be a clue there. I just don't remember it at the moment.

Q. You mentioned three possible reasons, as I remember your testimony, as to the number (1) that they might have been used in the Convair planes?

A. In a Convair, not the 880.

Q. You were not referring to the 880?

A. No, sir.

Q. To what Convair plane were you referring?

A. The Model 18.

Q. Had the Model 18 not been abandoned by this time in 1956?

A. Well, we had the—I think the answer is the 18 was on ice at that time in 1956. We were exploring the Model 19, Model 20 and were well aware if Convair's [Tr. 455] intended style to get into the commercial business and we weren't sure exactly what they would come up with.

Q. So there was still the possibility at the time the engine order was placed that Convair might produce a plane which would use these engines, is that correct?

A. I say this is a matrix consideration and I think it was quite clear at that point in time that it would not have been precisely the Model 18, however.

Q. If used in the Convairs, these engines would be original equipment as well as spares, would they not?

A. I would assume so.

Q. Would you tell us what were the Models 18, 19 and 20 of Convair?

A. Well, yes. The Model 18 was a highly swept commercial passenger cargo transport designed to satisfy both the domestic and international service requirements from

the outside. It was powered with—it would have been powered with four JT4 type engines.

It was believed to have—and this was our aim—to have superior performance to the models of the Boeing 707 and the Douglas DC-8 as we understood it that existed when the Model 18 was initially laid down.

Now, the Model 19 was a still larger plane. I'm a little vague at the moment exactly how it was [Tr. 456] configured, but in any event, it led to the Model 20 which—

Q. Was the Model 19 like the 18 intended to be both a transcontinental and intercontinental plane?

A. Yes, I believe so. And I think that was also true of the Model 20.

As I recall it now, the Model 20 was a double-deck, large—much larger six-engine airplane, intended for that kind of service, intended to be a type airplane which the other manufacturers would have been quite unwilling to produce.

Q. You mentioned also that a contributing reason for the large number of engines was the negotiations with Avro at the time who were considering—did you say a supersonic plane?

A. Yes, that's what I said.

Q. Yes, that's what I thought you said. Were those negotiations then in existence?

A. With that?

Q. Were negotiations then pending with Avro?

A. Yes, they were—call them discussions, call them negotiations. They certainly were not at a white heat with dripping pens over contracts, but they were discussions.

[Tr. 457] Q. Were you participating, by the way, in whatever discussions there were with Convair with respect to the Models 18, 19 and 20?

A. Well, I participated and handled many discussions but I'm sure that there were discussions between Hughes

and Convair to which I was not a party and possibly some others.

Q. But you were a party to some discussions?

A. Oh, yes.

Q. How about Avre, were you a party to discussions with Avro?

A. Yes. Here again I don't know whether it was all of them or not, but I participated in meetings with Avro personnel and Hughes.

And I might clear the record and say it is Avro Canada. There is an Avro in England.

Q. You mentioned also the possibility that existed at the time that Hughes Tool Company might engage in manufacture of jet aircraft as a third—

A. I guess it was Hughes Tool. I don't know whether it was Hughes Tool or Hughes, but at least Hughes.

Q. The Hughes interests?

A. Yes.

[Tr. 458] Q. Is that what was known as Project Greenland at one time?

A. I believe it was.

The Special Master: Was that the manufacture of engines or aircraft, did you say?

Mr. Hayes: I am sorry.

The Special Master: Was that the manufacture of—

Mr. Hayes: Aircraft, not engines.

The Special Master: I think you said engines.

Mr. Hayes: Did I?

The Special Master: Yes.

Mr. Hayes: I misspoke myself. I should have said aircraft.

Q. Nothing ever came of that project, did there?

A. Well, an application was filed with the CAB, and I'm not really sure what happened to it. I had the impression that land was acquired in Florida or to be acquired and I'm not sure what happened there.

Q. Did you ever know of any planes being manufactured?

A. I don't know of any that Hughes manufactured with JT4 engines.

[Tr. 459] Q. That is what I mean, any jet planes he manufactured with JT4 or JT3 engines.

A. I don't know of any.

Q. Were there any change-orders signed by you in connection with the Pratt & Whitney engines?

A. Yes, I believe there was.

Q. Do you recall how many?

A. I think only one.

Q. Do you recall the nature of the change?

A. Not in detail. It had to do with some change in accessories, the oil filter or some such as that. I just don't recall the detail.

Q. Not a major change?

A. No.

Q. Or was it a major change?

A. It was not a major change. It was a change, as I recall it, that involved not only Pratt & Whitney but the airframe manufacturers as well.

Q. You mean the Boeings?

A. Yes, the airplane people. The Boeing, yes.

Q. Did you mention price, impending price increase as one of the considerations for placing the order for engines?

A. No, but I think that's fair. That doesn't [Tr. 460] account for the very large number, though. That would

account for the numbers that we immediately saw a need for.

Q. Did you recommend an order be placed for engines, forgetting the number now, because of the impending price increase?

A. I called to Mr. Hughes' attention the fact that as of a certain date which was near at the time, that if orders were not placed for spare engines that the price would go up I believe it was 5 per cent. At least it would go up. 5 per cent comes to mind.

I pointed out that if he wanted to save that money, the order should be placed.

Q. That would be an eventual saving to TWA, of course, when the planes were delivered to TWA?

A. Well, I don't know. I didn't—I didn't have any way of knowing. I did not know under what terms and conditions the planes would finally run to TWA, signed over to TWA.

* * * * *

Q. Were you at all acquainted with the terms of the control order that had been entered by the CAB covering transactions between TWA and the Hughes Tool Company?

A. I would have assumed that a saving in engine [Tr. 461] price would have been passed along.

Q. You knew that for a fact, didn't you, Mr. Rummel?

A. I didn't know it as a fact. I would have assumed it.

Q. Had you ever read the order of the CAB?

A. I don't know that I had, but I'm sure that it has been described to me and it is quite possible that I had read it.

Q. Did anybody in describing it to you tell you that the Hughes Tool Company was not permitted to make profits on its dealings with TWA?

A. I don't recall that anybody told me that or not.

Q. When you called attention of Mr. Hughes to the impending price increase—incidentially, there was a required down payment of 5 per cent to buy Pratt & Whitney, was there not?

A. Yes, that was required. I can't recall whether I succeeded in putting the date off or not.

Q. Did he then authorize you to negotiate with Bill Gwinn?

A. He authorized me to—rather quickly to negotiate with Gwinn or really with Pratt & Whitney. [Tr. 462] I think Gwinn was mentioned. I don't think I interpreted the requirement to work with a specific man there.

Q. You were authorized to deal with the top officials of Pratt & Whitney in connection with these engines?

A. Of course. I was authorized to deal with the appropriate officials of Pratt & Whitney.

Q. On one occasion did you attend a meeting at the Beverly Hills Hotel with an Avro representative and Mr. Hughes—

The Special Master: Can you give an approximate time on that?

Mr. Hayes: I have not quite finished the question.

The Special Master: I am sorry.

Q. —at which time you called to Mr. Hughes' attention that there was a deadline on when the engines could be ordered?

A. Yes.

Q. That was shortly before the negotiation for these engines, was it not?

A. Yes.

I did not undertake any negotiations in this respect without first discussing it with Mr. Hughes.

[Tr. 463] Q. Was it at the same time that you told him of the impending price increase?

A. Yes. That was the main point of the entire discussion at that time.

Q. At that time also, were you still jockeying for delivery positions with Boeing with Hughes wanting the earliest delivery positions he could get?

A. I believe that's probably right, yes.

Q. You so testified, did you not, on your deposition?

A. If you say so. I wouldn't be surprised. I'd have to look it up.

Q. How many spare engines would have been needed if TWA had received all 33 of the Boeings?

A. This is sort of a memory test. As I recall it, we figured on 50 per cent on the JT3s and I am not entirely sure of the JT4s. The number that comes to mind is 60 on the JT4s although ultimately I think we took less. I am speaking now of this same period of time which I assume—

Q. That's right, I am talking about just this period when these orders were placed, Mr. Rummel.

Was it in your mind at the time that if TWA obtained additional airplanes such as those you mentioned, [Tr. 464] there would be use for all or nearly all of these engines, since some of them would have to be original equipment?

A. I don't recall understanding that TWA would have the use of 300 engines, no.

The Special Master: What do you mean by 50 per cent? It wasn't clear to me.

The Witness: I am sorry. It is 50 per cent of the installed engines in the airplane. In this case it would have been 30 engines.

Mr. Sonnett: While we are at that, would you just at some point tell me for the sake of the record what period of time are you talking about?

Mr. Hayes: 1956.

Mr. Sonnett: I know, but are we talking about February through to September or what?

The Witness: I am talking about more than 1956. I am talking about the fall of 1955 as well.

Q. That was when the negotiations began, you mean?

A. Well, I can't tell you precisely when they began. My recollection is it went through a number of months, the latter part of 1955, this exchange of wires, the phone conversations that preceded the wire [Tr. 465] exchange and so on. And I was speaking generally on this period.

Q. You can't—

Mr. Sonnett: Will you state what the period is you have been talking about, from when to when?

The Witness: Well, the fall of 1955 through—it must have been the latter part of 1956 when the thing wound up. I am not entirely sure when it came to 300 engines, but it was substantially after the initial discussion occurred.

It would have been probably late 1956. I note this one letter indicates that. Two letters indicate it.

Q. Did you have it in your mind at the time these engine orders were placed that if TWA did not use the engines it would be easy to dispose of them to others who would need them, other airlines?

A. Did I have that in mind?

Q. Yes.

A. I don't recall specifically having that in mind. I think it was clear that this kind of an order placed it in short supply and it would well have been [Tr. 466] a consideration.

Q. Might I suggest to you, Mr. Rummel, that over the evening, before we meet on Friday that you re-read pages

961, and I think it ends on 968 of your deposition—I have been paging it to see if it goes beyond that—offhand I did not find anything—I am not limiting you to those pages—and I would ask you on Friday morning if your testimony would be the same today if you were testifying on the matters that you did cover on those pages.

Would you do that, please?

The Special Master: Is that clear?

The Witness: Yes, pages 961 through 968.

Q. Yes, as I say, I am not limiting it. I think those are the pages involving the engines. I may have slipped something, but I hope we haven't.

A. Yes.

Mr. Hayes: Can we adjourn now?

The Special Master: We will adjourn now until Friday at 10:30.

• • • • •

[Tr. 511] • • • By Mr. Hayes:

Q. Mr. Rummel, you say in your prepared statement that regardless of your title your primary duty during most of your period of employment at TWA was to recommend the size and type of fleets to procure for TWA, do you recall that?

A. Yes.

Q. Were your recommendations solely as to acquisitions of plans?

A. No.

Q. What else did your recommendations encompass?

A. Maybe I am drawing too fine a line.

They related to fleet planning and we attempted [Tr. 512] to recognize as I indicated earlier not only the kind of plane

but we tried to hone in on the size of the fleets and consider their application.

Q. What I am trying to find out, Mr. Rummel, is whether your recommendations were limited solely to the procurement of airplanes.

A. Well, they certainly included, for example, recommendations concerning what not to procure in some instances.

Q. Did you make any recommendations with respect to the kind of changes to make or in the reduction in number of planes being used?

A. You are speaking, sir, of changes of airplanes—

Q. That's right.

A. —or configurations?

Q. Quantities.

A. Quantities?

Q. Yes.

A. I certainly did recommend increasing standing orders at times.

Q. Did you ever recommend decreases from standing orders?

Mr. Sonnett: May we assume this relates only to jet aircraft, Mr. Hayes, unless you other- [Tr. 513] wise indicate in your question?

Mr. Hayes: His statement is very broad. He did not limit it here in his statement to jet aircraft. So I don't know.

If he says that his statement has to do solely with jet aircraft, that is one thing. But his statement is all inclusive. It covers the whole period of his employment by TWA.

Mr. Sonnett: My only point was to be sure that the witness understood what it is you were seeking

to elicit, that is all, whether it is jets or whether it goes back to the days prior to the jets as well.

The Special Master: Let us confine the question at first to jet aircraft and then it can be followed up if desired.

Mr. Hayes: I would rather have it as broad as his statement is, Mr. Brownell. This is his statement and I want to know what he means by it.

The Special Master: Whatever is easier for the witness to comprehend.

A. And the period of time?

Q. Your language is your primary duty during the [Tr. 514] period of your employment by TWA has been to recommend what size and what type fleets to procure for TWA. Were you including in that statement piston aircraft as well as jet aircraft—

A. Yes, sir.

Q. —or were you not?

A. Yes, sir.

Q. Then my question has to do with both piston and jet aircraft.

A. The question, I believe, was did I ever recommend reducing.

Q. That is right. You said you had recommended increasing orders. The question is did you ever recommend decreasing orders?

A. Yes.

Q. Were those for jets or for pistons?

A. Pistons.

Q. How often did you recommend decreases?

A. I only recall one such instance.

Q. Was that recommendation based on considerations brought to your attention by other departments of TWA?

A. I don't believe so.

Q. Was it a technical recommendation?

A. Yes.

[Tr. 515] Q. Did it have to do with the kind of aircraft that had been on order?

A. Yes.

Q. You found some technical deficiency in it, perhaps?

A. Yes.

Q. To whom did you make these recommendations of which you speak in your prepared statement?

A. Depending on the time, to Mr. Hughes, to the Hughes people on occasion, and to TWA management. It would vary somewhat.

Q. To whom in TWA management did you make recommendations? I am confining the question now entirely to jets.

A. Here the question is extremely broad. You are referring now to the types or numbers of aircraft?

Q. I am referring to what you said. Your recommendations as to the size and type of fleets to procure.

A. I'm afraid if I don't answer more categorically, it can be confusing.

I do not recall specifically recommending as opposed to asking concurrence on, for example, the numbers of 880s once the contract was ready for adoption.

Initially the number of 880s, as I best re- [Tr. 516] call it now, did come from TWA.

Q. From whom in TWA?

A. I can't be absolutely sure, but it was through the Traffic function and the number was concurred in by myself.

Q. Do I understand you to mean—and if I am wrong, please correct me as I am sure you will—that the recom-

mendation to acquire 30 Convair 880s came originally from the Traffic Department.

A. Well, it came from several places.

In TWA, initially the 30 came through the Traffic Department, and as a result of their receiving from me an understanding of what the proposed airplane would be and would do.

Q. Originally from the Traffic Department you said?

A. That was a step.

Q. Who were the other departments or the other individuals who made recommendations with respect to the same thing?

A. Well, our own studies indicated that that would be an appropriate number in combination with other assumptions with respect to total fleet composition.

Q. When you used the erpression "our own studies," [Tr. 517] whose studies are you referring to?

A. My department.

Q. You indicated before that the number of 30 came from Traffic and other sources in TWA.

Who were the other sources beside yourself and Traffic, if anybody?

A. Here again it depends on the timing of the question. Initially you are covering a very broad period of time.

The number 30 was reviewed by many people in TWA prior to the contract being finally signed by Hughes Tool.

Q. Who suggested the number 30 in the first instance, if you can recall?

A. I believe the number 30 as best I can recall, came through the Traffic function in TWA to me, this all with respect to TWA's participation.

Q. You concurred in it?

A. Yes. As I recall it now, I concurred that 30 was a reasonable number.

Q. Was it you who recommended the number of Boeing aircraft that should be acquired, or did others participate in such recommendations?

A. I ought to make it clear, because I fear there [Tr. 518] can be some confusion here, that the recommendation on the 30 initially was the result of my trying to get better prepared to discuss the number of planes of that particular category with Hughes.

With respect to the initial placing of the order and the determination of the 9 versus some other number, as I best recall it, the nine aircraft, the 131s, was not a TWA number, but I'm quite sure that people in TWA were familiar with it.

Q. My question encompassed all of the Boeing aircraft that had been ordered.

A. The number 18 was a result of I think multiple considerations but I honestly can't specifically recall of how we arrived at the number 18.

The numbers in each case only become numbers with Mr. Hughes' acceptance of them with respect to action.

Q. I am trying to find out your recommendation, Mr. Rummel. Did you make a recommendation for eighteen 331s?

A. Well my best recollection of 18, is that during a number of phone calls with Hughes, we mutually came to the position that 18 would be a reasonable initial order, but I thought you are asking about the TWA [Tr. 519] specific inputs and recommendations that I might have had at that time. This is where I am rather vague at the moment.

Q. That was part of my question, too.

Did anybody else in TWA—you have told us now that you and Mr. Hughes agreed it was the right number for an initial order.

A. Yes.

Q. At least that's how I understand your testimony.

A. That's the way I recall it.

Q. Pardon?

A. Yes, sir, that's the way I recall it.

Q. Did anybody else in TWA make a recommendation as to the number of 331s to be acquired?

A. It is certainly quite possible, but as I say I am a little vague as to specifically how that number was arrived at.

Q. Did you have any discussions with any other personnel in TWA with respect to the number of 331s to be ordered?

A. Well, there were many reports, letters, performance analyses and the like which would illustrate what various fleets would do for the company, which were [Tr. 520] reviewed by him, both internally, and many of these things were discussed with Hughes, that—I am trying to answer the question as categorically as I can with respect to a specific recommendation that I received which led directly to a selection of the number 18, if I understood you correctly.

Q. I asked you if I recall rightly whether there were any other personnel in TWA with whom you had discussions as to the number of 331s to be ordered?

A. Well, I'm confident that there was, but I am hard put at the moment to recall the specifics.

Q. Do you recall with whom in TWA you had such discussions?

A. Not at the moment, no, sir.

Q. Do you recall whether or not numbers other than 18 were considered in the course of those discussions?

A. Again with TWA personnel?

Q. That's right.

A. Is that correct?

Q. Yes.

A. I'm just a little vague on that number.

Q. You can't recall what may have been said with respect to the size of the 331 fleet by anyone else in TWA?

[Tr. 521] A. Not specifically at the time the order was placed, no.

Q. Whatever discussions you may have had with other people in TWA as to the size of the 331 order, did you have those discussions before you and Mr. Hughes came to this agreement you mentioned before?

A. I don't think the number 18 was, but I can't be entirely certain.

Q. You draw a blank on that at the moment, Mr. Rummel?

A. Yes. It may come to me.

Q. Did you, as a result of studies you made, arrive at the number 18?

A. Well, we had studies which bore on the point. Whether they specifically showed 18 I'd have to—I don't know, but I believe they did. I'm not certain at the moment.

Q. How about the increases in the orders for the 131's, were they based on recommendations by you?

A. I urged that the numbers of those plans be increased.

Q. Did you specify in your urging the numbers by which the order should be increased?

A. I urged—well, yes, and no.

[Tr. 522] It went through a series of stages. I urged two things: That the numbers be increased, and that the deliveries be improved through the negotiations.

Q. I am asking if you recommend the specific numbers by which the orders were increased?

A. As I recall it, the orders were increased initially by less than I wanted them increased.

Q. Do you recall what recommendations you did make with respect to increasing the 131 order that was initially placed?

A. I was finally satisfied with 15, but I don't recall the detailed recommendations that led to that, if that's what you are getting at.

Q. I am trying to find out what specific recommendation you made with respect to the number of 131s to be ordered. That is what I am trying to find out.

A. Much of this was studied, much of it was handled in letter form, but with Hughes Tool and particularly with Mr. Hughes verbally, and to specifically when so many changes were made in the contract recall each turn of events is a little difficult for me.

I was not satisfied with the number of planes that were on order.

[Tr. 523] Q. At which point?

A. Pardon?

Q. At which point were you not satisfied?

A. When nine were placed.

Q. My question was, do you recall by what number that order for 131's should be increased?

A. No, I guess is the right answer, that I don't specifically recall what had transpired at each step of the way there.

Q. To whom did you make these recommendations, Mr. Rummel? Let us stay with the 131's for the moment, the increases in the numbers.

Q. These were discussed with Mr. Hughes and with Mr. Cook as I recall it now.

Q. Did you discuss your recommendations with anyone in TWA?

A. Well, I suspect I did.

Q. Do you remember?

A. I say we had studies bearing on this point. I don't categorically remember a specific day and hour in which I talked to people but I'm sure I discussed some of these things with people in TWA to get their views.

Q. Do you recall with whom in TWA you discussed [Tr. 524] increases in the order for 131's?

A. I'm confident that I touched base with Mr. Collings, for example, but I don't recall the exact specifics.

Q. You say you are confident that you touched base with Mr. Collings.

A. That's right.

Q. Do you have any recollection as to what you said to Mr. Collings in that connection?

A. Not categorically, no.

Q. Do you have it categorically or non-categorically any recollections?

A. I don't recall any dissents with respect to the number going to 15.

[Tr. 525] Q. You just don't recall your conversation in this connection with Mr. Collings, is that correct?

A. I'm trying very hard to answer just as explicitly as I can because so many different things transpired, and I don't specifically recall what was said in detail at all through these months of changing the orders.

As I say, there were many studies, many conversations and I'm sure many discussions.

Q. You cannot recall with whom you had the discussions other than Mr. Hughes and Mr. Cook and Mr. Collings, is that correct?

Well, we certainly discussed these things internally in the department.

Q. That is what I am trying to find out. With whom?

A. In my own area, Mr. Rourke, Mr. Fannon, those who

would have been involved in making the studies that relate to the appropriateness of the airplane numbers

Q. Have you any recollection as to whether your recommendations for the increase in the order for 131's was brought about in part by recommendations received by you or by management other than you from other divisions of the company? I mean of TWA.

The Witness: I missed part of that. Could [Tr. 526] you read that?

(The question was read.)

A. Well, I recall that Mr. Cocke was dissatisfied with the initial number of jets that were ordered.

Q. You mean the nine?

A. Yes.

But as to specific recommendations, I don't. The sequence of the changing numbers here related to more than simply making a decision or receiving a recommendation as to what the number should be. They were the result of a negotiation with Boeing as to the degree to which they could improve deliveries and make additional planes available in an early period.

Q. You have mentioned several times before, or at least once, that you would receive recommendations from Traffic leading to the decision as to the size of any particular fleet?

A. That is correct.

Q. In connection with the 131's—

A. Yes.

Q. —and the increases in orders of the 131's, were recommendations made by the Traffic Department?

A. Is that a quesetion?

Q. Yes.

[Tr. 527] Mr. Sonnett: Are you asking him whether he so testified or are you asking the fact?

Mr. Hayes: I am asking the fact.
Mr. Sonnett: Answer it as best you can.

A. Yes, we had exchanges directly with Traffic as to the number of airplanes our fleet should consist of.

Q. Do you recall any recommendations from the Traffic Department that the order for 131s be increased?

A. I just indicated that I certainly recall having discussions and understanding that Mr. Cocke who then headed that function was displeased with the number of planes we had.

I am trying to distinguish general knowledge and exchange of information from a specific recommendation per se which I understand is what you have been talking about.

Q. That's right. I am trying to find out what, if any, recommendation was made by Traffic for what increases in the number of 131s.

A. There was a broad recommendation that they just had to have more jet airplanes. And I think—as to whether it was at any one point in time, whether it was 9 to 11 or 9 to 12, that sequence came [Tr. 528] out of the negotiation, more than recommendation from Traffic.

Q. Do you recall the specifics of any recommendation by Traffic with respect to the increase in the orders for 131s?

A. Not specifically at the moment, no.

Q. Did your recommendations that it was your duty to make involve also recommendations as to the use to be made of equipment TWA had on what sectors, et cetera, et cetera?

A. At times, yes.

Q. Was that your primary responsibility?

A. It was part of the consideration.

Q. What does that mean, Mr. Rummel?

A. It means we couldn't do much planning without—

Q. I am sorry.

A. We didn't do much fleet planning without considering where they would be used.

* * * * *

[Tr. 543] * * *

Q. Would it be fair to say that Mr. Hughes and you consulted together and advised each other with respect to considerations such as safety?

A. Well, I—I think that's true. I think the question of degree either way wasn't asked, but yes, I think that's true.

Q. He was recognized expert in aeronautics, was he not?

A. Well, I certainly had that impression. I thought he was pretty good.

Q. Did you find his advice valuable in connection with the construction of the jets so far as the technical side of the jets was concerned?

A. Yes, I think so.

Q. Did you have authority up to the period ending December 31, 1960, to order aircraft for TWA?

A. No, sir.

Q. You never had that authority?

A. No, sir.

Q. Who in TWA has that authority?

Mr. Sonnett: Would you read that back?

[Tr. 544] The Special Master: Had that authority.

Mr. Hayes: I want the question to stand as it is, if I may, Mr. Brownell.

A. Whoever the board of directors authorized.

Q. Down to today, you don't have any such authority yourself?

A. You mean just to order airplanes on my own?

Q. Right.

A. No.

Q. Do you know who else in TWA besides yourself made any recommendations to management as to the size of the Boeing or Convair fleets? Can you identify the person?

A. Well, Mr. Rourke did through me at times. I'm sure that others who were interested weren't silent on these things, but I'm not certain as to who said what, when, the detail and to whom.

Q. Can you identify the departments which made recommendations forgetting the personnel involved?

A. Well, I would certainly think that—I know with respect to pistons the Traffic Department would offer recommendations as to numbers of planes, or sales, as the case may have been. I'm speaking of that function rather than—

[Tr. 545] Q. Did they with respect to jets?

A. I don't recall that, although, as I say, they did participate in certain phases.

Q. Did the Sales Department make recommendations?

A. That's what I was saying about the sale—I used this term Sales and Traffic interchangeably.

Q. You used them interchangeably?

A. Yes.

Q. Do you know any other department that made recommendations?

A. Yes. At least at one point in time the Planning Department did.

Q. Any other departments?

A. I don't know.

Mr. Hayes: I am going to a different subject now, if we may adjourn.

The Special Master: Yes.

(Whereupon, at 12:30 p.m. a luncheon recess was taken.)

[Tr. 546] AFTERNOON SESSION
2:00 p.m.

ROBERT W. RUMMEL, resumed the stand and testified further as follows:

(Discussion off the record.)

Mr. Sonnett: In terms of your having storage space, we have made some space available. If you want a room here, we can give you the small conference room next to this, so you can leave in there anything you want to, in terms of saving movement back and forth. There is a small conference room.

Mr. Hayes: Thank you. That would not be acceptable, for various reasons.

Mr. Sonnett: To the extent that will help you, we will be happy to do that.

Mr. Hayes: That is not acceptable. I don't know why in the world you are not willing to meet at our office, which would serve our convenience tremendously, would conserve at least 35 to 40 minutes each day.

Mr. Sonnett: Because then we will have to tote documents, and for a period of a year and a half [Tr. 547] we met at Chester's office faithfully every day and went through this, and it is about time we met here.

Mr. Hayes: You very well know the difference between depositions and trial.

Mr. Sonnett: That is not the point. The point is we had the burden for a year and a half and there is no reason why we should now be inconvenienced. We will do everything we can to meet your con-

venience. But we cannot do anything more than that.

The Special Master: May we proceed?

Mr. Hayes: I thought you were waiting to hear.

The Special Master: No. Let's go ahead with cross-examination.

Cross examination (cont'd) by Mr. Hayes:

Q. Mr. Rummel, is there any other department that you can recall that made recommendations with respect to the acquisition or use of aircraft, any department in TWA?

A. I don't recall any.

Q. Did the Finance Department?

A. The Finance Department participated on some occasions in the development of recommendations.

Q. Will you explain that, please?

[Tr. 548] A. I mentioned earlier that at times we would meet on special problems with the specially assigned groups to consider various facets of fleet planning.

In some of these instances the Finance Department representatives were included.

Q. Does the Finance Department make recommendations to management?

A. In these cases, recommendations that would flow from the group would include Finance Department considerations.

I can only speak with respect to my vantage point in the company. Whether they made other recommendations independently or not, with which I am not familiar or don't recall, I can't testify.

Q. You were not intimately familiar with the operations of the Finance Department?

A. No.

Q. Do you know whether or not they made studies of the ability of TWA to acquire aircraft?

A. Well, I believe they did on occasion.

Q. Were you any part of those studies?

A. I don't recall being a part of them, no. Undoubtedly some of our studies reflected in some of those studies.

[Tr. 549] Q. What do you mean by that?

A. Just that.

Q. Will you explain, please?

A. Well, the Finance Department had primarily to do with financing as opposed to planning, although, as I said, they participated to some degree in the planning exercise. With respect to financing, they would use the results to some degree of the planning studies.

Q. Could you give us an illustration, so I will be able to understand what you mean, Mr. Rummel?

A. Well, presently, for example, the five-year corporate plan includes five years of projected equipment programming.

In arriving at that plan, finance inputs are received. Once the implementation of the plan is undertaken, any associated financing with respect to that implementation reflects appropriately those parts of the plan that are needed to be reflected in the financing exercise.

Q. Is the Financing Department bound by the recommendation your group makes as to how many plans should be acquired?

A. No, I wouldn't say so, per se.

Q. They may recommend that TWA can or cannot finance such a number of aircraft; is that correct?

[Tr. 550] A. If it should come to the position today that we shouldn't buy airplanes because they couldn't be financed, I am sure they would say so.

Q. Let us go back now to 1956. What recommendations, if any, did Finance make with respect—in 1955 and 1956—to the acquisition of jet aircraft?

A. I don't recall their having made any.

Q. You don't know whether they did or didn't, is that a fact?

A. I don't recall their having made any.

Q. Do you recall that they did not?

A. I just simply don't recall that they made any.

Q. Were you aware of all recommendations on equipment made to TWA management?

A. By everyone?

Q. Right.

A. At every turn of events? Oh, I doubt that.

Q. Specifically in 1955 and 1956, were you aware of all recommendations that may have been made on equipment to TWA management?

A. I doubt that.

Q. Up to early 1956, Mr. Ralph Damon was president of TWA, was he not?

A. Yes.

[Tr. 551] Q. Did he interest himself—

A.—Up to—he was president in 1956 and some preceding few years.

Q. Yes, several years.

A. Yes, five years.

Q. He died in early 1956, if I recall correct?

A. Yes.

Q. Did he interest himself actively in matters of equipment for the airline?

A. Yes.

Q. Did he consult with you directly with respect to equipment for the airlines?

A. Not as frequently as Hughes, but we were in touch, yes.

Q. Did he always follow your suggestions?

A. No.

Q. Do you recall any particular recommendations you made to him while he was president with respect to the acquisition of jet aircraft?

A. No, I don't. Well, excuse me. I did recommend to him that the preferred type airplane would be Boeing airplanes.

Q. Is it a fact that until you became vice president-engineering and while you were chief engineer, your recom-
[Tr. 552] mendations went to whoever was your predecessor in the office of vice president-engineering?

A. Not always.

Q. Who was your predecessor in the position of vice president—engineering?

A. Well, there wasn't any. There was a vice president—engineering which—whose office was abandoned when he left the company. That position, as such, was recreated which I became, vice president—engineering.

Q. In that interim, to whom did you make your recommendations?

A. To my boss and a selected management group.

Q. Who was your boss?

A. Mr. Koepnick.

Q. Who was the selected management group?

A. Top management.

Q. Did you report to Mr. Collings?

A. Did what?

Q. Did you report to Mr. Collings?

A. Did I?

Q. Did you report to Mr. Collings?

A. Not when I reported to Mr. Koepnick.

Q. He left some time before you became vice president-engineering, did he not?

[Tr. 553] A. Yes.

Q. Did you then report to Mr. Collings?

A. Yes, I did.

Q. When Mr. Damon was president, did he, too, make suggestions with respect to equipment?

A. We would have discussions, yes.

Q. Did he ever make suggestions with respect to equipment?

A. Yes.

Q. As to specific types of equipment that should be acquired or considered for acquisition?

A. Yes.

Q. Did he sometimes call on your group to examine particular planes in which he was interested by way of acquisition?

A. Yes.

Q. Did you, during this period of 1955 to 1960, ever make any of your recommendations directly to the board of directors?

A. No.

Q. They always went through some superior and you don't know whether they got to the board or not?

A. They always went through some superior.

Q. Who made decisions as to the withdrawal of equip-

[Tr. 554] ment from actual use from the airline?

A. Well, I suppose here you are covering the entire gambit of the period or when Mr. Koepnick was there?

Q. No, I am covering the period covered in your statement, Mr. Rummel.

A. Well, much of the jet equipment was not delivered and some of it was disposed of in ways other than TWA receiving them. And if you are alluding to those kinds of decisions, this was outside of TWA. I have been, I thought, answering in the context of strictly what took place in TWA.

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[Tr. 587] The Special Master: Any time you are ready, Mr. Hayes, you may proceed.

By Mr. Hayes:

Q. In connection with your fleet planning as to which you have been testifying in determining the size and the type and number of new aircraft, would you list for us the various considerations to which you gave weight?

A. The aircraft, the competition—

Q. By the aircraft do you mean such things as the operating costs of the aircraft?

A. All pertinent aspects.

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[Tr. 588] The Witness: The aircraft, competition, routes, traffic growth characteristics, the impact on the airline and financial results. I should say forecasted financial results.

By Mr. Hayes:

Q. By the aircraft, do you include there operating costs, purchase price of the airplane and cost of provisioning?

A. Yes.

Q. All those?

A. Yes.

Q. How about the cost of ground support equipment?

A. That was usually considered.

Q. How about training costs?

A. Those were usually considered.

Q. When you speak of competition, just exactly what did you mean? Did you mean competitive routes or did you mean competitive aircraft or what did you mean?

A. I meant TWA competition.

Q. I assume you meant TWA competition, but in what sense did you mean it, Mr. Rummel?

A. I meant how competitive we would be as a result of a proposed program.

Q. Are you referring to the aircraft which the com- [Tr. 589] petition would be using on the same routes? Is that what you mean?

A. That would be included.

Q. What else would be included?

A. I meant competition broadly.

Q. What else would be included besides the competitive aircraft in competition broadly?

Mr. Sonnett: There was some testimony on this, Mr. Brownell, at an earlier stage of this cross-examination, beginning particularly at page 263 and thereabouts of the examination.

This does seem to be repetitive, but perhaps Mr. Hayes does not intend to be at it very long.

Mr. Hayes: I don't.

A. Well, the degree of feed provided by a competitor and the competitor's overall image in a specific market were factors as well as the services on a specific segment, for example.

Q. I frankly don't know what you mean by the degree of feed. It may be a technical term that is clear to you, but it isn't to me, I am afraid.

A. All right. Let me try to explain. If an airline has strong self feed, or feed from services provided by others

through, say, compatible schedules, that is, if [Tr. 590] on the direct route being considered, that route is fed traffic through these other means, then his ability to remain in that market or be strong in the market would be enhanced compared to the airline who did not have that amount of feed.

Q. Are there any other factors that are considered in the decisions on selecting the type and number of new aircraft? Let me suggest some.

Do you consider anticipated traffic growth?

A. Yes, I say projected traffic growth.

Q. That is what you meant by it I see.

How about the safety aspects?

A. That is part of the single word aircraft, in my use of the term here.

Q. How about airport limitations?

A. That relates to airplane performance characteristics.

Q. How about the availability of delivery positions?

A. That I relate to the competitive aspect.

Q. What did you mean by impact on the airline?

A. Things like need for additional maintenance and overhaul facilities, need for enlarging or changing terminal concepts.

Q. Did you consider technological improvements in [Tr. 591] the aircraft being considered by manufacturers?

A. Yes.

Q. What weight did you give to them?

A. I included that in the term aircraft. We gave them the weight that we judged to be due in each instance.

Q. If you anticipated a substantial breakthrough, did it mean that you might postpone getting new aircraft until a major improvement came along?

A. Those were a legitimate consideration.

Q. And it could result in a postponement of the acquisition of existing aircraft?

A. It could, yes.

Q. You mentioned forecasted financial results. Do you mean results of operation of the aircraft?

A. Well, broadly, yes, as a result of having acquired and used the airplanes.

Q. What about the company's financial condition, ability to make the purchase?

A. That was a consideration primarily given by the finance organization.

Q. But it was always a consideration, was it not?

A. Certainly. It was always a consideration in those cases where TWA ordered the airplanes.

Q. Did you participate in negotiations on price with [Tr. 592] respect to the jets?

A. To some degree, yes.

Q. Who carried on the negotiations primarily with respect to price?

A. I believe that Mr. Hughes did primarily with respect to the basic price, and I did primarily with respect to changes in the price.

Q. Generally speaking, were either you or Mr. Hughes able to negotiate successfully on price?

Mr. Sonnet: I don't know what that means.

The Special Master: I wonder if you could clarify that?

Mr. Hayes: All right.

By Mr. Hayes:

Q. Do you recall any instance where either TWA or Hughes was not able to negotiate to get better prices on aircraft?

The Special Master: Does that mean lower prices than the original offering price?

Mr. Hayes: Lower, yes.

A. No, I don't believe so.

Q. Do you recall whether there were instances where TWA was not able to acquire aircraft because of inability to finance?

[Tr. 593] A. Yes. Not in this particular period. I am going back to the early piston days now.

Q. In this particular period, the orders were placed by the Hughes Tool Company, were they not?

A. Yes, sir.

Q. Is it your testimony that TWA would have been able to place the orders and finance them?

Mr. Sonnett: Just a moment. There is nothing in this witness' direct, Mr. Brownell, that bears on the question of TWA's ability to finance these aircraft, nothing whatsoever. I think that counsel is going far beyond the scope of the direct here.

Mr. Hayes: The whole assumption—

The Special Master: Are you objecting?

Mr. Sonnett: Yes, I object.

The Special Master: Objection sustained.

I think you can get what you want by rephrasing your question.

Mr. Hayes: May I have the question again, please?

(The question was read.)

The Special Master: Do you want to relate it to specific transactions?

[Tr. 594] Mr. Hayes: All right.

By Mr. Hayes:

Q. Is it your testimony, Mr. Rummel, that TWA in 1956 was financially able to order the Boeings it did order and to make the down-payments and undertake to make the stage payments?

Mr. Sonnet: Read the question back, please.

(The question was read.)

Mr. Sonnet: There is no evidence that TWA ordered any Boeings in 1956, Mr. Brownell. The question, therefore, improperly states the record.

Mr. Hayes: I am sorry. Did I say TWA?

Mr. Sonnett: Yes, you did.

Mr. Hayes: I meant Toolco. Let me rephrase the question. I am sorry. That was a slip of the tongue.

The Special Master: Do you understand the question or do you want it—

The Witness: I think I understand it. He is asking me whether I thought in 1956 that the Hughes Tool Company was able to finance the jets that it had ordered.

Mr. Hayes: No, that is not my question.

[Tr. 595] A. No.

Q. No. I will try it again, Mr. Rummel. Is it your testimony that in 1956 TWA would have been financially able to order the Boeings the Toolco ordered and to make the required down-payments and to make the required stage payments.

A. I haven't testified to that point.

Q. You have said that TWA should have ordered the planes, have you not?

A. Yes.

Q. Do you mean that it should have ordered? Did you consider its financial ability when you stated in your direct case that TWA should have ordered them?

A. I have no reason to believe that that would not have been the case under the premise of the testimony.

Q. Would you explain what you mean? Frankly, I don't understand what you are saying, Mr. Rummel.

The Special Master: Do you have an opinion as to whether or not TWA was in a position to finance the acquisition of these planes? Do you have an opinion?

The Witness: I don't think I have an opinion that's sufficiently valid to present, no.

Mr. Sonnett: I think the witness was attempting to distinquish, Mr. Brownell, between two [Tr. 596] things: First, TWA, as it actually was when it was dominated by the Tool Company on the one hand, and, secondly, the hypothetical free TWA which was a premise in his testimony.

The Witness: That is absolutely correct.

By Mr. Hayes:

Q. Where do you state the premise in your testimony, Mr. Rummel?

Mr. Sonnett: What is the question?

(The question was read.)

Mr. Sonnett: I don't recall the witness having testified that he did state the premise. I thought the witness was referring to an effort earlier to answer a question of yours.

Mr. Hayes: May we have the record read back, Mr. Brownell? I think it is pretty clear.

The Special Master: Yes.

Mr. Hayes: You have to go back two or three questions.

(The record was read.)

Mr. Hayes: So I asked where the premise was stated in his testimony.

Mr. Sonnett: I am referring not to the di- [Tr. 597] rect testimony. I am referring to what you have elicited or tried to elicit from him before, as I understood you.

By Mr. Hayes:

Q. Are we in agreement, Mr. Rummel, that you don't state any such premise in your testimony?

The Special Master: In the prepared testimony?

Mr. Hayes: In the prepared testimony.

A. Yes.

Q. You have no opinion as to whether or not TWA would have the financial ability to finance the aircraft that Toolco, in fact, ordered?

Mr. Sonnett: I don't like to be persnickity, but this is a fairly important question.

Mr. Hayes: It certainly is.

Mr. Sonnett: Would you read it back? I don't think you said exactly what you meant to say, but read it back, Mr. Reporter.

(The record was read.)

Mr. Sonnett: Would have or would have had?

The Special Master: Would have had.

Mr. Hayes: Would have had, yes.

The Special Master: That is TWA as it exist- [Tr. 598] ed at that time.

Mr. Hayes: Right.

A. No.

Q. You have no opinion?

A. No.

Q. Is that true both of the orders placed for the Boeings and the orders placed for the Convairs?

A. Yes.

Q. Were there occasions in connection with the acquisition of aircraft where the Toolco and TWA worked together to create a competitive situation between aircraft manufacturers?

A. Yes.

Q. Did that activity on the part of TWA and the Toolco generally result in reduced prices or improved airplanes?

A. I think so.

Q. That is your best recollection, is it not?

A. Yes.

Q. Can you give us an instance of such competitive situations that were created by the Toolco and TWA?

Mr. Sonnett: Mr. Brownell, I must say all I can read into this is that counsel is going back into the 16 days of discovery deposition. I don't know what this has to do with the witness' direct, [Tr. 599] how it constitutes cross-examination with respect to this testimony.

Mr. Hayes: This is a damage hearing.

Mr. Sonnett: I understand that, but I don't see that this is proper cross-examination of this witness, whatever contentions, if any, you may wish to advance at some other time.

Mr. Hayes: This is the man held forth as an expert on acquisition of aircraft.

Mr. Sonnett: That is correct.

Mr. Hayes: I want to find out what happened.

Mr. Sonnett: I don't see what your pending question has to do with his direct testimony at all.

The Special Master: I will let the question stand.

By Mr. Hayes:

Q. Do you recall the question, Mr. Rummel?

A. No, I am afraid I don't.

Q. The question, so the reporter won't have to search for it, was, in substance, that you give us instances of competitive situations created between aircraft manufacturers by the Toolco and TWA.

The Special Master: In which he participated or of which he has direct knowledge.

[Tr. 600] Mr. Hayes: Of which he has knowledge.

A. This is limited to 1958 through 1960 still?

Q. No. I am covering your testimony now, from the time you were with the company.

A. The Martin Convair acquisition, the DC-6/6B-Connie competition, succeeding models of Connies, including the long bodies, as they are now called, Connie versus the DC-7.

Those are three examples.

[Tr. 601] Q. Was the effort in each instance to get a superior aircraft at a lower price for TWA?

A. No, that was my effort.

Q. Was it the effort of the Tool Company so far as you know?

A. As far as I knew the effort was in that direction, yes. I can't presume to know everything that went on, but this is certainly the impression that I had, yes.

Q. When an airline has certain kinds of airplanes, is it generally better to order, if it needs additional airplanes,

those of the same general type as it presently is operating rather than to operate several different kinds of airplanes?

A. It is not a foregone conclusion. That consideration is a valid one which must be analyzed and carefully weighed among other considerations.

Q. Is it true that generally speaking at least the cost of provisioning ground suport and flight training is less if you order additional aircraft of the same type than to order a totally different kind of aircraft?

A. As a generality—

Q. That is what I asked.

A. —that could be generally expected to be true. [Tr. 602] Frequently, of course, it is offset by revenues.

Q. That may be.

A. Yes.

Q. It is an important consideration, is it not?

A. It is a consideration whose importance depends on the circumstance.

Q. I meant to ask this question this morning. I may have asked this before, but I don't remember it. I just don't recall whether I did or not. It was on my mind and I forget all about it.

Would you define the term configuration for us, please, configuration of an airplane?

A. Configuration of an airplane?

Q. Yes.

A. I use it generally as indicating the design of the plane.

Q. You mean the external and internal design of the plane?

A. Yes.

Q. Is there a difference between the configuration of the airplane and the configuration of a cockpit?

A. Well, the cockpit is part of the airplane.

Q. I know it is. Thanks, just the same.

A. I'm sorry. I—I don't mean to be flip at all.

[Tr. 603] The Special Master: Your answer is yes, sir.

Q. What I mean is this: Might there be two planes of identical figuration speaking generally and yet the cockpit configuration from one airline running that plane would be different from another airplane running that plane?

A. Yes, that's true.

Q. So they might have a different cockpit configuration?

A. Yes.

Q. Even though the plane itself might be the same overall—

A. Yes.

Q. —as the same plane operated by another airline?

A. Yes.

Q. That's really what I had in mind in asking you about the cockpit.

A. I see.

[Tr. 604] Q. Do cockpit configurations vary among different air carriers?

A. Yes.

Q. Substantially?

A. In some cases.

Q. Has TWA a configuration all its own of the cockpit?

A. Well, there are differences between the TWA cockpit configuration and other airlines and there are also great similarities.

Q. Do you know of any other airline that has an identical cockpit configuration to that of TWA?

A. Yes, for a while, Northeast.

Q. What airplanes?

A. The Convair 880s.

Q. The ones that were eventually leased to Northeast that had been built on TWA configuration originally?

A. That is correct.

There may have been some minor changes that have crept in. I'm not sure now. But the cockpits are essentially identical.

Q. Aside from those which had originally been built for TWA configuration do you know of any airline that operates aircraft with the same cockpit configuration [Tr. 605] as TWA?

A. I don't know of any that are entirely identical.

Q. Did TWA engage in development work and preliminary design on new aircraft looking toward the acquisition of new aircraft?

A. Yes.

Q. Did it do more such work than other airlines did?

A. Well, I really—I don't think I'm in a position to testify precisely what all the other airlines did in this respect.

Q. Was Mr. Hughes personally interested in development of new aircraft for TWA?

A. He was certainly interested in the development of new aircraft and I had the impression that he had TWA in mind.

Q. Do you know of any other airline that he ever had in mind in the development of new aircraft?

A. Well, on the—not specifically, but I think the answer is yes.

Q. Tell us about it.

A. Well, for example, on the Caravelle undertaking that was proposed, the idea was to build into a production [Tr. 606] situation starting with TWA but hopefully selling to other airlines.

Q. That was a proposal that was made back in what, mid-'50s somewhere?

A. Well, that was—give me half a second. I'll think. I believe in the mid-'50s. I don't recall the exact date now.

Q. Was that a plane that had been developed at that time by Sud Aviation in France?

A. The plane had been developed, yes, and would have been the first of the series to have been produced.

Q. Who developed this Caravelle?

A. Sud Aviation.

Q. Did TWA work on the development of it?

A. Not at that time.

Q. Did it later work on the development of the Caravelle?

A. Yes.

Q. When?

A. Well, after the period we are talking about.

Q. You mean in 1961?

A. Yes.

Q. I am thinking of the period up to 1961.

[Tr. 607] A. Yes.

Q. Did Mr. Hughes work on the development of the Caravelle?

A. Not as far as I knew.

Q. My question to you before, Mr. Rummel, was did you know of any plane in the development of which Mr. Hughes worked which was intended for an airline other than TWA?

Mr. Sonnett: That is a new question.

Mr. Hayes: That is the question I asked before but let's not argue about it.

Mr. Sonnett: I don't think so.

The Special Master: Are you clear as to what the question is now?

The Witness: I am now, yes.

The Special Master: All right.

A. I know that some of the jets wound up with other airlines.

Q. Are you talking about the 880s and the six—331s?

A. Yes.

[Tr. 635] By Mr. Hayes:

Q. Mr. Rummel, on Friday last you testified that you agreed with the statement on page 6 of your prepared statement that TWA and Toolco recognized that in order for TWA to maintain its competitive position, it would require a fleet of jet-powered aircraft substantially as soon as its principal competitors and that orders for such equipment should not be delayed.

Please state the facts which are the basis of the agreement to which you testified.

A. Both Mr. Hughes and I worked diligently and hard through 1954 and 1955 to have aircraft developed which would satisfy TWA's needs.

It was recognized that TWA would have to be fully competitive in the jet age, and that the jets would likely prove to be a superior mode.

Q. Would have to be what?

A. A superior mode of transportation, which we would have to have in order to be competitive.

During the fall of 1955, there were numbers of discussions with Mr. Hughes, during which it was recognized that TWA would have to be equipped and Toolco should proceed expeditiously with the placing of orders for jet air-

[Tr. 636] craft.

Q. Have you finished?

A. Well, at that point discussions with Boeing were given new life, and negotiations undertaken which led to the development and signing of the contracts early the following year.

Q. You used the expression it was recognized that TWA would have to be competitive.

Recognized by whom?

Mr. Williams: If your Honor please, Mr Special Master, it seems to me that that is an expression that was perfectly proper and he does not have to state by whom it was recognized.

The Special Master: I will allow the question.

Mr. Williams: Can you answer it? Go ahead.

A. Well, I was going to say I believe everyone at least involved with me in the jet picture certainly recognized it.

Q. Can you give us names, Mr. Rummel?

A. Well, Mr. Hughes did, I am sure Mr. Damon did. Wait a minute. It could not have been in the fall. It would have been earlier, and when Damon was there he was [Tr. 637] acutely aware of the need of our remaining competitive. I did. My associates did.

Q. Could you name them, please?

A. Mr. Rourke, for example.

Q. Any others?

A. There was widespread concern, Mr. Hayes, that if TWA did not find itself in position to remain competitive in the jet age, we would be operating at a disadvantage, and that orders would have to be placed in order to place us in the desired position.

Q. You said it was recognized by Mr. Hughes, for one. What did he say to you in that connection in the fall of 1955?

A. Specifically—well, I certainly at this stage can't presume to give a verbatim account of a detailed conversation due to the passing of time.

The order for the 131s was intended, as I recall it, primarily, initially, as he expressed it to me, as a stopgap, hoping that superior aircraft could be evolved in sufficient time to then give us a competitive advantage.

The entire thrust of our efforts technically was to have superior craft developed which would place TWA at a competitive advantage.

[Tr. 638] Q. You said that the order for the 131s, according to your recollection of what Mr. Hughes told you, was a stopgap, hoping for the development of superior aircraft which would give TWA a competitive advantage; is that correct?

A. Yes.

Q. When did he tell you that, according to your statement? The order was not placed until March of 1956.

A. This was during discussions between ourselves during the fall of 1955.

Q. So this remark by Mr. Hughes, as you recall, that it would be a stopgap, the first order for 131s, was made in the fall of 1955; is that correct?

A. It was expressed, as I recall it, during the fall of that year.

(Mr. Sonnett entered the hearing room.)

Q. Can you identify the time more exactly?

A. It was around the time that the improved Boeing models were emerging and we were in the process of dropping the Model 18, or shortly following that. It was in that general period of time. I can't be specific as to the precise date, no.

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[Tr. 648] Q. Who was Harry West?

A. An attorney.

Q. For whom?

A. I believe the Chadbourne firm. I don't recall the full name.

Q. Whom did the Chadbourne firm represent?

A. Well, they represented TWA, but West in these activities dealt directly with Hughes, and what his personal situation may have been or that of the Chadbourne firm, vis-a-vis Hughes, I am not certain.

Q. Was the Chadbourne firm the general outside counsel of TWA at the time?

A. Yes, sir.

Q. Was Mr. West a partner in that firm?

A. Not at that time.

Q. But did he handle negotiations looking to the acquisition of the Boeings with The Boeing Company?

A. Well, he participated in them. I wouldn't say he handled them. There were other counsel and other lawyers involved from time to time.

Q. But he was an active participant?

A. He was an active participant in those areas in which he was suitable to be active.

Q. Do you recall anything Mr. Hughes said to you, [Tr. 649] other than what you have already told us, to the effect that Toolco should proceed expeditiously with placing orders?

A. He also made it known that he—during this period of time now, he made it known that he was in touch with Boeing. Numbers of meetings took place between Hughes and Boeing, itself, or Boeing representatives. Some of these, I did not participate in.

Q. Is there anything else that you can recall that he said to you?

A. Not categorically at this time, no, sir, on that point.

Q. For my own information, Mr. Rummel, you frequently use the adverb "categorically" in connection with your answers. In what sense do you use that, so I will understand your testimony?

A. I mean that I am trying to answer your questions—I am trying to think of a synonym for "categorically"—"precisely," perhaps, is the right word.

Q. I see. You have no precise recollection other than what you have already testified to as to discussions with Mr. Hughes to the effect that Toolco should proceed expeditiously with placing orders?

A. No.

[Tr. 650] Q. Did Mr. Hughes in any discussion with you ever give you any reason why Toolco should place the orders rather than TWA?

A. I don't recall that he did. I might say he wasn't in the habit of explaining all of his decisions to me.

Q. Regardless of his habits, did he give you any reason?

A. I don't recall a reason specifically expressed by Mr. Hughes.

Q. Do you recall them generally.

A. No.

Q. Is it correct that you have no recollection as to any reason he gave you?

A. He certainly may have, but I don't recall it at the moment.

Q. You mentioned that after these discussions with Mr. Hughes that Toolco should proceed expeditiously with placing orders, that the discussions with Boeing were then given new life.

What does that mean? What was done? Give us the facts.

A. Well, Boeing had been pushing us steadily, and the new life was that we started to respond by negotiating.

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[Tr. 659] knowledgeable of actions of other airlines, their posture and procurement activities and that sort of thing.

I didn't attempt to try to recite each and every scrap and knowledge that existed. I'm sure some of it now I just don't remember.

Q. I am asking you now to tell us if there are any other facts in your recollection than those you have already testified to which caused you to agree with the statement I read to you from your prepared testimony.

A. That's all that comes to mind.

Q. You stated in your prepared testimony that in the fall of 1955, the development of jet aircraft reached the point at which TWA should have made definite commitments for a fleet of medium to long range jet aircraft which would be sufficient to meet TWA's initial needs for its domestic and international routes.

That sentence like the prior one is confined you notice to the fall of 1955.

What do you mean by the expression of "development of jet aircraft reached the point at which"?

What point are you talking about?

A. At which initial orders could be placed.

Q. What point in the development had been reached?

A. Sufficiently definitive proposals from the manu- [Tr. 660] facturers to warrant placing orders.

Q. Had that point been reached by all manufacturers at that time?

A. All manufacturers?

Q. That is right.

A. You mean all manufacturers of jets?

Q. Yes.

A. No.

Q. It had not?

A. No.

Q. What manufacturers had reached that point in the fall of 1955?

A. Boeing, Douglas, DeHavilland.

Before then, Avroliner.

Q. Would you tell us what you are referring to in connection with this answer?

A. Simply refreshing myself by looking at the list of aircraft attached to my testimony.

Q. You mean Annex A?

A. Yes.

Commercial version of the YB 60, some time before this.

Q. What was the YB 60?

A. The YB 60 was a large proposed commercial [Tr. 661] variant of an experimental swept wing jet bomber which in turn was derived from the B-36.

Q. Who was the manufacturer?

A. It was never manufactured.

Q. Who was the one who proposed it, the manufacturer?

A. Convair.

Q. They had not reached the point of accepting orders, or had they?

A. Well, they sure acted like they were at that point.

Q. I am sorry.

A. They sure acted like they were at the point of wanting to make a deal.

Q. What other manufacturers had reached the point of asking for orders?

A. Sud Aviation, Vickers.

The Special Master: Is that the end of your answer?

The Witness: That's all I think of at the moment. I was taking time to search my memory, sir. Yes, that's all I think of.

Q. Was Lockheed?

A. Lockheed had done work on jet transports, some [Tr. 662] on their own but mostly under military contract, and had failed to elicit sufficient airline interest as I recall it now, to permit them to go ahead to the point of formally offering their jet aircraft.

They were deeply involved in the development of the Electra at this particular time, that is, the fall of 1955. And they had centered their attention on this.

Q. When did they offer their Electra to the airline industry, do you recall?

A. Not precisely, Mr. Hayes, but before the fall of this year. I mean before the fall of 1955.

Q. Before the fall of 1955?

A. When they first offered the Electra?

Q. That is right.

A. Yes.

Q. So Lockheed was another manufacturer that was offering jet aircraft?

A. I do not consider the Electra a jet aircraft.

Q. What jet aircraft was Vickers offering?

A. Well, at that time they were offering a commercial derivative of a bomber that was then under development or which possibly by that time had flown. I don't recall it that well in terms of exact timing.

[Tr. 663] They may have—in fact, I believe they did offer their jet prior to this time. It was—I have already described it.

Q. Did it have a name or a designation of any kind?

A. I'm sure it did, Mr. Hayes. I don't recall at the moment exactly what it was called now.

Q. Did any airlines order the Vickers jet which was a commercial derivative of a bomber under development?

A. I can't be 100 per cent sure but I believe that BOAC had placed an order through the Ministry or possibly it was a Ministry order in behalf of BOAC. Whether BOAC in fact signed an order, I can't be that sure.

Q. Any other airline?

A. Nothing more comes to my mind.

Q. Was the plane ever built and flown by a commercial airline?

A. The project was subsequently canceled.

Q. You referred to medium and long range jet aircraft in the sentence to which I directed your attention.

Will you tell us which of the manufacturers were ordering medium and which were ordering long range jet aircraft, giving the designations, if you remember them?

The Special Master: Offering.

[Tr. 664] A. You mean offering for manufacturing or orders?

The Special Master: You mean offering rather than ordering?

Mr. Hayes: Yes, offering to the airlines.

The Special Master: That's distinguished now between medium and long range?

Mr. Hayes: That's right. I want to know which is which and which manufacturers were offering them.

A. You are speaking now of the fall of—

Q. That's right. That is what you are speaking of.

A. DeHavilland was offering a medium to long range airplane.

Boeing—

Q. Did it have a name or a designation?

A. It was called the Comet. However, there were several Comets.

Boeing offered the two that I mentioned, but during the term of the negotiation with Boeing for the aircraft that Hughes Tool ordered, we entered into discussions with Boeing toward getting them to offer a medium range plane.

They did make preliminary technical proposals, but these were not of sufficient interest to us to warrant [Tr. 665] their making a formal offer as such to build them.

Q. Whom do you mean by "to us"?

A. Those who were negotiating. Myself, associates. This was all tied in closely with the Hughes people.

Q. Did you mean TWA acting through you?

A. I mean—I viewed TWA and Hughes in those days in this respect as being synonymous and I think they were.

Q. Yes, you have told us that.

A. Well, that's what I am referring to.

Q. But you are including TWA in the expression to us?

A. Yes.

Q. What was Boeing offering? They were not offering this one that you are talking about. What were they offering?

A. Both the 100 and the 300 series.

Q. And those are what TWA ordered as the 131s and 331s?

A. Hughes Tool ordered them as the 131s and the 331. That is, the complete designation perhaps to make it more clear is 707-131 and 707-331.

Q. Were they long range or medium range? Which were they?

[Tr. 666] A. Well, as I explained earlier, a couple of times, the 331 was suitable for international operations. The 131 was marginal for international operations and suitable for transcontinental operations.

Q. Did you consider it, the 131, as a long range airplane or a medium range airplane?

A. The 131 was capable of long range transcontinental non-stop operations, and quite capable of interim stops, coast to coast, and of course that's the way it was finally used.

Q. The 331s you would designate as long range?

A. I would place them as essentially long range international airplanes, again capable of economically being operated on some shorter segment.

Q. Did Boeing at that time offer any so-called medium range jet airplane as distinguished from the long range jet airplane?

A. Well, as I explained, we endeavored to get them to offer a medium range airplane, and they did not.

Incidentally, it was during the fall, and I guess that my conversations that I have been talking about dates—when I say the fall, I am talking about it started some time in the fall and then continued up until the time that we bought the airplanes. During this period [Tr. 667] Convair did offer the 880 which while it was intended as a transcontinental non-stop airplane, it was also intended to be capable of efficiently being used on a somewhat lesser range.

Q. But that was not available, was it, in the fall of 1955, not offered?

A. It depends—well—I would say it was offered, yes. It seems to me that when a manufacturer starts panting and pushing for the sale of an airplane, even though it is to some extent still being developed, it is indeed offered.

Q. I am speaking of an aircraft that was not still being developed, but had been developed, for which aircraft manufacturers were seeking orders?

A. Well, none of them, Mr. Hayes, were fully developed when they were ordered.

Q. You mean the configuration is not complete?

A. I mean they weren't fully developed, at that point in time, any of them.

Q. Was the Convair 880 in the same state of development in the fall of 1955, and I mean the fall of 1955 as the Boeing 131?

A. The 880 as such, as I best recall it, came forward during December of that year.

[Tr. 668] Q. Offered as a plane for which the company was seeking orders?

A. Offered as a plane and a concept of which Convair wanted to further develop working with Hughes and myself toward the sale of that general kind of airplane.

Q. Did they offer it to airlines generally?

A. They had—well, some of the Convair people indicated they had shown early design concepts to, I believe it was Northwest Airlines, around that time.

Q. This was the fall of 1955?

A. Very late fall. I mean—as I say it was in December, as I best recall, that the 880 came forward. So it was December and subsequent.

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By Mr. Hayes:

Q. What long range and medium range jets was Douglas offering to airlines in the fall of 1955?

A. As I recall, Douglas took the dual model approach about the same time that Boeing did, but [Tr. 669] there was less difference between their models.

They had a JT-3 and a JT-4 powered airplane.

Q. Are you referring to engine numbers now?

A. Yes, sir.

Q. What were the plane numbers or the plane designations?

A. DC-8s.

Q. All DC-8s?

A. DC-8.

Q. What was the DC-8, long range or medium?

A. DC-8.

Q. I thought I said DC-8.

A. I am sorry. I thought you said "A".

Q. Was the DC-8 a long range or medium range plane, the one that Douglas was offering in the fall of 1955?

A. The JT-3 powered DC-8 was roughly comparable to the 131 and the JT-4 DC-8 roughly comparable to the 331.

Q. So the DC-8 with the JT-3 engine was capable of transcontinental flight?

A. Yes.

Q. The DC-8 with the JT-4 engine was capable of making intercontinental flights?

A. Yes, this was the concept of the planes that [Tr. 670] were offered.

Q. These planes were not flying at that time, were they?

A. No.

Q. Would you call them both long range planes?

A. I'd put them in the same category that I just put the Boeings in respectively.

Q. What jets was Avro offering at that time?

A. Well, at that time, we were still working with Avro, as we had been for some time on a supersonic type plane. It was early in development and had not reached the stage where anything other than those preliminary type agreements could have been entered into.

Q. Was there any other jet it was offering to airlines at that time?

A. I mentioned the Comet.

Q. That was DeHavilland, I thought.

A. Yes, sir, maybe I misunderstood your question.

Q. I am talking about Avro.

A. Avro?

Q. Was there any other jet airplane that Avro was offering to airlines at that time?

A. The Avro I referred to is Avro in Canada. I [Tr. 671] am trying to recall whether Avro in England at that time offered anything.

At the moment, I don't recall this, although at one time I believe they did.

Q. You do not know then as you sit here now?

A. It was not an especially serious contender and I don't recall exactly when that was.

Q. When you said we were working with Avro you refer again to both yourself and to Mr. Hughes in behalf of TWA or do you have somebody else in mind?

A. Well, on behalf of TWA, I don't know how to bracket that. I say that Mr. Hughes and I were working directly on the Avro project, meaning Avro Canada—

Q. Yes.

A. —through this period. As I explained earlier this wasn't a constant high heat affair but it was a continuing series of discussions, reviews, explorations with Avro.

Q. Was it part of the exploration or efforts that you testified before which were directed toward getting a superior jet aircraft for TWA?

A. I certainly so understood it at the time.

Q. Was this Avro supersonic that was then on the drafting boards ever built and sold to airlines?

[Tr. 672] A. No.

Q. I do not know whether I asked you before when you mentioned the YB-60 of Convair, was that ever built and sold to airlines?

A. No.

And as I said, that was prior to this fall period.

Q. Sud Aviation was offering what airplane at that time?

A. The Caravelle.

Q. Was that a long range or a short range jet?

A. That was short range.

Q. Or was it medium range?

A. This is almost anybody's definition. It was capable of somewhat, I would call, medium range flights, yes.

Q. In your prepared statement, when you talk about TWA making commitments for a fleet of medium to long range jet aircraft in the fall of 1955, what specific aircraft did you have in mind in your statement that TWA should have made commitments for?

A. Well, I looked upon the jet developments as including the family concept.

At that particular time, we, had my recommenda- [Tr. 673] tion been followed technically, would have bought Boeing planes. That would not, however, have fully satisfied the medium range requirement.

Q. Is that your answer?

A. Yes, sir.

Q. What do you mean by the phrase "family concept"? You said you looked upon jet development as including the family concept.

A. Well, for example, as I mentioned earlier during our Boeing negotiations we attempted to persuade Boeing to develop a shorter range airplane, an airplane designed and optimized in a different way.

Boeing, in fact, later did develop a derivative model but they did not do so or offer it at that time.

And I was confident that these initial jets, contrary to some other opinions that existed at the time, would be developed into a family series.

Q. Would you please tell us what you mean by a family concept or a family series? It is not clear to me and I would like the record to be clear as to what you mean by those phrases, Mr. Rummel?

A. I'll try to make it very clear.

I am talking about developing derivative designs from existing designs which make use of earlier [Tr. 674] developments.

The Special Master: May I ask would for example the Boeing 707-300 family be one that included the 331?

The Witness: Well, the answer is yes. That certainly was an early manifestation of the family concept.

The Special Master: And the 100 is a separate family?

The Witness: No, I'd say the 100 and the 300 were the members of the same family series as later was the 720 airplanes. They essentially used the same—well, basic state of the art, the same tooling, to the extent that they could, and the attempt in these cases

is made to use as much of the earlier non-recurring costs, spreading them over a new series as they could, you see.

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[Tr. 677] Q. I will go back to the question I put before which got us off on this family concept.

What specific planes, medium and long-range, did you have in mind when in your testimony you stated that in the fall of 1955 TWA should have made definite commitments?

Can you identify the planes you are talking about?

A. Well, I would have ordered Boeing airplanes.

Q. Both 131s—

A. And 331s.

Q. —and 331s?

A. Yes. And I would order either or attempt to order either a shorter range—whatever it was—actually either Boeing or Convair, except Convair in fact didn't exist in the fall. It wasn't until later that it appeared.

Q. You did not have the Boeings in mind because the Boeing was not available, is that correct?

Mr. Sonnett: Just a moment. Read that question back.

(The question was read.)

A. The Boeing was not available?

Q. The Boeing medium range. You said that you [Tr. 678] tried to get them to build a medium-range and it never got beyond the point where it was feasible. You testified to that already.

So you did not have a Boeing medium-range airplane in mind in the fall of 1955 that should have been ordered, did you?

A. We had a medium-range airplane in mind all right.

Q. Which one was it?

A. What I said was we weren't successful as a result of our negotiation with Boeing to have Boeing proceed. The airplane they offered in my analysis just wasn't good enough to warrant proceeding.

Q. You did not consider that airplane then as one that should have been ordered in the fall of 1955, did you?

A. Not in the form it was offered, conceptually I think it was.

Q. You are talking about placing of orders here that should have been placed. You just told us that the Boeing medium-range was not the kind of a plane you wanted. I am not thinking about concepts. I am thinking about models that were being offered to airlines at the time for manufacture and for use by the airline.

I ask you if in your testimony or if it is your [Tr. 679] testimony that in the fall of 1955 TWA should have made definite commitments for the Boeing medium-range which did not measure up to your requirements.

A. It is my testimony, Mr. Hayes, and what I am saying here is that in my judgment that would have been the time that we should have moved in this area.

Q. What does that mean?

A. Exactly what I say.

Q. What do you mean by move in this area?

A. Place—what the testimony says.

Q. That in the fall of 1955 TWA should have placed orders—I will take your own language—make definite commitments for a medium-range Boeing with which you were not satisfied, is that correct?

A. I am not suggesting that we should have ordered the airplane if we weren't satisfied with it.

I am saying that is the appropriate time to have ordered and I believe that we could have had a satisfactory proposal had we concentrated on it instead of other matters at that time.

Q. When did Boeing develop a medium-range plane and really offer it as a medium-range plane for orders by the airlines?

A. I said many times that they regretted not having [Tr. 680] moved when we initially wanted them to move.

They did offer such a plane pretty much as a direct result of the Convair 880 offer. The exact time of this offer, the date it was formally offered I just don't recall at the moment.

Q. Was it in the fall of 1955?

A. No, it was after.

Q. It was after?

A. Yes.

Q. I am talking about your testimony which is confined to the fall of 1955, Mr. Rummel.

A. Well, that's what I am talking about.

Q. I would like to get an answer to the question as to whether it is your testimony that in the fall of 1955 TWA should have ordered from Boeing a plane that Boeing had not yet offered to the airlines.

Mr. Sonnett: I think that question has been answered. This is just sheer argument, Mr. Brownell.

The Special Master: Sustained.

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[Tr. 684] • • • Q. Can you identify the Hughes representatives to whom you made your recommendations in the fall of 1955?

A. I mentioned on numbers of occasions to Mr. Cook that I felt that we should proceed with the placing of orders.

Q. Anybody else?

A. Well, to Mr. Hughes, of course.

Q. You mentioned him.

A. Yes.

Q. Is there anybody else in Toolco to whom you made your recommendation?

A. Well, it is quite likely and possible that there were others, but I don't recall categorically right now who they were.

Q. To whom in TWA did you make your recommendations?

A. Mr. Damon.

I'm sure I mentioned my feeling on several occasions to others such as Mr. Cocke, but I don't specifically recall the occasion.

Q. What were those recommendations that you made in the fall of 1955?

A. That orders be placed for jets so that we could [Tr. 685] achieve either first or contemporary delivery with others.

Q. Did you make any other recommendation?

A. Well, that certainly was a primary one.

Q. Search your memory, Mr. Rummel, and see if you can elaborate.

A. Well, I specifically recommended the Boeing aircraft at that time versus Douglas and versus the Comets.

The Special Master: At this time, did you put in a recommendation as to specific number?

The Witness: Gee, undoubtedly we talked numbers, Mr. Brownell. I'm not that specific.

I don't know why I would have not used the same numbers.

Q. Do you recall the numbers that you used in the fall of 1955?

A. Well, the number of 331s that came into being was 18. I don't recall deviating from that.

Q. That came into being in 1956, did it not?

A. Well, these—no. It came into being in terms of being reflected in a contract in 1956.

Q. I am asking you—

Mr. Sonnett: Let the witness finish. Don't interrupt. Every time the witness starts to give him a responsive answer, he interrupts.

[Tr. 686] Mr. Hayes: That is one of the most unfair statements Mr. Sonnett has made. And he is a champion at it.

Mr. Sonnett: Maybe it is unfair in your eyes, but I am accurate about it. Why don't you let him finish his answer?

Mr. Hayes: I have been most careful to let Mr. Rummel finish.

Q. Would you proceed, Mr. Rummel?

Mr. Sonnett: Would you take the question fresh and go ahead and answer it?

(The question was read.)

The Witness: In terms of becoming a target for inclusion in the contracts, I'm not sure exactly the time that that came into being, but I think it was—I believe it was during the fall of 1956.

Mr. Sonnett: What year?

The Witness: I am sorry. 1955.

Q. Can you tell us now as you sit there, Mr. Rummel, what specific recommendations as to numbers of planes you recommended to either the Toolco or a representative of it or to anyone in TWA in the fall of 1955?

A. Well, in the fall of 1955, I was dissatisfied with the nine and later a larger number of 131s, because [Tr. 687] I was convinced that things like the supersonic Avro simply would not be sufficiently timely, that is, that we couldn't wait on it, the price would be too great.

So I was pushing for a larger number of 131s during the negotiation, that is, with our own people.

The specific numbers that we, in fact, were dealing with were reflected in various studies, and I don't specifically recall at the moment.

However, it was my view that about 18 was right on the 331s, and that we should have more than the nine 131s.

Q. Do you have any recollection as to how many more you recommended?

A. Well, the number we came to is 15, and I recall specifically indicating that it would be desirable to have more than the 15 at the time the 15 agreement was achieved. That was in the spring or the very early winter of 1966.

Q. Do you mean 1957?

A. 1956. I mean in the early part of that year.

Q. That the 15 were ordered in the spring of 1956, do you testify?

A. No, I'm saying—

The Special Master: The winter of 1956 [Tr. 688] means the winter of 1956-1957?

The Witness: Well—

The Special Master: When you said early in the winter you meant winter of '56-'57?

The Witness: I am only referring to the fact that—yes, yes, that would have been in the following year. Yes, that's right.

Q. You referred to studies you made that reflected these numbers?

A. We made numbers of studies relating to jet fleets.

Q. Did I understand your testimony—I will tell you what my understanding was—tell me if I am correct or not—I understood you testified that the numbers which you had in mind in the fall of 1955 were reflected in studies you then made. Did I misunderstand you or not?

A. Well, there were many studies made, both before, during and after Hughes placed specific orders for airplanes.

Q. Is that your answer? I don't want to be charged with interrupting you.

A. I think that's responsive.

Mr. Hayes: May we have the question repeated to the witness?

[Tr. 689] The Special Master: I think it was in the fall of 1955 were your recommendations as to specific numbers of planes reflected in studies. That would mean studies then in existence.

The Witness: Well, certainly not in all studies.

Some of the studies, to explain, were aimed at determining which the better plane was, Douglas versus Boeing versus others, and in some of those studies which would take various fleet sizes, sometimes on direction from Hughes, sometimes we would decide what a reasonable size fleet would be and evaluate them on a comparative basis.

I am a little vague as to exactly the detail of studies made now at that particular point in time.

By Mr. Hayes:

Q. What I am trying to find out, Mr. Rummel—I will phrase it as simply as I can—as to whether in any studies

you or anyone working for you made in the fall of 1955 there was a recommendation by you as to how many Boeing airplanes of what types should be ordered.

A. Well, I'm sure that that was included, but I [Tr. 690] don't recall the specifics at the moment.

Some studies were—included as many as 25 131s, for example.

Q. Do you mean that you were recommending 25?

A. I would have to refer to the studies now to remember exactly and precisely what each of the studies may have said then.

Q. I am not asking you what studies you made, Mr. Rummel.

I am trying to find out what recommendations you made. You testified previously that your recommendations were contained in studies then made.

A. I didn't intend to limit the answer to—in order to suggest that the only recommendations that I made were in studies. Many of these things were handled verbally, Mr. Hayes.

Q. May I proceed?

A. I am sorry, if I interrupted you.

Q. I will start over again.

You have testified that you made recommendations as to numbers of planes, both to Toolco and to TWA superiors.

You have also testified that your recommendations were contained in studies?

[Tr. 691] The Special Master: Reflected.

Q. Reflected in the studies.

Whatever the studies were, can you now identify for us any study made by you which contained a recommendation

as to the number of Boeing jets that TWA should then order?

Mr. Sonnett: For an initial order or for the entire fleet contemplated? That is where the problem is.

Mr. Hayes: There is no problem at all. I press my question, Mr. Brownell.

Mr. Sonnett: Answer it both ways if it is necessary to answer it.

A. Perhaps this will help. I enthusiastically recommended that we proceed with the Boeing orders. First, the order for nine and then the order for the larger numbers. I recommended we proceed with the order of 18. I do not remember being satisfied with the—at the time with the orders for the 131s. I kept pressing for more airplanes and better deliveries.

Q. This was all in the fall of 1955?

A. Well, and up to the time the orders were actually placed.

[Tr. 692] Q. But I am trying to find out what the fact was in the fall of 1955. That is the time you fix in your prepared testimony.

My question is directed to that, Mr. Rummel.

Is that clear to you?

Mr. Sonnett: It is clear to him. I think he answered that.

Mr. Hayes: He answered with what happened in 1956. I want to find out about 1955. The fall.

Mr. Sonnett: Maybe if the Master asked him how these numbers were arrived at and when we might get a simple declaratory answer that would eliminate all the problems that you seem to have.

The Special Master: In the fall of 1955, what studies by you or under your direction that you can

recall recommended specific numbers of Boeing planes be ordered? Do you remember any studies that existed in the fall of 1955 which contained your recommendation as to a specific number of Boeing planes be ordered?

The Witness: I don't recall a specific study, Mr. Brownell.

Mr. Hayes: Maybe instead of wasting a lot of time on this, I will ask the witness to produce [Tr. 693] any studies he made in the fall of 1955 which contained recommendations as to specific numbers of airplanes that should be acquired. That might be the easiest way to do this.

The Special Master: I think that is a good idea.

By Mr. Hayes:

Q. Would you do so, Mr. Rummel?

Mr. Sonnett: We will take a look and see what there is and I will let you know, Mr. Hayes. I assume you want whatever studies the witness has in mind

Mr. Hayes: Which contain recommendations as to specific numbers of planes.

Mr. Sonnett: We will find the studies that the witness has in mind and you can decide whether you want them or not.

The Special Master: Very good.

The Witness: I—

Q. Go ahead.

A. No, I was only going to try to explain that the—during these conversations with Hughes, I was attempting to persuade Hughes to move into Boeings rather than continue with these other investigations of designs [Tr. 694] which could only put off the day that it could receive airplanes,

and I was trying to urge that we move in with both feet with substantial quantities to protect our competitive position.

Q. Did you make those same recommendations to Mr. Collings and Mr. Damon?

A. Yes.

Q. You refer in that same sentence of your prepared testimony to a fleet of medium to long-range aircraft sufficient to meet TWA's initial needs for its domestic and international routes.

A. Excuse me.

To perhaps further clarify it, to go back to the early question, what I specifically recommended to Collings and Damon was that if they had the opportunity to try to persuade Hughes to the same kind of thinking that I had come to.

Excuse me, Mr. Hayes, for that insertion, but—could the question now be read?

Q. I don't think I finished the question, Mr. Rummel.

A. Oh, I see. I had my mind on this other thing.

Q. In your testimony you referred to the ordering of medium and long-range aircraft sufficient to meet TWA's [Tr. 695] initial needs for its domestic and international routes.

Will you please tell us what facts you knew in 1955 which indicated what would be TWA's initial needs for its domestic and international routes?

A. Well, we knew that Pan American and American were very actively negotiating with Boeing and Douglas.

We became satisfied, at least I did, that the placing of orders by them with one or the other or possibly both manufacturers was very imminent as the fall approached.

We later knew that orders, in fact, had been placed, not only by those airlines, but others.

It was a fact that we believed that the jets would prove to be a superior form of transportation, far out surpassing the pistons in appeal and in public receptiveness.

We knew that early delivery positions were in demand, that is, all airlines—at least all of the major airlines—viewed competition pretty much as we did, that is, that it was important to get a leg up on or at least be equal to the competitor.

We knew primarily from Boeing contacts that Boeing was ready to receive orders, or agreements which would lead to specific orders.

[Tr. 696] We also were familiar with the Boeing designs, and to a lesser degree with the Douglas designs.

We also knew how successful the early Comet operations had been with respect to public response.

That's all I think of.

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[Tr. 704] * * * By Mr. Hayes:

Q. Were there any studies made as to initial needs of TWA for aircraft in the period of, I think you said 1958 to 1959 when the jets would first go into service?

The Special Master: Yes or no.

A. Yes.

Q. Pardon?

A. Yes.

Q. Who made such studies?

A. Numbers of people were involved in our equipment studies.

Q. These are studies that were made in the fall of 1955, now?

A. Some of them, yes.

Q. I am talking about those that were made in the fall of 1955, Mr. Rummel.

Who made those studies that were made in the fall of 1955?

A. People within my department and others, pretty much [Tr. 705] as I explained heretofore.

Q. You better tell us who the others were who made these studies.

A. There were many, many studies made throughout this period. And by "studies," I mean investigations. Some were formalized and presented in formal letters; some were recorded only in handwritten notes and the like. We investigated things frequently at Mr. Hughes' request and investigated things that occurred to us we should investigate, and specifically, exactly who participated in all these things at any specific point in time, I can't testify to.

Q. Does that mean that you cannot now identify who outside of your department made studies of initial needs in the fall of 1955? Is that what your testimony is?

A. Well, it is not exactly what I said, but that, in substance, would be right.

Q. Is there anything wrong about what I said?

A. Well, if I heard it correctly, I don't believe there was anything wrong with it. It just wasn't what I said.

Mr. Sonnett: Is the question concerned, Counsel, with employees of TWA? Are you including the Hughes Tool Company people, as I assumed you were, [Tr. 706] but it is not clear from the question. I am sure the witness must have construed your question in some fashion.

The Witness: I construed it as—I am sorry.

By Mr. Hayes:

Q. How did you construe the question when you answered it, Mr. Rummel?

A. TWA.

Mr. Hayes: I believe here, too, Mr. Brownell, it would be helpful if any such studies made in the fall of 1955 were produced.

The Special Master: Did you rely on any specific studies of this category in preparation of this statement in your prepared testimony?

The Witness: No, not specific studies.

The Special Master: I don't see how he could produce any, then, if he did not rely on them in the preparation of this testimony.

Mr. Hayes: He has testified, Mr. Brownell, that they have been made and here I am—

The Special Master: He gave a very broad definition, as I recall it, of what he meant by "studies," and included oral conversations and con- [Tr. 707] ference material which would not be susceptible, I don't believe, to production of any paper.

Mr. Hayes: Obviously, oral statements would not be, but anything that is in writing is susceptible of production.

I have a right, I submit, to cross-examine him as to what the accuracy of this statement made by him as to—it's a form of opinion, apparently—what TWA should have done in 1955, and if such studies are extant, I submit they should be produced by way of testing—

The Special Master: To the extent that you relied on them in the preparation of this statement, I will ask you to produce formal reports.

Mr. Hayes: Mr. Brownell, if I may, that is asking him to produce nothing, because he has just testified that he did not rely on any. I am asking for any studies that exist, whether he relied on them in the preparation of this report or not.

Mr. Sonnett: Now—

Mr. Hayes: Just a second, Mr. Sonnett.

Mr. Sonnett: I am sorry. I thought you had finished. Please go ahead.

Mr. Hayes: Here he has made a statement. [Tr. 708] Am I supposed to be bound by this statement, without referring to contemporary records that may have been made? If they exist, they might refute this statement.

I submit I have a right to examine them and ask the witness to explain them, if they differ from this statement. They are plaintiff's records we are asking for. They are records which, according to this witness studies were reduced to writing, were made. I am not asking for anything oral. I am asking for what is susceptible of production, written studies.

Otherwise, you are saying in effect that I must accept, without reference to contemporaneous documents, the statement the witness makes.

The Special Master: To the extent that you relied on them in the preparation of this statement, I will ask you to produce them.

The Witness: Yes, sir.

Mr. Sonnett: I was about to point out, Mr. Brownell, as counsel has overlooked apparently, that one of the documents relied on was annexed. It is Annex C to the witness' testimony. And that has been produced, and that is the kind of study I gather the

witness has been talking about, where there was [Tr. 709] something formal.

However, we have noted your direction and we will comply with it.

Mr. Hayes: I am sorry to seem to be stubborn on this, but I press for a direction to produce any studies that are extant, whether he relied on them in connection with the preparation of this statement or not. They may not have been studies that he made. They may have been studies made by others.

If the plaintiff has them, I submit they should be produced, Mr. Brownell.

Mr. Sonnett: Whatever we had was produced when you were entitled to pure discovery years ago. We produced thousands of documents from Kansas City and every place else. Why don't you look in your files. Maybe you got them, if there are any.

Mr. Hayes: We find none. And I respectfully submit that the direction should be broader than the one you just gave the witness.

The Special Master: To the extent that it is broader than that, I will overrule the request.

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[Tr. 714] • • • By Mr. Hayes:

Q. The notes I have are that in response—in a fairly long response to a question of mine you spoke about the family concept and what would have been ordered, if your recommendations had been followed, and at that point added "others disagreed with my recommendations." I did not interrupt you at the time, because you continued speaking about medium range planes at the time, which were not satisfied by Boeing.

My question now is who disagreed with what in your recommendations?

The Witness: Is it fair to ask that that part of my previous statement be read back? I don't remember exactly when I made that comment.

Mr. Hayes: Do you now recall that anyone in TWA or Hughes disagreed with your recommendations in the fall of 1955 as to what should be ordered?

The Witness: Well, I guess the—to try to answer your question, I am sure that not everyone agreed with me on everything at any time. I don't specifically recall I used that phrase.

[Tr. 715] The Special Master: This is without reference to your previous statement. It is a question on its own.

The Witness: Oh, I'm sorry.

Not really, no. There certainly was discussion back and forth on should we buy Boeings versus some other type airplane, for example.

And at one point in time I think Ralph Damon pointed out that Boeing had not always built the world's best commercial planes, but he did not press the point at all in terms of conclusions arrived at, did not make it a point of disagreeing.

Q. Was Mr. Damon of a different opinion from yourself with respect to whether Boeings or Douglas should be ordered?

A. I don't recall his expressing such a view.

Q. Did others in TWA express a preference for jet-prop planes as distinguished from pure jets?

A. I certainly don't remember any such preference being expressed in the fall of 1955.

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[Tr. 718] Q. Did TWA acquire turbo-prop airplanes?

A. No.

Q. Directing your attention to exactly the same sentence in your prepared statement, Mr. Rummel, what do you mean by the language: "TWA should have made definite commitments."

I am particularly concerned about the verbs, "should have made."

A. What I mean is that airplanes should have been ordered at least by the time that Pan American and American ordered their airplanes.

Q. Did you write this sentence, by the way?

A. My memory on this is the same as on the others that you inquired into earlier. I can't exactly recall how each and every sentence was composed, but it is a sentence which I certainly agree with. Maybe I did. I just don't remember.

Q. What I am trying to find out is whether the use of the verb "should have made" is intended to mean as ought to have made.

A. I'm saying that airplanes should have been ordered when it was timely to order them in order to obtain the best delivery position.

Q. I understand that. I am trying to find out [Tr. 719] the exact meaning of the words "should have made." Do you mean ought to have made?

A. I don't see any difference.

Q. There was an obligation on TWA, is that right?

Mr. Sonnett: I object to that. It is calling for a legal conclusion.

The Special Master: Sustained.

Mr. Hayes: I have looked up the words "should" and "ought" in the dictionary and find that they

imply a moral obligation, Mr. Brownell, and I want to ask the witness if that's what he means by his testimony, that there was a moral obligation on TWA to have made such definite commitments.

The Witness: These words to me mean merely what I said they meant. That aircraft should have been ordered at that time when other people were ordering them on a contemporary basis to obtain good delivery positions for the company.

By Mr. Hayes:

Q. Do you mean by that that all airlines have an obligation to someone or other to place all their orders at the same time with aircraft manufacturers?

A. I didn't say that, Mr. Hayes.

[Tr. 720] Q. What do you mean, then?

A. I really am at a loss to put it any more clearly than I have.

Q. Let me ask you if you are suggesting that TWA had an obligation to somebody to place orders in the fall of 1955.

A. Well, we certainly had route franchises and we had an obligation to operate those routes ably and well and proficiently under the granting of the franchises.

Now, you can interpret that in many ways.

Q. As an obligation to the prospective customers?

A. I don't say that it was an obligation perhaps in the sense you mean it. I'm not sure what you mean.

Q. I am trying to find out what you mean, Mr. Rummel.

A. I've tried to explain that. I just don't know how to add to it. It is merely a statement in my opinion TWA or someone should have placed orders for jets for TWA at a time when it was timely to do so so we would have good competitive delivery positions initially. That's what I mean.

Q. That's all you mean by it?

A. That's all I mean, yes.

Q. On the basis of what considerations do you [Tr. 721] conclude in this testimony of yours that TWA should have made the definite commitments at the same time somebody else was making commitments?

Mr. Sonnett: I object to the question as repetitive.

The Special Master: Sustained.

Q. What considerations entered into your mind in concluding that TWA should have made definite commitments in the fall of 1955, if any, other than the fact that other airlines had been placing orders?

Mr. Sonnett: Same objection.

Mr. Hayes: I have not asked this question before, Mr. Brownell. I am asking—

The Special Master: You covered it for the whole paragraph, Mr. Hayes.

Mr. Hayes: I am sorry, I have not. I have not asked him for considerations other than those he has already testified to. Maybe there are none.

The Special Master: That is a different question.

Mr. Hayes: That is the question I asked him.

The Special Master: Have you any [Tr. 722] additional to which you have not already testified?

The Witness: None come to mind, Mr. Brownell.

By Mr. Hayes:

Q. Did you have in mind in writing this statement or adopting it TWA's financial ability to place orders at that time?

A. Not particularly.

Q. You did not consider that in connection with this sentence?

A. Not particularly.

Q. What do you mean by not particularly? Either you did or you did not, it seems to me.

A. I mean I am not unconscious of those considerations, but I didn't give it particular attention.

Q. Did you give financial ability of TWA any weight at all in the preparation of this sentence?

A. This is an area in which I personally am not especially proficient. It was not my intention to get into that.

Q. Does that mean that you did not give weight to financial ability of TWA?

A. Not particularly.

Q. Does "not particularly" mean anything other than [Tr. 723] no?

Mr. Sonnett: I object to that.

The Special Master: Sustained.

Mr. Hayes: I don't know.

The Special Master: Sustained.

Mr. Hayes: It seems to me I have a right to find out what the witness means by an answer when he says "not particularly." What does he mean? Does he mean no or something else?

The Special Master: Taken in connection with his prior testimony it is clear to me what he means.

Mr. Hayes: I am afraid it is not clear to me.

By Mr. Hayes:

Q. Did you generally take TWA's financial ability to order the planes into consideration in the preparation of this statement?

A. Not really.

Q. Did you know what TWA's financial condition was in the fall of 1955?

Mr. Sonnett: I object to it as irrelevant. The witness has not been offered as a witness on the question of whether or not TWA could have financed [Tr. 724] the planes. There is nothing in his direct on this subject. The cross is wholly outside the scope of the direct.

Mr. Hayes: Mr. Brownell, here is a witness who is put forward as an expert and uses words of obligation that TWA should have made definite commitments. That is the language.

The Special Master: The question, as I recall it, was did you know what TWA's financial condition was in the fall of 1955.

If you do not know it, say so. Or if you knew it in part, say so.

The Witness: Well, at the time I must have known it in part, Mr. Brownell. I don't recall exactly now what the—what it was.

Q. You have no present recollection, is that correct?

A. In 1955?

Q. Of TWA's financial condition in the fall of 1955.

A. No.

Q. You have mentioned that you made your recommendations from time to time to Mr. Hughes.

Did you make any of those recommendations to [Tr. 725] Mr. Hughes in writing?

A. I don't believe so.

Q. Did you make any recommendations to anyone in Toolco in writing?

Mr. Sonnett: On this subject?

Mr. Hayes: That's right.

The Special Master: With reference to the placing of orders for jet aircraft?

Mr. Hayes: That's right. Certainly.

A. I don't recall any.

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[Tr. 733] Q. On page 7 of your statement, the paragraph which begins on that page, the second sentence of that paragraph, you state:

> "By the fall of 1955, various air carriers had submitted firm orders for the acquisition of medium to long range jet aircraft and the anticipated effect upon TWA's competitive position made it important for TWA to do likewise."

What precisely do you mean by "firm orders"?

A. I mean that orders had been announced by the manufacturers and the airlines, and that as a result of this delivery positions were tied up and other salient factors determined.

Q. By "firm orders," do you mean executed contracts or letters of intent or are you not sure which you mean?

A. The orders referred to as we then knew it were firm orders subject only to the usual things of working out specification details and possibly some other factors.

Q. You mean firm orders other than letters of intent?

A. Well, I can't testify what the pieces of paper were called that were actually signed by the different airlines. For all practical purposes these were orders [Tr. 734] and they remained orders.

Q. Did you see the documents? You did not, did you?

A. Not at that time.

Q. Have you seen them since?

A. I think I have come to see possibly one or two of them.

Q. Which ones have you come to see?

A. Well, I am groping now but as I recall it I did at one point in time, see a Pan American document through our attorneys.

Q. Covering what aircraft?

A. I can't be that specific now but we made it a practice to review just as many such documents as we could get ahold of.

Q. Do you recall the date of the Pan American document?

A. No, sir, I do not.

Q. By the way, there was a question I intended to ask when we came back from lunch and I forgot.

We have been talking about 331s and 131s, about the 100 and 300 series. Is the 331—is there some question in your mind?

A. It sounded like you said three things. There [Tr. 735] were two, the 100 series and the 300 series.

Q. That is right.

A. All right, I'm sorry.

Q. Was the 331, the 300 series plane made to TWA's configuration?

A. Well, basically it was a—configured as a 300, but it included compliance with TWA's requirements.

Q. That is what I intended my question to be. It was a plane of the 300 series, was it not, made for TWA's requirements?

A. Well, there were features included which made it comply with our requirements. Basically it was a Boeing design, is what I am trying to say.

Q. I know that. I don't have any question in my mind it is a Boeing design.

Assuming it to be a Boeing design, is what I stated, correct, that it was TWA's version, so to speak, of the Series 300?

A. Yes, sir, and I testified previously to that, I believe.

Q. I don't think you did. I don't think I asked the question.

Was the 131 the TWA version of the Series 100 of Boeing?

[Tr. 736] A. Yes.

Q. Were 331s as such ordered by any other airline or did each one have its own separate number based on the 300 Series?

A. Well, as I indicated before, Mr. Hayes, each customer was assigned a model number by Boeing.

Q. So the only 331s were those built to TWA requirements?

A. I believe that is correct.

Q. The same is true of the 131s, they were the only 100 series built to TWA requirements?

A. I believe that is correct.

Q. I am sorry. I meant to ask that when we came back from lunch. It came into my mind.

What was the source of your information as to these firm orders that were placed in the fall of 1955 by other airlines?

A. Well, I had assigned to a member of my staff the job of compiling information of this type and keeping me and others advised.

So he was—he, in his efforts, was my primary source although I of course was also advised by manufacturers' representatives and others from time to time in this respect.

[Tr. 737] Q. Do you know what sources the member of your staff to whom you assigned the task used in order to get the information?

A. He used—I don't know exactly. No, I didn't indicate —I believe he used announcements, publications that then existed, the best information that he could find generally.

Q. You mean trade papers?

A. Probably, to some extent.

Q. What trade papers would carry information of this kind?

A. Practically all of them.

Q. You said trade papers were used to some extent. What else was used to get the information?

A. Oh, things like Aviation Daily, which was a daily newsletter.

Just what all he used in detail, I can't say after all this time.

We had a standing practice of pointing information in his direction that came to each of us, that is, those in our department and he used that plus other information to compile the results.

Q. The reports that would appear in Aviation Daily or other trade papers were announcements either by air-[Tr. 7381] lines that they had placed orders or by the manufacturers that orders had been placed?

A. Generally, yes.

Q. Any other sources of information that you or the man on your staff had?

A. I don't think I can add to what I already said.

Q. I am sorry.

A. I don't think I can add anything to what I have already explained.

Q. With respect to the Boeings, did the Boeing Company supply to you copies of the orders that were submitted by other airlines?

A. No.

Q. Did any aircraft manufacturer supply to you copies of orders that had been placed by other airlines?

A. No, I can assure you that was not their practice.

Q. In that same sentence to which I have directed your attention, Mr. Rummel, what is meant by the words "the anticipated effect upon TWA's competitive position"?

A. Well, here again, I am referring to the same kind of thing I testified to heretofore with respect to development of our thoughts regarding equipment.

Q. Is this sentence to which I have directed your [Tr. 739] attention an opinion by you?

A. Well, with respect to the orders, we believed we had factual information and good information.

As to the effect of those orders on the advisability of placing orders for TWA, I'd say as far as my views were concerned, it was a studied opinion.

Q. But it was an opinion, however well studied?

A. With respect to what we should then do?

Q. With respect to the anticipated effect.

A. Yes.

Q. That was an opinion you held in 1955, the fall of 1955, is that correct?

A. Yes.

Q. Did you base that 1955 opinion on anything other than what you have already testified to?

A. Nothing more occurs to me.

Q. When you speak of the anticipated effect upon TWA's competitive position, are you referring solely to your opinion as to the anticipated effect?

A. Well, not necessarily.

Q. What does that mean?

A. Well, it means that people generally recognized that if TWA would operate any length of time without being competitive, it would be in difficulty.

[Tr. 740] Q. Did any others in TWA in the fall of 1955 express to you the same opinion you held?

A. Yes.

Q. Who were they?

A. Mr. Cocke, for example.

Q. Who else?

A. I must say I don't recall finding any great disagreement on the advisability of moving into jets or being competitive.

Q. The question was who else in TWA expressed to you an opinion similar to the one you then held as to the anticipated effect upon TWA. You have identified one, Mr. Cocke.

Is there anyone else?

A. I'm sure Mr. Collings recognized the advisability of our being fully competitive, Mr. Rourke, Mr. Fannon.

I can't think of anybody who didn't.

Q. Did anybody in Toolco express a similar opinion to you?

A. Well, I think it was the actual—well, the answer is yes.

Q. Who in Toolco?

A. I'm certain Mr. Hughes felt it was important that we move once the others had moved.

[Tr. 741] Q. He so stated to you?

A. That's certainly the impression he left me, yes.

Q. Did he state it to you?

A. If you are asking if I remember word for word what he said, I do not, but I'm certain that's what he—what was implied, he said. Maybe I don't remember the words but, yes, that's what he said.

Q. Who else in Toolco?

A. I certainly had the impression that Mr. Cook felt we should be moving ahead. I don't remember that clearly

whether he categorically said we should move at any particular time.

Q. Anybody else in Tooloo?

A. I don't recall any specific people.

Q. Tell me if I correctly understand your testimony, Mr. Rummel.

I understand that each of these people you have identified said to you in substance that TWA should proceed to the acquisition of jet aircraft because it was important that TWA maintain its competitive position in the industry.

A. In essence, yes.

Q. Is there anything else they said that was more [Tr. 742] specific than that?

A. I don't recall anything right now.

Q. Did any one of them mention the number of aircraft that should be ordered?

A. Well, I'm sure numbers were kicked around, but I don't recall the specifics on that.

Q. Can you remember now any statement by any one of these people whose names you have given us with respect to the number of aircraft the person believed should be ordered?

The Special Master: In the fall of 1955?

Mr. Hayes: That's right. In the fall of 1955.

A. Mr. Hughes wound up being quite definite as to what should be ordered.

Q. What do you mean when you say wound up being definite? You mean when he placed the orders?

A. No, during discussions we targeted as I explained this morning, certain numbers of airplanes. While I don't recall exactly what transpired, numbers came into being as I best recall it, during the fall of that year.

Q. Do you remember the numbers?

A. They weren't final numbers of course until the [Tr. 743] order was placed.

Well, I've already testified to my best ability this morning in that respect.

Q. Aside from Mr. Hughes, did any other of the persons you mentioned, specify an opinion or state an opinion with respect to the number of aircraft that should be ordered?

A. This is during the fall of 1955?

Q. That is right.

A. I'm quite sure they expressed concurrence and did not disagree on the numbers. I don't recall any different numbers being expressed by these people at that time.

Q. Expressed concurrence with what numbers?

A. The numbers that were being kicked around.

Q. You do not recall those numbers?

A. Well, the number 18 comes to mind, and I am not sure of the numbers on the—as I said before on the 131s.

I remember being very dissatisfied with the number 8 and the number 9.

I am confident that these studies will show larger numbers of that type airplane.

Q. Do I understand your testimony to be that in the fall of 1955 some one or more of these people other than [Tr. 744] Mr. Hughes expressed the opinion to you that TWA should order eighteen 331s and some number of 131s?

Mr. Sonnett: I object to the form of the question. It misstates the testimony. The witness has not testified to any conversation with anybody to the effect that TWA should order anything. Hughes Tool Company, Mr. Hughes was doing that.

Mr. Hayes: The statement talks about TWA should have placed the orders.

Mr. Sonnett: That is a different thing.

Mr. Hayes: That is the statement.

Mr. Sonnett: That is a different thing entirely.

Mr. Hayes: I will withdraw the question and I will try another.

* * * * *

[Tr. 752] * * * Q. Are orders that airlines place for aircraft some- [Tr. 753] times cancelled?

A. Are they sometimes cancelled?

Q. Yes.

A. There have been such cases.

Q. Are they sometimes reduced?

A. There have been such cases.

Q. Is this uncommon in the aircraft industry?

A. It is more uncommon than common in my knowledge, yes.

Q. TWA, itself, has reduced orders, has it not, after having placed them?

A. Do you have reference to any particular time period or do you mean during the time I was with the company?

Q. Since the voting trust.

A. Since the voting trust?

Q. Right.

A. Since it was established?

Q. That is right.

A. Yes. We adjusted an order.

Q. That is right.

A. In other words, we cancelled one type and added another.

Q. As of 1955, what facts did you have which led you [Tr. 754] to believe that the orders placed by other airlines would be fulfilled in full?

Mr. Sonnett: In addition, of course, to whatever he has testified to on the subject to date.

The Special Master: That is understood.

A. I certainly had no reason that I can recall now to believe that they wouldn't have been fulfilled.

Q. You just assumed that they would be fulfilled in full, is that correct?

A. Well, it was my conviction they were entered into seriously with the intent that they should be fulfilled. I knew of no reason why to believe that would not be the case in the fall of 1955.

Q. In this paragraph as to which I am directing your attention, you refer to Annex C.

A. Yes.

Q. The second and third pages of Annex C list on the top of each page "Firm turbojet transport orders" and "Firm turboprop transport orders."

Do you see that, Mr. Rummel?

A. Yes.

Q. Is it your testimony that each of those were final contracts and not letters of intent?

A. I did not so testify.

[Tr. 755] Q. I am asking you if this is your testimony.

A. Oh, I thought you asked if I had so testified.

Q. No.

A. No.

Q. That is not your testimony?

A. The final contracts?

Q. That is right.

A. No, I didn't say they were the final contracts.

Q. No, no. I did not say you did. I am asking you now if you are saying that these represent contracts, final contracts rather than letters of intent.

A. I said they were firm orders, and I will tell you now that they were not all final contracts.

Q. Do you know when the final contracts were entered into in any case?

A. Somewhat vaguely.

Q. Can you identify any of them?

A. I guess I was thinking of my recollection of the entering into of agreements with Boeing which we then—and Douglas, which we then believed to be firm and which, in fact, turned out to be firm.

The dates on which so-called final—meaning the last detail contracts were signed, I don't know.

Mr. Hayes: Could I have the first part of [Tr. 756] that answer read?

(The record was read.)

Q. These agreements with Boeing and Douglas which you then believed to be firm and which you added turned out to be firm, were what, letters of intent or not?

A. I am pretty sure I tried to answer that one earlier and I said I wasn't sure what the name of the papers were than ran between the parties at that time.

Q. They might be letters of intent, so far as you know now; is that it?

A. Well, depending on what is meant by letters of intent. I am not that clear. They were binding agreements, as I understood them, contingent on things like agreement on specification.

Q. You have seen letters of intent for the ordering of aircraft, have you not?

A. Oh, certainly.

Q. Do they ever contain provisions that unless the final contract is entered into by a certain date there is no binding force to the document?

A. Do they ever?

Q. Yes.

A. Yes.

Q. Do you know whether or not the agreements that you [Tr. 757] refer to in pages 2 and 3 of Annex C were that type of agreement?

A. Not exactly, no. I might say it was pretty much a buyer's market.

Mr. Hayes: I move to strike the voluntary statement of the witness.

Mr. Sonnett: I second the motion. You will get through sooner if you do not volunteer.

The Witness: I am sorry.

The Special Master: On this happy occasion on which counsel agree so enthusiastically, I so rule.

By Mr. Hayes:

Q. I direct your attention to the paragraph which begins about a third of the way down page 9, Mr. Rummel.

Correction was made in your prepared testimony at the beginning of hearings so that the second sentence now reads:

> "Early in 1959, I was informed by Leonard Schwartz and Raymond Cook of Toolco that the number of jet aircraft TWA was to receive had been reduced."

First of all, who was Leonard Schwartz?

A. At that time, he was an officer of the Hughes Tool Company, I believe.

Q. Do you recall what office he held?

[Tr. 758] A. Job title? No, sir, I don't.

Q. Had he been with one of the aircraft manufacturers before that?

A. Yes, sir.

Q. With whom?

A. Lockheed.

Q. What happened? Did he later go to some other employment?

A. After Hughes?

Q. Yes.

A. Yes.

Q. Where?

A. I think it was Kaiser Industries International.

Q. How long was he with Hughes Tool Company, do you recall?

A. Not precisely.

Q. Do you recall where this information was given you by Mr. Schwartz and Mr. Cook?

A. I talked to Leonard by phone and then later met at the Waldorf Astoria where it was discussed.

Q. Met with whom, Mr. Schwartz?

A. Len Schwartz. There is another man from Hughes Tool, I believe, and I am quite certain that Raymond Cook was there.

[Tr. 759] Q. Did you get this information from Mr. Schwartz during the course of the telephone call?

A. It had been mentioned by phone, as I recall it. We met with Leonard at the Waldorf Astoria, as I said, and it was reviewed again and discussed in some greater depth.

Q. You met also with Mr. Cook and some other Toolco person at the Waldorf; is that what you testified to?

A. As I—I was in touch with Mr. Cook at this time. As I recall it, Mr. Cook was present, yes.

Q. And some other person from Toolco?

A. I am quite sure there was another chap from the Toolco there.

Q. Can you identify him?

A. I am—not completely, sir.

Q. What, precisely, did Mr. Schwartz or Mr. Cook or the two of them together give you in connection with the reduction of the number of aircraft?

A. It was indicated that the need existed for reducing the order from 30 to 20 Convairs for TWA and from 18 to 12 331s for TWA.

Q. You received both those items of information in the same meeting; is that correct?

A. My recollection is that both were discussed in [Tr. 760] that meeting, yes.

Q. Was any reason given for the reduction, Mr. Rummel?

A. Several reasons.

Q. Try, if you can, to tell us who said what, if you can possibly do so.

A. Well, as I recall it, Leonard did most of the talking and indicated financial circumstances made it advisable to reduce the orders, and that additionally he held the view that they weren't needed.

Q. Mr. Schwartz held the view?

A. That's my recollection, yes.

Q. Anything else that was said?

A. Well, lots was said, including mine and my associates' objections, but I think that's in substance what was said.

Q. What associates of yours were with you?

A. Mr. Rourke was with me.

Q. Anybody else?

A. I don't recall anyone other than Mr. Rourke being with me.

Q. One or the other of them told you that financial circumstances required the reduction; is that correct?

A. That's my recollection, yes.

[Tr. 761] Q. What was said in that connection?

A. Well, as I recall it, Leonard pointed out the tremendous sums that were required—they were big—in acquiring the jets and that the need existed for cutting the commitment down.

Q. Whose financial circumstances was he talking about?

A. Well, I took it he was talking about the Hughes Tool.

Q. Did he say so?

A. Well, it was a Hughes Tool order, and I think he probably did specifically say so, but again, I can't remember every word that was stated.

Q. Did he mention TWA's financial circumstances?

A. It could have been, but I don't recall him saying that, no.

[Tr. 762] Q. What did you say in response to that reason by Mr. Schwartz?

A. Well, the main thrust of my comments was that TWA had use for the entire fleet and that the fleet should be preserved.

Q. Did you tell him that TWA could buy the planes itself?

A. I did not.

Q. Do you know whether TWA at that time could have bought the planes itself?

A. No.

Q. Did Mr. Schwartz say anything to you about any prior conversations on the subject of reduction with anybody else in TWA?

A. I am not entirely sure at that point in time.

Q. I don't know what precisely you mean by that, you are not entirely sure at that point in time. I am talking about this particular conversation at the Waldorf.

A. I don't recall.

Q. You have no recollection.

A. Not that precisely, no.

Q. What did Mr. Schwartz say with respect to the view he expressed that the number of planes ordered [Tr. 763] would not be needed by TWA? What did he say in that connection?

A. He seemed pessimistic with respect to the attractiveness of the jets. He expressed the view as I recall it that too many jets had been committed at large by the industry.

Q. He expressed the view that what?

A. Too many jets generally had been committed for by the industry.

Q. Did he say anything else?

A. He thought—I believe he said that 20 Convairs and 12 Boeings would be sufficient for TWA's needs. This I disagreed with as I said.

Q. Is there anything else he said?

A. I think that was the essence of what he said.

Q. Did he mention that he had discussed his view of TWA's needs with anybody else in TWA?

A. I don't recall that being stated during that meeting.

Q. You mean you heard it stated at some other time?

A. Yes.

Q. By Mr. Schwartz?

A. Yes.

[Tr. 764] Q. When and where?

A. I can't be that specific.

Q. What did he state at the time on this other occasion?

A. Well, he made it known that he had talked to Mr. Thomas and Mr. Leslie and others.

Q. And? Did he say what they said?

A. I don't recall whether he did, no.

Q. Mr. Thomas at the time was the president?

A. Yes, that's right.

Q. And Mr. Leslie the financial vice-president?

A. That is right.

Q. But you don't recall that he reported to you as to what Mr. Thomas and Mr. Leslie said?

A. No, not specifically.

Q. What did you say with respect to the view expressed that TWA did not need all the planes that had been ordered?

A. I tried to persuade Mr. Schwartz and Mr. Cook then and on other occasions that we did need the planes, that we should receive them.

Q. What did Mr. Rourke say?

A. He held the same strong view that I did.

Q. Can you recall anything else that was said in [Tr. 765] the course of this conversation?

A. No, sir.

Q. You said you tried to persuade Mr. Schwartz and Mr. Cook on other occasions?

A. Yes.

Q. How many other occasions?

A. Well, I didn't count them. At every opportunity that presented itself virtually.

Q. How often? Can you give us any estimate?

A. No, Mr. Schwartz—no, I can't tell you exactly how how many times. They were in the area most of the time.

Q. Over what period of time did you state your objections?

A. Substantially I believe up to the time that deals were finally made for the disposal of the planes.

Q. In the fourth sentence in that same paragraph which begins on the fifth line, you state:

"However it"— that's TWA—"received only 12 Boeing 707-331 jet aircraft, not 18; the remaining six

Boeing 707-331 jet aircraft were diverted to Pan American . . ."

I am not reading the rest of the sentence because it has nothing to do with my question.

What do you mean by the expression "were di- [Tr. 766] verted to Pan American"?

A. I mean simply instead of TWA receiving them, they were delivered to Pan American.

Q. Do you know anything about the transaction by which they were diverted if I may take your word, to Pan American?

A. Well, at the time I was partly familiar with what was going on but I was not a party to the discussions with Pan American.

Q. Do you know whether others from TWA held a view that it was all right to divert six planes to Pan American?

A. It is possible that some of them did.

Q. What is your best recollection in that connection?

A. Well, my recollection is that both Mr. Leslie and Mr. Thomas were sympathetic to receiving some fewer planes.

Q. How many fewer?

A. I don't recall Mr. Leslie being quite that categorical. I believe on one occasion Mr. Thomas did indicate to me and I argued with him that he was content to wind up with 20 airplanes.

[Tr. 767] Q. Of the Convairs?

A. That I think was a little later than this. I don't think that occurred at this time.

Q. You are speaking of the Convairs?

A. Yes.

Q. I am talking about the six that went to Pan American.

A. I'm sorry.

Q. Did he say anything to you with respect to those six?

A. I don't recall him discussing specifically the six.

Q. Then you go on in that sentence and you say,

"These six 707 jets were not replaced until five 707-331Bs were leased in 1962 to 1963."

What is the difference between the 707-331 and the 707-331B?

A. The 331B is a somewhat more advanced airplane.

Q. In what sense is it a more advanced airplane?

A. It is a much later model equipped with fan rather than non-fan engine.

Q. What difference did it make in the operation of the airplane whether it was equipped with fan rather than non-fan jet engines?

[Tr. 768] A. Well, the principal operational difference is really whether it could be scheduled on somewhat longer flights, that is, the B model.

Q. Was it a more economical airplane to operate, the B?

A. It burned less fuel but it cost more to procure. I'm trying to remember—it probably was a little more economical.

Q. Was the introduction of the fan jet engine considered an improvement in the jets?

A. Yes.

Q. When was the development of the fan jet learned by the industry?

A. With respect to Boeing?

Q. With respect to anybody. The fan jet engine I am talking about.

A. For commercial use?

Q. That is right.

A. Again, I say when did we learn about—I guess you mean fan jets becoming available for use—

Q. Correct.

A. —rather than the technical possibility for feasibility, is that right?

Q. That is right.

[Tr. 769] A. I can't be entirely specific but I think it was around—probably around 1958, I believe. I'm not exactly sure right now.

Q. Who was the first manufacturer to announce the planes with the fan jet engines?

A. Boeing, I think. Yes, I'm quite sure it was Boeing.

Q. See if I can refresh your recollection. Was it Convair with the 990?

A. It could have been. I'm not sure of that exact date. It could have been. It wasn't as I recall it much difference between.

You asked what the—as to the airframe manufacturers date, I thought. Is that right?

Q. That is right.

A. Yes, all right.

Q. In your conversations with Mr. Thomas with respect to reduced number of planes, did he ever tell you that he would rather have a reduced number and wait for the improved plane with the fan jet?

A. I don't remember a specific referral to the fan jet as such. Except for that I think that view was expressed, yes.

Mr. Sonnett: Mr. Brownell, may I be per- [Tr. 770] mitted a one minute voir dire on the subject of Mr. Thomas? It will be no longer than a minute.

The Special Master: All right.

Mr. Sonnett: Did you ever have a conversation, Mr. Rummel, with Mr. Hughes about the extent of Mr. Thomas' authority to deal with jet aircraft on behalf of TWA or anybody else?

The Witness: Yes.

Mr. Hayes: Wait a second. First of all I object to my cross-examination being interfered with by plaintiff.

This witness has been put forward as their witness. I submit that I have the right to cross-examination and voir dire of their own witness to me is just utterly ridiculous. So I object—

Mr. Sonnett: I am trying to establish as you must know that Mr. Thomas had no authority whatsoever to deal with jet aircraft.

Mr. Hughes established it. Mr. Thomas knew and so does the witness and so does everybody else.

Mr. Hayes: I object to any questions addressed by plaintiff to its own witness when the witness is on cross-examination.

[Tr. 771] The Special Master: I will sustain this particular objection.

Mr. Hayes: I move to strike the answer already given.

Mr. Sonnett: Then I object to the form of the question with respect to Mr. Thomas because he is singling out a conversation. If he wants to get into conversations with Thomas, let's get the facts. Ask him whether he had a conversation with Thomas as to whether Thomas had any authority to do anything about jets.

Mr. Hayes: No comment. May we have the question to which objection is made. I have forgotten it.

(The question was read.)

By Mr. Hayes:

Q. Can you fix the time—

Mr. Sonnett: Are the questions with respect to Mr. Thomas designed to ask questions about Mr. Thomas as president of TWA or Mr. Thomas as an individual? It is quite important and this is why I wanted to conduct the voir dire.

I think we are entitled to know what counsel thinks he is establishing. Whether this was Thomas [Tr. 772] acting within the scope of his authority as president of TWA or not. That's the problem.

Mr. Hayes: No problem. Mr. Thomas was the president. I am asking about a conversation—he was this gentleman's superior and I am asking about his conversations.

Mr. Sonnett: No, Mr. Hughes was his superior in this area and also the superior of everybody else.

Mr. Hayes: I will overlook the gratuitous remarks. There is no point in Mr. Sonnett and I getting into discussion. We can brief those subjects.

Mr. Sonnett: I make an offer of proof, Mr. Special Master to the following effect. At least let me note for the record now and it can be developed on redirect.

When Mr. Thomas was hired as president of TWA it was an express term and provision of his employment, and he was hired by Mr. Howard Hughes, that Mr. Thomas was to have nothing to do with the procurement of aircraft of the financing of aircraft for TWA. Those were areas which were reserved by Mr. Hughes for himself.

[Tr. 773] My further offer of proof is that Mr. Hughes told that to this witness and that Mr. Thomas told that to this witness.

So that the entire line of examination designed to elicit statements of what Mr. Thomas may or may

not have said has nothing to do with the issues before the house.

Moreover, a further offer of proof and that is Mr. Leslie knew about these limitations of Mr. Thomas' authority from the outset.

The Special Master: The subject can be covered in redirect.

Mr. Hayes: Precisely.

What I am curious to know, however, is why if this was so important plaintiff now has to make an offer of proof and did not include it in the statement of its only factual witness.

The last question, if I recall correctly, was not answered.

The Special Master: I wonder if you would try to—

Mr. Hayes: I am going to rephrase it.

Q. At what time was it that Mr. Thomas did express the view to you that TWA would need a lesser [Tr. 774] number of aircraft than those ordered?

Mr. Sonnett: Just a moment. I object to the form of the question. If it purports to summarize the prior testimony it incorrectly summarizes it.

The Special Master: Sustained.

Q. What was it you said in answer to my question? Was it not that while Mr. Thomas did not refer to the fan jet engines, he did express the view that TWA would not need the number of planes that had been ordered? Was that your testimony, Mr. Rummel?

A. I don't recall saying it quite that way and I don't believe that was my testimony.

Q. What was your testimony in that regard?

Mr. Sonnett: I object to that question. Whatever the testimony was the record will show. If there is a question, I think counsel ought to put it.

Mr. Hayes: I have. I am trying to save time here but not going back to the record. That is my recollection of what the witness said.

The Special Master: He testified that is not his recollection.

Mr. Hayes: I know he did.

[Tr. 775] The Special Master: You are now asking?

Q. What is your recollection on this subject of the views expressed to you by Mr. Thomas with respect to the reduction of number of airplanes that had been ordered?

A. My recollection is that he expressed being content with fewer aircraft. However, this was some time after the time that I referred to in this paragraph.

Q. This was after the so-called diversion to Pan American of six 331s?

A. This was after the time of my discussions initially with Mr. Schwartz, and I believe Mr. Cook, I know Ray and I discussed this, that I referred to on page 9.

Q. Was it prior to the time that six 707-331s were diverted to Pan American?

A. I am not entirely sure of that.

Q. How best can you fix the time of this conversation with Mr. Thomas?

A. I'm quite sure, but I can't be positive of the timing. I believe it probably was around July or thereabouts.

[Tr. 776] Q. Of what year?

A. It may have been—oh, this same year.

Q. 1959?

A. Yes, I think so.

Q. Did he state to you in that conversation by what number he would be willing to have the number of aircraft reduced?

A. As I recall it, he indicated that—well, no, I don't think he put it that way.

Q. How did he put it? Tell us.

A. I believe he indicated that he was happy with 20 planes on the basis that the industry had all bought too many jets and in a year or two he could pick them up for a song.

The Special Master: I think the question was directed to Boeings.

The Witness: Oh, to Boeings?

Mr. Hayes: Yes.

The Witness: Oh, I don't recall Mr. Thomas with respect to the six Boeings—I must have been confusing the Boeings and the Convairs. I am sorry.

* * * * *

[Tr. 800] Q. That is the word you used. I want to know what you meant by it.

A. I have tried to explain it.

Q. I want to get specific and I repeat the question, Mr. Rummel:

By a timely basis or by sufficiently contemporaneous, did you mean in your prepared statement that the orders for TWA planes should be placed before the orders for Pan American and American planes?

A. I did not so assume in the prepared statement.

Q. What did you mean, is the question, by your testimony?

Mr. Williams: I object, on the ground that counsel is now arguing with the witness.

Mr. Hayes: This is not argument. This is asking what he means.

The Special Master: I will overrule that.

Did you mean earlier than October 1955?

The Witness: No, sir.

By Mr. Hayes:

Q. Did you mean earlier than the orders were placed for American and Pan American planes?

The Special Master: Which was?

Mr. Hayes: I don't know when it was.

[Tr. 801] The Special Master: I can't find it any place.

Mr. Hayes: I can't find it, either. We are suffering under the same disability, Mr. Brownell.

A. I meant at least by the time that the Pan Am order was placed and about the time that American's order was placed.

Q. You say at least by the time the Pan Am. And did you say about the same time as the American? Is that the phrase you used?

A. No later than that time.

Q. No later than American. Let me ask you if you mean by that language that the contracts for TWA planes should have been entered into on the same day as the contracts for the Pan American planes?

A. I don't think whether or not they were ordered on precisely the same day, in the sense of their having been signed the same day, is nearly as important as having come to agreement as to what the agreements would contain on

any—during the same period of time on a contemporaneous basis.

Once the agreement on delivery positions is achieved, the exact date of signing, one day versus the next, is not that important.

[Tr. 802] A manufacturer would not turn his back depending on one day more or less, in my opinion.

Q. Now you are transferring your testimony, as I understand it—and correct me if I am wrong, Mr. Rummel—from the actual orders to the agreement on delivery positions; is that correct?

A. I am not—it wasn't my intention to transfer anything.

Q. In the answer you just gave, you pointed out that the signing of the order was not important; what was important was the agreement on delivery positions. Is that correct or not?

A. That is not correct.

Q. What did you say, then?

A. I did not intend to say signing the order was not important.

The Special Master: As I remember it, he did not say it was important to have it signed on the same day—

Mr. Hayes: That is right.

The Special Master: (continuing)—as the other orders, but signed at a time which would enable the deliveries to be made at the same time as those deliveries of its competitors.

[Tr. 803] The Witness: That is essentially correct. The problem is that I am being asked to split a hair, which, as a practical matter, didn't exist.

By Mr. Hayes:

Q. I am asking you what you meant by your reference to what you said was important, to wit, the agreement on delivery positions. To what agreement do you refer or agreements?

A. I am talking about the manufacturer's agreement on delivery positions.

Q. Would that be a writing?

A. Would it be a writing?

Q. Right. Would it be evidenced by a writing in the normal course of business?

A. Well, certainly.

Q. It would. Is that called a contract or isn't it called a contract in the trade?

A. It can be called numbers of things.

Q. What are the numbers of things that it can be called, Mr. Rummel?

A. Well, yesterday we talked about letters of intent and what the precise initial form of agreements were. I didn't recall it specifically. Finally, these things are wrapped up in a contract.

[Tr. 804] Q. So it would be correct or not to say that by the agreement on delivery positions, you mean a writing which would be either a letter of intent or a formal contract?

A. I am speaking about agreements on delivery positions—

Q. So am I.

A. (continuing)—that were binding and understood between the manufacturer and the airline and reflected in some sort of writing.

Q. Right. And I asked you what kind of writing are they known by, and you said all kinds. I asked you to name

them and your answer was letters of intent or formal contracts.

Now, my question is by "agreements on delivery positions, binding agreements on delivery positions," to use your phrase, are you referring either to letters of intent or to formal contracts?

A. I am referring to those agreements which were reflected by the announcements that orders had been placed.

Q. Would they be agreements other than letters of intent or formal contracts?

A. I wouldn't think so, but I don't know exactly the precise form of agreements that existed between the other airlines and Boeing.

[Tr. 805] Q. Can you think of any other form of agreement that was entered into between Boeing and any airlines with respect to delivery positions that took a form other than a letter of intent or a formal contract?

A. Well, there could have been exchanges of wires, there could have been letters of agreement.

Q. I know there could have been. Do you know, as a fact, that there were?

A. I have already indicated I did not—do not precisely know the form of agreement between the other airlines and Boeing.

Q. Whatever the form was of the agreement on delivery positions, whether it be a letter of intent, an exchange of wires, letters or a formal contract—I do not care what form it took, Mr. Rummel—do you, by timely basis, mean that the orders or the agreements on delivery positions for TWA planes should have been made the same day as such agreement for either Pan American or American planes?

A. Well, I think I have already answered that question.

Mr. Williams: I think he has, too.

Mr. Hayes: I don't think he has.

Mr. Williams: I think you have been over [Tr. 806] this enough.

Mr. Hayes: He can answer this yes or no, Mr. Brownell, it seems to me, as to what he means. I don't know what he means.

The Special Master: I will sustain the objection.

I think it would be helpful to find out what the witness thinks is the relationship between the date of order and the date of delivery. Perhaps that is what you are really trying to get at here.

Mr. Hayes: Not precisely what I am trying to get at, Mr. Brownell.

Will you pardon me for just a second?

Do you want to say anything in response to the Special Master's comment?

The Witness: Well, deliveries, Mr. Brownell, are one of the primary objectives, that is, early favorable delivery positions are normally one of the primary objectives of these negotiations.

And up until you actually sign up and there is an agreement, there is always the possibility of somewhere that maybe the negotiating parties can do a little better to their interests.

As a practical matter, however, as things mov- [Tr. 807] ed along, deliveries became generally allocated during the negotiations and the likelihood of changes at the very last minute usually became fairly remote.

By Mr. Hayes:

Q. I still would like to know just what you meant by your testimony, Mr. Rummel, as to a timely basis or suffi-

ciently contemporaneous, and specifically whether you meant that the orders or letters of intent or fixing of delivery positions by any writing for TWA planes had to be entered into at the same time as similar agreements for either American Air Lines or Pan American Airlines.

Mr. Williams: I object to the form of the question and also it is repetitive.

The Special Master: Sustained.

Mr. Hayes: Mr. Brownell, this is a very critical portion of this. There is a whole series of tabulations built upon it.

Timely basis is a general expression. Sufficiently contemporaneous is a general expression.

I submit that I have a right to probe this witness and I ask you seriously to reconsider your ruling so that we will know precisely what he means by this language.

Sufficiently contemporaneous could mean before [Tr. 808] or after or the same minute. He has already told us that it doesn't necessarily mean before.

The Special Master: Reading that sentence and the next one together, Mr. Witness, by "timely basis" for the orders, do you mean October 1955?

The Witness: Not necessarily. I mean, really, at about the same time. That is that all—that the orders for the three airlines were brought to a head and culminated at just about the same time.

The Special Master: Can anyone tell me when the Pan American and American firm turbojet transport orders were dated?

Mr. Hayes: I can't. That's why we have the subpoena.

The Witness: I can give you my best recollection, but I don't know that I could state it as a fact.

The Special Master: All right, I would be glad to have your best recollection.

The Witness: I am quite sure that the initial Pan Am orders were in October, and I am reasonably confident that the initial American order was in November, but the early part.

The Special Master: You have already answer- [Tr. 809] ed that "timely basis" would not be before, not necessarily be before October 1955.

The Witness: Contemporaneous negotiations bringing them to a head at about the same time. One day more or less at that time would have been honored by Boeing.

The Special Master: Mr. Hayes?

By Mr. Hayes:

Q. Would you consider sufficiently contemporaneous an agreement to purchase planes for TWA which followed by one day the agreements for American and Pan American?

A. Well, that would depend entirely on the circumstances. It could be that that would be all right.

Q. You say it would depend entirely on the circumstances. What do you have in mind, Mr. Rummel?

A. Well, if negotiations had been undertaken at a time which would have permitted Boeing to allocate delivery positions which were favorable during the negotiations, if the negotiations had been seriously entered into, as opposed to, for example, a last-minute rush after deliveries had been promised to others, with a big rush to buy within one day, but without the benefit of earlier timely negotiations—these are the kinds of qualifications that I attach to my answer—it's hard to say.

• • • • •

[Tr. 821] * * * Q. Did those studies, if you recall now, indicate on what routes piston equipment would be used and on what routes jet equipment would be used?

I am speaking of the 1955 studies now, Mr. Rummel.

A. Well, I don't recall the specifics of the studies quite that well.

They all tend to reflect use of jets in the prime long haul routes initially, and the cessation once volume was obtained with the jets.

Q. Do you recall if any of those studies con- [Tr. 822] sidered the possibility of using turboprop airplanes on any of TWA's routes?

A. Turboprops were studied in that period.

Q. With respect to their use on particular routes?

A. Yes.

Q. These are the same studies you are referring to that are being searched for now leading to recommendations, is that correct?

A. They would be included, yes.

Q. Did anyone outside of TWA by way of advice to TWA make studies of the plane requirements of TWA in 1955?

A. Yes.

Q. Who?

A. Manufacturers.

Q. What manufacturers?

A. Boeing, Lockheed. Convair did a lot of work but I'm not sure they arrived at a conclusion.

Q. Anybody else?

A. There were likely others, but I don't recall specifically.

Q. Did anyone outside of TWA other than aircraft manufacturers make studies of TWA's plane needs in the fall of 1955?

[Tr. 823] A. Mr. Hughes gave this a great deal of attention during our various conversations and contacts.

Whether he had outside studies behind his views or not, I'm not certain.

Q. So you don't know as to whether Mr. Hughes had studies made, is that correct?

A. Well, he had studies made through me as I testified before.

Q. I am talking about—

A. You mean outside studies, I take it?

Q. Yes.

A. Not that I know of. I just don't know.

Q. Were copies of the studies made by Boeing, Lockheed, Convair or other aircraft manufacturers delivered to TWA? I mean those made in the fall of 1955.

A. Yes.

Q. You have seen them?

A. I did at the time, yes.

Q. Did anybody outside of TWA other than the aircraft manufacturers and other than the Tool Company make a study in the fall of 1955 with respect to TWA's plane requirements?

The Special Master: Jet plane requirements?

Mr. Hayes: Yes.

[Tr. 824] A. I'm quite sure they did.

Q. Who?

A. Well, I can't be entirely sure of the timing, but I believe that it was in this period of time that Pratt & Whitney did.

Q. Pratt & Whitney made studies of the aircraft requirements of TWA?

A. Yes, they did.

Q. Were copies of those studies delivered to TWA?

A. Yes. In each case—I mean in some cases they were letters and in some cases reports and in some cases they were briefs handed to TWA representatives or to Hughes during meetings. It was that kind of thing

But the answer is yes.

Q. Did anybody else make studies of TWA's plane requirements in the fall of 1955?

A. I'm not certain at the moment.

Q. To what is it you are referring to in your statement in answering this question?

A. Well, I—I'm referring to the list of aircraft, Annex A, to the testimony.

Q. Annex A?

A. Yes.

Q. Do you recall now what studies made by Boeing [Tr. 825] showed?

A. No, I don't.

Q. Do you recall what the studies made by Lockheed showed?

A. Not definitively, no.

Q. What do you mean by "not definitively"?

A. Well, I mean I don't remember definitively what the studies showed.

Q. You mean you do not remember what the studies showed even without the word "definitively"?

A. No, they showed that we needed Electras in Lockheed's opinion but I don't remember how many.

Q. You are uncertain as to whether or not Convair made studies?

Do you recall anything in the nature of a study from Convair in the fall of 1955 as to TWA's jet requirements?

A. Yes, to some extent.

Q. Give us your best recollection, Mr. Rummel.

A. Convair studies related to the—related to showing the economic characteristics of their various proposals when flown on TWA's routes and route segments primarily.

Q. Economic characteristics of what?

[Tr. 826] A. The various airplanes they were then proposing from time to time.

Q. I am speaking now of the fall of 1955, Mr. Rummel. Can you identify what various airplanes they were proposing in the fall of 1955?

A. Well, as I testified earlier, that would include the Model 18, the Model 19 and the Model 20. By proposing, I mean working on.

• • • • •

[Tr. 879] • • • Q. You testified this morning, Mr. Rummel, that both the 131 and the 331 were developments or outgrowths, I have forgotten the exact word you used, of the Boeing 707 original model so to speak, do you recall that?

A. Yes.

Q. When was the 331 first offered to the airlines?

A. I think that was covered here before when we were discussing what was meant by the word "offer."

It was discussed and Boeing was attempting to sell it during the fall of 1955.

Q. Do you recall when the first orders were placed with Boeing for 331s? I mean for the 300 series [Tr. 880] I should say. Because the 331 was a TWA designation?

A. I'm pretty sure that Boeing—I'm sorry. I am pretty sure that Pan American changed its order, that is, divided it between the 100 and 300 series some time during December, but I don't believe the orders were formalized until later.

The Special Master: December 1955?

The Witness: Of 1955, yes, sir.

Q. Are you referring, Mr. Rummel, to the order for 707s by Pan American which appear on the second line of page 2 of Annex C? Is that the order you are referring to?

A. Yes.

Q. Which you testified this morning at the time the order was placed was not for 331s.

What was the change that took place in that order as you recall it in December of 1955?

A. They wound up with six J57 powered airplanes on order about that time. The rest were J75 powered airplanes.

Q. The J57 was the 100 series, was it?

A. Yes.

Q. And the J75 the 300 series?

A. Yes.

[Tr. 881] Q. The 100 series being the rough equivalent to use that expression, of the 131s and the 300 the 331s, is that correct?

A. Yes.

Q. How many of the 300 series did they have on order after they made this change?

Can you answer without referring to your prepared statement from your recollection?

A. I want to be entirely sure.

Q. I want to know if you can answer without refreshing your recollection from your prepared statement or do you feel you need to refresh your recollection.

A. I'd feel better if I looked at it.

Q. Does that mean you need to refresh your recollection, Mr. Rummel?

Mr. Williams: Can you remember it without looking at the paper?

The Witness: Well, not definitely, no.

Q. All right. Now you may look at the paper and tell us what you are looking at.

A. Thank you. I didn't realize I had to have permission to look at my testimony.

17.

Q. 17 of the 300 series?

[Tr. 882] A. Yes.

Q. What were you looking at to get that figure?

A. Page 10 of Annex D.

Q. That would be a total of 23 aircraft they then had on order from Boeing, is that correct?

A. I believe so.

Q. So they increased the order by three in December you recall, according to your best recollection, in 1955?

A. To the best of my recollection.

The actual order was, I think, formalized later but I believe this change was negotiated during December.

Q. Do you know why it was that if Pan American wanted more 300 series than 100 series planes, it did not order the 300 series when it first placed its order?

A. Well, I testified to that before, Mr. Hayes.

My recollection is that when Pan Am ordered, the 300 series had not crystalized.

Q. When did it crystalize?

A. I believe it crystalized during December.

Q. That was—

A. It crystalized in the sense that it became a definitive project, not that all details had been agreed on.

[Tr. 883] Q. Was the first order for the 300 series the one placed by Pan American?

A. Yes.

Q. I notice in your paragraph to which I have been addressing these questions on page 10, the one just below the middle of the page, you state that in order to meet TWA's needs the 331s should have been ordered at that time, to wit, October 1955.

Will you explain how they could have been ordered in October 1955, if the plane had not been crystalized in October 1955?

A. The same way Pan Am ordered planes in October 1955. We and Pan Am were dissatisfied with the characteristics of the planes that were offered at that time. That was one of the motivations working with Convair to get a better airplane. Work was still under way insofar as developing and defining airplanes.

Q. By this second sentence of that paragraph is what you really mean that TWA's order should have been placed in October 1955, for 22 Boeings of the 100 series so that 18 of them could later be changed to the 300 series?

A. No, what I really mean is that we should have ordered 15 airplanes suited for domestic operations and [Tr. 884] 18 suited for international operations that we foresee as being suitable for it.

• • • • •

[Tr. 972] • • • Q. Were these offers of early delivery positions part of the effort to persuade the particular airline to buy its rather than its competitor's planes?

A. Well, partly, and partly in response to the airlines' drive to obtain early positions.

The major airlines were all seeking the best, the most favorable early positions, and the manufacturers had the problem of trying to keep to the degree they could the airlines reasonably interested.

Q. Which of the two major aircraft manufacturers offered the earlier positions, generally?

[Tr. 973] A. In terms of the calendar, that is, who was able to produce jets first, if that's what you mean, Boeing was.

Q. Were the offers of delivery positions by Boeing to airlines generally earlier than the offers of delivery positions by Douglas?

A. I believe you are asking, Mr. Hayes, whether Boeing offered airplanes for delivery before Douglas offered airplanes for delivery?

Q. Correct.

A. Well, the offers were made about the same time. The deliveries promised by Boeing chronologically came before they were promised by Douglas.

• • • • •

[Tr. 985] • • • Q. All of the 100 series were the same basic airplane I gather, but as delivered, 131 was delivered for example to TWA, it was to a certain degree a custom-made product, is that correct?

A. Well, that's exactly what I testified to earlier. I just indicated I had nothing to add.

Q. That is fine. I just want to make sure.

The next practice you identified as included in the prevailing industry practices which accorded with Boeing's selling policies was that of offering and selling delivery positions on a monthly allocation basis.

Is there anything you want to add to what you [Tr. 986] have already testified to this morning which falls under that practice?

A. Boeing indicated during negotiations conducted subsequent to the contract signing that some sort of off the

record agreements existed with respect to delivering certain numbers of airplanes initially to specific airlines.

That's all I would add.

Q. You said Boeing indicated during negotiations conducted after the contract was signed—what contract are you referring to?

A. Hughes Tool. That does not—I might say it was not during the fall of 1955 that I think you are still talking about, so perhaps I should not have volunteered that information.

Q. We might as well talk about it.

You say that Boeing indicated this whenever it was. When were these negotiations to which you just referred?

A. I don't remember exactly, Mr. Hayes. It was after the contracts were signed, prior to delivery.

Q. The first contract was signed in 1956 and the first delivery was what, in 1958 or 1959?

A. 1959.

[Tr. 987] Q. Can you place more specifically than that broad range when these negotiations took place that you are talking about?

A. No, I can't be precise. It was during the course of construction of the planes, as I recall it.

Q. You testified that this took place during negotiations. What negotiations were being conducted at the time?

A. Well, efforts were made to—both initially and later to have Boeing adopt the sequential delivery relationship and to improve the Hughes Tool delivery positions.

Q. Who conducted these negotiations?

A. Primarily myself, Mr. West, I believe Mr. Cook was involved at some phases. I was in touch with Hughes on certain times on this.

Q. I am sorry?

A. I was in touch with Mr. Hughes.

Q. You say you were in touch with Mr. Hughes?

A. Yes.

Q. I was not sure what you said.

These were negotiations to attempt to improve delivery positions as stated in the Toolco contracts?

A. Yes.

[Tr. 988] Q. Which Mr. West was that, Mr. Harry West of the Chadbourne firm?

A. Yes.

Q. You say that Boeing indicated an off the record agreement existed.

How did Boeing indicate and to whom?

A. Verbally.

Q. Who in Boeing indicated it to whom else?

A. I'm not absolutely certain.

Q. What is your best recollection?

A. I have the impression now that it was during negotiation with Mr. Connelly that this became clear.

Q. To whom did Mr. Connelly indicate it, to you?

A. I was there.

Q. Oh, to you. Who else was there?

A. I'm not entirely sure of that at the moment.

Q. But at any rate your best recollection is that at least Mr. Connelly indicated it to you?

A. That is the impression I have now, yes.

Q. When you say "impression," you mean your best recollection, I assume?

A. Yes.

Q. What Mr. Connelly indicated to you was that an [Tr. 989] off the record agreement existed concerning delivery of a certain number of planes to specific airlines.

Can you elaborate on that and tell us what he indicated as to how many planes were to be given to what airlines?

A. As I recall it, it was American and Pan American. And I believe that he indicated that each of these airlines would receive either three or four planes each, that is, Pan Am first and then American.

Q. Before any other airline received any, is that what you are saying?

A. Yes.

I think Boeing viewed this as a moral commitment that fell out of the negotiations that they had with these airlines, but it wasn't strictly reflected in the contract. That's what I meant by off the record.

Q. Did he tell you that it was no part of the formal agreements that had been entered into with Pan American or American?

A. I think so but I can't recall it with that degree of clarity at the moment as to exactly what he said.

Q. Did he tell you when these off the record agreements with Pan American and American were made?

A. I don't know that he did or he didn't.

[Tr. 990] Q. Did he indicate that they were made at the time the orders were placed by Pan American and American?

A. I don't know, Mr. Hayes. That's the impression I have.

Q. The impression was that he indicated that they were made at the time the orders were placed?

A. No, my impression was, as I recall it, that that's when they were made. I don't recall whether he specifically indicated that.

• • • • •

Q. You testified, Mr. Rummel, that the next prevailing industry practice which you mentioned which conformed with Boeing's sales policies was that it was generally the

practice of the manufacturers to give better delivery positions to those who first agreed to purchase planes, holding somewhat later positions for those they hoped to sell later.

Is there anything you want to add to what you [Tr. 991] have already told us with respect to that general industry practice?

A. No.

Q. The last of the industry practices you identified was that each of the aircraft manufacturers tried aggressively to sell aircraft.

All you are saying there is that they were trying to sell aircraft, is it not? That was their business.

A. They were trying real hard and were ready at that particular time.

Q. You mean were ready to sell?

A. They were ready to commit, yes.

* * * * *

[Tr. 1022] * * * Q. Your second assumption, paragraph numbered 2 is that, "Pan American, TWA and American all sought as early delivery positions as Boeing would provide."

Did TWA or Tool Company working with TWA seek as early delivery positions as Boeing would provide?

A. We, during the course of negotiations, did try to obtain the most favorable positions that were then available.

Q. When would Pan American, according to your assumption No. 2, seek those early delivery positions?

Mr. Sonnett: I don't understand that to be different from the question of when would the orders have been placed which has already been covered.

The Special Master: This is an assumption, isn't it?

Mr. Hayes: That's right.

A. During the course of contemporary negotiations.

Q. Can you elaborate on what you mean by contemporary negotiations, Mr. Rummel?

Mr. Sonnett: I object to that as repetitive. It was gone over yesterday at great length.

[Tr. 1023] The Special Master: Sustained.

Mr. Hayes: I submit, Mr. Brownell, that this is absolutely basic to all of plaintiff's so-called case here and that I should be accorded the widest latitude in discovering just what this witness has in mind with these broad general statements.

I did not ask him any questions so far with respect to assumption 2, none at all.

Mr. Sonnett: The subject matter has been covered at length. Mr. Brownell, we will be at this for months unless counsel—

The Special Master: I am trying to give counsel great latitude in this particular instance.

I sustain the objection.

* * * * *

[Tr. 1050] * * * Q. In the fall of 1955, Mr. Rummel, when Mr. Damon was president of TWA, was Mr. Damon in favor of ordering Boeings in the numbers which were eventually ordered from Boeing?

Mr. Sonnett: May I ask for clarification of the question as to whether or not I have an objection?

Is the question intended to find out whether Mr. Damon agreed with the amount of aircraft ordered by the Hughes Tool Company or is the question intended to deal with whether or not TWA should order any aircraft, if any, itself.

Mr. Hayes: I think I will just stand on the question, Mr. Sonnett.

[Tr. 1051] Mr. Sonnett: Then I object to it as indefinite. I don't know what aircraft you are talking about.

Mr. Hayes: I am talking about Boeing aircraft.

Mr. Sonnett: You left wide open the question who was ordering the aircraft. That makes quite a difference as to whether or not I find it objectionable for other reasons.

Mr. Hayes: So we won't have to bother reading it back, I will restate it.

The Special Master: All right.

Mr. Hayes: It may not be a complete restatement but at least it will be a rephrasing.

Q. In the fall of 1955, Mr. Damon was president of TWA. Was he in favor of ordering Boeing jet aircraft in the numbers that were eventually ordered?

The Special Master: Do you know whether he was?

The Witness: I think he died before the last orders were placed.

The Special Master: I think the question was whether in the fall of 1955 he had formulated an opinion and that opinion was known to you and [Tr. 1052] it was either for or against ordering the number of Boeing planes that were eventually ordered in this initial order.

The Witness: In the initial order?

The Special Master: Yes.

The Witness: I had the impression that he was strongly in favor of ordering Boeing airplanes at that time, that he did not disagree with the numbers.

Q. In what numbers was he in favor of ordering Boeing aircraft?

A. I can't specifically say the precise numbers he may have had in mind, but I don't recall Damon ever opposing the orders. He was anxious for TWA to move forward into the jet age fully competitively.

Q. Mr. Damon, in fact, died before the first order was placed for any Boeings, did he not?

The Special Master: He stated that was his recollection.

Mr. Hayes: Pardon.

The Special Master: He stated that was his recollection.

Mr. Hayes: Oh, did he?

The Special Master: Yes.

[Tr. 1053] Mr. Hayes: I missed it then.

Q. Did Mr. Damon ever state to you in the fall of 1955 how many Boeing aircraft should be ordered for TWA's use?

A. Well, I don't specifically recall at the moment. However, numbers of airplanes were discussed around the company a great deal.

Q. Did Mr. Collings in the fall of 1955 express to you his views as to how many Boeing aircraft should be ordered for TWA's use?

A. I already testified to the general concern, and I recall Mr. Collings expressing—I don't specifically recall an exact number, if that was your question.

Q. That was my question.

A. Yes.

Q. In the fall of 1955, did Mr. Leslie ever express to you his view as to how many Boeing aircraft should be ordered for TWA's use?

A. I don't recall the specific number at the moment.

Q. In the fall of 1955, did Mr. Cocke express to you his views as to how many Boeing jets should be ordered for TWA?

A. He wanted a sizeable fleet but I don't recall [Tr. 1054] precisely the number that he may have said during the fall.

Q. Who else was in the upper echelon of TWA management in the fall of 1955 besides Messrs. Damon, Collings, Cocke and Leslie?

Mr. Sonnett: By that do you mean holding some office in TWA?

Mr. Hayes: That is right.

Mr. Sonnett: You are excluding Mr. Hughes? That's my point.

Mr. Hayes: Exactly.

Mr. Sonnett: All right.

A. You observed that Mr. Damon was president and additionally I mentioned the other day Warren Lee Pierson was chairman. He also acted to some extent in management capacity.

Q. Anybody else in top TWA management at that time?

A. Those would be the only two higher than the ones you mentioned.

Q. Would there be any others below those but above you in the echelon?

The Special Master: With respect to the ordering of Boeing planes?

[Tr. 1054A] Mr. Hayes: With respect to the management of the airline.

Mr. Sonnett: That raises a question as to what the management of the airline had to do with ordering jets in the first place. That's the difficulty with the questioning.

[Tr. 1055] The Special Master: Would it cover your point to say whether there was anyone else at this time to whom he made recommendations with respect to the acquisition of the Boeing planes?

Mr. Hayes: He may or may not have made recommendations. They have been higher in the hierarchy than Mr. Rummel was. I am trying to find out who else was there in the TWA hierarchy at that time who was superior to Mr. Rummel in the corporate echelon.

The Special Master: With respect to the ordering—

Mr. Hayes: To the management of the airline generally.

Mr. Sonnett: Other than the ordering of aircraft.

Mr. Hayes: With respect to the management of the airline. It is a simple question.

Mr. Sonnett: I object to the question as irrelevant then.

Mr. Hayes: It is wholly relevant.

The Special Master: I will sustain that, I think it should be confined to people who would have been able to deal with the recommendations with [Tr. 1056] respect to the acquisition of Boeings.

Mr. Hayes: He is talking about assumptions here.

The Special Master: On the acquisition of Boeings.

* * * * *

[Tr. 1091] * * * Q. Is 1958 a year in which these ill effects were suffered by TWA which you mentioned?

A. Only the latter part of the year.

Q. What do you mean by the latter part of the year?

A. Well, my reconstruction assumes that we could have and should have under the assumptions received airplanes in November and December of 1958.

Q. So that does mean a part of 1958 you are including, November and December?

A. A very small part.

Q. That is based entirely on your reallocated deliveries, is it?

A. This is based on that, yes.

Q. I direct your attention to the full paragraph beginning at the bottom of page 15, Mr. Rummel, the first [Tr. 1092] sentence which reads:

> "At approximately the same time, Convair informed Toolco that Convair was proceeding with production of the 30 aircraft ordered by Toolco on the basis of a delivery schedule complementary to the Delta schedule."

On what facts do you base that statement?

A. Personal knowledge.

Q. Acquired where?

A. In my work as a Tool Company representative.

Q. You mean this is information that was communicated to you as the Toolco representative at Convair by Convair?

A. I didn't say that.

Q. What did you mean then?

A. I meant I participated actively in these discussions with Convair and with Mr. Hughes at that time.

Q. Are you talking about November 1958 when you say "at that time"?

A. Well, that would have been included, but the problem spanned a number of months.

Q. What months?

A. Well, substantially those months that preceded November.

[Tr. 1093] Q. Do I understand—

The Special Master: Could I hazard a guess that would be September and October?

The Witness: This covered quite a period of time, Mr. Brownell. I am at a loss to know quite exactly—I don't know—I wouldn't want to exclude August, for example. It could have been in July. I'm not that clear.

Mr. Hayes: What is not clear to me, Mr. Brownell, and I don't think is clear on the record, is that in the preceding paragraph Mr. Rummel refers to a confirmation between Delta and Convair as to Delta's deliveries dated November 18, 1958.

Q. Is that when that confirmation took place?

A. Well, that was when Delta signed the agreement that provided specific delivery positions to it.

Q. That was when the Delta delivery schedule was actually executed or confirmed or whatever word you want to use?

A. Well, November 18th is the date that Delta confirmed the Convair allocation of deliveries to it by signing Amendment No. 3 to the Delta purchase order.

Q. Did Convair advise Toolco before that that it [Tr. 1094] was proceeding with the production of the Toolco airplanes on a delivery schedule complementary to the Delta schedule which had not yet been agreed to?

A. This was a period of hectic and rather continuous activity between Convair and myself, and myself attempting to get clearance from Mr. Hughes and agreement on the allocation of planes between Delta and TWA.

Q. What I am trying to find out is whether the information Convair gave Toolco that Convair was going to produce the Toolco planes on the basis of Delta's delivery schedule of November 18, 1958, was communicated to Toolco before or after November 18, 1958.

A. Convair indicated on several occasions that they would be forced to proceed with this sort of allocation, and earnestly sought our approval to do so.

They communicated this directly to me on numbers of occasions and I am quite sure made efforts to contact the Tool Company directly.

The Special Master: Before or after November 18th?

The Witness: Oh, before.

The Special Master: Before November 18th?

The Witness: Yes.

Q. Is it your testimony that before November 18th, [Tr. 1095] Convair informed Toolco that Toolco planes would be produced on the schedule which later became Amendment 3 of November 18, 1958?

A. They requested authority to so allocate the deliveries primarily through me as the assigned Hughes Tool Company representative, and this was prior to November 18th.

Q. Who in Convair made this statement to you or made this request to you?

A. Dudley Digges on at least a majority of occasions. I can't be sure he was the only one I talked to.

Q. Is there any other representative of Toolco who was informed by Convair?

A. I kept, to the extent that I could reach him then, Mr. Hughes advised, I kept Mr. Cook advised, I believe Chuck Price, quite possibly Raymond Holliday.

Q. These were communications you had with these Toolco people?

A. Mostly phone—either mostly phone conversations or direct personal conversations.

Q. Did Convair directly get in touch with any of the Toolco people, if you know?

A. My belief is that they made this effort on [Tr. 1096] numbers of occasions, including attempting to reach Mr. Hughes through Bill Gay's office.

Q. You said that you tried to keep Mr. Hughes informed when you could reach him and it was not clear to me whether you did or did not reach him with respect to this.

Did you or didn't you?

A. Yes, I did.

Q. When was that?

A. Well, I don't have the precise date. This was during this period of the hectic activity that I referred to.

• • • • •

[Tr. 1100] • • • By Mr. Hayes:

Q. Mr. Rummel, I direct your attention to the paragraph which begins on the top of page 17. You have already given testimony as to the operation of the jet planning groups.

[Tr. 1101] In the first sentence of the paragraph you state that TWA's plans for the integration of the Convair 880s were made by such groups under your supervision.

Have you anything to add by way of facts as to the integration of the Convair 880s into TWA's operations?

A. No.

Q. You state in the second sentence that with the knowledge of Toolco, these plans had, since the contract was executed in 1956, been premised on the assumption that all

30 aircraft would be assigned to TWA pursuant to the terms of the Toolco-Convair contract.

What is the factual basis for the phrase "with the knowledge of Toolco"?

A. My personal contacts with Tool Company representatives.

Q. Do you want to elaborate on that, Mr. Rummel?

A. Well, contacts with Mr. Cook, Mr. Gay, Mr. Price at various intervals of time.

Of course, everyone understood that the planes were destined for TWA because of the announcements to that effect.

And at times, I know Mr. Holliday was familiar with the plan. Later on, Mr. Schwartz.

Q. In these contacts with Mr. Cook or Mr. Gay or Mr. [Tr. 1102] Price or Mr. Holliday or Mr. Schwartz, are you referring only to the fact which I understand your testimony to say was known to them that TWA expected to get the 30 Convairs?

A. Yes, and additional copies of the jet plans and premises were provided to Mr. Gay's office of the Hughes Tool Company in Houston.

Q. Was that the invariable practice, to provide copies of the jet plans and premises to Mr. Gay's office?

A. They were standing instructions that they be so sent.

Q. Were they so sent?

A. As far as I know, they always were.

Q. In a prior part of your testimony, you stated that some time in early 1959, you were advised that TWA would receive 20 aircraft. I mean 20 880s. I believe you testified that at or about that time the jet plans and premises were recast to be based on an expected fleet of 20 Convairs.

A. Well, I indicated actually in the testimony that I thought that the jet plans and premises were revised to 20 after a period of time had elapsed.

Q. That's right. About the period of time that you stated, as I recall, you couldn't recall how long it was [Tr. 1103] before the revision took place.

A. I didn't remember precisely, no.

Q. After that revision had been made in the jet plans and premises and the jet planning groups came up with different plans, were copies of those, too, supplied to the Toolco?

A. I am not aware of—I don't remember any changes in the instructions with respect to the distribution of the plans and premises. So I assumed that they were.

Q. You say in that same sentence that the 30 aircraft on order by Toolco would be assigned to TWA pursuant to the terms of the Toolco-Convair contract.

To what terms of the Toolco-Convair contract are you referring?

A. All the terms. Just offhand, I can't think of any terms that would be excluded. It was assumed that the warranty aspects, those things relating to the airplane, delivery commitments and all would have been honored. And those things which survived the actual delivery of the planes and any rights the Tool Company would have had as a result of the contract would have passed along to TWA along with the planes.

Q. Did you prepare this particular sentence or did counsel prepare it, do you recall?

[Tr. 1104] A. I don't recall that.

Q. The sentence refers to an assignment to TWA pursuant to the terms of the Toolco-Convair contract?

A. Yes.

Q. Was there anything in the Toolco-Convair contract by the terms of which the 30 aircraft were to be assigned to TWA?

A. There was an assignment—a clause in the contract which, as I recall it now, permitted the contract to be assigned by Tool Company to TWA without the consent of Convair.

Q. That permitted the Tool Company to assign it?

A. Yes, sir.

Q. As you—

A. This—

Q. Go ahead.

A. That's all.

Q. You were going to say something. I did not want to interrupt you.

A. That's all.

Q. As you recall, that provision of the contract, did it require the Tool Company to assign the planes to TWA?

A. Well, that's not my present recollection, no. It [Tr. 1105] just simply was permissive.

Q. By this phrase, "Pursuant to the terms of the Toolco-Convair contract," did you mean anything more than that you expected that Toolco would assign all 30 planes to TWA?

The Witness: Well, that question confused me slightly. Would you read it, please?

(The question was read.)

A. I simply meant pursuant to the terms of the Toolco-Convair contract.

Q. You just testified, as I understand your testimony, Mr. Rummel, that the provision for assignment in the Toolco-Convair contract was permissive and not obligatory;

that there was no requirement that Toolco assign the 30 planes to TWA.

A. The contract, I believe, is one of the exhibits and the clause that I refer to is contained therein. It can certainly be read. I am giving you my recollection of what it—the substance of that particular clause was.

Q. Yes, I understand it can be read. I am asking what you meant by the language in this paragraph.

Did you mean anything more than that you expected that Toolco would assign the planes, all 30 planes to TWA?

A. We certainly would expect they would assign all [Tr. 1106] 30 planes.

Q. Did you mean anything more than that by this phrase in this sentence?

Mr. Sonnett: Referring to the phrase "Pursuant to the terms of the Toolco-Convair contract," alone, I take it?

Mr. Hayes: Right.

A. Yes, I think I have already explained that we would expect those things—those Convair obligations which survived delivery to be handed onto TWA.

Q. I understand that if there had been an assignment.

A. Yes.

Q. Certainly. But I am asking about the assignment itself. By the assignment that would be assigned pursuant to the terms of the Toolco-Convair contract, I am trying to find out if you meant in your testimony anything more than an expectation by you that all 30 planes would be assigned.

A. Well, nothing comes to mind at the moment, as I sit here now.

Q. Nothing other than that?

A. Nothing other than what I have already said.

Mr. Hayes: I guess I just might as well give up.

[Tr. 1107] * * * By Mr. Hayes:

Q. Referring still to the same paragraph and the plans that were made for the integration by the jet planning groups, what dates were used by the jet planning groups with respect to the integration of the Convair 880s?

The Special Master: You mean for their being integrated into the operations?

Mr. Hayes: That is right.

A. Well, dates derived from knowledge and belief as to when the airplanes would be delivered, taking into account the necessary activities that had to be indulged [Tr. 1108] in as a prerequisite for undertaking service.

The Special Master: Were the delivery dates set forth in the order?

The Witness: The airplane delivery dates for the 40 planes were set forth in the contract.

The Special Master: Those are the dates that you used in planning?

The Witness: Well, after the ten planes had been assigned to Delta, Convair did submit change orders covering the other 30, which I could not obtain authority on to approve, and finally that's what they became and that's what we used. It was obvious it couldn't be anything else at that point, because the planes were being built.

By Mr. Hayes:

Q. Pursuing the Special Master's question, was the planning of the jet planning groups based on delivery dates stated in the contract between Toolco and Convair?

A. Well, I think that's all covered here. There were specific delivery dates in the contract for airplanes which were included in the jet planning exercise.

Q. Throughout the period up to 1960, were those the delivery dates that were used by the jet planning groups?

A. Not throughout, no.

[Tr. 1109] Q. When were changes made in the dates that the jet planning groups used?

A. Well, as the airplanes were delayed, were not received, the jet plans and premises were revised on occasion to reflect those differences, as I recall it.

In some cases, the company would take action to revise schedules and the like on advice, not waiting for the formal issuing of the jet plans and premises, however.

Q. My question was when did the jet planning groups use dates other than the dates in the Toolco-Convair contract?

A. Primarily—I can't be specific. My memory is not that good as to exact dates the premises were changed, because they were changed rather frequently, but it was primarily, I believe, during 1960.

There were changes in service dates prior to then, partly as a result of our evaluation of the probable certification date of the airplane.

Q. In the immediately preceding paragraph of your statement on page 16, you set forth what you call a Toolco schedule, November 18, 1958, for 30 planes.

Were the dates of delivery set forth in that schedule the contract dates of delivery?

A. They were consistent with respect to being included [Tr. 1110] in the 40-plane delivery dates, yes.

Q. In the paragraph after the one about which I am questioning you, the one in the middle of page 17, you set forth months of delivery for 20 planes to TWA.

Were those dates based on the contract between Toolco and TWA?

A. Contract between TWA and the Tool Company?

Q. I mean Toolco and Convair. I am sorry.

A. They were the same.

Q. They were the same?

A. Yes. That is, they were embraced by them.

Q. On page 21 of your statement, the paragraph which begins at the top, you show that deliveries to Delta, except for the first plane, were made in months later than the contract with Delta provided.

Do you see that?

A. I am looking at the top of page 21.

Q. Yes. Do you see the schedule to which I refer?

A. Yes.

Q. By March 1960, according to this schedule, you knew, did you not, that Delta at least would not get its second plane on the contract date?

A. I am quite sure I must have known that, yes.

Q. Was any change made in the jet plans and premises [Tr. 1111] with respect to the deliveries of the planes that Toolco had ordered for TWA in or about March 1960?

A. I don't recall the shifting that occurred in that—to that degree of particularity.

Q. So far as changes that were made by the jet planning groups with respect to the integration of the 880s into TWA's operations, is your recollection any more specific than that changes were made by the jet planning groups during 1960?

A. You are speaking specifically of 1960, is that correct?

Q. That is right. I understood your prior testimony to be that the jet planning groups did use different dates from the contract dates some time in 1960.

A. That was included?

Q. Yes. I am asking you if you can recall more specifically when in 1960 the jet planning groups used different dates in connection with their plans.

A. Not specifically, no.

Q. I direct your attention, Mr. Rummel, to the paragraph which begins at the top of page 22 of the prepared statement of yours and specifically to the first sentence which reads:

> "As the purchaser of the Convair 880 jet air- [Tr. 1112] craft, Toolco assumed responsibility for all matters pertaining to deliveries of the aircraft and I was instructed by Toolco that no TWA employee was to become involved in such matters."

Did you prepare that statement or did counsel prepare it, that sentence?

A. Well, I don't know who actually wrote it. I certainly could have.

Q. What did you mean by the portion of it which reads:

> "As the purchaser of the Convair 880 jet aircraft, Toolco assumed responsibility for all matters pertaining to deliveries of the aircraft."

A. Well, exactly that. As the Hughes Tool Company representative, I had no authority with respect to delivery matters.

Q. Do you mean solely that you had not been given any authority by Toolco with respect to delivery matters?

A. With respect to authorizing changes in contract dates.

Q. Contract dates with respect to deliveries, you mean?

A. Deliveries, yes.

Q. Did you have any authority with respect to agree-
[Tr. 1113] ments on deliveries by way of change orders?

A. No. In cases—had changes been proposed, for example, which might have incurred delay in delivery, I would have been unable to approve them.

Q. Changes proposed by whom?

A. If they had been proposed by anybody. If on Convair's analysis, specific proposals for including the changes had involved changes for delivery, I would not have been able to authorize them. All such proposals had a block included, calling out effect on delivery.

Q. Say this again. All such proposals—

A. Including the specific—it required that specific cognizance be taken of delivery on effective changes.

Q. That specific cognizance—I am sorry, I don't understand what you are saying.

A. I am just saying that the submission formally authorizing changes or included by change orders themselves, would always show whether or not there was any effect in Convair's delivery, it's contract delivery.

Q. And?

A. I don't recall—in fact, I was specifically not authorized and did not authorize any change orders without clearance that included delays in delivery. That's [Tr. 1114] all I am trying to say.

Q. That's all you mean by this phrase as to which I have questioned you?

A. Well, I think you included two facets, if I recall the sentence correctly. I think I answered one of them.

Q. I direct your attention to the first line, second line and half of the third line. That's all one facet, as I understood it. What two facets are you referring to, Mr. Rummel?

A. Well, I said I had not been authorized. I additionally was specifically instructed that no one else in TWA was to become involved in delivery matters.

Q. Is that all you meant by the phrase that Toolco assumed responsibility for all matters pertaining to deliveries of the aircraft, that no authorization had been given to anybody else?

A. It was very clear during this period from contacts with Mr. Hughes that it was strictly hands off with respect to Convair deliveries.

Q. I am asking you is that all you meant by the phrase that Toolco assumed responsibility?

A. By Toolco, I include Howard Hughes, of course.

Q. Certainly.

[Tr. 1115] A. Okay, yes, that's what I mean.

Q. Did Convair, in fact, propose change orders which would have involved delays in deliveries?

A. My present impression is that there was at least one such and possibly more, and I am a little vague, frankly, but I believe that the one on leading edge devices at one point at least included threats of delay.

Q. Were there any other instances where Convair proposed changes in the contract delivery dates?

Mr. Sonnett: May I have that question again?

(The question was read.)

Mr. Sonnett: Unrelated to proposed changes in the plane, Mr. Hayes?

Mr. Hayes: Any kind of changes. It is most general.

A. Well, I guess I don't really know.

Q. You don't have any recollection as to any changes proposed by Convair affecting delivery dates other than

the possibility you mentioned with respect to the leading edge device?

A. Right now I don't remember specifically whether or not there were any. I wouldn't be surprised if perhaps there were some.

And, of course, it must be understood or should [Tr. 1116] be, and that's why I am answering more at length, that it is quite possible and likely, even, that many of these things during 1960 were discussed directly with Hughes and—or the Hughes representatives, rather than me.

I don't want to indicate that all contractual matters came through me. It was clear that things on deliveries were not to come through me.

Q. Who handled matters having to do with deliveries on behalf of Toolco?

A. As far as—I can't categorically say, but my impression, from talking to the Tool people at the time and also the Convair people, was that Hughes was involved and also some of the Tool Company representatives.

Q. Can you name them?

A. I believe Jerry Owens at one time, I think Raymond Cook was, I believe to some extent Raymond Holliday, and, of course, Convair, I know, made numbers of contacts or attempted to make contacts through Bill Gay and the degree to which Bill Gay was involved, I can't say.

Q. Can you now identify any matters involving delays in delivery that were taken up by anyone in Convair with Mr. Hughes?

A. Not directly, no. I wasn't present, I don't believe, when efforts were made by Convair people to [Tr. 1117] contact Hughes.

Q. How about Mr. Owens, can you identify any such matters?

A. Well, Owens and I had a fairly long discussion in San Diego, during which he discussed setting aside the planes and the delays that were occurring in the Convair program.

Q. Can you give us the date, approximately, at least, of that long discussion you had with Mr. Owens?

A. No, I can't precisely.

Q. Can you tell us what was said in the course of that conversation, at least in substance?

A. Well, what he said could be boiled down to simply "Lay off," that he was handling that for Hughes.

Q. "Lay off" what?

A. I was trying to find out during the course of 1960, I believe this was, what in the world we could finally plan on with respect to airplane deliveries. Airplanes had been set aside. And his message was that this was an area that he was involved in with Hughes, and that nothing really could be said. One of his fears seemed to be that I might somehow reveal the fact that we had the discussion.

Q. One of his—

[Tr. 1118] A. Fears, f-e-a-r-s.

Q. Oh, fears. That you might do what?

A. Reveal the substance of the discussion to his associates or to Hughes.

Q. The substance of what discussion?

A. The one I am talking about.

Q. You mean your discussion with Mr. Owens?

A. Yes.

Q. Do I understand that he told you in substance that so far as deliveries were concerned, this was a matter he was handling and he asked you not to reveal to anybody that he and you had talked on the subject?

A. Yes. I am not certain of the timing of this meeting, however.

Q. You can't place the time?

A. No, not exactly.

Q. Can you recall any discussions between any one in Convair and Mr. Cook with respect to the deliveries of the 880s?

A. I can't specifically give you dates, if that's what you are asking.

Q. Can you recall the substance of any conversation?

A. No.

Q. How about Mr. Holliday?

[Tr. 1119] A. No, I don't think I can be that specific.

Q. In your conversation with Mr. Owens, did he tell you or report to you the substance of any conversations he may have had with Convair people?

A. I don't recall that degree of particularity, although I am sure that that must have been included.

Q. Did anyone in Convair give you any information as to any discussions they had with Toolco people respecting deliveries?

A. Well, at various times Dudley Digges indicated he had discussions with Hughes, and to some extent where things stood with respect to deliveries.

His main point seemed to be that he hoped I would try to prevail on Hughes to come to decisions.

Q. You say at various times. Can you identify any of these times?

A. Not precisely. I think they were primarily during 1960.

Q. You cannot be more specific?

A. Possibly somewhat before. No, there were numbers of phone conversations that covered a period of time and I just can't remember the exact time of these conversations.

Q. You say that in those discussions, Mr. Digges indicated to you that he had had discussions with Mr. Hughes [Tr. 1119A] as to where things stood with respect to deliveries.

Did he tell you in any of his conversations with you what he and Mr. Hughes said to each other?

A. I am quite sure he did include that to some extent. I don't remember the particularity at the moment.

[Tr. 1120] Q. You cannot recall anything he may have reported to you with respect to his conversations with Mr. Hughes?

A. Well, I don't recall it that definitely because of the numbers of conversations that occurred.

Q. But as you sit here now you cannot recall the substance of anything he may have reported to you as to what was said between him and Mr. Hughes?

A. Well—

Q. Or can you?

A. —only broadly, not in specific terms at the moment.

Q. Give us your broad recollection.

A. Well, he was trying to prevail—he gave me the impression he was trying to prevail upon Hughes to have planes accepted and delivered.

The Special Master: May I ask—

Mr. Hayes: Certainly.

The Special Master: —does that mean that planes were available?

The Witness: Well, during the course of 1960, numbers of planes were tendered for delivery by Convair, yes.

The Special Master: To Toolco?

[Tr. 1121] The Witness: To Toolco or to me. Things became very tight when they weren't deliv-

ered and Convair then took the approach of shotgunning, contacting almost everyone they could that they thought might have authority to bust the planes loose.

The Special Master: And the tender was rejected by Toolco?

The Witness: Yes, in essence.

Possibly to explain that, in numbers of cases the procedure was to submit an airplane for acceptance flying to determine that it was functionally correct.

Then if it was functionally correct, then the contract required that the airplane be delivered, and if at that point delivery wasn't effected, then costs would be accrued with respect to the delay.

So, prior to running the actual acceptance flights, since I had no authority to proceed with delivery, I would check or try to check with Hughes representatives as to whether they were prepared to have delivery effective and make payment. At that point, I required clearance which, when I [Tr. 1122] didn't receive it, which was pretty much all the time, then we wouldn't proceed with the acceptance flight and the airplanes would sit.

The Special Master: Does it interrupt you too much for me to ask these questions?

Mr. Hayes: No, no, I welcome it.

The Special Master: Why then was there delay in Delta receiving planes if the planes were available?

The Witness: Oh. No, I didn't mean to imply, Mr. Brownell, that the airplanes would have been available precisely at the time that the contract called for them.

What I meant to say was that they were available during the course of 1960.

The Delta planes were delayed simply for detailed reasons during the course of construction like availability of interior panels that were delayed, I remember, and things of this type that led to this early one month or so delays in Delta's case.

The Special Master: When you failed to receive clearance for taking delivery, did you protest either to Toolco's representatives or Convair [Tr. 1123] representatives?

The Witness: Well, what I was trying to do was to prevail with the Tool Company to receive the planes. All the company's TWA's plans were based on the expectation that the planes would be received and used.

So I did all that I knew how to do through Gay's office, through trying to get Hughes—there were conversations with Hughes when I tried to get the planes—through contacts with Raymond Cook, Raymond Holliday and Leonard Schwartz to try to get the planes busted loose. So I would call that a protest, sir. I don't know if legally that's—

The Special Master: Could you give a general or specific example of this type of protest where you were given some reason why the planes should not be delivered?

The Witness: Well, the general reason as I understood it then primarily from Mr. Cook and Mr. Schwartz, and I believe Mr. Holliday, was that they just simply weren't prepared to pay for them.

At one point in time, Convair proposed some sort of a leasing, minimum leasing arrange- [Tr. 1124]

ment to get the airplanes out, to try to get around that obstacle.

The Special Master: What happened to that proposal?

The Witness: Well, I am a little vague but it was not effected. It was not adopted.

The Special Master: That is all.

Mr. Hayes: I might say, Mr. Brownell, that this area that prompted your questions was something I was going to go into in greater detail.

The Special Master: That is what I was afraid of, that I was interrupting your train of thought.

Mr. Hayes: No, I am delighted you did, and I intended to go into it in considerable detail, but I think one or two things might be related to your questions right now.

The Special Master: Very good.

Q. How many planes were so tendered for delivery by Convair?

Mr. Sonnett: I am not clear that I understand that. You mean how many planes were tendered for delivery and there was delay on the part of [Tr. 1125] the Tool Company in accepting them?

Mr. Hayes: I am talking about in response to the Special Master's question based on Mr. Rummel's testimony that planes were tendered for delivery and were not taken up. I am talking about the number of planes to which Mr. Rummel referred.

A. I can't remember exactly how many were formally tendered. After—I've explained, after a fair number had been tendered and substantially completed or completed by Convair, they pulled back and did not complete all of the

rest of the airplanes, until the situation cleared as to what they could expect.

Q. When Convair tendered a plane for acceptance, it would not make delivery without receiving payment, is that correct?

A. Well, as I just said, Mr. Hayes, at one point during this period Convair undertook to develop a proposal which, as I recall it, would have permitted the planes to be delivered on the basis of a lease or similar type arrangement.

Technically, under terms of contract, when the planes were tendered for delivery—or I should say on delivery, the remaining moneys due were due.

Now, I can't testify as to the detailed dis- [Tr. 1126] cussions that may have occurred in that area between the Convair representatives and Tool Company representatives.

Q. You said that one of the reasons given you, and this was in answer to one of the Special Master's questions, as to why the tenders were not accepted, is that Toolco was not prepared to pay. You mean the contract price of the plane?

A. I said that's what I was led to believe at the time.

Q. That is right.

A. Whatever was required.

Q. And by "was not prepared to pay" did you mean that they did not have the funds to pay or that they did have the funds but would not pay, if you know?

A. Well, I can give you what I now recall my impression was at the time. I certainly cannot testify as to how many dollars were available inside the Tool Company.

Q. I am asking you what you were told by any Toolco representative with respect to failure to pay for the planes on delivery.

A. My understanding was that financing had not been completed and they simply didn't have the funds.

[Tr. 1127] Mr. Hayes: Is there any other question on this line that you have in mind, Mr. Brownell, before we leave it?

The Special Master: Yes, I would like one before we recess.

Were these tenders evidenced by any writing as far as you know?

The Witness: Yes, there were letters required by contract, I believe, which advised when planes would be offered, and then—I don't remember each of the details, Mr. Brownell, but our plant representative was in very close touch and the actual tendering was to him. And I had—as I say, I had to instruct him not to proceed without clearance from me. And I in turn had to get it from Toolco.

The Special Master: Were your instructions from Toolco not to have anything to do with the change orders which would involve change in delivery dates in writing?

The Witness: No, sir.

I might say that hardly anything—in fact, I don't remember anything from Mr. Hughes being in writing. I had rather strict instructions [Tr. 1128] not to put anything in writing, from me to him or from TWA to him.

The Special Master: Were any of your protests as to which you testified on delays in delivery dates or failure to accept tenders in writing?

The Witness: I don't know. There was a lot of letters. I would say that the actions I took to try to have delivery effected were reflected in papers that I had written at the time. I don't remember

specifically going on written record because I just didn't think it was appropriate in terms as you say, of a protest. I didn't view it as a legal protest. I viewed it as something that we had to get moving. I did what I could.

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By Mr. Hayes:

Q. Mr. Rummel, I direct your attention to the next sentence in the paragraph beginning on the top of page 22 which reads:

"If TWA, rather than Toolco, had been the [Tr. 1129] purchaser of the Convair 880 jet aircraft, it is my opinion that Convair would have made deliveries of the planes in advance of the dates upon which deliveries actually occurred and that TWA's overall delivery experience would have closely approximated that of Delta."

Would you state for the record the facts upon which you base that opinion?

Mr. Sonnett: In addition to anything he has previously testified to?

The Special Master: Yes, that is understood.

A. Well, with respect to closely—

Q. I am sorry.

A. With respect to closely approximating that of Delta, I believe from having been quite familiar with what was going on at the time that Convair would probably not have delivered initially in strict accordance with the contract but would have delivered more nearly as they delivered to Delta because the same details as I mentioned earlier that applied to Delta, I believe, would have applied to the Hughes Tool planes.

Secondly, it is my opinion that had TWA been in complete control of the situation, airplanes would [Tr. 1130] not have been set aside.

When airplanes were tendered we would have been able to effect deliveries and that the program substantially would have been on schedule.

Q. Are those all the facts upon which you base your opinion?

A. Well, this opinion is derived from the conglomerate of knowledge and information which I had just through my position in the whole affair.

Q. Is there anything else in that conglomerate of knowledge and information which you have not told us?

A. I don't recall anything specifically.

I might possibly point out that I can't conceive of TWA having placed planes under armed guard, which occurred.

Q. Anything else?

A. No, sir.

Q. What you just told us are all the facts upon which you base your opinion?

A. No, that's all I recall at the moment.

Q. Were there any other facts that you had in mind when you swore to this statement?

A. I think I have already covered that.

Q. Is your answer that there were or were not [Tr. 1131] other facts—

Mr. Sonnett: The witness' answer is that he thinks he has already covered it. He has answered that question several times.

Mr. Hayes: I don't think he has. This is a basic opinion of his and I am trying to find out on what it is built.

The Witness: I think I answered Mr. Hayes to the best of my ability.

Q. Can you as you sit here now, recall any additional facts upon which your opinion is based?

A. Not as I sit here right now.

Q. As you sit here now, do you recall that there were other facts which may have been in your mind at the time you swore to the statement?

A. Well, a great deal went on and there certainly could have been.

Q. Have you finished?

A. Yes, I said certainly could have been.

Q. I did not know whether you finished or not.

So far as dates of deliveries are concerned, what difference does it make who placed the order, whether it was TWA or Toolco in your opinion?

Mr. Sonnett: I object to that question.

[Tr. 1132] It is argumentative.

The Special Master: Overruled.

Mr. Sonnett: It is too broad.

Is it limited to whether it would be TWA on the one hand and Toolco on the other or is it as broad as it started out to be?

Mr. Hayes: It is limited to a sentence.

Mr. Sonnett: Would you read it? It started out to be as broad as all outdoors.

(The question was read.)

A. I guess I don't know what he really means. If he means dates of deliveries in the contract, for example, that resulted from the negotiation, that might be one facet.

If you are talking about deliveries that were actually effected, that's something else.

I'm not clear on what he intends.

Q. I'm talking about the deliveries you are speaking about in this sentence, Mr. Rummel.

Mr. Sonnett: That isn't what the sentence says.

Mr. Hayes: I beg your pardon. It does—

Mr. Sonnett: It does not.

Mr. Hayes: Please let me speak for a [Tr. 1133] moment, until I make one statement. Thank you.

The sentence reads: If TWA rather than Toolco had been the purchaser of the aircraft, it is my opinion that Convair would have made deliveries in advance of the dates upon which the deliveries actually occurred.

That's what the sentence says.

Mr. Sonnett: That is not the question you asked.

Mr. Hayes: Yes, it is.

Mr. Sonnett: No, you asked would it make any difference who placed the orders. That is not the same thing as being the purchaser, necessarily. Quite a vital distinction in this case, as you well know.

Mr. Hayes: Mr. Special Master, I submit the question should be answered.

The Special Master: I overruled the objection some time ago.

Mr. Hayes: I thought you did.

The Witness: May I have the question?

Mr. Hayes: I will rephrase it instead of wasting time.

[Tr. 1134] The Special Master: All right.

By Mr. Hayes:

Q. So far as the deliveries of the planes are concerned, and I am referring to the deliveries that you are speaking about in the sentence as to which I am questioning you,

what difference would it make whether TWA or Toolco had either placed the orders or been the purchaser? Take it either way.

A. Well, had TWA ordered these planes and had surveillance completely of the contracts, for reasons partly already enumerated, I believe that TWA would have received the airplanes about on time and Convair would have built them about on time.

Q. On what facts do you base that opinion?

A. I am basing it on the belief that had TWA had surveillance, that many of the things that occurred when it did not have surveillance, would not have occurred.

Q. By this sentence, are you suggesting or not that in 1956, the purchaser under the Convair contract should have been TWA rather than Toolco?

A. I'm simply saying that if TWA had ordered these rather than Toolco and had surveillance of the planes during the construction period, I believe that Convair would have tendered the airplanes to TWA for delivery [Tr. 1135] about on time and that TWA would have effected delivery.

Q. Would you answer the question? You already told us that.

Mr. Sonnett: I object to the question, if it needs any further answer; if it does not it is only argument. It is not a question.

The Special Master: Overruled.

A. Apparently there is some distinction in wording in the question I did not discern. Could it be read to me, please?

The Special Master: Yes.

I'll ask it.

Did you mean to imply that the contract for the purchase of the 880s should have been placed by TWA rather than Toolco?

The Witness: In the reconstruction we are pretty well assuming that's what would have happened.

Q. So does your opinion as expressed in this sentence contain an assumption by you that TWA could have placed the orders for the Convairs in 1956?

A. Well, I'm simply stating that if TWA had done that what the effect would have been.

Q. Now will you answer the question, Mr. Rummel?

Mr. Sonnett: I submit that's a responsive [Tr. 1136] answer, Mr. Brownell.

The Special Master: Have you anything to add to it to your knowledge as to whether or not TWA could have placed the order at the same date that Toolco placed it?

Mr. Hayes: That's right.

The Witness: Well, you see that gets over into the area of financing ability and all that sort of thing and I don't feel too competent to testify on it. That was not my area of responsibility.

Mr. Sonnett: As the witness has previously testified you recall, Mr. Brownell.

Q. Is it correct or not, Mr. Rummel, that so far as this particular sentence is concerned, you are indulging the assumption that TWA would have been financially able to place the orders at the time Toolco placed them?

Mr. Sonnett: I object to that on the ground it has been asked and answered before.

The Special Master: Overruled.

A. Well, in the reconstruction that's contained in the testimony, it is assumed that TWA would have ordered and then we derived the result that would have [Tr. 1137] been achieved.

Q. You mean by reconstruction your reallocation of delivery dates?

A. Yes.

Q. Now, will you answer the question, please, Mr. Rummel?

A. I have tried very hard to answer the question.

Q. I will put it again—

The Special Master: If the assumption is realistic, does it not necessarily require you to assume that TWA could have financially and otherwise placed the order at the same time that Toolco placed the order?

The Witness: Absolutely.

Q. So that assumption is in this sentence as part of your opinion, is it not?

A. Well, I did not specifically develop a personal opinion in that particular respect. That's why I tried to answer this so laboriously.

The Special Master: Off the record.

(Discussion off the record.)

The Special Master: Proceed.

By Mr. Hayes:

Q. In response to the suggestion made by the [Tr. 1138] Special Master off the record, is there anything more that would constitute a fuller answer to the answers that you have given on this opinion of yours expressed in the sentence as to which I have been examining?

A. No, I don't think of any, anything to add at the moment.

A great deal went on that led to my view at the time, but I don't have anything—I don't think of anything specifically to add now.

Q. You have nothing specifically in mind that falls within the great deal that you just mentioned?

A. Well, a lot of it has already been covered in previous testimony, Mr. Hayes.

The disruption to Convair's normal production processes, in my opinion, would not have occurred, had TWA had surveillance of this contract. That embraces many acts that did occur which I believe would not have occurred.

The Special Master: Acts taken by Toolco?

The Witness: Yes.

* * * * *

[Tr. 1155] * * * Q. I direct your attention to the next paragraph, if I may, Mr. Rummel, and the first sentence of which reads:

> "In addition, if TWA, rather than Toolco, had been the purchaser of the Convair 880 jet aircraft, it is my opinion that by the end of 1960, TWA's fleet would have consisted of all 30 Convair 880 aircraft instead of the 20 aircraft referred to in the previous table."

Will you give me the basis for that opinion, factual basis.

Mr. Sonnett: May we go off the record?

The Special Master: Off the record.

(Discussion off the record.)

A. Well, initially, TWA concurred that the Convair order should be placed and that it should be placed for 30 airplanes for TWA's use.

It planned on the use of those planes. Its planning clearly demonstrated the need for that many planes.

I am convinced that ships would have been delivered substantially on schedule, had TWA ordered and had surveillance of them, and I believe we would have [Tr. 1156] obtained all 30 planes.

Q. Is there anything you want to add to your answer or is that everything?

A. That's the salient, more important points.

Q. Are there any less important points that you have in mind?

A. Not right at the moment.

Q. The factual basis you give as I understand your answer is, (1) that TWA concurred in ordering 30 planes originally, is that correct?

Mr. Sonnett: That isn't quite correct, but—

Mr. Hayes: Let's have him straighten it out then. That is why I asked him. I don't want to be accused of misquoting the gentleman.

Mr. Sonnett: All right.

A. Well, what I am saying is that TWA agreed that it needed the Convair 880 airplanes, 30 of them.

Q. This was in 1956?

A. Yes.

Q. That is the first fact on which you base this sentence as to which I am examining you? Is it or is it not?

A. Yes.

[Tr. 1157] Q. The second fact that I noted is that TWA planned on the use of 30 planes.

A. Yes.

Q. When you say TWA planned on the use of 30 planes, to whom in TWA are you referring?

A. Well, this is pretty much as I described heretofore with respect to our planning activities. The company planned on the use of 30 880s.

Q. That is very broad, Mr. Rummel.

Who in the company planned on the use of 30 880s and when?

Mr. Sonnett: Objection, unless it is limited to anything new that the witness has not already testified to.

Mr. Hayes: I never asked him about this at all.

The Special Master: Does your testimony that you gave earlier cover this particular phase of the planning?

The Witness: I think so.

The Special Master: I will sustain the objection.

Mr. Hayes: Mr. Brownell, his testimony did cover the operation of the Jet Planning Staff [Tr. 1158] which made recommendations.

The Special Master: He says it now covered this.

Mr. Hayes: And we are awaiting the recommendations which we have asked for.

But now he talks about the company planned on the use of 30.

Q. Let me put it this way: When you state that the company planned on the use of 30, are you referring to people in the company other than the Jet Planning Staff?

The Special Master: And the management group in their various functions as to which you have already testified.

A. I have nothing—no one to add in addition to those testified. The Jet Planning Committee and Staff embraced the top management of the corporation.

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[Tr. 1179] The Special Master: During the times involved in this line of questioning, you were for certain purposes a representative of the Tool Company as well as an official of TWA?

The Witness: Yes, sir.

The Special Master: So that raises a question or two in my mind.

Your recommendations for the 30 as opposed to the 20 went, did they, to higher officials in the Tool Company as well as to higher officials in TWA?

The Witness: Yes.

The Special Master: Then I take it the meeting at the Waldorf—

The Witness: Excuse me. They were primarily directed to the Tool Company people with whom I was in close contact at the time and who appeared to be involved in effecting this reduction. I was trying to persuade them basically.

The Special Master: The Waldorf meeting, as I understood your testimony, was the first time that you knew definitively that Hughes Tool had decided to cut the number in its order?

The Witness: That is right.

[Tr. 1180] The Special Master: You stated here that you expressed opposition to that cut?

The Witness: Yes.

The Special Master: Did you express it to Toolco representatives as well as TWA higher officials?

The Witness: Primarily Tool Company representatives, and I tried to persuade Mr. Thomas, for example, that we should stay with 30 hoping he in turn could persuade them.

The Special Master: How about Toolco officials?

The Witness: Yes. They were Raymond Holliday, Raymond Cook, Leonard Schwartz, primarily.

The Special Master: Mr. Hughes?

The Witness: Yes, I did in phone conversations, at least two, with Hughes indicate my opposition to the curtailment.

The Special Master: Can you give us the substance of those conversations? I am interested especially in the reasons that you gave for your opposition and the replies that you received.

The Witness: Well, these were all, I think, verbal, and they were on the basis of my [Tr. 1181] belief, which I expressed to them, that TWA had good and proper use for these airplanes, that we needed them competitively and we would be a stronger airline if we in fact obtained the intended fleet. I felt we would be at a disadvantage if we didn't have them. That was the broad gist of it.

This was repeated—or was said more than once to most of these representatives. I can't recall my exact words now, Mr. Brownell.

The Special Master: Of course not.

What reply, referring now to those two conversations over the phone with Mr. Hughes, what was the substance as nearly as you can recall it of his reply?

The Witness: As I recall, it was dismissed rather summarily, and there was no extended discussion at all.

The Special Master: In your capacity as a representative for the Tool Company for certain purposes, did you feel that you had fully fulfilled your function in advising Tool Company as to the adverse effects that you foresaw in this cut in the number of planes, 880s ordered?

The Witness: Well, at the time I felt I had, if anything over-fulfilled it to the point [Tr. 1182] of their finding that it was being replayed like an old record.

Mr. Hayes: I am sorry, I didn't hear that.

The Witness: Being replayed like an old record. I kept going back, and I might say I did not change the plans and premises, until afterwards, hoping that by some quirk of circumstances we could move ahead to the larger number of planes than 20.

The Special Master: Did you ever receive in one of these conversations with Mr. Hughes or the other high officials of Tool Company in answer to your protest, reasons which you considered substantial business reasons for the action that Hughes Tool Company took in cutting the order?

The Witness: Well, Leonard—as I explained, Leonard—Leonard Schwartz' view, which I can again summarize, was that—it is all—I got the impression that's all that they could reasonably handle, but secondly that he felt that we probably didn't need as many as were on order at that time.

My impression from talking to Raymond Holliday and Raymond Cook was that the Tool Company [Tr. 1183] wanted to rid itself of financial obligations basically in the curtailment.

The Special Master: Could you give any more detail as to Mr. Schwartz' arguments as to why he thought the lesser number would take care of TWA's requirements?

The Witness: Well, he seemed to hold the view that the industry, including Hughes, had over-bought jets. He appeared to be pessimistic about the ulti-

mate response of the public to the jets which I was confident of, and he indicated the belief that other airlines perhaps would also find it necessary to cut back.

That's about as much as I can recall in specifics.

I remember opposing Leonard's beliefs, because I didn't believe them. I mean, I didn't agree with respect to TWA's need and use and suitability of our getting the entire numbers of airplanes on order.

The Special Master: Thank you. That is all I have.

By Mr. Hayes:

Q. In answer to one of the Special Master's [Tr. 1184] questions, the one directed specifically to your conversations with Mr. Hughes as to what reasons Mr. Hughes gave you you said in substance, as I noted it, that Mr. Hughes dismissed your protests rather summarily.

Can you tell us exactly—not exactly, but your best recollection as to the substance of what Mr. Hughes said to you?

A. Well, my best recollection is that he just didn't want to talk about it.

Q. Did he tell you he didn't want to talk about it?

A. No, he didn't have to tell me.

Q. What did he say?

A. I can't remember the exact words.

Q. I am not asking you the exact words.

A. I had many conversations with Hughes and I can assure you that I could understand when he did not want to talk about something. This is my recollection of this situation.

Q. What did you say to him?

A. I don't recall it in that detail, Mr. Hayes.

Q. You have now exhausted your recollection as to what took place in the conversations with Mr. Hughes when you expressed to him your opposition to the reduction in the fleet, is that correct or not?

[Tr. 1185] A. Yes.

Q. Specifically, did Mr. Hughes give you any of the reasons that Mr. Schwartz gave you?

A. No, I don't recall discussing it in any detail with Mr. Hughes.

What I told him, I remember I tried to tell him and did tell him that I felt TWA had good and substantial need for all 30 airplanes.

Q. Did he disagree?

A. He simply went on another subject, as I recall it, Mr. Hayes. We just didn't go into any depth, as I remember.

Q. You mean he did not express agreement or disagreement?

A. I just don't recall—

Q. He just changed the subject?

A. —the detail of that now.

Q. In the last sentence to which I have directed your attention on page 22, you state that you consistently maintained that TWA required all 30 aircraft to fulfill its needs through 1960.

Mr. Hayes: Let me withdraw that because I had another question on the sentence before, Mr. Brownell.

[Tr. 1186] The Special Master: Yes.

Q. With respect to the sentence before, you identified Messrs. Fellows, Rourke and Cocke as the people to your knowledge who had expressed their opposition.

Did you discuss the subject with Mr. Leslie?

A. Yes, I did.

Q. Do you recall that conversation?

A. Well, there were—like in most of these instances there were numbers of conversations relating to equipment throughout this period, and I don't recall right now any one specific conversation.

Q. In any conversation in the latter part of 1959 or 1960, did Mr. Leslie express to you opposition to a reduction in the fleet from 30 to 20 Convairs?

A. I don't recall him opposing it, no.

Q. How about Mr. Pierson?

A. I don't recall him specifically opposing the reduction.

Q. How about Mr. Taylor?

A. I don't remember discussing this with Taylor. He wasn't, as I recall it, directly involved.

Q. Do you know whether any one of these gentlemen, Messrs. Leslie, Pierson or Taylor ever expressed to any Toolco representative opposition to reduction of the [Tr. 1187] fleet?

A. I don't remember knowing of specific instances, no.

Q. Do you know of any general instances?

A. I don't remember any is what I am really trying to say.

* * * * *

[Tr. 1261] By Mr. Hayes:

Q. Mr. Rummel, with respect to any of the Avro planes, did anybody on behalf of TWA make any test flights of any of them?

Mr. Williams: What do you mean by test flights? You mean did they fly in them—

Mr. Hayes: That's right.

Mr. Williams: —try them out?

Mr. Hayes: That's right.

A. I flew in the Avroliner at Hughes' request.

Q. Did you pilot it?

A. No, I flew in it. Hughes piloted the aircraft.

Q. Hughes piloted it?

A. Hughes piloted it and I was flying with him.

Q. How many such flights were there in the Avroliner?

A. There was one—oh. Well, there was—when you call a flight, there were numbers of takeoffs and landings. There were one series of such flights if you like.

Q. For the record, is it customary to test planes by making a series in succession of takeoffs and landings?

[Tr. 1262] A. Well—

The Special Master: This is for purposes of determining whether or not you are going to procure the plane?

Mr. Hayes: That's right.

A. —very broadly, yes.

Q. Was that the kind of test flying you meant that Mr. Hughes made on the Avroliner?

Mr. Williams: I don't understand that.

Mr. Hayes: Takeoffs and landings, to test it.

Mr. Williams: Yes, but is it tied in with your former statement that this was for the purpose of procurement, in connection with procurement of aircraft?

Mr. Hayes: That's right.

Mr. Williams: Is that the kind of test landing and takeoff that Mr. Hughes did?

The Witness: I could answer it this way. Avro was led to believe that we were interested in procur-

ing the plane, and one of the purposes of the test was to learn more about the plane.

Q. Did Mr. Hughes or you or anyone else on behalf of TWA test fly the supersonic?

[Tr. 1263] A. That was a paper plane.

Q. The Boeing 377, I gather the impression from your deposition that that was the same as the Stratocruiser, am I right or wrong in that?

A. It was called the Stratocruiser.

Q. That was a plane that was being marketed, to be marketed by Boeing shortly after the war?

A. Yes, shortly after World War II.

Q. To what extent did airlines purchase and use the Stratocruiser, do you know?

A. Pan Am had a fleet, United had a small fleet, BOAC I believe had some of them and others. I don't recall specifically at the moment.

Q. Do you know when the last sale was made by Boeing of a Stratocruiser to a commercial airline?

A. Not exactly, no.

Q. Can you fix approximately the date?

A. No, I don't think so.

Q. Was it before 1950?

A. I—it is highly likely that it was, yes, but as to when Boeing made the last sale I just—I can't testify.

Q. Did Boeing offer to the airlines any airplane between its offers of the Stratocruiser and its offers of [Tr. 1264] the 707s?

A. Well, the answer I just gave was in reference to the original series that were called the Stratocruiser or the 377 series.

They subsequently did show up with drawings of—that illustrated turboprop conversion possibilities.

Q. Was that plane ever built and sold to a commercial airline?

A. I don't recall any having been either sold or built.

Q. So that after the Stratocruiser, was the 707 the first plane that Boeing offered to commercial airlines? I mean offered as a plane that could be flown, not a paper plane.

A. I believe the 707 series was the first commercial plane produced.

Q. After the Stratocruiser?

A. Yes.

But as I testified before, getting there was an evolutionary process. There were all sorts of things that could be called offers.

* * * * *

[Tr. 1268] * * * Q. With respect to the Bristol Britannia you gave rather a considerable amount of testimony on your deposition, Mr. Rummel.

The time so far as I can figure out from your deposition stretched over the period from 1952 to 1958.

Does that jibe with your present recollection?

A. I don't have any clear recollection.

[Tr. 1269] Q. You testified in substance that you had various and sundry communications with Mr. Hughes in connection with the Britannia and also with TWA, but I did not find any identification of who in TWA you had communications with respect to the Britannia.

Can you recall now?

A. I recall a meeting during which the Britannia—

Q. I am sorry.

A. I recall a meeting during which the Britannia was discussed with a Mr. Burgess and Mr. Leslie and Mr. Weller. A number of reports I wrote included the Britannia which were given a fairly wide distribution in the company.

And as in most cases, I tried to keep my immediate boss pretty well advised.

I don't think of anything else at the moment.

Q. Has Mr. Weller been identified for the record? I don't know offhand.

A. Yes.

Q. He has?

A. Yes.

Q. You mentioned a discussion with Messrs. Burgess, Leslie and Weller.

Did that have to do with the consideration as to [Tr. 1270] whether TWA should acquire the Britannia?

A. It had to do with what TWA should recommend to Mr. Hughes be acquired.

Q. What was the outgrowth of that meeting in that regard?

A. Well, let me say the meeting considered more airplane programs than just the Britannia, and I don't recall at the moment what the result was.

I believe it was the multiple type recommendation, however. That is, a recommendation with alternates.

Q. My notes indicate that there was a decision finally arrived at which was not to acquire the Britannia.

A. Yes.

Q. Was that decision arrived at at this meeting that you mentioned among Messrs. Burgess, Leslie and Weller?

A. Well, as I said, I don't recall what the outcome of the meeting was in that respect.

Q. Do you know whether or not Mr. Hughes or anyone on behalf of TWA test-flew the Britannia?

A. Well, I flew in the Britannia on tests. I didn't fly it.

Q. Was Mr. Hughes the pilot?

A. No.

[Tr. 1271] The airplane had been delivered to Montreal so Hughes could fly it, but as far as I can recall now he did not, although he might have.

Q. Were there active negotiations with the Bristol people looking toward the possible acquisition of the Britannia?

A. Extremely active.

Q. The deposition shows that you participated in them.

A. I did.

Q. What was the extent of your participation in these negotiations?

A. Well, I conducted quite a few of them.

Q. With whom?

The Special Master: You mean with whom from Bristol?

Mr. Hayes: Yes.

A. With the Bristol people?

Q. Yes. You don't remember their names. It is not important. I'll forget their names.

Was anybody else from TWA present at any of those negotiations?

A. Other than possibly members of my staff, I don't recall anyone else being present.

[Tr. 1272] Q. Did Mr. Hughes participate in those negotiations?

A. I was in close touch with Hughes during the negotiations and reflected our mutual positions.

Q. Did the negotiations get beyond the technical aspects of the Britannia?

A. Well, I view deliveries, price, availablity and release of planes by other lines to commit early delivery as going beyond the technical and those things and others were included.

Q. They were included?

A. Yes, they were.

Q. You mentioned a plane designated the Convair YB-60 which you define in your deposition as a commercial version of the YB-60, a large eight-engine jet variant of Convair's B32.

Would you tell us your participation in anything having to do with the Convair YB-60?

A. Well, I don't recall my deposition clearly, but I believe I covered a lot about that in it. I'm not sure at the moment how repetitive I would be. It is a long story.

Mr. Williams: I was there, but I haven't read it recently.

[Tr. 1273] Q. To refresh your recollection possibly you testified that it was from 1946 on, that it had to do with discussions with Convair concerning the development of jet aircraft and that you worked with Mr. Hughes in it and had discussions with Mr. Franklin and with the Convair people at Fort Worth and others, that you reported your findings to Mr. Hughes.

That is a brief summary of what I get from your deposition, Mr. Rummel.

A. I believe my deposition also mentioned Mr. Odlum.

Q. It may have.

A. I could be mistaken.

Mr. Williams: What additionally do you want from him on that, Mr. Hayes?

Q. Was this a plane which was still in development or was it one that had been built or was ready to be built?

A. It was considered for development.

Q. Was it being offered to other airlines as well as to TWA?

A. Not to my knowledge. No, although—

Q. I am sorry.

A. Not to my knowledge, although I think everyone [Tr. 1274] understood that it would have to be to be a viable project for Convair at some point in time.

At that time I don't believe it had been offered to anyone.

Q. Would you describe it as a paper plane during the period of your discussions with Convair?

A. Well, the answer, it being the commercial variant, partly. Partly.

Q. Under whose supervision, if anyone's, did you work in connection with any contacts you had with Convair concerning the YB-60?

A. Mr. Hughes.

Q. Anyone in TWA?

A. No.

Q. Nobody?

A. Nobody.

Q. Did you report your findings to anyone in TWA?

A. I can't be that specific, but I believe I undoubtedly reviewed the results finally with Mr. Collings.

Q. Did the discussions with Convair get beyond the technical aspects of this proposed plane?

A. Yes.

Q. To what extent? What do they include?

A. Deliveries, price, operating costs, how it would [Tr. 1275] likely be used.

Q. Anything else?

A. That's all that comes to mind.

Q. I thought you were thinking up something else to say. I did not know.

Did you make studies in that connection?

A. I don't remember any formal studies. I conferred with Convair and pushed pencils around a little bit, and then came to conclusions.

I guess you could say that I discussed it.

Q. You reported your conclusions to Mr. Hughes, according to your deposition?

A. Yes, to Mr. Hughes and also to Mr. Odlum.

Q. How did Mr. Odlum come into the picture? Was that when Atlas Company owned Convair?

A. I don't remember the dates that well.

Odlum was closely associated with Convair. He may have been running Convair at that point in time. He either was running it or was chairman. I'm just not that clear at the moment.

Q. Did anybody else in TWA other than your department make any studies or recommendations concerning the YB-60?

A. Not to my knowledge. My department wasn't [Tr. 1276] involved very much in this one.

Q. Just yourself personally?

A. Well, primarily.

Q. I don't know whether I asked you—I don't think I did—did Mr. Hughes or anybody on behalf of TWA fly the plane of which the YB-60 was a commercial variant, but which was never built?

A. The YB-60 was not the commercial variant, Mr. Hayes. This was a commercial variant of the YB-60.

Q. Thank you for correcting me.

Did anybody fly, test-fly the YB-60, Mr. Hughes or anybody on behalf of TWA?

A. I don't know, but I don't recall having heard that he did.

Q. You never flew in it?

A. No. It was there but it wasn't in flying shape then.

Q. You mentioned in your statement the Convair Model 110. You state that it was an experimental plane.

Tell us your participation looking forward to the possible acquisition of the Convair 110.

A. Here again, I just don't recall my earlier deposition.

Q. There is very little in your deposition I can [Tr. 1277] tell you. Forget your deposition now at the moment. I am asking the question from your memory today.

The Special Master: Did you refer to his prepared statement or to his deposition?

Mr. Hayes: To his prepared statement.

The Special Master: Where does that appear?

Mr. Hayes: In Annex A.

The Special Master: Yes, I see it.

A. Well, I reviewed specifications, calculated operating cost characteristics, considered airport characteristics in relation to the performance of the plane.

I'm quite sure that we ran route studies, that is, the application of the plane to our routes.

I had numbers of meetings with the Convair people during which the plane was discussed during its earlier formative time, and later on as it emerged.

That's all I recall.

Q. Can you fix the time of the discussions with respect to the Convair 110?

A. I can't exactly, no. It would have been the later—very late World War II years and immediate period following the war.

* * * * *

[Tr. 1305] * * * The Special Master: Proceed.

Mr. Williams: You made certain requests of us and Mr. Rummel is now prepared to answer the question with respect to Defendants' Exhibit 9 for identifica-

tion, and the other question related to Exhibits 10 through 14.

Mr. Rummel.

[Tr. 1306] The Witness: I reviewed the—my letter of May 11th that Mr. Hayes requested and found no reference either in it or in the attachments to it with respect to American jets.

On Defendants' Exhibits 10 through 14, I reviewed those to determine whether or not they contained specific recommendations from me as to the numbers of jets to be procured.

I found no such recommendations in those documents.

I might also comment on that, if you will allow me to.

The Special Master: Yes.

The Witness: I know a great part of my activity then was spent in developing studies and other related data which—all of which permitted me to make recommendations which I did during that time period.

The Special Master: As to numbers?

The Witness: Yes.

I can only conclude that these various studies have been somehow lost or thrown away with the passing of time. A lot of them were informal. They were studies—they were sometimes on miscellaneous pieces of paper. They were evolved through a period of time [Tr. 1307] and, of course, many of these things become obsolete with the passing of time or they changed as we moved on with our considerations.

In other words, a substantial part of these were informal and additionally many of my recommendations were of an oral nature, and this may account for the fact that they are not in the file.

Cross examination (cont'd) by Mr. Hayes:

Q. Is it your recollection that you did make studies in writing which contained recommendations as to numbers of jets to be acquired or not?

A. I am sure that was done, Mr. Hayes, but I am not clear on the exact form, as I indicated earlier, that these things took. A lot of the recommendations were oral.

Q. So you said. I am trying to find out what your recollection is as to the extent to which you made recommendations in writing.

A. I think I have covered that.

Q. I am trying to find out—

Mr. Williams: Can you say anything in addition to what you have already said?

The Witness: I can't think of anything more to add.

[Tr. 1308] Mr. Williams: We have produced, Mr. Special Master, everything from the file we have found.

By Mr. Hayes:

Q. Is it your recollection that any written study or recommendation that you made was ever sent to the Tool Company?

A. I don't remember sending the Tool Company written recommendations on numbers of aircraft.

As I indicated earlier, their standing instructions were not to put things in writing to Mr. Hughes.

Q. To anybody else in the Tool Company. I am not thinking only of Mr. Hughes.

A. I don't recall any specific study.

Q. Do you recall generally any studies that you submitted to the Tool Company?

A. I don't know how to add to what I have already said, Mr. Hayes.

Q. To whom in TWA did you submit any written studies or recommendations that you made?

The Special Master: As to number of planes to be procured?

Mr. Hayes: As to number of planes.

Mr. Williams: This has all been covered, Mr. [Tr. 1309] Brownell.

The Special Master: I will allow the question.

A. I just can't be that specific, either. I certainly know to whom they would have been reasonably sent, but to remember that, I would have to recall the specific studies and I just don't. I know all these things went on.

Mr. Hayes: Have you any report with respect to the documents, Mr. Williams, that we talked about yesterday morning?

Mr. Williams: Mr. Tenney will report.

Mr. Tenney: I think that we may be able to produce substantially all of the specific documents you spoke of this afternoon.

Mr. Hayes: Thank you very much. I should report, I suppose, for the record, Mr. Brownell, that my partner, Mr. Perkins, had a further conversation

yesterday, I am quite certain he said with Mr. Thompson, who is in the law firm, I believe, of Mr. Olsen—I don't believe he is company counsel—

Mr. Tenney: I believe you are correct.

Mr. Hayes: Mr. Thompson advised—there was some third person on the phone, too, who was a Boeing representative, whose name escapes me at the moment—[Tr. 1310] that he expects to have a list of all documents which he can send to Mr. Perkins to look over, in the light of the subpoena, he hopes before the end of next week.

He also indicated that he thought, without a commitment of any absolute nature, that he would be able to have whatever documents there are sent with a certificate of an officer before August 1st.

The Special Master: Fine.

Let me say right there that if there are any emergencies in this coming month, that either counsel considers requires action by me, if you get in touch with my partner, Mr. Castles, he will know where I will be and can be communicated with.

Mr. Hayes: I think counsel can agree on one thing and that is a hope that there will be no such emergency.

The Special Master: I certainly hope not either.

By Mr. Hayes:

Q. Mr. Rummel, I direct your attention to page 4 of your prepared statement, the paragraph beginning under the heading "Early Jet Developments." You might read that paragraph to yourself first.

A. I have read it.

[Tr. 1311] Q. Can you name the companies with whom you and the members of your department—I mean manufacturers of aircraft—were in close touch with during the period covered by that paragraph?

A. Yes. Douglas Aircraft Company, Glenn L. Martin Company, Consolidated Vultee, which later became Convair, Pratt & Whitney, Wright, Wright Aeronautical. Did I mention Boeing?

The Special Master: No.

Q. You did not.

A. Boeing. Possibly others. That's what comes to mind at the moment.

Q. Would DeHavilland be one of the aircraft manufacturers?

A. I was in touch with DeHavilland, yes, from about, oh, roughly maybe 1950, 1951.

Mr. Williams: You did not mention Lockheed. Is Lockheed in it?

The Witness: Lockheed should be mentioned. There were—

The Special Master: Did you confine that to domestic companies?

Mr. Hayes: No, I did not. The statement is not confined to domestic companies.

[Tr. 1312] The Witness: We were also in touch with other English companies, that's right—Handley-Page.

Mr. Hayes: I am sorry?

The Witness: Handley-Page, Vickers, Avro of England, Rolls-Royce, Bristol Engines and Snd.

Mr. Williams: That is French.

The Witness: That is French. Possibly others. That's all I seem to recall right now.

By Mr. Hayes:

Q. Were those communications with the companies you mentioned all related to the possible development of jet aircraft or jet engines for use in aircraft?

A. Not exclusively, no.

Q. Take Pratt & Whitney, Wright, Rolls-Royce and Bristol Engines. Were your communications with those companies limited to engines?

Mr. Williams: What do you mean by that, Mr. Hayes?

Mr. Hayes: He speaks about his keeping in close touch with the manufacturers of aircraft and engines in order to keep abreast of significant new developments in the commercial aviation field. I am trying to separate those that he was communicating with with respect to engines from those he was communi- [Tr. 1313] cating with with respect to aircraft.

Mr. Williams: Did those companies just make engines?

The Witness: The principal product that they manufactured in which we were interested generally was engines or engine accessories or engine installations, depending on the manufacturer.

The discussions, conferences embraced more than simply the power plant. We talked about use of power plants, installation of power plants, the kind of airplanes that would be built with engines, and so on.

By Mr. Hayes:

Q. But none of those four companies was the manufacturer of aircraft, was it?

A. No.

Q. The other companies you mentioned were all manufacturers of aircraft, were they not?

A. Well, they manufactured aircraft or proposed to manufacture airplanes, yes.

Q. What you are covering in paragraph 13 were the developments that took place in the early period before any jets were offered actually for sale by any manufacturers; is that right?

The Special Master: What is the reference [Tr. 1314] to paragraph 13?

Mr. Hayes: I am sorry. We have numbered the paragraphs.

The Special Master: You mean the bottom of page 4?

Mr. Hayes: The bottom of page 4. I am sorry, Mr. Brownell. For ease of reference we have numbered them. I have fallen into the habit.

The Special Master: All right.

A. The word "offered" is somewhat vague. These were discussions and reviews of very early, I would say preliminary proposals, the exploration of which was apparently aimed for determining whether or not we or the manufacturer should be sufficiently interested in formally offering these designs.

Q. These were all preliminary discussions looking toward a possible aircraft?

A. I'd call them exploratory.

Q. Exploratory?

A. That's why the end date here—

Q. I am sorry.

A. The end date here is not clear—

Q. No, it is not clear to me. I was going to ask you when.

[Tr. 1315] A. (continuing) —to me in this paragraph.

Q. That was the next question I was going to ask you. Up to what period did you intend to cover by this paragraph, Mr. Rummel?

A. We never stopped keeping in close touch with them, so there isn't any end period with respect to that.

The Special Master: I am reading the next paragraph in which you say basically that you meant to stop in 1951 and it looks as though the next paragraph is intended to cover 1951, 1952 and 1953.

Mr. Hayes: That's the impression I got from the statement.

The Witness: I believe that's correct. I was concentrating on that one paragraph alone.

By Mr. Hayes:

Q. When was the first date, first time, first year—I do not mean precise date, Mr. Rummel—that there were any exploratory discussions with Douglas with respect to jets?

A. I am quite certain it was 1946.

Q. Over how long a period did those discussions continue?

A. I can't be sure now, but I would guess possibly six months.

[Tr. 1316] Q. You mentioned Martin. Did Martin have in mind some time during this pre-1951 period the manufacturer of jet transports?

A. Excuse me, Mr. Hayes, I think the 1951 date that we put in the record a minute ago probably isn't correct. I don't think I had contacts with all of these manufacturers prior to 1951. In my answer I was going beyond that period. I am sorry to interject that, but I thought I better clear that up.

Q. My question was instead of trying to find it in the record, whether Martin at one time proposed the manufacture of jet transports.

Mr. Williams: In the pre-1951 period was the way the question was phrased.

Mr. Hayes: That is right.

I will broaden the question now, in the light of what Mr. Rummel said that he is going beyond 1950.

By Mr. Hayes:

Q. Part of the early jet developments that you had in mind in this section of your statement, was Martin one of the companies which proposed at one time or another the manufacture of jet transports for airlines?

A. Yes.

Q. Can you fix the approximate time?

[Tr. 1317] A. Not exactly, but I believe exploratory discussions occurred in 1948.

Q. Do you know about how long they continued?

A. I don't recall exactly. Over a period of months at that particular time.

Q. Was there a later time?

A. I am a little vague on that. I think so. But I am not positive.

Q. Did Martin ever actually engage in the manufacture of jet transports for airlines?

A. No.

Q. Do you know when they abandoned their apparent intent to manufacture jet transports?

A. No. I know when they went out of commercial business.

Q. I am sorry.

A. No, I don't.

Mr. Williams: He said "I know when they went out of commercial business."

Q. When was that?

A. Approximately 1952, I believe.

Q. You mentioned Convair. When were the first exploratory conversations held with Convair concerning any jet transports?

[Tr. 1318] The Special Master: That includes its predecessor company?

Mr. Hayes: Yes. I will use Convair to include Consolidated Vultee as well.

A. About 1947, approximately.

Q. Did Convair continue throughout the period into 1956 considering the manufacture of jet transports for airlines?

A. It is hard for me to say exactly what they considered. I am sure they never lost sight of the possibilities, but they were not constantly and continuously discussing jets with us throughout that period.

Q. But did Convair representatives from time to time throughout the period have discussions with you with respect to possible manufacture of jet transports?

A. Well, from time to time, yes.

Q. Can you now fix the times, Mr. Rummel?

A. Not precisely, Mr. Hayes. During the time they were taking with the development of the 240 series they didn't devote much attention to jets, as I recall it.

Q. Can you fix the time that they did, so far as you know, as a result of your contacts with them, devote considerable time to the possible manufacture of jets?

A. Well, they devoted a great deal of time beginning [Tr. 1319] in 1954 and continuing on through the period we are talking about.

Q. Can you fix the time when you had your first exploratory conversations concerning jets with The Boeing Company?

A. I can give you an approximate time, I believe. Likely in either 1947 or 1948. Possibly 1948.

Q. Did discussions with The Boeing Company by you continue regularly or not from the time of your first exploratory discussions with them?

A. There were intermittent reviews and discussions, not necessarily on a regular interval.

Q. At what point in time did serious discussions begin between you and The Boeing Company with respect to jets?

The Special Master: In the sense of intensive?

Mr. Williams: "Serious" is a rather difficult word.

Mr. Hayes: That's right.

The Special Master: Intensive.

Mr. Williams: Intensive.

Mr. Hayes: Yes. Something other than exploratory is what I am trying to find out.

[Tr. 1320] A. I can't really be exact. Boeing had—Boeing did present numbers of preliminary designs which I believed at the time were serious exploratory efforts on their part, and certainly the discussions were intense and things were seriously considered.

It was after they embarked on the development of the Model 80 Experimental Jet that they came to the position

of offering delivery positions and the like. I am troubled with the vagueness of the question, frankly.

Q. I am trying to get you to fix the time when this development took place.

A. Which one?

Q. I am speaking about after the Model 80.

A. Oh, when the Model 80 development took place?

Q. I thought you indicated that it was after the Model 80 that they offered or discussed delivery positions. I am trying to have that date fixed, if you can recall, by year, only.

Mr. Williams: When did Boeing first offer you delivery positions on any type of jet aircraft?

The Witness: I believe it was 1954, where there might have been further discussions.

By Mr. Hayes:

Q. Take DeHavilland. When did you have the discussions [Tr. 1321] to which you refer in this paragraph with the DeHavilland Company?

A. I can't be sure. Mr. Hayes. DeHavilland representatives would pass through, and I would greet them and talk. The first personal visit to DeHavilland, I think, was in 1951, if I recall correctly.

Mr. Williams: The first personal visit you made to DeHavilland?

The Witness: That I made, yes. I think it might have been 1952, but about that time period.

By Mr. Hayes:

Q. Did discussions continue from time to time between you and DeHavilland representatives from 1951 into 1955 or 1956?

A. Yes.

Q. You mentioned Lockheed. Can you fix the time when you first had exploratory discussions with Lockheed?

Pardon me. Let me withdraw that.

The DeHavilland discussions had to do with jets, is what I had in mind. I don't know whether I made it clear in my question or not.

A. Yes.

Q. Now to go to Lockheed, if you will, when did you [Tr. 1322] first have exploratory discussions with Lockheed?

Mr. Williams: We are talking about jets now.

Mr. Hayes: Yes.

A. Well, we had discussions on jet possibilities at Lockheed very likely early in 1946.

The first preliminary designs, as I recall it, were considerably later.

Q. How much later? A. I can't be sure, but I think maybe 1949 or 1950.

Q. Were either the early discussions or the later ones to which you referred as preliminary designs concerned with pure jets or jet props or both?

A. I was talking about jets.

Q. Pure jets?

A. Well, I thought that's what you were inquiring into.

Q. That's right, it was. I wanted to be sure.

A. Yes.

Q. Did Lockheed, during the period up to 1960, manufacture any jets other than jet props?

A. Lots of them.

Q. Pardon?

A. Yes, indeed

Q. For commercial use?

[Tr. 1323] A. No, noncommercial use.

Q. That's what I mean, for airlines.

A. No.

Q. None?

A. No.

Q. When did Lockheed first propose to you any discussions with respect to a jet propeller plane?

Mr. Williams: Proposed discussions? Read that question.

Mr. Hayes: When did they propose to Mr. Rummel any discussions with respect to a jet propeller airplane. When did they start or when did they begin?

Mr. Williams: When did they first propose to discuss?

The Witness: When did they propose to me rather than my proposal to them?

Mr. Williams: Yes.

Read the question: It's a little confusing to me. It is proposing discussions. It isn't—

Mr. Hayes: Why don't I withdraw it?

By Mr. Hayes:

Q. When did you first have any discussions with Lockheed with respect to a jet propeller airplane?

[Tr. 1324] A. That is a different question and I will try to answer it. I can only approximate. I think around 1951 or 1952.

Q. You mentioned Handley-Page. Is that a British Company?

A. Yes.

Q. When did you have the exploratory conversations with respect to jets with Handley-Page?

A. The early 1950s, I believe.

Q. Did Handley-Page ever manufacture jet transports for use by airlines?

A. They hadn't at that time, no.

Q. Did they down through 1960?

A. I don't believe so.

Q. You mentioned Vickers. That also is a British company, is it not?

A. Yes, it is.

Q. When did you first have exploratory conversations concerning jet transports with the Vickers Company?

A. Well, I think—I am guessing a little, but I believe 1950 or 1951.

Q. How long did those conversations continue or discussions?

A. Well, I had discussions with Vickers occasionally [Tr. 1325] through the years, not all on the—they weren't all the same series of discussions.

Q. Down through the end of 1956?

A. Yes.

Q. Did they all have to do with the manufacture of jet aircraft?

A. No.

[Tr. 1326] Q. With what kind of aircraft did they have to do?

A. Turboprops.

Q. When were the first discussions with Vickers with respect to turboprops?

A. I believe the same.

I might point out that these discussions were not of a continuous nature. There was a period of time when Vickers withdrew their jet design and were rather quiet about jets. When they had a new one, then we talked about it and so on.

Q. Did the Vickers Company manufacture any pure jets during the period ending in 1956?

A. Yes.

Q. For what airlines?

A. No, these were for the military.

Q. No, no, I am speaking of commercial airplanes.

A. Oh.

Q. Commercial transports.

A. Yes, they did.

Q. For what airlines?

A. I'm not sure.

Q. Any American airline?

A. No.

[Tr. 1327] Q. Bring it down to the end of 1960. Do you recall what commercial jets were manufactured by Vickers and for what airlines?

A. The same answer would be applicable.

Q. Do you recall how many pure jet transports Vickers manufactured down to the end of 1960?

A. No, not really. Very few.

Q. They were actively engaged beginning some time in the '50s in the manufacture of turboprops, were they not?

A. Yes.

Q. You mentioned Avro, England. We have had considerable testimony as to the Avro Canada developments. When were your first exploratory conversations with respect to jet transports with Avro England representatives?

A. Well, I don't recall exactly, but I believe it was during the early '50s some time.

Q. Do you recall how long they continued?

A. Not very long. The answer is no, I don't.

Q. Did Avro England during the period ending at the end of 1960 manufacture any commercial jets for airlines?

A. I don't believe so.

[Tr. 1328] Q. Lastly you mentioned Sud. Were you referring there to the Caravelle?

A. Yes.

Q. Is that the only jet airplane that Sud was proposing or manufacturing up to 1956 or up to the end of 1956?

A. It was the only jet commercial that they were manufacturing—

Q. That is what I am talking about.

A. —that I can recall.

Q. When were your first exploratory conversations with Sud Aviation?

A. About the same time period during the period I can't be that specific now.

Q. You mean in the early '50s?

A. Yes, sir.

Q. Did they continue from time to time through to the end of 1956?

A. Yes.

Q. Were there any other aircraft manufacturers other than those you have already mentioned which as I recall my original question seemed to be limited to the period prior to 1951, were there any other manufacturers of aircraft with whom you and the members of your department [Tr. 1329] kept in touch after 1955 or 1956 than those you have already mentioned? 1951, I mean. I'm sorry.

A. Well, I explained earlier that the answer I gave with respect to the numbers—or the identification of the manufacturers should not be construed as applying strictly to the period prior to 1951.

Q. I understand that.

A. And I believe you are asking now if there are any other manufacturers—

Q. Than those you have already mentioned up to the end of 1960, with whom you or the members of your department kept in touch.

A. This is with respect to jets?

Q. Yes.

A. Well, there may have been, but I don't recall them now.

• • • • • •

[Tr. 1351] • • • Q. Referring again to Annex B-1, Mr. Rummel, and to page 2, you set forth there certain recommendations in the upper part of the page.

Have you read it?

Mr. Williams: Let's read the whole page.

Mr. Hayes: You do not have to read what is [Tr. 1352] attached.

Mr. Williams: We won't read the schedules, but let us read the first part.

Q. You state there, Mr. Rummel, that your recommendations were made on the assumption that TWA's financial situation will soon permit executing an equipment program designed to maintain TWA's current industry position and perhaps eventually to gain industry leadership.

Did you at that time have any knowledge as to TWA's then financial position?

A. I undoubtedly had some familiarity with the state of affairs in the corporation.

Q. Did you know at that time whether or not TWA's financial position was such as to enable it to follow the recommendations contained in Annex B-1?

A. I don't remember now, Mr. Hayes.

Q. Did you know at that time whether in the past TWA when undertaking major equipment programs had the assistance of the Tool Company?

The Special Master: You mean financial assistance?

Mr. Hayes: Yes, financial assistance.

A. Well, as I testified earlier, I frequently didn't know who was undertaking them or who they would [Tr. 1353] finally wind up with with respect to who did what in this area. This is not my area.

Q. You were not party to any financial arrangements between the Tool Company and TWA with respect to equipment acquisitions?

A. I don't recall being party to arranging for financing with respect to the equipment program.

Q. Is that true during the whole period down to the end of 1960?

A. Yes.

Q. Annex B-2 attached to your statement, Mr. Rummel, is a report on what you found from various British aircraft manufacturers and airlines.

Was this prepared in its entirety by you, Mr. Rummel?

A. Well, I composed the report, Mr. Hayes, I certainly didn't develop all of the technical data that's reflected in the report.

Q. Who did?

A. Well, I charged—some of the data I see here was obtained from the manufacturers to some extent, some was developed by members of my staff.

Then, of course, some by me, including the summary and conclusions.

[Tr. 1354] Q. Did members of your staff go with you on your visit to England when this data was gathered, the data contained in Annex B-2?

A. I'm not sure, Mr. Hayes. It is possible that one did.

Q. When you refer to some of the data being prepared by members of your staff, was that prepared subject to your instructions to them after you returned from the trip?

A. Yes, Mr. Hayes. I authored this report and put it together. I'm simply trying to point out that each and every number here is not mine.

Q. I understand. Much of the—

A. The drawings, I didn't make the drawings.

Q. Much of the material in Annex B-2, for example, are drawings that you obtained from the manufacturers or airlines as the case might be, is that correct?

A. I guess it is possible. I don't remember obtaining this particular stuff from airlines. Let me look at it.

Q. I said airlines or manufacturers.

A. Okay, yes.

Q. To whom did you submit this report, Mr. Rummel?

A. I believe it went to the same people that the [Tr. 1355] earlier report that I discussed earlier went to.

Q. The only one you mentioned specifically, if I recall rightly, was Mr. Collings.

Mr. Williams: That's the only one he mentioned specifically. He said selected or selective top management.

Mr. Hayes: That's right. I am speaking of the names.

Mr. Williams: Selected group of top management and Collings.

A. I just can't be positive, Mr. Hayes, as to exactly who it went to.

Q. Do you know whether a copy of Annex B-2 was sent to the Tool Company?

A. I'm not entirely sure. I think so, but I couldn't—I wouldn't want to state that as a positive fact.

Q. Did you receive any comments from anyone concerning this report which is Annex B-2?

A. Well, I'm quite sure I did, Mr. Hayes, but I—I don't remember them in detail.

Q. You do not recall any particular comment that you received from anybody?

A. Not any more than I indicated earlier with [Tr. 1356] respect to the other report.

I guess I do remember one now, and that was Mr. Collings concurring subject to some question he had on finding that it would be awfully—terribly, terribly wise—

Q. I am sorry.

A. That it would be terribly wise, that it would be a good idea, to undertake experimental operations with a jet or two as I had suggested in this report.

I think he indicated a preference that this be done on an industry basis rather than TWA undertaking the expense alone, but this was compatible with my recommendation.

But that's sort of a flash in my mind. I don't remember the others.

Q. Do you know whether anyone submitted written comments in connection with Annex B-2?

A. No, I don't.

Q. At the bottom of page 2 of your summary and conclusions, and the paragraph carries over, I think, to the top of the next page, the paragraph beginning at the bottom—maybe you would like to read it first.

Have you read it?

A. Yes, sir.

[Tr. 1357] Q. You mentioned in that paragraph that Boeing has already announced plans to proceed, that Lockheed and Douglas have transports in preliminary design stages and that North American and Consolidated have evidence interest and then you say, "None has actually approved expenditures necessary to carry developments through the prototype stages however."

Does the "none" include all of those named five companies?

A. I would so take it. I assume that's what I had in mind at the time.

Q. Yes, that is what I am trying to find out.

On the top of the next page, you express the hope that no less than two United States manufacturers will shortly proceed with the development of jet transports for commercial use.

What was the reason for your hope that there would be no less than two?

A. Well, it was my firm conviction then and it is now that a competitive situation between manufacturers builds better airplanes for both manufacturers and for the airlines. And I felt that by having two we would eventually wind up with better transports.

Q. Do you know whether or not Mr. Hughes agreed with [Tr. 1358] you in the belief that two or more manufacturers were better than one?

A. I certainly had the impression that he did.

As I testified earlier in the pre-trial work we frequently specifically sought a competitive situation. What I said about design was equally true with respect to negotiation. We like to negotiate concurrently with more than one manufacturer when we could.

Q. I direct your attention, Mr. Rummel, to Annex B-3 to your statement.

Was this report prepared entirely by you other than the technical data, charts and so on, or did you prepare even those?

A. I personnally composed and authored this report. However, as I indicated technical data contained in it came substantially, I believe, in this instance from outside.

Q. From outside, do you mean—

A. Outside TWA.

Q. —Chiefly from British European Airways.

A. I believe so, yes.

Q. This is, I notice, Part 1 of report entitled "Operations with turbo-powered transports."

Do you notice that on the front page, the cover [Tr. 1359] page, Mr. Rummel?

A. Yes, I do.

Q. Do you know to whom copies of Annex B-3 were sent?

A. No more clearly than the others, I presume it was the same group.

Q. If I asked you the same questions as I did with respect to Annex B-2 as to whom they were sent and any comments you received, if you could recall, would your answer be the same?

A. Yes, sir.

Q. Except, of course, that Mr Collings' comment is related to Annex B-2?

A. No, I'm sorry.

Mr. Collings' comment that I referred to was related to B-1.

Q. Was it B-1?

A. Yes.

Q. I am sorry.

Do you have any recollection as to whether a copy of Annex B-3 was sent to the Tool Company?

A. I'd be awfully surprised if it was not sent to the Hughes Tool Company, but I am unable as I sit here to specifically recall that.

• • • • •

[Tr. 1378] Q. You mentioned in this paragraph as I noted before, that you were particularly interested in the rapid progress being made by the Boeing Company.

Were any other manufacturers of aircraft making progress during the same period?

A. Well, I'm sure that they were all making some progress.

Q. Were you interested in the progress they were making?

A. Certainly.

Q. Who were those other manufacturers who were making progress at that time?

A. Well, Boeing was cutting metal and the others were principally cutting paper.

They would have been Douglas, Convair, primarily.

Q. Did you follow the developments at both Douglas and Convair?

A. We followed progress to the degree that we could at Douglas, and we were closely associated with Convair during 1954 and beyond and possibly late 1953.

Q. Were you particularly interested in the progress that Convair was making?

A. Yes.

[Tr. 1379] Q. Why was it that you did not mention that in your prepared statement?

Mr. Williams: I object, your Honor.

Mr. Hayes: It is a perfectly proper question, Mr. Special Master.

Mr. Williams: I don't think there is any reason for including every airplane company who he is interested in. He says he was particularly interested in the rapid progress being made by the Boeing Company.

Mr. Hayes: I understanding what he said.

Mr. Williams: It does not mean he is not interested in the progress being made by other companies. Now he says why didn't he mention that he was interested in the rapid progress made by Convair.

The Special Master: Overruled.

A. It was the word "particular" that Mr. Hayes used to which I responded and what I meant to imply was that we were closely following paper developments at Convair. Indeed, we were participating with Convair in those developments.

What I am trying to point out here is that we at that time were tremendously impressed with what Boeing [Tr. 1380] was accomplishing and the experience they were obtaining, and the fact that they were taking the bull by the horns and proceeding with actual developments of aircraft.

Q. When you say "we," to whom are you referring in this context?

A. I'm talking about myself and my associates, primarily those in TWA.

Q. Will you name them, please?

The Special Master: Those outside of your own department?

Mr. Hayes: Yes.

A. Mr. Damon was interested, Mr. Collings, myself, I believe Mr. Cocke.

Q. Anybody else? Pierson?

A. Quite possibly, Mr. Hayes, I don't recall it specifically right now.

Q. By the way, it has been established on the record that Mr. Damon is dead.

Is Mr. Collings still alive?

A. Mr. Damon—

Mr. Williams: No. Now you are talking about Mr. Hayes?

Mr. Hayes: Yes, now.

[Tr. 1381] A. Oh, now?

Q. Yes.

A. I thought you were referring back to the date, to the time period I was talking about. He was very much alive then.

Q. No, now.

A. Yes, he is alive.

Q. Mr. Leslie?

A. Yes.

Q. Mr. Cocke?

A. Yes.

Q. Mr. Cocke is with TWA, is he not?

A. Yes.

Q. Mr. Pierson?

A. Is he alive? Yes. Is he with TWA, no, but he is on the board.

Q. While I am on this subject, is Mr. Thomas still alive?

A. To my best knowledge, yes.

Q. He is not with TWA, though?

A. No.

Q. Is Mr. Hall still alive?

A. Yes.

Q. Is he with TWA?

[Tr. 1382] A. No, sir.

Q. Mr. Fellows is still alive?

A. Yes.

Q. Is he with TWA?

A. Yes.

Q. Mr. Allen still alive of Boeing?

A. Yes.

Q. Is he still with Boeing?

A. Yes.

Q. Is Mr. Dunn still alive?

A. Yes.

Q. Is he with TWA?

A. Yes.

Q. Did others besides you in TWA have a meeting, to your knowledge, with Boeing during the 1953 to 1955 period?

A. Yes.

Q. Who?

The Special Master: Outside of your group.

The Witness: Outside of my group?

Mr. Hayes: Yes, that always means outside of his department.

A. The answer would still be yes.

Mr. Williams: Do you mean, Mr. Hayes, [Tr. 1383] whether Mr. Rummel was there or not?

Mr. Hayes: If he knows that they had meetings with them. That is all I want to know.

I asked him who they were outside of himself and his department.

The Witness: Mr. Collings, I believe, Mr. Damon. I just can't remember who might have sat in on some of the TWA meetings we had with Boeing personnel. It is possible that others may have at times than those just in my department.

Q. Did Mr.—

A. And—

Q. Oh, pardon me.

A. Excuse me.

Q. Go ahead.

A. I'm pretty sure that it was during this time there were meetings that involved Mr. Hughes.

Q. You mean meetings between Mr. Hughes and Boeing? Is that what you mean?

A. Yes.

Q. Anybody else in TWA that you know of?

A. Well, I'm sure there were, Mr. Hayes, but I can't pinpoint it.

[Tr. 1384] The reason I'm sure is that I recall one meeting and one trip to Boeing to actually look at and inspect the early construction work on the prototype 80, but I don't remember just who all was in that party.

So, I—I think that exhausts my immediate recollection anyhow.

Q. Do you recall whether Mr. Hughes was in that party?

A. Yes, he was not.

Q. I'm sorry?

A. He was not.

Q. Was Mr. West in communication with Boeing during this period?

A. This period I believe is up to early 1954.

Q. No, I think my question was from 1953 to 1955.

A. Oh, through 1955?

Q. Yes.

A. Yes, sure, West was in touch. And Hughes was, too. There is no question about it.

Q. Was Mr. Cocke involved in any such meetings?

A. I don't specifically recall Cocke being involved in meetings with Boeing.

He was involved in meetings with me re Boeing.

Q. In these meetings with whom did you meet at [Tr. 1385] Boeing?

Can you identify the Boeing personnel involved?

A. Gee, I'm quite sure I did about a week ago when you were talking about the same thing, Mr. Hayes.

Q. I don't think we were talking about this at any time, Mr. Rummel.

The Special Master: Can you recollect any of them?

The Witness: Yes, I think so.

During—spanning the period of time, rather than a distinct meeting?

The Special Master: Yes.

The Witness: Mr. Penell—

Q. What name is this?

A. Penell. I did go over this. Mr. Penell, Mr. Olsen, Mr. Connelly, George Sanborn.

Q. Mr. Allen?

A. I think there is a fellow named Bell.

Q. Bell?

A. I think so. I'm not positive that was his name although I recall his face.

Yes, Mr. Allen.

Q. Mr. Beall?

[Tr. 1386] A. Mr. Beall.

Did I mention Penell?

Q. Yes, you did.

Mr. Williams: Yes, you started out with that.

A. Rouzie and Steiner. George Schier. I don't believe I mentioned Mr. Schier previously.

Q. No, you did not.

Mr. Williams: What about Beall and Bell?

Mr. Hayes: He mentioned them.

The Witness: I mentioned them.

Mr. Williams: You mentioned them?

The Witness: Just now I did, yes.

Oh, Ed Wells.

Undoubtedly there are some others, Mr. Hayes. That's all that seems to pop into my mind.

Q. Did anyone at TWA other than you and members of your department have meetings with Convair during this 1953 to 1955 period?

A. Yes.

Q. Who?

A. When you say to 1955, I am taking this again to mean through 1955.

Q. That is right.

[Tr. 1387] A. Well, I explained that earlier.

Within TWA we had a selected group of representatives from other departments which participated with me in—at various times in working on the various design efforts that led finally to the 880, and additionally, of course, Mr. Hughes was in touch with Convair, as I also testified to previously, Mr. West, I am fairly certain that Mr. Collings joined us at some of the—at least part of the time at some of the Convair meetings that were held in Kansas City.

Q. Anybody else that you recall now?

A. Not that I recall at the moment, Mr. Hayes.

Q. Who were the Convair people with whom these meetings were held?

A. I believe I testified to that before, but—

The Special Master: Have you any names to add?

The Witness: Excuse me, sir?

Mr. Hayes: I don't think it was ever asked before.

Mr. Williams: Yes, it was. Sandy Coogan and others.

The Witness: Ralph Bayles.

Mr. Hayes: I don't think I heard that name [Tr. 1388] before.

The Witness: He was there.

Mr. Williams: He said seven or eight such people in addition.

Q. Can you now identify any others?

A. I don't think of any in addition.

Q. Take Douglas, who besides you was in touch with Douglas during this 1953 through 1955 period?

A. Douglas advised me that Mr. Hughes had been.

I take it just to be clear that your questions are relating to jets because we were in touch with Douglas in many areas because we operated Douglas equipment.

Q. Certainly. I am talking only about jets.

A. I can't be sure, Mr. Hayes.

Q. You cannot recall any other TWA personnel who communicated with Douglas during this period?

A. I'm sure there was some communications but I can't at the moment recall a specific occasion sufficiently to testify directly.

Q. With whom in Douglas did you have your meetings?

A. Schogram.

Mr. Williams: How do you spell that?

[Tr. 1389] Q. What name?

A. Schogram, Ira Schogram.

Q. How do you spell it?

The Special Master: S-c-h-o-g-r-u-m.

The Witness: I think it was a, g-r-a-m. Ed Burton.

Q. Burton?

A. Burton, B-u-r-t-o-n, Art Raymond, Don Douglas, Sr., members of his staff.

And here again I am sure there were others. Those are the ones that come to mind at the moment.

Q. Was there any time during this 1953 through 1955 period when any effort was made on the part of TWA to get delivery positions from Boeing?

Mr. Williams: From Boeing?

Mr. Hayes: Boeing.

Mr. Williams: 1953 through 1955.

A. Yes, I believe there was.

Q. When was that?

A. I don't believe I can be quite that specific.

I think it was during this period. Probably the early part.

Q. Do you recall who attended on behalf of TWA?

A. I believe Mr. Damon and myself and I believe, [Tr. 1390] but I'm not 100 per cent, I think Mr. Collings was there.

Q. Who attended on behalf of Boeing, Mr. Rummel?

A. Wellwood Beall.

Q. Where did this meeting take place?

A. I believe it was at the hotel—I'm not sure which one now—in San Francisco.

Q. Can you give us the substance of what was said at that meeting?

A. Well, the substance, as I recall it, of the meeting was that Boeing spread out some drawings and discussed—of airplanes, and discussed the merits of the designs as they saw them briefly.

And I believe TWA expressed interest in some sort of an arrangement with Boeing which would give TWA rights of first refusal to jet positions at such time as Boeing was in a position to offer firm positions.

And I'm not entirely sure of that—it isn't that detailed, but it was a right of first refusal for early positions sought, as I recall it, by TWA during this meeting.

Q. Do you recall how many preferred delivery positions were sought by TWA at that meeting?

A. No, sir, I don't specifically at this time.

[Tr. 1391] I have the impression that whatever number it was it related to getting a competitive edge on our competitors. That is, we were after a first run sequence of positions, and I don't think whatever the number was, as I now recall it, was intended to indicate that we wanted all of the first positions for any fleet that was being thought of.

Q. What did the Boeing people say with respect to that request of the TWA people?

A. My recollection is there was a verbal agreement that came from the meeting between Boeing and TWA to that effect.

Q. What was the nature of the agreement, do you remember?

A. Well, as I indicated, the nature of it was, as I recall it, that Boeing verbally said that before they closed any deals with others they would give TWA the opportunity for first positions.

Q. Was Mr. Hughes at that meeting by the way?

A. No, sir, he wasn't.

Q. Did I understand you to say you cannot recall the exact time of this meeting?

A. No, I think it was in the earlier part of the period we are talking about, but I don't remember the [Tr. 1392] exact time.

In other words, I think it was either in, oh, possibly 1953, very, very early 1954. But it was—I'm quite sure it was early. I don't think it was 1952 but I am not completely sure even about that. But it was very early in this—

Q. That would place it before the Model 80 was constructed then?

A. Yes, although I can't recall at the moment—

Q. Which you said was the summer of 1954.

A. —what relation the Model 80 was to that. I think I did indicate the preliminary work of the model did take place over a fairly extended period of time.

Q. I said before the Model 80 was flown which you indicated was correct in 1954.

A. Oh, yes. I'm trying my best to pinpoint it for you and that's about as good as I can do. I think that probably was the case.

Q. When the Tool Company finally placed orders for planes for TWA, was the oral agreement that you understood that Boeing had made, kept by Boeing?

A. No.

Q. It was not?

A. No.

[Tr. 1393] It was my understanding Boeing called it off prior to that. In fact, I believe it was prior to Damon's death.

Q. That would have placed it in 1955, at least prior to 1956?

A. Yes, that it was called off.

• • • • •

[Tr. 1397] Q. If you could find one airplane which would operate at optimum capacity, both internationally and transcontinentally, would it be an advantage to TWA to have such an airplane?

A. Well, I don't know any way to answer that without referring to specific proposals. One design—it would have been more unlikely to, unreasonable to expect one design to be optimized for both areas because of different range requirements.

We were seeking the best compromise through various design approaches and studies and evaluation of those.

Q. Would it be an advantage of TWA to have a single airframe with different engines for its two different kinds of routes?

A. Mr. Hayes, that's what Douglas offered and my recommendation was that we buy Boeings.

Q. Would it or would it not be an advantage?

A. I thought the Boeings were better even though they didn't have one common airframe.

[Tr. 1398] Q. I did not ask you about Boeings. I asked a different question, Mr. Rummel.

Would it be of an advantage to TWA to have a single airframe with different engines for the different routes?

Mr. Williams: I object to the question. The witness has already explained, already answered it. Other things being equal I suppose the answer would be yes, but the witness has just said they were not equal.

So he can't answer the question.

The Special Master: Is it inherent in your question other things being equal would this have been—

Mr. Hayes: Certainly.

Mr. Williams: Other things being equal would it be an advantage to have one airframe on which you could hang different engines.

The Witness: If all things were equal—

Mr. Williams: Yes, that's what we assume.

The Witness: —I would prefer one airframe with one engine, certainly, but they aren't all equal.

By Mr. Hayes:

[Tr. 1399] Q. Was it your purpose in your negotiations with Convair to get such a kind of airplane?

A. No, not necessarily.

Q. Were you seeking to get a competitive advantage over your both domestic and international competition by your efforts at Convair?

A. Well, I took it that was the idea.

Q. The answer is yes to the question.

Mr. Williams: Yes.

A. Yes.

Q. How long did these efforts at Convair continue?

A. They continued through the Model 20, I would say, that I discussed heretofore.

Q. Which you mentioned heretofore, I believe, is more accurate, Mr. Rummel.

Mr. Williams: We won't quarrel with that.

Mr. Hayes: It was mentioned.

Q. When you say it continued through the Model 20, through what models did it continue until it reached the Model 20?

A. Well, the ones I described heretofore, I failed before to describe the Model 19 because I didn't remember it that well and I still don't.

Models 18, 19 and 20. And the forerunner [Tr. 1400] exercises to Model 18, of which there were many.

Q. Will you tell us briefly what the forerunner exercises were?

The Special Master: It is in addition to your previous testimony.

Mr. Hayes: On this, Mr. Brownell, there has been a mention of the Models 18, 19 and 20 with the tiniest description. I want to get the details of this negotiation.

A. Well, the first meeting I remember that introduced all this, and I don't remember exactly when it was, but it occurred in Las Vegas, with Mr. Hughes. I was asked to come out and Mr. Hughes and Convair were there, I met with them, and this started the exercise toward exploring various design proposals to see what could be developed which in my view would best satisfy TWA's need.

These were highly secret meetings, and I was advised not to discuss the details of these and the similar secret meetings even with Mr. Collings.

We literally held meetings at various intervals all over the country—

Q. When you say "we," to whom are you referring?

A. Me. Convair and I. There was—I can't [Tr. 1401] remember exactly now, but there were some other meetings later with Hughes, including the one in Beverly Hills. It is hard for me to fix the exact time. The intervals between meetings were to allow Convair—to permit time for Convair to sharpen their pencils and make new lines on papers.

One meeting occurred in Washington, D. C., one at my home in Kansas City—I simply disappeared from work at the time for a couple of days—one in Seattle. There may have been, there probably was one or two in Convair, but I don't remember quite that specifically.

One of the men I didn't mention before who participated in some of these meetings was a fellow named Ken Ridler.

Q. Is he with TWA or Convair?

A. No, Convair.

I was the sole TWA man in most of these early exploratory meetings, and as I recall it now the doors weren't open to others in TWA until we started down the Model 18 road.

Q. You said these were highly secret meetings. What was the reason for the secrecy?

A. Well, I, at the time, thought it was entirely for industrial security in order to find and develop an [Tr. 1402] airplane with superior characteristics for TWA and presumably one in which we would have favorable early delivery positions to the exclusion of deliveries to our competitors.

Q. Who instructed you to maintain the secrecy?

A. Mr. Hughes.

Q. You respected his wishes in that regard, I assume?

A. Yes, I did.

Q. You told about—

A. I don't recall revealing a thing on it, although I might have mentioned to Collings that I had a special project that would take me from the office, and I think he understood what that was.

There was in a sense communication but nothing specific.

Q. These are the preliminary meetings you are talking about and you said nothing was disclosed you thought in TWA until the Model 18 appeared?

A. Well, I don't recall anything at the moment, Mr. Hayes.

Q. Tell us about the Model 18.

The Special Master: About the plane itself?

Mr. Hayes: Yes.

[Tr. 1403] The Special Master: Or about the negotiations?

Mr. Hayes: Whatever he knows about it. I want to know the story about the development of the Model 18.

A. I'm quite sure that that was covered in the pre-trial deposition.

Mr. Williams: It was in the deposition.

Mr. Hayes: It may very well have been.

Mr. Williams: I don't know how much has been read into the record or incorporated.

Mr. Hayes: I don't think anything.

Mr. Williams: It has not been touched on in cross-examination.

Mr. Hayes: It has not.

Mr. Williams: It has been extensively covered in depositions.

Mr. Hayes: I intend to examine the witness on it now. I don't have to go by his pre-trial deposition at all.

The Special Master: Except as such parts that have been admitted in this record.

Mr. Williams: That is right. I am not presently in a position even to object because I [Tr. 1404] don't remember, Mr. Hayes, what has been gone into.

Mr. Hayes: We have excluded from the portions of the deposition that were put in, as we stated, anything having to do with the Convair or Boeing jets.

It might be on a particular page there may have been some reference to it. We were offering as to other airplanes.

Mr. Williams: Go ahead.

Q. Will you tell us your best recollection now as to what was done toward the development of the Model 18 and by whom?

A. I'm a little vague, but as I recall it by the time the Model 18 became identifiable as such, and by that time it was a pure jet, I was asked by Mr. Hughes to go to the West Coast and undertake—that is, San Diego—and to undertake negotiations with Convair.

Convair made it very clear after I arrived that they had numbers of discussions with Mr. Hughes on the Model 18. I think this was probably during—either real late—I think it was probably early 1955. I'm not sure of the exact time now. It could have been late 1954 but I believe it was early 1955.

I obtained during some of the fairly frequent [Tr. 1405] calls with Mr. Hughes Mr. Hughes' permission to bring in a few other technical representatives which I mentioned heretofore from TWA to aid and assist in the negotiations of the specifications. I requested Mr. West, with Mr. Hughes' concurrence, to come to San Diego to aid in the contractual discussions. I was in charge of both.

And during the course of negotiations and technical explorations, the design was altered from time to time to—in an effort to make a better design or to have better capabilities. And during this period, the contract was—I will say substantially took form and at least in my view considerable progress had been made.

Now, I don't know how much stuff you want, Mr. Hayes.

Q. I want the whole story.

A. It transpired over a long time and it is slightly time-consuming.

If you want it I guess I am supposed to give it to you.

• • • • •

[Tr. 1416] • • • By Mr. Hayes:

Q. Would you, please, Mr. Rummel—you can do it all in one answer, if you want—take the three Models, 18, 19 and 20, and tell us what kinds of planes they were, what stage of development they had reached and what was the intended use by TWA of those planes?

Mr. Williams: Can we take it up model by model?

Mr. Hayes: Yes, sure.

Mr. Williams: Let us start with Model 18, [Tr. 1417] then.

A. Model 18 evolved through a period of time into a low-wing, all-metal, highly swept commercial transport, powered or to be powered by—with J75s, as we called them in those days, four engines.

The wing was swept to a higher angle than either the Douglas or Boeing proposals. As I recall it now, it was slightly faster. And at the time it was initially developed, it appeared to be somewhat better than the other contenders.

I don't recall its exact capacity, Mr. Hayes. I believe it was slightly larger than the then existing Boeing proposal. It was intended to be used in both transcontinental—or, let's say, it was intended to be suitable for use in both transcontinental and international service, as I recall it, for TWA, but the manufacturer, of course, recognized that such a plane could provide a very broad potential market base for him, since it would encompass domestic and international

competitors finally of TWA, in terms of their likely application in the event they should buy it.

The Model 19—

Q. May I ask a question before you go to the Model 19, Mr. Rummel? You said something that was not to be—[Tr. 1418] I have forgotten your exact words—better than the other contenders—

Mr. Williams: He said it was somewhat better than the other contenders.

Q. Whom did you mean by "the other contenders"?

A. What I said was that, but I also said that at the time the 18 finally became the 18, what I intended was a comparison between the 18 and the Boeing and Douglas proposals as they then existed, which at that time, as I now recall it, and I believe this is certainly the case, were powered with J57 engines and were what we termed suitable for domestic service, even though the Boeing-Douglas teams both felt their designs were fine for international service, and so represented them.

Q. I just wanted to identify who the contenders were.

A. Boeing and Douglas.

The Model 19 was an interim consideration, that is, between the Model 18 and 20, and I just can't seem to recall it clearly. I think that it had six rather than four engines, but I just don't remember the details.

The effort at that time was to see what could be done to get a step ahead of the then existing contenders, the same ones. That is, their latest—our understanding [Tr. 1419] of their latest designs.

Now, the Model 20 was a substantially larger plane than the Model 18. It, too, was considered in various forms. It had, as I recall it, six engines, J75s with the—I believe

the two principal forms considered were the long tube and double-deck. It had substantially more wing area than the Model 18, being a larger plane.

The one which finally evolved was a double-decker, powered by six J75s, and of substantially greater capacity than either the Boeing or Douglas proposal that had existed at that time.

Mr. Williams: Lifting capacity, carrying capacity or distance or all three?

The Special Master: I thought you meant passenger carrying capacity.

Mr. Williams: I thought so at first.

[Tr. 1420] The Witness: It had greater fuel capacity but I didn't mean that.

The Special Master: Off the record.

(Discussion off the record.)

The Witness: I meant greater payload capacity. It did have greater lift, of course.

Q. Was that like the Model 18 intended for use by TWA on both transcontinental and transatlantic services? I mean the Model 20.

A. Well, yes, it was part of the same series that I referred to earlier. It was the last one of that series.

It was also intended quite obviously to be sold to others in the event it would have been built by Convair.

• • • • •

[Tr. 1424] • • • Q. Do you recall the designation that aircraft had as a military tanker? Let me see if I can help your recollection. KC-135?

A. That aircraft I don't think had any designation. The ones that were produced as a result of getting the contract—

Q. That's what I meant.

A. —which came from that early development were called KC-135s. You realize I am sure they were different from the prototype.

Q. Oh, I assume so.

In the paragraph which begins near the top of page 6, you state that we engaged in numerous discussions with Boeing representatives throughout 1954 and thereafter. You mention in addition to yourself and Mr. Hughes, TWA employees, including Mr. Damon, then presi- [Tr. 1425] dent, and numerous Boeing employees.

You have already told us that during this same period there were negotiations of one kind or another going on at Convair with respect to the different models which you mentioned.

Were negotiations of one kind or another also going on with Avro during this period?

Q. Yes, there were several meetings which I described earlier with Avro, some of which took place during this period.

Q. I just wanted to fix the time, Mr. Rummel.

By the end of 1954, had any decision been made by TWA management as to which type of jet aircraft it would acquire and made by which manufacturer?

A. I doubt if we—

Q. I am sorry.

A. I doubt now that we had made a firm choice as to what—which kind of airplane we would like to see procured for TWA.

I believe at that time we tended toward the Boeing. We later or at some point in time, came to a clear technical preference. By that I mean merely—not purely the technical but the operational and economic and so on for Boeing, but I don't remember exactly when [Tr. 1426] that occurred. I believe it was after that.

The Special Master: May I inquire for my own information?

Mr. Hayes: Surely.

The Special Master: Does the end of 1954 have some special significance that escapes me?

Mr. Hayes: I am sorry. I did not hear you.

The Special Master: You asked that question up to the end of 1954.

Mr. Hayes: That's right.

The Special Master: Does that date have some significance that has escaped me?

Mr. Hayes: No. I just wanted to go little by little because 1955 has considerable different ideas or different pertinences, maybe, is the word.

• • • • •

[Tr. 1428] • • • A. This is one of the—this reflects one of the practices that I referred to in the early part of the testimony. It was Boeing's desire to configure their planes to meet as many requirements of as many major customers as possible in order to sell airplanes to those customers.

Q. Were they at this time, January 12, 1955, engaged in communicating with various potential customers so they could get as much agreement as possible on the type of plane to be manufactured by them?

A. This letter, the third paragraph clearly indicates that they had conferences and discussions under way with Pan American for some time.

Q. That's right, for two weeks you say?

A. Two weeks.

Q. Were they communicating with other airlines besides Pan American and TWA so far as you know?

A. At or about this time, and I can't be sure of the precise time, they were talking to American Airlines, and I'm confident to other airlines as well.

Q. When you say you are confident, do you mean you have a recollection that they were talking?

[Tr. 1429] A. I recall Boeing indicating that they were not only reviewing their proposals with airlines here but also some of the airlines abroad.

Q. In the next paragraph you state—

A. My difficulty is in recalling for sure the specific ones other than American.

Q. In the next paragraph you mention that you advised—

Mr. Williams: How does that start, "I told"?

Mr. Hayes: Yes.

Q. That you advised the Boeing representatives that you had been committed to certain work on the west coast which would make this impractical on a large scale basis for perhaps as long as two months.

What was the work on the west coast to which you were committed?

A. I believe two things. The six—well, it would then have been the 1449A and the Convair.

Q. You mean the Convair negotiations—

A. Yes.

Q. —which led to the 18, 19 and 20 eventually?

A. I believe so.

Q. Then in the last paragraph you speak about Pan [Tr. 1430] American wanting the first 25 jets and TWA's representative wanting the first 15 jets from Boeing.

Can you tell us more about that so far as you recall anything now?

Mr. Williams: Break it up. First you asked about Pan Am wanting 25 and the second question relates to TWA wanting 15.

A. Well, the—as I recall it now, the statement on 25, reflects Boeing's advice, and the TWA representative refers to Mr. Hughes. We had the rule never to use his name in writing. I guess I mentioned that before.

And I'm not certain now whether this particular sentence alluded or referred specifically to what Boeing said then or whether it included what I then understood from Hughes.

It could have been either one and I'm just not that clear as I read this now.

[Tr. 1431] Q. But is it your best recollection that at that time Pan American wanted the first 25 airplanes and TWA wanted the first 15 airplanes from Boeing?

A. No, not really. It is my understanding that Pan Am wanted the first 25 and Hughes had taken the position he wanted the first 15 for TWA.

I, however, don't remember the details, the sequence of the two positions.

Q. Do you recall when it was that TWA took the position, or Hughes, that the first 15 Boeing jets should go to TWA?

A. I don't remember TWA taking a position for Mr. Hughes. Is that what you said?

The Special Master: No, or Mr. Hughes.

The Witness: Oh, I'm sorry.

Well, no, this letter—I don't remember exactly, except it is clear from this letter it was prior to January 12, 1955.

Q. Is it your recollection that Mr. Hughes had been negotiating with Boeing for delivery positions prior to that time?

A. Yes, it is my recollection that Hughes had been in touch with Boeing just as I testified heretofore.

Q. Had any other TWA representative communicated [Tr. 1432] with Boeing prior to January 12, 19[illegible] concerning delivery positions on Boeing jets?

A. Well, I've already testified to that. I mentioned an earlier meeting in San Francisco a while ago.

And, of course, I had had numbers of meetings with Boeing people from time to time, my associates. I've already testified to that.

The Special Master: Discussing numbers to be ordered?

The Witness: Primarily, I think, discussing the airplane designs, discussing the availability of planes, attempting to persuade Boeing that TWA should be the first or among the very first customers for competitive reasons.

I don't recall definitizing numbers of fleets, potential fleets with Boeing during these discussions. I'm quite sure that I would have left that to Mr. Hughes.

By Mr. Hayes:

Q. Did you ever take a position, prior to January 12, 1955, with Boeing with respect to what delivery positions should be accorded TWA?

Mr. Williams: You personally?

[Tr. 1433] Mr. Hayes: Yes.

A. I personally, repetitively tried to persuade Boeing that when they built the transport that the first position should go to TWA.

Q. The first position.

A. Positions.

Q. How many?

A. I don't remember that clearly, Mr. Hayes. I was trying to persuade Boeing that TWA was a prime customer and that we should be the first with jets.

Q. What did the Boeing representative say to you in response to your request?

A. Well, I—there were—I don't remember specifically. There were numbers of such occasions, but the general impression I have is that they were generally sympathetic and encouraging in the sense they were trying to cultivate interest in their planes, but that they were generally non-committal except for the occasion I mentioned earlier.

I think that their theme was, that's fine, the way to get it is to order it.

The Special Master: May I ask a question?

Mr. Hayes: Surely.

The Special Master: Did I understand [Tr. 1434] you to say that one argument you used with Boeing to get prime delivery positions was that TWA was Boeing's prime customer?

The Witness: No, that we were a prime—

The Special Master: A prime customer?

The Witness: —potential customer.

I remember at one point trying to persuade Boeing that since we were both a domestic-international carrier, that by tailoring the planes more specifically to our requirements than others, they would more nearly satisfy the maximum number of their potential customers which was another reason why they should be working with us as opposed to working more importantly or more completely with others.

I don't remember all the details, Mr. Hayes. This

went over—these things span numbers of meetings in a fair period of time.

* * * * *

[Tr. 1493] * * * Q. Would you say there was a respectable number of airline engineers who at September 12, 1955, did believe that even the 707 would suffer from hidden penalties?

A. I don't believe that by the time the commercial designs were evolved into the 100, 300 series, that that was an important consideration.

Q. Had they evolved into the 100 or 300 series by September 12, 1955?

A. I don't believe so, but as I indicated before, I'm not completely sure. It could have been. But I don't think so, however.

Mr. Hayes: I offer in evidence, Defendants' Exhibit 26 for identification for the same purpose.

Mr. Tenney: We will waive our objection with that limitation.

The Special Master: Received.

(Defendants' Exhibit 26 previously marked for identification, received in evidence, as of this date.)

Mr. Hayes: I ask that there be marked for identification page 68 of American Aviation, [Tr. 1494] dated October 10, 1955. This is Defendants' Exhibit 27.

The Special Master: Mark it for identification.

(Page 68 of American Aviation, dated October 10, 1955, marked Defendants' Exhibit 27 for identification, as of this date.)

By Mr. Hayes:

Q. I show you, Mr. Rummel, Defendants' Exhibit 27 for identification, and I ask you to read the first three paragraphs.

A. I read the first three paragraphs, Mr. Hayes.

Q. Do those paragraphs accord with your recollection as to Douglas' decision at or about the time of this Article, October 10, 1955?

Mr. Tenney: I object to any such question until he has first been asked what his recollection is on that subject.

The Special Master: Split it into two, if you like.

Mr. Hayes: There is nothing improper about this question.

The Special Master: No. Let us try it the other way.

[Tr. 1495] What is your recollection independently of the subject matter covered by the first three paragraphs.

The Witness: I am a little vague, Mr. Brownell, on the exact dates, but as I indicated earlier I recall that Douglas and Boeing both swung over to the J75s about the same time.

The airlines generally during this period of time were dissatisfied with the range characteristics, at least for international services with the jets that Douglas and Boeing both had proposed and were pushing for more power.

I did not on reading this recall the difference between the J75 augmented and the one that's augmented still more. I don't doubt, though, that it might have been part of it at the time.

By Mr. Hayes:

Q. I believe that this refers to an augmented J57.

A. I'm sorry. If I said J75, I meant to say J57.

Q. Do you have any recollection that the statements contained in the first three paragraphs of this article are inaccurate?

[Tr. 1496] Mr. Tenney: I object to the form of that question.

Mr. Hayes: It is a perfectly proper question.

The Special Master: Do these three paragraphs refresh your recollection on the subject matter covered as to any matters in addition to what you have already testified?

The Witness: No, sir.

Q. I direct your attention, if I may, Mr. Rummel, to the third paragraph beginning in the second column starting with the words, "In a similar quandary. . . ." Please read it.

A. I read the paragraph.

Q. Insofar as you can recall, are the statements in that paragraph correct?

Mr. Tenney: I object to that question.

The Special Master: Does this refresh your recollection as to the matter covered as to anything in addition to what you have already testified?

The Witness: I think this generally accords with my recollection, Mr. Hayes, excepting this clause or phrase says, "In a similar quandary." I'm not quite sure what that's referring to.

[Tr. 1497] Q. Take my word for it, it refers to the quandary that Douglas was in as set forth in the first three paragraphs.

A. Well, it doesn't accord with my recollection.

Q. It does not?

A. No.

Q. As of October 10, 1955, your negotiations with Convair had gotten beyond the Model 18, had they not?

A. Mr. Hayes, as I indicated, I'm not quite sure as to the date when we went to the Model 19 and left the Model 18 behind.

It could have been November. I'm just not that certain at the moment.

Q. Let me ask you this question: As of October 10, 1955, had your conversations with Convair progressed to the point where you were considering the use of the J75 rather than the J57 engine?

A. I answered that a few moments ago, Mr. Hayes. My recollection is we considered the J57 type for power plants much earlier than that.

The Special Master: J75.

The Witness: J75. I'm sorry.

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[Tr. 1509] • • • By Mr. Tenney:

[Tr. 1510] Q. Mr. Rummel, in your direct testimony at page 4, you testified that you had been actively engaged since 1943 in all of TWA's major aircraft procurement programs. Mr. Hayes has asked you a number of questions on cross-examination about several of those programs.

I want to narrow the time period here to the period from 1954 to 1960, the end of 1960.

What was the extent of your knowledge of aircraft procurement programs for TWA during that period?

A. Well, I was intimately concerned with and involved in all of the important airplane procurement programs during that period.

Q. During that period, was there one person who made all of the ultimate decisions with respect to the acquisition of aircraft for TWA's use?

Mr. Hayes: I object. This calls for a conclusion, a matter of judgment. I have no objection to the elicitation of facts. This calls for a complete conclusion on the part of this witness.

The Special Master: Can you break that down into specifics?

By Mr. Tenney:

Q. Mr. Rummel, were you, during this period, acquainted with the manner in which decisions were made in the ac- [Tr. 1511] quisition of aircraft for TWA's use from 1954 to 1960?

A. I believe so, yes.

Q. Were you acquainted with the manner in which final decisions were made as opposed to interim recommendations?

A. Yes, I believe I was very close to that.

Q. As a matter of practice, during that period, was there one person who exercised the final power of decision on the aircraft procurement programs for the use of TWA?

Mr. Hayes: I object, Mr. Special Master. This again calls for a conclusion.

Any facts the witness has, we are perfectly happy to listen to, not a judgment or conclusion by him.

The Special Master: Overruled.

Mr. Hayes: He has already testified, for example, that he had nothing to do and had no knowledge concerning financing.

I am perfectly willing to have this witness testify to any facts in his possession, but I object to conclusions, to characterizations by him as to who did not have responsibilty.

Mr. Tenney: I will press the question, [Tr. 1512] Mr. Brownell.

The Special Master: Overruled.

A. Yes, Mr. Hughes.

Mr. Hayes: I move to strike the answer "Mr. Hughes." He was asked if there was one person, not to identify him.

The Witness: Well, I—

Q. Who was that person?

A. Mr. Hughes.

Q. In reaching his decisions, did Mr. Hughes consult others as to the type and quantity of aircraft to be acquired for TWA's use as far as you are aware?

Mr. Hayes: I object to this. Let the witness show a basis of his knowledge first.

Here again, we are getting into sheer conclusions by the witness.

The Special Master: Is that confined to other persons in TWA, that question?

Mr. Tenney: I did not so intend it, but I—

The Special Master: It might be well to break it down.

By Mr. Tenney:

Q. Did Mr. Hughes, in reaching these decisions, con-
[Tr. 1513] sult other persons in TWA as to the type and quantity of aircraft to be acquired for TWA's use?

Mr. Hayes: Mr. Brownell, I am sorry, but I have to object to this question.

The Special Master: I will reserve decision until the line of questioning is completed.

A. I believe on occasions he did, yes.
Q. Did he consult you in that connection?
A. Yes, on numbers of occasions.

Mr. Hayes: Can I have a running objection to all of these questions, so I won't have to object each time?

The Special Master: Yes. I think that's a good idea.

Mr. Hayes: Including the last one?

The Special Master: Including the last one.

By Mr. Tenney:

Q. Was there any person who Mr. Hughes consulted more than others in this connection?
A. Yes, I believe so.
Q. Who was that person?
A. I believe he consulted me more than any other person, in these respects.

The Special Master: What do you base that
[Tr. 1514] opinion on?

The Witness: I base it on a number of things, including people at the time infrequently, some of

them indicating they had calls from Hughes, that is infrequently in relation to the number of calls that I had.

I remember at one time, a representative of the Tool Company indicated that he thought I had had more calls and contacts from Hughes than anyone within the Tool Company even during this period.

The Special Master: Who was that?

The Witness: That was Mr. Cook.

The Special Master: Who was the source of your information within TWA?

The Witness: Mr. Cook indicated occasional contracts, Mr. Collings, Mr. Gilmore in a few instances. I had the impression that Mr. Thomas was in touch a few times.

The Special Master: Which one of them told you that you were consulted more often by Mr. Hughes than anyone else in TWA by Mr. Hughes?

The Witness: That was the Tool Company—oh, you mean within TWA?

The Special Master: Yes.

[Tr. 1515] The Witness: Well, this is my judgment from knowing of the number of calls made to me and having an understanding at the time as to the numbers of calls generally that he had made to others.

The Special Master: Is that the end of that line of questioning?

Mr. Tenney: No, sir, I have a number more on that line.

By Mr. Tenney:

Q. Was there any particular person to or through whom Mr. Hughes' decisions on matters of procurement of

aircraft for TWA's use were communicated to TWA as a regular matter during that period?

A. Well, as a regular matter, they were communicated through me, although there were some exceptions. For example, as I testified, during the cutback in—or the intended cutback at that time on the Convair and Boeing orders from Schwartz and Cook.

Q. When did Mr. Thomas become president of TWA?

A. I believe it was the summer of 1958.

Q. Did you ever have a discussion with Mr. Hughes in regard to the scope of Mr. Thomas' authority in connection with the acquisition of jet aircraft?

A. Yes.

[Tr. 1516] Q. When did that discussion take place?

A. Well, I can't be exact, but it was shortly after Mr. Thomas became president.

Q. What did Mr. Hughes tell you on that occasion?

Mr. Hayes: I object, because it has nothing to do with this case, and this is a particular objection over and above my general objections that I have phrased so far.

We are concerned here with acquisitions that were supposed to have taken place, according to Mr. Rummel, in his position as an expert in 1955, 1956 and in January 1957.

Apparently there were no new contracts for acquisition from the time Mr. Thomas became president until the end of 1960. It is wholly immaterial what conversation Mr. Rummel may have had with Mr. Thomas in 1958. The contracts had then been made.

[Tr. 1517] The Special Master: I think the cross-examination opened that subject up.

I will overrule the special objection.

Q. What did Mr. Hughes tell you in that discussion?

A. He told me that Mr. Hughes and I would continue to handle equipment as we had been, and that Mr. Thomas would serve as operating head of the airline, but that he would not be handling equipment.

Q. Did you ever have a discussion with Mr. Thomas concerning the same subject?

A. Yes, I did.

Q. When did that occur?

A. Some time after the conversation with Mr. Hughes. It was during my first meeting with Thomas.

Q. What did Mr. Thomas tell you?

Mr. Hayes: I object to this as hearsay.

The Special Master: Sustained.

Mr. Tenney: Mr. Brownell, Mr. Hayes has examined extensively as to the scope of Mr. Rummel's authority in TWA and as to his function in TWA during this crucial period of 1954 all the way to 1960.

I am asking the witness as to a conversation between the two people within TWA who would know most who had the responsibility in these matters.

[Tr. 1518] I think that this is completely within the scope of Mr. Hayes' cross and is designed to establish in connection with his so-called voir dire the authority and position of this witness.

Mr. Hayes: I still express the objection that it is sheer hearsay. Mr. Thomas is available.

The Special Master: I will sustain that objection.

Q. You have testified—

The Special Master: Unless you can establish that it modifies the organization chart.

Q. At this period of time, Mr. Rummel, was there a formal organization chart of the kind that I showed you and was marked TWA Exhibit 11?

Mr. Hayes: I object on the ground that it was not a formal organization chart. It was a description of the duties of one particular officer.

Q. Was there a formal organization chart at that time?

A. I don't recall any. One of the first things Thomas undertook was to develop a revised organizational concept with associated charts, manuals and so forth.

I don't believe we had a clearcut organization [Tr. 1519] at this time.

Q. Was the manual of organization or those pages of the manual of organization which have been marked as TWA Exhibit 11 developed while Thomas was president of TWA?

A. Yes.

Q. Did the conversation that you had with Mr. Thomas in connection with the scope of his authority and the procurement of aircraft for use by TWA establish a different responsibility in that field than would appear from this manual of organization?

Mr. Hayes: I object on several grounds.

First, it does not appear when this supposed organization chart if it ever existed, did exist.

Secondly, again, it is sheer hearsay.

The Special Master: You can answer yes or no to that.

Did the conversation with Mr. Thomas effect a change in the organizational chart?

The Witness: No, not that I'm aware of.

The chart was developed subsequent to that.

Q. Let me rephrase my question.

As president of TWA, did Thomas ever state to [Tr. 1520] you what the scope of your authority and his authority with respect to the procurement of aircraft for use by TWA was?

A. Yes.

Mr. Hayes: I object and move to strike the answer.

Please wait until I have a chance to object, Mr. Rummel. I ask that as a favor.

The Witness: I certainly will, Mr. Hayes.

Mr. Hayes: This is again sheer hearsay. Mr. Thomas is available.

The Special Master: Answer yes or no.

The Witness: Yes.

Mr. Hayes: I move to strike that answer, Mr. Brownell.

The Special Master: Overruled.

Q. What did he tell you on that occasion?

Mr. Hayes: Same objection, Mr. Brownell. As to hearsay, I mean.

The Special Master: Sustained.

Q. Who was the last president prior to Mr. Thomas?

A. Mr. Burgess.

Q. When did Mr. Burgess become president of TWA?

A. I think it was early 1957.

[Tr. 1521] Q. Did you ever have a discussion with Mr. Hughes with regard to the scope of Mr. Burgess' authority in connection with the acquisition of aircraft for TWA's use?

A. Yes.

The Special Master: Just a minute, Mr. Rummel.

The Witness: I am sorry.

Mr. Hayes: I object on the ground as I mentioned before in respect to Mr. Thomas. It is immaterial, it has nothing to do with the issues in this case that related to acquisition of aircraft in 1955, 1956, and January 1957.

The Special Master: Overruled.

The Witness: Yes.

Q. Do you recall when that occurred?

A. Well, shortly after Mr. Burgess was made president.

Q. What did Mr. Hughes tell you on that occasion?

A. He indicated that he would continue to handle equipment, and that I should continue to work directly with him on equipment matters, and that Mr. Burgess would serve as the operating head of TWA.

Mr. Tenney: In connection with Mr. Thomas, [Tr. 1522] I have one other question. It is a little bit out of that line.

Q. You have testified, Mr. Rummel, in answer to a question by Mr. Hayes that conclusions of the Jet Planning Committee in the form of recommended plans and premises were communicated to Mr. Thomas for his approval.

To the best of your recollection, did Mr. Thomas ever fail to approve any such recommendation?

A. To the best of my recollection, I don't recall Mr. Thomas not approving any of them.

The Special Master: Did your recommendations in any case that you can recall go to the board of directors of TWA?

The Witness: As far as I know now, Mr. Brownell, the plans and premises as such, did not.

At the same time, I just feel confident that some aspects of our planning must have been reviewed at these board meetings, but I certainly cannot presume to testify as to what occurred in these meetings.

The Special Master: You did not attend the board of directors meetings?

The Witness: No, sir, I did not.

They were not submitted to the board by me.

[Tr. 1523] By Mr. Tenney:

Q. During the period 1954 through the end of 1960, which continues to be the period I am asking you about, was there anyone employed by TWA, Mr. Rummel, other than yourself and those operating under your supervision, who was charged with an overall responsibility both for making a technical evaluation of aircraft being considered for use by TWA and for formulating recommendations as to the types and numbers of aircraft which TWA needed or should have for an efficient and economic operation?

A. No, although on occasions I consulted with others within TWA as I have testified to. It was incumbent on me to reflect the total company view insofar as I could.

Q. During your connection with TWA from 1943 to the present time, can you estimate, Mr. Rummel, the approximate dollar value, total, of the purchases of aircraft and associated equipment in which you have participated on behalf of TWA?

A. Well, not exactly.

Mr. Hayes: I—

The Special Master: Just a minute.

Mr. Hayes: I object to that question chiefly because the breadth of the verb partici- [Tr. 1524] pated. I don't know what it means.

The Special Master: I think you could clarify that a bit.

Mr. Tenney: I will rephrase that question by withdrawing the verb participating.

Q. At page 4 of your prepared statement, Mr. Rummel, you state that you have been actively engaged in all of TWA's major aircraft procurement program.

Would you estimate the dollar value in the aggregate of the purchases of aircraft in which you have been engaged actively since 1943?

Mr. Hayes: I object, Mr. Special Master, on the ground that again the words "actively engaged" are very strange words. It does not indicate by this question in what capacity the witness was actively engaged.

He could have been engaged as a merest subordinate, and if so, it is of no probative value in this case.

The Special Master: Overruled.

A. I cannot exactly, but it is over $1 billion worth.

Q. Turning to page 6 of your direct testimony, Mr. Rummel, you testified that in the fall of 1955 you [Tr. 1525] recommended to Mr. Hughes that TWA should place orders for jet aircraft.

What were the last previous aircraft for which orders had been placed for TWA's use?

A. The Lockheed Model 1449A, which was a turboprop. I believe that was committed late in December of 1954. Then it was changed into the 1649A later. And the contract for it I think was signed March—I believe March 1955, around March.

Q. In December of 1954, when the order was placed for the 1449A, were you consulted?

Mr. Hayes: I object if your Honor please. This goes beyond the scope both of the direct and of the cross. I don't see any redirect in this at all.

We are talking here in this case supposedly, and plaintiff has tendered a case, supposedly based on the acquisition of jet aircraft, not on orders that were placed with respect to piston aircraft.

Mr. Tenney: Mr. Brownell—

Mr. Hayes: Permit me just a second.

As a matter of fact in the trial briefs submitted by plaintiff they have deliberately ex- [Tr. 1526] cluded all piston aircraft. And this has been brought out on the record already was originally ordered—as a matter of fact this morning I think—as a turbo-prop and because of the inability to get engines was changed to a piston aircraft in early 1955.

So I object as beyond the scope of anything before your Honor at this hearing.

The Special Master: Overruled.

Mr. Tenney: I will repeat the question.

The Special Master: Do you want the question repeated?

The Witness: Yes.

Mr. Tenney: Would you repeat the question?

(The question was read.)

A. Yes, I was.

Q. Did you make a recommendation?

A. Yes, I did.

Q. What was your recommendation?

Mr. Hayes: I object. It is immaterial what his recommendation was and irrelevent.

Besides, we don't know to whom his recommendation was supposed to have been made.

The Special Master: You have reserved de- [Tr. 1527] cision, have you not, whether you are going to make the motions on the voir dire?

Mr. Hayes: Yes, I tried to make that clear, Mr. Brownell. I guess I didn't. I have decided that instead of trying to separate voir dire from cross, they become so immeshed in the course of the voir dire that I will make all motions at the conclusion of cross.

The Special Master: Then I will overrule this objection.

Mr. Tenney: Would you state the question again, Mr. Reporter?

(The question was read.)

A. I recommended to Mr. Hughes on several occasions that the 1649A not be purchased. I am sorry. That the 1449A not be purchased.

Q. Did you recommend an alternative airplane?

Mr. Hayes: I object on the same grounds as I have already stated, Mr. Brownell.

The Special Master: Overruled.

A. Yes, I recommended that the DC-7C be procured for TWA's use, built by Douglas.

Q. Who was the chief executive officer of TWA at that time?

[Tr. 1528] A. Ralph Damon.

Q. Who was the chief operations officer of TWA at that time?

A. John A. Collings.

Q. Did you tell them your views on this subject?

A. Yes.

Q. Were you familiar with their views on this subject?

Mr. Hayes: I object. If he was familiar with it it could only be by hearsay.

The Special Master: Sustained.

Q. Did they state to you their views on this subject for repetition to Mr. Hughes?

A. Yes, I'd say they stated their views to me knowing that either I would—

Mr. Hayes: I object. Now the witness is speculating as to what was in their minds when they stated their views.

The Special Master: That's what we are trying to get away from.

The Witness: I see.

Q. Did you tell Mr. Hughes what the views of Mr. Damon and Mr. Collings were on this subject?

A. Yes, I did.

[Tr. 1529] Q. What did you tell Mr. Hughes their views on this subject were?

A. I told Mr. Hughes that Mr. Damon and Mr. Collings were in agreement with my position on the 1449A and on the advisability of moving ahead with the Douglas DC7C.

Q. What was the result of these recommendations to Mr. Hughes?

Mr. Hayes: Which recommendations, Mr. Tenney?

Mr. Tenney: The recommendations that Mr. Rummel has been talking about.

The Special Master: The DC-8C, whatever that is.

Mr. Tenney: That the DC-7C should be purchased and not the 1449A.

A. Well, Mr. Hughes had—

The Special Master: I wonder if you could rephrase that a little for my benefit if nothing else. What did Mr. Hughes say when you told him that?

Mr. Tenney: Will you answer that?

The Witness: Oh, Mr. Hughes expressed con-
[Tr. 1530] fidence in Lockheed in that they would be able to evolve a better airplane than any of us then thought they would be able to do.

Q. What airplane was ordered by Toolco on that occasion?

The Special Master: On what occasion?

Mr. Tenney: On that occasion.

The Special Master: The occasion of his conversation with Mr. Hughes?

Mr. Tenney: In December of 1954.

Mr. Hayes: He has already testified the 1449A.

The Special Master: That is true, is it not?

The Witness: Yes, sir, Mr. Brownell, it is.

Mr. Hayes: If I am not allowed to repeat, Mr. Tenney, you should not either.

Mr. Tenney: As long as it is on the record.

Q. Thereafter, in the year 1955 when consideration was being given to the desirability of ordering jet aircraft for TWA's use as far as you are aware, did Mr. Hughes consult Mr. Damon or keep him informed?

Mr. Hayes: If he knows.

The Special Master: If he knows.

[Tr. 1531] Mr. Hayes: He may not know anything.

A. As far as I am aware, he did not. Because of that I made it a point to fill Mr. Damon in on occasion myself

thinking that he, as president, should be generally informed as to the important activities that were under way with respect to jets.

Mr. Hayes: I move to strike that portion of the answer beginning with the words "because of that," in stating what Mr. Rummel then did.

It is not responsive to the question.

Mr. Tenney: You can strike that and I will ask another question on the same general line.

[Tr. 1532] Q. Did you inform Mr. Damon on this subject?

Mr. Hayes: On what subject now?

Mr. Tenney: The subject of the consideration that was being given to the acquisition of jet aircraft for TWA's use during the year 1955.

Mr. Hayes: The trouble with this question, Mr. Brownell, is that the record already shows a consideration during that year was being given fairly actively to at least three different manufacturers' aircraft, Boeing, Avro and Convair, and some consideration was being given to Douglas.

I think the question should be made a little clearer so we know what we are talking about.

The Special Master: In the first place, do you have anything to add to your prior testimony?

The Witness: I don't believe so. I think this is covered.

The Special Master: May I interrupt for a minute? Are you going to press the objection as to which I reserved a few minutes ago?

Mr. Hayes: Yes.

The Special Master: Will it interfere in any way if I wait and read the record on that [Tr. 1533] before I rule?

Mr. Hayes: No.

Mr. Tenney: It won't interfere, Mr. Brownell.

May I just observe on that point that for a number of hearing days Mr. Hayes was examining this witness on the scope of his authority and on his function in TWA during this period and even outside of this period, and I believe that the questions that I asked were squarely directed to that point.

Q. Mr. Rummel, at page 435 of the transcript of the cross examination, Mr. Hayes asked you if you were the Toolco representative in connection with all of the contracts that had been made for the jets with Boeing and Convair.

Your answer reads in part:

"I was the representative on the specific contracts that I mentioned earlier."

In giving that answer, did you have other contracts in mind as to which you were not the representative?

A. Yes, I—

Mr. Hayes: Wait a second.

The Witness: Oh, I'm sorry. I guess I should [Tr. 1534] look to you.

The Special Master: Yes, that will save time.

Mr. Hayes: No objection.

A. Yes, I did.

Q. What other contracts did you have in mind?

A. Well, I had in mind the contracts entered into in the latter part of that period between Tool Company and Convair for 880Ms and for 990s.

I had no jurisdiction over those, and, in fact had been specifically instructed not to participate in any way or to have any surveillance and instruct my people along the same line.

The Special Master: I don't understand that. You mean you did not act in any way as a representative of TWA but only of Toolco with respect to those two contracts?

The Witness: No, sir.

I meant that, but—well, let me clarify it.

The Special Master: Yes.

The Witness: The specific instructions from Mr. Hughes was that I was to have nothing to do with those contracts, and I was to instruct the [Tr. 1535] people working for me that they were to have nothing to do with those contracts, either as a Hughes representative or as a TWA representative or in any capacity. I was not to participate.

Mr. Tenney: Perhaps I could clarify this a little bit, Mr. Brownell.

The Special Master: Off the record.

(Discussion off the record.)

The Witness: The two contracts, Mr. Brownell, or the three contracts that I was representative to on the airframe side of it was the contract that Hughes Tool had with Convair for the development of the thirty out of forty 880s.

Then finally the contract with Boeing for fifteen 131s, and the contract with Boeing for eighteen 331s.

Now, these two contracts—the contracts for the two groups of planes I just mentioned were entered into in the latter period between Hughes Tool and Convair for a certain number of 880M type airplanes

and 990 type airplanes and 990 was also at one time called the CV600. And it was those two contracts over which I had no surveillance of any kind and was instructed to keep hands off [Tr. 1536] completely.

That is what I had in mind in answering this question. I specifically referred to the early specific contracts over which I did have surveillance. I failed at this time to bring this aspect out.

Mr. Hayes: I might mention that this is not redirect at all because the witness' testimony as given at page 435 is crystal clear that he was referring to the eighteen 331s, the fifteen 131s and the thirty Convairs and this actually is new direct rather than redirect.

But go ahead.

By Mr. Tenney:

Q. My next question is to further clarify that point. Were these aircraft built to TWA's specifications?

Mr. Hayes: This is new direct. It has nothing to do with anything that is in his statement or with anything about which I cross examined this witness.

The Special Master: How do you react to that comment?

Mr. Tenney: I think that it is relevant [Tr. 1537] to the question that he asked here and it clarifies just what was the scope of Mr. Rummel's authority and what these contracts were that he was going into.

Mr. Hayes: His answer was crystal clear, I thought.

The Special Master: Off the record.

(Discussion off the record).

By Mr. Tenney:

Q. Did you or to your knowledge anyone else employed by TWA ever recommend to Mr. Hughes or the Hughes Tool Company the acquisition of Convair 990 aircraft for use by TWA?

Mr. Hayes: I object as immaterial and irrelevant.
The Special Master: Overruled.

A. I did not, and I don't recall knowing anyone else that did.

Q. At page 440 of your testimony, Mr. Rummel, Mr. Hayes asked you, and I am summarizing two questions, whether your duties would have been the same if TWA had placed the contracts rather than Toolco.

Your answer to that question reads:

"That is correct, yes."

[Tr. 1538] I ask you whether that answer is complete.

A. No, I guess it isn't entirely complete.

My duties were—my duties as a Hughes Tool special representative were limited in that I had no authority on delivery matters and no authority to disburse funds.

I think that had I been serving only as TWA's representative, I would have had somewhat greater authority with respect to deliveries.

For example, I don't believe that clearances would have been required of the type that were with respect to proceeding with deliveries. I don't think that Hughes Tool representatives could have limited our inspection activities at the factory or cause airplanes to have been set aside.

It is primarily this phrase that I would add to the statement.

The Special Master: Did you place any orders for planes solely as a representative of TWA?

The Witness: No, sir.

Well, you—

Q. Have you since 1960?

Mr. Hayes: Wait a second, Mr. Tenney.

[Tr. 1539] The Witness: I take it you are talking about jets, is that correct?

The Special Master: No, at any time during your employment. I am going to follow up by asking you if you did whether you made the sole decision as to the delivery dates.

The Witness: No, what happened here was that the—Hughes was so closely involved in all of the programs that the question of whether TWA or Hughes signed the orders—particularly in the piston area—was viewed as of no great significance.

In some cases with the pistons we had no problems of this type. In the 1649A we were deeply concerned over this, this particular aspect. It varied with the circumstances.

But in either case we all understood how this worked and tried to recognize it.

Mr. Hayes: Mr. Brownell, I didn't want to interrupt. You asked a question. I was about to make a motion at that point which was directed to the answer which immediately preceded your question in which the witness went on and said that he thought, he said think that if I had been representing TWA this and this and this and that [Tr. 1540] would have resulted.

This I submit is speculation by the witness and I move to strike that portion of the answer beginning

when he first used the words "I think," everything after that.

Mr. Tenney: Mr. Brownell, I would like to say on that that in this precise part of the cross examination what Mr. Hayes was asking for was Mr. Rummel's opinion as to whether his duties and responsibilities would have been different if the contract had been placed directly by TWA rather than by Hughes, and it is Mr. Hayes' question calling for an opinion here that I am directing this to and I am simply trying to clarify just what the witness' opinion was.

Mr. Hayes: At no point in my whole cross examination that I can recall have I ever asked Mr. Rummel to express an opinion.

I was asking for a fact here. He had been factory representative and I wanted to know what the duties of factory representatives were, and if it made any difference in the duties of a factory representative whether TWA placed the order or Toolco placed the order. That is a matter of fact, not [Tr. 1541] opinion. I never asked for opinion.

The Special Master: I was a little troubled by the answer and that's why I asked the question in an attempt to clarify whether your answer was based on experience or speculation as to what would have happened.

As I understand your answer, it is speculation as to what would have happened.

As long as that is clarified in the record I think we will let the record stand as it is.

By Mr. Tenney:

Q. At page 1120—

Mr. Hayes: Will you wait a second, Mr. Tenney, until I get the volume?

Mr. Tenney: Surely.

Q. —in answer to a question of the Special Master you described certain instances in which aircraft were tendered to Toolco by Convair, but delivery was not effected for various reasons.

Did this have any effect on Convair production of other aircraft, that is, aircraft other than the specific ones so tendered?

Mr. Hayes: I object to this, if your Honor please. This is asking for a conclusion by [Tr. 1542] this witness as to Convair's operations.

Mr. Tenney: I think, Mr. Special Master, that the witness has testified that he was quite familiar with Convair's operations since it was one of his functions as factory representative under this contract.

Mr. Hayes: It was not one of his functions to run the Convair Company. That was certainly not one of his functions. He may be an expert on many things, but he is not an expert on the operation of Convair aircraft.

The Special Master: Why don't you ask whether this was within the scope of his duties?

Q. Mr. Rummel, was it within the scope of your duties as factory representative for Toolco on the contract between Toolco and Convair for the production by Convair and sale to Toolco of thirty Convair 880 jet aircraft to be

familiar with the state of the production by Convair pursuant to that contract?

A. It was my duty as the Hughes Tool Company representative to be kept advised by our factory representative and as directly as I otherwise could be in this respect.

Q. Were you so advised?

[Tr. 1543] Mr. Hayes: I object. Now we are getting into hearsay again. We find now he is giving testimony as to what somebody advised him.

The Special Master: Will you rephrase that?

Q. Do you have knowledge, firsthand knowledge, in the scope of your authority as Toolco representative of the Convair production line at that time in connection with the production by Convair of thirty jet aircraft for Toolco?

Mr. Hayes: May I have the question repeated? It is a long one and I did not quite get it all.

The Special Master: Surely. Mr. Reporter.

(The question was read.)

Mr. Hayes: At what time do you have in mind, Mr. Tenney?

Mr. Tenney: At the time when aircraft were tendered to Toolco by Convair, but delivery was not effected as Mr. Rummel testified at the portion of the transcript to which I have referred him.

A. Yes.

Q. Now I will ask the question I was trying to ask. [Tr. 1544] Did this have any effect on Convair production of other aircraft pursuant to that contract, that is, other aircraft than those that were so tendered but not delivered?

Mr. Hayes: I object to this, if your Honor please. This goes into the operations by Convair in the production of aircraft.

He may have been very familiar with what happened up to that time. Is he being presented here as a witness on what Convair's problems were at that time?

The Special Master: I think I will allow the witness to answer.

A. Well, after airplanes had been put forward for delivery to Toolco and acceptance operations and delivery had been refused, Convair's production line started coming to a halt.

Convair withdrew workmen at various stages until it had reason to believe that the airplanes that they were investing in would, in fact, be delivered.

Mr. Hayes: I move to strike the answer, Mr. Brownell. The witness now is giving us supposed knowledge as to Convair ceasing operations.

This must have been Convair's decision. [Tr. 1545] The contract with Convair which is part of this witness' prepared testimony; one of the exhibits or annexes, I don't know which it is called—I think it is an exhibit—provides specifically that if delivery were not taken by Toolco they could just store the planes and charge Toolco for it.

Now, if Convair decided to cease production that was Convair's decision.

So I move to strike the answer.

The Special Master: Overruled.

* * * * *

By Mr. Tenney:

Q. At page 608 of the transcript, Mr. Rummel, Mr. Hayes asks the question:

"Q. Do you know of any plane in the development of which Mr. Hughes participated and which at the time of such participation was intended to be used by an airline other than TWA?

Your answer does not come until page 609, but it reads:

"A. No, I do not think I can think of any instances that I can certainly state as a fact if that is what he had in mind."

Mr. Rummel, in that answer, did you include aircraft which were intended to be used both by TWA and by other airlines?

A. No. I had in mind aircraft destined specifically for airlines other than TWA.

Q. Looking back at Mr. Hayes' question—

Mr. Hayes: Wait a second. Let me get this question and answer. It's not clear to me what the answer is, in light of the question.

Could I have that question and answer repeated, please?

(The record was read.)

[Tr. 1547] Mr. Hayes: All right.

By Mr. Tenney:

Q. Turning back to Mr. Hayes' question on page 608, if you include in that question aircraft which intended to be used both by TWA and other airlines, what would be your answer to that question so construed?

Mr. Hayes: Are you asking a different question or are you trying to construe my question, Mr. Tenney? If you are asking a different question, say so. That was not the construction of my question.

Mr. Tenney: I think the question covers that. The answer was not intended to cover that and I am simply trying to clarify it on a matter of redirect the answer to a precise question that you asked.

Mr. Hayes: I think it is strictly objectionable, but I won't object.

The Special Master: Off the record.

(Discussion off the record.)

Mr. Tenney: Let me rephrase the question now that we know what we are trying to do.

Mr. Hayes: Do we?

By Mr. Tenney:

Q. Looking at Mr. Hayes' question on page 608, which [Tr. 1548] perhaps can be construed as including—and I so construed it as including aircraft intended to be used both by TWA and by other airlines, what would your answer be?

A. Well, the development of the Constellation in which Mr. Hughes participated was certainly intended to be used by airlines other than TWA all along.

When we were working on the Convair series, that led to the 880, each of those was intended to be sold and used by airlines in addition to TWA.

The Avro that I mentioned, Supersonic Avro was another such case.

The Florida project that I mentioned involved, to my best understanding, planes not only for TWA, but for other airlines as well, and I believe in addition the Government.

I might add that I don't know of any manufacturer that could have undertaken a major plane development program for any one airline or, really, any one airline that could afford to pay for such a thing.

The Special Master: Are you saying that in these instances you cite the same specific plane was used by more than one company or are you saying the same type of plane?

The Witness: No, I wasn't—perhaps I can [Tr. 1549] clarify that, Mr. Brownell.

I am saying the same basic plane. The planes were somewhat different in detail in each historical case between airlines, but they basically—the same series would be made in the same tooling and the basic airframe would be for the larger part identical, and so on.

The Special Master: In other words, more than one airline ordered that basic plane and brought that basic plane?

The Witness: Well, in cases where actual planes were built, yes, in cases that I mentioned where their own plan was envisioned that they would be built for airlines other than just TWA alone.

By Mr. Tenney:

Q. In your prepared statement on your direct testimony, Mr. Rummel, in Annex D, Mr. Hayes asked you questions and you testified as to the general information that you had available in preparing the reallocation contained in that annex.

Would you state the mechanical process which you followed in using this information?

A. Yes.

The Special Master: You may proceed.

[Tr. 1550] The Witness: Thank you. I was not sure.

A. (continuing) What we did was group the actual deliveries to various airlines in chronological order with respect to Boeing. This included all of the deliveries of jets during this period.

We then checked those lists and rechecked them for accuracy, and we also checked them with The Boeing Company, who agreed they were right.

Well, then we pulled out or ignored, you might say, deliveries that had been made to airlines other than Pan American, American and TWA.

The Special Master: Or Hughes Tool, you mean?

The Witness: Yes, I should have said Hughes Tool.

A. (continuing) Now, actually, I think this was probably somewhat conservative with respect to the reallocation, because—

Mr. Hayes: I object to any comment by the witness as to what was or was not conservative, Mr. Brownell.

I am perfectly willing to have him explain this mechanical process, without comments.

The Special Master: You can give the reasons [Tr. 1551] as to why you adopted this mechanical process.

The Witness: Well, we did this because we felt that in doing it this way, it could be easily shown that the reallocation would have produced deliveries somewhat less favorable than if we had assumed that deliveries to airplanes other than—airlines other than the three I mentioned were also changed.

And the reason for this is that some of the airlines ordered after Pan American and American, but before Hughes Tool, in fact, did.

So when you go back and assume that Hughes Tool, American and Pan American would have ordered at the same time, I believe that some of these deliveries that were then open would have been picked up. But we did not so assume in this reallocation.

We then set out the Boeing policies and practices as we—as I recalled them, and set out to reallocate the deliveries on the general assumption that all three airlines had ordered—that is two airlines and Hughes Tool had ordered about the same time. And after this, we checked with Boeing the—our recollection on practices and policies as well as the reallocations, and the final product was [Tr. 1552] one which we all had agreed was a reasonable one.

I believe that very quickly would summarize the mechanical process.

Mr. Hayes: I assume when Mr. Rummel says "we all agree," he is not including the defendants.

The Special Master: The Court will take judicial notice of that.

By Mr. Tenney:

Q. At page 15 of your direct testimony, that is the statement, will you please look, Mr. Rummel, at the first sentence under the table?

A. I have.

Q. Who did Convair inform at Toolco of these facts?

Mr. Hayes: I think this has all been covered very substantially in cross-examination so far.

Mr. Tenney: Mr. Brownell, the reason—

The Special Master: I will allow it.

A. Convair informed me, as the Hughes Tool Company representative, and quite possibly could have informed others.

Q. Did you communicate this information to other Toolco personnel?

A. Yes.

[Tr. 1553] Q. Who?

A. Well, I advised Mr. Cook and I left word through Mr. Hughes, 7000 Romaine Street office, as I recall, and made an effort to contact Mr. Hughes. I think it was—I think it was probably some time before I actually got Hughes.

Q. This statement in that sentence is then based on your own personal knowledge, Mr. Rummel?

A. Yes.

• • • • •

[Tr. 1840] I now ask you if you can identify any meetings at which you were present between Mr. Damon and any representatives of Boeing.

The Special Master: On this question?

Mr. Hayes: On this question of deliveries.

A. The San Francisco meeting I mentioned earlier was one such meeting having to do with expected jet deliveries which would have provided Damon with background information.

Damon was knowledgeable, as most people in his position were, in this general area through more or less routine contacts with people, but at the San Francisco meeting as I indicated earlier, I was present and so was Damon.

Q. When did that meeting take place?

A. Well, I had difficulty before, Mr. Hayes, in recalling the precise date and I still do.

I think it was during 1954.

Q. 1954?

A. I am not sure. It could have been earlier.

Q. Let us come down to 1955. Were you present at any meetings discussing delivery dates between Mr. Damon and representatives of Boeing?

A. I don't recall any in 1955.

[Tr. 1841] Q. Do you recall any meetings in 1955 at which you were present and which Mr. Damon had with representatives of Lockheed concerning deliveries?

A. No, I don't recall any specifically in 1955 at the moment.

Q. Do you recall any meetings at which you were present between Mr. Damon and representatives of Douglas at which deliveries, jet deliveries, were discussed?

A. No.

Q. Did I understand you to testify a few minutes ago—I want to be sure that I understood you correctly—that there were meetings between manufacturers' representatives and Damon at which you were not present?

A. I was aware during this period that there were a few telephone calls to Mr. Damon from Boeing representatives and from Lockheed, and also that their representatives would touch base so to speak with Damon when they could, when they were in the area.

And I was not a party to these conversations or these contacts.

Q. This is in 1955 you are talking about?

A. This would have been to some extent in 1955.

Damon's activity on jets seemed to recede in this period rather pronouncedly.

[Tr. 1842] Q. Say that again?

A. His direct activities on jet acquisitions appeared to become less and less.

Q. During what period?

A. 1955.

Q. You mean ceased to be interested, is that what you are saying?

A. No, I didn't say that.

Q. What do you mean by seemed to recede? I don't know what you mean by that, Mr. Rummel. Please explain it.

A. Well, I only meant that I was working directly and more and more with Hughes and less and less with TWA in that period. That was in earlier testimony, I'm quite sure.

Q. But do you know of your own knowledge what Mr. Damon may have been doing with the manufacturers?

A. Well, certainly not totally. I'm giving you my best recollection that I do have on the point.

Q. Are you saying in substance that Mr. Damon was not actively communicating with manufacturers with respect to the possibility of acquiring jets for TWA?

Mr. Sonnett: In 1955?

Mr. Hayes: In 1955 I am talking about.

[Tr. 1843] A. Well, I didn't say it that way.

He was aware of Hughes' interest, and Damon seemed to be moving more towards the back burner, so to speak, in this area.

Q. Would you please explain that to me?

A. Well, I'm sorry.

This was the period as I testified earlier, when I was involved in the development of some airplanes at Convair and Avro and other things.

I tried to keep Damon generally informed, and he was knowledgeable of my working with Hughes frequently under very deep secrecy.

And there were many direct contacts with the manufacturers by both myself and Hughes, and I think it was only natural of Mr. Damon to not—well, to move way from—to some degree, from the direct participation that one might expect of a man in that position. And this occurred.

That's what I'm trying to say.

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[Tr. 1863] • • • By Mr. Hayes:

Q. At the end, the last paragraph, page 9 of Defendants' Exhibit 44 in evidence I notice Mr. Damon's recommendation.

Did Mr. Damon have any discussion with you as to the recommendation he intended to make to the board of directors?

A. I don't think he did.

Q. Did you know that he intended to make a recommendation to the board of directors?

A. I don't recall—I don't know that I did at this meeting. I had been urging action on jet procurement for some time to all those in authority who would listen to me including Damon.

[Tr. 1864] Q. Yes, you told us that several times, Mr. Rummel. Please don't repeat.

A. Well, I'm sorry, Mr. Hayes, if I repeated unnecessarily.

Q. Did you know of the action taken by the board of directors after Mr. Damon made his report?

A. I did hear of it subsequently, yes.

Q. How long after?

A. Oh, I'm not really sure, but I imagine fairly shortly after.

Q. Were you ever given an explanation by anybody as to why Mr. Damon did not recommend particular equipment to be acquired by TWA?

A. There was discussion on that point.

Q. Did you hear the question, Mr. Rummel? Please answer it.

The Witness: Will you read it, please?

(The question was read.)

Mr. Sonnett: I think the witness had started an answer. He was interrupted or paused. Maybe he can continue.

A. Well, what I was going to say is there were discussions on this following the meeting, and the conclusion that I arrived at was that Damon didn't feel free [Tr. 1865] to because of the Hughes handling of this; that this was simply a move, a pressure move to get the board to authorize

Damon to do something, and I had the impression that it was substantially ineffective.

Q. You said there were discussions. Discussions among whom?

A. Well, I can't be completely sure, but I'm quite certain that Ray Cook was one of them.

As I recall it, just what happened came to me through that channel rather than directly through TWA, but I can't be entirely sure.

Q. Are these discussions at which you were present?

A. These are discussions between people including me.

Q. Who else was present besides Mr. Cook or was it just Mr. Cook and yourself who were present?

A. That's the name that comes to mind. I don't recall who else may have been present. Possibly Mr. Rourke, but I'm not sure of that.

Q. Any of the directors other than Mr. Cook?

A. Oh, no, this wasn't during the directors meetings. I didn't participate in those. This was following.

Q. How long after?

A. I'm not sure of that either. I believe it was [Tr. 1866] shortly thereafter. I believe it was a matter of weeks but I can't be that specific.

Q. A matter of weeks anyhow?

A. Yes.

Q. You say you drew a conclusion as to why Mr. Damon didn't mention specific aircraft. On what did you base your conclusion?

A. General knowledge that he was frustrated in his efforts to get the company to move on jets, and the fact that he would ask the board for the authority to come forward with an equipment recommendation. This in itself seemed very strange because I had the impression that the president normally had such authority in any event.

This asks for authority to present to the board.

Q. What about this frustration, will you tell us about that?

A. As I said—

Q. The source of your knowledge is what I would like to get.

A. Primarily the impression that Mr. Damon gave me, as I—

Q. I am not interested in your impressions, Mr. Rummel. I am interested in what Mr. Damon may have told you.

[Tr. 1867] A. Well, I was trying to explain not only the words, but the demeanor, the general outlook during this period of time, meaning during the course of 1955 led me to believe that he was discouraged in equipment and dissatisfied with his own ability to get things done.

I had the impression then that he was being frustrated by the Hughes direct handling. I was working directly with Hughes and had gone out of my way to keep Ralph advised.

I did not have the impression that Hughes was keeping him advised.

It is observing this as well as what he said which leads me to this conclusion.

Now, during the Washington meeting I am quite certain I did mention earlier, he plainly indicated he was powerless to do anything to kick the program ahead.

Q. Have you finished?

A. Well, I—

Q. Let me know when you have finished. That is all.

A. Yes, I think I am finished.

Mr. Hayes: Mr. Brownell, I asked for what Mr. Damon said specifically. I don't want impressions.

[Tr. 1868] I move to strike the answer because it does not give us a word as to what Mr. Damon ever said.

Mr. Sonnett: I oppose the motion. The question was a broad question. Do you know why—

Mr. Hayes: The question was what he said.

Mr. Sonnett: What led off on this line was do you know why Mr. Damon did not recommend specific equipment.

Mr. Hayes: I did not ask such a question ever.

Mr. Sonnett: From that beginning, counsel, you continued on with the line, and you asked him to give you what he gave you and his answer is fairly responsive. I know you do not like it but it happens to be responsive and it is true.

Mr. Hayes: I am not going to get myself involved in any controversy now with Mr. Sonnett.

The Special Master: I will read it over first thing in the morning and be prepared to rule. We will reconvene tomorrow morning at 10:30.

Mr. Hayes: I do want to make the point I never asked the witness why. What I asked him was did he give an explanation and finally it got [Tr. 1869] down to Mr. Damon and I specifically directed him to tell what Mr. Damon said and not what his impressions were.

May we suspend now?

The Special Master: Yes.

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[Tr. 1875] • • • ROBERT W. RUMMEL, resumed the stand and testified further as follows:

The Special Master: On the record.

I examined the transcript of yesterday's hearings and decided to allow the answer of Mr. Rummel to stand as being responsive to the line of questioning, with, of course, complete liberty to Mr. Hayes to follow up with specific questions.

Mr. Hayes: While waiting for this exhibit [Tr. 1876] I will ask Mr. Rummel another question.

Examination (cont'd) by Mr. Hayes:

Q. Aside from impressions you may have formed, Mr. Rummel, what did Mr. Damon say to you with respect to his failure to make specific equipment recommendations?

Mr. Williams: You mean at any time during this period?

Mr. Hayes: It has to be with respect to very shortly prior to December 6th up to the date of his death in early 1956.

A. Well, it is pretty hard to be completely certain of precise words after all this time.

Mr. Williams: He is not asking for precise words. Whatever you remember.

The Witness: Well, he indicated a desire to move forward with the jet program and frustration, as I indicated in my earlier reply, in not being able to do so.

And during this meeting, he indicated great concern over his inability to be in a position, which he seemed to recognize, of not being in a position to be decisive and to move forward.

The Special Master: Could I ask a question, Mr. Hayes?

[Tr. 1877] Mr. Hayes: Surely.

The Special Master: Did he tell you why he did not present your equipment recommendations to the board?

The Witness: I don't recall that he did, Mr. Brownell, in specific terms, at least.

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[Tr. 1890] • • • Q. Do you know whether or not Mr. Leslie may have been in touch with aircraft manufacturers in connection with the amount of down-payments and progress payments that would be required?

A. I don't know.

Q. Were you aware in December 1955 that TWA's cash position at that time did not enable it to make the down-payments required on jets?

A. I don't know.

Q. You don't know whether you were aware of that or not?

A. No.

Mr. Hayes: I offer in evidence Defendants' Exhibit 45, Mr. Brownell.

Mr. Williams: No objection.

The Special Master: So ordered.

(Defendants' Exhibit 45 for identification marked in evidence as of this date.)

By Mr. Hayes:

Q. You have given us some testimony up to now, Mr. Rummel, about the negotiations that were carried on between you, sitting in on all of them, and the Convair people

with respect to Models 18, 19 and 20. I do not [Tr. 1891] think this question has been asked.

In those negotiations, what particular number of Models 18, 19 or 20 was under discussion, if any?

Mr. Williams: Mr. Hayes, may I understand it? Is it the number of planes for TWA you are talking about?

Mr. Hayes: That is right.

A. Well, a good many numbers were under discussion. As I recall it, the initial draft contract included 30 Model 18s, but I don't think at that time the—well, maybe that answers the question.

Q. Do you recall what the purchase price was in that proposed contract for the 30 planes?

A. No, I don't exactly.

Q. See if I can refresh your recollection.

Does the amount of $150 million appear to you to be the amount?

A. It would be on that order of magnitude. I don't remember exactly, Mr. Hayes.

Q. When Convair terminated the—Convair did terminate that negotiations for that particular number of Model 18s, did it not?

A. Well, the negotiation for Model 18 was terminated. I don't think there was a contract for them. There may have [Tr. 1892] been some sort of an agreement, and I am a little vague at the moment, that related to bailing out up to a certain point, but I may be confusing this with the 880 now.

Q. I think you are, as a matter of fact.

A. Well, this may be so. But I am a little vague on the inclusion of a specific dollar amount, at least in the early contracts. I am not sure that occurred.

Q. Didn't the negotiations get to the point where there was at least a draft of contract with the Company's specifications?

A. On the Model 18, the contract was well developed by the time the project was abandoned.

Q. How did it come about to be abandoned? What is your recollection there?

A. Well—

Q. Let me see if I can help you, Mr. Rummel. Did Convair have at that time military commitments as to which it was concerned as to its ability to perform in the event it entered into a contract with the Hughes Tool Company for planes for TWA?

A. I don't recall that concern being expressed in those terms.

There was a discussion for a while concerning whether the airplane would be built in Fort Worth or [Tr. 1892A] San Diego, which did relate to military commitments.

Q. Did Convair expect to be able to determine its military commitments by February 1st of 1956?

[Tr. 1893] **Mr. Williams: If you know. Your question obviously is objectionable in asking—**

Mr. Hayes: So far as the witness knows, of course.

Mr. Williams: As far as what Convair expected. He does not know except from what he was told.

Mr. Hayes: Except from what he was told, exactly. He was in these negotiations.

Mr. Williams: If he knows.

The Witness: Could that question be read? I somehow didn't capture it.

Mr. Hayes: I will restate it. It's easier.

Q. During the negotiations with respect to possible contract with Convair, did they at any time indicate that they had certain difficulties with respect to military aircraft on which they expected a decision by February 1, 1956, at which time they would resume negotiations concerning Convair aircraft with Hughes Tool and TWA.

Mr. Williams: Do you understand the question? It is a very long one.

Mr. Hayes: It is long.

[Tr. 1894] Mr. Williams: If you understand it, go ahead and answer it.

The Witness: I think I understand it, but I don't recall that.

Q. You do not recall any association of military or possible military commitments on the part of Convair with their proceeding with the commercial plane.

Mr. Williams: I don't understand that question. I object to it.

Mr. Hayes: Maybe the witness does.

Mr. Williams: Association?

Mr. Hayes: Yes.

Mr. Williams: I don't understand that.

The Special Master: Maybe I could rephrase that, unless you want to, Mr. Hayes.

Mr. Hayes: Go right ahead, Mr. Brownell. I would rather you do my work.

The Special Master: Did they ever indicate to you that the progress of their negotiations with you was dependent in any way on the outcome of the negotiations with the government on military planes?

The Witness: I don't recall it in that context. They were going all out to get both [Tr. 1895] military orders and our orders.

The significant aspect that I remember was the emergence of the improved Boeings and Convairs which meant that there would have been three manufacturers building essentially the same kind of airplane in competition. I think that was the underlying reason that caused Convair and ourselves to abandon the Model 18 project.

By Mr. Hayes:

Q. It may have been a slip of the tongue in your answer.

A. Maybe.

Q. You said the emergence of the improved Convairs and Boeings?

A. I'm sorry.

Q. You meant Douglas and Boeings, did you not?

A. I beg your pardon. I meant Douglas and Boeings, yes. I will try to be careful.

The Special Master: You are doing some of his work.

Mr. Hayes: You took over some of mine.

The Special Master: We are square all around now.

* * * * *

[Tr. 1909] * * * By Mr. Hayes:

Q. Some time in your cross-examination, Mr. Rummel, you have mentioned that the negotiations with Boeing reached the point where there was an order for eight Boeings made or given as a stop-gap measure at the time the order was entered.

The Special Master: Jets?

Mr. Hayes: Jets, yes. Boeing jets.

Q. Had there been any letter of intent entered into with Boeing by either TWA or the Tool Company before the date of the formal contract?

A. I'm not entirely sure.

Q. Let me ask you this question: Had there been any kind of commitment, informal or otherwise, between Boeing and either TWA or the Tool Company before the end of 1955 with respect to the purchase of eight Boeings?

A. With respect to the eight Boeings that were finally ordered, I am not entirely sure.

[Tr. 1910] There were offers from Boeing and meetings, and whether there were letters of memorandum written which may have had a contractual effect, I'm a little vague on it at the moment.

The Special Master: There couldn't have been if the directors next month were still discussing about whether orders should be entered.

Mr. Hayes: Directors for next month?

The Special Master: In January. Did you say December 1955?

Mr. Hayes: That's right. I said, was there any kind of commitment informal or otherwise.

The Special Master: Wouldn't that have been reflected in directors minutes that you introduced here in January 1956?

Mr. Hayes: No, they were December minutes.

The Special Master: Oh, they were December minutes?

Mr. Hayes: Yes, they were December minutes.

The Witness: We attempted during this period to get Boeing to commit and hold favorable delivery positions, and I'm sure we would have taken the

position that our conversations were tantamount to their commitment to do so.

[Tr. 1910A] But what I was referring to and I thought you were, was a contract or a preliminary contract form.

[Tr. 1911] Q. That was my first question, yes.

A. Yes. And this I'm not sure. I don't at the moment recall one having been signed in December, although I wouldn't want to swear that it hadn't been.

Q. You said, "We were negotiating."

Whom do you include in "we" at this point in your answer?

A. Mr. Hughes, myself and Harry West.

The Special Master: Would you read back to me that last answer of the witness about reservation of positions?

(The record was read.)

Q. Can you fix the date of these preliminary conversations which you said you would consider to be commitments?

A. Well, I said we would have, I think, construed them in continuing negotiations with Boeing as commitments. Whether we would have prevailed, I don't know.

These conversations occurred following, as I recall it now, the demise, if you like, of the Model 18, and during the period that we were working on Models 19 and 20, I believe.

I think I testified earlier Boeing had had people in San Diego talking to West and I there. There [Tr. 1912] had been other meetings. And it was during this latter quarter, more or less—I just can't be precise—of the year that our attention became centered on Boeing.

Q. Is it your best recollection as you sit here that the time of these discussions which you would later contend were commitments was in the fall of 1955?

A. Well, those are the ones that I'm referring to. They are not certainly to the exclusion of earlier discussions with Boeing on jets that I have referred to earlier.

Q. You have given some testimony with respect to the Avro negotiations which, if I recall correctly, you said continued into some time in 1956?

A. Yes. This is Avro Canada.

Q. That is right.

Was there an occasion when after one of the discussions with Convair terminated—and I cannot identify which plane—my guess would be 18, but do not take my word for it—that Avro representatives were presented with the design and specifications of the plane that had been contemplated with Convair?

A. Gee, I don't remember that.

Q. You have no recollection of that at all?

A. I remember we had numerous—well, we had—[Tr. 1913] not maybe numerous, but we had a number of discussions with Avro on advanced transports some of which had certain characteristics in common with Convair. That was because both reflected to some degree our thinking, but I do not recall at any point having handed, for example, another company, Convair data.

* * * * *

[Tr. 1921] By Mr. Hayes:

Q. Were you ever advised whether the Tool Company board decided not to require immediate reimbursement from TWA of a sum of approximately $17 million that had been made to Lockheed for 1649s?

A. I don't specifically recall it, Mr. Hayes, but I might have been knowledgeable.

Q. Do you know whether TWA in late 1955 had the funds necessary to make the down payments that would be required on jet contracts?

Mr. Sonnett: Objection as beyond the scope of the witness' direct, wholly outside his field of testimony and of competence.

Mr. Hayes: It is very much within it. He has testified as an expert what TWA should do. That is his language. This is entirely proper cross examination.

Mr. Sonnett: If you point out the testimony to me. I don't recall any testimony by him to that effect.

The Special Master: What was the question, do you know?

Mr. Hayes: Do you know?

The Special Master: I will allow the [Tr. 1922] question.

A. I think the question is did I know then what the situation—

Q. Did you know it then or have you learned it since? I will cover your whole scope of knowledge from then to now.

The Witness: May I have the question read?

The Special Master: Yes.

(The question was read.)

A. No, I don't.

Q. And you did not know it in 1955 either?

A. I would have—the answer would be no, but I would be surprised if they had the cash at hand.

Q. There is one date I would like to get more clearly established than it is because on review of the transcript I find a certain amount of confusion.

That is the date when the Model 880 was developed and offered to TWA or any airline.

I can tell you that the confusion arises from—I don't have the reference here I see, but there is one place in your testimony, if I remember rightly, where you suggested or said that it was developed in December of 1955.

[Tr. 1923] But later in another point in your testimony we discussed the Pratt & Whitney orders and the numbers that were ordered, the number of engines and you stated that one of the reasons was the possibility of using those engines in other airplanes, mentioning the Avro and one of the Convair planes, 18, 19 or 20.

First, did the 880 come into being before the negotiations ended for the 18, 19 or 20?

The Special Master: Come into being in the sense that it was being offered?

Mr. Hayes: Being offered, yes.

Q. Or was it after the demise of the 18, 19 and 20?

A. Well, I don't know exactly when it came into being in terms of the development within Convair.

The—my present recollection is that it was during December some time, and I certainly have to qualify this a little bit because I can't pick a day. I think it is about that time. It may have been late November or it may have been —but I think it was during December. I'm just not sure.

At that time Hughes called me at home and discussed the 880 possibility and asked that I get busy and picking up where we left off with Convair and undertaking—[Tr. 1924] asked that I undertake technical evaluations for air-

planes of that type simultaneously with the other work that was then going on.

Now, that would have placed it after the Model 18. I'm not clear at the moment as to how long we continued with the Models 19 and 20. It may have been after the Model 19.

On the other hand this could have gone on a little bit beyond.

For Convair to have put forward the proposal at that time to Hughes would have required that they had done work conceptually and in an effort to define the airplane prior to that time.

So there probably had to be an overlapping in terms of their effort.

Q. Is it your present recollection that the 880, even though it was only a concept or a dream, was put forward by Convair while negotiations or discussions were still going on at Convair with respect to either the 18, 19 or 20?

A. I don't believe that our negotiations on the 880 overlapped the negotiations on the Model 18, and I—what I am saying is I am not at the moment sure that the Models 19 and 20 were wholly dead, but I believe that [Tr. 1925] the Model 20 had been abandoned by the time we undertook serious negotiations on the Model 18 as far as being an official Convair—

Q. Model 880?

A. Model 880.

Q. You previously placed the negotiations on the 18, 19 and 20, and I am not trying to distinguish among them, as running into some time in 1956, and after the time of the placing of the Pratt & Whitney orders which was in February of 1956.

Does that help clear your recollection in any sense as to the first time the 880 was proposed?

A. No, it doesn't. I still have the impression it was during December.

Q. Do you have any recollection as to the lapse of time between your first hearing of the 880 and the making of the contract?

A. Well, the preliminary agreement was signed in the spring of 1956.

Q. My question was do you have any recollection as to the amount of time that elapsed between the time you first heard of the 880 and when the preliminary agreement was signed?

[Tr. 1926] A. It was a number of months.

Q. You don't recall how many?

A. I thought I just indicated my best recollection.

Q. Can you give us your best recollection as to the number of months?

A. Well, I can't be sure. The thing that pops into my mind is that the preliminary agreement was March, but I'm not completely sure. It might have been a little later.

Q. The preliminary agreement according to your statement was in June.

A. Well, all right, then I stand corrected. As I said, I wasn't quite that sure.

Mr. Sonnett: What is your reference to the portion of the witness' statement which says that the preliminary agreement was in June, counsel?

Mr. Hayes: Page 9, No. 3.

Mr. Sonnett: Where do you find the word "preliminary" in that statement?

Mr. Hayes: I don't find it in this statement.

Mr. Sonnett: You so characterized it.

[Tr. 1927] Mr. Hayes: That was the preliminary agreement.

Mr. Sonnett: I don't find the words "preliminary agreement" in there.

Mr. Hayes: I know. It is not there. Ask the witness.

Mr. Sonnett: You ask him, but you incorrectly described the witness' statement.

Mr. Hayes: This obstructionism business.

Mr. Sonnett: I am just calling your attention to it.

Q. I direct your attention to page 9 of your statement. When you used the words "preliminary agreement"—

Mr. Sonnett: Where? What line?

The Special Master: 5.

Q. When you used the words there beginning in Paragraph No. 3, "Purchase of Convair," et cetera, did you have the same agreement in mind that you now testify to as the preliminary agreement?

A. Yes.

Q. I ask you what is your best recollection as to the number of months that elapsed prior to June 7, 1956, [Tr. 1928] when you first heard of the 880?

A. Well, this would obviously make it around six months.

Q. Assuming that your guess as to December is correct?

A. Well, I think it was December, but I can't pinpoint it exactly, Mr. Hayes.

Q. You can't be absolutely sure, can you?

A. I can't be 100 per cent for sure that many years ago.

Mr. Hayes: May we recess now, Mr. Brownell?

The Special Master: Yes.

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[Tr. 1929] Q. Mr. Rummel, you testified before lunch that you first heard of the 880 in a telephone call from Mr. Hughes.

Was Convair offering the 880 for contract at that time?

A. Well, Convair was attempting to interest Mr. Hughes in the purchase of that kind of an airplane at that time.

Q. How developed was the airplane at that time?

A. I'd say it was a fairly advanced proposal.

Q. Any tooling done?

A. Oh, I hardly think so.

Q. Was it still on the drawing boards or not?

A. Oh, yes.

Q. Still on the drawing boards?

A. This was prior to the time, I believe, that it was released for production engineering.

Q. What do the words "released for production en- [Tr. 1930] gineering" mean?

A. Well, that usually follows the preliminary design effort which, broadly, generally categorizes those efforts which are engaged in to freeze the design sufficiently to permit detailed engineering and tooling.

Q. The meaning I get out of your answer—and correct me if I am wrong—is that it was still in the design stage at the time you first heard of it. Is that right or wrong?

A. That is right.

Q. When did it get out of the design stage?

A. The design stage, I guess, is a term that could be applied to the total development program of the airplane which, in some particularity, ran right up to delivery of individual units and even beyond that period of time.

Q. When you spoke of the design stage, what did you mean? How did you define the words "design stage"?

A. I said, I believe, preliminary design stage and then tried to define clearly what that usually means.

Q. What does it mean?

A. Well, the term "preliminary design" usually refers to that stage of airplane development during which the configuration of the airplane is established to the point where it is sufficiently final to permit the pre- [Tr. 1931] liminary design to be released for detailed engineering and production tooling.

Design development goes on throughout the production period in varying degrees and indeed extends beyond that period.

Q. The preliminary design stage extends into production, you say?

A. I didn't say that, Mr. Hayes.

Q. Maybe I misunderstood you, then. I am speaking of this preliminary design stage that you are talking about.

When did Convair pass the preliminary design stage and enter the detailed engineering and tooling stage on the 880?

A. Oh, I don't know what the release date on that was.

Q. Was it still in 1955 or was that in 1956?

A. No, it would have been in 1956.

Q. How long after you first heard of the 880 would that be?

A. I really don't know when it was, but it would have been logically an appreciable period.

Q. Will you define "appreciable" for me, please, Mr. Rummel?

[Tr. 1932] The Special Master: It would have been before June 7th, would it?

The Witness: No, sir, it would have been after that.

The Special Master: It would be after June 7th, the contract date?

The Witness: Yes, sir, because it was between June 7th and the final contract date that a great deal of technical negotiation occurred toward the determining of what the detail configuration and system concepts of the airplane would be and what it would and would not embody.

But precisely when Convair released it for detail engineering and tooling, those two dates aren't necessarily the same, to clarify the record perhaps, but usually they are around the same time, not always.

If anything, production tooling in the detail sense would follow. Even that goes by stages in most cases.

By Mr. Hayes:

Q. What was the substance of what was said by Mr. Hughes to you in the telephone call to which you referred?

A. Well, the substance, as I recall it, was that he [Tr. 1933] had been in touch with Convair and that Convair had a new, smaller jet design available, that he was interested in an appraisal of that design, and I believe, additionally, that he wanted preliminary work undertaken on the contract; that he wanted interest expressed to Convair in the airplane, to keep Convair's attention centered on TWA and Hughes so that in the event it became a full project, or, let's say, it became an airplane, that Hughes would be in line for the first of them.

In other words, we were to develop and maintain an interest and at the same time work on the contract. However, I don't believe I personally did much work on the contract at that particular time.

Q. When did you begin to do work on the contract?

A. Well, following that call I instructed, I believe, Harry West to commence work on the contract and I, from time to time, kept in touch with Mr. West.

What I was referring to a moment ago was that I don't recall personally negotiating on that phase with Convair in the immediate period following Mr. Hughes' call.

Q. Do you know when Mr. Harry West first began working on the contract with Convair?

A. My impression is it was shortly after this call [Tr. 1934] from Hughes, but I can't pin the date down there, either.

Q. You said that Mr. Hughes told you about the design, and he wanted an appraisal of the design.

Does the word "design," as you used it, include specifications for the airplane or does it not?

A. Well, it includes—it would include a review of specifications to the extent that they then existed, which was very brief.

Q. The detailed specifications, such as appear in the contract, would not then have been developed?

A. They hadn't then been negotiated, and then, as I recall it, the description—as I recall it, the descriptive data provided by Convair was very, very brief, practically an outline with respect to specifications.

Q. Tell us more about this data. Did it go beyond just outlining configuration? Did it, for example, specify the motors that were to be used or other details?

Tell us, please, if you will, what the position was at the time you communicated with Convair after your call from Mr. Hughes?

A. Well, I don't recall at the moment whether I called Convair or Convair called me immediately following [Tr. 1935] that call, but in any event, I met as soon as prac-

tical with Convair to review the data they had on the airplane.

And this data, as I recall it, consisted of several reports, three-view drawings—

Q. You say three-view drawings?

A. Three-view drawings.

Q. What does that mean?

The Special Master: Three-dimensional.

The Witness: No, it is—that's a term that is applied to a drawing that shows the—usually the top view, the side view and the front view of an airplane.

It shows the overall configuration, dimensions. Usually, it has on its face wing area and other dimensions.

However—it shows wing sweep angle and so on, tail height, and other dimensional, and usually some weight information.

The reports were sufficient to define the purpose in some detail on the airplane. As I recall it, they included weight information, preliminary balance information, performance information. I believe they included Convair's projection operating costs, and I believe they included segment payload [Tr. 1936] performance—

By Mr. Hayes:

Q. Segment what?

A. Segment payload performance on certain TWA segments.

There may have been two or three rather than one report. I am not certain of that at the moment.

In short, the data that was presented was a brief description, sort of a summary, if you like, of the design that they

were proposing, and it was obvious that this data was developed for the purpose of briefing us and interesting us in that airplane.

Q. I remember on at least one occasion in the past you referred to some airplane as being a gleam in the eye, if I remember your words correctly.

Would you describe this design that Convair submitted to you at that time as a gleam in the eye?

A. Frankly, Mr. Hayes, I don't remember exactly how I used that term previously. I guess I could answer it this way:

With respect to their prospect of capturing Hughes as a customer, it was a gleam in the eye. The design itself certainly was sufficiently definitive at that time to permit our understanding of what it was they intended to [Tr. 1937] build, but it was certainly not a final design.

Q. Was the 880, as developed, exactly the same design as was then submitted?

A. No. In fact, I don't even think it was called the 880 then. But the 880 that finally emerged was, with respect to exterior configuration, very, very similar to the originally proposed plane. I believe they called it the Skylark at one point, but I might be wrong on that.

Things like—some rather major items like the engines to be installed were—well, engines were initially specified. The engines were not firmly selected. And other design aspects were not firmly selected and agreed upon until substantially later.

Q. Was that the plane that Convair at one time referred to as the Model 22 or was it the 880 that was the Model 22?

A. Well, the Model—well, I believe the Model 880 was called the Model 22, but I wouldn't want to infer a clear distinction between either of them to the thing that was called the Skylark, which I think was the trade name.

Q. Did the Skylark have a model number, also?

A. I just don't remember in that detail now, Mr. [Tr. 1938] Hayes.

Q. No prototype had been built of this plane at the time you first heard of it, I assume—

A. No, sir.

Q. (continuing) —is that correct?

A. That's correct.

Q. Do you recall when the General Dynamics board decided it would not go ahead with the 18, 19 or 20? I think it was the double-decker plane.

A. I don't recall the General Dynamics board making that kind of a decision on either the Model 18 or 19.

I think—as to the Model 20, I don't know.

Q. Does your answer mean that your recollection of action by the General Dynamics board related to the Model 20 as distinguished from the Models 18 and 19?

A. Well, I thought you asked when, and I don't remember with respect to the Model 20.

Q. Yes. Do you recall that the General Dynamics board at one point decided not to go ahead with the Model 20?

A. I believe that is the case. At least, I believe that that was—I was so advised by a Convair representative.

Q. Can you identify him?

[Tr. 1939] A. Well, I am virtually certain it was Jack Bevely.

Q. Was there any actual offer by Convair to contract for the construction of the 880 prior to the time you were advised that the General Dynamics board had turned down the Model 20?

A. I don't believe so. I am fairly sure that the 880 call from Hughes came after that occurred.

Q. After that occurred?

A. I think so.

Q. When did that occur, do you recall?

A. Well, I can't be really sure. I have the impression that it was—by that you mean my information on the board action?

Q. That is right.

A. I—the thing that sticks in mind is some time early November, but I just can't be that positive. I think that's probably when it was.

Q. In your prepared testimony, Mr. Rummel, at the bottom of page 6 you mention the appropriateness of TWA contemplating aircraft of a smaller or shorter range than the 707, that the 880 had not yet been developed, and that TWA did not know then that it would acquire that plane.

Did TWA know at that time that it would need [Tr. 1940] planes other than long-range jets?

A. Well, I think, as I indicated earlier, we at that time and before contemplated the ultimate use of jets smaller and very likely of a shorter range configuration than the—those that would be procured for initial long-range intercontinental and transcontinental use.

Q. And those planes that would be used on segments of distances below the distances covered by long-range jets; is that correct?

A. Yes. As I indicated earlier, there isn't a clear line of demarcation schedulewise, but what we were contemplating ultimately was a pattern of services taking advantage of jet technology which would make the shorter range smaller jets more economical on the moderate-length haul than would use of the bigger jets be on those hauls.

So we contemplated that there would be small jets developed at some reasonable point in time that would fill out

our pattern of service and extend it into the short-range area of activities.

Q. In the fall of 1955, did you have any knowledge as to when those shorter-range jets would be developed?

A. I don't think we had positive knowledge in the sense that there then existed specific projects or air- [Tr. 1941] planes that could be bought for delivery as of a certain time.

Q. As of the fall of 1955, had you any assurance as to when you would be able to get such shorter-range jets?

A. I don't believe so.

Q. Other airlines faced the same problem, did they not, the need for shorter-range aircraft than the long-range jets?

A. Yes.

[Tr. 1942] Q. How did other airlines solve that problem, if you know?

A. Well, different airlines did different things.

United ultimately bought Caravelles.

Q. I am talking about what they did in the fall of 1955 at the moment, Mr. Rummel.

A. Well, I misunderstood your question then.

American Airlines—I am not sure if they placed an order in the fall of 1955, I had the impression it was before this, for Electras which are turboprops rather than jets.

Other airlines, Eastern and others bought Electras.

Ultimately of course, but not then, American bought jets for this kind of service.

Q. I am confining myself to 1955, Mr. Rummel.

American bought Electras you testified.

Did you say that Eastern bought Electras?

A. Yes.

Q. You did?

A. Yes.

Q. What did BOAC buy?

A. I am slightly confused by the question. You are referring now to smaller size and perhaps shorter [Tr. 1943] range type airplanes?

Q. Referring to the subject we have been discussing, I thought, of what airlines other than TWA did to take care of their smaller segments at the time when only long range jets were available.

The Special Master: Available for purchase?

Mr. Hayes: That is right.

For ordering at least.

A. Well, BOAC's situation was a little different.

They had ordered a substantial quantity of Comets some time before this, and my recollection is that upon ordering the longer range American jets they did so with a plan in mind of shoving the Comets into shorter range services as well as the supplementary services in the beginning.

Q. Did they also acquire turboprops, specifically the Viscount?

A. I don't think so.

Q. Your best recollection is that they did not?

A. I don't think BOAC bought the Viscounts, no.

Q. I refer you to Annex C attached to your statement, the third page thereof. You show an order of 12 Viscounts for BOAC in 1957.

[Tr. 1944] Mr. Sonnett: What page?

Mr. Hayes: Annex C, the third page.

Mr. Sonnett: 1957?

Mr. Hayes: I am sorry. Wait a second. I withdraw it. My mistake. Please forgive me.

Mr. Sonnett: Forgiven.

Q. But in 1957, at least BOAC did order Viscounts to take care of their shorter segments, did they not?

A. Yes, I believe they did.

Mr. Sonnett: Just a matter of clarification, that left hand column says "Delivery." Does that indicate when the order was placed or when the planes were delivered.

The Witness: Delivery.

Mr. Hayes: Wait. This was prepared in 1955. I withdraw my concession of error and accept Mr. Sonnett's.

Mr. Sonnett: I am also glad to help in bringing out the facts. I thought there was something confused.

Q. So that BOAC had in 1955 ordered Viscounts according to your statement, Mr. Rummel?

A. Yes, sir, that seems to be correct.

Q. Some of the other airlines had also without [Tr. 1945] going through them in detail?

A. Ordered Viscounts?

Q. Yes, and Electras, turboprops.

A. Yes.

Q. In at least some instances with respect to some airlines those turboprops served the same purposes as would have been served by some of the shorter range jets that you were hoping would be developed, is that correct? In the sense of serving the segments, I mean.

A. Well, it was more true of the Electras than the Viscounts.

The Viscounts had a much shorter range than I think we were contemplating for smaller jets at that time.

Q. Was it the judgment of TWA in the fall of 1955 to defer ordering turboprops in the hope that shorter range jets would be available at such early dates?

A. No, I wouldn't quite put it that way.

Q. How would you put it?

A. Well, I think it was a case of putting first things first, trying to find the solution to the long range highly competitive portions of our services first, particularly since initial jets were designed—being designed for those kinds of services, and then hopefully to follow by expanding the jet fleets to encompass the [Tr. 1946] somewhat shorter range services.

We continued to look at airplanes like the Electra, but we certainly had the hope that we would be able to move on a reasonable timely basis into shorter range jets rather than move into turboprops.

Mr. Hayes: I am sorry. Would you give me the last part of that again? I missed something you said, the very last part of the sentence.

The Special Master: Would you read it back?

(The answer was read.)

Q. Was it the judgment of TWA that it would be better to wait for the shorter range jets than to move into turboprops? This is the fall of 1955 I am talking about.

A. No, I don't—I wouldn't want to indicate that we had come to a final position. This was the direction that I hoped we'd be able to move.

Q. You say you hoped. Did others in TWA have the same hope?

A. I think so, yes.

Q. Would you say that was the general view in TWA, that you would be able to get shorter range jets in sufficient

time so that you would not have to buy [Tr. 1947] turboprops?

A. Well, I didn't say that we thought we would be able to do this.

I don't think we knew whether or not we could do it. We had hoped to move in this direction and contemplated then that smaller jets would be developed and felt that we should be prepared to move into that kind of equipment program when it was timely to do so.

Q. Do I understand by your answer that you had not rejected the idea of turboprops in the event a short range jet did not develop?

A. Well, I had not forever rejected the idea of the turboprop certainly. I was pretty well convinced that ultimately the jets would push the turboprops aside and I would hope we could move sufficiently to—into that area to avoid the need for turboprops, but I don't think I ever became convinced that that, in fact, would be the way it would work out.

Q. As a matter of fact, even as of today quite a few turboprops are operating on various airlines, aren't they?

A. There are quite a few still in service, yes.

Q. Did you recommend in the fall of 1955 against the acquisition of any Electras or other turboprops?

[Tr. 1948] A. I—well, let's see, the fall of 1955. I am not entirely sure.

Q. You do not have any recollection one way or the other as to the fall of 1955?

A. Well, I strongly favored jets, Mr. Hayes, but that was for the long haul services, and I was highly skeptical of the Electra.

And I did recommend against the Electra, but I don't have a clear recollection that it was the fall of 1955 and I doubt that it was as I sit here now.

Q. Was it before or after the fall of 1955 that you recommended against the Electra?

A. Well, on at least one occasion it was after that if memory serves me correctly. I think it does.

For example, it was evaluated alongside the Electra—I mean alongside the 880 other then current possibilities, including the Electra. And I recommended that the 880 would be a better investment at that time than the Electras as I recall it.

* * * * *

[Tr. 1975] * * * Q. Two of them ordered Douglas equipment, but American ordered the Boeing equipment. Were you ever advised by any officer of American why American chose to order Boeing equipment rather than Douglas equipment?

A. Well, I was advised by people in American who are now officers—I am not sure they were at the time the advice was received—

Q. Just identify them, please, Mr. Rummel.

A. Bill Lawrence, Bill Littlewood, and Littlewood was an officer at the time.

Q. What was Mr. Lawrence's position?

A. His position varied through the years.

Q. I mean the fall of 1955, as far as you can recall.

A. Well, he was involved in some of the American equipment negotiations. I am quite sure at that time he was at the Tulsa-American facility.

Q. Doing work similar to work you were doing for TWA?

A. No. Well, part of it.

Q. Did you get the same advice from both of these gentlemen, the same information, rather?

A. Essentially, yes.

Q. Were there any others who gave you this informa-
[Tr. 1975A] tion?

A. I don't recall any. There certainly could have been.

[Tr. 1976] Q. What was the information, Mr. Rummel?

A. Well, the gist of it was that they believed Boeing was a technically superior airplane and that combined with early deliveries compared to Douglas was the primary reasons for their going the Boeing route.

And one of them, I don't remember which now, indicated some concern over the Boeing management which I understood at the time stemmed from Boeing's earlier handling of the Stratocruiser series.

That's all that comes into mind now.

Q. Both of them mentioned early deliveries?

A. Compared to Douglas, yes, as one of the factors.

Q. I think we have shown or it has already been established, if I remember rightly, that the Boeing deliveries were to be roughly a year ahead of the Douglas deliveries, I think. Maybe I am wrong on that. I am thinking of the 707 as against the Douglas with the J57, and I think the gap was less with respect to the 331 and the Douglas with the J75. I think it was six or seven months.

A. The gap was less on the international airplanes.

Q. Yes, I think that is in the record. I just wanted to be sure that I did not misstate the record as you recall it.

[Tr. 1977] Do I, Mr. Rummel?

A. I'm not certain that it was exactly a year.

I note at page 2 of Annex C, it shows Pan Am scheduled for Douglas DC-8 deliveries early in 1960, and for Boeing 707s early in 1959.

Q. Yes, I think the record—

A. But I don't think we can assume from that as precisely a year.

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[Tr. 1998] * * * *Examination (cont'd) by Mr. Hayes:*

Q. According to your prepared statement, the schedule attached to Annex D, the deliveries of the 131 Boeings to TWA—that is page 4, I believe, of Annex D—of certificated planes that were available for scheduled service were made between March 7, 1959 and August 1, 1959, a total of 15 planes; is that correct, Mr. Rummel?

A. Yes, those were certificated to the transport [Tr. 1999] category.

Q. And available for scheduled service?

A. Yes.

Q. Whereas, the 331s, which the schedule of deliveries of which appears on page 10 of Annex D, began on November 5, 1959, and ended July 1. 1960, all certificated and available for service; is that correct?

A. Yes. Incidentally, Mr. Hayes, I do have some dates that you requested yesterday. At any time you would like for me to read them in, I will be happy to do so.

Q. Fire away. Go ahead.

A. TWA started jet service San Francisco to New York March 20, 1959.

American Airlines started jet service to San Francisco-New York November 1, 1959.

United Airlines started jet service San Francisco to New York September 18, 1959.

American Airlines started jet service Januar 25, 1959.

The Special Master: From where?

The Witness: Well, the recollection I have—I didn't specifically check that overnight—it is, I believe, Los Angeles and New York or possibly New York-Los Angeles.

[Tr. 2000] By Mr. Hayes:

Q. What was that date?

A. January 15, 1959. American received certification, that is route authority to serve San Francisco-New York on April 2, 1959.

Pan American started jet service across the Atlantic on a TWA segment October 26, 1958.

BOAC started jet service across the Atlantic on a TWA segment October 4, 1958.

This is in line—this last item is in line with the correction that I mentioned yesterday, and undoubtedly this service was provided with the Comet IV series.

Q. You mean the October 4, 1958?

A. Yes, sir.

Q. Those were the Comets?

A. Those were Comets. I believe that's what you requested, Mr. Hayes.

Q. Do you have there the date of TWA on New York-Los Angeles?

A. No, I do not.

Q. I think that was part of it, if I remember rightly.

A. Well, I didn't remember it, but it will be easy to get.

[Tr. 2001] The Special Master: Would you get that?

The Witness: Yes, sir.

Q. Were the 131s which were received in 1959 scheduled for domestic or international service by TWA?

A. Domestic.

Q. Entirely?

A. Yes. They were flown on domestic segments.

Q. What planes were eventually flown by TWA on the transcontinental services?

A. Well, many different kinds. You mean what jets?

Q. Between the 131 and 331s.

The Special Master: Transcontinental?

Mr. Hayes: Transatlantic, I meant.

The Special Master: He meant transatlantic.

Mr. Hayes: Did I say transcontinental? I am sorry. I meant transatlantic.

A. Well, the 331s were initially flown in the Atlantic and European services. The services later extended beyond Europe, and a certain number of these planes later were flown in transcontinental services.

Q. Do you mean that all 12 of the 331s which TWA received were all at one time in transatlantic service? When I say "at one time," I am speaking up to the end of [Tr. 2002] 1960.

A. I didn't say that.

Q. That was what I thought maybe you said. Were some of the 331s, and again I am limiting this to up to December 31, 1960, flown in transatlantic service and some in transcontinental service?

A. Yes.

Q Do you remember how many were in each service?

A. Not exactly, Mr. Hayes. I believe this varied somewhat with the season, but it was on the order from three to possibly four, or thereabouts. I just don't remember the exact number.

Q. Three to four what?

A. 331s in domestic service. I thought that's what you were asking.

Q. Three to four 331s were in domestic service and the balance of the 331s were in transatlantic service?

A. Yes. However, the initially delivered 331s went into transatlantic service?

Q. Were the 131s at any time flown in transatlantic service?

A. I don't believe so.

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[Tr. 2006] • • • Q. Did Mr. Cocke play an important role in the decision to use the 131s solely in domestic service?

A. Yes, I think Mr. Cocke's views were strongly respected.

Q. What were his views with respect to the use of the 131s?

A. Well, his views, broadly, as I recall them, were that we didn't have enough airplanes to do what he really wanted to do, which was to get both the Atlantic and the domestic area of operations as nearly simultaneously as possible, as our competitors were hitting them, and that on balance rather than be spread too thin in domestic, and rather than operating initially in both domestic and international, that he favored putting the 131s in domestic services and making a bigger splash there.

Q. And make what?

A. I guess that wasn't very good English.

Q. I didn't hear your words.

Mr. Williams: A splash.

[Tr. 2007] Mr. Hayes: Oh, splash. I didn't hear the word.

The Witness: Making a bigger impact there.

By Mr. Hayes:

Q. Even though he realized that this might mean that TWA would be at a disadvantage on the transatlantic service vis-a-vis Pan American?

A. Well, it's hard for me to say exactly what he realized.

Q. I mean did he say that?

A. I think what he was saying, my impression is that even though it was recognized that there would be a disadvantage in the Atlantic, that within the limited number of airplanes that we had available, this was the best overall plan, rather than operate too thinly in both areas.

Q. Were there other officers of TWA who believed some of the 131s should be used in international service?

A. Well, I can't be very specific. There were views expressed that it would be desirable to operate a few in the Atlantic, but I don't remember who expressed in detail views during these various discussions in which I participated.

Q. Was Mr. Pierson, the chairman of the board, [Tr. 2008] one of the ones who believed, so far as you know, that some of the 131s should be in international service?

A. I don't remember that.

Q. Can you remember any officer of TWA at that time who was of the opinion that some of the 131s should be used in international service?

A. Well, as I say, there was discussion on the point, and the issue was resolved. I don't remember any great dissenters at the time of the ultimate resolution, and I am at a loss at the moment to try to remember—to remember just who said what and what the individual views were.

Q. Do you recall, Mr. Rummel, what your forecast was in 1955, as to what TWA's traffic was expected to be in 1960?

A. No, I don't.

Q. Or in 1961?

A. I don't remember the figures.

Q. Are there any records available to you which would refresh your recollection?

A. I don't know for sure.

Mr. Hayes: May I ask the witness to find if there are any records which would refresh his recollection as to his 1955 and—

[Tr. 2009] By Mr. Hayes:

Q. If I asked you the same questions about 1956 forecast, would your answers be the same, that you do not remember?

A. Gee, I just don't remember the numbers.

Mr. Hayes: May I ask the witness to determine if there are any records which would refresh his recollection with respect to 1955 and 1956 forecasts as to expected 1960 and 1961 traffic?

Mr. Sonnett: Mr. Brownell, I oppose that request. We have made voluminous documentary production, all material on these subjects, long, long ago. Those documents have been available to counsel for a long time.

I don't think this witness' examination at this hearing should be prolonged by his now having to go back and make further documentary searches. They have had all the documentary discovery they are entitled to, it seems to me.

Mr. Hayes: This is not discovery. This bears directly on the issues here.

The Special Master: Were documents containing this information produced?

Mr. Sonnett: All documents that they sought [Tr. 2010] under their very broad demands, which included all kinds of forecasts of this type were produced by the hundreds of thousands and they went over them, and picked what they wanted.

They have had those documents for some years now. Whatever there is, we produced. To go back through this file search business is really quite a burden.

Mr. Hayes: Mr. Martin advises me that we may have something that was produced. As we sit here, we don't know. I have never seen them. I know that.

So I will defer the request and I may have to make it again. But by saying this, I am merely trying to expedite affairs. I am not conceding that just because in the course of discovery when I guess millions of documents were produced, documents such as I requested may have been produced, there may never have been copies taken of them. Nobody knew at that time that such documentation as this might ever become relevant even.

It may have been produced for inspection and no copies taken. It seems to me that it would be a very simple thing for Mr. Rummel to direct somebody [Tr. 2011] where to go to find these forecasts, if they existed. It does not require the witness' time one iota.

Mr. Sonnett: No. 1, it is not a very simple thing. It is a very burdensome thing.

Mr. Hayes: But for the present, I will withdraw the request.

The Special Master: We will close the argument and go on with the examination.

Mr. Sonnett: No. 2, I don't think the defendants have any right to any further discovery in this case. It is a hearing. It is not a discovery examination.

Mr. Hayes: I am delighted you made that distinction.

Mr. Sonnett: Well, I think there is a very vital distinction.

Mr. Hayes: There is no discovery being asked for.

By Mr. Hayes:

Q. Do you know whether or not in mid-December 1955 or before that—fairly soon before that—any request was made of The Boeing Company by you or Mr. Hughes as to possible delivery dates on Boeing aircraft?

A. Yes.

[Tr. 2012] Q. Who made the request?

A. I discussed deliveries with Boeing and I believe that Mr. Hughes had discussions at that same time with Boeing on deliveries.

Q. With whom did you have your discussions? With whom at Boeing?

A. With the Boeing representatives with whom I was in contact. I believe this included Harold Olsen, George Sanborn, I am pretty sure Bruce Connelly, and I am pretty sure Ed Wells, but I—I am not completely sure.

Q. I believe Mr. Olsen was the attorney for Boeing, is he not?

A. He is an attorney for Boeing, yes.

Q. Isn't he in that law firm that represents Boeing? He is not a house counsel, is he?

A. No, he is outside counsel.

Q. Was this all one conversation or were there several conversations with these various people?

A. Several.

Q. Do you recall what dates they told you would be the available delivery dates for Boeings?

The Special Master: That is pretty broad, isn't it?

Mr. Hayes: Yes. I don't know whether he [Tr. 2013] recalls them or not.

The Special Master: Mid-1955?

Mr. Hayes: No, December 1955. I said mid-December 1955.

A. Not exactly, but I think they were a little worse than we finally got.

Q. Was this for both the 131s and the 331s?

A. My comment related to the 131s. I am not sure that we made much headway on the 331s.

Q. I don't know what you mean by that.

A. With respect to improving the deliveries over those that they at that time were offering.

Q. They did give you dates, though, for the 331s? Or do you mean that they didn't even give you dates?

A. They—dates were available. I believe the dates which were mentioned in these discussions had already been given to Hughes. I don't know—I suspect they were given to Hughes first, but I am not really sure.

Q. You said Mr. Hughes also, you thought, spoke to the Boeing people. Do you know to whom he spoke with respect to possible delivery dates in mid-December of 1955?

A. Well, I can't be entirely certain as to that point in time, but I know he had discussed this sort of [Tr. 2014] thing with Bill Allen. I may have known at the time just who it was.

Q. Do you know if he had any discussions with Mr. Wells?

A. Yes, he did have discussions with Wells, and I certainly believe now it would have included deliveries. I am not sure I can state that exact fact from memory.

Q. Did Mr. Hughes and you check with one another as to the delivery dates that you had separately received from Boeing representatives?

A. Well, we did discuss dates and the effect of it was a check.

Q. I am sorry.

A. We discussed the dates and had there been any differences of information, it would have been very clear. I don't remember specifically setting out to check, but the check was there, nonetheless.

[Tr. 2015] Q. What I am trying to find out is whether you have any recollection as to whether Boeing gave Mr. Hughes and you different prospective delivery dates at that time.

A. I don't recall that occurring, Mr. Hayes.

Q. Do you have any recollection as to whether at that time—and I am confining myself now to mid-December of 1955—Boeing's prospective delivery dates as to the 131s would be on April 1, 1959?

A. No, I am not that sure. I have the general recollection that we made some progress on the dates during the negotiations with Boeing, but I don't remember it exactly.

Q. You mean between December and the signing of the contract you made some progress?

A. Well, between the time that we were seriously talking to Boeing and the time the contract was signed.

Q. Did you make progress between the dates that were given you in December 1955, whatever the dates were, and the time the contract was signed, do you recall, so far as the 131s are concerned?

A. Well, I have the impression now that we picked up a month or so, but I'm not—I just can't be entirely specific.

[Tr. 2016] Q. If I understand what you—

A. That is on the early planes. I don't remember doing much of the later ones.

Q. As to the 331s, do you recall that you made progress there too by improving delivery positions from those stated in December 1955 when you signed the contract later?

A. Well, I don't recall that and maybe I should make it clear that the dates being discussed then were dates which Boeing advised would be the dates providing—well, contingent on what other customers might do in the meantime to some extent.

In other words, I don't recall these dates, for example, having been presented in the light they were guaranteed irrespective of actions that we might take.

Q. Have you finished, Mr. Rummel?

A. Yes, sir.

Mr. Hayes: Could I have the first part of that answer read?

(The answer was read.)

Q. No, my question was, Mr. Rummel, if you recall whether by the time the contract was signed for the 331s, you had been able to negotiate an improvement in deliveries or whatever dates had been given to you in [Tr. 2017] December 1955 for the 331s?

A. I don't recall that occurring.

The problem that existed was to hold onto Boeing's offers, and I probably should add that I—I'm not entirely sure at the moment what the form of the dates for deliveries were at that time.

Q. Do you recall ever having been advised by Boeing, either directly or through Mr. Hughes, that Boeing—and this is in December 1955—I am confining myself at that time—I will start over again because of the interruption of myself by myself—do you recall at that time having been advised either by Boeing or by Mr. Hughes that Boeing

had stated that it would be prepared to deliver the first 131 a month after the first delivery to American Airlines?

A. No.

Q. You do not?

A. I do not.

Q. As to the 331s, were you ever advised either directly by Boeing or by Mr. Hughes that Boeing was prepared to deliver the first 331 to TWA three months after its first delivery to Pan American?

A. Well, I don't specifically recall it now, Mr. Hayes. I'd hate to—I mean I wouldn't want to be in the [Tr. 2018] position of having sworn it didn't occur, because we spent a great deal of time then and then later fighting with Boeing on sequential deliveries.

And in the course of extended discussions, things of this type did arise, but I'm not clear on whether or not—at the moment, whether or not that particular statement was made by Boeing or not at that time.

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[Tr. 2050] • • • *Examination (cont'd) by Mr. Hayes:*

Q. Do you recall, Mr. Rummel, how many engines were assigned by the Tool Company to Boeing?

A. No, I don't, Mr. Hayes.

Q. Does 200 click in your memory?

A. No.

Mr. Hayes: Would you mark this, please, Defendants' Exhibit 50 for identification? It is a letter agreement dated August 19, 1957, on the letterhead of Hughes Tool Company signed by Hughes Tool Company by C. H. Price, accepted by Boeing Airplane Company, and I cannot make out the signature, on the 22nd of August 1957, to which are attached

a letter addressed to Pratt & Whitney, on the letterhead of Hughes Tool Company, dated August 19, 1957, an agreement to consent to the foregoing delivery schedule, and I think it is the first day of September 1957, by [Tr. 2051] United Aircraft Corporation, signed by a vice president whose name would be Perkins or Parkins—do you know? It looks like one or the other. Let us say it is undecipherable. To which is also attached the consent to assignment dated September 3, 1957, signed by United Aircraft Corporation by a vice president, whose name I can't read, and Boeing Airplane by a vice president whose name I can't read.

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Mr. Hayes: I might say I don't intend to offer these documents in evidence. I am using them just if I can, to refresh Mr. Rummel's recollection.

By Mr. Hayes:

Q. I have put clips on the first page of the first document, and the first page of the second document, I described. [Tr. 2052] I direct your attention to the first paragraph of the first page of the first document and the first paragraph of the first page of the second document.

I ask you, Mr. Rummel, if that refreshes your recollection as to whether the number of engines involved was 200.

A. I read the two paragraphs.

Q. Does that refresh your recollection that the number of engines involved in the assignment was 200?

A. No, it doesn't.

Q. What you do remember, however, is that there was an assignment of engines by Toolco to Boeing, but what you do not remember is the number of engines; is that correct?

A. Well, my recollection is the same that I expressed this morning on that point.

Q. That is my recollection of what you expressed this morning. Have I stated it correctly?

A. Yes, I recall that at some point—I am not sure when—this seems to say when—engines were either transferred or sold or in some manner the rights were given up by Hughes to others.

Q. The contract entered into at that time provided for more airplanes of the 131 series, without any delay in [Tr. 2053] delivery dates as against the original contract, does it not?

A. Well, I believe a definite relationship existed between availability of engines and availability of airplanes during the time that some of these negotiations occurred.

Q. No. What I am asking you is if it is not a fact that the additional aircraft that were ordered at the time of the transfer of the engines to Boeing provided for deliveries which were no later than the dates contained in the original March contract between the Hughes Tool Company and Boeing.

A. I believe that's correct.

Q. Did you make efforts, after the contracts had been signed, to improve the delivery positions that had been agreed to between Boeing and Hughes Tool Company?

A. Yes.

Q. Were you successful in those efforts?

A. No, I don't believe we were. At least, I don't recall any successes in obtaining agreements from Boeing in addition to those contained in the contract.

Q. With whom in Boeing did you have conversations looking to improve delivery positions? I mean improved over the contract dates.

[Tr. 2054] A. They included Mr. Connelly, Mr. Allen, I believe Mr. Olsen and possibly some others.

I don't recall this as having occurred immediately subsequent to signing the supplemental agreement.

Q. When do you recall that these conversations occurred?

A. I am not really sure, Mr. Hayes. We never lost sight of the desire to improve Boeing's commitments with respect to deliveries, and I think seized on every opportunity that appeared to be open to us to persuade Boeing to improve its deliveries.

However, I don't think we jumped back in that immediately following signing supplemental agreements. I think we waited a respectable period. Just what that was, I don't know.

Q. What did Mr. Connelly, for example, say to you as to reasons for not improving the deliveries?

A. Well, the deliveries that I am referring to are Boeing's contractual commitments rather than the calendar deliveries that were anticipated at any point in time following the signing.

Q. I am asking you what you mean by the contractual delivery. What contracts are you referring to?

A. Oh, Hughes Tool Company contracts.

[Tr. 2055] Q. Go ahead.

A. Between Hughes Tool and Boeing.

Q. Right. What reasons, if any, did Mr. Connelly give you for declining to make a change in deliveries?

A. Well, he asserted that commitments on sequential deliveries was not compatible to Boeing's policy and in his view was not wholly practical.

Q. And what?

A. And in his view is not wholly practical.

Q. Would you explain that, please?

A. Explain what?

Q. Something about sequential deliveries.

A. Yes. I mean commitments to deliver in sequence between customers and between airplanes.

Q. Between different customers?

A. Well—

Q. Is that what you mean? I don't understand what you mean, Mr. Rummel. I am trying to.

A. Oh, I am talking about the contractual commitment to deliver on Boeing's part airplanes in specific sequence one to the other.

Q. You mean the sequence of the planes to be delivered to Hughes Tool Company?

A. No, but it would include that.

[Tr. 2056] Q. Do you mean the sequence of deliveries both to the Hughes Tool Company and to other customers?

A. I mean total production during the period in which the airplanes would be delivered to Hughes Tool.

I am trying to distinguish, Mr. Hayes, between the Boeing method of contracting for deliveries, which was so many airplanes per month by month-end, and with a sequence commitment airplane-to-airplane.

Maybe I can give you an example, if I am not clear.

Q. I wish you would, because I am afraid it is not clear to me.

A. What we were seeking was commitments along the line that the fourth, for example—now, these numbers aren't real—I am only trying to make an example.

Q. Yes, this is an example. I understand.

A. We knew the objective of getting the first couldn't be met at that time, but, say, the fourth airplane that would be assigned to Hughes Tool in production sequence and in

delivery sequence, and that Boeing would commit, so that they would not deliver Airplane No. 5 before they delivered Airplane No. 4. No. 5 perhaps might be assigned another airplane.

Q. Another airline, you mean?

[Tr. 2057] A. They would be specific airplanes to customers which, indeed, they had to do anyway, but they would then, additionally, commit to deliver in a definite sequence.

Once a sequence was determined, then we would have felt assured that we would have received them in that sequence as opposed to delivery by months, which was quite a different thing.

Q. See if I understand you, Mr. Rummel, because I am not sure that I do.

Just following a monthly sequence, it might be that other customers would get airplanes before TWA received airplanes, and that you wanted to avoid this happening at least as to particular airplanes?

A. I will take another example, Mr. Hayes. Perhaps this will help.

Assuming that Boeing committed to deliver during a certain month three airplanes each to two customers. We just didn't want the other customer to get the first three and Hughes to get the last three. We wanted a commitment on the sequence of delivery.

Q. Did Boeing tell you that they had any commitments whereby they were required to make deliveries to other customers before they did to TWA?

[Tr. 2058] A. During this particular phase and during the heat of negotiations, we were given to understand that there were commitments which we definitely construed as being of a nature of a commitment on sequencing—in short,

that American and Pan Am had been unofficially told that they would receive so many airplanes before anyone else did, other than in American's case Pan American.

Q. Other than what?

A. In American's case Pan American.

Q. Other than in American's case Pan American?

A. Yes.

Q. You mean Pan American was to have precedence over all airlines, is that it?

A. Yes.

Q. Then American—

A. Yes.

Q. (continuing) —had precedence over some other airlines?

A. Well, to a degree.

Q. Except that American had no precedence over Pan American as to the original deliveries; is that right?

A. I didn't say that, Mr. Hayes.

Q. Didn't you? I thought that was what you meant. That's what I am trying to find out.

[Tr. 2059] A. No.

Q. Would you straighten me out, please, Mr. Rummel?

A. Well, I don't—I am a little vague on the specifics, but I think what we were told was, first, we are talking about two things here, that Boeing would not agree, as I indicated, to specific sequential commitments, and then as we continued to press for earlier deliveries, it became known that Boeing had agreed—at least this was our belief as a result of these sessions—that X number of planes would be delivered to Pan American before anyone else got any, and that American would receive X number before any other airlines got any.

Now, I don't remember if that was divided between international and domestic or not. It might have been. I just don't remember all of the particularity.

Q. Were you told how many airplanes were involved in these preferences that were given to Pan American and American?

A. I don't remember, Mr. Hayes, if it was specifically stated or if we derived it from scraps of information we were able to put together at the time.

We had a definite impression as a result of this negotiation as to how much it was, but I wouldn't want to state that it was clearly stated then.

[Tr. 2060] Q. You do not recall the numbers available?

A. Well, my impression is that it was a very limited number. I believe it was either three or four in Pan American's case, and two or three—I am just not sure now—in American's case.

Q. Would it be as many as six in Pan American's case?

A. I—as I recall—and I am a little vague—information that was developed during this, as I say, heat of the negotiation, I don't have the impression now that it was that many.

[Tr. 2061] Q. Was this information that Mr. Connelly gave you?

A. Frankly, I can't be sure which—who stated it, and it wasn't—it was stated at the time off the record, so to speak.

Q. It was either Mr. Connelly or Mr. Allen.

A. It was not Mr. Allen.

Q. It was not Mr. Allen. It was either—

A. And I believe I indicated that these negotiations embraced—were in the presence of others. I don't recall just who they may have been.

Q. Did Mr. Connelly or whoever it was, Boeing representative, I will say, give you any reasons why preferences were given to Pan American and American?

A. Well, we understood it was because they had ordered first.

Q. Is that what we were told by the Boeing people?

A. This is a very definite impression that we had.

Q. Did I understand you to say before that these preferences were side agreements, were informal agreements that Boeing had made with Pan American and American?

A. Well, that's the impression that I have, because this—this was in the nature of—in my view and in the view of my associates—in the nature of agreeing to [Tr. 2062] sequencing which at the time the very thing that Boeing claimed was contrary to its policy and with which they would not agree in our case.

So this became quite an issue.

As I indicated in earlier testimony, the engineering and certification aspects of plane construction, particularly when there are differences between configurations for customers are such that some normal grouping, three planes, for example, in sequence initially, would not be either unusual or an abnormal situation.

Q. Who were the associates to whom you just referred? You said in the opinion of me and my associates.

What associates?

A. Mr. West was involved in some of these negotiations, and I believe Mr. Cook was.

Q. Are those the only ones you remember?

A. I'm not sure about Mr. Rourke. That's all I specifically remember, yes.

Q. Was Mr. Hughes involved?

A. Mr. Hughes was not involved personally, but he was involved through my conversations with him.

By that I mean he was not involved personally with Boeing as far as being present at meetings were concerned. There may have been phone calls.

[Tr. 2063] Q. He was aware, was he, of your conversations with Boeing in efforts to get improved delivery positions?

A. Yes.

Q. Was he in agreement with you in that regard?

A. He was in a agreement that efforts should be made to improve our delivery positions.

Q. Was he in agreement with you that other airlines should not receive preferences in deliveries over TWA?

A. Well, here it is a matter of degree, Mr. Hayes.

I wouldn't—I don't remember Mr. Hughes indicating that—well, it is not clear, I guess that—on the point. I remember that he was highly sympathetic to our getting additional—that is, getting earlier deliveries.

Q. At the time that the contracts were entered into, did you know of the preferences that were to be enjoyed by Pan American over all others and by American over others than Pan American?

A. Well, I certainly was well aware that earlier deliveries had been committed to Pan American and to American, but I don't recall having known of Boeing's intent to limit or treat this thing sequentially.

Had Boeing merely followed its contractual com- [Tr. 2064] mitments, substantially the effect of sequencing would have been achieved in any event. What sequencing language would gain would be simply that even though airplanes might be ready for delivery if such an airplane was not in the committed sequence, then delivery would be withheld—would have been withheld until the proper sequence occurred, and this is one of the things that Boeing was seeking to avoid by not committing to sequencing language.

Q. What reasons did they give for not wanting to deliver an airplane that was ready?

A. It wasn't quite that way.

Mr. Sonnett: Read that back, please.

Mr. Hayes: That's the way I understood the witness' answer.

Mr. Sonnett: I am not sure I heard you properly.

Mr. Hayes: I wonder maybe you misunderstood the witness.

Maybe I did.

(The question was read.)

Mr. Sonnett: That isn't what he testified to.

Mr. Hayes: That is what I understood Mr. Rummel to say with respect to sequencing.

[Tr. 2065] The Witness: No.

Q. Maybe you can state it over again. Maybe that would be the easiest way.

A. There is no need to state it over. Let me try to clarify it this way: That's exactly what they wanted to be able to do and that's why they didn't want the sequencing language.

Mr. Sonnett: What is it that they wanted to be able to do? I thought I understood you before.

The Witness: It is so simple.

Mr. Hayes: Thank you, Mr. Sonnett.

The Witness: Perhaps I could explain it this way?

Commitment on deliveries in a sequential manner means that Boeing would have committed to deliver airplanes by specific serial number in specific sequence to specific customers at a specific time, even though the time might be bracketed by deliveries per

month. We weren't specifically asked that they change that.

Now, with respect to delays, in the normal course of building airplanes and in the normal course of airlines accepting airplanes, one can never be [Tr. 2066] entirely sure precisely when an airplane will be ready for delivery. Some little adjustment might be required or an accessory might fail and require replacement or something else may come up, which would upset the intended delivery by either a matter of a day or two or possibly more. On the other hand perhaps for one reason or another an airplane would finally—be completed a day or two before the other, again in the normal course of building planes in an efficient way.

Boeing sought to avoid upsetting that. They only wanted to be committed to deliver X number of airplanes per month. Had they committed to deliver in accordance with the specific sequencing, it is possible an airplane would be ready out of sequence, but they in that event would have been contractually limited to hold the airplane until it fell into the right sequence and this they did not want to be committed to.

It is certainly not unreasonable from their point of view but it didn't serve the purpose that we were trying to gain at the time.

Q. Was it your position—I think your answer clarified this—that if a TWA plane was ready, they should [Tr. 2067] deliver it to you even though it might have been out of their contractual sequence?

A. Well, Boeing didn't agree to sequence.

Q. Did they have any agreement with either Pan American or American that you discovered whereby they did

agree to sequence in the sense that Pan American got some preferences over American and American got the preferences over the others?

A. That is the only area which bordered on that that I can recall.

Q. So that they did in those two instances at least agree to deliveries to particular airlines before deliveries to other airlines?

A. Well, but to be clear not by sequence. This was by just X numbers of planes.

Q. Before deliveries—

A. This was—we are getting very much into the detail of the kind of arguments we had.

Strictly I suppose they did not agree to sequencing in terms of serial by serial. They simply had agreed there would be X numbers of planes delivered, irrespective of what the serial might be before others were.

Q. Whether you call it sequence or not, there was a commitment that they would deliver a certain number of [Tr. 2068] planes to each of those two airlines before deliveries to others?

A. I don't—I'm not sure it was of record.

Q. I think you testified that it was your recollection that it was not of record, is that right?

A. I'd be very surprised if it was. This is the impression I now have.

Q. When you testified earlier in this cross-examination as to Boeing's practice to equalize delivery position, were you aware of these commitments that had been made to Pan American and American?

A. Well, I think I've already answered that by indicating that my present recollection is that this is a facet that was uncovered during these negotiations, that is, in terms of X numbers of airplanes being delivered.

We were aware approximately what the delivery positions committed per month was for these other customers.

Q. Do you recall any provision in the contracts that were entered into for the original purchase of the eight airplanes to the effect that Boeing warranted that it would not deliver more than 12 airplanes to other customers before the first delivery to Hughes Tool Company?

A. I don't remember that.

Mr. Hayes: This is one of the contracts [Tr. 2069] that is not in Exhibit R-1 which we plan to offer as I say.

Suppose I have just this one—

The Special Master: That provision is in the one you did offer.

Mr. Hayes: Is it?

The Special Master: Yes.

The Witness: I remember reading it this morning.

Mr. Hayes: Oh, that was in the letter agreement, yes.

The Special Master: It provided for eight airplanes.

Mr. Hayes: That's right. It was the January agreement.

I am speaking of the formal contract.

Q. You don't recall that provision at all?

A. No more than I did this morning when I noted it in the paper that was presented.

Q. In your prepared statement, Mr. Rummel, page 8, at the end of Paragraph No. 1, the last sentence you state that the Boeing 131 was suitable for use on TWA's domestic routes.

By the word "suitable" did you mean that it [Tr. 2070] would merely get by or it was entirely suitable?

A. I meant it as practical.

Q. Was it an efficient airplane for use on TWA's domestic routes?

A. Yes.

Q. In your opinion, was it the best jet airplane then available for use on TWA's domestic routes?

A. Boeing?

Q. Yes, sir.

A. Yes, I though the Boeing was the best.

Q. It was just that I did not know what you meant by the word "suitable." It could mean that you could get by with it just barely or that you could be enthusiastic about it.

A. Well, it had sufficient range capability to be reliably applied or let's say be applied to transcontinental non-stop schedules with good prospect of maintaining schedule reliability.

Q. In other words, you say that it was well suited, do you not, for use on the domestic routes?

A. It was as well suited as any jets that were then available.

Q. That is what I am talking about, the jets then available.

[Tr. 2070A] In the next paragraph numbered 2, the sentence beginning with the last word on page 8, you mention 707s as being suitable for use on TWA's international routes.

Do you similarly mean there that those 331s were well suited for use on TWA's international routes?

[Tr. 2071] A. Well, I meant they were suitable for certain gateway services, and that international operations could be undertaken on a practical basis with this kind of an airplane.

Q. And they were at least as well suited as any other jet then in existence?

A. I think I did go into the comparison between this and other jets but it was my view that the Boeing was somewhat better suited for long-range services than what was then being offered by Douglas.

Q. When did Boeing, so far as you know, first propose specifications for the 331?

A. Gee, my recollection is about the same as before on that point, Mr. Hayes.

Q. I don't think I ever asked you this specific question before, Mr. Rummel. I am sure I didn't. So I don't know what your recollection was.

A. Well, my recollection is that it was during the fall of 1955, perhaps late fall, that the configuration emerged. However, I'm not sure when specific proposals were offered.

The Special Master: Is the significance of this question detail specifications—

[Tr. 2072] Mr. Hayes: Yes.

The Special Master: —as distinguished from a proposal configuration?

Mr. Hayes: Yes.

The Special Master: What is the purpose of that?

Mr. Hayes: To show when the international jet became available, that is the purpose, the 331.

The Special Master: Does it make any difference when the specifications were available?

Mr. Hayes: Until at least, as I understand it, the basic specification was decided upon no offer could be formally made to a customer.

By Mr. Hayes:

Q. Am I right on that?

The Special Master: We have the dates of the offers, don't we?

Mr. Hayes: Not yet.

A. It depends on what you mean by offer, I guess, Mr. Hayes.

Perhaps it is a legal term that you are using and I'm using it in the terms of the practices that existed.

[Tr. 2073] There were quite a few discussions with the manufacturers on possibilities of using more powerful engines, and I had many discussions with Boeing well before that time even in advance of working on the Model 18 of wanting an airplane which I viewed as being much more suitable for international than they then offered.

Mr. Hayes: I ask that there be marked for identification a letter addressed by Boeing Airplane Company, signed by Mr. Connelly, to Hughes Tool Company, dated January 6, 1956, Exhibit 51.

(Letter from Boeing Airplane Company, signed by Mr. Connelly, to Hughes Tool Company, dated January 6, 1956, marked Defendants' Exhibit 51 for identification, as of this date.)

Q. Will you look, please, Mr. Rummel, at Defendants' Exhibit 51 for identification?

A. I've read it, Mr. Hayes.

Q. Did Defendants' Exhibit 51 come to your attention at or about the date it bears, or a copy of it?

A. I'm not certain.

Q. Do you recall when the first formal offer was made by Boeing to Hughes Tool Company?

A. No, I don't definitely.

Q. Defendants' Exhibit 51 does relate to the 311, [Tr. 2074] does it not?

A. It relates—it says for the 320.

Q. That's the same, the 331 being TWA and the 320—

A. 331 is the designation of the 320 manufactured to Hughes Tool specifications.

Q. When you say Hughes Tool you really mean the TWA specifications, do you not?

A. Yes.

Q. In Paragraph No. 1 there are set forth basic specifications with dates of November 15, 1955 revised December 5, 1955.

Is it your recollection that that was the date of the original detailed specifications of the 331?

A. Well, I can't be sure from this, Mr. Hayes.

I think I indicated in prior testimony that the month of November seemed to flash into my mind as about the time that the 300 series crystallized.

Now, Boeing had the practice of giving us even preliminary specifications on a regular basis. Whenever they had something new to offer, usually we would receive the specification.

This certainly indicates that the 320 concept was well established by November 15th, but I can't be sure from this that that's the earliest time.

[Tr. 2075] Q. Had any airline ordered the 320 series by November 15, 1955 or by December 6, 1955, so far as you know?

A. I think I'd have to answer that this way.

The initial Pan American order was for a very large number of planes for international service.

Q. I am sorry. I missed some words there.

A. The initial Pan American order was for a large number of planes and obviously for international service.

What the detailed contractual arrangements in this respect between Pan Am and Boeing were I don't know, but many of those planes became international airplanes.

Q. Are you saying that you don't know whether the original Pan American contract incorporated the specifications set forth in Paragraph 1 of Defendants' Exhibit 51?

A. No, I didn't say that, Mr. Hayes, and I would doubt if that were true.

Q. You believe that the original Pan American contract did incorporate the specifications referred to in Paragraph 1 of Defendants' Exhibit 51?

A. No.

Q. Maybe we misunderstood each other, Mr. Rummel. What is your recollection as to whether the original Pan American contract referred to the basic [Tr 2076] specifications of the 320 series, that it did or it didn't.

A. Well, my recollection was that Pan American ordered Boeing jets as they were configured at the time the order was placed, and that following that time a far better international airplane emerged, and that the order ultimately consisted primarily of the international airplane.

Q. The original order was confined to the 120 series, was it not?

A. No, I didn't say that, Mr. Hayes.

Q. I am asking you if you did.

The Special Master: The original Pan American order?

Mr. Hayes: That's right, the original Pan American order.

A. I am not clear at the moment as to what the identification of the plane was when the order was initially placed.

Q. Did the Attachment A, the delivery schedule, to Defendants' Exhibit 51 for identification ever come to your attention, Mr. Rummel?

A. I suspect that it did, but I can't be quite positive as to this particular piece of paper.

[Tr. 2077] Q. The contract for the 331s according to your statement was made on March 19, 1956.

You have testified that even in 1955 you and Mr. Hughes had been negotiating with Boeing for the 331s.

Did those negotiations continue up until the time the contract was executed on March 19, 1956?

A. Yes, I would say they were—they continued through that period.

Q. Were improvements in delivery dates negotiated prior to the time the contract was signed?

A. I said this morning I don't recall the deliveries having been improved on this model. It certainly could have happened. I still don't specifically recall.

Q. Will you note that in Paragraph 4 of Defendants' Exhibit 51 having to do with contractual provisions, reference is made to the letter agreement of the sale date covering the 120s which is Defendants' Exhibit 47. Do you note that?

A. Yes.

Q. Is it your belief that a copy of Defendants' Exhibit 51 in the normal course came to you at or about the time it was written?

A. I would certainly think so.

Mr. Hayes: I offer in evidence Defendants' [Tr. 2078] Exhibit 51 for identification.

Mr. Sonnett: In light of the witness' testimony, I have no objection.

The Special Master: Received.

(Defendants' Exhibit 51 for identification, received in evidence, as of this date.)

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[Tr. 2094] Q. Mr. Rummel, when did TWA first begin to fly polar routes to Europe?

A. I can't be sure, Mr. Hayes. I believe we did that first with our tip tank 1049Gs which would have been around possibly 1956, but I'm not sure.

Q. Did you use other aircraft on the polar routes as well as the 1049Gs?

A. Yes.

Q. What other craft did you use?

A. 1649As.

Q. What segments were operated over the Pole?

A. And we used the B series of jets on polar routes later on.

Q. That was the 331Bs when you acquired them or leased them in 1961 or 1962?

A. Yes.

Additionally, we had polar service for a period but not non-stop with jets.

Q. I am speaking of the non-stop polar services.

What were the segments on which the polar routes were operated?

A. West Coast terminals to London and to Paris but not simultaneously.

Q. Was the 131 a reliable airplane for use on the [Tr. 2094A] polar routes non-stop?

A. Well, its schedule reliability if that's what you mean, would have been practically zero.

Q. Was the 331 a reliable plane for use on TWA's polar routes non-stop?

A. Not non-stop.

[Tr. 2095] Q. The first jet that TWA acquired which was a reliable plane for non-stop polar routes was the 331B, was it not?

A. Yes.

Q. That was a fan jet, was it not?

A. Yes, sir.

Q. Until the development of the 331Bs, was TWA under the necessity of operating its polar routes with piston airplanes?

A. No, because one-stop service with jets was still much faster than non-stop piston service.

Q. Where would the stop be made?

A. Well, we tooled up at Frobisher. However, that didn't finally work out too well.

Then later on the stops were made in, I believe, Montreal.

Q. To what extent did TWA use jets on a one-stop basis over its polar routes.

A. Well, we did this at various times and for various lengths of time.

Our published schedules listed polar services but indicated that stops—a stop would be made en route.

These were usually called fuel stops.

Q. What jets did TWA use when it used jets on the [Tr. 2096] polar routes with one stop?

A. I'm petty sure initially it was 331s, Mr. Hayes.

Q. Can you fix the time when this took place?

A. No, sir, I'm a little vague on the exact timing of that.

Q. At the same time, were you also using pistons on the polar routes on a non-stop basis?

A. I'm not sure, Mr. Hayes. The polar route was pretty thinly populated, but I don't just recall at the moment if there was overlapping or not.

Q. At page 9 of your statement you set forth in Item No. 3 the purchase of the 30 Convair jet aircraft, and you have already testified that the agreement of June 7, 1956, was the preliminary agreement. I think that is the word.

Between the time of that preliminary agreement and the agreement that was finally made on September 10, 1956, was

there a review of the prospective purchase of the Convair 880 by TWA?

A. Yes.

Q. Where did that take place?

A. Well, the final review took place in Kansas City.

[Tr. 2097] Q. Who was present at that meeting?

A. Well, the ones I remember are Jack Weller—gee, there were seven or eight people there.

Q. Mostly top management?

A. They were all in the—either top or in the higher echelons of management.

Q. Was Mr. Collings there?

A. I—if he was, I don't think he was there the entire time.

The reason I say that is I recall reviewing the results with him subsequent to the meeting.

Q. Was Mr. Cocke present?

A. Well, that's one reason I hesitated slightly. I think he was, but I'm not sure. It could have been Clyde Fullerton who was there for him. I am not entirely sure of that.

Q. What was the occasion for the holding of the meeting or the calling of the meeting, Mr. Rummel?

A. The occasion was specifically to review the Convair 880 proposed order to determine whether from TWA's point of view or not it would go along with the Convair order or it would prefer an alternative.

Q. Who called the meeting?

A. I did.

[Tr. 2098] Q. Was it Mr. Collings?

A. I don't know who convened the meeting, but I called it.

Q. Did you have any conversation with Mr. Hughes with respect to the subject of the meeting before it was called?

A. Yes.

Q. Tell us that conversation, please.

A. Well, as I recall it, Hughes asked for an expression from TWA on whether or not we shall proceed with the 30 Convair deal, and I expressed the view that the best way to do this was to meet with a number of the top people in TWA and get their views, as I recall it now.

Q. Did you report that conversation to Mr. Collings?

A. I am confident that I did, and that he was knowledgeable concerning the holding of the meeting.

What I meant when I said I called the Meeting—I wasn't sure who convened it, it was merely I attended the meeting. I'm not sure at the moment whether I flew in from the Coast or whether I was there or not, but that morning the people were there, some of whom came from New York.

I just don't remember that detail of it.

[Tr. 2099] Q. At the time of that meeting, had the June 7th preliminary agreement been entered into?

A. Well, I'm quite sure that we were approaching not the June 7th date but the September date.

Q. What I am trying to find out is whether the meeting was held between June 7th and September 10th.

A. I believe so, Mr. Hayes.

Q. What was the consensus of the meeting with respect to proceeding with the proposed Convair contract?

A. Qualified approval.

Q. Can you explain that more in detail, Mr. Rummel?

A. Well, I believe that out of the meeting came several conditions, which the group felt should be met and which really amounted to conditional approval.

Q. Was the consensus of the meeting communicated to Mr. Hughes?

A. Yes.

Q. By whom?

A. By me after Hughes was unable to get Mr. Collings.

Q. Were there then further negotiations with Convair with a view toward meeting the conditions that had been stated at the meeting?

[Tr. 2100] A. Yes. Some of the conditions were not new to the negotiation and negotiations did continue.

Q. Did the September 10th agreement when finally executed substantially comply with the conditions that were recommended by the management group at the Kansas City meeting?

A. I'm fairly certain now that the majority of them, but I don't believe all of them were met.

Q. Were there any important ones that were not met?

A. I don't—well, I—my impression now is that the one on airplane price wasn't met, but I'm not wholly clear as to the extent of the difference.

Q. Would it be correct to say that the final contract substantially complied with the recommendation made at the Kansas City meeting?

A. Well, I think so.

I might say some of the conditions were included to provide a stronger base for negotiations.

Q. You mean for further negotiations with Convair?

A. Well, I remember one point in particular I had been trying to get, and by making this—by giving a stronger foundation than just Rummel we finally won the point.

[Tr. 2101] Q. Bargaining condition, so to speak?

A. That's right.

Q. The contract was not entered into by Hughes Tool Company then until after it had received the recommendations of TWA management, is that correct?

A. That I think is true of the September 10th—

Q. That is what I mean.

A. —that is the final contract.

Q. The final contract?

A. I might—I think I should point out for accuracy that this review meeting covered broad issues and a few narrow issues that were believed to be important. Broadly, numbers of planes, broadly what the plane would do for us and that sort of thing, and that in no way was a review of contract terms or detailed review of the contract or specification.

Q. Did it consider alternative airplanes as well, the meeting?

A. It did not consider any elective available at the moment because none existed. There were no other deals or contracts that existed to the degree of maturity that this one did.

The obvious alternative could have been Electras or Boeings and I'm not sure of the degree which [Tr. 2102] those at that time were discussed.

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[Tr. 2108] • • • *Examination (cont'd) by Mr. Hayes*:

Q. Mr. Rummel, what discussion, if any, was there at the Kansas City meeting as to which you were testifying yesterday afternoon with respect to the number of Convairs to be acquired?

A. Well, the number 30 was discussed, Delta's 10 was discussed, and the current views on numbers of planes, that is the 880s that might be sold to other airlines in a reasonable period was discussed in connection with the rebate provision of the contract.

[Tr. 2109] Q. What was the substance of the discussion as to the propriety of ordering 30 Convairs for TWA's use?

A. Referring to the meeting?

Q. Yes.

A. In Kansas City?

Q. That's right.

A. Incidentally, whenever you like, I have that one date that was asked yesterday.

Q. Fine. Why don't you interrupt? What date was that? I have forgotten.

A. Perhaps I shouldn't have, Mr. Hayes.

Q. No, I am glad you did.

A. You requested to know the inaugural date of TWA jet service on the New York-Los Angeles segment. That date is April 23, 1959.

Q. April 23rd?

A. 1959.

Q. Thank you, sir. Do you remember the question? The question was what discussion there was at the Kansas City meeting with respect to the propriety of ordering 30 Convairs for TWA's use?

A. Well, the—I don't recall questions in terms of propriety. 30 was the number compatible with earlier indications from TWA as to the need for airplanes in this—

[Tr. 2110] Q. I am sorry. I missed something there. 30 was what?

A. Was compatible with earlier indications from TWA that I testified to before for airplanes in this category.

Q. On this cross-examination you testified to that?

A. Yes, sir.

Q. Did you? I do not recall it. Go ahead.

A. I did.

Q. I will accept your recollection.

A. The principal discussion, as I recall it at this time, related to the probability of actually receiving rebates on the airplane price from Convair.

The basic question of 30 vs. some other number for TWA, as I recall it now, was behind us, and at the same time the proposition, as I indicated yesterday, was put be-

fore them, basically was should we go ahead with Convair or not.

Q. The number that was put before them was 30? That's what they were discussing; is that right?

A. For TWA.

Q. For TWA?

A. Yes.

Q. You said the number 30 was behind you at that time. [Tr. 2111] Had there been any recommendation from any department of TWA that 30 be acquired?

A. Well, I indicated previously, Mr. Hayes, that I had been in touch with Traffic on that point considerably earlier, and 30 is the number that I recall our having come into agreement on.

Q. Traffic, that would be Mr. Fellows, would it not?

A. Well, I believe Fellows was the spokesman on the point at that time, if I recall correctly, but I don't think he acted completely in isolation.

Q. No I am not suggesting that. That was his division, though, when you say "Traffic", was it not?

A. Well, it was Cocke's division and Fellows worked for Cocke, as I recall it.

Q. Is it correct to state, then, that prior to the Kansas City meeting there was agreement, at least, between Fellows and Cocke that 30 would be a good number or the right number for TWA to order, if they bought any, of course?

A. I am not sure I would put it wholly that way, because I have the impression that Cocke would have been happy to have still more.

Q. But he was agreeable to the 30?

A. I believe that is a fair statement.

[Tr. 2112] Q. You mentioned that the chief subject of discussion at the meeting was operation of the rebate clause.

Speaking broadly, was the rebate clause one whereby the prices of the planes, of the 30, would be reduced as more planes were sold by Convair to other airlines, without going into details?

A. I didn't intend to say, Mr. Hayes, that it was the chief subject for discussion at the meeting.

Q. Maybe I misunderstood you.

A. What I intend to convey was with respect to the numbers of airplanes, the discussion evolved around this issue.

Q. With that understanding, was my description broadly of the rebate clause as proposed by Convair an accurate one?

A. Could that be read? I don't remember discussing the content of the rebate clause.

Q. I did not say that you did, Mr. Rummel.

I stated the substance of it and I ask you, as an accurate, broad statement of the substance of the rebate clause, as you remember it, that there would be a reduction in the price of the 30 planes determined by additional sales by Convair of planes in excess of 40, without going into the details of the reduction.

[Tr. 2113] A. That is broadly true, at least, for certain numbers in excess of.

Q. That is what I say. I was not going into the details at all or attempting to do so.

It was a stepped up schedule, was it not, Mr. Rummel? For sales between X and Y numbers, the rebate would be so much on the original 30? For sales between Y and Z numbers, there would be a further rebate on the original 30? Is that the way, broadly, the rebate clause proposed would operate?

A. It is an over-simplification, but there were categories of rebates.

Q. Were they geared into the number of planes that would be ordered by others from Convair?

A. No.

Q. They were not. What were they geared into, then?

A. Airplanes that were delivered.

Q. Of course, when I said "ordered," I meant ordered and delivered. Pardon my inaccuracy of expression, Mr. Rummel. Planes that would be delivered to other airlines.

A. They were specifically tied to deliveries, actual deliveries pursuant to sales.

Q. Correct.

[Tr. 2114] A. There was some question of short-term leases, for example.

Q. You mean short-term leases were excluded from the rebate provision, or were they not?

A. They were excluded.

Q. At this Kansas City meeting, and by the time of the Kansas City meeting, was it expected that Delta would order 10 planes?

A. Yes.

Q. What was the substance of the conversation at the Kansas City meeting as to the expectation that other airlines would order 880s and in what quantities?

A. Well, I think views varied somewhat between people on that point, and I don't remember the specifics now. I think that at that time it was anticipated that Pan American would order a number of them and possibly some other airlines. I am a little vague now.

Q. You cannot remember the other airlines?

A. Well, numbers of airlines were discussed. I am trying to draw conclusions. That's where I am vague right now.

Q. Do you remember any of the other airlines which were discussed?

A. Were discussed?

[Tr. 2115] Q. Yes.

A. Oh, yes, we talked about the possibilities of United, I believe Capitol Airlines. I am not sure now.

Q. Have you any recollection as to the discussion with respect to the numbers that were expected to be ordered by other airlines, either individually or in total?

A. I don't, Mr. Hayes.

Q. You have no recollection of the numbers at all?

A. Well, I recall there were numbers, but I don't recall what they were now.

Q. You cannot recall? Even the total numbers that were discussed for all airlines as a possibility?

A. Well, I may not have been clear. What we were discussing, as I recall it, was the probability of sales, not the broad possibilities that were available to Convair. But I don't remember the specifics.

Q. You do not remember the numbers that were considered probable sales by Convair?

A. No, not right now.

Q. Can you remember whether or not that the number that it was expected Convair might sell to other airlines would be sufficient to bring about the operation of the rebate provision?

A. Yes.

[Tr. 2116] Q. It was hoped that there would be sufficient orders so that the rebate provision would operate; is that it?

A. Well, yes, any additional orders beyond the 40 operated the rebate provision.

Q. Yesterday, you gave some testimony, Mr. Rummel, as to a conversation you had with Mr. Connelly of Boeing with respect to deliveries of airplanes in connection with your attempts to improve the deliveries, do you recall that?

A. Yes.

Q. Did you have a record made of a conversation between you and Mr. Connelly which took place on December 20th or some date in December 1957?

A. I don't remember.

Q. Do you remember a conversation with him at or about that time?

A. Not specifically. I had conversations with him from time to time.

Q. Was there any occasion when you had a record made by any means whatsoever of a conversation between Mr. Connelly and you?

A. Well, if you mean was the conversation bugged, no, not as far as I have ever known.

[Tr. 2117] I did have a Dictaphone—

Q. You did have a what?

A. A Dictaphone and it was possible to record conversations, but I certainly don't recall ever having done so without making it clear to the other people that I was, but I don't know if I did or not in this case.

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[Tr. 2121] • • • By Mr. Hayes:

Q. I honestly don't remember whether this is in the testimony before the recess or not. I think it was. I looked for it and couldn't find it easily: that Convair had made it clear it would not proceed with the 880 program, unless it had at least orders for 40 aircraft?

A. I don't remember if that was in the testimony prior to the recess or not, either.

Q. Was that a fact?

A. Yes.

Q. I couldn't remember whether or not it was in your deposition.

Mr. Sonnett: At the bottom of page 13 of Mr. Rummel's prepared statement—

Mr. Hayes: That is where I read it. I knew I read it some place. I never thought of looking at his prepared statement.

The Special Master: I remember the figures.

Mr. Sonnett: "Convair was unwilling to undertake the program until it had firm commitments [Tr. 2122] for the purchase of 40 aircraft."

Mr. Hayes: My recollection was it was in his prior testimony and I searched and couldn't find it.

By Mr. Hayes:

Q. At the time that you were advised of a reduction in Convair's from 30 to 20 and you told us about your conversations with Mr. Schwartz at that time at, I believe, the Waldorf Hotel, was any mention also made of any reduction in the number of Boeings?

A. Yes, I think that was discussed at that same time.

Q. What was said in that connection as to the Boeing reduction?

A. Well, I can't be—the gist of it was that there would be a reduction in the Boeing fleet, and I believe Leonard discussed his views. He thought on the one hand we had committed for too many airplanes, and, secondly, of the problems in funding the purchase.

Q. Did he mention both of those considerations in connection with both the Convairs and the Boeings?

A. Well, I don't know that I remember quite that—that specifically. It was discussed during the course of the meeting.

[Tr. 2123] Q. Was anything said by him in that conversation as to the efforts of either TWA or Hughes Tool Company to obtain financing?

A. Well, I am pretty sure it was in that meeting that he mentioned—it could have been at a different meeting—I think it was that—he mentioned he had been in touch with the First Boston, but I don't—I don't recall that, the detailed discussion, although I guess that might have occurred.

I don't recall any detailed discussion on the financing particularities.

Q. Were you conscious of the need for financing in order for TWA to acquire jets?

Mr. Sonnett: I must at this point object. This has been gone into at some detail, commencing at 759 of the cross-examination, this entire meeting and conversation, and these subjects.

Mr. Hayes: I am not speaking of the meeting now at all.

The Special Master: Off the record.

(Discussion off the record.)

[Tr. 2124] The Special Master: On the record.

Q. Were you acquainted throughout the period from late 1955 to the end of 1960 with TWA's financial condition?

A. Certainly not in great depth. I was generally familiar with how we were doing.

Q. Did you receive copies of TWA's annual reports?

A. Certainly.

Q. Were you acquainted with the balance sheet condition of TWA throughout that period?

A. Well, as I say, I was generally familiar with the financial results during that period.

Q. By financial results, are you talking about the profit and loss results at the end of the year or are you also including the financial condition as reflected by the balance sheets?

A. I thought you were talking about the balance sheets.

Q. You were also acquainted with the profit and loss results for each year, were you not?

A. Well, I read the annual reports, Mr. Hayes, and I received some other data through the years just in my normal capacity in the company.

Q. Do you know what plans, if any, were originally intended for the financing of the jets ordered by TWA?

[Tr. 2125] A. No.

Q. You were not consulted in that connection at all by anybody?

A. Financing?

Q. Yes.

A. No.

The only consultation was simply putting forward to both the Tool Company and to TWA the information I had on the cash—or on the capital requirements.

Q. Your function ceased at that point?

A. I had no part of financing.

Q. Was there at any time an intention to have the jets acquired originally by the Tool Company and sold on conditional sale to TWA?

Mr. Sonnett: Intention on whose part?

Mr. Hayes: Could I have the question?

(The question was read.)

Q. An intention on either the part of Toolco so far as you know or on the part of TWA so far as you know?

A. I don't know Mr. Hayes.

Q. You never heard of that?

A. Well, I don't recall ever having heard of it.

Q. Did you ever hear in 1959, in the spring of 1959 of a plan for Toolco to purchase the planes and to [Tr. 2126] lease them to TWA?

A. Yes, I heard of the plans for interim leases of the jets.

Q. What do you mean by interim leases of the jets?

A. Well, I think my understanding at the time was arrangements might be made to lease the jets for TWA's use on a short term basis until such time as the financial problem was squared away.

Q. Are you speaking now of the leases that were entered into with respect to the Boeings which were delivered and were day to day leases?

A. That's what I had in mind.

Q. No. Aside from those leases—

A. Aside from those?

Q. Yes—did you ever hear of a plan whereby the Tool Company would acquire the planes and then lease them to TWA?

A. Well, I recall Convair proposing that sort of thing in order to get the 880 log jam moving.

Q. That was in 1960, was it not?

A. Yes, I guess that would be after the date you mentioned. I am sorry.

Q. I am speaking of 1959.

A. I don't remember that, Mr. Hayes.

[Tr. 2127] Q. Have you any recollection of such a leasing plan as I describe being proposed by Dillon, Read & Company?

A. No.

Q. You do not?

A. No.

Q. That never came to your attention?

A. Not—no, I don't remember anything from Dillon, Read coming to me.

Q. Whether it came from Dillon, Read Company to you or from other officers of TWA to you—

A. No, I wasn't drawing that distinction. I don't recall having been involved.

Q. Did you ever acquire any knowledge about a plan for financing of the jets by TWA directly through insurance and bank lenders which plan was proposed by Dillon, Read & Company?

A. I don't remember anything like that, Mr. Hayes. The financing was not my area of activity in the corporation.

Q. None of the matters I mentioned to you click with your memory at all?

A. No, not as I sit here.

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[Tr. 2135] • • • Q. In your prepared statement, Mr. Rummel, at page 9, you mention that TWA received 12 of the 331s, and that the remaining six 331s were diverted to Pan American.

Do you see the portion I am referring to?

A. Yes.

Q. It is my recollection that you have already testified, and correct me if I am wrong, that you had a conversation with Mr. Thomas concerning the reduction from 18 to 12.

The Special Master: Do you recall?

A. I'm not sure as to just what was in the earlier testimony at the point at the moment.

Q. I am not either and I just did not have a chance to check it, Mr. Rummel.

What recollection, if any, do you have as to any [Tr. 2136] conversations with Mr. Thomas with respect to a reduction of 331s from 18 to 12?

A. Well, I met with Thomas—I am not sure exactly when it was—and perhaps more than one time.

I have the impression that it was after the plans to dispose of these ships was well along, but I believe that there was a discussion on the point.

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[Tr. 2142] • • • By Mr. Hayes:

Q. I suppose you have forgotten the question by [Tr. 2143] now, Mr. Rummel?

A. I've forgotten the precise wording.

Q. I have forgotten it, too.

I will try it again.

What I was trying to elicit from you was the conversations you had with Mr. Thomas concerning a reduction from eighteen to twelve 331s.

A. Well, I recall an expression of attitude I would say on Mr. Thomas' part with respect to the reductions and in fleet numbers. I am having trouble at the moment trying to distinguish from memory between the Convairs and the Boeings.

But I remember Thomas at one point, and I am not sure exactly when this occurred, expressing the view with which I did not agree, that during the next few years, subsequent to this particular time, it would become clear that airlines generally had over-bought on jets, and that TWA or Hughes would be able to pick up jets from those who had over-bought at bargain prices.

One other—at one point in time he urged that we start moving vigorously into the development of smaller jets, that is, that then existed.

I believe this may not have been in exactly the same conversation, but I'm not entirely certain.

[Tr. 2144] And I think additionally, he expressed the view at one of the meetings that he was satisfied with or concurred with—I don't remember the words—with the idea of 20 Convairs.

The problem I'm having is to try to specifically recall any specifics at the moment on Thomas of the 18 to the 12, but I think these discussions occurred during the period that this was in issue.

Mr. Sonnett: I would like, Mr. Brownell, to be able to ask the witness one or two questions on the voir dire to lay a foundation for a motion to strike the answer.

Mr. Hayes: Mr. Brownell, I must object to these constant interruptions on so-called voir dire.

There is going to be a redirect. There is no reason at all that I can see why Mr. Sonnett cannot hold his questions until we are on redirect instead of interrupting my effort to present a picture here of what happened.

Mr. Sonnett: Your efforts—

The Special Master: Let us hear the first question and we can test that out.

Voir Dire Examination by Mr. Sonnett:

[Tr. 2145] Q. Is it your understanding that Mr. Thomas had any authority to act for TWA for an acquisition of jet aircraft?

Mr. Hayes: I object.

The Special Master: I will sustain the objection.

Mr. Sonnett: It seems to me the record is already clear that Mr. Thomas had no such authority.

The Special Master: I recall the record.

Mr. Sonnett: If that is so then Mr. Thomas' statements to this witness particularly after the event of this are pure hearsay and not binding in any sense on TWA.

Mr. Hayes: I am not going to argue the point now, Mr. Brownell.

The Special Master: I, of course, cannot decide at the present time as to the weight to be given to the answers on this line of questioning. In view of the fact that the former Master was not able to find this particular allegation to be a fact it would be helpful to me to have the subject matter probed a little further, leaving, of course, a later decision whether or not it meets the test [Tr. 2146] prescribed by Judge Metzner.

Mr. Sonnett: What I was attempting to raise—I realize the evaluation as to the weight of all of this you will have to make when the record is complete—but what I was attempting to raise is the point that Thomas' statements in respect to jet aircraft could not be on the state of this record admissible against TWA because by definition he had no authority to act for TWA in that field.

The Special Master: I believe any questioning along that line should come as a matter of redirect rather than interrupt the orderly procedure of the cross examination.

Mr. Sonnett: All right, sir.

Mr. Hayes: And I think I am safe in assuming that the Special Master is not accepting Mr. Son-

nett's statements as sheer legal gospel, even if I do not answer them at this point.

Mr. Sonnett: My recollection is—

The Special Master: I am persuaded heavily by both of you expert counsel, not more one than the other, I will put it that way.

Mr. Sonnett: My recollection is and this is what I premised my objection on, that there is [Tr. 2147] evidence in the record that both Hughes and Thomas both agreed in statements to this witness that Thomas had no such authority.

Mr. Hayes: Your recollection happens to be inaccurate, Mr. Sonnett.

Mr. Sonnett: I am not at all content to accept that. I am quite sure the record is clear.

The Special Master: Let us proceed with the cross examination.

Mr. Hayes: Yes, let's proceed. I would much rather get along with the cross.

By Mr. Hayes:

Q. In conversations with Mr. Thomas with respect to reductions of numbers of aircraft, did he ever say anything to you about the wisdom of waiting for improved designs?

Mr. Sonnett: Just to save interruption may I note a continuing objection to all conversations with Thomas on this point?

The Special Master: Surely.

A. I belive he did mention that possibly better planes would be available later during some of these conversations. And I am pretty sure I put that in the record earlier, if I am not mistaken. Maybe not.

[Tr. 2148] Q. The fan jet development took place prior to the time of the reduction in the number of planes that TWA was to receive, did it not? Specifically didn't it take place in 1958 with the American Airlines order for 990s from Convair?

A. The 990 always had a fan engine. That's one of the things that distinguished it from the earlier series.

Q. The development of the fan engine took place before your conversations with Mr. Thomas which you have just related, did it not?

A. Well, I think so, yes.

Q. Did Mr. Thomas ever say anything to you specifically with respect to assigning the right to purchase six 331s to Pan American?

Mr. Sonnett: Could I have that question read?

(The question was read.)

A. He may have. I don't remember what it was if he did.

Q. Did he ever tell you that he was in favor of a reduction from 18 to 12 or of an assignment of the right to acquire six 331s to Pan American?

A. I don't remember a specific statement to that [Tr. 2149] effect. I have the impression he was delighted to be able to move forward with the 12.

Q. You have in previous testimony told us about the constitution of the Jet Planning Staff and members of it and its functions and so on, and of the protests you made to sundry people with respect to the proposed reductions.

A. Yes.

Q. Did you ever bring up the subject of the proposed reductions in the fleet at any meeting of the Jet Planning Staff?

When I say the subject, I mean your protest against the reduction.

A. Well, I was protesting to those whom I thought the protest might have some effect.

I don't remember protesting to the Jet Planning Staff, if that's what your—

Q. That is what I am asking.

A. I don't recall—

Q. You have no recollection having done that?

A. No, I don't recall protesting at a Jet Planning Staff meeting, although certain—certainly program changes were discussed and I wouldn't want to say conclusively whether I did or I didn't. I don't remember right now.

* * * * *

[Tr. 2203] * * * The Special Master: So that you do not have any massive documentary material that you think necessary to put in with respect to the merger?

Mr. Hayes: No. If the Huntington report goes in, I think it takes care of the whole study.

The Special Master: Have you anything further to say, Mr. Sonnett?

Mr. Sonnett: I think you, Mr. Brownell, have put your finger on the heart of the problem. I have nothing to add to it.

The fact that a merger was proposed was certainly known to TWA. The fact that the proposed merger which Hughes wanted to bring about was considered by the captive board was known to TWA. The fact that the merger was never consummated is, indeed, not in dispute.

Even if this were a default in a stockholders suit—and this is not a stockholders suit—this line of evidence would be irrelevant, it seems to me.

The Special Master: I understand the respective positions now, and I believe it will shorten the record in the long run if we allow this [Tr. 2204] to go in.

I hope that the line of inquiry will be relatively brief, because I do have my doubts as to the relevance of any detailed information about the merger.

Mr. Hayes: I am not going to ask anything about the merger.

The Special Master: Received.

(Defendants' Exhibit 57 for identification marked in evidence as of this date.)

Mr. Hayes: Will it be conceded, just to save introducing a bunch of directors minutes, that the merger was proposed to the directors, I think it was in May 1960, and for several meetings thereafter the directors merely postponed final action?

Mr. Sonnett: I take it along with the concession that there is nothing that indicates that TWA ever agreed to not getting these six planes, with the further understanding that there is nothing to indicate that this document, Exhibit 57, was any more than a draft, and I don't know whether it was ever considered by the board or not. Certainly it was never adopted by TWA. I would take counsel's representation that that is what the minutes would [Tr. 2205] show if they were introduced.

Mr. Hayes: I can't make the first concession. You are asking me to undercut my whole position. That, I don't intend to do.

Mr. Sonnett: No. I mean aside from your argument, which I understand, but in terms of specific reference, if you contend that there is something in

the TWA minutes showing expressly a consent to not getting these six planes, even though the board was a captive board, I would suppose that you would want to put that in evidence before the Special Master for whatever it is worth.

The Special Master: You don't claim that is in the minutes, do you?

Mr. Hayes: I don't claim there is any mention in the minutes of the planes or anything else.

The Special Master: Would this requirement of Mr. Sonnett satisfy your desire for a statement with respect to the minutes?

I ask you, Mr. Hayes.

Mr. Hayes: I am sorry. I thought you were asking Mr. Sonnett.

The Special Master: No. That reply from [Tr. 2206] Mr. Sonnett is sufficient to allow you to go ahead without introducing the minutes?

Mr. Hayes: It being understood that the minutes do disclose that the merger was brought to the attention of the board of directors, but that there is no specific reference in the minutes to six planes or any other number of planes.

The Special Master: You do understand that, Mr. Sonnett?

Mr. Sonnett: Oh, yes.

The Special Master: All right, let us proceed.

Examination (cont'd) by Mr. Hayes:

Q. For some period of time in 1961, TWA continued to give consideration to the proposed Northeast merger, did it not, Mr. Rummel?

A. I believe that is correct, yes.

Q. Did you have any connection with the consideration given by TWA to the Northeast merger in 1961, after the new management came in?

A. I am pretty sure I discussed certain aspects of it with Mr. Tillinghast, possibly others, some time during 1961. I don't recall exactly the time.

[Tr. 2207] Q. Did you prepare any studies in 1961 concerning the proposed merger with Northeast?

A. Mr. Hayes, I can't say for sure.

My department did become involved in projections relating to that consideration from time to time, and I—as I sit here now I think it is likely that we did some work in 1961, but I don't recall the specifics at the moment.

Mr. Hayes: There was marked for identification on Mr. Rummel's cross-examination when Mr. Leisure was conducting it as Defendants' Exhibit 39, the minutes of the TWA board of March 20, 1961.

I now offer those minutes in evidence, particularly because of the report on the proposed Northeast Airlines merger which appears on page 8.

The Special Master: I think the way we were doing that before was to copy in the—

Mr. Hayes: Reading in—

The Special Master: —relevant portions.

Mr. Hayes: Fine. Why don't I just read it in?

Mr. Sonnett: May I look at it for a minute to see whether or not I have any objections? What page is it on?

[Tr. 2208] Mr. Hayes: Page 8.

Mr. Sonnett: I think it is irrelevant for the reasons previously stated.

Mr. Hayes: Do you want to look at it, Mr. Brownell? Have you a copy in front of you.

The Special Master: Yes.

As I understood you a little while ago your statement was going to be accepted by Mr. Sonnett in lieu of introducing the minutes.

Mr. Hayes: That was in 1960, that part.

I might mention, Mr. Brownell, the only reason I am going into this is because on Friday I asked Mr. Sonnett if he was basing no claim on Paragraph 47 of the complaint, and I did not get an affirmative answer.

The Special Master: I recall that.

Just mark this subdivision of the minutes and the reporter can copy it in.

Mr. Hayes: You have a copy before you, do you, Mr. Brownell?

The Special Master: Yes.

Mr. Hayes: It begins with "Report on the proposed Northeast Airlines Merger" and goes down to the word "consulting firm."

[Tr. 2209] Mr. Sonnett: If you are going to do that, take in the following two paragraphs one of which says Mr. Holliday abstained from voting.

The Special Master: Yes, put in that whole report.

Mr. Hayes: I see, the balance of the page. I looked at the next one that somebody returned to the meeting and I didn't think that was important.

Mr. Sonnett: It does indicate that Mr. Holliday was aware of the conflict of interest on the subject matter. If it is going in at all I think the whole thing ought to go it.

Mr. Hayes: Can we defer argument until time for briefs?

The Special Master: I was going to give you equal time.

Mr. Hayes: No, I don't want equal time now. I would like to finish the cross-examination without the benefit of wise cracks from counsel.

Mr. Sonnett: It is perfectly evident why he abstained.

("*Report on the Proposed Northeast Airlines Merger.*

"Mr. Albert V. Leslie recommended on behalf [Tr. 2210] of the Management Committee that final action on the matter of the proposed Northeast Airlines merger be deferred until there had been an objective review of the merits of the proposal by independent experts. He advised that the present merger offer from Northeast Airlines would expire March 31, 1961.

"After discussion, upon motion duly made, seconded and carried, it was

"RESOLVED, that the proper officers of this Corporation be, and they hereby are, authorized to request an extension of three months from Northeast Airlines of its merger proposal, and that the proper officers of the Corporation be, and they hereby are, authorized to engage a recognized consulting firm to assess the results of the proposed merger on the Corporation's operations and earnings, and to advise what terms, if any, would form a reasonable basis for a merger in light of the facts developed by said consulting firm.

"At this point, Messrs. Oscar Holcombe and Loyd Wright returned to the meeting.

"Following the meeting, on March 21, 1961, Mr. Raymond M. Holliday, advised the Secretary that

[Tr. 2211] he had abstained from voting on the above resolution.")

Mr. Hayes: Would you please mark for identification as Defendants' Exhibit 58 a copy of a letter dated July 6, 1961 on the letterhead of Chadbourne, Parks, Whiteside & Wolff to the Examiner, Walter W. Bryan of the Civil Aeronautics Board in the New York-Florida Renewal Case Docket No. 11285.

* * * * *

The Special Master: Have you read it, Mr. Rummel?

The Witness: I just read it, yes. I don't recall having seen it before.

By Mr. Hayes:

Q. Mr. Crimmins was a partner in the Chadbourne, Parks firm, was he not, Mr. Rummel, at that time?

A. I don't know.

Mr. Hayes: This exhibit was identified as having been sent by TWA or on TWA's behalf to the Civil Aeronautics Board during the deposition of [Tr. 2212] Mr. Tillinghast in this case.

I offer it in evidence.

Mr. Sonnett: Objection. Irrelevant as to any issue before the Special Master.

Mr. Hayes: If you withdraw Paragraph 47 I will withdraw the offer.

Mr. Sonnett: I stand on my objection.

The Special Master: In itself I certainly don't see the relevance. Maybe future developments will show the relevance.

Are you leading up as a statement of the final action as to—

Mr. Hayes: I will bring in final action eventually, yes.

The Special Master: I will allow it.

(Defendants' Exhibit 58 for identification received in evidence as of this date.)

Mr. Hayes: I ask that there be marked for identification, a document entitled "Preliminary Appraisal of Merger Possibilities for TWA Management Policy Committee" dated May 9, 1961.

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[Tr. 2213] Mr. Hayes: This I might mention was also identified by Mr. Tillinghast in the course of his deposition.

Mr. Sonnett: As what?

Mr. Hayes: A study that had been made. That's what it purports to be.

Mr. Sonnett: It purports to be a preliminary appraisal of merger possibilities of TWA management policy committee which has a note at the top of it "Hold for next Policy Committee meeting," as I read it.

Mr. Hayes: That is correct. You read very accurately.

Mr. Sonnett: If we both did we would finish a lot sooner.

Q. Did your department, Mr. Rummel, prepare Defendants' Exhibit 59 for identification? It is headed "Trans World Airlines Planning and Research."

A. I believe so.

Mr. Hayes: I offer it in evidence.

Mr. Sonnett: Irrelevant to any issue before the Special Master.

The Special Master: Received.

(Defendants' Exhibit 59 for iden- [Tr. 2214] tification received in evidence as of this date.)

Mr. Hayes: I ask that there be marked as Defendants' Exhibit 60 for identification a memorandum from Henry D. Fellows to D. W. Kittelberger, dated July 11, 1961, on the subject of a meeting of July 10, 1961, Northeast.

Q. Who is Kittelberger, Mr. Rummel? I don't think he has been identified.

A. Mr. Kittelberger at one time worked for Mr. Fellows. I don't recall his exact title now.

* * * * *

Mr. Hayes: I might mention that this exhibit was also identified on the deposition of Mr. Tillinghast, and I believe Mr. Rummel also identified it. He was present at the meeting covered.

The Special Master: Have you read it, Mr. Rummel?

The Witness: Yes, sir, I read it.

Q. You were present at the meeting referred to in Defendants' Exhibit 60 for identification, were you not?

A. The letter says I was, Mr. Hayes, but I don't [Tr. 2215] recall the meeting.

Q. You do not recall it as you sit here?

A. No, I don't.

Mr. Hayes: I offer in evidence Exhibit 60 for identification.

Mr. Sonnett: Same objection.
The Special Master: Received.

(Defendants' Exhibit 60 for identification received in evidence as of this date.)

Q. Do you recall when it was finally determined not to proceed with the Northeast merger?
A. No.
Q. Was it in the latter part of 1961?
A. I don't know.
Q. You have no recollection at all as to time?
A. No.
Q. Were you consulted with respect to the decision not to proceed with the Northeast merger?

Mr. Sonnett: I have a problem. I don't want to go beyond what I think is essential to make the point clear.

I am sure Mr. Hayes must be aware but if he isn't, there were a great many efforts following the filing of this case on June 30, 1961, for its [Tr. 2216] disposition other than in court, in the course of which various proposals were made relating to Northeast by the defendants.

I don't assume that he is now seeking to get into an area of any participation the witness may have had in that connection. I think the record is perfectly clear that there never was an agreement on a Northeast merger with TWA. So, how far he can go on post-filing discussions of Northeast without getting into other subjects I think I better flag it now so that inadvertently we don't get into a situation requiring disclosure of settlement discussions.

Mr. Hayes: That is a very interesting speech indeed, wholly improper. I had always learned, and I

still believe that references to settlement discussions of any kind are not admissible on a trial of an action or a damage proceeding.

Mr. Sonnett: That is correct.

Mr. Hayes: I have asked no question relating to settlement discussions. I object to Mr. Sonnett's action in dragging in settlement discussions. I am sure I do not have to ask you to disregard his comment as wholly improper.

[Tr. 2217] Mr. Sonnett: Will the reporter read the pending question?

Mr. Hayes: When, as and if I ask a question concerning any settlement negotiations, it will be ample time for Mr. Sonnett to make an objection. I promise you I will ask no such question.

Mr. Sonnett: If the reporter will read the pending question we have a problem.

The Special Master: Maybe the best disposition is to strike all this on the record if it is agreeable to both of you.

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[Tr. 2235] Q. Fine. Thank you. Does it indicate that it was presented by the Hughes Tool Company or does it indicate who presented it to the CAB?

A. Well, what it says, Mr. Hayes, is on page 1009, the paper that I recall in May was a paper that Hughes Tool put to the CAB, possibly in combination with TWA, I wasn't a direct party to that, but obtained some sort of CAB clearance, as I recall it.

Q. Do you recall now, referring to TWA Exhibit R-5, that CAB approval of the agreement was obtained?

Mr. Sonnett: I object to the form of the question. It calls for a legal conclusion as to which there is

extensive history in this case as to the effect and meaning of the CAB orders with respect to these transactions. The orders speak for themselves.

Mr. Hayes: I am not asking for the effect at all. I am asking whether or not he recalls an act taking place without any discussion of the legal effect.

Mr. Sonnett: You are calling for an interpretation of a CAB order by this witness. He is not competent to give it.

The Special Master: Do you recall that [Tr. 2236] the CAB took some action with respect to it?

The Witness: I don't recall the specifics, Mr. Brownell.

The Special Master: Do you know whether they took some action?

The Witness: Well, I think they did, but I don't recall at the moment exactly what it was.

By Mr. Hayes:

Q. Is it part of your recollection that the CAB disapproved TWA Exhibit R-5?

Mr. Sonnett: I object to the question on the ground it is argumentative. The CAB order speaks for itself. Its legal effect has been a matter of extensive writing by the Courts in this case.

The Special Master: Overruled.

A. No.

Q. Eventually, it did come to your knowledge, did it not, Mr. Rummel, that the Hughes Tool Company ordered some 990s from Convair?

A. Yes.

Q. When was that?

A. I am not entirely sure, Mr. Hayes.

[Tr. 2237] Q. Let me see if I can help you.

Was it in late 1960?

A. Well, I knew about it late in 1960, but believe I knew about it first before then.

Q. How long before late 1960?

A. That's what I am not sure of.

Q. Was it in 1960?

A. My impression is that it was during 1960 or possibly late 1959, but I think it is more likely that it was in 1960.

Q. Did there come a time when you had copies of the Toolco contracts with Convair for the 990s?

A. I don't recall having seen them.

Q. My last question was not limited to 1960. You may have so interpreted it.

Did there come a time after 1960 when you saw copies of the Toolco agreements with Convair?

A. I may have, Mr. Hayes. I don't recall.

Q. You have no recollection at all?

A. No, it is not clear.

Q. At the time you learned that an agreement had been made between the Tool Company and Convair for 990s, did you also learn to what configuration the planes were to be built?

[Tr. 2238] A. No, I don't think I knew that immediately. I did later.

Q. Still in 1960?

A. Oh, yes.

Q. To what configuration were they to be built according to the contract?

A. Well, can't—I can tell you what Hughes told me and I assume that's what was in the contract.

Q. Go ahead.

A. Hughes indicated they were to be built to American Airlines specifications.

Q. What did you respond to Mr. Hughes?

A. I argued with him along the line that if they were to be used at some point in time by TWA, and that certainly wasn't clear to me then, that in that event he should permit us to negotiate specifications and configure them to TWA's needs.

Q. What configuration particularly did you have in mind?

A. Well, I was referring to the detailed design configuration of the planes to make them as nearly identical to the 880s as the basic designs of the airplanes would permit.

For instance, the American Airlines' cockpit [Tr. 2239] was known to be different than TWA's 880 cockpit. There were other items of known differences which would have adversely affected operating costs if the changes were permitted to remain in the plane. And it as these kinds of things that I was talking about.

Q. What was there outside of the cockpit configuration?

A. I'm not entirely sure now, Mr. Hayes. I think autopilot was one. Numbers of accessories were different. Wheels come into mind. I'm not sure of that.

I'm just not entirely clear now. There were quite a few such items that we believed should be examined in detail and a determination made on what should be done.

Q. By the way, American Airlines is still running the 990s, is it not?

A. Part of them.

Q. What part of them?

A. Well, first, they didn't receive the full order.

Secondly—

Q. There was an agreement between them them and Convair reducing the order, was there not?

[Tr. 2240] A. The airplane didn't meet its specs and there was some sort of agreement negotiated between them to modify a certain number of those initially ordered to bring them closer—into closer agreement with the original specs.

And of those that were delivered, they later planned the disposal of them, and I believe a number have now been disposed of and if memory serves me correctly they are now operating 16 and plan to dispose of them too.

Q. They are now operating 16 out of—

A. That's what I think. I can't state that as an absolute fact, Mr. Hayes. I haven't checked it recently, but that's my impression.

Q. How many 990s did you learn the Tool Company ordered?

A. As I recall it, the orders—as I recall it, there were several orders, or there was one order that was amended and changed. I'm not certain of that.

I believe that Ray Holliday indicated—I am not real sure of this. I think it was initially six. I think it grew to nine and possibly to thirteen, but I'm not entirely sure of the numbers.

* * * * *

[Tr. 2246] Q. How about the cockpit configuration, is that normally installed before the airframe is finished?

A. Frequently parts of the systems are installed before the airframe is finished. Sometimes they are installed, removed, reinstalled and so on.

Q. But there has to be a cockpit before you can configure a cockpit, I would guess, am I right or not?

A. Well, you wouldn't install something that doesn't exist.

Q. That is what I was assuming.

A. Certainly you would expect a basic airframe to have been well along. However, frequently components are built up as subs and either installed or checked out in a structure before the structure itself is completed. This is a normal thing to anticipate and it happens in varying degrees, depending on the design and the approach taken by the manufacturer.

Q. Take cockpit configuration—take, for example, Convair and the 990.

Have you any knowledge as to how long after Convair received the first go-ahead to build 990s the cockpit configuration was installed?

A. No.

Q. Would it be a matter of years?

[Tr. 2247] A. I don't know what happened in that particular case.

Q. Would it normally be a matter of years?

A. The 990 wasn't a normal situation. It was a derivative design of the 880.

Q. I understand that.

A. Well, maybe I should say it depends on what you mean by normal, Mr. Hayes.

Q. Take the Boeings. You are well acquainted with their manufacture.

How long after the go-head was given for the manufacture of the 120s was the cockpit configuration installed in any airframe?

A. I am thinking categorically. Probably a few months. I am not real sure.

Q. A few months after the original was ordered?

A. Sure.

I perhaps should explain that what Boeing did was install airline panels in their Model 80, their early prototype.

I think what you meant was a little different than that, but I was trying to answer it categorically.

Q. I would like a categorical answer. But the airframe didn't even exist within a few months, did it?

[Tr. 2248] A. The Model 80 did.

Q. I am talking about the airplane that was to be delivered to an airline.

Take the Pan American order to Boeing. This you know all about, Mr. Rummel. You are an expert on this.

How long after the Pan American order was finally given to Boeing was the cockpit configuration installed in the first airplane manufactured for Pan American?

A. Well, I can't be exact on that answer. The installation went in in degrees just as I have described it.

In that particular case, final decisions on what the instrument arrangements would be, consumed quite a bit of time because efforts were made to standardize between airlines.

I would say that as an estimate, that probably between a year and a year and a half possibly.

Mr. Hayes: I notice I have run over, Mr. Brownell. Would you pardon me, please?

The Special Master: Yes. Does that finish that line of questioning?

[Tr. 2249] Mr. Hayes: I finished up to a point.

• • • • •

Examination (cont'd) by Mr. Hayes:

Q. Did you or your staff at any time between mid-1958 and the latter part of 1960 make any projections for either TWA or for the Tool Company as to what the results would be if TWA operated 990s?

A. Yes.

Q. Do you recall when those projections were made?

A. Not exactly, no.

Q. At whose request were they made?

A. Mr. Holliday's.

[Tr. 2250] Q. To whom were they circulated?

A. I can't be sure. I believe that Mr. Holliday, Mr. Thomas and I believe Mr. Leslie received copies. I can't recall whether distribution went beyond that or not.

Q. Do you recall what any of those projections showed, Mr. Rummel?

A. Well, they broadly showed, I believe, that we would be better off having more airplanes, but I don't recall the specifics.

There were several such studies, one specifically on the 990.

Q. It was the 990 I was inquiring about.

Did you receive any response to those studies from Mr. Holliday?

A. I don't recall any response, as such.

Q. Did you receive any from Mr. Leslie?

A. I don't recall any specific response, no.

Q. When you say "any specific response," do you recall any general response, any response of any kind, specific or general?

A. No.

Q. Did you receive any response from Mr. Thomas?

A. Well, I don't recall any specific response from Mr. Thomas.

[Tr. 2251] Q. Do you recall any response, whether specific or not?

A. Well, I recall that the four of us met and reviewed this study, but I don't recall any specific responses.

Q. When you say the four of you, do you mean yourself, Messrs. Leslie, Thomas and Holliday?

A. Yes.

Q. Can you place the approximate time of that meeting?

A. Not—no, I can't.

Q. Even by year?

A. Well, I believe that it was some time in 1960, but I don't specifically recall the date.

Q. Can you recall the substance of what was said at that meeting by anybody?

A. No, I don't.

Q. Do you have any recollection as to whether TWA considered during the 1959-60 period acquiring different size fleets, less than 63 in number? I mean jet fleets, of course.

A. Well, there was a great deal of discussion on the cutback, Mr. Hayes, and I know a lot of work was going forward in a number of areas, including financing, but I [Tr. 2252] don't recall it in terms that you mentioned.

Q. Do you recall any particular proposed program for jet acquisition by TWA which involved less than 63 planes?

Mr. Sonnett: I assume the question is meant in the same sense as previously defined, and that is, there were no acquisition programs by TWA, but what counsel is inquiring about is acquisitions by the Tool Company of planes which TWA might possibly acquire, or some of which they might.

Mr. Hayes: That was not the question.

Mr. Sonnett: All right, then. Then I think if you are inquiring about acquisition by TWA of aircraft from sources other than by Hughes, I think you ought to alert the witness.

You have been using those questions in the other sense previously.

Mr. Hayes: I think the question was as broad as could be.

What was the question? May we have it, please?

(The question was read.)

A. Once we knew of the cutback, we proceeded generally on that basis. We tried to proceed on the best understanding of what it meant.

[Tr. 2253] Mr. Hayes: Could I have the question again, please?

(The question was read.)

By Mr. Hayes:

Q. Can you answer that question, please, Mr. Rummel?

A. Well, from time to time both Boeing and Convair would propose acquisition programs for us for airplanes that they hoped to sell to us.

The Special Master: The question was confined to programs originated within TWA, was it not?

Mr. Hayes: That is right.

The Witness: Well, the answer—I don't recall any specific cases then.

By Mr. Hayes:

Q. Do you recall any programs in the formation of which TWA participated with bankers, which involved the acquisition by TWA of less than 63 planes?

A. No.

Q. You never heard of any?

A. Well, I was aware that efforts were being made in the financing area which I at the time believed to be respon-

sive to our anticipated acquisition of jets, but specifically fleets that TWA somehow originated in relation to financing, I don't recall that.

[Tr. 2254] Q. Do you recall any program, the formation of which TWA participated in, which involved the acquisition of 990s?

A. The 990s were given serious consideration at various times and in 1961 they were given additional consideration.

Q. I am speaking of 1959 and 1960.

A. No, I—I don't—I think it was during 1960 that we made the specification efforts that I referred to earlier.

Q. But do you know of any proposed program for TWA in which TWA participated, which involved the acquisition of 990s and other jet aircraft?

A. I don't recall any.

Q. Specifically, do you recall any plan proposed and in which TWA participated which involved a fleet for TWA of 27 Boeings and 25 880s?

A. No.

Q. Or one again in which TWA participated which involved the acquisition by TWA of 25 Boeings and 20 880s?

A. No.

Q. Or one which involved the acquisition by TWA of 27 Boeings, 28 880s and 6 990s?

A. No, I don't remember any specific program.

Q. Or one which involved the acquisition by TWA of [Tr. 2255] 27 Boeings, 24 880s and 6 990s?

A. No.

Q. You know nothing about any of such plans, is that it?

A. I didn't say I knew nothing of any such planes.

Q. Plans, not planes.

A. Oh, plans, excuse me. No, I don't remember those specific plans.

Q. You were not consulted with respect to any of them, if such plans were made by anybody?

A. I don't recall being consulted.

Q. By the way, do you know whether the contract that the Tool Company entered into with Convair for the purchase of 990s had a prohibition against assignment, except that it could be assigned to TWA?

A. No.

Q. You do not know that. Did it come to your attention that Toolco entered into any sort of an arrangement with Convair for the acquisition of 7 880M aircraft?

A. I have the impression there was a negotiation between Toolco and Convair, and possibly Capitol Airlines along that line.

I don't remember now whether a contract actually was drawn or not.

[Tr. 2256] Q. You mentioned Capitol Airlines. What is the connection with Capitol Airlines, Mr. Rummel?

A. I may be confusing that with the Electra affair.

Q. Did you mean that there was available from Convair 7 880M aircraft which Capitol had originally ordered from Convair?

A. I don't recall it that clearly. There were some airplanes, either Electras or 880s, which had been ordered by Capitol, which I believe were subject to negotiation by Hughes.

As I say, they may have been Electras, but I am not certain now.

Mr. Hayes: Off the record.

The Special Master: Off the record.

(Discussion off the record.)

Q. Do you know what happened with respect to the Tool Company contract with Convair for the 990s? Were they ever built?

A. Well, they were never completed. Some of them may have been in the early stages of construction, but I don't know exactly now what the final status of construction was.

Q. You say they were never built. None of them was ever built, isn't that a fact?

[Tr. 2257] The Special Master: Never completed.

Mr. Hayes: Never completed.

A. That's my recollection, as I just indicated.

Mr. Hayes: Pardon me just a second, Mr. Brownell.

The Special Master: That's all right.

Mr. Hayes: I ask that there be marked for identification as Defendants' Exhibit 62 a document entitled "TWA Fleet Requirements 1961-1970, Issued March 1, 1961, Prepared by the Planning and Research Department of TWA," et cetera.

• • • • •

Q. Would you look at it please, Mr. Rummel, and tell us if you recognize it?

A. Yes, I do.

Q. Was that prepared by your department and under your supervision?

A. Yes, sir.

Q. I am sorry?

[Tr. 2258] A. Yes, sir.

Q. That was, was it not, speaking generally, a report on the technical characteristics of various airplanes that were available as of the time it was prepared?

A. It included that, but it was more than that.

Q. What more was it then that?

A. It was the—contained all of the information we felt significant for making a specific recommendation to management as to what airplane should be procured.

• • • • •

[Tr.2278] • • • Q. Did TWA, I think it was 1961, acquire some 720Bs?

A. It leased for an interim period four 720Bs.

Q. For how long a period?

[Tr. 2279] A. From the period of availability until receipt of a comparable number of their 131Bs.

Q. Do you know how long that period was?

A. If memory serves correctly, around 14 months or so. It might have been a little longer.

The Special Master: Have you finished your answer?

The Witness: Yes, sir.

Mr. Hayes: I thought you were paging through to make some addition to your answer, Mr. Rummel. I am sorry.

By Mr. Hayes:

Q. To what configuration were the 720Bs that TWA leased built?

A. Substantially Northwest Airlines' configuration, I believe.

Q. Had Northwest originally ordered those planes?

A. I believe so, yes.

Q. Did TWA change the configuration?

A. I think we changed some of the instrument panel items, but the changes were held to the absolute minimum on the basis that we would segregate crews. I don't remember exactly what we changed now.

Q. When you say "segregate crews," you mean you had [Tr. 2280] particular crews operating the 720Bs distinct from those who operated the 131s and the 331s and the Convairs?

A. What I was specifically saying, crews, specific crews to operate the 720B. We segregated them for that service.

Q. Is it also a fact when you say "segregated them," that they were not operating Boeing 131s, 331s or 880s?

A. No. They were segregated.

Q. They were segregated?

A. At least not during that time.

Q. That is what I mean.

A. Crews bid in and out of this situation.

Q. Yes.

A. It wasn't necessarily the same man in each instance.

Q. At any time during 1959, did there come to your attention studies made by independent experts with respect to the aircraft, jet aircraft requirements of TWA?

A. I guess I view Convair and Boeing as independent experts. They came forward with ideas as to what we should do.

Q. They were mostly salesmen, weren't they?

A. Well, they were attempting to sell airplanes, certainly, but they had respectable views as far as I was [Tr. 2281] concerned.

Q. I am referring to independent experts not connected with the aircraft manufacturers.

A. I don't recall having outside consultants' opinions available when developing this March 1st report, if that is what you mean.

Q. No. I said 1959. The March 1st report is 1961.

A. I am sorry. In 1959? Yes, I know it is.

Q. I am sorry for the shifting back and forth.

The Witness: Could I have that question?

The Special Master: I think it had better be read back so there will be no misunderstanding.

(The question was read.)

A. I don't recall any relating specifically to requirements.

• • • • •

[Tr. 2313] • • • The Special Master: Proceed.

Mr. Hayes: Are you prepared, Mr. Sonnett, to respond to the offer in evidence of Defendants' Exhibits 66, 67 and 68, the contracts?

Mr. Sonnett: We have not finished our checking of those and I am unable yet to state whether all of those documents which came from the Tool Company files were previously produced to us or not.

If they were previously produced, I would not have a problem. If they were not previously produced, [Tr. 2314] I think the Tool Company is precluded by its default from now introducing them. That is my difficulty. It is a mechanical job.

It may be that you can answer it for us and we can take it subject to your statement, because it means going through each of the documents and checking it against our file of the produced documents. I mean if you can state that the Tool Company documents contained in these exhibits were produced to TWA in the course of the discovery proceedings in the case, that will eliminate that problem.

Mr. Hayes: I can obviously make no such statement, because I was no party to it, but I don't see how that constitutes an objection in any way. Partial contracts have been produced here, not complete

contracts. And we should not have a piece of a contract; we should have the whole document or all the documents.

Whether or not the Tool Company produced them is wholly immaterial, if, in fact, they were—if these documents are necessary to paint the whole picture.

We did not ask Boeing for the Tool Company contracts at all, just didn't.

I would suggest that the simplest way to do [Tr. 2315] it would be to consider them in evidence, subject to elimination, if it is discovered from Boeing, and we will be glad to undertake the task of communicating with Boeing as to any document as to which plaintiff has any difficulty, confirmation from Boeing that such and such a contract was entered into.

I think this is the easiest way to do it and it will save plaintiffs a great deal of mechanical labor.

Mr. Sonnett: The difficulty with it, I think is—I am not trying to be supertechnical about this—but there is a very real difficulty—apparently some documents included in these proposed exhibits are documents which preceded the making of the agreements, and the Special Master will recall that one of the events of default in this litigation was the deliberate refusal of the Tool Company to produce a bundle of documents which the Court and Special Master held twice were no longer privileged, and which related to these subjects, among other things.

I don't think the Tool Company at this stage of this case, in a hearing as to the amount of damages occasioned by the action alleged in the complaint, is in a position to select documents from its files and

[Tr. 2316] now offer them, which documents were not produced previously and they are precluded. This is my problem.

Mr. Hayes: I can answer that part of it very easily.

There were two classes of documents that were ordered to be produced and were not. One was a group of tax returns. The other was a group of documents as to which the Tool Company claimed privilege, in that they were confidential communications.

The Special Master: With whom?

Mr. Hayes: With counsel. Between the Tool Company and counsel.

The Special Master: This is new to me.

Mr. Hayes: I know it is.

The Special Master: Except for a reference in one of the hearings, I have no background on it.

Mr. Hayes: I have personally examined, not in this context at all, all of the so-called privileged documents and none of them is in any way a communication—

Mr. Sonnett: I move to strike that. That's wholly inadmissible. The Special Master—

Mr. Hayes: It is a statement of counsel.

[Tr. 2317] Mr. Sonnett: I am sorry. A statement of counsel is no substitute for evidence.

Mr. Hayes: May I finish, Mr. Sonnett? I have always carefully allowed you to finish anything you said, including all your aspersions on the defendants here, and I have never challenged them, because I think that should be done in a brief.

I have tried to conduct myself here as an advocate.

Mr. Sonnett: All right, but I don't think you are permitted or should be permitted to make any statement about the content of the withheld documents at this juncture of this case.

The Court's opinion—two opinions on the subject are very clear.

This is one of the three major acts of default, the reasons for the ruling, made a total of four times, were, among other things, that Mr. Raymond Cook was not acting in a legal capacity, but as a business negotiator in respect of these subject matters.

The Special Master: Let me break in here to ask whether it would be any prejudice to giving TWA further time to examine these documents? Because [Tr. 2318] the possible objections may disappear in the course of them.

Wouldn't it be better to argue that out after we have found out whether they are going to make a formal objection?

Mr. Hayes: They can have all the time they want, Mr. Brownell.

The Special Master: All right. Let's not make any decision on it.

Mr. Hayes: But I repeat the suggestion I made before, to wit, that if there is any question in their minds as to whether or not in the course of the voluminous discovery in this proceeding a particular document may have been produced from the Tool Company, that can be verified through Boeing. I think that is the fastest way to do it. These are all Boeing documents.

The Special Master: Let us leave it in the status quo, that they have been offered in evidence and

TWA has been given some time to consider whether or not it would make an objection.

Mr. Sonnett: Just so that the record is clear, Mr. Hayes' reference to the other category of documents—

[Tr. 2319] Mr. Hayes: What other category?

Mr. Sonnett: (continuing)—as being tax returns which they refused to produce, is not complete. There is a good deal more.

The Special Master: That is not binding on anyone.

Mr. Sonnett: No, but I just didn't want that idea planted inadvertently in the Special Master's head; it isn't accurate.

The Special Master: I wouldn't begin to form a judgment on that, because I have so little to go on.

Mr. Hayes: I am not going to argue the point.

The Special Master: This is not the proper time.

Mr. Hayes: No, indeed it isn't. I couldn't agree with you more.

Examination (cont'd) by Mr. Hayes:

Q. Have you over the recess, since last evening, had a chance to examine Defendants' Exhibit 65 for identification, Mr. Rummel?

A. I read Report 3-2065. Here it is, yes.

Q. That is the same document. Are you prepared to [Tr. 2320] answer the question as to whether Defendants' Exhibit 65 indicates that TWA had fixed on the number of aircraft which it intended to acquire at that time?

A. Yes.

Q. It does indicate that?

A. No, I am prepared to answer.

Q. What is your answer?

A. This report does not indicate that we had or that we had not fixed on a number of planes.

Mr. Hayes: I offer in evidence Defendants' Exhibit 65 for identification.

Mr. Sonnett: May I ask the witness a question with respect to the document?

The Special Master: Yes.

Mr. Sonnett: It will only be one which I thought you were going to ask him and it relates to the admissibility of the document.

The Special Master: Yes, you may ask.

Mr. Sonnett: Will you tell the Special Master, if you can, what was the reason for the preparation of this document?

The Witness: This document was prepared as a direct result of a phone conversation with Mr. Hughes, who requested that a study be made as [Tr. 2321] to the characteristics of and size of alternate fleets, the fleet size being determined by the amount of money that would be required to be invested in a fleet of 25 Lockheed Electras.

This was done to enable me to better discuss the pros and cons of these airplanes in response to his request.

Mr. Sonnett: In light of that testimony, I have no objection to the offer of the document in evidence.

The Special Master: It will be received.

(Defendants' Exhibit 65 for identification marked in evidence as of this date.)

• • • • •

[Tr. 2332] Q. What efforts, if any, were made by TWA to acquire any of the planes stated to be available on Page V-10 of Defendants' Exhibit 62?

A. Very serious consideration was given to all possibilities that were then known to solve TWA's equipment dilemma including the 880 and the 9—the 880Ms and the 990s as this report reflects. As to detailed efforts to negotiate, I am not entirely clear at the moment.

Q. Did you participate in any of the negotiations with either Convair or with Hughes Tool Company with respect to the acquisition of either 880s, 880Ms or 990s?

A. Yes, I was in touch with Convair and did actively discuss possibilities as well as their offerings to the extent offerings were received.

Q. To what?

A. To the extent specific offerings were received.

Q. What were the specific offerings that were received?

A. Well, I'm not clear at this point because, as I recall them, numbers of offerings were contingent offerings depending on what they would be able to work out with the Hughes Tool Company.

Q. What did they say had to be worked out with the Hughes Tool Company?

[Tr. 2333] A. Well, broadly, as I recall it, it had to do with the Hughes Tool Company agreeing to—

Q. You say agreeing?

A. —agreeing to—and I'm not sure of any detailed legal interpretation of what I am saying but what it meant was —what I recall the meaning was that they would have had to agree to give up their interest in or their rights to airplanes which Convair wanted to place in TWA's hands.

Q. Did you have any negotiations with the Hughes Tool Company with respect to Hughes Tool Company giving up such rights?

A. Well, their efforts I believe and I am just a little vague in detail—I think there were efforts made by TWA and Hughes Tool Company to determine availability. Mr. Davis at one meeting attempted to persuade TWA as to the value of the 990s, I believe.

Q. Did you have any negotiations with the Hughes Tool Company I asked.

A. Well, that's I was trying to answer. I don't recall specific negotiations other than the broad recollection that I have indicated.

* * * * *

[Tr. 2350] * * * Q. Which was faster, the 880 or the 131?

A. Well, the 880 was faster than the 131 up to the usable range of the 880.

Q. Up to what?

A. The usable range of the 880.

Q. Do you know whether or not Mr. Leslie communicated with the Tool Company with respect to acquiring 880s from the Tool Company?

A. I'm not certain.

Q. Did you ever have any conversation with Mr. Leslie in that regard?

A. None that I recall.

Q. He never consulted you about it?

A. Well, he might have. I just don't recall that he did.

Q. Did any officer of TWA consult you with respect to acquiring four 880s from the Tool Company?

A. Well, we certainly discussed and I included in the report the possibilities of this type, Mr. Hayes, which were considered prior to our deciding that we'd—it was more beneficial to go a different way.

[Tr. 2351] Mr. Hayes: I ask that there be marked for identification as Defendants' Exhibit 72, a telegram—I think this is dated February 27, 1961—I think this is dated February 27, 1961—I think Planning and Research is stamped on top—I am not sure of that—from J. William Bew, San Diego to R. W. Rummel at TWA in New York.

• • • • •

Q. Mr. Rummel, please look at and tell us whether you received it.

• • • • •

A. I don't recall it, but I certainly have no reason to doubt that I received it.

Mr. Hayes: I offer in evidence Defendants' Exhibit 72 for identification.

Mr. Sonnett: No objection.

The Special Master: Received.

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Q. What, if anything, did you do with respect to the information contained in the last few lines of Defendants' Exhibit 72 that Mr. Digges of Convair had [Tr. 2352] said that the Hughes Tool Company would offer all unassigned 880 aircraft to TWA?

A. I probably advised my associates in management, but frankly I don't recall any specific detailed act. It is too long ago.

Q. You have no specific recollection now as to what you did?

A. No, sir, I don't.

Q. I show you Defendants' Exhibit 39, which I am advised by Mr. Mallender has been marked for identification, but portions of which have been copied into the record,

which are the minutes of the board of directors meeting of TWA dated March 20, 1961, and I direct your attention specifically to pages 4 and 5, beginning at the lower portion of page 4 under the heading "Report On Future Jet Aircraft Requirements."

Will you read it first, please?

Have you read it, Mr. Rummel?

A. Yes, sir.

Q. Did you attend that meeting of the board of directors, do you recall?

A. I don't believe so.

Q. There is a reference there to a detailed study of the corporation's requirements for additional aircraft.

[Tr. 2353] Do you know or can you tell us whether that detailed study is Defendants' Exhibit 62?

A. I am quite sure it is.

Mr. Hayes: By the way, I offer in evidence that portion of Defendants' Exhibit 39 beginning with the words "Report On Future Jet Aircraft," on page 4 and ending with the words "$250,000," on the lower part of page 5, and following previous practice suggest that the reporter copy it in.

The Special Master: Off the record.

(Discussion off the record.)

Mr. Hayes: Is it in evidence this portion of the report?

Mr. Sonnett: No objection.

The Special Master: Received.

"(*Report on Future Jet Aircraft Requirements*

The Senior Vice President—Finance and Treasurer reported that, as requested by the Board at its meeting on March 1, 1961, the Planning and Research

Department had prepared a detailed study of the Corporation' Management Committee, based largely upon that study, recommended that an early commitment should be made for delivery during 1962 of twenty additional Boeing Model [Tr. 2354] 707-131B aircraft for Domestic Service and six Model 707-331B aircraft for International Service and, for the lease of from four to six Boeing Model 720B aircraft beginning in 1961, for a term ending with the delivery of the last of the twenty additional Model 707-131B aircraft. He reported that preliminary discussions with financing interests indicated that the necessary capital financing for this program, in the amount of $187.5 million, was available, including $40.5 million to be supplied by cash generated by the Corporation.

After discussion, upon motion duly made and seconded, Mr. Raymond M. Holliday abstaining, the following resolutions were adopted:

RESOLVED, that Messrs. Warren Lee Pierson, Chairman, E. O. Cocke, F.D. Hall, Albert V. Leslie and R. W. Rummel be, and they hereby are, appointed a Flight Equipment Committee to evaluate the flight equipment and present a report to the Board of Directors with the advice and consent of the President, when available, in order that the Corporation may commit for the acquisition of additional aircraft to [Tr. 2355] maintain a fully competitive position in the industry; and further RESOLVED, that the Chairman of the Board, or the President, or any Vice President of this Corporation be, and each hereby is, authorized to enter into an interim commitment for the acquisi-

tion of additional jet aircraft, provided that in the event the Board of Directors should not authorize the execution of definitive contracts for such aircraft, the Corporation shall not be bound to pay a cancellation penalty in excess of $250,000."

Q. I notice that the resolution adopted in its first half appoints a committee of which you are a member, and the function of the committee is to evaluate flight equipment requirements of the corporation to determine the availability of financing for such equipment and to present a report to the board of directors with the advice and consent of the president when available, et cetera.

Did such a committee actually operate, Mr. Rummel?

A. Yes.

[Tr. 2356] Q. Did you actively serve on that committee?

A. Yes. There weren't many meetings. I don't know what you mean by actively participate, but the committee existed.

Q. Whatever number of meetings there were, did you attend them?

A. To the extent there were meetings I attended them, as I recall it.

Q. Was a report presented to the board of directors by the committee?

A. I don't recall a formal committee report as such. It certainly shouldn't be taken to mean it might not have existed.

I recall that the committee concurred in the equipment recommendations, and I believe finally a means for financing the load—

Q. I missed something.

A. For handling the financing of the load—

Q. I got those words. It was before that that I missed, just immediately before.

The Special Master: Will you read it back?
(The answer was read.)

A. —imposed by the program was accepted by the [Tr. 2357] committee.

Q. Was what?

A. Accepted by the committee.

Q. What participation did you have in connection with determining the availability of financing?

A. None. This was handled by—essentially by Leslie who advised the committee members of what he intended to do.

* * * * *

[Tr. 2362] * * * *Examination (cont'd) by Mr. Hayes:*

Q. Mr. Rummel, did Mr. Leslie ever report to you with respect to a meeting he had with Mr. Holliday concerning possible purchase of the four 880s from Hughes Tool Company in the latter part of April 1961?

A. I don't recall such a report.

Q. Do you recall—let me see if I can jog your recollection in any way—Mr. Leslie ever reporting to you that he told Mr. Holliday that TWA would like to have those four 880s?

A. No, I—I don't recall his saying that.

Q. Do you recall any report from Mr. Leslie to you that Mr. Holliday stated that Toolco would not sell the planes to TWA on the basis of accepting subordinated notes?

A. No, sir.

Q. That does not click in your recollection either?

[Tr. 2363] A. No. I have a general recollection, but I don't remember that.

Q. What is your general recollection as to that subject?

A. Well, pretty much as I indicated. We were interested in—as I recall it—in getting the four airplanes and were unable to work out a deal to get them.

Q. But my question was directed to the payment in the form of subordinated—

A. Oh, no, I don't recall that.

Q. You have no recollection as to that?

A. No, sir, I don't remember anything on that.

Q. Did you have any conversation with Mr. Tillinghast in the latter part of April 1961, in which you stated in substance that in your opinion it was in TWA's best interest to acquire the four 880s from the Tool Company?

A. No, I don't.

Q. You have no recollection of that at all?

A. Except to the extent that I have indicated.

Q. If I recall your testimony you have given no indication of any conversation with Mr. Tillinghast at all on this subject.

A. No, I didn't specifically.

Q. You mean you had no conversation with Mr. Tilling-
[Tr. 2364] hast on this subject?

A. No, I don't want to testify that I had no conversation—

Q. I am sorry, I did not hear you.

A. I don't want to testify that I had no conversation with Tillinghast on the 880s or other facets of the equipment program. I am confident that I did.

But I don't recall the situation being that I was in a position to finally recommend the 880s, because I don't recall that we ever worked out a deal in which we could move.

Q. I mean prior to working out a deal, did you ever recommend that it was in TWA's best interest to acquire the 880s?

The Special Master: To Mr. Tillinghast, you mean?

Mr. Hayes: To Mr. Tillinghast, yes.

A. I don't recall that specifically, Mr. Hayes. I think that my view was that if we could work out a deal to get the four 880s, we could probably operate them more quickly than other planes, and that if we could get a deal worked out that was acceptable, we should do it.

But I don't recall a specific meeting with Tillinghast on the point.

[Tr. 2365] Q. Your recollection is that you made a recommendation along the lines you just mentioned, is that it?

A. No. What I am recalling is that that was my view, and I am sure that we discussed the pros and cons of moving ahead.

I don't recall being in the position to finally give Mr. Tillinghast a recommendation to proceed, because there wasn't any basis that I recall on which we could have proceeded.

Q. I am afraid I don't understand you. Aren't your recommendations generally made in advance of commitments that are made?

A. They are made in advance of commitments, but they usually take into account specific offers finally or at least what we expect to work out in terms of the negotiation.

Q. Your recommendations with respect to Boeing's and Convair's were made, as your testimony sets forth, in advance of the entering into of any contracts, were they not?

A. Well, obviously we didn't sign the contract and recommend that we do so at the same time. What I am trying to say is that in the case of the four 880s, as I sit here now, I do not recall our ever having a clear-cut offer from

the Tool [Tr. 2366] Company or an agreement on terms with them on which we could have finally acted.

Q. Did you ever make a recommendation of any kind to anybody in TWA that the four 880s should be acquired from the Tool Company, assuming that terms could be worked out?

A. Well, I can't be 100 per cent sure, Mr. Hayes, but I think it is likely that I did take the position that if we could get the airplanes with assurance of delivery and on acceptable terms, that four 880s would be advantageous.

Q. It was your view then or do I misstate your testimony, that assuming a deal could be worked out with either Convair or the Tool Company, that TWA should acquire the four 880s?

A. Well, I am quite sure that at one time that was my view and that I had to abandon that objective as being unrealistic.

Q. I am just trying to find out what your view was, Mr. Rummel.

A. I—well, as I recall it now—

Q. As I understand, the responsive part of your answer was that at one time that was your view?

A. I believe that is correct.

[Tr. 2367] Q. At what time?

A. Well, I think prior to coming to a conclusion that we would have to move forward with the Boeing program. So this would have been some time before, oh, March and April of 1961.

Q. But the Boeing program, according to your testimony, as I understand it, still left TWA immediately short of equipment; is that correct?

A. Well, I perhaps should say that my—I am trying to recall this particular time period, Mr. Hayes. I thought that's what you were asking about.

Q. I am talking about 1961.

A. Well, that's my answer, then.

Q. The question was, were you still short of equipment in 1961, according to your appraisal?

A. In 1961?

Q. In 1961—

A. Yes.

Q. (continuing) —after you entered into the Boeing contracts?

A. Yes.

Q. Did you then abandon the possibility of getting four 880s?

A. Well, not forever, no. It certainly was a hope [Tr. 2368] that I nourished that we would some day be able to get more 880s.

Q. Did you make any effort to get them in 1961?

A. I just don't recall now, Mr. Hayes, when the next efforts were made to get 880s.

Q. Was there any effort made to get 880s until Convair repossessed six 880s from Northeast in 1963?

A. I don't recall any.

Q. Did you make any recommendation to anybody in TWA management in 1961 or in 1962 that TWA press forward in an endeavor to get the four 880s from Hughes Tool Company which were built to TWA configuration?

A. Well, as I just indicated, I think it was early in 1961 that we attempted to negotiate and to give serious consideration to the four 880s.

After that, we may have, but I don't recall right now whether or not we did or, if we did, just what it was.

Q. You also testified, as I recall your testimony, and correct me if I am wrong, that you thought the efforts were abandoned after the Boeing contracts had been entered into.

A. Well, for the immediate ensuing period, I think thats—

[Tr. 2369] A. The immediate ensuing period, I think that's right. I don't think we ever closed the door to the possibility of picking up additional 880s.

Q. What efforts did you make to get them, is the question?

A. Well, my answer was I am not sure what we did in that time period. I don't recall any specific instances.

Q. I am asking what you did, Mr. Rummel.

A. Well, I am giving you my best recollection, Mr. Hayes.

Q. Are you saying that you did nothing?

A. I am not saying that. I am saying that I don't at this time recall having done anything in that time period.

Q. Did you make any effort to acquire 990s, the 990s that the Tool Company had on order at the time?

Mr. Sonnett: In addition to whatever he has covered in prior testimony?

Mr. Hayes: I never asked this question before. I am speaking of the period after he said the Boeing contract was entered into. I have never asked him this question before.

[Tr. 2370] Mr. Hayes: Pardon?

Mr. Sonnett: Are you asking the witness what efforts he made, if any, after April 1961 with respect to the acquisition of 990s?

Mr. Hayes: Whatever the date the Boeing contracts were. I think April 1961 is correct, but I am not absolutely sure.

A. I don't think I did on the 990s.

Q. Those 880s that were on order with Convair by Toolco were completed, were they not?

A. Well, they are in service, Mr. Hayes, with Northeast Airlines.

Q. So the answer is they were completed?

A. Sure. At one time or another.

Q. Do you know what happened after they were completed and before the Tool Company leased them, I believe it was, to Northeast Airlines?

A. I am pretty sure they were parked somewhere by Hughes.

Q. You mean Hughes Tool Company, I suppose?

A. Well, by Hughes Tool Company or their representatives or by Hughes. And the question existed as to their status in terms of title, but I don't recall any detail on that at the moment.

[Tr. 2371] Q. Where do you recall they were parked?

A. Well, I am not sure where they were parked.

Q. Does Ontario, California click in your recollection?

A. Yes, I believe it was Ontario, yes.

Q. They were not being used by any airline?

A. Not as far as I know.

Q. Do you know when they were eventually leased by the Hughes Tool Company to Northeast Airlines?

A. At the time the six Convairs were foreclosed.

Q. That was in 1963, was it not?

A. I think that's correct.

Q. By that time, do you know that the Hughes Tool Company had acquired a substantial interest in Northeast Airlines?

A. Yes.

Q. With the approval of the Civil Aeronautics Board?

A. Well, I think I understood that.

Q. Were those four 880s, so far as you know, up to the time that they were leased by the Hughes Tool Company

to Northeast Airlines ever acquired by or leased by any other airline?

A. I don't believe so.

[Tr. 2372] Q. Do I understand your testimony to be that so far as you know they were simply parked during that intervening period?

A. So far as I know, they were simply parked and not available for anything but parking.

Q. What do you mean by "not available for anything but parking"?

A. Well, there were times when we had covetous eyes on those planes. I don't recall ever having known that they were available to us or anybody else.

Q. How far did your covetous eyes carry your desires, Mr. Rummel? Did they result in action of any kind?

A. Well, at one point in time, I recall, after checking with Mr. Tillinghast, calling Ray Holliday to determine their status, but I don't recall the specifics on that, either.

Q. Can you fix the year?

A. No, I don't think I can.

Q. Do you know whether it was before or after TWA entered into the Boeing contracts in early 1961?

A. I am sure it was after that, Mr. Hayes.

Q. Did you communicate with Mr. Holliday?

A. This was by telephone.

Q. Did you communicate with him—

[Tr. 2373] A. Yes.

Q. (continuing) —by whatever means?

A. Yes, I just said I did.

Q. What was the substance of the conversation?

A. Well, I don't recall it in detail. I think the substance was would he be interested in making his planes available or could he make them available.

Q. Yes?

The Special Master: What was the substance of what he said?

The Witness: The occasion, I remember, and I am having trouble with the timing here, was that he wasn't sure, he would check in to it and call back.

And he did call back. It's coming back to mind now. This was when we again gave consideration to this possibility at the time the Storer acquisition of Northeast was announced, and he called back at that time and said that the duration of the use of these four airplanes by Northeast wasn't known, that he would keep the inquiry in mind, but at this time they couldn't talk about those particular planes. So this was after the period he was talking about.

• • • • •

[Tr. 2391] • • • Q. On the next page where there is a production and delivery schedule, there is a customer I wish you would identify—the others are all clear to me—and that is REAL for production Nos. 13, 19 and 20.

Do you know who REAL is?

Mr. Hayes: Off the record.

(Discussion off the record.)

Q. Do you know the initials REAL refer to an airline?

A. I'm pretty sure they do, Mr. Hayes.

Mr. Hayes: I offer in evidence Exhibit 76 excluding the handwritten notations on page 2.

Mr. Sonnett: No objection.

The Special Master: Received.

(Defendants' Exhibit 76 for identification, received in evidence, as of this date.)

Q. You testified previously that you had generally lost interest in ordering the 880s, the four 880s from [Tr. 2392] the Hughes Tool Company when the Boeing contracts were entered into in April.

Did interest continue in TWA in acquiring the thirteen 990s that Hughes Tool Company had on order with Convair?

Mr. Sonnett: May I have that question?

(The question was read.)

Mr. Sonnett: I think the question assumes a state of the record which is incorrect. I don't know that there is any evidence that TWA was interested in acquiring the 990s in April 1961.

As a matter of fact, part of our complaint alleges that TWA was resisting the efforts of Hughes' representatives to force the 990s down TWA's throat. They decided they didn't want them.

Mr. Hayes: Aside entirely from this sanctity of the complaint I will withdraw the question.

Q. I will put this question to you: After the Boeing contracts had been entered into, did TWA have any interest in acquiring the 990s which the Hughes Tool Company had on order from Convair?

A. Well, as I believe I testified earlier, Mr. Hayes, I don't believe so.

[Tr. 2393] Q. Do you recall the occasion for your sending Defendants' Exhibit 76 to Mr. Tillinghast with copies to the other four gentlemen?

A. Yes.

Q. What was the occasion?

A. The occasion was to keep him fully informed on delivery expectancy of the 990s, and to make sure that he

understood that the report earlier submitted—the big thick report we were talking about—

Q. Defendants' Exhibit 62?

A. 62. —had contained certain 990 estimates. It also had contained statements to the effect that I then believed that Convair could not make the estimated delivery dates on the 990s.

An the purpose of this was to acquaint Mr. Tillinghast and the others with current projections which substantiated the position taken in the report that they would not meet the dates and further to update the information reported in this respect.

Q. Did Mr. Tillinghast tell you when he asked for this memorandum what his purpose was in getting a revised schedule on the deliveries of the 990s both to American and Hughes Tool Company?

A. I don't recall that he asked for it other than [Tr. 2394] as a result of the conversation with him. The answer simply is no.

Q. You do begin your memorandum by saying, "In response to your verbal request." So he must have asked for it, did he not?

A. Well, Mr. Hayes, this was a way of starting a letter and what I am trying to say is that I—I don't recall the particulars but I think that I had mentioned in passing to him that as I had predicted earlier we had indications now that the deliveries were slipping, was he interested in knowing something to that effect, and I think he said, yes, by all means, or something.

I just don't remember the detail but I think it was that kind of a thing.

And it developed in the interest of updating the earlier report.

Q. Was Mr. Tillinghast also interested in learning when American would receive its 990s and be able to put them into service?

A. Naturally.

Q. Did he express to you any concern about American getting twenty-five 990s between November 1961 and July 1962, as against TWA's equipment situation at that time?

[Tr. 2395] A. I don't remember a specific discussion on that point leading to this letter, but I can assure you that he was keenly concerned and alerted and aware of the competitive thrust that our competitors could put forward with their jets.

Q. Do you recall any such discussion with him after he received Defendants' Exhibit 76 from you?

A. Well, I don't remember any immediately after. Later on, there were lots of discussions on American Airlines-Convair situation.

Q. How late is later on?

A. Well, during the period of—that we could clearly—more clearly anticipate 990 difficulty and the specific American-Convair problems that arose.

Q. How much later was that?

A. Mid to—well, I'm not entirely sure of the timing on that.

Q. Can you identify the year?

A. Well, I think it was later than 1961 and 1962 but I can't be entirely sure.

Q. Did Mr. Tillinghast at any time say to you that American would have a competitive advantage over TWA as a result of its acquisition of the 990s?

A. No, I don't remember specific statements to [Tr. 2396] that effect.

Q. With respect to the four 880s that the Tool Company had on order with Convair, did Mr. Tillinghast ever say to you in substance that they would be helpful in covering segments that were not covered by TWA's existing equipment?

A. Not exactly in those terms.

I have the impression that Mr. Hughes—Mr. Tillinghast was quite sympathetic to our getting the four 880s if acceptable terms could be worked out.

Q. Did you ever tell Mr. Tillinghast that the four 880s could be used on segments, if acquired from the Hughes Tool Company, which were not being covered by jet service?

A. Well, this certainly could have happened, Mr. Hayes. I don't specifically recall it, no.

Mr. Hayes: I ask that there be marked for identification as Defendants' Exhibit 77 a letter dated June 10, 1961, to TWA, attention Mr. Tillinghast, to the voting trustees, to the Irving Trust Company as agent for the equipment noteholders, to the Equitable Life Assurance Society, Metropolitan Life Insurance Company, from Hughes Tool Company signed by Mr. Holliday.

[Tr. 2397] • • •

By Mr. Hayes:

Q. Would you review it, please, Mr. Rummel, and indicate when you have done so?

[Tr. 2398] The Witness: I have looked at it, Mr. Hayes.

Mr. Hayes: In describing it, I neglected to mention that there was also attached a letter dated July 29, 1961—

Mr. Sonnett: June 9th.

Mr. Hayes: I am sorry, you are correct. June 9, 1961, from Hughes Tool Company by Mr. Holliday to TWA, attention of Mr. Tillinghast.

* * * * *

Q. Mr. Rummel, now that you have read Defendants' Exhibit 77, I ask you if either the letter dated June 10, 1961, or the attached letter of June 9, 1961, ever came to your attention?

A. I believe the June 10th letter did. I am not sure about the other one.

Q. How did that happen? Tell us the circumstances.

A. Well, I think Mr. Tillinghast called it to my attention. I don't remember any special circumstances.

Q. Do you recall any discussion with Mr. Tillinghast [Tr. 2399] concerning it?

A. No, I don't, Mr. Hayes.

Q. Do you recall at that time any discussion with Mr. Tillinghast with respect to the acquisition of the 990s or of the four 880s which the Tool Company had on order with Convair?

A. Well, I am quite sure that as a result of your calling this to my attention, I reviewed acquisition programs and the equipment parts of this letter, and then subsequently discussed that phase with him.

Q. Do you recall the substance of the discussion?

A. Well—no, I don't, excepting that that my views on the merits of the 990, as such, compared to the merits of the Boeings was not altered by this letter. We came to the same conclusion that we had earlier concerning the 990 vs. the Boeing program.

Q. Versus which Boeings now?

A. Well, I am speaking of the program to buy, which I believe we at least had tentative commitments on at this

time or possibly tentative commitments to buy the eighteen 131Bs and the six 331Bs.

Q. Do you know what the delivery dates were for the 131Bs?

A. I certainly knew them then. I don't recall right [Tr. 2400] now what they were exactly.

Q. Did you in your discussion with Mr. Tillinghast concerning Defendants' Exhibit 77 in substance recommend against acquiring the 990s?

A. I held the view that the Boeing program was preferable, I believe, both before and after this came in.

Q. But did you press your view to Mr. Tillinghast and advise against acquiring the 990s?

A. Oh, I am quite sure I did.

Q. Did you advise against acquiring the four 880s?

A. I don't recall what I said on the 880s at this time, Mr. Hayes.

Q. Is that the end of your answer or do you want to add something to it?

A. I have seen something here that refreshed my memory.

Q. Fire away.

A. Well, I guess that was all of my answer.

Mr. Hayes: I offer in evidence Defendants' Exhibit 77.

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[Tr. 2419] • • • The Special Master: All right, it will be received, the entire document.

• • • • •

By Mr. Hayes:

Q. Were you by any chance present at this meeting of the board of directors held on June 21, 1961, do you recall?

A. I don't believe I was.

Q. I direct your attention to—

The Special Master: What is that reference on page 3 "It is further stated that subsequently Mr. Rummel was present at the meeting, analyzed the various points raised by Mr. Davis and submitted a report on the subject."

I don't know whether that means this meeting or not. It is a little ambiguous.

Q. Will you read that on page 3?

The Special Master: About ten lines down, yes.

Mr. Sonnett: This is a meeting of the flight [Tr. 2420] equipment committee and others. If you look at the prior sentence I think that is what it refers to. It should have been at that meeting instead of "at the meeting."

Q. Your recollection is that you were not at the directors meeting, Mr. Rummel?

A. I'm virtually positive of it.

Q. I direct your attention, if I may, to Resolution No. 3 which is the second resolution which appears on the page 5 of Defendants' Exhibit 40.

Would you read it, please?

A. I've read it.

Q. Is it your recollection that the action there recorded that TWA should acquire additional Boeing aircraft rather than the 880s and 990s was in accordance with your recommendation or the recommendation of the flight equipment committee?

A. I'm quite sure that with specific respect to Proposal No. 3, that is correct.

• • • • •

[Tr. 2482] • • • Q. So far as the 727s were concerned, TWA would have had to finance the purchase of 727s, would it not?

A. I do not recall the 727s being offered for lease.

Q. Or on a conditional sale?

A. I'm not wholly positive of that, but I don't believe they were.

Q. The contract that was made for the 727 was an outright purchase agreement, was it not?

A. Well, the contract that was entered into I think during the fall of 1962 for ten of them was a purchase agreement.

Q. Was that about the same time that TWA changed its agreement with Boeing from a purchase of 331Bs to a lease of 331Bs?

A. Well, a change was made with respect to some of the planes you mentioned, and the papers, I think, were [Tr. 2483] finalized about the same time.

Q. Was it that kind of a change which they covered, to wit, a change from a purchase of 331Bs to a lease of 331Bs?

A. That was included among other things.

Q. What else was included?

A. Well, the change, I believe, from six to five 331Bs at that time.

Q. Right. Any other change?

A. I don't recall any with respect to the 331Bs.

Q. Or the 727s?

A. Or the—

Q. Or any other order you had pending with Boeing?

A. Well, the—I believe the 131B order—I believe it was changed from eighteen—from twenty to eighteen 131Bs, if I recall correctly.

And as I say at that time ten 727s were included.

• • • • •

[Tr. 2493] * * * Examination (cont'd) by Mr. Hayes:

Q. Have you any knowledge, Mr. Rummel, as to whether TWA attempted, through its bankers or its lenders, to arrange financing for the acquisition or which would enable them to acquire the Caravelles?

A. Mr. Leslie handled this sort of thing at that time and I am not very familiar with it.

Q. Do you have any knowledge of the subject?

A. Nothing specific.

Q. Do you know whether Mr. Leslie did approach the insurance companies or the banks which then were the lenders to TWA with respect to the acquisition of the Caravelles?

A. I believe he had discussions, but I don't know with whom.

Q. Is that the sum total of your knowledge as you sit here?

[Tr. 2494] A. Yes.

Q. Do you know whether or not Mr. Leslie or anyone on behalf of TWA had any discussions with any of TWA's bankers or lenders with respect to possible financing of the acquisition of the four 880s and the thirteen 990s?

A. No, I don't.

Q. You have no knowledge on the subject?

A. I don't recall any.

Q. You mentioned this morning some of the changes that were made in the existing TWA order to Boeing at the time ten 727s were ordered. There was a change from a purchase of six 331Bs to a lease of five 331Bs, and there was a cutback in the number of 131Bs.

Who negotiated those changes in contract with Boeing?

A. I believe I did, but with the assistance of some others as appropriate.

Q. Who were the others who assisted you?

A. Well, I had—I am quite sure that Mr. Leslie attended a few of the New York meetings with Boeing, and then others in my department. I believe Mr. Rourke participated.

There could have been some others. That's all [Tr. 2495] I recall at the moment.

Q. Did the commitment to Boeing for purchase, as rearranged, require any new or additional financing on the part of TWA, do you know?

A. No, I don't know, compared to the original Boeing order. I don't know.

Q. Did you attempt to negotiate with Boeing at any time to reduce your existing orders for 131Bs—I am speaking now of late 1961—or to change a purchase of six 331Bs to a lease of 331Bs so that funds could be released to acquire the Caravelles?

A. Well, the—I don't recall it quite in those terms.

Q. Tell us what you do recall, Mr. Rummel.

A. Well, I mentioned this morning that a—one of the forecasts indicated that a cash problem existed or would exist at some future time if we continued with the Boeing plan, I believe, with or without Caravelles.

The Carvelles made it worse. That is, made the problem more acute, had we gone ahead with that, too, as I recall it.

* * * * *

[Tr. 2532] Q. I am sorry.

A. I don't think TWA ordered as such until 1961, wasn't it?

Q. No. You know what I mean. The Tool Company orders, were they, in point of time, later than the orders of other airlines for smaller quantities?

A. Yes, the—at least the order for 331s was made later than some airlines who had ordered smaller quantities.

Q. So it did happen that later orders in time were for larger quantities.

I am asking you what was Boeing's practice in that situation?

A. Well, to perhaps clarify what I said—maybe I misunderstood you—this was talking about the first three or so orders.

The positions, the delivery positions that were obtained were in some instances better than those given to some of the smaller airlines who ordered four planes for similar type airplanes, I believe.

Q. Is that because of the greater size of the order?

A. Well, I don't think it was quite that simple. That may have been one of the Boeing considerations at that time.

[Tr.2533] Q. Straighten me out, Mr. Rummel, so that it won't be quite that simple.

Tell us what else you have in mind.

A. Well, I interpreted your question I hope correctly to be was it done solely for that reason, and I am saying that I doubt if Boeing's consideration was quite that simple.

Q. Have you finished your answer or were you going to add something?

A. Yes, I had finished.

Mr. Sonnett: Would you read it back to me, please?

(The record was read.)

Q. What were the other Boeing considerations that you have in mind and have not told us?

A. Well, in that specific instance I had the impression that Boeing valued Hughes as a customer not only for what

he then might order, but because of the fact that TWA's operations spanned three-quarters of the world and, as such, it represented a very large customer through the years.

They were anxious to have TWA on board, so to speak.

• • • • •

[Tr. 2551] • • • Mr. Hayes: I have not offered them in evidence yet.

The Special Master: You may use them to refresh the witness' recollection. We will take this one step at a time.

Will you examine the letter we have in mind?

Mr. Hayes: I directed the witness' attention with respect to Defendants' Exhibit 96, the letter to Pan American to the paragraph No. 3 called "Delivery" which begins on the fourth line at page 2, and ends with the words "Commercial customer," just above Item No. 4 on page 3.

Mr. Sonnett: I don't think that's appropriate examination. I think the witness ought to be asked whether—

The Special Master: Wait a minute. Maybe [Tr. 2552] he will be.

Mr. Hayes: He has to look at it first.

The Special Master: The question is to have him look at it. I will allow him to look at it.

I will allow him to be asked whether it refreshes his recollection as to Boeing's sales policies.

The Witness: No.

Q. Did you ever know, did you ever learn that Boeing in June of 1955 made an offer to Pan American which included an offer not to deliver any 707s to any other customer before delivery to Pan American of eight aircraft?

Mr. Hayes: I will withdraw the question. I phrased it badly.

Q. Did you ever know or did it ever come to your attention that Boeing offered to Pan American, if it placed an order by July 18, 1955, that it would deliver eight 707s to Pan American before any 707 would be delivered to any other customer?

A. I didn't know this particular offer as best I can recall.

[Tr. 2553] Q. I am not thinking of this document now. I am asking about the subject generally.

Did you ever know that Boeing offered to deliver eight 707s to Pan American before it made a delivery of a 707 to any other customer?

A. Not specifically, as I recall it, no.

Q. What do you mean by not specifically?

A. Well, I'm quite confident that there were numbers of offers to numbers of people, all with expiration dates, and I just don't recall having known then this particular situation.

Q. Did you ever know of an offer by Boeing to Pan American to deliver any number of 707s to it before it made delivery of any 707 to any other customer?

A. I think it was perfectly clear once you knew that Pan Am's order had been placed that they would receive the first airplane.

Q. You mean the moment it was placed?

A. I think by the time we were aware of the order it became clear to us that the first planes would be delivered to the first customer through our discussions with Boeing and our general knowledge of the situation.

Q. Fine.

Now will you try to answer the question, Mr. [Tr. 2554] Rummel?

The question was did you ever know that Boeing offered to Pan American to deliver 707s to it before it would deliver 707s to other customers?

A. It doesn't come to mind.

Q. You have no recollection of ever hearing of an offer by Boeing to prefer Pan American over any other airline by guaranteeing to it a specific number of 707s before delivery of a 707 was made to any other?

A. No, not as I sit here now.

Q. In mid-1955 and prior to June 24th, do you know if Pan American, American and United Airlines were all working with Boeing concerning possible orders of the 707s from Boeing?

A. Yes, I'm sure that these three airlines were working with Boeing and Boeing was working with them as were other manufacturers.

Q. Yes, I am thinking of just those three at the moment.

Were those airlines or any of them at the same time working with Douglas, looking toward the order of DC-8 jets from Douglas?

A. Well, these three airlines were working with Douglas during this period exploring jet acquisition [Tr. 2555] possibilities, I'm sure.

Q. All three of them?

A. Yes.

Q. I direct your attention to Defendants' Exhibit 97 for identification, that is, the letter from Boeing by Mr. Connelly to American Airlines.

Mr. Sonnett: Have you left 96, Mr. Hayes?

Mr. Hayes: Not entirely. I will be back to it.

Mr. Sonnett: All right.

Mr. Hayes: Don't file it away permanently.

Q. I would direct your attention to page 3, Item No. 4, delivery, where there is set forth a delivery schedule by months of 15 airplanes, and followed by language down to Item 5 "Term of offer."

Will you please read that language?

A. I read it.

Q. Do you have Defendants' Exhibit 96 for identification before you also and Defendants' Exhibit 97 for identification?

A. Yes.

Q. You will note that the delivery schedule set forth—

The Special Master: You do not want to [Tr. 2556] describe them, I guess, at this point.

Mr. Sonnett: Also one relates to 25 aircraft and another relates to a different number.

Q. Have you noted, Mr. Rummel, that the first monthly delivery set forth in Defendants' Exhibit 97 of April 1959 is after six aircraft would be delivered to Pan American—

The Special Master: I suggest that you not describe in detail the contents here until we decide whether or not it is going to be put in evidence.

Could you just ask him to compare the two and base your question on that?

Mr. Hayes: I could do it that way.

Q. Would you compare the two and tell me if the offer to American, Defendants' Exhibit 97, gives effect to the delivery of aircraft to Pan American in advance of delivery to other airlines?

Mr. Sonnett: I object to the form of the question.

The Special Master: Sustained.

Mr. Hayes: I think this is a perfectly proper question, Mr. Brownell.

The Special Master: You can use these [Tr. 2557] documents to ask him to refresh his recollection, but if you are going to ask that they be admitted into evidence at this time I will decide that they should not be.

Mr. Hayes: Mr. Brownell, if you will hear me on that and I hope you have not made up your mind finally, I will get nowhere if I ask him if it refreshes his recollection because he has none.

The Special Master: You have not asked him yet.

Mr. Hayes: He comes along here and says I don't know anything about this. This is something that Boeing was doing privately. But yet he presumes to tell us what Boeing's sales practices and policies were. This is more than refreshing recollection. This goes to the very foundation of his testimony, I submit.

I may use these concededly authentic documents from Boeing to show he did not know what he was talking about in his statement. I mean, it is a very basic point I have here.

Refreshing a recollection that is non-existent gets me nowhere. I submit that I have a [Tr. 2558] perfect right to show the lack of foundation for this witness' statement as to what were Boeing's practices and policies. I would ask you to reconsider in the light of that consideration.

Mr. Sonnett: May I point out—

The Special Master: No, I don't think I need any further argument on this. I see no reason to reconsider in view of Mr. Sonnett's statement that he will

have no objection to the introduction of these documents as part of the cross examination of Mr. Connelly.

But since Mr. Rummel has testified that he had no knowledge of these documents, I'm assuming in this discussion that that is his position.

I don't see how it can be used as a proper basis for cross examination of him.

Mr. Hayes: Because he presumes to be an expert as to Boeing policies, on his own. He does not rely on Connelly at all. He relies on his own statement.

I am confronting him with what Boeing was doing, and I submit it is proper—I can't think of any better way to demonstrate that there is no [Tr. 2559] foundation for the paragraphs in his prepared statement, TWA Exhibit 2, than to show that it lacks foundation. If Mr. Sonnett says that Mr. Connelly is his witness on this subject, then I move to strike from the prepared statement here all of the paragraphs under the heading "Boeing 707 Reallocation of Delivery Dates," including Annex D. They have no proper place here if I am not permitted to cross examine Mr. Rummel concerning them.

The Special Master: I don't think Mr. Sonnett has made that statement. Whether he has or not, the motion is denied.

Q. I direct your attention, Mr. Rummel, to Defendants' Exhibit 98 which is the Boeing letter to United Airlines dated June 24, 1955.

I might mention that the letters to American and United were the day after the letter to Pan American.

Particularly to page 3 of Defendants' Exhibit 98, Item 4 headed "Delivery."

I would ask you to read it.

The Special Master: Have you read it.

The Witness: Yes, sir.

Q. If you had known at the time you prepared your prepared statement that Boeing had offered earlier [Tr. 2560] deliveries to Pan American than it offered to any other airline, would you have made changes in your prepared statement and in Annex D?

A. Well, based on an extremely limited look at these particular sections I don't think so.

Q. If you had known at the time you prepared your prepared statement that in June 1955 Boeing had offered aircraft to Pan American with preferences in delivery as against all other airlines, and that on the next day it had offered aircraft to American and United with no preferences in delivery to them as against other airlines, but subject to a preference to Pan American, would you have changed anything in your prepared statement?

Mr. Sonnett: I object to the form of the question as not properly based on anything that is in evidence and argumentative.

The Special Master: Overruled.

A. Well, I don't think so, Mr. Hayes.

I think the knowledge and personal experience that I had through extended negotiations with Boeing through an extended period of time would have overridden this particular thing which may well have been the result of negotiation. I don't know what it is as I look [Tr. 2561] at it.

Q. If I recall your testimony in this case, it was in substance, and it conforms with your prepared statement, that it was Boeing's desire to treat Pan American, American and TWA equally.

A. Equitably.

Q. What is the difference?

A. On the assumption that we all ordered at about the same time.

Q. At about the same time?

A. Well, we couldn't be wholly equal. We couldn't obviously receive the same airplane.

Q. Obvious. Aside from being ridiculous is the answer to my question a yes?

Mr. Sonnett: I object to the form of that question. Counsel seems to overlook the fact that in each of these cases these documents refer when they open up to discussions which preceded the document, they also overlook the fact that in the Pan American case it was a proposal for 25 aircraft and a reference to delivery of eight.

The Special Master: The witness may answer the question.

The Witness: Could it be read, please?

[Tr. 2562] The Special Master: Surely.

Mr. Hayes: The question is what is the difference between treating the three airlines equitably and treating them equally and Mr. Rummel's answer was they obviously couldn't get the same plane. I assume he knew I wasn't talking about getting the same plane.

I asked him what the difference was between equally and equitably.

The Special Master: Do you have anything further to add?

The Witness: No. What I said was the practical exigencies of this situation had to be taken into account.

Q. If you had known that Boeing on June 23, 1955, had made an offer to Pan American with a preference of eight deliveries over all other airlines, and on the next day made offers to both American and United with no preferences to either of them over the other, but subject to the preference to Pan American, and in the light of your testimony that all three airlines were negotiating with Boeing at the same time, to wit, the dates of the letters, would you change your prepared [Tr. 2563] statement or any of your testimony in this case?

A. No.

Q. Not even the statement that if they had been ordered at about the same time in the quantities actually ordered there would have been different deliveries than those you fabricated in Annex D?

Mr. Sonnett: I think I will have to object to the form of the question as quite unnecessary to put it in that form.

Mr. Hayes: I don't know what's the matter with the form.

The Special Master: Overruled.

You would have not changed that part of your testimony?

The Witness: I think my projection would have been the same. I would not have changed it, no.

Q. Even though you would have known that Pan American and United and American had not, in fact, been treated equally at the time the offers had been made to them?

Mr. Sonnett: Again, this is a misstatement of the documents.

The Special Master: Do you object?

[Tr. 2564] Mr. Sonnett: I object.

The Special Master: Sustained.

Mr. Hayes: Could we suspend?

The Special Master: Yes.

* * * * *

[Tr. 2587] The Special Master: Do you want to press your motion to strike or do you want to reserve decision?

Mr. Sonnett: I do press it on the ground already stated and lastly of course I have not had a chance to cross-examine whoever prepared this or to cross-examine anybody in Boeing with respect to any of these agreements.

It just seems to me it is a document based on hearsay at this stage.

The Special Master: I will deny that motion.

By Mr. Hayes:

Q. As I recall your prior testimony, Mr. Rummel, you were not able to fix a time when the international version of the 707, the—what is it, 320 or 300 Series?—became available for contract.

Can you tell us now when it became available?

Mr. Sonnett: As I recall it—

The Special Master: I am sorry, I was looking for something and I did not hear that question. May I have it read again?

(The question was read.)

Mr. Sonnett: As I recall it, we had some problems earlier about what was meant by the [Tr. 2588] expression "available for contract." Perhaps if counsel could clarify that we can avoid the wastage of time for lack of definition.

Mr. Hayes: By available for contract I mean that Boeing was in a position to make contracts for the manufacture and delivery of such planes.

The Special Master: As evidenced by some action of Boeing?

Mr. Hayes: Yes, when they offered them to the airlines. When they submitted proposals to the airlines for the TWA version of the 331.

Mr. Sonnett: As of November 1954, the broadcast to the industry, which as I recall it is the earliest document.

The Special Master: Did you know that they were ready to offer a plane before then?

The Witness: It was during the fall of that year, Mr. Brownell, that the big push you might say was on by Boeing and that the airplane became crystalized. And I think it was during the fall that the Hughes delivery positions were obtained. I don't recall the exact form. It may have been a letter, it may have been a wire.

Boeing was not then in position to finalize [Tr. 2589] contracts. There may have been papers, agreements, conditional agreements, one kind or the other, and I don't believe that the contracts as such in terms of defining detailed terms and including specifications were squared away until some time during the first quarter on the international version.

By Mr. Hayes:

Q. First quarter of what year?

A. It may have been late in December in some instances. I'm not entirely sure of that.

The Special Master: You are talking about December 1954 and early 1955?

The Witness: No, 1955-1956.

This I might say is a normal thing. The deals usually mature over a period of months.

Q. In your answer you said something about delivery positions being given to Hughes. Did you mean Hughes or Pan American in the fall of the year?

A. Well, I'm quite sure—here again I can't be wholly certain as to timing—that it was some time in the—by the fall I mean the fall-winter, late in that year.

Q. Late in 1955?

A. Yes, I'm not including all the winter months by the [Tr. 2590] calendar.

Yes, I think—I believe what they then offered with respect to 331 deliveries were around that period of time.

Q. By fall-winter, do you include the months of October, November and December?

A. That I'm not sure as I say precisely when that occurred but my best recollection it was somewhere in that period, probably in the latter part, but I'm not sure of that.

Q. Would it conform with your recollection if I stated to you as of November 2, 1955, Boeing was not in a position to submit proposals on the over ocean configuration of the 707?

The Special Master: 320.

Mr. Hayes: It is the 331 of TWA. The 300 Series, I believe it is called.

A. No.

Q. It does not?

A. No, it doesn't.

Mr. Hayes: May there be marked for identification as Defendants' Exhibit 102 a memorandum from R. L. Bell of Boeing—

Q. He is of Boeing?

[Tr. 2591] A. He was of Boeing at that time.

Q. He was?

A. Yes.

Mr. Hayes: —to W. E. Beall, with copies to Messrs. Allen, Wells, Yeasting, Martin, Pennell Schairer, re, 707 over ocean configuration and proposal letters to be prepared for foreign airlines, dated November 2, 1955.

• • • • •

Q. I show you Defendants' Exhibit 102, and I ask you if it refreshes your recollection that as of November 2, 1955, Boeing was not in a position to submit proposals for over ocean aircraft.

Mr. Sonnett: What is the question?

(The question was read.)

Mr. Sonnett: Has it been established that the recollection of the witness on the subject matter has been exhausted before we reach this document?

Mr. Hayes: Yes, he has given his best recollection time and again, I think.

The Special Master: I would think so.

[Tr. 2592] Does this refresh your recollection on that point?

The Witness: No, it doesn't add anything.

Q. You mentioned a few moments ago I believe, that you thought that certainly by the end of the year 1955, delivery positions had been communicated to TWA by Boeing.

Do you recall that testimony?

A. No, I don't. I think they were communicated to Hughes and those representing Hughes. I don't know if they were to TWA. I don't believe I testified to that effect.

Q. Communicated to anybody, to TWA or to Hughes, anybody involved in the procurement of planes for TWA.

A. Well, I have the impression that I just conveyed on that point, Mr. Hayes.

Mr. Hayes: I ask that there be marked for identification a Boeing memorandum dated December 23, 1955 marked "Confidential" from R. L. Bell to E. C. Wells and Messrs. Allen, Beall and Connelly, re Model 707 delivery schedules.

This will be Defendants Exhibit 103.

• • • • •

[Tr. 2593] • • • Q. In the opening sentence, Defendants' Exhibit 103 for identification refers to a TWA request and then sets forth delivery positions being held for TWA for the Model 120 and the Model 320 Series.

Do you have any recollection that at or about that time such delivery positions were communicated to TWA?

A. I think this jibes with my general recollection but I don't remember the specifics, Mr. Hayes.

I think that Boeing generally from their viewpoint viewed Hughes and TWA as an identical, synonymous type term.

Q. Do you have any recollection that you received either directly from Boeing or through the Hughes Tool Company, either orally or in writing delivery position substantially similar to those set forth in Defendants' Exhibit 103 for identification?

I am not referring to the delivery positions of the other airlines. I am thinking only of TWA.

A. Well, I can't remember it in that detail. These seem to fall in the same general time period.

[Tr. 2594] I have the impression that the 131 deliveries were finally made a bit better—were better than this. I don't recall specifically this specific schedule but it is the kind of thing—

Q. I am not asking if these were the dates that were contracted for. I am asking—

A. I am sorry.

The Special Master: Does this refresh your recollection?

The Witness: No, not in specifics.

Q. Does it refresh your recollection for example as to delivery that TWA received either directly from Boeing or through the Hughes Tool Company from Boeing an offer to make 707s available during the period from April 1959 to August 1959 and to make 331s available during the period from November 1959 to January 1961?

A. Well, the November date sticks in my mind. The January date does not.

Q. Do you recall receiving at or about the date of Defendants' Exhibit 103 for identification a proposed delivery schedule for the 120 and 320 Series?

A. Not specifically, Mr. Hayes.

Mr. Hayes: I offer in evidence Defendants' Exhibit 103 for identification.

[Tr. 2595] Mr. Sonnett: Objection. It is hearsay.

The Special Master: Sustained.

Q. Would you look again at Defendants' Exhibit 103 for identification, Mr. Rummel, and tell us if the delivery positions that were actually negotiated for the 131s and the 331s were better than those set forth in Defendants' Exhibit 103 for identification?

Mr. Sonnett: That requires the witness to make a comparison between the document which is in evidence, their chart, and this. I don't see the point to that. If there is an argument to be made it can be made by counsel on the basis of his chart which is in evidence.

Mr. Hayes: The trouble with that objection is that 103 for identification is not in evidence and if we make the comparison then we will be told we are comparing something that is not in evidence.

Mr. Sonnett: If you compare the actual deliveries which are in evidence—

The Special Master: I think that would be an indirect way of putting it in evidence so I will sustain the objection.

Mr. Hayes: Off the record.

The Special Master: Off the record.

[Tr. 2596] (Discussion off the record.)

Mr. Hayes: On the record I will state that I have offered to Mr. Sonnett that if he wants to put in evidence documents received in the course of the Boeing production which set forth conversations between Boeing representatives and Mr. Hughes, I have no objection to their going in evidence.

Mr. Sonnett: Let the record reflect the fact that Mr. Sonnett would look forward to the examination of the Boeing witnesses, if any, with respect to the communications between Mr. Hughes and Boeing on this subject.

Unfortunately the inability to examine Mr. Hughes has precluded our getting into that subject matter earlier.

• • • • •

[Tr. 2642] • • • Q. Did Mr. Hughes, at the time of the negotiation leading up to the contract, tell you of any conversation he had with Mr. Allen respecting deliveries to Pan American, American and TWA?

A. Well, as I indicated before, Mr. Hayes, Boeing had made available from time to time delivery schedules for planes they proposed to sell to Hughes. I don't, as I sit here, recall if those were given through Mr. Allen. I suppose it is possible. I don't know.

Q. Would you please answer the question?

The Special Master: Read the question back.
(The question was read.)

A. Well, I don't recall.

[Tr. 2643] Q. You have no recollection?

A. Not now, no.

Q. At the time Mr. Hughes gave you the instruction not to enter into change orders and to hold hands off because of some claim that might be advanced against Boeing, you were then aware that there had been preferences granted by Boeing both to Pan American and to American, were you not? You may not have known the details, just that there were preferences in deliveries that had been granted to them?

A. Well, I am sure we knew then, as we had all along, that American and Pan Am were getting ships before we were.

[Tr. 2644] Q. At the time that Mr. Hughes gave you this instruction which you said came to you indirectly, was it part of the instruction that you were not to take any action which would disrupt Boeing production and thus delay deliveries?

A. No.

Q. That was no part of the instruction as you recall it?

The Witness: Well, just to be really sure may that question be read, because—

The Special Master: Of course.

The Witness: —it sounds as if I might not have heard it right.

(The question was read.)

A. My objection to the instruction was that that's exactly what would happen and that's why I thought it was self-defeating and I do not recall that being part of it.

Q. You never recall Mr. Hughes saying to you in substance that he did not want any action of yours to be one which would delay deliveries?

A. Well, yes.

Q. He did say that?

A. Not at this time.

Q. When did he say it? Was it when you complained [Tr. 2645] about the instruction?

A. That's right. When I finally got Hughes and explained that things were starting to come to a grinding halt and that because of his instructions to which I had been in opposition all along I felt Boeing was rapidly approaching the position where they could claim that our inaction was too disruptive to their orderly production process, and that they could claim that because of our inaction deliveries either might be delayed or at least they could never be advanced. I wasn't sure what they would say.

And when I brought that to Hughes, Hughes wanted to know why I had not called that to his attention before. I reminded him I repeatedly made the effort to do so and advised his representatives to that effect. At that point he agreed that we should not proceed on the basis of earlier instructions but to try to restore things to normal as reasonably expeditiously as we could.

Q. And that nothing should be done to delay deliveries? Did he tell you that?

A. Well, Mr. Hayes, the delivery area was one in which I was not authorized to do anything at any point in time which would adversely affect deliveries as I have testified to earlier.

[Tr. 2646] Mr. Hayes: Would you read the answer, please?

(The answer was read.)

Q. But in this conversation that you are talking about with Mr. Hughes, did he specifically say to you that you were to do nothing which would delay deliveries?

A. I don't recall it with that degree of precision, Mr. Hayes.

Q. How long, by the way, was this conversation you had with Hughes after you had received the instruction not to make change orders and so on?

A. I can't be sure, but I think it was—let me say it is my present impression, rather than a clear recollection, it was in the order from five to seven weeks or thereabouts.

Q. Did Mr. Hughes either at the time you talked to him or in part of the instruction which you received indirectly give as a reason for his instruction that he did not want any representative of TWA or the Toolco to take a position with Boeing which might interfere with the claim he planned to advance against Boeing?

A. Well, I didn't have the impression, and I hope I haven't given it in my testimony, that he specifically planned to lay a claim. My impression is that he wanted that area explored and to see whether or not claims [Tr. 2647] existed to the degree which would permit either threat of or mention of it or some use of it to advance our delivery positions during our negotiations.

Q. Whether he planned at that time to take action or to find the facts to determine whether he could bring an action or not, did he then give as a reason for the instruction that he wanted no contrary position to be taken by any Toolco or TWA representative at the Boeing plant?

A. Well, as I say, I don't recall it with that degree of precision, but the last thing I think that we would have undertaken was to do anything which would—tended to undermine that which we were then trying to accomplish, earlier deliveries.

Q. At the time this controversy arose was it known that Boeing was accelerating its production?

A. Well, the Boeing plan to have its manufacturing schedule for early planes in advance of contractual commitments was known I think, all along, and we knew it then.

* * * * *

[Tr. 2679] * * * Q. In your prepared statement, Mr. Rummel, page 10, the paragraph beginning five lines from the bottom, you state the study, that is Annex D, shows the effect which timely placement of orders would have had in accelerating deliveries of jets to TWA if TWA had received equal treatment with Pan American and American Airlines, its major competitors, et cetera.

I want to know what you mean by the words "equal treatment."

A. What I mean is that the study attached as Annex D shows what would have happened had TWA, Pan American and American Airlines ordered at about the same time and had Boeing made an effort to equalize deliveries between the three airlines on an equitable basis and in [Tr. 2680] line with their policy.

Q. I want to know what you mean by the words "equal treatment."

Can you define those words for us?

A. Well, by equal, I mean equitable.

Q. What do you mean by equitable?

Mr. Sonnett: I think the witness has just pointed out that what he meant he set forth in Annex D.

Mr. Hayes: I know what he set forth in Annex D but I am talking about his statement.

Mr. Sonnett: That is what he is talking about.

Mr. Hayes: I can read Annex D as well as anyone, I hope.

A. I guess I'm at a loss to be any clearer.

By Mr. Hayes:

Q. Did you give effect to the larger number of orders that were given by one as against the other airline?

A. Certainly, yes, I considered the full orders.

Q. That was 20 for Pan American?

A. As exactly set forth, Mr. Hayes.

Q. I think it was 25 for American or 30, I have [Tr. 2681] forgotten now offhand.

Take American. American ordered—

A. 25.

Q. —according to your Annex D 25 of the transcontinental 707s?

A. That is right.

Q. TWA ordered 15?

A. Yes.

Q. Did you give American any priority throughout the period of delivery for ordering five more 707s of the 120 series than were ordered for TWA?

A. Well, American was given a slight advantage over TWA on the 100 series during the early delivery period.

And, of course, Pan Am received planes before either—

Q. I am talking about just American and TWA right now.

A. —American or TWA.

Q. Just American and TWA.

A. Well, there is an advantage during the early delivery periods shown to American Airlines.

Mr. Sonnett: When you answer, if you are referring to Annex A, will you make that [Tr. 2682] clear because the record does not indicate what you are looking at?

The Witness: Yes, I am sorry.

I am looking at pages 6, 7 and 8 entitled "Reallocation" of Annex D attached to my testimony.

Q. Did you give effect or any effect to the fact that American's order was placed one day before TWA's order?

A. Well, this reallocation, Mr. Hayes, is on the basis that we all ordered about the same time, and that our negotiations were conducted nearly simultaneously.

Q. Would you answer the question, please, Mr. Rummel?

The Witness: Could I have the question?

The Special Master: Certainly.

(The question was read.)

The Witness: Not in preparing the reallocation.

* * * * *

[Tr. 2698] * * * Q. Do you know how long negotiations went on between the Hughes Tool Company and Pan American before the contract was made in, I believe, July 1959, whereby with the consent of Boeing the Tool Company assigned the right to acquire six 707-331s to Pan American?

I am sorry. It was in June 1959 that the contract was made.

Do you know how long negotiations between Hughes Tool Company and Pan American went on before the contract [Tr. 2699] was made?

A. No, not exactly.

Q. You say "not exactly." What do you mean?

A. Well, I mean I wasn't a direct party to those negotiations, and I can't be sure.

Q. In preparing your prepared statement, did you make any effort to determine how long those negotiations continued?

A. Well, like most aspects of the testimony, we used the best information that was available from almost all facets, including the best recollection I have, reviewed data available and the like, but I don't specifically recall the time span you are referring to as I sit here now.

[Tr. 2700] Q. You have no recollection of this, how long any negotiations continued, is that right?

A. I can't be specific.

Q. Why did you use the month of July 1959, when the minutes of the TWA board approving Mr. Thomas' consent were dated in June 1959, Defendants' Exhibit 54?

That information was certainly available to you, was it not, Mr. Rummel?

A. Yes.

I had attempted to determine the best deliveries from Boeing for six airplanes as soon as I understood that six were definitely being committed to Pan American.

There was an earlier proposal letter from Boeing which gave—which offered deliveries somewhat less attractive than those that were contained in this letter that preceded it. This particular letter is a result of a review conducted by Boeing after discussions with me along the line that I thought they would be able to do better.

I used this because it was the most current knowledge available at that time with respect to open positions at Boeing.

I might add—that's all.

Q. Do you want to add something?

[Tr. 2701] A. No, sir. I think that answers it.

Q. This attempt by you to find out open delivery positions, are you speaking about the time you were preparing your statement or are you speaking about 1959?

A. 1959.

Q. My question to you now is, is it because of the fact that Annex E happened to be dated in July 1959, that you used it as the date on page 12 of your statement?

A. Well, the reference on page 12 to July is in reference to Annex E.

The Special Master: "Is" you say?

The Witness: Yes.

Q. Did you attempt in preparing your statement to find out what delivery positions would have been available to Pan American in June 1959?

A. Well, as I just indicated, Mr. Hayes, and I don't have the date at hand, the offering before this one, offered aircraft for subsequent delivery to the positions contained in the July 27th letter.

Q. Are you referring to the first sentence in Annex E, "We wish to amend and supplement letter of proposal 6-1100-2-591"?

A. That sentence refers to the earlier proposal that I just mentioned.

[Tr. 2702] Q. When was that earlier proposal?

A. I don't remember the date, but I believe it was several weeks prior to—maybe a little longer to the July 27th letter.

Q. That is the proposal which according to your testimony had poorer delivery positions than those contained in Annex E, is that right?

A. Yes, and it was a result of a still earlier request to Boeing. It took Boeing some time to review what they could to do and to develop the proposal letter.

Q. I ask you again in connection with the preparation of your statement, TWA Exhibit 2, while you were in touch during the course of your various conversations with Boeing, did you attempt to discover from Boeing what delivery positions would have been available to Pan American in June 1959?

A. I discussed with Boeing whether or not the information I had which is presented here represented the best they could have then done for Pan American, about that time period, and they indicated that it was.

Q. That was July 1959.

My question was did you ask Boeing whether in June 1959, better delivery positions would have been available to Pan American?

[Tr. 2703] A. I asked Boeing whether the delivery positions as represented by this letter were or were not the earliest that could be made—that could have been made to Pan American at the time that they picked up the Hughes' airplanes.

And, as I recall Boeing's statement, it was yes, this is about the best they could then do.

Q. You did not ask them specifically what deliveries were available in June 1959?

A. Well, Mr. Hayes, I might have. I just don't remember my sentence by sentence questions to Boeing. The sense of it was as I just explained.

I wanted to know whether we were fairly representing or had information here that was valid with respect to other —to the offer that had been offered to Pan American, and my impression from Boeing's reply is that it is.

Q. If I recall your prior testimony correctly, it was to the effect that you did not know about the transfer of contract rights for the six aircraft to Pan American until it happened, is that correct?

A. I believe that's correct. I knew that some discussions were under way but I didn't know a deal had been made until it had been made and I had been told.

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[Tr. 2735] • • • Q. If I recall correctly, you testified earlier on this cross-examination, Mr. Rummel, that you were not personally a great deal at the Convair plant; that your information came through Mr. Bew or Mr. Rourke. Do you recall that?

A. Referring to the fall of 1959, I think that is correct.

Q. How much time did you spend over the years at the Convair plant?

A. Well, I spent a great deal of time during the preliminary design and early contractual discussion phases.

Q. No. I mean after the contract was made and production [Tr. 2736] started.

A. I made occasional trips as conditions seemed to warrant. I can't tell you how many days I spent or exactly what percentage of time I spent at the plant.

Q. Not even by years, say in 1957, in 1958?

A. Well, not really. Anyway, it is a confused picture. There were several efforts to get to the plant. I found myself on ice for weeks at a time, wherein I was unable to proceed to the plant because of requests from Hughes.

Q. Was that in 1957?

A. There was one—I don't recall this occurring in 1957. I do recall it occurring in 19—during 1960.

Q. Take a year at a time. During 1957, about how much time did you spend at the Convair plant?

A. 1957?

Q. Yes.

A. I don't know. There were numbers of trips, Mr. Hayes, when we were establishing our office and reviewing the Convair progress, resolving various issues that arose.

My memory just can't—

Q. Do you recall if you were there as frequently as once a month?

A. I don't think it was—I don't think it averaged [Tr. 2737] once a month, no.

Q. How about 1958, about the same or not?

A. In 1958—well, back to 1957 I suppose it could have been 12 trips, and it would have averaged, I am sure, more than 12 days a year, but I just don't remember in that particularity.

In 1958—I am not that sure of it.

Q. How about 1959?

A. 1959, after I moved to New York, there were fewer trips on my part and more on the part of the Kansas City staff.

Q. How about 1960, how often were you at the Convair plant?

A. In 1960 I was there personally to a very limited extent. Hughes didn't want me there.

Q. Yes, you have told us that several times.

A. I am sorry.

[Tr. 2738] Q. When was the period he did not want you there?

A. I am not positive of the exact time there either, but it was during, I believe, the early—either late winter or early spring period.

Q. Were you there after the early spring period?

A. I was on my way there for about a month or so.

Q. Were you there, was the question.

A. If you are asking—

Q. Were you in the Convair plant? That is what I am asking.

A. No, I didn't make it.

Q. Were you in the Convair plant at any time after the spring of 1960?

A. Yes, I'm sure I've been there since the spring of 1960.

Q. And before the end of 1960?

A. Before the end of 1960?

Q. Yes.

A. I'm not entirely sure.

Q. Is it correct to state that your knowledge of what was going on at Convair in 1960 was not the result of personal observation but was based on what was reported to you by TWA representatives there?

[Tr. 2739] A. Not entirely.

Q. Will you explain?

A. Well, for example, I made a trip to San Diego to talk to Jerry Owens who was one of the Hughes' representatives at the time, but I didn't at that time set foot on the Convair property.

I passed by and saw planes on hand parked around the field.

During the time that I was on ice, as I put it, out there, I passed around the outskirts of the field in the vicinity several times. I didn't, as I recall it, actually pass through the Convair gates.

I flew in and out of San Diego on several occasions. Their plant is at the same airport and the field operations were quite visible.

And there was one trip where I inspected the status of our—that is Convair's production, but I can't fix the exact time now during 1960.

Q. How many days all told were involved in these various trips you just talked about where you walked around the Convair plant or drove around it or looked down at it from an airplane?

A. I was in—I don't know how many days. I was in the La Jolla area about three weeks or so as I recall it [Tr. 2740] during which time I was in touch with Hughes. Then

on the side I was in touch with numbers of Convair acquaintances. It was during this period that I did what reconnoitering I could do.

* * * * *

[Tr. 2743] * * * Q. Assuming that it was produced by the Hughes Tool Company at Houston, have you any way of knowing where the Hughes Tool Company got it or from whom?

A. Well, it seems pretty clear it came from the Hughes Tool Company contract.

Q. I am not asking what seems pretty clear to you, Mr. Rummel.

I am talking about Exhibit R-14.

Do you know how it got in the Hughes Tool Company files?

A. No.

Q. Do you recognize any of the handwriting on it? The only handwriting I know is on the bottom of page 1 and the footnotes T and H on page 2, the date on page 2 and the word "concluded" on page 2.

A. I can't be sure of the handwriting.

Q. You referred to this as an allocation. What is your basis for calling it an allocation?

A. Well, the fact that the marks indicate which airplanes are to be delivered to TWA and which are to be delivered to Hughes.

Q. By serial numbers?

[Tr. 2744] A. By delivery dates.

Q. You do not know what planes by serial numbers, do you, from this Exhibit?

A. No.

Q. Are you by your statement suggesting that R-14 was prepared, whoever prepared it as a result of any agreement between TWA and the Tool Company?

A. Well, I don't know that TWA agreed with this allocation. The dates are consistent with the total contract commitments.

Q. That I am aware of and your statement makes crystal clear that it is consistent as I interpret the word consistent.

My question is, by your statement are you suggesting that R-14 sets forth the terms of an agreement between the Tool Company and TWA?

A. As I recall it, TWA's rights to procure the 880s wasn't finally established until December 31, 1960.

Q. That was not my question, Mr. Rummel.

I am asking what you meant by the statement I quoted to you on page 17 of your prepared statement.

Are you suggesting that R-14 memorialized an agreement that had been arrived at between the Tool Company and TWA?

[Tr. 2745] A. No, I'm not necessarily. I am suggesting that this is the allocation the Tool Company had come to with respect to the disposition of 20 of the 30 airplanes.

Q. On what do you base the statement that the Tool Company had come to that decision?

A. Well, for one thing we didn't know what specific airplanes we would be receiving, even after in many cases, December 31, 1960.

Q. What has that to do with Defendants' Exhibit R-14 which is dated September 4, 1959? Try to answer the question, please, Mr. Rummel.

A. Well, I don't recall a formal agreement between TWA and Hughes on this specific allocation.

Q. Or any formal agreement arrived at between the Hughes Tool Company and TWA on or about September 4, 1959?

A. Well—

Q. Do you recall one at about that time?

A. No, I recall the opposite.

TWA was trying to get a definite understanding from Hughes and a commitment that it would receive Convairs pretty much throughout this period.

Q. What did TWA do in that regard?

[Tr. 2746] The Special Master: That's what I was going to ask.

Did you base your planning after September 4, 1959, on these delivery dates?

The Witness: Well, I—we moved to the 20 plane base for planning once it became crystal clear that there was no hope of—in the foreseeable future of getting more than the 20 airplanes.

I was in charge of jet planning as I indicated, and waited a period of time after I first heard of the reduction, during which time I tried to persuade Hughes Tool representatives and Hughes that we should have all 30 airplanes.

Once it became finally clear, then we moved over to the 20 plane base, and this was changed, the Jet Plans and Premises Manual, as a planning base at that time.

Q. Your testimony shows that was either in June or July 1959, Mr. Rummel?

A. Yes, well, the question of what planes TWA would get is one of the very difficult unanswered questions that we had that lingered even after December 31, 1960. There was latitude even then in the selection of specific airplanes by serial number.

[Tr. 2747] Airplanes at Convair during the early part of 1960 were in various stages of completion. Some had been pulled aside and parked. There were some under armed guard.

Finally I think in February some time there was bailment.

The production line became so confused that during an extended period there wasn't any way to estimate reliably or know either when a full production in operation would be resumed or what the order of appearance of airplanes might be.

The Special Master: The trouble is it would appear that the allocation here is based on an unsigned, unidentified, undated document, that nobody knows where it came from. Isn't that the present state of the record?

Mr. Hayes: That is the present state of the record.

Mr. Sonnett: Except it was produced by the Hughes Tool Company in response to production.

Mr. Hayes: Sure it was produced by Hughes Tool Company. It was in their files. There were lots of TWA documents we produced from the Hughes Tool Company files.

[Tr. 2748] Mr. Sonnett: This isn't the time to get into argument about this problem—

The Special Master: No, no, I am just wondering if my impression was correct—

Mr. Hayes: It is obviously correct.

The Special Master: —as to the state of the record. The significance may be something else again.

Q. Have you any way of knowing whether R-14 may have been supplied to the Hughes Tool Company by the Convair Aircraft Company?

I am referring now to the information under the column "30 Convair 880s."

A. The allocation of these planes could hardly have come from Convair.

Q. Anything that prevented Convair from suggesting an allocation?

Mr. Sonnett: Of Convair planes.

A. Convair's general position was that it wanted TWA to get 30 planes. It felt that reallocations involved to a degree Hughes competing with Convair.

It is just not reasonable to think that Convair would have suggested allocation.

Q. Did Convair tell you that Hughes was competing [Tr. 2749] with Convair?

A. What I just said is my recollection of information from Dudley Digges.

Q. Did Dudley Digges say that to you?

A. Dudley was not happy with the prospects that Hughes would have ten Convairs on hand which had to be disposed of to what Convair then viewed as potential customers.

Whether he used the word "competition," I can't remember.

Q. You don't recall that?

A. Well, I recall the impression, the gist of what was said.

Q. You were acquainted with the Convair contract, were you not, at the time of this conversation with Dudley Digges?

A. The Hughes contract?

Q. Yes. You had negotiated it, and you were aware of its terms, were you not?

A. Yes, I was aware of the terms of the contract.

Q. Did you not know that under the terms of the contract the Hughes Tool Company would not assign its rights to any of the planes to any airline other than TWA without the consent of Convair?

[Tr. 2750] A. Oh, yes, I knew that.

Q. Did you mention that to Mr. Digges?

A. I don't remember it to that degree of particularity, Mr. Hayes.

Q. I notice further that on R-14 there are type-written dates and then there are changes handwritten.

Do you know when or by whom the changes were made?

A. I think this reflects the Hughes Tool Company position as of September 4th as to what airplanes it intended TWA to have.

Q. Now will you answer the question, Mr. Rummel?

A. I think I indicated earlier I wasn't sure what individual had written this information in. I still am not.

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[Tr. 2751] • • • Mr. Hayes: I plan to reproduce the next Jet Plans and Premises prepared after September 4, 1959 and dated October 2, 1959. We didn't know this would come up so we don't have it ready now. I shall have it ready at the next hearing.

Q. I call your attention, Mr. Rummel, to Exhibit R-5 attached to your statement, your prepared statement, the assignment of May 19, 1960, and I ask you if Exhibit R-5 contains the first formal agreement between the Hughes [Tr. 2752] Tool Company and TWA as to which of the Convair 880s would be assigned to TWA.

Mr. Sonnett: I don't mean to be technical, but there is a provision in the form of agreement which is part of TWA R-3 between the Tool Company—

Mr. Hayes: Let me get it, please, Mr. Sonnett.

Mr. Sonnett: Yes.

—and Convair.

Mr. Hayes: What page are you referring to?

Mr. Sonnett: Which is at page 3 under the heading "Article 2." It is in the annex.

Mr. Hayes: Page 3?

Mr. Sonnett: Yes.

Mr. Hayes: Article 2?

Mr. Sonnett: Page 3, Article 2, after the listing of delivery dates.

Since the question calls for the witness' answer with respect to formal contracts, I want to point out that in that language, for whatever it is worth, it says, "Prior to the execution of the definitive purchase agreement referred to in Article 4 buyer"—being the Hughes Tool Company—'shall designate the aircraft by manufacturing [Tr. 2753] number to be delivered to buyer with due regard to delivery positions desired by Delta Airlines as an initial purchaser of Model 22 aircraft with buyer."

What I am getting at is, and I don't know what the words of any subsequent contract in this regard may be—

The Special Master: This was a Convair-Hughes contract?

Mr. Sonnett: Yes.

Mr. Hayes: No, as a matter of fact it is the preliminary agreement. It is not the formal contract.

Mr. Sonnett: That is correct. What I am suggesting here is that the form of the question might create some problems because the preliminary agreement apparently gave to the Hughes Tool Company the right to designate with due regard for Delta, whatever that means.

[Tr. 2754] Mr. Hayes: Very interesting, but wholly irrelevant comment. My question was whether in fact the exhibit which plaintiff's counsel saw fit to attach to Mr. Rummel's prepared statement and which is designated R-5 was the first formal agreement between Hughes Tool Company and TWA as to what 880s were to be delivered to TWA. It has nothing to do with any deliveries to Delta at all.

Mr. Sonnett: What I am trying to suggest is that under the preliminary agreement between the Tool Company and Convair dated June 7, 1956, which is in evidence, the Tool Company had the right to designate which of the 40 aircraft it was going to get and which 10 Delta would get.

That's the point I am trying to suggest to you.

Mr. Hayes: You have made your point. It has nothing to do with the question.

I press the question.

By Mr. Hayes:

Q. Can you answer it, Mr. Rummel?

Mr. Sonnett: This is R-5 you want the witness to look at?

[Tr. 2755] Mr. Hayes: R-5, yes. I thought Mr. Rummel knew it by heart.

A. I believe it was.

Q. In your previous testimony you made some mention of Convair tendering planes in the course of 1960 which were not picked up; do you recall that, Mr. Rummel?

A. Yes.

Q. When were those planes tendered in 1960?

Maybe I can refresh your recollection. Is it your recollection that the first was tendered by Convair and delivered to TWA through the Tool Company on May 18, 1960?

A. That sounds about right.

Q. How many more airplanes were tendered by Convair?

A. Well, a good many were tendered in the sense that they were offered for final ground inspection and acceptance flying which was an immediate prerequisite to contractual acceptance of the airplanes.

Q. The question was how many.

A. Well, I'm trying to explain.

Convair offered these planes initially as they could considering that some planes were being set aside, but as time went on airplanes were abandoned in [Tr. 2756] various stages of completion.

So, the later ones were not, in fact, tendered for acceptance because they weren't completed to that point.

The exact number of planes which were formally tendered I am not sure of. I think that in a few cases it got to the point where Convair would make a record to at least their satisfaction of having tendered in order to lay a base for claims of their own for delays of acceptance.

Further, Hughes himself was personally involved with instructions and indeed he made several trips to San Diego himself, and the Hughes Tool representatives were on the scene in San Diego, and involved in surveying, giving surveillance to and participating in discussion with Convair on various matters.

Not knowing exactly what all went on in that particular area, I can't give a definite answer, but I can give you what I have by way I hope of explanation.

Q. That was a very lengthy answer.

The only question was how many planes were tendered. It was quite a speech you got in, Mr. Rummel.

Mr. Sonnett: Well—

Mr. Hayes: It was. You can't deny it.

[Tr. 2757] Mr. Sonnett: You know we can get along a lot faster if we don't waste time in colloquy, I think. I think that was uncalled for.

Mr. Hayes: That is an excellent rule for you to follow, Mr. Sonnett.

Mr. Sonnett: You like to be—I won't say it. It only wastes time. One-sided colloquy. It takes two to tango.

The Witness: If—

By Mr. Hayes:

Q. Are you going to say some more? Go ahead.

A. Well, I was going to say that Convair made it clear subsequently that it was claiming damages to varying degrees on 19 airplanes of the 20, because of failure to take delivery on them.

So, in that sense 19 were in the broad category of delayed acceptance, but I don't think as I've tried to explain, and I will try not to speak at length, Mr. Hayes, they were all

technically tendered as being completed and ready for acceptance.

This is what I was trying to explain.

Q. In 1960?

A. Yes, during 19—well—

Q. Is your testimony that during 1960 TWA having [Tr. 2758] acquired one plane on May 18, 1960 Convair later tendered nineteen 880s for acceptance? Is that your testimony or not?

A. No, sir, that is not what I said.

Q. I am trying to find out how many airplanes were tendered by Convair for acceptance in 1960 over and above the one that was acquired by TWA.

A. Well, this is a—this was a very confused and complicated situation at the time, and the answer isn't that simple.

For example, Convair could not have tendered airplanes it had bailed to Hughes or those under guard by Hughes. We couldn't even approach the planes.

And what I was trying to explain is that they had tendered a series for ground inspection and acceptance. And when things became so snarled up on the line that they started laying people off and the airplanes became delayed, they didn't complete the planes, some of them to the point where they could technically tender them in the sense they could say "Well, here is an airplane for delivery."

But they later claimed, nonetheless, damages on all of the 19 which originally were scheduled for delivery in that period of time.

[Tr. 2759] Q. Did I ask you anything about what Convair's claims were?

A. Well, I can't give you the exact number. I can only describe—

Q. I am trying to find out, and search your recollection, please, as to how many 880s Convair tendered for delivery during 1960. It is a very simple question.

The Special Master: You mean completed?

Mr. Hayes: Tendered for delivery, whatever it meant to the witness.

The Special Master: I think he was trying to explain that.

Mr. Hayes: He is giving quite a lot of explanation.

The Special Master: He did not know what an unfinished plane would qualify as, under your question.

Mr. Hayes: Of course not. It was not tendered if it was unfinished.

Mr. Sonnett: That is the problem.

The Special Master: Under that explanation, I would say the question boils down to how many completed planes were tendered, if you know?

The Witness: Well, if I could further—[Tr. 2760] and honestly, I am not trying to belabor this, Mr. Hayes. I am trying to answer your question.

Q. I wish you would.

A. But I take it the question is how many were tendered—

Q. For acceptance.

A. —to Bew rather than to Hughes or the Hughes representatives?

Q. I don't care to whom they were tendered.

A. Then I can't tell you. I don't know.

Q. You have talked about in the past planes that were tendered. I am asking you what planes you were talking about, how many of them?

Mr. Sonnett: You ought to give the witness an opportunity to tell you what he does know on the subject.

Mr. Hayes: He has had ample opportunity to answer a simple question.

Mr. Sonnett: It seems simple to you because you are not as well informed about the problem as the witness.

Mr. Hayes: Maybe I am better informed at the moment.

Go ahead, Mr. Rummel.

[Tr. 2761] The Special Master: It now stands completed planes to either TWA or Hughes, as I understand it. I don't want to take the words out of your mouth.

Mr. Hayes: That's right. Sure. Thanks a great deal. Maybe that will help us.

A. Well, the impression I have on the planes which Hughes placed underguard was—or is that the guards just simply showed up, and I honestly don't know. I don't have the impression those were ever tendered as such for anybody. And later some of these were put under bailment by Hughes.

Now, insofar as the planes which were tendered in the sense that Bew was advised to—that they were ready for final acceptance, that does not, I think, answer the question that has been asked.

I guess the answer is that in specific numbers, I can't say at the moment.

Q. You don't know, is your answer, isn't it, Mr. Rummel?

A. I don't know everything that went on certainly in the Hughes area at that time, so I can't—

Q. You specifically don't know how many planes were tendered, do you, for delivery?

[Tr. 2762] Mr. Sonnett: Are you asking for a further answer?

Mr. Hayes: I am asking for an answer which I haven't gotten yet. I've gotten several speeches having nothing to do with the question.

Mr. Sonnett: The difficulty with the question is it is highly ambiguous because the problem is whether the planes were tendered for acceptance flights by or on behalf of the Tool Company or whether counsel is talking about the acceptance flights having been performed, then they were tendered by Convair under the contract.

It was a requirement that there be acceptance flights before there could be a technical contractual tender.

That's the area of the problem.

Hence, we have the difficulty that the witness is having.

A. I could perhaps add this, Mr. Hayes, hoping it will help clear the air.

Our position with Convair that I argued later was that airplanes were not under strict terms of contract in fact tendered until after our own acceptance flight had been completed.

[Tr. 2763] Making available for ground inspection which is a preliminary to acceptance flight, we argued it did not constitute tendering in the true sense.

Convair completely disagreed with that view.

Now, all of our acceptance flying activities had to be cleared with Hughes or the Hughes office. We were not authorized to proceed with such clearances.

Since we couldn't proceed with our acceptance flying, because if we did and if the airplane was shown to be functionally satisfactory, we'd have been obligated to take them, we didn't proceed with either ground inspection or acceptance flying without clearance from the Hughes office.

So there is some question in my mind as to—at this stage at least, as to what in the legal sense tendering was. There are two sides to this question.

Mr. Hayes: He adopted your suggestion beautifully, Mr. Sonnett. Nice piece of coaching.

Mr. Sonnett: If you ask the witness questions of legal conclusions we get into problems.

Mr. Hayes: I will now ask a simple question and see if I can get an answer and it is going to be my last attempt.

[Tr. 2764] Q. How many planes did Convair tender for acceptance, be they acceptance flights, payment, what have you, during 1960?

Try to answer that one, Mr. Rummel, without giving us a speech.

Mr. Sonnett: I object to the form of the question as well as to the tone of counsel's voice, and I object to the fact that even now he does not put the question in such form as to enable the witness to answer it simply.

The Special Master: Overruled.

Mr. Sonnett: It is an incomplete summary of what the witness has said in terms of this problem of tender.

A. I don't know what to add to what I've already said, Mr. Hayes.

Q. You cannot give me anything further in answer to that question?

A. No, sir, I can't.

The Special Master: Let me try one.

Mr. Hayes: Fine. I wish you luck.

The Special Master: How many did Convair later claim it had tendered?

The Witness: Oh, all 19.

[Tr. 2765] Mr. Hayes: In 1960 he said one.

The Witness: I said they later claimed that they were—they claimed damages on account of delay in delivery of all 19 airplanes, and these were in different categories, some of which included storage costs, and I think the storage costs—well, I'd have to look it up now, but maybe seven or eight planes. They attempted to tender those which they had completed and that was all of them up to the time they saw fit—

The Special Master: How many did they tender?

The Witness: Maybe seven or eight.

The Special Master: Did I understand you to say, Mr. Rummel, that of the planes that Convair claimed to have tendered during this period, seven or eight were claimed to have been tendered in completed form?

The Witness: Well, I can't—that's an approximate number which as I recall it they attempted to tender for purposes of ground inspection and subsequent flight testing. It could have been a few more or less. But in the end, as I say, they claimed damages for all of them.

[Tr. 2766] By Mr. Hayes:

Q. As to whatever the number may be as to the planes that were tendered, do you know why they were not picked up, why delivery was not accepted?

A. We didn't proceed with the flight testing because we hadn't been cleared by Hughes to do so.

Q. Do you know why Hughes didn't clear the flight testing?

A. No. I had several impressions at the time. I can't say.

Q. Did TWA have the funds to pay for the planes at that time?

A. If you are asking had TWA completed its financing, I don't believe so.

Q. Aside from its financing, did it have the funds to pick up the planes at that time?

Mr. Sonnett: Objection as outside the scope of the issues involved before the Special Master.

The Special Master: Do you know?

The Witness: I don't know how much money we had, but I don't think we had enough to buy 20 airplanes. I am sure we didn't without some financing.

[Tr. 2767] Q. Do you know whether TWA had enough money to buy seven or eight airplanes from Convair?

A. No. I recall Convair trying to work out leases.

Q. I am talking about buying, Mr. Rummel.

A. I just don't feel qualified, Mr. Hayes, to comment on how much money we had at that time.

Q. You do not know, is that it?

A. No, I can't tell you exactly how much we had. This wasn't my area.

Q. Do you know whether the Tool Company lacked the funds to pick up the planes as they were tendered for delivery?

A. I had that impression at that time as one of the possible reasons.

Q. Where did you get that impression?

A. Primarily from Raymond Cook and Raymond Holliday.

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[Tr. 2788] • • • Q. You mentioned from time to time, in response to questions—I did not ask for the information—that the Hughes Tool Company placed guards around certain planes at the Convair plant and that bailments of certain planes were made to the Hughes Tool Company.

Mr. Sonnett: I object to the form of the question. It incorrectly describes the record.

The Special Master: So long as the comments are on the record, I don't think any damage will be done by proceeding.

By Mr. Hayes:

Q. How many planes were involved in this placing of guards around the plane by the Hughes Tool Company?

A. I believe at least four, Mr. Hayes.

Q. When you say "at least four," do you mean your recollection is that there were more than four or do you mean that there were four?

A. I mean I recall four—

Q. You recall four?

A. (continuing)—but I am not able to testify [Tr. 2789] whether it was only four.

Q. How many airplanes were bailed to the Hughes Tool Company by Convair?

A. A total, I believe, of four.

Q. Do you know if they were the same planes that had been placed under guard?

A. I believe they were, Mr. Hayes.

Q. Do you recall when the Hughes Tool Company first placed guards around any of the 880s?

A. I believe it was during 1960. I am not sure of the exact date.

* * * * *

Q. I ask you if you recognize it as a report of Mr. Bew.

A. I recognize Bew's signature.

Q. I direct your attention to the second paragraph below the list of dates and I ask you if that refreshes [Tr. 2790] your recollection as to the date when the Hughes Tool Company personnel first roped off planes.

A. Well, apparently I didn't remember correctly. This says that as of December 18, 1959, Aircraft Nos. 6 and 8 had been roped off and secured by Hughes Tool Company personnel.

Q. It also states, does it not, that production of those two stopped on December 5, 1959?

A. Yes.

Mr. Hayes: I offer in evidence Defendants' Exhibit 122 for identification.

Mr. Sonnett: No objection.

The Special Master: Received.

* * * * *

[Tr. 2797] * * * Q. As to these planes that were roped off, what physically happened to them? Where were they? The four 880s I am talking about.

A. Well, they were roped off on the Convair grounds.

Q. Were they taken out of whatever production lines may have existed there?

A. I'm quite—well, I believe they wound up being roped off in the outside area which was a work area.

I think for a while one was inside and I believe it was finally moved outside.

* * * * *

[Tr. 2798] * * * Q. Was any work done by Convair on the four 880s that were roped off or later bailed or whatever it was? I mean during the period of roping off or bailment.

A. No, I was advised that no work was done on the planes.

Q. Do you know how long they remained roped off or bailed?

A. I'm not entirely certain, Mr. Hayes. I believe it was—no, I'm not certain.

Q. Was it a matter of months, weeks, what?

A. Oh, months and months.

Q. When you say months and months, do you mean years?

A. Well, I think it was—I am not certain when they came out of bailment. I think it was probably during 1961.

Q. Are you sure of that?

A. That's why I said probably. I'm not really sure.

Q. You are not sure as to when?

[Tr. 2799] A. I just said I don't know the exact date.

Q. You mentioned earlier this morning in response to a question I put to you with respect to change orders that there was an amendment to the contract made by the Tool Company changing the delivery dates.

Do you recall that answer?

A. Yes, sir.

Q. Were you referring then to Amendment 4 entered into on March 2, 1960?

A. I don't remember the number as I sit here, Mr. Hayes.

Q. There has now been marked in evidence as Defendants' Exhibit 68 the purchase agreement between General Dynamics and the Hughes Tool Company and the amendments thereto.

I call to your attention Amendment No. 4 to the contract which is part of that exhibit and I ask you if that is the amendment as to changes in delivery position to which you referred this morning.

A. I believe so, yes.

* * * * *

[Tr. 2802] * * * Q. When did you learn that there was an Amendment No. 4?

A. Going through papers relatively recently with counsel, this came to my attention.

Q. Going through what papers?

A. Miscellaneous papers.

Q. I am sorry?

A. Just miscellaneous papers.

Q. Can you describe them better than that, Mr. Rummel?

A. No.

Q. You cannot identify what papers you are talking about?

A. No. I was reading some data to refresh myself not knowing what areas you might inquire into and this came up.

Q. Was that the first time you ever heard of Amendment No. 4?

A. No. It recalled to me that I was advised of the change in deliveries shortly after it had been made by the Hughes Tool people.

Q. Did this going through miscellaneous papers [Tr. 2803] with counsel take place after we had offered in evidence the complete contracts with Convair?

A. It could have, Mr. Hayes. I'm not really sure of that timing, so many things have happened.

Q. Was it called to your attention that your copy of the contract had an amendment missing which the defendants had now supplied?

Mr. Sonnett: I object to the form of the question.

The fact is that TWA files did not contain a copy of this document.

Mr. Hayes: Wait a second, Mr. Sonnett. Let the witness answer.

Mr. Sonnett: Just a minute.

You are asking about conferences with counsel. I have not stopped you. The particular document here is produced by the Hughes Tool Company at Houston to counsel.

The fact is that the TWA contract file on this did not contain a copy of Amendment 4.

Mr. Hayes: If Mr. Sonnett wants to take the stand I am perfectly willing to have him take the stand. I move to strike his remarks as completely improper.

[Tr. 2804] Mr. Sonnett: The witness already responded to this subject matter and has covered it, I think, in substance.

The Special Master: What is the pending question?

(The question was read.)

The Special Master: You may answer that.

A. Yes, I believe that was the sequence.

Mr. Hayes: May I see the copy you have in front of you, Mr. Sonnett?

Mr. Sonnett: Surely.

Q. Mr. Sonnett has produced a copy here which you had before you, Mr. Rummel, of Amendment No. 4 which purports to contain the signatures of Mr. Naish on behalf of General Dynamics and Mr. Holliday on behalf of the Hughes Tool Company.

At the time you were preparing your prepared statement, did you make any inquiry to determine if a signed copy of Amendment No. 4 was in anyone's possession?

A. Well, as I've already indicated, we tried to find at the time this work was initially done all of the amendments and contract data that was available to us.

Q. Who is "we"?

A. Myself, Strohm, and I believe counsel made the same effort.

[Tr. 2805] Q. Did you call to counsel's attention that there was no Amendment No. 4 in the documents attached to your prepared statement relating to the Convair contract, that you had a recollection of having been advised of such an amendment at or about the time it took place, and did you ask counsel if counsel had a copy of such amendment?

Mr. Sonnett: I will object to this. I think it is going pretty far on the subject. It is basically immaterial.

The Special Master: See if I am correct.

I think Mr. Rummel testified he did not know about there being an Amendment No. 4. He knew about the delay in the delivery dates.

Mr. Hayes: That's right. He knew about the agreement as to the deliveries at or about the time the agreement was made. That's what his testimony is.

The Special Master: The question is—

Mr. Hayes: The question is knowing all that, and knowing that Amendment 4 was missing from this batch of documents, did he ask counsel where Amendment No. 4 could be found.

A. Well, as I said, I recall discussing this with [Tr. 2806] Strohm and reviewing the documents with counsel. I don't remember specifically putting that question to counsel.

I don't think at that time I recognized what Amendment 4 was.

Q. Did you review these contracts before they were attached to your statement, Mr. Rummel?

A. Well, of course.

Q. All of them?

A. Yes, certainly I looked at the documents.

Q. Knowing that there had been an agreement of which you had been advised of a change in the delivery dates, did you note that no such agreement was included in the amendments attached to your statement?

A. Well, as I indicated, I don't—I didn't recall what Amendment 4 was or really anything about it until it came to my attention recently.

Q. My question did not ask you about Amendment 4 as such.

Mr. Hayes: May we have the question again, please?

(The question was read.)

A. What I am trying to make clear is, and I hope this is responsive, I don't remember at the time the [Tr. 2807] attachments to my testimony were put together remembering what Amendment 4 was.

We looked for—we searched the file to be sure the data was complete.

Q. You did remember that there was some agreement changing delivery dates? Forget the number now.

A. No, I don't think I did then.

Q. You do not think you remembered it at the time?

A. No, sir, I don't.

Q. You had forgotten that you had been advised of such an agreement in 1960?

A. I don't believe I remembered at that time.

Q. The only reason you remember it now is because the complete set of documents was called to your attention, is that your testimony?

A. Well, I've already indicated how it came to my attention.

Q. Aside from the four aircraft that were roped off or bailed to Hughes Tool Company, were there any other aircraft that were pulled off the production line and parked outside by Convair in early 1960?

A. Yes, numbers of other airplanes were set aside during 1960 in a semi-completed state.

Q. What do you know with respect to that setting [Tr. 2808] aside of other airplanes?

A. Well, this occurred progressively after we were unable to move forward with final inspection and acceptance flights on those airplanes that had been completed.

Convair gradually reduced its working force, stopping certain overtime shifts first, and then stopping finally weekend work, and finally laying off personnel.

Q. That all came later. I am addressing myself to early 1960 and specifically to March 1960.

The Special Master: I thought you said the whole year 1960.

The Witness: So did I.

Mr. Hayes: I said early 1960 I thought. I meant to say early 1960. Maybe it sounded like all of 1960.

The Special Master: Yes.

Mr. Hayes: Specifically March 1960.

A. I can't give you a precise report honed that fine.

Mr. Hayes: I ask that there be marked for identification—I guess it is a TWX—I am not sure—dated March 14, 1960 from Bew to Rourke as Defendants' Exhibit 126.

(TWX from Bew to Rourke dated [Tr. 2809] March 14, 1960 marked Defendants' Exhibit 126 for identification, as of this date.)

Mr. Hayes: Referring to a copy of a wire sent to R. W. Rummel.

Q. Do you recognize it, Mr. Rummel?

A. It appears to be a wire from Bew to—I guess it is a teletype from Bew to Rourke—

Q. Copy to you.

A. —dated March 14, 1960, and it appears to advise Rourke—it provides Rourke with a copy of the wire that was sent to me.

[Tr. 2810] Mr. Hayes: I offer in evidence Exhibit 126.

Mr. Sonnett: No further objection.

The Special Master: Received.

• • • • •

Q. Was Defendants' Exhibit 126, so far as you know, the first information you had that Convair had parked planes outside and was putting few man labor hours on their construction so far as you can recall?

A. I don't believe so.

Q. You had information to that effect before that?

A. I think so.

Q. The references there to Nos. 5, 6 and 9, are those references to so-called roped-off planes, do you know?

A. Well, I believe, Mr. Hayes, that by the time the planes were moved across to Harbor Drive, they had been placed under bailment. I think it was about that time they went under bailment.

Q. Whether it was roped off or bailed, those are the planes you are referring to as the planes that had been roped off or bailed to Hughes Tool Company? It [Tr. 2811] mentions three of them at that time.

A. He talked about four.

The Special Master: Four of them.

Mr. Hayes: Pardon me. That's right. I am sorry.

Q. Four of them, that is right.

A. It actually mentions seven planes.

Q. Were 13, 14 and 15 part of the planes that had been roped off or bailed to Hughes Tool Company?

A. I don't believe they were.

Mr. Hayes: I ask that there be marked for identification as Defendants' Exhibit 127 memorandum from Mr. Rummel to Mr. Thomas dated February 8, 1960, copies to Messrs. Cocke and Leslie, subject, Convair 880 integration into TWA service.

• • • • •

Q. Will you read it please, and tell us whether you identify it as a memorandum you sent to Mr. Thomas or about the date it bears?

A. I recognize it as a letter I sent. I note [Tr. 2812] this is an unsigned copy, however.

Mr. Hayes: I offer it in evidence.

Mr. Sonnett: No objection.

The Special Master: Received.

• • • • •

Q. I direct your attention, Mr. Rummel, to the fourth page headed "Why has Convair 880 airplane program been delayed."

Do you have it before you?

A. Yes.

Q. And to the second paragraph "Setting aside the three now two aircraft has not adversely affected the Convair production line. In fact, this may have helped materially" et cetera.

Is that reference to the three now two aircraft set aside a reference to the Hughes Tool Company aircraft that at that time had been roped off?

A. I'm not sure, Mr. Hayes.

Mr. Hayes: I ask that there be marked for identification as Defendants' Exhibit 128 a communication dated April 7, 1960, signed by Mr. Rourke to Mr. Digges at Convair through Mr. Bew with copies to Messrs. Bayless and Rummel.

[Tr. 2813] • • • Q. Would you look at it, please, Mr. Rummel, and tell us if you can identify it?

A. I recognize Mr. Rourke's signature.

Mr. Hayes: I offer it in evidence.

Q. I call your attention particularly—

The Special Master: Just a moment.

Mr. Sonnett: I am trying to look at this. They are poor copies.

Mr. Hayes: Yes, they are horrible copies, Mr. Sonnett. I agree.

Mr. Sonnett: No objection.

The Special Master: Received.

• • • • •

Q. I call your attention particularly, Mr. Rummel, to the last paragraph, in Defendants' Exhibit 128.

Would you read it, please, and indicate when you have done so?

The Special Master: On page 2?

[Tr. 2814] Mr. Hayes: On page 2, yes.

A. I've read it.

Q. Was Mr. Rourke's complaint in that paragraph as to what he apparently deemed to be lack of proper communication anything that contributed to delay because of rework or changes that might have been necessitated had Convair gone ahead without prior consultation with TWA?

A. No, I don't—not delay in delivery of planes.

Q. Delay of some other kind?

A. Well, some of the—I will say part of the complaint did relate to making some improvements in the airplanes and in cases when corrective engineering couldn't be included prior to airplane delivery we would try to work out ahead of time arrangements which would permit retrofitting those items we felt were desirable after delivery.

Q. Mr. Rourke's letter is concerned with different kinds of flap settings. What is a flap setting, by the way?

A. It relates to the angular position—

Q. It relates to what?

A. The angular position of the wing flap.

Q. Referring to different degrees, and expresses [Tr. 2815] dissatisfaction of the one that Convair chose, insisting on another one.

Do you recall what happened? Were changes made as a result of the Rourke protest?

A. Well, I think what Rourke is talking about is the fact that Convair wanted us to pay for the information.

Q. Did he mention that—

A. Yes.

Q. —that you can find in Defendants' Exhibit 128?

A. Yes.

Q. Where is that?

A. First sentence. The first sentence of the last paragraph.

Q. Yes. Was the change effected?

A. I don't remember now, Mr. Hayes, what this flap thing was.

Q. You have no recollection as to what happened in this particular controversy?

A. I remember that we were finally satisfied with the take-off flap setting, but I don't recall this particular incident.

Q. Do you recall whether it was a 30° flap setting?

[Tr 2816] A. I'd be guessing now.

Q. You do not have any recollection?

A. You mean what we wound up with?

Q. That is right.

A. I don't recall now, no. I have to look at the flight manual.

Mr. Hayes: I ask that there be marked for identification Exhibit 129 a teletype, I suppose it is from J. William Bew to Trans World Airlines, 380 Madison Avenue, dated April 13, 1960, dated as received April 30, 1960.

• • • • •

Q. I ask you if you recognize it, Mr. Rummel.

A. I've read it.

Q. Do you recognize it?

A. Well, it appears to be a wire or a teletype by Bew to New York. I don't specifically recall it.

Mr. Hayes: I offer it in evidence.

Mr. Sonnett: No further objection.

The Special Master: Received.

[Tr. 2817] • • • Q. In the last sentence of Defendants' Exhibit 129 Mr. Bew states:

"No man hours being expended on parked Nos. 13, 14, 15, 18 and 19."

Those were not, were they, the Hughes Tool Company guarded planes to which he refers in the sentence above?

A. The sentence above refers to the Nos. 5, 6, 8 and 9.

Q. That is right. Those were the guarded Hughes Tool Company planes, were they not?

A. That's what this says.

Q. How about the sentence to which I directed your attention, the very last sentence?

A. Well, I don't recall 13, 14, 15, 18 and 19 being under armed guard like the others, if that's what you meant, sir.

Q. Do you know the reason why Convair was putting in no work on five airplanes?

A. Well, this is the—reflects the general situation I testified to earlier, when they gradually withdrew because of inability to make deliveries.

Q. They were not due to make any deliveries by [Tr. 2818] April of 1960, were they?

A. Well, there was a great deal of work preparatory to delivery, Mr. Hayes, that they had not been able to complete.

Q. Have you any other explanation as to why Convair had parked five planes and was putting no work in on them?

A. No.

Q. TWA did not ask them not to work on them, did it?

A. Certainly not.

Q. Was this Convair's decision to park them, so far as you know?

A. Well, Convair was manufacturing the planes and exactly under what circumstances the decision was made to park them I couldn't testify to.

Q. I am not asking you that. It was the decision of someone in Convair to park these planes, these five planes referred to by Bew.

The Specialy Master: You are asking that?

A. Is that a question?

Mr. Hayes: Yes.

The Special Master: Was it a decision?

[Tr. 2819] Mr. Hayes: Of somebody in Convair to park these five planes on which no man hours were being expended.

The Witness: I don't know.

Q. Did you take any action by way of protest against Convair not working on certain planes?

A. Well, I was in touch with Convair people in an effort to persuade them to move ahead with production, and also in touch with Hughes Tool Company personnel trying to urge them to persuade Convair to move ahead with production.

Mr. Hayes: I ask that there be marked for identification as Defendants' Exhibit 130 telegram or teletype—I don't know which it is—from Mr. Bew to Mr. Rourke dated May 27, 1960, setting forth a copy of a wire sent the same date to Mr. Rummel.

• • • • •

Q. I ask you to tell us if you recognize it, Mr. Rummel.
A. It reads like a Bew wire.

Mr. Hayes: I offer it in evidence.
[Tr. 2820] Mr. Sonnett: No further objection.
The Special Master: Received.

• • • • •

Q. Mr. Bew refers in Defendants' Exhibit 130 to parts shortages and inadequate manpower.

Were you aware of Convair suffering from parts shortages in the production of the 880?

A. To the extent that it existed, I think yes.

Q. Were you aware of Convair spending inadequate manpower in the off station final assembly?

A. Well, it was our position that they should not have pulled back and they should not have set airplanes to one side, but should have continued at full pace to honor the contract.

Q. Do you mean by that that you were aware of inadequate manpower in off station final assembly?

A. I'm aware that our views were that they should have put more men, assigned more men to this project at that time, and that they should not have pulled them off.

Q. Did an accident take place to one of the 880s delivered to Delta while it was on a training flight?

A. Yes.

[Tr. 2821] Q. Does the date May 23, 1960, accord with your recollection as the date of the accident?

A. Well, I think it was during latter May. I don't doubt that.

Q. Were people killed in that accident?

A. The crew, yes.

Q. Did that accident cause concern to TWA?

A. Yes, of course.

Q. What, if anything, did TWA or did you personally do, let us say, after you learned about the accident which resulted in the killing of a crew on a training flight?

A. Well, several things.

I had long discussions with Hughes at that time. I sent a man to observe the CAB accident investigation after calling Delta and having their concurrence that an observer would be welcome.

We reexamined in detail numbers of airplane systems, all areas of suspect and numbers of areas not in direct suspect, but which were called to our attention through having examined the other ones.

We ran one flight test, even though Mr. Hughes requested that we not do it. We did, in short, the kind of things that we usually do following an [Tr. 2822] accident.

Q. Was Convair concerned about this accident, do you recall?

A. Well, I'm sure Convair was concerned in the sense they were more than slightly interested in knowing the cause and whether or not, depending upon the cause, further development or redevelopment of the planes would be required.

Q. What was determined to be the cause?

A. Well, final determination of causes, I think, are formally issued by the CAB in accident reports in usually a very appreciable period after the accident occurs.

And frankly, exactly what that report said as to the cause I'm not certain.

The control of the plane was lost shortly after it left the ground, and I'm speaking as to the reasons the CAB ascribed to that loss of control. I don't remember specifically what they said.

Q. As a result of the investigation that you and any others in TWA or the Tool Company who may have inquired into the causes, was any conclusion reached as to what the cause was without waiting for the final official report?

[Tr. 2823] A. Mr. Hayes, we took action in a number of areas which we viewed as possible causes without waiting for it to be positively determined what the precise cause of this particular accident was. This is one of the values of accident investigations.

Q. When did you take that action, how long after the crash in the areas to which you referred?

A. Very shortly afterward.

Q. How long?

A. Well, I'd say within a matter of weeks, maybe sooner. This was done by my sending Mr. Rourke and some others to San Diego, even though at that time Hughes had requested that I not go to San Diego.

Q. Would you tell us now what action you did take? What changes did you bring about?

A. Well, about that time we pressured Convair unofficially—I say that because it was contrary to Hughes' instructions—to make changes in the hydraulic system, including, I believe, changes in the pump.

This was partly because the operating record of the training plane in this respect was very poor, although I don't recall any proof that that did contribute to the Delta accident.

I think we required a reexamination of the [Tr. 2824] flap control system with respect to the rate of actuation of the flap, if I recall it correctly, and frankly I am a little vague on some of these details now, but with one engine out, one pump out.

As I say, we ran flight tests to explore some low speed regimes with engines out. This was done at altitude.

Q. Anything else?

A. Well, other things were reviewed and discussed, including the significance, if any, of the heart condition of the pilot. I remember long discussions with Hughes along that line.

Q. You say you pressured Convair to make changes in the hydraulic system, something about pumps, and reexamination of the flap control system.

Were the changes that you pressured Convair to make made?

A. Yes, those of significance were made. The hydraulic system pump change was one we wanted whether or not, and one we had raised with Convair prior to the accident. We had wanted it irrespective of the accident.

Q. They had been resisting you previously, is that what you are saying, or isn't it?

A. It was a case that they resisted for a while, [Tr. 2825] that particular change.

The rapidity with which they could make the change as I recall it involved availability of the new pumps which were from an alternate vendor.

And what we were trying to do was to have the pumps put on the planes that we expected to receive first, and Convair had the problem of wanting to put them on the airplanes that would be delivered first.

Q. How long was it after the date of the accident that you succeeded in persuading Convair to make the changes you wanted?

A. Relatively—a few weeks, as I recall it. I don't recall the exact time. It took us a while to analyze it and a little while to prevail.

It was very difficult, of course, to work with Convair then because Hughes had asked that we stay away from Convair during this period.

Q. You have told us that three times although I never asked you.

A. Well, it relates—

Q. Be sure to get it in, Mr. Rummel.

Mr. Sonnett: You don't want to keep it secret, do you?

Mr. Hayes: No. I don't mind it at all.

* * * * *

[Tr. 2828] * * * *Examination (cont'd) by Mr. Hayes:*

Q. You referred, Mr. Rummel, to the hydraulic system, the pumps and the changes that were made.

Did the changes with respect to the hydraulic system and the installation of new or different pumps cause delay?

A. No, I don't think so. To the extent this was done at Convair, it was done during the period that the airplanes were being delayed.

The Special Master: Delayed by other causes, you mean?

The Witness: Yes, I think so. We did it, of course, on the flight training plane ourselves.

Mr. Hayes: I am sorry, I did not hear what you said.

The Witness: We made the modification ourselves on the flight training plane.

[Tr. 2829] Q. How about the Delta planes that had been delivered to Delta; did they have to be returned to Convair for the installation of the new type pump?

A. I don't believe so, Mr. Hayes. Delta did not seem nearly as interested in having the hydraulic system improved as we did.

Q. You made several references to doing things and communicating with Convair, despite Mr. Hughes' instructions.

Just what were Mr. Hughes' instructions?

A. He asked that I not go to Convair or negotiate improvements in the airplane at that time.

Q. At what time?

A. Well, this was during the time I referred to earlier, that is, the time following the Delta accident.

Q. And you disobeyed the instructions; is that it?

A. Well, I—I did not go to Convair in adherence to the instructions. I did permit some of my people to go.

Q. Did you permit them or instruct them to go?

A. Well, I don't remember it quite that specifically. They were eager to go and we were anxious to move the airplanes along. I think it could be viewed to some degree as a breach of instructions, depending on the viewpoint.

Q. You did not consider the instruction to go to [Tr. 2830] the point of prohibiting you from sending your people to Convair to negotiate whatever improvements you wanted?

A. Well, I think the impression I have now is that they thoroughly—a literal interpretation could probably be so construed. I don't remember the precise words. The idea was that we were not to work at Convair in this area, and to the extent that I had one or two men go down to undertake improvements in the hydraulic system, which was not really directly related to the—or we didn't know that it was directly related to the accident, because this, as I said earlier, was the result of our own flight test experience

and also some Delta experience, which I don't think I mentioned earlier, with hydraulic systems.

I guess at this point, looking back on it, I would say that sending those two people down at that time probably was not in agreement with what Mr. Hughes had asked me to do.

Q. What reason did Mr. Hughes give you?

A. Well, the immediate reason—by that I mean—

Q. Whether immediate or not, I want to know what reason he gave you.

Mr. Sonnett: Just give him a chance to answer and you might be enlightened.

[Tr. 2831] Mr. Hayes: Or might not. Go ahead.

A. Well, the immediate reason for my staying and Mr. Rourke's staying in Los Angeles was to meet with Lockheed. The impression I had from what Hughes said with respect to the Delta accident was that we should wait until we were sure as to what all would be required to improve the aircraft, if anything, as a result of the accident, but I am not entirely clear on exactly what was said now in that respect.

Q. Is it your recollection or not that what Mr. Hughes told you was that he did not want you to negotiate any changes with Convair until it could be surely determined everything that would be required in order to improve the airplane?

A. I think that's the impression I now have, Mr. Hayes.

Q. You do not recall precisely what he said?

A. I recall very precisely, I think, the instructions, and I am trying to be as precise as I know how with respect to any reasons he gave. He didn't always give detailed reasons for what he wanted done.

Q. From your experience with Mr. Hughes in connection with the acquisition of airplanes for use by TWA, [Tr. 2832] can you say that it was his practice not to accept airplanes until he was sure that they were safe and were built in accordance with specifications?

A. Well, that certainly was my practice.

Q. I asked you about Mr. Hughes. You told us how intimately you worked with Mr. Hughes. Was that his practice?

A. Well, it wasn't his general practice to accept airplanes.

I think—my impression from having known Mr. Hughes closely is that if he were accepting airplanes, he certainly would not accept airplanes, unless he viewed them as being safe.

Q. And built in accordance with specifications?

A. Well, again, knowing him, I am not citing any specific incident, I would say if in his view he felt there was safety involved, not specifically written in the specifications, he wouldn't hesitate that it would be done, and I wouldn't either.

Q. What did you mean when you said it was not Hughes' practice to accept airplanes?

A. Well, we accepted airplanes that were finally used by TWA, even though they were on order by the Hughes Tool Company. And additionally, we frequently accepted [Tr. 2833] airplanes that were under contract, sometimes TWA contract, sometimes Hughes Tool, which were accepted and then operated by Hughes.

What I was trying to indicate was in those cases where he may have—at one time he ordered a DC-6 for himself, quite apart from TWA, and I had nothing to do with the acceptance of it, and I don't know what he did.

Q. I am talking about planes for TWA. That is what this lawsuit is about, as you know, Mr. Rummel.

What do you mean by the statement that it was not Hughes' practice to accept airplanes?

A. I mean I don't recall Hughes personally accepting planes. He authorized others to accept planes—

Q. You mean he did not personally come down?

A. Yes.

Q. That is all you meant by the statement, that he was not personally on the field to accept the airplane?

A. He didn't personally conduct—

Q. The acceptance procedure?

A. (continuing) —the acceptance flights, nor the acceptance procedure.

Q. And that is all you meant by that statement?

A. That is what I was referring to. I thought you were talking about what Mr. Hughes did.

• • • • •

[Tr. 2838] Q. I direct your attention, Mr. Rummel, to page 1 of Defendants' Exhibit 131 for identification, to the entry with the date 7 December 1959, and I ask you if that in any way refreshes your recollection as to when the Hughes Tool Company placed ropes around three of the aircraft?

This as you can see is a TWA Kansas City document. Do you not?

A. I don't know what it is, Mr. Hayes. I don't recognize it.

Q. Do you notice the initials "TWA Kansas City" on top?

A. I see that. I don't know what it means. There is some sort of a number under it, "678."

Mr. Sonnett: What that means is we produced it from the Kansas City files of TWA.

The Witness: I see.

Q. Does that refresh your recollection as to approximately when the Hughes Tool Company placed ropes around three of the aircraft?

A. Not really. As I sit here, I have no reason to doubt this information.

Q. Doubt what information?

A. That it says December 7th.

[Tr. 2839] Q. Were those aircraft at the head of the production line?

A. Well, I don't remember now, Mr. Hayes, the sequence. I seem to have the vague impression that No. 5 was No. 1 but I'm not really positive.

Mr. Hayes: I ask that there be marked for identification as Defendants' Exhibit 132 a memorandum from Mr. Bew to Mr. Cannady signed by Mr. Bew dated August 7, 1959, Convair 880 Status Report as of that date.

(Memorandum from Mr. Bew to Mr. Cannady dated August 7, 1959, Convair 880 Status Report, marked Defendants' Exhibit 132 for identification, as of this date.)

Q. I ask you if you recognize it,—a copy by the way to Mr. Rummel—as a TWA interoffice memo.

A. I recognize Bew's signature.

Q. If you look on the second page, you will see a schedule in Defendants' Exhibit 132 for identification giving the Convair manufacturing number in the first column and the delivery sequence in the last column.

You will note, if you will, please, that aircraft No. 5 referred to in Defendants' Exhibit 131 for [Tr. 2840] identification is listed as first in delivery sequence, Aircraft No. 6 mentioned in Defendants' Exhibit 131 for identification is

listed as the second in the delivery sequence and Airplane No. 8 listed in Defendants' Exhibit 131 for identification is listed as third, fourth or third, both numbers, as delivery sequence.

Do you notice those items, Mr. Rummel?

A. I see them here, yes.

Q. Can you now testify, is your recollection refreshed by Defendants' Exhibit 132 for identification, that Aircraft Nos. 5, 6 and 8 were at the head of the production line?

A. I can certainly testify that this is what Mr. Bew reported as of August 10, 1959.

Just where the Delta planes were and how they were interspersed looking at the total production line, I'm not certain.

Q. Aren't the planes identified by customer on the second page of Defendants' Exhibit 132 for identification?

A. Oh, yes, I see that now. Yes, that's right.

Q. Did I directly state the delivery sequence?

A. I would have every confidence that Bew knew what he was talking about when he wrote this letter on [Tr. 2841] August 8th.

Q. So can you now testify with a refreshed recollection that Aircraft Nos. 5, 6 and 8 were at the head of the production line?

A. This would certainly so indicate as of August 10th.

Q. Do you know of any planes at the head of the production line that were set aside other than those set aside by Hughes Tool Company?

I mean of course by February 1960.

A. Well, as I look at this, no.

Q. After Delta received delivery of its planes, were Delta planes returned to Convair for additional work or changes?

A. I don't remember, Mr. Hayes.

Q. You have no recollection?

A. No.

Q. Were there any changes made in the planes that went to TWA as a result of any lessons learned from Delta's operation of its 880s?

A. I'm sure there were, but I don't remember what they were.

Q. Weren't you intimately associated with such changes, Mr. Rummel?

[Tr. 2842] A. At the time, Mr. Hayes, I was quite conversant with them.

Q. Those were changes that TWA considered desirable?

A. Well, they were maintenance or reliability changes essentially.

Q. They were maintenance or what?

A. Maintenance or reliability.

Q. I am sorry. I still don't get the word.

A. Reliability.

Q. Reliability?

A. Yes, changes, mostly detailed in nature.

Q. Do you have any recollection of the deliveries to TWA being delayed in 1961 because manpower was diverted to make changes in the Delta airplanes that had been returned to Convair?

A. No.

Q. You have no recollection of that at all?

You gave some testimony Monday afternoon as to the number of planes that were at least relatively completed and were tendered to the Tool Company or TWA by Convair in 1960. I think you wound up estimating seven or eight allowing one or two either way.

Whatever the number, do you recall when those [Tr. 2843] tenders took place? I will ask you if the months of August, September and October would accord with your

recollection as to when the tenders took place.

A. Well, as I said the other day, Mr. Hayes, I don't remember exactly when these things occurred.

Q. Is it your recollection that it was the latter part of 1960?

A. I wouldn't be surprised if a few of them didn't occur then, but I suspect that some occurred well before then.

Q. You are not sure? You do not have a sure or definite recollection as to that?

A. I have been trying to sit here and recall it since you raised it again but I don't have any clearer recollection now than I had when I testified to it before.

Q. Were the planes that were so tendered, do you know, in final configuration? If you know. If you do not know, just say so.

A. Well, my impression is that they were offered for ground inspection and acceptance flight by Convair in belief on their part that they were configured for delivery.

Q. Including all passengers configuration requirements?

[Tr. 2844] A. Well, setting aside the one training airplane that we had received, I am not entirely sure as I sit here now that the seats were in some of the planes. We may have agreed to an exception. I am not entirely sure all of the galleys were in but I am not positive of that.

Q. Were you personally present when any of these planes was tendered?

A. You mean present at Convair, San Diego?

Q. That is right.

A. I don't believe so.

Q. So you have no personal knowledge as to what state they were in at the time of the tender, is that correct?

A. Well, Mr. Bew kept me advised by phone, and also Mr. Rourke in this regard. And as far as did my eyes look upon the planes at that particular point in time, I don't believe so.

Q. No, you don't know.

A. Well—

Q. Do you know if they were painted in TWA colors?

A. No, because one of the questions that persisted was what color should they be painted in for the Hughes airplanes.

[Tr. 2845] Q. What is an open flight squawk?

A. Usually when it is not written off.

Q. What is a flight squawk then?

A. It is a complaint by flight crews usually that are discovered during a flight, including ground roll and so on, the entire flight, which they wish to have corrected.

Q. Is the expression open flight squawk ever used in connection with acceptance of deliveries by the customer from an aircraft manufacturer?

A. Well, it is a fairly common term, Mr. Hayes.

Q. In that context, what does it mean?

A. Well, that would mean that a member of a flight crew either, Hughes or Convair's, I'm not sure—I mean a flight squawk per se could come from any flight crew—and the fact that it would be shown as open would indicate it had not been signed off, either by inspection or by possibly another flight if the flight were indeed required.

It would mean it was open. It had not been taken care of.

Or if it had been taken care of it had not been checked and acknowledged as having been taken care of.

[Tr. 2846] Q. In the course of acceptance of planes by customers from aircraft manufacturers, is there often a review or is there from time to time a review by the customer of claims that the plane is not complete, is not according to specifications and that such claims are referred to as open flight squawks?

A. Well, open flight squawks, depending on what they are, can reflect that kind of thing.

Q. Do you recall having a meeting—first of all I do not know whether he has been identified for the record. It is easier to ask you.

Who was Mr. Loomis of Convair in 1960?

A. For a period during 1960, Mr. Loomis ran the San Diego Division of Convair.

Q. Did he succeed Mr. Naish then?

A. Oh, no, Mr. Naish was president of Convair.

The San Diego Division was one of a number of divisions that reported to Mr. Naish.

Q. Mr. Loomis was the head of the San Diego Division, is that right?

A. That's the way I recall it, yes.

Q. That was the division which was building the 880s, was it not?

A. Yes.

[Tr. 2847] Q. Had he ever been with TWA?

A. Excuse me?

Q. Had he ever been with TWA?

A. Yes.

Q. When?

A. Well, from before 1943 some time to—I can't be sure. Approximately 1948 I would guess.

Q. Was it then that he went with Convair?

A. Well, I'm pretty sure, Mr. Hayes. I can't be entirely positive, but I'm quite sure he went directly to Convair from TWA.

Q. Do you know where he is now?

A. Not definitely, no. I think he's in Los Angeles.

Q. You do not know what company affiliation he has or is he still with Convair?

A. Oh, no. He's not with Convair. I answered that way because I think I knew where he was a year or two ago. I'm not sure if he is still there or not.

Q. Did you have a meeting with Mr. Loomis in approximately August or September 1960, in which you discussed with him the state of completion of some of the tendered planes?

A. I believe there was such a meeting, perhaps at [Tr. 2848] that time.

Q. Do you recall what position you took at that time in your conversation with Mr. Loomis with respect to the state of completion of the tendered planes?

A. Well, broadly I remember trying to get Loomis to complete the planes and to complete them in accordance with our desires.

Q. You mean the tendered planes, those that had been tendered?

A. That I don't remember with that degree of definitiveness.

Q. You do not recall—

A. Well, I—

Q. Go ahead.

A. I'm sorry.

Q. Go ahead. Say what you were going to say.

You do not recall stating to Mr. Loomis in substance that the tendered planes had various and sundry open flight squawks that had not been taken care of?

A. Well, if that was the fact I probably told him but I don't remember.

Q. All you remember is meeting with him?

A. I remember there was a meeting that lasted several hours in his office that involved some table [Tr. 2849] pounding but I don't remember the details on it.

Q. You do not recall what he said to you with respect to open flight squawks on tendered planes?

A. I remember he wasn't very anxious to do much about them.

Q. You mentioned several times, Mr. Rummel, about Convair offering to lease 880s to TWA in 1960.

What is your source of knowledge there?

A. Telephone conversations with Mr. Dudley Digges as I now recall it.

[Tr. 2850] Q. Did you obtain from Mr. Digges the terms of the leases that were being proposed?

A. Well, I don't remember specific terms.

As I recall it, he was indicating—advising me of Convair's efforts to work out lease arrangements as one way to deliver airplanes.

Q. Did he ever advise you that Convair had worked out lease arrangements?

A. I think he indicated he had proposed—Convair proposed lease arrangements to the Hughes Tool representatives, Mr. Hayes.

* * * * *

[Tr. 2904] * * * Mr. Hayes: You may examine.

* * * * *

Examination by Mr. Sonnett:

Q. Mr. Rummel, do you recall a conversation with Mr. Charles Thomas after he became president of TWA relating to the scope of his authority concerning aircraft acquisition?

A. Yes, sir.

Q. How soon after he became president did that conversation occur?

A. I can't be completely exact, but in the order of a month or so, I would say.

Q. Was this your first meeting with Mr. Thomas alone?

A. It was my first meeting with him at all and I was alone.

Mr. Hayes: If I may suggest, you need not [Tr. 2905] lead your own witness. I don't want to object on the ground of leading and Mr. Sonnett well knows how to ask questions that are not leading.

By Mr. Sonnett:

Q. Was anybody else present at the meeting?

A. No, sir.

Q. Had you had a meeting with Mr. Thomas alone prior to that meeting?

A. No, sir.

Q. What did Mr. Thomas say and what did you say on the subject of authority with respect to aircraft acquisition?

Mr. Hayes: I object. First of all, it is, again, leading. But aside from that, I go back to the comment you made yesterday, Mr. Brownell, which I did not discuss at that time—I thought it was inappropriate at that time—you said that you were inclined to change your ruling, and giving as a reason that I had asked Mr. Rummel questions about communications between Mr. Thomas and himself.

It is true that I had asked such questions about the conversations between Mr. Thomas and Mr. Rummel, with respect to the operation of the airline.

Mr. Thomas was the president of the airline, [Tr. 2906] charged, as president, with the performance of all the duties that a president had, was held out to the world as president of the airline, and my questions sought to elicit only those matters that had to do with the operation of the airline, reports Mr.

Rummel made to Mr. Thomas, Mr. Thomas' comments on them.

The particular thing, I think, which was most brought out was Mr. Thomas' views as president of the airlines with respect to how many aircraft TWA would want. That was bringing out from me, from one officer what the opinions of other officers were concerning the number of aircraft that plaintiff should have at any particular time.

This present question goes far beyond the administration of the affairs of the corporation—far beyond it. Mr. Thomas is alive. There is no reason why his testimony could not be taken, if it is necessary to plaintiff's case at all.

What is sought to be brought out here is sheer hearsay by Mr. Rummel of what Mr. Thomas said, not concerning the operation of the airline at all, but concerning a supposed separate and private agreement between Mr. Thomas and a person not an officer, a person who happened to be the president [Tr. 2907] of the corporation which owned the majority of the stock of the plaintiff leading up to a supposed private and separate agreement, which was supposed to limit his authority in some fashion.

It is an attempt to destroy by hearsay the authority which Mr. Thomas legally has.

If there was such a conversation, I submit Mr. Thomas is the one to put in any conversation he had with Mr. Hughes, not Mr. Rummel, who was not a party to it.

I ask you, therefore, to continue to sustain the objection that you have already sustained.

Mr. Sonnett: I think this is proper redirect, Mr. Brownell.

The witness has been asked on cross to narrate a series of conversations with Mr. Thomas relating to TWA and to equipment procured for it, and the like.

This is a conversation between the witness and Mr. Thomas, the first one after he became president, with respect to the scope of his authority to administer TWA.

I submit it is entirely proper redirect.

The Special Master: Reserving, of course, [Tr. 2908] any opinion as to the weight of evidence, I will allow the answer.

By Mr. Sonnett:

Q. The question was what did Mr. Thomas say and what did you say on the subject of aircraft procurement.

A. Well, Mr. Thomas said that he understood that Howard and I would continue to handle the equipment matters for the airline, that he would be operating head of the airline.

I indicated to Mr. Thomas that Mr. Hughes had already said the same thing to me, and that I certainly would do my utmost to keep him advised of developments with which I thought he, as president, had to be kept advised.

Q. I show you Defendants' Exhibit 62, Mr. Rummel, and I invite your attention to the page marked II-2 under the heading—

Mr. Hayes: Which page is that?

Mr. Sonnett: II-2.

Q. (continuing)—"Equipment." Will you examine that page, Mr. Rummel, please?

A. Yes, sir. I have.

Q. Does that page correctly set forth your views at the time with respect to the subject matter covered?

[Tr. 2909] A. Yes, sir.

Q. And that was at or about March 1, 1961, as I recall it.

A. The report was issued March 1, 1961, yes, sir.

Q. Have you at any time since that date had any reason to or have you, in fact, changed your views, as expressed in Defendants' Exhibit 62?

A. No, I think as time passed they became all the stronger.

Q. In what respect?

A. Well, for example, after this report was written, availability of the 990s became poorer and the price of the 990s became higher than reported in this report.

Mr. Sonnett: Will you mark, please, as the next TWA exhibit a document entitled "Purchase Agreement between General Dynamics Corporation (Convair Division) and Hughes Tool Company Relating to Manufacture of Convair 600 Aircraft," dated November 10, 1960, indicating on its face that it was produced from the files of the Hughes Tool Company at Houston.

(Document entitled "Purchase Agreement between General Dynamics Corporation (Convair Division) and Hughes Tool Company Relating to Manufacture of Convair 600 Aircraft," dated November 10, 1960, marked TWA Exhibit 12 for identification as of this date.)

[Tr. 2910] Mr. Sonnett: I offer it in evidence.

Mr. Hayes: No objection.

The Special Master: Received.

(TWA Exhibit 12 for identification received in evidence as of this date.)

By Mr. Sonnett:

Q. I show you TWA Exhibit 12, Mr. Rummel, and ask you whether in or about November of 1960, it came to your attention that an agreement had been made between General Dynamics and the Tool Company relating to the acquisition of the planes then designated Convair 600.

A. Well, I don't recall ever having seen this, although I believe Raymond Holliday indicated that discussions were underway for the possible acquisition of some 600s.

Q. Did you have any connection in the negotiation between General Dynamics and the Tool Company in respect of this agreement?

A. No, sir, none.

Q. Why not?

Mr. Hayes: I object to that.

Q. Did you have any conversation with Mr. Howard Hughes at any time as to whether or not you were to participate in any respect in negotiations relating to the [Tr. 2911] so-called Convair 600?

A. Yes.

Q. What did Mr. Hughes say?

Mr. Hayes: Can you fix a time and place?

Q. Will you fix the time and place, as best you can?

A. There were a number of telephone conversations. I believe—I can't fix it exactly, no, sir—but some time during 1960, I think around mid-year and possibly before, I was specifically instructed not to have anything at all to do with the Convair 990s or any activities relating to the 990s, and that I should advise all my people similarly not to become involved in 900s.

Q. Did you so advise your people?

A. Yes, sir, I did.

Q. Who were your people, as you meant to convey in that answer?

A. Mr. Bew, Mr. Rourke.

Q. Will you briefly describe Mr. Bew's duties in 1960?

Mr. Hayes: That is strictly repetition. It has all been covered.

Mr. Sonnett: I asked him to do it briefly.

Mr. Hayes: Even the briefly. There was [Tr. 2912] objection after objection on cross that the matter had been covered. This has been covered in detail.

The Special Master: Have you anything to add to what you previously testified to about Mr. Bew's duties in this period?

The Witness: So much has been said, I don't remember exactly what I said earlier, Mr. Brownell.

The Special Master: Off the record.

(Discussion off the record.)

The Special Master: I will allow the question.

A. Mr. Bew was the Hughes plant representative whose job it was to administer, as plant representative, those facets of the contracts which were under his surveillance at the facility.

This included conformance reviews, specification activities, mockup reviews. It included keeping track and reporting on production progress, delivery expectancy, arranging for acceptances, that is, flight crews conducting the tests when appropriate, and finally his assigned duty was to delivery of the aircraft for—that is, pursuant to contracts.

Q. With respect to TWA Exhibit 12, Article I, Sub- [Tr. 2913] paragraph (a), Mr. Rummel, you note there a

reference to six Convair 600 aircraft to be manufactured by Convair in accordance with the terms of this agreement, do you not?

A. Yes, sir.

Q. Was the designation of that aircraft subsequently changed to Convair 990?

A. I don't know if it was in the contractual sense, but the 990s were 600s.

[Tr. 2914] Mr. Hayes: I will stipulate that these were 990s if that is what you are trying to prove.

Mr. Sonnett: Thank you.

Q. I invite—

Mr. Hayes: You would hurry up this thing a great deal if you only tell me what you want to prove. I will stipulate most of it.

Mr. Sonnett: I doubt it.

Mr. Hayes: I am sure you do.

Q. I invite your attention, Mr. Rummel, to Article 2, Subparagraph (a) of the same exhibit entitled "Delivery Schedule."

That indicates, does it not, that six 990s were to be delivered according to this contract between July and October 1961?

Mr. Hayes: So stipulated.

A. Yes.

Mr. Hayes: It speaks for itself.

Q. Did you have any information from any representative of the Tool Company as to why six 990s were ordered in November, 1960 by the Tool Company?

A. Yes.

Q. What was the information and from whom did you receive it?

[Tr. 2915] Mr. Hayes: Fix a time and place, please.

A. Well, the information was obtained in New York, I believe, from the combination of Ray Holliday and Ray Cook. I had similar information from Convair as to the circumstances which caused the order to be placed at that time.

And my understanding—

Mr. Hayes: Before Mr. Rummel proceeds, I would ask that he be directed to confine his answer to whatever Mr. Holliday and Mr. Cook said to him. What representatives of Convair may have said to him is pure hearsay.

Q. Will you do that, Mr. Rummel, state as best you can the substance of what Mr. Holliday or Mr. Cook said to you on this subject?

The Special Master: And when it took place.

A. Well, during—it was in the fall of 1960, and the substance was that that six 880s were to be released by Hughes and made ready for Northeast Airlines, but that Convair would not agree to merely releasing those planes on the basis that if they did so their total orders or expectancy of orders, the level of business they would anticipate would be less by six airplanes.

They viewed that if Hughes merely released six [Tr. 2916] planes to Northeast, that those planes would take the place of six, Convair could reasonably build and sell to Northeast.

So, I was advised Convair's position was that they would agree to the substitution, if you like, of six, but what they were really saying as I understood it, they would agree to make the six available to Northeast providing the total number of planes then on order by Hughes would remain on order; that they would certainly agree to the 990s, and I think I had the impression they were referred to as 990s.

Mr. Sonnett: Will you mark please, for identification, as TWA 13 the document I hand you of five pages headed "Raymond Holliday."

(Document consisting of five pages headed "Raymond Holliday" marked TWA Exhibit 13 for identification, as of this date.)

Q. Mr. Rummel, was there an office of the Hughes Tool Company maintained on Romaine Street or Boulevard?

A. There was a Hughes Tool Company office at 7000 Romaine Street in Hollywood, California.

Q. Were you ever in that office?

A. Yes, sir.

Q. Can you describe briefly the activities carried [Tr. 2917] on in that office and who was in charge of it?

A. Well, I can describe that part with which I was familiar.

Q. Yes, please do.

A. Noah Dietrich had an office in that facility and I believe I testified earlier as to his position at that time. He was executive vice-president, I believe, or some such title. He handled the financial affairs for Hughes.

For a period of time, a Mr. Koontz and Vic Leslie were in that office, and additionally this seemed to be the communications center for Hughes' activities.

This seemed to be headed by Bill Gay and numbers of others. The others would record or take down messages and relay messages. They would arrange for phone calls for Hughes. And, however, Gay was more than this. Gay appeared to be sort of an assistant, personal assistant, if you like, to Hughes in many areas.

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[Tr. 2948] • • • Q. Mr. Rummel, is it the fact that at some point during the year 1960, Convair slowed down its production line for 880 aircraft.

A. Yes.

Q. Why was that?

A. Well, my understanding at the time was that they were unable to continue to carry the burden of building airplanes and not receiving—or not effecting [Tr. 2949] delivery and receiving payment for them.

Q. Referring to the procedures for acceptance of planes about which you testified on cross examination, particularly relating to the 880s, did you at any time give any instructions to Mr. Bew concerning the practice he was to follow relating to acceptance procedures?

A. Yes, I did.

Q. What were those instructions?

A. The instructions were that he was not to proceed with acceptance procedures or to conduct the acceptance flights without first receiving personal clearance from me or from Mr. Hughes.

Q. Did he conduct any acceptance procedures on Convair 880's during the year 1960?

A. No final acceptance procedures.

Q. I think you have testified that TWA got one 880 during the year 1960 as a training plane; is that correct?

A. I'm sorry, yes, that's correct. We did take—

Q. Other than the training plane?

A. Other than the training plane. That slipped my mind.

Q. Why did you give Mr. Bew those instructions?

[Tr. 2950] Mr. Hayes: I object to why.

Q. Did you have a conversation with Mr. Howard Hughes on that subject?

A. Yes, sir.

Q. What did he say and what did you say and place the time as nearly as you can?

A. Well, there were several conversations with Hughes. I believe the first was along this line—it was fairly early in 1960 to mid-year—I can't say the exact time.

No, there was earlier—there was an earlier case. That was during the fall of 1959, I believe the first—around that time of the first discussion along this line.

And the instructions from Hughes were that we were not to accept 880s without specific clearance from him, and that I should so instruct Mr. Bew or an others involved in that operation.

Q. Aside from the training plane, did you receive any clearance from Mr. Hughes relating to 880s during 1960?

A. No.

Mr. Sonnett: You may inquire.

• • • • •

[Tr. 2986] * * * Q. You testified this morning that beginning some time in the fall of 1959, Mr. Hughes told you not to accept any deliveries from Convair without clearance from him, and that similar statements or instructions were received by you from him into 1960; do you recall that?

A. Yes.

Q. Did Mr. Hughes give you any reason at that time?

A. I don't recall any specific reasons.

Q. Did he mention the difficulties in connection with financing?

A. No, I don't recall that.

In fact, at one time he told me to not get involved in financing.

Q. No, I am not asking you if he asked you to get involved in financing. I am asking if he mentioned [Tr. 2987] difficulties of financing as a reason for not taking deliveries.

A. I don't recall that, Mr. Hayes.

Q. You have no recollection on the subject? At any time when he instructed you not to accept deliveries?

A. I don't recall that.

Q. Is it your testimony that he gave you no reason whatsoever?

A. Well, I don't recall he explained his position. He just asked that we not accept the planes as I have explained it.

Q. When did ou first become a member of the finance committee of TWA, Mr. Rummel?

A. To try to clarify my answer, I probably ought to say that there were several committees from time to time that carried that name.

The finance committee I was a member of was established, I believe—I am not sure, Mr. Hayes—I think some time

during 1961. At least it was after Mr. Tillinghast became president.

And the members were TWA management people.

Q. Can you identify them?

A. Well, it varied somewhat from time to time.

I believe it was Mr. Leslie, I think Mr. Cocke, [Tr. 2983] myself, Floyd Hall, I believe.

Q. Or was it Mr. Tillinghast?

A. Floyd Hall, I believe.

I don't remember if Mr. Tillinghast has—I don't think he was a member.

Q. What was the function of the committee?

A. The function of the committee was to review appropriation requests and to recommend to the president either approval or disapproval to those items that were presented to the committee under the rules.

Q. Appropriations for what?

A. Capital.

Q. Capital appropriations?

A. Yes.

Q. How did you become a member of the finance committee?

A. How did I become a member?

Q. How did it happen? Yes.

A. Well, my function on the committee was primarily to express views—in addition to whatever business judgment I might want to express, it was to express views on the compatibility or non-compatability of the request with our long-range plans.

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[Tr. 2992] * * * Q. You testified on redirect that when Mr. Burgess became president, Mr. Hughes told you or at least Mr. Burgess told you, I guess your testimony was—no, Mr. Hughes told you—I am sorry—in substance that Mr. Hughes and you would continue to handle equipment matters, and that Mr. Burgess would operate the airline.

Can you remember the words that were used by Mr. Hughes?

A. Well, I can't remember the precise words, [Tr. 2993] Mr. Hayes, no.

Q. What was meant to you by Messrs. Hughes and Rummel continuing to handle equipment matters?

What did that mean to you?

A. It meant that we would continue to operate between us as we had heretofore with respect to negotiations with manufacturers, exploration of equipment possibilities and the like.

Q. How many negotiations were there with manufacturers after Mr. Burgess became president?

A. Well, during the time he was president, we had—we conducted negotiations of sorts with DeHavilland, with Bristol, with Vickers.

Q. You said negotiations of sorts.

What do you mean?

A. Well, negotiations of both an exploratory nature and those which were heading toward definitization of contracts. I meant negotiations generally.

Q. Which, if any, of those negotiations headed toward anything like a definitive contract?

A. Vickers, Bristol and while DeHavilland, as I recall it, had submitted contract forms we didn't, to my best recollection now, attempt to negotiate those forms.

[Tr. 2994] Q. Did the Vickers deal get to the point where any informal commitment was made by anybody?

A. Yes, it went beyond that.

Q. All right, tell us about it.

A. Hughes verbally agreed to buy fifteen Viscounts.

Q. For TWA?

A. Yes.

Q. What happened?

A. They weren't procured, that is, final papers were not signed.

Q. Who decided not to procure them?

A. I believe TWA did.

Q. Who in TWA? Was it Mr. Burgess or Mr. Leslie?

A. Well, there had been a downturn in business, and I believe Hughes had made it clear that this particular burden would have to be carried by TWA.

And I believe Leslie took the position that with the downturn in business TWA was unable to move ahead with the deal.

Q. Did Mr. Burgess concur in that opinion?

A. I don't remember Mr. Burgess resisting the opinion.

Q. This was despite whatever kind of informal commitment Mr. Hughes had made to Sir George Edwards, [Tr. 2995] was it not?

A. This was after that you say?

Q. No. The decision not to acquire was despite whatever informal commitment had been made by Mr. Hughes to Sir George Edwards of Vickers?

A. That is my recollection, yes.

Q. Who reported the TWA decision to Mr. Hughes?

A. I did.

Q. You testified on your redirect to Mr. Tenney that you reported Mr. Hughes' equipment decisions to TWA.

This was one instance where you reported TWA's equipment decision to Mr. Hughes, was it not?

A. Well, this was certainly all covered at length in my deposition.

What I advised Mr. Hughes on was that despite the fact before making a commitment as I understood it we obtained a view from TWA that TWA was in the process of reappraisal and it might change its mind.

In the meantime, I continued to negotiate with Vickers to reduce the price and other factors to make the deal still possible hopefully, but in the end had to advise Mr. Hughes that TWA did not feel it was able to proceed.

Q. Mr. Hughes was upset by that advice when he [Tr. 2996] received it from you, was he not?

A. Yes. Well, I certainly—this was by telephone. I think the wires were pretty clear in that respect.

Q. He mentioned to you that he would not change his commitment to Sir George Edwards because it was worth more to him and his reputation in Europe to stick with his word than to back out?

A. That's the way I remember it.

Q. About a year later he told you that he had talked to Sir George Edwards who was satisfied that he had discharged all his responsibilities; is that right?

A. Yes, sir.

Well, I say I think it is a year. I'm not sure of that.

Q. Do you know in what fashion Mr. Hughes satisfied his commitment to Sir George Edwards?

A. Well, I can only give you my impression of what he did.

Q. Fire away.

A. Well, my impression is that he made efforts to place the fifteen airplanes, and at one point he had Leonard

Schwartz make similar efforts. And I believe [Tr. 2997] at one point in time he had some others not connected with either TWA or Hughes Tool making similar efforts.

The success that he had in this respect I'm not sure of, Mr. Hayes.

Q. Did you ever learn that the particular Viscounts were sold by the Vickers Company to Northeast?

A. Well, I knew eventually that—I believe the majority wound up there. I don't know how many.

Q. That was the way that Mr. Hughes discharged his commitment to Sir George Edwards?

A. Well, I don't recall the timing that clearly, Mr. Hayes.

The information merely was that Sir George indicated satisfaction and that Hughes had fulfilled any and all obligations that he may have had morally or otherwise on this point.

Mr. Hayes: May we take a brief recess?
The Special Master: All right.
(Short recess taken.)
[Tr. 2998] Mr. Hayes: May we resume?
The Special Master: Proceed.

By Mr. Hayes:

Q. In this conversation you had with Mr. Hughes concerning Mr. Burgess' authority—and I frankly have forgotten whether you gave a similar conversation with Mr. Burgess—were you suggesting that Mr. Burgess was not to concern himself at all with the subject of what planes TWA should have?

A. I was only reporting the conversation.

Q. Did it mean to you that Mr. Burgess had been instructed by Mr. Hughes to keep his mouth shut on all such matters as to the possibility of acquiring equipment?

A. It wan't discussed that way, Mr. Hayes. Just as I described it.

Q. Or did it mean to you that so far as any prospective acquisitions were concerned, evaluations and writing of specifications would continue to be conducted by Mr. Hughes and you so that the president would be relieved of that burden?

A. No, what it meant to me was that Hughes would continue to handle equipment as he always—had been doing for the company.

[Tr. 2999] Q. The way he had been doing it was negotiating himself with you as a technical assistant making evaluations, writing specifications, et cetera? Isn't that the way he had been doing it?

A. Well, I was a little bit more than just a technical assistant.

Q. What more were you than that?

A. Well, as I have already indicated, I was involved in negotiating numbers of the aspects of contracts and other facets beyond the specifications, Mr. Hayes. That's what I am talking about.

Q. But that is all you had been talking about, participating in negotiations looking toward possible acquisitions and assisting in the writing of contracts when decisions had been made to acquire?

Mr. Sonnett: I think that is argumentative in light of the prior testimony.

Mr. Hayes: This is very important in the light of redirect.

The Special Master: Sustained.

Q. Do you know to what extent, if at all, Mr. Burgess, in fact, consulted with Mr. Hughes with respect to the equipment TWA should or should not have? Do you know?

[Tr. 3000] A. No, I don't.

Q. When you state that it was Mr. Burgess' job to be the operating head of the airline, just what did you mean?

A. Well, my impression of what Hughes meant was that Burgess would run the airline and Hughes would run the equipment end of the business.

Q. Did running the airline in your mind entail a responsibility for having the necessary equipment to run it properly?

A. Well, I think it was pretty clear that he could only operate the equipment that was available to him to operate.

Q. Did you understand by running the airline, he was to simply sit back and take whatever equipment was there and remain silent as to any suggestion he might have with respect to changes of equipment? Is that what you understood by operating the airline?

A. I have explained to the best of my ability what I understood, Mr. Hayes.

Q. You can add nothing further?

A. No, sir, I don't know what to add.

Q. You testified this morning, and also on June 23rd I think it was, on June 23rd to a similar conversation with [Tr. 3001] Mr. Hughes concerning Mr. Thomas, and this morning to a conversation with Mr. Thomas along the same line.

So as to save time, if I asked you the same question concerning the meaning of the conversation you had with Mr. Hughes respecting Mr. Thomas or with Mr. Thomas, as I did with respect to the meaning of the conversation you

had with Mr. Hughes concerning Mr. Burgess, would your answers be the same?

The Witness: Could that be read?

The Special Master: Yes.

(The question was read.)

The Witness: Would you please read the last part again?

Mr. Hayes: It is a little involved.

The Special Master: Let's start over again. Do you want to rephrase it?

Mr. Hayes: Maybe I will do it this way:

By Mr. Hayes:

Q. You recall that I just asked you a series of questions with respect to your testimony as to the meaning of your conversation with Mr. Hughes concerning the division of authority between Mr. Burgess, as the operating head of the airline, and Hughes with the able assistance of Mr. Rummel handling equipment.

[Tr. 3002] Do you recall that series of questions I asked you relating to Mr. Burgess?

A. I don't remember saying about how able I was.

Q. No, that was gratuitous on my part.

A. Yes, I remember.

Mr. Sonnett: Very well deserved. Thank you.

Q. If I asked you exactly the same questions concerning your understanding of your conversations with Mr. Thomas and with Mr. Hughes respecting the relative jurisdictions of running the airline as against acquisition of equipment, would your answers be the same as they were concerning Mr. Burgess?

A. Well, with respect to the gist of what Hughes was saying, broadly, yes.

I was struck by the similarity of the Thomas comment to my conversation with Hughes at the time.

Q. What acquisitions did TWA contemplate during the period that Thomas was president?

A. You mean on his own?

Q. Did TWA contemplate, while Thomas was president, a period of two years, from 1958 to 1960.

The Special Master: I think the witness is a little unclear as to whether you—

[Tr. 3003] Mr. Hayes: I will try it again.

By Mr. Hayes:

Q. Did TWA engage in any negotiations looking toward the acquisition of any aircraft during the period Mr. Thomas was president?

The Special Master: This is without reference as to whether title would have gone to Hughes or TWA?

Mr. Hayes: Yes.

A. I don't recall any independent TWA negotiations.

Q. Do you recall any that you participated in with Toolco looking toward acquisition of aircraft for TWA?

A. No.

Q. Do you know of any negotiations with Lockheed looking toward the acquisition of Electras while Mr. Thomas was president?

A. No.

Q. You participated in none?

A. I recall Lockheed making efforts from time to time, but I don't recall undertaking negotiations with them.

Q. Do you recall that anybody else in TWA conducted any negotiations with Lockheed looking toward the acquisition of Electras while Mr. Thomas was president?

A. No. Our people in Kansas City were trying to keep [Tr. 3004] up to date, as best they could, on the Electra, but I certainly wouldn't call it negotiations for airplanes.

Q. Do you recall Mr. Leslie negotiating with Lockheed in connection with the acquisitions of Electras?

A. I do not.

Q. And relating it also to the financing of the acquisition by Lockheed?

A. No, sir.

Q. You never heard of that?

A. I don't recall that.

Q. Do you recall Mr. Thomas' position concerning Electras?

A. No.

Q. Did you ever hear that Mr. Thomas was opposed to the acquisition of Electras?

A. Well, if he was, Mr. Hayes, I don't recall it.

Q. What knowledge do you have—and I mean knowledge, not impressions, Mr. Rummel—as to the frequency of direct contract between Mr. Hughes and Mr. Thomas while Mr. Thomas was president?

A. Well, Mr. Thomas indicated on a few occasions he either had been talking to or expected to talk to Hughes. I didn't—I don't remember ever seeing him talk to him.

Q. You don't remember him what?

[Tr. 3005] A. I don't remember seeing him talk to him.

Q. Of course Mr. Thomas was under no duty to report to you his conversations with Mr. Hughes, was he?

A. Well, I would certainly have thought he would have mentioned it to me, had it involved equipment, but other than that, no.

Q. But he never mentioned the Electras to you?

A. Well, Mr. Hayes, I certainly can't sit here and say that there the word "Electras" didn't pass between us.

Q. No, no. I mean he never mentioned to you that he was opposed to the acquisition of Electras?

A. I don't recall that.

Q. You testified on your redirect that in the 1954-60 period no one in TWA, other than you, was charged with the overall responsibility for technical evaluation of aircraft being considered and for making recommendations of the type and numbers TWA needed.

Do you recall that testimony?

A. Yes.

Q. And that it was incumbent on you to reflect the total company view with respect to acquisitions?

A. Yes, sir.

Q. What do you mean by overall responsibility or [Tr. 3006] what did you mean in giving that answer?

A. I don't know how to add to what I have said along the lines of what my responsibilities were.

Q. I quoted what you said. Specifically, did you mean that all other departments of TWA were under an obligation to make their recommendations concerning equipment to you?

The Special Master: You mean acquisition equipment?

Mr. Hayes: Yes. Didn't I say "acquisition"?

The Special Master: No.

Mr. Hayes: I am sorry.

A. I would so view it, yes.

Q. That the Sales Department was under an obligation under the TWA arrangement to advise you of any suggestion it had with respect to prospective acquisitions; is that right?

A. Well, it was my duty before making recommendations to be certain that they were broadly based and in-

cluded the views of all those who should have views in this area. And similarly, my position was well enough known so that others who might have views on equipment would have made them known to me.

Q. Are you suggesting by the answer that you gave on [Tr. 3007] redirect that others in TWA were barred from making recommendations directly to the president or to the board of directors?

A. I don't think anybody had—wore muzzles, Mr. Hayes. It was my job to bring these various views together, if possible, and to come up with a position that I was willing to recommend.

[Tr. 3008] Q. Whether they wore muzzles or only mufflers, was any officer of TWA barred from making his recommendations to top management except through you?

A. No, we didn't operate that way.

Q. Some of these top officers were members of the board of directors, were they not?

A. Yes, certainly.

Q. By your answer about you being the only one who had the overall responsibility for recommendations, you were not suggesting, were you, that there was any obligation on top management to follow your recommendations?

A. Well, if you mean did I think that the mere fact that I made a recommendation automatically—was automatically approved without question, certainly not.

Q. Your task ended when you made your recommendations, did it not, until there was action taken by somebody else pursuant to your recommendation?

A. Well, I'm not sure I understand what you are getting at.

My task certainly didn't end by presenting a letter of recommendation or a report of recommendation. I can assure you that I made every effort to have the recommen-

dations adopted and followed, whether it was to [Tr. 3009] Hughes or whoever it was.

Q. And if it was not followed your responsibility ended, did it not?

A. Well, I on occasion attempted to convert people to my views, even though I knew inevitably they might not appear to adopt them. Like for example the switch from 30 to 20 Convairs.

Q. After all your efforts if your recommendation was not adopted your responsibility had ended, had it not?

A. I guess if the recommendations as such weren't followed, it was my obligation to come up with a new recommendation.

Q. And as to the new recommendation, you might or might not go through the same process of having it not adopted, is that correct?

A. Well, it is certainly always a possibility that something might not be adopted.

Q. Not every single one of your recommendations was invariably adopted, is that true, Mr. Rummel?

A. No, I'm just like everybody else in that respect.

Q. On redirect you answered in response to some questions of Mr. Tenney if you gave an answer which [Tr. 3010] amended an answer you had given to a question I put to you on cross.

The question I put to you on cross and it is quoted at page 1546 of the transcript was:

> "Do you know of any plane in the development of which Mr. Hughes participated and which at the time of such participation was intended to be used by an airline other than TWA?

Your answer was quoted by Mr. Tenney as:

"No, I do not think of any instances that I can certainly state as a fact, if that is what he had in mind."

You proceeded to explain that in answering my question you had in mind only aircraft destined specifically for airlines other than TWA.

Do you recall that?

A. Yes, sir.

Q. Then Mr. Tenney beginning at page 1547 asked you:

"Q. Looking at Mr. Hayes' question on page 608 which perhaps can be construed as including and I so construed it as including aircraft intended to be used both by TWA and by other airlines, what would your answer be?

[Tr. 3011] "A. Well, the development of the Constellation in which Mr. Hughes participated was certainly intended to be used by airlines other than TWA all along. When we were working on the Convair series that led to the 880, each of those was intended to be sold and used by airlines in addition to TWA. The Avro that I mentioned, supersonic Avro was another such case.

"The Florida project that I mentioned involved to my best understanding planes not only for TWA but for other airlines as well, and I believe in addition to the government. I might add that I don't know of any manufacturer that could have undertaken a major plane development program for one airline or really any one airline that could afford to pay for such a thing."

You have already told us in some detail in the course of your cross or part of your depositions marked in evidence

concerning the Constellations, the Convairs, the 880, the Avro, Supersonic Avro, but you have not told us anything about the plane in the development of which Mr. Hughes participated that was involved in the Florida project.

That is the only project that you mentioned [Tr. 3012] which involved planes not only for TWA and other airlines but also for the government.

What was that airplane that was involved in the Florida project?

A. The airplane, Mr. Hayes, was never fully defined.

The Special Master: Have you finished your answer?

The Witness: Yes, I think so.

Q. Did the Florida project have a code name?

A. It might have had, Mr. Hayes. I don't recall it at the moment.

Q. Does the word "Greenland" click with your recollection, Project Greenland?

A. Yes, I believe it—I believe that was the name suggested by Ray Cook.

Q. Describe the Florida project or Project Greenland, please. Give us all you know about it, Mr. Rummel.

A. During conversations with Mr. Hughes, he indicated interest in manufacturing planes for TWA and others as part of a broad Florida project he then had under way, and the intention was to develop passenger and cargo planes which would be not only of interest to TWA but to other airlines and hopefully to the govern- [Tr. 3013] ment as well.

He instructed that an application be drawn for submission to the CAB to permit Hughes Tool or Hughes, I don't know now that it was Hughes Tool specifically, to manu-

facture planes in certain numbers for TWA's use and to offer them for sale to others.

However, he wanted the broadest possible coverage in the application so as to permit it to apply to numbers of let's say, discrete designs, such as might be evolved under the broad authority.

I remember that one of the problems was to know exactly how to write a description to the CAB so that we would know—so that they would know what he had in mind and still have it broad enough to permit the latitude that Hughes seemed to want.

Mr. Cook participated in much of this activity along with Mr. Spater. An application was filed, and as far as I've ever known it wasn't acted upon by the CAB.

Q. When did this take place?

A. I might say I also met with General Eaker in the Los Angeles area on the same project. That would help me fix the time.

Q. Was it while you were negotiating the Convair [Tr. 3014] 880 contract?

A. I'm trying to remember the exact time—

Q. That is the time you fixed on your deposition, Mr. Rummel.

A. —if you will give me just a second. It could have been that time.

Q. That is the time you fixed in your deposition.

A. I see.

Q. Was this plane ever developed?

A. No. Not to my knowledge.

Q. Did it ever get beyond an intention so far as you know?

Mr. Sonnett: On whose part?

Mr. Hayes: On anybody's part. It relates specifically to his redirect. He has testified about it as a plane in the development of which Mr. Hughes was active.

The Special Master: Was the application to the CAB made in the name of Hughes Tool?

Mr. Sonnett: No.

Mr. Hayes: I believe it was in the name of TWA if I remember rightly.

Mr. Sonnett: The application was dated May 10, 1956, and as was customary when Hughes con- [Tr. 3015] trolled the airlines the actual applications were made by the airlines, since it was the carrier.

Mr. Hayes: Under the act, the Hughes Tool Company could not engage in an additional phase of aeronautics such as building airplanes without permission of the CAB. That is the reason the application was finally—was it withdrawn or die? I forgot. I can't remember.

Mr. Sonnett: What happened was that the CAB raised antitrust questions and suggested that they wanted to investigate it and the application was ultimately withdrawn, I think, about a year later.

Mr. Hayes: I think that is an inaccurate statement but I am not going to argue it now.

Mr. Sonnett: It is my understanding—

Mr. Hayes: It is not my understanding.

Mr. Sonnett: —of what the CAB records would show.

Mr. Hayes: Yes, the CAB records will show.

Q. But this project never got off the ground, did it?

A. No, I don't think so.

[Tr. 3016] Q. This was a blast in the Los Angeles newspapers about it at or about the same time, was there not?

A. Well, yes, there were headlines—I don't remember what they said—concerning the establishment of an aircraft factory by Hughes in Florida rather than Los Angeles.

The Special Master: What are we leading up to here now, Mr. Hayes?

Mr. Hayes: Just pinning down this business of an airplane in the development of which Mr. Hughes was active. As far as I can find up to now there was no such airplane.

The Witness: I don't think the metal was cut on it, if I can save time.

Q. You don't think what?

A. Metal was cut on the plane.

Q. How many plans were made? How many designs did you see? How many blueprints, if any?

Mr. Sonnett: The only thing we didn't get into was the plywood flying boat.

Q. Can you answer the question?

A. I didn't see any specific plans. These were primarily discussions with Hughes.

[Tr. 3016A] Q. Were any blueprints ever prepared that you know of?

A. Well, I didn't see the blueprints if there were any.

[Tr. 3017] Q. So far as you know, did the Hughes Tool Company ever manufacture jet aircraft for use by airlines?

Mr. Sonnett: Objected to as beyond the scope of the issues before the Special Master, wholly beyond the scope of the direct examination and beyond the scope of any redirect.

Mr. Hayes: I understand the reason for the objection all right.

The Special Master: Overruled.

A. Well, I don't recall Hughes Tool manufacturing airplanes for airline use.

Q. Do you recall Hughes Tool Company ever engaging in the sale of jet aircraft to airlines—

Mr. Sonnett: Same objection.

Mr. Hayes: Wait a second.

Q. —other than to TWA prior to 1961?

Mr. Sonnett: Same objection. Wholly beyond the scope of the direct, the redirect, unrelated in either respect to either of those.

It is an attempt to try to get back into trying the case on the merits. We have been through all this before.

There was a motion, as you may recall, [Tr. 3018] that was made on this that Judge Metzner denied before your appointment—

Mr. Hayes: He did not deny on the merits.

Mr. Sonnett: —as Special Master where they sought in effect to get a summary judgment on the motion. It was an opinion.

This is simply an attempt to try to get back in to try the case on the merits. It has nothing to do with the testimony.

Mr. Hayes: It certainly has. This is a proposed finding that was not made by Mr. Rankin.

Mr. Sonnett: We understand one another's views on that. It has nothing to do with this witness' testimony.

The Special Master: I will allow the answer.

The Witness: Could the question be read?

The Special Master: Yes, will you read the question back?

(The question was read.)

A. Well, Hughes—I'm not sure I can answer the question categorically because I'm not sure I understand [Tr. 3019] it.

I testified earlier that Hughes had exerted efforts and caused efforts to be exerted to place the Viscounts.

I know he occasionally had airplanes on speculation which he would sell to airlines from the piston area onward at times, and the jets were leased, I think, through his actions to Northeast.

Q. Is that your whole answer?

A. And as I—and additionally Convair—I think this is in the record—approached me occasionally to say to Hughes to release delivery positions so they could sell to other airlines.

Now, that—I think there is a degree, I think, of what you are getting at in that. I'm not sure that the question is subject to at least my own ability to answer it any more thoroughly than I already have in the record.

Q. You understand what a sale of a jet aircraft is to an airline for use by an airline, do you not?

A. Well—

Q. Is there anything difficult about that concept?

Mr. Sonnett: I must say, Mr. Brownell, [Tr. 3020] I think this is highly argumentative and wholly beyond the scope of any redirect.

The Special Master: I think this is about the end of this line of questioning.

Mr. Hayes: It is very close to the end.

A. Do I know what a sale is?

Q. That's right.

Does that form a concept in your mind if you speak of a sale?

A. A sale as opposed to lease, as opposed to other things?

Q. A sale. Just the word "sale."

The Special Master: As opposed to negotiation—

A. Yes, I know what it is.

Q. I ask you again, do you know of a single jet aircraft ever sold by Toolco to an airline?

A. Other than TWA, of course?

Q. That is right.

A. Well, the six airplanes that went to Pan Am were so nearly a simultaneous transaction as I recall it between the three parties, I don't want to presume to judge legally who sold it. I thought that through Hughes' release of those planes Boeing in a simultaneous [Tr. 3021] transaction made them available to Pan American who bought them.

Q. And Boeing had to consent or the transaction could not take place?

Mr. Sonnett: Objection as calling for a legal conclusion.

Q. Aside from the Boeing transaction which is well covered in the record, do you know of any sale?

Mr. Sonnett: Of jets?

Mr. Hayes: Yes, that is what I am talking about.

A. Well, as I sit here I am not sure if the four 880s that Northeast are now operating were leased or sold. I suppose I knew—

Q. I said prior to 1961.

A. Oh, excuse me.

Q. You have already testified that they were not even completed then.

A. Yes. Excuse me.

I know nothing to add to my prior testimony to try to clarify this whole area.

Q. Does that mean that you know of no such sale?

A. Well, it means I know of nothing to add to my prior testimony, Mr. Hayes, to try to be any clearer [Tr. 3022] than I have.

Mr. Hayes: Thank you. You may examine.

Mr. Sonnett: Will you mark as the next TWA exhibit a letter from Raymond Holliday on behalf of the Tool Company to Pan American World Airways dated June 25, 1959, tendering six aircraft to Pan American.

(Letter from Raymond Holliday to Pan American World Airways dated June 25, 1959, marked TWA Exhibit 23 for identification, as of this date.)

Mr. Sonnett: I offer it in evidence.

Mr. Hayes: May I inquire, Mr. Sonnett, if this is the only document having relation to the assignment of contract rights by Toolco to Pan American or are there others?

Mr. Sonnett: I assume there must be others, but I am not interested in those. If you want to offer any others I don't object to it.

This is the offer of the Tool Company to Pan American about which you were just seeking to examine the witness, so I thought it ought to be—

Mr. Hayes: I did not examine him. He [Tr. 3023] volunteered information about it.

Mr. Sonnett: I thought it ought to be in the record.

Mr. Hayes: I have no objection, Mr. Brownell, to—what is that exhibit number?

Mr. Sonnett: 23.

Mr. Hayes: But I would like to reserve the right to put in any additional documents that may be necessary by mail relating to this transaction. I don't know whether there are any or not, offhand.

Mr. Sonnett: So long as they are authentic I have no objection.

Mr. Hayes: I am assuming this is authentic. I know it came from the Hughes Tool Company. It is a copy of a copy, obviously.

The Special Master: Received.

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Testimony at Damage Hearing of John B. Connelly

[Doc. 554-11]

[Tr. 3039] * * * JOHN B. CONNELLY, called as a witness by defendants, being first duly sworn by the Notary Public (William Blitz), testified as follows:

Examination by Mr. Hayes:

Q. Mr. Connelly, what were your positions with The Boeing Company from 1954 into 1961?

A. In 1954, I was director of Contract Administration for the company. And in 1956, the early part of 1956, I was elected a vice president of the company and assigned as general manager of the then Transport Committee, which is now the Commercial—

Q. Transport what?

A. Transport Committee.

Q. Committee?

A. No, Transport Division. I am sorry. Transport Division.

Q. Oh, Division. I thought you said "Committee."

A. That is now the Commercial Airplane Division.

[Tr. 3040] Q. As of 1961, you still had that position?

A. As of 1961—no, as of 1959, my position was changed to vice president and assistant general manager, primarily responsible for Sales and Contracts in support of our product.

Q. Is that the position you presently hold?

A. That is the position I presently hold.

Q. How long have you been with The Boeing Company?

A. Since April 1948.

Q. Will you give us a brief description of the Boeing organization, insofar as dealings with airlines were concerned as it existed in 1955, any changes that took place between then and the end of 1960?

A. In 1955, we had not divisionalized the company. At that time, the, you might say, central organization or headquarters group were concerned with all the activities of the company, including the beginning of our jet program.

It wasn't until the first part of 1956 that we did divisionalize, and at that point forward all matters pertaining to the Commercial Airplane Division—I will use that term rather than Transport Division, if that is all right—

Q. Certainly.

[Tr. 3041] A. (continuing)—the responsibilities in respect to commercial airplane programs were under the cognizance of the Commercial Airplane Division.

Q. Who made up this headquarters group that you mentioned in 1955?

A. Mr. William Allen, the president of our company.

Q. Anybody else?

A. Well, he was the principal—

Q. I want to know who the people were who made up the headquarters group referred to as working as a unit, so to speak, in 1955?

A. Mr. Wellwood Beall, senior vice president of the company, Mr. J. O. Yeasting was vice president—Finance, Mr. Fred Landen was vice president—Manufacturing, J. E. Prince was secretary and vice president—Administration, I, as I mentioned before, was director of Contract Administration, Mr. Edward Wells, vice president—Engineering. I believe that covers the principal—

Q. Was there a Mr. Bell or Ball with Boeing at time?

A. Mr. Bell at that time was director of Sales.

Q. Do I understand correctly that this headquarters group, whom you have identified, handled, as a group, assignments within their own group by themselves, possibly by the president, all relations with commercial airlines [Tr. 3042] looking to sale of jets in 1955?

A. I would say primarily Mr. Allen, Mr. Beall, Mr. Wells and I were involved, primarily in the negotiations at that time.

Q. Was there any division at that time, 1955, within The Boeing Company, so far as sales to airlines were concerned, as to which Boeing individual would be primarily responsible for particular airlines?

A. No.

Q. There was not?

A. No.

Q. Each and every person might be called upon to negotiate with each and every airline?

A. That is correct, as the occasion arose.

Q. And did so, in fact?

A. And did so, in fact.

Q. You mentioned in 1956 a divisional setup was installed or instituted. What was the effect of the institution of that divisional setup, so far as the relations with commercial airlines are concerned?

A. Well, the effect was that primarily all relationships with the commercial airlines became under the cognizance of the Commercial Airplane Division.

This did not mean that there was not coordination [Tr. 3043] with Mr. Allen, Mr. Beall in respect to certain matters.

Q. That was the division that you headed up at that time?

A. That is correct.

Q. At that time, did any division come into existence within the company as to which individuals would primarily deal with particular airlines?

A. No, except within the division, and this was more or less, again on the basis of individual assignments.

By way of explanation, we were in the course of building up within the division adequate sales capability, contract

capability and so forth. And we were in the throes of building these things up. And until such time as those ends could be accomplished, we had to resort to assigning people we thought were best qualified to handle certain assignments.

Q. Were these subordinates of yours or were such assignments also made to the men whom you described as making up the headquarters group?

A. I would say that as far as the headquarters organization is concerned, Mr. Allen and Mr. Beall continued to devote considerable time to the commercial airplane program.

Q. By "the commercial airplane program," you mean [Tr. 3044] including sales to commercial airlines?

A. That is correct.

Q. Was there any further change in the Boeing organization after 1956, again insofar as the sales to commercial airlines were concerned?

A. In organization?

Q. That is right.

The Special Master: Up to the end of 1960?

Mr. Hayes: That is right.

A. I can't recall specific dates, but the only change that has occurred or did occur, occurred along about 1959 when the activities of the division became expanded to the point where it was necessary to strengthen the division from a management standpoint.

And at that time, Mr. Yeasting, who was a director of the company and vice president of Finance, was reassigned as vice president-general manager of the Commercial Airplane Division. And I was assigned, as I mentioned before, the primary responsibility for Sales, Contracts and Support.

Q. Is Mr. Yeasting still the general manager of the Airplane Division?

A. Yes, he is.

Q. 1959 you said that took place?

[Tr. 3045] A. 1959.

Q. Who—

A. To the best of my recollection.

Q. Yes. Who first spoke to you, Mr. Connelly, about the giving of testimony in this action?

A. Mr. Robert Rummel.

Q. When was that?

A. I can't recall the exact date. I can remember the occasion in that we had a very large group of TWA people visit us in Renton, Washington, for the purpose of discussing equipment programs, requirements and to visually inspect the production line of airplanes in the course of final test and preparatory to delivery.

It was a very large group, and we used a bus to take them from our main office in the Commercial Airplane Division to the factory.

And Mr. Rummel asked me to remain in the bus—or asked me if I would—he had something he wanted to speak to me about.

Q. Can you fix the approximate time of this conversation?

A. I am sorry, I can't.

The Special Master: The year.

Q. When I say "approximate time," I am not thinking [Tr. 3046] of an exact date, Mr. Connelly.

A. I realize that. I can't—

Q. Was it a year ago, two years ago, three years ago?

A. Oh, no, I would say it would be three years ago at least.

Q. Proceed. Mr. Rummel asked you to remain in the bus.

A. Yes. And at that time he stated that—

Q. Was it just Mr. Rummel and yourself?

A. Just the two of us, that is right.

Q. Tell us the conversation.

A. He stated—again, this is to the best of my recollection—that TWA intended to bring action against the Hughes Tool Company relative to damages they felt they had suffered, and asked whether I would be willing to make a deposition in respect to what our practices, policies, procedures had been in respect to allocation of delivery positions and other matters relating to individual negotiations with particular airlines.

Q. He said that TWA was contemplating bringing an action against Toolco?

A. Yes.

Q. Was this before the action was instituted, this [Tr. 3047] conversation? The action, I can tell you, was instituted in 1961.

A. Well, it had reference to the present hearings.

Q. You knew an action had been instituted, did you not?

A. Oh, yes, yes.

Q. Is that all Mr. Rummel said to you?

A. Yes.

Q. What did you say to him, Mr. Connelly?

A. I said this was a matter I'd have to discuss with our own company people and with our counsel before I could give him a reply as to whether I would or would not.

Q. Is that all that occurred during that conversation, so far as you can recall?

A. That is all I can recall, as far as I can recall in connection with that particular point, yes.

Q. What particular point, Mr. Connelly?

A. The one we are discussing.

Q. You mean your availability to testify in the case?

A. That's right.

Q. Did you get into any discussion of the details of Boeing's sales policies and practices at that time [Tr. 3048] with Mr. Rummel?

A. I don't recall having had any discussions in respect to what our policies were at that time, no.

Q. Did he tell you what he understood the Boeing policies and practices to be at that time?

A. He might have, but I do not recall him having done so.

Q. No recollection at all?

A. No, I do not have any.

Q. What did you do after that?

A. I did check with our people and with our counsel, and was advised that I was certainly not obligated to volunteer to make a deposition, but that in view of the fact that it had been very definitely stated that they contemplated or intended, I should say, going forward with the proceedings, that I could be subpoenaed, and I decided that probably the greater convenience to Boeing and to myself would ensue by going forward with a deposition.

Q. With whom did you check in the company?

A. I checked with Mr. Beall and with our counsel. As I recall, Mr. Allen was not available. He was out of the city at that time.

Q. Can you identify the counsel?

A. Mr. Harold Olsen.

[Tr. 3049] Q. You mentioned that this was on an occasion when there was a large group of TWA people present at Renton to look at certain planes, production line and so on.

What planes were you referring to?

A. Well, the discussions centered around additional quantities of long-range aircraft, particularly our Model 707-320B, 707-320C.

We did discuss other models with them, a 720B, and future programs we had in mind, which I can't recall in detail at the moment.

But their primary interest was in the two models I first mentioned to you.

Q. Was that before the days of the 747?

A. Well in advance of that.

Q. Did TWA buy any planes of the models that you mentioned?

A. Yes, subsequently they did.

Q. How long after?

A. As nearly as I can recollect, it would be in 1960 or 1961, that area.

Q. 1960 or 1961. And your conversation with Mr. Rummel took place before then?

A. No, it was subsequent to the meeting that I had with Mr. Rummel at that time. I am not confident—I can't [Tr. 3050] really—they could have placed the order before then.

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Q. What is your present recollection as to whether TWA ordered additional planes as a result of or after, rather, the visit of the TWA team to which you referred?

A. Well, they have ordered additional planes since then.

Q. No, of the two models that you said they were particularly interested in.

A. Of the two models, yes.

Q. Do you know how many they ordered?

A. No, off-hand I can't remember.

Q. Do you know how long after the conversation between Mr. Rummel and you took place was it that they [Tr. 3051] placed the order?

A. As I mentioned before, they could have placed the first order for those two models before that time. You must understand these orders have been coming in year by year. I can't tie it down to a specific time. I am sorry, I can't do it.

Q. I know you mentioned that they might have placed the first orders for the planes earlier, but in your prior testimony you referred to additional planes that they were considering. I want to know if the orders of the additional planes of the models to which you referred were received after your conversation with Mr. Rummel or not?

A. Well, the facts are that they did order additional planes after that in successive years.

I wouldn't attach in my own mind too much importance to that particular visit, as to why they bought the airplanes, because they had already, as I recall, bought these airplanes, these types of airplanes.

Q. These types?

A. Right.

Q. But is it your testimony—I understand and I think it is—I want to get it clear—that after your conversation with Mr. Rummel TWA bought additional planes of [Tr. 3052] those types?

A. Yes, and they have over a period of years, in successive orders.

Q. When you checked with the Boeing people with respect to Mr. Rummel's conversation, did anybody mention as a consideration favoring your giving an affirmative answer to Mr. Rummel that Boeing did not want to offend TWA, who was a prospective customer?

A. Absolutely not.

Q. Not mentioned. Have you told us in substance the conversations you had when you checked with the Boeing people with respect to your testimony?

A. I am sorry. Would you repeat that, please?

Q. Have you told us in substance the conversations you had with the Boeing people when you checked with them as to Mr. Rummel's request or is there anything additional you want to add?

A. Well, I could add this: the advice of Mr. Beall, who I checked with, was that this is a matter that should be resolved with counsel; that we certainly were neutral in a situation such as this, and it was just a matter of how it would least inconvenience the company—

Q. Which company?

A. The Boeing Company. (continuing)—and its [Tr. 3053] people in respect to these proceedings.

Q. It was Mr. Olsen, then, who I assume told you, in substance, that you could be subpoenaed—

A. Yes.

Q. (continiung)—and it was after that that you decided not to wait for a subpoena, but to go ahead with the deposition, such as Mr. Rummel asked for?

A. That is correct.

Q. Did you then communicate with Mr. Rummel?

A. I can't recall doing so. To the best of my memory, I believe we were again approached.

Q. By whom?

A. By Ed—by Mr. Rummel as to whether I had made a decision.

Q. You say "we were approached." Who was approached?

A. I was approached.

Q. Who approached you?

A. Mr. Rummel.

Q. How long after, so far as you can recall, his first conversation with you did he make this second approach?

A. Several months.

Q. This is still a matter of two to three years back, so far as you can recall?

[Tr. 3054] A. As best as I can recollect.

Q. Was this a personal meeting with Mr. Rummel or a telephone conversation, so far as you can recall?

A. I believe the question was asked by telephone, and it was followed by another meeting with a group of people.

Q. Let us take the telephone conversation first. Tell us what each of you said to the other, so far as you can recall, in the course of that telephone conversation.

A. As I recall, Mr. Rummel asked me as to whether I had reached a decision as to whether I would make a voluntary deposition or not. And I said I had and that I would make a voluntary deposition.

Q. Was there anything else in the conversation?

A. On that particular point, I cannot recollect any other discussion.

Q. Was there any conversation between you at that time as to what the content of your deposition would be?

A. Not at that time, as I recall.

Q. Had Mr. Rummel at any point told you that he was going to be a witness in this proceeding?

A. Yes.

[Tr. 3055] Q. Did he tell you that in the course of his testimony he was going to cover the subject of Boeing's sales policies and practices?

A. Not at that particular time. This occurred at the time we had discussion in the bus, and very generally—

Q. He did tell you at that time that—

A. (continuing)—very generally that it did involve the relative delivery positions as to TWA and Pan American

and American in particular. That would be a part of his deposition.

Q. Did he go into any details at that time as to what he planned to testify to?

A. Not that I recall. It was a very general conversation.

Q. Did you make any comment on what the Boeing policies and practices you would testify to were at that time?

A. No, sir.

Q. Have you given us all of the telephone conversation that you can recall that you had with Mr. Rummel at the time you told him you had decided voluntarily to give a deposition?

A. As I recall, it was a simple question and a simple answer.

[Tr. 3056] Q. You said that was followed by a meeting at which others were present?

A. That is correct.

Q. How long after did that meeting take place?

A. This would be several months following the telephone call.

Q. Where did the meeting take place?

A. It took place in my office in Renton, Washington.

Q. Who else was present?

A. Mr. Rummel had a member of counsel with him.

Q. Do you remember who he was?

A. Corey—

Mr. Sonnett: Dunham, D-u-n-h-a-m.

The Witness: Yes, that is correct. And I had with me Mr. Ed Wells, Mr. Olsen and I believe Mr. Spalding, who was then our director of Contract Administration at the Commercial Airplane Division.

I can't be certain, but I feel reasonably confident he was there at that time.

Q. Anybody else?

A. No, sir.

Q. This meeting was arranged in advance of its taking place, I assume?

[Tr. 3057] A. Yes.

Q. Tell us what took place at that meeting, Mr. Connelly? Who said what, insofar as you can recall?

A. Well, Mr. Rummel became specific as to the matters which he proposed to include in his deposition as being his understanding of what our policies and practices in respect to airplane delivery positions were, and asked me in my deposition to state in some manner as to what our practices and policies were and had been.

Q. Let us stay with Mr. Rummel for a moment. You said be became specific. What did he say at that time?

A. Well, generally that the positions that TWA actually were able to obtain could have been improved had the Hughes Tool Company acted earlier, and given consideration to possibly a greater number of aircraft to put them in a better competitive position.

Q. Did he mention dates?

A. No, sir.

Q. Did he mention the subject of how Boeing would allocate delivery positions among two or more airlines?

A. Only his belief from knowledge from having worked with us, negotiated with us over a long period of time, what his understanding was of our policies and practices.

Q. What did he say his understanding was?

[Tr. 3058] A. That we gave consideration from a standpoint of any priorities we might grant to those who acted promptly, placed orders early or demonstrated a very definite interest in proceeding with negotiations early, and were prepared to order a fairly large quantity of airplanes.

Q. Did he say anything as to the way delivery positions would be allocated among particular airlines, his understanding that is as to how they would be allocated?

A. No, not to my recollection.

Q. Did he have with him any written documents setting forth what his understanding was?

A. I don't recall his having any.

Q. Is there anything else that Mr. Rummel said that you can recall?

A. No, I cannot.

Q. Who else said anything at this meeting?

A. As far as the Boeing people were concerned, very little was said, and nothing I recollect of any substance. We were listening to what Mr. Rummel and Mr. Dunham had to say.

Q. What did Mr. Dunham have to say?

A. I can't recall other than his comments were more or less along the same line as Mr. Rummel's.

[Tr. 3059] Q. Did you make any comment with respect to Mr. Rummel's understanding of what Boeing would do?

A. I don't recall having said so, but I could very well have said that generally it was our policy and practice to award some priority to those operators who stepped up first and who ordered, or over a long period of time would order under reasonable circumstances a large quantity of airplanes.

Q. Did you elaborate on that in any way?

A. I cannot recall having done so.

Q. At this meeting, was there any discussion as to what Boeing actually did with respect to contractual delivery positions awarded to Pan American, American and TWA?

A. None other than the inference of Bob's understanding that we were giving priority to those who stepped up early and who ordered a fairly large quantity of airplanes.

Q. Did his understanding identify Pan American and American?

A. Pan American and TWA—or American were mentioned in the conversation, yes.

Q. Did you express your agreement or disagreement with whatever he said with respect to Pan American and American?

[Tr. 3060] A. Only in reference to what our practice and policy had been.

Q. What did you say in that regard?

A. That it had been our practice and policy to give some priority to those who stepped up early and ordered a fairly large quantity of airplanes.

Q. Is it correct to say that the discussion at this meeting was in generalities rather than specifics? By that I mean, that you did not get into the details of actual delivery dates?

A. No, sir, we did not.

Q. Did anybody else representing Boeing at this meeting have any comment to make? If so, what was it?

A. I cannot recall any other comments of substance.

Q. What happened after that? What was the next step?

A. There was a third meeting at my home and the reason it was my home, I was recovering from an illness.

Q. How long after was that?

A. This, again, was several months after the last meeting I referred to.

Q. How far back would this be now? Can you give us an estimate?

A. No, I am sorry, I cannot.

[Tr. 3061] Q. A year ago, two years ago, or more?

A. I can't even be that explicit. It was several months after that prior meeting.

Q. Who was present at that meeting, Mr. Connelly?

A. At that meeting, Mr. Rummel and Mr. Dunham and Mr. Olsen and myself.

Q. Will you tell us what was said at that meeting, please?

A. As I recall, Mr. Rummel and Mr. Dunham had a statement of the actual deliveries that we had made to Pan American, American and TWA, and a rough reallocation, as they would see it, in respect to how these deliveries might have been otherwise had certain actions been taken by the Hughes Tool Company toward earlier commitments and for larger quantities of aircraft.

Q. You said you had a statement of delivery positions and a rough reallocation of those delivery positions provided certain things had been done by Hughes Tool Company.

Was that in the same form as the TWA statement of improvement of delivery positions which is attached to your prepared statement, TWA-3?

A. I can't recall whether it was at that time.

Q. I say the same form. I don't mean as to every [Tr. 3062] single detail.

A. As to content? No, it was a very abbreviated form, as I recall it.

Q. Do you recall whether the so-called reallocated delivery dates were the same as appear in TWA's statement of improvement of delivery position?

A. No, I don't recall that they were.

Q. Proceed with what happened at the meeting, please, Mr. Connelly.

A. Well, we discussed this statement of actual dates as they presented it, and in connection with that I stated that we would have to check our records to verify the accuracy of the actual deliveries.

And, secondly, in respect to the allocation, I brought up several matters relating to Boeing's problems in respect to variances in configuration of the aircraft, components installed in the aircraft, all of which would have to be taken into consideration in respect to any reconstruction, even under these hypothetical assumptions.

Q. Which were the considerations that you mentioned over and above those you have already told us about?

A. Let's see, I mentioned variances in configuration.

Q. That's right.

[Tr. 3063] A. Installation of different systems, et cetera.

Well, an obvious one would be that—first, we must give primary consideration to our own production line in that our capability to deliver airplanes early as a program and in adequate quantities to establish a firm base for a program must be given consideration, primary consideration.

Q. What does that mean, Mr. Connelly? Can you explain that?

A. Well, it means that we cannot go forward with an efficient production line, unless we have absolute control of that program. We cannot let individual customers dictate requirements which would prevent us from delivering airplanes under a program—I am not speaking about customers now—but under a program as early as it was possible for us to do so in a configuration that we felt on our own, in general, met the requirements of the majority of the airlines.

What I am saying is if a customer should insist upon a degree of changes in the airplane, which would delay our program, this was something that we could not accede to. So these things must be given consideration.

Q. Was there any discussion about these points you brought up?

[Tr. 3064] A. Well, we did discuss certain equipment items and certain differences in configuration, as between our basic airplane specification and the negotiated TWA specification.

Q. What was said in that regard, Mr. Connelly?

A. Well, that there were certain items incorporated or scheduled under the specification to be incorporated in TWA's airplane that would probably have had the effect, had that been the first airplane, for example, of a delay in our overall program.

Q. Would probably have been the effect if that had been the first airplane—would you please explain that? I am not at all sure what you mean.

A. Well, the best way to explain this, I guess, is to say that we must come up first, obviously, with a basic airplane and build up a projected program based on that. And we must give consideration to the fact that we cannot deviate very greatly from that basic specification and meet our program objectives.

Q. By "program objectives," are you including delivery positions?

A. Yes, sir. I mean, we go through the process of design, manufacture, flight test, certification and delivery.

[Tr. 3065] So, the buildup of that airplane is very important to us, obviously, in meeting these, you might say, benchmarks down the line.

Q. Let met state what this means to me and you can tell me whether I am right or wrong.

A. Yes, sir.

Q. That the airline whose specifications and requirements more closely met the Boeing basic specifications

would get delivery preferences over an airline whose requirements departed in a greater degree from the Boeing specification. Is that what you are saying or is it not?

A. Well, that might be a result. In effect, this more probably reflects a compromise on the part of an operator who is—who gives greater—or places greater emphasis on early delivery and perhaps some changes in the airplane that are not as important as early delivery.

Q. How would that operate, can you tell us?

A. Well, every airline has its own desires and what it considers to be its own requirements in respect to instruments, arrangement of instruments, systems in the airplane and so forth. And if these were permitted to reach the ultimate, why, it could be a serious disruption to any production line.

These points have to be brought out in negotia- [Tr. 3066] tion. And in most instances we have found that the majority of these changes are compromised in order to retain early delivery positions, rather than suffer a slide in delivery in order to incorporate them.

Q. But to the extent to which they are not compromised, they would contribute to later delivery positions; is that right?

A. That would be the result, yes.

Q. What else was said at this meeting at your home, Mr. Connelly?

A. I believe that covers the—everything I can remember.

Q. Did either Mr. Dunham or Mr. Olsen make any contribution to the conversation?

A. Nothing that would deviate from what I have said, sir.

Q. Was there anything said as to who prepared this written document that Mr. Rummel had with him?

A. I can't recall that anything was said as to whether either Mr. Rummel or Mr. Dunham had prepared it.

Q. Who presented it to you?

A. It was presented to me by Mr. Rummel.

Q. What was the next step?

[Tr. 3067] A. The next step was a later meeting several months later when—the same parties, Mr. Dunham, Mr. Rummel, Mr. Olsen and myself—we were presented with a more complete statement as to delivery positions as they actually occurred, and the reallocation of those positions under the assumptions that the Hughes Tool Company had ordered the airplanes at approximately the same time as Pan American and American, and in substantially the same quantities.

Q. In the meantime, between the first meeting at your home and the meeting as to which you are now testifying, had you checked the actual delivery positions in the document that had been handed to you?

A. I did not do so personally, but I had—

Q. You had a check?

A. I had one of our people check them, yes.

Q. Did you review reallocated delivery positions?

A. Yes.

Q. Did you have any communication, directly or indirectly, with TWA representatives between the meeting in your home and the later meeting?

A. I recall none.

Q. Where did this meeting as to which you are now testifying take place?

[Tr. 3067A] A. I could be mistaken that there was a meeting. There was either a meeting or it was sent to us in the mail.

I am sorry, I can't remember specifically.

Anyway, this material was placed in our hands.

[Tr. 3068] Q. Can you now fix the time that you received this material?

A. I'm sorry, I can't. It was several months after the—every one of these was inter-spaced by several months.

Q. That may be, but I am trying to find out—

A. I realize that.

Q. —whether it was a year ago or two years ago that you received this material or more.

A. Oh, I would say approximately a year, a year and a half ago.

Q. Was the material you then received the same as the rough material, the same in substance as the rough material that had previously been delivered to you at your home?

A. No, it was more in the format as attached to my deposition. I say it was more in the format.

Q. Was there a text of your proposed deposition sent to you also?

A. Yes, there was.

Q. Was that in the same form roughly as what is now TWA Exhibit 3?

A. That is my deposition?

Q. Yes.

[Tr. 3069] A. Roughly so, yes.

Q. Were the delivery dates that were set forth the same as those set forth in the document that had been delivered to you at your home?

A. That I cannot recall.

Q. Do you know if the reconstructed delivery dates were the same?

A. The same as what, sir?

Q. As those that had been set forth in the document that had been delivered to you at your home.

A. You mean the reallocated?

Q. That is right.

A. That also I cannot remember.

Q. Do you recall having had them checked or checking them yourself?

A. Not the reallocation figures, no.

We did check the actual delivery dates.

Q. You checked them in connection with the first document that you had received?

A. Yes, and with the second one.

Q. With the second one, too?

A. Yes, sir.

Q. But you did not check the reallocated dates in the two different documents with each other?

[Tr. 3070] A. No.

Q. Were the assumptions that were set forth in the document you later received the same as those set forth—the same in substance, I mean—as those set forth in the document you had received at your home?

A. I can't recall whether they were the same or not the same.

Q. From whom did you receive this document that we are now talking about, this draft of your proposed deposition, and the TWA statement of improvement?

A. I believe this was sent to Mr. Olsen's office. And I will have to go back and say again I mentioned I was not sure whether it was a meeting or it was sent to us by mail. I am more confident that it was sent by mail. And it was sent, I believe, to Mr. Olsen's office.

Q. Did you receive it from Mr. Olsen?

A. Yes.

Q. Was there any accompanying letter?

A. From TWA—from Hughes?

Q. Not from Hughes.

A. I mean from TWA. Excuse me.

I believe there was a letter of transmittal with it which recited that this as they understood it [Tr. 3071] more or less was more in conformity with the production problems that we had discussed and with the practices and policies of the Boeing Company and the allocations of positions than had the first discussion or rough outline set forth.

Q. Who sent the letter? Who wrote it? Whose letterhead?

A. I cannot recall it.

Q. Prior to the time that you received this revised document, had you had any communications with Mr. Rummel? I mean between the time of the meeting at your home and the time you received this revised document.

A. Any meeting with him?

Q. Communications of any kind.

A. Well, I undoubtedly did, because we have a great deal of business transactions of other natures.

Q. No, no, I mean with respect—

A. In respect to that?

Q. —to your proposed deposition.

A. No, sir.

Q. Do you know whether Mr. Olsen had any communication with either Mr. Rummel or anybody from the firm representing TWA?

A. No, I do not know.

[Tr. 3072] Q. Did you have any communication with Mr. Dunham or any other member of the Cahill firm?

A. No.

Q. You received this draft of proposed deposition. What happened then?

A. We checked over the assumptions that were contained in the allocation, and we made several revisions to the assumptions. I don't recall having made any in respect to the reallocation. And satisfied ourselves—or I satisfied

myself that it was consistent with—under those hypothetical assumptions with what might have resulted had these things all occurred based upon our basic business practices and policy.

Q. Do you recall what revisions you suggested in the assumptions?

A. There were several, but I cannot remember what they were.

Q. You cannot remember any of them at all?

A. No, sir.

Q. How did you communicate those suggested changes? To whom did you communicate them?

A. As I recollect, we revised the deposition, including these changes, and I signed it.

Q. When you say "we revised," who revised, Mr. [Tr. 3073] Connelly?

A. I revised—I reviewed it, Mr. Olsen reviewed it.

Q. Did you work together in this connection, Mr. Olsen and yourself?

A. In the final analysis we communicated together on it, yes.

Q. Before you signed it, did you or did Mr. Olsen communicate a copy of your revised deposition to any representative of TWA, do you know?

A. I do not know.

Q. Have you any idea of that at all?

A. No.

Q. How long did it take you to make the revision both in your deposition and in the reallocation or the assumptions that are part of the reallocations?

A. Well, it took several days.

Q. How long after that so far as you recall did you sign and swear to it?

A. Very shortly thereafter.

Q. How long ago was this?

A. I hate to be so vague, but I can't recall, sir.

Q. A year ago, a year and a half ago?

A. I would say about a year ago.

[Tr. 3074] Q. Your prepared statement indicates that it was sworn to by you on March 8, 1966. Is it your recollection—

A. A pretty poor guess on my part then, wasn't it?

Q. You may have signed another one before then?

A. I only signed one.

Q. After you signed it, was it then sent to anybody? If so, to whom and by whom?

A. As I recall it, it was rushed to Mr. Olsen's office and presumably was forwarded from there.

Q. Did you have any further communication with anybody in connection with your statement after that?

A. Only very recently.

Q. Tell us about that, please.

A. Just a couple of weeks ago Mr. Forrow visited us. Mr. Forrow, Mr. Olsen and I reviewed the deposition.

Q. Your statement?

A. My statement, that is correct.

I think the general purpose of the meeting was to acquaint me with how the proceedings were conducted and who probably would be present, perhaps types of questions that might be asked, that sort of thing.

[Tr. 3075] Q. Have you told us the whole conversation so far as you can recall it that took place two weeks ago?

A. I believe that covers everything, sir.

Q. Prior to the time you signed your statement, Mr. Connelly, did you check either the assumptions or the reallocated delivery dates or the text of your own statement with anyone in Boeing other than Mr. Olsen?

A. Yes, I sent it down to our legal group within the company, our Contract Administration Department for final review of the dates, particularly again were rechecked, the actual delivery dates, and for any comments that they might have in connection with the deposition.

Q. Did you get any comments from them?

A. Nothing other than it was their opinion that it satisfactorily represented what our policies under these various assumptions might well have been.

Q. Did you check with anybody else in Boeing?

A. No, sir.

Q. None of the officers?

A. None of the other officers, no, sir.

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[Tr. 3076] Q. When did TWA begin negotiating for the the 747s, Mr. Connelly?

Mr. Forrow: Objection, Mr. Special Master, outside the scope of Mr. Connelly's direct examination.

Mr. Hayes: Certainly not. He made this statement in March of 1966, and it is quite relevant.

The Special Master: You may answer.

A. Your statement was when did they start negotiations?

Q. That was my question.

A. Well, I would like to define what we might say we think the start of negotiations would mean.

Q. All right.

A. That is when a definite interest is manifested and when the airline indicates an interest in going forward with a review of the specification for the airplane, performance documents, et cetera.

And on that basis, I would say that their [Tr. 3077] interest—that negotiations we would consider started in January of this year.

Q. Prior to that, had there been efforts—approaches, rather—by Boeing to TWA with respect to the 747?

A. Only in respect to what we were thinking about as to an airplane of that type.

We had not indicated in any way that we were considering seriously going forward with it, beyond our technical interest in an airplane of this type.

Q. Aside from your prepared statement, Mr. Connelly, and the conversations you have told us about in connection with it, were you a party at any time to any discussions with a TWA representative with respect to this lawsuit?

A. No, sir.

Q. Never at all?

A. No, sir.

Q. Is any payment of any kind being made to you personally, other than your expenses, of course, for your appearance here as a witness?

A. Not that I know of.

Q. In connection with the preparation of your statement, Mr. Connelly, were you supplied a copy of Mr. Rummel's prepared statement in this case, other than [Tr. 3078] the particular portion which is attached to your statement?

A. Well, a great deal of material was made available to us. As far as I am concerned personally I read one page, not of his deposition, but this had to do with a portion of the cross examination . And I did that only because someone brought it up from the Contracts Department and he said he thought I ought to read this.

Q. I am speaking of the time prior to the cross examination when your statement was being prepared, were you supplied with any portions of Mr. Rummel's prepared state-

ment other than what is attached to your prepared statement?

A. No, sir.

Q. Since you mentioned this cross examination, what was the page you read? What was it about?

A. It had something to do with what personal relationship there might be between Mr. Rummel and myself.

Q. Do you know whether copies of Mr. Rummel's statement, prepared statement, other than the portion attached to your statement, were supplied to Mr. Olsen or any body else in Boeing?

A. Yes, it was.

[Tr. 3079] Q. It was supplied?

A. Well, I can't be specific as to what—as I say, a tremendous amount of material.

Whether this included the deposition Mr. Rummel made or only the reporting of the cross examination, I can't say.

Q. The reporting of the cross examination could not have predated your swearing to your statement?

A. No, that's—

Q. I'm speaking of material prior to that.

A. That is correct, no. This is more recent than that.

Q. Prior to your statement being prepared, do you know if a copy of Mr. Rummel's prepared statement was supplied to Mr. Olsen or anyone else?

A. No, I do not.

Q. What is this tremendous amount of material you referred to that was supplied, and to whom was it supplied?

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[Tr. 3080] • • • A. I can't identify the material, except I do not know that it contained a good deal of the reporting of the cross examination.

Q. To whom was it supplied?

A. I believe it must have gone to our counsel.

Q. You mean Mr. Olsen?

A. Well, or his office. And then referred to our contracts people.

I had imagined that this was a two-way street, that a great deal of information was being asked of us, and in return we were receiving back some of this cross examination and perhaps other material. I don't know.

Q. Did anybody report to you what the content of any of this material was?

A. Nothing beyond that one page I referred to.

Q. Do you know whether anybody reviewed the cross [Tr. 3081] examination of Mr. Rummel?

A. I think some of our contracts people must have, yes. The material was there.

Q. Did you have any conversations with them as to the content of the cross examination?

A. No, sir, except that one item that was brought to my attention.

Q. I show you, Mr. Connelly, TWA Exhibit 2 which is the prepared statement of Mr. Rummel in this action.

Could you tell me, please, if you have ever seen that document before?

A. No, sir, I do not recognize it.

Q. You do not recognize it?

A. No, sir.

Q. In connection with this statement attached to your prepared statement and headed "TWA's Statement of Improvement of Delivery Positions," were you at any time told the purpose for which TWA intended to use that statement?

A. Well, indirectly in view of the conversations we had the purpose was to demonstrate that TWA was damaged

by reason of not having competitive equipment early enough or in sufficient quantity.

Q. Who told you that?

[Tr. 3082] A. Mr. Rummel.

Q. When did he tell you that?

A. He told me—it could have been mentioned at that first meeting. I don't know.

But it certainly was at the second meeting I referred to.

Q. Did anybody else ever discuss this subject with you, that is, the purpose for which the statement of improved delivery positions was to be used?

A. No, sir.

Q. Only Mr. Rummel?

A. Right.

Q. Did he tell you that TWA intended to claim damages for each day's delay as it would appear to be a delay from the comparison of the actual delivery dates and the reallocated delivery dates?

A. I don't recall him ever having said damages for each day, but damages in respect to the overall.

Q. Did he say they were claiming damages with respect to the delivery dates of each plane?

A. Is this again on a day-by-day basis?

Q. Yes, a contrast between the two dates.

A. He never mentioned anything, to my knowledge, on a day-by-day basis, although that's one way of [Tr. 3083] calculating it, obviously.

Q. Did he tell you how much TWA was claiming for the supposed failure to get the Boeing planes earlier?

A. No, sir.

Q. He never mentioned amounts?

A. No.

Q. In Paragraph 3 of your prepared statement—

A. May I refer to it?

Mr. Hayes: Maybe Mr. Connelly should have a copy of his statement in front of him.

Q. —which appears on page 4, the second sentence referring to the statement of improvement of delivery positions, you state that the statement is a reasonable estimate of the improvement in delivery positions which TWA would have obtained based upon the foregoing.

By the word "reasonable," do you mean that that's what Boeing probably would have done?

A. I don't think anyone can ever say exactly what would happen, but that is a reasonable probability in my opinion.

Q. A reasonable probability that it might have happened, is that what you mean—

A. That it might have happened.

Q. —by reasonable?

[Tr. 3084] A. Yes.

Q. And is that all you mean by reasonable?

A. That's all I mean by it.

Q. Referring again to this reasonable, to what is it that you are referring there? Are you referring to the reallocated dates or are you referring to the assumptions or are you referring to both of them?

A. Well, this is directed primarily if not entirely to the reallocated dates.

Q. Do you mean by that that you are not testifying that the assumptions contained in the statement of improvement of position are also reasonable?

A. In part they are, yes, sir.

Q. Why don't we look at them? You tell us what you consider reasonable and which are not.

They begin on page 2 of the statement of improvement.

The Special Master: I don't believe you are referring to the page that Mr. Hayes is referring to.

Q. Page 2 of the improvement. The attachment.

A. Oh, I'm sorry.

Q. Those are the assumptions.

A. I would like to say that the assumptions that [Tr. 3085] I referred to, Mr. Hayes, are those assumptions contained in my deposition.

Q. No, I am talking about the assumptions contained in the statement of improvement of delivery position.

Is it your testimony that those assumption are also reasonable, or are you limiting yourself to the reasonableness of your assumptions and the reasonableness as you already explained it of the reallocated dates?

• • • • •

[Tr. 3086] • • • Q. If you do understand, go ahead and answer it.

A. Yes, the sentence which you have read which is over on page 5—

Q. That is right.

A.—based on the foregoing I assume that referred to the assumptions made in my deposition, sir.

Q. Let me ask you, are you making any statement as to the reasonableness of the assumptions contained in TWA's statement of improvement of delivery positions, pages 2 and 3 thereof?

Mr. Sonnett: Other than to the extent reflected in the witness' own statement? That is where the confusion is.

Mr. Hayes: There is no confusion. I am asking a very simple question.

Mr. Sonnett: I don't now which way the witness is to take it.

Mr. Hayes: I am certain Mr. Connelly [Tr. 3087] will tell us if he does not understand.

Mr. Sonnett: I don't understand.

A. I must confess I don't, sir.

Q. Do you have before you pages 2 and 3 of TWA's statement—

A. I have them right here, yes.

Q.—of improvement of delivery positions?

A. Yes.

Q. By the statement you made in Paragraph 3 that TWA's statement of improvement of delivery position is a reasonable estimate, et cetera, were you referring only to the reallocated delivery dates or were you also referring to the assumptions on pages 2 and 3?

A. I now understand the question.

Q. Fine.

A. I was referring to the allocation portion only.

Q. You were not covering the assumptions?

A. No, sir, I was not.

Q. By your statement that the delivery allocations were reasonable, were you intending to testify that Boeing would have agreed to deliver TWA's aircraft on the dates shown had the TWA order been placed at about the same time as Pan American's and American's?

[Tr. 3088] A. No, I cannot say that we would have agreed that that would happen.

I say it is a reasonable estimate of what we could have agreed to.

Q. But not that you would have agreed to?

A. I can't—there are too many other factors involved.

Q. When you are talking about TWA's orders, do you have in mind any particular number of planes, or did you have in mind any particular number of planes that TWA would have ordered, of both series, by the way?

A. Well, Pan American ordered 20 and American ordered 25. We would look upon TWA as being an airline that competitively should have approximately that number of airplanes as a minimum, being both in the international and domestic market.

Q. So you are thinking of roughly the same number of planes among all three carriers, is that it? Is that what you had in mind?

A. We would have thought that that would be a reasonable first order.

Q. I think you said that American ordered 25. They ordered 30, didn't they?

A. They had a right to cancel five.

[Tr. 3089] Q. I know, but they ordered 30 and later cancelled five, isn't that what happened?

A. Yes, sir, all right. They had that option to begin with.

Q. At what time, in fact—

A. For the record, I'd like to say that cancellation was concurrent with the replacement of an order for twenty-five 720 airplanes.

In other words, it was not a reduction in fleet.

Q. When did that take place, by the way?

A. I'm sorry, I can't remember.

Q. Was it before 1958?

A. It was before 1959.

Q. Is it your best recollection that it was some time in 1958?

A. That's the best recollection I have. Pardon Me?

Q. Is it your best recollection now that it was some time in 1958?

A. I'd rather say it was before 1959.

Q. You are not including 1955?

A. No.

Q. Or 1956?

[Tr. 3090] A. No.

Q. Are you including 1957?

A. It could be.

Q. It could be?

A. Could have been.

Q. If 1957 it would have been the latter part of 1957, would it not?

A. I'm not certain.

Q. Don't you remember when the 720 became available to airlines?

A. I probably should, but we have a few more things to remember. I'm sorry, I don't know.

Q. At what time, in fact, did early delivery positions on the 120s cease to be available to TWA?

A. By early deliveries, you mean what, sir? We still think they had early deliveries.

Q. Maybe we ought to define what you mean by early deliveries. What do you mean by early deliveries?

A. We mean earliest—

Q. Early deliveries as set forth, for example, in Mr. Rummel's statement?

A. Well, I will have to refer to the actual situation. We think they had very early delivery positions in consideration of the time they ordered the [Tr. 3091] airplane. What I am trying to say it is a relative thing.

Q. But I am trying to find out, Mr. Connelly, is that you have described Mr. Rummel's reallocation as reasonable?

A. Under certain assumptions.

Q. I understand. I am not trying to take those words out of your statement, Mr. Connelly.

A. No, I understand.

Q. I am trying to keep the questions a little shorter than they otherwise might be.

A. I see.

Q. And under these reallocations so far as the 120s are concerned, TWA receives the sixth plane, the eighth plane, the eleventh plane, the thirteenth plane and so on, and at no time are they more than one plane behind American or more than two planes behind Pan American.

Considering those delivery dates as the early delivery positions, at what time, in fact, did such delivery positions cease to be available to TWA?

A. Well, it was the time of negotiation with American, Pan American, United which negotiations were in the latter part of 1955.

[Tr. 3092] Q. Can you fix the time more clearly than that?

A. I'd say about October of 1955.

Q. By the way, prior to taking the stand today, did you review any of the Boeing documents that were produced pursuant to the subpoena?

A. No, sir.

Q. Were you told of the contents of any of those documents by anybody?

A. No, sir.

Q. Prior to preparing your statement, your prepared statement, did you review any of the Boeing documents?

A. No, sir.

Q. Did you have anybody—

A. Other than the actual delivery dates.

Q. Did you have anybody review the Boeing documents for you?

A. No, sir.

Q. If you turn to pages 10 et seq of the last two pages of the attachment to your deposition, you will find Mr. Rummel's reallocation of the 320 series, and you will note that the first three planes are to go to TWA before Pan American gets any, and that TWA has a time advantage over Pan American—

[Tr. 3093] A. Sir, may I interrupt? Is this on page 13?

Q. Wait. It is the number of planes I was looking at. It is the last two pages. Reallocation program production available for month, do you see it?

A. Yes, 12 and 13.

Q. My pages are not numbered for some reason. I don't know why.

A. You are right, it is the last two pages.

Q. At any rate, we are talking about the same schedule of reallocation, and according to this reallocation TWA would receive the first of the 320 series, and would continue to have an advantage over Pan American until the 11th plane was delivered to each of them.

At what time, in fact, did the delivery positions set forth in the allocation to which I have directed your attention cease to be available to TWA?

A. The latter—the very end of 1955, the very beginning again of 1956. I would say within, you might say, a 30-day period.

Q. You are talking of December of 1955 and January of 1956?

A. That's right, essentially December of 1955.

Q. The Boeing production of both the 120 series and the 320 series was accelerated, was it not, so that [Tr. 3094] deliveries became available prior to the contract dates?

A. In general, that is correct.

Q. When it was accelerated, did each airline benefit from the acceleration in the same degree?

A. To the extent our production line would permit us to do so, yes.

Q. What do you mean by that?

A. Well, if we had in our line for production certain airplanes allocated to customer A, and these were moving down the production line, they would have to go through the factory in that sequence. We can't juggle positions in the factory.

Q. In fact, regardless of what your production problems may have been, did each of the airlines benefit to the same degree as a result of the acceleration of production?

A. I believe in the overall this was the result.

Q. That is your present recollection?

A. Yes, and to a reasonable extent there were variations here and there, but the overall effect was generally an improvement to everyone.

Q. That is true, but did they all improve to the same degree is what I am trying to find out?

A. Probably not.

[Tr. 3095] Q. Probably not?

A. Because of production requirements.

Q. If, in fact, the acceleration benefited some airlines rather than others, is it proper to use actual delivery dates rather than contract delivery dates in any reallocation?

Mr. Sonnet: I think that is an argumentative question: I don't know what the word "proper" means.

The Special Master: Overruled.

A. I hate to ask you to do this, Mr. Hayes, but would you repeat it again?

Q. I will be happy to do so, Mr. Connelly.

The Special Master: Don't hesitate to do that at any time if it clarifies things for you.

Read the question.

(The question was read.)

A. I believe so, because I don't believe the degree of variance was substantial enough to have an appreciable effect on it.

Q. But to look at what would have happened if contracts had been made in late 1955 or early 1956, would it be more reasonable to use contract dates in a realloca- [Tr. 3096] tion rather than actual delivery dates?

Mr. Sonnett: The same objection. I don't know what the standard is that counsel is using here.

The Special Master: Overruled.

The Witness: Again I will have to ask—would you repeat the question?

The Special Master: Would you read that question back, please?

(The question was read.)

A. I thought that was the question I had just answered.

Q. No, it is a different question.

The Witness: You will have to read it again, please.

The Special Master: Do you want to rephrase the question?

Q. I will put it this way:

As I understand your statement, it is an acceptance as reasonable of a projection by Mr. Rummel as to what delivery dates would be assuming the three air carriers ordered at about the same time, am I correct in that?

A. Yes, sir.

[Tr. 3097] Q. Since it has to do with the ordering at about the same time, I ask you would it be more reasonable to use the contract delivery dates than the actual delivery dates?

• • • • •

[Tr. 3098] • • • A. My own opinion would be that at the time of order—we are assuming that they were placed at the same time, but in my opinion it would be more accurate to use actual dates because we have something that we at least have a handle on. And I don't believe again the degree of variance would be such as to substantially create any large difference.

Q. If you had contracts you would have a handle, too, wouldn't you?

A. Yes, sir, that is correct, but as long as we are delivering ahead of contracts we are meeting our contract requirements.

Q. You deem it at least equally reasonable to use actual delivery dates rather than contract delivery dates?

A. That is my opinion because I don't think the degree of difference is substantial.

Q. Referring to this statement attached to your prepared statement, the one prepared by Mr. Rummel, as far as the actual delivery dates set forth therein are [Tr. 3099] concerned, is it your understanding that they were all for certificated, fully certificated planes or that some of them were for not fully certificated planes?

A. Certificated planes.

Q. Did you have that checked?

A. Yes, sir.

Q. Is it your testimony that the dates set forth as actual deliveries were deliveries of fully certificated planes?

A. On the basis of the checks that were made by my people, yes, to the best of my knowledge and belief.

Q. It has been brought out so far in this proceeding—

A. May I amend that to one extent?

Q. Yes, sir.

A. Some of the uncertificated planes which were delivered were certified by the operators upon the furnishing of certificates by the Boeing Company.

So technically I guess the answer to your question could have been no, some of them were uncertificated. We considered them certificated because the provision in the contract under which they would come back to us for the installation of these items and then delivered as certificated airplanes was never carried out.

[Tr. 3100] In other words, the operators were using the airplanes, they incorporated the things that had to go in for final certification on their own to keep the airplanes in service.

Q. Let me direct your attention to page 4 of the statement of improvement having to do with the deliveries of the 120 series, the three columns, TWA, Pan American and American.

A. Right, I have it.

[Tr. 3101] Q. Is it your testimony on your recollection that the plane delivered to Pan American on August 15, 1958, was a fully certificated plane available for use for the carriage of passengers?

A. No, that, I am quite confident was an uncertificated airplane used for route proving and training and certificated by the carrier on our furnishing the necessary kits.

Q. I can advise you that the record in this case shows as of now the full certification didn't take place until November of 1958.

A. I believe that's probably right.

Q. Is it also true that the plane shown to be delivered to American on October 23rd was not a fully certificated plane available for the carriage of passengers?

A. It was not.

Q. The same is true of the plane shown to be delivered to TWA on January 29, 1959?

A. That I am not sure of.

Q. I can advise you that the record in this case shows it was NP or an X?

A. It was?

Q. Yes.

A. All right.

[Tr. 3102] Q. Later certified, I think the final certification took place in July.

When we come to the reconstructed schedules which appear at pages 6, 7 and 8 of Mr. Rummel's statement, would one need to carry over the non-certificated planes to the dates set forth in the reallocation?

A. Well, here the same circumstances held, and I—I cannot recall whether some of these were uncertificated or not.

Q. Was not the first plane delivered to each of those carriers an uncertificated plane in the sense that it could not be used for the carriage of passengers?

A. These still refer to the 120 series.

Q. That is right.

A. Well, we—this is true, they were uncertificated airplanes.

Q. I believe all of the 320 were certificated fully at the time of delivery, is that correct?

A. Either that or the circumstance I described held, and they were certificated very shortly after we obtained our type certificate.

Q. Are you acquainted with the subpoena that was served on Boeing on June 6, 1966, for certain documents?

A. For certain documents?

[Tr. 3103] Q. That is right.

A. I knew we had been served, yes.

Q. Did you ever see the subpoena?

A. No, sir.

Q. Did you have anything to do with complying with that subpoena?

A. No. The effect of it was you might say automatic. We were served and we began to furnish the material.

Q. In connection with compliance, were your personal files in your own office searched, do you know?

A. I don't know.

Q. Did you have nothing to do with whatever search was made?

A. I had nothing to do with it.

Q. Do you have personal files going back to 1955 and 1956 in your office?

A. Yes.

Q. You do?

A. Yes.

Q. But you just don't know whether they were searched or not in connection with the subpoena?

A. I don't know personally, no. I presume if the subpoena covered matters of that nature they probably were.

[Tr. 3104] Q. Prior to Boeing seeking to sell its jets, how long was it since Boeing had actually been engaged in the sale and delivery of aircraft to commercial airlines?

A. Our last previous program was the Stratocruiser program and I believe we delivered the last of those airplanes in 1950.

Q. What was the first jet aircraft that Boeing offered to airlines? Was it the 120 or the 320?

A. The 120 series.

Q. 120?

A. Yes.

Q. When was that?

A. We started to talk to the airlines about the—it wasn't then the 120 series. We had a prototype airplane which for purposes of reference I will say was designated the 367-80.

And we discussed the merits of that airplane from the standpoint of its performance and what could be done with that airplane in respect to a design of a commercial jet transport.

Q. When was that, Mr. Connelly?

A. I'd say those discussions were in 1954.

Q. Was that prototype the same plane as the 120?

A. No.

[Tr. 3105] Q. Tell us the differences, please.

A. Well, the differences were mainly in the fuselage size, the airplane—the diameter of the fuselage was increased, and the length of the airplane was increased approximately ten feet.

In general the aerodynamic characteristics of the airplane remained fixed.

Q. How about the engines?

A. It was the same engine. On the 120 airplane.

Q. Yes, that is what I am talking about.

A. Yes, the 120, the same engine.

Q. Was the plane that was being offered in 1954 the prototype or were you even then considering changing it so it would become what eventually did become the 120?

A. I didn't mean to say we were offering that airplane in 1954. We were discussing it with the airlines and it

wasn't until we had had the airline inputs as to what they thought would best meet their requirements that the 120 airplane was eventually designed.

Q. That was some time in 1955, was it not?

A. That is correct.

Q. When was the 120 developed and offered to the airlines, that is, with detailed specifications?

A. As nearly as I can recollect, it was—our first [Tr. 3106] overtures were made some time in about the middle of 1955.

Q. Had detailed specifications been prepared by that time?

A. As far as a basic specification was concerned, I would say it was well along, not completed.

Q. When were the detailed specifications completed, Mr. Connelly, as far as the basic airplane was concerned?

A. It would be, oh, roughly the third quarter of 1955.

Q. Is it correct to describe the 120 by contrast with the 320 series as a domestic airplane and the 320 as a transcontinental airplane?

A. At that particular time, this was true, although they —obviously the airplane could be used for over water routes, but taking the North Atlantic it was a marginal airplane.

Q. You have testified that the 320 series became available, I think you said, December of 1955 or January of 1956, if I recall correctly.

A. In that period, yes.

Q. That is right.

Prior to that time, did Boeing offer any truly international plane to the airlines?

A. Referring to the 707 series, no.

[Tr. 3107] Q. Is there another series that they did offer?

A. Well, of course, to answer your question—maybe I am being too technical—you go back to the Stratocruisers, and we had turbo—

Q. No, I am talking about jets.

A. That's why I mentioned the 707 series.

Mr. Sonnett: Also since we are defining terms, I suppose truly international means intercontinental without stops?

Mr. Hayes: Yes. I assume that Mr. Connelly—

The Witness: Major over water routes.

Mr. Hayes: That is right.

Q. Was the 320 the first such jet that was offered to the airlines by Boeing?

A. By Boeing, that is correct.

Q. Will you tell us just what were the policies that Boeing established in 1955 insofar as offering jets to the airlines were?

A. There is nothing in the way of any written policies that I am aware of that—number one, the first requirement, of course, was our own basic program.

Naturally, we are in business, and our first consideration must go—if we are going forward with a program we must establish a firm base for it. So that is [Tr. 3108] our first consideration.

In respect to our customers, we attempt to treat every one as fairly and equally as we possibly can, and we have to give what priorities we are able to do that our production line will permit us to do to those who step up first, seriously undertake negotiations with the idea of concluding them with a purchase, and order—I wouldn't put too much emphasis on the size of the first order, although that is a con-

sideration, but the overall potential of that airline, looking through the years.

Q. Any other policy?

A. Those are the basic policies, if we call them policies. They are practices that we have adhered to as closely as we possibly could.

Q. The first you mentioned is Boeing's basic program. By that, did you mean that Boeing's desire was to get back into the active manufacture of aircraft for airlines?

A. I didn't mean that directly but that certainly was an objective.

No, my point was we must give first consideration to our program. By that I mean we can't give first consideration to any customer. We have had customers say [Tr. 3109] "I will take the first 50 airplanes." We can't run a program giving any body the first 50 airplanes because we would never sell another one, if there is any competition in the field.

We must establish a progrm that permits us to introduce a number of customers of sufficient size and scope to give us a reasonable chance to have a profitable program.

Q. How important a consideration was it in Boeing's mind that Boeing get back into the supply of aircraft to commercial airlines?

A. Mr. Hayes, I think what has happened over the last ten years is the best answer I can give to you on that. I mean, our backlog today I would say is probably at least three-fourths commercial business.

Q. So I do not misunderstand you—

A. It was very important.

Q. Your answer is that it was very important?

A. It was very important, yes, sir.

Q. You said that there was no written record of these policies that you stated.

How did they come to be established? Were there meetings of the directors, or did the headquarters group decide on them? How did they come to be established?

[Tr. 3110] A. It was a management determination of basic principle of fair play as I mentioned before with first considerations being given to how can we develop a satisfactory and profitable program.

Q. You say it was a management decision. Whom do you include?

A. Well, I don't mean—it is not a decision. Let me say it is a culmination of what I think is just good sense, good business sense.

Q. That may be. I am trying to find out who the parties were who participated?

A. You can take all the people whom I named originally in headquarters.

Q. The headquarters group?

A. Yes.

Q. Did Boeing make any announcement of these policies to the trade, that is, to the airlines?

A. I don't think we made any public announcement of them. I think we probably have had occasion to mention these policies or practices at certain times in our relationships with probably all of our customers or the majority of them.

Q. Were these policies that you referred to or had these policies to which you referred been adopted by [Tr. 3111] Boeing in 1954 when Boeing was first showing the prototype?

A. Well, these—the term policy, if we use that word, has been a byword with Boeing for a long term. It wasn't peculiar to the jet program by any means.

Q. The reason I use it is that you use it, Mr. Connelly, in your statement.

A. Yes, that is correct, for the lack of a better word.

Q. I want to know what you meant.

A. Yes, sir, I understand.

Q. The question is were they the policies that existed at least in Boeing's mind when in 1954 they were first showing the prototype to airlines?

A. Well, our activity in 1954 was more directed toward the type of airplane that could be developed to satisfy the commercial airlines transport requirements as we saw them for the next ten or twenty years.

We weren't at that time talking about delivery positions, this, that or the other thing. This came later.

Q. Whatever the policies were established, did they continue throughout the whole period up to 1961, continue unchanged, I mean?

A. They continued to today.

[Tr. 3112] Q. You mentioned delivery positions.

Did Boeing establish, within its own organization, any policies with respect to how it would allocate delivery positions?

A. Yes, in the format of what our production rate would be, what our accumulated inventory of airplanes at point of certification would be, the number of customers we thought was necessary to assure a sound program, and we made some tentative projections as to what these delivery schedules should be, without any knowledge of how many, if any, of these customers we might be able to obtain.

Now, by that I mean we were starting out recognizing we have X number of airlines that could have an interest in an airplane, and we tried to initially project delivery schedules we think will be reasonably acceptable to the airlines, provide a reasonably competitive situation as far as they are concerned, and from there on this changes as time goes on, and we secure certain customers or competition gets others, and there are constant revisions of this.

It is—I think it is quite typical of any type of business such as ours with high risk programs and—I am trying to accent the importance of our having con- [Tr. 3113] trol completely of how we must allocate positions, being fair and equal across the board as best we can, but with the end result that we will have a successful program.

We cannot let customers dictate what our production schedule is going to be or what our delivery schedule is going to be.

Again I recite many times we have been approached by one customer, "I will take the first 50 airplanes." This is the surest way to go broke if you want to put it that way. In the meantime you have lost all the other customers.

Q. I understand you to say in the course of your answer that Boeing at one point or other arrived at tentative decisions or what have you with respect to delivery positions?

A. That's right.

Q. When was that, Mr. Connelly?

A. Oh, from a time standpoint, it would be the latter part of 1954 or the early part of 1955.

Q. What was the tentative decision that Boeing then came to?

A. Well, in the first place, there was no naming of customers. This was Customer A, B, C, D and E and how [Tr. 3114] this would fit in with an overall production rate and accumulated inventory.

Q. Do you recall any of the specifics of this tentative proposal?

A. I can't, because as I said, Mr. Hayes, this changes day by day, as the events go on.

Q. Do you recall whether Customer A, and I mean by A, the first one who ordered and B, the second one who ordered, and C the third, that Customer A would get a

certain number of delivery positions before Customer B would get any and so on? It was that kind of tentative decision that was made?

A. Yes, primarily, because we have two major factors we must contend with.

Everyone can't be first. You have to select someone. We have the certification program to go through with. That customer's airplanes are normally the ones we have to use for a certification program.

There is another point. I'm sorry at the moment it escapes me.

Q. Do you recall how many delivery positions under this tentative delivery program that you decided upon were to go to the first customer before the second customer got any, to the second customer before the third customer [Tr. 3115] got any and so on?

A. May I back up and answer—

Q. Sure.

A. The other point has to do with customer introduction. Each airline has a completely different specification than the other. We built no two customers' airplanes alike. It is pretty much a custom operation.

We cannot introduce customers as the customer might like us to because our capability to design and develop the differences between these airplanes and certificate these differences dictates a certain lag between one customer and another.

I am sorry to go—

Q. That is perfectly all right.

I am glad you did.

A. I forgot your second—next question.

Q. The second question had to do with this tentative delivery schedule that Boeing arrived at.

Do you recall how many airplanes under this tentative schedule were to go to Customer A before Customer B received its first, how many to Customer B before Customer C received its first, et cetera?

A. Only to this extent: We had to determine how [Tr. 3116] many airplanes we would need for the certification program. This obviously has to give No. 1 customer some lead, because we have to use his airplane to certificate the entire series and obtain our type certificate.

From that point on, it is a question of how fast we can introduce them from the standpoint of our own ability, as we can best estimate our capability to design and develop these differences in configurations.

Q. I understand that. My question was directed to this tentative delivery schedule that you worked out.

A. How many did we have for the 120, is that your point?

Q. No, no. How many did you have for Customer A before Customer B got one, how many for Customer B before Customer C got one? I am assuming that when you set up this tentative delivery, you had such items of certification in mind.

A. Yes. I would say we probably had in the order of three airplanes.

Q. How many airplanes are necessary to go to the first customer to meet your certification program?

A. Well, this must be related to your desire to be in a position to make as early deliveries as possible. And what I am trying to say is, you say how many are neces- [Tr. 3117] sary. Maybe one would be necessary, if you don't care.

But if you can accelerate the program, then we obviously put more airplanes in to accomplish the end result of having our program proceed earlier than it otherwise would be.

Q. But can you answer the question as to how many of the first deliveries must go to Customer A so that you can accomplish certification?

A. It could be one, it could be three, it could be five.

Q. There is no one number?

A. There is no one number. It depends on the program.

Q. Your tentative schedule did assume that with the delivery of three to Customer A, you would be able to accomplish certification?

A. Whether the first projected schedule had three or not, I don't know. We ended up with three.

As I say, this changes constantly, Mr. Hayes, as you go along.

Q. I think you said—I am not sure—correct me if my statement is incorrect, Mr. Connelly—that the tentative delivery schedule was not adhered to, in fact? You did not say that?

[Tr. 3118] A. No, it was not.

Q. You shook your head no?

A. I'm sorry. You might say that is only an estimate. It has to be to begin with. And as events occur, if we are successful in signing up X number of customers, we get one result.

If our competition is signing them up faster than we are, it brings about another result. So it can't be a fixed thing, obviously.

[Tr. 3119] • • • Examination (cont'd) by Mr. Hayes:

Q. Mr. Connelly, you mentioned in connection with the policies of Boeing that—speaking generally, this was—as I recall it—you considered not merely initial orders that might be placed by airlines, but also the potential which an airline represented.

Q. Did you say that Convair sold a block of 990s to Hughes Tool before any other purchaser came in?

A. I am quite confident that's the case, yes.

Q. See if I can jog your recollection a bit. Wasn't the first airline to order 990s American?

A. No—oh, I beg your pardon. I am speaking of the 880, not the 990. You are quite right, it was the 880, not the 990.

Q. As to 880s, weren't there contemporaneous orders placed by the Hughes Tool Company for TWA and by Delta?

A. I think some of the Delta positions could have come out of the original allocation.

Q. I did not hear what you said.

A. I think some of the Delta Airplanes could have [Tr. 3123] come out of the original allocation to the Hughes Tool Company. I am not sure of that, but not being a party or privy to those discussions or negotiations, this is pretty much hearsay. I don't know.

Q. You don't know of your own knowledge?

A. I do not know of my own knowledge, no.

Q. During the piston era, did Boeing, Douglas, Lockheed, Convair and, say, Martin follow the same sales policies do you know? You made an exception with respect to Lockheed as to the Constellation.

A. I am not familiar with what the practices were at that time.

Q. Do I understand, then, that you are not prepared to testify, Mr. Connelly, that Boeing's sales policies were necessarily the sales policies of the aircraft manufacturing industry generally?

A. I can't say that they were the same, of my own knowledge. There were differences in respect to certain programs.

Q. Were Boeing's policies, to which you refer, always reflected in the contracts it made with airlines? In short, were the contracts in accordance with its policies at all times?

A. We think the contracts that were entered into [Tr. 3124] were in accordance with those policies. There—

Q. Aside—I am sorry.

A. I was going to say there was no express policy statement, as such, in a contract.

Q. Did Boeing ever enter into informal agreements with any airlines which were not spelled forth in the formal contracts? By "formal contracts," I include all papers, side letters and everything else.

A. You mean to a conclusion?

Q. Pardon?

A. Let me—well, we have never in any instance not ended up with a definitive contract.

Q. I know that.

A. Formal definitive contract.

Q. That's right. Did Boeing ever make additional agreements, oral in character, relating to any of the provisions of the contract which were no part of the written agreement?

A. Or the final agreement?

Q. Yes.

A. Not to my knowledge.

Q. Never did?

A. Not to my knowledge. You mean a side agreement—

Q. That's right.

[Tr. 3125] A. (continuing)—or an oral agreement on the side?

Q. That is right.

A. Not to my knowledge.

Q. Did Boeing, as a matter of policy, disclose to one airline its contract terms with another airline or refrain from doing so?

A. We refrained from doing so.

Q. Was that policy generally followed?

A. Yes.

Q. With respect to delivery positions—and I am addressing myself to the jets entirely now, Mr. Connelly—when Boeing got to the point of reserving delivery positions for any one airline, or more—and I am thinking of the first airline and then the second and the third—did they reserve additional delivery positions for later possible customers?

A. Yes.

Q. What was the policy in that regard, so far as the 121s were concerned?

A. Well, that was the policy. I don't know how one could be specific on that, Mr. Hayes. This is a matter, as I mentioned before, of continual evaluation as we went along.

Q. So you say. But Boeing entered into contracts [Tr. 3126] for the 121s, if I recall your testimony, first with Pan American and American.

A. Correct.

Q. After those contracts had been entered into, can you tell us what delivery positions were available for later comers, other airlines?

A. All I can say in answer to that is we had reserved positions for others, including TWA, but I can't recall what they were specifically.

Q. You do not know whether it was among the first three planes or the first five planes or the first ten planes?

A. Planes or customers?

Q. Pardon?

A. Planes or customers.

Q. Planes. Plane deliveries. I am talking about delivery positions that were reserved.

A. Well, we had projected what our capability was from the standpoint of our production rate and our ability to introduce new customers, and we attempted to, from time to time, determine the more likely airlines to eventually be interested in taking those positions. And this was constantly changed.

Q. As of the time that the American and Pan American [Tr. 3127] contracts had been made, was there any written record of what delivery positions were then available or other airlines who might come along?

A. Our overall sales schedules, yes, which was not specific as to individual airlines.

Q. Does that still exist?

A. Well, not in the case of the 120, no.

Q. Does it in the case of the 320s?

A. No. We are far beyond that point now.

Q. I understand that. You have no recollection now as to what delivery positions, so far as the 120s are concerned, were still available for any particular airline after Pan American and American had made their contracts?

A. The specific position we quoted to TWA, yes.

Q. How about United?

A. United had purchased DC-8s.

Q. Before Pan American and American contracted?

A. Not before Pan American had contracted, no.

Q. Before American had entered into a letter of intent?

A. Yes, I believe that had occurred prior to that date.

Q. How about planes for foreign carriers, can you [Tr. 3128] tell us what delivery positions were reserved for them?

A. Well, we reserved positions for BOAC, Air France, Lufthansa, Sabena, KLM and SAS, all major overseas carriers.

Q. Can you identify the positions that were reserved?

A. No, I cannot.

Q. So that neither with respect to the 120 series nor the 320 series can you presently state from your recollection what positions were reserved for airlines other than Pan American or American?

A. No, because these were constantly changed.

Q. I am speaking of the time immediately after Pan American and American had contracted. As of that moment, can you testify what delivery positions were available to the others?

A. No, I can't, because it is not a fixed thing. I mean, it is a day to day change.

Q. With respect to the order, what did you consider an order? Was it a final order, was it a letter of intent? What was it?

A. We considered, and still do, that when an airline has expressed a serious interest and has entered into negotiations in good faith and we have quoted him positions, [Tr. 3129] we retain those positions as long as those conditions continue.

Q. Of what importance is a letter of intent, if there is still no formal contract?

A. Well, this depends on the character of the letter of intent, and in a majority of instances a letter of intent contains certain qualifications.

It may be a matter of board approval or financing or government approval or any set of circumstances that must be fulfilled before the agreement is binding.

Time limits are set on these things and so long as those letters of intent have not expired, we will retain the delivery position.

Q. Even though another airline might come along and be willing to enter into a final contract?

A. Yes.

Q. Do you disclose to other airlines what delivery positions you have agreed to give to other airlines?

A. We have in certain instances stated outstanding proposals that were made on a firm basis, as far as holding delivery positions for a certain period of time, yes.

Q. Did that happen in connection with the 120s?

A. I can't recall an instance where this was involved with a 120.

[Tr. 3130] Q. How about the 320s?

A. Yes, it happened in the case of TWA.

Q. What happened there, would you tell us?

A. I mean the Hughes Tool Company. Pardon me. Well, Mr. Hughes asked what open positions we had on the 320 airplane through, I think it was, June of 1960, and we told him what we had open, excluding the firm outstanding proposals we had at that time.

Q. You say "we." Who told him, do you know?

A. I guess I did. Or maybe Bill Allen did. I am not sure.

Q. Did you tell him how many delivery positions Boeing had agreed to give to Pan American?

A. To my knowledge, we have never revealed that, no.

Q. You did not reveal that?

A. Not positions. Of course, the press release gave the total quantity. And as is usually the case, a public announcement would state the first deliveries. It might even go so far as to say in what period of time they might be delivered.

Q. Do you recall what happened with respect to the Pan American order for 320s in that regard?

A. No, I can't specifically.

[Tr. 3131] Q. Has there ever been an instance where Boeing has negotiated with two different airlines at the same time, arranging for one to get delivery positions of the other under certain sets of circumstances?

The Witness: Will you repeat that again, please?
Mr. Hayes: Would you mind reading it?
(The question was read.)

A. Our customary procedures in cases like that would be to quote both, if they were the same position, subject to prior sale.

Q. What does that mean, if they were the same—

A. It means whoever steps up first would get them.

Q. You mean you would offer the same delivery positions to two different airlines?

A. This has happened in a very few instances.

Q. Has there ever been a situation where you have offered earlier airline positions to Airline A than to Airline B and further agreed that under certain circumstances Airline A could transfer its delivery positions to Airline B?

A. To my knowledge, this has only occurred in the case of an affiliate.

Q. An affiliate of whom?

[Tr. 3132] A. An affiliate of TWA or Pan American, whoever the affiliate might be.

Q. I am thinking of two airlines that are not affiliated. Has it ever happened?

A. Well, I am talking of two airlines primarily that are not affiliated, but Pan American has affiliates.

Q. You mean you have done this only in connection with Pan American or an affiliate of Pan American?

A. No. In certain cases where an airline has an affiliate, we have agreed that in certain cases they could under cer-

tain conditions transfer some of the airplanes they bought from us to that affiliated airline. BOAC and Cunard Eagle —or Cunard is a good example of that.

Q. Aside from affiliated airlines, have you ever entered into any such arrangement with two independent airlines?

A. As I recall, we gave Pan American the right to transfer a limited number of airplanes to foreign airlines, which might be required in order to obtain landing rights in those areas.

Q. Aside from that, do you recall any instance?

A. No, I do not.

Q. At the time that Boeing was negotiating with Pan [Tr. 3133] American, did Boeing know that Pan American was also negotiating with Douglas?

A. Yes.

Q. Did Boeing know that Pan American intended to buy Douglas aircraft?

A. It didn't know it, but we strongly suspected it.

Q. When did you get to the point of knowing it?

A. When the announcement was made.

Q. Do you recall when that was with relation to Pan American's formal contract with Boeing?

A. No, I do not.

Q. Whether it was before or after?

A. I am sure the announcement was after the formal contract. As I recall, both their purchase of Boeing and Douglas airplanes was announced at the same time.

Q. After delivery positions has been granted in one contract with a particular airline, would it be possible for that airline to improve its position by later orders, or was there any policy on that at all?

A. In a very few instances, it became possible to improve an airline's overall schedule by reason of certain open

positions that did develop from time to time and became available.

Q. How were they developed or did they become avail-[Tr. 3134] able, Mr. Connelly?

A. Well, we may have outstanding quotations to other customers that eventually were not consummated.

Q. Any other way it could become available?

A. Well, one possible way would be by some reason we were able to squeeze out one more airplane or something like that. I can recall no instances of this.

[Tr. 3135] Q. You mean improvement in manufacturing?

A. In manufacturing.

Q. In the case of the Toolco agreement, did it make any difference from Boeing's standpoint whether Toolco or TWA placed the order?

A. None whatsoever.

Q. When you mention TWA in your statement, do you include in that orders by Toolco for the benefit of TWA?

A. Well, normally I would, yes.

Q. I mean in the statement that you prepared.

A. Yes.

Q. You refer to TWA from time to time. In that, do you mean as well as Toolco for the benefit of TWA

A. Toolco, for the benefit of TWA, that's right.

Q. On your prepared statement, Mr. Connelly, page 2, the paragraph bearing the No. 1, the second sentence reads:

> "In accordance with its policies, Boeing would have afforded TWA substantially as early delivery positions as those afforded to other customers of comparable interest to Boeing,"

And then you proceed with various subdivisions.

Can you identify who were the customers of comparable interest to Boeing?

[Tr. 3136] A. I'm sorry. I lost the paragraph.

Q. Page 2.

The Special Master: Right here, the second sentence.

Q. The second sentence of No. 1, would you read that please, down to the word "Boeing"?

A. Yes.

Q. My question is, would you please identify who were the customers of comparable interest to Boeing?

A. Well, the other major trunks and the other major international carriers.

Q. As a group?

A. As a group.

Q. Did Boeing have any particular desire to sell some airlines more than others?

A. No, sir. We were interested in selling the greatest number of airplanes we possibly could.

Q. Did Boeing have a priority list among airlines?

A. No, sir.

Q. In that sentence you also use the phrase "In accordance with its policies, Boeing would have afforded . . ." Do you see the language, the beginning of that same sentence? A. Yes.

[Tr. 3137] Q. Does the language "would have afforded" mean the same as offered?

A. Yes, sir.

Q. It does mean the same?

What is meant by the phrase "substantially as early delivery positions"?

A. Well, that refers to our capability to equalize a situation in a manner consistent with our own production requirements.

Q. Can you translate that into numbers of planes or sequence?

Q. I'm afraid I can't, Mr. Hayes, because the factors involving this are so many and so varied.

Q. You do not mean delivery at the same time or in the same month or any particular period of time?

A. Or in any sequence.

Q. There could be or could there be fairly substantial time gaps between deliveries to different airlines in which you would still have considered substantial equality in delivery positions?

A. I don't think we can call it substantial equality. It would be a matter of whether or not we were able to produce the specific airplane that one company might desire at or about the same time as that or those being [Tr. 3138] prepared for other people.

Q. What do you mean by at or about the same time? That is what I am trying to find out, Mr. Connelly.

A. Our schedules are essentially on a monthly basis. We do not specify days or weeks.

We contract to deliver X number of airplanes to a customer within a certain month.

At the start of a program, we would say during or before a certain month, not knowing precisely what our production capabilities will be, looking two or three years ahead. It is possible we might be able to deliver them earlier.

Q. Would you consider as substantially early delivery positions a situation where two carriers ordered, Carrier A and Carrier B—say Carrier B a week after Carrier A—but Carrier A would have X number of airplanes, three,

four, five, before Carrier B received any, and there might be a period of two or three months during which Carrier A would receive its first airplanes? Would that be considered by you?

A. If I understand your question correctly, it does go back to a problem we have that everybody can't be first and we must have a certain number of airplanes to accomplish our certification program.

[Tr. 3139] So, it has to be, the first man has to have a certain number of airplanes ahead of whoever comes behind. From then on, it is a question of our ability to introduce new customers, because of the variance in design and development aspects of each individual customer's requirements.

Q. That is the best you can tell me in response to my question?

A. It is the best.

Q. In the actual situation that took place among TWA, American and Pan American with respect to the 120, is it your opinion that TWA, Pan American and American were accorded substantially early delivery position?

A. Substantially early?

Q. That is right. I am using your phrase, Boeing would have afforded substantial equality in early delivery positions.

A. That is why I asked the question.

Q. Yes?

A. As to substantial equality, by reason of the sequence in which these things happen, I don't think substantial equality holds.

Q. Would you explain that, please?

A. Yes, because our policy to give what priorities [Tr. 3140] there might be to the customer who first steps up and orders a substantial number of airplanes.

Q. As against Customer No. 2?

A. Or Customer No. 3.

Q. As to Customer No. 2, suppose he orders the next day. Your commitment is already made to Customer No. 1, is it not?

A. Well, by orders, I'd like to go back again and say that it isn't a matter of who signs a piece of paper. It is a matter of who expresses sincere interest and enters into negotiations in good faith. This could take months, not one day.

Q. There comes a point, does there not, Mr. Connelly, when Boeing and an airline have some sort of agreement that some number of planes will be purchased, whether it is a signed agreement—

A. Yes.

Q. —or not?

A. Yes, that's right.

Q. So far as Boeing is concerned, when that time arrives with Airline A, whatever commitments were made will be held fast—

A. That is correct.

Q. —assuming that eventually the contract is [Tr. 3141] signed?

A. That is correct.

Q. Let us assume that Airline A comes to such an understanding with Boeing on a particular date, and a week later Airline B comes to a similar understanding with Boeing. Will the commitment to Airline A remain, assuming that eventually both have signed contracts?

A. I don't think I am making myself clear.

If both airlines started negotiating at the same time in good faith, the schedules we would be quoting would represent substantial equality, even though the agreement we'll

sign as soon as the papers are ready may occur one day apart or a week apart.

Q. What then do you mean by substantial equality?

A. The—working toward the end result that both carriers would—even though one might have a few airplanes ahead of the other, that over a period of time we would attempt to equalize this situation so that the differential never exceeded that which it started with.

Q. How many airplanes do you mean when you say might have a few ahead of the other?

A. I don't know one can fix a number on that. It could be anything from one to five.

Q. Did Boeing, so far as you know, ever make offers [Tr. 3142] to two different airlines at or about the same time in which it offered one airline substantial priority over the other as to delivery positions, and for comparable numbers of planes?

A. We would have to on the basis of our ability to introduce new customers.

Q. You would have to offer one of them?

A. One obviously would have to have, say one month or something ahead so that we could concentrate on these designs and developments in sequence. We can't do them all all at once.

Q. Have you ever done it in numbers of airplanes offered, negotiating with two different airlines at the same time, offered one of the airlines a specific number of planes for delivery before the other airline would get any?

A. Yes. It gets to be one horse and one rabbit sometimes. There are some airlines that can only buy one airplane and there are others that can buy 15.

Q. I am speaking of two airlines now that ordered substantial numbers of planes.

A. I can't recall having done so, no.

Q. Let me phrase somewhat differently a question I put to you before.

[Tr. 3143] Did Boeing consider that TWA's actual deliveries were substantially as those of Pan American and American?

A. As contracted for?

Q. The fact. I am speaking of the fact now.

A. Well, that's as contracted for.

Q. What actually happened in your opinion. Were TWA's actual deliveries substantially as Pan American and American?

A. As the deliveries actually occurred, no, I don't think they were.

Q. As contracted for, in your opinion, were TWA's deliveries substantially as early as Pan American's and American's?

A. No, I don't think they were.

Q. Take the actual deliveries. How much earlier should TWA's deliveries have been to make them substantially as early as those of Pan American and American?

A. I can only answer that question one way. Had all three airlines come in at the same time, the schedules we are looking at here would not have been the schedules necessarily.

I mean, we would have to take it in the light of what our production capability, what are the de- [Tr. 3144] mands of these three airlines relative to others, and we would not have quoted necessarily the same schedules we did to Pan American or American.

Q. Or to TWA?

A. Or to TWA.

Q. To how many airlines could Boeing or was Boeing able rather, to provide substantial equality by deliveries at or about the same time?

A. Well, this depends on the program itself and what our capability is. In one program, we may be able to afford substantial equality to maybe four, five or six. Another—

Q. I am speaking of the 120s, in the fall of 1955.

A. I would think three or four.

Q. Three or four?

A. Yes.

The Special Master: And the 320s?

The Witness: I would think, Mr. Brownell, in that case in the order of three or four.

Q. In answer to a previous question you referred to these schedules. Did you mean the reallocated schedules or the actual deliveries?

A. Well, there was a question preceding that I'd have to go back to.

[Tr. 3145] Mr. Hayes: Can you read that where he referred to these schedules so Mr. Connelly will know exactly what he had in mind?

(The record was read.)

The Witness: I am speaking of contract schedule.

Q. The schedules you are looking at here, do you mean those attached, TWA—

A. Well, then we have to assume that the same acceleration would have to take place as far as reallocation is concerned.

Q. The reason I ask is because the only schedules that are before us and included in your statement are actual deliveries and reallocated deliveries.

That is why I asked.

A. The point I was trying to say is it may not have been these schedules at all if we had four customers or three customers in at the same time.

Q. You are speaking now of contract schedules that might have happened?

A. That's right.

I was saying beyond that, I would have to assume that such acceleration as did occur would have occurred in that instance.

[Tr. 3146] Q. Were all of them benefitting to the same degree?

A. Well, to substantially the same degree, yes.

Q. You were not specifically referring, by reference to these schedules, either to the actual deliveries which are attached to your statement or to the reallocated deliveries?

A. That's right, neither.

Q. When did TWA commence negotiations looking toward the purchase of jets with Boeing?

Mr. Sonnett: Will you read that question back? (The question was read.)

Mr. Sonnett: I don't know that there is anything in this record indicating that TWA ever did at any of the years here involved.

The Special Master: Does the question cover Hughes Tool as well as TWA?

Mr. Hayes: No, TWA at the moment. I am not thinking of Hughes Tool.

The Witness: I am glad you asked that question.

A. When did TWA—

Q. Yes.

[Tr. 3147] A. It is the time they bought their first fan powered airplanes, and I cannot remember the exact year.

Q. In 1954 or 1955—

A. No.

Q. —did you have any negotiations with TWA personnel?

A. In 1954 and 1955?

Q. Yes.

A. With TWA personnel—

Q. Right.

A. —acting for and in behalf of Hughes Tool Company?

Q. Did you have any negotiations with TWA personnel was the question.

A. I'm sorry. Yes.

Q. With whom?

A. Mr. Rummel, Mr. West, quite a few of the engineering people in Kansas City, I think Mr. Rourke, Mr. Parmet participated in them. I can't remeber all of the people, but there were a good number of TWA people participating in the negotiations.

Q. Mr. Damon?

A. No.

Q. No negotiation with Mr. Damon?

[Tr. 3148] A. Not to my knowledge.

Q. Did you conduct all of the negotiations, or were others conducting negotiations besides yourself?

A. Well, there had been some discussions. Here again, this is—I was not a party to these discussions.

Q. You were not a party to them?

A. No. This is prior to the time we actually sat down around a table and started negotiating.

Prior to that time, there had been some discussions, I think principally by telephone, and I would presume between Mr. Hughes and Mr. Allen and Mr. Beall.

Q. But you were not party to any of those discussions?

A. I was not a party, no.

Q. How far back did the discussions with Mr. Hughes go, if you know?

A. I do not know.

Q. Do they go back to 1954?

A. Yes, I believe they probably did.

Q. Were there any discussions with TWA personnel as early as 1954?

A. That I don't know.

Q. You mentioned before it was TWA personnel acting for Hughes Tool Company.

[Tr. 3149] Who told you that TWA personnel with whom you were negotiating were acting for Hughes Tool Company.

A. That's the word that was transmitted to me through Mr. Allen after discussions with Mr. Hughes.

Q. That is the way you learned it?

A. Yes.

Q. Was there any reason given as to why they were acting for Hughes Tool Company?

A. No. I think this is the way equipment acquisitions had been accomplished over some period of years.

Q. Had not TWA bought directly also from other airlines?

A. I don't know.

Q. You don't know?

A. No.

Q. You really don't know how TWA acquired prior aircraft, do you?

A. I suppose the answer to that is no.

Q. Were you told that TWA was not able to make the down payments that would be required?

Mr. Sonnett: I object to this as irrelevant wholly outside the scope of the examination, and in any

event what TWA personnel acting for Mr. Hughes might have said would not be binding on TWA.

[Tr. 3150] The Special Master: I am not just sure what Mr. Hayes is trying to get at here so I will allow the question subject to later motion to strike.

The Witness: Would you repeat the question, please?

(The question was read.)

A. No, that isn't the point that was told to me, but there is a point.

Q. All right, let's have it.

A. Mr. Hughes wasn't interested unless he got the first large block of airplanes. That's what was passed on to me.

Q. When was this?

A. This was just prior to the time that we made our first overtures to the airlines.

Q. That was back in 1954 then?

A. Or the early part of 1955.

Q. It was at the time of the prototype, is that it?

A. After we had demonstrated the prototype and obtained airlines inputs as to their desires and comments.

Q. When you were told that Mr. Hughes wanted—did you mention a number of early delivery positions?

A. Oh, I heard the figure 50, yes.

[Tr. 3151] Q. 50.

A. Yes.

Q. Who told you this by the way?

A. Mr. Beall.

Q. Did he also tell you that he wanted those early delivery positions for TWA?

A. He wanted the first 50.

Q. For whom? Were you told that or weren't you told anything in that regard?

A. Well, to us it was quite obvious.

Q. I want to know what you were told, Mr. Connelly.

A. I can't remember whether he said for Hughes Tool Company or for TWA.

Q. You have no recollection on the subject?

A. I have the recollection I just outlined, yes.

Q. As to what he wanted them for you don't know? You have no recollection as to what you were told in that regard, is that correct?

A. Well, if you are asking did he say he was buying them for TWA, the answer is no, as far as I know.

Q. Did he tell you—

A. Who?

Q. Did Mr. Hughes tell you that he was not buying them for TWA?

[Tr. 3152] A. No.

Q. You really don't know what? You were not a party to the conversation?

A. That's what I said to begin with.

Q. So you don't know what may have been said except as to what may have been reported to you later by Mr. Beall?

A. That's correct. I thought I made that clear. It was hearsay.

Q. When did Pan American commence negotiations?

A. Before the prototype was built?

Q. And continued such negotiations?

A. Correct.

[Tr. 3153] Q. When did American commence negotiations?

A. Very shortly after prototype flew.

Q. And continued such negotiations?

A. Right.

Q. When did United commence negotiations?

A. At about that same time.

Q. And continued until they eventually bought—

A. Until they made a decision, yes.

Q. What foreign airlines commenced negotiations at about the same time that Pan American, American and United did?

A. Well, now we have to switch over to the 320 because that was the long-range intercontinental airplane.

Q. When did you commence negotiations looking toward an international plane?

A. At the same time we were negotiating on the long-range airplane.

Q. When was that? Can you fix the time?

A. Yes, it was the month of December, the early part of January.

Q. Had you had negotiations with the foreign airlines prior to that time?

A. No, these offerings were all made about the [Tr. 3154] same time?

Q. No, the question was had you had any negotiations looking toward the possible purchase of an international plane assuming you would produce one?

A. At that same time, yes.

Q. Not before then?

A. Not before, no.

Q. When did Pan American decide to buy jets, regardless of when the contract was signed, in the sense that you considered a firm agreement?

A. That agreement was signed during the month of December 1955, if I recall.

Q. You mean the 121?

A. No, I'm speaking of the 320.

Q. No, I am speaking of the 121 now, the first order. I think you will find the agreement was signed October 13, 1955.

A. I was going to say around October.

Q. Was there a date prior to that at which you considered there was a firm commitment running between Pan American and Boeing?

A. I can't say there was a date, but we anticipated that they would buy, yes.

Q. Prior to October 13th at least you considered [Tr. 3155] it a firm agreement to the point that you would not have entered into a contrary agreement with another airline; is that right?

A. That is correct.

Q. How about American, when did you arrive at a similar understanding with American? Your contract, I can tell you, is dated March 1, 1956.

A. Yes, but not the letter contract. The letter contract precedes that several months.

I can't recall the exact date.

Q. How long after Pan American's commitment was it?

A. Very shortly after that.

Q. So that would bring it back to October 1955 or earlier?

A. It wouldn't have been earlier, I don't think. It is in that area, October, November, somewhere in there.

Q. What about TWA? The contract was signed the day after American's, March 2, 1956?

A. The definitive contract, you mean?

Q. That is right.

A. Well, we negotiated a proposed letter agrement with the Hughes Tool Company some time between Christmas and New Year's of 1955. I say proposed. I can't [Tr. 3156] remember when it was signed.

Q. It was signed either in late December or early January 1956, was it not?

A. I'm not sure.

Q. How about the foreign airlines, with respect to the 320s now?

A. They signed—BOAC—not BOAC, but Air France, Lufthansa, Sabena signed in the very early spring of 1956.

Q. Pan American was in December of 1955?

A. That's when we signed an agreement.

Q. When was the commitment made with Pan American?

A. I can't recall exactly. It was not too long before the agreement was signed.

Q. Were there commitments received from any of the foreign airlines prior to the spring of 1956?

A. Not prior to the spring of 1956.

The problem here again is a matter of not only airline management decision, but government approval.

Q. On the 121s, Pan American ordered 20 and American ordered 30?

A. That's correct.

Q. Was Pan American given any preference [Tr. 3157] over American even though it ordered ten less airplanes?

A. Not much except to the extent they had the first three airplanes.

We had a contract commitment with Pan American that they would get the first six airplanes.

Q. You were negotiating with Pan American and American at the same time, were you not?

A. Yes.

Q. Why did you make that commitment?

A. We made that decision because there was no competition as between American Airlines and Pan American

Airlines, and American Airlines because they were second, obtained some priority of their own.

Q. Was American negotiating with Douglas?

A. Yes.

Q. Was Pan American?

A. Yes.

Q. The negotiations with Boeing by both airlines were concurrent?

A. Yes.

Q. Is this your idea of or your opinion of what constitutes substantially equal treatment of the two airlines?

A. Yes, if you take the competitive picture into [Tr. 3158] account I think it is.

Q. What do you mean by that, take the competitive picture into account?

A. What I just said. There is no competition between Pan American and American.

Q. Was not American just as anxious to get jets as Pan American?

A. Yes, but when we talk about substantial equality, I think we have to relate it to the competitive atmosphere the airlines are faced with.

Q. You don't state that in your prepared statement, do you, Mr. Connelly?

A. Well, it is kind of a unique situation with Pan American. We were anxious to develop the foreign market and the best way to do that, of course, is to get an operator operating our planes.

Q. The best way to do that and I missed something.

A. I say we were anxious to develop the foreign market and it was considered to be very desirable to have Pan American operating airplanes as soon as possible.

Q. So this is a new policy or additional policy that Boeing decided upon when they gave Pan American [Tr. 3159] a preference; is that right?

A. I wouldn't consider it as such, no.

Q. It was a decision at any rate?

A. It was a decision, yes.

Q. That in order to—

A. We think it was consistent with an interpretation of our policy.

When you talk of substantial equality I think you have to relate it to the situation that airlines are faced with.

Q. This is not in your prepared statement, this conversation, is it, Mr. Connelly?

A. I don't know that—well, personally and I could be wrong, I don't see the pertinence of it to this particular situation.

Q. Whether you see it or not, the question is this consideration of the competitive atmosphere was not set forth in your prepared statement? Am I right in that or wrong?

A. I think it is inferred.

Q. Where? Show me.

A. When you use the words "substantial equality," I think—what else can it relate to?

Q. Show me where you refer to the competitive [Tr. 3160] atmosphere as a consideration determining substantial equality. You have the statement before you.

A. It wasn't stated specifically in here.

Q. Where was it stated inferentially?

A. I think the entire wording of the thing when we speak of substantial equality—what else do we mean by substantial equality?

Q. I don't know. I am asking you.

A. It has to have relation to the competitive situation. Otherwise, there would be no purpose to it.

Q. But in your statement you are talking of substantial equality among Pan American, TWA and American at least so far as the 120 series is concerned; are you not?

A. That's correct.

Q. Where in either the actual deliveries or in the reallocation which you find reasonable, or in your text do you find any reference to the competitive atmosphere being considered as among those three airlines?

• • • • •

[Tr. 3161] • • • The Special Master: This always means, of course, in addition to whatever you have testified to before.

A. Nowhere.

Q. Did you have any discussion with anybody prior [Tr. 3162] to your testimony with respect to this matter of competitive atmosphere?

A. At this proceeding, Mr. Hayes?

Q. That's right—

A. No, sir.

Q. —prior to your testimony in this proceeding.

A. No, sir.

• • • • •

Q. To continue a moment with this getting of planes on the international area, the plane as to which you gave Pan American priority over American was one that was as you have already testified primarily a transcontinental plane rather than an intercontinental plane, was it not?

A. Its capabilities were much better related to a domestic operation.

Q. That's right. As a matter of fact, you described its capabilities intercontinentally as marginal earlier in your testimony.

Was it that you were hoping to persuade foreign [Tr. 3163] airlines to buy the 121?

A. Well, initially, yes, we hoped that this would influence foreign sales. When it appeared that the JT-4 engine, the larger engine would become available, we looked at the 120 series as to what might be done to increase the gross weight capability of that airplane to increase its range, payload capability, and it became very evident that the more prudent move was to go to a larger airplane, the 320 series incorporating that engine.

Q. Before Boeing came out with the larger, the 320 series, was Douglas offering a plane that was capable of dependable intercontinental operation?

A. Well, I would say at about the same time they came out with two series of the DC-8, one powered with the J-57, which is the same engine we had on the 120 which would be a very marginal airplane again over ocean routes.

And I would say it was about the same time that they came out with a JT-4. It could have been a little bit ahead of us. I am not exactly clear.

Q. Isn't it a fact that they were ahead of you in offering an intercontinental plane?

A. Well, if so, not very much.

Q. On this business of substantial equality in [Tr. 3164] early deliveries, suppose one carrier orders 15 airplanes and another orders 25 airplanes. Would it be substantial equality to deliver the 15 airplanes ordered by the third carrier as soon as 15 were delivered to the second carrier, or would the first carrier receive a sort of ratable distribution so that at the end of the delivery period they would each have the full order?

A. I suppose every airline would dispute that point, I mean, argue that point back and forth, but if we tried to

move up, say, an order for 30 airplanes in the same period as somebody was ordering 15, we'd be out of business with any other customer.

So we are the ones that quoted the schedules that extended over a period of time. The benefit to the man buying—the airline buying 30 airplanes is assured price and delivery.

Q. Let me ask you this question: By way of date would TWA or Toolco—and I use the terms interchangably as you do—have had to place orders for the 131s to have been accorded what you consider substantial equality with Pan American and American?

A. At or about the same time that we sent out our initial, you might say, advice to the industry of our tentative decision to go forward with the airplane.

[Tr. 3165] Q. When was that?

A. That was, I'd say, late spring of 1955, in that area. I could be off a couple of months, but in that area.

Q. That is the date at which it would have had to place its orders?

A. To be concurrent with other operators, yes.

Q. If TWA in the spring of 1955, or whatever period you have in mind in your answer, had ordered eight 131s as in fact it did in its original order, would Boeing have afforded TWA substantial equality in early delivery positions with Pan American and American?

A. You mean as to relative numbers of airplanes delivered during the period they got their eight airplanes?

Q. I mean as to the early deliveries, to the three air carriers.

A. Well, if it is related to should the others be slowed down or they speeded up, to the extent of eight airplanes across the board, we wouldn't consider this to be an equi-

table solution to the problem, no. Quantity had something to do with it.

Q. Quantity was of some importance then?

A. We had mentioned that in the statement.

Q. I know you did. I am trying to find out now [Tr. 3166] how important quantity is or was in Boeing's mind at that time. Just how important was it?

A. Well, it is quite important to us.

Q. Major importance?

A. Yes, it was of major importance.

Q. How many aircraft would TWA have had to order in order to get substantial equality with Pan American and American?

A. Again, having ordered at the same time?

Q. That is right. In the spring of 1955 period that you mentioned.

A. Well, I would say in the order of 20 or 25 airplanes.

Q. Was Boeing advised by anyone on behalf of TWA or Toolco why it was planned to place a relatively small order initially for the 131s?

A. Well, my own information would be that Hughes or TWA were not too happy with deliveries after June of—let's see—this was 1959, I guess it was. Well, anyway, the first period of deliveries. Anything beyond June of that year, they were not too interested in.

Q. Was it only because of delivery dates?

A. I think there were occasions that they were at that time more interested in the big airplane, down the [Tr. 3167] line, than a great number of 121s because at that time, of course, they were dickering with Convair for the 880.

Q. Were you ever advised by anyone representing TWA or Toolco that Toolco considered the 131 a marginal plane in the light of its routes being both domestic and interna-

tional and were hoping for a plane that would be available and useful on both types of its routes?

A. I think that goes back to what I said their interest was more in the larger airplane. A larger type airplane, I should say.

Q. That was not available in the spring of 1955, was it?

A. It was not.

Q. It was not even available in October of 1955, was it?

A. No.

Q. You knew, did you not, that the Tool Company and TWA were carrying on negotiations with Convair?

A. Yes, sir.

Q. How did you know that?

A. I don't know any single thing to say. There was every evidence, Mr. Hayes. People were in San Diego, we knew that.

Q. Who were these people who were in San Diego, do [Tr. 3168] you remember that?

A. Well, Mr. Rummel for one. I don't know. I think they probably had a fairly large engineering group working on the specifications down there, but I couldn't name them.

Q. Did you know that the endeavor in those Convair negotiations was to obtain a plane that would be suitable on both the domestic and international routes for TWA?

A. I understood at the very beginning of the negotiations they were looking for that type of airplane, yes.

• • • • •

[Tr. 3169] • • • Q. At the same time that you knew that Toolco and/or TWA people were negotiating with Convair, did you know whether similar negotiations were going on with any other aircraft manufacturer on their behalf?

A. On their behalf?

Q. Yes.

A. No, sir.

Q. You don't know anything about that?

A. No.

Q. How much earlier than the dates the Toolco orders were actually placed would they have to have been placed in order to obtain the substantial equality with Pan American and American of which you speak?

A. They would have had to evidence sincere interest [Tr. 3170] and proceed with negotiations in good faith at the same time the others did, about the middle of 1955.

Q. In your negotiations with Pan American, prior to the time some commitment was arrived at whereby they purchased, were there any discussions as to the possibility of early deliveries being made to TWA?

A. I can't recall any specific discussions to that effect, but I am confident that they, as well as every operator, had one eye out for the other and the possibility that this could happen.

Q. How about the negotiations with American, did it happen?

A. Well, they were aware that many of our people were working with American Airlines.

Q. Who were aware?

A. Our engineering people in respect to the airplane itself.

Q. No. I said in your negotiations with American, was there any discussion with respect to delivery positions that TWA might receive?

A. None that I can recall specifically.

Q. You can't recall?

A. Nothing specifically, no. Any more so than any other airline.

[Tr. 3171] Q. Would Pan American or American have ordered Boeing equipment if early or substantially the same delivery positions were being offered and contracted for by Boeing for planes for TWA?

• • • • •

A. We certainly hope so, but I have no way of knowing whether they would or not.

Q. Do you know whether or not either Pan American or American would have been willing to give up some of their early delivery positions so that they could be offered to TWA?

[Tr. 3172] Mr. Sonnett: The same objection. Also, it is irrelevant.

The Special Master: Do you know whether they would have objected?

The Witness: Well—

The Special Master: Of your own knowledge.

The Witness: (continuing) —I can't answer the question as it was put.

I would like to answer the question in another way, if I might.

Mr. Hayes: Try to answer the question.

The Witness: All right.

Mr. Hayes: That is this question, not another question.

The Witness: Would they have given up some positions? The answer would be no, if those positions had been offered to them and accepted and contracted for. But had all three operators come in at the same time, it wouldn't necessarily have been that schedule.

By Mr. Hayes:

Q. When you say "contracted for," are you talking about a final binding contract?

A. No, I am talking about a commitment.

[Tr. 3173] Q. A commitment?

A. Whether it be written or oral. Does that answer the question, Mr. Hayes?

Q. That is all the answer I want.

A. Good.

Mr. Sonnett: I thought it was more than you wanted, Mr. Hayes.

Mr. Hayes: No, it is exactly what I wanted, I think we will get along much better, Mr. Sonnett, if you confine yourself to your problems.

Mr. Sonnett: I will try.

By Mr. Hayes:

Q. What would Boeing have done with respect to deliveries of the 120s among TWA, Pan American and American, if TWA had ordered first?

A. Well, it's easy to assume that the situation could have been reversed.

Q. How many aircraft, 120s, would Boeing have been willing to commit to TWA before it made a commitment for any deliveries to either Pan American or American?

A. This would largely depend on how large an order they placed.

Q. Assume 15.

A. I doubt if it would have been more than those [Tr. 3174] actually required for certification of the airplane under those circumstances.

Q. How many would they be?

A. Well, we eventually used three.

Q. What do you mean you eventually used three?

A. Well, this isn't a precise determination four years before you certificate an airplane. I mean, there are reasons that we may want to add one to the program as we go along.

Q. When you say "we eventually used three," to what were you referring, Mr. Connelly?

A. Three airplanes for certification.

Q. Where did you use that?

A. Where?

Q. Yes, and when?

A. Well, during the period prior to the delivery of the airplanes.

Q. You mean your contracts with airlines provided just for three deliveries to the first customer?

A. No.

Q. What do you mean, then, by the words "we eventually used three"? I don't know what you mean.

A. We usually used three for certification purposes.

Q. But you did not do that on the 120s, did you?

[Tr. 3175] A. I am speaking of the 120s.

Q. Didn't you give six to Pan American first?

A. We are not addressing ourselves to the same thing. I said in the event TWA had ordered airplanes first in a quantity of 15, I questioned that they would have had any more greater priority than receiving the first airplanes that were required for certification, whether it was one, two or three.

Q. Then you added the language that three was what you eventually used and I was wondering to what you were addressing yourself by the phrase "three was what we eventually used"?

A. Well—

Q. Where—

A. We could have committed ourselves, say, to two and eventually used three.

Q. That's all you mean by that?

A. That's right. I mean one was a physical requirement, the other is a contract requirement.

Q. How many delivery positions do you consider to be early delivery positions, say among three different airlines?

A. Well, this would have to be related to their respective competitive posture. Some airline could be [Tr. 3176] second in line and still be early, as far as his particular competition is concerned. It isn't an easy answer to give.

Q. Is this the best answer you can give us?

A. Yes, I think so.

Q. What was the policy, if any, of Boeing with respect to later delivery positions?

A. You mean in granting of options or—

Q. Letters of intent, the commitments you were making and so on. Did you have a policy with respect to later delivery positions?

* * * * *

[Tr. 3177] * * * Mr. Hayes. Let me rephrase it. It is faster.

By Mr. Hayes:

Q. Did Boeing have any policy as to how it allocated the later delivery positions among three or more airlines, or two or more?

A. No, this was a matter of what was available at the time a proposal was requested, and such subsequent actions as the airline might take.

Q. Do you consider that the allocation between American and Pan American on the 120 series provided substantial equality between them?

A. Yes, I do. I think I answered that once before.

Q. If you did, I have forgotten. It is entirely possible. I have a short memory.

Under Boeing's production plans, when it decided to proceed with the 121s, whatever the date was, how many airlines per month did it expect to produce and be available for delivery, of course, I mean?

A. I can't remember that figure. It was subsequently changed, as we moved along.

Q. In your statement, Mr. Connelly, at page 3, the bottom of the page, Paragraph (d), you say:

> [Tr. 3178] "Since Pan American, TWA and American would all have been seeking early delivery positions of the 120 series, Boeing might have selected TWA as the first customer but most probably would have selected Pan American as the first customer for the 120 series, affording Pan American the first three delivery positions."

Can you tell us the considerations which would have led Boeing to have most probably selected Pan American as the first customer for the 120 series?

A. Not without including (e).

Q. Can't you separate the two?

A. No, sir, I cannot.

Q. The 120 series was available before the 320 series, was it not?

A. Yes.

Q. The commitments would have been made for the 120 series before you knew you were going to produce a 320 series?

A. However, there was an overlapping in the negotiations on the smaller and the larger airplanes.

Q. At the time that the 120 series were committed for, you were not sure you were going to produce the 320, were

you? You were hopeful, but you were not sure; is [Tr. 3179] that correct?

A. That depends on the time we speak of.

Q. You previously said mid-1955 in your testimony, Mr. Connelly.

The Special Master: Is that the time you want to have this question relate to?

Mr. Hayes: Assuming that he has the same time in mind.

The Special Master: Mid-1955.

A. That's correct, but there were concurrent discussions going on on the larger airplane at that time which shouldn't be ignored.

Q. Were you sure at that time that you were going to produce the 320 series?

A. I can't say that we had made that final decision.

Q. You had three air carriers who were ordering substantially the same number of planes of the 120 series. As of that time, when the commitments for delivery would have been made, I asked you what were the considerations that would have led Boeing to select Pan American as the first customer for the 120 series?

A. I am a little foggy on—how many parties do we have at this time?

Q. Pan American, American and TWA.

[Tr. 3180] A. All at the same time?

Q. That is right, under your assumption.

A. Well, again, I have to refer to (e) because I feel in my own mind there probably would have been a renegotiation, so to speak, between ourselves, Pan American and TWA when the 320 became a firm program.

Here again, both airlines were very anxious to get early deliveries. Somehow it would have to be resolved. Pan American had ordered DC-8s, and in a sense was protected on the long range, having bought the airplane with the larger engine.

I think they would be—I feel quite confident in my own mind it was more important to them at that time to be first, irrespective of what airplane it was, than to center upon the 320 as being the—their desire, as far as early deliveries were concerned.

Q. It was more important to Pan American to be first?

A. To Pan American to be first.

Q. Why more important for Pan American to be first than to TWA to be first?

A. Well, we have to make two decisions here. I don't think—

Q. If I may interrupt, Mr. Connelly. I am not asking [Tr. 3181] you to make any decision. I am asking you what considerations were in Boeing's mind in mid-1955?

A. That's what I am trying to say, the decisions that we had to make at that time then centered around both airplanes.

Q. But you did not have the other airplane. That's what I am trying to find out.

A. Well, discussions were in progress, and there was considerable interest in the airplane. In the final analysis, this is what I believe would have happened, even if it required as between ourselves, TWA and Pan American, a reallocation.

Q. What would have actually happened, so far as you know of what Boeing's policy was in 1955 or mid-1955, to take your time, what kind of commitments would have been

made to the three airlines who were ordering at the same time? Can you tell us that?

A. If you stand alone and ignore Paragraph (e)—

Q. That is exactly what I am asking you to do.

A. (continuing)—probably the situation would have been reversed as between Pan American and TWA and American.

Q. What would the situation be, then, after you had gone through the reversal?

[Tr. 3182] A. And here again we are considering they would have bought essentially the same number of airplanes.

Q. That is right.

A. Well, it could very well be that TWA would have taken Pan American's place and Pan American would have been a second, and American third.

Q. Could have been?

A. Could have been.

Q. Anything could have been, Mr. Connelly.

A. That's right.

Q. We are not talking about what could have been. I am asking you what Boeing's policy at that time would have dictated. You have told us that you were not going to let the airlines run your business, that you were running your business.

A. Well, we think we would consider that to be substantial equality.

Q. What commitments would you have made in accordance with your policy?

A. I can't tell you what commitments we would have made under hypothetical situations. It would be impossible to tell you that.

Q. Aren't you in substance doing that in your statement?

[Tr. 3183] A. No, I am not. I am saying something is a reasonable estimate.

Q. You are not saying that Boeing would have done what is set forth in the reallocation, then?

A. No, I am not saying that any specific reallocation is necessarily precisely exact. I am saying the overall effect, in my opinion, is a reasonable estimate.

Q. You are not saying, as I gather from your last few answers, that Boeing would have picked Pan American as the first?

A. If TWA was first?

Q. No. If TWA and American were ordering at the same time.

A. And Pan American?

Q. That is right.

A. I would guess, eliminating (e) again, that probably Pan American would have been first, unless TWA was willing to compromise the configuration of their airplane so that we could meet our production schedule.

Q. Now you are going to Paragraph (f), aren't you?

A. That's right.

Q. Why would not American have been chosen as the first? It ordered the largest number of airplanes.

A. Well, it is certainly possible that they could [Tr. 3184] have been first.

Q. So that might have happened, also?

A. That could have happened, too.

Q. So that by this statement in Paragraph (d), to which I have directed your attention, you are not saying that any of this would have happened?

A. No. My thinking, again, here is a combination of (d) and (e).

Q. Of course, bringing in (e), you have to indulge in some hindsight, do you not, Mr. Connelly, since (e) was not a fact in mid-1955?

A. No, I don't think it is necessarily hindsight. I think you can foresee this situation developing.

Q. You can expect it, but foresee in the sense of certainty, that was not the case; isn't that correct?

A. Well, with a reasonable certainty.

Q. You hoped, didn't you?

A. Not necessarily hoped. It was stronger than a hope.

Q. You had no detailed specifications—

A. We were reasonably convinced, if you want to put it that way, that this was going to happen.

Q. You had no detailed specifications for the larger plane at that time, did you?

[Tr. 3185] A. None that we had issued, but they were well along in preparation.

Q. Had you discussed them with any of the airlines?

A. Oh, yes.

Q. With what airlines?

A. Pan American.

Q. Anybody else?

A. I think—well, it was—about the same time we were presenting the performance data on the airplane and preliminary specifications to the overseas airlines.

Q. Did you do it to any other airlines? Specifically, did you present them to TWA at that time?

A. I believe we did.

Q. Are you sure of that?

A. I am not sure, no.

Q. You can't testify to that as a fact?

A. No, I cannot. But we were certainly anxious to cover the whole market.

Q. The fact of the matter is that the 120 series was the only series in which American was interested, isn't it, at that time?

A. Yes.

Q. They ordered the largest number of planes?

A. Right.

[Tr. 3186] Q. And yet, according to your statement, Pan American would likely have been selected as the first customer?

A. Again, I have to say my opinion here is strongly motivated by a combination of (d) and (e).

Q. Whatever it is motivated by, that's what you suggest—

A. Yes.

Q. (continuing) —in your statement?

A. Yes.

Q. Actually, your statement is in very large part speculation as to what might have happened, given certain premises?

A. Well, the whole thing is speculation.

Q. Your whole statement?

A. No, I didn't say that. The whole situation is based upon hypothetical assumption.

Q. I am talking about your statement. That's based, too, on hypothetical assumptions?

A. As spelled out in—

Q. That's right.

A. That's right.

Q. In no sense are you testifying that this would have happened with respect to any particular portion of your statement?

[Tr. 3187] A. I cannot say that this definitely would happen. I say it is a reasonable estimate of what would happen.

Q. But there are various other reasonable estimates that could be thought up as well, are there not?

A. This is quite possible.

Q. Not only possible, but it is a fact that you could think up equally reasonable alternatives, could you not?

A. I have no comment on that. I haven't studied the situation in that light.

Q. Wouldn't it be equally reasonable to give the preference as to the 120s to American?

A. It could have happened.

Q. And it would have been equally reasonable, would it not? I am using your word "reasonable," Mr. Connelly.

A. It could have been.

Q. Equally reasonable, right?

A. An equally reasonable estimate, yes.

Q. The same is true with your Paragraph (e), which you like, that it would be equally reasonable to give the preference to Pan American as against TWA, would it not?

A. I don't personally think so, no. It could have happened. I don't say that. But here one could foresee [Tr. 3188] a situation where in the long-range market there would be a conflict between Pan American and TWA as to who was going to be first in that market. We didn't care which one it was, just so one of them was.

Q. If under Paragraph—

A. I have not finished.

Q. I am sorry.

A. Now, if you look at it, as you could see it at that time, Pan American, having ordered Douglas DC-8s with the bigger engine, were protected to some degree in the long-range market.

On the other hand—at the same time I should say Pan American was keenly eager to be first in the market, even with an airplane that didn't have a total range capability they would like to have.

But being first in the market creates an image, there is an advantage from the standpoint of publicity. And I think

that in the final showdown, where we had to select one or the other to be first on one program or the other, even if it required some reallocation between the two, that Pan American's election would be to be first, rather than have the first deliveries of 320 airplanes.

Now, that's my reasoning for what it is worth.

Q. In mid-1955, when you say you cannot separate [Tr. 3189] (d) and (e) and it was very much in your mind or in Boeing's mind, (e) was, in mid-1955, by that time Pan American had not ordered any Douglas DC-8s, had it?

A. They hadn't ordered them, but they were awfully close to it.

Q. You were hoping to sell them Boeings instead of DC-8s, were you not?

A. No. We were pretty well convinced they were going to buy both.

Q. At any rate, there was no order placed?

A. As a matter of fact, they had already bought the engines for the big airplanes, so we were pretty well convinced what they were going to do.

[Tr. 3190] Q. But if under (d) you had given American preference, wouldn't it be equally reasonable to give Pan American the preference under (e)?

A. It could have been.

Q. So far as American was concerned, in its negotiations with Boeing, did it insist that it obtain deliveries of Boeing jets before Boeing jets were delivered to any other airline, domestic airline?

A. They expected to have a—some preferential deliveries over any other competing airline.

Q. Did they say how many they wanted to be preferred as to?

A. Yes, there is no question at some time they all want at least ten or twenty. This is a typical situation.

We didn't offer them any more than six aircraft.

Q. Were they preferred to the extent of six aircraft over any other domestic customer?

A. Well, I guess the best way to answer that is to say our contract with TWA or the Hughes Tool Company provided that we were not to deliver any more than 12 aircraft prior to the month in which—or prior to the time they received their first certificated airplane.

[Tr. 3191] Q. To whom were those 12 aircraft to go?

A. Six to Pan American and six to American.

Q. Was Toolco or TWA advised who were to get those 12 aircraft prior to the time the contract was signed?

A. I can't recall having mentioned names specifically, but I'm sure they were aware of it, who they were.

Q. What makes you so sure?

A. Oh, comments were made that would indicate that they had a pretty good knowledge.

Q. Comments were made by whom to whom and when?

A. By Mr. Rummel, Mr.—primarily Mr. Rummel to Mr. Olsen, Mr. Wells and myself.

Q. When?

A. At the time we were negotiating a proposed letter agreement.

Q. What were those comments that he made?

A. Oh, I can't recall what they were.

Q. You have no recollection?

A. No.

As a matter of fact there could have been—I am sure there were some public announcements prior to that time both by Pan American and American Airlines. I'm sure—

[Tr. 3192] Q. As to the fact that each had a preference of six?

A. No, no, that they had purchases, so they knew at least who had purchased airplanes.

Q. Yes. Others had purchased also, had they not?

A. Yes, one other customer for three.

Q. You mentioned as one of the considerations in entering into these agreements was the establishment of Boeing as the manufacturer. You stressed that Boeing had to consider first its own program?

A. Right.

Q. Did Boeing work with any particular airlines in preparing the detailed specifications for the 120 series?

A. We worked with every airline that would work with us.

Q. Who were the airlines who worked with you?

A. Pan American, American, United. I'm sure some discussions were had with TWA, even before there was any interest expressed.

Continental Airlines, Braniff.

Q. These are all airlines who worked with Boeing prior to the finalizing of the specifications for the 120 series?

[Tr. 3193] A. That's correct.

Q. Among those airlines, did some work more closely and spend more time with Boeing than others?

A. Yes, I think Pan American and American.

Q. Between those two, would one spend more time and work more closely with Boeing than the other?

A. No, I think it was about an equal effort.

Q. Was an effort made to produce in detailed specification a plane that would be acceptable to both of them with a minimum of configuration changes?

A. No.

Q. What was the effort?

A. Well, they were individual efforts as far as their particular requirements were concerned. And it was our

problem obviously to sift these things out and determine what our final basic configuration should be.

Now, one reason that these two airlines participated very heavily in the initial discussion is because they have very large engineering departments and considerable talent. TWA does also, but as I recall it had not reached the degree of interest in TWA to where the extent of the effort was as great as were the two major airlines I mentioned.

Now, when you mention Continental and Braniff, [Tr. 3194] these are relatively small airlines, they were at that time quite small and they are today, and while they participated they were not in the position to contribute as much toward the finalization of the design as Pan American and American were.

Q. How about United?

A. United—it should be on an equal plane with Pan American and American as far as their contributions were concerned.

Q. You came up finally with detailed specifications for the 120 series?

A. That's right.

Q. Was an effort made by Boeing to come as close as it could in those detailed specifications to what all three of those airlines wanted?

A. We had several standardization meetings to try and bring the various airline desires to the end that we would have as much as possible a common specification.

We succeeded what I would say to only a relatively minor degree.

Q. How about as between United and American, did you succeed to more than a minor degree there?

A. Well, no. No, we did not.

I would say that our problems as between the [Tr. 3195] desires of Pan American, American and United were just about on an equal basis.

Q. Were the planes that Pan American wanted and American wanted and United wanted equally distant so to speak, in their configurations and so on, from the basic specifications that Boeing came up with on the 120?

A. I can't speak for the United, but of all of them Pan American's detailed specification came closest to our basic airplane.

Q. And then American's? Or not?

A. Of the three airlines, and I'm speaking here of Pan American, American and TWA, American did come closer, but there wasn't—well, there was a fairly substantial difference between the TWA desires and the American desires.

I can remember particularly the air conditioning systems which caused us a great deal of problems.

Q. From whom did you learn the TWA desire so far as changes were concerned?

A. I'm speaking now of a time when they were in active negotiations and this was all their Engineering Department.

Q. TWA's?

A. TWA's.

[Tr. 3196] Q. Not Toolco's?

A. No, TWA's.

Q. How about the 320 series, was Pan American's detailed specifications closer to Boeing's basic detailed specifications than was TWA's?

A. Yes.

Q. Was Pan American's closer than the detailed specifications of any other airline?

A. Much closer than BOAC, or—I would say that in the case of Lufthansa, Sabena and Air France, they were pretty close to the basic specification.

Q. But so far as number of planes is concerned, smaller airlines?

A. Smaller airlines.

Q. Was Pan American the principal airline that worked with Boeing to develop the 320 detailed specification?

A. Yes.

Q. Was it part of Boeing's policy or not to give a preference to an airline that had worked most closely with it in developing the specifications for the aircraft?

A. Preference in what regard?

Q. Deliveries.

[Tr. 3197] A. No.

Q. It was not?

A. Absolutely not.

Q. So Pan American received no consideration for the fact that it had worked so closely with Boeing in developing the detailed specifications?

A. None at all.

Q. Did its preference grow out of the fact that its configuration came closer to the Boeing basic specifications than did the others?

A. Well, the fact that it was very close to our basic specification made it easier for us to meet our program—

Q. That is what I had in mind.

A. —object. Yes, it would.

Q. With respect to the 320's, that was also true, was it not, that Pan American's specifications came closer to Boeing's detailed specifications?

A. I thought we were talking about the 320's, sir.

Q. I meant the last question to be for the 120s. Change this last one then. As to the 120s was the preference that Pan American received also attributable at least in part to the fact that its detailed specifications were closer to the

Boeing detailed specifications [Tr. 3198] than that of any other airline?

A. Well, I'd like to say that the fact that—in both cases, their specification was much closer to our basic specification. I don't like to use the word preference.

Q. Maybe you don't. They did have six planes delivered to them before anybody else?

A. It enabled us to do better, meet our program objective.

Q. Was the fact that their specifications were closer to the basic Boeing specifications what caused Boeing to agree that they would have six 120s before any other airline would get any?

A. It was a substantial reason, yes.

Q. What other reasons were there, if any?

A. I would say that's the principal one. I can't offhand think of any others.

Q. In your prepared statement, Mr. Connelly, page 4, Paragraph (f), you laid down as one of the considerations basic to your description of the improvement of delivery positions as reasonable that if TWA would not have compromised delivery positions contemplated in order to gain non-essential specific detailed configurations, going on to say that then the extent of configura- [Tr. 3199] tion variance that existed between Boeing's standard specification and the first Pan American 320 actually produced would not have been exceeded by TWA with respect to the cumulative gross effect on production or certification of the 320-330 series.

What do you mean by non-essential specific detailed configurations?

A. Well, the word "non-essential" is used as an expression of our opinion as measured by our own beliefs and those of other airlines.

I don't mean that this is considered non-essential by a particular airline who is requesting these things.

Q. Are you referring here to detailed configurations that TWA, in fact, wanted?

A. Yes.

Q. Then in your opinion they were non-essential? Is that what you are saying?

A. I'm saying they are not essential in the sense that the majority of the airlines were operating the airplanes without these items.

Q. But TWA desired—

A. Desired these, and for good reasons in their opinion.

[Tr. 3200] Q. You are not suggesting that TWA considered these variances from the standard configuration to be non-essential?

A. No, no, not at all.

Q. You are referring here, if I understand you correctly, to the changes that were actually made in the planes that were delivered to TWA?

A. That's correct.

Q. I take it too, you are not attempting to suggest here, and correct me if I am wrong, Mr. Connelly, that TWA would have compromised a configuration if it, rather than Toolco, had placed the order for the 331s?

A. I'm not suggesting that they would have, no.

Q. Do you have any basis for believing that TWA would not have insisted on its own configuration?

A. No, this a matter of what is the most important, early deliveries or the incorporation of certain changes in the airplane.

Q. Since these are changes that TWA wanted and had made, do you mean that if TWA had ordered earlier, than, in fact, did order, its delivery positions would have been

improved even though it insisted on the changes to which you refer in Paragraph (f)?

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[Tr. 3202] • • • Mr. Hayes: Maybe I could restate it more easily, Mr. Brownell?

The Special Master: All right.

Q. In Paragraph (f) you speak about TWA not having compromised delivery positions by insistence on certain configurations.

Paragraph (f) is part of your statement in Paragraph 3 that the reallocation is a reasonable estimate of improvement.

I ask you, even if TWA had ordered earlier, but would have insisted on the same configuration changes [Tr. 3203] that were actually made in the plane for TWA, would the reallocation still be reasonable?

A. I would have to answer it this way. We could not have quoted the same positions to TWA under those circumstances as we did quote to Pan American.

Q. So that the reallocation would necessarily have to be changed?

A. Or the whole program delayed which obviously we would not be very much in favor of.

Q. You would not have delayed the program?

A. That is correct.

Q. Pardon?

A. We would not, that is correct.

Q. Pardon?

A. We would not.

Q. So the only alternative is that the reallocation would have to be changed, is that correct?

A. That's correct.

Q. You have been telling us up to now about Boeing's policy, how they would have operated and so on.

Did Boeing, in fact, depart from the policies that you have described?

A. You mean have we ever departed from them?

Q. Did you? With respect to the ordering of the [Tr. 3204] 320s and 120s in 1955 and 1956, did Boeing depart from the policies you described?

A. No, sir, I don't believe so.

Q. Mr. Connelly, I show you a copy of Defendants' Exhibit 95 in this action. One copy of Defendants' Exhibit 95 which has been marked 95B has been marked in evidence in this case.

Would you please look at it and tell me if you recognize it?

Do you recall it, Mr. Connelly?

A. Yes, I recall it.

Q. Was this Defendants' Exhibit 95B—and I can advise you Defendants' Exhibit 95B is a Chinese copy of the document you have in front of you except it is one that went to Mr. Damon if I recall rightly rather than Captain Rickenbacker—was this the first written announcement to the airline industry of Boeing's desire to enter into contracts for 707s?

A. Yes, to the best of my knowledge it was.

Q. Do you recall to what airlines it was sent?

A. I can't recall specifically, but I feel quite certain that it was sent to all the airlines we felt would have an interest in this airplane.

Q. I can advise you that the documents produced [Tr. 3205] from Boeing's file showed that copies were sent in addition to the one to Eastern, which you have, to Pan American, American, United, Northwest and TWA, and

that a somewhat similar letter was sent on December 3, 1954 to BOAC.

Does that accord with your recollection?

A. I can't recall specifically to whom it was sent, but that sounds reasonable.

Q. I direct your attention, if I may, Mr. Connelly, to the portion of the letter beginning at the bottom of page 2 and going over to the end of that paragraph where it ends at the top of page 3.

Have you read it, Mr. Connelly?

A. Yes.

Q. Was that a statement that portion of Boeing's then intended policy with respect to deliveries to various airlines?

A. Yes, I would say it generally was.

Q. Let me see if I understand how this was to operate. That the first customer would get preference, and the second customer would receive airplanes at the same rate as shown in the schedule attached, depending on quantity, but the first delivery to the second customer [Tr. 3206] would start three months after the first delivery to the first customer? Is that what was intended?

A. That's what it says.

Q. That is what I understood it to say but I was not sure.

A. Yes.

Q. I wanted to be perfectly certain.

The same with respect to the third customer, the second customer would have a three plane preference over him—three months preference, I mean?

A. Yes.

Q. In each of these instances, setting forth the quantity of initial order, there is no case, is there, where the deliveries in the first three months would exceed three planes?

A. That's correct according to this tabulation.

Q. Was this policy on deliveries, in fact, adhered to by Boeing?

A. Well, in principle, but not as to specifics.

Q. Will you explain that, please?

A. Yes.

In the course of negotiations, we did commit in the case of Pan American to give them the first six airplanes. We had no specific provision in the American [Tr. 3207] agreement on priorities, but it was understood they would receive preferential treatment with respect to any other domestic airline.

As I recounted before in the TWA agreement, the provision was that we would not deliver more than 12 aircraft prior to the time that TWA received their first certificated airplane.

Q. You mentioned there was preferential treatment to American. What was the extent of that? Was it not that American was to receive six certificated planes before TWA received its first certificated plane and before any other domestic airline received a certificated plane?

A. As I said, there was no provision in the American agreement. And the way the schedules were arranged, this could have been either four or six airplanes, by reason of the fact that we don't commit on airplanes, we commit to deliver so many in a month.

Q. Was there not a side agreement with American that they would receive six certificated planes before any other airline domestic received any?

A. To my knowledge, there was no specific agreement in respect to a number of airplanes.

It worked out—it could have worked out, as I [Tr. 3208] say, as between four and six. So obviously we had to protect ourselves on the possibility it would be six.

Q. Will you state the agreement with American as you recall it?

A. There was no agreement in regard to preferential deliveries whatsoever.

Q. There was no agreement—

A. In the contract.

Q. I am not talking in the contract.

A. Well, I'm talking in the contract.

Q. I am saying outside the contract. Dehors the contract, was there not an agreement with American whereby they were to receive a preference as to deliveries?

A. It was understood that they would have preferential deliveries, yes.

[Tr. 3209] Q. Will you state what the understanding was, Mr. Connelly?

A. I can't state it any more specifically than that because we weren't requested for a number of months or a number of airplanes. The statement was made we are a big airline, we expect to be treated accordingly, if you want to do business with us.

Q. Did you make a commitment—and by "you" I mean the Boeing Company—

A. Going back to this statement, the fact that we couldn't bring another customer in for three months pretty well answers the situation because our delivery situation was such that there was a possibility of six airplanes going to them at the end of three months.

Q. But you scheduled only one airplane for each of the months, did you not, so that the second—

A. You mean that we contracted?

Q. No, in the schedule attached to Defendants' Exhibit 95.

A. No, I'm departing from that.

I don't think that we can be held to this after we are in negotiation with a customer. This brings about changes. It is quite common in any business, I would think.

[Tr. 3210] Q. I am not criticizing the Boeing Company.

A. I know you are not.

Q. I am trying to get some facts, Mr. Connelly.

A. We entered into agreements a year later than that and obviously some changes had come about.

Q. That's right. And one of the changes was, was it not, that Boeing made a commitment to American that it would receive six certificated planes before any other airline would?

A. I don't think any such statement was made to American Airlines until such time as the production schedule very definitely pointed out that would be the fact.

Q. What does that mean, Mr. Connelly?

A. Well, when we were arriving very close to the delivery period and we can foresee with sincerity exactly what our delivery schedule is going to actually develop to be.

Q. What was the commitment that was made to American?

A. There was no specific commitment other than they would give—be given some preferential treatment.

Q. Was that not defined in any way?

A. To my knowledge, it was never defined.

[Tr. 3211] Q. But eventually they did get preferential treatment—

A. Yes.

Q. —is that correct?

A. That's right.

Q. You said this is when your production got along. When was that?

A. Relatively close to the time of delivery.

Q. The first delivery to American of an uncertificated plane was in October 1958 and of a certificated plane in December 1958.

Does that help refresh your recollection?

A. I can't help you on a date that those discussions took place.

It was, I would say, several months prior to the time the airplanes were actually delivered.

Q. Some time in 1958?

A. Yes, it would be some time in 1958.

Q. I show you, Mr. Connelly, an exhibit that has been marked in this case, Defendants' Exhibit 53, a transcript of a telephone conversation between you and Mr. Rummel on December 20, 1957, which Mr. Rummel identified as far as he could see as an accurate transcript of the conversation had with you.

[Tr. 3212] Would you like to look at it, please?

A. It was this transcript taken by Mr. Rummel?

Q. That is right.

* * * * *

The Witness: Offhand, I don't recognize it, but I don't have any reason to question what's here.

Q. Would you read it, please? You only have to read down to the point I am going to ask you, the fourth comment I think on page 2.

A. How far do you want me to go down?

[Tr. 3213] Q. Go as far as you please. So far as my question is concerned you only have to go to the fourth comment on page 2. I am not keeping you from reading the whole thing, if you want to, Mr. Connelly.

A. All right.

Q. Is it or is it not a fact that in this telephone conversation you advised Mr. Rummel that Boeing had to deliver

six certificated airplanes to American prior to the month in which Boeing would deliver any airplane to any other domestic customer?

A. Yes, I apparently have said that.

Q. And that that was an understanding that you had with American or a representation, rather, that was made to American by Boeing?

A. No, it wasn't an original representation.

As I said, there was no—that's the way it worked out in the production schedule, and we had protected ourselves either against four or six airplanes.

It turned out from a production standpoint, it was six airplanes.

Q. You told us at the time that the production schedule where the production worked out so that it could produce six planes for them was a few months [Tr. 3214] before the first delivery and you said it was in 1958.

A. This is December 1957. Excuse the one-month delay.

Q. This is one month. You said several months before the first delivery which was in October.

A. Well, our first deliveries, production deliveries started much earlier than that to Pan American. We could foresee what our production schedule was going to produce.

Q. Is it your testimony that at no time did Boeing make a representation to American that it would deliver six certificated planes to American prior to the delivery of any certificated plane to another domestic airline?

A. To my knowledge, never before this.

Q. How long before this was it? By this we refer to December 1957?

A. Well, at such time as we could see in our production schedule precisely what it was going to be or more precisely I should say what it was going to turn out to be.

Q. Do you want to amend the time when the producti schedule gave you that information?

A. I can't amend the time because I can't recall wh it was.

[Tr. 3215] Q. Is it your testimony as I understand that the representation made to American was not made the time the agreements were made?

A. Yes, sir, it was not made at that time.

Q. What was the reason for making the representati when it was made?

A. Because American Airlines were keenly interested what this was going to be.

Q. What was going to be?

A. What this priority was going to be.

Q. When did you advise them as to that priority, wh it was going to be?

A. It was in about this time period. I can't be any mo precise that that. At such time as we knew when our pr duction schedule—what our production schedule was goi to produce for us.

Q. How did you happen to fix on six planes?

A. Because there were six airplanes that would be deli ered under our then target schedule.

Q. Could you not have equally or to some degree at lea improved TWA's deliveries?

A. No, sir.

Q. Why not?

A. Because we cannot move the airplanes out of [T 3216] their line positions.

And furthermore we had not represented to TWA th it would be any less than six airplanes.

Q. You had not what to TWA?

A. We had never represented to TWA it would be an less than six airplanes. There were—you get to this b

deduction. We said we would not deliver more than 12 prior to the month in which they received their first certificated airplane.

Q. That's right, you did.

A. That's right.

Q. Did that tell them that American was going to get six of the twelve?

A. No, not in itself.

Q. TWA was very much upset by the proposed delivery schedule, was it not?

A. So were Pan American and American.

Q. Pan American still got its first six, didn't it? What upset them?

A. Well, they wanted twelve.

Q. After the contracts were signed I am talking about.

A. Well, after the contracts were signed, there was not much to talk about at that point. The [Tr. 3217] negotiation had been concluded.

Q. When did Boeing begin its production line, Mr. Connelly?

The Special Master: On the—

Mr. Hayes: On the 120s.

A. Oh, I think our design work started in the first part of 1955.

Q. No, I mean production line itself. When did the planes actually begin to move down the production line?

A. Well, it would have been about 30 months prior to delivery of the first airplane. There is a year certification in there. Lead time is approximately 18 months.

Q. Do you recall when it was that planes began moving down?

A. No, I cannot. My statement is when parts are starting to be fabricated, not when a production line—final assembly would start roughly, oh, I'd say ten months prior to roll-out at the factory.

Q. The American contract was not finally signed until March, 1956, and the TWA contract was signed on March 2, 1956.

When you arranged your production line, wasn't [Tr. 3218] it possible for Boeing not to put six American planes ahead of the TWA planes?

A. Well, at that time, I guess anything would be possible, but it would not be prudent for us in light of what we thought was a proper way to proceed.

Q. There was nothing to prevent Boeing from putting in three or four American planes ahead of the first TWA plane, was there?

A. Well, this isn't that simple, Mr. Hayes. There were a lot of certification things we had to do to the—additional certification work on the TWA planes even if we had moved them ahead. That wouldn't result in any earlier delivery of the airplanes to them.

Q. Even though they ordered a day after American?

A. It didn't make any difference when they ordered. I am talking about the production capability of doing it.

Q. So far as production capability is concerned, Mr. Connelly, was there some point in the production that a decision was made as to the order in which completed airplanes would come off the production line?

A. Yes.

Q. When was that?

A. Oh, it was a continuing process.

[Tr. 3219] Q. When did it start?

A. At the very inception of the program, and was constantly revised as we went down the line.

Q. Was there any reason why since the contracts were actually signed only a day apart the production line could not have been by Boeing so arranged that American would not get six ahead of TWA?

A. Only at a great penalty to the Boeing Company.

Q. Would you explain that, please?

A. Yes.

I don't know whether you are familiar with a learning curve in a manufacturing operation or not, but—

Q. Assume I am not.

A. —we can't—all right. We assume that.

We cannot skip and jump from one configuration to another and achieve any improvement in our labor experience. And we have provided for that. That's the reason for that. That's the reason we quote deliveries on a monthly basis.

It gives us the right and the prerogative to build a certain number of airplanes of the same configuration simultaneously and in consecutive order.

Q. Did you have to have six American airplanes [Tr. 3220] ahead of TWA?

A. Apparently we determined that's what we should do, and we still fulfilled our contract commitments.

Q. You determined that prior to the time TWA signed its contract, did you not?

A. Well, it could have been, yes.

Q. Because you had the provision in the TWA contract that not more than twelve planes will be delivered to other carriers and you have identified the twelve planes as six for Pan American and six for American.

So that actually, is it not a fact that even when TWA signed the contract, Boeing knew, at least, that American was going to get six planes before TWA received its first?

A. No, four or six.

Q. Then why the provision for twelve?

A. Because it could be twelve.

Q. But you knew—

A. We obviously wouldn't protect ourselves for four if there was a good possibility it might be six.

Q. As you go down the production line, after the first deliveries, you actually switch from one configuration to another, do you not?

[Tr. 3221] A. We do, but we attempt, again, to build as many in sequence as we can of the same configuration, within the contract flexibility we have.

Q. For example, the delivery schedule shows that after Pan American and American had received their preferences, in March there was one American plane, and two TWA. In April, there were two American and three TWA. In May, there were four of each.

You switched back and fourth then, did you not, from one configuration to another?

A. Yes, but you'll see they are fairly well a group. And in many cases we have to get some of these airplanes out on the field to accomplish the certification work that has to be done.

Q. What do you mean they are fairly well grouped? Take May, for example, Mr. Connelly. American is May 4th, TWA May 10th, American May 12th, TWA May 13th, American May 21st, TWA May 24th and one each on May 28th.

Where is the grouping you are talking about? You alternated back and forth between the customers, did you not?

A. Which one are you looking at?

Q. The actual deliveries of the—

[Tr. 3222] A. 120?

Q. —120 series.

A. You will notice a grouping under American Airlines—

Q. For the first planes, yes.

A. No. Yes, for the first airplanes. And then we did deliver two to TWA—

Q. With one to American in between?

A. —in March. I am speaking of March now.

Q. Yes. There was one to American in between the two to TWA.

A. Then there are four to TWA and two—

Q. I think you will find it is three to TWA, Mr. Connelly, with American planes delivered in between.

A. In April?

Q. In April.

A. Well, I don't know. My schedule shows four for TWA and two for American unless I am missing something here.

Q. Mine shows three in Mr. Rummel's statement. Maybe the statement is not the same.

A. Then in May there is four for each.

But to answer your question generally within the flexibility we have within our contracts we try to [Tr. 3223] arrange our firing order as we call it at the factory to obtain the greatest efficiency we can and repetitive efforts is the best way to accomplish this from the labor standpoint.

Q. What I am asking you is what the reason is if you are able to switch back and forth from one configuration to another in later stages you can't do it at the beginning after, say, two or three airplanes.

A. I'm missing the point.

Q. I will try again.

If you look at that delivery schedule on page 4 of the statement of improvement—and you said you had four in April?

A. I have four for TWA in April and two for American.

Q. Wait. There is something wrong. Our statements do not agree. There are only three, Mr. Connelly, to TWA, one, two, three.

A. I beg your pardon. I must have been looking out of the upper lens of the glasses.

Q. You will note, Mr. Connelly, taking, say, April—first take March. There are three planes delivered to the two airlines. The first to TWA, the second to American, the third to TWA.

[Tr. 3224] Then in April there are five total delivered. The first to TWA, the second to American, the third to TWA, the fourth to American, the fifth to TWA.

Then in May, you find the same switching back and forth by dates. My question is if Boeing, the way it operated its production line could switch back and forth from one configuration to another, after it got started, why couldn't it do it early in the production line allowing say to take your previous figure three to a particuar configuration for each airline? Why couldn't it be done that way?

A. Well, in the first place, this doesn't indicate factory sequence. This is sequence of deliveries.

Q. I understand that.

A. Well, I know, but they don't go out of the factory necessarily in this order.

Q. Why couldn't Boeing have arranged that deliveries go out of the factory in a sequence whereby the deliveries could be alternated? What is so difficult about it?

A. I'm not saying it couldn't be done, but from a manufacturing standpoint, an engineering standpoint, this is the way it was arranged. And again, this is not the factory sequence. The factory sequence could be [Tr. 3225] an entirely different thing than this.

Q. This is the delivery sequence?

A. This is delivery. There is a long period between roll-out at the factory and the delivery of the airplane.

Q. All of these planes we are talking about here in March, April and May are all certificated planes, aren't they?

A. Yes, but we had had a lot of difficulty with the air conditioning system and a lot of these airplanes were stacked up on the field for TWA and had to be completed on the field.

So, I don't—I don't think we can say you can shift things around in the factory, nor can we necessarily shift people around in the field to accomplish that particular objective which you are—I believe is your point.

Q. Is the sum and substance of what you are saying with respect to these six deliveries to American before TWA got any that it just happened that way, there was no agreement of any kind?

A. It was not the matter of an agreement, no, sir.

Q. When I say agreement, I don't mean a written agreement.

[Tr. 3226] A. No.

Q. I know it is not in a written contract.

A. That's right. And it is not a written—it is not an oral agreement.

Q. It just happened that way?

A. It happened because the schedules were laid out that way, yes.

And there were other factors entering into it as I pointed out, and these were significant, where the problems we had with the TWA airplane on the air conditioning system held those airplanes up on the field for quite some time and could very well have been—account for the criss-crossing of the airplanes as indicated on this sheet.

Q. So it was really TWA's fault because of the particular air conditioning system it wanted?

A. No, I didn't say it's anyone's fault. It's one of those things that happened.

Q. But that was one of the causes, if not the chief cause, that TWA wanted a particular air conditioning system?

A. Yes.

• • • • •

[Tr. 3231] • • • The Special Master: Mr. Connelly, I understood, I think, from your testimony that the first orders came in for the 120s around October or November of 1955.

The Witness: As best I can recall, that is correct.

The Special Master: Also, that you testified that as of that time, you reserved, at least in your own minds, some delivery positions for airlines other [Tr. 3232] than those that ordered first?

The Witness: That is correct.

The Special Master: But that you had no records that would show exactly what it was at that time. Of course, they changed from time to time.

The Witness: They changed constantly.

The Special Master: Could you recollect how many positions you kept open—let us stick to the 120s for the minute—for airlines other than Pan American and American?

The Witness: This would refer to the early period?

The Special Master: Yes, right at the time you got those first two orders.

The Witness: No. I meant deliveries over, say, the first six or eight months, in that order.

The Special Master: Yes.

The Witness: Because you eventually get down—

The Special Master: I understand.

The Witness: There are lots of open positions. I can't be precise on this at all. I just have to draw on memory, as best I can. It will be general.

[Tr. 3233] I would say that we had at least one-third of our production capability through the first eight months available for other customers.

The Special Master: Were those vacant positions, if you want to call them that, at the time assigned to specific airlines which you thought were the most likely customers to come along next?

The Witness: From time to time, this is true, yes.

The Special Master: Did you consider Hughes Tool and TWA as separate customers, separate prospective customers?

The Witness: No.

The Special Master: Not at any time?

The Witness: We considered that they were one and the same.

The Special Master: Did your contracts contain a provision—and this may be in the record already—as you recall it, that prohibited an airline or restricted it in any way from reselling the planes?

The Witness: Yes, we had a clause in our contract that prevented the sale of those aircraft or transfer, with certain exceptions, which had to [Tr. 3234] do with financing, without our consent at any time prior to the delivery of the airplanes.

The Special Master: At any time prior to the delivery of the airplane?

The Witness: That's right.

The Special Master: Then after title passed, of course they were free to do—

The Witness: After title passed, we had no control.

The Special Master: Would that have prevented the customer, before title passed, from selling its delivery position as distinguished from the plane?

The Witness: There would have been no delivery positions, unless they had contracted for airplanes. We did not sell positions.

The Special Master: You did not sell positions?

The Witness: No, sir.

The Special Master: Can you recall any discussions you had with Hughes Tool representatives about a particular clause in there which said they could assign to TWA, without consent from Boeing? Were you in on any discussions that refreshes your [Tr. 3235] recollection as to how that particular provision in the contract came into being?

The Witness: Well, my recollection is that there was a specific provision in the Hughes Tool agreements that provided that they could transfer those aircraft to TWA. That would be in the record, in the contract itself, if what I said is correct.

The Special Master: Do you remember any discussion leading up to the formulation of that clause in which you participated?

The Witness: There was no extended discussion because we had assumed from the start that this would be the case.

The Special Master: How long do you recall did you reserve positions—the 120s still—for Hughes Tool, early deliveries, after the signing of the Pan American and American contracts? When would you say that they lost their early delivery positions—that Hughes Tool did?

The Witness: We had never designated a specific customer in respect to position. We had reserve—we were reserving for the major trunk lines. We were very anxious to get Eastern Airlines.

[Tr. 3236] And in the final answer, I believe, as best I can recollect, the positions we did quote to Hughes Tool Company was a residue of positions that occurred after final decisions had been made by certain key airlines such as United and Eastern Airlines, and these positions became available.

The Special Master: Really, what I am trying to get at here, so there won't be any mystery about it, is Hughes Tool did not order when American and Pan American did, say, in October of 1955? They did order some when—in March 1956?

The Witness: Well, may I say—

The Special Master: Did they lose any delivery position by that delay of six months or so?

The Witness: They lost delivery positions, in my opinion, by not moving as early as October of 1955.

The first definite interest that was manifested by Hughes Tool in buying Boeing airplanes occurred—well, it was between Christmas and New Year's, I remember that. At least we met for negotiation during that period. That was between Christmas and New Year's of 1955.

The Special Master: What happened during [Tr. 3237] the interval—if you had a third of your positions left open—what happened during that six months' interval that would have meant that Hughes Tool would lose out on early delivery positions? Did some other airline come in and express a definite interest so that you more or less allocated some of your vacant positions to them?

The Witness: Well, Hughes Tool had not indicated any interest up until the time I just mentioned, definite interest, and we were quoting these positions to any number of customers. Eastern Airlines, for one. I recall that. Certain foreign airlines.

Did I answer your question?

The Special Master: In part. And perhaps as much as you can, considering the lapse of time since this all happened.

But would you say that if Hughes Tool had ordered, for example, on New Year's Day 1956, that they would have got as good delivery positions as if they had ordered the same date that Pan American did?

The Witness: January 1, 1956?

The Special Master: Yes.

[Tr. 3238] The Witness: If you mean by "order," had they expressed the interest they wanted to move forward and sit down and negotiate a contract and specification—

The Special Master: Yes.

The Witness: (continuing) —no, because the others were at least four or five months ahead of it.

The Special Master: They had come in before New Year's Day?

The Witness: They had come in before that time.

The Special Master: That's what I was trying to get straight in my mind.

Now, if we can turn for a minute to the 320s, did you have roughly the same procedure there, that about a third of the positions, early delivery positions were left open as a matter of policy when the first orders came in for the intercontinental plane?

The Witness: Well, we quoted all of our positions to as many of the major customers as our schedule would permit us to. We did not reserve positions for anyone. We quoted everything we had [Tr. 3239] available.

The Special Master: You did not reserve them to specific people, reserve a number of delivery positions, as I understand, for whoever did come in?

The Witness: Well, we actually quoted positions to a number of customers.

The Special Master: Who did you quote to on the 320?

The Witness: Well, we quoted to Pan American, I believe we quoted to TWA, we quoted to BOAC, Sabena, Air France, SAS, KLM, all the major so-called international carriers.

The Special Master: Did any of them come in before Hughes Tool came in with the result that Hughes Tool lost delivery positions before they actually came in, any of those foreign airlines?

The Witness: Yes. Pan American came in. And we actually had been in negotiations with the foreign carriers, and here again I think I stated before the managements of those companies cannot commit without government approval.

So, in our discussions later with Mr. Hughes, it was pointed out—when he wanted to know how many [Tr. 3240] positions we had open through June 1960, we told him how many had been sold or firmly committed for, and how many outstanding firm proposals we had at that time, which had not expired. And so by that means, Mr. Hughes was aware of what was open through that period of time.

So these things had to precede that particular action.

The Special Master: Is it your testimony, then, that the delay by Hughes Tool in ordering from the time that Pan American first got early delivery positions, to the time that Hughes Tool actually put in its order, did result in Hughes Tool getting later delivery positions?

The Witness: Yes, I would have to conclude that.

The Special Master: That is all I have now.

Examination (cont'd) by Mr. Hayes:

Q. To continue for a moment along the line that the Special Master quizzed you, Mr. Connelly, you mentioned that the contract was made in October. Didn't you testify yesterday that the delivery positions to Pan American, for example, were fixed in mid-1955 substantially?

[Tr. 3241] A. I have tried to make clear, Mr. Hayes, that we don't go on the basis of when something is signed.

Q. That is correct. The contract was signed with Pan American in October of 1955; right?

A. Yes, and they had been working with us long in advance of that.

Q. That is right. When was the date that you made a commitment to them of the first six planes?

A. I can't remember the time.

Q. It was prior to October 1955?

A. Prior to that time, yes.

Q. A matter of months prior to that time, was it not?

A. No, not too long in advance of that, because here, again, we had the problem of an operator who wanted a much larger number of airplanes before anyone else could receive an airplane, and it was a matter of negotiation.

. Who was that operator?

. Pan American.

. What number of planes did they want before any-
y else received any?

. Well, this was related to the size of their order as
saw it. I think it was somewhere in the [Tr. 3242]
r of 12.

. Might it have been 25?

. No.

. Didn't you testify, in substance yesterday, that—
ou just said now, it is not the signing of the formal con-
t that was important, but that if you made a commit-
t to an airline on delivery positions and they continued
egotiate in good faith, you would not assign those
very positions to another air carrier who came along
even was prepared to sign the contract?

This was true, except in certain cases where we had
ed the same positions to, say, two carriers, with the
osal specifically setting forth they were subject to prior
and we would have advised them that there were other
mers whose positions were being quoted to.

Take Pan American. Had you not made a commit-
to Pan American of delivery positions prior to the
of the signing of the contract?

Oh, yes, definitely.

If another carrier came along between the time you
the commitment and the time Pan American signed
ontract, would you have given to that other carrier
elivery positions you quoted to Pan American?

r. 3243] A. No.

You would not?

Because those positions were quoted firm, because
had evidenced their sincere interest in the airplane

and wanted to proceed to negotiate a contract and specification.

Q. Can you search your recollection and tell us when it was you made specific commitments to Pan American as to early deliveries, before deliveries to other airlines?

A. Well, this was in the course of negotiations preceding the October date, the signing of the contract.

Q. That is right.

A. But I can't tell you what the time was.

Q. You can't tell me how long before it was?

A. No, I cannot.

The Special Master: Is that true both as to the 120s and the 320s, those dates?

The Witness: In the case of the 320s, this was a relatively short negotiation. That was a part of the negotiations at that time, yes. I mean, it would be immediately preceding the signing of a letter contract.

[Tr. 3244] By Mr. Hayes:

Q. That you made the commitment to Pan American?

A. That's correct.

Q. You also said in response to a question by the Special Master that at the time you made the Pan American contract—and I think the question also included the American contract, if I remember rightly—

A. So these are the 120s?

Q. That's right. (continuing)—that you had opened approximately one-third of your delivery positions during the first eight months; do you recall that?

A. Yes.

Q. Where were those delivery positions? Do you mean one-third for each month?

A. No, they were suceeeding in successive order in respect to our ability to introduce new customers.

Q. Do you mean this—let me just take the suppositious figures—that in the first eight months you expected to be able to produce, let us say, 40 planes—just take that as a figure—you made a commitment to Pan American that they would get the first six, did you not?

A. Correct.

Q. And your commitment to American was what? How [Tr. 3245] many would they get before any other domestic airline?

A. At that time, there was no commitment to the American Airlines, except it was understood they would have some priority.

Q. So the 120 delivery positions that you are referring to are one-third of the remaining positions after the six to Pan American and after whatever early positions American would get?

A. No, that's not correct.

Q. What is it then? Explain what you mean.

A. Well, I am taking the full schedule for Pan American and American for the eight months.

Q. That's what I am talking about.

A. No, you had—I did not understand it that way. I thought you were referring only to the first airplanes.

Q. No. I said assume you could produce a total of 40 planes in the first eight months. You had committed the first six to Pan American. So there were no delivery positions open among the first six that you reserved for anybody?

A. Right.

Q. You had a commitment of some kind to American—

A. Right.

Q. (continuing) —the details of which were, let us [Tr. 3246] say, up in the air as to number. It turned out to be six, but let us say it was up in the air at the time. I think your testimony yesterday was it might be four or six. The first ten to twelve planes would go to Pan American and American, would they not?

A. Right.

Q. So that when you speak of one-third of your delivery positions for the first eight months being open, are you not referring to one-third of the remaining delivery positions, to wit, 10 or 12 subtracted from 40?

A. Of course, the one-third was pulled out of the sky as being a figure.

Q. You take any fraction you please, Mr. Connelly. I don't care what fraction it is.

A. Well, anyone could. I can't remember any specific quantity. I was taking our production for the first eight months, and as best as I could recollect, somewhere in the neighborhood of one-third were available for other customers.

Q. That was one-third of the positions after Pan American got six and American got four to six, was it not?

A. It could be interpreted that way. I didn't construct it on that basis.

[Tr. 3247] Q. Were any of the first ten positions open to any carrier other than Pan American and American?

A. No.

Q. None?

Mr. Sonnett: At what time?

Mr. Hayes: At the time the Pan American and American contracts were made or the commitments were made, not necessarily the signing of the commitments.

A. You mean after the commitments were made?

Q. After the commitments were made.

A. Well, my question was more directed to more a period, to a time we had any commitments other—no, considering only those two commitments.

But I am trying to look at it from a production standpoint rather than from a contract commitment standpoint.

Q. The Special Master's question to you was the number of open positions after Pan American and American had committed.

A. Let's take 40 and subtract 12. That's the answer then.

Q. It is one-third of the remainder that were open?

A. Okay, fine.

[Tr. 3248] Q. Last evening at the time of adjournment it was suggested, I believe, by the Special Master, that you might review the transcript of the telephone conversation between Mr. Rummel and yourself and advise us if there was anything you wanted to add to your testimony.

A. No, I have nothing. This is a matter of the record, is it not?

The Special Master: It is in the record.

Q. Yes, sir, it is in the record.

A. Then it speaks for itself.

Q. Did I understand you to testify yesterday, Mr. Connelly, that there were no negotiations of any kind between Boeing and Mr. Damon with respect to the jets?

A. Not to my knowledge.

Q. You did not so testify?

A. Well, to my knowledge there were no negotiations with Mr. Damon.

Q. Would you look, please, at page 5 of the transcript of the conversation between Mr. Rummel and yourself, about the middle of the page?

Have you read this last evening, by the way?

A. Yes.

Q. Mr. Rummel said, "Well, we had—that's right. [Tr. 3249] And we had—I can recall an agreement with Damon way back before—practically before it existed—Wellwood, Beall and—see who else was it—myself—were you there? I don't believe you were.

"Mr. Connelly: No.

"Mr. Rummel: To the effect that you would not close with anyone else without first giving us the opportunity for a—on an equal basis.

"Mr. Connelly: Well, it's my understanding that that offer was made.

"Mr. Rummel: Oh, I don't think so. Whose was it made to?

"Mr. Connelly: Well, there have been several telephone—

"Mr. Rummel: I don't think so. The first thing I knew that American had bought was when I read it in the newspapers. It sure wasn't made to me.

"Mr. Connelly: Bob, I'll have to back off a little bit on that except that in talking to Ed Wells and Wellwood," and so on.

I can't make out what the rest of it is.

Mr. Sonnett: It is hard to read that one but I think the photostat is better.

[Tr. 3250] Do you want him to read from the photostat?

Off the record.

The Special Master: Off the record.

(Discussion off the record.)

"Mr. Rummel: Well I—of course I can't either. I mean I can't know exactly all the details of what went

on between Howard and your people at that time, but to my knowledge the thing was left where it was left in San Francisco.

"However, that was a long time ago but I'm merely pointing out that there are plenty of background discussions which I am sure Howard is not referring to right now because this ran to Damon.

"Mr. Connelly: Yeh.

"Mr. Rummel: Although I think he'd probably been apprised of it, but I don't understand—I know we pressed throughout the field for information on relative positions in detail and all that Boeing would speak of was vague generalities. But with assurance.

"Mr. Connelly: Bob, I can't agree with that."

My question really is in response to one of Mr. Rummel's remarks, you stated, Mr. Connelly, that it [Tr. 3251] was your understanding that an offer was made. It is on page 5.

A. Well, Mr. Hayes, I testified yesterday, and this I pointed out was hearsay—certain things were reported to me—discussions had been held between Mr. Beall—

Q. Mr. who?

A. Mr. Beall and I believe these were with Mr. Hughes. They may have been with Mr. Damon. I don't know.

But his report to me was that the interest of the Hughes Tool Company or TWA, was only there in the event they got a large block of the first airplanes.

Q. Was it also reported to you that—

A. I think, if I may continue—

Q. I'm sorry. I thought you finished.

A. —if there was an offer made, I'm sure it was one that would hold out, that we were anxious to do business with them, and we would offer delivery positions on as equal a basis with others as it was possible for us to do so.

Q. Under the then circumstances, whatever they might have been?

A. Well, those circumstances don't differ. I [Tr. 3252] don't understand what you mean.

Q. You already made a commitment to Pan American before you made any agreement with American, hadn't you?

A. This goes back long before that, before we even had a program.

Q. I understand that. What I am trying to find out is this: Were you aware, was it a fact so far as you know, that there was an agreement between someone in Boeing and Mr. Damon that you would not close with anyone else without first giving TWA an opportunity on an equal basis?

A. I can't recall that statement ever having been made to me.

Q. You don't recall it?

A. No, sir.

• • • • •

[Tr. 3253] • • • Q. This is the letter you may remember about which I asked a few questions yesterday, Mr. Connelly. The [Tr. 3254] one you have is addressed to whom, Mr. Rickenbacker, is it?

A. This would have been to Rickenbacker, yes.

Q. It was brought out yesterday that identical letters went at the same date to Pan American, American, United, Northwest and TWA.

What responses did Boeing receive from the letters it sent to those airlines?

A. There were—I can't recall distinctly what reactions we had.

Q. Of the airlines to which they were sent, which evidenced interest in negotiating with Boeing?

A. I'd say the majority were interested in taking a look at what we had to show them. This didn't necessarily mean they were interested in starting negotiation.

Q. Did all of the airlines get in touch with Boeing in response to Defendants' Exhibit 95?

A. I can't say whether all of them did or not, Mr. Hayes.

Q. Did Pan American?

A. Pan American very definitely had been working in this area. They were very interested in jet transport.

[Tr. 3255] Q. What about American? A. American was interested also.

Q. Did they start conversations with Boeing?

A. They were interested in coming out and flying in the prototype, getting the feel for what this airplane was.

Q. Did United?

A. United also.

Q. Did Northwest?

A. Any action on the part of Northwest would have been at some later time.

Q. How about Eastern?

A. Eastern were interested.

Q. How about TWA?

A. I don't know what response, if any, we had from TWA.

Q. Did anybody representing the Tool Company or TWA so far as you know, communicate with Boeing shortly after Defendants' Exhibit 95, the date of it?

A. I can't remember whether they did or not.

Q. Who is Ken Gordon of the Boeing Company?

A. Ken Gordon—

Q. Or who was he then?

A. —at that time was one of our sales engineers.

[Tr. 3256] Q. Who was Bill Taylor?

A. He likewise was one of our sales engineers.

Q. Who was George Schairer?

A. He was one of our research and development engineers.

Q. Did Pan American by early January indicate to Boeing that it was interested in purchasing 25 jets?

A. My only answer to that, Mr. Hayes, is Pan American showed a very marked interest in the airplane from the very first time we had the prototype program under way. And I can't remember any specific dates.

Q. Did Pan American by that early date—I am speaking now prior to mid-January of 1955—or Mr. Juan Trippe on its behalf insist that Boeing deliver the first 25 airplanes to Pan American?

A. At that particular time during the prototype period I am speaking about now I don't think they reached the point that they knew enough about the airplane to know whether or not they wanted to buy it.

Q. Can you answer the question more specifically than that?

A. No, I don't believe I can.

Q. By that date, did TWA desire the first 15 jet aircraft to be manufactured by Boeing?

[Tr. 3257] A. By what date, Mr. Hayes?

Q. Prior to the middle of January 1955.

A. Would you repeat the whole question, please?

Q. Yes.

By that time had TWA indicated to Boeing that it wanted delivery of the first 15 aircraft to be manufactured?

A. If so, it was never reported to me.

Q. You have no knowledge one way or the other?

A. No, I have not.

Q. Do you know whether Boeing hesitated to agree to sell the first 25 to Pan American for fear it would lose TWA's potential order for 15?

A. I don't know whether this ever occurred but I can answer it this way: We wouldn't offer the first 25 airplanes to anyone.

Q. I did not say you did.

A. I say we would not have.

Q. No, I did not say you would have.

My question was whether Boeing was reluctant to sell the first 25 to Pan American because of its fear it would lose TWA's potential order for 15.

A. I can't answer that question yes or no. I don't think the question of fear of losing TWA would [Tr. 3258] ever enter into that decision.

The decision is we would not sell the first 25 airplanes to any one customer.

Q. Do you have a recollection that Pan American ever asked for the first 25 deliveries?

A. I have no recollection of it.

Mr. Hayes: Would you let the witness have, please, Defendants' Exhibit 10?

Q. This is a memorandum from Mr. Rummel to Mr. Collings whom you know, I suppose, to be with TWA—

A. Yes.

Q. —with a copy to Mr. Damon dated January 12, 1955. You may read the whole memorandum and I am particularly interested in the last paragraph and my questions to you will be based on the last paragraph.

I ask when having read it, you can tell us it refreshes your recollection.

A. I have read it.

Q. Does it refresh your recollection in any way?

A. Not at all.

Q. You were not present at this meeting between Mr. Rummel on the one hand and Messrs. Gordon and Taylor and Schairer on the other?

[Tr. 3259] A. No, sir.

Q. None of them ever reported to you as to what happened?

A. No.

Q. I show you, Mr. Connelly, a copy of Defendants' Exhibit 96 for identification, a copy of a letter from Mr. Allen to Pan American, dated June 23, 1955, with a copy to yourself.

Do you recall if this was the first specific offer made by Boeing to Pan American?

A. I believe this is probably the first written proposal that was made, yes.

Q. Had there been any oral proposals prior to that date?

A. Not to my knowledge.

Q. Had Boeing discussed delivery positions with Pan American prior to the date of Defendants' Exhibit 96 for identification?

A. Well, undoubtedly this was the case, but I—I have no recollection.

Q. Were you a party to such discussions with Pan American?

A. No, sir.

Q. The aircraft referred to here is the 120 series, [Tr. 3260] is it not?

A. That's right.

Q. You will notice on page 3 on the delivery schedule, Boeing stated that at least eight aircraft would be delivered to Pan American before any will be delivered to any other commercial customer.

Do you see that?

A. Yes.

Q. Was that as a result of conversations, do you know, or was this a unilateral decision by Boeing?

A. Well, obviously not having been a party to it, I can't say anything more than my own opinion. It probably was preceded by some discussion.

Q. Were there meetings of the headquarters group that you have identified which was then handling all negotiations with airlines as to what offer should be made to Pan American with respect to delivery positions?

A. Not to my knowledge.

Q. Was this a decision so far as you know, entirely by Mr. Allen?

A. It could have been. I presume he probably talked to some of the people in the company about it.

He may have discussed it with Mr. Beall. I don't know.

[Tr. 3261] Q. Who handled the Pan American negotiations for Boeing?

A. Well, the final negotiations were conducted by Mr. Allen for the first few days, I was in attendance, Mr. Mickelwait of our law firm, and we had several of our technical people there.

Q. When you say the final negotiations, what negotiations are you talking about?

A. Discussions to effect a definitive contract.

Q. No, I am talking about the negotiations which preceded the date of Defendants' Exhibit 96 for identification, the negotiations prior to June 1955.

Who was handling negotiations with Pan American prior to that date?

A. We had any number of technical people working with the technical people of Pan American. Some of our sales engineers undoubtedly were there.

There probably were discussions between Pan American management, our very top management.

This is all supposition. I don't know.

Q. You can't tell us who under the setup in Boeing at that time would have the responsibility for making offers with respect to delivery positions?

A. I will never question our president's authority [Tr. 3262] to do that, no.

Q. Did anybody else have the authority?

A. I doubt anyone would without at least a discussion with Mr. Allen at that particular time.

Q. Certainly the engineers would not have that authority, would they?

A. No. Nor would the sales engineers.

Q. Who, so far as you know, handled the negotiations on behalf of Pan American with respect to delivery positions I am thinking now.

• • • • •

Q. Will you proceed and answer the question, Mr. Connelly?

A. Will you repeat it, please?

Q. Who, so far as you know, handled the negotiations on behalf of Pan American with respect to delivery [Tr. 3263] positions?

A. With respect to delivery positions?

Q. Yes.

A. I don't know, but I would assume Mr. Trippe and Mr. Gledhill.

Q. Again you were not party to those discussions?

A. No, sir.

• • • • •

Q. Prior to June 23, 1955, Boeing had also been negotiating, had it not, with a fair degree of activity, with both American and United?

A. According to my recollection, I doubt if you would use the word negotiating, but there were contacts constantly with all the airlines between our technical people and our —and their counterparts in the airlines.

Q. Were there conversations going on at the execu- [Tr. 3264] tive levels between your executives, Boeing's executives and the executives of American and United?

A. I can't answer definitely yes, but I would assume there had been discussions relative to the airplane between top officials of the airlines and our top management.

Q. Also with respect to delivery positions?

A. It would only be an assumption, sir. I don't know.

Q. I thought you testified yesterday in substance, and correct me if my recollection is wrong, Mr. Connelly, that Boeing worked actively throughout this period, early 1955 and the middle of 1955 with Pan American, American and United, trying to work out detailed specifications looking towards orders.

A. Detailed specifications, that is correct.

Q. That is true of all three of the Airlines, Pan American, American and United, is it not?

A. Well, I can't be positive as to that time period, but we were working with those three airlines on detailed specifications for the airplane.

[Tr. 3265] Q. I show you, Mr. Connelly, Defendants' Exhibits 97 and 98 for identification, letters dated June 24, 1955, one day after the letter to Pan American which we have just been discussing, addressed respectively to American and United Airlines.

I ask you if after reading them you can tell me whether these were the first offers made to those two airlines for the 120 series.

A. These were one day after, Mr. Hayes, the other one?

Q. Yes, one day.

A. I would have to give the same answer. To the best of my knowledge and belief these were the first written offers made to these airlines.

Q. You are in no position to testify as I understand it for lack of knowledge as to what conversations with respect to deliveries may have taken place between Boeing and either United or American prior to dates of Defendants' Exhibits 97 and 98 for identification?

A. The references are these two documents?

Q. That is right.

A. I was not privy to any such conversations, and I am not aware of what they might have been, or if [Tr. 3266] there were any, but I assume there were.

Q. You will notice on page 3 of these two letters, Defendants' Exhibits 97 and 98 for identification under the heading "Delivery" proposed identical schedules with a commitment that Boeing would not agree to deliver the Model 707-120 series which we know it is to any other customer engaged in commercial air transport within the United States earlier than such aircraft will be delivered to American or United as the case might be.

Do you see that?

A. I believe you said not agree. You mean agree not to.

Q. Would agree not to. I'm sorry.

A. Right.

Q. You see that, do you not, Mr. Connelly?

A. Yes, I see that.

Q. Do you know whether or not a letter similar to the letters to American and United were sent to TWA?

A. Do I—repeat that, please.

Q. Do you know whether or not a letter similar to the letters to American and United were sent to TWA?

Mr. Sonnett: I take it you are including in TWA Hughes Tool Company or Howard [Tr. 3267] Hughes?

Mr. Hayes: Either or both.

A. I don't know, but I believe not for the simple reason that it was very definitely understood that there was no interest on the part of the Hughes Tool Company or TWA unless they could get a large block of the first airplanes.

Q. You did not consider eight airplanes to Pan American to be a large block?

A. Well, it is less than 50, 40 or 33.

Q. It is less than 15, too, isn't it?

The Special Master: The Court will take judicial notice of that.

A. I believe that's right.

Mr. Sonnett: While we are at the numbers here, 50, 40, 33, I am not clear the significance of that is apparent on this record, 50, 40, 33.

Mr. Hayes: If it is not, it is not.

Q. Did you personally engage in the negotiations with TWA or the Tool Company?

A. Yes.

Q. At what point?

A. Between Christmas and New Year's 1955.

Q. Prior to that time, did you?

[Tr. 3268] A. No.

Q. So any knowledge you have as to any demands of TWA or the Tool Company would be the sheerest hearsay, would it not?

Mr. Sonnett: I don't know how sheer hearsay is.

Mr. Hayes: Hearsay, put it that way. Strike out the sheerest.

A. Only as reported to me, Mr. Hayes.

Q. You are not confident that everything that was said was reported to you, are you?

A. No.

Q. Did you consider that the offer to Pan American on June 23, 1955, of the 120 series was a guarantee that they would get the first eight airplanes, and offers the very next day to United and American with a guarantee only that deliveries would not be made to other domestic airlines in advance of the dates set forth in the offers, was in accordance with the Boeing policies you have described?

A. In light of the circumstances, yes.

Q. In light of what circumstances?

A. The lack of interest on the part of Hughes Tool or TWA in the airplane unless they do get a large [Tr. 3269] initial block of airplanes.

Mr. Hayes: Could I have the question repeated, please, to Mr. Connelly?

I am afraid you did not get the question.

The Witness: Did I go out of bounds?

Mr. Sonnett: No, I don't think you did.

Mr. Hayes: No, you made a speech about Hughes Tool Company so you are in bounds. That is the only rule according to Mr. Sonnett.

The Witness: I am sorry.

Mr. Sonnett: I thought Hughes was the defendant in this litigation.

Mr. Hayes: That was not the question.

The Witness: Would you repeat it, please?

Mr. Hayes: I will repeat it to you. It is easier than having the reporter look for it.

Q. Did you consider that an offer to Pan American of the first eight 120s and offers the next day to both United and American were the only limitation being that no better delivery positions would be offered other domestic carriers to be consistent with the Boeing policies that you described yesterday?

A. Yes, I do.

Q. How do you reconcile the preference of Pan [Tr. 3270] American for the first eight with the Boeing policies that you described yesterday of equal treatment for all?

A. Well, here again we must refer to the competitive picture. Pan American is an overseas operator.

Q. Is that your only reason?

A. In respect to Pan American, that is the primary reason, yes.

Q. Is it the only reason?

A. All right, it is the only reason.

Q. Were United and American just as interested in getting 120s as Pan American?

A. Interested, but as long as Pan American was not competing with them, their primary concern was with those operators they would be competing with.

Q. Did they tell you that or is that a bit of reasoning on your part, Mr. Connelly?

A. It has been reported to me that certain comments along that line had been made, yes.

Q. This is again hearsay that you received, is that correct?

A. Yes.

Q. Do you know whether United or American were advised at or about June 24, 1955, that the first [Tr. 3271] eight aircraft had been offered to Pan American?

A. I have no knowledge of that, whether it was—whether that statement was made or not.

Q. Was any announcement made to the trade that the first eight aircraft were offered to Pan American?

A. No, sir.

Q. Was this treated as an internal secret in Boeing as between Boeing and Pan American, this offer of the first eight?

A. It is not a secret. We don't practice making a public statement as to our offer.

Q. I notice on the top of each page of Defendants' Exhibits 97 and 98—it is also true on Defendants' Exhibit 96—the word "limited" appears.

What does that indicate to you, Mr. Connelly?

A. In this case, it is limited in respect to only the people who are designated here would get copies of this memorandum.

Q. Its distribution within Boeing was limited to the individuals named, is that what it means?

A. That's correct.

I would like to elaborate on that a little bit. It is a large organization. We have standard distribution lists. And should we, for instance, use [Tr. 3272] Distribution List A, this would go out to the many people who have no connection with that particular job. So we use the term limited when it is to be restricted to the people to whom copies are sent.

Q. It is expected they will not disclose it to anyone else?

A. Only to those who have a need to know.

Q. There is always the danger that if others know, it might become public knowledge; is there not?

A. That's correct.

Q. When did United get a certificate to fly to Hawaii, Mr. Connelly, do you know?

A. I don't recall.

Q. Do you know whether they were flying to Hawaii or planned to fly to Hawaii using jets?

A. Would you repeat that, please?

Q. Do you know whether they planned to use jets on flights to Hawaii?

A. I didn't know that, but I assumed they would.

Q. Do you know whether they were flying to Hawaii at or about the time offers were made?

A. Yes, they were, because they had used stratocruisers on that flight at one time, yes.

Q. Pan American was flying to Hawaii too at that [Tr. 32731] time, was it not?

A. That's correct.

Q. What happens to your competitive posture picture? You had United and Pan American competing on flights to Hawaii?

A. Well, that's a small segment if you compare it with the total picture.

Q. The fact is they were competitors, were they not?

A. On that route, yes.

Q. On that route, yes.

A. Yes.

Q. And planning to use the same planes on that route?

A. We would assume that.

Q. But nonetheless Pan American received the preference over United?

A. That's in the record.

Q. That is right. You said before that the only justification for giving Pan American preference was the competitive situation.

What happens now to that reason?

A. I still think it is a sound one.

• • • • •

[Tr. 3274] * * * Q. The offer to Pan American was extended from time to time, was it not, Mr. Connelly?

A. I don't specifically recall, but it could have been as long as we were in serious negotiation.

Q. You will note on the last page of Defendants' Exhibit 96 in evidence under the term of the offer that it was to remain firm until July 18, 1955.

By that time, Pan American had not made a commitment, had it?

A. By July 1955. As I recall, no.

Q. By the time you sent this letter of June 23rd, Defendants' Exhibit 96, you intended to keep it open until at least July 18th, or any date to which it might be extended and would not give those delivery positions to any other carrier; isn't that a fact?

A. That's right.

Mr. Hayes: I ask that there be marked for identification as Defendants' Exhibit 154 a telegram to Boeing Airplane Company from Franklin [Tr. 3275] Gledhill dated August 22, 1955.

* * * * *

Q. It bears your initials at the top, I notice, Mr. Connelly.

A. That's right. I have read it.

Q. Was this the first formal acceptance, so to speak, of the offer made by Boeing to Pan American?

The Special Master: Counter-offer, I think he calls it.

Mr. Hayes: Counter-offer strictly speaking.

A. I was going to say counter-offer. The reason for my hesitancy, I can't read the date up here. Is it clear on yours?

Q. It is 8/22/55 in handwriting.

A. To the best of my knowledge and belief this would be the first counter-offer from Pan American.

• • • • • •

[Tr. 3276] • • • Q. About the seventh line of the text, Mr. Connelly—the line before that "Price to be same as currently offered by American which we understand four million three," do you know what that language is intended to mean?

A. Apparently we had a counter-offer from American at the time.

Q. That Pan American knew about?

A. I don't know any more than I'm reading right here. I am as perplexed as you are. I assume this could have referred to a counter-offer from American. I don't know.

• • • • • •

Q. As of the date that Boeing received Defendants' Exhibit 154, would it have offered any of those eight first delivery positions to any other carriers without agreement of Pan American, assuming Pan American continued serious negotiation?

A. Not as long as we continued serious negotiation.

[Tr. 3277] The Special Master: How do we get to six?

Mr. Hayes: That is what I am trying to find out. I hope.

I ask that there be marked for identification telegram dated August 26, 1955, to Pan American World Airways from William Allen of Boeing.

• • • • • •

Q. Would you read it and tell us if this is the answer that Boeing sent to Defendants' Exhibit 154 in evidence?

A. It takes some time to read it. I have to ask you to please repeat the question.

Q. If you recognize it as a response of the telegram from Pan American to Boeing.

A. To the best of my knowledge and belief, that is true.

• • • • •

[Tr. 3278] • • • Q. Toward the latter part of this telegram, there is a quotation with proposed delivery dates of aircraft with the JT-4 engine. That is the intercontinental version, is it not?

A. No, to the best of my knowledge and belief this referred to our 707-220, which was a—the first model we proposed with a JT-4 engine.

Q. Was that intended to be an intercontinental plane?

A. It was intended with the type tanks they refer in here to give it some added range.

Q. Was it ever built?

A. We built five of them.

Q. For whom?

A. Braniff.

Q. Aside from that, was it ever built?

A. No.

Q. It was replaced for other purposes by the 320 series.

A. 320s, that is correct.

Q. Was this the first offer made by Boeing—I am referring to Defendants' Exhibit 155—of a plane designed to use the JT-4 engine?

[Tr. 3279] A. Was this the first airplane—

Q. First offer made to an airline of an airplane designed to use the JT-4 engine?

A. As best I can remember, a concurrent offer or a substantially concurrent offer was made to Braniff Airlines.

Q. Was a similar offer made to any other airlines?

A. One was made to Eastern Airlines.

Q. Anybody else?

A. I can only assume so, but I cannot remember positively.

Q. Do you recall whether the delivery positions set forth in Defendants' Exhibit 155 were the same as those contained in the offers to Braniff or Eastern or were better than those contained in the offers to Braniff and Eastern?

A. I have no recollection.

Q. Had there been conversations, do you know, between Pan American and Boeing with respect to an airplane using the JT-4 engine prior to the date Mr. Allen sent Defendants' Exhibit 155 to Pan American?

A. Yes.

Q. How long had they been going on?

A. I can't speak as to time, but I would say [Tr. 3280] for several months, when it was apparent that the JT-4 engine could be made available for commercial use. It was a military engine.

Q. At or about the time of Defendants' Exhibit 155, do you know if Douglas was planning to use the JT-4 engine in its DC-8?

A. Yes, I would say at about the same time.

Q. Was it making offers to airlines of DC-8s equipped with JT-4 engines at or about the same time?

A. To the best of my knowledge and belief, I think so.

Q. Was it receiving orders, do you know, or was it at least conducting serious negotiations with airlines looking to their purchase of such planes?

A. Again to the best of my knowledge and belief they were.

Q. Once Defendants' Exhibit 155 had been sent to Pan American, would Boeing have offered better delivery positions on aircraft equipped with the JT-4 engine than it had offered to Pan American?

The Witness: Would you repeat that, please?
Mr. Hayes: Would you read it, please?
(The question was read.)

[Tr. 3281] A. I cannot say.

Q. You don't know?

A. I don't know.

Q. Would your answer be the same if I added to my question the assumption that Pan American engaged in serious negotiations looking toward the purchase?

A. They were very interested in the JT-4 engine and the best airplane that could be built around it. This is not a direct answer, I realize that, to your question, but I can't answer the question directly. There was an interest in any airplane, may I put it that way, that offered a greater range payload capability than was possible with a J-57 engine.

• • • • •

[Tr. 3282] • • • Q. At the time that discussions were going on with Pan American, Mr. Connelly, with respect to the 120, Pan American was really looking, of course, for what eventually was the 320 type of plane, was it not?

A. They were interested in both airplanes.

Q. They never bought any more than six of the 120s, did they?

A. No, they were interested in the 120 primarily because of the more favorable delivery dates.

Q. But so far as the eventual use, it was the truly intercontinental plane in which they were interested, was it not?

A. Yes, that's right.

Q. When they were negotiating for the purchase of the 120s, was there any understanding between Pan American and Boeing that they would receive first preference on the [Tr. 3283] intercontinentals when they become available?

A. Not to my knowledge.

Q. Were you part of those negotiations at all?

A. At one point, yes.

Q. At what point were you a party to it?

A. Right up to the point that we had concluded the definitive contract.

Q. You mean for the 120s?

A. Right.

Q. Did you participate in all the conversations with Pan American through 1955 down to October, when the contract was finally executed?

A. No.

Q. I think you testified this morning that you had no discussions with them with respect to the deliveries.

A. At what time?

The Special Master: As of a certain time.

Q. June of 1955, or prior to June of 1955.

A. Prior to June of 1955? I personally did not, no.

Q. When did you get into negotiations, so far as deliveries were concerned, with Pan American?

A. During a time we were drafting the final definitive contract.

Q. Can you fix the time? It was executed—

[Tr. 3284] A. I believe it was around October of that year.

Q. That is right.

A. Yes.

Q. How long were you engaged in that work?

A. I would say about three weeks or so.

Q. But the decisions had already been made as to what eventually would go into the contract, so far as deliveries were concerned, had they not?

A. This matter of preferential deliveries was still under discussion.

Q. Did you discuss it with Pan American?

A. That matter was discussed between Mr. Allen and Mr. Trippe in the presence of the entire group who were involved in the negotiations.

Q. Tell us the discussion, please, fixing the time, if you can.

A. Well, it was during these two or three weeks that we were negotiating the final definitive contract and Pan American was desirous of getting a greater number of planes, and we were representing that what we had already offered or were prepared to offer was the maximum we could consider.

Q. Can you give us the figures, please, Mr. Connelly?

A. At that time, based on their order of 25 airplanes—[Tr. 3285] in consideration of their order for 25 aircraft, which I remember was the figure, as I recall we offered them the first eight airplanes.

Q. The contract, as executed, was for 20 planes, Mr. Connelly?

A. As executed, for 20 airplanes, the preferential deliveries were cut from eight to six.

Q. Because they were negotiating for 25, you offered eight, but when they cut to 20, you offered six; is that—

A. That's the way I recall it, Mr. Hayes.

Q. This was negotiated, do I understand, between Mr. Allen and Mr. Trippe in the presence of the teams?

A. As I recall this matter of preferential deliveries was resolved between Mr. Trippe and Mr. Allen.

Mr. Hayes: I ask that there be marked for identification a telegram from Beall to Messrs. Allen, Mickelwait, Connelly, with a copy to Schairer, dated September 28, 1955.

• • • • •

By Mr. Hayes:

Q. Would you read it, please, first, Mr. Connelly?

A. I have read it.

[Tr. 3286] Q. Do you recognize this as a telegram received by the parties indicated from Mr. Beall at that time? It was produced, I might say, from the Boeing files pursuant to a subpoena.

A. Yes.

• • • • •

[Tr. 3287] By Mr. Hayes:

Q. As of this date were you actively engaged in the negotiations? This was 15 days before the contract was signed.

A. I don't believe so, sir. I think that our actual meeting in New York occurred after that date.

Q. Boeing was still negotiating with both American and United, was it not?

A. As I recall, it was primarily at the technical levels.

Q. They were still negotiating? Boeing still expected that sales will be made to both those airlines, did it not?

A. Both those airlines had expressed a very definite interest, yes.

Q. Any commitments you may have made to either of them with respect to deliveries, you were holding firm until you terminated negotiations, were you not?

A. I would assume we did, yes.

Q. I direct your attention, Mr. Connelly, to "Item 3, Reassignment of deliveries if UAL or American do not purchase." Do you see the portion to which I am referring?

A. Yes.

Q. Had Pan American requested that if United or Ameri- [Tr. 3288] can do not purchase, that the delivery positions offered to them should be made available to Pan American?

A. As I read this, they must have. I assume this originated with the Pan American request.

Q. You have no personal knowledge on this subject?

A. No, I do not.

Q. Who would, do you know?

A. Well, I would imagine that Mr. Beall, Mr. Allen would have known about it.

Q. It is mentioned there that under the proposed arrangements with Pan American, American and United, Pan American would get 35 planes by the time that American and United got nine.

Mr. Sonnett: Each?

Mr. Hayes: Each.

Q. (continuing) Do you consider that an example of substantial equal treatment of three different air carriers negotiating with Boeing at the same time?

A. Yes, when you take the competitive situation into hand, I do.

Q. The competitive situation, you mean, between Pan American and American or between Pan American and United?

A. No, I am referring to the fact that Pan American is an overseas operator and American and United are essenti-
[Tr. 3289] ally domestic operators.

Q. But you are not forgetting that United is an overseas operator, as well, are you?

A. Well, American goes to Toronto.

Q. I said "overseas," Mr. Connelly.

A. Well, they go over the lake.

Q. You know what I mean, don't you, Mr. Connelly?

A. Yes, I know what you mean.

Q. I have tried to avoid wisecracks. I would appreciate it if you would.

Mr. Sonnett: If you would try to avoid repetition, we can avoid this. You have been over this before.

The Witness: I am sorry. I apologize.

Mr. Hayes: Thank you, sir.

Q. As of this date, what delivery positions were available for any other air carriers, besides Pan American, American and United?

A. At that particular time, I do not remember.

Q. Were there any delivery positions available as of the date of this telegram, prior to April of 1959?

A. I can't answer that question specifically, because I don't recall what our schedule situation was at that time.

[Tr. 3290] Q. Were there any other documents that you know of that were exchanged between Pan American and Boeing between the date of Defendants' Exhibit 156 and the final execution of the contract on October 13th?

A. What were those dates again, please?

Q. The date of the document before you, which is September 28, 1955, and the date of the execution of the contract, which is October 13, 1955. Do you know—

A. I cannot recall any.

Mr. Hayes: Let us turn now to American, if we may. I ask that there be marked for identification as Defendants' Exhibit 157 telegram from Mr. Smith, president of American Airlines to Mr. Allen, president of The Boeing Company.

• • • • •

Q. Would you please read it, Mr. Connelly, and indicate when you have done so?

Mr. Williams: Did you give the date?

Mr. Sonnett: August 17th—

Mr. Hayes: August 17, 1955.

A. I have read it.

Q. Was this the first counteroffer, so to speak, that [Tr. 3291] American Airlines sent Boeing, so far as you know, in response to the offer made to American on June 24, 1955?

A. As far as I know, this was the first written counterproposal.

• • • • •

Q. There is reference in Defendants' Exhibit 157 by Mr. Smith that they will expect Boeing to stock an adequate supply of spare parts during the operating life of the airplane: "Our general experience in the past was that the stock maintained by Boeing was insufficient and the prices for spare parts was in excess of industry average."

Had there been difficulty, so far as you recall, in the past on the part of Boeing stocking adequate spare parts for Boeing equipment?

Mr. Sonnett: I must say I fail to see the relevance of this line of examination.

The Special Master: Subject to motion to strike, the question will be allowed.

A. Do you mean by that trouble with American Airlines?

Q. Trouble with any airline, American apparently and [Tr. 3292] others maybe. Had there been difficulty?

A. Well, I don't think there has ever been a time in the history of the industry that someone has not complained about stocks of supplies, prices and whatnot. I would have to say this is true of every aircraft manufacturer.

Q. You do not recall any particular difficulty with respect to Boeing's dealings with American in this regard?

A. No, sir. The only airplanes we had sold previously to American were never delivered to American, because they sold their American Overseas Airline interest to Pan American prior to delivery of any aircraft.

Q. Had American flown any Stratoliners?

A. No.

Q. Or Stratocruisers?

A. They bought some, but as I say, they sold them to Pan American when they sold their overseas rights to Pan American.

Q. As of the date of this telegram, it had already been determined, had it not, by Boeing that it would offer the first eight delivery positions to Pan American?

A. If Mr. Allen's letter to Mr. Trippe we looked at earlier, the date of that letter preceded this, why—

Q. That's right.

[Tr. 3293] A. Yes.

Q. They were still being held open, you testified.

A. Yes. My memory—I have forgotten exactly what those dates were.

Q. They mention here that if Pan American does not purchase within ten days, American will have the delivery positions, and the documents we have already seen indicated

that there was a telegram from Pan American within ten days of this date.

They also mention that if during such ten-day period United does purchase from you, we will be willing to share one-half the Pan American delivery positions with United.

Was there any joint agreement or were there any joint conferences, do you know, between American and United with respect to this matter of getting Pan American deliveries?

A. Not to my knowledge.

Q. Did United make the same proposal to Boeing about getting one-half of the Pan American deliveries in the event Pan American did not purchase?

A. I don't recall any such instance.

Q. You have no recollection?

A. No, sir.

[Tr. 3294] Mr. Hayes: I ask that there be marked for identification as Defendants' Exhibit 158, a telegram dated August 22, 1955 to Mr. C. R. Smith from Mr. William Allen of Boeing.

• • • • •

Q. Please read it, Mr. Connelly.

A. I've read it.

Q. Do you recognize this as the response that Mr. Allen sent to Mr. Smith in reply to the letter of Mr. Smith?

A. That Mr. Smith sent to Mr. Allen, right.

• • • • •

Q. At the bottom of page 2 of Defendants' Exhibit 158 in evidence, Mr. Connelly, it is mentioned that delivery will be at the rate of one per month for nine months commencing in April 1959, and two per month for six months commencing January 1960, that Pan American, [Tr. 3295] Boe-

ing is advised, is submitting a firm proposal, and that American's delivery schedule will be adjusted if Pan American does not purchase.

Do you know whether at the date of Defendants' Exhibit 158 which was in August of 1955, American had been advised what the delivery positions offered to Pan American were?

A. I can't recall specifically, but I believe not.

Q. Were you part of these negotiations with American at this time? With respect to deliveries, I mean.

A. Not with respect to deliveries.

Q. Who was handling the delivery negotiations with the various airlines?

A. Well, as these wires and the one to Pan American would indicate there were discussions between Mr. Allen, Mr. Trippe, and Mr. Allen and Mr. Smith.

Q. They were at the top executive level, those negotiations?

A. That's right.

Q. And you were not party to them?

A. Not to these particular negotiations, no.

Q. Who was handling the negotiations with United with respect to the deliveries?

[Tr. 3296] A. Both Mr. Allen and Mr. Beall.

Q. Who on behalf of United?

A. Mr. Patterson.

Q. Do you know what, if any, conversations were had between anybody in Boeing and anybody in American as to what adjustment would be made in American's schedule if Pan American did not purchase?

A. I'm not aware of any and I do not believe any took place as to any specific adjustment.

Q. I don't know what you mean by "as to any specific adjustment."

A. Well, I interpreted your question to be along that line.

Q. My question was who, if anyone, in Boeing, negotiated with whom, if anyone, in American, with respect to what adjustment would be made, instead of just an adjustment will be made?

A. I know nothing beyond what is in this telegram.

Q. You are not aware as to whether or not there may or may not have been conversations along that line?

A. There may have been. I am not aware of it.

Mr. Hayes: I ask that there be marked for identification as Defendants' Exhibit 159, telegram from Mr. Smith of American to Mr. Allen [Tr. 3297] of Boeing, dated August 23, 1955.

• • • • •

Q. Would you please read it, Mr. Connelly—

A. I shall.

Q. —and let us know when you have done so?

A. I have read it.

Q. Do you recognize this as Mr. Smith's answer to the last telegram we just saw from Mr. Allen to Mr. Smith?

A. I have no reason to believe it is not.

• • • • •

Q. On the third page of Defendants' Exhibit 159, Mr. Connelly, the middle of the page with reference to the proposed delivery schedule, American points out that under the proposal they would not have five licensed airplanes until August, 1959, and Douglas was promising the identical number at the same period, and contrast- [Tr. 3298] ing it with the original proposal which was superior deliverability as compared with others.

Do you know anything with respect to the difference between the original proposal, the one to which Mr. Smith addresses himself here?

A. Neither of those schedules are before us.

Q. You have no recollection as to them at all?

A. As to either one.

Q. He mentions one of them. The first delivery is in the previous letter.

A. I might refer back to that letter we were looking at this morning.

Q. First, one plane in April of 1959.

Do you notice? It is on page 2 of Defendants' Exhibit 158.

Mr. Sonnett: Do you want him to look at it?

Mr. Hayes: Yes, he said he did not have it before him. I am directing his attention to it.

Mr. Sonnett: He now has it before him.

Mr. Hayes: I thought he had it before him.

Mr. Sonnett: No, I took it away from him when I thought you were through with it ten minutes ago.

[Tr. 3299] Is there a pending question?

Mr. Hayes: Yes.

The Special Master: I think so. If you can get in mind the two, the earlier delivery date and the later one, is that correct?

Mr. Hayes: That's what it was. What was the difference between them?

The Special Master: See if you have any comments on them.

The Witness: I'm at a loss what to compare this with.

Q. I would assume it would be the one in Defendants' Exhibit 97 which is the only one we found from your files.

A. I don't have it here.

Q. Take my copy, Mr. Connelly.

Mr. Sonnett: Don't these documents speak for themselves? The witness said he couldn't be expected to have a recollection now of a particular delivery schedule of some years ago.

The Special Master: As I understand it, if he has the two in front of him then the question is whether he recalls any reasons for the differences or any discussions connected with them.

[Tr. 3300] Mr. Hayes: That is right.

The Witness: Well, this original letter quotes one a month beginning in April 1959, for nine months. This Paragraph 5 of the telegram, speaking in narrative form and not in tabulation said delivery would be at the rate of one per month for nine months beginning in April 1959.

They would appear to be the same.

Q. But the later deliveries are different, are they not?

A. I'm sorry. I'm missing something here.

Q. How about the 1960 deliveries, aren't they different?

A. I only have the letter of June 24th and Exhibit 158.

Q. Correct.

A. My examination of that would show that the schedules in both were identical.

Q. Was the reference then in Defendants' Exhibit 159 which you have before you on page 3—do you know this—whether the reference there to the attractive features of Boeing's original proposal was superior deliverability as compared with others, do you know whether the others

referred to other airlines or other manu- [Tr. 3301] facturers?

A. I think it referred to manufacturers.

Q. Is this a speculation of yours, Mr. Connelly, or do you know?

A. No, that I think is quite clear. He refers to Douglas. He says one of the attractive features of your original proposal to us was superior deliverability as compared with others.

Q. Do they mean what others could get from other manufacturers, other airlines could get, do you know? Or don't you know what it means?

A. Well, I can only give you my interpretation of what I read.

I think he is referring to Douglas, Convair, Lockheed or any other manufacturer.

Q. You had no personal conversation at this time on this subject with Mr. Smith or any representative of American, did you?

A. No, sir.

Q. Take the last paragraph of that Defendants' Exhibit 159, referring to an acceleration date of deliveries in the event other potential customers delay and American's objection to the lack of a cutoff date for such other orders. [Tr. 3302] What, if anything, did Boeing do with respect to that request of American, do you know?

A. Well, in one of these wires it seems as though Smith had proposed there ought to be a cutoff date of September 9th, as I remember, and if—I assume that in his opinion if anyone delayed beyond that date, there ought to be a reallocation of delivery.

Q. As to those who ordered later?

A. Or those who had let proposals lapse or had taken no action.

I would like to check that September 9th date.

Q. Go right ahead.

A. I don't know where it is. I think it is the prior wire—

Mr. Sonnett: This one you are thinking of. It is September 30th.

The Witness: September 30th?

Mr. Sonnett: I don't know. There is a reference to September 30th.

The Witness: Right in here?

Mr. Hayes: Yes, right there.

The Witness: Oh, it is in that paragraph.

"Suggest September 30th this year be established as cutoff date."

[Tr. 3303] Q. What does that paragraph mean to you as to what American's suggestion was, Mr. Connelly?

A. Well, to me it means they are suggesting that if other customers to whom we had made proposals failed to act by September 30th that there should be a reallocation of those positions which would benefit American Airlines.

Q. The other customers would have been at that time Pan American and United, would they not?

A. Primarily, yes. There could have been others.

Q. What, if anything, was done with respect to this suggestion of American's, by Boeing?

A. I don't recall anything that happened as a result of that.

Mr. Hayes: I ask that there be marked for identification as Defendants' Exhibit 160 telegram from Mr. Allen of Boeing to Mr. Smith of American Airlines, dated August 25, 1955.

• • • • •

Q. Would you please read it, Mr. Connelly, and indicate when you have done so?

A. I read it.

[Tr. 3304] Q. Do you recognize this as Mr. Allen's answer to the telegram from Mr. Smith that we have just been talking about?

A. Yes.

* * * * *

Q. In the last paragraph Mr. Allen states that Boeing does not intend to hold delivery positions open indefinitely for latecomers.

Does that indicate to you that Mr. Allen interpreted Mr. Smith's prior telegram as referring not to those with whom you were then negotiating but with those who had not yet been negotiating?

A. I can't say exactly what I think this means.

Q. You had no discussions with American representatives on this matter, is that correct?

A. No, I did not.

Q. Mr. Allen further says that he believed we can work out some understanding with American on this point after we have reviewed with you and United the [Tr. 3305] time required to develop detailed specification and negotiate contract.

Was any understanding ever worked out with United on this point of deliveries or cutoffs?

A. You mean with American?

Q. I meant American. I'm sorry.

A. Well, whatever understanding was worked out was worked out in the final schedule contained in the contract.

Q. This has to do with the holding open of delivery positions for others. The final contract was not executed until March 1, 1956, which was several months after this.

A. That is correct. But of course the situation changes as I mentioned as we go along.

In other words, I don't mean to say that we could be bound by a schedule we quoted in June-July 1955.

Q. I just want to know if you know if any understanding was worked out with American, Mr. Connelly.

A. In the final contract, yes, sir.

Q. Aside from the final contract, do you know of any understanding that was worked out?

A. No.

[Tr. 3305A] Q. Do you know of any understanding worked out with American prior to the execution of the final contract?

A. Well, there was an understanding prior to the time signatures were affixed.

[Tr. 3306] Q. What was that understanding?

A. The same understanding as contained in the contract.

Q. What did that provide, if anything, if you can recall as to cutoff dates for others?

A. It provided nothing in that respect.

Q. So there was no understanding, is that your testimony?

A. No, I didn't say that.

In the schedule contained in the contract, if there was any adjustment, it was contained in that schedule.

Q. Maybe we have been talking at cross-purposes, Mr. Connelly. Defendants' Exhibit 160 refers to working out an understanding with American with respect to the time Boeing would hold open delivery positions for latecomers.

What I am trying to find out from you is whether any such understanding was ever worked out with American.

A. Not to my knowledge.

Mr. Hayes: I ask that there be marked as Defendants' Exhibit 161 for identification a copy of a letter from C. R. Smith to Mr. William Allen dated October 19, 1955.

[Tr. 3307] • • • The Witness: I have read it.

Q. Is this, so far as you know, this letter, the [Tr. 3308] next exchange of any kind between Boeing and American in writing after the date of the last exhibit which was, I think, in August 1955?

A. I have no reason to believe otherwise.

• • • • •

Q. As of October 19, 1955, is it a fact that Boeing was still actively negotiating with United and American and would not for the benefit of any other airline which then came along give to such airline any position that had been quoted to United and American?

The Witness: I hate to ask you to repeat that again, sir, but I wish you would.

Mr. Hayes: Would you read it, please?

(The question was read.)

A. Yes, we were in firm negotiations with those parties, and we would not disturb in any way their quoted delivery. So long as the negotiations were in progress should be added to that.

Mr. Hayes: I ask that there be marked for identification two separate letters because they are dated the same date, to wit, November 1, 1955.

The first of them is a two-page letter and the second is a four-page letter to which is attached a list of master changes which runs for four or five pages.

Could they be marked respectively as Defendants' Exhibits 162 and 163.

• • • • •

Q. Tell us first if you recognize those letters as the response to Mr. Smith's letter to which I have just directed your attention.

Mr. Sonnett: Which one? You want them both?

Mr. Hayes: Yes, they are both responses to the same letter.

I might mention for the record that Defendants' Exhibits 162 and 163 are in response to letters of October 19th and October 24th.

[Tr. 3310] The papers delivered to us by Boeing pursuant to the subpoena did not have any copy of the October 24th letter. The October 19th one is one that has already been marked as Defendants' Exhibit 161.

Mr. Sonnett: In the interest of completion of the record, Mr. Brownell, we have a copy which we obtained from Boeing of that October 24th letter.

Mr. Hayes: Do you?

Mr. Sonnett: Sure.

Mr. Hayes: We didn't get one.

Mr. Forrow: It was shown in the covering memorandum that we received.

Mr. Martin: It was shown to you—

Mr. Sonnett: So, I very gladly tender it to counsel.

Mr. Hayes: We did not have it. I am happy to have it.

So the record will be complete, may I ask that there be marked as Defendants' Exhibit 164 for

identification a copy of letter from Mr. Smith to Mr. Allen dated October 24, 1955.

[Tr. 3311] • • • The Special Master: Do you want the witness to examine it?

Mr. Hayes: Yes, please.

A. I read them.

Q. Taking together Defendants' Exhibits 162 and 163, Mr. Connelly, was Defendants' Exhibit 162 the first information that Boeing gave American as to the delivery schedule it had set up with Pan American?

A. I can't answer that question because I don't know.

Q. Looking at Defendants' Exhibit 163 on the second page the delivery schedule set forth there proposed to be for American is substantially better, is it not, than the delivery schedule that was proposed in the June 1955 letter to American, which is Defendants' Exhibit 97?

A. Is that the schedule where it is one per month starting in April?

Q. That is right.

A. For nine months?

Q. That is right.

[Tr. 3312] A. Yes, this would be an improvement over that.

Q. There was a difference also in that American was now talking about 20 airplanes instead of 15.

In Defendants' Exhibit 162, there is also a provision that if American accepts, Boeing's first plane of a certificated plane to an additional customer would be in April with the next in June.

Did that include all additional customers over and beyond Pan American and American?

A. These would be as best I can determine their next two possibilities for the incorporation of—or the introduction of a new customer.

The Special Master: Next to over and above what?

Mr. Hayes: Over and beyond the commitments that had been made to Pan American and American for deliveries prior to April 1959.

The Special Master: Not over and above United?

Mr. Hayes: United is not mentioned here. I am going to ask that question.

The Witness: Well, I can't remember exactly the date United made its decision to purchase DC-8s, but it was prior to the time we [Tr. 3313] entered into a letter contract with American Airlines. So it was known at that time that American Airlines—or that United Airlines was no longer in the picture so far as Boeing was concerned.

Q. Do you know whether or not the schedule contained on page 2 of Defendants' Exhibit 163 benefited American by awarding to American, so to speak, the delivery positions that had previously been held up to then for United?

A. I can't state precisely what it was, but I assume some of the airplanes were reallocated to American.

Q. Assuming that American accepted the proposal contained in the November 1, 1955 letters, Defendants' Exhibits 162 and 163, no other carrier could get a contract providing for delivery of a certificated plane prior to April 1959, even if it appeared and entered into a firm contract the following day, is that true?

A. Well, may I ask a question? Again we are talking about entering into a contract. Had they been in negotiations, serious negotiations prior to that time?

Q. Let us assume a carrier showed up on November 2nd—

A. And indicated his first interest?

Q. Indicated that he was prepared to buy X number [Tr. 3314] of airplanes and is prepared to sign a contract as soon as it could be drawn up.

A. That's about as definite as you could be, but there had been no prior indications.

Q. Let's assume that.

A. Assuming that, the answer to the question is no, he could not have obtained earlier positions.

Q. So that the negotiation is what is important—

A. Yes, sir.

Q. —rather than the date of the contract?

A. Yes, sir.

Q. I notice that in this third paragraph after the delivery schedule on page 2 of Defendants' Exhibit 163, Mr. Allen points out to Mr. Smith that under this revised schedule American would have ten rather than five airplanes by July 1959.

Do you see that, Mr. Connelly?

A. No, I am sorry, I don't.

Mr. Sonnett: Page 2. Mr. Hayes is talking about that paragraph (indicating).

The Witness: Yes.

Q. Had Boeing prior to the November 1st letter reviewed its proposed delivery schedules so that it could offer more planes to American by July 1959, than [Tr. 3315] Douglas was willing to offer?

A. I can't answer as to Douglas. I assume that this does represent an adjustment that was possible when United purchased Douglas airplanes.

Q. You will recall in a prior letter of Mr. Smith's he protested that he would have only five planes under the delivery schedule which was the same number that Douglas was proposing by the same date.

My question to you was, was this improvement in delivery positions dictated at least in part in order to get around Mr. Smith's concern that he would be getting Boeings' no sooner than he could get Douglas'?

A. No, sir, because I'm quite certain that when United bought the airplane, I questioned that Douglas was in a position to meet that delivery schedule.

Q. Do you know that?

A. No.

Q. This is speculation on your part?

A. Speculation.

Q. I direct your attention to the second paragraph—this is on Defendants' Exhibit 162, the shorter letter—after the delivery schedule on page 1 of that exhibit, the last part of that sentence after the semi-colon reading:

[Tr. 3316] "We do not reach a total rate of five airplanes per month until August 1959."

Is that a reference to Boeing's productive capacity?

A. Yes, that would refer to the production schedule.

Q. What was the rate of the production capacity prior to August 1959?

A. I can't recall what that was.

Q. Was it for any greater number of planes than would be sufficient to take care of Pan American and American, plus maybe one or two others beginning in April, 1959?

A. It was adequate to take care of that.

• • • • •

[Tr. 3317] The Special Master: Proceed.

By Mr. Hayes:

Q. Did I understand you to say in substance yesterday, Mr. Connelly, that Boeing never made arrangements with

any one airline whereby that airline could transfer its contractual rights to another airline, except in the case of affiliates?

A. Without the consent of the company.

Q. Pardon?

A. Without the consent of Boeing.

Q. Did Boeing ever agree that it would accept such a transfer?

A. Yes.

Q. That was your testimony?

A. Yes, we have agreed in certain instances. The case of Hughes Tool-TWA was one.

Q. That was not one other airline to another, was it?

A. No.

Q. I am talking about an agreement between Boeing and one airline, whereby as part of the agreement Boeing undertook, under certain conditions, whatever they might be, that the first airline could transfer its rights to the second airline.

[Tr. 3318] A. Mr. Hayes, I may have—maybe I am wrong in my recollection, but I think I also testified that we had permitted Pan American to transfer a certain number to certain foreign airlines—

Q. That is right.

A. (continuing)—in order to assure landing privileges.

Q. That is correct. You did testify to that. You also included affiliates.

A. Yes. And there are provisions—and this is a matter of record in the contracts themselves—where a transfer is made purely for financing purposes, and this is, you might say, approved in advance.

Q. There are no other exceptions you can think of?

A. I can think of none.

Q. At the time that Pan American entered into the contract for the 320 series, was there a side agreement by the terms of which, in substance, if Pan American should exercise an option to purchase additional 321s, which was the Pan American designation, it could notify Boeing to cancel out so far as it was concerned its contract for the 120s, and that Boeing, being paid, of course, would substitute in effect American for the delivery positions that were given up by Pan American?

[Tr. 3319] A. That is not the way I recall that arrangement to be—to have been.

Q. How do you recall it?

A. In consideration of the purchase of a number of 320 type airplanes, we agreed that Pan American could cancel out a number of their—not all, but a number of their 120 airplanes. And we agreed that they could sell a certain number of those airplanes to other airlines.

Q. To other airlines or just to American?

A. I can't recall it being specifically to American. It could have been.

Q. Let me show you a letter to Pan American Airways from Boeing, signed by J. B. Connelly, Director of Contract Administration—

A. I certainly should have read that one, shouldn't I?

Q. (continuing)—dated December 19, 1955. I might mention this letter is part of Defendants' Exhibits 79 and 81 which are the contracts with Pan American.

Will you review that and tell me whether or not in fact, Pan American did not enter into such an agreement in substance as I described it?

A. I have read it.

• • • • •

[Tr. 3320] * * * The Special Master: Do you recall this letter, having signed this letter?

The Witness: Oh, yes, there is no question [Tr. 3321] I signed this letter.

By Mr. Hayes:

Q. Having read that letter, Mr. Connelly, do you desire to change your testimony with respect to the matters you covered yesterday in this regard or again this afternoon?

A. No, sir.

Q. You do not?

A. No.

Q. You see no inconsistency between the letter of December 19, 1955, and your testimony?

Mr. Williams: I object to the question. He is arguing with the witness.

Mr. Hayes: No argument.

Mr. Williams: Do you want to add to anything you have testified to?

The Witness: No.

Mr. Hayes: I press my question.

By Mr. Hayes:

Q. You see no inconsistency between your prior testimony and what you on behalf of Boeing agreed to in the December 19, 1955 letter?

Mr. Williams: I object to the question.

The Special Master: Overruled.

[Tr. 3322] The Witness: Is it my turn?

Mr. Williams: Yes. Do you see any inconsistency with what you have testified to and the letter?

The Witness: Perhaps it could be construed as that.

This arrangement was an offer on our part in respect to a purchase of the 320 airplane, and the obvious desire of Pan American to eventually equip itself with 321s in place of 120s, if this was possible to do.

As to an inconsistency, this could be construed on four airplanes, but certainly not on six of the ten, where we did give them the permission to sell six to other airlines.

Are you referring specifically to the four to American Airlines?

By Mr. Hayes:

Q. I am referring to the whole letter, Mr. Connelly.

A. The whole letter?

Q. Yes.

A. Well, I think I have explained it as best I can, the arrangement, the purpose of it. I do not consider it inconsistent.

[Tr. 3323] I would like to say this: No company can operate rockbound tied, inflexible under conditions of that type. There are exceptions to every rule.

Q. Including the rule that Boeing is going to decide the order of deliveries to its customers?

A. Absolutely.

Q. Was American aware of the agreement made on December 19, 1955, between yourself and Pan American?

A. Yes, they had to be aware of it.

Q. Was any other airline advised of it?

A. Not to my knowledge.

Mr. Hayes: I ask that there be marked as Defendants' Exhibit 165 a memorandum, a copy, from Mr.

Allen to Mr. Smith, dated February 15, 1956, with copies to various people, including Mr. Connelly.

• • • • •

Q. Would you read it, please, Mr. Connelly, and indicate when you have done so?

A. I have read it.

Q. Do you recognize this as a copy of a letter from Mr. Allen to Mr. Smith?

[Tr. 3324] A. Yes.

• • • • •

Q. This letter was written roughly two weeks before the contract with American had been signed. It was signed on March 1, 1956.

The Special Master: TWA, you mean?

Mr. Hayes: With American.

A. That was the definitive contract.

Q. That's right, the definitive contract.

A. What was the date of the letter contract? I have forgotten that date.

Q. It was back in August of 1955. November—pardon me—November 1955.

A. November 1955?

Q. Yes. Pan Am was August.

A. American.

• • • • •

[Tr. 3325] • • • Q. The American letter agreement was November 1st?

A. November 1st.

Q. Yes. But the final agreement was not executed until March 1, 1956.

A. Yes, that is correct.

Q. First, do you know who put in these pencil notations or ink notations that are part of the schedule and wrote in "October" at the end? Do you recognize the handwriting, Mr. Connelly?

A. No, sir, I do not.

Q. In the first paragraph, the third sentence reads:

> "So far as I am aware, this delivery schedule is consistent with all understandings between us, either expressed or implied."

What were the implied understandings between American and Boeing?

A. I can recall none.

Q. If they existed, they may have been known to Mr. Allen, but they were not known to you; is that it?

A. If they existed, that is correct.

Q. Do you interpret Mr. Allen's letter as indicating that there may have been some implied understandings?

A. Well, as a layman's opinion, Mr. Allen was a [Tr. 3326] lawyer for a long time. Maybe this is a legal expression. I don't know, sir.

Mr. Hayes: I ask that there be marked as Defendants' Exhibit 166 a letter dated March 26, 1956, from Mr. Smith to Mr. Allen.

• • • • •

Mr. Hayes: I ask further that there be marked as Defendants' Exhibit 167 for identification copy of a letter from Mr. Allen to Mr. Smith, dated March 28, 1956.

• • • • •

By Mr. Hayes:

Q. Would you read them both, Mr. Connelly, and advise me when you have done so?

A. I have read them.

Q. You recognize them as letters that were exchanged between Mr. Smith and Mr. Allen?

A. Yes.

• • • • •

[Tr. 3327] • • • Q. Mr. Allen mentions in Defendants' Exhibit 167 that American was the principal beneficiary of the early delivery positions given up by Pan American. What were those delivery positions?

A. Well, this would have referred to those airplanes that became available by reason of a cutback in Pan American's order for the 120s from the original figure of 20 to 10. He referred here it was the principal beneficiary.

Q. Who were the other beneficiaries?

A. I have no knowledge.

Q. Both before and after Pan American entered into the amendment changing from 120s to 320s, there was no delivery position available to any other airline prior to April 1959, isn't that correct?

• • • • •

[Tr. 3328] • • • The Special Master: Do you want to rephrase the question, then, and make that clear?

Mr. Hayes: I will try.

By Mr. Hayes:

Q. At any time after June 1955, when Boeing made its [Tr. 3329] original written offers to both Pan American and American—

A. May I interrupt? You mean 1954 rather than 1955?

Q. I mean 1955. June 23rd to Pan American and June 24th to American and the same date to United.

A. All right.

Q. Those letters, I am referring to. After those dates and the responses by both Pan American and American indicating their good faith, negotiations looking toward a contract, were there any delivery positions available to any other airline, leaving United aside, prior to April 1959?

A. We had quotations out on other customers, yes.

Q. For deliveries prior to April 1959?

A. No, not prior to April.

Q. That is what my question was.

A. Well, the question is somewhat complex.

Q. Try it this way: Did Boeing—

A. I can answer this simply, if I may just—

Q. Sure, go ahead.

A. What improvements came about here, that is, American was the principal beneficiary of the early delivery positions given up by Pan American, would be those—that portion of the 10 airplanes that were after the committed priority airplanes, if we could refer to [Tr. 3330] them as such, available for transfer. I don't see how they could have been any others.

Q. Were any of those available prior to April 1959, to any airline?

A. They could have been.

Q. Were they made available by Boeing to any other airline prior to April?

A. Not after Pan American.

Q. Pardon?

A. Not after Pan American signed up, they were not, no.

Q. I will try this again. After June 24, 1955, when Boeing made its letter offer to Pan American, and June 24,

1955, when Boeing made its written offer to American, and after the two airlines, by engaging in negotiations, indicated their good faith to Boeing, did Boeing offer a delivery earlier than April 1959 to any other airline?

A. Only TWA.

Q. It did not offer them to TWA, did it?

A. Well, that's where their delivery schedule started.

Q. It started in April, but I said prior to April 1959.

[Tr. 3331] A. No, nothing prior to April.

Q. None prior to April 1959?

A. As best I can recall.

Q. Do you recall when American reduced its offer from 30 to 25 planes, Mr. Connelly?

A. I don't recall the date. I recall the circumstances.

Q. Can you tell us by year or by reference to some event that we can fix in time?

A. Well, the event was the availability of the Model 720 airplane, and I—

Q. That was roughly established as 1958.

A. All right, if that was 1958, that was the time. And they wanted to cancel those five out, which they always had a right to do in consideration of the fact they were buying 25 720s.

Q. Which five did they cancel, do you recall? Was it the last five?

A. The last five. I think their right of cancellation extended only to the last five.

Q. I honestly don't recall whether I asked this question before or not, Mr. Connelly, so pardon me.

A. Well, we will try it again.

Q. I just don't recall. At the time that Pan American [Tr. 3332] entered into the contract for the 120s, was there any understanding between it and Boeing that it would be

able to cancel out the 120 contract and switch to the 320 series when the intercontinental plane became available?

A. No.

Q. None?

A. None.

Q. Was there any understanding that if it did subsequently order the intercontinental plane, it would receive any preference such as it enjoyed in the contract for the 120s?

A. None to my knowledge.

[Tr. 3333] Q. So the preference given it in the contract for the 320s was separately negotiated at the time the contract was entered into?

A. That is correct.

* * * * *

Q. Production was accelerated, in fact, by Boeing, was it not, both of the 120s and the 320s?

A. Let's say we had good luck. By that, I mean that this was not an action in itself to accelerate. We were fortunate in being able to certificate the airplanes early enough and obtain manufacturing efficiency so that our schedules turned out better than we had originally estimated.

Q. With respect to the 320s between TWA and Pan American, the contract with Pan American contained a provision that Pan American was to receive at least five aircraft prior to the delivery of any such aircraft by Boeing to any other customer. You recall that, I [Tr. 3334] assume?

A. There was a preferential clause, yes.

Q. The actual deliveries, and as set forth in the statement attached to your prepared statement, show that Pan American received ten of the 320s before the first of the 320s was delivered to TWA or Tool Company.

How did that happen? The preference was for five.

A. Because of the capability we developed to manufacture and deliver the airplanes earlier.

I think you will find that TWAs were accelerated also.

Q. Yes, but not to the same degree. That is what I am trying to find out.

A. It could be.

Q. What is the reason why Pan American got the first ten out of a total order of 17?

A. Production reasons.

Q. Is that the only answer you can give?

A. That is the only answer I can give.

The Special Master: Didn't some foreign airline come in there?

The Witness: Well, we—this was a general thing. All schedules were—turned out to be [Tr. 3335] better than our contract schedules.

I was trying to answer Mr. Hayes' question why was it ten rather than five. We still met all of our contract obligations, and we were still able to deliver airplanes generally earlier to all our customers.

Q. You have no other explanation as to why—

A. Again I would point out when you are looking at a delivery schedule this is not a production schedule.

Q. What held up the planes that were destined for TWA?

A. I don't know. There could have been any number of reasons.

Q. Was it again air conditioning in the case of the 320s?

A. I can't answer what specifically the reasons might be.

Q. Was it the difference in configuration?

A. These things could have had a bearing on it, but in general most of those problems having been ironed out on

the 120, except for the differences in the airplane itself—I mean the larger airplane as compared to the smaller—the changes in themselves on the 320 should not have had as great an impact, unless by virtue of [Tr. 3336] the larger airplane it brought about some peculiar result that made the airplane unacceptable until certain fixes were put in.

Q. Is it not a fact that there was no foreign airline that received any delivery of a 320 before TWA received its first 320?

A. As I recall, TWA was the second airline to receive 320s.

Q. That is right.

A. Yes.

Q. So it had nothing to do with foreign airlines, as such, that TWA got the first ten?

A. Well, that is correct.

Q. I mean that Pan Am got the first ten.

A. The foreign airlines, as I mentioned yesterday, their detailed specifications came closer to our basic specification than did TWA.

Therefore, when we had certificated the basic airplane—well, not a basic, but the Pan American airplane, most of the systems were the same in the foreign airlines, and with the exception of BOAC where we had problems in getting not only FAA certification but the Air Registration Board certification in Great Britain, those airlines received deliveries earlier than con- [Tr. 3337] tracted for.

Q. Do you know what, if any—

The Special Master: Could I ask a question?

Mr. Hayes: Certainly.

The Special Master: If there was no foreign airline that came in between there, between the deliveries to Pan Am and the deliveries to TWA of this 320

series, what difference would it have made whether the Tool Company ordered 320s in October of 1955, say, or the spring of 1956, as far as delivery positions are concerned?

The Witness: Would you repeat that question, please?

(The question was read.)

The Witness: We held some positions in reserve, as I recall, for Northwest and for possibly TWA. There was more interest on the part of TWA in a larger airplane at least originally, than any other customer, American flag carrier might come into the picture.

In the case of BOAC, we couldn't deliver early because they had a different model. It was a 420 rather than a 320. It had a Rolls engine.

The Special Master: In that interim period, [Tr. 3338] then, do I understand your reply that some delivery positions were held for actual customers such as Northwest and BOAC and continued to be held by reason of continuation of negotiation?

The Witness: I mentioned American flag carriers, sir, not BOAC.

The Special Master: Anyone other than Northwest?

The Witness: TWA is a possibility, National, Eastern. That's a very good airplane for the San Juan trade. Therefore, we thought Eastern would have an interest in the airplane. But—

The Special Master: Does this line of questioning refresh your recollection at all as to the number of places that were held open in the order of delivery positions on the 320 series say, in October of 1955 or up to the spring of 1956?

The Witness: I cannot remember the number.

The Special Master: That is all I have.

By Mr. Hayes:

Q. The 320 you did not contract for, even offer in October of 1955, did you?

[Tr. 3339] A. No.

Q. That was in December of 1955?

A. Right.

Q. Your contract with Pan American I think you stated was negotiated very speedily?

A. Right.

Q. The date of the contract for the 320s was December 19, 1955.

If TWA had placed its order on December 20, 1955, would it have received any better delivery positions than it did?

A. If they had started negotiations earlier than Pan American or evidenced a keen interest to buy the airplane at that time. Largely this was business judgment on our part in retaining positions for TWA. By that time, we felt that Convair was committed to a medium range airplane, and at least we had a fighting chance for Douglas to eventually provide TWA with long range aircraft.

Q. I will try the question again, Mr. Connelly.

If on December 20, 1955, TWA without prior negotiation with Boeing showed up and said, "We want to enter into a contract for the 320 series," would they have received any better delivery positions than [Tr. 3340] they did receive?

A. No, because Pan American had started negotiations earlier.

Q. Again this comes back as it did on the 120s as to when you started negotiations?

A. Right.

The Special Master: I can't see that I must say on the state of the record as it is now it makes any difference as far as delivery positions are concerned as to whether Tool Company ordered before March 1956 or not.

Mr. Hayes: I don't either.

The Special Master: I would like to have any additional evidence on that we can get. The 320s I am talking about.

Mr. Hayes: Yes.

Q. I think you testified that until the—

The Witness: May I ask a question?

Do you mean by that you think we were so committed in one direction that it could not go the other direction, Mr. Brownell?

The Special Master: Who came in? I don't know of any other line. I am not discussing the policy as such but discussing the facts as nearly [Tr. 3341] as we can reconstruct them as to what happened there during this period. I don't know of any negotiations that you had with other airlines other than Pan American and American and TWA that changed the situation so far as early delivery dates are concerned between Christmas 1955 and March 1956.

The Witness: Of course American was not involved in the 320.

The Special Master: No, that is right. I wasn't sure so I put them in to make doubly sure.

The Witness: Yes.

Well, I can only say that I feel the picture could have been quite different had TWA stepped in first. That's just my own opinion.

The Special Master: But as long as they didn't, what difference does it make whether they did or not? That is what I am trying to get at.

They are claiming damages here as I understand it because of this delay in the placing of the order, confining us now to the 320s, but I can't see from what you told us or what we have gathered from other parts of the record that that made any difference so far as the allocation of [Tr. 3342] the early delivery dates are concerned.

Mr. Sonnett: Would you ask him, Mr. Brownell, whether any airline ever ordered aircraft without a preceding period of negotiation? Placing of orders—

The Special Master: I will make it broader than that. Did anything happen during this period by way of orders or negotiations, either one, which made a difference, as to whether TWA would get its early deliveries?

The Witness: I don't know how you answer that question.

Mr. Sonnett: I have some redirect which I think may be helpful. I will ask him now or later as you prefer.

The Special Master: That is up to Mr. Hayes.

Mr. Hayes: Go ahead. As long as the Master has brought this subject up, I'd just as soon have it down now.

Mr. Sonnett: Are you nearly finished?

Mr. Hayes: Almost.

Mr. Sonnett: Why don't you finish and I will go ahead and then I will do it all at once.

[Tr. 3343] The Special Master: All right, that will be more orderly I guess.

The Witness: Maybe one thing I haven't made clear is that these were all hypothetical questions obviously but if we had three airlines that came in immediately and every one of them had to be first and have some preference over the other, and we had to make the decision as to who would be first and what the respective delivery schedules would be, the original allocation, irrespective of what we may have quoted somebody, would have had to change, so that we could provide relative equality as best we could, within the limitations of our ability. First—we have to pick one to go ahead first obviously, and how rapidly can we introduce customers.

The Special Master: As a matter of theory or as a matter of policy I think you made quite clear.

The Witness: Have I made that clear?

The Special Master: My only question was what in fact happened.

The Witness: All right. That's the only point I have.

[Tr. 3344] By Mr. Hayes:

Q. I think you testified that you did not participate in any TWA negotiations until the last part of 1955?

A. To my knowledge and belief, that's correct, sir.

Q. There was a letter of intent signed in early January 1956.

With whom did you negotiate?

A. I negotiated with Mr. Rummel and Mr. West and I know conversations were had—you want the people directly—

Q. That is right.

A. Mr. West primarily.

Q. Is that the Mr. West who was attorney for TWA?

A. That's right.

And there were telephone discussions between Mr. West and Mr. Rummel. Mr. Wells who was with us had some telephone conversation with Mr. Rummel. And Mr. West, I believe, communicated from time to time with Mr. Raymond Cook.

Q. Was Mr. Hughes any part of the negotiations, do you know?

A. I cannot recall. Certainly not in person.

[Tr. 3345] Mr. Hayes: I have just a few exhibits I wanted to mark.

I ask that there be marked as Defendants' Exhibit 168, a memorandum from Mr. Beall to Messrs. Allen and others including Mr. Connelly dated September 23, 1955.

• • • • •

Q. Would you please read it and indicate when you have done so, Mr. Connelly?

A. I have read it.

Q. Do you recognize it as a memorandum, a copy of which you received, at or about the date it bears?

A. I don't recall the memorandum but I received it all right. There is no question about that.

• • • • •

[Tr. 3346] • • • Q. Was the recommendation contained in the last paragraph followed by Boeing?

A. This had primary reference, I believe, looking at the date, September 23rd, to the 120 series, because there is nothing in here that says anything—

Q. That is correct.

A. Down at the bottom there is a note that a Model 707 comparison sheet JT 3C-4 which was the smaller engine and

the JT 4A-3, the larger engine were sent to Mr. Hughes by special messenger.

[Tr. 3347] I only bring that up because it is the first indication that we were able to get some information on the —I would assume this to be the 707-120 Model, not the 320, had been forwarded.

I would have to say that we must have concluded at that time that our prospects of selling 120 airplanes to Mr.— or to the Hughes Tool Company were very nominal and that we should concentrate on Pan American and United.

Q. At any rate, no special effort was made to sell Mr. Hughes or TWA the 120 series at that time?

A. I can't remember whether we sent them a proposal or not, at the same time we sent out proposals to the others, but certainly we concentrated on those three customers.

Q. I ask you again, was any special effort made to sell the 120 series to either the Tool Company for TWA or to TWA directly at or about the time of this letter?

A. I'm quite certain, Mr. Hayes, we maintained contact.

[Tr. 3348] Q. What does that mean?

A. Well, I'm sure our engineers continued to call on the TWA engineers, keep them up to date.

Certainly, I don't believe negotiations were carried on nearly to the same degree as they were with the other three carriers but I wouldn't want to leave the impression that we just gone off and left a good prospective customer.

Q. You did not work on that prospective customer as hard as you worked on Pan American, American and United, is that correct?

A. Apparently we had been discouraged.

The Special Master: Discouraged by whom?

The Witness: By the lack of interest.

The Special Master: On the part of—

The Witness: Well, this refers to the discussions with Mr. Hughes. And it was Mr. Beall's conclusion that at the moment it didn't appear—I am reading my own words into this memorandum—that it appeared that there was not the degree of interest that warranted us concentrating on TWA to the same degree as the other three who were in active negotiations with us.

The Special Master: Did you have an [Tr. 3349] independent judgment on that at the time.

The Witness: No, sir, I was not in contact with TWA, as I say, until between Christmas and New Year's, 1955, and I think this was September.

Q. By the way, Mr. Connelly, who is Nat Paschall?

A. Nat Paschall is vice president and director of the Douglas Company.

Mr. Hayes: I ask to be marked as Defendants' Exhibit 169 for identification memorandum from Mr. Beall to Mr. Allen and others including Mr. Connelly, dated October 31, 1955.

• • • • •

Q. Would you please read it, Mr. Connelly, and indicate when you have done so?

A. Yes, sir. I have read it.

Q. Do you know whether this conversation was a call from Mr. Hughes to Mr. Beall or from Mr. Beall to Mr. Hughes?

A. I do not know.

Q. You received a copy of this in the regular course of business?

[Tr. 3350] A. Yes.

• • • • •

Q. Have you any way of knowing, Mr. Connelly, whether Mr. Beall told Mr. Hughes what Pan American's schedule was?

A. I have no way of knowing, but I'm quite certain he did not.

Q. I show you, Mr. Connelly, Defendants' Exhibit 102 for identification. I am terribly sorry for the reproduction. That was the best we were able to get, unfortunately.

The Special Master: This is not in evidence?

Mr. Hayes: No. This is one of those that was excluded, Mr. Brownell, because Mr. Connelly was not here.

Q. I might mention that my question to you with respect to this rather long memorandum is going to be limited to the first paragraph on page 1, and the first [Tr. 3351] paragraph on page 4.

A. The first on page 4?

Q. Yes. The first on page 1 and the first on page 4.

A. I have read those paragraphs.

Q. Will you explain what the meaning of that is? What I am trying to find out is whether or not Douglas was then offering a long-range configuration and that Boeing was not yet able to do so as of the date of that memorandum.

A. Yes, Douglas was offering the DC-8 with the JT-4 engine, a long-range airplane by comparison to the 707-120. We were in the process—we recognized that with the availability of the JT-4 engine this presented an opportunity to build a long-range high payload airplane with that engine. We were studying the adaptation of the engine to the existing 120 with wing tanks, et cetera, or a completely new airplane—not completely new, but a modification of the 120 airplane with a larger wing, greater fuel capability,

higher gross weight capability, to take full advantage of the engine.

• • • • •

[Tr. 3352] • • • Q. I show you, Mr. Connelly, Defendants' Exhibit 103 for identification, a memorandum from Mr. Beall to Mr. Wells with a copy to you and others dated December 23, 1955.

It is only the first page that refers to TWA and it sets forth the positions being held for TWA on both the 120 and the 320 series.

A. This answers a previous question in respect to—in which I stated that we had reserved some positions between the Pan American and foreign airlines for American flag carriers.

Q. The earliest is April, 1959, for TWA, is it not?

A. That's the 120.

Q. That's right.

A. The 320 it was November 1959.

Q. Was this memorandum, so far as you know, purely internal or was it supposed to indicate that these delivery positions had been offered to TWA, or don't you know?

[Tr. 3353] A. I don't know. I assume it is internal, although I do know a proposal was made or perhaps several in discussions between Mr. Allen and Mr. Hughes.

So it could have been passed on orally. I do not know.

Q. You mean at or about the time of the memorandum?

A. That is correct.

Q. The delivery positions set forth there for the 120 series are the same as those which appear in the first Toolco contract for eight planes which was entered into in March of 1956.

The delivery positions, however, for the 320 as set forth in Defendants' Exhibit 103 for identification are not nearly

as good as those which were provided for in the contract which was entered into in March 1959.

Who negotiated the improvement in delivery positions so far as the 320 series was concerned, if you know?

A. I do not know.

Q. Do you know whether TWA or Toolco was advised at any time between December 1955 and the time it entered into the contract for the 331s of the preference given by contract to TWA for the 320 series?

A. I don't know, but if so it would have been [Tr. 3354] communicated by Mr. Allen to Mr. Hughes directly.

Q. And you have no knowledge of it?

A. I have no knowledge of it.

• • • • •

Q. I show you, Mr. Connelly, copy of Defendants' Exhibit 105, a memorandum from Mr. Wells to Mr. Beall with copies to various Boeing officials including yourself dated July 24, 1956. This exhibit has been marked in evidence down to the end of the first full paragraph on the second page.

Would you please read it and then indicate when you have done so?

A. Down to the middle of page—

Q. I want you to read the whole thing. I say it has already been admitted in evidence down to the end of the first full paragraph of page 2.

A. I have read it.

Q. Do you recall receiving this memorandum at or about the date it is dated?

A. I don't recall it, but undoubtedly I did.

[Tr. 3355] • • • Q. Mr. Connelly, in your prepared statement, on page 6 of it, the fourth paragraph, you state that the earliest delivery positions Pan American could

have obtained from Boeing for six 707-331s, if they had been ordered in July 1959 were one in February 1961, two in March 1961, two in April 1961, and one in May 1961.

Do you see the portion to which I refer?

A. Yes, sir.

Q. In connection with making that statement, did you have the records of Boeing checked in any way?

A. Yes.

Q. Do the records show what you set forth in your statement?

A. Those were the earliest positions we could have quoted on the basis of our schedules at that time.

Q. I asked you if the records showed what you have set forth in this statement.

A. Yes, I would say the records did.

[Tr. 3356] Q. What records are you referring to?

A. Well, in particular I recall that when this question was asked—of course, as you know, this involved the sale of six airplanes by Hughes Tool Company to Pan American. And at the time that transaction was under way we were requested by TWA to quote the earliest position we could quote on the 331s as substitute aircraft and we submitted a proposal.

By the record, I mean that proposal.

Q. Did Pan American at or about that time ask Boeing for delivery dates either in June or July of 1959?

A. I have no recollection of any request for a proposal at that time.

Q. Do you know if Pan American sought delivery positions from Douglas in June or July of 1959?

A. No, I do not.

Q. Are you sure these were the only delivery positions that were offered to TWA in July of 1959?

A. I don't know if they were, but they were the earliest positions available at the time this request was made.

Q. I show you Defendants' Exhibit 114 in evidence, a letter dated July 24, 1959, to Mr. Rummel through Mr. Zak from Boeing Airplane, originally signed by Mr. [Tr. 3357] Spalding, described as manager of contract administration.

I ask if that proposal does not provide for delivery positions two months earlier than those set forth in your statement.

A. I'd have to relate this in time to when we quoted the prior schedule.

Q. What prior schedule?

A. We gave TWA a proposal for one in February 1961, two in March 1961, two in April 1961 and one in May 1961.

Q. What makes you think that was prior?

A. I don't know, but I'd like to see if we made a proposal.

Q. That's what I asked you, if you made more than one proposal in that month.

A. Well, I can't answer that. We make proposals to TWA all the time.

Q. I will show you a later proposal to TWA which is attached to the prepared testimony of Mr. Rummel in this action to Mr. Rummel through Mr. Zak from the same gentleman, Mr. Spalding, dated July 27, 1959, and that is the one whose dates are set forth in your statement.

[Tr. 3358] Why did you use the later one rather than the earlier one?

A. I have no idea why we did.

Q. Did you prepare this part of your statement or did you not?

A. I asked our contracts people to give me the earliest date as represented by the proposals that we were sending out at that time.

Q. The earliest?

A. The earliest delivery positions at the time we received the request from TWA.

Q. Do you think it is a slip then of your Contract Department?

A. It could be.

Q. At any rate, there is no doubt in your mind that you did offer earlier positions two months earlier three days earlier?

A. Apparently we did.

Q. In the light of that, do you want to correct the statement in Paragraph 4 of your prepared statement, Mr. Connelly, to reflect dates two months earlier?

A. On the face of this, I believe a correction is in order.

Q. At the time of this transfer of six planes—

[Tr. 3359] • • • Q. At the time of the proposal for Hughes Tool Company to assign to Pan American the rights to obtain six of the 331s, Boeing gave the consent, did it not, to that transfer?

A. Yes, sir.

Mr. Hayes: I ask that there be marked as Defendants' Exhibit 170 telegram to Hughes Tool Company to C. H. Price dated July 21, 1959, from Boeing Aircraft Company, T. L. Spalding, Manager, Contract Administration.

• • • • •

Q. I show you a copy of a telegram and ask you if you can identify it as the consent given by the Boeing Company to the transfer from Hughes Tool Company to Pan American of the right to acquire six 331s.

A. Yes.

• • • • •

[Tr. 3360] • • • Mr. Hayes: No further questions.

The Special Master: Did you have any knowledge at the time of this consent being given?

The Witness: Yes, we did. You mean the discussions between Pan American and Hughes Tool Company? We were informed.

The Special Master: Did you participate in the discussions leading up to the giving of this consent?

The Witness: No, only to the extent of consenting to it, recognizing the problems and—well, I guess asking for certain conditions to be included in respect to the payment for the airplanes.

The Special Master: What were the problems to which you are referring?

The Witness: Well, we were given to understand it was a matter of finance, ability to pay for the airplanes. That was our understanding.

The Special Master: That Hughes Tool [Tr. 3360A] Company would not have been able to pay for them so that you were not really giving up anything?

The Witness: That they were unable to finance the acquisition for themselves.

That was our understanding of the problem.

• • • • •

[Tr. 3361] • • • By Mr. Sonnett:

Q. Mr. Connelly, I show you Defendants' Exhibit 114 which you saw briefly before the recess, being a copy of a letter dated July 24, 1959, from Boeing, signed by Spalding to Rummel through Edwin Zak on the subject of proposal for the sale of six increased gross weight Model 707-331 aircraft to Hughes Tool Company, bearing a date stamp.

Will you just look at that for a minute? May I advise you—and I think the Special Master will judiciously notice—that that was a Friday, that is to say, the date of the letter?

Would you just read into the record the time and date on which that document was received, according to the stamp at TWA?

A. 4:00 o'clock on July 28th.

Q. I show you now a document which I ask the reporter to mark Plaintiff's Exhibit 24 for identification and ask you whether you recognize that as a letter from the same Mr. Spalding of Boeing, dated July 27, 1959, to Mr. Rummel, on the same subject as the preceding exhibit?

A. Yes.

• • • • •

[Tr. 3362] • • • Mr. Hayes: As I understand, you have already admitted in evidence—maybe I am wrong—Mr. Rummel's statement, including Annex E, or am I wrong?

Mr. Sonnett: You are correct, and the reason for offering Plaintiff's Exhibit 24 is that this is the original showing receipt stamps which are legible, and the receipt stamps are highly material to the line of questioning you engaged in just before you finished.

The Special Master: We will receive this.

[Tr. 3363] * * * By Mr. Sonnett:

Q. Looking at Plaintiff's Exhibit 24 in evidence, will you read the time of receipt as appearing from the stamp on that document and the date of the receipt into the record?

A. There are two stamps on it.

Q. Read them both.

A. One says "Engineering, BAC," I assume that would be Mr. Zak, was received on July 27th, at, I guess that's 4:15, or is it—3:45—excuse me.

Then the second stamp is "Received TWA July 28th, at 4:00 p.m."

Q. Referring to the exhibit before you, is it the fact, Mr. Connelly, that the proposed delivery schedule referred to in that exhibit is the delivery schedule referred to in Paragraph 4 of your sworn statement, which is Plaintiff's Exhibit 3?

A. This is Annex E—

Q. No. Is the schedule in the document which is also marked Annex E and also marked Plaintiff's Exhibit 24, the same schedule as the schedule appearing in Paragraph 4 of your sworn statement?

[Tr. 3364] A. Yes.

Q. Will you read the first sentence of the document before you, which is the letter dated July 27th?

* * * * *

A. "We wish to amend and supplement letter proposal 6-1100-2-591 to reflect delivery schedules of the six Boeing Model 707-331 aircraft."

Mr. Sonnett: I ask the Special Master to note both documents were received at TWA-New York at the exact same time.

Mr. Hayes: I am not going to argue that [Tr. 3365] point.

Mr. Sonnett: Then you should not have wasted time on what you did in examination about it.

Mr. Hayes: I will refrain even from comment.

Mr. Sonnett: Good.

The Witness: Mr. Special Master, may I make a statement, please?

The Special Master: Yes, we held you back from making a statement.

The Witness: I just wanted to correct one thing, Mr. Hayes.

I said I thought I ought to amend my letter. In view of this letter, I honestly feel that either an error was made between the date of this first one and the second one, or—more unlikely, we sold some airplanes in the interim.

By Mr. Sonnett:

Q. In any event, you do not now feel that Paragraph 4 of your statement requires any correction, in light of those documents, do you?

A. No. I failed to read in the first paragraph this amendatory provision.

Q. Referring, Mr. Connelly, to your testimony [Tr. 3366] generally regarding the contract with Pan American for 320s, which was signed December 19, 1955, do you recall generally your testimony to the effect that the negotiation period preceding the actual signing of that contract in formal negotiation for the contract was relatively short, I think you said something like several weeks?

A. That's correct.

Q. If TWA or Hughes Tool Company had commenced negotiations for 320s with Boeing during that same two-week period preceding December 19, 1955, would TWA

have received substantially equal treatment with Pan American regarding deliveries of 320 aircraft?

* * * * *

A. I believe they would have.

Q. Referring, Mr. Connelly, to your statement which is TWA Exhibit 3, page 2, Paragraph 1, and specifically Paragraph 1(a), will you read that paragraph to yourself, and then I will ask you, having read it, whether that correctly sets forth the policy of Boeing at the time, as you knew it then and now know it, and in your opinion would the re-
[Tr. 3367] sults stated in Paragraph 1(a) have occurred?

* * * * *

A. My answer is yes, I believe that would have been the case, subject to these other conditions, and that has to do with all of the qualifications that are included here.

Q. Just to place the dates in your mind, do you recall being examined concerning Defendants' Exhibit 96 and Exhibit 97, being letters respectively to Pan American and to American, and also being examined with respect to Defendants' Exhibit 98, being a letter to United, copies of which I place in front of you, and ask you merely whether you recall your testimony in general concerning those documents?

A. Generally, I believe I do.

Q. No such letter was sent to Mr. Howard Hughes or the Hughes Tool Company or TWA, was it?

A. Not to my knowledge.

Q. Do you why not?

A. As I stated before, there was—appeared to be a
[Tr. 3368] lack of any positive interest in this particular airplane.

Q. Was that the conclusion which Boeing had at that time on this subject matter?

A. Yes.

Q. What were the reasons that led Boeing to the conclusion at that time which conclusion you have just stated?

A. Well, as I previously said, there was no positive interest on the part of Hughes Tool to enter into negotiations to purchase this aircraft, unless they do be assured a large quantity of the very first airplanes to be delivered.

Q. You have previously referred to reports received by you from others in Boeing to the effect that Mr. Hughes was demanding either or perhaps at different times either the first 50 or the first 40 or the first 33 of the Boeing 707 aircraft. Do you recall your references to that subject previously?

A. Yes, this was hearsay.

Q. Will you tell us, as fully as you can, the period of time involved and who said what to you in that connection?

• • • • •

[Tr. 3369] • • • A. Well, the time involved was prior to the time we sent out these proposals which were the first firm offerings that I recollect we made. And I would say that the information reported to me in the main came from Mr. Beall.

It is possible that either Mr. Allen or Mr. Wells may have had some comments to make. But I think in the main I recall Wellwood Beall as being the one who had the greater number of contacts with Mr. Hughes.

• • • • •

[Tr. 3370] • • • Q. Do you recall, Mr. Connelly, what response was made by Boeing or any of its representatives to Mr. Howard Hughes when such proposals were advanced by Mr. Hughes to Boeing?

The Special Master: I think that is beyond the pale.

Q. I show you Defendants' Exhibit 168 and I show you Defendants' Exhibit 169, both in evidence, being memoranda of telephone conversations between Mr. Beall and Mr. Howard Hughes on September 23, 1955, and October 31, 1955, and ask you, Mr. Connelly, do you know whether or not there exists in Boeing or any other place, for that matter, any similar memoranda of other conversations with Mr. Hughes on this subject?

[Tr. 3371] A. If so, I have no knowledge of it.

Q. I refer you, Mr. Connelly, to Defendants' Exhibit 168, page 2, paragraph marked 4, which reads entirely as follows:

> "Upon query Hughes stated that he absolutely had no deal outstanding with Convair because of Air Force pressure on Convair to do more and better on certain Air Force projects of Convair. He said that he had worked secretly for six months with Convair on the deal for 30 jet transports, the first of which is to be delivered in October 1958. He stated that the detailed specifications had been completely negotiated, a formal contract been agreed upon by both parties and the financial arrangements made when the 'rug was jerked out from under the project!'"

I ask you whether prior to your receipt of a copy of this memorandum of September 23, 1955, you had information concerning Mr. Hughes or the Hughes Tool Company's negotiations with Convair on that subject.

A. I believe I previously testified to the effect that we knew that they had technical people in San Diego in dis-

cussions with Convair. We had every reason to believe that there were negotiations between Mr. Hughes and Convair.

Q. Referring to Defendants' Exhibit 169, the memoran- [Tr. 3372] dum of October 31, 1955, concerning a telephone conversation with Mr. Hughes, and in particular to Paragraph 4, reading as follows:

> "I asked him if he wanted a delivery quotation, but he said he would wait until after our American deal was settled one way or the other. If American does not buy from us, he might be tempted to talk to Trippe in matching delivery schedules."

You received a copy of that memorandum at or about the date it bears, October 31, 1955; is that correct?

A. Yes.

Q. Do you recall how long after that date you had any indication from Mr. Hughes, directly or indirectly, to the effect that he or the Hughes Tool Company or TWA were interested in proceeding with some exploration of a possibility of acquiring 707s?

A. I personally didn't have any knowledge until I was assigned to the negotiations, which was between Christmas and New Year's 1955.

Q. I show you Defendants' Exhibit 103 in evidence, which is a memorandum dated December 23, 1955, on the subject of Model 707 delivery schedules, signed by R. L. Bell, and invite your attention to the first sentence which reads as follows:

> [Tr. 3373] "In accordance with TWA's request, we are holding firm for TWA the following Model 707 delivery positions."

Do you know who made that request on behalf of TWA or the request at least referred to in that memorandum?

A. I don't know who made the request, but I can only assume, inasmuch as all the discussions were personally conducted by telephone at that time between Mr. Allen and Mr. Hughes, it was requested by Mr. Hughes, but I don't know.

Mr. Hayes: I move to strike the assumption, Mr. Brownell.

The Special Master: We will leave it in and give it such weight as it deserves.

By Mr. Sonnett:

Q. Referring further to Defendants' Exhibit 103, indicating that Boeing was holding firm for TWA the following Model 707 delivery positions, it appears, does it not, that the delivery positions referred to relate both to the 120 and to the 320 series of aircraft?

A. They are segregated into two groups, one for the 120 and one for the 320.

[Tr. 3374] Q. So far as you know, did Mr. Hughes or anyone else acting on behalf of the Hughes Tool Company or purporting to act on behalf of TWA, request Boeing at any time prior to the approximate date of this memorandum, December 23, 1955, to hold firm any delivery positions for either 120 or 320 aircraft?

A. Prior to the date of this memorandum?

Q. Correct.

A. I would assume that certainly a request was made, again I would have to say probably Mr. Hughes to Mr. Allen to hold these positions on the 120 aircraft, and preceding that I would assume that Mr. Allen had said we had these available for him.

But on the 320, I can't answer the question, because I don't know.

Q. Following the date of this memorandum, December 23, 1955, there were, in fact, negotiations, serious and in earnest negotiations in which you participated with TWA representatives, were there not?

The Witness: What was the last part of that question?

(The question was read.)

A. After this date?

Q. Yes.

[Tr. 3375] A. Yes, between Christmas and New Years, 1955.

Q. So that within a matter of a few days after the date of this memorandum, to wit, within a few days after you held firm for TWA the delivery positions reflected in this document, serious negotiations were conducted and when were they concluded in any respect?

A. Well, we concluded the negotiations between the 29th and the 31st of December. I can't recall when the agreement was signed, but that to us was of no importance when we were in serious negotiation on those airplanes.

Q. Is it a fair statement, Mr. Connelly, that within ten days to two weeks after Boeing held firm for TWA certain delivery positions, not only had a negotiation been conducted but you had reached substantial agreement on a contract, although the formal contract was not yet signed?

Mr. Hayes: Could I have that question back?

The Special Master: 320s?

Mr. Sonnett: 120s.

The Special Master: Will you read the question back?

(The question was read.)

[Tr. 3376] A. The formal letter contract?

Q. Yes.

A. That is correct.

Q. Referring, Mr. Connelly, generally, to your earlier testimony, concerning the problems which arose in respect of a variation in configuration of aircraft, do you have that testimony generally in mind? You can put that document away.

A. I would like to make one comment if I may.

Q. Go right ahead.

The Witness: On this schedule for 320 airplanes, Mr. Brownell, you asked a question previously as to what did we do if anything with positions in between those that were first quoted to Pan American on the 320 and what happened as far as the foreign customers were concerned. And I believe I'm correct in saying I testified that we had reserved positions for American flag carriers.

I just want to point out that this bears this out. This is not all our positions by any means and probably we were holding positions for Northwest and Eastern, National, other airlines. I just wanted to get that in because I didn't have [Tr. 3377] anything else to demonstrate it.

Mr. Hayes: What is the number of that exhibit, please?

Mr. Sonnett: 103.

Q. Let me ask you do you have in mind, at ten minutes to six on this long day and I will try to finish this very quickly, generally your prior testimony on the subject of problems that arose in respect of variations in configuration of aircraft and the need for Boeing to have control of its production program.

Do you have that generally in mind?

A. I believe so.

Q. Would you briefly summarize for us how a standard specification or configuration is arrived at in the airplane manufacturing industry?

A. Well, I can only speak for Boeing, but in our case, of course, our designers have their ideas as to what the configuration of the airplane should be, what the equipment should be for incorporation in that particular model aircraft.

We are also very interested in all the inputs we can get from the operating airlines as to what their ideas are.

Eventually, of course, we must make the de- [Tr. 3378] cision as to what that airplane should be. It is impossible to incorporate all the airline desires. We do our best to try to come up with what we believe will most satisfactorily fulfill the requirements of the airline.

And we fix upon that at some time as our basic specification.

I will have to admit we have never built a basic specification airplane, but at least we must have a base line to start from.

Q. Is it a fair statement then that the so-called standard 707 specification that Boeing is proposing in the summer of 1955 reflected not only Boeing's thinking but that of those of its prospective customers who saw fit to participate in discussions on the subject?

A. I believe the answer to that is yes.

Q. Had TWA participated in such discussions under Boeing's practice would their proposal have been considered just like those of Pan American or American or anybody else?

A. I don't like to say had they. I think they did contribute to some degree. Our engineering people were working with the TWA engineers and I'm certain that we had some inputs from TWA.

[Tr. 3379] As to participation, I cannot recall that TWA participated to the same degree as some of the other carriers, namely Pan American and American Airlines, and United Airlines.

Q. Then would it be a fair statement that because of what you have just mentioned, the specification reflected more of the input of other airlines than it did of TWA's input?

A. I don't think one can say yes or no to that for the simple reason that it is quite possible that TWA could have brought up some items which in the overall picture were just as significant as those who participated for a longer period of time.

Q. Let me put it another way. Boeing, I take it, was in fact interested in the input of all knowledgeable airlines with respect to this question?

A. Right.

Q. To the extent that TWA participated, its views were and would have been considered just as carefully and objectively as the views of Pan American or American or United or anybody else—

A. Yes.

Q. —is that a fair statement?

A. Yes.

[Tr. 3380] Q. You made some reference in your prior testimony to some problems relating to air conditioning. Will you summarize for us what the problem was, what developed?

A. Yes. Air conditioning was one of the items that was the subject of many discussions with all the airlines. There were many proponents of what is known as the air cycle system. And some of the airlines preferred a freon system. Need I describe what these two systems are?

Q. No. Just indicate that they are different kinds of systems.

A. We felt that the air cycle system in view of the timing of the program and the more proven reliability up to that period, the stage of development at that time, offered the better solution, and this was concurred in by the majority of the airlines.

American Airlines strongly favored a freon system.

And it was agreed that we would enter into a change with American Airlines to put a freon system in. The selection of that system we had a strong voice in. The final decision has to be ours as to what equipment goes in the airplane.

[Tr. 3381] At that time, the Air Research Company had a unit which as I understand had been developed not specifically for an airplane as large as the 120 but which had had considerable service experience and had proven to be reasonably reliable and they were further developing the item. And it was finally agreed that we would put that system in the American airplane.

TWA also preferred a freon system. They were working at that time with Convair and United Aircraft, the Hamilton Standard Division of United Aircraft, for a freon system for the 880. Naturally they would like to have that unit installed in the 707 for purposes of standardization, so they would only have one type of equipment to contend with.

We agreed in light of the estimates that were given to us by the Hamilton Standard people and the strong desire of TWA to go forward with that system for TWA.

Later in the program it became very clear that the possibility of Hamilton Standard meeting their delivery dates with a satisfactory item was exceedingly questionable, and TWA, being concerned about the effect it would have on

the delivery of their airplanes, agreed to change to the same basic Air Research freon system [Tr. 3382] that American had. So that we finally ended up with the Air Research program in both planes.

Q. May I show you these three documents, and ask you whether you can identify them, and if so, we will then have them marked and offer them?

A. You will understand I am not a technical man. I am giving you my understanding of the situation.

* * * * *

The Witness: This was a change order that was negotiated in respect to the change from the Hamilton Standard to the—no, I'm sorry. This is a master change which provides for the Hamilton Standard system in lieu of Air Research in accordance with TWA's request.

Q. There is a second one.

A. These are both the same.

Q. They are both the same changes but on different aircraft, I think you will find.

A. Oh, yes, one is for the 707-131 and the other one is for the 707-331.

* * * * *

[Tr. 3384] Mr. Hayes: May we have the numbers of this?

Mr. Sonnett: It is Plaintiff's Exhibit 25.

Q. Referring to the change proposals which are part of this exhibit, I note that each of the change proposals states, does it not, "effect on delivery schedule none," is that correct?

A. I read it on the top sheet here, no effect on delivery. Not in the change order itself. It is there.

Q. It does appear from this exhibit, does it not, that the change order on Hamilton Standard turbo compressors about which you have testified was made subsequent to the initial execution of the initial contracts relating to the aircraft in question, these being dated December 1956?

A. Yes, sir.

Q. Do I understand correctly, Mr. Connelly, that at some time after December 28, 1956, there was a further change made in this regard and TWA went back to the initial type of air conditioning?

A. To the initial type?

Q. Yes.

[Tr. 3385] A. I ask you that because I can't remember whether they had the American freon system, the Air Research unit or the air cycle system to begin with but whatever it was—

Q. Whatever it was they went back to the initial system, is that correct?

A. No, they went back to—they changed to the Air Research freon system. I can't remember whether they started with that system or with the air cycle system.

Q. They wound up with the same system that for example was in American's planes?

A. That's correct.

Q. I believe you testified and just so that we are clear about it in the record, did the change on the air conditioning systems result in any delay of delivery scheduled by the contracts for any of the TWA aircraft?

A. I don't believe so.

Q. With respect to this—

Mr. Hayes: Could I have that question and answer back?

(The question was read.)

Mr. Hayes: You are referring to the changes set forth in TWA Exhibit 25?

Mr. Sonnett: That's correct.

[Tr. 3386] The Special Master: And the later one?

Mr. Sonnett: They are both the same date. And the later one, that's correct.

The Witness: When I say I don't believe so, I am referring to contract schedule.

Q. Referring to your statement, Mr. Connelly, which is Plaintiff's Exhibit TWA 3, page 4, paragraph (f), about which you were examined earlier, would you just glance at that please?

A. Yes, sir.

Q. Let me ask you, did anybody purporting to act on behalf of TWA indicate to you that any non-essential configuration change was more important to the Hughes Tool Company or to TWA than early delivery positions?

A. My own opinion would be that they would have held early delivery to be more important.

Mr. Hayes: I move to strike the answer as not responsive. The question was did anybody indicate to him and we get an opinion.

The Special Master: I guess you better rephrase it.

Mr. Sonnett: Would you read the question?

The Special Master: I think the objection is well taken.

[Tr. 3387] Mr. Sonnett: I think the question called for a factual answer.

Q. That is to say, have you any recollection any TWA alleged representative ever indicated to you that any non-

essential configuration change was more important than early delivery positions?

A. I can't recall that point ever coming up.

Q. Do you recall any configuration change proposed by the Hughes Tool Company or its representative, whether or not on behalf of TWA which, in fact, affected early delivery positions to TWA or to the Hughes Tool Company?

A. You mean as to actual deliveries?

Q. Yes.

Mr. Sonnett: Read the question.

A. Again I ask you, you mean actual delivery?

Q. I will ask it in two parts. Maybe it is my use of the word early delivery positions that is throwing you.

Let me be specific first.

Did the air conditioning change about which you have testified or changes affect any of the early delivery positions of TWA, scheduled delivery positions?

A. The contract scheduled delivery?

[Tr. 3388] Q. Right.

A. No, by virtue of the change they made back to the other system.

Q. Did any of those changes, the air conditioning changes affect actual deliveries of any aircraft to Hughes Tool Company by Boeing?

A. I believe they did to some degree on the 120 series.

In other words, we met contract and possibly we—and we bettered contract deliveries. I remember there were a good number of the airplanes on the field, and we had to concentrate a good deal of efforts on those airplanes.

Q. Do you recall how many airplanes were involved in that problem?

A. No, sir, I do not.

Q. Do you recall how much loss in terms of accelerated delivery was occasioned thereby?

A. No, I do not.

Q. Would it have been as best you recall longer than two, three, four weeks?

A. I can't answer the question.

Q. You have throughout your cross examination, Mr. Connelly, been asked a whole series of questions [Tr. 3389] about placing orders. Will you state whether in any case any airline ever placed orders for aircraft without a period of negotiation as you characterize them good faith, sincere negotiation having preceded at least the first order for any such aircraft?

A. I cannot recall any.

Mr. Sonnett: I have nothing further now.

• • • • •

By Mr. Hayes:

Q. You may recall you mentioned on redirect, Mr. Connelly, that at the time offers were made by Boeing to Pan American, American and United, no offer was made to Hughes Tool Company, and you gave as your reasons, if I recall your testimony, Mr. Connelly, that there was no interest on the Hughes Tool Company part and no particular interest on Boeing's part as to Hughes Tool Company or TWA because they wanted a large quantity of planes initially.

Do you recall that testimony of yours?

A. I think I said to the best of my knowledge and belief as far as any offers might have been made.

[Tr. 3390] Q. Do you know what the opinions of other officials in Boeing were as to why no offer was made to Hughes Tool Company or to TWA?

A. I'd have to say that it was made abundantly clear that most of our people were convinced that there was no positive interest on the part of the Hughes Tool Company in moving forward prior to such time as they did in negotiating or acquiring 707-120 airplanes.

Q. Was that only because they wanted to have a large number of planes?

A. That was one of the conditions that was reported to me.

Q. Was it that the Boeing people all knew that at that very time TWA and Toolco were actively negotiating with Convair? Was that a contributing factor toward the decision not to send an offer to TWA?

A. Only in that it lent support to the fact that there probably was no positive interest on the part of Hughes Tool Company in 707s.

Q. Do you mean by that answer that the fact that they were negotiating with Convair as you knew persuaded Boeing that TWA and the Tool Company were not interested in buying the Boeings at that time?

[Tr. 3391] A. We—yes, we felt that they were more interested in going forward with Convair than they were with Boeing.

Q. You mentioned that when it came to the international, the negotiation was a very short negotiation and I think on redirect you said several weeks.

How long had the negotiation of the detailed specifications taken on the international plane?

A. I would just guess four, five weeks.

Q. How long had Pan American been working with Boeing with respect to the international plane?

A. From the very inception.

Q. The beginning?

A. Yes.

Q. Had there been exchanges of information and views and opinions from the beginning between Pan American and Boeing with respect to the International plane?

A. They were strongly urging us to go forward with such an airplane because it better met their requirements.

Q. You were not resisting the urging?

A. No, because as time went on we saw it was necessary to have such an airplane.

[Tr. 3392] Q. When you came to the mere writing of the specification a lot of work had already been done between Pan American and yourself, had it not?

A. I wouldn't say a lot of it, but considerable had been done, yes.

Q. That went back long before a few weeks prior to December, 1955, did it not?

A. Well, as I mentioned, in the order of five or six weeks.

Q. I thought you said that they were interested in the international planes from the very beginning.

A. From the very beginning of the inception of that airplane as far as we were concerned in our own planning.

Q. How long before that had Pan American been doing any work with Boeing with respect to an international plane?

A. From the very first time a JT-4 engine appeared it would be available.

Q. That was considerably before December of 1955, was it not?

A. Well, the problem involved more than the availability of the engine in a physical sense. It was whether or not the government would permit the engine to be used in a commercial airplane.

[Tr. 3393] Q. The expectation that it would be permitted to be used went back at least to the summer of 1955, did it not?

A. I can't be certain as to the timing, Mr. Hayes.

Q. But it was months before December 1955 when it was expected that the JT-4 engine would be made available, was it not?

A. As a matter of fact, it was considerably after we had embarked on the program, both we and Douglas that the engine was cleared.

Q. I did not ask you when it was cleared. That it was expected that it would be cleared, Mr. Connelly.

A. As I recollect, it was a few months but I wouldn't go beyond—

Q. It was a matter of a few months at least, wasn't it?

A. A few months when?

Q. Before December 1955.

A. Before December 1955?

Q. Yes.

A. Yes.

Q. With respect to these two delivery position letters, do you have those before you?

Mr. Hayes: Will somebody put them in [Tr. 3394] front of Mr. Connelly.

The one dated July 27th is Annex E and it is also TWA Exhibit 24, I believe. Am I right on that?

Mr. Sonnett: Yes.

Mr. Hayes: The one dated July 24th is Defendants' Exhibit 114.

Q. Do you have them before you, Mr. Connelly?

A. Yes.

Q. You gave as a conclusion of your testimony in this regard—by the way, you reviewed your testimony in this regard with Mr. Sonnett, during our recess, did you not, with respect to these documents?

A. Yes, I did, on these two documents.

Q. Yes.

A. That is correct.

Q. You gave us your conclusion at the end of your testimony as I remember it that you honestly feel that either an error was made or that Boeing had sold the airplanes to some other customer which you thought was the more likely explanation?

A. More unlikely.

Q. I misunderstood you then.

A. More unlikely.

[Tr. 3395] Q. What error was made by whom? Have you any knowledge on the subject to begin with or are you speculating now?

A. I'm not speculating because these things don't happen this way unless either one of those events have happened. An error was made in the schedule review or as I say more unlikely maybe we did sell some airplanes. I can't remember.

Q. You have no recollection on the facts of the situation?

A. No, sir.

I have to say that any time we supplement, amend and supplement, there is a reason for it.

Q. I don't doubt that. I am not questioning that.

A. I know you are not.

Q. The fact of the matter is that both these letters were sent, were they not?

A. Yes, that's very apparent.

Q. They would just as well have been sent to Pan American if Pan American had requested the information?

A. That is correct.

Q. If the July 24th letter had gone to Pan American and been accepted by Pan American, you would have felt bound, would you not?

[Tr. 3396] A. We would have been in a bad way.

Q. You would have been bound by it as a contract, would you not?

A. Or the same with TWA, that is correct.

Q. That is right, either one?

A. That's right.

Q. So that in fact Boeing did make an offer of two months earlier delivery positions than those which appear in TWA Exhibit 24?

Mr. Sonnett: I always thought as a matter of law which we seem to be debating that an offer is revokable at least until it is received. It is not an offer. Here we have two documents received at the identical time.

By Mr. Hayes:

Q. As a matter of fact, they were delivered through Mr. Zak, were they not, both of them?

A. They were both routed through Mr. Zak.

Q. There is no stamp on Defendants' Exhibit 114 showing when Mr. Zak got it. There is a stamp showing when it arrived at some TWA office likely in Kansas City. TWA Exhibit 24 shows it was received at Mr. Zak's office the day it is dated, July 27th.

Was it the normal practice when a communication [Tr. 3397] was going to TWA or to Mr. Rummel specifically through Mr. Zak to make personal delivery to him right at the plant?

A. I can't answer that question. I don't know.

Q. But it is obvious that he received it the same date it is dated, is it not?

A. Yes.

Q. It is fair to assume that he would have received it July 24th on the day it was dated?

A. That's reasonable.

Q. I put the question to you again. I think you answered it that if it had been accepted right then and there you would have had a contract on your hands.

A. And in serious difficulty.

Q. Did you have both these letters before you when you prepared your prepared statement?

A. No, sir, I had not—I merely asked our contracts people to give me as best they could reconstruction of the records what the earliest positions would have been had we been requested to supply positions.

Q. Who prepared the text of Paragraph 4 of your statement, if you know, Mr. Connelly?

The Special Master: Your prepared statement.

[Tr. 3398] A. Paragraph 4?

Q. That's right, which appears on the last page, whatever the last page is.

A. I think this is part of the original draft which was received by Mr. Olsen first from Mr. Rummel and Mr. Dunham and referred down to me, referred by Mr. Olsen's office to me.

Q. So that it was prepared by someone in New York acting on behalf of TWA in the first instance?

A. As far as that original draft was concerned, that is correct.

Q. Did it read as it does when you first received it?

A. I know he made many revisions in it.

Q. I mean this particular paragraph.

A. I can't recall. We made many revisions in the whole thing. I can't recall whether this was changed or not.

Q. Did you ask to have the documents which supported Paragraph 4 shown to you?

A. No, I asked our people to check what were the earliest positions we had available at that time from such records as we had available bearing upon that time.

Q. Were you told the purpose of Paragraph 4 [Tr. 3399] specifically by Mr. Rummel or anybody else for what purpose was—it going to be used by TWA in this lawsuit?

Mr. Sonnett: You mean going beyond submission as part of his testimony?

Q. Were you given any purpose for Paragraph 4?

A. I can't remember being told what the purpose was.

Q. I think you testified in response to some questions by the Special Master that you were advised of the negotiations that were going on between the Tool Company and Pan American?

A. Yes.

Q. Do you know when they began?

A. I assume it was around this period of time in here because we were asked for a proposal and I think I did testify that we gave TWA a proposal. Well, this is it.

Q. The last exhibit we put in through you was the consent by Boeing to transfer from Hughes Tool Company to Pan American of the right to acquire the six 331s, and Boeing's consent refers to the agreement with Pan American under date of June 25, 1959.

If you were aware of the negotiations, did you know that they went back to June 1959?

[Tr. 3400] A. The date means nothing to me.

Q. But you were kept informed, Boeing was, of the fact that they were negotiating when they were negotiating?

A. We were informed at some time. I don't know whether it was at the beginning or the end or the middle.

Q. Did you inquire as to what delivery positions would have been quoted to Pan American at the end of June, 1959?

A. I had no occasion to.

Q. Because the text that was supplied to you set forth July 1959, is that right?

A. No.

Q. What other reason?

A. I'm not certain I understood the question.

Q. You said you did not inquire as to what delivery positions might have been available in June of 1959.

I asked you if the reason for that was that the text—you said you had no occasion to do so—if the reason that you had no occasion if that the prepared text that was submitted to you had the month July 1959?

A. Well, I only checked these figures. I didn't—

[Tr. 3401] Q. That is all you did?

A. That's all.

Q. You did not go back to see when the agreement might have been made and when if Pan American wanted to get six 331s it might have asked for delivery positions?

A. No.

Mr. Hayes: That is all.

Mr. Sonnett: I think there is some confusion in terminology.

By Mr. Sonnett:

Q. You have referred to statements made to you by Boeing people concerning Mr. Hughes' statements in 1959 to the effect that he wanted 50 or 40 aircraft if he could get them ahead of anybody else; is that correct?

Mr. Hayes: That has been covered five times. Do we have to go over it again, Mr. Brownell?

Mr. Sonnett: Yes, we do, in light of the confusion and your words which I am going to clear up in one or two questions.

A. Yes, I believe I testified to that.

Q. If Mr. Hughes had said in the summer of 1955 he wanted to buy fifty 707s or forty 707s but he had not [Tr. 3402] imposed the condition of wanting them ahead of anybody else, would you have sold him the aircraft and would you have given him equal treatment on deliveries with others ordering at or about the same time?

A. We would have been delighted to.

Q. You would have been very happy to sell another fifty aircraft, wouldn't you, or forty?

A. Certainly.

Mr. Hayes: With Pan American or American getting the preferences. That is fine.

Mr. Sonnett: I have nothing further.

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INDEX

Volume I

	PAGE
List of Relevant Docket Entries	A-x
TWA Complaint [Doc. 1]	A-1
Order Referring This Action to Judge Metzner for All Purposes, dated August 31, 1961 [Doc. 42]	A-33
Opinion and Order of December 5, 1961 [Doc. 50]	A-35
Pretrial Order, February 7, 1962 [Doc. 59]	A-36
Toolco's Answer and Counterclaims [Doc. 63]	A-41
Holliday's Answer [Doc. 83]	A-99
Pretrial Order, July 12, 1962 [Doc. 101]	A-116
Pretrial Order, September 21, 1962 [Doc. 122]	A-118
Pretrial Order, January 10, 1963 [Doc. 144]	A-122
Pretrial Order, January 19, 1963 [Doc. 146]	A-127
Opinion and Order of Special Master dated January 22, 1963, Exhibit C to Bromley Affidavit dated February 15, 1963 [Doc. 179]	A-133
Exhibit A to the Affidavit of John F. Sonnett, dated February 1, 1963 [Doc. 166]	A-143
Exhibits B and C to the Affidavit of John F. Sonnett, dated February 1, 1963 [Doc. 167]	A-226
Pretrial Order, February 1, 1963 [Doc. 168]	A-253
Opinion and Order, February 7, 1963 [Doc. 173]	A-255
Toolco's Notice of Position, dated February 8, 1963 [Doc. 174]	A-268
Transcript of Pretrial Hearing, February 8, 1963 [Doc. 188]	A-270
Transcript of Pretrial Hearing, May 2, 1963 [Doc. 204]	A-309

PAGE

Opinion and Order, dated May 3, 1963 [Doc. 191] A-317

Opinion and Order of May 3, 1963 Granting Additional Defendants' Motion to Dismiss (memorandum endorsed on motion papers dated February 15, 1963) [Doc. 179B] A-323

Judgment of the Court of Appeals on Interlocutory Appeal, Entered July 10, 1964 [Docket No. 28405] [Doc. 478] A-324

Judgment of the Court of Appeals Affirming Dismissal of the Counterclaims, Entered July 10, 1964 [Docket No. 28406] [Doc. 479] A-326

Opinion of the Court of Appeals in Dockets No. 28405 and No. 28406 [Doc. 478] A-328

Opinion and Order of Special Master J. Lee Rankin, dated July 30, 1965 [Doc. 481] A-357

Opinion and Order of Judge Metzner, dated November 16, 1965 [Doc. 487] A-396

Transcript of Hearing Before Judge Metzner on December 30, 1965 [Doc. 498] A-400

Opinion and Order of Judge Metzner Denying Defendants' Motion for a Pre-Hearing Order, dated January 4, 1966 [Doc. 496] A-422

Order by Judge Metzner of January 4, 1966 Designating Herbert Brownell as Special Master in Place of J. Lee Rankin [Doc. 497] A-424

Volume II

Excerpts from Testimony at Damage Hearing of Robert W. Rummel [Docs. 554-2 through 554-10] A-425

Testimony at Damage Hearing of John B. Connelly [Doc. 554-11] A-977

Volume III

PAGE

Excerpts from Testimony at Damage Hearing of Edward J. Morehouse [Docs. 554-13, 554-14] A-1209

Excerpts from Testimony at Damage Hearing of Edward Wemple [Docs. 554-15 through 554-18, 554-32] A-1243

Excerpts from Testimony at Damage Hearing of John C. Biegler [Doc. 554-19] A-1527

Volume IV

Excerpts from Testimony at Damage Hearing of Gene M. Woodfin [Docs. 554-23, 554-24] A-1567

Excerpts from Testimony at Damage Hearing of Nathan S. Simat [Docs. 554-25, -26, -27, -28, -30, -31] A-1575

Excerpts from Testimony at Damage Hearing of L. John Eichner [Docs. 554-31, -32] A-1727

Testimony at Damage Hearing of Van Court M. Hare, Jr. [Doc. 554-32] A-1773

Excerpts from Pretrial Deposition of Robert W. Rummel [Docs. 224, 225, 226] A-1797

Excerpts from Pretrial Deposition of Charles C. Tillinghast [Docs. 210 through 222] A-1850

Excerpts from Pretrial Deposition of Emmett O. Cocke [Docs. 228, 231, 233, 235] A-1913

Jones v. *Uris Sales Corp.*—Master's Report [not a part of the Record herein] A-1934

Volume V

Notice of Filing of Report of Special Master dated September 21, 1968 [Doc. 509] A-1965

Report of Special Master, Filed September 21, 1968 [Doc. 508] A-1966

PAGE

Defendants' Objections to the Report of the Special Master, dated November 1, 1968 [Doc. 511] A-1967

Opinion and Order, Filed December 23, 1969, Adopting and Confirming the Report of the Special Master [Doc. 519] A-2027

Opinion and Order of April 13, 1970 Awarding Attorney's Fee and Costs [Doc. 530] A-2060

Final Judgment Entered April 14, 1970 [Doc. 531] .. A-2073

Volume VI

Toolco's Notice of Motion to Dismiss TWA's Complaint, August 8, 1961 [Doc. 22] A-2075

Order by Judge Herlands, dated August 14, 1961 [Doc. 25] A-2077

Transcript of Pretrial Hearing Before Judge Metzner, September 6, 1961 [Doc. 47] A-2078

Pretrial Order of Judge Metzner, September 7, 1961 [Doc. 44] A-2112

Transcript of Pretrial Hearing Before Judge Metzner, October 2, 1961 [Doc. 48] A-2115

Pretrial Order of Judge Metzner, December 18, 1961 [Doc. 354] A-2138

Toolco's Notice of Motion Before Special Master J. Lee Rankin, February 15, 1962 [Doc. 66] A-2140

Transcript of Pretrial Hearing Before Judge Metzner, February 23, 1962 [Doc. 79] A-2141

Orders of Special Master J. Lee Rankin, April 17, 1962, contained in excerpts from transcript of deposition of Charles C. Tillinghast, Jr. [Doc. 217] A-2176

Interrogatory Propounded by TWA to Toolco, May 4, 1962 [Doc. 89] A-2197

PAGE

Interrogatory Propounded by TWA to Raymond M. Holliday, May 4, 1962 [Doc. 90] A-2203

Transcript of Pretrial Hearing Before Judge Metzner, May 17, 1962 [Doc. 96] A-2206

Portion of Transcript of Proceedings Before Special Master J. Lee Rankin, June 4, 1962 [Doc. 218] A-2233

TWA's Notice of Motion and Affidavit of John F. Sonnett, June 25, 1962 [Doc. 305] A-2234

Affidavit of John R. Hupper, July 2, 1962 [Doc. 315] A-2240

Transcript of Pretrial Hearing Before Judge Metzner, July 12, 1962 [Doc. 107] A-2245

Pretrial Order of Judge Metzner, July 23, 1962 [Doc. 103] A-2267

Pretrial Order of Judge Metzner, July 24, 1962 [Doc. 93] A-2268

Transcript of Pretrial Hearing Before Judge Metzner, July 26, 1962 [Doc. 113] A-2270

Affidavit of Robert G. Zeller, August 28, 1962 with Exhibits A-K [Doc. 110] A-2283

Memorandum Reviewing the History of TWA's Application for Permission to Propound an Interrogatory of Hughes Tool Company Concerning the Location of Howard R. Hughes, August 30, 1962 [Doc. 106] A-2297

Transcript of Pretrial Hearing Before Judge Metzner, September 6, 1962 [Doc. 355] A-2305

Affidavit of John F. Sonnett, September 14, 1962, and Exhibits C and D thereto [Doc. 117] A-2316

Portions of Transcript of Proceedings Before Special Master J. Lee Rankin, September 15, 1962 [Doc. 226] A-2382

PAGE

Transcript of Pretrial Hearing Before Judge Metzner, September 19, 1962 [Doc. 129] A-2391

Portions of Transcript of Discovery Proceedings Before Special Master J. Lee Rankin, October 25, 1962 [Doc. 226] A-2428

Transcript of Pretrial Hearing Before Judge Metzner, October 29, 1962 [Doc. 184] A-2438

Notice of Motion by Toolco, December 4, 1962, for Leave to Depose Sessel and Wadsworth [Doc. 338] A-2461

Transcript of Proceedings Before Special Master J. Lee Rankin, December 14, 1962 [Doc. 237] A-2462

Transcript of Proceedings Before Special Master J. Lee Rankin, December 28, 1962 [Doc. 237] A-2514

Transcript of Pretrial Hearing Before Judge Metzner, January 9, 1963 [Doc. 185] A-2523

Transcript of Proceedings Before Special Master J. Lee Rankin, January 14, 1963 [Doc. 237] A-2571

Notice of Motion by Toolco, January 14, 1963 [Doc. 145] A-2574

Transcript of Pretrial Hearing Before Judge Metzner, January 17, 1963 [Doc. 186] A-2576

Notice of Motion by Toolco, January 22, 1963 [Doc. 147] A-2602

Transcript of Proceedings Before Special Master J. Lee Rankin, January 23, 1963 [Doc. 237] A-2603

Notice of Motion by Toolco, January 25, 1963 [Doc. 152] A-2615

Transcript of Pretrial Hearing Before Judge Metzner, January 28, 1963 [Doc. 187] A-2616

Letter of Chester C. Davis to Judge Metzner, January 29, 1963 [Doc. 448] A-2642

PAGE

Letter of Chester C. Davis to Special Master J. Lee Rankin, February 4, 1963 [Doc. 458] A-2645

Letter from John F. Sonnett to Chester C. Davis, February 5, 1963 [Doc. 459] A-2647

Notice of Motion by Tóolco, February 6, 1963 [Doc. 170] A-2648

Affidavit of Nazeeh Habashy, February 6, 1963 [Doc. 172] A-2649

Transcript of Pretrial Hearing Before Judge Metzner, February 6, 1963 [Doc. 187] A-2650

Affidavit of Bruce Bromley, February 15, 1963 [without exhibits] [Doc. 179] A-2676

Affidavit of William C. Chanler, February 15, 1963 [Doc. 179] A-2689

Order to Show Cause dated February 16, 1963, and Affidavit of John F. Sonnett, February 15, 1963 [Doc. 180] A-2692

Transcript of Pretrial Hearing Before Judge Metzner, February 21, 1963 [Doc. 189] A-2704

Order of the Court of Appeals for the Second Circuit dated June 6, 1963, Granting Leave to Appeal and Staying Damage Hearing Pending Appeal .. A-2736

Orders of the Supreme Court of the United States, dated November 16, 1964 Granting Writs of Certiorari A-2737

Orders of the Supreme Court, dated March 8, 1965, Dismissing the Writs of Certiorari as Improvidently Granted in *Hughes Tool Company et al.* v. *Trans World Airlines, Inc.*, Nos. 443 and 501 .... A-2738

Opinion of the Court of Appeals dated September 1, 1971, in Docket Nos. 34902, 35114, Affirming with Modifications the Judgment of the District Court A-2739

PAGE

Orders of the Court of Appeals, dated September 28, 1971, Denying Petitions for Rehearing and Rehearing *in banc* A-2799

Volume VII

PAGE

Excerpts from Transcript of Deposition of Charles C. Tillinghast, Jr. [Excerpts from Docs. 54, 210, 211, 216, 221] A-2800

Vol. 11 of Defendants' Exhibits to Deposition of Charles C. Tillinghast, Jr. (consisting of Exhibit 11, with subparts 11-A through 11-T, inclusive) [Doc. 238] A-3220

Opinions and Orders of the Civil Aeronautics Board with respect to the Hughes Tool Company—TWA Control Relationship, as follows:

(a) CAB Opinion and Order No. 3210, October 17, 1944 (officially reported at 6 C.A.B. 153) [not a part of the Record herein] A-3297

(b) CAB Order No. 4437, January 26, 1946 .... A-3307

(c) CAB Order No. E-922, October 29, 1947 .... A-3309

(d) CAB Opinion and Order No. E-1735, June 30, 1948 (officially reported at 9 C.A.B. 381) [not a part of the Record herein] A-3311

(e) CAB Opinion and Order No. E-4701, October 6, 1950 (officially reported at 12 C.A.B. 192) [not a part of the Record herein] A-3333

(f) CAB Opinion and Order No. E-16195, December 29, 1960 (officially reported at 32 C.A.B. 1363) A-3403

Excerpts From Testimony at Damage Hearing of Edward J. Morehouse

[Tr. 3864] EDWARD J. MOREHOUSE, called as a witness by defendants, being first duly sworn by the Notary Public (William Blitz), testified as follows:

Mr. Leisure: Is there to be an offer of any exhibits at this point?

Mr. Sonnett: Mr. Brownell, we now offer as the direct testimony of the witness exhibits which have been heretofore marked, being the Parts I, II and III of the report on the financing of TWA prepared by this witness and others at Harriman, Ripley.

Mr. Leisure: For the record, these are TWA Exhibits 5, 5A, 5B and 5C. Is that correct, Mr. Sonnett?

Mr. Sonnett: Yes, together with the affidavit of Mr. Morehouse, which is 5, these are 5A, 5B and 5C.

I would suggest that for mechanical convenience we mark later in the day the errata sheets and additions as 5D.

Mr. Leisure: If your Honor please, we have filed written objections to the exhibits now tendered, and we stand on those objections and reassert them now.

The Special Master: I will reserve decision.

[Tr. 3865] Mr. Leisure: May I proceed, your Honor?

The Special Master: Yes.

Examination by Mr. Leisure:

Q. Mr. Morehouse, would you look at your report, which is TWA 5A, at Part I? You will find that there is a letter there addressed to the Cahill firm, which is dated May 2nd, and the first sentence indicates:

"This is written in response to your request that we submit information in regard to the activities of Harriman, Ripley & Co., Incorporated in the investment banking business pertaining to the issue of corporate securities."

Do you recall when that request was made of you by the Cahill firm?

A. No, I do not specifically recall.

Q. Can you tell me whether or not it was before you had commenced preparing Part II of this report?

A. I am reasonably certain that it was after we commenced preparing Part II.

Q. Was it after Part II was completed?

A. I don't recall.

Q. Can you remember whether the request made of you was in writing or was an oral request?

A. I cannot recall, but I believe it was oral.

[Tr. 3866] Q. Do you remember the circumstances under which the request was made?

A. Not specifically, no.

Q. Do you remember who, in fact, made the request?

A. No, I do not.

Q. Do you recall when you signed this letter which is dated May 2, 1966, in Part I of your report?

A. It was signed, I believe, the date as of which it is dated, May 2nd.

Q. Would you look at Part II of the report, page 1? You will note that the first sentence there commences:

"This report is written in response to the request of Cahill, Gordon that we give our opinion . . ." et cetera.

Do you remember when that request was made?

A. I cannot give you a specific date, but it was made approximately three and a half years ago, when we were first approached and requested to consider assuming this task.

Q. Who in your firm was approached, if you recall?

A. Well, there were present at the initial meeting Mr. Ripley, myself, Mr. H. J. Berry. I believe that is all.

[Tr. 3867] Q. Can you tell me what Mr. Berry's position was with your firm at that time?

A. At that time, he was executive vice president.

Q. What was your title at that time?

A. It was either vice president or senior vice president. I have forgotten which.

Q. Where was that meeting held?

A. In Mr. Ripley's office at our then corporate headquarters, 63 Wall Street.

Q. Who, other than representatives from your firm, were present at the meeting?

A. Either two or three partners of Cahill, Gordon.

Q. Can you recall who they were?

A. I could only recall, I think correctly, Mr. Sonnett.

Q. Was there any representative from TWA present?

A. No, there was not.

Q. The request which you referred to at the top of page 1, was that oral or was that in writing?

A. It was oral.

Q. Can you tell me, as best as you can recall, the substance of the conversation that took place at this initial meeting?

A. Well, it's my recollection that there was a [Tr. 3868] brief description of the status of the particular lawsuit in regard to which these damage hearings were being held, and there was then a request of us to give consideration to writing this particular type of report.

Q. Can you recall what was told to you about the purpose of this report?

A. Yes. The purpose, as described to us, stated to us, was that the report would be used as an aid in establishing the amount of the damages which had been sustained by the airline as a result of the alleged—I guess as a result of the acts of the defendants.

Q. Was anything said to you at that point about the amount of those damages?

A. I do not recall.

Q. Do you know whether or not the Cahill firm approached any other investment banking house to enlist their support in this project prior to the time that you were approached?

A. I do not know.

Q. Do you know what investment banking firm was advising TWA at the time that you were approached by the Cahill firm?

A. It's my understanding that Dillon, Read, the firm of Dillon, Read has been the lead investment banking [Tr. 3869] firm advising TWA in recent years, but that is merely my understanding. I do not know that as a fact.

Q. During the course of the preparation of your report, did you have conversations with any representatives of Dillon, Read?

A. No.

Q. How long after this first meeting, which you have described to us, did you consider this proposal before coming to the conclusion that your firm would undertake it?

A. I do not recall exactly, but I believe several days.

Q. Do you recall whether or not there were any people in your firm who were opposed to undertaking this project?

A. I do not recall.

Q. Is it likely that you would recall if there had been any serious opposition to it?

A. Yes, I believe it is.

Q. Was there a formal letter of retainer?

A. I can't recall, but I can have that checked.

Q. Do you consider that Drexel, Harriman, Ripley was employed by the Cahill firm or by TWA to undertake this report?

A. I consider that we were employed by Cahill, [Tr. 3870] Gordon.

Q. Can you tell me approximately when the work commenced on this report?

A. Yes, it commenced almost immediately after we were —after we agreed to take on the task.

Q. Your best estimate is that that is approximately three and a half years ago?

A. Approximately.

Mr. Leisure: Off the record.

The Special Master: Off the record.

(Discussion off the record.)

Q. Over what period of time did that work continue until the report was completed?

A. Well, it continued intermittently throughout the entire three and a half-year period.

Q. When do you consider that the report was completed?

A. Immediately prior to the date of its submission.

Q. Is that May 2, 1966?

A. Approximately.

Q. Is that the date that you considered it submitted?

A. Yes, it is.

• • • • •

[Tr. 3901] • • •

Q. I asked on whom is the obligation.

A. The obligation would be on management.

Q. Does this suggest that management should have accepted these recommendations which are contained in your report?

A. I believe so.

Q. Does that mean there is no other way to finance than the method proposed by you?

A. No, we have so stated that we believe that this is a perfectly reasonable, practical method and the one way in our opinion we would have suggested.

Q. Do you assume that TWA would have accepted this recommendation?

A. We do not.

Q. Did you make any inquiry with respect to the names of the investment bankers who were actually advising TWA during the period 1955 through 1960?

A. We made no such inquiry.

Q. Is it fair to say then that for the purposes [Tr. 3902] of this report, you disregarded any advice that may have been given to TWA by any investment banker during the period 1955 to 1960?

A. We gave no consideration to any such advice because we were not aware of any such advice.

Q. Are you saying anything more than that this report constitutes one method by which TWA could have financed these projected requirements, assuming it had retained you in 1955, and assuming that it accepted your advice?

A. I believe that's a reasonable statement.

Q. At the top of page 3 of the report, you indicate that you are assuming that you were engaged by TWA as its investment banker throughout this period.

When do you assume that you were engaged?

A. Well, some time early in 1955. I don't know the precise—that we assumed the precise date, but obviously if we had done an equity financing in May we would have been working for some months with the airline.

So, early 1955 is the best I can give you.

Q. You do not make any assumption with respect to the precise time that you were engaged to undertake this project?

[Tr. 3903] A. Not a precise day or a week, no, sir.

Q. If in point of fact TWA was using a different investment banker in early 1955, you are not asuming that that is a reflection on the competence of the management, are you?

A. No, I am not.

Q. Did you make a study of the actual financing steps that were undertaken by TWA throughout the period in 1955-1960?

Mr. Sonnett: Is TWA in the context of these questions inclusive of Mr. Hughes and the Tool Company or is it meant to be TWA without regard to those two? Because—

Mr. Leisure: It is meant to be TWA unless I indicate otherwise.

Mr. Sonnett: There is nothing in the complaint which indicates that TWA had any power to do anything about its own financing in the years in question and by the default that is precluded. The entire responsibility was in the hands of the defendants.

Mr. Leisure: I consider that to be a summation, your Honor, not an objection to the question.

[Tr. 3904] Mr. Sonnett: It is in the complaint and it is established by the default.

The Special Master: Is there a pending question?

Will you read it, please?

(The question was read.)

The Special Master: If you wish to make any statement as to what you mean by TWA you may do so.

Do you feel that you can answer this question as it stands?

The Witness: Yes, sir, I believe I can.

A. Well, I would say that we are in no—we are in no position to study the financing steps that were taken by TWA because we don't really know what all of such steps may have been.

We are generally familiar with the terms of the equipment mortgage. We are aware of the common stock financing.

But we were in no position to undertake a study of the method by which TWA was financed during that period.

Q. Are you saying that the details with respect to the TWA financing were not available to you?

[Tr. 3905] A. Only as set forth—not the details. I wouldn't consider these the details.

The general outlines of the steps taken by TWA during the period were described in its annual reports, for example. But we have no knowledeg of any other—of any negotiations that may have been undertaken that are not described in the annual report.

Q. Did you make a request to see the financial records of TWA which might still exist which reflect what had been happening from 1955 to 1960?

A. I do not recall any such specific request, but we do have either as a result of our own records having this kind of material or having received it from Cahill, Gordon, we have copies of the various pertinent documents such as the

equipment mortgage and the prospectus and that type of thing.

We do not have any record of internal plans that may have been discussed or formulated with regard to financings.

Q. Did you make any inquiry with respect to the advice that may have been given TWA which led to its refinancing with Equitable in December of 1954?

A. I do not believe so.

Q. Do you know what investment banking house was [Tr. 3906] advising TWA at the time of that refinancing in the summer of 1954?

A. I believe it was Merrill Lynch.

Q. Did you assume that the advice that may have been given to TWA which led to the refinancing in December 1954 was bad advice?

Mr. Sonnett: There is nothing in the record showing that any such advice was given to TWA. Unless the witness is in a position to testify that he knows about that advice, it seems to me this is highly argumentative.

Mr. Leisure: I am just predicating my question on the former response of the witness that he believed that advice was given by Merrill Lynch.

The Witness: I did not answer—I don't believe that's the way I answered. I don't believe the question was, was advice given. I believe you asked me who the investment banker was that was representing TWA in those days, and I said I believed it was Merrill Lynch. I have no knowledge of any advice given to the airline by Merrill Lynch.

Mr. Sonnett: I might say, Mr. Brownell, [Tr. 3907] this persistent use of advice to TWA in light of this

record is certainly a little disingenuous. The record is quite clear and that record is not open for review now but it was Hughes who was running all the financing end of this thing and calling all the shots. This persistent use of TWA flies in the face of history.

Mr. Leisure: I will note an objection again to the instant summations that we get from time to time. Many of these questions are not yet determined and that's why we are here.

Mr. Sonnett: If you look at the complaint and reread it you will find that that question is determined.

The Special Master: I will consider the whole record in coming to any conclusion of my own.

* * * * *

[Tr. 3920] * * * Q. So that by your assumption of ordered, you are assuming that the order would have indicated delivery positions?

The Special Master: Delivery dates.

Mr. Leisure: Yes—

The Special Master: You are not distinguishing between the delivery positions—

Mr. Leisure: No, the delivery dates, the anticipated delivery dates.

A. Yes, I believe that our assumption would include such an anticipation.

Q. Then the last part of the sentence indicates that you are assuming that 30 Convair aircraft could and would have been ordered by such management in 1956 for delivery in 1960.

When in 1956 do you assume that the order for the Convairs would have been placed?

A. Well, it is my recollection that the order by Hughes Tool was placed in September, 1956, and I believe that that is the month that we assumed the order would have been placed under the assumptions set forth here.

[Tr. 3921] Q. Can you tell me when you assume you as the investment banker would have learned that TWA was going to order 30 Convairs?

Mr. Sonnett: The answer to that would be never. I wish we could for the sake of the record either not refer to TWA at all or if you refer to the ordering refer to it correctly. It invites colloquy from me and it wastes time.

Mr. Leisure: We are talking about an entirely hypothetical world here and I am now in the witness' hypothetical world and I am asking him when he assumes in his capacity as an investment banker that TWA would have ordered the 30 Convairs.

The Special Master: He gave that answer. Now you are asking him a separate question.

Mr. Leisure: He has not yet with respect to the Convairs, your Honor. He did with respect to the Boeings.

The Witness: I said September.

By Mr. Leisure:

Q. September is when they were ordered, I understand. My question is when you as the investment banker [Tr. 3922] would have learned that they were going to be ordered.

A. We made no such specific assumption, but since the ordering of that amount of aircraft involved a substantial capital expenditure, I think it is a fair presumption that as the company's investment banker we would have been in-

formed reasonably a short period of time before the ordering of the equipment but we made no specific assumption.

Q. Your financing plan as I understand is designed to pay for these aircraft and I would like to know when you have assumed that you knew that such a requirement existed.

A. I just answered the question.

Q. You said reasonably in advance of the order.

Can you do any better than that?

A. No, I cannot.

Q. Are you assuming that if historical TWA did not, in fact, order the aircraft in the number and buy the type indicated at page 1 of your report that historical TWA had incompetent management?

A. We made no such assumption.

Q. At page 3 of your report, at the top of the page, part of your assumption is that you were in intimate and direct contact with the management of TWA and had [Tr. 3923] access to all current information and data having a bearing on finance.

What current information and data were you referring to there?

The Special Master: By way of general type?

A. Well, the usual—certainly, the—all of the published reports, quarterly reports. Airlines have to file considerable information with the regulatory authorities on a more direct basis than quarterly. I presume we would have had access to that type of information.

That's in general the kind of information we are referring to.

Q. Was that information, in fact, given to you during the course of your preparation of this report or are you merely assuming that you would have had it had you been advising them in 1955?

A. On a reconstructed basis, that information was made available to us, yes.

Q. What do you mean by reconstructed basis?

A. I mean that the Price Waterhouse reconstructed quarterly reports would have been available to us—were available to us.

[Tr. 3924] Q. No Price Waterhouse reconstructed data would have been classified as current information and data in TWA files in 1955, would it?

Mr. Sonnett: I thought we were talking about the hypothetical free TWA in this whole line of questioning.

Mr. Leisure: I am trying to determine whether he is making the statement as an asumption which we did determine and then I am trying to find out whether the very data that he refers to in his assumption was in fact made available to him.

Mr. Sonnett: What he has testified to is that the same or similar data would have been available. I don't understand this jumping back and forth between the actual—

A. I don't understand whether you are referring to historical or reconstructed.

Mr. Sonnett: That is the problem.

Q. I am referring to the assumption that you made at page 3 that you would have had access to all current information and data having a bearing on finance.

I am trying to find out whether in fact you did.

The Special Master: Whether you did have [Tr. 3925] historical information of that same type?

Mr. Leisure: Right.

Mr. Sonnett: In fact, when this report was prepared.

The Special Master: In fact?

Mr. Leisure: Right.

A. Forgive me if I sound evasive. I don't mean to be. I—the assumption is—the reconstructed data that we have used in arriving at the program here is the kind of information, financial information that we are referring to here in this paragraph, and that we have. That was made available to us, yes.

• • • • •

[Tr. 3926] • • • Q. Mr. Morehouse, at page 3 of your report, you make the assumption that you were engaged by TWA as its investment bankers through the 1955 to 1960 period.

Is that an asumption that was given to you by the Cahill firm?

A. Yes, sir.

Q. Do you feel you needed to make such an assumption in order to give your opinion as to how TWA could have financed this assumed purchase of aircraft?

A. I don't know—no, I do not believe it is a necessary assumption, but it seems to me it is a logical assumption.

Q. Would your report have been any different had you not made that assumption?

A. I don't know, because we didn't consider it, but I doubt it.

[Tr. 3927] Q. Would you turn to page 5 of your report? We have a Chapter IV entitled "Premises and Assumptions."

Do you draw any distinctions between a premise and an assumption?

A. Not really. I believe the expression is used collectively, premise and assumption.

Q. In No. 1 of Chapter IV, page 5, you adopt certain assumptions with regard to figures prepared by other experts; is that right?

A. That's right.

Q. In paragraph No. 2 on page 5, you refer to the foregoing assumption by Cahill, Gordon.

Were all of the assumptions on pages 5 and 6 given to you by Cahill, Gordon?

A. Excuse me. I will have to check it.

Mr. Williams: Read the question, please.

(The question was read.)

Mr. Williams: It is all of the assumptions on 5 and 6.

The Witness: Yes, they were.

Q. At page 61 in paragraph numbered 5, you make a reference to on-time delivery of the 63-plane fleet. What do you mean by that?

A. I mean that the proceeds from the sale of piston [Tr. 3928] aircraft would have been as reconstructed, assuming that the jet fleet was delivered in accordance with the reconstructed delivery dates that have been set forth in the exhibit we looked at earlier this morning.

Q. Do you make an assumption that the jets which were, in fact, received by TWA were received late?

A. I don't understand that question.

Q. When you make a reference to on-time delivery, I am wondering whether there is an implication that in point of fact you assume that TWA received jets late.

Do you make any such assumption?

A. We make no such assumption.

Q. Do you know where the phrase "on-time" delivery originated?

A. I do not know where it originated.

Q. Do you know where you got it from?

A. I do not know that we got it from anywhere. I believe we may have used the expression "on-time" as a synonym for the word "timely," which "timely" word is used in that exhibit which we looked at earlier today.

Q. Is that TWA 14?

A. I believe so.

Q. Do you know whether or not TWA 14 annexed to your report is founded upon the exhibits attached to [Tr. 3929] Mr. Rummel's testimony?

A. I do not know that.

Q. At the bottom of TWA 14, there is an indication that the source is the testimony of R. W. Rummel and exhibits and annexes.

Does that refresh your recollection?

A. It doesn't necessarily—it doesn't refresh my recollection, but I believe it is obvious from the source that the answer to your question is yes.

Q. Did you participate in the preparation of Mr. Rummel's testimony or any of the exhibits or annexes attached thereto?

A. I certainly did not participate in the preparation of Mr. Rummel's testimony. And I do not believe in connection with—I do not believe that we participated in any way in the preparation of any of the annexes or exhibits, but without seeing them all again, I couldn't swear to it.

Q. Do you recall Annex D and Annex F to Mr. Rummel's testimony?

A. No, I do not.

Q. I wonder if you would take a moment to look at the statement prepared and submitted by Mr. Rummel, which was marked Plaintiff's Exhibit TWA 2 in evidence, and [Tr. 3930] look at Annex D and Annex F.

I am asking you to look at it only for the purposes of answering the question as to whether or not you participated in the preparation—

A. No.

Q. (continuing) —of either.

A. We did not.

Q. That applies to other people employed by Drexel, Harriman, Ripley?

A. That is right, sir.

Q. Did you make any independent study to verify or substantiate either Annex D or Annex F to Mr. Rummel's statement?

A. No, we did not.

Q. Referring again to paragraph numbered 5 at page 6, with respect to the reconstruction prepared by R.D.S., did you make any independent study to verify the reconstruction prepared by R.D.S.?

A. No, sir.

Q. Is it fair to say that if the inputs to your study, such as these reconstructions by R.D.S., Price Waterhouse and Coverdale & Colpitts had been altered, that it might have resulted in an altering of the report which you have tendered?

[Tr. 3931] A. I don't believe I can answer that without having a specific example of the extent of the alteration.

Q. If, for example, either the timing of the ordering of the assumed jet fleet or the number of planes that you assumed would have been ordered had been altered, might that have altered your financing plan?

A. Once again, without being specific as to number—numbers of aircraft, or specifics as to timing, I don't see how I could answer that question.

Q. Do you think that if you had been told to assume that TWA would order 45 jet aircraft instead of 63, that that might have altered your approach to this financing problem?

Mr. Williams: Would have altered his approach to the financing problem?

Mr. Leisure: Yes.

A. I doubt that it would have altered the approach.

Q. So that the number of planes which were given to you as an assumption has no effect on the approach to your financing plan?

A. No, I didn't say that. Certainly, it does, but the amount of alteration in the number and again—and in the timing, certainly would have to be spelled out for me to comment whether it would alter the approach.

[Tr. 3932] Q. If there was a reduction of the number of jet aircraft which you were to assume TWA would order, might that alter the amount of money that you recommend raising at the various stages in your financial report?

A. Yes, it might.

Q. If, in point of fact, you were told to assume that these aircraft were ordered in 1956 instead of in 1955, might that have altered the timing of the various steps that you recommend in this financing program?

A. It might, but not necessarily.

Q. Other than the assumptions which you have stated at one place or another in your report, are there any other assumptions which you made which are not so reflected?

A. I do not believe so.

Q. Did you assume that three-quarters of the stock of TWA was held by the Hughes Tool Company during this period?

Mr. Williams: Was that a necessary assumption to this calculation?

Mr. Leisure: I have no idea. I just asked him whether he assumed it.

A. It is not set forth as one of our assumptions; so my answer would have to be no.

[Tr. 3933] Q. You mean that you assumed that there was no majority shareholder when you devised this financing plan?

A. We assumed neither that there was nor that there wasn't.

Mr. Leisure: I think we are going to have a more satisfactory answer than that, your Honor.

Q. Did you ignore Toolco in devising this plan or did you assume when you formulated each of these financing steps that TWA was, in fact, a subsidiary of another corporation?

A. We did not assume that it was a subsidiary, but we did not assume that it was not a subsidiary.

Q. As I understand it, your first step in financing is a one-for-one rights offering; is that correct?

A. That's right, sir.

Q. You would have to know if you were advising a corporation who the shareholders were before you decided upon a one-for-one rights offering, would you not?

A. The answer to that question would be not necessarily.

Q. In the event that a corporation stock was three-quarters held by a majority shareholder and you [Tr. 3934] deemed it appropriate to have a one-for-one rights offering, would you be expected to inquire as to whether or not that majority shareholder would take up its proportionate

share of the one-for-one rights offering before you went any farther with the plan?

A. Yes, we would, certainly.

Q. I come back to my question. Did you assume, in devising this financing plan, that the stock of TWA was, in fact, held in the percentage of 74.35 per cent by another corporation?

A. Well, I have already answered the question. That is not one of our assumptions.

Q. Is it true, sir, that if you had assumed that three-quarters of the stock of TWA was held by another corporation, you might have embarked upon an entirely different financing program than the one that you here suggest?

A. No, it is not.

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[Tr. 4399] • • • Mr. Leisure: All right, I don't really care how it is marked.

May we mark it Defendants' Exhibit 202 for identification?

(Copy of letter dated September 10, 1963 from the Cahill, Gordon office to Mr. Ripley, marked Defendants' Exhibit 202 for identification, as of this date.)

Q. First of all, Mr. Morehouse, do you recognize Defendants' Exhibit 202 for identification?

A. I recognize it as something that was shown to me the other day at the same time as it was handed to you people.

But I do not recall having seen this prior to having it shown to me the other day.

Q. As of September 10, 1963, were you working on this assignment from Cahill along with Mr. Ripley?

A. Yes, sir, but in a less active capacity than I later assumed.

Q. Do you have any recollection of the Item No. 1 in the letter which is a tabulation of changes in the top management of TWA from 1963 to date?

[Tr. 4400] A. I may have seen it, but I do not recall it.

Q. Do you remember any conversations with Mr. Ripley as to why your firm wanted such a tabulation?

A. I do not recall any specific conversation.

Knowing Mr. Ripley, however, I would expect that he would request anything and everything that might possibly be of interest in this matter. I do not believe that it meant one thing or another in his mind. I couldn't possibly comment.

Q. After this tabulation was received in your office, did you, in fact, interview Mr. A. V. Leslie, who was a vice president, finance, of TWA during the period with which your report was concerned?

A. I did not, no, sir.

Q. Do you know whether anyone in your firm interviewed Mr. Leslie?

A. I do not know.

Q. Did you interview a Mr. E. O. Cocke after receiving this tabulation?

A. I did not and have no knowledge of anyone in my firm so doing.

Q. Did you interview a Mr. John A. Collings?

A. No, sir.

Q. Did you interview a Mr. Ben F. Sessel who is [Tr. 4401] still a director of TWA, as I understand it?

A. The same previous answer. I did not and I have no knowledge of any such interview by anyone in our firm.

Q. Would you give the same answer with respect to Mr. Warren Lee Pierson?

A. Yes, sir.

Q. The same answer with respect to a Mr. Thomas A. Slack?

A. Yes, sir.

Q. Item No. 4 seems to be documents pertaining to both the 1959 and 1960 plan suggested by Dillon, Read & Co. I think at one time earlier in the transcript you indicated that you did not have access to the actual financing plans undertaken by or suggested to TWA during this period.

Do you know whether you ever saw the documents which were enclosed with this letter and referred to as Item 4?

Mr. Williams: I don't think that is an accurate summary of what the witness has said.

Mr. Leisure: I want to be accurate.

The Special Master: Why don't we just ask the witness without reference to past testimony?

[Tr. 4402] Q. Do you recall whether or not you had access to the documents identified as Item 4 in Defendants' Exhibit 202 for identification?

A. I believe that these documents are in our files. I have never read them.

Q. Do you make an assumption in connection with your report, your written report, that any plan formulated by Dillon, Read was imprudent in any fashion?

A. I make no such assumption.

Q. Do you make any such assumption with respect to any plan or advice by Merrill Lynch to TWA during the period 1955 through 1960?

A. We make no such assumption.

Q. Do you make an assumption with respect to the actual financing that took place by TWA throughout the period 1955 through 1960 was in any way imprudent or improper?

Mr. Williams: Historical financing?

Mr. Leisure: Yes.

A. We made no such assumption in preparing our report, no, sir.

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[Tr. 4412] • • • Q. We have finally reached the last page of the report and I would ask you to turn to page 75, Mr. Morehouse.

Mr. Williams: I hope it is the last page of your questions, too.

Q. I ask you to direct your attention to the last paragraph of the report. I will read it quickly into the record, if I may.

"We do not wish this report to be interpreted as meaning that we think the financing program recommended herein is the only program by which TWA might have been successfully financed to meet the Question Posed. There may well be other programs by which TWA might have been financed successfully in the period under review. As for the program which we have outlined, we believe that it is the one which, in our opinion, we would have recommended if we had been advising TWA in the years 1955-1960, and one which, if adopted, [Tr. 4413] would have succeeded."

Do you remember whose idea it was to put that last paragraph in your report?

A. Yes, I remember quite distinctly that throughout the preparation of this report we have—"we," being Harriman Ripley—Mr. Ripley and myself have never felt that the program which we evolved was meant to be the only program of finance which could have accomplished the task described to us, and we felt it important to so state.

Q. Is it true that if an alternative method of financing to meet the question posed resulted in a recommendation for borrowing at different times during the period, there might also be a difference in the interest rates which TWA would have been charged on the borrowing?

A. Yes, that is true.

Q. Is it also true that if the timing of any proposed equity financing were altered that the amount of money which could reasonably be expected to be raised might be altered depending upon the then current market conditions?

A. I believe that is correct.

• • • • •

[Tr. 4427] • • • Mr. Leisure: May I move to one other area?

The Special Master: Yes.

Q. At page 4245 of the transcript, I asked this question, your Honor.

> "Mr. Morehouse, did any other airline, to [Tr. 4428] your knowledge, arrange borrowing in anticipation of buying jets as early as October 1955?"

Can you respond to that?

A. Yes, sir, it is my recollection that—now, having reviewed the record that Pan American arranged financing in 1955.

Could I look at the exhibit, please?

Mr. Tenney: Do you have your exhibits with you, Mr. Morehouse? Do you have your copy of the report with you?

The Witness: No, I don't believe I do.

Well, Exhibit Pan American 3 is a digest of a Pan American insurance loan agreement dated May 10, 1955, pertaining to $60 million debt financing which was arranged for as of that date and was available to Pan American until July 1, 1956.

Q. Is it a fact that the stated purpose of that borrowing was to purchase seven DC-7Bs and 33 DC-7s and the remainder to go into working capital?

A. I do not recall.

Q. You will note that my question did refer to the buying of jets.

Can you tell me whether there was any airline which arranged borrowing before October 1, 1955 in [Tr. 4429] anticipation of purchasing jets?

A. Well, I do not agree—excuse me. I believe that this Pan American borrowing at that time could very well fall under your description of a borrowing arranged in anticipation of future acquisition of jets.

Q. What is your basis for that statement?

A. Well, the future need, capital needs of any airline as of any time in 1955, total capital needs, included capital to meet both payments on piston engine equipment then on order—

Q. When on order?

A. At the time—could I finish my sentence? Maybe I should start over again.

The major airlines, certainly those which we have used for purposes of comparison in our report in 1955 had considerable amounts of piston engine equipment still to be

received and to a considerable extent still to be paid for in the years immediately following 1955, just as did TWA.

Our total projected capital expenditure program which the financing was designed to meet included substantial sums to pay for piston engine equipment for TWA. And I believe that Pan American in arranging the $60 million in financing in May of 1955 certainly had in [Tr. 4430] mind that this would be only a part of a total financing during the next few years, which total financing would be arranged to meet all of its capital expenditures during this period.

Q. Pan American did, in fact, borrow money in the next few years to make payments on jets, did it not?

A. I believe it did but I cannot recall precisely the financing history of Pan American during this period.

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[Tr. 4433] * * * Q. The next principle set forth in this section, Mr. Morehouse, is that an airline should own its own equipment rather than lease it from other parties.

In the course of your testimony on this subject, a good deal of attention was directed to the relative financial advantages of leasing and ownership to the users of the equipment.

On this point I would like first to ask you, Mr. Morehouse, whether, in your opinion, the difference between owning and leasing an airline's principal flying equipment can be adequately considered in terms of the relative cost to the airline of ownership and leasing.

A. My answer to that is no, Mr. Tenney.

I tried to point out during the course of my testimony that in my opinion, there were certain major benefits of ownership which might not be readily apparent on a balance sheet or an income account of a [Tr. 4434] particular company.

Q. Would you explain what you mean by that, Mr. Morehouse?

A. Well, primarily it gets me back to the subject of—and the importance of this subject in our opinion—the subject of control of one's principal income producing properties.

As I recall, I used the example of a steel company and pointed out that whereas it is one thing for a steel company to lease office facilities, for example, but it would be quite another thing for a steel company to lease all or a major part of its steel producing facilities.

If something were to happen which resulted in the steel company having to on reasonably short notice find additional office space, it could probably be found without any great penalty to the steel company, whereas if the same

development were to occur with respect to its major manufacturing facilities or one of its principal plants, it might be years or at least a long period of time before another such manufacturing facility could be obtained.

So, it seems to me, the same principle particularly applies to an airline where it is vitally important [Tr. 4435] from a competitive standpoint that the airline have at all times the ability to keep control of its principal income producing properties, particularly under the conditions which exist in the airline equipment field where the availability of equipment, the most modern, the most efficient equipment and the control thereof is vitally important.

If an airline were to suddenly lose certain of its equipment, particularly if such equipment were to represent the latest most efficient equipment, it might find it very difficult to find and obtain a substitute therefor so as to maintain its competitive position.

There is another aspect of rentals which I believe is important, and that is their effect upon the credit of a borrower.

Generally speaking, a lender would not consider that a proposed borrower having substantial lease obligations, rental obligations pertaining to its principal income producing properties as good a credit as another borrower not having such rental or lease obligations.

Most indentures covering debt securities contain severe restrictions, in some cases prohibitions, against a borrower entering into substantial lease [Tr. 4436] obligations.

Q. Are there differences from one lease to another that might affect the generality of the application of those principles, Mr. Morehouse?

Mr. Leisure: If your Honor please, I am going to note an objection on the ground that this line of

questioning results in repetitive testimony. On two or three occasions the witness has come in with no objection by me and volunteered an explanation of prior testimony.

He has been asked from time to time during the examination to elaborate or explain testimony and he has never once been shut off.

I think this entire line of questioning results in a complete rehash and nothing but repetitive testimony.

The Special Master: There is something to that. I will keep it in mind as we go along. I will allow this particular question.

Mr. Tenney: Would you read—

A. Yes, I remember the question and I would like to add the comment that certainly the extent to which rental obligations in our opinion are objectionable would depend —or would be influenced by the terms of [Tr. 4437] these— the lease covering such rental obligations.

To the extent that the lease by its terms gets closer to being an arrangement whereby the renter of the equipment does maintain a considerable degree of control, then obviously they would be less objectionable.

I believe I previously mentioned that in my opinion a day to day type lease would be the furthest from such— furthest from an example of a lease which might give the lender—give the user of the equipment a reasonably large degree of control.

There are other advantages in our opinion to ownership rather than leasing. In the nature of financial advantages, the use of the depreciation moneys generated by ownership, which, of course, are not available when you have

renting, the fact that the—well, I think that's sufficient to answer that question.

Mr. Tenney: I will turn to a new subject, your Honor.

[Tr. 4438] Q. You have testified on several occasions in the course of Mr. Leisure's examination that in preparing this report you neither assumed nor did not asume that TWA during the period under question was a single holder of approximately 75 per cent of its outstanding capital stock.

I am summarizing a number of comments.

Will you tell me what assumption you made and what the source of the assumption was as to financial assistance during this period to TWA from Hughes Tool Company?

A. Well, we were advised by Cahill, Gordon that we could not assume, for the purposes of our report, that the airline could look to Hughes Tool Company or to any 75 per cent stockholder for financial assistance.

The Special Master: Is that a change in your prior testimony?

The Witness: No, sir, I do not consider it so.

The Special Master: I don't quite get that because I thought you made it clear that you did not assume it one way or the other. Now you are saying that you did assume that there would be no [Tr. 4439] financial assistance.

The Witness: Well, maybe I should restate my answer.

We were advised by Cahill, Gordon that we could not assume that TWA could look to Hughes Tool or any major stockholder for financial assistance.

I don't think that that conflict with—

The Special Master: Does that mean that you assumed that there would be no assistance from major stockholders, financially, in any of this financing program?

The Witness: That's what it means, yes, sir.

The Special Master: I got a different impression from your prior testimony.

Mr. Tenney: Perhaps I can clarify it with a couple of more questions, Mr. Brownell.

Q. How was TWA to finance its program?

Mr. Leisure: I don't understand the question, your Honor.

The Special Master: I don't either, but we will allow the answer and see—

Q. Will you restate—

[Tr. 4440] The Special Master: —subject to striking.

Q. Will you restate the question which you were investigating in the course of preparing this report?

A. Well, the question was whether in our opinion TWA out of its own resources could finance this capital expenditure program. And we were advised that TWA—we were advised that we could not assume that TWA would have financial—could look to the Hughes Tool Company for financial assistance.

The Special Master: Would you still make the same answers to Mr. Leisure's question of a few moments ago that if you had known that Hughes was going to take up its share of the financing as I understood you to say it would not have made any

difference in your recommendation? Would you still stand on that?

The Witness: I think I'd have to know which specific question of Mr. Leisure's that you are referring to, Mr. Brownell.

The Special Master: The hypothetical question.

The Witness: The first one?

The Special Master: Yes, the first one say.

[Tr. 4441] The Witness: I would certainly still stand on that answer, yes, sir.

By Mr. Tenney:

Q. Is there anything inconsistent with your assuming that TWA could not count on financial assistance from a 75 per cent stockholder with a 75 per cent stockholder participating in any appropriate portions of your financial program?

Mr. Leisure: I object to the form of the question.

The Special Master: Do you want to try and rephrase that?

Q. Mr. Morehouse, there seems to be some confusion here, I think, as to what you mean by your answer to the last few questions.

Would you comment on whether a corporation which has a major stockholder needs to rely on assistance from that major stockholder in order to develop its own financial program?

A. Well, we assume that the subject corporation, the subsidiary corporation—

Mr. Tenney: Mr. Brownell, I think my last question has simply added to whatever confusion exists. Maybe I might try again.

[Tr. 4442] The Witness: It certainly has with me.

The Special Master: That makes it unanimous, I guess.

Q. Would it be inconsistent, Mr. Morehouse, with the program that you have set forth in your report for a 75 per cent stockholder, if there was one, to take up its proportionate share of the offering?

Mr. Leisure: I have the same objection as to form with this consistency. I don't know whether he is an expert on consistency or not, but I think the question is objectionable in that form.

Mr. Tenney: The offering was made in May of 1955 and that is the offering I am referring to, if that is the objection he is making.

Mr. Leisure: I am objecting to asking whether things are consistent. That does not seem to me to be a proper way to frame a question.

Mr. Tenney: I will reframe the question. We are really only trying to get clarification, I think, of a very simple point.

Q. Have you assumed in the preparation of this report that a 75 per cent stockholder, if there was one, was precluded from taking up its proportionate share [Tr. 4443] of the preemptive offering that you have recommended in May of 1955?

A. We have not.

Q. Would there be any change in the program which you have recommended if a 75 per cent stockholder, if there was one, had participated in proportion to its stockholdings in that or any similar preemptive offering?

A. No, sir.

The Special Master: I think that is probably enough to clarify it.

I will state what my understanding of the testimony is and then if counsel on either side want to comment or certainly if the witness wants to correct my impression, he is welcome, but I have understood that in preparing the report you did not take into consideration whether or not a controlling stockholder would have made any financial commitment in connection either with the equity or the debt financing. And when you were asked whether your report would be changed if there had been such a binding commitment from such a major stockholder to take up its full share on a preemptive offering you said that would not change your report in any respect.

[Tr. 4444] That's my understanding of the substance of the testimony.

Mr. Tenney: That's my understanding of the testimony, too, unless Mr. Morehouse wishes to change it.

The Witness: No, I don't want to change it.

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Excerpts From Testimony at Damage Hearing of Edward L. Wemple

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[Tr. 4495] Q. Those are all the people in the Cahill firm with whom you had discussions of one kind or another in the course of the preparation of your report?

A. Those are the ones that I can remember at the moment. There may have been others.

Q. Did you, in the course of the preparation of your report, consult with any TWA personnel?

A. Yes, sir.

Q. With whom?

A. James Cotter, George—

Q. Would you identify who he is, please?

A. James Cotter is in the Finance Department.

George Miller also in the Finance Department.

Jerry Himmelberg, also in the Finance Department.

Q. You had better spell that.

A. Himmelberg, H-i-m-m-e-l-b-e-r-g. I think the first name is Jerome.

Robert O. Jones, also in the Finance Department.

Vernon Ratcliff—

Q. Would you spell that, please?

A. R-a-t-c-l-i-f-f, if my memory serves me correctly.

Q. Is he in the Finance Department also?

A. No. He is Schedules and Planning.

[Tr. 4496] Mrs. Jean Valensky, also Schedules and Planning.

Q. Would you spell that, please?

A. V-a-l-e-n-s-k-y. Some people in Kansas City: Mr. R. W. Chambers. He is also in the Finance Department. Mr. John Tucci, also in the Finance Department. There are various other people whose names I cannot bring to memory at the moment. Back in New York City, Mr. John Logan, who is in Schedules. Mr. Thomas Kelly, Scheduling. Mr.

James Kerley, vice president—finance. And unquestionably there were others whose names do not come to mind at the moment.

Q. What was it that you obtained in connection with your studies from people in the Finance Department of TWA?

A. Generally speaking, it was information on locations of data pertaining to financial results from operations, and also explanations of the methods in which the information was put together.

Q. Put together by the TWA staff?

A. Yes, who prepared the statements.

Q. Is this true with respect to all of the people [Tr. 4497] you named in the Finance Department? It was all for the purpose of determining where data was and getting explanations from them as to how the data was assembled?

A. I believe that is a correct answer.

Q. Did any of the people in the Finance Department or anybody else who you may not remember whom you consulted supply any of the approaches or theories which you followed in connection with the preparation of your report?

A. No, sir.

Q. That was entirely your own responsibility?

A. The approaches and theories were entirely our own.

Q. What about the people in Scheduling and Planning whom you consulted, what contribution did they make to your work?

A. There again, it was primarily for advice as to where we could find operating statistics for TWA and other airlines.

Q. That was merely a location of material?

A. Advice as to where to find the information; that's correct.

Q. Did any of the people in Scheduling and Planning whom you mentioned or any others who you may not have [Tr. 4498] mentioned, make any contribution to the principles upon which your report was based?

A. The principles were our own development.

Q. Did you, in connection with the preparation of your report, consult with persons other than counsel and TWA personnel?

A. I presume you mean outside of our own firm?

Q. Yes, certainly.

A. I have no recollection of going outside of TWA, counsel and our own firm.

Q. As I understand it—and correct me if I am wrong, Mr. Wemple—your engagement was of the character where it was left to you to determine the techniques to be followed in preparing your reports; or were you guided as to what techniques to follow?

A. The techniques or systems we used for developing the estimates of changes in financial results that would have been the result of these additional aircraft were our development.

Q. Did you receive any directions from any of the people with respect to how you should develop your techniques?

A. A number of people expressed ideas as to how we should develop particular answers.

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[Tr. 4508] • • • Q. The decision as to the form that Exhibit 4C-1 for identification took, as I understand your testimony, was made by you?

A. Yes, sir.

Q. Is there any writing that you received from anyone outside your firm as to the form of Exhibit 4C-1 for identification?

A. Not to my knowledge.

Q. In Exhibit 4C-1 you adopt certain various approaches with respect to each of your chapters.

Were any other approaches tested by you in connection with any one of those chapters?

A. Yes, sir.

Q. Take them chapter by chapter and tell us what other approaches were tested by you?

A. My recollection is that for Chapter II which—

Q. How about Chapter I?

A. No. Chapter II which relates to TWA having received six additional B-331 long-range intercontinental Boeing aircraft, which were delivered to Pan American; in fact, we first went through an exercise of completely rescheduling TWA's International Division operation for one of the periods in which it would have been materially [Tr. 4509] different as a result of having the additional aircraft. And we rejected that particular approach to the thing as being too complex to possibly be followed through to a reasonable conclusion.

Q. Was that decision your own—

A. Yes, sir.

Q. (continuing) —not to follow it as too complex?

A. Yes, sir.

Q. Had you submitted the results of that approach to anyone?

A. Yes, we advised Cahill, Gordon of the indicated results from that approach.

Q. When you say "Cahill, Gordon," do you mean Mr. Tenney?

A. Tenney, Ordover, Cox.

Q. When you say "Cahill, Gordon," you are speaking primarily of Mr. Tenney, Mr. Ordover and Mr. Cox, but Mr. Tenney being the principal one?

A. Excuse me. Mr. Tenney was the principal. Also a Mr. Dunham, while he was a member, while he was associated with that particular firm.

Q. He is no longer associated with this firm?

A. That is correct.

Q. Do you recall when he ceased to be associated [Tr. 4510] with the firm?

A. One or two years ago.

Q. But you did present to Cahill, Gordon—

A. Yes, sir.

Q. (continuing) —the results of this other approach?

A. Yes, sir.

Q. Did you try any further approach with respect to Chapter II?

A. Not to my knowledge, no. I do not recall.

Q. Which approach did you try first?

A. The one I just described to you.

Q. The one which you rejected as too complex?

A. That's correct.

Q. After that, you tried the approach you presently have in your report?

A. That's correct.

Q. Where are the papers which deal with that approach?

A. They have been destroyed.

Q. They have been destroyed?

A. Yes, sir.

Q. How did they happen to be destroyed, Mr. Wemple?

A. The Cahill, Gordon representatives directed us [Tr. 4511] to destroy drafts which were not used in the final report and analyses which were not used in our final report.

Q. How about Chapter III? Did you try any other approach for Chapter III?

A. Chapter III relates to the earlier receipt of B-131 and B-331 aircraft. No, the analysis system used in this

Chapter is the one we have always used for this particular study.

Q. How about Chapter IV, did you try any other approach?

A. No, sir.

Q. And Chapter V?

A. The same answer, no other approach.

Q. Did you prepare a prior report based on your other approach with respect to Chapter II?

A. I don't recall one. There was definitely not a formal, signed, submitted report.

Q. I do not mean a formal one. A draft of a report.

A. That was what my answer was. I don't recall having put together a draft on it.

Q. What did you submit to Cahill, Gordon in connection with the prior report approach?

A. I showed them our working papers.

[Tr. 4512] Q. And the results that you obtained as a result of those working papers?

A. That's correct.

Q. Do you have your working papers handy, available to you now?

A. They are not at hand. We have working papers which support these Exhibits 4B and C.

Mr. Hayes: I have a working paper here which was produced in the course of the last several months from Folder 19, check on advertising and publicity expense. I find no number on it, but I do find a date 9/16/65, with I think the initials BRC, if I can make these out accurately. Attached to it is a further sheet from the same folder of April 14, 1965. May I have these papers marked for identification?

(Working papers, two, from Folder 19, bearing date 9/16/65, marked Defendants' Exhibit 203 for identification as of this date.)

By Mr. Hayes:

Q. Do you recognize Exhibits 203 for identification as one of the work papers that you use, Mr. Wemple?

[Tr. 4513] A. I recognize it as one of our working papers.

Q. I refer you to the long sheet, second page. There is a Footnote D, I think it is—this Xeroxing did not come out as clearly as I wish it did.

A. It sure didn't, did it?

Q. It reads, as I understand from Exhibit 2: "Schedule 3 of 3/4/65 draft of damage claim testimony."

A. Yes, sir.

Q. Can you identify the 3/5/64 draft of the damage claim testimony?

A. I don't quite know what you mean by "identify" it.

Q. Can you tell us what it was? To what is that reference?

A. It was a draft of a preliminary edition of this report.

Q. To what extent did it differ from the report now before us?

A. I have no idea.

Q. Do you have the work papers for the 3/4/65 draft?

A. Only insofar as the work papers are identical with the work papers for this particular report.

Q. Insofar as they are not identical, they, too, [Tr. 4514] have been destroyed?

A. Yes, sir.

Q. What is the reference toward the middle of that long page, under 1961, to Tillinghast, 4/17/61?

A. I expect that's the date Mr. Tillinghast took over with TWA.

Q. I am sorry?

A. I expect it is the date at which Mr. Tillinghast became president of TWA.

Q. When were these prior work papers destroyed?

A. Over the last several months.

Q. Can you be more specific?

A. Let's see. Our report was dated May 2, 1966, and as soon as we had finished preparation of that report, we then reviewed our working papers and discarded those which were no longer pertinent to this report.

Q. That was after you had received the instructions to destroy them?

A. Yes. We had gotten the instructions before that time. I am pretty sure we didn't actively work on it until we finished the report.

Q. When did you finish this report?

A. The latter part of April.

Q. What discussion, if any, did you have with [Tr. 4515] Cahill, Gordon representatives with respect to the destruction of the work papers?

A. None. If I understand your use of the word discussion.

Q. Was there any conversation in which you engaged with the person who gave you the instruction?

A. The instructions, generally speaking, were to destroy working papers and drafts that were not used directly in this report, and other than to make sure that we understood that those referred to our various files of data analyses as well, that was about the only discussion there was on it.

Q. What reason was given you for destroying the other work papers?

A. So that the cross-examination which would be made of me respecting this report would be limited to the material that went into this report.

Q. Was there any other reason given?

A. No.

Q. So that if the cross-examination went into prior approaches that you may have made, as you did with Chapter II, you would not have the data to answer the questions, is that right?

A. And time would not be taken to answer the ques-
[Tr. 4516] tions.

Q. Whether the time was important or not, you would not be able to answer the questions?

A. That's a natural outcome of destroying the working papers.

Q. Does the destruction of work papers accord with the practice that you ordinarily follow when you prepare reports?

A. We often follow that practice of discarding the work papers where the analysis is not used for the final answer and report.

Q. Do you destroy them before the final report is acted upon?

A. We destroy them when the final report is submitted.

Q. Immediately you destroy work papers of all other prior approaches?

A. We often destroy work papers of other prior approaches in the course of what we call filing the working papers, which is done after the final report is submitted.

Q. You never keep work papers so that whoever retained your firm would be able to be advised as to the results of other approaches you may have used?

A. We sometimes keep work papers of all approaches [Tr. 4517] used in a study.

Q. As to this particular report, you knew that you would be a witness testifying with respect to it, did you not?

A. With respect to this report, yes, that is correct.

Q. Did it enter your mind or did counsel suggest to you that there might be inquiries as to other approaches you used?

A. Yes, sir.

Q. Did you suggest to counsel that it would be wise to have your work papers on other approaches so that you could answer counsel's questions?

A. No, I did not suggest that to counsel.

Q. You did not suggest it?

A. No.

Q. You merely wanted to cut it short, is that it, Mr. Wemple?

A. I was merely following counsel's advice.

Q. At any rate, we don't have the benefit of your prior working papers, except insofar as they contribute to the existing report.

A. They are not available.

• • • • •

[Tr. 4685] Q. It is TWA plane No. 7731.

Taking out those 28 days, that plane was out of service —24 days—pardon me—one still does not arrive at 6.6, does one?

A. That's correct.

Q. One arrives at 6.9.

A. That is correct. There are no doubt other variations that are not known to me at the moment which were used in the calculation.

Q. Do you know how TWA reported to the CAB on its utilization of 131s during the year 1959?

A. I don't know offhand. I do know that they did report.

Q. Are you familiar with the form T3 which every airline must report?

A. Yes, sir, I know of those.

Q. Let me ask you if the way of arriving at utilization is to divide the total number of aircraft days for the year by the number of days in the year?

A. The—I guess I don't quite understand your question. Is the way who would arrive at aircraft utilization? And I am not sure about the use of your term "utilization." Please expand on the question.

• • • • •

[Tr. 4765] • • • Q. What are the other advantages that the fan jets have?

A. The fan jet has a larger takeoff power so that it can get off the runway in a shorter distance. It is reported to be quieter in the vicinity of airports, and under certain circumstances has a higher cruising speed.

Q. That is after it gets on its cruising speed?

A. That's right.

Q. On page 3 of your report you state that Cahill Gordon gave you some additional assumptions with respect to additional jet aircraft, and then you have a table. Are both the upper and part of that table assumptions given you by Cahill Gordon?

A. The upper part of the table is the Cahill Gordon assumptions that were given to us as set forth in II, III, IV and V on page 1.

Q. What about the lower part of the table?

A. That is a listing of the aircraft fleets that would be unchanged in this reconstructed operation.

Q. Is there implicit in this table on page 3 that even with a 63 plane fleet TWA would still have leased four 720-Bs and purchased eighteen 131-Bs.

[Tr. 4766] A. That is my opinion.

Q. I asked you if there was an implicit assumption that either there is or there isn't.

A. It is my opinion. I made that assumption.

Q. You never stated that in your report, did you?

A. I list them there as things which are unchanged. I list elsewhere the things which are given to us by Cahill Gordon.

Q. This is all one table, Mr. Wemple. At least it looks like it to me as you presented it. And the whole table, as introduced by you, gave us assumptions.

A. I call your attention to the Footnote A on the upper half of the table—

Q. That is right.

A. —given to us by Cahill Gordon. The other one has a completely different subheading "unchanged numbers and dates."

Q. So that you assumed that even with the 63 plane and even if it had been received by the dates that you were given to assume receipt, TWA would nonetheless have ordered four 720Bs and eighteen 131Bs?

A. Yes, sir.

Q. On what did you base that assumption?

[Tr. 4767] A. The B-131B aircraft fleet was ordered by TWA the last part of 1961—it may have been ordered before then. But at any rate they came in March 1962, and were used in conjunction with fifteen 131 aircraft, and the following year fifteen 331 aircraft—let me get my numbers right. Excuse me. And the following year twelve 331 aircraft and five 331-B aircraft. So that the latter part of 1963, TWA was operating essentially the 63 plane fleet plus these eighteen B-131B aircraft. The B-720Bs were leased

in July 1961—started July 1961 and were returned in the fall of 1962, roughly coincident with TWA's receipt of the entire B-131B fleet. So, in other words, when TWA got its B-131B fleet, it released the 720-B four aircraft.

Q. You say here that they were returned in September of 1962?

A. No. Which were?

Q. In the table on page 3.

A. The table on page 3 simply says they were returned in—

Q. September 1961.

[Tr. 4768] A. No, that is the date they were received.

Q. I am sorry. Wait a second.

A. And the return date is illustrated on Exhibit B.

Q. I'm sorry. My mistake. They were actually returned partly in September and partly in October of 1962, were they not?

A. That is correct.

Q. When TWA ordered the 131-Bs, it had, in fact, only a 47 plane fleet, did it not?

A. And it had on order to my knowledge the additional 331-B—sorry—and it also ordered the B-331B aircraft, five of them. And before the end of 1963, it obtained six more Convair 880 aircraft.

Q. I am speaking of 1961, Mr. Wemple. Did TWA place an order with Boeing in the first half of 1961?

A. I don't know.

Q. You do not know?

A. No, sir. I do not have information available on when those orders were placed.

Q. Were you a consultant to TWA at that time?

A. I was engaged by TWA in the fall of 1961 as I remember it to do a study of their forecast. I think it was August, but I'm not really sure of that date.

• • • • •

[Tr. 4841] • • •

The Special Master: I will hear Mr. Tenney.

Mr. Tenney: First, Mr. Brownell, I was not able to follow Mr. Hayes' numbers. I cannot address myself to them. I would have to analyze the numbers that he used in order to understand the comparisons that he is making. I don't think that that is particularly significant here. I think what is significant is the use which Mr. Hayes apparently proposes to make here of these, as to which I have read very carefully his comments on Tuesday, and I don't find anything that changes that in what he has just said although I may have possibly misunderstood him. I have three points I would like to make on the line of inquiry that Mr. Hayes now intends to pursue, as I understand it. First, it seems to me quite clear that on Mr. Hayes' own showing on Tuesday that whatever these documents prove or do not prove they are not appropriate subject matter for cross examination of this witness on his direct examination, because they are outside the scope of his direct testimony. [Tr. 4842] In answer to Mr. Hayes' questions on Tuesday, Mr. Wemple expressly said that the possibility of TWA acquiring various different kinds of aircraft did not enter into the calculations of his reports. The report itself, TWA Exhibit 4C, all four volumes of it, in spite of Mr. Hayes' attempt for the last two days to make it appear that he cannot understand it, is quite clear, and Mr. Wemple has himself described it quite precisely as an analysis of whether or not TWA would have made a greater operating profit if it had had certain specific additional jet aircraft at certain specific times, and his

analysis results in a very clear demonstration that it would have made a greater operating profit and a calculation of how much. It does not address itself, nor has Mr. Wemple expressed any opinion on whether TWA would have been better advised to get still different jet aircraft from any particular source.

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[Tr. 4854] A. And at that time several of the other people I mentioned, including Mr. Smock, worked for Mr. Rummel.

Q. How about him personally, did he participate in the preparation of it, so far as you know?

A. I have no direct knowledge of that. It was done by his people, to my knowledge.

Q. And Mr. Rourke?

A. I have no specific recollection of being involved at that time with Mr. Rourke in this connection.

Q. Were there any other persons connected with the preparation of Defendants' Exhibit 213, other than you and your associates and TWA personnel?

A. I have no first-hand knowledge on that subject.

Q. You mentioned in your letter, Defendants' Exhibit 214—before I come to that, I have a question begotten by something Mr. Tenney said. Do I understand that Exhibit 213, as handed to you, does not accord with your recollection as to the exhibits as to which you wrote Defendants' Exhibit 214?

A. As I looked through this Exhibit 213 briefly during the lunch break, there were tables in here which did not look familiar to me. There were others that did [Tr. 4855] look familiar. And not anticipating that this study was going to be subject for cross-examination, I have not recently thoroughly reviewed our working papers or this

particular 1962 study. I remember seeing some papers in our files that looked like some of these exhibits having to do with revenue expenses. I do not—I have not seen some of the other things in recent years.

Q. Would it be a great burden—do you have a copy of what Defendants' Exhibit 213 purports to be in your office?

A. Not to my knowledge.

Q. You do not?

A. No. As an individual package like that? We may have. I have no recollection of it. I have not seen one recently.

Q. The reason I ask is that if there is anything in Defendants' Exhibit 213 which should not be there, I would like to know.

A. I would be pleased to look through our papers and identify all parts of 213 that we do have in our office.

Q. Fine.

Mr. Tenney: May I suggest on that that [Tr. 4856] it is not really a question as to whether there is something in this document that should not be there? I don't think that we have any question but that this document, 213, is what it purports to be. It is a document that contains financial forecasts for the period 1962 to 1965, labeled Plans 1, 2 and 3. It was apparently prepared by TWA personnel and inside it on its various pages it says various things, and as far as I know, they are authentic. The problem is that you cannot assume that particular pages of this document are pages that Mr. Wemple is familiar with or that he had any knowledge of in connection with his letter. I think you will simply have to raise

whatever particular points in it you wish to ask him about and find out.

Mr. Hayes: If we get to any such page, Mr. Wemple can always so state.

Mr. Tenney: Yes.

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[Tr. 4862] • • • Q. The question was what your recollection was as to why Defendants' Exhibit 214 was confined to a review of Plan 3.

A. It is my recollection that at the time we completed our work on this review, that Plan 3 had been selected or adopted as the plan that TWA was most likely to follow.

Q. What information did you get in that regard, Mr. Wemple, and from whom?

A. I do not remember specifically. My guess is that the instruction probably came from Mr. Leslie or Mr. Rummel.

Q. Were you advised as to who participated in the decision to follow Plan 3?

A. No, sir.

Q. You have no information at all as to that?

A. None whatsoever.

[Tr. 4863] Q. If you will, look, please, at Defendants' Exhibit 213 and turn to page III-1. It is a single sheet and it is headed "Equipment Program."

A. Yes.

Q. You have it before you, Mr. Wemple?

A. I do.

Q. That page sets forth the equipment program assumed for Plan 3.

So far as acquisition of any new equipment is concerned, it is concerned solely with fan jets, is it not?

A. That's all that are listed, yes, sir.

Q. I will make a statement and you can correct me if I am wrong. I have found that in none of the equipment programs, and those for Plans 1 and 2 appear respectively at pages I-1 and II-2 call for any acquisition of 880s or for any acquisition of non-fan jet equipment.

A. Do you wish me to look at those pages and—

Q. Is that your recollection or do you want to check?

A. I have no recollection one way or the other on that.

Q. Do you want to check?

[Tr. 4864] A. What are the pages again?

Q. I-1 and II-2.

Mr. Tenney: Off the record.

The Special Master: Off the record.

(Discussion off the record.)

The Witness: As to the Caravelle equipment program, Sheet II-1, I have no knowledge or information as to whether those were fan jet engines or not. And on Sheet I-1, only fan jet aircraft are listed. And on Sheet III-1, only fan jet aircraft are listed.

[Tr. 4865] Q. Was your letter, Defendants' Exhibit 214 in any way an indication of an opinion by you, Mr. Wemple, that Plan 3 was the best of the plans?

A. I do not read anything in there that would indicate that.

Q. Was it or was it not?

A. It was not intended to be.

Q. Did you at the time in the latter part of 1963 know about the acquisition of six 880s by TWA?

A. At what time?

Q. At about the time they were acquired in the latter part of 1963.

A. At that time, we were working for Cahill Gordon. My guess is that I either read about it in the newspapers

or heard about it. I have no specific knowledge of any particular instance of learning about the acquisition of the 880s in the latter part of 1963.

Q. You had no discussions with TWA personnel concerning it?

A. No, not to my recollection.

Q. I don't think I asked you this this morning.

Mr. Hayes: Do you have Mr. Rummel's Exhibit 2 before you?

Q. I meant to ask you but I cannot remember having [Tr. 4866] asked you. Will you turn to Annex D of Defendants' Exhibit 2 for identification? In the course of the preparation of your report here—

A. Excuse me. Which report?

Q. I mean Defendants' Exhibit TWA 4C—

A. B and E.

Q. —Volumes I and IV, I think.

A. Yes, sir.

Q. —did you have delivered to you at any time Annex D of TWA Exhibit 2?

A. I don't believe so.

Q. Was the text of Mr. Rummel's prepared testimony which is the exhibit itself delivered to you at any time?

A. No, sir.

Q. So you never read it?

A. That is correct.

Q. Have you read Mr. Rummel's testimony in this case?

A. No, sir.

Q. Or had any report given to you as to the substance of it?

A. Yes, I have heard from time to time of things that it covered.

[Tr. 4867] Q. Things relating to your report here?

A. The development of the early delivery dates for certain of the aircraft I understood was developed in Mr. Rummel's testimony.

Q. Have you been told the substance of his oral testimony in that connection?

A. No, sir.

Q. You were not?

A. No, sir.

Q. All you were told is that he covered the subject in his cross-examination?

A. That is correct.

Q. Is that the substance of it?

A. Yes.

Q. Did you at any time prior to taking the stand here have brought to your attention the prepared statement of Mr. Connelly in this proceeding?

A. Yes.

Q. Did you see that?

A. I believe I have read it.

Mr. Hayes: That is TWA Exhibit 3, isn't it?

Mr. Ordover: Yes.

The Witness: Excuse me. My recollection is that I have read a state- [Tr. 4868] ment by Mr. Connelly. Whether that is specifically TWA Exhibit 3, I do not know.

Mr. Hayes: No, I understand you do not know that.

Q. When was that that you read it, Mr. Wemple?

A. Would it have been a year, a year and a half ago?

Q. I don't know.

A. I don't remember any closer than that.

Q. Substantially before it was submitted in this action?

A. Prior to May 2, 1966. How much before, I have no recollection.

Q. Did you use any portion of Mr. Connelly's statement in connection with the preparation of your report in this proceeding?

A. My vague recollection is that Mr. Connelly's statement had some what we call revised delivery dates which were used by us at that time and may be the same as we now have in our report.

Q. They are the same as appeared I can tell you—

A. Thank you.

Q. —in Mr. Rummel's prepared statement.

A. All right.

[Tr. 4869] Q. And they also conform with delivery dates which appear in your report?

A. Then those are the ones.

Q. Have you reviewed Mr. Connelly's testimony in this proceeding?

A. No, sir.

Q. Have you received—

A. Unless it was the same as the statement I read earlier. I guess it was not.

Q. I am speaking of his oral testimony.

A. No, sir.

Q. Have you had any report given to you as to the substance of Mr. Connelly's testimony on cross-examination or direct examination in this proceeding?

A. As I recall, it was my understanding that he discussed the subject of earlier delivery of various Boeing aircraft to TWA. I have no other information than that.

Q. That is the sum total of the information given you?

A. Yes, sir.

Q. You testified that you had seen the report of the Speas Associates.

A. Yes, sir.

[Tr. 4870] Q. Did you read the testimony of Mr. Speas in this proceeding?

A. No, sir.

Q. Any report as to the testimony of Mr. Speas in this proceeding?

A. No, sir.

Q. Did you read the report that was put in in this proceeding through the witness Mr. Morehouse?

A. I have read parts of that report. It is a very large report.

Q. Are you familiar with the scope of it?

A. Yes, sir.

Q. Have you read enough of it to feel familiar with it?

A. I am very modestly familiar with it, not thoroughly.

Q. Did you read any of the cross-examination or redirect examination of Mr. Morehouse in this proceeding?

A. I saw a—I think it was about one paragraph of Mr. Morehouse's statement respecting cross-examination, in the course of the cross-examination.

Q. Do you recall what subject was being discussed at that point?

A. It was the general advantage or disadvantage of [Tr. 4871] owning or leasing aircraft.

Q. You are familiar with the testimony he gave in that regard?

A. I remember his conclusion.

Q. Do you recall what it was?

A. That he was in favor of an airline owning aircraft.

Q. Is there anything else in his cross-examination that was called to your attention?

A. No, sir.

Q. Have you received any other report of the content of the cross-examination or redirect examination of Mr. Morehouse in this proceeding?

A. It has been—it is my understanding that his cross-examination covered the general scope set forth in his written report. I know no details, nothing specific.

Q. You were advised orally generally of the scope of the cross-examination, is that correct?

A. As being approximately that set forth in his report.

Q. Have you received copies of the Price Waterhouse reports, Exhibit 7 with various subdivisions?

A. I have copies of the Price Waterhouse report. I don't know them as Exhibit 7. I presume they are.

[Tr. 4872] Q. We will take that for granted.

A. My copy is not marked.

Q. Assume it is Exhibit 7.

A. Yes, sir.

Q. You have copies?

A. Yes, sir.

Q. Have you read those copies?

A. I have been over those copies. I have not read them in great detail.

Q. You are familiar with the manner in which they were prepared?

A. I am.

Q. You did mention that you had some early delivery days or you recall some early delivery dates attached to Mr. Connelly's prepared statement.

Did you make any attempt whatever to verify in any way these earlier delivery dates set forth in that statement?

A. No, sir.

Q. Have you any knowledge as to negotiations between Boeing in 1955 with either Pan American or American looking forward to the purchase by those airlines of jet aircraft?

A. I vaguely remember reading in the public press [Tr. 4873] about various airlines talking with Boeing about obtaining passenger carrying jet aircraft.

Q. In connection with the preparation of your present report, have you had any information given concerning such contract negotiations?

A. You say such contract negotiations between Boeing on the one hand and either American or Pan American on the other? I have been given general statements which included statements to the effect that Boeing and—was negotiating with Pan American and American Airlines—excuse me. Let me correct that statement. I have been told that Boeing was talking with Pan American and American Airlines in 1955 about those airlines purchasing Boeing jet aircraft.

• • • • •

[Tr. 4898] • • • Q. Is it your testimony that the planes that you set forth on page 30, for example, as having had plane miles reduced are the same planes that are shown in Annex F to Mr. Rummel's statement as having been retired?

A. That was and is not my testimony.

My testimony is that TWA had capability of operating the remaining amount of piston plane miles that would have been required by this plan of operation with the reduced fleets after this earlier retirement.

Q. You do not say that any place in your report, do you, what you just said to me?

A. Our report is premised on that calculation. Our report does not deal specifically with the earlier retirement of the piston aircraft.

Q. But you nowhere in your report set forth what you stated a moment ago that it was based on the conclusion or assumption, I have forgotten your language that TWA would have had sufficient pistons available to operate the necessary piston plane miles?

A. This was not the subject of our assignment. We made the back-check as a proposition of being careful and it came out with a satisfactory answer.

[Tr. 4899] Q. Do you have any work papers on that?

A. I don't know.

Q. Because there is nothing in the report on the subject, they too have been destroyed.

A. I don't know whether we have work papers on that particular item.

Q. Will you check and see if you have work papers on that subject?

A. Yes, sir.

Mr. Hayes: Off the record.

(Discussion off the record.)

Mr. Hayes: May we recess for five minutes?

The Special Master: Yes.

(Short recess taken.)

[Tr. 4900] The Special Master: Proceed.

The Witness: May I please correct an impression which I left indavertently. Efficient counsel has given me copies of all of the TWA exhibits. Therein is a copy of Mr. Rummel's testimony. I have not read it. We do have it. I have not read it.

By Mr. Hayes:

Q. Do you know whether they were read by anyone working on the report under your supervision?

A. No, sir, they came after the—our report was finished.

Q. My questions were directed to the preparation of the report.

A. No, sir.

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[Tr. 4925] • • • Q. Did you make any study to determine to what extent the 131Bs were either used on segments on which the Convairs might have been used or displaced planes on other segments which displaced planes were, in turn, used on segments? I will break that up. I will start with the first. It is too long a question. Did you make any study to determine the extent of it all to which the 131Bs were used on planes on which TWA could have used the 880?

The Special Master: On routes.

A. Shown on the table at the top of page 69, in October, 1963, TWA was operating 26 Convair 880 jet aircraft between 36 pairs of cities. And those 36 pairs of cities also received service as shown on the top of page 69 from a certain number of B131B flights and flights with B131s and flights with the B331s. And you can see a change in pattern, September 1960, through October—sorry—December 1960 through October 1963, in service to those 36 pairs of cities with various types of jet aircraft.

Q. Is there any similar tabulation in your report or in your work papers showing the data which appears in [Tr. 4926] the table on the top of page 69 on a month-to-month basis?

A. No, sir.

Q. Did you make such a study?

A. We may have made a study on three-month intervals. I am relatively sure we did not make it on monthly intervals. And I am doubtful that we still have it.

Q. It didn't enter into your report so it was destroyed?

A. We show here the part that we did keep—that we did use. The other parts that we did not use were destroyed.

Q. Let me ask you a general question. Laying aside the 63-plane fleet with which your report deals, did you make any study as to the extent to which TWA with other aircraft which it acquired during the period was able to and did service cities that might have been serviced with 880 aircraft?

Mr. Tenney: May I ask if that is limited to other than what Mr. Wemple has already said or could it be so limited?

Mr. Hayes: I never asked him this question. I started to as the second part of a long question and then I split it up and I confined it first to 131Bs and now I am asking him this question [Tr. 4927] generally.

Mr. Tenney: Would you read the question back to me? It seems to me he has said a good deal already and I would like to hear it again.

The Special Master: Read it back.

(The question was read.)

Mr. Tenney: I thought he had already covered it, but if he hasn't, go ahead.

A. I have to qualify my answer because, of course, our report deals only with the 63-plane earlier and et cetera fleet that is set up for our premises. However, if I understand your question correctly, our report does show TWA

history on page 60 and on page 69 and page 59. And there are pairs of cities which were served by TWA with CV 880 aircraft and that were served by TWA with different types of jet aircraft as well prior to the times the full fleet of 26 CV 880s became available. If I may be specific, to answer what I understand your question to be, among these —shown on page 69, among these 36 pairs of cities that received service in October 1963 with 26 CV 880 aircraft, amounting to 44,000 daily westbound plane miles, those same pairs of cities received service in March 1962 with 4900 westbound [Tr. 4928] plane miles of B331 aircraft. When the additional CV 880 became available in October, the B331 plane miles scheduled for those pairs of cities was reduced from the 4900 to the 1100. If I understand your question, that is a pertinent answer.

Q. It is not a pertinent answer to the question I thought I was asking you. Let me try it this way: Did you make any studies of any of these pairs of cities as to whether with the aircraft that was assigned to them the pairs of cities were adequately serviced at any of the periods where you have tables?

A. We did not make a study as to whether the service to a pair of cities was adequate or otherwise.

Q. You are giving us an opinion here as to supposed damages without determining first whether or not the service in fact was adequate.

A. My report deals with whether TWA would have made more operating profit from the operation of these aircraft.

Q. If you indulge the assumption, if you will, with me, Mr. Wemple, that the service to the cities was adequate, at any one of these times, at the time of any one of these [Tr. 4929] tables, are you saying that because arithmetic does it they would have made more money with more planes?

A. I make no representation or statement as to whether or not the service to those cities was adequate. I cannot indulge that assumption. I have no basis for doing it.

Q. I asked you to. You indulge all sorts of assumptions for plaintiff. I ask you to do one now for defendants.

Mr. Tenney: Will you say what you mean by adequate, Mr. Hayes.

Mr. Hayes: I mean what you meant in the complaint. That's exactly what I mean.

Mr. Tenney: I don't think that is a proper question.

Mr. Hayes: You used the phrase that they had an inadequate number of airplanes. So I will use exactly the same or the opposite of it that they had an adequate number of airplanes.

Mr. Tenney: I think in order to get an answer from this witness, you should and will have to state what you mean by adequate.

Mr. Hayes: I mean whatever you mean. You can define the term, if you want.

[Tr. 4930] Mr. Tenney: It is your question, Mr. Hayes.

Mr. Hayes: It is your term and I am adopting it.

A. From the point of view of maximum profit, TWA uld achieve more profit by having the additional aircraft r the revised service to these pairs of cities which they d increase when they got the additional CV 880 aircraft. om that point of view, I believe it is perfectly correct to nclude that this report is based on inadequate service to ese pairs of cities.

Q. Did you make any study of the pairs of cities to arrive at the conclusion that the service was adequate or inadequate?

A. From the point of view of operating profit to TWA, yes.

Q. No. Did you examine the service actually rendered, the number of passengers carried, the amount of competition that was met? That is the kind of study I mean, Mr. Wemple. Did you make any such study?

A. That study was not within the scope of our engagement.

Q. You merely were given an arithmetical task and you performed it; is that it?

A. TWA's record clearly demonstrates that they [Tr. 4931] successfully increased the service to those pairs of cities during this period of time when they were receiving the CV 880 aircraft, and would have made much more operating profit if they had been able to increase the service with this superior aircraft earlier.

Q. It would have—

A. I did review the service in certain instances by other airlines.

Q. Do you have any of your working papers on that?

A. I have none. No, that was a generalized review.

Q. It didn't get into your report, so they are destroyed?

A. It was not involved directly in the calculation.

Q. They are destroyed?

A. That is correct.

Q. We don't have the benefit of them?

A. They are set forth as public information in all airlines schedules.

Q. To what extent did you study on a segment-by-segment basis, either domestic or international the number of

passengers carried between pairs of cities and the services offered by competing airlines between those pairs of cities as well as TWA?

[Tr. 4932] A. At one of the earlier stages in, as I remember, Chapter IV, I did study such data. It did not give a basis for calculation of revised results. It was discarded.

Q. And destroyed?

A. And destroyed.

* * * * *

[Tr. 4937] * * * *Examination (cont'd) by Mr. Hayes:*

Q. Have you any matters on which you desire to report this morning, Mr. Wemple?

A. Yes. You requested letters between TWA and ourselves in connection with the scope of our engagement in the fall of 1961, and I have found those letters. They are being duplicated at the moment. They will be brought in shortly.

Q. We can look at them later.

A. Secondly, you requested me to review my working papers for an analysis I did at one time respecting the adequacy of TWA's piston aircraft fleet after the earlier retirement as stated by Rummel and Speas had been accomplished to perform the piston aircraft operations that TWA would have been obliged to perform in accordance [Tr. 4938] with our damage calculation. I do not have any of those papers. I discarded them once I had made the determination as being of no particular consequence.

Q. When you say you discarded them, you mean they, too, have been destroyed?

A. They are destroyed. I can't find them. I presume they are destroyed.

Q. Is that your full report this morning?

A. That is my full report.

Q. With respect to the 720Bs which TWA leased beginning in July, four of them, and they had all of them by September or October of 1961, did you make any determination as to the length of the segments serviced by those planes?

A. I remember tabulating the flights on which those planes were operated, the pairs of cities served and the length of service—length of segment.

Q. Did you determine what the average length flown per departure was for the 720Bs?

A. I have no recollection whether I did or did not.

Q. Do you have any information which would enable us to determine that?

A. The employees' timetables for that period set [Tr. 4939] forth in complete detail the operation of the 720B. It could be calculated from that information.

* * * * *

[Tr. 4942] The Special Master: It is put out by the company, isn't it?

The Witness: That is correct.

The Special Master: Where is the number of miles? Does that appear on here?

The Witness: No. Number of miles comes from other tabulations put out by various agencies.

The Special Master: Off the record.

(Discussion off the record.)

By Mr. Hayes:

Q. Is the information as to schedules contained in the employees' timetables as of any particular date the same

as the information as to schedules that would be contained in timetables sent to the public?

A. So far as I know, yes.

Q. Are you acquainted with the Schedule T4 to the Form 41 reports?

A. I do not recognize that number, as you describe it.

Q. You do not, therefore, know what is contained in Schedule T4?

A. I do not.

Q. Is there any question in your mind, Mr. Wemple, as to the accuracy of the Form 41s and the schedules there- [Tr. 4943] to that were submitted by TWA to the CAB?

A. I am sure they are prepared with every effort expended to have them accurate.

Q. The Form 41s are sworn to by an officer of the company, are they not?

A. So far as I know.

Q. I want to rephrase a question I put before. Mr. Wier reminded me that I misstated it. I take it the answer to the question is going to be you do not know. That is, as to whether if one uses the Schedule T3s and the Schedule T4s to CAB Form 41, one can calculate the average number of miles per departure of each type of aircraft for any particular period.

A. I do not know.

Q. You mentioned the Boston-Los Angeles flight of the 720B, which I believe you said was the only transcontinental flight that you recalled.

A. That is correct.

Q. Did another plane replace the 720B on that flight when the 720B lease ended?

A. I do not know.

• • • • •

[Tr. 4948] Q. What is inadequate about making a comparison on a miles-flown-per-departure basis?

A. I believe the theoretical problems are obvious that there are so many different pairs of cities that TWA flies between that it is conceivable that TWA could use the 880 aircraft on a certain number of—correction—that CV—correction—that TWA could use the 720B aircraft between certain pairs of cities and by coincidence it could have the same average miles per departure that the CV-880 does record.

Q. Let me try it this way: Were you familiar with TWA's plans as to where they intended to use the 880s?

A. I have read TWA's plans that were set up, I believe, in their documents "Jet Plans and Premises," as to where they planned to assign the CV-880 aircraft prior to their receipt of those aircraft.

Q. Did you follow through as to where they actually scheduled the 880s when they received them?

A. I also am familiar with where they actually used the 880s when they received them.

Q. Did they, to begin with, plan to use the 880s on transcontinental hops?

A. I do not recall any such plan.

Q. Do you know the—

[Tr. 4949] The Special Master: Did you say "transcontinental" or "transatlantic"?

Mr. Hayes: Transcontinental.

The Witness: Excuse me. May I ask for interpretation? You mean nonstop transcontinental?

Mr. Hayes: Yes, nonstop. I am speaking of flights flown per departure. All my questions are directed with that in mind.

By Mr. Hayes:

Q. What was the longest hop on which they planned to use the 880s?

A. I do not remember.

Q. Do you know what the average length of hop per departure was on which they planned to use the 880s?

A. I do not remember.

Q. Did you make any study of that?

A. I reviewed briefly TWA's plans for use of the CV-880 aircraft that were in the records in the period prior to when they actually did receive the aircraft, which would have been the early part of 1960, the latter part of 1959.

Q. When you say you reviewed briefly, would you tell us what you did?

A. I read pages taken from TWA's "Jet Plans and [Tr. 4950] Premises," which showed pairs of cities which they intended to serve with the CV-880 aircraft.

Q. To what extent, if at all, did you use the material you found in "Jet Plans and Premises" in the preparation of your report in this proceeding?

A. I have no recollection of having made any consequential use of that information.

Q. Did you anywhere in your report or in preparation, the work you performed in preparing it, make a comparison between where TWA planned to use the 880s and on what segments, and what, if any, planes they actually used to service those segments?

A. I noted that TWA's full use of CV-880 aircraft was different in a number of respects from the plans set forth in the earlier "Jet Plans and Premises" documents.

Q. When you say you noted that, what do you mean by those words?

A. This was my conclusion from looking at sets of papers which showed both sets of information.

Q. Did you make any tabulation?

A. No, sir.

Q. You just glanced at it?

A. I reviewed it.

Q. And came to a conclusion?

[Tr. 4951] A. And came to a conclusion.

Q. And your conclusion is not recorded anywhere on paper?

A. That is correct.

Q. Does your conclusion enter into your report?

A. The report is, of course, based on TWA using the CV-880 aircraft in precisely the manner in which they did use them.

Q. But did you make a comparison by pairs of cities, for example, between what TWA planned to do and what it actually did?

A. This was the information that I looked at that I have just referred to.

Q. And did not use?

A. And used it to come to a conclusion that they were different and our damage estimates calculation is based on what TWA actually did do.

Q. When you say came to the conclusion that they were different, do you mean that the 880s were scheduled in a different fashion, in fact, than the "Jet Plans and Premises" had called for?

A. There were differences between those two sets of operating plans, one fact and one anticipated.

• • • • •

[Tr. 4974] Q. I notice in 1960 per Exhibit B you show that during the so-called peak period TWA scheduled from

7.5 to 8.1 planes in its international service, all 331s. Did you make any study of the frequencies on which those planes were used and of the destinations they covered?

A. Yes.

Q. Where do I find that study in your report?

A. It is not set forth in our report. The information is of course in the employees' time tables.

Q. Did you tabulate the information? Is there any sheet to which it has been reduced?

A. There is no sheet of tabulation in the report.

Q. What do you mean then when you said you made a study? Do you mean you looked at the employees' time table?

A. And as I recall I made tabulations.

Q. You did make tabulations?

A. As I recall, yes.

Q. Where do I find the tabulations?

A. Those are not in existence.

Q. They too have been destroyed?

A. They have been destroyed as being of no par- [Tr. 4975] ticular consequence. I beg your pardon? Let me withdraw that answer and let me report back to you. I have a glimmer of having seen that in our working papers recently, and I would like to just have the opportunity to check.

Q. All right, will you do so?

A. Yes. Did you have in mind a particular year?

Q. I am talking about 1960. I am going to ask exactly the same questions for 1961, 1962 and 1963.

A. I will look up the answer to all three of them.

Q. What I have in mind is a tabulation showing what frequencies these planes were flown on, with what destinations. I am speaking of transatlantic flights now.

A. Yes, I understand your question.

Q. Did you make any study of what flights were being offered on the same segments that TWA flew during the peak seasons of each of these years by TWA's competitors on those segments?

A. I reviewed such information.

Q. What does that mean, Mr. Wemple?

A. I made sample tabulations throughout that period of flight-transatlantic flights to various cities [Tr. 4976] operated by TWA's competitors.

Q. Where is that tabulation?

A. So far as I know, that tabulation has not been saved, because I did not think it was of material or consequence.

Q. So you destroyed that?

A. It is destroyed.

Q. Did any part of that enter into your report?

A. Our calculation is not on that basis.

Q. To what point did you carry that study of what TWA's competitors were offering?

A. I believe I have already answered that question. Perhaps he could read back my answer to your previous question.

The Special Master: Was the general tenor of your answer that you made tabulation, that means numerical tabulation?

The Witness: Yes, sir.

Q. Did it show the number of frequencies each competitor flew?

A. It showed the number of flights per week to various cities offered by TWA's competitors.

Q. Did it cover all of the transatlantic points to which TWA flew?

[Tr. 4977] A. I remember it covered the principal ones.

Q. Will you define those?

A. London, Paris, Rome, Frankfurt.

Q. Did it cover Lisbon or Madrid?

A. It did not cover Madrid, and I am hazy as to whether my analysis of competitors covered Lisbon to the same degree as I did the other cities.

Q. Did it show the number of aircraft each competitor was operating?

A. No, sir, it showed flights per week.

Q. Just flights per week?

A. Yes.

Q. Was that true of each of the years 1960, 1961, 1962 and 1963?

A. I did for a number of years. I do not recall whether I did it for all of them.

Q. At any rate we don't have that data with which to compare your Exhibit B?

A. That is correct. The data are available in public documents.

Q. Thank you. What was the source you used to accumulate that data or what were the sources?

A. Old airline guides.

[Tr. 4978] Q. You did not consider the information you obtained from that study to be of any relevance with respect to your Exhibit C?

A. Exhibit C is a calculation—excuse me—correction—Exhibit C is a tabulation of the results of our calculation showing average number of additional—of jet aircraft that TWA would have had with the additional and earlier deliveries that are our premises. I do not see how there is any relationship between the service by competitors to par-

ticular European cities and this tabulation which is simply results of a calculation.

Q. Are you saying by that that as long as TWA continued to add planes it will continue to add revenue at a profit regardless of what competitors do?

A. I don't believe I have said that anywhere in this report.

Q. Is that one of the bases necessary to your report?

A. No, sir, it is not.

Q. All you do here is add planes and calculate additional revenues and deduct calculated additional expenses, do you not?

A. I think it is very appropriate to refer to the [Tr. 4979] charts on pages 22 and 24, with particular reference to the chart on page 24 which shows tremendously good correlation historically between the percentage of seats TWA offered in transatlantic service and the percentage of passengers which it achieved in transatlantic service. And that demonstrated correlation over the years 1958 through 1963 is a principal basis for our calculation of the additional revenues that TWA would have obtained.

• • • • •

[Tr. 4987] • • • Q. Did you make any similar study of other airlines operating transatlantically to determine whether their percentage of passengers followed closely their percentage of seats?

A. I remember doing a calculation respecting Pan American. I doubt that I did any others.

Q. Where is that study?

A. That has been discarded.

Q. Destroyed, you mean?
A. Yes.

The Special Master: Do you recall what it showed?

The Witness: Not as good correlation as TWA has achieved, but the more general pattern, as I remember it.

[Tr. 4988] The Special Master: That is for the same year?

The Witness: I don't remember whether I did it exactly the same years. It was within the same period.

Q. In Exhibit C, Sheets 4 and 5 of your report, Mr. Wemple, during the peak season, June through September in 1960, you have a range of 11.6 to 12.4 331s assigned to international service; in 1961 you have a range of 12.3 to 12.5 assigned to international service with, incidentally, 12.8 in October; in 1961 you have a range of—

A. Excuse me. I believe you are reading 1962 now.

Q. 1962, yes. In 1962, you have a range of from 16.2 to 16.7 assigned to international service, and in 1963 you drop to a range of from 15.5 to 15.9 in international service. Did you make any study of any kind as to the routes to which those planes would be assigned?

A. I think I answered a similar question earlier in this proceeding to the effect that our original approach to the premise of six additional B331 aircraft was based on—correction—was actually an effort to reschedule TWA's International Division and to set forth pairs [Tr. 4989] of cities and frequencies.

I believe I also testified that we discarded that approach because it was too complicated and in my judgment not

nearly as good an analysis as the one we have set forth here.

Q. I remember that testimony.

What was complicated about it, such a study, Mr. Wemple?

A. The development of a schedule pattern for an airline is a tremendously complicated assignment because so many different things must be taken into account, such as when you want your departures, when you want the arrivals, crew changes, crew transfers, maintenance of aircraft, utilizing small periods of time for short flights and many other factors.

Q. You would also have to take into consideration what competitors were offering, would you not?

A. Yes, sir.

Q. Did you go that far in your study which you destroyed?

A. We had available to us at that time the schedules of the competitors.

Q. I have already asked you this question with respect to 720Bs and the 880s.

[Tr. 4990] Did you with respect to the 131s make any calculation as to the average number of miles flown per departure for any of the years covered by your study?

A. I do not recall having made any calculation of that figure.

Q. Did you make any such study with respect to the 131Bs?

A. I do not recall having made it.

Q. Do I understand—I think my understanding is accurate—just check me, Mr. Wemple—that aside from whatever may have appeared in the transatlantic study which

you destroyed, you did not make a study as to where TWA in 1961 would have operated 11 jets transatlantically as against the 7.3 it did in fact operate?

A. We considered that problem and came to the conclusion that the operation by TWA when it did receive the jet aircraft which were actually received at later dates shows that TWA had schedules that could have been used at these earlier dates to utilize these additional aircraft.

Q. Where are the data for that study?

A. The data—the basic data for this study are in the employees' timetables.

Q. Where in the employees' timetables would I find where TWA intended to use additional jets?

[Tr. 4991] A. That was not my statement, sir. It was where they actually did use jets.

Q. I know. The question had to do with the additional jets.

A. I'm sorry.

Q. And that's what your answer had to do with?

A. I did not understand the intended aspect of it.

Mr. Tenney: It was not stated.

Mr. Hayes: I beg your pardon. It was very explicitly stated.

The Special Master: State it now the way you would like to have it answered.

Q. Aside from the partial or maybe it was complete study that you have destroyed, have you made any study as to where TWA in any of the years involved would have scheduled the additional jets which you furnish to it in Exhibit C?

A. No.

The Special Master: You mean by that the segments?

Mr. Hayes: Yes, the routes, whatever the routes were.

Q. In connection with your Exhibit C, your use of additional jets transatlantically, did you conduct any [Tr. 4992] or did you review any market surveys with respect to transatlantic traffic?

A. Yes.

Q. What?

A. I cannot be specific. We had various market surveys that had been put together by TWA from time to time which have gone through our office and have been reviewed by us at various times.

Q. Did they enter into your conclusions in Exhibit C?

A. No, sir.

Q. They did not?

A. They did not.

Q. You mean you just looked at them and you did not use them?

A. We have looked at them from time to time and we have not used them.

Q. They are not in your work papers?

A. They are in long ago work papers.

Q. You mean they too have been destroyed?

A. No, sir.

Q. What happened?

A. They were not in the papers that were a part of this study. They were not reviewed as a part of this [Tr. 4993] study. I was answering the question perhaps too literally.

Q. They have not been destroyed?

A. No, sir.

Q. They have not been supplied to us?

A. That's correct. And they were not used as a part of this study.

Q. What purpose did you have in reviewing them if you were not going to use them?

A. Well, at the time we put together this February 16, 1962 report, or rather I should say in the months prior to our putting together that report and other studies that we have made of TWA—

Q. By the February 16th you are referring to Defendants' Exhibit 214?

A. I'm not sure. Yes, yes, that's right.

Q. Go ahead, Mr. Wemple.

A. In the course of the work to develop that report and prior reports, we were given market surveys by TWA on various occasions.

Q. The market surveys you are referring to you used in connection or you reviewed at least in connection with the preparation of Defendants' Exhibit 214?

A. Yes.

Q. In no sense did you use them in connection with [Tr. 4994] the preparation of Exhibit C or any other part of your report in this proceeding?

A. That's correct.

Q. Are there any other data that you used in any way other than what we can find in your report or work papers in connection with the tabulations which you set forth in Exhibit C?

A. To the best of my knowledge, we have made reference to all of the basic data that we used in this report, and

in its various volumes, and we have given you the work papers that apply directly to these calculations, and there are no others.

• • • • •

[Tr. 4999] • • • Q. Did it occur to you that making a study on a segment basis would be more accurate?

A. I have tried to do studies on a segment basis from time to time over the years, and they involve such complications that I am very, very skeptical as to their overall accuracy.

Q. It is preferable to use the broad brush?

A. For one thing, passenger traffic data between—for particular segments is available only in samples taken in these—this period during certain times of the year, and then later—correction—and later changed to a small [Tr. 5000] sample throughout the year.

Q. Describe the sampling device, if you will, and who published it.

A. The CAB publishes an origin designation study each year, and it requires the airlines to submit certain traffic data collected either at a given period in a given month or sampled throughout the period.

Q. What is the sampling technique, do you know?

A. I know that an airline must report its actual passengers carried between various pairs of cities during the period selected for the study.

Q. You mentioned sample. What sample are you referring to, Mr. Wemple?

A. The sample that the airline reports to the CAB.

The Special Master: Sample days?

The Witness: Sample days and sample flights.

Q. Sample flights?

A. And sample days.

Q. How were the sample flights chosen, do you know?

A. No, sir.

In fact, it is my recollection it is all flights but a few ample days.

Q. Did TWA have available to you data for each flight nd segment showing number of passengers, frequency, [Tr. 5001] et cetera?

A. I know that TWA has those data available. We did ot ask for them.

Q. And you did not use them?

A. That's correct.

• • • • •

[Tr. 5005] • • • Q. Do you have Defendants' Exhibit 218 r identification before you, Mr. Wemple?

A. I do.

Q. Do you recognize it as a copy of a letter which you nt to Mr. Leslie on or about the date it bears?

A. I do.

• • • • •

Q. Do you know how your retainer for this particular signment came about, Mr. Wemple?

A. My recollection is that Mr. Leslie telephoned me and ked me to be present at a meeting at TWA. Now, as to y he telephoned me, I do not know.

Q. You mention in your letter in the second paragraph the first page that you will do everything possible to r. 5006] complete the first phase of your study by the end March so that the investment bankers can hold pre-

liminary discussions with insurance companies and others respecting the financing program.

Who were the investment bankers referred to here?

A. According to my memory, Dillon, Read was represented, Lazard Freres and I believe Lehman Brothers in the meeting I attended, which was prior to this March 13th letter.

Whether there were other investment bankers involved, I have no recollection.

Q. Can you tell us who the insurance companies referred to in your letter were?

A. I don't believe I knew who they were.

Q. Did you ever find out?

A. I have no specific knowledge on that point, no specific recollection.

• • • • •

[Tr. 5012] By Mr. Hayes:

Q. When you were first retained in connection with the study in March of 1959, the plan was for TWA to have a 63-plane fleet, was it not?

A. At the time we were engaged at that first meeting I attended, I did not know how many planes TWA planned to acquire, and it was, as I remember, perhaps a week or ten days after that before I found out how many planes they did specifically plan to acquire.

Q. When you did find out for the first time, what was the number?

A. My recollection is that it was 63.

Q. Did you begin your study based on a 63-plane fleet?

A. We began our study without information on the number of planes in the fleet. Within, as I say, about perhaps ten days after we started our study, we were advised that it would be a 63-plane fleet, insofar as their forward jet plans were concerned.

Q. After you learned it was to be a 63-plane fleet, did you continue your study based on a 63-plane fleet?

A. We continued our study, not necessarily with respect to a 63-plane fleet. Our study was primarily a review of their method of forecasting in the early stages.

[Tr. 5013] Q. Did they forecast on the basis of a 63-plane fleet?

A. I could not find a close correlation between their forecast methods, as we found them in the first couple of weeks of our study in March 1959 between numbers of aircraft and the revenue that they were forecasting.

Q. Would you look at the fourth page of Defendants' Exhibit 219, Mr. Wemple?

A. What is the heading or the first sentence or something on the fourth page?

Q. "Financial Forecast, Basic Assumptions, No. 1 Equipment."

A. Yes, I have it.

Q. The copy we were supplied shows fourteen 131s changed in handwriting or written above it, fifteen, assigned to domestic service; eighteen, of which eight are assigned to domestic mixed service and ten to international mixed service, and thirty 880s assigned to domestic, all first-class service, delivery schedule summarized on Schedule IV-A.

Does that refresh your recollection as to the size of the fleet with which your report or study was to be concerned?

[Tr. 5013A] A. This is, as I recall the numbers of aircraft that we were advised on as we began our study.

Q. Was the forecast that you studied based on those numbers of airplanes?

A. The numbers of airplanes changed in the course of our study.

[Tr. 5014] Q. I understand that. Originally, did you begin your study based on the numbers of airplanes and the mix of airplanes that I have just called to your attention?

A. And I thought I had responded to you that these are the numbers of airplanes, including the 14 or 15 of the 131s that we were advised on as we began our study.

Q. The forecast which is contained in Defendants' Exhibit 219 is concerned solely so far as jets are concerned with the 63 plane fleet as I read it to you, is it not?

A. I have not read this document—

Mr. Tenney: The exhibit speaks for itself. I think we ought to be able to avoid—

Mr. Hayes: Sure. I thought maybe Mr. Wemple would remember what he did.

Q. You mentioned that there was a change in the number of planes, did you not?

A. Yes.

Q. When did that change take place?

A. There was a change in the number of 131s at the very outset. We could not get a firm answer as to whether it was going to be 14 or 15, and this was apparently a matter that was being discussed within TWA, [Tr. 5015] and my recollection is that it was about a week after we started

our study that someone advised us that it would be one or the other, and frankly I have forgotten which they advised us it would be.

Then my recollection is that somewhere about the middle or early April we were given another set of aircraft as being what TWA was then planning to obtain.

Q. You were given by whom?

A. Probably Mr. Henry Fellows.

Q. Of TWA?

A. Of TWA.

Q. Did you have any conversation with anyone else with respect to the reduction of the number of aircraft?

A. I believe I remember telling Mr. Leslie that until TWA decided on what its future fleet was we would have to suspend work on our study.

And I think further I remember complaining to Mr. Leslie that I couldn't find out whether it was going to be 14 or 15 131 aircraft.

Q. Do you recall how long that uncertainty continued?

A. Well, the uncertainty respecting 14 or 15 B-131 aircraft I believe lasted for perhaps a week, maybe ten days, the first part of our study.

[Tr. 5016] Then the—

Q. Then it was resolved at what number?

A. I don't remember.

Q. Go ahead.

A. Then, the major change came during the first two weeks in April, as I remember. It was about the first of April when we were told there was going to be a change in the fleet or we were told that the fleet was up in the air, would we stand by until they decided.

And then as I remember it, it was about in the middle of April that we got the revised numbers and proceeded with our study.

Q. What were the revised numbers?

A. If I remember, it was twenty CV-880, probably fifteen B-131 aircraft, and—I don't remember the exact number of B-331 aircraft.

Q. Was it ten?

A. Ten or twelve are the two numbers that float through my mind.

Q. You mentioned that you told Mr. Leslie you would have to suspend your study. How long was your study suspended?

A. A week or ten days as I remember.

Q. By mid-April you had learned roughly of the re- [Tr. 5017] duced program?

A. Yes.

Q. I show you Defendants' Exhibit 64 in evidence, and I ask you if you recognize it.

A. Yes, I recognize it.

Q. The initials of the dictator appear to be JES.

A. That is correct.

Q. Who was that?

A. That is John E. Slater who was a partner of our firm at that time.

Q. Was he as well as you in on this study?

A. He was assisting me with this study.

Q. What, if any, connection did you have, Mr. Wemple, with Defendants' Exhibit 64?

A. I consulted with Mr. Slater on the writing of this letter, reviewed the text and agreed that this—these were proper statements to make.

Q. How far had your studies gone at that time?

A. By calendar they had been under way since March 13th or a few days before.

The number of aircraft that are listed here to my recollection had been determined in the early part of April, by the middle of April, and we had made progress with the review of TWA's detailed schedules for the opera- [Tr. 5018] tion of this particular jet fleet for the second following year, which would have been 1961.

And I judge from the reading of this letter that that review of the estimates for 1961 included profit figures and cash flow figures.

Q. At any rate your studies had progressed to the point where you and your partner, Mr. Slater, felt that you could make the statements contained in Defendants' Exhibit 64?

A. That is correct.

Q. I show you, Mr. Wemple, Defendants' Exhibit 63 in evidence, a financial forecast prepared by TWA under I suppose, A. V. Leslie, Senior Vice President and Treasurer, for 1959 to 1961.

Did that financial forecast, Defendants' Exhibit 63 come to your attention?

A. I believe so.

Q. Do you know whether Defendants' Exhibit 63 was at one point delivered to the investment bankers?

A. I cannot remember knowing that it was.

Q. Let me go back for a moment to Defendants' Exhibit 64, the letter to Mr. Thomas from Mr. Slater.

What was the occasion for the writing of that letter, Mr. Wemple?

[Tr. 5019] A. As I recall, Mr. Thomas telephoned either Mr. Slater or me and asked us to write a letter of comment respecting the adequacy of the numbers of the jet aircraft that they were proposing to obtain.

Q. Did you have any conversation with Mr. Thomas in connection with the number of the aircraft proposed to be acquired?

A. Other than in that telephone conversation, if I was the one that received the phone call, and I don't remember whether I was or not.

Q. Was that the only time you spoke to Mr. Thomas on the subject of a reduction?

A. Yes, sir.

Q. Did Mr. Thomas say anything to you at that time with respect to the getting a smaller fleet and waiting for better equipment?

A. No, sir.

Q. Did you know—you did know, I assume, that by May of 1959 the fan jet was known to be in existence?

A. I have no specific recollection on that point.

Q. Didn't you keep in close touch with the developments in the airline industry?

A. I follow the developments in the airline industry.

[Tr. 5020] Q. Did you not know that the fan jet was first announced, if I remember rightly, by Convair in 1958?

A. I probably did.

Q. You had heard of the 990, had you not?

A. I have heard of the 990.

Q. Did you know that was a fan jet airplane?

A. I know it is a fan jet airplane.

Q. Did you know that American had placed orders for it with Convair in 1958?

A. No, sir.

Q. Did you know that Boeing had announced fan jet versions, I believe, in late 1958 or very early 1959?

A. I recall that Boeing announced fan jet versions.

Q. At or about the time I mentioned?

A. At about that time, yes.

Q. Did you have that knowledge at about the time of the May 6th letter—

A. I probably did.

Q. —Defendants' Exhibit 64 was written?

A. I probably did.

Q. But you don't recall about Mr. Thomas making any statement about getting a smaller fleet initially and waiting to acquire later advanced aircraft?

[Tr. 5021] A. Mr. Thomas made no such statement to me whatsoever.

Q. Returning now again to Defendants' Exhibit 63, the May 15th forecast—

A. Yes.

Q. —I don't know whether I have asked you or not—I have honestly forgotten—whether it was part of your assignment to make a study of Defendants' Exhibit 63.

A. We made considerable study of TWA's financial forecast dated May 15, 1959, which this appears to be.

Q. I show you, Mr. Wemple, Defendants' Exhibit 15 for identification, a letter dated June 26, 1959 from you to Mr. Leslie with the word "Draft" on top of the first page, I think on all the pages if I remember rightly.

Do you have it before you?

A. Yes, I do.

Q. Do you recall whether Defendants' Exhibit 15 for identification was prepared by you or under your supervision?

A. It was prepared under my supervision.

Q. Do you recall to whom the draft report was sent?

A. Mr. Leslie.

Q. Was it sent to anybody else?

[Tr. 5022] A. Not by me.

Q. Did anybody else send it to anyone else, do you know?

A. Mr. Leslie gave it, as I remember, to certain banks that were interested in TWA.

Q. Did he sent it to any insurance companies, do you know?

A. I have no knowledge on that subject.

Q. Did you attend any meetings at which Defendants' Exhibit 15 for identification was reviewed?

A. I do not recall any.

Q. Do you recall a meeting on July 22, 1959, that you attended and also present were Mr. Leslie, Mr. Wadsworth, Mr. Flanagan, Mr. Schaenen, Mr. Stewart, Mr. Sherman and Mr. Kerr?

A. Yes, I remember that meeting.

Q. Will you identify, please, Mr. Wadsworth?

A. Mr. Wadsworth was of Dillon Read.

Q. Mr. Flanagan?

The Special Master: Dillon Read.

Q. Mr. Schaenan?

A. I guess he was Lehman Brothers or Lazard Freres.

Q. Mr. Stewart?

[Tr. 5023] A. Mr. Stewart was Lazard Freres perhaps.

Q. Mr. Sherman?

A. Perhaps Dillon Read. I am not sure.

Q. Mr. Kerr?

A. Irving Trust Company.

Q. At that meeting was Defendants' Exhibit 15 or its contents reviewed?

A. I have no recollection whether it was or not.

• • • • •

Q. As of the date of that meeting, what was under consideration was a 45 plane fleet, was it not?

A. I don't remember.

Q. I direct your attention to Defendants' Exhibit 15, Mr. Wemple, the table on the lower half of the first page. When I said 45 planes I was talking only of jets.

A. I realize that.

Q. It was a 45 plane—

A. The table on the—

[Tr. 5024] Q. Page 2 of Defendants' Exhibit 15, the lower half.

A. Page 2, yes, shows 45 jet aircraft.

Q. Do you know when it was decided that the number of 331s TWA would receive was increased from ten to twelve?

A. No, I don't remember that.

Q. In the course of these studies you made in the early part of 1959 and into July of 1959, did you have any discussions with any TWA personnel other than Mr. Thomas as to which you have told us respecting the adequacy for TWA uses of the 45 plane fleet?

A. The adequacy of the fleet was not within the scope of our engagement. I had no comments with anybody about it.

Q. Did you have any discussions with Mr. Leslie concerning the subject?

A. No, sir.

Q. Mr. Cocke?

A. No.

Q. Do you know Mr. Cocke?

A. Oh, yes.

Q. Mr. Rummel?

A. No discussions.

[Tr. 5025] Q. Defendants' Exhibit 15—you still hav before you, do you not, Mr. Wemple?

A. Yes.

Q. —which is devoted to the 45 plane fleet concludes the last page with an expression of your belief that TW plan of operation for 1959-1961 is sound, and that income estimates which are a part of the financial fore of May 15, 1959, have good prospect of realization.

That was the honest opinion I take it of yours at t time?

A. I call to your attention the first word of that s tence which is "Accordingly we believe" and then go on w your statement. That was my opinion at that time.

Q. I don't know what that changed in my questi Maybe you do.

Mr. Tenney: Maybe Mr. Wemple might expla

Mr. Hayes: If he wants to, he can go ahead. I not care.

A. There are a number of concluding remarks starti on page 48 which, in effect, emphasize things like delive dates, favorable condition of economy, particular [T 5025A] plan of operation, and our judgment was based those qualifications being realized, that is all.

Q. Certainly. I was not trying to read those out of t report, Mr. Wemple. I am the one who offered it.

A. Thank you.

[Tr. 5026] Q. So I offered all of it, including all t

qualifications. It is significant to me that plaintiff did not offer it.

Did you in May or June or July of 1959 receive any information as to negotiations between the Tool Company and Pan American with respect to the transfer of contract rights to six of the 331s to Pan American?

A. No information was received by us.

Q. I refer to the meeting which was held on July 22nd which you attended with the gentlemen whom we have previously identified. At that time, at that meeting, was anything said about the need for disposing of the ten extra Convairs and the six extra Boeings?

A. I recall no such conversations.

Q. Nothing at all said so far as you can recall?

A. I have no recollection about that.

Q. Did it ever come to your attention that when the Tool Company arranged to assign its rights to six 331s to Pan American Mr. Thomas consented to such transfer?

A. I have no information about that subject.

Q. Did it ever come to your attention that the TWA board approved Mr. Thomas' consent to the assignment?

A. I have no information on that.

[Tr. 5027] Q. When did you first learn that the Tool Company had assigned six 331s to Pan American, the contract rights to them?

A. I have no idea when I learned that.

Q. Did you ever learn that the Tool Company, by arrangement with Convair, agreement with Convair, arranged to have six 880s leased to Northeast?

A. Would you repeat the first part of that question?

Q. I will rephrase it.

Did it ever come to your attention that by arrangement

among the Tool Company, Convair and Northeast Convair leased six 880s to Northeast?

A. I believe that I read that in trade publications about the time it was announced.

Q. You did not have any other information regarding it?

A. No other information.

Q. Prior thereto, had you learned about the proposal for a TWA-Northeast merger?

A. I had heard that mentioned periodically for quite a number of years.

Q. Among TWA personnel?

A. Yes.

• • • • •

[Tr. 5039] Q. You knew, of course, they were leased from the Tool Company, did you not, or didn't you?

A. I have heard that.

Q. Did you make any inquiry to learn whether there was any time lag between the acquisition of the planes by the Tool Company and the Tool Company's leasing them to TWA?

A. I have no knowledge of that.

Q. Did you make any inquiry as to how the rental rates were fixed for the planes?

A. No.

Q. Do you know what the rates were?

A. No.

Q. You made no inquiry to determine them?

A. At one point I knew what they were per month or whatever it was. I do not know what that is now.

Q. Did you make any inquiry as to the reasonableness of the rental rates?

A. No.

[Tr. 5080] Q. Did you also assume, Mr. Wemple, in connection with Chapter II that with the exception that TWA would not lease five 331Bs which you have already mentioned, the remainder of the TWA long range fleet would remain the same?

A. If I understand your question correctly, would remain at 18 aircraft during the period 1959 through 1963?

Q. I am talking of the whole fleet, the leasing of the 720Bs, the purchase of the 131Bs.

A. My question was based on the grouping on page 4 wherein the B-331 and B-331B were considered very long range. I believe I misunderstood your question as to how you wanted me to characterize the aircraft.

Q. I was not thinking of the definitions you had on page 4. Let me put it this way:

Did you further assume that aside from the item you have already mentioned that TWA would not have leased the 331Bs, that the remainder of the jet aircraft would be the same as it historically was, plus the six 331s?

A. We set forth on page 3 the details of our assumptions, and I believe my answer is yes to your question for the period 1959 through 1963.

Q. That is the only period we are talking about.

[Tr. 5081] A. That is correct.

Q. What was the factual basis for your assumption that if TWA had received the 331s, it would not have leased the 331Bs.

A. TWA did not add to its fleet of very long range aircraft until some time, I believe it was in 1965.

When I make that statement, I mean very long range aircraft used for passenger service. There was some all cargo aircraft that came in in the meantime which I have not included in this particular report.

Secondly, that TWA used the 331 aircraft for very long range fleets, that it also—correction—for very long range flights on which it also used the B-331B aircraft.

Those are the principal historical facts that I used in making the assumption in this period through 1963 TWA would have held its fleet of very long range aircraft at the 18.

Q. Just those two facts and nothing else?

A. Those are the principal ones.

Q. Were there any others?

A. None that I can recall.

• • • • •

[Tr. 5158] The Special Master: Proceed.

By Mr. Hayes:

Q. Mr. Wemple, in connection with your displacement of the 331Bs which were fan jets by the 331s which were non-fans in your report, did you consider at all the extent to which TWA's competitors were using fan jets rather than non-fans?

The Witness: Would you repeat the question, please? Read it back.

(The question was read.)

A. I considered it briefly and found that it was—had no effect on our estimates and, therefore, did no further consideration of it.

Q. Tell us the extent of your brief consideration.

A. That TWA would have been able to operate its international services with the 331s insofar as the general public is concerned, as effectively as it would have—could have operated them with the 331B aircraft. And, therefore, TWA would have every reason to have expected just

as much revenue from a 331 aircraft on a particular flight as it did from a 331B aircraft. I mean that, of course, transportation revenue or operating revenue.

The Special Master: Net?

The Witness: Gross. Well, net after dis- [Tr. 5159] counts on tickets sold, but transportation revenue.

So, therefore, it seemed to me perfectly reasonable to do the calculation on the basis of a straight substitution of one plane for another.

By Mr. Hayes:

Q. You told us what your conclusion was as to why you sort of rejected the comparison with its competitors so far as fans and non-fans were concerned.

What were your reasons? What facts did you base your conclusion on?

A. As shown by TWA's employees' timetable, TWA used 331 and 331B aircraft on its longest range flights, and, for instance, operated nonstop between New York and Rome with each aircraft.

Q. Is there anything else on which you base that conclusion?

A. No, that is all.

Q. That is everything?

A. I mentioned yesterday they are aircraft of approximately the same size with no particularly distinguishable features on account of one being a 331B and another being a 331. I believe they are both equipped to show movies, they both have the same kind of seats, they both serve the same food and drink.

[Tr. 5160] Q. You mentioned this in connection with the international service.

Did you make any kind of a study as to the use of fan jets by TWA's domestic competitors?

A. I certainly have read American Airlines' advertisement respecting, I guess its complete use of fan jet aircraft. Neither United nor TWA appear to feature that aspect of their aircraft in their advertisements, and I believe, therefore, it is of no import in the determination of revenues that could be expected on a given flight, whether it be operated with a 331 or a 331B aircraft.

Q. Do you mean by that answer that you have made a detailed examination of the advertising of American, United and TWA during the period of your calculations?

A. I do not.

Q. If you have not made any such study, are you in a position to testify that United did not advertise the use of fan jets?

A. No, I am not.

Q. Or that TWA did not advertise the use of fan jets?

A. No, I am not.

Q. Have you any opinion as to whether advertising [Tr. 5161] plays an important or an unimportant part in attracting passengers to airplanes?

A. I believe advertising plays an important part in attracting passengers to an airline.

Q. If you reviewed any of the advertising, have you noticed that various airlines have over the very period covered by your report advertised their use of the new and the advanced, and other such adjectives, fan jets?

A. As I mentioned before, I am familiar generally with American Airlines' advertising of their fan jet aircraft.

* * * * *

[Tr. 5162] * * * Q. Do you know what fan jet equipment Pan American had during the period of your report?

A. As is set forth on page 10, Pan American got—correction. As set forth on page 2, TWA got fan jet very long-range aircraft commencing in November 1962.

My recollection is that American got them somewhat earlier than that. I do not remember the exact date.

Q. Do you recall how many fan jets Pan American acquired during the period covered by your report?

A. No, I do not.

Q. Did you make any inquiry as to what fan jets were used by foreign airlines competing with TWA on the transatlantic routes?

The Special Master: Would that be sig- [Tr. 5163] nificant, so far as his report is concerned?

Mr. Hayes: I think it would.

The Special Master: In what way? In the way of expenses or operating revenue?

Mr. Hayes: Yes, we have already been told that the fan jet is a cheaper airline to operate; its fuel costs are lower. I think before we are finished, we will find there are other advantages to it.

The Special Master: Would the competition with the foreign airlines be important here?

Mr. Hayes: Certainly, because they were all running on the same routes. Not all of them.

The Special Master: I thought all the comparisons we have been using up to date were Pan American on the international route and American on the—

Mr. Hayes: That is what the plaintiff has decided to use, but there are other approaches, too, besides using Pan American. And, as a matter of fact, Mr. Wemple in his report here shows the figures for

foreign air carriers from IATA statistics. They all have a bearing on his report.

Mr. Williams: The difference in expenses [Tr. 5164] is fully reflected in the report and as far as the revenues are concerned, he has already testified and explained that.

Mr. Hayes: I don't think we even talked about it.

The Special Master: Revenues to TWA?

Mr. Williams: Yes.

Mr. Hayes: He just testified as to figures. We have not examined him on it.

By Mr. Hayes:

Q. My question was did you make any study of what fan jets were operated by any of the foreign carriers competing with TWA transatlantically?

A. In the period of these estimates?

Q. That is right.

A. No, sir, no specific study of that point.

Q. On the domestic scene, did you make any inquiry as to what fan jets were being operated by competitors of TWA?

A. I have looked at lists of aircraft by other airlines from time to time, and I am sure that some of those lists had in them data as to—for instance, the fan jets that American was operating. I have made no particular specific study of that subject.

[Tr. 5165] Q. Are those lists still in existence?

A. No, sir.

Q. They, too, have been destroyed?

A. Some of them may be in some of those previous studies which you brought into the picture last week—our June 1959 study, for instance.

Q. There were no fan jets in existence then, Mr. Wemple.

A. That is correct.

Q. I am talking of the period of your report and the use of fan jets by TWA's competitors during that period.

A. I don't recall any in the 1962 study.

Q. You do not recall any?

A. I do not recall any.

• • • • •

[Tr. 5171] Q. A table?

A. Yes.

We go on to show that TWA will have a unique advantage in percentage of its seats being in jet aircraft during that period and that that advantage dissipates by the end of 1961.

Then on page 31, we show certain information on the jet aircraft ordered by TWA for international service and by other airlines involved in transatlantic.

For instance, we show there that Pan American had ordered for the Atlantic Division eleven jet aircraft and had six on hand for a total of 17. BOAC had ten on hand and it ordered 15 for a total of 25.

Whereas, TWA had only eight on order.

Then we go on on page 32 to further discuss—

Q. Who did you say had a total of 25?

A. BOAC, sometimes pronounced BOAC, the third line.

Q. Jet aircraft. I see 15

A. On the right hand side—they had ten on hand as of April—

Mr. Williams: 15 on order?

The Witness: 15 ordered.

Mr. Hayes: I see. I get it. I was look- [Tr. 5172] ing for the figure 25.

The Witness: No, sir.

Then we go on on the next page to talk about—more about jet aircraft on order.

The Special Master: Is there anywhere an expression of opinion or judgment on your part as to the adequacy of TWA's program of acquisition of additional jets?

The Witness: There is no specific statement on that. I believe it is easily understood as you read this report that more jet aircraft were going to be required by TWA to keep up with the competition and with the fleets of others.

The Special Master: But it does not say anything one way or the other.

The Witness: It does not specify it.

The Special Master: Do you know of any other study by the firm—

The Witness: No, we did not.

The Special Master: —covering this period that would express such an opinion one way or the other?

The Witness: There is the letter—what is the date—May 5th or thereabouts or May 14th [Tr. 5173] that was brought in yesterday wherein we relate to the—we refer to our conclusion that as far as adequate financial results what TWA had on hand would give them, but no—definitely no broad based study to specify specific additional numbers of aircraft in this period.

The Special Master: Thank you.

Q. You don't mean what TWA had on hand? You mean what TWA had on order.

The Special Master: On order, yes.

A. Had on order. Planned to receive.

Q. Did I understand you to say—I may have misunderstood you—that Defendants' Exhibit 15 indicated that TWA should acquire more jet aircraft?

A. In my opinion, as you read Exhibit 15, you will come to the conclusion that TWA is not as well covered with additional aircraft as its competitors, and that the future program that is likely to develop will include more jet aircraft by TWA.

There is no specific statement pointing that up.

Q. There is no recommendation as to how many more jet aircraft TWA should order, is there?

A. We were not asked for any recommendation as to [Tr. 5174] future acquisition of aircraft by TWA.

Q. You forecast profits with the operation of this 45 plane fleet, did you not?

A. TWA's financial forecast dated May 15, 1959, shows a cash flow fully adequate to take care of its commitments for operating expenses, interest and principal repayment.

• • • • •

[Tr. 5182] • • • Q. The question is do you recall whether or not there was in fact during the period covered by your studies here an excess capacity of aircraft, either domestic or international or both.

A. All aircraft or jet aircraft?

Mr. Williams: Jet aircraft.

Q. Jet aircraft.

A. I do not recall any excess capacity of jet aircraft in this period, and my approach to the thing would be with reference to operating profit.

Q. Your study assume, does it, based on what you just

said, that at no point during the period covered by your study was there in existence an excess of capacity?

A. Our study—I have to go back. Study 4C?

Q. That is right.

A. —shows simply the additional operating profit that TWA would have made for each of these various [Tr. 5183] conditions, and it does not specifically treat with any excess or deficiency in—it just doesn't treat with the excess capacity matter at all.

Q. You did not consider any bearing that an excess capacity may have had on the results that you obtained in any one of the years covered by your study?

A. From my point of view, there was not an excess of capacity in those years.

Therefore, I could not have considered it.

• • • • •

[Tr. 5212] Q. Take TWA to begin with.

Did you make any study of the factors TWA management considers in assigning additional aircraft of the same kind as aircraft it already has in possession?

A. I did not make a specific study.

The Special Master: You had studied some of the factors before then.

The Witness: I have. I generally am familiar with things that are considered, but in answer to his question I made no specific study.

Q. No study of any kind, is that correct?

Mr. Williams: He made no specific study.

Mr. Hayes: I want to know what studies, if any. If he made a general study, I would like to know what the general study was.

The Witness: As I remember yesterday, I testified that we had done a number of preliminary calculations using various factors for allocation between domestic and international.

We, of course, studied what TWA had done throughout the period of our damage calculation, and it was with reference to that study and to those considerations that I chose to make the allocation of the additional aircraft exactly as TWA had allo- [Tr. 5213] cated its then operating fleet.

Q. Was your reference just now to studies you had made to the first endeavor you made to reschedule the additional planes?

A. No, sir.

Q. What was it referring to then?

A. To preliminary calculations that we made prior to publishing of this final report.

Q. Where are those preliminary calculations?

A. They are discarded because they were not used in the development—in the final damage results which are set forth here.

Q. They too have been destroyed?

A. That is correct.

Q. Pursuant to the same instructions?

A. Pursuant to the same instructions, plus my practices.

Q. At any rate, whatever these studies were, they formed no part of your report?

Mr. Williams: That isn't what he said.

Mr. Hayes: He testified previously, Mr. Williams, last week, that he has preserved all work pa-

pers which eventuated in his report. These have been destroyed.

[Tr. 5214] Mr. Williams: If your Honor please, the questions that I thought counsel was addressing to the witness was what studies, whether they were specific or general, which he had made, which was the basis of his previous statements contained in this report, and he has just reported certain general studies, at least I would define them as general studies, and I think that answers your question.

Mr. Hayes: I did not ask you, Mr. Williams. I am asking the witness. Let us get the witness' answer.

Q. Are these general studies reflected anywhere in your report?

A. These general studies had no direct contribution to the calculations in our report.

Q. What indirect contribution did they have?

A. Insofar as—

The Special Master: The witness has already testified that on the basis of these preliminary studies he gained certain information as to TWA's practices, as I understand his previous answer, and undoubtedly that information went into the formation of his judgment on this particular point.

[Tr. 5215] Maybe I am wrong but that's the way I would summarize the testimony on that point.

Mr. Hayes: Maybe you are right. I would like to know what the information is then.

Mr. Williams: The witness has stated what it is.

The Special Master: He gave the various factors.

Q. Can you be more specific than to say you made a study?

Mr. Williams: Can you add to the testimony you have already given?

A. I thought that I had outlined the general types of calculation—correction. I believe I did outline that we had made calculations on different selected allocations between domestic and international. I do not remember exactly what they were.

I also mentioned that we, of course, reviewed this historical information which is set forth in Exhibit B, and that that was considered in making the judgment as to how we would make the allocation for the additional six.

I cannot give you specific instances.

Q. Can you describe the different methods of allo- [Tr. 5216] cation as to which you made calculations?

A. I believe I mentioned one that comes to my mind wherein we use a two to one allocation for a preliminary calculation.

Q. Two for what and one for what?

A. Two for domestic and one for international.

Q. Any others?

A. That's the only one I can remember.

Q. Let us leave TWA for a moment and look at TWA's competitors.

In making your allocation between domestic and international, did you make any study of the competition that TWA would face internationally?

A. I do not understand your "would face."

The competition that TWA did face in this period is a matter of record.

Q. Did you make a study of competition being offered to TWA internationally and use the results of that study in connection with your allocation of the additional 331s to the International Division?

A. No.

Q. Did you make any study of the availability of international traffic during the period covered by your damage calculation?

[Tr. 5217] A. As set forth on page 21 we tabulated transatlantic passengers carried by TWA, Pan American and various foreign airlines.

Q. That is what had been carried in the past?

A. That is what was carried during the period of our study.

Q. Did you make any calculation to determine what additional traffic over and above what had been carried was available?

A. We assumed for our calculations that there would have been no additional total number of transatlantic passengers because in my opinion that gives a most conservative calculation of additional passengers and revenue for TWA.

Q. Is it your basic assumption throughout the whole period of your damage study that the total number of transatlantic passengers would remain the same?

A. That is the assumption on which we based this calculation.

Q. Did you make any study as to whether TWA management, if it knew just exactly how many transatlantic passengers were going to be carried, would assign the six 331s on the same basis that the twelve 331s had been assigned between divisions?

[Tr. 5218] A. No study.

Q. If I asked you the same kind of questions with respect to the domestic allocation, would your answer be the same?

A. Our domestic calculations are predicated on no increase in total domestic passengers carried by domestic trunk airlines.

Q. No, would your answer be the same with respect to any studies you made with respect to what frequency competitors were offering?

A. I am afraid you will have to ask me the question.

Q. All right.

So far as your allocation to domestic was concerned, did you make any study as to the competition TWA would meet on its domestic routes?

A. What do you mean by "would meet on its domestic routes"?

Q. That in fact it had to meet. This is history.

A. At one point, I reviewed flights operated by other airlines between certain points. I do not now remember the cities I selected or which airlines.

We did make such a study.

Q. Did you use it in any part of your damage [Tr. 5219] calculation?

A. We did not.

Q. Has that study been destroyed, too?

A. Yes.

Q. Did you make any study to determine whether the TWA management, assuming it knew just what frequencies were being offered by its competitors and what traffic was, in fact, carried or expected to be carried, would have allocated to the Domestic Division the number of that portion of the adidtional six 331s which you in your studies have allocated to the Domestic Division?

Mr. Williams: May I have that question read, please?

(The question was read.)

The Witness: May I have just the first part of that question again?

Mr. Williams: It is a little complicated but I think it is all right. Just let's have it once more, the first part of it.

If the witness can understand and answer it, I have no objection.

(The question was read.)

A. No such study.

* * * * *

[Tr. 5282] * * * Q. So Exhibit B does not include as available for commercial service a plane, for example, that was used on a charter flight?

A. No, you—

Q. I just misunderstood you then.

A. There is a misunderstanding.

Q. Would you explain it, please?

A. Exhibit B includes aircraft available for commercial service in accordance with the terminology that we have used.

Exhibit B does not include miles of any particular flight. Exhibit B is simply aircraft.

Now, where we state here on page 14 the plane miles in International Division operated with jet aircraft, none of the all-cargo flights of jet aircraft are included in there. None of the ferry flights or non-revenue flights are included in there.

Q. How about charter flights?

A. Charter flights are included in there.

Q. Charter flights are included?

A. Yes.

Q. Have you any knowledge or did you make any determination as to the percentage of the jet plane miles [Tr. 5283] which you set forth in the table at the bottom of page 14 were chartered flights?

A. We made some calculations from time to time of that.

Q. Do you have those calculations?

A. No, sir.

Q. Have they been destroyed?

A. That is correct.

Q. So you have no information as you sit here as to the extent to which these plane miles were flown on charter flights?

A. That is correct.

Let us say, Mr. Hayes, I cannot give you statistics as I sit here. I know where the information resides, which is perhaps a more complete answer to your question.

Q. It is not in your report?

A. That is correct.

* * * * *

[Tr. 5286] * * * Q. What was your reason in rejecting the use of separate utilizations for two different kinds of craft?

A. That it was not necessary to classify them separately.

Q. I am afraid that is just telling me your conclusion in different words. I asked for your reasoning.

A. I cannot give you the step-by-step description of the reasoning.

Q. Are the ratios that you have in the table in the upper part of page 15 a measure of the utilization of aircraft?

A. What do you mean by the term "utilization"?

Q. The extent to which aircraft is used.

[Tr. 5287] A. I asked the question because utilization is often measured in an airline operation in terms of hours per day an aircraft is used for revenue flying.

So, your question apparently is a more generalized term utilization, a less specific one.

Q. Whatever it may be, can you answer it, Mr. Wemple?

A. I will answer it in the generalized context.

Yes, this is a degree of utilization—measurement of utilization.

• • • • •

[Tr. 5290] • • • Q. You really do not have any knowledge as to facts which will explain the low ratio that you show for 1959, do you?

A. I made no detailed investigation.

Q. Do the ratios which you set forth on page 15 vary at different times of the year?

A. I do not know.

Q. Did you make any study of that?

A. I don't believe we did.

Q. I cannot find it now, but I have a great habit of not noting the page of your report.

My recollection is that in your report you stated that the ratios were relatively uniform in 1960 to 1963.

Mr. Tenney: Page 15.

Mr. Hayes: Is it 15?

Mr. Tenney: Second line.

Mr. Hayes: That is right.

Q. "Were reasonably uniform" is the language.

I notice on looking at them that the ratios went from .67 in 1959, increased in 1960 to 1.75, 1961 to 1.78 and then de-

creased in 1962 to 1.76 and in 1963 to 1.72 [Tr. 5291] which was less than 1960.

What is the reason for those variations, Mr. Wemple?

A. I'm sure there are thousands of reasons for those variations.

Q. What reasons do you know of some of the thousands of which you are sure?

A. The ratio is the result of schedules that are set up, rather, the demand for charters and extra sections, and other things.

The Special Master: Outside the scope of your report?

The Witness: Outside the scope of our report.

Q. Did you make any studies to determine what facts accounted for the decreasing utilization after 1961 while the jet plane miles were increasing substantially as appears in the same table on the upper part of page 15?

A. As stated at the top of page 15, in my opinion, these ratios for that period 1960 through 1963 are reasonably uniform.

I made no study to determine specific reasons for the change from 1.78 to 1.62.

Q. Did this opinion that you just quoted or was [Tr. 5292] that opinion that you just quoted rather based on a figure other than the close affinity of the ratios as numbers?

A. That is what it is based on as it says in the table.

Q. You use those ratios, do you not, to estimate the additional plane miles TWA would have operated?

A. That's the calculation at the bottom of the page.

Q. That is right.

That is a purely arithmetical procedure, is it not?

A. The calculation is arithmetical procedure.

Q. Does it set forth any opinion of yours other than as to the accuracy of the arithmetic?

A. Yes, it sets forth my opinion that the additional aircraft could have been expected to have been used at the same ratios as the fleet TWA did have and did operate.

Q. So what you are saying then is that if the additional six planes were operated by TWA during the years in question, and if they were operated at the same ratios as the fleet which TWA actually had, the additional number of jet plane miles you calculated would have been flown?

[Tr. 5293] A. That is correct.

Q. That is all you are saying there, is it not?

A. That is what I am saying.

Q. That is the sum and substance of your opinion, is it not?

A. That's the basis, basic opinion, and methodology used for the calculation of these estimates.

Q. This opinion of yours which appears in the calculation at the bottom of page 15 assumes, does it not, that the plane miles would have been added at the average utilization experienced during the year?

A. Yes.

Q. Are you in the table on page 15, expressing any opinion that aircraft can be added and added and added to a particular operation at the same utilization as that at which existent aircraft are operated?

Mr. Williams: You mean added indefinitely?

Mr. Hayes: Yes.

Mr. Williams: You used three added, so I assume that's—

Mr. Hayes: That is what I mean.

A. I did not express that opinion as you have just stated it.

Q. I know you did not express it. I am asking [Tr. 5294] you if that is basic to your calculations?

A. That is not basic to our calculation.

Q. What cut-off point do you have—

The Special Master: I think we have been over this before.

Mr. Hayes: Not in this connection with the plane miles we have not.

Q. Did you establish any cut-off point?

A. I did not.

Q. Do the additional plane miles you show at the bottom of page 15 include charter plane miles or not?

A. Yes, they do include charter plane miles.

Q. To what extent are the plane miles you have added charter plane miles?

A. In the same proportion as the actual plane miles shown at the upper table.

Q. Where do I find the charter plane miles in the upper table?

A. They are not delineated separately.

The Special Master: You mean the answer you gave a few minutes ago from the working paper as to the—

The Witness: Those were not plane miles. Those were numbers of aircraft available.

[Tr. 5295] And they are for another aircraft. They were for the 131.

The 331 plane miles and number of aircraft set forth here include in all facets the charter operation.

Q. Where can I find in your report for any year or for all the years how many of the added plane miles were flown on charter flights?

A. We have not specifically delineated that item. As I have mentioned before, the actual plane miles includes charter miles.

Our calculation of additional plane miles is a ratio calculation which fundamentally includes the same percentage or same proportion of charter flights as did the basic plane miles.

Q. Let me see if I understand you, Mr. Wemple.

Take the year 1960. In the upper half you show 10.7 million plane miles.

Assume for the purpose of the question that one million of those were charter miles, a fraction of somewhere between 1/10 and 1/11.

A. Call it 10%.

Q. Does your answer mean that the added plane miles of 3.6 million in the lower half of the page, you are [Tr. 5296] assuming that the same 1/10 or 1/11 would be charter plane miles?

A. That is correct.

Correction. No.

Q. That is not correct? That is what I thought you said.

A. Your statement is incorrect. There is a twisting of numbers.

At the lower half of the page the figure of jet plane miles is 6.3, not 3.6.

Q. You are right. It is 6.3. But the—

A. The percentage in that 6.3 would be the same as the percentage was in the 10.7.

Q. Did you make any study of TWA's actual operations with respect to charter flights?

A. I have told you that I reviewed their statistics on charter mileage in the various years.

Q. Just the figures?

A. That is correct.

Q. Did you make any study to determine whether TWA was unable to fill any charter commitments that people sought to make with it during any of these years?

A. I did not make such a study. I believe no useful purpose would have been served.

[Tr. 5297] Q. Where in your report can I find the percentage of plane miles flown on charters, actually flown on charters, the number of plan miles which you included in the jet plane miles in the table on the upper half of page 15?

A. It is not set forth in the report.

Q. Is it in your working papers?

A. It is in the TWA operating statistics which are in the cabinet.

Q. Do we have copies of those?

A. I don't know.

Mr. Hayes: Can you tell me what folder it is or otherwise identify it?

We have it.

• • • • •

[Tr. 5450] • • • Q. Attached to or as part of Defendants' Exhibit 223 for identification are lists of actual jet deliveries with actual piston retirement, pari passu jet deliveries and reconstructed piston retirement dates.

You have testified that you did not give any effect to what pistons were actually retired.

My question now is did you in your studies give any weight at all to the pistons stated to have been retired on reconstructed piston retirement dates and [Tr. 5451] relate it to delivery of 63 jets?

A. As I recall, I partially or completely answered that question, but let me restate the answer to it.

Q. My questions were about actual retirements. Now I am asking you about this reconstructed.

A. That is my recollection, but let me reanswer it.

I took the reconstructed retirement dates that are listed here, reduced TWA's piston fleets accordingly below what they actually were, checked the capability of those fleets with average plane miles operated per aircraft to cover the piston plane miles that would have beetn required under his reconstructed operation and found the fleets less the reconstructed earlier retirements would have been adequate to cover the piston operation that remained after the reductions we have estimated in our report.

Q. Is that in your work papers?

A. No, sir.

Q. Destroyed?

A. Yes, sir.

Q. Discarded is probably a proper term.

It is either destroyed or not.

A. It is gone.

• • • • •

[Tr. 5481] • • • Q. What statistics for charter are not available from IATA for those years?

A. The number of transatlantic charter flights that were operated by the airlines.

Q. Are there any charter statistics available from IATA for those years?

A. I do not know the answer to that very broad question.

Q. Do you know whether all cargo flights enter into IATA statistics?

A. I do not know whether IATA carries statistics on all cargo flights.

Q. As to the flights that are reported, I believe you said yesterday they were flights between American cities, gateway cities, and European cities, and I think you said that in your report, too, somewhere.

A. That is a statement I intended to make yesterday.

Q. Do you know what beyond gateway flights are?

Mr. Williams: You mean what they mean?

Mr. Hayes: Yes.

A. Yes.

[Tr. 5482] Q. Will you explain what beyond gateway flights are?

A. Considering Paris as a gateway city and a stop on a particular flight, if the flight goes onto Geneva, Zurich, Milan and Rome, the segments beyond Paris would be considered flight beyond the gateway.

Sometimes those are operated with different flight numbers and sometimes they are operated simply as additional segments with the same flight number as is assigned to the transatlantic flight.

Q. I believe you told us the other day that the gateway cities, so far as TWA is concerned, were London, Paris, Rome and Frankfurt.

A. Yes.

Q. Do the IATA statistics include beyond gateway mileages?

A. I have not used any IATA mileage statistics. I do not know whether they specifically have that information.

Q. Do the IATA statistics for passengers include beyond gateway passengers?

A. They include passengers who made a transatlantic trip. If that same passenger went beyond the gateway, that

particular passenger is included in the IATA statis- [Tr. 5483] tics we have quoted.

Q. When planes go beyond the gateway, do they pick up additional—I will call them, for the sake of the record—local passengers?

A. Yes.

Q. Do the IATAs—

A. Some do and some do not, depending on the rights of an airline in the countries which they are serving.

Q. Are you acquainted with the five freedoms that are spoken about in air traffic?

A. Yes.

Q. Which freedom is it that has to do with beyond gateway traffic?

A. I thought it was the fourth freedom.

Q. What is the fourth freedom?

A. It is—refers to, for instance, TWA's right to carry a passenger between Paris and Geneva, although TWA did not bring that particular passenger into Paris.

Q. Is there a fifth freedom?

A. I am not familiar with the exact definition of the terms.

Q. At any rate, the IATA statistics do not include as flights or passengers continuations beyond the gateways?

[Tr. 5484] Mr. Williams: Read that again, please.

(The question was read.)

Q. Or do they?

A. I presume you are referring to the IATA statistics we have quoted in our report.

Q. That is right.

A. And as I thought I had just explained that a passen-

ger who travels beyond the gateway may be identified as one of the transatlantic passengers.

Mr. Williams: If he has made the transatlantic flight.

The Witness: If he has made the transatlantic flight.

Mr. Williams: But not otherwise?

The Witness: That is correct.

* * * * *

[Tr. 5487] * * * Q. I am talking about the flights that they are authorized to make. Are there any restrictions with respect to the carriage of passengers beyond the [Tr. 5488] gateways.

A. I believe there are some restrictions, and I cannot quote you the individual restrictions that do apply.

Q. You do not know even the restrictions that apply to TWA or Pan American?

A. I do not know the details of them.

Q. Do you know the nature of the restrictions?

A. From time to time, certain governments will not permit passengers of one sort or another.

I know those crop up from time to time. I do not know the detailed nature of other restrictions that may apply.

Q. What do you mean by passengers of one sort or another?

A. Some of the Middle East governments prohibit passengers of certain religions and nationalities periodically.

Q. Aside from that, do you know of any restrictions that would apply for example from say Paris to Rome?

A. I do not know of any restrictions.

Q. You know of no restrictions?

A. I do not know of any.

[Tr. 5489] Q. But you can't testify that they do not exist?

A. That is correct.

* * * * *

[Tr. 5494] * * * Q. Do you know whether or not there has been or has not been an increase of pure transatlantic traffic as against beyond gateway traffic over the years covered by your report?

A. How would you measure that? In terms of passenger miles?

Q. Any measure you want to take.

A. It is my understanding that there has been somewhat of a—I withdraw that.

And does your question refer to, for example, the IATA carriers who operate across the North Atlantic or does it refer specifically to TWA?

Q. It refers to TWA.

A. Well, the ratios at the bottom of the page 18 as to flights per plane miles, per International Division plane miles, show a very small change up and down during that period.

Now, if you could please restate the question, I can answer within the limits of the statistics set there on page 18.

If I understand your question—

[Tr. 5495] Q. During the period covered by your report, Mr. Wemple, has there been any change in TWA's operations whereby there has been an increase of straight transatlantic flights, east and west, and a decrease of beyond gateway flights?

If you do not know, say so.

A. I did not know the answer to that specific question.

Q. You did not study it?

A. I did not make those calculations or measurements.

Q. The data upon which you could base such calculations were of course available to you, were they not?

A. The data on TWA's transatlantic flights and beyond the gateway flights are set forth in the employees' timetables which are available to all of us.

Q. Did you make any determination as to whether or not TWA's passengers during the period in question increased in number on pure transatlantic flights but did not increase in the same proportion on beyond gateway flights?

A. I did not measure that.

Q. That data was also available to you, was it not?

[Tr. 5496] A. Those data are not readily available. I probably could have gotten them from TWA's records.

Q. What was the purpose of this ratio which you calculated at the bottom of page 18?

The reason I ask that is that I don't believe it is used in your report.

A. The ratio is not used. The purpose was to support the statement that is ahead of it, to show our source for that particular statement and to identify what we meant by "was relatively uniform."

Q. Other than that, it has no purpose?

A. It is not used further in the calculations.

Q. Suppose you made the division the other way and divided the number of flights into the number of plane miles? You would get the average number of miles per flight, would you not?

A. That is correct.

Q. Have you done it?

A. No, sir.

Q. Do you know, by the way, what the mileage is to the TWA gateways in Europe?

A. My recollection is that it is about 33 or 35 hundred to London. And obviously a little bit further to Paris and a little bit further to Rome than it is to [Tr. 5497] London.

Q. According to your work papers, Exhibit C and C8, Schedule 3-15 of page 4, I found the following mileages:

New York-London, 3,453.

New York-Paris, 3,635.

New York-Lisbon, 3,366.

New York-Frankfurt, 3,858.

New York-Rome, 4,277.

Are those statute miles, do you know?

They are miles I found in your work papers.

A. Just labeled "Miles"?

Q. I don't know whether they were labeled or not.

A. Thank you.

• • • • •

[Tr. 5498] • • • Q. There again you made no calculation as to how many plane miles would be involved in beyond gateway flights?

[Tr. 5499] A. Well, I made a calculation as to what TWA transatlantic mileage is of its total International Division mileage.

I do not have the result of that calculation available. It has been discarded.

Q. You mean destroyed?

A. No, sir. I mean discarded.

Q. Is it in existence?

A. It is not in existence.

Q. By "discarded," you mean it is not in existence?

A. That is correct.

Q. You don't mean it is put into a dead file?

A. That is correct. It is not in existence.

And my recollection is that the results of that calculation showed that a very substantial portion, definitely the majority, of TWA's International Division passenger miles—did I make my statement respecting passenger or plane miles?

Q. I have honestly forgotten. I lost you half way through. Start over again, why don't you, Mr. Wemple.

A. Let me withdraw that and start over again.

I made a calculation to determine the approximate proportion of TWA's transatlantic passenger miles is of TWA's total International Division passenger miles, [Tr. 5500] and that calculation showed that the substantial majority of TWA's International Division passenger miles are accounted for by transatlantic flights.

Q. You do not recall the figures?

A. No, sir.

Q. You cannot tell us, for example, the number of plane miles the International Division flies each year which would not be on transatlantic flights?

A. I have not done that calculation.

Q. You have not done it either for passenger miles or for plane miles?

A. I did it for passenger miles.

Q. But you discarded it?

A. And discarded it.

If it is material, I will be pleased to redo it.

Q. You did not do it, however, for plane miles?

A. That is correct.

Q. Taking the figures I gave you for average length of flight, Mr. Wemple, those figures show a substantial decline in 1961 and 1962, a decline of an average of 230 miles from 1960 to 1961, of 370 miles from 1961 to 1962, and an increase in 1963, but 1963 is still 209 miles lower than 1961 and 439 miles lower than [Tr. 5501] 1960.

What is the explanation, if any, for this decline in the number of miles flown per flight?

A. It is miles flown per transatlantic flight. The figures which go into this ratio are two completely different series. One is the transatlantic flights which are set forth at the top of page 21, and they generally decreased slightly from 1959 through 1961, and in 1962 and 1963 they increased very substantially for 1963.

Q. What table did you refer to?

A. The top of page 21. I happen to be looking at it, TWA's transatlantic flights.

Q. Are you talking about how the number of flights increased?

A. The number of flights, which is one element of the calculation that you have given here.

Q. I have considered that element in the question I gave you as to page 18, the bottom table.

A. In order to comment on how these miles per flight figures vary I have to look at the elements that go into the calculation.

Q. I gave you the elements. I took the elements you gave us, the number of transatlantic flights and the number of plane miles.

[Tr. 5502] I divided the flights into the plane miles—those are the only elements I am talking about—and I get an average number of miles per transatlantic flight.

I gave you the calculation. I pointed out the decreases, particularly as against 1960.

I am asking you what explanation you have for this decrease in average number of miles per transatlantic flight.

Mr. Williams: Is that what you are trying to explain?

The Witness: Yes, sir.

Mr. Williams: Go ahead and explain it then.

A. To return to the series at the top of page 21 which is TWA's number of transatlantic flights—

Q. The same figures which appear, do they not, at the bottom of page 18, at least for the years shown at the bottom of page 18?

A. That is correct.

Mr. Williams: Let him finish without interruption, please.

Q. Proceed.

Mr. Williams: Do you know where you are?

A. This is the denominator for this particular [Tr. 5503] calculation.

And as is very evident from that table, the denominator has not been constant. It varied from a low in 1961 to a high in 1963. And, of course, the 1963 high is substantially above the others.

Now, the explanation of how TWA came to operate those particular numbers of transatlantic flights is, of course, a very complex matter. It relates to TWA's available aircraft, it relates to the competition it faced, and to its plans and its policies respecting transatlantic flights.

And it is just a tremendous mass that is not subject to my answering to you without going into the—all I can answer is that this is how TWA chose to operate its International Division, and I cannot give you the reasons as to why it made the millions of decisions that went into those particular results.

Now, the International Division plane miles for TWA for the years 1959 through 1963 are set forth in the left hand

column of the table at the top of page 19, and this series, too, has a variation in—throughout the period, and 1963 is of course the highest figure.

Again, as to how TWA happened to operate those particular plane miles, this is simply—this is the way [Tr. 5504] TWA chose to operate during those years.

And the figures you have given me are a ratio. I see no easy way to offer a simple explanation of how those particular miles per flight happen to vary in that fashion. Obviously the ratio was considerably different in 1959 during the piston period than it was in the years that follow.

• • • • •

[Tr. 5514] * * * Q. As I understand the testimony you have given previously, you did not base your additional flights for the other years, your estimates for additional flights for the other years which appear in the table on the top of page 19 on any assumptions or any study as to where and when such flights would have been scheduled by TWA?

A. That is correct.

Q. You did not go into that?

A. That is—as I mentioned before, we did go into that at an earlier stage and discarded it as an impractical system to use for these estimates.

Q. Did you find it impractical because of the difficulty of getting all those additional flights scheduled?

A. No, sir.

Q. Did you make any effort to schedule those additional flights that you show at the top of page 19?

[Tr. 5515] A. That was the objective of that particular exercise and analysis.

Q. Did you finish your analysis in that regard?

A. No.

Q. Did you run into difficulties of any kind as to where those flights would be scheduled?

A. Not as to where those flights would be scheduled, no.

Q. Where then did you plan to schedule them?

A. I do not remember, except that we generally used the policy that they would be scheduled to places and at times that TWA eventually did schedule them when TWA had more jet aircraft.

Q. In making that study, did you compare TWA's flights with, for example, Pan American's flights where they were on competitive routes?

A. At that time we had available to us, and as I remember, used for occasional comparison what other airlines were doing.

* * * * *

[Tr. 5527] * * * Q. Did you make any study in connection with your calculations in the preparation of this report of the [Tr. 5528] routes that were operated by the foreign flag carriers during the period 1958 to 1963 and of the equipment they had with which to operate such routes?

A. A very casual study of the numbers of jet aircraft which the various foreign flag carriers had—

Q. Would you begin that again?

A. A very casual study of the numbers of jet aircraft the foreign air carriers had in their fleets. Perhaps a more descriptive term would be a very abbreviated study of that. And we also reviewed some information on the cities served by foreign flag carriers flying between the United States and various European cities.

* * * * *

[Tr. 5535] * * * Q. Whereas the transatlantic flight is supposed to be scheduled and extra sections?

A. And extra sections.

Q. They do not include nonscheduled flights?

A. Well, extra sections I would not call scheduled flights, but the—your statement is exactly correct, the transatlantic flights include both scheduled flights and extra sections, and the plane miles includes all plane miles.

Q. For example, the plane miles includes charter miles and the transatlantic flights do not?

A. That is correct.

Q. Yet you divide one into the other to get this ratio you call uniform?

A. That is correct.

Q. Just before we recessed at noontime, I had asked you what study you had made as to the routes flown and the equipment used by foreign flag carriers, and my question, I believe, was related to the statistics of foreign flag carriers on the top of page 21.

You stated generally, if I recall rightly, that you made some examination of timetables and so on.

A. That is correct.

[Tr. 5536] Q. Did you make any real study of the actual number of flights being offered by these foreign carriers and on what routes they were?

A. I did not make a detailed, extensive study.

Q. Do the results of any examination you made appear anywhere in your report?

A. They do not.

Q. Do the data that you developed still exist?

A. Well, the basic data that we used are available in the Official Airline Guides.

The results of our abbreviated analysis have been discarded long since.

Q. They no longer exist?

A. That is correct.

Q. Would the same be true with respect to any study of equipment which the foreign carriers had?

A. I made no detailed study of equipment foreign carriers used in the preparation of this report.

Q. At page 21 you state in the text in the middle of the page that IATA statistics are not available for charter flights for 1958—I don't know whether that means up to 1962 or through 1962.

A. I believe it is intended to mean through 1962.

Q. Do you have before you Defendants' Exhibit 214?

[Tr. 5537] A. Which is?

Q. Your February 16, 1962 report.

A. I do.

Q. I direct your attention, if I may, to Exhibit A attached to that report.

A. I have it.

Q. The table on the right-hand side of that page covering the years 1959 through 1961 preliminary, and the heading "Transatlantic Passengers" over the first three columns to the right of the years—do you see it?

A. Yes, I do.

Q. I direct your attention to a footnote marked by an asterisk which reads:

> "Includes nonmilitary charter traffic of IATA carriers as well as military MATS on-scheduled flights, but excludes carriage by nonscheduled airlines as well as miscellaneous carrying on cargo vessels and military transports."

A. Yes.

Q. Are those IATA figures?

A. Yes, but I call your attention to the fact that these are travel between Europe and U.S.A. and Canada, whereas the figures we have used in our other report are limited to travel between Europe and U.S.A.

[Tr. 5538] Q. By the other report, you mean the report that you submitted in this proceeding?

A. Dated May 2, 1966.

Q. It concludes no Canadian traffic?

A. That is correct.

Q. So charter traffic data was available, at any rate, from IATA?

A. Yes.

Q. What did you mean when, they say that the IATA statistics are not available for charter flights, when you used them in Defendants' Exhibit 214?

A. I have forgotten the exact details, but for the purposes of this particular report, which is dated May 2, 1966, it was our conclusion that the charter traffic statistics that might have been available, were not appropriate to be included in these—in this particular tabulation and particular analysis.

Q. Did you—

A. I expect that one of the factors was that as noted on Exhibit A that the traffic on nonscheduled airlines was excluded and nonscheduled airlines carry a considerable amount of this North Atlantic charter traffic.

Q. Are nonscheduled airlines members of IATA?

[Tr. 5539] A. Some are.

Q. Did not the IATA statistics which were available show the number of flights, the origin and destination and the number of passengers?

A. I do not remember.

Q. Did you examine to determine whether or not such statistics were available to you?

A. We examined in general available IATA statistics.

Q. Are you testifying in substance that IATA's charter statistics were not available?

A. I am testifying that we elected to not use separate charter flights and passenger statistics for this particular analysis.

It is my recollection that one of the factors in arriving at that decision was the matter of availability of figures that we would consider meaningful for this particular analysis.

Mr. Hayes: I ask that there be marked as Defendants' Exhibit 232, as a sample, a six-page document headed "International Air Transport Association Compiled by New York Branch Office, December 1959," three pages called "Eastbound," three pages called "Westbound."

[Tr. 5540] • • • Mr. Hayes: So as not to clutter the record, I will state, and counsel can correct me if it is incorrect, this which I have marked as a sample was a set of monthly statistics put out by IATA during the period mentioned by Mr. Wemple, 1958 to 1962.

By Mr. Hayes:

Q. I show you, Mr. Wemple, Defendants' Exhibit 232 for identification. Do you recognize it as a regular report made by IATA to its members?

A. I believe I have seen it before.

• • • • •

[Tr. 5541] • • • Q. Defendants' Exhibit 232 for identification shows, does it not, by airlines, charter flights for the month with number of flights and number of passengers, among other information?

A. There is some information labeled charters on here.

[Tr. 5542] Q. It gives the origin and destination which would permit the elimination of Canadian traffic, does it not?

A. I call your attention to the third line under "British Overseas Airways Corporation," 16 flights, Chicago—

Detroit—Montreal—London, revenue passengers 139 first, 129 tourist, 631 economy for a total of 899.

I have no idea how to determine those which were the U. S. to Europe passengers and those which were Canada to Europe passengers.

Q. Those are the scheduled flights, are they not? The charters I think you will find below them.

A. Oh, I misunderstood your point.

I—well, do you want me to examine all of the references to charter here in order to answer your question?

Q. You may do it any way you please.

I am asking you whether or not charter statistics were not, in fact, available for—

The Special Master: I think the question was whether or not you could separate out the Canadian passengers.

Mr. Hayes: And he could separate out the Canadian, that's right.

[Tr. 5543] The Witness: On the charter statistics that are here?

Mr. Hayes: That is right.

The Witness: I am not sure of the significance of that symbol on the westbound flights under "Charters" which is apparently for BOAC. It says "LAJES-Boston."

I don't know what that LAGES means.

Q. Are not those designations of airports?

A. I just don't happen to recognize them and I don't know whether one is Canada or one is U. S. or something else. The Boston is clearly—

Q. That information could be readily obtained, could it not?

A. Oh, as to what the symbols mean, absolutely.

In looking at these figures quickly, with the exception of the one I just mentioned, I see none that could not be classified as either U. S. or Canadian termini for a charter flight.

Q. As a matter of fact the Canadian designations are preceded by a "Y" in each instance, are they not?

A. A number of the Canadian terminals are identified by a "Y".

Q. Do you know that that was the routine that IATA [Tr. 5544] used to designate Canadian?

A. I did not know that there are none without a "Y" on them.

Q. The table on page 23 of your report, Mr. Wemple, you set forth the number of seats available, transatlantic seats for the years 1958 through 1963 by TWA, Pan American, foreign carriers, total IATA and TWA percentage, and then on the top of page 26 you calculate a revised TWA percentage which you arrive at by stating first the total IATA seats, and I am thinking now of 1958 and—

A. Excuse me. The top of what page?

Q. 26.

Mr. Williams: 26.

A. Thank you.

Q. For the years 1959 and 1960, you take the total IATA seats, you take TWA's actual seats, which you got from page 23, you add your estimated increases, you come to a revised total of TWA seats, you restate the IATA seats as revised, and they do not change for 1959 and 1960, and then you get a revised percentage of IATA for TWA.

A. That is correct.

Q. In the years 1961 to 1962, before calculating [Tr. 5545] the TWA percentage, you revise the total of IATA seats—

A. That is correct.

Q. —by adding to the actual IATA seats the number of additional seats you estimate TWA would have available?

A. That is correct.

Q. Then you calculate a percentage which you call TWA's revised percentage, which is the percentage arrived at by dividing your revised TWA seats by your revised IATA total?

A. That is correct.

Q. You followed the same procedure, did you not, in Chapter III?

A. That is correct.

Q. On page 26 your revised percentage for TWA of 12.5% becomes 13.4 when Chapter III is added in, and your revised percentage for 1960 of 19.7 on page 26 becomes 20.8 when Chapter III is added in, is that correct?

A. What page is that on, Chapter III?

Q. 48, I believe. The top of page 48, 20.8.

A. That is correct.

Q. For 1959 and 1960, you are assuming that the total of IATA seats would not change, and that the totals of other foreign carriers would not change?

[Tr. 5546] A. That is correct.

Q. But you are assuming a transfer of the additional TWA seats from Pan American?

A. That is correct.

Q. For the years 1961 through 1963, you are assuming that the total of IATA seats would be increased by your estimated increase in TWA seats—

A. That is correct.

Q. —but that the total seats made available by all other carriers, foreign and Pan American, would remain unchanged?

A. That is correct.

Q. Except for the shift from Pan American to TWA which you indulge for the years 1959 and 1960, you, in effect, are assuming, are you not, that the available seats offered by all other carriers remain unchanged throughout the period?

A. I selected that method of calculation—

Q. Just answer the question first, please.

A. Yes.

Q. Only TWA would have changed under our approach?

Mr. Williams: He said so.

Mr. Hayes: I think you are right, Mr. Williams. I guess he did.

[Tr. 5547] Q. In your text at page 25, you mention the assumption that the additional seats offered by TWA would have been a transfer from Pan American because TWA's aircraft would have been a transfer from Pan American was supplied to you by counsel?

A. Yes.

Q. Who also advised you that Pan American could have obtained replacements in the spring of 1961?

A. Yes.

Q. Then you go on, for the remaining years you selected the premise that the annual total number of transatlantic seats available would have been increased by the number of additional TWA seats.

What other premises did you consider before you made that selection?

A. I considered reducing the total number of IATA seats for other carriers by the amount that TWA's seats would have been increased. That is essentially the only other system I considered.

Q. Did you make any calculations based on that premise?

A. I don't believe I did.

Q. What did you do by way of considering it? What does that mean, you consider it?

[Tr. 5548] A. We are working here with a percentage, TWA's percentage of the IATA total. That percentage is the result of arithmetic with a numerator and denominator, the numerator being TWA's seats.

With the additional aircraft we have TWA's number of seats being increased. If we allow that increase in the fraction we would get a certain higher percentage.

If we at the same time reduced the denominator which would be in effect selecting the assumption that IATA seats would have been reduced by the number that TWA increased, the percentage would go still higher.

I elected to use the intermediate course whereby TWA's seats are increased but the IATA total is presumed to have not changed.

Q. Is that what you mean by considered?

A. That is correct.

Q. When you made the selection of which premise to use in 1961, 1962 and 1963, did you base it at all on a study of the equipment the foreign air carriers had available in those years?

A. No.

Q. Or on the routes the foreign carriers were flying in those years?

[Tr. 5549] A. No such study.

Q. Or on the number of passengers they were carrying by routes in those years?

A. No such study.

Q. The same would be true of Pan American, you made such study in those years?

A. In making that selection of this particular form to use for analysis, that is correct.

Q. Let us look again at the table at the top of page 19 where for the year 1961 you show 987 additional flights. Dividing that number by 52, one arrives at 19 one way flights or 9½ round trip flights.

As a practical matter, is it not a fact that since you are using a yearly average here, if those 19 additional flights would be scheduled there would be more in the summer during the peak season and less in the off-peak season?

A. I am using a yearly total, not a yearly average.

Q. I know that. I know what you are doing.

A. Now, could you please ask me your question on that basis?

Q. I am asking you whether if you or TWA were faced [Tr. 5550] with the task of putting on an average of 19 flights per week, it would actually schedule more per week during the peak season and less per week during the non-peak season.

A. I can't imagine TWA being faced with the proposition to put on an average of 19 additional flights per week for a one year period. So, therefore, I cannot answer your question.

Q. You supplied the figure of 987 added flights.

A. For a year, that is correct.

Q. Right. That comes out as I say to an average of 19 per week.

Mr. Williams: If you do it that way.

Mr. Hayes: Just be patient, please, Mr. Williams.

Mr. Williams: I am trying to understand what you want the witness to say.

Mr. Hayes: I asked this question, assume, as he does here, that TWA had these additional flights to schedule.

Q. Assume that. You made this assumption. You arrived at this calculation.

If TWA were scheduling 987 additional flights in the year 1961, would it schedule more of those flights [Tr. 5551] in the peak season and less in the off-peak season?

A. I would have to examine TWA's detailed flights pattern for the year 1961 to be able to answer that correctly, and I cannot do it extemporaneously.

Q. Didn't you make any study, I thought you did, of their flight pattern, their existing flight pattern.

A. I reviewed it.

Q. As a matter of fact around the same time or just shortly before, you were engaged to prepare this report, you had made quite a review in connection with Defendants' Exhibit 214, I think it is, of—

The Special Master: Here you are not asking for a review of management decision, though, Mr. Hayes.

Mr. Hayes: I know I am not.

The Special Master: You are asking him to make a management decision, it seems to me, and I don't think—

Mr. Williams: I object to the line of questions. I don't think it is productive of anything and is relevant here.

The Special Master: I will sustain the objection.

[Tr. 5552] Mr. Hayes: Mr. Brownell, if I may for a moment—

The Special Master: You may state your position.

Mr. Hayes: —we are faced here with a fantastic figure which is used as a basis for calculating damages of 987 flights in the course of a year.

The Special Master: Would it have made any difference on damages whether more of them had come in the summer season and less in the winter season?

Mr. Hayes: I think it would, because the summer season would have the higher load factors and the off-peak season would have the lower load factors.

The Special Master: You are entitled to point that out, but I don't see how the witness can tell you how he would have scheduled them. He is not an expert on scheduling.

So far his only comments in that area have been to review management decisions.

Mr. Hayes: So far as determining the realistic or lack of realism in this figure—would seem to me that this witness who comes up with [Tr. 5553] this additional number of flights and I think it is obvious that if the flights were being flown they would have been flown more in the peak season than in the non-peak season—

The Special Master: So do I.

Mr. Hayes: —how many actual flights he would be putting on TWA during that peak season, supposed flights rather than actual, and how much traffic there would be because he is talking about a static market here to fill the seats on those additional flights —he is not talking about a growing market—

The Special Master: Are the monthly figures there for the actual?

Mr. Hayes: I am sorry.

The Special Master: Are the monthly figures for the actual in his report?

The Witness: No, sir.

Mr. Hayes: No. But the IATA statistics are

monthly which he uses as a base here to get into this table 19. They are monthly figures.

The Special Master: You can certainly question him about them but I won't allow any further questions which would require him to make [Tr. 5554] a statement as to how he would have scheduled them hypothetically.

Q. As I understand it—I think I have asked that question—I won't repeat it—you had the IATA monthly statistics available to you, did you not?

A. Yes.

Q. You knew from the IATA statistics or you would determine how many flights were flown by each of the IATA members during each month?

A. That is correct.

Q. And how many passengers were carried by them?

A. That is correct.

Q. You could determine roughly at least the load factors at which they operated for each month?

A. I could have.

Q. You did none of that?

A. I did none of that.

Q. You are treating this figure of 987 additional flights on the same basis exactly as the actual flights that were flown, are you not—

A. That is correct.

Q. —for your damage calculation?

A. That is an annual figure and it is compared with an annual figure.

[Tr. 5555] Q. The same is true of your 1793 flights in 1962, is it not?

A. That is correct.

Q. And of the 311 in 1963?

A. That is correct.

Q. Take the peak of 1961, July 1961.

Do you know how many schedules TWA actually flew to Europe?

A. No.

Q. According to the Official Airline Guide, and I am relying on it, for July 1962—

A. I thought you had just said July 1961, but—

Q. 1961. I am sorry.

A. —it is immaterial to my answer.

Q. The question had to do with flights in July 1961. The Airline Guide I mentioned was published in July 1962. That should be 1961. I am sorry. It is a typo in my notes. It should be Airline Guide for July 1961 also.

• • • • •

[Tr. 5557] [Mr. Hayes:] I ask that there be marked for identification as Defendants' Exhibit 233 a work paper of Mr. Wemple's from Folder 9B headed "Jets, All Gateways" and then in the center headed "TWA-Hughes, TWA International Division, Summary of All Eastbound Weekly Transatlantic Jet Flights and Jet Service to Gateway Cities and Beyond," consisting of two pages.

• • • • •

Q. Are you acquainted with Defendants' Exhibit 233 for identification?

A. I am.

Q. Can you tell me from Exhibit 233 for identification how many jet flights TWA flew to gateway cities on April 30, 1961, effective April 30, 1961?

A. This particular schedule lists 40.

Q. The same number on July 1st, effective July 1, 1961?

A. That is correct.

Q. And also on August 2, 1961?

A. That is correct.

Q. That was to all gateways, if I recall rightly?

A. No, sir.

[Tr. 5558] I call your attention this is to the London, Paris and Iberian gateways alone.

Q. I am sorry. London—where do I find that?

A. At the top—first page.

Q. I see. London, Paris and Iberian gateways?

A. That is correct.

Q. Do you know how those flights were split by gateways?

A. I can read the numbers on this first page if that's the answer to your question.

Q. I don't know. You tell me if that is the answer, Mr. Wemple.

A. I am puzzled by your question. Please expand.

Q. How many of the weekly eastbound jet flights did TWA operate, say, in July 1961 to London, Paris and Iberian gateways?

A. 40.

Q. How many to each?

A. 16 to London, 19 to Paris and 5 to the Iberian Peninsula.

Q. These figures were obtained according to the footnote from the employees' timetables?

A. That is correct.

Q. You do not have Rome here. Have you any work [Tr. 5559] paper disclosing how many non-stop jet flights TWA had to Rome in July 1961?

A. The second sheet of this exhibit has a listing of weekly jet flights to Rome.

Q. Your first sheet is my second sheet and the other way around. I see. Now I am straight.

This is really to all gateways, is it not, practically, and to other cities as well?

A. That's what the title says.

Q. That shows for August 1961, as I understand it, two to Shannon, fourteen to London, seven to Frankfurt—

A. You are just a little too fast for me. Okay, I am with you.

Q. Four to Lisbon, five to Madrid, sixteen to Paris, two to Geneva, two to Zurich, three to Milan, sixteen to Rome, two to Athens, and one each to Dhahran and Bombay. They both couldn't be non-stop, could they?

A. The others are not necessarily non-stop.

The Special Master: No, I doubt it.

Mr. Hayes: I was wondering.

Q. There is no question in your mind, is there, Mr. Wemple, as to the accuracy of the number of flights to have been operated by TWA as of any of the dates set forth in Defendants' Exhibit 233 for identification?

[Tr. 5560] A. I have no reason to question this exhibit.

Mr. Hayes: I offer it in evidence.

Mr. Williams: No objection.

The Special Master: Received.

(Defendants' Exhibit 233 for identification, received in evidence, as of this date.)

Q. In 1962, TWA increased its schedules to those same gateways and others, did it not, to a total of 46? I am speaking of the peak season.

A. Yes.

Q. In 1963, it made a further increase, did it not, to a total of 61?

A. Yes.

Q. In connection with your methodology here of increasing TWA seats and leaving TWA's competitors unaffected except your transfer of seats from Pan American to TWA in 1959 and 1960, are you assuming that both the foreign carriers and Pan American would not have reacted to the additional competition offered them by the additional flights you set forth on the table on page 19?

A. I am not making that assumption.

Q. You are assuming their number of seats are remaining the same, are you not?

A. I selected that system for the calculation.

[Tr. 5561] Q. By assuming their number of seats remained the same, are you not assuming that they would not have put on additional capacity?

A. I make no assumption as to respect what they would have done in their flight operations. I simply selected the method for calculation that the total seats would have remained unchanged.

Q. Isn't there an unspoken assumption in table 19, Mr. Wemple, that they would not have increased in the available seats they were offering the public? Isn't that basic to it?

A. No, sir. I answered your question as to assumptions respecting the method of calculation, and I absolutely did not make an assumption respecting what the other airlines would have done in flight schedules, et cetera, if TWA had had these additional aircraft.

Q. On what basis then did you just use exactly the same number of figures for the flights and passengers—take the flights—for the flights that TWA's competitors, including Pan Am, would not have changed?

A. I believe I described why I made that particular selection in holding the denominator of the fraction which is used for the calculation of TWA's percentage constant, because on balance, it would give a slightly lower state-
[Tr. 5562] ment of results.

Q. Are you saying in substance, Mr. Wemple, that by leaving the number of foreign flights unchanged, you are not operating on the premise that there would have been no competitive reaction by the foreign carriers?

A. I have no intention and I do not make that claim, statement or assumption.

Q. The question is, is that not inherent in your tabulation?

The Special Master: That has already been answered.

Mr. Williams: He said no.

Q. If, in fact, the foreign carriers or Pan American or both had offered more seats in more flights to meet this supposed increased competition from TWA, your percentages would change to the extent to which such added competition was put into the market, would they not?

A. That is correct.

[Tr. 5563] • • • Q. When, Mr. Wemple, did Pan American put into transatlantic service any one of the six jets which you transferred to it in your Chapter II? By "commercial service," I mean Pan American's revenue service.

A. I have dates here. If you like, I will just read them off as to when Pan American—

The Special Master: You just want the first one, don't you?

The Witness: The first one was October 26, 1958.

Now, whether that specifically went into transatlantic service at that particular time, I do not know.

By Mr. Hayes:

Q. What is the number of that plane?

A. N711.

Q. No, I am referring—

A. I see what you mean.

Q. (Continuing)—to planes that you—

A. 701, 2, 3, 4, 5, and 6. One moment, please. I find a plane here, Plane 702 which was January 27 1960. [Tr. 5564] Plane 701 was December 8, 1959.

Q. You might as well give me the rest.

A. This table does not go beyond that point. Those are the only two of those particular planes that happens to be on this table.

Q. The rest were at later dates, were they not?

A. I would presume so.

Q. So, in fact, Pan American put one of the six jets with which Chapter II is concerned into revenue service on December 8, 1959?

A That is correct.

Q. Which would be 24 days for the year 1959?

A. That is correct.

Q. Or to speak for the month of December, it would be 8/10 of a plane for the month of December; is that right?

A. Yes.

Q. On Exhibit D, you transfer, as revised, 3/10 of a plane from Pan American to TWA in November 1959, and 1.6/10 of a plane in December 1959, do you not?

A. That is correct.

Q. How did you get those figures for November and December when Pan American's, the first of these six jets that went to Pan American did not go into service until [Tr. 5565] December 8, 1959, and couldn't generate any revenue?

A. The date I gave you before, which is what I understood your question related to, was the date the plane went into revenue service.

Q. That is right.

A. The numbers which you have just quoted me, the 3/10 and the 1.6 are aircraft available for commercial serv-

ice calculated as I have described so many times for aircraft on hand after other aircraft of that particular fleet had been placed in operation.

Q. Until you transfer seats from Pan American, Pan American must first have the seats, must they not?

A. I call to your attention that the seats calculation is based on plane miles which, in turn, is based on ratios of average number of aircraft available for commercial service, which ratios are set forth on the top of page 14, and that in both the numerator and denominator of those particular ratios are in terms of planes available for commercial service, rather than planes available for revenue service

Q. Would you mind answering the question, Mr. Wemple?

* * * * *

[Tr. 5572] * * * Q. Let us take a transfer of seats, Mr. Wemple.

craft on hand after other aircraft of that particular fleet have been placed in operation.

Q. I understand that, but on page 25, you used the premise that the additional seats offered by TWA would On what basis do you transfer the seats in plane N-701 from Pan American to TWA at a date prior to the time when Pan American actually used that plane in revenue service?

A. My answer is straightforward there cannot be any such transfer of seats.

Q. Will you explain that in the light of your language n page 25?

The Special Master: I don't want to interfere with this. I think I see what Mr. Hayes wants to get in the way of an answer.

Let me make this comment and then you can strike it from the record if anyone wants to.

He has explained to my mind at some length and evidently to everyone's satisfaction at the time the basis on which his statistical study was made.

As I understand the purport of Mr. Hayes' present line of questioning, he is questioning whether or not it was a realistic basis on which to calculate damages in view of the fact that the [Tr. 5573] actual history is different from the statistical study in ways that you have previously explained.

I would think maybe it would help to get the two of you together here if a question such as this were asked: In view of the fact that the date of actual service of the first Pan American plane was different than the date when you start computing the damages in your statistical study, do you think that it was a realistic basis—that your statistical basis is a realistic basis on which to calculate the measure of damages?

As I say, if anybody objects to this statement of mine, I will be glad to strike it physically from the record.

Mr. Hayes: I have no objection.

Mr. Williams: I think you stated it exactly and I would like to have the answer or explanation.

The Witness: I believe our system of analysis and calculation is solid, legitimate and proper, and the cornerstone is this chart on page 24 which shows TWA's remarkable correlation between percentage of seats offered and percentage of passengers obtained.

[Tr. 5574] If I were rewriting page 25 today, I would delete or modify that reference to transfer of seats.

The Special Master: That appears to be connected with actual history, I think is the trouble with that.

Mr. Hayes: That's right. I am concerned with the history.

The Special Master: You are saying now that you did not intend——

The Witness: Our system of calculation is not actually based on the transfer of seats, that is correct.

There were, of course, in the year 1960, a substantial number of seats transferred from Pan American to TWA, but the fragment of 1959 that is under discussion now does not have the indicated transfer of seats that is implied—does not have the transfer of seats that is implied by the last part of the statement on page 25. Or I should say by the statement in the last part of page 25.

Q. Are you telling us in substance by your last answer that in making your damage calculations you have not considered the historical facts based upon when Pan [Tr. 5575] American actually put the six planes with which you are concerned into revenue service on the Atlantic?

A. That is correct.

Q. You did not consider it important to look into this history of the actual useage of those planes by Pan American?

A. Yes, I considered the history of—no, let me withdraw that.

I did not consider it important as to where Pan American used those particular six planes, since Pan American had a substantial fleet of that type of aircraft.

Q. I am talking about transatlantic service.

A. So am I.

Q. I will try it again.

In making your damage calculation for the International Division of TWA insofar as the six aircraft that went to Pan American were concerned, and in making your transfer of seats which forms part of the basis for your damage calculations, did you disregard the dates when Pan American actually put those six planes into service, revenue service?

A. I don't know whether disregard is the right word. We did not consider it. We did not intention- [Tr. 5576] ally disregard it. We just did not consider it.

Q. I don't want to quibble in semantics, Mr. Wemple, about the meaning of the word disregard.

Did you in your calculations as to the number of seats to be transferred, consider the dates when the six planes that went to Pan American were actually put into revenue service?

The Special Master: Would it express your view more clearly to say "utilize" rather than "consider"? Did you utilize it in your formula?

Mr. Hayes: Maybe it would. You know what I am trying to get here and I can't get it.

The Special Master: I think that would be more understandable.

The Witness: There is another aspect of your question which relates to calculation of seats that were transferred. We did not calculate the number of seats that were transferred.

We did consider that if Pan American had not had these six B-707 long range intercontinental aircraft, Pan American's seats offered on transatlantic would have been reduced until it could have gotten replacements for those aircraft.

We did not make a quantitative determina- [Tr. 5577] tion of exactly how much they could have been reduced.

Mr. Hayes: Let me try it this way: I am afraid that did not help, Mr. Brownell. And no fault of yours, I will add.

Q. All of Chapter II leads up to a calculation of additional seats—I am speaking particularly of 1959 and 1960 now I should say—Chapter II leads up to a calculation of the number of additional seats TWA would have had if it had six particular Boeings, does it not?

A. That is correct.

Q. Then you proceed to put passengers in those seats?

A. That is correct.

Q. You also transferred the additional seats from Pan American, did you not?

A. No, sir, we did not make a specific transfer of additional seats from Pan American.

Q. I don't understand page 25 then.

That the additional seats offered by TWA would have been in effect a transfer of seats from Pan American because the aircraft would have been transferred from Pan American.

What does that mean if it does not mean what I [Tr. 5578] said?

A. As I mentioned before, if I were rewriting that page today I would rewrite it differently.

Q. However you would rewrite it, what does that mean?

A. It means that in my opinion Pan American would have offered fewer transatlantic seats during 1960 than it did actually offer, and, in effect, Pan American seats would have been reduced, TWA's would have been increased, and this would have effectively been a transfer of seats.

I do not represent that the number of seats that Pan American would not have offered would have been exactly the number of additional seats that TWA would have offered.

[Tr. 5579] Q. So that we are clear, the additional seats you are talking about are the additional seats that TWA could get from the six planes, are they not?

A. Which were assigned to International Division service, that is correct.

Q. So we are back to those six planes?

A. A portion of those six planes.

Q. Basically the six planes and then you make an allocation to International. Let us start with six planes.

A. That is correct.

Mr. Williams: So counsel wants to know why you didn't pick the same dates for going in service for TWA.

Mr. Hayes: That is not what I asked.

Mr. Williams: No? I am sorry. I withdraw it.

Mr. Tenney: We had some history last week.

Mr. Williams: I missed the history. As a matter of fact, I missed the point if that isn't it.

Q. I am trying to learn from you—Mr. Wemple, and maybe it is my fault—I don't know—maybe my questions are unclear—

Mr. Williams: Don't philosophize. Just ask a question. We are trying.

[Tr. 5580] Mr. Hayes: I am trying harder than I thought I would have to, Mr. Williams.

Q. So far as the seats in those six planes are concerned for the years 1959 and 1960, have you not trnasferred to TWA the additional seats that TWA would have had if TWA had received those planes?

A. That is correct.

Mr. Williams: All right, he answered it. I think it is repetitive.

Q. Are you not taking those seats away from Pan American? Everything else remains unchanged, remember, during those years.

A. I am taking those seats away from the—no, wait a minute. I withdraw that statement.

By the calculation at the top of page 26, I have taken those seats away from the total of Pan American and the foreign flag carriers, and I was thinking of taking them away primarily from Pan American. I should say—let me correct that last part—I was primarily taking those seats away from Pan American.

So the answer to your question is probably yes.

Q. Since those are the seats we are talking about, I want to know what basis there was for making a transfer from Pan American to TWA of those seats in those planes [Tr. 5581] prior to the time Pan American actually used those planes in revenue service.

A. And I cannot justify that.

Q. You cannot justify what?

A. What you had just said.

Q. I did not ask you to justify anything I said.

* * * * *

Q. Let me put it to you this way, Mr. Wemple: On Exhibit D you show for the year 1959—and I am taking [Tr. 5582] 1959 because of its simplicity—an addition to TWA of 2/10 of a plane.

If you had taken the date when Pan American actually put Plane 701 into revenue service, you would have, according to my calculation, only 6/100 of a plane in 1959.

Does that suggest anything to you?

A. In consideration of this line of discussion, if one is to ignore completely any transfer of seats from Pan Ameri-

can to TWA in the year 1959, or to eliminate any such possibility—let me change that from the word "ignore"—the table at the top of page 26, the third from the right column labeled "IATA Seats Revised" should be not 1823, but 1824, which represents TWA's increase, and that obviously would have no material effect on the percentages that are shown there.

I believe that is pertinent to the—I think that is the pertinent bit of information in answer to your question.

Q. I hope somebody else can make some sense out of that answer. I frankly can't. It has nothing to do with the question I addressed to you about Exhibit D as to whether or not you had any comment on the fact that under your Exhibit D you have 2/10 of a plane there whereas if [Tr. 5583] you took the date that Plane No. N701 actually went into service with Pan American you would get only 6/100 of a plane?

A. And that would not be as we have identified Exhibit D, average number of aircraft available for commercial service.

That would be some different figure called aircraft in revenue service.

Q. I guess I will give up.

Let me try it another way.

On page 20 of your report, you add 1100 seats in 1959?

A. That's correct.

Q. That's as a result of some mathematical calculations of yours?

A. That is correct.

Q. Are you telling us that those 1100 seats came from Pan American?

A. No, I am telling you that those 1100 seats came from TWA's operation of some of the six additional jet aircraft which are listed on page 10.

Q. It could come from only one of them, couldn't it, so far as Pan American's operation was concerned?

A. I'm not treating with Pan American's operation. [Tr. 5584] I am treating with TWA's operation of those aircraft.

Q. I am trying to find out about this transfer.

A. I am trying to explain about this transfer.

Q. Have you anything else to add?

A. No, sir.

Q. Thank you.

If I asked you the same questions with respect to the other six planes—

Mr. Williams: The other five.

Mr. Hayes: Thank you, Mr. Williams.

Q. —the other five planes of the six that you have assumed would have been delivered to TWA as I did with respect to the first of them concerning a consideration by you or to adopt your word a utilization by you of the dates when they actually were operated by Pan American in revenue service, would your answers be the same?

A. That is correct.

* * * * *

[Tr. 5593] * * * Q. The part of the report which deals with the transfer of seats, as specifically stated on page 25, and you gave testimony on it on Friday last.

A. Yes.

Q. In connection with this transfer of seats from Pan American or TWA, were you in effect assuming that Pan

Am allocated the six 331s which it received to its Atlantic Division in precisely the amount you estimated that TWA would have allocated them to its International Division?

A. No. sir.

Q. In the absence of such an assumption, how do you arrive at a transfer of the seats to the International Division from Pan Am's Atlantic Division which were accounted for by the six planes?

A. Pan Am would have been short six B-331 aircraft during the 1959-60 period that we are discussing. The shortage would have been a fractional shortage of the six during the last part of 1959, and corresponding shortages for various months in 1960.

Pan Am operated its B-331 aircraft primarily on transatlantic service, and we believe it is completely [Tr. 5594] reasonable to assume that they would have been able to provide fewer jet transatlantic seats during that period if they had not had the six B-331 aircraft that we are discussing.

As to whether this difference in Pan American's jet transatlantic flights would have been precisely what we assume TWA would have operated, is not the point.

The point is that there would have been a reduction, a general reduction in Pan Am seats and a general increase in TWA seats.

One can make several assumptions. That Pan Am's reduction would have been smaller than TWA's; that Pan Am's reduction would have been greater than TWA's additional.

I chose the middle ground as being most reasonable for this particular calculation.

To illustrate with reference, for example, to December of 1959, our calculation, as set forth on the top of page 20, and further after in our report to the revenue estimate

which is at the top of page 32 for the year 1959, as an element, a reduction of Pan Am's seats by 1100—that is set forth at the top of page 20—and a TWA increase in seats of 1100. If Pan Am, for instance, [Tr. 5595] had put—correction—Pan Am put one of its B-331 aircraft into revenue service on December 8, 1959. There would have been 24 operating days to the end of the month with that aircraft, and that aircraft carries something over 100 seats—let me use just 120 for round figures—let me use 110 for round figures. 1100 seats at 110 seats per aircraft would be 10 transatlantic flights or five transatlantic round trips within 24 days.

I offer that calculation to illustrate the type of changing seats that might have taken place.

Q. Could I have that arithmetic at the end again? I didn't quite get it.

The Special Master: Yes.
Do you want to read it back?
(The record was read.)

By Mr. Hayes:

Q. By this illustration, you are not testifying, are you, that Pan Am used that particular 331 in the Atlantic Division, for any particular number of flights between December 8th and December 31st, are you?

A. That is correct.

Q. You have made no inquiry as to where Pan Am used that particular 331, have you?

A. That is correct.

[Tr. 5596] Q. So you do not know whether it was in the Atlantic Division or one of its other divisions?

A. That is correct.

By Mr. Hayes:

Q. If you are saying that seats are being transferred from other Pan American planes rather than from Plane N701, which you identify on page 10, what factual [Tr. 5599] basis have you for that transfer?

A. To repeat, the majority of Pan American's use of the B331 aircraft in the 1959-60 period was on transatlantic service.

I believe that if Pan American had had six fewer B331 aircraft, it would have been obliged to have offered fewer B-331 aircraft seats on transatlantic service, and I chose for this particular calculation what I believe is the most reasonable assumption, and that is, that the additional seats that we have calculated for TWA's international transatlantic operation would have been approximately the same amount by which Pan American's transatlantic operation would have been reduced.

Q. Have you made any study or inquiry as to how Pan American, in fact, deployed the six 331s which you have identified on page 10 of your report?

A. No inquiry.

Q. None at all?

That is correct.

Q. You are not able to testify that any portions of any one of those six planes was, in fact, used in the Atlantic Division of Pan American?

A. I am not able to testify as to specific use of [Tr. 5600] any of those specific planes.

Q. Did you, for example, examine or consider or study, whether it went into your report or not, any data which Pan American reported to the CAB with respect to the use of this fleet in the years covered by your report?

A. I did.

Q. Did you specifically make any study of what jets it used in the Atlantic Division?

A. I did.

Q. What did you find for the year 1959, for example, as to what jets were used by Pan American in the Atlantic Division?

The Special Master: Would someone explain to me what bearing on our objective here it would have to know what the historical use of those six planes was by the time Pan American—

Mr. Williams: Especially, your Honor, in view of the fact that the witness said—

The Special Master: He did not use them in his calculation.

Mr. Williams: He did not use them, no.

Mr. Hayes: My point is a very simple one. We are talking about six particular identified planes. [Tr. 5601] If they were not used in the Atlantic Division, they could hardly have had their seats transferred to TWA.

The Special Master: The transfer is a mathematical or theoretical one. There is no assumption at any time that a physical transfer of those planes to TWA enters into this calculation. The witness has testified that he believes his calculation is a reasonable one, based on general experience, but there is no—I am sure he is not going to say regardless, if we spend all day, that the historical experience by Pan American, the actual use of these six planes has any effect whatsoever on his calculation.

Mr. Hayes: Then I submit there is no factual basis for his calculation.

The Special Master: That, I think you have made quite clear, and I would say to a point of exhaustion of the Special Master.

Mr. Hayes: I did not mean that.

The Special Master: So if there is some other line of inquiry, I believe it would be more useful to our objective.

By Mr. Hayes:

[Tr. 5602] Q. Let us get away into some other matters, then.

Does your transfer of seats involve some further assumptions? For example, implicit in your study, is there an assumption that the 331s that went to Pan American produced the same number of plane miles per year in the Atlantic Division that you estimate they would have produced for TWA in the International Division?

A. No such assumption.

Q. Is it implicit? I don't mean an express assumption. I asked is it implicit.

A. It's not implicit.

Q. Is it implicit in your calculations that Pan American, without those six jets, would have retained the same number of piston plane miles in its Atlantic Division over and above those that actually had been in it, as you estimate that TWA would have deleted?

A. I did not make a specific assumption on that matter.

Q. Are you, in effect, transferring to Pan American the piston planes that you are eliminating from TWA?

A. I am not.

Q. Or the piston plane miles that you are eliminating from TWA?

A. I am not.

[Tr. 5603] Q. Is it implicit in your calculations that there would have been a net decrease in Pan American's Atlantic Division plane miles in the same amount as your estimated net increase of TWA International Division plane miles?

A. No such assumption.

Q. Is there implicit in your study that the ratio of the number of Pan American transatlantic flights to its Atlantic Division plane miles was the same as the ratio of TWA's transatlantic flights to its International Division plane miles?

The Witness: Please read that question.

Mr. Williams: Read the question.

(The question was read.)

A. No.

Q. Are you implicitly in your study concluding that there was a decrease in Pan American's transatlantic flights?

A. No.

* * * * *

[Tr. 5608] * * * The Special Master: I think I understand this, if this will shortcut it a bit, that Pan American's history of flights and history of the actual number of seats flown by Pan American during this time would be immaterial—

The Witness: That is right.

The Special Master: (*continuing*)—to the calculations shown on page 47.

The Witness: That is correct.

Mr. Hayes: I suppose they could be, Mr. Brownell, What I would like to know is whether they are.

The Special Master: The witness said so, and you

have pointed out that you think they are. I suppose that in the summing up, I will hear quite a bit about that, but we tested the witness on a number of approaches to that and he maintains consistently that they are in his opinion immaterial to it. So I just raised the question of whether we have not covered it, so far as this witness is concerned.

Mr. Hayes: I would like a statement from him as to why it is immaterial.

[Tr. 5609] The Special Master: I think you are entitled to that.

The Witness: With reference to page 47 in Chapter III, if TWA had received the eighteen B-331 aircraft on the earlier dates set forth on page 40, Pan American would not have had as much opportunity to fly transatlantic services with B-331 aircraft.

As I mentioned before, I believe this would have resulted in Pan American having offered fewer transatlantic seats in jet aircraft and probably fewer total transatlantic seats. So that it seemed to me proper and reasonable to make the assumption that the total number of IATA seats in these two years, 1959 and 1960, would not have been changed as a result of TWA's having received eighteen B-331 aircraft on the earlier dates.

That is my statement as to the reason I believed it was immaterial as to exactly what Pan American operated during those years.

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[Tr. 5616] • • • Q. Under Chapter III, Mr. Wemple, you added 17,000 [Tr. 5617] additional seats in 1959 and 27,000 additional seats in 1960. The question I would like to have answered is whether those seats to which I have

just called your attention are also considered by you as a transfer from Pan American.

Special Master: That has been covered.

Mr. Hayes: I don't think it has, Mr. Brownell. I think I directed myself entirely to Chapter II up to now with respect to the transfer, not Chapter III.

The Special Master: I think it has been sufficiently covered.

Mr. Hayes: Could I have an answer? My recollection is that it has not been covered. He can either answer it yes or no. That is all I want to know.

Mr. Williams: I will object unless the witness has something additional to add to that testimony he has already given.

The Witness: Nothing additional.

Q. With respect to the planes which you assume to have been transferred from Pan American to TWA, are you making any assumption that Pan American in fact put those planes into service on the dates it received them?

[Tr. 5618] Mr. Williams: I object to that.

The Special Master: Sustained.

Q. On your table at the bottom of page 19, Mr. Wemple, you show as 130.51 number of seats per 331 aircraft for 1960. You do not show any figure for 1959.

What is the reason for the failure to show the figure for 1959?

A. No useful purpose would have been served because our calculation is based on a switch of jet aircraft for piston aircraft for a certain number of plane miles, and the seats per B-331 aircraft was not used anywhere in that calculation for 1959.

Additional seats calculated for 1959 are set forth at the top of page 20 based on the differences in TWA's average

number of seats in the B-331 aircraft and the L-1649A aircraft for the year 1959.

Q. In making this additional seats per jet aircraft at the top of page 20, what number of seats did you use for the 331s?

A. I do not remember.

Q. Because I noticed there is quite a variation from 1959 to 1960 in the additional seats, 7.2 per aircraft. You have told us what number of seats you used for 1960 for the jets but you don't tell us what number [Tr. 5619] you use in 1959 for the jets.

A. I do not set it forth in the report because I believed no useful purpose would have been served.

Q. How did you arrive at the figure of 68.7 additional seats per jet aircraft for 1959 which appears at the top of page 20?

A. As set forth in Note B directly under that table, we reviewed TWA's statistics in Schedules 3-71M, and for the year 1959 calculated the average number of seats per aircraft offered in the B-331 operation and in the L-1649A operation and subtracted the two averages.

Q. That was an annual average, is that right?

A. That is correct.

Q. Did you make any inquiry as to variations in seating capacities during the period of operation?

A. We used monthly figures to calculate the annual average.

Q. Did you give effect to the monthly figures with respect to the months that you were determining that the increase in number of seats would take place?

A. No.

Q. Carrying through on your methodology, at the top of page 26—and check me if I am incorrect, please, [Tr.

5620] Mr. Wemple—the thousand seat increase in TWA's seats brings about as revised by you, an increased percentage of TWA's share of total IATA, and then you use that percentage in relation to the historical to bring about a revised percentage of TWA's share of total IATA passengers, is that correct?

A. That is correct.

Q. Do you follow the same methodology in Chapter III?

A. That is correct.

Q. In Chapter II you show as revised—the table at the top of page 26—227,000 transatlantic seats that would have been offered under your assumptions by TWA, and to that figure is to be added, is it not, the 17,000 you show on page 47. So we get a total of 244,000?

A. That is correct.

Q. When you bring in the 17,000 from Chapter III, you increase TWA's share of IATA from an actual of 12.4% to 13.4%, is that correct?

A. No, sir. Chapter III is based on the change from the estimates of Chapter II, plus the actual. So that the percentages involved are 13.4 and 12.5 rather than 12.4.

Q. 12.5 is a revised percentage. The 12.4 is the [Tr. 5621] actual, is it not?

A. That is correct.

Q. That increase you calculate in Chapter III at page 47 produces according to your calculations a 7% increase in transatlantic passengers and 4.2 million additional revenue?

A. That is correct.

Q. You do not show anywhere, as I recall it, Mr. Wemple, under Chapter III, or anywhere else, how many flights would be required to produce 17,000 additional seats?

A. That is correct.

Q. Have you made a calculation?

A. No.

Q. You did—

A. Correction on that. The calculation may be set forth in our Chapter IV on expenses. I would be pleased to report back as to whether or not I could find it in there.

Q. In Chapter II, you did tell us, at page 20, that—

A. Excuse me, Mr. Hayes. I said Chapter IV. I mis-spoke myself. Volume IV is what I meant to say.

Q. I would appreciate it if you would let me know.

[Tr. 5622] A. I will.

Q. In Chapter II, you do set forth for 1959 sixteen additional jet flights replacing pistons.

Could one obtain the number of additional flights that Chapter III covers by dividing the 17,000 additional seats by the number of additional seats per jet aircraft which you show at the top of page 20?

A. I would have done it differently. I would have taken the first line of the calculation at the top of page 17 and simply multiplied the number of flights by the ratio of jet plane miles.

Q. Wouldn't the way I suggested be an accurate way of doing it, since you are adding seats at a rate of 68.7 additional per jet aircraft?

A. It would come out with approximately the same answer.

Q. I have made the calculation, Mr. Wemple, and I come out to 247 additional jet flights in 1959.

You showed in page 41, you are assuming for Chapter III that B-331 service would start on August 19, 1959, which is 131 days of assumed operation during 1959, or an average of two additional flights per day which you assumed under Chapter III. Is that correct?

A. I made no assumptions as to average number of [Tr. 5623] flights per day.

Q. Did you consider that, too, irrelevant to your report?

A. I did not consider it in making the calculation.

• • • • •

[Tr. 5644] Mr. Hayes: My last question was on what facts, hard facts, he bases what he calls his ideas.

Mr. Williams: Have you anything to add to what you have already testified?

The Witness: I don't believe I have anything to add.

Q. At page 20, the table at the top, after doing some arithmetic you arrive at TWA flying 16 jet flights which are replacement flights.

Have you made any calculation to determine how many jet aircraft other than the six which have been assigned to Pan American with which you are dealing in this chapter Pan American would have had to place in the North Atlantic service or the transatlantic service in order to meet those 16 jet flights? To match them, I mean.

A. I have not made that specific calculation.

Q. Have you made any general calculation along those lines?

A. No.

Q. If I asked you the same question with respect to the additional flights that will be necessary to take care of the 17,000 seats in Chapter III, would your [Tr. 5645] answers be the same?

A. The 17,000 additional seats in Chapter III are calculated for TWA having eighteen B331 aircraft on a certain earlier delivery date set forth on page 40.

Q. Yes. And my question is have you made any calculation to determine how many aircraft Pan American would have had out of its reservoir of jets other than the six to offer 17,000 more seats to match TWA's offering in 1959?

A. I have made no such calculation.

Q. If I asked you the same questions with respect to the 964 additional flights you show on page 20 for 1960, would your answer be the same?

A. If I understand that your question relates to calculations of how many aircraft Pan American would have required to make a duplicate increase in number of jet flights, I have made no such calculation.

Q. The same would be true of Chapter III for 1960?

A. Respecting the TWA additional seats and whether or not I have calculated what Pan American would have done to have offered that many more, I have not made such a calculation.

Q. Did you at any time make a study of the number of jets that Pan American used in its divisions other than [Tr. 5646] the Atlantic Division during the period covered by your study?

A. Yes, I reviewed Pan American's use of its different types of jet aircraft in divisions other than the Atlantic Division at one point.

Q. Are the results of that study in existence?

A. No, they have been discarded.

Q. No longer in existence?

A. That is correct.

Q. Do you recall what that study showed?

A. Yes. This was a study of Pan American operations by type of jet aircraft at various principal cities throughout the world.

The Special Master: As to which you previously testified?

The Witness: That is correct.

Q. I asked you if you recalled the results of the study. What did it show?

A. I previously said that Pan American's use of those B331 type aircraft was on Atlantic Division service.

Q. Aside from that generality, you cannot give us the results of the study?

A. That is correct.

[Tr. 5661] Q. Do you know what service Pan American scheduled eastbound, jet service, I mean, in 1960?

A. I cannot tell you that from memory.

Q. I am sorry?

A. I cannot tell you that from memory.

Q. Did you examine to determine how many eastbound schedules Pan American was offering as of the same dates that you have on Exhibit 233?

A. Not in connection with a calculation of this report.

Q. Whether you used it in connection with the calculation or not, did you examine the Pan American schedules to determine what schedules it was offering?

The Special Master: Other than that to which you have already testified.

The Witness: I think—not being sure exactly what I have testified, I have looked at Pan American schedules a number of times over the period 1957 to 1962. I rather expect I have looked at the Pan American schedule for the summer time 1960.

Q. Did you ever compare a columnar comparison?

A. Not in connection with the preparation of this report.

[Tr. 5662] Q. No. At any time while you were working on this report, did you ever prepare a comparison?

A. I do not recall having done so.

Q. You know the comparison that I have in mind of Pan American and TWA scheduled flights?

A. Similar to Exhibit—

Q. 233.

A. I presume.

Q. If Pan American had added jets to its Atlantic Division to compensate in whole or in part for the additional flights that can be determined from your report that TWA would have been offering in 1959 and 1960, there would necessarily have to be a change in your calculation to allow for the additional seats on those additional jets, would there not?

A. That is correct.

Q. The same would be true, would it not, to the extent to which foreign carriers offered additional service in the North Atlantic on jets?

A. That is correct.

Q. Any such increase of service under your approach would have increased IATA's total seats available and decreased TWA's percentage?

A. That is correct.

[Tr. 5663] Q. You made no such calculation?

A. That is correct.

Q. At pages 26 and 27 of your report, Mr. Wemple, you arrive at percentage increases, Chapter II, of the number of seats and in turn for the number of transatlantic passengers which you say TWA would have carried showing a per cent increase, and then you applied that amount on the top of page 27 to the International Division passenger revenues?

A. That is correct.

Q. Is the effect of that treatment to increase the number of passengers by the same percentage that you increased the number of seats?

A. No.

Q. It is not? Maybe I misunderstood you then. I thought it was.

At any rate, whatever procedure you use in Chapter II is used also by you in Chapter III, is it not?

A. That is correct.

[Tr. 5676] • • • Q. This chart on page 24, it purports to set forth what happened over a period of years during which both the capacity and the market were growing?

A. That is correct.

I beg your pardon. TWA's capacity went down in 1959. Other than that, each year of this period TWA had a—I believe had a larger capacity than the previous year. That is correct.

Q. And Pan American's went down in 1959, too?

A. Yes.

Q. But generally speaking is not what I said true, that what the chart on page 24 purports to record is what happened during those years so far as TWA's percentage of certain totals were, and that during those years both the capacity, overall, and the market were growing?

A. That is a very correct generalization.

Q. The percentages which you apply in accordance with your statement on page 25 at least for 1959 and 1960 assumes no growth in the market; is that correct?

[Tr. 5677] A. We assumed no increase in the total number of passengers for any of the years, 1959 through 1960 for our calculations that follow.

Q. But in the years after 1960, you do revise the number of seats, do you not?

A. That is correct.

Q. Your revision of number of seats and TWA's percentage carries through to your revision of TWA's percentage of passengers, does it not?

A. That is correct.

Q. Except for adding to IATA totals for the years 1961 through 1963 your estimates of increased TWA capacity, you are assuming what could be described, as a static market?

A. No, sir, as a static capacity.

Q. All right, static capacity.

A. That is correct.

Q. Your table on page 21 showing the increase of passengers does describe the market, does it not?

A. That is correct.

Q. There are substantial increases in each year of the number of people who traveled transatlantically, is that correct?

A. That is correct.

[Tr. 5678] Q. That increased number of passengers was to be shared among the various IATA carriers who were offering additional capacity; is that correct?

A. No, I make no assumption on that point.

Q. Isn't that common sense, Mr. Wemple, without an assumption, that the additional passengers would have to fly in the planes of some one of the IATA members?

A. That is correct.

Q. When you add seats to TWA, and you have passengers following those seats into TWA's revenue, aren't you assuming that TWA is capturing those passengers from its IATA competitors?

A. That is correct.

Q. But you made no determination as to how much it is getting from any competitior.

A. That is correct.

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[Tr. 5703] • • • Q. In 1959, Mr. Wemple, on the tables which appear there—at page 26 I should say—you increase TWA's seats by 1000 in the upper table?

A. That is correct.

Q. You increase TWA's passengers by 1000 in the lower table.

Does this indicate your opinion that all of the thousand additional seats would be filled?

[Tr. 5704] A. No.

Q. What does it indicate?

A. You will recall that the thousand increase in seats is a net increase, the result of larger jet aircraft replacing smaller piston aircraft.

TWA's number of jet seats is, of course, increased more than 1000. I have made no calculation to determine the loading of the additional jet seats that were offered.

Q. But it is a fact that you are adding 1000 seats in 1959 and you are adding 1000 passengers in 1959; is it not?

A. And we are changing roughly 1000 piston seats to jet seats as well.

Q. However you do it, that is what you are accomplishing, isn't it?

A. And the net result would be a 1000 increase in the number of passengers.

Q. So that for those 1000 seats we have 100 per cent load factor in effect?

A. The answer—that is not what the facts would have been.

Q. I know it isn't, but it is what your estimate is, is it not?

[Tr. 5705] A. No, sir.

The load factor is determined by the number of seats that exist in an aircraft, divided into the number of passengers that are seated in that aircraft.

Q. I took just these thousand additional seats and divided them into the thousand additional passengers and I got 100 per cent.

A. But there were more—

Q. I am talking about the addition, just the addition.

A. I cannot accept your load factor designation as applied to those additions.

Q. Project it then. That is your privilege You are also concluded, are you not, in 1959, with those same 1000 passengers, that they would have been carried on sixteen flights that would have replaced 1649As?

A. Do you have a page reference for that?

Q. I believe it is page 20, if I remember rightly. Maybe I am wrong on the page.

A. That is correct.

Q. Yes.

A. Sixteen jet flights replacing sixteen piston flights.

Q. Sixteen into 1000 gives 62½ additional passengers on the average?

[Tr. 5706] A. Yes.

Q. So your calculation is based on your determination that the sixteen additional flights would have an average of 62½ additional passengers per flight?

A. That is correct.

Q. Aside from your calculations did you determine any facts upon which to base that conclusion?

The Special Master: Other than those to which you have already testified.

A. No further facts to report.

Q. All of those additional flights with the 62½ additional passengers per flight that would have been carried would have occurred in late November and December of 1959, would they not?

A. That is correct.

Q. That consideration does not cause you to change the number of additional passengers per flight?

A. It does not.

Q. If we turn to Chapter III for 1959 where you added 17,000 seats for a total of 18,000, you come up with—page 47, I believe—

A. Yes.

Q. —I think it is 11,500 additional passengers, if I can find it. Pardon me. 10,500 additional [Tr. 5707] passengers. 157,500 minus the 147,000 you have already estimated in Chapter II.

Do you see it, Mr. Wemple?

A. That is correct.

Q. All of those passengers would have been carried on jet flights which replace 1649As; is that correct?

A. That is correct.

Q. You do not have this figure in your report, as I recall it, but your total of added seats for Chapters I and II is 18,000 and when that is divided by, I think it is 68.7—yes—68.7 additional seats, we arrive at a total of 262 flights for the two chapters; is that correct?

A. Approximately.

Q. If we divide the total increase in passengers of 100 under Chapter II to the 10,500 in Chapter III, by the number of 262 to represent the flights, one arrives at practically 44 additional passengers, on an average, per flight? I think it is 43.9.

A. Yes.

Q. Those are all additional passengers now?

A. That is correct.

Q. All of those passengers, additional passengers, [Tr. 5708] would have been carried in the period between August 19th and December 31, 1959, unless I misread your report?

A. That's correct.

Q. Most of the flights would have occurred after October 1, 1959, would they not?

A. That is correct.

Q. In the light of the time of the year and the number of passengers that you are putting on these flights, do you still believe that your approach here is realistic?

A. I do.

The demand for places on the jets that were flying in those days was quite high.

Q. All through the winter months?

A. Through the winter months.

Q. Other than anything you have already told us, can you give me any facts upon which you base that answer?

A. I can remember reviewing both Pan American and TWA load factors that were achieved in that early period and being impressed that they were remarkably high. I do not have statistics that I can quote you here.

Q. Did you make a record of your review or is that something else that was discarded?

[Tr. 5709] A. I discarded the review that I made prior to the presentation of this report.

Q. Did you make any review or any study in connection with your report as to what TWA's percentages of its revenue plane miles and revenue passenger miles flown with jets in 1960 compared with the same percentages for Pan American were?

A. I recall making no such study.

Q. Did you not think it pertinent to the kind of report that you are presenting here, Mr. Wemple?

A. No, I did not think it necessary for this determination.

Q. The data to make such calculations are all available, are they not, Mr. Wemple?

A. They can be taken off of some of the CAB Form 41 schedules, I believe.

Q. I will state these figures to you and you may check them if you so desire.

That in the year 1960, TWA's percentage of plane miles flown in jets was 58 and Pan American's—

A. Excuse me, sir. This is TWA International Division, total plane miles divided into the plane miles operated with jet aircraft? Am I correct on that?

Q. I think that's the way it is calculated, yes.

[Tr. 5710] Mr. Williams: Mr. Special Master, if this is a question, I object to it. The witness has already said it is not pertinent.

Counsel, if he wishes to make a statement, may do so, but we undertake no obligation to check these figures.

Mr. Hayes: I am not bound by the witness' statement of what is pertinent, as I understand the cross examination.

The Special Master: Not for purposes of your argument.

Mr. Hayes: I will ask a question.

I will make a statement as to what my question is based on.

Q. To resume, TWA's percentage of jets to total plane miles in 1960 was 58 and Pan American's 60.5.

And of passenger miles in jets, TWA's percentage was 80.2 and Pan American's 79.4.

I ask you, assuming the accuracy of the figures, and you may check them if you so desire, whether the fact that TWA's high percentage of passenger miles, higher than Pan American's flown in jets, should not be considered in determining comparative operations of the two companies.

A. I think those figures are completely consistent [Tr. 5711] with our estimates that are set forth here for Chapters II and III.

Mr. Hayes: Could I have the last part of the question again where I said "And I ask you"?

(The question was read.)

The Witness: I do not think it was necessary to consider these figures and as you state them I see nothing inconsistent between these figures and the calculations in our report.

Q. I gave you the figures for 1960. Your answers would be the same, I assume, if I gave you similar figures for the years 1961 through 1965; is that correct?

A. Our estimates don't go beyond 1963, but—

Q. To 1963 then.

A. That is correct.

• • • • •

[Tr. 5733] • • • Q. Is it a fact that actually during the period covered by your report, the jet seats made available by TWA and the passengers carried by TWA grew more rapidly than the jet seats made available or the passengers carried either by Pan American or by all IATA carriers?

A. I have no data on that point, and, therefore, no way to answer.

Q. Can the data be obtained from your report?

A. No, sir.

Q. It cannot?

A. It cannot.

Q. Not even from the tables on pages 21 and 23?

A. Your question related specifically to jet seats. The table on page 23 is all seats. So, the answer, therefore, is no.

Q. Did you make any such calculation?

A. I did not.

Q. You have told us, of course, that so far as TWA is concerned, after 1959 all of the transatlantic plane miles, all of the plane miles flown by the International Division, were jet plane miles, except for certain required or special piston miles.

A. Could you refer to a particular page for that [Tr. 5734] statement, if you want me to confirm—

Q. Yes, page 18. I thought you knew your report sufficiently well that I did not have to refer you.

A. I assume you are asking a question?

Q. I did ask a question, Mr. Wemple.

A. I would like—

Q. Page 17, I think it is.

A. (continuing)—it read, so I can answer it.

The Special Master: Read the question back.
(The question was read.)

A. Our estimates of the reconstructed TWA airline operation with the additional jets indicate that in our opinion the statement of your question would have taken place.

Q. From the tables on pages 21 and 23, can one determine whether the total seats offered by TWA and the total passengers carried by TWA, transatlantically, increased more rapidly than the total seats offered or passengers carried by either Pan American or the foreign carriers?

A. The basic data from which that calculation could be made are there.

Q. You have not made the calculation?

[Tr. 5735] A. I have not made it.

Q. Do you know to what extent, if at all, after, let us say, 1959, both Pan American and the foreign air carriers were operating jets as against pistons?

A. I do not have specific quantitative data on that point.

Q. Do you know whether during any of the period covered by your report transatlantic load factors were declining?

A. Yes.

Q. To what extent did they decline?

A. I do not have the load factors here. I cannot recall them offhand.

Q. They can be calculated from the data in your report, can they not?

A. For transatlantic flights, yes.

Q. That is all we are talking about, isn't it?

A. Load factor—I thought by your question you were relating to TWA's International Division operation or Pan American's Atlantic Division.

Q. I am relating my question to your report, which has to do with transatlantic. At least, I understood it did.

A. Pages 21 and 23 certainly have to do exclusively [Tr. 5736] with transatlantic.

Q. From those data can the load factors be determined for the years in question?

A. For transatlantic flights, yes.

Q. Do the load factors show a drop in load factors after 1959?

A. I believe they do, but I am not sure.

Q. You have not made the calculation?

A. That is correct.

Q. When I asked showing a drop, was that true not only of TWA but also of Pan American and IATA carriers?

A. Not having made the calculation, I cannot answer your question from knowledge of the numbers.

Q. For 1960, taking the data that you set forth at pages 21 and 23, I calculate that in the year 1960 TWA had a 63 per cent load factor, which was a drop of 1.6 per cent from 1959; that Pan American had a 68.5 per cent load factor, which was a drop of 10.2 per cent from 1959; and that all IATA carriers had a 63.6 per cent load factor, which was a drop of 2.4 per cent from 1959; and that in the year 1951, TWA's load factor dropped 13 per cent, Pan American's dropped 15 per cent and all IATA carriers dropped 13 per cent.

Assuming the accuracy of my arithmetic, what is [Tr. 5737] your explanation for the 1960 and 1961 load factors?

A. I believe we went over that yesterday. The load factor is the result of adding more seats than achieving an increase in passengers.

Q. Yes, we had that much. You defined a load factor. I am asking you what your expert opinion is as to these changes in load factors in 1959 and 1960. I have never asked you that question before.

A. I am afraid I do not understand the question.

Q. Without repeating—I will repeat the arithmetic, if you want me to. I prefer not to, to save time.

A. I have notes on the arithmetic.

Q. Fine. I asked what your opinion as an expert was as to why those load factors changed as they did change in 1960 and 1961.

A. I have nothing further to add.

Q. In 1962, Mr. Wemple, TWA's load factor went up 1.9 per cent, Pan American's went down 3.6 per cent and all IATA carriers went up 6/10 of 1 per cent.

Have you any expert opinion as to why those changes took place in 1962?

A. TWA and the grand total of all IATA carriers obviously achieved more passengers than their increase in number of seats.

[Tr. 5737A] With Pan American, the arithmetic was different, in that Pan American added more seats than they achieved an increase in passengers.

[Tr. 5738] Q. You are just telling me what the arithmetic shows. I am asking you for an opinion as an expert as to the reasons for those changes, if any, if you know them.

A. The reasons for those changes are the way in which individual airlines were operated, and in summary, the way all the IATA transatlantic carriers were operated during those particular years.

Q. You have not made a study of those operations to give us any opinion?

A. I have not made a study of those operations to give you specific reasons as to why each airline's results in load factors turned out the way they did.

Q. As part of your study, did you or did you not give consideration to seasonal variations in load factors?

A. I am generally familiar with seasonal variations in load factors. I therefore fundamentally did give consideration to those seasonal variations.

The seasonal variations are not a part of our calculation of changes in gain from operations. So, therefore, they are not specifically reflected in these calculations which are set forth in this report.

Q. Does your answer mean or does it not that you considered the variations, but that the variations did [Tr. 5739] not enter into your calculations?

A. That is correct.

Q. Did you, as part of that consideration, calculate what the seasonal variations were?

A. I did not.

Q. What consideration then did you give to the load factors, the varying load factors during the year?

A. I assume you mean what consideration did I give to variations in load factors throughout the different seasons of the year.

Q. That is right.

A. And I repeat, they were not used in our calculation.

Q. But you previously answered that you did consider them. You have also told us that you did not use them. I want to know what you mean when you said you did consider them.

A. I knew of the existence of the seasonal variations in load factor, and in determining the way in which these estimates could be put together, most soundly, I elected to use the annual average figures or annual figures rather than individual monthly or seasonal figures.

Q. Of course, even the monthly load factors were [Tr. 5740] available to you from the IATA statistics you used, were they not?

A. They could have been calculated.

Q. Do the load factors vary not only during the months of the year but also with the direction of the flights as to whether they are eastbound or westbound?

A. Yes.

Q. According to the IATA figures which you used, TWA in June, 1960 had a 92.3% load factor eastbound, which was higher than the load factor of Pan American or of all IATA carriers for any month in that year, and westbound TWA had a load factor of 91.9% which was higher than the load factor Pan American or all IATA carriers had in any month that year.

Would that indicate to you that TWA in 1960 was attracting more passengers than its competitors?

A. I have no idea—correction. Those percentages which you gave me would not enable me to answer that question, whether they were or were not attracting more passengers than its competitors.

Q. You cannot tell?

A. Not from those figures.

Q. Can you tell from any of the figures that were available to you?

[Tr. 5741] A. I certainly could have looked at the IATA monthly passenger figures for TWA, Pan American and the other airlines for June of 1960 by direction to determine whether or not TWA had attracted more passengers than the others.

Q. But you did not do so?

A. I did not do so.

Q. The IATA statistics, in fact, publish the load factors, do they not?

A. Usually, yes.

Q. I notice from the monthly IATA figures which you used that by November 1960, TWA's load factor had dropped to 34.5 per cent, Pan American's to 39.2 per cent and IATA's to 37.7 per cent eastbound.

Does that indicate to you—

A. I did not get the Pan American figure.

Q. 39.2 per cent.

A. And the IATA figure?

Q. 37.7.

Does that indicate to you anything other than a seasonal drop?

A. I have not made a quantitative study of the seasonal variations. I have no idea whether that is a normal seasonal change.

[Tr. 5742] Q. You have no opinion on the subject?

A. No opinion.

Q. Do you know that in the year 1961 the load factors of TWA, Pan American and all IATA carriers failed to reach the load factors of 1960?

A. I am not surprised. I did not remember that specific point.

Q. Do you know that they failed to reach in 1962 their 1960 load factors?

A. I am not surprised. I did not remember those specific numbers.

Q. And that they similarly failed to meet them in 1963?

A. My answer is the same.

Q. According to your Exhibit B, it is indicated—your report—that in the winter months of 1961 to 1962 there was a considerable shift of 331s from the International to Domestic service.

That is correct, is it not?

A. That is right.

Q. Despite that shift, according to the monthly IATA figures, thus taking capacity out of International, TWA nonetheless had low load factors, as did the other carriers I might mention during those months.

[Tr. 5743] Would that indicate to you that there was a lack of market to be served transatlantically?

A. It would indicate to me that TWA believed that it could find a better use for those aircraft elsewhere than on International Division routes, and therefore they made the switch from International Division assignment to Domestic Division assignment.

Q. Does it also follow from your answer that if planes could have been operated profitably in the International Division, or at least as profitably, they would have been kept in the International Division?

A. I have no basis for answering that question.

Q. You do not know? You did not inquire into that?

A. I did not inquire.

Q. Is it part of your opinion as expressed in your report that TWA could capture additional passengers with the additional planes and seats as well in months of low load factors as in months of high load factors?

A. The only opinion expressed in our report is that TWA would have maintained its historical correlation between per cent of annual IATA seats and per cent of annual IATA passengers.

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[Tr. 5769] A. —which I believe I would have to know how you were going to use the term "transatlantic passenger," "beyond the gateway passenger" and the term "other than transatlantic passenger."

The Special Master: Aren't you using it here for the purpose of finding out whether the fares are included in the transatlantic fares?

Mr. Hayes: That is right.

The Witness: The revenue figure at the top of page 27 includes revenue for carrying a person across the Atlantic and wherever else TWA's International Division happens to operate a flight. All of that revenue is in there, whether it be beyond the gateway or for the transatlantic trip.

Q. You have already testified to that.

A. All right.

Q. How do you separate out beyond gateway passengers? What is your definition?

A. I have not done so in this report.

Q. I know you have not.

What would be your definition?

Mr. Williams: I think this is repetitious.

Mr. Hayes: I thought it was settled, but apparently I misunderstood his prior testimony.

[Tr. 5770] Mr. Williams: Let us look at the record when we have a chance.

Mr. Hayes: I thought it was defined.

Mr. Williams: I thought it was, too.

Mr. Hayes: Apparently it hasn't been.

A. There are several kinds of beyond gateway passengers.

There are those that board a flight at a point such as Paris and travel to Geneva or Zurich or Milan.

There is another beyond the gateway passenger who has come on a transatlantic flight that stops at Paris and continues to Milan. He is both a transatlantic and a beyond the gateway passenger.

So there can be overlap in this definition and one must be careful.

Q. You do not, as you sit here, give us any precise and exact definition then of beyond gateway traffic?

A. That is correct. I give you those two general definitions.

Q. On the top of page 27 still, the revenues as you have already made clear, including all revenues, necessarily include first-class, coach and economy?

A. That is correct.

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[Tr. 5773] • • • Q. As a matter of fact, in reference to Defendants' Exhibit 242 for identification, it indicates that for 1962 and 1963, there was no coach revenue?

A. That is correct.

Q. Let us take economy then and coach and economy when they both existed.

A. Yes.

Q. Did the revenues from coach and coach and economy increase each year historically after 1960?

A. I believe they did.

The Special Master: Percentage-wise?

The Witness: Percentage-wise, too, I believe. Whether that went through the entire period of 1963 with a per cent change each year I am not sure.

Q. You mentioned with respect to beyond gateway revenue your reasons for concluding that they would increase them in the same proportion as the transatlantic revenue. Are you also assuming that the beyond gateway [Tr. 5774] revenue passenger miles would have increased in the same proportion as the transatlantic miles did?

A. We made no such assumption.

Q. Did you make any study at all of beyond gateway operations in terms even of revenue miles or available seat miles or load factors?

A. I do not recall any.

Q. It certainly is no part of your report?

A. That is correct.

Q. Did you make any study of the competition TWA meets in beyond gateway segments?

A. No detailed study.

Q. Did you make any general study?

A. I don't believe I would identify the consideration we gave as a study.

Q. Is there any consideration you gave over and above anything you have already testified to?

A. I am generally familiar with the competition TWA faced in its flights beyond the gateway cities of London,

Paris, Frankfurt and Rome, and it was with the background of that general familiarization that we selected this particular method for calculating the changes in revenues.

Q. By the way, isn't Lisbon considered a gateway [Tr. 5775] city, too?

A. Yes.

Q. I thought it was. You always mention the other four and never mention Lisbon.

A. That is correct.

Q. Did you make any assumption or any studies as to the airlines from which TWA would capture additional passengers beyond the gateway?

A. I did not.

Q. Did you make any assumption as to a transfer of seat miles from Pan American beyond the gateway?

A. I did not.

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[Tr. 5777] • • • Q. With respect to this table on the top of page 27, as you have already explained to us, as I understand it, you have arrived at the percentages of increase you apply there via the table on the bottom of page 26 by basing your revisions on what you have referred to as the correlation of the TWA percentage of seats and passengers and so on as shown on the chart on page 24.

A. That is correct.

Q. Have you determined what, if any, correlation existed—that was historical of course, was it not?

A. That is correct.

Q. Have you determined what, if any, correlation exists between the transatlantic seats TWA actually offered and the International Division passenger revenue which you show on the top of page 27?

A. I have not done that correlation analysis.

Q. Or have you done it on the basis of any correlation between the TWA passengers actually carried and the international revenue which you show on the table at the top of page 27?

A. No, I have not done that correlation.

Q. Should there be correlation apparent between the [Tr. 5778] seats TWA actually offered or the passengers carried and its international revenue?

A. I have no reason to expect correlation.

Q. Why would there not be, Mr. Wemple?

A. Well, it's a historical—these are historical facts you are asking me about—

Q. That is right.

A. (continuing) —and correlation, statistical correlation does not come between those series, and, as I simply say, I have no reason to expect that these two series or three series of numbers would show correlation between each other.

Q. By the first part of your answer, I don't know what you meant.

A. Well, correlation is a statistical measurement, and it is very unusual to find correlation that is statistical correlation between series, and I would be surprised if there was correlation between seats and revenues and between passengers and revenues.

Many things affect, for example, the revenues produced per passenger, and these things have changed over the period of time that we are talking about.

Q. Would you please explain what you mean by statistical correlation between series?

[Tr. 5779] A. There is a statistical test that one can apply to two series of numbers to determine the degree of correlation. This is a long, complicated formula, and—but

nevertheless, it is one that is commonly used to determine correlation between series of numbers.

Q. Let me get away from the word "correlation." I don't want to get into any complicated statistical approaches.

Should there not be a relationship between the number of seats offered or the number of passengers carried and the International Division revenue, or should there not? Should there or should there not?

A. I would expect that there would be a general relationship between the number of passengers carried and the International Division passenger revenues.

I would be surprised if there was any particular relationship between seats and passenger revenues.

Q. But there should be as to passengers?

A. A general relationship, I would expect.

Q. Did you consider using that historical relationship in your approach to your study?

A. No, I did not.

Q. You did not consider at all?

A. Well, I considered it and I discarded it.

[Tr. 5780] Q. Did you make any calculations based on it?

A. I don't remember whether I did or not. I probably did. And one factor in discarding it is that revenues are, of course, affected by the fares that are charged in a particular period of time, and this is a factor that is obviously without particular relationship to numbers of passengers.

Q. By the way, do those calculations, if you made them, still exist?

A. They do not exist, no. One possible exception to that last statement. It may have been that there were some revenues per transatlantic passengers used in the February

1962 report. If it is important, I will look. I have a vague recollection.

Q. What is it you have in mind? I don't know.

A. That's Exhibit 214. No, I see the thing I was thinking of. It is on Exhibit E, and it is a figure of international passenger miles per transatlantic passenger handled.

Q. It is not the figure you thought was there?

A. No.

Q. You are referring to Exhibit 214?

A. Exhibit 214 and Exhibit—what did I say?

Q. E.

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[Tr. 5783] A. There was a plan at one time to concentrate the jets on transatlantic service and use the pistons "beyond the gateway."

Q. Was that plan ever put into operation?

A. I believe it was.

Q. How long was it continued?

A. I do not know.

Q. When was it abandoned?

A. I do not know. I would surmise that the piston mileage for the International Division, which I believe—which is set forth on page 17, shows that it was essentially eliminated by the year 1962.

So I presume that by that year the jet aircraft had come into general use on beyond-the-gateways flights.

Q. Did you make any inquiry as to whether TWA's beyond-gateway passengers increased, in fact, in the period covered by your report?

A. I made no such inquiry.

Q. You show an increase of your transatlantic passengers of quite a substantial number from 1959 to 1963, going all the way from 146,359 to 359,000, more than doubling.

Did you make any determination at all to see whether beyond-the-gateway passengers doubled or what relationship they bore to the transatlantic passengers?

[Tr. 5784] A. I did not.

Q. You did not consider it important to make such a determination?

A. I did not consider it important. I might add also that I am not sure as to the practicability of making such a determination.

Q. Meaning what by that?

A. Whether or not one can get a good measure of "beyond-the-gateway passengers."

There is this problem that we have discussed before of definition.

Q. Can you not arrive at the figures of beyond gateway by deducting from the total number of passengers handled by the International Division those who were on transatlantic flights?

A. No. As we have set by our—well, that gives you one measure of beyond-the-gateway passengers. It does not indicate how many of the transatlantic passengers were also continuing beyond the gateways.

Q. I thought we had agreed on a definition of beyond the gateway at the beginning of this session.

A. All right, within the limits of that definition, my answer to your question is no.

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[Tr. 5802] Can you define that for us?

A. Annual yield figures are obtained by taking the annual revenue from transportation which has been determined at the end of the year by TWA and its public accountants and dividing that by the number of revenue passenger miles that have been recorded for the division's operation

for the year. And it gives a figure in terms of cents per mile.

Q. Is yield also used in connection with the revenue per mile on a segment basis?

A. I guess the yield is used for a wide variety of things. The definition I have given applies to the figure that we quote at the bottom of page 30 which happens to relate to Domestic Division yield.

Q. That is an annual figure?

A. That is an annual figure.

Q. Do you know whether the fares per mile are higher beyond the gateway than they are transatlantically?

A. No, I do not know the specific answer to that. There are, of course, many, many fares beyond the gateway, and I do not know what their individual per mile rates are.

Q. You made no study of what the fares beyond gateway [Tr. 5803] cities were—

A. I did not.

Q. —on per mile basis—

A. I did not.

Q. —as against transatlantically?

A. I did not.

Q. Not having made any study, I gather you have no opinion as to what would be a fair rate per mile to apply to determine the revenue that could be estimated for beyond gateway mileage?

A. It would be a very difficult estimate to make because of the difference in types of tickets that are used for various kinds of transatlantic and beyond the gateway travel.

Q. Would it be appropriate to estimate beyond gateway revenue passenger mile by estimating the average length of beyond gateway trips and multiplying that figure by the number of beyond gateway passengers?

A. I would need to have the first part of that question repeated, please.

Mr. Williams: Could you read it back, please?

(The question was read.)

A. It would not be appropriate to use that method of estimating for my purposes or for this particular report.

[Tr. 5804] Q. What is inappropriate about it?

The Witness: Would you please read the rest of the question?

(The question was read.)

A. I would have no idea how to estimate the number of beyond gateway trips and to get the number of beyond gateway passengers which could be converted into revenues. I think it would be a very difficult task.

Q. So far as you know, it cannot be done?

A. No, I—I did not mean to say that.

Q. You are not at all sure it cannot be done, are you?

A. That is correct.

Q. But you did not do it?

A. I did not do it.

Q. In connection with the same table on the top of page 27, you include charter revenues, and I believe you have already testified that these percentages of increases being applied as they are to International Division revenue are by virtue of that very fact applied to charter revenues?

A. That is correct.

Q. Did you make any study of the charter revenues that TWA historically received during the period covered by your report?

[Tr. 5805] A. I thought I answered that question this morning. I will re-answer it.

Q. Maybe you did. I don't remember it. Pardon me if I ask it again.

A. I reviewed charter revenue statistics in this period. That was about the extent of my study of them.

Q. Did your examination include a determination of the number of charter flights each year?

A. No.

Q. Or the routes flown?

A. No.

Q. Or the number of passengers carried?

A. No.

Q. Or the character of the passengers by nationality or civilian or military?

A. No.

Q. Or the amount of the charter revenue?

A. I think I just answered your point on the amount of the charter revenue.

Q. You mean that it is included in the total figure of revenue?

A. Yes.

Q. But I mean, did you try to segregate out the [Tr. 5806] amount of the charter revenue?

A. No, I didn't.

Q. Did you examine charters from the angle of the equipment used in each of these years on charter flights aside from the 400,000 miles that you gave us for one year?

A. No.

Q. In your assumption that the charter revenue would have increased in the same proportion as to the total international revenue, did you take the further step of determining from what airline the charter passengers would have been captured?

A. We did not make the specific assumption respecting the charter revenue.

However, we did not consider which airlines would have been those who would have lost charter passengers that would have gone to TWA.

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[Tr. 5862] By Mr. Hayes:

Q. What do nonscheduled transportation services consist of?

A. That was also a question that was in the transcript on which I was to report, page 5764 of the transcript, and the CAB Manual on Uniform Systems of Accounts and Reports, Section 9, Functional Classification—Operating Revenues, Sub Account 3200, Nonscheduled Services, has a paragraph which describes the nonscheduled transport services. And the essential item for TWA is from the performance of aircraft charter services.

Q. Anything else included?

A. The paragraph includes transportation of air traffic between points not prescribed in certificates, and from performances of other transportation services not constituting an integral part of services performed to—correction—services performed pursuant to published schedules filed with the CAB.

Q. What was the reference to the CAB charter accounts?

A. This is on a sheet labeled "Profit and Loss, Section 9, Functional Classification, Operating Revenues, Sub Account 3200."

Q. Could I see it?

[Tr. 5863] A. Certainly.

Q. I thought you said Account 3200?

A. Isn't that the number?

Q. Oh, way down underneath. The heading is "3900." I see. Now, I have it. That is a subheading.

I might say that that appears in Uniform Systems of Accounts, Section 9, page 53.

Did you make any inquiry as to whether there was included in the total for 1959 of 1,890,000 items other than charter?

A. I assume you are referring to these other items which I have just read, which are to be included in the nonscheduled services.

Q. Correct.

A. I did not make a specific inquiry.

Q. Did you make any general inquiry?

A. Yes.

Q. Of whom?

A. Of TWA people.

Q. Of whom?

A. I do not remember.

Q. When?

A. Probably some time during the past three years.

Q. Do you have any record?

[Tr. 5864] A. No, sir.

Q. It is your recollection that you were told that the only items there that were included in that amount were charters?

A. No. My recollection is that that account was considered to be essentially all charter revenue.

Q. It was considered by whoever you spoke with in TWA?

A. That is correct.

Q. But you made no study?

A. I made no study.

Q. Proceed.

A. The next item I have on my list, again, is from page 5764, and I was to report back on the item called "Other transportation," which is listed on Schedule 2-2M, and which for the year 1959 was $30,000 and is similarly quite small in the years that follow.

Other transportation is, for example, where TWA records fees that employees pay for travel on TWA.

Currently, the $3 youth fare charge goes into other transportation.

It is a small amount of miscellaneous transportation revenue.

Q. All right, sir.

[Tr. 5865] A. That is all I have to report.

Q. At transcript page 5621, you testified, in substance, that you may have made a calculation as to how many flights would produce 17,000 additional seats, the figure which appears at page 47 of your report, and that you would check your Volume IV for this calculation.

Have you done so?

A. I did so and I found nothing.

Q. You found no such calculation?

A. That is correct.

Q. At transcript page 5765, you said you would determine whether TWA conducted charter operations after 1958, having to do with freight, and whether the freight items which appear on Schedules 2-2M now marked Defendants' Exhibit 242 for identification for the years 1959 to 1963 are limited to scheduled freight operations.

A. The freight revenue listed in those 2-2M figures is for scheduled service, freight revenue. There is a very small amount of freight charter in the nonscheduled transportation services figure, which we have mentioned heretofore.

Q. Did you determine the amount?

A. No, sir. As far as a specific dollar figure, no, we did not determine that.

[Tr. 5866] Q. Is that testimony based on the same recollection of a conversation three years ago that somebody told you that?

A. Plus my own observations in and around TWA during this period of 1959 to 1963 when I was working on various jobs for TWA.

Q. Anything else?

A. That is all.

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[Tr. 5868] Q. Do you have before you, Mr. Wemple, Defendants' Exhibit 245 for identification?

A. I do.

Q. The International Division which is headed Sheet 2 of 2.

Specifically—

A. One moment, please.

I have it.

Q. Specifically account No. 6137 on that page. Do you identify it?

A. Yes, communications purchased.

Q. I notice that for the years 1959 through 1962, they range between a little over a half million to a bit under three-quarters of a million until 1963 when there is a minus amount of $53,000.

What is the explanation for the minus amount in 1963?

A. That TWA changed its method of obtaining communications from purchase to some other form.

Q. How would one get a minus amount in a communications purchased account?

A. It could have been a credit on an overpayment from a preceding year. That is the only explanation I can think of for it.

[Tr. 5869] Q. That is speculation on your part, is it not?

A. That is correct.

Q. You made no inquiry?

A. I made no inquiry.

I think it is appropriate to state that our estimates were based on changes for each individual year.

Q. In connection with your determination of what expenses were fixed and what were variable, did you make any study of any airlines other than TWA for the purpose of determining whether there was an industry pattern with respect to what expenses varied and what did not?

A. I did not.

We were concerned with what TWA's own experience had been during this period of increasing numbers of jet aircraft being operated.

Q. Is it fair to say that generally speaking at least all airlines would follow generally the same pattern with respect to what expenses were variable and what were not?

A. I have made no such study. I cannot comment on that.

Q. You have no knowledge on the subject at all?

A. That is correct.

Q. I notice when one gets to your costing sheets, [Tr. 5870] Exhibits F, G, H and J in Volume IV, in every instance I believe and I have not checked every single page, the actual column reads "Actual Expense with Revision of Chapter I."

What does that mean, "Revision of Chapter I"?

A. That heading is for Exhibit F. And the revision of Chapter I effects the figures for example on Sheet 5 of Exhibit F under "Depreciation and Amortization Expense."

Q. I find this revision of Chapter I through all of these exhibits, not merely Exhibit F.

A. I also call your attention to the Chapter I on Sheet 3 in Exhibit F.

And I would refer your attention to page 9 of Volume I of our report, wherein it lists certain revisions in rentals expense and revisions in depreciation and amortization expenses.

Those changes have been made in the actual figures, so that the figure that we are using in Exhibit F is an actual

with whatever revisions there were for the calculation of Chapter I.

Q. The same explanation holds with respect to Exhibits G, H and I?

A. G refers to the actual revision for Chapters I [Tr. 5871] and II, and J, for example, revisions of Chapters I through IV.

Q. But insofar as this actual column refers to Chapter I, is it your testimony that what you have done is to throw out the rental expense that was actually incurred and put in the depreciation expense which you show at the bottom of page 9 of your report?

A. That is correct.

Q. That is not explained anywhere in your report that you did that, is it?

A. I thought it was explained adequately by the note at the head of these columns, "Actual Expense with Revisions of Chapter I."

Q. You thought it was?

A. Yes.

Q. You did not take the trouble to write an additional sentence or two so that we wouldn't have to worry about it?

Mr. Williams: No, he did not, Mr. Hayes.

Q. So with respect to those rentals you substituted depreciation, as you say, for the rental expense.

When you eliminated the B-331B expense, did you eliminate the rental also?

A. Yes.

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[Tr. 5915] • • • Q. Do I understand from one of your last answers that you did not make the calculation on the basis of block hours at all?

A. At some early stage in this work, we may have used block hours. I do not recall specifically whether we did or did not.

Q. If you did, it has been discarded, to borrow your word, and does not exist?

A. That is correct.

Q. I direct your attention, if I may, Mr. Wemple, to page 71 of your report, that is, Chapter V, which deals with 30 as against 20 880s.

Specifically, I direct your attention to a table at the bottom of the page. I note that in the year 1963 you have no added costs for maintenance.

A. That is correct.

[Tr. 5916] Q. In view of the fact that for the purposes of Chapter V you added 7.9 880s to the fleet for that year, how is it that there is no added cost for maintenance?

A. The 7.9 additional CV-880 aircraft is set forth on page 66.

The top of page 70 shows that that 7.9 additional aircraft was expected to result in 9.4 million additional CV-880 plane miles, and 4.8 million fewer piston aircraft plane miles.

Exhibit J, Sheet 29, shows the calculation of our estimated change in maintenance; that 9.4 million additional CV-880 plane miles is estimated to have been accompanied by an increase, a proportionate increase of $2.8 million in direct maintenance expense. This is Exhibit J, Sheet 29.

[Tr. 5917] Q. Yes, I have it.

A. The reduced piston aircraft operation which follows immediately, again a proportionate reduction of the piston aircraft operation shows that a reduction of 4.8 million plane miles of piston aircraft operation proportionately would have reduced the maintenance expenses on that aircraft by $2.5 million.

Accordingly revisions in maintenance burden expense are set forth on the next page, and here we see that the proportionate increase in CV-880 applied maintenance burden expense would have amounted to 1.5 million dollars. A proportionate reduction in the L-1049G piston aircraft maintenance expense would have amounted to a reduction of 1.8 million dollars for a net change, a reduction of 3/10 million dollars in applied maintenance burden expense which just exactly offsets the calculated increase in direct maintenance expense of 3/10 of a million dollars for a net no change which is set forth in the table you referred to at the bottom of page 71.

Q. I understand your arithmetic, Mr. Wemple.

Do you consider it realistic that you could put on 7.9 more planes, jet planes, which are larger than the piston aircraft and fly them 4.6 million more plane miles without any increase in maintenance?

[Tr. 5918] A. Yes, because they are replacing piston aircraft plane miles for a major part of the total mileage that is operated. And the piston aircraft maintenance expense in that particular year was obviously higher.

Q. What do you mean by a major part?

A. 4.8 million miles of piston aircraft mileage were eliminated, which is slightly more than half of the 9.4 million plane miles of jet aircraft operation that was added.

Q. What you are telling us is that the piston costs you have eliminated are about twice as great on a plane mile basis as the jets you put on?

A. That is correct.

Q. Is that what you are saying?

A. That is correct.

Q. The 1049G was a very high cost plane, was it not?

A. In the year 1963 which we have been discussing, it maintenance cost was certainly substantially higher on

per plane mile basis than the maintenance cost of the CV-880 jet aircraft.

Q. Was the 1049G one of the highest cost piston planes?

A. I have not made a study of that particular [Tr. 5919] general premise. I cannot comment on it.

Q. Do you know that the 1649A was one of the highest cost piston planes?

A. It was—I have heard it reported to be one of the highest cost piston planes.

Q. You made no inquiry as to the relative costs of the different piston planes?

A. That is correct.

Q. What was that sheet on Exhibit J? I have forgotten it and I lost my place, Mr. Wemple.

A. I believe it started on page 29.

Q. Yes, thank you.

I notice there you are talking about the 1049G.

A. That's correct.

Q. Where do I find in your report that the 1049G planes were the ones eliminated when the assumed additional 7.9 CVs were put on?

A. On Sheet 4 of Exhibit J under the term "Note" near the top of the page.

Do you find it?

Q. Yes, sir.

A. It states that the piston aircraft expense changed simulation above and certain others that follow used statistics for the L-1049G aircraft.

[Tr. 5920] We selected statistics for this aircraft to be representative of the several types of Lockheed piston aircraft which would have shown reduced plane miles with additional CV-880 service available—correction—with additional CV-880 aircraft available for commercial service.

Q. What was the basis for your statement there that the costs of the 1049G were representative of the several types of Lockheed Constellations that would have been replaced?

A. In general, we reviewed TWA's reported plane miles for piston aircraft throughout this period.

We reviewed the maintenance and flying operations costs for these aircraft.

Q. When you say these aircraft, which aircraft, Mr. Wemple?

A. There was the L-1049G, there was the L-749 and 749As usually run together with it.

I believe there were some L—no, correction. There was no L-049.

My recollection is that in the year 1963, the bulk of the piston aircraft mileage was operated with 1049G aircraft and with 749 aircraft, and that the 749 aircraft were generally assigned to the shorter segments, [Tr. 5921] and it appeared to us that a most reasonable method of calculating these estimates would be to use the 1049G costs.

Q. You already told us that you had made no comparative study of the costs of the different piston aircraft.

A. As such.

Q. How then can you tell that the 1049G was representative of the costs of all the Constellations if you made no such study?

A. I did not mean to make that statement. We simply as it says—

Q. Which statement?

A. That you just made.

Mr. Williams: Let him explain. You just asked him a question. Let him answer it.

Mr. Hayes: All right.

Q. Go ahead.

A. As set forth in the note we set forth L-1049G statistics to be representative of the several types of Lockheed aircraft which would have shown reduced piston plane miles.

Q. That is the second time you have told us that, Mr. Wemple. We heard it the first time.

[Tr. 5922] A. I thought I had already answered your question. That was why I was repeating myself.

Q. Have you or have you not testified just within the past ten minutes that you made no comparative study of the costs of the different kinds of piston aircraft?

A. I did not make that study which you described as an overall study on the comparative costs of piston aircraft.

Q. On what factual basis did you determine that the 1049G costs were representative of the costs of all the piston airplanes that would have been replaced?

The Witness: Would you read that last part of the statement over again, please?

(The question was read.)

A. What I am trying to say is that we did not make that statement. The statement that I had made here is different from that which is contained in your last question:

The statement that we have here is that we selected statistics of a 1049G aircraft to be representative of the several types of Lockheed Constellations that would have shown reduced piston miles.

* * * * *

[Tr. 5930] Q. It is very easy to determine the costs per plane mile, is it not, of the different kinds of Constellations that TWA actually operated?

A. For an annual period, yes.

Q. You did not make that determination?

A. I did not.

I beg your pardon. I did look at operating costs for the various types of piston aircraft insofar as flying operations and maintenance were concerned I think for the 1049G and the 749.

I do not remember the results of that examination. I discarded the examination. I do not have it.

Q. Your reason for discarding it was not that you found the cost of the 749 is lower, was it?

A. No, it was not.

Q. Do you know if there was any year over this period covered by your report when the cost of the 1049G and of the 1649A was not higher than the cost of the other piston aircraft?

Q. I do not know the answer to that.

• • • • •

[Tr. 5944] The Special Master: Proceed.

By Mr. Hayes:

Q. Mr. Wemple, did you ever make any calculation showing the quarterly amounts, if not the yearly, of additional flying operations and maintenance expense that would have resulted from the use of four-engine piston aircraft in place of Martin aircraft?

The Witness: Would you re-read the first part of that question, please?

(The question was read.)

A. I recall making a comparison of, I believe, the flying operations and maintenance expenses combined for Martin aircraft versus a four-engine Constellation on a plane mile basis. And it was that calculation which I was referring to when I agreed with a previous question of yours, that the Martin has a lower per plane mile direct operating cost.

Q. What happened to that calculation, since it is not in your report?

A. I am sure it has been discarded.

Q. Did you consult with anybody concerning it?

A. This was perhaps a year and a half to two years ago. I may have consulted with counsel. I have no recollection of consulting with any particular person.

[Tr. 5945] Q. Did you send the calculation to anyone?

A. No.

Q. Did you send it to Price, Waterhouse?

A. I don't believe so.

Q. Did you have any communication with Price, Waterhouse concerning it?

A. I may have consulted with them at that time, but I have no direct recollection of it.

Q. Do you recall what reason you had for not using it in your report?

A. It was not pertinent to our report.

Q. In what sense?

A. We were simply eliminating piston aircraft service as a result of additional jet service.

We were not remaking the TWA schedule pattern.

Q. What was your purpose in making the calculation?

A. As I remember, someone asked me to make it.

Q. Do you recall who?

A. No.

Q. Do you recall what period was covered by it?

A. Yes, it probably would have been 1959 or 1960 or both.

Q. Did you make similar calculations with respect to other piston aircraft?

[Tr. 5946] A. I recall none.

Q. Do you recall what the study showed, Mr. Wemple?

A. That the Martin aircraft direct cost per plane mile was lower than the Constellation aircraft.

Q. Substantially lower?

A. Yes.

Q. That was the reason why you eliminated four-engine pistons rather than the Martins—

A. No.

Q. (continuing)—in your study?

A. No.

Mr. Hayes: I ask that there be marked for identification as—oh, I have a thing I want to take care of. I wanted to do it. I am forgetting it all the time.

I have here as an exhibit a transcript of the testimony of Mr. Henry Fellows, who was general manager of marketing and sales planning, TWA, at the time before the CAB in the general fare investigation. That was Docket No. 8008, to which reference has been made in the past.

This is his prepared testimony which was submitted at the time. I offer it in evidence as evidence of how TWA in its submission to the CAB [Tr. 5947] actually calculated its costs.

Mr. Williams: May I see it, please?

Mr. Hayes: Surely.

Mr. Williams: Mr. Special Master, we have not had an opportunity to read this exhibit. I realize that Mr. Henry Fellows at the time was general manager of marketing and sales planning for TWA. However, we have not called him in this proceeding.

Whether this is admissible against us, whether it has any bearing on this proceeding or not, I don't know, until I have read it.

Mr. Hayes: The chief reason I am offering it, Mr. Williams, is because of the next to the last page,

but I did not want to pull out a page; I wanted to give the whole thing, in which he shows how TWA in making its presentation in the general fare investigation calculated its costs.

The Special Master: Are you going to ask this witness anything?

Mr. Hayes: About this?

The Special Master: Yes.

Mr. Hayes: No.

The Special Master: Why don't you keep [Tr. 5948] it overnight, Mr. Williams, and we will reserve the offer.

Mr. Hayes: Let us mark it for identification.

The Special Master: Mark it for identification.

Mr. Williams: I may have no objection, but I don't know yet, if counsel could pass to something else.

Mr. Hayes: Would you mark it for identification?

(Testimony of Henry Fellows marked Defendants' Exhibit 251 for identification as of this date.)

Mr. Hayes: I ask that there be marked as Defendants' Exhibit 252 for identification a letter from Coverdale & Colpitts by Mr. Wemple to Mr. Trautlein of Price, Waterhouse, dated October 26, 1965.

(Letter from Coverdale & Colpitts by Mr. Wemple to Mr. Trautlein, Price, Waterhouse, dated October 26, 1965, marked Defendants' Exhibit 252 for identification as of this date.)

Mr. Hayes: I will have to get copies of this made.

[Tr. 5949] Q. Do you recognize that letter as one you sent to Mr. Trautlein?

A. I do.

Q. Is the study referred to in that letter about the Martins and the four-engine aircraft the one about which you just testified?

A. It sounds as though it was.

Q. What four-engine aircraft were you talking about there?

Mr. Williams: Would you wait just a second, please?

Mr. Hayes: Certainly.

A. It was a four-engine—

Mr. Williams: Just a second.

All right.

The Witness: Is there a question?

Q. The question was what four-engine aircraft did you compare with the Martin?

A. I do not remember specifically. It would have been a four-engine Constellation aircraft. I cannot tell you which one.

Q. You do not know which model?

A. That is correct.

Q. What did you mean by the language:

[Tr. 5950] "Please do not use this schedule because we find from further study that this substitution of aircraft probably would not have taken place."

A. May I look at the letter again a minute?

Q. Certainly. I am sorry I do not have extra copies.

A. No, that's not the problem. The problem is my trying to recollect what this was all about.

My recollection is that this was an exercise related to early sale of Martin aircraft, that is, sale of them at dates earlier than they were actually sold, and it had been sug-

gested that this earlier sale would have required the replacement of Martins with four engine Constellation aircraft on particular flights that had been operated with Martin aircraft.

As we got further into the matter, it became apparent that the Martin flights were not eliminated because the aircraft were sold, but they were eliminated for independent reasons having to do with scheduled changes.

And also there was very little direct substitution of four-engine Martin aircraft—correction—of four-engine Constellation aircraft on flights that had been operated with Martin aircraft. The bulk of the change [Tr. 5951] involving the Martin aircraft was simply an elimination of Martin aircraft flights.

That is as I recall the reason for that particular exercise.

Q. You referred to a further study which apparently must have taken place between October 4th and October 26, 1965. By that time you had already been working on this study for some three years.

What further study did you make during those three weeks?

A. Well, as I have just explained, we did the first calculation, as I remember it, simply assuming that four-engine Constellation aircraft would have been used mile for mile for Martin aircraft.

And then as we continued that particular exercise, we went further in our analysis of the schedule patterns, as I have just described, and found that the substitution of four-engine Constellation aircraft for Martin aircraft did not, in fact, take place nor would have taken place.

Q. Who requested you to make this study?

A. I suppose it was authorized by counsel. I have no recollection of who requested us to make the study.

• • • • •

[Tr. 6027] A. As set forth on page 67, we found that TWA's utilization of Convair 880 aircraft when it had 20 and when it had 26 stayed approximately the same. And it is this kind of evidence that supported my decision to assume the same utilization.

Q. By utilization, do you mean the same number of hours per day use of the aircraft?

A. No, sir, I mean in this instance the same number of daily westbound scheduled plane miles.

Q. What about the utilization in the sense of the utilization per day of aircraft?

A. We—these calculations are premised on the assumption that for a given period the total fleet with the additional aircraft would have shown the same hours per day utilization as the existing fleet did.

Q. On what did you base that assumption?

Mr. Williams: Can you add anything to what you have said?

The Witness: I have nothing to add.

Q. I direct your attention to the ratios you set forth at the top of page 28, the ratio of million of plane miles per aircraft for the 331s, and I note that the ratio which was 1.41 in 1960 went to 1.48 in 1961, and then dropped to 1.36 in 1962 and 1.33 in 1963.

[Tr. 6028] What is the reason for the drop in ratio which you there calculate?

A. The schedule patterns that were used for these aircraft operations in those various years were obviously different to the extent indicated by these ratios.

I have no explanation for the difference. They were obviously set up to serve different periods of time.

Q. Would they indicate changes in utilization from year to year, those differing ratios?

A. I would think so.

Q. Did you make any further inquiry as to changes in the utilization as evidenced by the ratios within any year?

A. No, sir.

Q. Did you make any study, Mr. Wemple, as to whether during the period covered by your report, TWA was actually utilizing its jets to the fullest degree possible?

A. I did not.

Q. What consideration did you give in your report to the number of plane miles flown domestically by the 720Bs in 1961 and 1962?

A. We selected the premise that those would have been unchanged by the revisions in fleets which are used [Tr. 6029] as the premises for the various sections of this report.

Q. You assume those plane miles would remain the same?

A. That is correct.

Q. What about the 131Bs in 1962 and 1963?

A. We assumed no change in those aircraft operations.

Q. What about the 331Bs in 1962 and 1963?

A. We assumed those would have been operated with 331 model aircraft.

Q. Your assumption is that the 331s would have operated the same number of plane miles as the 331Bs?

A. That is correct.

Q. Other than anything you have already told us, have you any factual basis for that assumption?

A. Nothing more to add.

Q. After determining your plane miles, your next step was to calculate the number of additional jet seat miles, is that correct?

A. Yes.

Q. That calculation appears at the bottom of page—

A. 28, for example.

Q. 28, yes. Where you multiply the average number of seats and you apply a load factor for the year, is [Tr. 6030] that right?

A. That is correct.

Q. Then you arrive at what you call additional passenger miles?

A. That is correct.

Q. What was your reason for using load factors domestically and not internationally?

A. For the international calculation we had the unique availability of transatlantic statistics, and the remarkable historical correlation between TWA's per cent passengers and per cent seats.

Similar data did not exist for the Domestic Division operation.

Q. You could have used load factors internationally, could you not?

A. I could have I expect.

Q. But you did not?

A. I did not.

Q. Did you try out the International on a load factor basis?

A. I did not.

Q. Domestically, as I understand your report—correct me if I am wrong—you show, for example in Chapter IV for the 880s at page 54 the additional seat miles?

[Tr. 6031] A. That is correct.

Q. You use the average number of 880 seats experienced in 1961 for your additions under the assumptions that the 880s would be on hand in 1960, is that correct?

A. That is correct.

Q. Internationally you showed the net addition of seats after deducting the piston seats?

A. That is correct.

Q. You did not do that Domestically, or did you?

A. We arrive at the same answer, I believe. The calculation is slightly different in its form.

Q. Where do I find it, Mr. Wemple?

A. As you say, the seat miles are on page 54 and then converted into passenger miles. And then there follows on the next several pages the development of the reduced number of piston aircraft passenger miles, which then is converted to a net figure on page 63.

Q. What was the reason for the different treatments Internationally and Domestically, different methods you used?

A. I have mentioned the availability of transatlantic statistics for the International Division which was used in making our calculations.

• • • • •

[Tr. 6052] Q. The industry.

A. We made no assumption respecting change or not change in industry passengers.

Q. Inherent in your report is there not the assumption that more passengers would be attracted to TWA with this equipment?

A. That is correct.

Q. So they would have to come from some place?

A. That is correct.

Q. You did not follow through to decide where they came from?

A. There was no purpose to be served by that.

Q. You did not make any assumption, I gather then, that the total number of passengers traveling would increase?

A. I made no assumption respecting that point.

Q. So not making that assumption, are you not assuming that the additional TWA passengers that you envision here came from competing carriers?

A. No, I'm not making any assumption in that respect.

Q. Where are they coming from?

Mr. Williams: I think your Honor, we went through this—

[Tr. 6053] Mr. Hayes: On International, not on Domestic.

Mr. Williams: —a long time ago.

Mr. Hayes: We never went through this on Domestic.

The Special Master: That is my recollection also that we did not do this on Domestic.

A. It was the history of the beginning of jet aircraft utilization in Domestic service that additional passengers were induced to travel by the availability of the superior jet aircraft.

I make no assumption whether these additional passengers would have been newly induced passengers or diverted passengers or both.

Q. You left that right up in the air?

A. That is correct.

Q. You mention that the airport has something to do with the load factor.

Does the type of terminal, station, have something to do with the load factor?

A. I'm sure it does.

Q. Do you know when the American and United Terminals at Idlewild were completed?

A. It was before TWA, but I do not remember when.

• • • • •

[Tr. 6059] • • • Q. Did you make any calculation, Mr. Wemple, so far as domestic operations were concerned, as to the percentages of domestic operations flown with jets by TWA and by American, United or the whole industry?

A. I have a vague recollection of having made some such calculations quite a number of years ago.

Those calculations have long since been discarded.

Q. They no longer exist, I take it?

A. That is correct.

Q. Do you recall what those showed?

A. My recollection is that during the early years of this period, TWA operated a smaller percentage of plane miles with jet aircraft than did American.

[Tr. 6060] Q. How much smaller?

A. I do not remember the details.

Q. Do you remember what the situation was in other years?

A. I have no other recollection of results of those calculations.

Q. You do not recall that in each of the years from 1959 to 1963 TWA's percentage of revenue plane miles was higher than American's, except for the year 1960 where it was 4/10 of one per cent lower?

A. I have no recollection of those statistics.

Q. And also higher than United's in every year?

A. I have no knowledge or data on that.

Q. Do you have any recollection that in each of the years 1959 through 1963 the percentage of available seat miles flown with jets in domestic operation, TWA had the same percentage as American in 1959 and much higher than United, and that in every other year TWA's percentage was higher than either American or United, except in 1960 when it was 2.8 per cent lower than American?

A. I have no knowledge of data on that subject.

Q. Or that the same situation obtained during those years with respect to revenue passenger miles flown with jets? Do you have any recollection of that?

[Tr. 6061] A. I am not sure—I have no recollection, but I'm not sure I understand your term "revenue passenger miles flown with jets."

Q. The percentages of revenue passenger miles flown with jets in domestic service, that TWA's percentage was higher than either American or United in every year except that in 1959 TWA and American had the same percentage and in 1960 American was higher by 4.1 per cent? You have no recollection of that?

A. I have no knowledge of data on that subject.

Q. On the domestic scene, did you consider that at any time during the period covered by your study there was an excess of capacity in the industry?

Mr. Williams: This has a familiar ring. I don't know whether—

Mr. Hayes: We covered it internationally before.

Mr. Williams: All right.

A. I do not find any reason respecting capacity by TWA and other airlines to modify in any way whatsoever the estimates that we have set forth in Volumes I and IV.

* * * * *

[Tr. 6096] * * * Q. What is a marginal load factor?

A. I do not know. I am not—let's say I am not familiar with that term. I do not know what you mean by it.

Q. I mean by a marginal load factor the load factor that was experienced when new equipment was added.

A. You mean such as the 90 per cent that TWA and American achieved in early 1959 with their jets?

Q. As against the previous year, whatever it might be.

A. Well, there was no previous year.

Q. Then there would not be a marginal load factor for the jets, if there was not a previous year?

A. No.

• • • • •

[Tr. 6139] Q. Have you any opinion, Mr. Wemple, as to which between 4B and 4C represents the proper approach or the better approach to the determination of net operating profits?

A. I have no opinion on that matter.

Q. The differences between the two are gigantic, are they not?

A. They are.

Q. Over $100 million?

A. And also in pages of analysis.

Q. I am delighted you mention that, because the fewer the pages, the greater the money. You have no opinion as to which is better?

A. That is correct.

Q. Though they are over $100 million apart?

A. I have no opinion.

Q. In 4C you come out with $50 million-odd, $51 million or $52 million, after you eliminate Chapter I having to do with rentals? If you include that, you come out with $64 million and here you come out with $170 million, and still you have no opinion?

[Tr. 6140] A. Correct.

Mr. Williams: That is what he said. That is a matter for the Court.

By Mr. Hayes:

Q. Do you consider both of these approaches to be reasonable?

A. Yes, sir.

Q. But you have no explanation as to the gigantic difference between them?

Mr. Williams: That is a different question.

Q. As to the reasonableness, I am talking about. They are both reasonable. You are an expert, Mr. Wemple.

Mr. Williams: Can you add anything to that?

The Witness: I have nothing to add.

Q. Is it part of whatever opinion is expressed in 4B that the 1964-65 profit ratios could be applied to each of the years 1959 to 1963?

A. I chose to apply them to the composite of the years 1959 through 1963.

Q. I know what you chose. Will you answer the question?

Mr. Williams: Read the question, please.

[Tr. 6141] The Witness: You will have to give me the question again.

(The question was read.)

A. It is not.

Q. It is not?

The Special Master: Can I ask a followup question here?

Mr. Hayes: Surely.

The Special Master: Do I understand your last few answers to mean that these two, Exhibit B on the one hand and Exhibit C on the other, are basically computations from assumptions that were furnished to you, and that you have no opinion, as an expert, based on your background, as to which is a more reasonable method of calculating damages in this case?

The Witness: As you have pointed out, the assumptions used for the calculations in 4C are quite different from the assumptions used in the calculation of 4B, and I have no basis for judgment as to which is the proper set of assumptions to be used for the overall damage determination.

I simply represent that with the assumptions in 4C this is an answer. Those are obviously more [Tr. 6142] limited assumptions, although more detailed, than the assumption for 4B.

Mr. Williams: We chose, Mr. Special Master, to think that this was a legal question which would be put to the Court, and I pressed the witness myself for the same kind of answers that Mr. Hayes has been trying to elicit, and for the same reasons he gave me the same answers.

Mr. Hayes: Have you anything further, Mr. Brownell?

The Special Master: I am thinking, but I am not saying.

I have nothing more on this point.

By Mr. Hayes:

Q. Would there be anything inappropriate about applying the 1964-65 ratios which you arrive at to the years 1959 to 1963 separately, assuming there is validity in applying them to the years as a group?

A. We have not set them up to be used that way.

Personally, I think it is better to apply the combination of the two years, 1964 and 1965 to the total of the years 1959 through 1963.

Q. What I am trying to find out is, assuming there is validity in applying the 1964-65 ratio to a [Tr. 6143] five-

year period, what would be improper about applying it separately to each of the years in the five-year period?

A. This has to do with the degree of significance, and I have no problems whatsoever in applying the two-year average to the entire five-year period. I have made no study to determine that the statistical significance is as good or as appropriate, if it is applied to the individual years.

Q. So you made no study to determine that; is that what you said?

A. That is correct.

Q. So you have no opinion on it, I gather?

A. I did express an opinion. I have made no detailed study.

Q. An opinion not based on a study?

A. That is correct.

Q. Mr. Wemple, what is the extent of your experience with passenger airlines?

A. In the fall of 1956 I believe it was, our firm was engaged by TWA and, as has been brought out at various times in this session, we have been engaged on various studies for TWA a great deal of the time since 1956 to date. [Tr. 6144] I believe it was around 1960 I did a study for BOAC on their sales activity in the United States.

Somewhere along in that period, I did a study for Flying Tiger, which is nominally a freight airline, but had a substantial amount of charter passenger business.

I have done a variety of studies for airports which are—

Q. The question was airlines.

A. (continuing) —only indirectly related. Correct. I believe that's the answer to the question.

Q. The 1956 study for TWA concerned what?

A. This was a review of TWA's operations and organization.

Q. You mean the corporate organization?

A. No, the personnel in the operating organization, if that's the same thing.

Q. Did it have anything to do with forecasting earnings or estimating earnings costs?

A. I believe not.

Q. Then you did two studies for TWA that have come out that you mentioned, one in 1959 and one in 1962?

A. Those are the dates of the reports.

Q. In each instance, as I understand it, TWA supplied you with forecasts prepared by it and you reviewed [Tr. 6145] them and expressed your opinions concerning them?

A. I believe one of those studies involved working with TWA in the preparation of those forecasts, but the answer to your question is yes.

Q. Of course, you have been engaged by TWA in connection with the preparation of the reports, TWA Exhibits 4, et seq. The Flying Tiger is not a scheduled airline, is it?

A. It's a scheduled freight airline. It is not a scheduled passenger airline.

Q. I mean scheduled passenger airline.

A. No, that is correct.

Q. You mentioned BOAC. Did that have anything to do with the forecasting of income and expense for BOAC?

A. It did not. Correction. It had to do with recommendations pertaining to their selling operation in the United States. Those recommendations, of course, involve revenues and expenses.

Q. I mean did it involve an overall study of the revenue and expense of BOAC?

A. It did not.

Q. Were you ever employed by any passenger airline in a managerial capacity?

A. No, sir.

[Tr. 6146] Q. Were you ever involved in decisions as to how aircraft should be scheduled, either as to time or as to routes? I mean the making of the decisions?

A. Well, I am a little confused by your question, but let me just answer the involvement.

As a part of the 1956-57 study with TWA, I spent a considerable amount of time with their scheduling people as to what they were doing and revisions that would be desirable.

As far as participating in the making of the final decision, the answer is no.

Q. Were you ever involved in the making of decisions for any passenger airline with respect to the equipment utilization? By "equipment," I am referring to the aircraft.

A. No.

Q. Were you ever involved in decisions as to routes, as to what routes to seek, what routes to abandon, et cetera?

A. Again, in one of our studies we did discuss extensively the abandonment of certain routes. We did not—I did not participate in the final decision.

Q. What study was that?

A. That was the 1956-57 one, as I remember.

[Tr. 6147] Q. Were those studies made by you of suggestions that TWA made as to what routes would be abandoned?

A. My recollection is that this was simply a part of our overall—correction—a part of our detailed review of TWA's entire operations.

Q. Did you ever testify before the CAB with respect to airline operation?

A. No.

Q. Do you have any writings on the subject of airline earnings and expenses?

A. No. I assume you mean published documents?

Q. Right.

A. No.

Q. I was not referring to the exhibits before us.

Are you a member of any professional society, the membership of which is made up of consultants or experts or management personnel with respect to airline operation?

A. No society that is specifically limited for focused on airline operation.

Q. Specifically, are you a member of the American Institute of Aeronautical and Astronautical Engineers?

A. I am not.

Q. Are you a member of the Society of Automotive [Tr. 6148] Engineers?

A. I am not.

• • • • •

[Tr. 6152] * * * *Examination by Mr. Tenney*:

Q. Mr. Wemple, here is TWA Exhibit 4A to which is attached a booklet, "Record of the Professional Experience of Coverdale & Colpitts, Consulting Engineers," which I believe has been marked TWA 4A(2), although it does not [Tr. 6153] appear on that document.

A. It does on the copy I have. Perhaps I have your copy.

Q. It is the same booklet.

A. Yes.

Q. That booklet describes in some detail the practice of your firm Coverdale & Colpitts, does it not?

A. Yes, this is our—we call it record of professional experience for the firm.

Q. Would you briefly describe the nature of that practice?

Mr. Hayes: Is this of the firm?

Mr. Tenney: Yes.

Mr. Hayes: Then I object to anything other than the qualifications of Mr. Wemple as an expert. We can't cross-examine the firm.

Mr. Tenney: Part of the qualifications of Mr. Wemple as an expert is his membership in a professional firm.

Mr. Hayes: So far as it has to do with him, his qualifications, I have no objections whatsoever. I object to the qualifications of his firm.

The Special Master: I will allow the line of questioning and see how it develops.

[Tr. 6154] The Witness: Could I have the question again?

By Mr. Tenney:

Q. Would you describe briefly the nature or the practice of your firm?

A. We render professional services to industry and transportation activities.

I guess it is proper to say that the majority of our engagements, the bulk of our work is involved with estimating the financial results that there will be from a particular project, particularly as to what the net revenue that is available to service debt for a particular project is, and these estimates are usually used in connection with financing of a particular project.

These projects, as I say, can be transportation projects, they can be industrial projects.

Q. How long have you been associated with that firm, Mr. Wemple?

A. I believe it was August 1952.

Q. When did you become a partner of the firm?

A. In the spring of 1960—correction—in the spring of 1954.

Q. You have just described the nature of the practice of Coverdale & Colpitts. Has your—

[Tr. 6155] A. Correction. That—my memory is fuzzy. That may have been the spring of 1956, rather than 1954.

Q. As a matter of fact, that's the statement on TWA 4A, so I assume it is 1956.

A. Yes, thank you.

Q. You just described the nature of the practice of Coverdale & Colpitts. Would that description apply also to your practice as a member of that firm since 1956?

A. The amount of work that I have done on industrial projects has been quite small. Otherwise, it very definitely describes the practice that I have been engaged in.

Q. Would you turn to the letter which has been marked TWA Exhibit 4A, Mr. Wemple? A. Yes, I have a copy.

Q. 4A(1), I am told.

A. That's the way mine is marked.

Mr. Hayes: 4A(1) is this?

Mr. Tenney: That is what I am told this marking means.

Mr. Hayes: Because the "(1)" was stricken off mine by somebody.

By Mr. Tenney:

Q. At pages 3 and 4 of that letter, you have a list [Tr. 6156] of studies in which you participated or of which you have been in charge.

Would you run down that list, Mr. Wemple, and give us some idea of the financial magnitude of the projects involved?

A. Yes, these were studies that were performed under my direction. I was in charge of them.

The first is an industrial district proposal, which, as I remember, was expected to be about a $30 million project.

The next is an aerial tramway, which is an $8 million project.

The next is a study to put a value on a phthalic anhydride manufacturing unit, which, as I remember, was alleged to have been worth about $1.5 million.

The next is the Connecticut Turnpike project, for which $459 million of bonds have been sold.

The next is a three-bridge project which is about a $20 million bond issue.

The next is the O'Hare International Airport development project at Chicago. That was $125 million bond issue.

The Honolulu International Airport was a $14 million revenue bond issue and, as I remember, that was [Tr. 6157] simply a part of about a $30 million project.

The Palm Beach, Florida proposed airport was about a $3 million project.

The Denver, Colorado airport terminal was a part of a $11 million project.

The Flying Tiger Line, at the time we did the study, showed a total asset value of about $27 million on its balance sheet.

The last study was not financial feasibility, the British Overseas Airway study.

Q. Several of these studies, Mr. Wemple, deal with airports.

Would you say there is a relationship between airports and airlines?

Mr. Hayes: I will concede that aircraft land and take off from airports.

Q. Is there any further relationship between an airline, knowledge of an airline and a study of an airport, Mr. Wemple?

A. The airport operation and capital cost is quite often financed by airlines and it becomes a part of the airlines' operating expense at that particular airport.

The organization of the airport, the physical facilities and actually the airport rate schedules are set [Tr. 6158] often as a result of negotiations with airlines and with references to airlines' financing—financial practices and operating practices.

Q. In preparing this report, have you tried to make full use of your knowledge of the airline industry and your judgment based on experience of what matters were relevant or not relevant?

A. By "report," I assume you mean—

Q. TWA Exhibit 4C.

A. Could you give me that question over again now that I can identfy the report?

Q. In preparing this report, have you tried to make full use of your general knowledge of the airline industry and your judgment based on experience of what matters were relevant and were not relevant?

A. Yes, very definitely.

Q. In preparing this report, have you consulted standard references whenever you considered them appropriate

A. Well, let me say I have consulted standard references on many, many occasions in the preparation of this report.

Q. Is every such consultation reflected in this report or in your working papers?

[Tr. 6159] A. No. Oftentimes the consultation turned up figures and statistics that showed that the point I was studying or researching was not pertinent. Obviously, there is no reference to that kind of instance.

There were other consultations where the figures proved to be confirming to analyses that we had already made. Again, we made no particular notes or references.

We often copied figures from standard references and our work sheets generally show the location in the standard reference where we got the figures, and there are, of course, many references—many notes in our reports as to standard references which we used as a source of data.

Q. Are there any material considerations lying behind the report in its finished form that are not reflected in the working papers and the reports as they now stand?

A. The matter of my total knowledge and experience with airline matters is, of course, not thoroughly or completely set forth in the report, insofar as it may have influenced my judgment.

However, all matters and considerations which I considered to be relevant are set forth in the report with reference to estimates and calculations in the report.

[Tr. 6160] Q. TWA Exhibit 4D, Mr. Wemple, is a letter signed by Coverdale & Colpitts, addressed to Mr. Edward J. Morehouse, dated May 2, 1966, and the first sheet of that letter sets forth your estimate as of April 1959 of the operating results which TWA could anticipate in the years 1959 to 1963, with a 63-plane jet fleet.

I show this to you, but I don't intend to ask you any questions on it. Defendants' Exhibit 206 is from your working papers relating to this forecast, is that not correct?

A. That is correct.

Q. On the right-hand side of Defendants' Exhibit 206 as the next to the last entry numbered 14, there is a reference to PAA jets experiencing high load factors on the North Atlantic; is that correct?

A. That is correct.

Q. In answer to questions by Mr. Hayes, you testified that the early Pan American load factors were not set out in your report or in the working papers, but that you had general knowledge of them. Do you recall that testimony?

A. That is correct.

Q. Can these load factors be obtained from public sources?

A. Yes.

[Tr. 6161] Q. Have you since, at my request, prepared a table showing them?

A. I have. I have it here. It sets forth the Pan American Atlantic Division jet aircraft passenger load factors by quarter, starting with the fourth quarter 1958, running through the fourth quarter of 1961, which, of course, is an extension of the period that is noted here which would have ended in April 1959.

Mr. Tenney: I ask that there be marked as TWA Exhibit 40 for identification this document which is headed "PAA Atlantic Division Jet Aircraft Passenger Load Factors by Quarters, 1958-1961."

• • • • •

By Mr. Tenney:

Q. Was this document prepared under your supervision, Mr. Wemple?

A. It was.

Mr. Tenney: I offer it in evidence.

Mr. Hayes: May I ask the purpose of this offer, Mr. Tenney?

Mr. Tenney: There was a good deal of talk about Pan American load factors, early load factors [Tr. 6162] in the course of your cross-examination, Mr. Hayes, and I would like to put what those load factors were into the record.

Mr. Hayes: You related this offer, as I understand it, Mr. Tenney, to Defendants' Exhibit 206.

Mr. Tenney: That is correct.

Mr. Hayes: Defendants' Exhibit 206, the assumptions contained therein, could not have gone beyond the first quarter of 1959. These are the load factors through 1961.

Mr. Tenney: That is correct. It goes on past the 1959 period, but I believe that the—

Mr. Hayes: That is why I asked what the purpose of the offer was. If it's just to explain Item 14 on the right-hand side of Defendants' Exhibit 206 and is limited, therefore, to the fourth quarter of 1958 and the first quarter of 1959, I have no objection.

Mr. Tenney: I would like to put it in for the entire period, apart from the Defendants' Exhibit 206. I think this was a matter of interest as was brought out in the cross-examination.

Mr. Hayes: Then you are not relating it [Tr. 6163] specifically to Defendants' Exhibit 206 or to TWA Exhibit 4D, as such?

Mr. Tenney: I believe it is related to that. It is also related to a subject which was examined upon extensively.

Mr. Hayes: You are not limiting the offer to that?

Mr. Tenney: I am not so limiting the offer.

Mr. Hayes: If it is not so limited, I have no objection.

The Special Master: Received.

(TWA Exhibit 40 for identification received in evidence as of this date.)

By Mr. Tenney:

Q. Mr. Wemple, your report, TWA Exhibit 4C, Volume I, page 9, which is a part of Chapter I—

A. I have it.

Q. (continuing) —in the first table appearing on that page under the headings "Domestic Division" and "International Division," there are entered the B-131 and B-331 respectively.

Mr. Hayes pointed out in the course of his examination that some part of the 331s were used in the Domes- [Tr. 6164] tic Division. Do you recall that?

A. I recall that.

Q. What difference does this make to this portion of your report, that some portion of the B-331s were used in the Domestic Division?

A. It makes no difference. As set forth in the second sentence at the top of the page, these expenses were taken from the CAB Form 41 reports, Schedule P-5.2.

The total rentals expense for B-331 aircraft is recorded under the International Division reports.

TWA apparently did not transfer any of the rentals expense to their report for the Domestic Division for the year 1960. So that this is the total rentals expense, as paid by TWA for the use of the entire fleets during those years irrespective of what division they were used in.

Q. In the course of your testimony on this chapter, Mr. Wemple, you stated that nothing except rental expense and depreciation would be changed, insofar as gain from operations is concerned, if TWA owned the aircraft instead of leasing them.

Do you remember that testimony generally?

A. I remember it.

Q. Are there some types of leases on which other [Tr. 6165] factors would have to be taken into account, if you were computing the cost of ownership as opposed to the cost of leasing insofar as gain from operations is concerned?

A. Yes. Actually, TWA had one of those kinds of leases with Northeast Airlines for Northeast's use of time of the aircraft. And the arrangements for that lease provided for the lessor to pay certain of the maintenance expenses, as I remember.

Now, if TWA had had these aircraft which are the subject of Chapter I on a different kind of a lease which involved the lessor paying certain of the costs, the operating costs for the aircraft, then obviously an adjustment would have been required in operating cost to reflect the circumstance in the lease.

However, we examined the cost reports in detail for these aircraft for the period when they were leased and we found that the only item that would have been affected was rentals expense and the depreciation and amortization charges for TWA.

Q. So the estimate reflected in Chapter I of your report involved the exercise of judgment on your part as to whether other factors should be taken into account?

A. Most certainly.

[Tr. 6166] Q. Mr. Wemple, would it have been possible to use what has been called in-revenue service dates in your estimates covering the buildup period of the new jet fleets?

A. I presume you mean in lieu of the average number of aircraft available for commercial service which we did use.

Q. That is right.

A. It probably is theoretically possible to do that, although there is no record made by TWA, no summary record maintained by TWA on the matter of number of aircraft in revenue service.

The detailed information from which such a record could be developed does exist in the TWA flight message reports and a few other things. So I suppose it is theoretically possible to have done it.

Q. Would it have been practicable to use the in-revenue service information for the first portion of the period while the fleets were being built up?

A. A calculation of that nature could be made.

Q. Mr. Hayes asked you whether you had made any studies as to what the effects on your revenue estimates would have been if you had used in-revenue service dates, and I believe you testified that you had not. Do [Tr. 6167] you remember that testimony?

A. That is correct.

Q. Have you since, at my request, made such a stud
A. I have.
Q. Have you made a tabulation of the results?
A. Yes. The—yes, I have.
Q. Would you give it to me, please?
A. That is more than a tabulation of the results. Th
is the working papers which I used to develop the answe

Mr. Tenney: I ask that there be marked as TW
Exhibit 41 for identification a sheet headed "Eff
on Estimated Change in Gain or Loss From Ope
tions If Number of Aircraft In Revenue Service
Used in Place of Average Number of Aircraft Av
able for Commercial Service," to which there
attached a number of sheets.

• • • • •

[Tr. 6168] By Mr. Tenney:

Q. Do you have TWA Exhibit 41 for identificat
before you, Mr. Wemple?
A. I do.
Q. Would you explain what TWA Exhibit 41 for ide
fication shows and how it is prepared?
A. For each of the Chapters II through V, we took
in-revenue service dates which are set up at various pla
in Volumes I and IV of our report, and there is anot
exhibit which was a letter to Price, Waterhouse, whic
don't happen to have with me, which gives in-revenue se
ice dates for some of these items.
Q. I show you TWA Exhibit 4E. Is this the letter
A. Yes, that is the one.
We took the historical in-revenue service dates and
took the reconstructed in-revenue service dates for

years in which there was a buildup of jet fleets which were the subject of these Chapters II through V.

Using the date when an aircraft went into revenue service, we calculated for each month and an annual average for the particular year involved a figure which is the average number of aircraft in revenue service.

In the period of time when the fleet would have reached its full size, as far as TWA having the fleet on [Tr. 6169] hand was concerned, we then shifted to the average number of aircraft available for commercial service, because by that time all of the aircraft in a particular fleet would have been in.

So we thus have a number mostly similar to the average number of aircraft available for commercial service, but which is calculated for the number of aircraft in revenue service.

We then took those numbers of aircraft in revenue service and went through our calculations that are in Volumes I and IV of our report, and revised the ratios which we used to calculate additional plane miles and to calculate additional expenses for the jet fleets.

The results of those calculations are set forth on the top sheet of Exhibit 41. It shows a grand total of change of an increase of 1.3 million in the change in gain or loss from operations for the Chapters I through V.

I emphasize, if I haven't already stated it, that we made the in-revenue service calculation for both the historical and the reconstructed conditions.

Q. Will you explain what the attachments are to this top summary sheet, so that we can have that in the record? [Tr. 6170] A. The attachments are by chapter. The first group of papers in each attachment is the calculation of average number of aircraft in revenue service.

Following that are the revenue calculations from the text of our report.

Following that are the revised expense calculations which are marked pages from Volume IV from our report.

And then following that is a revised summary page from the text of the report.

What we have done in each instance for these report pages is simply mark them with the revised figures that we obtained, using the in-revenue service numbers of aircraft for the years when there was a buildup of fleet, either actual or reconstructed.

Q. Just to make sure that this is clear, as I understand it, then, the sheets from the report that appear in these attachments are photocopies of the report pages as they originally appeared with marks on them to indicate the revisions that you have computed, is that correct?

A. That is correct.

• • • • •

[Tr. 6173] • • • Q. I show you a sheet which has been marked for identification as TWA Exhibit 4C(IV)(i).

You testified that this represented a revision of Schedule B of your report showing some changes based on information which you had received and reflecting some revisions in TWA's historical reports of aircraft available for commercial service.

Do you recall that testimony?

A. I do.

Q. Was this document prepared under your supervision?

[Tr. 6174] A. It was.

Q. In this table, there are monthly figures. There are also for each year averages showing the average number of aircraft available for commercial service by type on an annual basis.

What is the source of these annual average figures?

A. We calculated the annual average figures.

Q. From what?

A. From the monthly statistics which are set forth on this exhibit.

• • • • •

[Tr. 6176] • • • Q. Mr. Wemple, did you use the monthly averages in the computations of Volume I of your report?

A. No, we used the annual averages that are developed from the monthly figures.

Q. What differences are there in the annual averages on this exhibit from Exhibit B, as it appears in your report?

A. There is one difference for the annual average for an individual type of jet aircraft.

It is in the 1961 CV-880 annual average number of aircraft available for commercial service.

The revision is from the 14.6 figure which we originally calculated, to the revised figure of 14.5.

Q. Is there any revision in the annual averages re- [Tr. 6177] lating to other types of aircraft?

A. There is none.

Q. Have you, at my request, made a computation of what the difference would be in the estimates set forth in Volume I of your report, if you were to use the corrected annual average for CV-880s appearing on this revised schedule instead of the annual averages used on Schedule B, as it appears originally in your report?

A. We have made that calculation.

Q. Do you have the results of it with you?

A. Yes. Again, I have a summary sheet which shows the effect of that change in the annual average for 1961 for the CV-880 on estimates for Chapters IV and V. The total effect is—you can read it. It is set forth there.

Mr. Tenney: I ask that there be marked as TWA Exhibit 42 for identification a summary sheet—off the record.

The Special Master: Yes.

(Discussion off the record.)

Mr. Tenney: —headed "Changes in improvment in gain or loss from operations for a correction of certain numbers of CV-880 aircraft that TWA actually had in 1961, which changes the annual average number available from 14.6 to 14.5 aircraft and af- [Tr. 6178] fects slightly the estimates of Chapters IV and V" to which are attached photocopies of pages 63, 64, 71 and 72 of TWA Exhibit 4C(1) marked to indicate certain changes.

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Mr. Tenney: I ask that there be marked as TWA Exhibit 42A for identification a number of other sheets from the report marked to show changes in the nature of revisions of calculations which Mr. Wemple has made in the course of arriving at TWA Exhibit 42 for identification.

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The Special Master: In the absence of an objection, 42 will be received in evidence and 42A will be marked for identification.

Mr. Hayes: 42 will be in the same category as the report itself, subject to our general objections.

[Tr. 6179] The Special Master: That is correct. At this point they are both marked for identification.

By Mr. Tenney:

Q. Would you state what the summary sheet shows, Mr. Wemple?

A. The summary sheet shows that the effect of this change in annual average number of aircraft available for commercial service for the CV-880 fleet that TWA actually had in 1961 from 16—correction—from 14.6 to 14.5 would have affected our calculations set forth in Chapter IV of our report for 1960 by an increase of $1/10 million in the estimated change in gain from operations; and for Chapter V for the year 1961, an increase of $4/10 million in the estimated change in gain from operations.

Q. You testified, Mr. Wemple, that in connection with Chapter III of your report, TWA Exhibit 4C, and Schedule C—I guess it is Exhibit C of Volume IV, which gives your computations of aircraft available for commercial service on earlier delivery dates—you testified that you had not deducted in Schedule C any time to reflect the possibility that reconstructed TWA's B-131 fleet would have been reduced by the necessity of returning one plane to Boeing for a two-month period for equipment [Tr. 6180] completion and final certification, such as occurred historically.

Do you remember your testimony generally on this?

A. I do.

Q. Have you determined at my request the difference which such allowance would have made in the estimates contained in your report?

A. I have.

Q. Do you have it with you?

A. Yes.

Mr. Tenney: Off the record.

The Special Master: Off the record.

(Discussion off the record.)

Mr. Tenney: I ask that there be marked as TWA Exhibit 43 for identification a sheet headed "Changes in improvement in gain or loss from operations for a reduction of two plane months in the number of B-131 aircraft that would have been available for commercial service in 1959 with earlier receipt of fifteen B-131 aircraft, Chapter III," to which there is an attached photocopy of page 51 of TWA Exhibit 4C marked to reflect certain revisions.

I ask that there be marked for identification [Tr. 6181] as TWA Exhibit 43A a series of pages from TWA Exhibit 4C marked with revisions of calculation details which Mr. Wemple has made in coming up to the conclusions expressed in TWA Exhibit 43 for identification.

The Special Master: It will be marked.

* * * * *

By Mr. Tenney:

Q. Will you state for the record, Mr. Wemple, what TWA Exhibit 43 shows?

The Special Master: In the way of results?

Mr. Tenney: In the way of results.

A. TWA 43 shows that if in our calculations of improvement in gain from operations for the year 1959 for Chapter III in Volume I of our report we had made an allowance of two plane months for an aircraft of the B-131 series being returned to Boeing, it would have reduced our [Tr. 6182] change in gain from operations by one-half million dollars.

Q. I would like to turn now to Volume I of your report, TWA Exhibit 4C, page 27, and specifically to call your attention to the table at the top of that page.

You will recall that Mr. Hayes asked you a number of questions as to the application of the figures in the second column which is headed "Per cent of Increase in Transatlantic Passengers with Additional B-331 Aircraft" to the figures in the first column which is headed "Actual International Division Passenger Revenue."

Do you recall your testimony on that subject generally?

A. Generally, I do.

Q. At one point Mr. Hayes gave you some figures which were from the CAB Handbook of Airline Statistics, reporting TWA total scheduled international passengers in certain years, and he compared them with the IATA figures of transatlantic passengers set forth in your report and derived a difference which he referred to as TWA's beyond gateways passengers.

Do you remember that generally?

A. I do.

Q. Have you since examined, Mr. Wemple, the CAB [Tr. 6183] Handbook to which Mr. Hayes referred, to see what it shows with respect to the relationship between transatlantic and beyond gateways traffic?

A. I did.

Q. Would you explain what you found and what your conclusions were?

A. Yes. The CAB Handbook had a figure for TWA International Division of total originating passengers for each year.

We then went to the CAB Form 41 Schedule T-4, which gives the development of that figure by individual city and it also gives certain other passenger statistics.

Incidentally, the passenger statistics changed as to details. I believe it was in the year 1960. So that there was a greater choice of passenger statistics to examine for the years 1961 and thereafter.

We compared those data with the IATA figures and considered the characterizations of the data set forth in the CAB Form 41 Schedules T-4.

It is our opinion that the passenger statistics of enplaned passengers on scheduled service is most nearly comparable to the IATA statistics that we used in our report.

[Tr. 6184] We took TWA's International Division enplaned passengers for scheduled service for the U. S. cities that are served by TWA International Division, and multiplied that figure by 2 to give a transatlantic passenger statistic. The times 2 is, of course, to take the enplaned passenger in the U. S. city which would be an eastbound transatlantic passenger and to take the enplaned passenger —and to multiply it by 2 to represent that transatlantic passenger returning to the U. S.

We then took the difference between this calculated number of transatlantic passengers and deducted it from the total number of enplaned passengers for TWA International Division, scheduled service, and obtained a difference figure which is generally characterizable as the beyond the gateway passenger that you just mentioned.

Q. Do you have a summary of the results of this calculation?

A. I do.

Mr. Tenney: I ask that there be marked as TWA Exhibit 44 for identification a single sheet headed "TWA International Division Passenger Enplanements, U. S. Cities and Other Cities, 1959-1963."

• • • • •

[Tr. 6185] • • • Q. Will you explain, Mr. Wemple, what TWA 44 for identification shows as a result of your examination?

A. TWA Exhibit 44 shows calculations of beyond gateway passengers for TWA's International Division as 43.5 per cent of the total International Division passengers for the year 1959.

And for the years 1960 through 1963, the percentage ranged from a low of 32.5 to a high of 35.5, which I believe is a relatively uniform percentage.

Q. What do you conclude from that as to the propriety of using transatlantic passenger figures to determine total International Division passenger revenue in the manner in which you have done it at the top of page 27 of your report?

A. I believe this analysis supports the reasonableness of our work set forth at the top of page 27, wherein for individual years, 1959 through 1963, we have calculated the additional International Division passenger revenue on the basis of the percentage increase that would have been achieved in transatlantic passengers for each individual year.

[Tr. 6186] Q. Mr. Hayes gave you some figures as to beyond gateways passengers that he computed in the method that he described to you, which were quite different from this.

Can you account for that difference, Mr. Wemple?

A. The principal reason for the difference is that Mr. Hayes used a different CAB passenger statistic, which does not correlate particularly well with the number of transatlantic passengers reported by airlines to IATA.

In effect, they are a different series of figures obtained from different sources, as presented by Mr. Hayes.

These figures are all from one source and are comparable.

Q. A little later on in connection with the same table in your report, Mr. Hayes asked you a number of questions about the inclusion of charter revenues, and referred to

some figures from the CAB Handbook which he stated indicated a decrease in the percentage of charter passengers flown from 41 per cent in 1959 down to 7.5 per cent in 1963, with the 1962 figure being the low figure of 1.4 per cent.

Does such a fluctuation in the number of charter passengers from year to year have any relevance to the table at the top of page 27, Mr. Wemple?

[Tr. 6187] A. No. The table at the top of page 27 is predicated on the belief that TWA's charter business in the International Division would have varied with the availability of jet aircraft, as its transatlantic scheduled passengers would have varied as set forth at the top of page 27.

Q. What charter passengers are you assuming in the table at the top of page 27 that TWA would have carried?

A. A proportion of charter business that was the same as the proportion of charter business that TWA actually carried during each of the individual years.

[Tr. 6188] Q. So that a change from year to year would have what relevance to your assumptions?

A. The estimates for each individual year are predicated on what took place during that particular year.

The fact that there was a change from year to year is not relevant.

• • • • •

Q. Would you turn to page 52 of your report, [Tr. 6189] Volume I of TWA Exhibit 4C?

A. I have it.

Q. You state on that page, Mr. Wemple, that you assume TWA would have commenced revenue service with CV880s on May 15, 1960.

In the course of Mr. Hayes' examination, you testified that this assumption was based on instructions from counsel

and was not based on any examination of the actual experience of Delta.

Do you recall that testimony?

A. I do.

Q. Do you know, Mr. Wemple, when Delta inaugurated revenue service with CV880 aircraft?

A. Yes, it was May 15, 1960.

Q. From what source is that date available?

A. I found it in Delta's annual report for their fiscal year ending June 30th, I believe it is, 1960.

Q. Do you know when the CV880 was certificated for passenger service by—is it the CAB that does that or the Federal Aviation Agency?

A. I understand it was May 1, 1960.

Q. In the absence of directions of counsel, would you have chosen a later date than May 15th for inaugurational service by TWA, Mr. Wemple?

[Tr. 6190] A. For the premise that TWA would have received the CV880 aircraft on the contract delivery dates that are set forth on page 52, I would not have chosen any later date than May 15th for the commencement of revenue service.

Q. Would you explain why, please?

A. TWA would have received its first CV880 aircraft in November 1959 and prior to May 1st, TWA would have received a total of seven CV880 aircraft.

Delta received its first CV880 aircraft, I believe it was in February 1960 and it commenced revenue service on May 15, 1960.

TWA would have had a CV880 aircraft on hand longer than Delta. It would have had quite a sufficient number of aircraft on hand to have commenced revenue service, and therefore I believe it is perfectly reasonable to assume TWA would have commenced revenue service with this fleet certainly no later than May 15, 1960.

Q. Earlier this week, Mr. Wemple, Mr. Hayes asked you a number of questions on Chapter V of your report in the course of which you stated that for the table at the top of page 70 of your report you had made a computation of revenues based on average piston aircraft, while in your expense calculations you had based [Tr. 6191] calculations of expense for flying operations and maintenance on the historical expense incurred by TWA in connection with the 1049G piston aircraft.

Do you recall your testimony on that subject?

A. I do.

Q. Have you since at my request made a computation to determine what the effect would be on your estimates if you had based your estimates of expenses for Chapter V on an average of TWA's piston aircraft as you based the table at the top of page 70 which deals with revenues?

A. I have.

Q. Do you have the results of that computation with you?

A. I do.

Mr. Tenney: I ask that there be marked as TWA Exhibit 45 for identification two sheets, constituting photocopies of pages 71 and 72 of the Volume I of Mr. Wemple's report, TWA Exhibit 4C, marked to indicate certain changes, and also that there be marked as TWA Exhibit 45A for identification a series of work papers and other changed pages from his report establishing the details of the calculations leading up to TWA Exhibit 45 for identification.

[Tr. 6192] * * * Q. In this instance, Mr. Wemple, I notice that there is no summary sheet.

Would you, therefore, explain a little more fully what this TWA Exhibit 45 for identification shows?

A. For this TWA Exhibit 45, for each of the years 1960 through 1963, we made an alternative calculation of changes in flying operations and maintenance expense that would have been the result of TWA having received a fleet of thirty rather than twenty CV880 aircraft which is the basic subject of Chapter V.

These alternative calculations used TWA's historical total expense for the operation of all piston aircraft in each of those years. And it is this expense for all piston aircraft on which we—correction. And it is this historical expense of all piston aircraft that we used for our application of ratios to calculate changes in expense that would have been the result for [Tr. 6193] Chapter V.

The revised expense calculations are set forth on pages 71 and 72 which have been marked and printed, and are Exhibit 45.

The results are an increase in expense in 1960 from 10.8 to 11.6 million.

In 1961, from 21.6 to 22.8 million.

In 1962, from 21.0 to 21.7 million.

In 1963, from 14.1 to 14.9 million.

Q. What is the result of that change on your computations of improvement in gain or loss from operations?

A. If my quick arithmetic is correct, it is a total increase of $3½ million.

Q. A total effect in what direction?

A. Increase in expenses.

Q. What result does that have on the change in gain or loss from operations?

A. That would have a corresponding amount of effect. It would—if applied, it would reduce the calculated improvement in gain from operations set forth for Chapter V by $3½ million.

• • • • •

[Tr. 6194] • • • Q. Mr. Wemple, do you have available a copy of Defendants' Exhibit 15? That is the Coverdale & Colpitts report dated June 26, 1959.

In the course of your testimony on this report in answer to questions by Mr. Hayes you stated in substance that in your opinion a reading of this report would lead the reader to the conclusion that TWA would require additional jet aircraft to keep up with its competitors.

I would like you to briefly examine Defendants' Exhibit 15 and point out the portions of that report which lead you to that conclusion.

Mr. Hayes: I object to this, Mr. Brownell. The report speaks for itself. We can all read it. We can all draw our own conclusions as to what the report says.

The Special Master: Are you going to ask him to comment on it or just—

Mr. Tenney: I would like him to go through the report and comment on those portions of the [Tr. 6195] report that indicate TWA's need for jet aircraft.

Mr. Hayes: I press my objection, Mr. Brownell.

The Special Master: I will allow the answer, which I trust will be rather brief.

Mr. Hayes: I am sorry.

The Special Master: Which I trust will be rather brief.

A. There are three general classes of statements in the report.

The first class I would like to refer to relates to the advantages of a jet aircraft over a piston aircraft which, of course, are well known.

Page 2, it points out the speed difference.

Page 4, it points out that jet aircraft are more comfortable and attractive than piston aircraft.

Page 33, it points out that TWA and American had been averaging 90 per cent load factor during the initial months of operation with their new jet aircraft.

There is another series of statements which point up that with the fleet of 45 jet aircraft that were the basis for this particular study and forecast, TWA was going to be obliged to operate a number of piston aircraft on a number of important segments and that piston [Tr. 6196] aircraft by TWA would be operated against competition by other airlines' superior more modern aircraft, and that TWA was going to have to limit its schedules which it was operating with jet aircraft or with any kind of aircraft.

Page 3 points out that TWA expected to still have 72 piston aircraft in its fleets.

Page 6 points out that TWA would be operating a 1049G piston aircraft in direct competition with American's Lockheed Electra.

Page 10A, the Domestic Division, flight segments in their total schedule pattern, 126 would be operated with jet aircraft, and a total of 274 would still have to be operated with piston aircraft.

Those piston aircraft segments would be—include Pittsburgh to Chicago service, Cincinnati to Detroit service, Pittsburgh to St. Louis, New York to Columbus, et cetera.

That in the International Division, TWA was going to operate its beyond the gateway system—correction—its beyond the gateway service with piston aircraft.

And page 28, it points out that American would be using jet and turboprop aircraft on a number of [Tr. 6197] intermediate and short-range segments which TWA would have to be operating with piston aircraft.

It also points out at a page which I seem to have trouble putting my hand on at the moment that TWA's International Division—it is page 15—service would be reduced during the summer peak from 43 flights per week down to 36 flights per week.

It points out that those essentially will be jet-aircraft flights, but TWA is having to eliminate non-stop direct service between New York and Rome, between New York and Frankfurt, between Boston and Paris, between Chicago and London, et cetera.

The other kinds of statements that are set forth in here are that TWA with 45 jet aircraft will not be nearly as well equipped with jet aircraft as its principal competitors were then scheduled to be.

For example, TWA would have 37 jet aircraft for Domestic Division service, American would have 75 jets, and 33 turboprops, the Lockheed Electra. United at that time was scheduled to have 58 jets as against TWA's 37.

In number of seats as set forth on page 30, TWA would be able to offer 3537 jet seats—this is a daily service proposition—against American's 8000 and United's [Tr. 6198] 7700.

In the International Division, TWA would have eight jet aircraft available. It lists here that Pan American would have seventeen available.

Actually, this list prepared in this report is incorrect, because it did not reflect the six additional B331 aircraft that were diverted from TWA to Pan American.

BOAC, another principal competitor, was expected to have 25 jet aircraft against TWA's eight.

Those are the principal elements of the report which support my statement that I made the other day.

Q. Were you ever requested by TWA or Tool Company during the period in the early part of 1959 leading up to the preparation of this report which has been marked Defendants' Exhibit 15—to repeat, were you ever requested by TWA or Tool Company to express an opinion as to whether or not the 45 jet aircraft on order for TWA with which this report deals was too many or too few or the right number for TWA?

A. We never received that request.

Q. Were you ever requested by TWA or Tool Company to conduct an analysis of the relative advantages of this 45-plane fleet as against a 63-plane fleet for TWA?

A. We were not.

[Tr. 6199] Q. Did you ever state an opinion to TWA or Tool Company that a 45-plane fleet would be better for TWA than a 63-plane fleet?

A. We did not.

Q. Mr. Wemple, I show you Defendants' Exhibit 64 which is this rather bad photocopy of a letter addressed to Mr. Charles S. Thomas, president of Trans World Airways, Inc. and dated May 6, 1959, which I believe you testified you participated in the preparation of.

A. That is correct.

Q. In that letter, you state that you have made certain studies in the second paragraph, Mr. Wemple.

Is Defendants' Exhibit 15 the report that you have just gone over a report on the studies which are referred to in this letter of May 6th?

A. It is.

Q. In what connection was the May 6th letter to Mr. Thomas prepared?

A. It was prepared at his request.

Q. Did he explain why he wished the letter?

A. I did not learn or know of any explanation at that time as to why he wished the letter.

Q. You express the opinion in the May 6th letter that the jet fleet listed above which is the 45 planes [Tr. 6200] listed in the table just above which is to be delivered to TWA by the end of 1960 provided a fleet of aircraft in types and numbers adequate for a sound economic operation.

What did you intend to convey to the reader in that statement of opinion?

Mr. Hayes: I object to this what he intended to convey. We have his document here as to what he said. What is his intention is not evidentiary at all.

Q. What did you mean by that statement?

* * * * *

[Tr. 6201] * * * A. I believe this letter was written as a perfectly straightforward statement of our opinion at that time of May 6th, which is namely that the studies had shown that TWA could expect in the year 1961 a sound economic operation with those aircraft.

Q. Did you mean to suggest that TWA would be better with the numbers of jet aircraft set forth than with a larger or smaller number?

Mr. Hayes: I object to this.

The Special Master: He has already testified that he has never given any opinion on that subject.

Q. Is your prior answer that you had never stated any opinion to TWA as to whether or not the 45-plane fleet was too large, too small or the right number in any way affected by this letter?

Mr. Hayes: I object to this. It is the [Tr. 6202] same business again.

The Special Master: It seems harmless to me. I will allow the answer. It seems a little repetitious but there is no harm.

The Witness: May I have the question again?

(The question was read.)

A. No.

Q. In Defendants' Exhibit 15, Mr. Wemple, in which you commented just now, you set forth some forecasts as to jet and turboprop aircraft which would be on hand for various airlines in the year 1961.

Have you prepared at my request a list of the aircraft, jet and turboprop aircraft, which TWA and its principal competitors actually did have on hand over the period from shortly prior to that time up to as recently as practicable?

A. I have.

Q. May I have it, please?

A. Yes.

Mr. Tenney: I ask that there be marked as TWA Exhibit 46 for identification a table headed "Jet and Turboprop Aircraft On Hand For TWA And Principal Competitors, 1958-1966."

[Tr. 6203] • • • Q. Would you just explain how this table is put together and what the meaning of the various entries are? Not in any detail, just generally, Mr. Wemple.

A. We went to the sources which are listed at the bottom of the page and tabulated the number of aircraft reported for these various airlines as on hand at six-month intervals from 1958 through 1966.

We have separated the turboprops from the jets because they have certain different characteristics, although, in my

opinion, are vastly superior to the piston aircraft operated —correction—to the piston aircraft which TWA and most airlines operated.

The NA items on the right for the June 30th period are simply that the ICAO statistics do not show June 30th aircraft fleets on hand.

Q. Under Trans World Airlines, that column, does that include all the airplanes that TWA—all the jet aircraft that TWA had for both domestic use and international use?

A. And cargo use.

[Tr. 6204] Q. So that not all of them would have been available at the same time at any rate either domestically or internationally, is that correct?

A. They would have been divided between the Domestic and the International Divisions.

The history of TWA's division for the years 1959 through 1963 is set forth in Volume I of our report.

The Special Master: What page?

The Witness: Exhibit B.

Correction. Did I say Volume I? I meant to say Volume IV, Exhibit B.

Mr. Tenney: I offer this in evidence subject to the same ground rules.

Mr. Hayes: Subject to our general objections which have not been ruled on.

The Special Master: So received.

(TWA Exhibit 46 for identification, received in evidence, as of this date.)

Q. Turning to another subject, there was a good deal of testimony, Mr. Wemple, in the course of Mr. Hayes' examination about the use by TWA of four Boeing 720B jet aircraft which it leased for a period in 1961 and 1962?

Do you recall that testimony in general?

[Tr. 6205] A. I do.

Q. Would you turn to the chart on page 58 of your report, Exhibit 4C, Volume I?

A. I have it. Page 58, you said?

Q. Yes.

Will you explain what this chart shows as to the use by TWA B720 aircraft at the time to which this chart relates?

A. This page 58 is developed from information in TWA's employee timetables, and it lists all of the service that TWA operated on a daily basis westbound between various pairs of cities in the United States.

TWA offered other service than with the CV880 aircraft between these pairs of cities, and that other service is tabulated there by type of plane.

There was a very small amount of service between these 30 pairs of cities with the B720 aircraft, namely, three flight segments out of a grand total of 87?

Mr. Hayes: A grand total of 87.

The Witness: 87 flight segments on the righthand side of page 58, that is correct. Do you see it?

The Special Master: 67 were jets?

The Witness: 67 were jets, 87 grand total.

[Tr. 6206] Mr. Hayes: I will defer my questioning.

Q. How did you select these 30 pairs of cities, Mr. Wemple?

A. As I have mentioned these were pairs of cities that were—correction.

As I have mentioned, this is the entire daily westbound service that TWA offered in the March 1962 schedule with

the Convair 880 aircraft, and that Convair 880 aircraft schedule provided service for these 30 pairs of cities.

Q. On page 68 of your report there is another chart. What does it show, Mr. Wemple?

A. Page 68, did you say?

Q. Yes.

A. It shows the pairs of cities that were served daily westbound by Convair 880 service by TWA in October 1963. There were a total of 36 pairs of cities served in that particular flight schedule pattern.

Q. Do you know how many pairs of cities are included in that table on page 68 that are not included in the table on page 58?

A. I think it is 13, approximately 13.

Q. Have you at my request determined how these [Tr. 6207] additional pairs, these 13 additional pairs of cities were serviced by TWA in March of 1962 which is the time to which your table on page 58 refers?

A. I have determined the amount of jet aircraft service that TWA offered in March 1962 between these 13 pairs of cities.

Q. Do you have a table showing the results of that?

A. I do.

Mr. Tenney: I ask that there be marked as TWA Exhibit 47 for identification a table headed "Types of Jet Aircraft used by TWA in March 1962, for Daily Westbound Service for the Pairs of Cities Listed on Page 68 but are not Listed on Page 58 of the C & C Report Dated May 2, 1966."

• • • • •

Q. What does TWA Exhibit 47 for identification, Mr. Wemple, show as to service provided by the B720 aircraft?

A. It shows that there was no service provided by B720 aircraft for these 13 pairs of cities.

[Tr. 6208] Q. Taking together the information shown in the tables on pages 58 and 68 of your report and in TWA Exhibit 47 for identification, Mr. Wemple, do you have any conclusion as to the relationship between the B720 jet and the additional CV880s in TWA's historical schedule planning?

A. Yes, my conclusion is that there was very little use of the B720 aircraft on the part of TWA's Domestic Division service that was operated with CV880 aircraft.

Mr. Tenney: I offer TWA Exhibit 47 in evidence subject to the objections, the same group of objections.

Mr. Hayes: Subject to the outstanding objections to the whole report.

The Special Master: Received in evidence.

(TWA Exhibit 47 for identification, received in evidence, as of this date.)

Q. Mr. Wemple, are there any statistics kept that you are familiar with as to break even load factors?

A. Yes, there are.

Q. What kind of statistics are there?

A. The CAB publishes a break even load factor for airlines by division on an annual basis.

[Tr. 6209] Q. Have you at my request prepared a table of certain information from those statitistics?

A. I have.

Q. Will you show it to me, please?

A. Yes.

Mr. Tenney: I ask that there be marked as TWA Exhibit 48 for identification a table headed "Break Even Passenger Load Factors Scheduled Service 1958-1963."

• • • • •

Q. Mr. Wemple, do you consider these figures as to break even load factors from CAB reports to be reliable figures?

A. Well, they certainly are reliable figures of what the CAB calculates as the "Break Even Passenger Load Factor" for various lines.

Beyond that, I view them as a very general guide to the operating profit versus load factor for an individual airline division, but certainly not a precise measure of that relationship.

Mr. Tenney: I offer TWA Exhibit 48 in evidence, subject to the same general objections [Tr. 6210] that Mr. Hayes has alluded to.

Mr. Hayes: Subject to our objections to the whole report.

The Special Master: So received.

(TWA Exhibit 48 for identification, received in evidence, as of this date.)

Q. Turning to TWA Exhibit 4B, Mr. Wemple, which is your comparative profit study—

A. I have it.

Q. —Mr. Hayes asked you just yesterday a Number of questions on this report as well as a number of questions at the beginning of the examination.

Among other things I believe you testified that this study compared operating profit and did not take into consideration net profits or any item that went into net profits but was not considered in operating profits, is that generally correct?

Do you recall your testimony on that generally?

A. Yes, as I recall, I said that the figures beyond operating profit that get into the net income or net profit calculation were not included in this particular report.

Q. What kind of thing is eliminated by that approach? What sort of thing are we talking about that is eliminated?

[Tr. 6211] A. Interest on debt, income from non-airline operations such as Pan American's International Hotels Division, taxes, income taxes are not—are thereby excluded from consideration in this particular report which is Exhibit 4B.

Q. You explained in the course of your testimony that the comparability of route structure I think you said broadly defined was a principal consideration in your determination of the most comparable airlines for purposes of the study which is reported on in TWA Exhibit 4B.

Will you state again what comparisons you consider particularly significant under this broad heading of route structure?

A. Yes.

The cities that were served by TWA and the other airlines, and the service between pairs of cities by TWA and the other airlines, and the general area served, for instance, the Baltimore-Washington area which was discussed yesterday.

Q. In the course of your testimony, you stated at one point, Mr. Wemple, that you had at one time made a quantitative study of traffic that certain airlines carried, do you recall that?

[Tr. 6212] A. I do.

Q. You also testified, I believe, that that was no longer available?

A. That is correct.

Q. What was the source of the material that you had included in that study?

A. Much of it came from CAB publications and as I recall some of it came from annual reports. I think those are the principal sources of the information that we had originally used for that general study.

Q. Have you since at my request—

A. Excuse me. Also, airline guides, timetables.

Q. Have you since at my request, Mr. Wemple, consulted those sources and prepared a general similar study?

A. Well, I have reviewed certain CAB statistics to assemble data on traffic by American and TWA domestic and by Pan American Atlantic and TWA international.

Q. Do you have a copy of the results of that?

A. I do.

Mr. Tenney: I ask that they be marked as TWA Exhibit 49 for identification—

The Witness: Here are the results of the analysis to show the comparability of traffic [Tr. 6213] statistics for TWA international and Pan American Atlantic for the period 1959 through 1965.

Mr. Tenney: I ask that this be marked TWA Exhibit 49A for identification, a—

The Witness: May I also suggest that you include in A the statistics I have on the comparability of traffic for American Airlines and TWA domestic.

Mr. Tenney: I ask that there be marked as Exhibit 49A for identification three spread sheets headed respectively "Passenger Originations by TWA International and PAA Atlantic Divisions, 1959 to 1965," "Passenger Originations by TWA Domestic Division and American Airlines, 1959 to 1965," and "Revenue Passenger Miles, TWA Domestic Division and American Airlines, 1959 to 1965."

• • • • •

Q. Do you have similar results with respect to United Airlines?

A. At your request I assembled similar traffic statistics for United Airlines and TWA for the same period.

[Tr. 6214] Mr. Tenney: I ask that there be marked as TWA Exhibit 49B for identification this sheet which Mr. Wemple just handed me constituting a spread sheet headed "Passenger Originations by TWA Domestic Division and United Airlines 1959 to 1965."

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The Witness: Perhaps it would be well to point out that that is a combination of United and Capital's statistics, because United merged with Capital in the course of that period, and that obviously has a very large effect on those traffic statistics as well as other considerations for United.

By Mr. Tenney:

Q. I am not sure that the record is particularly clear as to what you were saying about TWA Exhibit 49B, Mr. Wemple.

Did you have a further explanation that you wanted to give?

A. Yes, I simply wanted to emphasize that the United traffic statistics reflect—correction—the United traffic statistics set forth there are a combination of [Tr. 6215] United and Capital for the early part of the period before the merger, and to also comment that insofar as a comparative profit study is concerned, I think it would have been most inappropriate to have selected United for that comparison because of this very major change that took place with the airline during the period which involved its merger with Capital.

Q. Apart, however, from the merger with Capital, will you comment as to what TWA Exhibits 49A and 49B show as to the comparability of the airlines involved insofar as

that comparability is concerned with the matters reflected in these tables?

A. The first comparison is between TWA international and Pan American Atlantic, and the table shows essentially that after the Pan American figures are adjusted to eliminate the Berlin and Bermuda services which are not transatlantic services as generally defined or as generally employed by our other discussions of transatlantic operations. But after that adjustment, the cities that are served by both airlines, that is, the common cities, have passenger originations which represent between 70.6 and 78.3 per cent of TWA's total International Division passenger originations and for Pan American the range is from a low of 66.3 in 1964 to a high of 88.8 in 1959.

[Tr. 6216] So that these cities which are served by both airlines represent the bulk of both airline division's traffic.

The domestic comparison is—I have two of them. One is on the basis of passenger originations which shows that the passengers for both TWA and American at the cities which they both serve runs approximately 80 per cent of the total passenger originations of both airlines throughout the period.

Now, for the domestic operation, we have another statistic available, and that is revenue passenger miles between pairs of cities as compiled by the CAB.

Now, this has to be set up by pairs of cities, and we selected the 75—correction—we selected the 75 pairs of cities which TWA serves which provide over 80 per cent of TWA's total revenue passenger miles.

Now, American Airlines serves many of those same 75 pairs of cities, and the service that American Airlines—correction—and the traffic that American Airlines obtained for those same 75 pairs of cities throughout this entire

period runs about between 43 and 46 per cent of American Airlines' total business.

Now, the United Airlines comparison on a passenger boarding, whereas for the cities served by [Tr. 6217] both TWA and American the passenger boardings represent about 80 per cent of each airlines' total passenger boardings, United's passenger boardings for those same—for the cities that are common with TWA represents only about 60 to 65 per cent of United's total boardings.

On the traffic statistics which are revenue passenger miles, again United—the United-Capital combination is lower than the American comparison. The American figure is about 45 per cent of American's total revenue passenger miles.

The United-Capital figure is about 35 per cent of United's total revenue passenger miles.

Q. What do you conclude from that as to the relative comparability of the United and American to TWA's Domestic Division?

A. That United is not the most comparable airline. American is.

Mr. Tenney: I offer TWA Exhibits 49A and 49B in evidence subject to the same objections that Mr. Hayes has referred to.

The Special Master: So received.

(TWA Exhibits 49A and 49B for identification, received in evidence, as of this date.)

Q. On the map which appears as Exhibit B to TWA [Tr. 6218] Exhibit 4B, you testified that this was taken from the maps published by the airlines in the Airline Guide for a particular month, that is, March 1964.

Would you explain why you chose this source from which to draw a map comparing route structures?

A. We found it completely impractical to prepare a map for inclusion in this report that would be of manageable size and would show the entire official route structure of each airline.

Furthermore, in my opinion, it would have been misleading.

We, therefore, turned to the Official Airline Guide as demonstration of what each airline thought were their most important routes to feature in a map.

Q. Do you know whether there are other routes in which TWA and American are in direct competition which were not shown as direct routes on those maps?

A. There are.

Q. Would you name some of them?

A. Yes, the outstanding omission is New York to Los Angeles which American did not choose to serve—to show as a through-service.

There is also New York to Chicago which for some reason American did not choose to show on its map.

[Tr. 6219] Q. If they had been shown on those maps in the Airline Guides which were your source, how would they have been represented on your Exhibit B?

A. A black line.

Mr. Tenney: Mr. Brownell, I have no further questions.

• • • • •

[Tr. 6246] • • • Q. It is just not clear to me why for two years you used the upper line here which is line 19 on page 218 of the Handbook and for the remaining three years you use line 20.

A. I would like to have used line 20. Those data did not exist in CAB form for individual cities for the two preceding years.

The Special Master: So that you came out with a result that you thought was the most accurate estimate you could get from CAB sources?

The Witness: That's right. It is a roundhouse approximation. No question.

Q. But there is a mixture of peaches and pears here, is there not?

A. There is a mixture.

Q. You gave some testimony with respect to charter revenue and I think what you said in substance was that even though the charter revenue dropped from year to year —I think there was an increase in one year, if I recall correctly—you are just assuming that with the additional planes and flights and so on there would [Tr. 6247] be a continuation each year of the same percentage, whatever it was?

A. I thought we were talking about percentage of charter passengers, rather than revenue, this morning.

Q. Whatever it was, charter passengers.

A. And my statement was, yes, that with the availability of extra aircraft we assumed that TWA would have handled a proportionate percentage of additional charter traffic.

Q. That the percentage would be exactly the same as it historically was for the year?

A. That is correct.

Q. And this is pure assumption on your part?

A. That is correct. This was our judgment of what was a reasonable assumption to do.

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[Tr. 6660] • • • Mr. Ordover: The purpose of this session today is to mark for identification or in evidence as the particular case may be certain docu-

ments relating to the testimony of Mr. Edward L. Wemple, which has heretofore been completed in this damage hearing.

This session is being held pursuant to an agreement of counsel made while Mr. Wemple was on the stand. It is being done to facilitate the marking of these documents and the agreement at the time was made so that Mr. Wemple's examination would not be interrupted by the necessity for obtaining and marking these documents.

Pursuant to the suggestion of the Special [Tr. 6661] Master noted at page 6254 of the transcript, Mr. Wemple has prepared TWA Exhibit 46A. This exhibit has been furnished to the Special Master and counsel and subject to the general objections of the defendants previously made and pursuant to the agreement of counsel for the defendants noted in their letter of March 16, 1967, I hereby offer TWA 46A in evidence.

Mr. Wier: Counsel for defendants has no objection to the receipt of TWA 46A in evidence subject, of course, to our objections to Mr. Wemple's testimony in general and further subject to the specific provisions included in our letter of March 16, 1967 to the Hon. Herbert Brownell, copies to Dudley B. Tenney, Esq.

(Four-page document, the first page of which is headed "TWA v. Jet and Turboprop Aircraft Year-End Inventory, 1958-1965 For TWA and Principal Competitors and Additional Allocation of TWA's Jet Aircraft," marked TWA Exhibit 46A in evidence, as of this date.)

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[Tr. 10,638] • • • Mr. Tenney: As our next rebuttal witness, I will call Mr. E. L. Wemple, who has appeared before in this proceeding, and I do not think, therefore, will have to be resworn.

Mr. Perkins: I agree.

EDWARD L. WEMPLE, recalled as a witness, resumed the stand and testified further as follows:

Direct examination by Mr. Tenney:

Q. Mr. Wemple, are you familiar with the testimony that has been given by Mr. Nathan Simat in this proceeding?

A. Yes, I have read Mr. Simat's reports, his supplemental report and I believe I was present during most of his testimony on cross-examination.

Q. As you know, Mr. Simat has in his prepared reports and also in his oral testimony, expressed strong disagreement with the testimony which you gave earlier in this proceeding.

[Tr. 10,639] Do you wish to change the estimates and the opinion that you have expressed previously in any way as a result of having heard Mr. Simat's opinions?

A. No, I do not.

Q. In the report which Mr. Simat presented last year, which was marked Defendant's Exhibit 271, in Part III he states his opinion as to "certain fundamental errors in Mr. Wemple's methodology."

Commencing on page III-4 there are a series of four numbered paragraphs which purport to describe these so-called errors in your methodology. They are elaborated on elsewhere in that report.

I would like to direct your attention to the so-called fundamental error described on pages III-4, as consisting of your use of "the same average load factors," for estimating domestic operations as those which were experienced historically.

I will also remind you that this statement of so-called error is also referred to, among other places, in Part C of Vol. B at page 1 of which it is stated:

> "Mr. Wemple's assumption presupposes that TWA could introduce jet capacity into the market in unlimited quantity without suffering a decrease in average jet load factors."

[Tr. 10,640] Do you believe, Mr. Wemple, that capacity could be added in unlimited quantity without affecting load factors?

A. No, I do not and none of my estimates are based on a premise of adding unlimited quantity into the market.

Q. Would you explain that, please?

> Mr. Hayes: May I interpose here? It seems this is not at all rebuttal testimony. Mr. Wemple is not now going all over again his original report.
>
> The Special Master: So far, you are right. I will let it go a little while until I see the trend.

A. I have an exhibit prepared here to show what historically happened in TWA's scheduling during the 1959 to 1963 period when TWA introduced jets into the operations.

> Mr. Tenney: Just a moment, Mr. Wemple. I ask that this sheet, which is headed "TWA v. Hughes. Departures By Fleet Segment Length, Piston and Jet Aircraft 1959-1963" be marked as TWA Exhibit 443 for identification.

• • • • •

[Tr. 10,641] By Mr. Tenney:

Q. Is the document which has been marked as TWA 443 for identification, the exhibit you have just been referring to?

A. Yes.

Q. Please proceed.

A. This exhibit uses data on departures of piston and jet aircraft, taken from Mr. Simat's working paper, Vol. B printout, identified as "Program Output Listing 1." It groups departures for the last month of each quarter within a year by flight segment length.

I should like, first, to call your attention to the phenomena or the development that is shown in the departures of 1501 miles and longer. Those are the three right-hand groups which are listed ahead of the total.

In the year 1959, in the 1500 to 2000-mile segment length, for example, there were 1973 departures noted.

By the year 1963, there were none with piston aircraft.

For the next longer segment length there were 645 piston departures in the year 1959 and by the year 1963 this was down to 105.

In the next longer one there were 141 piston [Tr. 10,642] departures in 1959 and this sheet shows a reduction to 87 for the year 1963.

We actually couldn't find those in the examination we made of the flight schedules. However, my point is still the same, and that is that this represents a replacement of piston aircraft departures with jet aircraft departures.

The second phenomena that is shown in this schedule analysis can also be illustrated by the same flight segment length groupings.

In 1959, the 1500 to 2000-mile segments show 2494 departures and by 1963 that number has increased to 3355 departures.

The next two longer segment length groups show virtually a doubling of the number of departures between 1959 and 1963.

The Special Master: This is all domestic, isn't it?

The Witness: Yes. This illustrates the second scheduled change development, namely, a net increase in number of departures in the longer segment lengths.

The third development which I want to point out is best illustrated by the left hand column, which are [Tr. 10,643] the departures of segment lengths less than 300 miles long.

In 1959, there were 40,691 such departures recorded for that segment length in Mr. Simat's analysis. By 1963, there were only 25,000 such departures, a reduction of 15,000 in total number of departures of the short segment lengths.

There were, in 1963, 5470 piston—I am sorry—5470 jet departures and one must assume that those represent replacements of piston departures in the early years. But there was absolute elimination of 15,000 departures.

This, to my knowledge, was a management decision to eliminate the short stage length departures operated with piston aircraft, because they were not profitable. It had nothing whatsoever to do with the advent of the long-range jet aircraft, which is the subject of our analysis and estimates.

In my estimates, insofar as replacement of piston service is concerned, over 60 per cent of the jet mile-

age that TWA would have operated with the earlier and additional jet aircraft, would have been for direct replacement of piston service.

I have another schedule developed to show [Tr. 10,644] the magnitude of the net increase in jet service that would have occurred in accordance with my estimates.

Mr. Tenney: I ask that this sheet which is headed "TWA v. Hughes. Total Available Seat Miles Operated, Domestic Scheduled Service Only. TWA, UAL and AAL," be marked as TWA Exhibit 444 for identification.

Mr. Perkins: This was revised from the ones we received on Friday.

The Witness: This is revised from the paper that was distributed ahead of time to a very minor degree in the TWA estimated additional seat miles for the years 1959 and 1960 and 1961.

• • • • •

By Mr. Tenney:

Q. Mr. Wemple, before you go on to discuss this exhibit, perhaps you should tell us how we can tell this from the earlier incorrect one that was distributed previously.

Mr. Hayes: We never received an earlier incorrect one.

Mr. Cayo: Yes, we did. We never [Tr. 10,645] received the correction.

A. The revised edition has under the TWA, estimated additional seat miles for the year 1959 the figure 105. The next figure is 910 and the next figure is 1018.

Q. Will you go ahead, please?

A. This exhibit shows the amount of net additional jet miles which I estimate TWA would have operated with the earlier and additional jet aircraft, as a percentage of the historical seat miles which TWA, United and American operated in each year.

I have selected United and American, because, of course, they serve many of the same markets that TWA does and I believe this gives the best picture of the overall magnitude of the estimated additional seat miles in the total market, which was served by TWA.

The percentages are shown in the right-hand side of the upper part of this table. They are, of course, quite small, ranging from .5 per cent to 3.7 per cent.

Mr. Perkins: I think Mr. Hayes will join me in noting a continuing objection to this whole line of testimony, on the ground it doesn't appear to be rebuttal testimony at all, but a further support for Mr. Wemple's variation of—I don't know [Tr. 10,645] what it is—Mr. Wemple's original testimony.

The Special Master: You may proceed.

A. (continuing) The lower part of this table shows the additional TWA seat miles which I estimated as a percentage of TWA's historical seat miles and there the percentages start as 1.6. The highest in any year is 13.6.

I believe that these percentages show that my estimated additional jet seat miles cannot possibly be characterized as introducing jet capacity into a market in unlimited quantity.

Q. In your opinion, what effect would the addition of this amount of additional service have been on individual markets served by TWA?

A. I made that kind of an analysis for five of TWA's most important markets. These were tables identified as

31 through 36. The one on the top covers New York to Chicago schedules by TWA in June 1960.

Mr. Tenney: So that we can identify for the record what you are talking about, I ask that six sheets of which the first is headed "TWA v. Hughes. New York-Chicago Nonstop Jet Flights, Actual, June 1960," be marked as TWA Exhibit 445 for identification.

• • • • •

[Tr. 10,647] • • • By Mr. Tenney:

Q. Mr. Wemple, I believe that TWA Exhibit 445 for identification is the series of tables that you were just now referring to.

A. It is.

Q. I understand that you made some corrections in your earlier version of these which were originally distributed to counsel for defendants. May I ask whether you were able to send them copies of those corrections?

A. To my knowledge, they did not get copies of the corrections. The changes—

Mr. Hayes: We did get some corrections. You mean corrections of the corrections?

Mr. Tenney: No. I state for the record that I am advised that the corrected versions were distributed to defendants, but particularly since there are two versions now, can you tell us how we can be sure that we are dealing with the correct one?

The Witness: The second New York to Chicago sheet, the correct one, in the left-hand column, under "Flight No." the eighth figure, in the [Tr. 10,648] corrected version, has Flight No. 90.

Mr. Perkins: Instead of what?

The Witness: 800-B.

By Mr. Tenney:

Q. Mr. Wemple, you were commencing to make a statement with respect to this. You may proceed.

• • • • •

The Witness: The first sheet lists non-stop jet flights as operated by TWA, American and United between New York and Chicago in June 1960.

You will note that TWA operated only one jet flight in each direction out of a total of six of all airlines eastbound and seven westbound.

I point out that in addition to these jet [Tr. 10,649] flights, of course, TWA operated seven piston flights in each direction, and American, which was the major factor in this particular market, operated 14 eastbound and 15 westbound, most of which were Electra flights.

Turning to the second sheet in this package, I have inserted into the June 1960 listing of nonstop jet flights, additional flights, nonstop jets, which TWA was able to operate in July 1961. The additional flights are indicated with an "A" on the left-hand side of each of the two groups of columns.

In July 1961, TWA had approximately the number of jet aircraft that the assumptions would have given TWA in June 1960. So that we have simply moved forward the nonstop jet service TWA was able to

operate in July 1961 and presumably would have been able to operate in this particular market in June 1960.

These additional nonstop jet flights would have given TWA the very best competitive position of all the airlines in this market. It would have given them a much better competitive position, versus, for instance, American's, I think it was, eleven Electra flights in each direction.

[Tr. 10,650] TWA, with this arrangement, would have had seven jet flights.

The next sheet is New York to Los Angeles nonstop service. As it was operated by TWA in July 1960, plus the addition of the additional flights TWA was able to operate in this market in July 1961.

By Mr. Tenney:

Q. Mr. Wemple, I think you misspoke on the dates covered. Would you state those dates again?

A. I did misspeak. Thank you, Mr. Tenney.

This tabulation shows TWA and the other airlines' flights between New York and Los Angeles, nonstop, with jet aircraft, in June 1960.

I have added to the schedule the additional flight TWA was able—correction—that TWA did operate in July 1961, and the additional flights in each direction is identified with the "A" at the left side of each group of columns.

With this additional flight, TWA would have been able to operate as many nonstop jets between New York and Los Angeles as American did in June 1960 and this, in my opinion, would have improved TWA's competitive position in this particular market.

The next sheet is for the New York to San Fran- [Tr. 10,651] cisco market and it shows the flights operated by TWA, American and United.

There were no additional flights operated by TWA in July 1961.

In June 1960, TWA operated three eastbound flights. So did American.

In 1960, TWA operated three westbound flights as against two for American and two for United.

The next tabulation deals with Chicago to Los Angeles service, in both directions.

Here we have an additional airline, Continental, which serves that market.

In July 1961 TWA operated two additional flights in this market and these are shown by the letter "A".

With the two additional flights in June 1960, TWA would have been able to match the number operated by both American and United in each direction in this market.

The last sheet covers the Chicago to San Francisco market and the July 1961 schedule for TWA would have given TWA two additional flights in each direction in this market. With those two additional flights, TWA would have had a total of three in each direction.

In June 1960, American operated three in one [Tr. 10,652] direction and four in the other direction. United operated four in both directions.

In conclusion, I believe these additions to these particular markets, as I have said in passing, would have materially improved TWA's competitive position.

Q. Have you made any examination to determine whether in such markets as these an increase in service offered has historically had a result on TWA's share of passenger traffic?

• • • • •

[Tr. 10,655] • • • A. Yes, I have. I have prepared some charts to show TWA's share of each of these markets and TWA's share of non-stop flights operated in each of these markets, for the period 1959 through 1964.

Mr. Tenney: I ask that a series of charts five in number, of which the first is headed "New York-Chicago. TWA per cent of Non-Stop Jet Flights. TWA per cent of Passengers Carried. TWA Non-Stop Jet Flights per Day by Quarter, 1959-1964" be marked as TWA Exhibit 446 for identification.

Mr. Perkins: Would you note for the record that I have been advised that we have received no work papers which enable our experts to check the results of this exhibit. I think the pages there, the numbers 41 to 45 at the lower left hand corner and they certainly need more backup material in order to be able to check the accuracy [Tr. 10,656] of these exhibits.

The Witness: It had been my understanding that the work papers behind these had been made available to you during the last several days. My associate is making a call to see if we can clarify that point.

Mr. Perkins: Thank you.

• • • • •

Q. Is TWA 446 for identification the study that you have just referred to, Mr. Wemple?

A. It is.

Q. In the light of the statement by Mr. Perkins as to work papers, perhaps it might be helpful if you simply said what types of work papers do lie behind these charts.

A. We have tabulations of numbers of TWA's per cent of the market for each quarter for 1960 through 1964, taken from the CAB competition studies.

Q. Are those the same CAB's competition studies that have been referred to frequently during the course of Mr. Simat's and Mr. Eichner's testimony?

[Tr. 10,657] A. They are. For the year 1959, we have copies of passenger traffic data submitted to the CAB by the airlines for these pairs of cities. That data was used by the CAB to develop the annual report on competition study for the year 1959 and copies of the basic data sheets are included in our work papers.

We have tabulated data taken from those airline sheets to calculate TWA's per cent passengers for each quarter.

We have tabulations of non-stop jet flights operated by the airlines serving these markets, that did operate jet flights, this is of course 1959 through 1964, each month during the period and then we have summarized those into quarterly per cents of non-stop jet flights for TWA.

Q. The particular compilations of information from the CAB competition study and from the official Airline Guide, have been retained by you?

A. They have been retained by us.

Q. And was that what you meant when you stated just now that it was your understanding that it had been available to counsel for defendants?

A. That is correct.

Q. Will you proceed with your explanation of [Tr. 10,658] TWA Exhibit 446, Mr. Wemple?

A. The first sheet which covers New York to Chicago, shows on the left hand side a dotted line representing TWA's per cent of passengers for each quarter of 1959 and for the first quarter of 1960, in a descending configuration. In other words, TWA's per cent of passengers in the New York to Chicago market as measured by the CAB competition studies, declined.

You will notice before that, that American started its service in November 1959, United started its service in January 1960. TWA did not start jet service until April 1960. When TWA entered that market with some jet service, TWA's per cent of the market revived and went upward.

The Special Master: When was that, you say?

The Witness: April 1960. Then, although TWA increased its number of jet flights in that market slightly during the year 1960, as shown by the solid line for TWA's per cent of non-stop jet flights in a descending configuration the other airlines increased their number of jet flights much more than TWA, so that TWA had a reducing percentage of non-stop jet flights and TWA's per cent [Tr. 10,659] of the traffic dropped in the fourth quarter of 1960.

Thereafter, in 1961, when the CV 880 came in and TWA was able to put many more jet flights in the New York-Chicago market, TWA's per cent of the non-stop jet flights increased and so did TWA's per cent of the traffic.

Thereafter, TWA's per cent of the passengers roughly fluctuates with TWA's per cent of the non-stop jet flights.

The New York to Los Angeles page shows the same general kind of picture. TWA was second into the market here in April 1959 and as it went into that market with non-stop jet service, its percentage of the market went up.

United came along in October 1959 and TWA's per cent of the market went down and thereafter there is general fluctuation of TWA's per cent of the market generally with TWA's per cent of the non-stop flights.

The next chart is New York to San Francisco, in which TWA was the first in the market with jet service, in March 1959, and TWA's per cent of the traffic rose to a very nice 58 per cent [Tr. 10,660] during the third quarter of 1959.

United came along in September and American in November with jet service and TWA's per cent of the market dropped.

Thereafter the per cent of the market and per cent passengers is traced across the page, in some degree of correlation.

The next chart is Chicago to Los Angeles and this is the same general pattern. I call your attention particularly to 1961 when, with the additional CV 880 aircraft that TWA got into service in that year, TWA was able to increase substantially its per cent of non-stop flights in this market in the third quarter of 1961 and its per cent of traffic went up substantially also.

The fourth chart is Chicago to San Francisco and it shows the same pattern. American was the first in this market and TWA's per cent of the market dropped when American introduced jet service and then came up when TWA introduced jet service in June of 1959 and again there is the same following of patterns of the two lines.

I believe these many instances of per cent of the market showing immediate response to per [Tr. 10,661] cent of jet flights, shows clearly that TWA could expect, in these competitive markets, that passenger traffic, additional passenger traffic, would come their way if they were able to increase the amount of jet service. They were able to operate in such competitive markets.

Q. Referring back to the passage from Mr. Simat's original report that I called your attention to before, he mentioned that you had used in your estimates historical average load factors. I believe you have in fact used in your estimates historical average load factors and specifically load factors for the jet fleets, that is, the type of jet fleet that you have made your estimates with respect to, is that correct generally?

A. That is correct.

Q. Will you explain why you have used that type of historical average jet load factor?

Mr. Hayes: It seems we are just going more deeply and more deeply into his original report with more justification for it. It seems to me that we should bring this to an end.

The Special Master: It was attacked in cross-examination and that is the reason I will allow it.

[Tr. 10,662] Mr. Hayes: I beg your pardon?

The Special Master: It was attacked basically in the cross-examination and therefore if he can shed any more light on it even though in redirect examination, I will allow it.

Mr. Hayes: It was attacked by me in my cross-examination of Mr. Wemple and Mr. Wemple went on redirect at that time and he had every opportunity to defend the method he used and insofar as he could defend it, we will assume that he has defended it.

The Special Master: It's a perfectly proper objection. I have no quarrel with your raising it at all but I think Mr. Simat put some frosting on your cake and he is now responding to the frosting.

Mr. Hayes: I am delighted that the cake is now more delectable.

Q. Can you answer my question?

The Witness: Please repeat the question.

Q. Will you explain why you have used the type of historical average load factors that you have used in your estimates?

A. I believe they are the best load factors to [Tr. 10,663] use for estimates for the equipment assumptions that we have been given.

To illustrate this, I have prepared this chart, which shows—

Mr. Hayes: What chart is this?

Mr. Tenney: I ask that this chart, headed "TWA v. Hughes, Domestic Division, Monthly Passenger Load Factors (Scheduled Passenger Service) for All Aircraft Types and Certain Jet Aircraft, 1959-1963" be marked as TWA Exhibit 447 for identification.

• • • • •

Q. I believe, Mr. Wemple, you were starting to comment on this document that has now been marked as Exhibit 447 for identification. Would you continue with what you were about to say, please.

A. Yes. The solid line on this chart connects points which are the monthly load factors which TWA achieved for all aircraft combined throughout this period 1959 through 1963.

[Tr. 10,664] Mr. Hayes: May I interrupt? What is the word "hourly" supposed to indicate for that solid line?

The Witness: Mr. Hayes, I have no idea what the word "hourly" is doing there. It should be "average load factor."

Mr. Hayes: I am sorry for the interruption but I just didn't understand "hourly."

The Witness: The dotted lines are the monthly load factors recorded by the various fleets of jet aircraft as a new fleet was put into operation plus three months. I believe this chart shows that the new fleets shortly after their introduction fell into a monthly variation pattern that was very similar to the monthly variation pattern being experienced in TWA's overall average load factors.

The jets had their individual characteristic load factors, as illustrated, for example by the CV 880 jet fleet. It was put into operation in 1961 and recorded load factors which were higher than TWA's overall average load factor.

In 1963, when the jet fleet was increased in the middle of the year by roughly one-third from [Tr. 10,665] 20 to 26 aircraft, the load factor still maintained its characteristic position above the overall average of all aircraft.

Based on this, I selected each year's historical load factor as being the best load factor figure to use for our passenger mile calculations for these assumptions.

Q. Can you relate these selections that you have made as to load factors and the other comments that you have made in the course of your testimony just now, to each of the separate equipment assumptions that you have studied here?

A. The B-131 equipment assumption had to do with earlier receipt of those aircraft. So that it would have been possible to have operated additional B-131 plane miles in the first half of 1959. As shown clearly by the level of the

131 load factor points in 1959, jet seats were tremendously in demand at that time and I believe that additional flights operated in the first half of 1959 would also have been tremendously in demand.

For our calculation of additional B-131 passenger miles, I used a figure which I believe was 83 per cent annual average load factor, 83.1 per cent and as you can see by the chart, that understates, I believe, [Tr. 10,666] the number of additional passengers that would have been achieved with additional 131 miles in the early part of 1959.

The early receipt of B-331 jet aircraft is the same kind of an assumption, where it would have been possible for TWA to have operated a small amount of additional Domestic Division mileage with those intercontinental jet aircraft. That small amount of Domestic Division mileage would have come in the latter part of 1959 and the early part of 1960, when these jet seats were very much in demand.

The average load factors I used for those, were 83.1—this is historical—for 1959 and 64.5 for 1960.

As you look at this chart, comparing those figures with the dotted lines of what was actually achieved in those particular periods, I believe, again, that those load factors, if anything, understate the additional passengers that would have been achieved.

The next assumption has to do with the earlier receipt of CV 880 jet aircraft. As I mentioned before the CV 880 characteristically operated higher than TWA's average load factor. No doubt a result of being a smaller aircraft and the particular service to which TWA applied that aircraft.

[Tr. 10,667] With the earlier receipt of those aircraft there would have been additional CV 880 operation in 1960, which was a period in which relatively few jets were operated by domestic trunks and we have used historical figures on load factors of 68.6 for the CV 880 additional mileage

operated in 1960 and 65.5 for the additional mileage that would have been operated in 1961, during the first part and I think that as you look at this record of history, you will see that those historical selections are most conservative.

The assumption as to six additional B-331 aircraft would have given TWA additional jet mileage in the years 1960 through 1963. These are intercontinental aircraft primarily designed for international and primarily scheduled for internation service.

There would have been a small amount of additional Domestic Division service that could have been operated with these 331 aircraft and I think it is most reasonable to assume that they would have been operated in the same schedule patterns and with the same results each year that the B-331s were operated each year.

The next assumption to which I wish to call your attention, has to do with the CV 880 jet aircraft, the assumption whereby TWA would have had a fleet of [Tr. 10,668] 30 rather than a fleet of 20. This would have given a substantial number of jet planes miles operated during the years 1960 through 1963 as a result of having these aircraft.

We made a special study of the schedules operated with the CV 880 aircraft and we found a remarkable consistency of schedule pattern throughout the period. This relatively uniform schedule pattern is also illustrated by average stage lengths for CV 880 aircraft as recorded by Mr. Simat.

For the year 1961 the figure was 821 miles. For the year 1963 the figure was 767 miles, which is 93 per cent of the first year's figure.

It was my finding that TWA was relatively uniform in its use of CV 880 aircraft throughout this period including the period when TWA's fleet was increased from 20 to 26 and therefore, I believe, it is most reasonable to

have selected TWA's historical load factors for CV 880 jet passenger mile calculations.

• • • • •

[Tr. 10,669] • • • Q. Referring back, Mr. Wemple, to the so-called fundamental errors in your methodology which Mr. Simat testified to, one of them, he states at Page III-4 of [Tr. 10,670] his original report, consisted of your employment of what's called historical "equipment usage." The element of that which is expanded on more fully, most fully, I should say, is that you "inherently assume that the added jet and deleted piston flights would be at the same stage lengths as the average jet or piston flight actually operated each year," instead of what is called on several occasions in Mr. Simat's report, "marginal stage lengths." Will you comment on that, please?

Mr. Hayes: I would like the record to show, Mr. Brownell, that all of these questions are directed to the defense of Mr. Wemple's original report we have an objection to.

The Special Master: All right.

A. It is fundamental to my answer to your question that we consider the amount of increase which I estimate these equipment assumptions would have meant to TWA's plane miles or schedule of operations.

Q. Have you made a tabulation of that increase?

A. I have.

Mr. Tenney: I ask that this sheet headed "TWA v. Hughes, Revenue Plane Miles, Domestic Scheduled Service Only, TWA, All Aircraft Types, [Tr. 10,671] 1959-1963," be marked as TWA Exhibit 448 for identification. This, I am advised, also has been

revised from the version furnished to the defendants on Friday.

I understand that the revision has been supplied to you previously and I further understand that the difference is a correction of the label of the two columns to correctly identify the figures as plane miles.

The original incorrect identification was seat miles.

• • • • •

[Tr. 10,672] Q. Is TWA Exhibit 448 for identification, the tabulation you just now referred to?

A. Yes, it is, and the significant thing on that tabulation is that our estimated additional plane miles that TWA would have been able to operate with the jet aircraft amount to less than a 10 per cent increase in any year in the total plane miles that TWA did operate.

The various equipment assumptions would, of course, have had a different impact on the scheduling of the additional plane miles. It seems to me that the assumptions respecting early receipt of B-131 aircraft, B-331 aircraft and CV-880 aircraft, would have meant simply earlier inauguration of additional services for TWA and that our use of assumptions which imply an adoption of the historical average stage length for those particular types of aircraft for each aircraft's first full year of operation, are just plain unquestionable.

As to the assumption of the six additional B-331 intercontinental aircraft, this would have meant a small addition to the domestic operation in terms of plane miles. I think it is perfectly reasonable to assume that those additional plane miles would have been [Tr. 10,673] operated in the same general schedule pattern as the B-331 plane miles were actually operated in the Domestic Division.

The CV-880 aircraft assumption representing a fleet of 30 rather than a fleet of 20, is the assumption which produces the largest amount of additional plane miles.

As I mentioned before in a discussion of load factor, we did schedules analysis for the CV-880 in some detail, both for the fleet of 20 and for the operation when TWA had a fleet of 26 and found quite uniform usage of those particular type of aircraft.

As I mentioned under the load factor discussion, that uniform usage is also confirmed by the uniformity of annual average stage lengths which in the year 1963 had an average stage length that was 93 per cent of the average stage length for the year 1961.

Therefore, I concluded it is perfectly reasonable to assume that the CV-880 additional flight miles, as a result of the assumption of a fleet of 30, would have been operated in the same general scheduled pattern that TWA did operate its CV-880 fleet.

Q. You were said, sir, to have made a fundamental error, according to Mr. Simat's testimony, through your [Tr. 10,674] use of average historical, that is, experienced, passenger yields. My reference is to Page III-5 of his original report.

Will you comment on that so-called fundamental error, please?

A. Yield, which is a passenger revenue in terms of cents per passenger mile, is a developed figure. It is not a cash register reading. Each year TWA and its independent public accountants make a study and determine the amount of revenue which TWA shall record as income from the transportation of passengers.

The study is important and complex because people pay for transportation in a wide variety of plans and manners.

They buy tickets on time. They buy tickets through travel agents who some time are very slow in paying the money along to the airline. They use tickets for travel on TWA which are obtained from other airlines and for trips which involve two airlines, where the total price of the ticket must be split with other airlines.

They buy on air travel cards, on time payment plans and so forth.

TWA and its independent public accountants determined the proper revenue figure to be taken as [Tr. 10,675] passenger transportation income for the year. That revenue figure is then divided by a figure that comes from operations reports, a figure of revenue passenger miles recorded for all of the flights operating and the result is called "yield," which is cents per passenger mile.

We examined a number of yield figures which were used internally by TWA and we concluded that none of them was suited for our use for these particular estimates.

We have more recently done a study whereby we took the traffic on-board reports for transcontinental piston flights, I think it was Flights 3 and 4, as they were operated in February 1959, and we put a price which was the fare each of those passengers paid, divided it by the number of passenger miles and figured an income per passenger mile figure.

We did the same thing for TWA's non-stop transcontinental jet flights, 1 and 2, which were operated in April 1959 and we determined that the money paid to TWA per passenger mile on the jet was, I believe, .5 cents higher than it was on the piston, which is about a 10 per cent higher figure.

We did the same kind of an analysis for travel between New York and Chicago on TWA in June 1960 on piston air-

craft and on jet aircraft and we came up with [Tr. 10,676] a similar higher figure per passenger mile for the jet travel, of about 5/10 or 6/10 of a cent, which again is about 10 per cent.

During the period 1959 to 1963, TWA's average yield went up. I believe it was about—correction. Let me not guess. Let me look it up. TWA's average yield per passenger mile in 1959 was 5.487 cents. In 1963 the yield figure was 5.845 cents.

I believe that the jet surcharge and the higher price that the passengers paid for jets was certainly a factor in causing TWA's yield to increase.

I would like to point out that our revenue estimates do not claim any additional revenue for TWA passengers who would have shifted from piston aircraft to jet aircraft for their transportation as a result of TWA being able to operate more jet aircraft, replacing piston aircraft, with the earlier and additional jet deliveries.

Our additional revenue calculation is limited to revenue for what I call the net additional passenger miles that would have been recorded by TWA as a result of having the additional jet flights and in this we used TWA's overall average yield. We did not make any adjustment for the jet surcharge which passengers would have paid.

[Tr. 10,677] I believe our use of this overall average figure for our revenue calculations, is the very best system that I know of for doing such revenue calculations.

Q. In the course of that answer, Mr. Wemple, you referred to an examination of revenues, yields, in flights between New York and Los Angeles in February and April 1959 and for flights between New York and Chicago for June 1960.

Are the computations behind the statement of the results that you made there, available?

A. They are now. I believe my associate has them and will provide them for you.

Mr. Tenney: In the event the defendants wish the computations, we will provide them for you.

Mr. Hayes: You may indulge the assumption that they do.

Mr. Perkins: There were other analyses and studies referred to and I don't know if what you referred to referred to everything that Mr. Wemple referred to in his testimony.

Mr. Tenney: I believe they did, but I will ask Mr. Wemple.

By Mr. Tenney:

Q. Were there any analyses that you referred to [Tr. 10,678] or intended to refer to, other than the ones I have just mentioned, that the work papers have not hitherto been made available to defendants?

A. The only new analysis is the one which we just finished up this morning, the work papers of which my associate has now available to you.

Mr. Hayes: I believe Mr. Wemple mentioned some study made by TWA and their outside accountants, too. There was some reference to it.

Q. Would you briefly explain what you intended to refer to by that reference?

A. Each year towards the fall of the year TWA and its independent public accountants review data on income and ticket revenue in very considerable detail and from this review they determine the revenue figure which shall be taken by TWA and shown on its books for income from transportation of passengers.

Q. And this is the published yield figure that is produced annually?

A. This is the revenue figure which is published in TWA's annual reports.

Q. And you did not intend to refer to any other study other than that which is in the normal course of business performed by TWA and its public accountants [Tr. 10,679] annually?

A. That's correct.

Mr. Tenney: I am simply trying to make clear there is no separate study and so there are no papers that we can produce for you.

Q. Your fourth fundamental error, so-called, in Mr. Simat's report of last fall, relates to the manner in which you have produced your cost estimates, Mr. Wemple. My reference there is to Page III-5 of Mr. Simat's report last fall.

Will you comment on that error, so-called, Mr. Wemple?

A. I've prepared a study and calculation for the purpose of determining the nature and amounts of the change in operating expense which would result from acceptance of costing theories of Simat, Hellieson & Eichner and of the traffic and revenue analysis which I have adopted.

Mr. Tenney: Mr. Wemple, if you will pause for a moment, I will have this document marked for identification as TWA Exhibit 449 for identification. It is headed "TWA v. Hughes. Alternative Calculation of Changes in Domestic Division Operating Expenses Using SHE Estimates of Available Unit Costs, [Tr. 10,680] Costing Units and Cost Categories and C & C Estimates of Changes in Traffic, Revenues Jet and Piston Service."

This document consists of three typewritten pages to which are attached a large number of sheets containing the breakdown of the figures and I ask whether it would be desired that we include these attached sheets as part of the exhibit or simply designate them as work papers. Copies, of course, are equally available to counsel for defendants. I ask which Mr. Brownell would prefer and which the defendants would prefer.

Mr. Perkins: My preference would be to limit it to the summary sheets here and just submit those as work papers and if it is necessary to offer them in evidence, we will offer them on cross.

The Special Master: Fine.

Mr. Tenney: So Exhibit 449 for identification should only include the three typewritten sheets that I described. The remaining papers are not to be considered as part of the exhibit.

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[Tr. 10,681] • • • Q. Is the document which has been marked TWA Exhibit 449 for identification, the study that you have just now referred to?

A. It is.

Q. Would you explain this exhibit, please?

A. As set forth on page 2, the first paragraph of this exhibit, for these alternative calculations we have used the SHE costing units which were listed in SHE report Volumes I and II. We have also used the SHE statements on TWA variable unit costs which are costs per block hour, et cetera, which we took from work sheets which were furnished with SHE Volume B. We have applied these unit costs to our estimates of changes in passenger traffic and in revenues. And we have set forth our estimates from our report, Volume I.

The result of this alternative cost calculation is set forth on page 3 and it gives a total figure of $91.5 million of additional operating expenses for the assumptions for which we have made estimates in our Volume I, as amended, by TWA Exhibits 42 and 43 and Defendants' [Tr. 10,682] Exhibit 262.

This figure of 91.5 million may be compared with the figure produced by our system of calculation of 94.9 million. There is a $3.4 million difference.

Accordingly, if we had used the SHE system of calculating operating expenses, we would have produced an improvement in gain from operations of 67.4 million rather than the figure we did produce of 64.0 million.

Accordingly, I believe the difference between Mr. Simat's preference for calculating operating expenses and my system, is of no practical importance to this discussion.

Q. What then does account for the substantial difference between the results of your estimates and the results of the computations made by Mr. Simat, if it is not costs?

A. Mr. Simat's estimates are based upon substantially different numbers of revenue block hours than result from our estimates. Different numbers of departures. Different numbers of piston plane miles deleted. Different numbers of stewardess block hours.

Those are the reasons for the difference which occur to me at this moment, to answer your question.

Q. Can they be summarized as a difference in [Tr. 10,683] operating patterns?

A. In the main, yes.

Q. It is also true, of course, is it not, that there are differences in the estimations by you and by Mr. Simat of how many additional passengers would be carried on these various assumptions?

A. That's correct, and also the amount of revenue that would be associated with those additional or lesser passengers.

• • • • •

Q. This point relates to a statement by Mr. Simat in the course of redirect at transcript 10,456-58, in which he states that, "On-line" passengers in the New York to Los Angeles market for the period 1959 to 1963, in the New York-San Francisco market in the period 1959 to 1962, generally decreased.

Do you recall that testimony, of Mr. Simat's?

[Tr. 10,684] A. Yes, I do.

Mr. Tenney: You may recall, Mr. Hayes, that there was an exhibit produced, I believe, in connection with that, although I don't have the exhibit number.

Q. Will you comment on that phenomenon described by Mr. Simat, please?

A. It was my observation that during the period 1959 to 1963, the airlines providing coast-to-coast service, as they got jet aircraft, were able to substantially improve transcontinental service from points other than New York; that prior to the jet aircraft and, of course, during the early period of jet operations, coast-to-coast service was superior between New York and Los Angeles and San Francisco and I believe that many people from places such as Boston, Philadelphia, Washington, and so on, traveled to New York to make their transcontinental trips; that as the coast-to-coast service improved between, for example, Boston and the West Coast, people, of course, began taking flights from the Boston area.

To review the figures, I have prepared this tabulation of data taken from the CAB competition studies.

Mr. Tenney: I ask that this sheet headed "TWA v. Hughes, Transcontinental Passengers, 1959- [Tr. 10,685] 1963," be marked as TWA Exhibit 450 for indentification.

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Mr. Tenney: TWA Exhibit 450 for identification, having been produced since the time when we gave to the defendants copies of the other exhibits we have had marked, has not previously been given to them, but we are at this time furnishing them with copies and if there are any work papers with respect to it, of course, they will be available. It's actually simply a takeoff. Well, I should not say what that is.

Q. Mr. Wemple, is TWA Exhibit 450 for identification the document you were just now referring to?

A. It is.

Q. Will you explain how it was produced?

A. The upper part of the tabulation lists pairs of cities. An East Coast city on the left and a West Coast city on the right of the column headed "Segment." The East Coast cities are New York, Boston, Philadelphia, Washington and Baltimore.

The West Coast cities are Los Angeles and San [Tr. 10,686] Francisco.

The figures under each column heading 1959 through 1963 are taken from the CAB competition study and they are the total on-line passenger traffic between those pairs of cities.

You will note that the New York-Los Angeles, between 1959 and 1963, actually showed a 1 per cent decrease. New York-San Francisco, a modest 10 per cent increase. However, if you take the transcontinental subtotal you will find

that the total of all this coast-to-coast travel increased 17.5 per cent between 1959 and 1963.

The lower part of the table is included for interest. It shows that with the New York to Chicago to West Coast travel also included the increase for all the segments listed is 18.6 per cent during this same 1959 to 1963 period.

Q. May I ask on this, what carriers are covered?

A. All of those carriers providing transcontinental service, New York-Chicago—all the carriers providing coast-to-coast service, which, of course, is TWA, United and American and any other carriers whose traffic would have been listed in the CAB study as traveling coast to coast.

Q. You have included, then, all passengers listed as [Tr. 10,687] traveling between these two pairs of points by the CAB competition studies on whatever carrier?

A. Yes, to the best of my knowledge, that is how it has been put together.

Mr. Tenney: I offer in evidence, the documents which have been marked as TWA Exhibits 443 through 450 inclusive, which are the documents that Mr. Wemple has been testifying with respect to this afternoon.

Mr. Perkins: In addition to the general objection that has been made to the whole line of testimony and the exhibits offered up to this point, we also object to these until we have had an opportunity to examine them and cross examine Mr. Wemple with respect to them.

(TWA Exhibits 443 through 450 for identification, inclusive, received in evidence, as of this date.)

Mr. Tenney: I have no further questions of Mr. Wemple at this time and he is available for cross examination.

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[Tr. 10,735] Mr. Perkins: I ask the reporter to mark as Defendants' Exhibit 378 for identification a cover page of the CAB report entitled "A Study of the Domestic Passenger Air Fare Structure," and pages 210 through 236 from that report which comprise the letter from Mr. Barch that I just referred to.

• • • • •

Mr. Perkins: Excuse me. I apparently didn't mention the important point that Mr. Barch was a vice president of TWA.

Mr. Tenney: May I ask whether a copy of the entire report is available?

Mr. Perkins: Yes, if you would like to see it (handing).

Q. At the bottom of page 211, Mr. Wemple—

A. Excuse me, Mr. Perkins, I don't—

Q. The numbers are at the top of the page.

—Mr. Barch states with reference to disparities between fares in north-south directions as opposed to east-west directions and I quote:

[Tr. 10,736] "Data from the present fare structure study also illustrate this condition in the spread between the fare per mile and rate per mile curves resulting from computed fares developed by application of the standard regression formula (Y equals A plus BX) applied to an appropriate sample of existing fares. Exhibit 1 attached, illustrates the disparity between the directional curves."

Turning to Exhibit 1, I particularly direct you attention to—

A. Excuse me, Mr. Perkins. Which page of Exhibit 1?

Q. The first page of Exhibit 1.

A. I have it.

Q. You will note that for jet first class and jet coach, Mr. Barch has computed rates per mile for north-south and east-west directions varying in the case of jet first class from 18.89 cents per mile on segments of 100 miles down to 7.24 cents on segments of 1,900 miles or longer.

I also call to your attention pages 4 and 5 of Exhibit 1 in which he has charted the rates per mile which he has developed from a regression formula showing how the rate declines as the segment length increases.

[Tr. 10,737] I ask you whether this is not an appropriate method of estimating what fares would be at different segment lengths.

Mr. Hayes: You mean yields?

Mr. Perkins: Fares or yields.

Mr. Tenney: I don't see how the witness can be asked to glance at a document of this length which he has never seen before and expected to answer as to whether a particular table appended as an exhibit to one of the appendices represents an appropriate method of doing anything at all.

He has had no opportunity to determine what is really involved in this study, let alone what methods were applied.

I believe that this question is not one that any witness can be expected to answer under these circumstances.

[Tr. 10,738] Mr. Perkins: I don't know about any witness, but if Mr. Wemple does not know, he can certainly say he does not know.

The Special Master: You have not had an opportunity to study this?

The Witness: I have never seen this report.

The Special Master: I don't see how he can answer it intelligently.

• • • • •

[Tr. 10,672] Q. In TWA Exhibit 444, you have tabulated for all aircraft types by year, 1959 through 1963, the historical seat miles for TWA, United and American, and your estimated additional TWA seat miles shows the per cent additions by TWA, and you have also shown those same percentages—you have also shown percentages for the relationship between the estimated additional TWA seat miles and TWA's historical seat miles.

In connection with that exhibit, you stated at page 10,646 that these percentages show that your estimated additional jet seat miles cannot possibly be characterized as introducing jet capacity into a market in unlimited quantity.

[Tr. 10,763] This testimony is in relation to your using the average load factor for each type aircraft in the year in estimating the added or deleted traffic additional or deleted aircraft.

In your report, you did not indicate any percentage increase where it would no longer be appropriate to use the average stage length, did you, Mr. Wemple?

A. If you refer to our report dated—

Q. TWA 4C?

A. Yes.

Q. Yes?

A. (continuing)—I don't recall for Domestic Division operations any percentage increase in seat miles figures in here at all.

Q. But—

A. If I understand your question.

Q. In applying your procedure of estimating additional traffic by using the average load factors, you nowhere in your report, as I recall, stated any percentage increase in capacity beyond which that would not be an appropriate way of estimating, did you?

A. I believe my answer properly is that is correct.

Q. Did you have any limitation in mind at that time?

[Tr. 10,764] A. No.

Q. I think here you mention that the highest in any year is 13.6 per cent. That is related to TWA's miles.

I would assume that you think it is certainly appropriate within that percentage to use the average load factor to estimate.

A. I believe I have so stated.

Q. Do you think there is a limit anywhere, or is it an unlimited quantity?

A. No, I would not say that TWA can add jet capacity in unlimited quantity in a market, without affecting the load factor. I am afraid I do not understand your question and I am, therefore, puzzled how to answer it. Perhaps I can ask you to rephrase it or repeat it to me.

Q. You have said that Mr. Simat was in error in charging you with an error in applying the average load factor to additional capacity in unlimited quantity.

If that is true, there must be some quantity beyond which you could not do it. I am asking you do you have in mind or have you ever had in mind some quantity beyond which you would not go? Have you ever considered this?

A. Yes, I have considered it. I do not have a [Tr. 10,764[A]] quantity in mind because the assumptions that we were given for these particular estimates did not involve, to use Mr. Simat's terms, introducing jet capacity into the market in an unlimited quantity.

So, I had no occasion to determine what might on a theoretical basis be a point at which you were to get into the thing that would be characterized as "unlimited quantity."

Q. You would not be able, in your opinion, to state any number where this principal—100 per cent or you have no—

A. I am not prepared with any number. A great many things are involved in the operation of an airline.

If one were to—TWA started off with essentially, as I remember, one transcontinental flight between New York and Los Angeles the very early part of this 1959 jet operation.

I believe it is perfectly reasonable to expect if they could have started off with three transcontinental flights instead of one, all three of those still would have been filled right up to the hilt; so that the load factor achieved would have been extraordinarily high in spite of an apparent tripling of jet flights.

This is the reason that I cannot give a pre- [Tr. 10,765] cise answer to that very broad question, as to what comprises "unlimited quantity."

Q. By the way, you state at the bottom of page 10,643 running over into 10,644, that this schedule which is TWA Exhibit 444 was developed to show the magnitude of the net increase in jet service.

At page 10,645 you say it shows the net additional jet miles which you estimate TWA would have operated.

Is that really what this exhibit shows, Mr. Wemple, the net additional jet miles?

A. The words "seat miles" should have been there rather than "jet miles."

Q. Let us add "seat miles," and I repeat the question.

A. Yes. I believe this exhibit does show the estimated net additional jet seat miles in comparison with TWA, United and American's total seat miles in the broad market served by those three airlines.

Q. What do you mean by "net additional jet seat miles"?

A. It is fundamental to our estimate that we estimated, as I have mentioned a number of times before, that a certain amount of the additional jet aircraft [Tr. 10,766] availability would have been used for direct replacement of piston aircraft flights and seat miles.

Over and above that direct replacement is the part which I call net additional jet seat miles.

Q. So this is the net—

A. Correct.

Q. (continuing) —it is not the added jet miles; it is the net over the deleted piston miles?

A. Over the piston miles replaced.

Q. Over the piston seat miles?

A. That is correct.

Q. But in your estimating, you estimated separately for added jet miles and deleted piston miles, did you not? You used separate load factors?

A. We calculated—yes, we used separate load factors for jet seat miles and piston seat miles, that is correct.

Q. The jet seat miles were not always added in the same markets where the piston seat miles were deleted, were they?

A. The total jet seat miles, as I have said before, served two different purposes. One was the direct replacement of piston seat miles and the other was a—what I have called a net addition.

[Tr. 10,767] Now, insofar as being in the same general markets are concerned, if you mean markets as pairs of cities, yes, they were in the same general markets, pairs of cities.

Mr. Perkins: I ask the reporter to mark as Defendants' Exhibit 379 for identification a sheet entitled "Various Comparisons of Wemple's Jet Seat Miles Added (Domestic) With Historical Jet Seat

Miles Flown (Domestic)," to which are attached three pages of work papers.

• • • • •

By Mr. Perkins:

Q. This tabulation, Mr. Wemple, in Column 3 shows that TWA assumed jet seat miles added in each year for each type of jet aircraft and in Column No. 4 it shows what percentage that was of the total jet seat miles flown by TWA in that year, and in Column 5 the percentage is related to the total seat miles flown with that type of aircraft.

There are other percentages which show what the total jet seat miles added—the percentage relationship [Tr. 10,768] with the total of American Airlines, United, American and United together, and all three of the trunks.

First, I direct your attention to this particular total—this Column 4, the percentage of the total jet miles added to the total TWA seat miles operated on jets in that year, which is 63.2 per cent, and the relation with American—

A. I am sorry, Mr. Perkins, I did not follow that last one.

Q. In Column 4 under 1960 opposite total 63.2 per cent.

A. I see your point. I was looking at the wrong year.

Q. The percentage of the total added jet seat miles in that year is 43.1 per cent of what American was flying and 56.6 per cent of what United was flying.

I ask you, in your opinion, could TWA have introduced capacity in those percentages at the average load factors for jets?

A. Yes, I believe they most certainly could. And I think in order to understand the reasonableness of my answer, you must take into account the number of jet aircraft that each of those airlines was operating in those years.

[Tr. 10,769] Your Exhibit 342 shows that TWA, American and United, number of jet aircraft assigned to service, Domestic Division in the year 1959 for the big three was 245.

In the year 1963, the number of jet aircraft these three used for Domestic Division service was 201.

By the—correction—so that the 1959 number is 12 per cent of the total number that those three airlines were able to use effectively in 1963, when they finally had that number of aircraft available to use.

It would have been a perfectly marvelous thing for TWA to have been able to double the number of aircraft, jet aircraft it had in 1959 and it would have given TWA a tremendous competitive advantage, I believe, over the position that it did find itself in in comparison with the other airlines.

[Tr. 10,770] Q. My question—

The Special Master: The other airlines were restricted in their supply, too, weren't they?

The Witness: And particularly United which in 1959 was suffering from the delay of the DC-8 deliveries.

Q. My question was not directed at this point—I think I will come back to it later—to 1959 and 1963, but I was asking just about 1960, the percentages shown in Defendants' Exhibit 379 for identification, and I just wanted your opinion whether additional seat miles could have been operated in those percentages at the average load factor?

A. My answer has been yes, I believe they could, and I point out to you that much of this assumed TWA jet seat miles which is listed here is for direct replacement of piston seat miles.

So that the—there was a block of passenger traffic already there just ready to move into TWA's better aircraft.

Q. Just looking at 1961 under column 5 for the CV-880s, you will notice that your assumed additions result in doubling the 880 capacity which would have been operated in that year, and I take it your answer [Tr. 10,771] would be the same with respect to that if I asked you the same question?

A. Yes, it would be, Mr. Perkins, and as I pointed out the other day, the CV-880, traditionally throughout the period, ran a higher average load factor than all aircraft operated by TWA in a particular year.

So my answer is yes.

Q. I think you did testify that you selected your average load factors as typical of particular types of jets because in your opinion they were operated in a manner characteristic with that type of jet.

A. I think I would have said it that TWA's operating plan assigned certain—correction—assigned various types of aircraft, jet aircraft, to characteristic service. And in my opinion they would have assigned the additional aircraft of that same type to the same characteristic service in a particular year or a particular period.

Q. Even if the capacity was doubled?

A. In this instance, certainly, even though the availability number of seat miles was doubled.

Again, a part of those available seat miles would have been replacing piston seat miles in the same service.

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[Tr. 10,784] • • • Q. Returning to TWA Exhibit 447, is there some reason for your breaking off these dotted lines showing monthly average load factors for each type of jet after the introductory period?

A. Plus three months.

Q. Plus three months. Excuse me.

A. It simplified the chart, and it was intended to show initially that after the first few months at the very beginning of introduction of a new type of jet fleet the load factor pattern became similar, generally, to the pattern of all aircraft being operated by TWA in that period.

The Special Master: I remember your testimony on that. I couldn't understand why that should be so.

Is there any explanation for that or is that just another historical fact?

The Witness: I think it shows and is a reflection of the fact that—or the situation that load factor is influenced by a great many things.

[Tr. 10,785] There are seasonal variations in load factor. There is environment, that is, competitive situation developments that affect load factors.

And those things which affect TWA's overall load factor also very promptly begin to affect the new jets as they are brought into the fleets.

That was all I was trying—intending to show by this.

By Mr. Perkins:

Q. Of course, the average load factor is in part made up of the jet load factor, isn't it, that you show?

A. A very small part in the early period. A larger part—

Q. A much larger part in the later period, right?

A. That's correct.

Q. For any of these you have not charted what happened after the introductory period plus three months?

A. Not on this particular chart.

Q. You have not done it previously?

A. I have done it. I did not retain it.

It was a monstrous looking chart because it had so many lines on it.

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[Tr. 10,786] Q. I note, Mr. Wemple, that in each case these average monthly load factors are declining quite rapidly, for the 131s and for the 331s and for the 880s, not for the 720s. Don't you think it would have been of interest to see what happened to these load factors as time went on?

A. I have studied them.

Q. But you have not shown them here?

A. They have not been included in this chart.

The Special Master: Isn't the reason you did not include them basically because after this three-month period generally they stabilized at about the same thing for all types of equipment, the same pattern?

The Witness: Each type of equipment seems to have its characteristic pattern, that is correct. There are some exceptions to that, as you go from one end of the period to the other, but that is generally true.

Q. In your opinion, Mr. Wemple, as these various new fleets were introduced and added to TWA's overall capacity, is it your opinion that they would have had any affect on the average load factors achieved by the existing fleets?

[Tr. 10,787] A. Of the specific type?

Q. Well—

A. Again, I'm sorry I don't understand your question. Does your question relate to a specific type or does it relate to an introduction of an additional aircraft of a particular type affecting the overall load factor? Of course, my answer to the latter is yes.

Q. For instance, as the 331s were introduced in the domestic service, would that have any affect upon the load factors obtained by the 131s which had previously been introduced? And repeating that question again, would the introduction of the CV-880s which you have shown here in 1961, in your opinion, did that have any effect on the average load factors obtained by the existing 131s and 331s?

A. I would have no reason to believe that they would have.

• • • • •

[Tr. 10,797] Q. Comparing the figures for the transcontinental subtotal for 1960 and 1961, there was an absolute decline in the transcontinental traffic, and while it picked up again in 1962, it still didn't come back to the 1960 level. That's the 1,337,000 in 1962 compared with 1,042,000 in 1960, only slightly above the 1959 figure of 1,273,000.

If, as you say, these improvements in service took place in 1961 and 1962, how do you explain the fact that the transcontinental traffic for all of these segments didn't improve at all in those years, but declined?

A. I believe you just recited what is quite obvious, that in all of those years it was somewhat higher than it had been in 1959, and that the improvement which had the effect was probably complete for the majority of 1963, which represents the overall effect.

This exhibit, of course, was offered in comment on Mr. Simat's statement which related to changes between 1959 and 1963, and that is what this exhibit is offered with reference to.

Q. You have no other explanation of why with the addition of these other services in 1961 and 1962 the total traffic declined from 1960?

A. I have made no study of that particular aspect [Tr. 10,798] of the thing of the intervening years details.

Q. With respect to the percentages in 1963, have you read or listened to the testimony of both Mr. Simat and Mr. Eichner at various times that in 1963 there was a general improvement in traffic?

A. Yes, there was a—I am familiar with the fact that there was a general improvement in traffic in 1963.

Q. Isn't that the explanation for the improvement increases in 1963 rather than these additional services?

A. I am sure that the general increase in domestic travel is reflected in the 1963 figures as well as the improved service for the other than New York-East Coast cities.

Q. Mr. Simat's testimony not only related to the absence of any increase in traffic over that period, but he also related that historical fact to the changes in capacity offered in those markets during that period.

Did you make any similar study of the changes in capacity for the transcontinental segments listed in TWA 450?

A. I am sure there were more seat miles offered in 1963 than there were in 1959, and that they were primarily jet seat miles, the increase was in jet seat miles.

And as I mentioned before, the airlines found [Tr. 10,799] it profitable to operate at lower load factors, because their break-even point was so much further down, and this is the way the airlines operated, including TWA in that period, with additional seats in 1963 compared to the number they operated in 1958 and 1959.

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Excerpts From Testimony at Damage Hearing of John C. Biegler

[Doc. 554-19]

[Tr. 6314] * * * Q. In any case, I believe you testified that you received no suggestions on the draft from any of the other experts?

A. I testified that we received no suggestions as to the draft of our report or the form of our report from the other experts, yes, sir.

Q. But the draft was reviewed by Cahill and you received suggestions from them?

A. Yes, it was reviewed by Cahill, and we did receive suggestions relating principally to format, arrangement of the material, not to the calculations or form of the financial statements.

Q. Did you adopt these various suggestions?

A. Some we did, some we didn't. Most of them we did, because they did improve the—we felt they improved the arrangement and the readability of the report.

Q. But it is your testimony they did not relate to the substance of the report or any of your conclusions?

A. I would say that any suggestions they made did [Tr. 6315] not relate to matters of substance, conclusions in our report.

Q. When was the report completed in the form as finally submitted on May 2nd?

A. I think it was completed probably the morning of April 28th.

Q. And delivered immediately to Cahill, I assume?

A. As quickly as it was bound.

Q. And to the other experts at that time, too?

A. I do not recall whether we circulated that to the other experts or not.

* * * * *

Q. Mr. Biegler, do you know whether prior to the time that you were retained there had previously been another accounting firm retained to help in the preparation of the damage case?

A. I have no knowledge of it.

Q. At that April 8th meeting, were there presented to you any pro forma statements—

[Tr. 6316] A. No, sir.

Q. —of what the assumed financials would be?

A. No, sir.

Q. There were not?

A. No, sir.

Q. You started from scratch, in other words?

A. Yes, we started without—with nothing on paper but we discussed the general concept of our work.

Q. What is your understanding, Mr. Biegler, as to the purpose of this reconstruction that you were asked to do by Cahill Gordon?

A. Well, we were advised that there was a damage proceeding.

We were supplied as information at the very early stages with a copy of the complaint, which gave us a general idea that there was a proceeding and what it was roughly all about.

And it was our understanding that what we were attempting to do is to apply to the historical financial statements the effect of certain assumptions which were to be given to us to show what the financial data of TWA reconstructed might have looked like if these assumptions were applied.

Q. You understood then that this would be used as [Tr. 6317] an instrument for measuring the damages to be claimed by the plaintiff in this case?

A. I don't know that we were ever given that precisely. We were asked to indicate what the difference would be between the actual TWA results during this period and what they might have been or would have been if these assumptions had been applied to them. And the difference, of course, is a matter for our client to use in whatever way they felt appropriate.

Q. You speak of this difference between the historical and reconstructed.

You were measuring this difference, and did you understand that this difference as computed by you would constitute a major part of the plaintiff's damage claim in this case?

A. I don't know how to put it, sir, in any other way than to say that we applied these assumptions to the historical financial statements and came up with a difference to be used by our client in whatever manner they chose to. I have no control over the decision as to how they use this information.

We did what we were instructed to do.

[Tr. 6318] Q. I understand that you had no control over what they would do with it. I think my question related to your knowledge or understanding of what they would do with it after you had computed it.

Mr. Williams: Can you add anything to what you have said?

The Witness: I don't believe so.

Q. To be specific, if you would turn for a moment to page 5 of Volume I, and the items listed under, or next to Capital A, as I understand it, relate to your reconstruction in the first paragraph, page 1. You show certain figures which add up to 84 million dollars described as the increase in stockholders equity before income taxes.

My question is whether you understood that this increase would be claimed as damages by the plaintiff.

A. At the time we were preparing this report and developing this information, we, of course, did not know whether the—whether our client would claim this amount or not.

We were asked to do as I described before, certain things.

But in view of the fact that we understood the general nature of the assignment and what might be the [Tr. 6319] end use, we, of course, arrayed this data in such a form as to bring out the effect of the application of these assumptions on a basis of effect before income tax. But as to—as I said before, as to how this would be used by our client, we did not know at the time we prepared this report.

Q. Did you ever engage in a reconstruction like this before, Mr. Biegler?

A. I have never engaged in a reconstruction like this before.

Q. Judging from the—what was it, 22,000 man hours that—I don't know if that is the right figure—that went into it, I gather this was not a simple or easy task.

A. In terms of volume of detailed work, it was not a simple, easy task. There was a lot of detail to deal with. It did involve a lot of man hours.

Q. If you will turn back to page 1 again, please, Volume I, the first paragraph states that in accordance with your instructions you prepared these data for the period September 30, 1955, to December 31, 1963.

Whose decision was it to use this particular period for the reconstruction?

[Tr. 6320] A. It was our client's decision.

Q. That was—

A. Cahill Gordon.

Q. —not your decision in any way?

A. Not to my knowledge, no.

Q. Did you have any discussions with your client about the period that should be used for the reconstruction?

A. We may have had discussions at our earliest meetings to define the scope of the project.

And I'm sure, while I cannot recall the specific terms of those discussions, the dimensions of the project were set out and they related of course to the work of the other experts which ran—as to my recollection, really span, taking them all together, span this period, September 30, 1955 to December 31, 1963.

Q. Did you ever try any other period?

A. No, sir, never tried any other periods.

Q. Do you have any opinion of your own as to whether this period is or is not an appropriate period for this work of reconstruction?

A. I do not have any opinion other than the fact of what you might call the input is confined to this period in terms of the data derived from the reports of [Tr. 6321] the other experts and the assumptions supplied to us.

Q. Your starting point here is September 30, 1955.

Is this the point at which the historical TWA and reconstructed TWA first diverge?

A. On the basis of the assumptions given to us, this is the first balance sheet where you see a divergence.

Some of the assumptions which were given to us which are derived from the Drexel Harriman Ripley report deal with changes which were assumed to have taken place several months before September 30th, but they have—they were given effect to in the September 30th balance sheet.

Q. How about the closing period of December 31, 1963? I think you testified that this was in your opinion appropriate only as it coincided with the inputs that you received from the reports of the other experts, is that—

A. Well, I said that that was the last date which would be affected by the input of the other experts in terms of reconstruction of the annual results of operations.

Q. You say that is the last—I am sorry.

A. Well, the last input we received was with respect to results of operations. There were some changes in the [Tr. 6322] 1963 results as a result—from the Coverdale & Colpitts report.

Q. But this is not a point at which historical and reconstructed TWA come together again, is it?

A. I—you will have to define for me what you mean by come together.

There were certain things that were historical and reconstructed so far as I could see that could never come together at any date.

Q. That is right. Once you have started them on their divergent paths, there are certain effects that will persist after December 31, 1963, and be reflected on the balance sheet, is that correct?

Even if you assume no other inputs, there would be balance sheet differences that would persist if you went on and did it for—suppose you took the income statements and the balance sheet for—the income statement for 1964 and the balance sheet at December 31, 1964. There would certainly be differences in historical and reconstructed then, would there not?

The Special Master: You mean such as interest on outstanding securities, things of that sort?

Mr. Perkins: Interest, costs, depreciation.

[Tr. 6323] A. Well, I believe the existence of two different debt structures at December 31, 1963, would lead to a variation in interest charges from then on reconstructed vis-a-vis historical.

So far as other elements, such as operating income and expense, I would have no basis for judging whether that would be any different or not.

Q. But at least it is conceivable that there would be effects persisting after December 31, 1963, as a result of inputs relating to an earlier period—

A. I have—

Q. —in addition to what you said about the debt structure?

A. There would be a difference between reconstructed and historical in terms of depreciation charges in the future.

• • • • •

[Tr. 6367] • • • Q. I think my question is, you have adjusted the historical data, you have reconstructed them in accordance with certain assumptions that have been given you, and you have computed a difference—in this particular case it is the difference of 123.1 million over this period as of December 31, 1963.

Do you have an opinion as to whether it is fair to compare an historical with an assumed situation on the basis of assumptions and to compute that at a cutoff date when the effect of the assumptions may be to continue after that date?

Mr. Williams: That's rather a complicated question.

I think I will object to the form of it. I think it can be broken up and restated, but it is rather confusing.

The Special Master: I understand what you are trying to get at. There may be continuing effects after December 31, 1963 and does that affect the validity of—

Mr. Perkins: On the basis of the assumptions.

[Tr. 6368] Q. I just wondered whether you have an opinion as to whether in comparing—we are engaged here, as I understand it, or the work you—you have done is really to compare an actual historical situation with an assumed situation on the basis of a number of assumptions that have been given to you.

You have computed differences as they stand at a certain cutoff date, December 31, 1963.

My question was whether you have any opinion as to whether it is fair to make a comparison of this kind when the effects of those assumptions that you have been working with may persist after that cutoff date.

Mr. Williams: Do you understand the question?

The Witness: I understand the question.

Mr. Williams: The first question is is it fair.

Mr. Perkins: No.

Mr. Williams: You argue it later but the basic question is is it fair to compute it this way.

Mr. Perkins: My question, sir, is [Tr. 6369] whether he has any opinion on that subject, whether he cares to express an opinion of any kind.

Mr. Williams: The question is do you have an opinion as to whether it is fair to compute this the way you did, taking the cutoff date that you did.

The Witness: I believe that applying the assumptions as given to us over this period results in a fair presentation of the difference in results for this period.

I have no opinion as to what the on-running effect might be at some future date insofar as operations are concerned.

Mr. Perkins: I think you have answered my question.

Q. You said it is fair for the period, but you express no opinion beyond the period.

A. Because my engagement—the terms of my engagement terminated insofar as this work was concerned on December 31, 1963, insofar as reconstruction of the financial statements are concerned.

Q. I think I understand your answer, sir. I hope I do.

A. You are asking me, sir, about something I have [Tr. 6370] no opinion on because I have no idea what the effects would be that you are referring to. It is something I have never considered.

Mr. Williams: You mean after the cutoff date?

The Witness: That's right. I have given it no consideration.

Q. My question was in a hypothetical form, if there were such effects whether you had an opinion whether it would be fair to use a cutoff date.

Mr. Williams: If there were such effects?

A. I would prefer, sir, not to answer a hypothetical question of that type because I do not know what my instructions would have been under hypothetical situations.

Q. That figure of 123.1 million—I am now back at Exhibit 2, the upper righthand corner—if you can also put another finger on page 5 of Volume I, and in that tabulation there there is a figure of 71.7 million showing the effect of application of assumptions to increase in income and special items.

The 123.1 million is a figure which, as I understand it, is going to come down to this 71.7 million after you have subtracted whatever is appropriate to subtract, is that correct?

[Tr. 6371] A. That is correct.

Q. Mr. Mallender tells me there may be some other additions, too.

A. Whatever needs to be done to arrive at 71.7 from the 123.1, yes, sir.

Q. In any case, looking at Exhibit 2, the first thing you do is subtract the historical and reconstructed provisions for depreciation and obsolescence, and from the increased gain you subtract the increase of depreciation of 47.9 million, is that correct?

A. Yes, that's correct.

Q. Again these depreciations figures are summarized from the annual figures in 2-1, and the source of the annual figures in 2-1 is Schedule F in Volume II, is that correct, sir?

A. That is correct, sir. Section F.

Q. Section F?

A. Yes. It is shown on the last page, page 2 of Schedule F.

I am referring to the grand totals that are shown on Exhibit 2.

Q. On the second page of Exhibit F, the totals are those shown in the third and fourth columns, is that correct?

A. That is correct, sir.

[Tr. 6372] Q. The assumptions with respect to the provisions for depreciation and obsolescence are stated beginning on page 8 of Volume II?

A. Yes, sir.

Q. Paragraph 1 states an assumption derived from TWA's historical policy, and perhaps this is an assumption for which you take responsibility, do you?

A. I believe that if you will refer to the first page of our report on Volume I, I say in order to maintain consistency between the reconstructed and historical financial data, the adjustments which reflect these assumptions on the historical financial data for the period were made on bases which correspond in all material respects with the accounting methods, which was an agreed term of our project.

The reason was to minimize deviations between reconstructed and historical which might be injected by using different accounting methods. And I think what we are trying to say is we didn't use a different system of depreciation on the reconstructed airline than we did on the historical.

Q. I see nothing wrong in that. This was basically your agreed approach?

A. It was basically our agreed approach with our [Tr. 6373] client.

If our client had instructed us to do something differently we would have done it for this exercise.

Q. You would have?

A. Yes, sir.

Q. Then, of course, all the remaining assumptions under Paragraph 2 there have the same character as the ones we have been discussing before. They are part of input that you have used in computing reconstructed depreciation?

A. Yes, sir.

Q. Following Schedule F, we have Schedule F-1.

Schedule F-1 shows the historical and reconstructed depreciation by fleet, does it not?

A. Yes, sir, it does.

Q. If we look at the 331s, the second line, which shows reconstructed 18 and historical 12, we see that the reconstructed depreciation naturally is considerably greater in every year beginning in 1959, and that difference continues, and in 1963 the reconstructed figure is 11.4 million as against an historical figure of 7.6 million, a difference, if my math is right, of 3.8 million.

Have you computed what that difference would be in 1964 or subsequent years?

[Tr. 6374] A. I have not.

Q. Is it your opinion that there would be a substantial difference in 1964 and subsequent years?

A. Well, I would—I prefer not to answer these questions by some sort of roundhouse approach, but if you wish to take '64 it would be my guess assuming the same 18 aircraft that we would have probably the same difference with respect to that particular fleet, assuming they had 18 at the end of 1964.

Q. You said previously—

A. But that is not—you are asking me to give you an answer without actually calculating it out and I hope that you accept that on that basis.

Q. I understand.

That would also be true, would it not, of the 880s, the fourth line, CV-880s, new, and they are reconstructed as against 20 historical, and in every year beginning in 1960 the reconstructed depreciation is substantially greater than historical, and in 1963 reconstructed is 12.5 million as against 7.8 million, a difference of $4.7 million.

Your opinion would be, realizing you have not done any computation, that there would be a substantially similar difference in 1964, based on those same assumptions?

[Tr. 6375] A. I believe it is reasonable to assume that if in 1964 we continued with a 50 per cent larger fleet of new Convairs, 20 against—30 against 20, that the charge for depreciation on this larger fleet of Convairs purchased new, would be something comparable to the difference in 1963.

Q. On those same assumptions, a difference would persist until they had been reduced down to their residual values?

A. Presumably until you followed it through. It wouldn't be necessarily on an annual basis because of difference of timing of aircraft coming into the picture.

Q. But this is an effect of the assumptions that would persist after 1963, is it not, in your opinion as an accountant?

A. Well, if you wish to isolate a particular item—

Q. That is what I am doing—

A. You are asking to take just depreciation—

Q. Yes, just depreciation.

Mr. Williams: One at a time. The reporter can't possibly get you both talking.

Mr. Perkins: I am sorry.

[Tr. 6376] Mr. Williams: What were you going to say, Mr. Perkins? You were asking a question.

Mr. Perkins: I believe the witness said if you want to isolate it as to particular items such as depreciation, and I said, yes, that's exactly what I was doing.

Mr. Williams: All right, then you finish.

The Witness: Well, I think my answer was that if you are dealing solely with depreciation as we are here, the answers that I gave, dealing solely with that aspect of cost and operation, my answers are probably—are fair.

Q. I understand that and I was trying to be very specific here, take some figures that were identified and isolated in your report.

A. Yes, sure.

• • • • •

[Tr. 6389] • • • Q. Now if you will please turn to Schedule B in Volume II, this again deals with reconstructed long term debt and shows the additions, the assumed additions to that debt throughout the period you are dealing with, is that what this does?

A. That is correct. Additions on a reconstructed basis starting from zero.

Q. If you will look at the first column you will see that the—or I should say I see that under the Series A notes the total amount of 170 million was taken down prior to the end of 1958, and after that, there is no change in that balance, is that correct?

A. That is correct.

Q. As to the Series B notes in the second column, the entire amount was taken down—I am not sure I am reading this right—in 1960, is that it, so that the ending balance—

A. A portion was taken down in 1959 and a portion was taken down in 1960.

[Tr. 6390] Q. So that at the end of 1960 the ending balance was 90 million and after that that remained the same.

Then in the fourth column, subordinated debentures were assumed to have been issued in 1959 in the amount of $60 million. So that the balance there was 60 million at the end of 1959, and after there is no change.

So, after 1960, as you look across there, there are no further changes of any kind whatsoever in the reconstructed debt, is that correct?

A. That is correct.

Q. Is that an assumption derived from the Drexel Harriman Ripley report?

A. The Drexel Harriman Ripley report ends insofar as financing is concerned, with December 31, 1960, and the terms of the flight equipment mortgage notes that are included in their financing do not call for any further—any reductions under their terms through December 31, 1963. The sub-assumption C, if you want to call it that, of the basic assumptions—these detailed assumptions that you are referring to on page 6, give you the basis for no other changes in the debt financing program.

Q. You mean in reading Schedule B, I have to consider that enumerated assumption C on page 6 is part of [Tr. 6391] the assumptions that underlie Schedule B, is that correct?

A. Yes, sir.

Q. I will transfer my question and say where in the Drexel Harriman Ripley report do you find the assumption that the debt financing program referred to in assumption B—that's the program that they recommend—is to be considered as a substitute for the entire amount of debt financing both long term and short term reflected in the historical financial statements except for minor amounts.

A. You will not find that, sir, in—directly in Drexel Harriman Ripley's report.

Q. Where did the assumption come from then?

A. It came as a result of discussion of the whole problem of constructing these financial statements, discussions with our client, Cahill Gordon.

Q. They gave you that assumption?

A. Yes, sir, they did.

Q. Did you discuss the basis for any such assumptio with them?

A. We may have at the time. I don't recall the detail of our discussion.

Q. But the Drexel Harriman Ripley financing as I unde stand it is a program that carries you through [Tr. 6392 December 31, 1960, is it not?

A. That is correct.

Q. You have carried that program through Decembe 31, 1963?

A. We have carried this program through, and we ha eliminated the historical program, whatever program the was in 1961, 1962 and 1963, that's right.

Q. You have assumed, have you not, that had the Drex Harriman Ripley program been carried out, no furth long term financing of any kind would have been enter into by reconstructed TWA in 1961 or 1962 and 1963?

A. The application of the assumptions that were giv to us clearly bring out that there are—that by assumptio C that there were no additional financings in 1961, 19 or 1963.

Q. I understand that, but that assumption is one y got from counsel, is it not?

A. That is correct.

Q. That is not an assumption that you can find in Drex Harriman Ripley anywhere?

A. No, sir, it is not.

Q. Mr. Biegler, would you please turn now to Schedu E-3 of Volume II?

[Tr. 6393] A. Section—

Q. E.

This schedule is entitled "Reconstructed and Histori Additions and Transfers to Flight Equipment."

Over in the left hand column we have a description first of a piston fleet and underneath that of a jet fleet.

As we proceed across this schedule from left to right we see year by year the historical and the reconstructed capital expenditures for each type of airplane.

Is that what this represents?

A. Expenditures transferred to the flight equipment, yes, sir.

Q. Transferred to flight equipment?

A. Yes, sir.

Q. I note looking at the jet fleet that for both reconstructed and historical you have fifteen B-131s, and then you have reconstructed eighteen 331s as against twelve 331s historical, and you have eliminated five 331Bs from the reconstructed, and you have thirty 880s reconstructed as against twenty 880s historical, and you have eliminated six 880s used from the reconstructed and as to all of those I recognize that they are derived from [Tr. 6394] the various principal and enumerated assumptions.

But we go on from there and we find in both columns of reconstructed and historical eighteen 131Bs, four B-720Bs described as leased, and two B-331Cs described as leased, and they have a double asterisk which says the reconstructed and historical amounts are assumed to be identical.

In addition there is a reference to B-727s and B-331Cs which a footnote describes as aircraft on order as of December 31, 1963.

My question is that as to those aircraft for which there were additions to the flight equipment fund where the reconstructed and historical amounts are assumed to be identical, from where do you derive the assumption that those amounts would be identical?

A. Well, if you are not given an assumption that there is to be a change, the only thing that we can do is leave it the same way as it was historical.

We were given no assumption to change these figures. Therefore, we left them as they were.

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[Tr. 6409] • • • The Special Master: Are there any preliminaries this morning?

Mr. Williams: Mr. Special Master, before Mr. Perkins goes on with his cross-examination, I have something which I would like to mention.

[Tr. 6410] Since we recessed on Tuesday, I have learned from Mr. Biegler that for his own assistance he had prepared what is really a condensed summary of his report. He has prepared it, really, for his own assistance, but we found it so helpful to us that I thought I would offer a copy to Mr. Perkins and a copy to you.

It adds absolutely nothing to the facts and figures contained in the report, but it is the sort of thing that might be used by way of summary to help a person understand the rather voluminous and complicated report.

The figures, as I say, are all found in the report, but it isn't easy for a layman to understand how they fit together without a summary analysis.

I asked him to bring it this morning with the thought that it might be of service to you, Mr. Special Master, and to Mr. Perkins, and if you wish, I will offer it in evidence as TWA Exhibit 50, or we can mark it for identification, or you can use it yourself. I don't care.

Mr. Perkins: I have no objection to its being admitted into evidence, subject to our verification that these figures are all identifiable from [Tr. 6411] the report and properly correspond with what you have there.

Mr. Williams: I will then offer it in evidence as TWA Exhibit 50.

The Special Master: Received.

Mr. Perkins: I might add, Mr. Williams, it might have been very helpful if something like this had been included in the report at the outset.

Mr. Williams: We didn't know it ourselves.

(Document entitled "Condensed Summary of Effect of Application of Assumptions," marked TWA Exhibit 50 in evidence as of this date.)

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[Tr. 6438] • • • Mr. Perkins: I might say at this point, your Honor, and this is really not to be construed in any way as a criticism of Mr. Biegler or his firm, that I am sure they have presented this reconstruction in probably the best way that they could, and I have no opinion on whether there is any better way to do it.

I just wanted to state for the record that it is not a very easy document to understand, digest and analyze. If you look for the inputs that come in from the other experts, you do not see them right away. They all suffer a kind of "sea change," and I realize that had to be in the way that the witness did it.

I just want to say what perhaps is clear, that it was difficult for us to understand.

We had to retain our own accountants, and I don't think they understood it right away, either.

As of January 15th, they had accumulated some —nothing like 22,000 hours, but 600 hours in [Tr. 6439] the process of testing, analysis and looking at the work papers.

Naturally, in that process they did not have the time to verify whether the figures in the work papers were properly entered from the various books and ledgers in Kansas City.

We have no reason to doubt that they weren't put down accurately and properly, but we don't know it. We have not been able to verify it, and in that sense we relied on the figures in the work papers just as Mr. Biegler has relied on the audit of Haskins & Sells.

Again, there is no reason to suspect error in either case, but we just don't know. And whether any of these amounts will ever become material or not to check them out and verify, I just don't know, but I would like to say we would like to reserve that right in case at some future date it does become material.

Mr. Williams: Your Honor, I have no objection to their reserving a right of that sort, but I do think since they have had since last May, we should have some advance notice in case they do wish to do any verifying, so we will be prepared [Tr. 6440] for it.

Mr. Perkins: You will have all the notice we can possibly give you, Mr. Williams, I assure you. I doubt if it will be necessary, but at this point I just don't know.

By Mr. Perkins:

Q. On page 5 of Volume I, Mr. Biegler—

The Special Master: Before you get into that, as I understand it, the only thing you are reserving is in case you run across some instance from now on where you believe that there has been a mistake in the figures, that you reserve the right to call that to my attention.

Mr. Williams: That is my understanding of what counsel said.

Mr. Perkins: We have examined the work papers. We have no way of knowing for sure whether the figures in the work papers are accurate. We have not been able to test that. I say we assume they probably are accurate.

But if the need should arise to test those figures against the books, ledger, invoices or what not in Kansas City, we would like to reserve the right to do so.

[Tr. 6441] The Special Master: I wouldn't want to approve a reservation which would extend the time for bringing the hearings to a conclusion. It is perfectly all right with me for you to reserve the right, if you run across, in the ordinary course of your study, mathematical errors or a prima facie mistake in the figures, you certainly will have the opportunity to call that to my attention and make such verification as you need.

Mr. Perkins: I don't think we have in mind anything that would contemplate prolonging the proceedings, but, I think at this point I am not sure just how much of what's in here will be material,

and there may be some things in there which in the time we have had to date it has simply been impossible for us to verify through our accountants.

By Mr. Perkins:

Q. On page 5 of Volume I, Mr. Biegler, up to now we have been discussing how you got to the 71.7 million of increase in income and special items before provisions for income taxes.

Underneath that, you have a further item of 12.3 million described as an increase in capital surplus.

[Tr. 6442] You have a further statement about that particular item on page 6,—

A. Yes, sir.

Q. (continuing) —where you say that this particular increase is accounted for by the difference between the net proceeds of the assumed 1955 equity financing, and the proceeds of the historical equity financing in 1957, and that historical financing is one that you have eliminated in accordance with your instructions; is that right?

A. That is correct, sir.

Q. The enumerated assumptions underlying what you have done here are stated in Schedule A of Volume II on page 13. They are recapitulated on page 13.

A. Page 13?

Q. 13, after Tab A. I think that sets forth what I have just stated to you. And again where No. 3 there says that the later sale is to be eliminated "as a consequence" of the 1955 equity financing. That phrase "as a consequence" does not express your own personal views, but is simply part of the assumption, as given to you, is it not?

A. It is my understanding of the assumption, yes, and it is also my interpretation of the Drexel, Harriman, Ripley report. This was the way I understood it.

[Tr. 6443] Q. It is your interpretation of their report—

A. Yes, sir.

Q. (continuing) —but not your own independent assumption?

A. I am not—no, sir, it is not an independent assumption.

The Special Master: I wonder if we could have a little more discussion of that 12.3 million figure. I am not sure I understand that.

By Mr. Perkins:

Q. Under paragraph 1 there you say that the assumed issue is to be sold at 17.50 per share on June 1, 1955, and then there is a description of the use of the proceeds.

By the way, Mr. Biegler, wouldn't the effect of this June 1st equity issue show up in the balance sheet of June 30th?

A. The balance sheet at June 30th?

Q. The TWA balance sheet at June 30th would—

Mr. Williams: 1955.

Mr. Perkins: 1955, thank you.

Q. (continuing) —reflect the effect of this transaction, would it not?

A. If there had been a balance sheet reconstructed [Tr. 6444] as of June 30, 1955, and this transaction had taken place, I would expect to see it in that balance sheet, yes sir.

Q. Wouldn't you assume that reconstructed TWA like historical would have had a June 30, 1955 balance sheet?

A. Well, they most certainly would have.

Q. But you did not choose to do it that way; is that—you chose to start with September 30th?

A. That is right, because those were our instructions to start with September 30th and to apply the effect of these assumptions which were given to us by Drexel, Harriman, Ripley, the effect of those assumptions to the September 30, 1955 balance sheet which was supposed to give us our starting point for this project.

Q. That was given you as your starting point?

A. Yes, sir, it was.

Q. Going back to page 6, then, we have the proceeds of the assumed equity financing of 55.5 million, and that is simply money that came in from the shareholders, is it not?

A. It is money that came in from the buyers of those shares, yes, sir.

Q. They were shareholders after—

A. After they bought them, I assume they would be.

Q. If they were not previously. They did not take [Tr. 6445] up their rights.

That is also true of the historical financing of 43.2 million? That is simply money contributed by people who were or became shareholders at the time they contributed the money to the corporation?

A. That is right.

Q. Some of that you classified as an earned surplus of $12.3 million.

I think if we turn to Exhibit—

Mr. Williams: Did the Special Master ask a question about the 12.3 million?

The Special Master: Yes.

Mr. Williams: You understand, your Honor, what that is? The theory, I assume, is that because of the higher price at which the shares would have been sold in 1955, the corporation would have real-

ized $12.3 million more than they did, in fact, realize when this same number of shares was sold in 1957.

The Special Master: Is that considered an element in your damages?

Mr. Williams: Yes.

The Special Master: In the face amount of 12.3 million?

Mr. Williams: Yes.

* * * * *

[Tr. 6463] * * * Q. 5¾ per cent is, I think, stated in the assumptions, Assumption 1 on page 4, that this was an assumption supplied to you by your client, the use of an interest rate at 5¾ per cent and it states that that is the coupon rate on the long-term debt issue closest to December 31, 1963.

Did you suggest that particular interest rate to your client?

A. I did not.

[Tr. 6464] We asked our client what rate to use in this calculation of discounted present value, and this is the one that resulted from our question, assumed external borrowing rate.

Q. Is there any particular reason to use this rate rather than some other rate, or is it just an arbitrary—

A. Well, I think if you were looking for an external borrowing rate, you probably would look at the latest borrowing prior to the date we are dealing with by historical TWA, and this makes—made a—frankly made a lot of sense to me, if you were going to use an external rate.

And if you look at Exhibit I-B, you see that the 5¾ is the—is the rate on the issue that, as we discussed earlier this morning, the issue that was effected in 1963.

Q. Isn't it true that this measure that you have made here is primarily used as a means of evaluating alternative uses of particular capital?

A. I don't know—I don't really understand your question, Mr. Perkins.

Q. It is an estimating tool, is it not, used by the management of a company in deciding whether certain uses of capital might be more profitable than other uses [Tr. 6465] of capital?

A. Might be. I don't know.

Q. You do not know that?

A. No, sir.

Q. How about the December 31, 1963 date, was that a date you used on counsel's instructions?

A. It certainly was a date that was agreed to between counsel and ourselves. It was the terminal balance sheet date.

We had reached the point where we had reconstructed TWA and had the effect of the reconstructed operations. It was the date that we would be expected to make this kind of a calculation.

Q. You did not give any consideration to what might have happened after that date?

A. We did not under this calculation, no, sir.

Q. Did you consider it under any other calculations?

A. The only thing that—where any consideration was given to what might have happened after that date was a supplemental calculation where we were asked to assume conversions of debentures. You will note that the assumption which was given to us here is that there are no conversions of debentures.

Q. Right, yes.

[Tr. 6466] A. And we were asked by counsel to also make a calculation of what the effect on this present value

calculation would be if we assumed that the convertible debt—we were given assumptions. We were told to assume that the historical convertible debt was converted when it was, and that we would assume that the reconstructed convertible debt was converted at the same time. I believe you have a memo in your file of papers which describes that matter.

We did make the calculation. It is in our working papers. It is in the working papers supplied to Arthur Young.

Q. From what you said I assume that you know that all of the debenture issue of 1963 was converted prior to the time that you undertook this assignment?

A. Well, I don't recall the actual dates of conversion that were ascertained for the purpose of that supplemental calculation which is not a part of my report. But I do believe that it was some time in 1965.

I don't know that—I can't tell you whether it was before our engagement or not without referring to the precise dates.

Q. It was converted prior to the time that you submitted your calculation of present value, was it not? [Tr. 6467] I believe you said—

A. Well, yes. It must have been before May 2, 1966, yes, sir, if it was in 1965.

Q. What is your opinion of the appropriateness of submitting a calculation of present value as of December 31, 1963 of debt which includes an amount of $38.5 million which prior to the time you make the calculation no longer exists?

A. I think it is justified by the assumption that was given to us here that there are no conversions of debentures.

If we had been making this calculation in point of time on December 31, 1963, you certainly could not assume conversions that had not occurred.

The Special Master: What troubles me a little bit is to call it historical.

The Witness: Well, it is historical, sir, as far as the position at December 31, 1963 is concerned.

Q. Let me ask you this to clarify that: It would be possible, would it not, if you had a building with a lease and fixed rentals over a period of, say, 20 years, it would be possible as of a date to calculate the present value of the rentals that you would receive over that [Tr. 6468] period, would it not?

A. Yes, sir, it would.

Q. You could calculate those, say, as of a date December 31, 1963?

A. Yes, sir.

Q. You might receive those instructions on January 2, 1964, and you could perform that calculation, could you not?

A. Yes, I could.

Q. On January 1st, that building might have been, let us say, destroyed by a tidal wave or some uninsurable risk. It would still be possible for you on January 2nd to calculate the present value of those rentals as of December 31, 1963, would it not?

A. Yes, sir, it would.

Q. That is comparable to what you have done here, is it not, analogous?

A. I think you are—I don't quite see your analogy the same way that you do, sir, but I will accept it for the way I understand it.

Q. If you see it differently, explain the difference to me.

A. Well, the fact is at December 31, 1963, these debentures did exist, they were convertible, and we had [Tr. 6469] no basis for assuming conversion—you know we

can't look into the future insofar as the reconstructed TWA and—

Q. When you made this calculation it was no longer the future you were then in the present, were you not? That's why I think the analogy holds.

At the time that you made the calculation you knew that this debt which you were computing as of December 31, 1963 no longer existed in the form in which it is set forth in your assumptions?

A. Well, that is correct, we did know that, yes.

Q. I concede that your assumptions certainly justify what you have done, but I am wondering about what justifies the assumptions. Do you have any opinion on that?

A. I believe that these assumptions were reasonable ones to make a calculation of the present value of the debt on an historical basis at December 31, 1963.

Q. You have no opinion as to whether it would be appropriate to use that computation for the purpose of damages in this lawsuit at a date which is now several years later than December 31, 1963?

A. As I think I have indicated before, the question of whether this is used for a claim of damages is out of my particular field, sir. We have made certain calculations [Tr. 6470] and made some measurements of positions at various dates and so on.

But as to whether that item should or should not be in a specific claim for damages, I have no opinion. That is a legal matter.

Q. Are you also aware, Mr. Biegler, that—to identify it, let us turn to Exhibit I-B in Volume I.

At the top of the righthand column under historical, there is an amount of $100 million as the amount of subordinated income debentures, 6½ per cent, due June 1, 1978.

The footnote at the bottom—I will have to withdraw my question whether you are aware of it because obviously you were.

It says, "Stock purchase warrants originally attached to the subordinated income debentures authorize purchase of 2,700,000 shares of stock at $20 a share to June 1, 1965 and at $22 a share thereafter to December 1, 1973."

In your computations of present value at December 31, 1963, did you give any consideration to the exercise of these warrants?

A. I did not, sir.

Q. None had been exercised by that date, had they? [Tr. 6471] Do you know that?

A. I don't know that.

Q. You never did a computation?

A. No, sir, I did not.

In fact, in sending over the material that you requested, the memorandum that refers to some computation on warrants—and I frankly was mystified by its inclusion in the memorandum—we did nothing because we assumed that the gentleman who wrote the memorandum had misunderstood the conversation. It was a totally meaningless thing to me.

Q. The gentleman who prepared the memorandum was from Price Waterhouse?

A. That is correct.

Q. Do you know who it was?

A. Yes, sir, it was Mr. Schwartz who attended that particular meeting that the memorandum refers to.

Mr. Perkins: I think since we have been discussing this memorandum we can mark it for identification.

This is a memorandum for the files, special damage study, with initials at the bottom CBS in caps and signed initials above that and a date of April 19, 1966, two pages.

[Tr. 6472] (Memorandum for the files, special damage study, with initials at the bottom CBS in caps and signed initials above, dated April 19, 1966, consisting of two pages, marked Defendants' Exhibit 265 for identification, as of this date.)

Q. I will ask the witness if this is the memorandum that we have just been talking about.

A. It is.

Q. Paragraph 4 says that Mr. Tenney requested that you prepare another calculation of present value of future payments for historical and reconstructed debt service based on the following assumptions, and Subparagraph (b) thereof refers to all outstanding warrants to be exercised on the same date.

And you have testified that Mr. Schwartz who has initialled the memorandum personally prepared it.

Did you discuss this? Did you see this? Did Mr. Schwartz submit this to you after preparing it?

A. Yes, a copy would have come to me.

Q. Did you read it?

A. I'm sure that I did at the time.

Q. Did you discuss 4B with Mr. Schwartz?

A. I don't know that I discussed it with Mr. Schwartz.

[Tr. 6473] Q. Whom did you discuss it with?

A. I probably discussed it with Mr. Trautlein, my partner.

Q. What was the substance of that discussion?

A. Well, I'm sure that the substance—and I can't tell you because this is an internal office memorandum, just summarizing some broad matters discussed at a meeting,

and I can't tell you what we said but I assume that I would have said, "Well, I don't understand that point. We don't—we couldn't do anything on that."

And I think—

Q. Did you report back to the client? This is a request from your client that you prepare a certain calculation.

A. I probably did not because this was Mr. Schwartz' recollection of a discussion, and he—for all I know there may have been subsequent discussion which might have clarified this point.

Q. But although you were supervising this work, you just ignored this particular request?

A. I would say that we—we ignored it to the degree that it didn't seem to have any relationship to the calculation on the assumption that all these convertible securities would be converted.

[Tr. 6474] And I frankly don't know, sir, how we could inject into the present value calculation the exercise of warrants on stock.

There may be a way, but I personally do not know what it would be.

Q. It does have some relation to the stockholders' equity, does it not? You have reported on the increase in stockholders' equity?

A. As of December 31, 1963, yes, sir.

Q. Any exercise of warrants would increase that equity, would it not?

A. Yes, it would. People exercise their warrants and paying in the additional amount would provide more capital.

Q. Do you have any information as to whether any of these warrants have been exercised and when?

A. I have no information concerning the warrants other than it is shown on Exhibit 1B.

Q. Returning to Exhibit 265 for identification—

Mr. Perkins: This has been identified by the witness. Perhaps I should offer it in evidence at this point.

Mr. Williams: No objection.

The Special Master: Received.

[Tr. 6475] (Defendants' Exhibit 265 for identification, received in evidence, as of this date.)

Q. On page 2, Paragraph 5 says that Mr. Tenney agreed to your suggestion that you perform an additional analysis of present value giving effect to future income taxes of 50 per cent.

Did you perform this calculation?

A. We attempted to, and quite frankly gave up on this calculation, because we found that it was just impossible to arrive at any sort of an estimate of what an effective tax rate would be based on a statutory rate of assumed 50 per cent, because of such things as accelerated depreciation that would enter into the picture, the investment credit.

And I quite frankly, sir, gave up on this calculation.

Q. So it was never performed?

A. It was never completed. It started and we gave up. Because we just couldn't get the assumptions to make such a calculation.

Q. What occasioned your suggestion?

A. Well, the thing that occasioned it was my concern that if this were to be ultimately used in a damage claim, if it were, and I might—I want to emphasize that—that [Tr. 6476] any amounts that might be received with respect to such a matter as this would probably be subject to tax.

And putting it in its simplest terms would $20.3 million if that were the amount which were claimed, would that be

after an effective tax was paid, would that be representative of the differences in present value. That's what started me on the train of thought concerning income taxes.

And, as I say, when I sat down and tried to figure out what you would use as an effective tax rate, I gave up, because there are just too many assumptions to be made, concerning effective tax rates, over the span of years that we are talking about here for a present value calculation.

Q. But you knew that there would be income taxes of some kind, did you not?

A. I did not know that there would be income taxes. There might well have been no income taxes paid over this period of years through the accelerated depreciation allowances. You might have a series of operating losses and then they would be offset against operating income.

I think if you made enough assumptions you might make a stab at this, but I gave up.

Q. You made quite a few so far?

[Tr. 6477] A. That's sort of the assumption I am trying to describe as the sort of assumption that you have to deal with in projecting effective tax rates and I frankly gave up.

Q. But as a realistic matter, if you were weighing—or let me ask you this: Ordinarily in performing these calculations for some managerial purpose, don't you take taxes into consideration? We are talking about how much this—say the debt would be. The interest will be the net effect after taxes, will it not?

A. It will be net after applying the effective tax rate, whatever that is, yes, sir.

Q. Do you ordinarily ignore taxes in trying to measure the present value of future burdens or future income?

A. Well, as I explained earlier, the example that I was thinking of where you had an unfunded liability that you were setting up at present value, we would use the effec-

tive earnings, internal earnings rate after taxes, after the effective tax cost.

You would probably use what ever you consider to be the current earnings rate after taxes, and then the following year as you continue to accrue, you would base it on the earnings rate that year which would be your best [Tr. 6478] measure of—the safest measure of future earnings.

So that I think if you were using an internal earnings as your basis of discounting you would consider after taxes, after actual taxes. We are talking here more or less about cash flow so you can't use statutory rates. You have to talk about effective tax cost.

Q. That would be true in measuring the burden of future interest payments, you would consider—

A. That's true, that's true. The effective tax—the effective cost after taxes of the interest which might be something less than the statutory rate if your effective rate were zero.

Mr. Perkins: I would like to mark for identification as Exhibit 266 copies of supplements to the Schedule B-3 to Form 41 submitted to the CAB by TWA, quarterly—March 31, 1964 is the date on the first one, and then for each quarter after that, to and including the quarter ended September 30, 1966.

(Copies of supplements to Schedule B-3 to Form 41 submitted to the CAB by TWA, first dated March 31, 1964 and ended September 30, 1966, marked Defendants' Exhibit 266 for identification, as of this date.)

Q. These reports show the number of warrants, the total amount of warrants which were exercised during the [Tr. 6479] respective quarters, and the changes in the capital stock account as a result thereof.

The computation which we have made shows that during this period warrants in the amount of $6,155,960 were exercised.

With that information, Mr. Biegler, do you still consider that it is appropriate for this purpose of this lawsuit, if you have an opinion, to show an increase of 12.3 million in capital surplus reconstructed over historical at December 31, 1963?

A. Well, I have no opinion. Your question is long and complicated, but I really have no opinion on your question.

We made a calculation of reconstructed against historical at December 31, 1963, and covering that period, and that's what the 12.3 million is.

That's all I can tell you, sir. This is information that you handed me here that relates to periods subsequent to that, and I have no opinion on the pertinence of this to what I have—the figures that I have submitted in my report.

Q. There were instances to which you testified in which you sought out information after 1963 for the purpose of your report?

[Tr. 6480] A. There were a few instances, that is correct, for the purpose of my report, yes, sir, but I did not—

Q. You made no inquiry as to future changes in stockholders' equity which had occurred after December 31, 1963, but prior to the time that you submitted your report for the present date?

A. I made no inquiries concerning changes in stockholders' equity since December 31, 1963 for the purpose of my report.

Q. So that what has happened after that date with respect to the capital stock of TWA or the long-term, the historical long-term date as it existed at December 31, 1963, is totally immaterial to the assignment you were given and on which you have reported?

A. I don't know whether it is—you say immaterial. That is a conclusion.

But it is not a matter that I considered necessary to carry ut my particular assignment, for me to go beyond 1963.

Mr. Perkins: I would like to offer this in evidence.

Mr. Williams: No objection.

The Special Master: Received.

[Tr. 6481] (Defendants' Exhibit 266 for identification, received in evidence, as of this date.)

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[Tr. 6523] • • • Mr. Sonnett: Mr. Brownell, there are several preliminary matters which I would like to raise bearing on the question of scheduling which I understand you indicated you would like to have discussed this morning.

The Special Master: Right.

Mr. Sonnett: Both of these matters have some relationship to the problem of scheduling from here on out, and subject to the resolution of these [Tr. 6524] two we anticipate that the two witnesses who are called for today would be our last witnesses in terms of the plaintiff's case in chief.

The first relates to Mr. Connelly of Boeing and to his letter to you of February 23, 1967, with a copy to Mr. Hayes and to me, which I take it everybody has had a chance to examine.

It might perhaps be in order to mark it for identification at the moment, so the record reflects what we are talking about.

(Letter dated February 23, 1967, from Mr. Connelly, The Boeing Aircraft Company, marked TWA Exhibit 51 for identification as of this date.)

Mr. Sonnett: Specifically with respect to this, my proposal would be in the interest of saving time that it be stipulated that Connelly would so testify and

that this be incorporated in the record as part of his testimony.

I don't know what the views of Mr. Hayes on that subject would be.

Mr. Hayes: I have no objection.

The Special Master: We can just take the statement in the record that you made as enough for that. It isn't necessary to have any paper signed.

[Tr. 6525] Mr. Sonnett: I would think if you so direct, it would be admitted for the purpose for which I have offered it.

The Special Master: I will direct it.

(Plaintiff's Exhibit 51 for identification received in evidence as of this date.)

Mr. Sonnett: The other one which I hope we can dispose of equally expeditiously is an effort to eliminate the need for some additional material in the record, and I would like to tender this proposed stipulation to counsel for the Tool Company and to the Special Master, and to request, please, that they read the last paragraph first, because I think this may shorten our problem.

Mr. Hayes: May I inquire what the purpose of the stipulation is? It seems to me to be completely outside the scope of anything that can possibly come before you as Special Master.

Mr. Sonnett: We will argue in due course. The reason for the third paragraph is to avoid the necessity of having argument now. We will argue in due course on the basis of these facts which I think are accurate, the factual material the Special Master is entitled to consider under well settled [Tr. 6526] law—for example, the International Boxing case in the Supreme Court—to consider what the fruits were that the defendants enjoyed by reason of their con-

duct. And as this indicates, the gain of the Hughes Tool Company out of its own share of TWA stock amounts to roughly $450 milllion after payment of expenses.

Mr. Hayes: Whatever the figures are, they seem to have absolutely no relevancy to the issues before you.

Mr. Sonnett: I didn't think you would stipulate relevancy. That's why I put paragraph 3 in. This is a matter for argument.

Mr. Hayes: Suppose they had sold at a loss, would that prove there were no fruits and, therefore, no conspiracy?

Mr. Sonnett: As I say, I don't think this is the time to argue.

Mr. Hayes: No, but you are asking me to sign a stipulation assuming the facts are accurate.

I won't sign a stipulation which has nothing to do with the case.

Mr. Sonnett: I was hoping we could avoid the necessity of calling witnesses to make a record of the simple facts contained in paragraphs 1 and 2 [Tr. 6527] which have been widely publicized, except, of course, two is a figure that we have arrived at which I am sure the Tool Company already has and can verify easily.

Mr. Hayes: I don't see any need even for calling witnesses.

If they call witnesses, it would only delay this proceeding. I would object to their testimony, on the grounds that I have already stated, and then you would be called upon to rule. You can rule just as well on this stipulation, it seems to me.

The Special Master: Why don't you just make it an offer of proof?

Mr. Sonnett: All right, I would like to know whether in this connection counsel for the Tool Company are now prepared to dispute the accuracy—

Mr. Hayes: We would have to check the figures.

Mr. Sonnett: If you do that, at least the record will reflect the correct numbers, whatever the ultimate decision as to relevance and materiality. So I would be quite happy to offer it. I would like to have it marked, therefore, as an exhibit for [Tr. 6528] identification—make it as an offer of proof.

Mr. Hayes: Are these figures before taxes that you set forth here?

Mr. Sonnett: Yes.

As long as we are doing that, I would like to also similarly, on the same basis, have marked and offer the prospectus for the sale of the Hughes stock, dated May 3, 1966.

Mr. Hayes: Same objection.

The Special Master: Mark them for identification and consider them as an offer of proof and I will reserve decision.

(Proposed stipulation marked Plaintiff's Exhibit 52 for identification as of this date.)

(Prospectus re sale of Hughes stock, dated May 3, 1966, marked Plaintiff's Exhibit 53 for identification as of this date.)

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INDEX

Volume I

	PAGE
List of Relevant Docket Entries	A-x
TWA Complaint [Doc. 1]	A-1
Order Referring This Action to Judge Metzner for All Purposes, dated August 31, 1961 [Doc. 42]	A-33
Opinion and Order of December 5, 1961 [Doc. 50]	A-35
Pretrial Order, February 7, 1962 [Doc. 59]	A-36
Toolco's Answer and Counterclaims [Doc. 63]	A-41
Holliday's Answer [Doc. 83]	A-99
Pretrial Order, July 12, 1962 [Doc. 101]	A-116
Pretrial Order, September 21, 1962 [Doc. 122]	A-118
Pretrial Order, January 10, 1963 [Doc. 144]	A-122
Pretrial Order, January 19, 1963 [Doc. 146]	A-127
Opinion and Order of Special Master dated January 22, 1963, Exhibit C to Bromley Affidavit dated February 15, 1963 [Doc. 179]	A-133
Exhibit A to the Affidavit of John F. Sonnett, dated February 1, 1963 [Doc. 166]	A-143
Exhibits B and C to the Affidavit of John F. Sonnett, dated February 1, 1963 [Doc. 167]	A-226
Pretrial Order, February 1, 1963 [Doc. 168]	A-253
Opinion and Order, February 7, 1963 [Doc. 173]	A-255
Toolco's Notice of Position, dated February 8, 1963 [Doc. 174]	A-268
Transcript of Pretrial Hearing, February 8, 1963 [Doc. 188]	A-270
Transcript of Pretrial Hearing, May 2, 1963 [Doc. 204]	A-309

PAGE

Opinion and Order, dated May 3, 1963 [Doc. 191] A-317

Opinion and Order of May 3, 1963 Granting Additional Defendants' Motion to Dismiss (memorandum endorsed on motion papers dated February 15, 1963) [Doc. 179B] A-323

Judgment of the Court of Appeals on Interlocutory Appeal, Entered July 10, 1964 [Docket No. 28405] [Doc. 478] A-324

Judgment of the Court of Appeals Affirming Dismissal of the Counterclaims, Entered July 10, 1964 [Docket No. 28406] [Doc. 479] A-326

Opinion of the Court of Appeals in Dockets No. 28405 and No. 28406 [Doc. 478] A-328

Opinion and Order of Special Master J. Lee Rankin, dated July 30, 1965 [Doc. 481] A-357

Opinion and Order of Judge Metzner, dated November 16, 1965 [Doc. 487] A-396

Transcript of Hearing Before Judge Metzner on December 30, 1965 [Doc. 498] A-400

Opinion and Order of Judge Metzner Denying Defendants' Motion for a Pre-Hearing Order, dated January 4, 1966 [Doc. 496] A-422

Order by Judge Metzner of January 4, 1966 Designating Herbert Brownell as Special Master in Place of J. Lee Rankin [Doc. 497] A-424

Volume II

Excerpts from Testimony at Damage Hearing of Robert W. Rummel [Docs. 554-2 through 554-10] A-425

Testimony at Damage Hearing of John B. Connelly [Doc. 554-11] A-977

Volume III

PAGE

Excerpts from Testimony at Damage Hearing of Edward J. Morehouse [Docs. 554-13, 554-14] A-1209

Excerpts from Testimony at Damage Hearing of Edward Wemple [Docs. 554-15 through 554-18, 554-32] A-1243

Excerpts from Testimony at Damage Hearing of John C. Biegler [Doc. 554-19] A-1527

Volume IV

Excerpts from Testimony at Damage Hearing of Gene M. Woodfin [Docs. 554-23, 554-24] A-1567

Excerpts from Testimony at Damage Hearing of Nathan S. Simat [Docs. 554-25, -26, -27, -28, -30, -31] A-1575

Excerpts from Testimony at Damage Hearing of L. John Eichner [Docs. 554-31, -32] A-1727

Testimony at Damage Hearing of Van Court M. Hare, Jr. [Doc. 554-32] A-1773

Excerpts from Pretrial Deposition of Robert W. Rummel [Docs. 224, 225, 226] A-1797

Excerpts from Pretrial Deposition of Charles C. Tillinghast [Docs. 210 through 222] A-1850

Excerpts from Pretrial Deposition of Emmett O. Cocke [Docs. 228, 231, 233, 235] A-1913

Jones v. *Uris Sales Corp.*—Master's Report [not a part of the Record herein] A-1934

Volume V

Notice of Filing of Report of Special Master dated September 21, 1968 [Doc. 509] A-1965

Report of Special Master, Filed September 21, 1968 [Doc. 508] A-1966

PAGE

Defendants' Objections to the Report of the Special Master, dated November 1, 1968 [Doc. 511] A-1967

Opinion and Order, Filed December 23, 1969, Adopting and Confirming the Report of the Special Master [Doc. 519] A-2027

Opinion and Order of April 13, 1970 Awarding Attorney's Fee and Costs [Doc. 530] A-2060

Final Judgment Entered April 14, 1970 [Doc. 531] .. A-2073

Volume VI

Toolco's Notice of Motion to Dismiss TWA's Complaint, August 8, 1961 [Doc. 22] A-2075

Order by Judge Herlands, dated August 14, 1961 [Doc. 25] A-2077

Transcript of Pretrial Hearing Before Judge Metzner, September 6, 1961 [Doc. 47] A-2078

Pretrial Order of Judge Metzner, September 7, 1961 [Doc. 44] A-2112

Transcript of Pretrial Hearing Before Judge Metzner, October 2, 1961 [Doc. 48] A-2115

Pretrial Order of Judge Metzner, December 18, 1961 [Doc. 354] A-2138

Toolco's Notice of Motion Before Special Master J. Lee Rankin, February 15, 1962 [Doc. 66] A-2140

Transcript of Pretrial Hearing Before Judge Metzner, February 23, 1962 [Doc. 79] A-2141

Orders of Special Master J. Lee Rankin, April 17, 1962, contained in excerpts from transcript of deposition of Charles C. Tillinghast, Jr. [Doc. 217] A-2176

Interrogatory Propounded by TWA to Toolco, May 4, 1962 [Doc. 89] A-2197

PAGE

Interrogatory Propounded by TWA to Raymond M. Holliday, May 4, 1962 [Doc. 90] A-2203

Transcript of Pretrial Hearing Before Judge Metzner, May 17, 1962 [Doc. 96] A-2206

Portion of Transcript of Proceedings Before Special Master J. Lee Rankin, June 4, 1962 [Doc. 218] A-2233

TWA's Notice of Motion and Affidavit of John F. Sonnett, June 25, 1962 [Doc. 305] A-2234

Affidavit of John R. Hupper, July 2, 1962 [Doc. 315] A-2240

Transcript of Pretrial Hearing Before Judge Metzner, July 12, 1962 [Doc. 107] A-2245

Pretrial Order of Judge Metzner, July 23, 1962 [Doc. 103] A-2267

Pretrial Order of Judge Metzner, July 24, 1962 [Doc. 93] A-2268

Transcript of Pretrial Hearing Before Judge Metzner, July 26, 1962 [Doc. 113] A-2270

Affidavit of Robert G. Zeller, August 28, 1962 with Exhibits A-K [Doc. 110] A-2283

Memorandum Reviewing the History of TWA's Application for Permission to Propound an Interrogatory of Hughes Tool Company Concerning the Location of Howard R. Hughes, August 30, 1962 [Doc. 106] A-2297

Transcript of Pretrial Hearing Before Judge Metzner, September 6, 1962 [Doc. 355] A-2305

Affidavit of John F. Sonnett, September 14, 1962, and Exhibits C and D thereto [Doc. 117] A-2316

Portions of Transcript of Proceedings Before Special Master J. Lee Rankin, September 15, 1962 [Doc. 226] A-2382

PAGE

Transcript of Pretrial Hearing Before Judge Metzner, September 19, 1962 [Doc. 129] A-2391

Portions of Transcript of Discovery Proceedings Before Special Master J. Lee Rankin, October 25, 1962 [Doc. 226] A-2428

Transcript of Pretrial Hearing Before Judge Metzner, October 29, 1962 [Doc. 184] A-2438

Notice of Motion by Toolco, December 4, 1962, for Leave to Depose Sessel and Wadsworth [Doc. 338] A-2461

Transcript of Proceedings Before Special Master J. Lee Rankin, December 14, 1962 [Doc. 237] A-2462

Transcript of Proceedings Before Special Master J. Lee Rankin, December 28, 1962 [Doc. 237] A-2514

Transcript of Pretrial Hearing Before Judge Metzner, January 9, 1963 [Doc. 185] A-2523

Transcript of Proceedings Before Special Master J. Lee Rankin, January 14, 1963 [Doc. 237] A-2571

Notice of Motion by Toolco, January 14, 1963 [Doc. 145] A-2574

Transcript of Pretrial Hearing Before Judge Metzner, January 17, 1963 [Doc. 186] A-2576

Notice of Motion by Toolco, January 22, 1963 [Doc. 147] A-2602

Transcript of Proceedings Before Special Master J. Lee Rankin, January 23, 1963 [Doc. 237] A-2603

Notice of Motion by Toolco, January 25, 1963 [Doc. 152] A-2615

Transcript of Pretrial Hearing Before Judge Metzner, January 28, 1963 [Doc. 187] A-2616

Letter of Chester C. Davis to Judge Metzner, January 29, 1963 [Doc. 448] A-2642

PAGE

Letter of Chester C. Davis to Special Master J. Lee Rankin, February 4, 1963 [Doc. 458] A-2645

Letter from John F. Sonnett to Chester C. Davis, February 5, 1963 [Doc. 459] A-2647

Notice of Motion by Toolco, February 6, 1963 [Doc. 170] A-2648

Affidavit of Nazeeh Habashy, February 6, 1963 [Doc. 172] A-2649

Transcript of Pretrial Hearing Before Judge Metzner, February 6, 1963 [Doc. 187] A-2650

Affidavit of Bruce Bromley, February 15, 1963 [without exhibits] [Doc. 179] A-2676

Affidavit of William C. Chanler, February 15, 1963 [Doc. 179] A-2689

Order to Show Cause dated February 16, 1963, and Affidavit of John F. Sonnett, February 15, 1963 [Doc. 180] A-2692

Transcript of Pretrial Hearing Before Judge Metzner, February 21, 1963 [Doc. 189] A-2704

Order of the Court of Appeals for the Second Circuit dated June 6, 1963, Granting Leave to Appeal and Staying Damage Hearing Pending Appeal .. A-2736

Orders of the Supreme Court of the United States, dated November 16, 1964 Granting Writs of Certiorari A-2737

Orders of the Supreme Court, dated March 8, 1965, Dismissing the Writs of Certiorari as Improvidently Granted in *Hughes Tool Company et al.* v. *Trans World Airlines, Inc.*, Nos. 443 and 501 .... A-2738

Opinion of the Court of Appeals dated September 1, 1971, in Docket Nos. 34902, 35114, Affirming with Modifications the Judgment of the District Court A-2739

PAGE

Orders of the Court of Appeals, dated September 28, 1971, Denying Petitions for Rehearing and Rehearing *in banc* A-2799

Volume VII

PAGE

Excerpts from Transcript of Deposition of Charles C. Tillinghast, Jr. [Excerpts from Docs. 54, 210, 211, 216, 221] A-2800

Vol. 11 of Defendants' Exhibits to Deposition of Charles C. Tillinghast, Jr. (consisting of Exhibit 11, with subparts 11-A through 11-T, inclusive) [Doc. 238] A-3220

Opinions and Orders of the Civil Aeronautics Board with respect to the Hughes Tool Company—TWA Control Relationship, as follows:

(a) CAB Opinion and Order No. 3210, October 17, 1944 (officially reported at 6 C.A.B. 153) [not a part of the Record herein] A-3297

(b) CAB Order No. 4437, January 26, 1946 .... A-3307

(c) CAB Order No. E-922, October 29, 1947 .... A-3309

(d) CAB Opinion and Order No. E-1735, June 30, 1948 (officially reported at 9 C.A.B. 381) [not a part of the Record herein] A-3311

(e) CAB Opinion and Order No. E-4701, October 6, 1950 (officially reported at 12 C.A.B. 192) [not a part of the Record herein] A-3333

(f) CAB Opinion and Order No. E-16195, December 29, 1960 (officially reported at 32 C.A.B. 1363) A-3403

Excerpts From Testimony at Damage Hearing of Gene M. Woodfin

[Tr. 6838] • • • Mr. Sonnett: I understand, but I propose to spend a little time on this.

Q. Under the heading "Jet Aircraft," it reads:

"TWA's major U.S. airline competitors have announced that they have ordered jet aircraft for delivery beginning in 1958. The cost of jet aircraft will greatly exceed that of the latest models of piston-engine aircraft (although they will have greater speed and capacity) and their use will require substantial investments in ground equipment and will pose major problems relating to operations, traffic control, maintenance and airport availability.

"TWA has placed no orders for jet aircraft, but its management believes that it will be necessary for TWA to operate such aircraft if it is to maintain its competitive position and that the cost of the required aircraft, spare parts, and engines will exceed $320,000,000. Accordingly, TWA is making plans for the operation of Boeing 707 and Convair 880 jets.

[Tr. 6839] "Hughes has placed orders, under contracts assignable to TWA, for 15 Boeing 707-131 aircraft, 18 Boeing 707-331 aircraft, and 30 Convair 880 aircraft, for delivery beginning in 1959. These contracts are subject to modification as to number and model of aircraft covered and as to specifications of the aircraft, including seating capacity. Hughes is not committed to sell any of these aircraft to TWA, nor is TWA committed to buy any of them from Hughes. Any such transaction between TWA and Hughes requires approval of the Civil Aeronautics Board.

"One of TWA's competitors is operating turbo-prop aircraft and others have ordered such aircraft. TWA has not ordered such aircraft, but is considering these and other types of new aircraft for future use."

Assuming those statements set forth in the registration statement or prospectus were correctly made, would you have advised TWA at the time to engage in the financing which, in fact, it did engage in in 1957?

A. Well, if I may say so, the financing in 1957—and I don't know that this question has ever been put to [Tr. 6840] me, but the purpose of the issue appears in the prospectus. It also appears in the digest and DHR Trans World Exhibit No. 7. This money was to pay for planes, the Lockheed 1649 and spare parts, which it had, and to pick up some additional bank borrowing on money that it had to have at that time.

This was not intended to be a financing to cover $320,000,000 worth of jets. They were on order—I would judge from what I read here that they were using the Hughes Tool Company credit to get a place in line to have these planes ordered.

And I would not necessarily have advised any financing at all at that stage of the game if Hughes was content to pay the down payments which I think run about 10 per cent of the purchase cost on these over a period of time until, as the pressure got a little stronger for Hughes Tool Company, you could hope to have a better climate for financing.

Mr. Morehouse didn't want to do any financing during this period of time either, and I don't think I would have in 1957.

Q. So that, in your opinion, the financing in June of 1957 was not in the best interests of TWA and you would not have so regarded it at the time?

[Tr. 6841] A. I didn't say that, Mr. Sonnett.

I said they had to have that financing—they were in trouble—to pay for their 1649's.

I thought you asked me and I apologize if I misunderstood, if I would have advised them to have done a financing which would contemplate the financing of $320 million of jets in 1957. I did not intend to say that it was not necessary to have the financing of the some $43 million at that time to pay for planes that they had and were receiving.

Q. If you would assume, Mr. Woodfin, that every statement of fact set forth in the prospectus before you had been true, would you have advised TWA to go ahead with this financing in June of 1957?

A. I don't think any of those facts set forth there would be germane to the problem of whether or not you needed the money to pay for the airplanes. If they take the airplanes away, you had to do something. You didn't have bank credit. You would owe the bank $55 million. You would come to a point where you had to do some financing.

The principal shareholder says, "I will put my money out." The minority come along. I think this is one of those times you reach when you've got to put the [Tr. 6842] money up.

Q. Are you saying that the decision would have been made by Hughes and not by the management and that you had to accept whatever decision Hughes made?

A. Well, I'd say this: I'd say that, if the management decided it wanted to have this offering and they talked to Mr. Hughes, who owned—and let's asume the most independent, competent management you want to assume, but we've still got to make some assumptions about ownership, and, if he says, "I am not willing to subscribe to my part of it," I don't think you could have done it.

• • • • •

[Tr. 7200] The Special Master: I believe you intimated before leaving aside any question of motives, that the program of financing that was actually carried out by TWA is a reasonable one within—while men might reasonably have differed whether to do some of this in 1955 or 1956 or 1957, that even in retrospect, the actual financing program was within the realm of good business judgment.

[Tr. 7201] The Witness: If Hughes hadn't been there they would have been in serious trouble, because they ran into deep operating troubles starting in—I don't know whether it is operating trouble. But they started losing money.

You see, the start of 1955—1955 was a bad year for TWA. They were down from $10 million earnings in the previous year to the $5 million at the end of 1955, and each quarter was getting progressively worse in comparison to the preceding year. Contrary to American, Pan American and United, they lost money in 1956. The other companies made money in 1956. They lost money in 1957. They lost money in 1958. It wasn't until 1959 that they started making a little money again.

By this time, of course, their chances of any big equity financing other than with Hughes' help or any big borrowing had disappeared and continued to be more difficult to do from the very date that they had the May financing or June financing, whenever it is —it doesn't tell us precisely—in 1955, because the market went down like a rock from then, from then on down the road, and their earnings went down.

• • • • •

[Tr. 7259] * * * Q. Addressing ourselves again to page 21 of your report, the last sentence of the paragraph, the first paragraph under (e) reads:

> "Mr. Morehouse is assuming, contrary to our view, that the common stockholders would double their holdings in TWA when they could at best expect only a nominal rate of return for the foreseeable future."

Bearing that in mind,—

[Tr. 7260] A. I mean by "nominal rate of return," of course, TWA was paying no dividend. This was a nominal rate of return on the additional equity that was invested. We would assume they would put it in tax—in government notes or short-term governments or something so they could get some return on it.

> The Special Master: It would be the corporation that could only expect a nominal return?
>
> The Witness: Yes, the sentence is poorly drafted.

By Mr. Sonnett:

Q. With respect to that statement, let us consider the 1957 TWA common stock offering. That was a one-for-one offering, I think, as we have already established, was it not?

A. Yes, completely underwritten by Mr. Hughes when the company was in dire straits for money after loss years 1956, 1957, and in a very bad year in 1957.

Q. The subscription price of the 1957 offering—

A. $13.

Q. (continuing) —13 when the market was 14—

A. That's correct.

Q. (continuing) —what better expectation could the stockholders of TWA have in 1957 than presumably they had [Tr. 7261] or would have had in 1955?

A. Well, they would have had very little, except they were getting much closer to the jet age. At that time they had the equipment to pay for which they had on hand. There was a very definitive use for the money. And I am sure it was an unhappy financing. It is not one that one would have wanted to undertake, unless it was required.

Q. Do you recall the number of shares of the 1957 offering which were made available to stockholders other than Hughes?

A. Well, I can't tell you precisely, but it was—Hughes at that time owned about 74 per cent, as I recall. So it is about 25 per cent of 3.3 million.

The Special Master: Was your question offered or taken up?

The Witness: Offered.

Mr. Sonnett: Offered.

By Mr. Sonnett:

Q. Our figure is 860,894 shares were made available to stockholders other than Hughes.

Do you know how many of those shares were subscribed for by others than Hughes?

A. Well, approximately three-fourths.

[Tr. 7262] Q. About 75 per cent, then?

A. That's correct.

Mr. Sonnett: Would you mark this—

The Witness: 75 per cent of the 25 per cent.

Mr. Sonnett: Correct.

Will you mark these two letters, one July 9, 1957 of TWA to the Hughes Tool Company, and the second July 11, 1957 of the same subject matter to the New York Trust Company as the next exhibit, A and B?

(Letter dated July 9, 1957, from TWA to Hughes Tool Company, marked TWA Exhibit 267A for identification as of this date.)

(Letter dated July 11, 1957, from TWA to New York Trust Company, marked TWA Exhibit 267B for identification as of this date.)

Mr. Sonnett: I will offer these in evidence.

Mr. Leisure: I will object to them, until there is some questioning that would indicate their relevance.

The Special Master: I think they are relevant. I will admit them.

[Tr. 7263] (TWA Exhibits 267A and 267B for identification received in evidence as of this date.)

By Mr. Sonnett:

Q. Referring to 267B, you note the statement therein, do you not, that:

> The Hughes Tool Company had purchased 45,917 shares of the common stock. This was out of the portion made available to stockholders other than Hughes and not subscribed for by Hughes.

Is that correct?

A. That's true, plus the 170,900 shares which Merrill Lynch bought for their account.

Q. Is it your understanding of the 1957 TWA financing that the Hughes Tool Company was required to purchase those 45,000-odd shares?

A. I'd have to look at the prospectus again. I don't believe they were, but I'd like to see the prospectus.

Q. That is Exhibit 194.

A. They had to provide them with a minimum of $34 million. And I—and they had purchased the $34 million

minimum. The 45,000 shares they didn't have to pick up, if they didn't want to.

The Special Master: That is the way I [Tr. 7264] read it.

By Mr. Sonnett:

Q. Do you know the number of shares that Hughes purchased through the exercise of rights which he had purchased on the open market?

A. 170,000 shares, I would presume.

Q. 170,900?

A. 900 shares.

Q. Is that about right?

A. Yes, sir. I guess that—that's the only way I know he could have gotten them. Merrill Lynch bought the rights and that would account in my mind for the offering being as well subscribed as it was because it gave the rights some value.

Q. Was he obliged under the financing to purchase the rights?

A. Well, he was obliged to buy $30 million—up to $34 million worth. Which way he chose to do it, Mr. Sonnett, I wouldn't want to comment on, because whether that would encourage other people to come in or not it was probably helpful. Certainly they were unexercised rights that he had to pick up or could pick up in addition to that.

Q. Could, not that he had?

[Tr. 7265] A. That he could, yes, 45,000. Nobody was knocking the door down to take it all.

Q. That was not surprising in light of the then financial situation of TWA in 1957, was it?

A. No, it wasn't at all.

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Excerpts From Testimony at Damage Hearing of Nathan S. Simat

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[Tr. 7537] • • • Q. Are you a member of any professional society exercising disciplinary supervision over its members?

A. There are various professional societies to which I belong, which exercise a small measure of disciplinary control over the members of the society, but I would not say that I belong to any society that has either licensing practices or an examination practice or anything of that character.

Q. What professional societies do you belong to, Mr. Simat?

A. American Economic Association, American Statistical Association, Institute of Management Sciences, several others.

Q. Are there any others that you regard as relevant to what you are doing here?

A. Yes. I belong to a Regional Planning Association which I think covers the same kind of transportation matter that is generally covered in this report. • • •

[Tr. 7708] • • • The Special Master: Are we ready, then, to go ahead with Mr. Simat's cross-examination?

Mr. Hayes: I suppose the first step here—

Mr. Tenney: Is to move to strike it.

Mr. Hayes: (continuing)—would be to substitute the corrected pages which have been supplied for the pages in the exhibits as originally presented. That is Exhibits 271A and B for identification.

All of the material that you required Mr. Simat to present has, according to Mr. Tenney's letter, been transmitted to plaintiff's counsel, and in view of the corrections, I think the best procedure would be to consider the corrected pages substituted for the original pages.

We have submitted the corrected pages. None [Tr. 7709] of us, including our own office, has a copy of the report with the corrected pages in lieu of, and we will endeavor to get copies for your convenience whereby you will be able to tell at a glance what the original page was as well as the corrected page. We just didn't have the time to get that out before this morning.

The Special Master: On that you are now offering—

Mr. Hayes: To substitute corrected pages for the pages in the original report.

The Special Master: It will be received on the same basis as the original submission.

Mr. Tenney: Mr. Brownell, may I be heard on that?

The Special Master: Yes.

Mr. Tenney: As I stated in my letter to you, which defendants received a copy of on Friday, we wish to renew our motion to strike the original report, in which case there is no point in receiving these changed pages in evidence.

I might start out by saying we disagree strongly with Mr. Hayes' statement that we have been given what you said we were to be given.

[Tr. 7710] In aid of that motion, I would like, first, a little additional voir dire of Mr. Simat, if I may.

The Special Master: You may proceed.

Mr. Hayes: I might call to your attention the sentence in your letter to the effect that in the course of the following weeks, most, if not all of the material necessary to understand the data used and the nature of the computations was finally made available. I am taking you at your word.

Mr. Tenney: I will explain that, Mr. Hayes.

Voir Dire Examination

By Mr. Tenney:

Q. I imagine you realize, Mr. Simat, that you are still under oath, although you have not been resworn.

A. I understand.

Q. You will recall your testimony in this hearing on July 24, 1967. That was the day when I examined you on the format and preparation of this report, Defendants' Exhibits 271A and 271B, which I will call your report, and I moved to strike it.

In recalling that testimony, do you wish to change any of the testimony which you gave that day?

[Tr. 7711] A. No.

Q. Specifically, you testified extensively that as source material for your report—and I am talking about the report as it was originally filed—not about the report as you have now changed it—you testified that as source material you used TWA's employees' timetables, which are already in evidence in this proceeding, corrected from certain filings with the CAB called transmission sheets, and you expressly stated that you did not use the Official Airlines Guide. Citations for that are 7538 and 7542.

Do you recall that testimony?

A. Yes.

Q. Do you wish to change that testimony?

A. No.

Q. Another specific instance, you testified quite extensively about the so-called SLURP program and you testified that this was used at Operations Research, Inc.—we have called it ORI—and you were quite explicit about that.

Do you wish to change that testimony?

A. I have since determined that Operations Research used not the version of the SLURP program that I thought they were using, but a canned program which they obtained [Tr. 7712] from IBM, which they had modified to include certain features of the SLURP program. So I was mistaken in that respect.

Q. Would you care to give us the title of that canned program?

A. No, I don't have the title of the canned program. I will be glad to furnish it to you.

Q. You also testified rather extensively towards the end of that day that these operations were performed either under your—

> The Special Master: Read the citations for that last point into the record also.
>
> Mr. Tenney: It was explicitly covered at the pages following page 7544.
>
> The Special Master: Thank you.

By Mr. Tenney:

Q. You also testified towards the end of that day that these operations were performed either under your supervision or by others with careful checks being made by you.

For example, you talked about some hand-checking of the computer work which I had the impression you performed personally.

A typical example is at pages 7670 to 7672. I [Tr. 7713] think there are others.

Do you care to change your testimony on that?

Please remember, I am talking about your report as it was originally filed, not as it has been changed or your trying to change it now.

A. I frankly am not aware that I testified that I had performed hand calculations personally. Hand calculations were performed by my organization.

If I testified to the effect that I personally performed the hand calculations, I may have overstated my exact role.

I did perform some hand calculations, yes.

Q. First I would like to pursue the question of the Official Airlines Guide and the employees' timetables.

Mr. Simat, I have here—and I would like to go over in as much detail as is necessary to make my point, but I don't think it will take a great deal of detail—the employees' timetables effective January 10, 1961 for TWA, a copy of the Official Airline Guide, showing the January 1961 timetables for TWA, and I would like you to look at Table I, Book 1 of your computer printouts and find what you have given us as the January 1961 timetables for TWA schedules.

This is one that we looked at as a spot check.

[Tr. 7714] I would like you to examine them and see if you can determine whether that schedule was taken from the employees' timetables or from the OAG.

I think you will find, because of the Convair 880 schedules in January of 1961, that it quite clearly was taken from the OAG.

A. Excuse me. May I have the flight number read back again, please?

Q. Any Convair 880 flights.

A. Any one?

Q. Any Convair 880 flights, or all.

A. What the comparisons indicate, that while there is no Convair 880 flights shown in the Official Airline Guide, there are Convair 880—Convair flights shown in the employees' timetables and there are no Convair 880 flights shown in our schedules here.

[Tr. 7715] • • • The Witness: May I point out in this connection, Mr. Tenney, that we have on rechecking the schedule information transcriptions, found many errors and that we have, in fact, corrected these errors, we believe, in our most recent runout of the schedule information.

And you will find in the revised data that information for the Convair 880 schedules in this period is reflected.

[Tr. 7716] By Mr. Tenney:

Q. I am exploring the question of what your source material was for your original report that you testified to on July 24th, Mr. Simat.

A. Let me make this clear again, Mr. Tenney, that our instructions were that the final source of all schedule information was the employees' timetable.

This was the source to which all information was presumed to have been checked before it went into published form.

Now we have found many errors, and apparently these are included.

But let me also point out to you that before publishing our previous report that we made every effort to ascertain whether the errors in the schedule information were consequential and our test checks indicated that the information that we had transcribed if it was not entirely accurate

was nevertheless very close to the actual experience of TWA, and that revision of the information would not result in any material changing of the findings and conclusions.

Mr. Tenney: We selected January of 1961 as a spot check, because it was a logical place to expect a difference between the employees' [Tr. 7717] timetables and the OAG, because it was not until the end of December 1960, that the defendants released to TWA any of the Convairs that they had been holding up before.

When they were released it was necessary to take urgent action to schedule the planes and naturally the timetables were produced as fast as possible for the employees. The OAG of course has a lead time. So that we could check out—and it is perfectly apparent that the OAG was used.

I would like to have this document—

Mr. Hayes: May I move to strike the sort of argument. If Mr. Tenney has any questions to address to the witness I think he should address the question and confine himself to the questions.

The Special Master: You may proceed.

Mr. Tenney: I would like this document which was received on July 21st at 4:30 p.m., that is, the Friday immediately before Mr. Simat's previous appearance here, with a very limited group of work sheets that were then produced for us—I would like this marked as TWA Exhibit 318 for identification. It consists of 25 pages.

[Tr. 7718] • • • Q. I show you TWA Exhibit 318 for identification and ask first if you can identify it as a work sheet produced by your office.

A. Yes.

Q. Will you look at page 2 of TWA's Exhibit 318 for identification and read into the record the first two sentences, please?

A. "The purpose of this task is to prepare the schedules of Trans World Airlines for analysis by a computer. The necessary information will be taken from the Official Airline Guide."

Q. Do you wish to change your testimony as to the source of the information contained in your report as far as schedules go as it was originally submitted in this proceeding, Mr. Simat?

A. No, I do not.

This document was prepared at a very early stage. It is essentially an internal document prepared to train people who had no prior experience with the transcription of schedule information to correctly transcribe schedule information.

[Tr. 7719] We were at that time using for illustrative purposes the Official Airline Guide because we had only a limited number of copies of the employee timetable information.

The entire set of instructions is cast in terms of Official Airline Guide information which is in the same basic format as employee timetable information.

The analysis that was prepared was to be checked and ultimately conformed to the employee timetables, and this is why we give the employee timetables as the source of the information.

The correctness of the information is to be determined by comparison with the employee timetable and not with the Official Airline Guide.

That is the statement that I am making and that is the statement that I wished to make earlier. All of the schedule data were to have conformed by my instructions with the employee timetable information.

And I might point out in this connection that it is not only true of the schedule information but also it is true of Form 41 information, that is, financial data, obtained for TWA that we had at intermediate stages from time to time used the ATA statistics for transcribing Form 41 information rather than the Form 41 reports.

[Tr. 7720] And the reason for this is that the Form 41 reports as available to us were in such terrible condition that we were not able to work with them on a day to day basis but again the instructions were that after all of the transcription work was done, the information was to be checked back to the Form 41 reports which is the ultimate source of the data.

So that then becomes the source of the report.

I do not regard the Official Airline Guide as the source of the schedule analysis and the employees' timetable is the source of the schedule analysis.

Q. We have here a copy of instructions by your office that on their face direct the key punch operators to use the Official Airline Guide?

A. These are not instructions to key punch operators. These are instructions to our own people for the transcription of information from a schedule to a work sheet which is then submitted to the key punch operator for key punching.

Q. Have you any copies of instructions to your people calling for using the employees' timetables? I seem to recall that you testified that no copies of that sort of instructions were retained.

A. We do not normally retain copies of instruc-

[Tr. 7721] tions, of this sort.

It was by digging back through our files that we found that we had an instruction manual in this degree of detail. The reason for preparing such a detailed instruction manual is that we were in fact dealing with inexperienced people to whom a few oral instructions would have meant very little.

Q. Are you aware of any instance in which the OAG differed from the employees' timetables during the period 1959 through 1963 in which your Table 1, Book 1 of your original computer printouts used the employees' timetable and not the OAG?

A. No. I haven't made the complete check or comparison between the OAG and the employees' timetable.

Mr. Tenney: Neither have we but we made a spotcheck and the results of the spotcheck are now on the record.

I offer in evidence TWA's Exhibit 316 A and B, 317 and 318 for identification.

The Special Master: In the absence of objection they will be received.

• • • • •

Q. You have indicated, I believe in an earlier [Tr. 7722] statement today, Mr. Simat, that in the course of rechecking your work you found a number of errors.

I assume that those errors are the basis of the corrections that have been proferred by Mr. Hayes this morning.

A. That is correct.

Q. When did you start finding out these errors, Mr. Simat?

A. We had actually instituted check procedures even before the submission of our first report. We were handling a great deal of information in a very short space of time.

While we were employing checking procedures that we had every reason to believe would detect any substantial errors in the results, we were not sure at any point up to the submission of the report that we had correctly entered all of the detailed information.

For one thing, as I mentioned earlier, the status of the source material is exceedingly poor. In working with the Form 41 data for example, we were working with copies of copies. The original work sheets, I am sure was a carbon copy to start with.

We found that a number of numbers were totally undecipherable. We found in other cases that there had [Tr. 7723] actually been slippage of lines, wherein the alignment of the figures and the stub were not entirely correct.

And then there were cases where we just simply had to throw up our hands in despair, we just couldn't make out the figures at all.

The employees' timetable information was in similar shape. We were working with reproductions of reproductions and the information was very difficult to read.

We also had a number of relatively inexperienced people transcribing the information. That is the reason for the detailed manual which we do not normally prepare in connection with the schedule transcription work that we do internally. Because of the necessity for compiling the information quickly, we had to bring in people on a temporary and part time basis to actually do the transcription work.

Now, none of these circumstances is conducive to 100 per cent accuracy.

So while I knew of no specific errors at the time that we submitted our report, I was ready to wager that there were a number of errors in the basic information.

We were also compelled by pressure of time to [Tr. 7724] introduce checking procedures which were not 100 per cent satisfactory in disclosing all of the errors.

For example, in checking the schedule information, we used a sampling procedure wherein the work product of individual personnel was checked, spot-checked. If an error was found, that particular period, whatever it might be, was redone. There were some periods that were redone two, three times until we were satisfied that we had them reasonably accurate.

On a sampling basis of course, there is a certain amount of error that will get by undetected.

This was true both of the schedule transcription data and also of the cost transcription data although it was essentially true we kept our more experienced people on the cost data rather than the schedule data.

Q. Mr. Simat, I am asking you simply when you started the process of discovering these errors and making this revision? You have given us Thursday night 311 revised pages which we count as making 5,945 corrections.

We are advised that all 14 volumes of the computer printouts—that is one set—if you add that one to it it is one set—that we have been working on for two months have been rerun.

[Tr. 7725] When did it come to your attention, Mr. Simat, that you should commence this revision?

A. I have been trying to explain, Mr. Tenney, that we have felt all along that further checking procedures were required and that if we had the opportunity to perform the further checks and to introduce somewhat more accuracy into the calculations and into the basic data that we work from that we would.

The checking procedures were initiated before the publication or before the submission of our previous report. We

have been working on corrections on checking from that point forward.

We have found it necessary to put aside from time to time our work on the corrections in order to progress in other areas.

I might point out in this connection that for almost the entire month of July and a good part of the month of August we were busily producing information in connection with the original report, answering questions, compiling the basic reports, making sure that everything was appropriately cross-referenced so that the understandings as to what went into the original reports would be complete.

We were also proceeding during this period in [Tr. 7726] the preparation of our critique on the aircraft disposition program. This, too, consumed a good deal of the time and effort in the shop during the months of July and August.

We have also at the same time been proceeding on what I now call Phase 2 which is the more detailed approach that I previously outlined. And as you know, we encountered quite a few difficulties in obtaining the basic information. We have had people working on the sample forms, cataloging the information that was submitted.

We are progressing as fast as we can in that area. And all of this has taken time away from the checking procedures. But we have been progressing in that area.

In July, early July, we hired largely for this purpose, I might point out, Mr. William Wolf, who was formerly a director of scheduling for Pan American. He has been spending virtually full time reviewing the schedule data.

The Special Master: Is any further checking going on now which might result in additional modifications?

The Witness: Not of the original report, no. We have completed all of the checking.

[Tr. 7727] Q. While you were preparing all this information which you were talking about in answering questions on the original report, supplying cross-references, telling us how it was put together—which parenthetically of course you knew was the result of the correspondence that defendants' counsel and we were engaged in throughout this period—why did you not at any point inform us that a major revision of that report was under way?

A. Well, for one thing, Mr. Tenney, I do not believe that the revision is a major one.

The errors that we have corrected while they are numerous are relatively insignificant. The final results have been barely changed.

Unfortunately, the method of estimation that we used is a chain method wherein if the first number is changed, virtually every number from that point forward is changed.

But all of the changes with one or two exceptions have been very, very minor. They have not as was pointed out in the letter of transmittal significantly changed our estimate of the profit and loss from the added jet services. We are within 2 per cent or approximately 2 per cent of our original estimate.

The Special Master: Do you agree to that [Tr. 7728] conclusion, Mr. Tenney?

Mr. Tenney: I believe that he has adjusted his end results so that they are a small number of percentage points worse from the TWA standpoint. I have no means, none whatsoever, of having an opinion based on checking as to the remainder of his statement, but I doubt it very much.

The Special Master: What's running through my mind is if the changes are all insignificant with pos-

sibly one or two exceptions, which I understood you to say, whether we could not have those one or two exceptions and disregard the insignificant changes in the interest of saving time here without producing significant results.

Mr. Tenney: I would be surprised if Mr. Simat would be willing to stand on the mish-mash of his original report, frankly. * * *

[Tr. 7883] * * * Q. So Table 8A, which is jam-packed with things like that—I have a list here five pages long—Mach 3 speeds and so forth for marginal speed for 880 aircraft and other early jets—Table 8A should be disregarded, is that correct, Mr. Simat?

A. Well, I certainly didn't rely upon it. If there is some other use you can see for the information in Table 8A, the information is there, but I would certainly not rely on it for any estimating purposes.

Q. Then let us turn to Table 9 in the same volume. This table is headed "Operating Statistics of Added Flights." I take it that this is a table that you did rely on, is that correct, Mr. Simat?

A. Yes.

Q. Let us turn once again to the CV-880 aircraft, which, once again, is the first jet aircraft type.

The Special Master: Table 9, is it?

Mr. Tenney: Table 9, yes.

Q. Let us take a look at June to July of 1962 in that table, and if you carry it over to the extreme right- [Tr. 7884] hand column, you find the average block-to-block speed of added trips, and I find that the 880 aircraft was then traveling average for additional flights 1.11 miles per hour. Is that a figure that you should pay much attention to in considering added flights, Mr. Simat?

A. I certainly wouldn't pay much attention to it.

Q. What really was the normal cruising speed, approximately, of the CV-880 aircraft?

A. Oh, it's about 475 miles an hour.

Q. From February to March of 1962, it seems to have been going 177.07 miles per hour. That is pretty near stalling speed for it, isn't it?

A. No. Let me point out to you that we are talking about block-to-block speeds, and block-to-block speeds are computed by dividing the miles flown by the block-to-block time.

There is in every flight profile, as you know, Mr. Tenney, an ascent and descent factor. There is also a taxiing factor. There is also a waiting time. And it is quite conceivable that speeds as low as 30 miles per hour are flown by jet airplanes, when they are flown over short distances. And the bulk of the time in-flight is consumed in getting up into the air and coming down or [Tr. 7885] flying around in the air, but not in cruising.

So I can point out to you that it is faster to fly over a distance of 30 miles with a DC-3 airplane than with a Boeing 707 jet. Over such stage lengths, the block speed of the Boeing 707 would be slower than the block speed of a DC-3.

Q. By the way, I show you, Mr. Simat, Vol. I of the Coverdale & Colpitts report, which is TWA 4C-1.

On page 2, you will see some cruising speed information as to different types of jet aircraft. I think you will find that the CV-880 is shown as having a cruising speed of 615 miles per hour. I think you said it is someplace in the 400s.

Would you care to change that?

A. Yes, I will change that. I think I was thinking in terms of average speeds.

Q. Since we are dealing with block-to-block speed, which might well be lower than cruising speed, would you turn to the next table which is "Aircraft Type B-70," which is the symbol for the 131 aircraft, and look at November to December of 1963, and look across at that same average block-to-block speed?

The 131 was averaging a block-to-block speed of 1745 miles per hour. Would that be explained by the [Tr. 7886] flight profile, Mr. Simat?

A. Yes, in fact, it would.

Bear in mind, Mr. Tenney, I think you are forgetting that we are dealing with differences, the differences between the number of flights operated in one month and the number of flights operated in a second month, differences in the number of hours per day that aircraft are operated and differences in the number of miles.

In both examples that you have selected, you will note that the number of added departures per day were quite small. We were not dealing with any material volume of added operations, and—it is possible, conceivable that where a change in operations involves the substitution of operations to and from terminal areas where the waiting time, the taxiing time, the ascent-descent time, the congestion factors are less than they are at some of the more highly congested terminal areas, that we will get changes in the number of hours per added operation which we divided by the—or divided into number of added miles per added operation will provide block speeds of 1745 miles or even something perhaps slightly larger.

However, these do occur in a distinct minority [Tr. 7887] of cases. Over the entire period, I think you can count on almost the fingers of one hand the number of cases where the block speeds are that unusual—the computed added block speed, I should say, is that unusual.

It will happen. It happens arithmetically. If I can give you another contrived example: if we were to add a fraction of a flight in New York where the terminal time is very high, we would get under such circumstances or tend to get, I should say, very low added block speeds.

On the other hand, in adding fractions of flights to points such as Fresno, where the congestion factor is very low, we could very well get block speeds of this amount.

Q. Doesn't this show that this concentration upon differences in an extrapolation from differences that you have engaged in in deriving your data for this entire analysis arithmetically, as you put it, inevitably produces wild statistics that you have then ground into your regression analysis?

A. That is not so. The use of first differences or differences between one period and another will, for certain ratios, produce fairly wide differences, particularly those ratios involving hours and miles.

[Tr. 7888] There is generally more stability to ratios involving miles and numbers of aircraft departures, that is, the ratios which are depending upon average hop, and over a period of five years the resultant average relationships, in my opinion, are satisfactory.

In almost every instance that we have been looking at, the number of added aircraft, the number of added departures are relatively small.

Q. I thought that you testified earlier that in your regression analysis there was no weighting of these segment-month statistics for the number of flights involved but the change was always treated as equivalent to any other changes.

A. That is correct, we treated each month as a separate and distinct entity.

Q. If you take into account the extremely small values, there are certainly quite a number of strange results here.

* * * * *

[Tr. 7894] * * * Q. There are, of course, throughout these tables a number of operating statistics of added flights, and then operating statistics of deleted flights that are similar to the ones that I have called your attention to that have block to block speeds that are out of line with any possibility for a given airplane, that have lengths of hop that are surprising, to say the least.

They are, as you have explained, produced by the arithmetical results of the study of what you have called first differences here. But I think that you made it clear enough that you think these results are sound in your opinion and that you are willing to extrapolate from them so I won't go over all these other details.

Do you still insist that the method of subtracting one month from another month by type of aircraft and dividing these mileages and departures and relying on the factorial differences that you have got is a sound method of analyzing how an airline will operate?

A. Let me first point out to you, Mr. Tenney, [Tr. 7895] that we did not use the block speed relationships in any of our analyses programs in the form in which they appear in the tables referred to by you.

The only information that we used in connection with our analyses was the length of hop of added flights. And I do not believe that you dwelt too long on the length of hop added flights or deleted flights.

I do want to point out, however, that we did not use the block speed relationships nor did we use the utilization relationships in any further analysis.

I do not feel that the information that we were required to use for want of other information to establish the pat-

tern of added flights is the best information that I can conceive of for estimating how added airplanes would be used. It was, however, the best information available to us.

We worked with obvious problems insofar as we used information which was uncorrected for seasonal variations in traffic demand.

If we had better information, we would use the better information.

The estimating problem that we were confronted with was to make the best estimate we could with the information available on the stage lengths for which or [Tr. 7896] over which added jet aircraft would be operated or the added jet aircraft would be operated or the stage lengths from which jet—or piston aircraft would be deleted.

The best experience in my opinion as to what would happen with an additional injection of jet capacity is what did happen when capacity was added.

We were compelled by reason of not having the internal records of TWA to use published records as to the scheduling of aircraft. And we find in comparing the published scheduling records with reports submitted by TWA to the Civil Aeronautics Board that it is not always true that when flights are scheduled with Convair 880 aircraft they are operated with Convair 880 aircraft. We are also finding or have found that it is not true that when flights are scheduled with 131 aircraft that they are always operated with 131 aircraft.

There are substitutions of aircraft which do not appear in the schedule data. And for these reasons there is a certain amount of infirmity in the schedule information. On the other hand, there is nothing better—or was nothing better available to us.

And as for the soundness of the conclusions [Tr. 7897] that we have derived from the data, it is a fact that the

stage length of jet operations decreased as jets were added. Nothing will alter that fact.

The decline in stage lengths is occasioned by the additional jet capacity at lower stage lengths than those flights that were operated before the addition.

This is a simple mathematical conclusion. If the flights were added at the same stage length as those already operated, there would be no decline in stage length. It is obvious that added flights were coming in during the period at lesser stage lengths than the flights that were already being operated.

We have used what we think is or was the best available information to us to estimate the relationship between the existing and added flight stage lengths, and I believe that our estimates are reasonable. We were able—

The Special Master: Can I interrupt at this point? I don't like to get too far out of tune with the development of the case. I am quite puzzled at this point.

Do I understand that the effect of the shorter stage lengths would be to increase your [Tr. 7898] estimated costs of operation?

The Witness: That's exactly right, sir.

The Special Master: I hope as we go along we can keep this in mind. How can it be that two people so expert in this field having the advantage of actual operating figures can estimate the financial results to TWA in the operation of a comparatively small number of airplanes and come-up with a difference of over $100 million in a five year period which is over $20 million a year?

I hope somewhere along the line we could get a summary so that I could focus on it while we are in the course of cross-examination here as to what are

the categories of difference here, because just at first blush it seems all out of line with me.

Mr. Tenney: Mr. Brownell, that is exactly what I plan to do in the course of cross-examination. It is quite a lengthy report and it has a lot of figures in it. But I propose to go through the report section by section, giving Mr. Simat as I believe I have today an ample opportunity to explain what he did. And I believe that it will be quite apparent how he has [Tr. 7899] come out with these diametrically opposite conclusions from the plaintiff's experts here.

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[Tr. 7917] • • • By Mr. Tenney:

Q. In Book V of the computer printouts, Table 16, the very first jet covered—

A. I believe it is the 880.

Q. 880. Have you found it?

A. Yes.

Q. Here I find that you have 34 samples for a study, Mr. Simat, and once again the data are determinable from the left-hand column, giving the Y values and the right-hand column giving the X values for your selected sub-case, and once again can be plotted in the same way.

[Tr. 7918] Is that generally correct?

A. That's generally correct.

Q. Have you attempted to plot this?

A. No, we have not made scatter diagrams of the information on this table.

Mr. Tenney: I ask that this graph be marked as TWA Exhibit 320 for identification.

• • • • •

By Mr. Tenney:

Q. Assuming that TWA Exhibit 320 for identification is a correct transcription graphically of the data set forth in your selected sub-case on the 880s, and that the least squares line, as there represented, is a correct representation graphically of your selected equation, a statistician, do you consider that equation a very good fit of the data?

A. If that were the only information available, I might be somewhat disturbed about the strength of the relationship, but the information that you have plotted on the chart is not the only information available.

[Tr. 7919] I also had available to me the information that the Convair 880 stage lengths in actual experience decreased as Convair 880 aircraft were added.

I had the relationships that we had fitted not only to the Convair 880 equipment, but also for the Boeing 707s, 131Bs, the 131s and the 331s, all of which yielded a characteristic pattern that indicated that the marginal stage lengths, stage lengths at which added operations were performed, were substantially below the stage lengths of the existing operations at the time of the addition.

The relationships, moreover, are consistent among the various types of jet aircraft.

They are not only supported—they not only support one another, they are also supported, I think, by the planning expectations of TWA.

From our analysis of the TWA jet plans, we find that in projecting the usage of aircraft about to be delivered, that TWA's plans staff similarly made provision in their planning estimates for a decline in the average stage length of operations as the size of the fleet was built up. And this, of course, again indicates that the marginal load factor, the load factor at which added services were being performed or to be performed, is lower than the average stage length.

[Tr. 7920] So, taken alone, the relationship is not as good as I would have hoped it to be. Taken together with all other available information, the relationship yields a consistent result which is consistent not only with other relationships similarly derived for other types of aircraft, but also consistent with experience.

The Special Master: May I ask a question right there?

Would you go so far as to say in your own analysis that the other observations and information which you had in themselves was the basis of your final judgment rather than the study that you made here?

The Witness: That is exactly right.

As I indicated, we did not expect to obtain high correlations from the use of the kind of information that we used in these anlayses, because we knew we were including seasonal distortions in the picture and we just didn't anticipate that the relationships would be that good.

On the other hand, we did get relationships from the analyses that were consistent with what we expected to find, and these relationships, I might say, are supported not only by empirical evidence, but [Tr. 7921] I believe by sound business practice.

In the scheduling of aircraft, an airline would ordinarily use the first airplanes that it receives in those uses which are the most profitable to it.

As additional aircraft are received, they will go into the next most profitable uses, and so on.

In the industry today, and it was true in the 1959-1963 period as well, the most profitable operations were conducted in the longer haul stage lengths.

Short-haul operations are today and they were in the 1959-63 period, either unprofitable or relatively unprofitable, compared to longer haul operations.

So the relationships that we determined here were relationships that we did expect to see. The problem is simply one of measurement, attempting to find the best measurement of the added stage length and it is in this area that we expect that the supplemental report will make a substantial contribution.

By Mr. Tenney:

Q. But, Mr. Simat, this is the only data you used in your statistical analysis, isn't it? None of the stuff [Tr. 7922] you are talking about is involved in the statistical regression analysis in these printouts?

A. These are the only data that we used to establish the precise relationship between the marginal stage length and the added stage length, to test the principle of whether the marginal stage length was, in fact, an amount below the average stage length.

We considered considerable additional data, including other information that appears in the IBM runs that have been made available to you.

Q. Is any of that additional data involved in the regression analysis that produced the equation that you have used to determine stage lengths?

I would like a yes or no answer to that.

A. I believe I have already given—

Q. I would like a yes or no answer to that.

A. To determine the exact relationship between added stage length and average stage length that was used in our estimates, we used no data, but the data contained in these analyses.

Q. Isn't it entirely clear that to any statistician—and, of course, you are an expert statistician, Mr. Simat—from this plot that the relationship shown by that least squares

line is statistically invalid and not as you [Tr. 7923] testified in your direct testimony statistically valid?

I refer to page A5 of Vol. II of Defendants' Exhibit 271.

A. One of the biggest mistakes that a statistician can make is to accept the data that he is working with as being beyond reproach.

A statistician must consider, in my opinion, the quality of the information that he is working with at the time he draws his conclusions.

It is customary practice among statisticians, for example, to exclude certain observations, on the grounds that they are atypical.

It is also a practice among some statisticians to weight observations differently. Those which they accord more standing to are weighted more heavily than those which they feel are more nebulous, more tentative, perhaps subject to greater error are weighted less heavily.

I have already testified that we considered a number of the observations here, those, for example, produced where the traffic was either trending upward or downward, seasonally, to provide a distortion in the relationships.

What we hope to have is a balance in the distor- [Tr. 7924] tions. And I believe that we did, in fact, achieve a balance.

We got on balance a relationship which was consistent with what we would have expected on an a priori basis.

Q. I don't see how you can have it both ways, Mr. Simat. Either you are going to rely on history and not on a statistical analysis that you say you have determined to be statistically valid—in that case we can talk about history and we have no quarrel about history if history is used in an undistorted way.

But I do not see how you can refer to history to back up a statistical analysis that you have testified—and you are under oath on this, Mr. Simat—

Mr. Hayes: He is quite conscious of the fact he is under oath. Let's not be Perry Masonish about this.

Mr. Tenney: It happens to be an important factor here.

Mr. Hayes: Everything is important in this case, Mr. Tenney.

Q. Mr. Simat, do you know of any instance in which a statistician has represented an analysis as bad as this [Tr. 7925] one as being statistically valid besides your own?

A. Yes.

Q. Name one.

A. In the first place, I do object to the characterization of the analysis as bad.

There are a number of observations that are plotted on the chart which is marked for identification as TWA 320. They do not all have the equal value.

The fact is that a least squares line fitted to all of the observations does show the kind of trend that we anticipated we would receive.

The fact that there are observations above and below the line do not shake my confidence in a line, particularly since I do know from other information that the line that we obtained is the kind of line that must have historically occurred in the TWA experience.

The Special Master: That means you disregarded this particular part of the study in reaching your conclusion? Because this would appear to be contrary to your—

The Witness: No, we haven't disregarded it, this part of the study. We have used the relationship shown here to determine the exact mathematical relationship between the stage length of added [Tr. 7926] flights and the average stage length. We have used it for that purpose only to find a measure of the relationship between the two results.

We have not used correlation in this case to test whether the relationship is indeed valid, because there is other information which I think is superior, that indicates that we are dealing with a valid correlation.

Now, I personally would have hoped for a more defined relationship in the sense that the amount of distortion present would be less than is here.

I believe that the way we have conducted the analysis, we have balanced out upward and downward distortions.

What I am saying in short is that I personally do not place much weight on the correlation coefficient that is derived from this particular relationship.

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[Tr. 7928] • • • By Mr. Tenney:

Q. We have prepared in exactly the same way graphs of the data set forth in Table 16 of the computer printouts in your preferred sub-case with respect to the other two types of jets, as to which you have determined equations that are set forth and used in your report.

The equations themselves, of course, appear on page A7 of Vol. II of your report. The data are derived from the computer printouts.

I take it, Mr. Simat, that your answers to similar questions with respect to these two charts would be the same

as the answer to the questions that I have asked you on the earlier charts. Would that be so?

A. Yes.

Q. Keeping these computer printouts in front of you, there is some additional information on these computer printouts that I would like to examine.

I think that this table which I have had prepared in blank, which can be filled out from data in the computer printouts, may be helpful.

I show you the form of the table.

[Tr. 7929] Ignoring, for the time being, the latter two columns, I would like to refer to the computer printout and determine with you what the figures would be for the first three columns that are blank in this form.

To explain the left-hand two columns, if necessary, the left-hand column simply identifies the aircraft type, and the next column sets forth the equation taken directly from your page A7 of Vol. II of your report. It also, of course, is derivable from the computer printouts.

The next three columns are the ones that I would like to obtain the information called for.

Turning to the B-331, can you tell us what the R figure is or coefficient of correlation for your preferred equation in the B-331, Mr. Simat?

A. The figure is .24429.

Q. How about R^2?

A. .05968.

Q. How about the standard error?

A. 3906.831.

Q. The CV-880 comes a little earlier in the printouts, I think you will discover. I wonder if we could get the same information for the CV-880?

A. The R is .17838.

The R^2 is .03182.

[Tr. 7930] The standard error is 931.694.

Q. Next on the B-131—

The Special Master: Is this for each plane? When it says B-331, does that mean for each increase, each plane added?

Mr. Tenney: This is the formula that Mr. Simat has derived for use in determining the stage lengths for added flights for B-331s throughout the period.

The Special Master: Generally?

Mr. Tenney: Generally.

The Special Master: I see.

By Mr. Tenney:

Q. On the 131, what is the corresponding information?

A. The R is .69148.

The R^2 is .47815.

The standard error is 2345.181.

Q. Then the B-131B, which is the last of the jets as to which you have derived equations set forth in your report?

A. The R is .27594.

The R^2 is .07615.

And the standard error is 1864.768.

Q. Those standard error figures are all in miles, as [Tr. 7931] indicated in this table; is that correct, Mr. Simat?

A. Yes.

Q. Turning to the last two columns left blank in this form that I have given you, the expression at the head of the next-to-the-last column, 1 minus R^2, I believe you defined at our last session as the coefficient of nondetermination; is that correct?

A. That's correct.

Q. And that can be derived, can it not, by the arithmetical subtraction of R^2 from 1; is that correct?

A. Yes.

Q. The square root of 1 minus R^2, which is the expression at the head of the final column, we found at our last session is the coefficient of alienation, I believe; is that correct?

A. Yes.

Q. And as indicated by the form of the expression, once the coefficient of nondetermination has been obtained, its square root can be calculated and that will be the coefficient of alienation; is that correct?

A. Yes.

Mr. Tenney: It would save time, perhaps, if I furnished everyone with those figures. They are readily obtainable, of course.

[Tr. 7932] I would like to have the sheet which Mr. Simat has been filling out marked as TWA Exhibit 323 for identification.

Mr. Hayes: He did not fill it out. He was reading the figures.

Mr. Tenney: In that case, I would like to have this sheet which sets forth in the columns to which Mr. Simat was referring identical figures to those which he read.

On the last two columns, the figures are obtainable by the mathematical computation that he has just described.

I would like that marked as TWA Exhibit 323 for identification.

Mr. Hayes: You don't want that. The other one would be 323.

Mr. Tenney: I withdraw that. I thought I would be marking something that he had been marking, but it is unnecessary under the circumstances.

• • • • •

By Mr. Tenney:

Q. Referring to Arkin and Colton Statistical Methods [Tr. 7933] Book, which we were referring to at our last session, on page 85, I read the following:

> "Just as the coefficient of correlation is a relative measure of the degree of association between two series, the coefficient of alienation is a comparative measure of the lack of association."

Do you agree with that statement, Mr. Simat?

A. Yes.

Q. Looking at TWA Exhibit 323 for identification and looking at the extreme right-hand column, we find that the coefficient of alienation for your formula as to B-331s is .96970, which is very nearly perfect alienation or nonassociation, isn't it, Mr. Simat?

A. What the formula indicates is that there is a considerable amount of variance which is not explained by the relationship.

As I have testified, I would expect that.

Q. You have even more perfect alienation for the CV-880 formula, do you not?

A. There is a higher coefficient of alienation, meaning that there is more unexplained variance, yes.

Q. Even for the B-131, the coefficient of alienation or the measure of nonassociation of the data that you have been analyzing is greater than the coefficient of correla- [Tr. 7934] tion, is it not?

A. That's true, but from that one cannot conclude that there is an invalid statistical relationship between the two variables.

Q. The final jet that we have here, we have once again a very high coefficient of alienation, .96, which is far higher

than any measure of association shown for your formula; is that not correct?

A. That is correct, there is a considerable amount of unexplained variance.

Q. Mr. Simat, do you wish to change your testimony as set forth on pages A7 of Vol. II of your report to the effect that you have determined that these formulas are statistically valid and a significant improvement in estimating stage lengths if added jet flights?

A. No.

* * * * *

[Tr. 7978] * * * Q. The historical average was 1844 miles for B-131s during the year 1959, and your report has statistically determined that added flights would be at 1401 miles by the [Tr. 7979] use of your equation in part A of Vol. II; is that correct, Mr. Simat?

A. Yes.

Q. Referring to Ezekiel and Fox, page 24, a portion of which we read into the record some time ago, you will recall that Ezekiel and Fox suggests that the standard error of an average or an estimate should be given together with it as one method of indicating the statistical significance of the average.

The standard error shown on TWA Exhibit 323 for your B-131 equation is 2345 miles. So that if you were to follow the practice suggested by Ezekiel and Fox, an appropriate way of stating the mileage that you have estimated for 1959 B-131 added air flights would be, would it not, 1411 miles plus or minus 2345 miles?

A. Well, I don't know that that's an appropriate way of stating it. And I agree that you should indicate a standard error of the estimate. It could be one standard error on one side of the number, two standard errors, three standard errors.

There is no single practice that is preferred.

But I don't know what implication you are attempting to obtain from all this. Whatever the standard error of the estimate may be, what the equation yields is the [Tr. 7980] most probable value of the marginal stage length.

Q. And if, as you suggested, you were to use two standard errors and follow the Ezekiel and Fox method of notation—you would only use two standard errors if you were trying to emphasize your interest in accuracy—the notation would be 1411 miles plus or minus 4690 miles, wouldn't it?

A. You understand, of course, that the standard error is both to be added and subtracted. So that having arrived at a figure of 1411 miles as the probable value, that what the standard error is saying in effect is that you could subtract from that figure as well as add to that figure.

And it could very well be that the true marginal stage length is below the figure of 1411 miles that we have estimated. It cuts both ways.

The Special Master: It would be somewhere between 0 and 4000 miles, roughly?

Mr. Tenney: It might be minus, sir, by his analysis.

The Special Master: It might be minus down to 0? It might be plus up to 4000. Would that be right?

Mr. Tenney: I suppose so, sir. Some place [Tr. 7981] in that range.

The Witness: Well, the equation determines the most probable value.

The Special Master: Yes, I understand.

* * * * *

[Tr. 8007] * * * Q. Would you turn in your report, Mr. Simat, to page B-8?

Towards the bottom of the page you state:

> "Selecting those city pairs where increases in jet services were accompanied by decrease in piston services, we correlated the amount of changes in jet services with the amount of changes in piston services for the various combinations of jet and piston aircraft types involved."

You go on to say that you did the same thing among piston types, and you state that the correlations appear in Table B-V on page B-9.

What was the purpose of this analysis, Mr. Simat?

A. The purpose of the analysis was to ascertain whether the introduction of jets displaced the piston [Tr. 8008] type aircraft in rough proportions or whether the effect was concentrated in one or another of the piston type aircraft.

In short, we were testing Mr. Wemple's premises and our own premise by this examination.

If, in fact, the introduction of the jets affected only the long haul piston aircraft, we would expect to find correlation between the added jet services and the displaced piston services only between jet aircraft and such aircraft as the Lockheed 1649A.

We did, however, find that there was a strong correlation between added jet services and displaced piston services for all prevailing types of piston aircraft. And this we believe supports the validity or our estimate that where we have in estimating the distribution of piston miles displaced by plane type allowed for proportionate declines, in the piston miles operated by all types of aircraft.

Q. How was this analysis performed?

A. It was performed by selecting those city pairs and those periods, changes from one month to the next, where there were increases in jet operations and decreases in

piston operations with the particular types of airplanes involved here.

[Tr. 8009] In other words, for the correlation between Boeing 331s and Martin 404-202As, the R being for that correlation .87, we selected all of those segments where there was an increase in Boeing 331 service and a decrease in Martin 404-202A service in the same period, and we correlated the amount of correspondence in the segments between the amount of added Boeing 331 service and the amount of retired or displaced Martin 404 service.

In short, if one mile of Boeing 331 service was added and one mile of Martin 404-202A service was displaced, we had a correlation between those two factors.

If it varied among the segments, then in some cases the amount of added Boeing 331 miles might be five and the deleted Martin 404 miles one, so that we had one for one mile displacements, five for one mile displacements, ten for one mile displacements and so on, the correlation would be lower.

It was only when the displacement was on either a mile-for-mile basis or some defined ratio that remained constant among the various pairs of points that we got high correlations and this—what's set forth here is the result of those regressions.

Q. Would these additions and deletions be on the same segments?

[Tr. 8010] A. Yes.

Q. And in the same month?

A. And in the same month, yes.

Q. Since there are 60 months and well over 100 segments served by TWA at all times during this period, you have approximately—you have a minimum of 6000—actually I think it is closer to 8000—segment months that you were studying, is that correct?

A. You would have to multiply that by another factor to provide for the number of different combinations of aircraft that are under consideration.

Q. But each segment month is separately studied to determine what combinations of aircraft you can find to have changed in that segment month, is that—

A. That's right.

And one particular segment month can provide as many as ten combinations of aircraft, ten or more, taking two at a time.

Q. Where in the computer printouts is this analysis to be found?

Actually, Mr. Simat, I think——

A. The basic data, of course, appear in Table VIII, Book III.

Q. The regression analysis to be found in Table XX [Tr. 8011] of Book V?

A. Also Table XXI.

Q. Looking at your chart on page B-9, the first half of it where you are showing correlation between added jet services and displaced piston aircraft services, there are 27 different correlation figures shown.

Comparing them to the correlations that appeared originally on your unrevised page B-9 there really is very little similarity. They are practically all changed. They aren't even all relating to the same pairs of aircraft types.

Can you explain why these results were changed so very much in your revision?

A. Well, in the first place, I don't agree with your characterization of the results. I think that both the unrevised and revised data indicate the same general picture, and that is the correlation between added jet services and deleted piston services across the board for all types of piston services.

As to why there were changes, as you know there were some errors in the original schedule analysis, and these errors were corrected in the revised schedule analysis.

In some cases, the number of instances where we [Tr. 8012] had an increase with one type of airplane and a decrease with another type of airplane, these were diminished to the point of no return or were added and so we have somewhat different results.

But the picture is in my opinion almost exactly the same and the changes themselves are not material.

Q. In original page B-9 for these two particular aircraft types you referred to a moment ago, the Martin 404 and the Boeing 331, originally you showed a correlation coefficient of 1.00.

Now, in the revised page you show a correlation coefficient as you mentioned a moment ago of .87.

Looking at Table XX of Book V where the regression appears for this particular pair of planes, it is opposite sign change M4 versus B30 is the heading—have you found the table, Mr. Simat?

A. Yes, I have.

Q. How many samples is this based on?

A. Two.

Q. So that out of the, say, 8000 segment months, there were two segment months in which there was a change in the service of opposite sign nature between Martin 404s and Boeing 331s, is that correct?

A. That's correct.

[Tr. 8013] Q. Actually I was rather surprised in the light of that number of samples at the change in the correlation coefficient between 1.00 in your original and your revised .87.

With two samples, you only have two points, don't you, Mr. Simat?

A. That's correct.

Q. Isn't it true that you can draw a straight line between two points that passes perfectly through those two points necessarily?

A. That's certainly true.

Q. What would the correlation coefficient of such a straight line be with respect to those two points?

A. 1.00.

Q. Yet the correlation coefficient set forth in this table is as you reproduce it in your report, .87, is it not?

A. That is correct.

Q. Can you explain this apparent anomaly, Mr. Simat?

A. The only way I can explain it and I would certainly have to check into it is that the RHO which is printed out here is a RHO corrected for the number of samples.

• • • • •

[Tr. 8018] • • • By Mr. Tenney:

Q. Mr. Simat, just before lunch, we were talking about Tables 20 and 21 of the computer printouts and their relation to the correlation set forth on page B-9 of Vol. II of your report.

We had been talking about the particular relationship between Martin 404s and B-331s and had noticed that there was a sample size of 2 in Table 20 with a coefficient of correlation of .87.

On Table 21, which takes in all sign changes for that same pair of types, there is a slightly larger sample size.

Have you found the table, Mr. Simat?

A. Yes, I have.

Q. The sample size there is 5, is it not? • • •

[Tr. 8019] • • • A. Yes, the sample size is 5.

Q. So that if you take all instances out of the 8000 segment months under study in which changes in both the 331s

and Martin 404s occurred, there are 5 of which 3 had changes in the same direction; is that correct?

A. Yes.

Q. It was only the other two that had changes in the opposite direction that you had studied in Table 20 coming up with a correlation coefficient of .87.

Now, when you take the remaining three into account in Table 21, the correlation coefficient is only .25; is that right, Mr. Simat?

A. Yes.

Q. And R^2 is .06?

A. That is correct.

Q. To take the one that you were looking at a moment ago that I inadvertently misled you to, the Martin 404 against the CV-880, you have a sample size there of 3, [Tr. 8020] taking all changes into account in the 8000-segment months, is that right, Mr. Simat?

A. Yes.

Q. And the coefficient of correlation there is .29 and the R^2 is .08; is that right?

A. That's right.

Q. Of those three samples, one involves changes in the same direction. Table 20 only studies another case of a sample size of 2 in opposite directions.

If you turn to Table 20 on that pair of airplanes, you will find a coefficient of correlation .65, which, once again, is surprising, since a straight line can be drawn between the two points, but still considering the sample size and the nature of the coefficient of correlation, is that a very statistically valid relationship that you have determined?

A. No.

• • • • •

[Tr. 8064] By Mr. Tenney:

Q. The figures that we looked at on page 4-33 were only for 1960, of course, and they only reflected the passengers deleted because of the addition of that portion of the six additional 331s that were put on domestic service in 1960, which was an average of 1.4 aircraft.

If for 1960, for example, you wish to count all the passengers that were deleted, piston, because of, according to your study, the replacement of piston flights by jet flights, you have to go to Part V, VI and VII.

In Part V, the figures are on page V-20. This relates to the earlier delivery of CV-880s, twenty in number. Excuse me. Early deliveries of the Boeing 331s and 131s. I am sorry.

And the 1960 total of passengers deleted works out at 83,371.

For the twenty CV-880s, that is Part VI, on page 6-18, and a large number of passengers are deleted in 1960. It works out adding all these types together at 947,374.

In Part VII at page 7-19, still in 1960, for ten additional 880s, we have an additional 533,971 piston passengers deleted for a total in that year alone of 1,729,434 piston passengers that TWA is assumed to have [Tr. 8065] lost.

Totaling the corresponding tables for jet passengers added, you get 546,707, for a net loss of 1.2 million passengers.

Doing the same thing for all others, coming up with a grand total—none of these figures are added up and totaled by year in your report—but totaling them up, we find that in the five-year period TWA has deleted 5,102,206 piston passengers, but has only gained 2,041,515 jet passengers for a net loss of over 3 million passengers.

Don't you think that computing a net loss of over 3 million passengers as the direct result of reequipping the airline with new, modern jet equipment is a little strange, Mr. Simat?

A. Not a bit. As a matter of fact, my figures don't entirely agree with yours, but they are very close. And they indicate that over the five-year period, according to our estimates, there would be a decrease of approximately 13 per cent in total passenger originations of TWA, and a decrease of 2.5 per cent in the total passenger miles flown by TWA.

And if I again—I again call your attention to the statistics which I cited earlier that indicated that be- [Tr. 8066] tween 1959 and 1961 alone at a time when TWA added approximately 1 billion seat miles to its operations with jet airplanes, TWA suffered a loss of over 10 per cent in the number of passengers which it carried, and I believe a loss in the passenger miles—I haven't checked that figure—I will right now—

Q. You attribute this loss to the direct result of the equipment with jet aircraft, Mr. Simat?

A. There is a loss in passenger miles from a total of 4.6 billion to 4.25 billion, approximately, in a two-year period.

And I do attribute this loss to the scheduling changes which accompanied the introduction of the jet fleet.

As I pointed out, the replacement of piston aircraft miles with jet aircraft miles in the longer stage lengths and the increase in the absolute number of jet flights operated in the longer stage lengths did not develop any material amount of traffic.

On the other hand, the displacement of piston services from the shorter stage lengths did have a material impact

on the volume of traffic moving in the short-haul segments. And it did decrease in absolute terms the number of passengers and passenger miles that [Tr. 8067] were flown over those segments, because the short-haul market is extremely sensitive to the number of flights that are operated, the frequency of service and frequency of service was curtailed and curtailed very markedly during this period.

Q. You believe that by TWA getting and putting into service ten additional Convair 880s and about perhaps up to one-third of six additional Boeing 331s that would have been assigned to domestic service, plus the somewhat earlier receipt of the aircraft, both the additional and the ones that it did, in fact, receive—it is your opinion that this would have had the direct result of TWA losing net something in the neighborhood of 3 million passengers?

A. That is correct. I think the last thing that TWA needed at this time was additional capacity. That was at a time when the entire industry was having difficulties incorporating the capacity which it had.

The earnings of all carriers were down and all carriers show the same kind of decline in traffic.

If I recall the period, the government was quite concerned at that time about the amount of over-capacity and the airlines were furnishing a report to the Board at its request, with special data indicating load factors of jet flights on the major segments of the airlines. This [Tr. 8068] was no bonanza period.

Q. Going back to this table that you were referring to in the Handbook of Airline Statistics, looking at the originations—if that is the line that we should look at—line 19—if you extend your examination from 1961, which is where you directed our attention up to 1963, you do not find that there has been a loss in passenger originations since 1959, do you, but, instead, an increase in passenger originations?

A. That is correct. And it took a very substantial growth in the economy to produce that kind of an increase in traffic.

Q. It is about a 500,000 increase in passengers net over that five-year period; is that correct?

A. Are we still referring to TWA?

The Special Master: Yes, origination.

The Witness: Passenger origination. Excuse me. I am looking at the wrong line here.

Let me point out that between 1959 and 1962 the number of passenger originations on TWA in no year exceeded the 1959 total. It was only in 1963 that we had the increase of 500,000 passengers.

And I should further point out in connection with that that there was a very substantial gain in [Tr. 8069] income levels and in economic activities which accounts, in my opinion, for the general increase in traffic during this period.

It has nothing to do with the acquisition of jets. • • •

[Tr. 8070] • • • By Mr. Tenney:

Q. Mr. Simat, the answers that you were giving, explanations that you were giving a moment ago, lead rather naturally into the consideration of load factors and other matters that are discussed rather fully in your Part C, which I think we can go into more fully tomorrow.

There is one question separate point still in Part B that I would like to get before we get to Part C, and it is a change of subject.

It deals with pages B-19 and B-20 of Vol. II of your report.

On these pages there appears a section or there commences, I should say, a section headed "Number of Piston Aircraft Retired (Domestic and International Divisions)."

On those two pages which are both revised, there [Tr. 8071] are some changes indicated from the earlier version of your report.

I wonder if you could explain to me why you made those deletions?

A. Simply because I goofed. I had intended to use a method which would substantially understate the number of piston aircraft retired, so that the eliminated depreciation and insurance costs would be low.

I found that I selected a method which maximized the amount of depreciation and insurance costs that I eliminated. It was just a mistake on my part. I don't know how I managed to mesmerize myself into thinking I had chosen the conservative method, but I was wrong.

Q. When you had found out that you had not chosen the conservative method, Mr. Simat, but had, instead, chosen a method that would maximize, you decided to stick with the maximization and change the description of it as conservative rather than the other way around; is that correct?

A. I don't believe I have categorized it as conservative.

Q. You did originally?

A. I did originally, yes.

Q. And that is the substance of the deletion, [Tr. 8072] isn't it?

A. I fully confess to the error of my ways.

Q. If you had calculated the annual aircraft miles per available aircraft for each of the years in question from the actual data for that year, the result would have been fewer aircraft miles per available plane and a larger number of so-called surplus aircraft than you have assumed, would it not?

A. Yes, if we had used the low utilization rates prevailing as a result of the mothballing of piston aircraft, no longer used or useful in TWA's aircraft services or schedule services, we would have ended up with a higher number of surplus aircraft, yes, sir.

Q. On page B-21 where the table appears in which you compute the number of surplus aircraft, actually all of those dates under the word "Years" really are meaningless, aren't they? Couldn't they just as well be replaced by the year 1958, since it was 1958 data that you used?

A. Oh, I suppose we could eliminate some superfluous numbers in the table.

The fact is that the last column, the annual aircraft miles per available aircraft, is the figure that is used in calculating surplus aircraft. And the same figure was used for each aircraft type for each year.

[Tr. 8073] And that figure is based upon 1958 experience. • • •

[Tr. 8092] • • • Q. Turning, however, to TWA Exhibit 330, which sets forth both jet capacity and piston capacity, it is true, is it not, Mr. Simat, that a piston seat offered to the public on any market is, to some extent, a competition with every type of seat that is offered to the public on the same market?

A. I don't think there is any question about that. If their services are operated in the same market, if they are at all acceptable to the public traveling in that market, those services do compete with all other services in the same market that are similarly acceptable to the public.

Q. Consequently, it is relevant in determining the increase in capacity that is being offered to the public, based on your assumptions of increases in the number of [Tr. 8093] jet seats offered, to take into account the overall capacity including pistons; is it not?

A. Only to the extent that there is a direct overlap in every market in which services are offered. That is, in every market where there are jet services, there are piston services. In every market where there are piston services, there are jet services.

Also, if we are going to play the arithmetic game of adding piston capacity and jet capacity as though they were equal things, the results can be highly misleading, because while a piston seat does compete with a jet seat, it does not compete with a jet seat on equal footing.

Q. On TWA Exhibit 330 for identification the next to last column sets forth the net change for TWA alone, jets and pistons, year by year, and that column certainly is dealing with a change in the same market, is it not, Mr. Simat?

A. No, it is not.

For that column to be accurate, we would have to have the conditions that I just enumerated, a complete overlap of the market where piston and jet services were being supplied and complete comparability of jet and piston seats in terms of their appeal to the public.

• • • • •

[Tr. 8120] • • • Q. Page 403 of the 1965 CAB Handbook which I see that you are looking at gives a definition of break-even passenger load factor which is very close, almost exactly the one that you gave as your first definition, and I assume is the definition that we should use in looking at these tables.

[Tr. 8121] I read that definition into the record just for convenience.

> "Break-even passenger load factor represents the number of passenger load factor points at which scheduled passenger revenues equal the cost of conducting scheduled passenger service."

I think that is all I need to read for our present purposes for the definition.

Using break-even load factors in that sense then, Mr. Simat, what was the effect on the break-even load factors of American trunk airlines of the introduction of jets into their fleets?

A. The general impact was to reduce break-even factors.

Q. The break-even load factors for operations of jets was lower than with pistons, was it not?

A. On the basis of overall averages, that is true.

In the shorter haul markets, the break-even load factor on jet operations actually exceeds the break-even load factor on certain of the pistons.

Q. That varies in accordance with the type of jets as well as the type of pistons, does it not, Mr. Simat?

[Tr. 8122] A. It varies with the type of jets as well as the type of piston.

It varies with the distance of operations.

It varies with revenue yield.

There are lots of variables in the break-even load factor.

Q. Page 403 of the CAB Handbook, 1965 CAB Handbook, which is the page that I see you have before you, gives the average break-even load factor for the domestic trunk lines generally as being for the year 1959, 57.5 per cent; for the year 1960, 58.3 per cent; for the year 1961, 56.0 per cent; 1962, 51.3 per cent and 1963, 50.7 per cent.

Is that correct, Mr. Simat?

A. That's what the figures say.

Q. Your Table C-VII at page C-17 of your report shows 1961 as the first year when the trunk line carriers had approximately as much jet capacity as piston capacity. Before that, there was more piston capacity. After that, there was more jet capacity.

Is that correct, Mr. Simat?

A. Yes.

The Special Master: What year was that?

Mr. Tenney: 1961.

[Tr. 8123] Q. Generally, the sharp drop in break-even load factors following 1960 and for the next several years has been attributed to the introduction of jets into service, is that not correct, Mr. Simat?

The Witness: Excuse me. May I have that question read back, please? I missed something.

The Special Master: Sure.

(The question was read.)

A. I am not sure that everyone attributes the decline in break-even load factor to the introduction of the jets. I certainly do.

The Special Master: Did or did not?

The Witness: Do.

Mr. Tenney: There is time, I think, perhaps, for one more general question before lunch. It may save a good bit of time if it proves possible to answer it simply.

Q. Can we agree, all else equal, that a passenger would in all probability choose to travel by a jet rather than by a piston, if he was given the alternative?

A. I am sure we could agree on that, if we add a few more conditions. One is that the timing of the jet and piston services are acceptable to him; that the [Tr. 8124] number of stops or routing of the airplane is satisfactory, both from the standpoint of the jet and the piston services. I don't think there is any real doubt that a passenger offered a choice of alternative services at convenient departure times, offering him non-stop, where he wanted to go, that passenger would unquestionably choose the jet.

* * * * *

[Tr. 8125] * * * The Witness: I wanted to supplement the last answer that I gave to state that I was assuming, in making the answer, that the rates for transportation on the jet and piston aircraft were the same.

The Special Master: You mean the fares?

The Witness: Yes.

Cross examination (cont'd) by Mr. Tenney:

Q. Mr. Simat, if the break-even load factors decline simultaneously, it is perfectly possible for a decline in passenger load factors to be accompanied by an increase in profits, is it not?

A. Yes.

Q. American Airlines, at the end of 1959, is shown by the ICAO Fleet Statistics, which appear in TWA Exhibit 57, which is already in evidence—American Airlines, [Tr. 8126] as I say, is shown as having at the end of 1959 twenty-four jets in its fleet, all of them Boeing 707s.

I show you a photocopy of the relevant page of TWA Exhibit 67.

Is that correct?

A. Are you asking me to vouch for the ICAO Statistics or simply to tell you whether the figures you quoted are part of the statistics that you furnished me?

Q. Whether they are part of the statistics that I furnished you.

A. Yes, there are twenty-four aircraft shown for American Airlines as of the end of 1959.

Q. The corresponding table, still from TWA Exhibit 67, in the ICAO Fleet Statistics as of the end of 1960, shows that American Airlines had increased its jet fleet by an additional ten Boeing 720 jets; is that correct?

A. The same source shows that as of the end of 1960 American Airlines had thirty-four aircraft on hand, ten of which were Boeing 720 aircraft.

Q. I make that a 42 per cent increase in its jet fleet from the end of the preceding year.

Referring to the 1965 CAB Handbook which you have before you, at page 144, American's overall load factors are shown as declining from 70.4 per cent in 1959 to 65.3 [Tr. 8127] per cent in 1960; is that correct, Mr. Simat?

A. I am looking at a page 144, Mr. Tenney, and I see a load factor of 60.5 per cent which is termed the overall revenue load factor in 1959, and a load factor of 56.5 per cent in 1960.

I think you were talking about a revenue passenger load factor, not the overall load factor.

Q. Yes, I am incorrect. I did misspeak myself, Mr. Simat. I intended to call your attention instead, as you have indicated, to the total revenue passenger load factor which in those years is 70.4 per cent and 65.3 per cent respectively. Is that correct?

A. Yes.

Q. The same handbook, 1965 handbook at page 403, which we were looking at this morning, reports break-even load factors, and for American they report the break-even load factor—break-even passenger load factor, I should say—as being 65.2 per cent in 1959, but 61.0 per cent in 1960; is that correct?

A. Yes.

Q. Still in the same handbook at page 242, American's [Tr. 8128] operating profit is reported, and its operating profit in 1959 is reported as having been $24,518,000. It stayed about the same, but rose slightly in 1960 to $24,721,000, according to this report.

Is that correct, Mr. Simat?

A. Yes.

Q. So that American in the years 1959 to 1960 would be an example of an airline whose passenger revenue load factor declined while its profit stayed even or, indeed, increased somewhat; is that correct?

A. That is correct. And I point out further that between 1959 and 1960, American Airlines added approximately 1.5 billion seat miles to its total operations. While I do not have the figures for jet and piston service separated, I would assume that the great bulk of the increase, if not the entire increase, was increased seat miles operated with jet aircraft. And having added 1.5 billion seat miles during this period, American Airlines added a profit of approximately $200,000 between 1959 and 1960.

The Special Master: Operating profit?

The Witness: Right.

• • • • •

[Tr. 8142] *** Q. In 1964, for Trans World Airlines, the CAB 1965 Handbook at page 146 shows a revenue passenger load factor of 56.4 per cent which has decreased substantially from the years that we were looking at earlier, does it not?

A. Yes, and it is up considerably from the low point of the period which was in 1962 when the load factor was 51.3 per cent.

Q. On page 403, the break-even passenger load factor for TWA is shown as having declined to 48.9 per cent which is substantially lower than it was during the years we were looking at before, is that not correct?

A. Yes, it is down from the break-even load factor in 1959 and also from the break-even load factor in 1960.

[Tr. 8143] Q. On page 244, TWA's domestic operating profit for the year 1964 is shown at $50,892,000, is it not?

A. Yes.

Q. So this, too, is an example of the fact that it is possible for load factors to decline while profits increase, is it not?

A. I wish you would go back over those figures again. It was my recollection that the load factor in 1964 was up.

Q. The load factor in 1964 was 56.4 per cent and the comparison that I was drawing was with 1960 when it was 63.9 per cent.

So that over that period of time, there had been a decrease of 7.5 per cent in the load factor?

A. Yes, it is possible.

It is also possible to lose money in a rising load factor.

Q. You have explained both in your report and orally that in your opinion not only did each addition of jet capacity produce a less than proportionate traffic increase, but also that each decrease in piston aircraft capacity—that with each decrease in piston aircraft capacity the loss in piston traffic was more than [Tr. 8144] proportionate to the reduced capacity. There, of course, I am quoting from C-I of your report.

I think that you have also here earlier today and yesterday drawn the further conclusion that a net loss of airline passengers over this period was the result, is that correct?

A. That is correct.

I indicated that the explanation of the loss in traffic was a sensitivity of the passenger travel market in shorter stage lengths to frequencies of operations, that is, to the number of flights available. With the curtailment of piston aircraft services, the effect on traffic is quite marked.

Q. The 1965 CAB Handbook at page 144 has American statistics, that is, American Airlines statistics, and at page 132 it has total domestic trunk statistics.

Looking first at American and at the origination line which I think you told us the other day was the best line to look at, the line 19 as far as traffic goes, I find that in the last pre-jet year, which was 1958, American's originations are reported as 7,191,000 and that in 1963 the last year that we are concerned with in our study, at 8,402,000.

The intervening years I will read rapidly.

[Tr. 8145] 1959, 7,633,000.

1960, 8,080,000.

1961, 7,576,000.

1962, 7,998,000.

Over the period, is it not clear that American's passenger traffic increased significantly?

A. It is certainly true that over the period from 1958 to 1963, there was a significant increase in American Airline's traffic, and the traffic of every trunk line in the business.

Also, all the local service airlines, all of the international carriers. And this increase was in large part the result of a very substantial gain, in economic activity.

Q. It is also the period of the first five years in which jet capacity was introduced by these airlines into schedule service, is that not correct?

A. That is correct.

And let me point out to you, Mr. Tenney, that with respect to American Airlines' passenger originations, between the year 1959 and 1961, there was a decline in the absolute number of passengers from 7,633,000 to 7,576,000.

And this was a period when American presumably, by your count, had an edge in the number of jet aircraft.

[Tr. 8146] Q. The decline as we both know, for TWA was greater, was it not?

A. Yes, but with a greater number of aircraft, American Airlines, they should have shown, if I understand your theory correctly, a substantial increase in passenger traffic.

It is perfectly obvious that the jets that were added between the years 1959 and 1961 did not add a single passenger.

Q. I would like to put into the record the corresponding figures for domestic trunks as a whole from page 131 of the CAB Handbook, again the originations line. For all domestic trunks in 1958 there were 35,515,000 originations.

1959, 44,488,000.

1960, 45,184,000.

1961, 44,669,000.

1962, 46,759,000.

1963, 53,380,000.

The increase that those figures reflect you would attribute to the same factors that you attribute the increase in American's passengers, is that correct, Mr. Simat?

A. I increased—I attribute the increase in the [Tr. 8147] total number of passenger originations and the much greater increase in passenger miles I might point out to a greater public acceptance of air transportation, part of a continuing trend, and further to a very substantial improvement in the state of the economy.

If you will take random data for the years 1965 and 1966, you will see the increase in these two years is even more dramatic than anything that we had experienced before without any substantial influx of jets.

Q. Will you repeat that last part, please?

A. Without any substantial influx of jets.

Q. On page C-II, you make the statement at the end of the first paragraph that in your opinion:

> "A further addition of capacity by TWA or by any other air carrier would have been even more unprofitable."

Setting TWA aside for the moment, what do you mean, Mr. Simat, when you use the phrase "even more unprofitable" in that sentence?

A. I have in mind that between 1958 and 1961, for example, the airline industry added considerably to its investment in the form of jet aircraft, and yet the airline industry as a whole did not experience [Tr. 8148] an increase in earnings. In fact, there was a decrease in earnings.

So that for every dollar of investment added, there was, in fact, a loss, an operating loss.

I am suggesting that if the capacity increase had been any greater than it actually had been that the amount of the profit lost would have been still greater.

I am further suggesting that it was not possible for any major airline to have added capacity over and above the capacity it already added at a profit.

Q. The fact is that American Airlines returned a profit in its operations during every year of this period, did it not?

A. That is not the test.

The test is whether the additional investment in aircraft and in capacity produced a net operating income over and above the net operating income that would have been experienced if they hadn't added the capacity to the investment.

We are talking about adding capacity here, not maintaining capacity.

Q. How do you know, Mr. Simat, what American would have achieved if it had not added capacity during this period?

[Tr. 8149] A. We have the figures for the earlier years of the period.

I am not aware of any developments in the economy, in the climate in which American Airlines and other lines were

operating, that would have caused a deterioration in profits, except the addition of capacity.

Q. The fact remains, does it not, that American Airlines achieved a profit in each year in this period? That can only be answered yes, I think, Mr. Simat.

A. It is your question. I think the answer is yes. Let me check.

American Airlines in each of the years from 1959 through 1963 achieved a profit in domestic operations.

In international operations American Airlines lost money in 1959, 1960, 1961.

Q. I think you have already testified, Mr. Simat, that for American the international operations represented in the year that you selected to compare only two per cent of the total, a relatively minor proportion, is that not correct?

A. The total revenues are not great, but that doesn't make the operations any less profitable.

[Tr. 8150] Mr. Tenney: Would you read that back to me?

(The answer was read.)

The Witness: I would point out to you, Mr. Tenney, in this connection, that in the year 1964, American Airlines reported a net profit of $3,231,000 on total international passenger revenues of $8,200,000. By just crude calculations that appears to be close to a 40 per cent return per dollar of passenger revenue.

Q. Mr. Simat, what would have happened in your opinion to any airline that in 1959 through 1963 did not acquire jets but simply continued to fly the pistons that it had been flying before?

A. There would have been some loss of traffic.

Q. I thought you testified that there were no factors that you were aware of in the economy during this period that could have accounted for any losses other than the increase in jet capacity?

A. I believe that your earlier questions were directed to the industry as a whole.

Q. No, they were not.

A. We are now talking about a single carrier.

Q. They were not. They were addressed to a single [Tr. 8151] carrier, specifically in many instances American. The same way your sentence on page C-II that I called your attention to is addressed to a single carrier, an additional capacity by TWA or by any other carrier.

I am not talking about the industry. I am talking about a single carrier.

A. The record will speak for itself, but my recollection is that the line of questioning that came up earlier had to do with the state of industry and factors that would account for traffic developments within the industry as a whole.

Q. Let us go back to some of those questions then so that we know what we are talking about.

We were talking at one point there about American Airlines. And we are talking about American Airlines in connection with this sentence of page C-II of your report which says and I quote only this part:

> "A further addition of capacity by any other carrier would have been even more unprofitable."

I am inquiring as to how unprofitable the historic addition of jet capacity was by a specific airline, in this case, American.

I call your attention again, as I did before, [Tr. 8152] to page 242 of the CAB Handbook showing that American Airlines actually returned a profit throughout this period.

A. Perhaps, Mr. Tenney, I can illustrate some of the basic economics here with a rather simple numerical example.

Let's assume a situation where there are only two carriers in the whole wide world and they operate between one pair of points.

And let's assume that each of the airlines is operating 100 seats in the market and each is carrying 80 passengers. The load factor is in each case 80 per cent.

And by any break-even standards, this is a profitable load factor.

Let us assume that things go on swimmingly in this vein, until one of the two carriers decides that it might be desirable to add another flight and to obtain a bigger share of the market. So it does this. It adds another flight, another 100 seats.

It is now offering two-thirds of the capacity in the market, and this should entitle it to two-thirds of the traffic.

There will be 300 seats in the market, instead [Tr. 8153] of the 200 seats, 160 passengers, and the load factors will be 53.3 per cent, probably in terms of just pure break-even point, without considering return on investment and costs of capital, an amount that is sufficient to recover the operating costs of the operation for all carriers in the market.

However, what has the carrier that has added the additional flight wrought? He is now getting two-thirds of the traffic, approximately 107 passengers, in lieu of the 80 passengers he was getting before. So he is adding 27 passengers, but he has added 100 seats and the costs of 100 seats.

So by virtue of the addition of the flight, he has gained 27 passengers, but he has lost a lot of money.

Now, the operation may on an overall basis be profitable, but it is not as profitable to either carrier as it was before.

To the carrier that has been stripped of the 27 passengers that the adding carrier has acquired, he is losing the revenue of the 27 passengers.

To the carrier who has added the capacity he is gaining revenues of the 27 passengers but he is adding one heck of a lot of costs.

[Tr. 8154] So nobody gains.

Q. The other carrier lost those passengers while not doing anything at all, isn't that correct, Mr. Simat?

A. That's correct.

Now, let's go through the arithmetic again and have the other carrier recover some of those passengers.

We have our first carrier operating 200 seats now, and the second carrier in the market has decided that he is not to be outdone. So he adds another 100 seats in the market.

Now we have 400 seats in the market. We have 160 passengers divided two ways. That is 80 passengers per carrier. Divide that two ways, and that is 40 passengers per flight.

We are not operating all services at a load factor or 40 per cent.

The carrier has gained back the difference between 80 and—excuse me. Let me calculate that one out.

Mr. Tenney: Off the record.

(Discussion off the record.)

The Witness: It has gained back the 27 passengers and it has cost that carrier the cost of operating 100 seats to gain back that 27 passengers [Tr. 8155] and it has lost money in the process.

Now, ask me should it have done what it did, added the second 100 seats? The answer is no.

It was better off not operating the second 100 seats than operating the second 100 seats.

In other words, you do not correct mistakes by making additional mistakes.

Q. In that example that you just gave, Mr. Simat, you made the comparison for the second carrier between—the comparison as to what the second carrier achieved by adding its jet between the number of passengers that it ended up with after these two successive additions of capacity in the same market which was 80 to the figure that it would have had, and, in fact, since you did it in a step process, did for a time have, as a result of doing nothing while the first carrier added its flight, and that is how you got the 27 additional passengers produced by its added flight, that is, the second carrier's added flight, is that correct?

A. That's correct, yes. It is the difference between not doing anything and doing something.

Q. Why did you not compare the number of passengers that it had at the very end of all of this operation with the number of passengers that it had at the very beginning of all of this operation, in which case it would [Tr. 8156] have produced zero passengers by adding a flight?

A. Well, if you want me to make the comparison, I will, but I don't think it is appropriate.

Q. It would be quite unsound to make that comparison, wouldn't it?

A. I can't answer that question categorically.

If you assume a situation where one carrier is free to act and another carrier is not free to act, then the answer is probably yes.

But if you assume a situation where all carriers in the market are free to act, then I'm not sure what the answer is.

In other words, it is a question of whether you have to take into account what the competitive impact of the action will be.

Q. I am trying to confine myself to the example that you formulated which was as you explained deliberately simplified, but attempting to take into account competitive factors.

In the terms of your comparison of these two air carriers who are the only two air carriers in the market and they compete on this particular pair of cities, which is, of course, a necessarily simplified assumption, but in terms of your own example it would be [Tr. 8157] quite unsound, would it not, to evaluate what the second carrier achieved by adding its flight through a comparison of what it had before there had been any increases, even by the first carrier against what it had after both carriers had made their increase? That would be an unsound comparison, would it not?

A. That would be true. And it would also be unsound for the first carrier in the market to have added the 100 seats without considering the possibility that the second carrier in the market would add a like 100 seats.

Q. The answer to my question was yes, was it not?

A. With my qualification, yes.

Q. I am going to get a straight answer to my question, Mr. Simat. That's not a qualification you just gave. It is a volunteered statement about something the first carrier you say should have taken into account. The answer to my question was yes, was it not?

A. I think I've answered all of your questions, Mr. Tenney.

Mr. Tenney: Would you read my question back, please?

(The question was read.)

Q. I would like an answer to my question without [Tr. 8158] any volunteered comment as to what the first carrier ought to be thinking about while this is going on.

The Special Master: Give him an answer.

A. I believe I said it was true.

• • • • •

[Tr. 8165] • • • Q. In 1959, as this table shows, TWA flew 1,379,000,000 jet seat miles, according to your table, and 1,146,000,000 jet passenger miles, is that correct, in 1958?

A. Yes.

Q. The marginal load factor that we pointed out a moment ago appears in your table opposite the year 1960, but actually you have applied this as the marginal load factor for 1959 in your computations, have you not?

A. That is correct. We have used the change between 1959 and 1960 to guide us in determining how additional capacity operated in 1959 would be utilized.

[Tr. 8166] Q. Just to look ahead a bit, you do this in each year, do you not? The marginal load factor that you determine and put in your table opposite the year 1961 is the one that you use for calculations of 1960 results and so on down the line. 1962's marginal load factor is used in 1961. 1963 is used in 1962 and 1964 is used in 1963, is that correct?

A. That is correct.

Q. In 1960, before adjustment again, the figures shown for available seat miles for TWA are TWA's actual 1960 figures, are they not?

A. Yes.

Q. The same is true for revenue passenger miles shown for 1960, actual TWA statistics, nothing assumed about them, is that correct?

A. That's exactly correct.

Q. The amount of the assumed capacity increase does not come into your computations until after you have deter-

mined this marginal load factor from the actual capacity increase in the subsequent year, is that correct?

Mr. Hayes: I am sorry to interrupt—

A. I am not sure I understand that question.

The Special Master: Read it back, please.

[Tr. 8167] (The question was read.)

Q. If that is confusing, I will try to restate it.

A. Well, I think I understand the question now.

The answer is that the amount of capacity increase is something that is entirely independent of the calculation of the marginal load factor.

Q. The amount of capacity assumed to be increased?

A. Or assumed to be increased, yes, sir.

Q. The assumed increased capacity for TWA which both you and Mr. Wemple have used for the year 1959 can be found on page V-VII in Volume I of your report. It is Table V-F. I think as a matter of fact it may appear in one of the tables we put in. I think TWA Exhibit 329 and 330 that we put in earlier this morning actually has that figure. It has been the easiest way to look at it.

For 1959, I find that there was an assumed increase of 267.9 million available seat miles of jet capacity for TWA, is that correct?

A. Yes.

Q. Your marginal load factor is determined in this table based on a computation of the results of an addition in available seat miles of 1.640 billion, is it not?

A. Yes.

[Tr. 8168] Q. Mr. Simat, the assumed increase in capacity in 1959 is only about 19 per cent of TWA's actual 1959 capacity, but you have determined a marginal load factor based on the results of an addition in capacity of, I think it is, 118 per cent.

Is that a proper method of computing what would have occurred in 1959?

A. Yes, I believe it is a proper method of computing what would have happened in 1959.

Q. Do you really think that you would have as much of a drop in load factors from a 19 or 20 per cent increase in capacity as you had from 118 per cent increase in capacity?

A. I think that we are within the range of capacity increases where the differences in the marginal load factors are not material.

* * * * *

[Tr. 8225] * * * Q. Mr. Simat, I notice that that correlation between the B-131B and the B-720-B was by a fair amount the highest correlation in your table on C-26, which is taken from Table XX, and it is by a very considerable amount the highest of the correlations between any two pairs of aircraft that we have been discussing here when the correlations are taken from Table XXI as well.

Can you tell us what in general TWA's experience with the 720Bs in its fleet was? How many were there, in general when it did have them and what the circumstances were when they left TWA's fleet?

A. They were a total of four aircraft all told, and they were in service from July of 1961 through October of 1962.

The aircraft were leased to TWA. The figures I gave you were for domestic services. There is an [Tr. 8226] indication, a footnote to the table that in 1961 .0—excuse me—0.1 aircraft were assigned to the International Division.

Q. When did the Boeing 131B aircraft come into TWA's fleet?

A. The first of the aircraft assigned to service came in in April 1962.

Q. By the time that the 720Bs were retired from TWA's service and the lease terminated, how many 131Bs approximately had come into TWA's fleet?

A. In the last month in which there are any recorded B-720Bs, there were on the average 1.8 such aircraft, and in the same month the number of available 131Bs in domestic services is indicated as 17.6.

Q. What was the relationship in point of time between TWA entering into the contract for the purchase of the the 131Bs and its making the arrangements for the lease of the 720Bs?

A. I can't answer that question, Mr. Tenney.

Q. To put it more generally, is it not the case that the 720Bs were leased by TWA to fill in part the needs for jet equipment during the period pending the arrival of the 131Bs for which they made arrangements at approximately the same time?

[Tr. 8227] Mr. Hayes: I object on the ground that there is nothing in Mr. Simat's testimony as to this unless he knows as a matter of fact.

The Special Master: Do you know?

The Witness: I don't know as a matter of fact, no.

Q. If the 720Bs were leased as a stop gap measure pending the arrival of the 131Bs, that would tend to explain why you would get a very high correlation between the additions of 131Bs and the deletions of 720Bs, would it not?

A. If that were so, yes.

* * * * *

[Tr. 8290] * * * Q. Did that proportion in your opinion increase, decrease or remain the same over the five year period you have studied?

A. There was a slight tendency for the proportion to decrease over the five year period from which we concluded that the factor, whatever it was for jet operations was somewhat different from the factor of piston operations, that the average jet passenger would tend to make fewer intermediate stops than the average piston passenger.

At the beginning of the period, however, there were several forces which required, if anything, more stops on on the part of the jet passenger than the piston passenger because the jets were operated over a limited number of stage lengths or a limited number of markets. There was some tendency for passengers who might have used direct flights to have rerouted themselves so as to [Tr. 8291] make use of the jet aircraft involving a separate connection or an additional connection over and above the connection that they would have made if there were no jet services available.

The Special Master: Does that indicate there was a strong passenger preference for jets during this early period of jet operation?

The Witness: I think that where the jets were available, the jets were obviously the preferred aircraft. And where it was possible to make connection to jet flights and save time in the process, passengers would reroute themselves.

In those cases, of course, there would be no additional traffic created by reason of the rerouting. It is simply a matter of passengers rerouting themselves.

And if rerouting involved an additional number of miles flown, a passenger flying out of his way to make the connection, this would have a depressing effect on revenue yields. For the same amount of revenues

that the airlines would collect, it would have to fly the passenger a greater distance.

• • • • •

[Tr. 8328] • • • By Mr. Tenney:

Q. Page D-19, the next page has one thing that I found just slightly puzzling, the top of page D-19 which is a revised page.

The sentence says:

> "They establish a relatively small spread between the jet and piston aircraft percentages ratios as we would expect and they establish a somewhat higher percentage ratio for piston than for jet aircraft services as we would further expect."

And I notice that the revision on that page, the only revision was that you changed the word "lower" in the phrase "somewhat lower percentage" to the word "higher" to make it "somewhat higher percentage."

Was that change a reflection of a change in your computations or a change in your expectations, Mr. Simat?

A. It was a change brought about by the clear light of day.

As I recall my drafting of the original sentence, it was some time around 2:30 in the morning, and sometimes I am not at my best at 2:30 in the morning.

[Tr. 8329] Q. On page D-21, Table D-IX, we have what you have headed "Recalculation of Estimated Net Added Passenger Revenues to Determine the Amount of Overstatement from the use of Faulty Passenger Revenue Yields," which is a lengthy table in terms of numbers of columns at any rate, and the first three columns after the dates are taken, according to your heading, from Mr. Wemple's figures.

After that, we are dealing with your computations.

Is that correct?

A. Well, in the case of column 5, the computations are not mine. The computations were already prepared by the Civil Aeronautics Board. They are the computations of average passenger trip lengths which we derived from the Handbook of Airline Statistics published by the Civil Aeronautics Board.

Q. So this is an actual average trip length of passenger added miles, although you have headed it "Assumed Trip Length," is that correct?

A. That is correct.

Q. The next column is headed "Actual Trip Length of Passenger Added Miles."

That is not an actual trip length, that is an assumed trip length, isn't it, Mr. Simat?

[Tr. 8330] A. That's a calculated actual trip length of the traffic that was added between 1959 and 1963, derived directly from TWA's experience.

To obtain this figure, we took the 1959 passengers carried by TWA and the 1963 passengers carried by TWA and subtracted one total from another to obtain the number of passengers added.

We took the 1959 passenger miles and subtracted those passenger miles from the reported 1963 passenger miles to derive the number of added passenger miles.

Then we derived the added passenger miles by the added passengers to obtain the added distance over which the added passengers traveled.

And that figure is 1453, which is what you would expect if the added traffic were largely carried in jet aircraft.

Q. You have applied that 1453 in each of the five years, 1959 through 1963, without any change, is that correct?

A. Well, the 1453 is the average for the 1959-1963 period, and for purposes of this calculation we have used the period average and applied it to each of year of the period.

Q. If you tried to compute this figure in the manner [Tr. 8331] that you have described on an annual basis by comparing each year with the next year, could you do it?

A. It could be done. And I would anticipate that in lieu of the amount shown here of 1453 miles each year of the period, we would have a decreasing series, where in 1959 the trip length of added passengers was substantially higher than the trip length in 1963. And if I carried the calculations out on that basis, I think you would find that the column headed "Mr. Wemple's Overstatement of Net Passenger Revenues in Miles" column 9, would be higher for the years 1959 and 1960, somewhat lower for the years 1962 and 1963, and the total effect of introducing an annual average trip length would be to increase the amount of the overstatement from 4.6 to something higher.

Q. In 1960, as opposed to 1959, TWA had a decline in revenue passenger miles.

There was also a decline between those two years in originations.

You have the phenomena from 1960 to 1961.

If you applied your method in those two years to obtain an annual figure, what kind of result would you get?

A. I don't think you could apply the same method [Tr. 8332] to data for the years 1959, 1960 and 1961, since during this period, as I have testified and as you have now stated, there was an absolute decline in the amount of traffic carried by TWA, notwithstanding the addition of considerable jet capacity.

To make the calculations on an annual basis, I would—for this period—I would go to the detailed information

which has now been furnished us by TWA indicating the on-line trip length and the flight stage length of passengers that were actually carried by TWA in jet services.

We now have the information we did not have earlier, which enables us to get behind divisional averages and totals.

From the information that we now have we are able to make a better approximation or a better estimate of the average trip length of added traffic year by year for jet aircraft. In fact, we can do this for each type of jet airplane.

Q. If you performed this annual computation from 1959 to 1960 and 1960 to 1961 using the method that you described and carried out the arithmetic, in spite of the fact that TWA had a decline in those years in originations and passenger revenue miles, by your method wouldn't you come out with a negative yield figure with TWA paying the [Tr. 8333] passengers to travel on it?

A. I think we have another version here of a parable.

It was once true, Mr. Tenney, that Capital Airlines had a negative investment. In other words, it was on a deficit in its investment account and it was also true that they lost money for that year. And some witness divided the operating loss by the investment base which was negative and concluded that Capital had the highest rate of return in the industry.

The reason for that is when you divide one negative by another negative you get a positive.

Q. But doesn't the fact that it cannot possibly be used on an annual basis during much of this period indicate that this method that you have used to select a single figure which you call actual trip length of passenger added miles for each year of the five-year period is a completely unsound method?

A. Not so, Mr. Tenney.

The obvious fact which you can observe from column 5 is that the average trip length of passengers during this period was increasing. It went from 892.6 miles in 1959 to 942.3 miles in 1963.

And algebraically I know of no phenomenon that [Tr. 8334] would explain that increase in average trip lengths, save the fact that the added passenger traveled at a somewhat higher average trip length than the passengers that we started out with in 1959.

In other words, to bring the average up you have to add something at a higher value than the average.

There are varying ways of determining what the trip length is of an added passenger. In those years where there was an absolute decline in the volume of passengers and passenger miles, algebra fails you.

However, there are ways of obtaining, even for those years, the trip lengths of added passengers. And if you look at the entire period from 1959 to 1963, it is possible, using simple algebraic calculation, or arithmetic calculation, I should say, to compute the average trip length of the added passenger.

The figure that appears when you make that computation is 1453 miles. That is the trip length which explains the difference in the average trip length experienced by TWA's passengers between 1959 and 1963.

And to my mind, it is not an unreasonable figure.

Q. But to summarize, in part, this figure when you apply it in each year in this five-year period without change, isn't it true, Mr. Simat, that there is nothing [Tr. 8335] whatsoever actual about it; that it is instead an example of a variable constant added to your work to come out with a predetermined answer, otherwise known as the finagle factor?

A. It is certainly true, Mr. Tenney, that the 1453 miles does not—is not the added trip length for each year of the period. It is the average for the entire period.

And I have testified that if we determined as we now can more accurately the figure for the added trip length for each year of the period, we would find that it is higher for 59, 1959, than it is for 1963, and that if we made the adjustments in Table D-IX on that basis, that we would find that the overstatement in Mr. Wemple's estimates were even greater than we estimate in column 9 of the table. • • •

[Tr. 8400] • • • The Special Master: As long as you were interrupted in your argument by me, Mr. Hayes, let me ask you, suppose Mr. Simat next spring should [Tr. 8401] after more cross-examination, develop another theory which he thought was even more accurate to express his views, how would you feel about that?

Mr. Hayes: I think that if I were in your shoes I would say you've had time enough to think up your best one.

The Special Master: You think three bites is enough?

Mr. Hayes: No, it is only two bites. The second was merely correction.

The Special Master: The first and then revision and substitution?

Mr. Hayes: The second is not a bite.

The Special Master: Do you, Mr. Simat, look on this as a substitution for your—what will be the status of your present report if this report is allowed?

The Witness: I think I testified earlier and I still feel that the revenue estimates produced by this second round would be far superior and more reliable than the revenue estimates produced by the first round.

The Special Master: Let me ask you, either you or Mr. Hayes, whichever one decides, your pre- [Tr. 8402] sent report comes up with the idea that TWA would have lost millions of dollars if it had had these additional planes.

Do you think it is reasonable to expect that your supplemental report will show that TWA would have come up with some profit, that there would be $50 million difference between your present estimates—60 million between your present estimate and revised estimates? What help is it going to be to me to have a supplemental report which shows that instead of losing $60 million under these assumptions TWA would have lost 70 million or 100 million or 30 million or would have broken even, not had any profit! That is really my problem.

Mr. Hayes: I think it amounts to this. You are sitting as a master in a damage hearing. What we have so far tendered is merely a critique of plaintiff's expert witness, with the reasons given as to why in our expert's opinion his assumptions can't be accepted; and with adoption—with the application rather to the plaintiff's expert's methodology of refinements that our expert thinks should be made before it could be accepted.

The second report is taking a new, fresh [Tr. 8403] look based not on divisional averages, not on assumed data.

For example, the assumption that Mr. Wemple indulges with respect to how many flights there would be in the International Division without telling us where they are going to fly. He did not study that or anything else, without telling us what areas they would be put in or where they would be put in or anything about them.

Now what is proposed is that on the basis of what TWA actually did—

The Special Master: I understand that.

Mr. Hayes: —flight by flight—

The Special Master: Let me—

Mr. Hayes: To answer your question if I may—I don't think I have answered it—

The Special Master: I don't think you have either.

Mr. Hayes: That's what I would like to do. This is merely preliminary.

The Special Master: Right.

Mr. Hayes: I think from your position as a master on a damage hearing you would want to know what is the best estimate that can be made based [Tr. 8404] on the actual facts regardless of what the result would be. I can fully understand Mr. Simat sitting here can't tell you what is is going to come out with. He has not finished it.

The Special Master: Let us take a couple of hypothetical situations. Suppose Mr. Simat came out with the result in a supplemental report on his refined figures that TWA would have lost $120 million instead of $60 million, what difference as a practical matter would that make in the case?

Mr. Hayes: I think as a practical matter that would make this difference to you, that on a detailed study assuming it stands up there couldn't possibly

be any award of damages here. There is nothing to compromise.

The Special Master: Isn't that true on the present—

Mr. Hayes: We think the present report tends to establish that the calculations put in by plaintiff are not reliable, but the second report would show what are reliable calculations and there would be a much firmer basis for a conclusion by you that there couldn't possibly have been the damages claimed. That is the big difference it [Tr. 8405] would make.

The Special Master: That would seem to throw considerable doubt on your mind on the validity of the present report.

Mr. Hayes: No, it does not. I don't at all even suggest that there is any lack of validity in the present report.

I am thinking rather of a record that we must make here first for you and then for the courts beyond, and I am thinking chiefly of the best evidence for this case. This is what I am driving at.

The Special Master: So am I. I want to make it very clear on the record that I in view of the large amounts involved in this case, I want to give the defendants more than what I think is reasonable time to develop their expert testimony in this matter, and I am trying to lean over backwards in that respect.

On the other hand, I recognize we have to come to the conclusion some time.

You say that this should be the last bite, the third bite. Mr. Tenney says the second bite is enough.

I realize there is tremendous cost to both [Tr. 8406] sides involved.

I still can't quite get through my head why Mr. Simat, having presented this report showing that TWA would have lost $60 million on these assumptions as to why—and you stand on that report as being the judgment—because Mr. Simat has said very firmly that in his opinion even aside from the results, his study has shown that he thinks that all the surrounding facts and circumstances and background support his conclusions. If his conclusions are accepted at face value, TWA not only has no case, but as I said facetiously the other day, they owe Mr. Hughes quite a lot of money.

But what I mean to say is that the gap is so wide there, before you could come to a conclusion that TWA was damaged, if you are going to accept Mr. Simat's testimony, that a ten per cent change in the figures, 20 per cent, I believe, change in the figures would still come to the same conclusion, that under no circumstances is TWA entitled to any damages here.

So I don't want to waste your time or the plaintiff's time or the Court's time or anybody else delaying the matter for another year, six months to [Tr. 8407] a year, as I think Mr. Tenney expressed it, if I can't see any possibility of there being a change in your general conclusions.

Mr. Hayes: If I knew which I don't, and I am not inquiring because I have no right to make—

The Special Master: In other words, how can you do anything except help TWA in a new report, by showing that the loss wouldn't have been as much as you thought? Because it certainly won't do much good as I see it at the moment to say TWA would have lost 70 million instead of 60 million.

Mr. Hayes: I couldn't agree with you more, Mr. Brownell. • • •

[Tr. 8431] • • • By Mr. Tenney:

Q. At the end of our session on Tuesday, Mr. Simat, we had gone over some information as to Pan American and other carriers, equipment position in 1959. I would like to turn to the next year 1960.

You testified that by the end of 1959 Pan American had received 21 jet aircraft, and that TWA had received four of its international type B-331s.

Can you tell us what Pan American received in terms of jet aircraft during the year 1960, mentioning types if you have them available?

A. I have before me a summary table which does not provide information as to the type of aircraft beyond a general description of the manufacturer and the overall model number.

And according to the figures that I have before me, as of December 31, 1960, Pan American had 29 Boeing aircraft of the 707 variety, and this was an increase of eight over the number of aircraft it had on hand at the end of December 31, 1959.

Pan American further had 17 DC-8 aircraft, Douglas aircraft, for a total of 46 aircraft. And the [Tr. 8432] 46 at the end of 1960 compares with a total of 21 aircraft at the end of 1959, all of which were Boeing.

Q. I think perhaps you know this of your own knowledge, Mr. Simat, even though the model numbers are not set forth in greater detail in that table.

Of those eight additional Boeing 707 type aircraft received by Pan American in the year 1960, it is true, is it not, that three of them were Boeing 707-331s, originally constructed to TWA's specifications?

A. It sounds right, Mr. Tenney, but I do not have the figures before me to confirm it.

Q. Can you tell us how many additional intercontinental type jet aircraft TWA received in 1960?

A. Again, I will have to consult another source for that. According to the figures before me, TWA had 19 Boeing aircraft in 19—at the end of 1959, and a total of 27 at the end of 1960.

That is a net gain of 8. I would have to consult another source to determine the type numbers of those 8 aircraft.

Q. I think that from the Coverdale & Colpitts report—and in fact I think we covered this on Tuesday—15 of those aircraft in both years were Boeing 707-131s, not used in transatlantic service.

[Tr. 8433] So that all 8 of the increase in 1960 were of the 331 type?

A. Yes, that has been called to my attention as something that appears on page 10 of the Coverdale & Colpitts report.

Q. In 1960, therefore, Pan American took delivery of a total of 25 additional jet aircraft usable on its intercontinental routes, while TWA took delivery of an additional 8 such aircraft, without regard to the specific manufacturers or precise model numbers.

Yet on page E-5 of your report, it appears, does it not, that during 1960 TWA was able to increase its percentage of available seats offered as compared to Pan American's available seats offered from 53 per cent to 72 per cent.

That is what your table shows there, does it not, Mr. Simat?

A. Yes.

Q. On Tuesday we put in TWA Exhibit 337 which gives the ratio in a slightly different form as Pan American to

TWA, and it shows that the ratio of transatlantic seats offered by Pan American to those offered by TWA dropped in 1960 to 1.39 from a figure in 1959 of 1.89, which is just a different way of expressing the same [Tr. 8434] proportion, is it not, Mr. Simat?

A. Yes.

Q. Doesn't this change in the proportion of seats offered between those two airlines at a time when Pan American was taking delivery of far more aircraft than TWA was—doesn't this change in proportion indicate that Pan American found it necessary to use many of its jets on other routes and could not concentrate on a competitive response to TWA in the transatlantic market?

A. It could mean various things, Mr. Tenney.

It could mean that Pan American decided that the capacity in the transatlantic market was already excessive, and that a further investment of equipment in the transatlantic market would not have been economic for it.

Q. Do you see from these statistics any support for the theory that Pan American in 1960 was engaging in competitive response to TWA's increase in transatlantic service?

A. Yes, I note that between 1959 and 1960, Pan American increased its seating capacity in the transatlantic market from 472,000 to 537,000, an increase of approximately 25 per cent.

Q. The approximate increase in TWA's seats offered from 1959 to 1960 was on the order of approximately 70 [Tr. 8435] per cent I make it by eye. It that about right, Mr. Simat?

A. Your eye is pretty good. It is within 1 per cent of what I calculate on my slide rule.

I also note, Mr. Tenney, that the total number of IATA passengers increased approximately 25 per cent between 1959 and 1960.

Q. One of the assumptions that we are operating under in all of these estimates is that six of the jet aircraft that Pan American would have had at the end of 1960, that is, the six Boeing 707-331s that we have referred to would not have been in Pan American's fleet but would instead have been in TWA's fleet, is that not correct?

A. That is one of the assumptions, yes.

Q. Moreover, an additional assumption that we are making in these estimates is that delivery dates of these aircraft as between Pan American and TWA would have been reallocated with more of the earlier delivery positions going to TWA and fewer of the earlier delivery positions going to Pan American, is that not correct?

A. If by these aircraft you mean aircraft of the Boeing 331 type, the answer is correct.

It is not, of course, correct with respect to [Tr. 8436] the six aircraft.

Q. If TWA with the historical proportion of aircraft available to it was in 1960 able to increase its percentage of total available seats offered in transatlantic service as compared to Pan American to 72 per cent, is it not reasonable to assume that our reconstructed TWA, as we sometimes call it with six more jet aircraft of the proper type and all of its aircraft of this type having their delivery dates somewhat affected in a favorable direction by that second assumption would have been able to schedule substantially more proportionately jet seats as compared to a Pan American that under these same assumptions would have had fewer aircraft on a somewhat slower timetable?

A. The answer is not necessarily so, and maybe to make it more precise, no.

The fact is that Pan American did have aircraft deployed in other divisions which could have been switched to the

Atlantic Division. Pan American had various other options on the operation of aircraft, all of which would have permitted Pan American to increase its volume of service on the transatlantic sector over and above the service that it actually supplied in 1959 on the same sector.

[Tr. 8437] Q. In terms of jet aircraft, as opposed to piston aircraft, what options did Pan American have that would have made the conclusion I suggested a moment ago an unsound one in your view?

A. My earlier statement did refer to jet aircraft. If I didn't make that clear, let me make it clear now.

Q. Then would you explain what the options were that you referred to?

A. Well, during the year 1960, Pan American had a total available fleet on the average of 32.4 aircraft, these are four-engine jet aircraft, of which a total of 16.0 or somewhat less than half were deployed in the Atlantic Division. That left a remainder of some 16.4 aircraft deployed in other divisions which could have been deployed in the Atlantic Division if need be.

In the same year, TWA had all told a total of 6.1 four-engine jet aircraft assigned to its international services.

So there was on hand as far as Pan American was concerned a substantial reserve of four-engine jet aircraft which were available to be switched into the Atlantic Division if management had so decided.

Q. But on our assumption, of course, that reserve would have been substantially less by perhaps six aircraft?

[Tr. 8438] A. I referred, Mr. Tenney, to average numbers of aircraft for the entire year, and not the number of airplanes on hand at the end of the year.

And I pointed out earlier that there are material differences between the average numbers of aircraft available during the year and the average numbers of aircraft—the actual numbers of aircraft available at the end of the year.

If, for example, every airplane in the fleet were received on December 30th, the actual average number of aircraft available during the year—and let us assume a fleet of ten airplanes is received on December 30th—it would be in the order of 20 days divided by 365 or by quick arithmetic something about 6 or .6 or .7.

Q. Have you computed what the average number of aircraft during the year 1960 for Pan American would be if you took into account the assumptions that we are operating under?

A. No, I have not made that calculation, but I will. It is a calculation that can be made from the receipt dates of the airplanes after allowing for an inservice lag to put the dates on all fours with the dates that are reported to the Civil Aeronautics Board. There is, of course, a difference in the counting of [Tr. 8439] aircraft days between the information reported to the Civil Aeronautics Board and the information maintained internally by TWA.

In the case of the Civil Aeronautics Board information, the starting date, the date when the meter started running on aircraft days is the date that the airplane is placed in service, in transport service. It is not the date when it is available for service.

And there is a lag which I would estimate is normally on the order of approximately ten days between the in-service date and the availability date.

Q. I think perhaps there is another way that this can be computed without much difficulty.

Isn't it true that the amount of the annual average jet aircraft available for service to Pan American would be decreased by the operation of these assumptions in 1960 should be the same as the amount by which the annual average of airplanes of this type available to TWA in 1960

was increased? We are just talking about the same aircraft switched over and certain delivery assumptions.

Is that not correct?

Mr. Hayes: May I have that question, please?

[Tr. 8440] The Special Master: Read it back.

(The question was read.)

A. Yes, that's approximately correct with the difference that the method of counting aircraft days by the Civil Aeronautics Board is a little bit different than the method of counting aircraft days that is used in the Coverdale & Colpitts report and used internally by TWA.

Q. I find on Exhibit D of Volume IV of the Coverdale & Colpitts report the figure given of an additional 5.0 B-331 jet aircraft available for commercial service to TWA during the year 1960, and that figure is given as an annual average.

So that while there might on the basis of the slight difference in computation that you refer be a slight difference there, we are talking approximately about 5.0 aircraft fewer on an annual average basis available to Pan American in 1960, are we not?

A. Yes.

Q. Is it your opinion that Pan American in 1960 would have allowed the effect of any equipment shortage that it might have felt it had to be concentrated upon those parts of the worldwide system other than the transatlantic routes?

[Tr. 8441] The Witness: May I have that question read back?

(The question was read.)

The Special Master: Is that clear to you?

The Witness: I think it is clear to me now.

A. I don't think there is much doubt that Pan American if it felt it was suffering from an equipment shortage would

have placed the bulk of its equipment in the Transatlantic Division.

In point of fact, the Atlantic Division is where Pan American first put its jets.

In the year 1959, for example, Pan American had on hand during the year an average of 7.7 jets on a system-wide basis. Of these 7.7, 6.3 were put in the Atlantic Division.

Q. Wouldn't Pan American be jeopardizing its worldwide good will if it extended beyond a limited period of time the period during which it did not offer adequate service on it worldwide routes other than the North Atlantic?

A. I am afraid I don't understand what you mean by Pan American's international good will.

[Tr. 8442] Q. Pan American's routes are as you have testified and as, of course, is on the record in other context here worldwide and have been for decades.

It is true, is it not, that Pan American has attempted for decades to build up a worldwide route system and good will on a worldwide basis among potential passengers seeking to create a clientele that will turn to Pan American in preference to other air carriers for air transportation?

A. Oh, I'm sure that as a matter of company policy, it is a policy of Pan American to attempt to obtain as much traffic as it can from the various points it serves.

However, this is a policy that has to be tempered by the availability of aircraft and by general economic conditions.

For example, for many years Pan American ran from London what is known as a change of gauge service to the Scandinavian countries. It did not even operate a through-plane, that is, a single plane on which the passenger could sit and get all the way to the Scandinavian countries. They operated a plane across the Atlantic to London, where a change was made to a small DC-3, later a DC-4, neither

plane pressurized even to supply services to the Scandivian countries.

[Tr. 8443] I might point out that the Scandinavian rights came to Pan American at a fairly high cost, since they had to acquire American Overseas Airlines to obtain those rights, and as part of the—I guess you would call it the package—they had to suffer TWA's entry into London and Frankfurt, two markets where TWA was not previously certificated.

Q. In this London to Scandinavia route that you refer to during the period that Pan American was using DC-3s and DC-4s on it, what other airlines were operating on that route with more advanced equipment?

A. Scandinavian Airlines System otherwise known as SAS was operating through-plane service from the Scandinavian countries to New York throughout this period, with the most modern four-engine equipment available.

Q. No American airline, of course, was servicing Scandinavia at all at that time?

A. Pan American had the exclusive U. S. flag airline rights to the Scandinavian countries, and still has.

Q. Of Pan American's jet fleet in 1959 and 1960, six we have established earlier consisted of Boeing 707-100 series aircraft, which were the earliest jet aircraft [Tr. 8444] delivered to Pan American.

On Atlantic service, it was necessary, was it not, for those aircraft to plan a fuel stop at Gander?

A. I believe that was true in one direction only.

Q. Occasionally stops had to be made in the other direction as well, did they not, depending, of course, on weather conditions?

A. Yes, depending upon weather and load conditions occasionally stops had to be made in the other direction.

But the stop in the other direction was made at Prestwick.

Q. When the 707-300 series aircraft went into service, did Pan American continue to use the 707-100 series aircraft on Atlantic service or did it transfer them to its other routes?

A. I really don't know the answer to that question, Mr. Tenney. It is something I would have to look up. I can look it up and give you an answer later, if you wish.

Q. I don't know that that will be necessary. Let me state as an assumption for some further questions what I believe to be the fact, and you can, of course, if on checking it, subsequently you find me to be incorrect, correct this. [Tr. 8445] But as an assumption for further questions, I believe it is correct to say that Pan American transferred its 707-100 series aircraft to other routes shortly after the 300 series became available, although there was up to the beginning of 1960 some slight amount of service offered with those aircraft. On the whole, they were transferred to other routes.

Those aircraft, the 100 series aircraft would not be satisfactory for the transpacific routes, would they?

A. Again, it is not a question that I can answer categorically.

I would believe that they would be satisfactory for the Hawaiian service where the non-stop stage length is about 2200 miles.

Beyond Hawaii, where the non-stop distances are much larger, I would guess that they would not be satisfactory. But, of course, the Hawaiian service comprises a very substantial part of Pan American's Pacific operation.

Q. At least beyond Hawaii, it would have been necessary, would it not, if Pan American had chosen to transfer its long-range Boeings, or other available [Tr. 8446] long-

range jet aircraft, to the North Atlantic routes in 1960—it would have been necessary, say, for Pan American to accept that competitive foreign airlines and particularly Qantas, BOAC and JAL, to be the airlines that would first introduce jet service to those transpacific routes?

The Witness: May I have that question read, please?

(The question was read.)

A. I just don't understand the question.

The Special Master: It would have been a necessary result that Pan American would have had the BOAC, Qantas and Japanese Air Line jets running on the Pacific and Pan American would not have been there with jets.

The Witness: I would again have to refresh my recollection on this, Mr. Tenney, but I believe that that was the case, that BOAC and Qantas jets were in operation before Pan American put its jets in transpacific routes. Of course, the Japanese Air Lines services supplied in the transpacific area were in that period very moderate.

By Mr. Tenney:

Q. On page E-7, you state, Mr. Simat, at the top [Tr. 8447] of the page—it is a carry-over sentence, but it is on page E-7 that the language appears I would like to call your attention to.

You refer to the years 1959 to 1960, and you describe them as a time when the industry was facing tremendous over-capacity.

In 1959, there was no over-capacity, as least in terms of jets in the industry, was there, Mr. Simat?

A. I don't believe that over-capacity can be reckoned in terms of any one particular airplane.

The over-capacity situation results when there is too much capacity overall for the traffic demand.

The fact that one particular type of airplane may appear in the inventory in very moderate numbers does not mean that an over-capacity situation does not exist.

For example, there can be an over-capacity situation today, although the DC-3 is perhaps operated at a level of one per cent of the total seat miles provided by domestic airlines. That doesn't mean that the DC-3 is not in an over-supply situation.

So, I don't think that I can answer that question as it relates to jets alone. There was an over-capacity situation in the industry as a whole.

[Tr. 8448] Q. We established, however, on Tuesday, did we not, that at least with respect to the airlines that we looked at, Pan American and TWA jet load factors in 1959 were quite high by any standards?

A. That, of course, Mr. Tenney, does not signify that an overcapacity situation did not exist, if it were true that all of the traffic carried in jet airplanes were passengers that would otherwise have been carried in propeller aircraft that the high load factors on the jets themselves do not signify that any additional traffic was brought into the market on that operation of the jets on top of all of the other capacity being offered by the airline as an economic thing.

Q. So you are unable with respect to 1959 to judge whether the industry had over-capacity in terms of jet capacity alone, is that the substance of what you are now saying?

A. I am saying that the fairer test is whether the industry with the capacity that it was offering in 1959 was able to conduct a profitable operation overall.

Q. In your opinion then, in 1959—and I take it that you would apply this theory to subsequent years as well—and you can correct me if I am wrong—you can only judge [Tr. 8449] whether there is an over-capacity by grouping jets together with pistons to determine whether there is an over-capacity, is that a fair statement?

A. I think the fair statement is that you have to consider the entire supply of capacity and the entire demand for capacity in determining whether there is an over-capacity situation.

Q. So just to wind that little point up and take some of these assumed examples with exaggerated numbers that we have taken from time to time to clarify positions, if there are only a very few jets and they are flying at 90 per cent load factors which undoubtedly means that many times there are people that would like to fly on those planes and are unable to do so, because the 90 per cent load factor is an average figure, but there are a lot of pistons, a lot more pistons than there are jets and they are flying, let's say, to exaggerate, 20 per cent load factors, you would say that the industry was facing a position of over-capacity, and you would not think of it a fair thing to do to segregate the jets and consider whether there was over-capacity in terms of jets or not?

A. I believe that the fairer test would be to determine the revenues added by the additional capacity [Tr. 8450] offered on jet aircraft against the expenses added by reason of the operation of the aircraft, and if the expenses are greater than the revenues then you did the wrong thing in adding the airplane, and if the revenues are greater than—the added revenues are greater than the added cost, you came out like a bandit.

The point is that an over-capacity situation is defined in terms of whether it is possible to conduct economic operations as a result of the capacity added.

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[Tr. 8456] • • • Q. On page E-7 there is a table in your record which is headed "E-IV," which sets forth what you term flights added first in the second quarter and then in the third quarter of the years 1960, 1961, 1962 and 1963 for TWA, Pan American and foreign flag carriers grouped.

Can you tell me whether in this chart all types of jet and pistons are combined or whether it is solely jet flights?

A. I believe these are all flights, jet and piston combined.

Q. When you say flights added in the second quar- [Tr. 8457] ter for example, do you mean flights added over the same quarter in the preceding year or do you perhaps mean flights added over the next preceding quarter?

If that is not clear, for example, in the second quarter of 1960, you have a figure of 322 flights added. Is that 322 more than the second quarter of 1959 or is it 322 more than the first quarter of 1960? You do not expressly state which.

A. It is the first quarter of 1960. • • •

Q. I show you TWA Exhibit 338 for identification, Mr. Simat, which is an exhibit that we have prepared from TWA Exhibit C and C5 which is in evidence and which sets forth IATA monthly statistics.

This table compares the flights on the other basis and not the one that you did; that is, this table sets forth the absolute number of flights flown by Pan American and TWA in each of the months specified and then computes the difference month by month and quarter by [Tr. 8458] quarter from the corresponding month and corresponding quarter in the preceding year.

In this table, we find that in the second quarter of 1960 TWA increased the number of flights that it flew across the

Atlantic by a net of one starting with 18 fewer in April but increasing to 13 more in June, while in the same period of time Pan American decreased its flights for a net of 152 flights in the quarter.

Doesn't that illustrate that Pan American was not following the theory of competitive response, at least during that quarter, in scheduling its jet flights across the Atlantic.

The Witness: May I have that question read back please?

The Special Master: Sure.

(The question was read.)

A. I do not believe that you can use data of this kind to establish the degree of competitive response.

I deliberately steered clear of making year to year comparisons because of a number of factors that can change between the years.

I think in measuring the degree of competitive responsiveness, the method that we used of comparing the change from quarter to quarter during the buildup of [Tr. 8459] the seasonal peak is a much more meaningful measure than the kind of comparisons that result from taking the differences between flights in the quarter of one year and the same quarter of another year.

I note, for example, that in the third quarter we seem to have a reverse phenomenon with Pan American increasing flights and TWA decreasing flights, and I think it would be scarcely possible to conclude from these data that there is no competitive relationship between Pan American and TWA.

Q. Do you happen to know the time when Pan American's DC-8 jets were delivered to it in 1960, that is, the approximate dates during that year?

The Special Master: Can you refresh his recollection on that?

Mr. Tenney: Your Table E-A has some information.

A. Yes, I was about to point that out. It does have some of the information that you are asking for.

The Table E-A which appears at Page E-A-1 indicates that in June of 1960 Pan American had nine DC-8s in its system and all nine were assigned to the Atlantic Division.

That information is derived from a Pan Ameri- [Tr. 8460] can exhibit in the transatlantic renewal case Docket 13577.

Q. If those aircraft had come in rather shortly prior to that date, that would tend to explain, would it not, the increase in flights flown by Pan American in the third quarter of 1960 over the second quarter which appears in TWA Exhibit 338 for identification.

A. Well, I suppose to the extent that more aircraft assigned connote an ability to operate more frequencies, that would be true. It would scarcely explain the decline in Pan American's operations between the second quarter of 1959 and the second quarter of 1960 where the flights declined 152. The number of aircraft assigned to the Atlantic Division of Pan American did go up over that period.

According to my figures and again quoting from Exhibit E-A, in June of 1959, there were six Boeing 121 aircraft available in the Atlantic Division, in June of 1960, there were 13 Boeing 321 airplanes available and nine DC-8s available.

So there were a total of 22 aircraft available in June of 1960 as opposed to six jet aircraft available in June of 1959. And I would assume therefore there was a much greater capacity available in the [Tr. 8461] second quarter of 1960 than in the second quarter of 1959.

Sheer availability of airplane doesn't explain the behavior of the flights, which in the second quarter of 1960 decreased some 152 flights over the second quarter of 1959.

Q. Are those figures in the table on E-A-1 average figures or are they end of period figures? Do you happen to know, Mr. Simat?

A. The answer is that I do not know precisely. I assume that they are end of period figures.

The Special Master: What were those figures as to types?

The Witness: In June of 1959, there were six aircraft available of the 121 series, that is the smaller Boeing with the shorter range.

In June of 1960, there were 13 airplanes assigned to the Atlantic Division of the longer range 321 series, plus nine DC-8s which also had transatlantic capabilities. So there were 22 airplanes available.

And the figures indicate that the decline in flights operated—

The Special Master: I get that part, yes.

[Tr. 8462] Q. And those were year and figures. So that if the DC-8s had come in very shortly before the end of that period, they would not be expected to have performed any significant amount of service in the second quarter, is that correct?

A. Yes, there were also, as I pointed out, 13 Boeing 321 aircraft available.

Q. Yes, I realize that.

I notice also that the six 100 series aircraft had by this time apparently been transferred from the Atlantic Division to other routes as far as this table indicates.

A. The Boeing 121 aircraft as you indicated were no longer assigned to the Atlantic Division, apparently replaced by the Boeing 321 and the DC-8.

Q. The total flights in your table on page E-7 and also the total flights in TWA Exhibit 338 for identification include piston flights and do not break out jet flights, so that the increased number of jets might have been accompanied by a substantial decrease in piston flights on the part of TWA, might they not? I mean on the part of Pan American, might they not?

The Special Master: You can't tell from this table. [Tr. 8463] The Witness: His question is might and the answer is yes they might have but from this table you can't tell as you point out.

Q. If you look at Table E-VI on page E-11, a comparison which breaks out the pistons and the jets can be made. Taking for example, July of the years in question which appears to be the closest date that we can pick, we find that in 1959 Pan American flew 29 piston weekly transatlantic round trips, and 24 jet weekly transatlantic round trips, while in July of 1960, the figures were nine piston weekly transatlantic round trips and 50 jets.

So that although these dates do not precisely correspond, it is a reasonable assumption, is it not, that from year to year Pan American had drastically decreased the amount of its piston service on the transatlantic routes, is a that correct?

A. Oh, yes, Pan American did decrease its piston operations on the transatlantic routes as did TWA, where the decrease is from 45 flights piston flights in July 1959 to six piston flights in July of 1960, one fewer piston flight than was operated by Pan American.

Q. Starting on page E-8, you have a general dis- [Tr. 8464] cussion of the competitive reaction in 1959 as to which we had some testimony already today and the day before yesterday, in the first sentence under "Competitive

Reaction, in 1959," you make the statement that you conservatively estimate that foreign flag carriers would not have responded competitively with additional seats in 1959.

In 1959, in your judgment, was it possible for foreign flag carriers to respond competitively with additional jet seats in 1959?

A. According to the data which I have—and the data derived from the Digest of Statistics—they are compiled by the International Civil Aviation Organization, ICAO—foreign air carriers had on hand—and I am referring now to foreign air carriers that are competitors of TWA and Pan American—foreign air carriers had on hand at the end of 1959 some 30 jet aircraft.

And I would from these figures conclude that it was possible for foreign air carriers to have supplied additional jet capacity.

Also, it was possible for foreign air carriers to have increased their piston capacity. Since piston aircraft were operated at a fair differential, it was possible by use of night services, by additional fre- [Tr. 8465] quencies, for foreign air carriers to have increased their participation in the market by adding to their piston services.

So the answer is yes, they could have increased not only their jet seats but also their piston seats as well.

Q. The fact is, however, that to a considerable extent in your judgment that they could have added additional seats, you were relying on the ability to add piston seats as a competitive response to the assumed addition by TWA of jet seats, is that not correct, Mr. Simat?

You have mentioned the piston seats every time we brought this up.

Mr. Hayes: I think he mentioned both in his last last answer, Mr. Tenney.

Maybe to keep the record straight what I should do is object to the question in that it misstates his testimony as is apparent from the last answer.

The Special Master: Will you rephase your question?

Mr. Tenney: I will go at it a little dif- [Tr. 8466] ferent way.

Q. How many carriers are you including in this group of carriers that you said were competitive directly and had 30 jets on hand at the end of the year 1959?

A. Four.

Q. Which four are they?

A. The four are BOAC, Air France, Sabena and I have Qantas in the totals too.

Q. There are a number of air carriers, foreign flag air carriers operating on those routes that did not have jets, is that not corect?

A. Oh, that's correct, yes.

Q. What did Sabena have at the end of the year?

A. One.

Q. Was it in revenue service?

Mr. Hayes: Was it what?

Mr. Tenney: Was it in revenue service?

My information indicates that it was not.

A. My source does not indicate whether it was in revenue service or not, if you are testifying to it.

Q. No, I am not testifying to it. I am asking you the question. You do not know the answer, is that correct?

A. Well, my source does not indicate whether it is [Tr. 8467] in revenue service or not.

Q. How many did Air France have?

A. Three.

Q. How many did BOAC have.

A. 19.

Q. Do you happen to know when Air France got its jets?

A. No, I do not.

Q. Do you happen to know during what part of 1959 the BOAC jets came in?

A. I believe the BOAC jets were available—or some at least were available in 1958. There were at least six aircraft available to BOAC at the end of 1958.

And the balance I believe came in early in 1959.

Q. All of these BOAC jets were the Comet IVs, were they not?

A. That's correct.

Q. None of them were Boeings?

A. No.

Q. Doesn't that indicate that with the exception of BOAC and to an extremely limited extent Air France any competitive response in 1959 by foreign flag carriers to additional TWA jet seats would have had to be [Tr. 8467A] in terms of additional piston seats?

A. No, I do not agree with that at all.

Obviously foreign flag carriers did have jets and they were able to respond with jets. It is simply a matter of degree.

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[Tr. 8473] Q. Have you assumed, Mr. Simat, that Pan American had in 1959 a means of acquiring Boeing 320s on a different schedule than either the historical schedule [Tr. 8474] or the historical schedule as modified by Mr. Rummel's testimony on the basis of certain assumptions? Did you have some other means of acquisition in mind?

A. I have not made any assumption with respect to that.

The calculation that appears at page E-9 is a calculation to show how many additional Boeing 321 aircraft would be

required to meet the increase in capacity which has been estimated for TWA, the 18,000 seats.

And it is estimated and I believe quite conservatively that this amounts to a total of 0.4 aircraft.

We have assumed for purposes of this estimate that each aircraft would make one flight per day. In point of fact each aircraft can make two flights a day in the transatlantic.

I have in mind, however, that in 1959 Pan American had a total of 7.7 aircraft, of which 6.3 were assigned to the Atlantic Division, leaving a balance of 1.4 airplanes out of which the 0.4 airplane to meet this capacity requirement—and I think it should be substantially less than 0.4 airplanes, but they had 1.4 airplanes to meet a need for 0.4.

So I believe there was ample capacity on the [Tr. 8475] part of Pan American to have supplied the 18,000 seat deficit, if you want to call it a deficit, if they wanted to.

Q. During the first half of 1959, isn't it true that Pan American had available to it only the six Boeing 707-100 series aircraft that it already had, in fact, on the Atlantic Division and that no transfer of those aircraft could have accomplished any increase in service on the Atlantic Division?

A. Well, it is certainly true that there were six Boeing aircraft on the Atlantic Division, but it is not true that they could not have accomplished more transatlantic flights with the six Boeing aircraft.

The six Boeing aircraft were utilized not only in transatlantic services but in services beyond the gateways, that is, penetrating into Europe. It would have been possible for Pan American to have turned these flights around sooner and accomplished transatlantic flights with the same number of airplanes. That's one possibility.

Q. Would that fall under the general head of increased or improved utilization that you discuss somewhat elsewhere in your report?

A. I think it would have the effect of increasing [Tr. 8476] utilization.

If the airplane is used exclusively in the transatlantic service where the stage lengths are very long, the result would be to increase the average utilization per day and hours and certainly to increase it in miles per day.

Operations beyond the gateways were, as a rule, conducted at shorter stage lengths, and in the air transportation field as in most transportation fields it is almost axiomatic that the longer the stage length of operation the better the utilization. The higher the speed, the more the hours per day that the vehicle can be effectively used.

But that is not necessarily the assumption that I am making.

Q. I would like to turn to page E-A-2.

This is the first page of a table which is described on the preceding page as a listing of non-transatlantic flight segments operated by Pan American with jet aircraft where no competitive jet aircraft were in operation.

You indicate at the top or near the top of this first page of the table that Pan American was operating its flight No. 1 from San Francisco to Honolulu with [Tr. 8477] jets and against no jet competition, is that correct?

The Witness: May I have the question read back, please. I am sorry. I think I missed something.

(The question was read.)

A. The flight operated from San Francisco to Honolulu to Tokyo to Hong Kong according to the table. And it is my understanding it had no jet competition on any leg.

Q. I note that in April you specify only the Honolulu-Tokyo-Hong Kong legs and you do not commencing in April of 1960 include the San Francisco-Honolulu leg, is that correct?

A. That is correct.

That would indicate that in April of 1960, there was a jet service operated between San Francisco and Honolulu by another airline.

Q. What airline would that be.

A. United Airlines.

Q. Is it realistic to assume that Pan American might have transferred the jet aircraft operating from Honolulu on its flight 1 with pistons while keeping the jet leg from San Francisco to Honolulu?

A. Oh, yes, I think it is quite logical to assume that. [Tr. 8478] A substantial part of the traffic that would move on a service from San Francisco to Honolulu to Tokyo to Hong Kong would in all probability make a stop-over at Honolulu. That is one of the big attractions of the Central Pacific routing of Pan American, the stop-over at Honolulu and it is well advertised and is considered to be a major factor in Pan American's position in the Pacific area.

Q. The jet would still have to stay on the West Coast to fly the San Francisco to Honolulu leg, wouldn't it? That same jet could hardly be transferred and fly the Atlantic, could it?

A. That particular jet?

Q. That particular jet?

A. Well, perhaps not that particular jet, but the number of aircraft required to operate that particular pattern would be reduced, and by rescheduling the service, by timing it differently and so on, it would be possible in my opinion to free the equivalent of a whole jet airplane from the Pacific Division of Pan American for use in the Atlantic Division. It is simply a matter of rerouting.

I also might mention in this connection that if it became desirable to transfer the entire airplane [Tr. 8479] from the Pacific Division to the Atlantic Division that it was possible to do this by the use of the polar route from the West Coast to Europe.

Q. I am asking for information on this, Mr. Simat. Did Pan American have authorization to fly the polar route?

A. I'm not sure exactly when the authorization to fly the polar route began.

In any event, it is used only largely in the summer months. But I don't think it is necessary to physically transfer the plane that way. It is a matter of rerouting airplanes and reassigning them among divisions.

Q. Pan American Airlines commenced jet service from San Francisco to Honolulu to Tokyo in August of 1960, did it not?

A. I'm not sure of the precise date That sounds about right.

I note that between July of 1960 and October of 1960, according to our data on page E-A-2 there is the omission of Tokyo flights which suggests to me that there was a Tokyo service available in October that was not available in July.

Q. Northwest Airlines began jet service from [Tr. 8480] Seattle to Tokyo at about the same time, at the beginning of August, 1960, did it not?

A. I believe that that is approximately right. Northwest initially contracted for the DC-8s and like all airlines that ordered the DC-8s the Northwest orders came through later.

The Seattle-Tokyo route is not directly competitive with the Pan American route from the California points.

Q. You say it is not directly competitive, Mr. Simat, by which I take it you mean it has a different point of ori-

gin, but for passengers within point of origin at any distance at all from either San Francisco or Seattle who wish to go to Tokyo, it is a very important element of competition, isn't it?

A. I point out to you, Mr. Tenney, that the Northwest Seattle-Tokyo route has had a very distinct mileage advantage over the Central Pacific route amounting to maybe 2000 miles, and the attractiveness of the Central Pacific route is the Honolulu stop-over and not the time saving that emerges from that, and the passenger who wanted to save time would have in the normal course taken the Seattle routing, in any event.

I don't consider those two routes to be in [Tr. 8481] substantial competition, no.

Q. On the next page of this table, you give information with respect to Latin America and Bermuda and one of the significant routes indicated there is the route from New York to San Juan in December of 1959 which continues for a time thereafter.

Do you happen to know when Eastern Airlines began its jet service to San Juan?

A. I don't have the precise date. Eastern Airlines, of course, was one of the fortunate airlines that acquired the DC-8.

Q. I show you a photostatic copy of the Official Airline Guide, page C-163 for the month of July, 1960 which indicates if I read it correctly that Eastern was flying DC-8 jet service from New York to San Juan at that time.

The date when this service was commenced does not seem to appear any place on this page as far as months go. There are under the Bermuda table, you will note, several notations as to flight discontinued effective August 14th. We don't have here apparently the original Airline Guide

from which this is photostated but if you will assume subject to check that this is from the volume that I represent it as being from, doesn't [Tr. 8482] this indicate that Eastern Airlines was by the end of July, anyway, 1960, operating jet service from New York to San Juan daily as a matter of fact, it says?

A. It is quite possible, Mr. Tenney.

I would point out to you that the volume of service supplied in October of 1960 by Pan American was substantially in excess of the daily volume as you know.

Q. So that if that's correct, then your table on these two pages dealing with Latin American routes would be in error to that extent, that the New York-San Juan route would not be a route on which Pan American was operating jets without jet competition?

A. That's correct.

• • • • •

[Tr. 8490] • • • Q. Have you ever advised the management of an airline to deliberately use brand new jet equipment at substantially less utilization than they could have achieved making best use of the operation possibilities at the time?

A. The answer to that, sir, is yes.

Q. What airline was that?

A. Northeast.

Q. Were those operations very successful?

A. They were more successful than the operations that would have been conducted if they had conducted the operations that I advised them not to conduct.

Q. Were you responsible for the forecast presented on Northeast Airlines' behalf to the CAB of income that they expected to achieve in 1963 in the New York-Florida renewal case?

A. Only for the traffic portion of the forecast, which I might point out was within two per cent.

Q. How close was the income portion of the fore-
[Tr. 8491] cast?

A. That was very close, the revenue portion.

Q. The forecast as to operating profit was nearly four million, was it not?

A. I don't recall the exact figure.

Q. Do you recall the actual operating loss achieved in 1963?

A. Not offhand, no.

Q. I have here the figure of 11,142,000. Is that approximately right?

A. It could very well be right. At the time the forecast was prepared there was no Eastern Airlines shuttle operations in contemplation.

Also, the Civil Aeronautics Board had not yet ruled that the route should not be renewed. Eastern had not yet pressed for bankruptcy proceedings on the part of Northeast and threatened to have the tickets remanded.

• • • • •

[Tr. 8494] • • • Q. On the next two pages, E-21, E-22, you compute your estimates of TWA's increase of transatlantic passengers.

Am I correct in summarizing your report on this subject as basing the difference in the figures of passengers that you come up with from the figures as to the passengers that Mr. Wemple in the Coverdale & Colpitts' report came up with on the differences in the number of seats offered which would result because of your assumptions on competitive response that we have been discussing?

Mr. Hayes: Could I have that question read?

Mr. Tenney: I think I better withdraw that question. That is confused even to myself.

Mr. Hayes: We are in agreement

Q. The figures as to passengers that you come up with on these pages are of course different from the passengers that have been estimated by Mr. Wemple in the Coverdale & Colpitts' report.

Am I correct in understanding that the difference results entirely from the different assumptions that you have made as to the number of flights that competi- [Tr. 8495] tors of TWA would have flown during these periods?

A. Well, if you will change the word "flights" to seats, I will agree with you.

Q. Seats. I change the word to "seats."

So that if your estimate that Pan American would have reacted to any increase in the seats offered by TWA on a seat for seat basis, and the foreign flag carriers would have similarly reacted on a one seat for every two seats offered by the American flag carriers basis, if those estimates of yours were completely rejected, your estimates as to the number of passengers would fall with them, is that not correct?

The Special Master: If your assumptions fall your conclusions fall, isn't that what you are saying?

Mr. Tenney: That's what I am saying.

The Witness: Post hoc ergo propter hoc.

The Special Master: What is the answer to that?

The Witness: I would hope that the answer would be correct even though the assumptions are incorrect, but you are right, Mr. Tenney.

* * * * *

[Tr. 8577] * * * By Mr. Tenney:

Q. Mr. Simat, shortly before our recess, we established that one category of cost as to which you used a different costing unit than Mr. Wemple did, that is, the category general administratnon expense, has some computer testing made in your computer printouts of the two alternative costing units.

I believe that the category other cash operating expenses, which you chose is designated as Equation 14A in your index and in the various printouts, and the costing unit transportation revenues, in this category is designated as Equation 14B in your index and again in the printouts.

Is that correct?

A. Yes.

Q. Do you have any tabulation of the relative results that were achieved by these checks of those two costing units?

[Tr. 8578] A. Not at hand, no.

Q. There are obviously various ways that they could be compared, but would you agree with me that a comparison of the corrected R^2 as reported in each one of these tests would be a reasonable measure of what the checks showed?

A. I think that's one basis for comparison.

Another basis for comparison is the stability of the B coefficient value.

* * * * *

[Tr. 8581] Q. I am familiar with what it is and we will look at it, Mr. Simat. I am not suggesting that this classification is in any way unsound. We have to do something with respect to the index which we are all working with because otherwise it will be confusing.

I see no particular problems that are quite that substantial in nature in Books XI and XII which deal with TWA

although they are set up somewhat differently. If we see any problems we will clear them up then.

I would suggest that we look first, if you will please, at Book IX which is the domestic cross-sectional analysis of indirect costs and see what we can see there as to Equations 14A and 14B.

This book is classified in the first instance by equations so that it is quite possible to take off the results for each of the five years 1959 to 1963 for any given equation without too much chasing back and forth.

Looking at Equation 14A first, the year 1959, I find a corrected R^2 of .8890.

Is that correct, Mr. Simat?

A. Yes.

Q. What other value there would you suggest we try to preserve for comparison. I have tabulated some [Tr. 8582] of these correct R^2 but I have not tabulated—

A. Why don't we just look at that one then?

Q. All right.

A. I also suggest—

Q. If you think that the slope is important—

A. Yes, why don't you list that too? That's .0474.

Q. Why don't we just run on by year here which is the easiest way to do this, I think, staying on Equation 14A.

A. All right, do you want me to call the figures out?

Q. You can call. I will jot this down and I suggest you might want to jot it down too.

A. For 1960, the R^2 corrected is .9600.

The cost coefficient is .0505.

For the year 1961, the R^2 corrected is .9557.

The cost coefficient is .0506

For the year 1962, the R^2 corrected is .9712.

The coefficient is .0509.

For the year 1963, the R^2 corrected is .9680 and the cost coefficient is .0519.

Q. Thank you.

Now could we turn from that to the next succeeding equation which is 14B and get the same information?

[Tr. 8583] A. For the year 1959, the R^2 corrected is .8987.

The cost coefficient is .0380.

For the year 1960, the R^2 corrected is .9712.

The cost coefficient is .0416.

For the year 1961, the R^2 corrected is .9610.

The cost coefficient is .0424.

For the year 1963, the R^2 corrected is .9602.

The cost coefficient is .0414.

For the year 1963, the R^2 corrected is .9709.

The cost coefficient is .0418.

Q. Thank you.

These are all the tables in Book IX that would bear directly on the comparison we are tryiing to make, are they not?

A. Yes.

Q. Looking at the figures that you have come up with here, as far as R^2 corrected goes, I make for four years out of the five the R^2 corrected as higher for transportation revenues which is Mr. Wemple's costing unit than for other cash operating expenses which is your costing unit.

The only year that that is not true of is 1962.

Do your figures agree with me on that?

A. Yes.

[Tr. 8584] Q. Do you see a substantial difference in the consistency of slope that you would consider significant?

A. I don't see a substantial difference in the R^2 and as far as the consistency of slope is concerned, I think there is slightly more consistency of slope in the equation relat-

ing to general and administrative cost to other cash operating expenses.

Q. What is in terms of ten thousands which is the unit that these slopes are expressed in, that is, four figures to the right of a decimal point—.0001 would be one-ten thousandth—in terms of ten thousands what is the range between the slopes that you have taken off for 14A and 14B respectively?

A. For 14A the range is .0045.

For 14B, it is .0044.

The average level of the cost coefficient in 14A is somewhat higher than the average level of the cost coefficient in 14B, and in terms of percentage deviation I would say that the 14A relationship is probably somewhat better, but not materially so.

Q. Do you ascribe any significance to the difference in average levels? Wouldn't such a difference inevitably result from the use of a different X unit?

A. I don't think that any of the differences I am [Tr. 8585] looking at here are particularly significant.

Q. That was domestic. I don't know whether you want to go through the exercise or not.

I have gone through the exercise as to R^2 for international as well, coming out with the same result. I can read them off to you if you like. I do not have the slopes unfortunately.

Should we go through the exercise for slopes as well or can we just take my figures on the international?

A. I think we might as well go through the exercise for slopes as well.

Q. That would be for Book X?

A. The R^2 corrected for 14A for the year 1959 is .9857. and the cost coefficient is .0586.

For the year 1960, the R^2 is .9929, and the cost coefficient is .0492.

For the year 1961, the R^2 corrected is .9922 and the cost coefficient is .0494.

For the year 1962, the R^2 corrected is .9920, and the cost coefficient is .0552.

For the year 1963, the R^2 corrected is .9971 and the cost coefficient is .0546.

Q. Thank you and now we will turn to Equation 14B.

[Tr. 8586] A. 14B the R^2 is .9904, corrected, and the cost coefficient is .0479.

For the year 1960, the R^2 corrected is .9910 and the cost coefficient is .0386.

For the year 1961 the R^2 corrected is .9937 and the cost coefficient is .0391.

For the year 1962, the R^2 corrected is .9947 and the cost coefficient is .0418.

And for the year 1963, the R^2 corrected is .9978 and the cost coefficient is .0396.

Q. Thank you.

Looking back at the figures that you have read off from the printouts and looking first at the R^2s as to which I have had an opportunity to examine them before in my tabulation, I find that four of the corrected R^2 for Equation 14B are higher than those for Equation 14A in the same year, the only difference in this case being the year 1960 when it comes out the other way.

Do your notes correspond with mine?

A. Yes.

Q. Do you see any substantial difference in the consistency of slope in the two equations to which you would ascribe any significance?

[Tr. 8587] A. Again, the range of differences in the slope values under 14B is proportionately somewhat greater than it is under 14A.

Q. What are the absolute differences?

A. The absolute differences, as I calculate them for 14A, .0094, for 14B, .0093. There is about a 25 per cent difference in the value of the cost coefficient on the average, the cost coefficient under 14A being higher than the cost coefficient under 14B.

Q. Differences in the absolute amount of slope are, of course, to be expected as between different variables selected for your X variable, is that not correct?

A. That's quite true, Mr. Tenney.

I am only using the differences as a base from which to measure the degree of stability in the experienced cost coefficient for each year.

Q. Do you consider that those tests establish a superiority for your costing unit over Mr. Wemple's costing unit?

A. Not in and of themselves. Taken together with other considerations, including the fact that other cash operating expenses is normally used in my experience at least in the air transport industry as the explanatory factor for general and administrative costs, including [Tr. 8588] the conceptual reason that the size of the general and administrative burden is not only related to the amount of revenues which an airline obtains, but also to the complexities and size of its total operations.

In short, there would be general and administrative costs incurred, if the airline had no revenues at all. If it operated its aircraft empty, it would nevertheless incur some general and administrative costs.

Conceptually it appears to me that transportation revenues are not as good a costing unit as other cash operating expenses. The stability of the cost coefficient values seems to confirm that, although I do not really place much value on the differences between the two.

In terms of the R^2 corrected, the differences are so slight that I would not use that as a discriminating factor.

Q. I understand your explanation of the reasons apart from the statistical check, that in your judgment point towards the selection of the other cash operating expenses. But from the statistical check alone, if you were to use the statistical check as the determining factor in your choice, wouldn't you consider it signi- [Tr. 8589] ficant that out of the ten equations that were derived through your regression analysis eight of them had corrected R^2 which is the corrected coefficient of determination that are higher for the transportation revenues variable than for the other cash operating expenses variable?

A. I don't consider the difference in the R^2 to be significant at all.

I do not believe that there should be a substitution of statistical measures for common sense. I think it is unavoidable that you have to consider the cost model, the cost estimating relationships in terms of what it is you know about the behavior of operating cost to determine whether a particular cost factor makes sense.

I've used the statistical analysis simply as a check to reasonableness of the relationships and I place as much value in this particular case upon the stability of the cost coefficient as I do upon the R^2 corrected which as you know are subject to some sampling error and the differences are almost infinitesimal.

[Tr. 8590] Q. Is it fair to say that the controlling, the controlling factors in your selection between these two units were derived from your experience and judgment and were not dependent upon the statistical analysis?

A. It is fair to say that I approached the analysis with the idea that other cash operating expenses were better related to general and administrative costs than transporta-

tion revenues, and that had the statistical analysis indicated that transportation revenues in terms of the empirical evidence provided a much superior measure I would have switched.

Q. As it is, it is sort of a Mexican standoff at any rate, isn't that fair, Mr. Simat, as far as the statistical analysis goes?

A. Well, as far as the statistical analysis, yes, it is a Mexican standoff.

As far as the conceptual differences are concerned I don't think that there is any real problem.

* * * * *

[Tr. 8668] * * * Q. Book XI is time series analysis in the sense that you have used that and as you have defined it this morning, is it not, Mr. Simat?

A. Yes, it is.

Q. It is confined to TWA, the first portion of the book covering domestic direct costs and the second portion of the book international direct costs, is that correct?

A. That is correct.

And I might say as a preface that we did not rely on any of this information.

[Tr. 8669] Q. I do think there is one thing I would like to ask you about, though—I won't introduce my little plots here—by which I mean graphs—but there are one or two odd things about this that may have a rather general significance.

Take the international side of this, and take any equation, but Equation 1 I suppose is the most important of the direct cost equations, and then look, if you would, please, at aircraft type 808.

A. As a matter of fact, that is exactly where I opened it up.

Q. Aircraft type 808 is shown in your index as being the Boeing 707-300 series, is it not?

A. Yes.

Q. When, just approximately, did TWA get Boeing 300Bs which of course are designated by TWA as 331Bs, into their fleet? Just approximately.

The Special Master: Can you refresh his recollection on that?

Q. It was about the end of 1962, was it not?

Mr. Hayes: 331Bs?

Mr. Tenney: That's right.

A. Yes.

Q. Looking at your residual analysis of this [Tr. 8670] table here, I see figures for the Boeing 300B, direct operating costs, commencing—the first figure I see there if I translate it correctly is the third quarter of 1959, is it not?

A. You are absolutely right. It is the first quarter of 1959.

Q. Excuse me. First quarter of 1959.

Not only TWA but nobody in the world had that kind of airplane at that time, isn't that correct?

A. It just shows you you can't rely on these figures.

Mr. Tenney: There are some other examples but I don't think I will go into them.

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[Tr. 8753] * * * Q. But in your estimates of transatlantic flights, you have used the same numbers that Mr. Wemple estimated which involve an allocation of the total mileage flown by these aircraft in international service, between transatlantic flights and other International Division services, is that not correct?

The Witness: May I have that question read back, please?

(The question was read.)

A. Mr. Wemple estimated transatlantic flights by applying an historical factor representing the ratio of numbers of transatlantic flights to numbers of aircraft miles flown. We have applied the same ratios in our estimate of transatlantic flights.

Q. By the application of that ratio, Mr. Wemple assumed an increase in non-transatlantic services proportionate to the increase in total aircraft miles flown, is that not correct?

I think that the portion of the Coverdale & [Tr. 8754] Colpitts report immediately prior to page 15 and then on page 15 sets the analysis forth rather fully. I just want to make sure I am clear as to what your answer is on this general subject.

A. If I may take a crack at rephrasing the question before answering it, because I am not sure I can answer it in the form in which it was given to me, if we were to take the total flights estimated by Mr. Wemple, transatlantic flights, and multiply those flights by some average distance per flight—and this would be difficult to determine, I might add—the mileage that we would come up with as a result of a calculation would be something like less than the total International Division mileage that is operated by TWA. So there obviously or should be in the historical experience some reflection of mileage operated beyond the gateways.

However, the significance of that mileage is not at all clear. I am not aware, except for some minor operations through the Middle East, of services which TWA originates abroad.

In short, the bulk of TWA's services originate in the United States and are operated across the Atlantic and penetrate into Europe.

So, all the mileage is accounted for and all of [Tr. 8755] the traffic, transatlantic traffic carried on these flights is accounted for.

Now, historically, it has been true, and I think that Mr. Wemple's figures would indicate, that, there is an increasing proportion of TWA's transatlantic service that is operated between the gateways—and by gateways I mean U. S. gateways such as New York and transatlantic gateways such as London, Paris and Rome.

This is characteristic of U. S. operations in the transatlantic area. As time has gone on, there has been less of a concentration of long flights penetrating deeply into Europe or the Middle East, and more of a concentration of transatlantic services, turn-around flights operated in the transatlantic area. And this policy, I might state, is encouraged by the U. S. Government. The last international policy paper that was promulgated by the government strongly suggested that U. S. airlines concentrate primarily on the transatlantic area and devote less effort to operations beyond the gateways.

I don't know whether this has answered your question as completely as you anticipated or not.

Q. I think it does.

Just one or two more questions on that same general subject.

[Tr. 8756] If reconstructed TWA with these additional aircraft employed to some extent in beyond the gateway services found that the use of these additional jet aircraft in those services did not produce any increase in revenues, management could have made a decision to concentrate all of those services on what you have described as turn-

around transatlantic flights, thus providing more transatlantic seats, might they not?

A. Yes, that was certainly an option open to management.

A further option open to management was not to have flown that mileage at all. But as I have tried to make clear we are not altering in any way the assumptions made with respect to total miles flown. And in the transatlantic area we have further assumed that Mr. Wemple's calculation of the usage of the aircraft is a correct calculation, and we have followed his calculation.

I myself would not agree that the use of the aircraft as it is inherently assumed in the calculation is the appropriate use of the airplane.

The Special Master: Are you speaking now as between transatlantic and beyond the gateway or between domestic and international?

The Witness: Well, I am trying to make a [Tr. 8757] distinction here between really three things.

There is transatlantic, and then there is beyond the gateway, beyond the gateway meaning in this case the origination of a flight abroad and moving to another point abroad.

The Special Master: I understand.

The Witness: Then there are questions of how far you route a transatlantic flight once you get into Europe. In other words, having operated to Paris, do you want to go to Rome as well on that flight? If you do not go to Rome on that flight and operate only to Paris, presumably you lose some of the Rome passengers that you are carrying.

And in the figures that we have used, we have used TWA's historical experience with respect to its

New York-Paris and New York-Rome passengers as well.

So we have made no basic change in the manner in which they were routing airplanes or assumed no basic change. But there were options obviously available to management. They could turn the flight around at Paris if they wanted to.

By Mr. Tenney:

Q. You have not in your computation made any estimate [Tr. 8758] as to what additional revenues might have been achieved by the exercise of that option?

A. That is correct. Or revenues that might have been lost by the exercise of that option.

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[Tr. 8762] Q. Would you refer, please, to Volume IV of the Coverdale & Colpitts report, Exhibit F, sheets 51 and 52 which are the page references given on this table that we have been looking at for the lines in question.

You will see near the bottom of the page the line which reads, "4B-331B jet aircraft," and the figure under the heading "Actual Expense" of $10.4 million, and then the figure in the last column opposite the same line of minus 10.4 million indicating a deletion of the $10.4 million in question in the Coverdale & Colpitts estimates.

Do you see those entries, Mr. Simat?

A. Yes.

Q. Do you see immediately under that the explanatory sentence which reads:

"Our estimates assumed the substitution of B-331 aircraft for B-331B aircraft which eliminates this B-331B expense."

Do you see that sentence, Mr. Simat?

A. Yes, I do.

[Tr. 8763] Q. Did you in your report estimate a reduction of TWA's expenses to reflect the absence of operating costs for the B-331B aircraft in 1963?

A. If we didn't, we should have.

I would have to check again to make sure.

I had some problems with the numbers in Exhibit F. It does not seem reasonable to me that a given amount of B-331 mileage could be used to replace the same amount of B-331B mileage at a lower cost, since the B-331B is a less expensive airplane to operate per mile than the Boeing 331, but let me examine my own figures.

I will have to check this further, Mr. Tenney, but I believe that we do have an error here. I believe that we have not offset the Boeing 331B miles in our cost estimates and consequently we have not deducted the reduction in Boeing 331B aircraft operating costs in 1963 that we should have deducted.

But I will have to check out the figures.

Q. In theory, historical B-331B costs should be deleted for the purposes of the assumptions we are making here, is that correct?

A. That's absolutely right, yes.

Q. I will call your attention to the fact that this involves in the International Division for 1963 the largest [Tr. 8764] portion of those 331B expenses totalling $11.8 million, but that a small amount appears in 1962, 100,000 only, and a relatively small amount appears also in the domestic portion because of the nature of the allocation of the B-331B between domestic and international which shows up on Schedule II-5 for 1963 and amounts to 700,000.

Mr. Hayes: That is II-5, TWA Exhibit 345.

Mr. Tenney: That is right.

Q. II-5 for 1963 amounting to 700,000 and II-4 for 1962 amounting to 100,000.

So that you have about an additional 900,000 in those miscellaneous places as to which the same principles are applicable and as far as we can tell there was no deletion.

A. I will certainly check that out.

In principle, the B-331B costs should have been deleted. If they were not, it is sheer error on our part. • • •

[Tr. 8868] • • • By Mr. Kohn:

Q. May I ask one question on what you just said, Mr. Simat?

When you say that the use of one airline gives you problems for purposes of comparison, may I ask you is there any airline whose domestic operations are more comparable to the domestic operations of TWA than those of American Airlines?

A. I would say that United Airlines is probably very close in comparability to TWA in terms of its domestic route structure and the extent to which it parallels TWA's routes.

I would have difficulty distinguishing between United and American Airlines on the grounds that United [Tr. 8869] was less comparable than American.

Q. You think United is as comparable as American is to TWA?

A. I think there are a number of airlines that would have to be considered.

TWA, like all major trunk lines, competes with virtually every other major trunk line in the business today.

In fact, I believe it is true that TWA competes with every trunk line over some portion of its routes.

But the difficulties of using one airline as a basis for estimating the profits of another are that the earnings of

any one particular airline are quite susceptible to changes in policies, changes in route structure, which affect that airline perhaps more peculiarly than the operations of any other airline.

I myself do not feel that the comparative profit type of study is particularly valid in any circumstances, but I would say to make it more valid than the study is here, one would certainly have to broaden the base by extending the number of years that are used as the base period from which the given period is estimated.

One would also have to extend the base to in- [Tr. 8870] clude a greater number of airlines in the base so as to make the results less susceptible to the kinds of errors that can creep in because of the events that are peculiar to one airline or another airline.

And one would also have to examine both the base period and the given period very carefully to make sure that there were no changes between the base period and the given period that would affect the earnings of one airline more than another.

For example, if it were true that one airline was the beneficiary of a major route grant which affected its earnings in the base period, a route grant which it did not have in the given period, certainly either the given period earnings or the base period earnings, would have to be adjusted to equate the two situations, to assume either that the route grant was there all along or it was not there at all in both periods. You couldn't have it both ways.

• • • • •

[Tr. 9180] • • • Mr. Tenney: Our spot-checks, as I say, showed several instances in those two months which was the only two we checked, December of 1959—excuse me—July of 1959 and December

of 1961 in which we thought Viscounts and Electras were included. I am glad to know it was in error if that occurred.

Mr. Brownell, I have really only one other thing which is in the nature of a response to a question directed to counsel I guess I would put it some time ago in the course of the examination.

It was with respect to TWA Exhibit 355 and TWA Exhibit 356. Those two exhibits were introduced in the course of Mr. Kohn's cross examination of Mr. Simat on the so-called comparative profit study of Mr. Wemple and the related section of Mr. Simat's report.

The portion of the transcript—and Mr. Perkins may wish to check this—to which I refer is page 8881A.

You may recall that these exhibits, TWA 355 and 356 were prepared to correspond in most respects to tables introduced in the course of Mr. Wemple's [Tr. 9181] comparative profit study comparing TWA's international operations with Pan American's Atlantic operations and TWA's domestic operations with American's domestic operations. The differences in these two exhibits were that one of them added United Airlines as a domestic comparison, and the other added domestic trunks as a domestic comparison. Otherwise, they came out with about the same figures.

Mr. Hayes said on page 8881A and I quote him:

"I notice that there has been a change between page 4 of Mr. Wemple's Exhibit 4B and TWA Exhibits 355 and 356 with respect both to the figures called TWA actual profits in the two exhibits including the

profit for international from 34.4 to 34.5 and a corresponding reduction of $100,000 in the Pan American figure. Is this supposed to also be an amendment of Mr. Wemple's original report which was carefully checked by counsel and Mr. Wemple?"

Mr. Kohn said, "We will have the $100,000 figure you mentioned checked."

I have a couple of extra copies. Here is a set of 355 and 356. And here are two copies of 355 and two copies of 356.

It was not our intention by introducing 355 and [Tr. 9182] 356 to amend or make any changes in Mr. Wemple's original report. The differences in these figures that Mr. Hayes called attention to are the results of rounding differences, people rounding things in a different way this time than they did last time.

But in order to avoid the suggestion of a correction which was not intended to Mr. Wemple's original report, I would like to amend for the record certain of the figures in these two documents.

In the first table of Exhibit 355 opposite Pan American Atlantic under 1964 the figure 26.2 should read 26.1 which is what it read in the corresponding table in Mr. Wemple's original report.

That does not affect the average.

In the third table the lines opposite TWA international, the figure under 1963 should be 23.3 instead of 23.4, and the total figure should be 34.4 instead of 34.5.

In the final table at the bottom of the page opposite TWA international under the actual column the figure 34.5 should be changed to 34.4 and the difference figure of 81.1 should be changed to 81.2 and

correspondingly the total at the very bottom of the page, 149.4 should be changed to 149.5.

[Tr. 9183] Except for the last few figures which are the result of the computation, this conforms the figures to those given in Mr. Wemple's original report.

There are substantially the same changes to be made in TWA Exhibit 356. In the first table opposite Pan American, Atlantic, under 1964 the figure should be 26.1 and not 26.2.

In the third table opposite TWA international under 1963 the figure should be 23.3 and not 23.4. The total figure for TWA international should be 34.4 and not 34.5.

In the final table opposite TWA international, actual TWA profits should be 34.4 and not 34.5. The difference figure should be 81.2 and not 81.1.

And the total figure at the extreme bottom right should be 121.3 instead of 121.2.

To repeat, the cause of these things they were rounding differences, rounding these things in different manners on the two separate occasions.

• • • • •

[Tr. 9788] Q. A minute ago, Mr. Simat, you referred to certain passages in the Ezekiel & Fox. So as to put this in some kind of a manageable compass as far as whatever else you would like to bring up, would you attempt to review the passages that you directed our attention to just now—I realize you did not have a chance to study it carefully—and consider whether those adequately bring out the points you were trying to make, and if they do not, give us a list of such other things as you wish to call our attention to, if possible on Thursday when we resume, and I suppose that

we could all agree that whatever point there is in these probably can be brought out with a relatively limited number of examples, if you will select the ones that seem to you to be most appropriate to make your point.

Then we can review them and see if we have any further questions on it.

Would that procedure be satisfactory to you, Mr. Simat?

A. It sounds most fair, Mr. Tenney.

Q. I have one question that is somewhat on the same line, perhaps one small group of questions and perhaps we can get to that before we recess.

In previous printouts of regressions that you [Tr. 9789] have furnished us with, Mr Simat, in connection with your earlier report, and indeed in most of the printouts that you have furnished us with in connection with this report, some other tests or perhaps I should call them parameters have been printed out. Specifically almost all of them have listed the standard error of estimate.

I notice that is not here in this one. Can it be readily computed from this data?

A. It can be computed from the data. It is not shown in this particular printout, and the reason that it is not shown is that we have used from time to time in our analysis various programs for computing correlation coefficients.

Some of the work has been done in Boston, and we have used two different computer organizations in Boston. We have had some of the work done in Washington, D. C. and we have used two different computer organizations in Washington, D. C.

And there are variations in the programs insofar as certain of the programs do not report or print out all of the statistical parameters.

The program that was used in this particular case did not print out the standard error, but the standard error can be computed, and we would be glad to supply it.

[Tr. 9790] Mr. Perkins: I would like to make one statement, Mr. Tenney, as to what the report does or does not contain, and this pertains particularly to Volume B of the report.

It was composed under extreme pressure to meet a deadline, and there is no doubt that if time—if there had been even another week to write it, it would have been a fuller, clearer, more detailed report.

That is simply a fact which may explain why some things are not in the report that might otherwise be there.

The attempt was to put the essentials there and the work papers it was hoped would supply anything else.

But I am sure that with further time this would have been a somewhat more full and lucid report, the text in Volume B in particular.

Mr. Tenney: Let me state for the record the figure which has been given to me by a man who computed it as the standard error of estimate for your preferred equation and perhaps you can check it and confirm subsequently whether this is accurate or not.

[Tr. 9791] It is one standard error plus or minus 10,530,000 passenger miles.

I think this would be a good time for our recess.

The Special Master: All right.***

[Tr. 9997] * * * By Mr. Tenney:

Q. As I understand it, this printout that you have just showed me, Mr. Simat, is the printout of data cards that were used in connection with the production of De- [Tr.

9998] fendants' Exhibit 331, I believe it is, which was revision of your profit and loss calculation on certain changed principles; is that correct?

Mr. Perkins: I think that was—my recollection may be faulty—I think that reflected changes in connection with the elimination of 331B costs, and I think there was a change in the computation of the method of adjusting the marginal load factors for the effect of economic growth.

In connection with submitting that, Mr. Simat had had a program prepared which could immediately compute the profit and loss effect of changing any of the factors that he had used, and Defendants' Exhibit 331 was such a computation of profit and loss, and in connection with that we supplied a program—a printout of program and probably other materials.

By Mr. Tenney:

Q. I do not recall—I am asking for the transcript to be checked and possibly you will recall—that we were informed at the time that the constants that you had used for yield have been changed.

Do you recall that?

A. I don't recall that we changed the constants of [Tr. 9999] the yields.

Q. In your revised report, Mr. Simat, at page D-8, the figures for the yield formula that you used in that revised report are all set out, and they are different from these figures that appear in this program, and I now discover from your having explained it to me now, that they are different from the figures that you used for Defendants' Exhibit 331.

We did not know that at the time. That may also explain why most of the cost figures seem to be different, cost constants seem to be different from those that were used in your previous report.

For example, in your previous report, Vol. I—

The Special Master: When you say "revised report", you mean revised pages of original report?

Mr. Tenney: Mr. Brownell, we had a lot of revisions of these documents and it is undoubtedly confusing.

Defendants' Exhibit 271 was, of course, originally introduced in July, and then we had a large number of revised pages.

The Special Master: Yes, I remember that.

Mr. Tenney: That was regarded as the revised [Tr. 10,000] basic report of Mr. Simat, and that's usually what I intend at least to be referring to when I speak of his revised report.

The Special Master: All right, I just wanted to get that clear.

Mr. Tenney: In that report, there are figures set out as to many factors that were used in computations.

One of the figures set out on the page I cited is a list of the factors used for the yield formula for each year in question.

In the way this thing is organized, that particular table was largely the same as it had been in July, and you can actually see the corrections that were made. There were relatively few figures. And I think we all have them marked in our copies.

Mr. Perkins: Two of them were just rounding corrections, and the only correction of any significance

was the fixed amount for 1959, which was changed from $5.59 to $5.34.

Mr. Tenney: A good deal later, near the end of the cross-examination of Mr. Simat on this report, a revised profit and loss study—computation, I should say, was introduced which was marked as [Tr. 10,001] Defendants' Exhibit 331, and came up with different end results.

My understanding was that it had reflected changes only of the types that Mr. Perkins outlined on the record a few minutes ago.

I had not understood, although it now does appear, that most of the other constants or factors were revised to some extent.

Just for example—I have not examined this program that Mr. Simat is referring to for this purpose—but in the case of tons per aircraft, a factor that Mr. Simat uses for some of his computations, the year 1959 for the 1049H aircraft, Vol. I, Page V-14 of Mr. Simat's revised report, Defendants' Exhibit 271 sets out that figure of tons per aircraft for that type of aircraft at 10.924.

In our check of the program data used for Mr. Simat's supplemental report, we find that the figure he has used is 14.905. It had not occurred to us that this change might have been inserted into Defendants' Exhibit 331, and in the course of our cross-examination last fall, we did not inquire into it to that extent.

I think perhaps now about all I can do is [Tr. 10,002] ask were these other factors changed at that time as well.

The Witness: Is there a pending question?

Mr. Tenney: Yes. I will restate it, because it followed a lengthy statement and it might be more difficult for the reporter to find it.

By Mr. Tenney:

Q. In connection with the preparation of Defendants' Exhibit 331 last fall, were there changes made in your variable cost factors from those which were printed out or set out in revised Defendants' Exhibit 271?

A. It is my understanding that Exhibit 331 contains all the revisions that were made either as a result of errors determined and revised in the report itself or as a result of errors that may have become manifest through the cross-examination.

And 331 is supposed to be the correct version of the calculation of profit and loss in the case.

And I am not aware of any changes in 331 that are not a matter of record.

Q. I do not believe that there is anything on the record except this conversation, question and answer this afternoon, that reveals that there were changes in these costing factors used in the computation of Defendants' [Tr. 10,003] Exhibit 331.

But do I now understand that there were such changes?

A. I am just not aware of them. I will be glad to look to see if there were any changes. I don't believe so.

But we will certainly check out this possibility, since it seems to be a matter of caution.

As far as I know, the calculations that are performed in Exhibit 331 are to support—or to support 331 are the correct calculations. These were made available to you for checking.

We have used the same basic factors in calculating the profit and loss data in connection with our supplemental report.

There should be no change between 331 and the supplemental report in any of the costing factors.

And as far as the yield information is concerned, the only difference between the report and what it sets forth there and the figures that appear in the computer run are that the computer actually worked out the formula and came out—carried the calculations out a greater number of places than we did for purposes of the report, and consequently there are rounding errors, or rounding dif-
[Tr. 10,004] ferences, I should say, but they are all in the last place and generally insignificant.

Mr. Perkins: I might just state, Mr. Tenney, we had assumed that since you had an opportunity to examine that and didn't ask any questions about it, that it was satisfactory to you. And we noted that, in fact, TWA Exhibit 370, you submitted a number of calculations which were, in fact, based upon the figures shown in Defendants' Exhibit 331.

Of course, we don't mean to say if you now have some questions that you did not have at that time about anything that appears in 331, we would certainly be most happy to explain them to you.

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[Tr. 10,034] The Special Master: Proceed.

By Mr. Tenney:

Q. Mr. Simat, Subchapter D of Part III of your report is headed "Estimated Changes in Operating Profit or Loss," and it begins on Page III-24.

The actual changes are set out in tabular form on the Pages III-25, III-26, III-27; is that correct?

A. Yes.

Q. III-27 is Table III-J, and it summarizes the net changes produced by combining your piston estimates and your jet estimates for the years in question; is that right?

A. Yes.

Q. On the assumption that we are dealing with here, TWA would have had in the period in question a substantial number of additional jet aircraft, varying in absolute number, of course, from year to year, but a significant number of jet aircraft in addition throughout the period to those that it had historically; is that not correct?

A. Yes.

Q. Those aircraft, that type of aircraft, I should say, generally speaking, the transport aircraft that were being introduced into domestic airline service during that [Tr. 10,035] period, represented the newest, fastest and most attractive aircraft being operated in domestic service in those days, did they not?

A. Yes.

Q. Is it fair to say that the net results of the changes in TWA's operating fleet that this would have produced would have been in the direction of making it a newer, more modern fleet than it was historically?

A. Yes, a higher percentage of the fleet would have consisted of aircraft of the jet variety.

Q. I believe you have testified on several occasions that the jet aircraft are more attractive to passengers, other things being equal, than piston aircraft. I am only looking for a general answer to that. I am sure that you have a number of comments that you have already made on the record as to what this means and why, but in general, is that not correct?

A. I just wouldn't want to bury the term "other things being equal." That is a mighty big "if."

But other things being equal, yes, the jet is a more attractive airplane than the piston aircraft.

Q. I believe, however, you have stated, on occasion, in the record, your views as to what other things should be

examined, and I do not think that we need to go into [Tr. 10,036] it again, unless you think it is important at this point.

The Special Master: I am not insisting on it.

Q. In the column on Page III-7, giving the total for the five years 1959 through 1963, opposite the figure "Increases-decreases in operating profit," we find (87.32) and that represents, as I understand it, your estimate or opinion that the result, as far as operating profit goes to TWA of its change in its fleet, would have been to cause it to have $87.32 million less operating profit or more loss, whichever way you want to look at it, than it did historically in those five years; is that correct?

A. Yes.

Q. The next figure immediately above it in that column indicates that the operating costs to TWA of this improved fleet would have been 12.60 million less than its historical fleet; is that correct?

A. Yes.

Q. With a more modern fleet, more attractive to passengers, if TWA could have operated that fleet at an operating cost such as $12.60 million less, how could it be that TWA would have lost money by the change?

A. I think, Mr. Tenney, that we have been over this ground before and you have to look, as they say on Madison [Tr. 10,037] Avenue, at the big picture.

The replacement of piston aircraft services by jet services was not, as I think I pointed out before, an unmitigated blessing.

During the period when the industry was substantially increasing its jet capacity from 1958 and 1959 through 1961, there was, indeed, an absolute loss in traffic. And the reason

for the loss in traffic is associated, in my opinion, with the very sharp decline in the number of operating scheduled frequencies.

The substitution of a large jet with 120 or more seats for services that had been supplied with aircraft with seating capacities of 50 to 60 seats, or approximately half, resulted in a very material reduction in schedule frequencies.

And since the jets did not stimulate traffic, did not add to the total volume of traffic, however attractive they may have been in competition with piston aircraft being provided in the same markets, all other things being equal, there is no evidence, with the exception of what we have developed in connection with this proceeding, that the jets actually did add to the total volume of traffic which moved in the industry.

The Special Master: Why don't the air- [Tr. 10,038] lines go back to the piston planes, then, if they can make that much more money?

The Witness: The answer is that the jet, all other things being equal, is a more economical plane to operate. Its cost per seat mile will be less than that of the piston aircraft when the traffic develops to the point where a sizable fleet of jet aircraft can be utilized at frequencies which are demanded by the market. The jet is a very economical plane, and the jet will make a profit.

We are now talking about whether in a period when the addition of jets were resulting in fairly substantial losses in traffic for the industry as a whole, whether additional jets were required to make a carrier whole.

The answer is in a period of over-capacity, the addition of additional capacity is not the answer.

As for why the airlines do not go back to piston aircraft, there were periods when some of the airlines would have wished very devoutly that they could have returned to the good, old days.

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[Tr. 10,393] Q. If one were to reject the theory that you can make a profit and loss analysis applicable to individual aircraft in a fleet and rank them by profitability—and I realize, Mr. Simat, that that is a hypothesis that you have made and I am not asking you to reject it—I am just asking you to suppose that hypothesis were rejected—and make the further hypothesis that the only reasonable way of determining the profitability of units in a fleet were to average revenues and costs for the fleet, then the entire analysis that you have made in Appendix D would not be possible, would it?

A. Oh, it would be possible. It wouldn't be appropriate under those assumptions.

Q. You would not get any results that would point in any direction at all, would you?

A. Well, we could follow the same procedures. We would not be following the procedures to any meaningful conclusion, if that's the answer you are seeking.

Q. The process of ranking aircraft by profitability is the fundamental first step that you must make to apply the analysis that you have applied in the alternative estimate, is it not?

A. The underlining hypothesis is that aircraft in the fleet will have different levels of profitability, [Tr. 10,394] and it is possible to estimate the profitability of a larger or smaller fleet of aircraft by ranking the aircraft in order of profitability, determining a relationship between the rank order of profitability and profit and loss, and estimating for a larger or smaller fleet accordingly.

This, in my opinion, is a reasonable way of doing it, but, of course, it would not be reasonable under the assumption you have propounded.

Q. On page III-29 of Volume B, there is a chart which is labeled IIIA and which is headed "Operating Profitability of Jet Aircraft Showing Profit or Loss by Profit Rank in a Sample Month."

Was this chart intended by you to be illustrative of the points that you were making in connection with the alternative estimate?

A. Yes, it is illustrative of the differences in profitability of different aircraft in the fleet when they are ordered in relation to their actual profit or loss as determined by whatever method of revenue allocation and cost allocation is used.

Q. Mr. Eichner this morning testified that there was nothing particularly necessary about ranking the most profitable ones first. You could rank the less [Tr. 10,395] profitable one first. And if you did that and transferred the results onto a graph like this, all the lines would be pointing up, wouldn't they?

A. You simply change the scale, but you don't change the line. • • •

Q. Mr. Simat, TWA Exhibit 434 for identification has taken the precise three months and aircraft that you chose for your illustrative chart at Page III-29, and we have plotted the same data except that we ranked the least profitable aircraft as No. 1 and the most profitable aircraft as the last number in this ranking order, and we find that all the lines point up.

Now that you look at this chart, isn't it clear that that's what they would have to do if you ranked them in that manner?

A. Well, the basic character of the line does not change whether they are pointing upward or downward.

The line indicates that there is among the [Tr. 10,396] individual aircraft of the fleet a difference in profitability, such as the difference between two aircraft consecutively ranked is virtually a constant amount, that is, the amount of difference between any two aircraft is approximately the same, however, they are ranked, either from high to low or low to high.

Q. Whichever way you rank them statistically it would make no difference, you would get the same formulas and so forth that you have come out with and the same coefficients of correlation and so forth that you have come out with in Appendix D, is that not correct?

A. That is right. With the exception, of course, that they would be ranked in order of profitability from low to high or high to low.

Q. Back on Appendix D, those pages starting at page 3, the next to the last column are correlation coefficients.

These are the same measures in general that we have been referring to from time to time in both this report and your previous report last fall?

A. Yes.

Q. These, of course, are simple correlations because you have only one independent variable, is that correct?

[Tr. 10,397] A. Yes.

Q. There were one or two surprises here.

On page 5, for the 331 aircraft for September and October of 1961, there were only two data points, is that correct, Mr. Simat?

A. Yes.

Q. As a matter of theory, isn't it clear—I think you have previously testified—that a regression of this type per-

formed on two data points must produce a formula with a correlation coefficient of 1.0?

A. Right. In the interest of conservatism we have stated it as .9999.

Q. Is it possible that your computer was not computing it right?

A. I think the computer was computing it right.

Q. Why weren't you conservative in April of 1962 where the computer seems to have come up with the two data points with a coefficient correlation of 1.0000?

A. I think we may have run out of conservatism by then, but I don't think there is any practical difference between the two correlation coefficients.

Q. Do you regard these correlation coefficients as high, Mr. Simat?

A. They are high.

[Tr. 10,398] Q. Do you rely on them as indicating a reliability for the analysis that you have performed here?

A. Only to the extent that they indicate to me that our basic premise as to the difference in profitability among individual aircraft was essentially correct; that the differences are—amount to a constant, so that the first ranked airplane has a profit margin that is some sum greater than the second airplane which in turn has a profit margin which is the same amount greater than the third ranked airplane and so on.

Q. If you take any 25 numbers, just to pick a size of sample, and you rank them in order of magnitude, aren't you always going to find, if you did it right, that the last one is smaller than the one just before it and so right on up the line?

A. Well, that's certainly true since that's the criterion for the ranking. The question is whether you get the same difference in amount between conservative aircraft.

If we had a truly random situation where profit margin was not related to ranking at all, then we would find that there would be a tendency for a large number of aircraft to show rather small differences among them in order of profitability than for a [Tr. 10,399] comparatively few number of airplanes to show large differences in profitability.

* * * * *

[Tr. 10,402] Q. We, Mr. Simat, have caused some random numbers to be generated by a computer, using numbers of the quantity that are involved in your various samples, and we had five separate sets of random numbers generated, each of them being six-digit figures, since the figures that you were working with from Appendix B are six-digit figures, that is, they are figures in the group of 1 to a million.

The six sets were sets of 4, 6, 15 and 24, and then another set of 4, since we were trying to get the largest and smallest numbers used in the three types of aircraft that you have. So we have 4 and 15 for the 131, 6 and 24 for the CV-880, and 4 for the 331. We omitted the two.

And we caused regressions to be run on those sets of numbers, after they had been ranked in decreasing order, to see if we could ascertain a regression formula from them and what the statistical results were.

All of these processes are things that can be accomplished through programming a computer in the proper way, can they not?

A. Yes, there are about four or five different ways of obtaining random numbers, and I assume that these random numbers were obtained with signs, they were plus and minus.

Q. No, these are numbers in the group from 1 to a [Tr. 10,403] million.

A. Of course, the numbers in our series run from pluses to minuses.

Q. That is true. So that it would slightly increase the size of the total group that you could include?

A. Slightly, meaning double it.

Q. I don't think you have any minus figures that are in anything like that order of magnitude, Mr. Simat. I have previously checked this, but I don't think you have any minus figures that are as high as 100,000, do you?

We find one 125,000 minus figure.

A. I don't see any plus figures above 500,000.

Q. So that we have a number of series of numbers within, oh, roughly—the precise numbers are not important—the range of 500,000 or so and minus 125,000 or so or a total of something between six and seven hundred thousand six-digit numbers that might be involved; is that correct?

A. Well, the entire range of experience, profit and loss on the method of cost and revenue allocations used is from approximately plus 400,000 to minus 100,000, which would give you a range of about 500,000 in total.

Mr. Tenney: Would you read that back to me? [Tr. 10,404] (The record was read.)

By Mr. Tenney:

Q. Actually, if you have a series of random numbers that are all of constant positive sign, you can convert them without affecting their randomness into a series including both positive and negative by uniformly subtracting a constant figure of your selection from each of your random numbers, can you not?

A. Yes.

Q. Any regression in terms of developing a regression line that you performed on the resulting figures would not be changed by that process, would it? It would change your intercept, I believe, but it would not change the slope of your line in any sense?

A. That is correct.

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[Tr. 10,407] By Mr. Tenney:

Q. Clearly, Mr. Simat, without an examination and analysis of the program which I can't expect you to perform here, you are unable to check the randomness of these numbers, and I shall not ask you to do so, but that is something that you could check by an analysis of the program, could you not?

A. Yes.

Q. I ask you to assume that the numbers were random numbers properly selected for the purpose in the way I have described to you and answer the questions that I will ask you on these regressions on that assumption.

Taking the first sheet of TWA Exhibit 435 for identification, the first process performed on the four random numbers as to rank them in descending order of magnitude. That is essentially the first process performed by you and your colleague, Mr. Eichner, on the numbers that have been produced by Mr. Eichner's analysis in Appendix B, is it not?

A. That was a process that was used. I myself would have tested the range of the data also to see whether or not the random numbers generated were in the same range order of differences as the series that they are purporting to represent.

I notice, for example, that just to pick one at random that I am looking at a page which is headed "24"—I don't know whether that is the 24th run or the 24th page—

Q. No, this is the regression on 24 data points. Some 24 random numbers?

A. The range that I observe is from a low value of $36,779 to a high value of $786,639 which is a difference of about $750,000, and in examining the range of profit or loss data for any particular aircraft type or any particular month, I can't find any experience that comes even close to producing such a range.

I think this is generally true of all of the data generated by the random generation technique.

Q. As I understand that statement, Mr. Simat, you have suggested by it that the range of numbers from which these random numbers were selected is too large to be comparable to the ranges of numbers that you were using?

A. Yes.

The range of numbers will affect the calculation of the standard deviation of your Y series, and the larger that standard deviation the higher the cor- [Tr. 10,409] relation coefficient is apt to be.

If you reduce the range and reduce the standard deviation, you would have a tendency of reducing the correlation coefficient.

Q. If you took all random numbers that had been generated within any given range of numbers, could you not reduce or increase the range to any desired extent by multiplying all of the random numbers uniformly by a predetermined constant? For example, if you had selected your random numbers from a range of one million, couldn't you reduce the range to half a million by multiplying them all by .5 and rounding fractions up one perhaps?

A. Yes.

Q. Or you could increase the range by a corresponding process?

A. Yes.

Q. That would not change the randomness of the series if it had been properly generated in the first instance, would it?

A. But it would change the standard deviation which is a measure of dispersion arrived at by squaring the differences between each value and its mean.

The larger the range, the larger the standard [Tr. 10,410] deviation will be.

Q. It is your opinion then, Mr. Simat, that the coefficient of correlation would be decreased if you used a smaller range for this purpose?

A. Yes.

Q. Do you think that would be of material effect in this case?

A. I don't have any means offhand of estimating the effect. I think it would be significant, yes.

Q. You do not believe that it would increase the coefficient of correlation?

A. No. That is, increasing—decreasing the range will not increase the correlation coefficient.

Q. The correlation coefficients achieved by the regressions contained in TWA Exhibit 435 for identification are not printed out directly since this program prints out only the R^2 which is the square of the correlation coefficient, but they can be computed from that R^2 figure which appears about a third of the way up on the left hand side of the first sheet for that particular regression under the heading "Index (R^2)."

That computation can be made, can it not, Mr. Simat?

[Tr. 10,411] A. Oh, yes, take the square root of the figure that is shown.

Q. Without bothering to compute the precise correlation coefficients, it is apparent, is it not, that they would all be above .9 and all except the first two—I withdraw that. They would all be above .9, would they not?

A. Yes, some would be just fractionally above .9.

Q. Some would be very close to 1.0, wouldn't they?

A. Some would be very close to 1.0.

Q. Mr. Simat, is not your analysis in Appendix D essentially nothing more than creating a statistical pattern by rankings and random numbers that were produced not by a computer but through Mr. Eichner's analysis, and then deducing statistical conclusions from it?

A. No.

In the first place, Mr. Eichner's analysis did not produce random numbers.

In Eichner's analysis produced a reasoned profit and loss for individual aircraft under certain very definite and consistent methods of obtaining the revenue allocations to those aircraft and the cost allocations [Tr. 10,412] on the basis of experience data.

Q. Do you believe that the correlation coefficients that you print out in your Appendix D are any indication that the results you have achieved are reliable?

A. Yes, I think the correlation coefficients that we obtained indicate that the results that we have shown and obtained by our cost and revenue estimating procedures pretty clearly establish that there are differences in profitabilities among aircraft, which are part of a rational pattern; that differences in aircraft profitability are accounted for by differences in aircraft usage and not by any random effect.

Q. As far as the extent to which your coefficients of correlation furnish any indication of reliability of your results, would it not be significant that a similar regression performed on a properly selected series of random numbers ranked in decreasing order of magnitude produce correlation coefficients as good as the ones that you have developed?

A. Well, I do not agree that the random numbers that have been generated by whatever program was used are in any way comparable to the figures that were determined by us from the profit and loss analysis.

[Tr. 10,413] I already pointed out that the range of numbers is materially different in the two data sets, and this alone is enough to create differences in the regression coefficients or the correlation coefficients I should say.

. . . . . .

[Tr. 10,455] By Mr. Perkins:

Q. Mr. Simat, you were questioned at various points during the cross examination as to the basis of your opinion that jets, the mere addition of jets or a substitution of jets for pistons did not in itself stimulate new traffic in connection, particularly with the justification for your ratios of .17 per cent and so forth as contrasted with much higher load factors that that many jets obtained in operation during this period.

I ask you whether you have examined some of the prime markets for TWA and its principal competitors with respect to the effect of substituted jets for pistons and adding jet capacity on traffic carried?

A. Yes, I have.

Q. What were the segments that you studied or the markets that you studied, rather?

A. The two primary TWA markets, markets which over the five-year period have ranked Nos. 1 and 2 in TWA's passenger mile volume afford, I think, a particularly [Tr. 10,456] good illustration of the effect of jets on total traffic and also the development of jet services over the years, and the resulting diseconomies of services.

I have examined the total numbers of on-line passengers carried by American, TWA and United—these, of course, are the three transcontinental carriers—in the New York-Los Angeles and New York-San Francisco markets—these markets are respectively 1 and 2 among TWA's markets—and I find in looking at the New York-Los Angeles traffic that the annual travel between New York and Los Angeles as reflected in the surveys of the Civil Aeronautics Board has decreased from 1959 from a total of 526,000 passengers to 520,000 passengers in 1960, 450,000 passengers in 1963—

Q. 1961.

A. 1961. Excuse me.

463,000 passengers in 1962, and 515,000 passengers in 1963.

In the case of New York-San Francisco traffic, the experience is quite similar, with the exception that after 1960 the traffic totals reflect not only the impact of the jet but also the impact of a third non-stop transcontinental carrier in the market, American Airlines. [Tr. 10,457] Prior to 1960 or the end of 1959, more correctly, American was not permitted to fly non-stop between New York and San Francisco but was required to serve at least one intermediate point.

In the case of New York-San Francisco traffic, the respective totals for each of the years of the five-year period are 307,000 in 1959, 328,000 in 1960, after American came into the market, 297,000 in 1961, 291,000 in 1962, and 336,000 in 1963. And 1963, of course, was the year of a big gain in the general economy.

Mr. Perkins: Would the reporter mark a two-page document, the first page of which is headed "Annual On-Line Passengers Between New York and Los Angeles Carried by American, TWA and

United, 1959 to 1963," and the second page of which is headed "Annual On-Line Passengers Between New York and San Francisco Carried by American, TWA and United, 1959 to 1963," as Defendants' Exhibit 367.

(Two-page document, first page of which is headed "Annual On-Line Passengers Between New York and Los Angeles Carried by American, TWA and United, 1959 to 1963," marked Defendants' Exhibit 367 for identification, as of this date.)

Q. I ask, Mr. Simat, if Defendants' Exhibit 367 [Tr. 10,458] for identification sets forth the results of his analysis of the traffic carried in those markets in those years.

A. It does.

Mr. Perkins: I offer it in evidence.

Mr. Tenney: Are there any additional work papers on this document?

The Witness: No.

Mr. Perkins: The source is stated as the competition among domestic airlines, CAB.

Q. Are all the figures set forth in that source, Mr. Simat?

A. Yes, the figures are directly derivable from the source. They all appear in the source as separate totals.

Mr. Tenney: This includes both jets and pistons in every instance, as I understand it.

The Witness: Yes. There is, of course, in the source no distribution between jet and piston operations of passenger traffic. Only the single combined total is reported.

Mr. Tenney: The on-line passengers, as I recall it, are based on the origin and destination studies, is that correct?

The Witness: The on-line totals are [Tr. 10,459] derived in the first instance from the survey which the Board calls the origin destination survey, which reports the true origin and destination of the passenger and the passengers routing. Wherever there is a change of airlines involved, the routing disclosed, indicates the combination of airlines used and the points at which the inter-line transfer is made.

The Special Master: Why do you think TWA had a continuous drop during these years in the percentage of traffic that it got in these two markets?

The Witness: There are, of course, a host of considerations that enter into the division of traffic between competing airlines in any one or more markets.

Advertising efforts is one major consideration.

In my opinion, the TWA advertising plan during the period was largely geared to attracting new travelers, the first traveler, and as a result TWA, I think, suffered in terms of percentage participation in the market in many markets where business travel tends to provide a high proportion [Tr. 10,460] of total travel.

I do not believe that the decline occurred because of any lack of equipment or service in the market. There are also—

The Special Master: You think it was their advertising policy.

The Witness: I think advertising policy is a major consideration.

Then there are other problems, of course, or other factors which affect distribution of traffic in the transcontinental markets.

One factor is the identity of the transcontinental airlines on other companies. United has traditionally enjoyed a greater identity in traffic originated at the West Coast terminals because of the extensive service which United supplies on the West Coast of the U. S. between Seattle, Portland and Los Angeles-San Francisco. That is more or less United's home base.

American Airlines has enjoyed a similar advantage in the East because of its extensive services between Boston-New York and Washington.

TWA has lacked the advantage of strong terminal support at both ends. And this advantage [Tr. 10,461] when properly exercised by competing carriers normally does not favor TWA's position in the transcontinental markets.

Mr. Perkins: Do you have any more questions at this point, Mr. Brownell?

The Special Master: I am bursting to ask a few, but I won't.

Mr. Perkins: Was there a ruling on that offer?

The Special Master: No, I don't think so.

In the absence of an objection it will be received.

(Defendants' Exhibit 367, received in evidence, as of this date.)

Q. Have you also made a study, Mr. Simat, of the service offered by TWA, American and United in those same two markets during this period in terms of frequency and type of equipment, at least jet versus piston?

A. Yes, we have tabulated for the month of August in each of the years from 1958 through 1963, the weekly frequencies offered by TWA, United and American eastbound and westbound, and with jet and piston [Tr. 10,462] aircraft. Thus, we have covered all of the frequencies available for the transportation of passengers in what we believe to be a representative month of the year. August is either at the peak or near the peak of transcontinental traffic.

Our figures indicate that there has been a very steady increase in the amount of jet capacity that has been offered, and, in fact, the amount of total capacity that has been offered over the years in the face of this static or even declining trend in the total volume of traffic.

By approximate calculation, the total number of seats offered by all three carriers over the period has doubled or more than doubled in both the New York-San Francisco and New York-Los Angeles markets.

So here we have a case which I think is probably as illustrative as any that could be obtained for establishing the economics of jet operations.

Q. Have you prepared a tabulation, Mr. Simat, showing for each of these airlines and for the month of August and each of these years the weekly frequencies and whether they were performed by jet or piston service?

[Tr. 10,463] A. Yes, we have.

Mr. Perkins: I ask the reporter to mark as Defendants' Exhibit 368 for identification a three-page document, the first page of which is headed "UAL-TWA-AAL, Combined Transcontinental Non-Stop Scheduled Frequencies Per Week-August 1958-1963," the second and third pages consisting of the detailed data upon which the first page is based.

(Three-page document, first page headed "UAL-TWA-AAL, Combined Transcontinental Non-Stop Scheduled Frequencies Per Week-August 1958-1963," marked Defendants' Exhibit 368 for identification, as of this date.)

Q. Is this the tabulation you just referred to, Mr. Simat?

A. Yes, it is.

Mr. Perkins: I offer it in evidence.

The Special Master: In the absence of objection it will be received.

(Defendants' Exhibit 368, received in evidence, as of this date.)

Q. From this study of the history of traffic in those two markets, 1959 through 1963, in relation to the services that were offered, what conclusions do you draw with respect to the stimulus afforded by the [Tr. 10,464] addition and expansion of jet service during these years on traffic?

A. I think it is apparent from the traffic totals that the jet itself has had little or no impact on the stimulation of additional traffic.

Consequently, it appears apparent that the economics of adding capacity are largely the economics of stealing traffic from a competitor and in monopoly situations where there are no competitors, the economics of jet operations require the substitution of jet capacity for piston aircraft capacity on a seat mile per seat mile basis in order to realize the economies of jet operations, but in no event does it appear that there is any gain to be realized from the addition of capacity qua addition of capacity.

The Special Master: There is an obvious error there in the 1960 TWA figures. It does not show any eastbound flights at all, New York-San Francisco.

The Witness: We will examine that as soon as I can obtain the scheduled information. • • •

Excerpts From Testimony at Damage Hearing of L. John Eichner

[Tr. 10,158] L. JOHN EICHNER, called as a witness, being first duly sworn by the Notary Public (William Blitz), testified as follows:

Cross Examination by Mr. Tenney:

Q. Mr. Eichner, first I understand that you are an officer of the corporation Simat, Helliesen & Eichner.

A. I am.

Q. Of which Mr. Simat who has been testifying here is I believe president.

A. Correct.

Q. I understand that you desire to adopt as your direct testimony in this proceeding Part II of Defendants' Exhibit 359 which is—359A, I should say, which is Volume A of the supplemental report of Simat, Helliesen & Eichner, Inc.?

A. I do.

Q. Mr. Eichner, in this portion of the report—I may refer to it occasionally as the report, but we are talking about this portion of the report, as I understand it, you have attempted to analyze what historically occurred in TWA's operations in the period 1959 to 1963, is that correct?

A. Correct.

[Tr. 10,159] Q. In doing so, you have made use, I believe Mr. Simat explained, of the traffic information which you have derived from a study of TWA's internal records, including the on-board reports and similar information that were supplied to defendants by TWA at your request last fall.

A. That is correct.

Q. As I understand it, none of the figures that you have set out in Volume A are based upon the competition studies

or similar information which we have been discussing at considerable length with Mr. Simat?

A. Not in the appendices. And I'm not sure about the body of the report if we referred to it or not and I believe we did in some footnotes.

Q. Appendix A sets out in tabular form the specific analysis that you have made of the historical operations in that period with respect to jets, is that not correct?

A. That's correct.

Q. Would you turn to the month of June 1959 in Appendix A?

The first column is headed "B-70 A/C NUM."

Would you state what that heading means?

A. These are B-707-131 aircraft which we numbered [Tr. 10,160] arbitrarily from the routing charts which we were furnished by TWA.

Q. The fact that that column contains seven entries running from 010 to 070 reflects the fact that you identified seven aircraft in operational service in that month, is that correct?

A. That's correct.

Q. These numbers do not, as I understand it, purport to represent specific aircraft in the sense of a physical object, one physical object, do they?

A. Not in the sense of an NC numbered aircraft. Yes, in the sense of an aircraft which was an investment of TWA and which was shown as an active aircraft on their routing chart.

In other words, on their routing chart they showed seven actives in the upper left hand corner. Each of these numbers represents one of those actives the way they had them routed and as detailed in Table G and GG.

Q. But 010 actually represents a flight pattern for one day and not a particular aircraft, is that not correct?

A. It represents a flight pattern for one day which would not have been possible if they had not had [Tr. 10,161] that aircraft.

Q. But that flight pattern might be flown on any given day by any of the seven aircraft that they had, is that not correct?

A. As we stated in our report, it usually—the pattern was for TWA to rotate each one of the seven aircraft through all seven patterns but if they had had only six active aircraft, then there could have only been six numbers there and the seventh one would have had to have been dropped.

Q. Since you have designated these units as aircraft, I think that we will probably frequently be referring to them as aircraft in the course of this cross-examination, and I would simply like to get it clear on the record, right now, and as clear as we can make it, that the entries that you have listed here as A/C number such and such are really 24 hour flight patterns from the routing chart, that is, what a particular aircraft, but not necessarily the same aircraft, is doing on a 24 hour period? It is a pattern? It is a routing pattern and not an aircraft?

A. I think I might have a semantic problem, Mr. Tenney. TWA itself called them operating units. They said they had seven operating units and I think that's [Tr. 10,162] probably as good a way to refer to them.

The Special Master: What you are saying then if you are talking about the New York-Los Angeles run that it might be one physical airplane one day and another physical airplane the next day? It does not mean the same NC number?

Mr. Tenney: That is correct.

Mr. Perkins: I think that is all set forth in a good deal of detail at the very beginning of our report.

The Special Master: Yes, but he is trying to educate me.

Mr. Perkins: Yes.

Q. The way you have selected these numbers is, I believe, by looking at the routing chart—and perhaps for this purpose it would be helpful if we did pull out the routing chart for June of 1959—I am sorry we did not—

A. I have one for June of 1959 here if you want to use it across.

Q. You have taken the patterns shown in order from top to bottom along the left hand side of the page—

A. Usually.

Q. —have you not?

[Tr. 10,163] A. Usually.

Q. In every case that we found you had done so?

A. In every one that I did personally I did it that way, but some of the people helping me after a while took them slightly out of order.

• • • • •

[Tr. 10,167] • • • Q. The two columns just before that "Average Length"—I should say the column just before that "Average Stage Length" presumably is a numerical average of the average stage length set forth for the specific segments in Table GG, taking into account the number of departures for each segment, is that correct?

A. Correct.

Q. The passenger revenues from which the total revenues are computed as you have just described take into account all passengers on board in that segment and no

solely what Mr. Simat has described as on-board passengers, is that not correct?

A. That's correct.

Q. "Average Passenger Load Factor," the heading for the third column in Appendix A, is a similar computation derived from the load factor figures set out for particular segments in Table G, am I correct?

A. That's correct.

Q. The last four columns in this particular table which are "A/C OPER"—"GRND plus IND"—"Total OPER" and "Profit/Loss"—would you state what each of those headings is intended to cover?

A. A/C OPER covers the aircraft operating expenses [Tr. 10,168] for the direct operating cost of the flight. In Table—in Appendix A, it would include the block-hour cost for the crews, for the fuel consumption, for the maintenance and maintenance burden, for the—all insurance and depreciation and aircraft rentals, if any.

The GRND and IND represent the ground and indirect expenses such as aircraft servicing, traffic servicing, stewardess, other passenger service expenses and so forth.

Total operating is the sum of those two columns and profit and loss is the difference between the total revenues and total operating expense.

Q. In the case of ground and indirect costs, how have you derived that figure for the particular aircraft unit that is described as aircraft No. 010?

A. We used the methods that were described in the Volume II of the first report. We computed the aircraft servicing costs based upon a weighted departure which was the available tons times the departures.

The traffic servicing was based as described in the first report.

The stewardess expense was based upon four hostesses per jet as we described in the first report.

The passenger servicing expense other than [Tr. 10,169] stewardess expense varied with the loads that we had on board.

The advertising varied with the traffic.

The general administration is varied with all other cash costs.

If you wish I could do it with a pencil and paper while we recess and bring you back a pencil and paper for the record if you want to.

Q. I don't think it will be necessary at all.

The point that I would like to make clear, and I think perhaps it is clear from your answer, is that the ground and indirect expenses, specifically, represent an allocation to this particular operation of expenses that are only recorded on an overall basis by TWA, am I not correct?

A. These are expenses which are only recorded on an overall basis by TWA, but which by our costing method is developed in the first report and by TWA's own internal costing methods tend to vary with the operation.

If you add a departure from O'Hare to LAX on Flight 27 the first trip listed here you have to add people to service it, and it reflects that additional personnel.

Q. One final question to round out the description [Tr. 10,170] of this table, the second column which we have not discussed yet is headed "Rank." Rank is simply the numerical order of profitability that you have determined for these aircraft units as set out in the last column, am I not correct?

A. That's correct.

Q. If, for example, a particular aircraft pattern in the month of July were relatively more profitable than in the

month of June, its rank in the month of July would be different than it was in June, is that not correct?

A. That's right.

Q. It does not represent the order in which aircraft were received or necessarily the same aircraft number from month to month?

A. No. The only purpose of the ranking was to show that as additional jets were delivered, some jets were quite profitable and remained quite profitable, but other jets became less profitable or became losers.

Mr. Tenney: We will go into how this is used in some detail later on.

• • • • •

[Tr. 10,209] • • • Q. Using this averaging approach that you have used, if we look, say, at the next aircraft unit that you have identified in that same month which has an average stage length according to Appendix A of 2538.26 miles—that is a transcontinental trip, is it not, Mr. Eichner?

A. Yes, sir, it is.

Q. Can you tell us what segment that presumably [Tr. 10,210] is flown on?

A. If you are referring to aircraft No. 030—

Q. Yes.

A. That was flown on segments—it was scheduled between San Francisco and New York and New York and San Francisco. And it had some irregular operations involved.

And also on a segment between San Francisco and Baltimore.

Q. On segments of that length, it really is unlikely at the very least, that the passengers would be flying by TWA an average trip length of 1.435 times the segment length, is it not?

A. Yes, it is.

Q. In general, therefore, your approach has tended to minimize the revenues associated with the longest segments, is that not correct?

A. I would not use the word minimize, Mr. Tenney. So I would say no.

It has tended to approximate the revenues on the longer segments more accurately than other methods which have been used in this case. But it is not as accurate as using the data which we later obtained from the station performance report which would result in [Tr. 10,211] slightly higher revenues.

Q. As a matter of fact, the ratio that is recommended on Page III-22 for segment lengths in this range over 2500 miles, this being the ratio that I take it Mr. Perkins would prefer that I question you about, the ratio is 1.01 for 1959 and over the five year period after ranges 1.00, does it not?

A. Yes.

The ratio shown on Page III-22 which gives a more precise estimate of both revenues and expenses would be 1.01.

Q. That would produce a higher total revenues figure for this long range flight, is that correct?

A. A slightly, very slightly higher revenues figure for this long range flight on the magnitude of $10,000 out of approximately $922,000.

Q. Once you have determined a passenger revenues figure, what have you done to transform that into a total revenues figure?

A. We added five per cent to it for cargo.

Q. Do you think that the use of across the board indication of five per cent for cargo revenue is an accurate reflection of TWA's historical jet operations?

A. I believe we stated in a footnote in one of [Tr. 10,212] the reports which I believe I wrote that we wanted to explore this problem and we just did not because of the lack of time. It was a figure that was used throughout the case and we saw no reason to question it.

Q. You have examined, have you not, Mr. Eichner, the report put in on behalf of TWA by Coverdale & Colpitts as Mr. Wemple's testimony in this proceeding?

A. Yes.

Q. At Volume I, Page 31 of that report which constitutes testimony in this proceeding, the only evidence which has been produced on this subject is stated that in the Domestic Division the proportion of cargo revenue to total revenue varied in the five year period between 7.1 per cent and 8.5 per cent.

Do you see those figures in that table on that page, Mr. Eichner?

A. Yes, sir.

Q. Actually, that being a percentage of total revenue, it would be slightly higher as a percentage of passenger revenue, would it not, because of the smaller base?

A. That's correct.

Q. Mr. Wemple has testified that he used the five per cent figure for estimating additional cargo revenues, [Tr. 10,212A] although historically the proportion was from 9 to 12 per cent. He has rounded the figures up there at the top of Page 31.

But you, Mr. Eichner, are supposed to be dealing with historical figures in Appendix A, are you not?

A. That is correct.

[Tr. 10,213] Q. Why did you not use the historical ratios that have been testified to in these proceedings?

A. Well, because it would have been obviously incorrect to use 9 to 12 per cent of the total operating revenues which includes the all-cargo operations of TWA.

Mr. Tenney: Would you read that answer back, please?

(The answer was read.)

Q. I think you stated a few minutes ago that the ratio if related to passenger revenues solely would be even higher, did you not—

A. Yes, sir.

Q. —because of the smaller base?

A. I said—we were referring to the 7.1 to 8.5 per cent shown in the first column.

When you referred to 9 to 12 per cent you are referring to the per cent of cargo shown in the last column which includes the international where a much higher ratio is included.

Now, I testified in response to your question that if you were referring to a ratio between cargo revenue and passenger revenue instead of cargo revenue to total revenue which Mr. Wemple used, then you would have a somewhat higher percentage than the one shown in this [Tr. 10,214] column of 7 to 8.5 per cent.

Q. Why did you not use 7 to 8.5 per cent or something somewhat higher instead of 5 per cent, Mr. Eichner?

A. Because it would have been incorrect.

Q. Why would it have been incorrect? Would you enlighten me, please?

A. Because the cargo revenues for the Domestic Divisions includes the cargo revenues on the all-cargo flights.

Q. You have and have had available to you information on all cargo departures performed by TWA historically as well as other flights, have you not, Mr. Eichner?

A. That's correct.

Q. Do you happen to know whether there were any all-cargo jet flights during the month of June, 1959?

A. There were none.

Q. As a matter of fact, it was not until 1963, was it, that all-cargo jets were introduced by TWA?

A. That's correct.

Q. It is a fact, is it not, that most mail and cargo shipped by air moves in the late evening and early morning hours, rather than during other hours of the day, Mr. Eichner?

A. This is correct.

Excuse me. Let me just modify that answer [Tr. 10,215] slightly. It is shipped during the evening hours. However, the number of flights operated by an airline such as TWA is much less during the evening hours than it is during the daytime.

So the evening flights will have a tendency to carry a higher cargo load than daytime flights, but in the totals, whether more moved at night or in the daytime, you can't say unless you examine the figures.

Q. Since most of it is shipped at night, do airlines not specifically schedule some flights at times during the late evening and night hours that are intended to be particularly convenient for cargo and mail shipments?

A. Occasionally they do. It was very seldom that they did this with jets during the early period that we are speaking of.

Q. What period do you mean to cover?

A. June, 1959.

Q. Did it become common during the total five-year period that we are considering through 1963?

A. It never became common, because passenger jets were so expensive to operate for cargo trips, but it was done occasionally as we all became desperate in 1961 and

1962 to use these jets profitably and try to find [Tr. 10,216] profitable uses for them.

Mr. Tenney: Would you mark this document as TWA Exhibit 423 for identification, it being a four-page document headed "Schedules of Flight 15."

(Document headed "Schedules of Flight 15," marked TWA Exhibit 423 for identification, as of this date.)

Q. Mr. Eichner, TWA Exhibit 423 for identification is a takeoff of schedule information for a flight flown by TWA's Flight 15 taken from the employees' timetables which are TWA Exhibit 4C3 for identification and covering the pertinent information on Flight 15 from the inauguration of that flight during June of 1961 through December of 1963.

I believe that from your study of the schedules you have examined some of this information on Flight 15, have you not?

A. We have examined the passenger information on Flight 15.

Q. Flight 15 appears in the routing charts of that period that you have studied for purposes of determining aircraft units for this analysis, does it not?

A. Yes.

Q. Throughout this period, Flight 15 was flying in the hours immediately around midnight, was it not?

[Tr. 10,217] A. That is correct.

Q. The on-board reports cover for individual flights not just passenger information but also cargo loads, do they not?

A. They show the mail, express and freight loads.

Q. From those mail, express and freight loads, using experienced yield factors, it is possible to compute for a particular flight the amount of revenue obtained by TWA in return for its transportation of air mail, express, freight and baggage, is it not?

A. It is possible to make an estimate on a different basis than the 5 per cent average that we used, but whether or not it would be a better estimate, I could not say until I made a study of those yields and of the way they taper.

Now, the reason for this is that there is a much stronger taper in cargo rates than there is in passenger rates. They go down much more sharply with distance. As an example, in the Post Office Department, they pay the airlines such as TWA a multi-element rate so much for loading each pound on a plane, so much for each ton mile of line haul or pound mile of line haul.

This means that you have a much sharper decline in your yields. And for anyone to make a statement as to what the results would be without having made a study of [Tr. 10,218] these tapering yields it would be impossible.

Q. Is it not probable in your opinion that Flight 15, flying at the time that it did, on the route that it covered during the period 1961 to 1963, had proportionately a substantially greater part of its true total revenues derived from mail, express, freight than the average of TWA's fleet?

A. It is possible that if the operation were a dependable one that it did.

Q. If a particular flight derives only a small portion of its revenues from passenger service and a larger portion of its revenues—at least proportionately—from cargo operations, does your method as applied in Appendix A not tend to distort the results of the operations of that aircraft unit in a downward direction?

A. It would tend to distort the total revenues in a downward direction, just as we have undoubtedly overstated revenues in an upward direction for many afternoon and evening flights, early evening flights.

Q. So that it exaggerates the difference then between those two aircraft if the late night aircraft hauling a larger portion of cargo in it turned out in your analysis to be a less profitable aircraft? The difference between that and the other aircraft is exaggerated by your [Tr. 10,219] method, is it not?

A. The differences between your high passenger aircraft which don't have much room for cargo and your very low passenger loads which were carried on trips such as 15 which showed heavy passenger losses tends to be dampened by using the average 5 per cent method.

Q. What do you mean by dampened?

A. It means that the cargo revenues are overstated on many of the jet flights shown in GG by using the 5 per cent average and they are understated on a few other trips. And we know that these were relatively few because there were relatively few flights operating late at night.

Q. You used the word dampened. Do you mean exaggerated? That was my question.

A. No, sir. The cargo revenues which are credited are dampened by using a 5 per cent average. The total revenues, excuse me, are dampened by using a 5 per cent average.

Q. In January of 1962, for example, we have found from Table GG that you have classified Flight 15 with aircraft unit No. 080, which appears on page 71 of Appendix A.

Can you confirm that, Mr. Eichner?

A. Which type of equipment is this, Mr. Tenney?

[Tr. 10,220] Q. This would be Table GG for January, 1962. Flight 15 is classified, I believe—

A. It is a 131, isn't it?

Q. 131. Classified with aircraft unit 080?

A. Yes, sir.

Q. 080 ranks on page 71 of Appendix A as the eighth ranking aircraft by profit and loss computations in that month.

If you added to the total revenues shown there, which are $577,000 an additional, say, $80,000 for cargo revenues, perhaps taking a portion of them proportionately from other aircraft, would that not tend to decrease the difference that you have reflected between the profitability of this eighth ranking aircraft and the aircraft that you have listed above it?

A. Yes, and perhaps your question is illustrative of what I mean by dampening.

You can increase the revenues of a plane such as 080 and reduce the losses on that one but then you increase the losses and perhaps this plane No. 090 which is marginally profitable for the month or 160 which only earned $7000 then become loss figures if you juggle the figures.

Q. I am not juggling the figures, Mr. Eichner. You [Tr. 10,221] are juggling the figures. You are the person who is putting in perfectly constructed figures on cargo revenue and drawing conclusions from them.

A. Is that a question, Mr. Tenney?

Q. Do you consider an accurate computation of cargo revenues a matter of juggling figures?

Mr. Perkins: I object. I don't think this is getting us anywhere. Why don't you just ask questions?

The Special Master: I think I have both points of view in mind.

Mr. Tenney: I ask that this document be marked as TWA Exhibit 424 for identification consisting of

a cover summary sheet and six pages of work papers and ten pages of on-board reports from which information has been taken with respect to Flight 15 in the month of January, 1962 breaking out not only passenger revenue, but also air mail express, freight, first-class mail and baggage.

(Cover sheet entitled "Analysis of Revenues TWA Flight 15, For Departures Included in SHE Table GG, January 1962," six pages of work papers and ten pages of on-board reports, marked TWA Exhibit 424 for identification, as of this date.)

[Tr. 10,222] Q. I show you TWA Exhibit 424 for identification. The on-board reports attached as the last set of attachments are copies of on-board reports that have been previously delivered to you, are they not?

A. They are similar to many on-board reports which we have received, that's correct.

Q. By the process of identifying the work sheets, cargo revenue for this month for TWA Flight 15 has been computed and related to passenger revenue, and computed as being in the proportion of 58 per cent.

Is that a relationship that you consider an expectable relationship in order of magnitude from your experience in the airline business?

A. TWA 424 does not impress me as having all the facts stated, and I would say no.

Q. What would you expect the order of magnitude of this relationship to be?

A. I would have no idea until I had a chance to study much further.

It could be half as much as the 58 per cent if the yields taper as much as I think they do.

Q. There isn't any possibility at all it could only be 5 per cent, is there?

A. No, I would not say there would be 5 per cent on [Tr. 10,223] this one flight in the month of January, 1962 which is a very low seasonal month in the California market.

Q. A few minutes ago, Mr. Eichner, I believe you stated that during the daytime hours jets that were flying relatively full from the passenger standpoint did not have much room for cargo? Is that about what you said?

A. No, I said they had less room available for cargo.

Q. Do you happen to know how much room the 131 aircraft has for cargo on top of all baggage expected when it is flying full in the configurations that TWA normally flew it then?

A. Well, normally you would use a figure of somewhat less than 10,000 pounds depending upon the reserve fuel policy of the pilots.

Q. One more question on this general line. Are you familiar with the Post Office policy which is sometimes referred to as the flight of value consideration?

A. Yes.

Q. I wonder if you could just briefly describe what that policy is.

A. During this period, somewhat later than June, 1959, but during 1961 or 1962, the Post Office Department had been having problems in getting its mail transported [Tr. 10,224] because the mail was moving in the evening and there were very few flights provided by the airlines to move this mail at the time the Post Office desired. They wanted departures around 11 o'clock or midnight from the New York area, for example, to go to the West Coast.

No airline—there was not enough passenger traffic to put on such a flight, and no airline was willing to put on

such a flight without some assurance that the Post Office Department would continue to give it the mail loads once it put it on and had experienced the passenger losses, which it was bound to incur such as Flight 15 demonstrated.

The first flight that I believe that was put on was an American Airlines flight out of New York to the West Coast, and it was designated by the Post Office Department. United Airlines and TWA promptly tried to match it with a non-stop flight to the West Coast and they were not given any air mail on their flights.

This has since spread to a few other markets.

Mr. Tenney: Would you read back the last part of that answer?

(The answer was read.)

Q. It is quite possible, is it not, that an aircraft flown for the specific purpose of attracting that type of cargo, air mail cargo, might, in fact, be overall profitable [Tr. 10,225] while an analysis directing attention solely at passenger revenues would make it appear to be unprofitable? Is that not possible?

A. Yes, Mr. Tenney. As we said before, this would be a desirable refinement in our report if we could have punched all the mail, express, and freight information and if we could have obtained accurate yield information rather than using averages such as these in TWA Exhibit 424 which we know are incorrect.

Q. But, of course, by your ranking system if one of the lower ranking aircraft were moved up in relative profitability, its numbered space would just automatically be taken up by another aircraft which was forced down by your method, is that not correct?

A. We are dealing with historical facts and figures and that is correct, because we are dividing up the pie of rev-

enues between these flights and we were in a situation of excess capacity.

If you make one loser profitable then you have to make another profitable plane a loser.

Q. If an analysis of an apparently unprofitable airplane proved that it were profitable by making a closer examination, a refinement I think you have called it, of its revenues from air mail and similar sources, if, as I [Tr. 10,226] say, such an analysis showed that this apparently unprofitable airplane were profitable, then quite without any necessity of making some other airplane unprofitable, doesn't your method automatically force down in ranking something to fill up that last hole that you have there?

A. Yes.

Q. Just one more point as to how some of these identifications work which I would like to illustrate by reference to the CV-880s for the months of August, September and October, 1962 and first Appendix A.

Would you turn to those pages, please?

In each of those months, I find under the heading "ACNUM" which we have identified as being a unit aircraft which you have determined from your examination of the routing charts—I find in each of those months an Aircraft No. 150.

Can you confirm that for me?

A. Yes, sir.

Q. In the month of August, Aircraft No. 150 ranks as No. 7, if I have this correctly.

I am not entirely sure we have the right example here, but essentially, and I think perhaps you can simply give me an answer without my making the statement which might be a little inaccurate as to which aircraft is involved.

[Tr. 10,227] This 150 which appears as No. 7 in August of 1962, and then the 150 which appears as rank No. 11 in September of 1962—excuse me.

No. 16 in September of 1962, and then has still a different rank number in October of 1962 of 11—those are not only not necessarily the same physical aircraft but they are not even necessarily the same routing pattern, are they?

A. That's correct.

As I see, Flight—Aircraft No. 150 in August involved Flight 185, which went from New York to Kansas City to Albuquerque, and Flight 184 from Albuquerque to Kansas City, and Flight 46 from JFK to Boston.

Whereas, in September, Aircraft 150 became an even shorter haul jet operating between points such as New York and Columbus and Chicago with a very short average length of hop.

Q. And in October of 1962, it has still a third entirely different pattern, is that not correct?

A. In October of 1962, the aircraft, the 880 aircraft designated as 150 was operating trips 91, 132, 159 and—excuse me. Just those trips apparently. No, 157 and 160.

Q. That does not necessarily mean that the other trips were not being operated also, perhaps under some other [Tr. 10,228] aircraft identification number?

A. The other trips are shown in GG—all of the other trips which were scheduled with 880s are shown in GG, and the numbers, as I stated before, are purely for identification so that we may discuss them.

Q. For identification, they should be relied on only on an individual month basis? And that is the point I am trying to get across. You cannot follow that number from

month to month and in any sense at all regard it as being a development of a particular plane, is that correct?

A. That is correct as far as the aircraft number is concerned.

Mr. Tenney: I just wanted to get that clear and I think this would be a good time for a luncheon recess.

The Special Master: All right, 2:00 p.m.

(Whereupon, at 12:30 p.m., a luncheon recess was taken.)

[Tr. 10,229] * * * Q. Mr. Eichner, for my next point, I would like to refer to a particular month that I have chosen by way of illustration—it involves a number of months—and that is the month of June of 1960 for the B-331 aircraft.

Table GG is our source—I believe for the seat miles offered in that type of aircraft in that month, and for the passenger miles which were carried. I don't think it is printed out in Appendix A.

Am I correct in that?

[Tr. 10,230] A. That's correct.

Q. The totals for the month by fleet type are not printed out in your Table GG, but they can be added up and actually, as we have ascertained, totals of that type can be obtained from the tape, the computer tape that you provided us with by simply writing a program to tell the computer to add them up and print out the results.

Am I correct in that?

A. Yes, you are correct. Many types of analysis can be made from GG and the GG tapes.

Q. We have added up the seat miles and passenger miles for the B-331 aircraft for the month of June 1960 from GG and we get for seat miles 17,887,020 and for passenger miles 15,623,310.

We have done the same thing for July of 1960 and obtained the figures respectively of 38,585,418 for seat miles and 28,397,467 for passenger miles.

We have checked TWA Exhibit C and C3(2), which is TWA's Schedule 3-70M, which are operating statistics for TWA's Domestic Division for those particular months, and to our surprise we have obtained in each case approximately a third more seat miles and a third more passenger miles according to TWA's operating statistics than are reflected in your Table GG.

[Tr. 10,231] I believe that that which is illustrated by these two months is true in substantially every month.

Are you aware of that and can you give me some explanation?

A. Yes, I can explain this.

Mr. Markham has been furnishing me with the routing charts and he is not here right now, so I will do it from memory, subject to check.

But as you recall, as we said in the book, we used the routing charts to route out the different fleets.

In this particular month the 331s, as I recall, are on the 131 routing charts. And there is only one 331 routing shown which is the one which appears in Table GG and which also appears in Table A as 010, making a profit of some 355,000, a very profitable transcontinental trip.

However, there is a note at the top of the routing charts that Flights 90 and 91 are also routed but are not shown on the routing chart.

Flights 90 and 91 are shown in the employees' timetables as being operated with 331s, but they were not shown on the routing charts, so we did not know what the complete aircraft day was of the routing, so we don't put them in the IBM runs.

[Tr. 10,232] I have priced them out manually and I found that they were marginally profitable. But that's the reason they don't appear in here and that's the reason they don't appear in the discrepancy. It was in the underlying material that you furnished us.

Mr. Tenney: I ask that this table be marked as TWA Exhibit 425 for identification.

This is a document I have just shown the witness.

(Table headed "June and July 1960—Comparison of Table GG and TWA Exhibits C and C-3(2) (Schedule 3-70M)," marked TWA Exhibit 425 for identification as of this date.)

By Mr. Tenney:

Q. TWA employed B-331s for its international routes, did it not?

A. Yes, sir.

Q. On many occasions were there not domestic legs of flights that also had an international leg as an otherwise continuous flight?

A. Yes, sir.

Q. We have tried to determine from Table GG whether the domestic legs of international flights have been taken into account at all and our best impression—we [Tr. 10,233] can't be absolutely sure, but our best impression is that the domestic legs of international flights have not been reflected in your Appendix A or Table GG and it occurs to me that perhaps the flights that you were referring to, which I don't happen to know the details on, might be an example.

Do you happen to know whether in general domestic legs of international flights have been for some reason excluded from your analysis?

A. In general, if they do not appear on the domestic routing charts, they have been excluded from our analysis because, as we said, we only included flights shown on the domestic routing charts.

This happens to be an unusual circumstance that you are calling attention to and I don't recall very many other occasions when we found a routing chart with notes such as this one has at the top: "Does not include Flights 90 and 91 B-331, 405 hours, 1480 miles."

This was a flight that happened to operate as a round trip between New York and Chicago. It is the first New York-Chicago flight TWA put on.

And I have no idea why they specifically excluded it from this routing chart. The other 131 that operated, Flight 100 and Flight 1, which were transcontinental trips [Tr. 10,234] from Los Angeles to New York, are included. Evidently, there was some special reason which we do not understand, which they do not explain to us, so we do not include it.

Mr. Perkins: Did you mean to say 131?

The Witness: 331. But it is on the 131 chart.

Q. So that there are at least those two types of situations—one, the unusual situation you have called attention to on this particular routing chart, and the other, the situation involving a domestic leg of an international flight in which your 331 statistics in Appendix A are incomplete, am I correct?

A. They are complete for what is shown on the routing chart, Mr. Tenney.

Q. You had comparable information for international flights, did you not, Mr. Eichner?

A. I understood from the Special Master that we were to exclude the international operations from this supplemental report.

Q. The domestic legs of these international flights are part of the Domestic Division operations, are they not?

A. But they are not shown on the domestic routing charts, that's correct.

Q. I go back to my original question. In at least [Tr. 10,235] these two respects, the statistics that you have set out with respect to the B-331 aircraft in your Appendix A are incomplete, are they not?

A. Yes, with regard to the very small number of international trips which operated domestically, they are excluded. But as far as international passengers which occurred on the domestic trip shown, of course they are included in the on-board data.

Mr. Tenney: Would you read the answer back?

(The answer was read.)

By Mr. Tenney:

Q. But you have not reflected those statistics in your Appendix A, have you, Mr. Eichner?

A. No, sir.

Q. I really only have one other thing I would like to get on this point, Mr. Eichner. You have said it was very small.

We have not checked the totals, but we have checked those two months that are set out in TWA Exhibit 425 for identification, and we spot-checked four other months, two of them in 1960 and two in 1961—I shan't bother setting out the figures—but in every case we had just about the same proportion as is shown here on [Tr. 10,236] TWA Exhibit 425 for identification.

Whether it is very small or very large, is that about the proportion, overall, that has been omitted from your computations? Do you know the answer to that?

A. I know the answer to that. And the answer is no, that is not the proportion, overall, which has been omitted from our computations, because I did a comparison to satisfy myself that we were getting reasonably complete answers in this initial run of GG in Table G which supports Appendix B.

And I took the entire B-131 fleet and the Convair 880 fleet and the entire B-131B operation, and I found out—because these were the major things we were speaking about in this case, the deliveries of the 131s and the 880s, for example. And these were the planes that were showing very large losses during the damage period.

And I found out that we had accounted for 97 per cent of the B-131 passenger miles in 1959, 97 per cent of the B-131 passenger miles in 1960, 93 per cent of the B-131 passenger miles in 1961, 88 per cent in 1962 and 86 per cent in 1963.

I found that on the 880s we accounted for 99 per cent in 1961, 90 per cent in 1962 and 89 per cent in 1963.

[Tr. 10,237] I found that we similarly accounted for very high percentages of the aircraft days which means of the depreciation and of the aircraft miles. And I will be glad to furnish you this table.

Now—

Mr. Tenney: I move that so much of Mr. Eichner's answer be stricken because I am clearly asking him a question with respect to the B-331s.

The Witness: Excuse me, Mr. Tenney. I had understood your question to be directed to Table GG.

Mr. Tenney: I believe that my question clearly is directed to the proportion of omitted material wit

respect to B-331s, as indicated by the samples shown in TWA Exhibit 425 for identification.

The Special Master: Let us read the question back.

(The question was read.)

The Special Master: I will allow the answer.

By Mr. Tenney:

Q. You just heard my question, Mr. Eichner. Would you understand it, please, as confined to B-331s and can you answer that question?

[Tr. 10,238] A. I believe that the answer is that more of the 331 statistics are omitted from GG because the routing chart information which we got was much more—much poorer on the 331s than it was on the other major fleets.

The Special Master: What percentage?

The Witness: I would estimate that approximately 80 percent of the 331 operations are included. Should I answer—give a reason why this happened?

The Special Master: No.

Mr. Tenney: I think you already have, Mr. Eichner.

The Special Master: Yes.

The Witness: Okay.

By Mr. Tenney:

Q. I believe among other things you testified, did you not, that you did not consult the routing chart information and comparable information with respect to international flights that was made available to you; is that not correct?

A. That's correct, we did not use the international routing charts.

Mr. Tenney: I offer TWA Exhibit 425 in [Tr. 10,239] evidence.

Mr. Perkins: No objection.

The Special Master: Received.

(TWA Exhibit 425 received in evidence as of this date.)

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[Tr. 10,241] Q. I would like to compare that aircraft with another Convair 880 which appears in the table for the month of November of 1961. That Convair 880 is designated as aircraft unit 030.

Do you see that aircraft on that table?

A. Yes, sir.

Q. It is listed as having an average stage length of 753 miles—correction—734 miles. It is within less than a mile of the average stage length of the first aircraft I called your attention to.

It has an average load factor indicated of 60.53 which is two and a half per cent higher than the load factor for the first aircraft that I called your attention to.

I shan't bother reading the total revenues and total operating expenses, but it has a net loss figure opposite it of $13,723.

Do you see those figures on the table?

A. Yes, sir.

Q. Just to be complete with another potentially significant figure, we find on Table GG that this aircraft had 109 departures in the month of November 1961, which compares with 108 for the other aircraft. So there is a difference of only one departure. That, of course, [Tr. 10,242] you could confirm from Table GG, if you wish.

Can you explain to me why two aircraft of similar type flying precisely the same average stage length, almost

identical number of departures in the months in question, should produce a significant loss for the aircraft with the higher load factor as opposed to a significant profit for the aircraft with the lower load factor?

A. Yes, sir.

Q. Will you please explain that to me?

A. In 1961, TWA's aircraft maintenance and maintenance burden expense per revenue block hour which is the basis for the expenses in this report were $294.82 for the Convair 880. They were $311 in 1962 and in 1963 they dropped to $183.15 per block hour.

This is a substantial reduction in block hour cost on the 880s. And it was due to the reversal of maintenance reserve in 1963 as I recall, but that is subject to check as an explanation for this very large difference.

Large variations in expense like this from time to time are one reason why it is dangerous to deal in averages in forecasting what revenues and expenses and profits are on individual aircraft flights and why [Tr. 10,243] this detailed analysis that we have done is the only proper way to do such an estimating job.

Q. I take it that the total block hours for the two aircraft in the two months in question were very close, is that not correct?

Actually, I have 194.77 for A/C No. 30 in 1961 and 190.45 for A/C 50 in 1963.

The Witness: May I have that question read again, please?

(The question was read.)

A. Yes, the total block hours were very close if you multiply 195, rounding off, times 295, which is about $111 or $112 higher than the block hour cost for maintenance used in June of 1963 for aircraft No. 50. You come up with a differ-

ence of approximately $20,000 out of the $26,000 difference in aircraft operating expense shown in Table AA.

In Table AA, for November 1961, aircraft No. 030, as I read it, had an aircraft operating expense of $169,053.

In June 1963, for 190 block hours, aircraft No. 050 had an aircraft operating expense of $133,159, some $36,000 less, less than $36,000 less.

The most of this difference can be accounted [Tr. 10,244] for by the difference of some $112 per block hour cost in maintenance.

Q. Would you compare the ground and indirect expenses for those two aircraft, please?

A. The ground and indirect expenses for aircraft No. 30 in 1961 were $109,528 and the ground and indirect expenses for aircraft No. 50 in 1963 were $95,680.

Q. Can you explain that difference?

A. Well, one difference that occurs without looking at any inputs is the fact that general administrative expense varies. As we have explained—as Mr. Simat explained before, with all other cash operating expenses.

If you have a very large difference in cash operating expense due to the difference in maintenance cost then a difference was occurring in the general and administrative expense as well.

Q. In your opinion, would that be associated with a change in 1963 as you testified the other was associated?

A. I'm sorry. I am afraid I don't understand the question.

Q. I believe you testified that in the case of [Tr. 10,245] the direct operating expense the principal part of the difference was associated with an accounting change in 1963. This change in indirect expense, does this result from a change in 1963 as well that makes it different from 1961?

A. Well, if your general administrative costs reflect your all other cash operating expenses and TWA's accountants decided that their cash operating expenses had been overstated, and consequently were understated for 1963, then this correction would take place in the general administrative expense accounting method as well.

The Special Master: I think the question is, did that in fact happen?

The Witness: Yes, it did in fact happen from the figures I see before me.

Q. Let us take a comparison that is in the same year then. I would like to refer you to two B-131 aircraft, one in the month of February 1960 and one in the next month of March 1960.

The one in February 1960 has been designated by you as aircraft No. 090, and the one in March as [Tr. 10,246] aircraft No. 130.

The average stage lengths are almost precisely the same, 2,478 in one case and 2,474 in the other.

The load factors are close, 64½ per cent in February, 65.9 per cent in March.

Once again the aircraft in February makes a significant profit, $31,500 and the aircraft the next month with a slightly higher load factor makes quite a lot less money, only $6,585.

Can you explain that, please?

Mr. Tenney: While you are looking at those figures, Mr. Eichner, I am going to ask that this paper which sets out the figures that I have been referring to, all taken from your report and its work papers be marked as TWA Exhibit 426 for identification.

(Document headed "Comparison of Selected A/C Numbers from Appendix A," marked TWA Exhibit 426 for identification, as of this date.)

Mr. Hayes: While Mr. Eichner is working may I ask the stenographer to read back the question to me, please?

(The question was read.)

A. Not offhand. Just looking at your selection [Tr. 10,247] of numbers it is apparent that the difference is in the aircraft operating expenses, because the differences in total revenues and in indirect expenses are relatively small.

So I would want to work through the calculation by hand and see just what caused it. And I will be glad to report back to you on this.

Q. Mr. Eichner, if you are going to check back, I think perhaps I should—to make sure that I give you examples that pick up whatever explanations you wish to make about these results that seem a little unusual—I think I ought to suggest that you check also one or two other aircraft which might illustrate other points. I do not know.

Aircraft No. 120 in February of 1963—that is a Convair 880—and 110 in December of 1963, Convair 880 have very similar statistics as far as stage length goes. Again, the higher load factor makes a lot less money.

I don't want to do just cumulative things. There are quite a few like that.

Mr. Perkins: Why don't you give us a list of them all, Mr. Tenney? We will be glad to check any of them for you.

[Tr. 10,248] Q. To take one example of a B-331 and making this one also in the same year, indeed consecutive

months, aircraft No. 030, December 1960 and 020 in November of 1960 have almost precisely identical stage lengths and the higher load factor is a loss operation and the lower load factor is a profit operation.

While you are checking, you might as well check those and perhaps you can report back on it tomorrow—

A. I can report back—

Mr. Perkins: I was just going to ask if the reporter would read back those numbers just so I can be sure we have those right and we don't have to wait for the transcript.

Mr. Tenney: Surely.

(The question was read.)

The Witness: It was a very simple explanation and it should have occurred to me at the time.

I checked the analysis we had made of the TWA on-board reports for aircraft No. 90 in February of 1960, and I find that TWA reported that the 74,356 miles which this plane flew only required 148 and a fraction block hours.

I find that the on-board reports for aircraft [Tr. 10,249] No. 130 showed that for only 71,746 miles flown in March of 1960 this aircraft required 172 block hours.

So there was approximately a difference of 23 block hours for fewer miles flown as reported by TWA in their on-board reports and this is reflected in the direct operating costs.

Q. Can you explain why that should be?

A. No, sir. We did not go behind the data furnished us by TWA.

Q. In the data furnished you by TWA, it discloses, does it not, which direction these aircraft are flying in?

A. Yes, sir.

Q. These were transcontinental flights, were they not?

A. Yes, sir.

Q. Aircraft No. 090 with the shorter block hours, do you happen to know which direction that airplane was flying?

A. That was an eastbound flight.

Q. Which direction was the other aircraft flying in?

A. It is a westbound flight.

[Tr. 10,250] Q. That produces substantial differences in the operating results of those two flights, does it not?

A. Yes, sir.

Q. Is it possible to fly an airplane eastbound and just leave it there and then continue to fly all your flights eastbound?

A. No, sir.

Q. So if you are going to fly a flight eastbound you have to fly it westbound some time, don't you?

A. That's correct. That's why we believed it was necessary to look at the whole pattern of the aircraft days and of the planes rather than just individual flights.

Q. However, in this case you have treated an eastbound operation separately from a westbound operation and deduced differences in operating profit and loss which have resulted in affecting plainly the ranking as to profitability of these aircraft, have you not?

A. We merely reflected what occurred, Mr. Tenney, and that is correct, that it did cost less to fly eastbound than westbound.

Q. But by your arbitrary separation of a total fleet and routing pattern into individual aircraft units, some of which are going only in one direction, [Tr. 10,251] you have

produced a distorted comparison of the units themselves, have you not?

Mr. Perkins: I object to the form of the question. It contains a characterization that is arbitrary.

I suggest that you ask the question without including that adjective.

Mr. Tenney: I think it is a perfectly fair cross-examination.

Mr. Perkins: That is your characterization. There is no testimony here to that effect.

Mr. Tenney: I think it is perfectly proper cross-examination.

The Special Master: We have characterized things much worse than that.

A. Different hours produce different aircraft operating costs.

Q. Is that your best answer, Mr. Eichner?

A. No, sir, it is a historical fact.

Q. You called attention on those two aircraft to one difference and that was a block hour difference.

I notice another difference from your Table GG in that the eastbound flight you have allocated $90,856 of hull insurance and depreciation to, and on [Tr. 10,252] the westbound flights you have allocated $97,123 of hull insurance and depreciation too.

Is there anything in your analysis of hull insurance and depreciation that calls for that to be varied in that way between eastbound and westbound flights?

A. Would you read off the numbers please?

Q. $90,856 in the case of eastbound flight aircraft unit 090, $97,123 in the case of westbound aircraft unit 130.

A. The explanation which is contained in the writeup of how we did this costing is based on the number of air-

craft days that the planes were in service. February is a 28 day month. March is a 31 day month. The plane assigned to this run which was only used for one transcontinental trip received the full burden of hull insurance and depreciation during the month of March and because it was a very low utilization on this plane—only some four or five hours a day—it consequently had to take the entire burden on that one trip.

Q. Do I understand that answer, Mr. Eichner, correctly? Did you mean to say that in February, it being a shorter month, you charged less insurance and depreciation? [Tr. 10,253] Is that correct?

A. We said that we did it on the basis of aircraft days. There were more days in the month of March. And you will find as you go through our reports that 30 day months are charged 30 times the daily figure, 31 day months are charged 31 times the daily figure and 28 day months are charged 28 times the daily figure.

Q. So you have assumed that the aircraft had an operating day for each day in the month as long as it was available for service in that month, is that correct?

A. The way the depreciation, hull insurance and equipment rental charges were assigned, and as explained in our volume, was that we took the number of aircraft days as reported in the Form 41s, we divided into these fixed charges to get a daily charge which was applied throughout each active aircraft for the number of days that is shown on the routing charts for each month.

If this plane was shown for a 31 day month it got 31 days times that charge. If it was shown for a 30 day month such as April or June, it gets 30 days times that charge. And if it is shown for February it [Tr. 10,253A] gets 28 times that charge.

Mr. Perkins: Except in 1960 which I think was a Leap Year.

The Witness: 29 days.

[Tr. 10,254] Q. It does happen, as I believe TWA Exhibit 426 for identification shows, that this February aircraft had 30 departures and consequently greater usage in that month of February than Aircraft 130 in March had which had only 29 departures.

Doesn't your formula for allocation produce a distortion in that case?

A. As a matter of fact, Mr. Tenney, to do it any other way would produce a distortion.

No, it does not. If we do not do it in this way, then we would end up charging in the month of February—suppose we had divided it on a monthly basis—we would charge appreciably more for each flight, if we made the depreciation charges in the month of February equal to the depreciation charges for the month of March.

Depreciation and hull insurance are not a function of the number of miles that you fly a plane each day or the number of hours that you fly it each day. They are a function of obsolescence and time passing.

And this method is an accurate reflection of those costs as applied to these trips.

The Special Master: What run was this plane on, this 090?

The Witness: It was—090 operated from Los [Tr. 10,255] Angeles to JFK.

The Special Master: How could it have 30 departures in February then?

The Witness: They probably ran an extra section. And it would be counted as a scheduled flight.

Whereas, probably 130 which was flying from JFK to LAX probably had a couple of cancellations due to weather.

Q. TWA does not record its hull insurance and depreciation in the way you just described, does it?

A. Do you mean in its public records?

Q. In any records that you know about.

A. Internally they may very well use it because it is a very accurate way of doing it when you are trying to forecast revenues, expenses or measure the profitability of equipment. They should do it if they do not.

Mr. Perkins: You don't know how they do it?

The Witness: I do not know how they would do it.

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[Tr. 10,274] • • • Q. I would like to refer back to an aircraft that we were looking at before, because it illustrates a different point, and that's the pattern that you have identified as Aircraft No. 090 in February of 1960 for the Boeing 131s.

For this purpose I would appreciate it if you would take a look at your routing chart, which is dated effective January 11, 1960.

Can you tell me, Mr. Eichner, what this aircraft number that you have identified as 090 does in February of 1960, that being a period in which this routing chart is effective?

A. The routing chart shows that Flight No. 10 was an airplane which left Los Angeles at 9:00 o'clock in the morning, having turned over Flight 81, which arrived at approximately 11:15 the night before. It went to New York and arrived there at approximately 4:45 p.m., New York time, which would be some four hours scheduled flying time later. And then it sits on the ground from 4:45 p.m.

until the next day, having gone through a maintenance check [Tr. 10,274A] A or check C, and goes out at 3:30 p.m. on Flight 43 the following day.

[Tr. 10,275] Q. That operational pattern is the pattern that you have designated as aircraft unit 090, am I correct?

A. That's correct.

Q. A large part of that operating pattern for that 24 hour period is taken up with their check A or C, is it not?

A. A large part of two planes in the winter of 1960 was taken up with this check A or C, not only with flight 10s airplane taken up with that, but also the flight which operated No. 43 and which appears as aircraft No. 130.

But for simplicity, we can concentrate on the one that you have as 090, and that operating pattern consisting of one transcontinental flight and the rest of the time spent on the ground for maintenance purposes? Is that a summary of the situation of that operating unit?

A. There is no way of telling from the routing chart, Mr. Tenney, whether this particular plane that evening spent its time on the ground for this maintenance check. The flight the next day is designated check A or C and you could make that assumption if you wished.

As you will see, flights 10 arriving at 4:45 [Tr. 10,276] and flight 43 departing at 3:30 a.m. means that TWA at this period of time set aside a plane almost 24 hours a day for check A or check C operation at JFK.

Q. That was 3:30 p.m.?

A. 3:30 p.m., yes.

Later on, they did have a maintenance spare set aside full time at some stations. This is practically a full time maintenance spare which they have designated as two active aircraft.

Q. The way this routing chart works, each of the other operating units in turn would go through this pattern, would it not? Or perhaps I should say each number, each actual physical aircraft would go through this pattern so that some time at some periodical interval it would find itself flying this pattern and having this period of time for check A or C?

A. That's correct.

Q. The expenses and lack of revenue associated with a plane being on the ground for the better part of a day for maintenance purposes is a necessary concomitant of operating the entire flight, is it not?

A. The minimum amount of time required to pull these checks is a necessary concomitant but frequently we find that low utilizations which are shown [Tr. 10,277] as maintenance checks and which may represent maintenance work or it may just represent a lack of desire to operate the plane in a very high utilization.

You will notice up at the top of this page that utilization on this fleet at a time when TWA claimed they were short of aircraft, jet aircraft, at a time when the jet aircraft cycle was very new, was only 8 hours and 56 minutes.

TWA has achieved much higher utilizations on these fleets since then. They have tightened up maintenance procedures because in later years they found that they could use planes profitably.

So this may or may not represent 23 hours of maintenance time required for this plane.

Q. Isn't it the customary experience of TWA and of other airlines that during the early months of operations of a completely new type of aircraft, it is impractical to obtain as high utilizations as can be obtained later?

A. Yes.

Q. Isn't that what happened with American as well?

A. Yes, the utilizations did—

Q. Isn't that what happened with BOAC as well?

[Tr. 10,278] A. I beg your pardon?

Q. BOAC.

A. I don't know BOAC's utilization patterns.

Q. I believe that it is in the record amply from Mr. Simat's testimony last year that this pattern does exist.

You have called attention to the fact that there is an 8 hour and 56 minutes average utilization.

You have also testified that there is at least an average of one aircraft on the ground for maintenance purposes under the routing chart.

If you took out that maintenance unit—that overhaul unit—excuse me—I am sorry—I misspoke.

The aircraft operating units in the upper left hand corner show a total of 15 operating units of which is shown as an overhaul unit.

Do you know whether that overhaul unit is included in the computation of utilization?

A. I assume that the utilization is the overall utilization because it gives all the numbers up there and we did divide 856 into 125 and we come up with 15 aircraft. So it is the total utilization on the fleet.

Q. If you took out this unit that is in overhaul, [Tr. 10,279] your utilization would be over ten hours a day, would it not?

A. Your active utilization which is a different figure, Mr. Tenney.

Q. Going back to the flight that we were examining here, you testified a few minutes ago that keeping an aircraft on the ground for the better part of a day for maintenance purposes was a necessary concomitant of operating a fleet.

You then went on to give a further explanation but I just want to recall that general testimony to you.

In this instance, that particular operating unit for your analysis purposes in Table GG and Appendix A bears the entire burden of this absence of revenue and existence of expense which is associated with the not immediately productive maintenance activity, is that not correct?

The Witness: Would you read that question back to me?

(The question was read.)

Q. Do you understand my question?

A. No, sir.

Q. I will try to restate it.

You have testified, I believe, that—

[Tr. 10,280] The Special Master: That part is clear. You have in mind your prior testimony on that.

The Witness: Yes.

The Special Master: You can just ask the question, I think.

Q. The aircraft operating unit that under this routing chart has as part of its pattern a maintenance layover has less opportunity to earn revenue and relatively a greater expense burden than operating units that do not incorporate in their patterns these maintenance layovers, is that generally correct?

A. That is generally correct.

Q. In your analysis, however, there is no attempt to allocate to other aircraft than this operating unit No. 090 this burden, although this burden, because of the rotating pattern of flying this jet is, in fact, applicable to each of the aircraft in turn, is that not correct?

A. The burden which you say would be allocated is solely in the fixed cost per day.

There is no special burden in the aircraft operating expenses which are only on the block hours of flight 10 and flight 43 that it turned on.

So that it would make no difference there [Tr. 10,281] whether that were one plane coming in as flight 10 and going out as flight 43. It wouldn't make no difference in the aircraft operating expense column. Or if they were divided up with two planes. It would make no difference in the indirect expense column because depreciation, hull insurance and flight equipment rental does not enter into that computation.

So the only difference that we are talking about is in the amount of depreciation expense charged to this plane.

Now, there is an alternate way of charging this depreciation expense. Or there is a couple of alternate ways.

One way is that we could have charged the depreciation, hull insurance and the other fixed daily charges on an aircraft mile basis. Or we have charged it on an overall block hour basis.

This is a method commonly used before a fleet is routed out when you are trying to estimate whether an additional trip or an additional plane would be a profitable one.

We have tried both methods in addition to the one we selected, and we have found that it made no appreciable difference in the overall results because [Tr. 10,282] TWA still showed a large number of jets losing money even when we did something as extreme as charging these fixed charges on an aircraft mile.

Now the reason for this is if we reduced these fixed charges per day on planes which are engaged in check A or check C, we have to add the fixed charges to some of

the other planes in the fleet. And the planes which are not engaged in check A or check C would have to bear that burden of expense.

Q. But it does change the relationship between these operating patterns, does it not?

A. It changes the relationship between the operating patterns to a small degree but it is not enough change to keep from having planes which are losing money.

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[Tr. 10,560] • • • By Mr. Perkins:

Q. Beginning at page 10,284, you were questioned rather extensively, Mr. Eichner, about a footnote in your report which referred to an unassigned 880 aircraft [Tr. 10,561] in the routing chart for, I think, October 17, 1963. Is that the only instance in the 880 routing charts when an aircraft was listed as unassigned?

Mr. Tenney: I object. It's outside the scope of the cross-examination.

Mr. Perkins: I don't see that it is. You evidently attached great importance to this fact in view of the very extensive cross-examination you gave to it.

I think the record should show that this is not the only occasion on which aircraft were so listed in the routing charts.

The Special Master: I will allow it.

A. No, there was another 880 on the routing chart effective as of March 29th, which was shown as unassigned, and this was in a month when there were two additional aircrafts and spares and one for air training.

Q. Did you state the year?

A. 1963.

Q. Were there some occasions with other fleets when aircraft were listed as unassigned?

A. Yes. We found that on the B-131 fleet routing charts for September 23, 1962 and for October 1, 1962, there was one unassigned aircraft shown on each routing [Tr. 10,562] chart and for the 131-B fleet for September 5, 1962, we also found an unassigned aircraft, which remained unassigned through September 23, 1962.

Q. At page 10,319 and following, you were questioned about the effect on 880 operating profits of Flights 107 and 108, which were added to the routing chart effective November 17th and the questions related to the month of December 1963.

Would you state the segments on which those added flights were operating?

A. The added mileage in the added segments were between New York and Baltimore, St. Louis and Kansas City, in both directions.

The balance of the operation of Flight 108, as the record shows, was a replacement of Flight 136 from San Francisco to Los Angeles to Kansas City.

Q. At the time those flights were added, was there existing jet service with 880s over those segments?

A. There was existing jet service with 880s over the Kansas City to St. Louis portion of the trips, in both directions.

There was jet service with the 131-Bs between the St. Louis and Baltimore, and over the Baltimore to New York segment. [Tr. 10,563]

So there as jet service over the entire—over all three new segments, some of which was by 880 and some of which was by the other fleet.

Q. Can you tell us what the operating profits realized by TWA were on those segments before and after the addition of Flights 107 and 108, taking the complete months of October as the before period and December as the after period?

A. Yes. The profit for the month before the flight was added over those segments netted out at $30,700, as shown in Table GG. And after the profit netted out as $14,800, a drop of over 50 per cent. We are rounding this out in dollars.

Q. At page 10,347, it was suggested to you by Mr. Tenney that one reason which might impel TWA to operate jet flights at a loss over certain segments was that it was certificated for those segments and might be in danger of losing its franchise if it didn't conduct such operations.

Is there any requirement, Mr. Eichner, under the certification, that any service be provided with jets rather than pistons?

A. None that I know of.

Testimony of Damage Hearing of Van Court M. Hare, Jr.

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[Tr. 10,601] • • • *Direct examination by Mr. Tenney:*

Q. Mr. Hare, will you outline briefly your educational and work background, with particular reference to your qualifications in the field of statistics?

A. Yes. I attended the Massachusetts Institute of Technology and received a Bachelor of Science in Electrical Engineering in 1950, after working for two years on the statistics of electronic applications and radiation counters.

I attended Columbia University and obtained a Master of Arts Degree in the field of sociology, specializing in social [Tr. 10,602] statistics.

I then entered the Engineering School of Columbia University and in 1961 I received the Ph.D. in Operations Research. The title of my thesis was "Queues With State Dependent Service Times," a statistical topic.

During the intervening years between 1953 and 1961, I was employed first as a research assistant and, later, an instructor in operations research at the Case Institute of Technology.

As a result of that association, I developed a number of consulting assignments which I have continued and widened since that time, again in the field of computer applications, for a number of the country's largest corporations.

I am presently—or in 1962, rather, I was invited to join the staff of Columbia University, as an assistant professor.

In 1967, I was promoted to associate professor with tenure.

Between those two dates I was a visiting professor, a visiting assistant professor at the Case Institute of Technology and this fall I have been invited to be visiting pro-

fessor of operations research at the University of Massachusetts.

[Tr. 10,603] Have you published any material in this field?

A. Yes, I have published both articles and contributed to a number of technical books. Beginning in 1956, two of the books to which I contributed portions, chapters to the books, were called "Introduction to Operations Research" and "Progress in Operations Research" published by John Wiley.

My latest full length book is entitled "Systems Analysis: A Diagnostic Approach," and it was published in the spring of 1957 by Harcourt, Brace & World. And for the five years preceding last fall, I was also the editor of the Bulletin of the Operations Research Society of America. I resigned that position to become consulting editor to Harcourt, Brace & World in the field of information technology. I still have that contract.

Q. Prof. Hare, are you familiar with the testimony of Mr. Simat in connection with the second volume, which is Vol. B of his supplemental report, which has been marked Defendants' Exhibit 359B?

A. Yes, I am, and in particular with the traffic regression equation and the later work entitled "The Alternate Estimate."

I believe I have also either heard the oral testimony of Mr. Simat or have read the transcripts dealing [Tr. 10,604] with this subject.

Q. Have you specifically reviewed in this connection the transcript of the hearing of last Friday, March 22nd?

A. I have.

Q. Prof. Hare, I show you a series of computer printouts of certain regressions which have been marked as TWA

Exhibits 436A, B and C (handing to witness) for identification, and I ask if you are familiar with these documents.

A. Yes, I am familiar with them. At Mr. Tenney's direction I personally had caused these regressions to be generated, wrote the program for the generation of the random numbers involved.

The purpose of this example or exercise was to demonstrate a mathematical or an arithmetical fact as follows:

If you generate a series of random numbers and rank them in order and then fit a regression line to those numbers, as a first step and at the second step cut the range of the variability of the Y variable in half and repeat the process, the index of determination R^2 and the corresponding correlation coefficient will be unchanged.

[Tr. 10,605] The reason for that fact is that the formula for computing R^2 contains in both the numerator and the denominator values of Y, both of which have been adjusted by the same constant.

Thus, when you cancel out that constant both above and below the line, you are left with the original equation and this fact, of course, would hold for any constant that was used in multiplying the original values of Y.

Q. Can you explain what changes would occur in the various mathematical relationships involved under those circumstances?

A. Yes. I believe that we could do this most clearly by reference to a graph which I have prepared for this purpose.

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By Mr. Tenney:

Q. I show you a graph marked TWA 440 for identifica-
[Tr. 10,606] tion, Prof. Hare, and ask if this is the graph

that you prepared and that you just now referred to (handing to witness).

A. Yes, it is.

Q. Will you proceed with your explanation, please?

A. In order to clarify the point, it is easier first to assume that we have not dealt with random numbers, but, rather, with numbers which are uniformly declining over the range.

The range shown here for the value of Y is between zero and 1 million. The range shown for X is shown between zero and 24, and if we divide the range for X into 24 equal intervals, we can speak of a rank order going from the largest value of Y to the smallest, that value of Y being taken at the midpoint of each of the 24 intervals.

To illustrate what the values of Y would be, we have not plotted the 24 points, but, rather, for artistic clarity, have drawn the simple line showing how those numbers would decline. They would decline from a value at the first rank of 1 million and would reach a value of zero at the 24th rank under this situation.

It turns out here that the slope of Line A is easily determined as 1 million divided by 24 or approxi- [Tr. 10,607] mately minus 41,670 and, of course, the numbers would drop off as you moved to the right at each interval by that amount.

The point that we are attempting to illustrate first is shown in Line B, in which the original range of the numbers instead of going from zero to 1 million, goes from zero to 500,000, and they note that the intercept is reduced by one-half and that the slope of the line also is reduced by one-half.

In this illustration, of course, again, the correlation coefficient both in Line A and Line B would be 1 and it is unchanged by this arithmetic transformation.

In the same way, going back to the original range of 1 million, if I decided not to have 24 observations which had been ranked, but, rather, 12, so that we had picked 12 numbers, such as that at the 12th rank, we would be down to zero and at the first rank we would be up in the million. We note that the effect there is not to change the intercept, but, rather, to increase the slope of the line to double it over the value in Line A.

I believe if we referred to Appendix D of Mr. Simat's report, we will see an example of this same type in which the reduction in the number of observations which have been ranked increases the slope of the cor- [Tr. 10,608] responding line. I refer to page 3 of Appendix D, which refers to 707-131 aircraft. And for the first three months of 1959 there are a small number of data points, 4, 6 and 7, respectively, and we note there a slope factor ranging between a minus 111,000 and a minus 44,000; whereas, if we now progress to a case where we have a higher number of observations, for example, January 1961, where there were 15 observations, the slope drops because of the larger range of the X values to minus 11,000.

This is just an arithmetic fact. That is a consequence of the ranking procedure. That was the purpose of this chart, to illustrate that arithmetic relationship.

Q. Could you relate the explanation that you have just given to TWA Exhibits 436A, B and C, which you testified that you prepared?

A. Yes. In that exhibit, you will discover that the same relationships hold for the random number series, at least approximately. The reason for using the same set of random numbers in each of the exhibits lettered A, B and C was so that we could demonstrate the arithmetic property I have just mentioned rather than add in the additional com-

plication of generating successive samples of different random numbers.

[Tr. 10,609] We will note, for example, in that exhibit, that we have an intercept value of about 1 million and that we have a B-value or slope value of minus 38,140.

You will recall theoretically the number we would get from Exhibit 440, Line A, would have been about minus 41,000—a difference in both of these cases is due to the sample variation that occurs when you select a limited number of random numbers.

Q. 436B: could you explain what relationship is shown by 436B in terms of the principal factors we have under discussion?

A. Yes. 436A and B correspond respectively to Lines A and B in TWA Exhibit 440. Line C is not so duplicated in the random number set. I might add, however, that Exhibit 440C can also easily be—pardon me.

Q. 436C.

A. 436C could also be illustrated by the graph. The arithmetic argument is that if I were to subtract a constant value from each of the observations used, it would have the effect simply of dropping the line down parallel to itself. The intercept would be reduced by the constant of the subtraction. The slope would in no way change and neither would the correlation coefficient, for the same arithmetic reason that we mentioned before, and that is [Tr. 10,610] illustrated again in the random regressions shown in TWA 436C.

Q. Last Friday, March 22nd, at transcript 10,435, Mr. Simat suggested the possibility that the random number series which had been shown to him might constitute a special selection out of a larger group of random number series which had been generated and that the remainder might not show the same patterns.

Did you perform any other random number analyses in connection with the particular study contained in TWA Exhibits 436A, B and C?

A. No. These are the only regressions that were run for this particular exhibit. There was no selection whatsoever.

Q. In his comment at that point, I think that the context indicates that Mr. Simat was also referring to certain earlier random number series which I had shown him on a preceding occasion, which have been marked TWA Exhibit 435.

I show you a copy of TWA Exhibit 435 and I ask you if you are familiar with that document (handing to witness).

A. Yes, I am. I was also, at your direction, responsible for generating these exhibits, generating [Tr. 10,611] both the random numbers and running the regression analysis.

Q. TWA Exhibit 435 contains and performs certain operations on a number of series of random numbers. In connection with that study, did you generate any other random number series not included therein?

A. Yes. We generated two sets of random numbers in addition to those presented here.

Q. Did they show any different pattern?

A. They showed the same identical pattern of high coefficient correlation that this set does. They were, however, in the first instance a set of fifty 3-digit random numbers and in the second instance a set of twenty 6-digit random numbers.

The reason that those were not used was that under the direction of Mr. Tenney, I believed that we should generate figures more nearly like those used by Mr. Simat. We restricted our further study to 6-digit random numbers in sample sizes of four, six, fifteen and twenty-four. Those regressions are available for inspection, if desired.

Q. Do you recall in approximate terms the correlation coefficient that you obtained in those regressions?

A. As I recall, they were on the order of .97 or [Tr. 10,612] .98.

Q. At transcript 10,436 of last Friday, immediately following the passage that I have just now referred to, Mr. Simat stated that in his opinion if instead of taking the same group of random numbers and arithmetically constricting its range, if I may call it that, by multiplying by .5, as you have done in TWA Exhibits 436A, B and C, if instead different groups of random numbers were generated from a larger range of figures and from a smaller range of figures, then on the average the results with respect to random numbers produced from the smaller range would show lower correlations.

Have you performed since that occasion an experiment to see if this is so?

A. Yes. The Saturday morning following Mr. Simat's testimony, at your direction, I generated six additional regressions to examine the results doing the calculation as suggested.

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Q. I show you a copy of TWA Exhibit 441 for identification and ask you, Prof. Hare, if this is the study that you made on Saturday that you have just now referred to.

A. Yes, it is.

Q. Will you explain what this study consists of?

A. This study is designed to illustrate the same point that we had illustrated before. The first three runs used random numbers which ranged between zero and 1 million, with 24 observations, three replications of 24.

In the bottom three, we have constrained the range of the random numbers not by using the same random numbers as in TWA 436A, B and C, but, rather, causing different random numbers in the constrained range to be produced by the computer.

The same process performed before is repeated here and the summary results shown. We note that the intercepts and the slope of the fitted line is reduced by [Tr. 10,614] one-half.

The standard error is reduced by one-half, which is the standard deviation of Y about the average value of Y. Yet the correlation coefficients or the coefficient of determination, as shown here, remains unchanged.

The slight differences that occur between the two are due to the sample variation and one would expect this when generating different sets of lines from a random number table.

I might point out, however, that it is not difficult to prove, statistically, that the exercise carried out here is mathematically equivalent to the simple arithmetic case we have illustrated in TWA 440.

Very simply, if you generated random numbers across the entire spectrum between zero and 1 million and divided that range into 24 intervals, the expected value that you would get is the long-range average. If you kept making samples, the expected value or long-range average that you would get at any particular interval would be at the midpoint of that interval, and since that is the case, it reduces to the arithmetic situation that we originally described for TWA 440.

Q. Were these all of the random number series you generated in connection with this study?

[Tr. 10,615] A. Yes. Only six were generated and we have them here.

Q. Have you at any time in connection with this case performed any other regressions upon random number series?

A. No. Every regression that I have run has been mentioned.

Mr. Tenny: I offer in evidence TWA Exhibits 436, 440 and 441. In the case of 436, of course, this is a re-offer. I offered it previously, last Friday.

Mr. Perkins: I have no objection. I, of course, will have a few questions to address to the witness about them.

The Special Master: Received.

(TWA Exhibits 436A, B and C, 440 and 441 received in evidence as of this date.)

Mr. Tenny: I also offer TWA Exhibit 435, which apparently I failed to offer at the time.

Mr. Perkins: No objection.

The Special Master: Received.

(TWA Exhibit 435 received in evidence as of this date.)

[Tr. 10,616] By Mr. Tenney:

Q. On Friday, at transcript 10,478, Mr. Simat used the term "significant," and he has used that term and another term "statistically significant." Does the word "significant" have a special meaning when used in connection with statistical analyses of the type that we have been dealing with here?

A. Yes. The word "statistically significant" has a special meaning. It is possible to make statistical significance tests. With reference to regression analysis, one would test the coefficient slopes, intercepts and perhaps the correlation

coefficient to see whether they differ materially from zero, especially could they have been achieved as a result of chance due to sampling.

I hasten to add that the standard tests of significance have some fairly strong assumptions in the field of regression analysis. In particular, the residuals that one obtains from the analysis, that is the difference between the actual values and the observed values, must be independent. They must have a normal, so-called normal distribution, which means they have a symmetry above and below the line and a number of other requirements of that sort.

If those requirements are met, it is possible to [Tr. 10,617] make a probability statement about the values of the coefficients in the equation as they differ from zero.

If the probability is very small of achieving such a result, we say that the coefficients are significant and, therefore, we would have to reject the hypothethis of no relationship.

Q. When you say that a relationship is statistically significant, what does that imply as to the utility of the equation?

A. As it occurs in most measurement applications, in order to answer such a question, one must state the purpose for which the measurement was undertaken.

There are basically two purposes for which regression analysis is carried out. The first one is of an exploratory nature, experimental nature, to test the theory that certain of the variables have an association with each other.

In that application, if the assumptions required for making statistical tests have been passed, then we can apply the tests and come up with a statement regarding the significance of the association which has been found.

In such a situation, the finding of a significance tells the investigator that he has some support for his theory, that there is perhaps something worth looking into [Tr. 10,618]

further, and the second application of regression is essentially an extension of the first, that is, for estimation and prediction.

In the case of estimating and predicting, the questions that we ask are generally somewhat different from the questions we would ask in the first instance. Namely, we ask ourselves, is the regression equation, when used for prediction, much better than essentially doing nothing at all! which would amount to taking the average value of Y as the estimate without regard to the values of the independent variables.

There are various ways of assessing or answering that second question. Many have been repeated here on several occasions. I thought it might be illuminating to try to summarize those by saying that there is a dependent relationship between the standard error of the estimate and the correlation coefficient, again an arithmetic relationship.

The standard error of the estimate is a measure in a sense of the precision with which one can estimate. It gives an absolute sort of number that one may compare with the value estimated.

In order to illustrate how a change in the level of precision changes with the change in the correlation [Tr. 10,619] coefficient, we have prepared an exhibit which shows those values. I am indebted to Prof. A. J. Duncan of Johns Hopkins University, who inspired this table by suggesting it in his handbook, "Quality Control and Industrial Statistics."

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[Tr. 10,620] Q. Is TWA Exhibit 442 for identification the exhibit that you were just now referring to?

A. Yes, it is.

Q. Will you explain it, please?

A. This table is a modification of the table printed in the Duncan book on page 663. Professor Duncan stops his tabulation at a correlation coefficient of .6 and has a number of intervals between .6 and one.

For the sake of simplicity, I have tabulated the table for correlation coefficients between zero and 1 and at intervals of 1/10th. The extreme column to the right, number 5, represents the fractional reduction in the standard error one achieves by using the regression equation as opposed to doing nothing at all, in which case the figure corresponding to the standard error would simply be the standard deviation of the Y values. We note, for example, that if a correlation coefficient is one, we, of course, have removed all or reduced the precision or the imprecision by one, whereas if the correlation coefficient is zero, we have done nothing or accomplished nothing by using the regression equation.

I note in this table that when R equals .4, that the amount of variability which has been explained by an equation having that value of R, is about 16 per cent.

[Tr. 10,621] The unexplained variability is about 84 per cent. The coefficient of alienation is .913. The last column which turns out to be one minus the coefficient of alienation, tells us that we have actually improved things by using such a regression equation only about 9 per cent over doing nothing at all. Other values of R, of course, can be related in the same manner.

I would continue with that point to say that I think practically most investigators who had in the back of their mind making estimates particularly where the estimates involved substantial amounts of money, would not be overjoyed at seeing a result that only improved their estimates and precision in terms of 9 per cent and the usual consequence would be that a search would be continued for more varia-

bles that would, in an explanatory way, reduce the variability and thereby increase the precision of the equation.

Mr. Tenney: I offer TWA 442 in evidence.

Mr. Perkins: No objection.

(TWA Exhibit 442 marked for identification, received in evidence, as of this date.)

Mr. Tenney: You may examine, Mr. Perkins.

Cross examination by Mr. Perkins:

[Tr. 10,622] Q. Mr. Hare, you stated that your special field of expertise, in addition to statistics, was operations research and systems analyses and without burdening the record at any great length, I wonder if you could state in a sentence or two what sort of things you do in that field.

A. These are fields which have grown up since World War II in which analyses of a mathematical and statistical nature are made of operations in order to more clearly define them and improve them by understanding how they work. Within that field one would find individuals working in the problems of scheduling factories, for example, of inventory production control, of the allocation of economic resources, using mathematics.

Q. What kind of work have you done?

A. I have largely within that realm engaged in fields such as inventory and production control forecasting for that purpose, including a fair amount of market statistical work, collecting information for these other fields.

Q. Have you had any experience in the airline industry or consulting with them apart from what you have done in this particular case?

A. Within the restricted framework that I have [Tr. 10,623] just mentioned, I am not certainly an expert in the

operation or the scheduling of an airline itself. I have, on a number of occasions, consulted in the area of inventory control statistical applications and so on, with TWA and with Eastern Airlines.

Q. But not in the area of scheduling aircraft, traffic estimates or anything like that?

A. I am not an expert at all in that area.

Q. I note that—well, it's at the top of the fourth page, which seems to be marked—excuse me, at the top of the third page of TWA Exhibit 441, it states, "These are the random numbers generated to simulate observations," and I wonder if you could explain what kind of observations were being simulated?

A. This exercise or experiment was conceived as a sampling experiment in which each of the sampled random numbers taken from a population ranging between zero and one million, could be considered an experimental observation of the character of that population. So that we have collected at random 24 numbers which in the sampling sense could be called observations. They were then arranged in order and a standard regression program was used to fit a line to.

Q. That doesn't imply that you were attempting [Tr. 10,624] here to simulate observations, for example, on the profitability of aircraft?

A. There is, of course, no relationship between this specific set of numbers and any dollar value. The pattern which emerges, however—

Q. I am not asking about the pattern. I was just wondering about the simulation of the observations.

A. These are not dollar values and the word "observation" has to do purely with the random number generated.

Q. As I understand it, if this series of random numbers —I am going to refer here for simplicity to TWA 441, your

last exhibit, but I think the same questions and answers would apply to all of the other exhibits. Taking your first sample, which is drawn—there are 24 of these observations, drawn randomly from numbers ranging from 1 to 1 million, if those are truly selected in a random number, would you say that there was an equal chance to any number in that range to be selected by your program?

A. That is a definition of the random number. In the range of integers between zero and 999,999, each of those has a probability of selection of one in a million.

Q. Would it then be true, at least on the average, [Tr. 10,625] if you took a number of these samples, about 50 per cent of the numbers in any sample would be in the range from one to 500,000 and the other 50 per cent would average out in the range between 500,000 and 1 and one million?

A. Yes, that is true. However, because of the 24 sample observations, there can be, of course, some variation from that theoretical value, from sample to sample, and it's not difficult to calculate for a sample of 24 what that range of variation, let's say around 50 per cent, is. It's simple.

Q. But if you took enough samples it would tend to approach 50 per cent?

A. Yes.

Q. And likewise, if you divided your million into ten parts of 100,000 each, then on the average, about ten per cent of the numbers would show up in each 100,000 range, is that correct?

A. That's correct, and of course the same thing that I just mentioned with regard to the samplings variation holds here too, except the variation would be somewhat greater because you are grouping fewer things together.

Q. Likewise, if you divided your numbers into [Tr. 10,626] six equal parts, you would expect to find roughly 16⅔ per cent of the numbers with each of those six parts?

A. Roughly.

Q. I have verified this theory against your first three samples and if my count is correct, I found that in the first one there were—well, might I say, if you have a sample of 24 observations, one-sixth of them would be, of course, four observations. So that on the average you will find four observations in the top six, the numbers above, roughly, 833,000 and you would likewise on the average find another four in the bottom range, from one to, say, about 166,000?

A. That is true. Again, there would be a substantial variation because of the small numbers that will end up in each of the categories you have mentioned.

A test can easily be made of this and if you apply that test, which is called the Chi² test, you will discover that the variation that you have noticed here is in no way—it is a property of random number generation.

Q. As I was stating when I interrupted myself, I made a count of the numbers appearing in the top six and the bottom six of the first three samples and if my count is correct, I have had six in the first and ten in [Tr. 10,627] the second and seven in the third, which makes 23 and dividing by three gives an average of 7⅔, which is pretty close to the number 8 which you would get if you presumably had enough samples.

A. Yes, that sounds right.

Q. Is it possible, with a computer or otherwise, to randomly select, say, 24 numbers from a million numbers, which would fall within the normal distribution pattern?

A. Yes, it is, of course, by adjusting each—this is a number in which each observation has equal probability. One may weight that probability by a multiplier and thereby generate any distribution that you would like to reproduce. All computers, however, start out with the equal probability random number.

Q. If you did generate random numbers with the normal distribution, would you expect to find as many as 16⅔ per cent in the upper sixth of the numbers or the lower sixth of the numbers?

A. No, you would not and that is the definition of the normal distribution. Most of the numbers would be clustered about the average of that distribution, whatever you chose to make it.

Q. What percentage would be approximately—would [Tr. 10,628] you know what the percentage would be in the upper sixth or in the lower sixth?

A. A smaller percentage—I was attempting to think of the range.

Q. Two per cent?

A. Something between two and five per cent. I might add, Mr. Perkins, that if you did generate the normal distribution numbers and rank them, then you certainly would not end up having a straight line result because of the bunching that would occur towards the center of the range. It would be a distinctly non-linear result. It happens to be a mathematical consequence of ranking random numbers if they are approximately equally spaced, so that when you rank them they go downhill in equal increments, then you end up with a straight line. This was precisely the pattern that Mr. Simat referred to in his alternate estimate. The similarity between these two patterns is all I want to point out.

Q. If you make the assumption that profits of individual aircraft or of aircraft operating patterns, were clustered around some middle or average point typical of a normal distribution and you then ranked those different profit numbers, as Mr. Simat has done, would you obtain the type of

line that you have obtained in [Tr. 10,629] your regressions of random numbers?

A. No, you would not, Mr. Perkins. You would get a distinctly non-linear result and you couldn't fit a straight line to it. It would be a different case entirely. If my memory is correct, Mr. Simat did make a test and discovered that his data did not follow that particular distribution but rather another one.

Q. You ranked in each case, referring specifically to 441, where each sample consists of 24 observations, you have ranked them and obtained a regression with a high coefficient of correlation.

If your program for any of these samples were to generate a 25th number, would your regression tell you anything about the size of the 25th number? In other words, you couldn't fit it into that equation, could you?

A. You would have to recompute the entire thing, if you added another observation. I have no way of telling, from looking at the random numbers, of course, what the next random number would be that would be generated, so I really can't answer your question.

Q. I would like to give you just a couple, I think, simple hypothetical examples, where the numbers are presumably not random that deal with ordering.

[Tr. 10,630] Your first example: Assume that you have a class in one of your courses of 25 students and you give them a test and on the day of the test 24 of them show up and take the examination and you grade them, say, somewhere, from 90 to 60, if you gave them a numerical grading system, it would then be possible, would it not, to take the highest grade and assign a rank number of one to that and the second highest grade and assign a number of two to that and so on down through 24, would it not?

A. Yes, it would.

Q. You could then run a regression analyses on that relating the grade on the rank number? That would be a conceivable operation, would it not?

A. It's conceivable but I think it would not be too meaningful because in the example you picked you wouldn't get an appropriate spread between all the pupils. I don't know who has ever found a class that had the appropriate distribution so that a straight line would make sense.

Q. If you couldn't fit a straight line you could fit a curve?

A. Yes.

Q. And you might have a regression and it might have a fairly high coefficient of correlation?

[Tr. 10,631] A. Yes.

Q. And now your 25th student takes a makeup examination of equal difficulty and you grade him, would your regression tell you anything about what his ranking would be?

A. Well, no, it would not. We would have to, of course, in order to determine the individual's rank, we would have to place him in the sequential order of all of the 24 previous students. Therefore, the specific series might be changed but in terms of that single individual's influence on the fit of the curve, I can't answer specifically without knowing the grade that the man achieved.

Q. But if you had a descending slope and No. 24 of your students had a grade of 60, you couldn't fit him into that and predict that your 25th would have a grade of 58 or a lower grade, could you?

A. No, each time you added a new observation and in this case you would have to rerank and redo the regression.

Q. I would like to give you just one more hypothetical example. I will write these numbers down. I think we all know that when a company advertises, its purpose is to in-

crease sales and hopefully, profits. [Tr. 10,632] I am not calling on any expertise but isn't that a matter of general knowledge?

A. I think that's the general theory.

Q. Let's consider a company that advertises and an analysis has been made of the relationship of the amount that it invests in advertising to the added profit that it makes and assume it's been determined that an investment of $1 million would add $500,000 to profits and an investment of $2 million would add $800,000 to profits and an investment of $3 million would add $900,000 to profits, while an investment of $4 million would add, again, only $800,000 to profits. One way of analyzing this, and I am not asking you to agree that it would be a good or appropriate way, but one way would be to look at what each additional million dollars did to profits and you will find the first million dollars added $500,000 and the second million added $300,000 more than that and the third million added $100,000 more than that and the fourth million made a negative contribution of $100,000. You could rank those, could you not. One million is given a rank of one against 500,000. The second, 300,000. 100,000 is ranked as three and minus $100,000 is ranked as four and you could perform a regression—of course I picked very simple numbers—but [Tr. 10,633] even if the numbers were not rounded numbers and were more complicated, you could still perform a regression on those numbers, could you not?

Mr. Tenney: Mr. Brownell, up to this point I thought I discerned some connection between the questions including the hypothetical questions that Mr. Perkins was addressing to the witness and the witness' direct testimony but at this point I do not see such a connection and I object to the question as outside the scope of the direct.

The Special Master: We will allow it through for a little while.

Q. You could perform a regression, could you not?

A. I am not sure what you are attempting to measure by the regression. The relationship between—

Q. I am asking whether you could—

The Special Master: Expenditures and profits.

Q. The $500,000 you rank as one and the $300,000 you rank as two and the $100,000 you rank as three and the minus $100,000 you rank as four. So that you have a rank order of those numbers and a series of numbers and you could relate them by means of a regression to the numbers, could you not?

[Tr. 10,634] A. One could certainly fit a curve to that particular example. I would have to make an observation from a practical point of view, outside of the hypothetical question. I believe if someone came to me and said that he could assure me that if I spent $1 million I would achieve additional sales of exactly $500,000, I would be very suspicious.

Q. An additional profit?

A. I would be even more suspicious of that because I don't know of anyone who could easily collect data to define such a relationship.

The Special Master: This is posited.

Mr. Perkins: I can assure you that there are many advertising agencies that spend millions of dollars on just this kind of analysis.

The Special Master: Of the client's money.

A. Yes, looking at the numbers, a straight line would now result because we do have equal increments between the values given to me.

Q. Having done that and assuming, as I posited, that this was a reasonable type of an analysis that has been made, based on the judgment of those making it, as a reasonable analysis, wouldn't then your curve give [Tr. 10,635] you some kind of tool for estimating what rank number five would be?

A. Again, the result of such an estimate would depend, in my mind, not on the mechanics of fitting the line to the data but rather to the amount of data that you had and also to the accuracy or the variation inherent in the data points themselves. Thus, I could fit a line in one case and have a very good fit and in the case of data points which were widely scattered and you have given me a situation which I believe has only four points and requires the fitting of a curve—

Q. I state this is merely by way of illustration and you can imagine for the purpose that we have 24 observations.

A. In that case you would then have to look at the result that would occur at each of the observations. I would like to have for example, more than one observation result in your middle column, the profit column, for each of the experimental manipulations in the experimental budget. To argue from one point is certainly not a statistically sound practice, in my viewpoint.

Q. I agree, you need lots of observations and you want to be sure the figures were accurate and all, but if you assume that and having a regression of this kind, [Tr. 10,636] wouldn't it be reasonable to conclude from it that if there were 24 observations, that if you took the 25th, if you wanted to know what the effect of the 25th million was or whatever the unit is, it would not be somewhere up in the middle or near the top?

A. The answer to that question, of course, how far it would be, up or down, would depend on many factors. I

think, again, the problem here is not one of a mechanical calculation but one of the data. For example, let's suppose that I did in fact spend the next million dollars in the advertising budget and by some fluke of circumstance in the area of my products sale, let's say I am selling beer, the Army opens up fortuitously in the area a new Army camp. It may well be that the next data point that you bring to me as a result of an additional million dollars to the advertising budget, will in fact, show a tremendous increase as a result of that particular observation. So it would depend, in my mind, I couldn't tell you on a single point. I would need to have a replication of those points and a number of data points.

Q. In a sample of this kind, isn't the order of the data a very different thing from ordering a set of random numbers which will tell you nothing where the 25th [Tr. 10,637] number will be or a number of grades, which tells you nothing where the next grade would be if you performed a regression on the grades as ordered?

A. Yes, if you have assumed and can assume that there is a meaning to the rank, that there is some relationship between the rank and the variable, for example, that you have indicated here, namely, the additional million dollars in the budget, one could make such an analysis.

Again, I think the problem here is not one of the hypothetical cases but the practical application of that, in which the way the data is arrived at, is of paramount importance.

Q. And you have made no study here of whether it would or would not be reasonable, in terms of experience, to rank profitability of individual aircraft?

A. No, I have made no such study.

Excerpts from Transcript of Deposition of Robert W. Rummel

[Docs. 224-227]

[Dep. Tr. 227] * * * Q. At that time, namely, 1943, what other plans or programs were underway at TWA with respect to aircraft acquisition or the development of an air fleet?

Mr. Barr: May I have that read, please?
The Special Master: You may.
(The question was read.)
Mr. Barr: Thank you.

[Dep. Tr. 228] A. I don't recall any specific programs, Mr. Davis. This was in 1943, and the size of most airlines had been reduced or, let's say, expansion plans were not being fulfilled because of the war effort, the airplanes simply weren't coming along.

I don't know of any specific programs. I think, as I recall, the company was trying to look at a number of possibilities to see—to be poised, you might say, to try to move if conditions would warrant moving.

Part of my initial work was to look at various airplanes, see if they could be converted, what they could be converted to, or what they might produce if they were converted, to talk, which we sometimes did, with the manufacturers with respect to what they might be planning for the post-war undertakings.

Q. Will you describe what you were doing along those lines, identifying the manufacturers, the kind of activities that you were engaged in at that time?

A. By "that time" I assume you mean 1943, 1944, in that area?

Q. In that period, right.

A. Rather than—

Q. Rather than what?

A. Rather than right after I joined the company. I [Dep. Tr. 229] was simply getting on my feet at that time. Answering this question will involve covering some period of time.

I looked at various interior configurations of the DC-3, including three-wide and four-wide seats—that is, three across and four across the cabin seats—payload range characteristics of converted DC-47s, the same for C-54s, the same for C-69s—

Q. C-69s?

[Dep. Tr. 230] A. Yes. (Continuing) —we analyzed commercial application of a very large double deck six engine Convair, one or two of which were being built for the military, we considered the—we considered a commercial—we considered commercial possibilities of the Lockheed Constitution, which was then being built, as I recall it, we looked at possibilities of adapting the large Douglas transport—the number I don't recall at the moment—to post-war work, we even had a look at the Hughes flying boat, we had a look at the Northrop all wing bomber, we looked at the Budd Conestoga—

Q. Budd—

A. (Continuing) —B-u-d-d Conestoga—it was an all-stainless steel cargo airplane—we took a rather quick look at the Curtiss-Wright wood cargo airplane, we looked at the Curtiss C-46, which was the commercial development of—no, I said that wrong—we looked at the C-46 converted on paper into a post-war airplane and the CW-20, which was the commercial development of the C-46, we looked at various preliminary designs that Convair, under McLaddon, were working up from time to time, we did the same with Ed Burton at Douglas, and Boeing managed to pro-

duce a few thoughts on post-war airplanes even then, and would review them with us from time to time.

Numbers of these meetings with manufacturers and [Dep. Tr. 231] the undertaking of these study projects were on direction from Jack Frye to Franklin and to myself. I occasionally would meet with Frye on some of these things. There could have been others. Now, some of these were extended studies, some were quite brief.

Q. Were these activities in connection with an effort to develop a program post war or in anticipation of the end of the war, is that what you were doing during this period?

A. Yes. I think it could probably be summed up by saying that we desired to be in a position to recommend definitive action at such time as definitive action might be in order, depending on how the war turned, and so on and so on.

* * * * *

[Dep. Tr. 248] * * * Q. Were you ever told, was it ever suggested to you by anyone, that you should not approach anyone to explore the possibilities of their having a useful product?

A. Well, yes, I have been, but not at this particular time, as I recall it.

Q. Will you identify the time, then, when you were?

A. Well, not precisely, but it was essentially later on, I was asked not to approach various manufacturers at times in different areas, sometimes on the basis it wasn't [Dep. Tr. 249] timely, sometimes on the basis of simply that this wasn't to be done. I realize that isn't very specific.

Q. Can you be specific?

A. Yes. I was asked not to do much with Douglas during the jet period, early jet development, on the basis that we couldn't get with them anyway.

Q. On the what?

A. Basis that we really couldn't get with them anyway. There were times I was asked not to work with Lockheed in certain specific areas. I believe I was told at one time not to work with Boeing on the jets. That was likely in the 1953-1954 period. I was definitely asked not to work with Convair on the 990.

That's all I seem—that comes to mind.

Q. All those instances related to the so-called development of jet aircraft or jet age? How would you describe this period?

Mr. Williams: Before we pass to any other question, I will ask the Special Master if he will ask counsel to fix—when he says he was asked—to fix the person, the time and place of such conversations.

Mr. Davis: May I do so in my way?

Mr. Williams: I think this is the time to do it.

The witness has said he was asked to do some [Dep. Tr. 250] thing. I want to know who it was.

Mr. Davis: May I do it my way?

Mr. Williams: I think there comes a time—

The Special Master: I think he is entitled to have it developed as a part of this examination.

Mr. Davis: I intend to.

The Special Master: You may do it in your own way.

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[Dep. Tr. 273] [Mr. Williams] • • • Let's not be diverted from the objection which I raised, that when you elicit from a witness an answer with respect to a conversation we are entitled, no matter what your purpose, or what you want to do, or how clever you

may be, to have the name of the participants in that conversation.

I would like to ask, Mr. Special Master, that the witness and counsel be required to state who it was who asked him not to get in touch with these various airplane manufacturers.

The Special Master: I will sustain the objection, and direct that at this point the inquiry be made as to who made this instruction each time, and then I will give you a full opportunity to develop every situation to the fullest extent so that there could be no misunderstanding about the context in which it was given and any surrounding explanation or reasons for the direction.

Mr. Davis: Mr. Special Master, I, for the record, want to state that I believe it to be my right to conduct this discovery as I see fit.

[Dep. Tr. 274] I have no objection to interrupting my discovery to allow either the Special Master or Mr. Williams to ask this witness any questions as to any area as to which he has already testified.

The Special Master: I will interrupt it myself, and I will ask the witness to state on each of these ocassions that he has described who gave him such directions as he has described and when. Take them one at a time.

The Witness: The initial instructions on the 990 were through the Hughes Tool Company representatives. This was repeated later on by Mr. Hughes in a phone conversation to me, that is, that I should not have anything to do with the 990.

The Special Master: Did he give you any reason for that instruction at the time?

Mr. Davis: I don't believe we have on the record what the instruction was yet, do we?

The Special Master: Tell what the instruction was.

The Witness: The instructions were that I should not participate or allow the participation in either contract or specification development activities, that we should not inspect any 990 parts or components at [Dep. Tr. 275] the Convair facility, and that we should not discuss the 990 with Convair.

The Special Master: Was any explanation given to you at that time as to why you should not have such discussions?

The Witness: Well, Mr. Hughes generally wasn't in the habit of explaining detail or reasons for instructions. The impression I had was that he preferred to either work himself on the 990 or have Tool Company representatives do it. It was clear that I was not to.

The Special Master: Did you understand from him there was some reason that you personally should not do it?

The Witness: Well, if it was a personal reason, I don't think I understood it.

The Special Master: You didn't understand that it was something involving your own personality in the contact that you might make?

The Witness: My personality?

The Special Master: Yes.

The Witness: No, I certainly didn't so understand it.

The Special Master: You just understood that he was instructing you not to get involved in the 990?

[Dep. Tr. 276] The Witness: That's right.

The Special Master: Did you understand that that included all the TWA people, that instruction?

The Witness: Yes. Well, it included all the TWA people that I had any jurisdiction over.

The Special Master: And there was no further explanation than you have given?

The Witness: Not that I can recall. I say, the impression I had was that these were areas in which he preferred to work himself, or have others work, rather than have me work in the areas.

The Special Master: By that—

The Witness: By that I mean TWA in this case, or as a representative of Hughes Tool Company, either one.

The Special Master: He thought someone other than TWA people might do it more effectively?

The Witness: I can't say that was either stated or inferred, Mr. Special Master. It simply was that he did not want me to work in this area.

The Special Master: What was the next time that he instructed you not to work with some manufacturer?

The Witness: This also was a phone conversation. I can't be real specific on the time, but it had to [Dep. Tr. 277] do with the Lockheed Electra. Let's take the Lockheed Electra as the next one that I mentioned earlier. The impression that I had then was that he was working with Bob Gross and possibly others giving consideration to possibilities of procuring the Electra, and that it simply wasn't timely for any activities on my part. I got the impression that rather than having the issue confused that I should not do anything but bide my time.

The Special Master: What was the next instruction?

The Witness: These are not really in sequence. The conversation relating to Boeing was that he did not want any promotional work done at Boeing, by that I mean he didn't want TWA to influence the Boeing design to make it a better design, he didn't want anything done on deliveries, and I got the impression, and I can't, again, recall it word for word, but I recall having the impression that he felt this was a premature effort, until he had time to give it further thought, presumably, and I say "presumably" advisedly, in consultation with me and others, I am sure he talked with many people on airplanes, until such time as it appeared that we could center our attention on a [Dep. Tr. 278] product which would permit us to take a lead, and this might or might not at this time turn out to be the Boeing.

The Special Master: I get the impression from what you say that you understood that he was asking you not to do more with Boeing with the idea that he did not want you to help develop an airplane that would not be fully satisfactory for TWA purposes, and wished to wait until you had worked out the state of the art to such an extent that you could have the best plane possible. Is that what you are saying?

The Witness: Well, partially. We had had a number of cases previous to that time wherein TWA's negotiation effort had produced airplane improvements which TWA did not finally avail itself of, but the competition did.

The Special Master: You really helped your competitor, then, in those efforts?

The Witness: Well, this, I think, was a general thing that he was trying to avoid. I don't recall

whether or not this specific thing was stated in the conversation or referred to, but I understood his feeling on this, in fact I shared it to a great extent. We had, in the past, done a number of things, and [Dep. Tr. 279] developed airplanes in negotiating efforts which we didn't finally buy. The DC-6B, for example, which I mentioned yesterday, was one of them. I don't say it wouldn't finally be developed, but that is what developed.

The Special Master: What is the next instruction that you recall? Did you mention something about Douglas during your testimony?

The Witness: Yes. I would say Douglas might have been more a discussed understanding between us than a specific instruction as such, but I took the effect to be the same.

The Special Master: What do you mean by a discussed understanding? You must have had some communication.

The Witness: Yes. I had numbers of phone conversations with Mr. Hughes on various jet airplane developments as I had understood them. The Douglas situation was not particularly a happy one at this time.

The Special Master: Did you discuss that with Mr. Hughes, the fact that it was not a happy situation with Douglas and TWA at that time?

The Witness: Yes. As I recall it, I did discuss that. The unhappiness, if you like, was not so much between TWA and Douglas as it was between Douglas and [Dep. Tr. 280] its thoughts concerning its prospects for dealing with Mr. Hughes.

The Special Master: I see.

The Witness: It seemed to have the conviction that it could never complete a deal with Mr. Hughes.

The Special Master: Did Mr. Hughes say anything to you about that in this instruction, about whether there was a possibility of making a deal?

The Witness: I really can't recall the discussion quite that clearly. The net result I do, which was that we would let Douglas go their way, and if there were to be any contacts with Douglas, that Douglas would have to contact him first. It was that kind of a situation.

The Special Master: Had that continued for some period of time, that kind of a situation?

The Witness: Yes. Well, not—it came to a head I think with the Douglas decision to build commercial jets. In a way, Douglas was saying that they would be happy to deal with TWA, in fact, I had a call on that line, but that they didn't feel they could conclude a deal with Mr. Hughes, and they felt that they would devote their effort in other areas.

The Special Master: Did you report that to Mr. [Dep. Tr. 281] Hughes?

The Witness: I don't recall reporting it in those specific terms, but there was—as I say, the discussion embraced this general situation.

The Special Master: What did Mr. Hughes say then? Did he make it clear that if Douglas didn't want to deal with TWA by avoiding him that that wasn't to be done?

The Witness: Well, as I remember it, he took the attitude that Douglas would have to come to him before we did any more with them, and we did not work with Douglas. I think on top of all this the

impression I had from Douglas was that Douglas feared we were trying to do them one better, and were simply trying to find out what they were doing, which, of course, was not the case.

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[Dep. Tr. 354] • • • Q. And subsequently did AVRO offer any other type of aircraft to the U. S. Airlines?

A. Well, as far as I know, AVRO did not offer anything to the U. S. Airlines at large, although they might have without my knowledge, obviously.

AVRO worked with me and with Mr. Hughes over a fairly extended period of time toward the development of a transport airplane. This was subsequent to the small four engine jet period that I just mentioned.

As I recall it, this was 1954, 1955, and I think into 1956. I am not saying that we worked continuously. There were a number of meetings, and AVRO from time to time had produced plans and information for review.

I might say too, Mr. Davis, this was one of those projects which was highly confidential and extremely restricted in TWA as to the numbers of people that knew about it or had anything to do with it.

Q. Was there any particular reason for that secrecy or restriction?

[Dep. Tr. 355] A. Well, first, it was Mr. Hughes' desire. Secondly, it was my understanding that we were trying to explore possibilities toward developing an airplane better than the competition could develop, and the last thing we wanted at that stage was to have the story out.

Q. Then what happened to this subsequent effort by AVRO to develop a suitable commercial jet transport?

A. As I understand it, you are asking what the end point of all this was?

Q. Yes.

A. Well, the end point was it wasn't produced.

Q. It was not produced?

A. No.

Q. When you say "not produced," you mean AVRO never in fact produced any commercial jet transport, is that correct?

A. We didn't contract for them, or Hughes didn't contract for them.

Q. I understand that, but my question is whether or not any other airline contracted for them or—

A. No. They weren't produced. As far as I know, there were no contracts for them, and as far as I know, and I certainly can speak only from what I know myself here—

Q. I understand.

[Dep. Tr. 356] A. (Continuing)—this was such a secret venture, let me say I would be surprised if AVRO talked to other airlines. Now, this doesn't go to say that they didn't, or that they might not have. Perhaps there was other understandings I didn't know about.

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[Dep. Tr. 362] • • • Q. Mr. Rummel, I believe we had about completed your description of the extent to which Canadair was a factor in the availability of aircraft to the commercial airlines of the United States, isn't that correct, you had finished your description of that aspect?

A. I believe so.

Q. Before I leave Canadair, however, during that period which you have identified was Canadair a subsidiary of General Dynamics, another division comparable to Convair?

A. I believe they were during a substantial part of that period, at least. I am not certain as to the date of that affiliation.

Q. The next manufacturer which you have identified, according to my notes, at least, is DeHavilland of England. Will you give us the same type of information with respect to that manufacturer?

A. My first direct contacts with DeHavilland were—began I think in 1952 or 1953. DeHavilland were developing the Comet airliner, which was a four-engine jet. In fact, it [Dep. Tr. 363] was the first long range high speed jet that was produced, and it was viewed as a highly advanced airplane. The AVRO I mentioned earlier was a small low speed, relatively speaking, jet, not in this category.

I visited the DeHavilland factory, looked at the production line, which was then primarily empty, and looked at a Comet. I may have that 1952 year wrong. In any event, to pin it down, if it requires pinning down, it was shortly after the first Comet had flown, maybe a few months, that I was there.

DeHavilland had kept I think all airlines and all prospective customers, at least, this is my impression, they certainly did us, advised generally of the progress they were making, the kind of airplane they were producing, and clearly England wanted to use it as a vehicle to break into the world air transport market.

There were a number of subsequent meetings with DeHavilland. As I recall it, we fairly seriously considered the procurement to the Comet on two occasions. I am not clear as to the exact timing here.

I discussed the Comet with Mr. Hughes numbers of times by telephone, and obtained delivery information and that sort of thing, which I also made available to TWA.

As I recall it, at one point our board of directors [Dep. Tr. 364] met in London and had a short ride in the Comet, although I had no part of making that particular arrange-

ment, didn't know about it until afterward. I viewed it as—I assume it was a courtesy demonstration of some sort.

Pan American in fact bought or committed to buy a number of Comets. I recommended against the Comet for a number of technical reasons. This was before the Comet had run into serious technical difficulties. Mr. Hughes seemed to agree with this view. In any event, no commitments were made either by Hughes or by TWA.

After the series of crashes and the resulting redevelopment of the Comet, approximately during the time when this was being implemented, the line was being re-established, again, I am not certain precisely the year, but I would suspect that it would be in 1955, I think, 4 or 5, maybe 1955, DeHavilland was demonstrating I believe a Comet somewhere in Canada. In any event, there was a group of DeHavilland people in Canada flying some airplane, and as I recall it, it was a Comet, but I am not certain.

In a phone conversation with Mr. Hughes, I remember I was home at the time, in Kansas City, he made—this is probably why I recall it this clearly—what was an unusual and challenging but I think unimportant, in a sense, request, he asked that I get ahold of—contact a certain individual [Dep. Tr. 365] I know, whose name is Frank Lloyd, at DeHavilland, that I was to do this without letting the operator know at the other end who I was, where I was calling from, I was not to contact anyone else before speaking to him—there were some limitations that bring this back to mind. I don't think it is important to this testimony, but I did succeed in getting hold of him on the third try, as I recall. I had no idea when I started where he was, except that he was in Canada.

In any event, the Hughes' request was to contact Frank Lloyd, and determine what they could really do for us with

respect to early airplane deliveries, get their thoughts on airplane price, and then discuss it with him.

He suggested—

Q. "He" being Mr. Hughes?

A. (Continuing)—Mr. Hughes suggested that Lloyd and I get together right away, but that no one in TWA be permitted to know a thing about this.

I called Lloyd, as I say, Frank, and got ahold of him, and arranged to meet him in Chicago. In fact, I had the hotel room set up through the West Coast Hughes' office to maintain security, and I met Lloyd—let me say I got ahold of him late at night—I met him the next evening in Chicago, and as I recall it, it was the Blackstone Hotel.

[Dep. Tr. 366] After discussing the situation with him, after he went through a series of documents and things on deliveries and whatnot, I got Mr. Hughes on the phone as he had directed that I do. I might say that it was not normally possible to simply call Mr. Hughes except by his agreement that he should be called or by some prior arrangement. But I got him right away, and talked to him very, very briefly, whereupon he discussed this situation with Mr. Lloyd.

* * * * *

[Dep. Tr. 370] * * * Q. I was going to ask you that question anyway, Mr. Rummel, and while I am at it, could you tell me whether or not this expiration of the Pan Am order took place before or after the decision by TWA to abandon further efforts to procure the Comet?

A. Well, I don't know of any TWA decision. Maybe you didn't mean it that way. As I said, it was between Hughes and myself and Lloyd, and I recommended to Hughes, as I recall it, and there was a full discussion between us, and the net result of it all was that we didn't move.

Q. I understand that. My question then is did this Pan Am abandonment of their order take place before or after your recommendation to Mr. Hughes?

[Dep. Tr. 371] A. I am just not sure about that now.

Q. But you are clear, or are you clear, that your decision and recommendation was not influenced or predicated by the action taken or lack of action taken by Pan Am?

A. Well, we tried to take cognizance of our equipment position as it would be with the airplanes and without the airplanes, as we understood that others would be.

As I recall it now, we had in mind putting the Comet in service in the U. S. rather than overseas. I can't state that as a fact, except that it is what I presently recall, in order to get a jump on the competition, and possibly undercut airplanes like the Electra. At least, we gave consideration to the possibilities of this type, and I am quite sure this was one of them at the time.

Q. My question was whether or not your recommendation was influenced by the fact that Pan Am had abandoned its procurement program of Comets, or whether that was a factor at all in the decision which you reached in connection with your recommendation.

A. I don't recall, Mr. Davis. I certainly wasn't blind to what Pan Am was doing, as nearly as I could find out what they were doing.

Q. In the course of your description of the discussions with DeHavilland you referred to several conversations with [Dep. Tr. 372] Mr. Hughes, and then you described some of them.

Have you—

A. I described one of them, I think. Anyway, excuse me.

Q. I thought there was at least one as to how to contact your friend Mr. Lloyd, and one in Chicago—

A. Oh, yes, sir.

Q. Then presumably there was one when you made your recommendation not to go ahead with the Comet?

A. This is right.

Q. Is that right?

A. Right.

Q. Because what I want you to do now is to give us the full nature of whatever discussions you had with Mr. Hughes relative to DeHavilland. By that I mean at least by describing the subject matter you were discussing in such further detail as you care to give, but I am not trying to turn this into a technical discussion of all the technical aspects of the aircraft.

A. Mr. Hughes always had great interest in the design aspects of airplanes, the power plant installation, for example, structure, he was interested in—greatly in pressurization aspects of the airplane with respect primarily to safety. In fact, he was interested in safety [Dep. Tr. 373] aspects in almost every aircraft design of the airplanes on which we worked.

One of the areas that I am certain we discussed was the use of material in the Comet, the fact that they used prestretched skin, extremely thin skin. We considered a number of structural factors.

We were—talked about the fact that the engines were buried, built within the wing, the wing surrounded the engines. This introduced questions, such as the likelihood of or the problems of containment of fire if fire should occur, the effect of an explosion at such a vital structural area, not that we predicted explosions, but I mean, these things were discussed.

We discussed performance aspects of the airplane. As I recall, this was of particular interest. Range, payload. We had run some studies on predicting the operating cost of the airplane, and by that I mean the direct operating cost. These were reviewed at one time or the other during this period, probably several times.

[Dep. Tr. 374] I might interject this, and say that De Havilland were offering several versions of the Comet. This wasn't one airplane. It was one, a succeeding model, and then one they were thinking of, that kind of thing.

We talked and discussed airplane price, I think we talked about the general ability of a manufacturer like DeHavilland to produce aircraft that would measure up to standards that we were accustomed to, I think we talked about CAB approvals.

It was an effort to evaluate, let's say, and judge the wisdom of proceeding or not proceeding.

Q. Then you had discussions about the necessity or desirability of secrecy?

A. Yes. This stemmed from Mr. Hughes.

Q. I would like you to describe or give us your recollection as to the nature of those discussions.

A. Well, it was just a clear statement that I wasn't to talk to anybody, including the people in TWA, about this exercise. I am referring now to the particular sequence just before and then following the Chicago meeting.

The earlier investigations, while there were discussions with Hughes, as I recall them, were not particularly secret.

[Dep. Tr. 375] Q. What I am trying to understand, Mr. Rummel, is what reasons or explanations, if any, were given to you by Mr. Hughes in connection with this secrecy aspect.

A. I don't recall any specific explanations, Mr. Davis.

Q. What was your understanding—excuse me.

A. I don't recall any specific explanations. My understanding was that I wasn't to say anything.

Q. What was your understanding as to the reason for the request?

A. Well, I don't know, but it wasn't a particularly unusual request, as I recall it.

Q. It was not unusual?

A. No, to deal quietly, so to speak, in dealing in matters in which Mr. Hughes was interested.

Q. Do you recall whether or not Mr. Hughes gave you any reasons or explanations for not discussing these matters internally at TWA?

A. No, I don't recall.

Q. Who was the chief executive officer of TWA during this period which you have been describing? Mr. Damon died in 1956, did he not?

A. That's my recollection.

Q. Subject to correction, let's take it—

A. Yes. I think Mr. Damon was still there at this [Dep. Tr. 376] time.

* * * * *

Q. Now I would like to go back to these instructions you received from Mr. Hughes relative to secrecy, more particularly, secrecy involving the internal organization of TWA, and I would like you to tell us your recollection as to how Mr. Hughes made that request and your understanding at the time of the reason or basis for the request, if you had any understanding.

A. As I recall it, I don't recall Mr. Hughes explaining to me the reasons for this in this particular instance. [Dep. Tr. 377] He might have. I don't recall it. Anything

beyond that that I would say I think would simply reflect a general assumption on my part as to what might or might —might have led him to say that, and I don't know what led him to say that specifically. He said it, I didn't.

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[Dep. Tr. 509] • • • Mr. Davis: What decision was made by TWA, if one was made, as to what they would pursue with these various manufacturers?

Here we have testimony of this witness that Sud came to them with a potential program.

Boeing was doing what they were doing.

Douglas was doing what they were doing.

I want to know what decision TWA made.

Mr. Williams: I object on the ground that we have gone into this in detail. That the witness has particularized the degree of consideration given to each program. Whether it was preliminary or serious, the very type of plane—and I have notes here, which if I need to argue it, I could, but I don't think we need to go through all this again.

The Special Master: I have the impression of the testimony that the witness said that during this period of time they considered not offering, but the type, and they conferred with Sud about it, but they [Dep. Tr. 510] did not take any steps to procure it.

Is that correct or not?

The Witness: That is certainly correct from TWA's point of view.

The Special Master: Isn't that the question?

Mr. Davis: No, sir. I want him to describe how this decision was arrived at, what they decided to do, if anything. We know they didn't get Caravelles,

they got something else eventually. That is a record which even Mr. Williams can't question.

The witness testified about Mr. Hughes' interest. He testified about some program with a possibility of TWA going into the manufacture, or the Tool Company going into the manufacture of Caravelles.

What I don't understand yet is what, if any, decisions were being made by TWA management as a result of the situation which he has now finished describing.

In other words, sir, I point out that we had a situation where during this period of time the airline was interested in pursuing some course of action with either one or more manufacturers. I am interested in getting a description from this witness as to what decision was made, how it was arrived at, [Dep. Tr. 511] who participated in it, and what TWA did.

The Special Master: You may ask him the question if whether or not there was a decision made with regard to this Caravelle program in the period from 1952 through 1954.

Mr. Davis: May I point out, Mr. Special Master, that this witness is likely to address himself merely to the Caravelle program, if phrased that way, and the Caravelle was an aircraft of competitive potential with other type of aircraft.

What I am interested in at this point is the testimony of this witness as to the decision, if any was made, with respect to which type or category of aircraft, jet aircraft, they were interested in pursuing, or as he previously testified, what they did in order to develop some competition among manufacturers so as to have a choice.

The Special Master: I will consider the other types of planes after you get into this one, and get this buttoned up.

By Mr. Davis:

Q. Will you describe, then, Mr. Rummel, what decisions, if any, were made by the TWA management with respect to [Dep. Tr. 512] this offering by Sud?

A. I don't recall TWA management making any decision with respect to the Sud offering. I am speaking now of the decision with Sud that led to the consideration that airplanes be manufactured over here.

Q. Who was that discussed with? Was that discussed within TWA, and if so, by whom?

A. Not to any appreciable extent at all. It was discussed primarily between myself and Sud, and myself and Hughes, and then to the extent that Sud was able to talk to Hughes about it.

Q. What I don't understand is why TWA gave any consideration to the manufacture of aircraft at this period.

A. This was essentially a discussion between Hughes and myself, and just what may have been in Hughes' mind at that time I couldn't say. I don't think it would be correct to say that TWA gave any management consideration to the manufacture of aircraft as such. This possibility was explored by myself on behalf of Hughes.

Q. What conclusion, if any, did you reach as to the economics or desirability of acquiring some Caravelle jet aircraft as an addition to the TWA air fleet?

Mr. Barr: From the context, may I request Mr. Davis specify who he means by "you"?

[Dep. Tr. 513] The Special Master: Will you explain by that in which of your capacities you consider you were acting at that time?

The Witness: In a good many cases, Mr. Special Master, it seemed to me the interests were parallel. It would be hard to say to what extent representing TWA and Hughes. At that time I was a special agent of the Tool Company.

The Special Master: If you think you were acting on behalf of both, just so state.

The Witness: With respect to representation of what might fit the airline, I was reflecting TWA. With respect to the manufacture of airplanes, it was exploratory on behalf of Hughes, and I was not reflecting any views expressed to me by TWA management at all. In fact, this investigation was conducted in almost complete secrecy from TWA management.

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[Dep. Tr. 531] *** Q. Mr. Rummel, before I enter into another area is there anything that you would like to say, explain or add to, with respect to the testimony that you have given us [Dep. Tr. 532] to date?

A. Yes, there is, Mr. Davis.

On further reflecting on the Caravelle situation, and recalling what was said yesterday, it seems to me that there might be some confusion as to the timing of the Caravelle demonstration here in the States.

You may recall I mentioned that we held on to a facility in Kansas City and that at Mr. Hughes' request I contacted Mr. Burgess. I also contacted some others in this regard. But this was during the Burgess regime, obviously, which was in 1957. As I recall it, you kept interrogating me about a competitive situation that existed more toward the beginning of the Caravelle exercise, 1952 to 1954, and then 1955, and I said I wasn't exactly sure when this trip was, but I

thought it was late in that period, and I just want to be clear, on further recollection I can establish that the Caravelle tour was in 1957. I think it was the first half of the year, but I am not sure of the exact dates even now.

Q. So that in 1957, and after orders had been placed with Boeing and Convair for jet equipment—

A. This is correct.

Q. (Continuing) —TWA was still giving active consideration to the possibility of the Caravelle program, is that [Dep. Tr. 533] the fact?

A. Well, the Caravelle sequence I mentioned yesterday with respect to exploring whether or not a construction program should be undertaken was primarily between Hughes and myself and the Sud Aviation people.

As I mentioned, Ray Hopper was involved. I don't know whether Ray had the background fully or not.

TWA was not a direct party to any extent I can recall to this exercise. I think it would be fair to say that some of us at TWA recognized the ultimate need for a smaller short-haul type jet at such time as we could move forward with such program. By "such program," I mean program to procure one way or the other short-haul jets.

Q. What is not clear to me from your last answer is what you were discussing with Mr. Burgess, then, with respect to facilities in Kansas City in 1957.

A. Well, only this, Mr. Davis: As I indicated yesterday, TWA was then moving from its Fairfax airport airplane and engine overhaul facility to a new facility, also in the vicinity of Kansas City. This made this facility at Fairfax available.

TWA was negotiating, as I recall it, through George Clay's office with Kansas City, Kansas, to release [Dep. Tr. 534] the facility back to the city. When Hughes and I dis-

cussed the possibility of manufacturing the Caravelle, the question of where this could be done arose, and Hughes suggested that we try to hold on to this facility until the question was resolved.

I contacted both Clay and Burgess. I did not explain to either of them the reason for it. I simply said there was a request to hold on to the facility for a while.

Q. Those facilities were subsequently disposed of?

A. Yes. After the Caravelle negotiation, that is, this particular negotiation, was concluded, and when nothing came of it, then I took it upon myself as being an obvious thing to go ahead and release the facility.

I do not recall specifically inquiring of Hughes at that time whether I should release it, but I did release it by simply advising Clay, as I recall it, that it was no longer needed.

There was one or two memos memorializing the request that it be retained and its release, as I recall it, but they were entirely non-denominational, insofar as the Caravelle or any other specific project was concerned.

Q. Do you recall approximately when it was that you [Dep. Tr. 535] released those facilities?

A. No, I don't know. I say, it was following this particular exercise.

Q. You can't give me a year—

A. Well, I guessed a few times on years yesterday. I can't be specific. Presumably, it would have been following this period. I know it was following the period, but I don't know exactly when it was.

Q. You understand that when I am asking you for a date I am not asking you for a specific day of the year, or even month of the year. A year, or part of the year, would be enough for me, and always subject to correction when

you confirm what the more exact date is. You understand that, don't you?

A. Yes. That was the nature of my comment this morning, to try to clear the air, because we were talking about a rather broad period of time yesterday, and while I did identify it with Burgess, it seemed to me there could be some confusion on the point.

Q. Who was Clay?

A. Mr. Clay was then our corporate secretary.

Q. Isn't it true, though, that in or about 1957 is when you arranged for this demonstration of the Caravelle?

A. Yes.

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[Dep. Tr. 537] *** Q. Then, as I recall, the ship, that is, the Caravelle, went to Los Angeles for the specific purpose of giving Mr. Hughes an opportunity to either fly it or examine it or what have you, is that right?

A. It was flown to Los Angeles.

Q. For that purpose?

A. For that purpose.

Q. My question was whether it is a fact, therefore, that as late as 1957 TWA or you and Mr. Hughes were still giving active consideration to the possibility of procuring some Caravelles. Is that true or not?

A. Everything he said suggested complete seriousness on his part, and I certainly was serious, following through with what I was supposed to do as a result of my conversations with him.

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[Dep. Tr. 619] *** Q. Let me ask you this. Are you familiar with the circumstances or decisions made in connection with the reduction of the number of 880s which

TWA was to acquire from 30 to 20 or 24, or some other figure?

A. I am not familiar with how the decision was made or who made it.

Q. But you are aware of the fact that that event did [Dep. Tr. 620] take place?

A. A reduction from 30 to 20?

Q. Yes.

A. Yes, I certainly am.

Q. When did that take place, do you recall?

A. It seemed to me to dance around—there were various numbers back and forth. As I recall it, TWA's understanding that it would get 20 was made during Thomas' regime. I don't remember exactly when, but that is my recollection. It was during his regime, and then did not from that time on change from 20.

Q. Did you or your group make any studies or evaluations as to the desirability of reducing the number of 880s from 30 to 20, in terms of TWA's need, the size of its fleet, the economic use of the aircraft?

A. My personal recommendation throughout was that TWA should have 30 airplanes. However, we did make a study showing what TWA could do with 20 when it was requested that we do that.

Q. Who requested you to do that?

A. I am just a little vague on that. I think we were advised that it was 20, and I think we then in our projections included 20.

Q. Did you have any discussions at any time—

[Dep. Tr. 621] Mr. Williams: Just a second.

A. That was all.

Q. Did you have any discussions at any time with Mr. Thomas or any other senior executive at TWA as to either Mr. Thomas' views—

A. Yes. I recall recommending to Mr. Thomas that we go for more than 20 airplanes.

Q. Do you recall what he said?

A. He seemed to favor 20.

Q. Can you tell us what transpired? What happened?

A. As I recall it, we were sitting in his office talking. I think at one such meeting Mr. Leslie was there. I believe Mr. Thomas expressed the view that he would rather have an airline somewhat underequipped rather than overequipped. Let me say I got the impression that 30 wasn't at that point even an admissible number somehow. I think my effort was to try to change a prior decision.

At least that is the impression I have now of what was taking place. I don't recall precisely what was said.

I think Leslie's view was pretty much the same as Mr. Thomas', although as I recall it, his view varied from time to time as to how many airplanes he thought TWA should have.

My own view was consistent. It was that we should have the 30. I still think we would have been better off as [Dep. Tr. 621A] an airline to have them. That's neither here nor there at the moment.

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[Dep. Tr. 622] By Mr. Davis:

Q. Mr. Rummel, perhaps I can direct your attention to what I have in mind more effectively through this document. May I have this marked as a defendants' exhibit? Those are handwritten notes of Mr. Thomas supplied to us by his counsel in response to a subpoena.

(Handwritten notes of Mr. Thomas marked Defendants' Exhibit 155 for identification, as of this date.)

Q. Are you familiar with Mr. Thomas' handwriting?

A. Not particularly.

Q. I am not going to ask you to authenticate this document. On page 2 of what has been marked as Defendants' Exhibit 155, the following appears:

"When Dillon, Read started to work on a permanent financing plan, Mr. Hughes sent word that 25 Boeing 707's and 20 Convair 880s would be made available to TWA, and the financing should be predicated on that basis. This reduction followed TWA's management's recommendation, and was perfectly acceptable."

My question to you, Mr. Rummel, is are you familiar with TWA's management recommendation to the effect that the Convair 880 program, so far as TWA was concerned, should be reduced from 30 to 20?

Mr. Barr: Could I have that question read?

[Dep. Tr. 623] (The question was read.)

Mr. Barr: I object to the form of the question.

The Special Master: Why?

Mr. Barr: Because "from 30 to 20 of the management's decision" referred to reduction.

Mr. Davis: The witness testified his recommendation was 30, and was still his recommendation.

Mr. Barr: That is not the management decision referred to in that memorandum.

By Mr. Davis:

Q. For the reduction of the 880 program to 20 from whatever it was prior thereto.

The Special Master: Is there any objection in that form.

Mr. Barr: No, sir.

The Special Master: You may answer it.

A. The first recollection that I have, Mr. Davis, of No. 20 is hearing it from Leonard Schwartz in a phone call. As I recall it, Leonard was in New York, and I was in Kansas City.

Q. I am trying to refer you to the recommendation of TWA's management. I am asking you if you are familiar with the recommendation of TWA's management, either to [Dep. Tr. 624] Mr. Thomas or to Mr. Hughes or to anyone, to reduce the procurement of 880s downward to 20 aircraft.

A. I don't recall ever having participated in that kind of a recommendation.

Q. Let me then read to you the paragraph on that same page 2, of Defendants' Exhibit 155, which reads as follows:

"The commitments of the HTC for jet aircraft at this time was for 33 Boeing 707's, and 30 Convair 880s. I had stated several times that I thought the airlines had overbought on jets, and recommended that the HTC cut back on some of those orders if they could. This would make it possible to start jet operations with a good basic jet fleet, and then after a year or so operating record and appraisal of the market know what additional jet planes were needed and the type that best suited to keep TWA in the forefront of the industry."

Mr. Barr: Before you ask the question, Mr. Davis, I don't have this before me, but for the record could you state what the date these notes of Thomas bear?

Mr. Davis: Yes. They are dated March 1960, I believe. That is my information. It does not appear on the face of this particular exhibit, Mr. Barr, what the date of these handwritten notes were. [Dep. Tr. 625] My information is from the balance of the

material furnished to us, and I believe to you and counsel for TWA by Mr. Thomas, that they were in March 1960. Page 7 of that exhibit refers to the morning of March 21st at 10:00 a.m. On page 4 there is a sentence which reads:

"The 2nd of December, 1959, and sufficient planes after January 1, 1960, to commence service in March 1960."

In other words, I think that you have to read the document itself and the events which were taking place to satisfy yourself that the date of these handwritten notes relate to a period in March 1960.

Mr. Barr: Thank you.

By Mr. Davis:

Q. My question to you, Mr. Rummel, is whether or not you are familiar with or ever heard of those views being expressed, either by Mr. Thomas or other senior officers at TWA?

A. Yes, I recall Mr. Thomas expressing the view at one time that if we obtained relatively few Boeings and Convairs, that in his view we would be in somewhat better shape, or maybe in a better position, if you like, to procure succeeding models that might be superior to those [Dep. Tr. 626] that were then being offered. However, this was long, long after the phone conversation I referred to a moment ago with Mr. Schwartz.

I recall, I think, that this took place with Thomas some time during 1960. I don't recall exactly when. I think at the same meeting he expressed the view that he personally thought the industry had overbought. I remember arguing with him some on that.

I believe Mr. Fellows was present at the meeting, and argued against that idea too.

I recall Thomas having commented pretty much as I understood you to read this, but this was quite late in the game, and long after the Schwartz conversation.

Q. Is that your full and complete recollection relating to that point of view? Did any other senior officers at TWA express comparable views?

A. I think Leslie did. I don't know that he expressed comparable views as to the reasons for his views, but I think he did express a view that 20 was enough.

Q. Do you recall views being expressed, either by Mr. Thomas or any other senior officer at TWA to the effect that it would be desirable not to over-commit TWA for a jet fleet until it could be ascertained useful and profitable, they could be operated, what improvements might be [Dep. Tr. 627] made, and subsequent models of jet aircraft, until after more experience had been gained as to their operation, or words to that effect—I mean thoughts to that effect?

A. I don't think any of us wanted to over-commit. It was a question of how we viewed over-commitment. For example, I recall Mr. Cocke taking quite the opposite views, as I recall it at least, he wanted 30, but I believe that both Mr. Thomas and Mr. Leslie did on occasion express the view that was stated.

Q. Do you recall the matter being seriously discussed at committee meetings or board meetings?

A. Not as to a decision process at all. As I say, I was advised that it would be 20.

* * * * *

[Dep. Tr. 656] * * * Q. You considered the 990 type of aircraft so different from 880-M?

The 880-M, by the way, is just an 880 with some modifications to it? What is the difference between the 880-M and the 880?

A. There were several 880s. There was a group of 880-Ms initially manufactured to Capital Airlines specifications, as I recall. Additionally, at one point we received a proposal from Convair for the manufacture of new 880-Ms, built substantially in compliance with the TWA 880 specifications, or Hughes Tool 880 specifications, if you like.

[Dep. Tr. 657] The salient or, I would say, significant differences that I recall between the 880-M and the 880 as types, setting aside for the moment detail differences that would come out of a direct comparison of specifications, but looking at only those items that are the same, the 880-Ms had leading edge devices on the wing which were slots and slats to improve the airflow during takeoff primarily and to some extent the smooth airflow during some of the approach conditions. As I recall it now, Convair had an airflow problem at one point, and they thought this might help it.

The 880-M I believe was offered with more fuel capacity and a somewhat higher rated engine in terms of power output, but I don't recall that difference being other than a transient one. That is, the 880 would finally catch up with it through engine modifications.

Essentially, but broadly speaking, the 880-M was closer as a type by far to the 880 than the 990 was.

Q. Were those differences that you have described sufficient to require a classification of that aircraft as a different type of aircraft for fleet operations? In other words, from the point of view of TWA, and the problems of operating an air fleet, are those differences which you have described such that you would categorize an 880-M as a different type of aircraft than an 880?

[Dep. Tr. 658] Mr. Williams: He didn't do so.

Mr. Davis: Please. Yes, he has, in effect, because earlier I asked him to identify the three types of aircraft in the fleet, and he said "What we were talking about was the 990, the 880-M and the Caravelle," and I am asking him now to explain what the difference is between the 880-M and the 880, which they already had in their fleet.

Mr. Williams: All right.

Mr. Davis: You will have an opportunity to cross examine him.

Mr. William: I only want the question to be clear. I have to understand it too.

Q. Will you try to answer my question, Mr. Rummel, so that I can understand the nature of the problem of an air-carrier when procuring additional aircraft and integrating additional aircraft into an existing fleet?

A. When we considered the 880-Ms that had been procured for Capital we had to recognize the differences in configuration between that airplane and the 880s that we were receiving, and by configuration I mean in this case the differences in systems, in cockpits, the items that I discussed heretofore. We tried to estimate the cost of standardizing those things which it made sense to standardize economically.

[Dep. Tr. 659] As I recall it, we looked at the estimate of the added cost of training pilots on the basis that we would not standardize the airplanes to see how that would come out. We looked at the costs of standardization and the cost of pilot training if the airplanes were standardized, and we compared the two. We took the added training costs over whatever it was, probably a five year period, and so on.

In other words, we tried to determine by analysis and estimating techniques the cost of adding this additional group of airplanes.

Now, I use the word "type" loosely, I guess, Mr. Davis. I think an 880-M is a different type because this designated a different type, and in this case it in fact was quite different from the 880s that we had.

The figure that comes to mind, and I can't be certain of this, was that the total estimated cost for mods, and it was a loose estimate in some respects, I think was a little less than $200,000 an airplane, but I am not completely sure of that. But this would indicate to some extent the differences, but in arriving at that we didn't totally standardize. We tried to standardize things which had economic or cost significance, or safety implications, so to speak.

Since the 880-Ms were different from what we had, and since they were being considered as to advisability of [Dep. Tr. 660] procurement, we viewed this as an additional type.

I am repeating somewhat, but we set out to determine how well it could be integrated with what we had, or if not, then what the added cost would be.

I might say we also considered the effects—I am quite sure now, I don't recall specifically, but it would have been certainly natural to consider the revenue loss from time out of service and items of that character.

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[Dep. Tr. 874] • • • Q. Do you recall whether or not you discussed this report or study with Mr. Hughes?

A. No, I do not. We certainly discussed—I certainly discussed these airplanes with Hughes from time to time. Whether I specifically discussed this study, I sure couldn't say this many years afterward.

Q. Do you recall whether or not there was any discussion within the TWA management group or with top management at TWA relating to the subject matter of these recommendations?

A. No, I don't recall any. I remember making it a point to try to keep people like Mr. Collings, Mr. Damon, advised of pertinent equipment developments, that is, to try to place the airplanes in perspective as we saw them from time to time.

It certainly is not at all impossible that this report was issued, but I don't—I simply don't recall.

Normally reports that were issued were either issued in draft, but were normally fully approved reports.

Q. That is only what TWA has furnished to us, Mr. [Dep Tr. 875] Rummel. I don't know.

Let me ask you, normally, such a report, when prepared, would it be submitted to Mr. Hughes, or would it be submitted to the top management people at TWA?

A. Well, the report would not be submitted to Mr. Hughes as such. Mr. Hughes had some rather strict instructions about submitting anything of printed material or in writing or anything of record to him, and it was on only extremely rare exceptions that it was broken.

The standing rule was not to send things to Mr. Hughes but rather to discuss it on occasion with him.

Q. So you would ordinarily discuss with Mr. Hughes the result of reports or studies undertaken by your department?

A. From time to time we did. We tried to be responsive to his questions.

Occasionally we would undertake special studies in order to answer his questions.

This could have been such a study, Mr. Davis, but I simply don't remember if it was or not.

Q. I appreciate that. I am only trying to establish the fact that such a report would have been prepared in this

form for consideration or use by TWA's management group.

[Dep. Tr. 876] A. Well, reports are written in a good many different forms as such. We didn't have, as I recall, a particularly standard form.

The reports were more or less tailored to what we were—what the occasion called for.

Q. Look at Defendants' Exhibit 157. You see the paragraph beginning, "In discussion, and based on a more normal traffic growth and assuming TWA continues with its plan to acquire 30 Convair . . .," and let's stop at that point.

At that time, namely, about August 1956, Mr. Rourke was aware of a plan of TWA to acquire thirty Convair 880s?

A. Well, that is the way he would have put it in any event, Mr. Davis. We never had the practice of including Mr. Hughes' name in our internal documents.

* * * * *

[Dep. Tr. 890] * * * Mr. Hughes had a very keen interest in the design characteristics, features of the airplane, the estimates of availability, and, as I said, participated personally in a number of these meetings.

The meetings I am referring to were held intermittently and irregularly. It was when Convair had something to present, then a meeting would be held. They were held in all parts of the country, and this certainly is not exact, but I suppose not oftener than once every four months. But it wasn't on any specific schedule. But that was the order of the activity with respect to the review activity.

I received a call or calls from Hughes, and here I have to deviate some from the Convair situation in order to

cover the Convair situation, during 1954, I don't remember the exact time of the year, but I think during the summer, possibly toward the fall, with respect to the 1449-A, which was a turbo-propeller airplane that he had been discussing with Lockheed.

We got into a negotiation with Lockheed on that [Dep. Tr. 891] airplane, and it was finally ordered by Hughes. As I remember, it was December 23, 1954. I am quite sure, at least, it was December 23rd.

Well, this particular project ran into difficulties. This was one I mentioned earlier that I had recommended against and the TWA preference at the time, as I had understood it, was for the DC-7C. The reason I was opposed to it, and tried to prevail with Mr. Hughes, was that I felt that it was an uneconomical airplane.

Since I am really trying to get back to the Convair situation, let me summarize this, and if you want me to, I can try to fill this in later on.

In any event, Pratt & Whitney withdrew the turbo-prop engine, and Lockheed was prevailed upon to put in a Wright engine or decided to put in a Wright engine. It became the 1549-A, and then later became the 1649-A, and that airplane was delivered in quantity to TWA during the Burgess regime in 1957.

It was during the—that negotiation, that is, as I recall it, the resurrection, if you like, of the 1649-A out of the 1449-A debris, that work began in earnest at Convair on the development of the model 18. I recall this because I was on the West Coast at the time, and was asked to conduct the two negotiations simultaneously, to keep [Dep. Tr. 892] the Lockheed negotiation going, and to undertake negotiation with Convair for the model 18.

I might say, the model 18 was not the model 880. It was a larger predecessor generally similar to what Boeing finally built, but at that time believed to be somewhat better than either Boeing or Douglas' offering, and to explain that I perhaps should say that my recollection is that at that time Boeing and Douglas were both offering domestic jets, and had not taken the step to international jets, where we were seeking, Hughes and I, to get an airplane that could serve both areas. I think I viewed all these efforts as representing TWA's best interest, and I certainly wasn't aware of any conflicts of interest.

The model 18 development spanned quite a period of time, during which specifications and contracts were developed. I reported to Hughes from time to time. I was cautioned not to discuss this with TWA management on numbers of occasions.

Mr. Hughes, however, knew and understood that I was bringing in TWA experts from time to time to aid and assist in specific areas.

Now, I am not saying that each and every person was cleared. I think he had that confidence in me. [Dep. Tr. 893] He simply knew that I was doing this because I would ask if this would be quite all right, and he said on a limited basis, certainly, but keep the group small, as I recall it.

Hughes had numbers of discussions with Convair or let me say Convair reported he had had such discussions and while I can't be specific, I am quite sure that Mr. Hughes mentioned it a time or two.

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[Dep. Tr. 896] Mr. Hughes showed fairly keen interest over the phone, as I recall it, in the double-deck airplane. I at the moment do not recall Mr. Hughes seeing

the actual layout, but there could have been a meeting along this line.

This got to the point where Convair did become interested, and the project, as far as I was able to determine, had the support of the San Diego management, at least it had that support to the extent that it presented the plan for building this airplane to the General [Dep. Tr. 897] Dynamics board, or at least it was so reported to me.

The board, as I indicated earlier, turned it down. The only explanation that I recall is that it was simply too much to undertake, and also that to undertake a big jet at that time, with Boeing and Douglas moving forward, and having already captured orders, did not make too much sense, because while all this was going on at San Diego, the delivery positions toward the end of this operation were in fact being snapped up by our competition at Boeing and Douglas.

Now, it was during part of this that we—I say "we"; it was a discussion with Hughes now that I am referring to—gave consideration to the need for TWA having jet aircraft, at least contemporaneously with our competition, and preferably before. We had not been unmindful of the time it would take to develop airplanes, but the emphasis was on developing these newer airplanes, and it became very clear that serious consideration should be given to procuring Boeings or Douglases.

Now, Boeing had a distinct advantage, in my view, in two areas. One was the background of experience in building big jets, and the other was that they had a significant lead over Douglas in initial production.

Negotiations were undertaken with respect to [Dep. Tr. 898] holding delivery positions, and some change, as I recall it now, in specifications and preliminary contracts with

Boeing in this period, and this finally led up to procurement of the eight, I think it rather quickly became nine 131s.

Hughes and I had discussed this in light of a hedge. This would get us in the business, permit us to—that is, "us," TWA—to at least have a toehold until this bigger, better airplane could be produced, if ever. I remember we also discussed ultimate use of the 131s along the line, well, maybe it could become a sky coach airplane.

[Dep. Tr. 899] Now, during this period I was trying to influence Hughes to go the Boeing route, particularly the latter part of the period, because while I was highly interested in TWA having the best airplanes that could be built, it became very obvious that we would have to move.

Otherwise a significant gap in time would exist between when our competitors had airplanes and we would. It was also during this period of time, not as a constant thing, but it was interwoven, during this period of time that attention was given to a development by AVRO. This was a large, as I remember it now, six engine airplane designed for low supersonic speed cruising.

By that I mean it was a fairly slow supersonic airplane that would cruise, I think, between 900 and 1200. I don't recall the exact figure. Miles an hour that is.

It was during this period of the model 18, model 19, and model 20 at Convair, after the General Dynamics board pulled the plug, so to speak, activity at Convair, on my part, at least, pretty much ceased.

We went to work more in earnest with Boeing, reviewing specifications, and I will get to the Boeing story, there were numbers of discussions and a few meetings in Beverly Hills, a couple in San Diego and so on, I received a call from Mr. Hughes advising of the development of the 880 [Dep. Tr. 900] proposal by Convair. He asked that I review it. He

described it briefly. He advised that Convair would be getting in touch with me.

The thing that sticks in my mind here that recalls this is that I had another commitment which prevented my seeing the Convair people right at that time, but it turned out that I saw them anyway, but under conditions somewhat different than had been planned. They chased me from Kansas City to Seattle, and we met at Seattle, and I believe this is the first time that the 880 was reviewed by myself or Rourke.

It was considerably smaller than the airplanes we had been working on. This was in the winter, I think, between 1955 and 1956, but I don't recall what month. I think fairly late in 1955.

We, as I recall it, were not particularly favorably impressed with the 880, and tended to favor, from TWA's point of view, placing a larger Boeing order. However, we continued to work with Convair.

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[Dep. Tr. 959] • • • Q. I am confused only in this respect, Mr. Rummel. Looking at Exhibit E, you see "Assuming medium range operation of nine 120s in conjunction with the following fleets," so the eleven appears to be something in addition to the nine, and therefore my question still remains as to where did the eleven come from.

[Dep. Tr. 960] A. I couldn't say. I see what you mean all right, I think, but I couldn't say where the eleven come from. At one point, as I recall it, eleven were ordered by Hughes Tool. Now, whether this was being thought of as an order for eleven in addition to the nine, or whether the leading sentence was simply poorly constructed, I don't know, Mr. Davis, I just can't tell you that.

Q. Have you given us your total recollection as relating to the placement of an order for eighteen 331 Boeings on or about March 1956?

A. I have already touched on circumstances relating to the placement of the order of eighteen from time to time in prior testimony. I think I last said that the development of the contract in detail and the specification was to some extent conducted concurrently with the development of the contract and the spec for the 131s, and that the 331 order was actually placed by Hughes a month or two following the placement of the 131 order.

The 331 at that time was viewed as a more permanent type investment than the 131, and as I recall it, the order for the 331 was placed following the breakdown in negotiations at Convair for the models 18, 19 and 20.

However, at the moment I don't recall but I am quite sure that the project Mexico City, which was the [Dep. Tr. 961] AVRO, and the project Greenland were still active.

Now, the project Greenland may have become active after this. This was the project that I had referred to earlier, perhaps not by the code word, but as, to identify it, as the one that involved the filing in Washington with respect to—that is, before the CAB, as I recall it—with respect to Hughes obtaining permission to build airplanes for TWA.

What I am trying to pin down, though, in mind, and I guess I am doing a poor job here, is whether at the time the order for the eighteen airplanes was signed we might have abandoned the AVRO, but I don't think so. The reason I don't think so is that the order for the 300 engines bore a relationship to either the AVRO or an AVRO-like project.

As I recall it, the order for the engines was placed before we went firm on the 880. At the moment I can't recall whether it was after we placed the order for the—well, no,

I guess—well, I am not certain of my recollection, but it probably was after the order was placed for the 331s, but it might not have been.

I realize I may be being a bit confusing. I am trying to recall out loud probably what I ought to think through before I speak. Let me give you a reference that [Dep. Tr. 962] would pin this down more, and that is this, that the thing that initially brought about the placing of the order for engines with Pratt & Whitney was the fact that Pratt & Whitney had announced a price rise—as I recall it, it was 5 per cent—in engine price to the industry. This had been announced a number of months before it was effective.

The down payment required to be made for Pratt to accept the order was also, as I recall it, 5 per cent, or thereabouts.

Since engines were generally in short supply, at least during the initial period, or it was thought they would be, because everybody, Douglas, Lockheed—excuse me—Douglas and Boeing, was clammoring for engines, and engine availability, as I recall it, was pacing the availability of the airplanes, since they were in short supply, it occurred to me that it would be a good move to order our spares and save the 5 per cent, because if we didn't order we would lose 5 per cent, but the worst that could happen, if we ordered and then something occurred so we didn't fulfill the obligation, would be to lose the 5 per cent down payment.

On the other hand, they were in short supply, and it seemed to me that it wasn't a bad investment.

The date would help bring this in focus. This is [Dep. Tr. 963] a date which I am sure could be found somewhere, the price rise, the effective date of the price rise.

Now, I went to Hughes and saw him personally at this time. As I recall it, I had mentioned this engine problem, the proposition, on the phone earlier. I had occasion to see

him—I think it was in the Beverly Hills Hotel—along with a chap from AVRO, and I took the opportunity to point out that we had a deadline on the engines, that if we were going to move, and he wanted to save this 5 per cent, and I thought he should, that we—he should be moving, and he at that point authorized me to negotiate with Bill Gwinn.

As I recall it, the instructions weren't specifically limited to talking to Bill, but dealing with the top people at Pratt & Whitney. But the idea was to obtain assurances of delivery positions, as I recall it, without actually ordering, and to obtain premium delivery positions.

Now, at this same time we were—well, this would help fix the date—as I recall it, we were still jockeying for delivery positions to some extent with Boeing, and certainly it was a factor in the AVRO consideration, so that we—in any event, let me say, Hughes wanted the earliest possible positions that he could get.

I undertook a telephone negotiation with Gwinn, [Dep. Tr. 963A] asking that, in effect, that positions be preserved, but that we put off the day of formal commitment. [Dep. Tr. 964] In the end, and it was some time later, a substantial order for spare engines was placed for the JT4, far in excess of the 60 that represented our estimate for the number that would be required to go with a fleet of eighteen, and for I believe 40, if I recall correctly, JT3s.

I might say the reasonableness of these numbers against the size of the fleet went like this, that if TWA obtained all of the airplanes, then it would need these engines. If another airline with somewhat comparable routes obtained the airplanes—I am not suggesting that this was a specific plan; I am just saying this was the reasonableness of it—that in that event, then it would probably require the same number of engines.

Now, if the fleet somehow became split between airlines, and were operated as two groups, or three or four, then reasonably the number of spare engines that would be required, I must say all things are not equal, but as a reasonable thing the total number of spares in that event that would be required would be greater than that which would be required for one airline and one fleet. But in any event the orders were finally placed.

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[Dep. Tr. 1129] • • • Q. These are the only notes of yours which have been furnished to us, Mr. Rummel, and I would like to put to you a question I put to you earlier today, and that is, is it your recollection that these notes reflected by Defendants' Exhibit 160 are the only notes of yours of which you are [Dep. Tr. 1130] aware, which relate to your activities at TWA, involving aircraft acquisitions or procurement?

Mr. Williams: Now in existence?

By Mr. Davis:

Q. Now in existence.

A. I don't know what is in existence. All I know is that we tried to turn over every bit of information that we had, and I assume that the files were thoroughly combed by all concerned. There is no doubt as we went through the years I wrote more than this.

Q. Do you have any recollection of destroying any notes throughout the years, or cleaning out the files?

A. Not particularly. I am quite sure that some of the dead deals, rather than have things laying around with Hughes' name on, I may well have thrown things away. I don't recall any specific instances of that, but probably I did in some cases.

Q. I am interested in the fact that the notes, the only notes we have, are the ones which relate to the Convair and 880, and I am wondering whether it was your practice to maintain comparable notes with respect to other procurement activities or negotiations.

A. Hughes had the long-standing, and quite often repeated instructions not to make notes, not to have records [Dep. Tr. 1131] of any kind of what went on between us or between he and TWA.

Most of his deals were considerations or prospective undertakings, and were cloaked in various degrees of secrecy. This became almost a standard practice, I would say.

A lot of the notes that I made I am sure didn't bear Hughes' name at all, and sometimes they were of such a nature, and deliberately so, that others on reading them would not have the vaguest idea of what they contained, but they meant something to me.

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[Dep. Tr. 1342] • • • Q. I didn't mean to interrupt you, I am interested in how that meeting came about, and—

A. It was called by Mr. Hughes.

Q. This was on the subject of the performance characteristics of the 1449A?

A. That's my recollection, yes.

Q. Please proceed.

A. Before all this got under way, that is, before the negotiation became advanced, we had analyzed the DC-7C and other airplanes that were being considered, I believe including turbo-prop possibilities of the Constellation, and had recommended that TWA procure the [Dep. Tr. 1343] DC-7C. The DC-7C was a DC-7 with more wing and more fuel capacity. It may have had a fuselage one seat row

longer than the DC-7, but I don't recall that at the moment. This recommendation had been concurred in by Mr. Damon and Mr. Collings, and I am quite sure had been passed along to Mr. Hughes.

It may have been this recommendation that sparked the negotiation at Lockheed, but I don't recall specifically that that in fact was the case.

But in any event, the Lockheed negotiation started about this time, or shortly thereafter, for the 1449A.

I recall on numbers of occasions advising Mr. Hughes that the 1449A, in my opinion, was uneconomical, and that it was a poor risk, that I didn't feel we had reasonable technical assurance that either the engine or the airplane, but my main worry was the engine, could be reasonably expected to produce the fuel consumption characteristics that Pratt & Whitney was claiming for it and that Lockheed was relying on.

At one point we looked at wing tip engines on the 1449A and found that with normal operating practices, as I recall it now, the airplane could only fly non-stop about halfway across the continent. That was with the tip engines on.

[Dep. Tr. 1344] I simply point that out to avoid confusion. We also, as I recall it now, looked at operating these tip engines part way across to get a speed boost and cutting them off and letting them fly along for the ride. We looked at all sorts of possibilities.

Mr. Hughes seemed determined to move forward with the 1449A. At one point I recall risking his anger by raising the question as to whether or not he wanted a vehicle with which TWA could make money. I realized there could be other considerations.

He indicated that he certainly did want airplanes that TWA could make money with, and that he recognized there

was a difference of opinion between TWA and Lockheed on the merits of the airplane. I tried to dissuade him from moving forward with the 1449 because I did not believe it to be a worthwhile venture for TWA, and certainly not in comparison with the DC-7C.

[Dep. Tr. 1345] There was an additional meeting, as I recall, at Lockheed attended by Mr. Damon, I think Mr. Collings, myself and Mr. Rourke. As I recall it, Bob Gross, Kelly Johnson, possibly Courtlandt Cross, Leonard Schwartz, and I think a few others, were there for Lockheed.

This was arranged before by Mr. Hughes in order for Lockheed to convince TWA that the airplane and one that they should be fully interested in, and possibly additionally to resolve some of the technical positions that we were apart on, but I don't remember that particular aspect being front and center at that time.

The 1649—I am sorry—the 1449A contract was signed by Hughes Tool—well, let me say, I didn't see anybody sign it, but it was wrapped up for signing. I guess I am not sure whether it was signed in California or Houston, but at least the signatures authorized on December 23, 1954, I think. I think it was December 23, 1954.

The meeting on December 23rd took place in the evening at the Beverly Hills Hotel. I recall that Raymond Cook, Mickey West, myself, I believe Harry L. West, were present, and I believe—well, I am certain the principal Lockheed representative was Leonard Schwartz, and I am sure there were a few others there.

[Dep. Tr. 1346] I believe one was Kirk Yost, but I am not absolutely positive. We were in a largish green colored room downstairs.

It was some sort of a dining room. I forget what it was called.

Lockheed had the long paneled room on the other side of the building downstairs, and Schwartz was running from that meeting back and forth, conferring on various points with his people and then reporting them to Mr. Cook, who had the lead, as I observed it, in closing the deal.

I continued to try to prevail with respect to my views on the worthwhile nature of the airplane throughout the negotiation, and continued to do so that evening. As I recall it, at just about every opportunity and every free moment I tried to convince Mr. Cook, to some extent Mickey West—I say "some extent" because he was fairly new; I think that's the only time I saw him in relation to this particular deal—and I recall that at one point toward the end of the evening Mr. Cook was talking to Mr. Hughes, presumably either about the deal or the effect of the deal on the Hughes Tool cash position, or other considerations with which I was not directly involved or concerned, but Ray, knowing my long-standing feeling, [Dep. Tr. 1347] urged Mr. Hughes talk to me, he had asked that I stand by, and after this was said several times through the course of the conversation, at the close of the conversation Mr. Hughes did talk to me, and I remember advising that I felt it was a poor bet—I don't recall my exact words—that it was an airplane which I felt was exceedingly risky and one which, from all that I could see, even at that stage, would simply be an uneconomical undertaking.

As I recall it, Mr. Hughes indicated that he felt that Lockheed would do a pretty good job, that he felt that Lockheed would do a better job than the papers indicated, and something to the effect that if they did not they would certainly lose a long-standing customer, or something to this effect.

I think he mentioned that he had an agreement with Lockheed—I don't recall what it was—either on the weight of the airplane, or some such thing, that he felt would improve the outlook.

I assume this was verbal. At least, I never saw it later, and it didn't come up again.

I did my best at that time to make it clear, at least as far as I was concerned, as a professional opinion, if you like, to Mr. Hughes that this was not the way to go, either for TWA or himself. However, the papers were [Dep. Tr. 1348] signed.

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[Dep. Tr. 1443] • • • By Mr. Davis:

Q. The part that I particularly want to call to your attention, you note Mr. Tillinghast was referring to what transpired at a meeting of the executive committee of TWA, in the course of which he referred to discussion relating to the 1649A situation.

At page 6550, Mr. Tillinghast says:

> "My recollection, Mr. Davis, is that I raised the question of whether there might be a specific complaint related to the 1649As based on discussions I had had with Mr. Rummel, during the course of which he had told me that he had been very, very much against the 1649; that he had thought the ship would turn out to be a poor one and an uneconomic one to operate, and that this had become true, and that he could never understand how Mr. Hughes had bought the 1649s."

Then he goes on to say:

> "As I recall the meeting . . ." the meeting of the executive committee ". . . both Mr. Leslie and Mr.

Cocke said that we had better not complain about that because at least part of the management of TWA had been very anxious to get the 1649s, and that this was far [Dep. Tr. 1444] from a one-sided situation."

Now, I understand your testimony about your feelings from your point of view about the 1649A, whether it developed at the time of negotiating with Lockheed or disappointment that developed subsequently.

What I am interested in now, Mr. Rummel, is your identifying and describing that part of management of TWA which may have reflected a desire to obtain 1649s, if any, or if you know of any.

A. Yes. Well, as I said the other day, the company management felt that it needed additional aircraft and that it should have an additional aircraft to satisfy traffic needs. The preference as to type of aircraft was that we wanted the DC-7C. I remember specifically Damon and Collings and myself feeling strongly that way.

I think Damon and Collings accepted the recommendation that I had put forth to them along that line.

I believe that Mr. Cocke also felt that way, but I don't recall that as clearly as I do with respect to Damon and Collings. I don't remember what Leslie's attitude was, if he had one on that particular item.

We evaluated the DC-7C in relation to the Lockheed airplanes that existed, and as negotiations continued, through Hughes' efforts, as I recall it, the 1449A was [Dep. Tr. 1445] finally brought out as a proposal, and his negotiations concentrated on that.

I already explained what happened to the 1449A, how it became, as a proposal, at least, the 1549, and finally the 1649A.

By the time the 1649A rolled around, which was, or came into being, let's say, which I think was in the spring of 1955, thereabouts, the delivery potentials that we had contemplated as being available for the DC-7C were not there.

Douglas had been quite successful in selling that version to numbers of airlines. At that time there was a delivery advantage of going to the 1649A route.

As I recall it, it was the feeling on the part of a number of people, and I suspect this included Mr. Cocke, I am not certain about the others, but they definitely wanted to move forward with the 1649A in order to have airplanes for the summer season of nineteen—well, so they would have airplanes as soon as possible and before the DC-7Cs.

I don't remember what the original delivery schedule was at the moment on the 1649A. I think they were finally late in being delivered.

Just how this word got to Hughes, if it did, at that [Dep. Tr. 1446] point, I don't know. But that would be all that I recall with respect to anyone wanting the 1649A. It was simply, as I recall it now, there wasn't much other choice if we wanted airplanes; it then at that point had to be 1649As or miss a season's airplanes.

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Excerpts from Transcript of Deposition of Charles C. Tillinghast

[Docs. 210-222]

[Dep. Tr. 4427] [Mr. Sonnett] • • •

Now, as to where Mr. Hughes may now be, the record is replete with statements by Mr. Davis, by [Dep. Tr. 4428] Mr. Cook, and by Mr. Holliday—I have the record references here—statements made in this proceeding, in which Messrs. Davis, Cook and Holliday disclaim any knowledge as to where Mr. Hughes is.

In the record before the Special Master it is established that there is at least one address to which mail is customarily sent by people who are trying to reach Mr. Hughes, and that is 7000 Romaine Street, the communications center.

The Special Master will recall that at one time I wrote Mr. Hughes a letter there asking whether he would be prepared to accept a subpoena.

I also sent copies of that letter to the Beverly Hills Hotel and to the Hughes Tool Company in Houston, Texas. I had a reply from Nadine Henley saying that she picked up the mail at Beverly Hills, and she wasn't currently in touch with Mr. Hughes, but would bring the matter to his attention when she heard from him.

[Dep. Tr. 4429] The Master will recall that pursuant to his direction Mr. Davis wrote to Mr. Hughes, in which a certified copy of the order for production of documents was forwarded. That letter went to 7000 Romaine Street, but so far as I know, Mr. Davis has not yet informed us whether he had an answer to that letter. If he has it, I would like to see it. It should be made a part of the record.

Finally, there is now evidence that Mr. Hughes himself in financial transactions has used and designated 7000 Romaine Street as his mailing address. He did this in a promissory note when he borrowed $11 million from the Bank of America, according to documents recently produced.

So that our problem is not an easy one, and it seems to be a problem which Mr. Davis and Mr. Cook and Mr. Holliday have had as well as counsel for TWA. With that in mind, we constructed these interrogatories so as to ascertain under oath the information that officers, directors or attorneys of Toolco may have concerning where Mr. Hughes was in the 30 days preceding the expected date of the answer to the interrogatories, where he was or will [Dep. Tr. 4430] be on the date of the answer, and where he is expected to be, so far as they know, in the period up to July 1st.

* * * * *

[Dep. Tr. 4432] * * * The disclosure of information as to where Mr. Hughes can be served therefore is an essential prerequisite to our carrying out that program; and I would therefore urge that the Master direct that the answers to these interrogatories be made very promptly, the interrogatories themselves having been served on May 2nd.

I think that completes what I have to say, unless you have some questions, Mr. Rankin.

The Special Master: Any other party other than the Tool Company care to comment on these motions for interrogatories?

Mr. Davis?

Mr. Davis: It is quite apparent, Mr. Special Master, that counsel for TWA is still trying in one way or another to change or upset the priority for the taking of depositions which has been established, may I say repeatedly, by the Court.

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[Dep. Tr. 4437] • • • I am quite conscious of the fact that the Special Master did rule that TWA might serve interrogatories upon the Tool Company relating to the location of Mr. Hughes. Now we must examine what those interrogatories are and whether or not they are objectionable.

I have tried to follow the amendments and [Dep. Tr. 4438] correction that Mr. Sonnett expressed today.

Before I go to that, let me add one other factor. Mr. Sonnett has made a rather full statement of alleged difficulties that he has encountered. I don't question anything that Mr. Sonnett has said. But those seem to me again statements of fact, and it seems to me statements of fact which are not before us, or if they are before us, I would like to have them in some form which I may be permitted to address myself to.

I don't believe it is relevant, really, to the issue. The issue is, and I submit primarily, whether or not or the extent to which TWA at this time is to be permitted to interfere with the Tool Company in its efforts to conduct its discovery proceedings in an orderly fashion, and permit at the same time what amounts to a simultaneous or contemporaneous discovery proceeding conducted on the part of TWA directed to the Tool Company.

I respectfully submit that from the decisions that we have had to date that is not what the rules contemplate, nor what is proper or orderly.

Mr. Sonnett refers to the fact that the [Dep. Tr. 4439] rules, new rules, will come into effect in July. So be it.

The Special Master: Mr. Davis, before you leave that point, I wish you would tell me anything you know about the law that supports your position that interrogatories cannot be developed and ordered when a priority with regard to discovery in the taking of depositions is granted by the Court.

I found no decisions to that effect. In fact, I found cases directly to the contrary, that interrogatories could be addressed to the parties at the same time that there was a priority established concerning the taking of depositions.

Mr. Davis: Mr. Special Master, as you may recall, I was engaged in Washington before the CAB at the time that this matter was argued here, and it is my understanding of the cases, but I may be wrong, but it is my understanding of the cases that interrogatories, written interrogatories, are a form of discovery procedure, and the Courts have so recognized it, and it is also my understanding that in this district, at least, without Court permission and a special showing to justify the serving of interrogatories, it is regarded as an interference [Dep. Tr. 4440] with the discovery proceeding which a party may be engaged in, and the Courts have held, absent permission by the Court, that an opposing party may not independently engage in discovery proceedings addressed to the person who is actually

engaged in discovery proceedings, and I believe there is authority to that effect.

The Special Master: If you can find any—

Mr. Davis: I would have thought it would have been submitted to you for consideration in connection with the memoranda that was submitted in opposition—

The Special Master: If you can find any such authority, I will give you until Friday morning at 10 o'clock. The cases I found were to the effect that this was under an entirely different rule from the provisions as to discovery otherwise, and also in regard to taking depositions, and that it was independent and could be proceeded with at the same time.

I think that is a very important legal proposition as far as your position is concerned, and I wanted to inquire, without interrupting you any more than necessary, as to what support you might have for the position.

[Dep. Tr. 4441] Mr. Davis: I am not in a position to refer you to a particular case, Mr. Rankin.

It was or it has been my understanding, it has been my understanding, that a person engaged in oral depositions was not thereby precluded from also serving written interrogatories.

In other words, the mere fact that a party was engaged in the taking of oral deposition did not preclude him from also using other means of discovery proceedings.

But I am referring to my understanding of the practice, which I believe is supported by decisions—I may be wrong as to that, but it certainly has been

my understanding—that while a party is engaged in discovery proceedings the other may not, during that period, commence its discoveries, be it by oral depositions or notice of the taking of oral depositions or interrogatories, without permission of the Court.

I may not be able to cite a case squarely in point on that. Certainly it seems to me that the reasoning underlying the matter would lead to that conclusion, even if we are to assume that this is a novel question.

* * * * *

[Dep. Tr. 4453] * * * The Special Master: Mr. Davis, as I indicated to you before, the reason that I was willing to consider an application for the right to present such interrogatories was only so that when we reached the time that they were entitled to depose Mr. Hughes in the development of their case they wouldn't then have to try to find him.

If you could give me some help on that problem so that we could be assured, and I don't mean just by your promises, because while I have complete confidence in you and your promise I won't let you be in a position where you promise for Mr. Hughes in this particular situation.

Mr. Hughes has a right to at least-at this time not allow himself to be served if he can avoid [Dep. Tr. 4454] it, and unless he put himself into such a position that I could rely upon it, representing the Court, insofar as being assured that we would have him with a service of the law so that he could be deposed at a certain time, then we have the problem

of whether or not we shall arrive at the time for his deposition and have to go through the spectacle of the Federal Court trying to get an important witness in this case to depose in order to develop the truth that is necessary to the trial of this case, and I don't intend to have a Federal Court put in that position if we can avoid it under the law.

I mean no reflection of any kind on you or counsel on your side in this matter, but I do think we have to face up to that problem, and that is the only reason that I would allow this much interference with your priority action, even though I don't think under the law, as I understand the cases, that interrogatories have been held to be an interference, depending on how far they go and other considerations that are in the discretion of the Court.

Nevertheless, for the limited purpose of making sure that when this witness is reached in proper order he will be available to develop whatever [Dep. Tr. 4455] he can contribute to the case, that is the reason that I am interested in what you have to say concerning that problem.

Mr. Davis: My comments on your objections, Mr. Rankin, are these:

I recognize and have no objection to the Court, through you, taking whatever steps may be necessary in order to insure the availability of whoever is a proper witness in this proceeding. But let us look at the facts in a realistic manner, if I may suggest it.

* * * * *

[Dep. Tr. 4456] * * * Mr. Hughes long ago, but following the decisions of the Court as to the priority

of the taking of deposition, was informed as to the likelihood as to when he would be likely to be needed.

Counsel before Judge Ryan, in seeking—I am referring to counsel for TWA—before Chief Judge Ryan, in order to obtain the designation of a particular Judge, called that an important case, referred it to a case with which he had had personal experience, the Ford-Ferguson case, referring to, in that case, a deposition going on for four years, and, if my memory serves me correctly, indicated that he thought in this case the depositions would be—of all the parties—would probably be as lengthy if not lengthier.

That was a justification for the relatively unusual step of assigning this matter to a single judge.

The point I am making is that there is no emergency either for the protection of the Court or the protection of the parties to be able to serve Mr. [Dep. Tr. 4457] Hughes tomorrow or the next day.

Counsel by his statement, which I am sure is a well-informed statement, has indicated that Mr. Hughes, if his information is correct, was believed to have been a number of places, including outside of the country.

That is nothing so very unusual, and there is no reason or basis for believing that that will continue indefinitely.

I could understand the concern of counsel and of the Court, perhaps, if we were delaying or interfering with the rights of the parties to obtain information from a needed witness because he was not available to the Court. But that is not what is before us.

I indicated to counsel for TWA and the Special Master that I have reason to believe that I will hear from Mr. Hughes in the reasonably near future.

I am not in a position of committing myself to a particular date, but I believe that, and certainly don't know of any fact that would tend to indicate that Mr. Hughes is not likely to be available whenever his proper turn arrives.

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[Dep. Tr. 4463] • • • Mr. Sonnett: Would the Master inquire of Mr. Davis whether he has had a reply from Mr. Hughes to Mr. Davis' letter of March 29, 1962, in which Mr. Davis, in a letter to Mr. Hughes, sent to Houston, Texas, copy to 7000 Romaine Street, copy to the Special Master and to counsel for all parties, pointed out that Mr. Hughes was familiar with the motion schedules already, and in which Mr. Davis said that in reliance upon Mr. Davis' earlier inquiries he had already reported on the record that everything had been produced, and nevertheless the Master had directed that the inquiry be made of Mr. Hughes, and enclosed a certified copy of the order, accordingly it was being forwarded, and Mr. Davis' letter concluded by saying "In order to fully comply with the request of the Special Master, I should be advised in [Dep. Tr. 4464] writing whether or not you have in your personal possession or control any documents described in the schedules attached to the enclosed motions.

"If you should have any such documents, they should be delivered to me promptly for production."

The letter was March 29th, sent airmail. I think it would be appropriate to ascertain whether or not there was a response, and if so, what the response was.

The Special Master: Mr. Davis, have you received a response?

Mr. Davis: No, Mr. Rankin, I have not received a response from Mr. Hughes. As I previously indicated, those familiar with the papers or files that might be regarded as files in his personal possession as distinguished from those that are in the possession of the Tool Company relating to the subject matter have all been produced. But I have not heard from Mr. Hughes.

Mr. Sonnett: With respect to Rule 4, I think Mr. Davis is overlooking the fact that the judges of the Southern and Eastern District, based on their familiarity with many so-called big cases, have seen fit unanimously to change a policy that was [Dep. Tr. 4465] judge-made here in this district for some years, and that is to take away the premise of Mr. Davis' entire argument, because when they provided in Rule 4 that from and after the 40th day after commencement of an action the service of a notice to take a deposition of a party or witness or the pendency of any such deposition should not prevent any other party from taking a concurrent deposition of any party or witness.

I think they knew exactly what they were doing. They were changing the rule of automatic priority in the so-called big case to provide for a new approach to a very difficult problem of judicial administration.

When they placed on counsel, as they did in that rule, an express duty for all attorneys to make every reasonable effort to stipulate as to the taking of all such concurrent depositions, the judges of the Southern District knew what they were doing. And when they said if the lawyers couldn't arrange it the Court would, they knew what they were doing.

The Court has given to Judge Metzner the responsibility for the entire case. He in turn has appointed the Master with complete authority over the [Dep. Tr. 4466] discovery aspects of the case, subject only to appeal to Judge Metzner.

It seems to me that the record is perfectly clear that Judge Metzner, when he devised the schedule quite awhile back, long before the amendment to Rule 4, that Judge Metzner then believed that we would have finished the deposition of Mr. Hughes by now. At least he specifically directed that we were to have started it in April of this year.

I don't think it advances the cause any for Mr. Davis to approach the matter as if Rule 4 had not been adopted. It was a very thoughtful and carefully planned amendment to the rule by the bench designed to eliminate problems just like the problems we have in this case on delay of discovery.

Certainly the judges believed that it would promote the purpose of Rule 1, just, speedy determination of controversies, to make this change, or they wouldn't have made it.

What we have run into, and it is perfectly clear, is a calculated tactic of trip, stumble and delay for over a year in discovery proceedings. So the premise of Mr. Davis' argument is invalid. The practical

problems of locating Mr. Hughes are [Dep. Tr. 4467] obvious.

I don't know what better proof we need of the difficulty than the statements of Messrs. Davis, Cook and Holliday. Mr. Holliday, before the CAB, recently was asked the following question:

"Q. Mr. Holliday, the discussion we just had on the record about Mr. Hughes is or may be, that is, where he is or may be, do you know where Mr. Hughes is now?

"A. I have no knowledge at all as to where Mr. Hughes might be.

"Q. Do you know where he is in the United States?

"A. No, I have no knowledge at all as to where he might be."

The one point, it seems to me, that is overriding, and it is a point the Master has made, is that whatever Mr. Hughes' idiosyncrasies, he must be responsive to the process of the courts of the United States like anybody else, idiosyncrasies or no idiosyncrasies.

So far as the constant barrage and implication about publicity, I will make a proposal right now to solve the problem if Mr. Davis will undertake [Dep. Tr. 4468] to carry it out.

I will accept an affidavit signed by Mr. Glenn and Nadine Henley of their personal service of a subpoena on Mr. Hughes in this case returnable July 1st or at such date as you may fix or the Court may fix in lieu of the answers to these interrogatories.

I want the affidavit by two people who have been close to Mr. Hughes for many, many years. If he has some personal problem about people coming close to him who are strangers, that will resolve that.

I have no wish to embarrass the man, and I have not been giving statements to the press, contrary to the practice of Hughes Tool Company.

It is a perfectly simple solution to the problem, if they wish to follow it. All I want is an affidavit before a qualified notary public, I will supply the subpoena, of service of that subpoena on Mr. Hughes by these two people, and I will take their word under oath, and the entire problem is resolved.

I don't know what else I can do. That would be the easy way to do it. I am not even suggesting that I want to send a U. S. Marshal in to do it. That can be done very easily, very privately, and very quietly, if they wish it to be done that way.

[Dep. Tr. 4469] Otherwise it seems to me there is no alternative except to use the process of the Court, which we are using here, I submit, very properly and correctly.

As to Mr. Holliday, Mr. Holliday is in default. Under the rules, his answer should be stricken, or such other terms imposed as the Master may deem proper. I gather from the papers that there may have been some oversight on the Holliday aspect, and certainly I have no desire to seek any forfeiture. As to our Holliday motion, I would not object to a disposition by the Master to the effect that if Holliday does not answer the interrogatories within a reasonable period of time, say by Friday this week, that his answer then be stricken.

Mr. Davis: I take it that Mr. Sonnett is now addressing himself to his motion with respect to the interrogatories addressed to Mr. Holliday. As my letter to you, sir, copy to counsel, indicates, it was

an inadvertent oversight on the part of counsel for Mr. Holliday not to have had the objections that were made apply equally to the interrogatories addressed to Mr. Holliday, at least to the extent to which they would be applicable.

[Dep. Tr. 4470] The position on behalf of the Tool Company or Mr. Holliday—after all, Mr. Holliday is an officer of the Tool Company, and the interrogatories addressed to the Tool Company were broad enough to cover all officers of the Tool Company, including Mr. Holliday—is substantially as indicated by the papers before you, sir.

First of all, I wish to call to your attention that leave was sought merely to serve interrogatories upon the Tool Company, and the permission granted was permission granted to serve interrogatories upon the Tool Company. I am not going to suggest that that justifies the inadvertency of the oversight, because those would have been simply two additional points that we would have made.

However, I appreciate Mr. Sonnett's candor when he refers to the testimony of Mr. Holliday under oath in the CAB proceedings, during which time a representative of the Cahill firm was present throughout, or substantially throughout those proceedings, and he has his answer. To the extent to which the interrogatory is genuinely designed to elicit what Mr. Holliday knows, Mr. Holliday has answered that under oath. Mr. Sonnett did not give the date [Dep. Tr. 4471] as to Mr. Holliday's testimony before the CAB.

Do you have it, John?

Mr. Sonnett: I don't have the date of it, but let me say—

Mr. Davis: It was subsequent to the time the interrogatories were served.

Mr. Sonnett: To dispose of that point that Mr. Davis is making, the CAB isn't in this case, neither is this case in the CAB proceeding. We are entitled to an answer. If that is Mr. Holliday's information, let him give it under oath here. All he has to do is sign and swear to it.

Mr. Davis: The point, Mr. Rankin, is obviously that the objection that we are asserting is not a desire to deprive TWA of information to which they are entitled. It is perfectly apparent if Mr. Holliday under oath in the CAB proceeding did not know or answered as he did, that that would be the same answer he would give to the interrogatory if his counsel sent the interrogatory to him for the purpose of answering it. To be sure, the question was not phrased to information and belief, or whatever it may be. The point is what we are here objecting to is basically what we previously indicated with [Dep. Tr. 4471A] respect to the interrogatories to the Tool Company, addressed to the Tool Company. [Dep. Tr. 4472] Counsel for TWA clearly recognized by the procedure that he followed that the service of interrogatories was an interference, asked for permission to serve interrogatories upon the Tool Company, not upon Mr. Holliday. We believe that the interrogatories actually served upon the Tool Company are improper, even if it is concluded that TWA may interrupt in that fashion the discovery of the Tool Company in which it is currently engaged.

I recognize that if it is assumed that leave for the filing of interrogatories addressed to Mr. Holliday

was not required, and that they were therefore properly served, that I as counsel for Mr. Holliday in this proceeding should have filed objections to the filing of those interrogatories before this, and to the extent to which the failure to include objection on behalf of Mr. Holliday occurred, I apologize.

The Special Master: I will overrule the motion to strike the answer of Mr. Holliday. I further order and direct that unless Mr. Hughes authorizes his counsel or some other person in writing, in form satisfactory to counsel for TWA and the Special Master, to accept service of a subpoena to appear for the taking of his deposition on or after July 1, 1962, at [Dep. Tr. 4473] such time as it may properly be reached under the orders of the Court, by June 20, 1962, that Hughes Tool Company answer the interrogatories as presented, except as modified by the statements of Mr. Sonnett this morning.

I did not direct that Mr. Holliday personally have to answer the interrogatories, because I interpret the interrogatories as reaching such information as Mr. Holliday has.

Mr. Barr: If this matter is concluded—

The Special Master: I want to make it clear on this record that where I provide that the order will not require the answering of the interrogatories if Mr. Hughes authorizes the acceptance of a subpoena, it is only a subpoena for his appearance for the depositions, and I am not requiring that he authorize the service of process in this case upon himself. I want to make that clear in the record.

Is there any question?

All right, Mr. Barr.

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[Dep. Tr. 4669] Q. I am interested in criticism or critical remarks that Mr. Leslie may have made relating to the allegations of this complaint.

A. The only thing I can say on that, Mr. Davis, is that at—on one occasion, sometime after this action had been brought, Mr. Leslie said to me that he thought that the lawyers had brought the wrong suit, that the suit they should have brought was a suit based upon the fact that Mr. Hughes wouldn't let TWA be run like a business, and he said, so far as this matter of financing is concerned, that he always felt that Hughes Tool Company had plenty of money that they could come up with if they really wanted to, and he shouldn't have been criticized, impliedly or otherwise, for having failed to arrange financing, because, he said, it was always—"I always knew if Mr. Hughes really wanted to he could provide the financing."

[Dep. Tr. 4670] So I suggested that he go and talk with Mr. Sonnett, and explain his views fully to Mr. Sonnett. That is the only occasion that I can recall. I am quite sure it is the only occasion when he was let's say critical of the lawsuit, to my knowledge.

Q. And when did this take place?

A. Oh, I would guess that this was sometime in the fall of 1961.

Q. Before Mr. Leslie went to the hospital?

A. Oh, yes. It was well before then.

Q. Wasn't Mr. Leslie referring to a proposed affidavit that had been submitted to him?

A. I know that at the time he spoke to me—well, I want to put this right.

I know that the time that he spoke to me was at a time when he was having some conversations with Mr. Sonnett.

So far as I know, no affidavit was ever submitted to him for signature, Mr. Davis.

Q. He spoke to you more than once on this subject, didn't he?

A. No, I think he spoke to me only once.

Q. Wasn't there a time as a result of which you suggested he go see Mr. Sonnett and discuss his views with Mr. Sonnett?

[Dep. Tr. 4671] A. This is the time about which I have just testified.

Q. After he had an opportunity to discuss the matter with counsel for TWA did he bring the subject up again with you at all?

A. No, I have no recollection of his having mentioned it again.

Q. Did you mention it to him?

A. No.

Q. Did you ask him if he was satisfied now that there was merit to the lawsuit?

A. No, I didn't, Mr. Davis.

Q. This subject of the manner in which equipment had been financed was one which was important to you, was it not?

A. Well, it wasn't important in the current operations of the company. It was important to the lawsuit.

Q. Don't you recall a telegram from Mr. McCone suggesting that a thorough investigation be made of the manner in which equipment had been made available to TWA in the past, or financed, in connection with what the attitude of TWA should be toward 990s?

A. Well, on the subject of Mr. McCone's telegram, if you are referring to the one I think you are, it had to do with the question of whether there was any obligation

[Dep. Tr. 4672] on the part of TWA to buy 990s from Hughes Tool Company, and I satisfied myself, as I have already testified several times, that there was no obligation.

Q. I understand that, but I also gathered from your prior testimony that as a result of the inquiry being made by Mr. McCone, possibly others, you undertook to inquire as to the facts, I thought from Mr. Leslie and Mr. Rummel. Am I wrong in that?

A. I undertook to inquire as to whether or not there were any facts that would give rise to an obligation on the part of TWA to take the 990s from Hughes Tool Company, and I satisfied myself that there was no obligation.

Q. Yes, but in connection with that I thought that you previously testified that you had made inquiries as to the past practices of the Tool Company in its relationship with TWA.

A. Only to the limited extent of determining whether any obligation exists, and as I think I already testified, most of my conversations were with Mr. Rowe, who had personally been familiar with this whole situation, and who was quite positive that there was no obligation, and indeed, subsequent circumstances have made that abundantly clear.

Q. Can you give me as fully as you can just exactly [Dep. Tr. 4673] what it is that Mr. Leslie said to you at the time that you suggested he go see counsel?

A. I don't think I can give you any more than I have already told you, Mr. Davis.

Q. Following that have you ever been told by anyone what the details were that Mr. Leslie had to support those general conclusions?

A. No, I have not.

Q. Did you discuss that with Mr. Reed, counsel for the voting trustees?

A. I don't believe I ever discussed that with Mr. Reed.

Q. Mr. Breech?

A. No.

Q. Did you ever tell him about the incident?

A. No.

Q. Did you tell Mr. Leithead, the chairman of the special litigating committee, about this incident?

A. This was long before Mr. Leithead's committee was formed, Mr. Davis, and I don't believe I have ever told Mr. Leithead about it.

Q. Since it was formed you had no occasion of telling Mr. Leithead about it?

A. No.

Q. Do you recall discussing that or mentioning it to [Dep. Tr. 4674] any of the directors of TWA?

A. I have no recollection, Mr. Davis, of having discussed that with anyone but counsel.

Q. By counsel you are referring to Mr. Sonnett, or members of his firm?

A. And Mr. Rowe.

Q. Would you tell me what your discussion with those gentlemen was?

Mr. Sonnett: I am not quite sure I know what Mr. Davis is intending to ask. If the question is intended to be as broad as it sounds, I object to it.

Mr. Davis: I am only interested in the discussion had with counsel relating to what Mr. Leslie had said, what facts Mr. Leslie claimed were pertinent to his criticism of the lawsuit, or relating in any way to the lawsuit.

Mr. Sonnett: I think I, on that basis, must press the objection. I think conferences between this witness and counsel with respect to the preparation of this case, and the possible testimony of any witness, it seems to me, are clearly within the work product rule, and I don't think Mr. Davis should be allowed to get at this through the back door, which he is trying to do.

[Dep. Tr. 4675] Mr. Davis: I understand, Mr. Rankin, from this witness, that this occurred not in connection with preparing anybody as a witness, but in the fall of 1961 Mr. Leslie, an officer of the company, who heretofore had been described as one familiar with the facts, went to the chief executive officer of the company to explain to him the facts that he knew which were pertinent to the merits of the lawsuit, and the chief executive officer referred him to counsel, and apparently the chief executive officer, rather than going back to Mr. Leslie and finding out from him just what the details of it were, found out what Mr. Leslie was saying through counsel.

The Witness: That is not correct, Mr. Davis.

Mr. Davis: I don't understand the basis of the objection.

Mr. Sonnett: In the first place, the first objection is you have misstated the record of the witness' testimony rather badly. The witness did not testify as you have described his testimony.

The Special Master: The inquiry can be made of the witness as to what he said to counsel about this matter, and as to what counsel related Mr. Leslie said to counsel.

[Dep. Tr. 4675A] But if you are getting into the question of any advice that counsel gave concerning—

Mr. Davis: I am not seeking that.

[Dep. Tr. 4676] Q. Mr. Tillinghast, I am not asking for any advice given to you or to anyone else at TWA by counsel. I am merely asking you to describe the discussions that you have had insofar as what you told counsel with respect what Mr. Leslie had told you and what they told you as to what Mr. Leslie had told them.

A. Well, Mr. Davis, all of my discussions with counsel have related to the question of whether or not there ought to be an amendment of the complaint or a separate action for the purpose of stating certain additional and alternative causes of action.

Q. I am not interested in the advice of counsel with respect to the form of the complaint, Mr. Tillinghast.

I am interested solely as to what Mr. Leslie said or what counsel reported to you Leslie said.

I don't assume that Mr. Leslie was purporting to act as a lawyer. Was he?

Mr. Sonnett: I am afraid he was. He was trying to improve this complaint.

A. Mr. Davis, I will repeat, if I may finish my question, my answer, that all of the conversations I have had with Mr. Sonnett and Mr. Rowe about what Mr. Leslie had to say had been in the context of whether or not there should be additional or alternative counts or suits or [Dep. Tr. 4677] causes of action, and I cannot separate any discussion I have had with them of what Mr. Leslie had to say from the subject of advice as to causes of action that should or should not be pleaded.

Q. You mean that you are unable to separate the facts told to you by counsel, what Mr. Leslie told them were facts, transactions, the manner of operation of TWA prior to the time you became chief executive officer, the facts relating to whatever conduct took place between the Tool Company and TWA, you cannot separate those from the advice you were receiving from counsel as to the kind of a cause of action that ought to be brought, is that what your testimony is?

Mr. Sonnett: Mr. Rankin, may I, in the first place, object to the form of this question. Secondly, it seems to me perfectly apparent that what Mr. Davis is trying to do is to find out whether in the course of my interrogation of Mr. Leslie Mr. Leslie gave me his version of facts, and whether I transmitted Mr. Leslie's version of the facts to this witness.

If I did, it clearly is within the work product rule. Whether I told it to this witness or to the special litigation committee doesn't deprive it of the work product character. There is no waiver at [Dep. Tr. 4678] all. Mr. Davis will have ample opportunity to examine Mr. Leslie when he testifies, and to get his version of the facts, and to find out why Mr. Leslie thought that TWA's case against Hughes could be strengthened by the cause of action which struck him as most important, Hughes' refusal to let TWA be run as a business. The witness is going to be here. This is just a back door attempt to get at work product that he can't get at directly.

The Special Master: You may answer this question.

A. Mr. Davis, neither Mr. Sonnett nor Mr. Rowe has ever stated to me the facts stated to them by Mr. Leslie.

Q. And you made no effort to obtain those facts from Mr. Leslie through anyone else?

A. That's correct.

Q. A moment ago you testified that you did not know of any affidavit submitted to Mr. Leslie for his signature. Now my question is whether or not you ever learned that Mr. Leslie had a draft of a proposed affidavit which he discussed with his own counsel and which disturbed him.

A. No, I have no knowledge that Mr. Leslie had a counsel or discussed a draft of affidavit with him. The only thing that I know is that about the time that I am [Dep. Tr. 4679] speaking of there was a question of whether or not it would be advisable to prepare affidavits or to have various of the officers of TWA prepare affidavits.

So far as I know, no affidavits were prepared for anyone or submitted to anyone for signature.

Q. But you do recall a point at which consideration was given to the desirability of having various officers of TWA—

A. That was discussed, yes.

Q. When was that discussed?

A. This would have been some time in the fall of 1961 also.

Q. Do you recall those who participated in that discussion?

A. Well, these were discussions I had with Mr. Sonnett and Mr. Rowe.

Q. Just the two of them?

A. Yes.

Q. You never discussed that with Mr. Rummel or Mr. Cocke or Mr. Leslie?

A. No, I don't recall ever having discussed it, except that I mentioned before that at one point Mr. Rummel gave me a draft of a statement of fact that he was preparing, and if my recollection is correct, at the time it was [Dep. Tr. 4680] contemplated that that might be embodied in an affidavit. But to the best of my knowledge, that was never done.

Q. Don't you know or weren't you told that at about the same time or around that time, in the fall of 1961, Mr. Cocke was also presented with, say, a draft?

A. I don't know, Mr. Davis. I might further illuminate this by saying if I recall correctly, this was at a time when it was thought that there might be a motion to dismiss or a motion for summary judgment, and when it became apparent that Hughes Tool Company wasn't going to press that motion I believe that the matter of possible affidavits sort of just disappeared.

Q. Now you remember, don't you, the conferences and activities within TWA to prepare affidavits to oppose this motion of the Hughes Tool Company?

A. No, I do not, Mr. Davis.

Q. Did Mr. Cocke express to you some difficulties in subscribing to facts reflected by a draft submitted to him?

A. No, he did not.

Q. Did he express to you some criticism of the allegations of the complaint or the facts which TWA was trying to put together?

A. No. The only thing even approaching any criticism [Dep. Tr. 4681] on the part of Mr. Cocke was a question that Mr. Cocke raised as to what the legal theory of the complaint was, and he once raised a question as to what he thought about public relations effects of a technical case, which he apparently regarded this might be. But

that is the extent of any misgivings of any sort that Mr. Cocke expressed.

Q. Was that about the same time, in the fall of 1961, about the same time that Mr. Leslie was expressing—

A. No, as I recall it, this was considerably before that, and relatively shortly after the complaint was filed.

Q. You have given me a description of what Mr. Cocke said. Can you tell me more specifically the substance of what he said, other than in terms of conclusions?

A. I have great difficulty at this point in recalling exactly what he said, Mr. Davis. The only thing I can recall is that he said that he thought some people would have question in their minds as to whether Hughes had done more good or more bad for TWA, and I remember saying to him that it wasn't a question of whether on balance there was more good or more bad, it was a question of whether there had been a violation of the antitrust laws, that that was a technical legal question, that, as I conceived it, the broad issue of where the greater good or [Dep. Tr. 4682] evil lay wasn't involved in the action, and that is all I can remember of my conversation with Mr. Cocke.

Q. There came a time when Mr. Cocke's duties and responsibilities were transferred to someone else?

A. That's correct.

Q. In fact, Mr. Cocke was transferred to a status of semi-retirement?

A. No, I wouldn't say semi-retirement.

Q. How would you describe it?

A. Well, he was transferred into a new position, in which he is very active.

Q. When did that take place?

A. September 1st.

Q. 1961?

A. 1961.

Q. Was that fairly soon after Mr. Cocke had described to you his views?

A. I can't be sure, Mr. Davis, what the concatenation of events was. It may have been either before or after. It would, as I recall it, not have been long distant in point of time, but whether it was before this or after this, I just couldn't tell you.

Q. Do you recall whether or not it was before or after this motion that had been made by the Hughes Tool [Dep. Tr. 4683] Company?

A. Can you tell me when that motion was made?

Q. Shortly after the complaint was filed, August.

A. Well, it—I had my conversation with Mr. Cocke, as I recall it, my conversation relative to his change of position, about ten days prior to September 1st.

Q. Prior to the shift in position, will you describe generally what the scope of Mr. Cocke's duties and responsibilities was before this change took place?

A. He was system general manager.

Q. What does that mean?

A. Well, he was the general manager of the operations of the system.

Q. Was he the senior officer in charge of the overall operation aspect of the airline?

A. That's correct.

Q. How long had he had that position?

A. Oh, a couple of years, I guess.

Q. What had he been prior to that?

A. He had been general sales manager.

Q. So he had been system general manager during 1959 and 1960?

A. Not assistant general manager.

Q. No, he had been system general manager?

[Dep. Tr. 4684] A. Yes.

Q. During the years 1959 and 1960, is that correct?

A. Well, I don't know just when he went in, Mr. Davis, but I have known the date. It was when the reorganization under Mr. Thomas took place, and that was some time in—I think it was some time in 1959, yes.

Q. During the reorganization that Mr. Thomas put into effect at TWA, while he was president of TWA, Mr. Cocke was made system general manager, is that right?

A. That's right.

Q. How old a man is he?

A. Mr. Cocke?

Q. Yes.

A. He is 58 at the moment, I believe.

Q. Then, in September 1961, a decision was made to relocate Mr. Cocke, is that correct?

A. No, the decision was made in August.

Q. Do you recall when it was made in August?

A. Well, it would have been about ten days—well, the decision, I guess, was in the process of being made during the first half of August, and I talked with Mr. Cocke a week or ten days before September 1st, when Mr. Hall took over as system general manager.

Q. What duties were assigned to Mr. Cocke as a result [Dep. Tr. 4685] of this change?

A. Well, Mr. Cocke is now in charge of what we call industry affairs, and as such, he is in charge of public relations, he is in charge of tariffs, he is in charge of relations with other airlines, which includes jurisdiction over the Air Transport Association and the International Air Transport Association, and you might say that he is in charge of external affairs.

Q. By external you mean outside of the country?

A. Well, outside of the company. Dealings with other airlines, public relations, matters of that sort.

Q. Was his compensation affected as a result of this—

A. There was—no change was made in his compensation.

Q. That was a change that you discussed with some of the directors?

A. Yes.

* * * * *

[Dep. Tr. 4686] * * * Q. Will you now describe the discussion you had with Mr. Breech as to the desirability or lack of desirability in making this move with respect to Mr. Cocke, and with particular reference to the impact it might have on the lawsuit or his availability as a witness, things of that kind?

A. To the best of my recollection, Mr. Davis, I never discussed with anyone any impact that it might have on this lawsuit, with anyone.

I discussed with Mr. Breech the fact that we seemed to be falling substantially behind our forecasts, we had been having a very bad season, and I felt that we needed [Dep. Tr. 4687] to strengthen the system management, that I felt that Mr. Cocke was not the man who would bring the greatest strength to this position. I said for one thing I felt that he had been through so many crises and discouragements over a period of years that he—well, that his ambition and spark to do better had been somewhat dulled. I felt that our problem was of a magnitude that it would be better handled by a younger, less disillusioned, more aggressive person, and that I felt Mr. Hall would bring more drive and imagination to the position.

Also, I said that I felt that Mr. Cocke was by nature not a planner, and that I felt that the position needed somebody in it who was more of a planner than Mr. Cocke. I said that Mr. Cocke could be very useful to me filling this other position, to which I didn't have time to do justice

and that our external affairs needed more time and attention, particularly with the coming retirement of Mr. Pierson, who over the years had handled IATA and a number of other external matters.

Mr. Breech, who then felt, and I believe still does today, the highest regard for Mr. Hall, agreed with me completely that Mr. Hall would do a more effective job. I should also add that I told him that I was getting the impression that there were a good many people in the system [Dep Tr. 4688] that felt that Mr. Cocke lacked the leadership that was needed in this position, and I felt that they were restive, and that, among other things, a change in this position would have the enthusiastic support of the system people, and would give them new hope, would improve their morale, and generally give us a more effective operation.

Q. Do you recall what Mr. Breech said in response?

A. Only that Mr. Breech agreed very vigorously, and felt that Floyd Hall would bring new strength and vigor to the office, and that it was a move that would be very advisable to make.

* * * * *

[Dep. Tr. 4689] * * * Q. Mr. Cocke was at the time a director?

A. He was.

Q. Is he still a director?

A. He still is a director. And I would like to add that so far as I have been able to discern, the change has worked out excellently. It has had Mr. Cocke's enthusiastic acceptance, and I think in his present job, relieved of the great pressures that inevitably are on the system general manager, he is happier, more effective, and that things worked out very well.

* * * * *

[Dep. Tr. 6113] * * * By Mr. Davis:

Q. Mr. Tillinghast, did anyone ever tell you that the contention that there ever existed a conspiracy between Atlas and Hughes Tool Company relating to a Northeast merger was a lot of nonsense, a lot of bunk?

A. Yes.

Q. Will you identify who those people were?

A. Well, just one person. Mr. Stretch.

Q. I had in mind anyone connected with TWA.

[Dep. Tr. 6114] A. No, he did not.

Q. No one ever did?

A. No one ever did.

Q. Did you ever discuss this matter with Mr. Reed?

Mr. Williams: "This matter" being the inclusion of Atlas Corporation as a co-conspirator?

Mr. Davis: The feeling that at least a serious question existed as to Atlas being a co-conspirator, yes.

Mr. Williams: Did you ever discuss that with Mr. Reed?

A. Well, I discussed that, as I recall it, with Mr. Reed in the course of a conference which Mr. Sonnett, Mr. Rowe and I had with Mr. Reed and his partner, Mr. Surbeck, at a time when they, Mr. Reed and Mr. Surbeck, reviewed a draft of the complaint, and discussed with Mr. Rowe and Mr. Sonnett their comments.

Q. Who else was there besides yourself?

A. My recollection is we were the only ones, those that I have just mentioned.

Q. When did that take place, approximately, do you recall?

A. Well, that was rather shortly, as I recall it, before the filing of the complaint, Mr. Davis. I can't tell [Dep. Tr.

[Dep. Tr. 6115] you exactly when it was, but it would have been in the last two weeks of June.

Q. Will you describe exactly what was said in that conference?

* * * * *

[Dep. Tr. 6121] * * * A. Well, Mr. Davis, as I recall that meeting, we had before us a draft of complaint, and we went through it from more or less beginning to end.

As I recall the discussion, it related mostly to legal theory.

I remember that there was rather a lengthy discussion of the affect, the legal affect of Civil Aeronautics Board orders, particularly as it related to the Section 7 cause of action. It is a little difficult for me to recall all that was said at the time on each of these subjects.

I think, as I say, that most of the time was consumed in the—in a discussion of legal theory.

Q. I am interested in facts at the moment, Mr. Tillinghast.

Mr. Sonnett: You want an answer or an argument? You asked him what was said, and he told you, Mr. Davis. Why don't you withdraw the comment, or keep it to yourself.

Q. May I have your complete and total recollection of what was said relating to the facts which supported any of these legal theories?

A. Well, I don't recall, Mr. Davis, that there was any extensive discussion of the facts as such. I think that the [Dep. Tr. 6122] discussion related to the legal affect of the fact and to the legal theories involved in the complaint.

Offhand, I can't recall any specific discussion of factual questions, although there may have been.

Mr. Williams: May the witness be excused? He does have a 5:00 o'clock appointment uptown. He has answered this question and several more.

If counsel wants to pursue it further, he can do so when we resume.

Mr. Davis: I would like to pursue it now, if I may.

Mr. Williams: I don't agree to this procedure, your Honor. I think you set a time for stopping.

You asked him to answer the question.

He has answered it as best he can.

If counsel isn't satisfied, let him ask some questions on Thursday.

The Special Master: I think that the inquiry should reach the range of the conference, and after that is established, then we will excuse the witness.

Mr. Davis: Yes.

Q. Whether the discussion of the facts was extensive or not, and whether or not they related to legal theories, I want you to give me at this time your total recollection [Dep. Tr. 6123] of the facts which were discussed at that conference, facts which were mentioned in that conference.

Mr. Sonnett: If any.

A. Well, facts were mentioned, such as the fact that various of these things had been submitted to the Civil Aeronautics Board, that Hughes had pre-empted to himself the matter of equipment, that he was the one who controlled financing.

I would think, Mr. Davis, that—my recollection is that this complaint we were discussing was pretty close to the form of the complaint that was finally filed, and you might say that in a sense we discussed all of the facts that are set forth in that complaint.

I have to say once again that this discussion was a discussion more—primarily of legal theory of the complaint rather than as to the underlying facts, and the facts, as I recall it, were discussed only as they were incidental to a discussion of the legal questions.

Q. What facts were discussed relating to the existence of a question as to Atlas Corporation being a co-conspirator?

Mr. Williams: If any such facts were discussed.

A. Offhand, I don't recall any facts relative to that that were discussed as such.

Q. I don't refer now to a discussion of facts as such. [Dep. Tr. 6124] I am referring to anything mentioned, adverted to, referred to.

A. Well, at the moment, Mr. Davis, I have no recollection of any specific discussion of the Atlas side of things, although I have no doubt that it was touched on at some point in the course of the discussion.

Q. Will you describe the nature or extent of the participation of Mr. Reed and his partner in this discussion of the allegations of the complaint?

A. Well, as I recall it, Mr. Reed's participation in the discussion of the complaint was a rather limited one, and that most of the burden of the discussion was carried by Mr. Surbeck, who is an antitrust expert.

I remember, so far as factual discussions, that we had a discussion of the relative virtues of bringing an antitrust type of proceeding as opposed to a what would ordinarily be a derivative stockholders type of suit.

I remember, so far as facts are concerned, that Mr. Sonnett stated that he felt so far as any common law or equity cause of action by TWA against Mr. Hughes or Hughes

Tool Company that he felt he wanted to investigate the matter considerably farther than he had been able to, and hoped to have an opportunity of either voluntarily or in some proceeding talking or—talking with or examining Mr. Hughes [Dep. Tr. 6125] relative to certain facts.

I remember we discussed the airplane that Mr. Hughes pre-empted in, oh, 1956, or whenever it was, and lived in for a matter of some months, I remember Mr. Sonnett's taking the position, with which Mr. Reed agreed, that one of the advantages of bringing an antitrust action was that it avoided the matter of—well, let me put it this way—that it didn't carry the social stigma that certain other types of actions might, and that therefore very likely would involve less the creation of a personal gulf or a personal vendetta with Mr. Hughes.

With respect to the facts that were discussed, this is all that comes to mind at the moment, Mr. Davis, although I am sure that in the course of the discussion a good many more things were touched on.

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[Dep. Tr. 6283] • • • Mr. Davis: We will come to that.

The Witness: Mr. Davis, it is my recollection that at this meeting we had a general discussion of the conclusions to which Mr. Cahill and Mr. Sonnett were in the process of coming, so to speak. As I recall it, Mr. Cahill or Mr. Sonnett, and I can't recall at this juncture just who did the talking, said that they had by no means completed their investigation, but they had come to some tentative conclusions.

The conclusions were that rather than to become involved in the details of an equity action involving possibly multiple assertions of wrongdoing, which

would involve considerably more factual investigation and determination of detail which they had not had an opportunity to pursue, they felt that they very likely would recommend to TWA the institution of an antitrust action, based upon the fact that Mr. Hughes had pre-empted to himself the procurement of planes and the financing of TWA's operations.

They said, as I recall it, that they had talked with Mr. Thomas in California, and that he seemed most reluctant to talk very freely, but that out of [Dep. Tr. 6284] those discussions some things had appeared very clearly.

Among those were the fact that when he had taken over as president of TWA, there had been an understanding between him and Mr. Hughes that he was to have nothing whatever to do with the procurement of equipment, nor the working out of financial arrangements of the company, nor with advertising, all of which Mr. Hughes was keeping to himself.

They said that they felt it was clear that in these—

By Mr. Davis:

Q. Excuse me, but when you said "they said it was clear," I would appreciate if you would identify who "they" is.

A. Mr. Cahill and Mr. Sonnett. That Hughes had pre-empted these areas to himself. They said they also thought it was clear that TWA had suffered very substantially from the delay in getting equipment, and that they had received from both Mr. Leslie and Mr. Fellows separate estimates that TWA had been damaged by this to the extent of approximately $35 million.

They had said, as I recall it, or Mr. Sonnett said this, I am quite sure, that he felt as he looked at [Dep. Tr. 6285] this situation and saw the dispute that had come up over the Boeing acquisition and the pressures that the Tool Company had brought to try to interfere with that, that there wasn't likely to be any real solution to this problem, short of a divestment of Hughes' interest in the airline.

He said, if I recall correctly, that when the voting trust was set up, people felt that at last they had this problem solved and had stability, and then it was just a matter of time before another controversy arose.

He said, "I think you have to face the fact that it is very unlikely that you will ever be free of controversy, so long as this relationship exists, and for that reason he thought a divestment proceeding was what was really needed in order to solve the problem.

He said that it seemed abundantly clear that TWA was too large and too important to its stockholders and employees and the public to be the plaything of an eccentric man, and that he felt that in the last analysis a Court would come to the conclusion that a continuation of this relationship was just inconsistent with the public good and with the good of others having a legitimate interest in the company.

I remember he referred—

[Dep. Tr. 6286] Q. "He" being who?

A. I believe this was Mr. Sonnett—to the then fairly recent decision in the Panagra case, and he also referred to the duPont decision.

Mr. Rowe, I recall, raised the question as to the effect on any action of this sort, of the fact that certain of these things had in a sense been submitted to the Civil Aeronautics Board and approved as specific transactions.

To that Mr. Sonnett said, if I recall correctly, he felt that the Panagra case estabished beyond any real doubt that if there was an underlying antitrust situation, the approval of specific transaction done pursuant to the conspiracy which in and of itself might be legitimate and proper would not save the conspiracy from being the subject of judicial action.

As I remember it, and I can't remember everything that was said on the subject, a large part of the discussion revolved around what I will refer to as the CAB question, and what the effect of the CAB action was, both as it related to Section 7, and as it related to the question of an antitrust conspiracy generally.

That is as much as I remember at the moment, Mr. Davis, although undoubtedly there were a good many other [Dep. Tr. 6287] things said.

* * * * *

[Dep. Tr. 6294] * * * By Mr. Davis:

Q. Will you identify the information that you have relating to what you have described as the efforts of Mr. Hughes, or of this conspiracy, to monopolize or otherwise pre-empt the procurement or financing of aircraft by TWA, without repeating anything which you have already testified to?

You may repeat it as much as you care to if you are uncertain as to whether you have already testified to it.

A Mr Davis, it is my understanding that from prior to the time that Mr. Thomas became president, that Mr. Hughes has insisted on personally approving all purchases of aircraft and all financial arrangements. And when Mr. Thomas became president of TWA, it was distinctly understood that he would have nothing to do with those two subjects.

It is further my understanding that the motivation
Mr. Hughes sprang from the fact that Mr. Hughes is a ve
rich man, that the Hughes Tool Company made substanti
profiits, and that if those profits were paid out in the norm
course as dividends, that the vast majority of them woul
go to Uncle Sam in the form of taxes.

[Dep. Tr. 6295] And as a consequence of that, M
Hughes was concerned with means of having Hughes To
Company in the business of running an airline, and to h
so fixed that it would have demands on its cash which woul
make it impossible to pay dividends, and thus would mak
it possible to avoid a 102 tax problem that obviously woul
exist in the absence of this need.

It is further my understanding that towards the end o
each year, at least in the earlier days, Hughes conferre
with the financial people for the purpose of reviewing thi
problem and seeing to it that there were commitments tha
would offer ample protection against any 102 type of claim

It is further my understanding that for some reason
which I have never fully understood, Mr. Hughes insisted
on keeping percentage interest in TWA at a point just un-
der 80 per cent, thus enabling him to treat this as an inte-
gral part of the Hughes Tool Company business without
getting him in the position of consolidating earnings for
tax purposes.

From what I have been told in these regards, I have con-
cluded that the interests of TWA were sacrificed to the per-
sonal interests of Howard Hughes and both the personal
whims and the personal tax problems of Howard [Dep. Tr.
6296] Hughes, and that the welfare of TWA from the stand-
point of being free to finance itself and to raise capital, even
though it meant a dilution of the Hughes interests and to
itself, go out and make its own arrangements for plane

were treated as secondary to Hughes' primary interest in his own welfare.

As I know, I read the article to which frequent reference has been made here, called "The Spook and the Bankers" or "The Bankers and the Spook"—I can't remember which—which recounted many of the problems faced in trying to work out the 1960 financing.

I have been told several times by Mr. Wadsworth of Dillon, Reed, and others, by Mr. Sessel, that it was next to impossible to work anything out with Mr. Hughes because things would get about to the point of decision, and then nothing would happen. That he would constantly stall and postpone, and that several attempts to really straighten out TWA's financial condition were thwarted by the fact that Hughes insisted on being the person to decide such things, and that either it was impossible to get decisions from him, or he would refuse to do what seemed to be necessary to the achievement of the ends required.

I have also been told, principally by Mr. Leslie, [Dep. Tr. 6296A] I think, that Mr. Hughes refused to let TWA be run like a real business organization, and in particular prevented it from having the continuity of management that would enable it to be run as well and as profitable as its competitors.

That is perhaps a bird's eye view of the matter.

[Dep. Tr. 6297] Q. Have you identified now all the areas?

A. I am sure I haven't identified every single one of them, but I think with my prior testimony I have identified certainly the important areas which characterize my thinking or knowledge on the subject.

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[Dep. Tr. 6302] * * * By Mr. Davis:

Q. Among the various matters identified in your last answer, Mr. Tillinghast, you referred to an understanding that you had that Mr. Hughes resisted the procurement of aircraft or financing without his personal approval.

My question to you is: What is your understanding based upon? Who told you that?

A. I have been told that by many people, Mr. Davis.

Q. Anyone at TWA, or anyone claiming to have personal knowledge of the facts?

A. Yes.

Q. Who?

[Dep. Tr. 6303] A. Mr. Rummel and Mr. Leslie, Mr. Rowe, Mr. Pierson.

Q. Mr. Pierson?

A. Yes. Those are all that come to mind at the moment, but I am sure that numerous other people have remarked on this. I have always understood this to be something about which there wasn't the slightest question whatever.

Q. But those are understanding on oral conversations with those people. You never received anything in writing in the form of a report or memorandum, or you never saw any such writings or memoranda purporting to set forth facts or examples of this?

A. I don't recall any writings that dealt with this problem. I have never known any occasion within TWA for anyone to write it.

Q. Do you know of those people whom you have identified, do any of them claim to have had direct communication with Mr. Hughes in that regard?

A. I know Mr. Leslie and Mr. Rummel have.

Q. Does Mr. Rowe claim to have had direct communication with Mr. Hughes on that subject?

A. I don't recall his having claimed to have had direct communication with Mr. Hughes on that subject.

Q. Mr. Pierson?

A. I just don't know so far as Mr. Pierson is con- [Dep. Tr. 6304] cerned. Mr. Davis, as I recall what Mr. Pierson said on the subject, it was just a casual remark in the course of a conversation with him in the early days.

Q. Was anyone else present at the time he made that remark?

A. Not that I recall.

Q. You also testified as to your understanding relating to the alleged motivation of Mr. Hughes in connection with tax questions, 102 problems, and the like?

A. Yes.

Q. What is the basis of your understanding as to the motivation of Mr. Hughes?

A. Well, it consists principally of a conversation with Mr. Leslie.

Q. Anyone else? Mr. Slack?

A. Yes, Mr. Slack.

Q. Do you recall the occasion when you discussed that with Mr. Slack?

A. Yes, I recall the occasion when I discussed it with Mr. Slack, because the way this came about was that one day I was thinking about this complaint, and this would have made it, I guess, June, maybe May—I can't remember just when—and I was wondering really what had been the point of all this running of airplanes through [Dep. Tr. 6305] Hughes Tool Company. As I was thinking about it, occurred to me that maybe it was a 102 problem that was

responsible for all this, and I walked down the hall and went into Mr. Leslie's office, as I recall it.

I asked Mr. Leslie, or I said to Mr. Leslie, as I recall it, "It just occurred to me what this procurement is all about. It seems to be obvious that Mr. Hughes has a 102 problem, and that this would be a convenient way of solving that problem."

I can't remember just exactly what he said in response to that, but then he went on to say that for years, I believe both when he was with Hughes Tool, and after that, when he was with TWA, in the latter part of the year there would be a conference in which they would discuss this problem.

He said Hughes was one of the best taxmen that ever lived, and he was completely pre-occupied with the subject of taxes, and personally completely absorbed in this tax problem, and it was one that had been a perennial problem year after year.

(Mr. Cook entered the hearing room)

I am not sure whether it was the same day—as a matter of fact, I think I have my chronology a little bit wrong here, because I think my conversation with [Dep. Tr. 6306] Mr. Slack was before my conversation with Mr. Leslie. I was thinking first it was after, but it wasn't; it was before.

I asked Mr. Slack the same question. Mr. Slack gave me a long speech about how he had been Mr. Hughes' attorney, and had professional obligations, and didn't feel free to talk about the subject, and so forth and so on, but from what he said I got the very distinct impression that I had hit the nail on the head.

This was obviously about the time of a board meeting, because Mr. Slack was there in New York.

Q. And following this conversation with Mr. Slack, you went to see Mr. Leslie?

A. I think it was in that sequence. It may have been the other, but I think I talked with Mr. Slack first, and then talked with Mr. Leslie.

Q. Can you tell us a little bit more specifically what it is that Mr. Slack said to you?

A. It is hard to be exact, but he said he had been very close to Mr. Hughes. That he had represented him in many ways as his personal counsel. That one of the things that he had dealt with was what I was asking him about.

Q. The 102 tax problem?

A. That's right. That Mr. Hughes had given him, [Dep. Tr. 6307] many provocations, but that he took great pride in his professional rectitude. He didn't use exactly that word, but his professional obligations. That so far he had not breached his obligations, vis-a-vis Mr. Hughes, and that he hoped that I would not urge him to or force him into something of that sort.

Whereupon, I said that I wouldn't think of doing it, and the conversation stopped there.

* * * * *

[Dep. Tr. 6363] * * * The Special Master: He may answer the question as to his understanding of the position of the Cahill firm.

A. As I think I testified the other day, Mr. Davis, the Cahill firm recommended an antitrust action as opposed to just an equitable action for a number of reasons.

One was they felt what Mr. Sonnett has just said, that it would not be in the interests of TWA or in the interests of working out some solution of this problem to charge Mr. Hughes with personal misconduct, the feeling being that this would increase feelings to the point that any feasible solution might become impossible.

They also recommended, as I testified the other day, that the only ultimate solution to this problem was a divestiture by Mr. Hughes or the Tool Company of its interest in TWA so that TWA would not be the tail to somebody else's kite.

They also stated that while they were familiar with such things as his commandeering the 1649 airplane at a time when it was very badly needed by TWA, their investigation of this aspect of the matter was quite incomplete. They felt that it would take a good deal of time. They felt that if this were to be developed it would be desirable to have [Dep. Tr. 6364] an opportunity to question Mr. Hughes and people at the Hughes Tool Company, which had not yet been a possibility. They felt that the damages that could be recovered in an antitrust proceeding would certainly be sufficient to cover miscellaneous damages suffered by the corporation by reason of individual acts of malfeasance, and recommended that rather than to hold this up until they had fully investigated that end of it and were prepared to make a definitive recommendation that we should proceed with the antitrust action.

Q. And this was a subject which was discussed at this June 21 meeting, where Mr. Sessel was present?

A. This was discussed in part at that meeting, yes.

* * * * *

[Dep. Tr. 6379] * * * Mr. Davis: That is what I intend to try to establish, and I think I am entitled to try to establish that.

Mr. Sonnett: That is not the state of the record.

Mr. Davis: If this witness or TWA was told by anyone, whether it be the Cahill firm, Mr. Rowe, or anyone else, or a lay person, that the only way to achieve an objective was to use this kind of a complaint, I am entitled to establish that as a fact with-

out having to first establish that that is in fact what Mr. Sessel told Mr. Gordon.

The Special Master: I don't understand your question, Mr. Davis, to be what you just now described, as to whether there were such discussions or such advice. I understood your question was whether or not this statement was true.

Mr. Davis: That is the way I started the line of questioning.

The Special Master: Yes.

Mr. Davis: Then Mr. Sonnett, in order to save time, pointed out that taken literally I might be trying to get this witness to testify as to whether or not this was in fact what Mr. Sessel said to Mr. Gordon, [Dep. Tr. 6380] and by this statement I am not trying to suggest that I am trying to confirm at this point the telephone conversation itself.

I then said I wanted to know whether or not it was in fact true that TWA was told or believed that the only way to get an official divestment order was by alleging an antitrust action.

The Special Master: Is that your question now?

Mr. Davis: That is my question now.

The Special Master: You may answer that question.

The Witness: Excuse me. Would you read it back to me?

(The record was read.)

The Witness: Not that I recall, Mr. Davis.

Mr. Davis:

Q. That is not the substance of what Mr. Sonnett or Cahill told TWA at the June 7th meeting?

A. No, Mr. Davis. I don't recall ever being told or believing that that was the only way that it could be achieved. I believe at that first meeting that they did advise us that this a direct and efficacious way of dealing with what they conceived to be the fundamental problem, and that they recommended it for that reason.

Q. What fundamental problem are you referring to?

[Dep. Tr. 6381] A. The fundamental problem that I testified to previously, Mr. Davis, the inconsistency between proper and orderly administration of the affairs of TWA and its use as a plaything or a thing of whim by Mr. Hughes.

Q. In other words, in order to solve that problem you were told the way to do it was by bringing an antitrust action?

A. We were advised that the relief that would be available in an action like this represented, in their view, the most expeditious way of dealing with this fundamental problem.

Q. Let me refer you to your testimony at page 6285. Look at line 8, which reads:

"He said, if I recall correctly"—by "he" who were you referring to? Mr. Sonnett I believe you said. Is that right?

A. I believe so, yes.

Q. (Continuing)—"Mr. Sonnett, if I recall correctly, that when the voting trust was set up, people felt that at least"—

A. "That at last."

Q. (Continuing)—"that at last they had this problem solved."

What problem was that referring to?

Mr. Sonnett: If you read back in the testimony a prior paragraph you will find out.

[Dep. Tr. 6382] Mr. Davis: May I get the answer from the witness, please?

Mr. Sonnett: I object to your taking a portion of a witness' answer and quoting it back to him without quoting the entire answer.

Mr. Davis: He may read this entire record, so far as I am concerned, in connection with his answer. I think this witness is quite capable of refreshing his recollection however he wishes to, including conferring with counsel.

All he has to do is ask for it.

Mr. Sonnett: All I want you to do is put proper questions, and I object to your taking a portion of an answer out of context.

The Special Master: You may answer the question.

A. Mr. Davis, I believe that this problem is the problem referred to in the immediately preceding paragraph of my testimony.

Q. What is that?

A. If you would read the preceding paragraph you would find it stated there.

Q. You mean the dispute about the Boeing acquisition and the pressures that the Tool Company have brought?

A. No, Mr. Davis. What I was trying to say was this, [Dep. Tr. 6383] that—

Q. Let me interrupt you for a moment. What do you mean by the preceding paragraph? You mean the one that starts at line 24 of page 6284?

The Special Master: Mr. Davis, I don't think he finished his answer.

You may proceed with your answer.

The Witness: Would you go back and give me what I was saying when I was interrupted?

(The answer was read.)

A. (Continuing) —that there had been these problems for years resulting from the fact that TWA had not been run as an independent free business, but rather as an adjunct of the Hughes Tool Company, and according to the whims of Howard Hughes, that at the time that the voting trust had been set up many people thought that this basic problem had been solved, but that no sooner had the voting trust been set up than controversy reappeared again, and as evidenced by this Boeing controversy, the question was presented of whether or not TWA was going to be run in the interest of TWA and its stockholders or as an adjunct of Hughes Tool Company, in accordance with the dictates of Howard Hughes, and in the discussion to which I have referred Mr. Cahill and Mr. Sonnett took the position that they felt that there was probably [Dep. Tr. 6384] just one solution to this continual—continuing problem, and that was a divestment of the interest of Hughes Tool Company in TWA.

Q. How was this divestment to be accomplished?

A. By the action which they were recommending that we bring.

Q. An antitrust action?

A. That's correct.

Q. With particular reference to Section 7 of the Clayton Act?

A. Among other things.

Q. What other things?

A. Well, they were talking about both a conspiracy—a Sherman Act case and a Clayton Act case.

Q. At that meeting you were discussing the purpose for which the voting trust had been set up?

[Dep. Tr. 6385] A. No, I don't recall that we were discussing the purpose for which the voting trust was set up, merely that those who had felt that when the voting trust was set up the problem was solved had been rather disillusioned, and now we were again in the middle of problems and controversies.

Q. Did you discuss your testimony with counsel, particularly the testimony that relates to these meetings?

Mr. Sonnett: What is this?

Mr. Davis: I want an answer to the question, if I may.

Mr. Sonnett: I object to it. I resent the question, and I don't like your insinuation, and I don't like your manner either.

The Special Master: He is entitled to an answer to the question. You may answer.

A. The answer is no.

Q. You have not discussed your testimony with counsel relating to these meetings?

A. That's correct.

Q. Did you discuss it with anyone else other than counsel?

A. No.

Q. Referring to your testimony which begins at line [Dep. Tr. 6386] 8 of page 6285, when you identified that the "he" in that line referred to Mr. Sonnett, I recall that a moment ago you said that the problem there referred to was described in the "preceding paragraph."

Let me refer you to the preceding paragraph which begins at the bottom of page 6284, line 24.

A. Well, it refers, in line 5, to any real solution to this problem. It is the same problem, Mr. Davis, and to get the whole context you just have to go read back and get the whole preceding testimony to which this is tied.

Q. Now let's start reading from line 24 at page 6284. You see there where you say "They"—"they," referring to Mr. Cahill and Mr. Sonnett, isn't that right?

A. That's right.

Q. (Continuing) —"They . . . or Mr. Sonnett said this, I am quite sure, that he felt as he looked at this situation and saw the dispute that had come up over the Boeing acquisition," let me stop at that point, "the dispute that had come up over the Boeing acquisition."

This was on June 7th, this meeting, is that right?

A. Yes.

Q. Are you referring to the dispute that had come up over the Boeing acquisition as a dispute which has [Dep. Tr. 6387] previously been identified, testified about, by these documents, Defendants' Exhibit 11, which have previously been identified, or are you referring to any other kind of dispute?

A. Mr. Davis, I don't think the documents testified to the dispute. I testified to the dispute. The documents are part of the dispute. I hate to—

Q. I don't want to quibble with you either, Mr. Tillinghast. I am merely asking you whether or not at that time the reference was to the only dispute that existed as of June 7th as a dispute that has been described in this record.

A. No, that isn't the only dispute that existed as of June 7th, Mr. Davis. A number of things had occurred prior to June 7th.

As I understand it, the voting trust had no sooner been set up, and an attempt made to function under the voting

trust, than the Tool Company directors refused to appear at directors' meetings and constitute a quorum, and as a consequence there had to be a special meeting of the stockholders, and a reorganization of the board of directors, and the Boeing dispute, to which there has been testimony at length, was merely the latest episode in the matter.

[Dep. Tr. 6388] Q. Have you now fully described the nature of the dispute that existed prior to June 7th?

A. I am not sure that I have fully described it, Mr. Davis.

Q. Please do so at this time then.

Mr. Sonnett: If Mr. Davis is asking the witness whether he has anything to add to the record of his testimony from the beginning up to now, I have no objection, on the so-called Hughes problem. If he wants him to repeat any portion of it, I do object.

Mr. Davis: As a standing rule, Mr. Sonnett, I never ask the witness to repeat what he has previously testified to. All he has to say is what he has previously testified to is his complete testimony on the subject.

Mr. Sonnett: Your standing rules I don't find any place in the books, Mr. Davis. I do find the burden on you to put appropriate questions.

Mr. Davis: The Special Master has ruled on more than one occasion and directed the witness that he does not have to repeat prior testimony.

Mr. Sonnett: Why don't you say so in your question?

Q. You don't have to repeat prior testimony, Mr. [Dep. Tr. 6389] Tillinghast, and unless I say otherwise, you may assume that to be a continuing construction of my questions.

A. As I try to think back over the testimony, Mr. Davis, the matters that have been described by my testimony or which appear in the documents, I would say that perhaps the only thing that I haven't touched on that now comes to mind, and perhaps I have adequately covered this, is statements attributed to you to the effect that Mr. Hughes was going to insist on controlling TWA, and that there couldn't be any solution to these problems unless and until TWA was prepared to recognize that control.

Q. Will you identify who attributed that statement to me?

A. I believe Mr. Reed or Mr. Sonnett or Mr. Rowe, or maybe all of them. I am not altogether clear, Mr. Davis.

Q. Do you recall when?

A. Oh, during this letter-writing period prior to—

Q. June 7th?

A. Well, I am not sure that—well, yes, it would have been, as I recall it, in or about this time, yes.

Q. But you cannot recall who of these three gentlemen, or is it your testimony that all three reported the same thing to you?

[Dep. Tr. 6390] A. My recollection is that it was the commonly held viewpoint, and it is a little difficult for me to remember just who said what about what you had actually said to them, but I would be sure it came at least from Mr. Reed and I think from one of the others as well.

Q. Do you recall how this came up or how you were told that, the circumstances?

A. Oh, in the course of discussions about this campaign that you were carrying on at the time.

I might say, I distinctly recall your having told this to me directly yourself, but that was well after this period of time.

Q. What do you recall me telling you, Mr. Tillinghast?

A. That there could be no solution to these problems unless TWA was prepared to be responsive to the wishes of the Tool Company.

Q. Do you recall whether I put it responsive to the wishes of the Tool Company or responsive to the wishes of the stockholders or owners of TWA?

A. The Tool Company.

Q. Do you recall when that took place?

A. Yes. That was in my office, I believe, in October of 1961.

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[Dep. Tr. 6573] • • • Q. At or in connection with your meetings or conferences with Mr. Sonnett or Mr. Cahill, or perhaps at the executive committee meeting of the 29th, you mentioned the fact that the problem or the question of a sealed complaint was discussed. Do you remember your testimony in that regard?

A. Yes, I remember it.

Q. Did counsel at that time describe to you what consequences would flow from obtaining a Court order sealing the complaint?

A. Well, I recall that counsel said that it would not be available to the public in the Clerk's office, and as a consequence, there would be no publicity on it. I don't recall much beyond that, Mr. Davis.

Q. Do you recall whether or not he informed the meeting that if an order sealing the complaint was obtained TWA and its officers should not, in violation of such order, make the complaint available to outsiders?

A. No, I don't recall any such discussion.

Q. Was there any discussion at that meeting as to any plan for seeking to obtain an order for the examination

[Dep. Tr. 6574] of Mr. Hughes simultaneously with the filing of the complaint?

A. I believe there was, Mr. Davis. I believe that was part of the package, so to speak, that Mr. Sonnett presented that morning.

Q. Will you describe what was said in that connection?

A. So far as I can recall, that it would be desirable to obtain a priority with respect to depositions, and that they hoped to—or that they planned to make a motion to obtain Mr. Hughes' deposition first, and that it was a matter of conjecture whether they would be successful or wouldn't be successful, but they thought it desirable to get the priority of deposition if possible.

Q. Was there any statement or comment made as to the nature of the desirability?

A. Mr. Davis, I am not sure I understand your question.

Q. Was anything said to describe or identify why it was desirable to obtain as soon as possible an order for the taking of the deposition of Mr. Hughes?

A. I don't recall anything beyond what I have just testified to.

Q. You are quite sure of that?

A. That's correct.

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[Dep. Tr. 6576] • • • Mr. Davis: May I have these handwritten notes marked as Defendants' Exhibit 117.

(Photostat of handwritten notes, dated 7/19/61, marked Defendants' Exhibit 117 for identification, as of this date.)

Q. Look at Defendants' Exhibit 117, Mr. Tillinghast. They are notes which we obtained from the Bank of America, and they appear to be notes by Mr. Carver of a

telephone conversation with Mr. Gordon in which Mr. Gordon described to Mr. Keith Carver Mr. Gordon's telephone conversation with Mr. Sessel, and you will note it is dated July 19, 1961.

You note in the first paragraph there is a statement "Tillinghast and Leslie will talk to banks next Tuesday." That is after making reference to the summer losses, et cetera.

Do you know whether or not you and Mr. Leslie talked to the banks on the Tuesday following July 19th?

A. Well, I know, Mr. Davis, that we had a talk with the banks in the latter part of July. I think July 25th is the date, although I wouldn't be absolutely positive [Dep. Tr. 6577] of it.

Q. Will you please just identify the subject matters that were discussed at that meeting with the banks, and in so doing identifying who was present at that meeting?

A. Oh, dear, Mr. Davis. Each of the banks had a representative. I am not sure that I could identify them each by name at this point.

Q. You are referring to the banks involved in the 1960 financing?

A. That's right.

Q. What was the subject of discussion, the purpose of the meeting?

A. Well, let me finish my—

Q. Please do.

A. And then each of the two insurance companies had a representative there. I remember Mr. Keehn was there. I am not sure who else from the Equitable. I believe there were a couple of people from the Equitable and a couple of people from the Met.

The purpose of the meeting was to discuss our financial situation, and the need to roll over some of our maturities in order to improve our year end cash position.

Q. You notice that the next item is "This presumes that Toolco may have to come up with some money on its [Dep. Tr. 6578] guarantee."

Do you recall a discussion at that time as to the possibility of the Tool Company having to come up with money on its guarantee?

A. No, I do not.

Q. Can you identify the guarantee this refers to?

A. Well, I would only be speculating as to it, Mr. Davis.

Q. You are not familiar with the provision in the 1960 financing under which the Tool Company gave a guarantee as to the working capital needed by TWA or for maintaining a particular level of working capital?

A. I know there was such a provision, Mr. Davis, that applied until all of the Convairs had been delivered. Whether this refers to that or not, I can't be sure.

Q. Now look at the next entry there, after the note which says "May not tell other banks," "knew HRH scared by Cahill lawsuit."

Did you have any discussion or participate in any meeting with Mr. Sessel indicating that Mr. Hughes was scared by the Cahill lawsuit?

A. Well, Mr. Davis, we had a board meeting on the 19th of July, I believe, which is this day. At that lawsuit we discussed, among other things, the settlement [Dep. Tr. 6579] negotiations that were then taking place with Mr. Bautser, and I think that the view was expressed that Mr. Hughes appeared very, very concerned about the lawsuit, and looked as if he was making serious efforts to try to get it settled.

Q. You see the next note, which is "But worse than expected."

Now will you tell me what was said or discussed at this board meeting on the 19th tending to indicate that Mr. Hughes was scared by the lawsuit but much worse than expected?

A. Mr. Davis, I can't recall anything being said.

Q. Isn't it true, Mr. Tillinghast, that one of the purposes of the lawsuit was to scare Mr. Hughes?

A. No, Mr. Davis. The purpose of the lawsuit was to get some claims of TWA settled, and to bring an end to the warfare that then seemed to be going on, and our interest was in getting something settled, not in scaring Mr. Hughes.

Q. Look at the next entry or sentence, "They," refering to the Cahill law firm, "have concluded if get him on stand would keep him there for two or three months."

Were you or Mr. Sessel or the board of directors ever told that?

[Dep. Tr. 6579A] A. Oh, Mr. Davis, I am not sure of that. It may have been. It certainly would by my judgment, that if he were on the stand he would certainly be there a matter of months before this whole thing was unraveled, at least judging by my own experience.

[Dep. Tr. 6580] Q. What I am trying to get you to tell us, Mr. Tillinghast, is what was said at the board meeting of the 19th or any meeting which you can recall at which Mr. Sessel may have been present.

A. I don't recall, Mr. Davis. It is entirely possible, when speculated, that he would be on the stand for months once he got on, but I have no distinct recollection of it.

Q. Do you recall what was said about the general strategy of starting a lawsuit, deciding upon an antitrust cause of action, getting an order to show cause for the deposition of Mr. Hughes, the advantages of forcing talks with the

Tool Company, and the threat of what could take place in the lawsuit—you remember that kind of a discussion?

Mr. Sonnett: Mr. Rankin, that is obviously a misstatement of the entire record, and I object to it.

It also implies some reflection on the professional standing and ethics of myself and my firm, which I resent.

The facts are not as Mr. Davis summarized them. The evidence in this record is quite clear.

Insofar as Mr. Hughes is concerned, he will be on the stand for a good two or three months, and I make no secret of that, and never have. Like anybody else, he will submit to the procedures of the courts.

[Dep. Tr. 6581] Mr. Davis, by putting argumentative and erroneous questions, is seeking to create a record which I intensely dislike.

The Special Master: I will sustain the objection to the form of the question.

Q. Do you recall whether or not at this July meeting of the board a report was made that the lawsuit would be sealed until August 1, 1961?

A. Yes, I am quite sure that the status of the sealing was reported to the meeting, Mr. Davis.

Q. Do you recall also a report being made at that same board meeting as to the effect the lawsuit had had to date?

A. On whom or what?

Q. Was there a report to that effect made, a description by you or someone else at that meeting describing the effect that the filing of the complaint had had?

A. Only, Mr. Davis, insofar as I have already testified. As I recall it, what was said at that time was that the institution of the action had been followed by very vigor-

ous talks between Mr. Bautzer and Mr. Reed, that we had the impression that Mr. Hughes was very seriously concerned about the suit, and that real progress seemed to be made in coming to some sort of an understanding, that, having in mind Mr. Hughes' unpredictability, that it would be rash [Dep. Tr. 6582] for anyone to predict what was going to happen, and that until we had a settlement that we shouldn't count on it, but that to that date things appeared to be proceeding seriously and constructively, and that there was at least a hope that we might get everything washed up and come out with a permanent settlement that would enable TWA to operate without the harassments which had marked the recent past.

Mr. Sonnett: Mr. Rankin, may I call to your attention, and for the sake of the record, the fact that on July 7, 1961 Judge Dimock of the Southern District entered an order which provided, in Paragraph 1, "The order of June 30, 1961 sealing the complaint and all other papers filed herein is hereby extended and the Clerk of this Court is directed to keep under seal the complaint and all other papers filed herein until 10:00 a.m. on August 1, 1961, subject to further order of this Court," and that that order was jointly applied for and consented to by my firm and by Mr. Davis.

Mr. Davis: That is part of the record in the file of the Court.

* * * * *

[Dep. Tr. 6647] * * * A. Mr. Davis, I don't, as I say, recall any particular discussion of it at this time. I am sure, as I have already testified, the matter of an application to seal the complaint was discussed. As I recall it,

this was all against the background of facilitating Mr. Reed's discussions with Mr. Bautzer, and putting him in a position whereby on the one hand we would not run the risks that we would run if we hadn't started the suit, and on the other hand, he would be as free as possible to carry out those things that Mr. Bautzer was requesting him to do.

My recollection of the order to show cause, and the examination and everything else, was that we were trying to get our ducks in a row, so that there was no chance of our being scooped or prejudiced by going through the period of delay which would be involved in Mr. Reed's [Dep. Tr. 6648] talking with Mr. Bautzer. I am not sure that answers your question, but that is my best recollection of the matter.

Q. Are you saying, among other things, that Mr. Reed had been discussing with Mr. Bautzer the commencement of this action?

A. No. Mr. Reed had not been, so far as I know at least, discussing with Mr. Bautzer the commencement of this action. Mr. Bautzer, as I understand it, had several times said to Mr. Reed that before this—or that when this special committee had made its report, and before TWA did anything, he hoped that he could sit down with Mr. Reed and discuss the problem, and hopefully work out some settlement of it so that there wouldn't be the need for any action.

What we were aiming to do in this whole matter was to put this thing in a posture, whereas I say, we wouldn't be prejudiced by any delays, but Mr. Reed would be in a position to explore with Mr. Bautzer what it was that Mr. Bautzer wanted to talk about.

Q. Was there any discussion as to the probable reaction of Mr. Hughes if Mr. Sonnett were successful in obtaining an order to show cause for the taking of the deposition of Mr. Hughes?

[Dep. Tr. 6649] A. Mr. Davis, I don't recall any particular discussion of that. I would say I am sure, I think, it is very likely somebody commented on the fact that Mr. Hughes wouldn't be very happy, but I really don't recall any particular discussion about it.

Q. Do you have a general recollection as to what was said in that connection?

A. Not beyond what I have already testified to, Mr. Davis.

Q. You discussed it with Mr. Sessel and Mr. Slack, didn't you?

A. What?

Q. The probable reaction of Mr. Hughes of what he would be likely to do rather than forced to testify?

A. I don't recall discussing that with Mr. Sessel and Mr. Slack, except at one of the board meetings in July, I think it was, when we were discussing settlement of the action.

Q. Isn't it a fact that this meeting, one of those present said "This lawsuit will never go to trial because Mr. Hughes will be forced to settle this before we will be faced with that necessity"?

A. Not that I recall, Mr. Davis.

Q. Would you recall it if it had been said, in sub- [Dep. Tr. 6650] stance?

A. I think very likely I would, but I don't recall.

Q. Do you recall at the meeting Mr. Sonnett reporting that he had not completed his investigation of the facts?

A. I am sure that in the course of the conversation Mr. Sonnett said, or somebody pointed out at that meeting that that was the fact. That the investigation of the facts hadn't been completed so far as it related to so-called equitable causes of action.

Indeed, I believe it was at that meeting, I think Mr. Sonnett observed, as he had once before, or at least once before, I guess several times before, that the relief that would be obtainable in an antitrust action would, in fact, make TWA whole for any damages that it had suffered, and that the best people were defendants in antitrust actions, and that he felt that one of the reasons for bringing an antitrust action was that it didn't have the social approbriums attached to it that some other types of action did, and he thought Mr. Reed's chances of working something out with Mr. Bautzer would be improved rather than diminished if we avoided anything that would point an unpleasant finger at Mr. Hughes personally.

Q. Did anyone suggest at that meeting that before making any final decision as to the kind of action to [Dep. Tr. 6651] bring, the investigation should be completed?

A. No.

Q. What was the conclusion of the meeting?

A. I think the conclusion of the meeting so far as Mr. Reed and Mr. Surbeck were concerned, was that Mr. Surbeck said in substance "I think you have got a good cause of action."

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Excerpts From Transcript of Deposition of Emmett Osborn Cocke

[Docs. 228, 231, 233, 235]

[Dep. Tr. 1349] * * * Q. Can you tell me what was said with respect to this action authorizing Mr. Tillinghast to proceed with the filing of this complaint when in his judgment the filing is timely? Do you see that in the notes?

A. Yes.

Q. "President authorized to proceed when in his judgment the filing is timely."

A. There was a feeling expressed at the meeting that the filing of a suit by the Hughes Tool Company was imminent, and it was felt, is my recollection, that Mr. Tillinghast should have the authority to file the suit in his judgment, depending on whether he thought the Tool Company was going to file a suit, or if the Tool Company would file a suit he would be authorized to file TWA's suit.

Q. In other words to file first?

Mr. Williams: That isn't what he said. You are asking now? Is that a question?

Mr. Davis: I am asking him.

A. I recall when the suit was filed by Mr. Tillinghast, [Dep. Tr. 1350] or authorized to be filed, that at that time he indicated that he had understood that the filing of a suit by the Hughes Tool Company was imminent.

The Special Master: That doesn't answer the question, Mr. Cocke.

The Witness: I am sorry, I didn't understand the question.

The Special Master: Will you read the question?

(The question was read.)

Mr. Williams: Do you understand the question?

A. Yes, I believe that was part of the consideration.

By Mr. Davis:

Q. Was that in effect said, "Mr. Tillinghast, you are authorized to file this suit whenever you think the Tool Company is likely to start an action, so that TWA can file its action first"?

A. That is my recollection.

Q. Of what in effect was said?

A. Yes.

Q. Can you tell me who said that?

A. I have no clear recollection of who said it.

[Dep. Tr. 1351] Q. Was there any discussion "suppose the Tool Company was not going to file a lawsuit," then this lawsuit was not going to be filed.

Mr. Williams: That is not a question.

Mr. Davis: That is my question.

Mr. Williams: Put it in the form of a question.

By Mr. Davis:

Q. Is that what was said—if the Tool Company did not file, then Mr. Tillinghast was not to file?

A. No.

Q. Can you tell me what was said at that meeting or prior to that meeting in connection with this authorization given to Mr. Tillinghast, because it is not clear to me what was taking place at that time.

Mr. Williams: Mr. Special Master, I think the witness has already said or testified as to what was said.

The Special Master: You can testify to anything in addition to what you have said, Mr. Cocke.

The Witness: I have nothing to add.

Q. Nothing to add at all?

A. No.

Q. Was there any discussion that you recall with respect to the filing of this complaint in secrecy under [Dep. Tr. 1352] seal? Do you have any recollection of any discussion along those lines?

A. Yes. It was decided to file the complaint on, I think it's called a sealed basis, so that the possibilities of a settlement of the controversy would be greater during the period that the complaint was sealed, rather than after it became public.

Q. Do you remember any more that was said in that connection?

A. No, I can't.

Q. Do you have any recollection of anything being said by anyone relating to examining Mr. Hughes?

A. No, I do not.

Q. Nothing at all?

A. No, I do not.

Q. Do you recall any discussion or any statement by anyone relating to the probability that Mr. Hughes would settle rather than testify?

A. I recall that opinion was expressed, yes.

Q. Can you tell me who expressed that opinion?

A. No, I can't.

Q. Do you recall any discussion at all about filing that complaint at the same time, making some move to compel [Dep. Tr. 1353] Mr. Hughes to testify? Do you remember that being discussed at all?

A. No, I don't recall it.

* * * * *

[Dep. Tr. 1470] * * * The Witness: Mr. Special Master, if I may at this time, I recall in reviewing my

testimony that I had become confused. I believe I stated that the board of directors of TWA reviewed the complaint and authorized the Executive Committee to act upon it. I find in reviewing the material that I was in error. That the Executive Committee acted upon the complaint, and the board of directors then ratified the action. It just occurred to me while I was looking at this meeting, and I would like to change the record.

The Special Master: You may.

By Mr. Davis:

Q. I was asking you if by looking at this testimony of Mr. Tillinghast, that would assist you in any way recalling the circumstances of when you first saw or received a draft of this proposed complaint.

Mr. Daly: There are two questions—when he first saw it or when he first received the complaint.

By Mr. Davis:

Q. The first time you saw one.

A. I believe the first time that I saw a copy of the [Dep. Tr. 1471] complaint was several days before the Executive Committee meeting on June 29th.

Q. In other words, you have no recollection of a discussion of a draft of the complaint taking place at a board meeting?

A. I have no recollection of this being discussed or these documents being issued. I may be in error. It may have happened, but I just don't recall it.

Q. I will take that date, a few days before June 29th. My question to you now is, what recollection, if any, do

you have of any further discussion with respect to the subject matter which was discussed at the March 1st meeting, relating to these possible claims that TWA might have against either the Hughes Tool Company or other organizations that you testified about already. I want your recollection now of any other discussion or conversation as to which you have any knowledge or information with respect to that subject matter, between March 1st and this date when you first saw this draft of the complaint a few days prior to June 29th.

A. Could I have that question read back?

The Special Master: Read the question, please. (The question was read.)

Q. Do you understand my question, Mr. Cocke?

[Dep. Tr. 1472] A. I believe I do, Mr. Davis.

Q. Let me make myself very clear to you.

I understand your testimony that on March 1st at a meeting of the board there was a discussion in which you participated. Mr. Slack made some comments, and others there, that you already testified about, relating to damages to TWA and the desirability of hiring special counsel to investigate the relations of TWA with the Tool Company or other organizations.

You remember your testimony in that regard, do you not?

A. Yes.

Q. Then I understand that a few days prior to June 29th for the first time you saw this draft of the proposed complaint?

A. Yes.

Q. What I am inquiring about is whatever knowledge or information you have now, today, with respect to what

discussions or conversations took place relating to that subject matter of what cause of action, if any, TWA had against the Tool Company or other organizations.

Mr. Daly: Between what dates?

Mr. Davis: Subsequent to March 1st, and up to the date when he first saw this draft of the complaint.

[Dep. Tr. 1473] Mr. Daly: Do you understand that now?

The Witness: Yes.

Mr. Davis, I think I mentioned several things that I recall discussing regarding the complaint. Whether that was at the Executive Committee meeting or whether it was prior to that or after that I have a difficult time recalling.

I have only just recalled another comment that may have been made at the Executive Committee meeting, and it may have been made at a board meeting and that was discussion in connection with whether or not the lawsuit should be filed as an anti-trust action or as a civil suit.

I recall a comment being made "If you file as an antitrust action there would be treble damages, and if you lost the antitrust action you could still then file a civil suit."

Who said that, I am trying to give you the best of my recollection—it was said at some meeting. I recall the comment being made.

By Mr. Davis:

Q. Apart from that do you have any knowledge or information, irrespective of when it took place—

A. Mr. Davis, I just cannot recall anything more. I'll [Dep. Tr. 1474] try.

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[Dep. Tr. 1625] * * * The Special Master: I am going to ask, Mr. Davis, that you ask the witness whether or not he has a recollection of the particular matter that you are inquiring about. The reason for that is, in the first place I think that should properly be established.

Beyond that I am disturbed myself at the conflict in some of these documents, and where the truth does lie amongst them. I don't want them to be used in such a way as to unintentionally persuade the witness that the facts may be in one respect when we will find sooner or later that the facts are contrary to that, as we might well suspect in regards to some of these documents.

It is very possible that someone started out to write the minutes. They kept notes one way, and later for various reasons or legal reasons decided they needed to be amplified, and the witness might say, "Well, that isn't what happened."

Mr. Davis: Mr. Rankin, I think everybody appreciates that we are not here at a trial to establish the facts. We are trying to discover [Dep. Tr. 1626] evidence with respect to what may have taken place.

I don't believe this witness is in a position of being so naive as to testify to something which he does not recall. His problem has been, as I understand it, in recalling something, and as was stated by his personal counsel yesterday, his tendency, if there was a tendency on the part of this individual witness of saying he does not remember unless in fact he did remember.

It seems to me that whether these documents correctly reflect a fact or not is not the problem and not

the issue here. I am not trying to establish the truth of the contents of this document. I am trying to direct the witness' attention to matters, to apparent recollections of other persons, to be sure, to see to what extent his memory could be refreshed.

My question is whether or not he has any recollection or to give us whatever recollection he has as to whether or not Mr. Sonnett outlined possible courses of action which were available to the corporation, and then I will pursue that.

Mr. Daly: Let him answer that question.

The Special Master: You may answer that.

A. Yes. In looking at the minutes, and I think I [Dep. Tr. 1627] have testified before, that there was a great deal of discussion as to the way in which this action was to be taken.

I notice from the minutes, as I have testified before, that it was TWA's counsel's opinion that he agrees to the filing of the suit, but expressed a different opinion on whether it should be an antitrust, or minority stockholder type of action.

In searching my memory, Mr. Sonnett either at this meeting, and I would assume it was at this meeting because of the comments made by Mr. Rowe—that there was a discussion as to whether it should be held as an antitrust action, or whether it should be filed as a civil damage suit.

I believe I stated that one of the conversations was that it should be filed, that it was Cahill's opinion that it should be filed as an antitrust action—they felt it was an antitrust action with evidence they had discovered or studies that they had—they felt it was an antitrust action. If the antitrust action failed, the corporation could still

fall back on a civil suit. The reason it should be filed as an antitrust suit, as was explained to me, was because in an antitrust suit you would get triple damages, but even if you lost the antitrust [Dep. Tr. 1628] suit, you could then go back and sue for damages on the other basis.

I remember that discussion. That is, as far as I can remember, is the main thing that was discussed.

There was a discussion of when the suit should be filed. The reason for this Executive Committee meeting, as I recall it, was to enable Mr. Tillinghast to have the authority to file this suit when in his judgment he felt it would be in the best interests of the corporation. The reason that was being discussed, as I think I have stated, was that there was some feeling on the part of the people at the meeting—I had no knowledge of why this came up—but that the Hughes Tool Company were going to file a suit against TWA. There was some legal comment that if TWA filed first, I think the term is that they would have the right of prior deposition.

As far as this meeting is concerned, I realize that it was an extremely important meeting—that I had reviewed the complaint, I believe a few days before. If I remember correctly, this date was June 29th, which was just before the 4th of July, but that has no bearing on what I was saying. Mr. Tillinghast wanted the authority to file this suit so that he would be able to move quickly, and it would not be necessary to have the Executive [Dep. Tr. 1629] Committee called, or to have a board of directors meeting called, but it was the feeling and recommendation of counsel that Mr. Tillinghast be authorized so that he could file this suit on his own authority, and that he had the right to do what he thought was in the best interests of the corporation.

I just can't think of anything further that I can add to my testimony in connection with this meeting.

Mr. Davis: Mr. Rankin, I want to point out that I have listened to the interpretation or conclusions of this witness as to the reasons for the meeting, and why people were saying various things at this juncture, and I understand the only purpose of my examining this witness at this time was to see to what extent he had a recollection of what in fact transpired.

What I would like to do—perhaps his counsel could elicit it more easily from him, having had the benefit of private discussions and consultations with the witness—is whether or not this witness has a recollection of the substance of what Mr. Sonnett said, what Mr. Tillinghast said, of what Mr. Rowe said, or Mr. Sessel who was present at the meeting said, so that we can get the facts.

[Dep. Tr. 1629A] If he is unable to do that, I will accept that as having given him a fair opportunity to identify what was said.

[Dep. Tr. 1630] Mr. Daly: Mr. Davis, I am sure that Mr. Cocke has given you his best recollection of everything that he remembers about this meeting. If you want to go ahead and ask him does he remember what somebody else said, what "A" said, what "B" said, what "D" said, I certainly have no objection to it.

It is possible that the mention of some name might spark a recollection that he doesn't have at this time, but I think up to this moment at least, you have certainly exhausted his recollection of what occurred at this meeting, and he just can't tell you anything more.

If you have something that might refresh his recollection, show it to him. We have spent now two days on this meeting, and all I have heard all day is Mr. Cocke repeating precisely what he said before.

Mr. Davis: When I show him something, you feel that what I show him may not be proven or established and you feel it is not fair to the witness.

Mr. Daly: I have never made an objection on that score at all. What I objected to was your assuming in your question that something was established. You have a perfect right to show Mr. Cocke anything that might refresh his recollection.

[Dep. Tr. 1631] You can go out and pull a door in from outside and pull it in here, and if that will refresh his recollection, you can show it to him. I haven't made any objection on that ground.

What I have objected to is that you are assuming on the record that a certain state of facts exist. Anything that you have to show Mr. Cocke that will refresh his recollection, you show it to him, and I at no time ever objected to that.

But I do object to assumptions in your questions, because that is the sort of thing that gets a witness into trouble.

If you have anything, show it to Mr. Cocke. I will certainly have no objection, but I do have objection to your stating when you are showing him something that this is something that says something that is so.

I don't know that it is. It may or may not be. But if it refreshes Mr. Cocke's recollection, show it to him. That has been the only basis for my objection.

The Special Master: Mr. Cocke, I am interested in whether or not you can remember what anyone

said at this meeting, any individual, beyond what you have [Dep. Tr. 1632] already told us.

Mr. Tillinghast, Mr. Sonnett—just take them one at a time—all those that you know were there—and tell me whether you can remember what any of them said.

Mr. Barr: Mr. Special Master, it is clear that Mr. Cocke in the answer that Mr. Davis just characterized did tell us some of the things at least that Mr. Rowe said, and some of the things at least that Mr. Sonnett said, and some of the things that Mr. Tillinghast said. I can remember him telling about Mr. Tillinghast's introduction.

The witness has not failed, as Mr. Davis suggests, to tell us anything about the substance of what was said at the meeting. He said what these people said on many occasions.

I certainly am interested, as you are, in finding out if he knows anything in addition to this, but I just want it to be clear on the record, at least in my mind the witness has told us the substance of what at least some people had said, at least a part of what some people said.

The Witness: Mr. Special Master, I just do not recall a detailed discussion at this meeting on this complaint. I just don't recall it was gone over [Dep. Tr. 1633] in detail.

I say it may have, but I don't recall it. I am sure if there had been a lot of discussion I should have recalled it.

I would say that in reading the complaint, I did not understand the complaint. There were allegations of antitrust action, and buying and selling of airplanes.

I am just not able to make any comments on the right or wrong of what was done, and I just in my own mind, because I don't recall detailed conversations—as I said before, I think, the meeting only lasted two hours. We discussed two other subjects at the meeting.

I notice some place here that Mr. Sessel left at 12:45. If there was a detailed discussion at this meeting, I just do not recall it, sir.

By Mr. Davis:

Q. Do you recall any statements made by anyone relating to the desirability of trying to obtain some kind of a divestiture of the Tool Company's holdings in TWA?

A. I am familiar that the question of divestiture is in the complaint. I recall being told or of reading some place that under an antitrust action was the only way in [Dep. Tr. 1634] which divestiture could be accomplished. Again, whether it was talked about at this meeting or if I read it some place, or if someone told me, I am familiar with and remember the fact that in an antitrust action that was the only action in which Mr. Hughes could be forced to divest himself of his stock in TWA.

Q. Do you have any recollection of anything that was said relating to the desirability or lack of desirability of filing the complaint under seal?

A. There was some discussion as to whether or not the complaint should be filed under seal, and it was felt in the best interest of the corporation, and I certainly agreed with this, that if there was any possibility of avoiding a litigation—and before this time I did not know such a process was possible—that it was possible that the suit could be filed and sealed.

As I recall, from what I was told, or what my knowledge of it is, if the case was sealed and there was no publicity on it, in that kind of situation, which I can well understand, it would be a great deal simpler to reach a settlement of the differences of the two parties rather than after it had been unsealed and the case had started, and things had happened, where people said things. That it would certainly make it more difficult to reach a settlement [Dep. Tr. 1635] than when it was sealed.

Whether it was at this time—I certainly felt that filing it under seal, if that should be done, it certainly would be fine as far as I realized it, because I felt that I did not like to see TWA as an airline become involved in litigation.

Q. In your answer you have referred to how you felt. I can understand that. What I am interested in knowing, Mr. Cocke, is whether you are able to testify as to what was said, or the substance of what was said by anyone there present at the meeting?

Mr. Daly: Could you ask him whether he expressed that feeling to anybody at the meeting?

A. I am sure I expressed that feeling. I can't say whether it was at this meeting that I expressed the feeling.

In listening to whatever discussion someone was telling me about the fact that it would be filed and sealed, I don't recall anyone objecting to filing it under seal.

I think it was the consensus of everything that I heard anyone say that this would be the best thing to do in the hopes that this litigation could be avoided and a settlement could be reached before it broke open to [Dep. Tr. 1636] public knowledge.

By Mr. Davis:

Q. What was said with respect to the possibility of obtaining a settlement? Do you have any recollection of what anyone said at that meeting relative to that subject?

A. I would like, Mr. Davis, to say that these recollections, I would not be characterized or have it said that it actually happened at this meeting.

I am trying to give my best recollection to the questions that you ask me. In the discussions as to how the settlement was to be arrived at, whether it was at this time or later, there were many discussions and many ideas or proposals to settle the litigation.

I remember that there was, I believe, a settlement, where it appeared it was going to be settled the day before.

Mr. Daly: The day before what?

The Witness: The day before the suit was unsealed, if that is the proper term. I recall in reviewing this material that there was a deadline set by TWA of acceptance, I believe, at 9:00 o'clock in the morning, before it was unsealed.

I recall there was a difference of opinion between Mr. Bautzer and Mr. Davis. In the notes that I [Dep. Tr. 1637] reviewed—I was either told or read some place that Mr. Bautzer indicated he would be willing to settle on that basis, and Mr. Davis said he would not be willing to settle on that basis. No agreement was reached, and the decision was made by TWA to unseal the suit.

By Mr. Davis:

Q. I am primarily interested in the discussion that took place at the time this decision was made on June 29th, Mr.

Cocke. Do you have any recollection of what, if anything, was said about what efforts would be made to obtain the deposition of Mr. Hughes?

A. Again I am not limiting myself to this meeting. There was discussion that I recall, that one of the reasons TWA was to file the suit first was to obtain the right of prior deposition.

I am not completely familiar with these legal terms, but I can only say that it was obvious if TWA had the right of prior deposition, that the deposition of Mr. Hughes would be taken before the deposition of any of the TWA witnesses.

Q. What I am interested in is what was said in that connection, if anything was said in that connection. Is there anything else you recall?

[Dep. Tr. 1638] For example, did anyone say anything to the effect that if a court order was obtained for the deposition of Mr. Hughes, that would insure a settlement on particular terms, or anything like that?

A. There had been discussions that if it was necessary for Mr. Hughes to make the deposition, that there would be a probability that it would be easier to reach a settlement, yes.

Q. Do you recall anyone saying anything about Mr. Hughes' attitude about taking his deposition, or what he would do or not do depending on whether or not his deposition was ordered?

A. There have been discussions as to the opinion, and I believe Mr. Slack made the statement, that if Mr. Hughes would not want to make a deposition, and that if he was forced to make a deposition, or that when that time came, the possibility of settlement would be greater.

Q. Did anyone say anything at that time with respect to what tendencies or inclinations Mr. Hughes had displayed in the past, or was anything said in that area as to what would be likely to happen, what Mr. Hughes would be likely to do?

A. Some people—I think Mr. Slack, and I am not sure who else—had the feeling that Mr. Hughes would not want [Dep. Tr. 1639] to make a deposition.

I recall, in thinking over this, that I disagreed with that opinion. I brought up the fact that Mr. Hughes had made a deposition in Washington many years ago in connection with Senator Brewster, and I didn't have the same opinion, that Mr. Hughes would feel that a settlement would be made if it was necessary for him to make a deposition.

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[Dep. Tr. 1646] have any recollection of what was said by anyone relating to the desirability for obtaining a divestiture order, or the reasons for wanting a divestiture order, or anything in that area?

A. I believe the reasons that I recall was the fact that Mr. Hughes controlled 78 per cent of TWA, and that there were problems that had been involved in connection with the control of TWA by the Hughes Tool Company.

Mr. Davis: May I have the answer read to me?
(The answer was read.)

By Mr. Davis:

Q. Can you identify what was said with respect to either the problems or control?

A. I would in substance say that the problem because of the fact that Mr. Hughes or the Hughes Tool Company would not agree to the financing plans that had been offered by the lenders.

Mr. Daly: This was the substance of what was said by somebody to you at some time, is that right? Is that what you want to know?

Mr. Davis: I want to know what was said. I don't want your interpretations.

A. In substance I recall that comment being made.

Q. You don't know by whom?

[Dep. Tr. 1647] A. I don't know where or who made the comment. It was a discussion of the Hughes' problem. That to the best of my recollection is the substance of what was told me of the Hughes' problem.

Q. Do you recall anything being said as to whether or not there would be more or less social stigma or social opprobrium in bringing an antitrust action rather than some other kind of action?

A. No, I do not.

Q. In your prior answers you made a number of references to Mr. Slack. Can you identify more clearly what your recollection is as to what Mr. Slack said that relates to the testimony you gave with reference to Mr. Slack?

A. I don't believe I can. I think, as far as my recollection is concerned, I testified in substance as to the comments Mr. Slack made as to the various questions that came up.

Q. Can you identify more than you already have the nature or substance of what Mr. Slack said, when, to whom?

A. As I recall it, I have stated that I recall Mr. Slack had stated that he didn't feel that Mr. Hughes would agree to any settlement of the litigation until he was called upon to make a deposition.

I think I have also said—I may not have Mr. [Dep. Tr. 1648] Slack, I think as I recall it, commented that he did not feel that the antitrust action was the right action to have filed. He felt that it wasn't an antitrust suit, that it was a civil suit.

Q. Can you identify a little more clearly or more specifically what your recollection is as to what Mr. Slack said with respect to the kind of a claim that TWA had against the Tool Company?

A. No more than what I have said. I believe I testified that Mr. Slack felt that because of the delays in the financing which delayed the equipment, and which caused the damages to TWA, that there was a basis for a claim for damages from the Hughes Tool Company.

Q. I am interested in your prior answer relating to Mr. Slack's remark relating to his thinking that the antitrust action was not the proper or right action. I am interested in getting your complete total recollection of what Mr. Slack said in that area.

A. I don't recall his exact words. I said, as I recall, Mr. Slack making that comment that he felt that the antitrust suit was not—in effect, the question of whether there was an antitrust action.

Q. That is all?

A. That is the substance of the conversation.

[Dep. Tr. 1649] Q. Was that a conversation with you that you recall, or was that something said at a meeting of some kind that you recall, or can you identify more clearly the circumstances under which that comment was made?

A. May I go off the record for a minute, Mr. Special Master?

The Special Master: Yes.

(The witness conferred with Mr. Daly.)

Mr. Daly: Mr. Cocke has just told me he is somewhat concerned that perhaps the question would lead to answers that the plaintiff would want to claim privilege on. Isn't that the problem? Let me go into conference again.

(Mr. Daly conferred with Mr. Cocke.)

Mr. Daly: It is a question of possible privilege. I don't know and I don't make any representation that it is privilege.

Mr. Davis: Isn't it a fact that all the witness is concerned about is whether or not he recalls comments or conversations which may have taken place after the lawsuit was started?

Mr. Daly: That is right. He doesn't know either, but he is concerned that you may be going into a privileged area, and he thought it should be [Dep. Tr. 1650] called to the attention of the people here. He just doesn't want to do anything improper.

The Special Master: Mr. Zeller, in regard to that, is there any claim by the plaintiff that Mr. Slack acted as counsel in connection with any of these matters?

Mr. Zeller: No, your Honor.

The Special Master: He was only a director.

Mr. Zeller: And acting as such, like a good many other men who have been lawyers in the past, they have a hard time forgetting their legal knowledge.

The Special Master: I will instruct you, Mr. Cocke, insofar as any communications with Mr. Slack are concerned, they are not claimed by counsel for TWA to be privileged, and so you may relate those so far as you recall them.

A. I recall Mr. Slack making comments at a board meeting, the substance of which I have related, the question in his mind as to whether the antitrust approach substance was not a proper action—whether there was a legal basis for an antitrust suit.

(Mr. Cook entered the hearing room.)

By Mr. Davis:

[Dep. Tr. 1651] Q. My question is to try to develop a little more clearly the nature or substance of what was said, rather than your conclusion.

Mr. Daly: I do object to two characterizations there. First, I think what he said was very clear, and secondly, I don't think he was giving conclusions. He was giving the substance of the conversation.

The Special Master: I will sustain the objection.

By Mr. Davis:

Q. Can you give us any more of the substance of the conversation than you have?

A. I don't believe I can. As I said, the substance was, I recall Mr. Slack making a comment that he didn't feel this was an antitrust action.

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[The following document, which is not part of the Record of this case, has been printed in this Joint Appendix at the instance of defendants.]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 2018/1963

MARY RICKMAN JONES, individually and as a stockholder of URIS SALES CORPORATION, suing on behalf of herself and all other stockholders of URIS SALES CORPORATION,
Plaintiff,

—against—

URIS SALES CORPORATION, and MORTON PENN,
Defendants.

REPORT OF SPECIAL MASTER

I. *The Complaint, the Judgment and Order of the Court.*

This is an action brought by plaintiff individually and as a stockholder of Uris Sales Corporation ("Uris") on behalf of herself and all other stockholders of Uris against Uris and Morton Penn ("Penn"). It is important at the outset that the allegations in the complaint and the prayer for relief in the complaint be carefully examined because of the law which is applicable in cases like this in which defendants' answer has been stricken.

Plaintiff alleges that Penn made certain representations to her on the basis of which she bought 50% of the stock of Uris, which was engaged in the business of selling and supplying merchandise to post-exchange establishments in

military camps and installations. Among the representations were "that he would use the monies paid by the plaintiff for said stock as part of its capital and apply same for and towards clearing all of its then liabilities . . . " (Par. 5). Plaintiff claims that the representations were false and fraudulent in that Penn "did not use or intend to use the monies paid to him by plaintiff for said stock as part of the corporation's capital or for or towards the development or expansion of its business . . . " but "wrongfully and fraudulently conducted and managed the affairs and business of said corporation so as to divert its assets, business, customers, profits and benefits from defendant corporation to his own benefit and advantage by various schemes, artifices and devices, among them those hereinafter set forth" (Par. 7); that Penn organized other corporations owned or controlled or in which he had a financial interest for the purpose of engaging in the same or similar business as Uris and diverted to such business enterprises opportunities properly belonging to Uris (Par. 8(a)); that he concealed the assets and proceeds of the defendant Uris to deprive the stockholders of their rightful share and interest in Uris (Par. 8(b)); that he manipulated and falsified the books of Uris to make it appear that the corporation was indebted to him and to hide and conceal loans made to Uris by plaintiff (8(c)); that he prosecuted a system of fraud and forgery by which he withdrew or charged substantial sums to Uris for non-corporate purposes (8(d)), that he refused to grant plaintiff access to the books and records of Uris (8(e)) and that he "committed other wrongful schemes, frauds and irregularities at present unknown to the plaintiff." (8(f)).

Plaintiff in her prayer for relief asks for judgment (1) "directing the defendant Morton Penn to account to the

defendant corporation for all assets, monies, profits, business opportunities lost, wasted, dissipated, embezzled or diverted from the defendant corporation by him", (2) "directing the defendant Morton Penn to restore to the defendant corporation the amounts lost, dissipated, embezzled or diverted from the defendant corporation together with appropriate interest thereon", (3) directing that a trust be impressed upon the assets of businesses in which Penn has an interest, (4) restraining Penn from paying any further sums to himself from the assets of defendant, (5) appointing a receiver, and (6) awarding plaintiff and her attorneys allowances for fees, costs and disbursements.

The order of Hon. Lloyd F. MacMahon, dated November 12, 1964, directed that the answer of defendant be stricken, that plaintiff be awarded judgment for the relief demanded in the complaint together with costs and disbursements, that Penn be fined $500.00 for his misconduct and contempt of court, and appointed me as Special Master to determine and assess the damages and relief to which plaintiff is entitled and to report to the Court. Defendants appealed from the order and asked that the proceedings before me be stayed. I was advised, in February 1965, that the Court of Appeals had denied defendants' application and I then scheduled hearings.

II. *Proceedings Under Order of Reference.*

Testimony was taken during 10 hearings held in my office commencing February 24, 1965 and ending August 19, 1965.

The transcript is over 547 pages (the pages were incorrectly numbered by the reporter). Plaintiff submitted 51 exhibits, several of which consisted of many documents. Defendants submitted 9 exhibits. Plaintiff called 14 witnesses and the defendants 2. At my request, the attorneys, during the hearings, held many conferences, in several of which I participated, which resulted in stipulations which

shortened the record considerably. Plaintiff has submitted to me a 57-page memorandum of fact to which is attached a 13-page memorandum of law and 5 appendices. Defendants have submitted a 56-page memorandum.

Attached hereto as Appendix A are my rulings on all matters with respect to which I reserved rulings during the hearings.

III. *The Issues.*

A. Preliminary Statement.

Plaintiff's claims for money damages fall into two broad categories. The first category consists chiefly of individual transactions between plaintiff and Penn, which plaintiff claims resulted in damage to her. The second category consists of plaintiff's claims that Penn diverted corporate opportunities to other of his businesses to the damage of Uris.*

B. General Principles of Applicable Law.

Rule 54(c) of the Rules of Civil Procedure provides:

> "(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

Moore's Manual of Federal Practice and Procedure states:

> "A default judgment cannot give to the claimant greater relief than the pleaded claim entitles him to; and Rule 54(c) provides that such a judgment 'shall

* Although plaintiff does not, in the complaint, ask for damages to herself as an individual, in her memorandum she asks for "individual judgment in favor of plaintiff". (p. 55-56).

not be different in kind from or exceed in amount that prayed for in the demand for judgment.' Since the prayer limits the relief granted in a judgment by default, the prayer must be sufficiently specific that the court can follow the mandate of the Rule.

"Judgments by default are of two kinds: for want of appearance; for failure to plead or otherwise defend as provided by the rules, although the party has appeared in the action. It is arguable that, as a matter of policy, the limitations of the Rule should apply only to a judgment by default for want of appearance and not to a default judgment where the defendant has appeared. In the latter situation a party who has put in an appearance is entitled to receive notice of all proceedings in the action, including a written notice of the application for judgment at least 3 days prior to the hearing on such application; and only the court can render the default judgment where the defending party has appeared. These factors would warrant a rule authorizing the court to render such a judgment as the complainant proved himself entitled to, no matter what the initial pleading may have requested. But Rule 54(c) does not go that far; it makes no distinction in the type of judgment by default; and hence all judgments by default are subject to its limitations." (§25.04 (7) at pages 1839-40).

It would seem, therefore, that when a defendant's answer is stricken for contempt and he is in default, the judgment cannot be different in kind from that prayed for in the demand for judgment.

The general rule is that a defendant in default is foreclosed from contesting the truth of any of the allegations in the complaint. This is true when the allegations of a

complaint are definite, distinct and positive, but when the allegations of a complaint are indefinite and the demands of the complaint are in their nature uncertain, the requisite certainty must be afforded by proof. *Thomson* v. *Wooster,* 114 U.S. 104 (1885); *Ohio Cent. R. Co.* v. *Central Trust Co.,* 133 U.S. 83 (1890); *Clifton* v. *Tomb,* 21 F.2d 893 (4th Cir. 1927); *State Reserve Bank* v. *Swift & Co.,* 32 F.2d 590, 593 (8th Cir. 1929). In the *Ohio Central* case, the Court said:

"The bill was taken as confessed; but that fact did not, in itself, justify giving complainant more than it claimed. In *Thomson* v. *Wooster,* 114 U.S. 104, 5 Sup. Ct. Rep. 788, the general nature and effect of an order taken on a bill *pro confesso,* and of a decree *pro confesso* regularly made thereon, and of our rules of practice on the subject, are discussed in the opinion of the court by Mr. Justice BRADLEY; and it is there held that under the rules and practice of this court in equity 'a decree *pro confesso* is not a decree as of course, according to the prayer of the bill, nor merely such as the complainant chooses to take it; but that it is made, or should be made, by the court, according to what is proper to be decreed upon the statements of the bill, assumed to be true.' If the allegations are distinct and positive, they may be taken as true without proof; but if they are indefinite, or the demand of the complainant is in its nature uncertain, the requisite certainly must be afforded by proof. But in either event, although the defendant may not be allowed, on appeal, to question the want of testimony or the insufficiency or amount of the evidence, he is not precluded from contesting the sufficiency of the bill, or from insisting that the averments contained in it do not justify the decree. Under the eighteenth rule in equity, where the bill is taken *pro confesso,* the cause is proceeded

> in *ex parte,* 'and the matter of the bill may be decreed by the court;' and hence, if a decree be passed not confined to the matter of the bill, it may be attacked on appeal for that reason." (113 U.S. at p. 90).

It is important to consider the above principles of law in evaluating plaintiff's claims for damages other than the claim asserted in connection with the allegation that Penn diverted corporate opportunities from Uris to his other companies. With respect to the diversion of corporate opportunities, it is clear that plaintiff alleges such diversion in her complaint clearly and positively (Par. 7) and that she asks for appropriate relief in the prayer in her complaint (WHEREFORE clause, Par. 1). The principles of law which are applicable in connection with the damages claimed as a result of the diversion of corporate opportunities will be discussed below.

C. The Damages Claimed by Plaintiff other than those Claimed to be the Result of a Diversion of Corporate Opportunities.

1. The $70,042.71 Claim.

The June 30, 1953 balance sheet of Uris (P. Ex. 2)* lists a debt due from Rickman Sales Company in the amount of $70,042.71. Rickman Sales Company was owned by Penn (MM p. 9-10).** Plaintiff in her memorandum claims that Penn "took" this amount from Uris "for his solely

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* Reference is made to exhibits introduced at the hearing before the Special Master.

** Unless otherwise indicated, reference is made to the pages of the transcript of the testimony taken before the Master (Master's Minutes). The testimony referred to here was given by Penn on his examination before trial and was read into the transcript of the hearings before the Master. The reference to the page number of the transcript of the depositions before trial is not repeated in this report.

owned Rickman company". The only testimony that plaintiff cites in her brief in support of this claim is that Penn never tried to collect this amount from Rickman Sales Company for Uris "Because Rickman never had the money to pay it back." (P.'s brief, p. 3). An examination of the complaint discloses that there is no allegation to which this claim of damage can be associated. Penn is accused in the complaint of concealing assets, of falsifying records and withdrawing funds for non-corporate purposes but this claim does not fall within any of those allegations. If it is plaintiff's position that she is entitled to recover this claim under the broad allegations in Par. 8(f) that Penn "committed other wrongful schemes, frauds and irregularities ..." she would be required under the Rules set forth in the *Thompson* case and other cases cited (*supra*, p. 7) to prove the charges. There is no proof submitted. The only evidence is that Penn failed to take steps to collect a debt which, as far as the proof goes, was uncollectible. Accordingly, I find no damages for plaintiff in connection with this claim.

2. The $3,491.96 Claim.

The balance sheet of Uris, dated June 30, 1963 (P. Ex. 2) shows that Penn owes Uris $3,491.96. This appears to be a loan from Uris to Penn. There is no indication that this loan was authorized by the stockholders of Uris as required by §714 of the Business Corporation Law of the State of New York. Although the loan was unauthorized the borrower is obligated to repay it. This act of Penn as a director of Uris in loaning himself money without stockholder approval is, at the very least, an "irregularity" as alleged in the complaint (Par. 8(f)) and a "diversion of funds" which plaintiff in her prayer for relief asked that Penn

restore to Uris "with appropriate interest". There is no indication when this money was loaned to Penn but the loan does appear on the June 30, 1963 balance sheet, so the loan was made on or before that date. I find that Penn should restore to Uris the amount of $3,491.96 with interest computed at the rate of 6% per annum from June 30, 1963 to the date of such restoration.

3. The $6,827.71 Claim.

On the June 30, 1963 balance sheet of Uris it appears that Uris owes plaintiff $6,827.71 for monies loaned to Uris by plaintiff. Plaintiff does not claim any wrong-doing on the part of the corporate defendant Uris or by Penn. All that is claimed is a debt owed by Uris to plaintiff. There is nothing in the prayer for relief which would apply to this claim. Accordingly, I find plaintiff is not entitled to recovery of this amount.

4. The $79,692.87 Claim.

This claim is made up of several small claims lumped together without any attempt made to tie in the claims with the allegations made in the complaint or with the prayer for relief.* It will be necessary, therefore, to examine each individual claim and, where possible, to place each claim in an appropriate classification.

(a) The $15,000 check, dated March 27, 1951 (P. Ex. 3).

Plaintiff's Exhibit 3 is a check dated March 27, 1951, from plaintiff, payable to Penn and endorsed "Morton Penn, Post Merchandise Corp." There is a conflict in

* When these individual claims are added, they amount to a slightly higher figure than the $79,692.87 amount asserted by plaintiff.

the testimony whether this was a loan to Penn or a gift. Plaintiff claims that it is a loan. I find that the $15,000 check was, as indicated on its face, a "loan" which plaintiff expected to be repaid to her (MM 26-27) and which Penn treated as a loan and repaid in part (P. Ex. 1). There is no prayer in the relief demanded that money loaned by plaintiff to Penn be returned to her. Accordingly, I find that plaintiff is not entitled to recover on this claim.

(b) The check dated March 16, 1951 for $200 (P. Ex. 4).

Plaintiff gave Penn a check for $200 so that he could "come down and talk over business with me. He said he would see that I was repaid in time to come." (MM 27). This was the day before plaintiff made Penn the $15,000 loan referred to in subparagraph (a) above. This amount would seem to be a gift or at best a loan. In either case, there is nothing in the prayer for relief which would entitle plaintiff to recover this amount.

(c) The check in the amount of $15,000, dated January 5, 1952 (P. Ex. 5).

Plaintiff testified that this amount was in payment for the stock to be issued to her and that it was needed to pay "the lawyers in the bankruptcy and pay off the creditors, part of it" (MM 32). The check was endorsed by Sydney Basil Levy who represented creditors of the corporation. Since the check offered in evidence by plaintiff indicates on its face that it was used for a valid corporate purpose, it is difficult to see how Penn could have diverted to his own benefit this money paid to him by plaintiff for her stock. Even if I assume that the complaint is definite and certain with respect to the allegation that Penn wrongfully diverted money

paid to him for the purchase and sale of stock and therefore Penn cannot offer any testimony on his own behalf with respect to this transaction because his answer has been stricken, I cannot ignore the fact that the proof offered by plaintiff herself shows that this money which was to be in part payment for her stock was not used for a fraudulent purpose, but indeed was used for a legitimate corporate purpose. Accordingly, I find that plaintiff cannot recover damages with respect to this claim.

(d) The $15,000 cash which plaintiff claims she gave to Penn on January 5, 1952, the same day she gave Penn a check for $15,000.

Plaintiff testified that she paid Penn $15,000 in cash on January 5, 1952, the same day she gave Penn the check for $15,000 referred to in subparagraph (c) above, and that she received from Penn a receipt for the cash, which recites that it was for the purchase of stock. The receipt was read into evidence (MM 36-37). Plaintiff testified "this was by cash. He got this the same day he got the $15,000 for the lawyer. This is for the stock. He said he had to have this cash to give to his aunt because she wanted cash". Penn denies receiving this money and claims that the receipt was for the $15,000 check which he received the same day. I find that plaintiff paid Penn the $15,000 in cash for the stock. Unlike the $15,000 check dated the same day, January 5, 1952, which on its face, and which plaintiff's testimony indicates, was used for a valid corporate purpose, there is no acceptable evidence that the $15,000 cash was used for a valid corporate purpose. Since plaintiff alleges in her complaint specifically that she paid Penn money for stock which was

diverted from Uris to Penn for his own benefit (Par. 7), since her prayer for relief asks that this money be restored by Penn to the corporation and since defendants' answer is stricken, I must find that these monies were wrongfully diverted and that Penn be directed to account to Uris for this amount of $15,000, with interest computed at the rate of 6% per annum from January 5, 1952 until such restoration.

(e) Various checks and money orders totalling about $5,000 (P. Exs. 7, 8, 10, 13, 14 and 18).

These checks and money orders were sent by plaintiff to Penn "at his request under the same conditions." (MM 40-51). Plaintiff's testimony as to the requests by Penn for money and "the conditions" under which the money was sent to Penn is:

"Q. Mrs. Jones, did Mr. Penn from time to time—did you have conversations with Mr. Penn from time to time about money?

A. Yes, I did.

Q. What did he say to you?

A. He asked me what kind of partner was I? Didn't I trust him. He said he had to have money to operate the business. He said I should either wire to him or send him a check to help him along.

Q. Did he tell you who was going to repay the money?

A. He said the corporation and him would be responsible for it and I would get every penny back that I ever put in it and that he was giving me credit all the time for it." (MM 41-42).

There is no claim here that these monies were paid by plaintiff for stock in Uris. In her brief plaintiff

does not state which allegations in the complaint pertain to these monies or where in the prayer for relief she claims to be entitled to a recovery of these monies. There is no attempt to prove that these monies were used for other than valid corporate purposes or were used for Penn's own benefit. If it is plaintiff's claim that the allegations of Par. 8(f), that Penn "committed other wrongful schemes, frauds and irregularities ..." then there was an obligation on plaintiff to submit proof to that effect and no proof was offered. Accordingly, I find that plaintiff is not entitled to recover with respect to these monies.

(f) Western Union receipt for $1,000, dated August 31, 1963 (P.Ex. 19).

This appears to be an advance against commissions earned by Rickman Sales as the selling agent of Rickman Manufacturing Company. Claims for other such monies were withdrawn by plaintiff and it appears that plaintiff inadvertently failed to include this $1,000 item in the other withdrawals. If it were not intended to be withdrawn and plaintiff still asserts a claim with respect to this money, it would fall into the same category of claims discussed above in subparagraph (e) and, like the others, is disallowed.

(g) Check in the amount of $4,000, dated April 2, 1958 (P.Ex. 20).

The cash receipts journal of Uris reflects $4,000 as a loan payable to plaintiff. If it is a loan then it is not covered by the allegations in the complaint or in the prayer for relief. If it is not a loan it is, on plaintiff's testimony, money forwarded to Penn at his request, "under the same conditions" (MM 50) and falls under

the same category as those claims described in subparagraph (e) above, which are disallowed.

(h) Check in the amount of $2,500, dated November 1, 1953 (P.Ex. 21).

Plaintiff testified that this check, payable to "City Motors", was given in order to buy a station wagon needed by a salesman of Uris. "I bought the station wagon and paid for it." (MM 51-52). There is no allegation in the complaint or any prayer for relief which could possibly permit plaintiff to recover under this claim.

(i) Check in the amount of $3,500, dated June 15, 1953 (P.Ex. 22).

This is a cashier's check the proceeds of which were turned over to Penn. This money was, according to plaintiff "requested by Mr. Penn under the same conditions" as the money represented by the checks and money orders described in subparagraph (e) above (MM 52). Even if we assume that Penn did receive this money, this claim would fall into the same category as those described in subparagraph (e) above and is disallowed.

(j) Check in the amount of $750, dated November 12, 1954 (P.Ex. 23).

Like the check described in subparagraph (i) above, this was a cashier's check the proceeds of which plaintiff claims were turned over to Penn. No evidence at all is submitted with respect to the proceeds of this check not even that they were "requested under the same terms and conditions". This claim is disallowed.

(k) Four checks made payable to "Cash", in different amounts and on different dates, totalling $3,000 (P.Exs. 24A, B, C and D).

These checks, payable to "Cash", were endorsed by plaintiff's bookkeeper and, according to plaintiff, the proceeds were turned over to Penn when he visited her in Salisbury, North Carolina. Plaintiff testified that this money, like the other monies described above, was requested by Penn and transmitted to him "under the same conditions" (MM 53-54). Even if we assume that the proceeds of these checks made payable to "Cash" were turned over to Penn, plaintiff's claims with respect to damages must be disallowed.

(l) Check in the amount of $6,000, dated January 19, 1952, payable to "Mary Rickman" (P.Ex. 25).

This check is made payable to plaintiff's own order. Again, she testified that she "transmitted" the monies to Penn, who "requested them under the same conditions". Here, however, plaintiff adds that Penn needed the money to pay off the creditors of Uris Sales, that it was going to run better than $24,000 (MM 55). Even if we assume that the proceeds of this check were turned over to Penn, as plaintiff testifies, there is no proof or attempt to prove that the monies were used for anything but a legitimate corporate purpose. Accordingly, this claim is disallowed.

(m) Four checks, payable to "Cash" or to plaintiff, totalling $10,700 (P.Exs. 26A, B, C and D).

These four checks were made payable either to "Cash" or to the order of plaintiff. Three are dated in the spring of 1956 and the fourth in the spring of 1958. Plaintiff testified that she gave this money to Penn for travelling expenses. "I advanced it to him. He said he and his corporation, our corporation, would stand good for it and that we would make lots of money

with it". Again, plaintiff does not try to associate how this claim fits in with the allegations in the complaint and the relief demanded in the complaint. If, as plaintiff indicates, these monies were "advanced" to Penn and plaintiff claims that the advances constituted a loan which should be returned to her, there is no prayer in the complaint for such relief. Under all the circumstances, I find that this claim should be disallowed.

(n) Three checks, payable to "Cash" or to the plaintiff, totalling $2,000 (P.Exs. 27A, B and C).

Again, even if we assume that the proceeds of these three checks which were made payable either to "Cash" or to plaintiff were transmitted to Penn they were, according to plaintiff, transmitted by her to Penn "At his request and under the same conditions" and must fall within the category of the claims described above in subparagraph (e), which were disallowed.

5. The $52,799.06 Claim.

Apparently, it is plaintiff's contention that some of the monies transmitted to Penn by her as described above were treated on the corporate books as "loans payable to Morton Penn" in the amount of $52,799.06 instead of being credited on the corporate books as monies advanced by plaintiff (P.'s brief, pp. 10-22). Plaintiff in her brief asked for "Individual judgment in favor of the plaintiff against Uris Sales Corporation for $52,799.06, which is shown on the books as due to Morton Penn, but which is really money of the plaintiff, and an order cancelling and discharging the entry as due from Uris Sales Corporation to Morton Penn." (p. 55). Plaintiff read into the record parts of the transcript of Penn's examination before trial in which

he admitted the possibility that some part of the $52,799.06 reflected on the books of the corporation as a loan to him could have been monies advanced by the plaintiff (MM 21-22). Even if we assume that the allegation in the complaint which accuses Penn of falsifying books and records (Par. 8(c)) is applicable and that some of the monies advanced by plaintiff appear on the books of Uris as loans from Penn to Uris, the relief demanded by plaintiff in her memorandum that Uris pay her money individually cannot be granted. Nowhere in her complaint does plaintiff ask that Uris, the corporate defendant, repay any loans or monies advanced by her to the corporation, and I cannot find that plaintiff is entitled to something that she does not ask for in her prayer for relief (*supra*, pp. 5-7). Whatever plaintiff's claims may be with respect to this amount, and it is indeed difficult to determine precisely what her claims are, they are disallowed.

D. Plaintiff's Claim with respect to Alleged Diversion of Corporate Opportunities.

Plaintiff alleges "distinctly" and "positively" that Penn diverted corporate opportunities which belonged to Uris to corporations or businesses in which he owned, controlled or had a financial interest and thereby realized earnings and profits to which "defendant corporation is rightfully entitled". (Par. 8(a)). The prayer for relief asks that Penn be directed to restore to Uris the amounts "lost, dissipated or diverted" from Uris together with interest. Since (a) the allegations are distinct and positive, (b) the relief is prayed for in the complaint and (c) defendants' answer is stricken, I must find that Penn diverted corporate opportunities from Uris to International Service Corporation ("International").

The record is not at all clear as to Penn's interest in International or what equity, if any, he had in International. Penn did testify, however, on his deposition before trial, that his business activities on behalf of International were for him "personally" and were "never intended to be for the benefit of Uris". (MM 535-36).

Plaintiff introduced into evidence commission payments made to International from five of its accounts, Danvin, Inc., Garrison Sportswear, Botany Brands, Transistor World Corporation and Hazel Bishop. The bulk of these payments were made over a period of approximately two years, and totalled $215,720. At his deposition before trial Penn testified that International had 31 additional accounts. In her brief plaintiff states that there were 32 such accounts, but she inadvertently includes Crescent Toys of England as one of the accounts. Penn testified that he did not know whether this was an account of International (MM 322). Plaintiff claims that it was difficult, if not impossible, for her to establish the amount of commission payments made by the 31 other companies represented by International because a great many of the companies, particularly those whose offices were located in Europe, were not subject to subpoena.

Herbert Eurman, a certified public accountant, testified for plaintiff. For about 13 or 14 years Eurman audited the accounts of firms engaged in the business of representing manufacturers. He audited "ten or more" of such firms (MM 348). He testified that there "is an accepted practice in the trade, that a minimum commission from a single line should be no less than $5000 per year" (MM 353). He also testified that the "accepted net profit" on each account would be "no less than one-third of the gross commission" before taxes (MM 354). He had no knowledge as to the

actual operations of International or Uris (MM 355). No further foundation was laid for the testimony of Eurman except that described above.

Plaintiff's claim for damages comes down to this: From the five accounts with respect to which direct testimony was offered International received $215,720 in commissions. Each of the other 31 accounts provided International with, at least, $5,000 commissions each year. Multiply 31 by $5,000 and multiply that figure by three because the 31 accounts were "represented for at least three years". That figure is $465,000. Add the $215,720 to the $465,000 and divide that figure by one-third (the percentage of net profit), the resulting figure of $226,906.67 is the total damage suffered by reason of the diversion. Plaintiff then takes 50% of that figure and, in her memorandum, asks for "individual judgment" against Penn for $113,453.34.*

It is clear that plaintiff is not entitled to "individual judgment". In her complaint plaintiff asks that Penn be directed to account to Uris for the monies diverted from the defendant corporation to him and that is all she is entitled to get.

I will accept the testimony of Eurman that the 31 accounts would have produced minimum commissions of $5,000 each a year. It seems to me that this is something concerning which Eurman was qualified to testify. He was not simply giving an opinion as to what he considered reasonable, but testifying from experience as to what was customary in the business. This factual basis for his testimony was not controverted by defendant, except by way

* The amount sought in plaintiff's brief is $115,953.33, but I have reduced this amount because of the inadvertent inclusion of Crescent Toys of England as one of the accounts.

of argument. Moreover, the record regarding the five accounts with respect to which direct testimony was offered supports Eurman's testimony.

I must reject, however, plaintiff's claim that "these accounts have been represented for at least three years". The record does not support such a statement. The only testimony with respect to these 31 accounts and the length of time they were represented by International appears in the testimony of Penn on his examination before trial which was read into the record before me. This testimony was given in the fall of 1963 and the spring of 1964. I can make no assumption that these accounts are still represented by International. The testimony with respect to each such account and the duration of representation by International is summarized below:

1. Reeves Soundcraft—No period of time is given with respect to representation by International. This account was represented by Uris for "less than a year" and it was through International that Uris secured representation (MM 262), so the period could not have been more than one year.
2. C. A. Reid—"About six months" (MM 266).
3. Forstner Jewelry—"Possibly a period of a year" (MM 268).
4. Ohio Art Company—"A year or so" (MM 269).
5. Roeser—No time given (MM 273).
6. Tozo—No time given (MM 274).
7. Fuyija—"The past year" (MM 275).
8. Aristocrat Leather—No time given (MM 279).
9. Cameo Parkway Record Company—No time given (MM 279).
10. Kalimar—"Possibly for a year" (MM 304).
11. Taron—"Within a year" (MM 306).
12. Tokay—"Maybe a month or so" (MM 306).

13. Walther Brush Company—No time given (MM 307).

14. Trix—No time given (MM 308).

15. D'Orsay—"Possibly a year" (MM 308).

16. Mepps—No time given (MM 309).

17. Ytrio—"Six months or thereabouts" (MM 312).

18. Uher Co.—International represented Uher prior to Penn's meeting Uher, which was "possibly a year and a half or so ago" (MM 315).

19. Kurbi & Nggeloh of Germany—"I have no idea" (MM 316).

20. Bertram of Germany—"I don't know" (MM 317).

21. Gero of Holland—"About a year and a half, two years" (MM 318).

22. Leppington Cutlery—"About a year and a half, two years" (MM 318).

23. Senedesi of Italy—No time given but Penn visited them about "eight or nine months ago" (MM 319).

24. Rio of Holland—No time given (MM 320).

25. Narang of India—No time given (MM 321).

26. Torchio of Italy—No time given (MM 321).

27. Bianchi of Italy—No time given (MM 321).

28. D.A.M. of Germany—"I don't have any idea" (MM 322).

29. Bryant & Tucker of England—"Possibly the past year, thereabouts" (MM 325).

30. Decorel—"During the past year" (MM 268).

31. Ridgeway Pottery—No time given (MM 274).

Based on the foregoing testimony, I cannot agree with plaintiff that these accounts were represented for at least three years. It seems to me that the most that the record supports is that these accounts were represented by plaintiff for approximately one year and I find that plaintiff

represented them for an average of one year for the purpose of applying the $5,000 a year figure testified to by Mr. Eurman.

I have examined each of the checks issued to International from the five accounts with respect to which direct testimony was offered and have made the following compilations of the commissions paid to International for the following years:

Year	*Amount*
1961	$ 1,690.00
1962	115,930.91
1963	53,753.39
1964	36,678.81
1965	213.32

Regarding the 31 accounts, I have found that the approximate length of time they were represented by International was one year. As indicated above, the record does not show the exact periods of representation by International. The testimony with respect to such representation was given by Penn on his examination before trial at hearings held in the Fall of 1963 and the Spring of 1964. Because of the question of accrual of interest I have allocated the $155,000 in commissions which Uris would have earned from representation of these accounts one-half ($77,500) to 1962 and one-half to 1963. The total of such commissions and the commissions described above for the five accounts is therefore:

Year	*Total Commissions*
1961	$ 1,690.00
1962	193,430.91
1963	131,253.39
1964	36,678.81
1965	213.32

The only evidence available in the record regarding the financial condition of Uris indicates that Uris operated at a loss of $8,313.01 on gross sales of $72,313.46, $50,712.11 of which were commissions, for the six-month period ending June 10, 1963. There is no evidence Uris ever operated at a profit. Therefore, while the 33⅓% net profit figure testified to by Mr. Eurman might be an acceptable measure of damages in the case of an efficiently operated and profitable company, it does not seem appropriate here. Some consideration must be given to the fact that Uris was not being efficiently and economically operated and that, despite the increased revenue it would have received if the commissions paid to International were paid to Uris, it is unlikely that Uris would have realized net profits of 33⅓% on such commissions. It would seem appropriate therefore to discount this profit figure substantially.

It is, of course, impossible to determine with mathematical certainty what this percentage figure representing net profits lost should be. However,

> "The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount." *Story Parchment Co.* v. *Paterson Parchment Co.*, 282 U.S. 555, 562 (1931).

See also, *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251 (1945). Once the fact of damages is established, the risk of uncertainty as to their amount is upon the wrongdoer, not the plaintiff. *Dabney* v. *Chase National Bank*, 201 F. 2d 635 (2d Cir. 1953); *President and Directors of Manhattan Co.* v. *Kelby*, 147 F. 2d 465 (2d Cir. 1944). Where, from the nature of the case, damages cannot be ascertained

with certainty, it is enough to adduce facts and circumstances which have any tendency to show damages and their probable amount and from which an intelligible and reasonable approximation can be made. *Duane Jones Company* v. *Burke*, 306 N.Y. 172 (1953); *DeLong Corporation v. Lucas*, 176 F. Supp. 104 (S.D.N.Y. 1959). And certainly difficulty in computing damages with mathematical certainty does not warrant the refusal of any damages whatever for the wrong. *Federal Waste Paper Corp.* v. *Garment Center Capitol, Inc.*, 185 Misc. 818 (Sup. Ct. N.Y. Co. 1945).

The fact of damage has clearly been established in this case, as has a basis for their measurement, and I am obliged to arrive at a figure. Whether or not Uris would have made an overall profit had it received these commissions in the years in question, it certainly is entitled to some amount representing what it would have netted with respect to these particular accounts. Under all the circumstances, I find I should apply a figure of 15% in computing the net operating profits Uris would have made on these commissions. On this basis, Uris would have received, for the years in question:

Year	*Amount*
1961	$ 253.50
1962	29,014.64
1963	19,688.01
1964	5,501.82
1965	32.00

Accordingly, I find that Uris has been damaged in the amounts indicated in the table set forth immediately above and that Penn restore to Uris such monies, with interest computed at the rate of 6% per annum on $253.50 from

December 31, 1961, on $29,014.64 from December 31, 196[illegible] on $19,688.01 from December 31, 1963, on $5,501.82 from December 31, 1964, and on $32.00 from December 31, 196[illegible]

E. Legal Fees.

Plaintiff asks for legal fees in the amount of $50,00[illegible] plus disbursements of approximately $2,500. Plaintiff is entitled to reasonable counsel fees in an action of this sort, §626(a) of the New York State Business Corporation Law. In his affidavit, Mr. Hershbaum, attorney for plaintiff, claims that the time spent on the preparation of this case not including appearances in court, appearances on the examination of defendant Penn before trial or the appearances before me as Special Master was in excess of 300 hours. His affidavit shows that Mr. Hershbaum had court appearances or appearances on examinations totalling 24 days. Under all the circumstances and considering the result achieved I find that plaintiff is entitled to a reasonable counsel fee of $20,000.

The Order of Judge MacMahon, dated November 12, 1964, provides that the expenses of and incidental to the proceedings before the Special Master, including his fee, stenographer's fee, and other disbursements, are to be charged to and paid by the plaintiff and all such sums shall be included by plaintiff as taxable costs in her judgment against Penn. In order, therefore, for plaintiff to recover her costs, it will be necessary for her to itemize such costs and expenses rather than to approximate them and to include them as taxable costs in her judgment against plaintiff. With respect to my fee, I have already been paid $2,500 by plaintiff on account of my services as Special Master. Since defendant Penn will ultimately bear the cost of my fee, I will, immediately after filing this report, mee[illegible]

with the attorneys for plaintiff and for Penn and attempt to agree on an amount for the balance of my fee. Absent such agreement, I will make an application to this Court for the reasonable value of my services.

F. In her complaint, plaintiff asks that a trust be imposed upon the assets of all of the companies and enterprises of Penn to the extent of the damages sustained by Uris, that Penn be restrained from paying or causing to be paid any further sums of money to himself from the assets of Uris or from the assets of any of his companies, and that a receiver be appointed "with usual authority conferred upon receivers in such case".

It does seem to me that some restrictions should be placed upon Penn in his operation of Uris pending his compliance with any judgment entered by this Court. I recommend that Penn be prohibited, without the prior written consent of plaintiff or without the prior written approval of this Court from (1) paying to himself either directly or indirectly any salaries, commissions or expenses on any basis or in such amounts which would result in Penn's receiving more income from Uris than he was receiving as of the date of this report, and (2) that plaintiff be restrained from paying any dividends of Uris. I recommend that such prohibitions be enforced until ten (10) days after payment by Penn to Uris of the amounts described in subsections C and D of Section III above. It seems to me that after Penn has restored the above sums to Uris if plaintiff and Penn (each owns 50% of the stock of Uris) find that they cannot agree upon the operation of the business and the constitution of the Board of Directors of Uris plaintiff should pursue any relief to which she may be entitled under the applicable statutes and law with respect

to the dissolution of the company. In the meantime, she should have some protection that Penn will not be in a position to dilute the assets of Uris. Penn must, however, it seems to me, be permitted to withdraw some salary and expenses from Uris if the business of Uris is to continue. To impose upon Uris the costs and expenses which would necessarily be incurred if a receiver were appointed might be more than Uris could stand and continue to operate.

IV. Recommendations

A. On the basis of the foregoing, I recommend that judgment be taken against Penn in favor of Uris in the following amounts:

1. $3,491.96, with interest at the rate of 6% per annum from June 30, 1963 to the date of restoration by Penn to Uris (III.C.3 *supra*, p. 10).

2. $15,000.00, with interest computed at the rate of 6% per annum from January 5, 1952 until restoration by Penn to Uris (III.C.4(d) *supra*, p. 11).

3. (a) $253.50, with interest computed at the rate of 6% per annum from December 31, 1961 until paid;

(b) $29,014.64, with interest computed at the rate of 6% per annum from December 31, 1962 until paid;

(c) $19,688.01, with interest computed at the rate of 6% per annum from December 31, 1963 until paid;

(d) $5,501.82, with interest computed at the rate of 6% per annum from December 31, 1964 until paid;

(e) $32.00, with interest computed at the rate of 6% per annum from December 31, 1965 until paid.

B. That plaintiff have judgment against Penn in the amount of $20,000 for counsel fees.

C. That any judgment should provide that Penn be prohibited without the prior written consent of the plaintiff or without prior approval of the Court from (1) paying to himself either directly or indirectly any salary, commissions or expenses on any basis or in any amounts which would result in Penn's receiving more money from Uris than he was receiving at the date of this report, and (2) from paying any dividends of Uris. I recommend that such prohibitions be in force until ten (10) days after payment by Penn to Uris of the amounts described above.

Respectfully submitted,

PAUL J. QUINN
Special Master

March 29, 1966.

APPENDIX A

Rulings Reserved at the Hearings

Plaintiff in its brief has requested that I rule in its favor with respect to all matters on which rulings were reserved at the hearings (p. 54 of plaintiff's memorandum), but has made no effort to specify the particular questions on which it is still necessary to rule. Defendants have likewise given no indication in their brief of the matters on which they still desire specific rulings. I have, therefore, studied the record for this purpose and find that I reserved rulings on certain evidentiary and related questions. Since my obligations as Special Master include that of determining the relevance and weight of the evidence offered, any necessary resolution of these questions is encompassed in my findings. For purposes of clarity, however, the questions, with appropriate transcript references, and my disposition thereof are set forth below:

1. Defendants' objections to plaintiff's introduction of Exhibits 1-27C on grounds of "lack of connection". (MM 34, 37, 100).

Overruled.

2. Defendants' motion to strike testimony relating to "advances" made by plaintiff to Penn and/or Uris Sales Corporation as immaterial (MM 365).

Denied.

3. Plaintiff's objection to defendants introduction of excerpts from Penn's examination before trial except on the question of damages. (MM 345-346).

Sustained.

4. Defendants' request for ruling that no proof has been submitted entitling plaintiff to relief under the allegations of the complaint. (MM 368-369).

Denied.

5. Defendants' motion to strike "an accountant's report" as not the best evidence. (MM 366).

Denied.

INDEX

Volume I

	PAGE
List of Relevant Docket Entries	A-x
TWA Complaint [Doc. 1]	A-1
Order Referring This Action to Judge Metzner for All Purposes, dated August 31, 1961 [Doc. 42]	A-33
Opinion and Order of December 5, 1961 [Doc. 50]	A-35
Pretrial Order, February 7, 1962 [Doc. 59]	A-36
Toolco's Answer and Counterclaims [Doc. 63]	A-41
Holliday's Answer [Doc. 83]	A-99
Pretrial Order, July 12, 1962 [Doc. 101]	A-116
Pretrial Order, September 21, 1962 [Doc. 122]	A-118
Pretrial Order, January 10, 1963 [Doc. 144]	A-122
Pretrial Order, January 19, 1963 [Doc. 146]	A-127
Opinion and Order of Special Master dated January 22, 1963, Exhibit C to Bromley Affidavit dated February 15, 1963 [Doc. 179]	A-133
Exhibit A to the Affidavit of John F. Sonnett, dated February 1, 1963 [Doc. 166]	A-143
Exhibits B and C to the Affidavit of John F. Sonnett, dated February 1, 1963 [Doc. 167]	A-226
Pretrial Order, February 1, 1963 [Doc. 168]	A-253
Opinion and Order, February 7, 1963 [Doc. 173]	A-255
Toolco's Notice of Position, dated February 8, 1963 [Doc. 174]	A-268
Transcript of Pretrial Hearing, February 8, 1963 [Doc. 188]	A-270
Transcript of Pretrial Hearing, May 2, 1963 [Doc. 204]	A-309

PAGE

Opinion and Order, dated May 3, 1963 [Doc. 191] A-317

Opinion and Order of May 3, 1963 Granting Additional Defendants' Motion to Dismiss (memorandum endorsed on motion papers dated February 15, 1963) [Doc. 179B] A-323

Judgment of the Court of Appeals on Interlocutory Appeal, Entered July 10, 1964 [Docket No. 28405] [Doc. 478] A-324

Judgment of the Court of Appeals Affirming Dismissal of the Counterclaims, Entered July 10, 1964 [Docket No. 28406] [Doc. 479] A-326

Opinion of the Court of Appeals in Dockets No. 28405 and No. 28406 [Doc. 478] A-328

Opinion and Order of Special Master J. Lee Rankin, dated July 30, 1965 [Doc. 481] A-357

Opinion and Order of Judge Metzner, dated November 16, 1965 [Doc. 487] A-396

Transcript of Hearing Before Judge Metzner on December 30, 1965 [Doc. 498] A-400

Opinion and Order of Judge Metzner Denying Defendants' Motion for a Pre-Hearing Order, dated January 4, 1966 [Doc. 496] A-422

Order by Judge Metzner of January 4, 1966 Designating Herbert Brownell as Special Master in Place of J. Lee Rankin [Doc. 497] A-424

Volume II

Excerpts from Testimony at Damage Hearing of Robert W. Rummel [Docs. 554-2 through 554-10] A-425

Testimony at Damage Hearing of John B. Connelly [Doc. 554-11] A-977

Volume III

PAGE

Excerpts from Testimony at Damage Hearing of Edward J. Morehouse [Docs. 554-13, 554-14] A-1209

Excerpts from Testimony at Damage Hearing of Edward Wemple [Docs. 554-15 through 554-18, 554-32] A-1243

Excerpts from Testimony at Damage Hearing of John C. Biegler [Doc. 554-19] A-1527

Volume IV

Excerpts from Testimony at Damage Hearing of Gene M. Woodfin [Docs. 554-23, 554-24] A-1567

Excerpts from Testimony at Damage Hearing of Nathan S. Simat [Docs. 554-25, -26, -27, -28, -30, -31] A-1575

Excerpts from Testimony at Damage Hearing of L. John Eichner [Docs. 554-31, -32] A-1727

Testimony at Damage Hearing of Van Court M. Hare, Jr. [Doc. 554-32] A-1773

Excerpts from Pretrial Deposition of Robert W. Rummel [Docs. 224, 225, 226] A-1797

Excerpts from Pretrial Deposition of Charles C. Tillinghast [Docs. 210 through 222] A-1850

Excerpts from Pretrial Deposition of Emmett O. Cocke [Docs. 228, 231, 233, 235] A-1913

Jones v. *Uris Sales Corp.*—Master's Report [not a part of the Record herein] A-1934

Volume V

Notice of Filing of Report of Special Master dated September 21, 1968 [Doc. 509] A-1965

Report of Special Master, Filed September 21, 1968 [Doc. 508] A-1966

PAGE

Defendants' Objections to the Report of the Special Master, dated November 1, 1968 [Doc. 511] A-1967

Opinion and Order, Filed December 23, 1969, Adopting and Confirming the Report of the Special Master [Doc. 519] A-2027

Opinion and Order of April 13, 1970 Awarding Attorney's Fee and Costs [Doc. 530] A-2060

Final Judgment Entered April 14, 1970 [Doc. 531] .. A-2073

Volume VI

Toolco's Notice of Motion to Dismiss TWA's Complaint, August 8, 1961 [Doc. 22] A-2075

Order by Judge Herlands, dated August 14, 1961 [Doc. 25] A-2077

Transcript of Pretrial Hearing Before Judge Metzner, September 6, 1961 [Doc. 47] A-2078

Pretrial Order of Judge Metzner, September 7, 1961 [Doc. 44] A-2112

Transcript of Pretrial Hearing Before Judge Metzner, October 2, 1961 [Doc. 48] A-2115

Pretrial Order of Judge Metzner, December 18, 1961 [Doc. 354] A-2138

Toolco's Notice of Motion Before Special Master J. Lee Rankin, February 15, 1962 [Doc. 66] A-2140

Transcript of Pretrial Hearing Before Judge Metzner, February 23, 1962 [Doc. 79] A-2141

Orders of Special Master J. Lee Rankin, April 17, 1962, contained in excerpts from transcript of deposition of Charles C. Tillinghast, Jr. [Doc. 217] A-2176

Interrogatory Propounded by TWA to Toolco, May 4, 1962 [Doc. 89] A-2197

PAGE

Interrogatory Propounded by TWA to Raymond M. Holliday, May 4, 1962 [Doc. 90] A-2203

Transcript of Pretrial Hearing Before Judge Metzner, May 17, 1962 [Doc. 96] A-2206

Portion of Transcript of Proceedings Before Special Master J. Lee Rankin, June 4, 1962 [Doc. 218] A-2233

TWA's Notice of Motion and Affidavit of John F. Sonnett, June 25, 1962 [Doc. 305] A-2234

Affidavit of John R. Hupper, July 2, 1962 [Doc. 315] A-2240

Transcript of Pretrial Hearing Before Judge Metzner, July 12, 1962 [Doc. 107] A-2245

Pretrial Order of Judge Metzner, July 23, 1962 [Doc. 103] A-2267

Pretrial Order of Judge Metzner, July 24, 1962 [Doc. 93] A-2268

Transcript of Pretrial Hearing Before Judge Metzner, July 26, 1962 [Doc. 113] A-2270

Affidavit of Robert G. Zeller, August 28, 1962 with Exhibits A-K [Doc. 110] A-2283

Memorandum Reviewing the History of TWA's Application for Permission to Propound an Interrogatory of Hughes Tool Company Concerning the Location of Howard R. Hughes, August 30, 1962 [Doc. 106] A-2297

Transcript of Pretrial Hearing Before Judge Metzner, September 6, 1962 [Doc. 355] A-2305

Affidavit of John F. Sonnett, September 14, 1962, and Exhibits C and D thereto [Doc. 117] A-2316

Portions of Transcript of Proceedings Before Special Master J. Lee Rankin, September 15, 1962 [Doc. 226] A-2382

PAGE

Transcript of Pretrial Hearing Before Judge Metzner, September 19, 1962 [Doc. 129] A-2391

Portions of Transcript of Discovery Proceedings Before Special Master J. Lee Rankin, October 25, 1962 [Doc. 226] A-2428

Transcript of Pretrial Hearing Before Judge Metzner, October 29, 1962 [Doc. 184] A-2438

Notice of Motion by Toolco, December 4, 1962, for Leave to Depose Sessel and Wadsworth [Doc. 338] A-2461

Transcript of Proceedings Before Special Master J. Lee Rankin, December 14, 1962 [Doc. 237] A-2462

Transcript of Proceedings Before Special Master J. Lee Rankin, December 28, 1962 [Doc. 237] A-2514

Transcript of Pretrial Hearing Before Judge Metzner, January 9, 1963 [Doc. 185] A-2523

Transcript of Proceedings Before Special Master J. Lee Rankin, January 14, 1963 [Doc. 237] A-2571

Notice of Motion by Toolco, January 14, 1963 [Doc. 145] A-2574

Transcript of Pretrial Hearing Before Judge Metzner, January 17, 1963 [Doc. 186] A-2576

Notice of Motion by Toolco, January 22, 1963 [Doc. 147] A-2602

Transcript of Proceedings Before Special Master J. Lee Rankin, January 23, 1963 [Doc. 237] A-2603

Notice of Motion by Toolco, January 25, 1963 [Doc. 152] A-2615

Transcript of Pretrial Hearing Before Judge Metzner, January 28, 1963 [Doc. 187] A-2616

Letter of Chester C. Davis to Judge Metzner, January 29, 1963 [Doc. 448] A-2642

PAGE

Letter of Chester C. Davis to Special Master J. Lee Rankin, February 4, 1963 [Doc. 458] A-2645

Letter from John F. Sonnett to Chester C. Davis, February 5, 1963 [Doc. 459] A-2647

Notice of Motion by Toolco, February 6, 1963 [Doc. 170] A-2648

Affidavit of Nazeeh Habashy, February 6, 1963 [Doc. 172] A-2649

Transcript of Pretrial Hearing Before Judge Metzner, February 6, 1963 [Doc. 187] A-2650

Affidavit of Bruce Bromley, February 15, 1963 [without exhibits] [Doc. 179] A-2676

Affidavit of William C. Chanler, February 15, 1963 [Doc. 179] A-2689

Order to Show Cause dated February 16, 1963, and Affidavit of John F. Sonnett, February 15, 1963 [Doc. 180] A-2692

Transcript of Pretrial Hearing Before Judge Metzner, February 21, 1963 [Doc. 189] A-2704

Order of the Court of Appeals for the Second Circuit dated June 6, 1963, Granting Leave to Appeal and Staying Damage Hearing Pending Appeal .. A-2736

Orders of the Supreme Court of the United States, dated November 16, 1964 Granting Writs of Certiorari A-2737

Orders of the Supreme Court, dated March 8, 1965, Dismissing the Writs of Certiorari as Improvidently Granted in *Hughes Tool Company et al.* v. *Trans World Airlines, Inc.*, Nos. 443 and 501 .... A-2738

Opinion of the Court of Appeals dated September 1, 1971, in Docket Nos. 34902, 35114, Affirming with Modifications the Judgment of the District Court A-2739

PAGE

Orders of the Court of Appeals, dated September 28, 1971, Denying Petitions for Rehearing and Rehearing *in banc* A-2799

Volume VII

PAGE

Excerpts from Transcript of Deposition of Charles C. Tillinghast, Jr. [Excerpts from Docs. 54, 210, 211, 216, 221] A-2800

Vol. 11 of Defendants' Exhibits to Deposition of Charles C. Tillinghast, Jr. (consisting of Exhibit 11, with subparts 11-A through 11-T, inclusive) [Doc. 238] A-3220

Opinions and Orders of the Civil Aeronautics Board with respect to the Hughes Tool Company—TWA Control Relationship, as follows:

(a) CAB Opinion and Order No. 3210, October 17, 1944 (officially reported at 6 C.A.B. 153) [not a part of the Record herein] A-3297

(b) CAB Order No. 4437, January 26, 1946 .... A-3307

(c) CAB Order No. E-922, October 29, 1947 .... A-3309

(d) CAB Opinion and Order No. E-1735, June 30, 1948 (officially reported at 9 C.A.B. 381) [not a part of the Record herein] A-3311

(e) CAB Opinion and Order No. E-4701, October 6, 1950 (officially reported at 12 C.A.B. 192) [not a part of the Record herein] A-3333

(f) CAB Opinion and Order No. E-16195, December 29, 1960 (officially reported at 32 C.A.B. 1363) A-3403

Notice of Filing of Report of Special Master Dated September 21, 1968

[Doc. 509]

[CAPTION] 61 Civ. 2324

PLEASE TAKE NOTICE, that the undersigned has this day filed his report in the above entitled action.

Dated: New York, New York
September 21, 1968.

/s/ HERBERT BROWNELL
SPECIAL MASTER

To:

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Attorneys for Defendants
Hughes Tool Company and
Raymond M. Holliday

The Report of Hon. Herbert Brownell, Special Master, dated September 21, 1968, was filed with the District Court in printed form. Since sufficient copies of the Special Master's 323-page Report are available as originally printed, it has not been reprinted but has been bound into this Joint Appendix following this page.

United States District Court

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324

TRANS WORLD AIRLINES, INC.,

Plaintiff,

—against—

HOWARD R. HUGHES, HUGHES TOOL COMPANY, and RAYMOND M. HOLLIDAY,

Defendants.

REPORT OF HERBERT BROWNELL, SPECIAL MASTER

Dated: September 21, 1968

United States District Court

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324

TRANS WORLD AIRLINES, INC.,

Plaintiff,

—against—

HOWARD R. HUGHES, HUGHES TOOL COMPANY, and RAYMOND M. HOLLIDAY,

Defendants.

REPORT OF HERBERT BROWNELL, SPECIAL MASTER

Introduction—Prior History of the Case

This is an action by plaintiff Trans World Airlines ("TWA") against Howard R. Hughes ("Hughes"), Hughes Tool Company ("Toolco"), and Raymond M. Holliday ("Holliday"), an officer of Toolco and a director of TWA at the time of the filing of the complaint. The complaint was filed on June 30, 1961. Service was made on Toolco at that time, but service of process on Holliday was not made until January, 1962. Both Toolco and Holliday appeared and answered the complaint. Hughes was never served, and he has not appeared in the action.

The complaint sets forth three claims. The first claim alleges violations of Sections 1 and 2 of the Sherman Act

and Sections 3 and 7 of the Clayton Act. The second claim, based on certain of the acts alleged in support of the first claim but only those acts committed since December 31, 1960, also alleges violations of Sections 1 and 2 of the Sherman Act and Section 7 (but not Section 3) of the Clayton Act. These two claims allege that TWA is a major U. S. air carrier with both domestic and international routes, that Toolco "was and is engaged . . . since in or about 1939 in the development, manufacture and acquisition of aircraft and related equipment from the manufacturers thereof . . . and in the sale or lease of such aircraft to air carriers", and that Toolco has acquired 78% of the common stock of TWA. The first two claims further allege that through various acts the defendants and Atlas Corporation (named as a co-conspirator but not as a defendant) required TWA to acquire all of its jet aircraft from Toolco and to boycott all other suppliers, provided financing for the acquisition of jet aircraft only on the condition that TWA purchase all its jet aircraft from Toolco, and sold and leased jet aircraft on the condition that the purchaser would not buy or lease from any competitor. The third claim, based on pendent jurisdiction, alleges malicious and wilful interference with the business of TWA through the same acts pleaded in support of the first two claims. The complaint seeks treble damages and also injunctive relief requiring defendants to divest themselves of all stock in TWA and to refrain from acquiring any interest in TWA or seeking to exercise control or domination over TWA. In its answer to the complaint, Toolco asserted various counterclaims against TWA and also against others.

In August 1961, the case was assigned to Judge Charles M. Metzner for all purposes, pursuant to Rule 2 of the

General Rules of the District Court. On February 7, 1962 Judge Metzner appointed J. Lee Rankin as Special Master to supervise the discovery proceedings.

Simultaneously with filing the complaint, TWA moved by order to show cause on June 30, 1961 to take the deposition of Hughes. This motion was denied, however, and Toolco was allowed priority in the taking of depositions. On February 7, 1962, in the same order appointing the Special Master, Judge Metzner established a schedule of depositions, which was subject to change by the Special Master upon application of either party. This schedule called for Toolco to continue with the depositions of some twenty-four witnesses which had then been noticed, with the plaintiff to commence depositions immediately upon completion of Toolco's schedule. The last deposition by Toolco was set for April 19, 1962, and the depositions noticed by TWA were to commence with the deposition of Hughes on April 23, 1962.

This schedule was subsequently amended by the Special Master. The deposition of Hughes was set for September 24, 1962, then adjourned to October 29, 1962, and finally set for February 11, 1963. Although Hughes himself was never served with process as a party, the Special Master ruled that Toolco would be responsible for his appearance at the deposition, and Toolco did not contest this ruling.

On January 10, 1963, Judge Metzner denied an application by Toolco to further postpone the deposition of Hughes, so that Toolco might continue with its own depositions. On January 14, Toolco moved to have the deposition of Hughes taken only on written interrogatories, and in the event that this was denied, further moved to have set down for hearing a motion which it had originally made in August, 1961 to dismiss the complaint. Characterizing

this motion as appearing to be "another attempt to put off the deposition of Hughes", Judge Metzner denied the request to have the deposition taken by interrogatories. As to the second branch of the motion, Judge Metzner observed that the case "is not in a posture for a meaningful disposition of the motions to dismiss the complaint or for summary judgment" and noted the agreement of Toolco on several occasions that such a motion was premature. However, the Court further stated that it "cannot prevent defendant Toolco from pressing these motions at this time" and set the motions down for argument.

After oral argument on February 6, 1963, Judge Metzner denied Toolco's motion from the bench and entered a formal opinion and order the following day. (Reported at 214 F. Supp. 106). In that opinion, Judge Metzner stated that "as to the merits of the motion, there is no doubt that the complaint on its face sets forth a claim against the defendants and is not subject to dismissal under rule 12(b)(6)". Judge Metzner further ruled that the acts of the defendants alleged in the complaint were not exempted from the antitrust laws by virtue of certain orders of the Civil Aeronautics Board, and that the C.A.B. did not have exclusive primary jurisdiction over the subject matter of the complaint.

Almost immediately thereafter, at a pre-trial conference before Judge Metzner on Friday, February 8, 1963, counsel for Toolco announced that Hughes would not appear for the deposition scheduled for the following Monday, February 11. Toolco also declared its unwillingness to produce as previously ordered certain income tax returns, as well as certain other documents for which a claim of attorney-client privilege had been made but rejected by the court. Toolco also filed a written "Notice of Position" dated February 8, which recited in part that:

"Toolco hereby elects, subject only to whatever relief it may hereafter obtain, to rest on the merits of its positions as heretofore taken so that it may avoid the burdens and expenses involved in further pre-trial and trial proceedings prior to the time that an appellate court has had the opportunity to rule upon the decisions and orders heretofore made herein."

Counsel for Toolco elaborated on this position at the pre-trial conference on February 8. Adverting to the earlier ruling of the Special Master that Toolco would be responsible for Hughes' compliance with the deposition subpoena, with the possible sanction of a default if the subpoena were not complied with, counsel stated that "the Tool Company did not seek a review of those rulings of the Special Master by the Court and accepted in effect the responsibility placed on it by that ruling." (Tr. of Feb. 8, p. 9). He also stated Toolco's awareness of the possible consequences of a failure to comply with the discovery procedures:

"I have also had occasion to describe to my client, the Hughes Tool Company, the sanctions available under the Rules by reason of a respectful declination or election to stand on the questions of law which have been decided to date and not to proceed any further with respect to discovery proceedings. I have particularly called to their attention the provisions of 37(d) —Rule 37(d)—of the Federal Rules, with respect to the sanctions which could be applied by the Court on the Tool Company. [Tr. of Feb. 8, p. 9]

• • • • •

"The Tool Company does want to rest on the merits of its position, and it does so fully aware of the sanctions which the Court, in its discretion, may impose upon the Tool Company. . . . [*Ibid.*, p. 11]

• • • • •

> "We are fully aware—my client is fully aware—that by insisting on a right to obtain a review on the legal questions which have been decided to date, and should it develop that they are in error, as indicated by your Honor's decisions and rulings, as a consequence they may be deprived of further defending on the merits, other than on the question of damages." [*Ibid.*, p. 12]

In response to questions from the Court, counsel advised that embraced within the contemplation of the "notice of position" was an advice to the Court that Hughes would not appear for the deposition on February 11, and that plaintiff could take any proceedings it is advised to take by way of sanctions under Rule 37. [Tr. of Feb. 8, p. 20] When counsel for TWA questioned whether Hughes would be bound by the anticipatory default, Toolco further waived the right to any defense against sanctions should Hughes in fact appear for the deposition:

> "The Court: • • • Now, Mr. Davis says that as far as the defendant Hughes Tool Company is concerned, they will admit today that Mr. Hughes will not appear on Monday and that as a result you may then take whatever steps you wish to pursuant to Rule 37 [sic].
>
> "I would also like Mr. Davis to state for the record that if by chance Mr. Hughes should appear at the courthouse on Monday, despite what has transpired here this afternoon, that will be no defense to any proceeding taken by T.W.A.
>
> "Mr. Davis: I will so state, your Honor." [Tr. of Feb. 8, pp. 48-49]

Toolco also re-iterated its intention not to produce the documents which it had been ordered to produce, and the Court summarized the state of the proceedings to counsel for the plaintiff and the defendants on the counterclaims as follows:

"The record is now set for you to take whatever action you wish to take on the counterclaims and for Mr. Sonnett to take whatever action he wishes to take on the claims based on the default of Mr. Hughes on Monday.

"Secondly, you have the failure to produce the tax documents, which is an individual and separatr [sic] ground for proceeding; and you have the failure to produce the attorney-client documents, which are a separate and individual ground for proceeding." [Tr. of Feb. 8, pp. 59-60.]

After counsel for Toolco again stipulated as to the binding nature of these acts, the hearing was adjourned.

Thereafter, on February 15, 1963 TWA moved to amend the ad damnum portion of the complaint and formally moved for default judgment pursuant to Rule 37. At the hearing on February 8, counsel for TWA had intimated an intention to increase the amount of damages which TWA was seeking. On May 3, 1963 Judge Metzner granted the motion to amend the complaint and directed that default judgment should be entered for TWA, with a hearing to be held to determine the amount of damages. The question of "the amount of the damages to be paid" was referred to the Special Master previously designated to preside over the discovery proceedings. The counterclaims were also dismissed with prejudice. The opinion is reported at 32 F.R.D. 604. As will appear hereafter, the commencement of the damage hearings was long delayed.

In granting this relief to plaintiff, Judge Metzner reviewed the history of the proceedings to date, and stated:

"It is clear that the deposition of Hughes is essential for the proper presentation of TWA's case. It is also clear that the failure of Hughes to appear on February

> 11th for his deposition was the result of a clear and studied determination by Toolco after all efforts to postpone the appearance of Hughes had failed. The default was deliberate and willful and justifies the court in entering a default judgment. . . ." 32 F.R.D. at 607.

The order was certified by Judge Metzner for immediate appeal.

On June 2, 1964, the Court of Appeals, Second Circuit, affirmed the propriety of the entry of the default and also the earlier decision of Judge Metzner relating to the Court's jurisdiction. The decision of the Court of Appeals is reported at 332 F. 2d 602. After ruling that the Civil Aeronautics Board did not have primary jurisdiction over the anti-trust activities alleged and that prior orders of the C.A.B. did not immunize the acts alleged in the complaint from the operation of the anti-trust laws, the Court went on to uphold the complaint as stating a cause of action under the anti-trust laws:

> "The defendants maintain that in any event the complaint fails to state facts sufficient to establish the jurisdiction of the district court. They claim that the allegations of antitrust violations in the complaint are wholly conclusory and that the specific transactions alleged to have been effected by the defendants do not state a cause of action under the antitrust laws. We do not agree. We cannot say that the specific transactions alleged in TWA's complaint—that Toolco refused to finance aircraft acquisitions by TWA unless TWA agreed to purchase planes from no supplier other than Toolco; that Toolco required TWA generally to boycott all other suppliers of aircraft; that the defendants have attempted through various means to monopolize a substantial segment of interstate and foreign air commerce—are on their face insufficient to

support a claim of antitrust violations, a claim which surely falls within the jurisdiction of the district court. The allegations state the outlines of a tying arrangement, an economic boycott of the defendants' competitors, and an attempt to monopolize commerce, all unlawful under the antitrust statutes. It would be particularly inappropriate to find these allegations insufficient to establish the district court's jurisdiction inasmuch as the defendants denied the plaintiff the right through pre-trial discovery to add more detail and substance to the allegations set forth in the complaint.

* * * * *

"We are satisfied that the complaint sufficiently states a cause of action and establishes the district court's jurisdiction." 332 F. 2d at 610-11.

With respect to the dismissal of the counterclaims with prejudice, the Court held that one such counterclaim against additional defendants should have been dismissed for lack of jurisdiction, but otherwise affirmed the dismissal of the counterclaims with prejudice as a consequence of the default. In doing so, the Court affirmed the rulings of the District Court that required production of the tax documents and those documents as to which the claim of attorney-client privilege had been claimed, and affirmed the propriety of granting a judgment by default in view of the non-compliance with these orders and the failure of Hughes to appear as ordered.

"The sanction of judgment by default for failure to comply with discovery orders is the most severe sanction which the court may apply, and its use must be tempered by the careful exercise of judicial discretion to assure that its imposition is merited. However, where one party has acted in willful and deliberate disregard of reasonable and necessary court orders

and the efficient administration of justice, the application of even so stringent a sanction is fully justified and should not be disturbed. [citations omitted]

"Hughes' deposition was absolutely essential to the proper conduct of the litigation. Yet he and Toolco seized upon every opportunity to forestall this event. To this end they demanded the production of a multitude of documents by TWA and the additional defendants and secured successive adjournments of the deposition. Indeed, Hughes and Toolco seemed to look upon the entire discovery proceedings as some sort of a game, rather than as a means of securing the just and expeditious settlement of the important matters in dispute. It was only at the very eve of the Hughes deposition—after the other litigants had been put to much delay and expense—that the defendants made a 'business decision' to terminate discovery.

"Hughes' conduct is particularly intolerable in a large and complex litigation such as this one. The protracted antitrust suit taxes the energies and resourcefulness of each party to the litigation; and it consumes much time of the court and the special masters it appoints. Tactics such as Hughes' serve only to frustrate the implementation of the discovery machinery devised by the federal judiciary to expedite the handling of such complex litigation. See Handbook of Recommended Procedure for the Trial of Protracted Cases, Report of the Judicial Conference Study Group on Procedure in Protracted Litigation, 25 F.R.D. 351 et seq. (1960).

"In the light of all these circumstances, the district court was not obliged to employ sanctions less severe than the dismissal of the counterclaims with prejudice. Whatever lesser sanctions might have sufficed with regard to the documents withheld by the defendants, it seems to us that a dismissal of the counterclaims was appropriate, in view of Hughes' intransigence after intensive and expensive discovery proceedings already protracted for more than one year." 332 F. 2d at 614-15.

The Supreme Court granted certiorari as to the decision of the Court of Appeals, but the writ of certiorari was subsequently dismissed as improvidently granted. 380 U. S. 248-9 (March 8, 1965).

On May 10, 1965, TWA moved before J. Lee Rankin, the Special Master, for an order adopting certain interim findings of fact, based on the allegations of the complaint. The interim findings were sought by TWA "as a basis for the submission of its further evidence as to the amount of its damages." On July 30, the Special Master entered an order which outlined the effect of the default and which tentatively adopted some of the proposed interim findings while tentatively refusing to adopt others.

The failure of the Special Master to adopt the omitted findings was appealed by TWA to the district court. On November 16, 1965, Judge Metzner entered an opinion and order which did not deal with specific findings but which further stated the law pertaining to the effect of the default and returned the matter to the Special Master. 38 F.R.D. 499 (1965). These two decisions by the Special Master and Judge Metzner, as well as a subsequent decision by Judge Metzner noted below, are described more fully elsewhere in this opinion.

Shortly thereafter, Toolco moved before Judge Metzner for an order calling on TWA to set forth the facts which would preclude a finding that Toolco had never been engaged in the manufacture or supply of aircraft in competition with any other manufacturer or supplier. This motion was denied by Judge Metzner on January 4, 1966.

J. Lee Rankin, who had been appointed Special Master to determine the amount of damages, resigned this position upon being appointed Corporation Counsel of the City of

New York. The undersigned was appointed as Special Master under the same terms as the original reference.

On May 2, 1966, the hearing on damages formally commenced with the submission of the plaintiff's direct testimony on damages in written narrative form. Defendants' direct testimony was also thereafter submitted in written narrative form. All witnesses were subjected to thorough cross-examination, which (together with the oral testimony of one rebuttal witness for plaintiff) covers nearly 11,000 pages. More than 800 exhibits were also introduced by both parties. The hearings closed on April 9, 1968, and printed briefs have been submitted by both parties.

Effect of the Default

The first question which must be considered is the effect of the default on plaintiff's case and the extent of the burden which plaintiff must still meet in order to justify recovery. Despite prior rulings in the case, this has been the subject of continuing disagreement between the parties in the damage hearings.

Prior to the commencement of the hearings on damages, plaintiff moved before Special Master Rankin, as noted above, for certain findings of fact based on the allegations of the complaint, which were requested on an interim basis as a foundation for the submission of its evidence on damages. Plaintiff took the position that the default justified the entry of such findings without further offer of proof by plaintiff. After full written and oral argument, Special Master Rankin entered on July 30, 1965 an opinion and order which discussed in detail the effect of the default and which adopted certain of the proposed findings on an interim basis. However, Special Master Rankin declined,

also on an interim basis, to adopt the balance of the proposed findings. A full statement of his opinion is required to properly evaluate the positions of the parties in the damage hearings. The Special Master described the effect of the default as follows:

"The default having been entered for the reasons indicated above, the question remains as to its effect. The default is an admission implied by law as a result of the default, which thereupon dispenses with any proof of the facts alleged in the complaint, except as to unliquidated damages. The default not only has the legal effect of an admission of the allegations, but precludes any showing of defensive matters in regard thereto except as to damages. When the damages are not liquidated, there is no admission as to the damages by reason of the default, and proof thereof is required. (See 3 Freeman, Law of Judgments, Secs. 1281-1282, pp. 2662-2664 (Tuttle's Ed. 1925).

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"All parties agree that *Thomson* v. *Wooster,* 114 U. S. 104 (1885) is the leading case by the Supreme Court of the United States on the effect of a default. It is recognized in that decision that upon the entry of a decree *pro confesso* all matters alleged with sufficient certainty are admitted. However, it is as to those matters not adequately alleged with regard to certainty, or subjects which from their nature and the course of the court proceedings require an examination of details imposing an obligation on the complainant to furnish proof, that differences arise.

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"While conclusions of law are for the court in the determination of any judgment to be awarded and it thus decides whether the damages proved did in fact flow from the violations of law alleged, the defendants after their default no longer have the right to contest

whether the asserted violations did in fact occur. They are limited to pointing out such information or evidence as may be in the record where the court should take judicial notice of records or facts which show that the allegations could not be true.

"When the plaintiff has pleaded a 'statement of claim' showing that he is entitled to relief (F.R.C. P. Rule VIII (a)), he may yet be unable to prove the case alleged. But that is not a problem in a default where the allegations are, in legal effect, admitted. Defaulting defendants are allowed to raise questions as to allegations contrary to judicially known facts because when a pleader states matter as facts which is not out of harmony with that which the court judicially knows, such averments in the pleading are disregarded. *Greeson* v. *Imperial Irrigation District,* 59 F. 2d 529 (9th Cir. 1932); *Interstate Natural Gas Company* v. *Southern California Gas Company,* 209 F. 2d 380 (9th Cir. 1953). See also In Re: *Woodmar Realty Company,* 294 F. 2d 785 (7th Cir. 1961); *Cert. Denied,* 369 U. S. 803 (1962) and *Glen Coal Company* v. *Dickenson Fuel Company,* 72 F. 2d 885 (4th Cir. 1934).

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"Thus, at this stage of the case, the court is obligated to arrive at a judgment and that judgment must be just. Therefore, whenever a court would take judicial notice of the proceedings of public bodies such as the Civil Aeronautics Board or other Federal commissions or the files of the court or any similar matters and such records and information would satisfy the court that any allegation of the complaint or any part of an allegation could not be true, the court is not required by reason of the default to accept such allegation, or such part of it.

"The effect of information appearing in the record up to this date, or as hereafter developed, bearing upon the truth of the allegations of the complaint, is somewhat different. Where such evidence clearly shows

that the allegation or part of an allegation could not possibly be true, the court will not stultify itself by accepting such allegation or part of it in the face of such evidence. Where, however, the evidence merely may tend to show that the allegation may not be maintained and the defendants by reason of the nature of their default have materially interfered with the plaintiff's ability to produce evidence which might support the allegation or disprove such record evidence, the court is not required to reject the allegations. Such a result would reward the defendants for their interference with the processes of the court.

"For the reasons indicated the defendants, at this point, do not have the right to produce evidence to try to establish in any manner that the allegations of the complaint other than as to damages cannot be maintained. That opportunity was given up by their decision to default. The rights of plaintiff resulting from the default should not be taken away by any refinements and legalistic reasoning of any considerations that do not reach to the level of necessary and proper requirements for a fair and just hearing on the question of damages.

"On the other hand, it should not be forgotten that the court in entering a judgment of default is performing 'a judicial act'. *Pope* v. *United States,* 323 U. S. 1. Furthermore, Rule 55(b)(2), under which the court directed that this hearing be held recognizes that such is the nature of the responsibility, at this point in the default proceeding, by stating:

> 'If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as to it seems necessary and proper . . .'

"It is within the framework described that the Special Master must proceed. Recognizing that it is his duty on behalf of the court to be satisfied of the liability of the defendants, as well as of the proof, according to law, of the amount of damages claimed, he must also be satisfied by a preponderance of the evidence that any damages were proximately caused by the violations of law alleged in the complaint. Therefore, in the belief that the damage portion of the trial will be advanced by his doing so, the Special Master has sustained a considerable portion of the plaintiff's motion and has adopted certain findings requested, but only on an interim basis, for the purposes of the hearings on damages. He is reserving the right, however, before such hearings are closed to modify any or all of said interim findings if he finds it desirable or necessary in order that justice may be promoted in this case. The Special Master has also declined to adopt certain interim findings proposed in the motion. The findings adopted are set forth in Exhibit AA attached to this opinion and order and made a part hereof as fully as if set out herein. [Exhibit AA is not reproduced herein.]

"The failure to adopt, at this time, any proposed finding is not a determination by the Special Master that such finding is false, or disproved, or that it will not be fully established by the close of the hearings on damages. Such proposed findings have not been adopted at this time because in each instance they appear directly or indirectly to have a bearing upon the question of damages, and may be affected either partially or wholly by the evidence which is adduced in proof of damages herein.

"The failure to now adopt such proposed interim findings, is not to be construed as placing such findings at issue, except to the limited extent that there is any information of which a court would take judicial notice, or there is evidence in the record which would prove such findings to be false or there may be evidence prop-

erly adduced as a part of these hearings on damages which would establish such findings to be false and is brought to the attention of the Special Master before the hearings close. The defendants are not allowed by the present refusal to adopt such tendered findings to contest them on the merits as they could do if there had been no default."

On appeal by plaintiff to Judge Metzner from portions of the Special Master's opinion and order, the legal effects of the default were again thoroughly briefed and argued orally. On November 16, 1965, Judge Metzner entered an opinion and order disposing of the appeal (reported at 38 F.R.D. 499). This opinion and order made no reference to any specific proposed findings which the Special Master had agreed or declined to adopt. It did, however, summarize generally the legal effect of the default, clarified a seeming ambiguity in the opinion of the Special Master relating to liability and proximate cause, and returned the case to the Special Master for proceedings in accordance with the Court's opinion. That opinion is, of course, controlling here.

Pointing out that the reference to the Special Master was made "to determine the amount of damages", Judge Metzner described the effect of the default as follows:

"Liability is not an issue for the Special Master except in a very limited sense. The sufficiency of the complaint has already been established by the denial of defendant's motion to dismiss. 214 F. Supp. 106 (S. D. N. Y. 1963), *aff'd*, 332 F. 2d 602 (2d Cir. 1964), *writ of cert. dismissed*, 380 U. S. 248, 85 S. Ct. 934, 13 L. Ed. 2d 817 (1965). By virtue of the default the defendant has admitted the truth of the well-pleaded allegations of the complaint. *Thomson* v. *Wooster*, 114 U. S. 104, 5 S. Ct. 788, 29 L. Ed. 105 (1885).

"Allegations are not well pleaded if they are shown to be indefinite or erroneous by other statements in

the complaint (*Thomson* v. *Wooster, supra*); or where they are contrary to facts of which the court will take judicial notice (*Glenn Coal Co.* v. *Dickinson Fuel Co.*, 72 F. 2d 885, 889 (4th Cir. 1934)); or where they are not susceptible of proof by legitimate evidence (*Cohen* v. *United States*, 129 F. 2d 733 (8th Cir. 1942); *Greeson* v. *Imperial Irr. Dist.*, 59 F. 2d 529 (9th Cir. 1932)); or where they are contrary to uncontroverted material in the file of the case (*Interstate Nat. Gas Co.* v. *Southern Calif. Gas Co.*, 209 F. 2d 380, 384 (9th Cir. 1953); *In re Woodmar Realty Co.*, 294 F. 2d 785 (7th Cir. 1961), *cert. denied*, 369 U. S. 803, 82 S. Ct. 643, 72 L. Ed. 550 (1962)). However, it may be shown by plaintiff, in the context of this case, that some matters of which the court may take judicial notice should not be so noticed. See McCormick, Evidence § 330 (1954). Where file material is involved, if the plaintiff did not have full opportunity to meet or controvert such material, then it should not be used to nullify the allegation. If evidence merely tends to show that an allegation is not true, the allegation must be taken as true in this default. Finally, the plaintiff is entitled to the benefit of all reasonable inferences from the evidence tendered."

Judge Metzner's opinion makes clear that the failure of the Special Master to adopt certain of the findings did not constitute a determination that the allegations on which they are based are not well-pleaded:

> "The Special Master stated that the failure to adopt any proposed finding is not a determination that such finding
>
> 'is false, or disproved, or that it will not be fully established by the close of the hearings on damages.'
>
> Such proposed findings are not at issue except to the limited extent noted above. The Special Master specifically stated that

> 'the defendants are not allowed by the present refusal to adopt such tendered findings to contest them on the merits as they could do if there had been no default.' "

It is thus clear from the Court's opinion that even those findings not adopted by the Special Master are admitted by the default except to the extent that they can be disproved within the framework of the well-pleaded allegations rule as set forth by the Court. Furthermore, the Court's opinion also establishes that the allegations are presumed to be well-pleaded, and that the burden is on the defendants to show that they are not:

> "Attempts by defendant to escape the effects of its default should be strictly circumscribed. It should not be afforded an opportunity to litigate what has already been deemed admitted in law. In the absence of an exceedingly strong showing that an allegation is untrue under the rules set forth above, the allegation stands as admitted."

A subsequent opinion and order by Judge Metzner on January 4, 1966 also shows that the defendants carry the burden of disproving each allegation of the complaint, despite the Special Master's failure tentatively to adopt a finding based on a particular allegation.

One of the findings which the plaintiff had requested but which the Special Master failed to make at that point in the proceedings was to the effect that Toolco was engaged in the development and manufacture of aircraft, as alleged in the complaint. The Special Master did adopt a portion of the same finding which stated that Toolco was engaged in the acquisition of aircraft from manufacturers in various states and in the sale and lease of such aircraft in interstate commerce, but failed to adopt a further position to

the effect that such sales and leases were "to air carriers in various other states". The defendants, as above mentioned, moved before Judge Metzner in December, 1965 for an order requiring TWA to set forth the facts on which TWA would rely in order to preclude the entry of a finding of fact as follows:

> "The facts before this Court establish that at no time during the period covered by the complaint herein were the defendants, or any of them, engaged in the manufacture or supply of commercial transport aircraft in competition with any manufacturer or supplier of such aircraft."

Despite the failure of the Special Master to adopt the findings noted above, Judge Metzner ruled that the burden with respect to these facts still rested on the defendants rather than the plaintiff, and denied the motion:

> "It asks that plaintiff come forward to negative a fact which defendant asserts as true. The shoe is on the other foot."

Finally, it may be noted that there is no procedural requirement for making such interim findings before taking evidence in the hearing on damages, and the Special Master's disposition of the request for findings appears to have been simply an exercise of the Master's power to regulate the proceedings before him, which is generally subject to review only for abuse of discretion. See 5 Moore's Federal Practice, ¶ 53.06. In fact, during oral argument before Judge Metzner on the motion to review the Special Master's failure to adopt certain of the proposed findings, both counsel for Toolco and the Court treated the Special Master's order as an exercise of discretion in the conduct of the proceedings. Counsel for Toolco asserted that the Mas-

ter could have denied all of the proposed findings without committing reversible error, and the Court agreed, stating that the Master "wanted to lay down some ground rules which could perhaps shorten the hearing." (Tr. of Sept. 28, 1965, pp. 15-16)

It is, therefore, clear that the burden of disproving *all* the allegations of the complaint still rests on the defendants, and the failure of the Special Master to adopt certain findings of fact has not created in the plaintiff a burden of proving those facts. Although the defendants have asserted that the findings which were not adopted represent "gaps" in plaintiff's case which plaintiff is required to fill in through proof, this contention cannot be and is not sustained.

The burden assumed by a defaulting party is a heavy one. Its weight is illustrated by *Thomson* v. *Wooster*, 114 U. S. 104 (1885), which was cited by Judge Metzner, and by other early Supreme Court decisions. In *Thomson*, the plaintiff sued for infringement of a re-issued patent on a folding guide for sewing machines. The original patent was dated October 5, 1858, had been extended for seven years in 1872, and had been re-issued in December 1872. The complaint alleged that numerous suits had been brought and sustained against other infringers, and sought an accounting of profits and damages. The defendants appeared but failed to file an answer to the complaint, and a decree *pro confesso* was entered. The case was referred to a master to determine the profits and damages. After an award by the master, the defendants appealed, asserting among other arguments that the re-issued patent was invalid because it was for an invention other than the one covered by the original patent, and also because an excessive amount of time elapsed between the original issue

and the re-issue, and as a further reason because the complaint alleged that successful suits had been brought on the original patent, whereas invalidity or inoperativeness were conditions precedent of a re-issue. These arguments were rejected by the Supreme Court.

"A confession of facts properly pleaded dispenses with proof of those facts, and is as effective for the purposes of the suit as if the facts were proved; and a decree *pro confesso* regards the statements of the bill as confessed.

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"... it seems clear that the defendants, after the entry of the decree *pro confesso*, and whilst it stood unrevoked, were absolutely barred and precluded from alleging anything in derogation of, or in opposition to, the said decree. . . . The attempt, on the hearing before the master, to show that the reissued patent was for a different invention from that described in the original patent, or to show that there was such unreasonable delay in applying for it as to render it void under the recent decisions of this court, was entirely inadmissible because repugnant to the decree. The defendants could not be allowed to question the validity of the patent which the decree had declared valid. The fact that the reissue was applied for and granted fourteen years after the date of the original patent would, undoubtedly, had the cause been defended and the validity of the reissued patent been controverted, been strongly presumptive of unreasonable delay; but it might possibly have been explained, and the court could not say as a matter of law, and certainly, under the decree of the court, the master could not say, that it was insusceptible of explanation. And on this appeal it is surely irregular to question the allegations of the bill. If anything appears in those allegations themselves going to show that the decree was erroneous, of course it is assignable for error; but any attempt

to introduce facts not embraced in those allegations, for the purpose of countervailing the decree, is manifestly improper. The introduction of the original patent, pending the appeal, was clearly irregular." (114 U. S. at 110 and 114)

The Supreme Court then noted the argument of defendants that as a matter of law the re-issued patent must be void, since (quoting the defendants' assignment of errors),

"'... the bill avers that during the fourteen years of the original term of patent the validity of said letters patent was established in numerous suits in the Circuit Courts of the United States, and that all persons sued took licenses and paid therefor, as well as many others not sued, thereby averring, in substance, that the original letters patent were *valid* and *operative*:

"'Wherefore, appellants ask this court to hold that the original letters patent having been *valid* and *operative*, as averred by complainant, for over fourteen years, no reissue thereafter could be legally obtained, because *invalidity* or *inoperativeness* are conditions precedent to the grant of a reissue.'

"The answer to this assignment is obvious. The suits brought on the original patent may have been for infringements committed against particular parts of the invention, or modes of using it and putting it into operation, as to which the specification was clear, full and sufficient; whilst, at the same time, there may have been certain other parts of the invention, or modes of using it and putting it into operation, as to which the specification was defective or insufficient, and which were not noticed until the application for reissue was made; or, in the original patent the patentee may have claimed as his own invention more than he had a right to claim as new—a mistake which might be corrected at any time. At all events, the court cannot

say, as mere matter of law, that this might not have been the case." (114 U. S. at 115)

The Supreme Court's disposition in *Thomson* of the defendants' attacks on the validity of the allegations in the plaintiff's bill shows the exceedingly heavy burden assumed by a defaulting party who attempts to disprove the allegations of the complaint. Even when relying on matters appearing of record, the defendant must show that such matters conclusively, and beyond all doubt, prove that the allegations could not be true.

Another case illustrating this heavy burden is *Harshman* v. *Knox County*, 122 U. S. 306 (1887). Plaintiff had sued the county on certain bonds which the county had issued, and when the county defaulted, obtained a judgment of $77,374.46. He then brought a proceeding by mandamus against the Justices of the county court to compel them to levy a tax sufficient to pay the judgment. The county defended on the ground that the bonds were issued pursuant to a special statute (incorporating a railroad) which authorized a certain rate of tax to support the bonds, that the county had levied such tax and still had insufficient money to pay, and that there was no authority to levy additional taxes. Although the bonds, which were attached to the original complaint, recited that they were issued pursuant to that special statute, the plaintiff in his complaint alleged that the bonds were issued pursuant to a different and more general statute which granted unlimited taxing power. As recited in the Supreme Court's opinion,

"... the contention of the respondents in the Circuit Court was, that they were entitled to show by the recitals in the bonds themselves, in contradiction to those contained in the judgment founded upon them,

that they were in fact issued under the charter of the corporation, and not under the general law. On this point, the judgment of the Circuit Court was in their favor, denying to the relator the peremptory writ of mandamus, and this decision is now alleged as error, for which the judgment should be reversed." (122 U. S. at 316)

Noting that the question was whether the county was estopped to deny that the bonds were issued under the general statute, the Supreme Court opinion stated:

"The averment to that effect in the petition in the action, if material and traversable, was confessed by the default. * * * The averment as to the character of the bonds, and the grounds and authority upon which they were founded, so as to constitute them legal obligations of the county of Knox, contained in the petition, was clearly material to the plaintiff's cause of action. If the defendant had denied it by a proper pleading, the fact would have been put in issue, and the plaintiff would have been bound to prove it. * * * In the absence of a denial, the fact as stated in the petition of the plaintiff is confessed by the default, and stands as an admission on the record, of its truth by the defendant." (122 U. S. at 316-317)

The judgment of the Circuit Court was reversed, with directions to award a peremptory mandamus.

Proof of Basic Anti-Trust Allegations

Against the background of decisions such as these, and having established that defendants bear the burden of disproving the allegations in the complaint, regardless of the Special Master's interim findings, it must now be determined whether any of the allegations have been shown

to be disproved within the narrow confines of the "well-pleaded allegations" rule. The chief allegation which defendants claim to be disproved is the allegation that Toolco was engaged in the development and manufacture of aircraft and the supply of aircraft to air carriers. The defendants claim that this allegation is disproved by various C.A.B. opinions, orders and records which are said to be appropriate for judicial notice, and by certain exhibits introduced during the hearings on damages as well as by the testimony of certain of plaintiff's witnesses during the hearings.

The question of judicial notice is an important one, for it underlies a major portion of Toolco's defense on liability. However, Toolco's reliance upon judicial notice of official documents and records is misplaced. Although judicial notice may indeed be taken of official reports such as reports of administrative agencies, the notice extends only to the existence of the report and its contents, and not to the accuracy of facts recited in the report. For example, in *Stasiukevich* v. *Nicolls,* 168 F. 2d 474, 479 (1st Cir. 1948), Judge Magruder denied judicial notice as to facts recited in an official Congressional committee report:

> "The official report of a legislative or congressional committee is admissible in evidence in a judicial proceeding, as an exception to the hearsay rule, where the report, within the scope of the subject matter delegated to the committee for investigation, contains findings of fact on a matter which is at issue in the judicial proceeding. See Wigmore on Evidence, §§ 1662, 1670. Indeed, the court could properly take judicial notice of the report, without its formal introduction into evidence. But though the court may receive the report in evidence, or may take judicial notice of its existence and contents, this does not mean that the court must

accept the findings in the report as indisputable truth; the findings are merely evidence of the facts asserted. See Unitd [sic] States v. Aluminum Co. of America, 2 Cir., 1945, 148 F. 2d 416, 445, 446; Morgan, The Law of Evidence, 1941-1945, 59 Harv. L. Rev. 481, 485-86 (1946)."

McCormick on Evidence, §328 at p. 704, also notes that while courts will take judicial notice of official documents, this merely "dispenses with formal authenticating proof of the genuineness of the documents" and "does not mean that if the document is a statement of facts, such facts are themselves judicially noticed."

No authority has been cited to support taking judicial notice of facts merely because they are contained in the findings of an administrative agency, and indeed, such treatment would accord the findings of an administrative agency greater weight than is accorded the findings of a court of law. Determinations of fact by a court of law may be used in a separate proceeding only within the narrow confines of the doctrines of res judicata and collateral estoppel, and are not binding on other parties. A Court's reliance on findings of fact in another case may constitute reversible error. Cf. *Radovich* v. *Cunard,* 364 F. 2d 149 (2nd Cir. 1966). If judicial notice cannot be taken of facts contained in findings of a court of law, it would seem that *a fortiori* judicial notice may not be taken of facts simply because they are contained in findings of an administrative agency. Such findings may be of some probative value under the authorities cited above, and in the absence of a default the C.A.B. materials might be quite persuasive. However, they do not permit judicial notice to be taken of the assertion that Toolco was never a manufacturer or supplier of aircraft.

The existence and contents of an administrative order or a document filed with an administrative agency may under certain circumstances be of relevance to a judicial proceeding apart from the facts recited therein. This is true, for example, with regard to the question of whether an administrative agency has primary jurisdiction over the subject matter being litigated. *Interstate Nat. Gas. Co. v. Southern Calif. Gas. Co.*, 209 F. 2d 380 (9th Cir. 1953). However, the relevance of C.A.B. orders and filings to primary jurisdiction in this case has already been considered and disposed of by Judge Metzner and by the Court of Appeals.

Even if judicial notice were taken of the fact that no U. S. air carrier ever purchased a commercial transport aircraft manufactured by Toolco, this would not of itself be sufficient to disprove the allegation that Toolco was "engaged in" the development and manufacture of aircraft. In addition to the general allegation of "engaging" in paragraph 3 of the complaint, there is also an allegation that "defendants and General Dynamics Corporation (hereinafter called 'Convair') entered into an arrangement for the joint development of a jet-powered aircraft to be manufactured by Convair and to be supplied by the defendants to air carriers, including TWA" (Paragraph 14) as well as an allegation that "the defendants also entered into a plan under which Toolco would itself commence the manufacture of a jet-powered aircraft" with the intent that "Toolco would furnish this aircraft . . . both to TWA and to other air carriers." (Paragraph 15). While these efforts were eventually abandoned, they would appear to constitute "engaging in" the development and manufacture of aircraft. Also, they occurred at the period of time when TWA alleges that it should have been arranging for purchases from

other suppliers such as Boeing Aircraft Corporation (Boeing). Furthermore, there is evidence which would suggest that the development and manufacture of the Convair 880 aircraft, which did in fact take place, had elements of a joint venture between Toolco and Convair, with Toolco to benefit financially from the sale of such aircraft over and above the initial order for 40 placed by Toolco and Delta Airlines Inc. (Delta). There is also evidence that Hughes took steps to find buyers, including Delta, for the Convair 880. Defendants do not seriously contest these facts, and in many cases admit them. In view of the specific allegations of paragraphs 14 and 15 of the complaint, which are admitted by the default and which have not been disproved by the defendants under the "well-pleaded" rule, and in view of the additional evidence suggesting what might have been shown to be a joint venture between Convair and Toolco, it is not possible to find that the allegation of "engaging in" the development and manufacture of aircraft could not be true. The testimony of Robert W. Rummel cited at p. 55 of defendants' brief likewise does not show that the allegation could not be true, but at best tends to show that it may not be true. This is not a sufficient showing under the rules laid down in Judge Metzner's opinion:

> "If evidence merely tends to show that an allegation is not true, the allegation must be taken as true in this default."

The same holds true with respect to the allegations of the complaint that Toolco was a supplier of aircraft purchased from other manufacturers. The general allegation that Toolco was engaged in the supply of such aircraft to airlines (Paragraph 3) is supplemented by allegations

that Toolco purchased aircraft from Boeing and Convair (Paragraph 17), that defendants caused six of the Boeing aircraft to be "diverted" to the principal transatlantic competitor of TWA (Paragraph 18), that defendants caused six of the Convair 880 aircraft to be leased to Northeast Airlines Inc. (Northeast), of which three had previously been assigned to TWA (Paragraph 22), and that Toolco also agreed to purchase Convair 990 aircraft from Convair and sought to have TWA purchase these aircraft from Toolco, rather than purchasing additional aircraft from Boeing as TWA proposed to do (Paragraphs 37 and 38). There was also evidence that Toolco purchased a large supply of jet engines from Pratt & Whitney Aircraft Corporation, which it subsequently sold at a profit.

Toolco does not deny that it purchased aircraft, or that it sold aircraft to TWA. In fact, it asserts that all of the aircraft which it purchased were purchased for TWA and as a convenience to TWA, and that TWA would have been unable to purchase such aircraft itself because of financial considerations. It does not deny that six Boeing aircraft purchased by Toolco from Boeing were assigned to Pan American Airways Inc. (Pan Am), or that six of the thirty Convair 880 aircraft originally purchased by Toolco from Convair were leased by Convair to Northeast, but it does contend that these were merely the disposition of aircraft which had been determined to be excess to TWA's needs by TWA's own management. Furthermore, it contends that since all aircraft sold by Toolco were manufactured by Boeing or Convair, there can be no question of restraining competition by Boeing or Convair, while Douglas Aircraft Corporation (Douglas), the third major manufacturer, was not in the running for TWA's orders in any case.

Here again, it is difficult to say how the issues would have been resolved had this case gone to trial. However,

in the context of the default, it cannot be said that defendants have met the difficult burden of showing that the supplier allegations are not well-pleaded. While a prospective purchaser could purchase Boeing or Convair jets from Boeing or Convair rather than Toolco, the element of delivery time was a factor which might cause such a purchaser to turn to Toolco rather than to the manufacturer directly. Jet aircraft, being an enormously expensive commodity, are not manufactured and sold from open stock. A purchaser from a manufacturer at a particular point in time would be offered certain dates for future delivery, depending on the manufacturer's backlog and production facilities at the time of order. On the other hand, Toolco might be able to offer the assignment of aircraft which had been ordered previously and which were scheduled for delivery at dates earlier than those which the manufacturer could offer. To the extent that only one manufacturer is involved, then it is true that the total number of aircraft sold by that manufacturer remains the same. However, it cannot be said as a matter of law that Toolco's ability to offer certain delivery dates to Pan American for Boeing aircraft might not have influenced Pan American to forego purchasing from Douglas, or that Northeast might not have purchased or leased from some manufacturer other than Convair if the Toolco 880's had not been available. Furthermore, price increases over a period of time by a manufacturer might mean that the manufacturer's price at the time of negotiation with a new customer was higher than that paid by Toolco. In fact, this appears to have been the case with the Pratt & Whitney engines. The fact that Toolco in this litigation refused to make available certain documents and information which might have had a bearing on its sales of aircraft and engines and the

profits or tax savings which it may have derived therefrom, makes it particularly difficult to sustain Toolco's contention that it purchased only for the benefit of TWA. There is, moreover, an allegation in the complaint that "Despite repeated requests by TWA, Toolco refused throughout the period 1956 to 1960 to assign to TWA the rights to acquire" the jets which Toolco had ordered from Convair and Boeing (Paragraph 18). This allegation has not been disproved under the "well-pleaded allegations" rule and therefore stands as admitted. It tends to rebut the argument that the aircraft were ordered solely for TWA.

Much of defendants' argument that Toolco was not a supplier of aircraft centers around evidence that Hughes and Toolco were acting in an effort to secure "the newest and finest equipment" for TWA. (Defendants' brief, p. 74, and generally pp. 73-94). However, the fact that Hughes and Toolco were interested in securing good aircraft for TWA is not inconsistent with an intention to act as a supplier of aircraft to TWA and to other airlines as well. Nor is the fact that aircraft were ordered to TWA specifications of itself conclusive that such aircraft were intended solely for TWA, since certain of these aircraft were in fact sold or leased to other airlines, namely Pan American and Northeast. Furthermore, there is evidence that Toolco ordered Convair 990 aircraft which were to be built to the specifications of American Airlines.

Although there is evidence to suggest that Toolco may have been purchasing solely for TWA, this does not constitute a sufficient showing on the part of defendants. Furthermore, the intention of Toolco in ordering the aircraft is a subject which undoubtedly would have been developed more fully had the deposition of Hughes been taken. The default foreclosed fuller examination of this question.

Under all of the circumstances, it cannot be said that defendants have disproved the "supplier" allegations within the limits of the "well-pleaded allegations" rule.

In short, the evidence relied on by Toolco merely tends to support its position and does not conclusively establish that the allegations could not be true. Moreover, in addition to the allegations of the complaint cited above, it is also alleged that Hughes was the sole stockholder of Toolco and controlled its activities (paragraph 4) and that Toolco in turn had acquired more than 78% of TWA's common stock (paragraph 11), which is far more than a controlling interest. Judge Metzner in his opinion of May 3, 1963 stated that:

> "It is clear that during all of the times covered by the complaint the management of TWA was controlled by Hughes personally." 32 F.R.D. at 606

Therefore, even a conclusive showing that the six Boeing jets and ten Convair jets were declared excess to TWA's needs with concurrence of the Hughes-dominated TWA management would not necessarily establish as a matter of law that Toolco had no responsibility for the decision to cut back, which Toolco asserts was the sole reason for the sale of aircraft to carriers other than TWA.

One other allegation in the complaint which may require special comment is the allegation that Atlas, though not named as a defendant, was a co-conspirator with defendants in seeking to restrain competition. Since Atlas was not named as a defendant, it has not been represented by counsel at any stage of this case. Furthermore, the occurrence of the default has precluded any examination of whether there is any evidence to support the charge of conspiracy.

The law of the default appears to require that Atlas be deemed to have conspired with Toolco for purposes of this litigation. The complaint alleges generally that Atlas, together with the defendants, engaged in a conspiracy and attempt to restrain trade in violation of various provisions of the antitrust laws (paragraph 9), that the acts of Atlas were done in furtherance of the offenses charged and with anti-competitive intent, for the profit of Atlas (paragraph 10), and that more specifically, Atlas joined with Toolco in attempting to force upon TWA a merger with Northeast, which would have enlarged the defendants' captive market for aircraft and would have furthered the anti-competitive scheme (paragraphs 21 and 47). Since the allegations of conspiracy have not been disproved within the limits of Judge Metzner's order, they must be taken as admitted as far as the defendants in this case are concerned. The fact that Atlas was not named as a defendant does not prevent a charge that Toolco conspired with Atlas. *U. S.* v. *Griffith*, 334 U. S. 100, 103 (1948). However, the "fact" of the conspiracy is taken to be true only for purposes of this litigation and between the parties to this litigation. There is no intent to bind Atlas or to suggest what outcome would have resulted as to it had the allegations of the complaint been litigated.

Proximate Cause

Apart from the "well-pleaded allegations" rule, however, the defendants argue that under the opinion of Special Master Rankin, proximate cause is not admitted for any purpose by the default. They assert that plaintiff has the burden of proving that any injuries which it suffered were proximately caused by antitrust violations of the defen-

dants. Although admitting that the default may have established the existence of antitrust violations for purposes of this proceeding, they assert that the default did not relieve the plaintiff of establishing this causal connection by means of proof submitted in the hearing on damages. In support of this position, they point to the statement in the Special Master's opinion that he "must also be satisfied by a preponderance of the evidence that any damages were proximately caused by the violations of law alleged in the complaint", a requirement flowing from the Special Master's duty "on behalf of the court to be satisfied of the liability of the defendants, as well as the proof, according to law, of the amount of damages claimed . . . ."

However, defendants' position cannot be sustained. Judge Metzner in his opinion noted that the Special Master's mention of a duty "to be satisfied of the liability of the defendants" might appear to be inconsistent with an earlier statement by the Special Master that "the defendants, at this point, do not have the right to produce evidence to try to establish in any manner that the allegations of the complaint other than as to damages cannot be maintained." Referring to this as an "ambiguity . . . which may need clarification", Judge Metzner stated that the conflict in approach was only an apparent one in light of the Special Master's entire opinion, that the matter was referred to the Special Master to "determine the amount of damages", and that "[l]iability is not an issue for the Special Master except in a very limited sense." The sufficiency of the complaint had already been upheld, and the default admitted all well-pleaded allegations of the complaint. Therefore, liability was an issue only to the extent that the defendants could show, within the rules laid out in Judge Metzner's opinion, that particular allegations in the

complaint were not well-pleaded. Thus under Judge Metzner's opinion (which is binding here), the reference to proximate cause in the Special Master's opinion is interpreted to mean that the plaintiff (as is customary) has the burden of establishing proximate cause, but that this burden is satisfied as to liability if proximate cause is adequately alleged in the complaint, unless the defendants are able to show that such allegations are not well-pleaded. It does not mean that the plaintiff must always prove proximate cause with evidence, regardless of a default.

This conclusion is fortified by the few authorities which bear upon the subject. In the recent case of *Jones* v. *Uris Sales Corp.*, 63 Civ. 2018 (S. D. N. Y. June 27, 1966), *affirmed* 373 F. 2d 644 on the basis of the District Court's opinion on this issue, Judge MacMahon rejected a similar argument by a defaulting defendant that the plaintiff had the burden of proving proximate cause in a hearing before a special master on the question of damages:

> "Defendants' second contention, that even if the allegations are 'distinct and positive,' plaintiff must still prove 'a causal relationship between the allegation deemed admitted and the damage resulting therefrom,' is an obvious attempt to cripple the rule of *Thomson* v. *Wooster* by qualifying it. Defendants have cited no authority in support of their contention, and we seriously doubt that any exists. In any event, the causal relationship is stated distinctly in the complaint. . . ."

The implication of Rule 55, Federal Rules of Civil Procedure, also suggests that proximate cause can be admitted by a default. Under Rule 55, judgment can be entered without any hearing whatsoever if the amount of damages is fixed. Cf. *Ferraro* v. *Arthur M. Rosenberg Co.*, 156 F. 2d

212 (2nd Cir. 1946). If a plaintiff alleges that a defendant has proximately caused damages in a fixed amount, then clearly he is not required to submit further proof of proximate cause, since no hearing is required. It is only when the amount of damages is uncertain and unliquidated that a hearing must be held to fix the amount of damages. Furthermore, a plaintiff's proof of proximate cause may well require evidence in the possession of the defendant. To hold that a plaintiff must always prove proximate cause regardless of a default might allow a defendant to avoid a judgment by withholding such evidence, regardless of the sanctions of Rule 37.

Authorities applying state law, while also relatively scarce, also support this position. In *Putney* v. *DuBois Co.*, 226 S. W. 2d 737 (Mo. Ct. of App. 1950), proximate cause was deemed admitted by the default, and in other cases, a plaintiff was allowed to recover, apparently without offering proof of proximate cause. *State of Maryland* v. *Travelers Indemnity Co.*, 197 A. 2d 265 (Dist. of Col. Ct. of App. 1964); *Anderson* v. *Gallman*, 99 A. 2d 560 (Dist. of Col. Ct. of App. 1953); *Baltimore Transit Co.* v. *Mezzanotti*, 174 A. 2d 768 (Md. Ct. of App. 1961); *Osborn* v. *Gibson*, 309 S. W. 2d 15 (Mo. Ct. of App. 1958).

On the other hand, defendants (as in *Jones* v. *Uris*, *supra*) have been unable to cite any authority for the proposition that proximate cause, even if alleged, is not admitted by a default. The case of *E. V. Prentice Mach. Co.* v. *Associated Plywood Mills, Inc.*, 252 F. 2d 473 (9th Cir.), *cert. denied*, 356 U. S. 951 (1958), cited by defendants at p. 112 of their brief for the proposition that plaintiff must show proximate cause despite an admission of liability, is not in point. This was not a default case, and the defendant, while admitting a violation of the anti-

trust laws, specifically excluded the question of whether the plaintiff had suffered harm therefrom. Defendants' contention cannot be sustained, and plaintiff may rely on well-pleaded allegations in the complaint to establish proximate cause.

Insofar as required to explain the basis for award of damages in this Report, reference will be made in later sections hereof to other specific allegations of the complaint which are deemed to be well-pleaded. Unless a contrary conclusion is specified herein, all allegations of the complaint on which damages are awarded are taken by me to be well-pleaded.

Evidentiary Rulings

At the time that defendants tendered certain documents as their Exhibits 321, 322 and 323, judicial notice was taken of some portions (representing C.A.B. opinions and orders which were also contained in plaintiff's Exhibit 315), while decision was reserved as to the balance. Judicial notice will not be taken of these remaining documents.

For the most part, these remaining documents are motions, contracts and similar papers submitted to the C.A.B. in connection with the proceedings which resulted in the orders which have been noticed. Defendants have offered them either for admission into evidence or for judicial notice. Special memoranda of law have been submitted by both parties, and it is clear that defendants intend to use these documents to contest the allegations of the complaint, including paragraph 20 concerning conditions on the aircraft leases from Toolco to TWA. As indicated earlier, defendants do not have the right to introduce evidence to contest the allegations of the complaint as to liability, and

therefore the only question is whether these documents should be judicially noticed.

There is some question as to whether these documents are a proper subject for judicial notice. However, they will not be judicially noticed on grounds of relevance, even if they are viewed as otherwise fit for such notice. It is clear, as shown above, that judicial notice of these documents would at best be judicial notice of their existence and contents. It would not constitute judicial notice of the truth of what they contain. They would at best be mere evidence to be weighed with other evidence relating to such truth.

For judicial notice to be taken of a fact, the better view, in my opinion, is that such fact must be indisputable. While Wigmore in Volume 9 of Wigmore on Evidence, 3rd Ed., does take the position that a fact judicially noticed may be contested through the introduction of evidence and need not be indisputable, Morgan (in "The Law of Evidence, 1941-1945", 59 Harv. L. Rev. 481, 1946) takes the opposite view and holds that facts must be indisputable to be noticed. If indisputable, rebuttal evidence would be improper. McNaughton, in a preliminary draft of his proposed revision of Wigmore's chapter on judicial notice, accepts the Morgan view and holds that judicial notice should be limited to indisputable facts. McNaughton, "Judicial Notice—Excerpts Relating to the Morgan-Wigmore Controversy", 14 Vanderbilt L. Rev. 779 (1961). The distinction may not be of overriding importance in the normal case, since as a practical matter it may not make much difference whether the propriety of notice is argued before notice is taken or after. However, in a default case, the spirit of the Supreme Court cases dealing with the effect of a default and the rationale of Rule 37 require

that judicial notice not be used broadly to permit a contest on the merits of the complaint, and that judicial notice be limited to those facts which are indeed indisputable. It cannot be said that the facts recited in the documents submitted are indisputable, and that as a matter of law, plaintiff would not have been able to produce contradicting evidence. It must be remembered that in *Thomson v. Wooster,* the defendant was not permitted to introduce a government document (a patent) in his effort to dispute the allegations of the complaint. Even though that patent would have been strongly presumptive of the invalidity of a reissued patent, the court went to great lengths to point out hypothetical means by which the two might be reconciled.

Defendants also argue that the documents as to which decision was reserved should be noticed on the ground that they are necessary for a full understanding of those opinions of the C.A.B. which have been noticed. However, the meaning of these noticed opinions is clear on their face, and in any event, since they would not be sufficient to disprove the allegations of the complaint, there is no reason for further detailed elucidation.

Other C.A.B. documents which have been considered are those offered as Defendants' Exhibit 358A, B, C and D. These are reports filed by various airlines with the C.A.B. showing acquisition of aircraft, and are cited by defendants in an effort to disprove the allegations of the complaint concerning Toolco's engagement in the manufacture of aircraft (Defendants' brief, p. 56). Defendants' brief suggests at pp. 46-47 that plaintiff has objected to this exhibit. However, plaintiff did agree that the reports were appropriate for judicial notice (Tr. 9590), and although intimating that an objection might be made on other

grounds, no such objection was raised. This exhibit has been considered, but it is insufficient to disprove the allegations of the complaint, for the reasons set forth above.

Certain other C.A.B. documents were introduced which bore not on the issue of liability but rather on the amount of damages. Decision was reserved at the time as to these exhibits, Defendants' Exhibits Nos. 255, 259 and 261, which bear on the issue of overcapacity in the airline industry during the early 1960's when TWA claims that it should have had more jets. Exhibit 255 is a statement before the House Subcommittee on Appropriations on January 29, 1963 by the Chairman of the Civil Aeronautics Board. Exhibit 259 is a C.A.B. order relating to a United Air Lines fare proposal, and Exhibit 261 is a letter from the President of United Air Lines to the Chairman of the C.A.B. in response to that C.A.B. order. Judicial notice will be taken that Exhibits 255 and 259 were issued, and Exhibit 261 (which is of questionable standing for judicial notice) will be deemed admitted into evidence. Neither the Chairman of the C.A.B. nor the President of United were available for cross-examination, but their statements have been considered for their appropriate evidentiary worth.

One other ruling on an evidentiary matter was handled separately, at request of defendants' counsel. They requested a ruling prior to filing of briefs on the introduction into evidence of DX 364 for identification. On June 13, 1968, I sustained the plaintiff's objection to such introduction. Defendants' counsel in their brief have requested reconsideration of my ruling. I have reconsidered it in the light of said request, and adhere to my former ruling which is set forth below in full:

"During the hearing on damages (transcript page 10,698) defendants offered in evidence certain portions

of the deposition of Emmet Osborn Cocke, a director and officer of plaintiff Trans World Airlines, which were marked for identification as Defendants' Exhibit 364. This deposition had been taken in the course of the discovery proceedings prior to the entry of the default against defendants. Plaintiff objected to the receipt of Exhibit 364 into evidence, and a ruling on the objection was reserved by the Special Master. That objection is now sustained for the reasons set forth below.

"Although Rule 26(d)(2), F.R.C.P. permits the deposition of an officer or director of a party to be used by an adverse party 'for any purpose', Rule 26(d) nevertheless makes clear that a deposition may be used only 'so far as admissible under the rules of evidence.' To the extent that proffered evidence bears on the amount of damages, it is within the scope of the hearings on damages in this case and the normal rules of evidence apply. On issues of liability, however, the rules of evidence have been substantially modified by virtue of the default. As to liability, the default has admitted the well-pleaded allegations of the complaint, and allegations bearing on liability may be contested only within the limits set forth in Judge Metzner's opinion of November 16, 1965 (38 F.R.D. 499).

"An examination of the proffered pages of the Cocke deposition shows that they are concerned with issues of liability rather than the amount of damages. For the most part, they deal with the proposed merger between TWA and Northeast Airlines, certain aspects of TWA's jet acquisition program, and the circumstances surrounding the institution of the present antitrust action. These proffered pages do not qualify for consideration on such issues of liability under the rules laid down in Judge Metzner's opinion.

"The only portion of Judge Metzner's opinion which might justify admission of Exhibit 364 is the reference in that opinion to 'uncontroverted material in the file

of the case.' There is substantial question whether this deposition represents 'uncontroverted' material and whether plaintiff had 'full opportunity to meet or controvert such material.' However, aside from this question, the deposition would not appear to be entitled to consideration. Mr. Cocke's deposition was not admitted into evidence prior to the default and does not constitute a part of the formal record in this case. If Mr. Cocke were called as a witness at this time, his testimony would be inadmissible because it would constitute a presentation of evidence on liability which is prohibited by the default. It is hard to see how Mr. Cocke's deposition can be admitted into evidence if his live testimony could not.

"There is also some question as to whether the deposition is admissible in light of the contention that plaintiff has had no adequate opportunity for cross examination, and a further question as to the relevance of many of the pages offered. However, there is no need to reach these questions in light of the considerations set forth above.

"The objection is sustained."

Other evidentiary rulings more appropriately appear hereafter in the discussion of the damage claims.

Damage Claims

The plaintiff's damage claims will now be discussed in the following Sections:

I. Losses in operating profits due to inadequacy of jet fleet caused by delays in delivery and failure to deliver jets.

   (A) International division losses.

   (B) Domestic division losses.

   (C) B-331B's.

   (D) Mitigation claim.

   (E) Adjustment in interest cost.

   (F) Damages under Section I.

II. Losses due to being required to lease jets from Toolco instead of buying jets from the manufacturers.

III. Losses connected with financing the jets.

IV. Losses due to delay in disposal of displaced piston aircraft.

V. Losses due to disruption of business.

VI. Alternative over-all claim for damages based upon comparative profitability study.

VII. Interest on damage claim.

VIII. Recapitulation and final award.

I. *Losses in Operating Profits Due to Inadequacy of Jet Fleet*

The plaintiff has elected, in its damage claims, to present specific evidence of damages with respect to only a

portion of the allegations of the complaint. The damages claimed are confined to those said to stem from actions of the defendants in the period from early 1955 to the end of 1960 when the Hughes-dominated board of directors of TWA was replaced, for management purposes, by independent voting trustees. In its claim for damages due to the inadequacy of its jet fleet (Section I) the plaintiff takes the position that the main effect of these 1955-60 actions of the defendants was felt by TWA in a period beginning in 1959 (when the planes TWA "should have" ordered in 1955 would have begun being delivered in substantial numbers) through the end of 1963 (when TWA's independent management achieved "a more nearly adequate fleet"). While actions of the defendants at earlier periods are alleged in the complaint, they are referred to by the plaintiff in the damage proceedings primarily for background purposes.

The complaint states:

"During this period [in or about October 1955] when other United States-flag air carriers were placing orders for jet powered aircraft, and thereafter, the defendants caused and directed TWA to forego making any arrangements for the acquisition, by sale, lease or otherwise of any jet powered aircraft (par. 17) • • • TWA has further been injured in the following manner:

(a) TWA was prevented from obtaining jet powered aircraft and was deprived of opportunity for adequate use of jet powered aircraft during the years 1958, 1959, 1960 and to date with a resultant loss in profits." (par. 52)

The complaint (pars. 9 and 10) also alleges that these actions of the defendants resulted from and were in furtherance of defendants' antitrust offenses.

It is undisputed that by 1955 aircraft manufacturers including Boeing and Douglas had prepared plans and drawings for the manufacture by themselves of jet powered aircraft intended for commercial use. At the same time the major U.S. air carriers were devoting substantial efforts to determine whether and how the jet powered aircraft then being developed by Boeing, Douglas or others could be best utilized by them.

Commercial jet aircraft concededly have a very great competitive advantage over piston aircraft or turbo-prop aircraft both in speed, comfort, efficiency and operating costs. From the first introduction of the jets into commercial service, passengers having the choice have chosen to travel by jet rather than by piston aircraft.

The principal witness of the plaintiff in support of its damage claim for loss in operating profits due to inadequacy of its jet fleet was Mr. Robert W. Rummel, Vice President, Planning and Research, of TWA. He joined TWA as a senior engineer in charge of new aircraft studies and future fleet planning in 1943. He became Chief Engineer of TWA in 1949 and held that position until 1956, when he was elected Vice President, Engineering. In 1959 he was appointed to his present position of Vice President, Planning and Research. From 1956 through 1960 he was also employed by Toolco as a consultant and special representative in connection with the acquisition of jet aircraft from Boeing and Convair, and the acquisition of jet engines. As Toolco's special representative during that period he reported directly to Hughes. He had authority to commit funds under Toolco contracts, and the Toolco factory representatives at Boeing and Convair reported to him as special representative of Toolco responsible for the technical administration of the Toolco contracts with such manufacturers (TWA Ex. 2).

Rummel testified that since 1943 he had been actively engaged in all of TWA's major aircraft procurement programs and had been intimately concerned both with the aircraft actually acquired through Toolco and also with aircraft which TWA considered for procurement. He stated that his activities included negotiations with aircraft manufacturers with respect to technical specifications, performance characteristics, provisioning and spare parts, delivery schedules and acceptance tests. He was cross-examined extensively as to his qualifications as an expert. I find him qualified as an expert in these fields. I reserved decision on the admissibility of his prepared testimony (TWA Ex. 2) until I had an opportunity again to review it in the light of the case as a whole.

In accordance with the foregoing discussion of the effect of the default, defendants' general objections (Nos. 1 and 2) to the testimony of Rummel, which were also reasserted as to plaintiff's other witnesses, are overruled. The first objection was founded on the argument that plaintiff had the burden of proving all allegations which were omitted by Special Master Rankin in his Interim Findings, and the second objection was based on the argument that plaintiff bore the burden of introducing evidence to prove proximate cause, regardless of the default. Neither of these positions can be sustained, for the reasons set forth above. Decision had also been reserved as to certain of the specific objections in part 3 of the objections to the testimony of Rummel (specific objections 4, 5(a), 10, 11, 12, 13, 14, 15, 18, 19 and 21), and these objections are also hereby overruled.

Similarly, I reserved decision on the admissibility of the prepared testimony of the witnesses for the defendants. I now rule that such testimony is likewise admitted into evidence. I likewise decide that the experts called by

the plaintiff and defendants as witnesses in these proceedings were qualified for the purposes for which they appeared.

Rummel testified that although TWA's principal competitors, both on domestic routes and on international routes, were engaged in serious negotiations for acquisition of jet aircraft either with Boeing or Douglas during the last six months of 1955, TWA and Toolco, which were during this period in all respects closely controlled in aircraft procurement matters by Hughes personally, did not engage in negotiations reasonably calculated to preserve TWA's competitive position in the industry for early deliveries of jet aircraft. Rummel also testified that he had recommended negotiations with Boeing before and during this period for acquisition of a jet fleet for TWA, but that Hughes did not authorize negotiations with Douglas and informed Boeing that Toolco and TWA were interested in ordering the Boeing jets only if Toolco could obtain a large priority in delivery positions (vis-a-vis its competitors). He also testified that Boeing refused this demand on the ground that it would wreck its commercial program.

Rummel testified that in general the major air carriers which placed orders first obtained the most advantageous delivery positions. He stated that in order for TWA to obtain competitive equality in early jet deliveries, TWA, Pan-Am and American Airlines, Inc. (American) would have had to commence and continue serious negotiations looking toward a commitment with Boeing for long range jets at about the same time; also, all three carriers would have had to have placed orders for these Boeing aircraft at about the same time. He stated that "at about the same time" does not mean that the actual signing of contracts or letters of intent must be simultaneous, since execution

of such formal documents is not the significant factor; and that minor differences in final contract dates are not significant so long as the negotiations have been substantially contemporaneous. He also testified that the size of the order would play a role in priority of delivery positions; that in fact the major carriers did place large orders and got priority of deliveries; and that a carrier's potential total order was more important than the size of the first order. He testified in detail, as hereinafter set forth, as to his estimate of the delivery dates that the plaintiff could have achieved and would have achieved if it had not been prevented by the defendants from ordering jets during the period under consideration.

The defendants have failed to disprove, in any manner open to them in the light of their default, that they prevented TWA from entering into negotiations with Boeing as alleged in the complaint or that Toolco failed seriously to negotiate with manufacturers during the latter half of 1955, all contrary to Rummel's advice and to TWA's demonstrable competitive needs, with the result of keeping TWA from ever getting as favorable delivery positions for long-range jets as those obtained by TWA's principal competitors in the years in question.

Mr. Ralph Damon, the then President of TWA, advised the Board of Directors of TWA on December 9, 1955 of the substantial orders for jets by TWA's principal competitors and pointed out that these jets would be coming into competition with TWA possibly in 1959 and surely in 1960 and 1961, at which time "Every airplane which TWA now owns or has on order or option will be either totally obsolete or heavily outclassed in speed, comfort, passenger acceptability and economics on competitive routes." (DX 44).

In his report to the Board he also predicted that any airline which did not have comparable equipment by that time would be practically out of business soon thereafter. Rummel testified that Damon had been kept out of any participation in the consideration of jet equipment by Hughes.

Hughes finally authorized negotiations with Boeing for acquisition of jets, presumably for TWA, in late December 1955. A protective order for eight delivery positions for Toolco for B-131s was secured from Boeing on January 6, 1956 (D Ex. 47). A contract for eighteen B-331s was entered into on March 19, 1956. Additional B-131 jets were ordered in a series of contracts entered into between March 2, 1956 and January 10, 1957, with an ultimate total of fifteen (TWA Ex. 2, p. 8; Ex. R-1; Ex. R-2; D Ex. 66, 67). The numbers of B-331s and B-131s finally fixed upon were based upon discussions between Rummel and Hughes as to the proper number of Boeing aircraft for TWA's foreseeable needs for long range jets as of that date.

The delivery dates for these Boeing jets were later than those obtained by the plaintiff's chief competitors. These aircraft moreover were not to be purchased by TWA but were to be purchased by Toolco, with Toolco retaining the power to make a later decision as to their ultimate use and destination.

Later, in April 1956, Hughes caused Toolco to enter into a contract with Convair for thirty CV-880 medium range jet aircraft which had been recommended to him by Rummel for inclusion in TWA's projected jet fleet. (See complaint par. 17.) Here again Toolco retained the power to make a later decision as to whether the planes would go to TWA (TWA Ex. R-3, R-4.) The plaintiff does not complain that the medium range jets should have been ordered earlier but

does allege that the defendants interfered with the production of the planes and caused late deliveries of some of the jets and diverted others of them to Northeast and prevented delivery to TWA of still others.

Experts for both plaintiff and the defendants submitted estimates of the changes in TWA's operating revenues and expenses which would have occurred if the additional aircraft had been secured and the existing aircraft had been delivered earlier. Their estimates were made on the basis of the following premises:

(a) TWA would have received six additional Boeing B-331 aircraft (long range jet aircraft suitable for non-stop trans-Atlantic operations) which were diverted to Pan-Am.

(b) Fifteen Boeing B-131 aircraft (a slightly shorter range jet suitable for trans-continental operations but not well suited for trans-Atlantic operations) and twelve B-331 aircraft, which were actually received by TWA, would have been received on earlier delivery dates.

(c) Twenty CV-880 aircraft, which TWA actually received, would have been received on earlier delivery dates.

(d) Ten additional CV-880's would have been received.

Estimates of the delivery dates for the additional Boeing and Convair aircraft in categories (a) and (d) and of the earlier "reconstructed" delivery dates for the aircraft in categories (b) and (c) were prepared by Rummel. The B-131 and CV-880 aircraft were all used in TWA's domestic operations, and the delivery dates are discussed in the section of this opinion dealing with domestic operations. The B-331 aircraft were used in both international and domestic operations. As to these, Rummel prepared a table

showing the improvement in delivery position he estimated that TWA would have achieved, taking into account both the six additional planes (which had been diverted to Pan-Am) and the delays in delivery of the twelve other Boeing B-331 jets. The table, shown below, lists in the first column the actual receipt date for the twelve B-331's by TWA and the actual receipt dates for the six additional B-331's by Pan-Am. Since all eighteen were part of the original Toolco contracts with Boeing, the delivery dates for all eighteen would have been advanced by making timely orders. The actual delivery dates were earlier than the contract delivery dates, so are used by the plaintiff in computing its damage estimates. Opposite each "actual receipt date" is the "reconstructed earlier receipt date" fixed by Mr. Rummel on the assumptions hereinafter described.

Actual Receipt Date	Reconstructed Earlier Receipt Date
*November 5, 1959	*July 19, 1959
November 10, 1959	August 22, 1959
November 10, 1959	August 28, 1959
November 25, 1959	September 22, 1959
*December 15, 1959	*October 6, 1959
December 23, 1959	October 27, 1959
*December 30, 1959	*November 5, 1959
January 18, 1960	November 10, 1959
*March 23, 1960	*December 15, 1959
April 1, 1960	December 30, 1959
April 5, 1960	January 18, 1960
April 14, 1960	February 29, 1960
*April 29, 1960	*March 23, 1960
May 9, 1960	April 26, 1960
May 25, 1960	April 29, 1960
*June 8, 1960	*May 9, 1960
July 1, 1960	June 8, 1960
July 1, 1960	July 1, 1960

* Diverted to Pan-Am

(In the case of two of the planes, Toolco failed to make payment when they were ready for delivery so the "ready for delivery" date is used in the above table rather than the "actual receipt" date.)

Since the B-331 aircraft were used by TWA in both international and domestic operations, the added availability of these planes was allocated between the international and domestic operations of TWA in the same proportion as the allocation actually made by TWA of its B-331 aircraft during this period. The details of this allocation of the additional B-331 availability are shown in the sections of this report dealing with TWA's international and domestic operations. As to responsibility for diversion of the six B-331 aircraft to Pan American, I have already rejected defendants' argument that ratification of the assignment by the Hughes-dominated TWA Board of Directors is sufficient, under the rules of the default, to relieve defendants of responsibility for this portion of plaintiff's claim.

The Rummel testimony was corroborated in many significant aspects by the testimony of Mr. J. B. Connelly, Vice President and Assistant General Manager of Boeing's Aircraft Division. (TWA Ex. 3) Connelly testified that he was familiar with the development, production, sales and deliveries of commercial jet aircraft by Boeing during the period 1954 to 1961 and in particular the jet aircraft known as the Boeing 707-120 and the Boeing 707-320 series.

The policies followed by Boeing concerning the sale of commercial jet aircraft to commercial air carriers throughout the period 1955 to 1961 were testified to by Connelly. He testified that he participated in and was generally familiar with the negotiations between Boeing and Pan-Am, between Boeing and American and between Boeing and Toolco as well as other air carriers. He stated that in 1955

Boeing wished to sell substantial numbers of 707 jet aircraft to TWA. This included the 707-330 Series, long-range jets suitable for TWA international service. (The configuration later chosen from this Series for TWA's use was designated as B-331.) It also included the 707-120 Series, suitable for transcontinental service. (The configuration in this Series chosen for TWA was B-131.)

Connelly testified that Boeing would have afforded TWA substantially as early delivery positions as those afforded to other customers of comparable interest to Boeing. He stated specifically that had TWA commenced negotiations and ordered jet aircraft comparable in number to those ordered by Pan-Am and American, respectively, at about the same time as such other customers ordered jet aircraft from Boeing, Boeing would have afforded TWA substantial equality in early delivery positions with Pan-Am and American. He stated that Boeing would have sought to provide substantial equality of early delivery positions as between Pan-Am and TWA for planes used primarily on international routes and substantial equality of early delivery positions as between American and TWA as to aircraft used primarily on domestic routes. He stated that Boeing would have agreed, assuming that TWA had placed such orders, to deliver and would have delivered to TWA jets of the B-120 and B-320 Series earlier than such aircraft were in fact delivered under the Boeing agreements with Toolco. He further testified that he had examined the "Statement of Improvement of Delivery Positions", prepared by Rummel and hereinafter discussed, and expressed the opinion that it constituted a reasonable estimate of the improvement in delivery positions which TWA would have obtained. With reference to the six B-331 jets which were originally ordered by Toolco and were later

delivered by action of Toolco to Pan-Am instead of TWA, Connelly corroborated the testimony of Rummel as to the earliest delivery positions Pan-Am could have obtained from Boeing for six such jets if they had been ordered from Boeing in July 1959. The Connelly testimony was not seriously controverted.

The Rummel and Connelly testimony reinforce the above-quoted allegations of the complaint in respect of the inadequacy of the plaintiff's long range jet fleet caused by action of the defendants.

In view of the fact that the "reconstructed" TWA possessed six additional Boeing B-331 jets and ten additional CV-880 jets, it was assumed that this larger fleet would have rendered unnecessary certain additions to the TWA fleet which were made when the management of TWA was turned over from the Hughes interests to independent voting trustees in December 1960. It was assumed that TWA would not have acquired five B-331B (fan jet) aircraft which it leased in 1962 and 1963, and that it would not have acquired six CV-880 aircraft which it purchased in 1963. However, it was assumed that even with the larger "reconstructed" fleet, TWA would nevertheless have acquired the four B-720B aircraft (a later model Boeing medium range jet) which were leased during 1961 and 1962, and would also have purchased the eighteen additional B-131B aircraft (fan jets) which it received in 1962.

The foregoing assumptions, which set forth a hypothetical jet fleet for TWA in 1959-1963, constitute the basic equipment premises for the estimates of the expert witnesses for both plaintiff and defendants. As to the piston fleet which would have been operated by TWA during this period, each expert made such adjustments in TWA's actual piston operations as, in his opinion, would have accompanied the hypothesized jet operations.

Defendants argue that there is no certainty that the hypothetical jet fleet recommended by Rummel, which forms the basis for that part of the plaintiff's damage claims due to inadequacy of its jet fleet, would in fact have been implemented by the plaintiff under an independent management. They stress that Rummel was not chief executive officer of TWA nor in any position to impose his equipment views on the Board of Directors. They cite various inter-office memoranda, introduced into evidence, indicating that there was a running exchange of comments, and differing opinions, among TWA officers and staff members from time to time over the types and amounts of jet equipment to be purchased. Defendants also introduced in evidence various opinions expressed by CAB officials, trade magazine editors and airline executives, including some TWA officials, to the effect that airlines may have overbought jet equipment capacity and would suffer adverse financial consequences if they did not cut back their jet programs. They conclude that the plaintiff's expert testimony is too speculative to be accepted as a basis for damages.

Given the well-pleaded allegations of the complaint, however, the testimony of Rummel, who was chief procurement officer for the plaintiff at the time and an equipment procurement representative of Hughes, as well as the Connolly testimony, and the evidence that the assumed additional fleets of B-331s, B-131s and CV-880s were in fact ordered in the same type and quantity by a Hughes-dominated TWA, although at later dates, I am of the opinion that the hypothetical jet fleet and reconstructed delivery dates constitute a proper basis for computing damages under this Section I. The evidence of the plaintiff's experts as to the reconstructed jet fleet is well within the standards of distinctness and positiveness of proof allowable in default sit-

nations under the doctrine of *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946).

By way of orientation for the detailed discussion which follows showing the methodology used by the various experts in making up their estimates of damages due to the inadequacy of TWA's jet fleet, it should be stated at this point that estimation of the changes in TWA's operating revenues requires a consideration both of the added revenues and costs that would have accompanied additional jet operations and of the decreased revenues and costs that would have resulted from eliminated piston operations. The estimates of revenues and costs produced by the plaintiff's experts and the defendants' experts were dramatically different (see Tables pp. 59 and 83). The plaintiff's experts estimated that TWA would have experienced an increase in net operating profits after appropriate adjustment for depreciation for the years 1959 through 1963 in the amount of 51.7 million dollars, whereas the defendants' experts estimated that if TWA had acquired and operated the hypothetical jet fleet as assumed by the plaintiff, it would have experienced a decrease in net operating profits after depreciation adjustments for these same years, of 95.91 million dollars. The defendants' brief states at page 220:

> "It was not, of course, Simat's [expert witness of defendants'] opinion that the management of reconstructed TWA would have permitted such staggering losses to accumulate. Management could have drastically cut schedules * * * but while such measures might have avoided the dire consequences of operating Wemple's [expert witness of plaintiff] added plane miles, they would not have sufficed to put the added fleet in the black."

At this point I shall separate the claims of the plaintiff with respect to the adequacy of its jet fleet into divisions

A and B, i.e., between claims for loss of operating profits of its International Division and claims for loss of operating profits of its Domestic Division.

(A) *International Division*

It will be useful, I believe, from time to time while reading the ensuing discussion as to the International Division to refer to the table which follows, comparing the amounts of the estimates of experts retained by the plaintiff and defendants. The table is a portion of plaintiff's Ex. 420 (Sch. C).

(Table reproduced on following page)

As to the International Division, the plaintiff's claim as shown on foregoing Table is for $22.4 million damages. It may usefully be divided into two parts. First, the reduction of the plaintiff's projected Boeing jet fleet by the conceded diversion of six of the eighteen B-331 jets by action of Toolco to Pan-Am, TWA's principal transatlantic competitor, at a time when fierce competition existed for the lead in the jet service on international routes (cf. complaint, pars. 9, 10). The amount of damages claimed by reason of this diversion is $17.6 million. Second, the delays in the delivery of that fraction of the B-331 jets assigned to the International Division which resulted from the original equipment orders being delayed by Toolco until after the earliest delivery positions for the long range jets had been preempted by Pan-Am. This second claim is for $4.8 million.

Revenues—First Part

The plaintiff retained the firms of Coverdale & Colpitts (sometimes referred to as "Coverdale") and Price Waterhouse & Co. to calculate the change in operating profits based upon the foregoing assumptions.

Coverdale, with its predecessor firm, is a nationally known firm providing consulting engineering and financial services to industry and government. It conducts industrial studies involving mergers and reorganizations, management appraisals, transportation and product pricing analyses, plant location and operations studies. These studies have included all forms of transportation including air transportation. The Coverdale study in this case was presented through the direct testimony of Edward L. Wemple who has been a partner in the Coverdale firm since 1956. Studies in the airline field which have been made under his supervision have included analyses of operations programs for TWA, Flying Tiger Line and British Overseas Airways, as well as traffic and revenue studies for various airports, including O'Hare International Airport. He is a member of the American Institute of Consulting Engineers.

Before discussing the Coverdale report on the additional B-331 planes, it should be remembered that these planes were assumed to have obviated the leasing of five B-331B aircraft in 1962-1963. The international service actually operated with the B-331B aircraft were assumed to be performed by the additional B-331's. Revenue and cost figures were adjusted accordingly by all expert witnesses.

The Coverdale estimate of changes in operating profits relating to the six diverted B-331s will now be summarized. It starts with a computation from TWA equipment records of the annual average number of additional B-331 Boeing

jets that would have been available for commercial service for the International Division if there had been no transfer of the six B-331s to Pan-Am by action of Toolco and these planes had been in TWA's service (a jet in service for one-tenth of a year would show as one-tenth of a jet in the annualized figures):

The computation of such annual average number of additional jets is as follows:

1959	0.2	B-331s
1960	3.6	"
1961	3.7	"
1962	4.8	"
1963	0.9	"

Coverdale relied on actual TWA experience as to the time ordinarily elapsing between the date of receipt of a plane and the date of commencing service in fixing the date when an aircraft was "available for commercial service." Aircraft "available for commercial service" is a term which is defined to include not only aircraft actually employed in revenue-producing activities, but all other owned or leased aircraft on hand, once commercial service has been inaugurated with aircraft of the same type. (See TWA Ex. 4(c)(4), Ex. B, C; Tr. 4653-62, 4695-4703.) Thus the term includes aircraft not overhauled, aircraft being used for pilot training activity and other similar non-productive aircraft.

Coverdale assumed that an increase in the number of aircraft available for commercial service would produce a proportionate increase in plane miles flown, thus allowing for maintenance, training and other non-productive employment of the additional aircraft on a basis exactly proportionate to TWA's historical experience in the same year with aircraft of the same type. The Coverdale computa-

tions also implicitly assume that in any given year additional aircraft of any type would be employed in operations substantially similar in kind to those in which aircraft of the same type were employed by TWA in the same year.

The assumed additional aircraft available for commercial service in the International Division would have produced additional passenger revenue jet plane miles, as follows:

1959	0.1	million	miles
1960	6.3	"	"
1961	6.6	"	"
1962	8.4	"	"
1963	1.5	"	"

The estimates of these additional jet plane miles were obtained by applying the experienced annual utilization for the B-331s in a particular year to the assumed additional availability of that type of jet in the same year.

Coverdale then estimated the corresponding reduction of the number of piston aircraft miles. This estimate was based on determining the ratio between the increase in all jet plane miles flown historically in the International Division in a given year over those flown in the preceding year, and the decrease in all piston plane miles flown in this Division between the same two years, and estimating that a further increase in jet plane miles would have produced a further and proportionate decrease in piston plane miles for that year.

The corresponding reduction of piston passenger revenue plane miles was as follows:

1959	0.1	million	miles
1960	5.1	"	"
1961	1.6	"	"

These reductions would have been piston plane miles flown by Lockheed L-1649As and are obtained by applying

to the experienced annual utilization for the L-1649As in a particular year in the International Division their assumed lesser availability in that year.

The ratio of the number of transatlantic flights to millions of plane miles being fairly uniform, the number of assumed increased transatlantic flights was then computed on a basis directly proportionate to the net increase in plane miles; and on the basis of seating capacity of the B-331 aircraft, the number of increased available seats was computed, with the following results:

	Additional Flights	Additional Available Seats
1959	—	1.1 thousands
1960	228	89.1 "
1961	987	154.3 "
1962	1,793	251.0 "
1963	311	44.0 "

The additional seats in 1959 resulted from using aircraft of greater seating capacity, even though the number of flights remained the same.

The international operations of TWA consisted of transatlantic flights and continuation of certain of these flights "beyond the gateway" (the gateway being the point at which the eastward transatlantic flight made its first European stop). It was conceded there is no source to obtain the industry figures for the number of "beyond the gateway" scheduled passengers (Tr. 8498). It was accordingly assumed by Coverdale that increased TWA service for the International Division would have been divided between scheduled transatlantic operations and other international operations as historically divided.

During the years in question, the figures submitted by the plaintiff's experts showed a very close correlation between TWA's percentage of the total available transatlantic seats

and its percentage of total transatlantic passengers on all airlines constituting the members of the International Air-line Transportation Association (IATA). Their estimate of additional TWA transatlantic passengers which would have been obtained is therefore obtained by taking the increased percentage of seats and proportionately increasing the number of passengers.

Here it should be noted that in estimates for 1959-60, the additional seats offered by TWA would have been, in effect, a transfer of seats from Pan-Am to TWA, because TWA's additional aircraft would have been transfers of the six diverted B-331s from Pan-Am and there would have been no increase in the total U. S.-airline available transatlantic seats; but since Pan-Am could have obtained delivery of other similar jets from manufacturers in the spring of 1961, the annual total numbers of transatlantic seats available for the years 1961, 1962 and 1963 were assumed by the plaintiff to have been increased by the number of additional seats that would have been offered by TWA.

The industry competitive factors in 1959-60 were markedly different in international travel from the 1961-63 period. Notice of these differences is taken in discussing damage theories hereinafter.

The calculation of TWA's additional transatlantic passengers in accordance with the above premises produced the following results:

	Actual Passengers	Revised Number of Passengers
1959	146 thousand	147 thousand
1960	243 "	298 "
1961	208 "	275 "
1962	277 "	382 "
1963	359 "	377 "

There were then computed the additional revenues which would have been received by TWA in respect of these additional passengers. This was done by taking the actual International Division passenger revenues for each of the five years in question and increasing them by the same percentage as the increase in the number of TWA transatlantic passengers for each year in question.

The additional passenger revenues, so calculated, are as follows:

1959	$ 0.6	million
1960	18.9	"
1961	20.4	"
1962	29.5	"
1963	5.3	"

There was additional assumed revenue from mail, express, freight and excess baggage which all experts estimated at 5% of the assumed additional passenger revenue. The total estimated additional revenue from the assumed six additional B-331s was therefore $78.4 million for the International Division.

Hereafter we will discuss the estimates of the plaintiff's experts as to the amount of attendant increased operating expenses which amounted to $60.8 million leaving the net additional revenue of $17.6 million as the amount of the plaintiff's damage claim for the International Division with respect to the six additional B-331s transferred by reason of the action of Toolco to Pan-Am. Before reviewing the estimates for operating expenses, however, we will first discuss the computations of the defendants' experts with respect to the change in operating revenues related to the International Division from these six assumed additional B-331s.

The defendants retained as their experts to analyze the Coverdale estimates, and to prepare their own estimates

of changes in operating profits, the firm of Simat, Helliesen & Eichner, Inc. (sometimes referred to as "Simat").

The report of Simat was presented through direct testimony of Messrs. Nathan S. Simat, Robert I. Helliesen and L. John Eichner, officers of that organization. The Simat organization was formed in 1963 and engages in economic and transportation studies for government and private clients. It has conducted studies for various air carriers from every sector of the air transport industry. Simat was for many years employed by the Civil Aeronautics Board as a transportation economist. As Head Economist of the Analysis Division of the CAB, he prepared numerous operating and financial analyses dealing with air traffic, revenues and costs, feasibility of equipment purchase programs and he appeared in numerous commercial rate and mail proceedings. As Chief of the Certificates Section of the Routes Division of the CAB he prepared or supervised the preparation of studies dealing with the economic consequences of adding and deleting air services. He has acted in management and economic consulting capacities for Northeast Airlines and Sabena Belgian World Airlines.

Helliesen was for some years employed by American Airlines, Inc. in various economics and marketing capacities and held the office of Director of Schedule Planning and Business Research in that company. He has done economic research for the Air Transport Association of America in connection with the CAB general passenger fare investigation and has also been retained by the Convair Division of General Dynamics. He formed the Aircraft Exchange, which provided regular market reports of bids and offers for the purchase, sale and lease of used transport aircraft, and served as its head in 1958-1962. He joined the Simat organization in 1965.

Eichner served in responsible positions with Capital Airlines, Trans-Texas Airlines and from 1961 to 1966 was Assistant Vice President of Corporate Planning for American Airlines, Inc., where his duties included the preparation of special studies and forecast of revenues, expenses and ground facilities for various types of air equipment. He joined the Simat organization in 1966.

The Simat report assumed the same reconstructed earlier delivery dates for the jet equipment as the Coverdale report, and assumed all the other equipment assumptions of the Coverdale report, so that the size of the hypothetical jet fleet in both reports for the five year period 1959-1963 is identical. The defendants' experts used the Coverdale estimates for the number of added and deleted aircraft and aircraft miles and further used the assumption that all deleted piston aircraft services in TWA International Division had been operated with L-1649A aircraft. They also testified that it was not unreasonable to use the percentage share of available IATA transatlantic seats as a guide for estimating TWA's percentage share of transatlantic passengers and accordingly used the same number of TWA transatlantic seats assumed to be added.

It was their opinion, however, that Coverdale's estimate that TWA could increase its share of available transatlantic seats was erroneous. Simat's opinion was that the transatlantic market is the leading international air travel market in the world and the object of vigorous competition by nearly 20 air carriers exclusive of supplemental and charter carriers and that it was difficult, if not impossible, to conceive of a market where a likelihood of unilateral competitive action without response from other carriers in the market, is more remote.

Under this theory of "competitive response" developed by defendants' experts, and more fully stated hereafter, the reconstructed estimates for additional transatlantic passengers by Simat were:

1959	146 thousand
1960	281 "
1961	255 "
1962	343 "
1963	368 "

The opinion of Simat on this theory of competitive response was that Pan-Am, as TWA's principal transatlantic competitor, would have taken some of its long range jets off of its other international flights to maintain its "historic ratio" of available transatlantic seats vis-a-vis TWA, or else it would have retained some of the piston seats which were historically retired, or both. Simat was also of the opinion that foreign airlines would have likewise responded competitively. He selected the second and third quarters of the years 1960-63 (omitting the first and fourth quarters when various airlines observed different policies in the seasonal reduction of weekly frequencies) and noted that in these selected quarterly periods, for each flight (including pistons as well as jets) added by TWA, the following "pattern of competitive response" in annualized average additional planes was shown in 1960, 1961, 1962 and 1963: In the second quarter of said years Pan-Am added .07, 1.3, 2.1 and 1.9; foreign flag carriers added 3.3, 4.2, 5.4 and 5.3; and in the third quarter of said years Pan-Am added 1.7, 1.8, 2.5 and 2.7; foreign flag carriers added 4.4, 5.0, 4.4 and 6.4.

It will be illuminating to discuss the defendants' arguments separately for the 1959-60 period and for the 1961-63 period.

Simat estimated that in 1959 Pan-Am would have transferred .04 jet aircraft (on an annualized basis) to the transatlantic service from its other international routes but that the foreign competitors, since it was assumed that no increase in the total transatlantic service of U.S. airlines would be involved, would not have responded competitively. For 1960 Simat first estimated that for each flight added by TWA, Pan-Am would have responded competitively by adding one flight and other foreign competitors taken as a group would have responded by adding one flight; but since he did not assume that the additional seats generated by TWA through the replacement of piston flights by jet flights would have engendered a competitive response, he adjusted his estimates of competitive responses to the net addition of .85 transatlantic seats by Pan-Am and the same by the other IATA carriers for each seat that would have been added by TWA.

Conclusions as to Revenue Estimates

The severe worldwide shortage of jet equipment through 1960 was such in my opinion, as to make the assumed transatlantic competitive response unrealistic for the 1959-60 period. It is reasonable to assume that TWA's usage of the six diverted B-331s would have been proportionately the same as its usage of the curtailed fleet it did acquire, and thus that approximately one-third of the diverted six B-331s would have been used domestically by TWA. The total U.S. airline competition on the transatlantic route would thus have involved the use of two fewer jets during these years, thus appearing to rule out any probability of "competitive response" from foreign lines. As to Pan-American, piston aircraft with their higher cost and lower attractiveness were in no position to compete effectively

against jets. On cross-examination of Simat, it was brought out that essentially there was no "historical pattern" of response by competitors to additional TWA transatlantic service. The ratio of such TWA to Pan-American service, for example, varied from 53% to 82% in the years leading up to introduction of the jets (Tr. 8378).

Also it was shown that in 1960 TWA historically increased its percentage of transatlantic seats vis-a-vis Pan-Am, without competitive response, indicating that Pan-Am made a management decision that it preferred to use many of its jets on other international services to maintain or improve its position there. If Pan-Am had not received the diverted planes, it presumably would have been in an even less favorable position to exert a "competitive response" on the transatlantic service during the years in question. Pan-Am faced jet competition, for example, on the Pacific routes where Quantas and BOAC were operating jets. When Pan-American did receive B-331s in quantity, it transferred the B-131s theretofore used on the transatlantic service to the Caribbean service, thus further indicating the need on its part to distribute its jet equipment on a worldwide basis. All airlines dropped piston service on transatlantic routes as jets became available, because of customer preference for jets.

Finally, no testimony was introduced as to the effect financially on the other worldwide operations of TWA's transatlantic competitors of transfer of jet service from these other international operations to the transatlantic route. In the absence of such figures, and considering the facts summarized above, it appears to be sheer speculation to conclude that the managements of the competing airlines would have automatically made a competitive response in any given ratio to the changed conditions on the transatlantic route.

Support for this conclusion also may be found in an examination of Pan Am's Pacific operations and a comparison of the profitability of these operations with Pan Am's Atlantic operations. The table below, comparing Pan Am's Pacific and Atlantic divisions for both seat miles and operating profit, is taken from statistics in the C.A.B. *Handbook of Airline Statistics* 1965 Edition, which has been frequently relied on by both sides. This comparison shows that in the years in question, except for transition year 1959, Pan Am's Pacific operations were far more productive on a revenue per seat mile basis than were its Atlantic operations. It cannot be lightly assumed that Pan Am would have sacrificed its earnings on the Pacific in order to match T.W.A. flight increases on the less profitable Atlantic route.

COMPARISON OF PAN AM PACIFIC AND ATLANTIC OPERATIONS

(000's omitted)

	Pacific Division		Atlantic Division	
	Seat Miles (000)	Operating Profit ($000)	Seat Miles (000)	Operating Profit ($000)
1959	1,397,428	5,557	2,447,837	17,469
1960	2,108,703	18,672	3,220,514	16,593
1961	2,525,397	21,689	4,361,135	4,468
1962	2,915,237	30,965	5,123,207	12,489
1963	3,267,904	38,814	6,007,142	33,273

Source: C.A.B. Handbook of Airline Statistics, 1965 Ed., Part III Tables 83 and 85, Part IV Tables 83 and 85.

As to the availability of jet aircraft for foreign flag carriers from non-competitive sectors, it is not known whether or not the profitability of these non-competitive sectors would or would not inhibit the shifting of jet aircraft to the Atlantic. Also, it is not clear whether the individual non-

competitive sectors recorded by Simat were not merely intermediate portions of a longer flight, which could not be deleted if the longer flight was to be retained, or that these sectors were operated with jet aircraft suitable for transatlantic operations.

Finally, there is no evidence that scheduling considerations would have permitted the shifting of aircraft from their actual routes to the Atlantic. For example, elimination of a short non-competitive flight by Pan Am or some other carrier might not free enough jet hours for an additional transatlantic flight, and even if sufficient hours were available, there is no evidence that they would have been available at times which were commercially attractive for transatlantic operations.

The defendants' experts stated a further objection to the plaintiff's method of calculating changes in operating revenues in that the plaintiff's experts assume that the categories of passengers other than scheduled transatlantic passengers included in the International Division ("beyond the gateway" and charter service passengers) would increase in the same percentage as for IATA scheduled transatlantic passengers. Defendants' experts produced statistics designed to show that TWA's actual experience demonstrated that "beyond the gateway" International Division passenger revenues, as defined by them, increased during the years in question at only 52% of the rate of increase for transatlantic IATA passengers; that the percentage of "beyond the gateway" passengers, as defined by them, to the total TWA International Division passengers dropped from 40.4% in 1959 to 29.5% in 1963; and that in terms of absolute numbers such TWA "beyond the gateway" passengers remained relatively unchanged over this period except for a "spurt" in 1963, while its IATA transatlantic passengers increased almost fourfold.

The evidence was conflicting as to the proper basis for measuring the volume of "beyond the gateway" passengers (Tr. 8506; TWA Ex. 340).

The plaintiff's claim for the 1959-60 period, however, does not rest upon any increase in traffic from year to year. It assumes only that whatever traffic moved in the International Division area would have been proportionately redistributed in its favor, if it had the assumed increase in number and betterment in quality of equipment. Transatlantic passenger figures of the industry are used as a basis for computations because they are admittedly accurate and constitute the bulk of revenues for the International Division, whereas no one was able to produce satisfactory International Division territory figures for the industry for estimation purposes (Tr. 8498). As to overall charter service in the area served by the International Division, it seems reasonable to assume, as the plaintiff did, that it is obtained for the transatlantic service generally in proportion to capacity offered, assuming the same type of equipment is used.

The plaintiff points out, finally, that the defendants' experts assume that if TWA had failed to obtain a favorable customer response to a larger jet capacity offered to charter customers and to "beyond the gateway" customers, TWA nevertheless would have continued the same proportionate distribution of its International Division jet aircraft between transatlantic service and these other services as it did historically. They stated that any rational management, during this period of jet shortage, would have promptly redistributed its aircraft assigned to the International Division so as to take advantage of the demand on the more profitable segments. If the more profitable segments consisted of transatlantic service, then service would have been transferred by management from the "be-

yond the gateway" service and the charter service to scheduled transatlantic flights.

As to the 1961-63 period, competitive conditions changed materially from the 1959-60 period. Jets had become available in greater quantity and the industry load factor dropped. Economic conditions were less favorable for international travel during most of the period. Piston service on the transatlantic route ceased, and TWA's comparative shortage of jet equipment in 1961 caused it rapidly to lose its market position. The plaintiff has assumed that in this period the total number of seats offered by the industry in general transatlantic competition would have increased because Pan-Am could have received delivery from Boeing directly of six B-331s which it decided to buy in 1959. Accordingly the plaintiff has estimated that TWA would have obtained its historical share of passengers based on the increased industry capacity. The net increase in operating profits estimated by the plaintiff for these years (on the basis outlined above) is substantially lower than for the 1959-60 period. The figures are as follows:

	Gross Estimated Additional Revenue	Estimated Increased Costs	Net Estimated Additional Revenues
1961	$21.4 million	$19.6 million	$1.8 million
1962	31.0 "	28.5 "	2.5 "
1963	5.6 "	5.9 "	(.3) "

For background purposes, it is noted at this point that during the 1961-63 period, Pan-Am's Atlantic Division historically made an operating profit of $50.3 million; and TWA's historic operating profit for this period in its International Division was $25.1 million.

The defendants make the same two points in respect of the 1961-63 period as discussed above to dispute the validity of the plaintiff's estimates—i.e.—"competitive response"

and disproportionate increase assumed for "beyond the gateway" and charter service. In reply the plaintiff makes several additional points in respect of the years 1961-63: (a) It is unrealistic and speculative to assume TWA's foreign competitors would have weakened their competitive position on other routes to meet such increased transatlantic competition as would have been produced by Pan-Am's assumed acquisition of six additional jets early in 1961. Pan-Am would have had during this period, under the posited assumptions, exactly the same number of jets that it historically had, and presumably would have distributed them worldwide as it historically did. (b) It is reasonable to assume that an increase in jet service by TWA with resultant increase in its proportion of total service offered by the industry, would have correspondingly increased its proportion of total traffic carried in its International Division.

The reasoning of the plaintiff appears to me to be valid and accordingly I accept the added revenue estimates in respect of the six diverted B-331s as computed by the plaintiff's experts for the International Division.

Estimates of Operating Costs

The added costs of operating the six additional jets in the International Division were computed in detail by the experts for the plaintiff and defendants. (See summary thereof in table on p. 83.)

A brief description of the methodology used by the plaintiff's expert in estimating changes in operating expenses attendant upon the assumed additional TWA operations in respect of the six diverted B-331s is set forth below. Changes in operating expenses are separately computed for the increases in jet operations and the decreases in piston operations. As to each category, hereafter described,

a determination was made of the extent to which it varied historically in the years in question as the scale of operations changed, and an estimate was made based on the assumption that further changes in the scale of operations would produce further changes in expenses on a proportionate basis. Following are the categories and the method used for each in computing the changes in expenses for the assumed changes in operations.

Flying operations and maintenance expense incurred for operating and maintaining aircraft were changed in proportion to the assumed changes in plane miles or number of aircraft available.

Aircraft servicing expenses which have to do generally with ground activities for aircraft were computed on the basis that the estimated net increase of plane miles operated would have been proportional to the increase in number of flights processed on the ground and accordingly plane miles were used as the index for calculation of changes in this class of expense.

Passenger service expense which has to do with passengers while in flight was computed insofar as cabin personnel is concerned in proportion to plane miles operated; and expenses for food supplies and liability insurance were varied in accordance with passenger revenues.

Traffic servicing expense which has to do with handling passenger and cargo traffic on the ground were varied in proportion to transportation revenues.

Service and administration expense which has to do with supervisory and administrative activities for servicing of aircraft and traffic was varied in accordance with changes in plane miles.

Promotion and sales expenses were varied in accordance with changes in transportation revenues.

General and administrative expense which has to do with corporation matters in certain activities such as financial, accounting, legal and general administration were varied in accordance with changes in transportation revenues.

Depreciation and amortization were computed by Price Waterhouse & Co. and certified by it as being appropriate under the assumed changes in equipment.

The detailed changes in operating expenses are set forth in the Coverdale Report, Volume I and summarized at pages 37 and 38 thereof by years.

The total increased costs found by the defendants' experts for this facet of the case were less than those found by the plaintiff's experts by reason of the fact that the defendants' experts had calculated costs on the basis of a smaller increase in traffic. The total added costs under this facet of the case found by the plaintiff's experts was $60.8 million; the corresponding total found by the defendants' experts was $51.9 million. If the estimates of the plaintiff's experts as to increased traffic and revenues for the International Division are accepted, and the cost estimates of the defendants' experts are recomputed on that basis but using their own costing methods, the recomputed cost estimates of the defendants' experts would be at least as low as those of the plaintiff's experts. Since the estimates of the plaintiff's experts are accepted by me as to traffic and revenues, their estimates as to operating cost should be accepted. Accordingly, at this point no detailed discussion of the different costing methodologies used by the experts for the International Division is called for.

Revenues and Operating Costs—Second Part of Claim

The second part of the plaintiff's claim as to the International Division, as stated above, is a claim for $4.8 million damages caused by delays in delivery of the 18 Boeing B-331 jets (insofar as a fraction thereof is assumed to be used in the International Division service) which resulted from orders therefor being delayed by Toolco until after the earliest delivery positions had been preempted by Pan-Am. The assumed earlier delivery dates would have affected operations only in 1959 and 1960 since the last of the B-331s was historically delivered in 1960.

There is agreement between the experts that the annual average added B-331 aircraft for the International Division under assumption of the earlier deliveries of the twelve B-331 jets for 1959 would be .9 aircraft and for 1960 would be .6 aircraft; that the added jet aircraft miles would be 1.6 million miles for 1959 and 1.1 million miles for 1960; that there would be a reduction of 1.6 million piston aircraft plane miles in 1959 leaving the International Division total plane miles unchanged; that there would be no reduction of piston plane miles in 1960 and accordingly the net increased plane miles for the International Division in 1960 would have been the same as the gross increase, i.e., 1.1 million plane miles; that the additional transatlantic seats for 1959 would have been only from the difference in size between the jets and the replaced pistons and would have amounted to 17 thousand additional transatlantic seats; and finally that the additional transatlantic seats for 1960 would be 27 thousand. Translating these figures into increased revenue, on the same basis as was used in the case of the six additional (Pan-Am) planes,

and adding thereto the 5% for additional revenues from cargo, the plaintiff's experts estimate that the total additional International Division operating revenues from assumed earlier delivery of twelve B-331s would have been $4.5 million in 1959 and $6.4 million in 1960. The defendants' experts would reduce these figures, as in the case of the six additional (Pan-Am) planes for the factors of (a) competitive response and (b) failure of "beyond the gateway" and charter traffic to increase proportionately to the increase in transatlantic service. The defendants' experts' figures, with these reductions, show assumed additional operating revenues of only $2.79 million in 1959 and $2.03 million in 1960. For the reasons above stated, the plaintiff's estimates of additional revenues are accepted.

As to operating costs, here again if the plaintiff's estimates on increased traffic and revenues are accepted, and the defendants' cost figures are recomputed under its own methods of costing but on the basis of the plaintiff's increased traffic and revenue figures, the result would be a total of operating costs at least as low as the plaintiff's cost figures. The plaintiff's operating cost estimates are accordingly accepted.

A recapitulation of the damages awarded in respect of the International Division is set forth at the end of Section I of this discussion of plaintiff's damage claims.

(B) *Domestic Division*

The next division of plaintiff's claims for damages with respect to inadequacy of its jet fleet is for loss of operating profits in its Domestic Division. Here because of the greater variety of aircraft types compared to the International Division, the opportunity for changing segment

(stage) lengths of flights, the more complicated fare structure, and the difficulty of computing applicable load factors, the estimation of changes in operating results is more difficult.

As a beginning to a review of this aspect of the case, it will be instructive to examine the following table showing the historical jet competitive picture between the plaintiff and its chief domestic competitors, the quantitative extent to which TWA historically lagged behind its chief domestic competitors in acquiring jets in the years 1959-63, and comparative operating profits:

Domestic Operating Profit (Loss)

vs.

Percent of 1964 Jet Fleet[1]

	American			United[2]			T.W.A.		
	Operating Profit (000)	*No. of Jets*	*% of 1964 Fleet*	*Operating Profit (000)*	*No. of Jets*	*% of 1964 Fleet*	*Operating Profit (Loss) (000)*	*No. of Jets*	*%*
1959	$24,517	24	30.0%	$18,802	15	13.4%	$ 26,308	18	2
1960	24,720	34	42.5	9,429	44	39.3	(883)	21	2
1961	19,089	49	61.3	3,100	76	67.9	(10,226)[3]	42	5
1962	19,335	63	78.8	14,845	87	77.7	(7,391)	56	6
1963	39,004[3]	64	80.0	26,635	91	81.3	17,552	61	7
1964	61,245	80	100.0	49,865	112	100.0	50,892	83	10

Sources: TWA Exhibit 46A and CAB Air Carrier Financial Statistics

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[1] Domestic year end inventories as a percent of 1964 year end invento

[2] Excludes special adjustments. If these are included, the tendencies more accentuated. Thus, for American in 1963 inclusion of the adjustment re in operating profit of $43,900,000 and in 1961 for TWA results in opera losses of $24,200,000.

[3] Excludes Capital 1959-1960. If Capital is included, the United opera profit is $19,100,000 in 1959, and $3,100,000 in 1960. United's 1961 and (to extent) 1962 operating results were affected by its acquisition on June 1, of Capital Airlines which had already incurred operating losses in 196 $3,400,000.

The subdivisions of the plaintiff's Domestic Division claims are:

(a) failure to receive certain B-331s which were diverted by action of Toolco to Pan-Am and delay in delivery of other B-331s; and delay in delivery of fifteen B-131s;

(b) delay in delivery of twenty Convair 880s;

(c) failure to receive an additional ten Convair 880s of which six were diverted by action of Toolco to Northeast Airlines.

It will also be useful I believe, from time to time, while reading the ensuing discussion relating to the Domestic Division, to refer to the tables which follow comparing the amounts of the estimates of the plaintiff's experts and the final (or Supplemental) Estimates of the defendants' experts relating to the Domestic Division. The first table is plaintiff's Exhibit 420, Schedule B, showing the comparisons of the two sets of experts for each of the years 1959-63, as well as the comparisons of the totals for five years. The second table is Schedule B1 of plaintiff's Exhibit 420. It sets forth the plaintiff's (Coverdale) estimates of each of said years by categories. Category II-1 relates to chapter II of the Coverdale Report dealing with the six additional B-331s. Category III-1 relates to chapter III of the Coverdale Report dealing with earlier receipt of B-131 and B-331 aircraft. Category IV relates to chapter IV of the Coverdale Report dealing with the delay in receipt of twenty CV-880 aircraft. Category V relates to chapter V of the Coverdale Report dealing with the failure to receive ten CV-880 aircraft.

The third table is Schedule B2 of plaintiff's Exhibit 420. It sets forth the final (or Supplemental) estimates of the

defendants' expert (Simat) for each of the five years—1959-1963. Simat, in its Supplemental Report referred to hereinafter, did not break down its estimates by categories (although it did so in its Original Report referred to hereinafter). The Final (or Supplemental) Simat Report gives, as will be noted, separate estimates for added jet revenues and costs, and for revenues and costs of deleted pistons, in lieu of breaking down the figures by the above mentioned categories.

(Tables reproduced on following pages.)

B331's and B131's—Plaintiffs' Position

(a) We will first discuss the plaintiff's revenue estimates (Coverdale) for the B-331s allocated to the Domestic Division. The facts with respect to failure to deliver and delay in delivery of the Boeing B-331s have been set forth above. We have also previously listed (p. 52) the reconstructed earlier receipt dates for the B-331s as computed by Rummel and have set forth the underlying assumptions by which they were fixed.

The Coverdale report computed the change in operating profits for the Domestic Division by a different methodology than used by it for the International Division claims in certain particulars. These are set forth in the discussion, which follows, to the extent the methodology is different. The annual average number of B-331s which would have been available for commercial service (after the above-described adjustment for the B-331Bs and for a non-controverted short-term lease of aircraft time to Northeast) was computed for the Domestic Division under the same method heretofore set forth. They were as follows (TWA Ex. 4(c)(1), pp. 13, 27, 42):

	Planes Allocated from the 6 Diverted B-331s	Planes Allocated from Late Delivery of the 12 B-331s
1959	none	0.6
1960	1.4	0.7
1961	2.2	
1962	1.0	
1963	0.5	

These assumed additional jet aircraft would have produced (under the method heretofore described) additional

passenger revenue plane miles as follows (*id.*, pp. 28, 43, 44):

For the Diverted Planes	For the Late Deliveries
1960 — 2.0 million miles	1959 — 0.8 million miles
1961 — 3.3 " "	1960 — 1.0 " "
1962 — 1.4 " "	
1963 — 0.7 " "	

Using actual seats per aircraft and actual TWA average load factors for B-331s in Domestic Division service for each year (except the B-131 load factor was used for B-331 computation for 1959 when no B-331s were in domestic service) the resulting passenger miles for the additional jet aircraft would have been as follows (*id.*, pp. 28, 43, 44):

For the Diverted Planes	For the Late Deliveries
1960 — 156 million miles	1959 — 74 million miles
1961 — 206 " "	1960 — 78 " "
1962 — 76 " "	
1963 — 42 " "	

The reduction of piston passenger revenue plane miles, based upon the actual annual TWA experienced ratios in domestic service of all piston plane mile decrease to all jet plane mile increase, was as follows (*id.*, pp. 29, 43, 44):

For the Diverted Planes	For the Late Deliveries
1960 — 2.9 million miles	1959 — 0.8 million miles
1961 — 4.2 " "	1960 — 1.4 " "
1962 — 0.9 " "	
1963 — 0.2 " "	

The reduced piston passenger miles were then computed by using the average number of seats based on the average for all TWA piston aircraft for the year and actual annual average load factors of TWA's piston aircraft used

in the Domestic Division during the years in question. The resulting figures were (*id.*, pp. 30, 44, 45 and by calculation):

For the Diverted Planes	For the Late Deliveries
1960 — 123 million miles	1959 — 38.4 million miles
1961 — 182 " "	1960 — 59 " "
1962 — 44 " "	
1963 — 9 " "	

The net increase in passenger miles was then computed. Using TWA's annual average yield (Domestic Division actual passenger revenue, combined jet and piston, per passenger mile) the increase in Domestic Division revenues for the B-331 aircraft operations was estimated at (*id.*, pp. 30, 44, 45 and by calculation):

For the Diverted Planes	For the Late Deliveries
1960 — $1.9 million	1959 — $1.9 million
1961 — $1.4 "	1960 — $1.1 "
1962 — $2.0 "	
1963 — $1.9 "	

The additional revenue for non-passenger traffic (mail, express, freight, excess baggage) was calculated at 5% of the estimated additional passenger revenue. The resulting total additional revenue estimate was:

For the Diverted Planes	For the Late Deliveries of B-331s
1960 — $2.0 million	1959 — $2.0 million
1961 — $1.5 "	1960 — $1.2 "
1962 — $2.1 "	
1963 — $2.0 "	

The total of additional revenues thus claimed in respect of the B-331s under subdivision (a) is $10.8 million.

Next we summarize the plaintiff's revenue estimates in respect of the late deliveries of B-131s.

Rummel prepared a table showing the effect on delivery positions by reason of the delays in delivery of the B-131s. His underlying assumptions in computing the reconstructed earlier receipt dates therefor were the same as those discussed above (pp. 48-56) in respect of the B-331 earlier delivery dates, and are accepted for the reasons stated above.

The list below shows the actual receipt dates for the B-131s and opposite each such date is the corresponding reconstructed earlier receipt date. (TWA Ex. 4(c)(1), p. 40.) Each plane, as in the case of the B-331s, was fully identified, and actual receipt date verified for the record, from official CAB records.

Actual Receipt	Reconstructed Earlier Receipt
1/29/59	11/30/58
3/17/59	12/31/58
3/30/59	1/31/59
4/ 3/59	2/27/59
4/18/59	3/30/59
4/29/59	4/ 3/59
5/10/59	4/18/59
5/13/59	5/10/59
5/24/59	5/13/59
5/28/59	5/24/59
6/13/59	5/28/59
7/ 1/59	6/13/59
7/10/59	6/29/59
7/14/59	7/10/59
8/ 1/59	7/27/59

On the basis of TWA's experience as to time between receipt dates and commencing service, Coverdale computed that revenue service for the B-131s would have commenced

January 6, 1959. Only the year 1959 is involved in the B-131 computations.

Coverdale, using the same methodology as described above for B-331s assigned to domestic service, computed the additional annual average number of B-131s available for 1959 in the Domestic Division at 1.4 aircraft. The additional jet plane miles were 1.9 million miles. The additional passenger miles were 176 million miles. The corresponding reduction of piston plane miles was 1.9 million miles. The deleted piston passenger miles (using the number of seats in the L-1649A times the actual load factor) were 89.6 million miles. The increased passenger revenue estimate resulting from these computations is $4.1 million. To this figure 5% is added for non-passenger revenues. The plaintiff therefore estimates additional revenue from the assumed earlier delivery of the B-131s for the Domestic Division of $4.3 million.

The total estimated increased revenues under subdivision (a) of the Domestic Division claim is thus $15.1 million. We note in passing that Coverdale estimated combined increased expenses for subdivision (a) at $6.1 million leaving estimated additional net operating revenue of $9.0 million as the amount of plaintiff's damage claim for subdivision (a) of the Domestic Division claims. Discussion of costs will, however, be deferred until later.

B331's and B131's—Defendants' Position

We will next review the revenue computations of the Simat Report for subdivision (a). The Simat estimates use a different method of computation of the average stage length over which the added flights would be operated, a different method of computing load factors and a different method of computing passenger yields. Coverdale

assumed that the added jet services would be operated at the same average stage lengths as existing domestic jet services for planes of the same or similar types in the year that the added services would be operated; that added jet aircraft and displaced piston aircraft would be operated at the same average load factor (per cent of available seats which are occupied) as all flights operated in that year by TWA with aircraft of the same or similar types; and that added jet services and displaced piston services would yield revenues per passenger mile equal to the average yield experienced by TWA per passenger for the year in which added for the same or similar type plane.

The basic differences between the two reports, according to the Simat, arise from certain erroneous assumptions from the Coverdale report. Simat testified that jet aircraft, as they were received by the various carriers including TWA, were assigned to the most lucrative long-haul routes, where their attractiveness to passengers and operating economies could be most fully exploited. As additional jets would be received, they would be added to the best of the remaining routes, which were less advantageous than the original assignments, and according to Simat, the history of jet deliveries showed a pattern of assignment to routes of decreasing advantage. Simat asserted that the Coverdale study failed to take this pattern into consideration, and that as a result, the Coverdale report contained certain "fundamental errors" as follows (italics mine):

(1) The assumption that added jet aircraft and displaced piston aircraft would be operated at the same average *load factors* as the average of all aircraft of the same or similar types for the year is unrealistic. Added jet operations, Simat estimated, in fact would produce addi-

tional traffic at levels well below the average for existing jets, and displaced piston aircraft would be drawn from the most effective of the piston aircraft services, rather than services of average effectiveness.

(2) The assumption that added jet aircraft of a particular type would be used in *stage lengths* exactly as the average of all aircraft of the same or similar types for the year is not realistic because the added aircraft are not used as productively or as economically as available aircraft of the same or similar types. Additional aircraft would be operated at stage lengths shorter than average. By the same token displaced piston services were not average piston aircraft services but were long-haul services affording better-than-average use of piston aircraft with respect to productivity and operating economies.

(3) The assumption that passenger traffic added by added jet services or deleted by displaced piston services would have *revenue yields per passenger mile* equal to the average experienced yield per passenger mile for the year in which added, is unrealistic. Simat estimated that the yields from this added jet passenger traffic would be below average revenue yields per passenger mile and yields of traffic from displaced piston services would not necessarily be at the average revenue yield for the Domestic Division.

We will defer until later discussion of a Supplemental Simat Report, and now discuss the three factors which, in the original Simat Report, differentiate it from the Coverdale Report as to the Domestic Division.

The original Simat Report states his opinion that the assumed additional jet operations would not have produced additional net revenues for the plaintiff in the 1959-63 period. In support of this conclusion, Simat makes the following points:

1. The economic climate for increased airline capacity was not favorable during the years in question. In June 1960 the economy started a downward drift which continued through February, 1961. This was followed by a gradual recovery through the third quarter of 1962 and finally through the balance of 1962 and in 1963 by a period of accelerated growth.

2. While volume of domestic air travel has shown a long term trend of generally more rapid rate of growth than the economy as a whole, it mirrors the forces of decline and growth in the economy.

3. Actual load factors for the industry declined precipitously in 1959 through 1962, leveling out only in 1963. TWA's load factor in all its scheduled services declined from 71% in 1959 to 53% in 1963.

4. The U. S. air trunkline industry suffered a decline in earnings shown by the CAB Handbook of Airline Statistics, 1965 edition, as follows:

	Operating Profit	Adjusted Net Income
1959	$124 million	$71 million
1960	$ 80 "	$16 "
1961	$ 13 "	($36) "
1962	$158 "	$40 "
1963	$259 "	$77 "

5. From the same source, it was shown that from the beginning of 1959 to the end of 1961 approximately one billion dollars were added to the investment of U.S. domestic and international trunk line carriers in additional flight equipment, ground property and equipment and net working capital. For each dollar added there was a loss of 9 cents in operating profit.

6. The rate of return before investment tax credit—a measure employed by the CAB to gauge the appropriateness of airline earnings for regulatory purposes—reached a low of 4% for U.S. certificated route air carriers from 1959 through 1963. This was the lowest average rate of return for the industry for any five consecutive post-war years. It compares with an average rate of return of 7% for the preceding 1955-58 period and a rate of return of 11% for the 1964-68 period.

Simat next presented a mathematical study based upon computer calculations to support his conclusions. He expressed his opinion that *marginal load factor,* i.e., the ratio of the net passengers added by an additional flight to the seat capacity added by the flight, rather than annual average load factor for the type of plane for the year involved, should be the factor used in considering whether the addition of an assumed flight would be profitable in calculating damage estimates. He states that the marginal load factor for added flights is generally less than the actual load factor of existing flights because added flights compete to some extent with existing flights of the same carrier and divert traffic from other existing flights.

Simat then made an adjustment in his marginal load factor percentages, before applying it to his damage estimates, to compensate for traffic produced solely by "forces in the economy." The adjustment was intended to result in isolating the additional traffic that he estimated would have been due solely to the introduction of additional jets. This adjustment was in proportion to the increase in Disposable Personal Income, which is an index used by the Office of Business Economics of the U.S. Department of Commerce and which, in Simat's opinion, would have reflected the ability of people to engage in air travel for personal reasons.

The adjusted marginal load factors, by years, were applied by Simat to the agreed upon added plane miles for estimating added and deleted passenger miles. The average marginal load factors for the combined experience of all types of jets were used by Simat to obtain the marginal load factor for jet operations since, he stated, his studies showed a high degree of interrelation among the various categories of jets. The same method was used for non-jets to obtain the average marginal load factor for non-jets.

Simat found, as a result, that the Coverdale estimates of increase in passenger traffic from the addition of domestic jet services were "overstated" by 1.65 billion passenger miles, equal to 41.9% of the total estimate of added jet traffic. He also found that Coverdale "understated" the estimates of deleted piston aircraft traffic by 1.1115 billion passenger miles, equal to 63.3% of the total estimate. We reserve until later our opinion of the validity of the use of average load factor (Coverdale) or adjusted marginal load factor (Simat) in computation of damages.

The procedure followed by Simat to obtain domestic passenger revenue yields was to apply to his estimates of added jet and deleted piston passenger miles in each year, not the historical average yield for all passengers (as did Coverdale) but the particular yield which was found by him to be applicable in that year to trips of the average length that would have been taken by passengers who would have been added and deleted. This required three steps: (1) estimation of average stage lengths for the assumed added and deleted traffic; (2) estimation of average passenger trip lengths for the assumed added and deleted traffic; and (3) estimation of the average yield which would have been realized by TWA for different passenger trip lengths.

Simat reviewed TWA's domestic jet schedules and derived mathematical relationships between existing stage lengths of jet flights and the stage lengths of jet flights actually added in the years in question. Based upon these relationships, he estimated the stage lengths of the flights that would have been added with the assumed additional jet aircraft.

His relationships for estimating the stage lengths of added scheduled jet services for each type of jet aircraft are expressed in the formula (DX 271A, p. IV-3):

$$\textit{Average Stage Length of Added Jet Services (Miles)} = C1 \times \textit{Average Stage Length of Existing Jet Services (Miles)} + C2$$

Where C1 is an amount less than 1.0 applied to determine that part of the stage length of added jet services that varies in proportion to the actual length of existing jet services and

C2 is an additional number of miles that does not vary with the stage length of existing jet services.

For the B-331 aircraft, the specific relationship was:

$$\textit{Average Stage of Added Flights (Miles)} = 0.271 \times \textit{Average Stage of Existing Flights (Miles)} + 631.544$$

Adjustment was made for non-scheduled flights by assuming they would have had the same lengths as scheduled flights and would be flown in the same relative proportions as the miles actually flown in all service in the same years.

The above formula for the B-331s was determined by a method commonly recognized by statistical experts for determining relationships between two variables, and known as regression analysis or as the method of least squares (Tr. 7805-6). As an example, by plotting on graph paper aircraft hours operated (independent variable) and

amount of operating expenses (dependent variable) for several airlines, one can connect the dots on the graph with a straight line which represents an average relationship between the points. There are various standards for placing the straight lines, but the method of least squares fits the line to the various observations (dots) so as to reduce the squares of the deviations (differences) to a minimum. It produces a line showing the average of the various lines that might be fitted to the observations. If one squares the deviations and divides by the number of observations, one gets the standard error of estimate; and, given a normal distribution of errors, 68% of the observations should fall within one standard of error and 95% of the observations should fall within two standard errors. Relationships based on fewer observations tend to be more untrustworthy, and results showing a large proportion of observations outside the standard error of estimate likewise tend to be untrustworthy unless validated by independent means.

No claim was made by Simat that regression analysis was anything more than a statistical method useful in testing the validity of assumptions made by non-mathematical observations and raw data and conclusions based thereupon. Nevertheless Simat was of the opinion that the statistics produced by regression analysis under the assumptions made in his report confirmed his expert opinion as to the financial results that would have been obtained under the relevant equipment assumptions.

The average stage length estimated by Simat for the added B-331 domestic flights are set forth below, and are compared with the stage lengths used by Coverdale, which were based on the average stage lengths which TWA actually experienced with B-331 jets for that year (DX 271B, Ex. A-D):

	Coverdale	Simat
1959	1869 miles	1047 miles
1960	1869 "	1047 "
1961	1389 "	1009 "
1962	920 "	881 "
1963	799 "	848 "

The number of flights that would be performed with the added aircraft miles was obtained by dividing the added plane miles by Simat's estimated average stage length of the added services:

	Net Added B-331 Flights
1960	1600
1961	3122
1962	1613
1963	855

In obtaining his trip length data for added and deleted traffic, Simat noted that TWA's average passenger trip length historically trended steadily upward during 1959-1963—from 892.6 miles per passenger to 942.3 miles per passenger. TWA would have added 499,000 passengers and 725 million passenger miles during this period, giving an average trip length per added passenger of 1,453 miles. This is 1.6 times the 914 mile average stage length of TWA's domestic traffic in this period. Simat then derived a relationship between the stage lengths of added and deleted flights and the trip lengths of passengers added and deleted as a consequence of the flight changes. Separate ratios were established for jet and piston services, using various assumptions that Simat considered reasonable on the basis of his experience. Using these ratios, he estimates the average trip length of added jet passengers by increasing the estimated stage lengths of the added flight

by 144% and of deleted piston passengers by applying 168% to the stage lengths of the deleted piston flights.

He stated that the reason why revenue passenger yield realized by domestic air carriers varies with distance traveled is because the fares contain a fixed component in the form of a charge per ticket, which is intended to cover such costs as ticketing and handling of the passenger and baggage at airports (not dependent on length of trip) and a variable component in the form of a charge per mile. As the length of trip increases, there results a "fare taper." Adding to the effect of taper are such factors as that passengers on longer than average trips get a disproportionate part of fare discounts. By use of regression analysis Simat obtained a relationship between yields and trip distances on an industry basis for the years 1959-63. These figures were adjusted to TWA yields by comparing the actual passenger yield for TWA at an average trip length in each year with the yield estimated for the same trip length using the industry relationship.

The estimated revenue yields were applied to the estimated adjusted marginal load factors, computed as above described, and transportation revenues were obtained.

We now show the results of the methodology in the original Simat Report under subdivision (a):

The seat miles for the added B-331 planes are the same as under Coverdale assumptions. The adjusted marginal load factors and added passenger miles are (DX 271B, p. IV-25):

	Added Seat Miles (Millions)	Marginal Load Factor	Added Revenue Passenger Miles
1960	241.6	32.4%	78.3 million
1961	418.1	22.7	94.9 "
1962	180.9	49.2	89.0 "
1963	97.7	49.5	48.4 "

The average stage lengths, passenger trip length, and added passengers are (*id.*, p. IV-27):

	Average Added Stage Length (Miles)	Average Added Trip Length (Miles)	Added Passengers
1960	1,138	1,633	47,449
1961	1,009	1,447.9	65,543
1962	881	1,264.2	70,400
1963	848	1,216.9	39,773

Applying the yields for passenger revenues, computed as set forth above, the following estimated added revenues are obtained (*id.*, p. IV-29):

	Passenger Revenue Yield Per Mile	Total Added Revenues
1960	5.342¢	$4.39 million
1961	5.685¢	$5.67 million
1962	5.979¢	$5.59 million
1963	5.768¢	$2.93 million

As to displaced piston aircraft service, Simat noted that Coverdale had based its estimate on the experienced ratio of total such miles deleted to total jet miles added in each year, and had assumed that all the additional plane miles deleted in domestic service were flown with L-1649As or L-1049Gs. Simat disagreed with this latter assumption, and stated that by eliminating the piston aircraft with the largest number of seats, Coverdale had overstated the number of piston seat miles to be eliminated. Simat accordingly computed the additional piston miles deleted according to the type of piston plane proportional to the plane miles of each type actually deleted in the year in question. The results, applying marginal load factors, gave the estimated deleted passenger miles as follows (*id.*, p. IV-31):

		Deleted Available Seat Miles (Millions)	Marginal Load Factor	Deleted Passenger Miles (Millions)
M-404—	1960	22.	63.2	13.90
	1961	38.	57.3	21.77
L-049/749				
	1960	52.88	63.8	33.74
	1961	63.39	58.	36.75
	1962	50.78	72.6	36.87
	1963	5.51	69.4	3.82
L-1049	1960	33.51	64.4	21.58
L-1049G	1960	61.16	63.1	38.59
	1961	43.66	57.1	53.15
	1962	1.60	72.7	1.16
	1963	2.39	69.4	1.66
L-1049H	1960	.97	66.	.64
L-1649A	1960	10.09	63.5	6.41
	1961	80.24	63.4	50.87
	1963	9.10	84.8	7.72

The average stage lengths and average trip length of deleted passenger traffic having next been obtained, the numbers of deleted passengers were computed. The revenue yields were computed for each type of deleted piston and the resulting deleted revenues, were as follows (*id.*, p. IV-35):

		Deleted Revenues (Millions)
M-404	1960	$1.02
	1961	$1.67
L-049/749	1960	$2.08
	1961	$2.42
	1962	$2.64
	1963	$ .26
L-1049	1960	$1.30
L-1049G	1960	$2.23
	1961	$3.39

		Deleted Revenue (Millions)
L-1049G (cont.)		
	1962	$ .07
	1963	$ .11
L-1049H	1960	$ .03
L-1649A	1960	$ .37
	1961	$3.21
	1963	$ .47

The methods used in the original Simat Report for estimating changes in operations from the earlier delivery of certain B-131 and B-331 aircraft follow the procedures described above in respect of the changes from failure to receive certain B-331s, and the detailed figures appear in DX271A, Chapter V.

The original Simat estimate for subdivision (a) is that the total revenues would have been strikingly less than the Coverdale estimate if the Boeing jets had been introduced and operated under the posited equipment assumptions.

Discussion of costs relating to this subdivision (a) and my decision as between the methodologies of the plaintiff and defendants are deferred until later.

Twenty Convair 880's—Plaintiff's Position

Subdivision (b) of the plaintiff's claim for loss of profits in the Domestic Division is based upon the delayed delivery of twenty of the thirty CV-880 aircraft originally ordered by Toolco from Convair. On this subject paragraph 19 of the complaint states:

> "During the period 1956 to 1960, the defendants required Convair to make certain changes in the design of Model 880 aircraft on order by Toolco, but the defendants prevented TWA from arranging with Convair for certain design modifications which were de-

sired by TWA and which would not have interfered with the scheduled dates of delivery. During the year 1960 the defendants also prevented and restricted TWA from making acceptance and test flights from time to time of various specific Convair model 880 aircraft then on order with Convair by Toolco."

Paragraph 18 of the complaint provides, in part, with respect to the Convair 880's:

"Despite repeated requests by TWA Toolco refused throughout the period 1956 to 1960 to assign to TWA the rights to acquire such aircraft."

The background facts are that Toolco, in April 1956, contracted with Convair for thirty medium range CV-880 jets, a newly developed model. At or about the same time Delta contracted with Convair for ten of the CV-880 jets. These contracts provided for a subsequent allocation of delivery dates for the 40 planes between Toolco and Delta, which was to be worked out between the parties at a later date. The selection of CV-880 jets by Toolco for medium range operations was on Rummel's recommendation. He favored concentrating on pure jets in preference to buying turbo-prop aircraft for medium range operations. The number ordered by Toolco—i.e.—thirty aircraft, was also based upon Rummel's recommendation.

The plaintiff does not contend that a medium range jet could or should have been ordered at an earlier date. After a succession of modifications in the original Toolco and Delta contracts, Convair agreed in the final contract to the first delivery to be made in November 1959 and the fortieth in September 1960, with the allocation of specific dates still to be made by mutual agreement.

In the fall of 1958 when the production of the CV-880's had reached a point where it became essential to allocate particular aircraft between Toolco and Delta, so that the configurations would meet the respective requirements of the two airlines, Toolco refused to agree to any proposed allocation of delivery dates and Convair finally made a specific allocation on its own initiative (Rummel, TWA Ex. 2, p. 15; Tr. 1094-1095, 1108, 1552-1553). Delta executed a contract amendment incorporating the delivery schedule provided for it (TWA Ex. R10). Toolco never executed such an agreement, but the evidence shows that Toolco could have contracted for the contract delivery dates assigned to it by Convair. The plaintiff has accordingly assumed delivery dates so assigned by Convair (original contract delivery dates) in measuring the delays in delivery of twenty of the CV-880's.

Rummel testified (Tr. 307, 321, 444, 1538) that defendant Hughes assumed personal control of all matters connected with Convair deliveries; that no one else in TWA was permitted to become involved on matters of delivery; that in the fall of 1959 defendant Hughes instructed him that he was not to proceed with any acceptance procedures or even to continue acceptance flights without receiving personal clearance from defendant Hughes (Tr. 2949-50, 2987). The evidence as a whole bears out this Rummel testimony.

Rummel also testified that in December 1959 Toolco sent armed guards to the Convair plant who actually took control over the first four CV-880's coming off the production line and scheduled for delivery to TWA or Toolco; that these planes were subsequently bailed to Toolco and remained in that condition for many months, unavailable for final inspection test flight or acceptance procedures (Tr.

2788-90, 2810-17, 2839-40). The effect of this incident is discussed later.

Rummel also testified that removal of other CV-880's from the production line came as a direct result of the actions of defendant Hughes (Tr. 2836-37). Rummel also testified that when Convair subsequently tendered approximately seven or eight completed aircraft, they were refused because "we had not been cleared by Hughes to do so" (Tr. 2763-66).

Rummel also testified that Convair claimed damages from Toolco for delay in delivery and storage costs on nineteen of the twenty planes which eventually went to TWA and that in 1963 (when TWA purchased six additional CV-880s from Convair after repossession from Northeast Airlines) that Toolco agreed to credit Convair with a substantial sum in recognition of these claims (Tr. 2757-65; DX 145; TWA Ex. 21).

Delta during this period was accepting deliveries of aircraft under the contract with an average delay of 1.4 months per plane subsequent to the various contract delivery dates. Rummel testified that if TWA had been the purchaser, independent of defendants Hughes and Toolco, it was his opinion that Convair would have delivered the aircraft to TWA on a schedule at least closely approximating that of Delta (Tr. 1129-1139).

TWA's claim for damages under this facet of the case is based on the original Toolco-Convair contract delivery dates, as stated above. Its theory of damages is that by reason of the actions of Toolco, it is entitled to rely upon the schedule of deliveries which Convair was willing (prior to these events) to contract to meet.

Following is a table showing the original contract delivery dates, the actual receipt dates and the months difference (TWA Ex. 4(c)(1), p. 52):

Actual Receipt Date	Contract Delivery Date	Months Difference
5/18/60	11/59	6
1/ 1/61	1/60	12
1/ 5/61	2/60	11
1/ 6/61	3/60	10
1/ 8/61	3/60	10
1/12/61	4/60	9
1/21/61	4/60	9
2/ 2/61	5/60	9
2/15/61	5/60	9
3/15/61	6/60	9
3/18/61	6/60	9
3/20/61	7/60	8
4/26/61	7/60	9
5/ 6/61	7/60	10
5/25/61	7/60	10
6/ 9/61	8/60	10
7/ 9/61	8/60	11
8/10/61	8/60	12
9/ 2/61	9/60	12
10/13/61	9/60	13

The Coverdale Report computed the increase in annual average CV-880s which would have been available for commercial service if the original contract delivery dates had been met under this portion of the case, as follows (*id.*, p. 53):

1960—10.3 planes
1961— 5.2 planes

assuming the aircraft would have been received on the 15th of whatever month was specified in the contract for each aircraft.

Using TWA historical data for 1961 operation of CV-880s, Coverdale calculated the additional plane miles would have been 5.9 million for 1961; and again using 1961 data (since TWA was not operating CV-880s in 1960), it calculated the additional plane miles for 1960 as 11.6 million.

Using TWA's average of 88.3 seats offered for sale per CV-880 in 1961, it then calculated the additional seat miles as (*id.*, p. 54):

1960—1,024 million additional seat miles
1961— 521 million additional seat miles

Using TWA's 1961 average CV-880 passenger load factor, the resulting number of additional jet passenger miles for 1961 is 341 million miles. Since TWA did not have CV-880s to operate in commercial service in 1960, Coverdale took average load factor for 1960 for TWA's Boeing 331s and 131s used in the Domestic Division and thus computed additional jet passenger miles for 1960 for the CV-880s as 702 million miles. (*Id.*, p. 55.)

To obtain the corresponding reduction in piston plane passenger miles a complicated formula was used: An examination was made of the historical service patterns for the thirty specific pairs of cities in which TWA historically employed its twenty CV-880s when they were put into service in 1961 and for the six additional pairs of cities served by the six additional CV-880s when they were put into service in 1963. The historical decrease in piston service on those particular segments was totaled and was related to the amount of jet service introduced on such segments. It was found that the average decrease in piston plane miles was 52% of the increase in jet plane miles between the same cities. It was assumed that this percentage would be applicable to any earlier service and to any further increase in CV-880 service in similar operations; and

that in any given year the kinds of operations in which TWA would have used additional jets of a given type would have been essentially similar to the operations in which aircraft of the same type were used by TWA historically in the same year. Applying the 52% reduction factor to the additional CV-880 jet plane miles the additional reduction of piston plane miles becomes (*id.*, p. 62):

1961—3.1 million
1960—6.0 million

More than half of the reduction shown above was in flights of L-1049G aircraft, and the Coverdale Report used the average number of seats offered for sale in L-1049Gs for each of the two years in question, and the average load factor for such piston plane for each year, and thereby arrived at the following figures for reduced piston passenger miles (*ibid.*):

1960—286 passenger miles
1961—134 passenger miles

The above changes in jet and piston passenger miles and TWA's actual yields (computed as set forth above, at pp. 84-86) gives estimated net increase of passenger revenues as follows (*id.*, p. 63):

1960—$23.5 million
1961— 12.2 million

Adding the 5% estimate for non-passenger revenues these figures become (*ibid.*):

1960—$24.8 million
1961— 12.8 million

for the net estimated additional revenues under subdivision (b).

Twenty Convair 880's—Defendants' Position

The defendants take the position that there is no positive and distinct allegation in the complaint that the delays in delivery of the CV-880s were caused by the defendants; and that the plaintiff has failed during the damage hearings to introduce evidence to link the delays sufficiently with actions of the defendants. The defendants claim that the proof indicates that the delays were due primarily, if not exclusively, to Convair—i.e.—the manufacturer. The defendants cite at pages 142-150 of their brief the references to various contemporaneous documents which were introduced as exhibits in which TWA's representatives described actions or failures to act, on the part of Convair, which might have contributed to delays.

There is an allegation in the complaint that "during the period 1956 to 1960, the defendants required Convair to make certain changes in the design of Model 880 aircraft on order by Toolco. . . ." (Paragraph 19). However, this paragraph in the complaint does not allege that these changes in design resulted in any delays in the delivery of any aircraft, and no evidence of any such delay was introduced. The only specific action of the defendants prior to May 1960 (when the first 880s were delivered to plaintiff) cited by the plaintiff as being active interference by Toolco and defendant Hughes with the deliveries of the planes was the setting aside of three of the 880s from the production line in December 1959 and the stationing by Toolco of armed custodians to guard the planes. But it is clear from a contemporaneous document (Deft. Ex. 127) that Rummel did not consider this action by Toolco in itself to have delayed Convair's production schedule, although it was probable by this time that Convair was not going to be able to deliver on the original schedule.

In an inter-office memorandum written by Rummel to Mr. Charles Thomas, then President of TWA, under date of February 8, 1960, he stated:

> "Setting aside the three, now two, aircraft has not adversely affected the Convair production line. In fact this may have helped Convair materially by (1) beneficial reassignment of personnel, (2) permitting more timely completion of engineering, and (3) permitting more orderly, i.e., less out of station construction. Of course, delivery of the two aircraft now set aside is affected. They have been rescheduled for substantially later delivery * * *. Certification has not been adversely affected by setting aircraft aside."

I conclude that the defendants are not chargeable with responsibility for delays in delivery by reason of the December 1959 incident.

On March 2, 1960, the purchase agreement between Convair and Toolco covering all thirty of the CV-880s was changed by amendment No. 4 which established a new schedule for delivery of the planes as follows:

May	1960—4	planes
June	4	"
July	5	"
August	5	"
September	4	"
October	5	"
November	3	"

In my opinion the plaintiff's position that it was entitled to take the original contract delivery dates in measuring the amount of damages is not valid. Rather it should be bound by the revised delivery dates established in Amendment No. 4.

The evidence clearly shows, however, that commencing about May 1960 when Convair was able to offer deliveries, the defendants, as alleged in the complaint, prevented deliveries from being made and caused substantial delays in deliveries.

I have heretofore set forth the references to the testimony of Rummel showing that Hughes assumed personal control of all matters connected with Convair deliveries and that no one else at TWA was permitted to become involved on matters of delivery or acceptance procedures or even to continue acceptance flights. Rummel also testified that after TWA was rendered unable by Hughes to carry out final inspection procedures, numbers of additional aircraft were removed by Convair from the production line in a semi-complete state (Tr. 2807-8). This occurred progressively as TWA could not proceed with acceptance procedures (Tr. 2808). In "the summer" of 1960 Convair tendered seven or eight completed aircraft and Rummel testified that, "We didn't proceed with the flight testing because we hadn't been cleared by Hughes to do so." (Tr. 2766). Also, it is uncontroverted in the evidence that Convair claimed damages from Toolco for delay in delivery and storage costs on nineteen of the twenty planes which eventually went to TWA (Tr. 2757-58, 2764-65); and in 1963 Toolco settled Convair's damage claims for disruption of its business and delays in deliveries by crediting Convair with $3,750,000.

We turn now to the defendants' computations set forth in the Simat Original Report. Using his methodology described above for Boeing planes in domestic service, Simat reached the following results in respect of the assumed earlier delivery of 20 CV-880s:

Simat assumed the Coverdale estimates of 10.3 added planes for 1960 and 5.3 added planes for 1961; and the estimate of 11.7 million added jet plane miles for 1960 and 6.0 million jet added plane miles for 1961. By analysis of TWA domestic schedules for CV-880s over the period 1961-1963, Simat established by regression analysis the estimated stage lengths of added CV-880 jet service to be 752 miles, although the historical average stage length of existing CV-880 flights was 819 miles. The number of added flights becomes 15,558 for 1960 and 7,978 for 1961.

To the net assumed added seat miles, Simat then applied the "estimated adjusted marginal load factors" (32.3% for 1960 and 22.5% for 1961) and obtained added revenue passenger miles of 333.7 million miles for 1960 and 119.2 million miles for 1961. Since the average stage length of added service was estimated at 752 miles for both years, the number of added passengers becomes 309,239 for 1960 and 110,462 for 1961. TWA's actual average passenger revenue yield per mile was then adjusted proportionately in the same proportion as the actual average trip length bears to the adjusted trip length, and the total added revenues were (DX. 271A, p. VI-16):

1960—$19.5
1961—$ 7.3

As for piston aircraft operations, by regression analysis the estimated stage lengths of each type of displaced piston plane was calculated, and the number of deleted piston flights and miles was also estimated for each type of piston plane. The total deleted revenues from piston operations,

similarly computed for each type of piston, and then combined, were (*id.*, p. 20):

1960—$41.3
1961—$20.0

Simat, it will thus be seen, estimated very substantial losses in revenues for both years from the assumed additional operations of the twenty 880s.

Discussion of estimated changes in expenses under subdivision (b) is deferred until later. However, the figures for loss of revenue, apart from costs, are significant. In view of the clear preference by airline passengers for jets over pistons, it is almost impossible to accept the conclusion that replacements of piston flights by jet flights would have caused net revenues to decline from $41.1 million to $19.5 million in 1960 (more than 50%) and from $20.0 million to $7.3 million (more than 65%) in 1961. These figures should be contrasted with the views of the Civil Aeronautics Board as expressed in Order No. E-16195 (December 29, 1960, TWA Ex. 315.4, also reported at 32 C.A.B. 1363). That Order approved the loan agreement which substituted control by independent voting trustees for control by Hughes. Noting that the loan would enable TWA to take delivery of the 20 Convair 880's, the C.A.B. stated:

> It appears that the failure to receive this equipment as planned may have played a substantial part in TWA's recent inability to maintain its traffic position relative to its principal competitors. Thus, we note, for example, that the carrier's preliminary traffic reports for the month of November 1960 show that TWA's share of the Big Four domestic passenger market has declined from 23 to 20.2 percent. By way of contrast, United, which was behind TWA, has

> caught and passed it, increasing its share from 21.3 percent to 29 percent. It appears to be significant that TWA's major competitors have already taken delivery of much larger jet fleets than TWA is operating and have firm orders for delivery of more. [Footnotes omitted.]

Thus, the C.A.B., an impartial body which is certainly experienced in matters such as these, was of the opinion that the delay in delivery of the Convair 880's had probably resulted in a heavy loss of traffic to TWA, rather than a preservation of traffic as Simat asserts. Simat's conclusion that replacing piston flights with jet flights would result in a heavy loss of traffic can only be viewed with disbelief and reflects on the credibility of his entire approach.

Ten Convair 880's—Plaintiff's Position

Subdivision (c) of the plaintiff's claim for loss of profits in the Domestic Division is based upon the failure to receive ten of the thirty CV-880s originally ordered by Toolco from Convair.

In addition to the more general allegations of the complaint (see Par. 52) the following statements appeared therein:

> "In or about April 1956 the defendants arranged for Toolco to place orders for at least 30 Model 880 jet powered aircraft to be manufactured by Convair (par. 17)."

> "In November 1960 while the proposal for merger was pending, the defendants arranged for the lease by Convair to Northeast of six of the Convair model 880 aircraft which Toolco had ordered from Convair.

Among the aircraft so leased to Northeast were three aircraft which Toolco previously by an agreement with TWA of May 9, 1960 had assigned to TWA (par. 22)."

There is no disagreement over the fact that the remaining four 880s out of the ten involved in the claim under subdivision (c) were retained by Toolco for some time and later leased by it to Northeast (TWA Ex. 2, p. 10), and were never released by Toolco to the plaintiff.

Earlier we described the main major provisions of the contemporaneous contracts between Toolco and Convair, and Delta and Convair, for a total of forty CV-880s (pp. 101-03). Rummel testified that as a result of this and other reductions in the jets available to the plaintiff, caused by actions of Toolco, TWA was unable "to provide the schedule coverage that was advisable because of lack of equipment for a number of years" (Tr. 1085-86).

Rummel was informed on March 5, 1959 by Toolco representatives that TWA was not to receive ten of the Convair 880s which had been previously ordered (TWA Ex. 2, p. 9; R. Tr. 147). It appears that Toolco had had negotiations with Capital Airlines about selling six to ten of those CV-880s in January 1959. Rummel protested about the cutback in the Convair fleet (Tr. 762-65) as did other TWA officials (Tr. 1165-74, 1193-94). The opposition to the reduction was communicated to the executives of Toolco and to Hughes personally, but Hughes dismissed TWA's objections "summarily" (Tr. 1178-81).

The original contract delivery dates for the ten planes which the plaintiff takes as being the dates when it would have received the ten planes but for the aforementioned actions of Toolco, are as follows (TWA Ex. 2, p. 18; TWA Ex. 4(c)(1), p. 65):

December	1959
February	1960
April	1960
May	1960
June	1960
June	1960
July	1960
August	1960
August	1960
September	1960

and in each case it is assumed by Coverdale for damage computation purposes that the aircraft would have been received on the 15th day of the applicable month.

The additional annual average number of CV-880s available for commercial service was computed on this basis as (TWA Ex. 4(c)(1), p. 66):

1960	5.1
1961	9.9
1962	10.
1963	7.9

(The reduced figure for 1963 results from the fact that, as noted above, TWA actually purchased six of the ten planes in question from Northeast Airlines in the last quarter of 1963, and it was assumed that these six CV-880s would have been among the thirty aircraft in the original Toolco order for such planes).

The Coverdale calculation of additional passenger miles TWA would have recorded each year is similar to the calculations described above (pp. 104-06) for the twenty CV-880s involved in the delayed deliveries. It results as follows (*id.*, p. 67):

1960—351 million additional jet passenger miles
1961—648 " " " " "
1962—599 " " " " "
1963—506 " " " " "

It was assumed that service by TWA for the additional ten CV-880s would have been similar to that which it actually operated with a fleet of twenty CV-880s in 1960 and with a fleet of twenty-six commencing in 1963.

The Coverdale Report then took thirty-six pairs of cities where most of the CV-880 service was concentrated and found that the reduction of piston aircraft service for such pairs of cities was 51% of the jet aircraft service added. Using this ratio, the report then calculated reduction of piston aircraft service as follows (*id.*, p. 70):

1960 — 123 million miles
1961 — 235 " "
1962 — 247 " "
1963 — 195 " "

At TWA's average annual yields, computed on the basis above described, the following are the Coverdale calculations for net increase of passenger revenues (*ibid.*):

1960 — $12.9 million
1961 — $24.3 "
1962 — $21.5 "
1963 — $18.2 "

Using 5% additional revenue for non-passenger revenues the total additional revenue figures become:

1960 — $13.5 million
1961 — $25.5 "
1962 — $22.6 "
1963 — $19.1 "

In considering whether to allow the full amount of the plaintiff's claim under this subdivision (c) relating to the failure to receive ten CV-880s, the question arises as to whether the plaintiff is justified in using the original contract delivery dates or whether (as in the case of the calculation of damages in respect of the delays in delivery of the twenty CV-880s considered under subdivision (b)), the plaintiff should be required to use the amended delivery dates set forth in Amendment No. 4 of the contract between Toolco and Convair.

For the reasons stated above, it is my opinion that it is reasonable to use the contract delivery dates in Amendment No. 4 in computing its damages under this subdivision (c).

Ten Convair 880's—Defendant's Position

The original Simat estimates in respect of the failure to deliver the ten additional CV-880s are now considered.

Simat assumed the estimates of added planes and added plane miles as computed in the Coverdale Report. By regression analysis the stage lengths for the assumed added service were obtained, as were the stage lengths of the assumed deleted piston service, by types of planes. To the added seat miles assumed, Simat then applied the "estimated adjusted marginal load factors" (32.3 for 1960, 22.5 for 1961, 48.7 for 1962 and 49.4 for 1963) and obtained added revenue passenger miles of (DX 271A, p. VII-15):

1960	—	165.4	million miles
1961	—	224.5	" "
1962	—	519.1	" "
1963	—	435.2	" "

The assumed added passengers were (*ibid.*):

1960 — 163,487
1961 — 211,693
1962 — 494,193
1963 — 422,976

The average passenger revenue yield per mile (adjusted as described above) then produced total added revenues of (*id.*, p. VII-17):

1960 — $ 9.7 million
1961 — $13.7 "
1962 — $33. "
1963 — $26.6 "

The total deleted revenues from piston operations, similarly computed for each type of plane, and then combined, were (*id.*, p. VII-21):

1960 — $21.0
1961 — $37.8
1962 — $22.3
1963 — $10.2

Discussion of changes in costs under subdivision (c) is deferred until later.

I now take up the Simat Supplemental Report.

During the Simat cross-examination on the original Simat Report, plaintiff's attack was directed primarily to the validity of the concept of a marginal load factor—both before and after adjustment for economic growth. The use of this factor, more than any other, accounted for the wide variation in the estimate of the experts covering domestic operations.

The defendants countered with the statement that with the data then available to them they were confined to

pointing out the "fundamental errors" of the Coverdale Report—that they needed additional data from TWA records if they were expected to produce the best judgment of their expert (Simat) as to changes that would have occurred in operating profits.

The testimony of the defendants' experts was that any realistic estimation of the change in net operating profit requires the construction of an articulated TWA operating plan in which specific consideration is given to how the added jet capacity would be integrated with existing operations, to what types of service would be added, to what existing services would be eliminated in their entirety, and of what shifts in aircraft usage would occur as added jet aircraft displaced other aircraft from their existing usage to displace, in turn, other aircraft in a chain reaction. Since the scheduling and integration of new aircraft capacity is one of the most complex functions performed in the operation of an airline, Simat stated, it cannot be dealt with in generalities but an extensive bank of background information is needed to make appropriately informed judgments concerning the most probable and suitable use of additional aircraft on a route system as heterogeneous as that of TWA, and the resulting effect on operating profit.

The defendants accordingly made a demand for massive additional production of TWA's operating records to enable their experts to construct an operating plan for TWA for the years in question and thus test the validity of their underlying damage theories. This demand was vigorously contested by the plaintiff as unnecessary and too late. It was my opinion that because of the incredibly large spread between the estimates of the experts as to operating results to be expected from the assumed added jet fleet, the Special

Master and any court reviewing the matter were entitled to the best judgment of all the experts, based on every available TWA record, as to the factors involved in their judgment. The defendants' admission that the original Simat Report did not reflect the best judgment of their expert because of the limited source material available, also influenced me. Accordingly, the defendants' belated request was granted as to the production of all available records sought by it affecting the Domestic Division operations of TWA.

I decided that corresponding figures for the International Division operations need not be produced because of lesser complexity of the factors involved in the operations of that Division. For example, the computations of transatlantic load factors were basically undisputed, and the stage lengths of the flights of course did not vary to any considerable degree in the International operations.

This demand for production entailed a substantial delay in the completion of the damage hearings but resulted in a Supplemental Simat Report reflecting, in conjunction with its original report, its final revised estimate of changes in plaintiff's domestic operating revenues. The Supplemental Report did not change estimates of costs, so the Simat cost estimates for the Domestic Division are found in the original Simat Report.

The mass of material furnished by the plaintiff as a basis for the Simat Supplemental Report consisted mainly of TWA's routing charts and on-board reports and on-line passenger revenue yield information for the five-year period 1959-1963. Traffic and financial data for all scheduled flight services were made available by individual flight segments. For each segment of each flight, the information was converted into a form considered suitable by Simat

for computor processing. This information included flight itinerary, departure and arrival time, number of flights per month, type of equipment, classes of service and numbers of seats in each class, and distances between points served.

Basically the differences in method from the Original Report may be summarized as follows:

1. Rather than estimating the average stage length of added and deleted operations by the use of Domestic Division average relationships between stage lengths of existing added and deleted services, the report estimated directly the changes in flight operations by segments and derived the stage lengths from individual flight segment data.

2. Rather than estimating passenger miles on the basis of average divisional marginal load factors, the Report estimated them on the basis of individual segments.

3. Rather than estimating passenger trip lengths on the basis of divisional averages, the Report estimated them likewise on data from the individual flights.

Following is a more detailed description of the methodology used in the Simat Supplemental Report:

The routing charts show the flight patterns over a twenty-four hour period for each aircraft. The on-board reports provide monthly summaries of data by flight number, segment and type of equipment for all revenue flights. They show number of departures and number of revenue passengers. From the origin and destination points, data were obtained for computing aircraft miles and block hours. Block hours are defined as the elapsed time between departure from the gate position before take-off to arrival

at the gate position after landing. From these figures, seat miles were obtained for each aircraft in each segment for each month. Simat then computed the average monthly stage length (aircraft miles divided by departures) and the average monthly load factor (revenue passenger miles divided by seat miles).

The annual average stage lengths resulting were (DX 271A, p. II-12):

Pistons	1959	1960	1961	1962	1963
M-404	161	155	141	—	—
049/749	366	318	265	199	191
L-1049	532	445	426	—	—
L-1049 G/H	722	567	375	336	322
L-1649A	1,414	534	311	299	—
Jets					
CV-880	—	—	821	790	767
B-131	1,888	1,533	1,207	892	648
B-131 B	—	—	—	1,509	1,303
B-331	—	2,027	1,572	1,007	827
B-331 B	—	—	—	479	340
B-720 B	—	—	1,010	967	—
For All Fleets	440	445	489	552	591

The load factors shown were (*id.*, p. II-20):

Pistons					
M-404	64	61	59	—	—
L-049	66	59	58	—	—
L-749	64	63	61	64	63
L-1049	64	59	—	—	—
L-1049 G	70	60	60	61	57
L-1049 H	73	56	—	—	—
L-1649 A	70	59	54	59	56

Jets	1959	1960	1961	1962	196
CV-880	—	—	66	56	57
B-131	83	69	53	49	56
B-131 B	—	—	—	42	47
B-331	—	64	49	42	43
B-331 B	—	—	—	37	44
B-720 B	—	—	48	50	—
For All Fleets	71	64	57	51	53

Simat next determined his estimate of the monthly operating profit or loss, based on distances actually flown and number of passengers actually carried. He did this first computing revenues and costs under the methodology used in his Original Report and second by computing them under the Coverdale methodology. He summarized his results in the following language:

> "While the profit or loss determined under the Simat procedures is, in our opinion, substantially more accurate, the difference is not significant to the present analysis. For both methods demonstrate, with equal certainty, although in different degree, that individual aircraft in each of TWA's jet fleets varied strikingly in their earning capacity, depending upon their scheduling, and they also demonstrate that, as jets were added, the additional jets were placed on routes where they began to contribute not profits, but losses."

The Supplemental Report does not make separate estimates according to categories of assumptions, as did the Simat Original Report and the Coverdale Report.

In deploying the assumed additional jet fleet, Simat built a constructive schedule just as TWA historically scheduled such equipment when it in fact received the additional equipment (with certain adjustments not material for understanding the methodology). It selected as

a basis for the schedule of the constructive fleet in each month ("constructive fleet month") the schedule pattern adopted by TWA in the "guide" month, i.e., a subsequent month when the actual jet fleet was closest in number to the constructive fleet. The average jet stage length was computed for each guide month and applied to the total jet miles in the constructive fleet month, to obtain total constructive jet departures. Piston fleet miles and departures were similarly constructed. To determine the traffic carried by the "constructive" fleet, Simat did not use the on-board data furnished by TWA but chose instead an intricate method of computing passengers from data from a competition study of the CAB made in 1966, which tabulates from samples the number of passengers who purchased tickets for travel on TWA, or other airlines, between each combination of cities served by TWA and other airlines. By regression analysis Simat then related the change in the volume of passenger miles between each two successive years, for each flight segment, with the corresponding changes in the volume of seat miles scheduled with jet and piston aircraft. Further regression analysis was used to convert the relationship between changes in non-stop on-line passenger traffic service (traffic carried between a point of origin and a point of final destination) as reported in the CAB Competition Survey, and changes in aircraft services to a relationship between changes in on-board traffic and changes in aircraft services.

Passenger yields were then applied (varying with the estimated length of passenger trip to show "taper" as described in the original Report). The ratio of length of passenger trip to stage length was also computed as in the original Report, with some refinements statistically.

Operating revenues resulted from this application of

yield figures to the passenger miles. The results showed an even greater net loss of revenue for the Domestic Division than shown in the original Report. Total revenues were estimated at $79.79 million and total costs at $191.74 million, or a net loss estimated for operating with the assumed additional Domestic fleet of $111.95 million. Some "alternative" computations are also set forth in the Supplemental Report to "validate" the findings of the Report, but are not otherwise relied upon (DX 371) and accordingly are not discussed in this Opinion.

Conclusions

I have described above the claims of the plaintiff for Domestic Division losses resulting from inadequacy of its jet fleet. I have also examined the methodology used in the reports of the plaintiff's expert witness (Wemple of Coverdale) and the defendants' expert witness (Simat) and their estimates of the financial results to TWA if the hypothesized jet fleet had been received and operated in the years 1959-63. Since the conflicting results as to the amount of damages are based largely upon three assumed factors, the reasonableness of those factors will now be discussed as a preliminary to award of damages under this part of the case (Section IB-Domestic).

The greatest portion of differing results stems from the use by Coverdale of the historical annual average load factor (percentage of available seats which are occupied) for each type of plane to compute the number of net additional passenger miles that would have been flown if the additional planes had been available; and from the use by Simat of the marginal load factor (ratio of the net traffic added by an added flight to the seat capacity added by the

flight) in his computation of the number of net additional passenger miles. (In his Supplemental Report Simat did not denominate this factor as marginal load factor, but for purposes of this discussion the term is applicable to both of his Reports.) In my opinion the historical average annual load factor of the same or similar type of plane involved in the computation is the proper measure to be used. Since it is computed separately for each year it adequately takes into account the steadily decreasing load factors experienced by TWA and by the industry during most of the period covered by the damage claims.

The defendants quite properly state that use of the annual average load factor would not be valid if applied to unlimited assumed additions to traffic. However, the Coverdale report was based upon a limited assumed increase in traffic—limited by the amount of increased traffic assumed by the equipment assumptions of the posited hypothetical TWA jet fleet.

The percentages of seat miles of all types of aircraft assumed to be added by TWA domestically in 1959-63 measured against the total of TWA, American and United; and the percentage of seat miles so added by TWA measured against TWA's historical jet domestic seat miles is shown in the following table (TWA Ex. 444):

TOTAL AVAILABLE SEAT-MILES OPERATED
DOMESTIC SCHEDULED SERVICE ONLY
TWA, UAL AND AAL
ALL AIRCRAFT TYPES, 1959-1963

Year	TWA, UAL and AAL Historical Seat-Miles (A)	TWA Estimated Additional Seat-Miles (B)	Percent Additions by TWA
	(Millions)		
1959	21,738	105	0.5%
1960	24,827	910	3.7
1961	29,020	1,018	3.5
1962	34,613	774	2.2
1963	37,969	638	1.7

Year	TWA Only Historical Seat-Miles (A)	TWA Estimated Additional Seat-Miles (B)	Additions Percent
	(Millions)		
1959	6,492	105	1.6%
1960	6,962	910	13.1
1961	7,487	1,018	13.6
1962	8,623	774	9.0
1963	10,042	638	6.4

(A) Source: CAB Handbook of Airline Statistics (1965 Edition).

(B) Source: C&C Report (May 2, 1966) Volume I, Chapters II-V; Exhibits TWA 42, 42A, 43A and DX 262.

As applied to this posited increase in traffic, I am of the opinion that use of the annual average load factor in the Coverdale Report is reasonable.

A comparison of industry average load factors (scheduled operations of the trunk line air carriers) for the years in question with the TWA average load factors used by

Coverdale also tends to confirm the reasonableness of the Coverdale computations. The industry figures are as follows (DX 271B):

	Jets	Non Jets
1959	79.9	59.7
1960	69.6	55.3
1961	59.5	53.
1962	53.6	52.6
1963	54.	53.3

The use of the marginal load factor by Simat to measure increase or decrease in number of passenger miles is, in my judgment, inappropriate. I note that Simat throughout his testimony refers to the marginal load factor as being appropriate to determine whether an assumed added flight would be profitable. That may well be so for an individual flight under normal industry conditions which do not involve a transition period in which there is introduced into the market a highly preferred new type of equipment. But it seems to me to erroneously exclude from consideration the probability that passengers would be diverted from competitors, who would not have had, under the assumptions here applicable, as great a quantity of jets as they had historically, to TWA which, under said assumptions, would have had more of the jet equipment so highly preferred by the traveling public. Indeed Simat stated (Simat Tr. 9123) "A truly accurate measure of marginal load factor should consider not only the competitive factors but also the other factors I mentioned of increased public acceptance, changes in quality and quantity of air services, and independent of the change in capacity alone." As applied in the Simat Report, these factors have not been sufficiently recognized. I am strengthened in my opinion by the follow-

ing statement of defendants in their brief (p. 220) that even though Simat's methodology led to the mathematical conclusion that TWA would have lost $95.91 million, if it had operated the assumed additional jet equipment as hereinbefore described: "It was not, of course Simat's opinion that the management of reconstructed TWA would have permitted such staggering losses to accumulate. Management could have drastically cut schedules * * * but while such measures might have avoided the dire consequences of operating * * * [the jet] added plane miles they would not have sufficed to put the added fleet in the black." A mathematical result which varies so widely from the estimate of what would in fact have occurred, must be regarded with great caution.

In terms of passengers carried, the Simat calculations (with marginal load factor being the greatest factor) also result in an unrealistic assumed loss to TWA over the five year period of over 3 million passengers, as follows (TWA Ex. 328):

	Jet Added	Piston Deleted
1959	79,768	138,635
1960	546,707	1,729,434
1961	387,698	1,915,988
1962	564,593	967,280
1963	462,749	350,869
Total	2,041,515	5,102,206

A factor which leads to such unrealistic mathematical results as does the marginal load factor as used herein, should be rejected.

Examples of the unreliability of the results reached by use of the marginal load factor are cited in the Plaintiff's brief (pp. 191-4) as follows:

"In 1959, for example, a period when TWA's actual jet load factor of 83.1% was such as to demonstrate that jet capacity of all airlines was far less than sufficient to fly the passengers who wished to fly in jets, the defendants employ a 'marginal load factor' in computing what would have occurred with more jets of 56.5%. In 1960, the actual figure is 68.6% but defendants use 37.1%. In the year 1961 the actual figure was 55.6%, while the marginal figure used is 31.7%.*

"The fallacies of this approach would be more apparent if quarter-to-quarter figures were employed. For example, in the fourth quarter of 1960, TWA was able to offer 829,780 jet available seat miles. In the first quarter of 1961, it was able to offer 873,704 jet available seat miles—the increase resulting primarily from the deliveries of the first few Convair 880 jet aircraft. Revenue passenger miles for the two periods were respectively 490,699 and 482,514. [TWA Ex. C & C 4 (24)] A simple computation following the principles that Simat espouses indicates a marginal load factor of zero—according to Simat the sole cause of TWA's falling load factors has to be its improvement in equipment, limited as that improvement was.

• • • • •

"From 1959 to 1960 TWA decreased the piston service which it offered by 1,171 million seat miles; the piston passenger traffic which it carried was decreased by 1,054 million revenue passenger miles. The simple-minded computation to which the defendants' cause and effect assumptions lead them is that TWA's piston miles were operated at a marginal load factor of 90%;** that is, that for every 100 piston seat miles subtracted

* After the adjustment against economic growth, discussed below, the figures are 53.7% for 1959, 31.5% for 1960 and 21.0% for 1961. The defendants' figures were changed several times, and DX 330 is believed to reflect the final estimates.

** The adjustment against economic growth is applied in reverse to make this figure, for computational purposes, an historic 94.5%.

or added by TWA in 1959, 90 revenue passenger miles were subtracted or added as a direct result [DX271B, p. C-23, as modified by DX330]. This being, according to defendants, the sole explanation of the historical trends, they conclude that further decreases of piston mileage offered would have had similar effects, so that any time TWA was led to cancel a piston flight in 1959 it would have cost itself the passengers which would have filled 90% of that piston's seats, while added jets would (according to defendants' jet analysis), have filled only 56.5% of their seats. Any such piston cancellation, whether or not involving a jet replacement, would obviously be a scheduling decision costing TWA a great deal of money.

"Indeed, if there were operative in actual fact something properly describable as a 90% marginal load factor for pistons in 1959, TWA and all other airlines should as a matter of sound business management have made every effort to increase piston mileage so as to take advantage of this extremely favorable market situation. The proper management decision would have been to reverse the developing situation and replace all of the limited existing jet mileage with piston mileage."

The reason for Simat's extraordinarily high estimates of the load factors on displaced piston flights seems to be a fundamentally unsound approach. Simat's marginal load factors for the deleted piston services were calculated by matching decreases in piston passenger traffic with decreases in piston flights. However, it is apparent that some of the decreases in piston passenger traffic were the result of passenger preference for jets, which caused fewer persons to use those piston flights which continued to be operated. Simat paired the deleted piston flights with the total decline in piston passenger traffic from all sources.

To take a hypothetical example, it may be assumed that an airline operated four flights from Point A to Point B with 50 seat piston aircraft, averaging 40 passengers per flight. If it is further assumed that jet competition would cause a loss of five passengers per flight, then each flight would be carrying only 35 passengers. If the airline then withdrew one of these flights, the load factor of the deleted flight should properly be 70% (35 passengers as against 50 seats). However, there has been a total loss of 55 passengers, if the first loss of five passengers per plane is added to the loss attributable to the deleted flight. Using Simat's method of matching deleted flights with the total decline in passenger traffic, the deletion of one 50 seat flight would be deemed to have resulted in the loss of all 55 passengers, rather than the loss of 35 passengers. It is this basic error of methodology which apparently has resulted in estimates of marginal load factors for deleted piston flights which exceed 100% (i.e. exceed the maximum capacity of the deleted aircraft). It is, moreover, apparent that passenger traffic was declining on all major piston flights which were feeling the effect of competition from jets, both on flights which were subsequently deleted and also on those flights which were continued in operation. Matching this total passenger decline with the deleted flights alone has resulted in a completely invalid marginal load factor for deleted piston services, and the result has been to vastly overstate the amount of revenues that TWA would have lost by deleting piston flights.

The defendants counter by giving examples of "absurd results" reached by the Coverdale method, as set forth below, but it is my opinion that the questions they raise in that connection can be rationally answered. At page 245 of the defendants' brief, they point out that Coverdale

would add nearly two billion revenue passenger miles to TWA's domestic traffic from 1959 through 1962, a period in which that traffic declined by 154 million passenger miles; that in 1961 Coverdale bestows on TWA 644 million additional passenger miles heedless of the fact that in that year the entire domestic trunk industry could add only 300 million; and that American Airlines suffered a decline of 500,000 passengers and 339 million passenger miles in 1961 in spite of having added fifteen jets. Where, the defendants ask, were the additional TWA passengers to come from? It appears to me they would probably have come from passengers that were attracted from competitors who would not have had as attractive equipment in type or quantity, vis-a-vis TWA, as they did historically during the years of jet shortage; and that new passengers would also have been attracted by the new and preferred assumed TWA jet equipment. The new jets did not cause the historical decreases in traffic admittedly experienced by the industry and by TWA, as the methodology used by Simat seems to dictate.

It should be emphasized that plaintiff has not sought to recoup from defendants its entire operating losses incurred historically during some of the years in question. For example, as pointed out at page 32 of plaintiff's reply brief, in 1961, a year in which Pan-Am and American operated at a profit, TWA's operating losses were $12 million and its net loss $15 million before special adjustments (TWA Ex. 94). Its damage evidence claimed that operating results were adversely affected by $10.6 million by its failure to receive the jets diverted to others and delays in receipt of the jets it did receive. It is that adverse effect upon its operating results alone, for which plaintiff seeks recovery

in its claims based on inadequacy of its jet fleets. Plaintiff has not sought to blame defendants here for the results of a general economic turndown. Rather, since jets were admittedly more attractive to the traveling public than pistons, it is the reflection of customer dissatisfaction with inadequate equipment attributable to defendants' conduct that is here the key element.

The adjustment made by the original Simat Report in the marginal load factor was intended to eliminate such part of the assumed added traffic as was attributable to economic changes. It is true that the economic changes for this period had already occurred and had been fully absorbed by the flight schedules which had historically been operated during those years. Thus, deletion of economic growth factors might be valid in determining the extent to which assumed additional flights might have produced additional passengers for the domestic airline industry as a whole. However, what is at issue here is not how many passengers would have been added to the entire airline industry, but how many passengers would have been added to TWA. While some might have been totally new passengers, others would represent a diversion of existing passengers from other airlines to TWA. In short, the addition of more jet flights might have resulted in a considerable redistribution of airline passengers with great increases for TWA, even though relatively few new passengers are produced for the airline industry as a whole. Therefore, the economic growth factor, while it may be applicable in other contexts, is not properly applicable here.

A second instance of different factors used by the experts was historical "average annual stage length" used

by Coverdale in estimating stage lengths of assumed added flights, as opposed to "marginal stage lengths" used for this purpose by Simat. The factor of annual average stage length of TWA, as used by Coverdale separately for jets and pistons, in my opinion, adequately takes into consideration the various changes in stage lengths accompanying the introduction of jets. The mathematical basis for confirming Simat's estimates of marginal stage lengths of added flights developed, on cross examination, to be unreliable (Tr. 7918-34; TWA Ex. 320; Tr. 7955). No reasonable alternative to use of the annual average stage length by type of plane, as used in the Coverdale Report, was presented to me and I accept the validity of its use as a proper factor to be employed in the calculations of damages. (See TWA Ex. 396). The acceptance of the use of the annual average stage length, as a proper factor, eliminates the need for any discussion at this point of the validity of the factor of average trip length of passengers as computed by Simat.

Also in my opinion the Coverdale Report is reasonable in using actual annual average yield per passenger in computing the dollar yield estimates for assumed added passengers. In my opinion the Simat estimates, using the so-called "fare taper" are less reliable because they fail to take into consideration adequately the jet fare surcharges in existence during much of the period involved, and the varying fare structures in operation for various periods and various classes of travel.

In adopting the Coverdale figures based on TWA's average performance rather than the Simat figures based on declining marginal productivity, I have been influenced by the overall picture of TWA's performance in relation to the performance of all of the other domestic trunk carriers

during the period 1959-1963. In 1959, TWA had the highest operating profit for its domestic operations of any U. S. trunk line. It also operated over many of the most densely traveled long haul routes in the country. Given the strength of its route structure and its 1959 operations, it is reasonable to assume that with adequate equipment TWA would have fared approximately as well in the ensuing years as the trunkline industry as a whole. If a condition of overcapacity had set in, it would be reasonable to assume that TWA would not have fared significantly worse than the other trunks, since it is not asserted that historical TWA was operating too many aircraft during this period. The statistics, however, show that TWA fared far worse during this period than the other trunks. It is clear that during 1960, 1961 and 1962, when plaintiff claims it was short of jets, TWA fell significantly behind the other carriers, and that beginning in 1962 and in 1963 and 1964, when TWA was catching up in terms of jet equipment, it also significantly improved its performance in relation to the other trunk carriers.

These statistics, which are set forth below, are taken from the CAB's 1965 Handbook of Airline Statistics. In Part III, Table 4, figures are given for the entire domestic operations of the domestic trunk carriers for revenue passenger miles, passenger originations and passenger emplanements. Individual figures for TWA are given in Part III Table 18. If the TWA figures are subtracted from the totals for all trunk lines, the TWA figures can then be compared with the totals for all trunk lines other than TWA. In all cases, figures are given as shown in the Handbook, with the final 000's omitted. The comparisons are shown in Chart 1. To compare TWA's post 1959 performance with that of the other carriers, the figures in Chart

1 can be expressed year by year in terms of the percentage increase or decrease in relation to 1959. This comparison is set forth in Chart 2. The divergence between TWA's performance after 1959 in comparison with that of the other trunk lines can be seen even more clearly when the percentage figures in Chart 2 are shown in the graphs which follow that chart.

Chart 1

REVENUE PASSENGER MILES

	1959	1960	1961	1962	1963	1964
All Trunks Other Than TWA	23,547,987	24,782,266	25,286,494	27,402,634	31,079,743	35,127,863
TWA	4,579,229	4,450,933	4,248,298	4,425,206	5,304,013	6,530,505

PASSENGER ORIGINATIONS

	1959	1960	1961	1962	1963	1964
All Trunks Other Than TWA	39,358	40,252	40,018	41,932	47,751	53,828
TWA	5,130	4,932	4,651	4,827	5,629	6,704

PASSENGER ENPLANEMENTS

	1959	1960	1961	1962	1963	1964
All Trunks Other Than TWA	42,526	43,308	43,213	45,639	52,001	58,551
TWA	5,487	5,370	5,139	5,393	6,221	7,412

CHART 2

MEASUREMENT OF PERFORMANCE BY YEAR IN RELATION TO 1959

REVENUE PASSENGER MILES

	1959	1960	1961	1962	1963	1964
All Trunks Other Than TWA	23,547,987	+5.2%	+7.4%	+16.4%	+32.0%	+49.2%
TWA	4,579,229	—2.8%	—7.2%	—3.4%	+15.8%	+42.6%

PASSENGER ORIGINATIONS

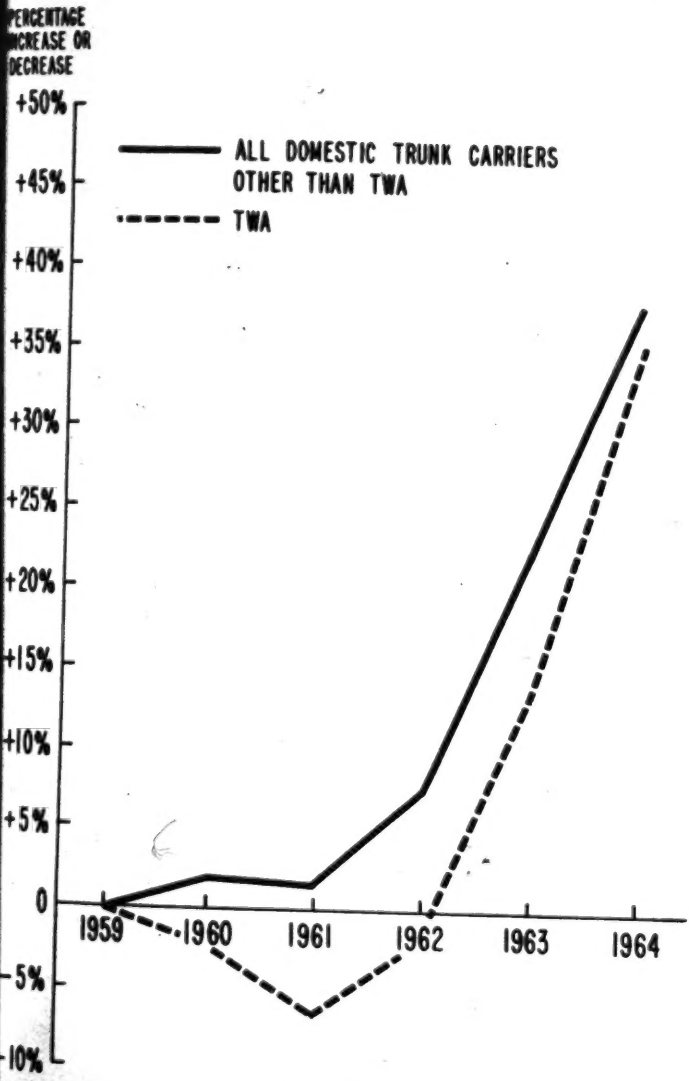
	1959	1960	1961	1962	1963	1964
All Trunks Other Than TWA	39,358	+2.3%	+1.7%	+6.5%	+21.3%	+36.8%
TWA	5,130	—3.9%	—9.3%	—5.9%	+9.7%	+30.7%

PASSENGER ENPLANEMENTS

	1959	1960	1961	1962	1963	1964
All Trunks Other Than TWA	42,526	+1.8%	+1.6%	+7.3%	+22.3%	+37.7%
TWA	5,487	—2.1%	—6.3%	—1.7%	+13.4%	+35.1%

PASSENGER ENPLANEMENTS

PERCENTAGE INCREASE OR DECREASE COMPARED TO 1959



From this it can be seen that TWA's performance in 1960 and 1961 was significantly worse, when compared to its 1959 performance, than that of the other trunk carriers. In 1962, it turned the corner of recovery, and by 1964 had nearly reached the same level of performance, vis-a-vis 1959, as the other trunks. This strongly suggests that TWA's shortage of jets in these years had a significantly adverse effect on its competitive position. Had TWA's performance been maintained at the same level as the other trunks, its passenger traffic would have been far greater than the levels which it actually experienced. In view of TWA's excellent route structure and its strong performance in 1959, the inference is strong that its failure to maintain its position in 1960 and the subsequent years was due to its shortage of jet equipment, which affected its ability to compete for the available passenger traffic. These statistics make it almost impossible to accept the Simat thesis that TWA would have suffered further drastic declines in passenger traffic if it had replaced piston flights with jets. Rather, the inference is that TWA would have obtained far higher levels of passenger traffic. Therefore, the Coverdale use of TWA's historical average figures to project the additional traffic from the jets would appear to be a conservative estimate.

As to the Domestic Division claims, the plaintiff's proof is sufficiently certain and direct to meet the standards in default situations (*Bigelow* v. *RKO Radio Pictures Inc.*, 327 U. S. 251 (1946)). The defendants, while raising doubts as to certain aspects of the claims which could undoubtedly have been cleared up if Hughes had been willing to testify, have failed to disprove these claims by any method open to them in the light of their default. Accordingly, I find as follows:

Subdivision (a). The plaintiff's estimates of revenues are reasonable and are adopted by me.

Subdivision (b). The plaintiff's use of original contract delivery dates in the Convair contract is not reasonable. Its estimates of revenues if computed instead on the basis of using the delivery dates provided for in Amendment No. 4 to said contract are reasonable and as so changed (as hereinafter set forth) are adopted by me. After appropriate adjustment of assumed changes in expenses, the net dollar reduction from plaintiff's claim is hereafter shown.

Subdivision (c). The plaintiff's estimates of revenues, modified similarly to use the delivery dates provided for in said Amendment No. 4, are reasonable and as so changed (as hereinafter set forth) are adopted by me. The appropriate related adjustment in expenses is hereafter shown.

As to costs of operation of the assumed added plane miles under subdivisions (a), (b) and (c), I find that if the methods of computation thereof, used by Simat, were applied to the increased traffic and revenue estimates by Coverdale, and which I have adopted as reasonable, they would produce at least as low expense estimates as those of Coverdale, and accordingly I adopt the Coverdale estimates of expenses applicable to subdivision (a), (TWA Ex. 449; Tr. 10,679-82) and the estimates of expenses under subdivisions (b) and (c) modified as above stated; provided, however, that a change in the applicable amount of net interest costs (hereafter discussed), is to be given effect.

After the record in the case was closed I requested counsel for the plaintiff to recompute the damage claim in respect of failure to receive and delay in delivery of the Convair 880s on the basis of using the delivery dates set forth in Amendment No. 4 to the Convair-Toolco con-

tract instead of the original contract delivery dates. The recomputation, with copy to counsel for defendants, has now been submitted to me. Since I have now decided (*supra*, p. 141) that the Amendment No. 4 dates are properly used for computation of damages, I set forth below the amount as computed by the plaintiff to be deducted from the plaintiff's claim in respect of the Convair 880s; and I have arranged to have the recomputation (Letter of Dudley B. Tenney to the Special Master dated August 30, 1968, with enclosures) filed with the Exhibits:

SUMMARY OF EFFECT OF APPLICATION OF REVISED ASSUMPTION THAT DELIVERY DATES FOR THIRTY CV880 AIRCRAFT WERE THOSE SET FORTH IN AMENDMENT NO. 4 IN LIEU OF THOSE SET FORTH IN ORIGINAL TOOLCO-CONVAIR CONTRACT

FOR THE PERIOD SEPTEMBER 30, 1955—DECEMBER 31, 1963

(Amounts in millions)

Increase in income and special items before provisions for income taxes (Price Waterhouse & Co. report, Vol. I p. 5, as revised by $.2 million in TWA Exs. 42 and 43 and DX262)	$71.9
Adjustments—Add (deduct) (Note 1):— Decrease in gain from operations before provisions for depreciation, obsolescence and amortization, per Coverdale & Colpitts	($3.6)
Reduction in provisions for depreciation of airframes, engines and rotable parts due to later timing of the fleet, $1.9 million in 1960 and ($.1) million in 1962 (Note 2)	1.8

Decrease in proceeds relating to earlier sale of 103 piston aircraft:		
Per R. Dixon Speas Associates	(.8)	
Less—Reduction in "bad debts" (Note 3)	.2	
Decrease in reserve for overhaul of jet aircraft, eliminated at December 31, 1963, resulting from reduced maintenance expense (Note 4)	(.7)	
Total adjustments		(3.1)
Increase in income and special items before provisions for income taxes, as adjusted to reflect delivery of thirty CV880 aircraft on dates set forth in Amendment No. 4 of Toolco-Convair contract		$68.8

Since, however, I have elsewhere rejected the plaintiff's claim in respect of the earlier sale of piston aircraft, I eliminate from the foregoing recomputation the items

Decrease in proceeds, etc.	$(.8) million
Less reduction in "bad debts"	.2 "

Accordingly the recomputation, as so changed, results in a reduction of the plaintiff's claim in respect of the Convair 880s of $2.5 million.

(C) *B-331B's*

An additional point is raised by the defendants in connection with the plaintiff's claim under this Section I. It asserts that the cost of operation of the five fan-jet B-331Bs

which were leased by the plaintiff from Boeing was less than the cost of operations of the additional B-331s it would have had in the assumed additional fleet underlying the plaintiff's damage claim. The defendants claim that the savings in operating the B-331Bs in the post-1963 period until the end of the leases in 1971 and 1972 should accordingly be deducted from any damages awarded under this Section I. They estimate such lease period for the five planes at 40.33 aircraft years. On the basis of a historically determined production rate of 4,000 block hours per aircraft, and applying a "conservative" cost advantage of $100 per block hour, the savings would aggregate $16.1 million (DX 271A, pp. VIII—10-12; Tr. 8818-19). The defendants state that it is the rule in both tort and contract cases that a plaintiff may recover only for the net effect of defendants' acts after deducting the value of any benefit caused by such acts.

The plaintiff points out that insofar as savings from the operation of the B-331Bs (as against the assumed additional B-331s) for the 1959-1963 period is concerned these estimated savings were deducted fully in the Coverdale computations. And the plaintiff makes no claim for damages based upon operations of its jet fleet in the post-1963 period.

The plaintiff further points out that the defendants had nothing to do with the decision to lease the B-331Bs; it was the Voting Trustees, after the defendants' control of the operations of TWA had ceased, who ordered them; and accordingly the rule of law cited by the defendants has no application to the facts in this case.

The plaintiff finally points out that if one were to attempt to calculate the relative benefit of operating the B-331Bs and the assumed jet fleet in the post-1963 period, it would

be necessary to take into consideration many additional factors ignored in the defendants' calculation. Four such items are listed in the plaintiff's reply brief at p. 130, as follows:

"(i) During the period within which the six owned B-331s would have been fully depreciated, the rental expense for the five leased B-331Bs would have exceeded total depreciation upon the six B-331s by some $9.5 million [TWA Ex. 353; Simat Tr. 8805-06].

"(ii) If TWA wished to continue operating the five B-331Bs at the end of the lease period, when reconstructed TWA would have owned six fully depreciated B-331s, historical TWA would either have to exercise its option to buy the planes at a substantial figure or have to enter into a new lease [Tr. 8813-15].

"(iii) Six B-331s would have earned more revenue than five B-331Bs, but Simat made no allowance at all for such additional revenue although he thought it 'appropriate to consider the earnings power of the additional B-331, that is, the sixth aircraft' [Simat Tr. 8806, 8810].*

"(iv) No account was taken of the resale value of the six owned B-331Bs [Simat Tr. 8814-16] despite the defendants' statement that airplanes 'cannot be thrown away' [Def. Br., p. 275].*

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* "Defendants also take no account of either the ultimate resale value or the post-1963 earning power of the four additional CV-880s which reconstructed TWA would have had in its jet fleet if it had received all 30 CV-880s."

I am of the opinion that the defendants have failed to state any claim for a benefit due to their actions; that their computation of the value of the alleged benefit is fatally deficient; and accordingly no deduction should be made from damages awarded to the plaintiff by reason of the

alleged savings in operations of the B-331Bs in the post-1963 period.

(D) *Mitigation Claim*

Defendants also claim that the plaintiff should have mitigated its damages by "picking up the four unassigned 880s in 1961"; by accepting the opportunity, which it allegedly rejected, to acquire seven 880Ms available for delivery from Convair from June through December 1961 in Capital Airlines' configuration (or from October 1961 through April 1962 in plaintiff's configuration), and thirteen fan-jet 990s available from Convair for delivery from December 1961 through April 1962 in American Airlines' configuration. The citations in support of the mitigation claim (DX 56; DX 62 pp. V-4, V-9-10; DX 72; DX 74; Tr. 2332-33, 2351-52, 2364-67; DX 78, p. 4; Tr. 2405-08) are generally too indefinite or too incomplete to form a basis for a specific mitigation claim. Evidence from the defendants to complete the picture as to the underlying facts was not available to the plaintiff due to the defendants' default. Indeed, defendants do not even compute the dollar value of their mitigation claim.

The plaintiff correctly points out that Toolco owned the four unassigned 880s and had the rights to the seven 880Ms and the thirteen fan-jet 990s (Rummel Tr. 1534-37) so that Toolco's agreement would have been required to consummate any of the transactions. The independent Trustees of TWA were engaged in a series of bitter controversies, including threats of litigation, with Toolco in 1961-1962 (complaint, paragraphs 35, 37, 38, 39, 40-46), so that no transactions of the kind which the defendants envisage in their mitigation claim would have been feasible as a business matter, especially since the policy of the Voting Trus-

tees favored buying Boeing planes rather than additional Convairs. The defendants' mitigation claim is accordingly rejected.

(E) Adjustment to Reconstructed Interest Cost

The interest cost of the funds that would have been applied to the timely acquisition of a sufficient number of aircraft must next be determined.

TWA introduced the testimony of John C. Biegler, a partner of Price Waterhouse, who used the Drexel Harriman Ripley financial plan (TWA Ex. 5, Part II) and a reconstructed flight equipment fund take down schedule (TWA Ex. 7(b) 2, VI, B, Schedule B-3) to compute the total interest cost that would have been incurred by Reconstructed TWA during the period October 1, 1955-December 31, 1963 (TWA Ex. 7(b) 2, VI, B, Schedule B-1). This figure was compared with the actual interest cost incurred by Historical TWA (TWA Ex. 7(b) 2, VI, C, Schedule C). After appropriate adjustments Price Waterhouse found that there would be an increase in gross interest cost for Reconstructed TWA over Historical TWA in the amount of $9.9 million. In addition to this increased cost, Reconstructed TWA would also have incurred added expense to the extent of $1.0 million, a premium for its early payment of the $35 million 3¾ percent Equipment Mortgage Sinking Fund Bonds in July, 1955 (TWA Ex. 7(b) 2, VI, A, Schedule A). These costs appear in the plaintiff's "Condensed Summary of Effect of Application of Assumptions" as deductions from the alleged overall reconstructed gain in operating profits (TWA Ex. 50).

The defendants have not attempted to fix the appropriate interest cost. Since I have not accepted the Drexel Harriman Ripley financial plan (see pages 257-264) on which the Price Waterhouse computation relied, I have independently calculated the appropriate cost of interest. The testimony of Biegler indicated that a separate calculation of reconstructed interest expense would be feasible, granting certain additional assumptions. (Tr. 6361). I believe the record is sufficiently complete to allow these assumptions to be taken. However, in my opinion it is not necessary or feasible for me to construct a complex financial plan on the order of that presented by Drexel Harriman Ripley. Also, I do not find it necessary or feasible to extend my determinations by making detailed calculations reflecting complex and minor accounting adjustments.

In reconstructing the interest expense associated with the additional and earlier purchase of jet flight equipment I have assumed that funds were available at the time of the delivery of each aircraft. Except with respect to an item representing accrued interest on deposits for the purchase of twenty CV 880's, which is a matter of historical record and which is discussed hereafter at page 155, I have not made provision for funds for advance deposits and progress payments on aircraft purchases. For me to do so on a reconstructed basis would involve elaborate calculations and several speculative assumptions not required in recognizing the historical item of accrued interest on deposits for the twenty CV 880 aircraft. For similar reasons I have not considered any commitment fees and short-term investment returns that might be experienced with certain types of financing. The proceeds from the sale of piston aircraft were determined to have no material impact on the calculation of interest. In my opinion, these procedures and assumptions are fair and reasonable, and they avoid the

substantial amount of speculation or guesswork that would be involved with a more complex calculation.

In arriving at an appropriate deduction for cost of capital, I find that two components must be determined: (1) the amount of funds needed and the timing of the takedowns; and (2) the rate at which the funds are obtained.

(1) ***The amount of funds needed and the timing of the takedowns.***

(a) *six additional B-331 aircraft*—The six B-331 aircraft that were diverted became historically available to Pan American on the following delivery dates.*

Aircraft No.	*Date Received*
N701	November 5, 1959
N702	December 15, 1959
N703	December 30, 1959
N704	March 23, 1960
N705	April 29, 1960
N706	June 8, 1960

To avoid undue complexity I assume that one-third of the funds required for the purchase of these aircraft and related spare parts and equipment would be needed by TWA as of October 1, 1959, one-third as of January 1, 1960 and the balance as of April 1, 1960. As stated in the Price Waterhouse Report, the full purchase price of these aircraft and related spare parts and equipment would amount to a capital expenditure of $43.1 million (TWA Ex. 7(b) 2, VI, p. 35). I accept this figure.** Accordingly, I assume

* Source: Coverdale Report, TWA Ex. 4-c(1), p. 10. The impact of delivery to TWA at dates earlier than the above dates which Coverdale in its report described as "assumed receipt dates" is considered hereafter at pp. 150-155.

** Defendants' expert, Simat, relied on the Price Waterhouse Report for basic data in computing the cost of capital to effect purchase of the leased aircraft (Simat Report, DX 277A, IX-B-3).

that $14.4 million would be required as of the beginning of the fourth quarter of 1959, $14.4 million as of the beginning of 1960 and $14.3 million as of the beginning of the second quarter of 1960.

(b) *ten additional CV880 aircraft*—It was my determination above at page 141 that TWA would have acquired ten additional CV880 aircraft during 1960 and that delivery would have occurred from May through November of that year. As stated by Price Waterhouse, the full purchase price for these aircraft and related spare parts and equipment would have amounted to $48.1 million (TWA Ex. 7(b) 2, VI, p. 43). I accept this determination. Accordingly, I assume that one-third of this total amount, $16.1 million, would be needed as of April 1, 1960, one-third of $16.0 million as of July 1, 1960, and the balance of $16.0 million at October 1, 1960.

(c) *earlier delivery of jet aircraft*—I determined above at pages 52, 87 and 141 of this Report that TWA would have acquired its jet fleet prior to the historical delivery dates. With respect to the Boeing fleet, eleven B-131 aircraft and seventeen B-331 aircraft would have been acquired an average of 1.63 months earlier, and nineteen CV880 aircraft an average of 7.74 months earlier as shown in the calculations below.

Average Delay in Purchase of Fifteen B-131 and Eighteen B-331 Aircraft

Actual and Assumed Receipt	*Reconstructed Delivery Date*[1]	*Months Difference*
B-131 Aircraft		
1-29-59	11-30-58	2.0
3-17-59	12-31-58	2.5
3-30-59	1-31-59	2.0
4- 3-59	2-27-59	1.0
4-18-59	3-30-59	0.5
4-29-59	4- 3-59	1.0
5-10-59	4-18-59	1.0
5-13-59	5-10-59	0.0
5-24-59	5-13-59	0.5
5-28-59	5-24-59	0.0
6-13-59	5-28-59	0.5
7- 1-59	6-13-59	0.5
7-10-59	6-29-59	0.5
7-14-59	7-10-59	0.0
8- 1-59	7-27-59	0.0
B-331 Aircraft		
11- 5-59	7-19-59	3.5
11-10-59	8-22-59	2.5
11-10-59	8-28-59	2.5
11-25-59	9-22-59	2.0
12-15-59	10- 6-59	2.5
12-23-59	10-27-59	2.0
12-30-59	11- 5-59	2.0
1-18-60	11-10-59	2.0
3-23-60	12-15-59	3.0
4- 1-60	12-30-59	3.0
4- 5-60	1-18-60	2.5
4-14-60	2-29-60	1.5

[1] See determination pp. 52 and 87 this report.

Actual and Assumed Receipt	*Reconstructed Delivery Date*	*Months Difference*
4-29-60	3-23-60	1.0
5- 9-60	4-26-60	0.5
5-25-60	4-29-60	1.0
6- 8-60	5- 9-60	1.0
7- 1-60	6- 8-60	1.0
7- 1-60	7- 1-60	0.0
	Total	45.5

Average Delay:

$$\frac{\text{Total Months Delay}}{\text{\# of Aircraft Delayed}} = \frac{45.5}{28} = 1.63 \text{ Months}$$

$$= \frac{1.63}{12} = .1354 \text{ Year}$$

Average Delay in Purchase of Twenty CV880 Aircraft

Actual Receipt	*Delivery Date Reconstructed*[1]	*Months Difference*
5-18-60	5-15-60	0.0
1- 1-61	5-15-60	7.5
1- 5-61	5-15-60	7.5
1- 6-61	6-15-60	6.5
1- 8-61	6-15-60	7.0
1-12-61	6-15-60	7.0
1-21-61	7-15-60	6.0
2- 2-61	7-15-60	6.5
2-15-61	7-15-60	7.0
3-15-61	8-15-60	7.0
3-18-61	8-15-60	7.0
3-20-61	8-15-60	7.0
4-26-61	9-15-60	7.5
5- 6-61	9-15-60	7.5
5-25-61	9-15-60	8.5
6- 9-61	10-15-60	8.0
7- 9-61	10-15-60	9.0
8-10-61	10-15-60	10.0
9- 2-61	11-15-60	9.5
10-13-61	11-15-60	11.0
	Total	147.0

Average Delay:

$$\frac{\text{Total Months Delay}}{\text{\# of Aircraft Delayed}} = \frac{147.0}{19} = 7.74 \text{ months}$$

$$= \frac{7.74}{12} = .6450 \text{ year}$$

[1] See determination page 141 this report.

For the purpose of calculating the effect on cost of capital with respect to the delayed Boeing aircraft I find that a determination that the aircraft would have been delivered earlier requires a matching determination that funds would be needed earlier to effect purchase. As above, in determining the capital amount needed I rely on those figures provided in the Price Waterhouse Report.

As stated by Price Waterhouse the initial cost of fifteen B-131 aircraft would have been $71.6 million and the cost of related spare engines $5.9 million or a total of $77.5 million (TWA Ex. 7(b) 2, VI, pp. 30 and 32). The schedule of reconstructed deliveries above indicates that only eleven of the B-131 aircraft were delayed. On a prorated basis the cost of these eleven aircraft would amount to $56.8 million.* Price Waterhouse also indicated that the total reconstructed cost for eighteen B-331 aircraft and related spare parts and equipment would have been $129.3 million (TWA Ex. 7(b) 2, VI, p. 35). Seventeen of the eighteen B-331 aircraft were delayed and the prorated cost of these aircraft is $122.1 million.** On a fleet basis, the total cost of delayed Boeing aircraft and related spare parts and equipment thus amounts to $178.9 million. Accordingly, I determine that TWA would have to have had this amount available an average of 1.63 months earlier in order to take delivery at the reconstructed earlier dates.

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* 15 aircraft = $77.5 million = $5.16 million per aircraft
× 11 delayed aircraft
15 = $56.76 million for 11 aircraft

** 18 aircraft = $129.3 million = $7.18 million per aircraft
× 17 delayed aircraft
18 = $122.06 million for 17 aircraft

Similarly, on a reconstructed basis the funds necessary to effect the purchase of the delayed CV880 aircraft would have had to be available to pay for the aircraft on the earlier reconstructed delivery dates. I have determined, as set forth above that these aircraft would have been delivered an average of 7.74 months earlier than the historical delivery dates, and accordingly, actual funds would have had to be available more than seven months earlier.

As stated by Price Waterhouse, the initial cost of the nineteen CV 880 aircraft that would have been acquired earlier would be the historical capital outlay of $83.0 million, plus a reconstructed amount of $.5 million for the earlier purchase of spare parts (TWA Ex. 7(b) 2, VI, pp. 43 and 46). This total figure of $83.5 million includes a $4.1 million historical payment for interest on an advance deposit. Since I have determined that the funds to pay for the earlier purchase of these aircraft would have been available 7.74 months earlier it is reasonable to assume that the accrued interest on the advance deposit would be reduced. Therefore I determine that instead of the $4.1 million interest payment, TWA would have paid $3.5 million, a difference of $.6 million.* Such an adjustment reduces the total sum needed to purchase the nineteen delayed CV 880 aircraft from $83.5 million to $82.9 million.

(2) ***The rate at which the funds are obtained.***

In Section II pp. 183-84 I have determined that the *Hanover Shoe* case is controlling on the question of the

* 1. Interest Payment of $4.1 million at 5.5% (TWA Ex. 7(b)2, VI, p. 44) indicates time period of 51 months.

2. Adjusted period:
51 − 7.74 = 43.26 months

3. Adjusted interest payment on advance deposit:
$4.1 million × 43.26 = $3.5 million

proper cost of capital to employ in measuring damages in antitrust cases. According to *Hanover*, the proper rate to employ is the company's external borrowing rate.

In examining the record I find that there is enough evidence of borrowing rates for the period in question to fix an approximate constructive rate for TWA which is both fair and reasonable under the facts and circumstances developed at the hearing. The record discloses that TWA historically negotiated major debt financings on several occasions during the general period in question, 1955-1963. The significant independent borrowings involved the following debt.*

1957	Chattel Mortgage Notes, 5¼% due December 1, 1960	$ 20.7 million
1957	Bank Loan, 5¼%	$ 12.0 million
1960	Equipment Mortgage Notes, 6½%, due December 31, 1972	$114.8 million
1960	Equipment Mortgage Serial Notes, 6%	$ 85.4 million
1961	Equipment Mortgage Notes, Series B, 6% due December 31, 1977	$ 57.0 million
1961	Equipment Mortgage Serial Notes, Series B, 5½%	$ 21.9 million
1961	Subordinated Income Debentures, 6½% due June 1, 1978	$111.9 million
1963	Convertible Subordinated Debentures, 5¾% due October 1, 1983	$ 38.5 million

Interest rates for these actual borrowings range from 5¼-6½ percent. Reference to long-term borrowings by

* Source: Price Waterhouse Report, TWA Ex. 7(b)2, VI, Schedule C4

other airlines at or about this time (1957-1960) indicates that rates on debt financings generally ranged from 5-6½ percent.* Those straight financings (no convertible feature) of more than $25 million with indicated borrowing rates are listed below:

1958	*Delta* —Debentures due Oct. 1, 1974, 6%	$25.0 million
	Northwest —Credit 4¼-4⅝% due 1965	$32.5 million
	Northwest —Notes due October 1, 1978, 6%	$40.0 million
1959	*American* —Promissory Notes due Nov. 1, 1996, 5%	$30.0 million
1960	*Pan American* —Promissory Notes 1st installment due 1967, 6%	$50.0 million
	Capital —Secured Notes Series A due September 30, 1965, 5½%	$25.5 million
	American —Notes, 5¾%	$60.0 million

I also take note that one aspect of the Drexel Harriman Ripley financial reconstruction was a $90-100 million debt financing scheduled for May 1959 (TWA Ex. 5, Part II, p. 70). Drexel Harriman Ripley made the following appraisal as to the interest rate on this proposal:

*Source: Loeb, Rhoades Report DX270, Part II, Exhibit A.

"We believe that institutional investors, in the second quarter of 1959, would have charged TWA an interest rate of 6% on the used portion of the Series B Flight Equipment Notes, and a commitment fee of ½% per annum on the unused portion." (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 70)

The Rate Applicable to the Reconstructed Purchase of the Boeing Fleet—On a reconstructed basis TWA would have purchased its entire Boeing fleet between November 30, 1958 and July 1, 1960.

The record discloses no large-scale financing by TWA at or about the time when arrangements for funds certainly would have been made to effect purchase during the above period, i.e., 1958-1959. Therefore I have looked to those points in the record that suggest a rate that might have been obtained at this time by an independent management seeking funds to purchase a substantial jet fleet. Considering the evidence on airline borrowings recited above on pages 155 through 157, I believe that it is fair and reasonable to fix TWA's borrowing rate for funds needed to purchase the Boeing aircraft on the reconstructed delivery dates at 6%.

The Rate Applicable to the Reconstructed Purchase of the Convair Fleet—However, I find a different interest rate should be used in respect of the thirty CV 880 aircraft. I have previously determined that the reconstructed and timely delivery of a fleet of thirty CV 880 aircraft would have occurred between May 15, 1960 and November 15, 1960. These deliveries would have occurred subsequent, in point of time, to the deliveries of the Boeing fleet. Of the total reconstructed Boeing fleet of thirty-three aircraft only two were delivered after delivery of the first Convair aircraft.

Unlike the case with the acquisition of the Boeing fleet, where there is no evidence in the record of financings directly related, in point of time, to the acquisition of the fleet, TWA did undertake large scale financing approximately seven months subsequent to the first delivery, on a reconstructed basis, of the Convair fleet. From the financial statements submitted in evidence it is reasonable to conclude that the historical purchase of twenty CV 880 aircraft was largely financed by the historical borrowings arranged in December, 1960, referred to above on page 156. Aside from the training aircraft which was delivered in May 1960 the first deliveries of the CV 880 fleet historically commenced immediately after the December 1960 financings.

Under the December, 1960 financing agreements provision was made to sell Equipment Mortgage Notes (of which $114.5 million were sold) at 6½%, and Equipment Mortgage Serial Notes (of which $85.4 million were sold) at 6%. The weighted average interest rate for these external borrowings is 6.3%.* There is no significant evidence that TWA could have borrowed at a lower or higher rate at or about the time of the reconstructed delivery dates. Accordingly, I determine that 6.3% should be the rate applicable in computing the additional interest cost that would be connected with the additional and earlier need of funds for the reconstructed acquisition of the CV 880 aircraft.

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*Weighted Average interest rate (x)

$114.5 million	× 6.5%	=	7.443
$ 85.4 million	× 6.0%	=	5.124
199.9 x		=	12.567

x = .063

Reconstruction of Interest Cost

The basic components determined above, i.e., the amount needed, the timing of the take downs, and the rate, allow a computation of an interest cost that is an appropriate deduction from the overall increase in operating profits resulting from the reconstruction of TWA to include the additional and earlier use of jet aircraft. In computing interest charges, an adjustment should be made, however, to the gross capital investment required to give effect to the cash throw-off in the form of depreciation and amortization from the added capital investment. I note that such an adjustment was an integral part of the calculation introduced by Simat with respect to the constructive purchase of the leased aircraft (DX 271A, IX-B), and that plaintiff's counsel in their brief adopted this calculation (Plaintiff's Brief, p. 227). The depreciation and amortization figures associated with the reconstructed additional and earlier use of jet flight equipment have been calculated by Price Waterhouse. They were not materially challenged by the defendants and I accept them as stated. I have used them below in column 2 of Calculations A and B and also in Calculations C and D. Finally, it is assumed that the reconstructed borrowings necessary to finance the purchase of the additional jet equipment will not be paid off prior to December 31, 1963.

Proceeding on the foregoing assumptions and evidence, I have determined that Reconstructed TWA would have incurred additional interest cost over the period 1959-1963 in the amount of $8.3 million for adding six B331 aircraft, and $8.7 million for adding ten CV 880 aircraft, or a total of $17.0 million. The details of these determinations appear in Calculations A and B below.

Adding Six B-331 Aircraft
($ millions)

	(1) Adjusted Capital Investment Beginning of Period	(2) Less Depreciation and Amortization for the Period[2]	(3) Adjusted Capital Investment End of Period	(4) Average Investment for the Period (1) + (3) ÷ 2	(5) Interest at 6 per cent	(6) Interest Cost for the Period (4) × (5)
Fourth qtr. 1959	14.4[1]	—	14.4	14.4	1½%[3]	.216
First qtr. 1960	28.8[1]	0.4*	28.4	28.6	"	.429
Second qtr. 1960	42.7[1]	1.1*	41.6	42.1	"	.632
Second half 1960	41.6	2.3*	39.3	40.5	3%[4]	1.215
1961	39.3	5.1	34.2	36.7	6%	2.202
1962	34.2	4.3	29.9	32.0	"	1.920
1963	29.9	3.6	26.3	28.1	"	1.686
Total increase in interest cost for period 1959-1963						$8.300

* Proration of annual depreciation of $3.8 million.

[1] See (1)(a) above on page 150.

[2] Source: TWA Ex. 7(d).

[3] One-quarter of annual rate of 6 per cent.

[4] One-half of annual rate of 6 per cent.

CALCULATION B

Interest Cost 1960-1963

Adding Ten CV-880 Aircraft

($ millions)

	(1) Adjusted Capital Investment Beginning of Period	(2) Less Depreciation and Amortization for the Period[2]	(3) Adjusted Capital Investment End of Period	(4) Average Investment for the Period (1) + (3) ÷ 2	(5) Interest at 6.3 per cent	(6) Interest Cost for the Period (4) × (5)
Second qtr. 1960	16.1[1]	.1*	16.0	16.1	1.58%[3]	.254
Third qtr. 1960	32.0[1]	.6*	31.4	31.7	"	.501
Fourth qtr. 1960	47.4[1]	1.3*	46.1	46.8	"	.739
1961	46.1	5.7	40.4	43.3	6.3%	2.728
1962	40.4	5.4	35.0	37.7	"	2.375
1963	35.0	4.4	30.6	32.8	"	2.066
				Total increase in interest cost for period 1960-1963		$8.663

* Proration of annual depreciation of $12.0 million.

[1] See (1)(b) above on page 150.

[3] Source: TWA Ex. 7(d) as amended by letter of Price Waterhouse to Cahill, Gordon of August 30, 1963, Note 2.

[3] One-quarter of annual rate of 7.2 per cent.

Since historically TWA had the benefits of the earnings generated by the twenty-eight delayed Boeing aircraft and the nineteen delayed CV 880 aircraft after their historical acquisition, in determining damages for delay in receipt of these aircraft, I am concerned only with the loss of profits in the period between constructive deliveries and actual deliveries. I have determined, as stated above, that the average delay in acquisition of the Boeing aircraft was 1.63 months and that the average delay of the CV 880 aircraft was 7.74 months. I find that these are fair and reasonable periods to use in determining the additional interest cost to TWA which would be incurred in financing the earlier acquisitions. Accordingly, I determine that the additional interest cost related to the earlier ownership of the delayed Boeing aircraft would be $1.4 million, as shown in Calculation C below. The additional interest cost related to the earlier purchase of the delayed CV 880 aircraft amounts to $3.2 million as shown in Calculation D below.

CALCULATION C

Interest Cost 1958-1960

Earlier Purchase of Twenty-Eight Boeing Aircraft ($ millions)

Cost of 11 B-131 Aircraft delayed[1]	56.8	
Cost of 17 B-331 Aircraft delayed[1]	122.1	
a. Total cost of earlier Boeing Aircraft		178.
Less increase in depreciation as a result of the earlier purchase[2]		3.
b. Net value of earlier investment		175.
c. Average earlier investment (a + b ÷ 2)		177.
× annual interest rate[3]		
Increased interest cost for one year		10.6
× average delay		.13
		$1.43

[1] See determination page 154 above.
Source: TWA Ex. 7(b)2, VI, pp. 30, 32 and 35.

[2] Source: TWA Ex. 7(d).

[3] See page 158 above.

CALCULATION D

Interest Cost 1960-1961

Earlier Purchase of Nineteen CV-880 Aircraft
($ millions)

Cost of 19 Aircraft delayed[1]	$ 82.9
Less increase in depreciation as a result of the earlier purchase[2]	$ 6.8
Net value of earlier investment	$ 76.1
Average earlier investment (a + b ÷ 2)	$ 79.5
X Average annual interest rate[3]	$ .063
Increased interest cost for one year	$5.0085
X Average delay	.6450
	$3.2305

[1] See determination page 155 of this report.
Source: TWA Ex. 7(b) 2, VI, p. 46.

[2] Source: TWA Ex. 7 (d) as amended by letter of Price Waterhouse to Hill, Gordon of August 30, 1968, Note 2.

[3] See page 159 above.

The total increase in interest cost caused by the additional and earlier purchase of jet flight equipment aggregates $21.6 million as shown in Calculation E below.

CALCULATION E

Summary of Adjustments to Interest Cost
1958-1963

	($ millio
I. *Additional Purchase*	
Six B-331 Aircraft	$ 8.
Ten CV-880 Aircraft	8.
	$16.
II. *Earlier Purchase*	
Eleven B-131 Aircraft and Seventeen B-331 Aircraft	$ 1.
Nineteen CV-880 Aircraft	3.
	4.
Total	$21.

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As shown by the above table the proper amount to be deducted from the damages under Section I in respect of interest cost is $21.6 million. This represents an increase of $10.7 million over the deduction made by Price Waterhouse (TWA Ex. 50).

(F) Damages under Section I

For the reasons above stated, the amount of the damages under Section I is as follows:

A. International Division		$22,400,000.
B. Domestic Division	$29,300,000.	
Less adjustment as to Convair 880s:	($ 2,500,000.)	$26,800,000.
Total Net Revenues		$49,200,000.
Less adjustment relating to interest rate:		($21,600,000.)
Damages under Section I		$27,600,000.

An accounting adjustment related to the above damages is made in the final award in Section VIII.

II.

Losses due to being required to lease jets.

The following allegations in the complaint underlie the claim considered in this Section II:

"9. Beginning in or about the year 1939 and continuing up to and including the date of the filing of this complaint, the defendants, Atlas and other persons acting for each of them have been and are now engaged in:

• • •

"(f) Sales and leases of jet-powered aircraft on the condition, agreement and understanding that the purchaser or lessee shall not buy or lease the goods of a competitor or competitors of the vendor or lessor, in violation of Section 3 of the Clayton Act; and

• • •

"10. Each act of the defendants and Atlas hereinafter alleged was done in furtherance of the offenses charged in the preceding paragraph and was a part thereof and was done with the primary purpose of restraining and monopolizing the trade and commerce described above. It was the intent of the defendants and Atlas, *inter alia*:

• • •

"(h) That the defendants and Atlas would obtain substantial profits for themselves, at the expense of TWA and other air carriers, as the result of restrictions upon competition in the trade and commerce hereinbefore alleged.

• • •

"20. During the period 1959 to 1960, defendants arranged for the lease to TWA by Toolco of certain jet-powered aircraft on a day-to-day basis. Such aircraft were the first and only jet-powered aircraft made available to TWA by the defendants during the years 1955 to 1960 and the number of aircraft so leased by Toolco to TWA was inadequate for the needs of TWA. Such leases were given on a continuing condition, agreement and understanding that TWA would not purchase or lease aircraft from any other potential supplier thereof. The effect of such continuing condition, agreement and understanding was to foreclose, to all potential suppliers of jet-powered aircraft to TWA other than defendants, the opportunity for selling or leasing jet-powered aircraft to TWA."

The specific allegations set forth in Paragraph 20 above concern a fleet of fifteen B-121 jet aircraft and four B-331 jet aircraft that were historically leased by TWA from Toolco according to a schedule of delivery dates commencing in January, 1959 and ending in December, 1959. These nineteen leased aircraft are among the fleet of sixty-three jets considered in Section I. Except for two B-131 aircraft which were purchased in May, 1960, they were historically purchased by TWA on December 30, 1960.

The plaintiff and its experts contend that the defendants forced TWA to lease these jet aircraft from Toolco instead of permitting it to own them, with the result that TWA had to pay far more to have the use of these aircraft than it would have paid if it had originally bought the aircraft itself. TWA further contends that

"Toolco, on the other hand, not only profited through the receipt of rental payments but also, by taking depreciation on an accelerated basis, created a tax gain for which it claimed capital gains treatment upon ultimate sale." (Plaintiff's Brief, p. 220.)

Proof of Damages

TWA through its financial expert, Morehouse of Drexel Harriman Ripley, included among the "Fundamental Principles of Airline Finance" that an airline should own its flight equipment rather than lease it from other parties. Two minor exceptions to this general principle, the "seasonal interchange" type of lease and the "through run interchange" type of lease were stated. (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 4)

The cross-examination of Morehouse developed the following points:

¶ The equipment represented by the two exceptions, i.e., the "seasonal interchange" and the "through run interchange" type of lease, is a comparatively small part of the total fleet of any airline. (Tr. 3991-3992).

¶ In the opinion of Drexel Harriman Ripley an airline is not soundly financed if its major income producing facilities, as contrasted with what might be described as servicing equipment such as hangars and airport facilities, are not owned. (Tr. 3995).

¶ The principal distinction between the popularity of railroad car leasing and the unpopularity of airplane leasing is the much more rapid development of the state of the art in the aircraft field, but it might be appropriate for an airline to lease rather than buy if it thought that the particular aircraft which it needed presently might be outdated quite shortly. (Tr. 3996).

¶ There has been interest in the use of equipment trust financing for airlines. Equipment trust financing is not particularly germane to the leasing problem, but it is somewhat "in the same ball park." (Tr. 4000).

¶ There are under certain conditions tax advantages such as the investment credit which make it a good business decision to enter into leasing arrangements. The investment credit was not a factor, however, during 1955-1960. (Tr. 3997, 4020-1).

¶ After the investment credit became effective United Air Lines leased a sizeable number of airplanes through a third party group of commercial banks to whom the credit was more valuable than if United had owned or leased directly. (Tr. 4029).

¶ Among the factors to consider in a comparison of the cost of ownership with the cost of leasing would be an estimate of the cost of the capital involved in the purchase of an airplane, and the depreciation on the airplane, when owned, compared with the gross rentals involved in the lease alternative. (Tr. 4013-4014).

¶ Drexel Harriman Ripley believe that it is in the best interests of an airline to retain the greatest degree of control of its income-producing property. Ownership gives that greatest degree of control. A very long lease with reasonably flexible provisions probably involves the giving up of less of the control factor than the opposite extreme, a day-to-day lease which has no assurance of any reinstatement of the lease. (Tr. 4020, 4019).

Operating Profit Lost—TWA has claimed that had it owned the aircraft leased from Toolco in 1959 and 1960 from the date Toolco received them, it would not have incurred actual rental expense aggregating $7.8 million in 1959 and $16.4 million in 1960. These rental charges were historically incurred by TWA and were taken from Form 41 reports filed with the Civil Aeronautics Board (CAB) (TWA Ex. 4(c)(1), p. 9). Assuming ownership, TWA's

accounting expert, Biegler of Price Waterhouse, estimated that depreciation on these nineteen aircraft during the actual lease period would be $4.4 million in 1959 and $8.5 million in 1960. (TWA Ex. 7(d)). By subtracting these depreciation estimates from actual rentals Wemple of Coverdale computed a "Total Improvement in Gain From Operations" amounting to $3.4 million in 1959 and $7.9 million in 1960. In addition, Price Waterhouse estimated a further improvement in gain from operations in the amount of $1.4 million, representing a reduction in depreciation and amortization expense for TWA on a reconstructed basis during 1961-1963 if the aircraft were owned rather than leased ($1.0 million in 1961, $0.1 million in 1962 and $0.3 million in 1963 (TWA Ex. 7(d)). The total improvement in operating profits over the period 1959-1963 before provision for the cost of funds necessary to achieve earlier ownership would then aggregate $12.7 million. (Plaintiff's Brief, pp. 221-222).

The cross-examination of Wemple of Coverdale presented the following points:

¶ The leases from Toolco to TWA were approved by the CAB. (Tr. 5040).

¶ Coverdale did not inquire into the question whether TWA should have owned rather than leased aircraft in 1959 and 1960. (Tr. 5047).

¶ No inquiry was made as to whether TWA was in the financial condition to buy the airplanes in 1959 and 1960. (Tr. 5048).

¶ In measuring the difference between owning and leasing insofar as it affects operating expenses cost of capital would not be considered but it would normally be considered in a feasibility analysis of the entire project. (Tr. 5053).

The Cost of Capital—The cost of funds that would be necessary to pay for the ownership of the aircraft which historically were leased is reflected in the Price Waterhouse Report (TWA Ex. 7(b) 2, VI, B) in the form of interest cost. Plaintiff's Brief states the following position:

"This cost of the borrowed money which reconstructed TWA needed to buy the Boeing jets instead of leasing them appears in the reconstructed financial statements prepared by Price Waterhouse & Co., as part of a total provision for all of TWA's financial needs, including, for example, CV-880s as well as Boeings. It is possible, if desired, to allocate a portion of TWA's cost of borrowed money to the acquisition of these jets so as to derive a separate net damage figure for the effects of the wrongful acts alleged in paragraph 20 of the complaint. As indicated in TWA Ex. 314, as of December 31, 1960, reconstructed TWA's weighted average interest rate on outstanding debt was 4.75%, and that is plainly the cost of money properly applicable to buying the leased jets. Applying this interest rate to Simat's average net book value figures for the leased jets for 1959 and 1960 [DX 271A, pp. IX-B-3-4], TWA's 1959 cost of money to buy the leased jets would have been $2.4 million in 1959 ($51.3 million x 4.75%) and $3.4 million in 1960 ($72.1 million x 4.75%). Reconstructed TWA's cost of capital to own the leased jets during 1959 and 1960 would thus have been $5.8 million,* not the $12.6 million calculated by Simat, and on this basis, TWA's net losses from not being allowed to buy the leased jets, stated separately, would aggregate $6.9 million (before trebling)." (Plaintiff's Brief, pp. 226-227)

*"It must be emphasized that this interest expense is already reflected in the Price Waterhouse & Co. Report as part of the interest which would have been paid by reconstructed TWA. It is not an additional deduction from TWA's claim of $104.5 million, before trebling."

TWA's basic contention is that the only cost of capital which can be considered in antitrust cases is interest on borrowed money. They cite *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 377 F. 2d 776 (3rd Cir. 1967), *rev'd on other grounds*, 88 S. Ct. 2224 (1968), as authority for this position.

Defendants' Answer

The Defendants' Brief asserts that TWA has not presented any evidence in support of its leasing claim other than the computation of Coverdale. Defendants further state that the plaintiff:

> "... relies solely on paragraph 20 of the complaint, the allegations of which purport to set forth a violation of section 3 of the Clayton Act. (Pl. Memo., p. 220) Apart from the legal and factual defects of the section 3 charge, nothing in paragraph 20 provides a foundation for the claim that plaintiff was injured by being required to lease aircraft rather than own them. (See pp. 17-18, 103-04 *supra*) There is no claim and no evidence that the rentals were excessive.* Indeed, all of the leases received CAB approval. (CAB Orders E-13542, E-13873, E-14169, E-14504, E-14877)." (Defendants' Brief, pp. 292-293)

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* "The rentals were no higher in relation to the value of the aircraft than those paid by plaintiff's post-1960 management to Boeing for the four 720Bs, also a short-term lease which included installed engines. The rental rate for the 720Bs of $80,000 a month per plane is equivalent to a daily rate of $2,630, compared with the daily rates of $2,500 for the B-131s and $2,940 for the B-331s. (TWA C & C-4(2) for qtrs. ended March 31, 1960 and December 31, 1961) In each case the daily rate amounts to 0.05% of the value placed by plaintiff on the leased aircraft ($5.1 million each for the 720Bs, $4.6 million each for the B-131s and $5.8 million each for the B-331s)." (*Ibid.*)

In an effort to support the propriety of the lease arrangements, the defendants introduced the report of Simat.

Simat testified that the leasing of flight equipment is a common practice among U. S. airlines and that during the period 1955-1963 eleven different trunklines and Pan American leased flight equipment for their scheduled operations at rentals in excess of $100,000 per year in at least one year, and in some cases in each year, of the period. Simat stressed that the leasing of equipment can, in many instances, reduce the overall costs of the airlines, including the cost of capital, by substituting the credit of the lessor for the credit of the lessee. (Simat Report, DX 271A, Vol. 1, IX and Exhibit IX-A).

Woodfin of Loeb, Rhoades, defendants' financial expert, disputed Drexel Harriman Ripley's contention that an airline should own rather than lease its equipment.

> "The relevance to his report of Mr. Morehouse's second principle, that an airline should own rather than lease its equipment, escapes us. We know of no such general principle. A decision as between ownership and leasing must depend upon the facts of each particular situation and requires not only a comparison of the relative costs, including the cost of capital, but also a determination of a company's needs and objectives. We do not attempt to set forth here the reasons why an airline might choose to lease rather than own equipment, but note that leasing of aircraft took place during the 1955-1960 period and remains a fairly common practice in the airline industry today." (Loeb, Rhoades Report, DX 270, Part II, p. 13).

Loeb, Rhoades' representative, Woodfin, was cross-examined on the firm's opinion of this matter and the following points were developed:

¶ Generally, the airlines own their airplanes. Tax considerations dominate the decision to lease. Today, there are a great number of airlines that don't own their airplanes because of tax benefits derived from leasing. (Tr. 7100)

¶ There would not be much concern if a lessor who owned 75 per cent of an airline was leasing planes to the airline on a day-to-day basis because the lessor would be principally interested in keeping the planes in use producing income. (Tr. 7104A-7106)

¶ It would not be of material concern that every jet aircraft that TWA had in 1959 was leased, and that they were all subject to mortgages taken out by Toolco. (Tr. 7106)

¶ Woodfin would not dispute the following view of his partner, Kenrick Gillespie, which was expressed in an advisory letter dated June 8, 1959. (TWA Ex. 258, p. 2):

> "The cost of the overall jet program will run well in excess of $300 million, and permanent financing has not yet been crystallized. The commitment for purchase of the jets was made by the parent, Hughes Tool, and to date the planes are being leased to TWA on a month-to-month basis. This is an interim and unsatisfactory arrangement. We believe that a solution to this problem is imminent and will involve ownership of the aircraft by TWA and permanent financing of a satisfactory nature." (Tr. 7111-7112)

Cost of Capital Defense—The defendants persistently challenged TWA's proof of damages on the leasing claim on the basis that an improper provision was made for the cost of funds necessary to purchase the aircraft. In their

brief defendants argue that TWA's imputation of a debt expense of owning these aircraft as reflected in the overall cost of the financial program designed by Drexel Harriman Ripley is not a sufficient showing of cost.

Instead of using merely debt expense as a cost of capital for the leased aircraft the defendants assert that an overall cost of capital including the cost of equity as well as debt expense should be employed.* Evidence on this point was presented by defendants' witness, Simat, who adopted the cost of capital applicable to TWA which had been established at 10.25% by the CAB for rate-making purposes (Simat Report, DX 271A, IX-6).

Simat computed the average additional investment in the nineteen leased aircraft after depreciation and multiplied this figure by 10.25%. His findings were as follows:

> "• • • if they had been owned during 1959 instead of leased [the average additional investment], would have been $51.3 million greater than historical TWA. With a cost of capital at 10.25%, this would have cost $5.2 million for 1959. Similarly, the average additional investment in the B-131 and B-331 aircraft after depreciation, if they had been owned during 1960 instead of leased, would have been $72.1 million greater than historical TWA. Applying the 10.25% cost of capital, this would have cost $7.4 million for 1960 (Simat Report, DX 271A, IX-7).

Simat concluded that if TWA had owned the fifteen B-131s and the four B-331s instead of leasing them in 1959 and 1960, the costs of ownership (depreciation, amor-

*The concept of "cost of capital" as used by defendants was defined by the District Court in the *Hanover Shoe* case as:

"the rate of return expected by investors on capital funds they place at • • • [a concern's] disposal." (245 F. Supp. at 289-290)

tization and capital) would have exceeded the costs of leasing (rentals paid) by $1.3 million. (Simat Report, DX 271A, IX-8).

The defendants also contend that *Hanover Shoe, Inc. v. United Shoe Machinery Corp.* should not be interpreted to exclude the cost of equity capital from the computation of antitrust damages in all cases. Defendants' Brief cites several alleged grounds of distinction that exist in this case. Defendants argue that while the Circuit Court characterized the concept of cost of capital as a novel one which had not yet reached the point of general acceptance among economists, and the measurement of which was vague and not susceptible of general agreement, that there are no such questions about the concept in the regulated airline industry.

> "[cost of capital] has long been a topic for concern and investigation by the CAB, which must ensure that subsidies and passenger fare levels are adequate to cover all the capital costs of an airline, both debt and equity (DX 271A, pp. IX-5-6) . . . Nor is the measurement vague. After extensive hearings in the General Passenger Fare Investigation, Dkt. 8008 32 C.A.B. 291 (1960), the CAB found the cost of capital for the 'Big Four' domestic trunks, which includes TWA, to be 10.25%. (Id. at IX-6). The figure is susceptible of general agreement. Plaintiff's financial expert, Morehouse, testified that he would accept the cost of capital established by the CAB in determining the costs of ownership" (Tr. 4015-17) (Defendants' Brief, p. 277).

Defendants' counsel raise a further alleged distinction.

> "The most important distinction from *Hanover* is the finding in that case by the District Court that Han-

over at all times had sufficient capital to purchase the machinery in question and that, if additional capital had been needed, it would not have raised equity capital but borrowed the necessary funds at an interest rate of 2.5%. 245 F. Supp. 258, 289-92, 299. This finding, affirmed by the Circuit Court, was the sole ground upon which the Supreme Court decided this issue in favor of Hanover. (36 U.S.L. Week at 4649) It did not decide or intimate that the overall cost of capital should under no circumstances be deductible in antitrust cases. The circumstances here are the opposite of those in Hanover. Plaintiff charges that it did not have enough equity, and Morehouse's reconstructed financing provides for the issuance of common stock and convertible debentures. A composite cost of equity and debt is therefore apt for TWA." (Defendants' Brief, p. 278).

The cross-examination of Simat yielded the following pertinent points:

¶ The 10.25 per cent figure is a figure which the CAB concluded was a reasonable figure for the cost of capital of a major airline such as TWA. It includes not only the cost of debt securities but also the cost of equity securities which are no less a cost to the company than the cost of debt. (Tr. 8820).

¶ The Price Waterhouse Report does not cover the full cost of capital, i.e., it covers only that portion of the cost of capital which is represented by the cost of debt financing. (Tr. 8825).

¶ If a business achieves a return in the course of its operations sufficient to meet its cost of capital that portion of the return which relates to the return on equity would appear in the income statement as net earnings or profits. (Tr. 8827).

¶ The cost of equity is actually an estimate of the return on investment which investors must be able to expect from a company's future operations but it is no more an estimate than depreciation expense, and the expired costs of any other assets of the company which are only partially consumed during the period. (Tr. 8832).

Determination of Damages

The allegations of the complaint set forth above (pages 168 and 169) are taken to be "well pleaded." As a result of their default, defendants are found to have admitted each of the allegations included in the paragraphs of the complaint dealing with aircraft leases during the period 1959 through 1960.

The defendants have argued that the principal paragraph in the complaint relative to the leasing claim (par. 20) does not specify any injury as a result of Toolco leasing aircraft to TWA rather than TWA owning these same aircraft. Indeed, the defendants stress that there is no claim that the rents were excessive and that all of the leases received CAB approval. (Defendants' Brief p. 292-293) A reading of paragraph 20 without the other related allegations of the complaint would support this contention. It appears that the singular thrust of the paragraph goes toward the claim that the 1959-1960 leases did not provide a sufficient number of aircraft for TWA's needs and that the provisions of the lease agreements prohibited TWA from buying *or leasing* other jet aircraft from another potential supplier. This aspect of TWA's overall claim is the subject of Section I above, and has been decided in favor of TWA. I am not, however, persuaded that the inquiry under this Section II into the question of damages as a result of these leases should be arrested on the basis of the silence within paragraph 20. I find that

other general allegations in the complaint specify enough grounds of injury to base my findings in this portion of the claim on an evaluation of all the evidence presented rather than on an omission in a specific allegation. For instance, it would appear that the above quoted paragraph 10 subsection (h) would be sufficient to cover damages resulting from leasing rather than owning the aircraft.

TWA's financial expert, Morehouse of Drexel Harriman Ripley, believed that it was a "fundamental principle" for airlines to own rather than lease their flight equipment. The ability to control primary income producing property was cited as of paramount importance. The defendants' expert, Woodfin of Loeb, Rhoades, disputed the Drexel Harriman Ripley proposition as a general principle and cited that leasing of aircraft was a fairly common practice in the airline industry from 1955 onward. (Loeb, Rhoades Report DX 270, Part II, p. 13). However, in cross-examination on the question of the Toolco-TWA leases, Woodfin stated that he would not dispute the view of his partner, Gillespie, that the 1959-1960 leases were an interim and unsatisfactory arrangement. (Tr. 7111-7112)

The defendants' expert, Simat, gave additional testimony that the leasing of aircraft was common among airlines from 1955-1963; however, no evidence was presented that other airlines leased all their jets during 1959-1960 or that flight equipment rentals of any one airline approximated the $24.2 million spent by TWA during those years for jets.

There was indication that United Air Lines took some advantage of the investment credit by leasing aircraft through commercial banks but this tax advantage was unavailable in 1959 and 1960. (Tr. 3997, 4020-1). There was no evidence presented that aircraft manufacturers had sufficient financial resources and were willing to lease, or as to the existence of a third party financier who was

ready, willing and able to act as lessor to TWA during the period. I have also noticed that as of December 31, 1960 that of 2,036 aircraft operated by certificated route air carriers in system operations, 1,919 were owned and 117 were leased (Civil Aeronautics Board, Handbook of Airline Statistics, 1961 edition, PI-1).

In view of the paucity of evidence showing that the lease arrangements were superior to ownership, or that TWA was unwilling or incapable of purchasing jets during 1959-1960, I am persuaded, that absent Toolco's control, that TWA would have purchased the 15 B-131 and 4 B-331 aircraft directly from Boeing.

Given this determination, the question of damages from leasing rather than owning centers on the calculation of damages presented in evidence by TWA's expert, Wemple of Coverdale.

As indicated above the calculation was based on two factors: (1) the historical rental payments on the jet aircraft from TWA to Toolco; and (2) a computation of the appropriate depreciation and amortization applicable to the leased jets. Defendants have not disputed the accuracy of the rental payments used in the calculation and no material challenge was made to the determination of depreciation and amortization constructed by Price Waterhouse and testified to by their representative, Biegler (Tr. 6327-6343). I therefore accept the figure of $12.7 million as the extra costs incurred by TWA by reason of its being forced to lease rather than own the nineteen jet aircraft, but this amount is before the necessary deduction of the cost of funds required for their purchase.

The defendants have urged that the computation of the difference between leasing and owning flight equipment must include an additional deduction of the cost of ownership or "cost of capital." The foundation of this "cost of

capital defense" rests on including as part of the cost of capital an appropriate cost attributable to the cost of equity. Using as their overall cost of capital the rate of 10.25% which had been established by the CAB for rate-making purposes the defendants claim that it would be more expensive to own than lease.

TWA and its counsel have not objected to Simat's formula for computing financial differences between leasing and owning. In fact TWA's counsel adopts Simat's figures for "average additional investment" in computing their own leasing claim separately from their general operating claim. (Plaintiff's Brief, p. 227). However, TWA has vigorously disputed Simat's use of a cost of capital which includes a cost of equity rather than its own estimate of cost of capital which is solely limited to its reconstructed borrowing rate, i.e., 4.75%. TWA's counsel also argues that the recent case of *Hanover Shoe Inc.* v. *United Shoe Machinery Corp.*, 377 F. 2d 776 (3rd Cir. 1967) *rev'd on other grounds* 88 S. Ct. 2224 (1968) is dispositive on the question of excluding a cost of equity in the computation of damages in antitrust cases. Despite defendants, attempt to distinguish *Hanover* from the facts of this case I find the following language to be a clear statement favoring TWA's position:

> "United contends that Hanover's so-called cost of capital should have been treated as an element of the cost of acquiring the machinery. The court below disallowed this item, which was defined as 'the rate of return expected by investors on capital funds they place at * * * [a concern's] disposal,' after hearing the conflicting testimony of expert economists called by each party. It found that 'cost of capital' is an economic concept which allows a company to decide if a certain investment is sound by computing the rate of return which will be required on that investment to jus-

tify expending funds on it rather than in an alternative investment, and that it is measured in terms of percentage of earnings per share of common stock to price per share, and of percentage of net profits after taxes to stockholders' equity. It also found that the measurement of cost of capital was vague and not susceptible of general agreement in its application and that in any event it was not a proper element in the calculation of damages but was only a guide to investment.

"The novel concept which United sought to have approved has not yet reached the point of general acceptance even among economists. We agree with the court below that cost of capital is not sufficiently related to actual costs to be included in an antitrust damage calculation." (377 F. 2d at 791-92)

The U. S. Supreme Court has expressed agreement with this finding. 88 S. Ct. 2224, 2237 (1968).

Accordingly, I do not accept the defendants' figure for the cost of capital as computed by Simat since it is an inappropriate measure of the cost of ownership. I am persuaded that the correct external cost of capital is the appropriate borrowing rate for TWA during the period in question. However, since I have not accepted TWA's reconstructed financial plan which is considered in Section III hereof, the rate which TWA asserts (4.75 per cent) must also be rejected. In Section I pages 147 to 167 of this report I have discussed the problem of adjusting the overall interest cost that must be deducted from the total "loss" in operating profits that I have awarded as a fair measure of damages. There it was determined that an appropriate rate to apply to the purchase of Boeing aircraft would be 6 per cent. Adopting the figures of average additional investment for the nineteen jet aircraft during 1959 and 1960 upon which both parties agree, I have determined

that on a separate basis TWA's damages would amount to $5.3 million as set forth below:

Determination of Separate Net Damage Resulting From Leasing Rather Than Owning Jet Aircraft

Year	(1) Average Additional Investment in Jets (Net Book Value)	(2) Assumed Interest Rate on Borrowed Funds	(3) Cost of Capital to Own Jets (1) x (2)
1959	$51.3 million[1]	6%	$3.1 million
1960	$72.1 million[1]	6%	4.3 million
Total			7.4 million

	($ millions)	
Total Rentals Jet Aircraft 1959-1960	24.2	
Add		
Historical Increase in Depreciation and Amortization Costs in 1961-1963 Over Reconstructed Costs[2]	1.4	
		25.6
Less		
Depreciation and Amortization 1959-1960	(12.9)	
Cost of Capital—(3) above	(7.4)	
		(20.3)
Total Net Loss by Reason of Leasing Rather Than Owning		$5.3

[1] Sinnat Report, Dx 271A IX-B-3-4.
[2] Price Waterhouse Report, TWA Ex. 7(d).

III.

Losses connected with financing the jets.

The following allegations of the complaint underlie the claims considered in this Section III.

"7. The trade and commerce involved in this action concerns:

* * * * *

"(f) The financing in interstate commerce of the United States of the acquisition by sale, lease or other means of aircraft for use by TWA in air transportation in interstate and foreign commerce of the United States."

Paragraph 9 of the complaint alleges that defendants and others engaged in a combination and conspiracy to restrain interstate and foreign commerce in violation of Sections 1 and 2 of the Sherman Act and Sections 3 and 7 of the Clayton Act.

Paragraph 10 of the complaint alleges, in part, as follows:

"10. Each act of the defendants and Atlas hereinafter alleged was done in furtherance of the offenses charged in the preceding paragraph and was a part thereof and was done with the primary purpose of restraining and monopolizing the trade and commerce described above. It was the intent of the defendants and Atlas, inter alia:

* * * * *

"(g) That defendants would supply TWA with the aircraft essential to its business only on the condition that TWA would accept such financing arrangements relating to the aircraft as the defendants dictated, and in turn that defendants would allow

TWA to procure financing essential for the acquisition of the aircraft it needed only on the condition that TWA would accept such aircraft as the defendants dictated; and"

* * * * *

The allegations with respect to equity financing are set forth in paragraph 23 of the complaint. The allegations with respect to debt financing are set forth in paragraphs 24 through 28, inclusive, and paragraph 52(c) and (d) of the complaint and are more fully discussed hereafter.

The Proof of Damages

In proof of damages, TWA offered as direct expert testimony the report of Drexel Harriman Ripley, a firm of investment bankers with experience during the 1955-1960 period under consideration, in the financing of airlines and manufacturers of aircraft and jet equipment. Drexel Harriman Ripley "reconstructed" on the basis of certain assumptions given them by TWA's counsel, the TWA financial structure so as to provide what, in their opinion, would be adequate financing for a 63-plane jet fleet and in doing so made the central assumption that beginning in 1955, TWA's management was free to do what was best for TWA. Drexel Harriman Ripley assumed "neither that there was nor that there wasn't" a majority stockholder of TWA such as Toolco. (Tr. 3933)

In their report, Drexel Harriman Ripley stated:

"This report is written in response to the request of Cahill, Gordon, Reindel & Ohl that we give our opinion as to whether Trans World Airlines, Inc., if it had been under an independent and competent management not influenced by any consideration other than the prudent conduct of its operating and financial affairs, during the 1955-1960 period, could have fi-

nanced its projected capital requirements for those years, including specifically the purchase of 15 Boeing 707-131s, 18 Boeing 707-331s, 30 Convair 880s, and all the piston aircraft which were purchased by it and delivered during the foregoing period; and, if so, that we describe the methods by which, in our opinion, such capital requirements should have been financed.

"We have been advised, and assume for purposes of this report, that if Trans World Airlines had been adequately financed the 33 Boeing aircraft could and would have been ordered by an independent and competent management in the fall of 1955 for delivery in 1959 and 1960, and that the 30 Convair aircraft could and would have been ordered by such management in 1956 for delivery in 1960." (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 1)

• • • • •

"We are assuming for the purposes of this report that we were engaged by Trans World Airlines as its investment bankers throughout the 1955-1960 period, and that we were thus in intimate and frequent contact with the management and had access to all current information and data having a bearing on finance." (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 3)

• • • • •

"We have designed the foregoing financing program* on the basis of projected and reconstructed capital expenditures prepared by Price Waterhouse & Co.; on the basis of reconstructed financial statements prepared by Price Waterhouse & Co.; and on the basis of forecasts of funds generated prepared by Coverdale & Colpitts. And we have used various statements of figures furnished to us by Trans World Airlines pertaining to historical balance sheets, income

* Described below on page 190 of this report.

accounts, and certain other historical financial data." (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 2)

Drexel Harriman Ripley also considered such other historical data as general financial information about the economy, the airline industry and the stock market.

The Drexel Harriman Ripley Report asserted that there are certain fundamental principles which should govern prudent management of a major airline in arranging its corporate financing, as follows:

"We have consistently maintained that the fundamental principles which should be followed in airline finance, throughout the 1955-1960 period under review, are as follows:

The airline should get, or endeavor to get, its equity or junior capital prior to or simultaneously with getting its senior borrowed capital.

The airline should own its own equipment rather than lease it from other parties.

* * * * *

Contractual commitments for capital expenditures should be prepared for reasonably in advance of the time they are to become due. By this we mean that the airline should plan and arrange its financing program so as to have sufficient liquid capital and/or credit standing to afford reasonable expectation of obtaining the funds required to meet its forward commitments." (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, pp. 4-5)

In determining TWA's financial requirements and whether it had sufficient equity capital and credit standing to fulfill these financial requirements, Drexel Harriman Ripley accepted the assumptions given it by TWA's counsel, as described above, and proceeded to reconstruct the

financial condition and results of operations of TWA for the 1955-1960 period. In effecting the reconstruction, Drexel Harriman Ripley made adjustments in the historical figures principally to reflect the acquisition and financing of jet aircraft and their operation subsequent to 1958. Timely delivery of jet aircraft was assumed. Drexel Harriman Ripley relied upon a reconstruction of income (loss) and a projected capital expenditure program for 1955-1960 which had been prepared by Price Waterhouse and also gave consideration to projections of cash flow made by Coverdale. (See IV. "Premises and Assumptions," Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 5.)

Based on the foregoing considerations, Drexel Harriman Ripley summarized their opinion as follows:

> "In our opinion Trans World Airlines could have financed, and if we had been advising it during the 1955-1960 period we would have advised it to finance, the acquisition of the foregoing aircraft and its other capital expenditures by means of the following program, which will be more fully described hereinafter, in addition to the estimated internally generated funds." (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 1)

The financing program recommended was composed of four separate elements, summarized in Plaintiff's Brief as follows:

> "(i) An underwritten common stock issue in May 1955 offered preemptively on a share-for-share basis at $17.50 per share to provide net proceeds of $55.5 million.
>
> "(ii) A private placement long-term loan commitment with institutional investors in October 1955 for

$150 million minimum—$170 million maximum at 4% interest.

"(iii) An underwritten non-preemptive offering in May 1959 of $60 million of 5% subordinated debentures, convertible into common stock.

"(iv) A private placement long-term loan commitment with institutional investors in May 1959 for $90 million minimum—$110 million maximum at 6% interest." (Plaintiff's Brief, pp. 60-61)

TWA claims that by reason of Toolco's preventing TWA management from adopting and following the above financing program, that TWA has been damaged to the extent of $97.8 million, of which $36.9 million ($12.3 million before trebling) is attributable to Toolco's interference with TWA's equity financing, and $60.9 million ($20.3 million before trebling) is attributable to defendants' refusal to permit TWA to arrange debt financing as TWA claims was done by other airlines when the prevailing cost of money was lower.

Plaintiff's Brief states in respect of its claim of $12.3 million in damages (before trebling) attributable to Toolco's interference with the equity financing:

"TWA is claiming $12.3 million in damages (before trebling) for the wrongful acts of defendants set forth in paragraph 23.

"This damage is measured by the difference between:

"(i) the net proceeds from a 1-for-1 common stock offering which TWA was forced to make in 1957, when the market price for TWA stock was at one of its lowest points historically and TWA's financial condition was very shaky, so as to enable Toolco to increase its equity interest in TWA, and

"(ii) the net proceeds of a 1-for-1 common stock financing which Drexel Harriman Ripley would have recommended be made by TWA in the spring of 1955 (assuming they were advising TWA in 1955), when the market for stock was far more favorable for a successful equity financing, when TWA's prospects even in the opinion of Toolco's expert witness were rosy, when TWA should have been preparing for the needs of the jet age, and when TWA had already for many years (as set forth in the complaint) been starved of equity." (Plaintiff's Brief, p. 69)

Plaintiff's Brief states in respect of a claim of $20.3 million in damages (before trebling), attributable to defendants' refusal to permit TWA to arrange debt financing:

"TWA is making a separate claim of $20.3 million (before trebling) for the wrongful acts of defendants set forth in the foregoing paragraphs.

"This separate claim is based upon the difference between:

"(i) The present value (*i.e.*, the present equivalent of the future burden) of future payments for debt service on TWA's long-term debt historically outstanding on December 31, 1963, and

"(ii) The present value (i.e., the present equivalent of the future burden) of future payments for debt service on long-term debt for reconstructed TWA as of December 31, 1963 with a debt structure of the kind and in the amounts recommended by Drexel Harriman Ripley." (Plaintiff's Brief, p. 120)

In answer to TWA's claim for damages, defendants introduced as direct testimony the Report of Loeb, Rhoades (DX 270) in which its conclusions are stated, as follows:

"The equity financing plan suggested by DHR in the Morehouse testimony as of the Spring of 1955 would have been a plan so contrary to the best interests of TWA and its stockholders that it would not have been accepted or implemented by prudent and competent officers and directors of that company.

"We would not have recommended to TWA or to its stockholders that TWA engage in Mr. Morehouse's proposed equity financing in the Spring of 1955. It could not have been accomplished without Toolco actively participating by subscribing to its proportionate share of the proposed equity offering, and it would not have been in the best interests of TWA's stockholders for Toolco to have done so at that time.

"Our opinion that TWA would have rejected Mr. Morehouse's 1955 equity financing plan is the same on the assumptions that TWA could not or would not have looked to Toolco for assistance in such a financing, or that TWA was widely held with no controlling stockholder.

"Lastly, TWA without the assistance of Toolco, could not have financed the so-called 'reconstructed' capital requirements of $544.8 million during the period October 1955 through December 1960, on any reasonable basis." (Loeb, Rhoades Report, DX 270, Part II, p. 3)

I have concluded that the investment banking firms of Drexel Harriman Ripley, and Loeb, Rhoades and the witnesses who participated in the preparation of their direct testimony and who submitted to cross-examination with respect thereto are well qualified as experts competent to give testimony as to TWA's financial affairs in the 1955-1960 period. The direct testimony of each discloses a thoroughness of preparation and a familiarity with the subject. The cross-examination of the witnesses was extensive

and searching and most helpful in considering the issue of damages.

The Equity Financing

This Report will consider first the evidence with respect to damages introduced in connection with equity financing. Paragraph 23 of the complaint alleges as follows:

> "23. Subsequent to the acquisition of stock by Toolco in TWA, defendants for reasons of self-interest continuously refused to allow equity financing by TWA except on condition that, as a result of any such financing, Toolco would be enabled to increase its equity position in TWA and instead caused TWA to obtain funds chiefly by means of debt financing. TWA was thus rendered unable to seek the financing it needed for the acquisition of aircraft except upon the approval of defendants. The purpose of the defendants in rendering TWA dependent upon them for such assistance in financing as defendants might choose to provide, and the effects thereof, were, among other things,
>
> "(a) to create and maintain control in the defendants of the business of financing the purchase of aircraft for use by TWA, and
>
> "(b) to strengthen defendants' control over the acquisition of aircraft by TWA."

The Drexel Harriman Ripley Report and Morehouse Testimony Relating to Equity Financing

Drexel Harriman Ripley states that TWA should have known early in 1955 that the jet age was imminent and that provisions must be made for funding substantial capi-

tal expenditures (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, pp. 6 and 10).

The circumstances of the airline industry in early 1955, as seen by Drexel Harriman Ripley, is stated in their report as follows:

> "Prior to 1955, the major airlines had experienced five years of good earnings with the trend generally upward. In early 1955 it was generally recognized that the jet age was coming and that large amounts of additional capital from outside sources would be required to acquire jet aircraft and other facilities. However, there were wide differences of opinion as to the type of jet aircraft which would be preponderant. One school of thought favored the 'straight jet'; another favored the gas turbine driven propeller type, generally referred to as the 'prop-jet' or 'turbo-prop'. None of the airlines, so far as we know, could at that time estimate with any degree of certainty just how much additional capital would be required. But it was generally recognized that the amounts would be very large." (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 6)

The Drexel Harriman Ripley Report cites the annual reports of commercial aircraft manufacturers as evidence of the awareness of the airline industry in early 1955 that the advent of the jet age was imminent, but, only the Annual Report of the Boeing Company for the calendar year 1954 (DX 187), which was issued on March 7, 1955, can be helpful in understanding the airline industry's thinking in early 1955. Referring to the Boeing 1954 Annual Report, the Drexel Harriman Ripley Report states:

> "*Boeing*: In its 1954 annual report, published in the early part of 1955, Boeing refers to its B-47 (a jet bomber) as being 'well established' in the military

service, and states that considerable active interest had developed among airline operators in a commercial application of its jet prototype tanker-transport." (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 7)

Drexel Harriman Ripley also cited the Annual Reports for 1953 and 1954 of National Aviation Corporation, a closed-end investment trust which concentrates its investments in the airline and aircraft manufacturing industries, as follows:

"*National Aviation 1953 Report*: This report states categorically that it was all but a certainty that the (then) piston-engined newcomers (presumably the DC-7 and the Lockheed Super Constellation) were the last of their kind for mass travel by air, the reason being that the few companies concerned with commercial transport were all working on jets.

"*National Aviation 1954 Report*: This report refers to the British invasion of the U. S. domestic airline market with the Vickers Viscount turbo-prop. And it states that the new 'shape of things to come in 1955-58 is in ferment • • • • .'" (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 8)

Capital Expenditure Requirements in the Jet Age

The Drexel Harriman Ripley Report asserts that in early 1955 TWA could have formed an opinion as to its capital expenditure requirements in the jet age. It stated:

"We doubt that in early 1955 the TWA management could make an accurate estimate of its forward capital expenditure program. But it seems reasonable to presume that the management would have at that

time estimated the six-year total at over $300 million, and probably nearer to $400 million." (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 10).

Shortage of Equity Capital

Drexel Harriman Ripley compiled certain statistics which it employed as "yardsticks" for measuring the TWA equity capital in comparison with that of its major competitors (Pan American Airways, American Airlines and United Air Lines). These statistics consisted of (i) Total Operating Revenue; (ii) Net Operating Income; (iii) Net Income Including Capital Gains; (iv) Revenue Airplane Miles Flown; and (v) Available Seat Miles. In addition, Net Operating Income per Revenue Airplane Mile and per Million Available Seat Miles for five years, 1950-1954, and for one year, 1954, were set forth in comparative form (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 11).

Drexel Harriman Ripley applied these "yardsticks" and determined that TWA had a shortage of equity capital. Plaintiff's Brief summarized and stated this matter as follows:

"* * * On the basis of 1954 revenue miles flown and available seat miles, respectively, TWA was 33% to 28% larger than Pan American, 10% to 7% smaller than American, and 9% to 5% smaller than United; using these figures as yardsticks, TWA was short of proprietary capital by from $69 million to $74 million in comparison with Pan American, by from $27 million to $30 million in comparison with American, and by $17 million to $21 million in comparison with United. Using available ton miles as a yardstick, TWA was 12.7% larger than Pan American, 15.6% smaller than American and 13.6% smaller than United, indicating a proprietary capital shortage of $53 mil-

lion when compared to Pan American, $21 million when compared to American and $13 million when compared to United. [Drexel Harriman Ripley Report, Part II, pp. 9-10]" (Plaintiff's Brief, pp. 82-83)

The Drexel Harriman Ripley Report then proceeds to conclude with respect to additional equity required, as follows:

> "In the light of the foregoing, and recognizing that TWA was the only company conducting both U. S. transcontinental and transatlantic operations, we believe that TWA would have been well advised in early 1955 to obtain not less than $50 million of additional proprietary capital. TWA's book net worth at December 31, 1954 was only $67.2 million, a very low amount in relation to the capital expenditure program which it faced in the (then) next few years.
>
> "It is our opinion that we would have advised TWA in early 1955 to raise not less than $50 million of additional equity capital. And that it be raised by an underwritten preemptive offering of common stock." (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 10)

Drexel Harriman Ripley supports its opinion that TWA should and could have raised at least $50 million additional equity capital in 1955 by citing, in addition to TWA's operating results in the 1950-1954 period which compared favorably with its principal competitors, the announcement in March 1955 that TWA's earnings per share in 1954 were double earnings per share for the preceding year 1953, the fact that the general stock market was strong and advancing and that the market for TWA common stock from January 1, 1954 to June 30, 1955 showed a greater percentage advance than the Standard & Poor's Index of Air

Transport Stocks or the Dow Jones Industrial Index, and performed better than its three major competitors.

Drexel Harriman Ripley then concluded:

> "Thus, the market for TWA stock in the first six months of 1955 showed no sign that investors were worried about the TWA losses reported for the first quarter. The seasonal character of TWA's operations and those of other airlines was generally recognized." (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 17)
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> • • • • •
>
> "From the foregoing it will be noted that the market for TWA stock was strong in terms of price and trading volume in early 1955, and that market prices were much above book values." (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 17)

The TWA loss for the first quarter referred to above was a loss of $3,898,000, announced on May 5, 1955 (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 13).

The Drexel Harriman Ripley Report compares the price earnings ratios of TWA with its three major competitors during the period 1950-1955 and notes that TWA was selling at about the same price earnings ratio as United Air Lines, although United Air Lines had a better long-term historical earnings record than TWA and was paying cash dividends whereas TWA was not. During the same period Pan American and American Airlines sold at higher price-earnings ratios. Drexel Harriman Ripley also indicated that in early 1955 the major financial advisory services regarded TWA as an appropriate "hold." (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, pp. 19-20).

The recommendation of the Drexel Harriman Ripley Report with respect to an equity issue by TWA is set forth as follows:

"We would have advised and urged TWA, in the spring of 1955, to put out a major equity issue in the first half of that year. The stock market was strong and its trend was upward. The first half of 1955 was the time for TWA to correct its obviously short proprietary capital position and prepare for the jet age.* We would have recommended that the equity financing be effected in April or May. The regular 1954 year end audit would comply with the SEC rule for listed companies. (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 21)

* In February 1955 General Motors issued and sold $328 million of common stock. Goodyear Tire & Rubber sold $45 million in July.

Cross Examination of Morehouse

There is set forth below certain supplemental information developed in the defendants' extensive cross-examination of Edward J. Morehouse of Drexel Harriman Ripley and certain exhibits admitted in evidence. The information set forth is selected to illuminate the Drexel Harriman Ripley Report. However, I did not confine my consideration solely to the information listed below.

¶ Any change in the timing of the financing (including the equity financing) would affect the amount of damages computed under the Drexel Harriman Ripley approach (Tr. 3892).

¶ If, hypothetically, common stock were offered in October 1955 when the market price of TWA stock was $22 as compared to $31 in May 1955, there could have been an effect on the amount raised and, therefore, an effect on damages (Tr. 3884-3885).

¶ The Boeing Annual Report dated March 7, 1955 (DX 187) contains the following sentence which had been omitted from the Drexel Harriman Ripley Report:

"Our entry into the commercial field is as yet undetermined. We desire such a commercial development, if it can be accomplished on a sound financial basis and without interfering with our military commitments." (Tr. 4109)

¶ The Boeing 707 prototype was flown in July 1954 (Tr. 4120).

¶ On November 19, 1954, William H. Allen, President of Boeing, quoted a price of $4.25 million for the commercial version of the jet tanker (DX 95). On December 21, 1955, Noah Dietrich, then Vice President of Toolco and a director of TWA, wrote to Fred Ayers, Senior Vice President of Toolco and also a director of TWA:

"For several years it has been assumed in the air transport industry that jet aircraft would play a prominent role when their design reached the stage of development as to be commercially feasible. Early this year [1955] TWA engineers and representatives of the Tool Company concluded that the time was ripe to commence negotiations for the design and manufacture of jet airplanes which would suit the peculiar requirements of TWA. Because of the tremendous cost of newly designed jet aircraft it was a foregone conclusion that the Tool Company would have to lend substantial financial assistance to TWA. The exact form and extent of such support being left open, pending final determination as to the requirements and the existing financial capabilities of TWA itself." [DX 46]

¶ The article by Selig Altschul, entitled "Financing Patterns to Change for Jet Transport Acquisitions" appearing in the November 7, 1955 issue of AMERICAN AVIATION (DX 31, p. 27) "is probably a reasonably good

description of the picture as it then existed * * *" (Tr. 3985), but Morehouse disagreed with the following statement as being "too general":

> "'It is important to note that the bulk of financial requirements for the airlines for ordering jets will not come until four years or so from now. This gives them time to work out financing programs.'" (Tr. 3987-3988)

¶ A memorandum from J. P. Ripley of Drexel Harriman Ripley to Berry and Morehouse of the same firm, dated September 23, 1955 (DX 182), summarizing a conference with Curtis Barkes, Financial Vice President of United Air Lines, states:

> "'Barkes said that just off the top of his head he is thinking along the following lines. He is wondering if we could work out a transaction with Metropolitan by the terms of whch [sic] UAL would borrow from the Metropolitan $30,000,000 within the next two or three months and make a commitment to borrow the balance (presumably about $90,000,000) on the condition that UAL sell $30,000,000 of preferred stock. Then UAL could sit down and consider the risks involved in selling the preferred stock right now or waiting until later to sell it. He appreciates the risks involved, but he thinks the market might be better next summer.'" (Tr. 3965)

There is no indication that Ripley asserted the foregoing violated a fundamental principle of Drexel Harriman Ripley or that he was offended by the suggestion of Barkes, contained in DX 182 (Tr. 3967-3968).

¶ The timetable for the hypothetical sale of equity in the spring of 1955, assuming a June 1, 1955 closing and

the retention of Drexel Harriman Ripley by TWA in January 1955 would be (i) two or three weeks to conduct the survey to conclude that TWA required equity financing and to formulate a plan (Tr. 4104); (ii) receipt of approval of recommendations and commencement of work approximately in the middle of March 1955 at the latest (Tr. 4099); and (iii) the filing of a registration statement with the SEC on April 19, 1955, the preparation of which would have commenced as late as a month prior thereto (Tr. 4097), but might take longer so that it might have commenced somewhere between February 19 and the middle of March 1955 (Tr. 4098).

¶ Morehouse expressed doubt that in January 1955 Drexel Harriman Ripley would have known that the Government would on August 1, 1955 give the required consent to Boeing to use Government facilities to manufacture commercial jet aircraft (Tr. 4127).

¶ Drexel Harriman Ripley were instructed to assume that orders for jet aircraft would have been placed in the fall of 1955 and Morehouse stated that:

> "... it is not unreasonable to assume that only a few months earlier than that time they would have had enough information about probable costs and probable needs to have estimated that their capital expenditure program would have been in the order of the numbers we have set down here" (Tr. 4169).

¶ In the spring of 1955, the airline would probably have had enough information to know that its needs were going to be in the order of $300 million to $400 million (Tr. 4171).

¶ Sometime in the second half of 1955, United Air Lines (for whom Drexel Harriman Ripley was then acting as

investment bankers) first came to some conclusion with respect to what its anticipated expenditures might be for jet aircraft (Tr. 4172).

¶ In concluding that TWA was short of equity, Drexel Harriman Ripley compared TWA revenue per seat miles and available ton miles with its competitors, but did not consider that TWA, during 1954 at the time the comparisons were made, had taken the lead in promoting coach travel (Tr. 4157-4158), and that the statistics for one of the competitors, American Airlines, reflected a 24-day pilot strike in 1954 (Tr. 4157). Thus the TWA revenue per seat mile, "a yardstick" used by Drexel Harriman Ripley in developing the shortage in TWA equity, appears higher in relation to its competitors and according to the Drexel Harriman Ripley approach, resulted in a greater shortage of equity (Tr. 4157-4166).

¶ Airline stocks during May and June 1955 "were volatile and investments in them were speculative in nature." (Tr. 4196).

¶ During the period from January 1, 1946 to May 12, 1955 the equity financing of all airlines aggregated $47,272,425 (Tr. 4256), the largest of which was an offer by Braniff of $5,700,000 (Tr. 4257), and TWA accounted for the other three large equity financings, one in 1949 and two in 1952 (Tr. 4256). On July 3, 1945, there was an equity issue of $42,398,000 by Pan American Airways coupled with stock purchase warrants to purchase an additional $36,800,000 (Tr. 4258) (very few of the stock purchase warrants were exercised because of the sharp drop in the Pan American Airways' stock (Loeb, Rhoades Report, DX 270, Part II, p. 8).

¶ The Drexel Harriman Ripley Report recommended a 1-for-1 rights offering of TWA stock in May 1955, yet Ripley in a letter dated August 25, 1955 (DX 193) in speaking of a prospective rights offer of common stock of United Air Lines admitted that a 1-for-3 rights offering would be very high and that "even one to five is pretty high" (Tr. 4262).

¶ Application of the "yardsticks" to TWA produced a TWA equity shortage ranging from $13 million to $74 million, the upper end of the range being produced by comparison with Pan American Airways, the only one of the comparable competitors flying the transatlantic run. The absolute dollar comparison of capital indicates that the amount of equity shortage would have been fixed in the upper range. (Tr. 4166)

¶ TWA's need for additional equity was "so bad" that in the opinion of Drexel Harriman Ripley TWA should have rushed to the market and raised the equity in May of 1955 rather than at some later date in the summer. (Tr. 4167)

¶ It is not clear from Drexel Harriman Ripley's records that they actually recommended equity financing to United Air Lines in the fall of 1955. The next equity financing of United Air Lines subsequent to the fall of 1955 was in 1960. (Tr. 4307)

The Loeb, Rhodes Report and Woodfin Testimony Relating to Equity Financing

The Loeb, Rhoades Report (DX 270) constitutes the direct testimony of Gene M. Woodfin, a general partner of Loeb, Rhoades, an investment banking firm of New York City.

As noted above in this Report, the Loeb, Rhoades Report disagreed with the Drexel Harriman Ripley recommendations in every material respect. Loeb, Rhoades stated that it would not have recommended the 1955 equity financing, and were of the opinion that no prudent competent officers or directors would accept the Drexel Harriman Ripley recommendations. The Loeb, Rhoades Report further stated that they were of the opinion that TWA could not have financed the "reconstructed" capital requirements of $544.8 million without the assistance of Toolco (Loeb, Rhoades Report, DX 270, Part II, p. 3). The Loeb, Rhoades Report, in asserting its opinion, made the following statements:

> "Mr. Morehouse's written testimony and exhibits, despite the labor devoted to their presentation, are no more than an exercise in a hypothetical financing conducted without regard to certain important historical facts and yet with the benefit of hindsight on such things as the peaks of the stock market for airline stocks. This is no criticism of Mr. Morehouse or of DHR, who, pursuant to counsel's instructions, prepared an academic answer to an academic question. We have examined that exercise in the light of important historical facts, which cannot be ignored. Only thus can its validity be tested." (Loeb, Rhoades Report, DX 270, Part II, p. 4)

Loeb, Rhoades stated that the airline industry in early 1955 was uncertain about the imminence and implications of the introduction of the jet aircraft into commercial aviation:

> "Unquestionably the greatest uncertainty facing the airlines in early 1955 was the anticipated coming of the jet age to commercial aviation. There were no

commercial jet aircraft actually available at that time and no one knew the answers to the many questions airline executives were pondering: When would commercial jet aircraft become available for ordering? Who would build them? Would they be turbo-prop or turbo-jet, or both? How large would they be? How much would they cost? When would they be delivered? To what extent and when would they replace piston operations? Would they win a high degree of public acceptance? How many would the airlines purchase? Could airport facilities be improved in time?

"As Mr. Morehouse pointed out at page 6 of his report, none of the airlines, in early 1955, could have estimated with any degree of certainty how much capital would be required for the purchase of jet aircraft. At the same time it would have been obvious to anyone knowledgeable in the airline and aircraft industries that only down payments and perhaps progress payments would be required in the early years, with the heavy money requirements coming three, four or five years after orders were placed. (Loeb, Rhoades Report, DX 270, Part II, pp. 6-7)

The prospect of a substantial increase in domestic commercial airline competition, involving the granting of new routes and the reduction and elimination of the CAB subsidy contributed to the uncertainty. In early 1955, the ability of the airline industry to obtain equity financing was extremely limited as is apparent from the history of airline financing during the post-war years (Loeb, Rhoades Report, DX 270, Part II, pp. 8-9 and Exhibit A).

As an indication of the climate for airline equity financing, there is cited a $40.8 million, 3½% cumulative convertible preferred stock issue by American Airlines on June 11, 1946, which was followed shortly after issuance by a sharp drop in price of the preferred stock market

value which continued below par value for about eight years. The market price of the common stock did not reach the conversion price based on redemption until December 1954. Also cited was the $43.4 million sale of capital stock of Pan American on July 3, 1945 through an underwritten offering of capital stock with stock purchase warrants attached, exercisable at $18 a share. Because of the market decline in 1946 very few of the warrants were exercised (Loeb, Rhoades Report, DX 270, Part II, p. 8 and footnotes). Common stock offerings of domestic trunk airlines during the period from January 1946 to June 1957 were rare and in very small dollar amounts. Of the four major offerings, two were by TWA, one in 1952 for $10.7 million and the other in 1957 for $43.4 million, and each of the four larger offerings were underwritten in whole or in part by a principal shareholder (Loeb, Rhoades Report, DX 270, Part II, p. 9).

"This dearth of equity financing was not by design. The airlines were forced to rely on debt financing during the post-war piston era because airline equities had no investment status and most airlines were simply unable to obtain equity financing. For example, W. C. Barkes, Vice President of Finance and Property for United Airlines, explained United's 1955 debt financing program in testimony before the CAB in 1957 in the General Passenger Fare Investigation as follows (United Ex. U-2, Docket No. 8008, pp. 12-13; attached hereto as Exhibit D):

" 'The 1955 financing program for United was handled entirely by arranging for issuance of debt. This was not a matter of choice, for the ability of United, as well as the industry, to sell equity has been limited. That further increase in equity is necessary and desirable is apparent, but it is equally

apparent that it cannot be accomplished satisfactorily until the present period of depressed earnings is brought to an end.'

"In 1955 airline shares were speculative securities and they were not held in quantity by institutional investors." (Loeb, Rhoades Report, DX 270, Part II, pp. 10-11)

As of June 30, 1955, none of the airlines had obtained any financing for jet aircraft and prior thereto had financed their equipment purchases chiefly out of earnings, cash accumulations from fast depreciation and tax amortization certificates and short-term bank credits. Long-term debt was obtained infrequently. The Pan American 25-year $60 million loan from a group of insurance companies in May 1955 was for the purpose of financing the acquisition of piston aircraft. (Loeb, Rhoades Report, DX 270, Part II, pp. 11-12)

The fundamental principles of Drexel Harriman Ripley, summarized on page 189 of this report, were challenged by Loeb, Rhoades, which stated:

"We believe that it is unrealistic to postulate a set of principles to which diverse companies in a growth industry with varying needs and abilities should conform."

• • • • •

"With respect to Mr. Morehouse's first principle, getting equity prior to or simultaneously with senior debt, it is our experience that most companies raise funds through the sale of common equity or convertible securities only when the need therefor is clearly demonstrable. It is common practice for a lending institution to make a commitment to lend senior debt conditioned upon equity or subordinated debt financ-

ing being done prior to or contemporaneous with the later takedown of the senior funds. A well organized financing plan raises equity only when required, not in unknowing anticipation of possible future needs some years away. As we shall show below, the fact of the matter is that historically no major airline followed Mr. Morehouse's first principle. The facts indicate that during the 1955-1960 period none of the airlines sold equity or securities convertible into equity until the latest date possible and then in amounts as minimal as possible. This is reasonable and what one would expect, rather than the converse suggested by Mr. Morehouse's first principle.

"Mr. Morehouse's third principle, that contractual commitments for capital expenditures should be prepared for reasonably in advance of the time they are to become due, is difficult to quarrel with as a general proposition. The statement of the principle, however, totally fails to answer the important questions of timing and amount. No guidelines are given as to how much money should be raised, by what method or what is meant by 'reasonably in advance.'

"In short, we do not believe that a realistic financing program can be devised or reconstructed upon any such a set of principles of airline finance. Instead, a careful analysis of the factual situation existing in the securities markets, the airline industry at large, and the individual company is required." (Loeb, Rhoades Report, DX 270, Part II, pp. 12-14)

Loeb, Rhoades stated that TWA had no need for equity in early 1955 and that it was doubtful that any TWA management would have been persuaded that TWA, in 1955, was short of equity in comparison with the other airlines. Loeb, Rhoades knows of no airline that bases its equity or debt financing upon its relationship to other airlines using

"yardsticks" such as formulated by Morehouse. (Loeb, Rhoades Report, DX 270, Part II, p. 15)

According to Loeb, Rhoades, the results obtained using the "yardsticks" show a variance in the indicated equity shortage from $13 million to $74 million.

"A widely accepted measurement of the strength of a company's capital structure is its debt-equity ratio. On that basis, TWA with its ratio of 78.4% equity to 21.6% debt (p. 10 Morehouse Report) was in a better financial position than American, United and Eastern and equally as well off as Pan American.

"• • • While it likely was recognized by all of the airlines and by their financial advisers in the forepart of 1955 that, at some time in the future, both additional equity and debt financing would be required by each of them to meet the oncoming jet age, no one could be sure of 'when' or of 'how much.'" (Loeb, Rhoades Report, DX 270, Part II, p. 16)

It was Loeb, Rhoades' opinion that the equity issue proposed by Drexel Harriman Ripley was excessive in amount and that it is unrealistic to state that it could have been sold in the spring of 1955.

"It is clear that the $58.4 million common stock offering proposed by Mr. Morehouse for the Spring of 1955 would have been of astounding size, exceeding by more than $11 million the sum total of all domestic trunk common stock offerings during the 1946-1955 period.

"• • • To suggest, as Mr. Morehouse does, that TWA or any other domestic trunk airline, could have sold in the Spring of 1955 what was a theretofore unheard of dollar amount of stock is in our opinion utterly unrealistic, unless a financially sound majority stockholder for some reason insisted upon it and

agreed in advance to assure its success." (Loeb, Rhoades Report, DX 270, Part II, pp. 17 and 18)

Loeb, Rhoades thought that the proposed equity financing in May 1955 was premature:

"To have accomplished an offering of $58.4 million of common stock in the Spring of 1955 Mr. Morehouse would have to have made his recommendations to TWA and had them accepted early in 1955.

"It is common knowledge that in early 1955 there were not yet any jet aircraft available for order by TWA or any other airline and that the magnitude of the orders and investment required by the airlines was unknown. We agree with Mr. Morehouse (p. 6) that, while it was generally recognized that the amounts would be very large, none of the airlines could estimate with any degree of certainty just how much additional capital would be required. Certainly no airline management could have foreseen in early 1955, when or in what amounts, funds would be required for the purchase of jet aircraft." (Loeb, Rhoades Report, DX 270, Part II, pp. 18-19)

The first carrier to order jets was Pan American which placed an order in October 1955 for 25 Douglas DC-8s and 20 Boeing 707s, at a cost of $269 million. The $60 million loan arranged May 10, 1955 by Pan American was to finance the acquisition of piston aircraft and to increase working capital. A $30 million loan on December 19, 1956 was to finance the purchase of 9 DC-7s and make advance payments on 23 707s and 21 DC-8s. Pan American had no equity financing until July 29, 1959. American Airlines ordered 30 707s in November 1955 and in the same month placed privately $75 million of 4% notes. The following year on September 1, 1956, American placed privately an

additional $60 million at 4¼% the proceeds of which were added to general funds and were available for the purchase of jet aircraft. American raised no equity until June 15, 1959. United ordered 30 DC-8s at a cost of $175 million in late October 1955 and also ordered 45 piston aircraft. On December 22, 1955, United arranged with three insurance companies to borrow, prior to March 1, 1959, up to $120 million and at the same time arranged a $30 million standby revolving credit with a group of bankers. Two years later, in December 1957, United arranged for another $130 million bank credit. It was not until November 1960 that it sold equity in the form of convertible debentures (Loeb, Rhoades Report, DX 270, Part II, pp. 19 and 20).

Loeb, Rhoades in their Report concluded that:

> "The actions of these airlines clearly indicate that competent management did not raise equity in the mid-1950's as a part of long-range financing for the purchase of jet aircraft." (Loeb, Rhoades Report, DX 270, Part II, p. 20)

Finally Loeb, Rhoades stated that TWA had no use for equity funds in the spring of 1955 since $35 million of the proceeds of the equity issue was to be used to pay off a 15-year 3¾% equipment mortgage which had been arranged with Equitable in December 1954. (Loeb, Rhoades Report, DX 270, Part II, p. 21)

In the opinion of Loeb, Rhoades, the 1-for-1 preemptive offering recommended by Drexel Harriman Ripley is a drastic measure without historical precedent, unless a major stockholder willingly participates. On such an offering, the market price for TWA would drop lower than $17.50 as stated by Drexel Harriman Ripley and even at

$17.50, TWA stockholders would suffer a self-inflicted loss in the aggregate indicated market value of $44,990,000, and a stockholder who did not purchase additional stock would find his holdings diluted in market value by $13.50 per share (Loeb, Rhoades Report, DX 270, Part II, pp. 22-23).

No competent management would approve the dilution of the equity position of its stockholders and reduce stock leverage unless the need is clearly apparent and the circumstances pressing:

> "In our opinion a prudent and competent management would have considered both dilution and leverage in weighing Mr. Morehouse's proposal to raise equity in the Spring of 1955, and would have decided to postpone any equity financing until the need for the money could be more clearly demonstrated. In our view these considerations would have led to the same result whether the shares of the company were widely held by the public or largely held by a majority stockholder.
>
> "The fact that TWA actually did a one-for-one rights offering in 1957 does not change our view. This was not a public offering underwritten by investment bankers. There was a definitive and immediate need for the funds* and the issue was underwritten by Toolco which had agreed to provide TWA with a minimum of $34 million of proceeds, exceeding Toolco's pro rata portion by approximately $2 million. Actually, Toolco subscribed to $35 million or 80.69% of the issue. (DHR Exhibit: Trans World 7)." (Loeb, Rhoades Report, DX 270, Part II, pp. 24-25)

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* See Purposes of Issue Section, DHR Exhibit: Trans World 7.

The Report then took up alternative assumptions as to Toolco:

"(i) If we assume that TWA had accepted Mr. Morehouse's recommendation with respect to the $58.4 million equity offering in the Spring of 1955 and that Toolco had agreed to take up its pro rata share of the offering in order to maintain its percentage of ownership, such a financing probably could have been done. It is our opinion, however, that such an expensive, premature and unnecessary financing would have been a bad business decision. We would not have recommended such a financing to TWA management or to the stockholders of TWA in the Spring of 1955. If such a recommendation had been made, it is our opinion that it would not have been accepted by TWA management, by its majority stockholder or by its other stockholders.

"(ii) If Toolco could not have been looked to for participation in the suggested equity offering, it is our opinion that it could not have been accomplished. We would not have participated in such an underwriting and it is our opinion that a syndicate could not have been formed to have underwritten such an offering. We have already discussed the difficulties of accomplishing such a large financing under any circumstances, and we believe the impact on the financial community of a declination by Toolco to subscribe to its share of the offering would have doomed the proposal at the outset. In short, had Toolco declined to participate, Mr. Morehouse's suggested 1955 equity financing in our opinion, could not have been accomplished.

"(iii) It is difficult to comment upon the purely hypothetical question presented by the assumption that there was no Toolco and that TWA was a widely-held company with no controlling stockholder. Such was not the case. Moreover, in view of the assistance TWA received as the result of Toolco's financial backing in the post-war years, it is difficult to assume that TWA, absent Toolco, could have been in as good a financial

condition as it was in historically, in the Spring of 1955. Even indulging in the assumption that it was, it is our opinion that no prudent and competent management with due regard for the interests of its stockholders would have accepted the suggested equity financing plan, and if it had, we do not believe that such an offering could have been underwritten." (Loeb, Rhoades Report, DX 270, Part II, pp. 25-27)

Loeb, Rhoades concluded that Drexel Harriman Ripley's proposal was not "doable" and in relation to the amount of common stock sold by the domestic trunk airlines during the entire 1946-1956 period it was "stupendous."

"• • • if the offering had not been held precisely in the Spring of 1955, the subsequent history of TWA's earnings would have made any later offering even more difficult to consummate. Earnings for the third quarter of 1955 were $4.2 million compared to $7.1 million for that quarter in 1954 and the fourth quarter earnings dropped to $100,000 from $1.3 million the preceding year. (Exhibit F). The years 1956, 1957 and 1958 were all loss years for TWA. (DHR Exhibit: Financials—5). Commencing in June 1955 the stocks of the airline group declined counter to the general market. (DHR Exhibits: General 5 and 7). TWA shares declined from a high of 31⅝ in June to a low of 22¾ in October 1955, and, of course, went much lower thereafter. (DHR Exhibit: Trans World 9). Even accepting Mr. Morehouse's fortuitous selection of late May or early June 1955 for the proposed equity financing, we do not believe it could have been done without the assistance of Toolco. The selection of a somewhat later date would have made the success of any such a proposed financing even more improbable." (Loeb, Rhoades Report, DX 270, Part II, pp. 27-28)

Cross-examination of Woodfin

There is set forth below certain supplementary information developed in the plaintiff's cross-examination during 5½ days of Woodfin, a general partner of Loeb, Rhoades and certain exhibits admitted in evidence. The information set forth below is selected to illuminate the Loeb, Rhoades Report. However, I did not confine my consideration solely to the information listed below.

¶ Woodfin had experience in negotiating the financing of pipelines (Tr. 6762) but prior to 1959, claimed no expertise in airline financing (Tr. 6763).

¶ Woodfin was associated with Loeb, Rhoades when two Seaboard World Airlines' financings were done in 1960 and 1966. Seaboard was exclusively a cargo carrier with a record of operating losses and the financings were effected in part to adjust creditors' claims (Tr. 6767-6771).

¶ Loeb, Rhoades also acted as investment bankers for Northeast Airlines in 1956 and had connections with Capital Airlines (Tr. 6772-6773).

¶ It was not "in the cards" for any independent competent management (forgetting Toolco) to have jumped in and have had a rights offering when they did not need the money in May 1955. (Tr. 6808)

¶ Historically it took a lot of help from Toolco to finance a program substantially less than the $550 million capital program recommended by Drexel Harriman Ripley. Woodfin does not see how TWA could have financed such a substantial program without the help of Toolco. (Tr. 6813)

¶ The fact that in May 1957 TWA sold 3,337,036 shares of common stock for $43,381,486 means that with Toolco cooperation TWA could have sold the common stock in May 1955. (Tr. 6822-6823)

¶ It is significant that at the time of the May 1957 equity issue TWA had a real present need for the funds and sold stock despite the downtrend in earnings commencing in June 1955, which was not arrested until the year 1959. (Tr. 6828)

¶ Loeb, Rhoades would not have advised any financing in 1957 if Toolco was content to make the down payments on equipment acquisitions. As pressure to pay installments mounted, a better case was made for financing. Neither Drexel Harriman Ripley nor Loeb, Rhoades would have done the equity financing in 1957. (Tr. 6840)

¶ The 1957 financing was not intended to cover the jets but to pay for the Lockheed 1649 A and 1049 G aircraft and spare parts. (Tr. 7217-7218)

¶ While American Airlines in May 1955 had a ratio of 78% equity to total capitalization and was in a strong balance sheet position to borrow for the jet program, this in the opinion of Woodfin does not mean that an airline should be so operated. With a high equity ratio earnings available for stockholders are going to be reduced. The CAB encourages a 50% debt ratio which provides leverage beneficial to stockholders. (Tr. 6871-6875)

¶ The growth of the domestic passenger airlines particularly in 1953, 1954 and 1955 was not reflected by enthusiasm on the part of stockholders. Airline stocks were speculative without a broad investment appeal (Tr. 6863) but as of October 27, 1954 Loeb, Rhoades stated in an

investment "informatory" (TWA Ex. 207): "The strength in airlines reflects a widening interest in this group which we have been recommending for some time, believing that finally some of the basic problems are being overcome." (Tr. 6887A)

¶A Loeb, Rhoades informatory on American Airlines commented that its 80% ratio of equity to total capital puts it in the strongest position of any airline to meet the financial demands of the jet program (Tr. 6875).

¶In 1954-early 1955 the outlook for commercial jets continued uncertain. Boeing had not received permission from the U. S. Air Force to use the tanker-jet tooling and the Renton, Washington plant to build a commercial version of the tanker-jet, there remained questions about the functioning of jet aircraft in hot weather, noise, and whether the airline industry would decide upon turboprops such as the Electra (Tr. 6889-6892).

¶Several issues of aviation trade journals in the late summer and early fall of 1954 carried accounts of Boeing's prospects for the manufacture of a commercial jet, its ability to satisfy U. S. Air Force obligations and also meet commercial requirements and the estimate that the capital requirements of the commercial airline industry would range between $1.5 billion to $3 billion over the next 10 years. (Tr. 6900-6907).

¶On November 19, 1954 Allen, President of Boeing, wrote Damon, President of TWA, with a carbon copy to Hughes (DX 95A), stating that the time had arrived to negotiate with the airlines for a commercial ship but pointing out that before actual construction can begin, Boeing must obtain from the Air Force permission to use the tool-

ing designed and constructed for the Air Force contract and also permission to use a portion of the Government-owned plant at Renton, Washington. To assist in negotiating with the Government, Boeing suggested a "production type contract", which would become binding upon both parties on receipt of notice given by Boeing if the final price is within the maximum price and the delivery schedule is as favorable and the aircraft specifications are substantially the same as set forth in the production notice contract. The indicated sales price was in the neighborhood of $4,250,000 per aircraft assuming a quantity of 50 (Tr. 6908-6912).

¶ American Aviation Daily of December 3, 1954 (TWA Ex. 216) observed that the prototype aircraft for the Boeing 707 jet had 40 hours flight time with the original set of jet engines which was a remarkable record for prototype aircraft according to Boeing (Tr. 6914-6915).

¶ Woodfin was aware in December 1954 that Pan American was negotiating for Boeing commercial jets (Tr. 6937, TWA Ex. 219).

¶ Loeb, Rhoades was aware that there was active interest in commercial jets in the fall of 1954 and considered this in preparing their direct testimony. But at that time no one could ascertain who would order what and when, and what the delivery timetable would be. Loeb, Rhoades' opinion would not be affected by knowledge that Pan American Airways was seriously negotiating, for that was a fact. (Tr. 6920-6923)

¶ Woodfin was aware in January 1955 that United was negotiating for DC-8 jets for delivery starting in 1960 and

possibly 1959 and United actually ordered jet aircraft in the fall of 1955 (Tr. 6943-6944).

¶ In January 1955 Boeing was interested in commencing active negotiations with TWA on specifications for its jet aircraft (Tr. 6947, DX 10).

¶ The payment of $10,000,000 for an option to purchase 15 jet aircraft to be delivered four years later at a total cost of $75,000,000 would not, in Woodfin's opinion, require raising money to finance the option in January 1955. (Tr. 6950-6951).

¶ When asked was it not obvious in early 1955 to everyone in the airline business that millions and millions of dollars would be required for financing jet aircraft? Woodfin replied:

> "A. As to exactly when the sums of money would have to be produced and how much outside money would have to be produced was all a function of how the airlines operated, what cash flow off they had from depreciation and earnings, what cash they had available, from tax acceleration certificates, and the rest of it, how much outside money was going to be needed and how many airplanes were actually going to be ordered. I don't think anybody knew. There was a lot of speculation, of course." (Tr. 6957)

¶ Woodfin did not consider the equity financings by other airlines in the years covered by the complaint prior to 1955. TWA Ex. 224 sets forth a record of equity financings, including convertible preferred stock, for the period from 1939-1945, inclusive (Tr. 6980-6983).

¶ The price of an airline's common stock is a highly material consideration to an airline company and its investment bankers contemplating an issue. (Tr. 7046).

¶ In determining whether a common stock issue is doable an underwriter would look at the common equity financing of other companies in the same period. It would do no good to examine issues of convertible preferred, convertible debentures or any other different securities (Tr. 7073-7074).

¶ In December 1955 United Air Lines completed the "largest single financing program in the history of the airline industry * * * as part of its long range preparation for jet airliner operations." This aggregated $150 million. (TWA Ex. 180, p. 6, Tr. 7084).

¶ In May 1955 TWA did not know what aircraft was to be ordered. When the equipment program had been determined they would have discussed their money needs with Equitable who held their equipment mortgages. However, contrary to United which had its best year in 1956, TWA earnings started downhill in the second half of 1955 and operations continued to show a loss in 1956, 1957 and 1958. This barred TWA from approaching Equitable (Tr. 7114-7116).

¶ Loeb, Rhoades would not determine TWA's financial requirements by employing the "yardsticks" used by Drexel Harriman Ripley. These yardsticks are used to measure efficiency of airline operations and the efficient use of capital and the statistics are more meaningful for flight engineers and operating people (Tr. 7122-7123).

¶ In May 1955 there had not been a sizeable common equity offering by airline companies for several years and Loeb, Rhoades had serious doubts that the stock market would absorb a $50,000,000 issue. (Tr. 7130).

¶ Woodfin agrees "as a generalization" that stock should be sold first before selling debt, a general principle set

forth by John F. Childs, Vice President, Irving Trust Company, in an article entitled "Long Term Financing" appearing in the Corporate Treasurer's and Controller's Encyclopedia, Volume 2, page 435 (Tr. 7133), but none of the airlines sold equity before selling debt and the most natural and normal practice is to couple the sale of debt with equity (Tr. 7136).

¶ On May 3, 1955 Loeb, Rhoades stated in a Research Department informatory (TWA Ex. 201) that American Airlines with a ratio of 78% of equity to total capitalization was in need of no financing until the jet program and then probably would be in the strongest position of any of the airlines to finance the program (Tr. 7189).

¶ Woodfin is in fundamental disagreement with the Drexel Harriman Ripley proposal that capital be doubled and stock be sold below book in May 1955 when TWA had no precise information with respect to its aircraft requirements (Tr. 7249).

¶ Woodfin objects to paying off in June 1955 an equipment mortgage loan obtained from Equitable Insurance Company in December 1954 believing it would put TWA in a very strange position in the fall of 1955 when it returned to the insurance companies to get a loan commitment (Tr. 7250-7251).

¶ In 1957 when historically TWA sold common stock to its stockholders the jet age was much closer and there was a very definite use for the money. 75% of the 25% minority stockholders subscribed for the stock (Tr. 7261-7262).

¶ TWA was the only one of the big four airlines which did not pay a dividend. If funds were sought from stockholders in May, 1955 before the details of the jet acqui-

sition program were known and when there was no immediate need for the funds it would be taxing the stockholders (Tr. 7285).

¶ Offering additional stock substantially below the market involves the risk of depressing the after-market to the detriment of all stockholders (Tr. 7307-7308).

¶ In January or February of 1955, none of the airlines were able to determine the amount of money required and when it would be needed (Tr. 7197).

¶ Late in 1955 United completed a $150 million financing program designed to cover its commitments for the 30 DC-8 jetcraft ordered late in 1955 together with related ground equipment and facilities. This financing was privately arranged because United did not have a sufficiently high potential rating to go to a public offering and was entirely a debt issue because in the words of United Air Lines: "This was not a matter of choice, for the ability of United, as well as the industry, to sell equity has been limited. That further increase in equity is necessary and desirable is apparent, but it is equally apparent that it cannot be accomplished satisfactorily until the present period of depressed earnings is brought to an end." (Loeb, Rhoades Report DX 270, Exhibit D, pp. 12-13, Exhibit U-2 in CAB Docket No. 8008).

The Debt Financing

TWA's claim for damages in respect of the defendants' interference with TWA's debt financing is founded upon paragraphs 24 through 28 inclusive and paragraph 52(c) and (d) of the complaint which are set forth below.

Paragraphs 24 through 28 of the complaint provide:

"24. From 1955 until December, 1960, the defendants used their power over the financing of aircraft thus obtained to compel TWA to acquire aircraft of the type and in the manner dictated by the defendants and used their power over TWA's acquisition of aircraft, obtained as hereinbefore alleged, to compel TWA to obtain financing for the acquisition of such aircraft of the type and in the manner dictated by the defendants.

"25. At least as early as 1955, the needs of United States air carriers for the extensive financing required for acquisition of jet-powered aircraft were recognized throughout the air carrier industry and by others, including the defendants.

"26. In 1955 and continuously thereafter until December, 1960, the defendants, pursuant to and in furtherance of their plan to control TWA in a manner advantageous to themselves, directed TWA to make no efforts itself to obtain financing necessary for the acquisition of jet-powered aircraft required for the needs of TWA.

"27. Commencing in the year 1955 and continuing thereafter, various other air carriers, including competitors of TWA, made appropriate arrangements for the financing of jet-powered aircraft. In 1955 and 1956 various United States air carriers were able to obtain funds at a cost (or interest rate per annum) in 1955 of 4%, and in 1956 at costs ranging from 4¼% to 4¾%.

"28. In 1955 and thereafter for a period of several years, the defendants discussed with others various proposals for the financing of jet-powered aircraft, but the defendants did not make arrangements for such financing nor allow TWA to make such arrangements until December 1960, at which time the prevailing cost of funds (or interest rates) for debt financing was approximately 6-6½%."

Paragraph 52 of the complaint provides, *inter alia*:

"52. TWA has further been injured in the following manner:

• • • • •

"(c) TWA was foreclosed from obtaining financing on more advantageous terms than those available to it in December 1960 and thereby suffered a loss by virtue of the greater cost of borrowing it ultimately experienced.

"(d) TWA's ability to obtain financing for its needs was substantially impaired."

It is helpful to note particularly that the foregoing allegations, all of which are admitted by defendants' default, assert that (i) defendants dictated the type and manner of acquiring aircraft and manner of financing the acquisition (par. 24); (ii) United States air carriers recognized in early 1955 the need for extensive financing in order to acquire jet aircraft (par. 25); (iii) defendants directed TWA to make no efforts itself to obtain financing for the acquisition of jet aircraft (par. 26); (iv) various other air carriers, including TWA competitors, made arrangements for financing commencing in 1955, and in that year and in 1956, obtained commitments at interest rates ranging from 4% in 1955 to 4¼-4¾% in 1956 (par. 27); (v) defendants discussed various proposals for financing TWA jet requirements in 1955 and for several years thereafter made no arrangements for financing nor was TWA allowed to arrange financing until December 1960, when interest rates were approximately 6-6½% (par. 28); and (vi) TWA was foreclosed from obtaining advantageous interest rates and thereby suffered a loss (par. 52(c)).

The debt financing recommended by Drexel Harriman Ripley in their Report was summarized at pages 190-91 of this Report and is repeated herewith:

> "(ii) A private placement long-term loan commitment with institutional investors in October 1955 for $150 million minimum—$170 million maximum at 4% interest.
>
> "(iii) An underwritten non-preemptive offering in May 1959 of $60 million of 5% subordinated debentures, convertible into common stock.
>
> "(iv) A private placement long-term loan commitment with institutional investors in May 1959 for $90 million minimum—$110 million maximum at 6% interest." (Plaintiff's Brief, pp. 60-61)

On the basis of the allegations of the paragraphs of the complaint set forth above, TWA purported to establish damages before trebling in the amount of $20.3 million, which was determined as follows:

> "This separate claim is based upon the difference between:
>
> "(i) The present value (*i.e.*, the present equivalent of the future burden) of future payments for debt service on TWA's long-term debt historically outstanding on December 31, 1963, and
>
> "(ii) The present value (*i.e.*, the present equivalent of the future burden) of future payments for debt service on long-term debt for reconstructed TWA as of December 31, 1963 with a debt structure of the kind and in the amounts recommended by Drexel Harriman Ripley." (Plaintiff's Brief, p. 120)

The date of December 31, 1963 was selected for the purpose of calculating damages because according to TWA's

counsel that date permitted the simplest and most logical assumptions. As of December 31, 1963, the debt structures of Historical TWA and of Reconstructed TWA were comparable because (i) the jet fleet had been delivered and financing arranged, (ii) both Historical and Reconstructed TWA had outstanding long-term non-convertible and convertible debentures and the total amount of debt outstanding was comparable, and (iii) the shares outstanding of Historical and Reconstructed TWA as of December 31, 1963 were practically identical. If calculations had been made at a later date, additional assumptions would have been required to make adjustments for conversions of convertible debentures which occurred in respect of Historical TWA. (Plaintiff's Reply Brief, pp. 73-74)

October 1955 Debt Financing

Drexel Harriman Ripley Report and Morehouse Testimony

In forming their opinion with respect to debt financing in October 1955 and their recommendation that TWA should have and could have arranged mortgage loan commitments from institutional investors which would have provided over the next three years a minimum of $150 million and a maximum of $170 million, Drexel Harriman Ripley took the following approach:

(i) A pro forma balance sheet as of September 30, 1955 was prepared for Reconstructed TWA in which effect was given to the May 1955 sale of common stock providing net proceeds to TWA of $55.5 million. (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, pp. 23-25 and Exhibit thereto "Financials—7")

(ii) A capital expenditure program for Reconstructed TWA was projected by Price Waterhouse as of September 30, 1955, which indicated that Reconstructed TWA would require capital expenditures from the fourth quarter of 1955 through December 1960, aggregating $375.3 million (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, pp. 26-27 and Exhibit thereto "Financials—8")

(iii) A source of funds forecast from October 1955 to December 1960 for Reconstructed TWA as of September 1955 was prepared by Coverdale (Drexel Harriman Ripley Report, TWA Ex. 5, Part III, Volume 2 "Financials—9")

(iv) The balance sheets of Historical TWA and Reconstructed TWA as of September 30, 1955 were then compared with those of their three principal competitors, the balance sheets of American Airlines and United Air Lines as of September 30, 1955, and the balance sheet of Pan American Airways as of December 31, 1955.

In this comparison Historical TWA had a book net worth less than its three principal competitors by the following amounts: Pan American Airways $40 million, American Airlines $42 million, and United Air Lines $29 million; whereas Reconstructed TWA would have shown a greater book net worth than its competitors by the following amounts: Pan American Airways $15 million, American Airlines $13 million, and United Air Lines $26 million. Reconstructed TWA would have had no funded debt, showing 100% equity in its capital structure compared to 67.9% for Pan American Airways, 79.2% for American Airlines and 73.3% for United Air Lines; whereas Historical TWA would have had a ratio of 67.4% of equity to total capitalization. (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 25)

Drexel Harriman Ripley stated in their report that they would not have recommended short-term financing because funds required by TWA were very large and the returns on their investment in form of earnings were several years off. They would, therefore, have recommended that between July 1 and September 30, 1955, that TWA take corporate proceedings to authorize a flight equipment mortgage and in the fourth quarter of 1955 to arrange with institutional investors for a commitment to purchase flight equipment mortgage notes in the principal amount ranging between a minimum of $150 million and a maximum of $170 million, with an interest rate of 4% and a commitment fee of ½% on the unused portion. (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 31) A summary of the principal provisions of the equipment mortgage and the October 1955 loan agreement are set forth in the Drexel Harriman Ripley Report, TWA Ex. 5, Part II, pp. 29-30, 32, 33.

Lastly, Drexel Harriman Ripley in their Report set forth a five year projection as it would have appeared in September 1955, showing as of December 31 for each of the years 1956-1960, inclusive, the outstanding equipment mortgage notes, their percentage of net tangible assets and the "Leeway" for the issuance of additional funded debt within the 60% voluntary action limit of funded debt to consolidated net tangible assets required by the mortgage. Drexel Harriman Ripley concluded that Reconstructed TWA could expect to be able to take down by 1959 the maximum of $170 million available from the equipment mortgage financing while remaining comfortably within the 60% limitation.

Cross-examination of Morehouse

There is set forth below certain supplemental information developed in the defendants' extensive cross-examination of Morehouse of Drexel Harriman Ripley and certain exhibits admitted in evidence. As was the case earlier in this Report, the information set forth below is selected to illuminate the Drexel Harriman Ripley Report. However, I did not confine my consideration solely to the information listed below.

¶ In formulating the $170 million debt financing in October 1955, Drexel Harriman Ripley made no assumption as to whether interest rates were going up or going down and took no advantage of hindsight in knowing that interest rates substantially increased over the five year period from the fall of 1955 to the end of 1960. (Tr. 3888-3889)

¶ The proposed debt financing of October 1955 assumed and was dependent upon the successful consummation of the May 1955 equity financing. Since in ordering aircraft equipment the lead time is in many cases so long, an airline need not necessarily arrange financing prior to entering into a contractual commitment for the equipment if it is satisfied that its credit standing and liquid capital give it a reasonable expectation that total financing is available. (Tr. 4038)

¶ It would not be proper for an airline to rely upon the credit standing of a parent holding 75% of its stock. (Tr. 4039)

¶ In planning the TWA May 1955 financing, Drexel Harriman Ripley would not have necessarily discussed with Equitable Life "rolling over" $35 million of the equipment mortgage placed in December 1954 and would have men-

tioned possible additional financing in the fall of 1955 in general terms rather than specific terms. (Tr. 4250)

¶ In formulating its recommendations for October 1955 Drexel Harriman Ripley would have believed in the summer of 1955 that TWA in the fall of 1955 would have been negotiating with Boeing for 33 jet transports, of which 15 would be Boeing 707-131s and 18 Boeing 707-331s. (Tr. 4299-4300)

¶ Drexel Harriman Ripley assumed that TWA entered into the long-term financing arrangements on October 1, 1955 and that there would have been some negotiations with Boeing prior thereto. (Tr. 4300)

¶ Drexel Harriman Ripley's recommendations for October 1955 were not based on 20/20 hindsight even though the Capital Expenditure Projections prepared by Price Waterhouse admittedly used 20/20 hindsight. (Tr. 4335)

¶ While the general operating characteristics of jet aircraft were not known in September 1955, Drexel Harriman Ripley were of the opinion that a potential lender could have been satisfied with reasonable forecasts based on the known general operating characteristics. (Tr. 4338)

¶ Coverdale projected TWA revenue income to be greater than the actual results of operations of Historical TWA which showed a loss. On the basis of historical results TWA would not have been able to take down the amounts of money projected by Drexel Harriman Ripley under the 1955 mortgage equipment loan because of the provision of the mortgage limiting funded debt to 60%. (The limitation of debt to 60% of consolidated net tangible assets.) (Tr. 4351)

The Loeb, Rhoades Report and Woodfin Testimony Relating to the October 1955 Debt Financing

The Loeb, Rhoades Report disagreed with the Drexel Harriman Ripley opinion that TWA could and should have made arrangements in October 1955 to borrow between $150 million and $170 million from institutional lenders. Loeb, Rhoades stressed that the Drexel Harriman Ripley Report and testimony of Morehouse recommending the October 1955 debt financing assumed and was dependent upon the successful consummation of the equity financing in May 1955 producing net proceeds of $55.5 million. (Loeb, Rhoades Report, DX 270, Part II, p. 28)

Loeb, Rhoades proceeds to state that in its opinion even if the October 1955 financing was not dependent upon the May 1955 equity financing, it could not have been successfully arranged. The Loeb, Rhoades Report states their opinion as follows:

> "In assessing the likelihood of success for Mr. Morehouse's projected $150-170 million flight equipment mortgage loan of October 1, 1955, we think it relevant to consider the following:
>
> (i) By October 1, 1955 no jets had been ordered by any airlines;
>
> (ii) By October 1, 1955 none of the airlines had arranged any financing (debt or equity) for the purchase of jet aircraft; (Exhibit A)*

* The debt financings referred to by Morehouse on page 32 of his Report (see also Financials—13) were arranged on the following dates: Pan American May 10, 1955; Northwest June 30, 1955; Eastern October 31, 1955; American, November 1, 1955 and United December 21, 1955. However, the earlier Pan American and Northwest financings were for the purpose of acquiring the latest series of pistons ordered. (Exhibit A).

(iii) The maximum $170 million mortgage commitment which Mr. Morehouse assumes TWA could have obtained substantially exceeds the long-term commitments obtained by any other airline in 1955.** The large commitments obtained by United, Eastern and American later in the Fall of 1955 were the largest in the history of the airline industry. Indeed, a $150-170 million loan to TWA on October 1, 1955, would have been almost three times as large as any long-term commitment that had been made to that date to any airline for any purpose, and would have exceeded the commitments to the other airlines by a minimum of $30-50 million. (Exhibit A).

(iv) Detailed projections with respect to the Boeing 707-331s and the Convair 880s could not have been prepared as of October 1, 1955. Lending institutions, such as life insurance companies did not make commitments of the size envisaged by Mr. Morehouse without making a comprehensive analysis of the planned use of the funds. Jet aircraft were an unknown and untested commodity in the Fall of 1955. Any insurance company asked to lend large sums of money for such a purchase during this period would have demanded detailed information as to the type and size of the fleet, cost, terms of payment, delivery dates, earning power, depreciation, planned usage, configuration and the like.

We are advised by counsel that we may assume, based upon the record in the case to date, that the intercontinental Boeing, the 707-320 series, was not ordered by any airline until December, 1955 and that detailed information on that aircraft such as described

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** American obtained $75 million; Eastern obtained $90 million; and United obtained $120 million of long-term debt. Financing done by other airlines during this period was for much smaller amounts. (Exhibit A).

above was not available to the airlines until some time after October 1, 1955. We do not believe that funds could have been borrowed for the acquisition of this aircraft until detailed projections containing information relating to cost, terms, delivery, earning power and the like could have been made available to prospective lenders. We note that such detailed projections, although hypothetical, were in fact included as a part of Mr. Morehouse's Report (Financials—8, 9 and 10) but that his projections were based upon information apparently not yet available to the industry. We also note that detailed projections which United in fact used in order to obtain its loan commitment in December 1955. (Defendants' Exhibit 197 in evidence.)

Moreover, Mr. Morehouse assumed that TWA's proposed borrowing on October 1, 1955 would have included a $25 million projected down payment for medium/long-range airplanes not yet selected. As to the last item, it is our opinion that a commitment of this size could not have been obtained as of October 1, 1955 to buy an unspecified number of unselected airplanes which had not yet been developed or identified.

(v) Although not disclosed by Mr. Morehouse's exhibits, TWA's earnings, as compared to 1954, began to fall in the second quarter of 1955 and dropped sharply in the third and fourth quarters. (Exhibit F)." (Loeb, Rhoades Report, DX 270, Part II, pp. 29-31)

In conclusion the Loeb, Rhoades Report stated an opinion with respect to the October 1955 debt financing as follows:

"In view of the above, and even assuming, contrary to our view, that the proposed 1955 equity financing had been accomplished, it is our opinion that TWA would not have and could not have obtained a commitment for $150-170 million on October 1, 1955." (Loeb, Rhoades Report, DX 270, Part II, pp. 31-32)

It is noted that Loeb, Rhoades emphasizes that prior to October 1, 1955 none of the airlines had arranged any financings (Debt or Equity) for the purchase of jet aircraft and that the $60 million financing of Pan American and the $29.5 million financing of Northwest arranged on May 10, 1955 and June 30, 1955, respectively, were in each case to finance the acquisition of piston planes, not jets, and in the case of Pan American also for working capital. The first financing specifically concerned with the acquisition of jets was the Eastern Air Lines financing arranged on October 31, 1955 amounting to $90 million of which $40 million was earmarked for future jet orders. The first financing earmarked solely for acquisition of jets was the American Airlines financing of $75 million effected November 1, 1955 and the United Air Lines financing of $150 million effected December 21, 1955, of which $30 million was arranged with thirty-eight banks and $120 million with insurance companies.

Cross-examination of Woodfin

There is set forth below certain supplemental information developed in TWA's extensive cross-examination of Woodfin and certain exhibits admitted in evidence. As was the case earlier in this Report, the information set forth below is selected to illuminate the Loeb, Rhoades Report. However, I did not confine my consideration solely to the information listed below.

¶ The United Air Lines Annual Report for the calendar year 1955 stated in referring to a financing program arranged in December 1955:

> "The largest single financing program in the history of the airline industry was completed by United in December as part of its long-range preparation for

jetliner operations. Included were arrangements for a maximum of $150,000,000 in new capital, to be available over the next five years. Of that amount, $120,000,000 may be realized from the sale of new debentures and up to $30,000,000 may be borrowed under a new bank credit agreement. No equity financing is involved.

"Series D, 4 per cent sinking fund debentures will be sold as funds required from February 1, 1956 through March 1, 1959, to the Metropolitan Life Insurance Company, The Prudential Insurance Company of America and The Mutual Life Insurance Company of New York. . . .

"The new credit agreement is with a group of 38 banks headed by The First National City Bank of New York. Replacing an earlier agreement dated March 1, 1955, it makes loans available through December 31, 1960, with repayment over a five-year term thereafter." (TWA Ex. 180, p. 6, Tr. 7084)

¶ Most of the airline financing from 1946 to the 1955 period was with banks, mostly five year money. (Pan American in October 1946 had a $40 million credit agreement with the National City Bank.) Only Pan American, United and TWA had placed any long-term money with institutions. (Tr. 7182-7183)

¶ Prior to October 31, 1955, when Eastern Air Lines arranged a $90 million financing with Equitable Life Assurance Company, of which $40 million was to finance jet acquisitions, there had been only the following long-term financings arranged with insurance companies: (i) a $60 million financing of Pan American Airways arranged on May 10, 1955 with a group of several insurance companies, (ii) the $40 million financing arranged by TWA with Equitable Life Assurance Company to replace a 1953 bank

credit and to purchase 20 Lockheed 1049-Gs, and (iii) three financings of United Air Lines arranged with Metropolitan Life and MONY, a $12 million financing in 1947, a $10 million financing in March 1952, and a $20 million financing in July 1954, the last two of which were stated to be for general purposes. (DX 270—Exhibit A—pp. 2, 4, 5 and 6, Tr. 7250-7251)

¶ On October 25, 1955, the Board of United approved the purchase of 30 Douglas DC-8's at a total cost of $175,000,000; on October 14, 1955, Pan American Airways ordered 25 Boeing jets and 20 Douglas jets; and in November, 1955 American Airlines ordered 30 jets (Tr. 7382-7383).

¶ An agreement in principle is reached between the lender and the borrower some time before the execution of the formal written documents evidencing the loan commitment. (Tr. 7388)

¶ In October 1955, after giving effect to the $55.5 million May 1955 equity financing and the $170 million October 1955 debt financing, TWA on a pro-forma basis had a more favorable ratio of debt to total capitalization (57%) than did United Air Lines which had a ratio of 61%. But it is doubtful that TWA could have raised more long-term money than United Air Lines. Long-term lenders would be interested in earnings as well as amount of equity and TWA was not doing well in the latter part of 1955. (Tr. 7409-7410)

¶ In Woodfin's opinion it would have been a mistake to terminate in May 1955 the $40 million financing arranged by TWA with Equitable Life in December 1954. Institutional lenders do not like to have recently completed financings terminated even if Equitable Life had been will-

ing to "roll over" the $40 million financing. Woodfin doubts that Equitable together with other insurance companies would have been willing to participate in an additional $150-170 million financing in October 1955 as recommended by Drexel Harriman Ripley. Such a financing involved a larger commitment than a group of large insurance companies gave subsequently to TWA's three principal competitors. Woodfin would hold this opinion whether or not TWA had effected the $55.5 million equity financing in May 1955. Only a relatively few number of large life insurance companies were participating in airline financing in 1955. (Tr. 7250-7255)

The May 1959 Debt Financings

Drexel Harriman Ripley recommended that Reconstructed TWA in May 1959 make (i) an underwritten non-preemptive offering of $60 million 5% Convertible Subordinated Debentures and (ii) a private placement with institutional investors of a long-term loan commitment ranging from $90 million to $110 million and bearing interest at 6%.

In formulating their recommendation, Drexel Harriman Ripley first considered the reconstructed situation of TWA in September 1956, again for the period from 1957 through mid-1958 and lastly in 1959.

As of September 30, 1956

It was assumed that TWA had placed orders in September 1956 for 30 Convair 880 jet aircraft for delivery in 1960 at a total price of $157,900,000 and that a down payment of $26,300,000 was made at the time the orders were placed with substantially no further payments required until the third quarter of 1959, the funds for the down

payment being obtained from a takedown on July 1, 1956 of $50 million of the Series A Mortgage Notes arranged for by Reconstructed TWA in October 1955.

The report proceeded to examine the financial posture of TWA as of September 1956 in the light of its then projected capital expenditure program and considered what, if any, financing arrangements might have been indicated in September 1956.

Drexel Harriman Ripley considered TWA's reconstructed operating results during the first nine months of 1956, which showed a loss of $500,000 and internal cash generation of $17.5 million and noted that by September 1956 Reconstructed TWA was running well behind the Coverdale forecast of funds generated prepared as of September 1955. They also considered (i) a reconstructed balance sheet as of September 30, 1956, which gave effect to the receipt of $55.5 million net proceeds of sale of common stock in May 1955 and the takedown of $100 million under the October 1955 debt financing, (ii) TWA's capital expenditure program projected by Price Waterhouse as of September 30, 1956, and (iii) the projection of TWA money requirements as of September 30, 1956, which indicated a peak requirement by the 1960 third quarter of $233.5 million, which was $163.5 million in excess of the $70 million remaining available out of the $170 million 1955 mortgage commitment.

Drexel Harriman Ripley concluded as follows:

> "In summary, then, TWA's financial posture at September 30, 1956 was about as follows: It had experienced sizable operating losses during the nine-month period then ended, and C&C was forecasting further losses in 1957. TWA had a projected peak requirement for $163.5 million in new outside funds (over and above what had been provided for in the 1955 mortgage financing) and it appeared that some form of junior

security would have to be included in the financing of this requirement. But the new money did not appear to be needed before the first quarter of 1959, almost 2½ years hence.

We conclude that under the circumstances prevailing in September 1956 we would have recommended to TWA that it not attempt, at that time, to formalize further financing arrangements even though all indications were that it would have to do so later. We believe that TWA would have held conversations with its major institutional lenders to advise them of the enlargement of its projected money requirements, indicating (a) that it would be approaching them at a later date to discuss further borrowing arrangements, and (b) that it recognized the indicated need for junior financing prior to or in conjunction therewith.

It would not have been practical, in September 1956, to attempt to pinpoint a target date for a financing two years or so away. We believe that it would have been logical to plan in terms of a financing sometime in the latter part of 1958 or early in 1959. However, since the junior financing would doubtless involve the sale of common stock, either directly or through the use of a convertible security or warrants, we believe that TWA and we, as their investment bankers, would have been keeping a weather eye on the market for airline securities with a view toward a possible earlier financing should stock market conditions permit." (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 38)

1957 Through Mid-1958

Drexel Harriman Ripley then proceeded to consider the reconstructed TWA situation in 1957 through mid-1958. They assumed that the $70 million remaining balance of the $170 million financing arranged in October 1955 had been taken down, $50 million on April 1, 1957 and $20 million on January 1, 1958, and that Reconstructed TWA had the same aircraft leases as Historical TWA. They noted

that reconstructed generation of funds from internal sources for the twelve months ended September 30, 1957 exceeded by $13.9 million the forecast made by Coverdale in September 1956, but that in the last quarter of 1957 internal cash flow on a reconstructed basis was $4.8 million lower than the forecast for that quarter and that cash flow continued to lag behind the forecast for the next two quarters so that the accumulated lag in cash flow for the period from September 30, 1956 to June 30, 1958 was $3.5 million. On instructions from TWA's counsel, Drexel Harriman Ripley assumed that in the fourth quarter of 1957 TWA made a commitment to acquire four L1649A piston aircraft and four L1049H piston aircraft, although the expenditures for these eight piston aircraft were not included in the Price Waterhouse Projection of Capital Expenditures made as of September 1955 and September 1956. The net cash expenditures by TWA for these eight aircraft totalled $17.3 million and were to be made in the last quarter of 1957 and the first three quarters of 1958, and Drexel Harriman Ripley assumed that these acquisitions would be financed by the takedown on January 1, 1958 of the last $20 million available under the October 1955 financing. (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, pp. 39-40)

On the basis of the foregoing considerations, Drexel Harriman Ripley in their report made the following comments with respect to the situation in mid-1958:

> "As a result of the foregoing factors, TWA would have been aware, by mid-1958, that funds required from outside sources to meet projected capital expenditures would be larger than indicated by the September 1956 projection. Timing of the money requirement had not changed, however. It appeared that the airline should be able to meet its scheduled progress

payments on the jets, and its other capital requirements, without obtaining new funds from outside sources until the spring or summer of 1959.

TWA, however, was on 'thin ice' with respect to the funded debt restrictions of the Flight Equipment Mortgage. Exhibit: Financials—27 indicates that throughout the first half of 1958 TWA's reconstructed funded debt as a percentage of net tangible assets would have hovered right around the 60% figure set forth in the voluntary action covenant of the funded debt limitation. It did not appear that there was any immediate danger of reaching the 65% default level." (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 41)

Operating under these considerations Drexel Harriman Ripley stated that TWA probably would have given thought to doing some junior financing in 1958 in order to provide some additional "cushion" beneath its outstanding funded debt and thereby avoid the possibility of default under the 65% provision of the outstanding Flight Equipment Mortgage. (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 43)

After comparing the market prices of TWA stock with Standard & Poor's Index of Air Transport Stocks as well as the AIMV (Aggregate Indicated Market Value) and the book value of TWA shares and noting the decline of TWA common from a mid-1955 high of 31⅝ to 12¾ in March 1958, when the historical book value per share was $15.09, and after also considering published comments on airline stocks of Moody's Stock Survey, Drexel Harriman Ripley commented as follows:

"So, throughout the first half of 1958 TWA's shares, and the shares of its principal competitors, were selling at prices only slightly recovered from their then recent lows. But the market generally seemed to be expecting an improved performance from airline shares

during the forthcoming months. Since TWA's period of outside money need still appeared to be at least twelve months away, we believe that we would have recommended that TWA adhere to its plans for a financing in 1959 rather than attempt to accelerate part of the program. It appeared to be a good business risk that market conditions for an equity offering by TWA (which would clearly be the cornerstone of the financing) would be better by mid-1959 than they were in mid-1958.

Thus, commencing in the summer of 1958, we believe that TWA, in consultation with its lawyers, accountants, investment bankers, institutional lenders, etc., would have been engaged in the task of designing and preparing for a major financing, in the spring or summer of 1959, involving the sale of both senior and junior securities." (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 43)

Early 1959

In preparing for the major financing in the spring or summer of 1959, Drexel Harriman Ripley considered various earnings and other data relating to TWA and its principal competitors including a tabulation of TWA operations, both historically and reconstructed, year by year, 1954-1958, compared with its three main competitors. Drexel Harriman Ripley observed that the operating results of all four airlines during the five year period showed the effects of the high cost of preparation for the introduction of jet equipment, but noted that TWA, with losses from operations in three out of the five years, turned in by far the poorest performance of the four airlines. The report then turned to consideration of a more detailed income account for Reconstructed TWA for the five years 1954-1958, inclusive, and set forth brief summaries of TWA news releases commenting on revenues and operat-

ing results put out on April 1, 1959 and April 23, 1959. Consideration was also given to a summary of items appearing in the current section of Moody's Transportation Manual from January 1, 1959 to June 30, 1959, relating to the CAB monthly earnings reports of TWA and its competitors and also the earnings reports of TWA and its competitors for the year ended December 31, 1958 and interim reports, which in each case were compared with the similar period a year earlier. (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, pp. 47-52)

Having considered operating figures of TWA and its three principal competitors as summarized above, the report then turned to a consideration of the general stock market situation and the market quotations for the common stocks of TWA and its three principal competitors. It noted that the stock market in general was strong and advancing through 1958 and the first half of 1959, referring to the Dow Jones Industrial Average during that period, which indicated a percent advance over the 18 month period ranging from a high of 43% to a low of 41% and for the six month period ended June 30, 1959 ranging from a high of 8% to a low of 6%. (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 53)

In commenting upon the market quotations for the common stock of TWA's competitors, the Report noted that over the 18 months ended June 1959, the stocks of TWA's main competitors advanced in greater amounts percentagewise than the Dow Jones Industrials. With respect to the market for the TWA common stock, the Report commented:

> "TWA, although operating at a loss in the first quarter of 1959, was sharply reducing its loss in that quarter as compared with the corresponding quarter of 1958. TWA stock advanced strongly in price during the first half of 1959, in fact, more than double that of the Standard & Poor's Index of Air Transport

Stocks. And it was selling well over its book value." (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 54)

A comparative tabulation showing volume, price per share and approximate dollar volume of trading in TWA common stock for the entire year 1958 and the first six months of 1959 was then set forth, and also a tabulation giving a comparison of the market prices of TWA stock with its historical book value at year-end over the five year period preceding 1959 and at the middle of 1959.

The Report commented upon the price-earnings ratios of TWA and its three principal competitors as follows:

"Translating the foregoing figures into price/earnings ratios (P/E), and using the Standard & Poor's figures of earnings per share, brings the following results:

	Price/Earnings Ratios-Times			
	TWA	PAA	AAL	UAL
Five-Year Average 1954-1958	30.8	19.6	15.8	10.9
Three-Year Average 1956-1958	—	20.7	15.9	10.7

Note: Prices taken at average market price—April, May, June 1959. Using the AAL figures including the 'special credit' for 1954, the ratio for the five-year average 1954-1958 becomes 15.1 time (instead of 15.8 times).

It will be noted that TWA shows no figure for the P/E ratio for the three-year period 1956-1958, the reason being that TWA operated at a loss in each of the three years. Its three main competitors operated profitably in each of the five years 1954-1958. Nevertheless, as stated hereinbefore, TWA stock was strong in the market in early 1959, doubtless because of anticipated future operating profits." (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 56)

The Report then noted that Standard & Poor's was advising investors to hold TWA, buy Pan American and American Airlines, and hold United Air Lines. It then noted that Moody's Stock Survey published a relatively bullish article on the subject of airline stocks in the spring of 1959 and that both Moody's and Standard & Poor's were emphasizing the importance of the coming jet airplanes.

Again the report reconstructed the TWA situation in March 1959 resorting to a reconstructed balance sheet, a capital expenditure program as projected by Price Waterhouse as of March 1959, and a projection of money requirements as of March 1959, noting that the latter projection indicated a peak money requirement by the 1960 third quarter of $160.7 million.

Lastly the Report, in coming to its recommendations as to the 1959 debt financing, noted that (i) as of March 31, 1959, reconstructed funded debt as a percentage of net tangible assets was 59.1%, (ii) as of that date not more than $100 million could have been raised by the issuance of additional equipment mortgage notes, assuming a total financing of $160 million, and (iii) all of the new money would not be required by TWA until the third quarter of 1960, by which time TWA's net tangible asset position should improve through retention of forecast earnings. The Report stated its recommendation as follows:

> "Under the above circumstances, we believe that we would have recommended junior financing in the amount of $60 million. Subject to the sale of $60 million of junior securities, we believe that TWA could have obtained commitments from institutional investors for the private purchase of Series B Flight Equipment Mortgage Notes to provide, over the next two years, a minimum of $90 million and a maximum of $110 million." (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 61)

The Report then turned to specific consideration of the essential terms for the junior financing and the senior debt financing.

Junior Debt of $60 Million

Drexel Harriman Ripley ruled out issuing common stock because of the poor earnings record of TWA and also excluded the issuance of a straight or convertible preferred because the dividends would not be deductible for tax purposes by TWA. The Report concluded that convertible subordinated debentures should be publicly offered in May 1959 and that the offering should be underwritten rather than making a preemptive offering to stockholders.

It was Drexel Harriman Ripley's opinion that the conversion rate should be "right on" or very close to the market at the time of offering. As the announcement of a proposed offering of convertible subordinated debentures of the magnitude contemplated frequently has a depressing effect on the market, Drexel Harriman Ripley in arriving at the conversion price of $18.50 per share discounted by 15% the mid-May 1959 market price of $21.75 per share (first concluding, based on a consideration of the historical and reconstructed earnings of TWA that a reconstructed market value would have been approximately the same as the historical value). (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 66)

An interest rate of 5% was recommended, which was the same rate being paid on similar issues by American Airlines and Eastern Air Lines and slightly above a 4⅞% rate being paid by Pan American Airways and a 4¾% rate being paid by KLM.

An outline of the specific terms of the proposed subordinated debentures is set forth on pages 68 and 69 of the Drexel Harriman Ripley Report.

Senior Debt Financing

Drexel Harriman Ripley were of the opinion that TWA could and should have obtained in May 1959 from institutional investors commitments to purchase from $90 million to $110 million Flight Equipment Mortgage Notes subject to the prior sale of $60 million convertible subordinated debentures, the funds to be taken down over a period ending December 31, 1960.

The recommended interest rate was 6%, which was admittedly higher than the interest rate on current unsecured borrowings of its principal competitors, Pan American Airways, American Airlines and United Air Lines. Only Delta and Northwest Airlines were paying a 6% rate on their senior debt. (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 70)

It is important to note, and the Drexel Harriman Ripley Report acknowledges, that Reconstructed TWA, giving effect to the May 1959 financings, would have had a higher debt ratio and lower earnings and cash flow coverages than the other six trunk airlines, except that TWA's cash flow would have exceeded that of Pan American Airways and Delta. However, as a counter-consideration, Drexel Harriman Ripley in their Report cited as favorable factors for TWA (i) a "strong forecast of earning power" arising from ownership by December 1960 of a jet fleet which would have equalled or surpassed the fleets of each of its three main competitors, (ii) a strong mortgage security for its senior debt as compared with the other airlines whose debts were unsecured, and (iii) a higher interest rate except for Delta and Northwest. (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, pp. 70-71)

The terms of the loan agreement pursuant to which the mortgage equipment notes would be issued are set forth on page 71 of the Drexel Harriman Ripley Report.

Lastly, the Report compared the balance sheets of Historical and Reconstructed TWA with those of Pan American Airways, American Airlines and United Air Lines, and also compared the historical and reconstructed capital structure of TWA as of December 31, 1960, which indicated that Reconstructed TWA would have had a total funded debt of $320,180,000, of which $260,180,000 was senior, compared to the historical total funded debt of $223,242,000, of which $123,242,000 was senior. (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 74)

The Loeb, Rhoades Report Relating to the May 1959 Debt Financing

Loeb, Rhoades in their Report stated that notwithstanding their conviction that neither the May 1955 equity nor the October 1955 debt financing recommended by Drexel Harriman Ripley could have been accomplished, they would assume that for the purpose of commenting on the proposed 1959 financing, the 1955 financings as recommended by Drexel Harriman Ripley had been accomplished. Their Report noted that the proposed convertible debentures financing of $60 million substantially exceeded any equity financing done by Pan American, American, Eastern or United during the 1955-1960 period, mentioning that Eastern sold $25 million of convertible subordinated notes on October 21, 1958, American sold $40 million of convertible subordinated debentures on June 18, 1959, Pan American sold $46.97 million of convertible subordinated debentures on July 29, 1959 and United sold $25 million of convertible subordinated debentures on November 30, 1960. In view of these circumstances and the fact that the reconstructed earnings of TWA during the years 1956, 1957 and 1958 were disappointing, Loeb, Rhoades questioned that the

offering would have been doable. Further, Loeb, Rhoades found it difficult to believe that it would have been possible to have had two equity financings—one in 1955 and one in 1959—and catch the market each time at or near its high over a thirteen-year period. (Loeb, Rhoades Report, DX 270, Part II, p. 33).

Turning to the proposed private placement of $90 million to $110 million of 6% mortgage notes in May 1959, Loeb, Rhoades expressed doubt that an institutional investor would have been willing to enter into the commitment again in light of the poor earnings and cash flow coverages as well as the high senior debt ratio of 60.7% indicated for the first quarter of 1960 on page 70 of the Drexel Harriman Ripley Report. In commenting on the schedule, Loeb, Rhoades stated:

"(c) The May 1959 $90-110 Million Loan Commitment

With respect to the private placement of $90-110 million of 6% mortgage notes in May 1959, we doubt that an institutional investor would have been willing to enter into the commitment in light of the poor earnings and cash flow coverages and the high senior debt ratio of 60.7% shown for reconstructed TWA in Mr. Morehouse's schedule at page 70. According to the schedule, on a pro forma basis reconstructed TWA had earned an average over five years (1954-1958) of only half of the interest that would have been payable had the total reconstructed senior debt of $280 million been outstanding. The 12 months ended March 31, 1959 were not much better than the five year average, as only 70% of the interest had been earned. None of these figures would seem to justify an institutional lender making an additional $90-110 million senior debt investment in reconstructed TWA.

Based upon our dealings with insurance companies in arranging financing for our clients, we know that all

insurance companies, including the major lenders, are regulated in their investments by state laws, which prevent the lenders from acquiring obligations which are predominantly speculative in character.

We note that Mr. Morehouse speculated as to the quality of both his proposed October 1955 mortgage obligations and his $60 million May 1959 convertible subordinated debentures. In Mr. Morehouse's opinion the institutional investors would have viewed the October 1955 obligations as 'not quite up to Baa quality' (page 31). As to the May, 1959 convertible subordinated debenture issue, he states that it 'might have been rated no higher than B'.* (page 68). However, he gives no clue as to a possible rating for the $90-110 million May 1959 mortgage notes. It is our opinion that the May 1959 mortgage notes would have been considered at best of B quality, and thus might well have presented to institutional lenders a question as to whether such an investment would have complied with applicable state laws. (Loeb, Rhoades Report, DX 270, Part II, pp. 33-35)

* Although DHR Exhibit: General 1 defines Baa and Ba ratings, no definition of a B rating is given. Moody's defines a B rating as follows: 'Bonds which are rated B generally lack characteristics of the desirable investment. Assurance of interest and principal payments or of maintenance of other terms of the contract over any long period of time may be small.'"

The Loeb, Rhoades Report then turns to a consideration of the reconstructed capital requirements of TWA from October 1, 1955 through December 31, 1960 appearing in the Drexel Harriman Ripley Report as Exhibit: Financials—31, which showed a total requirement of $544.8 million to cover the cost of the 63 jet planes originally ordered by Toolco for TWA, as well as the cost of the piston acquisitions TWA historically incurred. Apart from funds generated from operations assumed on a reconstructed basis, TWA would have been faced with raising in excess of

$300 million of new money to carry out the hypothetically reconstructed capital requirement program in the period from October 1, 1955 through December 31, 1960. Loeb, Rhoades concludes that in view of the diminishing reconstructed earnings in 1955 and the losses incurred in 1956, 1957 and 1958, TWA could not independently have raised $300 million on reasonable terms.

After listing on page 36 of their Report the financial aid given TWA historically by Toolco in the 1955-1960 period which assisted TWA historically in acquiring 47 jet planes and various piston planes, Loeb, Rhoades states as its opinion that TWA could not have independently financed the capital requirements of the hypothetical program which were even greater than that met historically by TWA with Toolco's assistance. In conclusion, Loeb, Rhoades reverts to the May 1955 equity financing of $58.4 million recommended by Drexel Harriman Ripley as the cornerstone of its program and repeats its opinion that the equity financing could not have been completed without Toolco's participation and that without Toolco, no prudent and competent management without the benefit of hindsight would have adopted such a program.

Cross-examination of Witnesses on 1959 Debt Financing

The cross-examination of the expert witnesses as to that portion of their respective reports relating to the 1959 debt financing was not as extensive as the cross-examination devoted to the May 1955 equity financing and the October 1955 debt financing, possibly because their direct testimony as embodied in their respective reports was especially detailed and explicit. No supplemental information developed on cross-examination addressed to the May 1959 debt financings needs to be noted herein.

Determination of Damages Related to Financing

I find that those paragraphs of the complaint that form the basis of TWA's claim for damages related to financing, specifically paragraphs 7(f), 10(g), paragraphs 23 through 28 inclusive and paragraph 52(c) and (d) are "well pleaded" and in considering and determining the damages claimed by TWA, I accept these allegations as proved.

It may be helpful once again to restate below in summary form the essence of these allegations as follows:

1. For the purpose of creating and maintaining control of the business of financing the purchase of aircraft for use by TWA and strengthening control over the acquisition of aircraft by TWA, the defendants rendered TWA dependent upon them for such assistance in financing as defendants might choose to provide, refusing to allow equity financing by TWA except on condition that as a result Toolco would increase its equity position in TWA and causing TWA instead to obtain funds chiefly by means of debt financing, thus rendering TWA unable to seek financing needed for the acquisition of aircraft except upon the approval of defendants. The actions complained of commenced subsequent to the acquisition by Toolco of a stock interest in TWA and the action continued throughout the period covered by the complaint. (Par. 23).*

2. From 1955 until December 1960 defendants dictated the type and manner of acquiring aircraft and the manner of financing the acquisition of aircraft. (Par. 24).

3. At least as early as 1955 United States air carriers recognized the needs for the extensive financing required for the acquisition of jet powered aircraft. (Par. 25).

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* Toolco first acquired stock of TWA in 1939 (6 CAB 153, 154) and continued its actions until December 31, 1960.

4. In 1955 and continuously thereafter until December 1960 defendants directed TWA to make no efforts itself to obtain financing necessary for the acquisition of jets required for TWA needs. (Par. 26).

5. Commencing in 1955 and continuing thereafter various other air carriers, including TWA competitors, made appropriate arrangements for the financing of jet aircraft, and in 1955 and in 1956 obtained commitments for funds at interest rates ranging from 4% in 1955 to 4¼%-4¾% in 1956. (Par. 27).

6. In 1955, and for several years thereafter defendants discussed various proposals for financing TWA jet aircraft, but made no arrangements for such financing, nor was TWA allowed to make any such arrangements until December 1960, when interest rates for long-term debt were approximately 6-6½% (Par. 28); and

7. TWA was foreclosed from obtaining financing on more advantageous terms than those available to it in December 1960 and thereby suffered a loss because of the greater cost of borrowing and TWA's ability to obtain financing for its needs was substantially impaired. (Par. 52(c) and (d)).

The well pleaded allegations restated above, which are accepted as facts, lead to the determination that with one important exception noted below, the existence of Toolco, its ownership of stock and the role played by it historically in making or guaranteeing loans to TWA or in buying TWA equity all must be ignored in considering and determining damages to TWA attributable to the foregoing allegations of the complaint. To give weight to the existence of Toolco, its TWA stock ownership and the role played by it in TWA financial affairs would be in deroga-

tion of the allegations and not permissible as I interpret the doctrine of *Thomas* v. *Wooster* (114 U. S. 104) discussed on pages 21 through 24 of this Report. Notwithstanding this exclusion, I must consider the actual Balance Sheet as of December 31, 1954 and the actual operating results for the year 1954 and the first two calendar quarters of 1955, as did TWA and its experts Drexel Harriman Ripley, and as must have an independent Board.

Proof of Damages. TWA in submitting its proof of damages has endeavored to establish through the expert testimony of Drexel Harriman Ripley what it would have recommended to TWA in the early part of 1955, in October 1955 and in May 1959. Further through the expert testimony of Drexel Harriman Ripley and through cross-examination of Woodfin, a general partner of Loeb, Rhoades, the expert retained by the defendants, TWA has endeavored to establish that if the Board of TWA in early 1955 and continuously thereafter had been composed of directors acting prudently, independently and free from any control or dominance by Toolco or any other major stockholder, it would have approved and could have carried out the recommendations of Drexel Harriman Ripley.

TWA and its expert, Drexel Harriman Ripley, state quite clearly and repeatedly that the debt financings recommended in October 1955 and May 1959 assumed and were conditioned upon the sale in May 1955 of common stock bringing net proceeds to TWA of $55.5 million (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, pp. 23-25; Tr. 3981, 4313-4314). The recommendations with respect to the May 1959 sale of $60 million convertible debentures and the placing of $90-$110 million equipment mortgage notes assumed and were additionally conditioned upon the successful placing in October 1955 of a $150-$170 mil-

lion equipment mortgage (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 58).

It is, therefore, understandable why TWA, its expert and counsel devoted a substantial amount of attention to the prudence and doability of the May 1955 equity financing and why the defendants, their expert and counsel similarly addressed an equivalent amount of attention to proving that the May equity financing was imprudent, premature and not doable.

No alternative theory of damage was presented by TWA or the defendants and I must, therefore, address myself to TWA's contention that an independent and prudent Board of TWA could and should have sold in May 1955, $58.5 million of common stock of TWA which would bring net proceeds to TWA of $55.5 million.

In the receiving and hearing of evidence on damages I have been guided by the principle of *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251 (1946). The Supreme Court in *Bigelow* stated that "the most elementary conceptions of justice and public policy require that the wrongdoers shall bear the risk of the uncertainty which his own wrong has created." (327 U. S. 251, 265). However, the Court defined the responsibilities of the trier of fact in the following language at page 264:

> "In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly."

I recognize that with respect to participation in the financing of commercial airline companies and aircraft manufacturing companies, Drexel Harriman Ripley, and

its senior officers who participated in the preparation of their Report are eminently qualified. As a product of careful and sophisticated statistical research and presentation their Report is commendable. However, after careful deliberation, I have determined that TWA has not established that a prudent and competent management of TWA acting independently and free of any control or interference on the part of Toolco would and should have calculated in the spring of 1955 the amount of the financial requirements of TWA for the jet aircraft age. It is also my determination that an independent and prudent TWA management would not have accepted the recommendation of Drexel Harriman Ripley that TWA sell in May 1955 $55.5 million (net proceeds) in common stock of TWA.

For me to find to the contrary would in my opinion endow Drexel Harriman Ripley and an independent prudent Board of TWA in 1955 with a prescience, wisdom and perfection of timing that exceeds the natural capacity of the most experienced men acting without the benefit of hindsight. I am aware that in the spring of 1955 the equity capital of historical TWA reflected the influences of the major stockholder, Toolco, over several years prior thereto, but I am not persuaded that it has been convincingly established that TWA was "obviously short of proprietary capital" in the early part of 1955 (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 21).

TWA and Drexel Harriman Ripley compared the net worth in absolute dollars of TWA with the net worth of its principal competitors and showed that at best TWA was short by $25.7 million (United Air Lines) and at worst short by $39.1 million (Pan American) (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 9). In addition, TWA and Drexel Harriman Ripley resorted to

a comparison of certain "yardsticks" applied to TWA and to its principal competitors. Several "yardsticks" were employed: (i) Total Operating Revenue; (ii) Net Operating Income; (iii) Net Income Including Capital Gains; (iv) Revenue Airplane Miles Flown; (v) Available Seat Miles; and (vi) Net Operating Income Per Revenue Airplane Miles and Per Million Available Seat Miles for 5 years 1950-1954 and for one year 1954. Defendants' expert, Loeb, Rhoades, stated that these "yardsticks" are tools normally used for measuring operating performance. On that basis TWA, which as the record discloses had revenue and earnings up to December 31, 1954 that compared favorably with those of its principal competitors, might be said to have made the most efficient use of its equity capital (Tr. 7122-7123). It is deemed significant that a comparison of debt-equity ratios as of December 31, 1954, indicated that TWA with a ratio of 78.4% equity to 21.6% debt was in a better financial position than American and United and about equal to Pan American. (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 9).

Loeb, Rhoades was of the opinion that TWA having placed with Equitable Life a $40 million Equipment Mortgage Loan in December 1954, was adequately financed. I accept this opinion of Loeb, Rhoades. In January and February 1955 the performance characteristics of commercial jet aircraft and the dates on which they were to be delivered were still far from being settled. It was acknowledged that the delivery dates for jet aircraft were three or more years away. While there was discussion in the trade press and periodicals that commercial airlines were almost certain to be using commercial jets in the future, it was still an open question whether they were to be pure jets or turbo-prop jets (Loeb, Rhoades Report, DX 270, Part II, pp. 6-7). While the Annual Report in 1953

of the National Aviation Corporation, a closed-end investment trust, concentrating on airline and aircraft manufacturing industries regarded the DC7 and the Super Constellation as the last of their kind for mass air travel. Its Report for 1954 referring to the advent of the Vickers Viscount turbo-prop stated that the new "shape of things to come in 1955-58 is in ferment * * *" (See page 196 this Report). In the early months of 1955 Boeing could not say when it would commence the manufacture of commercial jets. Its Annual Report for the calendar year 1954 which bears the date March 7, 1955, was far from definite. The manufacturing facilities, tools and equipment used by Boeing for the manufacture of the U. S. Air Force jet tankers were owned by the U. S. In early 1955 Boeing was seeking, but had not obtained, the consent of the U. S. Air Force to use these facilities for the manufacture of commercial jets (this consent was not obtained until August 1955) (Tr. 6889).

During the spring and summer of 1955 the specifications and performance characteristics of the commercial jet continued to be the subject of speculation and discussion. The functioning of jet aircraft in hot weather, noise at airports and the choice between pure jets and turbo-props, such as the Electra and Vickers Viscount was still unresolved (Tr. 6889-6893). It was not until October, November and December of 1955 that delivery schedules were arranged and firm contracts were signed. It was in those months that the airlines made arrangements to finance the acquisition of jets. The first financing arranged was by Eastern Air Lines on October 31, 1955 for $90 million, of which $40 million was earmarked for the purchase of jets. This was followed by the American Airlines financing of $75 million

arranged on November 1, 1955 and the United Air Lines financing of $150 million arranged on December 21, 1955, these being solely to finance the acquisition of jets.

I find it unlikely for an independent Board of TWA to have acted upon the Drexel Harriman Ripley recommendation with respect to initiating a plan to secure $300-400 million over six years in the first quarter of 1955 when there was no proven need for equity capital and when specific information with respect to the performance characteristics and delivery dates of jet aircraft was still unavailable and uncertain. That is to say, I am not persuaded that this information was available in sufficiently definite form to permit the formulation of the financial program of the magnitude which Drexel Harriman Ripley states it would have recommended, and I conclude that an independent prudent Board of TWA would not have accepted and acted upon the Drexel Harriman Ripley recommendations and that the sale in May 1955 of common stock of TWA for $58.5 million netting TWA $55.5 million would not have occurred.

But even if an independent prudent Board of Directors of TWA would have concluded in the early months of 1955 that a program should be formulated and acted upon to provide funds with which to finance the long-term acquisition of jet aircraft, I am persuaded by and accept the expert testimony of Loeb, Rhoades to the effect that such a Board would not have implemented the plan advocated in the Drexel Harriman Ripley Report. Loeb, Rhoades in their direct testimony and their cross-examination established the following points: (i) TWA was not clearly in immediate need of equity capital as asserted by Drexel Harriman Ripley; (ii) the $58.5 million common stock offering exceeded by more than $11 million the sum total

of all domestic trunk common stock offerings during the 1946-1955 period; (iii) the terms of the one-for-one offering involved an extreme dilution of stockholders' interest; and (iv) the $58.5 million offering exceeded by $23 million the sum total of common stock offerings of all other airlines between May 1955 and 1960 (Loeb, Rhoades Report, DX 270, Part II, Exhibit A). It is also significant to note that United Air Lines which was being advised during the period in question by Drexel Harriman Ripley sold no equity to finance jets until 1960, when it issued convertible debentures in the amount of $25 million.

The recommended October 1, 1955 mortgage debt financing amounting to $150-170 million was stated by TWA's expert, to be largely dependent on the successful completion of the May 1955 common stock offering. Testimony of both plaintiff and defendants indicated that an improved balance sheet based on a reconstruction of TWA as of September 30, 1955 incorporating the added equity would be a crucial step in securing the large amount of debt conceived by Drexel Harriman Ripley for the fall of 1955.

TWA's expert was faced with a difficult task in offering to prove that large scale financing would have been obtained in 1955 in an amount and on the terms estimated. Relative to the previous year, TWA's quarterly earnings were dropping rapidly after the first quarter of 1955. (Loeb, Rhoades Report, DX 270, Part II, Exhibit F.) It appears that in order to secure the amount indicated at favorable terms that TWA would have had to complete jet financing commitments before lending institutions became cognizant that TWA's earnings deterioration was more serious than a mere seasonal variation. Against this history TWA and Drexel Harriman Ripley endeavored to show that an independent TWA Board would have had

the singular foresight to plan both the common stock offering of $55.5 million and the October 1, 1955 debt financing of $150-$170 million well ahead of its competitors. As indicated above, the advent of commercial jet aircraft was the subject of discussion in the trade press in November and December of 1954 and January of 1955 and was commented upon in the Boeing Annual Report of 1954 which was dated March 7, 1955, and the cost of a commercial jet aircraft was generally accepted to be in the neighborhood of $4,250,000. Nevertheless, I am satisfied from the record that there remained to be determined as of August-September 1955 (the time which the debt financing would have had to be negotiated) much vital information regarding specific aircraft orders, performance and delivery schedules before realistic bargaining for such large scale funds could take place. Indeed, a $150-$170 million loan to TWA on October 1, 1955, would have been almost three times as large as any long-term commitment that had been made to that date to any airline for any purpose. (See page 234 this Report). I conclude that TWA has not proved that either of the 1955 financings could have been reasonably negotiated at the time, in the amount and according to the terms suggested, by an independent and prudent management.

Since the May 1959 equity financing of $60 million and debt financing of $90-110 million assumed and were dependent upon the 1955 common stock and mortgage debt financings and since I have determined that the latter on their face as proposed by TWA's expert could not have taken place under the historical circumstances established in the record, I thus find a failure of proof with regard to these subsequent financings. Although the complaint alleges damages attributable to defendants' interference with the proper and timely financing of TWA, I do not feel that I, as Special Master, can independently, with the

record available, make an ultimate determination of any specific amount of damages with respect to financing. Therefore I determine on the whole that no damages be awarded to TWA in respect of the allegations of the complaint set forth above.

In view of my determinations above it is not necessary for me to consider the calculation of the debt burden as of December 31, 1963. However, I do think it might be proper for me to observe that an independent prudent management might have subsequent to December 31, 1963 found opportunities to refinance all or part of the funded debt at more favorable terms and thus nullify the significance of a present value comparison as far as damages are concerned.

IV.

Loss Due to Delay in Disposal of Displaced Piston Aircraft

Plaintiff alleges in paragraph 52 of its complaint that it "was foreclosed from the opportunity for early sales of its obsolescent piston-engine aircraft, causing loss to TWA". It claims that the earlier delivery of the jet aircraft would have allowed it to retire many of its piston aircraft earlier and at least as early as its competitors did (TWA Ex. 2, pp. 22-23) and that a decline in the market prices obtainable for these aircraft during that period caused TWA damages of $6,880,600, before trebling (TWA Ex. 6B, pp. 9, 24-26). TWA has lowered this claim to $5,700,000 before trebling by taking into consideration possible losses due to uncollectible items receivable (Plaintiff's Brief 231).

TWA does not contend that the acquisition of any particular jet airplane would have caused the retirement of any particular piston plane or planes (Tr. 1649), and it states that as the jet aircraft were delivered over a period of time, they displaced piston aircraft from certain routes which in turn displaced other piston aircraft from other routes, and so on, in a chain reaction which made piston aircraft available for sale which were not necessarily the particular planes which had been serving the routes to which the jet aircraft were assigned (Tr. 1649-50, 1799-1800). Nor does TWA contend that there is a specific relation in terms of seating capacity between the jet aircraft and the piston planes retired in connection with their acquisition (Tr. 1683, 1799). Its claim rests on the broader assertion that until it received jet aircraft it was re-

quired to keep sufficient piston aircraft to carry on its business (Tr. 1596, 1600, 1798). The proof it offers as to the loss it sustained is put forward as a reasonable estimate of the number of sales of piston aircraft which were delayed, the extent of the delays, and the cost to TWA of the delays (Plaintiff's Brief 230).

It will be recalled from the discussion under Section I of this Report that the hypothetical jet fleet of reconstructed TWA used in computing lost operating profits consisted of 63 jet aircraft. As a basis for computing damages under this Section IV, Rummel constructed Annex F to TWA Exhibit 2 (hereinafter "Annex F") in which he first listed the delivery dates of the first 63 jets historically received by TWA and the delivery dates of the first 63 jets assumed to have been received by reconstructed TWA. Rummel next determined how many days earlier reconstructed TWA would have received each of its first 63 jets than it historically received each of its first 63 jets ("jet gain days"). Rummel also listed chronologically the sales dates for 103 piston aircraft which TWA historically sold between December 31, 1958, and July 20, 1962 (the latter date being the date on which TWA sold the last piston aircraft it sold before receiving its 63rd jet) (Tr. 1593, 1630). Rummel then determined reconstructed piston sale dates by moving forward the sale date of each of the 103 pistons a number of days ("piston gain days") equal to the jet gain days of the reconstructed jet with which it was linked (Tr. 1607, 1690). The pistons were linked to the jet by the following method:

Rummel linked the first jet received to those (four) of the 103 piston aircraft which TWA sold prior to the receipt of that jet airplane (Tr. 1647). He then took the period the delivery of the jet was delayed, jet gain days,

which is 60 days, and advanced the date these four piston aircraft were actually sold by 60 days to arrive at a "reconstructed piston retirement" date. The actual retirement date listed for each piston aircraft is the date the airplane was historically sold and the reconstructed retirement date is the date on which TWA claims for damages purposes the plane would have been sold if the delivery of the "linked" jet aircraft had not been delayed (Tr. 1631-32, 1653, 1689-90, 1724). The second jet received by TWA was delivered on March 17, 1959.* In Annex F, TWA has linked to the second jet the piston aircraft actually sold prior to the delivery date of that jet airplane and subsequent to the delivery date of the jet airplane previously received (Tr. 1700-01). As the second jet is claimed to have been delivered 76 days late, TWA asserts in Annex F that the piston aircraft linked to it would have been retired 76 days earlier.

This system is used throughout Annex F to attribute to each of the 103 piston aircraft a reconstructed retirement date. The number of days by which the reconstructed dates are advanced vary from 11 to 707. As each piston aircraft is linked to the first jet airplane which was delivered after the piston plane was sold, jet airplanes which were delivered after the delivery of other jet airplanes by an interval in which no piston aircraft sales took place are not linked to any piston aircraft and therefore play no part in TWA's computation of days by which piston retirement dates are reconstructed. For example, no piston aircraft were actually sold between March 25, 1959, when the airplane listed on Annex F as Piston No. 7 was sold, and June 26, 1959, when the airplane listed

*The date March 17, 1958, appearing in Annex F is a typographical error; the plane was delivered on March 17, 1959 (Tr. 1696).

on Annex F as Piston No. 8 was sold. Between these two dates, nine jet aircraft were delivered at various times from March 30, 1959, to June 13, 1959, but eight of these nine jet airplanes are not linked to any piston aircraft. Although TWA does not contend that any particular piston airplane would in fact have been sold on its reconstructed retirement date, it offers Annex F as "a reasonable construction of events that could have been expected" to occur (Plaintiff's Brief 234, Tr. 1632).

Plaintiff based its estimates as to the price which it would have obtained for the displaced piston aircraft upon a study made by R. Dixon Speas Associates, aviation consultants with extensive experience in evaluating aircraft. The study was presented through the prepared testimony of Mr. R. Dixon Speas (TWA Ex. 6B). The report reflected a study made by Speas Associates of the market for used piston aircraft offered for sale by the various United States trunk line air carriers for the years in question and concluded with the opinion that if the 103 piston aircraft had been sold earlier at the reconstructed retirement dates, TWA would have received 6.9 million dollars greater proceeds than it did historically for those aircraft.

To determine the price which TWA would have obtained on the reconstructed retirement date for each of the piston aircraft, Speas has constructed by statistical analysis sales price trends, by types of aircraft, of all the aircraft sold by United States trunk line air carriers from January 1, 1958, to June 30, 1964. These sales price trends are depicted in the figures set forth at pages 33-43 of TWA Exhibit 6B, where in every class of aircraft the trend line so constructed by TWA declines throughout the period. To determine the damages claimed for each piston air-

craft, Speas, at pages 24-26 of TWA Exhibit 6B, applies the rate of market price decline for aircraft of that type to the period of delay equal to "piston gain days" arrived at in formulating reconstructed retirement dates in Annex F.

For purposes of reference it is noted that the prices actually received by TWA for the piston aircraft it sold in the period from January 1, 1958, to June 30, 1964, including the 103 aircraft it links to the delivery of jet aircraft, are set forth at pages 80-85 of TWA Exhibit 6B, and the prices received by other United States trunk line air carriers in the sales of piston aircraft in the same period are set forth at pages 122-154 of the same exhibit.

Defendants attack the validity of TWA's proof. They contend that the reconstructed retirement dates for piston aircraft are meaningless without proof that the earlier delivery of particular jet airplanes would have advanced the sale of particular piston airplanes, and advanced them an equal number of days (DX 324, p. 5). Defendants also attack TWA's price trend lines. Although they do not dispute the validity of the mathematical basis for the trend lines given all the assumptions used by Speas, they contend that the lines are constructed with reference to inappropriate data (Defendants' Brief 281). They point out that the condition of the aircraft and the nature of the sales transactions were not considered and that the trend lines are based in part on data for periods not relevant to the aircraft in question (DX 324, pp. 5-6). Defendants also point out that TWA's computations give no consideration to benefits which TWA could offset against losses in sales prices, such as depreciation and the use of the aircraft while allowing the usable flight time after overhaul of air frames, engines, and propellers to expire

(DX 324, p. 6), and that the average cost of a full overhaul on the two-engine planes, which are the M-202 and M-404 aircraft, exceeds $100,000 and the cost of overhaul of larger piston aircraft is greater (DX 324, pp. 32-34). Defendants also contend that there was not a steady market for each of the types of piston aircraft retirement by TWA (Defendants' Brief 284-86). They further contend that any comparison of the sales by TWA to the sales by other airlines should entail an examination of the percentage of each airline's piston aircraft sold during the initial period of jet aircraft acquisition. (DX 324, p. 7).

In supporting their contention that the sales transactions were not sufficiently homogeneous to warrant their use in the construction of price trend lines, defendants maintain that sales which were actually trade-ins on jet acquisitions or sales to buyers which entailed a high risk of default were made at prices far higher than could be obtained from arm's length, financially responsible buyers (DX 324, pp. 14-17). Defendants also contend the sales of any aircraft for less than $100,000 were not sales for use as airplanes but as scrap (DX 324, p. 17), implying that either these aircraft were not usable for flying or there were no buyers. In addition, defendants contend that TWA did not require the 103 piston aircraft during the period in question, and to illustrate this they set forth tables comparing the normal utilization of certain aircraft types with TWA's utilization during that time (DX 324, pp. 21-26).

TWA attempts to meet defendants' contention that the reconstructed retirement dates cannot be taken as dates when the aircraft would have been sold by arguing that it cannot be said that the absence of sales at any time within the period means there were no buyers, for sales took place throughout the period and to say that an absence of sales indicates an absence of buyers is "improb-

ably deterministic" (Plaintiff's Brief 235). As TWA asserts, its claim is based on the proposition that market prices declined steadily and continuously during a six-year period beginning in mid-1958 (Plaintiff's Reply Brief 119). TWA attempts to meet defendants' contentions that the trend lines are based on sales which are too disparate to be compared by arguing that the factors which distinguish particular sales average out in the formulation of the trend lines (Plaintiff's Brief 239-44). In particular, TWA contends that any differences in sales prices accounted for by differences in flying time since overhaul are random and that airlines provide "progressive maintenance" and do not allow aircraft to be flown without maintenance until they require a complete overhaul (Plaintiff's Brief 239). TWA also contends that each piston aircraft it sold was, on an average basis, approximately 50 per cent "run out of time" (Plaintiff's Brief 244).

Proof of any actual relation between the acquisition of jet aircraft and the retirement of the piston aircraft, other than the chronology set forth in Annex F, was not introduced. It was apparently available to TWA, for Rummel testified that TWA had charts showing probable piston aircraft retirements as a function of the acquisition of jet aircraft (Tr. 1801) and made several references in his testimony to a specific piston retirement plan.* He also

* "Forward planning regarding fleet composition" (Tr. 556), "the removal of a fleet or fleets would be on a plan known basis" (Tr. 562), the disposition "did reflect planning" (Tr. 1611), "the development of plans" (Tr. 1619), "the specific plan for retirement" (Tr. 1638), "the plan" (Tr. 1641), "the plan to retire pistons" (Tr. 1653), "in the overall piston retirement plan we spoke of release of airplanes in terms of what they would do" (Tr. 1722), a "disposal plan" (Tr. 1745), and an "overall plan" (Tr. 1755). TWA personnel were assigned the formulation of a plan to retire piston aircraft (Tr. 1616, 1638-39). There was a broad plan in writing contained in the Jet Plans and Programs Manual which did not link the retirement of particular piston planes to specific jet deliveries (Tr. 1624), and certain exhibits introduced by defendants are taken from this source (Tr. 1666, 1670).

testified that he chose the dates of actual sales "rather than a plan" as the basis of TWA's proof on this issue (Tr. 1641).

I accept as "well-pleaded" the allegation of paragraph 52 of the complaint that plaintiff was foreclosed from the opportunity for early sales of piston aircraft, but I determine for the reasons set forth below that TWA is not entitled to the damages it claims in its proof with respect to losses due to delay in having piston aircraft available for sale. Defendants have proved conclusively that TWA's decisions to retire or retain many of the 103 aircraft were based on considerations having no connection with the acquisition of jet aircraft or defendants' acts and that the losses claimed in the proof offered by TWA with respect to the remainder of these aircraft cannot be said to be the result of defendants' acts. Instances of these failures in proof are set forth in the detailed review which follows. Moreover, the statistical analysis used by the plaintiff is deficient for the reasons advanced by the defendants and summarized above. The detailed application of the analysis of each type of piston plane sold by TWA, as set forth below, indicates clearly the unreasonableness of the results obtained under the methodology used, and plaintiff's claim under this Section IV is rejected in its entirety.

M-202A Aircraft

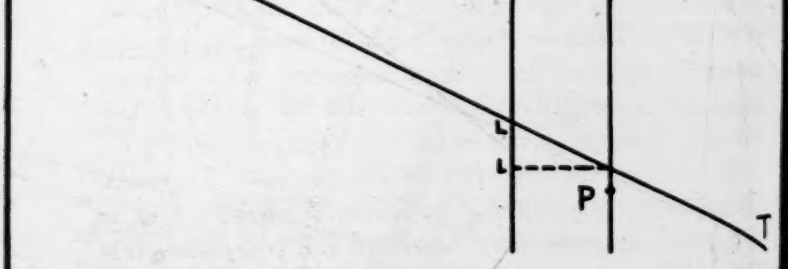
TWA claims damages of $75,800, before trebling, for delay in having eleven M-202A aircraft available for sale (TWA Ex. 6B, p. 9). These are short-range, two-engine airplanes. According to TWA's proof, the earliest date at which any of these aircraft would have been sold had there been no delay in the receipt of jet aircraft is No-

vember 1, 1958, which is the "reconstructed retirement date" set forth in Annex F for Piston Aircraft No. 1. The proof shows, however, that TWA historically made these aircraft available for sale in December 1957 and that on February 15, 1958, TWA announced that they were retired from service (Tr. 1656, 1661, DX 35). As these aircraft were put up for sale and retired from service prior to their reconstructed retirement dates, TWA's claim that a delay in the availability of these aircraft for sale due to a delay in receiving jet aircraft caused the loss to TWA claimed in its proof cannot be sustained. My reasoning in support of this conclusion follows:

TWA's claim is for losses due to a delay in having certain aircraft available for sale. It has computed its damages for that delay in a series of steps, the first of which, as described above, are (1) the computation of piston gain days, (2) the formulation by statistical analysis of trend lines which show the market price for each type of aircraft declining throughout the period at a steady rate, and (3) the determination of the decline in market price during the period between the reconstructed retirement date and the actual retirement date by translating the piston gain days for each aircraft into quarters of delay and multiplying the quarterly rate of market decline for the particular type of aircraft by the number of quarters of delay. The next step is to put forward the resulting amount not only as the decline in market price between the reconstructed retirement date and the actual retirement date but also as the amount of damages claimed for delay in having the aircraft available for sale. The claim that the delay in acquiring jet aircraft caused a loss in this amount is apparently based on the contention that TWA's failure to sell the aircraft between the recon-

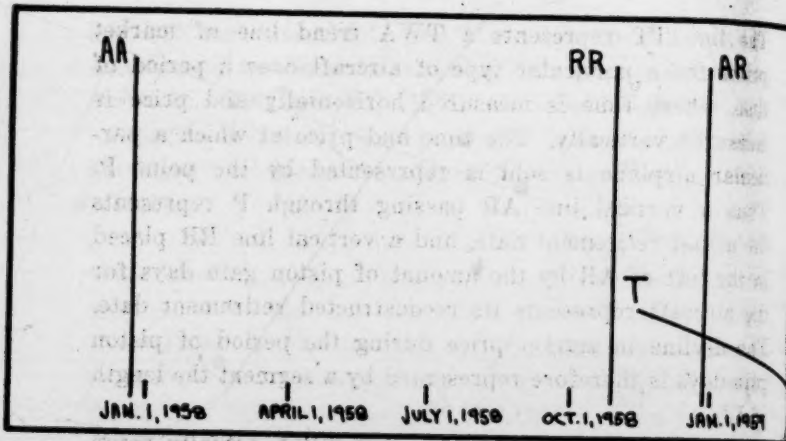
structed retirement date and the actual retirement date was caused by delay in receiving jet aircraft. An alternative possible basis would be the contention that this amount equals the decline in market price during earlier, but equal, periods of the delay in having aircraft available for sale.

At first Rummel testified that the theory of TWA's proof was that the piston aircraft were not available for sale prior to the date of actual retirement (Tr. 1612, 1613-14) and he also testified that the piston aircraft were needed at the reconstructed retirement dates because of the lack of having jet aircraft (Tr. 1633). This testimony indicates that it is TWA's contention that because of the jet delivery delays the aircraft could not be given up prior to their actual retirement dates and therefore that the fall in market price between the reconstructed retirement date and the actual retirement date is TWA's actual loss. TWA's proof in this respect may be set forth in graph form as follows:



The line TT represents a TWA trend line of market prices for a particular type of aircraft over a period of time, where time is measured horizontally and price is measured vertically. The time and price at which a particular airplane is sold is represented by the point P. Thus a vertical line AR passing through P represents the actual retirement date, and a vertical line RR placed to the left of AR by the amount of piston gain days for the aircraft represents its reconstructed retirement date. The decline in market price during the period of piston gain days is therefore represented by a segment the length of LL.

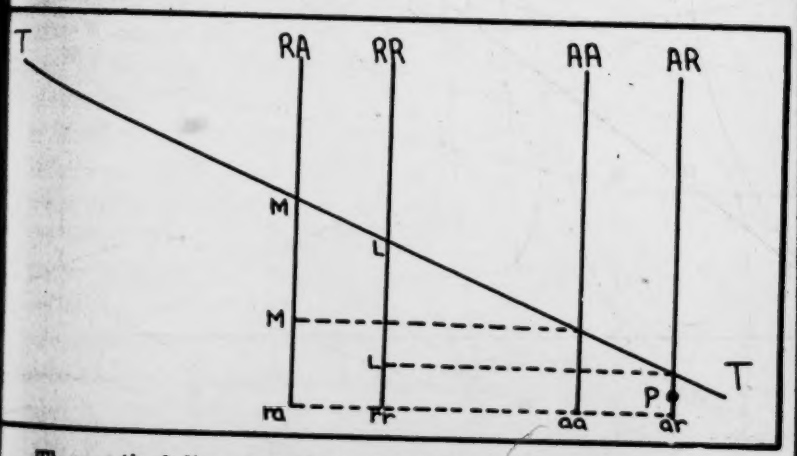
It was established, however, that TWA actually made many piston aircraft available for sale not only in advance of their actual retirement dates but in advance of their reconstructed retirement dates. In some instances piston aircraft were actually made available for sale approximately two years prior to the earliest reconstructed retirement date for any aircraft of that type (DC-4 aircraft; DX 324, p. 67; Annex F). In the case of M-202A aircraft, the planes were available for sale at least as early as December 1957 while the earliest reconstructed retirement date set forth in Annex F for any aircraft of this type is November 1, 1958, and the earliest actual retirement date for these aircraft is December 31, 1958. A graph showing these dates with respect to the first M-202A airplane sold would appear as follows, with the line AA representing a date as of which the proof has established the aircraft was actually available for sale:



Rummel also testified that piston aircraft were available for sale earlier than the dates listed in Annex F and that the reconstructed retirement date is not the date an airplane would have been available for sale but the date it is assumed it would have been sold (Tr. 1631-32, 1633, 1692, 1751, 1754, 1756). He testified that in Annex F TWA assumed that if the jet aircraft had not been delayed, the piston aircraft would have been available for sale in advance of the reconstructed retirement dates "exactly to the same degree" that the dates they were actually made available for sale preceded the actual retirement dates (Tr. 1751) and that the time it would have taken to make the reconstructed sale may be assumed to be the same as the time it took to make the actual sale (Tr. 1753). This testimony indicates that TWA seeks as damages the difference in market prices on the reconstructed retirement date and the actual retirement date on the theory that, although aircraft were available for sale prior to the reconstructed retirement dates, it takes a certain amount of time to sell any particular airplane even when a market exists. Possibly TWA contends alternatively that that amount is equal to the decline

in market value during the period it actually complains of, that is, the period of delay in having the aircraft available for sale, which decline would be equal to the decline in market price in the later period between the reconstructed retirement date and the actual retirement date because (1) the lead times between having aircraft available for sale and selling them would be the same in both cases and (2) the trend line shows a market price decline at a steady rate.

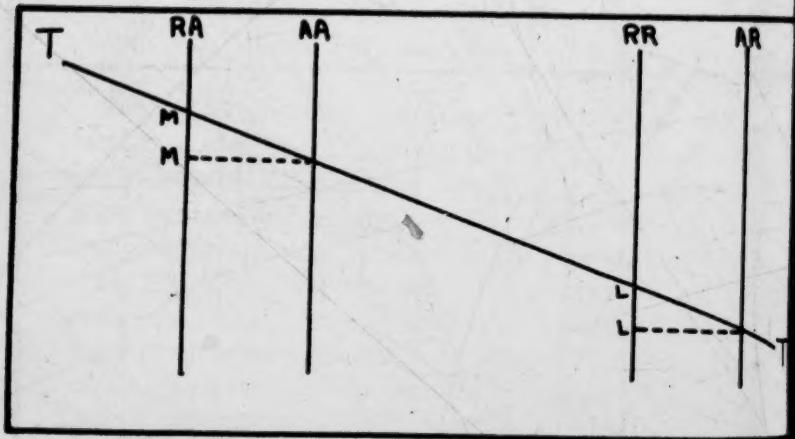
Rummel's introduction of the factor of equivalent lead times may be set forth in graph form as follows:



The vertical line AA plotted to the left of AR represents the date the aircraft was actually available for sale, and on TWA's assumption that the time it took to effect the sale would have been the same at any earlier time, a vertical line RA representing the reconstructed availability date would lie as far to the left of RR as AA is from AR. The segments shown on the graph as ra-rr and aa-ar are equal, and therefore adding the segment rr-aa to each of them results in the segment ra-aa being equal to rr-ar.

The segment MM therefore equals the segment LL, which expresses the conclusion that the decline in market price in the period of delay in having aircraft available for sale equals the decline in market price between the reconstructed retirement date and the actual retirement date.

Where the proof shows that an aircraft was actually available for sale prior to its reconstructed retirement date, a graph would show the lines AA and RA to the left of line RR:



In this situation the particular proof of loss attributable to defendants' acts put forward by TWA cannot be sustained. No matter which of the theories described above underlies TWA's claim, the damages claimed are based upon the assertion that the aircraft would have been sold on certain dates, the earliest of which, in the case of M-202A aircraft, is November 1, 1958, while defendants have shown that the aircraft were available for sale prior to that time, at least as early as December 1957 for M-202A

planes. If there was a market throughout the period, as TWA asserts (Plaintiff's Brief 235, Tr. 3688, Plaintiff's Reply Brief 119, 122) and must assert to support its contention that planes could have been sold throughout the period earlier than they were, the delay in selling these planes after they were no longer needed cannot be said to be caused by defendants' acts. The proof does not show that there is any particular number of months or years required to effect the sale of an airplane once it is placed on the market. On the contrary, the evidence shows that planes of the same type, even when made available for sale at the same time, were sold at widely varying times after becoming available for sale. The contention of TWA that it may be assumed that the period between availability and sale would be the same whenever a plane is made available for sale, thereby requiring an earlier, reconstructed availability date to enable a sale to take place on the reconstructed retirement date, is conclusively disproved. As defendants were not responsible for TWA's failure to sell these aircraft from December 1957 on, I am unable to find that the loss it claims in its proof to have sustained upon the sale of the M-202A aircraft, which sales occurred over the period December 31, 1958, to October 1, 1959 (Annex F), is due in any part to a delay prior to December 1957 in having the aircraft available for sale or that the damages claimed may be a measure of a loss attributable to the period of delay in availability. Moreover, the proof conclusively shows that these aircraft were made available for sale prior to "mid-1958" which TWA asserts was the commencement of a six-year price decline (Plaintiff's Reply Brief 119). In addition, in view of TWA's assertion that there was a market for the sale of the aircraft, I conclude that TWA has failed in its proof

based on the assertion that, as a reasonable reconstruction of events that would have occurred, an airplane would have been sold on a certain day if the acquisition of jet aircraft had not been delayed, where defendants have shown that the aircraft was actually made available for sale by TWA prior to that time.*

In considering TWA's proof above, I have treated as valid its basic assumption that there was a market throughout the period, the existence of which would have enabled airplanes to be sold on their reconstructed retirement dates at market prices which declined at a steady rate. Rummel testified, however, that the market was glutted by the time TWA's planes were available for sale (Tr. 1636),** and if that is the fact TWA's methodology is further invalidated.

Moreover, TWA's proof shows that from 1959 to 1963 there was an elimination of 15,000 short-segment departures resulting from a TWA decision "to eliminate the short stage length departures operated with piston aircraft, because they were not profitable and had nothing whatsoever to do with the advent of the long-range aircraft, which is the

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* Rummel conceded that a document showing M-202A aircraft to be available for sale in February 1958 indicated that he could not say that the first four of these aircraft sold were timed to the first jet as is shown in Annex F (Tr. 1668). Rummel also testified that he could not say the M-202A listed in Annex F as Piston No. 21 and linked to Jet No. 16 was needed by TWA until the delivery of that jet in view of proof that TWA leased the piston plane on January 14, 1959 (Tr. 1679) and again on June 13, 1959 (Tr. 1681-82). The reconstructed retirement date for that plane in Annex F is June 17, 1959. Similarly, the M-202A airplane listed in Annex F as Piston No. 22 was leased twice prior to its reconstructed retirement date of June 17, 1959, the second leasing taking place on June 6, 1959 (Tr. 1685-86). Piston No. 13 was leased on June 27, 1959, and has a reconstructed retirement date of June 29, 1959 (Tr. 1690-91).

** Defendants showed that TWA did not lag behind its competitors in 1958-1959 in selling piston aircraft (Tr. 3692-93) and takes the position that the market decline took place at that time (Defendants' Brief 285).

subject of our analysis and estimates." (Tr. 10642-43 and TWA Ex. 443). That the M-202A aircraft were all operating on average stage lengths of less than 300 miles and were the subject of this managerial decision (Defendants' Brief 290) is undisputed. The elimination on this scale of the short stage length departures operated with piston aircraft having no connection with the introduction of the jet aircraft into service makes it impossible to conclude that the short-range M-202A aircraft were retained because the delivery of long-range aircraft was delayed. The claim for damages with respect to these aircraft is disallowed in its entirety. It is noted that the first four aircraft of this type which were sold form the starting point of the trend line set forth at page 33 of TWA Ex. 6B. There is no evidence to support the conclusion that higher prices were obtainable for aircraft of this type between November 1, 1958, and the date on which they were sold, December 31, 1958, and the trend lines of market prices constructed by TWA do not purport to show that higher prices were available prior to the initial sales which constitute the starting points of the trends (Tr. 3610-11, 3612). For that reason also, TWA's proof does not support the damages it claims with respect to these aircraft.

L-1049, L-1049G and L-1049H Aircraft

TWA claims damages of $808,100, before trebling, for delay in having eleven aircraft of the types L-1049, L-1049G, and L-1049H available for sale (TWA Ex. 6B, p. 9). Speas testified that he considered the L-1049, L-1049G, and L-1049H aircraft to be enough alike to use the same market decline in computing damages for aircraft of all these types (Tr. 3644). The trend line constructed for the market price of these aircraft is apparently based

solely on data of L-1049 sales, and the data for L-1049G and L-1049H aircraft were not used in determining the trend line (TWA Ex. 6B, pp. 24, 26, 38, 85, Tr. 3643), although the quarterly market declination rate constructed with reference to L-1049 aircraft is used as the basis for computing the claimed loss attributable to L-1049G and L-1049H aircraft (TWA Ex. 6B, pp. 24-26). TWA contends that using the sales data for the L-1049H aircraft would result in a trend line which would not be reliable because it would have a low coefficient of correlation (Tr. 3789). All nine of TWA's L-1049 aircraft were listed for sale on February 6, 1959 (Ex. G annexed to DX 324), while according to TWA's proof the earliest date on which any of the planes would have been sold if the jet aircraft had not been delayed was July 18, 1959, which is set forth in Annex F as the reconstructed retirement date for Piston No. 16, the damaged L-1049G for which TWA claims no damages on the ground that it was damaged prior to its reconstructed retirement date. (TWA Ex. 6B, p. 24; Tr. 1707, 1737). The next earliest reconstructed retirement date was September 24, 1959, which is set forth in Annex F as the reconstructed retirement date for the L-1049 airplane listed as Piston No. 26. Only five of the nine L-1049 aircraft were sold by June 30, 1964 (TWA Ex. 6B, pp. 80-85).

As these aircraft were listed for sale prior to the earliest reconstructed retirement date for aircraft of any of these types and are enough alike for TWA to value them on the same trend line, for the reasons set forth above with respect to M-202A aircraft, TWA's claim that a delay in the availability of these aircraft for sale due to a delay in receiving jet aircraft caused the loss to TWA claimed in its proof cannot be sustained. Moreover, if only the data of

L-1049 sales will serve as the basis of a trend line having a reliable coefficient of correlation, TWA's claim that losses with respect to the other types may be measured by the trend line, with which their own data is incompatible, is not accepted. The claim with respect to these aircraft is therefore disallowed in its entirety. It is noted that the aircraft which is plotted on page 38 of TWA Ex. 6B as sold in the second quarter of 1963 is the same plane that is also plotted as having been sold in the fourth quarter of 1960, having been repossessed in the interim (Tr. 3643). It was therefore available for sale at least as early as the time of its first sale. It is also noted that if the sale of this aircraft, which occurred after the period of the sale of the 103 aircraft, had not been considered, TWA's claim would concededly be reduced by $120,250 (Tr. 3779).

DC-4 Aircraft

TWA claims damages totalling $91,800, before trebling, with respect to delay in having available for sale six DC-4 aircraft (TWA Ex. 6B, p. 9). On July 27, 1957, TWA authorized the sale of all these aircraft (DX 324, p. 67, Tr. 1729-30, 1739) and offered aircraft of this type for sale through an aircraft broker on January 2, 1959 (DX 324, p. 67 and Ex. G annexed thereto where this type is referred to as C-54). The earliest of the dates to which TWA's proof shows the sale of any of these planes would have been advanced if the delivery of jet aircraft had not been delayed is June 8, 1959, which is the reconstructed retirement date set forth in Annex F for Piston Aircraft No. 8. As these aircraft were for sale prior to any period of delay in their sale claimed to be caused by the delay in receipt of jet airplanes, for the reasons set forth above with respect to M-202A aircraft, TWA's claim that a delay

in the availability of these aircraft for sale due to a delay in receiving jet aircraft caused the loss to TWA claimed in its proof cannot be sustained. Moreover, minutes of TWA's Board of Directors show that TWA made these planes available for sale because they were being operated at a loss, not because they were no longer needed by reason of the acquisition of jet aircraft (Tr. 1729-30, DX 37). The date they were made available for sale was prior to "mid-1958" which is the time TWA asserts the six-year price decline commenced (Plaintiff's Reply Brief 119). In addition, these aircraft were all configured for cargo or engine carrying service rather than passenger service (DX 324, p. 67, Tr. 1716). The claim for damages with respect to these aircraft is disallowed in its entirety.

It is noted that in a sale of a group of four of these planes by TWA in 1959 the price paid by the buyer and plotted by TWA at page 35 of its Exhibit 6B, purchased not only four aircraft but also 29 extra engines (Tr. 3657). One of the other of these four-engine aircraft which is plotted on the same chart was apparently sold with only one of its engines (Tr. 3658-59). TWA's proof indicates that the factor of extra engines would reduce the quarterly market price decline from $12,400 to $12,000 (Tr. 3784). It is also noted that if sales in the first three quarters of 1958 and the fourth quarter of 1962 had been eliminated in determining the rate of market price decline for this type of aircraft, TWA's claim would concededly be $37,740 less (Tr. 3772).

L-1649A Aircraft

TWA claims damages of $1,461,900, before trebling, with respect to delay in having available for sale four L-1649A aircraft (TWA Ex. 6B, p. 9). These are long-range air-

craft which were directly replaced in function by the jet aircraft. In view of Rummel's testimony that TWA would have liked to sell these aircraft earlier because they were uneconomical but delayed their retirement because they were substantially undepreciated (Tr. 1800), any loss resulting from a decline in the market price obtainable for these aircraft cannot be attributed to the acts of defendants.[1] The claim for damages with respect to the delay in the availability of L-1649A aircraft for sale is therefore disallowed in its entirety.

The damages claimed with respect to the first two aircraft sold of these four would have to be disallowed in any event, for they were the first aircraft of that class to be sold by any airline in the period from January 1, 1958, to June 30, 1964, and each brought the highest price obtained to the date of its sale. There is no evidence to support the conclusion that a higher price was obtainable for aircraft of this type between January 1, 1958, and the dates on which they were sold in the fall of 1960, and the trend lines of market prices constructed by TWA do not purport to show that higher prices were available prior to the initial sales which constitute the starting point of the trend (TWA Ex. 6B, p. 39, Tr. 3610-11, 3612). Similarly, the damages claimed for the last two aircraft sold of this type would have to be reduced, for their reconstructed retirement dates are dates prior to the initial sales, and plaintiff's computations in effect extend the price trend lines to times prior to the commencement of the trend. All the sales of aircraft of this type were sold by TWA, and the

[1] There is other TWA proof that aircraft of this type were ordered with full knowledge of the coming of jet aircraft because of their "cash generating power" and that even with the advent of jet planes there would be a need for aircraft of this type for several years (Tr. 3795).

first four of these sales were to a buyer outside the country and without a credit rating, factors which TWA admits would affect the sales prices (Tr. 3621). These planes were later repossessed by TWA (Tr. 3628).

L-749A Aircraft

TWA claims damages of $346,000, before trebling, for delay in having three L-749A aircraft available for sale (TWA Ex. 6B, p. 9). The proof shows that TWA sold two L-749 and three L-749A aircraft during this period (TWA Ex. 6B, pp. 81-85) and that it offered "several Lockheed model 749 and 749A Constellation airplanes for sale" as early as July 25, 1958 (Exhibit F Annexed to DX 324). As TWA's L-749A aircraft were listed for sale prior to the earliest reconstructed retirement date for aircraft of this type, which is set forth in Annex F as July 13, 1959, (Piston No. 23) for the reasons set forth above with respect to M-202A aircraft, TWA's claim that a delay in the availability of these aircraft for sale due to a delay in receiving jet aircraft caused the loss to TWA claimed in its proof cannot be sustained. TWA's claim for damages with respect to L-749A aircraft is therefore disallowed in its entirety.

Even apart from the proof that TWA made these aircraft available for sale in July, 1958, its claim for damages could not be granted in the amount requested. The first L-749A airplane sold by any airline in the period between January 1, 1958, and June 30, 1964, was the plane listed in Annex F as Piston Aircraft No. 23 (TWA Ex. 6B, p. 37). This airplane was sold at a substantially higher price than any other aircraft of its type. There is no evidence to show that a higher price would have been obtainable had the plane been sold at an earlier date, and, as shown above with

respect to M-202A and L-1649A aircraft, the trend line constructed by plaintiff does not purport to show higher prices prior to the initial sale. TWA's claim for damages with respect to this airplane would therefore be disallowed in any event.

The second aircraft of this type sold by TWA is the plane listed in Annex F as Piston Aircraft No. 58. This plane was actually sold on November 24, 1961, and according to Annex F, it would have been retired by March 12, 1960, except for the defendants' delay in furnishing jet aircraft. The proof shows, however, that at least as early as August 17, 1960, TWA considered that this aircraft was not needed, for at that time it leased it to another company (Tr. 1771), and therefore the fact that TWA did not sell this plane in the period from August 17, 1960, to November 1961 cannot be attributed to its claimed need to retain aircraft because of delay in receiving jet aircraft. The period from March 12 to August 17, 1960, is one of 1.7 quarters rather than the 6.8 quarters which was used to compute the damages attributed to this plane at page 25 of TWA Exhibit 6B, where the aircraft is listed as No. 44 under its registration number N-6017C. Using TWA's method of computing damages, the maximum decline in market price which could have been related to delay in receiving the jet aircraft referred to in Annex F as Jet No. 52 is $37,230, which is the rate of quarterly market decline for this aircraft type computed by TWA of $21,900 (TWA Ex. 6B, p. 25) for a period of 1.7 quarters.

Not all of this loss could be attributable to the acts of defendants, however. As has been determined above, defendants are not responsible for part of the delay in the delivery of the 30 Convair 880 jet aircraft. In Annex F, the last 48 of the 103 piston aircraft, Piston Nos. 56-103,

are related to timely deliveries of Convair 880 jet aircraft with respect to which defendants are not responsible for 60 days of the delivery delay, and this particular piston airplane, Piston No. 58, is linked to the nineteenth Convair 880. Therefore, even if damages could be awarded with respect to any aircraft of this type, defendants could not have been responsible for damages for delay with respect to this airplane for a period greater than one quarter.

The third aircraft of this type with respect to which TWA claims damages is the plane listed in Annex F as Piston Aircraft No. 103. This plane has registration number N-6012C and appears also as No. 103 at page 26 of TWA Exhibit 6B. The plane was actually sold on July 20, 1962, and TWA has assigned it a reconstructed retirement date of August 12, 1960. At approximately that time an aircraft of the same type was sold for $164,000 (TWA Ex. 6B, p. 78). The aircraft actually sold in the third quarter of 1960 is the only airplane of this type sold by an airline other than TWA in the period January 1, 1958, to December 31, 1964, and there were only five sold by TWA. The actual sale of an airplane of this type at the time of the reconstructed sale date raises the question whether the better evidence of the price TWA would have obtained for this plane is the price actually obtained by its competitor at that time or the higher price claimed by TWA, which is the price actually received for the airplane later plus the amount the market price declined from the reconstructed retirement date to the actual sale date as shown by the trend line TWA has set forth at page 37 of its Exhibit 6B.

TWA attributes the fact that particular sales prices fall above or below its trend lines to random differences in the condition of the aircraft of any particular type (Plain-

tiff's Brief 239-40, 242). The only two aircraft of this type for which the engine and airframe condition are in evidence are the TWA aircraft bearing registration numbers N-6012C and N-6017C (TWA Ex. 421, p. 3). These planes brought approximately the same price although N-6017C was sold on November 24, 1961, and N-6012C was sold on July 20, 1962. The trend line set forth at page 37 of TWA Ex. 6B represents a decline in market price of approximately $58,400 in that time, and as there are so few aircraft on which this trend line is based, if the condition of the plane which was sold later was equivalent to or better than that of the plane which was sold earlier, there would be reason to refer to the actual sales price at the reconstructed retirement date, rather than to apply the trend-line market price decline to the price later received. According to TWA, reference to actual sales at the reconstructed sale dates would be a valid method of determining loss (Tr. 3685). TWA's Exhibit 241 shows, however, that the later-sold airplane had more hours of flying time before an airframe overhaul was required and before an overhaul was required of any of its four engines. This difference in the condition of the two airplanes is consistent with TWA's explanation of deviation of particular prices from the trend lines and supports the validity of the trend line constructed for this type of aircraft. In the absence of similar information with respect to the aircraft actually sold in the quarter of the reconstructed retirement date, TWA's reliance on the trend line is accepted for this purpose with respect to aircraft of this type.

Even if damages could be awarded with respect to aircraft of this type, the damages of $170,830 claimed by TWA with respect to this airplane would have to be diminished in view of the determination made above that

defendants were not responsible for part of the delay in the delivery of the 30 Convair 880 aircraft. Annex F shows that the last 48 of the 103 aircraft are related to deliveries of jet aircraft of this type and that this particular piston airplane, which is the last of the 103 piston aircraft to be sold, is linked to the twenty-seventh Convair 880 airplane. Any period of the delay in retiring piston aircraft No. 103 attributable to the acts of defendants would therefore have been diminished by 60 days with the result that damages with respect to this aircraft would necessarily have been diminished by at least $14,600 to $156,220.

M-404 Aircraft

TWA claims damages of $1,009,300, before trebling, for the delay in having 37 M-404 aircraft available for sale (TWA Ex. 6B, p. 9). These are short-range, two-engine aircraft, and, as shown above with respect to M-202A aircraft, TWA's proof shows that from 1959 to 1963 there was an elimination of 15,000 short-segment departures resulting from a TWA decision "to eliminate the short stage length departures operated with piston aircraft, because they were not profitable. It had nothing whatsoever to do with the advent of the long-range jet aircraft, which is the subject of our analysis and estimates." (Tr. 10,642-43 and TWA Ex. 396, 443). For this reason, as in the case of the M-202A aircraft, TWA's claim with respect to M-404 aircraft is disallowed in its entirety. Although it is therefore unnecessary to examine in detail the computation of damages with respect to M-404 aircraft, it should be noted that TWA had aircraft of this type available for sale from a time not shown by the proof until March 11,

1959 (Ex. E annexed to DX 324) and that 18 aircraft of this type were gradually sold by March 20, 1961,[1] when TWA declared the remaining 19 aircraft surplus (Tr. 1747-48, DX 39). In addition, no damages could be granted with respect to the first three aircraft of this type sold by TWA, listed in Annex F as Piston Nos. 5, 6 and 7, as, for the reasons set forth above with respect to M-202A and L-1649A aircraft, these aircraft form the starting point of TWA's trend line (TWA Ex. 6B, p. 34), and there is no reason to believe that the market price was higher at an earlier time than the prices obtained for these aircraft. Moreover, as the last 19 of these aircraft were actually available for sale from March 20, 1961, prior to both the reconstructed and actual retirement dates, the delay in effecting sales of these aircraft after that date, which amounted to more than nine months in the case of the planes listed in Annex F as Piston Nos. 59-75, cannot be attributed to defendants' acts. These limitations alone would reduce the damages claimed by TWA for these aircraft by $361,641, as damages for the aircraft listed in Annex F as Piston Nos. 5-7 would be disallowed in their entirety, and the quarters of delay would be limited to 3.3 for Piston No. 48, 3.2 for Piston No. 49, and 3.67 for Piston Nos. 59-75.

L-049 Aircraft

TWA claims damages of $3,087,000, before trebling, for delay in having 31 L-049 aircraft available for sale (TWA

[1] Sales of these aircraft occurred in February, March, August, and November 1959, January, February, March, June, and September 1960, and February 1961. Two of these aircraft, numbers N-40432 and N-40441, were leased to another company in November 1959 (Tr. 1749), more than six months prior to their actual retirement date in June 1960 (Annex F, p. 3).

Ex. 6B, p. 9). These are intermediate-range, four-engine airplanes. TWA's L-049 fleet, or at least "several" airplanes of it, was for sale as early as July 15, 1958 (DX 349), but none was sold before the sale of one on August 26, 1959 (TWA Ex. 6B, p. 81), and a second one was not sold until April 30, 1961 (TWA Ex. 6B, p. 83). The aircraft of this type are listed in Annex F as Piston Nos. 20, 43-47 and 76-100, where the earliest reconstructed retirement date for any of them is May 12, 1959, and the next earliest is May 5, 1960. As TWA considered these aircraft available for sale as early as July, 1958, for the reasons set forth above with respect to M-202A aircraft, TWA's claim that a delay in the availability of these aircraft for sale due to a delay in receiving jet aircraft caused the loss to TWA claimed in its proof cannot be sustained. The claim for damages with respect to having aircraft of this type available for sale is therefore disallowed.

Although TWA's offering of its aircraft of this type for sale in 1958 shows that defendants are not responsible for the delays claimed in TWA's proof with respect to L-049 aircraft, there are other reasons which would require the disallowance of TWA's claim with respect to all of these aircraft. It is undisputed that the 30 of the 31 aircraft TWA still had in 1961 were operating at stage lengths of less than 300 miles (Defendants' Brief 290, Annex F, TWA Ex. 396) and the proof shows that elimination on a large scale of such piston flights was the result of a decision having nothing to do with the acquisition of jet aircraft (Tr. 10642-43, Defendants' Brief 290). There are separate reasons why the claim with respect to a different 30 of these aircraft must be disallowed, and these 30 aircraft are the first five and the last 25 which were sold.

TWA made particular efforts to sell four aircraft of this type in March, 1959 (Ex. E Annexed to DX 324), but four aircraft of this type were not disposed of until May, 1961 (Annex F, TWA Ex. 6B, pp. 80-83). The fifth aircraft of this type to be sold, listed as Piston No. 46 and assigned a reconstructed retirement date of May 14, 1960, in Annex F, was removed from service on November 24, 1959 (Tr. 1761). As these five aircraft were available for sale prior to their reconstructed retirement dates, for the reasons set forth above with respect to M-202A aircraft, TWA's claim that a delay in the availability of these aircraft for sale due to a delay in receiving jet aircraft caused the loss to TWA claimed in its proof cannot be sustained.

The sixth aircraft of this type which was sold by TWA is listed in Annex F as Piston No. 47 where it is linked to a Convair 880 airplane with respect to which it has been determined defendants are not responsible for 60 days of the delay in acquisition.*

The proof shows that TWA would not be entitled to any damages for the remaining 25 aircraft in any event. When they were sold, the flying time after overhaul of the airframes and engines was substantially used up (TWA Ex. 421). TWA had been granted a time extension to operate the engines for 2,000 hours between overhauls (DX 354, p. 2) and for all practical purposes had used up even the additional times granted prior to selling the aircraft. Three of the aircraft were "incomplete, uncertified and non-flyable" and parts had been removed which would not be replaced (DX 354, p. 2). Three other aircraft were

*The number of quarters set forth at page 26 of TWA Ex. 6B for this aircraft, which is listed there as No. 66, is apparently incorrect, for the entire period of delay claimed of 13 months and 10 days equals 4.4 quarters rather than 4.6.

in "minimum ferry condition" and were not in "airworthy condition" (DX 354, p. 2). The remaining 19 aircraft complied with federal airworthiness directives only up to December 31, 1961 (DX 354, p. 2). Sales of "non-operating" aircraft of this type by another airline were omitted by TWA in computing the market price decline (Tr. 3773-74).

As noted above, these airplanes were made available for sale on June 21, 1961. Piston No. 47, which was sold on June 23, 1961, had over seven-eighths of its flying time after overhaul remaining for its airframes and approximately three-fourths of its flying time after overhaul remaining for its engines (Aircraft N90830 in TWA Ex. 421). In view of the proof that a complete overhaul of a four-engine aircraft costs more than $100,000 and in view of TWA's argument that its trend lines are valid despite differences in overhaul times because airlines provide progressive maintenance and do not allow aircraft to be flown until they require a complete overhaul (Plaintiff's Brief 239) and the significance which TWA attaches to the time since overhaul in determining the value of aircraft (Tr. 1723, 3633), TWA's claim with respect to these 25 aircraft would be disallowed.

Even if all 25 airplanes had been airworthy, the difference in value between these airplanes in a completely used up condition and Piston No. 47 which was sold shortly after these planes were made available for sale is at least three-fourths of the cost of overhaul or at least $75,000 per airplane. TWA received an average of approximately $16,000 for each of these 25 aircraft, and the price received for Piston No. 47 (TWA Ex. 6B, p. 83) was not more than $75,000 higher.

It should be noted that even if damages could be awarded with respect to these 25 aircraft, defendants would not be responsible for 60 days of the delay in making them available for sale because these 25 aircraft are Piston Nos. 76-100 in Annex F, the retirement of which is linked to the Convair 880 aircraft. This limitation alone would result in a diminution of TWA's damages by $810,000 before trebling.

V.

Losses due to disruption of business.

Plaintiff makes a separate claim for damages for disruption of its business at the time of transition to jets. It bases this claim primarily upon the following allegations of the complaint:

> "53. As additional results of the offenses hereinabove alleged, TWA further has been immediately and irreparably injured in that: * * * (f) the period of disruption caused by the transition from non-jet to jet operations has been extended * * * (g) the co-ordination of the change from non-jet to jet operations has been disrupted over an extended period of time; * * * (h) the management and business of TWA has been disrupted over an extended period of time."

Plaintiff presented its detailed evidence to support this claim through the prepared testimony of Raymond F. Rowe, Staff Vice President—Transportation Training (TWA Ex. 8) and Virgil L. Walstrom, Director—Maintenance and Overhaul Planning (TWA Ex. 9). The damages are stated by these witnesses to be the direct result of defendants' activities which delayed the deliveries to the plaintiff of Convair 880s. The amount of the claim under this Section V is as follows:

(1) $350,246 in monthly guaranteed salaries which TWA paid to 24 captains and 14 flight engineers who had to be held off schedules because the Convair 880 aircraft, for which they had been trained, had not arrived; and since there were no other aircraft available on which they were qualified to operate, TWA paid the above sum to these employees while they remained idle and "substantially unproductive" to the Airline. (TWA Ex. 8, p. 3).

(2) $177,260 as the cost of refresher training for 62 captains, 40 first officers and 45 flight engineers. (TWA Ex. 8, p. 4).

(3) $42,972.65 as the cost of subsequent retraining of the ground crew. (TWA Ex. 9, pp. 3-5).

These three claims total $570,478.65, and they appear not to overlap in any way the claims reflected in the computations of Price, Waterhouse (TWA Ex. 7) or Coverdale (TWA Ex. 4).

Rowe testified that TWA's training plans at first were based on the original contract dates for delivery of the CV-880s, i.e., that deliveries were to commence in November 1959, with scheduled service to commence in March 1960. Delays in delivery ensued, however, and full scale training of flight crews did not commence until February 1960. As noted elsewhere in this opinion it was clear to the plaintiff at or about this time that deliveries would not begin until May 1960. It appears to me that the plaintiff was justified in commencing the flight training courses in February 1960, as Rowe testified, in preparation for deliveries in May.

The first CV-880 was in fact delivered in May 1960 and used for training purposes. Rowe stated (TWA Ex. 8) that "by summer of 1960, adequate flight-crews had been trained." Elsewhere in this opinion, I have concluded that commencing in May 1960 the further delays in deliveries of 880s were caused by defendants. Rowe testified, without contradiction that in the summer of 1960 flight crew training was drastically reduced because the 880s had not been delivered; co-pilots were returned to service on piston equipment; but captains and flight engineers could not be returned for such service without additional retraining;

that TWA was obligated to pay their salaries even though no 880s were available. (TWA Ex. 8, pp. 2 & 3).

Deliveries of the 880s were resumed in January 1961, by which time the flight crews required refresher training in order to be qualified under TWA standards and FAA regulations (id. p. 4). Walstrom testified that similar refresher training in December 1960 was required for ground crews. (TWA Ex. 9).

I am of the opinion that the plaintiff took reasonable steps to mitigate its losses caused by the delays in deliveries that were due to the defendants' actions.

There is set forth below certain supplementary information developed in the cross-examination of Rowe:

¶ Annex A to TWA Ex. 8 does not list all captains and flight engineers who had completed Convair training prior to the commencement of 880 revenue service in January 1961, but only those who were held off regular service flights so that they would be available to fly Convair 880s when delivered (Tr. 6594).

¶ A TWA pilot normally would fly about 750 to 800 hours a year (Tr. 6597).

¶ While a pilot is in training, the pilot does not perform regular service flight on other types of aircraft (Tr. 6599-6600). In order to qualify for scheduled flight operation, FAA regulations require that a pilot complete a proficiency check every six months on the type of equipment he is going to perform on, and also complete at least three take-offs and landings to a full stop within the last 90 days (Tr. 6601).

¶ TWA regulations for safety reasons prohibit a pilot from flying piston equipment after he has completed tran-

sition on jet equipment without transition back to the piston equipment (Tr. 6602).

¶ Training for a captain or first officer consists of three weeks of ground school, 12 to 18 hours of simulator training, 8 to 20 hours transition training on the aircraft, and then 20 hours of line time (regular commercial service with passengers) under supervision. Training for a flight engineer is the same except that he requires four weeks of ground school (Tr. 6602-6603).

¶ Because of TWA safety regulations, when a captain or flight engineer begins training on a new type of aircraft, he devotes his full time to that training and does not fly other craft even though he is otherwise qualified to fly them (Tr. 6607).

¶ The above-stated TWA regulation does not apply to first officers [co-pilots] (Tr. 6609, [6613]).

¶ TWA regulations are approved by the FAA and consequently must be complied with like any other FAA regulation (Tr. 6610-6611).

¶ In order to return to piston equipment, a captain is required to complete one hour of transition on piston aircraft and at least one ILS approach and three take-offs and landings. Then in order to return to jet aircraft again, he is required to complete two hours of transition training and three take-offs and landings with jet equipment (Tr. 6611-6612).

¶ The guaranteed salary of captains, co-pilots and flight engineers was computed on the basis of an 85 hour month even though the union contract only guaranteed salary for a 60-hour month (Tr. 6615-6616).

¶ Mr. Rowe felt that the real reason for not returning the captains and flight engineers to piston aircraft was the belief that the Convair 880s were expected momentarily and crews would be needed to serve on them. (Tr. 6626).

There is set forth below certain supplementary information developed in the cross-examination of Walstrom:

¶ About 80 hours of classroom training was necessary to qualify a ground crew mechanic for service on a Convair 880 aircraft (Tr. 6550-6551).

¶ The minimum of 80 hours training was a TWA requirement and not specifically required by the FAA (Tr. 6555-6556).

¶ The ground crew were trained mainly where they were domiciled although there was a "minor amount of travel involved" (Tr. 6556-6557).

¶ Refresher training of the ground crew would be necessary whenever the "considerable time" of three months or more had elapsed since initial training and actual contact with the airplane (Tr. 6570).

¶ TWA did not hire any additional instructors to conduct the refresher training on Convair 880s (Tr. 6573).

¶ All the refresher training listed in Annex A consisted of classroom training (Tr. 6573).

¶ Refresher training took place in lieu of regular productive work (Tr. 6574).

¶ While taking refresher training, the ground crew was not on overtime pay (Tr. 6574).

¶ Walstrom was "sure" that maintenance suffered during the period that refresher courses were given, and that "it resulted in some degree of overtime over what we would

normally have had." Walstrom guessed that "it is just axiomatic that it has to be handled in some way, the work that has to be done. And one way it can come out is overtime." (Tr. 6574-6575).

The supplementary information thus developed in cross-examination of Rowe and Walstrom supports the plaintiff's entire claim under this Section V, and accordingly said claim is allowed for the full amount of $570,478.65.

VI.

Alternative over-all claim for damages based upon comparative profitability study.

Up to this point we have considered the plaintiff's claims for damages suffered by it as a result of specified allegations of the complaint. The plaintiff also claims under this Section VI damages "for the totality of its injuries set forth in the complaint." It claims certain additional injuries not covered by the preceding portions of this opinion as follows:

1) Injuries to TWA piston fleet, being included in the term "aircraft" in the following portion of paragraph 10 of the complaint:

> "It was the intent of plaintiff and Atlas, inter alia * * *
>
> (d) that defendants would have TWA as a captive market and would supply the requirement of TWA for aircraft, including jet-powered aircraft, upon terms advantageous to themselves;
>
> (e) that the requirements of TWA for aircraft, including jet-powered aircraft, would be enlarged for the benefit of defendants and Atlas by various means."

Other paragraphs of the complaint cited under this heading are as follows:

> "TWA has been denied the right freely to acquire aircraft necessary to its operations and has received such aircraft as were made available to it in an untimely manner (par. 50)."
>
> "TWA has been further and immediately injured in its business * * * in that defendants have allowed TWA to procure financing essential for the acquisition of

aircraft only upon the condition that TWA would accept such aircraft as the defendants dictated, • • •" (par. 51)

2) Injuries relating to the disruption of the management and business of TWA. Under this heading plaintiff cites paragraph 53(h) of the complaint reading as follows:

"As additional results of the offenses hereinabove alleged TWA further has been immediately and irreparably injured in that • • •

(h) The management and business of TWA has been disrupted over an extended period of time."

3) Injuries relating to the disruption of the transition from non-jet to jet operations (over and above the disruption claims previously discussed above under Section V of this opinion). Under this heading the plaintiff cites paragraphs 53(f) and (g) of the complaint which were quoted above in discussion of the disruption claimed under Section V.

4) Injuries to TWA's good will (and consequent ability to attract passengers in competition with other airlines) due to the many years of victimizing of TWA by the defendants. Under this heading plaintiff cites paragraph 52(e) of the complaint which reads:

"TWA had been further injured in the following manner • • •

(e) TWA's good will in its business in serving passengers throughout the world was diminished."

This Section VI claim is presented by plaintiff as an over-all alternative claim, i.e., it includes damages incident to all of the claims discussed above in Sections I-V and

damages for the above listed four categories of additional injuries not covered by Sections I-V.

The testimony in support of this alternative over-all claim for damages was presented in the form of a very brief comparative profit study prepared by Coverdale & Colpitts. It attempted to measure the extent to which the operating profits (not net profits) earned by the plaintiff during the years 1959-1963, inclusive, fell short of such profits that plaintiff would have attained had its profits for those years been on the same level vis-a-vis certain other air carriers, as the profits earned by it during the years 1964 and 1965. The comparison used for TWA's International Division was with the Atlantic Division of Pan-Am. The comparison for TWA's Domestic Division was based upon a comparison with American Airlines, Inc. These airlines were the ones most nearly comparable in the opinion of Coverdale & Colpitts with TWA. The basis upon which the study was made was that during the years 1959-1963 the plaintiff's business was handicapped by unlawful restraints or monopolization of the defendants, whereas during the so-called base years of 1964 and 1965 the effects of the defendants' alleged illegal actions had been substantially dissipated and accordingly the profit figures for those two years represented operations when the plaintiff's business was not handicapped by unlawful restraints or monopolization. The comparative profitability study is plaintiff's Exhibit 4(b) and was prepared under the direction of Wemple and submitted as a portion of his sworn direct testimony. No study of comparative operations policies or physical facilities or service policies was made by Coverdale.

The Coverdale Report found that TWA's 1959-1963 route structure was not materially different from what it was in

1964 and 1965. It also concluded that the route structures of the Atlantic Division of Pan-Am and of American were not materially different in 1959-1963 from what they were in 1964 and 1965.

The operating profits during the base years 1964 and 1965 of TWA's Domestic and International Divisions and of the air carriers for purposes of comparison were as follows:

	1964	1965	Average
	(Millions)		
TWA International	$34.6	$47.6	$41.1
TWA Domestic	50.9	49.8	50.3
PAA-Atlantic	26.1	33.7	29.9
American (Domestic)	61.2	70.9	66.1

The ratios of TWA's operating profits to those of the air carriers selected for comparison in 1964 and 1965 were as follows:

	1964-1965 Average Operating Profit (Millions)	Ratio, TWA to Other
TWA International	$41.1	
PAA-Atlantic	29.9	1.37
TWA Domestic	$50.3	
American (Domestic)	66.1	.76

The operating profits (losses) in each of the years 1959 through 1963 of TWA and the selected air carriers were as follows:

	1959	1960	1961	1962	1963	Total
	(Millions)					
-Atlantic	$17.5	$16.6	$ 4.5	$12.5	$33.3	$ 84.4
rican						
omestic)	24.5	24.7	19.1	19.3	43.9	131.5
International	(—7.8)	17.1	(—13.5)	15.3	23.3	34.4
Domestic	26.3	(—0.9)	(—24.2)	(—7.4)	17.5	11.3

Application of the TWA profit ratios determined for the base years 1964 and 1965 to the total 1959-1963 profits of the selected air carriers, establishes that TWA's profits would have been as set out below if TWA had attained a profit level comparable to that reached by TWA in 1964 and 1965:

1959-1963 Profits		1964-1965 Profit Ratio, TWA to Other	Calculated 1959-1963 TWA Profits
	(Millions)		(Millions)
PAA-Atlantic	$ 84.4	1.37	$115.6
American (Domestic)	131.5	.76	99.9

The difference between the profits calculated by this method and TWA's actual profits are as follows:

Comparison Airline	Calculated 1959-1963 TWA Profits (Millions)	Actual TWA Profits		Difference (Millions)
PAA-Atlantic	$115.6	TWA International	$34.4	$ 81.2
American (Domestic)	99.9	TWA Domestic	11.3	88.6
				$169.8

The operating profits earned by TWA's International Division in the period 1959 through 1963 were about $81 million less than they would have been if that Division's profit, as compared with PAA-Atl., had been as high as in the years 1964 and 1965. The operating profits earned by TWA's Domestic Division in the period 1959 through 1963 were about $89 million less than they would have been if that Division's profit, as compared with American, had been as high as in the years 1964 and 1965.

In my opinion the Coverdale comparative profit study does not provide an acceptable measure of damages in this proceeding, and I disallow the over-all claim based upon it. The allegations in the complaint relating to it are very much less definite and certain than the specific allegations with which the claims under Sections I-V of the opinion have dealt and to a considerable extent are overlapping therewith. Under Sections I-V of this opinion, the plaintiff claims a total of approximately $104 million and accordingly the claim for additional damages under this alternative claim amounts to an additional $65 million of general damages based solely upon the comparative profit study.

The objections of the defendants to the basis of the study, and the validity of the comparisons made therein for the purpose for which it is sought to be used are, in the main, valid.

The fact that many of the routes of the airlines used for comparative purposes parallel those of TWA (see maps attached to the study) is in itself not a sufficient basis for indicating that comparable earnings should follow therefrom. Some additional factors required to make the comparison valid in such a complex business, all of which are missing from the study, are comparative equipment and physical facilities and a myriad of management accounting and service factors. The variance in historical load factors in earlier years between TWA and the other airlines is one reflection of the importance of these missing factors. See *Wolfe* v. *Nat'l Lead Co.*, 225 F. 2d 427 (9th Cir.) 1955.

Furthermore, it seems inherently invalid to raise T.W.A.'s 1959-1963 results by using the 1959-1963 levels of operating profit of American and Pan-Am. Both of these carriers actively compete with TWA on its major routes. If TWA were to have significantly increased its revenues by introducing additional jet service in 1959-1963, it is

obvious that much of the increased revenue would have represented a diversion from its major competitors, including American and Pan-Am. Since the improvement in TWA would have lowered the operating profit of its two major competitors, it would not seem proper to estimate the operating profit of reconstructed TWA on the basis of the unreduced levels of operating profit of American and Pan-Am.

It also seems to me that the two alternative methods used by Coverdale in computing damages contain significant inconsistencies (TWA Ex. 4(b) and 4(c)). In my opinion the methodology used by Coverdale in plaintiff's Exhibit 4(c) is more precise and realistic than that shown in its comparative profitability study (TWA Ex. 4(b)). At one point the following colloquy occurred during the cross-examination of Wemple (Coverdale):

> "Q. Have you any opinion, Mr. Wemple, as to which between 4B and 4C represents the proper approach or the better approach to the determination of net operating profits? A. I have no opinion on that matter.
>
> Q. In 4(c) you come out with * * * $64 million and here you come out with $170 million, and still you have no opinion. A. Correct." (Tr. 6139-40) (See also Tr. 6134 and Simat Def. X 271A. p. XI-1).

The plaintiff did not call any other witness to support the Comparative Profit Study.

In my opinion the evidence to support the study is conjectural. The damages awarded in respect of Section I-V of this opinion adequately reflect the totality of the plaintiff's damages. When applied to the underlying facts the Comparative Profit Study produces results which are unrealistic (Def. Brief, p. 305).

VII.

Interest on damage claim.

The plaintiff in its brief takes the position that any award should carry interest, as an exercise of the discretionary authority of the trier of the facts to include in the award a sum constituting prejudgment (or moratory) interest, which would itself be subject to trebling (Plaintiff's Brief, p. 284). It alleges that the defendants, "through skillful exercise of their rights of appeal and through vigorous and lengthy contests of TWA's damage case," have succeeded in postponing for over five years a determination of the sum that should be awarded to TWA. Furthermore, TWA asserts that failure to record the operating profits which should have been recorded in each year, 1959 through 1963, and other elements of damage, have deprived plaintiff not only of the absolute amounts, but also of the normal increment on these sums.

The defendants in their brief state that the matter of award of interest should not be covered in the Special Master's opinion on damages but should be reserved for the trial judge who passes upon the Special Master's report.

I have interpreted the order of reference to the Special Master as requiring me to express my opinion on this subject.

The first line of cases to be considered establishes the Federal rule that interest may be allowed upon unliquidated claims.

In *Miller* v. *Robertson*, 266 U. S. 243, 258 (1924), the court allowed interest upon unliquidated claims:

> "Generally interest is not allowed upon unliquidated damages. *Mowry* v. *Whitney*, 14 Wall. 620, 653, 20 L. Ed. 860 (1871). But when necessary in order to arrive at fair compensation, the court in the exercise of a fair discretion may include interest or its equivalent as an element of damages."

In *Miller* the claim was capable of reduction to a specific monetary amount with a minimum degree of difficulty. There the buyer refused to accept ore and the seller sued for the difference between the contract price and the lesser price obtained when the seller resold ore after the buyer's refusal. The Supreme Court said the lower court properly allowed interest since the claim was a "debt" but suggested that such an award was within its discretion.

In *Concordia Insurance Co.* v. *School District No. 98*, 282 U. S. 545 (1931), the following statement appears:

> "In the absence of an authoritative state decision to the contrary, there was nothing in either [statute] which required the trial court in rendering its judgment to depart from the rule in respect of the allowance of interest which this court has recognized, namely, that, even in the case of unliquidated damages, 'when necessary in order to arrive at fair compensation, the court in the exercise of its sound discretion may include interest or its equivalent as an element of damages.' (citing *Miller, supra*)" 282 U. S. at 544-545.

In *National Airlines, Inc.* v. *Stiles*, 268 F. 2d 400 (5th Cir. 1959) the court concluded that interest was clearly in order. The case appears to be an expansion of the doctrine insofar as it allows interest in a situation where the damage is pecuniary but not subject to close valuation. An action had been brought under the Death on the High Seas Act by the widow of a passenger who was killed when the

defendant's airplane crashed. In awarding interest, the court pointed out that a party suffering a financial loss from the death of a "breadwinner", just as from the destruction of a ship, could be adequately compensated for the loss only "if the award is made at the time of the loss or if interest for the time between loss and payment is allowed." 268 F. 2d at 405. In so holding, the court stated:

> "It is quite clear that with as many uncertain factors as there are for consideration by the court in arriving at the fair value of plaintiff's pecuniary loss the length of time to the date of judgment may sometimes be taken into consideration by the court in determining the amount of its award." 268 F. 2d at 405.

After reviewing the congressional intent, the court affirmed the lower court's award stating:

> "... Congress clearly did intend to provide full compensation for the loss; and . . . the courts cannot carry out this clear mandate without taking into account the inadequacy of delayed compensation." 268 F. 2d at 406.

The court pointed out that admiralty stands on a different footing from the common law regarding damages, "for the general rule in common law had traditionally been that prejudgment interest could not be allowed on an unliquidated tort claim."

Shortly after the *National Airlines* decision, a Federal case was decided which laid to rest the question of power of the Federal courts to award prejudgment interest on unliquidated claims under Federal statutes. This case, which involved the High Seas Act, was *Moore-McCormack Lines, Inc.* v. *Richardson,* 295 F. 2d 583 (2d Cir. 1961), *cert. denied,* 368 U. S. 989 (1962). In the *Moore-McCormack* decision, the court stated:

"Interest was never refused on unliquidated claims from any doubt that some financial loss is actually suffered from delay in receiving money. Theoretically, refusal was based on the concept that interest was payable only on a 'debt' and that no debt could be due until the liability had been fixed. (citation omitted) McCormack traces the distinction to a survival of the medieval distaste for interest as 'usurious.' (citation omitted) A further explanation sometimes advanced is that a debtor should not be burdened with prejudgment interest upon an obligation so nebulous that he must necessarily look to the courts to fix its scope. Similar considerations would, however, seem to support the disallowance of prejudgment interest where liability is in doubt as to a 'liquidated' claim. But since the courts have not seen fit to deny prejudgment interest in the latter case, we see no reason why they should not grant it in the former." 295 F. 2d at 594.

It thus appears that the Federal courts have discretionary authority to allow interest on unliquidated claims, as well as liquidated claims, in proper cases where the statute is silent as to award of interest.

Next to be considered is a series of Federal cases standing for the proposition that when a penalty is authorised by the statute, it may be improper to award interest in addition. These cases first arose under the Fair Labor Standards Act but their rule of law regarding interest was made applicable to the private antitrust field by Judge Wyzanski in *Cape Cod Food Products, Inc.* v. *National Cranberry Association*, 119 F. Supp. 900 (D. Mass. 1954).

Cape Cod was an action by a food products company against individuals and corporations for damages claimed to have been sustained by the plaintiff by reason of an alleged conspiracy on the part of the defendants to violate

the antitrust laws. Judge Wyzanski charged the jury as follows:

> "Finally, I instruct you . . . that you are not to allow any interest of any kind. The problem of interest is one which has not yet been authoritatively settled by the Supreme Court of the United States. The ruling that I make is in accordance with the ruling of Judge Caffey in the Southern District of New York, and contrary to an earlier ruling of my own. But I am now bearing in mind a decision in the Supreme Court of the United States in connection with the Fair Labor Standards Act, 29 U. S. C. A. §201 *et seq.*, and double damages, and I have concluded that in a statute where treble damages are available, interest is not appropriately allowed. So you will please not take into account the problems of interest of any kind." 119 F. Supp. at 911.

Judge Wyzanski cites in support of his conclusion *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697 (1945).

Brooklyn Bank was an action for back wages and liquidated damages under Section 16(b) of the Fair Labor Standards Act. That aspect of *Brooklyn Bank* relevant to the situation presently under consideration centers around the court's consideration of whether an employee recovering minimum wages and liquidated damages under Section 16(b) is also entitled to interest on the sums so recovered. Mr. Justice Reed, speaking for the Court, first stated that the question of the right to interest on sums recoverable under a federal statute is a question of federal, not local, law. He then went on to disallow the interest requested and, in so doing, made the following statements at pp. 715-16:

> "Interest is not recoverable in judgments obtained under §16(b). As was indicated in our decision in *Overnight*

Motor Co. v. *Missel,* 316 U. S. 572 (1942), §16(b) authorizes the recovery of liquidated damages as compensation for delay in payment of sums due under the Act. Since Congress has seen fit to fix the sums recoverable for delay, it is inconsistent with Congressional intent to grant recovery of interest on such sum in view of the fact that interest is customarily allowed as compensation for delay in payment. To allow an employee to recover the basic statutory wage and liquidated damages, with interest, would have the effect of giving an employee double compensation for damages arising from delay in the payment of the basic minimum wages. See *Royal Indemnity Co.* v. *United States,* 313 U. S. 289, 296. Allowance of interest on minimum wages and liquidated damages recoverable under §16 (b) tends to produce the undesirable result of allowing interest on interest. See *Cherokee Nation* v. *United States,* 270 U. S. 476, 490. Congress by enumerating the sums recoverable in an action under Section 16(b) meant to preclude recovery of interest on minimum wages and liquidated damages."

Shortly after the *Brooklyn Bank* decision, the Supreme Court applied the rule in that case to penalties incurred under the Agricultural Adjustment Act of 1938. In *Rodgers* v. *United States,* 332 U. S. 371 (1947), the District Court rendered judgment in favor of the Government for penalties incurred under the Act for marketing cotton in excess of farm quotas plus interest from the date the penalties became due to the date of judgment. The Circuit Court of Appeals affirmed this decision and the Supreme Court granted *certiorari.* In an opinion by Mr. Justice Black, the Supreme Court reversed the lower court's decision and denied the propriety of awarding interest.

In *Rodgers,* the petitioner produced and sold more cotton than allotted him under Part IV of the Agricultural

Adjustment Act of 1938 as amended. Stat. 31, 55-60; 55 Stat. 203; 7 U. S. C. A. §§ 1281 *et seq.* The United States instituted suit to recover money "penalties" to which non-cooperating farmers are "subject" for quota violations. Mr. Justice Black, after stating that federal law controls since the penalties are imposed under an act of Congress, said:

> "Since penalties under the Agricultural Adjustment Act are imposed under an Act of Congress, they bear interest only if and to the extent such interest is required by Federal law (citations omitted). There is no language in the Agricultural Adjustment Act or in any other act of Congress which specifically allows or forbids interest on penalties such as these prior to judgment. But the failure to mention interest in statutes which create obligations has not been interpreted by this Court as manifesting an unequivocal congressional purpose that the obligation shall not bear interest. (citation omitted) For in the absence of an unequivocal prohibition of interest on such obligations, this Court has fashioned rules which granted or denied interest on particular statutory obligations by an appraisal of the congressional purpose in imposing them and in the light of general principles deemed relevant by the Court. (citation omitted)" 332 U. S. at 373.

The opinion next contains the following statements cited in the Plaintiff's brief in support of the proposition that interest should be awarded in a private antitrust action:

> "As our prior cases show, a persuasive consideration in determining whether such obligations shall bear interest is the relative equities between the beneficiaries of the obligation and those upon whom it has been imposed. And this court has generally weighed these relative equities in accordance with the historic judi-

cial principle that one for whose financial advantage an obligation was assumed or imposed, and who has suffered actual money damages by another's breach of that obligation, should be fairly compensated for the loss thereby sustained." 332 U. S. at 373.

However, the actual holding of *Rodgers* undercuts the relevance of this statement to the present situation. *Rodgers*, as mentioned above, appears to be the application by the Supreme Court of the rule it established in *Brooklyn Bank*. In disallowing prejudgment interest, the Court made the following observations:

"... [W]e think that the question of interest on the penalties provided in the Agricultural Adjustment Act on non-cooperators should be governed by the rule previously applied by this Court to criminal fines. Although Congress neither wholly prohibited nor made it a crime for a farmer to market cotton in excess of his quota, still it imposed sanctions upon non-cooperators analogous to those of the criminal law. The purpose of Congress in requiring payment of penalties into the Federal Treasury for marketing above the allotted amount was not to raise revenue for the Government's financial advantage but to deter farmers from planting and marketing more than their quotas. In fact, the whole philosophy of the Agricultural Adjustment Act is based on the theory that the public will be benefited, not damaged, if farmers produce and market within these quotas, thereby avoiding the payment of penalties." 332 U. S. 374-375.

The penalties imposed by the Fair Labor Standards Act and the Agricultural Adjustment Act are analogous for the question here under consideration to those imposed by the trebling of damages in a private antitrust action. The situation in which TWA finds itself is not unlike the situ-

tion of the government in the *Rodgers* case insofar as the penalties are concerned and *Rodgers* leaves no doubt but that interest cannot run on that part of the treble damages which is the "penalty" or "deterrent factor." But, as *Rodgers* was speaking only to penalties in and of themselves, the case does not necessarily mean that interest could not run on the primary damage claim. That interest can run on this primary amount is, in fact, the contention of TWA.

In *Brooklyn Bank, supra,* the court merely stated, without severing withheld wages from liquidated damages, that "[t]o allow an employee to recover the basic statutory wage and liquidated damages, with interest, would have the effect of giving an employee double compensation for damages arising from delay in the payment of the basic minimum wages." 324 U. S. at 715. It would seem, then, that *Rodgers* did in no way qualify the *Brooklyn Bank* holding. *Rodgers* was discussing only penalties so the Court talked in terms of penalties. *Brooklyn Bank* was discussing actual damages plus liquidated damages, and the Court spoke in terms of disallowing interest on both with the suggestion that the liquidated damages had the same effect as interest insofar as the claimant was concerned. Therefore, the *Rodgers* decision seems in no way to support TWA's contention that interest should be allowed on the primary amount in the situation presently being considered.

This interpretation of *Brooklyn Bank* is borne out in *Asselta* v. *149 Madison Ave. Corp.,* 95 F. Supp. 856 (S. D. N. Y. 1951). There the problem and its solution depended upon an interpretation of the effect of § 11 of the Portal-to-Portal Act of 1947, 294 U. S. C. A. § 260, on § 16(b) of the Fair Labor Standards Act, 29 U. S. C. A. § 216(b).

Under the Portal-to-Portal Act, the awarding of liquidated damages as provided in the Fair Labor Standards Act was no longer mandatory, but, by § 11, was placed within the sound discretion of the court. Judge Kaufman, in distinguishing the *Brooklyn Bank* decision, made the following observations:

> "Clearly, interest on an award in which no liquidated damages were granted, such as in the present case, would not be barred by the holding in Brooklyn Savings Bank v. O'Neil. An analysis of the opinion in the O'Neil case indicates that the Court regarded the provision for liquidated damages as a substitute for interest, which, the Court said, 'is customarily allowed as compensation for delay in payment.'" 95 F. Supp. at 858.

The stage was then set for Judge Wyzanski's adoption of the Federal Rule concerning interest on penalties to private antitrust litigation where treble damages are available.

Although interest is traditionally considered compensation for delay in the payment of money rightfully due the claimant, it appears that where penalties are involved, as in the trebling of the principal amount in a private antitrust action, such penalty is conceptually in lieu of interest. TWA, in the situation presently under consideration, is not entitled to moratory interest.

VIII

Recapitulation and Final Award

The schedule below compiles the separate determinations (prior to adjustments as set forth below) made in the foregoing sections of this Report.

SUMMARY OF SEPARATE DETERMINATIONS

			($ millions)	
Section I	*Losses in operating profits due to inadequacy of jet fleet*			
	(1) International Division		22.4	
	(2) Domestic Division	29.3		
	less: adjustment with respect to earlier delivery of Convair aircraft	2.5		
			26.8	
			49.2	
	less: cost of capital to effect earlier and additional purchase of jets (increase in gross interest cost)		21.6	
				$27,600,000

SECTION II	*Losses due to being required to lease jets*		
		12.7	
	less: cost of capital to effect purchase of jets	7.4	
			5,300,000
SECTION III	*Losses connected with financing the jets*		
	(1) Damages with respect to equity financing	-0-	
	(2) Damage with respect to debt financing	-0-	
			-0-
SECTION IV	*Loss due to delay in disposal of displaced piston aircraft*		-0-
SECTION V	*Loss due to disruption of business*		570,478.65
	TOTAL		$33,470,478.65

The determination of the amount of damages in the previous sections of this Report has generally followed the separate statement of the several aspects of the over-all claim as set forth by TWA. However, these various interrelated aspects of the over-all claim were consolidated by Price Waterhouse and adjusted in connection with TWA's historical financial statements. The result of the Price Waterhouse analysis, which was put forward by plaintiff as its final claim, developed the total sum of $104.5 million before trebling (TWA Exs. 7 and 50).

The defendants have not raised any serious question as to the Price Waterhouse analysis. Although I have not accepted some of the underlying calculations by other experts which were incorporated into the Price Waterhouse report, I do accept the basic principles of combination and adjustment. The Price Waterhouse results have been modified to incorporate the specific determinations in the foregoing sections of this Report.

In Section III of this Report I have set forth my determination that there should be no damage award with respect to financing. This determination reduces the Price Waterhouse total sum by $32.6 million, leaving $71.9 million. In Sections I and IV I have made specific determinations which accept in part and reject in part the underlying data upon which this figure of $71.9 million is based. These adjustments include a reduction with respect to the Domestic Division operating claim, of $2.5 million; an increase in gross interest cost of $29.0 million; and making no provision for any increase in proceeds with respect to the sale of piston aircraft and other property retirements.

These adjustments appear in tabular form below in the "Consolidated Statement of Award". Adopting the adjusted Price Waterhouse formulation together with the separate award for losses due to disruption of business

stated in Section V, I determine that the over-all award for damages should be $45,870,478.65 (before trebling).

CONSOLIDATED STATEMENT OF AWARD

	($ millions)	
A. *Increase in gain from operations with respect to earlier delivery, additional purchase, and owning rather than leasing jet aircraft*	76.8*	
less: adjustment with respect to earlier delivery of Convair aircraft	2.5	
	74.3	
less: increase in proceeds relating to earlier sale of piston aircraft	–0–	
less: increase in gross interest cost	29.0	
		$45,300,000
B. *Losses connected with financing the jets*		
(1) Damages with respect to equity financing	–0–	
(2) Damages with respect to debt financing	–0–	
		–0–
C. *Loss due to disruption of business*		570,478
		$45,870,478

* Source: TWA Ex. 50 as amended by TWA Exs. 42 and 43 and DX 262.

On April 9, 1968, TWA moved on the record to amend its complaint to ask damages in such amount as the Special Master should find to have been established by the evidence. TWA gave written notice on May 2, 1966, of intent to make such motion at the close of the hearing, and there is no suggestion of surprise. I have determined that no amendment of the complaint is required in order to award the plaintiffs the damages hereby awarded because the previous motion of the plaintiffs to amend their complaint to increase the amount of damages sought to be recovered, as granted by Judge Metzner, was sufficiently broad to authorize the award hereby made.

Pursuant to 15 U. S. C. § 15, the damages of $45,870,478.65 determined above are trebled to $137,611,435.95.

The plaintiffs' request for award of counsel fees and costs is referred to the District Court for decision.

The foregoing Report shall constitute my findings of fact and conclusions of law.

/s/ HERBERT BROWNELL
Special Master

Dated: September 21, 1968

Defendants' Objections to the Report of the Special Master, dated November 1, 1968

[Doc. 511]

[CAPTION] 61 Civ. 2324

PLEASE TAKE NOTICE that defendants Hughes Tool Company ("Toolco") and Raymond M. Holliday object to the Report of Herbert Brownell, Special Master, filed herein on September 21, 1968, in the following particulars:

I. DETERMINATIONS RELATING TO DEFENDANTS' ALLEGED ANTITRUST VIOLATIONS

A. CLEARLY ERRONEOUS FINDINGS OF FACT

The Special Master clearly erred, on the undisputed facts of record or of which he had judicial knowledge, in failing to make the following findings which are relevant and material to a determination whether defendants violated the antitrust laws as alleged in the complaint:

1. Toolco's acquisitions of control of plaintiff through purchases of its stock commencing in 1939 were all approved by the Civil Aeronautics Board ("CAB") after public hearings pursuant to section 408 of the Federal Aviation Act, 49 U.S.C. § 1384.

Transcontinental & Western Air, Inc., Control by Hughes Tool Co., 6 C.A.B. 153 (1944)

Transcontinental & Western Air, Inc., Further Control by Hughes Tool Co., 9 C.A.B. 381 (1948)

Report of Edward T. Stodola, Hearing Examiner, Dkt. 2796, dated January 30, 1948, reported at 12 C.A.B. 193 (1950)

Trans World Airlines, Inc., Further Control by Hughes Tool Co., 12 C.A.B. 192 (1950)

tion ("Convair") for the specific and exclusive use of plaintiff and in lieu of plaintiff's placing such orders directly with the manufacturers.

Complaint, par. 17

Sworn statement of Rummel (TWA 2)

Concession of counsel contained in TWA memorandum to the Special Master, pp. 4, 22

Testimony of Rummel (Tr. 308, 635-36, 1101-06, 1155-57)

Report of R. S. Damon, dated December 6, 1955 (DX 44)

Letter from A.V. Leslie to Noah Dietrich, dated December 19, 1955 (DX 45)

Letter from Noah Dietrich to Fred Ayers, dated December 21, 1955 (DX 46)

(iii) Toolco's contracts with Boeing and with Convair all provided that Toolco's rights thereunder were not assignable without the consent of the manufacturer except to plaintiff, Toolco and plaintiff being regarded as a single purchasing entity.

Letter from J. B. Connelly to Toolco, dated January 6, 1956 (DX 47)

Sworn statement of Rummel (TWA 2, Ex. R-3)

Contract between Boeing and Toolco, dated March 2, 1956 (DX 66, Article 21)

Contract between Boeing and Toolco, dated March 19, 1956 (DX 67, Article 21)

Contract between Convair and Toolco, dated September 10, 1956 (DX 68, Article 16)

Testimony of Rummel (Tr. 1104, 2593)

Testimony of plaintiff's witness Connelly (Tr. 3131-32, 3135, 3233-35)

(iv) The Boeing and Convair contracts were administered by Rummel in the best interests of plaintiff and as though plaintiff rather than Toolco had placed the orders, all of the jet aircraft being configured as closely as possible to plaintiff's unique requirements and specifications.

Testimony of Rummel (Tr. 308, 314, 432-36, 438-40, 443-44, 604-05, 1538)

(v) Plaintiff received 47 of the 63 jet aircraft ordered for it by Toolco from Boeing and Convair, it having been determined in 1959 by Toolco, with the concurrence of the president and other senior officers of plaintiff, that six B-331 jet aircraft and ten CV-880 jet aircraft were surplus to plaintiff's needs.

Sworn statement of Rummel, as amended (TWA 2, pp. 9, 17; Tr. 147-48)

Testimony of Rummel (Tr. 757-63, 2122-23)

Testimony of Wemple (Tr. 5016)

Letter from Coverdale & Colpitts to A. V. Leslie dated March 13, 1959 (DX 218)

Deposition of Cocke (DX 364 for id., pp. 1008-09)

(vi) Toolco disposed of the sixteen surplus jet aircraft as follows:

Its contract rights to the six B-331 jet aircraft were assigned in July, 1959 to Pan American Airways ("Pan Am") with the consent of Boeing and with the consent of plaintiff's president, Thomas, ratified by its Board of Directors.

TWA Board Minutes, dated June 26, 1959 (DX 54)

Supplemental Agreement #5, dated September 3, 1959, to March 19, 1956 contract between Boeing and Toolco (DX 67 and Article 21)

Six of the ten CV-880 aircraft were leased by Convair to Northeast Airlines ("Northeast") in 1960 and 1961 after Convair had reduced Toolco's commitment from 30 to 24 CV-880s in return for Toolco's agreement to purchase six CV-990 jet aircraft.

Sworn statement of Rummel (TWA 2, pp. 9-10)
Testimony of Rummel (Tr. 2915-16)
Toolco-Northeast Control Case, 36 C.A.B. 280, 295 (1962)
Purchase Agreement between General Dynamics and Toolco, dated November 10, 1960 (TWA 12)
Letter from J. V. Naish to Toolco, dated May 6, 1960 (DX 146)

The remaining four CV-880s, after having been repeatedly offered to plaintiff in early 1961, remained parked on the ground until 1962 and 1963, when they were leased to Northeast, in which Toolco had in the meantime acquired substantial control with CAB approval.

Sworn statement of Rummel (TWA 2, p. 10)
Telegram from W. Bew to Rummel, dated February 27, 1961 (DX 72)
Letter from A. V. Leslie to Toolco, dated March 20, 1961 (DX 73)
Testimony of Rummel (Tr. 2364-68, 2370-72)

(vii) In 1961 Toolco ordered from Convair seven additional CV-990 jet aircraft, making a total order of thirteen, which Toolco was prohibited from assigning to anyone except plaintiff without the consent of Convair and none of which was ever completed following plaintiff's rejection of them in early 1961.

Testimony of Rummel (Tr. 2256-57, 2369-70, 2391-92)
Purchase Agreement between General Dynamics and Toolco, dated November 10, 1960 (TWA 12)
Amendment No. 1, dated February 22, 1961, to November 10, 1960 Agreement between General Dynamics and Toolco (TWA 14)
Projection by TWA's planning and research department, dated March 1, 1961 (DX 62)
Letter from J. V. Naish to Toolco, dated May 6, 1960 (DX 146)
Letter from W. P. Gullander to Toolco, dated July 7, 1960 (DX 147)

Defendants' Objections to the Report of the Special Master, dated November 1, 1968

Letter from E. D. Johnson to Toolco, dated July 14, 1960 (DX 148)
Letter from R. M. Holliday to General Dynamics, dated July 14, 1960 (DX 149)
Letter from R. M. Holliday to General Dynamics, dated August 6, 1960 (DX 150)
Letter from R. M. Holliday to General Dynamics, dated September 6, 1960 (DX 152)

5. During the period of the complaint plaintiff acquired and operated various models of piston and jet aircraft manufactured by Boeing, Convair, Douglas, Lockheed and Martin.

Sworn statement of Rummel (TWA 2, pp. 8-9)
Deposition of Rummel (pp. 1267-74)
TWA Motions in Docket 1182, filed March 29, 1951 and April 18, 1958 (DX 321 for id.)
C.A.B. Orders No. E-5324 (April 25, 1951) and No. E-13334 (December 30, 1958) and (DX 321 for id.)
1945, 1949, 1951 and 1953 TWA Annual Reports (TWA 78; TWA 82; TWA 84; TWA 86)
TWA Prospectus, dated February 18, 1949 (TWA 293, p. 21)
Toolco-TWA-Lockheed-Mellon Subordination Agreement, dated June 6, 1947 (DX 272)
Toolco-TWA-Lockheed-Lending Institution Agreement, dated Aug. 4, 1949 (DX 276)
TWA Fifth Supplemental Indenture, dated Aug. 1, 1949 (DX 277)
Toolco-TWA-Equitable Agreement, dated Jan. 16, 1951 (DX 283)

6. During the period of the complaint Rummel and Hughes explored almost every conceivable source of supply of piston, turboprop and jet aircraft in order to obtain the best possible aircraft for plaintiff and, acting in pursuit of

that objective and in the best interest of plaintiff, held discussions or negotiations with Douglas, Martin, Lockheed, Consolidated Vultee (Convair), Boeing, AVRO of Canada and England, Vickers, Handley-Page, Bristol, de Havilland and Sud Aviation.

Testimony of Rummel (Tr. 456-57, 637, 1256-57, 1310-12, 1390-93, 1399)

7. In the period 1953-55, concurrently with exploratory discussions and negotiations with various other potential suppliers of jet aircraft to plaintiff, Rummel and Hughes, with the assistance of plaintiff's technical personnel and general counsel and acting in the best interests of plaintiff carried on exploratory and contract negotiations with Convair for the development and production by it of a jet aircraft, known as the Model 18, which would be uniquely suited to plaintiff's domestic and international requirements; and such negotiations continued until September 1955, when Convair decided not to build the Model 18.

Testimony of Rummel (Tr. 1417-18, 1890-95)
Deposition of Rummel (pp. 886-89, 892)
Running Record of Negotiations with Convair (DX 11)

8. In early 1956 Toolco considered the possibility of developing, subject to approval by the CAB, with which the requisite application was duly filed by plaintiff, a long-range jet aircraft suitable for use by plaintiff on both its domestic and international routes, but the project was abandoned in a few months before it reached the blueprint stage.

Testimony of Rummel (Tr. 3010-16A)
C.A.B. Orders No. E-10360 (June 8, 1956) and No. E-12604 (June 4, 1958) (DX 321 for id.; DX 323 for id.)

Defendants' Objections to the Report of the Special Master, dated November 1, 1968

9. At no time during the period of the complaint did defendants engage in financing the acquisition of aircraft by plaintiff or other air carriers in competition with insurance companies, commercial banks or other lending institutions.

a. Toolco was not a lending institution and did not supply financing of air carriers generally.

b. From time to time Toolco rendered financial assistance to plaintiff, its lawfully acquired subsidiary, frequently as a condition of plaintiff's obtaining loans from the Equitable Life Assurance Society ("Equitable") and other lending institutions, in the form of subordinated loans, guarantees, underwritings of working capital and security issues, and upon conditional sales agreements without recourse and in other forms and upon terms and conditions which are not normally available from lending institutions but are characteristic of financial aid from a parent company to a subsidiary.

9 C.A.B. 381, 384
12 C.A.B. 192, 206, 210
TWA Motions in Docket 1182, filed Feb. 28, 1950; March 29, 1951 (Ex. D); March 25, 1954; May 2, 1956; May 28, 1957 (Amended Motion); April 18, 1958; May 6, 1960; and Dec. 22, 1960 (DX 321 for id.; DX 322 for id.)
C.A.B. Orders No. E-4160 (May 12, 1950); No. E-5324 (April 25, 1951); No. E-8214 (April 1, 1954); No. E-10300 (May 17, 1956); No. E-11432 (June 11, 1957); No. E-13334 (December 30, 1958); No. E-16195 (December 29, 1960) (DX 321 for id.; DX 322 for id.)
TWA Board Minutes, dated January 8, 1947 (TWA 286)
Contract between Toolco and TWA, dated December 26, 1947 (DX 274)
Toolco - TWA - Lockheed - Lending Institutions Agreement, dated August 4, 1949 (DX 276)
Fifth Supplemental Indenture, dated August 1, 1949, to December 1, 1945 Indenture (DX 277)

Conditional sales contract between Toolco and TWA, dated June 6, 1956 (DX 290)
Testimony of Woodfin (DX 270, Ex. A)

10. During the period of the complaint plaintiff obtained financing for the acquisition of aircraft from aircraft manufacturers including Martin and Lockheed and from a number of insurance companies and banks including, among the principal ones, Equitable, the Metropolitan Life Insurance Company ("Metropolitan"), the Mellon National Bank and Trust Company and the Irving Trust Company.

Deposition of Rummel (pp. 1267-74, 1451-55, 1461-67)
9 C.A.B. 381, 382-83
12 C.A.B. 192, 204-05, 222
1945, 1949, 1951, 1953 and 1954 TWA Annual Reports (TWA 78; TWA 82; TWA 84; TWA 86; TWA 87)
TWA Motions in Docket 1182, filed March 29, 1951 and April 18, 1958 (DX 321 for id.)
C.A.B. Orders No. E-5324 (April 25, 1951) and No. E-13334 (December 30, 1958) (DX 321 for id.)
Report of Drexel Harriman Ripley (TWA 5B, Ex. Trans World 4-6)
TWA Board Minutes, dated January 8, 1947 (TWA 286)
TWA Prospectus dated February 18, 1949 (TWA 293, pp. 21, 24-25)
Toolco - TWA - Lockheed - Mellon Subordination Agreement, dated June 6, 1947 (DX 272)
Toolco - TWA - Lockheed - Lending Institutions Agreement, dated August 4, 1949 (DX 276)
TWA Fifth Supplemental Indenture, dated August 1, 1949 (DX 277)
Toolco - TWA - Equitable Agreement, dated January 16, 1951 (DX 283)
TWA-Equitable Bond Purchase Agreement, dated December 30, 1954 (DX 285)

Defendants' Objections to the Report of the Special Master, dated November 1, 1968

11. There is no evidence that Atlas Corporation ("Atlas") engaged at any time during the period of the complaint in the manufacture or development of commercial transport aircraft or in the supplying of such aircraft to U.S. air carriers.

12. In 1960 Atlas, pursuant to an agreement with Toolco, caused Northeast, which it then controlled through stock ownership, to submit to plaintiff, subject to approval of the CAB and of the majority of the stockholders of plaintiff other than Toolco, a proposal of merger, which was reported by a study committee appointed by plaintiffs president, Mr. Thomas, as being fair in its terms and possessing significant cost and income advantages for plaintiff but which lapsed on March 31, 1961 without having been acted upon.

36 C.A.B. 280, 294-95
Report of the Huntington Committee (DX 57)
Deposition of Cocke (Dx 364 for id., pp. 1120, 1181-83, 1191, 1332, 1493)

13. The interim leases under which Toolco leased certain B-131 and B-331 jet aircraft to plaintiff in 1959 and 1960 pending the consummation of permanent financing for their purchase by plaintiff were all approved by the CAB upon applications signed by officers and directors of plaintiff, and neither the applications nor the leases disclose any condition, agreement or understanding that plaintiff "would not purchase or lease aircraft from any other potential supplier thereof."

Motions, Leases, and CAB Orders contained in DX 323 for id.

The Special Master clearly erred in making the following findings for which there is no evidentiary basis in the record which are clearly against the weight of the evidence:

Defendants' Objections to the Report of the Special Master, dated November 1, 1968

14. It was clearly erroneous to find that the negotiations conducted by plaintiff and Toolco with Convair in 1953-1955 for the development and production by Convair of the Model 18 jet aircraft constituted "'engaging in' the development and manufacture of aircraft" by Toolco. (Report, p. 28)

See Part I(A), Objection #7 and citations in support thereof.

15. It was clearly erroneous to find that the short-lived idea in 1955 of having Toolco develop a jet aircraft for plaintiff's use constituted "'engaging in' the development and manufacture of aircraft" by Toolco. (Report, p. 28)

See Part I(A), Objection #8 and citations in support thereof.

16. It was clearly erroneous to find that the activities of Toolco referred to in paragraphs 14 and 15 of the complaint "occurred at the same period of time when TWA alleges that it should have been arranging for purchases from other suppliers such as Boeing Aircraft Corporation (Boeing)." (Report, pp. 28-29)

Complaint, pars. 14, 15, 16, 17

17. There is no evidence to suggest that "the development and manufacture of the Convair 880 aircraft . . . had elements of a joint venture between Toolco and Convair." (Report, p. 29)

Testimony of Rummel (Tr. 2006-2100, 2110-16)
Sworn statement of Rummel (TWA 2, Ex. R-3)
Contract between Convair and Toolco, dated September 10, 1956 (DX 68)
Letter agreement #1 between Convair and Toolco, dated September 20, 1956 (DX 68)
Toolco-Convair telegrams, dated September 18-20, 1956 (DX 68 [following letter agreement #2

Defendants' Objections to the Report of the Special Master, dated November 1, 1968

18. It was clearly erroneous to find that Toolco's purchase of Pratt & Whitney jet engines in 1956 had any other purpose than to serve the best interests of plaintiff by securing the satisfaction of its foreseeable engine requirements at a cost savings or that Toolco resold the engines at a profit. (Report, p. 30)

Testimony of Rummel (Tr. 305-08, 449-65, 2052)
Deposition of Rummel (pp. 961-68)
Letter from R. Holliday to Pratt & Whitney, dated February 14, 1956 (DX 4)
Telegram from R. Holliday to Pratt & Whitney, dated February 15, 1956 (DX 6)
Letter from United Aircraft to Toolco, dated September 7, 1956 (DX 8)
TWX from Boeing to Toolco, dated December 11, 1956 (DX 48)
Supplemental Agreement #3, dated January 10, 1957, to March 2, 1956 contract between Boeing and Toolco (DX 66)

19. It was clearly erroneous to find that Toolco was able to trade in the delivery positions of the jet aircraft it had ordered from manufacturers. (Report, p. 31)

Testimony of Rummel (Tr. 1104, 2915-16)
Testimony of Connelly (Tr. 3131-32, 3135, 3231-35)
Letter from J. B. Connelly to Toolco, dated January 6, 1956 (DX 47)
Contract between Boeing and Toolco, dated March 2, 1956 (DX 66, Article 21)
Contract between Boeing and Toolco, dated March 19, 1956 (DX 67, Article 21)
Contract between Convair and Toolco, dated September 10, 1956 (DX 68, Article 16)
Contract between Convair and Toolco, dated November 10, 1960 (TWA 12, Article 16)
Letter from J. V. Naish to Toolco, dated May 5, 1960 (DX 146)

Defendants' Objections to the Report of the Special Master, dated November 1, 1968

20. It was clearly erroneous to find that the allegation in paragraph 18 of the complaint that "Toolco refused throughout the period 1956 to 1960 to assign to TWA the rights to acquire" the jets which Toolco had ordered from Convair and Boeing had not been disproved. (Report, p. 32)

Sworn statement of Rummel (TWA 2, Ex. R-5)
TWA Motions in Docket 1182 filed January 29, 1959; March 13, 1959; June 26, 1959; September 22, 1959; November 6, 1959; March 30, 1960; April 14, 1960; May 6, 1960; July 1, 1960; and December 22, 1960 (DX 322 for id.)
C.A.B. Orders No. E-13542 (February 26, 1959); No. E-13873 (May 15, 1959); No. E-14169 (July 1, 1959); No. E-14504 (September 30, 1959); No. E-14877 (January 29, 1960); No. E-15430 (June 26, 1960); No. E-15561 (July 21, 1960); and No. E-16195 (December 29, 1960) (DX 322 for id.)
Toolco-TWA Leases dated March 17, March 30, April 18, April 29, May 13, May 24, May 28, June 13, July 1, July 10, and August 1, 1959 (DX 322 for id., item No. 10d)

21. It was clearly erroneous (although irrelevant to a determination as to whether defendants violated the anti-trust laws) to find that plaintiff's management was "Hughes-dominated." (Report, p. 33)

Testimony of Rummel (Tr. 279-81, 412-14, 515-17, 550-51, 1381-84, 1835-40, 2096-2116, 2319-21)
Deposition of Rummel (pp. 394-98, 1201-02)
Rummel Call Sheets (TWA 22)
TWA Annual Reports, 1947-1967 (TWA 80-99; DX 374)
TWA Board Minutes, dated December 13, 1955 and December 5, 1957 (DX 287; DX 34)
Report of R. S. Damon, dated December 6, 1955 (DX 44)
TWA Staff Engineering Report, dated April 19, 1956 (DX 65)

Defendants' Objections to the Report of the Special Master, dated November 1, 1968

22. It was clearly erroneous to find that the factory representatives at the Boeing and Convair factories were Toolco employees reporting to Rummel as special representative of Toolco. (Report, p. 46)
Testimony of Rummel (Tr. 317-23, 326, 384)

B. Erroneous Conclusions of Law

1. The Special Master erred in holding that defendants during the period of the complaint violated the following anti-trust laws:

(a) Section 1 of the Sherman Act;
(b) Section 2 of the Sherman Act;
(c) Section 3 of the Clayton Act;
(d) Section 7 of the Clayton Act.

(N.B.—While there is no express holding to this effect, such a holding is implicit in the Special Master's acceptance without exception or qualification of all of the allegations of the complaint (Report, pp. 25-34). The same comment applies to our objections to other conclusions of law for which no specific reference is cited.)

2. The Special Master erred in holding that the agreement between Toolco and Atlas to submit a proposal for the merger of plaintiff and Northeast to the Board of Directors and minority stockholders of plaintiff was in violation of Section 1 or Section 2 of the Sherman Act.

3. The Special Master erred in holding that Atlas was engaged in a contract, combination or conspiracy with defendants to unreasonably restrain or monopolize interstate trade or commerce in violation of Section 1 or Section 2 of the Sherman Act.

Defendants' Objections to the Report of the Special Master, dated November 1, 1968

4. The Special Master erred in holding that defendants were engaged in a contract, combination or conspiracy within the meaning of Section 1 or Section 2 of the Sherman Act.

5. The Special Master erred in holding that defendants during the period of the complaint unreasonably restrained or monopolized interstate trade or commerce in the furnishing of commercial transport aircraft to U.S. air carriers or to plaintiff in violation of Section 1 or Section 2 of the Sherman Act.

6. The Special Master erred in holding that defendants during the period of the complaint unreasonably restrained or monopolized interstate trade or commerce in the furnishing of financing to U.S. air carriers or to plaintiff for the acquisition of commercial transport aircraft in violation of Section 1 or Section 2 of the Sherman Act.

7. The Special Master erred in holding that defendants leased jet aircraft to plaintiff in violation of Section 3 of the Clayton Act.

8. The Special Master erred in holding that Toolco's acquisition of control of plaintiff violated Section 7 of the Clayton Act.

9. The Special Master erred in holding that he was bound by allegations of the complaint despite an exceedingly strong showing by facts of record or within his judicial knowledge that such allegations were untrue. (Report, pp. 29, 33)

Defendants' Objections to the Report of the Special Master, dated November 1, 1968

10. The Special Master erred in holding that he was bound to accept all the allegations of the complaint, including those which are not factual or definite but conclusory and indefinite. (Report, p. 21)

11. The Special Master erred in refusing to take judicial notice of the contents of opinions of the CAB relating to the acquisition and exercise of Toolco's control of plaintiff and of applications and documents submitted by plaintiff to the CAB for approval in accordance with the terms of the Control Orders. (Report, pp. 26-28, 38-41)

12. The Special Master erred in refusing to admit into evidence or otherwise to consider relevant portions of the deposition testimony of plaintiff by Mr. E. O. Cocke, a senior vice president and director of the plaintiff at the time of the deposition. (Report, pp. 41-43)

II. Determinations Relating to Plaintiff's Claims That it Received an Inadequate and Late Jet Fleet.

A. Clearly Erroneous Findings of Fact.

The Special Master clearly erred, on the undisputed facts of record, in failing to make the following findings which are relevant and material to a determination as to whether plaintiff's failure to receive 15 Boeing B-131 and 18 Boeing B-331 jet aircraft on certain dates set forth in the opinion of Rummel (Annex D to TWA Ex. 2) and to receive 30 Convair 880 jet aircraft on the delivery dates set forth in the Toolco-Convair contract or in Amendment No. 4 thereto were proximately caused by conduct of defendants in violation of the antitrust laws as alleged in the complaint:

Defendants' Objections to the Report of the Special Master, dated November 1, 1968

1. Toolco and TWA originally started talking about jets with Boeing and many other potential jet manufacturers in 1947 or 1948 and in 1953 or 1954 Boeing agreed to give TWA a right of initial refusal of its first jet delivery positions.

Sworn statement of Rummel (TWA 2, pp. 4-5)
Testimony of Rummel (Tr. 1310-12, 1319, 1390-93)

2. In early 1955 and continuously thereafter until sometime in late 1955 Toolco and TWA engaged with Convair in discussions and negotiations which were undertaken in good faith, which were in the best interest of plaintiff and which were conducted with a view to obtaining for plaintiff a long range jet which would be suitable for operation on both its domestic and international routes.

Deposition of Rummel (pp. 890-92)
Testimony of Rummel (Tr. 1399, 1417-19, 1938-39)
Running Record of Negotiations with Convair (DX 11)

3. The jet negotiations between TWA, Toolco and Convair initially were for a jet aircraft known as the Model 18. These negotiations reached an advanced stage before they were terminated by Convair in September, 1955.

Deposition of Rummel (p. 131)
Memorandum from W. E. Beall to W. M. Allen and others, dated September 23, 1955 (DX 168)

4. Following the collapse of the Model 18 negotiations, plaintiff and Toolco continued to negotiate in good faith with Convair for the development and production by it of two other design proposals, the Model 19 and the Model 20, also especially suitable for operation on both the domestic and international routes of plaintiff, until these

proposals were vetoed by the Board of Directors of General Dynamics in November, 1955.

Deposition of Rummel (pp. 131, 892-97)
Testimony of Rummel (Tr. 455-56, 1417-19), 1938-39)

5. Defendants' negotiations with Convair in 1955 did not restrain interstate trade and commerce in the furnishing of jet aircraft to air carriers.

6. Boeing's plans for the B-100 series of commercial jet aircraft were only in a pre-design stage in February, 1955, and they did not progress to a point where serious contract negotiations could take place until June, 1955.

Testimony of Rummel (Tr. 1461)
Testimony of Connelly (Tr. 3261, 3263-64, 3328-31)

7. After June 23 and 24, 1955, when Boeing offered the bulk of its early delivery positions for the B-100 series to Pan Am, American and United, while making no offer to plaintiff, it was impossible for Toolco to obtain equality in early deliveries of B-131 jet aircraft with Pan Am and American.

Letter from W. E. Allen to Pan Am, dated June 23, 1955 (DX 96)
Letter from J. B. Connelly to American, dated June 24, 1955 (DX 97)
Letter from J. B. Connelly to United, dated June 24, 1955 (DX 98)
TWA Memorandum to the Special Master, p. 19
Testimony of Connelly (Tr. 3308)

8. When the rejection of the Convair Model 20 proposal became known in November 1955, Toolco and TWA acted promptly to procure from Boeing delivery commitments for 8 B-131 jet aircraft which Boeing continued to hold

firm as of December 23, 1955 and which were confirmed by a letter agreement of January 6, 1956.

Testimony of Rummel (Tr. 1938-39, 2011-14)
Deposition of Rummel (p. 897)
Memorandum from R. L. Bell to E. C. Wells, dated December 23, 1955 (DX 103)
Letter from J. B. Connelly to Toolco, dated January 6, 1956 (DX 47)

9. The order for 8 B-131 jet aircraft was expanded in subsequent negotiations to include 15 such aircraft with a substantial improvement over the deliveries promised in the January 1956 letter agreement.

DX 47, *supra*, Objection #8
Supplemental Agreement #3, dated January 10, 1957, to March 2, 1956 contract between Boeing and Toolco (DX 66)

10. Plaintiff instituted jet service on its domestic routes in March, 1959, ahead of its largest competitor, United, and of every other domestic trunk carrier except American, a bigger airline, which it lagged by only two months in start of jet service and equalled in the amount of jet service provided in 1959 relative to its size.

1959 United Annual Report (TWA 184)
1959 TWA Annual Report (TWA 92)
C.A.B. Form 41 Reports, Schedules B-7 (DX 358 B and C for id.)
Percent of domestic jets assigned to service (DX 341)

11. If Toolco, instead of ordering B-131 jet aircraft for use on plaintiff's domestic routes had ordered DC-8 jet aircraft from Douglas, the only United States aircraft manufacturer other than Boeing to offer a long-range jet aircraft in 1955, plaintiff would have received such jet

aircraft substantially later than the B-131 jet aircraft which Toolco in fact ordered for it from Boeing.

Article from American Aviation, dated October 24, 1955 (DX 28)
1959 Pan Am Annual Report (TWA 128)
Sworn statement of Rummel (TWA 2, Annex D)

12. Boeing did not develop until December 1955 the intercontinental version of the B-707, known as the B-331 in plaintiff's configuration, to a sufficient extent for contract negotiations to begin with respect thereto.

Memorandum from R. L. Bell to W. E. Beall, dated November 2, 1955 (DX 102)
Testimony of Connelly (Tr. 3093, 3106, 3153, 3365)

13. Toolco commenced negotiations with Boeing for B-331 jet aircraft at about the same time as Pan Am but was unable to obtain delivery positions equal to those which Boeing offered to Pan Am.

Testimony of Rummel (Tr. 2011-13, 2016)
Testimony of Connelly (Tr. 3153)

14. The delivery positions contained in Toolco's formal contract of March 19, 1956 for 18 B-331 jets were substantially better than the positions offered by Boeing in December, 1955.

Memorandum from R. L. Bell to E. C. Wells, dated December 23, 1955 (DX 103)
Contract between Boeing and Toolco, dated March 19, 1956 (DX 67)

15. In 1960 plaintiff's International Division flew a greater percentage of transatlantic seats relative to Pan Am than in any year since 1954 and earned a higher operating profit than Pan Am.

1965 C.A.B. Handbook, pp. 309, 317
Simat Report (DX 271B, p. E-5)

Defendants' Objections to the Report of the Special Master, dated November 1, 1968

16. If Toolco had ordered the intercontinental version of the DC-8 jet aircraft from Douglas, it would have received such aircraft substantially later than the B-331 jet aircraft Toolco in fact ordered for it from Boeing.

Article from American Aviation, dated October 24, 1955 (DX 28)
1959 Pan Am Annual Report (TWA 128)
Sworn statement of Rummel (TWA 2, Annex D)

17. Plaintiff has not shown that, in the absence of any exercise of control by defendants with respect to its procurement of jet aircraft, it would have ordered jet aircraft in 1955 from Boeing rather than from Douglas.

Article from American Aviation, dated September 12, 1955 (DX 26)
Article from American Aviation, dated November 7, 1955 (DX 31)
Memorandum from E. C. Wells to W. E. Beall, dated July 24, 1956 (DX 105)
1958 Eastern Annual Report (DX 312, p. 4)
1959 United Annual Report (TWA 184, p. 6)
1965 C.A.B. Handbook, p. 507
Testimony of Rummel (Tr. 715, 1263-64, 1975-76, 3104)

Receipt of Additional B-331 and CV-880 Jet Aircraft

18. Early in 1959 Toolco determined that it was advisable for plaintiff to reduce its planned jet fleet from 63 to 45 aircraft on the ground that the smaller fleet would be sufficient for plaintiff's needs and better suited to its financial abilities.

Testimony of Rummel (Tr. 575-63, 2122-23)

19. Thomas, the president of plaintiff, and other senior officers of plaintiff were in favor of such a reduced fleet and did not oppose it.

Deposition of Cocke (DX 364 for id., pp. 1008-09)
Testimony of Rummel (Tr. 766-67, 769, 775-76, 1186, 2143-44, 2147)

Defendants' Objections to the Report of the Special Master, dated November 1, 1968

20. Coverdale and Colpitts ("C and C"), a firm of consulting engineers, was requested to review plaintiff's financial projections for 1961 based on a fleet of 45 jet aircraft and advised that the types and numbers proposed would be adequate for a sound and economic operation.

Letter from Coverdale & Colpitts to Charles S. Thomas, dated May 6, 1959 (DX 64)

21. In the spring of 1959 plaintiff was in a poor financial condition, having experienced net losses in 1957 and 1958.

1957 and 1958 TWA Annual Reports (TWA 90; TWA 91)

22. It was not unusual for an airline to cut back on its initial jet orders.

Supplemental Agreement #5, dated July 28, 1958, to March 1, 1956 contract between Boeing and American (DX 85)
American Form 41 Reports, Schedules B-2, 2d and 3rd qtrs. 1961
Southern Transcontinental Service Case (Docket #7984, Tr. 11179)
1958 Eastern Annual Report (DX 312, p. 18)

23. Plaintiff has not shown that the officers or directors of plaintiff were dominated by defendants, that they did not exercise an informed and independent judgment with respect to the procurement and financing of plaintiff's equipment as well as with respect to other phases of plaintiff's business or that they were derelict in performing the obligations and responsibilities of their office.

See Part I(A), Objection #21 and citations in support thereof

24. Rummel was a middle echelon executive whose field of competence was the engineering and economic aspects of aircraft performance and who had no power of decision

with respect to what equipment should be procured by plaintiff.

Testimony of Rummel (Tr. 276, 515-17, 575, 543, 545-53, 595-98, 722-24, 762, 822-24, 1136-37, 1352-53, 1863, 1879, 1921-22, 2124-27, 2766-67, 3008-09)

25. The decision in 1959 to reduce the size of plaintiff's initial jet fleet was not in restraint of interstate trade or commerce in the supply of jet aircraft to air carriers.

See Part II(A), Objections ##18-22 and citations in support thereof

26. Toolco's proposal to offer to assign six surplus B-331 jet aircraft to Pan Am, subject to Boeing's consent, was made with the concurrence of Thomas and was ratified by a unanimous vote of plaintiff's Board of Directors.

Contract between Boeing and Toolco, dated March 19, 1956 (DX 67, Article 21)
TWA Board Minutes, dated June 26, 1959 (DX 54)

27. The decision to assign six surplus B-331 jet aircraft to Pan Am was not in restraint of interstate trade and commerce in the supply of jet aircraft to air carriers.

See Part II(A), Objections ##18-22, 26 and citations in support thereof

28. Plaintiff has not shown that, in the absence of any exercise of control by defendants with respect to its procurement of jet aircraft, it would have ordered as many as 63 jet aircraft or that, if it had done so, it would not have reduced the initial order as being in excess of its needs and financial capabilities.

See Part II(A), Objections ##18-22 and citations in support thereof

Defendants' Objections to the Report of the Special Master, dated November 1, 1968.

29. Plaintiff has not shown that, in the absence of financial assistance from Toolco, it could have financed an initial jet fleet of 63 aircraft or any number of aircraft.

Report, pp. 255-57, 263-64.
Testimony of Woodfin (DX 270, Part II, pp. 37-38).

29A. Plaintiff has not shown that Toolco had the financial ability either to accept delivery of any of the jet aircraft it ordered for plaintiff at any earlier dates than those in which such aircraft were in fact delivered to plaintiff or to pay for any greater number of such aircraft than the number which were in fact delivered to plaintiff in 1959 and 1960.

Early Receipt of CV-880 Jet Aircraft

30. The failure of Convair to meet its delivery commitments for CV-880 jet aircraft, as specified in its original contract with Toolco and in Amendment No. 4 thereto, was the result of numerous factors, such as engineering changes, the arrival of parts and manpower problems, for which defendants were not responsible.

Testimony of Rummel (Tr. 2820-25, 2844-49)
Call Sheets of Rummel (TWA 22)
Memorandum from R. K. Rourke to Rummel, dated January 15, 1960 (DX 116)
Memorandum from J. W. Bew to E. E. Canady, dated December 18, 1959 (DX 122)
Memorandum from N. R. Parmet to R. K. Rourke dated January 13, 1960 (DX 124)
Memorandum from R. K. Rourke to Rummel, dated January 22, 1960 (DX 125)
Memorandum from Rummel to C. S. Thomas, dated February 8, 1960 (DX 217)
Memorandum from R. K. Rourke to D. Digges, dated April 17, 1960 (DX 128)

Defendants' Objections to the Report of the Special Master, dated November 1, 1968.

TWX from J. W. Bew to R. K. Rourke, dated May 27, 1960 (DX 130)
Telegram from J. W. Bew to Rummel, dated February 16, 1961 (DX 137)
Memorandum from R. K. Rourke to Rummel, dated March 1, 1961 (DX 138)

31. Deficiencies in Convair's production of the CV-880, resulting in substantial additional delays, persisted after its resumption of production in January, 1961.

TWA Fleet Requirements, 1961-1970, dated March 1, 1961 (DX 62, p. V-9)
Telegram from J. W. Bew to Rummel, dated February 16, 1961 (DX 137)
Memorandum from R. K. Rourke to Rummel, dated March 1, 1961 (DX 128)
Letter from R. C. Loomis to R. K. Rourke, dated July 11, 1961 (DX 142)
Memorandum from R. K. Rourke to Rummel, dated August 2, 1961 (DX 143)

32. Plaintiff has not shown that defendants were responsible for Convair's delay in the delivery of the CV-880 jet aircraft to plaintiff.

See Part II(A), Objections ##30-31 and citations in support thereof
Plaintiff's Reply Memorandum dated September 24, 1965, pp. 22-23

33. Plaintiff has not shown that defendants' administration of Toolco's contract with Convair unreasonably restrained interstate trade or commerce in the supply of jet aircraft to air carriers.

The Special Master clearly erred in making the following findings for which there is no evidentiary basis in the record or which are clearly against the weight of the evidence:

Earlier Receipt of Boeing Jet Aircraft

Defendants' Objections to the Report of the Special Master, dated November 1, 1968.

34. It was clearly erroneous to find that in or about October, 1955 defendants caused TWA to forego making any arrangements for the acquisition of any jet-powered aircraft. (Report, p. 45)

See Part II(A), Objections ## 2-4, 6-8 and citations in support thereof

35. It was clearly erroneous to find that TWA was prevented from obtaining jet-powered aircraft during the years 1959, 1960 and the first half of 1961. (Report, p. 45)

C.A.B. TWA Form 41 Reports, Schedules B-7, 1959-2d qtr., 1961

36. It was clearly erroneous to find, without more, that in 1955 aircraft manufacturers including Boeing and Douglas had prepared plans and drawings for the manufacture by themselves of jet-powered aircraft intended for commercial use. (Report, p. 46)

Article from American Aviation, dated September 12, 1955 (DX 26)

Article from American Aviation, dated November 7, 1955 (DX 31)

1965 C.A.B. Handbook, p. 507

Testimony of Rummel (Tr. 715, 1263-64, 1461, 1975-76, 3104)

Running Record of Negotiation with Convair (DX 11)

Report, pp. 219, 260

B.—We object to this finding, although literally true, because standing alone it conveys a materially untrue impression of the readiness of Boeing and Douglas to enter into the production of commercial jets. The same comment applies to other objections made to statements "without more," which may or may not be literally true standing alone.)

Defendants' Objections to the Report of the Special Master, dated November 1, 1968.

37. It was clearly erroneous to find that during the last six months of 1955 TWA and Toolco did not engage in negotiations reasonably calculated to preserve TWA's competitive position in the industry for early deliveries of jet aircraft (Report, p. 48)

See Part II(A), Objections ## 2-4, 6-8, 12-13 and citations in support thereof
Testimony of Rummel (Tr. 1399, 1418)
Deposition of Rummel (p. 892)

38. It was clearly erroneous to find, by implication, that Toolco's early demand for priority in delivery positions of Boeing jets was an abnormal demand or caused negotiations with Boeing to be broken off. (Report, p. 48)

Memorandum from Rummel to John A. Collings, dated January 12, 1955 (DX 10)
Testimony of Rummel (Tr. 1431)

39. It was clearly erroneous to state that the complaint alleges that defendants "prevented TWA from entering into negotiations with Boeing". (Report, p. 49)

40. It was clearly erroneous to find that defendants prevented TWA from entering into negotiations with Boeing. (Report, p. 49)

See Part II(A), Objections ## 2-4, 6-8, 12-13, 37 and citations in support thereof.

41. It was clearly erroneous to find that Toolco failed seriously to negotiate with manufacturers during the latter half of 1955. (Report, p. 49)

See Part II(A), Objections ## 2-4, 6-8, 12-13, 37 and citations in support thereof.

42. It was clearly erroneous to find that Toolco acted contrary to TWA's demonstrable competitive needs in nego-

tiating with manufacturers during the latter half of 1955. (Report, p. 49)

See Part II(A), Objections ## 2-4, 6-8, 12-13, 37 and citations in support thereof.

43. It was clearly erroneous to find that Toolco's conduct of negotiations with aircraft manufacturers in the latter half of 1955 resulted in keeping TWA from ever getting as favorable delivery positions for long range jets as those obtained by TWA's principal competitors in the years in question. (Report, p. 49)

See Part II(A), Objections ## 10, 15 and citations in support thereof.

44. It was clearly erroneous to find that Hughes finally authorized negotiations with Boeing for acquisition of jets, presumably for TWA, in late December 1955. (Report, p. 50)

Testimony of Rummel (Tr. 2011-14)

45. It was clearly erroneous to find, without more, that a protective order for 8 delivery positions for Toolco for B-131s was secured from Boeing on January 6, 1956. (Report, p. 50)

Memorandum from R. L. Bell to E. C. Wells, dated December 23, 1955 (DX 103)
Testimony of Rummel (Tr. 2011-14)

46. It was clearly erroneous to find, without more, that a contract for 18 B-331s was entered into on March 19, 1956. (Report, p. 50)

See Part II(A), Objections ## 12-14 and citations in support thereof.

47. It was clearly erroneous to find, without more, that the delivery dates for the Boeing jets were later than those

obtained by the plaintiff's chief competitors. (Report, p. 50)

See Part II(A), Objections ## 10, 15 and citations in support thereof.

48. It was clearly erroneous to find, without qualification, that Toolco retained the power to make a later decision as to the ultimate use and destination of the Boeing jets. (Report, p. 50)

Contract between Boeing and Toolco, dated March 2, 1956 (DX 66, Article 21)
Contract between Boeing and Toolco, dated March 19, 1956 (DX 67, Article 21)

49. It was clearly erroneous to find that the delivery dates of the 18 B-331s ordered by Toolco for plaintiff would have been advanced by making timely orders. (Report, p. 52)

See Part II(A), Objections ## 12-14, 37 and citations in support thereof.

50. It was clearly erroneous to find, without more, that Rummel's testimony was corroborated in many significant aspects by the testimony of Connelly. (Report, p. 53)

E.g., Testimony of Connelly (Tr. 3140, 3339-40)
vis-a-vis Sworn statement of Rummel (TWA 2, p. 10)

51. It was clearly erroneous to find, without qualification, that Connelly participated in and was generally familiar with the negotiations between Boeing and Pan Am, between Boeing and American and between Boeing and Toolco as well as other air carriers. (Report, p. 53)

Testimony of Connelly (Tr. 3283-85, 3294-3304)

52. It was clearly erroneous to find that Boeing would have afforded TWA substantial equality in early delivery

positions with Pan Am and American under any conditions realistically imaginable. (Report, p. 54)

See Part II(A), Objections ## 2-4, 6-8, 12-13, 37 and citations in support thereof.

53. It was clearly erroneous to find, without more, that Connelly testified that the "Statement of Improvement of Delivery Positions" prepared by Rummel was a reasonable estimate of the improvement in delivery positions which TWA would have obtained. (Report, p. 54)

E.g., Testimony of Connelly (Tr. 3083-84, 3088)

54. It was clearly erroneous to find that the Connelly testimony was not seriously controverted, if by "Connelly testimony" is meant his direct testimony. (Report, p. 55)

55. It was clearly erroneous to find that Rummel was chief procurement officer for the plaintiff at the time of the initial jet orders. (Report, p. 56)

See Part II(A), Objection #24 and citations in support thereof.

56. It was clearly erroneous to find that the hypothetical jet fleet and reconstructed delivery dates constitute a proper basis for computing damages. (Report, p. 56)

Receipt of Additional B-331 and CV-880 Jet Aircraft

57. It was clearly erroneous to find that the management of TWA was "Hughes-dominated". (Report, pp. 33, 45, 53, 56)

See Part I(A), Objection #21 and citations in support thereof.

58. It was clearly erroneous to find that the numbers of B-331s and B-131s finally fixed upon were based upon discussions between Rummel and Hughes as to the proper

number of Boeing aircraft for plaintiff's foreseeable needs for long range jets. (Report, p. 50)

Memorandum from E. C. Wells to W. E. Beall, dated July 24, 1956 (DX 105, p. 2)
Testimony of Rummel (Tr. 689-90, 823-25, 1305-10, 2008-09)

59. It was clearly erroneous to find that Hughes caused Toolco to enter into a contract with Convair for thirty CV-880 jet aircraft in April 1956. (Report, pp. 50, 101, 112)

Testimony of Rummel (Tr. 515-17, 2096-2100)
TWA Staff Engineering Report, dated April 19, 1956 (DX 65)

60. It was clearly erroneous to find, without more, that Toolco retained the power to make a later decision as to whether the CV-880 jet aircraft would go to TWA. (Report, p. 50)

Contract between Convair and Toolco, dated September 10, 1956 (DX 68, Article 16)

61. It was clearly erroneous to state that the complaint alleged Toolco's having prevented delivery to TWA of CV-880 aircraft other than those which were leased to Northeast with the acquiescence of TWA. (Report, p. 51)

62. It was clearly erroneous to find that the Connelly testimony reinforced the allegations of the complaint in respect of the inadequacy of the plaintiff's long range jet fleet. (Report, p. 55)

63. It was clearly erroneous to find that Rummel was the chief procurement officer for the plaintiff at the time of the reduction in the jet fleet initially ordered for plaintiff. (Report, p. 56)

See Part II(A), Objection #24 and citations in support thereof.

Defendants' Objections to the Report of the Special Master, dated November 1, 1968.

64. It was clearly erroneous to find that Toolco refused throughout the period 1956 to 1960 to assign to plaintiff the rights to acquire CV-880 jet aircraft. (Report, p. 101)

65. It was clearly erroneous to find that the selection of CV-880 jets by Toolco for medium range operations was based on Rummel's recommendation. (Report, p. 101)
Testimony of Rummel (Tr. 515-17, 2096-2100)

66. It was clearly erroneous to find, without more, that three aircraft leased by Convair to Northeast were aircraft which Toolco had previously assigned to plaintiff on May 9, 1960. (Report, p. 113)

TWA Motion in Docket 1182, filed December 22, 1960 (DX 322 for id.)
Testimony of Rummel (Tr. 2129-30)

67. It was clearly erroneous to find that Toolco had had negotiations with Capital Airlines about selling six to ten CV-880s in January 1959. (Report, p. 113)

68. It was clearly erroneous to find, without more, that Rummel protested about the cutback in the Convair fleet as did other TWA officials. (Report, p. 113)

See Part II(A), Objections ##18-25 and citations in support thereof

69. It was clearly erroneous to find that Hughes summarily dismissed TWA's objections to the cutback in the Convair fleet. (Report, p. 113)

See Part II(A), Objections ##18-25 and citations in support thereof

Earlier Receipt of CV-880 Jet Aircraft

70. It was clearly erroneous to find, without more, that defendants required Convair to make certain changes in the design of Model 880 aircraft on order by Toolco, but pre-

vented TWA from arranging with Convair for certain design modifications which were desired by TWA and which would not have interferred with the scheduled dates of delivery. (Report, pp. 100-101)

Testimony of Rummel (Tr. 308, 314-17, 432-36, 438-40, 443-44, 1538, 2786)

71. It was clearly erroneous to find, without more, that Hughes (who is not a "defendant" as stated) assumed personal control of all matters connected with Convair deliveries that no one else in TWA was permitted to become involved on matters of delivery. (Report, p. 102)

See Part II(A), Objection ##30-31 and citations in support thereof
Sworn statement of Rummel (TWA 2, pp. 3-4)
Testimony of Rummel (Tr. 307-24, 326, 384, 432-36, 438-40, 443-44, 1142-43, 1538)
Contract between Convair and Toolco, dated September 10, 1956 (DX 68, Letter Agreement (e) and Change Orders)

72. It was clearly erroneous to find, without more, that Convair tendered approximately seven or eight completed aircraft in the summer of 1960. (Report, pp. 103, 109)

Testimony of Rummel (Tr. 1125-27, 2756, 2760-65, 2844-49)

73. It was clearly erroneous to state that the complaint alleges that defendants commencing about May, 1960 prevented deliveries of Convair jets from being made and caused substantial delays in deliveries. (Report, p. 109)

74. It was clearly erroneous to find that Convair was able to offer deliveries to plaintiff in May, 1960 (apart from

the one CV-880 delivered to it in May) or that defendants prevented such deliveries from being made or caused substantial delays in deliveries. (Report, p. 109)

See Part II(A), Objection ## 30-31, 70-73 and citations in support thereof

B. Erroneous Conclusions of Law

1. The Special Master erred in holding that the order of default relieved plaintiff from the burden of establishing by a preponderance of the evidence that the damages claimed by it were proximately caused by conduct of defendants in violation of the antitrust laws as alleged in the complaint. (Report, pp. 34-38)

2. The Special Master erred in holding that, because of the default, defendants have the burden of disproving that the damages claimed by plaintiff were proximately caused by conduct of defendants in violation of the antitrust laws as alleged in the complaint. (Report, p. 49)

3. The Special Master erred in holding that the standards of proof sustained in *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), are applicable to a determination as to whether plaintiff in this case has established by a preponderance of the evidence that the damages it claims were proximately caused by conduct of defendants in violation of the antitrust laws as alleged in the complaint.

4. The Special Master erred in holding that the delivery to plaintiff of fifteen Boeing B-131 jet aircraft and twelve Boeing B-331 jet aircraft at dates later than plaintiff now claims the same aircraft would have been delivered if ordered earlier was proximately caused by conduct of de-

fendants in violation of the antitrust laws as alleged in the complaint. (Report, pp. 48-50)

5. The Special Master erred in holding that the delivery to plaintiff of twelve instead of eighteen B-331 jet aircraft and of twenty instead of thirty CV-880 jet aircraft was proximately caused by conduct of defendants in violation of the antitrust laws as alleged in the complaint. (Report, pp. 33, 56, 112-13)

6. The Special Master erred in holding that the delivery to plaintiff of twenty CV-880 jet aircraft at dates later than the dates specified in Amendment No. 4 to the Toolco-Convair contract was proximately caused by conduct of defendants in violation of the antitrust laws as alleged in the complaint. (Report, pp. 108-109)

7. The Special Master erred in holding that defendants are liable for plaintiff's failure to receive 63 Boeing and Convair jet aircraft on the dates he has determined without proof that, but for defendants' conduct in violation of the antitrust laws as alleged, plaintiff would have ordered and taken delivery of such aircraft of the types, in the numbers and at the dates now claimed by plaintiff.

8. The Special Master erred in holding that defendants are liable for plaintiff's failure to receive 63 Boeing and Convair jet aircraft without proof that plaintiff was financially able to order and pay for such a fleet. (Report, p. 263)

9. The Special Master erred in holding that the actions taken and opinions held by plaintiff's chief executive and other senior officers and directors of plaintiff were imma-

terial to the question whether plaintiff would and could have ordered and taken delivery of a fleet of 63 jet aircraft of the types in the numbers and at the dates now claimed by plaintiff. (Report, p. 33)

10. The Special Master erred in receiving into evidence, over objection, hearsay testimony by Rummel respecting the authority of Burgess and Thomas, both presidents of plaintiff, in the field of equipment procurement. (Testimony of Rummel, Tr. 1515-17, 1521)

11. The Special Master erred in relying upon evidence of a settlement of claims between Convair and Toolco as a basis for his determination that defendants were responsible for delays by Convair in delivery of CV-880 jet aircraft to plaintiff. (Report, pp. 103, 109)

12. The Special Master erred in basing findings of fact upon allegations of the complaint without reference to undisputed evidence in the record which contradicted such allegations.

13. The Special Master erred in basing findings of fact on the direct testimony of Rummel and Connelly without reference to testimony by Rummel and Connelly on cross-examination or to evidence contained in TWA and Boeing documents which contradicted such direct testimony.

14. The Special Master erred in basing findings of fact on opinion testimony of Rummel and Connelly which had no factual support in the record or which related to subject matters on which such witnesses were not qualified to give expert testimony.

Defendants' Objections to the Report of the Special Master dated November 1, 1968.

III. Determinations Relating to Plaintiff's Claim that it was Injured by Leasing Jet Aircraft from Toolco.

A. Clearly Erroneous Findings of Fact.

The Special Master clearly erred, on the undisputed facts of record or of which he had judicial knowledge, in failing to make the following findings which are relevant and material to a determination as to whether plaintiff was injured by leasing fifteen B-131 and four B-331 jet aircraft in 1959 and 1960 from Toolco as a proximate result of conduct of defendants in violation of the antitrust laws as alleged in the complaint:

1. In 1959 and 1960 Toolco leased to plaintiff on a day-to-day basis pending the consummation of permanent financing and in order to permit plaintiff to take immediate delivery thereof upon completion by Boeing, 15 B-131 and four B-331 jet aircraft.

TWA Motions in Dkt. 1182 dated January 29, 1959; March 13, 1959; June 26, 1959; September 22, 1959; November 6, 1959 (DX 322 for id.)

CAB Orders No. E-13542 (February 26, 1959); No. E-13873 (May 15, 1959); No. E-14169 (July 1, 1959); No. E-14504 (September 30, 1959); No. E-14877 (January 29, 1960) (DX 322 for id.)

2. All of said leases and all extensions thereof were approved by the CAB, as required under the terms of the Control Orders, upon applications filed by plaintiff and signed by Thomas, the president and a director of plaintiff, Leslie, the financial vice president and a director of plaintiff or Taylor, plaintiff's vice president for government relations.

Defendants' Objections to the Report of the Special Master dated November 1, 1968.

TWA Motions in Dkt. 1182, dated January 29, 1959; March 13, 1959; June 26, 1959; September 22, 1959; November 6, 1959 (DX 322 for id.)
CAB Orders No. E-13542 (February 26, 1959); No. E-13873 (May 15, 1959); No. E-14169 (July 1, 1959); No. E-14504 (September 30, 1959); No. E-14877 (January 29, 1960) (DX 322 for id.)

3. The leases did not contain, and the applications for approval did not disclose, any condition, agreement or understanding that plaintiff would not purchase or lease aircraft from any other potential supplier thereof.

TWA Motions in Dkt. 1182, dated January 29, 1959; March 13, 1959; June 26, 1959; September 22, 1959; November 6, 1959 (DX 322 for id.)
CAB Orders No. E-13542 (February 26, 1959); No. E-13873 (May 15, 1959); No. E-14169 (July 1, 1959); No. E-14504 (September 30, 1959); No. E-14877 (January 29, 1960) (DX 322 for id.)

4. There is no evidence that the rentals under the leases were unreasonably high.

C.A.B. TWA Form 41 Reports, Schedules B-2, 1st Qtr. 1960, 4th Qtr. 1961

5. Except for the rentals paid on the first B-131 until May 1959, Toolco received no payment of rent on any of the leased aircraft until the consummation of the financing on December 30, 1960. 1959 TWA Annual Report (TWA 92, p. 7)

6. There is no testimony by any of plaintiff's witnesses that plaintiff would or could have purchased rather than leased such aircraft in 1959 and 1960 but for conduct by defendants in violation of the antitrust laws as alleged in the complaint.

Defendants' Objections to the Report of the Special Master dated November 1, 1968.

The Special Master clearly erred in making the following findings for which there is no evidentiary basis in the record of which are clearly against the weight of the evidence:

7. It was clearly erroneous to find that the aircraft leased to TWA by Toolco during the period 1959 to 1960 were the first and only jet-powered aircraft made available to TWA by the defendants during the years 1955 to 1960. (Report, p. 169)

Concession of counsel contained in TWA Memorandum to the Special Master, p. 220 and fn.

8. It was clearly erroneous to find that such leases were given on a continuing condition, agreement and understanding that TWA would not purchase or lease aircraft from any other potential supplier thereof. (Report, p. 169)

See Part III(A), Objection #3 and citations in support thereof.

9. It was clearly erroneous to find that plaintiff's experts contended that the defendants forced TWA to lease these jet aircraft from Toolco instead of permitting it to own them. (Report, p. 169)

Testimony of Wemple (Tr. 5038-40, 5047-49)

10. It was clearly erroneous to find that plaintiff's experts contended that the result of the leasing was that TWA had to pay far more to have the use of these aircraft than it would have paid if it had originally bought the aircraft itself. (Report, p. 169)

Testimony of Wemple (Tr. 5048-49, 5052-53, 5071)

11. It was clearly erroneous to find that Toolco not only profited through the receipt of rental payments but also by

taking depreciation on an accelerated basis, creating a tax gain for which it claimed capital gains treatment upon ultimate sale. (Report, p. 169)

(N.B.—We refer to this as a finding by the Special Master although it is stated as a contention by plaintiff, since the Master appears to consider it relevant to his determination that defendants are liable for the leasing.)

B. Erroneous Conclusions of Law

1. The Special Master erred in holding that plaintiff's leasing of fifteen B-131 and four B-331 jet aircraft from Toolco in 1959 and 1960 was proximately caused by conduct of defendants in violation of the antitrust laws as alleged in the complaint. (Report, pp. 180-82)

2. The Special Master erred in holding that paragraph 10(h) of the complaint and other general allegations in the complaint provide a sufficient basis to cover antitrust damages resulting from leasing rather than owning aircraft. (Report, pp. 180-81)

3. The Special Master erred in holding that plaintiff is entitled to recover damages in antitrust representing the claimed excess cost of leasing over ownership of aircraft the leasing of which had been approved by the CAB and thereby acquired the immunities conferred by Section 414 of the Federal Aviation Act. (49 U.S.C. § 1384)

4. The Special Master erred in holding that defendants had the burden of proving that lease arrangements were superior to ownership or that TWA was unwilling or incapable of purchasing jets during 1959-1960. (Report, p. 182)

Defendants' Objections to the Report of the Special Master dated November 1, 1968.

5. The Special Master erred in using the interest cost of capital rather than the appropriate overall cost of capital determined by the CAB to be 10.25%, in computing plaintiff's claim of damages from leasing rather than owning jet aircraft. (Report, pp. 183-84)

IV. Determinations Relating to Amount of Plaintiff's Claim for Lost Operating Profits

A. Clearly Erroneous Findings of Fact—International Division

The Special Master clearly erred in failing to make the following findings with respect to plaintiff's claim that it was damaged in the period 1959-1963 by reason of its failure to receive 18 Boeing B-331 jet aircraft on certain dates set forth in the opinion of Rummel (Annex D to TWA Ex. 2):

1. Plaintiff has failed to establish by a preponderance of the evidence that the operation of the added jet equipment assumed by its expert witness, Wemple, in the period 1959-1963 would have increased the net operating profits, after depreciation, of its International Division over such period.

2. Plaintiff has failed to establish by a preponderance of the evidence that, if it had added the transatlantic jet flights assumed by Wemple in the period 1959-1963, Pan Am would have operated fewer transatlantic jet flights than it in fact operated in 1959 and 1960 or that Pan Am in 1961-1963 and the foreign flag carriers in 1960-1963 would not have responded by operating additional jet flights.

Simat Report (DX 271B, pp. E-4-E-8, E-14-E-16; Ex. E-A, E-B)

Testimony of Simat (Tr. 8436-43, 8463-67A, 8476-79, 8485-87)

Defendants' Objections to the Report of the Special Master, dated November 1, 1968.

3. Plaintiff has failed to establish by a preponderance of the evidence that its operation of the added jet equipment assumed by Wemple in the period 1959-1963 would have increased its transportation revenues from the operation of international charter flights.

Simat Report (DX 271B, pp. E-23-E-25, E-40-E-45)
Testimony of Wemple (Tr. 5804-09, 5862-64)

4. Plaintiff has failed to establish by a preponderance of the evidence that its operation of the added jet equipment assumed by Wemple in the period 1959-1963 would have increased its transportation revenues from flights operated beyond the gateway.

Simat Report (DX 271B, pp. E-23-E-39)
Testimony of Wemple (Tr. 5494-96, 5774-76, 5783-84, 5408, 5809)

5. There is no evidence in the record that, if plaintiff had received B-331 aircraft at the earlier dates assumed by plaintiff it would have leased any such aircraft to Northeast Airlines in October and November, 1959, thereby earning additional net incidental revenues of $200,000.

Coverdale Report (TWA 4C(1), p. 49)
Testimony of Wemple (Tr. 5112-15, 5135-40)

The Special Master clearly erred in making the following findings for which there is no evidentiary basis in the record or which are clearly against the weight of the evidence.

6. The Special Master clearly erred in finding that plaintiff's operation of the added jet equipment assumed by its expert witness, Wemple, in the period 1959-1963 would have increased the total transportation revenues of its International Division by $89.3 million. (Report, pp. 58-75, 78-79)

See Part IV(A), Objections ##2-4 and citations in support thereof.

Defendants' Objections to the Report of the Special Master, dated November 1, 1968.

7. The Special Master clearly erred in finding that the assumed additions to the number of transatlantic flights operated by plaintiff in such period would have taken place without any increase in the number of transatlantic flights operated by Pan Am or foreign flag carriers. (Report, pp. 60-72, 74-75, 79)

See Part IV(A), Objection #2 and citations in support thereof

a. It was clearly erroneous to find that it was the opinion of defendants' expert witness, Simat, that Coverdale's estimate that TWA could increase its share of available transatlantic seats was erroneous. (Report, p. 67)

Simat Report (DX 271A, pp. IV-73-79; DX 271B, pp. E-2-E-3, E-16-E-18)

b. It was clearly erroneous to find, by implication, that Simat's opinion as to the probable competitive response of Pan Am was based in any degree upon the retention by Pan Am of piston seats which were historically retired in 1960 or any later year. (Report, pp. 68, 69-70)

Simat Report (DX 271B, pp. E-10-E-12, E-14-E-16)

c. It was clearly erroneous to find that there was a severe worldwide shortage of jet equipment through 1960 such as to make Simat's opinion unrealistic with respect to the response that would have been made by plaintiff's transatlantic competitors in 1959-1960. (Report, p. 69)

Simat Report (DX 271B, pp. E-8-E-12, E-14-E-16; Exs. E-A, E-B)

Testimony of Simat (Tr. 8436-46, 8463-67A, 8476-79, 8485-89, 8755-57)

Coverdale Report (TWA 4C(1), p. 25)

Testimony of Wemple (Tr. 5164-65, 5216, 5527-28, 5535-36)

d. It was clearly erroneous to find that the equipment assumptions for TWA used by Wemple would have resulted in the use of two fewer jets by U.S. air carriers on transatlantic routes in 1959-1960 and ruled out any probability of competitive response from foreign air lines. (Report, p. 69)

Simat Report (DX 271B, pp. E-8-E-19)
Testimony of Wemple (Tr. 5575-79, 5593-5601)

e. It was clearly erroneous to find that there was no "historical pattern" of response by competitors to additional TWA transatlantic service. (Report, p. 70)

Simat Report (DX 271B, pp. E-4-E-6)

f. It was clearly erroneous to find that in 1960 TWA historically increased its percent of transatlantic seats vis-a-vis Pan Am without competitive response. (Report, p. 70)

Simat Report (DX 271B, pp. E-5-E-6)

g. It was clearly erroneous to find that Pan Am would not have been in an equipment position in 1959 and 1960 to operate the added transatlantic jet flights estimated by Simat as its minimum response to the assumed addition of transatlantic jet flights by plaintiff. (Report, p. 72)

Simat Report (DX 271B, pp. E-8-E-9, E-14, Ex. E-A)

h. It was clearly erroneous to find that foreign flag carriers were not in an equipment position in 1960 to operate the added transatlantic jet flights estimated by Simat as their minimum response to the assumed addition of transatlantic jet flights by plaintiff. (Report, p. 72)

Simat Report (DX 271B, p. E-14, Ex. B)

i. It was clearly erroneous to find that TWA's comparative shortage of jet equipment in 1961 caused it rapidly to lose its market position. (Report, p. 74)

j. It was clearly erroneous to find that TWA's foreign competitors would have weakened their competitive positions on other routes in 1961-1963 if they added the transatlantic jet flights estimated by Simat as their minimum response to the assumed addition of transatlantic jet flights by plaintiff. (Report, p. 75)

Simat Report (DX 271B, p. E-14)

8. The Special Master clearly erred in finding that plaintiff's operation of the added jet equipment assumed by Wemple would have increased its beyond-the-gateway and charter service passengers and revenues in proportion to the increase in its scheduled transatlantic passengers and revenues. (Report, pp. 72-75, 79)

Simat Report (DX 271B, pp. E-23-E-45)
Testimony of Wemple (Tr. 5217, 5494-96, 5499, 5733-36, 5774-75)

9. The Special Master clearly erred in finding that the added costs of operation of plaintiff's International Division in the period 1959-1963, based on Wemple's assumed added equipment and estimated added traffic, would have been no greater than $66.9 million. (Report, pp. 75-77, 79; Schedule facing p. 58)

Simat Report (DX 271B, Part G)

a. It was clearly erroneous to find that Simat's cost estimates, if recomputed on the basis of Wemple's estimates of added traffic, would be at least as low as Wemple's cost estimates. (Report, pp. 77, 79)

Simat Report (DX 271B, Part G)

b. It was clearly erroneous to find that Wemple's estimates as to operating cost should be accepted on the basis that his estimates as to traffic and revenues were accepted. (Report, pp. 77, 79)
Simat Report (DX 271B, Part G)

Defendants' Objections to the Report of the Special Master, dated November 1, 1968.

B. Clearly Erroneous Findings of Fact—Domestic Division

The Special Master clearly erred in failing to make the following findings with respect to plaintiff's claim that it was damaged in the period 1959-1963 by reason of its failure to receive 15 Boeing B-131 and 18 Boeing B-331 jet aircraft on certain dates set forth in the opinion of Rummel (Annex D to TWA Ex. 2) and to receive 30 Convair 880 jet aircraft on the delivery dates set forth in Amendment No. 4 to the Toolco-Convair contract:

1. There is no evidence that if plaintiff had received 15 Boeing B-131, 18 Boeing B-331 and 30 Convair CV-880 jet aircraft on the dates assumed, it would still have leased four Boeing 720B jet aircraft in 1961 and 1962 or acquired 18 Boeing 131B jet aircraft in 1963.

Coverdale Report (TWA 4C(1), pp. 2-3)
Testimony of Wemple (Tr. 4766-67)

2. Plaintiff has failed to establish by a preponderance of the evidence that the operation of the added jet equipment assumed by its expert witness, Wemple, in the period 1959-1963 would have increased the net operating profits, after depreciation, of its Domestic Division over such period.

Simat Report (DX 359A, Part II)

3. Plaintiff has failed to establish by a preponderance of the evidence that it could have sold added jet capacity at the same average rate at which it sold the jet capacity it did operate with any type of jet equipment in any year of the period.

Simat Reports (DX 271B, Part C; DX 359A, pp. II-20-II-32)

4. In the 1959-1963 period the unprecedented expansion of domestic trunk airline capacity resulting from the introduction of jet equipment in the face of a nearly static demand for air travel produced a situation of acute overcapacity which alarmed the

Defendants' Objections to the Report of the Special Master, dated November 1, 1968.

Civil Aeronautics Board as well as the industry.
Testimony of Rummel (Tr. 1799-1800)
Testimony of Wemple (Tr. 10794-800)
Testimony of Simat (Tr. 2999-8000, 8114, 10045-46, 10455-64)
R. Dixon Speas Report (TWA 6B, Figures 38, 57)
1960, 1961, and 1962 Annual Reports of American Airlines (TWA 157; TWA 158; TWA 159)
CAB Order No. E-17885 (December 28, 1961) (DX 259)
Article from Aviation Week, dated January 30, 1961 (DX 257)
Statement of Alan Boyd to House Subcommittee on Appropriations, January 29, 1963 (DX 255 for id.)
Letter from C. C. Tillinghast to Alan Boyd, dated January 29, 1962 (DX 260)
Letter from W. A. Patterson to Alan Boyd, dated January 26, 1962 (DX 261)
Simat Report (DX 271B, pp. 3, C-2-6, C-9)
Simat Report (DX 359A, pp. II-20-24)
C.A.B. Form 41 Reports, Schedules B-7 (DX 358 B & C for id.)
C.A.B. Form 41 Reports, Schedules B-43, 1958-1963 Annual On-Line Passengers Between New York and Los Angeles Carried By American, TWA, and United, 1959 to 1963 (DX 367)
UAL-TWA-AAL, Combined Transcontinental Non-Stop Scheduled Frequencies Per Week—August 1958-1963 (DX 368)
1965 C.A.B. Handbook, pp. 130, 132, 144, 470
Transcontinental Passengers, 1959-1963 (TWA 450, revised)

5. As plaintiff and other airlines added jet capacity in the 1959-1963 period, the average load factors at which they operated jet capacity steadily declined until sometime in 1963.

Simat Reports (DX 271B, Part C; DX 359A, pp. II-20-II-32)

Defendants' Objections to the Report of the Special Master, dated November 1, 1968.

The Special Master clearly erred in making the following findings for which there is no evidentiary basis in the record or which are clearly against the weight of the evidence:

6. The Special Master clearly erred in finding that plaintiff's operation of the added jet equipment assumed by its expert witness, Wemple, in the period 1959-1963 would have increased the total transportation revenues of its Domestic Division by $133.7 million. (Report, p. 141, table facing p. 82)
   Simat Reports (DX 271B, Parts C and D; DX 359A, Part II)

7. The Special Master clearly erred in finding that TWA historically lagged behind its chief domestic competitors in acquiring jets in the years 1959-1963. (Report, pp. 80, 140)
   Percent of domestic jets assigned to service (DX 341)
   TWA's share of Big Three jets assigned to service (DX 342)
   Simat Report (DX 271B, pp. C-17, C-23)

8. The Special Master clearly erred in finding that TWA's shortage of jet equipment in 1959-1963 had a significantly adverse effect on its competitive position. (Report, p. 140)
   Report, p. 307
   Simat Reports (DX 271B, pp. C-17, C-23; DX 359A, Part II)
   Report of TWA System General Manager (DX 254)

9. The Special Master clearly erred in finding that the historical average annual load factor of the same or similar type of aircraft is a proper measure to be used in estimating the added traffic which would have been obtained by TWA from the operation of additional aircraft in any year of the 1959-1963 period. (Report, p. 125)
   See Part IV(B) Objections ## 3-5 and citations in support thereof.

Defendants' Objections to the Report of the Special Master, dated November 1, 1968.

a. It was clearly erroneous to find that the use of the average annual load factor is reasonable as applied to the equipment assumptions of the posited hypothetical TWA jet fleet. (Report, pp. 125-126)

Domestic available seat miles operated: TWA, UAL and AAL (TWA 444)

Coverdale Report (TWA 4C(1), pp. 28, 43, 54-55, 66-67)

Comparison of assumed jet seat miles added with historical jet seat miles flown (DX 379)

Testimony of Wemple (Tr. 10765-66)

b. It was clearly erroneous to find that the industry average load factors for the years in question confirm the reasonableness of the Coverdale computations. (Report, pp. 126-127)

Simat Report (DX 271B, Part C)

c. It was clearly erroneous to find that the addition of nearly two billion revenue passenger miles to TWA's domestic traffic from 1959 through 1962, as estimated by Wemple, could have come from TWA's competitors. (Report, pp. 131-132)

Coverdale Report (TWA 4C(4), Exs. B and C)

Testimony of Simat (Tr. 8152-58, 9045-54)

Availability of jets to American Airlines, actual vs. reconstructed (DX 339)

Daily flight segments scheduled with jet aircraft (DX 340)

d. It was clearly erroneous to find that customer dissatisfaction with inadequate TWA equipment is a key element which supports Wemple's use of the average load factor. (Report, pp. 132-133)

10. The Special Master clearly erred in finding that the marginal load factor, used by defendants' expert, Simat, to estimate the increase or decrease in revenue passenger miles that would have resulted from the assumed additions of jet operations and deletions of piston operations, is inappropriate to measure such increase or decrease. (Report, p. 127)

Defendants' Objections to the Report of the Special Master, dated November 1, 1968.

a. It was clearly erroneous to find that the marginal load factor failed to take into account the diversion of passengers from competitors. (Report, pp. 127, 133)
Testimony of Simat (Tr. 8204-10, 8239-41, 8358-60)

b. It was clearly erroneous to find that, under the applicable assumptions, competitors of TWA would not have had as great a quantity of jets as they had historically. (Report, pp. 127, 132)
Availability of jets to American Airlines, actual vs. reconstructed (DX 339)
Testimony of Simat (Tr. 9045-47)

c. It was clearly erroneous to find that the mathematical result of using the marginal load factor varies widely from the estimate of what in fact would have occurred. (Report, p. 128)

d. It was clearly erroneous to find that the loss of over 3 million passengers to TWA from 1959 through 1963 as the result of adding jet flights and deleting piston flights was unrealistic. (Report, p. 128)
Report, pp. 132, 138
Testimony of Simat (Tr. 7996-8004, 8037-39, 8045, 8065-69, 10036-38, 10040-46)
Testimony of Eichner (Tr. 10357-58)

e. It was clearly erroneous to find that the replacement of pistons with jets could not have resulted in a loss of traffic and revenues to TWA. (Report, pp. 111-12)
Report, pp. 132, 138
Testimony of Simat (Tr. 7996-8004, 8037-39, 8045, 8065-69, 10036-38, 10040-46)
Testimony of Eichner (Tr. 10357-58)

f. It was clearly erroneous to find that the use of the marginal load factor with respect to replaced piston flights was a fundamentally unsound approach. (Report, pp. 130-131)
Simat Report (DX 271B, Part C)

Defendants' Objections to the Report of the Special Master, dated November 1, 1968.

11. The Special Master clearly erred in finding that the factor of annual average stage length of TWA, as used by Coverdale, adequately takes into consideration the various changes in stage lengths accompanying the introduction of jets. (Report, pp. 133-134)

Simat Reports (DX 271B, Part A; DX 359A, Part II-B)

12. The Special Master clearly erred in finding that the Coverdale Report is reasonable in using the actual annual average yield per passenger in computing the dollar yield estimates for assumed added passengers. (Report, p. 134) Simat Report (DX 271B, Part D)

a. It was clearly erroneous to find that the Simat estimates fail to take into consideration adequately the jet fare surcharges and the varying fare structures in operation for various periods and classes of travel. (Report, p. 134)

Simat Report (DX 271B, Part D)

Relationship between first class and tourist passengers for jets and pistons, TWA, 1959-1963 (DX 376)

Use of historical first class and tourist mix relationships for jets and pistons in Wemple's yield calculations (DX 377)

Testimony of Simat (Tr. 8269-73, 10020-27, 10029-33)

13. The Special Master clearly erred in finding that the added costs of operation of plaintiff's Domestic Division in the period 1959-1963 based on Wemple's assumed added traffic and revenues, would have been no greater than $104.4 million. (Report, p. 141, table facing p. 82)

Simat Report (DX 271B, Parts F and G)

Defendants' Objections to the Report of the Special Master, dated November 1, 1968.

C. Clearly Erroneous Findings of Fact—Added Costs of B-331 Operation

1. The Special Master clearly erred in failing to find that, if plaintiff had received six additional B-331 jet aircraft in 1959 and 1960 and therefore had not leased five fanjet B-331B jet aircraft in 1962 and 1963, as assumed by Wemple, it would have incurred added costs of approximately $16.1 million by reason of operating five B-331s instead of five B-331Bs after 1963 until the expiration of the B-331B leases.

Report, pp. 55, 60
Simat Report (DX 271A, Part VIII)
Coverdale Report (TWA 4C(1), p. 12)
Testimony of Simat (Tr. 8818-19)

D. Clearly Erroneous Findings of Fact—Plaintiff's Duty to Mitigate Damages

1. The Special Master clearly erred in failing to find that in 1961 Toolco offered to sell to plaintiff four CV-880 jet aircraft, constituting four of the CV-880s which plaintiff now claims it should have received, and that plaintiff did not accept such offer.

TWA Fleet Requirements 1961-1970 (DX 62, pp. V-4, V-10)
Telegram from J. W. Bew to Rummel, dated February 27, 1961 (DX 72)
Letter from R. Holliday to Tillinghast, dated June 10, 1961 (DX 77)
TWA Board Minutes, dated June 21, 1961 (DX 40)
Testimony of Rummel (Tr. 2351-52, 2368-69, 2399-400, 2420)

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fendants' Objections to the Report of the Special Master, dated November 1, 1968.

a. It was clearly erroneous to find that the marginal load factor failed to take into account the diversion of passengers from competitors. (Report, pp. 127, 133)
Testimony of Simat (Tr. 8204-10, 8239-41, 8358-60)

b. It was clearly erroneous to find that, under the applicable assumptions, competitors of TWA would not have had as consideration the various changes in stage lengths accompanying the introduction of jets. (Report, pp. 133-134)
Simat Reports (DX 271B, Part A; DX 359A, Part II-B)

12. The Special Master clearly erred in finding that the Coverdale Report is reasonable in using the actual annual average yield per passenger in computing the dollar yield estimates for assumed added passengers. (Report, p. 134) Simat Report (DX 271B, Part D)

a. It was clearly erroneous to find that the Simat estimates fail to take into consideration adequately the jet fare surcharges and the varying fare structures in operation for various periods and classes of travel. (Report, p. 134)
Simat Report (DX 271B, Part D)
Relationship between first class and tourist passengers for jets and pistons, TWA, 1959-1963 (DX 376)
Use of historical first class and tourist mix relationships for jets and pistons in Wemple's yield calculations (DX 377)
Testimony of Simat (Tr. 8269-73, 10020-27, 10029-33)

13. The Special Master clearly erred in finding that the added costs of operation of plaintiff's Domestic Division in the period 1959-1963 based on

Wemple's assumed added traffic and revenues, would have been no greater than $104.4 million. (Report, p. 141, table facing p. 82)
Simat Report (DX 271B, Parts F and G)

C. Clearly Erroneous Findings of Fact—Added Costs of B-331 Operation

1. The Special Master clearly erred in failing to find that, if plaintiff had received six additional B-331 jet aircraft in 1959 and 1960 and therefore had not leased five fanjet B-331B jet aircraft in 1962 and 1963, as assumed by Wemple, it would have incurred added costs of approximately $16.1 million by reason of operating five B-331s instead of five B-331Bs after 1963 until the expiration of the B-331B leases.

Report, pp. 55, 60
Simat Report (DX 271A, Part VIII)
Coverdale Report (TWA 4C(1), p. 12)
Testimony of Simat (Tr. 8818-19)

D. Clearly Erroneous Findings of Fact—Plaintiff's Duty to Mitigate Damages

1. The Special Master clearly erred in failing to find that in 1961 Toolco offered to sell to plaintiff four CV-880 jet aircraft, constituting four of the CV-880s which plaintiff now claims it should have received, and that plaintiff did not accept such offer.

TWA Fleet Requirements 1961-1970 (DX 62, pp. V-4, V-10)
Telegram from J. W. Bew to Rummel, dated February 27, 1961 (DX 72)
Letter from R. Holliday to Tillinghast, dated June 10, 1961 (DX 77)
TWA Board Minutes, dated June 21, 1961 (DX 40)
Testimony of Rummel (Tr. 2351-52, 2368-69, 2399-400, 2420)

Defendants' Objections to the Report of the Special Master, dated November 1, 1968.

2. The Special Master clearly erred in failing to find that plaintiff could have acquired additional jet aircraft in the period 1961-1963 and that its failure to acquire such aircraft should be considered in mitigation of damages.

TWA Fleet Requirements 1961-1970 (DX 62)
TWA Executive Committee Minutes, dated March 15, 1961 (DX 71)
TWA Board Minutes, dated March 20, 1961 (Tr. 2352-55)
TWA C.A.B. Form 41 Report, Schedule B-2, 2d qtr. 1961
Memorandum from Rummel to Thomas, dated June 3, 1960 (DX 56)
Telegram from J. W. Bew to Rummel, dated February 27, 1961 (DX 72)
Letter from Tillinghast to R. Holliday, dated June 16, 1961 (DX 78, p. 4)
TWA Board Minutes, dated June 21, 1961 (DX 40, pp. 2-5)
Testimony of Rummel (Tr. 2236-37, 2249-51, 2254, 2257-58, 2366-70, 2391-92, 2399-400, 2405-08, 2411-12, 2414, 2420)

3. The Special Master clearly erred in finding that the purchase by plaintiff in 1961 of four CV-880s from Toolco would not have been feasible as a business matter. (Report, pp. 146-147)

E. Erroneous Conclusions of Law

1. The Special Master erred in holding that, because of the order of default, defendants have the burden of disproving the amount of damages claimed by plaintiff as a result of its claimed receipt of an inadequate and late jet fleet. (Report, p. 140)

2. The Special Master erred in holding that the standards of proof sustained in *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), are applicable to a determination

whether plaintiff in this case has established by a preponderance of the evidence that it would have obtained added operating profits in the amount estimated by its expert witness, Wemple. (Report, p. 140)

3. The Special Master erred in basing findings of fact on opinion testimony of Wemple which is arbitrary and without factual support in the record.

4. The Special Master erred in basing findings of fact upon data and tabulations of data which were not introduced in evidence by either party and were not the subject of expert testimony or cross-examination. (Report, pp. 71, 80, 134-140)

5. The Special Master erred in basing findings of fact upon his own opinion with respect to matters which are properly the subject of expert testimony and as to which no expert testimony was introduced by either party. (Report, pp. 71, 80, 134-140)

6. The Special Master erred in basing findings of fact upon a dictum in a CAB opinion which was not based upon any investigation by the CAB or upon any evidence introduced in a hearing before the CAB. (Report, pp. 111-112)

7. The Special Master erred in holding that the increase in cost after 1963 of operating five B-331 jet aircraft, which plaintiff assumes it would have acquired as a basis for estimating its lost operating profits, over the cost to plaintiff of operating an equivalent number of B-331B jet aircraft, which plaintiff in fact acquired but assumes it would not have acquired, does not constitute a proper deduction from plaintiff's estimate of lost operating profits. (Report, pp. 145, 146)

Defendants' Objections to the Report of the Special Master, dated November 1, 1968.

8. The Special Master erred in holding that plaintiff does not have the burden of establishing that it fulfilled its duty to mitigate damages or that it was relieved of its duty to mitigate damages by reason of controversies with Toolco or the policy of the voting trustees to favor Boeing planes over Convair. (Report, pp. 146-147)

V. Determination Relating To Plaintiff's Claim That Its Business Was Disrupted

The Special Master clearly erred, on the undisputed facts of record, in failing to make the following findings which are relevant and material to a determination as to whether payment of salaries to captains and flight engineers while they were idle prior to the delivery of the Convair 880s and payment of the purported costs of refresher training courses conducted prior to delivery of the 880s were proximately caused by conduct of defendants in violation of the antitrust laws as alleged in the complaint:

1. The claims for business disruption are based on late deliveries of Convair 880 jet aircraft for which defendants were not responsible and which were not the proximate result of any alleged antitrust violation.

See Part II(A), Objections ## 30-33, 75-78 and citations in support thereof.

2. Plaintiff has failed to establish that, as a result of delays in delivery of Convair 880 jet aircraft, it paid any salaries it would not have paid or incurred any other expenses it would not have incurred if such aircraft had been delivered on the dates set forth in Amendment No. 4 to the Toolco-Convair contract.

3. Plaintiff was not damaged by reason of the amounts paid to maintenance instructors for reaching refresher courses since the instructors were on

salary and would have been paid regardless of whether the classes were held.

Sworn statement of Walstrom (TWA 9, p. 5)
Testimony of Walstrom (Tr. 6573)

4. Plaintiff is not entitled to recover wages it paid to many captains and flight engineers for attending refresher courses while they were purportedly idle, in addition to wages paid them while they were idle during the same period.

Testimony of Rowe (Tr. 6631)
Sworn statement of Rowe (TWA 8, Annex A)
Defendants' Brief to Special Master, p. 300 fn.

5. Plaintiff was not damaged by reason of costs allocated by it to the use of its own simulator and transition training plane since such costs would have been incurred regardless of whether the simulator and plane were used for refresher training.

Sworn statement of Rowe (TWA 8, Annex B, n. 6)
Analysis of simulator and transition costs, dated June, 1960 (DX 269)

6. Plaintiff was not damaged by reason of salaries paid to captains, first officers and flight engineers for taking refresher training which was held before or only shortly after June 15, 1960 when TWA would have commenced revenue service with the 880s if the planes had been delivered pursuant to Amendment No. 4 to the Toolco-Convair contract.

Letter of Dudley B. Tenney to the Special Master with enclosures, dated August 30, 1968 (Filed with exhibits, Report, p. 142)
Sworn statement of Rowe (TWA 8, Annex B, Schedule 3)

Defendants' Objections to the Report of the Special Master, dated November 1, 1968.

VI. Determinations Relating to the Computation of the Amount of the Damage Award

A. Clearly Erroneous Findings of Fact—Cost of Capital

The Special Master clearly erred, on the undisputed facts of record, in failing to make the following findings which are relevant and material to a determination of the increased capital cost which plaintiff would have incurred if it had acquired sixty-three jet aircraft in the manner and on the dates assumed by plaintiff:

1. If plaintiff had ordered for purchase fifteen Boeing B-131, eighteen Boeing B-331 jet and thirty Convair CV-880 jet aircraft and received the Boeing aircraft on the dates set forth in the opinion of Rummel (Annex D to TWA Ex. 2) and the Convair aircraft on the dates scheduled in Amendment No. 4 to the Toolco-Convair contract, it would have paid to the manufacturers thereof, prior to delivery, advance deposits and progress payments amounting to $23.5 million for the B-131 aircraft, $34 million for the B-331 aircraft and $26.3 million for the CV-880 aircraft.

Price Waterhouse Report (TWA 7B(2), pp. 28-29, 35-36, 43-44)

2. The interest cost to plaintiff of the capital needed to make such advance deposits and progress payments would have been not less than $12.3 million, which amount is in addition to the increased cost of capital which would have been incurred by plaintiff after receipt of the aircraft.

Price Waterhouse Report (TWA 7B(2), pp. 30, 37, 45)

3. On acquiring the leased B-131 and B-331 jet aircraft from Toolco in December, 1960, plaintiff paid $11.3 million less for the B-131 aircraft and

$2.4 million less for the B-331 aircraft than it would have paid if it had purchased such aircraft directly from Boeing.

Price Waterhouse Report (TWA 7B(2), pp. 30, 37)

The Special Master clearly erred in making the following findings for which there is no evidentiary basis in the record or which are clearly against the weight of the evidence.

4. It was clearly erroneous to find that it would involve elaborate calculations and speculative assumptions, not required in recognizing the historical item of accrued interest on deposits for the twenty CV-880 aircraft, to make provision for funds for advance deposits and progress payments on plaintiff's assumed aircraft purchases. (Report, p. 148)

5. It was clearly erroneous to add Toolco's historical interest cost of $4.1 million on advance deposits for twenty CV-880 aircraft to plaintiff's capital base for the purpose of computing its increased cost of capital, instead of including such amount as part of such increased cost. (Report, p. 155)

6. It was clearly erroneous to exclude capital expenditures for rotable parts, expendable parts and construction work in progress in determining the increased capital cost of the assumed earlier receipt of the fifteen B-131 jet aircraft. (Report, p. 154)

Price Waterhouse Report (TWA 7B(2), pp. 31-33)

7. It was clearly erroneous to exclude capital expenditures for spare engines, rotable parts, other flight equipment, expendable parts and construction work in progress in determining the increased capital cost of the assumed earlier receipt of CV-880 aircraft. (Report, p. 155)

Price Waterhouse Report (TWA 7B(2), pp. 45-49)

8. It was clearly erroneous to compute the increased interest cost of owning the leased B-131 and B-331 jet aircraft only for the years 1959 and 1960. (Report, pp. 184-85)

Defendants' Objections to the Report of the Special Master, dated November 1, 1968.

B. Clearly Erroneous Findings of Fact—Use of TWA Ex. 50

1. The Special Master clearly erred in finding that the principles of combination and adjustment employed by plaintiff's expert witness, Biegler, in reconstructing financial data relating to plaintiff, for the period September 30, 1955—December 31, 1963 in accordance with plaintiff's instructions, as summarized in TWA Ex. 50, as amended, provide a proper basis for adding $12.4 million (before trebling) to the Master's damage award. (Report, pp. 321-322)

Price Waterhouse Report (TWA 7B(1) pp. 1-7; TWA 7B(2), Section V, and Section VI, Parts E, F, H and J)
Price Waterhouse depreciation schedule (TWA 7D)
Coverdale Report (TWA 4C(1), p. 73)
Price Waterhouse summary of its Report (TWA 50)
Testimony of Biegler (Tr. 6315-19, 6321, 6369, 6373, 6390-92, 6409-11, 6405, 6470-75, 6478-81)

C. Erroneous Conclusions of Law

1. The Special Master erred in using the interest cost of capital, rather than the appropriate overall cost of capital determined by the CAB to be 10.25% in computing plaintiff's claim of damages based on estimated loss of profits as a result of its claimed receipt of an inadequate and late jet fleet. (Report, pp. 155-156)

2. The Special Master erred in holding that the interest cost of capital which plaintiff would have incurred in making advance deposits and progress payments on its assumed purchases of jet aircraft should not be deducted

from the estimated increase in its operating profits in computing any damages to which it may be entitled by reason of its claim for lost operating profits. (Report, p. 148)

3. The Special Master erred in holding that plaintiff is entitled to recover damages by reason of retroactive changes in accounting procedures instituted by it after the commencement of this action and at the end of the period for which it claims damages. (Report, pp. 321-322)

WHEREFORE, defendants Hughes Tool Company and Raymond M. Holliday respectfully pray that their objections to the Report of the Special Master be by this Court sustained, that the portions of the Report to which those objections pertain and the Special Master's award of damages to plaintiff in the amount of $137,611,435.95 be rejected pursuant to Rule 53(e)(II) of the Federal Rules of Civil Procedure and that judgment be entered herein for defendants on all of plaintiff's claims for damage.

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Dated: November 1, 1968

Opinion and Order, filed December 23, 1969, Adopting and Confirming the Report of the Special Master

[Doc. 519]

[CAPTION]

METZNER, District Judge.

The special master, Herbert Brownell, Esq., has submitted his report awarding plaintiff $137,611,435.95 as damages after trebling as provided in § 4 of the Clayton Act, 15 U.S.C. § 15. The matter had been referred to him for assessment of damages following the entry of a default judgment imposed as a sanction for failure of Howard R. Hughes to appear for deposition. Trans World Airlines, Inc. *v.* Hughes, 32 F.R.D. 604 (S.D.N.Y. 1963). In the ensuing discussion, plaintiff will be referred to as TWA and defendants Howard R. Hughes and Hughes Tool Company as Hughes and Toolco, respectively.

Both parties have filed objections to the report. The defendants move to confirm those portions of the report which are favorable to them and move to reject those portions which are adverse to their position. If their contentions are correct, TWA is not entitled to any damages. TWA objects to the report on the ground that the amount awarded is inadequate. The maximum figure for which it contends is $510 million plus prejudgment or moratory interest of over $175 million. The respective contentions of the parties will be discussed below.

The history of this litigation, in which TWA sought damages for claimed antitrust violations, shows that it has been long and complex. It was originally instituted on June 30, 1961. On August 31, 1961, the case was assigned to me for

Opinion #36406, filed December 23, 1969, Adopting and Confirming the Report of the Special Master

all purposes pursuant to Rule 2 of the General Rules of this court. Since then it has been the subject of many pretrial rulings, opinions and appeals. The sufficiency of the complaint was upheld in an opinion reported in 214 F.Supp. 106 (S.D.N.Y.1963). In that opinion this court also ruled adversely to defendants' contention that the acts complained of were exempt from the antitrust laws by virtue of certain orders of the Civil Aeronautics Board. After the court was informed that Hughes would refuse to appear for examination, it granted TWA's application for a default judgment. 32 F.R.D., *supra*. The Court of Appeals affirmed the rulings found in 214 F.Supp., *supra*, but refused to pass upon the propriety of the entry of the default judgment. 332 F.2d 602 (2d Cir. 1964). On March 8, 1965, the Supreme Court dismissed writs of certiorari as improvidently granted. 380 U.S. 248, 249, 85 S.Ct. 934, 13 L.Ed.2d 817, 818. The special master and the court then made preliminary rulings as to the effect of the default judgment on the damage hearings. 38 F.R.D. 499 (S.D.N.Y.1965).[1]

[1] Despite these rulings defendants moved to compel TWA to come forward with evidence to preclude the finding of a fact which in effect would remove the basis of TWA's claim. In a memorandum opinion dated January 4, 1966, denying the motion, the court said:

> "A 7-inch stack of affidavits, briefs and supporting documents has been submitted in connection with this motion. After reading them and listening to defendant's extensive argument, one wonders why the case was never defended on the merits, if all that defendant contends for is true. At this late date, after the complaint has been sustained and a default judgment entered, with appeals to the Court of Appeals and a writ of certiorari dismissed by the Supreme Court, defendant now, in effect, seeks summary judgment in its favor. It asks that plaintiff come forward to negative a fact which defendant asserts as true. The shoe is on the other foot. The plaintiff has a judgment in its favor and the only limitation thereon has been spelled out in the order of the Special Master dated July 30, 1965 and the order of this court dated November 16, 1965. Together they outline the procedures to be followed before the Special Master, where the matter is properly pending. The court cannot conceive of any further reason for delay in proceeding before the Special Master until the hearings are completed."

Opinion #36406, filed December 23, 1969, Adopting and Confirming the Report of the Special Master

The hearings before the special master commenced on May 2, 1966. Some 11,000 pages of testimony were taken from expert witnesses in the fields of economics, engineering, finance and accounting. Over 800 exhibits containing 60,000 pages were admitted in evidence. The special master thereafter rendered a 323-page report. A hearing was held on the objections of the parties to the report. They submitted over 1,300 pages of briefs and memoranda, including a 62-page listing by defendants of 216 specific objections to the report.

At page 12 of his report, the special master states, "Despite prior rulings in the case, this [effect of the default] has been the subject of continuing disagreement between the parties in the damage hearings." I thought that this issue had been clearly disposed of in the preliminary report of the original special master, dated July 30, 1965, and in this court's opinion in 38 F.R.D. 499.

As stated in that opinion at page 501:

> "Liability is not an issue for the Special Master except in a very limited sense. The sufficiency of the complaint has already been established by the denial of defendant's motion to dismiss. 214 F.Supp. 106 (S.D.N.Y. 1963), aff'd, 332 F.2d 602 (2d Cir. 1964), writ of cert. dismissed, 380 U.S. 248, 85 S.Ct. 934, 13 L.Ed.2d 817 (1965). By virtue of the default the defendant has admitted the truth of the well-pleaded allegations of the complaint. Thomson v. Wooster, 114 U.S. 104, 5 S.Ct. 788, 29 L.Ed. 105 (1885)."

In the present report, the special master has referred to another case, Harshman v. Knox County, 122 U.S. 306, 7 S.Ct. 1171, 30 L.Ed. 1152 (1887), which on its facts is even stronger than Thomson v. Wooster, *supra*. Without going

into the details of that case it is sufficient to quote the Court's language at page 317, 7 S.Ct. at pages 1175-1176:

> "In the absence of a denial, the fact as stated in the petition of the plaintiff is confessed by the default, and stands as an admission on the record, of its truth by the defendant."

In the hearings before the special master, TWA did not have to present any evidence to support the well-pleaded allegations of the complaint, and defendants may not offer evidence to controvert such allegations. To the extent that they did, it will be disregarded. That opportunity was forfeited by defendants as a result of the default.

Defendants may show, however, that an allegation is not well pleaded, but only in very narrow, exceptional circumstances. The *Thomson* and *Harshman* cases clearly support this rule. For example, an allegation made indefinite or erroneous by other allegations in the same complaint is not a well-pleaded allegation. Other examples, as detailed in 38 F.R.D. at 501, are allegations which are contrary to facts of which the court will take judicial notice, or which are not susceptible of proof by legitimate evidence, or which are contrary to uncontroverted material in the file of the case. That opinion went on to say:

> "However, it may be shown by plaintiff, in the context of this case, that some matters of which the court may take judicial notice should not be so noticed. See McCormick, Evidence § 330 (1954). Where file material is involved, if the plaintiff did not have full opportunity to meet or controvert such material, then it should not be used to nullify the allegation. If evidence merely tends to show that an allegation is not true, the allegation must be taken as true in this default. Finally, the plaintiff is entitled to the bene-

fit of all reasonable inferences from the evidence tendered.

"Attempts by defendant to escape the effects of its default *should be strictly circumscribed.* It should not be afforded an opportunity to litigate what has already been deemed admitted in law. *In the absence of an exceedingly strong showing* that an allegation is untrue *under the rules set forth above,* the allegation stands as admitted." 38 F.R.D. at 501 (emphasis added)...

This quoted language had in mind the impact of the failure of Hughes to appear for deposition. His default stymied TWA in the acquisition and presentation of evidence in support of its claim. As the Court of Appeals said (332 F.2d at 614):

"We think it clear beyond any question, in light of all the circumstances here presented, that the deposition of Hughes was necessary to all aspects of this litigation * * *."

And again at page 615:

"Hughes' deposition was absolutely essential to the proper conduct of the litigation."

Defendants claim that there are allegations in the complaint which are contrary to facts of which the court will take judicial notice. They particularly refer to that portion of the third paragraph of the complaint which alleges that Toolco was engaged

"since in or about 1939 in the development, manufacture and acquisition of aircraft and related equipment from the manufacturers thereof in various states and in the sale and lease of such aircraft to air carriers in various other states for use in interstate and foreign commerce."

They request that judicial notice be taken of the fact that Toolco never "manufactured" or engaged "in the sale and lease" of aircraft. I cannot take judicial notice of these matters because they are not indisputably true.

The question whether judicial notice can be taken of facts which are not indisputable has been the subject of disagreement among scholars. Wigmore thought that notice should not be limited to indisputable facts. He took the position that the taking of judicial notice of a fact merely relieved the offeror of more formal proof. However, this did not prevent his opponent from disputing the fact by offering contrary evidence. 9 Wigmore, Evidence § 2567 (3d ed. 1940). See also Thayer, Preliminary Treatise on Evidence 308-309 (1898); Ohio Bell Telephone Co. v. Public Utilities Comm'n of Ohio, 301 U.S. 292, 301-302, 57 S.Ct. 724, 81 L.Ed. 1093 (1937); United States v. Aluminum Co. of America, 148 F.2d 416, 445-446 (2d Cir. 1945). The more recent thinking is that only indisputable facts such as matters of common knowledge and matters capable of certain verification will be judicially noticed. When noticed such facts are binding on the trier of the facts. Morgan, The Law of Evidence, 1941-1945, 59 Harv.L.Rev. 481, 482-87 (1946); McCormick, Evidence § 330 (1954); McNaughton, Judicial Notice, 14 Vand.L.Rev. 779 (1961); Alvary v. United States, 302 F.2d 790, 794 (2d Cir. 1962).

I do not have to resolve the debate among scholars concerning the taking of judicial notice during trial. It is clear to me that after a default only indisputable facts should be noticed to contradict allegations of the complaint. Otherwise a preliminary hearing would be necessary to afford plaintiff a chance to rebut factual material which a defendant claims should be judicially noticed. See the *Ohio Bell* and *Alcoa* cases, *supra*. In effect it would permit a defendant to litigate facts which are foreclosed by a default under the *Thomson* and *Harshman* cases, *supra*.

Opinion #36406, filed December 23, 1969, Adopting and Confirming the Report of the Special Master

In determining indisputability, the courts will consider "the nature of the subject, the issue involved, and the apparent justice of the case." McCormick, Evidence § 330, at 709 (1954). Each of these factors counts against noticing the proposition offered by defendants. First, the subject of the proposition is not scientific, historical, geographic or statistical matter of the kind courts are most willing to notice. Instead it is a garden variety proposition about who did what, when and where. Second, the facts which defendants wish judicially noticed in this litigaton would be relevant to the central issue of liability under the antitrust laws. The more critical an issue is to a case, the more reluctant courts should be to determine it by taking judicial notice. Third, the apparent justice of the case in the posture of a default based upon wilful refusal to appear for deposition requires me to resolve all doubts against defendants.

The defendants are urging that certain facts are indisputable because they appear in orders of the CAB and material in the CAB files. While judicial notice may be taken of the existence and contents of such material, it does not follow that the court will take judicial notice of the truth or accuracy of the contents. Stasiukevich *v.* Nicolls, 168 F.2d 474, 479 (1st Cir. 1948). In that case the court found that "the findings are merely evidence of the facts asserted," and went on to state that "of course, the other party may introduce evidence tending to prove the contrary of the facts asserted in the official report." Since a finding is merely evidence and is rebuttable, it cannot be considered indisputable. As to material in the CAB files, it stands on even weaker footing, since it has not been subject to any sort of examination of an adversary nature.

Defendants argue that TWA has failed to establish that it received late or inadequate deliveries of jet aircraft as a proximate result of the conduct of the defendants in viola-

tion of the antitrust laws. They assert that the claim "is defective for the further reason that the plaintiff has failed to establish by a preponderance of the evidence that, but for defendants' conduct, it would and could have accomplished the results now asserted."

It has been said of "proximate cause" that:

> "There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion * * * Much of this confusion is due to the fact that no one problem is involved, but a number of different problems, which are not distinguished clearly * * *." Prosser, Law of Torts 240 (3d ed. 1964).

The question of proximate cause involved in this case arises out of a distinction between the *fact* of damage and the *amount* of damage. The Supreme Court explained this distinction recently in Zenith Radio Corp. *v.* Hazeltine Research, Inc., 395 U.S. 100, 114 n. 9, 89 S.Ct. 1562, 1571, 23 L.Ed. 2d 129 (1969):

> "Zenith's burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by its proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and the fact of damage."

Basically defendants seek to deny that they caused *any* injury to TWA, i.e., to deny the *fact* of damages. The fact of damages, however, is an element of liability. The complaint alleges that the defendants committed certain acts which caused injury to TWA. The allegations are admitted by the default and the fact of injury is thereby established. The only question remaining is the amount of damages defendants should pay TWA.

When we come to the computation of the amount of damages in an antitrust case, we look to the rules enunciated in

Opinion #36406, filed December 23, 1969, Adopting and Confirming the Report of the Special Master

Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652 (1946). Those rules are that the trier of the facts must use the most precise proof available, that even where a defendant by his own wrong has prevented a more precise computation, the award may not be based on speculation or guesswork, and that the award must be predicated on a just and reasonable estimate of the damage, based on relevant data.

Finally, the report must be reviewed in the light of the strong presumption in favor of the findings of fact made by the special master. They are to be accepted unless clearly erroneous. Fed.R. Civ.P. 53(e) (2); Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 689, 66 S. Ct. 1187, 90 L.Ed. 1515 (1946); United States v. S. Volpe & Co., 359 F.2d 132, 134 (1st Cir. 1966); E. I. du Pont de Nemours & Co. v. Purofied Down Prods. Corp., 176 F.Supp. 688, 691 (S.D.N.Y. 1959). This rule is the same as Rule 52(a), which is applicable to findings of fact made by the trial court in a non-jury case. Such a finding is clearly erroneous only where "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948).

The complexity of the proof in this case is attested to by the nature of the testimony proffered by the parties. Intricate questions of engineering, finance and economics were involved.[2] They were reviewed and resolved with painstaking care by a special master of extremely high com-

2. An example of the complexities of the proof may be found in the following quotation from the report (page 94) which relates to testimony affecting only one aspect of an item of damage:

"The above formula for the B-331's was determined by a method commonly recognized by statistical experts for determining relationships between two variables, and known as regression analysis or as the method of least squares (Tr. 7805-6). As an example, by plotting on graph paper aircraft hours operated (independent variable) and an amount of operating ex-

petence. Especially apt here is the language of the court in Badenhausen v. Guaranty Trust Co., 145 F.2d 40, 53 (4th Cir. 1944), cert. denied, 323 U.S. 797, 65 S.Ct. 440, 89 L.Ed. 636 (1945), referring to the effect to be given to the findings of a special master who prepared a plan of railroad reorganization:

> "Especially imperative is the rule when, as here, the master has lived with the case for four years, has patiently studied the complex questions involved and has listened with painstaking care in extended hearings to the arguments and proposals of all the parties who desired to be heard."

To the same effect, see Santa Cruz Oil Corp. v. Allbright-Nell Co., 115 F.2d 604 (7th Cir. 1940).

Bearing these considerations in mind, I will first pass upon the specific objections by the defendants to the report of the special master.

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penses (dependent variable) for several airlines, one can connect the dots on the graph with a straight line which represents an average relationship between the points. There are various standards for placing the straight lines, but the method of least squares fits the line to the various observations (dots) so as to reduce the squares of the deviations (differences) to a minimum. It produces a line showing the average of the various lines that might be fitted to the observations. If one squares the deviations and divides by the number of observations, one gets the standard error of estimate; and, given a normal distribution of errors, 68% of the observations should fall within one standard of error and 95% of the observations should fall within two standard errors. Relationships based on fewer observations tend to be more untrustworthy, and results showing a large proportion of observations outside the standard error of estimate likewise tend to be untrustworthy unless validated by independent means.

"No claim was made by Simat that regression analysis was anything more than a statistical method useful in testing the validity of assumptions made by non-mathematical observations and raw data and conclusions based thereupon. Nevertheless Simat was of the opinion that the statistics produced by regression analysis under the assumptions made in his report confirmed his expert opinion as to the financial results that would have been obtained under the relevant equipment assumptions."

Opinion #36406, filed December 23, 1969, Adopting and Confirming the Report of the Special Master

DEFENDANTS' OBJECTIONS TO THE REPORT OF THE SPECIAL MASTER

I. DETERMINATIONS RELATING TO DEFENDANTS' ALLEGED ANTITRUST VIOLATIONS

A. FACTS WHICH DEFENDANTS CLAIM SHOULD HAVE BEEN FOUND.

Objections 1-3 and 13. The suggested findings as to CAB approval are irrelevant to the proceedings and were so adjudged by this court on defendants' motion to dismiss (214 F.Supp. 106), which determination was affirmed by the Court of Appeals (332 F.2d 602) when it said at page 610:

> "Nor do we find any merit in the defendants' alternative contention that the Civil Aeronautics Board, in approving Toolco's acquisition of control over TWA and certain specific transactions thereafter, immunized the defendants from the operation of the antitrust laws as to all the ramifications of these transactions."

Objections 4 with 11 subdivisions. These are suggested findings based on a suggested finding that Toolco never manufactured or supplied commercial transport aircraft to United States air carriers in competition with manufacturers and suppliers of such aircraft. First, the defendants by their default admit that they did engage in such activity. Second, the suggested findings do not necessarily clearly negative liability when all the allegations of the complaint are read together. Third, there is sufficient in the record on this default to justify the refusal of the special master to so find. In this regard, reference is made to the placing of orders by Toolco for Convair 880s built to the specifications of Capital Airlines, the placing of orders for Convair

990s built to the specifications of American Airlines, the sale of Boeing 331s to Pan American and the leasing of Convair 880s to Northeast Airlines.

Objections 5-8. The suggested findings that during the period covered by the complaint Hughes did everything to explore the source of supply jets in the best interests of TWA fly directly in the face of the alleged wrongdoing by the defendants which is admitted by the default. Additionally the record contains evidence to the effect that Hughes was not acting solely in the best interests of TWA in the development of the Model 18 by Convair.

Objections 9, 9a, 9b and 10. These are suggested findings that defendants did not engage in financing the acquisition of aircraft in competition with insurance companies, commercial banks or other lending institutions and that TWA obtained such financing from various airplane manufacturers and banks. I fail to see their relevancy in view of the charges contained in the complaint which are, in effect, that defendants dictated to TWA the methods and means of financing the acquisition of aircraft. See paragraphs 10(g), 23, 24, 26, 27 and 28 of the complaint.

Objections 11 and 12. These are suggested findings that Atlas never manufactured or developed aircraft and submitted a proposal pursuant to an agreement with Toolco for merger of Northeast Airlines and TWA which was reported as being fair. The default admits the allegations of the complaint regarding the conspiracy and that the proposed merger was advantageous to the defendants and disadvantageous to TWA. Further, as regards TWA reports favorable to the merger, the domination and control of TWA by Hughes must be taken into consideration in evaluating such reports.

Opinion #36406, filed December 23, 1969, Adopting and Confirming the Report of the Special Master

B. FINDINGS CLAIMED TO BE CLEARLY ERRONEOUS.

Objections 14, 15 and 17 to the findings that the activity by Toolco constituted "engaging in" the development and manufacture of aircraft by Toolco. The record is sufficient to sustain these findings.

Objection 16 to the finding that Toolco was engaging in this activity when TWA should have been arranging for purchases from other suppliers. This finding is sustained by paragraphs 16, 17, 24, 25 and 26 of the complaint.

Objections 18, 19 and 20 to the findings regarding the purchase of Pratt & Whitney engines, Toolco's trading on its delivery positions as to jets and Toolco's refusal to assign to TWA its rights to acquire jets. These objections are predicated on an assumption that the findings were made after a contested trial following full pretrial discovery procedures. Obviously it is not open to defendant to claim, as it does in objection 20, that it disproved the allegations in paragraph 18 of the complaint, or that the engines were purchased for TWA's best interests and were not resold at a profit.

Objection 21 to the finding that TWA's management was dominated by Hughes is clearly frivolous. The finding is not only admitted by the default, but was so found in 32 F.R.D. at 606 and 332 F.2d at 614.

Objection 22 to the finding that the factory representatives were Toolco employees reporting to Rummel as the representative of Toolco is captious. The record shows that Rummel was Toolco's special representative even though he received compensation from TWA. The factory representatives reported to a TWA employee, Rourke, who reported to Rummel. If Rourke had been paid by Toolco, reimbursement would have been made to Toolco by TWA as part of the cost of the aircraft.

Opinion #36406, filed December 23, 1969, Adopting and Confirming the Report of the Special Master

C. Conclusions of Law Claimed to be Erroneous.

Objections 1-12 are directed to conclusions of law made by the special master. His findings of fact have been sustained by the rulings on the objections made above. Paragraphs 9 and 10 of the complaint have been admitted by the default and defendants' judicial notice argument has been rejected. The conclusions of law are further buttressed by the opinion of the Court of Appeals that the specific transactions alleged to have been effected by the defendants state a cause of action under the antitrust laws. 332 F.2d 602, 611. These objections are overruled.

II. Determinations Relating to TWA's Claim That It Received an Inadequate and Late Jet Fleet.

A. Facts Which Defendants Claim Should Have Been Found.

Objections 1, 2, 3 and 4 are suggested findings similar to those in objections 6 and 7 in I A, *supra,* and are similarly disposed of. It is frivolous to claim that this record could possibly sustain a finding that TWA was an independent negotiator.

Objection 5. The suggested finding that defendants' negotiations with Convair in 1955 did not restrain trade takes a mediate fact, meaningless without other mediate facts, and draws a negative conclusion of law out of context.

Objections 6, 7, 8, 9, 11, 12, 13, 14 and 16. These suggested findings are misleading. They state facts which assume that the conditions were not of defendants' doing. The assumption is wrong, since the state of the record on liability shows that defendants' conduct brought about the fact situation, and it is this very conduct which is the basis of TWA's complaint. Furthermore, reliance on achieving

better delivery dates with an increase in orders only buttresses TWA's position that prompt action with its welfare in mind would have achieved even better results.

Objections 10 and 15. These are suggested findings that TWA equalled its domestic competitors in jet service in 1959, and in 1960 flew more transatlantic seats relative to Pan American and earned a higher operating revenue than Pan American. Assuming the suggested findings to be true, they miss the point in issue that defendants' actions prevented even better results from being achieved.

Objection 17. This is a suggested finding that TWA has failed to show that it would have ordered jet aircraft in 1955 from Boeing rather than from Douglas absent the exercise of any control by defendants. The default precludes the necessity of making any such showing.

Objections 18, 19 and 20. The suggested findings that Toolco in 1959 determined that it was advisable to reduce the planned jet fleet and that Thomas and the firm of Coverdale & Colpitts agreed are negatived by the default and are not borne out by the record.

Objection 21. The suggested finding that in the spring of 1959 TWA was in poor financial condition ignores the allegations of paragraphs 4, 10(b), 10(g), 23, 24 and 26 of the complaint regarding Toolco's domination and control of TWA.

Objection 22. The suggested finding that it was not unusual for an airline to cut back initial jet orders covers only part of the relevant fact. The remainder is that such an airline would, and did, at the same time increase orders for other models.

Objection 23. The suggested finding that TWA has failed to show domination by defendants preventing the exercise of independent judgment by the executives of TWA completely ignores the default.

Opinion #36406, filed December 23, 1969, Adopting and Confirming the Report of the Special Master

Objection 24. The suggested finding that Rummel was a middle echelon executive with no power of decision as to what equipment could be purchased by TWA ignores the record, unless it be defendants' contention that the decision as to what equipment could be purchased was lodged in Hughes.

Objections 25 and 33. The suggested findings that the decision to reduce the size of the initial jet fleet and that the administration of the Convair contract by defendants was not in restraint of trade are contrary to the admissions made by the default.

Objection 26. The suggested finding that Thomas and the board of directors of TWA ratified the transfer by Toolco of six of the Boeing 331s to TWA's competitor Pan American overlooks the admitted exercise of control and domination of TWA by Hughes.

Objection 27. The suggested finding that the transfer was not in restraint of trade is contrary to the admissions made by the default.

Objections 28, 29 and 29A. These are suggested findings that TWA has failed to show that absent control by defendants it would have ordered 63 jets, that it could have financed such fleet and obtained earlier delivery dates. The default precludes the necessity of making any such showing.

Objections 30, 31 and 32. These are suggested findings that failure to meet the delivery schedule of the Convair 880s was not defendants' responsibility, that such delay was attributable to Convair, even after January 1961. The suggested findings are contrary to the admissions inherent in the default and to the testimony in the record.

Objection 33. The suggested finding that TWA has failed to show that defendants' administration of the Convair contract unreasonably restrained trade ignores the effect of the default.

Opinion #36406, filed December 23, 1969, Adopting and Confirming the Report of the Special Master

B. Findings Claimed to be Clearly Erroneous.

The objections under this subdivision are numbered 34 through 74. In the main, the findings attacked are just the opposite of what defendants claim the special master should have found as set forth in objections 1 through 33 in II A above.

The findings made by the special master which are referred to in this subdivision are not clearly erroneous. As to objection 56 to the finding that the hypothetical jet fleet and reconstructed delivery dates constitute a proper basis for computing damages, I refer to the discussion of the *Bigelow* case, *supra*. Many of the findings are clearly established by the admissions inherent in the default. Others rely on disputed evidence in the record, but obviously this does not require their rejection under the "clearly erroneous" rule. In addition to these comments for overruling the objections, I refer to specific comments made in ruling on objections 1 through 33 in II A above.

C. Conclusions of Law Claimed to be Erroneous.

Objections 1, 2 and 3 have been disposed of in the discussion of proximate cause and the *Bigelow* case, *supra*. The remaining objections 4 through 14 are directed toward conclusions of law which are amply supported by the findings of fact sustained by the above rulings.

III. Determinations Relating to TWA's Claim That It Was Injured by Leasing Jet Aircraft from Toolco.

A. Facts Which Defendants Claim Should Have Been Found.

Objection 1. The suggested finding that the leases of jets in 1959 and 1960 were made pending consummation of permanent financing disregards the admissions of the allegations in paragraph 20 of the complaint.

Opinion #36406, filed December 23, 1969, Adopting and Confirming the Report of the Special Master

Objections 2 and 3. The suggested findings that the leases were approved by the CAB and did not disclose any restrictions in acquisitions by TWA are subject to the same rulings made on objections 1-3 and 13 in I A above. The leases were between Toolco and its controlled TWA.

Objections 4 and 5. The suggested findings that there is no evidence that the rentals were unreasonably high and that Toolco received no rental until December 30, 1960 are immaterial.

Objection 6. The suggested finding that there is no testimony that TWA would have purchased rather than leased the jets absent the alleged conduct of defendants in violation of the antitrust laws is subject to the same ruling made with regard to objection 17 in II A above.

B. Findings Claimed to be Clearly Erroneous.

Objection 7 to the finding that the leased jets were the first made available to TWA by defendants during the years 1955 to 1960 is overruled because there is no such finding.

Objection 8 to the finding that the leases were made with the understanding that TWA would not lease or purchase jets from other potential suppliers is overruled because of the admission of the factual allegations of paragraph 20 of the complaint.

Objections 9, 10 and 11 refer to statements of contentions by the special master and are not findings.

C. Conclusions of Law Claimed to be Erroneous.

Objections 1 through 5. In view of the rulings and comments on the objections referred to in A and B of this part, the conclusions of law made by the special master, referred to in objections 1 through 4, are correct. Objection 5 to the use of interest cost of capital is more an objection to a finding of fact and is overruled because the finding is not clearly erroneous.

Opinion #36406, filed December 23, 1969, Adopting and Confirming the Report of the Special Master

IV. Determinations Relating to TWA's Claim for Lost Operating Profits.

A. Facts Which Defendants Claim Should Have Been Found With Reference to the International Division.

Objections 1, 2, 3 and 4. These are suggested findings that TWA has failed to prove damage in this category based on assumptions of TWA's expert. They are predicated on finding that the figures of defendants' experts are correct. The refusal to make such findings was not clearly erroneous.

Objection 5 is a suggested finding that there is no evidence in the record to justify an assumption that TWA would have leased Boeing 331s to Northeast in October and November 1959. The assumption made by TWA's expert was justified on the facts as to the time of year and passenger demand.

B. Findings Claimed to be Clearly Erroneous With Reference to the International Division.

Objection 6 is to the finding that there would be an $89.3 million increase in operating revenue. This finding is not clearly erroneous.

Objections 7 through 7j. These objections except 7i are directed to findings as to the "competitive response" which defendants' expert relied on in his computations. The findings are supported by the record and are not clearly erroneous. Objection 7i is to the finding that TWA's comparative shortage of jet equipment caused it to lose its market position. The finding is supported by the record.

Objection 8 is to the finding relating to "beyond-the-gateway and charter service passengers." This finding is supported by the record.

Opinion #36406, filed December 23, 1969, Adopting and Confirming the Report of the Special Master

Objections 9, 9a and 9b. These objections disagree with the special master's findings as to operating costs. The findings are supported by the record.

C. Facts Which Defendants Claim Should Have Been Found With Reference to the Domestic Division.

Objection 1. The suggested finding that there is no evidence that TWA would have leased four Boeing 720Bs or bought 18 Boeing 131Bs would not be a correct finding. The record justifies the opposite finding made by the special master.

Objection 2. The suggested finding that TWA has failed to prove that its net operating profits would have increased is predicated on accepting defendants' evidence. The conflict in the evidence was for the special master to resolve and his contrary finding is supported by the evidence.

Objection 3 is a suggested finding that TWA has failed to prove that its average rate of capacity could have been maintained with an added jet capacity. The suggested finding relies on the testimony of defendants' expert which the special master was entitled to reject.

Objection 4 is a suggested finding that in the 1959-1963 period there was an acute overcapacity which alarmed the CAB as well as the airline industry. The suggested finding does not affect the fact that under proper conditions TWA would have been able at least to maintain its competitive position in relation to other carriers. See chart at page 138 of the report.

Objection 5 is a suggested finding that as airlines added jet capacity in 1959-1963 the load factors steadily declined. The implication of this suggested finding disregards the fact that with an adequate jet fleet TWA's position would have been different. See page 133 of the report.

Opinion #36406, filed December 23, 1969, Adopting and Confirming the Report of the Special Master

D. Findings Claimed to be Clearly Erroneous with Reference to the Domestic Division.

Objections 6 and 13 to the findings as to increased transportation revenues and increased operating costs are overruled. The findings are supported by the record.

Objections 7 and 8 are to the findings as to TWA's shortage of jet equipment. The findings are supported by the record.

Objections 9, 9a and 9b to the findings using the average annual load factor in estimating added traffic are overruled. See comments on the immediately preceding objections 3-5.

Objection 9c. The objection does not encompass the complete finding of the special master.

Objection 9d. The finding objected to is correct in the context used by the special master.

Objections 10, 10a, 10b, 10c, 10d, 10e and 10f. These objections go to findings by the special master in which he refused to accept defendants' testimony as to "marginal load" factor as opposed to accepting TWA's testimony as to "annual average load factor." Here again there is present a conflict of testimony which the special master was justified in resolving as he did. See the findings to which objections 9, 9a and 9b immediately above are directed.

Objection 11 is to the finding that TWA testimony adequately takes into account changes in stage lengths accompanying the introduction of jets. The special master simply resolved the conflicting testimony on this subject and his finding is supported by the record.

Objections 12 and 12a. Here again the objections are predicated on the refusal of the special master to accept the testimony of defendants' expert as opposed to that of TWA's expert. The objections are overruled.

Opinion #36406, filed December 23, 1969, Adopting and Confirming the Report of the Special Master

E. Fact Which Defendants Claim Should Have Been Found with Regard to the Added Cost of Operating the Boeing 331s.

Objection 1. The suggested finding that there would have been increased costs in operating five 331s over the actual cost of operating five 331Bs which were leased is predicated on accepting defendants' testimony. The special master was justified in refusing to do so for the reasons stated in the report.

F. Facts Which Defendants Claim Should Have Been Found with Regard to Mitigation of Damages.

Objections 1 and 2. These are suggested findings that Toolco offered TWA four Convair 880s in 1961 which TWA refused and that TWA could have acquired additional jets in 1961-1963, which it failed to do. The suggested findings completely ignore the existence of the new management of TWA, its problems with defendants at the time, and its business judgment to concentrate on Boeing planes for the best interests of TWA.

G. Finding Claimed to be Clearly Erroneous with Reference to Mitigation of Damages.

Objection 3 to the finding that the purchase of four Convair 880s was not feasible as a business matter is overruled. See comment on the immediately preceding objections 1 and 2.

H. Conclusions of Law Claimed to be Erroneous.

Objection 1. The import of the conclusion as set forth in this objection does not appear in the report.

Opinion #36406, filed December 23, 1969, Adopting and Confirming the Report of the Special Master

Objection 2. The application of the standards of proof set forth in the *Bigelow* case, *supra*, is proper.

Objection 3. The special master was justified in accepting the testimony of TWA's expert.

Objections 4, 5 and 6. The special master acted properly with regard to the matters to which these objections are made.

Objection 7. This objection ties in with objection 1 in E immediately above and is similarly disposed of.

Objection 8. This objection does not correctly reflect the cited page of the report. The conclusion reached by the master there was proper.

V. Determinations Relating to TWA's Claim for Disruption of Its Business.

A. Facts Which Defendants Claim Should Have Been Found.

Objection 1. The suggested finding that the defendants were not responsible for late deliveries of the 880s has been rejected above (II A, objections 30-33).

Objection 2. The suggested finding that TWA was not subject to expenses it would not otherwise have incurred is not sustained by the record.

Objections 3, 4, 5 and 6. These are suggested findings that TWA was not damaged by reason of certain payments made to maintenance instructors and crew members, or costs allocated for use of a simulator and transition training plane. The suggested findings overlook the fact that TWA was paying for enforced idleness and refresher training made necessary by the delays. These are proper items of damage.

Opinion #36406, filed December 23, 1969, Adopting and Confirming the Report of the Special Master

VI. Determinations Relating to the Computation of the Amount of the Damage Award.

A. Facts which defendants claim should have been found.

Objections 1 and 2. The suggested findings relate to a $12.3 million increased cost of capital on advance deposits and progress payments for the reconstructed fleet. The special master explained that to make such findings would "involve elaborate calculations and several speculative assumptions." The suggested findings are not supported by the record.

Objection 3. The suggested finding regarding the cost of purchasing the theretofore leased jets is incomplete and misleading standing alone.

B. Findings claimed to be clearly erroneous.

Objection 4 is to the finding refusing to make provision for increased cost of capital on advanced deposits and progress payments. The finding is merely the opposite of what defendants claim should have been found as detailed in objections 1 and 2 in IV A above. The objection is overruled.

Objection 5 is to the finding which added interest cost on advance deposits for twenty 880s to TWA's capital base. The finding is not clearly erroneous.

Objections 6 and 7 are to the findings excluding capital expenditures for ratable parts, expendable parts and construction work. The findings are not clearly erroneous.

Objection 8 is to the finding limiting to the years 1959 and 1960 the increased interest cost of owning instead of leasing the jets. The special master was justified in making the finding.

Opinion #36406, filed December 23, 1969, Adopting and Confirming the Report of the Special Master

C. Finding Claim To Be Erroneous Regarding the Use of TWA Exhibit 50.

Objection 1 is to the finding that the principles of combination and adjustment used by TWA's expert were proper. The special master was justified in making this finding.

D. Conclusions of Law Claimed To Be Erroneous.

Objection 1 is to the use of the external borrowing rate and is overruled.

Objection 2 relates to objection 4 in VI B above and is overruled.

Objection 3 to the adjustments of TWA's historical financial statements is overruled.

TWA's Objections to the Report of the Special Master

TWA has filed objections to the report on the following grounds:

1. The award as a whole is inadequate.

2. The special master erred in rejecting TWA's comparative profit measure of damages.

3. The award on TWA's claim for losses in operating profits is inadequate.

4. The award on TWA's claim for losses due to leasing jets from Toolco is inadequate.

5. The special master erred in denying damages for losses connected with financing the jet fleet.

6. The special master erred in denying damages for losses due to delay in disposing of the displaced piston aircraft.

7. The special master erred in finding that TWA is not entitled to an award of prejudgment or moratory interest.

I. Inadequacy of Total Award.

The contention that the award as a whole is inadequate is predicated on a claim that it permits the defendants to retain the fruits of their wrongdoing.

Toolco is alleged to have acquired its stock interest in TWA at a cost of $94 million. On May 3, 1966 it sold this stock for a net price of $545.8 million, with a resulting profit of $452 million. After payment of the 25% capital gains tax, the net profit after taxes is calculated at $339 million. I am advised that any judgment for damages in this case is fully deductible from current income for tax purposes. Therefore, on the award recommended by the special master, the ultimate cost to Toolco of paying such award would only be $75 million, leaving Toolco with a net profit of $265 million. TWA claims that Toolco should not be permitted to retain this amount since it violates the theory of unjust enrichment.

The fallacy in the application of this theory to this case is that the profit on the sale of the stock is not attributable to the illegal acts of the defendants. Defendants' control and domination of TWA ended on December 30, 1960. TWA does not seek damages for the period subsequent to 1963 because it claims that by the end of 1963 the ill effects of defendants' control had been eliminated. At that time the stock was selling at about $32 a share compared with $86 a share at the date of sale. Therefore, the high value that the TWA stock reached in 1966 had nothing to do with

the acts of the defendants. There is no dispute that Toolco's acquisition of the controlling interest in TWA was legal. It was the improper exercise of control that is attacked by the complaint. 214 F.Supp. at 109-110. What TWA seeks under this objection is not damages based on unjust enrichment flowing from the acts of the defendants, but rather punishment not within the contemplation of any accepted measure of damages. The cases relied on by TWA (*Bigelow, supra;* Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 38 S.Ct. 186, 62 L.Ed. 451 (1918); Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968)) are not in point, since they speak of the unfairness of permitting a defendant to retain the profits flowing from his illegal acts.

This objection is overruled.

II. The Comparative Profit Measure of Damages.

TWA claims that the special master erred in not using its comparative profit studies as the measure of damages. One such study showed losses to TWA of approximately $170 million. Another showed losses of $121 million. TWA advanced a second measure of damages based on specifically computed losses claimed to flow from the defendants' conduct. The special master proceeded on this theory, but only awarded $45 million of TWA's claim of $105 million.

The first argument to support the comparative profit measure of damages is related to TWA's claim of unjust enrichment. Since the unjust enrichment theory has been rejected, this argument for the use of comparative profit studies fails.

TWA then argues that the comparative profit study is a proper and standard method of measuring damages without

regard to the amount that it would produce. The special master rejected the comparative profit studies because there was a more precise method of ascertaining damages, which was the method he used. Further, he found that the comparative profit study was based on indefinite allegations of the complaint. The method he used was predicated on more specific allegations of the complaint. TWA's reliance on *Bigelow, supra,* for the use of the comparative profit measure of damages is misplaced. In that case the Court found at page 266 of 327 U.S. at page 580 of 66 S.Ct. that it was proper to use comparative receipts to measure damages because the defendants' "wrongful action had prevented petitioners from making any more precise proof of the amount of the damage."

This objection is overruled.

III. Inadequacy of Award for Losses in Operating Profit.

TWA complains that in determining the "cost of capital" factor in computing operating profit the special master erred in using 6% for 1959 and 6.3% for 1960. If the jet fleet had been available for use by TWA at the times it should have been, TWA would have needed capital at those times to finance the purchase of the jets. The interest paid for borrowing the money would be a cost factor to be added to other operating expenses each year, and would be offset against the expected receipts to determine the operating profits that would be realized if there had been an adequate jet fleet.

The special master first determined the amount of money that had to be available beginning in 1959 to finance the purchases based on the "reconstructed" delivery dates of the aircraft. He then applied TWA's historical external

borrowing rate at those times to arrive at the yearly cost of capital.

TWA contends that it was error to use this rate because its financial condition and the program of financing it followed were the result of the illegal acts of the defendants. It claims that if it had been free of restraint it could have undertaken financing in 1955, and that the maximum cost of borrowing would have been only the 4¾% paid by its competitors in 1955 and 1956 rather than the 6 to 6½% it paid in 1960.

The use of the lower rate for "cost of capital" would increase the operating profits found by the special master for the years in question, and would result in an increase of $4.9 million (before trebling) in the award for this item of damage.

The special master rejected TWA's theory of damage on losses connected with financing the jets (see V below). Included in that loss was a projected cost of capital predicated on what TWA might have done in the area of financing in 1955. In view of this ruling, the rate of interest paid by competitors in 1955-1956 is not the true measuring rod. Rather, the rate paid by competitors in 1959 and 1960 is the more accurate figure. The record shows that it ranged from 5 to 6½%, not significantly different from the 6 and 6.3% rate used by the special master.

This objection is overruled.

IV. Inadequacy of Award for Losses Due to Leasing Jets from Toolco.

TWA seeks an increase of $1.6 million (before trebling) in the award for this item of damage. What has been said in III above applies equally as well to this objection. This objection is overruled.

Opinion #36406, filed December 23, 1969, Adopting and Confirming the Report of the Special Master

V. Refusal to Award Damages for Injuries Alleged to Have Been Suffered in Financing the Jets.

It is the claim of TWA that the illegal acts of defendants with respect to financing the acquisition of jets by TWA caused it damage in the amount of $30 million. The claimed damage is based on the difference in its cost under the program which it was forced to adopt and a plan which it claims an independent TWA would have adopted. TWA offered expert testimony by Drexel Harriman Ripley, Inc., a firm of investment bankers, as to what an independent TWA would have done to provide adequate financing for the jet age. Defendants countered with their expert, Loeb, Rhoades & Co., a firm of investment bankers.

The special master reviewed the conflicting testimony in detail in pages 186 through 264 of his report. TWA claimed it would have undertaken financing operations in May 1955, October 1955 and May 1959. It appears that the latter two financings depended on "the prudence and doability of the May 1955 equity financing."

The special master referred to the standards of the *Bigelow* case (see page 12 of this opinion) and also noted that he was aware that TWA's financial condition in 1955 reflected the influences of Toolco. He then stated (page 258 of the report):

> "However, after careful deliberation, I have determined that TWA has not established that a prudent and competent management of TWA acting independently and free of any control or interference on the part of Toolco would and should have calculated in the spring of 1955 the amount of the financial requirements of TWA for the jet aircraft age. It is also my determination that an independent and prudent TWA management would not have accepted the

recommendation of Drexel Harriman Ripley that TWA sell in May 1955 $55.5 million (net proceeds) in common stock of TWA.

"For me to find to the contrary would in my opinion endow Drexel Harriman Ripley and an independent prudent Board of TWA in 1955 with a prescience, wisdom and perfection of timing that exceeds the natural capacity of the most experienced men acting without the benefit of hindsight."

The special master pointed out that no alternative theory of damages was presented by either TWA or the defendants. After discussing in detail the basis for his findings, the special master concluded that TWA had failed to sustain its burden of proof as to damages claimed to have been suffered as the result of the financing program that it was forced to adopt.

As already indicated, proof as to the amount of damages is unfettered by the effect of the default. The resolution of conflicting testimony is a question for the special master and the clearly erroneous rule is applicable.

This objection is overruled.

VI. Losses on Sales of Used Piston Aircraft.

TWA complains that the special master erred in refusing to award any damages for claimed losses on the sale of piston aircraft. It admits that no other area of damages presented quite such complex questions of computation. The amount of damages it seeks under this item is $2.7 million.

TWA takes the position that when jets were introduced into service pistons were made obsolete. Therefore, any delay in delivery of jets must have caused delay in the disposal of pistons. Since the market price of pistons steadily declined during this period, it is claimed that a loss to TWA resulted.

Opinion #36406, filed December 23, 1969, Adopting and Confirming the Report of the Special Master

Here again the difference must be recognized between the fact of injury which is admitted and the amount of damages which TWA must show flowed from that injury. The special master found that TWA had failed to sustain its burden of proof on this item of damage and detailed his reasons on pages 272 through 295 of his report. I have reviewed those findings and find that they are supported by the record.

This objection is overruled.

VII. Moratory Interest.

TWA has asked to be awarded moratory, or prejudgment, interest on its recovery. This raises the question whether moratory interest is within my power to grant in an antitrust action for treble damages.

The right to interest on a sum recoverable under a federal statute is determined by federal, not local, law. Rodgers v. United States, 332 U.S. 371, 373, 68 S.Ct. 5, 92 L.Ed. 3 (1947); Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 715, 65 S.Ct. 895, 89 L.Ed. 1296 (1945). Under federal law interest is not available on sums recovered as penalties. Rodgers v. United States, *supra;* United States v. United Drill & Tool Corp., 87 U.S.App.D.C. 236, 183 F.2d 998, 1000 (1950) (dictum). Some cases have ruled that interest is also unavailable on double or treble damage recoveries in certain circumstances. Brooklyn Sav. Bank v. O'Neil, *supra* (Fair Labor Standards Act); United States v. Globe Remodeling Co., 196 F.Supp. 652, 658 (D.Vt.1961) (False Claims Act).

Relying on *Brooklyn Bank,* Judge Wyzanski denied moratory interest in a treble damage antitrust case. Cape Cod Food Prods., Inc. v. National Cranberry Ass'n, 119 F.Supp. 900, 911 (D.Mass. 1954). He cites an unpublished decision

by Judge Caffey in this district which reaches the same result. A different result is suggested by the rationale of United Mine Workers v. Coronado Coal Co., 258 F. 289, 846-847 (8th Cir. 1919), rev'd on other grounds, 259 U.S. 344, 42 S.Ct. 570, 66 L.Ed. 975, 27 A.L.R. 762 (1922), but that decision came before *Brooklyn Bank* or *Rodgers*.

Interest should not be allowed in antitrust actions where the statute provides for punitive damages. Treble damages compensate a plaintiff handsomely for all his losses, including loss of the use of money rightfully his.

This objection is overruled.

Conclusion

The report of the special master awarding damages in the sum of $137,611,435.95 pursuant to 15 U.S.C. § 15 is confirmed.

So ordered.

[The above opinion also appears at 308 F. Supp. 679.]

Opinion and Order of April 13, 1970 Awarding an Attorney's Fee and Costs

[Doc. 530]

[CAPTION]

METZNER, District Judge.

Plaintiff, Trans World Airlines, Inc., moves for the award of reasonable attorney's fees and costs of suit as the successful party in this antitrust litigation. Clayton Act § 4, 15 U.S.C. § 15. Plaintiff requests counsel fees in the sum of $10,500,000 and costs of suit in the sum of $2,230,602.

This court has already awarded damages in the sum of $137,611,435.95. 308 F.Supp. 679 (S.D.N.Y. Dec. 23, 1969).

The general rule is that the fixing of counsel fees in an antitrust action is within the discretion of the trial court, "reasonably exercised." Montague & Co. v. Lowry, 193 U.S. 38, 48, 24 S.Ct. 307, 48 L.Ed. 608 (1904). The problem of how to exercise this discretion reasonably has been the subject of much discussion. Farmington Dowel Prods. Co. v. Forster Mfg. Co., 297 F.Supp. 924 (D.Me.1969), modified on appeal, 421 F.2d 61 (1st Cir. 1969); Hanover Shoe, Inc. v. United Shoe Mach. Corp., 245 F.Supp. 258, 302 (M.D.Pa. 1965), vacated on other grounds, 377 F.2d 776 (3d Cir. 1967), aff'd in part on other grounds, rev'd in part on other grounds, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968); Noerr Motor Freight, Inc. 1. Eastern R.R. Pres. Conf., 166 F.Supp. 163, 168 (E.D.Pa.1958), aff'd, 273 F.2d 218 (3d Cir. 1959), rev'd on other grounds, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961). In *Hanover Shoe, supra,* the court detailed what appear to be the generally accepted factors to

be weighed in determining a reasonable attorney's fee. They are:

> "(1) whether plaintiff's counsel had the benefit of a prior judgment or decree in a case brought by the Government,
>
> (2) the standing of counsel at the bar—both counsel receiving the award and opposing counsel,
>
> (3) time and labor spent,
>
> (4) magnitude and complexity of the litigation,
>
> (5) responsibility undertaken,
>
> (6) the amount recovered,
>
> (7) the knowledge the court has of the conferences, arguments that were presented and of work shown by the record to have been done by attorneys for the plaintiff prior to trial,
>
> (8) what it would be reasonable for counsel to charge a victorious plaintiff."

However, these factors are only general guidelines and in the final analysis "The reasonableness of an attorney's fee can only be determined with reference to a particular case." *Noerr, supra,* at 168.

We have here an unprecedented recovery—some 30 times greater than the next highest recoveries on record. In Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 587 (10th Cir. 1961), petition for cert. dismissed per stipulation, Wade v. Union Carbide & Carbon Corp., 371 U.S. 801, 83 S.Ct. 13, 9 L.Ed. 2d 46 (1962), the treble damages were $4,400,000 and in *Hanover Shoe, supra,* at 302, they were $4,239,000. Obviously the fee to be awarded will be unprecedented, but the court will attempt to insulate itself against the impact of the amount requested in determining what a reasonable attorney's fee should be in this case.

Opinion and Order of April 13, 1970 Awarding an Attorney's Fee and Costs

The action was instituted on June 30, 1961. On August 31, 1961 it was assigned to me for all purposes pursuant to rule 2 of the General Rules of this court. The suit was of great magnitude and complexity, and was bitterly contested from its inception. The first phase of the litigation started with defendant Hughes Tool Company conducting deposition proceedings and discovery being made by both parties. Massive sets of interrogatories were served by both parties. The deposition proceedings covered some 80 days of testimony embodied in 13,000 pages of transcript. During this period attempts were made by TWA to serve Howard Hughes so that his deposition might be taken. Toolco engaged in extensive legal maneuverings to forestall the taking of the deposition. Some of those activities are recited in 332 F.2d 602, 611-613 (2d Cir. 1964). Defendant finally moved to dismiss the complaint, which motion was denied, 214 F.Supp. 106 (S.D.N.Y.1963). The culmination of the maneuvering occurred on February 8, 1963 when counsel for Toolco stated that Hughes would not appear for deposition. He referred to "a business decision" not to proceed further with discovery proceedings, but rather to rest on the merits of the positions theretofore taken and seek judicial review thereof. The Court of Appeals said:

> "Hughes' deposition was absolutely essential to the proper conduct of the litigation. Yet he and Toolco seized upon every opportunity to forestall this event. To this end they demanded the production of a multitude of documents by TWA and the additional defendants and secured successive adjournments of the deposition. Indeed, Hughes and Toolco seemed to look upon the entire discovery proceedings as some sort of a game, rather than as a means of securing the just and expeditious settlement of the important matters in dispute. It was only at the very eve of the Hughes deposition—after the other liti-

gants had been put to much delay and expense—that the defendants made a 'business decision' to terminate discovery." 332 F.2d at 615.

Twenty-one pretrial hearings were held by this court during this phase of the litigation, resulting in the entry of many orders and opinions after hearing argument and reading papers submitted on contested matters.

The first phase ended, as far as this court was concerned, with the striking of Toolco's answer for failure of Hughes to appear for deposition. A judgment by default was directed to be entered in favor of TWA against Toolco and the counterclaims asserted by Toolco against TWA were dismissed with prejudice. 32 F.R.D. 604 (S.D.N.Y. 1963). Separate appeals were taken by Toolco from these two determinations (214 F. Supp. 106 and 32 F.R.D. 604), and the hearing on the amout of damages to be awarded TWA was stayed pending these appeals. The Court of Appeals did not pass upon the propriety of the entry of the default judgment against Toolco with respect to the complaint. It limited its review and affirmance to the holding that the district court had jurisdiction of the treble damage action and that issuance of certain orders by the CAB did not constitute a defense to the action. 332 F.2d 602. At the same time it sustained the dismissal of the counterclaims with prejudice because of Toolco's failure to produce Hughes for examination and its failure to produce certain papers and documents. Id. at 615. It also affirmed the granting of summary judgment to the plaintiff on the sixth counterclaim. Id. at 616. The Supreme Court granted certiorari in both appeals, 379 U.S. 912, 85 S.Ct. 261, 13 L.Ed.2d 184 (1964), and after hearing oral argument on March 3 and 4, 1965, dismissed the writs of certiorari as improvidently granted, 380 U.S. 248, 249, 85 S.Ct. 934, 13 L.Ed.2d 817 (1965).

Opinion and Order of April 13, 1970 Awarding an Attorney's Fee and Costs

The second phase of the litigation commenced with the hearings on the damage claims before a special master. Preliminarily, some matters of procedure were disposed of, including an appeal to this court from a ruling of the special master (38 F.R.D. 499 (S.D.N.Y. 1965)), a motion by the defendant which in effect asked for summary judgment in its favor. This latter motion was denied on January 4, 1966. The special master thereafter directed that on May 2, 1966 plaintiff submit in written form all of the testimony it proposed to offer as its affirmative case. Plaintiff offered eight witnesses who were cross-examined by the defendant for a period of 50 days. The defendant followed the same procedure of submitting the testimony of its witnesses in written narrative form and offered four witnesses who were cross-examined by plaintiff for a total of 35 days. The testimony covered some 11,000 pages of transcript with over 800 exhibits containing 60,000 pages admitted in evidence. Experts of recognized standing in the fields of economics, engineering, finance and accounting were called by both sides. At the conclusion of the hearings before the special master, some 745 pages of briefs were submitted by the parties. The special master then rendered a 323-page report. Cross-motions addressed to the report were submitted to the court with an additional 600 pages of briefs by the parties in support of their respective positions. The court's opinion on these motions was rendered on December 23, 1969. 308 F.Supp. 679.

In this application, counsel of record have stated that they have spent 64,000 hours on this case since they were retained by plaintiff. I have excluded some 4,000 hours that are credited to persons who worked on the case but who were not members of the bar in the year that the services were rendered. One of these persons is credited with 3300 hours over a three-year period. An additional 1400

hours have been excluded, since they are not within the period for which compensation should be considered. I have also made an adjustment of hours depending on whether, at the time the services were rendered, the person involved was a partner or associate. The result is that the firm is credited with 58,600 hours, of which 20,000 hours are allocable to partners' time and 38,600 hours allocable to associates' time. These hours were all attributable to the problems of this litigation.

One of the factors to be considered in determining a reasonable fee is whether the plaintiff had the benefit of a prior government judgment or decree. Defendant contends that the default judgment in this case gave plaintiff even greater assistance than a prior government judgment would have offered. This is an oversimplification of the problem. The default occurred only after several years of intensive litigation with appeals by defendant all the way up to the Supreme Court. If there had been a prior judgment which would have the prima facie effect afforded by §5(a) of the Clayton Act, 15 U.S.C. § 16(a), this effort might well have been unnecessary.

Despite the default the issue as to the amount of damages was severely contested. There still remained for disposition intricate and complex issues and proof on the question of damages, which are amply reflected in the report of the special master. In addition defendant relitigated the effect of the default and the scope of judicial notice, which had previously been disposed of (38 F.R.D. 499). The length and scope of the damage hearings belie defendant's argument that "So far as that was concerned [absence of a prior judgment] their job was a cinch. The default • • • left only arithmetic to be done by plaintiff's counsel." For example, an expert offered by defendant was cross-examined for 22 days on the basis of a 656-page

report which he had used in putting together his direct written testimony. Subsequently this witness made corrections in his direct testimony which produced 13 volumes of computer printouts. A supplemental report was then filed by defendant for this witness which contained 230 additional pages with more computer printouts and work papers. All of this had to be analyzed and met by plaintiff's expert witness in this one field of inquiry.

We come now to the question whether compensation may be granted for time spent in this lawsuit on matters unconnected with the award of damages. § 4 of the Clayton Act provides that:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15.

Defendant contends that time spend by plaintiff's counsel in seeking to obtain equitable relief may not be considered in determining the amount to be awarded as counsel fee. This is true since the allowance of attorney's fees is incidental to the statutory right to damages. Decorative Stone Co. v. Building Trades Council, 23 F.2d 426 (2d Cir.), cert. denied, 277 U.S. 594, 48 S.Ct. 530, 72 L.Ed. 1005 (1928) (request for an award of counsel fee rejected where only injunctive relief was sought); Ring v. Spina, 84 F.Supp. 403, 408 (S.D.N.Y. 1949), modified sub nom. Ring v. Authors' League of America, Inc., 186 F.2d 637 (2d Cir.), cert. denied, 341 U.S. 935, 71 S.Ct. 854, 95 L.Ed. 1363 (1951), and Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 888, 899 (S.D.N.Y.1948) (request rejected where damages and injunction were sought, but plaintiff successful in obtaining only an injunction). In this case, however, the

development of the facts was the same for both grounds of claimed relief, and the hours eliminated would merely be those devoted to spelling out the claim for an injunction and applying therefor to the court. Such time would be minimal in the overall picture, but will be taken into account in fixing the fee.

Defendant also contends that the time spent in defending against the counterclaims may not be considered on this application. Bergjans Farm Dairy Co. v. Sanitary Milk Producers, 241 F.Supp. 476, 489 (E.D.Mo.1965), aff'd, 368 F.2d 679 (8th Cir. 1966). This is certainly true as to the sixth counterclaim on which summary judgment was awarded plaintiff. But here again the amount of time involved on this issue is minimal. As to the other five counterclaims, they were inextricably bound up with the claims of plaintiff. Defendant itself stated that "In effect the facts asserted in the counterclaims constitute affirmative defenses to the allegations of the complaint." These affirmative defenses had to be overcome for plaintiff to succeed on its claim for damages and thus should be considered in making the fee award.

Defendant argues that the award of counsel fee should be limited to the time and effort necessary to prove items of damage sustained and may not include an award for time spent on claimed items of damage which were rejected by the trier of the facts. Union Leader Corp. v. Newspapers of New England, Inc., 218 F.Supp. 490 (D.Mass.1963), vacated on other grounds sub nom. Haverhill Gazette Co. v. Union Leader Corp., 333 F.2d 798, 801 n. 2, motion to recall mandate denied, 333 F.2d 808 (1st Cir.), cert. denied, 379 U.S. 931, 85 S.Ct. 329, 13 L.Ed.2d 343 (1964); *Bergjans Farm Dairy Co., supra;* Osborn v. Sinclair Ref. Co., 207 F.Supp. 856, 864 (D.Md.1962), rev'd on other grounds, 324

F.2d 566 (4th Cir. 1963). These decisions are refinements of the rule set forth in the *Decorative Stone, Ring* and *Alden-Rochelle* cases, *supra*. However, the courts in applying this limitation pointed out that they were concerned with cases where the recovery was small in relation to an asserted large claim. It is interesting to note that in *Union Leader* single damages were $29,442 with an award of counsel fee of $60,000 and in *Osborn* single damages were $325 with an award of $14,000. See also Darden v. Besser, 257 F.2d 285 (6th Cir. 1958), where single damages were $15,000 with an award of $30,000.

In the instant case the award, to say the least, is substantial. The failure of the plaintiff to achieve a recovery of $510,000,000 was not due so much to the failure to prove items of damage as it was to the rejection of its theory of measuring damages. There was a reasonable basis for urging the comparative profits theory (Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969); Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264, 66 S.Ct. 574, 90 L.Ed. 652 (1946)) even though the court ultimately ruled against plaintiff on this theory.

Consequently, while reassessment must be made of the time and labor spent by plaintiff in these areas of work, this does not require extensive adjustments in the time factor. The court has been closely involved with this case since August 31, 1961 and is in a position to make a proper evaluation without further proof being called for. This is all the more true since, as indicated below, the time factor is not that crucial in a case such as this.

The firms of Cahill, Gordon, Sonnett, Reindel & Ohl, representing the plaintiff, and Donovan, Leisure, Newton & Irvine and Chester C. Davis, representing the defendants, are recognized as able and experienced counsel. In fact,

the Donovan, Leisure firm was counsel for the successful plaintiff in the *Hanover Shoe* case, *supra.* The history of the proceedings attests to the great responsibility undertaken by counsel.

Defendant points out that plaintiff's application claiming 64,000 hours of time spent on this litigation amounts to a request for $164 an hour for all of the services rendered, whether by senior partners, junior partners, senior associates or junior associates. It then refers to computations made by it of awards in other cases, translated into terms of hourly rates. The requested fee, if it is to be based on a "mix" rate of $164 an hour, could be excessive even in the City of New York. I would estimate that a "mix" rate of $75 an hour would be charged by outstanding, experienced law firms in this city. However, attributing substantial weight to an hourly rate is unfair in a case such as this where success and complexity of issues are such important factors. In *Hanover Shoe, supra,* where the treble damages of $4,239,000 were about the highest heretofore obtained, the court pointed out that it arrived at the fee award of $650,000 on bases other than hours spent by counsel. Consequently, the computation of hourly rates in that case had little meaning.

Similarly, a fee based on a percentage of recovery is not a satisfactory test for this case, although it appears to have been the sole one used in the *Union Carbide* case, *supra,* where the court held that "an allowance of 15 percent of the amount recovered • • • would be reasonable." 300 F.2d at 587. A percentage fee gives undue weight to the size of the recovery. In cases with small recoveries, it completely ignores professional skill and the complexity of the work involved, and could result in an insufficient award for services rendered. See *Union Leader, supra,* 218 F. Supp. at 493; *Noerr, supra,* 166 F.Supp. at 170. Conversely,

where the recovery is extraordinarily high, it could result in an excessive award.

Finally, we come to the eighth factor, which has been framed by two judges as the ultimate test to be applied: that is, a fee which in the judgment of the trial court "would be reasonable for counsel to charge a victorious plaintiff. The rate is the free market price, the figure which a willing, successful client would pay a willing, successful lawyer." Cape Cod Foods Prods., Inc. v. National Cranberry Ass'n, 119 F.Supp. 242, 244 (D. Mass. 1954); *Farmington Dowel, supra,* 297 F.Supp. at 926. On the other hand, this test has been characterized as the outer limits of recovery *Noerr, supra,* 166 F. Supp. at 170.

It seems to me that the major factors bearing on the fixing of attorneys' fees in antitrust cases are the complexity of the problems presented, the skill of counsel, and the measure of success achieved by counsel. The other factors are subsidiary to these and may be helpful in evaluating them, but neither separately nor collectively do these other factors constitute the basis for fixing the fee.

In measuring the success of counsel, only single damages should be considered, since that is the amount produced through the efforts of counsel. Trebling is a penalty imposed by law and automatically attaches to the damages found. Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp., 194 F.2d 846, 859 (8th Cir.), cert. denied, 343 U.S. 942, 72 S.Ct. 1035, 96 L. Ed. 1348 (1952); Milwaukee Towne Corp. v. Loew's, Inc., 190 F.2d 561, 571 (7th Cir. 1951), cert. denied, 342 U.S. 909, 72 S.Ct. 303, 96 L.Ed. 680 (1952). Consequently, the referable recovery here is $45,870,478.

As stated at the outset, the problem of how to reasonably exercise the court's discretion is a difficult one and in the final analysis it can only be resolved with reference to a

particular case. A point is reached where the amount of plaintiff's recovery is unrelated to services of counsel. The large amounts involved do not add to the complexity of the problems, increase the responsibilities of counsel or require greater capabilities of counsel.

After carefully reviewing the entire matter and giving effect to the adjustments discussed above, it is my considered judgment that reasonable attorney's fee in this case is $7,500,000.

Plaintiff requests $2,230,602 as "the cost of suit" allowable by § 4 of the Clayton Act. It concedes that, aside from attorney's fees, no case has ever gone beyond "taxable costs" which are awarded in any case to a successful party. 28 U.S.C. § 1920; Fed.R.Civ.P. 54(d). Similar requests by successful plaintiffs in private antitrust suits to be awarded their "reasonably incurred expenses of litigation" have been uniformly rejected. *Farmington Dowel, supra,* 297 F.Supp. at 930. This request is accordingly denied.

Alternatively, plaintiff requests $396,596.43 as taxable costs. Included in this sum is $28,342.63 claimed for services in connection with attempts to serve Hughes. These charges are based on payments to lawyers and private investigators in several parts of this country and Mexico City. To the extent that these payments are allocable to attempts to serve a summons on Hughes as a defendant in this action, they clearly are not taxable costs against Toolco. They also are not taxable for that portion of the services involved in attempting to serve a witness subpoena on Hughes. § 1920 provides for taxation of fees of witnesses, not the expense of searching out the witness. On the record it is clear that Hughes and Toolco were one and the same, and therefore service of notice to take deposition would have sufficed for plaintiff's purposes. Consequently, this item is disallowed.

Opinion and Order of April 13, 1970 Awarding an Attorney's Fee and Costs

The sum of $19,145.20 for printing costs in the Court of Appeals and the Supreme Court is not taxable, nor are the costs applicable to printing more than 50 copies of the other documents.

As to the transcript of damage hearings, plaintiff may only tax its share of the cost of transcript furnished to the special master plus three additional copies.

Finally, plaintiff has again requested moratory interest to run from the date of the report of the special master. I rejected this plea in my opinion disposing of the motions addressed to the report of the special master. I see no reason to change that disposition in which I said:

> "Interest should not be allowed in antitrust actions where the statute provides for punitive damages. Treble damages compensate a plaintiff handsomely for all his losses, including loss of the use of money rightfully his." 308 F.Supp. at 696.

Judgment shall be entered accordingly. So ordered.

[The above opinion also appears at 312 F.Supp. 478.]

Judgment Entered April 14, 1970

[Doc. 531]

[CAPTION] 61 Civ. 2324

This action came on for hearing before the Court, the Honorable Charles M. Metzner, District Judge, presiding, and the issues having been duly heard, and the Court having rendered its decisions of December 23, 1969 and April 13, 1970, and having directed the entry of judgment thereon,

It is hereby Ordered and Adjudged

That the plaintiff Trans World Airlines, Inc. recover of the defendants Hughes Tool Company and Raymond M. Holliday, jointly and severally, the sums of $137,611,435.95 as damages, $7,500,000.00 as a reasonable attorneys' fee, and $336,705.12 as costs, for a total amount of $145,448,141.07, together with interest thereon at the rate of 6% as provided by law.

Dated at New York, New York, this 14th day of April, 1970.

CHARLES M. METZNER
U. S. D. J.
JOHN LIVINGSTON
Clerk of the Court

Judgment Entered 4/14/70

INDEX

Volume I

	PAGE
List of Relevant Docket Entries	A-x
TWA Complaint [Doc. 1]	A-1
Order Referring This Action to Judge Metzner for All Purposes, dated August 31, 1961 [Doc. 42]	A-33
Opinion and Order of December 5, 1961 [Doc. 50]	A-35
Pretrial Order, February 7, 1962 [Doc. 59]	A-36
Toolco's Answer and Counterclaims [Doc. 63]	A-41
Holliday's Answer [Doc. 83]	A-99
Pretrial Order, July 12, 1962 [Doc. 101]	A-116
Pretrial Order, September 21, 1962 [Doc. 122]	A-118
Pretrial Order, January 10, 1963 [Doc. 144]	A-122
Pretrial Order, January 19, 1963 [Doc. 146]	A-127
Opinion and Order of Special Master dated January 22, 1963, Exhibit C to Bromley Affidavit dated February 15, 1963 [Doc. 179]	A-133
Exhibit A to the Affidavit of John F. Sonnett, dated February 1, 1963 [Doc. 166]	A-143
Exhibits B and C to the Affidavit of John F. Sonnett, dated February 1, 1963 [Doc. 167]	A-226
Pretrial Order, February 1, 1963 [Doc. 168]	A-253
Opinion and Order, February 7, 1963 [Doc. 173]	A-255
Toolco's Notice of Position, dated February 8, 1963 [Doc. 174]	A-268
Transcript of Pretrial Hearing, February 8, 1963 [Doc. 188]	A-270
Transcript of Pretrial Hearing, May 2, 1963 [Doc. 204]	A-309

PAGE

Opinion and Order, dated May 3, 1963 [Doc. 191] A-317

Opinion and Order of May 3, 1963 Granting Additional Defendants' Motion to Dismiss (memorandum endorsed on motion papers dated February 15, 1963) [Doc. 179B] A-323

Judgment of the Court of Appeals on Interlocutory Appeal, Entered July 10, 1964 [Docket No. 28405] [Doc. 478] A-324

Judgment of the Court of Appeals Affirming Dismissal of the Counterclaims, Entered July 10, 1964 [Docket No. 28406] [Doc. 479] A-326

Opinion of the Court of Appeals in Dockets No. 28405 and No. 28406 [Doc. 478] A-328

Opinion and Order of Special Master J. Lee Rankin, dated July 30, 1965 [Doc. 481] A-357

Opinion and Order of Judge Metzner, dated November 16, 1965 [Doc. 487] A-396

Transcript of Hearing Before Judge Metzner on December 30, 1965 [Doc. 498] A-400

Opinion and Order of Judge Metzner Denying Defendants' Motion for a Pre-Hearing Order, dated January 4, 1966 [Doc. 496] A-422

Order by Judge Metzner of January 4, 1966 Designating Herbert Brownell as Special Master in Place of J. Lee Rankin [Doc. 497] A-424

Volume II

Excerpts from Testimony at Damage Hearing of Robert W. Rummel [Docs. 554-2 through 554-10] A-425

Testimony at Damage Hearing of John B. Connelly [Doc. 554-11] A-977

Volume III

PAGE

Excerpts from Testimony at Damage Hearing of Edward J. Morehouse [Docs. 554-13, 554-14] A-1209

Excerpts from Testimony at Damage Hearing of Edward Wemple [Docs. 554-15 through 554-18, 554-32] A-1243

Excerpts from Testimony at Damage Hearing of John C. Biegler [Doc. 554-19] A-1527

Volume IV

Excerpts from Testimony at Damage Hearing of Gene M. Woodfin [Docs. 554-23, 554-24] A-1567

Excerpts from Testimony at Damage Hearing of Nathan S. Simat [Docs. 554-25, -26, -27, -28, -30, -31] A-1575

Excerpts from Testimony at Damage Hearing of L. John Eichner [Docs. 554-31, -32] A-1727

Testimony at Damage Hearing of Van Court M. Hare, Jr. [Doc. 554-32] A-1773

Excerpts from Pretrial Deposition of Robert W. Rummel [Docs. 224, 225, 226] A-1797

Excerpts from Pretrial Deposition of Charles C. Tillinghast [Docs. 210 through 222] A-1850

Excerpts from Pretrial Deposition of Emmett O. Cocke [Docs. 228, 231, 233, 235] A-1913

Jones v. *Uris Sales Corp.*—Master's Report [not a part of the Record herein] A-1934

Volume V

Notice of Filing of Report of Special Master dated September 21, 1968 [Doc. 509] A-1965

Report of Special Master, Filed September 21, 1968 [Doc. 508] A-1966

PAGE

Defendants' Objections to the Report of the Special Master, dated November 1, 1968 [Doc. 511] A-1967

Opinion and Order, Filed December 23, 1969, Adopting and Confirming the Report of the Special Master [Doc. 519] A-2027

Opinion and Order of April 13, 1970 Awarding Attorney's Fee and Costs [Doc. 530] A-2060

Final Judgment Entered April 14, 1970 [Doc. 531] .. A-2073

Volume VI

Toolco's Notice of Motion to Dismiss TWA's Complaint, August 8, 1961 [Doc. 22] A-2075

Order by Judge Herlands, dated August 14, 1961 [Doc. 25] A-2077

Transcript of Pretrial Hearing Before Judge Metzner, September 6, 1961 [Doc. 47] A-2078

Pretrial Order of Judge Metzner, September 7, 1961 [Doc. 44] A-2112

Transcript of Pretrial Hearing Before Judge Metzner, October 2, 1961 [Doc. 48] A-2115

Pretrial Order of Judge Metzner, December 18, 1961 [Doc. 354] A-2138

Toolco's Notice of Motion Before Special Master J. Lee Rankin, February 15, 1962 [Doc. 66] A-2140

Transcript of Pretrial Hearing Before Judge Metzner, February 23, 1962 [Doc. 79] A-2141

Orders of Special Master J. Lee Rankin, April 17, 1962, contained in excerpts from transcript of deposition of Charles C. Tillinghast, Jr. [Doc. 217] A-2176

Interrogatory Propounded by TWA to Toolco, May 4, 1962 [Doc. 89] A-2197

PAGE

Interrogatory Propounded by TWA to Raymond M. Holliday, May 4, 1962 [Doc. 90] A-2203

Transcript of Pretrial Hearing Before Judge Metzner, May 17, 1962 [Doc. 96] A-2206

Portion of Transcript of Proceedings Before Special Master J. Lee Rankin, June 4, 1962 [Doc. 218] A-2233

TWA's Notice of Motion and Affidavit of John F. Sonnett, June 25, 1962 [Doc. 305] A-2234

Affidavit of John R. Hupper, July 2, 1962 [Doc. 315] A-2240

Transcript of Pretrial Hearing Before Judge Metzner, July 12, 1962 [Doc. 107] A-2245

Pretrial Order of Judge Metzner, July 23, 1962 [Doc. 103] A-2267

Pretrial Order of Judge Metzner, July 24, 1962 [Doc. 93] A-2268

Transcript of Pretrial Hearing Before Judge Metzner, July 26, 1962 [Doc. 113] A-2270

Affidavit of Robert G. Zeller, August 28, 1962 with Exhibits A-K [Doc. 110] A-2283

Memorandum Reviewing the History of TWA's Application for Permission to Propound an Interrogatory of Hughes Tool Company Concerning the Location of Howard R. Hughes, August 30, 1962 [Doc. 106] A-2297

Transcript of Pretrial Hearing Before Judge Metzner, September 6, 1962 [Doc. 355] A-2305

Affidavit of John F. Sonnett, September 14, 1962, and Exhibits C and D thereto [Doc. 117] A-2316

Portions of Transcript of Proceedings Before Special Master J. Lee Rankin, September 15, 1962 [Doc. 226] A-2382

PAGE

Transcript of Pretrial Hearing Before Judge Metzner, September 19, 1962 [Doc. 129] A-2391

Portions of Transcript of Discovery Proceedings Before Special Master J. Lee Rankin, October 25, 1962 [Doc. 226] A-2428

Transcript of Pretrial Hearing Before Judge Metzner, October 29, 1962 [Doc. 184] A-2438

Notice of Motion by Toolco, December 4, 1962, for Leave to Depose Sessel and Wadsworth [Doc. 338] A-2461

Transcript of Proceedings Before Special Master J. Lee Rankin, December 14, 1962 [Doc. 237] A-2462

Transcript of Proceedings Before Special Master J. Lee Rankin, December 28, 1962 [Doc. 237] A-2514

Transcript of Pretrial Hearing Before Judge Metzner, January 9, 1963 [Doc. 185] A-2523

Transcript of Proceedings Before Special Master J. Lee Rankin, January 14, 1963 [Doc. 237] A-2571

Notice of Motion by Toolco, January 14, 1963 [Doc. 145] A-2574

Transcript of Pretrial Hearing Before Judge Metzner, January 17, 1963 [Doc. 186] A-2576

Notice of Motion by Toolco, January 22, 1963 [Doc. 147] A-2602

Transcript of Proceedings Before Special Master J. Lee Rankin, January 23, 1963 [Doc. 237] A-2603

Notice of Motion by Toolco, January 25, 1963 [Doc. 152] A-2615

Transcript of Pretrial Hearing Before Judge Metzner, January 28, 1963 [Doc. 187] A-2616

Letter of Chester C. Davis to Judge Metzner, January 29, 1963 [Doc. 448] A-2642

PAGE

Letter of Chester C. Davis to Special Master J. Lee Rankin, February 4, 1963 [Doc. 458] A-2645

Letter from John F. Sonnett to Chester C. Davis, February 5, 1963 [Doc. 459] A-2647

Notice of Motion by Toolco, February 6, 1963 [Doc. 170] A-2648

Affidavit of Nazeeh Habashy, February 6, 1963 [Doc. 172] A-2649

Transcript of Pretrial Hearing Before Judge Metzner, February 6, 1963 [Doc. 187] A-2650

Affidavit of Bruce Bromley, February 15, 1963 [without exhibits] [Doc. 179] A-2676

Affidavit of William C. Chanler, February 15, 1963 [Doc. 179] A-2689

Order to Show Cause dated February 16, 1963, and Affidavit of John F. Sonnett, February 15, 1963 [Doc. 180] A-2692

Transcript of Pretrial Hearing Before Judge Metzner, February 21, 1963 [Doc. 189] A-2704

Order of the Court of Appeals for the Second Circuit dated June 6, 1963, Granting Leave to Appeal and Staying Damage Hearing Pending Appeal .. A-2736

Orders of the Supreme Court of the United States, dated November 16, 1964 Granting Writs of Certiorari A-2737

Orders of the Supreme Court, dated March 8, 1965, Dismissing the Writs of Certiorari as Improvidently Granted in *Hughes Tool Company et al.* v. *Trans World Airlines, Inc.*, Nos. 443 and 501 .... A-2738

Opinion of the Court of Appeals dated September 1, 1971, in Docket Nos. 34902, 35114, Affirming with Modifications the Judgment of the District Court A-2739

PAGE

Orders of the Court of Appeals, dated September 28, 1971, Denying Petitions for Rehearing and Rehearing *in banc* A-2799

Volume VII

PAGE

Excerpts from Transcript of Deposition of Charles C. Tillinghast, Jr. [Excerpts from Docs. 54, 210, 211, 216, 221] A-2800

Vol. 11 of Defendants' Exhibits to Deposition of Charles C. Tillinghast, Jr. (consisting of Exhibit 11, with subparts 11-A through 11-T, inclusive) [Doc. 238] A-3220

Opinions and Orders of the Civil Aeronautics Board with respect to the Hughes Tool Company—TWA Control Relationship, as follows:

(a) CAB Opinion and Order No. 3210, October 17, 1944 (officially reported at 6 C.A.B. 153) [not a part of the Record herein] A-3297

(b) CAB Order No. 4437, January 26, 1946 .... A-3307

(c) CAB Order No. E-922, October 29, 1947 .... A-3309

(d) CAB Opinion and Order No. E-1735, June 30, 1948 (officially reported at 9 C.A.B. 381) [not a part of the Record herein] A-3311

(e) CAB Opinion and Order No. E-4701, October 6, 1950 (officially reported at 12 C.A.B. 192) [not a part of the Record herein] A-3333

(f) CAB Opinion and Order No. E-16195, December 29, 1960 (officially reported at 32 C.A.B. 1363) A-3403

Toolco's Notice of Motion, August 8, 1961

[Doc. 22]

[CAPTION] 61 Civ. 2324

MOTION TO DISMISS THE COMPLAINT

SIRS:

PLEASE TAKE NOTICE that, upon the summons and complaint herein, the annexed affidavits of Raymond M. Holliday and Chester C. Davis, and all the proceedings had herein, the undersigned will move this Court at a stated term thereof for the hearing of motions to be held at the United States Court House, Foley Square, New York, New York, Room 506, on the 29th day of August, 1961 at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order pursuant to Rules 12(b) and 56(b) of the Federal Rules of Civil Procedure dismissing the complaint herein and each of the claims for relief alleged in said complaint, and for judgment in favor of the defendant Hughes Tool Company, on the grounds that said complaint and each of the claims for relief alleged in said complaint fails to state a claim upon which relief can be granted, that this Court lacks jurisdiction over the subject matter of the action and over the subject matter of each of said alleged claims for relief, that there is no genuine issue as to any material fact and

that defendant Hughes Tool Company is entitled to judgment as a matter of law.

Dated: New York, N. Y.
August 8, 1961.

Yours, etc.,

CHESTER C. DAVIS,
Attorney for Defendant
Hughes Tool Company
120 Broadway,
New York 5, N. Y.

To:

CAHILL, GORDON, REINDEL & OHL,
Attorneys for Plaintiff
Trans World Airlines, Inc.,
80 Pine Street,
New York 5, N. Y.

District Court Order, August 14, 1961

[408]

[CAPTION] 61 Civil 2324

MEMORANDUM

The motion of defendant Hughes Tool Company is hereby granted as follows: the taking of depositions pursuant to the plaintiff's notices served on August 1, 1961 shall be, and hereby are, stayed until defendant Hughes Tool Company shall have completed the taking of depositions pursuant to the notices which said defendant served on August 3, 1961.

By force of the understanding of counsel and Judge Dimock's order of July 7, 1961, the August 3, 1961 notices of said defendant are deemed to have been made between July 7, 1961 and July 20, 1961. On the other hand, by force of said understanding and order, plaintiff's August 1, 1961 notices are deemed to have been made after July 20, 1961, because said notices of plaintiff without leave of court would be permitted under F.R.C.P. Rule 26(a) only after [409] July 20, 1961.

Consequently, said defendant has priority in the taking of depositions under the general rule that, in the absence of some special and good reason, pre-trial examinations should proceed in the order in which they are demanded.

The dispositive issue is whether the record before the Court evidences special circumstances warranting a departure by this Court, in its discretion, from the general rule.

The Court has concluded that the plaintiff has not made such a showing. The Court will adhere to the general rule. So ordered.

As this memorandum-decision constitutes an order, no settlement is necessary.

/s/ WILLIAM B. HERLANDS

Transcript of Pretrial Hearing, September 6, 1961

[Doc. 47]

[CAPTION] 61 Civ. 2324

Before: Hon. CHARLES M. METZNER, District Judge.

New York, September 6, 1961, 11:00 a.m.

[APPEARANCES]

• • •

[2] The Court: What is this all about? I got the matter referred to me for all purposes, so who wants to start?

Mr. Sonnett: My name is Sonnett, your Honor, counsel for plaintiff. I take it that Mr. Davis is principal counsel for Hughes Tool.

I take it that our problem today is to ask your Honor to lay out a schedule for us covering pending motions and deposition schedules.

The Court: What motions are pending?

Mr. Sonnett: There is a motion by the plaintiff for production of documents, and there is a motion by defendant to dismiss and for summary judgment, both motions were directed by Judge Ryan to be stayed pending the assignment of the case to your Honor and pending this meeting with your Honor.

The Court: I assume that I would have to pass on the motion to dismiss and for summary judgment before anything else, unless you see some different procedure I should follow.

Mr. Sonnett: Whatever procedure is agreeable to your Honor.

The Court: You are more familiar with the case than I am at this stage of the proceeding, so I [3] will be guiding actually at this point.

Transcript of Pretrial Hearing, September 6, 1961

Mr. Davis: Your Honor, I have prepared a memorandum which outlines the proceedings had to date so far and which may be helpful to your Honor in following the position of the defendant Tool Company. If I may hand this to your Honor, I think it may be helpful.

Actually, there is one other thing which is pending, and from the defendant Tool Company's point of view it is important, as we see it, that we schedule as promptly as possible the commencement of the taking of depositions in accordance with the decision made by Judge Herlands in this matter, in which he has established the priority of the defendant to commence the taking of depositions.

In connection with the motion to dismiss, which was filed by the defendant on August 9th, the most important matter now pending is awaiting the opposition papers to be filed by the plaintiff, because as soon as we get those opposing affidavits, which presumably will disclose or delineate the factual contentions underlying the broad allegations of this complaint, the sooner we will be in a position to intelligently discuss the scope of the issues which will [4] have to be tried in so far as that complaint is concerned; but to start at the beginning, perhaps I should first describe what this case is all about.

This is an action that was commenced by TWA, or, I should say perhaps, [those] now in control of TWA, on June 30th of this year. It is a complaint which alleges violation of the antitrust laws and seeks damages in excess of $100 million and other injunctive relief, temporary injunction, and so forth.

Since both TWA and the defendant Hughes Tool Company—we will refer to Hughes Tool Company as Toolco—are both Delaware corporations, the jurisdiction of this court rests solely upon the allegations of the violation of the antitrust laws.

Transcript of Pretrial Hearing, September 6, 1961

To identify the parties somewhat, TWA, as your Honor undoubtedly knows, is one of the leading air lines of this country. Toolco is primarily engaged in the manufacture and sale of equipment in the oil well drilling industry. Toolco has not at any time been engaged in the manufacture of commercial flight equipment and, as it appears from the affidavit of Mr. Holliday, which was filed in support of the motion to dismiss, the only activities of the Tool Company with respect to the sale or lease of aircraft to commercial [5] air lines with a minor exception have arisen from the efforts made in the past by the Tool Company to assist TWA in its acquisition of aircraft equipment and the financing of such acquisitions.

Now, the Toolco is the owner of more than 78 per cent of TWA, of the capital stock of TWA. This stock, however, is presently held in a voting trust. It is a voting trust which was insisted upon by certain lending institutions in connection with what is referred to as the December, 1960, financing; it is an agreement, I believe, dated December 1, 1960, which became effective December 31, 1960, so that the Tool Company since December 31, 1960, while it continues to be the owner of 78 per cent of the outstanding stock of TWA, has not had any voting control over TWA.

To understand a little bit some of the issues I will advert to in a moment, I should pause at this point to explain this control situation of TWA which exists at the present time.

Under the voting trust, which the lending institutions required in connection with this December, 1960, financing, a majority of the notes issued by TWA at that time, in the aggregate of some $145 million—

[6] Mr. Cook: $165 million.

Mr. Davis: —the holder of the majority of those notes has the power, under the terms of the voting trust, to the

Irving Trust as the notes agent, to remove—first of all, to appoint or remove, or appoint as successors to, a majority of the voting trustees. At the present time the Equitable and the Metropolitan Insurance Companies, as the holders of the majority of those notes under the terms of the voting trust, through the Irving Trust Company as notes agent, have the absolute power to remove the majority of the voting trustees without cause—this is specifically so provided for—and to select and appoint successors.

The voting trustees are Mr. Breech, Mr. Olds, who were appointed by the lending institutions, and Mr. Holliday, who is an officer of the Tool Company and a representative of the Tool Company and a voting trustee.

The bylaws of TWA provide that the holders of the majority of the stock may remove any of the directors of TWA without cause and elect their successors; and, of course, 78 per cent of the stock, when put into this voting trust, the effect that we have [7] of these lending institutions through these voting trustees since December 31, 1960, have been, as a matter of legal power—though the extent it has been exercised may be in dispute, I don't know— in absolute power and control of TWA.

Mr. Hughes, who was named as a defendant but who has not been served, is the sole owner of the Tool Company, of the Hughes Tool Company, referred to as Toolco.

Mr. Holliday is an officer and director of the Toolco.

Neither Mr. Hughes nor Mr. Holliday have been served with process, although they are named as defendants.

The Tool Company acquired its controlling interest in ownership in TWA beginning some time prior to 1942. At the end of 1942, I believe it is, the Tool Company had acquired approximately 45 per cent of the outstanding stock

of TWA. This acquisition of the controlling interest, practical controlling interest, in TWA was subject to and approved by an order of the Civil Aeronautics Board, the CAB, under Section 408 of what is now known as the Federal Aviation Act of 1958, with a comparable section in [8] the Civil Aeronautics Act of 1938 when it was originally passed. That order which found it was consistent with the public interest is to be found—referring to my memorandum—in 6 CAB 153. That was a decision by the CAB in 1944.

I should say at this point that one of the conditions imposed by that order was that no transaction, no commercial transaction, between the Tool Company and TWA could take place which exceeded $200 per item or which in the aggregate exceeded $10,000 without further CAB approval. Then in 1950 the CAB was confronted with the question as to whether or not a further acquisition of stock by the Tool Company, raising its interests in TWA from the 45 per cent to approximately 78 per cent, a little in excess of 78 per cent, required further approval by the CAB. For the acquisition of control by the Tool Company of TWA and the issue then before the Board, as recognized by the decision, was that while under the 1944 decision the Tool Company, as a practical matter, had control of TWA, having 45 per cent of the outstanding stock, the situation developed that the Tool Company, with 78 per cent of the stock, could control and exercise control over TWA without soliciting proxies of minority [9] stockholders, in effect without the aid or assistance of any other owners of TWA, and the Board held that that change in situation required a further determination by the CAB under 408 of the Act, and in 9 CAB 381 and 12 CAB 192 we find the Board again approving this acquisition of further

control by the Tool Company over TWA, subject to the same limitation, that every transaction between the Tool Company and TWA involving $200 per transaction or aggregating over $10,000 was subject to CAB approval.

As your Honor knows, there is an exemption from the application of the antitrust laws which is to be found in the Federal Aviation Act itself, Section 414—I refer to it in this memorandum—and in Section 7 itself of the Clayton Act, when the acquisition of control of an air line is the result of a CAB order approving the transaction after consideration by the CAB of the public interest involved, and in Section 414 of the Federal Aviation Act you find a clear-cut statutory exemption from the application of the antitrust laws required by or necessitated by any order of the CAB.

The complaint, which I am about to describe, does not advert in any way, shape or form to [10] the CAB approvals, and there is no allegation which negates the existence of that exemption; we are left in the dark. I think it is fair to assume that counsel for TWA is going to assert a contention of some kind that some transaction or activities took place which are not covered by these CAB orders, because I think it is perfectly clear, so far as the Tool Company is concerned, every transaction relating to any of the matters referred to in the complaint, that is, with respect to flight equipment or the financing of flight equipment, was submitted to the CAB and approved by the CAB and, interestingly enough, those applications were prepared by and submitted to the CAB by TWA—by TWA.

Let me disgress for a moment and point out that although we are still the 78 per cent owner, when we recently made a formal request, in regard to this motion to dismiss, to TWA's counsel to furnish us with the files of

TWA relating to these applications for approvals and approvals to be obtained from the CAB, that request was denied on the ground at the time that Judge Herlands had not yet come down with a decision as to our priority in discovery proceeding. Since that time, of course, Judge Herlands has come [11] down with his decision establishing our priority in the commencement of the taking of depositions.

This complaint, as I indicated before, was filed on June 30, 1961. At the time that it was filed, the plaintiff obtained an order sealing the complaint. The Tool Company did not know and the record did not disclose the reasons or the grounds for sealing the complaint, but that is what took place. At the same time the plaintiff obtained an order to show cause, originally returnable July 11th, for the purpose of the taking of the deposition of Mr. Hughes, or, rather, I should say the way it read was that it was an order to show cause to take the deposition of the Tool Company, by its officer and director, Howard R. Hughes, seven days after the service of the notice. The affidavit in support of that application for granting the plaintiff an opportunity to take a deposition out of turn, so to speak, was that they believed that they needed to get some facts which would enable them to make up their mind as to whether or not they had the basis to seek some kind of a temporary restraining order.

The parties then consented to an order which was entered by this court on July 7th, and the effect of that order was to continue the seal of the [12] complaint and all the papers filed until August 1 and to adjourn or postpone this application for the taking of the deposition of the Tool Company, through Mr. Hughes, until that same date.

There were other portions of that order which became the subject of a decision by Judge Herlands, and I will refer to them when I come to that decision.

Transcript of Pretrial Hearing, September 6, 1961

I think it is fair to say that it is a well-known, general fact that Mr. Hughes personally is or has been in the past reluctant to make public appearances and has preferred to have the business of the Tool Company operated by other officers of the Tool Company who consummate whatever transactions appear to be in the best interest of the Tool Company.

The complaint itself contains three claims for relief.

The first claim for relief, which covers a period from 1939 to date, alleges violations by the defendants of Sections 1 and 2 of the Sherman Act and Sections 3 and 7 of the Clayton Act. These alleged violations of the antitrust laws seem to be or can be classified into four categories.

It is claimed that the defendant Tool [13] Company at various times in and after 1939 acquired the common stock of TWA in an amount which presently aggregates more than 78 per cent; that the defendant Tool Company foreclosed a potential supplier from furnishing jet powered aircraft to TWA and sought to establish TWA as a captive market for aircraft which were purchased by Toolco and furnished by the Tool Company to TWA; that the defendants dictated the financing arrangements with respect to the acquisition of aircraft by TWA, and that the defendants and Atlas Corporation proposed a merger of Northeast Airlines with TWA upon terms allegedly advantageous to defendant and disadvantageous to TWA. Atlas is named as a co-conspirator in this complaint but is not named as a defendant. Atlas Corporation owned a controlling interest in Northeast Airlines.

The second claim for relief in the complaint relates to the same violation of the antitrust laws and to the same acts which are alleged, to the extent to which they are alleged in the first claim for relief, except it speaks only for the period from December, 1960, to date. That is the

period from which TWA passed into the control of certain other persons.

[14] Quite frankly, at this point it is a little difficult for the Tool Company to understand what it is that the second claim for relief has added as a cause of action to what is contained in the first claim for relief.

The third claim for relief appears to be predicated upon the same alleged acts as the second, but it characterized such acts as being a malicious and wilful interference with the business of TWA, and presumably seeks relief upon general principles of law and equity in respect of the application of the antitrust laws. I assume that the theory there is that, if the jurisdiction of this court has been established by the allegation of the first and second claims for relief, pendant jurisdiction would apply to the third claim for relief.

In view of the fact that it cannot be disputed that the acquisition and control of TWA by the Tool Company was approved by the CAB, and such approval exempts such acquisition from the application of the antitrust laws, and once it is realized that the Tool Company, with the approval of the CAB, became the owner of 78 per cent or better of TWA, it becomes a little difficult to understand how the Tool Company [15] conspired with TWA or did anything with respect to TWA other than exercise the control which normally follows a 78 per cent ownership. When you add to that the fact that every transaction between the Tool Company and TWA was specifically approved by the CAB, it is easier to understand why the Tool Company feels that it is necessary to commence some convenient but early date for the taking of the deposition of TWA and others to develop the facts which presumably underlie these various very serious charges.

Transcript of Pretrial Hearing, September 6, 1961

The proceedings that have been had to date are as follows:

On August 1 the application for the taking of the deposition of Tool Company, through Mr. Hughes, was heard by Judge Murphy, and Judge Murphy decided that matter on the merits and denied that application.

On the same date that the matter was being heard by Judge Murphy, that is, on August 1, TWA served the Tool Company with new notices for the taking of depositions of the Tool Company through six other named officers, and at the same time also served a notice for the taking of the deposition of Mr. Hughes as a witness. This was served on us on August 1. On August 3rd, the defendant Tool Company for the [16] first time served its notices for the taking of the deposition of TWA, by certain named officers; of Dillon, Read, who were the investment house who promoted and brought about this 1960 financing; the Irving Trust Company, the notes agent; and the Metropolitan and the Equitable, who are the holders of the majority of those notes and are in control of TWA; and also Charles Thomas, who had been president of TWA up until the middle of 1960 and who was the last president of TWA prior to the acquisition and control of TWA by these lending institutions.

To understand the motion that subsequently was made by the Tool Company to stay the notices served by TWA on August 1 until after the completion of the taking of the deposition by the Tool Company, which came on to be heard by Judge Herlands, it is necessary to refer to the order of July 7th, which was entered by this court upon the consent of counsel between the parties and pursuant to an understanding which had been reached between counsel for TWA and myself.

I have set forth that order on page 11 of this memorandum, but basically what happened was this, Judge: The parties decided to try to maintain the status quo between July 7th and August 1st. The [17] Tool Company recognized that normally a defendant is entitled under the Rules to serve a notice to take depositions within the first 20 days after the commencement of an action, whereas a plaintiff may not commence the taking of the deposition of the defendant, unless he should pose special or unusual circumstances. The parties wanted to maintain the status quo until August 1 so that the order that was submitted to the Court on July 7th and which was entered by the Court had the effect of providing that notice of depositions served after August 1 and before August 20th were to be deemed to have been filed or opposed, as the case may be, within 20 days after the commencement of the action.

However, because of the wording that was actually employed by the parties, the effect of it was, as Judge Herlands pointed out, to say that anything done between August 1 and August 20 was to be deemed to have been done after July 7 and before July 19.

Before Judge Herlands the plaintiff renewed its effort to establish special and unusual circumstances so as to entitle them to take the deposition of the defendant Tool Company, and particularly and the only effort that they pressed was that of taking the deposition of Mr. Hughes before giving the de-[18]fendants an opportunity of taking the deposition of the plaintiff and finding out what the actual facts are which underlie the allegations of this complaint.

Judge Herlands, in the course of the argument, asked both parties to submit proposed schedules for the taking of depositions, and this was done. The plaintiff submitted an alternating schedule commencing with their side to take

the deposition of Mr. Hughes first, and then they gave us an opportunity to take the deposition, and they submitted that kind of a proposal of alternating schedule.

We submitted a memorandum pursuant to their request, where we pointed out that we had made a motion to dismiss the complaint or a motion for summary judgment. It is a motion made under Rule 12(b) and Rule 56(b). And we felt that a response to that motion to dismiss would have the effect of delineating the issues raised by the plaintiff, the issues of fact outlined in the complaint.

Judge Herlands, in his decision, in effect rejected both the suggestions that were submitted by counsel and held that the taking of depositions by the plaintiff pursuant to the notice that they had served should be stayed until the defendant Tool Company [19] shall have completed the taking of depositions pursuant to the notices which said defendant served on August 3, 1961, and the memorandum of the decision constituting an order of the Court. Judge Herlands found that by force of this understanding of counsel in the order of July 7, 1961, the notices which had been served by the defendant Tool Company should be deemed to have been served prior to plaintiff's notices, and he said that the positive issue was whether the record before the Court evidenced special circumstances warranting a departure by this Court in his discretion from the general rule, and he held that "the plaintiff has not made such a showing. The Court will adhere to the general rule. So ordered."

Following this decision by Judge Herlands, which came down on August 14, 1961, the Tool Company on August 18 served some additional notices for the taking of the depositions of certain additional financial institutions that had been involved in the December financing as part of the

group now in control of TWA, and it also served notice of the taking of the depositions of the voting trustees named by those lending institutions, and also served a notice for the [20] taking of the deposition of the Boeing Company, and the relevancy of the Boeing Company will become apparent in just a moment, your Honor.

The practice followed by counsel for the defendant Tool Company, your Honor, was to serve notice for taking depositions and then to serve subpoenas duces tecum for the production of documents on the return day of the notice of taking depositions. We believe that such a procedure is not only permitted under the Rules but that it avoids the necessity of burdening the court's calendar by making a motion under Rule 34. When we follow that practice, the person is served with a subpoena and will produce documents as soon as he reasonably can do so and we will have an opportunity to examine those documents in order to expedite the actual taking of depositions; we examine the documents and arrive at a mutually agreeable date for the actual taking of the deposition after the documents have been examined.

We are quite cognizant of the fact that a similar result may be obtained by a proceeding by motion under Rule 34. That is a practice that we followed subsequent to Judge Herland's decision.

I should have indicated that prior to [21] Judge Herlands' decision, immediately following our motion to dismiss, we wrote a letter to counsel for TWA requesting documents relating to the approvals by CAB. I have annexed as an exhibit to this memorandum our letter dated August 10, 1961, and the reply we received on August 11, 1961, by Mr. Sonnett. The interesting part of that reply, your Honor, is the last sentence of the second paragraph,

which in effect says that they did not believe that they would be in a position to make documents relevant to the subject matter of the motion to dismiss available to us. One of the reasons given was the pendency of the decision by Judge Herlands.

At the same time, after the decision by Judge Herlands, counsel for TWA, and notwithstanding Judge Herlands' decision, which I think makes it perfectly clear that defendant Tool Company was to have priority in discovery proceedings, made a motion under Rule 34 for the production of documents by the Tool Company. I believe it is well established in this court that once priority for the taking of depositions has been established for one side, that the other side may not, until completion of discovery proceedings which priority affords to the one party, try to require the [22] production of documents by the other party. This motion is one which Mr. Sonnett referred to a moment ago as being pending. It calls for the production of documents as soon as possible and not later than some date in October.

We have not yet had an opportunity to file papers in opposition to that motion. Quite apart from the fact that it is premature by reason of certain documents called for, and so far as that motion is concerned and a schedule is concerned, any time convenient to the Court and the parties, the motion may be made returnable at any time so long as we have been allowed to submit some papers in opposition. As far as I can see, there is no urgency for hearing that motion or deciding it.

The next thing that took place, your Honor, was an application by counsel for TWA under Rule 2(b) of the general Rules of this court, and this was made on August 17th, immediately following the decision by Judge Herlands. This brings us up to date in so far as the proceedings had in this matter so far.

Transcript of Pretrial Hearing, September 6, 1961

Now, what are the matters that are pending? Before going into the question of depositions, there is one thing which I would like to stress on behalf of the [23] Tool Company is that quite apart from the priority which Judge Herlands' decision has established, it should be recognized that Judge Herlands' decision also recognized that discovery proceedings by the Tool Company should commence independently of the motion to dismiss. I make it clear that we deliberately noticed the taking of the deposition of TWA to commence on August 23rd, and we noticed our motion to dismiss returnable on August 29th, and that was a fact that was clearly and forcibly brought to the attention of Judge Herlands in our memorandum submitted pursuant to a suggestion to submit a proposed scheduling of the taking of depositions.

We did that, your Honor, with a specific purpose in mind. We believe that it is important to the Tool Company that we commence the taking of depositions as soon as it can be reasonably arranged, having in mind whatever work may be required, although, as I point out, I don't believe there will be any burden upon either TWA or its counsel to commence with the taking of depositions fairly promptly.

The need of the Tool Company for the commencement of the taking of depositions, I have attempted to set out commencing at page 17 of this memorandum [24] submitted to your Honor, and it may require some explanation by me, and, of course, I will be very happy to expand on what we point out there.

I should point out that we have not yet, that is, the Tool Company has not yet, filed its our answer to the complaint, and I think it only fair to state that when we file an answer, we will have to assert some counterclaims against TWA and others. We have the problem of both compulsory counterclaims and permissive counterclaims. What I have

done beginning at page 17 is to indicate the seriousness of the counterclaims or claims that the Tool Company must consider asserting in this action.

I think it only fair also to point out that when this complaint was unsealed, there was a great deal of publicity with respect to the commencement of this action by TWA against its owner, Tool Company, and it is to be anticipated that the answer to be filed by the Tool Company and any claims which may be asserted by the Tool Company are likely to receive widespread public interest, and it seems to the Tool Company that we ought to be fairly sure of our facts before asserting such claims.

Now, we recognize, of course, under the [25] Rules it is not necessary to proceed in that manner, but we believe in this situation it is important for us to proceed in this manner. The reason I am emphasizing that, your Honor, is to point out that the taking of the deposition and the commencement of the taking of depositions in this matter is not related to the existence or the lack of existence, or whatever you may decide with respect to the motion to dismiss. It seems to me the procedures we ought to follow with relation to this motion to dismiss should be discussed and decided by your Honor after we have received the opposing papers.

Now, we filed our motion and our supporting affidavits on August 9. I am quite confident that counsel for TWA is prepared to file opposing affidavits immediately. I am sure that most of the facts they want to set forth must have been considered before they prepared the complaint, and I am sure they will have no difficulty in stating whatever facts they have which support the allegations of this complaint. Once we see what those are, we will be in a position of determining what issues exist in so far as the complaint is concerned.

Transcript of Pretrial Hearing, September 6, 1961

I will be surprised if counsel for TWA [26] does not raise some facts which will require, or some issues which will require, clarification through the normal process of oral depositions.

I made a reference to the fact that the complaint charged with one of the antitrust laws was the fact that the Company proposed or negotiated a proposed merger between Northeast and TWA. I want to point out in that connection that that proposed merger was one which by its terms was subject to CAB approval. By its terms it was also subject to approval by a majority of the minority stockholders of TWA, and because the Atlas Corporation is an investment company, it also was subject to a finding by the Securities and Exchange Commission that the transaction did not involve any overreaching and was fair.

However, the contentions in this complaint relating to Northeast and Atlas have some corollary repercussions. The Tool Company also has a substantial investment in Northeast. It advanced to Northeast in May of 1960 over $9 million.

Northeast Airlines is presently involved in a proceeding before the CAB involving obtaining a permanent authorization of its New York-Florida route. It is encountering, as was to be anticipated, some [27] rather strong and, may I say, perhaps bitter opposition on the part of some competing airlines, and there is no question that those competing airlines are capitalizing right now and will continue to capitalize on the allegations of this complaint that Northeast was involved in an alleged conspiracy to violate the antitrust laws. The seriousness of that contention, your Honor, is that, if there be any basis for contending a violation of the antitrust laws, it necessarily must mean either that some secret transaction took place, of which I assure your Honor that the Tool Company is wholly unaware,

which required CAB approval and for which CAB approval was not obtained, or somehow or other the facts submitted to the CAB by TWA, whose files we do not have access to, even though we own 78 per cent of TWA, are the basis for a contention that the approval of the CAB is to be disregarded, vitiated in some manner undisclosed to us.

The allegations of this complaint require, so far as the Tool Company is concerned, that we proceed as promptly as we possibly can for developing the facts, the facts that justified these allegations, and in the last section of this memorandum we have submitted we have suggested a schedule as to pending matters. It [28] is roughly in—my associate, Mr. Cox, has just reminded me that I forgot to mention one very important point for the commencement of the taking of depositions, and that is that the Tool Company is very much concerned to consider the possibility of it seeking some special equitable relief in connection with the so-called Boeing transaction and its financing. Since this is one of the matters alleged in the complaint as wilful and malicious conduct on the part of the Tool Company on the assumption that the Tool Company, notwithstanding 78 per cent ownership of TWA, was seeking to hurt TWA, the situation is the following:

Since December 31, 1960, the persons in control of TWA decided to commit TWA for the acquisition of some Boeing jet aircraft at a cost of some $180 million. At the same time they rejected the possibility of acquiring some 13 Convair jet aircraft which had been ordered by the Tool Company pursuant to the usual past practice of ordering aircraft for TWA when TWA was not itself in a position to order itself or finance, and in order to assure prompt delivery it had been the practice of the Tool Company to order the aircraft and subsequently make them available to TWA. In order to finance this $180 million of jet aircraft, it was

dis-[29]closed in a registration statement, which became effective in May of 1961, that TWA was about to commit itself or had committed itself or intended to commit itself to borrow some $147 million from the same lending institutions who are in control of TWA. At one time I believe it involved the addition of one additional insurance company, Prudential, and I was told it withdrew leaving the identical lending institutions.

In any event, it appeared that TWA intended to negotiate with those lending institutions the borrowing of some $147 million toward this $180 million obligation that we were going to incur with Boeing. At the same time it was disclosed that one of the terms and conditions of that borrowing was that in the event the voting trust would terminate for any reason, that is, the voting trust that was imposed upon the Tool Company, and the circumstances, which is another story, relating to the $165 million borrowing, the same lending institutions were insisting apparently on terms and conditions that an additional $147 [million] long-term debt would immediately mature and become due and payable by TWA should the voting trust terminate for any reason.

The voting trust, by its terms, terminates [30] at any time that the money borrowed at the time it was created is refunded or the lending institution repaid. It is true that they impose a 22 per cent penalty on the Tool Company if the Tool Company tries to repay it, but they have a right to repay it. It was the position of the Tool Company therefore that this proposed new financing, which appeared to us to involve self-dealing, or at least terms, lending terms, which are not competitive, also involved the possibility that as a practical matter these lending institutions were about to lend money under terms which would have the effect of

continuing this voting trust for a period longer than originally intended.

TWA refused to furnish to the Tool Company any information with respect to those negotiations. It even refused to furnish that to Mr. Holliday.

We have read in the newspaper recently that some financing was consummated by TWA; the newspaper account merely said that the lending institutions involved were not identified, and we do not know what the terms and conditions of that financing are and whether or not any of those objectionable terms and conditions I referred to in fact exist today.

Obviously, there may be some equitable [31] relief that we may seek, and before we are, of course, in a position of taking such steps, we must obtain the facts, which we propose to do by commencing discovery proceedings as soon as possible.

I suggest a general schedule, your Honor. We believe that TWA should promptly serve its papers in opposition to Tool Company's motion to dismiss. Presumably TWA's counsel, already having made a detailed investigation of the facts prior to the filing of the complaint on June 30, 1961, is prepared to respond to said motion which he made on August 9th. I think it is to be expected that such response will have the effect to delineate the factual issues underlying the allegations of the complaint. Then it seems to me, your Honor, that we ought to fix an early date for the production by TWA of the documents we have called for by our subpoena served on TWA on August 16th.

It seems to me that those documents should be readily available for production inasmuch as presumably they have been gathered by special counsel for TWA in connection with their investigation which resulted in the commencement of this action.

Then it seems to me that we ought to agree [32] upon the earliest possible convenient date for the commencement of the taking of depositions by the Tool Company and we propose [to] commence by taking the deposition of TWA.

Then it seems to me, your Honor, that is one of the matters which has been held in abeyance pending a referral of this matter to your Honor. We have been interrupted as a result of TWA's application to Chief Judge Ryan with the completion of the service of subpoenas duces tecum on persons whose depositions are to be taken as witnesses. They are as witnesses at the moment; some of them are potential cross defendants.

I submit that it would be helpful to permit us to proceed promptly to serve those subpoenas duces tecum so that the person served may have as much time as possible to respond to the subpoena and so that we will not waste any time when we are ready to take their oral depositions.

Plaintiff's motion for the production of documents under Rule 34, as I previously indicated, may be set down for hearing at any time that is convenient to your Honor and counsel for the plaintiff. I don't believe that there is any urgency for the determination [33] of that matter, but if counsel for TWA feels that there is, we will be prepared to oppose that on any reasonable notice.

Then it seems to me that after we have received the papers in opposition to the motion to dismiss, then we will be ready to give consideration to an appropriate date for a hearing on the motion to dismiss, if that course of action appears to be the one that might be the most productive for an early disposition of the issues involved in this case. It took an awful long time to describe this, your Honor, but I hope it has been helpful.

The Court: Mr. Sonnett?

Transcript of Pretrial Hearing, September 6, 1961

Mr. Sonnett: Your Honor, with reference to the specific program suggested by counsel on page 22 of his memorandum, as your Honor knows, Judge Ryan agreed that, despite the heavy burdens on your Honor and other judges in this court, this was a typical big case that needed to be administered by one judge, and I think in the interests of saving the Court's time and in the interests of the parties—we are happy to be before you as the judge who will supervise the pretrial and will try the case—I don't think your Honor wants to hear from me about the merits of any of these problems [34] until such time as the record is ready for presentation to your Honor.

On the specific program I can be in a position to serve the opposing affidavits on the motion to dismiss and for summary judgment by next Wednesday. We have had some problems at TWA recently. I think all will recognize that it has been rather extraordinary; it has been a little difficult to get to the chief executives to finalize the affidavits, but we can serve and file the opposing affidavits and our brief on Wednesday next.

As for step two suggested by counsel, production of documents by TWA, we are prepared to start producing for inspection tomorrow morning, and counsel may proceed with inspection of the documents, which are very voluminous, called for by the subpoena duces tecum.

On the question of how long it will take us to complete a search for documents and for counsel to inspect them, we have some practical problems. I think one of the problems is whether counsel wants us to produce copies of, for example, printed contracts that I am sure Tool Company already has. We have problems about whether counsel really wants to see the contract [35] files of particular planes. One file alone is about eight feet, change orders in

design and so forth, but their subpoena, while broad, we haven't objected and we will produce whatever it is in fact they want. We have a special office set up at TWA's offices, and counsel can send anyone he desires tomorrow morning at 10 o'clock and he can inspect and choose, or whatever he wishes to do. We have a practical problem about files of TWA located at Kansas City, which is the operations base and headquarters of TWA. Once counsel for Hughes Tool has looked at what we have in New York and has told us whether he wants us to produce, for example, these printed documents that they already have, it may be that what they ought to do is go out and look at them there, or, if they really want us to do it, we can bring them here.

Mr. Davis: There will be no problem.

Mr. Sonnett: They are very voluminous, that is my point, Judge. I will estimate that it will take counsel for Hughes Tool Company probably a minimum of two weeks to look at the documents that TWA will have here and at Kansas City. My best estimate is that as to the documents yet to be searched for in Kansas City, we will need probably three to four weeks. We have a [36] crew of six working on the document problem, so I would say, Judge, that it would take, for us to be in a position to say that we think we have fully complied with the subpoena duces tecum, perhaps we can shave it some with a crew of six—that would be my guess—a month.

Counsel can help to the extent that, having had a preliminary look at what we have at TWA, if he will then say, "Now, there are certain areas that you needn't bother producing," like the printed documents that they have, and so on, we would cut that job down and maybe get it done in two weeks.

As for the step three suggested by counsel, the taking of depositions, let me say before leaving documents that we

most strongly recommend to your Honor that there be a production of documents by both sides before any depositions commence, because I think if there is, we will find that the length and scope of the depositions to be taken in due course by both sides will be very much narrowed. Otherwise, we are going to have a very real problem, I think, in the taking of depositions.

Hughes Tool has noticed, I think it is, 21 sets of depositions; for example, the top two men in [37] the insurance company and the banks and so on. The number of individuals involved in their notice, I am not sure, but I would say it is 30 people, or thereabouts. I think that if your Honor were to direct at the outset of this case that we get the documents under control before we start depositions, I think we are going to have a net saving of time on the part of everybody, particularly, I think, the outside people, banks, insurance companies, Boeing Aircraft, who, after all, are only witnesses.

So our request is that your Honor pass upon whatever the disputed items of our motion to produce may be. I don't know how much counsel will concede that we ought to have, but when we got up the motion to produce, we took the same items that he had in his subpoena duces tecum, we added some necessary references to the Tool Company and we added only one really new item, and that is the income tax returns of Hughes Tool for reasons which I suppose bear on this conspiracy which we will argue at length before your Honor because I am sure they will not give us the right to see that.

I would think if counsel would indicate to us the items that he would concede that we have a right to [38] see and indicate the ones that he wants to dispute and your Honor were to dispose of that document problem, because it does

take time, I don't think it is in the interest of everybody to have the whole deposition thing start before we have the documents controlled. I think if we could get the documents out of the way in the next two or three weeks, with production by us and by them, and then turn to the depositions, adhering to the schedule which Judge Herlands has established, we are not suggesting any deviation from that, and then argue this motion to dismiss at whatever time your Honor desires to hear it, we will be prepared to argue it on the present record after depositions are taken, or whatever time it is convenient to the Court.

My only point on depositions is that, if counsel is going to want depositions to use in connection with his motion for summary judgment and to dismiss, I think we are going to need some too, because what we are complaining of in this complaint isn't anything that was authorized or required approval by the CAB. Counsel's argument is quite beside the point. There is no act alleged in our complaint that was authorized or required or approved by the CAB. [39] In due course your Honor will consider that and determine the question, but if he is going to want depositions to use on the motion for summary judgment, it seems to me that we ought to have a chance to show the other side of the coin, namely, the things that happened.

The Court: That is certainly in line with decisions of the Court of Appeals in this circuit.

Mr. Sonnett: So I would say, your Honor, one way or the other, if he wants to argue it on the present record, fine. If he wants depositions, we ought to have the record made so you can decide it on the basis of an adequate record.

The Court: How about 3: Tool Company should commence taking the deposition of TWA 10 days after the date

fixed for the production of documents; you have no objection to that?

Mr. Sonnett: None whatsoever, your Honor. It is just a matter of administering the document problem.

The Court: What about 4: Service of subpoenas which were interrupted?

Mr. Sonnett: I think this has to do really with the convenience of these 30-odd people who were noticed as witnesses, these being banks and insurance [40] companies, aircraft companies scattered all over the country. I would think that as a matter of not interrupting any more than necessary—

The Court: I don't see how 4 is a problem, Mr. Davis.

Mr. Davis: It is not, your Honor. I just mentioned it because, as things now stand, we had an understanding that we suspended the service of those pending a reference of this case to your Honor, and I just wanted to point out that it is a matter pending in the sense that we ought to have an understanding that from this date forward we are free to resume the service of those subpoenas, and, so far as the convenience of the parties is concerned, of course we will cooperate in every way possible to fix dates, or whatever date that was originally fixed, or some date convenient for those concerned.

The Court: Have you coupled the motion for summary judgment and the motion to dismiss?

Mr. Davis: Yes, your Honor.

The Court: It would seem to me that in view of our decisions here in this circuit, your opponent should have the opportunity of depositions before your motion is passed upon.

[41] Mr. Davis: No objection. So far as the motion to dismiss is concerned and the motion for summary judgment,

the only suggestion we made is that after we receive these answering affidavits next Wednesday, and I quite agree, perhaps the thing should be postponed for a determination until the parties are ready to have it heard on whatever documents he needs or we need. I have no objection to that.

The Court: I am just saying at this writing, pursuant to the cases in our Court of Appeals you would be in a very bad position to win your motion; plaintiff merely saying, "I haven't had an opportunity to take depositions," and automatically your motion would be denied.

Mr. Davis: That is why I have suggested the commencement of the taking of depositions should be independent of and not related to this motion to dismiss.

The Court: I don't know how you are going to set that up. If the Court decides the motion to dismiss is really a summary judgment, you are back in the other box again.

Mr. Davis: That is why I suggested, your Honor—

[42] The Court: Suppose we do this: You say plaintiff's motion for production under Rule 34 for documents should be set down for a hearing at any time which is convenient to the Court after you have had an opportunity to submit papers in opposition.

Let's take that one first. What time do you want to submit your papers?

Mr. Davis: Well, I think if we had a week's time to submit papers in opposition—

The Court: Take any time you want. Today is the 6th. September 13th.

Mr. Silverman: With the holidays Monday and Tuesday, your Honor, I think maybe we had better postpone it a little more.

Transcript of Pretrial Hearing, September 6, 1961

The Court: Let's put it over to Monday, because I have to go to the Judicial Conference. Do you want to have argument a week from Monday on this motion?

Mr. Sonnett: I would like to see their opposition papers a day in advance of argument.

The Court: We can set it down for argument a week from Monday, that is the 18th. Could you have your papers in Mr. Sonnett's hands by Friday morning at 10 o'clock?

[43] Mr. Davis: Sure.

The Court: That gives you eight or nine days.

The gentleman sitting on your right doesn't seem enthusiastic.

Mr. Silverman: One can hardly be enthusiastic about a lot of work, but we will get it out.

The Court: You might as well get started on the right foot and have everything in.

Mr. Silverman: I shouldn't think there will be any difficulty about that.

The Court: September 15th, 10 a.m., for service of papers; all right?

Mr. Sonnett: Yes, sir.

The Court: I think that should be the first step, and at that time I will be prepared to rule on your item 3 as to whether the production of documents by Toolco should proceed abreast of their taking of depositions. In the meantime you can commence, as I understand it from Mr. Sonnett, the examination of documents which have already been collated, and by September 13th—or do you want to make that the 18th also, Mr. Sonnett; give you to September 18th to serve your papers in opposition?

[44] Mr. Sonnett: I would prefer it, Judge for the reasons that I have indicated.

The Court: Make it September 18th.

Transcript of Pretrial Hearing, September 6, 1961

Mr. Davis: May I make a suggestion on that, your Honor? It seems to me that our opposition and the effectiveness of considering the issue as to the scope of the documents they are requesting of the Tool Company on their motion 34 will be greatly assisted once we see what it is they are claiming as the underlying facts of the complaint. The problem we now have, your Honor, is that we have a 38-page complaint, but after your Honor has had an opportunity to look at it, you will find it tells you very little other than conclusions.

The Court: That is shorter than the one I have in the minority stockholders case in DuPont, on the same problem of General Motors, exercising its 21 per cent interest.

Mr. Davis: That is why I am suggesting, your Honor, that once we have, even though we may not dispose of the motion for summary judgment—once we have these answering affidavits, which at least set forth the factual contention, it is almost answering a bill of particulars, it is going to give them an [45] opportunity to tell us for the first time what we have been doing that has not been approved by the CAB.

The Court: And you would therefore be able to narrow your request for documents.

Mr. Davis: Conceivably, except we have the problem of the counterclaim, as I indicated before, but certainly it would permit us to understand the reasonableness of their request for income tax returns.

That is the thing we are primarily opposed to. The rest of the stuff we are not opposed to. That is really what the thing is going to come down to. That is what is basically the justification for their trying to probe into that, and I assume it is not for the purpose of embarrassing the Tool

Company or Mr. Hughes, and the reasonableness of that, your Honor, will become—we can focus on it once we or after we have received these papers in opposition, so I would suggest, whatever the dates are, the fact is, I was thinking, when I was suggesting it, I wondered if I could spend some time with my family and children before September 20th, but what I would suggest, however, is that a consideration on our opposition to their [46] request for documents, apart from the fact that it is premature, as we contend, will be greatly facilitated and the issue sharpened if we have received at least a week or 10 days before whatever it is that they are going to lay out for us as being the factual foundation of their complaint, and then we will see what the reasonableness of what they want is.

Mr. Sonnett: May I suggest, Judge, that what counsel is saying has nothing to do with our rights for production of documents. I think your Honor will look at the complaint, the allegations of the complaint, and determine whether we are asking for documents which are relevant to the general subject matter and whether we have good cause. I am prepared to argue the matter of the income tax returns at your Honor's convenience, to submit the authorities and the reasoning.

Our point about the tax returns is that we think that a principal motivation of Hughes Tool for becoming a supplier of aircraft, which it became, was because Hughes Tool had some problems. It threw off so many millions of dollars a year and Howard Hughes was saved from paying; if they paid it out in dividends, he would pay 92 per cent. What they deliberately did [47] was to create matters of convenience for the Tool Company and this led to a lot of the things that they did with the captive TWA.

I will be prepared at your Honor's convenience to submit the cases. I don't think these affidavits we are going to submit really have anything to do with the question of whether our motion to produce is well founded, nor the allegations of the complaint.

The Court: Let's make the same date, September 18th, for the motion to dismiss and on the motion for production of documents. Serwe your papers on Friday.

Mr. Silverman: Was your Honor making September 18th the date for argument of the motion to dismiss?

Mr. Davis: No, the motion for production of documents.

Mr. Silverman: The Court, I think, was suggesting the argument of the motion to dismiss on the 18th.

Mr. Davis: No, your Honor, I don't think we would be ready to argue the motion to dismiss on the 18th.

[48] The Court: Is this the one that was on my calendar on August 22nd?

Mr. Davis: August 29th was the first return day, I believe.

Mr. Sonnett: It was either this motion to produce or the other one, I am not sure, Judge.

Mr. Davis: No, the motion for summary judgment was first made returnable August 29th. I am quite confident that is right.

Mr. Sonnett: But at that point, your Honor, we were going to apply for an adjournment and extension of time because, your Honor, I strongly believe that what your Honor indicated a little earlier, and that is the determination of this motion to dismiss or motion for summary judgment in whole or in part—

The Court: I will reserve the motion indefinitely. The motion to dismiss may be able to be disposed of on what you have submitted. If, on the other hand, what comes in

I have to consider as a motion for summary judgment under Rule 12, I cannot put it over, but I cannot tell until I see the papers.

Mr. Davis: That's right. I want to say quite frankly I thought I made it clear in my opening remarks, we are not prepared to permit this to [49] be dismissed until we have decided what counterclaims we want. I would rather withdraw it if it is going to cause any confusion.

It seems to me the motion to dismiss the complaint is a motion which was warranted based upon the affidavits we filed in support of it. I think we ought to find out what it is that the plaintiff claims as a basis for their complaint, and after we see that, then I think we will be—conceivably we will be willing to say all right, if that is your position, there is a pure question of law involved. I don't anticipate that, your Honor, and I would be less than frank with your Honor if I didn't say that. When I see the opposing papers on the weekend before September 18th, I will withdraw the motion and renew it when we are ready to establish the fact.

I am sorry if I spoke this late on the thing. I thought your Honor was still addressing yourself to—

The Court: I was trying to bring them both in together.

Mr. Davis: No, I think the motion for the production of documents by the Tool Company is a motion which we believe is premature based upon the [50] firmly established precedents of this court, and I think it is up to TWA to show some overwhelming reason why they need those documents.

The Court: I would conceive it is to cross examine the witnesses whom you have subpoenaed on their depositions of them. This is a perfectly valid reason for looking at them.

Mr. Davis: I think we may come to that point, your Honor.

The Court: Let's do it this way: I think perhaps that you can hold off your motion to dismiss at the present writing and let's go on to the production of documents and keep the schedule, and that is September 10th—

Mr. Silverman: 15th, I think you said, sir.

The Court: —September 15th at 10 a.m.

Mr. Silverman: For opposing papers on the Rule 34 motion.

The Court: That is right. We will argue it on September 18th at 10:30. I don't know the courtroom yet. We will have to find out.

All right.

Mr. Sonnett: Yes. May I, your Honor, I have a commitment to Judge Cashin in a cartel case [51] and I don't know the date, but if I am not able to be available, my partner, Paul Williams, can do it for me.

The Court: There is a holiday that week, too, isn't there, Wednesday?

Mr. Silverman: I think the 11th, 12th and 20th are Jewish holidays.

Mr. Davis: I have no objection to putting it over past the 20th. In fact, I would like it.

Mr. Sonnett: I am sure you would like to put it off forever, but we have to get on with the case.

The Court: There is an earnest plea for progress in the case.

Mr. Sonnett: I am in favor of that, Judge. We are desperately anxious to get this case tried. I hope we can do it.

Mr. Davis: We will cooperate in that respect.

The Court: How about the 21st, if you have no serious objection?

Mr. Sonnett: No.

Mr. Davis: Since Mr. Williams has just appeared for the first time today, we can put it over [52] when you are available.

Mr. Williams: This is not the first time I appeared in this case.

Mr. Sonnett: Mr. Williams appeared when we filed the case. He wouldn't be with me on the case, but he is taking some of the load. But as to the dates, the 21st is all right with me.

The Court: Are you sure of that holiday date, the 20th, Wednesday?

Mr. Silverman: I am almost sure.

The Court: Make it Thursday, September 21st, and you can file your papers then by Monday, the 18th. That will give you three working days.

Mr. Sonnett: Thank you, Judge.

The Court: September 18th for the service of papers. All right.

Mr. Sonnett: Thank you.

Mr. Davis: We will delay the commencement of depositions until after the 21st date.

The Court: Yes.

Mr. Silverman: And the motion to dismiss is held off?

The Court: Held in abeyance.

Mr. Davis: Thank you, your Honor.

A-2112

Pretrial Order, September 7, 1961

[Doc. 44]

[CAPTION] 61 Civ. 2324

ORDER

A pretrial conference was held in this cause on September 6, 1961, wherein the following proceedings were had.

I.

The following counsel were present representing the plaintiff:

CAHILL, GORDON, REINDEL & OHL, Esqs.,
JOHN F. SONNETT, Esq.,
PAUL WILLIAMS, Esq. and
CORYDON B. DUNHAM, Esq.,
Of Counsel.

The following counsel were present representing defendants:

CHESTER C. DAVIS, Esq.,
Attorney for Hughes Tool Company,
RAYMOND COOK, Esq.,
PETER M. FISHBEIN, Esq.,
MAXWELL COX, Esq.,
JAY H. TOPKIS, Esq. and
SAMUEL J. SILVERMAN, Esq.,
Of Counsel.

II.

Plaintiff TWA has already gathered some of the documents called for by the subpoena duces tecum served on TWA on August 16, 1961 by defendant Hughes Tool Co. TWA shall continue gathering the material called for by this subpoena duces tecum and shall complete compliance with the subpoena by Friday, October 13, 1961. Defendant Hughes Tool Co. may commence the inspection and copying of said documents on September 7, 1961.

III.

Plaintiff's motion pursuant to F.R.C.P. 34 shall be argued on September 21, 1961 at 10:30 a.m. in chambers. Defendant Hughes Tool Co. shall serve and file its papers in opposition prior to 10 a.m. on September 18, 1961.

IV.

The question as to when defendant Hughes Tool Co. shall commence taking depositions and when it shall comply with any order entered on plaintiff's motion pursuant to F.R.C.P. 34 will be argued in conjunction with said motion.

V.

The motion by defendant Hughes Tool Co. to dismiss the complaint pursuant to F.R.C.P. 12 and for summary judgment pursuant to F.R.C.P. 56 shall be held in abeyance. Said defendant shall notify the Court when it desires the motions to be heard. A date will then be fixed for the serving and filing of papers in opposition and argument on the motions.

VI.

The service of subpoenas by defendant Hughes Tool Co. may continue.

So ORDERED.

Dated: New York, N. Y.
September 7, 1961.

/s/ CHARLES M. METZNER
U.S.D.J.

A-2115

Transcript of Pretrial Hearing, October 2, 1961

[Doc. 48]

[CAPTION] 61 Civ. 2324

Before: HON. CHARLES M. METZNER, District Judge.
New York, October 2, 1961, 10:30 a.m.

[APPEARANCES]

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[2] Mr. Sonnett: Good morning, your Honor. I do not know whether the Court had an opportunity to read our reply papers which, unfortunately, I ground out over the weekend and could not serve and file until this morning.

The Court: I did not.

Mr. Sonnett: Your Honor will find that we have submitted two memos of law. I would like to explain why two, briefly. One is our reply memorandum in connection with the motion for production, which is the pending matter before your Honor. The second is a brief with respect to the defendant Tool Co.'s claimed defenses.

The reason for the second brief, may it please the Court, is that Tool Co. suggests from time to time in its papers that it has some defense to the complaint here. It hasn't yet tendered that defense for decision. The motion to dismiss, as your Honor will recall, is pending, and we don't have an answer yet in the case, but the repeated suggestion of this alleged defense of exemption, it seemed to me, required us to set forth in a brief what our position is as

plaintiff. We have done that in the brief with respect to defendant Tool Co.'s claimed defenses. [3] I hope your Honor will find it of some assistance in understanding the plaintiff's theory of the case.

In so far as the motion for production is concerned, your Honor, the opposing papers, as I read them, concede our right to the production of all documents which we seek except financial records and income tax returns, and the opposing papers take the position that the time of production should be deferred until after the Tool Co. has completed its scheduled depositions.

Our position is that the papers should be produced promptly, all of them, including the financial records and tax returns, and that they should be produced prior to the commencement of the depositions.

I think the basic ground of distinction in this case from some of those, in fact I think all of those, relied on by the Tool Co. is that we have a total of something over 25, I think, witnesses to be examined by the Tool Company. Four are TWA executives. Over 20 are outside witnesses. The subject matter of the examination of all of the outside witnesses will be directly connected with the matter of financing of aircraft, with the motives, purposes, intent of the Tool Company in doing what it did do and how [4] it did it.

Our cross-examination of these witnesses cannot be successfully done or completed until we have the Tool Company documents. We are not seeking to interfere with their priority of deposition. Rather, we are trying to make the depositions shorter and more meaningful when they occur.

So I submit, your Honor, on the basis of the allegations of the complaint, on the basis of the needs in this case for administration, the fact that we are about to commence an extensive program of depositions, that the time to get rid of the document problems is now. We shall be confronted with very real, practical problems otherwise.

The 25-odd witnesses are to be examined in New York, in California, in Pennsylvania and in the State of Washington. If we are going to be running into—and I suspect we will unless this Court takes action to prevent it—controversies about document problems on the one hand, necessitating an appeal back to this Court or perhaps to other courts, the problem will be compounded. If we are going to be in a position as plaintiff where our cross-examination of these witnesses will have to be [5] reserved at least in large part until we see the Tool Company documents, it just means an additional burden on 20 outside witnesses and on the parties and, I might add, I think on the Court as well.

As for the financial records, including tax returns, your Honor will note on examination of the complaint that we charge that the specific motivation of the defendants was to so dominate and control TWA as to achieve the maximum benefit for the defendants themselves. This was and is a case of a deliberately calculated purchase for control by the Hughes Tool Co. which assumed the role of supplier of aircraft and which dictated the times and places and terms on which TWA could get the aircraft it needed. It is that which is at the heart of our case.

We believe that the financial records of the Tool Company, including their tax returns, will establish that the

specific motivation for doing things the way they did do them, with the result, I believe, of a clear violation of the antitrust laws, was a tax motivation. We submit, your Honor, that the cases which we have cited in our reply memorandum are directly authoritative on the matter of tax [6] returns in a case such as this, and I refer particularly to the cases cited at pages 8 and 9 of our reply memorandum.

I think, your Honor, that outlines our position. I have nothing further at this time. I would like a few minutes in reply, though, if necessary.

The Court: Mr. Davis.

Mr. Davis: Your Honor, this is the third time that TWA in one way or another has attempted to embarrass the Tool Company by trying to do something out of turn.

The first time was when they filed this complaint under seal and at the same time obtained an order to show cause to take the deposition of Mr. Hughes within seven days after the filing of that complaint. That attempt failed before Judge Murphy.

The second time that they tried to again find some reason for embarrassing the Tool Company was when they tried to commence taking depositions before giving the defendant Tool Company an opportunity to find out what it is that they are really claiming. That attempt failed before Judge Herlands when he decided that the defendant was entitled to priority. [7] It is perfectly clear, and counsel for TWA knows, that once priority has been established under Rule 26, it establishes the priority for discovery under Rule 24.

The issue, therefore, is what is the special circumstance here, if any, to justify the plaintiff, who presumably knows what he is suing about, to have access to the records. The first statement Mr. Sonnett makes is that we concede that what they seek is relevant. That is not true. What we have said is that we have no objection to that portion of the request for documents that they have made which they have justified only by saying: the defendant asked for these documents, so we are going to ask for the same things in reverse; and we have said: you can have all the documents we have when your turn comes.

The only thing we are really objecting to in so far as the production of documents is concerned is the financial statements of the Tool Company and its income tax returns, and I would like to address myself to that for a moment, if I may.

TWA well knows the sensitivity that the Tool Company has had over the years to public [8] disclosure not of the kind of financial statements we normally think about, in the form of annual reports, which most corporates normally make available to their stockholders. TWA knows and the persons in control of TWA know, because that includes lending institutions who have obtained, on a confidential basis in connection with some other transactions, detailed information about the Hughes Tool Company, that our financial statements contain a lot of detailed information which would hurt us to disclose. Therefore they find it extremely important to obtain them.

Motivation. Motivation about control: It is admitted that we acquired control of TWA and that TWA became a

subsidiary of the Tool Company. It is admitted that this was done with the approval of CAB, whatever the reasons. So we controlled TWA. It is admitted.

What is the motivation as to why we acquired control of TWA? Was there a tax reason why we were willing to come to the assistance of TWA when we did it at the time we did it, which permitted CAB to approve our acquisition for control of TWA? What relevant intent does that have under the antitrust laws? None, absolutely none.

[9] This is quite apart from the fact that the only tax intent which is referred to in the moving papers is a so-called desire on the part of the Tool Company to avoid the consequences of an unnecessary accumulation of funds. Well, I don't know of anything unusual about people not wanting to pay any more taxes than they have to, to be sure. But it isn't even true. On the face of it it isn't true.

It is perfectly well known that once TWA became a subsidiary of the Tool Company the cash requirements of TWA, as well as the cash requirements of the Tool Company and all its other enterprises, were pertinent issues for this tax question, and therefore it makes absolutely no difference whether TWA was financed one way or another, whether we did it by committing our credit to acquire equipment and subsequently made it available to TWA or whether we did it in some other way, absolutely irrelevant.

I submit, your Honor, that TWA knows that and that there is absolutely no justification which has been shown whatever for attempting to embarrass the Tool Company. The Tool Company is defending itself against what? Against a 38-page complaint [10] that states a lot of con-

clusions. I can make the allegations of that complaint by looking at any form book. But when we asked TWA to specify just exactly what it is that they claim we have done which is outside the scope of the CAB orders, there is a dead silence.

As to the underlying issues, I want to refer to this although it is a sort of digression because I think it is pertinent to what we are here for today because it was mentioned in your Honor's pretrial order. We attempted to bring out what are the real underlying issues here by bringing on a motion to dismiss with an affidavit in support of our motion. We could have proceeded in other ways, perhaps, but that is the way we decided to proceed. That was done so as to give TWA an opportunity to respond with opposing affidavits which would presumably state facts, not counsel's educated wording of the complaint, facts in an affidavit.

Presumably TWA is claiming that we have done something contrary to the approval of CAB, which was obtained. But what we have done contrary to the approval of CAB is to remain a deep, dark secret. [11] At least today we don't know. And it is difficult to address one's self to the relevancy of the needs of TWA to prosecute this action which they have commenced, presumably based upon some facts they know, since we cannot find those facts out.

That is one of the reasons why we believe the normal rules of this court should prevail here. We are the defendants. We have obtained priority in the taking of depositions. We want to pursue the taking of depositions and find out what the facts are that the plaintiff knows, not

what counsel argues. Then we will have something tangible before us.

In the memorandum that was served on us today reference is made to the number of lawyer hours that would be involved in what has already taken place, in the production of documents, in the possibility of making this a very, very big case. It is true that a great many lawyer hours have been spent since the last time we were before your Honor and TWA presumably has been producing documents by the carload. We have been told by counsel for TWA that all the documents we have requested will be furnished to us on or before October 13th but that they will have to [12] determine the order in which that material is made available to us.

Do you know what has been made available to us, your Honor, to date? We have had some men in Kansas City because we were told that is where the documents were, and there we get reams of files that give us all the detailed changes and specifications of all the aircraft ever acquired by TWA from the beginning of time. Every time a screw was changed, we get all the specifications, reams of files. When we say we would like to get the files which constitute the applications to CAB for approval of what we have done, "We'll provide everything in good time."

You see, your Honor, the peculiar situation is that when the Tool Company was in control of TWA the applications for approval that were submitted were prepared by TWA and its general counsel, and the Tool Company does not have those files. Those were done by a subsidiary.

Comes the beginning of this year 1961 and some persons acquired control of TWA under circumstances which will

be the basis of a great deal more by way of answer and counterclaim, we suddenly find ourselves without any files whatever. When we wrote a [13] letter before this discovery proceeding was started, we were told that access to those files would be made available to us in due course in connection with discovery proceedings.

Mr. Cox calls to my attention that we have seen CAB applications. I was not referring to the bare application itself. I was referring to the files which contain the information we submitted to the CAB.

When we asked for the files which related to the financing and the proposed financing which is taking place, we were furnished with the printed documents, but the files which disclose what negotiations took place, who insisted on the provision referred to in Mr. Holliday's affidavit, which is an obvious effort to perpetuate those in control beyond the term of the original arrangement of December, 1960, that is not yet available for us.

I submit, your Honor, if counsel for TWA anticipates a great many lawyer hours in the production of documents for discovery proceedings, a great deal of that, to be sure, will be within their control, and we are not complaining about what has been taking place. The arrangement is that on or before October 13 we are supposed to have all those files, and we [14] will wait patiently until October 13, and presumably they are entitled to produce their files in whatever order they want to.

But I don't think that your Honor should get the impression that, since it was ruled that we were to have an opportunity to really commence the examination of TWA's files, we have made any progress to date in that connection. We have made very little, if any, progress, and, as I say, this has been solely within the control of TWA.

Transcript of Pretrial Hearing, October 2, 1961

Your Honor, I don't see that I can advance the proceedings very much by repeating what basically appears in Mr. Holliday's affidavit. I am fully conscious of the fact that on this kind of case the normal tendency is: well, they are asking for relevant documents. Let them have it. What harm does it do?

I urge your Honor to consider the very serious harm that the Tool Company will suffer if these people are going to have access, in a public matter, to those detailed financial reports which are never made available. The problem confronting us, your Honor, is that we happen to be a corporation which is owned by one man. As a result of that we do not prepare, we cannot respond to a request for, financial [15] statements of the kind or nature that most other corporations prepare, which just gives a generalized picture of what is taking place. The only thing we have in our files is statements which are prepared for the various operating heads.

In fact, within the Tool Company there is such sensitivity about the disclosure of the details of the operation of some of those divisions that even within the company an officer in charge of a particular division does not have access to the detailed financial information of another division.

So that the income tax returns contain very detailed information with respect to the operation of the business that, as the affidavit of Mr. Holliday points out, would seriously injure the company if that were to become public.

It is true that, when dealing with these lending institutions, we have at their request prepared financial statements which were furnished to them on a confidential basis. Included in those lending institutions is the Irving Trust

Company. Irving Trust Company is one of the lending institutions now in control of TWA. What they have done with the information they received on a confidential basis [16] we are not in a position to say, of course, but the affidavit of Mr. Holliday indicates that there is some concern that maybe some of that information has been misused. If so, of course we have no means for redress. But we are very sensitive against making that information generally available.

In so far as the time when TWA should have access to whatever they are entitled to obtain, there is no question that we have no objection, although we don't concede the relevancy, to giving them all the documents that they ask for, whether relevant or not relevant, with the exception of those financial statements and income tax returns. But it is perfectly obvious also that we cannot be doing two things at once. We cannot be searching our files, our records to respond to the request of TWA which they admit copied ours. Presumably, if the defendant wants to know something about this matter, the plaintiff may ask for exactly the same information. They made no effort whatever to limit, for the purpose of immediate production, the kind of documents they feel they have to have right away, just the same broad thing. In fact, they say: all this we are asking for because the defendant [17] asked for it, just that bluntly.

It is perfectly apparent, your Honor, that, if we are going to make progress here—and we are the ones who want to make progress here; we want to make progress here because we believe there is a complaint on file here which is absolutely unsupportable and we want to get the facts out and we want to be in a position to dismiss this

complaint, to stop this entire proceeding. We believe that it can be done without a trial. But, your Honor, a great deal depends on what contentions are made as to the facts, and the only way we know of is to go out and get them.

Therefore we want to start taking depositions as soon as possible. We want these people to produce the documents we have called for and permit us to start the taking of depositions without interference. Then, if, for reasons which I do not anticipate, things bog down through no fault at all of the parties, it seems to me that plaintiff can renew its application to this Court for such relief at that time as they need.

But my plea, your Honor, is that we want to start taking the depositions of TWA and start [18] finding out what it is they are really claiming we have done, and we don't want to be interfered with in that process by having to divert our attention to the production of documents they call for. After we have taken some depositions and know really, on the basis of discussing openly, what the facts are, then we can consider what it is that TWA really needs for the purpose of prosecuting this action.

Before I close, I would like to introduce—perhaps I should have done this before I presented my argument—Mr. Raymond A. Cook of the Houston firm of Andrews, Kurth, Campbell & Jones who is here with me, and I would like to move his admission for the purpose of this case.

The Court: We are very glad to have you here.

Mr. Sonnett: I am happy to have the frank concession, your Honor, that Hughes controls TWA "and so what" because that concession saved us a lot of waste motion in proving what I think is pretty obvious anyway.

The fact is that he did control TWA up until December of 1960. The fact is that aside from [19] Tillinghast, the new president of TWA, the people of TWA whose depositions he wants to take are people who were working for TWA at a time when every significant decision of TWA was imposed on it by Hughes and people who reported directly or indirectly to Hughes.

The pose that they are completely in the dark is absurd on its face. They dominated, controlled and ran this airline and ran it into the ground prior to December of 1960, so much so that when, in order to raise funds to buy jets which were vital to its existence, TWA could not get the money except from Hughes primarily or from the banks and lending institutions, the banks and lending institutions said they wouldn't put up the $167,000,000, I think, of their money and their depositors' money and their policyholders' money until there was a voting trust which would take control of this airline away from the man who had ruined the airline, to wit, Howard Hughes.

The voting trust was signed with the authority of Hughes. He accepted, in December of 1960, the hard fact that under his control the airline was about to go into bankruptcy. So he accepted the voting trust.

[20] There were three voting trustees appointed, all distinguished men: One, a defendant here, a Hughes Tool man named Holliday; another, Ernest R. Breech, former chairman of the Ford Motor Company; the third, Irving M. Olds, former chairman of U. S. Steel.

The voting trust agreement is a long, carefully drawn, carefully worked out document which was examined, cross-examined and looked at over a microscope by Hughes' counsel, and on the eve of the airline going under, in De-

cember, 1960, he finally, at the eleventh hour, signed or caused the signing of the voting trust agreement.

The voting trustees put in a new board of directors. I am not going to dwell on the board except to note with regret in one sense that one of its distinguished members, John McCone, former chairman of the Atomic Energy Commission, has just been appointed as head of the Central Intelligence Agency. That is the caliber of the new board. This isn't a board that has been running this thing out of some back room in Beverly Hills, like Hughes was running it. This is a responsible board of directors of excellent businessmen. That board picked a new [21] president who has been trying to run the airline.

The airline was pretty sick, indeed, in December of 1960, and it has gone through a very, very difficult economic period, as have all airlines, but this one was very sick to begin with in December of 1960. And, as Hughes Tool Company has recently been informed, the financial situation confronting this airline is very perilous today. A new program was announced for the procurement of Caravelle planes. It looks as though that program will have to be called off. The airline is still suffering from the strangulation that Hughes has imposed on it in the exercise of his control, keeping it so weak in terms of equity that it couldn't stand on its own feet without his helping hand, indeed, the helping hand that took it and led it and forced it to go where he wanted it to go.

Your Honor, we have made our position quite clear in the complaint. We have also spelled it out, I think, very lucidly in our brief with respect to their claimed defenses. Now I urge your Honor, in the interest of keeping the airline going and in the interest of the minority stock-

holders, to take action which will make it possible to try this case as early [22] as possible because I think what is motivating them is that, if they can avoid an early trial, they may be able to avoid any trial at all. I think that is what they are up to.

The Court: Everybody seems to want an early trial. Everybody wants depositions and papers and documents. We can try it tomorrow, you know, if you want to.

Mr. Sonnett: May I suggest to your Honor that, if counsel is agreeable, I am prepared to go ahead.

Are you agreeable, counsel?

Mr. Davis: Certainly. To start trial in this case?

Mr. Sonnett: Yes.

Mr. Davis: Certainly. Bring Mr. Tillinghast in.

Mr. Sonnett: If your Honor will fix a date, we will start the trial any date suitable to your Honor.

The Court: He said "Bring Mr. Tillinghast in."

What did you mean by that?

Mr. Davis: Mr. Tillinghast is the person whose deposition we have been trying to take for some [23] time, your Honor. Currently he is the president of TWA. As your Honor knows, an answer has not yet been put in—

The Court: We have pending two motions, too, which you held in abeyance for summary judgment to dismiss the complaint.

Mr. Davis: That's right, your Honor. That is what I adverted to a moment ago. As your Honor will recall, the last time, which was the first time we appeared, the question of this motion to dismiss came up. We believe that this case can be decided, in so far as the complaint is concerned, on admitted facts. However, and we are prepared to proceed with that motion to dismiss, in all candor I

must say that when I see what the answering affidavits are, and I presuppose that Mr. Sonnett will serve us with answering affidavits which will raise issues of fact, if that takes place, then we will be able to decide whether or not we are ready to proceed with a motion to dismiss and summary judgment.

The thing which Mr. Sonnett overlooks, of course, is the counterclaims we have. If we are going to stay in this court, we have some very serious [24] problems relating to TWA and the persons who acquired control of TWA.

Mr. Sonnett referred very briefly to what took place in December, 1960 on this financing and creation of the voting trust. I don't feel I should go into that until I am prepared to submit the facts formally, but it is a real serious problem. There is a very serious problem involved in connection with this very recent financing that Mr. Sonnett referred to, because we have a situation here where the lending institutions, whether they like it or not, acquired control of TWA. They acquired complete control of the voting trustees who, in turn, completely control the board of directors.

We have no objection to the board of directors, your Honor, but those same lending institutions very recently negotiated with TWA, whom they control, and therefore I call that self-dealing, a new debt arrangement for an additional $147,000,000. That is in addition to the $167,000,000 or $165,000,000 that was arranged in 1960 which produced this voting trust. If you look at the provisions as quoted in the affidavit of Mr. Holliday, the lending institutions, who were in control, who were dealing with themselves, [25] put in some provisions obviously designed to perpetuate or continue their control of TWA.

Your Honor, there is something very peculiar there. They imposed a 22 per cent penalty on the Hughes Tool Company if the Tool Company pays them off. I don't know why. They provided in this new financing that the new $147,000,000 long term debt accelerates or matures all at once if this voting trust should terminate, lawfully terminate, or if Mr. Hughes should acquire all these outstanding notes.

I don't know what power these lending institutions think they have to impose those kind of terms on a business whether or not it is in need of funds.

In the allegation of this complaint of antitrust violation there is a little bit of: if I do it first maybe I will stop them from doing it to me. But, if there has been anybody who has been capturing the market for financing the whole phase, it isn't the Hughes Tool Company. The Hughes Tool Company has no objection to other people financing it, and the record is perfectly clear when you look at what has happened to it throughout the years. It isn't the Tool Company who is insisting on [26] financing TWA. It appears at the moment that the persons who have acquired control of TWA would like to keep that control.

Mr. Tillinghast, as the president, makes a contract, negotiates with someone, I don't know who, which contains provisions as to the annuity he is to receive should the voting trust terminate.

We own 78 per cent of the stock, yet we have no right to vote a single share of it, and there is a management who is not responsible to anybody. The lending institutions say: We have elected a fine board and we want to wash our hands of it. All we want to do is deal with new owners. That is all we want to do.

The management of TWA that is in there now has no ownership responsibility, has no responsibility to ownership whatever. It is a very interesting situation, and all of it will be brought out when we file our answer and counterclaims.

It is well known and appreciated by TWA and by some of the people of TWA that Hughes Tool Company is not one that seeks lawsuits, and the first question before us is to delineate the issues underlying the complaint, and the way to do that, your [27] Honor, is either to require them to submit affidavits setting forth the facts which they claim exist or give us an opportunity to take depositions so we can find out what the facts are. Somebody made a decision to file this complaint. Somebody must know what the facts are that they are complaining of, and that is the plaintiff, and there is nothing unusual about that.

What we want to do is to proceed with the taking of depositions of the plaintiff, and we have argued this question twice now, your Honor, both before Judge Murphy and before Judge Herlands, and this is the third time it is coming up.

The Court: One thing that bothers me, Mr. Davis, on this motion, and I haven't read the briefs, obviously, is this: Isn't the plaintiff entitled to these documents, without the substantive questions of the tax return and the financial statements, to adequately prepare for your deposition?

Mr. Davis: I assume they will have ample opportunity to prepare for the taking of depositions of the Tool Company. All I am saying is that—

The Court: No. To prepare for the [28] depositions that you are going to take of TWA. They are going to

have a right to cross-examine those witnesses, and those documents may be important.

Mr. Davis: I assume that TWA, the plaintiff, is fully prepared to answer questions with respect to the complaint. I take it that all the documents they need as to the facts that they claim are relevant to this issue were considered before the complaint was filed.

The Court: Well, there may be a lot of other documents in existence which they have heard of or think exist but which they never saw, and that happens in all these cases.

Mr. Davis: Let me point out that that is true in every case, and I respectfully submit, your Honor, that somebody has to start, and once somebody—

The Court: The only question I have here is whether they are entitled to the production of documents from you before you start the oral depositions of the witnesses on your motion against them. That is the only question I have.

Mr. Davis: You mean in taking the deposition of the plaintiff?

The Court: That is the only question I [29] seem to have. If I am mistaken, I would like to be told where.

Mr. Davis: If we eliminate the question of the financial statements and the tax returns—

The Court: No, you cannot eliminate that. That is something I still have to determine. I haven't said whether I will allow them or not. But, whatever documents they are entitled to, isn't the question whether they should have them before you start taking your oral depositions?

Mr. Davis: Your Honor, that is what I meant to suggest in my other presentation. In so far as the time in which we are supposed to produce documents to help them

to cross-examine whatever witnesses they want, may I suggest that is a matter which can be decided after we have completed taking the depositions of the plaintiff. At that time I think we may be in a position to know whether or not we are going to proceed by summary judgment or not.

I would be very frank to say, your Honor, that after we have taken the deposition of the plaintiff and before we start taking the deposition of witnesses, if your Honor feels that the plaintiff needs documents that we have, even though they have [30] described them by saying "Give us whatever we have asked of you," which is all right with me, we will take the time off and produce those documents.

The Court: Mr. Sonnett?

Mr. Sonnett: May it please the Court, on the question of the trial date which I think strikes at the heart—

The Court: We have passed that facetious remark.

Mr. Sonnett: I think your Honor put his finger on what the heart of the problem is. May I say that unless this case is set for trial and goes to trial early in the year, I think there are grave questions as to whether there will be any trial at all. I am prepared to submit, your Honor, if counsel is agreeable, a statement off the record which will emphasize the imperative need for an early trial, and I assert to your Honor it is imperative. So that I would apply to your Honor now to fix January 2nd as the date for trial of this case—

The Court: That is the date I fixed in the minority stockholders suit against duPont. I know they are not going to meet it, but—

Mr. Sonnett: We can meet it, provided [31] your Honor imposes the control—

The Court: In fact, I made it January 2nd of last year and they didn't meet it.

Mr. Sonnett: We will meet it in this one because we will be forced to meet it, your Honor. We will be forced to because we have no choice. With the strong hand of the Court on the pretrial, we can be ready, all of us.

He talks about wanting depositions. Fine. I would like to make one thing very clear. As counsel for TWA, I haven't any concern, really, about what he does or doesn't do in his problems with the banks and the insurance companies. If he is able to demonstrate that the obligations of these banks to their depositors and the obligations of the insurance companies to their policyholders were not the reason why the banks and the insurance companies insisted on the voting trust, as apparently they did, if he is able to persuade the Court that maybe even the CAB in its December order, when they said they would approve the voting trust but they want to make it clear that there would have to be a searching inquiry before they will ever let Hughes get control of this airline, searching in terms of the public interest—[32] if all of that is to be disregarded and Hughes is going to be able to tie this case up, in what is a diversion, in some collateral problem he may have, then I say to your Honor that there may not be anything left of this case except perhaps in the extreme case of it being advanced by a trustee in bankruptcy against Hughes.

Hughes is notorious for delay. He delayed all during 1960 in stepping up to the plate on financing, and TWA was hurt and hurt badly, as the CAB noted in its December order. This is not just my assertion. This is an assertion by the Civil Aeronautics Board based on what it knew about what Hughes had done here.

I say to your Honor that there is a pressing need, in the interest of the airline with which I am concerned, to

go forward with the case, and whatever problems Hughes may have with the banks and insurance companies are their problems; they are not TWA's.

Counsel can hardly be serious in saying that the corporation, of which Hughes has the beneficial interest of over 78 per cent, was doing something—the corporation, which is the plaintiff here—which would warrant any counterclaim by him against the corporation. The only thing the corporation did [33] that hasn't pleased him is that it filed this lawsuit, and we intend, if we can, to see that it is tried.

I don't think there is any way of bringing this case to a head and of preventing the kind of stalling tactics that will occur that may make the lawsuit moot unless your Honor imposes a very strong hand on the pretrial, and the only way I think that that can be effectively done is to set a trial date, and then we are all going to have to meet it. And the depositions are not going to go on for weeks or months. They are going to be taken in a business-like way and done, and they will be done much more quickly if we have the documents in advance.

That is all I have.

The Court: Mr. Davis, do you want to say something?

Mr. Davis: I don't think it is necessary for me to say anything more than I have already said. I gather Mr. Sonnett is not asking the Court to put in an anticipatory limitation on a deposition which has not yet commenced. I think we can dispose of whatever problems occur in the so-called firmly-handled depositions after they have started or after [34] we see what kind of information we get.

The Court: I have an expression of opinion from both counsel that you are anxious for an early trial. Conse-

quently the Court will be guided by that in either case. But I am not prepared to fix a trial date now, Mr. Sonnett, because I am not sure of my own schedule. I know I have a private antitrust suit starting on December 6th. Whether I can then engage in another long trial depends on the Chief Judge of the Court, as to whether he wants me to give up my regular assignment through January and February to take this on. I am perfectly willing to do so. Whether I try this or some other case makes no difference to me. But that is a question of administration.

All right.

A-2138

Pretrial Order, December 18, 1961

[Doc. 354]

[CAPTION] 61 Civ. 2324

ORDER

Plaintiff having brought on a motion, pursuant to Rule 34, Federal Rules of Civil Procedure, for the production and inspection of documents and argument having been had thereon on October 2, 1961, and plaintiff having appeared in support of said motion by CAHILL, GORDON, REINDEL & OHL, Esqs. (John F. Sonnett, Esq. and Paul W. Williams, Esq., of counsel) and defendant Hughes Tool Company having appeared in opposition thereto by CHESTER C. DAVIS, Esq., Paul, Weiss, Rifkind, Wharton & Garrison, Esqs. (Jay H. Topkis, Esq., of counsel) and Andrews, Kurth, Campbell & Jones, Esqs. (Raymond A. Cook, Esq., of counsel), and due deliberation having been had thereon, and the court having rendered its decision in a Memorandum Opinion dated December 5, 1961, it is hereby

ORDERED, that:

1. Plaintiff's Motion for an Order, pursuant to Rule 34 of the Federal Rules of Civil Procedure, directing the production and permitting the inspection and copying of documents, papers, books, letters and other material in the possession, custody and/or control of defendant Hughes Tool Company as designated in the schedule annexed to said Motion, is granted.

2. The depositions heretofore scheduled by defendant Hughes Tool Company under its notices are hereby

rescheduled to commence on January 5, 1962 in the order and sequence noticed and the depositions heretofore scheduled by plaintiff under its notices are hereby rescheduled to commence on April 3, 1962 in the order and sequence noticed.

3. The production of writings and other material by defendant Hughes Tool Company pursuant to this order shall be made on March 15, 1962.

4. Pursuant to the provisions of Rule 30(b) of the Federal Rules of Civil Procedure, all income tax returns and financial statements of defendant Hughes Tool Company produced pursuant to this Order for inspection and copying shall not, without further order of this court, be disclosed publicly by plaintiff or its counsel except in connection with the preparation, pretrial proceedings and trial of this action or any other action or proceeding in which any of the parties herein are participants.

Dated: New York, N. Y.
December 18, 1961

/s/ CHARLES M. METZNER
U.S.D.J.

A-2140

Toolco's Notice of Motion, February 15, 1962

[Doc. 66]

[CAPTION] 61 Civ. 2324

NOTICE OF MOTION
BEFORE THE SPECIAL MASTER

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Chester C. Davis, sworn to the 15th day of February, 1962, defendant Hughes Tool Company will move before J. Lee Rankin, Esq., the Special Master herein, (1) for a ruling that, pursuant to Rule 26, Fed. R. Civ. P., the deposition of plaintiff, Trans World Airlines, Inc., be concluded prior to the commencement of any other depositions noticed by Toolco or by any other party and (2) that the Special Master determine whether the deposition of plaintiff be suspended until a reasonable time has elapsed for the service of the additional defendants and for their appearance in the discovery proceedings.

Dated: New York, N. Y.
February 15, 1962.

Yours, etc.,

CHESTER C. DAVIS, ESQ.
Attorney for Defendant
Hughes Tool Company
120 Broadway
New York 5, N. Y.

[To Defendants' Attorneys]

[fol. 1024] [File endorsement omitted]

[fol. 1025]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
61 Civ. 2324

TRANS WORLD AIRLINES, INC., Plaintiff,

vs.

HOWARD R. HUGHES, HUGHES TOOL CO. and RAYMOND M. HOLLIDAY, Defendants.

Transcript of Proceedings—New York, February 23, 1962

Before: Hon. Charles M. Metzner, District Judge.

APPEARANCES:

Cahill, Gordon, Reindel & Ohl, Esqs., Attorneys for Plaintiff; John F. Sonnett, Esq., Dudley B. Tenney, Esq., and Marshall Cox, Esq., of Counsel.

Chester C. Davis, Esq., Attorney for Defendant Hughes Tool Co., Chester C. Davis, Esq., and Maxwell E. Cox, Esq., of Counsel.

Cravath, Swaine & Moore, Esqs., Bruce Bromley, Esq., [fol. 1026] and Winthrop, Stimson, Putnam & Roberts,

Esqs., Peter W. Kaminer, Esq., and Silas M. R. Giddings, Esq., and Ben-Fleming Sessel, Esq., and Chadbourne, Parke, Whiteside & Wolff, Esqs., Edward Nealer, Esq., and Dunnington, Bartholow & Miller, Esqs., Charles L. Stewart, Esq., of Counsel, Attorneys for Additional Defendants.

ARGUMENT ON SCHEDULE OF DEPOSITIONS
RE ADDITIONAL DEFENDANTS

Mr. Bromley: May it please the Court, my name is Bruce Bromley. My firm is Cravath, Swaine & Moore. We represent four of the nine additional defendants which about ten days ago were brought into this action by way of the assertion of alleged counterclaims.

Four of the nine additional defendants represented by me are Metropolitan Life Insurance Company, the Equitable Life Assurance Society of the United States, James F. Oates, Jr., the president of Equitable, and Harry C. Hagerty, the vice-chairman and board of directors of Metropolitan.

There is before you, brought on by notice, a motion on our part which is by way of an appeal from a ruling or [fol. 1027] rulings of the Special Master. The motion seeks an order and direction from your Honor that the schedule of depositions which your Honor set by order of February 7th be revised and that the additional defendants be granted priority of discovery after the defendant Tool Co. shall have completed its discovery of TWA, and to that extent the schedule be interrupted so we additional defendants can discover the basis of the counterclaims after Tool Co. shall have discovered the basis for the complaint against it, and then, and not till then, shall the rest of the discovery by way of deposition go forward.

On February 13th, which was just a week after your Honor set the schedule in the main action, Tool Co. served upon us a 62-page alleged counterclaim and answer.

In that document six so-called counterclaims were pleaded, and nine additional defendants were added to the action. As I say, this was just a week after you had set up the schedule in the main action.

Five of those counterclaims concerned the additional defendants. Only one of them is a real counterclaim against [fol. 1028] TWA, and that is the sixth one for unpaid interest, so alleged.

But the other five claims are really independent claims, and TWA is joined merely, I submit, as a device in order to label these claims as counterclaims, because no relief is sought against TWA of any substantial nature, although the claims demand against the additional defendants more than half a billion dollars in damages, in addition to certain injunctions. ..

Within hours after these counterclaims were filed, Tool Co. through Mr. Davis, Hughes Tool Company, instituted efforts before the Special Master to subject all these additional defendants and the counterclaims to the three established schedule of depositions which your Honor had set up before any of these claims against the additional defendants had been asserted.

I say to your Honor at the outset your schedule obviously was set up in an entirely different lawsuit than the one which now confronts us and is before you. In spite of our best efforts with the Special Master he has refused to grant us what we believe to be adequate relief, and he has ruled [fol. 1029] that before any of us additional defendants can have any discovery of any kind by way of depositions from Tool Co. relating to the counterclaims Tool Co. may examine not only TWA as to the basis of its complaint against Tool Co., but also examine in aid of Tool Company's defenses to that complaint, examine all other witnesses and parties, and also may examine the additional defendants.

He has also indicated that Tool Co. may examine not only as to the basis of the plaintiff's claim against Tool Co., but also the additional defendants on the counterclaims.

That ruling, we submit, is wrong because it denies the additional defendants seasonable opportunity to develop from Tool Co. the person asserting the counterclaims against the defendants the basis of those claims, the real issues, and denies us the opportunity to define and delimit them in seasonable time so that we may, if we are so ad-

vised and the basis appears, move to dismiss some or all of them.

The ruling denies us that seasonable opportunity so to protect ourselves because many, so many of the facts which are relevant to the complaint and the defenses thereto, [fol. 1030] are equally relevant to the claims made against the additional defendants.

Had these so-called counterclaims been asserted against the nine additional defendants in a separate action, as they should have been, these defendants would, of course, have been accorded priority of discovery as to their basis in just the same manner that you accorded Mr. Davis, and his defendant client, Tool Co., priority.

The Court: Judge Herlands did that; I didn't.

Mr. Bromley: I am sorry, you are correct. Just as Judge Herlands did.

The Court: He gave them priority. I didn't give them priority.

Mr. Bromley: They got that priority.

The Court: They have it.

Mr. Bromley: They got it, and Mr. Davis asserts that is proper action, and normal procedure is always to give the defendant priority, except in this situation.

But Tool Co. has now become a plaintiff against us additional defendants, and I think the law in conventional counterclaim situations is clear that while the defendant [fol. 1031] in an action can have a limited priority to discover the basis of the claims against him, the next proper step is also for the plaintiff, who becomes a defendant on the counterclaims, to have the next priority with respect to those counterclaims. That is what has been denied us, because the Special Master, looking at your schedule, the names, the dates, has embarked upon a program which may take months, perhaps years, to complete that schedule, because it is completely broken apart.

We now have nearly two thousand pages of one TWA witness alone, and although under your schedule we are all due to be in California on the 20th to take the deposition of a witness, one Thomas—

The Court: Didn't he agree to come to New York? I suggested that he be brought to New York at the time I had the prior conference.

Mr. Sonnett: He did, your Honor, subject to certain mechanical arrangements about transportation, and so on.

The Court: All right.

Mr. Sonnett: As the record stands, I think that he is prepared to come to New York, and so is the Bank of [fol. 1032] America, provided they have arrangements made for their transportation expenses and counsel fees and reasonable notice.

The Court: Thank you, Mr. Sonnett.

Mr. Bromley: My only point is I don't care where the deposition is taken, the fact is the schedule has been completely disrupted because the Special Master says, "The dates don't mean anything; I am going to accord Tool Co. full and complete opportunity without regard to the dates that you set to exhaust its discovery against TWA."

It looks to me, although Mr. Davis refuses to make any estimate, that having really only scratched the surface on one witness that before he comes to the end of the trail on all the TWA witnesses alone it will be months away.

Now, if they are after, he can go down this whole schedule while we sit back unable to find out under proper discovery procedure what the issues between us on the counterclaims really are, and what the basis of those claims are. It is impossible for us to follow this schedule and adequately protect our clients.

I submit that it is of the greatest importance that we [fol. 1033] learn as soon as possible, without interference with his right of discovery against the plaintiff, the basis, the limitations, and the facts underlying his claim against us, and when that shall have been done it is then time enough for both of us to complete discovery with everybody else.

I want to make it perfectly clear that I have no quarrel with Tool Co., Mr. Davis', right to discover against TWA's complaint and to examine all of the witnesses. I wish the Special Master would make him get down to work and do it a little more promptly, but I have no desire to interfere with that. All I wanted to do is to take my place next in line so that I can start somewhere near even with him when we come to proceed to the host of other witnesses who will follow.

I must say that what Mr. Davis has done appears to me to be a very clever device indeed having gotten you to sign an order giving him complete priority in an action, and having that order signed, sealed and delivered, he then serves this massive claim against nine additional parties, and insists that the schedule which your Honor set—and he has persuaded the Master to follow it—be adhered to [fol. 1034] without regard to the rights of the additional parties to exercise their traditional and normal right of discovery as soon as it is practicable. And surely it is practicable for us to exercise that right of discovery as soon as he shall have developed all of the basis of the three causes of action asserted against him in the TWA complaint.

So, I say that the ruling of the Special Master is an abuse of discretion because of the great prejudice to the additional defendants involved in his decision.

I would like to take just a moment further more to point out, because I think it bears on this, what I said at the outset. That these five claims against the additional defendants are dressed up as counterclaims when they are not counterclaims at all, and obviously done to enable Mr. Davis to hang on to the priority order which Judge Berlands gave him, and to the schedule which your Honor gave him.

I want to take just a minute to look at the second counterclaim. It asserts on behalf of defendant Tool Co. the claim that additional defendants Equitable and Metropolitan have acquired control of TWA in violation of the Federal Avia- [fol. 1035] tion Act. But it seeks no relief against TWA. All it seeks is that my defendants be ordered to terminate the voting trust which exists under the financing of all the Tool Co. stock in TWA deposited in that voting trust.

Now, sure, in words the counterclaim says, "We ask the Court to order the TWA recognize any court order which may terminate the voting trust."

Surely, no one in his right mind would say that you need a court order to TWA to cause it to obey another court order. That is a transparent device to make it appear as though this was a counterclaim.

That goes right down through the whole list. In the next counterclaim, where they seek to recover $135 million against the additional defendants, they don't ask any damages against TWA, they don't ask any relief against TWA, except that if the Court orders the termination of the voting trust once more TWA shall recognize that order.

Now, why do I mention that? I think we ought to move to dismiss all these counterclaims, except the sixth one, which is a real counterclaim. I hope TWA will do so, and [fol. 1036] in our notice of motion we say we intend to at a day to be fixed by your Honor. But the importance of it today is that here they have a wide open opportunity to develop all the facts that they want to with respect to their claims while we must sit back in ignorance of that information which the rules are designed to accord us by way of discovery of claims asserted against us, or any other person who is in the posture of a defendant. I say that is wrong, and I say that is an abuse of discretion.

I would like to illustrate again, if I can, just how we will be prejudiced with a precise example about Mr. Thomas, of whom we have spoken.

Mr. Thomas used to be the president of TWA. He left in July, 1960. It is alleged in the counterclaim that the additional defendants procured Mr. Thomas' resignation as part of a conspiracy to enable them to insist upon a voting trust of the Hughes stock in TWA. My position is that my clients had nothing to do with procuring the resignation of Thomas, and I believe that it in fact was forced by Hughes, who after a long and bitter negotiation with Thomas booted him out of TWA. But if I have to go ahead [fol. 1037] with Thomas, either in California or in New York, when his term comes under your Honor's schedule, I have got to do that without having had any discovery as to what the Hughes claim is with respect to the charge which involves Thomas asserted in the counterclaims.

I apprehend that lacking that discovery if I get it much later on I shall have to request, move, that Thomas be produced again.

The Court: I would think that is what is going to happen, Judge Bromley.

Mr. Bromley: Yes. Now, what a waste of time, effort and money that is.

The Court: What do your friends on your left say?

Mr. Sonnett: I would like to be heard, your Honor. When the additional—

The Court: We assume you will be heard, Mr. Sonnett. I am sorry, I just wanted to tell Judge Bromley something which I am sure he knows, that you have been at the bit since last July, eight months ago, to start, and now he has come in and wants you to wait some more. I assume he understands the effect of his request.

[fol. 1038] Mr. Sonnett: Well, I will have partial opposition to his motion to present in due course, your Honor.

Mr. Bromley: You remind me of defendants in a negligence case. The plaintiff can just sit still, you know.

I only want a little interruption. I don't want to disrupt his plan. I agree he ought to be able to go ahead just as fast as he can, but I do not see how anybody can possibly object to all of us, who have had very little connection with this litigation, being given an opportunity to discover on what basis in the world we are sought to be held liable for half a billion dollars before we undertake to cross-examine, before we undertake the task of posing proper objections, to this vast parade of witnesses. That strikes me as being very fair, and I don't believe Mr. Sonnett will really oppose that once he understands the limited nature of my request.

That confusion to which you spoke, in answer to my suggestion, will follow every witness if this piecemeal approach is permitted.

I mean by that to say that if we have no discovery of the [fol. 1039] claims against us, and Mr. Davis goes ahead on the counterclaims with everybody else, then Mr. Thomas is only one of a large number who we will have to come back and examine again, and I submit that that is a waste of the judicial processes of this Court, and an undue burden on the defendants, and an unnecessary expense.

We were just served with a memorandum from Mr. Davis, and I want to call your Honor's attention to one statement in it, because I think it supports my assertion

that he has done all this with malice aforethought and with a cleverly designed purpose, and so far as the Special Master is concerned he seems to be getting away with it.

On page 15 of his answering memorandum he says:

> "Cases which hold that absent special circumstances priority of discovery shall be based upon who first serves a notice of deposition express a general rule, but in the instant case Tool Co. served its notice to take the depositions of the additional defendants as witnesses many months ago."

[fol. 1040] I think that discloses what he is up to. Before we were concerned with the litigation, or had any standing in it, he served notices to take our depositions. Then when we come into it as additional defendants he says, "Ah, I have priority because, indeed, I served you with a notice many months ago."

I think that discloses his scheme, and I think he should be stopped in order to accord us what the law so frequently and so clearly says the normal rule is, to enable the defendant, as soon as possible, to discover the basis of the claims against him.

As I understand it, Mr. Kaminer from Winthrop & Stimson is here for Irving Trust Company, and Mr. Sessel, and desires to add something with respect to his position.

The Court: Mr. Kaminer.

Mr. Kaminer: Thank you very much, your Honor.

May it please your Honor, I represent temporarily the Irving Trust Company, together with Mr. Sessel and Mr. Giddings.

I say "temporarily" because we were just served and I was the only partner who had a few days available.

[fol. 1041] I was not present at any of the hearings before the Special Master. We were served very recently with this half a billion dollar counterclaim. I want to say if I should make any mistake about facts it isn't intentional. This is all I have been able to learn in the three days that I have had since I got Judge Bromley's motion.

I want to ask for the same relief that Judge Bromley does. I have not even formerly appeared herein, but I have

with me a notice of appearance, I have with me a paper which I ask your Honor's leave to serve, and that is a paper requesting exactly the same kind of relief that Judge Bromley does, and adopting his memorandum as mine. In other words, there is nothing new in the paper which Mr. Davis has not seen, just so that I have formal standing here to be before your Honor, and also a notice to take the deposition which Judge Bromley has already served.

I don't want to take the time now to interrupt your Honor while I serve these papers. If your Honor prefers—

The Court: You may go ahead.

[fol. 1042] Mr. Kaminer: I want your Honor to consider the situation my clients are in, and their counsel. It is true that your Honor made an order setting forth in what order certain witnesses should be examined and certain depositions taken, but that order was made at a time when we were not sued. We had no standing to be heard, we were not here, we could not have been.

Now, then, the next thing we get is this enormous counterclaim, and I only want to say this. I have spent a lot of time reading it. These are several counterclaims. The sixth one is the only counterclaim which can be said to be one in truth and in fact, and that is only asserted against TWA. Everything else either the relief sought is in favor of TWA, or TWA is brought in by some stringpulling.

Now, we will have time, and we will make a motion, as Judge Bromley pointed out, to say that these counterclaims should be dismissed, and that is the first thing we need time for. They should be dismissed because no matter how liberal the rules are upon analysis it will be seen that they had nothing whatever to do with the complaint and the counterclaims.

[fol. 1043] I can tell it to you in one sentence. The claim says—I am very new to this, so if I make mistakes forgive me—the claim says under the domination, stewardship, whatever you want to call it, of Mr. Howard Hughes and the Tool Company TWA was hurt by a violation of various laws. The counterclaim says under the domination, under the subsequent domination and control or stewardship of their lending institutions TWA and Tool Company were hurt some more.

That is a different story. It is no answer to the complaint to say later on some other people hurt you.

Now, imagine what kind of morass we are getting into. I am a great believer of consolidation for trial in all kinds of things, but there is nothing here to be consolidated. There are two separate and distinct claims. The Special Master, as I have read in the record, has said this.

It may be there should be priority with respect to the claim of the complaint, and then maybe there should be priority to the additional defendants. He immediately recognized—and he is a very distinguished man and saw that [fol. 1044] clearly—that there will be an area where no one knows where those different priorities well lie because of arguments of counsel which will go on for ages. This will not expedite this case. This will all result in a morass.

Therefore, I say to your Honor that in accordance with the request of Judge Bromley, in which I fully join in every particular and without any exceptions, we be accorded the traditional right to examine first, that that should be granted, and we should also be given time, and your Honor should fix the time, when papers should be served and you will hear a motion to dismiss these counterclaims subject to their being brought in a separate action.

I think there are a lot of games being played here. I am all new to this, and I am just reading papers, as I did all day yesterday. I think the game is that Mr. Hughes doesn't like to be examined, and that is why we have all these very devious schemes of serving notice for examination of witnesses, getting an order setting forth a schedule, and then all of a sudden these witnesses become defendants in a half million-dollar suit.

The Court: Half a billion-dollar.

[fol. 1045] Mr. Kaminer: Your Honor is so right. Thank you.

The Court: I am impressed, Mr. Kaminer. I have got to admit that.

Mr. Kaminer: I am scared, your Honor. These figures are a little more than I am used to.

In addition to that, while there is a partner of mine who is not in the city and has not been since the counterclaim

was served who knows something about these facts, certain aspects of it, he has never been in court on this.

There is supposed to be production of documents in four places simultaneously. We have got to find out from our clients, we people who have not been to court before, what the facts are. We have got to prepare and elicit those facts and the basis of the counterclaim first from the one asserting it—i.e., the nominal defendant, really the plaintiff. So, I say to you I am not here appealing from the Special Master's ruling because I asked him for no relief. I am applying to you to modify your own order in view of these new developments, because the Special Master is bound by your order. I believe what he did he did because he [fol. 1046] thought your order compelled him to.

Your Honor had set down the schedule, and he thought that he should not deviate therefrom. That is my view, but I don't know the background.

I think your Honor ought to immediately consider, without interruption of the examination of TWA with which we are really not terribly concerned, modifying the priority question and setting down a time when we in any event should argue the dismissal motion, which will be brought.

Your Honor also ought to, I believe, consider that we are not dealing just as far as this priority question is concerned with sporting rules of the game. As far as we in my firm are concerned we have to find out what this is about. We do not know what this is about, and the rights of our clients are very much at stake.

We get a notice from Mr. Davis—that is, our clients did—and we didn't appear then so he couldn't send it to us, so I am not criticising him—that these depositions are going on, and are going to go on according to this schedule. I have never been in a lawsuit, and I doubt whether your Honor has while your Honor was still in practice, where [fol. 1047] within a few days you find yourself expected to examine, cross-examine, where all the others have had months to know all the documents involved. It is just an impossibility.

I am not asking for favors as counsel. I am saying my client's rights cannot be protected.

Thank you very much, your Honor.

The Court: All right.

Mr. Stewart: My name is Charles L. Stewart, of Dunnington, Bartholow & Miller, appearing for Dillon-Reed & Company.

If your Honor please, the field has been pretty well covered by Judge Bromley and Mr. Kaminer, and if I may I would like to follow the same procedure that Mr. Kaminer has suggested and serve my motion later and adopt the brief of Cravath, Swaine & Moore.

Your Honor, we received this case from our clients late Monday afternoon. Prior to that time we had no opportunity to sit down with them, we didn't even know about the case other than what we had read in the newspapers. They handed over a series of papers which proved to be 60 pages of counterclaims seeking damages against Dillon-Reed in the amount of $400 million. Even though the [fol. 1048] counterclaims may eventually be shown to be completely baseless the issues are complex and they are very involved.

Yesterday I got a copy of the complaint, and although I have not had an opportunity to study it I agree with Mr. Kaminer that we probably should move to dismiss for improper joinder. But we do need time, your Honor, to make these motions addressed to the counterclaims.

Whether or not the joinder is proper we may even have to request your Honor allow us to take the deposition of the Hughes Tool Company before we can serve a reply on this case. In order to understand some of the facts that Hughes Tool Company bases its counterclaims on.

We came into this case, your Honor, some eight months after it had started. We came into it finding our client was scheduled to have its deposition taken two weeks away, on March 8th.

I join Mr. Kaminer and Judge Bromley in saying there is something very peculiar in this business of only six days elapsing between the time of the order and the time that these counterclaims are served. Both counterclaims must have been in the works for months.

The Court: I am surprised they got them out so fast.

[fol. 1049] I thought they were going to wait until they finished examining your clients. Everybody knew it was coming, Mr. Stewart.

Mr. Stewart: We didn't, this I assure you, your Honor. We did not.

The Court: Go ahead.

Mr. Stewart: I would like to suggest, your Honor, that they should not be allowed by this ruse of getting a schedule of examinations, examining us noticing us as witnesses in this case, knowing that we were going to be aided as party defendants on these counterclaims, to get priority of examination. I suggest to your Honor that that would prejudice our position irreparably.

I realize that counsel can't be in two places at once, and that your Honor having appointed a Special Master in this case may feel that the examination of TWA ought to be continued. If that is the case, your Honor, may I suggest, as did Mr. Kaminer and Judge Bromley, that after that examination is completed that Dillon-Reed have priority of examination of the Hughes Tool Company.

As Mr. Kaminer suggested, there apparently have been a lot of games going on in this proceeding about which [fol. 1050] at this point we know nothing, but it seems very, very strange to me that Howard Hughes, if he is the leading force behind all of these events, can manage to throw up enough of a smokescreen in which he can persuade this Court, or any of the parties here, that he should not be examined. If he has all the facts and all the background I suggest to your Honor that he is the one who can clear up all of this.

I also don't understand how he can come in and say that you can't get an examination of me because I am an eccentric in California, whereas you are just business men in New York City.

If your Honor please, we ask that we be granted additional time to make our motions addressed to the counterclaims, and that your Honor grant us priority in the discovery of the Tool Company.

Thank you.

The Court: Anybody else?

Transcript of Pretrial Hearing, February 23, 1962

Mr. Neaher: My name is Edward Neaher, of Chadbourne, Parke, Whiteside & Wolff. I appear here as a pinchhitter for my partner Ralph Ray, who was to be here, but unfortunately had a critical illness of a member of his family at [fol. 1051] home and couldn't make it.

I am somewhat under the same difficulty as Mr. Kaminer in that I have had the benefit of a very quick look at the pleadings and the papers served by Judge Bromley.

The Court: Who do you represent?

Mr. Neaher: I am sorry, I meant to make mention of that. I represent Charles T. Tillinghast, Jr.

I saw enough in these papers, however, to indicate that it would be very advisable for us, on behalf of Mr. Tillinghast, to join in Judge Bromley's motion and adopt his brief, and I therefore request permission to serve a similar motion as Mr. Kaminer requested.

I don't think I can add much, except I don't think Mr. Davis would claim that an order granting priority in the examination of TWA should be construed as an order granting priority as against Mr. Tillinghast in his individual capacity as a defendant named in these counterclaims. It would certainly seem to us that as an individual defendant he ought to have the advice of counsel and an opportunity to study the claims made against him before [fol. 1052] he would be subjected to continued examination not as a representative of TWA but as one personally liable with other defendants for a staggering amount of money.

That is all I have to say, your Honor.

The Court: All right, Mr. Neaher.

Mr. Sonnett.

Mr. Sonnett: Yes, your Honor.

I said to your Honor earlier that I had a partial opposition to the position expressed by Judge Bromley, and that opposition also, which is only partial, applies to the position expressed by counsel for the other additional defendants.

I might add that I also anticipate that what I have to say will be in total opposition to what Mr. Davis will say to your Honor.

The Court: Why should this day be different than any other one?

Mr. Sonnett: I will try to, and I will, I believe, be brief, your Honor.

I have served no papers because I, too, thought that it was an informal pretrial conference under the general order, but I do not believe there are any papers I need to submit to make the point which I hope your Honor will [fol. 1053] consider and will grant.

Going back, quite rightly as your Honor did, to the history of the case, June 30th of last year, your Honor will recall that we applied before Judge Murphy for an order allowing us to examine Hughes within the 20 days on the ground of special circumstances. The special circumstances we then apprehended were that unless restrained Hughes would continue the malicious and very harmful efforts that were being made to disrupt a contract between TWA and Boeing for the supply of substantial numbers of planes in order that Hughes could try to succeed in his effort to ram down TWA's throat some 990 Convairs which Hughes was committed to buy to the tune of some $80 million.

When the captive customer wasn't any longer captive, he decided to subdue it and make it a captive once again, despite the voting trust, despite the independent board of directors, despite the new management, despite the fact that the Boeing contract was signed up and was to be carried out, and despite the technical judgment of TWA's [fol. 1054] technical people that they wanted the Boeing planes.

I might add that the history of the 990 program, as reported widely since, indicates how wise TWA was. It is an abysmal failure.

Now, because we wanted to put a stop to the Hughes efforts to sabotage the Boeing contract we made an application brought on by order to show cause to examine Hughes within the 20 days. By the time we got that argued on August 1st, Hughes had backed off, and he wasn't quite so vigorous with his efforts.

When Hughes realized on August 1st, which is the time we went before Judge Murphy, that he couldn't succeed in sabotaging the Boeing contract, and that his efforts to settle the litigation were not successful, and that it was going to proceed in open court, and the complaint was un-

run the risk at that stage of further efforts to sabotage the Boeing arrangement. We think that our lawsuit had a very healthy deterrent effect.

The next time we got into a problem of priority of depositions was because in furtherance of the efforts to settle the case, and by arrangement between counsel, we agreed [fol. 1055] on a stipulation which said that we will treat everybody as if they had proceeded in timely fashion under the rules so that the time that will elapse during the settlement talks will not prejudice anybody. And on the basis of that stipulation when the matter came before Judge Herlands ultimately with respect to some of the notices which Hughes Tool Company had served—they had only served some, not all that are on the list—Judge Herlands said, "In view of that stipulation I think I am bound to apply the normal priority rules, and so I am going to let them have priority as to their notices dated August 3rd," which again I say to your Honor are only a part of the notices that he ruled on.

When the matter came to your Honor, your Honor accepted it as it then stood, and quite rightly so, and at that time I, too, accepted it, feeling bound by the orders to which I have referred on the subject of priority.

However, I submit to your Honor—and this is my opposition to the application made by the additional defendants—I submit that as a matter of law and under well-settled law [fol. 1056] in this district, the record before you now establishes certain circumstances which warrant TWA in taking the deposition of Hughes immediately upon completion of the Tillinghast deposition.

Accordingly, our application is to terminate the Tillinghast deposition by Tuesday. In that connection I should point out to your Honor that your Honor's order contemplated about a week for four TWA witnesses. I should further say that that was the period of time initially selected by Hughes Tool Company on the basis of which they got their priorities.

Further, if they had proceeded to examine properly those depositions could have been completed in a week. But what happened was that although Mr. Davis told your Honor in chambers that he couldn't put an answer in, and he

couldn't make up his mind about these counterclaims until he had at least examined the four TWA people, and therefore your Honor directed that he would not have to put his answer in until he had examined the four TWA people, he suddenly found himself able, suddenly, quickly, out of the blue, to file the answer and so-called counterclaims before the Tillinghast deposition was even halfway through. [fol. 1057] A very skillful tactical move, but hardly in accordance with the representations made to this Court.

Why the rush about filing the counterclaims? Well, it is perfectly simple, I think, what he is up to. The effort here is to create a diversion in TWA's case, to slow that case down to a walk, to strangle, just as he strangled TWA in years past, as we have charged.

And now, by creating a procedural morass he hopes to bog down this case, and bog it down for good.

I am sure meanwhile he hopes he will get some pat on the back from the Civil Aeronautics Board for being willing to put some money into Northeast, and maybe get a whitewash that way. I don't know what he is up to. But I know one thing for sure, and it is obvious from this record, that what he is trying to do is prevent the TWA case from being progressed as it could be speedily and come to trial, as I hope it can.

The Tillinghast deposition, had it been taken on the issues raised by the complaint and the answering portion of the answer, could have been done easily in a day and a half to two days. Tillinghast became president of TWA [fol. 1058] in the spring of 1961. The complaint was filed on June 30, 1961. He has been examined in great detail about everything that happened before he became president up to the time he became president, while he was president, and that about 90 per cent of the deposition has had to do with things that happened after he became president and after the lawsuit was filed, all examination clearly designed to try and find some support for these so-called counterclaims.

So what counsel has done—and I submit this as to TWA, and I am not concerned about the additional defendants, they can take care of themselves—but as to TWA if the answer and counterclaim had been before your Honor when

you made your last order I believe you would have relied on the decisions in this district that say that when a plaintiff is confronted with a counterclaim this rule about defendant's priority of discovery does not apply because the assertion of the counterclaim against the plaintiff is a special circumstance under the decisions in this district, as I read them.

Therefore, I say as matters stand today on the record [fol. 1059] before your Honor there are special circumstances, and, therefore, I say having had two weeks of Tillinghast when he could have done it in two days, that we should be allowed to proceed with discovery against Hughes Tool Company, and I think that the only practicable solution to the administration of the case is to provide some series or program of alternating depositions along that line.

I would be very happy to have the additional defendants out of this case, and that isn't because I have reached a judgment as to whether there is any merit or not in anything Davis says about the additional defendants. I can say that on the basis of everything I have seen to date I see no basis for the assertion of the so-called counterclaims, certainly not against TWA. They are strictly phonies. The only counterclaim that seeks anything from TWA which might be called a counterclaim truly is the $170-odd thousand from TWA, and this is on the theory that he is entitled to double interest on some obligation of TWA's.

I am prepared to submit that matter on the papers to your Honor for a ruling, and if he is right we will pay the judgment within 24 hours. That has nothing to do [fol. 1060] with the rest of this mish-mash that he has come up with as a counterclaim. It is purely a question of construction of some documents.

TWA doesn't think he is entitled to the extra $76,000 in interest. He says he is. But other than that all he is doing is he is saying that since December of 1960, when the voting trust went into effect, this big conspiracy to take control of TWA away from Hughes and give it to the banks and the insurance companies has been in existence. If every word of that were true, if every single word

of it were true, it would not be a defense to any aspect of TWA's cause of action as alleged in this complaint. It is apples and oranges.

As a matter of fact, he has been kind enough to serve a derivative suit for TWA against these additional defendants so that TWA would get $115 million from Mr. Davis' client, and if he is right—I doubt that he is, from what I know to date, but if he is right we will get another $135 million from these additional defendants.

I would not protest TWA getting $280 million, but I don't want to have my lawsuit for TWA, which is what [fol. 1061] I am concerned with, ground to a halt and brought to a halt by the tactics that he is using. If he wants to sue them, he can sue them in some other case, not in my case.

In any event, if they are going to stay in the case, it seems to me that the whole posture of the case before your Honor has changed, and that your Honor should apply a rule of alternating depositions relying on the decisions in this district so that TWA should start with Hughes next week, when Tillinghast is through. That is, I believe, the only fair construction of the cases on a record like the one before you.

The Court: You say that the rule in this district is that where the defendant has served a counterclaim he loses his priority of deposition in so far as the counterclaims are concerned, and that the plaintiff made them proceed?

Mr. Sonnett: Yes, your Honor. There are decisions—

The Court: I don't know whether I should tell you this, but your firm submitted a brief just the opposite to me the other day.

Mr. Sonnett: Not in a case like this.

[fol. 1062] The Court: Paramount v. De Laurentis.

Mr. Sonnett: I don't know who wrote that brief, but let me say I have read Bromley's brief, and I say—

The Court: I don't know who wrote that brief. I read it yesterday, and I decided it. Maybe you ought to read the Law Journal.

Mr. Sonnett: In this case, it is hard even to read the morning papers.

On the basis of Bromley's brief you have this transparent attempt to make counterclaims against TWA. I say this is radically different from the other. On the state of this record I believe TWA is entitled to a fair chance for its discovery because the record has been radically changed and changed by action of the Hughes Tool Company alone, and was done at a time months or at least a month ahead of the time they said to you they would be ready to do it, and because Tillinghast has been examined for two weeks when a proper examination should be two days.

The Court: All right.

Mr. Sonnett: I hope I have made myself clear that I do not think that these additional defendants who were chal-
[fol. 1063] lenged with doing something wrong from December 1960 to date belong in my case where I charge Hughes with violations of law which are very serious from 1939 to June of 1960. It is a case of apples and oranges, and he is slowing us down desperately in our case, which is all I am concerned with.

The Court: What I would like you to do is submit a short memorandum of law on this question of priorities. I am sure you don't want me to rely on the one I read yesterday in another case.

Mr. Sonnett: I am sure that one is not a situation like this.

The Court: I think it is.

Mr. Sonnett: You mean there were additional defendants?

The Court: No, there were not. Not additional defendants.

Mr. Sonnett: This is what I am relying on. If you take them out of this case, the additional defendants, I am prepared to go forward on the order and the schedule that you last signed. I am quite prepared to do that, because then it is the same case, but if they want to sue us for the $75,000, that's all right.

[fol. 1064] The Court: You will pay them?

Mr. Sonnett: I will pay them if they are entitled to it, and you say so. But while they are in the case—

The Court: Let me have that memorandum in the next couple of days.

Mr. Sonnett: Yes, your Honor.

The Court: Mr. Davis, you have been sort of quiet. But that is not a word of encouragement. I would like to finish by 12.30.

Mr. Davis: I think I will be finished by 12.30, your Honor.

For the record, my name is Chester C. Davis, and I am appearing on behalf of Hughes Tool Company.

I am really surprised at so many eminent counsel seeming to be so disturbed at a procedure which to me appears relatively simple. On this priority of discovery proceedings I think everyone recognizes that it involves a certain amount of discretion to be applied to the various circumstances presented to the Court. I believe there are decisions in this district which indicate that the Courts need not be slaves to the concept that a defendant normally is [fol. 1065] entitled to priority.

The reason for the development of that concept, as everybody recognizes, is under the new rules at the time the plaintiff forms a complaint and under the new rules of pleading he does not say what he is complaining of, and, therefore, the defendant needs to find out what it is that the complaint is all about, and is normally given priority.

I think this is applicable in this situation, also. Everybody recognizes everybody will have a chance to get all these facts they need before there is any judgment entered on whatever contentions are asserted by anyone. No one is going to be deprived of the fairness of justice. It is a question of getting the facts.

I am not going to rely on the general principle, which I am sure is also recognized by everyone here, that since this Court has delegated the discretion as to how these discovery procedures were to be conducted to a Special Master they should normally be left to interfere with the Special Master unless there is a clear abuse of discretion.

I should like to merely present some of the circumstances [fol. 1066] which are here present, and which to my mind clearly support the ruling and the fairness of the rulings made by the Special Master.

Transcript of Pretrial Hearing, February 28, 1963

We have to start with the complaint. A complaint very artfully drawn but as vague and general as one can find, notwithstanding the number of pages which it runs. It doesn't say one single thing as to what it is they're complaining about, except allegedly it is a violation of the antitrust law. It doesn't refer to the CAB orders. All you can glean from it is that somehow or other the Tool Company, while it was in management, or presumably in control of TWA because of its 78 per cent stock ownership, that it used that control in an improper manner in connection with financing and furnishing of equipment, particularly the jet equipment. That comes out of the complaint and conclusions.

Also, some contentions that the Tool Company in 1961 wilfully and maliciously interfered with the business of TWA. Then some reference that a merger to be approved by CAB and the stockholders constituted some conspiracy in violation of the antitrust law. That is all the complaint says.

[fol. 1067] In that connection, may I also point out that there is no question that the defendants Equitable and Metropolitan and Irving are in control of TWA, were in control of TWA when this complaint was prepared and served on the Tool Company. Whether or not they deny exercising their control is a matter of fact to be established, but there is no question they are in charge of TWA today, assuming the 78 per cent stockholding. These people who sit right here.

Now, the complaint says nothing. An effort was made to obtain the deposition of Mr. Hughes out of turn. Judge Murphy denied that. The stipulation that was decided upon has nothing to do with anything except that the parties agreed to delay everything during the month of July so that when everything was resumed the same rules would apply, et cetera.

The question first came on before Judge Herlands at a time when the Tool Company quite properly based upon a completely vague complaint said:

> "We want to find out what it is they are complaining against us, and in order to do that we want to take the

[fol. 1068] deposition of TWA, the Metropolitan, the Equitable, Tillinghast, the list."

There is no question but we had a right to do that. It was bitterly opposed.

Now, on this scheduling—may I interrupt for one moment to point out Judge Herlands, in the course of the argument, said, "Why don't you gentlemen submit your respective proposed schedules."

These notices of deposition, your Honor, were not served or were not noticed in any particular order based upon the facts or circumstances which we had of knowing the best way to develop these facts and defending ourselves. Instead of following the practice in this district, including the one followed by Mr. Sonnett, of having all depositions returnable the same date and the same place as his were, one in California and one in New York the same day, we indicated we were prepared to take the deposition of one party and a week after the completion of that deposition to commence the next one, as a general scheme of what we were prepared to do. We were the ones who wanted to move expeditiously.

That complaint hurt the Tool Company before the CAB. [fol. 1069] The CAB is investigating the charges of this complaint on an entirely unrelated transaction. We were the ones interested in finding out the facts which supported this complaint.

Mr. Sonnett submitted to Judge Herlands a proposed schedule where he would start with Mr. Hughes, then we would take them on alternating schedules. We submitted a memorandum where we said the only schedule we submit is that we are permitted to take and discover the facts of all the people who we have noticed, and then TWA may discover from us.

Judge Herlands denied to adopt either schedule submitted to him, and the decision clearly stated the defendant was supposed to have priority as then noticed.

This proposition of people not knowing is the surprising thing. Notices and subpoenas duces tecum were served on the Equitable and Metropolitan and Dillon-Reed as of Sep-

tember. Judge Ryan thought it was going to be a big case, and should be assigned to one judge for all purposes, so Judge Ryan said, "Until I assign it to a judge for all purposes I am going to hold up everything." That stopped us [fol. 1070] from completing the service of subpoenas and it suspended the return date of those notices.

These gentlemen then took the position, legally quite correct, that they did not have to respond to these subpoenas duces tecum until the return date of the notices. Meanwhile, sure, they must have done something to gather the documents. Perhaps not through the particular individual counsel here present. Since last September. But they took the position, which they had a right to, of not giving us anything until the return date of the deposition.

Obviously, the purpose of getting documents is to enable an expeditious deposition, whoever it may be that has to be examined orally. In any event, everybody is in accord that Judge Herlands decided in this case that the Tool Company was to have priority in the depositions which had been noticed, and we have not changed that. We haven't added to it. We haven't added a single individual or party to it. It is the same people.

I do not believe everybody is construing what the Special Master has been doing as something which he feels bound to do not to deviate from the order or the time of the sched- [fol. 1071] ule which is annexed to your Honor's order. He has construed that order, I think, the way it was intended, and certainly in accordance with what it says—namely, that the Tool Company is to proceed expeditiously and as much as possible maintain a scheduled time and keep going.

The Special Master did indicate at an appropriate time he will undertake a showing of good cause for an alteration of the order of taking those depositions. After all, the responsibility is upon counsel for the Tool Company to develop the facts in its defense.

Now, knowing that the contention of the Tool Company was that these parties had acted together in what we claim to be an improper and unlawful manner to acquire control of TWA, we did put informally those persons on notice that while they were being noticed for their deposition as witnesses to protect themselves because we had in mind the

possibility that the same facts which constitute a defense to this complaint might very well also constitute the basis for futher additional relief.

[fol. 1072] Mr. Kaminer, I believe, is in error when he says that this answer and the counterclaim merely say that TWA has been injured further and more than the alleged injury that TWA is asserting against the Tool Company. That answer, your Honor, sets forth facts in considerable detail which, if true, constitute a defense.

If TWA was deprived of equipment, if the financing of TWA injured TWA, as is claimed in the complaint and we can show that that was the result of the course of conduct, or a conspiracy, or a monopoly, by these other persons, if only on the issue of damages as to did we cause the injury or did they, the same set of facts, plus the addition of the prayer for relief, might very well also constitute a basis for additional relief.

Whether we call it counterclaims, or affirmative defenses, is not particularly important. We have alleged facts in our answer. It is wrong, it is specific. I do not believe that Judge Bromley really means it when he says "We don't know what we are defending against."

I submit, your Honor, that the answer that we have served is about as detailed a pleading as has been filed in [fol. 1073] this court for some time.

Your Honor is fully aware of the fact that counsel for TWA was pressing us for putting in an answer as soon as possible, and your Honor indicated that even though we have a motion to dismiss this complaint pending which has not come into issue for a number of reasons that it seemed the time was approaching when an answer ought to be put in, and I expressed in chambers at that time my concern that these witnesses that had been noticed perhaps should know the nature of the claim that we were asserting.

Had we filed to serve those papers as promptly as we could, I could have understood a sense of unfairness or injustice to require these persons to be deposed to produce these documents which will condemn them and yet be in the dark as to the nature of the claim that the Tool Company intended to assert against them, and derivatively on behalf of TWA, because today there is only one person who is

really interested in TWA and that is the 78 per cent stockholder. The others don't have any interest in TWA except possibly to maintain the captive market for financing, or [fol. 1074] for something else.

All that has happened is that we have told these same witnesses, the same persons, who have testified to exactly the same thing, that will produce exactly the same documents, we have put them on a formal notice as to what the nature of our contention is. Why that creates any sense of unfairness, injustice, or depriving anybody of any rights I simply do not understand.

Mr. Sonnett said—I presume he is representing TWA and should be interested in this derivative action—he says, "Go ahead, but start it in another action."

Suppose we had done that on the same facts. We would still be taking the depositions of these parties, obtaining the same documents. Should we move to consolidate for trial afterwards?

They say, "Ah, yes, but had that been done they would have had an opportunity to take the deposition of the Tool Company first."

I have no question in my mind if that had been the mechanical posture of the case that we would have been before your Honor and said, "Your Honor, obviously we can't be [fol. 1075] in two places at once. We are engaged in taking the deposition pursuant to the action commenced by this complaint. We are pursuing it without delay."

And they will have to wait their turn. That is all we are talking about.

Now, quite apart from the fact that the answer is quite detailed, as distinguished from the complaint, detailed in facts, we must also bear in mind the contention of the answer of the Tool Company which is a defense as well as establishing, we believe, the basis for affirmative relief—that there is a conspiracy, certainly concerted action among these various defendants. These are not bare, naked allegations.

The deposition taken to date, the documents obtained to date, establish a course of conduct which unquestionably requires an inquiry.

May I suggest, your Honor, where do they think they are going to find out their misdeeds, in our files, through our people, or in their files? Where are the facts to be found as to whether or not there has been an unlawful course of conduct on the part of these additional parties? Through the [fol. 1076] Tool Company or through their own files and through their own witnesses? That is what they want to avoid. I understand why they want to avoid it.

There would have been technically the basis of making such a contention if the answer we had filed had been one as bare of facts as the complaint is. We took great pains to avoid that charge.

Judge Bromley has indicated or referred to a Mr. Thomas as an example where he believed that he is being prejudiced if the deposition of Mr. Thomas should take place before he has had an opportunity to examine the Tool Company, and he said because the answer that we filed contends and asserts facts to support the contention that Mr. Oates and Mr. Hagerty, also someone at Dillon-Reed, had conversation with Mr. Thomas which we contend encouraged Mr. Thomas to leave TWA in 1960.

We have to find some place to find facts. He is as a good a place as any.

The other is to go into an examination of Mr. Oates, Mr. Hagerty, and Dillon-Reed. These are the two places to find them. We can't answer that question. I don't see anything [fol. 1077] difficult about it.

I might as well say on this point, while on the subject of Mr. Thomas, it might be a good idea perhaps to take the deposition of some of these—or to change the order in which the deposition is being taken. I do have in mind making an application to the Special Master at an appropriate time that I believe I have the basis for now for changing the particular order of the depositions to be taken because I believe that the order of your Honor, with respect to taking these depositions, was that we were to keep at it without wasting time because I believe the responsibility for an orderly development of the facts is on counsel, and wholly on counsel.

Certainly, it is not the responsibility of opposing counsel to develop or establish the order in which the defendant is

to develop the facts in order to defend himself, and we are defending ourselves.

So I respectfully submit, your Honor, if I may add one more point, that your Honor may not be fully aware unless you have had an opportunity to read this rather lengthy [fol. 1078] answer.

The Court: Nobody has taken the trouble to give me a copy. I read about it in the newspaper. That's how I know what is going on in this lawsuit.

Mr. Davis: It has been filed, I believe, your Honor.

The Court: It hasn't come upstairs. I signed an order for you this week, Miss Lea, but you didn't leave a copy with me.

Miss Lea: Yes, I did. I left an extra copy in chambers.

The Court: I will go look for it.

Mr. Davis: I apologize if we have not, and will see it is done immediately.

You will note in there that there is a contention that we assert quite seriously that the very commencement of this action by TWA was intended in furtherance of these other objectives.

Mr. Sonnett: Where do you say that in this answer? Point it out. That is a misstatement.

The Court: Let Mr. Davis finish his argument.

[fol. 1079] Mr. Davis: I submit that no matter which way you look at this the answer always comes out to the same place. We responded to an action commenced by TWA. TWA is in control of the same people. We obtain a priority, we are in the process of taking deposition. We ought to have an opportunity to complete the development of the facts.

The incidental fact that these same individuals who were noticed for their deposition covered by the decision by Judge Herlands now have been put on notice that they should defend themselves and protect themselves, I do not think puts them in a worse position, it puts them in a better position than they were in before we named them. If they want or need more time for replies, I am sure they will get more time to put in a reply. I think they may have difficulty in replying, because our answer is so detailed it

is going to be difficult for them to reply to the facts alleged there in the manner in which I know they want to answer.

The Court: Have you considered the limitation of the deposition of these parties to matters raised solely by the [fol. 1080] complaint and not in counterclaims?

Mr. Davis: The Special Master raised the question should I get into an area that does not appear to be addressed to a defense to the complaint then a question may arise. We believe that we can establish that without any difficulty, and will establish it to the Special Master's satisfaction. I am confident that all or substantially all of the depositions that we will engage will relate to defenses to the complaint, construed broadly to be sure, since the complaint is very broad.

Now, should we reach the posture where it may be said that a certain amount of this inquiry appears to have more bearing on establishing a cause of action against these additional defendants rather than establishing the basis for defense, bearing in mind all the time if they can prove they did it, we didn't do it, we have a practical question there. Should we at that point stop for the purpose of starting the process all over again in order to give them what, this so-called priority?

[fol. 1081] The Court: It is a variable right, isn't it, Mr. Davis?

Mr. Davis: It is when you don't know what you are charged with.

The Court: You fought for it.

Mr. Davis: I did, your Honor, and I was successful, may I submit, primarily because the complaint was so barren of any information, any factual conclusions.

I respectfully submit, your Honor, that you can read that complaint, and I will use it as a guide in the future, I think it is an extremely well-drawn complaint, but I defy anybody to figure out what it is that the Hughes Tool Company was suppose to have done, but from the conclusions, to justify the complaint. You can look at it from beginning to end, you will find something in one of the briefs submitted in one of these pretrial conferences, but you cannot find the factual contention which presumably must exist if the complaint is any good at all that what took place was not

within the contemplation of the CAB order which approved every transaction involving more than $200 between the Tool Company and TWA, and if those transactions were approved by the CAB the antitrust laws are not applicable, [fol. 1082] and that is the only basis of jurisdiction of this Court.

You can look at that complaint from beginning to end, and I defy anyone to be in a position to defend themselves or to know what it is that they are talking about, and the briefs that have been submitted in one of those pretrial conferences had bold assertions that everything was being done for some purpose or motive, allegedly unlawful, but what is it that we are supposed to have done that was not covered by a CAB order? That does not appear on the face of the complaint.

What it is that constituted this wilful and malicious interference in the business—

The Court: We will leave that for motions of summary judgment which you are threatened with.

Mr. Davis: That is not entirely out of the ball park, either.

The Court: I didn't knock it out of the ball park. I said we agreed about six months ago you couldn't move for a summary judgment just on the complaint, and that under the decisions of our Court of Appeals you have to practically wait until all deposition proceedings were completed [fol. 1083] before the Court thinks it is proper to entertain a motion for summary judgment. I didn't foreclose you, I just said we will get to that discussion later on.

Mr. Davis: I appreciate that, your Honor, and I think we all agree it is a difficult motion to support and, therefore, one that should not be made hastily.

I do think that there is a technical deficiency in the complaint in the respect that it does not allege a violation of CAB orders. I think we also have the question of primary jurisdiction involved.

The Court: Make that for a separate application on papers.

Judge Bromley, what time do you want for your motions?

Mr. Bromley: Ten days, your Honor.

The Court: You can have as much time as you want because the depositions are going to continue.

Mr. Bromley: Ten days.

The Court: All right. You fix any day you want with counsel, and arrange for exchange of papers, and notify my [fol. 1084] chambers, and we will have a hearing.

Mr. Davis: The only thing I may request in that, your Honor, I am sure Judge Bromley wouldn't object to it, and that is to give me an adequate amount of time to answer after receiving his papers, particularly since the Special Master is keeping my nose to the grindstone a little bit and I do need some consideration on time to reply.

Mr. Bromley: You will never have time enough to give a good answer. I will give you all the time you want, though.

Mr. Davis: Thank you, Judge.

Your Honor, do you want that reference Mr. Sonnett asked about?

The Court: No.

Mr. Browley: I must deny, if it please your Honor, that my clients control TWA. Their sole power is to appoint voting trustees.

Now, although the counterclaim is a very long and voluminous document it is so distorted, confused and inaccurate that the need to clarify it by discovery is far greater than is Mr. Davis' need against a notice form of pleading which the rules allow such as this complaint is, so the wealth [fol. 1085] of detail that he has put in his counterclaim as contrasted with the bare bones of the complaint only adds to our burden, it doesn't lessen it, because we have to sift out all the inaccuracies, distortions, and omissions by discovery in order even to be able to answer the charges.

The Court: May I suggest this. I understand Mr. Kaminer and Mr. Stewart and Mr. Neaher—I suggest that you arrange a date for a hearing allowing sufficient time for the preparation and service of your papers, and preparation and service of the answering papers by defendant, and if you want time to reply, and just check with my chambers as soon as you have a date fixed just to make sure that I set it aside and am free.

Mr. Sonnett, you are going to give me a memorandum on the decisions in this district on priority?

Mr. Sonnett: As applied to this case; yes, your Honor. And may I simply invite your Honor's attention to the fact that in the second paragraph of his opinion and order of August 14, 1961, Judge Herlands specifically referred to the understanding of counsel.

[fol. 1086] The Court: Mr. Sonnett, we have gone through this every time we sit down. We go back to the interpretation of what happened before Judge Herlands. We have gone past that. We have an order set. You have a Special Master who, in my opinion, is one of the ablest lawyers in the United States, presiding over your deposition proceedings. We have an order set, and we should go on instead of having to go back to decide what was said before Judge Herlands.

Mr. Sonnett: I believe that is so, and I hope will be so, and that is why I urge you to put in the order as you should have originally, making it an alternating program.

Mr. Bromley: Does your Honor—we have a memorandum of law which we have filed and which I assumed you have.

The Court: I received it this morning. I have a memorandum from you, and I received one from Mr. Davis this morning, also.

Can I have yours on Monday, Mr. Sonnett?

Mr. Sonnett: Yes, your Honor.

The Court: It shouldn't be too difficult.

Mr. Sonnett: No, it will not be difficult.

[fol. 1087] Mr. Kaminer: May I hand up our bare bone papers just for the record? There is one thing which concerns me, and I am not sure, perhaps I misunderstood your Honor.

Did you—

The Court: First, Mr. Neaher, did you have any papers you wanted to submit, or do you want to rely on the record?

Mr. Neaher: I would like to rely on the record, but still reserve the right to submit a formal notice of motion.

Mr. Kaminer: Your Honor said depositions are going to go on. Are we considered from now on bound by them? I don't know what you mean.

The Court: I would assume you have to complete Mr. Tillinghast, you have two or three other TWA witnesses.

Mr. Sonnett: Tillinghast has had about ten days, and counsel has declined as yet to give an estimate of when he will be through.

The Court: I don't have a copy of the schedule before me, but I don't think anybody is involved who are related to the defendants.

Is Mr. Thomas—no, Mr. Thomas is now an individual, is [fol. 1088] he not?

Mr. Sonnett: The difficulty, your Honor, is that the subject matter of the Tillinghast examination, which has extended far beyond what it could have been, a day or two, is the so-called counterclaim approach that Mr. Davis has now invoked into the case, so that unless—if he is allowed to go on examining in aid of his counterclaims, and at his present rate—

The Court: Has the Special Master made any ruling as to the scope of the depositions?

Mr. Sonnett: The Special Master has raised this very point and suggested this is something that counsel should consider, and then said something to the effect, "Well, it might be rather difficult to administer," and I think there is something to that point, but I think that it is clear because I argued to him this very point. I have said to him, in all good faith, the deposition of Tillinghast could have been completed in two days, because he is a witness in the first six months of 1961, that is all he knows anything about. But instead of that we have had extensive day after day after day about events post-filing of the complaint designed [fol. 1089] to establish this so-called conspiracy which in its very inception is supposed to have started in September, 1960, and our complaint covers 1939 through the period to June 30, 1961, so we have had nothing by way of what is really involved in the case except the last six months of it.

The Court: When the schedule of witnesses, Mr. Kaminer, or Judge Bromley, or Mr. Stewart, or Mr. Neaher, is so arranged that one of your clients has been scheduled, then I suggest you make application to the Special Master, or to me, rather to the Special Master, because he is com-

pletely competent to handle the problem, but I want these depositions to continue as much as possible. I want to get this case moving and disposed of.

Mr. Kaminer: Here is what I was going to suggest as a practical matter to avoid making an awful lot of applications to your Honor and to the Special Master. While your Honor is considering this question of priority and modification of that order, and your Honor will have to consider the motions to dismiss the joinder, we certainly do not object to the depositions going on as far as TWA witnesses are concerned, but we want to be assured, first of all, that [fol. 1090] there will be substantial time in which we can prepare our witnesses and go over all the facts and learn about all these documents, and I think your Honor only can indicate that now because that seems to me—

The Court: Well, I think you have a copy of the order, and I don't have a copy of it.

Mr. Kaminer: One of my witnesses is scheduled for March 1st, which is next week.

The Court: You have Charles Thomas, you have Bank of America, Bankers Trust, Morgan Guaranty Trust, the Mellon Bank. Up to that point you have no witness whose employer has become a party, right?

Mr. Kaminer: That's correct, your Honor.

The Court: I will have this decision out next week.

Mr. Davis: Your Honor, may I say that I do expect to make an application to the Special Master with respect to this order. I can't, of course, make any representation to the likely result, but that may help or give Mr. Kaminer a different basis for making an application.

The Court: Let's proceed until we are actually faced with the problem.

[fol. 1091] Mr. Kaminer: Very well, your Honor.

(Whereupon, at 12.40 o'clock p.m. the proceeding was concluded.)

Reporter's Certificate to foregoing transcript (omitted in printing).

A-2176

Opinion and Order of Special Master J. Lee Rankin, April 17, 1962

[Doc. 217]

[CAPTION] 61 Civ. 2324

[APPEARANCES]

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This matter was presented to the Special Master with extended argument and numerous briefs, all of which have been carefully considered. The issues now to be determined by the Special Master are the purpose and extent of the attorney and client privilege, whether such a privilege protects communications of an attorney while he is acting as a business agent on behalf of the client and how the privilege may be waived when it is recognized that certain evidence is privileged except for the fact that a waiver under the law [4362] has occurred.

Determination of these questions is now to be made as applied to certain documentary evidence in the custody, control or possession of the Hughes Tool Company claimed to be privileged because it involves communications between defendant and one or more of its several outside attorneys. Once determined in this proceeding, however, the principles of law as to when there is a privileged communication between attorney and client which precludes the production of documentary evidence subject to such privilege, and the manner in which the privilege can be and is waived shall apply to other parties to the litigation.

The facts concerning the various communications between the Hughes Tool Company and its outside counsel which the Tool Company now claims is privileged and further

asserts that it is not required to produce for examination by the other parties to the litigation because of the attorney and client relationship, are not complicated. However, there are several aspects of the problem by reason of records in the hands of outside [4363] attorneys as well as those in the possession of the Tool Company that make the case and the several evidentiary questions in issue, materially different.

First, Raymond Cook, one of the principal outside attorneys for the Tool Company for the period after 1955, has advised the Court that he may well have to be a witness in this proceeding and has already filed a lengthy affidavit sworn to as of November 22nd, 1961, in a proceeding now being heard before the Civil Aeronautics Board in what is called Tool Company—Northeast Control Case, Doc. No. 11620. A copy of that affidavit is attached to the affidavit of Thomas D. Barr, one of the attorneys for the additional defendants, Equitable Life Assurance Society of the United States, Metropolitan Life Insurance Company, James F. Oates, Jr., and Harry C. Hagerty, and sworn to as of March 26th, 1962, and filed in this proceeding. The Cook affidavit consists of 40 paragraphs with a number of subparagraphs and is 22 pages long. It will not be necessary to go into the detail of the affidavit of Mr. Cook at this time, but we shall refer to it so that it [4364] may be examined at length by those who care to do so. I shall call attention to various parts of it later in this Opinion. It is apparent from the affidavit that although Mr. Cook was and is an attorney, he was stating information that came to him in connection with the financial business affairs of the Tool Company for an indeterminate period of years. He was also relating at length what he considered to be the facts concerning

many matters and transactions in which the Tool Company was involved during the period described in the affidavit.

It is incumbent upon the Special Master to examine this affidavit with care to determine what portion of Mr. Cook's activities might have been privileged because of the attorney and client relationship if no waiver had occurred. It also has been necessary to decide what part of what he did involved acting as an ordinary agent, or as a business agent on behalf of the client, and would not be properly within the privilege of attorney and client. We needed to ascertain the extent of the waiver that occurred by reason of the Tool Company authorizing the filing of the [4365] affidavit in question and its advising the Court that Mr. Cook was to be a witness in this case regarding a number of the important issues.

Determining the question at hand, it is also necessary to consider the affidavit of Raymond M. Holliday, Vice President, Secretary and Chief Financial Officer of the Tool Company which was sworn to on November 22nd, 1961, and filed in the same proceeding before the Civil Aeronautics Board, referred to above. In his affidavit, Mr. Holliday adopts the affidavit of Mr. Cook which I have referred to, both as to the facts and the conclusions. However, he adds additional assertions as to the facts in issue in this case.

In paragraph No. 4 of the Holliday affidavit, Mr. Holliday says: "It is inconceivable that Tool Co. which has an equity interest in excess of one hundred and forty million dollars in TWA, including debts in an amount in excess of eighty million dollars, would maliciously and willfully interfere with TWA's business. It has not done so. Rather it has acted on the advice of counsel to take steps which its counsel

advised were required to protect its equitable rights arising from [4366] its ownership in TWA." As indicated hereinafter, the Holliday affidavit and particularly paragraph No. 4 thereof has an important bearing upon the waiver question.

In the answer which the Hughes Tool Co. filed in this proceeding in the paragraph numbered 40, it said: "All of the activities of Tool Co. alleged in the complaint with respect to the period subsequent to 1960 were taken on the advice of counsel for Tool Co. solely for the purpose of protecting Tool Co.'s interest as beneficiary under said voting trust and as equitable owner of more than seventy-eight per cent of the stock of TWA." This portion of the answer affects the question of whether any attorney and client privilege which might otherwise exist with regard to the period after 1960 has been waived.

The record shows that the named defendant Howard R. Hughes, who has not yet been served in this action, was not an officer or director of the Tool Company after the end of the year 1960. It has also been stated on the record a number of times and apparently is accepted by all of the parties that Mr. Hughes is the sole stockholder [4367] of the Hughes Tool Company. There is no showing that after the close of 1960 Mr. Hughes was authorized to act on behalf of the corporation in any capacity other than as its stockholder. There are numerous communications in question between Mr. Hughes and various outside counsel for the period starting with 1961, from the beginning of the year, and at least up to the time shortly before this litigation was instituted.

The affidavit of Mr. Cook is much too long to try to set it forth in detail in this opinion. However, a careful con-

sideration of its purpose and what it purports to present as well as the various subjects delineated will be of help in the consideration of our problem.

It should be observed that Mr. Cook said that he was familiar with the "facts and circumstances" which he set forth and that he participated as counsel for the Tool Company in TWA's jet equipment program and the financing thereof from their inception. He then discussed what he referred to as "facts known to me." Paragraphs 17 through 33 deserve careful consideration as to the subject matter concerning which Mr. Cook said he was [4368] presenting facts on behalf of the Tool Company.

Some of the specific subjects covered were: the recognition by the Tool Company that if TWA were to maintain its competitive position it would require a fleet of jet aircraft as soon as its principal competitors; advice that the Tool Company received from investment bankers and the necessity for TWA to have additional equitable capital in order for permanent financing to be accomplished. He then referred to discussions with Equitable concerning its requirements for the permanent financing for TWA and the fact that the Tool Company was not satisfied with these discussions. Further, there is the development of the plan for permanent financing through a leasing arrangement and the Tool Company's belief that TWA would be in a position independently to finance its jet equipment program.

He then referred to the Tool Company's negotiations with Irving and its agreement to support the Dillon Read plan. There is a reference to advice by Irving through Sessel and the Tool Company's decision not to seek or negotiate any interest rate until after Irving had formed

[4369] a banking group. It is stated that representations were made to the Tool Company by Sessel and the Tool Company protested with respect to these representations, and when it was informed about interest rates, agreed to the interest rates but did not know that Irving had refused to permit other banks to participate in the plan. Mr. Cook also referred to Dillon, Read's advice to the Tool Company as to the interest rates. He made a statement concerning the lenders' commitment to the Dillon, Read plan and the Tool Company's guarantee agreement. He discussed the problem concerning Thomas's compensation and advice that the Tool Company gave to the lenders, as well as the various alternative suggestions for Thomas's successor and the fact that the Tool Company regarded the lenders' reliance upon Thomas's resignation in making their demands concerning management, as merely the use of an excuse to accomplish their objectives.

The affidavit then described the Tool Company's agreement to the financing plan in March 1960; advice that it received on August 1, 1960, from the lenders that they would insist on [4370] a voting trust; and finally that the Tool Company did agree in March 1960 to place its stock in a voting trust although it was unwilling to so agree under certain conditions. Then he referred to the Tool Company position as to demands made by the lenders and its request to Irving to develop an alternate plan. He asserted Irving's representation to the Tool Company concerning its inability to develop such an alternate plan and its refusal to permit participation by other banks, although this was unknown to the Tool Company.

Other paragraphs of the affidavit described the ability of Irving to apply economic pressure on the Tool Company

and Irving's presentation to it, of the bank plan. He related the Tool Company's doubts about General Dynamics' ability to participate in the plan, how those doubts were confirmed and the protests that were made to Irving. Then he went into the Tool Company's presentation to Irving of its own plan, the bank meeting of October 6, 1960, and finally the Tool Company's accession to Irving's demand on certain conditions.

[4371] The affidavit related how the first time that demand was made upon the Tool Company by the Metropolitan Life Insurance Company that the Tool Company's right to terminate the voting trust be subject to a penalty and that the Tool Company promptly submitted to the Equitable an alternate proposal and Irving then refused to participate in the alternate plan. He stated that after this both Equitable and the Metropolitan indicated their willingness to reinstate the Dillon, Read plan provided the Tool Company met the additional demands and Irving made a similar proposal to the Tool Company.

Mr. Cook then described how the Tool Company endeavored to negotiate a reduction of the premium after it received the October 19th letters and finally made an oral agreement to accept the lenders' demand subject to the understanding with Irving that it be submitted back to the Board of Directors, and Mr. Sessel's account of that understanding which Mr. Cook claims were incorrect. Thereafter, the Tool Company proceeded to cancel its commitment.

He related that the Tool Company made a further effort to develop a new plan for financing [4372] and upon failure of that, the 1960 financing was consummated.

Mr. Cook then developed the position that the Metropolitan and Equitable acquired and maintained control of the business and affairs of TWA, the Tool Company's expectations on the interest rate, and finally the lenders' demand that the Tool Company turn over control of TWA to them upon terms calculated to perpetuate the control that they had achieved.

Upon a consideration of the detail of the affidavit, it is apparent that it purports to be based on information which Mr. Cook received as counsel of the Tool Company. It is also obvious that it deals with that company's state of mind, position, attitudes and agreements with third parties as well as representations which he stated such third parties made, concerning the matters described in the affidavit. In many respects the affidavit parallels the allegations in the answer and counterclaims.

[4373] The applicable law involves a variety of legal principles. First, it should be recalled that this is not an action which depends upon diversity of citizenship for the Federal Court to have jurisdiction. The right to recover treble damages and obtain an injunction for violation of the Antitrust Laws is one that is created by the Federal Statute and did not exist at common law. See United States vs. Addyston Pipe and Street Company, 85 Fed. 271, 6th Cir. 1898; Standard Oil Company of New Jersey vs. United States, 221 US 1, 1911; and Apex Hosiery Company vs. Leader, 310 US 469, 1940. For this reason we do not have the problems relating to the distinction between substantive procedural statutes and rules of law, which must be dealt with in diversity cases under Erie vs. Tompkins, 304 US 64. However, even in a diversity case,

Opinion and Order of Special Master
J. Lee Rankin, April 17, 1962

Federal Courts have held that they are not precluded from deciding that a statutory privilege need not be allowed. Monarch Insurance Company of Ohio vs. Spack, 281 Fed. 2nd 401, 5th Cir. (1960) and Humphries vs. Pennsylvania Railroad Company, 14 F.R.D. 177 US District Court, N.E. Ohio E.D. (1953) where it is said: "The con- [4374] clusion is sound that Federal Courts are warranted to view the problems pertaining to the attorney-client privilege in the light of the law of the Federal Court rather than the law of the State where the litigation occurs." Professor Moore has taken substantially the same position in his work at 2 Moore's Federal Practice, First Ed. 2641.

A symposium on "The Lawyer-Client Privilege": Its Application to Corporations, The Role of Ethics, and Its Possible Curtailment, reported in the Northwestern University Law Review Vol. 56 May and June 1961, No. 2 at pages 235 to 262 presents a careful statement of the basis for the attorney-client privilege as it exists in the law. There it is said: "There is, perhaps, no principle of law which exists on a sounder basis, or which is supported by a more uniform chain of adjudication, than that which holds all information acquired by an attorney from his client, touching matters that come within the ordinary scope of professional employment, as privileged communications."

This symposium recognized that the purpose of [4375] the rule was to encourage the placing of full confidence in the attorney without fear of the disclosure of the secrets entrusted. It found that there were certain required conditions if documents or testimony were to come within the rule. They are:

(1) that a professional relationship be established between the client and its legal advisor;

(2) that the communication must be confidential and not made simultaneously to third parties or be intended to be communicated to third parties;

(3) the communication must be relevant to the advice sought and

(4) the circumstances must indicate that it was intended to be confidential and

(5) the privilege does not encompass information gleaned from sources other than the client or his authorized agent even though acquired by the attorney in the course of professional employment.

The attorney-client privilege covers the action of the attorney as legal advisor. It does [4376] not extend to communications between directors, officers, or agents of different corporations, or to negotiations between such corporations which are made or conducted by men who happen to be members of the bar. Nor does it extend to communications made by a client to his attorney with the understanding that the information is to be imparted to a third party.

The privilege does extend to communications to or from lawyers where the documents were prepared to solicit or give an opinion, on law or legal services and such parts of them are privileged as contained or have opinions based on information furnished by an officer or employee of the corporation in confidence and without the presence of third persons. Radio Corporation of America vs. Rauland Corporation 18 F.R.D. 440, U.S. District Court N.D.

Illinois, E.D. (1955) and United States vs. United Shoe Machinery Corporation 80 F. Supp. 357, United States District Court D. Massachusetts (1950).

As stated by Judge Irving R. Kaufman while a District Judge in Commercio E. Industria Cont. vs. Dresser Industries, 19 F.R.D. 513, U.S. District [4377] Court S.D. New York, (1956) "The privilege should certainly not be extended to communications between an attorney and his client pertaining to the attorney's negotiations with a third party over terms and details of business transactions." In applying this principle to the facts before him, Judge Kaufman further said, "While Mr. Schwartz is a reputable lawyer, of many years standing, due to the exigencies of the situation—the client being in Brazil and the parties to be negotiated with being in the New York area—he was called upon to perform the proper, practicable and convenient task of acting as the clients' alter ego in these business transactions. In this age of high finance and international commercial transactions more and more are lawyers called upon because of their integrity and business acumen to assist clients in their business dealings. Judge Levet previously rejected plaintiff's contention that the attorney-client privilege was applicable to this situation when he denied an application to vacate a notice by the defendant Dresser to examine Mr. Schwartz (citing the authority). For the reasons stated earlier I fully concur with Judge Levet's conclusion."

[4378] When it is found that the relationship between the attorney and the client meets all of the other requirements and does not involve action as a business negotiator or a present disclosure or contemplated future communica-

tion to third persons there remains the further question of whether or not there has occurred a waiver either in specific terms or by implication. Professor Wigmore in his treatise on evidence examines the question of waiver, in a number of its aspects.

In Section 2327 of the 1961 Edition at page 634, he asks the question, "What constitutes waiver by implication?" He then answers: "Judicial decision gives no clear answer to this question. In deciding it, regard must be had to the double elements that are predicated in every waiver, that is, not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended [4379] that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or disclose, but after a certain point his election must remain final.

"(2) The client's offer of the attorney's testimony in the cause at large is not a waiver so far as the attorney's knowledge has been acquired casually as an ordinary witness but otherwise it is a waiver for, considering that the attorney ought in general not to be used as a witness (Section 1911 supra), the client ought to be discouraged from utilizing his attorney in double and inconsistent capacities, and if he has seen fit to furnish him knowledge as a witness, he should deny himself the right to invoke the attorney's function as an advisor.

"(3) The client's offer of his own testimony as to specific facts about which he has happened to communicate with the attorney is not a waiver, for the same reason as in paragraph (1) supra. But his offer of the attorney's testimony as to such specific facts is a waiver for the same reason as in paragraph (1) supra.

[4380] "(4) The client's offer of his own or the attorney's testimony as to a specific communication to the attorney is a waiver as to all other communications to the attorney on the same matter. This is so because the privilege of secret consultation is intended only as an incidental means of defense, and not as an independent means of attack, and to use it in the latter character is to abandon it in the former.

"(5) The client's offer of his own or the attorney's testimony as to part of any communication to the attorney is a waiver as to the whole of that communication on the analogy of the principle of completeness, (citing Section 2113 supra).

In Section 2328 of the same treatise, Professor Wigmore deals with waiver at a former trial. He says under waiver by joint clients, agents, assignees, "(1) A waiver at one stage of the trial should be final for all further stages, and a waiver at a first trial should suffice as a waiver at a later trial since there is no longer any reason for preserving secrecy."

These principles have been followed in this [4381] District in a number of decisions. Knaust Bros. vs. Goldsclagg, D.C.S.D.N.Y. 1939, 34 Federal Supp. 87; Munzer vs. Swedish-American Line, D.C.S.D.N.Y. (1940) 35 F. Supp. 493; and Wild vs. Payson (1946) 7 F.R.D. 495, 500.

Opinion and Order of Special Master
J. Lee Rankin, April 17, 1962

Wigmore's position as to the proposition that the privilege is not divisible has also been applied a number of times in this District. It is stated in the case of In re Associated Gas & Electric Co., 59 F. Supp. 743, D.C.S.D. N.Y. (1944), in the following terms: "The petitioners having waived as to some of the letters relating to a specific subject open the door to all the privileged correspondence between it and its attorney on that specific subject. The Court cites for that proposition Hunt vs. Blackburn, 128 U.S. 464; White vs. Thacker, 5 Cir., 78 F. 862; Western Union Telegraph Co. vs. Baltimore & Ohio Tel. Co., D.C. 26F.55; Kunglig, Jarnvagsstyrelsen vs. Dexter and Carpenter, 2 Cir. 32 F. 2nd 195; and People ex rel. Brownell vs. Higgins, 96 Misc. 485, 160 N.Y.S. 721. To like effect see United States vs. Pellier, 255 F. 2nd 441, 2 Cir. (1958) and cases cited therein.

Furthermore, once the waiver is made as [4382] Professor Wigmore says, it is general and it cannot be made special so as to be limited to a particular purpose or a particular person. See People vs. Bloom, 85 N.E. 824. The reasoning supporting this principle is developed at some length in the case of McKinney vs. Grand Street P.P. and S. R. Co., 10 N.E. 544 where the Court said: "It is claimed by the appellant that the ban of secrecy having once been removed by the patient and the information having lawfully been made public the right to object further thereto had not been conferred. There seems much reason in this claim. The patient cannot use this privilege both as a sword and a shield,—to waive when it inures to your advantage and wield when it does not—after the publication, no further injury can be inflicted upon

the rights and interests which the statute was intended to protect, and there is no further reason for its enforcement. The nature of the information is of such a character that when it is once divulged in legal proceedings, it cannot be again hidden or concealed. It is then open to the consideration of the entire public, and the privilege of forbidding its repetition is not conferred by the [4383] statute. The consent, having been once given and acted upon, cannot be recalled, and the patient can never be restored to the condition which, from motives of public policy, requires suppression of such information."

There seems to be no question but what it is the duty of the Court to examine the documents if there is a genuine dispute as to whether the privilege is applicable and determine the question. See Ellis-Foster Co. vs. Union Carbide & Carbon Corp., 159 F. Supp. 917B (D.N.J. 1958); International Min. and Chemical Corp. vs. Golding-Keene Co., 162 F. Supp. 137 (W.D.N.Y. 1958); Zenith Radio Corp. vs. Radio Corporation of America, 121 F. Supp. 792 (W.D. Del. 1954); Bruun vs. Hanson, 30 F. Supp. 602 (W.D. Idaho 1939); Radio Corporation of America vs. Rauland Corp. 18 F.R.D. 444 (N.D. Ill. 1955).

It also appears to be well established that the burden of proving that any communication is privileged is upon the person who asserts the privilege. Humphries vs. Pennsylvania Railroad Co., 14 F.R.D. 177, (U.S.D.C. N.D. Ohio 1953), where it is said: "It is indisputable that one who claims a privilege has the burden of establishing affirma-
[4384] tively that the matters for which he claims the privilege fall within its coverage." See also Mowell vs. Van Buren, 77 Hun 569 (3rd Dept. 1894); Banker's Money

Order Ass'n. vs. Nachod, 120 App. Div. 732 (1st Dept. 1907); Matter of Morrell, 154 Misc. 356 (Surr. Kings Co. 1935).

Applying these principles to the facts in the case we find that Mr. Howard R. Hughes had no official position as an officer or director with the Tool Company after the close of 1960. He was only its sole stockholder. The Tool Company has advised us by letter dated April 16, 1962, that there is such a community of interest between that company and Howard Hughes, that it produced all relevant files maintained by Mr. Hughes. It is also apparent from a number of the documents produced for examination by the Special Master that Mr. Hughes was active on behalf of the Tool Company, both before January 1, 1961 and thereafter.

The affidavit of Mr. Cook and other portions of the record show quite clearly that in many of the activities by Mr. Cook on behalf of the Tool Company he was acting as a business agent and not merely as a legal advisor. It also establishes [4385] that in his activities as a business agent he obtained information from a number of third parties and presumably communicated it to the Tool Company.

He also appears to have passed on to third parties information, positions, attitudes and claims of the Tool Company concerning numerous specific matters. Wherever Mr. Cook's actions or those of Mr. Davis or Mr. Bautzer would fit into the categories just described, and they were acting as business agents and not merely as lawyers or were expected to communicate information to third parties or receive information from third persons to be com-

munication to the Tool Company, all of such communication and information and the full scope of it would not b privileged because it does not come within the basic require ments to qualify for the privilege.

An additional question is raised as to whether the motion of the parties in this proceeding under Rule 34 which hav been sustained include documents in the hands of the partie outside counsel. The records, memoranda, writings an similar documents are described in the motions as those "i the [4386] possession, custody or control of Hughes To Company, (Toolco hereinafter referred to as Hughes To Company, and any concern or persons associated at an time with Hughes Tool Company, including its sole stoc holder)." It would appear that such documents an writings in the hands of outside counsel of the Tool Co pany while not in the Tool Company's possession or custo would be within its control.

Several New York cases dealing with discovery und New York statutes and not under the Federal Rules Civil Procedure so hold. They are LeFever vs. Lefkowit 178 N.Y. Supp. 2nd 172; In re Buono's Will, 179 N.Y. Sup 2nd 717 and Duncan vs. Hammond, 190 N.Y. Supp. 2 1018. These cases hold that the attorney is but the age of the client and it is sufficient that one person have in h possession, or in the possession of his agent or attorney otherwise under his control a paper which relates to t merits of the action. They also recognize that the attorn may have papers which are his own and distinct from tho of the client and connected with the preparation of t case. Such papers although not work papers belong to t attorney [4387] as his own and not as the agent or rep

sentative of the client and therefore not subject to the control of the client.

An example of this was a request for the typewriter that was used in preparing a will and all of the copies of writings prepared on that typewriter after the date the will was prepared—the Court held that the typewriter and such other writings were not under the control of the client and the client had no right to them and they were not producible since they were a part of the equipment and materials used by the attorney in the conduct of his office as an attorney.

[4388] It may be that in this case there are writings and documents prepared by outside counsel concerning matters that they were working on for the Tool Company that were either legal memoranda or factual memoranda that the Tool Company would have no right to demand as being within its control, or belonging to it, and in fact there may even be memoranda that the Tool Company did not expect to be made of various conversations or communications. Such writings would be outside the scope of the motions in this action.

Conclusions

Apart from the consideration of waivers the following conclusions are indicated:

1. Any party asserting the attorney-client privilege has the burden of proving the existence of that privilege as to particular documents, writings or testimony.

2. All parties under their Rule 34 motions are entitled to the production of any documents that deal with facts

learned [4389] by counsel for the opposing party, from third parties, or sources other than the client, such as reports of conversations and negotiations with anyone not an officer, agent or employee of the client.

3. All parties are entitled under such motions to the production of any documents which were prepared by counsel when such counsel to the clients' knowledge was acting as its business agent in negotiating transactions or contracts.

4. The parties are entitled under their motions to the production of any documents which show on their face that there was no privilege by reason of the fact that the discussions in question were held or the legal advice given in the presence of third parties and to all documents dealing with matters as to which the client had knowledge that there was a waiver of the privilege by reason of communication of matters related thereto to third parties.

[4390] Concerning waivers, a party waives the privilege when it fails to assert its existence, or where it produces a portion of the subject matter by the testimony of counsel in affidavit or other form. Once having put a part of the subject in issue the privilege is waived so that the entire matter may be fully developed.

Where a party puts in issue by its pleadings, the advice of counsel and its right to rely on such advice, the privilege is waived as to all advice on the matter so placed in issue, including the basis for such advice, both legal and factual.

Opinion and Order of Special Master J. Lee Rankin, April 17, 1962

ORDER

It is therefore adjudged and ordered that all parties to this litigation shall produce in response to the Rule 34 motions filed against them herein, all documents in their possession, custody or under their control, and in their hands or the hands of their agents or attorneys which come within each and all of the categories and classifications described under conclusions in the [4391] foregoing memorandum opinion.

Should any party have questions as to whether particular documents or writings come within the terms of this order for production, the Special Master will examine and rule upon such cases upon their being presented to him.

Dated April 17, 1962, signed by J. Lee Rankin, Special Master.

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[4401] I will sustain the motions to propound and have answered the limited interrogatories about the location of Mr. Howard R. Hughes. In so doing I want to make it very clear that this interference with the right of the Tool Company to proceed with its discovery is not a precedent for any other such interference, but is granted in recognition, in the first place, that much of the documentary evidence that the Special Master has ruled is not privileged and must be produced by the Tool Company with relation to its outside counsel, demonstrates a very active participation by Mr. Hughes on behalf of the Tool Company, and it is not realistic to assume from such materials that there were not common interests between the Tool Company and Mr. Hughes throughout the period involved in this litiga-

tion—a common interest which went beyond that of the ordinary stockholder, and involved many important business decisions.

I am unwilling to preside as Special Master and permit the day to come when the [4402] parties would be entitled to take the deposition of Mr. Hughes, and then be unable to do so because they have been unable to locate him.

Furthermore, I am unwilling to sit here and allow what is brought to my attention, a large expense to be incurred, which will be damaging to TWA as well as the Tool Company, and all other stockholders of TWA, which expense would be incurred very largely or entirely for the purpose of trying to find out where Mr. Hughes is.

As far as I am concerned, if there is a cheaper or cheap way to acquire that knowledge, and make Mr. Hughes available to discharge his responsibilities concerning this litigation, the parties are entitled to it.

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[fol. 1212] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 61-2324

TRANS WORLD AIRLINES, INC., Plaintiff,

—against—

HOWARD R. HUGHES, HUGHES TOOL COMPANY, and RAYMOND M. HOLLIDAY, Defendants,

—and—

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, et al., Additional Defendants on Counterclaims.

INTERROGATORY PROPOUNDED BY PLAINTIFF TRANS WORLD AIRLINES, INC.—Filed May 4, 1962

Now comes plaintiff Trans World Airlines, Inc., and hereby propounds to defendant Hughes Tool Company (herein Toolco) the following interrogatory pursuant to the orders of the Special Master, dated April 17 and April 30, 1962, and under Rule 33 of the Federal Rules of Civil Procedure to be answered under oath within fifteen (15) days from the date of service hereof by an officer of Toolco.

Interrogatory

1. State whether any officer, director or attorney of Toolco has any knowledge, information or belief as to:

(a) Where Mr. Howard R. Hughes (herein Hughes) has been during the last 30 days prior to the date hereof;

[fol. 1213] (b) Where hughes is at the present time;

(c) Where Hughes will or presently intends to be during the period from the date hereof until July 1, 1962.

2. If the answer to any of the parts of question 1 above is in the affirmative, state

(a) As to 1(a) above, where Hughes has been during the last 30 days prior to the date hereof, giving sufficient information to have enabled one, not otherwise having knowledge of such facts, to have served process upon Hughes, including but not limited to the street address, including city, county, state and country, and including the exact location at such street address, such as room number and location;

(b) As to 1(b) above, where Hughes is at the present time, giving sufficient information to enable one, not otherwise having knowledge of such facts, to serve process upon Hughes, including but not limited to his street address, including city, county, state and country, and including the exact location at such street address, such as room number and location; and

(c) As to 1(c) above, where Hughes will or presently intends to be during the period from the date hereof until July 1, 1962, giving sufficient information to enable one, not otherwise having knowledge of such facts, to serve process upon Hughes, including but not limited to the street address, including city, county, state and country, and including the exact location at such street address, such as room number and location.

[fol. 1214] 3. If the answer to any of the parts of question 1 above are in the negative, state the extent to which inquiry has been made to support the negative reply.

Interrogatory by TWA to Toolco, May 4, 1962

4. State whether Nadine Henley, Kay Glenn, F. William Gay, John Holmes, Michael Conrad, Robert Marsh, Sam Barber, Grant G. Horr, Joel L. Boyce and Robert Maheu, employees of or consultants to Toolco, have any knowledge, information or belief as to:

(a) Where Hughes has been during the last 30 days prior to the date hereof;

(b) Where Hughes is at the present time; and

(c) Where Hughes will or presently intends to be during the period from the date hereof until July 1, 1962.

5. If the answer to any of the parts of question 4 above is in the affirmative, state

(a) As to 4(a) above, where Hughes has been during the last 30 days prior to the date hereof, giving sufficient information to have enabled one, not otherwise having knowledge of such facts, to have served process upon Hughes, including but not limited to the street address, including city, county, state and country, and including the exact location at such street address, such as room number and location;

(b) As to 4(b) above, where Hughes is at the present time, giving sufficient information to enable one, not otherwise having knowledge of such facts, to serve process upon Hughes, including but not limited to his [fol. 1215] street address, including city, county, state and country, and including the exact location at such street address, such as room number and location; and

Interrogatory by TWA to Toolco, May 4, 1963

(c) As to 4(c) above, where Hughes will or presently intends to be during the period from the date hereof until July 1, 1962, giving sufficient information to enable one, not otherwise having knowledge of such facts, to serve process upon Hughes, including but not limited to his street address, including city, county, state and country, and including the exact location at such street address, such as room number and location.

6. If the answer to any of the parts of question 4 above are in the negative, state the extent to which inquiry has been made to support the negative reply.

7. State whether any of Toolco's employees, agents, and/or representatives, including but not limited to those persons employed by Toolco in Los Angeles, specifically at 7000 Romaine Street and 915 N. Highland Avenue, who, during the year preceding the date hereof, have performed services of a personal nature or otherwise directly for Hughes, have any knowledge, information or belief as to:

(a) Where Hughes has been during the last 30 days prior to the date hereof;

(b) Where Hughes is at the present time;

(c) Where Hughes will or presently intends to be during the period from the date hereof until July 1, 1962.

[fol. 1216] 8. If the answer to any of the parts of question 7 above is in the affirmative, state

(a) As to 7(a) above, where Hughes has been during the last 30 days prior to the date hereof, giving suffi-

cient information to have enabled one, not otherwise having knowledge of such facts, to have served process upon Hughes, including but not limited to the street address, including city, county, state and country, and including the exact location at such street address, such as room number and location;

(b) As to 7(b) above, where Hughes is at the present time, giving sufficient information to enable one, not otherwise having knowledge of such facts, to serve process upon Hughes, including but not limited to his street address, including city, county, state and country and including the exact location at such street address, such as room number and location; and

(c) As to 7(c) above, where Hughes will or presently intends to be during the period from the date hereof until July 1, 1962, giving sufficient information to enable one, not otherwise having knowledge of such facts, to serve process upon Hughes, including but not limited to his street address, including city, county, state and country, and including the exact location at such street address, such as room number and location.

9. If the answer to any of the parts of question 7 above are in the negative, state the extent to which inquiry has been made to support the negative reply.

[fol. 1217] 10. State the name of every person who participated in the preparation of the answers to the foregoing questions.

Cahill, Gordon, Reindel & Ohl, Attorneys for Plaintiff, Trans World Airlines, Inc., Office and P. O. Address, 80 Pine Street, New York 5, New York.

Interrogatory by TWA to Toolco, May 4, 1962

To:

Hon. J. Lee Rankin, Special Master, 36 West 44th Street, New York, New York.

Chester C. Davis, Esq., Attorney for Defendant, Hughes Tool Company, 120 Broadway, New York 5, New York.

Winthrop, Stimson, Putnam & Roberts, Attorneys for Additional Defendants, Irving Trust Company and Ben-Fleming Sessel, 40 Wall Street, New York 5, New York.

Cravath, Swaine & Moore, Attorneys for Additional Defendants, Equitable Life Assurance Society of the United States, et al., 1 Chase Manhattan Plaza, New York 5, New York.

Dunnington, Bartholow & Miller, Attorneys for Additional Defendant, Dillon Read & Co. Inc., 161 East 42nd Street, New York 17, New York.

Chadbourne, Parke, Whiteside & Wolff, Attorneys for Additional Defendant, Charles C. Tillinghast, Jr., 23 Broadway, New York 4, New York.

[fol. 1218] Affidavit of Service (omitted in printing).

[fol. 1220] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 61-2324

TRANS WORLD AIRLINES, INC., Plaintiff,

—against—

HOWARD R. HUGHES, HUGHES TOOL COMPANY, and RAYMOND M. HOLLIDAY, Defendants,

—and—

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, et al., Additional Defendants on Counterclaims.

INTERROGATORY PROPOUNDED BY PLAINTIFF TRANS WORLD AIRLINES, INC.—Filed May 4, 1962

Now comes plaintiff Trans World Airlines, Inc. and hereby propounds to defendant Raymond M. Holliday (herein Holliday) the following interrogatory pursuant to the orders of the Special Master, dated April 17 and April 30, 1962, and under Rule 33 of the Federal Rules of Civil Procedure to be answered under oath within fifteen (15) days from the date of service hereof by Holliday.

Interrogatory

1. State whether Holliday has any knowledge, information or belief as to:

(a) Where Mr. Howard R. Hughes (herein Hughes) has been during the last 30 days prior to the date hereof;

Interrogatory by TWA to Holliday, May 4, 1962

[fol. 1221] (b) Where Hughes is at the present time;

(c) Where Hughes will or presently intends to be during the period from the date hereof until July 1, 1962.

2. If the answer to any of the parts of question 1 above is in the affirmative, state

(a) As to 1(a) above, where Hughes has been during the last 30 days prior to the date hereof, giving sufficient information to have enabled one, not otherwise having knowledge of such facts, to have served process upon Hughes, including but not limited to the street address, including city, county, state and country, and including the exact location at such street address, such as room number and location;

(b) As to 1(b) above, where Hughes is at the present time, giving sufficient information to enable one, not otherwise having knowledge of such facts, to serve process upon Hughes, including but not limited to his street address, including city, county, state and country, and including the exact location at such street address, such as room number and location; and

(c) As to 1(c) above, where Hughes will or presently intends to be during the period from the date hereof until July 1, 1962, giving sufficient information to enable one, not otherwise having knowledge of such facts, to serve process upon Hughes, including but not limited to the street address, including city, county, state and country, and including the exact location at such street address, such as room number and location.

Interrogatory by TWA to Holliday, May 4, 1962

[fol. 1222] 3. If the answer to any of the parts of question 1 above are in the negative, state the extent to which inquiry has been made to support the negative reply.

4. State the name of every person who participated in the preparation of the answers to the foregoing questions.

Cahill, Gordon, Reindel & Ohl, Attorneys for Plaintiff Trans World Airlines, Inc., Office and P. O. Address, 80 Pine Street, New York 5, New York.

To:

Hon. J. Lee Rankin, Special Master, 36 West 44th Street, New York, New York.

Chester C. Davis, Esq., Attorney for Defendant, Raymond Holliday, 120 Broadway, New York 5, New York.

Winthrop, Stimson, Putnam & Roberts, Attorneys for Additional Defendants, Irving Trust Company and Ben-Fleming Sessel, 40 Wall Street, New York 5, New York.

Cravath, Swaine & Moore, Attorneys for Additional Defendants, Equitable Life Assurance Society of the United States, et al., 1 Chase Manhattan Plaza, New York 5, New York.

Dunnington, Bartholow & Miller, Attorneys for Additional Defendant, Dillon, Read & Co. Inc., 161 East 42nd Street, New York 17, New York.

Chadbourne, Parke, Whiteside & Wolff, Attorneys for Additional Defendant, Charles C. Tillinghast, Jr., 23 Broadway, New York 4, New York.

[fol. 1223] Affidavit of Service (omitted in printing).

Transcript of Pretrial Hearing, May 17, 1962

[Doc. 96]

[CAPTION] 61 Civ. 2324

Before: Hon. CHARLES M. METZNER, District Judge.

New York, May 17, 1962, 10 a.m.

[APPEARANCES]

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[2] The Clerk: Trans World Airlines, Incorporated v. Howard R. Hughes, Hughes Tool Company, and Raymond M. Holliday, defendants and The Equitable Life Assurance Society of the United States, et al., additional defendants on counterclaims.

The Court: I don't have the TWA papers. Did you file them downstairs?

Mr. Sonnett: We submitted a very brief memorandum this morning, your Honor.

The Court: All right.

Mr. Sonnett: And TWA is resting on the main briefs submitted by Mr. Kaminer.

The Court: All right. Miss Lea.

Miss Lea: May it please the Court, may I first explain, your Honor, that up until this morning Mr. Davis intended to be here and at the very last minute found he could not. We apologize for his not being able to attend, and I am telling you this in kind of an anticipatory apology for my argument, as well, which might be a trifle disjointed under the circumstances.

The Court: You don't need any apology.

Miss Lea: The Tool Company is here seeking review of the Special Master's ruling primarily in so [3] far as said ruling is determined to have been a waiver of any attorney-

client privilege which Toolco would otherwise be entitled to assert.

The Special Master was given an opportunity to review to some extent the documents with respect to which Toolco claimed privilege, and having reviewed them stated on the record in so far as he could determine from the documents themselves they weren't communications between attorney and client and communications which did contain legal advice and but for a waiver would be communications which would be subject to a claim of privilege and not producible.

Following some argument and the submission of memoranda on behalf of the various parties, the Special Master determined that Toolco had waived its privilege with respect to some of the communications between attorney and client by reason of the fact that an affidavit had been filed by Raymond Cook in a Civil Aeronautics Board proceeding, and that by reason of the fact that Toolco had pleaded as one of its defenses advice of counsel.

The question, it seems to me, when boiled down is really a very simple one. Waiver requires two elements. It requires a disclosure and it [4] requires a disclosure of communications otherwise privileged on occasion, and we think that in part, at least in this case, the determination of each of these elements requires inquiry into the facts surrounding waiver and into the facts surrounding the creation and existence of the privileged communication itself, and that on the basis of the record that the Special Master had before him at best there is no basis at all for a finding that a waiver had in fact taken place of any communications—any communications otherwise privileged.

Now, in so far as the Special Master found and the opposing parties urged that the affidavit submitted by Mr. Cook

to the Civil Aeronautics Board constitutes a waiver, our position is this:

A reading of the affidavit, a reading even of those paragraphs which have been quoted by the defense, Irving Trust and Sessel, the memorandum submitted to your Honor indicate that the information which Mr. Cook supplied in the affidavit to the CAB and the statements which he made to the CAB was information and statements which came to him as, in effect, a witness to the events which had transpired, that is, that Mr. Cook observed events, participated in trans-[5]actions, and by reason of his observations and participation was able to execute an affidavit which related the facts involved therein.

Such a relation of facts is relation of material which is not privileged. The attorney, or any individual who observes facts and participates in events is on some occasions required, or at least in a position to state those facts and repeat those facts without there being any waiver of any kind. There can't be any waiver unless there is a privileged communication to the extent that he himself observes it and does not relate facts, or does not relate information which came to him from his client by way of a privileged communication. There is no privilege and there is no waiver.

This is a situation which applies to Mr. Cook's affidavit. The examples are quoted here in defendant Irving's and Sessel's brief, which indicate this, and I would just like to advert to them very briefly.

They begin on page 15, your Honor, and the quotes go on for several pages. Starting on page 15, paragraph 17—and I will briefly go to those portions which are underlined and which opposing [6] parties apparently think are most supporting of their point of view—they have here underlined from paragraph 17:

Transcript of Pretrial Hearing, May 17, 1962

"Accordingly Toolco and TWA did not seek to negotiate any interest rate until after Irving had formed the banking group,"

and then go on to say, underlining paragraph 18:

"When Toolco protested, notwithstanding the representations made to it by Sessel, no opportunity had been given to TWA to negotiate."

We can go on and on here, and it is apparent from a reading of all of these that these are objective, let me call them, facts, observable by Mr. Cook in the course of whatever it was that he was doing, which information did not necessarily come, and there is no indication from the face of the affidavit itself that this information did come to him in the course of privileged communications from a client.

These are things which he saw happening and these are things which he learned otherwise, say, as far as the face of the affidavit indicates than by communications from the client.

If this is so, then this information is not privileged. If the information is not privileged, [7] then the statement cannot be a waiver of any privilege.

The whole affidavit itself, I believe, is attached to our moving papers, and going through it even single paragraph by single paragraph fails to disclose one instance in which the affidavit itself recites or indicates, or in any manner tends to show that the information which Mr. Cook has put down therein is information which he got from the client in the course of a confidential communication.

That is our position with respect to the affidavit itself, except that I would say that to the extent that any of the opposing parties believe that they can show that any other statements contained in the affidavit were not statements

learned by Mr. Cook in the objective fashion as distinguished by way of communications from the client himself, that such facts, or that a determination of such facts at the appropriate time may indicate that a waiver has occurred.

This is not our position. We don't believe that any such facts exist, that they could show them, but our position is that if, assuming arguendo such facts do exist, they must be shown and they must be placed on the record before there can be any proper [8] finding that a waiver has, in fact, occurred.

This has not been done. There is nothing in the record, except argument of counsel and memoranda, and this is an insufficient basis and it is certainly no factual basis upon which to find that a waiver has occured with respect to the statements found in the Cook affidavit.

With respect to the second major point of contention which we have here, and that is on the pleading of advice of counsel, the Special Master determined that by virtue of the fact that Toolco [in] its answer had set up a partial defense to some of the allegations of the complaint, that the actions which it had taken, which were alleged to have been willful and malicious interference with TWA's business, were taken on advice of counsel, whatever those actions were, and they have not been determined yet.

The complaint was general. Mr. Tillinghast has testified with respect to some letters which he states constituted this willful and malicious interference, and if that is all that TWA claims we have one situation. What more they claim, we don't at this moment know.

However, the Special Master determined that [9] merely by virtue of pleading this, putting it in our answer, we have waived the attorney-client privilege with respect to such materials.

Again, we think that this was error. We think it was error because the ruling failed to take into account one of the two essential elements of waiver, which is that there must be a disclosure of the confidential communication. Merely saying that you relied upon advice of counsel without saying what the advice of counsel is, is not a waiver. It is not a disclosure of any privileged communication. Until you have had that disclosure, you are not entitled to assume that there has been a waiver and you are not entitled to look at documents otherwise privileged.

Now, the fact that having set this up as a defense, Toolco may be required at some point, at some appropriate point to disclose what it is it is relying on of advice of counsel and may say that relying on merely a statement of counsel in and of itself is a disclosure of communications sufficient to waive the privilege. We don't believe it is. Whatever we may be required to do at a later point, will happen then.

[10] We are talking as of then, and the waiver as of today, we submit, has not occurred by reason of the pleading in the complaint itself.

This advice of counsel, aside from the problems with it that I have already indicated, become somewhat more complicated by the fact that what the advice was, what the client relied upon, what the scope of the defense itself is are again much as in the case of the affidavit questions, which require determinations of fact and which require inquiry into facts. Without knowing the underlying circumstances one can't say, one can't determine the breadth of the disclosure, assuming that a disclosure has, in fact, taken place, or the breadth of the waiver.

Again, we submit, that the Special Master was in error in determining on the basis of no facts at all, but merely on the basis of the pleading itself, that—and he has found a

very broad waiver of the attorney-client privilege on the basis of this pleading.

In summary, it is Tooleo's position that at this point there is no basis in the record upon which a finding of waiver can be predicated.

It is further our position that neither the [11] Cook affidavit nor the pleading itself is any waiver of the attorney-client privilege.

We respectfully request that your Honor reverse the ruling of the Special Master in this respect.

The Court: Mr. Kaminer.

Mr. Kaminer: May it please your Honor, I have been selected by my colleagues to save your Honor's time and to present the argument to you so there won't be so much duplication.

My first point is that the appeal is, of course, entirely untimely. I don't know whether your Honor had a chance yet of reading our memorandum. I am merely asking this because I don't want to bore you by repeating too much.

The Court: You go on and make your argument.

Mr. Kaminer: I will, sir.

In the first place, the Special Master set a time, which he then extended, for ruling, which was the appeal had to be noticed—a notice of appeal had to be filed by April 27th. This was the extended time.

On that day, my learned opponent sent a letter to him interpreting the opinion of the dis-[12]tinguished Special Master as being academic shadow-boxing and said, "Of course, this is all very well, but we don't have to produce anything."

That is the import of the letter and it is in this memorandum which we handed to your Honor.

The Special Master writes back on the next business day and says, "This is not so at all." There is more correspond-

ence, and the Special Master specifically said, "I will not make a new order to extend the time to file a notice of appeal," and indeed, he said, "I will not regard you in default for not complying with giving these documents over right away until such time as Judge Metzner shall determine either that the time for an appeal has expired, or that the order should be sustained," et cetera.

The Court: Let's assume that we are dealing with the substance now and not the question of whether—

Mr. Kaminer: I will come to it right away, your Honor. What has happened here in this case—and I am not saying this against my very charming opponent who is arguing here today. I didn't expect to have to confront her. I rather expected to con-[13]front Mr. Davis.

The Court: Oh, I don't think Miss Lea is going to rest on her charm to defeat your argument and put you in an unfavorable position.

Mr. Kaminer: What I have to say is no reflection on her. That's what I want to say.

Miss Lea: Thank you.

Mr. Kaminer: We have been getting the worst runaround which I believe this Court has ever heard of. Arguments have been made over and over and over again, the same arguments, and now we are still here and haven't got the documents to which we are entitled.

Miss Lea has cut the subject a little shorter than it is and the distinguished Special Master's opinion is a little broader than what you heard about.

Now, here we have Mr. Cook, who is an outside lawyer from Texas, whom your Honor has seen, who, as his own affidavit and the other affidavits in the binder show, has acted as the negotiator all the way through.

That is a method of Mr. Hughes. He sends lawyers and then later on we are told, "Oh, well, these [14] were lawyers, too bad, it's privileged."

The law is very well conscious of that kind of thing. There are two principles of law firmly established; one, if a lawyer is a negotiator, no privilege.

My friends have cited something in their brief, but they don't always like to cite the full, relevant parts that they heard, which, of course, is human and quite understandable, but the fact of the matter is that in the very article which they cite as saying that the burden hasn't been overcome, it is said that where it is shown that the lawyer has acted as a negotiator there is no privilege and the Master has so found and the basis for his finding are the facts in the Cook affidavit and various other facts to which I will refer.

Now, as far as waiver is concerned, waiver comes about in a variety of ways, and once it is made it cannot be recalled.

A waiver occurred here, first, when Mr. Cook filed this affidavit, which is a part of this record here, having been made so by other affidavits, and in which he disclosed not just what he learned from third parties—there have been read just a few [15] of the excerpts—but the state of mind of the Tool Company, what they concluded, that they decided they wouldn't negotiate this, that they decided they would do that.

Now, all that could have come only from the Tool Company, or Mr. Hughes, which is the same thing, the alleged client, and the affidavit says the facts herein came to me as counsel.

Now, his own affidavit says that. He can't go back on that. The Special Master pointed that out in his opinion.

You are told that the Special Master in view of the documents said on the record that they didn't seem to him to—

I forgot what Miss Lea said—to be anything but—to contain any factual communications.

Well, first of all, the fact is that the important papers have never been shown to him, as far as I know, because after that statement by the Master, the Master inquired whether all the files of the Cook firm and Mr. Bautzer had been shown, and I know of no fact that they have been shown, but that is utterly immaterial.

Whether they have all been shown to him or [16] not, the fact of the matter is that the Cook affidavit clearly sets forth facts, A, which show that Cook was the negotiator so there was no privilege anyway.

The law has said and the Master has cited to you in your brief that if a client uses a lawyer not in the proper way for which a lawyer should be used, that is, to give legal advice, but as a negotiator there is no privilege and we have cited you a lot of cases.

The fact is also, as the Master has set forth with abundant quotes, that where you call a witness in whatever form and proffer—and that witness is a lawyer and you proffer that witness' testimony, that is the end because the law does not favor that kind of thing.

You have seen, no doubt, the quotations from Wigmore, and the cases supporting it.

Now you are told that, of course, this waiver in the answer about legal advice doesn't mean anything because the legal advice isn't disclosed.

Well, there are two very interesting cases on this subject, both in New York. The first one is Smith v. Bentley and the pleading said that the defendant had paid a portion of the royalties in [17] question to another defendant upon the advice of his counsel that he was legally entitled thereto.

That's just exactly what is disclosed here, that all the actions of the Tool Company with respect to the matter alleged in the complaint were taken upon advice of counsel.

In another case by Judge Learned Hand—it was quite an interesting case. It is called United States v. Cotter—this occurred: It was a criminal case and the defense suggested that they had employed counsel to advise them when they had been investigated and that, therefore, the lawyer would not have countenanced any ill will. Mind you, they did not say what the lawyer said.

The prosecution, in addressing the jury, suggested that if this was the case, the defendants should have called the lawyer and that the prosecution couldn't have done so because the communications would have been privileged.

The Court of Appeals said that all the defense arguments were no good and then quoted that the defendants might, however, have made an even better argument. They might have added that their own argument about counsel was itself an [18] abandonment of any privilege, whether it had originally existed or not.

Now, the record is full of waivers. You cannot do your business by lawyers and then hide behind alleged privilege. You are to use lawyers as counsel, but when you put them on the stand, when you plead their advice, that is the end of privilege.

And an interesting thing is that throughout this case there has been an enormous reluctance to comply with one of the most fundamental questions, namely, that if you are claiming privilege and withhold an otherwise relevant document—your Honor understands there is no question here of relevancy; these are documents called for by the orders. This is not a case your Honor recently decided; this is a case of whether or not they are privileged—when you claim

privilege and it is challenged, you have got to submit it to the Court.

Some documents were submitted. Now, in this very brief again, which they submit to your Honor today, we are told that there is not enough to make it necessary to submit them.

I think it is on page 5. The Master has said, one, there has been a complete waiver of anything, [19] of the subject matter which Mr. Cook described in his affidavit. We have summarized what the subject matters are, but you will find they are identical to 99 per cent of the allegations of the counterclaims.

And they state what Tool Company did and why it did it and how could that have come from third parties, their state of mind. And that is what the Master pointed to.

You have a pleading which says we relied on advice of counsel in doing the acts which the complaint complains of here, and, of course, as the Master pointed out in one of the letters which he had to write because his, I thought, very clear and learned opinion was not clear to my learned friends, he said, "You have to produce everything written since 1960 which is relevant," and anything which was before counsel—and this is what we are really talking about—they write letters attacking, let's say—to give a good example and a very relevant one—the voting trust.

Of course, when you do that and say, "We did this on advice on counsel," then everything which was before counsel and formed his advice comes in.

I remember two cases in point which I cited on the record before the Special Master. We didn't [20] put them in our brief, just by oversight. I will try to get it out fast. But they were dramatic.

In one case a lawyer's advice was pleaded as a defense. That opened the door to any other advice which the client had received on the subject matter and it turned out to the great chagrin of the party that he had first consulted the lawyer who said, "You can't do this."

Then he consulted a lawyer who said, "All right," so he pleaded that second lawyer's advice. You cannot have a partial waiver.

And I was in a case where a special master—a hearing examiner, a judicial officer of the Federal Government—held this—it was also very dramatic when it happened—and that case is American Cyanamid, Docket No. 7211 before the Federal Trade Commission.

There a letter had been written to the Attorney General of the United States in 1955 by counsel saying that the client had been advised that a certain patent was invalid.

Many years later, an antitrust proceeding was instituted and it was ruled that that letter opened the door to all communications with counsel on this question of the validity of the patent.

[21] Of course, you cannot waive partially. That would be a wonderful thing and there are a lot of cases which tell you and point out graphically how unjust it would be if you could just disclose that much.

Now, my friends say the time hasn't come. Well, we have been at it for a long time. Your Honor has been at it longer than we additional defendants.

The time had come to produce these documents on March 15th. That was when the time had come under the orders of the Court and of the Special Master, but we are told we have to take testimony when we have the sworn affidavit in the record which says that the man who made it learned the facts as counsel—we quoted that portion—and which shows

the state of mind of the company; when we have a pleading in the case, when we have additional affidavits which are also in the binder, filed in this very case, and, in addition to all of that, we have another affidavit of which you haven't been told a thing. That is the affidavit of Mr. Holliday, an officer of the Tool Company.

Before I go into that, let me suggest to your Honor that it has been stipulated that the Cook affidavit, of which we have been talking, which was filed [22] in Washington—that its filing was authorized by the Tool Company, no question about that, but it was not filed by itself. It was filed together with another affidavit by Mr. Holliday, and Mr. Holliday says, among other things, that the Cook affidavit describes all the events accurately which happened before a certain period of time, so that is the client himself.

Holliday is an officer, as your Honor by now knows, of the Tool Company.

And then it says that the Tool Company has acted on the advice of counsel to take steps which its counsel advised were required to protect its interests with respect to subsequent period of time.

Then it shows that Toolco, through its counsel—never mind, your Honor, what I talked about using counsel as businessman—through its counsel and upon his advice did a certain thing.

You have got to take these two affidavits together, as the Master did.

Now, I don't believe that there can be any question—I conclude, if I may, with that, your Honor—that the Master was right when he said, "I have ruled and told you what documents I consider as waived and what kind of documents were never published [23] at all," such as when a lawyer acts as negotiator, such as a lawyer learning facts from third parties, and the like.

Now, "You submit those, produce them forthwith, and any documents as to which you have questions—submit them to me and I will rule."

We have cited pretty ancient and pretty recent authority to your Honor to show there is no doubt that he was right, that it is not the province of counsel to determine what is privileged, but that of the Court.

In one fairly recent case the Court appointed a Special Master for that very purpose if the parties couldn't agree to it.

Now, we have got here a Special Master so there can be no question about it. I don't think that I have to waste your Honor's time any more. I think it is so clear, A, that the appeal is untimely, and, B, that the Master was, if I may so, as right as rain, but I think I will cease and desist.

Mr. Sonnett: May I have several minutes, your Honor?

The Court: Certainly.

Mr. Sonnett: I think the point about the [24] appeal being not timely is far from having a technical point when your Honor considers—

The Court: I am going to go to the merits, Mr. Sonnett; forget about this question.

Mr. Sonnett: Yes, your Honor.

May I suggest while I normally wouldn't advocate a technical point, this particular matter of privilege was argued five times before the Master over a period of several months.

The matter has had very lengthy consideration, and while I do not suggest that your Honor should take a technical position, I think that the fact that it was argued five times and a very careful and learned opinion was written and that the Master extended the time to appeal and that the appeal was two weeks after the date and that the argument before your Honor was adjourned to today so Mr. Davis could be

here, and he is not here, all of these, I think, being matters of record, should be considered in determining how much faith really there is on the part of Hughes Tool Company in this so-called appeal.

Now, I will be very brief. I think Mr. Kaminer's argument in brief covers the matter generally, [25] but there is one aspect in particular that I would like to emphasize.

Your Honor will find in the brief submitted by Mr. Kaminer a reference on page 22 to an affidavit of August 8, 1961, signed by Chester C. Davis, in which he stated—and I quote in part—"All of the acts alleged in the complaint to have been done in and after 1960 were done upon my advice as counsel for Toolco."

In the answer—I think it is in paragraph 40—the allegation is made:

> "All of the acts alleged to have occurred since 1960 were done upon advice of counsel."

If your Honor will look in due course—I don't suggest taking the time now—at the allegations of the complaint, and in particular those relating to the year 1961, your Honor will find, among other things, that it is charged there that assertions were made as to legal positions during 1961, positions of Toolco, and that these related to, among other things, the position of Toolco, that it had the right to terminate the voting trust other than in accordance with its terms, and the like.

[26] Now, having asserted in sworn affidavits and in a formal pleading to this Court that every act we allege, including the taking of these positions, every act we allege as having occurred in 1960, was done upon the advice of counsel, we now find characteristically Mr. Davis is backing away from that, because if you look at his affidavit in sup-

port of this appeal in paragraph 14 you find now a disclaimer.

It is said there that Toolco obviously did not intend to set up advice of counsel as a defense to a charge of antitrust violations.

If, however, the allegations in paragraph 40, that is, of the answer, are construed as asserting the defense of advice of counsel, with respect to the antitrust charges—which, incidentally, it does—Toolco requests that it be permitted to amend its answer so as to clearly state the defense which it intended to assert.

In other words, it now appears from the record that they do not take the position that any advice of counsel was or could be a defense to the second antitrust cause of action.

Your Honor will further find on page 8, paragraph 15 of the same Davis affidavit, now before [27] you, a further very interesting statement beginning at the bottom, 7:

> "However, the letters identified as constituting willful and malicious interference were either written by counsel, or on oral advice of counsel, and no written communications exist with respect thereto."

Now, this is very strange. We have an affidavit, we have an answer asserting that every act we allege as having been committed in 1960 was done on advice of counsel, but the closer you get to it, the more difficult it becomes to find any evidence of the advice.

Now, certainly, if this is artful pleading in the affidavit, if what is really being said is that there was advice on the subjects referred to in the written communications, we are clearly entitled to have that advice because the privilege, if any, has been waived both by the affidavit and the answer.

If, in fact, there was any legal advice, well, let's not waste time in a further effort to conceal that fact. Let's know what we are doing; but I don't think that the Tool Company can have it both ways.

[28] They can't assert that there was legal advice and that that's the reason these acts occurred by way of concession and avoidance and now suggest that perhaps there wasn't any.

Perhaps counsel himself did this—perhaps—and maybe this is what they are suggesting—these weren't the acts of the Tool Company, but the assertions made were made in the name of the Tool Company.

Now, it just seems to me, your Honor, when you consider that you granted our motion to produce in December of last year, that the production was to have occurred in March, that we have been at this privilege problem five times before the Special Master, arguments ad nauseam, briefs ad nauseam, that the Special Master worked on this at great length. He issued a very careful opinion.

Only two of the conclusions he expressed are in any event raised by this so-called notice of appeal.

As your Honor will see from the small brief we submitted today, it seems to me that what we need is for the Court to dispose of this once and for all and let's get at the documents showing this advice, if, indeed, there are any, or let's establish that [29] there aren't any.

Thank you, your Honor.

The Court: Miss Lea.

Oh, I am sorry.

Mr. Barr: If your Honor please, my name is Barr from Cravath, Swaine & Moore. I don't want to say anything more about the legal problems involved. I think Mr. Kaminer covered them more than adequately.

Transcript of Pretrial Hearing, May 17, 1962

Your Honor, this problem has been in this lawsuit since the initial defendants first came into it. Since prior to 1960 the Tool Company has had a policy of conducting almost all of its business negotiations through three attorneys:

Mr. Raymond Cook, Mr. Gregson Bautzer and lately Mr. Chester Davis.

Now, all of those attorneys have at one time or another conferred, negotiated to bargain with my clients and with the clients of every other attorney in this room regarding the agreement or failure to agree about the subject matter of this lawsuit. These are the people who dealt on behalf of the Tool Company.

Now, the Special Master quite properly ruled that as to those negotiations, the bargaining, [30] the facts and circumstances and the documents are not privileged; there is no privilege involved there and those must be produced.

I take it the Tool Company doesn't now challenge that ruling of the Special Master, but those documents have not been produced, although they have been ordered to be produced by the Special Master.

Then, as to the question of waiver, your Honor, the Tool Company has followed since the beginning of this lawsuit a course of conduct of using the advice of counsel and the information of these attorneys as a sword against the additional defendants because all of these activities which the TWA charges in its complaint the Tool Company has done, they say, "No, our defense is that we didn't do it; the additional defendants did it."

So when they pleaded advice of counsel here and when they use the information that their counsel have gained acting as business advisers, they are using it against us.

Now, there are several other things. You have heard about the Cook affidavit and certainly that is the broadest kind of waiver I have ever seen.

I think what it really was was a preliminary [31] draft of the counterclaims, because many of the paragraphs are absolutely identical with the counterclaims, and much of the other language is also, I think.

That affidavit was filed in another proceeding, it is true, and there has been a nice little record established down in Washington and the examiner has found, and it has been publicized throughout the country, that there was no evidence in that record of any wrongful conduct by Hughes with respect to TWA.

Now, in addition to that, Mr. Cook has announced to the Special Master many times off the record, and it is in the Special Master's opinion, that he will be a witness in this proceeding, and he is not appearing as counsel in this proceeding because he will be a witness.

You heard about the Holliday affidavit, which is also a very broad waiver. Section 40 of the answer, paragraph 40, is also a very broad waiver and again, your Honor, a sword against us.

And the Davis affidavit of August 8, 1961, and Mr. Holliday's affidavit of August 7, 1961, both of those say everything the Tool Company [32] did in and after 1960 they did on advice of counsel.

Now, the Special Master on that aspect, which is really the other part of his ruling here, said, "That on the basis of all of those things I find that there has been a waiver as to the matters contained in those affidavits and the answer," and so on.

Miss Lea has told you that there isn't any waiver in the Cook affidavit because it is all just facts. If that is so, I don't see what problem they have because the Special Master's ruling simply says whatever documents are covered in the subject matter discussed in these affidavits, and so on, must be produced.

Now, he doesn't say Tool [Company] could drive them all over and produce everything immediately. He says, "If you have any problems with any of these documents, bring them to me and I'll rule on them. If you think a document is still privileged, bring it to me and I'll look at it and I will decide."

Further, he says, "If you think a document is not covered by the waiver, bring it to me and I will decide"—but the Tool Company simply refuses to do that.

[33] They come here and tell your Honor that they have been ordered to produce. What they have been ordered to do is produce the things as to which, A, they no longer claim the privilege; B, they no longer believe, or they now understand there has been a waiver, and as to the rest of the documents they are to bring them to the Special Master and show them to him.

Your Honor, Mr. Kaminer has included the order of the Special Master and the opinion in the order. I won't read it to you, but I would like to refer you to page 4388 to 4391, which contains his conclusions and order, and it is very clear from that—

The Court: I have read it.

Mr. Barr: Now, sir, on the basis of the considerable amount of work—and there are over 250 pages of oral argument before the Special Master on this subject—there must be another 250 pages of briefs and affidavits submitted to the Special Master on this subject—the Special Master has read a substantial number of the documents. The documents that he has not yet read he has asked that the Tool Company furnish to him so that he may read [34] them.

Moreover, he has said in his order, "If you have any problems about particular documents, bring them to me and I will rule on them individually," but instead we get this appeal.

Your Honor, I submit, that the appeal is a complete waste of everybody's time.

What they ought to be doing is submitting to the Special Master the documents about which they still have a problem—and nobody knows what they are yet, whether there are any, or how many there are, how many of the documents they are still withholding they are ready to admit should be produced, but it has been two months now, Judge, almost since we have been in this case that we have been trying to get at the facts that these three lawyers, who are going to be the principal witnesses in this case, know about, and I believe we are entitled to have them, sir.

Thank you.

The Court: Miss Lea.

Miss Lea: I really hardly know where to begin in reply, your Honor. There has been so much said that first I really don't understand. I don't [35] know how it goes to the fairly simple issue which I tried to indicate at least we think is before your Honor, and to the extent I do understand, most of it is just plain wrong, a misstatement of the fact as well as law, I think.

The suggestion has been made, I think, that Toolco is somehow remiss in seeking to protect its rights by asking for a review before your Honor rather than producing documents either one by one and claiming the privilege with respect to them and then being confronted with the necessity of taking an appeal to review if we found it required under the circumstances from each document rather than trying to get the situation straightened out at the very beginning, get the whole question of privilege straightened out at this point, which is what we are trying to do.

It seems to me much more reasonable and certainly much more expedient, or expeditious to do it that way rather than to take time doing it in piecemeal fashion.

During the course of the several arguments we have had a lot of stones thrown at us. I suppose we ought to be accustomed to that by now. We ought [36] to be trying to get it fixed at any rate and trying to pick up some of them and indicate what the situation really is.

I think each of the gentlemen who spoke said that Toolco did not make available to the Special Master, as I stated in my argument, all of the documents with respect to which it claimed privilege.

That just isn't so. Mr. Kaminer and Mr. Barr, I think, mentioned the documents reposing in the files of Mr. Bautzer. To the extent that those are not Toolco documents, to the extent that those documents belong to the various law firms and various individuals, a motion directed at Toolco does not require their production and they have not been produced.

I don't see that a party can be or is required to make available or to turn over, or, indeed, is capable of making available things which don't belong to it. To ask us to do it and then to castigate us for not doing it, it seems to me is sheer nonsense.

The remarks which have been made with respect to the general statements concerning the attachment of privilege which was made by the Special Master during the course of his opinion are general statements with [37] which Toolco is in general agreement. It is the application of some of those principles with which we quarrel.

We recognize them when an attorney acts in a non-legal capacity and communicates with his client matters relating to that non-legal capacity, matters which are not otherwise within the confidential relationship, that such matters are not privileged. We understand that. We always have.

The question, however, whether any particular individual at any particular time was acting as a negotiator and solely

as a negotiator and not acting in any manner as attorney with respect to which the privilege would attach is again a question of fact, and Mr. Barr got up and made what he claimed were some statements of fact. If he intends to testify on the subject, that is all very well and good, but let's make sure that what he is doing is testifying as to facts which he claims that he knows and let's do so at the proper time and in the proper place.

Mr. Barr's statements, with all deference to Mr. Barr and the great respect I have for him, are not facts upon which a finding of waiver can be based on the state of this record.

[38] Mr. Kaminer made some comments about waiving the privilege when you offer the testimony of the attorney in evidence, or where you put the attorney on the stand to testify with respect to certain facts.

First of all, with respect to a matter of who is going to be a witness, I do not recall that the Tool Company has ever said that it would call any of its attorneys as witnesses. My understanding of the situation is that there have been occasions that others may be required to call them in and that they may appear as witnesses for that reason. I am not absolutely certain about that. I may be in error.

In any event, it doesn't really make very much difference because until the time that they get on the stand, until the time that they relate or disclose privileged communications, there isn't any waiver. What may happen tomorrow or next week or next month is no basis for saying that today you have waived a privilege which existed up until today because some time you may do something different.

Well, let's wait until something different happens. At that point it may be appropriate to find that a waiver has occurred. It certainly isn't [39] so now.

There were also statements made with respect to Mr. Cook's having stated that he was counsel for Tool Company during a certain period. Learning facts as counsel and learning facts from the client in the form of privileged communications, or confidential communications to which the privilege attaches, are two very different things. The fact that Mr. Cook may have been acting as counsel and may have been told by Mr. Zilch something which affects his activities as counsel does not mean that if he discloses what was told to him by someone unconnected with the client that just because he happens to be the attorney in that instance he has waived the privilege. It is only the communication from the client to the attorney, or conversely, which the privilege affects. Those are not matters which on the face of the Cook affidavit are being disclosed here.

I just don't understand the arguments of counsel in so far as they tend to indicate otherwise. I think your Honor, when he reads the Cook affidavit, will be able to determine that in so doing.

Mr. Kaminer: Your Honor—

Mr. Barr: If your Honor please,—

[40] The Court: I have heard enough.

Mr. Kaminer: May I point one thing out?

I won't repeat a word I said, but I would like your Honor to look at page 4385 of the Special Master's ruling. That is in the binder, sir. I can hand you up another copy. We have it all here.

The Court: You have it here. I have a copy here, have I not?

Mr. Giddings: It is in the square binder, your Honor. Here it is.

The Court: 43—what?

Mr. Kaminer: —85, sir.

Your Honor has just been told that, of course, they haven't produced anything in the hands of outside counsel because they don't have to. Now, here is a ruling by the Special Master which says—has your Honor found it?

The Court: Go ahead.

Mr. Kaminer: (Reading):

> "An additional question is raised as to whether the motions of the parties in this proceeding under Rule 34 which have been sustained include documents in the hands of the parties outside counsel. The records, [41] memoranda, writings and similar documents are described in the motions as those in the possession, custody or control of Hughes Tool Company."

I leave out the parenthesis.

Maybe I should read it:

> "Toolco hereinafter referred to as Hughes Tool Company and any concern or persons associated at any time with Hughes Tool Company, including its sole stockholder. It would appear that such documents and writings in the hands of outside counsel of Tool Company while not in the Tool Company's possession or custody would be within its control"—

and then he cites various cases.

Now, we are told that these papers have not been produced. I haven't even heard this argued, and there it is in black and white, that they have to be and there is an order that they have to be.

The other thing I want to say is about the Cook affidavit, but I think there I best rest on what has been said because your Honor says you have heard enough.

The Court: All right. The only comment I [42] have is that nobody, including the Special Master, cited In re Colton written by Judge Metzner on this problem about six months ago. It is on appeal now before the Court of Appeals.

Mr. Kaminer: Your Honor, we hadn't found it. We certainly would have.

The Court: I said that facetiously. I will write to the Special Master and tell him.

Mr. Kanimer: Has the case been published yet, sir?

The Court: It is in the advance sheets. It is on appeal, though. It was argued. It has been pending now for over a month.

A-2233

Transcript of Proceedings Before Special Master J. Lee Rankin, June 4, 1962

[Doc. 218]

[CAPTION] 61 Civ. 2324

[APPEARANCES]

• • • • •

[4472] The Special Master: I will overrule the motion to strike the answer of Mr. Holliday. I further order and direct that unless Mr. Hughes authorizes his counsel or some other person in writing, in form satisfactory to counsel for TWA and the Special Master, to accept service of a subpoena to appear for the taking of his deposition on or after July 1, 1962, at [4473] such time as it may properly be reached under the orders of the Court, by June 20, 1962, that Hughes Tool Company answer the interrogatories as presented, except as modified by the statements of Mr. Sonnett this morning.

I did not direct that Mr. Holliday personally have to answer the interrogatories, because I interpret the interrogatories as reaching such information as Mr. Holliday has.

Mr. Barr: If this matter is concluded—

The Special Master: I want to make it clear on this record that where I provide that the order will not require the answering of the interrogatories if Mr. Hughes authorizes the acceptance of a subpoena, it is only a subpoena for his appearance for the depositions, and I am not requiring that he authorize the service of process in this case upon himself. I want to make that clear in the record.

• • • • •

TWA's Notice of Motion and Affidavit, June 25, 1962

[Doc. 305]

[CAPTION] 61 Civ. 2324

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of John F. Sonnett and all prior proceedings herein, the undersigned will move before Hon. J. Lee Rankin, Special Master on the 2d day of July, 1962 at 10:00 A.M. or as soon thereafter as counsel can be heard,

(a) For an order pursuant to Rule 30 (d) of the Federal Rules of Civil Procedure terminating the deposition of plaintiff Trans World Airlines, Inc. by its President, Charles C. Tillinghast, Jr. as of July 2, 1962; and

(b) For a further order determining that Rule 4 of the Civil Rules of the United States District Court for the Southern District of New York, effective July 1, 1962 is applicable in the instant case; and

(c) For a further order directing that counsel for all parties shall meet and come to agreement upon the schedule of depositions under said Rule 4 and that should counsel fail to agree on such schedule then

the Special Master, on July 12, 1962 will determine the order of depositions that will be followed.

Dated: New York, New York
June 25, 1962

Yours, etc.,

CAHILL, GORDON, REINDEL & OHL
Attorneys for Plaintiff
Office & P. O. Address:
80 Pine Street
New York 5, New York

To:

CHESTER C. DAVIS, Esq.
Counsel for Defendants
Office & P. O. Address
120 Broadway
New York, New York

cc: All Parties

Affidavit of John F. Sonnett, June 25, 1962

[CAPTION]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

JOHN F. SONNETT, being duly sworn, deposes and says:

1. I am a partner of Cahill, Gordon, Reindel & Ohl, Attorneys for plaintiff Trans World Airlines, Inc. ("TWA") and I am familiar with the matters hereinafter set forth.

2. This affidavit is submitted in support of a motion by plaintiff TWA for an order terminating the deposition of TWA by its President, Charles C. Tillinghast, Jr., as of July 2, 1962. In addition, I submit this affidavit in support of plaintiff's motion that the Special Master determine that Rule 4 of the Civil Rules of the United States District Court for the Southern District of New York, effective July 1, 1962, is applicable to the instant case and for an order directing counsel for the parties to agree upon a schedule for the taking of depositions and providing that, failing such agreement, the Special Master will make such determination.

3. The defendant, Hughes Tool Company ("Toolco") commenced taking the deposition of the plaintiff, TWA by Charles C. Tillinghast, Jr. on January 5, 1962. Since that time, the parties have convened for the purpose of taking depositions or for oral argument a total of 27 times and Mr. Tillinghast has been on the witness stand for 17 days.

4. It is clear that the defendants have already had this witness under examination for a sufficient period of time to

gain complete discovery of any relevant information in his possession. However, in addition to the 17 days previously completed, the defendants will have had four more days to question this witness before the return date of this motion to terminate his deposition. If their true purpose is a discovery of the facts, they will have ample opportunity in the next few days to complete their examination into this witness' knowledge. However, I feel constrained to state that up to now the defendants have shown no inclination to complete the deposition of Mr. Tillinghast. Indeed, quite the opposite has been the case. They have consistently used every procedural device available to protract the length of time Mr. Tillinghast must spend on the witness stand. A continuation of these tactics will constitute an unreasonable burden upon both the deponent and the plaintiff while a termination of the deposition will in no way prejudice the rights of the defendants to any discovery of fact useful to the preparation of their case.

5. As to the second branch of plaintiff's motion, it is submitted that the language of Rule 4 clearly indicates that it was promulgated to deal with precisely the situation found in the instant case. The Federal Rules of Civil Procedure require the plaintiff to obtain leave of court before allowing it to file notices of taking depositions where the plaintiff seeks to file such notices within twenty days after the commencement of the action. No such limitation is placed upon the defendant. This has led to the former practice in this district of granting complete priority of discovery to the defendant. In complex litigations a financially strong defendant has thus been allowed to protract his discovery procedures to the point where in some cases years

might pass before the plaintiff would have an opportunity to develop his case.

6. It was to mitigate this often difficult problem that new Rule 4 was promulgated. Effective July 1, 1962, it provides that ". . . neither the service of a notice to take the deposition upon oral examination of party or witness, *nor the pendency of any such deposition,* shall prevent another party . . . from noticing or taking the deposition upon oral examination of party or witness concurrently . . ." (Emphasis supplied). Depositions noticed by counsel for defendants are pending in the instant action, so many of them, indeed, that to judge by the time which defendants have spent so far in taking a single deposition, it is reasonable to expect that there will be such depositions pending or being taken for a long time to come. Under Rule 4, however, TWA is not thereby prevented from "noticing or taking" depositions concurrently. The language of the rule itself, with its emphasis upon pendency, makes it clear that from and after its effective date its provisions are available to litigants in actions already in progress. This is consistent with the general rule that changes in procedural or remedial law are immediately applicable to existing actions or causes of action, and not merely to those which arise in the future. See *Dargel* v. *Henderson,* 200 F.2d 564, 566 (Emergency Court of Appeals, 1952), and cases cited; *Untersinger* v. *United States,* 181 F.2d 953 (2d Cir. 1950). A number of cases to the same effect (and none *contra*) are collected in 46 *Modern Federal Practice Digest,* under the "Statutes, Reg. Number 267(2)", the heading of which is "Statutes relating to remedies and procedure—Application to pending actions and proceedings."

7. The only limitation to be found in the language of Rule 4 is "unless otherwise ordered by the court for good cause shown." It is submitted that in the instant case good cause can be shown for the applicability of the new procedure, and not for its suspension. The former priority practice in this litigation has been a weapon for obstructing its progress. It should be recalled that the defendants had originally scheduled the depositions of four TWA officers to be taken in one week. Now, while the entire litigation has stalled on the taking of a single deposition, numerous other persons who have facts in their possession of paramount significance to the issues herein cannot be called to the witness stand. Apart from the ever present risk of death or some other event which may make such a witness unavailable, the mere passage of time necessarily and inevitably will dim his recollection. The purpose of discovery is to establish facts on which the parties—all of them—can build their cases. If the plaintiff's motions are denied and the delaying tactics of the defendants are allowed to continue, I submit that the plaintiff will be deprived of its substantial rights.

8. I, therefore, respectfully request that the Special Master grant the motions of the plaintiff.

JOHN F. SONNETT

[Jurat omitted]

Affidavit of John R. Hupper, July 2, 1962

[26781]

[CAPTION]

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

JOHN R. HUPPER, being duly sworn, deposes and says:

1. I am an attorney-at-law and a member of the firm of Cravath, Swaine & Moore, attorneys for the additional defendants The Equitable Life Assurance Society of the United States, Metropolitan Life Insurance Company, James F. Oates, Jr., and Harry C. Hagerty. I am familiar with all the prior proceedings herein since the date of joinder of said additional defendants.

2. I make this affidavit in support of a motion originally made by plaintiff Trans World Airlines, Inc. (TWA) and in which the above-named additional defendants now join, for an order by the Special Master that Rule 4 of the Civil Rules of the United States District Court of the [26782] Southern District of New York, effective July 1, 1962, is applicable to the instant case. I am not concerned with the termination or continuation of the examination of Mr. Tillinghast or that of any other particular witness. I am concerned with the substantial period of time which separates us from the examination of witnesses crucial to our defense and I am very concerned that when our time to examine eventually arrives the witnesses may not be able to testify.

3. Accordingly, I believe that it is vital to the protection of the rights of the additional defendants that discovery proceedings be expedited. By order of February 7, 1962, Judge Charles M. Metzner set forth a schedule of depositions entitling Hughes Tool Company (Toolco) to depose 24 separate individuals in a time period that was to terminate at the end of April. We have now been operating under that order for more than four months and the examination of the first witness is not yet completed. In addition, plaintiff is presently entitled under that order to examine 7 additional individuals. I need not speculate about the substantial period of time which will be required to complete those depositions, under the present schedule. Nevertheless, the additional defendants are not entitled to commence their examinations until those 31 have been completed. I think it is fair to say that the time necessary for completion of those depositions must, under almost any schedule, be measured in years. I do not believe that Judge Metzner contemplated any such prolonged proceeding.

4. It is obvious that the passage of time dims recollection, especially of facts of the magnitude and complexity of those presented by the pleadings in this case. Of more importance, however, is what appears to be a real [26783] possibility that at least two vital witnesses should be examined with some promptness if their testimony is to be perpetuated.

5. It is a matter of general knowledge as well as a matter frequently apparent in these proceedings that Mr. Howard Hughes is difficult to find and that his present whereabouts are unknown. For example, Raymond M. Holliday testified on April 9, 1962, in the *Toolco-Northeast Control*

case (CAB Docket No. 11620) that he had not communicated with Mr. Hughes since October, 1961, and then he had only received a telephone message. (TR. 794-796). Mr. Hughes' testimony is of great importance to the defense of the additional defendants. I have, therefore, been disturbed by the recurrence of rumors and statements in the public press that Mr. Hughes' hearing and general health are deteriorating. (See, *e.g.*, The Wall Street Journal, April 23, 1962, page 1, Newsweek Magazine, May 21, 1962, page 73, The New York Daily Mirror, May 30, 1962, page 10, and The New York Times, June 24, 1962, Section 3, page 1-R). The Wall Street Journal on April 23, 1962, stated that one of the theories advanced for Mr. Hughes' increasing reluctance to appear in public "is that his health is not too vigorous". In a column by Walter Winchell in The New York Daily Mirror on May 30, 1962, the following appeared:

> "*Memos of a Fugitive* from Broadway: Billionaire Howard Hughes ill? Or is it the trouble caused by enemies? (He's down to 125 lbs. Looks like a ghost)"

I cannot, of course, state whether such information is accurate. It is, however, a major concern to me that the most important witness in this case may be unavailable at whatever time in the future the present schedule may permit counsel [26784] for the additional defendants to take depositions.

6. Another witness whose availability seems problematic is Noah Dietrich. I am informed that Mr. Dietrich is now about 73 years old and that he was from 1925

through 1957 Mr. Hughes' chief adviser. An example, of the importance of Mr. Dietrich's testimony is the following excerpt from Fortune Magazine of January, 1959 at page 82:

". . . Dietrich asserts that he did not appreciate how deeply Hughes was committing the tool company's assets until one day in early 1956 he added up the orders for aircraft on which Hughes had obligated the tool company and discovered that they exceeded Hughes's assets.

"The aggregate value of the orders came, as previously noted, to nearly $500 million. Dietrich had known, in a general way, that Hughes was negotiating with a number of aircraft companies for new equipment; Hughes had discussed with him, during their desultory telephone exchanges, the difficulties he was encountering in deciding among the planes that were available. But numbers and costs had never been precisely mentioned. Hughes appears to have settled on the numbers himself, in independent consultation with T. W. A.'s chief engineer, Robert Rummel. The orders were placed with the manufacturers, the tool company was instructed to draw up the necessary contracts, and its lawyer bundled up the commitments and sent them on to Dietrich, who was then occupying the office on Romaine Street, so that he could present them in due course to the tool company's board of directors for ratification.

"It is impossible for an outsider to determine the merits of the situation that thereafter developed, particularly since Hughes has declined to discuss his affairs. Dietrich says he warned Hughes that he

was becoming dangerously overextended, and that the only safe way out was to set about arranging for $300 million worth of long-term financing, either in the form of an offering of T. W. A. bonds, to be guaranteed by the tool company, or a combination of T. W. A. stock and tool-company debentures. Dietrich discussed such a project with the Wall Street house of Merrill Lynch and found that firm willing to undertake the marketing. Hughes brushed the idea aside. . . ."

7. Should either of the above gentlemen become unavailable for any reason, it would seriously and irreparably prejudice the rights of the additional defendants. [26785] That is particularly so since, as Toolco's counsel so frequently asserts, Mr. Hughes did not keep files. Thus, the only evidence available on many issues will be the testimony of Messrs. Hughes and Dietrich.

I believe, therefore, that it is imperative that the additional defendants be permitted to undertake at least some examinations in the reasonably near future. Accordingly, I submit that a sound exercise of discretion by the Special Master dictates the application of the principles embodied in Rule 4 to these proceedings.

(Sworn to by John R. Hupper on July 2, 1962.)

Transcript of Pretrial Hearing, July 12, 1962

[Doc. 107]

[CAPTION] 61 Civ. 2324

Before: Hon. CHARLES M. METZNER, District Judge.
New York, July 12, 1962, 10:30 a.m.

[APPEARANCES]

• • •

[2] The Court: I have here a notice of motion by the defendant Hughes Tool Company to review the rulings of the Special Master regarding interrogatories. In conjunction with those papers I have some correspondence from Mr. Davis, the attorney for Hughes Tool Company, to the Master dated June 11 and the answer of the Master dated June 14, and a letter from the plaintiff, TWA, dated June 22.

Since I have read the moving papers I suggest Mr. Sonnett start off and then Mr. Davis can answer. This is on the motion regarding interrogatories.

Mr. Sonnett: I think the record before the Court probably is sufficient for decision of the question without any extended argument. In terms of the cases cited by Hughes Tool Company I think the letter of the Special Master distinguishes those very effectively and the Court has that letter.

The Court: You rely on him as counsel to you?

Mr. Sonnett: To the Court and all parties and except in respect of the second matter before the Court today where we differ with his conclusions, I think that on the

matter of the interrogatories regarding the location of Mr. Hughes, the Master has exercised very sound discretion. I think there is no showing of [3] burden by Hughes Tool Company that is of any consequence and I think that without the interrogatories—

The Court: I am frankly bothered not by the question of calling upon the defendant to answer these interrogatories while it is conducting the deposition of the plaintiff, but of the scope of the interrogatories. I have just received your brief which is on time because today was your time for filing it and I haven't had a chance to read it. I wonder did you discuss the scope?

Mr. Sonnett: Yes, we have.

The Court: Why don't you tell me something about it?

Mr. Sonnett: The only interrogatory which I think presented a problem on reflection was the interrogatory which I think is No. 7 and we discussed that at the bottom of page 18, beginning at the bottom of page 18 of the memorandum that we served and filed today and your Honor will note that we agreed before the Special Master to amend that interrogatory so as to eliminate what did seem to us on reflection to present a real burden problem.

We did it by inserting the underscored language which appears in the interrogatory as now stated at [4] page 19 of our brief.

The Court: The defendant says some of the people you requested aren't in their employ or are merely consultants. What about that? They certainly can't answer interrogatories as a party as to somebody who may not be in their employ.

Mr. Sonnett: Yes, and I would agree. The difficulty, of course, is the nature of the relationship between some of

these people and Hughes Tool and Hughes is really known only to the people involved and to the Hughes Tool Company and Mr. Hughes.

The Court: You think you are also entitled to consultants?

Mr. Sonnett: No, I do not.

The Court: Whom I assume are independent contractors.

Mr. Sonnett: I do not know and would not so urge if their representation to the Court is those people are consultants, I suppose I am bound by that at this time.

The Court: Now, let us take the $64 question, how can you ask Hughes Tool Company about the whereabouts of Mr. Hughes?

[5] Mr. Sonnett: I think it is proper discovery under Rule 26 and Rule 33 on interrogatories because it relates to the identity and location of a witness, indeed the single most important witness in the entire controversy. If they know I see no reason why they shouldn't supply the answer. I think it is precisely that kind of discovery that that portion of the rule contemplates.

The Court: You are speaking now of Hughes, not as a co-defendant but as a witness either for or against the defendant Hughes Tool Company?

Mr. Sonnett: Yes, your Honor, and I might add while he is named as a defendant, of course we haven't been able as yet to serve him and he hasn't voluntarily appeared and he is a defendant in name only.

The Court: I will hear Mr. Davis.

Mr. Davis: If your Honor please, the vice in the interrogatories which have been served is that it is not seeking information of the tool company. What it does, if you look at Interrogatory No. 1, is to state whether any officer, di-

rector or attorney of the tool company has any knowledge, information or belief. Now that necessarily requires the tool [6] company, if it is going to answer these interrogatories, to in effect carry on some oral deposition of the officers, directors or attorneys.

It requires a further problem, a development by counsel for the Tool company as to whether this knowledge, information or belief is something which has been acquired by these officers, directors or attorneys in connection with their duties or functions as officers, directors or attorneys for the Tool company or in connection with some other capacity, particularly true in the case of attorneys.

We all know that undoubtedly it is true that counsel for the tool company may also have been or is counsel for Mr. Hughes individually and what we intended to raise with the Special Master and urge upon the Court here is that it is not merely the burden of answering the interrogatories addressed to the tool company, does the tool company know something, but this, in order to answer these properly would require the tool company to engage in an investigation of its officers and employees.

The Court: That is true of any inventory which a corporation has to answer. They have to ask the officers and directors and employees what the [7] answers are in order to furnish the answer.

Mr. Davis: May I point out normally the question relates to the affairs of the corporation and therefore normally a corporation knows it has records, it knows where to go and who to ask. It can be bound by an answer because the interrogatory relates to its business, to its affairs, it relates to something the corporation has done and it is a reasonable burden, I submit, in those situations for the

corporation to answer the question with respect to what it has done, as to what business activities it has engaged in.

The vice here is this is not that kind of interrogatory. When we deal with attorneys, of course,—No. 7 and 4 also—4 relates to individual people, whom we point out are not employees of the tool company, who may have been at one time, and others are only outside consultants. An attorney, obviously, falls into neither category or both. He certainly is an independent person and what knowledge or belief he may have—what I think counsel have been doing is confusing, if I may use that word, the use of the interrogatory and the use of the oral depositions under 26.

[8] I respectfully submit that when the time comes, when it is proper for TWA to take a deposition of the tool company, at that time they may ask questions of whoever it wants to of the tool company and discover who has knowledge and information and satisfy themselves about whatever relationship and inquire however they want to inquire into any knowledge or information or belief which they may have. They do intend to take the depositions of the tool company. At that time we will have no objection to their making that kind of inquiry.

The Special Master, we respectfully submit, appears to have been moved in a desire to insure that TWA, when it comes their turn to discover facts, will have an opportunity to inquire of Mr. Hughes and he believes that and I think places a great deal of reliance upon the statements made by counsel for TWA—I am sure accurate statements as far as counsel for TWA knows them. Whether or not the facts or statements are accurate is another question, of course.

I note that in this brief they filed an appendix, a summary of various statements. Presumably TWA has taken the

position that Mr. Hughes is available to them only as a witness unrelated to the tool [9] company and therefore must be served as a witness. Presumably Mr. Hughes is not a resident of the State of New York and counsel well knows, therefore, not subject to the service of process of this Court in this action. They are taking the position that they need to know where Mr. Hughes is in order to serve him with process is what the papers say, presumably serving him as a witness rather than some other kind of process and some other kind of action. I don't know whether the discovery rules are intended to cover that kind of situation really.

The Court: I think it is obvious Mr. Hughes is in a peculiar situation. He is obviously ducking service in this lawsuit.

Mr. Davis: I have a feeling, your Honor, that a great deal of showmanship has been displayed in connection with where is Mr. Hughes. That when the time comes for taking the deposition of the tool company the position of TWA counsel is Mr. Hughes as a former president of the tool company or as a one hundred per cent stockholder of the tool company or some other reason, is required to be produced by the tool company as its managing agent or on some other theory. I would be very much surprised if that isn't what they [10] do really. But nevertheless the question is raised, this important need at this time to be able to serve Mr. Hughes and for Mr. Hughes as an individual, who, after all, does have some individual rights even though he may be a one hundred per cent stockholder of the tool company, they would like to have these interrogatories served. I think the interrogatories have been deliberately framed that way. They don't ask what the tool

company knows and lets the tool company assume the normal responsibility of any corporate defendant in answering the question. They want the tool company to go out and get the knowledge, information and belief of anyone at one time or another that may lead to the service of Mr. Hughes. Look at Interrogatory No. 7.

I don't know what business it is of the tool company as a corporate defendant to go around and find out the knowledge or information of employees who also happen to be personal friends or had rendered personal service to its stockholder. We are supposed to go out and make an inquiry as to what knowledge, information and belief they have. We submit the interrogatories are too broad and improper.

The Court: Mr. Sonnett, on what basis do you demand an interrogatory of the corporate defendant [11] as to whether an attorney employed by it has any knowledge, information or belief?

Mr. Sonnett: The information in the possession of the attorney is under the control of the client necessarily since it is information—

The Court: Under Hickman and Taylor?

Mr. Sonnett: I think information as to the identity or location of a witness which the lawyer has and he has by reason of the fact that he is lawyer for a corporate defendant.

The Court: He may not have it by that reason. He may have it by reason of the fact that he also represents Mr. Hughes personally.

Mr. Sonnett: We don't have that situation. If we did, I would have felt differently. The record is abundantly clear and if there is any doubt I will ask if there is anybody representing Mr. Hughes personally.

The Court: The gentleman from Texas attended some conferences with me whom I am sure represented Mr. Hughes personally.

Mr. Sonnett: He disclaimed that.

The Court: In this lawsuit he may disclaim it, but that doesn't mean he didn't represent him personally [12] in other matters.

Mr. Sonnett: That has not been asserted, your Honor.

The Court: I think that is what you are up against really, aren't you? Mr. Davis, are you an attorney for Mr. Hughes personally?

Mr. Davis: Yes, sir, I have given advice to Mr. Hughes personally. I do not represent him in this action and I have not been authorized to represent him in this action.

The Court: All right. Go on to the next problem that bothers me. Your No. 7 you ask whether any tool company employees, agents and/or representatives who during the year preceding the date hereof have performed services of a personal nature or otherwise directly for Mr. Hughes. How do you sustain that?

You are not asking whether they have done it in relation to the corporate defendant, you are asking the corporation to go and ask their officers, agents and employees whether they did anything personally for Mr. Hughes outside the corporate activities.

Mr. Sonnett: I thought our amendment eliminated the problem which otherwise would exist because we inserted language appearing at page 19 [13] of our memorandum, we inserted the language, "To the knowledge of any of tool company directors or officers."

For example, if tool company's directors or officers know that one of tool company's chauffeurs has been driving a

tool company car to and from a particular address where Mr. Hughes has been staying or is staying or is suspected to stay very shortly, it seems to me that information is not privileged, relating to the identity or location of a witness and they should be required to supply it.

To avoid the problem they would have to go and conduct an investigation as to whether or not any of their employees did personal work for Hughes, we inserted that language which I think takes care of the problem.

The Court: Supposing a director of Hughes Tool Company has done personal work for Mr. Hughes unconnected with the tool company. Do you say by virtue of being a director of the tool company you can ask the tool company this interrogatory to find out from a director what his personal relationships with Mr. Hughes have been?

Mr. Sonnett: Only in respect of the location of Mr. Hughes.

[14] The Court: Let us go on to the next motion.

In this motion the reverse is true. I have read your papers, Mr. Sonnett, and haven't read Mr. Davis's. They have been filed on time but also only this morning pursuant to the direction of the Court, so I suggest Mr. Davis start off.

Mr. Sonnett: Yes, your Honor. I don't want to extend the prior matter but may I say in answer to your prior question certainly if a director of the tool company were on the stand I could ask him where is Mr. Hughes. He would have to tell me no matter how he acquired the information.

The Court: All right, Mr. Davis, application by plaintiff pursuant to Rule 4 of this Court adopted July 1st.

Mr. Davis: Your Honor, I appreciate the fact that since my brief was only filed this morning, this gives me an op-

portunity of describing our position. Peculiarly enough, however, I am a little bit at a loss to understand just exactly what it is that counsel for TWA is seeking to review here. There is no question and no one ever argued and certainly the tool company never argued that the rules of the court which became effective July 1 in 1962, including Rule 4, applies [15] to pending actions. The issue, as I understand, was whether this Rule 4 which became effective July 1 set aside all prior decisions and orders of this Court with respect to the conduct of discovery not only in connection with this case but all cases.

We have annexed to our brief an Appendix A, Mr. Rankin's decisions and the reasons he gave in support of the decision, and if your Honor is not familiar with that I would suggest that—

The Court: I have read it. That is in the moving brief, too, as I recall.

Mr. Davis: I don't know, sir.

The Court: Appendix B of the brief in support of the movant's position, that is the order of the Special Master on July 2, 1962.

Mr. Davis: I will not take the time in reviewing that. The position of the tool company is that the decision of the Special Master should be affirmed for the following reasons:

First, that the Court in this particular case has already carefully considered on more than one occasion the manner in which the discovery proceedings were to be conducted and had entered several orders in that regard. Rule 4 by its very terms applies only in cases where [16] there are no court orders.

Our second position is that as a matter of law the adoption of the court rules, procedural rules, while applicable

to pending actions do not have the effect of setting aside and reversing or modifying or altering prior decisions.

The Court: I think you ought to discuss whether I should exercise my discretion. It is clear in my mind that I have the power. You should only argue the question of whether I should exercise my discretion in granting the plaintiff alternate dates for depositions.

Mr. Davis: I will address myself to that, then. When the new Federal Rules were adopted in 1938 they were construed as to permit a plaintiff to commence an action against a defendant and in effect merely put him on notice that they had a cause of action and eliminated the requirement of specificity in pleadings, the pleading of facts. And the answer given by the Court when defendants complained that this liberal construction was permissible by plaintiff was you will be able to discover the facts in discovery proceedings. It is true that in most cases, certainly in a complaint which charges violation of the antitrust laws and even in a case where there is nothing more than that, a defendant [17] has some idea as to what it is all about. He knows how he has been conducting his business and if there is any indication at all in the complaint of the area of the alleged wrongful activity, a defendant is able, if he really wants to, to defend himself, and when I speak of defending himself I am always including preparing himself before his deposition is taken, before he is asked to testify.

We have an unusual situation here which I have tried to highlight by an appendix which I incorporated in my brief which relates to the CAB orders. This is a situation where we have the specific provisions of the Aviation Act, that the antitrust laws are not applicable. We know as a fact, as a matter of record, that every transaction between the

tool company and TWA involving more than $200 per transaction or $10,000 in one year was specifically reviewed and approved by the CAB. The acquisition of the stock interest of the tool company in TWA was approved by the CAB. In the 1950 further control case which specifically authorized the tool company to increase its holdings in TWA from what was then somewhat below 50 up to 78 per cent, the CAB approved and I have referred to it in my papers, the language used by the Commission, recognizing that in [18] so doing it was permitting the tool company to be in such a position of control as to dominate the policies followed by TWA.

Now I submit, your Honor, that under those circumstances the defendant is entitled to find out what it is that the plaintiff is complaining of before he should be required to be deposed. That basically was the argument that we had before Judge Murphy and Judge Herlands. TWA would say no, we had a special circumstance.

The Court: I understand that now you have been going forward for several months before the Master, who as I understand, was sitting from ten to four, two or three days a week, and it would seem to me by now you ought to know what it is all about.

Mr. Davis: No, your Honor, that is not quite the situation if I may put it that way. It is true we have been seeking to take the deposition of TWA since last August and it is true that it commenced January.

The Court: You started with the Special Master.

Mr. Davis: But there has been starting with the Special Master only 17 days of examination of Mr. [19] Tillinghast, 17 days, that is all we had.

The Court: How much more do you want?

Transcript of Pretrial Hearing, July 12, 1962

Mr. Davis: You ought to look at the 17 days and find out what we have been through in order to try to obtain the facts, what we have covered so far, and that is really revealing. This complaint, as you will recall, while it is primarily based, judicially based on alleged violation of the antitrust laws, there is an allegation that the tool company wilfully and maliciously interfered with the business of TWA apart from the fact that it owned 70 per cent of TWA. That is something alleged to have taken place during the period of 1961, Mr. Tillinghast was the chief executive officer. That is what Mr. Tillinghast was testifying about, and I daresay it is quite revealing to find out the concepts that he used to contend what constituted an alleged malicious interference with the affairs of TWA, the letters, communications that were written by the tool company addressed to TWA, some were addressed to directors and some were to lending institutions.

It was during 1961 that this so-called additional Boeing financing took place. Now, interestingly enough, it was Mr. Tillinghast who decided to commence this action to be sure upon the [20] advice of counsel or others.

It has been my experience that the most fruitful place to discover the facts, the basic facts, is to find the man who presumably has been told everything. I expected Mr. Tillinghast to be in a position, when I covered the portion of the complaint relating to the alleged violation of the antitrust laws, having been the person who made the decision to start the action, to be able to say yes, this we contend, that at such and such a time the tool company did this, that and the other. I don't have any personal knowledge and this is what they claim took place. Where a better place to go than the chief executive officer, the person who presumably received all the reports.

Now, there is no question the Special Master has been sitting on top of these depositions, seeing to it that the time was not wasted and seeing that we pushed along. We have been handicapped to some extent in obtaining documents. I don't start the colloquies but it may take time in answering them. There is no question in my mind Mr. Tillinghast had a conference with Mr. Thomas last May who was the prior president of TWA and presumably the chief executive during the height of this so-called misconduct.

[21] I would ask him what did Mr. Thomas tell you, what inquiries did you make when he was chief executive officer. He did not inquire into that. Any particular reason for not doing that? Yes.

What was it? I was afraid if I asked questions and I got information you would get it out of me. This is in the record. I am not quoting the exact words, but that is the essence of what he said. If the chief executive officer does not want to disclose the facts underlying the complaint, we will have to get it some other way and it takes a little more time, but that doesn't affect the fundamental right that we have to discover in some way or other what it is that TWA is contending before we are required to be subjected to oral deposition in defense of ourselves.

Your Honor by your prior decision has already given in effect concurrent discovery when you required us to produce the documents. We did. You have limited the scope of the discovery that we may engage in and certainly they can't say that they have been expecting to find out from us what it is they are complaining about. They may want to find out what our defenses are but it seems to me before we should [22] be required to go into this area we

ought to have some kind of specifics, something we can address ourselves to. I will go beyond that and, as I indicated in the brief, and I am quite serious, I know it is a hard thing to do, but in the light of the situation of the CAB in the northeast control case where they reviewed the matter as well as the relationship between the tool company and TWA, we expected to be in a position to dispose of this action. But difficult as it is, when we get the facts as your Honor indicated, warned me the first time, you suggested that your inclination would be to give everybody a full discovery.

The Court: Not my inclination, the Court of Appeals of the Second Circuit's inclination.

Mr. Davis: That may be, but every case has a different situation. We have an unusual situation here. Without going into the primary jurisdiction basis of the complaint, you have a very well-drawn complaint but admissions are admissions and once I get some basis, get this thing nailed down as to what it is that they are talking about, I have no hesitation in submitting that I will be in a position and I submit successfully even before the Second Circuit of [23] dismissing this cause of action on the primary jurisdiction if nothing else.

The Court: Not if you have Judge Clark on the bench.

Mr. Davis: Your Honor, I believe that the provisions of the Federal Aviation Act are quite specific, not quite the same at all, and the determination of the CAB, as you will see in our memorandum, is rather impressive, the number of times since 1944, the transactions they approved. The depth they went into. They weren't rubber stamp approvals. If you look at the portion quoted on page 19 of my brief where, before giving approval they say:

Transcript of Pretrial Hearing, July 12, 1962

"... it is not felt that action can be taken on this motion without first obtaining additional information, such as the full history of the airplanes, including copies of the original bills of sale to Hughes Tool Company, a breakdown of the cost elements of each airplane, including the cost of each item of conversion, the amount of depreciation accrued on each airplane, an appraisal of the planes at cost or market value, whichever is lower, by an impartial third party, a statement of the use made of the planes from [24] the date they were purchased to the present date, including total number of flying hours, the total number of hours of use of each engine. It is assumed, of course, that Trans-Continental and Western Air, Inc., have secured all necessary consents and approvals to the proposed purchase required under or by reason of any prior commitments made by the carrier."

The CAB went into every one of these transactions. It isn't a question of their not knowing what they were approving. On page 20:

"... inevitably the controlling company, by virtue of its investment in the acquired carrier, will endeavor to make itself accountable—as indeed the acquirer here under scrutiny had—for the managerial efficiency, the operating economy, and the financial integrity of the controlled carrier. Accordingly, in determining whether or not a particular acquisition should be approved, it is necessary to consider the overall impact of the acquirer's plans and policies with respect to the controlled carrier."

[25] You can look at page 21, the issue before them was giving us control of Northeast and how that was resolved. You bear in mind if we did anything or contemplated an order of the CAB giving us approval, the antitrust laws are not applicable to us and that is the basis of the jurisdiction of this Court.

I don't believe it is necessary to take a lot of time of this Court and spend a lot of money and keep a lot of attorneys busy for the purpose of finding out that there is no foundation or basis or merit in this lawsuit. But I submit in conclusion, your Honor, we have got to contrast on the one hand the rule which says the complaint does not have to disclose so long as it puts you on notice, and a statement of notice permitting a defendant to find out what it is a plaintiff is talking about.

I am fully aware of the many cases, Judge Weinfeld's many cases before the adoption of Rule 4 that under certain circumstances the ends of justice and the expedition of litigation requires some kind of concurrent discovery. But that is true in every case and the Special Master clearly recognized that in a finding where he said even if the question was [26] originally before him he would not find that it would expedite this litigation or serve the ends of justice by having concurrent depositions. So I don't think that is what TWA is really seeking to review. They say they are not seeking to review only to the extent that Rule 4 is to apply.

The Court: Let us ask Mr. Sonnett. You say you don't know what he is seeking.

Mr. Sonnett: We are requesting your Honor to hold that Rule 4 of the Civil Rules of the District Court applies to this case and for a further order pursuant to the provi-

sion of Rule 4 directing that counsel for all parties shall meet and come to agreement upon the schedule of depositions under Rule 4 and in the event counsel should fail to agree on such a schedule, then the Special Master should determine the order of depositions to be followed. That was the Rule 4 aspect of our motion below and the Special Master, I respectfully submit, did not clearly hold one way or the other as to whether Rule 4 applies.

The Court: I think he held that he thought Rule 4 applied but that he wasn't going to use it, which he didn't have to do and which the Court doesn't have to do. I think, as I said to Mr. Davis, the [27] Court has the power to alternate without Rule 4. Obviously I did that in this very litigation in my order. It is inherent in the power of the Court to control the litigation before it. The only question I have is should I exercise the discretion that I have in calling for not a cessation but the interruption from time to time of defendant's examination of the plaintiff to allow the plaintiff to conduct its examination of the defendant. That is the only question I have before me.

Mr. Sonnett: I understood that was the question, and I am about to come to it. My second point is, I think the Special Master declined to exercise his discretion within and in accordance with the policy and purpose of Rule 4. I think that Rule 4 represents a very distinct addition to and a refinement of Rule 30 on motions to terminate or limit or alter depositions in this district.

After all our prior orders were entered, bearing in mind the general rule on first-come first-served, I think when this Court and your Honor issued Rule 4 you were saying it shall be generally the principle that depositions should be concurrent in [28] big cases and that lawyers ought to try to work out a schedule. If they can't, the Court will.

Now as to why that new and I think very definite and wholesome policy should be applied in this case, your Honor will recall that back in February of this year your Honor issued an order in which your Honor laid out a tentative schedule of depositions based on the then existing rule of first-come first-served. Under that schedule of depositions as your Honor envisioned, all depositions would now be completed in this case. The last deposition on that list was supposed to be the deposition of Hughes Tool Company by Mr. Collier and Mr. Wentz but to commence on June 4th of this year. So instead of having completed 26 or whatever it is—I think it is 26 depositions—we have not yet completed the first of the depositions.

Mr. Davis is in error. We have had 23 days of testimony by Mr. Tillinghast. The record is now about 6000 pages. He says he is going to need some more time. We will have about between 25 and 30 days of testimony by the first witness. There is real prejudice involved to TWA if it is held off from commencing its depositions.

[29] The first point is that there are all sorts of public reports that Hughes has not been well. I don't know whether he has got a problem or not but on the present basis, unless we can go to concurrent depositions, we will be held off commencing the deposition of Hughes for at least a year because there is that long list of witnesses, as your Honor will recall, before we get anywhere near Mr. Hughes.

I don't know whether Hughes will be dead or alive six months from now. Nobody else does, but we would be held off quite a while and if the program is followed we will be held off at least another year. We have other witnesses we haven't noticed yet because hopefully we thought

Rule 4 would be applied and directed to sit down with Mr. Davis and work out a schedule of other witnesses to fit them in on some practical workable basis as Rule 4 contemplates lawyers should do.

We have noticed Mr. Dietrich, who for many years was the chief lieutenant of Hughes up until 1957. He was the man who carried out Hughes' general orders and instructions and ran the Hughes empire, no question about it. Dietrich is in his seventies. [30] Like so many others, he parted company with Hughes and he is out in California. I don't know whether Mr. Dietrich is going to be around a year from now and nobody else knows. We have got a lot of very important evidence that we can't get at because of the schedule as it now stands, and where we now have a new rule that says, as I read it, that the Court should approach this kind of problem on the principle of concurrent depositions rather than on the other way around, it seems to me that the interests of TWA and all its stockholders really would be best served if we were given an opportunity to get at this testimony which may disappear forever before we can reach it. It is a publicly owned company in the sense that it has a substantial minority stockholding. It is an important public utility having its problems financially both because of Hughes and the situation in the airline industry generally and it needs to prosecute this case vigorously. Our hands are tied behind our back and I think Rule 4 was intended to prevent that, your Honor.

In terms of the Court's discretion, I think that is all I can say. We can work out as a practical matter, we could work out a program of concurrent [31] depositions. We did it in the old Ferguson case when the Special Master

was there and concurrent depositions were going on quite often and the Master went from one room to another if there was a problem and he ruled and it worked.

We went ahead on that basis there. I see no reason for not permitting the truth which I am certain Hughes himself is best equipped to tell us, the details of how he tried to sabotage the Dillon Read financing plan, his acts to sabotage, and he is the one man who can tell us. The man operates under great secrecy, specializes in trying to conceal. Obviously his testimony is the only way we can get at the full truth here.

The Court: All right.

Mr. Barr: May I be heard very briefly on behalf of Equitable and Metropolitan? We join in the motion directly on the ground of why the Special Master should grant it, and I would like to address myself to that very briefly.

The Court: I think there is something in the papers about that.

Mr. Barr: Yes, Mr. Hupper's affidavit was [32] submitted. My name is Barr. Your Honor, since we, the additional defendants, got in this case back in February, I am reminded of the statement by Winston Churchill that this man is a riddle wrapped on an enigma. He made that statement and it applies to Mr. Hughes, both in the substantive matters alleged against us and the conduct of the discovery of this case. The real problem has been the riddle concerning Mr. Hughes, what he said, where he is, what he is doing. The Special Master on a number of occasions on the record of the deposition has expressed a great concern about the availability of Mr. Hughes; whether or not he will be available when the time comes to depose him.

Indeed, the Special Master on occasion directed that correspondence be directed to Mr. Hughes concerning documents and that he respond in writing. That is something up to this point that has never been done.

Mr. Sonnett has I think indicated on a number of occasions that he made very diligent efforts to locate Mr. Hughes and find his whereabouts and get him into this case as a witness. Indeed, the tool company itself apparently cannot find Mr. Hughes, doesn't know where he is. In that respect, your Honor, I refer you to paragraph 5 of Mr. Hupper's affidavit, [33] some testimony by Mr. Holliday, who seems to be the front man, at least perhaps, a chief executive officer at the present time of the tool company. He testified in April of this year that he has not communicated with Mr. Hughes since October of 1961. There are rumors in the press that Mr. Hughes is ill and also all sorts of rumors floating around, some rumors even suggesting that Mr. Hughes is a myth, he doesn't really exist at all.

If Mr. Hughes is going to be unavailable, if he is not going to testify, come forward in this litigation, then I submit to your Honor that now is the time to find that out and that if the litigation is going to end then, it ought to end now before we take all this time and effort and find out that the principal actor in the proceeding simply is not going to show up. I think that is one special reason why your Honor should apply Rule 4 to these proceedings. Thank you, sir.

The Court: Decision reserved.

(Hearing closed.)

Pretrial Order, July 23, 1962

(Memorandum Endorsed on Motion Papers Dated July 18, 1962)

[Doc. 103]

[CAPTION] 61 Civ. 2324

July 23, 1962. After reading the briefs submitted in support of and in opposition to this application for clarification of the order of July 12, 1962, the application is denied. So ordered.

Charles M. Metzner
U.S.D.J.

Pretrial Order, July 24, 1962

(Memorandum Endorsed on Motion Papers Dated May 10, 1962)

[Doc. 93]

[CAPTION] 61 Civ. 2324

Defendant Hughes Tool Company has applied to the court to review the opinion of the Special Master rendered on April 17th, 1962 and the order of the Special Master contained in his letter of May 2d, 1962, as modified by his letter of May 3d, 1962, to the extent that the defendant is required to produce for inspection and copying by adverse parties any privileged communications between attorney and client.

The court has reviewed the opinion of the Special Master which appears in the transcript at pp. 4361-4391 and the letters referred to above. The Special Master has made an exhaustive study of the law applicable to the attorney-client privilege. The court agrees that the law is as stated by the Special Master both as to the privilege and the waiver thereof. The court sustains the ruling of the Special Master as he has applied the law to questions presented to him. If there are any specific documents concerning which the defendant desires specific rulings as to their admissibility, they may be submitted to the Special Master pursuant to the directions appearing at p. 4391 of the transcript

and in the letter of May 2d, 1962, as modified by the letter of May 3d, 1962.

So ordered.

Dated: New York, N. Y.
July 24, 1962

CHARLES M. METZNER
U.S.D.J.

Transcript of Pretrial Hearing, July 26, 1962

[Doc. 113]

[CAPTION] 61 Civ. 2324

Before: Hon. CHARLES M. METZNER, District Judge.
New York, July 26, 1962, 4:25 p.m.

[APPEARANCES]

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[3] The Court: Miss Lea, I will hear your application.

Miss Lea: Thank you. Mr. Davis is not here because he is continuing with conducting the deposition of Mr. Tillinghast, which is under your Honor's order to continue from day to day until we reach the time specified.

Our application this afternoon is really a very simple one, and I am not at all sure why it has occasioned some of the fuss and fury that it has on the part of Mr. Sonnett.

At any rate, it should not present any problem at all. Our motion is a very simple one, brought pursuant to Rule 33, asking that the Court extend and enlarge our time under that rule to answer the interrogatories in the form finally determined upon when your Honor entered your last order on this question. It is the Tool Company's position, I think it is manifest, that neither TWA nor anyone else can be prejudiced in any way by granting us this enlargement of time. We ask it on the basis, partially at least, that the month of August, during which we would otherwise be required to answer, is a month which has been set aside as a time to be free of discovery proceedings. During this month we were to suspend all discovery and to go over until sometime in [4] September. September 4th,

I think, is the date it was to be resumed. In keeping with the special master's ruling that there be such a suspension, he determined that the answers to the counterclaims by the additional defendants, as well as by TWA, could be deferred during that period and would be deferred for a period of thirty days after your Honor's order determining that motion came down, and, in any event, would not be required to be answered before September 30th, which was in apparent recognition of the fact that we were to have at least a part of the summertime free.

A further problem which presents itself in answering the interrogatories before the time that we ask for is that this being summertime and being vacation time, it is reasonable to assume that many of the people from whom inquiry has to be made will not be available during this period, but will be off on their holidays.

To answer the interrogatories is not really a simple matter. Questions directed to a corporation, persons affiliated with a corporation, normally concern themselves with the business of the corporation. In this case, though, we have to make inquiry outside of the scope of the business of the corporation and ask further and additional questions of the persons listed in the [5] interrogatories, and I think it is reasonable to assume that this will take a greater period of time than might otherwise normally be the case.

A further factor which makes it difficult for the Tool Company to answer these interrogatories within a limited period of time is the fact that the officers of the Tool Company are not located in New York, they are located in Houston and in Los Angeles. The inquiries to be made must be made of persons who are not in New York, but

who are at the various places where the Tool Company maintains its offices, and to some extent problems of communication and getting the papers in final form and so on may arise and all this during the period which under the special master's order is to be a free period.

TWA has stated that it requires this information in order to serve a subpoena upon Mr. Hughes for his appearance as a witness on deposition. In view of the fact they do not resume depositions until September 4th and then at that time the Tool Company does have the right to expeditiously proceed with its examinations, I don't think it is very reasonable to assume that TWA would have to serve a subpoena for the appearance of Mr. Hughes in advance of the time the Tool Company is requesting for answering the interrogatories. It is a practical matter [6] to a great extent in getting the answers up and framing them at this time of year.

The Court: How much time do you want?

Miss Lea: We have asked, your Honor, for until September 25th. We picked that date because it is approximately nineteen or twenty days after September 4th, which is the day that we resume, and if we resume then, that will give us a reasonable period of time, I believe, in which to file the answers. If we can have them before, if they can be prepared in the light of all the circumstances, we will certainly file them before that date, but we would like at least until then in which to get these answers ready for filing with the parties in court.

The Court: Is that all?

Miss Lea: Only one further matter. As your Honor might have noticed, we did request that the special master grant us an enlargement of time to September 25th and he

stated his view that the earlier order of the Court precluded him from doing so, that your Honor's July 12th order meant to preclude an application for an enlargement of time under Rule 33.

The Tool Company is of the view that since it has never requested such enlargement and the Court did [7] not expressly or impliedly rule on it, that this question is an open question and that your Honor should determine it and that we have more than fifteen days from, I think it is the 24th or 25th of July, in which to answer the interrogatories.

The Court: Mr. Sonnett?

Mr. Sonnett: I am not quite sure, your Honor, whether I heard Miss Lea's colloquy, but there was some comment about sound and fury.

The Court: We are trying to find out whether we should give the Tool Company until September 25th to answer the interrogatories.

Mr. Sonnett: Yes, your Honor. I must say it always puzzles me that Mr. Davis is exceedingly anxious to take these appeals to your Honor, but he does not show up and sends a very charming lady to do these very difficult jobs.

The Court: I think we agreed at a prior hearing that Miss Lea was not relying on her charms to achieve her ends.

Mr. Sonnett: Her charm is evident; her persuasiveness is not. I hate to have to characterize the opposing affidavit as I am about to in one respect. Putting aside the argument, the representation in the [8] affidavit that there was some arrangement to recess the discovery proceedings so that everybody could have a month off is false. In the record at page 5142 the special master said as follows:

"Mr. Reporter, I will put on the record the arrangement about the vacations during August. We will adjourn beginning August 1st and running through to September 4th so far as any proceedings are concerned before the special master."

That was very deliberately done by the special master and reflected an understanding on his part, and I thought, on the part of all counsel, based on what was said, that we were just suspending the taking of testimony before him and that nothing else in the case was to be suspended in any way. That was the arrangement, and it was quite clear.

I don't know whether your Honor has had an opportunity to read the decision of the special master which is here being appealed, but it appears at 6141 of the record, and I will read briefly what the special master did decide. He said as follows:

"I will deny the application. I construe Judge Metzner's order of July 12, 1962 to [9] contemplate that the answers to the interrogatories will be made in accordance with the rule and that he has already decided how the interrogatories shall be answered as to a certain date when the time shall be computed by his reference in paragraph one of that order, at the bottom of the page.

"Also, treating the matter without regard to Judge Metzner's order, assuming I have the power to act on it, I would deny the application because, as I have indicated before, I think it is most important in this litigation that the information as to the location of Mr. Hughes be furnished to TWA as soon as possible."

He goes on discussing his views in that regard at some length, several pages of the record.

So that what your Honor has before you today is the special master said, first, he was bound by your Honor's order; he said, secondly, independently of that, as a matter of his discretion, based on his knowledge of this case over all these months, he would deny this if he were to exercise any discretion, and I think he was entirely sound.

I think this is a matter in which your Honor [10] should give his discretion great weight.

As to the history of the problem before your Honor today, we served and filed with the Court—I don't know whether the Court has had a chance to read it—a brief memorandum just setting forth the chronology of this particular matter. Your Honor will find that this has a long history, going back to March of this year. It is evident, I submit from that history, that for a period of over four months the Hughes Tool Company has been stalling on this question, and what they now would have your Honor do is give them another two months. If they are permitted to do this, the interrogatories will be completely meaningless and so will the answers because Hughes has known, I am sure, since March that the interrogatories was a problem that they were going to face.

I find, looking at this chronology, and I think the Court will agree with this thought, that from March right on there has been a calculated program here of delay. It is characterized by letters to the Court, by letters to the special master, by statements of misunderstanding by Mr. Davis and the like, knowing full well that he was under an order by the special master months ago to get this information up. Now his response to that is a very flat statement

by him to the special master, [11] "I have taken no action" after these months, after the series of orders by the special master and the Court. It seems to me that counsel should not be permitted just to say, "I have taken no action." I don't think there is any showing, may it please the Court, of any basis on which they should have any extension of time. I don't think the rules were made to be set aside by counsel's whim, and that is what we are confronted with here.

If this were the first time the interrogatories question was up, I would feel rather differently, but the matter has been very much before the Hughes Tool Company and the Court and the special master since March. I don't think there is any showing of any reason why they should be given additional time.

The Court: I handed down my opinion July 12th. You will have to start with July 12th. Now, it is true, since you have had a broad interrogatory which has been sustained, that nothwithstanding vacation plans of counsel, certainly vacation plans of employees who are employed have been advanced, and you may be met with an argument that these people are away and are not available. Now they can't be held at fault for that. They can't force their officers and employees to hang around while they make up the answers to interrogatories.

[12] Mr. Sonnett: They knew back in the spring, long before vacation time, about this.

The Court: They didn't know until I ruled upon it.

Mr. Sonnett: They knew they were under an order by the special master.

The Court: From which an appeal was taken tardily, but it was taken.

Mr. Sonnett: Yes, and they knew and their employees knew. Now Mr. Davis has solved that problem in the course of colloquy at one point when he indicated it might be difficult to get hold of some of them, but I think the Court will be very much interested, and I know I will be, if it develops, for example, that Nadine Henley has been sent to Europe for three months. I think if we find we are being diddled, and I think that is what Mr. Davis has been doing with us, by moving out of range people who can give the answers, I think the Court will take as dim a view as I do of that.

The Court: There is nothing to prevent them from writing letters to wherever he is and getting answers by correspondence.

Mr. Sonnett: Exactly, your Honor. I think they can give us an answer to this in fifteen minutes.

[13] The Court: I also have to take into consideration the broadness of the interrogatories and the ability of the defendant to answer it properly.

Mr. Sonnett: I think if they were trying to make any kind of good-faith compliance here, in fifteen minutes by a phone call they can tell us where Mr. Hughes is, we would serve him with a subpoena returnable on a set date or such other date as may be fixed, and the whole problem would be laid to rest.

The Court: They may tell you now that Mr. Hughes is at some address in Los Angeles and by the time you get around there he is in Las Vegas at some famous address or in Houston, Texas or somewhere else. I don't think it is that easy. They could give you the Beverly Hills Hotel, I suppose, which is a commonly known address of Mr. Hughes. The Wall Street Journal carries it, The New York

Times carries it. I assume everybody else knows about it, and I assume you have not been able to find him at the Beverly Hills Hotel.

Mr. Sonnett: We certainly have not. We have tried.

In the event that your Honor should feel that they should be given a little more time, I have prepared several supplemental interrogatories, and if your Honor [14] were disposed to allow another ten days or two weeks, whatever you think is reasonable, I would not seriously object, provided as a condition you require them to answer the supplemental interrogatories.

The Court: Let me hear them.

Mr. Sonnett: May I hand them up, your Honor? They are very simple.

The Court: Does Miss Lea have a copy?

Miss Lea: No, I do not.

Mr. Sonnett: I am about to give them to her.

May I say, your Honor, on the matter of the supplemental interrogatories that there are basically three, and what they are concerned with is as follows:

Interrogatory 1 of the supplemental interrogatories is designed to carry back the informational period to January 1, 1962. The reason for that is that because of the delays of the Hughes Tool Company since March, the answers to the interrogatories which we will get, particularly if they get any further extension of time, may well be meaningless because the people who will have the information will suddenly be unavailable, and it seems to me that carrying it back to January 1st does not impose any great burden.

[15] The second interrogatory is related solely to the question of communications with Mr. Hughes since January

1, 1962, on the subject of his whereabouts or on the subject of these interrogatories, again a date prior to the first time Hughes Tool Company was ordered by anybody to answer these interrogatories or that the subject of the interrogatories came up.

Mr. Hughes, of course, knew in January 1962 that we were looking for him. There is no question about that. But he didn't know then that we were going to follow the interrogatory course when our private efforts proved unsuccessful.

The third interrogatory merely seeks to discover whether anybody who did know as of that time has had a change in status so that they are no longer employees within the scope of the order, that they have suddenly acquired some title of consultant or something else.

I might say on that point, your Honor, that we will probably be back to you some day with real problems about this business of consultants. At least Mr. Maheu, who is a private detective working for the Hughes Tool Company, really isn't that at all; he is some kind of a consultant. I simply mention that because I see problems of that kind coming up, and I think that if there has been [16] a change of status of any of these people since the 1st of January, your Honor should require them to tell us about that as a condition to giving them another ten days or two weeks, should your Honor think that be reasonable.

The Court: The time, I assume, has expired for the answers to the interrogatories.

Mr. Sonnett: I am sorry, Judge.

The Court: I assume that the time in those twenty days from July 12th—

Mr. Sonnett: The 15th, sir. It would be up tomorrow, the 27th.

Miss Lea: Excuse me, your Honor, I think it is fifteen days from July 23rd or 24th, which is the date of your Honor's decision denying our application for clarification and modification of the July 12th order. I don't see how the time could be held to be running during the time the application was held pending before the Court.

The Court: I think I should have decided that by saying "Motion for reargument denied." Then your time runs from the original date, but I didn't.

Well, let us assume it is fifteen days from the 23rd—

Miss Lea: May I be heard in reply to some of the [17] things Mr. Sonnett has said?

The Court: We only have a question of fixing the date. Do you want to keep the record straight?

Miss Lea: Yes.

The Court: Go ahead.

Miss Lea: I don't want them to go unanswered. There is no right in TWA's demanding as an exercise of the Court's discretion that the Tool Company answer further interrogatories which Mr. Sonnett has just handed us in the courtroom.

Secondly, I don't know why or what kind of justification Mr. Sonnett can possibly believe he has for saying that Mr. Davis has been diddling. I don't know what the word means, but it is not something to which I would agree.

The Court: It is a derivation of "doodle".

Mr. Sonnett: Mr. Davis is an expert.

Miss Lea: I think it most unfortunate that counsel should make statements on the record indicating that he thinks other counsel is diddling or behaving in some other fashion in derogation of their rights or of their obligation to the Court, without having any basis for that. I think

it is a most unfortunate and most serious statement which he has made in that respect.

[18] As to the special master's decision and the burden which may be imposed upon the Tool Company, the statements we have in our moving affidavit amply cover that. I think the reasons stated for the enlargement of the time are valid, and we should get an extension until at least September 25th.

Mr. Sonnett: May I say, your Honor, that in my opinion Mr. Davis has been trying to diddle us here.

The Court: Do you want to define the word "diddle," so Miss Lea will understand what you are talking about?

Mr. Sonnett: I will be happy to. I think diddling, at which Mr. Davis is an expert, is a purported compliance with the Court's order, but with tongue-in-cheek, with every intention to avoid them and escape their impact, and that is exactly what this record shows.

Now I am not alone in this conviction, your Honor, because your Honor will note from the record that the special master, fully familiar with this, denied the application as a matter of his own discretion, with the expectation that the Hughes Tool Company would have to answer these interrogatories by tomorrow, the 27th. Now he has watched Mr. Davis work intimately for some months, so that, I am sorry to say, my opinion of Mr. Davis's [19] tactics, I think, is shared by the special master and that accounted for his decision.

Miss Lea: Now that I know what diddling means, I certainly don't agree with it, any more than I did before, nor with any of the remarks of Mr. Sonnett. I think the basis of the special master's decision appears in the transcript, which we have annexed to the affidavit filed with

your Honor and I think our justification for believing that he was in error on that also appears there.

I have nothing more to say about it.

The Court: In the first place, Mr. Sonnett, I will not entertain this application for supplemental interrogatories served this moment upon the defendant. You may wish to submit them at some future date, but I won't entertain them at this time.

I will fix the date as August 27th for compliance.

Miss Lea: The 27th, your Honor?

The Court: August 27th. That is a Monday.

(Hearing concluded.)

[fol. 1491] [File endorsement omitted]

[fol. 1494]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324

TRANS WORLD AIRLINES, INC., Plaintiff,

—against—

HOWARD R. HUGHES, HUGHES TOOL COMPANY, and RAYMOND M. HOLLIDAY, Defendants,

—and—

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, METROPOLITAN LIFE INSURANCE COMPANY, IRVING TRUST COMPANY, ERNEST R. BREECH, DILLON, READ & CO., INC., BEN-FLEMING SESSEL, JAMES F. OATES, JR., HARRY C. HAGERTY and CHARLES C. TILLINGHAST, JR., Additional Defendants on Counterclaims.

AFFIDAVIT—Dated August 28, 1962

State of New York,
County of New York, ss.:

Robert G. Zeller, being duly sworn, deposes and says:

1. I am a member of the firm Cahill, Gordon, Reindel & Ohl, attorneys for the plaintiff, Trans World Airlines, Inc., ("TWA"), and am familiar with all prior proceedings had herein. I make this affidavit in support of plaintiff's motion for relief pursuant to Rule 37(d) of the Federal Rules of Civil Procedure.

2. By orders of this Court dated July 12, 1962, and July 26, 1962, the defendant, Hughes Tool Company [fol. 1495] ("Toolco"), was directed to answer on or before August 27, 1962, certain interrogatories propounded by plaintiff on May 2, 1962, pursuant to Rule 33 of the Federal Rules of Civil Procedure.

3. Subsequent to the issuance of such orders but prior to August 27, 1962, certain correspondence was had between and among counsel for TWA, counsel for Toolco and the Court, copies of which correspondence are annexed hereto as Exhibit A (letter dated August 1, 1962 from Chester C. Davis, Esq. to John F. Sonnett, Esq.); Exhibit B (letter dated August 1, 1962 from Mr. Davis to Hon. Charles M. Metzner, U.S.D.J.); Exhibit C (letter dated August 2, 1962 from Robert G. Zeller, Esq. to Judge Metzner); Exhibit D (letter dated August 20, 1962 from Mr. Zeller to Judge Metzner); Exhibit E (letter dated August 21, 1962 from Judge Metzner to Mr. Davis); Exhibit F (letter dated August 21, 1962 from Mrs. Lola Lea to Mr. Zeller); Exhibit G (letter dated August 22, 1962 from Mr. Zeller to Mrs. Lea); Exhibit H (letter dated August 24, 1962 from Mrs. Lea to Mr. Zeller); and Exhibit I (letter dated August 24, 1962 from Mr. Zeller to Mrs. Lea).

4. When no answers to the interrogatories had been served by the close of business on August 27, 1962, I asked Mr. Chester C. Davis, counsel for Toolco, when I could expect to be served with answers to the interrogatories. Mr. Davis advised me that Toolco did not intend to answer such interrogatories.

5. On August 28, 1962, I received a letter from counsel for Toolco, a copy of which is annexed hereto as Exhibit [fol. 1496] J (letter dated August 27, 1962 from Mrs. Lea to Mr. Zeller); and on that same day sent to counsel for Toolco an answering letter, a copy of which is annexed hereto as Exhibit K (letter dated August 28, 1962 from Mr. Zeller to Mrs. Lea).

Robert G. Zeller

Subscribed and sworn to before me this 28th day of August, 1962.

Thomas J. Cerna, Notary Public, State of New York, No. 41-0607760, Qualified in Queens County. Certificate filed in New York County, Term Expires March 30, 1963.

Affidavit of Zeller, August 28, 1962

[fol. 1497]

EXHIBIT A TO AFFIDAVIT

(Letterhead of Chester C. Davis, New York 5, N. Y.)

August 1, 1962

Re: *TWA* v. *Hughes Tool Company, et al.*

John F. Sonnett, Esquire
Messrs. Cahill, Gordon, Reindel & Ohl
80 Pine Street
New York 5, New York

Dear Mr. Sonnett:

This is to confirm that I am authorized to accept process on behalf of Howard R. Hughes for his appearance as a witness on deposition in the above-entitled matter. In order to avoid further effort and expense by TWA to locate Mr. Hughes, I will acknowledge service on his behalf if you will deliver appropriate papers to me.

It should be understood that the foregoing is solely for the purpose of effecting service and is without prejudice to any and all rights of Mr. Hughes, the Hughes Tool Company or Raymond M. Holliday relating to the calling of Mr. Hughes as a witness on deposition.

Very truly yours,

/s/ CHESTER C. DAVIS
Chester C. Davis

4:3

[fol. 1498]

EXHIBIT B TO AFFIDAVIT

[Stamp—Received—C. G. R. & O.—Aug 2 1962—Referred to Mr. Sonnett]

(Letterhead of Chester C. Davis, New York 5, N. Y.)

August 1, 1962

Re: *TWA* v. *Hughes Tool Company, et al.*

Honorable Charles M. Metzner
United States District Judge
United States Court House
Foley Square
New York 7, New York

Dear Judge Metzner:

In connection with the interrogatories served by TWA on the Hughes Tool Company for the purpose of locating Howard R. Hughes in order to serve him with a witness subpoena to appear on deposition, there is enclosed a copy of a letter to Mr. Sonnett advising him that I am authorized to accept service of such process on behalf of Mr. Hughes.

Counsel for TWA has been questioning my authority to accept service on behalf of Mr. Hughes and has been insisting that I obtain written confirmation thereof. I am, therefore, enclosing a photocopy of such written authorization which I heretofore requested, and which I recently received.

It is respectfully requested that the enclosed photocopy of the authority which I received from Mr. Hughes be kept confidential and not be made a part of the record.

Very truly yours,

/s/ CHESTER C. DAVIS
Chester C. Davis

CC: Counsel for all Parties
(without enclosures)

[fol. 1499]

EXHIBIT C TO AFFIDAVIT

August 2, 1962

Re: *TWA* v. *Hughes Tool Company, et al.*

Dear Judge Metzner:

In Mr. Sonnett's absence, I received this morning from counsel for Toolco a copy of a letter dated August 1, 1962 written to you, together with a letter of the same date to Mr. Sonnett advising him that Toolco's counsel was now authorized, presumably by Mr. Hughes, to accept service of process on behalf of Mr. Hughes for his appearance as a witness on deposition in this case. Although Toolco's counsel, Mr. Davis, apparently sent to you a copy of written confirmation of his authorization, no copy of the written confirmation was sent to us.

I called Mr. Davis' office and in his absence spoke to Mr. Maxwell Cox to request a copy of that confirmation. I told Mr. Cox that I had noted Mr. Davis' desire that the confirmation be kept confidential and offered to treat our copy of such confirmation as a confidential document under the terms of the Special Master's order of March 21, 1962 relating to confidential documents. Mr. Cox advised me that he was unable to permit me either to look at the authorization or to furnish me a copy of it.

As Mr. Sonnett pointed out in the argument before the Special Master on July 31, 1962, the crux of this matter is that any authorization by Mr. Hughes to counsel must be irrevocable or it is apt to prove meaningless.

[fol. 1500] It was for this reason that we prepared the proposed stipulation and form of order which was submitted to Toolco's counsel on July 31, 1962, but which Toolco's counsel refused to consider. I understand that that proposed stipulation and form of order have been transmitted to you along with the transcript of the argument on

that day. Under the circumstances, our position must remain as stated at that time.

Very truly yours,
Robert G. Zeller

Hon. Charles M. Metzner
United States District Judge
Southern District of New York
United States Court House
Foley Square
New York 7, New York

cc: Special Master
All Counsel of Record

[fol. 1501]

EXHIBIT D TO AFFIDAVIT

August 20, 1962

Re: *TWA* v. *Hughes*

Dear Judge Metzner:

Last week we learned from what we consider a reliable source that Howard R. Hughes was at the Beverly Hills Hotel in Los Angeles, California. On Friday, August 17th, attempts to serve Mr. Hughes with a subpoena duces tecum under Rule 45 F.R.C.P. were made both by private process servers and by the United States Marshal. These attempts were unsuccessful. We were advised by the Marshal that he was referred to the Hughes Tool Company office at 7000 Romaine Street, Los Angeles, California and was told by that office that service of such process could be made only on Mr. Davis of New York.

Affidavit of Zeller, August 28, 1962

We expect to try again to serve Mr. Hughes when we receive on Monday, August 27th, the answers of Hughes Tool Company to our interrogatory as to Mr. Hughes' whereabouts.

Very truly yours,
Robert G. Zeller

Hon. Charles M. Metzner
United States District Judge
Southern District of New York
United States Court House
Foley Square
New York 7, New York

cc: Chester C. Davis, Esq.

RGZ:neb
Mailed 8/20/62

[fol. 1502]

EXHIBIT E TO AFFIDAVIT

(Letterhead of United States District Court,
New York 7, N. Y.)

August 21, 1962

Mr. Chester C. Davis
120 Broadway
New York 5, New York

Re: *TWA* v. *Hughes Tool Co.*

Dear Mr. Davis:

This will confirm the telephone conversation today of my secretary, Miss Lowers, with Mrs. Lea of your office.

Upon my return from vacation I found your letter of August 1st with its enclosures of a photocopy of what you say is a written authorization from Mr. Hughes to accept service on his behalf of a witness subpoena in the above entitled matter and a copy of your letter to Mr. Sonnett

dated August 1st, 1962. In view of your insistence that the photocopy of the authority be kept confidential and not be made part of the record and your failure to furnish a copy to Mr. Sonnett, I must proceed on the basis that it is not properly before the court. Consequently, I am returning to you said photocopy.

In the circumstances, I will expect that you will comply with the order of the court of July 26th, 1962.

Whatever further conversations you wish to have with Mr. Sonnett or the Special Master on this matter are solely within your discretion.

Very truly yours,

/s/ CHARLES M. METZNER

CMM:dl

cc: Counsel for all parties
Special Master

[fol. 1503]

EXHIBIT F TO AFFIDAVIT

(Letterhead of Chester C. Davis, New York 5, N. Y.)

August 21, 1962

Robert G. Zeller, Esquire
Cahill, Gordon, Reindel & Ohl
80 Pine Street
New York 5, New York

Dear Mr. Zeller:

This is to confirm receipt, by mail, of a copy of your letter of August 20, 1962 to Judge Metzner and of a copy of TWA's Notice of Taking Deposition of Howard R. Hughes, as a witness, in Los Angeles, California, on September 24, 1962. I assume that the Notice was filed for the purpose of obtaining the subpoena referred to in the letter.

Affidavit of Zeller, August 28, 1962

Mr. Davis has asked me to advise you that upon his return to New York, he will be glad to make arrangements with you for the service of the subpoena on him, which he is authorized to accept on behalf of Mr. Hughes.

Very truly yours,

/s/ Lola S. Lea
Lola S. Lea

cc: Honorable Charles M. Metzner
United States District Judge
United States Courthouse
Foley Square
New York 7, New York

J. Lee Rankin, Esquire
36 West 44th Street
New York 36, New York

[fol. 1504]

EXHIBIT G TO AFFIDAVIT

August 22, 1962

Re: *TWA* v. *Hughes*

Dear Miss Lea:

This will acknowledge receipt of your letter of August 21st. For the reasons stated in my letter of August 2nd to Judge Metzner, and stated earlier at the hearing before the Special Master on July 31st, we do not believe that our client's interest would be adequately protected by relying upon service of the Hughes subpoena on Mr. Davis in the absence of irrevocable authority from Mr. Hughes along the lines of that proposed in our draft stipulation. So far as we are aware, that irrevocable authority has not been granted.

We therefore await with great interest the service on August 27th of Toolco's answers to our Interrogatory as to Mr. Hughes' whereabouts.

Very truly yours,
Robert G. Zeller

Lola S. Lea, Esq.
Chester C. Davis
120 Broadway
New York 5, N.Y.

cc: Honorable Charles M. Metzner
J. Lee Rankin, Esq.

[fol. 1505]

EXHIBIT H TO AFFIDAVIT

(Letterhead of Chester C. Davis, New York 5, N. Y.)

BY HAND

August 24, 1962

Re: *TWA* vs. *Hughes Tool Company, et al.*

Robert G. Zeller, Esq.
Cahill, Gordon, Reindel & Ohl
80 Pine Street
New York 5, N. Y.

Dear Mr. Zeller:

Referring to the letter of Judge Metzner dated August 21, 1962, there is enclosed a copy of the written authority from Mr. Hughes to Mr. Davis which is being filed with the Court today. I understand from your letter of August 2, 1962 to Judge Metzner that you agree to treat the authorization as a confidential document under the terms of the Special Master's order of March 21, 1962 relating to confidential documents.

Your letter dated August 22, 1962 points out that you do not believe that your client's interest would be adequately protected by a service on Mr. Davis because you do not know whether the authority of Mr. Davis is irrevocable.

Affidavit of Zeller, August 28, 1962

May I suggest that the problem would be solved if you were to serve Mr. Davis promptly and before any question as to revocability could arise.

I assure you again that Mr. Davis will accept service of whatever subpoena you have obtained whenever you care [fol. 1506] to submit same to this office. If you prefer to have Mr. Davis personally available at that time, please so advise.

Very truly yours,

/s/ Lola S. Lea
Lola S. Lea

Encl.

cc: Hon. Charles M. Metzner

J. Lee Rankin, Esq.
All Counsel

[fol. 1507] EXHIBIT I TO AFFIDAVIT

August 24, 1962

Re: *TWA* v. *Hughes Tool Company, et al*

Dear Mrs. Lea:

This will acknowledge receipt of your letter of August 24, 1962 and the copy of what you say is the written authority from Mr. Hughes to Mr. Davis. We offered to treat this document as a confidential one under the terms of the Special Master's Order of March 21, 1962 relating to confidential documents, and will do so. Now that I have seen the document, however, I must say I am unable to see why anyone could possibly be interested in having treated it as a confidential document.

I am glad to have your assurance that Mr. Davis will accept service of the subpoena upon Mr. Hughes which we have obtained, and to have your suggestion that we serve Mr. Davis promptly in order to avoid any question of revocation. In view of the contents of the document trans-

mitted with your letter, however, I can see that many questions other than revocation might be raised.

We therefore continue to feel as we have in the past that our client's interest would be better protected by service of process upon Mr. Hughes personally than upon Mr. Davis as Mr. Hughes' agent to receive service. We will continue to await Toolco's answers on August 27th to our Interrogatory as to Mr. Hughes' whereabouts.

Very truly yours,

Robert G. Zeller

Lola S. Lea, Esq.
Chester C. Davis
120 Broadway
New York 5, N. Y.

cc: Honorable Charles M. Metzner
J. Lee Rankin, Special Master
ALL Counsel

[fol. 1508] EXHIBIT J TO AFFIDAVIT

(Letterhead of Chester C. Davis, New York 5, N. Y.)

August 27, 1962

Re: *TWA vs. Hughes Tool Company, et al.*

Robert G. Zeller, Esq.
Cahill, Gordon, Reindel & Ohl
80 Pine Street
New York 5, N. Y.

Dear Mr. Zeller:

Referring to your letter of August 24, 1962 and your telephone conversation of this afternoon with Mr. Davis, this is to confirm that Toolco understands that it has complied with the order of the Special Master, affirmed, except as modified, by the order of the Court dated July 12, 1962 as amended by order dated July 26, 1962. As you will recall,

said order required Toolco to answer certain interrogatories in the event that Mr. Hughes failed to furnish written authorization to accept service of a deposition subpoena.

The authority of Mr. Davis to accept service on behalf of Mr. Hughes having been confirmed in writing and filed with the Court and the Special Master, we do not understand what proper interest of your client remains in seeking answers to interrogatories as to the whereabouts of Mr. Hughes.

[fol. 1509] As previously indicated, Mr. Davis is available to you at your convenience.

Very truly yours,

/s/ Lola S. Lea
Lola S. Lea

cc: Hon. Charles M. Metzner

J. Lee Rankin, Esq.
Special Master

All Counsel

[fol. 1510] EXHIBIT K TO AFFIDAVIT

(Letterhead of Cahill, Gordon, Reindel & Ohl,
New York 5, N. Y.)

August 28, 1962

Re: *TWA* v. *Hughes Tool Company, et al.*

Dear Mrs. Lea:

This is to acknowledge receipt of your letter of August 27th.

The order to which you refer was *not* a conditional order. The order directed Toolco to answer TWA's interrogatory as to Mr. Hughes' whereabouts on or before August 27, 1962.

Affidavit of Zeller, August 28, 1962

As counsel for TWA, we were willing to agree, subject to Judge Metzner's approval, that it would not be necessary for Toolco to answer the interrogatory if Mr. Davis received written authorization from Mr. Hughes which, in our opinion, was sufficient to make the personal service of a subpoena upon Mr. Davis the legal equivalent of personal service upon Mr. Hughes. No such adequate authorization has ever been given to Mr. Davis, and we have never consented to any departure from the express and precise terms of the order entered on July 26, 1962, compliance with which was again directed in Judge Metzner's letter of August 21, 1962. Moreover, at no time has it been possible for you to be under any reasonable misapprehension that we considered the photocopy of a piece of paper finally transmitted with your letter of August 24, 1962 to be an adequate authorization.

[fol. 1511] It is plain that Toolco has deliberately defied the Court's order. We will serve upon you later today a motion for the granting of appropriate relief.

Very truly yours,

/s/ Robert G. Zeller
Robert G. Zeller

Lola S. Lea, Esq.
Chester C. Davis
120 Broadway
New York 5, New York

cc: Hon. Charles M. Metzner

J. Lee Rankin, Esq.,
Special Master

All Counsel

[fol. 1512] Affidavit of Service (omitted in printing).

[fol. 1514] [File endorsement omitted]

[fol. 1515]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324

TRANS WORLD AIRLINES, INC., Plaintiff,

—against—

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY, Defendants,

—and—

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, et al., Additional Defendants on Counterclaims.

MEMORANDUM REVIEWING THE HISTORY OF TWA'S APPLICATION FOR PERMISSION TO PROPOUND AN INTERROGATORY TO HUGHES TOOL COMPANY CONCERNING THE LOCATION OF HOWARD R. HUGHES—Filed August 30, 1962

This memorandum contains a chronological review of the proceedings in the above-entitled action relating to the application of Trans World Airlines, Inc. (herein TWA) to propound an interrogatory to the Hughes Tool Company (herein Toolco) concerning the location of Howard R. Hughes (herein Hughes) and is filed in support of TWA's [fol. 1516] motion for relief pursuant to Rule 37(d) of the Federal Rules of Civil Procedure.

The following is a list of dates along with a description of the activity on that date:

Date	*Description of Activity*
March 22, 1962	Direction of the Special Master permitting the submission of briefs on April 2, 1962 concerning the authority of the

Memorandum

	Court to obtain from Toolco or anyone else information as to the location of Hughes in order to permit service of process upon him. (Tr. 3626-3627)
April 2, 1962	Memorandum filed on behalf of TWA in response to the request of the Special Master noted above.
April 3, 1962	Date of letter of Toolco counsel to Special Master suggesting that no proper application had been made for the serving of an interrogatory by TWA.
April 4, 1962	Date of letter of TWA counsel to Special Master citing his request as noted above that such memoranda be submitted, and requesting that, if the prior proceedings were not sufficient, the letter should be considered as an application and the giving of due notice.
April 17, 1962	Date of hearing and decision of Special Master granting TWA the right to propound an interrogatory to Toolco concerning the location of Hughes. (Tr. 4401)
April 27, 1962	Last day on which Toolco had right to appeal from the Special Master's decision granting TWA the right to propound the interrogatory.

[fol. 1517]

April 27, 1962	Date of letter of Toolco counsel to the Special Master stating that Toolco was "not in a position at this time to seek review" of the Special Master's decision to serve the limited interrogatory and stating that it was Toolco's understanding that it would have a right to object to the form and substance of any interrogatory after it had been served.

Memorandum

April 30, 1962	Date of letter of the Special Master to Toolco counsel in answer to Toolco's letter of April 27, 1962, stating that TWA was authorized to serve an interrogatory forthwith and allowing Toolco two days after the service of such interrogatory within which to file any objections.
May 2, 1962	TWA interrogatory served on Toolco, requiring an answer by May 17, 1962.
May 11, 1962	Date of notice of Toolco's motion and objections before the Special Master to the TWA interrogatory, objecting both to the form of the interrogatory and also to TWA being allowed to serve such interrogatory at all.
May 17, 1962	Date of memorandum of TWA in opposition to Toolco's objections.
May 28, 1962	Date of memorandum of Toolco in support of its objections.
June 4, 1962	Hearing and second order of the Special Master, directing that the interrogatory should be answered on June 20, 1962. (Tr. 4472-4473)
June 7, 1962	Notice of Motion of Toolco for review and reversal of Special Master's order overruling Toolco's objections to the interrogatory. This "Notice" did not specify a day certain for the return date, and Toolco appears to have made no attempt to arrange for such date.
[fol. 1518]	
June 11, 1962	Date of letter of Toolco counsel to the Special Master attempting reargument of the Special Master's ruling granting TWA the right to propound the interrogatory.

Memorandum

June 14, 1962	Date of letter of Special Master answering Toolco counsel's letter of June 11, 1962, rejecting the attempt to reargue the Special Master's order, and distinguishing the authorities cited in the Toolco letter.
June 22, 1962	Date of letter from counsel for TWA to Judge Metzner requesting that Toolco's motion for review be denied without further hearing or alternatively requesting an early hearing.
July 10, 1962	Date of memorandum of Toolco in support of its motion for review and reversal of the Special Master's order overruling its objections to the interrogatory.
July 12, 1962	Date of TWA memorandum in opposition to the Toolco motion regarding the interrogatory.
	Date of hearing before Judge Metzner and pre-trial order granting TWA the right to propound an interrogatory to Toolco concerning the location of Hughes.
July 13, 1962	Date of letter from counsel for TWA to counsel for Toolco specifying July 27, 1962 as date by which responses to interrogatory were to be made, computed according to pre-trial order of July 12, 1962.
July 18, 1962	Date of notice of motion and memorandum by Toolco for an order by Judge Metzner clarifying or modifying the pre-trial order dated July 12, 1962 regarding the interrogatory. This "notice" did not specify a day certain for the return date, and Toolco appears to have made no attempt to arrange for such a date.

Memorandum

[fol. 1519]

July 20, 1962 — Date of memorandum of TWA regarding the attempt of Toolco to avoid answering the interrogatory on the location of Hughes.

July 23, 1962 — The following statement was made on the record by Toolco's counsel regarding the efforts which he had made to comply with the outstanding orders of the Court concerning answering the TWA interrogatory:

> "In other words, I have taken no action. I am not in a position to take any action in transmitting these interrogatories to the Tool Company for an appropriate time until I am in a position to say this is what you are supposed to answer." (Tr. 5828)

Oral application by Toolco counsel before the Special Master for an order extending its time to answer the interrogatory beyond July 27, 1962. (Tr. 5828 *et seq.*)

Date of decision of Judge Metzner denying the Toolco motion to modify or clarify the interrogatory.

July 24, 1962 — Argument on the part of Toolco counsel before the Special Master in support of its oral application for an extension of time to answer the interrogatory and decision of Special Master denying the application on the basis that the Special Master has no power to modify the Court's orders and, if he did have power, he would refuse the extension, in the exercise of his discretion. (Tr. 6128 *et seq.*)

Memorandum

July 26, 1962	Application by Toolco for an order enlarging the time within which it could answer the interrogatories to September 25, 1962.
	Order of Court extending Toolco's time to answer interogatories to August 27, 1962.
[fol. 1520]	
July 27, 1962	Statement by counsel for Toolco that he had received authorization to accept service of subpoena on behalf of Howard R. Hughes (Tr. 6457 *et seq.*)
July 31, 1962	TWA offered Toolco proposed stipulation providing for personal service upon Chester C. Davis of subpoena directed to Howard R. Hughes in lieu of receiving answers to interrogatories. This stipulation was rejected by Toolco, Toolco's counsel stating that he wanted instead to leave the matter as it had been left by Judge Metzner's order. (Tr. 6714; Exhibit L annexed hereto).
	TWA stated its intention to proceed therefore in accordance with the Court's schedule (Tr. 6718-6719; Exhibit M annexed hereto), and the Special Master determined that there would be no modification by him of the Court's order (Tr. 6723; Exhibit N annexed hereto).
August 1, 1962	Letter from Mr. Davis to Mr. Sonnett stating that Mr. Davis was authorized to accept service of a subpoena on behalf of Howard R. Hughes.
	Letter from counsel for Toolco to Judge Metzner enclosing a photocopy of purported written authorization to accept service on behalf of Howard R. Hughes.

Memorandum

August 2, 1962	Letter from counsel for TWA to Judge Metzner stating that TWA had not received a copy of the purported authorization.
August 20, 1962	Letter from counsel for TWA to Judge Metzner advising the Court that TWA had been unsuccessful in its attempts to serve a subpoena on Howard R. Hughes on August 17, 1962 and advising the Court that such attempts would be renewed after receipt of answers to the interrogatories.
[fol. 1521]	
August 21, 1962	Court advised Toolco by letter that it was returning "what you say is a written authorization from Mr. Hughes" and that it expected compliance with its order of July 26, 1962.
	Letter from counsel for Toolco again stating that Mr. Davis was authorized to accept service of a subpoena on behalf of Mr. Hughes.
August 22, 1962	Letter from counsel for TWA to counsel for Toolco stating belief that TWA's interest would not adequately be protected by service upon Mr. Davis and advising that TWA awaited service of answers to its interrogatories.
August 24, 1962	Letter from counsel for Toolco to counsel for TWA containing photocopy of purported authorization and requesting it be kept confidential.
	Letter from counsel for TWA to counsel for Toolco stating that TWA intended to await Toolco's answers to interrogatories after considering purported authorization.

Memorandum

August 27, 1962 — Counsel for Toolco, Chester C. Davis, told counsel for TWA that he had no intention of answering the interrogatories.

Date of letter from Mr. Davis' associate counsel, Mrs. Lola Lea, confirming Toolco's intention not to answer interrogatories.

Respectfully submitted,

Cahill, Gordon, Reindel & Ohl, Attorneys for Plaintiff, Trans World Airlines, Inc., Office and P. O. Address: 80 Pine Street, New York 5, New York.

Of Counsel: John F. Sonnett, Dudley B. Tenney, Robert G. Zeller.

August 30, 1962.

A-2305

Transcript of Pretrial Hearing, September 6, 1962

[Doc. 355]

[CAPTION] 61 Civ. 2324

Before: Hon. CHARLES M. METZNER, *District Judge.*
New York, September 6, 1962, 11:30 a.m.

[APPEARANCES]

. . . . . .

[3] The Court: You may proceed, Mr. Sonnett.

Mr. Sonnett: May it please the Court, we have served with our motion a memorandum which sets forth the chronology of our efforts to obtain some disclosure of information as to the whereabouts of Howard Hughes, and I don't propose to burden the Court with a recital of that chronology except to point out that we started in March of this year and we are still at it.

I will have a reply affidavit in a moment to serve which I think contains some exceedingly significant information. Before coming to that, may I say to the Court that I believe on the basis of the record to date, and in light of your Honor's letter to counsel, in which you stated when returned a photocopy of the alleged authority that you would expect compliance with the Court's order so that the interrogatories will be answered on the 27th of August, but I think your Honor made crystal clear, if there was any doubt about it, and there wasn't, that Hughes Tool Company was to supply this information.

Instead of doing that, the Hughes Tool Company elected to disregard the Court's two prior [4] orders and the Court's letter. Now it seems to me that the attitude

demonstrated by the Hughes Tool Company is in such willful and deliberate disregard of specific unambiguous directions by the Court that the contempt shown to the orders of the Court is more grievous than that shown in the Friedman case in which Judge Sugarman granted a default judgment in excess of 12 million dollars.

In that situation—I don't know whether your Honor has had a chance to see the text of the memorandum opinion, may I hand it up? Unfortunately I only have one copy.

The Court: Has it been published?

Mr. Sonnett: No, sir.

The Court: I will get a copy from Judge Sugarman. What is the title?

Mr. Sonnett: Friedman v. United States Trunk Company, 62 Civil 73, and the memorandum is dated August 16, 1962.

In that situation, where a defendant ignored a notice to take depositions, ignored a motion for a default and simply did not appear, Judge Sugarman, having found that there was a deliberate refusal to [5] pay any attention to the Court's orders, had no difficulty in awarding a default judgment in excess of 12 million dollars.

The record in this situation, I submit, is much more serious because here there is a crystal clear proof of specific notice contained in a direction by the Special Master to the effect that he would not interfere in the slightest with this Court's order by reason of any alleged authority that Mr. Davis had to accept process.

The direction of this Court in its two orders and in the letter most recently sent it, I think, open to no misunderstanding.

I think that the conduct, therefore, of Hughes Tool Company can only be characterized for what it was, a

deliberate, willful intention to refuse to comply with the directions of the Court.

I might rest at that point, your Honor, but something has come to my attention in point of fact only definitely yesterday and last night. It has led to the necessity to file reply affidavits which contain very grievous charges against the Hughes Tool Company.

I would like to hand the affidavit up and to serve it now. I regret that I could not do it [6] sooner. In point of fact, my affidavit was just finalized and signed this morning. If your Honor would wish to read the affidavit, it would be a lot easier than my recital of it.

The first five paragraphs is set forth substantially what I have already said. The new material is contained in paragraph 6.

After very careful and thorough consideration of the gravity of the charges made in this affidavit, I felt impelled to make the charges there contained—

The Court: They are serious charges.

Mr. Sonnett: The serious charge is that the Hughes Tool Company deliberately submitted to this Court, in an attempt to defraud the Court and mislead it, a forged document.

Your Honor will note that annexed to my affidavit is an affidavit by a leading examiner of questioned documents, Mr. Charles Andrew Appel, Jr.

Mr. Appel's qualifications cannot be gainsaid. For many years he was a special agent of the FBI in charge of document work and since his retirement from the FBI he has been engaged in a great number of cases of major significance.

I had Mr. Appel come up because I was con [7] cerned when I saw this alleged authorization, and I had him

come to New York and he did yesterday morning. We spent the entire day on this matter.

Your Honor will find he set forth in detail his reasons in the exhibits annexed for the conclusion that Howard R. Hughes did not make the signature contained on the so-called authorization represented to this Court to be an authorization to accept service of process.

I would like to make it clear that I have no information, nor do I personally believe, that Mr. Davis had any knowledge of this. However, I represent to your Honor that on the record before you it is beyond doubt that somebody in the Hughes Tool Company wilfully, knowingly, purposefully, in order to mislead counsel for TWA and this Court, submitted a forged document.

I think on that ground alone your Honor should strike the answer and give us a default judgment.

If your Honor has the slightest doubt about it, I am prepared to call Mr. Appel to the stand right now. He is here for cross-examination. I think your Honor should direct, if you have the slightest [8] doubt—and this record admits of no doubt—that everyone connected with the Hughes Tool Company who had any connection with the forged authorization be called before this Court to testify under oath forthwith.

The Court: Mr. Sonnett, obviously your opponent has just been served with this document three minutes ago and should be afforded an opportunity to answer the serious charges contained in your affidavit. I will give the attorney for the Hughes Tool Company one week to submit affidavits in refutation of these charges.

Aside from this charge, Mrs. Lea, the charge that the signature of Howard Hughes to the purported author-

ization for Mr. Davis to accept service in this proceeding is forged, have you anything else to say regarding the motion of Mr. Sonnett to strike your answer?

Mrs. Lea: In the first instance I would like to point out, as your Honor is aware, that I have just been served with this piece of paper. I think the charges are undoubtedly ridiculous and completely without foundation. I appreciate your Honor's indulgence in giving us time to formally make any [9] statement with respect to those charges. I wish, however, to point out that the written authorization was merely confirmation of authority which had been received, and I am not quite sure that this affects the problem whatsoever.

As a matter of fact, at this posture of the proceedings I don't think we any longer have a problem. The problem has been mooted for the reason that the United States Marshal for the Southern District of California has indicated this morning that he served Mr. Hughes by delivering a copy of the subpoena to Mr. Davis who was authorized to accept that subpoena on Mr. Hughes' behalf. The return has been filed and is in the office of the clerk.

As far as I can determine, at this point there is no question of service open for decision.

The Court: Was the service made on the exhibition by Mr. Davis of the authorization that you have filed in this court?

Mrs. Lea: I believe the service was made upon a delivery to the United States Marshal of an affidavit by Mr. Davis, indicating he was in fact authorized to accept service, and it was on the basis of Mr. Davis' affidavit that—

Transcript of Pretrial Hearing, September 6, 1962

[10] The Court: It seems we are having a lot of last minute developments today, first a charge of forgery and then a statement that Mr. Hughes was actually served.

Do you know of any service by the United States Marshal for the Southern District of California, Mr. Sonnett?

Mr. Sonnett: In the light of the unsatisfactory state of the record, we did make an effort several weeks ago to serve Mr. Hughes in Beverly Hills. We made that effort with private investigators and with the United States Marshal. The effort was unsuccessful.

Thereafter, I am told—I was not here—that Mr. Davis represented that he was going to be here in court today to deal with this matter. Apparently what he saw fit to do was to go out and try to blunt the point of this motion and to frustrate it by going to the Marshal and saying, "Look here, I am authorized to take it for Mr. Hughes."

I regard what Mr. Davis has done, and I think the Court should, as a nullity.

Moreover, I think that in the light of the very well founded charge that a fraud was attempted [11] to be worked on this Court that all matters should be held in abeyance until the Court determines whether to call witnesses in here under cross-examination to find out how widespread the scheme was. All I can say is that one of the leading document examiners in the United States tells me and tells the Court under oath, and he is here for cross-examination and will be at any time if anybody wants him, that the signature on that authorization is not the signature of Howard R. Hughes.

I don't know what kind of games Mr. Hughes or the Hughes Tool Company thinks they can play with the Court of the United States. I for one do not think they can

play that kind of game. I don't know if your Honor wishes me to have Mr. Appel available for cross-examination today or a week from now, but he will be available at any time.

The Court: I will deal with the allegation of forgery separate and apart from the problem of the authorization, its legal effect and whether service was actually made on Mr. Hughes today.

So, Mr. Appel, if necessary, will be called at some time in the future after I have received the answering affidavits of the defendant Hughes Tool [12] Company to the charges contained in your reply affidavit which they were just notified of this morning. At that time we can take care of that problem.

When is the return date of the subpoena that was served this morning, Mr. Sonnett?

Mr. Sonnett: If it was served, my understanding of what Mrs. Lea said is that the service was on Mr. Davis as the alleged agent of Mr. Hughes. If that constitutes service, which I doubt in these circumstances, the return date of the subpoena would be September 24th.

The Court: If Mr. Hughes appears on September 24th, then hasn't all of this been moot?

Mr. Sonnett: If there was, as I believe, fraud on the Court, the question of the punishment the Court wishes to impose for what I regard as contempt, if Mr. Appel is right somebody ought to be punished for attempting to misrepresent this document to this Court.

The Court: I have never relied on that document, and that is why I returned it twice, the two times that it was submitted to me, first on a confidential off-the-record basis and then in [13] conjunction with an affidavit to seal it.

My letter clearly indicated that I wanted nothing to do with that document. You could file it if you wanted to, but I was not going by any action on my part to indicate that I accepted that document or rejected it. It was a question which would have to be presented in the normal fashion.

My letter indicated that any further negotiations between Mr. Davis and you be had directly with you, and the Court was not going to be part of it.

Mr. Sonnett: Yes.

The Court: That was the reason for it. I did not know what that document meant, whether it had any meaning at all. It was on a blank piece of paper without a date, without an address, without any mention of this case, so until you two were willing to present it to the Court in a more formal fashion, I was refusing to have anything to do with it.

The first step was taken, I think, last Friday when the attorney for the defendant did serve me with a copy and did file it in this court.

Mr. Sonnett: When we then had a chance to [14] analyze that document for the first time, we found all of the defects you pointed out but we found one more, it was not only a nullity legally but it was a fraud.

The Court: I am not saying it was a nullity legally. I purposely refused to touch the piece of paper because I did not want to have any action taken by me as any indication that I was passing upon the legal effect of the document.

Mr. Sonnett: Exactly. You then said to counsel for Hughes Tool Company that they would be expected to answer.

The Court: They did not work out anything with you, that is why I added the last sentence that they carry out further conversations with you.

Mr. Sonnett: Nothing was done except to refuse to comply with the orders of the Court.

The Court: We have two problems.

Is Mr. Hughes going to appear on September 24th? By doing that, I suppose he would validate whatever affidavit Mr. Davis gave to the United States Marshal today to justify acceptance of service of the subpoena on his part.

The other problem is the document that has [15] been filed in this court which you claim is a forgery.

So we will have to let both of them stand in abeyance. The first one until September 24th and the second one to the filing by the attorney for the Hughes Tool Company on a week from today an answer to the charges contained in your reply affidavit that you served on defense counsel ten or fifteen minutes ago.

If you want additional time after receipt of that answer to file a reply, you may have it.

Mr. Sonnett: I would like to have three days after the receipt of the affidavit within which to file any further affidavits or to seek leave of the Court to examine under oath those who participated in what I regard as a deliberate attempt to commit a fraud on this Court.

The Court: All right.

Mrs. Lea: May I clarify several things on the record.

First, the reference by Mr. Sonnett to Mr. Davis' intention or representation to be here today. He was intending to, but it was only late yesterday afternoon that we were informed by counsel for the [16] Hughes Tool Company in California that the Marshal then had in his hands a

subpoena to serve on Mr. Davis for accepting service for Mr. Hughes. He did not learn until close to six o'clock that was in fact the case, and he made himself at that time available, assuming in so doing that he [be] would doing exactly that which TWA had been seeking or at least which it claimed to have been seeking, and which was to see to it that service was in fact effected.

With respect to the date of September 24th, I would like to point out to your Honor that the notice of taking deposition does mention the 24th day of September, and then goes on to say, as indeed I believe it must under the order of your Honor as well as the order of the Special Master, or such other time or place as may be fixed by order of the Court or by agreement.

Mr. Hughes is not scheduled to be reached for deposition until some time after the Tool Company has had an opportunity to complete the discovery in which it is now engaged.

I doubt now merely by filing a new notice and making a whole lot of unfounded charges that TWA could conceivably be permitted to interrupt that [17] schedule or interrupt the Hughes Tool Company's discovery in that fashion.

The Court: How is the deposition of Mr. Tillinghast proceeding?

Mrs. Lea: The deposition of Mr. Tillinghast has been completed. The Hughes Tool Company is now deposing the next TWA witness who is Mr. Leslie. Because of the problem of personal privilege of Mr. Leslie, we are going to be examining Mr. Rummel next week.

We are proceeding with the depositions fixed in your Honor's schedule as rapidly as we can. We are in the midst of our discovery.

The Court: How long is that going to last? I had the impression once you got through with Mr. Tillinghast that you would move quite rapidly.

Mrs. Lea: We will certainly do our best to be as expeditious as we can. How long it will take, I cannot tell you, I just do not know.

The Court: I think, Mr. Sonnett, you may be advised to make an application to the Special Master, if you think it is necessary and proper, that the completion of the examination by the Hughes Tool Company by TWA may be suspended in order to proceed [18] with Mr. Hughes on September 24th.

Mr. Sonnett: Yes, your Honor.

The Court: Frankly, I am very much interested to see if Mr. Hughes is going to show up in view of all the charges thrown back and forth here.

Apply to the Special Master. If the Hughes Tool Company is dissatisfied with the ruling of the Special Master, they may appeal this ruling to me.

Mr. Sonnett: Yes, sir, we shall do so promptly.

The Court: You may have until September 17th to file a reply to Mrs. Lea's affidavit which is due September 13th.

Mr. Sonnett: I trust the affidavits to be submitted on behalf of the Hughes Tool Company will be affidavits by those people who participated in the preparation of the document, not hearsay by counsel, we have had too much of that.

The Court: We will judge the affidavits when they are submitted.

Mr. Sonnett: Yes, your Honor.

(Adjourned sine die.)

Affidavit of John F. Sonnett, September 14, 1962

[1765]

[CAPTION]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JOHN F. SONNETT, being duly sworn, deposes and says:

1. I am a member of the firm of Cahill, Gordon, Reindel & Ohl, counsel for Trans World Airlines, Inc. ("TWA"), and I am familiar with the proceedings had in this matter.

2. This affidavit and the accompanying exhibits are submitted in support of the motion of TWA for an order:

(a) that TWA may commence taking the deposition of Howard R. Hughes in New York on September 24, 1962 [1766] and continue such deposition from day to day until completed,

(b) directing that defendant Hughes Tool Company ("Toolco") produce Hughes at that time and place for the purposes of such deposition, and

(c) suspending the taking of depositions by Toolco from September 24, 1962 until the deposition of Hughes is completed,

and in reply to so much of the affidavit of Chester C. Davis sworn to September 13, 1962 (hereinafter the "Davis Affidavit") as purports to discuss the foregoing motion.

Affidavit of John F. Sonnett, September 14, 1962

3. The basis for TWA's request that it be permitted to go forward with the deposition of Hughes commencing September 24 has been made a matter of record in numerous prior proceedings before the Special Master and before the Court. Particularly pertinent is the hearing before the Court on September 6, 1962 on TWA's motion for the entry of a default judgment against Toolco based on Toolco's deliberate and wilful failure to answer interrogatories as to Hughes' whereabouts, and the proceedings in connection with TWA's earlier motion for an order that Rule 4 of the new Civil Rules of this Court should be applied in this case. TWA believes that the Court, on the entire record to date, has concluded that TWA should proceed with the depo- [1767] sition of Mr. Hughes on the 24th, and accordingly that no useful purpose would be served by repetition of the points which TWA has previously made.

4. A substantial part of the Davis Affidavit is devoted to an expression of Mr. Davis' views as to the merits of the present action. See, e.g., pages 4-6, 12-23. This is apparently set forth in the hope that it will lead the Special Master not only to postpone beyond September 24 the taking of Hughes' deposition, but, as well, to decide that the taking of that deposition or indeed any depositions by TWA could serve no useful purpose and therefore should not be allowed to transpire. The implied suggestion that an anti-trust plaintiff should be denied the right to develop its case through depositions of the adverse party's witnesses is patently absurd. Hence Mr. Davis' attempt to confuse the issue by fragmentary, incomplete and inaccurate discussion of the merits of this litigation should be ignored.

5. This affidavit is therefore concerned primarily with so much of TWA's pending motion as seeks an order directing Toolco to produce Hughes here in New York for his deposition. On September 6, 1962, counsel for Toolco (Mrs. Lea), in the argument on TWA's motion for the entry of a default judgment, advised the Court that the United States Marshal for the Southern District of California on that same day had served Mr. Hughes with a subpoena to testify as a witness in this case by delivering a copy of a subpoena to [1768] Mr. Chester Davis in Los Angeles who was authorized to accept that subpoena on Mr. Hughes' behalf.

6. The subpoena referred to was a subpoena issued by the United States District Court for the Southern District of California on August 17, 1962. At our request, a member of the firm of Gibson, Dunn & Crutcher, a law firm in Los Angeles which has acted for us in connection with this case, and which had assisted us in our unsuccessful efforts to serve Mr. Hughes personally at the Beverly Hills Hotel on August 17, 1962, ascertained from the local United States Marshal's office the circumstances of the service of that subpoena upon Mr. Chester Davis, as counsel for Hughes, on September 6. As is shown by the memorandum by the Gibson, Dunn partner, a copy of which is attached as Exhibit A, it is apparent that this service was an eleventh hour device contrived to avoid the consequences of Toolco's wilful refusal to comply with the Court's order directing Toolco to answer interrogatories as to Hughes' whereabouts.

7. The subpoena in question directs Hughes to appear and testify on September 24 at the Federal Court House in

Los Angeles. It was made returnable there to comply with the provisions of Rule 45, FRCP.

8. In addition, however, the record in this matter establishes that Howard R. Hughes throughout has been and is at least the "managing agent" of Hughes Tool Company.

[1769] 9. Before discussing some of the matters showing that Hughes has been and is at least a managing agent of Toolco, it should be pointed out that Judge Metzner ruled on September 6, 1962 that the question whether effective service had been made upon Hughes was to be dealt with separately from the question whether a fraud had been sought to be perpetrated on the court through submission of an "authorization" purporting to bear Howard R. Hughes' signature which did not in fact bear Howard R. Hughes' signature (Tr. 11-12, 14-15). The first question, the Court pointed out, could best be answered by whether Mr. Hughes showed up in response to the subpoena on September 24th. It was in this connection that he suggested the filing of TWA's instant motion. Despite Judge Metzner's ruling that the two questions are to be treated separately, the Davis Affidavit lumps both matters together. The equivocal and evasive way in which the forgery is sought to be dealt with in the Davis Affidavit accordingly is the subject of a separate affidavit by me to be filed directly with the Court on September 17th as directed. A copy is hereto annexed as Exhibit B.

10. Some of the evidence in this matter which establishes that Hughes was and is at least the managing agent of Hughes Tool Company, is hereinafter discussed. It consists of:

Affidavit of John F. Sonnett, September 14, 1962

A. Sworn statements of Holliday in CAB proceedings relative to Northeast Airlines;

[1770] B. Communications which passed through the Hughes Communications Center at Romaine Street in Los Angeles in 1961, and which communications were produced to the CAB; and

C. Various documents produced in this case from the Communications Center at Romaine Street.

SWORN STATEMENTS OF HOLLIDAY IN THE CAB PROCEEDINGS

11. From April 2d until approximately April 20, 1962, the Civil Aeronautics Board conducted hearings in Washington, D. C. in the matter of the "Toolco-Northeast Control Case", Docket No. 11620. In those hearings Toolco sought approval of certain transactions which would place it in control of Northeast Airlines. Mr. Raymond M. Holliday, a defendant in this proceeding, was called as a witness on behalf of Toolco.

12. In his written direct testimony Mr. Holliday stated "I am executive vice president, secretary and the chief financial officer of Hughes Tool Company". (Direct testimony of Raymond M. Holliday). In addition, Mr. Holliday stated that he was a member of the Board of Directors and of the Executive Committee of Toolco (Tr. 781) and,

"Q. Am I to understand that you control the Tool company?

"A. No, I don't control the Tool company, no. It is controlled by a stockholder, Mr. Hughes." (Tr. 784).

Affidavit of John F. Sonnett, September 14, 1962

[1771] 13. The hearing before the Civil Aeronautics Board established that the decision to acquire control of Northeast Airlines was made personally by Mr. Hughes, and that the decision was made in 1961.

> "Q. Let me ask you this, Mr. Holliday. I believe you previously testified that the policy determinations by the Tool company to acquire Northeast were made by Mr. Hughes sometime in October of 1961?
>
> "A. I don't think I said the precise time. It was in the early fall or middle summer. I don't think I testified to the time." (Tr. 1107).

Mr. Holliday then stated:

> "A. Maybe this would clear this up. I remember when Mr. Stretch—well, he talked with Mr. Davis about this. Mr. Davis said is this something we can do or the Tool company can do without consulting Mr. Hughes? I said it is something I don't think the Tool company would do without consulting Mr. Hughes, and he was later consulted." (Tr. 1108)

14. The transcript of that hearing also shows that Toolco finally agreed to pay Atlas $5,000,000 for its position in Northeast. On that subject the following took place during Mr. Holliday's cross-examination:

> "A. . . . We reported the $5 million figure to Mr. Hughes, however.
>
> "Q. Who reported that? Was that you?
>
> "A. I believe it was Mr. Davis and Mr. Cook, I don't know which one.

"Q. Mr. Hughes said that was all right?

"A. I don't know whether he said it is all right. He certainly did not veto it. If he had vetoed it we would not have had the agreement." (Tr. 1206).

[1772] DOCUMENTS PRODUCED TO THE CAB.

15. The CAB hearing established that during 1961 scores of communications concerning the Northeast merger flowed through the Toolco message center at 7000 Romaine Street, Los Angeles, California, to Mr. Hughes from Messrs. Davis and Cook or from Mr. Hughes to Messrs. Davis and Cook. Copies of several of these documents are attached hereto as Exhibit C. In this connection it is interesting to note that Mr. Davis was retained as Toolco's counsel directly by Mr. Hughes and not by the officers of Toolco (Tr. 1107). One of the communications between Toolco's counsel and Mr. Hughes was read in part into the CAB record by Mr. Cook during an executive session of the hearing, the transcript of which was later made public by the Civil Aeronautics Board. The text as read by Mr. Cook follows next and amply demonstrates that Mr. Hughes personally makes the important decisions for Toolco:

"MR. COOK: [Reading from Memo to Hughes] In my view it is impossible to apply to the situation the ordinary business standards for investment. Independently of other objectives, it is obvious that you would not invest funds in a bankruptcy enterprise.

"In an informal and confidential conference which we had with Bill Forrester, he pointed out in his opinion you can probably do better to pick

up the Airline in a Chapter 10 Bankruptcy where you would not be saddled with completed capitalization and threat of trade creditors. Forrester would even say that in the Florida Route Case Northeast would be stronger in a Chapter 10 Bankruptcy than under Hughes control.

"Nevertheless we are quite aware you do have other important objectives which we are not free to discuss with Forrester such as the following:

[1773] "(a), exploiting the CAB proceedings to restore public favor to you and to the Tool Company. To some extent this is already being achieved,

"(b), avoiding the possible adverse publicity of a Northeast lawsuit against the Tool Company in the event of a chapter 10 receivership,

"(c), protecting the favorable possibility of employing a Northeast package as frankly inflated piece of contribution with which to effectuate a TWA settlement,

"(d), the matter of finding a home for four 880's,

"(e), protecting or restoring value to the Tool Company's $9½ million investment in Northeast."

(Tr. Executive Sessions 234-235)

VARIOUS DOCUMENTS PRODUCED IN THIS CASE.

16. Documents produced in this litigation by Toolco likewise contain cogent evidence that Hughes was and is, by any test, at least a managing agent of Toolco. Particularly instructive are the so-called "call sheets" of Raymond

Holliday and other documents during the year 1960 and 1961. Copies of various of these are annexed as Exhibit D. Even the most casual perusal of the instructions transmitted by Hughes shows that Mr. Hughes is not merely consulted and advised as to Toolco developments but is in fact the one who makes the decisions and advises his subordinates of them.

[1774] 17. An interesting illustration of the absolute personal control which Hughes habitually exercises over Hughes Tool Company, and which he sought to exercise over TWA, is to be found in the call sheet appearing as the first document in Exhibit D annexed, a message from Hughes to William A. Forrester, Jr. It will be noted that Hughes instructed his communicator on October 28, 1960 to call Mr. Forrester

> ". . . and tell him that for his information that Charlie Thomas negotiated and developed the deal with Dillon Read financing plan without my authority or encouragement from me; he forced it down my throat then at a Board meeting at which time he created a coalition of my directors and turned them against me and faced me with a mass resignation of all but one of the TWA directors. I have never liked this plan; I have never been in favor of this plan; I have fought it from the very beginning and I am still fighting it and I assure you that if it is employed it will be over my dead body and if you would like to come up with any suggestions of an alternative plan or any way whatsoever by which I can avoid being forced into the Dillon Read program, I would be most grateful. It is very flattering for you to say that you don't think I have ever

been forced to do anything and maybe there was a time when this might have been a fairly accurate statement, but I assure you it is not true today and has not been true concerning this Dillon Read program from its inception. I have fought it hammer and tong from the very first day that I ever heard of it."

18. As an illustration of the continued exercise of Hughes' absolute authority, despite his alleged resignation as president of Toolco, Mr. Holliday's call sheet for February 20, 1961, contained in Exhibit D, reveals long and detailed instructions from Hughes to Holliday regarding the handling of [1775] Toolco's Convair 990 order. Clearly these are the directions of one who is called upon to make the final decisions as to company affairs.

19. Buried in the text of the February 20th call sheet is the following illuminating statement by Hughes:

> "However I obtain TWA's acceptance to this is my own problem; most likely HTCO will control TWA when the matter comes up."

20. Although the above quoted testimony before the CAB and the document appended hereto by no means contain all of the evidence demonstrating that Hughes is Toolco's managing agent, they are sufficient to establish that fact beyond doubt. They show that Howard R. Hughes exercises absolute domination and control of all major decisions by Toolco in the field of commercial aviation. They compel agreement with the observation by the CAB's hearing examiner in the Toolco-Northeast control case that:

Affidavit of John F. Sonnett, September 14, 1962

". . . I think that we should quit kidding ourselves to believe that Toolco is some other entity besides Howard Hughes." (Tr. 1085).

(Sworn to by John F. Sonnett on September 14, 1962.)

[fol. 1778] BER-C-2

EXHIBIT C TO AFFIDAVIT

MEMO NO. 673—September 11, 1961—11 A.M.

TO: HRH

FROM: Chester C. Davis

SUBJECT: Atlas-NEAL

Stretch and Austin will see the Chairman of the CAB about 4:30 P.M. this afternoon NYC time for a preliminary discussion. They anticipate that he will want to know whether a deal has in fact been traded or at least whether the parties are so close that a deal is certain if we get necessary indications from CAB. The banks are also inquiring as to whether the parties are close to a deal. Stretch is pressing me for an indication. I have indicated that his proposal is in the ballpark but I have not yet indicated the area or range which we would be willing to pay if everything else is satisfactory.

I do not need to commit myself now on an exact price. I have in mind also the possibility of trading price against time for payment which would give us an opportunity to realize full value for TWA's securities that might be used. I do not need to know, however, the area or range of price which would be satisfactory to you. There is no normal standard for placing a value on the interest of Atlas in NEAL. CAB may also inquire as to our attitude toward a possible merger of NEAL into TWA.

[fol. 1779] I should talk to you as soon as possible. In any event, I urgently need a message from you as to the price area in which I may commit. I should have this message this evening at the latest because I expect to be in Washington tomorrow morning.

Exhibit C

[fol. 1780] BER C 3

OPERATING MEMORANDUM 724

SEPTEMBER 17

10:00 P.M.

TO: HRH

FROM: RAC

SUBJECT: B of A Conversations

Carver referred the Northeast matter to Gordon who, after a conference with others in the bank, announced the following position for the bank with respect to your proposed transactions:

a. The bank does not want to dictate to HRH what business decisions he should make.

b. While therefore they cannot "sanction" the transaction, they will make certain comments.

c. They feel that unless H receives indications from the CAB that he can rely on, he will be a "damn fool" to go through with the deal.

d. (Blocked out)

[Handwritten notation—Relevance TR 228]

e. HRH should not make a deal which impairs his ability to solve the Convair problem, although Gordon recognizes that it is possible that by the end of the year the HTC may become a creditor rather than a debtor.

f. HRH should not make a deal for Northeast that would impair his chances of making a settlement with TWA; that is, he should not commit subordinated debentures of TWA in amounts to prevent their use as a part of the TWA settlement.

[fol. 1781]

g. This acquiescence by the B of A in the Northeast transaction should not be construed as either a release

of cash collateral or a commitment for additional loans but should not be considered as a turn-down.

In my opinion HRH does not need to go back to B of A to make this deal provided that he is prepared to meet the B of A's specified conditions, (Blocked out)

[fol. 1782]

BER-C-4

Copy

October 24, 1961

MEMORANDUM TO: HRH

FROM: CCD and RAC

RE: NORTHEAST

1. Stretch advises that the Chairman of the CAB will call some time tomorrow to arrange for an immediate meeting with us as representatives of Toolco for the purpose of discussing the procedures which we should consider following in light of our intentions and in view of the rapidly worsening situation at Northeast. Stretch says that the Chairman will also indicate to us that the Board is not prejudiced against the Tool Company. Stretch also says that he will be at the end of his rope by the end of the week.

2. It is increasingly clear that Northeast can be effectively helped only if Toolco is prepared to assure the overdue trade accounts that they will be paid. Shell has already insisted upon such an assurance to cover future deliveries. Vickers understandably is unwilling to give up any collateral position except as part of a program indicating that Northeast can be kept out of bankruptcy—in other words that there is a program for taking care of the trade creditors.

3. From our point of view, the giving of so-called limited assistance is likely to become unrealistic. This amount will keep increasing, particularly if an overall program reassuring the trade creditors is not developed and publicly

[fol. 1783] presented. It seems to us, therefore, that in order to keep the situation under control it is necessary to consider making a deal with Atlas giving us the right to acquire their position and which would form the basis for an application to CAB for their approval as to our acquisition of control. Pending CAB approval, we probably could limit the amount of financial assistance and reasonably expect the trade creditors, particularly the more important ones, to await CAB action. The application filed with CAB, however, would have to contain in effect a commitment on the part of the Tool Company assuring the payment of trade creditors upon CAB approval of our acquisition of control.

4. It is important that we have an opportunity to discuss this Northeast situation with you before we are invited by the Chairman to see him.

-end-

[fol. 1784]

BER-C-5

September 20, 1961

2:30 A M

OPERATING MEMORANDUM NO. 738

TO: RAYMOND COOK

FROM: HRH

SUBJECT: NORTHEAST NEGOTIATIONS

Tell Cook that this thing is beginning to look completely okay to me; that there are a few items in both the memorandum and the application which I want to discuss with him before it is filed. That I will call him tomorrow without fail and discuss these matters or send him a message setting them forth. I will try to do this in time for the corrections to be made and the document to be filed tomorrow but I think that is expecting too much. I think a more realistic schedule would be the filing with the CAB on Thursday. That, however, tomorrow I will review with him fully all

of these items to which I refer. I don't think these are going to give us any trouble because they are simply items which I feel must be corrected from our standpoint but nothing which I believe will cause any displeasure with Atlas or the Board.

(Blocked out)

[Handwritten Notation—Relevance Tr 147]

In other words, go ahead with the program that he has outlined to me but with the limitation that no documents will be executed or promised to be executed until I give him further approval. This is not to be construed as meaning I wont grant approval perhaps even tomorrow, but tonight I want it understood that I have not approved any documents to be executed or promised to be executed, and

[Handwritten Notation—Relevance Tr 147]

[fol. 1785] BER C6

ABC—

MEMO 983 November 16 QIYQ 1961 10:00 AM

TO: HRH

FROM: ~~BILL GAY~~ R. Cook

RE: NORTHEAST AND LOCKHEED MEETINGS

1. Pursuant to the papers filed by Northeast with the CAB yesterday (copies of which should by now have been delivered to you) the Board will probably call a meeting either on tomorrow Friday or Monday, and by three P M today we should know which.

2. If the hearing is called for tomorrow Chester and I both feel that I should attend with him and I will plan to do so. If it is set for Monday I will still plan to come to Los Angeles for the Lockheed meeting tomorrow.

Exhibit C

3. If the Lockheed meeting must again be delayed on this account I will arrange for Bill Gay to give Lockheed the nexessary explanations.

[fol. 1786]

BER-C-7

Memo #1015—December 13, 1961—10:30 pm

To: HRH

From: Raymond Cook

Subject: Northeast

Referring to your memorandum of December 12 (yesterday morning), we believe that it is essential that we immediately tie up Northeast with an option from Atlas along the lines of our last message so that we may control the situation. This will not prevent you from making a different and better deal along the line of a firm commitment to buy out Atlas for cash as you are now contemplating. If we do not act by tomorrow (Thursday) and tie up the situation we are afraid we will loose our bargaining position with Atlas and loose face with the CAB and publicly.

[fol. 1787]

BER-C-8

AABBCC—

October 3, 1961

5:45 AM

OPERATING MEMORANDUM 815

TO: RAYMOND COOK & CHESTER DAVIS

FROM: HRH

SUBJECT: NORTHEAST DEAL AND STRETCH

Please ask Mr. Cook and Mr. Davis to use every effort to keep the Northeast deal alive and please promise Mr. Stretch we will spend the entire evening trying to arrive at a mutually satisfactory deal.

Exhibit C

[fol. 1788] BER-C-9

AABB—

December 14, 1961
8:00 AM

OPERATING MEMORANDUM 1016

TO: RAYMOND COOK

FROM: HRH

SUBJECT: NE-ATLAS

Raymond:

I am sure you believe sincerely in the fairness of what you propose, but when you say we can take an option at one price and then go ahead and negotiate and possibly close a firm deal at a much lower basis without the acquisition of the option having hurts us, I just do not believe that you yourself believe this.

As you know, this entire affair is being played out in five scenes and three acts in front of the CAB.

Now if we take an option at the figure you are discussing and then try to negotiate at a lower figure, the CAB will say we led Atlas down the garden path and encouragd them (by taking the option) to think we were seriously interested at the higher figure.

Please make the following firm offers for immediate acceptance:

$3,500,000 cash for Atlas' interest in NE—no strings no conditions, no option—naturally this would assure Atlas that we have made a firm decision to save NE from bankruptcy and therefore the major asset to be derived out of the deal by Atlas would be the virtual assurance that NE will be put back into healthy financial condition and converted into a profitable enterprise for the benefit of all the NE stockholders.

[fol. 1789] I think the absolute all-out horror-filled tragedy of Atlas permitting NE to go bankrupt to the financial

destruction of the stockholders is something so serious to Atlas that it would destroy public confidence in Atlas as a sound investment trust and make it impossible for all practical purposes for Atlas to continue in business.

I would expect an immediate liquidation of the company.

So this deal, in my judgement, should be viewed, not so much on how little or how much it brings in, in the form of purchase price now, but in terms of how much a skillfully managed Atlas Corporation can make for its stockholders through the coming years as opposed to how little the stockholders will realize out of an immediate forced liquidation on terms far from ideal.

I can argue the merit of this proposal, both practically and morally, going back to the fact that Odlum moved into my remnant RKO Company which consisted of nothing but a nice fat bank account of $24,000,000 plus and while hiding and concealing the fact from me, secretly acquired over 1,000,000 shares and took control of the company.

He then guided events into a merger between RKO and Atlas so my Atlas stock cost me $6,000,000 and any depreciation since then was solely due to the management of Atlas which I never interfered with in any slightest way at Mr. Odlum's request.

(The above is with respect to my alternate offer which is immediate firm (no option) exchange of my stock plus $1,000,000 cash for Atlas holdings in NE.)

[fol. 1790] So, according to my calculations, this offer would mean the Atlas holdings in NE, a bankrupt company by everyone's admission, would cost me:

Atlas stock	$ 6,000,000
Cash	1,000,000
HTCO advances to NE	10,200,000 plus
A.....	
Total	$17,200,000 plus

and this is only the beginning.

Exhibit C

Heaven knows how much we will have to put into NE to save it, but a conservative guess would be $20,000,000. Our money, not bank loans which would be on top of this.

And all of this ignores completely the very large amount of money it cost us in our G.D. transactions to arrange and make available those six 880's which everyone now complains about as being too late, but they didn't think they were worthless when we gave them to NE and when NE could not get a single jet from anybody else for love or money here or abroad. Not a jet to be had from anybody, and NE was so desperate that when Odlum first came to me he was ready to settle for one airplane diverted to NE from our deliveries in January or February. So we gave him 6 and on the best lease anybody ever got—so good Naish got fired for it—and now they are complaining that the planes were late.

Anyway our costs in connection with that deal—which were very, very heavy—are ignored in the computation I have submitted above.

[fol. 1791] If anyone wants to argue that my stock in Atlas is not worth $6,000,000 today, there is one pretty good answer to that. Atlas management had full control of my $6,000,000 plus and if it is not worth $6,000,000 today, the responsibility lies only one place—Atlas—and it is from this same Atlas that we are contemplating buying NE, so I think due adjustment is owing to us.

The same answer applies if anyone wants to argue that our $10,200,000 investment in NE is not worth that amount today.

I agree it is not worth that amount—it is not worth anything and neither is the Atlas indebtedness in NE which we are getting ready to buy.

Also, here again, any depreciation in the $10,200,000 is Atlas' doing—we advanced the money at Atlas' urgent plea and again at Atlas' request we have kept hands off 100 percent and Atlas has managed NE without any interference from us, so any loss in the $10,200,000 is Atlas' responsibility—and it is with this same Atlas that we are

dealing and we are entitled to proper adjustment and credit.

We want Stretch as a part of this deal.

Just one thing:
The basis for the two proposals:

$3,500,000 is a 50 percent markdown for cash—all cash now—no options—no notes—no TWA debentures—no Atlas stock.

The other proposal is based upon the following:

$7,000,000 is taken from the figures comprising the variable [fol. 1792] option which starts at $7,500,000 in April 1962 and slides up to $9,500,000 by April 1963. If you extrapolate this to the advanced date of December 1964, you come up with a figure of about $7,000,000.

If my stock is valued at my cost of $6,000,000 plus and you add the $1,000,000 cash which I am offering you come up with $7,000,000 plus.

I am sure they will argue that my Atlas stock is not worth $6,000,000. The answer to that is that it was not only worth $6,000,000 plus in a bank in cash and correction: sentence should read: The answer to that is that it was not only worth $6,000,000 it consisted of $6,000,000 plus in a bank in cash and no liabilities. If Atlas, under their sole uninterfered with arbitrary management—with no obstruction or interference from me—operating in accordance with their own judgement, lost a part of my $6,000,000 then I don't see why I should be penalized for it in this deal.

However, apart from all of the above, there is no reason why my price which I am tendering, consisting of my Atlas stock plus $1,000,000, there is no reason why this must be worth $7,000,000 because I assure the Atlas holdings in NE are not worth $7,000,000—not be a long way.

[fol. 1793]

EXHIBIT D TO AFFIDAVIT

HTC ROMAINE

478

FORRESTER, WM. A. JR.

Fri., 10/28/60

12:30 p.m. (Per Opr) Got him on the line.

INFO They talked.

2:00 p.m. Call him back and tell him that for his information that Charlie Thomas negotiated and developed the deal with Dillon Reed financing plan without my authority or encouragement from me; he forced it down my throat then at a Board meeting at which time he created a coalition of my directors and turned them against me and faced me with a mass resignation of all but one of the TWA directors. I have never liked this plan; I have never been in favor of this plan; I have fought it from the very beginning and I am still fighting it and I assure you that if it is employed it will be over my dead body and if you would like to come up with any suggestions of an alternative plan or any way whatsoever by which I can avoid being forced into the Dillon Reed program, I would be most grateful. It is very flattering for you to say that you don't think I have ever been forced to do anything and maybe there was a time when this might have been a fairly accurate statement, but I assure you it is not true today and has not been true concerning this Dillon Reed program from its inception. I have fought it hammer and tong from the very first day that I ever heard of it.

2:30 p.m. Ans: Advised.

Exhibit D

Mon., 10/31/60

11:50 a.m. Must speak to HRH.

INFO Omit; they talked.

Wed., 11/2/60

8:20 a.m. Tell HRH I would like to talk to him. I think I've got a plan on a second problem of his which he asked me to think about and I think it will have a bearing on the first problem.

Wed., 11/9/60

12:25 p.m. (Per Holliday) Anxious to talk; at Mr. Gordon's request, Forrester is meeting with Gordon in the morning, and must talk before then.

2:15 p.m. Tell him that I have been on this deal with Crown and the Convair people this entire day and I am not going to be able to talk to him until tomorrow.

200927

[fol. 1794]

HTC ROMAINE

500

ODLUM, FLOYD

Wed., 5/24/61

INFO HRH talked to him today.

5:20 p.m. Before we could contact Mr. Forrester he was on his way home to Connecticut. We will contact him tonight and expect to see him in my apartment here before the latter part of tomorrow forenoon.

6:00 p.m. Advised HRH, call omitted (per PW)

Fri., 5/26/61

2:00 p.m. Memo #148 (Per Mr. Cox) re TWA Financing

Exhibit D

6:00 p.m. (Per Roy) Mr. Davis has indicated a number of decisions are required and I am aware the New York Stock Exchange wants certain assurances. I don't want any of this done until I consider it during the weekend.

I will be in contact with you and Davis during the weekend. I want to be sure no action will be taken, no statements made or decisions given to the New York Stock Exchange or any action taken either with the NY Stock Exchange or otherwise until I have had a chance to review these things.

I will not call you or Mr. Davis tonight so please don't wait up for my call. I will try to contact both of you tomorrow.

7:30 p.m. Ans: Advised Odlum.

Sat., 5/28/61

10:00 a.m. Memo #152—Atlas Corp, AAL's 990s, Voting Trust.

HRH advised.

Sun., 5/28/61

5:00 p.m. I want to talk to Mr. Hughes about instructions for his public relations counsel.

6:10 p.m. Advised HRH (per Roy)

201144

[fol. 1795]

HTC ROMAINE

498

HOLLIDAY, RAYMOND

Wed., 1/25/61

8:45 p.m. I am going to go on to sleep now and regarding the two matters he is handling in NYC—the meeting of the trustees and the Board of Direc-

tors meeting—try to make those meetings as late as they can possibly be made in the morning.

9:00 p.m. Advised.

Fri., 1/27/61

9:00 a.m. I want to be sure that you are standing by at a telephone. I want you throughout the day in your office. I want you to be able to clear your office and to talk privately at any time.

9:30 a.m. Advised.

Sun., 1/29/61

9:30 p.m. Vic Leslie says that Counsel for TWA has advised him that TWA cannot accept #9. That they must insist on 26 and 30. They cannot accept it because it would take 90 days to deliver #9, whereas 26 and 30 each would be delivered within about 4 weeks from the time that Convair is given the go ahead.

Mon., 1/30/61

2:30 p.m. Regarding the $5 million—we will be obligated to pay provided we do not make an amendment to the contract increasing the number of aircraft from Convair.

By letter to Hughes Tool to my attention, Convair has advised that "delivery positions for the 7 additional 600 aircraft cannot be held beyond Feb. 1, 1961 without a definitive purchase agreement."

They point out that "these delivery positions have been held since July, 1960, and have now reached a point in manufacture when very substantial orders must be placed for parts and material. It is imperative that an amendment to the present contract increasing the number from 6 to 13 aircraft be executed prior to Feb. 1, 1961. If this is not done we shall have no alternative

but to bill Hughes Tool for the cost pursuant to the letter agreement and to cancel these delivery positions."

201108

[fol. 1796]

HTC ROMAINE

498

HOLLIDAY, RAYMOND

Wed., 2/1/61

3:00 p.m. HTCo has on order 10 CJ 805 engines which TWA state are surplus to their needs even assuming that they might receive all 24 880's. Storage charges on these engines are being billed by GE but no arrangement for the payment of any storage charges has been made.

Bob Rummel advises that GE would cancel the order for these 10 engines without any cost to HTCo and give us the right to order additional engines if a need should arise in Sep. or Oct. at the price HTCo is now obligated to pay. This is notwithstanding that the price will increase immediately by approximately $14,000 per engine. A cancellation of these—$1-1/2 million obligation—would not only relieve us of the present obligation but would improve our balance sheet.

Cancel: per delivery

Tue., 2/7/61

3:30 p.m. The contract change order we sent out for the 7 600's is being returned by Convair today as not acceptable. Also, they are putting a registered letter in the mail to us today rescinding forthwith the contract for the 7 22-M's.

Thu., 2/9/61

3:00 p.m. A. 880-M Recisions: Written notice was received today from Convair rescinding the 880-M

contract. No mention was made of cancellation damages, although Naish has orally stated there would be none claimed. It is the opinion of Cook and Holliday that without express agreement from Convair, HTCo will remain contingently liable for whatever damages Convair may suffer from HTCo breach. Accordingly they recommend that HTCo promptly send Convair a written agreement acknowledgment of the recision notice and expressly incorporate Naish's oral waiver of damage claims.

B. Purchase Agreement for 7 Additional CV 600 Aircraft.

1. This morning Cook talked to Loomis, Gullendar and Naish in San Diego concerning primarily the necessity for a conclusion of the contract on 7 additional CV600 aircraft. (Naish regarded the 880-M problem as having already been solved.)

2. Gullendar and Naish want Cook and Holliday to come to San Diego Monday, Feb. 13, to negotiate to a conclusion a firm definitive agreement on the 7 additional aircraft.

3. The contract from which HTCo is expected to execute with respect to these additional aircraft, calls for a "down payment" of approximately $5,800,000 and progress payments aggregating another $4,300,000 commencing on June 1, 1961. Naish says that Convair may accept a promissory note for 60 days, but no longer.

4. Any solution which can likely be negotiated with Convair will require banking support and should be coordinated with the Bank of America.

5. Cook and Holliday recommend that prior to Monday, perhaps, Friday afternoon or Saturday morning, they be authorized to negotiate with the Bank of America on the following basis:

Exhibit D

[fol. 1797]

HOLLIDAY, R.

Thu., 2/9/61 (Continued)

(a) The 880-M contract is irrevocably rescinded without penalty on Hughes Tool Co.

(b) Hughes Tool Co. will continue to offer TWA at least 2 of the remaining 880's until its new Board and President have had a reasonable opportunity to consider and accept.

(c) The $3,108,000 of down payment which so far remains applied to the 880 contract will be re-applied as a partial payment on the 600 contract.

(d) Convair will extend to Hughes Tool Co. credit for not less than 60 days for the deficiency of down payment on the 7 additional aircraft of approximately $2,700,000 and for the current deficiency of progress payment on the first 6 aircraft of approximately $2,600,000.

(e) The Bank of America would give general approval, though not a binding commitment for its financing of the final two 880's.

(f) Hughes Tool Co. agrees to obtain either a disposition of, or a mutually agreeable financing of the entire fleet of 600's prior to the date of the next progress payment due there on May 1, 1961.

(g) Negotiations with TWA and its investment bankers will be promptly commenced for a public offering of TWA subordinated debentures.

6. Naish says that no action can be expected out of TWA on either the additional 880's or on

the seven 880M's until some time in March, when at the earliest TWA will have its new Board and President.

7. In the absence of contrary instructions Cook and Holliday plan to arrive in Los Angeles Friday morning.

INFO Omit. They talked.

INFO Mon., 2/13/61

See message posted to Raymond Cook at 10:00 a.m. this date.

Thu., 2/16/61

6:20 p.m. (Per RC) Have received a telegram this morning addressed to Howard R. Hughes, 2200 Gulf Building, Houston, Texas as follows: "On January 6, 1961 we duly demanded that you pay the whole amount due and payable on the $10,664,659.39 note outstanding under your special loan agreement with us which has been past due since October 31 of last year. We have had no response from you and we hereby renew such demand and insist that the note be paid in full not later than February 24, 1961. If the note is not paid in full by that date we intend to avail ourselves of the remedies provided for in the loan agreement and to proceed promptly against you and against the stock of the Hughes Tool Company and other securities held by us as collateral for the loan. Signed, Irving Trust Company, Robert A. Kerr, Vice President." Need to talk to HRH re above. (above message should have been in red)

201110

Exhibit D

[fol. 1798]

HTC ROMAINE

498

HOLLIDAY, RAYMOND

Mon., 2/20/61

3:30 p.m. Regarding GE engines—have been advised by GE that if HTCo wants to cancel the ten excess CJ805's it must do so by Monday 2/20.

4:00 p.m. Advised.

7:30 p.m. Cancel the engines provided we have the privilege to reinstate.

Regarding the Convair negotiations: I urge as follows: Regarding the claim that I would take AAL specs for the model 600's—this is true as to the original specs and at no time have I indicated any hesitation or uncertainty concerning the acceptance of the original AAL specs. At no time did I say that HTCO would take any subsequent change orders placed by AAL without approval of same first.

Convair's argument "why obtain TWA's opinion regarding 3% of the airplanes when TWA will not accept the other 97% is completely improper for the following reasons:

It is not up to Convair to decide whether TWA will accept the so-called 97% of the airplanes. This has never been a matter for discussion. However I obtain TWA's acceptance to this is my own problem; most likely HTCO will control TWA when that matter comes up.

In any event, it is not Convair's worry; the 97% is HTCO's problem.

Now, regarding the 3%; Convair is mistaken in saying it is HTCO's fault that this matter was not resolved because HTCO failed to give deci-

sions; this is an invalid and improper decision which Convair is seeking to take; for this reason we do not want these 3% of changes. We have a signed specification and that specification is the airplane we want. Failure by HTCO to accept changes ordered by AAL simply means by omission that HYCO has elected to take the airplanes without any changes and contractually unless you and R. Cook have permitted a default by failure to make payments, Convair is ~~not~~ obligated to give us the airplane in accordance with the original specifications.

If Convair says HTCO has failed to give a decision with respect to the change orders the answer is simply we failed to order the changes when offered and therefore I say again we elected not to take the changes and this is the way we want the airplane. Convair has no right whatsoever to bill HTCO for the 70 thousand dollars. HTCO demands the airplanes according to the original specifications and does not want any of the changes.

At no time have we agreed to take blanket changes by AAL or any of them for that matter and I do not want them. In other words, Convair wants an answer regarding the change orders and here it is: The answer is *no* regarding all change orders regarding the original specs. Quite obviously Convair wants HTCO to accept these change orders in the interest of saving Convair money which naturally results from making the HTCO plans identical with the AAL planes. If Convair went ahead and put some of these changes into the HTCO planes it was done not because Convair thought we wanted them and not because Convair was uncertain as to whether we wanted them but simply because

Exhibit D

[fol. 1799]

HTC ROMAINE

498

HOLLIDAY, RAYMOND

Mon., 2/20/61 (continued)

Convair wanted to put them into the planes and charge us for them for the simple reason that this would save Convair a great deal of money over the other route, namely, to build the planes in accordance with the contract.

I want you to recite all of the above to Convair in detail and I want you to say in spite of my feelings that this is a very bad deal for HTCO and that it is costing HTCO approximately a million dollars for changes which I do not want in the airplane. Nonetheless, in the interest of getting the entire matter resolved HTCO is willing to do the following:

Give Convair promissory notes as negotiated by you; make no other changes whatsoever in any of the contracts except the one which Convair has requested concerning the 70 thousand dollars of change orders. HTCO will accept that provision exactly as it presently exists as a result of your negotiation with Convair. There are to be, however, absolutely no other changes at this time. This means the contracts will remain as presently drafted concerning delivery. Convair and HTCO to have the following oral understanding: (Not intended to be legally binding but hoped to be morally effective) A statement of intentions that Convair recognize and negotiate and that with respect to items which may be mutually agreed deleted Convair will be reasonable in the pricing. HTCO will arrange for contract administration concerning all aircraft on order in a manner in keeping with Convair's desires either by Bew or someone else (if it is

not to be Bew HTCO will make every effort to find someone acceptable to Convair and will submit his name to Convair for discussion prior to assigning him to the position).

Regarding deliveries—HTCO recognizes that present schedule is unrealistic and will sit down with Convair without delay to review proposed new scheduling taking in every way a reasonable viewpoint provided the relative slippage between AAL and TWA is as Convair represents, not disadvantageous to TWA in relation to AAL as compared to their relative position prior to slippage.

In regard to deliveries, you might point out HTCO has had long experience with Boeing, Lockheed and Martin in purchasing transport; aircraft; is well aware they rarely come out on time and that you cannot get blood out of a rock so that if the deliveries have slipped then they have slipped and there is nothing we can do about it. You might point out HTCO has never sought to cancel any one of its numerous contracts with airplane manufacturers for reasons of retarded delivery and from the best of my knowledge has never sought to cancel any airplane contract for any other reason. The best evidence of this is the fact that Convair has released us from all liability under the 22M's and we still do not want to cancel this contract and are fighting to avert its cancellation.

Regarding the informal understanding—regarding the four additional 880's; I say that HTCO desires that the contract for these airplanes remains undisturbed. HTCO will notify Convair promptly of the disposition of the airplanes. HTCO has offered the four airplanes to TWA. If TWA does not take them HTCO will notify Convair promptly of what is desired to be done with these airplanes. In any event, in accord-

ance with Convair's last proposal HTCO does not make any commitment at this time to Convair in any way affecting these airplanes either for cancellation or otherwise and they are not

HOLLIDAY, RAYMOND

Mon., 2/20/61 (continued)

allocated to TWA; nor are any other unallocated airplanes to be allocated to TWA until TWA makes at least a satisfactory oral agreement with HTCO with respect to these four additional airplanes.

Regarding the 22M's HTCO is aware that Convair contends that Convair is no longer obligated contractually to HTCO with respect to these airplanes. HTCO does not consent to or acquiesce to this position by Convair but at the same time Convair does not change the documents to be signed at this time or desire anything toward reinstatement of the 22M contract.

However, HTCO will appreciate very much indeed Convair withholding for as many days as is humanly possible any action toward destruction of these aircraft—or commitment to anyone else concerning them as HTCO is making an immediate all-out effort for TWA to accept these aircraft; taking all measures toward this objective and HTCO has confidence in this respect in spite of Convair's apparent receipt of information tending to indicate that TWA is not interested in these airplanes. In addition to this HTCO is approaching certain bankers immediately as to the possibility of obtaining financing for the purchase of these aircraft independent of any possible disposition to TWA. HTCO is determined to purchase these aircraft; does not

want them destroyed or disposed of to others under any circumstances. HTCO will make a most determined effort to satisfy Convair immediately of HTCO's determination and financial ability to accept and pay for the aircrafts promptly *fulfilling* its obligation in regard to these airplanes without delay.

In summary, you could point out to Convair that the settlement HTCO is proposing would give Convair everything that Convair wants in regard to revised specs and *an* additional $70 thousand dollars added to the price of each model 600 airplane and would put HTCO completely at the mercy of Convair in regard to any adjustment of this matter. I consider this concession completely and utterly unfair but I am proposing it as an indication that we want to give and take and we are therefore placing ourselves at Convair's mercy in respect to the adjustment of this matter if Convair should ever decide in Convair's own arbitrary judgment to condescend to make any judgment.

Also, it should be noted that with respect to the seven 22M's, which we so urgently want, again we would be completely at Convair's mercy in regard to any hope of obtaining these airplanes inasmuch as under the proposal I am making no new papers would be signed concerning these aircraft and therefore Convair's present written notice of cancellation would stand unchanged and in full effect.

Make full use of and emphasize most strongly with respect to the two points below: (a) the revised specs and $70 thousand of additional price; (b) cancellation of the seven 22M's to HTCO—we would be completely at the mercy of Convair in any possible discussion concerning a judgment or disposition of these matters.

Italicized words typewritten interlineation.

Exhibit D

Then point out to what extent it may seem advisable that in return for HTCO placing itself completely at Convair's mercy in respect to the above points, it seems little enough that Convair trust HTCO to sit down immediately

201113

[fol. 1801]

HTC ROMAINE

498

HOLLIDAY, RAYMOND

Thu., 3/2/61

4:00 a.m. Please take all preparatory steps necessary to be in a position to tender to the Bank of America on Friday a mortgage on the real estate we discussed. I hope to persuade the bank to accept a general description of the property in general language which will not require the taking of an inventory. Please do not actually make presentation to the bank until I communicate further with you, but please make all necessary preparations in order that we will be in a position to make this tender by Friday afternoon at the latest, as this is the deadline imposed by the bank. Many thanks, Howard.

4:15 a.m. Ans: Advised.

Fri., 3/3/61

6:00 p.m. We met with B of A this morning and they are satisfied to take the property as collateral provided the right to egress and ingress can be worked out.

We agreed that it was not the intention of you to deny the right to egress or ingress and are now developing a method by which this can be done, to wit: A mortgage on the road way with an easement back to HTCo.

With this one change the bank is completely satisfied and the paper work is being completed to

provide for the mortgages which will probably be signed on Monday. In other words, unless some further question arises from B of A the matter with them is now settled until the time, or until April 20, when it will become necessary to renew the note on some long term basis.

The following TWX was sent to HTCo in Houston: "Model 880 aircraft manufacturing statements #26 and #20, were initially tendered to the HTCo on Aug. 12, and Oct. 18, 1960 respectively and upon your failure to accept delivery, were stored. Convair hereby notifies you that said aircraft #26 and #30 are being prepared for 43-tender to the HTCo for inspection and acceptance on March 8 and March 15, 1961 respectively, pursuant to an agreement between Mr. Hughes and Mr. Loomis on Feb. 15, 1961.

"You are requested to advise the undersigned immediately if the HTCo or TWA as assignee of HTCo will, after inspection, accept the aircraft on the date indicated. In connection with the foregoing, your attention is invited to the provisions of Article #2A5 of the purchase agreement between HTCo and Convair dated Sep. 10, 1956, signed, Convair by D. H. Diggs for C. L. Meador."

I received in my office in Houston a letter from Convair dated Feb. 27, 1961, asking for prompt designation of a representative to provide administration of the 600 contract pursuant to the negotiations conducted in firming up the seven follow-on 600's.

Have met with Bautzer and am going to meet again in just a short time.

HRH Advised.

Exhibit D

[fol. 1802]

HTC ROMAINE

498

HOLLIDAY, RAYMOND

Fri., 3/3/61 (continued)

5:15 p.m. OK on Bank of America. Please proceed to work it out accordingly. Regarding the ingress and egress, please be most careful on the paper work on this.

Regarding the two communications from Convair, do not do anything regarding these things until further instructions from me. I will get word back to you by Mon. morning what to do apropos these two messages delivered me from Convair. Please do not give them any response orally or otherwise. If they press you futher for an answer, tell them they will hear back from us on Mon.

11:30 p.m. Advised—call cancelled.

Sun., 3/5/61

12:00 a.m. Please call Cook and say that I want both of you to leave Houston Sunday evening at the very latest. You and Cook are to come out together. I will talk to you when you get to L.A.

Tue., 3/7/61

10:00 p.m. You are to come alone to Odlum's ranch tomorrow. Just you are to come out and follow all the instructions as given before concerning the meeting at the Odlum ranch tomorrow afternoon.

Wed., 3/8/61

3:45 a.m. Send a telegram or however it should be done to Convair by 7:00 a.m. from Houston; to be sent by Chuck Price in the usual way. The authoriza-

tion should apply to #26 only not #30 or any of the others. From a practical standpoint the result should be that #26 be delivered to TWA without any delay whatsoever. I want the designation to be carried out from a legal, practical, mechanical and documentation standpoint. The same identical way we have done the others, unless there was a defect in the documentation on the prior occasions which was disadvantageous to us, in which case, of course, I want any such defects not to be repeated on this occasion.

4:45 a.m. Ans: Advised.

3:45 a.m. Please tell Odlum when you first see him that I appreciate very much indeed the message he was kind enough to send me last night, and please tell him further that I have complied with and carried out his recommendation precisely and exactly in every detail. Also, please tell him that I appreciate very deeply his courtesy, concerning your meeting today and also the meeting he had with Greg Bautzer last night, both upon such short notice.

201117

[fol. 1803]

HTC ROMAINE

498

HOLLIDAY, RAYMOND

Sun., 3/26/61

5:15 p.m. I request that you leave for New York tonight on a very important matter.

5:20 p.m. Advised.

Wed., 3/29/61

7:00 p.m. I want you to remain in NYC because I may want you to have a meeting either tomorrow or Friday, but you can definitely get home the Easter weekend.

Exhibit D

Thu., 4/6/61

9:20 p.m. Memo #49—Letter from TWA.

Sat., 4/8/61

1:30 p.m. Memo #51—TWA Sub. Debentures

HRH Advised.

Fri., 4/14/61

1:00 a.m. Do not sign anything unless you have approval from me or from Bautzer through me. On future signatures on any letters or documents, you may take Bautzer's suggestions.

Ans: Advised.

Sun., 4/16/61

12:30 p.m. I met with Plumb yesterday and until 2 p.m. EST today and have made arrangements to make available whatever more time he desires.

201120

[fol. 1804]

HTC ROMAINE

498

HOLLIDAY, RAYMOND

Mon., 4/18/61

1:15 p.m. Regarding copy of the letter of over-subscription of debentures, please notify the people at CPW&W that we do not consent. Until further communications you must consider that this is disapproved. However, we will consider the matter and communicate again with them. Meantime, the matter is not approved.

What is the latest date on which action can be taken on this matter? Is the failure to respond reason for them to believe that the matter was approved? I want your and/or Bautzer's opinion on this. Is failure to reply construed as consent?

The date on this letter was April 12; why wasn't I notified sooner?

2:45 p.m. Ans: I will advise them directly and also get answer to the questions you mention and let you know forthwith—possibly late this evening or first thing tomorrow morning.

Wed., 4/19/61

2:30 p.m. For practical purposes we have until April 26, the day before the board meeting and stockholders meeting on April 27, because this is a matter that should be approved by the Board of Directors. Technically and legally, it could probably be approved at some date after the Board meeting and could be approved by the Executive Committee any time within one week prior to the offering, which could carry it into sometime in May, but the answer should be given for all practical purposes by April 26. It is something the company would want to approve rather than the Executive Committee. The reason the letter was not brought to your attention before was that copies were sent to me both in Houston and NYC and it just happened that I wasn't in either place.

Thu., 4/20/61

10:00 a.m. Where do we stand on the four airplanes for TWA?

12:15 p.m. Ans: I had lunch with Leslie and he said that if we wanted to make them an offer we should do so because it would have to be appraised by the Board of Directors and it would have to be before the Board meeting because at that time they would probably want to commit for some Boeings.

I don't have any new information than what I gave to Bautzer, and I know he talked to you

since that time. The last thing we had was the letter Leslie sent to me and following that I had lunch with him. Leslie said they would like to have the planes but we will have to make them an offer. I did not give an offer because I felt we had a deal all along. He did reiterate, however, that they are not going to try to buy them at a distressed price.

201121

[fol. 1805]

HTC ROMAINE

498

HOLLIDAY, RAYMOND

Fri., 4/21/61

3:00 p.m. HRH advised.

Mon., 4/24/61

(HRH called Bautzer and Bautzer called Holliday, while he was talking to HRH, so Bautzer could ask questions of Holliday and then pass the answer to HRH.)

7:20 p.m. I met with Mickey West today and discussed with him his working with Tom Plumb.

Tue., 4/25/61

10:02 a.m. Memo #64—TWA Debenture Problems.

Wed., 4/26/61

9:00 p.m. Memo #68—Offer of Planes to TWA.

Omit calls—they talked.

Thu., 4/27/61

9:30 p.m. Memo #72—TWA Stockholders Meeting.

Exhibit D

Fri., 4/28/61

4:15 a.m. Do not execute the document you are holding in Houston until you get my approval.

8:30 a.m. BG advised him.

201122

[fol. 1806]

HTC ROMAINE

498

HOLLIDAY, RAYMOND

Sun., 4/30/61

8:15 p.m. It is OK for him to go to NY if his business is in connection with the four airplanes. It is also OK for him to execute the papers he has. Go ahead and do it before he goes to NY. If he is going to NY, execute the papers in Houston, put them in an envelope to Schwab and give them to Chuck Price. Instruct Price to hold it for further instructions.

8:30 p.m. Advised Holliday, who called Schwab.

Mon., 5/1/61

4:45 p.m. Before talking with the people at TWA about the four 880's I need to speak to you. TWA, from my conversation with Leslie while Leslie was in Kansas City, will require that a written offer be made quickly.

Tue., 5/2/61

11:40 a.m. Memo #73—Payment for 600's.

4:30 p.m. Memo #74—Re Letter from Olds.

Sun., 5/7/61

4:20 p.m. I have talked to Convair and while they are not unduly upset about the progress payments, they

are very anxious to proceed immediately with negotiations.

8:30 p.m. Advised.

Mon., 5/8/61

4:30 p.m. Memo #76—Progress Payments to Convair.

Tue., 5/9/61

3:30 p.m. Memo #78—TWA Debentures.

201123

[fol. 1807]

HTC ROMAINE

498

HOLLIDAY, RAYMOND

Tue., 5/9/61 (Continued)

9:00 p.m. I talked with Bautzer and he affirmed that Reed had told him that the over-subscription right to the extent that it was subscribed would go to reduce the commitment of the Tool Company.

Following my conversation with Bautzer, I called Francis Reed and he affirmed that to the extent the over-subscription right given to the minority was actually subscribed that the commitment of the Tool Company would be correspondingly reduced. Reed said that he felt that it was late but he would try, and felt confident that he could get the papers amended to provide for the over-subscription right. Reed also told me that it would be necessary for the Tool Company to give to TWA a letter assenting to an over-subscription right and will dictate a letter accomplishing this to my secretary tomorrow morning.

Omit—they talked.

Exhibit D

Wed., 5/10/61

3:50 p.m. Memo #81—Purchase Agreement on 13—600's.

Memo #82—Proposed Telegram to TWA.

Thu., 5/11/61

9:00 p.m. Prior to leaving Houston, I talked several times with Bill Forrester and the work on the project seems to be going ahead in full course. I have an appointment with Forrester at 9 in the morning and at that time the plan and mechanics for accomplishing the project will be discussed and delineated.

Omit—they talked.

Fri., 5/12/61

4:30 p.m. Memo #85—Re TWA Financing.

Sat., 5/13/61

4:00 p.m. Memo #86—Re Brandi.

Memo #87—Re Brandi.

201124

[fol. 1808]

HTC ROMAINE

498

HOLLIDAY, RAYMOND

Sun., 5/14/61

7:15 a.m. Arrange a meeting with C. Davis for later in the day.

10:00 p.m. Memo #90—Offering of Debentures.

Memo #91—Proposed Resolution.

Exhibit D

Wed., 5/17/61

7:00 a.m. Please follow carefully the recommendations of Mr. Odlum and Mr. Davis.

7:30 a.m. Ans: Advised.

8:30 a.m. The TWA Board of Directors declined the Merrill Lynch plan. They voted to proceed with their own registration statement and their own offering and Mr. Davis was permitted to come into the meeting and talk to the Board of Directors and explain the position of the Tool Company. However, the matter seemed to be completely cut and dried and after having taken the action, I retired from the meeting to advise Mr. Davis of the action taken.

Mr. Davis gave me a letter addressed to the TWA Board which pointed out the risk of liability on the part of TWA and the Board members individually, etc. I gave the letter to the Chairman with the request that he read it to the Board and it was read to the Board by Mr. Tillinghast.

Following the reading of the letter, Mr. Tillinghast designated Carl Rowe, counsel for TWA, to talk to Mr. Davis immediately and Mr. Breech designated Mr. Reed, counsel for the Trustees, to talk to Mr. Davis, and that is the meeting Mr. Davis is presently attending.

Omit all calls—they talked.

Sat., 5/20/61

6:30 p.m. Memo #114—Board of Directors Meeting, HTCo.

Memo #118—Meeting with Forrester.

Mon., 5/22/61

11:45 a.m. Telegrams sent to SEC, TWA and Davis. See Memo #126.

Exhibit D

[fol. 1809]

HTC ROMAINE

HOLLIDAY, RAYMOND

Tue., 5/30/61

10:15 p.m. Please tell Mr. Davis to be sure that Mr. Odlum, or anybody, does not give to the NY Stock Exchange any decision in this matter until I communicate with Mr. Davis.

10:30 p.m. Advised.

Thu., 6/1/61

4:30 p.m. Advised Holliday of message to Davis.

Fri., 6/2/61

12:15 p.m. Omit all calls—they talked.

Mon., 6/5/61

5:35 a.m. I urgently and most strongly request that the proposed press release not be made and that we not make any other press statement until further discussion. I want to put forth for Mr. Davis', Mr. Holliday's and Mr. Odlum's consideration my reasons for feeling as I do. If afterwards they do not agree then I will not object further.

6:00 a.m. Advised.

Fri., 6/9/61

8:30 a.m. The minority subscription figure is $19,037,900. It is possible that this figure might change slightly as it has not yet been certified.

11:30 a.m. Advised.

Mon., 6/19/61

3:00 p.m. Memo #225—Letter from Tillinghast.

Memo #226—Telegram to Tillinghast.

Exhibit D

[fol. 1810]

HTC ROMAINE

498

HOLLIDAY, RAYMOND

Mon., 7/31/61

1:30 a.m. HRH advised. Calls cancelled.

Fri., 8/4/61

4:30 p.m. Memo #406—B. of A. Views on Settlement Negotiations.

Sun., 8/13/61

9:00 p.m. I want to call you early in the morning, but don't wait for it—go ahead with your activities pending such time as I call you.

9:30 p.m. Advised.

Tue., 8/15/61

3:15 p.m. Memo #486—Convair 880's.

Tue., 8/22/61

7:00 p.m. Regarding Houston firm, I am not going to be able to get that to him to transmit until tomorrow morning, so just let anybody waiting up go on to bed.

7:45 p.m. Holliday advised.

Sat., 9/9/61

7:30 p.m. Have you heard from Mr. Loomis and if so, what is the report?

11:00 p.m. I haven't heard from him at all.

Fri., 9/15/61

10:30 a.m. Set up a conference call in 30 to 45 minutes between Bill Gay, Raymond Holliday and myself.

Exhibit D

[fol. 1811] HTC ROMAINE

HOLLIDAY, RAYMOND 498

Mon., 10/2/61

7:00 p.m. Telegram from G. D.

Thu., 10/19/61

7:00 p.m. Memo #892, Re Northeast.

Fri., 10/20/61

7:30 a.m. Advised HRH of Memo #892. Call cancelled.

4:00 p.m. Memo #1028—Lockheed—Jetstar.

Tue., 12/19/61

4:00 a.m. Memo #1028, HRH advised per JH; cancel.

201129

[fol. 1812] #330 521

HTC ROMAINE

July 19, 1961
7:15 p.m.

To: HRH

From: Raymond Holliday

The first thing that came up at the board meeting today was the approval of the minutes. I explained that I had just received the minutes; that while they might have been mailed that I hadn't received them and consequently I would abstain from voting.

Next was the approval of the Executive Committee Meetings and I had glanced at these, and the minutes of June 29, that was the authorization for the filing of the law suit. I stated that I questioned the authority of the Executive Committee to authorize the filing of the law suit because as I remembered the resolution hiring the law firm that came out of the board of directors meeting that a report was to be made back to the board by the Cahill firm. It was explained to me that there was a report made to the board but that it was oral; that a report also was made to the Executive Com-

mittee on June 29 and at that time the Executive Committee authorized Tillinghast to file the law suit whenever he felt it was the necessary thing to do in his judgment. So I questioned the authority of the Executive Committee and wanted the record to show that. At that time Slack suggested that the board should at that time ratify the action of the Executive Committee. The vote was taken and I cast the only "no" vote.

Nothing else came up for some time except the approval of the 1961 financing for the Boeing purchase. When that came down for vote I pointed out that nothing had been said yet on the part of HTCo. making a settlement which would permit this and there was a considerable amount of discussion. Mr. McCone and Mr. Hood raised some questions about it which were going into the merits of it, as to whether or not it was something that could be afforded, whether they needed the planes, and some very searching questions.

I pointed out that there were some discussions going on at that time in which the financing was an ingredient and if the board could not withhold the matter for a vote at a later time I would abstain from voting. McCone also abstained because he thought it was being acted upon too quickly.

Tillinghast made a report of his conversations with Bautzer and after he made his report I pointed out that Bautzer was authorized to make the representations he made. At that point Breech suggested that since I was also a defendant in the suit that possibly it might embarrass me and I might retire from the meeting for 15 minutes, which I did. There was no further discussion of this, and nothing also came up at the meeting that was of any particular significance. There was a lot of talk about why the company was losing money but nothing else came up for action or to be voted upon that was anything except routine.

I made a complete report of the meeting to Bautzer.

Exhibit D

[fol. 1814]

HTC ROMAINE

519

OPERATING MEMORANDUM

Subject: TWA Subordinated Debentures, etc.

Date 5/11/61 - 5:00 AM

From: HH to R. Holliday

Please move ahead with all possible speed on the program to sell and pay to the HTC the proceeds thereof the entire $111 million plus of TWA's subordinated bonds. Please consider this authority to do everything necessary to proceed with this program without delay. The directives concerning the secrecy which I gave you before may be violated as required, but no more and no sooner than necessary. Bear in mind that any market is supply and demand, and if word of availability of this enormous quantity of bonds should suddenly become known up and down the street, it might raise hell with the price. Please work in close contact with Bill Forrester (or whatever other investment brokers you decide to use). But remember, this is a tricky program and one which will require the maximum skill and attention of the very best investment brokerage brains every single minute of every day as to every single detail.

This is a big assignment I am giving you, Raymond, and if you carry it out to my expectation, the rewards and results to you will be very substantial. I would like to have before me the plan of how this program is to be carried out, but you can dictate this in the evenings when it will not interfere with your work, and I do not want to delay or hold up any slightest detail of this program waiting for me to read these plans, and I do not want you to wait one minute for any further authority or comunication from me.

•••

Regarding the warrant or right to purchase TWA stock which will be attached to the debentures, as I stated in my last message, we would like to retain as many of these warrants as possible, but if the debentures simply cannot be sold without the warrants attached, even at a reduced price

(reduced by not too much more than the value of the warrant), then in that event, we will simply have to let the warrants go along with the debentures. The sale of the debentures is the primary objective and has priority over any other consideration, such as retention of the warrants.

• • •

Regarding Convair, I see no reason for you to go to San Diego. I feel confident if you call on the telephone immediately to Meador or Loomis and give them full information concerning the subordinated debenture offering, but not including, of course, our recent decision to liquidate the $70 million plus of debentures originally intended to be held by HTC, but pointing out that beyond any doubt this offering will bring the HTC around $20-30 million, and state to Meador or Loomis that they have the HTC's promise to start making payments to Convair in whatever amount Convair requires the very first day that we commence receiving funds from the sale of these debentures. I fully believe that if we lay this on the line, openly and honestly with Convair, so that they know there is some money

[fol. 1815] forthcoming just over the horizon, I believe they will be willing to wait until we receive some of these funds, provided it does not take too long. Anyway, you can do all this on the phone and tell Meador and Loomis that you are busily engaged in this debenture program and that a trip to San Diego will only delay it, and if you point out that you probably should go immediately to New York in connection with this very matter, and if you offer to come to San Diego if they desire following this trip to New York, by which time you will have perhaps more accurate dates available, I am sure you can obtain their acceptance to this program. Anyway, please try immediately.

• • •

Regarding the letter requested by TWA concerning the forthcoming offering of debentures, copy of which has been sent to me (HRH): Please ask Bautzer and Cook each by telephone for any changes (if any) they recommend in respect to this document. Try to persuade Cook to give you his advice. Tell him I am contacting Bob Campbell right away regarding the fees.

Exhibit D

But in any event, I want this letter executed and delivered in the quickest possible time. If it is impossible to obtain Cook's comments, go ahead without them. Give Bautzer a very quick opportunity to seek counsel within his firm as some of these men might be very valuable in studying and revising this letter. In any event, I want the letter executed as quickly as possible, still to comply with the requests contained herein. Then I want it sent to New York air express, picked up at the airport and shot into Leslie by the quickest possible method of conveyance. Call Leslie immediately and say that the letter will be executed today and will be sent today and will be in their hands by tomorrow morning at the latest. Make a second call to Leslie after the letter has been executed and sent. Could be Reed if this is the man to be assured. HRH wants Leslie or Reed or both to be called and say that they letter will be executed today and will be received by them no later than tomorrow morning. HRH wants the second call to either or both of these, saying the letter has been executed and has been sent and is en route. If the letter is already in the mail, please phone them and tell them. Holliday is to decide whether it will be Leslie or Reed or both.

301289

[fol. 1816]

519
HTC ROMAINE

OPERATING MEMORANDUM

Date 5/11/61 - 5:00 AM

Subject: TWA Subordinated Bonds

From: HRH to R. Holliday

Please move ahead with all possible speed on the program to sell and pay to the HTC the proceeds thereof, the entire $111 million plus of TWA's subordinated bonds. Please consider this authority to do everything necessary to proceed with this program without delay. The directives concerning the secrecy which I gave you before may be violated as required, but no more and no sooner than necessary. Bear in mind that any market is supply and demand, and

Exhibit D

if word of availability of this enormous quantity of bonds should suddenly become known up and down the street, it might raise hell with the price. Please work in close contact with Bill Forrester (or whatever other investment brokers you decide to use), but remember this is a tricky program and one which will require the maximum skill and attention of the very best investment brokerage brains, every single minute of every day as to every single detail.

This is a big assignment I am giving you, Raymond, and if you carry it out to my expectation, the rewards and results to you will be very substantial. I would like to have before me the plan of how this program is to be carried out, but you can dictate this in the evenings when it will not interfere with your work, and I do not want you to delay or hold up any slightest detail of this program waiting for me to read these plans, and I do not want you to wait one minute for any further authority or communication from me.

301291

[fol. 1817]

519
HTC ROMAINE

OPERATING MEMORANDUM

Date 5/11/61 - 5:00 AM

Subject: Regarding the warrant or right to purchase TWA stock which will be attached to the debentures.

From: HRH to R. Holliday

As I stated in my last message, we would like to retain as many of these warrants as possible, but if the debentures simply cannot be sold without the warrants attached, even at a reduced price (reduced by not too much more than the value of the warrant), then in that event we will simply have to let the warrants go along with the debentures. The sale of the debentures is the primary objective and has priority over any other consideration, such as retention of warrants.

301292

Exhibit D

[fol. 1818]

#14
HTC ROMAINE
520

OPERATING MEMORANDUM

Subject Aircraft #26 and #30 Date March 9, 1961
4:50 p.m.

To: HRH

From: Raymond Holliday

1. Odlum recommends that HRH designate both #26 and #30, but in the event HRH will not do this, he recommends that an agreement be sought with TWA whereunder the designation of #26 be rescinded and #30 designated in lieu of #26 in order to give TWA the earliest possible deliveries.

2. Odlum advises HRH that HRH will make a serious mistake if he seeks to obtain an indemnity or waiver, either oral or written, in respect of the TWA law suit by using the last 20 TWA planes as a "quid pro quo" for such an indemnity or waiver.

3. Odlum states that it is his view that the TWA board of directors cannot recall the resolution ordering the investigation and that the best course of action to pursue is to offer the trustees and TWA some "sweetener" such as an option on the four 880s and some financing assistance and endeavor to have the investigation sufficiently thorough to prevent a derivitive suit, but cursory enough so that only a small amount of money would be involved. He states this type of suit can be compromised and settled by agreement of the parties, whereas a derivitive suit settlement would require the approval of a federal court, and further that compromise and settlement of this type of suit would provide insulation against the derivitive suit.

4. Holliday recommends that HRH call Odlum since our meeting of yesterday and discuss the over-all problem.

Exhibit D

5. Holliday also recommends that HRH consider the recommendation be made to Bautzer regarding Holcomb. Yesterday Holcomb stated to Montrose that he considered Slack's speech and conduct trecherous and unforgivable and that he was so damned mad he had to bite his tongue while Slack had the floor.

6. Holliday can perhaps give HRH more background information in this regard in a telephone conversation.

301392

[fol. 1819]

(Letterhead of General Electric Company)

October 5, 1961

HUGHES TOOL COMPANY
3000 Romain Boulevard
Los Angeles, California

Attention: Mr. Howard Hughes
President

Gentlemen:

In past conversations and correspondence with your corporate management, we have endeavored to determine your intentions regarding purchase of spare equipment to support your order for thirteen Convair 990s and four remaining Convair 880s. Although thoroughly sympathetic and cooperative, your management have not been in a position at any time during the past year to commit to purchase of any engines, reversers or suppressors.

After rechecking with your management and General Dynamics and carefully reviewing various means of maintaining inventory of these items without excessive cost, we have determined that it is necessary to reallocate these items to spare parts and firm orders.

We regret this action will result in virtually no spare equipment being available at the time the aircraft are

ready for delivery. However, we thought it best to advise you.

Very truly yours,

/s/ R. L. STODDARD
R. L. Stoddard, Manager
Commercial Contracts

COPIES: Mr. Raymond M. Holliday
Mr. J. G. Zevely, General Dynamics

224

[fol. 1820]

Transmitted to HRH in Memorandum No. 644.

(Letterhead of Atlas Corporation, New York 5, N. Y.)

AIR MAIL September 6, 1961

Re NORTHEAST AIRLINES, INC.

Mr. Howard R. Hughes,
7000 Romaine Street,
Los Angeles 38, California

Dear Mr. Hughes:

Since last writing to you on August 28, 1961 concerning Northeast Airlines, Inc., the following has developed:

(1) The insurance underwriters have advised us that the hull and liability coverage of Northeast will be cancelled on September 15th unless advance premiums aggregating about $530,000 are paid prior to that time.

(2) The secured creditors are temporarily foregoing payments of interest as well as principal, but have asked for another meeting in the middle of this month to review the situation. In other words, the secured creditors are not committed beyond September 15th and have advised Northeast that they expect some definitive proposal from Northeast concerning the cash situation as a condition of their continued forebearance.

The overdue trade debt of Northeast Airlines at the present time is about 4½ million dollars. On the basis

of past experience, October and November are the poorest months in the Florida air traffic market. It was with these facts in mind that I indicated in my letter to you of August 17th that 4 or 5 million dollars would be required to carry Northeast through until the beginning of the winter season, after which substantial profits can reasonably be expected. However, with the cooperation of the secured creditors, and assuming the trade debt can be held in line by substantial payments thereon, it is my belief—and that of Northeast's Treasurer—that $3,000,000 might be sufficient for this purpose.

350001

HTC ROMAINE

[fol. 1821] After discussing the matter with Mr. Holliday, I conferred with one of the senior officers of Manufacturers Trust Company as to whether Manufacturers Trust Company would be willing, assuming Hughes Tool Company desired so to do, to guarantee a loan of approximately 3 million dollars from the Trust Company to Northeast Airlines. I was advised today by the Trust Company that as a matter of principle it would be happy to do business with the Tool Company along the lines suggested, provided, of course, that sufficient financial data concerning the earnings, assets and liabilities of the Tool Company were made available to justify a normal commercial loan.

Since my last letter to you I have also been informed from sources in which I have complete confidence that the CAB would approve a transaction of the character above mentioned. As a matter of fact, Mr. Hughes, I have been informed from the same source that it appears quite likely that as an alternative to the collapse of Northeast Airlines, the Board would entertain favorably a proposal whereby the Hughes Tool Company acquired outright control of Northeast Airlines through purchase of the Atlas interests in the airline on condition, of course, that the Tool Company would provide Northeast Airlines with the necessary working capital to assure its financial integrity. Atlas Corporation would be willing to entertain such a proposal from you on fair terms as the best and the quickest means

of resolving a complicated and difficult situation for all concerned. It could well be that if this matter were presented soon enough, the question of the Atlas-Hughes Voting Trust could be resolved expeditiously and in a way which would terminate that problem favorably from a public standpoint.

I hope that you have had an opportunity to read the material I enclosed with my letter to you of August 28th because I believe this shows pretty conclusively that Northeast's future is assured if the immediate financial problems can be resolved.

Unfortunately, time is extremely critical. The insurance premiums are due eight days from today. Even if you were to provide a solution to the problem, it would still be necessary to present the matter to the CAB.

Since the Tool Company and yourself together have the largest stake in the Northeast/Atlas situation, bankruptcy or receivership of Northeast would probably have a greater impact on you—both directly and collaterally as it might affect your other interests—than on anyone else. On the positive side, it is my sincere belief that prompt and appropriate steps by the Tool Company could form the basis of a successful and rewarding venture.

Kindest regards.

Sincerely,

/s/ David Stretch

350002

[fol. 1822] August 17, 1961

TO: MR. BILL GAY, ET AL.

In view of the critical and urgent nature of the attached letter to Mr. Hughes, I would appreciate your bringing this to his attention at the earliest possible time.

D. A. Stretch

Exhibit D

[fol. 1823]

(Letterhead of Atlas Corporation, New York 5, N. Y.)

AIR MAIL August 17, 1961

CONFIDENTIAL

Re Northeast Airlines, Inc.

Mr. Howard R. Hughes,
7000 Romaine Street,
Los Angeles, 38, California

Dear Mr. Hughes:

A copy of the TWA complaint in the New York Federal Court action was recently forwarded to me by Mr. Tillinghast. Since the conspiracy charges involving Atlas are prejudicial to the interests of both Atlas and Northeast Airlines and, as you well know, are completely without foundation, I called Mr. Tillinghast to request a meeting with him and Mr. Breech. The meeting was held at the New York office of TWA on August 15th and was attended by James Austin and myself for Northeast and by Messrs. Breech, Tillinghast, Leslie and Cocke for TWA.

At the meeting, I endeavoured to outline briefly facts which negated the existence of the alleged conspiracy. It quickly developed, however, that the TWA people were not interested in that discussion, Tillinghast saying that "this matter was in the hands of Counsel".

The meeting then proceeded to a discussion of merger of Northeast and TWA. Messrs. Breech and Tillinghast made it clear they were not interested. The stated reasons included the following:

(1) That TWA's cash position was not good and was likely to get worse.

(2) That under existing circumstances neither the TWA Board nor the banks or insurance companies could be expected to approve a merger which involved further problems.

Exhibit D

(3) That the principal officers of TWA were heavily involved in TWA's existing problems, including particularly the Hughes litigation, so that they had no time to devote to the matter of merger with Northeast.

568
HTC ROMAINE

[fol. 1824] (4) That merger negotiations would be difficult so long as Atlas and Northeast were involved in litigation with TWA.

As you know, Atlas and Northeast formally indicated a willingness to merge Northeast into TWA in June, 1960. For a period of over nine months thereafter, Northeast kept its offer open without any action on the part of the TWA Board. During this period, Northeast did not feel it was in a position to discuss merger with any other airline.

As I believe you are aware, Northeast's present financial condition is very critical and Atlas is not in a position to provide additional funds. In view of this and of the action of the TWA people, the possible alternatives open to Atlas, would seem to be:

(1) To sell its Northeast holdings to a third party on the best terms possible, or

(2) To negotiate a merger of Northeast with another carrier and as part thereof arrange for interim assistance.

I know of no prospective buyer of Atlas' holdings in Northeast. With respect to the second alternative I have had conversations with executives of several airlines since the CAB entered its order combining a merger investigation with the route case. Merger with one or two of these would not be likely to receive CAB approval, but one or two others would, I think, be feasible from the Board's point of view. Whether any of these would be in a position to help Northeast in the interim is, however, very doubtful.

In view of your substantial investment in both Atlas and Northeast, and your understanding of the airline in-

dustry in general and the Northeast potential in particular, I hope, Mr. Hughes, that you will agree it is in your interest to assist Northeast in this critical period. The figures indicate that something between $4,000,000 and $5,000,000 will be required to carry Northeast until the commencement of the winter season. With these additional funds and the earnings from the Florida business next winter, Northeast should thus be able to operate successfully through the period of the CAB hearings. I recognize that a further loan would no doubt require CAB approval but in view of the serious problems facing Northeast, I believe the Board would permit the loan to be made. Short of such help it appears that Northeast will not be able to meet its payroll after another thirty days. Obviously the consequences of bankruptcy or receivership of Northeast would be catastrophic both to it and to Atlas.

Despite Northeast's present condition, its growth in the
567
[fol. 1825] first six months of 1961 has been by far the largest of any carrier in the industry and it has now surpassed National Airlines in many of the markets to Florida. Information concerning Northeast's recent operations and its future prospects are set out in a memorandum dated July 17, 1961 from Mr. Lane (Northeast's Financial Vice President) to me, copies of which I delivered to Mr. Chester Davis at the end of July with the request that he forward a copy to you.

Kindest regards.

Sincerely,

/s/ David Stretch

569

Exhibit D

[fol. 1826]

HTC ROMAINE
520

OPERATING MEMORANDUM

Date May 8, 1961 (10:50 a.m.)

Subject: Four 880 documents. Opinion on the decision on the fabrics on the 13 600's.

To: Loomis, Robert (Per BG)

From: HRH

1. Bill Gay is to call Loomis and tell him that the documents on the four 880's are in the state of being completed in New York and will be sent out here as soon as the attorneys have finished with them. At the close of business last weekend they had finished them with the exception of 1-2 yet to be completed.

2. HRH wants Bill to ask Loomis if, in his opinion the colors and fabrics to be decided upon may conform to the American specifications in as much as American has put a lot of time, study and research into this problem. They no doubt have an intelligent answer to these problems and a very good set of specifications. This is not to be taken in any way as an indication that we have any thought of offering any of our planes to American because we definitely have no such intentions. The suggestion regarding the choice of materials is made only because it seems to me that since Burk probably will not come to San Diego and we are choosing another man, it seems to me that by all odds the quickest way to get all of these open issues resolved in a hurry is to simply follow American specifications in each instance. I would like until tomorrow morning before such a decision is made. In the meantime, I would like to know Loomis' reaction to this suggestion and I would like to know what he thinks American's reaction will be but I do not want the matter discussed with or made known to American yet.

Exhibit D

[fol. 1827] #71
CAB

HTC ROMAINE

520

OPERATING MEMORANDUM

Date 4-27-61 4:00 P.M.

Subject: Convair Contract

To: HRH from BG

Loomis reiterated that the offer he made on 4-1 in which he agreed to return the money that HTC put up as down payment on the 4 airplanes and absolve HTC of any further consequences as far as Convair is concerned, is still good. He said, however, that Convair does not have a buyer for the planes, and it would be their intention to offer them, and they are obligated, he considered, to offer them first to TWA, and that Convair would offer them to TWA at the same price that HTC had paid for them.

Regarding Bruce Burk and a contract representative for the 13—600's, Loomis said these decisions became more urgent every day and do affect both costs and delivery dates of the airplanes. He said that a decision must be made by tomorrow on the colors and fabrics for the interiors, and if HTC did not make the decision, it would be necessary for Loomis to make the decision himself in order for Convair to comply with the terms of the contract. He would like very much to be able to discuss the interior decision, plus the other decisions that are urgent, with you or, if you cannot, with your representative who you would have empowered to make the decision.

[Handwritten Notation—Sent Copy to Cook 9/29/61—(Air)]

Exhibit D

[fol. 1828]

HTC ROMAINE

No. 13.

520

OPERATING MEMORANDUM

Date 3/9/61 6:00 a.m.

Subject: Aircraft #26 and #30.

To: Bill Gay

From: HRH.

Call Loomis and Bew this morning. Call Loomis at 6:50 a.m. and call Bew at 7:30 a.m. Give them the following message. The agreement HRH made with Loomis concerning indemnifying him with respect to the two airplanes absolutely holds good, that we have sent them a telegram (Assuming it was a telegram. It may have been a TWX) designating #26. We did this because we thought it was the first to come through, #26 on the eighth and #30 on the fifteenth. So we went ahead and gave the designation on #26.

We are in some negotiations with Mr. Breech and it would be very disadvantageous for us if we were forced to give the designation for #30 in addition right now. The rest of the week might see the end of these negotiations and we might be quite happy to give the designation on #30 in addition to #26.

Tell Loomis it is definitely our intention to resolve our negotiations with Breech prior to the time for delivery of the second of these two airplanes. We dont want to hold it up one minute. We, therefore, would appreciate it very much if Mr. Loomis would proceed with the completion and acceptance procedures with respect to both airplanes without delay. Relying upon the promise HRH gave to him in HRH's conversation with him about the 15th of February. Having the designation in writing for one of the two airplanes and being assured with respect to the other that we will, by the time it is ready, do one of the following two things: (a) designate it in writing for TWA, (b) take delivery for it and pay for it in cash.

With this understanding we would like to delay as long as possible the time when we must either designate the second

airplane or take delivery of it, yet, not in any way to retard the work, either on the ground or in the air which is being carried on with respect to either airplane and not to retard in any way the actual completion or delivery of either airplane. If, in order to accomplish this, it would be helpful for us to send Convair a telegram (it should be by the same means of communication as was used when we designated #26 yesterday) it would say "with respect to our telegram of 3/8/61 whereby reference is made therein to aircraft serial number 26, approval is hereby granted at your option for the substitution of aircraft serial number 30 in lieu of aircraft serial number 26".

With this thought Convair could go ahead and make delivery of whichever plane is completed first and thereby we could delay until the time when the second airplane is completed and ready for delivery, the designation with respect to that airplane. All of this would possible only

301385

[fol. 1829] if Mr. Loomis is willing to cooperate fully. Also you should call Bew and obtain his cooperation on this same program. I think Bill should tell both Loomis and Bew that we are not asking them to deceive anybody or conceal any information from anyone that is entitled to have it but, on the other hand, since we do not contemplate that this entire situation will continue more than probably the balance of this week and the week-end, the less said to anybody else, particularly TWA personnel, the happier weekend it will be for all of us.

If Loomis wants this message then whoever drafted the language of the telegram designating #26 yesterday should draft this message (HRH assumes it might have been Cook but Holliday dictated it to RC). The message should be brief and say in substance exactly what HRH has indicated above unless there are legal reasons for using additional language. Do not make any explanation in the message. If sent to Loomis by Chuck Price and if Loomis wants the message then it should be sent from Houston by Chuck Price. It is OK to identify the telegram by serial number or whatever way they might want to identify it but make sure it says the same thing and that it is for our benefit.

Henley

Transcript of Proceedings Before Special Master J. Lee Rankin, September 15, 1962

[Doc. 226]

[CAPTION] 61 Civ. 2324

[APPEARANCES]

• • • • •

[58] Mr. Davis: I don't know whether this will help to a better understanding of the way in which Mr. Hughes operates. I vividly recall the entire conversation, actually, that I had with Mr. Hughes as a result of this forgery contention. I remember his saying to me "What are they claiming I used a machine to sign my name and once in a while change it?"

I do know—I am not disclosing any particular trade secret—that the Hughes Tool Company has been [59] developing what I understand is a very interesting machine to in effect do the work of draftsmen and mechanical things.

Somebody puts in something, and this thing goes on and apparently saves a fantastic number of man-hours.

We know, it is not a matter of record, but I think enough has been indicated on the record and disclosed that Mr. Hughes does very little writing.

I have explained why the acknowledgment that was made was made as it was—because it was not physically possible to have Mr. Hughes refer to the document itself, as the California form normally contemplates.

So far as having another affidavit by Mr. Hughes, all that would have meant is that someone would have claimed "Sure there is another piece of paper by Mr. Hughes, but that is still a forgery."

Transcript of Proceedings Before Special Master J. Lee Rankin, September 15, 1962

It seems to me that the most effective way of putting an end to that was by having someone who knew Mr. Hughes say that it was not.

References to the memorandum, or whatever it is, annexed as part of Mr. Sonnett's current affidavit relating to what Mr. Hughes said or didn't say, [60] relating to this last financing, is to me quite understandable.

There is no question he resisted the insistence of the lending institutions to this voting trust, and that is a matter which is involved in this lawsuit as to the propriety of the existence—but for the purpose of this discussion we may assume that everything described in that memorandum in fact took place, and was not just a relatively normal reaction of an individual. How does that relate to a violation of the antitrust laws?

It was Mr. Hughes who made decisions, and not the corporate officers of TWA. Let us assume that. The question is somebody had to make decisions as to which aircraft is to be acquired and how it is to be financed. That is an internal corporate matter which is not within the ken of the jurisdiction of this Court.

• • • • •

[98] The Special Master: Do any other counsel wish to be heard?

Gentlemen, I am ready to rule on this matter. I have given careful consideration to all of the showings that the parties have made, the arguments, and for myself I am satisfied that there was authority for the service of the subpoena.

That the subpoena is binding upon Mr. Hughes, and as I construe the subpoena, it is binding upon Mr. Hughes to

appear on September 24, 1962, or in the alternative, as fixed by the Court at any other time that the Court lawfully orders Mr. Hughes to appear [99] in the courthouse at Los Angeles.

I feel that there is such a close connection between Mr. Hughes, as evidenced by some of the documents that I have seen, and the fact that he is the sole owner of the Hughes Tool Company, that the Hughes Tool Company is responsible for Mr. Hughes with regard to this subpoena, and its validity and whether it is an authorized act, and I advise and instruct counsel for the Hughes Tool Company to write Mr. Hughes and inform him about my construction of this subpoena, and that I will consider it an express waiver if he fails to communicate with the Court promptly and advise of any other construction of the subpoena, either as to its validity or when he should be required to appear, and if at any future time in this case Mr. Hughes should claim that the service of such subpoena was not authorized, not a valid instrument, not binding as I am construing it, I shall entertain a motion to strike the answer of the Hughes Tool Company and enter judgment against it in this proceeding.

It is very difficult for me to try to do equity to all the parties in this proceeding. Everyone claims he wants to be first.

I recognize what the Court has said about the [100] plaintiff TWA, and I am most anxious that it not be forgotten in all this dispute in our efforts to try to develop the facts in this proceeding.

For myself I think there have been conscientious efforts on the part of all counsel to try to forward these depositions in the proceedings to date.

Transcript of Proceedings Before Special Master J. Lee Rankin, September 15, 1962

I have been giving considerable study to the various seminars that have been held regarding this type of case, and the recommendations by courts and counsel concerning such matters, to try to find out ideas or suggestions that I might contribute to more quickly advancing this cause, and try to reduce or end the very large expense that I recognize is going on, as well as to try to see that justice is done in this case.

I feel there is an affirmative burden and duty upon the Court, and therefore upon the Special Master, to act, to try to help to reduce the extent and cost of discovery where it can be done, and to advance as rapidly as possible, even as complicated a case as this is, to the point when it can be tried and disposed of for all the parties.

I know this is not a problem that I have peculiarly had myself, because several counsel have [101] mentioned this around the time as bothering them—whether or not other procedures could be used that might help to advance this cause, and reduce its protracted nature.

I had thought that before we completed the testimony of Mr. Tillinghast, I would be informed about the ultimate facts that the plaintiff was relying upon to support the various allegations of its complaint, which are largely conclusions of law, but do conform to the requirements of the federal rules concerning such complaints.

I did not think that with the chief executive officer of the plaintiff being deposed, we would reach a point at the conclusion where I would not know the ultimate facts upon which the plaintiff was relying to establish those various allegations insofar as they had a bearing upon a violation of the antitrust laws.

But I did find that I was in that position. I think that has an important bearing upon what is equitable in asking testimony of principal witnesses of the defendant in this case, and when that should be required.

I therefore deny the application of the plaintiff, and each paragraph of it, because I have given [102] particular study about this matter, and what I could do to try to help to advance these proceedings, and regardless of whether on appeal my decision is upheld or reversed, and regardless of what conclusion I shall arrive at today, I want to suggest some action that I think should be taken in this proceeding.

For some time I have been thinking about our progress with this case, and I believe we are reaching a point where it will be expedited by Rule 16 and other procedures, under the rules, which I shall refer to hereafter.

I consider that we may profitably continue with the deposition of Mr. Rummel this next week, but at the close of our session on September 21st, I shall interrupt the sessions for the taking of depositions under Judge Metzner's prior order in this proceeding, of July 21st, as I recall it, until October 1, 1962, at 10:00 a.m.

I invite any and all counsel during the week of September 24th to apply to Judge Metzner for a pre-trial conference, and ask that he enter a pre-trial order in this case covering in his judgment and discretion the following:

1. Either that he hold hearings, and as a [103] result thereof enter a pre-trial order defining and limiting the legal and factual issues in this case as to the complaint and answer, or in the alternative, that he authorize and direct the Special Master to make a full and complete inquiry with

regard to such issues, and report to the Court with recommendations for the form and terms of such an order and the grounds and basis for any such recommendations.

2. That if the Court appoints and directs the Special Master to recommend such an order, that in addition to the authority granted to the Special Master under prior orders, he be authorized and directed to make the following inquiries of the plaintiff and the defendants regarding the complaint and answer, and concerning the counterclaims and answers to the counterclaims at some later date, but prior to the time depositions in defense of prosecution of the counterclaims are begun.

a. A statement by counsel for plaintiff, either orally or in writing at the option of the Special Master, of each and all ultimate facts and the witness or witnesses who they expect to testify thereto, as to each paragraph of the complaint.

b. Agreements or disagreements by defendants [104] with each of such claimed ultimate facts.

c. The same procedure to be followed as to each paragraph of the answer and later, as indicated, as to the counterclaims and the answers thereto.

d. Any proposed findings of fact that the Special Master may require from the parties, and comments on opposing parties findings.

e. Exploration in detail as to the extent that the facts may be stipulated by the parties and admissions of fact that can be obtained and the agreement to such stipula-

tions in writing and the definition of the precise areas of factual dispute.

f. Periodic reports to the Court by the Special Master of the progress being made with such responsibilities.

g. A right of review by the Court as to all recommendations of the Special Master and also as to any definitive orders or rulings under such a direction or by application of any of the Federal Rules by the Special Master.

h. Depositions to be interrupted pending completion of such authorized action and then resumed in accordance with the Court's prior orders after the pre-trial order is entered.

[105] Should no counsel make such an application, as suggested, to the Court by the close of the day on September 26, 1962, the Special Master shall approach Judge Metzner and request that he take such proposed action in order that this case be properly expedited.

Mr. Sonnett: May I inquire as to a point of clarification, Mr. Rankin? In that portion of your ruling where you found that there was authorization to accept the subpoena returnable the 24th, and that it was a valid service, am I correct in my assumption that you are not ruling upon the matter whether there was a forgery of the authorization, but rather that you base your ruling on other grounds in the record?

The Special Master: I am not making that ruling, because I feel that is before the Court, otherwise I would.

Mr. Sonnett: That is the point I wanted to clear on the record.

Transcript of Proceedings Before Special Master J. Lee Rankin, September 15, 1962

The Special Master: Are there any inquiries thus far?

Mr. Davis: Off the record.

(Discussion off the record.)

Mr. Sonnett: Further by way of clarification, and my own understanding, Mr. Rankin, I take it from [106] your ruling that you have not directed any alteration in the date of September 24th under the subpoena?

The Special Master: I meant to rule on that, that Mr. Hughes would not be required to appear on the 24th, but he would have to be held in readiness to appear whenever the Court would order him, should Judge Metzner order him to appear on the 24th, despite my ruling, or at any later date in the proper order as the Court may determine that he should be reached—either the Special Master or the Court.

In that regard, following the order of Judge Metzner of July 21st, but I read into that order a further position of Judge Metzner that should these depositions at any time be considered to be not progressing in such a way that they should be interrupted in order to permit TWA to proceed with its depositions, that power is inherent in the Special Master and the Court, and is expressly reserved.

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[181] The Special Master: I will incorporate in my direction to counsel for the Hughes Tool Company the order that if Mr. Hughes does not accept the interpretation I place upon the subpoena, and the authority for service of that subpoena, and the requirement to produce documents under it, that he so inform the Special Master by Friday of next week.

Transcript of Proceedings Before Special Master J. Lee Rankin, September 15, 1962

I am imposing that responsibility for giving that notice upon counsel for the Hughes Tool Company, because I am piercing the corporate veil as to the Hughes Tool Company, and I am bringing what I hope is clear notice of very substantial sanctions, not against Mr. Hughes, but against the Hughes Tool Company, in case there should be at some later date a claim of lack of [182] authorization or failure to respond to the subpoena because of any such claims, either as to personal appearance when the Court would order, or as to the production of documents.

I am not directing that counsel obtain an answer from Mr. Hughes. If I don't receive one by Friday of next week, I have told you plainly, I hope, the construction I am placing upon the action in the failure to receive any, and the sanctions that are indicated as far as the Tool Company is concerned.

I do ask you to bear with me in giving that notice to Mr. Hughes, so there will be no question about his opportunity in view of his interests, both personally and in the Tool Company, to take exception to the interpretation placed by the Special Master on this matter, if he sees fit to do so.

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[fol. 2011] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324

TRANS WORLD AIRLINES, INC., Plaintiff,

vs.

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY, Defendants.

Before: Hon. Charles M. Metzner, District Judge.

Transcript of Proceedings—September 19, 1962

[fol. 2012] APPEARANCES:

Mr. Davis, Mrs. Lea, Mr. Cook, Mr. Cox, Mr. Sonnett, Mr. Bromley, Mr. Stewart, Mr. Kaminer, Mr. Hupper, Mr. Barr, Mr. Bradner, Mr. West, Mr. Harrell, Mr. Tenney.

The Court: Mr. Sonnett.

Mr. Sonnett: May it please the Court, if the Court doesn't hear me I wish to be advised that I practically lost my voice. I will do my best.

The basic position which I would like to advance to the Court today is that on the basis of the entire record to date the Court should direct that TWA may proceed with the deposition of Howard R. Hughes Monday in Los Angeles pursuant to the subpoena issued from that court and that should be done whether or not the depositions cur-[fol. 2013] rently being taken here continue or are suspended.

The special master has ruled, as your Honor has noted from the record, I am sure, that Hughes is bound personally by the adoption, authorization, ratification or whatever

it was that he did in respect of a personal appearance at some time. The question of the forgery we believe to be perpetrated and the attempted fraud on the court expressly has not been passed upon by the master, that being before your Honor.

The reasons why we think that TWA should be permitted to go forward now in respect of the Hughes deposition are that the depositions have been in progress since early this year. We have had a total, I believe, of nine pre-trial conferences with your Honor. This will be the tenth, according to my count, since this case was assigned to your Honor for all purposes.

Without attempting to review the prior history of any of those which your Honor certainly has clearly in mind, it was clear beyond any doubt in July at a hearing before you, as you observed at the time, your Honor, that Mr. Hughes [fol. 2014] was obviously ducking service. It was also represented at that time that Mr. Hughes was not represented by any counsel in this case and that is still the state of the record.

The statement was made before the special master at page 179 of Saturday's transcript, in which Mr. Davis stated, "I am not appearing as counsel for Mr. Hughes. Mr. Hughes personally is not subject to the jurisdiction of this court. I did state on the record before Judge Metzner that I have and am giving advice to Mr. Hughes with respect to him individually and like all counsel act as counsel for clients to the extent to which they consult me."

Your Honor will note the following discussion and at the bottom of page 180 Mr. Davis says, "I am not appearing in this action on behalf of Mr. Hughes."

What Mr. Rankin did rule on Saturday, as I understand his ruling, was that Hughes Tool Company would be required to produce Mr. Hughes at least as a managing agent at some date to be determined.

The Court: I don't gather that, Mr. Sonnett. Point to the record where Mr. Rankin found that Mr. Hughes should be produced as a managing agent.

Mr. Sonnett: At page 99 of the transcript—commencing at page 98, at the bottom:

Transcript of Pretrial Hearing, September 19, 1962

[fol. 2015] "The Special Master: That the subpoena is binding upon Mr. Hughes and as I construe the subpoena it is binding on Mr. Hughes to appear on September 24, 1962, or in the alternative as fixed by the court at any other time that the court lawfully orders Mr. Hughes to appear in the courthouse at Los Angeles. I feel that there is such a close connection between Mr. Hughes as evidenced by some of the documents that I have seen and the fact that he is a sole owner of Hughes Tool Company, that the Hughes Tool Company is responsible for Mr. Hughes with regard to this subpoena and its validity and whether it is authorized to act, and I advise and instruct counsel for Hughes Tool Company to write Mr. Hughes and inform him about my construction of this subpoena and that I will consider it an express waiver if he fails to communicate with the court promptly and advise of any other construction of the subpoena either as to its validity or when he should be required to appear and if at any future time in the case Mr. Hughes should claim the service of the subpoena is not authorized and not a valid instrument, not binding as I am construing it, I shall entertain a [fol. 2016] motion to strike the answer of Hughes Tool Company and enter a judgment against it in this proceeding."

In another place in the record, your Honor—I shall try to put my hand on it—the Special Master stated in substance that he was piercing the corporate veil in this connection.

The Court: I had a feeling from reading the record that the Special Master was not meeting your point on a request that he rule specifically that Mr. Hughes was a managing agent. I think you have to interpret that language rather than saying that language is a holding. He did duck your direct question and I don't consider that an answer, some forty pages later to be an answer.

Mr. Sonnett: I had in mind 181 of the transcript, in which the Special Master continued as follows:

"I will incorporate in my direction to counsel for Hughes Tool Company the order that if Mr. Hughes

does not accept the interpretation that I make as to the authority of the service of that subpoena and the requirement to produce documents under it, that he so inform the Special Master by Friday of next week. [fol. 2017] I am imposing this responsibility and giving notice to counsel for Hughes Tool Company because I am piercing the corporate veil as to Hughes Tool Company, applying what I hope is clear notice of every substantial sanctions, not against Mr. Hughes but against the Hughes Tool Company in case there should be at some later date a failure to respond to the subpoena."

Now, since your Honor has put it so clearly, I agree, I must say, that I think that what the Special Master said on this point does require some construction and I think probably that his language is a holding that Mr. Hughes is at least a managing agent of Hughes Tool Company in the sense that he ruled. But certainly he did not explicitly so state.

In any event, your Honor, in the light of the record before you, it seems to me evident that with all of the history of the efforts to find Mr. Hughes and serve him personally, with the, I believe, deliberate effort to conceal his whereabouts so that we couldn't serve him, with what I believe to be a deliberate campaign to frustrate the orders of the court in that regard which are clear and explicit, with what I still believe is established beyond doubt as a forgery and fraudulent authorization—and I would like to [fol. 2018] come to the attempted answer to that in a moment —and with the acceptance on September 6th without reservation of a subpoena calling for his appearance, that rather unusual procedure being acceptable to the marshal in California because he was supplied with the affidavit by Mr. Davis which said, "I have been authorized in writing by Howard R. Hughes to accept service on his behalf of a subpoena for his appearance as a witness on deposition in the above-entitled action."

It seems to me that in any event the action which was taken by Mr. Davis on September 6th and the action which is alleged to have been taken by Mr. Hughes on Septembe

11th, the so-called acknowedgment by the notary, perhaps as a matter of contract law, constitutes a ratification, and perhaps in that connection it may be binding. I don't know.

I do know that during the period from September 6th when Mr. Davis was out there for the purpose of attempting to render moot our application to strike their answer for failure to answer the interrogatories, there was ample time then to have submitted to Mr. Hughes the form, for example, of authorization that we had initially proposed which was clear, explicit, contemplated a proper form of [fol. 2019] acknowledgement and actual execution by Mr. Hughes, and so on.

Therefore I think, your Honor, that the present state of the record is unsatisfactory in the sense that putting aside for the moment the question of the date when Mr. Hughes appears or is supposed to appear, I am not clear what kind of a procedural morass we may get into if he doesn't show up.

I am not clear whether and just what would be involved in the Special Master's suggestion at that time that he would strike the answer of Hughes Tool Company and presumably direct the default judgment in our favor.

The Master apparently is proceeding on the assumption that he need not reach the question of the power of the court over the individual to require his appearance like any other individual under penalty of a citation for contempt, one of the powers the court has with respect to any individual who disobeys a judicial process.

I do think that your Honor's observation on September 6th was a correct one. The best proof of the pudding is in the eating. The best solution to this and the safest in order to avoid creating a situation of great ambiguity, is to see [fol. 2020] whether or not he will show up as directed on the 24th or whatever date your Honor directs he shall show up.

I think that that is the only way we can all be sure of the record, and if there should ever be need to apply sanctions the court is in a position to apply them.

On the question of the time as to when he should appear, in the original order which your Honor signed back in February it was contemplated that the entire deposition as

scheduled would be completed by now. I represent to your Honor that with diligence on the part of examining counsel it could have been.

I think that your Honor will find that in examining the record here there has been an illustration of delay, stalling tactics, in the depositions, and as recently, I might add, as last Thursday, we are in the process of having the second witness, Mr. Leslie, who has been on three days, and I think we barely scratched the surface, and for reasons of business convenience we agreed to have Rommel go in.

An examination of the Rommel record, I think, will satisfy your Honor that the examination has been conducted in such a way as to make it interminable if allowed to pro-
[fol. 2021] ceed. In point of fact, whenever the witness, despite Mr. Davis' best efforts to avoid this result, gets into something of real substance in the case, Mr. Davis backs away from it. Then when the Special Master seeks to have him deal with this, Mr. Davis asserts, and I believe correctly on this point, that if you please, he will conduct this the way he wants to whether the parties like it, or, indeed, even the court likes it.

That reference I have at hand here and if your Honor will take the time to note just what is happening in these depositions in an effort to delay and stall this matter, the witness Rommel, when asked a question by Mr. Davis as to whether the witness Rommel had ever been directed not to have contact with plane manufacturers he said yes. He said that it happened by personal direction of Howard Hughes to him in respect of Douglas Airplane, Electra Aircraft and Convair 990.

The minute Mr. Davis started to receive that answer he backed away from it and sought to avoid the subject and protest was made; there was a wrangle and more of the colloquy that fills up this record, so many pages of it, and Mr. Davis then announced to the Special Master that he
[fol. 2022] was going to do this his own way.

He stated at page 271 of the transcript, amongst other things, "Whether I do it"—that is, conduct the examination —"in a manner which is satisfactory or pleasing to either Mr. Williams or other counsel here or may I suggest even to the court, at this stage of the proceedings, I am entitled

to my discovery proceeding as I think is best designed to develop the facts in a manner which I can understand."

Now, the Tillinghast deposition dragged out interminably. When it is realized that Mr. Tillinghast was president of TWA for only a few short months when this case was filed, and when it is recognized how many, many weeks were taken on this deposition, it seems to me that it is a clear case there of delay beyond all reasonable bounds.

Your Honor will recall that in an effort to deal with that we had some pre-trial conferences and we urged that the only sure cure for this was a program of alternating or concurrent depositions. Your Honor directed at one point Mr. Davis should suspend his efforts to examine in either of the so-called counterclaim and get the case moving forward, and several times we have stated that we wished that the case would progress more rapidly, and indeed it [fol. 2023] should because the financial problems continue and the problem of a trial date is a very important matter to this airline.

At this rate, if we were just to forecast the rate of progress based on what happened to date in the deposition program, Mr. Davis would be at this for another year or two beyond a doubt.

I think that when the Hughes Tool Company initially represented that a deposition program, by the submission of dates they contemplated a couple of weeks for witnesses and so on, and it was possible that they were perhaps a little optimistic.

On the other hand, what they have done far exceeds any representation that they ever made to the court in any way about the length of time they would need.

I think that the needs of TWA to prepare its discovery, particularly in respect to Howard R. Hughes, is acute. Hughes, as your Honor will see from the record before you, is the one man who knows the whole story.

Annexed to our papers are extracts from his call messages, his directions to people as to how to do this and how to do that, both before and after December of 1960, that [fol. 2024] same exercise of absence of dominion and control in respect of aircraft that characterized the situation for years.

He is the one who knows best the extent to which the motivations for what we think are plain violations of law, were tax motivations. I think that when we take his deposition we could decide at the end of that whether TWA is going to need another twelve witnesses or another two witnesses or maybe no witnesses before it would be ready to ask your Honor to fix a trial date.

We have had Noah Dearick, for many years the chief lieutenant of Mr. Hughes. Dearick is around seventy. I don't know how much longer—nobody knows how much longer Mr. Dearick is going to be around.

Take Mr. Hughes himself. I know nothing about this man's health except what I read in the public press, but I think that the failure to have his evidence as a matter of record for use in this case would be a tragedy.

So, your Honor, it seems to me that consistent with the history of the case, the amount of time that you have allowed them, the approach by Rule 4 of concurrent depositions, the fact that they can do concurrent depositions—[fol. 2025] they have very distinguished counsel in addition to Mr. Davis—they have Mr. Cook recently take a deposition—it seems to me that the only way to really move the case along is a program of concurrent depositions.

I therefore strongly urge your Honor to consider that and to direct it before the evidence escapes us for all time, perhaps: To get it reduced to question-and-answer form under oath.

I don't believe that on the forgery aspect, unless your Honor has any question, that I need to go beyond what is in my reply affidavit which I filed with the court Monday.

I submit to your Honor that nowhere has anyone asserted yet, hearsay or otherwise, that Howard Hughes personally signed the document which is said to be an authorization.

The Court: How do you interpret those words that were used in Anderson's affidavit of acknowledgement, in which he says, "Said Howard R. Hughes further acknowledged to me that he confirms such authorization to Mr. Davis in a writing to me as follows:"?

Mr. Sonnett: I interpret that with particular reference to the background which resulted in document of so-called [fol. 2026] acknowledgement coming into being, your Honor

will find the Davis affidavit, Mr. Davis asked California counsel to get the California statutory form of acknowledgement of Mr. Hughes and have him execute it.

He went out there and there was a formal acknowledgement, but it is not the statutory form. There is a big difference. The California statutory form requires an oath as to personal execution of the document. That is conspicuously missing. All that we have here is that having been caught at it Mr. Hughes is willing to, by this acknowledgement procedure, try to make it look good and adopt it.

The Court: Suppose he did adopt it. You say that this doesn't even go that far?

Mr. Sonnett: I would be prepared, your Honor, to concede that if in fact he appeared before a notary public and if in fact he made the oath which it is stated he made, if that be the fact, that probably is some kind of a ratification under some principles of contract law. But I know of no way that the process of the United States District Court can be treated in that fashion.

In the first place, as your Honor well knows, the rule in [fol. 2027] respect of service of subpoenaes, requires personal service. Therefore my initial suggestion, when much was sought to be made out of a desire to avoid embarrassing Mr. Hughes, my initial suggestion was that of his intermediates, Mr. Glen or anybody serve him personally with the subpoena and make an affidavit of service, and I would take that. They didn't see fit to do that.

That is the very first thing I suggested, trying to avoid any embarrassment. I am not interested in embarrassing this man.

The Court: You are getting away from my question. If you were in negotiation with Mr. Bormley who represented a client on the other side looking toward the settlement of a lawsuit and you wrote a letter to Judge Bromley stating that my client has confirmed to me in writing the following settlement, what do you think Judge Bromley would think if he received such a communication? Wouldn't he think that your client signed such a document?

Mr. Sonnett: I think if those were all the facts he might well, but that is not our case. If your Honor will go back briefly on the chronology, what we find on July 12th, you

[fol. 2028] directed that interrogatories be answered. You observed, and entirely correctly, at that time that it appeared that Mr. Hughes was ducking service, and he was.

Then we find that we were back again before your Honor on July 26th in connection with an extension of time being sought by the Hughes Tool Company to answer the interrogatories.

Meanwhile apparently Mr. Davis has sent out to Mr. Hughes a form of authorization designed by Mr. Davis but never shown to us that was dated in late June. Mr. Hughes had, according to Mr. Davis—he got that form and that form was the one that tried to import into the authorization a condition that Mr. Hughes after all would be willing to appear or accept service to appear provided he was guaranteed in fact his turn at bat wouldn't come for a year while Mr. Davis took a lot of depositions. However, Mr. Hughes did not sign the Davis form.

Whoever prepared it, and I don't know who did, and whoever signed it, and I don't know, except I know it wasn't Mr. Hughes, they got a little bit of a form without a date on it, and at some point that little bit of a form was the one sent to your Honor and your Honor returned it because your Honor had questions about it, and when you returned [fol. 2029] it with a letter to counsel you stated that you expected that counsel would comply with the court's order to answer the interrogatories on August 27th.

Now, what happened? There wasn't any effort to comply with the court's order whatsoever. Instead, after we moved to strike the answer for wilful default—and I think it was wilful and aggravating—Mr. Davis hopped on a plane and rushed out there with the idea of having the deputy marshal at 7:15 a.m., California time, accept these representations so Mr. Davis can accept the subpoena and then report to you that our motion was moot because there was service?

Why the 7:15? Well, of course that strategy was that we were before your Honor at eleven-thirty that day.

The Court: You didn't state it correctly. 7:15 is 10:15 here, fifteen minutes before you walked into the courtroom.

Mr. Sonnett: Yes, your Honor, but I think Mr. Davis had a little bit of time to palaver with the marshal before the marshal agreed to accept the affidavit.

I have the return and the affidavit, a certified copy, and [fol. 2030] that is the strategy. The strategy was not to answer the interrogatories which you had twice directed be answered and then, B, to ram down the court's throat and ours the form of authorization unsatisfactory certainly to us and presumably to the court as to form.

And then counsel making that good by getting the marshal to take it and at no time between September 6th and September 11th when this so-called acknowledgement was done —at no time did Mr. Davis get a-hold of Mr. Hughes while he was in Los Angeles and ever say, "Look here, this thing is getting difficult. Sign this form and acknowledge it in regular statutory form and swear that you signed it."

He didn't do that.

What happened was after we found the forgery he decided this is serious enough for him to consent to notice it and he would therefore go through some ceremonial before a notary public and we still don't have his signature on anything. I submit to your Honor that it was a calculated program of frustration in regard to the orders of the court. I don't think that Mr. Hughes or anybody else ought to be allowed to do this, and I think that that is [fol. 2031] exactly what was done.

The Court: That still doesn't mean, by the use of the words "confirmed in writing" that Mr. Hughes is not saying that he signed that document, and I could also point out, Mr. Sonnett, when you related the background leading up to this, that you left out a preface which is that the Special Master said that there were alternative roads to follow, either Mr. Davis was to produce an authorization for him to accept service of a witness subpoena or he would direct that Hughes Tool Company answer certain interrogatories.

We have reached the point when that authorization was not forthcoming. We then had the motion before the Special Master for interrogatories and, as I recall, an appeal was taken by Mr. Davis from the Special Master's ruling on interrogatories.

So I was proceeding on the same basis the Special Master was, that these interrogatories would be answered by the date fixed unless an authorization was produced. So with

that background, then you can go into what you have already said.

Mr. Sonnett: There is one additional element, your Honor, and that is at the beginning of this I raised the question of the uncertainty we might get into by any such [fol. 2032] procedures as those being discussed and the net of it all was the Special Master's direction that any authorization would be personally signed by Howard R. Hughes.

The Court: Mr. Hughes says, confirms that he made such authorization.

Mr. Sonnett: But it came only after proof of forgery and while that may have been enough to bind him in some—

The Court: Do you come forward with proof that a signature is actually your signature unless it has been challenged? Don't you sign things and everybody assumes it is your signature?

Mr. Sonnett: That proof has not been submitted to your Honor.

The Court: We come back to what the words mean, this acknowledgement that Mr. Hughes confirmed in writing. I assume if you used such language as I indicated before in the supposition, you and Judge Bromley were negotiating a settlement of a case in which you were adversary counsel, that if you wrote to Judge Bromley: "I have in my hand the proposal for settlement of the case confirmed in writing by my client," that Judge Bromley and you would understand [fol. 2033] that to mean that your client had signed such a document. I think that is the common understanding of those words, certainly in the legal profession.

Mr. Sonnett: It is not an understanding of an acknowledgement required, nor the words of acknowledgement required by statute.

The Court: You are going to the question that Mr. Davis represented that he was being extra careful in making sure that they comply with the California statute when in fact they did not. That is something different. We are talking about the common understanding of the words "confirmed in writing," which is what this notary public says that Howard Hughes told him.

Mr. Sonnett: Then I think the words are not quite that clear. There is ambiguity and I think that the record establishes that this piece of paper wasn't drafted by Mr. Hughes. It was drafted by California counsel, who are familiar with the California form, and therefore knew this was a departure from the California form.

The Court: I understand that, Mr. Sonnett. Let us go on to something else.

Mr. Sonnett: I just want to make the point that the [fol. 2034] acknowledgement says that Mr. Hughes further acknowledged to me that he had confirmed such authorization to Mr. Davis in a writing, reading as follows. It doesn't say that it was a writing by him. It would have been very simple to say in a writing which I signed. It doesn't say that. It doesn't say that at all and I think this ambiguity in this is deliberate.

The Court: I will ask that question of Mr. Davis when he gets up.

Mr. Sonnett: So much on the forgery side, and what I regard, your Honor, as a wilful attempt to obstruct the orders of the court.

I think, however, regardless of that, and if the question had never arisen, I think the necessity for TWA to commence its discovery is real and acute.

The Court: What about the suggestion of the Special Master on page 102 of the transcript regarding a Rule 16 definition of issues at this time?

Mr. Sonnett: I think that the suggestion is an excellent one at the right time. I think at this time it would be idiotic.

The Court: Why?

Mr. Sonnett: Because it is impossible, your Honor, it [fol. 2035] seems to me; when we look at the pleadings you will see every allegation of consequence in this complaint substantively is denied by Hughes Tool Company. Any attempt to limit issues is going to produce only weeks and weeks of interminable conversation instead of discovery.

In the second place, I know who some of our witnesses are. I don't know how many there will be. I don't know how many more I am going to need. It may be that after the deposition of Howard Hughes I will put down Hughes will be our witness on ninety-nine per cent of the complaint.

The Court: Aren't you in a position to formulate the ultimate facts for a pre-trial order as contemplated?

Mr. Sonnett: I think we can formulate as far as they can meaningfully at this stage of the case by the denials of the allegations in the complaint. These are allegations are factual, but the issues are clearly drawn there. The question of how much, if any, of those defendants would be willing to stipulate is something that will lead us down the garden path for many, many months.

I am prepared and will be prepared happily to join in [fol. 2036] a pre-trial application, a hearing by your Honor or the Special Master after we have had some discovery. I don't know how much discovery we are going to need. Maybe Mr. Hughes will be enough, maybe he won't be. I can't tell.

I can't emphasize too strongly that he is the one human being that the record plainly demonstrates who does know the whole story. He is the one who pulled the strings.

That is all I have.

The Court: Mr. Davis.

Mr. Davis: Your Honor, I understand that at the request of Mr. Sonnett a transcript of the proceedings before the Special Master was sent to you. Since these arguments are fairly voluminous and a burden on the Court, I have an extract which contains merely the decisions of the Special Master, and if it would assist the Court, I have—

The Court: I have it.

Mr. Davis: What has been going on in this case since this complaint was filed under seal is best described by the remarks of Judge Dawson apparently in a situation which I would have recognized as this one, although it is not [fol. 2037] identified. I found it in the 1958 Stanford University—a statement by Judge Dawson:

> "When the complaint was filed the plaintiffs served notices for the taking of depositions of numerous officers of numerous defendants and for the discovery of books and records of the defendants. There was no way to determine the proper scope of depositions as to respective defendants or how much of the discovery

sought was for legitimate trial purposes or how much was merely for the purpose of making life miserable for the defendants in order to coerce a settlement. To allow such a complaint to stand would have added to the delay and congestion of the court by requiring continuous hearings on the scope of depositions and the proper limitation on discovery. The obvious thing to do was to require the plaintiffs to clarify the issues by stating specifically the nature of the complaint of each plaintiff against each defendant."

Let me say, your Honor, that just as soon as I find the time and certainly before next week, we do intend to submit to your Honor an application in accordance with the suggestion of the Special Master.

[fol. 2038] Now first let me address myself to the constant efforts which have been made by the plaintiff TWA through its counsel to set aside or frustrate the decisions of this court with respect to the priority which was granted to the defendants in effect first by Judge Murphy and denying their application, and specifically by Judge Herlands, more specifically by your Honor when you had occasion to reconsider the matter after we filed our answer and counterclaims and when at the same time you also granted partial discovery relief to the plaintiffs by requiring the defendants to produce all documents in their possession relating to or as called for by the various schedules.

If there have been nine or ten meetings with your Honor in this case—and I don't know how many we have had—I believe that all of them were related to an effort made by the plaintiff to take the deposition of Mr. Hughes out of turn.

The situation in this case—and frankly the basis of the arguments which we had occasion to present before—we never had an opportunity to present fully to your Honor because it was always a decided question, we have a rather unusual situation here.

First of all, the jurisdiction of this court over the subject [fol. 2039] matter of the action is dependent upon the existence of facts tending to indicate that there is a question

to be decided, as to whether or not the conduct of the defendant was in violation of the anti-trust laws.

That is the only basis for the jurisdiction of this court over the subject matter.

The complaint complies with the concept of noticed pleadings and does assert violation of the anti-trust laws—There is no question about that—by conclusions of law, by reference to the statute and by statements that you can find in decided cases but wholly unrelated to identifying the specific count, the occasions, the events, the manner how the defendants are supposed to have violated the anti-trust laws.

In most anti-trust cases, even noticed pleadings do give the defendants some idea as to what it is about, what the plaintiff is complaining about, the distribution system that the defendant has, the acquisition of a competitor and without perhaps knowing all the evidentiary details to support the complaint, in a normal anti-trust action the defendant does know or should know if he is honest, what this is all about.

[fol. 2040] In this situation when TWA is suing its seventy-eight per cent stockholder to require divestiture by the stockholder, we find it more complicated by the fact that the very acquisition was approved by the CAB not only once but—

The Court: Mr. Davis, I hate to interrupt you but you have given me that four times now. I know it by heart.

The question is whether Mr. Hughes should be deposed on September 24th or not.

Mr. Davis: In that connection we come to the conclusion, unusual as it may seem, that notwithstanding the lengthy deposition of Mr. Tillinghast when he was given repeated opportunities to describe or identify what it is the plaintiff claims took place, the conduct which is alleged to have occurred in violation of the anti-trust laws and outside the scope of the CAB authority, not only was I unable to find out what that was but I refer you to the statement made by the Special Master who listened and supervised the deposition of Mr. Tillinghast, to the conclusion of the Special Master which you find at page 101, where Mr. Rankin said:

Transcript of Pretrial Hearing, September 19, 1962

"I had thought before we completed the testimony of [fol. 2041] Mr. Tillinghast I would be informed about the ultimate facts that the plaintiff was relying upon to support the various allegations of his complaint which are largely conclusions of law but do conform to the requirement of the Federal Rules concerning such complaints. I did not think that with the chief executive officer of the plaintiff being deposed we would reach a point at the conclusion where I would not know the ultimate facts upon which the plaintiff was relying to establish those various allegations in so far as they had a bearing upon the violation of the anti-trust laws but I did find that I was in that position."

And that is the position of the defendant, and quite apart from any obligation that the Court may have to satisfy itself in some manner that it has probable jurisdiction over the subject matter of this action I humbly state that any principle of justice requires that a defendant be aware, be informed in some way as to what it is he is being charged with before he is required to testify.

The position and efforts that the tool company has been making ever since the complaint was filed have been to [fol. 2042] dismiss because the facts do not exist which support the jurisdiction of this court.

What has been developing is that Mr. Hughes, because of a deep personal interest in aviation and because through the tool company he was a seventy-eight per cent stockholder of TWA, he did take an active part or interest in the specifications of the aircraft being acquired, the type of aircraft to be acquired. Whether or not decisions by TWA with respect to the acquisition of aircraft or its financing should be made by a corporate officer or by a seventy-eight per cent stockholder may be a question that could be raised in some forum which has jurisdiction over those kind of actions, not here.

The Court: We have it here in a diversity action of minority stockholders.

Mr. Davis: There are none here.

The Court: It could happen.

Mr. Davis: I meant in this action, if these are the facts they are talking about.

In spite of the portions that Mr. Sonnett referred to in the record, Mr. Rommel has testified quite clearly that Mr. Hughes actively promoted competition amongst these vari- [fol. 2043] ous manufacturers. This blind answer that I got, which I have been exploring ever since, was that it is true as Mr. Rommel eventually testified to without any prompting on my part, that Mr. Hughes, who was anxious to get as much of a competitive jump against his competitors in the airline industry, when they were working on developments or the possibility of procuring advanced aircraft, he wanted secrecy maintained and then he did not want anyone to even discuss anything with a particular manufacturer.

But the record is replete with evidence that Mr. Hughes and the tool company throughout this entire period first of all was promoting competition amongst the manufacturers, doing everything that he could to maintain a competitive position of TWA.

However that may be, my position basically is that until such time as we do find out what the nature of the claim is which is being asserted by the plaintiff, and how the exemption under the Federal Aviation Act is not applicable, we are not ready to be disposed irrespective of any other consideration.

I am not going to refer, because I am sure that your Honor is more familiar than I am with the deep thought and study which has been given in various seminars by [fol. 2044] judges of this district as well as elsewhere, that it is desirable in the so-called big case that that be done, that plaintiff when they applied to Judge Ryan for assignment of this case to your Honor—

[fol. 2045] The Court: You agree with them, don't you?

Mr. Davis: No, your Honor. I think the case will be disposed of very quickly.

The Court: It seems that anybody who would enter a counterclaim for $365,000,000 must think it is a big case.

Mr. Davis: At that time we didn't have an answer in. In those seminars it is perfectly clear that the consensus of opinion of all concerned is that under noticed pleadings,

even before discovery proceedings of any kind are to be entered into it ought to be developed what the contentions of the parties are. Judge Ryan tried that but counsel for plaintiff in one way or another avoided the opportunity. When he tried that, I believe that is my affidavit, I do recall qute clearly Judge Ryan suggesting to counsel for plaintiff to prepare some kind of statement, he suggested the same thing to me.

Of course I said I can't prepare a statement as to what our position is, what facts we claim until I understand the claim. Otherwise it is going to be an exercise of how much imagination I am capable of.

[fol. 2046] Well, we never succeeded in that matter. I thought at one time that through my motion to dismiss if there had been a requirement that answering affidavits be filed, and whether or not the matter came on for decision, that would force at least some kind of an issue.

The Court: Under our rules, under a motion to dismiss if affidavits are used the Court may consider that as a motion for summary judgment under Rule 56 and require the other side to answer. But as I pointed out to you at this stage of the game this Court guided by the Court of Appeals, thought that motions of this type should not be granted in this type of case at this stage.

Mr. Davis: That is correct, your Honor. Every once in a while we have a situation which I honestly believe exists here that this complaint was drawn without anybody having any facts whatsoever.

I think quite frankly I originally started out with the thought if I depose Mr. Tillinghast, even though had not lived through the period when this alleged misconduct took place, but he was chief executive officer, he decided to file [fol. 2047] the complaint, that the very least we would get out of him is a description or identification of contentions and that is where both I and the Special Master have been disappointed.

Therefore, I quite concur with the views expressed by the Special Master since that has happened, the desirable thing to do now, although I must say parenthetically if I had a little more time to complete the deposition of Mr. Rommel, I don't believe I will be able to complete it in two more

days, I only had about six days, I think I could affirmatively establish facts that negate the possible existence of a violation of the antitrust laws but admittedly it is doing it the hard way.

The Court: Let me ask you this question, Mr. Davis:

You set up a schedule which I think was originally submitted either to Judge Murphy or Judge Herlands before the case was submitted to me for all purposes. You have indicated subsequently before me that that was merely a tentative list and by the date set forth in that list you didn't intend to tie yourself down as to the number of days it would be necessary to take for each witness.

[fol. 2048] Now, if it was even a tentative list as to Mr. Tillinghast it was so tentative as to be practically nonexistent, it meant nothing.

You have now completed Mr. Tillinghast and as I understand you have Leslie and Rommel in some stages of examination.

How many more people do you have and how many more days are you going to need to complete that deposition?

Mr. Davis: Your Honor, may I respectfully refresh your recollection a little more accurately than the way I understand your statement to be?

This schedule so-called was nothing but a tabulation of notices for the taking of depositions which I had made.

The Court: Mr. Davis, I will accept whatever corrections you want to make about my recollection. I want to know about the future.

Mr. Davis: Then let me also say I have not finished with Mr. Tillinghast, I stopped because I was directed by the Court to stop.

The Court: You are finished with Mr. Tillinghast as far as his deposition on your part is concerned. You may be [fol. 2049] able to come back after the plaintiff has had an opportunity for a deposition but as far as your deposition is concerned of the plaintiff, you are finished with Mr. Tillinghast.

Now, I want to know how many more days do you need for the other persons who were noticed?

Mr. Davis: Well, your Honor, without any knowledge of what the answers are that I am going to get it is difficult

to estimate the amount of time except it will be considerable.

The Court: What do you mean by considerable?

Mr. Davis: Let me put it this way, I don't know what the issue is yet.

The Court: You know what questions you are going to ask.

Mr. Davis: I do not.

The Court: You haven't got a general area of inquiry before you go into your deposition?

Mr. Davis: If I could do it from 1939 to date and cover all conceivable events which might have occurred, which have a bearing on the alleged violation of the antitrust laws, it is going to take a long time.

If, however, we do proceed with the suggestion of Mr. Rankin about compelling the plaintiff to identify what it [fol. 2050] is that they claim took place and more particularly who do they know who has any information with respect to what they claim took place, then I assure your Honor I will be able to dispose of those witnesses, to establish the full facts in a very short period of time.

I could then be asked I think, fairly asked the question how long do I expect to take to examine such persons in those areas. It may be that a lot of people that I have noticed are not necessary. The problem that we have, your Honor, is simply of trying to find out what it is—the only person who knows is the plaintiff—I don't know what it is they claim we have done in derogation of CAB orders. I don't know what they claim that we have done or what course of conduct we engaged in.

In one of the allegations of the complaint they said we boycotted some manufacturers. I asked that question of Mr. Leslie, if he ever heard of that.

"No, I never heard of it."

I examined Mr. Rommel and find that the TWA, the defendant dealt with every conceivable manufacturer of aircraft in the United States and abroad. So I don't know what the boycott contention is.

[fol. 2051] I think the solution suggested by Mr. Rankin is the only one, that is recognized by every seminar that I am familiar with and what he is in effect saying now, that

we finished with Mr. Tillinghast, we haven't found out what plaintiff is claiming as result of that examination, strange as that may seem to be, and I gave the man every opportunity to tell me whatever he knew or heard of. That is the man who had access to all the officers of TWA. If he doesn't know and won't make the effort to try to find out, who is going to tell me what it is they claim?

Counsel is supposed to make an investigation but I can't examine them under the attorney-client privilege.

Mr. Rankin says in fact if we don't do it he will, let us require the plaintiff to identify what it is they claim. Then several things will happen.

First of all, you will be able to determine whether or not there is a basis for the Court assuming jurisdiction over the subject matter. I don't think that is conferred merely by the filing of a piece of paper. But it is questioned and it seems to me we will have that much more.

Then it seems to me we will now have an identify of [fol. 2052] what area needs to be explored. At that time I will be in a position to answer your question as to how many witnesses I need and if any and how much time.

My strong belief is when plaintiff is forced to do that, there ain't going to be any more lawsuit because there are no facts that he can state and identify.

The Court: You may be able to get past a motion for a dismissal in this court and still not have a lawsuit.

Mr. Davis: I have a counterclaim.

The Court: We haven't reached your $365 million claim. We are dealing with the small $150 million problem now.

In other words, you tell me as of now you have no way of knowing how many more days you will have to conduct your depositions?

Mr. Davis: I cannot make an intelligent estimate that would be informative to the Court absent a disclosure by TWA of the facts or ultimate facts or circumstances or events which they claim constitute a violation of the antitrust laws; that is correct, your Honor.

[fol. 2053] The only information I got out of Mr. Tillinghast was that as to what he claims was a willful and malicious conduct, he referred documents and that issue is ready to be decided by the Court.

The Court: Don't sit down, I am not finished. On pages 99 and 181, the Special Master directed you to advise Mr. Hughes of certain facts. Have you done that?

Mr. Davis: Yes, your Honor. I wrote a letter on Monday and enclosed the pages of the decision of the Special Master and particularly called attention to the fact that if anyone had or if he had any different interpretation he was to advise the Court by Friday.

The Court: I understand if he doesn't so advise the Court, if he doesn't show up there there will be a default entered against Hughes Tool Company. You sent him certain pages. Did you send him page 99 and 181?

Mr. Davis: Maybe I misunderstood the statement. There is no default on Friday.

The Court: On page 99 and 181 the Special Master indicated certain action that you should take with regard to notifying Mr. Hughes, the Special Master's views regard-
[fol. 2054] ing the subpoena.

Mr. Davis: That has been forwarded to Mr. Hughes.

The Court: And that if Mr. Hughes fails to advise the Special Master or the Court by this Friday that he so understands that there will be a waiver, right?

Mr. Davis: That is right.

The Court: And a default judgment would be entered against the Tool Company for $150 million.

Mr. Davis: Not unless he failed to appear when called. That is the only thing I was misunderstanding, I thought you were saying that there would be a default judgment this Friday.

The Court: Now let us get to the forgery question.

Tell me, Mr. Davis, if Mr. Hughes left his home and had gone out before a notary public and took the time to go through this acknowledgment, wouldn't it have taken less time on his part merely to have signed an affidavit to those facts before the notary public and have furnished another sample of his signature for the Court to peruse in connection with this signature affixed to the authorization?

[fol. 2055] Mr. Davis: Let me explain the problem.

The Court: Excuse me just so that the reporter has my sentence.

And to be used to refute the affidavit of Mr. Appel attached to Mr. Sonnett's affidavit submitted to the Court on September 6?

Mr. Davis: The answer is this, your Honor:

When Mr. Hughes called me on Monday at my request he asked me if I wanted him to—what he was going to do was write a letter in his own handwriting and put a half dozen samples of his signatures for all to look at, what do they think I use a machine to sign with or something of the sort. I told him no, I was afraid if he did that all I would be doing would be raising another issue of fact as to whether the second signature was a forgery or not a forgery.

The Court: What did you gain by a notary public's acknowledgment as opposed to an affidavit sworn to before such a notary public?

Mr. Davis: The process I went through was simply this, I wanted to have—let me first say this:

As Mr. Sonnett keeps on saying, trying to keep on the facts, it is a ratification rather than the very document [fol. 2056] which I filed in this court, that is authentic. As far as that issue, there is no question of getting a new authorization, this was my problem of having an acknowledgment with respect to the piece of paper which I had filed. That piece of paper was in my possession, not in California; it was here.

When I was in California to accept service, I came right back because of things I had to do here. When I discussed with California counsel the problem of having an acknowledgment of his signature on a piece of paper that was not physically there for the affiant to say "Yes, this is it."

If we assume contrary to fact that the paper was actually a forgery, how could Mr. Hughes know about it? If you assume Mr. Hughes could know about it it precludes the concept of forgery.

What I told California counsel was to prepare something conforming as closely as possible to the statutory form of acknowledgment in California and to refer to and identify the piece of paper which I received, sign the piece of paper, it could not be there and the man in the usual form says, "I acknowledge the signature on this piece of paper as mine." [fol. 2057] That is what took place.

It seems to me what took place is as clearcut—not a ratification, your Honor, but a confirmation that the authorization that I received was an authorization by Mr. Hughes from Mr. Hughes and that is the only question that was ever before the Court because as the record is quite clear the Special Master did give an alternative which was that either the Tool Company was to answer interrogatories or there be filed by the time those interrogatories were to be answered a writing by Mr. Hughes.

Now, either the writing that I furnished was a writing by Mr. Hughes and before the interrogatories were required to be answered or I got an authorization subsequent to that date.

So far as I was technically concerned, I am not interested in new authority, a new signature. The one important thing was whether or not the paper I received was in fact a paper from Mr. Hughes confirming in writing the authority I asked for. There was no question in my mind, I knew Mr. Hughes was aware of the writing he was receiving because we exchanged communications with respect to it.

The Court: Your affidavit says you spoke to him on [fol. 2058] September 11.

Mr. Davis: Prior to that time, your Honor. My affidavit was prior.

The Court: Did you speak to Mr. Hughes prior to September 11?

Mr. Davis: I did not have a telephone conversation with Mr. Hughes but I was exchanging communications with Mr. Hughes.

The Court: You mean by the central office?

Mr. Davis: Not through that central office, through someone.

The Court: You have no direct telephone conversation at all?

Mr. Davis: That is right but from questions being asked and his wanting to know why it had to be in writing, I knew Mr. Hughes, through the channel I was using to communicate with him ever since I have been in the case, he was aware of my request of why I needed the confirmation

in writing. There is no question about it that this was an authorization by Mr. Hughes, a confirmation in writing. I am not interested in what means he uses to sign or who he uses to sign. I am only interested in something which is binding on Mr. Hughes.

[fol. 2059] The Court: But you have a little problem too, Mr. Davis. You were faced long before this with claims by counsel that they didn't trust Mr. Hughes and therefore wanted it in writing. And I think the Special Master adopted that viewpoint when he gave you the choice of answering interrogatories or producing a writing. So you knew that you had a person for whom you were going to represent to the Court that you were authorized to accept service for; whom neither your adversary nor the Special Master had much faith and that is why they were calling for a written authorization signed by Mr. Hughes.

When you filed with the Court a document purporting to be that and a handwriting expert comes forth and says that is not his signature, aren't you in a peculiar position?

Mr. Davis: I don't think so unless my client fooled me but he didn't. The reference I have in mind—

The Court: But didn't you understand, Mr. Davis, that after the event, after you became advised that neither the Special Master nor your adversary trusted Mr. Hughes, that when you did produce a document which was then [fol. 2060] attacked, as being a forgery, this was again saying you can't trust Mr. Hughes and shouldn't you then have gotten an affidavit sworn by Mr. Hughes before a notary public so that you would have then had a document which was complied with, whether the original authorization had been acknowledged before a notary public, in an independent swearing?

Mr. Davis: If I followed the Court's suggestion I would be technically in default because I received another piece of paper, whether it was an authorization or confirmation, I would have received something past the due date for answering the interrogatories.

The Court: You know, Mr. Davis, that the Court would not have entered a default judgment for $150 million on that basis.

Mr. Davis: I am confident of that but at the same time I am trying to avoid unnecessary arguments by my friends representing TWA.

But, your Honor, there is something you implied in the way you were putting the matter which is not my understanding of what was the rationale with respect to the requirement by the Special Master. Page 45 of the transcript—

[fol. 2061] The Court: You mean Saturday's transcript?

Mr. Davis: Saturday. Where the interpretation or substantially the same language was used at the time the actual requirement was made, page 45, line 7—look at line 4. When I ask someone for written evidence of something it is for the purpose of making it clear there is no misunderstanding as to the nature or scope of the authority. If we are goint to start, and I don't believe that this is really the kind of game—how do you identify anybody as anybody, by footprints, thumbprints?

The Court: In writing, handwriting experts have accepted methods of determining whether the purported signature of Mr. Hughes is in fact that of Mr. Hughes.

My only point to you, Mr. Davis, that is in view of the background that neither the Special Master nor your adversary had much faith in Mr. Hughes personally, and because they also wanted to protect you against what he may do and that certainly is implicit in what the Special Master said on page 45, he asked for written evidence,—nobody has in these proceedings and even in your absence on September 6th has said you are not involved in this personally [fol. 2062] but when that evidence is produced and is attacked as being a forgery, with an affidavit from a person who appears to be reputable and I must admit he hasn't been subject to cross-examination, but his qualifications seem quite clear, aren't you then in a position not to furnish this Court with an acknowledgment by a third person which in fact doesn't comply with the California statute because the California statute says acknowledge that he executed the same.

Those words are not in the acknowledgment, Mr. Davis. Shouldn't you then have prepared, not you, I assume Cali-

fornia counsel, shouldn't you have prepared for Mr. Hughes' signature an affidavit just as I assume was prepared for the notary public, the form of the acknowledgment? And since you had to bring Mr. Hughes from wherever he was to this notary public, or maybe the notary public was taken to Mr. Hughes, Mr. Hughes merely had to sign a piece of paper, not even tell a story to the notary public and the time involved would be shorter than was involved in telling the story to a notary public who then had to sign an affidavit? Wouldn't we then have had another signature of Mr. Hughes but this time sworn to before a notary public [fol. 2063] which could have been a perfect refutation of what a handwriting expert may have said in a counterveiling affidavit to me?

Mr. Davis: May I suggest what we would then be discussing, Mr. Sonnet would be standing there and making exactly the same argument and now he says all that proves, your Honor, is that the same person who forged the first letter forged the second and we would have to have a trial at that time and bring in all these notary publics and bring Mr. Hughes.

If I were to produce a man walking into the courtroom and say this is Mr. Hughes he would say prove it.

Let me address myself to what seems to me is the only way to solve these questions of forgery and the question of authorization. There is no issue of fact as to how a thing gets signed. Whether or not a writing is in fact an authorized writing—a man may put an X even though he is capable of writing—the law is perfectly clear as I understand it. The only issue as far as I am concerned that ever existed was either this subpoena—and I don't want any side trials, I want to try this TWA case—and to my mind the only thing needed was an acknowledgment that the [fol. 2064] authority that I received was confirmed in writing, the writing was evidence of the nature and scope of the authority so there could be no question as to what it is.

The purpose of any writing is not to chase over the countryside to determine whether a man can forge his own signature.

The Court: There was an alternative route that would have been much more effective from your point of vie

If you take the trouble of getting an acknowledgment why not get an affidavit?

Mr. Davis: The only problem, I wanted an acknowledgment that the paper which I had here in New York was the one. Let me point out one other thing because I don't think it would be fair to finish without me making this much of an observation. This relates to these efforts to take the deposition of Mr. Hughes next Monday or any time.

TWA has served many notices of deposition for the taking of the deposition of Mr. Hughes. They first took the position he was a managing agent of the Tool Company and the Tool Company could be required to produce him, the notice itself said that.

Then they figured out a better way of annoying and [fol. 2065] harrassing Mr. Hughes and the Tool Company to coerce some kind of settlement without ever disclosing the merits of the lawsuit and they had a big hullabaloo about wanting to locate Mr. Hughes.

Everybody knows there are a lot of people trying to locate Mr. Hughes and a lot of people who would like to coerce some money out of either Mr. Hughes or the Tool Company because of the publicity or notariety that comes when they raise a claim. We know that, we read the newspapers. So then they asked for interrogatories to be answered by the Tool Company, interrupting our discovery proceedings in a technical sense for that purpose and persuaded the Special Master that they needed answers to those interrogatories and publicly disclosing where Mr. Hughes was so they would be able to serve him.

Of course, as a managing agent they didn't need that but no, they need him as a witness. I believe I mentioned that one of the arguments before your Honor we would hear he was a managing agent but that was dropped.

At the time they applied for answers to these interrogatories, your Honor, what did they say to the Special Master? This is not an effort to change the priority for the [fol. 2066] taking of depositions established by this Court. That is the representation that they made.

Now, they want interrogatories answered. In order to induce the Special Master to grant the interrogatories it is

true first they suggested anyone else could serve Mr. Hughes but finally, no, Mr. Davis will accept service, it will be satisfactory to us if he is authorized.

Now, I got authority to accept service on his behalf—that is not enough. They want to protect me. It has to be confirmed in writing. I obtained that writing, to be sure the writing I would have preferred would not be as broad.

The Court: The problem was couldn't they even slap you with a summons?

Mr. Davis: Then the reason is perfectly apparent for the trip to California. First they said it is revocable, there was an objection. Did they ever before September 6th question it? No, that came as a surprise here. The only thing that I did was when they served me with another notice for the taking of deposition on August 17 and a subpoena out of the California court, I thought that this [fol. 2067] was a game where they were going to take the position how can we arrange to serve Mr. Davis with a subpoena out in a California court because it requires a person to be in California.

I have been trying to make arrangements to accept service in New York, whatever requirements for doing this be but the Cahill firm wouldn't talk to me. All they would say is that this is not a satisfactory authorization. Why, I don't know.

Apparently if you look at this affidavit filed they had this application for the pilot's license since February of last year. Now they are trying to say which is the forgery. My answer, your Honor, is nothing is a forgery if it is done with the authorization of the person. I am saying to you, sir, the law is perfectly clear, there is no basis or justification to even say forgery unless you believe it is not an authorized act.

I believe the law to be if I asked Mr. Cook right here to sign my name to a letter as is sometimes done—

The Court: How about a check?

Mr. Davis: And as to a check it is not a forgery. Now, [fol. 2068] when all this takes place, what do we find? That appears to be now a reason or justification for saying to you we must have Mr. Hughes.

The Court: I believe I made it clear as to the September 6th hearing these were separate and independent issues and one would have no bearing on the other.

Mr. Davis: I merely refer back to the remarks of Judge Dawson when we have a complaint which does not disclose the facts or allegations. It was filed under seal in order to compel a settlement they are not entitled to. We want to discover the facts and justification for this complaint so our rights can be properly represented.

The Court: Judge Bromley, do you wish to say anything?

Mr. Bromley: With your Honor's permission, my position relates to the additional defendants Metropolitan and Equitable and their respective individuals is that the Special Master was in error in the ruling which he made as your Honor mentioned commencing on page 102.

As I understand him he has in effect said let us put an [fol. 2069] end to these depositions before the direct examination is completed, before there is cross-examination and proceed to what is really a final pretrial.

If one looks at page 103, one will find in paragraph 2 that he contemplates the settling of an order which will define not only the issues as between the plaintiff and defendant but also as between the defendant and the additional defendants prior to the time any depositions are begun, either in defense of or prosecution of the counterclaims.

It seems to me that is a fundamental error for this reason:

The time for that kind of a pretrial has not arrived. What has been done so far as I see it is a preliminary pretrial which was of course proper, which set, charted or assumed to try to chart a course of the discovery and that pretrial order has been in existence and while it hasn't worked out, as your Honor suggested, quite the way it was thought it would, discovery is proceeding.

To interrupt all of that now and come in to try to frame the issues before we, the additional defendants, and before TWA has had any discovery from the central act in both [fol. 2070] controversies, Hughes himself, it seems to be a pure waste of time.

I think because of the length of time consumed by Mr. Davis and although he wouldn't answer your Honor's question, we all know that he has about 20 more witnesses whose examinations he has heretofore noticed, because of the inordinate length of his efforts to perform his discovery functions, I think the time has come when we should have a go at Mr. Hughes and I think Mr. Sonnett should be accorded a prompt opportunity, perhaps after the finishing of Rommel and Leslie, to get a little discovery from a man who knows most about both controversies and give me a chance to cross-examine Mr. Hughes in so far as Mr. Sonnett's examination necessarily impinges upon the issues posed by the counterclaim.

I suppose we all realize that to a certain degree the issues are inextricably wound.

The Court: That is one of the reasons I assume you had the Special Master, to have somebody present who can possibly draw a line one between the other.

Mr. Bromley: That is right and he is alert and has done that very well so far and can be trusted in the future [fol. 2071] to do it well but I say again I think it would be a pure waste of time—I don't think the situation is ripe for the kind of pretrial discovery the Special Master seems to envisage because you cannot do that until you have substantial discovery on both sides.

It doesn't do any good to look at the pleadings, having in mind nothing has been developed by anybody with respect to the issues involving the additional defendants. You cannot look at the pleadings and have a meaningful limitation of issues until you have had substantial discovery from both sides.

Since Mr. Davis has seen fit to take so much time with the first witness I say the time has come for us to have and for Mr. Sonnett and me to have a go at Mr. Hughes.

The Court: Mr. Kaminer.

Mr. Kaminer: May it please your Honor, I agree with Judge Bromley's observation that it is a little too early for the pretrial hearings which the Special Master envisaged. I would like to call to your attention that we have a practical problem here.

We want to get the case going. It is costing so much [fol. 2072] money that it is a disgrace and we are not particularly happy I assure you to have been paid as much as we are and to see this kind of thing going on.

Now, in view of what is happening here we are going to have another interesting issue, namely, whether Mr. Hughes considers himself bound. That could be easily avoided. Your Honor has made all the arguments in questions to Mr. Davis which I planned to make so I don't have to make them. If Mr. Hughes appears on the 24th and answers under oath the question of whether or not he signed that paper—

The Court: That is immaterial.

Mr. Kaminer: Sir?

The Court: I think that is immaterial. If he appears and I direct him to appear, which is now the question I have before me, if he answers whether he signed that paper or not is immaterial. You are going down a collateral line which is unnecessary.

Mr. Kaminer: Secondly, I think the only thing which will bring this case somewhere within sensible proportions is if there is now an examination of Mr. Hughes. You have [fol. 2073] heard the reasons for that and I don't want to repeat them but we think this would have a much more beneficial effect on this case than six months of pretrial.

The Court: Mr. Stewart. You represent Dillon Reed.

Mr. Stewart: I won't repeat what Mr. Kaminer said as to the expense in this case. Dillon Reed was brought in some six months ago or seven months ago as an additional defendant on counterclaims and since that time has been forced to spend tens of thousands of dollars in legal fees and out of pocket expenses for documentary reproduction.

It is still unclear why we were joined in the case. We have no power or ability to grant anything that the Tool Company is asking by way of relief. Dillon Reed merely came up with a plan and made a fee but the point is this, your Honor:

After some months of very active litigation we have had no opportunity to make any discovery of facts underlying the counterclaims against Dillon Reed. Our investigation shows the claims against us are baseless.

The principal charge against us is that we in some way [fol. 2074] concealed the intent of Mr. Thomas to resign from the Tool Company.

How do you prove that you didn't conceal something? We know the charge is false. But the only way we can prove it is through the examination of Howard Hughes. He knows the charge is false and I believe he will so testify. It may be, your Honor, that after the examination of Howard Hughes. He knows the charge is false and I believe he will so testify. It may be, your Honor, that after the examination of Howard Hughes we may be able to dispose of this matter as far as Dillon Reed is concerned either by stipulation or settlement.

There is, of course, the additional question that even if your Honor were to order that appear for his examination, whether that would only be the trigger for a new round of litigation as to whether he is able to appear or whether this would be injurious to his health. However that may be, I think that Dillon Reed—

The Court: Really we have enough problems now, Mr. Stewart, without some of those. Somebody said there is a question that Mr. Hughes is psychotic and some counsel [fol. 2075] in this transcript before the Special Master got off on that point but I think we have enough of our own problems without looking for any more.

Mr. Sonnett: He is crazy like a fox, your Honor.

Mr. Stewart: I will be faced with the problem of a lapse of time that if we get into a year or more of pretrial no witness' memory is going to be that good any more. But I suggest if for any reason he won't appear or cannot appear, that we find out now and not a year from now or two years from now after we have expended thousands and thousands of dollars in litigation fees.

I respectfully urge your Honor that you grant the TWA motion for the examination of Howard Hughes on the 24th.

The Court: Mr. Davis, do you want to say anything?

Mr. Davis: Your Honor, very briefly, because I really anticipated some of the arguments made here today. I didn't understand that we are here to explore in detail the

desirability of the suggestion made by the Special Master with respect to this pretrial conference he is suggesting. [fol. 2076] I am simply amazed that here we come down to the discovery of TWA and we don't know the basis of the complaint.

Let me read a short paragraph from a statement of Judge Bromley on protracted cases.

The Court: That is not a nice thing to do. I know how Judge Bromley feels. In the motion part counsel argue a decision I handed down last year.

Mr. Davis: I took this out of Judge Bromley's remarks for your Honor:

> "It wasn't very long before I got a real shock. Judge Weinfeld sent for all of us and said, 'I am not going to pass on these interrogatories which have been objected to by the Government. There is no need to do that.'"

I will skip:

> "'Now, I want you gentlemen to tell me your contentions; settle for me the sections of the country which you say competition may be affected and what lines of commerce.'
>
> "That was getting down to cases much too fast for me. I had not begun to think about the issues yet but we had to get busy right away; quick we had to make up our minds what the lines of commerce were, what [fol. 2077] the sections of the country were, that was not an easy task. I should have much preferred to postpone that for many years until all the proof was taken but we had to do it immediately for Judge Weinfeld and we did do it. We submitted our contentions that put the case very quickly into a posture where it was commencing to crystalize."

I don't know what happened to change Judge Bromley's views so drastically.

I also refer—I am sure your Honor is familiar with this—but this was a section in the manual of recommended

procedures for the trial of protracted cases prepared by the United States Judicial Conference in 1958. It reads:

> "One of the most effective devices for bringing the issues to the surface is for the Court well ahead of the date scheduled for the conference to direct counsel for both sides alternately to submit tentative written or oral statements elaborating and clarifying the positions taken in the pleadings. These should not be couched in the verbose language of the complaint but should certainly state ultimate facts as to each legal [fol. 2078] issue. These statements may then become the subject of one or more pretrial conferences at which the Court can discuss with counsel for the parties any points that appear to require further clarification or elaboration. Discovery should thereafter proceed in accordance with the bound as indicated to the clarification and elaboration of the issues as result of these pretrial conferences."

That is what I understand Mr. Rankin is in effect or has in effect suggested. He suggested that we go through that process. Ordinarily the plaintiff is going to be required to identify what it is they claim and that justifies this Court to do anything, much less order someone to testify, and let us satisfy ourselves first as to what it is that TWA is concealing.

They started this action, they are the plaintiff. How can the defendant come and answer questions about anything unless he knows what plaintiff is talking about?

That is what Mr. Rankin is trying to do and that is what all of the learned gentlemen are trying to avoid.

The Court: All right.

[fol. 2079] Mr. Sonnett, do you want to conclude?

Mr. Sonnett: I have only one thing to say, your Honor. I think a reading of the complaint which Mr. Davis seems to have lost somewhere in the recesses of his deep, dark, distant past, a reading of the complaint would indicate there is set forth in detail specifically, ultimate facts relating to the nature of the commerce involved and the con-

spiracy, the acts performed in furtherance of the conspiracy and the effect thereof. There couldn't be any more precise statement of facts.

The Court: I will reserve decision on your motion, Mr. Sonnett, to review the ruling of the Special Master.

(Decision reserved.)

Reporter's Certificate to foregoing transcript (omitted in printing).

Discovery Proceedings Before Special Master J. Lee Rankin, October 25, 1962

[Doc. 226]

[CAPTION] 61 Civ. 2324

[APPEARANCES]

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[53] The Special Master: Anything further, gentlemen? I am ready to rule on this application of the Tool Company to adjourn the deposition of Mr. Hughes and order the return date of the notice for the taking of the deposition and the return date of the subpoena be adjourned.

[54] Before telling you what my final ruling regarding the matter will be, I want to advise you of the various considerations that I have been taking into account in addition to your memoranda, your arguments, and the various papers that have been filed.

In the first place, I do not conceive that Judge Metzner set the date of October 29th as a date that necessarily bound the Special Master as to when the deposition of Howard Hughes should be taken, but it was an indication of the thinking of Judge Metzner, and it was to control, depending upon developments in the interim, at least up to October 22nd.

I also have in mind the statement of Judge Metzner in his order, I think it was in July, in which he modified the order concerning the manner in which depositions should be taken, and said, in words similar, but I am not quoting him exactly, that we must not lose sight of the plaintiff's rights in this litigation.

Discovery Proceedings Before Special Master
J. Lee Rankin, October 25, 1962

By reason of my position as Special Master, and my attendance at these proceedings, I have been in a position to determine whether the parties have cooperated, whether they have been diligent in their efforts to discover, in producing documents, and I find that [55] the parties have all cooperated in producing documents in accordance with the Court's order and the orders of the Special Master, that the Tool Company has diligently proceeded with the discovery proceedings in taking these depositions.

There are several matters pending before the Court which have not been decided, and I think it is important to this litigation that we have the benefit of Judge Metzner's decision concerning them.

I also recognize that Judge Metzner is very busy with the day-to-day business of the court that he has to conduct in the trial of cases, that he has several large matters comparable to this one which have been assigned specially to him by the presiding judge of the court, and there is only so much of his time, by necessity, that he can devote to this litigation.

Therefore, it can only be expected that it would take a reasonable time to get a disposition of the matters pending before him and others that may necessarily be presented to him regarding the problems relating to discovery in this action.

I think that we must take this into consideration both as to the Rule 16 application now under submission and ruling of the Special Master concerning the [56] privileged documents claimed by the Tool Company, but which, as I understand it, has not even been submitted to Judge Metzner yet because he has not set a time for presentation of that matter to him, as I understand it.

Discovery Proceedings Before Special Master
J. Lee Rankin, October 25, 1962

The question has been raised by counsel for the Tool Company as to whether or not there is any cause of action here that can be properly pursued on the ground that the Court does not have jurisdiction of the subject matter.

That issue is not one properly before the Special Master. I have no jurisdiction to pass upon that question.

However, I think it is important to the litigation, and the right of any of the parties, to discover, in that there can be no benefit of a final judgment in this action if the Court does not have jurisdiction of the subject matter, and none of the parties can get their claims properly resolved by the Court if there is a true question of that kind in the case.

Therefore, it is, I think, proper that I take into consideration that there is such a claim being made, and that reasonable opportunity be allowed for its presentation at as early a date as possible to the [57] Court.

The claim is made, as I observe from various papers presented, and argument, that the Court does not have jurisdiction of the subject matter because the primary jurisdiction is with the Civil Aeronautics Board, an administrative body.

While I have no authority to pass upon that question, and do not purport to give any opinion about it, it seemed to me that I should examine it sufficiently to see whether or not it could be a serious issue in the case, and I am particularly impressed with the fact that under the holdings of the Supreme Court generally the question of primary jurisdiction is an issue of whether the administrative body has an expertise that should be applied to the controversy before the Courts act, that the question as developed in the

case of U. S. against RCA, California against the Federal Power Commission, a long line of Interstate Commerce Commission cases, the Shipping Board cases, is whether or not the statute provided for a pervasive regulatory scheme and an exemption from the antitrust laws, and in the cases that I have referred to the Supreme Court has called attention to the fact that the Federal Aviation Act is one of the acts in which [58] such provisions are made.

On the other hand, in the case of Slick Airways against American Airlines, opinion by Judge Forman in 107 Federal Supplement 199, the Court carefully examined the question of whether or not an antitrust suit could be brought and maintained in the Federal Court despite the claim that there was primary jurisdiction with the Civil Aeronautics Board, and he found that the antitrust action could be maintained, principally on the ground that it was not conceived by the Federal Aviation Act that the relief prayed for could be granted by the Civil Aeronautics Board, that the Board had no power to grant damages, treble damages, as requested there, and it had no authority to grant the additional injunctive relief asked for.

Then he dealt with the question of whether or not the particular acts complained of were those which were exempted from the antitrust laws or whether there was something beyond that that was involved in the complaint.

On the rehearing he also dealt with the decision in the Court of Appeals of the District of Columbia taking the other position, opinion by Judge Bazelon, and he distinguished that case and adhered to his opinion.

[59] Then there is a further factor that except in very rare cases the Supreme Court has not said that where they

find that there is primary jurisdiction in an administrative body that the case should be dismissed, but they have merely held the case in abeyance pending the action of the administrative tribunal or agency, and after that action proceeded with it.

However, whatever the merits of that claim are, it seems to me it is a factor that I should take into consideration with regard to the time for Mr. Hughes' deposition to be taken, and the opportunity for it to be fairly presented to the Court if the Tool Company wishes to press it.

If the argument on jurisdiction goes to the question of motion for summary judgment or motion to dismiss based upon all of the evidence, then it is an entirely different question, and it seems to me it involves the problem referred to by the Court and counsel before, as to whether or not the Tool Company is entitled to get the litigation disposed of without the plaintiff having an opportunity to find out what its counsel now says could be 75 per cent of the facts from one of the witnesses who from the record already developed before us obviously knows some important [60] things about this litigation. The extent of his knowledge, and the range of it, we do not know at this time.

But the question of whether or not a final disposition on motion could be had of the case, assuming the Court had jurisdiction otherwise, without even an opportunity to inquire as to the knowledge of this important witness, is a serious one.

I am not purporting to pass upon either of those questions, but I have examined them sufficiently so that I can say to you that I think it is proper that the Tool Company have an opportunity, within such reasonable time as can

be made available to it, to raise them before the Court, which is the proper place, in my opinion, that those questions be raised.

Then I think we have the question of how far the Tool Company fairly should be permitted to go before we think of other parties in this litigation, not with the idea of exhausting the rights of the Tool Company for discovery, but with the concept that there could be a pause that does not injure it, and allow the plaintiff to proceed with some discovery before returning to further discovery for the Tool Company.

In addition to all of this, it seemed to me that [61] I must consider and inquire into the problem of logistics.

I do not know how many records these parties will have to move to California to properly examine Mr. Hughes, but in view of what has already happened in this case in the depositions before me, I would think that a considerable number and bulk of documentary evidence would have to be taken by all parties in order to properly conduct any examination of Mr. Hughes. That is one factor of logistics.

Another is the number of lawyers, associates, and the amount of stenographic help that would be involved in such an examination.

Roughly, I guess that there might be some 35 to 40 people, counting those around the table here and those that would have to be working back of the scenes on documents, getting them ready for examination, and the stenographic help.

That may be too large an estimate, or it may be too small. But regardless of how accurate it is, it certainly is a real problem, and it caused me to believe that taking into

account two holiday periods, one in November and one in December, it was quite unreasonable and certainly undesirable to contemplate [62] that many people going back and forth to California several times to try to adjust to problems and the other considerations involved if we would try to take Mr. Hughes' deposition either on October 29th or during that season.

So I have concluded that the Tool Company should be allowed to complete, within the limits that I will describe, the examination of the TWA witnesses, Mr. Leslie and Mr. Breech, and that I will allow the Tool Company, if it cares to, to make an oral application to suspend the deposition of Mr. Cocke, in light of the fact that his difficulty of recollection up to date has been such that I feel that his deposition has not been very productive, and I should wish to give them an opportunity, if they care to, to use the time to the utmost for productive discovery.

I therefore order that the deposition of Howard R. Hughes be adjourned to February 11, 1963, and that the return date for the notice to take depositions and the subpoena be adjourned to that date, and that the deposition be taken at the same time and place.

I have in mind, in that regard, also the fact that Judge Metzner's order appointing me as Special Master was dated February 7th, and it will be a year [63] at that time during which the Tool Company has had the opportunity to make discovery.

I contemplate also that such period should give it a reasonable time to present whatever motions it cared to to the Court with regard to the jurisdiction of the Court over the subject matter and elements of primary jurisdiction, or

other legal issues of that character, and I would hope that questions in regard to interrogatories will be resolved, that we will have a ruling on the Rule 16 application, and a determination of the right of all parties to any of the documents claimed to be privileged by the Tool Company which is now on appeal.

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[114] The Special Master: Lady and Gentlemen, I am ready to rule on this matter.

I shall deny the motion to quash the interrogatories served by the defendant Hughes Tool Company on plaintiff dated October 11, 1962, and deny the order to strike the interrogatories.

[115] I will give you my reasoning, for what it may be worth to you.

In the first place, I do not consider that there is any requirement to obtain leave from either the Special Master or the Court for the filing of the interrogatories. The rule does not require it, and I do not construe the order of Judge Metzner appointing the Special Master and providing for these proceedings to require any such permission.

In that regard, however, lest it be misunderstood, I do consider that the rules give the Court or the Special Master ample power to quash interrogatories or strike them or delay the day that they would have to be answered if they were to cause an unreasonable burden on any of the parties because of the fact that they have a responsibility of moving the case along by conducting the deposition proceedings or some other function in connection with the proceedings that are being conducted day by day.

Discovery Proceedings Before Special Master J. Lee Rankin, October 25, 1962

I invited the application by any of the parties to this litigation to the Court for a proceeding under Rule 16 because I thought it would advance the entire litigation by eliminating issues that the parties did not think were in the case at this time or that they [116] were not satisfied that they could produce evidence to support or for any other reason, and thereby direct our efforts in the taking of depositions to the issues that were important and confine the depositions to such issues as much as possible.

That matter, as Mr. Sonnett has said, is under consideration for determination by Judge Metzner at this time.

I consider each of these rules to be cumulative and independent, and that the whole purpose of the federal civil rules is to aid and assist the acquisition of information which will either support the claim or defense or show that there is nothing to support such claim or defense, and that they should be used by all of the parties, each of the rules, and all of them, as much as possible to get to the facts as promptly as possible so as tc reduce the expense of the litigation and the time consumed by the parties, counsel and the court in the handling of the case.

I therefore think that the interrogatories are proper, that TWA could be of great assistance to the progress of the case by answering them promptly, that insofar as any of the answers eliminate or reduce the issues, or demonstrate ultimate facts that will [117] support the claims, they will be of assistance in the conduct of this litigation.

I also think that it is important that the answers to the interrogatories be furnished so that the depositions from now until February 11th can be devoted to concentration on all of the matters that are not furnished by the answers

to the interrogatories, and also confined to whatever issues can be refined out of the interrogatories and the answers.

It seems to me that it is the responsibility and duty of the Court and the Special Master, as an arm of the Court, to do what can be done to try to determine as explicitly as possible what issues there are in this case between the parties and what ultimate facts there are which will support those issues and what witnesses will be able to testify to them.

Those are the reasons for my ruling.

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Transcript of Pretrial Hearing, October 29, 1962

[Doc. 184]

[CAPTION] 61 Civ. 2324

Before: HON. CHARLES M. METZNER, District Judge.
New York, October 29, 1962, 10:30 a.m.

[APPEARANCES]

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[3] The Clerk: Trans World Airlines vs. Howard R. Hughes, et al.

The Court: Mr. Sonnett.

Mr. Sonnett: May it please the Court, on study of the transcript before the special master Friday and Saturday it became apparent to me that the problems created by the rulings below were so grave in terms of impact on the progress of this case as to require TWA to try to make its position even more clear than I thought we had before the special master. Accordingly, having spent the weekend in an effort to try to make our position more clear, I put that in a memorandum on appeal to your Honor and was able only to submit it and serve it this morning.

Of course, I have no objection to any amount of time your Honor may see fit to give the defendants to put in any answering memoranda, if they feel one is required.

The gravity of the procedural problem facing us, I think, can best be summed up by saying that if the master's rulings below are permitted to stand in my judgment the TWA case will come to a grinding halt for a period of at least six months.

I think the master, with the best intentions [4] certainly, but without fully realizing the import of his rulings below, and their effect on this litigation, committed error; and our purpose today is to persuade your Honor that that is so.

The master, below, ruled that the deposition of Hughes should be adjourned to February 11, 1963. He ruled that the Tool Company, if it cared to, might suspend the deposition of TWA by Cocke, and that on the ground if the master felt that the deposition of Cocke had not been productive.

I might pause to say that I do not regard that as any function of the master under your Honor's appointment. Nor do I agree with the master's conclusion because what led him to that conclusion with regard to the deposition in fact may be of great significance, and I believe is, in TWA's case, for reasons which I will be glad to develop later, if your Honor sees fit to have me do so.

The master further ruled that he would allow the Tool Company to complete before the deposition of Hughes commences, the examination of TWA witnesses, Mr. Leslie and Mr. Breech.

Now I have no problem about the completion of the Leslie deposition. It has been ordered; three [5] days have been taken; I informed the master as to when the Leslie deposition was to go on to completion, TWA will have at least three days of cross-examination, and subject to what developed yet in the record to be made by Leslie we might have more.

As to Breech, the injection of Breech, Friday came out of the blue. I frankly wasn't aware that that matter was being argued, nor did I purport to argue it. But I think

the injection of Breech came because the master had decided initially to postpone the Hughes deposition to February 11th and then he was trying to figure ways and means to fill in the intervening time, and the deposition of Breech seemed to him a useful thing in that regard.

Now as to Breech, I represent him only in his capacity as chairman of the board of TWA. He is not an officer of TWA. He has no executive functions in TWA. He is in this situation at this time, and has been, because he tried to do a public service for this airline by going on its board, as indeed did the other directors who came on, and I might say that they are having a hard enough time doing it, and all they are getting for it is abuse.

However that may be, Breech's status as [6] a party to this case has not been determined. Your Honor, in connection with the motion relating to service of venue has stayed the proceedings as to Breech. The notices and orders heretofore made relate to Breech only as a witness, and under those orders he is to follow later as a witness and not to precede.

As to Mr. Breech, he is out of the country in fact until the middle or late November, I am advised through his counsel. He has stated to his counsel that he would be available in Detroit, where he has his home; thereafter at Phoenix, where he has a winter home, and thereafter he would make himself available to the convenience of the Court and the parties—indeed, he would provide facilities in Detroit at no expense to anyone for the taking of his deposition as a witness when that time came.

Mr. Breech's connection with TWA does not involve any period of time prior to 1961—December of 1960. So it is manifest, I submit, that his deposition would serve no pur-

pose with respect to the period 1939 through December of 1960. It would be relevant only to 1961 and later.

That period of time, as your Honor will recall, [7] is the period of time covered in our second and third causes of action, and that period of time is the period of time covered in our counterclaim.

You had previously directed that the examinations on the counterclaim be deferred until the end of the discovery program.

So that examination of Breech now could relate only properly to the second and third causes of action, and I see no need that he be examined on those at this time prior to the deposition of Mr. Hughes.

Moreover, that deposition will cause a great deal of controversy as to scope, as to whether it really relates to the answer or whether it relates to the counterclaim.

Further, as to Breech, TWA, in any event, is not in position to produce Mr. Breech since he is neither an officer nor a managing agent of TWA and under Rule 37(d), your Honor, I think it would be improper, therefore, to attempt to require TWA to produce him.

The Court: Whether you can produce him or not his counsel made the offer in court two weeks ago, Mr. Sonnett.

[8] Mr. Sonnett: Yes, sir. I must emphasize this.

The Court: Let's go on to something else now.

Mr. Sonnett: Yes, sir.

The special master below indicated that it would be desirable that certain decisions be made by the Court before Mr. Hughes was deposed. I don't see any relation between the two whatsoever. We are prepared to go forward with Mr. Hughes without the Court's decisions on those matters and abide by the Court's decisions when they come down.

There is no relationship between the two and there is no impediment, so far as I am concerned, as far as interrupting discovery on the basis of the situation now existent.

The special master indicated that he felt that the taking of depositions be postponed. I submit that that is improper under the established practice. Indeed, what it really consists of, I think, would be an effort to try the case on the evidence now available with the hope of short-circuiting the Hughes deposition which I have said to the master—and, I finally believe, will produce at least seventy-five per cent of the evidence we need to try the case.

[9] I believe with the completion of the Hughes deposition for the first time we can come to your Honor and say, "This now is for real. We believe we will need, so far as TWA is concerned, only the following by way of witnesses," and we will be able to suggest, and suggest in all sincerity, and with some basis to go on, that your Honor set a tentative trial date because the setting of the tentative trial date is the only or one of the only effective ways to expedite a pre-trial, as your Honor knows.

Now on that subject let me pause for a moment. It is not oratory when I say to your Honor that TWA's needs for discovery and an early trial are very real. TWA has a very substantial financial problem. It is the legacy of these defendants. The sooner this case can be tried, the better off everybody is.

At this rate, since we haven't been able to commence depositions for a year, the only effective way for us to proceed is to give us access to what I believe and represent to your Honor will be seventy-five per cent of the evidence before we are ready to suggest a trial date.

Now the master also made other suggestions [10] relating to the merits of the case and motions that ought to be made, all, I submit, going far beyond the matters entrusted to his responsibility, which, if carried out, would be productive only of further delay.

If the other defendants seek to make other motions, of course they have their right to make them, and, of course, we have a right to be heard, and, of course, the matter will be decided. But it seems to me that the frustration of the discovery proceedings by repeated discussions, as we have had them ad nauseam, of the merits, without tendering motions for decisions, has operated in this case to delay the discovery substantially because the record is full of such discussion, and I submit that that is what has led the very able and conscientious special master into error, because I think that instead of getting on with the job, handling the day-to-day administration of the depositions, he has sought to be concerned about the expense and the delay of the proceedings and to concern himself with short cuts. And I think that that is what has gotten us into the trouble that we are now in.

The master also ruled, and I believe contrary [11] to the rules and the authorities, that the defendants might use Rules 23 and 36 concurrently, that while they are engaged in the depositions and discovery they have a right to put to us interrogatories. The interrogatories, your Honor, I have discussed in detail in my memorandum. I don't intend to take any of the Court's time in oral argument to try to discuss those in detail, but there are certainly conclusions concerning them that I think your Honor will reach just as I have reached.

These interrogatories purport to be interrogatories relating only to formal allegations in the complaint—paragraphs 2, 3, 4, 7 and 8.

These are allegations identifying the parties, identifying the nature of the trade and commerce involved.

Now, with that tongue-in-cheek approach, I think the master was led into the assumption that all that was involved here was purely formal, were purely formal matters which could readily be supplied, but the fact of the matter is that these interrogatories, as they stand, relate to every single allegation of the complaint—every one of them—and to ask or attempt to ask for them before we have had a discovery [12] would be impossible.

Now as to the statistical ones, which are those relating to paragraphs 7 and 8 of the complaint, I say to your Honor that the fact is—and I am prepared, should your Honor wish to have it, to present evidence today by a witness, subject to cross-examination, that to comply with interrogatories relating to this case proposed by the defendants would require the full-time work of six men or a year at a minimum period.

This is a conservative estimate. It is made by knowledgeable people. One of them is in this courtroom now, Mr. Fellows of TWA, whose responsibilities are such that he knows the details of all this, and I am prepared, should your Honor wish to have this before you, for him to take the stand now.

I am not just making a speech. It will take a minimum of six months to a minimum of a year to do it.

Thus to import into this procedure now the procedure of having to answer interrogatories now before we speak to Hughes is as good as saying we can't have Hughes be-

fore a year, and I say that that is erroneous, and, for that reason, a burden, and [13] also for the reason that it would frustrate the order your Honor has previously made.

Now that is our position. I am sorry to have had to inflict on you a brief; it is not as long as it looks; there is an appendix to it. It is thirty-seven pages.

And I say to your Honor that it was not until Saturday when I reread the transcript for the third time that I realized and became aware of the full impact and application, and what it could do to this case that I felt that I had to write a brief. And I might say that it was not until three o'clock Saturday morning that I decided to tell you what I sincerely meant and believe to be true.

The Court: Judge Bromley, you are alive and interested. Would you like to talk now?

Mr. Bromley: May it please the Court, I endorse Mr. Sonnett's position and everything that he said.

It seems to me that it has now become apparent that Mr. Davis has been able at every critical point to insert into the consciousness of the special master some new tactic well designed to postpone Mr. Hughes' appearance as long as may be, [14] and the sudden injection of Mr. Breech as the man to be examined before we get to Mr. Hughes is an illustration of that tactic.

There really is no reason to have Mr. Breech examined before Mr. Hughes. As Mr. Sonnett has said, his prime concern is in the area of the counterclaims, not in the complaint.

And, secondly, even the February 11th date on the record is not a firm date because the master made it perfectly clear that he was free to postpone it at the last minute

again, or prior thereto, should developments, in his mind, warrant it.

Now all Mr. Davis has to do is to extend Mr. Breech's examination and then argue that, after all, the interrogatories are answered and the February date becomes March or April or May, and all the time the company is suffering, and we, Metropolitan and Equitable, as its principal creditors, are likewise suffering.

And the whole controversy really could be measurably advanced should we have the opportunity promptly to examine Mr. Hughes.

I think the master should be reversed in that respect and that your Honor should rule that upon [15] the conclusion of Leslie—because Mr. Cocke, it is apparent, knows nothing about anything—we should proceed to California, holidays or no holidays.

The Court: Mr. Stewart.

Mr. Stewart: Very briefly, your Honor, I would like to speak about the date for Hughes' examination.

We have already submitted an affidavit outlining our position and I don't see any point in repeating what is contained there.

I don't see any reason for your Honor to put over this examination of Mr. Hughes to February 11th. But even more, I endorse what Judge Bromley says in the sense that whatever date is set should be a firm date.

We have all seen how the Tool Company can come up to what is supposedly a firm date and nothing happens. We actually have a logistical problem, your Honor, in going out to Los Angeles to take Mr. Hughes' examination. I would very much hate to see a situation where we plan

for this, prepare for this, get out to Los Angeles, and on February 11th there is no Mr. Hughes.

So that I would ask that whatever date is [16] set, your Honor, be a firm one.

The Court: Mr. Weiner.

Mr. Weiner: Your Honor, my name is Stephen Weiner. I appear for the Irving Trust Company today.

We join in the position of counsel whom you have already heard, and it is certainly urged that the date of February 11th should be made a firm date, if indeed your Honor does not set an earlier date for Mr. Hughes' deposition.

We certainly think that the special master, having left it open and then further adjourned it to that date, that it should be closed by your Honor and that Mr. Hughes' deposition should be taken on February 11th, if not before. Thank you.

The Court: Mr. Davis.

Mr. Davis: Your Honor, the position of the Tool Company hasn't changed.

The Court: Has changed?

Mr. Davis: Has not changed.

The Court: I didn't think so. (Laughter)

Mr. Davis: We believe that the Tool Company, as well as the Court, is entitled to know what are the [17] facts which the plaintiff claims it is going to be able to prove and which, if they are able to prove, will establish a violation of the antitrust laws based on the circumstances which are admitted, which we know exist in this case.

And we believe that that is a right which a defendant has, since he has no right to try to force an amendment to the pleadings to disclose those ultimate facts under present practice, and is a right which has been frustrated every

Before this case was assigned we know that Judge Ryan made an effort to get counsel for TWA to prepare a form of statement of facts or proposed stipulations as to what they claim so that we could see what it is we were denying —understood what they were claiming.

That opportunity was rejected and they said, "No, it was too soon, and the case ought to be deferred; it is a big case. We know what has happened here."

The question now is whether we fix an arbitrary date, whether it be February 11th or some other date and say, "This is the date on which the Tool Company has to be prepared in order to answer [18] questions to be interposed."

The question that we have today really is that the plaintiff is unwilling to answer interrogatories. This plaintiff has been unwilling to disclose what are the facts which underlie the complaint ever since the complaint was filed in the proceeding.

Now we started out by the taking of oral depositions in the belief that normally that is the most expeditious way of finding out from the plaintiff not only what it is that he is claiming but also, at the same time, discovering what the evidence is which supports the claim, because there is no question in my mind that the discovery rules perform two functions:

One is to give some means to the parties to develop and narrow and identify the issues, and the other is to discover evidence to support whatever positions the parties want to try to prove, come the trial.

Now the special master has found that we have proceeded diligently in our efforts to conduct oral depositions. I don't think anybody can question that.

[19] I took the trouble to do some statistical analysis of what has transpired because I knew that the time would come when I would hear from Mr. Sonnett, seven months having elapsed, or a year having elapsed, and the fact of the matter is that we have had a total of fifty-five days of depositions—Mr. Tillinghast, Mr. Leslie, Mr. Rummel, Mr. Cocke—to date.

Had we had those fifty-five days continuously from the time that we started we would have been up to April 13th. This is the end of October.

More than that, there is reference to 9760 pages of transcript. Only sixty per cent, however, of that is Qs and As. The balance has been left to objections, sometimes on pretexts to objections to form, and then we have had argument.

Now if I were to take the sixty per cent of the pages of transcript, and assuming that all my opponents had done with their objections, their objections to form and let a ruling be made, I would have had, and I would have covered, the same ground that I have covered by sometime in March of this year instead of now, this being the end of October.

The balance of the time has been spent by bringing me here before your Honor on one pretext or [20] another, all aimed at the charge that we are delaying or avoiding or doing something with respect to the deposition of Mr. Hughes.

Now the fact of the matter is that this Court has consistently held that the defendant was entitled to discovery. Your Honor has set forth the schedule and we have attempted to follow that schedule, and we were entitled to complete the deposition only if TWA brought some of the other witnesses before they were to commence their discovery proceeding.

More than that, your Honor, eight of them, by giving them all the documents in our possession that they have asked for—the only thing that is still pending is some question with respect to privileged documents and communications between counsel and his client.

And now we hear, in fact we know, that eminent counsel for TWA investigated this matter before commencing this action and now they tell us that it is going to take them six months to describe or identify the trade or commerce which presumably we have interfered with.

I don't understand why.

[21] Now it is true that interrogatories—and one of the disadvantages of proceeding by interrogatories, is that I must cover whatever imagination my adversaries may have in answering in whatever they may be talking about. They appear to be lengthy. There is no question but that they cover the same ground from different angles. Now all it requires them to do, however, is to state what they claim; and they don't even have to state that. If they don't have any facts all they have to do is to state what knowledge or belief they have with respect to the facts: none of their contentions.

There is no question, your Honor, that interrogatories are one of the tools available to compel an adversary to identify the issues. That is clear. You can find many decided cases.

Now, to be sure, there are other ways of approaching this question of forcing the plaintiff to identify what it is that he claims.

One time I hear Mr. Sonnett say that whatever they are talking about has nothing to do with the approval from the CAB. At the same time I find in the complaint that it

is claimed that we acquired seventy-eight per cent of the stock for the purpose [22] and intent of controlling TWA and using that control in some way so as to interfere with the manufacture and financing of aircraft, the fact not being clear as to the aircraft being used by all carriers or merely aircraft to be used by TWA.

But we did not know at the time we denied that the acquisition of the stock was approved by the CAB.

There is no question, I suppose, that to a large extent the seventy-eight per cent stockholder did exercise some control over the management of the corporation which became in effect, its subsidiary.

CAB approval in the 1950 control case clearly recognized what the effect would be of approving that, and so certainly we have, if that is what they are referring to, interfered with it.

I don't think enough, but that is beside the point. It has nothing to do with the anti-trust laws, is my point. And whether or not it was seeking to acquire this type of aircraft or some other type of aircraft was made by the board of directors that was subservient to the wishes of the Tool Company or was made by the Tool Company, in effect, or by Mr. Hughes while he was chief executive officer, [23] president of the Tool Company.

What difference does it make? If it involved liability, it involved liability to the minority stockholders if we did not do it properly. As a matter of fact, we operated TWA with success, which is more than they did in the last couple of years since they took over control.

I don't understand what the problem of TWA—what its financial problems are, which, to be sure, we were aiding by the use of our credit, which is now no longer available

to them, but what has that to do with the necessity of examining Mr. Hughes? Unless we are trying—and we should all be frank enough to recognize what Judge Dawson had to say—and we know that that is used quite frequently, and if that is what they are trying to do, I think they ought to come out quite frankly and say so.

In any event, whatever their purpose may be, my position, your Honor, is simply this: I am prepared to follow any procedure suggested by your Honor or the special master, or by anyone, including Mr. Sonnett.

How do you want me to go about finding out what it is that TWA claims has taken place which justifies [24] the assertion that the anti-trust laws have been violated by Mr. Hughes or the Tool Company or Mr. Holliday?

And once that is done I will be willing, without resisting, to follow any schedule for the purpose of discovery of whatever evidence there is in anybody's possession to support those contentions or those facts.

That is why I know just exactly what we have. We don't have, it is true at this time, any way for Mr. Sonnett's anticipating the disposal of this litigation. And he says that I have encouraged that. But whether I am right or wrong about it, what is it that I am expected to do in order to carry out what is clearly the intent of the rules, that plaintiff—particularly the anti-trust rules in the so-called "big case"—is going to be entitled to file a complaint which does not have to disclose what I call a cause of action, as this one does not. Oh, it states a claim. It claims that we violated the anti-trust laws. How I don't know.

Why is it that the CAB approval does not cover the situation? I don't know. I have prepared and submitted an exhibit, Defendants' Exhibit 163, [25] before these wit-

nesses wherein I have listed every acquisition of aircraft by TWA from 1939 to date. They don't know where they came from on a few. Most of them were acquired directly from the manufacturer. In some instances witnesses testified, and they will testify some more when I continue with Mr. Leslie, the financial officer, because TWA did not have the credit available that the Tool shop had to place an order to help to finance. Usually it requires the consent of one of the additional defendants, the Equitable.

Mr. Sonnett says that is not what I am talking about. Well, I thought that perhaps we were forcing, because there was some reference to a captive market here. I inquired from Mr. Cocke and the others that testified, and Mr. Rummel testified that they always want more and it is just a question of their getting as much as they could, and they were trying to persuade Mr. Hughes that they need more aircraft and finance, so would he please help to finance it.

So we weren't shoving the equipment down their throat. And we weren't really in restraint of trade. Restraint of what trade? The trade of [26] manufacturing and selling aircraft?

Mr. Rummel testified that Mr. Hughes—that is, Mr. Rummel at the suggestion of Mr. Hughes—contacted a list of people who manufactured aircraft during that period in trying to develop an aircraft best suited to TWA's needs. But how soon those decisions were made, I don't see how they interfered with that aspect of the business.

They alleged one time that the Tool Company had plans for itself getting into the manufacture of aircraft, which were never carried out. There is a suggestion in the testimony that that was done for the purpose of seeing if they

could not get a better deal from those who were not engaged in the business. Suppose that we had gone on with those plans. How would that have restrained the trade of manufacturing aircraft? There would have been one more manufacturer in the field.

Now we are talking about the financing of the manufacture of aircraft. They say that we voted our stock or exercised our control over this subsidiary in a manner which prevented TWA from financing themselves the way they wanted to, I assume. I don't know by what right these lending institutions [27] claim that they had to lend them money if it wasn't necessary.

But however that may be, I suppose that the controlling stockholder had the right to have some views as to what was the best way of financing the business of which he is a stockholder without having anything to do with the anti-trust laws.

I don't know what theory they are going to come up with.

I proceeded expeditiously with depositions. Admittedly I am still finding out what the nature of their claim is. I am finding out that which negates the existence of the violation of the anti-trust laws.

We suggested the possibility of a pre-trial conference for the development of the issues. They resisted that approach also on the ground that it was likewise premature, and they did not want the matter to be referred to a special master.

So we proceeded with Rule 33 and now we are told that that is not a right way to proceed in spite of the fact that the cases I read make it clear that it is exactly the way to proceed. And the cases also have held that it is a proper way to [28] proceed even if my interrogatories are addressed to matters that are presumably within my knowl-

edge and not within theirs, because I am entitled to admissions from them in answer to my interrogatories. And I am also entitled to discover, if it is true, that they don't have a cause of action.

I have reference, your Honor, to the decision by Judge Conger in the Interboro News case, which also involved an anti-trust action, where he pointed out that the amended complaint follows through containing little more than a short plain statement of the claim even though it had some thirty-odd allegations—thirty-seven paragraphs.

And then he says that still the rules do contemplate "that such a pleading, which is little more than a notice of claim, should be supplemented by some procedure designed to give an opponent additional information necessary to prepare for trial."

And I skip some and continue:

> "The plaintiffs suggest that the defendants have acquired this knowledge through prolonged depositions. If the responses of counsel contained in the excerpts annexed to the memoranda [29] are fair examples of what the defendant has learned they know little more than they did after reading the amended complaint."

Now in our case, after taking these oral depositions, all we learned is that they stimulated competition.

Therefore he concludes that these interrogatories come within the power of the discovery rules, which are "to narrow and clarify the basic issues between the parties," referring to the Hickman v. Taylor case.

They do not call for plaintiff's evidence; they call for that which the plaintiff's evidence purports to prove.

Now I am also very conscious of the decision of Judge Kirkpatrick in Pennsylvania shortly after the new rules in 1938 that came into effect. That is referred to also in my memorandum before the special master.

By the way, your Honor, it is my clear understanding that we were to appear today based upon the papers before the special master and I confirmed that late Friday. I understand from Mr. Sonnett today that on Saturday he wanted to submit [30] some additional material and this morning, just before coming to court, I did receive something which looked to me to be voluminous—I don't know whether it contains an appendix or not—I have not had a chance to look at it. I don't know what it contains. And if it is to be considered by your Honor I would like to have an opportunity at least to decide whether or not it requires any answering paper on my part.

The Court: I will give you a week. Next week, Monday.

Mr. Davis: I would like, your Honor, if I may, to advise your Honor whether or not we need it at all because quite frankly whatever schedule will be established with respect to the deposition of Mr. Hughes I am terribly anxious that I do get answers to my interrogatories at the earliest possible moment. And for that reason I am inclined, unless I find something in this memorandum which I feel requires clarification, I would be inclined to let the matter rest for your Honor's decision based upon what seems to me is well established law in this district, that interrogatories are a proper means for delineating the issues.

So far as the service of interrogatories— [31] while oral depositions are going on—I have only found one decision which seems to me is in point. That was the decision

by Judge Weinfeld, which I referred to in my memorandum, in which he says that the deposition discovery rules create integrated procedural devices, again referring to Hickman v. Taylor.

And then he says, "The sections are complementary to one another and the use of one does not restrict the further use of the other on the same subject matter."

Then he ends with this sentence:

> "The various sections may be used independently, simultaneously or consecutively as required."

And he cites for that Hawaiian Airlines v. Trans-Pacific Airlines. This case is referred to in my memorandum before the special master, and it seems to me that the very thing that counsel for TWA were urging not so long ago about simultaneous and recurring depositions, or suspending one deposition and taking on another, all attest to the fact that we have been accustomed to using all these devices however the circumstances may develop, subject always, [32] of course, to the appropriate application to the Court for relief under 30(b).

And if it should be claimed—I don't understand why it should be claimed—but if it should be claimed that my taking the deposition of Mr. Leslie, now working for Douglas Aircraft, imposes a burden upon them with respect to answering the interrogatories, I would be willing to consider giving them a little time to answer.

But I don't know why it is so difficult for them to state what it is that they claim.

The Court: Mr. Sonnett has said that it would take him six months to gather the statistical data that you have

asked for. I am not familiar with the statistical data you have asked for.

Mr. Davis: Well, your Honor, the interrogatories do not ask for any statistical data other than to ask them what it is that they talked about in their complaint.

The thing that is not clear in their complaint is whether they—whether the market is that of TWA or other than TWA, and they cite in their complaint a bunch of statistics with respect to matters that we concede. And all I have asked them to do is to [33] identify what they are talking about. I would be perfectly willing right now to say, "Well, give me what you can. Give me what you can and we will hold in abeyance what you can't give me."

I am finished with the interrogatories. This doesn't cover the entire complaint. I made it clear to the special master that I was supposed to proceed seriatim. We won't submit to them more than one set of interrogatories.

All I am asking you to do at this juncture, as far as I have gone in my attempt, is to identify what business they claim the Tool Company is in—that is crucial, of course, in any question involving the anti-trust laws—and to identify the line of commerce which they claim that we have attempted to monopolize or attempted to interfere with or to restrain.

And if you look at the interrogatories you will see that it follows exactly the allegations of the complaint.

It says, with respect to allegation so and so, identify what you are talking about in here. If they didn't have it before they filed the complaint, let me have what they do have. And then they can [34] supplement later, when they get more information, or indicate where the statistics that they cite come from. That is one of my questions.

One thing which is bothering me a little bit in these interrogatories, your Honor, is periodically I asked them to identify who are the persons who participated in the answers and what is the basis of the knowledge or information that is used to answer the questions. That is difficult for them to do because they don't have it.

But that is the only part in the interrogatories that I am aware of where they might have a little difficulty.

Now it is true that in going through these interrogatories I in effect have forced them to come out and identify what is the course of conduct that they claim the Tool Company has engaged in which supports the filing of this complaint.

Judge Kirkpatrick pointed out that the burden which is on a defendant who is sued, assuming that he is sued without cause or justification in the sense of without facts to support it, is pretty tremendous, and he is entitled to protection against that impose a burden. And that is particularly [35] true when being charged with violations of the anti-trust laws.

Of course, it is a burden upon the plaintiff. And I would like particularly to call to your Honor's attention to two portions in this decision, which is also referred to in my memorandum. Judge Kirkpatrick says:

> "Courts have always been keenly alive to the burdens by way of expense, loss of time, and exposure of private business affairs which discovery imposes upon anyone required to submit to it, burdens which have increased a hundredfold with the volume and complexity of modern business, and have fully appreciated the great wrong of subjecting an innocent defendant to

them merely to let a plaintiff who may think that he has been wronged learn that he has not."

On the other hand he points out that a plaintiff is entitled to plead a cause of action when he has one.

Then he says, with respect to the procedure to be followed—after referring to a decision by Mr. Justice Cardozo he says, "Searching for guidance in the reported decisions under the old practice and [36] avoiding restrictive formulas, the only general rule having 'the capacity of flexible adjustment to changing groups of facts'"—the standard which Judge Cardozo laid down—"which I can discover is that the plaintiff before he is granted sweeping discovery must somehow convince the court that there is at least reasonable ground to believe that a cause of action exists and can be proved if the necessary facilities are afforded him."

That is exactly my position, your Honor. Give them all the rights they want—Mr. Hughes or anybody else—and impose this great burden upon us and upon him, but only after, in one way or another, they have come forth with enough to make this Court feel that there is a reasonable ground to believe that there is a cause of action under the anti-trust laws against Mr. Hughes, and he should be required to subject himself to this burden that they are trying to place upon him. And let's not be naive and overlook the statement of Judge Dawson.

The Court: All right, I will give you until November 7th to submit an answering brief if you care to. If you decide you don't want to submit an answering brief, call my chambers and let me know.

Toolco's Notice of Motion, December 4, 1962

[27289]

[CAPTION]

BEFORE THE SPECIAL MASTER

SIRS:

PLEASE TAKE NOTICE that upon all the proceedings heretofore had herein and upon the annexed affidavit of Chester C. Davis, Esq., defendant Hughes Tool Company ("Toolco") will move the Special Master on December 6, 1962 at 10 A. M., or at such other time as may be fixed by the Special Master, at Room 3111, 120 Broadway, New York, N. Y., for a direction that following the completion of the present examination of E. O. Cocke, and absent changed circumstances, Toolco may either upon the completion of the deposition of [27290] A. V. Leslie or in conjunction with his staggered deposition, next depose Ben-Fleming Sessel and the Irving Trust Company by Sessel and Arthur L. Wadsworth and Dillon, Read & Co. Inc. by Wadsworth.

Dated: New York, N. Y.,
December 4, 1962.

Yours, etc.,

CHESTER C. DAVIS, Esq.
Attorney for Defendant
Hughes Tool Company
120 Broadway
New York 5, N. Y.

Transcript of Proceedings Before Special Master J. Lee Rankin, December 14, 1962

[Doc. 237]

[CAPTION] 61 Civ. 2324

[APPEARANCES]

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The Special Master: Mr. Tenney, I will hear from you first in regard to how this stipulation is any different than the subpoenas that have been served in this case.

If you recall, in this record there were some subpoenas to produce documents served earlier, and they departed from the orginal subpoenas that Judge Metzner had ordered documents to be produced under? [4] Do you recall that? Maybe you don't in the record.

Mr. Tenney: I am not quite clear of what the difference is that you are referring to.

The Special Master: That was the case, and I raised the point—I think the Cravath firm had theirs somewhat different, and they proceeded at once to modify them so that they conformed to the subpoenas, and the lists of documents particularly, that Judge Metzner had ordered to be produced, both as to the Tool Company and to the other parties.

Insofar as their departure, I would like to know it if there is any in this case. I understood from Mr. Ordover that there was some difference between this and the listing under the subpoena for the other documents, earlier.

Transcript of Proceedings Before Special Master J. Lee Rankin, December 14, 1962

Mr. Tenney: Mr. Rankin, there is certainly a difference, and I might as well start off by saying that the schedule of documents to be produced which is annexed to this stipulation is the product of an agreement between counsel for TWA and counsel for Atlas as to the documents that counsel for Atlas are prepared to produce, and reflect a joint effort to avoid undue harassment or oppression on Atlas, while securing for TWA those documents that TWA considers [5] important at this time in connection with its preparation of this case.

There was no effort made to have the schedule read exactly as any previous documentary schedule has read. I am sure there are many differences. I am not quite able to comment on any particular one because the differences are quite extensive. This is a very narrow subpoena.

The Special Master: You recognize under the rule that you are entitled to this if you show good cause, don't you? That is what the rule says. That is the reason I want to get this question clarified at the start. Do you want to see the rule?

Mr. Tenney: I am sorry, Mr. Special Master, but I am not quite clear of what you are referring to as to the requirement of making an affirmative showing of good cause. I do not think we would have any difficulty in doing so, but I would like to be enlightened.

The Special Master: Don't you consider that Rule 34 requires an affirmative showing of good cause to discover documents?

Mr. Tenney: Mr. Special Master, I did not consider that we were proceeding under Rule 34. We are [6] proceeding under Rule 45.

Transcript of Proceedings Before Special Master J. Lee Rankin, December 14, 1962

The Special Master: I will hear you. I am not sure whether you are entitled to proceed under Rule 45, in light of the fact that you know you can't depose any witnesses at this time in light of the Court's order. I have, so that you will understand, construed that it was the law of the case so long as you conformed to the prior requests for documents, that the various parties were entitled to them, even though they didn't have the right to examine the particular witnesses.

That is one reason why I wanted to know why there was a departure, and what the departure was.

Mr. Tenney: First of all, Mr. Special Master, I did not understand that the plaintiff was under any obligation to move for permission to obtain the issuance of a subpoena duces tecum, and to serve it. We did not so move. I believe that other parties have followed the same procedure without having moved for permission.

I do not believe that there is any requirement to move.

My understanding of the rules is that under Rule 45 any party is entitled to the issuance of a [7] subpoena by the Clerk upon a showing of a notice of deposition.

My understanding is that there is no requirement of showing good cause, and my understanding further is that no party has any standing to object to the production of documents.

I recognize that there is an order applicable here which for reasons that are very obscure to me, has prevented the plaintiff to this time from taking any pre-trial examinations.

I have understood that because of that existing order, which, as I say, I have difficulty in understanding, and I

consider to be entirely unjustified under the rules, we are under a direction not to take the deposition of any person on oral examination, but I have also understood that we were permitted to avail ourselves of the rights that are ordinarily available to parties under the Federal Rules, to engage in pre-trial discovery, to prepare the case which we instituted in this court as long as we did so without interfering with the conduct by Mr. Davis of the pre-trial examinations which he is conducting at the present time.

We have taken extreme precautions to avoid that.

[8] We have stated on the record, and I repeat on the record that we do not intend to take an examination of any person pursuant to the notice and the subpoena which we have served. We have so stated to counsel for Atlas.

In other words, we have confined, and I believe that this is the most that we can possibly be expected to do under the existing orders—we have confined this very limited effort to do something in support of our case, to a request for clearly relevant documents from a person, a corporation, very closely involved in some of the central actions in this case.

We have phrased our subpoena and our schedule so that the documents called for are without exception within the schedules that we were permitted to obtain from a party.

The schedule is far more limited, however, because we have been careful to avoid any unnecessary harassment of a person not a party to this litigation.

We believe we have been successful in doing so, because we have been able to agree with counsel for that third party on a formula which they do not consider oppressive.

I am not aware of any requirement for me or for [9] TWA to obtain permission to proceed this way, and if there is a requirement, I should like to be enlightened on it.

The Special Master: I am sure that you are aware that all the other proceedings as far as the documentary production, were pursuant to Rule 34, as I recall.

Mr. Tenney: I do not believe that to be the case, sir. I believe most of them have been pursuant to subpoenas duces tecum.

The Special Master: Do you have a question about that, Mr. Bradner?

Mr. Bradner: Mr. Davis obtained all his documents under Rule 45.

The Special Master: That is correct, but not as to the other parties not taking depositions.

Mr. Bradner: As I understood the prior cases of Merrill Lynch and First Boston, were pursuant to the same procedure which is involved here.

The Special Master: That is right.

Mr. Bradner: I assumed this was being done under Rule 45 and not Rule 34.

Mr. Tenney: Mr. Leslie is another example. Both plaintiff and defendant secured documents from [10] Mr. Leslie on a subpoena duces tecum.

The Special Master: But he was being deposed in accordance with the Court's order. That is the distinction I was trying to point out, Mr. Tenney.

Are there any exceptions in that regard?

Mr. Tenney: Merrill Lynch, First Boston, Dillon, Read, at the instance of Mr. Davis. As a matter of fact, I believe all of those who are now presently additional defend-

ants were at some prior time third parties while this order was in effect, and Mr. Davis secured documents from them in exactly the same procedure—along the same lines that we are now proceeding.

The Special Master: What I construe may be wrong. All the people that you have listed so far as being on the list that the Court ordered their depositions be taken, with a priority to the Tool Company. I think that is different.

You may have some reason why it isn't, and if you will tell me I would appreciate it. The depositions would be Merrill Lynch and First Boston.

As I understand, that matter is before the Court.

Mr. Tenney: Merrill Lynch and First Boston are before the Court, sir?

[11] The Special Master: Yes, I understood that there were some objections. Is that resolved?

Mr. Tenney: There are none to my knowledge, the documents have been produced.

Mr. Davis: We had an argument before you, and I did not ask for a review of your ruling.

The Special Master: I understood that First Boston and Merrill Lynch directly took something to the Court.

Mr. Davis: They were contemplating something.

The Special Master: That is the last communication I received on it.

Mr. Davis: I don't know whether they have or not. But I do know that documents have been produced pursuant to some arrangements, as to which we did not object, following the ruling of the Special Master on an argument that was had at the offices of the Cahill firm when those two subpoenas were at issue.

I would like to reserve my comments for when it is my turn to do so.

[12] Mr. Tenney: I wish again to make it very clear that I consider that I was attending this argument as an argument of a motion that had been made by counsel for Toolco with respect to our subpoena, and that in the absence of any such motion, the subpoena is beyond any question whatsoever a fully valid and enforceable subpoena, and I do not understand why I should be required to speak first on this, but I now shall, if that is your wish, sir.

The Special Master: The reason I thought you should speak first was because of an obligation to show cause.

Mr. Tenney: I do not believe there is any such obligation, sir, but I shall try to show cause.

The Special Master: I do not recognize under the Court's order that you have any right to produce any witnesses at this point in the taking of the depositions, because I consider that I am bound by the Court's order giving the Tool Company priority except insofar as it is modified by my order that is on review, concerning Mr. Hughes.

Mr. Bradner: Mr. Rankin, if I might be heard on this, it is my recollection of what transpired before—shortly after you ruled that Mr. Hughes was [13] to be examined on February 11th, Mr. Sonnett raised the question before you as to whether TWA and other parties who were so advised might proceed by the method of obtaining documents, dry depositions, so-called, under Rule 45.

I understood you to rule at that time that this might be done to the extent that it did not unfairly interfere with the examination of the Tool Company, which it was conducting.

Transcript of Proceedings Before Special Master J. Lee Rankin, December 14, 1962

I understood that the subsequent subpoenas that were issued in connection with Merrill Lynch and First Boston were issued under that prior ruling of yours.

I certainly came away from that hearing with the very definite understanding that I had been listening to an argument under Rule 45, in which Mr. Davis was objecting to the subpoenas, and the whole argument was based on that basis.

I must say that this comes as quite a surprise to me to have the position taken that these subpoenas are under Rule 34.

As I remember, under Rule 34 you could not bring such a subpoena.

The Special Master: I do not recall that par- [14] ticular place in the record. Could you refresh me?

Mr. Bradner: I did not come prepared with the reference. I did not anticipate the problem.

The Special Master: As I recall, it was an inquiry as to the production of other documents during .....

Mr. Bradner: It was in connection with the production from third parties. I think that all of the parties to the case have produced to all of the other parties of the case under Rule 34, or under prior Rule 45 subpoenas.

The Special Master: In connection with their depositions.

Mr. Tenney: This case was instituted on June 30, 1961, under the provisions of the Sherman and Clayton Acts. Service was obtained of two of the defendants—one immediately and one in February, or January, I believe.

There has been no successful attack on the service, on the jurisdiction of the Court.

Transcript of Proceedings Before Special Master J. Lee Rankin, December 14, 1962

A motion was filed by counsel for Tool Company about fifteen months ago, which was in form a motion to dismiss the complaint.

That motion has never been brought on for [15] argument. Judge Metzner has expressly stated on several occasions to Mr. Davis that while he may bring that motion on for argument at any time that he wishes Judge Metzner does not believe that it is well-founded at this time.

Now, sir, notices to take depositions of various witnesses, both party and non-party, were filed by counsel for Tool Company and by counsel for the plaintiff.

There was a good deal of argument as to what the schedule of those depositions should be. The order of Judge Metzner to which the Special Master has referred sets forth a schedule for the taking of the existing depositions as to which notices had then been filed.

There is not a word in that order granting to Tool Company priority. There has never been a word in any court order entered in this case granting to Tool Company priority of taking depositions as such, contrary to what counsel for Tool Company has said, and I believe contrary to the understanding that the Special Master a few minutes ago expressed.

The Special Master: Will you explain that to me, Mr. Tenney?

[16] Mr. Tenney: In the first place, sir, that order dealt, and on its face it purports only to deal with the specific notices of taking depositions that were before the Court.

Counsel for Tool Company requested an order, and has acted ever since as if he obtained an order granting him priority of discovery. No such order was entered.

Transcript of Proceedings Before Special Master J. Lee Rankin, December 14, 1962

There was an order entered which specified with respect to the particular witnesses whose depositions had been noticed, an order in which they would be taken, and in point of fact all of the depositions which had been noticed by counsel for Tool Company are listed on that schedule prior to the depositions which had been noticed by counsel for TWA.

The Special Master: Why doesn't that mean priority? I am not following you, I guess.

Mr. Tenney: In the first place, sir, the notices of taking depositions filed by counsel for TWA, and I am sure that counsel for Tool Company would take the same position, by no means exhaust the list of witnesses which counsel for TWA proposed to examine before trial of this action.

I feel sure that counsel for Tool Company feels [17] much the same as to his list so far.

The order entered by Judge Metzner was limited to the depositions before him. His failure to enter an order granting general priority of discovery to counsel for the Tool Company constituted, it seems to me clear, a rejection of the suggestion that Mr. Davis has so often made, that there is some right in the defendant to examine as long as he wishes before the plaintiff can commence.

Now, sir, Rule 26 of the Federal Rules reads, in part, as follows:

> "Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery, or for use as evidence in the action, or for both purposes. After commencement of the action, deposition may be taken without leave of Court, except

that leave granted with or without notice must be obtained if notice of the taking is served by the plaintiff within twenty days after commencement of the action. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45."

From the commencement of practice under the Federal [18] Rules until 1962, there was a general practice in the Southern District which has been characterized by many people in different ways, but a practice of giving the defendant the first opportunity to take examinations.

In the original form of Rule 26, there was not the language about leave of Court being necessary for twenty days after a complaint was filed, when the notice was served by the plaintiff.

That amendment to the Federal Rules constituted a limited recognition by the revisors of a certain sourdness, a limited soundness in the point of view then being taken by the Southern District.

As a practical matter in those twenty-four years—twenty-two years, I guess it is actually—almost no other district in the country followed any general priority rule.

Moreover, I think that I can say with considerable confidence that in the Southern District there was never any application of this general rule which permitted the defendant to take examinations exclusive of any right on the plaintiff to take examinations for an extended period of time, such as the period of time that these pre-trial depositions have [19] continued.

Without exception, when that problem actually arose, a practical solution was found by the judges of the Southern District Court.

One of the common solutions was alternating depositions. Another solution adopted in the Ford-Ferguson case during the latter part of its pre-trial discovery procedure, which lasted for several years, was concurrent depositions, arranged in such a way so as to minimize as far as possible the burden on counsel of having concurrent depositions, but more importantly, both as to the concurrent deposition procedure and the alternating deposition procedure, most importantly, I should say, so arranged as to recognize that the function of a court is to hear the complaints of the injured, and to act upon them, and that the rules are directed to be construed by Rule 1, and I quote:

> "These rules govern the procedure in the United States District courts in all suits of a civil nature, whether as cases at law or equity, with the exception stated in Rule 81. They shall be construed to secure the just, speedy and inexpensive determination of every action."

[20] The plaintiff has come to the United States District Court for the Southern District of New York—Section 4 of the Clayton Act, substantially similar to Section 7 of the Sherman Act, which reads:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States, in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee."

I repeat, "may sue therefor in any district court of the United States."

[21] The federal rules are stated to govern the procedure in the U. S. District Court in all suits of a civil nature, and that they are to be construed to secure the just, speedy and inexpensive determination of the action.

There is not a word in the federal rules about priority to a defendant.

On July 1, 1962, the Judges of the U. S. District Court for the Southern and Eastern Districts of New York put into effect new civil rules. Rule 4 reads in part:

> "From and after the 40th day after commencement of an action, unless otherwise ordered by the Court for good cause shown, neither the service of a notice to take the deposition upon oral examination of party or witness, nor the pendency of any such deposition shall prevent another party, adverse or otherwise, from noticing or taking the deposition upon oral examination of party or witness, concurrently"—I emphasize that word "concurrently"—"with the taking of deposition noticed or commenced earlier."

It has been ruled by Judge Metzner in this matter that that rule now in effect in this district does not deprive the Judges, Judge Metzner in this [22] case, of the discretion to apply a different procedure in the sound discretion of the Court.

Judge Metzner early in July, in the exercise of that sound discretion continued temporarily the order that was then in effect, permitting counsel for Tool Company to take examinations according to the schedule previously entered,

and forbidding, in effect, counsel for the plaintiff from taking depositions in accordance with the schedule previously submitted.

It is our position, and we have expressed it unsuccessfully, I am sorry to say, in these proceedings here, and we now have the point on appeal before Judge Metzner, that all possibility of exercise of discretion contrary to the express—to the sound exercise of discretion, I should say, contrary to the express provisions of the Clayton Act, or the Federal Rules of Civil Procedure, and the Civil Rules for the U. S. District Court for the Southern and Eastern Districts of New York, has now expired, and there is no conceivable justification for further delay, in commencement by plaintiff of the oral examination before trial of key witnesses, particularly Mr. Howard Hughes.

Now, sir, I realize that this is something [23] which is not directly before you this afternoon. However, it is only possible to consider the decision with respect to what is before you this afternoon in the light of this record.

Under the rule that has been adopted here, and the Special Master has been applying, the plaintiff has been prevented from engaging in oral discovery, if I can use a loose term, that is, of putting a witness on the stand under oath, and asking him questions. That right has been to date granted solely to the defendant.

However, within extremely narrow limits, I am sorry to say, in this case now 18 months old, brought by a public service corporation, publicly owned—Mr. Davis may know more about the number of stockholders than I do, at the moment, because as I say, I was not prepared at this point—but with thousands of stockholders, against a ma-

jority stockholder and its controlling person, which is alleged in our complaint to have grievously injured this public service corporation.

As I say, in these 18 months the plaintiff has been granted certain extremely narrow rights, always subject for some reason that I again do not [24] understand to the injunction that they must never be exercised in any such way as to interfere or be burdensome upon the defendant.

Those narrow rights have related to documentary discovery. Judge Metzner ordered the production of documents by parties, quite separate from the schedule of taking oral examination before trial.

While sitting through this year of depositions, counsel for plaintiff has endeavored to make such use as it can of this limited right, this limited opportunity I should say, to exercise the rights given to it by statute.

It has tried to do so, as enjoined upon it, so as not to be unduly burdensome to the defendant.

I find it interesting that we do not seem to have difficulty with the third parties to whom we have addressed these subpoenas. There have been several. We have explained to them that we are willing to be reasonable about these things. We are not trying to harass them or be burdensome. We have a large lawsuit here. We have a duty to our client. And if I may say so, the Courts have a duty to our clients also.

We have addressed in this instance to Atlas [25] Corporation, which your Honor may recall is stated to be a co-conspirator in this action, a subpoena pursuant to a notice of taking deposition, on the expressed understanding that this subpoena would be construed to require the production

of documents, but that no oral examination would be taken at this time. This is a procedure which antedates, I believe, even the federal rules.

I think I am not entirely sure of the origin. I think it may have been under the equity rules. It is a procedure that is so well known in the federal bar throughout the country as to need no justification, because in civil, as in criminal cases, parties are entitled to the assistance of the court in obtaining the evidence that they need, and this evidence often is documentary rather than oral.

Moreover, it is well understood, and counsel for Tool Company has certainly given us many examples of it, that the taking of the examination of a particular person on oral deposition requires the use of documentary material, to refresh his recollection, possibly to under some circumstances perhaps challenge his credibility.

That documentary material may not be in his [26] possession. It very often is not, but is in other persons' possession.

I am certain that long before the admission to practice in the court of the Southern District in New York of any person around this table, subpoenas duces tecum to persons other than those whose depositions were to be taken, have been issued directly without objection.

I am puzzled as to why it is that every time counsel for plaintiff tries to open a door to some of the rights which it has under the federal rules, it finds standing barring the way, the defendant.

As I say again, this stipulation narrowed the types of documents called for to such an extent that counsel for Atlas Corporation was prepared to sign it. I have the original here.

I may also say that I informed personally counsel for Atlas Corporation that there was this argument, so that he could have an opportunity to be here if he wished. He is not here. He informed me he did not intend to come. I shall not try to explain why not, but he did make it quite clear that he was prepared to accept this stipulation, and [27] prepared to commence production of documents under it.

I may say that we have one oral agreement between us, and that is that because he has had some difficulty of a personal nature, production instead of starting on Tuesday, the 18th, he has requested it should start on Wednesday, the 19th, and I have told him that of course this is entirely satisfactory to the plaintiff.

We have no wish whatsoever to be burdensome on Atlas.

Sir, the good cause that I cite is the right of the plaintiff granted to it under the Clayton Act, and I do not understand what precedent gives counsel for Tool Company any standing to object to it.

The Special Master: My original inquiry was whether this stipulation as to the list of documents goes beyond the original lists that were provided for under Judge Metzner's order, and that is what I was trying to consider, because I felt that was largely the law of the case insofar as it reached into that area. I want to get that clear.

I take it from what you say it is less than that rather than anything beyond it.

[28] Mr. Tenney: Insofar as the description of documents is concerned, it is unquestionably less than that. Of course Judge Metzner's order did not refer to documents in the possession of Atlas Corporation. That is why I have

had some difficulty in answering the Special Master's question. This schedule is not encompassed within Judge Metzner's order. For that reason it is in terms of the types of documents requested narrower in many significant respects, and in no respect, I believe broader.

The Special Master: Thank you.

[29] The Special Master: Before you proceed, Mr. Davis, I have a couple of questions I would like to ask Mr. Tenney.

Mr. Tenney has furnished me the copy of the record for October 25, 1962, at 10 a.m., of the argument and inquiries that occurred there, and I think in light of Mr. Bradner's remarks, and Mr. Tenney's concerning this, that it would be wise at this point to insert in the record that portion starting with Mr. Sonnett's remarks on page 64 down through on page 68, just before the statement of the Special Master "That is right," which covers what Mr. Sonnett said on the matter and what I said.

It refreshes my memory as to what happened. I don't know whether you have had a chance to read it again.

Mr. Tenney: I have not read it again. I am going by recollection of what happened. I read it at the time.

The Special Master: Mr. Sonnett said he thought in light of the Court's order that I had plenary control over the proceedings as well as to whether or not he would have any right to follow this procedure, and that was why he was making the inquiry.

[30] Mr. Tenney: I stand corrected. I stated it somewhat differently before.

The Special Master: I think your view probably is different than he expressed about the control of this situation,

but it was raised at that time, and the only particular matter that I had in mind at this time was whether you were going beyond the type or list of discovery that we had followed before.

I notice that I also said that it would be subject to any party raising objection on the ground of harassment at the time, so such authority as was granted was expressly subject to that right in any party to this proceeding.

That may have been beyond my authority, under the law, but that is the way I provided at the time.

Mr. Tenney: Yes, sir, and I had understood that this hearing this afternoon was to consider a motion by a party, Toolco, in accordance with that instruction.

The Special Master: I do have an inquiry, Mr. Tenney. I gather from your argument that you do feel badly aggrieved about the arrangement for the depositions in various orders of the Court and the Special Master, and you have a right to that feeling, and [31] conscientious representation of your client.

I have difficulty trying to reconcile your contentions with going ahead and getting something done in this case. It seems to me that your argument logically would either "when we start Mr. Hughes' deposition, then the Tool Company can notice depositions all over the country and you have to be there too."

I don't see how you can have an orderly court process if there isn't some recognition that TWA does not have unlimited counsel, doesn't have unlimited funds—even the Metropolitan, which I suppose is the largest aggregation of property here, can't conduct litigation as though there wasn't any money involved in expenses.

So the Court has to try to regulate it that a reasonable relationship can be had.

That doesn't solve your problem of whether the plaintiff should be delayed this long. I appreciate that. But it does seem to me that somewhere we have to find an effort to limit how much of this can go on at the same time. Maybe you can tell me how that fits in with your thinking.

Mr. Tenney: Yes, sir, I am very glad to express my views on that. It is always a balance of conveni- [32] ence bearing the necessity of justice in mind.

There are undoubtedly certain key witnesses in any litigation, even one as complex as this one. For a witness whose testimony is obviously crucial to the determination of the case, undoubtedly counsel in chief for the parties closely affected would wish to attend themselves. I feel sure that their desire would be so mutual in that, that there would not be any need for applications to the Court to prevent them from taking other depositions at the same time.

However, there are other kinds of procedure in pre-trial discovery. There are many witnesses that are not that important. I recall at one time in the Ferguson case there were at least six depositions being taken simultaneously. Counsel in chief, I don't believe, was attending any of them.

There is also the question of the extent to which a deposition should be permitted to go on from a time standpoint, and I think that the question of concurrent depositions, and whether that is unduly burdensome on the parties, or alternating depositions, and whether that might be unduly burdensome on an orderly attempt to develop the fact by one of the parties, changes as time goes on.

[33] I think that is recognized by the present provision of Rule 26 with its 20 day proviso, and by the present provision of the Southern District Civil Rules with a 40 day proviso.

Times change. Within limits I think probably it is a very sound rule that the defendant in the ordinary case at least, not knowing too much about the complaint brought against him, should be given a first right to inquire, but if that first right to inquire is dragging on, there comes a point where some decision has to be made for the protection of the other parties.

That decision is clearly within the discretion of the Court, and in this instance, of course, your discretion, Mr. Rankin, I believe.

It could take the alternating deposition route, and that would be, I should think, particularly appropriate for key witnesses.

I should think, for example, that having completed the principal officers that counsel for Tool Company has chosen to notice initially, of TWA, Mr. Tillinghast, Mr. Rummel, Mr. Cocke, Mr. Leslie when he was originally noticed, although now he is no longer an officer—it would be a realistic and reasonable exercise of discretion to suspend and allow counsel [34] for TWA to take the key person—the key person in this entire litigation, indeed, Mr. Hughes—and I would think it realistic and reasonable to provide that that should be the only deposition going on at that time, just as the only actual oral depositions that have been going on in this last year have been those conducted by counsel for the Tool Company.

I don't think that that automatically becomes something like the Laws of the Medes and Persians.

Possibly this might be as much as counsel for TWA needed to establish a major part of its case. As Mr. Sonnett has explained to you, we believe it will be. Conceivably we might want to request permission to go on with some others, but we certainly could not go on indefinitely, and this case would never come to trial if there was no limit placed on the number of depositions to be taken, particularly when it is, I think, fair to say seldom any real motivation on the part of a defendant to press for an early trial.

I would think that as this case moves on towards trial, a time would come when Mr. Davis' very expert assistants could conduct depositions in his absence.

Mr. Cook has appeared as counsel here. He is certainly a lawyer of great experience and ability. [35] Mrs. Lea, Mr. Cox have argued important motions, have prepared important documents. I see no burden on Tool Company to have a portion of the pre-trial discovery handled by Mr. Davis' assistants. That would be very likely to be the case, for example, if concurrently Mr. Davis were permitted to take the deposition of one of the witnesses he has noticed, and TWA were permitted to take the deposition of someone other than Mr. Hughes.

I should imagine Mr. Davis would like to have his entire force present when Mr. Hughes was being deposed.

Perhaps Mr. Davis could examine the witness he had noticed, and Mrs. Lea could protect the rights of the witness we had noticed.

In the case of a third party witness, she would not even be needed to protect that third party's rights. If he needed

protection he could obtain counsel. I don't think that there is anything in this procedure to date that would indicate any disposition on the part of the plaintiff at any rate to unduly oppress or harass or deprive a third party of his reasonable rights.

That is my best answer, sir.

[36] The Special Master: There is one other thing. I notice that Mr. Sonnett in asking if he might proceed in this manner said that the documents he would request would be only very key documents. Do you recall that?

Mr. Tenney: Yes, sir, I think I am familiar with this.

The Special Master: Do you consider that is all you are requesting in this stipulation?

Mr. Tenney: I believe this is a very narrow range, yes, sir. Some of these documents undoubtedly will be more important than others. It would not be practicable to identify documents with a qualifying phrase "important documents." We find it necessary for the protection of Atlas Corporation to describe the documents by date, by addressee, by so forth, by general classification. It is a narrow range of documents. We consider them to be key, which is why we were willing to restrict it to such a narrow range, and I believe it is sufficiently narrow for a full protection of the rights of the people most concerned with the difficulty of producing them, that is, Atlas Corporation.

At least they have so indicated by signing the [37] stipulation.

The Special Master: Mr. Davis?

Mr. Davis: Mr. Rankin, I recognize that Mr. Tenney is capable of outdoing me in brevity. I don't think that I will take the time, in view of the lateness of the hour, to address

myself to the general philosophical expressions as to the application of the rules and the rights of the defendants, or of a plaintiff in any kind of situation, of which there can be many, and which we have argued on many occasions when the issue was really before the Special Master, or before the Court—the right of a defendant to find out from the plaintiff what he is talking about, in some terms which are understandable so as to adequately put the defendant on notice what the claim is.

I don't believe that the rules contemplated that a lawyer, however well intentioned may subject the defendant and a lot of other people to burdens that are involved in this kind of a lawsuit, and still refuse to answer interrogatories or refuse to participate in Rule 16 procedures which will require counsel, since the client apparently doesn't know, what is the basis of the contention that the antitrust laws have been violated.

[38] I would like to address myself to the issue before us today, which is really not as involved as what has been discussed today.

First of all I would like to make this point quite clear.

The Hughes Tool Company was not consulted, and is not a party to this so-called stipulation. Obviously if Atlas Corporation, TWA, or anyone agree among themselves to exchange documents, we, the Tool Company have no standing, and so far as I am concerned, it may happen every day of the year.

My standing here relates only to the asserted right to documents pursuant to a proceeding which has taken place in this action. My understanding is, and I would like to be corrected at this point if I am wrong, that this so-called

stipulation is not an agreement between Atlas and Mr. Dudley, or TWA, or between counsel for Atlas and the Cahill firm, relating to what documents they will voluntarily produce or not voluntarily produce, but rather it is merely an agreement that was arrived at which substituted a schedule to a subpoena which was served pursuant to a notice for the taking of the deposition of Atlas.

Am I correct?

[39] Mr. Tenney: The stipulation speaks for itself. I think you are correct.

Mr. Davis: In other words, the situation before us is, and irrespective of what rights may have been waived, that we have a notice for the taking of the deposition of Atlas, and predicated upon that notice for the taking of that deposition, a subpoena duces tecum was issued, and that the original schedule purporting to describe what documents were to be produced at that deposition pursuant to that subpoena, was amended by an agreement between counsel for Atlas and counsel for TWA.

That is the situation to which I am addressing myself.

I think it is important, however, to correct Mr. Tenney in the suggestion that the prior orders of this Court have not clearly and firmly established the manner and the order in which depositions were to be taken in this action, whether they are to the liking of Mr. Tenney or my liking, I think, is immaterial.

We do know that there are applications which have been made which have been ruled upon by the Special Master, and reviews pending before Judge Metzner with respect to the manner in which this [40] pre-trial discovery procedure is to be conducted in the future.

Transcript of Proceedings Before Special Master J. Lee Rankin, December 14, 1962

I am not going to revert to the length of time for a number of reasons—the number of deposition days we have been engaged in, I don't think require my comments at this time. We have not been a year on depositions. A year has elapsed—more than a year has elapsed—for a number of reasons.

I don't think it is necessary for me to go into those at this time.

Judge Metzner's order—I am referring to the one of March 5, 1962, contains the following:

> "At the outset of the litigation last summer defendant Hughes Tool Company obtained priority in the deposition discovery procedures."

That is what Judge Metzner said in so many words. Then he refers to the fact that it has been assigned, and then my recollection is that Judge Metzner ordered that the Tool Company would continue to take depositions of those people noticed pursuant to the original notices of the Tool Company, which was TWA by certain individuals, and a number of others, and that after that had been completed, TWA could engage in discovery procedures.

[41] Thereafter the additional defendants could, and thereafter the Tool Company could resume. In that same order, as I recall it, the Tool Company was limited as to the area which it could cover in its discovery procedures.

Whether or not Mr. Dudley would like to persuade the Court to change the order, the manner in which these depositions have been taken—I know he has a right to apply to the Court. I recognize whenever there are changes in circumstances, upon a showing of a need, that the Court will undoubtedly listen.

There is no question this record is full of repeated efforts to change that order. I don't understand what Mr. Tenney is referring to by saying that this situation is to be controlled by the rules as though there had been no orders of the Court, because there have been.

Reference has been made to the procedure that the Tool Company followed. It is true the Tool Company is merely following—following the service of this complaint, did serve notice for taking depositions, and did serve subpoenas duces tecum. It was that which was the subject of these prior orders of the Court.

[42] The effort that was made at the time the complaint was filed under seal, an effort was made to obtain the right of the plaintiff to examine Mr. Hughes before the Tool Company could examine, and that was denied. If they want to apply again, they can apply again, but let us recognize what the record is.

What are the rules which are applicable here? Before I go into that I should point out, as I think everybody recognizes, that Judge Metzner in one of his orders establishing the manner in which pre-trial proceedings were to be conducted in this case, and in the exercise of his discretion, did permit the plaintiff and the additional defendants to obtain documents, broad categories, as reflected by the various schedules that were attached to the applications—notwithstanding the right of the Tool Company to pursue with its oral examination, depositions, without interference.

That is what I understood the situation to be, until recently when counsel for TWA began to serve some notices for the taking of deposition of a number of witnesses which

had heretofore never been listed by anyone, and obtaining subpoenas duces tecum for the production of documents in connection with those deposi- [43] tions.

I understand they are referred to sometimes as dry depositions, in the sense they were willing to waive the right to take oral examination.

I have previously stated that I was not inclined to object to any procedure which would give counsel for TWA, or even counsel for the additional defendants, any additional documents that they had not obtained in connection with the Rule 34 motion which had been made and which was granted, so long as it did not impose upon us any unreasonable burden, or annoyance, and so long as it was contained within reasonable limits.

That is still basically my position, not because of any desire to be generous, but for the very simple reason I would like to be in a position of giving to these people all documents they can possibly find anywhere in anybody's hand so they can answer these interrogatories which I want answered.

Therefore I am reluctant to do anything or take any position which in any way would interfere with an opportunity to answer these interrogatories. I would like for them to have all these documents.

[44] At the same time there are limits to what I am prepared to do, when the rights of either my client, or persons associated with my client, or mine are interfered with in a manner which to me is without conceivable justification.

The history of this is that because they served a notice for the taking of the deposition of Mr. Hughes long before they had any right to commence the taking of depositions

of anybody, but presumably so that they would be in a position to serve a subpoena upon Mr. Hughes, they also took the position that they ought to have an opportunity to get documents and begin to prepare themselves for the time when under some court order yet to be obtained, they would be in a position to conduct some oral examination, and I do not question the right they have to obtaining, from wherever any documents exist, whatever document they need in preparation for that date.

I want to point out that TWA is making no showing of a need for the production of any documents at this time, unless it is for the purpose of answering interrogatories.

As to my standing, to take a position with respect to this subpoena, I respectfully submit that [45] whether or not there is an argument they are proceeding under 34 or 45, they have the same standing, because 45 refers to 30(b), and I am seeking a protective order under 30(b), and 30(b) says that after noticing is served for taking a deposition, upon motion seasonably made by any party, or by the person to be examined, and upon notice and for good cause, I may obtain a limiting order, and that is the basis upon which I am applying, in addition to the fact that I construe the existing orders of the Court to have limited the right of TWA to proceed without leave of Court.

I believe that the record to date, and certainly the statements made by Mr. Tenney's partner, Mr. Sonnett, which appear at page 68 of the transcript, clearly recognizes that situation—at least I thought it did.

The prior orders of the Court in this case and Rule 30(b) is the basis upon which I am appearing and objecting to these notices and attached subpoenas.

Transcript of Proceedings Before Special Master J. Lee Rankin, December 14, 1962

The only one at the moment which remains unresolved is this one directed to Atlas Corporation.

What is it in fact I am really objecting to? It is not so much the procedure of what is being [46] worked out between Mr. Tenney and whoever is representing Atlas in this matter, although I must say that if there is not some indication as to where the limits are of this kind of a procedure, I would be burdened.

The fact of the matter is that I do have the assistance of Mr. Cox and Mrs. Lea, but there are a great many things to be done also, which I believe Mr. Tenney understands a lot better than he indicated in his description of how things could be done if he had his way.

My objection to the schedule relates to the perfectly unreasonable and unjustifiable description or attempted definition of persons associated with Hughes Toolco or Hughes Aircraft, which appears in the footnote 1 to the schedule.

If that is construed merely as indicating that any communication relating to the subject matter covered by the schedule, by any of these named persons for or on behalf of the Hughes Tool Company, or anyone reasonably associated with this action, I would have no objection.

But if you take this definition literally, it calls for all writings relating to communications between or among any of these named people, and I [47] point out a number of them are counsel, lawyers. I am one of them.

I do not know, and I do not believe that so far as I am personally concerned there are any communications relating to jet aircraft or airplanes, and flying machines, and all systems, engines and component parts, which I have ever written on behalf of anyone else, which are in

the possession of Atlas Corporation, although it is conceivably so.

For a long period of time when I was a member of the firm of Simpson, Thacher & Bartlett, I did represent Atlas Corporation, and I do not know what letters or communications I may have written to an officer or employee of Atlas Corporation relating to the affairs of I don't know who.

I haven't any idea what Mr. Bautzer, or Mr. Cook, Mr. West, Mr. Richard Gray, or some of the others—or what communications they may have had among them relating to matters wholly unrelated to any conceivable asset of this lawsuit.

I wrote a letter for the purpose of getting some kind of confirmation that that was not the intention. There was no intention to annoy, harass or embarrass any of these listed individuals under the device of [48] seeking documents needed for some understandable purpose in connection with this lawsuit.

Then I refer to Paragraph E of this schedule. All of these sub-paragraphs are covered by this footnoted item, in individuals that I have mentioned.

E refers to any transaction or contemplated transaction, proposal or negotiation between Northeast or Atlas on the one hand, and Hughes or Toolco on the other hand, for the acquisition or proposed acquisition by Hughes or Toolco of any stock, debentures, notes, evidence of indebtedness or other securities of Northeast, or the guaranteeing or endorsement by Toolco or Hughes of any loan by any financial institution to Northeast, or the furnishing by Toolco or Hughes of additional securities for any such loan, whether as an accommodation or otherwise.

The period of time covered is from 1956 to date, to the date of this subpoena.

We do know in this complaint, on the basis of facts which no one can ever disclose, it is claimed that part of this alleged conspiracy was an effort to obtain control of Northeast, even though the testimony to date indicates—I am not so sure, but I think the pleadings themselves recognize that what is there [49] referred to was the submission of a proposed agreement to acquire control of Northeast, subject to stockholder's approval, of both TWA, a majority of the minority stockholders of TWA, and the Northeast stockholders, but also approval of the CAB.

We all know that Section 414 of the Federal Aviation Act specifically excludes from the provisions of the antitrust laws a transaction covered by a 408 proceeding.

Everyone here knows, and counsel for TWA, better than anyone else, because Mr. Ordover sitting here participated in the sense of being present, that there was a 408 proceeding before the CAB, relating to the acquisition of control of the Tool Company of the Northeast, which was approved by the CAB, which is now a final order by the CAB, and which relates to transactions involving efforts of the Tool Company to give financial assistance to Northeast up to now, arrangements which are being made currently with banks, and accommodations which are being made providing funds to Northeast, and I submit to you, Mr. Special Master, that this appears to be an effort to go and inquire into the affairs of Northeast and of the Tool Company, which is frankly and clearly and [50] admittedly outside the scope of this complaint, no matter how you construe it.

It may be that Atlas Corporation does not care as to what they make available or don't make available.

I submit to you there is no conceivable justification that I can recognize, and there has none been advanced by Mr. Tenney with all the talk that we heard about why the prior court orders are improper, that justifies that effort.

We do know that there was for a long time discussions, and presumably a discharge of their fiduciary obligation, these TWA directors should be considering Northeast.

I think it is a matter which is of record without going into any privileged communications or discussions—that information with respect to Northeast and its affairs is a matter that may be of some concern in the business area.

If TWA is interested in details with respect to some of Northeast's affairs, it may be that we would be willing to let them have the information. But not under the so-called guise for the noticing of notice of taking depositions, then making it dry, and [51] obtaining a subpoena duces tecum, and approaching it from the point of view of having a right under the guise of this lawsuit.

I will close by merely pointing out that I am prepared to consider voluntarily any agreement that is worked out between TWA and Atlas for the production by Atlas of any documents, or group of documents which anybody believes that any conceivable relationship to alleged violations of the antitrust laws, but when it comes to attempting to annoy, harass or embarrass the Tool Company or any of its affiliated companies—Hughes Aircraft, for instance, which is named here.

I don't represent Hughes Aircraft. They know since Hughes Aircraft Company is wholly unrelated to the Hughes Tool Company.

Transcript of Proceedings Before Special Master J. Lee Rankin, December 14, 1962

The laughter may be funny to you, Mr. Marshall Cox. It is not funny to me. Nothing will be funny to me until you and your firm have the courage to disclose the justification for the complaint you filed.

I submit that on the state of the record to date, and without showing more justification than I have heard here today, the Tool Company does have the right to object to a procedure in this proceeding, [52] in this lawsuit, under the sanction of the existence of this complaint, under the umbrella of the orders of this Court, to do what they are seeking to do by this proposed notice and subpoena.

The Special Master: Mr. Tenney.

Mr. Tenney: I should like to ask you, Mr. Rankin, to bear with me for a moment, because I agree that much of the discussion that Mr. Davis and I have engaged in as to prior orders of the Court is not really germane to the issue here, but it is important discussion, nevertheless, because I think I must not leave the statements of Mr. Davis unchallenged.

Mr. Davis has referred to a statement by Judge Metzner. I believe the date of it was March 5th—outlining the history of the case to that time, in which the phrase is used that "Toolco secured priority at the commencement of the action."

That is a description of what occurred and must be taken in the light of what did occur, and of the rules as they then existed.

It is true that counsel for TWA attempted to secure permission to take the deposition of Mr. Hughes before any depositions were taken on behalf of Tool Company.

Transcript of Proceedings Before Special Master J. Lee Rankin, December 14, 1962

[53] This under the Federal Rules and in the light of the time that this attempt was made, it being immediately following the institution of the complaint, and in the light of the fact that new Civil Rule 4 had not been adopted, which would at least have changed the situation after a period of forty days, had it been adopted at that time, this did require, as I say, consent, and it was not obtained. It was denied.

That resulted in counsel for Tool Company being permitted to start taking depositions before counsel for TWA could. This is in a sense priority.

The key point that I was trying to make earlier is that this is not a determination of an absolute priority which I believe really would have been unprecedented in this district.

It was a limited priority. It applied to what was before the Court at that time—before my connection with this case—I think it was before Judge Herlands.

Moreover, the reference that Mr. Davis made was to a historical statement, not to an ordering paragraph by Judge Metzner. I think that is significant too.

I think the significant things about those orders [54] are that the orders themselves were quite limited. They did—the evidence of the past year shows this—they did undoubtedly permit counsel for Tool Company to commence taking examinations and to continue taking examinations while counsel for TWA was not permitted to do so, pending some further order.

But that is quite a different thing, I submit, from a determination that counsel for Tool Company had a right to continue to do so for an indefinite period of time as an absolute matter.

The order has to be limited to what was before the Court. The schedule of depositions to which Mr. Davis referred almost simultaneously is part of a different order, actually, and it does not contain a single word about priority.

It contains a schedule of depositions, all of which would have been completed by now if that schedule had been complied with.

The Special Master: It would seem to me, Mr. Tenney, that Judge Metzner made it very clear that the Tool Company had secured priority because he recited the history, and in reciting the history he proceeded to say he did not grant that priority, that it had already been determined by other judges of the Court [55] before the case reached him, as I recall the order.

Mr. Tenney: That is correct, sir.

The Special Master: Then he proceeded to set out the order in which depositions should be taken.

It seems to me in his order of July, in which he modified the order insofar as, particularly, the additional defendants were concerned, he said that it wasn't necessary to have Rule 4, that the Court always had that discretion to determine a change in the order of depositions, and that he conceived that the Special Master had so construed his powers, and that was an inherent power. That is the way I read it.

Mr. Tenney: Yes, Mr. Rankin, I quite agree with you on that. My problem is that counsel for Tool Company has not so construed these references to priority. Counsel for Tool Company has attempted to erect these things into some absolute right that can only be taken from him with his consent, which I am quite sure he will not give.

Transcript of Proceedings Before Special Master J. Lee Rankin, December 14, 1962

I was going to address myself to the more recent orders of Judge Metzner just for the moment again, because I think it is most unfortunate to have these statements as to what they mean to go unchallenged, [56] when I disagree with them.

I think the July 12th order of Judge Metzner, and the orders entered in September—actually, there were some directions in the course of colloquy on September 6th, and a formal order entered on September 21st.

I think it is impossible to read those orders without concluding, as I have concluded, that contrary to what counsel for Tool Company says, there is now an order of the Court calling for the early examination of Mr. Hughes.

At the moment the original date having been set by the Court, being October 29th, which is now past, and the Special Master having set February 11th, a date which is on appeal, and subject to the application that I have given notice I intend to make for changing that date to January 14th, this may seem a little bit not directly important right now, but its importance for the future is very great.

Mr. Davis constantly by mis-characterizing these orders on the record creates an aura in which the orders are intended to be absolute, which they are not.

I would like to address myself more directly to [57] what is before the Special Master at this moment. The difficult thing with Mr. Davis' position is that the documents that are requested are not his documents, or the documents of his clients.

The subpoena is not addressed to them. The subpoena is addressed to Atlas Corporation—documents in their possession.

Transcript of Proceedings Before Special Master J. Lee Rankin, December 14, 1962

It hardly seems worthwhile emphasizing that difference, but Mr. Davis devoted so much of what he had to say to it, that I suppose I must go over it again.

His clients have no property right in those documents. No letter from the counsel that he referred to, to Atlas, possibly affects any attorney-client privilege of any of his clients.

If there could possibly be an attorney-client privilege, it would be that of Atlas. It is always waivable, as far as that goes, by Atlas.

As to Mr. Davis' personal position, I think he may not have noticed—I would like to call his attention to the fact that in consideration for the fact that he might personally find this somewhat troublesome because of his past connection, perhaps with Atlas, we have made a special limitation of date as to documents coming to or from Chester C. Davis, so [58] it applies only to documents after May 22, 1961, which I submit, illustrates our desire not to raise any difficult questions with anyone, but to stick to what we have a right to get.

These documents, I submit, are clearly within the scope of the complaint. I do not see how anyone can challenge that, although I recognize the fact that Mr. Davis has challenged it. There is no basis for that challenge.

Moreover, the limitations of relevancy are primarily intended for the protection of the person to whom a subpoena is addressed, unless there is demonstrated some actual attempt to harass Mr. Davis' clients—and it is excluded by the nature of the proceeding—he has no right to talk about relevance.

Transcript of Proceedings Before Special Master J. Lee Rankin, December 14, 1962

We have, as counsel for TWA, the right and the duty to try to determine ourselves what type of evidence we will be able to submit, to try to obtain evidence that will be admissible, and in that, to extend our search beyond the precise limits of admissible evidence, so as to get documents that may produce other documents that may be admissible evidence.

[59] The Special Master: What about the Northeast documents? Can you tell me, Mr. Tenney, why those are requested?

Mr. Tenney: Northeast, and the relationship between Northeast, and TWA and Tool Company, is a central matter in this litigation. It occupies a substantial portion of the complaint. The documents which we expect to get from Atlas, we hope will be extremely useful in establishing the charges that we have made as to Tool Company's activities in connection with Northeast. That is Point 1.

Point 2. I believe that the activities of Tool Company in the procurement and supply of aircraft to Northeast are of profound significance in determining the nature of the business that Tool Company was engaged in, and particularly in the light of some of the antitrust issues that are presented in this lawsuit, in the light of the duPont case, involving the activities of a supplier who is also a major stockholder of its customer.

Moreover, sir, it seems strange that counsel for Tool Company never refers to the fact that there is a non-antitrust cause of action in this complaint. The third cause of action is not under the antitrust [60] laws.

If there is, which I do not believe to be the case, an available exemption to Tool Company from the application of

the antitrust laws to its wrongful conduct with respect to TWA, that exemption is clearly not applicable to the third cause of action.

But [what] counsel for Tool Company would like to have the Special Master and the Court do is accept, before he proves it, before he establishes it, that he has, or his client has a complete defense to this action.

If there is a complete defense to this action, and it is upheld by the Court, the action is terminated, and the plaintiff no longer has the right to seek to develop evidence to prove its claims.

Until that defense has been proved, the simple assertion by counsel for the defendant that he has a good defense does not deprive the plaintiff of its right.

We have to go ahead and prove this complaint, and we intend to do so, and we think the means that we are using at the present time are reasonable, and are most certainly not any kind of harassment.

The Special Master: I am wondering about information as to financial transactions, recent [61] financial transactions with the Northeast—how they are involved in this litigation. Maybe you can help me on that, Mr. Tenney.

Mr. Tenney: The complaint here charges a continuing wrong. It is not ended on June 30, 1961. There are allegations in that complaint, and applications for injunctive relief, that are continuing.

We are not fully aware of what Tool Company's activities with respect to Northeast have been. We believe that we can establish, if we are given an opportunity, that in the past at least, and we can get to the past in many instances from the present, those activities have involved a

violation of the rights of TWA, cognizable at equity in the historic stockholders' suit, involving a misappropriation by a majority stockholder of rights belonging to the corporation as such, and in our judgment, cognizable under the antitrust laws as well.

Those are continuing. It is a seamless web really. I don't see how you can place a date of limitation on just when we can find evidence relevant to this scheme and plan and past conduct of Tool Company.

I would like to emphasize again, Mr. Rankin, [62] that these are documents in Atlas' possession, not documents in Northeast's possession. We are asking for matters that have already been disclosed by Northeast, in the case of the particular documents that you referred to, to Atlas Corporation. There can be no question of privilege there.

The Special Master: There could be harassment if you are asking for things that you may be entitled to later, but not at this time, in light of getting key information for the purpose of taking Mr. Hughes' deposition.

Mr. Tenney: I might mention also cross-examination of Mr. Leslie, which in the light of the direction made this afternoon, has been postponed, of course. We consider that this material may be very useful also in connection with the cross-examination of Mr. Leslie.

As far as harassment goes, I am sorry, sir, I don't see who we are harassing. Mr. Davis says he would like us to have documents, but he sure won't let us do anything about getting them.

Atlas has not claimed harassment.

As to Hughes Aircraft Corporation, which I apologize for laughing about, it is our belief [63] that Hughes Aircraft Corporation is a creature of Mr. Hughes.

Transcript of Proceedings Before Special Master J. Lee Rankin, December 14, 1962

The Special Master: If the footnote was construed as Mr. Davis was suggesting, how does that limit you in the way it is objectionable?

Mr. Tenney: The sneak phrase he put in there is acting on or on behalf of Mr. Hughes. I do not want there to be a determination prior to our examining these documents, whether a particular associate of Mr. Hughes, among that group name, was in connection with a particular communication in the Atlas files, was acting for or in behalf of the Hughes Tool Company.

The ways of the Hughes Tool Company and Mr. Hughes are sometimes strange and mysterious. The only way I can identify the documents I need are by addressee, addressor designations. It means that Atlas Corporation does not have to make a decision as to who Mr. Davis was acting for after May 22, 1961, when he wrote a letter to Atlas Corporation. They are entitled to assume, as I do assume in fact, that he was acting for whoever he was acting for—these documents are relevant and significant to this litigation.

[64] I emphasize there is no attorney-client privilege at all.

The Special Master: Even if they relate to someone else—the mere communication of address and addressor would be controlling?

Mr. Tenney: There is another non-conclusory limitation. Relating directly or indirectly to jet aircraft, including but not limited to airplanes and flying machines, and all systems, engines and component parts of such jet aircraft, and the financing thereof to summarize some of the remaining language.

We are not asking for things that don't have something to do with this litigation.

Transcript of Proceedings Before Special Master J. Lee Rankin, December 14, 1962

I should also like to call your Honor's attention again to the letter which we wrote you—addressed to Mr. Rankin by Mr. Sonnett—on November 8, 1962, which has actually been marked as an exhibit so as to get it on the record. The authority cited there, I think, established that contrary to Mr. Davis' assertion of a right to plead harassment because the documents requested from third parties are not in his view germane to the action—his standing is very limited indeed. The case of Shepard and Kassel makes it clear [65] he can't plead another party's harassment. It is either his own, or the other party should plead harassment.

The Special Master: I construe that when I said this could be done, it was conditioned upon any party being able to object. I said at the time I considered that part of it—whether or not his claim of harassment is valid, is something else—but I did recognize any party to this litigation granted the right in this manner, which I construed was out of turn in light of what I thought was the priority schedule of Judge Metzner, was subject to the right of any party to object at the time, on the ground of harassment or the burdens that were imposed upon them.

I indicated then and still feel that you should have an opportunity to try to advance your case if we can carry on the other activities, as the Court has directed, must have priority. I want to try to find out how we can get that done without an unreasonable burden. That is why I was asking particularly about limiting the demands or the production to such documents as would relate to the Hughes Tool Company. I do not recognize Mr. Davis' claim about the aircraft company. I assume when he says that the [66] ownership was transferred in 1956, that it is a fact that

he will establish or try to establish later in the proceedings, which is something that he shall have an opportunity to do. But up to that time that you have a right to inquire into it, and find out how valid it is, and what happened in regard to it—at least as long as it was part of the Tool Company, it is part of the issues involved from 1939 up to that time.

So I have thought that the Hughes Aircraft Company is a reasonable inquiry at least within certain limits.

I don't want to foreclose you, Mr. Davis.

Mr. Davis: On the Hughes Aircraft, Mr. Rankin, to my mind it is no more of a problem than what Mr. Tenney keeps overlooking. First of all this footnote does not relate merely to subparagraph A, but all the subparagraphs of the schedule, because it is a definition of associated persons. The problem that arises there is the possibility, of which I am not aware, of communications between these various people relating to something else, which for one reason or another may be in Atlas' possession.

The main point, however, is on this Northeast [67] situation. That gives rise to the statement by Mr. Tenney that of course if we were in a position at this point to obtain a ruling of the Court on the validity, continuance of this complaint, all of its rights would disappear.

In that connection I want to emphasize the fact that no one here can seriously question, and I can assure a Special Master and a Court that it is our intention that as soon as we have the answers to interrogatories, we will have that question before the Court.

There have been rulings by the Special Master that these interrogatories are to be answered. Once those interroga-

tories are to be answered we will understand the area of issues as to which documents may be relevant or pertinent.

The problem we now have is the effort on the one hand to determine what are reasonable requests, what are reasonable burdens based on this vague reference of issues.

Mr. Tenney is saying about Northeast Airlines, and the dealings and transactions relating to Northeast are the essential parts of the case. I don't understand what that means.

[68] I certainly don't understand what the financial arrangements of which Atlas was necessarily a party, since up until the transfer of its majority ownership of Northeast to the Tool Company, pursuant to the CAB order—they were a party to all these various transactions, and banking arrangements currently being discussed, negotiated and arranged for.

I don't think there can be any question about the validity of the 408 proceeding before the CAB, and the legal effect of those proceedings without arguing the matter at length.

The reference to the third cause of action refers to a wilful and malicious interference into the affairs of TWA —how this Northeast matter can have any bearing on this —is beyond my understanding what this schedule and subpoena is all about.

May I suggest, Mr. Special Master, that the rights of TWA to proceed for discovery of additional evidence, of documents in this matter, since apparently it is not related to their ability to answer interrogatories—that the matter be held in abeyance until we have a ruling by the Court on the matters now pending before it, as to the obligation of

TWA to answer interrogatories now on what is really the practical answer to [69] all these burdens that are being imposed on a great many people, and a lot more—this is no assurance yet, that after having had gone through this procedure with Merrill Lynch, First Boston, Mr. Henry Crown, Mr. Atlas, and this will go on indefinitely.

May I suggest that a possible answer to this entire problem will be found after we have an appropriate determination by the Court, where the matter is now pending, as to the obligation of the plaintiff at this time to disclose by answer to interrogatories, or pursuant to the other matter which is pending before the Court—the application for the Rule 16 proceeding—so that the area of the issues will be defined.

The motion to dismiss can then be scheduled for argument and disposition, and having that behind us, then the rights of the plaintiff, which Mr. Tenney is so anxious to protect at this time, will then be fully and adequately protected.

I still haven't heard a reason why it is of any moment or importance to TWA or its counsel to have what they are seeking now, and more particularly I still have not heard a rational explanation of what it is—they are familiar with the complaint—the [70] contentions what is the conduct of the Tool Company or Atlas or Northeast that violates these antitrust laws—how it is that the arrangements or accommodations that the Tool Company may have given to Northeast, or is currently giving to Northeast, all of which was the subject of a 408 proceeding before the Board, and approved by the Board, and now that the Board has determined that it is in the public interest, and

outside the scope of the antitrust laws, for the Hughes Tool Company to acquire control of Northeast, how it can be that the allegations of this complaint include or cover some kind of violation of the antitrust laws by reason of our dealings relating to Northeast. This is something I am still unable to understand, but undoubtedly when these interrogatories are answered, the Court will be in the position of determining just what is the legal justification for counsel for TWA, and the present management of TWA to use the funds of TWA in the manner they are being used, and to impose a burden upon the Tool Company and others by reason of the continuation of this lawsuit.

I submit that a possible sound disposition of this question might be made after we have a clearer [71] understanding of what is involved in this complaint, and presumably the decision of the Court, either on the Rule 16 motion, or in connection with the interrogatories, will give us the answer.

Mr. Tenney: We find ourselves, Mr. Special Master, talking about things here, again and again, which are not apparently directly germane to what is before you. Now the interrogatories. The reason that this is so, sir, is that what is here before you is an attempt by the plaintiff to proceed to prepare its case, as I submit, it has the right to do.

Counsel for Tool Company is opposed to the plaintiff developing evidence in support of the case.

He has various things now pending, each of which would be a major obstacle in the plaintiff's preparation of the case.

The interrogatories is one of them. The interrogatories were not drafted to be answered. They were drafted to be

unanswerable. We have tendered evidence that it would take six men over a year at TWA alone to prepare answers to a portion of these interrogatories.

We have offered a witness on that subject, and will call him when and if the Court desires to examine [72] into the accuracies of that representation.

The significance here, of course, is that counsel for Tool Company wishes to postpone as long as possible, forever, if possible, any development of the affirmative case of the plaintiff. Obviously therefore counsel for the Tool Company would find it extremely reasonable to delay any decision on this very simple matter, until some future time when innumerable other things would have presumably been decided.

One thing that would definitely be decided by that procedure would be that plaintiff would have been forbidden to conduct its limited discovery to try to establish the allegations of the complaint.

On behalf of TWA I object to any delay in the determination of this matter. I believe that we are entitled to this information. I believe that we have asked for it in such a way as to avoid any possible harassment of counsel for Tool Company, or interruption of the proceedings that counsel for the Tool Company is engaging in—any of them.

The Special Master: I am ready to tell you my thoughts in regard to the matter, and possibly it may be necessary to delay a definitive order until [73] Monday if the suggestion that I may make cannot be worked out by counsel for the parties.

I think you are entitled to a ruling, and I am quite reluctant to delay the matter and appear to be trying to

pressure the Court into an earlier ruling than he would otherwise make in regard to the matters that he now has on review. I think it is my duty and function to try to decide the matters that come before me the best that I can, and as they reach me from time to time, and let the Court handle his own business in his own way, without any action of mine appearing to be awaiting some action of his.

I have generally considered that Judge Metzner's orders had granted certain priority to the Tool Company, and that Judge Metzner has made it clear that he felt that he had the discretion to change that priority, and that the Special Master had such a discretion and had exercised it in the past, and that Rule 4 was merely a recognition of that inherent discretion in the Court.

I also have construed that while Judge Metzner provided for certain priority on depositions, that he also wished or made orders that caused me to think that he wished the parties to have available to [74] them the documentary evidence that might assist them in the preparation of their cases, even though they were not authorized under the order of the Court to proceed immediately with the oral examination of their witnesses.

I recognized in the record when Mr. Sonnett made inquiry, that he could make the limited discovery that he was requesting, which he said would be limited to key documents by this dry deposition procedure, and if you will recall, when the matter was before me concerning Merrill Lynch, and First Boston, I said explicitly that the decision in those two matters should not be considered as a precedent for any similar proceedings, and particularly would I examine any later proceedings as to any undue burden or harass-

ment. I believe that the plaintiff is entitled to obtain the documents at this time subject to some reasonable limitations, and I am disposed to sustain the motion of the Tool Company insofar as it purports to extend the footnote in such a way as to reach documents not related to the Tool Company, the Hughes Aircraft Company, and Mr. Hughes, and as to the Northeast Airlines insofar as it would reach out beyond key documentary material relating to the [75] Northeast Airlines. That is, that I consider you are entitled to documents that will assist or might lead to relevant evidence concerning the activities of the defendants with relation to Northeast Airlines in regard to some of the allegations of the complaint.

So I suggest that if counsel prior to noon Monday can agree upon some limiting language, I will be pleased to accept that, and if that is beyond your ability, I will enter an order that I will draft myself at 2 o'clock on Monday, generally sustaining the right of the plaintiff, but limiting it in the respects that I have indicated.

Mr. Davis: Could you make it a little later than Monday noon, because I don't intend to work with counsel over the weekend.

The Special Master: Mr. Tenney, do you have any objection to it going to the close of the day on Monday?

Mr. Tenney: I have no objection to the close of the day on Monday, sir. I see no real difference from my standpoint on that.

May I ask for one point? Perhaps you might comment as to what you mean by "key documents," sir, because I find that it might be rather difficult for [76] Mr. Davis and

I to agree, since I am sure that he would think a document that I thought was quite important would be entirely irrelevant.

Mr. Davis: No, Mr. Tenney. You identify any group of documents which you think support the contention of the violation of the antitrust laws, you can have them.

If you are trying to go into the area of what the aid or assistance or banking arrangements or accommodation of the Hughes Tool Company gave to Northeast during that period, starting, I think, in September of 1961, the various matters presented to the CAB, which culminated in that 408 proceeding and the order of the CAB, I do object to it.

If you are referring to Northeast documents in the so-called period prior to, up to and including the discussions, conferences or efforts that were made to develop a merger agreement to be submitted, between TWA and Northeast; May 1958, 1959 or 1960—if that is the period, you can have them all.

The Special Master: I think it might help if counsel would try to agree—if they would each submit to me by 4:30 on Monday, his suggestions limiting the language of production. What I had in [77] mind was what Mr. Sonnett said when he said "key documents for the deposition of Hughes, to wit, documents constituting or relating to communications from Hughes or on behalf of Hughes to others, on certain subjects which would be a narrow but exceedingly important range of documents to have for his deposition."

He was defining to me at the time when he was asking for this authority, and that is all I can turn to, is what he said.

I don't mean to limit you precisely to that language, but something that would fit in with the spirit of it.

Mr. Tenney: I will see what we can do, and make such suggestions as I am able to. Perhaps Mr. Davis will favor me with his ideas during Monday, and I can look at them.

Mr. Davis: You are the plaintiff, Mr. Tenney.

The Special Master: If you can't agree, exchange your proposals, at least.

(Whereupon, at 7:00 p.m., the hearing was closed.)

Special Master's Ruling on Toolco's Motion to Depose Sessel and Wadsworth, December 28, 1962

[18762]

* * *

The Special Master: I am ready to rule on the motion of the Hughes Tool Company for a direction that following the completion of the present examination of E. O. Cocke, Tool Company may on the completion of the deposition of A. V. Leslie, or in conjunction with his staggered deposition, next depose Ben-Fleming Sessel, and the Irving Trust [18763] Company by Sessel, and Arthur L. Wadsworth and Dillon, Read & Company, Inc., by Wadsworth.

I consider it necessary first to review the record. I shall therefore refer briefly to the prior orders of Judge Metzner and the Special Master in this case.

The priority of Tool Company in the taking of depositions herein was recognized by Judge Metzner in his order of February 7, 1962. In setting the schedule for the taking of certain depositions by the defendant and the plaintiff and fixing the time for taking all depositions noticed by the defendant first, and the depositions noticed by the plaintiff in the order that Judge Metzner entered. That was the effect of his order.

In his order of March 5, 1962, Judge Metzner recognized this priority by stating:

> "At the outset of the litigation last summer, defendant Hughes Tool Company obtained priority in the deposition discovery procedures."

However, he then went on to say:

> "While the courts have adopted a normal rule of priority, depending on time of service of a notice

to take deposition, and the necessity for a defendant [18764] to obtain particulars of the charges leveled against him because of the notice form of pleading, such rules are not rigid in their application, and must yield in unusual circumstances to the ultimate goal of prompt orderly and fair disposition of the litigation.

"Furthermore, the plaintiff who instituted the litigation must not be lost sight of in the maze that has resulted from the pleadings.

"The service of a notice to take depositions six months before answer cannot afford the defendant Hughes Tool Company the right of priority insofar as its counter-claims are concerned."

In the order just referred to the Court allowed the Tool Company to continue its schedule of depositions.

"Limited, however, to evidence which bears on plaintiff's claims against Hughes Tool Company."

He further provided that then the plaintiff should proceed with its schedule of depositions "In the order provided in the pre-trial order of February 7, 1962."

He also authorized the additional defendants to either participate in the depositions conducted by the plaintiff, or by separately scheduling depositions to follow those taken by the plaintiff.

He further provided that at the conclusion of those [18765] proceedings by the additional defendants Hughes Tool Company was to resume and complete its depositions.

On the appeal from the order of Special Master denying the motion of the plaintiff for an order determining that

Special Master's Ruling on Toolco's Motion to Depose Sessel and Wadsworth, December 28, 1962

Rule 4 of the Civil Rules of the United States District Court of the Southern District of New York was applicable in this case, the Court said:

> "Irrespective of Rule 4, the Court has the power to vary any order heretofore entered fixing priority of deposition—discovery proceedings."

Judge Metzner allowed the plaintiff to renew its motion before the Special Master on September 20, 1962, saying:

> "If at that time it is advised that the depositions scheduled upon the completion of the Tillinghast deposition are not moving as expeditiously as possible, and that any further delay in the taking of the depositions of the defendant would be prejudicial to the plaintiff."

In his September 21st order Judge Metzner passed upon and approved the interpretation and conditions expressed by the Special Master as to the binding effect of the subpoena, for which Chester C. Davis, on September 6, 1962, accepted service on behalf [18766] of Howard R. Hughes, obligating Mr. Hughes to appear as a witness for the taking of his deposition. This was to be taken in the United States District Courthouse for the Southern District of California, in Los Angeles, on September 24, 1962, or at any future time that the Court might direct for the taking of Mr. Hughes' deposition pursuant to the subpoena.

Such action was subject to the penalty of grave sanctions which the Special Master stated in his order.

In the same order the Court approved and affirmed "The ruling of the Special Master denying the application of the plaintiff to proceed with the deposition of Howard R.

Special Master's Ruling on Toolco's Motion to Depose Sessel and Wadsworth, December 28, 1962

Hughes on September 24, 1962, to the extent that the return date of September 24, 1962 contained in the subpoena served upon Howard R. Hughes is adjourned by order of this Court to October 29, 1962, at the same time and place.

Judge Metzner further said:

> "The Tool Company may apply to the Special Master on October 22, 1962 for a further adjournment of the date now fixed for the deposition of Howard R. Hughes."

On October 25, 1962, I passed upon the applica- [18767] tion of the Tool Company for a further postponement and set the return date for the subpoena for February 11, 1963.

My order is now on appeal before Judge Metzner.

I wish to refer to my order of October 25, 1962, and so clarify it in this order that there may be no valid basis for misunderstanding it.

In that order I found that all parties had cooperated in the production of documents, and that the Tool Company had diligently proceeded with the discovery proceedings in taking depositions.

I had suggested an application for a Rule 16 pre-trial proceeding to aid in defining and sharpening the issues in this case. The Rule 16 question is now before Judge Metzner.

I set over the return date of the subpoena for Mr. Hughes to February 11, 1963, "and provided that the return date for the notice to take depositions and the subpoena be adjourned to that date, and that the deposition be taken at the same time and place."

Thus, I indicated, and I now wish to remove any doubts about it, that I set the date with the intention and expecta-

tion that the deposition would start at [18768] 10 o'clock on that morning and proceed until it was concluded according to law.

I postponed the date to the time I designated to allow for action in several respects which I described at length. I took into account the witnesses that I thought could be completed by that date, or if not, I planned that there would be an interruption of their depositions.

I named such witnesses as Mr. Cocke, Mr. Leslie and Mr. Breech. In my announcement I referred to the opportunity for the Tool Company to present any motions reaching the question of whether the Court had jurisdiction of the subject matter, and a motion to dismiss the action in the intervening period.

I have overruled motions attacking the interrogatories served on TWA, so as to provide the full benefits of the rules to aid discovery in the interim.

I took into account the people involved and the requirements for moving them as well as the necessary documents and records.

All of this was done in order that there be no doubt left that it was my purpose and intention to proceed with the taking of the deposition of Mr. Hughes by the plaintiff beginning February 11, 1963 [18769] at 10:00 a.m. in Los Angeles, at the place designated in the notice.

I was trying to exercise a judicial discretion in recognition of the need of the defendant to obtain the particulars of the charges leveled against it, and of the further fact that a year will have elapsed by February 11, 1963, since the defendant began taking depositions.

I believed then as I do now that in the light of the discovery that has occurred, the defendant will not be affected

Special Master's Ruling on Toolco's Motion to Depose Sessel and Wadsworth, December 28, 1962

adversely beyond the exercise of a reasonable discretion in light of all the facts to interrupt the taking of depositions merely by allowing the taking of the deposition of Mr. Hughes by the plaintiff.

I also determined that in fairness to the plaintiff it should be allowed at such time to take the deposition of the person by whom plaintiff's counsel have repeatedly asserted they expect to be able to establish 75 per cent of their case.

I considered that the ultimate goal of prompt orderly and fair disposition of this litigation would be substantially advanced by such interruption, and I reaffirm each and all of those conclusions.

[18770] I am now denying the application and motion of the Tool Company to depose Mr. Sessel and the Irving Trust Company by Mr. Sessel, and Mr. Wadsworth and Dillon, Read & Company, Inc., at any time prior to the taking of the deposition of Howard R. Hughes, which is to begin on February 11, 1963, as indicated above.

I do not think it would advance the proper administration of this case since it would in my judgment inevitably branch out into the issues of the counter-claims, or result in such continuous controversy as to the exact limits of such issues that it might interfere with the taking of Mr. Hughes' deposition at the time and place fixed.

Are there any questions?

Mr. Davis: I take it this also covers a denial of the application to take that of Mr. Wadsworth?

The Special Master: Yes. I think I should provide for a prompt time for a review of this order before Judge Metzner if anyone wishes to do so, in light of Mr. Sessel's problems, about trying to go on his trip.

Special Master's Ruling on Toolco's Motion to Depose Sessel and Wadsworth, December 28, 1962

Mr. Davis: May I understand in the light of this ruling, the scheduled depositions which are available to the Tool Company?

[18771] The Special Master: Yes. Mr. Cocke's deposition is set to continue on January 2nd, to the extent that he is to be given a full opportunity to extend each and every question with regard to the years 1959, 1960 and 1961.

Mr. Leslie is to return on January 14th, and continue through that week, and we then reserve the question about what to do with him after that.

If the Court should rule on Mr. Breech, and I feel that while I suggested that he could be deposed as part of TWA's people in my prior ruling, that the Court had that matter or has that matter, at least, under its jurisdiction for determination.

If the Court should determine that he could be deposed, then he would be available.

I want to make it clear that I would expect to interrupt any deposition on February 11th to proceed with Mr. Hughes. I don't want to leave any doubts in your mind, or anybody else's, so that if you feel that that is any modification or change of any prior orders that you wish to seek to review, that you fully understand it, so far as I am holding, that I expect to proceed with Mr. Hughes on February 11th.

Mr. Davis: I have no other question. I would [18772] like to inquire, however, if it would be acceptable to suggest a postponement of the resumption of Mr. Cocke from January 2nd to January 3rd. Mr. Cox and I have been occupied since the last time we have been here, on briefing in the Delaware action, and are proposing to travel out of the city on this forthcoming weekend.

Special Master's Ruling on Toolco's Motion to Depose Sessel and Wadsworth, December 28, 1962

Mr. Cocke may return on January 2nd with a refreshed recollection, but counsel will not be refreshed on January 2nd, particularly if he travels on New Year's Day in order to return here.

The Special Master: I would be disposed to grant that request.

Is there any reason why Mr. Cocke could not be produced on the 3rd?

Mr. Tenney: Not so far as I am aware. I assume that will be all right. I will be in touch with him. I am not sure I can reach him right at this moment. We would have no objection to that as far as TWA, separately from Mr. Cocke.

The Special Master: We will plan on it then for 10 o'clock on January 3rd.

Mr. Davis: Would you undertake to inform Mr. Cocke?

[18773] Mr. Tenney: I will undertake to inform Mr. Cocke.

If there is any hitch in that, I will let you know, Mr. Rankin.

The Special Master: I would like to suggest that for any review of this order, the papers be filed with Judge Metzner by 10 o'clock on Monday.

Mr. Davis: I think that is impossible.

The Special Master: With your problems and all?

Mr. Davis: Yet we ought not to be asked to do it before January 3rd.

Mr. Chanler: Why wouldn't it be possible for Mr. Davis to file the same papers he filed before you, sir?

Mr. Davis: Because I have something entirely new and different now. I have something entirely new and different in the way of a ruling of the Special Master to which I want to address myself.

Special Master's Ruling on Toolco's Motion to Depose Sessel and Wadsworth, December 28, 1962

Mr. Chanler: That affects Mr. Sessel?

Mr. Davis: Yes. What I want to review now is this order.

The Special Master: It is a very short time, and unless there is serious objection, I would tend to grant Mr. Davis time to January 3rd, at 10 o'clock, [18774] in the light of the holiday period that intervenes.

Mr. Stewart: Service to be made on other counsel at the same time?

The Special Master: On all counsel, yes.

I also at this time direct the reporter to send a transcript promptly to Judge Metzner, of this proceeding this morning.

Are there any other questions?

Mr. Davis: I have none.

The Special Master: We will reconvene on January 3rd.

Pretrial Hearing, January 9, 1963

[24686]

[CAPTION]

BEFORE:

HON. CHARLES M. METZNER,
District Judge.

[24688] [APPEARANCES:]

* * *

[24689] The Court: The Court has a number of matters pending. The Court has indicated to counsel that it desired argument on several of them this afternoon. But for the record there is an appeal pending by TWA pursuant to a telephonic request to review an order of the Special Master adjourning the deposition of Howard R. Hughes to February 11, 1963. Yesterday counsel for TWA filed an application to withdraw this appeal based upon the transcript of the hearings before the Special Master on October 25, 1962, and October 28, 1962.

Second, we have an appeal by Hughes Tool Company dated January 3, 1963, seeking to review an order of the Special Master denying Toolco's application to examine Ben-Fleming Sessel and the Irving Trust Company by Sessel and Arthur L. Wadsworth and Dillon, Read & Company by Arthur L. Wadsworth upon the completion of the deposition of A. V. Leslie or in conjunction with his staggered deposition.

Thirdly, we have a motion by Hughes Tool Company pursuant to Rule 16 of the Federal Rules of Civil Procedure, authorizing and directing the Special Master to conduct pre-trial conferences, with recommendations for the form

and terms of a pre-trial order defining and limiting the legal and factual issues [24690] in this case.

Fourthly, we have an appeal by Hughes Tool Company dated September 19, 1962, from an order of the Special Master directing the Tool Company to produce for inspection and copying by opposing counsel the documents with respect to which Hughes Tool Company claims attorney-client privilege.

Fifth, we have an appeal by TWA pursuant to a telephonic request to review an order of the Special Master denying its motion to quash or strike interrogatories served by Toolco on October 11, 1962.

And, finally, we have an appeal dated December 20, 1962, by TWA from an order of the Special Master overruling TWA's objections to the further interrogatories dated November 13, 1962.

Obviously, there is no need to hear argument on item number 1 regarding the adjournment of the deposition of Howard R. Hughes to February 11, 1963, since TWA has withdrawn that application.

There is no need to have further argument on the application by Hughes Tool Company for an order directing the Special Master to have pre-trial conference hearings pursuant to Rule 16 of the Federal Rules of Civil Procedure.

[24691] There is no need to have argument on the appeal by TWA to review an order of the Special Master to quash or strike the interrogatories served by Toolco, since that was argued on October 29, 1962, and the final papers were submitted on November 7th.

I see no necessity for argument, unless counsel wishes it, for the appeal by TWA from an order of the Special Master overruling TWA's objections to the further interrogatories, since I assume the same principles will be argued

on that item as have been argued on the original motion to strike.

Mr. Sonnett: We would rest, your Honor, on the prior record, plus the short brief served this morning.

The Court: I received that this morning.

Mr. Sonnett: Yes, your Honor.

The Court: I suggest then, Mr. Davis, that you start off on your application to review the order of the Special Master denying your application to proceed with the depositions of Sessel and Wadsworth.

Mr. Davis: Your Honor, preliminarily I would like to make some corrections on the papers which we submitted in connection with that application. Referring first to my affidavit——

[24692] The Court: Just a second. I have gone through all these in the last four days. Now I will have to go find it.

Mr. Davis: This is the last paper I filed, your Honor.

The Court: Your affidavit or Mr. Cook's affidavit?

Mr. Davis: That is correct, looking at my affidavit first, your Honor, you will note that following page 16 at the end of the affidavit there is annexed as Exhibit A excerpts from the testimony of Mr. Cocke. Yesterday Mr. Cocke made some corrections of a typographical nature which do change the sense of what he was saying, and I would like at this point to make two small corrections.

The Court: Where do they appear?

Mr. Davis: First at page 55 of Exhibit A, your Honor.

The Court: Yes, I have it.

Mr. Davis: Page 55, you see in the answer of Mr. Cocke where he said, "I said, and I repeat that I expressed the opinion that Mr. Hughes, to use my own words, was afraid of a deposition."

The Court: Yes?

Mr. Davis: He wants to insert the word "not." [24693] He wants to express the view that Mr. Hughes was not afraid.

The Court: Was not afraid.

Mr. Davis: That is what he testified to yesterday. And then at page 65, in the next to the last full paragraph, the line beginning:

> "I don't recall who made the decision that it should be deferred because it wasn't on the agenda."

He wants to insert the word "not" between "should" and "be." So it reads:

> "I don't recall who made the decision that it should not be deferred because it wasn't on the agenda."

The Court: All right.

Mr. Davis: One more matter, your Honor, in connection with the affidavit of Mr. Cook, Mr. Cook annexes as part of his affidavit a letter from Mr. Sessel to a Mr.—— I will give you the exhibit number— I think it is Exhibit A of the affidavit. It is a letter of April 16, 1958, by Mr. Sessel to Mr. Engelman.

The Court: I have it.

Mr. Davis: That, your Honor, is a copy, or, rather, is a transcription by one of our reporters of the document found in the Irving Trust Company files. [24694] At that time we didn't have available to us a photostatic copy of the document itself as found in the files of the Irving Trust. That, however, was made available to us yesterday afternoon. I would like to hand to the Court at this time a photostatic copy of the document that we did find in the files of the Irving Trust. To my knowledge there

is no difference between the document itself and this copy, but I would prefer that for the record.

The Court: Have you given a copy to the other side?

Mr. Davis: All of them have a copy, because the document was produced during yesterday's deposition and all counsel were there and obtained in due course a copy of everything that was produced. I have extra copies here if anyone wishes one.

Mr. Sonnett: There is no correction in the date of the letter; it is still written in 1958.

Mr. Davis: Yes.

The Court: You may proceed, Mr. Davis.

Mr. Davis: Now, your Honor, there is one other matter which I would like to call to your Honor's attention and have the record reflect. The question was raised before the Special Master by Mr. Barr, and I am [24695] calling it to your Honor's attention, and that is that a substantial portion of what appears in my affidavit and Mr. Cook's affidavit was not before the Special Master at the time he made his ruling which is now under review. In other words, the testimony of Mr. Cocke subsequent to December 18, 1962, and which we have in our exhibit as an excerpt beginning at page 13, namely, the excerpts from Mr. Cocke's deposition beginning at page 13 of Exhibit A, and that is following January 3, 1963, wasn't before the Special Master at the time of his ruling. Exhibit B to my affidavit, however, was at one time an exhibit to a brief which was filed with this court and a copy of which had been furnished to the Special Master, and, therefore, in one sense it may be deemed that he would have been aware of the existence of that letter, even though it was not specifically referred to at the time he considered and decided the application which we made for the taking of the deposition of Mr. Sessel.

Pretrial Hearing, January 9, 1963

Now, going to the affidavit of Mr. Cook, the letter of April 16, 1958, which I just handed to your Honor, a copy of which is marked Exhibit A to Mr. Cook's affidavit, that was not before the Special Master at the time of his ruling.

[24696] Exhibit B, being a memorandum found in the files of the Equitable signed by Mr. Oates, was not before the Special Master. Nor was Exhibit C, which is a memorandum from the files of Equitable by Mr. Keehn, dated December 29, 1960.

Now, the next document, Exhibit D, being the notes of a telephone conversation between Mr. Sessel and Mr. Gordon, of the Bank of America, was an exhibit which had been used during the course of the depositions. Mr. Cocke had not testified with respect to that exhibit as he did on January 3rd and following. But that document was one which was part of the record and, therefore, it may be assumed that the Special Master was aware of its existence.

Exhibit E of Mr. Cook's affidavit, which is a memorandum of Mr. Keehn dated July 7, 1965, furnished to us by Equitable Life, was not before the Special Master at the time of his ruling. He became aware of it subsequently.

Exhibit F, which are the notes of a telephone conversation or notes of Carver relating to a telephone conversation between Mr. Gordon and Mr. Sessel, was marked as Defendants' Exhibit 117 and was a document which was made part of the record at the time of the [24697] Special Master's ruling, but, of course, Mr. Cocke's testimony, which, to some extent, relates to the same subject matter was not before the Special Master.

Now, if your Honor please, I do not want to take the time of the Court or burden the Court by repeating to the Court what I know has been previously and adequately presented to the Court and unquestionably considered by

the Court. There are relatively few things which I feel desirable to point out to the attention of the Court if I assume that your Honor has had an opportunity since yesterday to review my affidavit and that of Mr. Cook.

I appreciate the fact that I was late in filing that affidavit. Mrs. Lea and I stayed up to 4 o'clock in the morning to get enough time, but, mechanically, I got a little fouled up and I could not get it filed any sooner than I did. If I may assume that your Honor has had an opportunity to review the material which is presented in these two affidavits, I can limit my remarks very briefly.

The Court: I have read them.

Mr. Davis: First, I would like, then, to emphasize a matter as to which I am sure my opponents will advert to, and that is the length of time which the [24698] Tool Company has been on depositions, and even the reference of the Special Master that on February 11th it will be approximately a year that he has been sitting as a Special Master. In fact, the Tool Company has had 80 witness days during that period of time, 80 days during which we examined a witness. During that time I have had a computation made by my office, and I am informed that only 80 per cent of the pages of transcript taken during those 80 days are in Q and A form. The rest has been spent in colloquy or points being raised by one of the various counsel. On each day of these depositions there have been a number of counsel present, and each, of course, has been afforded full opportunity to either make objections, comment on the objections, or make remarks. So that based upon the number of pages of the transcript taken during those 80 witness days I find that only approximately 66 per cent of those transcript pages are devoted to Q and A. That would reduce, in effect, the taking of questions and answers from witnesses to 53 days.

The further fact that I would like to call to your attention is what has transpired since October 25, 1962, which is the date, if your Honor will recall, when the Special Master ruled with respect to the objections [24699] of TWA to answering these further interrogatories.

The Court: You mean the first interrogatories on October 25th?

Mr. Davis: That is correct, and at the same time it is the time when he ruled upon the application as to the further adjournment of the return date and taking of the deposition of Mr. Hughes, where the Special Master in fixing the advance date of February 11th made certain comments as to what he assumed could take place during that period of time.

Subsequent to that date the Tool Company has had 25 witness days, and based upon the pages of transcript during those 25 witness days we find that approximately 82 per cent of those pages were devoted to Q and A.

I mention that, your Honor, only for the purpose of putting into proper focus what it is that the Tool Company has been doing.

The Court: What is the status of the depositions of Cocke and Leslie?

Mr. Davis: I stopped at the deposition of Mr. Cocke when I said that, "I have no further questions of him at this time." The Special Master felt that it would be desirable to give Mr. Cocke an opportunity [24700] to refresh his recollection and testify further. As to the manner in which it was to be done, the Special Master suggested that his remarks should be kept confidential and under seal, and if your Honor would like to have more information with respect to that——

The Court: Have you now finished with Mr. Cocke?

Mr. Davis: No, I have not. I have been requested—maybe I should say it has been suggested, if not requested by the Special Master to review once more with Mr. Cocke his testimony covering the years 1959, 1960 and 1961 so as to give Mr. Cocke an opportunity to further expand and elaborate on his prior testimony.

The Court: Wasn't he supposed to do that on January 3rd?

Mr. Davis: It started on January 3rd, your Honor, and it has not been completed. First of all, a number of things happened during the course of Mr. Cocke's testimony with respect to the production or lack of production of documents. There is a good deal involved. A good deal of time was taken up in that connection. And, as I say, I have submitted to you excerpts from Mr. Cocke's testimony subsequent to January 3rd. Yesterday I would say that he testified approximately an hour and a [24701] half. The rest of the day was spent in trying to untangle this production of documents question which has arisen, what has been produced and what has not been produced.

The Court: How about Mr. Leslie?

Mr. Davis: Mr. Leslie testified to the financing which took place in the year 1958. Then he asked that he be excused from further testimony because of his commitments and obligations to Douglas, the year end financial statements coming up, and his return date has been adjourned for one reason or another, and as of the moment he is scheduled to return on January 21st.

The Court: Isn't it the 14th?

Mr. Davis: It was the 14th.

The Court: The transcripts I read before the Special Master said January 14th.

Mr. Davis: You are quite correct. However, either yesterday or the day before the Special Master informed us that he is scheduled for argument before the Supreme Court of the United States, which is scheduled for that week. And so yesterday we all received a letter which was confirmed that we would resume our depositions on January 21st with Mr. Leslie.

[24701] The situation with respect to Mr. Leslie is Mr. Leslie has asked that he be required to come to New York only when there could be a full week devoted to him. The matter is left in abeyance as to what the ruling of the Special Master may or may not be as to the availability of Mr. Leslie for that one week which is presently scheduled.

The Court: How much time do you have with Mr. Leslie?

Mr. Davis: Your Honor, it depends almost entirely as to whether or not I may assume that a decision will be made with respect to the appeal which TWA has taken as to interrogatories. There is nothing which transpired subsequent to 1958 other than the 1960 financing which is the heart of this controversy as referred to by Mr. Cocke. Whether I shall take the time to go through the details, and it would be a very detailed examination, because there were extended negotiations with a great many complications taking place during 1958 and 1960. However, from the point of view of the antitrust law, which is all I am addressing myself to or trying to address myself to, there is very little that I can really hope to obtain from Mr. Leslie, other than putting him through basically the [24702] same area that Mr. Cocke testified about in what appears as Exhibit A, because, as your Honor knows, for some time, in fact, I believe, from the first day that I appeared before your

Honor, I indicated that it was my plan and expectation to bring on an appropriate motion to dismiss as soon as we were in a position to do so.

The Court: You have made six references to that before the Court, starting September 1, 1961.

Mr. Davis: I am surprised it is as few times as that, your Honor, and I am sure it is a burden to have me repeat my position so many times. But it is basic to the issue which I think is confronting us, and, basically, the position of the Tool Company is if it is to have or is entitled to any right to discover what a complaint is about, we have not had it yet, because we still do not know.

It now appears from the examination of Mr. Cocke's testimony, and something which I think was to be suspected before I examined Mr. Cocke, but I could not make the assertion, and that is there is no one at TWA, unless it is Mr. Sessel, and I doubt Mr. Sessel knows any facts which justify violation of the antitrust law. Certainly, his letter just handed to you suggests just [24703] the opposite. I don't think there is anyone at TWA knows any fact supporting that.

In that respect, counsel have asserted the work product privilege, which they have a right to assert. The only thing I know of as to how a defendant may find out, if he is entitled to find out, if you assume he is entitled to find out, the only way in these circumstances a defendant is going to be able to find out what this complaint is about or what the course of conduct of either Hughes or the Tool Company of which TWA is complaining about, may be by means of interrogatories or a Rule 16 proceeding, which will require TWA corporate-wise to answer at least questions based upon whatever knowledge that has been accumulated through its various agents or agencies.

[24704] On this advice question, your Honor may know or may not know that in the course of the depositions of Mr. Tillinghast that the attorney-client privilege, not the work-product privilege, between the Cahill firm and TWA was waived in the presence of a third party, namely, counsel for the voting trustees. There was a detailed discussion of the complaint, the legal theories involved, and presumably whether the facts justify or do not justify whatever the complaint is about. There was also furnished the minutes of the executive committee meeting of June 29, which the Special Master has also ruled to be an independent and separate waiver of the attorney-client privilege. So we are not handicapped by the attorney-client privilege insofar as I can now examine any witnesses who had any conversations with counsel with respect to the subject matter of the complaint, although we are at odds, that is, the Cahill firm and I are at odds as to the scope or extent of that waiver, and the Special Master has ruled so far that the waiver has taken place, and the extent of the waiver is yet to be determined as we proceed.

However, the Cahill firm has still asserted the work-product privilege, whatever memos they have [24705] prepared. Apparently, the only person who has given them any memo of any facts is Mr. Rummel. That would seem to be the conclusion from Mr. Cocke's testimony, and certainly based upon the record, the excerpts of which I have not added to Exhibit A. It would seem that the only writing in existence which identifies or describes whatever transactions are involved are the so-called Rummel notes with respect to it. With respect to the financing, there are some handwritten notes of Mr. Leslie and there are other notes of Mr. Thomas, all of which have been produced.

Before I leave this question of interrogatories, your Honor, I understand that counsel for TWA's main objec-

tion from a legal point of view to answering these interrogatories is the assertion that interrogatories may not be served while a party is engaged in oral discovery.

The Court: I think that is in the sole discretion of the Court whether or not they shall be served.

Mr. Davis: That may be the proper answer, your Honor. What I would like to say at this point, your Honor, is I am perfectly willing as I indicated [24706] in my argument before the Special Master, and I want to say it here also, to suspend oral discovery for the purpose of obtaining answers to my interrogatories.

The Court: What else do you have to say about Mr. Sessel?

Mr. Davis: With respect to Mr. Sessel, I think there can be no question from the facts which I have assembled and tried to present to you in these two affidavits that if there is a single person who does have knowledge of what, in fact, took place during the period 1955 through 1960, which counsel for TWA has asserted on a number of occasions is the period of the acquisition and financing of the jet aircraft, the period which involved the so-called negotiations for the Northeast merger, if there is a single person who knows those facts from all sides and angles, it would be first Mr. Sessel, of the Irving Trust, who during that period was not only the leading banker for TWA, but also the principal banker for Mr. Hughes and the Hughes Tool Company, who was a director of TWA, who participated in all negotiations and decisions that took place during that period. And, secondly, if there is any other person who compares to Mr. Sessel, it would be Mr. Wadsworth, of Dillon, Read, [24707] Dillon, Read, who were the principal architects of the so-called Dillon, Read plan, which was on

and off, and finally was consummated in 1960. And if we are to be required to continue the taking of oral depositions for whatever period of time the Court determines is the right which we have or to comply with whatever right the Court previously determines we have, I submit that we ought not be handicapped or restrained as to who we take on next.

In this respect I would submit to your Honor a decision by Judge Weinfeld in Haynes v. Columbia Pictures Corp., 16 F. R. D. 118, 124 (S. D. N. Y. 1954), quoting from what appears in that opinion. As I understand, the facts in that case, your Honor, involved a question as to whether diversity of citizenship existed, and the plaintiff was examining the defendants, some of whom were residents of California and some residents of New York. Apparently controversy arose as to which he ought to examine first, and the Court had occasion to say:

> "... There remains the defendants' final request that the examination of the California residents be deferred until the conclusion of the [24708] depositions of the New York residents.
>
> "Absent unusual or compelling circumstances, an examining party should be permitted to examine witnesses or parties in the order he deems best calculated to disclose evidence or leads pertinent to the subject matter of his claim or defense. No sufficient ground has been presented for interfering with the control which the plaintiff here as the examining party would normally exercise in the order of the examination."

The Special Master's ruling, however, seems to have been predicated upon, first, the fact that in connection with the implementation of the first decision by Judge Herlands with respect to priority the Court annexed a schedule to its order. That schedule consists of nothing more than a notice of the taking of the deposition served by the defendants immediately following the filing of the complaint. I believe I have said more than once that in serving those notices for the taking of deposition there was no intent on the part of the Tool Company or its counsel to follow any particular scheme, nor had it any idea as to what would be the best way in which [24709] to determine whatever evidence was to be developed. Mr. Sessel and Mr. Wadsworth are on that list to which priority was established, and the only question which is to be raised in that connection is that their names do not appear immediately following that of TWA.

The Special Master also seemed to be concerned with the fact that he had determined that Mr. Hughes' deposition was scheduled to take place on February 11, and it may be inferred that he felt by the time that Mr. Leslie was concluded and Mr. Cocke was concluded, then the time lapses which were bound to occur, that nothing worthwhile might be accomplished prior to February 11th, and, therefore, in that sense no particular harm to Toolco, if you assume that Toolco's depositions or discovery is to be interrupted, and is to be interrupted before this Court has satisfied itself that it has jurisdiction over the subject matter of this action.

[24710] I respectfully submit, your Honor, that the facts presented to the Court by these affidavits and by the testimony of Mr. Cocke, and if your Honor has had an opportunity to review even hastily the testimony of Mr.

Rummel, I submit that the conclusion is inevitable that there is at least a very, very serious question as to whether or not the claim that TWA is asserting is properly a claim under the antitrust laws. I respectfully submit to your Honor that we are confronted with the necessity of satisfying ourselves as to the basis for the jurisdiction of this court before a plaintiff may subject a defendant to what TWA is seeking to do with respect to the deposition of Mr. Hughes, quite apart from the admissions of TWA with respect to the testimony of Mr. Cocke, which I have annexed as an exhibit to my affidavit, portions of which I would like to particularly call to your Honor's attention.

Now, I say, your Honor, that even if we were to assume that the CAB did not exist or that if exemption from the application of the antitrust laws did not exist, I am talking now simply as to whether or not there is a course of conduct by the Tool Company which is related in any way to the violation of the antitrust laws.

[24711] The Court: Mr. Davis, we have gone through this several times. You are arguing a motion for a summary judgment.

Mr. Davis: No. I say I want to be in a position to do that.

The Court: But you will never get to that point until you go through the proper procedures. I am not of a mind to overrule the decision of the Court of Appeals.

Mr. Davis: I would like opportunity to address myself to that question at the appropriate time if I get answers to my interrogatories which I am entitled to. We have the position of the plaintiff at that point.

The Court: You have not afforded the plaintiff an opportunity to examine and cross-examine the defendant,

and in Arnstein v. Porter, Colby v. Klune, and in the Bozant case and other cases the Court of Appeals said unless you have had an opportunity of discovery of the opposing party and examination and cross-examination the Court should not grant a motion for a summary judgment.

Mr. Davis: If that is the thing that is underlying the question, I would like an opportunity to brief the question to your Honor.

[24712] The Court: I don't think you have to, because I have looked into that question on several occasions and I have done extensive research upon it and I have written upon it.

Mr. Davis: If the complaint states a cause of action——

The Court: You want to go beyond the complaint and produce the evidence that you have adduced at a deposition proceeding. You, therefore, turn your motion into a motion for summary judgment and the rule states you can do that.

Mr. Davis: Your Honor, in that connection your Honor is overlooking the provisions of the Federal Communications Act. This complaint did not say anything about a course of conduct in violation of the CAB. The admissions of the plaintiff are just as much a part of this complaint as the complaint itself.

The Court: No doubt about that.

Mr. Davis: I am talking about the testimony of TWA.

The Court: All right. Let us go on to something else, then, Mr. Davis. We have been through this several times and I have ruled on it back in March.

Mr. Davis: I recognize that you have, but a [24713] defendant is reasonably entitled to find out the course of conduct that is in the case, and I respectfully submit that I have not had that opportunity. The only thing I have

discovered in these 80 witness days is that counsel for TWA knows what they are doing, but nobody else does.

The Court: Do you have anything else to say about Sessel-Wadsworth?

Mr. Davis: I believe that your Honor is sufficiently familiar with the circumstances which relate to this date of February 11th and how it occurred without my retracing the procedural steps that took place. That developed merely because we elected to accept the service for the subpoena of Mr. Hughes, rather than answer interrogatories, because up to this point there has never been any order of this court or finding either by the Special Master or this court that the circumstances developed justify or support the need of the plaintiff at this time to take the deposition of Mr. Hughes. There is no such finding or order of any kind. All that has happened is that rather than answer interrogatories as to Mr. Hughes' whereabouts I undertook to accept service of a subpoena in connection with the noticing of the taking of the deposition. That notice of subpoena [24714] had an arbitrary date, the same as mine had when I started to file my notices and that date has been adjourned on a couple of occasions. There has been no finding whatever of any kind by the Special Master, no finding of fact or circumstance which has developed since October 25th or any other time indicating any need at this time for the plaintiff for the protection of any rights of the plaintiff to take the deposition of Mr. Hughes or anyone else in the Hughes Tool Company.

Now, as I have indicated before, your Honor, and whether or not I succeed or do not succeed, I respectfully submit I am entitled to this and I am prepared to suspend all oral depositions if answers to these interrogatories are

given which will be binding upon TWA and which will establish whether or not this court has jurisdiction over the subject matter of this action, and I respectfully submit that once we have answers to these interrogatories, this court, as well as defendants' counsel will know what it is we are defending ourselves against, and I ask that an appropriate decision be made as to the order of taking depositions and like related matters.

Your Honor, I would like a few minutes, unless your Honor tells me you are sufficiently familiar with the [24715] testimony of Mr. Cocke, to point out the circumstances which cast great doubts as to the true underlying reasons for having selected the course of action of filing of the antitrust complaint, which is the sole foundation for the Court exercising any of its powers. If your Honor has adequately reviewed these excerpts of Mr. Cocke's testimony, I will not burden your Honor. On the other hand, if your Honor has not had an opportunity to do so, I would like to address your Honor's attention to a few portions.

The Court: You have indicated that at the beginning of your argument and I have read your papers.

Mr. Davis: I have nothing that I think is necessary for me to add, then.

The Court: Counsel for Irving Trust Company, Mr. Chanler. I assume you are also talking for Mr. Sessel.

Mr. Chanler: Yes. The Irving Trust Company and Mr. Sessel.

[24716] As your Honor is aware, I want to remind your Honor that on February 7, 1962, you stated that the schedule of examination may be varied by the Special Master if in his opinion the circumstances require certain variances. Then again on March 5 after the counterclaim was

filed you stated that the examinations of Toolco should be limited to the complaint and they could not examine as to the counterclaims and that since the Special Master is presiding over the depositions on a day-to-day basis, he will see to the application of this limitation.

Now, in September the question of the examination of Hughes came up, and your Honor at that time set the examination of Mr. Hughes to October 29, giving Toolco the right to file an application for further adjournments, stating the propriety of such application is peculiarly within the Special Master's competence.

Mr. Rankin, thereupon, adjourned the deposition to February 11, 1963, stating he did so in order to give everybody, particularly Toolco, ample time to complete the examination of what witnesses it then had, Tillinghast, Leslie, Cocke and Rummel, and the presentation of whatever motions Toolco cared to make to the Court with respect to various legal contentions which it had previously [24717] raised, there having been made more than six times a motion to dismiss.

Now, he made it quite plain that he intended the examination to be held, and no appeal was taken from that order of the Special Master. So that order, it seems to me, is now the law of the case setting down the Hughes deposition for February 11.

On December 4 Mr. Davis filed an application for examination of the Irving Trust by Sessel, and Dillon, Read by Wadsworth, and Wadsworth individually. That was argued at that time without any particular reference by Mr. Davis to come before Mr. Hughes' deposition. It looked as though there would be time to examine Mr. Sessel, because there was some talk about Cocke's examination soon being

terminated and Leslie's. It became apparent while that was pending that there would be less time to examine Mr. Sessel and that there could not be more than four or five days before the Hughes deposition of February 11 during which Mr. Sessel could be examined.

Aside from that point, the Special Master in his order of December 28 stated:

> "* * * in order that there would be no doubt left that it was my purpose and intention to proceed [24718] with the taking of the deposition of Mr. Hughes by the plaintiff beginning February 11, 1963, at 10.00 a.m. in Los Angeles, at the place designated in the notice."

He affirmed that was his intention. He then denied the motion to examine Mr. Sessel on this ground, among others:

> "I do not think it would advance the proper administration of this case since it would in my judgment inevitably branch out into the issues of the counterclaims, or result in such continuous controversy that it might interfere with the taking of Mr. Hughes' deposition at the time and place fixed."

I have pointed out that your Honor has placed in the Special Master the discretion as to the question, first, of whether or not to vary the schedule of depositions and how to arrange the depositions, and, secondly, you have stated that the Special Master had special competence to see to the application of the limitation that there should be no examination as to the counterclaims. He has exercised that discretion.

Now, actually, this application before your [24718] Honor of Mr. Davis is an application to request that you reverse the Special Master's decision on the ground that there was an abuse of the discretion, since your Honor left this matter entirely to the Special Master's discretion. I think it is a most extraordinary thing to ask this Court to review the exercise of discretion by a lower court, to come in and present to you a very lengthy affidavit with innumerable affidavits attached to it, none of which were presented to the lower tribunal at the time the matter was presented there.

Mr. Davis made a long speech that some of them may have been in the record, and the Special Master if he looked through this voluminous record and if he had clerks to do so, he might have found some of them. But none of this material that they present to your Honor in an effort to show that the Special Master abused his discretion when he said there would be no interruption to permit an examination of Mr. Sessel and because it might involve examination as to counterclaims, and tried to show that that is unreasonable by presenting to your Honor totally different facts and totally different affidavits. It seems to me to be a highly improper procedure.

[24720] In the first place, he has changed his grounds very substantially here. Now there being no time for an examination of Mr. Sessel, as far as I can see, because, as Mr. Davis pointed out, the Special Master has to argue a case before the Supreme Court which will take up all of this week and next week, Leslie will be on the week of the 21st, and then Cocke will be on the week of the 28th, and there will be, no doubt, considerable examination there, and the Special Master said he had a considerable number of

questions, and by the week of February 4th we are all going to be packing up to go to Los Angeles. So that really he is now making a plain application here to ask your Honor to reverse the Special Master's order of October 25 setting down the examination of Hughes for February 11. He didn't appeal from it; he never objected to it. He never actually said that is what he is doing, but that is the only implication in his present motion. He said he wants to examine Sessel first and Wadsworth, which means there won't be any examination of Hughes in probably six or eight months.

Your Honor pointed out if he really wants to make a motion to dismiss and if it had any merit in it, the first thing is to get through with the [24721] examination of Mr. Hughes, and no such motion can be granted until that is done. He is trying to get other witnesses involved here in order to postpone the day when Mr. Hughes will have to stand up and be examined.

I submit if his application is granted we won't see Mr. Hughes for eight or ten months or a year. Then we will see other witnesses. The idea of bringing in all this Cocke testimony and all these matters before your Honor have nothing to do with the motion whatever. Moreover, he never made any such application before the Special Master. He never asked the Special Master to postpone Mr. Hughes' examination. He said he wanted to examine Mr. Sessel to find out more of these facts.

Another point I want to make clear is that these affidavits, particularly Mr. Davis' own affidavit, conclusively confirm the wisdom of the Special Master's determination that it would be inappropriate to examine Mr. Sessel because it would be impossible to disentangle questions relat-

ing to the complaint from questions relating to the counterclaims. The burden of Mr. Davis' affidavit, which, I say, was never before the Special Master, is that he has evidence to produce, according to him, that Mr. Sessel and others were instrumental in having this complaint and this lawsuit [24722] brought with improper motives in order to take away Hughes' control and obtain control of TWA for themselves, and that it is all part of this conspiracy. That is the counterclaim. I submit to your Honor that I don't see a single subject mentioned in this Davis' affidavit where he outlines what he is going to talk about. On page 12 in his affidavit I don't see a single subject there as to which I could permit Mr. Davis to ask Mr. Sessel a question without objecting on the ground that he is attempting to examine him on the counterclaims. It may be they have some relation to the complaint, although it is a novel idea to me that in arguing that a complaint does not state the cause of action, you say it was brought in bad faith by the client who told the lawyer, "See if you can't bring a complaint that will bring about such and such a result. That has nothing to do with the validity of the complaint. This is nothing but an attempt to adjourn the examination of Mr. Hughes and to examine, if possible, Mr. Sessel on the counterclaims. There is nothing here to show that Mr. Rankin didn't act in the best of discretion, and, if anything, his discretion has been confirmed.

[24723] I would like to add one personal matter, your Honor: Mr. Sessel has been trying since last October to take a six-weeks' trip around the world, and he has had to postpone it twice, the last time on January 4th. He is leaving on Friday and he would like a decision at the earliest time, your Honor.

The Court: Mr. Stewart, you represent Wadsworth?

Mr. Stewart: And Dillon, Read, yes, your Honor. It is very difficult to assess any kind of reply, either to Mr. Davis' argument here or to the papers, more than 100 pages, that were served on us late yesterday afternoon. Dillon, Read is hardly mentioned. There are one or two references to the fact that Dillon, Read worked on the financing for TWA which later became the 1960 financing. There is no dispute as to that. We admit that. I don't know whether to be flattered or insulted by this omission of any justification for taking the deposition of Wadsworth at this time. But one thing that Mr. Davis said I thought was very interesting, and that is, it is not at all clear that he even plans to examine Mr. Leslie, the financial vice-president of TWA who worked on this financing, as to the facts, the negotiations, the [24724] conversations that were held in connection with this financing.

I have read the Toolco papers, and the same question comes to mind, your Honor, why was Dillon, Read added in this lawsuit?

The Court: You have asked that question before, Mr. Stewart. Nobody wants to give you an answer.

Mr. Stewart: They have not done so so far. We have been in it a year and we have not had an opportunity to examine the man who is responsible for bringing these charges against Dillon, Read.

Your Honor knows that Mr. Wadsworth was the officer at Dillon-Read who was primarily responsible for the so-called Dillon, Read plan for the financing of TWA. In working on this he kept a diary, a day-by-day diary of his telephone calls, of his negotiations, his conversations with the banks and insurance companies who were the prospective lenders to TWA. The diary is voluminous. It is about

500 pages of foolscap altogether. Toolco got that diary, your Honor, by a subpoena before Dillon, Read was named as a party defendant in this lawsuit, along with a bunch of other material. They have had it now for [24725] close to a year and a half, I believe, and Toolco admits as recently as our argument on this application on December 11 that they find nothing in this diary which casts any light as to the facts upon which TWA relies in support of its complaint. I can see this situation developing though, your Honor, with this diary and with these personal notes of Mr. Wadsworth, if the prior examinations of Toolco are any criterion, I can see an examination of Mr. Wadsworth going for weeks, months, on end.

Now, since Dillon, Read is concerned solely with the financing and that is their only part in this case, the financing of 1960 and the subsequent financings of TWA, and the counterclaims are essentially dealing with the 1960 and subsequent financings, any examination of Wadsworth could concern itself with just one thing, and that is the heart of the issues in the counterclaims.

Toolco has had priority for a year to find out what they are being charged with. They are not interested in pursuing TWA's statement that 75 per cent of their case is going to be developed on the examination of Mr. Hughes. But one thing is very certain, your Honor, they can't find out from Mr. Wadsworth what the facts are that TWA relies on in support of its complaint. [24726] Nothing he says, nothing he does not say could bind TWA in any way.

Mr. Wadsworth was not consulted in the filing of the complaint by TWA against Toolco, and I suggest that any inference that Toolco can find out from Mr. Wadsworth what TWA's case is is just sheer nonsense. He is not an

officer at TWA, he is not a director of TWA, he is not an employee of TWA. He can't possibly know.

This file of voluminous material served on us, your Honor, just proves one point to me, that Toolco will claim anything, say anything, do anything to prevent the deposition of Howard Hughes taking place on February 11, or any other date, for that matter.

I respectfully urge, your Honor, that you affirm the ruling of the Special Master.

The Court: Mr. Sonnett.

Mr. Sonnett: I think Judge Bromley is next in our agreed batting order.

Mr. Bromley: May it please your Honor, I really think this is an attempt on Mr. Davis' part just to get rid of the Hughes examination for as long a time as he can, and I call to your Honor's attention in support of that accusation to paragraph 22 on page 15, where he says, [24727] "Toolco respectfully submits that it is entitled to priority in discovery under the circumstances here present in accordance with the prior orders of this Court; and that, accordingly, it is entitled to the examination of Sessel and others before the deposition of Hughes is taken."

[24728] Now, if you turn back to page 2 at the bottom, you will see another device in the making:

> "Toolco expects shortly to bring on a separate application for appropriate protective relief with respect to the current efforts of TWA to take the deposition of Hughes before plaintiff has divulged the justification for an antitrust complaint, whether by way of answers to interrogatories or otherwise."

Your Honor, we are making expensive and extensive preparations to go to Los Angeles confident of your Honor's decision, and if any such further devices delay this are in the making, I think he ought to do it very promptly, and if Mr. Hughes is not going to show up on the 11th, I think these gentlemen ought to tell us before we incur all the thousands of dollars of expense and all the moving out there only to find out that he does not appear.

I endorse everything that has been said and that which is now to be brilliantly said by brother Sonnett.

The Court: Mr. Sonnett, with that introduction do you want to talk or do you want to rest?

Mr. Sonnett: Judge, I am afraid to say anything for fear of spoiling it, but there are a few points that [24729] I feel I must say. Obviously, in respect of the deposition of Sessel or Wadsworth, I have no direct interest, except insofar as it impinges upon the progress of TWA's case. No doubt in due course both will be deposed. No doubt in due course both will be important witnesses on various matters.

But in respect of my problem, which becomes increasingly acute, may I say to your Honor that the needs of TWA to advance its discovery after the defendants have had a year, the needs are acute. TWA's 1962 year will show according to its president at best a break-even, more likely a loss. This litigation is expensive. When I say, as I have said and repeat to your Honor, that I expect 75 per cent of the evidence we will use at the trial to come out of the mouth of Hughes, I am not saying that rashly. I expect that. And I would like very briefly to demonstrate to your Honor why I think that is so and why I think

we need to go forward as quickly as possible with the Hughes deposition.

We have withdrawn our application that you set the date earlier than February 11th because as a practical matter it is apparent that we could not start before that, anyway. I think your Honor will realize that we have no desire to bore you with statistics, but [24730] we have in terms of discovery in this case so far on the documentary side produced over a million pieces of paper, that is, TWA, that the Hughes Tool Company has produced 325,000, that Dillon, Read has produced 18,000, Irving Trust 30,000, Metropolitan Life, 5,000, Equitable, 35,000, Bank of America, 12,000, the Chadbourne firm, general counsel for TWA, 20,000, from the CAB files 12,000, The First Boston Corporation, 3,000, Merrill, Lynch, 2,500, Atlas Corporation, 1,000, the Mellon Bank, 2,000, Charles Thomas, a thousand—approximately 1,700,000 pieces of paper have been produced so far on the documentary side of the case.

The Hughes Tool Company has had all that and they have had a solid year, and if Mr. Davis' count is 80 days, mine is 83 of solid question and answer discovery. We have not had a day. I don't know how long Mr. Hughes is going to be around to be examined, but I do know that he is the one person who has what we need the most. We need to know the decisions at the highest level which Hughes made, and there is no mistake about it, he is the one who made them, and we need to develop out of his mouth, and we will, the reasons why he made the decisions he made.

We start out, your Honor, with a handicap by [24731] the fact that the Hughes Tool Company counsel completely disregard the discovery which they have had to date. For

example, they would brush aside the entire Tillinghast deposition as if it did not even enlighten them as to claims concerning 1961. It does. And I think it contains very significant evidence relating to the efforts of Hughes to ram 990's down the throat of TWA at a time when the independent management for the first time wanted other aircraft, as to what Hughes and his representatives did in that connection at a time, mind you, when there was a voting trust in existence and Hughes was presumably out of control. Now they disregard the Tillinghast deposition.

They would minimize and disregard the Rummel deposition, and a reading of that record is very enlightening, because every time counsel for Hughes Tool came to an area where it was obvious the witness was going to hurt him, he backed away, and at one point it became so obvious the Special Master himself took over the questioning, because he said to Mr. Davis on the subject of whether Hughes had instructed Rummel to boycott airplane manufacturers, except the one chosen by Hughes, Davis does not pursue that, and Mr. Rankin said, "I don't think the record ought to be left that way," [24732] and he pursued it, and the witness testified that he had had such instructions. This is the man who worked with Hughes closely and intimately and knew all subjects connected with the procurement of aircraft. He was a man—and this is not a reflection in any way on him—on the payroll of both Hughes and TWA. He is a high man in his field and he is an excellent witness and is very useful in support of TWA's case.

Now, as to the production of the present set of papers quoting Cocke as to what Leslie said to him, after examining Leslie for 18 solid days they have just reached the beginning of the jet period in their examination, and counsel

for Hughes Tool Company says to you with a straight face presumably, well, he may not want to get into that particularly. The reason is pretty obvious, because I think he had forgotten things, like the document I have in my hand, which they have had for many, many months. This is a document in Mr. Leslie's handwriting. It will be used on his cross if Mr. Davis does not use it on his direct. It was written in the spring of 1960 when both TWA and the Tool Company were on the verge of receivership because of the actions of Hughes. And in that document, among other things—I am not going to go into all of it, [24733] because, as your Honor can see, it is very lengthy—it is headed "TWA, In Appreciation"—in that document, Leslie, the man who has been on for 18 days so far, says, among other things—this is at the very beginning, under the heading of "Background":

> "During 1956 Hughes Tool Company acting through Mr. Howard R. Hughes placed orders for 18 Boeing 331's, 15 Boeing 131's and 30 Convair Model 880 jet airplanes. . ."

stated at the time and repeated many times since to be for TWA's use.

Skipping down:

"It was stated by Hughes at the time the orders were placed (among others the writer) that TWA was not to concern itself with the financing of this equipment as he through Toolco would find the required funds."

Later on after Mr. Leslie has been analyzing the history and the situation of TWA, he comes to the conclusion, among others that:

"TWA with Equitable should sue Toolco-Hughes for damages due to implied contract default."

There are other discussions about TWA to assert claims against Hughes. That was in March or thereabouts of 1960. It represented the judgment of Leslie, who, I [24734] might add, at one time was in the employ of the Hughes Tool Company for some years in a financial capacity, and also with TWA. Leslie has not been asked about that. They have had this piece of paper for months. I think what this shows is that there are none so blind as those who will not see. If counsel for the Tool Company would take a look at the documentary evidence they already have, they would be very much enlightened about various of the problems that face them in this case.

Now, on the Hughes deposition and the need for getting forward with it promptly, I represent to your Honor that it is provable, and without pulling out all the documents, that it was a cardinal policy that Hughes throughout maintained that there be secrecy concerning everything. There are documents in which he instructs people, "Don't make notes of this," "Keep this a secret." As a matter of fact, there is one which is, I think, so amusing and pertinent and it is brief, that I would just like to read it to your Honor, because it comes out of the mouth of Mr. Holliday's secretary, and it is really quite a commentary on the secrecy rules which Hughes rigidly enforced. This is a letter written by Laura Lee, who is Mr. Holliday's secretary, to Mona Lee, who is Leslie's secretary.

[24735] The Court: Where does Lola Lea fit in?

Mr. Sonnett: I don't think there is a relationship, but perhaps we can judge better after reading the letter. Perhaps she is kindred in spirit. It says as follows:

Pretrial Hearing, January 9, 1963

"Dear Mona Lee:

"I am trying to work up some information in regard to all of the subsidiaries of HTC and all companies in which we own stock, etc. and as usual, it isn't easy to find out the simplest information. We do carry secrecy to extremes in some cases, in my very humble opinion!

"Would you be good enough to furnish me the following on TWA: State incorporated in; date of incorporation; and the date set up for the annual stockholders meeting each year. I assume that you will not have to get a security clearance and be fingerprinted and all that stuff to furnish this meager bit of information to a fellow employee.

"Many thanks . . . . . and what would I do without you????????

Laura Lee."

[24736] When it get to a state where a secretary does not know in what state TWA is incorporated in, I think we have some idea of the extremes of the policy.

I might say that Mr. Leslie himself, for example, in 1955 in writing confirmed in a letter to Mr. Damon that the usual policy of everybody being sworn to secrecy was followed in a recent meeting with Mr. Hughes, this being the standing order of business.

Further, if one looks at these call sheets that record in part these telephone messages coming from headquarters, one is struck by the number of entries which say "Omit; they talked." It is astonishing the number of them.

But as to those fortunately that are available which were not omitted—in retrospect they wish they had

omitted—it is probative on the subject of the motivation of Hughes for what he did here with his co-defendants, and I am not going to take a great deal of time, except to indicate that it is in this type of area that we have our problems and where the need for the testimony of Hughes is absolutely essential to the case, because he is the one who has got the information. It is not in the documents. And under his cardinal policy of secrecy, the others knew just as much as he [24737] wanted them to know, and no more.

In that connection, to advert for a minute to the Leslie view of the situation in March, 1960, his appreciation, in which he said that TWA and the Tool Company both were on the verge of bankruptcy, that TWA should sue Hughes, this is long before we came into it as counsel for the new management, that Hughes in referring to that meeting in his own words said, and I would like to read this, your Honor. Your Honor has heard it before, but I want to follow it up with a brief excerpt from one other document you have not heard, and the two together, I think, illustrate where the deposition of Hughes is going to establish all the proof of motivation that we need to sustain the conspiracy, in addition to enlightening everyone as to what, in fact, was done. This is the call sheet of a call from Hughes, a message from Hughes to William A. Forrester, of Merrill, Lynch, of October 26, 1960. It starts out with the time 12:30 p.m. (Per Opr) Get him on the line.

"INFO They talked."

Then "2:00 p.m."—and this is this message from Hughes to Forrester, "Call him back and tell him that

for his information that Charlie Thomas"—[24738] parenthetically the then president of TWA—"negotiated and developed the deal with Dillon Read financing plan without my authority or encouragement from me; he forced it down my throat then at a Board meeting at which time he created a coalition of my directors and turned them against me and faced me with a mass resignation of all but one of the TWA directors. I have never liked this plan; I have never been in favor of this plan; I have fought it from the very beginning and I am still fighting it and I assure you that if it is employed it will be over my dead body and if you would like to come up with any suggestions of any alternative plan or any way whatsoever by which I can avoid being forced into the Dillon Read program, I would be most grateful. It is very flattering for you to say that you don't think I have ever been forced to do anything and maybe there was a time when this might have been fairly accurate statement, but I assure you it is not true today and has not been true concerning this Dillon Read program from its inception. I have fought it hammer and tong from the very first day that I ever heard of it."

Why? What the Hughes deposition is going to establish, and I have no doubt about it, and it will be established in the first week of deposition beyond any [24739] doubt, that the motivation for what Hughes did as charged in this complaint was a financial one and it consisted of tax avoidance, a specific financial motivation. That is what cast light on what was done and why it was done and how it was done and what led him into the antitrust violations which he and the others clearly committed.

In terms of the motivation, on December 4, 1960, Mr. Hughes apparently had a telephone conversation with Mr.

Carver, of the Bank of America. These are Mr. Carver's notes of that conversation. And at page 3 of those notes in setting out at length a conversation with Mr. Hughes that ran about an hour and a half on the phone. At the end of that Mr. Carver says:

"Three things came to HRH's attention this week anti DR."

What follows makes it clear this is anti the Dillon Read financing plan.

"1. 102 tax situation—it is real bad and three weeks before year end—ML——"

That is a reference to Merrill, Lynch and a proposed alternate financing plan——

"ML is better—have chairman of board and only [24740] need to get one man (Nixon?) so he would have to set out at once to refinance."

Now, there is the proof of why. It was the 102 tax situation. And I think the first week of the examination of Hughes based on things like this plus his tax returns, which your Honor directed that we have, and plus some other documents, are going to supply that background against which the purposes of the acts done will be obtained and will explain why they did get into antitrust violations.

Now, I know of no other way to get that information the way Hughes ran his empire, characterized by secrecy, by being surreptitious, by leaving behind no trails, by instructing people to keep things secret and giving them only part of the information, by sitting in the center of the web and pulling all the strings. He is the one there. I have said and I repeat to your Honor, I believe that 75 per cent of the evidence we will introduce at the trial will come out of the mouth of Hughes during his deposition. Thank you, your Honor.

Pretrial Hearing, January 9, 1963

The Court: The next matter for argument is the question of the attorney-client privilege. Mr. Davis.

Mr. Davis: On the attorney-client privilege I [24741] ask Mrs. Lea to present the matter to your Honor, if she may.

The Court: Certainly.

Mrs. Lea: May it please the Court, I should in the first instance like to point out that the documents that we are talking about and the question that was raised before the Special Master which is on here before your Honor involve communications which are unquestionably communications between attorney and client and to which the privilege unquestionably would apply were it not for the matter of waiver.

The Court: I understand that the documents we are talking about on this appeal have already been reviewed by the Special Master.

Mrs. Lea: That is correct. He has seen the documents. He has stated on the record that these are communications between attorney and client, and if it were not for the question of waiver, they certainly would not be producible.

Toolco, of course, does not take issue with the general statement that if a waiver of the attorney-client privilege has occurred documents are producible. The question and the primary question before your Honor, is whether or not a waiver of the privilege has, in fact, [24742] occurred.

It seems to me that in order to put this question of waiver in proper perspective it is necessary to see what it is the privilege is designed to accomplish. The privilege is designed to protect the confidentiality, it is designed, in a measure, to protect secrecy, an unpleasant word here insofar as discussions between client and attorney are con-

cerned, it is designed to operate to keep from the public generally, often persons not directly involved, that which is passed between attorney and client. Accordingly, it is in our view only when the client does something to destroy the secrecy or to indicate that the policy or privilege no longer obtains that we can say the waiver has, in fact, taken place. This is accomplished, if at all, through a disclosure of the contents of the communication, the nature or contents of the communication. It is that which will indicate if the client no longer wishes to keep the material confidential.

Now, if it is a disclosure which is, in fact, required before we can say the waiver has taken place, it is plain to us, at any rate, that in either paragraph 4 of the answer of Toolco nor in any of the affidavits—specific reference was made to the Holliday [24743] affidavit—that neither of those documents did, in fact, disclose what the nature or the contents of the advice that was given by counsel to client is, nor is there any disclosure of any of the facts or any portion of the communications which passed between the attorney and the client.

Under these circumstances, without any kind of disclosure at all there has not been any waiver. If there be no waiver, there is no compulsion for Toolco to produce these documents.

We do understand that having pleaded advice of counsel, Toolco cannot forever claim that privilege and claim that it need not disclose the basis of that defense, assuming that defense is pressed at the trial, and assuming that Toolco at some point seeks to rely on it. If at the appropriate time it appears that reliance will be placed on that defense and if it appears that information which is now privileged is necessary in order to establish that defense or is necessary to

the opposing parties in order to be able to meet it, then at such time it will become appropriate to make a choice of furnishing that information to the adverse parties, thereby waiving its privilege and giving it up, or waiving and giving up its defense. The choice, however, is [24744] Toolco's to make, whether to keep the defense or keep the privilege, and it can be required to do so, we believe, that is, to make a choice, only at a time when Toolco is called upon to divulge the factual basis of its contentions and its defenses. We have certainly not come to this point as yet.

The plaintiff has not even supplied to Toolco what it claims or what the basis of its motion is. We feel very strongly that the papers before this Special Master are privileged, that there has been no disclosure, no waiver of the privilege, and that opposing parties are accordingly not entitled to any of this information.

However, primarily in an effort to see to it that nobody who claims a need for relevant facts is deprived of the relevant facts, on September 17th Mr. Davis made an offer on the record to opposing counsel in which he said that he would turn over and the Special Master hold all materials which we claim pertinent which the Special Master can turn over to opposing counsel when plaintiff has revealed the basis of its complaint and the Court has had jurisdiction of the subject matter.

In a memorandum which we submitted today Toolco, it seems to me, has made an even more generous offer.

[24745] It is said that primarily and by reason of the fact that we think it is essential before anything else in this case be done that plaintiff be required to answer interrogatories and tell us what this is all about, and if they claim that this material or the documents with respect

to which we claim privilege is necessary in order to permit them to answer interrogatories and having got this information, once they are in position to use it, they will then be able to answer interrogatories, then the Tool Company has offered in its papers to make this material under those conditions and circumstances available to the Court. I don't know that we have heard yet from counsel for TWA as to the acceptability of the second proposal. I don't know.

The Court: I am sure Mr. Sonnett will want to answer your argument.

Mr. Sonnett: I am going to yield to a most charming man at this table, Mr. Kaminer.

Mr. Kaminer: I want to apologize, your Honor, on various counts. First, I may be slightly unintelligible because I am getting a cold, and, secondly, for being here at all, because, as your Honor knows, [24746] I am out of the case for other reasons, because of other engagements, but was brought back because of my knowledge of the subject, and, thirdly, for saying to you again that which you have heard before, because I cannot help it if the same arguments are made to you. I think your Honor's patience is something which I really enjoy.

We have submitted to you a brief which we sent to the Special Master in which we set forth the arguments which had been made to you before and made to the Special Master all over again after you had affirmed his first ruling. Now, today at 3 o'clock I get this new brief containing two points, and I quote:

> "1. Toolco has not waived any privilege by reason of its pleading or otherwise since the answer merely gives notice that advice of counsel will be asserted as a defense without disclosing the nature or contents of the advice relied upon . . ."

I now turn to what has been said to your Honor in this courtroom, that no waiver can result from the mere pleading of the defense prior to the disclosure of the privileged information, except in those cases where, unlike here, the pleading itself discloses the advice.

[24747] That was said to you, if your Honor please, before you affirmed the Special Master's ruling.

But let me go on to point 2:

> "2. While Toolco may be required during the course of pre-trial proceedings to disclose the facts upon which it relies with respect to any given defense or give up that defense, it may not be required to do so until such time as it is appropriate for Toolco to disclose the factual basis of its defensive contentions."

This has been said to you by my learned opponent the last time:

> "The development of further specifications of wilful and malicious interference must await the completion of Toolco's discovery. Until all facts upon which TWA relies are ascertained, the matters with respect to which Toolco asserts its counsel's advice as a defense cannot be determined."

And now we turn to page 14 of their present brief:

> "The development of further specifications of wilful and malicious interference must await the completion of Toolco's discovery. Until all facts upon which TWA relies are ascertained, the matters with respect to which Toolco asserts its counsel's [24748] advice cannot be determined."

How often are we going to say to the Court and to the Special Master that there is no question, that this whole thing is moot. And I am not going to be sweet about this. How often are we going to bring this issue before the Court and have the Court listen to this all over again on the basis of the claim that the answer did not waive anything, that the question is totally moot, particularly, your Honor, after all these affidavits that have been filed, which your Honor has, which the Special Master has analyzed and ruled upon and said of course it is waived, anyway. One of the affidavits says:

> "The activities of Toolco subsequent to 1960 which are alleged to have constituted a malicious and wilful interference with TWA's business as well as a violation of the antitrust laws were taken on the advice of counsel to Toolco that such activities were necessary or desirable in order to protect Toolco's equitable rights."

Well, if that is not telling your clients what the advice was and telling the world what it was, I don't know what it is. There is no issue here of any right or question of whether they should waive the privilege—[24749] the privilege is waived. That is the fact. It happened before the answer, it happened again in the answer, it happened again after that.

Now, let me tell you one other point, and I think your Honor will feel perhaps sympathetic with me for being mad and no longer sweet. In April the Special Master ruled that they furnish a list of all the documents which they wished to withhold. Do you remember the April-May letters were with you on your last ruling——

The Court: May 2nd and May 3rd.

Mr. Kaminer: May 2nd or May 3rd. I want to quote from your last ruling in which you said that not only does it seem that the Special Master had written an interesting dissertation of the law, but the Court sustained the ruling of the Special Master as he has applied the law to the questions presented to him. This was no academic exercise and these May letters were before you and there was a direction that a list of all the documents be furnished. We have not got such a list today.

The Court: I understood from reading the transcript before the Special Master that the purpose of furnishing the list was to provide a background for [24750] argument on the motion. But since the documents were referred to the Special Master and he has now ruled that the privilege has been waived there is no need for giving you the list. You get the documents, according to the Special Master's ruling.

Mr. Kaminer: I don't think that is quite right.

The Court: I have read the whole file before you came to court.

Mr. Kaminer: The Master had made a ruling earlier, as you know, not only as to the waiver point, but as to various other points.

The Court: But the purpose of the list was merely to facilitate argument before the Special Master in the application.

Mr. Kaminer: With all due deference, I thought the list was to be given to us to see what documents were withheld, because I do not believe that all the documents which are withheld, none of them were produced.

The Court: Well, the Special Master has ruled you are entitled to all the documents; so what do you need a list for. He is not withholding any.

Mr. Kaminer: We are entitled to all the documents from a certain date on. There were [24751] more documents withheld prior to that date.

The Court: I understood that all the documents in issue were submitted to the Special Master, that the Special Master saw them, that you did not see them, and that appears from a reading of the transcript.

Mr. Kaminer: The Special Master has recently again when he made the second ruling, your Honor, he told us again.

The Court: As I understand it, all documents were submitted to the Special Master and Mr. Davis, I think, so indicated. Page 122 of the transcript of the September 15 hearing before the Special Master. Counsel for the Hughes Tool Company said he made available to the Special Master all the documents in issue.

Mr. Davis: That was done, your Honor.

The Court: And the Special Master ruled upon those documents when he handed down his ruling. So that the purpose of the list was in case there was a dispute at the hearing you could direct your attention to them. Mr. Davis didn't furnish a list because it is immaterial at this point, since the Special Master as it stands right now has ruled that you are entitled to all of them.

Mr. Kaminer: So that you don't misunderstand [24752] my point, at page 164 following this discussion the Special Master again ruled that there should be a list furnished.

The Court: I read that.

Mr. Kaminer: I think we need this list for our protection. The record is now very confused. Let us have a clear list of what is withheld. That is what the Master ordered and that is before you now. That is the ruling on page 164.

The Court: I have a notation of it. Go ahead.

Mr. Kaminer: In any event, what you have been told in this brief is the very thing you have already decided last time. And I think we have reached the point here where there must be an end to this kind of multiplicity of proceedings, where people obey what is ordered to be done. Thank you.

Mr. Barr: My name is Thomas D. Barr. I am one of the attorneys together with Judge Bromley who represent the Equitable and the Metropolitan, and I together with Mrs. Lea and Mr. Kaminer have been on this part of the case, and being somewhat younger than Mr. Kaminer I am not unhappy at the opportunity to argue as he was.

I was prepared to take your Honor at great [24753] length through all of the affidavits that I attached to my affidavit which your Honor has before you and which your Honor, I notice, has seen on several occasions in the past. I am not going to do that. I want simply to say, your Honor, that it is perfectly clear to me the Tool Company has waived the attorney-client privilege with respect to every issue in the complaint and in the counterclaims. That it has done intentionally and deliberately.

You have before you attached to my affidavit the affidavit of Raymond A. Cook, dated November 22, 1961, and filed in the Toolco-Northeast Control case before the C. A. B. That affidavit describes activities of Toolco since 1944. That affidavit, your Honor, I believe is the first draft of the counterclaims. If you read that affidavit next to the paragraphs in the counterclaims you will see that word for word in many respects many paragraphs are the same. The Special Master so found. The Special Master's first ruling at page 4372 of the transcript said just that. That analysis is

not original with me. It was Mr. Rankin's. It is perfectly clear that that is exactly what it is.

In addition to that affidavit, there are two affidavits of Mr. Holliday, one in this case, one in the [24754] C. A. B. Toolco-Northeast Control case. One of them adopts Mr. Cook's affidavit in toto. Both of them set forth in great detail not only the fact that the advice of the lawyer was relied on, but exactly what acts were taken and what was done and what was said with respect to that advice. It is perfectly clear.

Finally, your Honor, Mr. Davis' own affidavit in this case, which is attached to my affidavit as Exhibit C, says on page 4:

> "The activities of Toolco subsequent to 1960 which are alleged to have constituted a malicious and wilful interference with TWA's business were taken on my advice as counsel."

And then for a number of pages thereafter he sets forth what the Tool Company did, what actions he took, and so on.

These men are all attorneys, your Honor. That is perfectly clear. But they are also the attorneys who throughout this whole period of time were doing the basic negotiating on behalf of the Tool Company with all of the other clients. Mr. Cooke and Mr. Bautzer largely negotiated the 1960 financing. Mr. Davis was intermittently involved in the activities of 1961. The Master's last ruling, the one of September [24755] 15, 1962, closes with this:

> ". . . I believe regardless of any pleading there have been numerous waivers by affidavit in which

the whole question of the legal advice over a long term of years to the Tool Company has been presented in support of claims in legal proceedings, and by all of that action I consider that there has been a waiver. . ."

I won't burden your Honor any further. The hour is late. You have read all this material. I am not opposed to having the same opportunity to argue the same question, but I hope the facts are a little different next time and in different form.

The Court: That completes the argument on the matters before the Court. The Court is prepared to rule on the six items and will submit a formal pre-trial order and file it by 10 o'clock Friday morning. The hour is late now and I am in the middle of a three-month criminal trial. So tomorrow's time is pretty well circumscribed.

In Item 1, which was the ruling of the Special Master adjourning the deposition of Howard R. Hughes to February 11th, Mr. Sonnett's application to withdraw the appeal from that ruling is granted. Item No. 2, [24756] which is the appeal by Hughes Tool Company to review the order of the Special Master denying its application to examine Ben-Fleming Sessel and the Irving Trust Company by Sessel and Arthur L. Wadsworth and Dillon, Read & Company by Arthur L. Wadsworth, that appeal is denied and the order of the Special Master is affirmed. In conjunction with that I would like to say that in view of the withdrawal of the appeal by TWA from the order of the Special Master fixing the appearance of Mr. Hughes on February 11 I will take this time as an opportunity to state that I agree with what the Special Master has said and

that this deposition will proceed on February 11 in Los Angeles at the same time and place fixed in the original subpoena.

Item No. 3, the application by Hughes Tool Company pursuant to Rule 16, that application is denied without prejudice to renew on the papers before the Court 30 days after the completion of the deposition of Howard R. Hughes.

As to Item No. 4, which is the appeal by the Hughes Tool Company from the order of the Special Master directing the Tool Company to produce for inspection and copying by opposing counsel the documents with respect to which the Hughes Tool Company claims [24757] attorney-client privilege, the order of the Special Master is affirmed.

As to Items Nos. 5 and 6, which are related appeals, the first one going to the order of the Special Master denying TWA's application to quash or strike interrogatories served by Toolco on October 11, 1962, and the second, which is an appeal from the order of the Special Master overruling TWA's objections to further interrogatories dated November 13, the order of the Special Master is modified to the extent that TWA shall answer those interrogatories 60 days after the completion of the deposition of Mr. Hughes.

I think the resolution of much of this matter, both as to Rule 16 and as to the adequate answering of interrogatories by the plaintiff and the motions which Mr. Davis has been talking about, all will be assisted greatly by the deposition of Mr. Hughes, and I think, Mr. Davis, you will be closer to the resolution of the questions you are raising after Mr. Hughes' deposition than you are now.

Transcript of Proceedings, January 14, 1963

[4884]

[CAPTION]

* * *

BEFORE:

HON. J. LEE RANKIN,
Special Master

* * *

[4885]

Hearing on request for production of Toolco's privileged documents, at the offices of Chester C. Davis, Esq., 120 Broadway, New York 5, N. Y., on January 14, 1963, at 11:56 a.m. Reported by Hyman Schneider, a Shorthand Reporter and Notary Public of the State of New York.

[4886] [APPEARANCES:]

* * *

[PRESENT:]

* * *

Mr. Hupper: Let the record show that the time is now 11:56 a.m., and that the various counsel are here to accept production of the so-called privileged documents which by Order of Judge Metzner of January 10, 1963, are to be made available to all parties by noon on January 14, 1963.

Let the record show that we are further here to receive delivery of any lists of further documents in respect of which the Tool Company claims the attorney-client privilege, again as provided in paragraph 4 of Judge Metzner's order of January 10, 1963.

Appendix A, Annexed to Affidavit of Bruce Bromley, February 15, 1963

Transcript of Proceedings, January 14, 1963

Mr. Cook, is the Tool Company prepared to com- [4887] ply with the Order of Judge Metzner of January 10, 1963?

Mr. Cook: Mr. Reporter, please show on the record that Mr. Chester Davis is not present at this time, when the request is being made. I have been shown by his secretary, however, a copy of a letter dated January 14th, from him to Judge Metzner, in which Mr. Davis has made the statement, "The documents have been placed in a sealed envelope and are now in my possession subject to further direction by the Court."

I have also been handed by Mr. Davis' secretary a sealed Manila folder which I suppose is an envelope, and it carries this legend on the face. "January 14, 1963. These are the privileged documents which are producible pursuant to the Special Master's order of September 15, 1962, and the order of the Court dated January 10, 1963, not to be opened except upon further instructions from Mr. Davis."

Construing the two together I do not consider, gentlemen, that I am privileged to turn over these documents to you at this time.

Mr. Hupper: Mr. Cook, can you tell us whether or not Judge Metzner has stayed the effectiveness of [4888] his order of January 10th?

Mr. Cook: I have stated all I know about it, Mr. Hupper.

Mr. Hupper: We understand from all information available to us that there is no such stay outstanding, and that being the case, I again call upon you to produce those documents.

Mr. Cook: I have stated all I know on the record.

Mr. Hupper: I must put you on notice that your failure to produce those documents at this time is in our view, it now being 12 noon exact, a violation of Judge Metzner's

order of January 10, 1963, and we will so treat it in further proceedings before Judge Metzner.

Mr. Giddings: The record should show that Mr. Hupper in his remarks has been speaking for all of the additional defendants, and Mr. Furth advises me also for counsel for TWA.

Mr. Bradner: That is correct.

Mr. Hupper: Mr. Cook, I would also like to request of you whether or not there are any other documents other than those which have previously been supplied to the Special Master, as to which a claim [4889] of privilege has been made, in respect of which the Tool Company now claims an attorney-client privilege?

Mr. Cook: I would prefer for Mr. Davis to answer that Mr. Hupper.

Mr. Hupper: The reason I asked that question is that paragraph 4 of the order of the Court of January 10th requires that the Tool Company provide us at 12 noon on this date with a list of any such other documents. In the absence of any information concerning such documents, or the furnishing of a list, it must be our position that there has been a violation of Judge Metzner's order in that respect also.

Gentlemen, I have nothing further except in accordance with your suggestion, Mr. Furth, I think we ought to request the reporter to prepare this transcript immediately so it can be sent forthwith to Judge Metzner.

Mr. Cook: Is that all?

Mr. Hupper: That is all for the moment.

(Whereupon, the hearing was concluded at 12:04 p. m.)

Toolco's Notice of Motion, January 14, 1963

[Doc. 145]

[CAPTION] 61 Civ. 2324

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Chester C. Davis, sworn to this 14th day of January, 1963, and upon all the proceedings heretofore had herein, the undersigned will move before Honorable Charles M. Metzner, United States District Judge for the Southern District of New York, at a time and place to be fixed by him (a) for an order, pursuant to Rule 30(b), Federal Rules of Civil Procedure, that the deposition of Howard R. Hughes may be taken at this time only on written interrogatories; (b) in the alternative, and if the relief requested under Rule 30 (b) is denied then, pursuant to the order of the Court of September 7, 1961, that the motion of Hughes Tool Company to dismiss the complaint pursuant to Rules 12(b) and 56(b), Federal Rules of Civil Procedure, be brought on for hearing and determination and in connection therewith that the Court set a schedule for argument and for the submission of papers in support of and in opposition to said motion; (c) that the order of the Court of January 10, 1963 be stayed or otherwise modified until a final determination that this Court has jurisdiction over the subject

matter of the complaint; and (d) for such other and further relief as to the Court may seem just and proper.

Dated: New York, N. Y.
January 14, 1963.

Yours, etc.,

CHESTER C. DAVIS, Esq.
Attorney for Defendant
Hughes Tool Company
Office & P. O. Address
120 Broadway
New York 5, N. Y.

[To All Attorneys of Record]

[24759]

Pretrial Hearing, January 17, 1963

[CAPTION]

BEFORE:

HON. CHARLES M. METZNER,
District Judge

* * *

[APPEARANCES:]

* * *

[24761] The Court: Gentlemen, I have just received and have not had an opportunity to look at some minutes before the Special Master. Are they necessary for me to have read before we have our hearing this afternoon?

Mr. Davis: They do involve some new matter, your Honor, but I think we could take care of it with statements.

It primarily relates to the efforts made by some of the parties to obtain further documents or matters on the requested deposition of Mr. Hughes, and that sort of thing is covered in there.

The Court: All right.

Mr. Sonnett: I think Pages 90 and 91, your Honor, of the transcript are the matters in particular that the Special Master suggested be raised with your Honor relating to—I just received ours, yours must be at your office.

Mr. Davis: We have not received them yet.

Mr. Sonnett: I would be happy to read them aloud, if you like, it is a half a page, if you don't have your copy of it.

Is that agreeable, your Honor?

The Court: Certainly.

Mr. Sonnett: Reading from Page 90, this re- [24762] lates to the question of where the Hughes deposition should occur and the length of time during which Mr. Davis and Mr. Hughes should consider that question, having in mind your Honor's suggestions at the pre-trial conference in chambers yesterday, the Special Master stated today at Page 90 of the transcript:

"The Special Master: When I brought the matter to your attention I had in mind that it might be much more satisfactory and pleasant to Mr. Hughes and everyone else involved if we could have some satisfactory place that would provide not only a room where the deposition could be held, but a place where Mr. Hughes and his counsel could retire to at any time that it became a burden upon him and he wished a recess, or anything of that kind, as well as some adequate room for other counsel to retire to.

"I thought it could be arranged without prejudice to any claims and rights that the parties might have.

"As I see it, it is a matter of accommodation, and I am ready to bring the matter to Judge Metzner's attention and ask him to close the matter as of next Monday at 5 o'clock, and if there isn't some agreement on it, we will just have it at the courthouse, [24763] and that will be the end of it."

There is another paragraph, I suppose, that should be read, your Honor.

> "After we once start, or after it is set, and we all have to make commitments, I don't think it is reasonable this notice to try to move around. I am not willing myself to ask the whole court system to try to set something up for us and do all the things necessary, to inconvenience the Court and the Marshal's office, and other people that will be necessary to help us, and then make a change in it.
>
> "I assume you are not ready to say at this time, Mr. Davis, what you would desire to do, without prejudice."

And Mr. Davis replied: "I have the same confidence that Mr. Barr expressed a moment ago with respect to my outcome of the motion to dismiss."

Meaning that he was not ready to answer the question.

The Court: Yes. Well, I would suggest that regardless of the outcome of Mr. Davis' motion that that decision be made because you may be faced, Mr. Davis, with proceeding on February 11th and obviously arrangements do have to be made in advance as to what [24764] is going to happen so that you could indicate by next Monday where you want this taken in view of the information you brought to the Court's attention yesterday.

However, I have received a letter from you today in which I understand that you have withdrawn from the Court's attention that portion of the affidavit that we discussed yesterday. Am I correct in that?

Mr. Davis: I thought it was the reverse, your Honor. I thought I said that since Paragraph 9 was before your

Honor yesterday, that I was following the suggestion in effect that Mr. Sonnett made which was to file the affidavit with Paragraph 9 excised, and I am submitting Paragraph 9 in an envelope to be filed with the clerk of the court.

The Court: So that Paragraph 9 and the claims of relief based upon that Paragraph is still before the Court for determination?

Mr. Davis: No, the only thing before the Court for determination, your Honor, under the motion and application that I have made is solely that of bringing on our motion to dismiss.

I had asked for the Court the alternative of acceding to a procedure for furnishing the plaintiff with answers to written interrogatories, if it was the [24765] Court's view that such a procedure was necessary in order to consider the motion, and I understood the Court to have stated that it was not prepared to consider favorably a procedure for written interrogatories.

The Court: Is that the sole basis for Paragraph 9 being in the affidavit?

Mr. Davis: That is correct, your Honor. The purpose of Paragraph 9 in the affidavit, your Honor, is solely for the purpose of indicating the substantial burden and risk upon the Tool Company to proceed in a manner indicated by the order of January 10th before the plaintiff has either been subjected to the testing by motion to dismiss based upon the record as it is as of today or after the plaintiff had been given such other and additional opportunity as your Honor may grant to not come in with respect to adducing additional facts now known to the plaintiff, but before any examination of the defendants.

The Court: I will consider that the motion is made on the papers submitted to the Court yesterday, but for the purpose of the record, Paragraph 9 has been separately filed and sealed by the Court, the result being that the notice of motion and affidavit, which you filed in chambers today, shall be entered by the [24766] clerk and these papers shall indicate on their face that there is an additional portion of that affidavit under seal, which has been considered by the Court in conjunction with the applications contained in your notice of motion.

Mr. Davis: That is correct, and I understand that procedure is acceptable to the other parties.

Mr. Sonnett: I have no objection, your Honor, but to prevent any inadvertence of direction of your Honor's present direction, may I apply that Pages 5, 6 and 7 of our memorandum served yesterday which relate to this subject matter be sealed and we will submit a fresh copy for the Court file indicating that those pages have been deleted and are sealed, and would ask your Honor to instruct all other counsel who have the memo to so regard it.

The Court: What are the pages?

Mr. Sonnett: 5, 6 and 7. The entire Point 2 of our memorandum served yesterday.

The Court: All right.

Mr. Davis, you may proceed.

Mr. Davis: Your Honor, I understand that today it is primarily for the purpose of having the record indicating your Honor's ruling with respect to the re- [24767] spect to the request that I have made on behalf of Tool Company or a schedule relating to the submission for determination of Tool Company's motion to dismiss and also with respect to the application of Tool Company for a delayed effective

date of the order of the Court of January 10th requiring a production of privileged documents.

I understand that as a result of the discussion we had——

The Court: You left something out. You left something out. You have three requests for relief in this notice of motion.

Mr. Davis: That is right, your Honor, I disposed of the other one a moment ago. There was a third request for the possibility of furnishing to the plaintiff the answers to written interrogatories under Rule 33, whether they be addressed to Tool Company or to Mr. Hughes or however they want.

Likewise, a voluntary offer to make available to them, notwithstanding our position of privileged documents, all privileged documents at this time, if your Honor concludes that plaintiff should have that additional information before being subjected to my motion to dismiss.

[24768] To put it differently, your Honor: I conceive of the question that is confronting us now is that the plaintiff has claimed and is now claiming that it is entitled to examine the defendant, particularly Mr. Hughes, who is a named defendant, at this time, based upon the record to date and without any further disclosure to the Court than has taken place as of today.

On the basis of the Court's jurisdiction over the subject matter of this action, and we are resisting that effort on the part of the plaintiff. In resisting that effort, we have made two suggestions on which we are about to get a ruling on the record based upon our conference of yesterday.

The Court: Make a fresh record. Yesterday was a pre-trial conference. Today is just a pre-trial.

Mr Davis: All right, your Honor, I don't want to burden the Court——

The Court: You want a record, Mr. Davis, and you are entitled to it, so go make it.

Mr. Davis: It is our position, your Honor, that particularly under the decision of the Supreme Court in the Panagra case that came down, this plaintiff, by filing this complaint, has improperly invoked the jurisdiction of this Court.

[24769] I further submit to your Honor that a defendant is entitled to have not only the question of the Court's jurisdiction passed upon by the Court, but is also entitled to an adequate definition of the factual issues or, to put it in other words, the wrongful conduct alleged before the defendant may be required to testify.

The time has come when your Honor had indicated by its Order of January 10th that it was the desire of the Court to permit the plaintiff to examine Mr. Hughes.

Therefore, we are approaching the problem in two fashions: First, I say we are prepared to give additional information to the plaintiff, additional to the information he has now or had at the time he filed the complaint, and I am prepared to voluntarily give him these privileged documents.

Now——

The Court: You mean after the Court ruled?

Mr. Davis: I beg your pardon?

The Court: You are prepared to voluntarily give him the documents after the Court ruled you should give it to them?

Mr. Davis: I meant waiving the objection that we have to a voluntary—I say voluntary—I say without [24770] relying upon the direction of the Court to do it.

Secondly, we are prepared, if as plaintiff has been claiming and as we understand plaintiff's position, that a Rule 16 procedure would be premature, and that their answers to interrogatories are premature because they need to examine Mr. Hughes. I am questioning the validity of that argument.

If the plaintiff is not able to identify to the Court now the wrongful conduct which they claim is within the scope of the jurisdiction of this Court, I believe that the complaint ought to be dismissed and that is what I want to test.

I understand on that aspect of the matter your Honor has indicated—I don't know whether I should have a ruling on each one of these points first——

The Court: You just make your argument and I will hear the other people and then I will rule.

Mr. Davis: All right.

Leaving aside that offer that I have just indicated, we come to the question of fixing a schedule for the hearing and determintion of the motion to dismiss. In that area I call the Court's attention to the fact that that motion in part, only in part, will be based upon admissions on the record to date by the plaintiff [24771] in the court of the oral examination which the defendant was permitted to conduct under the prior Orders of the Court.

I want to call the Court's attention to the fact that the examination of Mr. Cocke is not completed by reason of the direction of the Special Master under circumstances which, if your Honor wishes to go into, we have been requested by the Special Master to discuss with your Honor——

The Court: I have read the transcript of the hearing involving that point.

Mr. Davis: Today the Special Master indicated that by reason of certain questions personal to Mr. Cocke, he will be prepared to dispose and permit me to conclude whatever scope of further examination he directs me to conduct at some future time and, as I understand the position of the plaintiff and the additional defendants, they are not concerned about eliciting any additional information from Mr. Cocke.

The second thing I want to call to your Honor's attention, however, is that Mr. Leslie's deposition has not been completed.

And that today Mr. Sonnett marked for identification a document, parts of which he read to your [24772] Honor in the last argument that we had, which resulted in the January 10th Order, for the purpose of requesting Mr. Leslie to translate these written notes and obviously indicating that he would expect to use that material in opposing my motion to dismiss.

He also stated, or confirmed, on the record today what previously appears on the record, that TWA had substantial cross-examination of Mr. Leslie.

Mr. Leslie, up until very recently, was a senior vice-president and financial treasurer of TWA, familiar with the financing aspect of this transaction involved in the acquisition of aircraft that this complaint talked about.

In that regard, your Honor, the position of the Tool Company is simply this: That the plaintiff be denied his cake and eat it too. Either they want to stand on the proposition that they are entitled to examine the defendant, Mr. Hughes, now based upon the showing they have made to date, or it is their position that they want an opportunity to develop more facts before they take the position they are entitled to examine Mr. Hughes.

As far as I am concerned, they can have either position. I respectfully submit they should not have both.

[24773] In other words, I am prepared to submit for determination by the Court, pursuant to whatever schedule the Court fixes, that my contention that this plaintiff, based upon this complaint and particularly the decision of the Supreme Court of the United States, is not entitled to stay in this court and to pursue the defendants in this way whatever or, I am prepared to consent to any schedule your Honor may fix which would give an opportunity to the plaintiff to develop or adduce any more facts out of TWA.

It is my position that it is the plaintiff's responsibility to establish facts justifying invoking the jurisdiction of the Court. They can not invoke the jurisdiction of this Court based upon what they do not know, but expect to find out from Mr. Hughes.

Obviously if they have got some other documents which they think are relevant or pertinent that they want to use in opposition to the motion, I would just expect an adequate development of whatever the facts are in connection with whatever document it is, according to the direction of the Special Master.

I don't want my position in this regard to be construed as it is likely to be construed as another attempt to delay anything.

[24774] With the Supreme Court decisions of the other day I am satisfied that I can proceed and should proceed with the protection of the rights of my client, especially the heavy burden of expense that this litigation is causing. I do recognize, in fairness to that, the plaintiff may assert and may assert later, and that is why I want to preclude it if I can, the assertion that, oh, well, there was a lot more

that Mr. Leslie knew, but we didn't have an opportunity to complete Mr. Leslie.

I will make one more comment with respect to the schedule, your Honor, because I have in mind what was discussed informally yesterday with all of the counsel.

In connection with the fixing of this proposed schedule, I appreciate the fact that plaintiff is pressing your Honor for a schedule which would permit the possibility at least of a determination of this motion prior to February 11, as if that date is any more sacrosanct than any other pre-trial Order as to the deposition of other witnesses, but I am fully aware——

The Court: I should not use the word "sacrosanct" in that Order, should I?

Mr. Davis: But I am fully aware of the strong expressions made by your Honor in that regard. What I want to call to your Honor's attention, which I did not [24775] do yesterday, your Honor, is that among the other burdens which I already have and may concur momentarily, I am confronted with a briefing schedule in the Delaware action, which also involves a motion to dismiss with respect to Mr. Hughes. That schedule involving a brief this coming Wednesday and oral argument this coming Friday. That is an action which, of course, is being guided and controlled by Mr. Sonnett of Cahill's firm, I should say, on behalf of TWA.

I have no doubt that I can obtain an adjournment or an extension of the schedule in Delaware if I had a little cooperation from counsel here, and I would like to suggest that the Court could be of some assistance to me in obtaining that cooperation if your Honor has in mind the kind of a schedule which was discussed yesterday.

Now then, I come to the last application for relief, which is contained in the papers that were filed last Monday, and that is in connection with the Order of the Court affirming the decision of the Special Master with respect to the delivery of these privileged documents.

In that connection I merely want to point out that the delivery of those documents results in irreparable [24776] consequences, not merely with respect to the documents themselves, but with respect to the subject matter opened up by those documents.

I want to be sure that your Honor understands that the issue here is not whether or not these documents are in fact communication between attorney and client entitled to the attorney-client privilege, but for a waiver, that the issue of law that has been decided by the Special Master, and affirmed by your Honor, is as to the effect of a waiver by a mere pleading of a defense advice of counsel without an identification of the nature of the advice.

The Court: What about the affidavit?

Mr. Davis: Likewise the affidavits which state that what was done was done pursuant to advice to counsel, but does not disclose the nature of the advice. The presumption is that what was done was done because that is what counsel advised, but conceivably they did exactly the opposite of what counsel advised.

There is a statement by the Special Master of other conduct, but there has been no determination of what other conduct is being referred to.

I do recognize that—bear in mind, your Honor, that this is a defense which is asserted before the [24777] defendant knows what the plaintiff is claiming, he knows now little bit more in this wilful prosecution, we do realize that o long as that defense remains the plaintiff is entitled to quire into it, but I submit and that is the whole issue on

which I so far have had adverse rulings of the Court that the time within which the defendant has either to abandon the defense or disclose the nature of the advice, is when it is his turn to be deposed, to testify in pre-trial proceeding of some kind.

That is the issue of law which I would like to preserve, if I may, for some Appellate review or, at least, until such time as the Court has had an opportunity to pass upon this jurisdiction question and, therefore, the relief which I am not seeking with respect to this production of documents is that the Court consider delaying the effective date of the production of those so-called privileged documents at least until the Court has acted upon this motion to dismiss, which is about to be scheduled.

Now, alternatively, so that I won't have to stand up again, I have indicated yesterday that should, contrary to my expectations, the Court not look with favor upon that delayed date, that then I would like a [24778] reasonable opportunity to try to get some additional relief.if additional relief is, in fact, available to me.

Now let me address myself for the moment as to what harm we are talking about by delaying their obtaining these documents, these privileged documents.

Is it for the purpose of opposing my motion to dismiss? Presumably they know what the course of conduct is which they claim, I don't know what they have to prove in a motion to dismiss, but can't they identify what it is they are claiming without these communications between attorney and client?

Presumably it is for the purpose of preparing for the examination of Mr. Hughes. This presupposes, of course, that the motion to dismiss is not granted. They say that is

what we assume and we are entitled and getting ready for that eventuality.

Everything that has been said on the record, your Honor, indicates that the examination of Mr. Hughes is to be protracted. Sonnett made that statement on the record, several months. These additional defendants want to examine on the counterclaim even though they haven't filed an answer yet to the counterclaims because they got extension of time from the Special Master, as [24779] I recall it, that so long as the motion is to dismiss the counterclaim, which they did not make, but TWA made, was pending, they did not want to have to answer the counterclaims.

They want to examine Mr. Hughes on February 11th. We have no answer to the counterclaims yet.

Now, I submit, your Honor, that considering the possible injury to Tool Company, if we should be right, either with respect to our motion to dismiss or on this question of law, as compared to the injury which is likely to take place or the handicap to these plaintiffs and additional defendants in examining because they are not able to obtain what normally no one obtains, namely, privileged communications between attorney and client, leaving aside whether or not I made a mistake in my pleading, is hardly to me a reason for saying that it is of importance that they obtain the documents now.

Therefore, I respectfully submit that on that issue the Special Master has seen all these documents and I would have no objection for the Court inquiring of the Special Master as to whether he believes that these documents would contain anything which would be of material bearing on any motion to dismiss, but I do resist the production of those privileged documents [24780] at this time because of the consequences to my client if that takes place.

The Court: I understand that you are still relying upon your defense of advice of counsel.

Mr. Davis: No, your Honor, as a matter of fact——

The Court: It is not in the case any more?

Mr. Davis: Your Honor, certainly if it is based—if all they are claiming, the defense of counsel was a defense, if a defense at all, to the alleged wilful and malicious interference of the affairs of TWA.

Tillinghast identified the documents, letters—the letters that he received. If that is all that is involved in this wilful and malicious interference, I don't need that defense, but there again I am caught between several things which have happened. I have been taking the position all along that a defendant had to make a final decision with respect to his defenses only after either a Rule 16 proceeding or answers to interrogatories. But on January 10th I was told I was not going to have that.

Therefore, the question about when need I amend my pleadings, well, presumably, if the deposition of the Tool Company takes place on February 11th, as [24781] presently scheduled, then I have got official date at that point on the basis that I am assuming, but I submit that the issue that the assertion of advice of counsel puts the other side merely on notice that that is a defense which will be asserted at the trial, and that they are entitled to discover that evidence before we go to trial, but it itself does not constitute a waiver of the privilege.

That has been the difference of opinion.

The Court: Plus the affidavits, don't forget the affidavits.

Mr. Davis: Likewise it does not identify, disclose or the nature of the advice. I think that that decision, your

Honor, if it is the law, I presume it is as of the moment, I submit has some pretty serious impact on the proof as a whole, and I believe one which does deserve review to the extent to which a review is feasible, without adversely affecting whatever rights the plaintiffs may have.

My point in this regard simply is that I don't believe that there is any facts which would justify the conclusion that there is any particular harm or injury to the plaintiff at this time.

Now, if we presuppose the motion to dismiss [24782] that that is subject—a certification or otherwise, depending which way it goes, by whatever decision comes down, is likely to be reviewed, there would be an appropriate time to obtain a review of the whole at that time. I respectfully submit that until the Court has made a determination that it does have jurisdiction based upon this complaint and whatever has transpired to date, but not about what is to transpire tomorrow, and that the enforcement of the determination that plaintiff is entitled to these documents on the ground of the waiver of attorney-client privilege is something which should be submitted.

The Court: You have not only moved under Rule 12-B, but also under 56, for summary judgment and there will be affidavits submitted and I don't know whether those alleged privileged documents or, rather, I will go along with you and say that the non-waived privileged documents would not be necessary for the plaintiff to resist your motion.

Mr. Davis: Your Honor ——

The Court: I am sorry, I thought you were finished.

Mr. Davis: I was going to address myself to Rule 56.

[24783] The Court: I was just making an observation.

Mr. Davis: Your Honor, the motion was drawn, of course, before the Supreme Court came down with this Panagra decision. I think you will find that the grounds upon which we present this is not based upon any question of the triable issue of fact. It is true the plaintiff does want to submit some affidavit in that regard and I would be interested in knowing what facts they want to disclose.

The Court: Are you going to rely solely on the face of the complaint to make your motion?

Mr. Davis: Yes, sir, I have two grounds on which I am going to brief, at least it is my thinking as of the moment. One is going to be based solely upon the complaint, the decision of the United States Supreme Court in the Panagra case, and the CAB orders, 44, 50, and the further control case which specifically covered the conduct in relationship of Tool Company with TWA.

The second part of my contention will be predicated solely upon admissions of the plaintiff. I submit, your Honor, that admissions of a plaintiff are not in the same category as when parties submit conflicting affidavits which raise an issue of fact to be filed.

If a plaintiff makes admissions and says this [24784] is what I am complaining about, it becomes part of the complaint and if what he is complaining about does not entitle him to any relief, that is the end of it.

The Court: You mean to say—I don't know what the record shows—but I assume you are referring to the record of depositions that exist up to the present time when you speak about admissions, is that correct?

Mr. Davis: Those contain admissions and not admissions, your Honor ——

The Court: You are going to put those in and Mr. Sonnett is not going to be able to say there are other por-

tions of that record which I want to come in which may dilute the admissions.

Mr. Davis: Certainly, my point is, Your Honor, that admissions, I was addressing myself to the ——

The Court: Weight to be given to the document.

Mr. Davis: No, to the problem and the cases and the line of cases which relate to whether there is a triable issue of fact whether two parties contend something different.

Now, we may disagree and Your Honor will have to decide what is the nature and scope of the admission, but it is not the same thing as whether I claim that fact "A" two place and the other side claims fact "B" [24785] two places, thereby raising an issue of fact to be decided which as the Second Circuit has said, you don't decide that on summary judgment. That is the only point I was trying to make, your Honor.

The Court: All right.

Mr. Sonnett.

Mr. Sonnett: Your Honor, I will rest primarily on the memorandum which was served and filed by TWA yesterday. I would add to that only very briefly as follows: In response to the answers Mr. Davis has just made to you and since we have a complaint unanswered here, I take it that Mr. Davis' proposed motions are going to be motions for judgment on the pleadings under Rule 12-C and perhaps a summary judgment motion.

12-C, as the Court will recall, provides that after the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings if on a motion for judgment on the pleadings matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment, and disposed of as provided in Rule 56, and all

parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

[24786] As your Honor pointed out repeatedly in the case before, therefore a plaintiff is entitled to discovery by way of deposition and certainly the plaintiff is entitled to present portions of the existing record, affidavits or anything which can confirm that which is going to be presented to the Court by Mr. Davis, which I haven't yet seen.

Accordingly, your Honor, I think the record made today on this problem is so clear that I would feel that I were trespassing on the Court's time, it being now about a quarter to 6:00——

The Court: Only a half a day, Mr. Sonnett.

Mr. Sonnett: It may be for your Honor, but after listening to Dr. Davis all morning, it seems to me like it is several days.

The Court: I have two questions to ask you.

Mr. Sonnett: Yes, your Honor.

The Court: About what is this Leslie deposition. Mr. Davis seems to indicate that one of the basis of opposition to his motion will be a claim by you that you have not completed or started a cross-examination of Mr. Leslie?

Mr. Sonnett: No, sir. Mr. Davis——

The Court: I think I have voiced Mr. Davis' objection.

[24787] Mr. Sonnett: You have, I was disagreeing not with your rendition of what he said, but Mr. Davis would let me better to speak for myself. Your Honor directed that all depositions pending at the time of February 11th would be suspended for the Hughes deposition to commence.

I intend to comply with the Court's orders, of course.

As for Leslie, again Mr. Davis is making a mountain out of a mole hill. The fact of the matter is, as I presented to the Court the last time we had an argument in court, the fact of the matter is that Mr. Davis has crept up very slowly on Mr. Leslie and he hasn't got into the years which will be most enlightening because these were the years in which the big damage occurred to TWA.

If he sees fit to present a motion to the Court based on whatever there may be in the 10,000 pages of record to date, or the one million, seven hundred thousand pieces of paper to date, obviously I will search that record and present whatever I can to oppose it and anything else available to me to oppose that motion.

As to Leslie, Mr. Davis has not completed his direct and at the rate he is going, he won't be through [24788] with that for a while, so the opportunity for cross-examination hasn't arisen yet.

However, because of a purely practical problem, since he applied this morning in a motion to the Special Master, which is in the record that your Honor hasn't had a chance to read, he applied to suspend all depositions until your Honor had determined his motion to dismiss and in connection with that motion, the Master has directed that the Cocke deposition be adjourned without date, the date to be fixed some time after the conclusion of the Hughes deposition, and in response to Mr. Davis' request that the Leslie deposition be adjourned, I said I had no objection but there was a practical problem.

The practical problem was that we had a piece of paper written by Mr. Leslie, a lengthy one, whose handwriting is illegible or almost so, except to him, and therefore urged that in lieu of taking Mr. Leslie's deposition next week, which was set to be resumed next week and since Mr. Davis

was asking that it be suspended, that the Special Master should, if he saw fit to do so, send the handwritten notes to Mr. Leslie and ask him to dictate a translation and send them back to us, since the content of that document would be of considerable use not only on the motion, but also on the deposition [24789] of Mr. Hughes, and the Special Master saw fit to so decide and has undertaken to do that so that there isn't any problem in respect of the Leslie situation.

The Court: The next question I want to ask you, Mr. Sonnett: Mr. Davis said he had some problems regarding time because of a Delaware proceeding. Is it within your power to "get off his back" concerning the Delaware proceeding?

Mr. Sonnett: The difficulty there which involves, of course, entirely different offenses and different damages is——

The Court: I am just thinking about time. You know the date that I preliminarily set yesterday.

Mr. Sonnett: Yes, your Honor. May I say to your Honor this that it has been as difficult to get Mr. Hughes to come in to that court as it has been in this and that dilatory tactics followed by Mr. Hughes finally led—after an appeal—finally led to a holding that he couldn't attack the sufficiency of the complaint against him individually there without making a general appearance.

Finally that was settled on appeal and, by the way, all TWA's way, I might add, and finally Mr. Davis brought on his motion. He has been talking about this [24790] Delaware case where, by the way, they are represented by very competent counsel, Judge Tunnel, a former member of the bench down there and a very able advocate, easily as good as what we see in any courtroom.

Judge Tunnel has argued a good many matters before. I haven't found it necessary to argue down there except once on a preliminary matter about a year ago. He has been talking about a motion to dismiss the complaint against Hughes individually in Delaware for a long, long time, back since May, at least, of this year.

He has made his motion. He has submitted his brief. We have put in our answering brief. It has been served and filed. The vice-chancellor has set the matter down for argument, I do not intend to argue it and I don't see what his problem is.

Mr. Davis creates these very problems for this very purpose. That is to say, that only he can attend everything that may be involved in the Hughes situation no matter where it is and then urges that upon the Courts as an excuse for delay.

If your Honor, despite what I have just said, were to say to me that you think that the administration of justice would be furthered if we were to consent to an adjournment, I would say to your Honor, we would ask [24791] the vice-chancellor to do so cheerfully, because we will follow any suggestion your Honor makes.

The Court: Well, I can't direct you as to what you should do.

Mr. Sonnett: I only want a suggestion if your Honor feels your Honor should make it.

The Court: Well, I think that it would be helpful in view of the tremendous burdens that Mr. Davis says that he is involved in and I am not going down the collateral road to find out whether those burdens are as heavy as he said they are or not, but in view of the position that you have taken in the proceedings in this court, I would say

that if it was possible for you to relax the schedule that is imposed upon Mr. Davis in Delaware, that you should do so, if it does not prejudice your clients' interests in any way.

Mr. Sonnett: On the assumption, your Honor, that the Special Master is going to rule favorably on a second motion which was before him today, and it was left that rather than speculate as to your Honor's decision, because we were running into conflicting versions of your Honor's tentative thinking as of last night, and I suggested that the Master hear the arguments today and reserve decision until he had your Honor's [24792] Order and then decide these other matters.

One of the motions, which is critically important, involves some additional tax information which will be essential in connection with the deposition of Hughes, and I think very helpful in our position to this forthcoming motion.

I think that the Special Master is going to grant that.

Now that, therefore, will allow a lot of time for Mr. Davis to function on that question, although he doesn't need any help there because Mr. Cocke's firm has worked on the tax problems of Hughes for many years, and is a very distinguished tax partner who could produce all the documents we sought in the motions this morning within a matter of 48 hours.

However, in order—since I anticipate a favorable ruling there and I want Mr. Davis to turn his attention to the more urgent matters involved in this case—I would be willing, your Honor, quite happily, to ask our local counsel, Mr. Fingerly, to ask the vice-chancellor to set this motion down for any time between the 1st and the 11th of February, which Mr. Davis would select.

I believe he is going to be in California on [24793] February 11th, along with the rest of us, if not earlier.

The other alternative, if I may finish, the other alternative is that we will be tied up in this deposition out there and if Mr. Davis insists that he, rather than Judge Tunnel, should argue the thing in Delaware, it will be some months before it is argued.

So I am perfectly agreeable to any adjournment up to, but not later than whatever time it takes him to get to the West Coast for February 11th, whichever date is agreeable to him and to the vice-chancellor.

Mr. Davis: You are not replying to the reply brief, Mr. Sonnett, which you keep overlooking. It is perfectly agreeable to me and I appreciate your cooperation.

Mr. Sonnett: You aren't representing that you are writing the reply brief?

Mr. Davis: Yes, that is so.

The Court: Pardon me, it is getting late and the sun is beyond the mizzenmast, or something like that.

I understand, Mr. Sonnett, that you will try to arrange for a relaxation beyond February 1st of whatever schedule Mr. Davis is under in the Delaware proceeding.

Now, I am not familiar with the schedule except [24794] that he indicated he had to get something out during the period between now and February 1st. All I ask is that, if you can, do this with all propriety with regard to the interests of your client, and if you can, facilitate the adjournment of that schedule so that Mr. Davis will have his time free for these motions, which he wishes to make before this Court in this proceeding.

Mr. Sonnett: Yes. Mr. Tenney, my partner, your Honor, suggests that we can do that quite readily if we

have his reply brief a few days before the argument, we can, I am sure, work that out by agreement.

It may be one of the few things we can work out by agreement.

The Court: Now the last thing. On the attorney-client privilege, Mr. Davis in urging the Court that at least the Court should modify the Order of January 10th to the extent that you are not furnished with the documents prior to the Court's ruling on the motion to dismiss.

Mr. Sonnett: As to that, your Honor, it is very hard to answer because we don't know what is in the documents and depending upon the nature of the advice—and I must say I don't understand Mr. Davis' argument—when something is said that a client acted pursuant to [24795] legal advice, that that may not mean that at all. It may mean that the client acted just the contrary to the legal advice.

I am completely lost there. That is one of the more difficult of the many difficult things I have heard Mr. Davis say, but not having seen the documents, I can't tell how useful they would be in connection with the motion to dismiss.

I don't know whether there is advice in there which is now waived which I could stand up in Court and say, "Your Honor, Mr. Davis, or one of his colleagues back a year ago or two years ago, expressed the legal opinion which I join in today," on some point or another. I can't tell.

As to the question of the damage that will be done by a disclosure, I think that is very badly overstated. We have a situation where the first order to produce this material was made many months ago and by a process of trip, stumble and delay, Mr. Davis has kept them out of our hands for many months despite all the pressure from the Court. To say that to make this material available to counsel in-

volved in this case is going to cause any great public injury, I just don't understand. I don't follow it at all.

[24796] The fact is the Court has directed that we are entitled to have the material. I therefore see no mystery about our having it now as the Court has directed.

The Court: Judge Bromley.

Judge Bromley: I think not tonight, your Honor.

The Court: Mr. Giddings.

Mr. Giddings: Your Honor, in view of the hour and everything that has been said, we will rest on Mr. Sonnett's remarks.

The Court: Mr. Stewart.

Mr. Stewart: No further argument.

The Court: I promised you I wouldn't call on you last next time. I will change that.

I hope to have a formal written order tomorrow, but I am involved in this long criminal case and the committee meeting that I attended between the adjournment of the case this afternoon at 4:30, and coming down here at 5:00, has been adjourned after a half hour because of my leaving until tomorrow at 4:00 o'clock, so that if it is not out by tomorrow at 5:30, it will be out by noon on Saturday morning.

All right.

Toolco's Notice of Motion, January 22, 1963

[CAPTION]

[2527]

SIRS:

PLEASE TAKE NOTICE that upon the motion of defendant Hughes Tool Company ("Toolco") to dismiss the complaint herein, the papers to be filed in support of said motion by Toolco as provided in the order of the Court dated January 19, 1963, and upon all proceedings herein, the undersigned will move before Honorable Charles M. Metzner, United States District Judge for the Southern District of New York, at such place as shall be fixed by him, on February 8, 1963 at 4:00 o'clock in the afternoon, or at such other time thereafter as shall be fixed by the Court, (1) for an order that the deposition of Howard R. Hughes shall not be taken in this action until after a final [2528] adjudication of the aforesaid motion to dismiss and (2) for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
January 22, 1963.

Yours, etc.,

CHESTER C. DAVIS, ESQ.
Attorney for Defendant
Hughes Tool Company
120 Broadway
New York 5, N. Y.

Transcript of Proceedings Before Special Master J. Lee Rankin, January 23, 1963

[Doc. 237]

[CAPTION] 61 Civ. 2324

[APPEARANCES]

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[3] Mr. Davis: I have just sent a letter to Judge Metzner which I would like to read into the record, and I will have copies for you, sir, and all counsel here, which reads as follows:

"Dear Judge Metzner:

I was unable to obtain an interlocutory review of your order requiring the delivery to opposing counsel of privileged documents pursuant [4] to your order dated January 10, 1963 as amended by your order of January 19, 1963 and the stipulations between the parties pertaining thereto. In view of the irreparable injury to my clients which would result from prematurely turning over to opposing counsel such documents, as counsel for Hughes Tool Company I must respectfully decline to comply with your said orders, at least prior to a determination of the motions to dismiss now pending before your Honor.

There would be no objection, of course, to furnishing such documents to your Honor so that you may satisfy yourself that nothing contained therein would be useful in connection with your proper determination of said motions.

Very truly yours."

Transcript of Proceedings Before Special Master J. Lee Rankin, January 23, 1963

I have a copy here. I will show this copy to you.

Mr. Barr: Mr. Davis, purely in the interest of making a record, I certainly want to put you on notice that I do consider this to be contempt. I assume that it is deliberately done. May I ask just for the record whether there is any dispute as to whether or not you were as of 5 o'clock this evening [5] required under the existing orders of the Court to produce these documents for our inspection and copying.

Mr. Davis: There is no question in my mind that the stipulation extending the time within which the Tool Company could comply with the order of Judge Metzner dated January 19, 1963 expired at 5 o'clock today.

Mr. Barr: I have one other matter.

Mr. Zeller: I would like to note for the record that it seems apparent that Mr. Davis is going to turn to this in regard to the premature turning over of the documents. This is deliberate flagrant contempt of the Court's order. We certainly have to reserve our rights to act accordingly.

Mr. Davis: I appreciate that. So the record may be clear, you should understand that I, as counsel for the Hughes Tool Company, am satisfied that the Court lacks jurisdiction over the subject matter of this action. I recognize that could develop if I was in error, but I feel it is my duty as counsel for the Hughes Tool Company, and I believe I have precedence for this, to refuse to permit any further action on the part of the parties [6] which would cause any injury to my clients, until after the Court determines the motions which are pending before it, and which establish that there is jurisdiction in the premises.

I know this is not the time and place to argue the merits or lack of merits of such a position, but that is the position.

Transcript of Proceedings Before Special Master J. Lee Rankin, January 23, 1963

Mr. Barr: Mr. Davis, again for the record, I take it you do not contest the jurisdiction of the Court over the counterclaims?

Mr. Davis: There are motions to dismiss those counterclaims now pending before the Court. I recognize that you have taken advantage of the existence of that motion for obtaining a ruling that you were not required to answer those counterclaims, and in the form the motion was made by TWA.

My recollection is a little vague of the extent as to which you supported that position, directly or indirectly before the Court, but whether you did or did not, the fact is that there is pending before the Court, undetermined, a motion to dismiss the counterclaims. By reason of the existence of that motion to dismiss now pending, the additional defendants have not filed any answers to the counter-[7]claims within the time prescribed by the rulings.

Mr. Barr: I take it that you are not persuaded by the efficacy of the motion to dismiss, or any motion to dismiss.

Mr. Davis: If the Special Master feels it would be useful for me to engage in any more discussion with Mr. Barr, the matter is adequately stated on the record.

Mr. Barr: I want to be perfectly clear. I think it is to your advantage as well as ours, that we are clear on this —I take it from your remarks that you do not contest the jurisdiction of the counterclaims.

Mr. Davis: You may assume whatever you want to. At present there are motions to dismiss those counterclaims before the Court. I did resist that motion, but I have no decision on it. I will consider what else is involved after I get a decision on those motions.

Transcript of Proceedings Before Special Master J. Lee Rankin, January 23, 1963

Mr. Giddings: Mr. Special Master, to complete the record on the question of documents, Judge Metzner's order of January 10th directs that the documents heretofore submitted to the Special Master shall be produced.

[8] It goes on to state that if there are any additional documents to which the defendant Hughes Tool Company asserts a non-waive[d] attorney-client privilege, such documents shall be submitted for a ruling to the Special Master by noon of January 14, 1963, and a list thereof furnished at the same time to counsel for all parties.

May I ask through you, Mr. Special Master, whether or not there are such other documents, and whether lists are available?

The Special Master: Mr. Davis.

Mr. Davis: I do not know of the existence of any other documents called for by the rulings of the Special Master heretofore made with respect to the production of documents.

Mr. Zeller: That is not quite the question. The question is whether there are any documents you withheld from production on the grounds of attorney-client privilege.

Mr. Davis: I do not know of the existence of any other documents called for by your Rule 34 motion, which have been withheld on the ground of privilege, that are not in that sealed envelope which I now have, and which represent all the documents that [8A] the Special Master examined. I don't know how clear I can make it.

Mr. Zeller: Well, it is clarified.

[9] Mr. Barr: Mr. Special Master, for your information you should be informed that we have not received any notification or any indication, or any communication of any

sort from counsel of the Tool Company with respect to the place of taking the deposition, and therefore pursuant to the last sentence of Judge Metzner's order of January 19th, which I think perhaps I should read— "Consequently, unless counsel for the defendant indicates by noon on January 22, 1963, a desire to change the designated place, the deposition shall proceed in the United States Court House in Los Angeles."

We have not received any such indication, and accordingly, pursuant to Judge Metzner's order the deposition will be held at the courthouse.

We are making our arrangements, and for your convenience I want you to be aware of it also.

Mr. Giddings: That applies to the other additional defendants.

Mr. Davis: So no one may take any unnecessary steps, let me say that the Tool Company is not prepared to address itself to whatever problems, if any, exist with respect to the availability of Mr. Hughes at any particular time, until after there [10] has been a determination of the Tool Company's motion to dismiss.

Mr. Zeller: I take it that deals adequately, in your judgment, Mr. Davis, with that provision of Judge Metzner's order, as well as the provision directing you to produce documents. I take it this is something you thought about very carefully before doing it.

Mr. Davis: I trust that it adequately takes care of all the information that you gentlemen need.

Mr. Zeller: I am talking about the expression of the defiance that you just made.

Transcript of Proceedings Before Special Master J. Lee Rankin, January 23, 1963

Mr. Davis: Your characterization of the facts, Mr. Zeller, will not change the facts, and you may describe it as you wish. I am prepared to pursue this matter of dismissal. I am satisfied, not only by my knowledge of the facts, but based upon the complaint, the law as I know it, the admissions of the plaintiff on the record, that this court does not have jurisdiction over the subject matter of the complaint, and I am satisfied that ultimately that will be the decision.

Therefore, I feel it is my duty to protect my client from a further burden and annoyances which [11] would be extreme by attempting to make any further arrangements on the assumption that this complaint will continue as a complaint justifying any further proceedings in this action.

Mr. Barr: Mr. Special Master, may I request—we want these documents very badly and we will take whatever steps are available to us.

May I request, sir, and I think that you should immediately inform Judge Metzner at your first opportunity, of contempt of Toolco's counsel so that the Court can take whatever proceedings it deems advisable under the circumstances.

The Special Master: If you ask that this transcript be transcribed promptly, and be sent to Judge Metzner, I will so direct.

Mr. Barr: I do so request. In view of the fact that the contempt has occurred, that you, sir, at your first convenient opportunity, should inform the Court that its order is being held in contempt by the Tool Company.

The Special Master: I shall do so. I assume that any action concerning the contempt will be taken before Judge Metzner.

Transcript of Proceedings Before Special Master J. Lee Rankin, January 23, 1963

Mr. Barr: I have been running that over in my [12] head, sir, and I believe this is his order, and it is before him.

The Special Master: I am not sure what the status of it is. I think it is an affirmance of my order, but you will have to figure out what you think is the proper thing to do, and I will be available.

I do regard it as a contempt. Mr. Davis, I appreciate your position that you claim the Court does not have jurisdiction of the subject matter. I am not sure that that will protect you if the Court during its deliberations has to have a reasonable time to determine that fact, if prior to the time it determines that fact you fail to comply with the Court's orders.

Furthermore, I wish to call to your attention that even though you would maintain your position that the Court does not have jurisdiction of the subject matter insofar as the complaint is concerned, the counterclaims may very well be independent as far as the law is concerned, and this order bears both upon the counterclaims and the complaint, so that the contempt may be valid for failure to produce with regard to the counterclaims even if the Court should find [13] finally that the complaint should be dismissed because it does not have jurisdiction of the subject matter.

I bring that to your attention so that you will not overlook it, and act in such a way as to bring great injury to your client without at least having it in mind.

Mr. Davis: These are matters which I have had in mind, Mr. Special Master, which have been very carefully considered by me.

The fact remains that those counterclaims are currently subject to a motion to dismiss, whatever the grounds, and

that until the Court has acted upon those pending motions to dismiss, I believe that I am not only justified, but it is my duty to resist further discovery on the basis of the complaint or counterclaims until those pending motions are decided in such a way so as to determine the questions that are involved.

I hand you a copy of the letter that I sent to Judge Metzner, sir. May the record show that I am handing you gentlemen a copy thereof at this time?

Mr. Barr: Mr. Special Master, just so there will be no doubt on the record, I construe Judge Metzner's order as requiring the production for each [14] of us individually, and the right of the plaintiff to receive the documents and the right of any of the additional defendants is equal, but separate.

But so that there will be no doubt on that question, may I ask you to direct the Tool Company to produce those documents only for the additional defendants.

The Special Master: I so direct.

Mr. Davis: The position of the Tool Company remains the same, Mr. Special Master.

[15] The Special Master: I want to call your attention, Mr. Davis—this may be gratuitous on my part—this is a serious action and I am sure you are well aware of that—of the fact that your requests for stays of this action during the efforts to take various action, until the Court will act concerning your motion to dismiss, or for summary judgment, have all been denied, as I understand it, and I think that has an important bearing upon the question of your duty to comply with the order. I merely call it to your attention—

Transcript of Proceedings Before Special Master J. Lee Rankin, January 23, 1963

Mr. Davis: That may be unless those orders are errors as a matter of law. Insofar as the stays involved are concerned, they were for a review of these interlocutory orders, which I did not obtain, since the application for review of the interlocutory orders were denied, or at least the decisions covered both.

I am aware of the fact that I had previously made an application to Judge Metzner for a stay with respect to the application of the provisions relating to the production of the privileged documents. I am aware of those matters.

The Special Master: I do not mean to argue [16] the matter with you, Mr. Davis, and I am sure you do not mean to.

I am just trying to make sure that you are not overlooking any of these things which I think have a serious bearing upon the whole question.

Mr. Davis: I have tried not to overlook anything.

Mr. Barr: Let me say again so that this record is clear, that whatever the appeals, the Second Circuit, this afternoon at about 4:00 o'clock, denied Mr. Davis' application for a stay of Judge Metzner's order requiring him to produce those documents, which have been extended by stipulation until 5:00 o'clock.

It denied his petition for leave to file a petition for mandamus, and it dismissed the appeal that he took yesterday afternoon—that the Tool Company took yesterday afternoon—with respect to both of Judge Metzner's orders of the 10th and the 19th of January.

So that there is no motion of any sort pending with respect to either of Judge Metzner's orders, or with respect to the privileged documents.

Transcript of Proceedings Before Special Master J. Lee Rankin, January 23, 1963

The Special Master: Mr. Zeller.

[17] Mr. Zeller: There is one other matter I would like to turn to, if I may, Mr. Special Master, and that is to the order which your Honor recently issued requiring the production of what we might call the tax documents, for lack of a better shorthand expression.

I would like your Honor to direct at this time that at the time of production of those documents, that any documents called for by that motion which the Tool Company desires to withhold under a claim of attorney-client privilege be submitted to your Honor for consideration and a ruling, and that a list of such documents be furnished at the same time to us.

The Special Master: Mr. Zeller, I am not clear—maybe you can help me—as to whether there is anything open that the Tool Company could claim a privilege on.

Mr. Zeller: I don't know. It is the way Mr. Davis responded earlier on this question, your Honor, when we asked him whether there were any other documents being withheld on grounds of attorney-client privilege.

His response was, if you will recall, that there were no documents called for in our original [18] Rule 34 motion which he was withholding on grounds of attorney-client privilege.

A new category has been opened up by your Honor's granting of the additional Rule 34 motion here recently.

It may well be, and I suspect it will be, that there will be documents called for in those categories which the Tool Company will assert a claim of attorney-client privilege on.

My request is simply for a direction that if that be the case, that the documents against which any such claim be

asserted, be submitted to your Honor at the same time production is made to us of the clearly non-privileged documents, and that we be given a list of the documents as to which the claim is made.

The Special Master: Mr. Davis, do you wish to comment on that request?

Mr. Davis: May I say this, Mr. Special Master: I am informed that it would be physically impossible to gather the documents covered by your last ruling with respect to the production of documents within the time specified therein, irrespective of any other objections that we may have.

[19] I base that upon information I received from Mr. Cook that it would take weeks to try to gather all of the material called for if the Tool Company were in fact properly required to produce such material.

Therefore, at this juncture I know of no claim of attorney-client privilege with respect to the material called for.

I haven't the slightest idea whether there would exist or would not exist any documents which would fall into the category of attorney-client privilege when that is done.

But to be sure, some of those documents would be located fairly soon, but to produce all that were called for would not be feasible within the time allowed.

May I also state that it will be our intention to seek a review of the ruling, and of course, we also are confronted with the position which the Tool Company has indicated today it intends to take and maintain, until after there has been a determination of the motions pending before the Court.

I am not going to try at this time to address myself to all those various things, but I have given [20] you at this time all that I know on the subject.

The Special Master: I will grant your request then, and direct that the Tool Company furnish such documents and lists thereof at the time of production.

You may incorporate that in your request for a review, if you like.

Is there anything further, gentlemen?

Mr. Zeller: I think that is it.

(Whereupon, at 5:30 p.m., the hearing was closed.)

Toolco's Notice of Motion, January 25, 1963

[Doc. 152]

[CAPTION] 61 Civ. 2324

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE that defendant Hughes Tool Company ("Toolco") will move before Honorable Charles M. Metzner, United States District Judge for the Southern District of New York, at a time and place to be fixed by him, and upon such papers as he may direct, for review of the order of the Special Master of January 22, 1963 requiring Toolco to produce for inspection and copying by opposing counsel certain new and additional documents recently requested which the Special Master has ruled are entitled to confidential treatment, and which are more fully described in the schedule attached to the affidavit of John Hupper filed in support of the motion to produce, and for such other and further relief as to the Court may seem just and proper.

Dated: New York, N. Y.
January 25, 1963.

Yours, etc.,

CHESTER C. DAVIS, Esq.
Attorney for Defendant
Hughes Tool Company
120 Broadway
New York 5, N. Y.

[To All Attorneys of Record]

[24799]

Pretrial Hearing, January 28, 1963

[CAPTION]

BEFORE:

HON. CHARLES M. METZNER,
District Judge

* * *

[APPEARANCES]

* * *

[24801] The Court: Mr. Davis, you filed a notice of motion setting down for hearing an application by you to adjourn taking the deposition of Mr. Hughes. You made it returnable——

Mr. Davis: Four o'clock, February 8th, your Honor.

The Court: Yes, I assume from your subsequent correspondence you are withdrawing that motion.

Mr. Davis: That is correct, your Honor. The only purpose of filing that notice of motion was merely to give your Honor an opportunity by mechanical means to carry out what your Honor indicated you intended to do in your January 10th and January 19th order, and at this time I have no motion or application to make.

The Court: You don't have to actually because I think I indicated in that order that after reviewing the papers, if I thought the deposition should be adjourned, I would notify you to that effect.

You did not have to——

Mr. Davis: Your Honor, it was just a question to have something before your Honor to [24802] act upon. That was the only purpose that I had in bringing on that motion, and I am pleased to withdraw it at this time.

The Court: Secondly, we have your application to review the order of the special master regarding the production of the so-called tax documents.

Mr. Davis: That is correct, your Honor.

The Court: Let us hear argument on that.

Mr. Davis: All right, your Honor.

I am not prepared to present to the Court at this time all the facts and circumstances relating to the problems of the Tool Company in connection with the production of those documents. I have been in communication with Mr. Holliday in Houston, who in turn reported to me the information he obtained there. I am prepared to give that information to your Honor orally now.

I would hope to have an opportunity to submit an appropriate affidavit identifying what those circumstances are and perhaps more fully or accurately than I can state them now.

I am sure your Honor will appreciate that I have been addressing myself primarily to the problem [24803] of the papers that I am to file by February 1 on the very important motion to dismiss that we have brought on, which is now pending before your Honor.

Quite apart from any other consideration, I am informed that in order to review the files which would have to be reviewed to reduce the documents which are called for by the schedule annexed to Mr. Hupper's affidavit it would require a review of substantially all of the same files which were reviewed once before in connection with the production of documents which was made pursuant to your

Honor's order of, I believe it was, March of last year. In other words, there is no way that all the documents called for by that schedule could be produced other than by reviewing substantially all of the files, both in Houston and in Los Angeles, which were reviewed once before.

I am informed that it is the opinion of those who are familiar with those files that probably all the documents called for have already been produced and made available to plaintiff and these additional defendants. To be sure, that does not include the 1961 tax return or the 1962 tax return called for, which is not yet prepared, and [24804] of course that is not available.

I am also informed that based upon the actual cost and expenses incurred in connection with the prior review of the files and production, it is estimated that the cost of doing this at this time would be conservatively at least $150,000.

I am also told that in order to review the files which would have to be reviewed it would take a period from four to six weeks.

I am also informed that at this time, particularly with the year end and the work which has to be done in connection with year-end tax returns, federal and state, the closing of the books, the individuals who are familiar with or who could most readily identify the documents called for, which relate to information that was used in connection with the review by the Internal Revenue of whatever tax returns were filed or whatever questions were raised, are all at this time busily engaged on other matters.

Now, this is the substance of what I was told. I have asked that it be put in affidavit form so I could submit it to your Honor. I expect to have it shortly. I am not in a position to per- [24805] sonally supervise the preparation of the affidavit.

However, in that connection, your Honor, I think that I should also state that the Tool Company believes quite sincerely that the motion to dismiss is entitled to not only the most careful consideration by the Court but, notwithstanding the indications given on the record by the Court, is firmly convinced that the action will be dismissed and therefore has asked me to resist as respectfully as I can granting to these plaintiffs or additional defendants further discovery causing any further expense or burden upon the tool company until after the Court has either decided the motion to dismiss or has satisfied itself that it is a meritorious motion to dismiss.

While I am up I will cover all the ground at once, and, without suggesting that I believe that the Court is likely to require that the tool company incur the burden of expense I have attempted to describe prior to a consideration of our motion to dismiss, I would like to respectfully suggest that, if the Court is of a different view, as in the case of the privileged documents, which the Court's order [24806] of January 10th and January 19th required me to produce—and I exhausted my efforts to obtain a review of those orders unsuccessfully—I be given an opportunity of developing some procedure so that I may have some kind of an order which would be appealable, because I know that I still have to convince your Honor that the motion to dismiss that we are bringing on is a meritorious one.

I believe that when I submit my papers on February 1, and they are not going to be in as well organized a shape as I would like them to be—I am running behind schedule—I believe that your Honor will be satisfied, whichever way your Honor will decide the question, that it is a serious and meritorious question, and I can personally assure your Honor that the desire on the part of the Tool Company to resist further production or discovery proceedings by the

plaintiff at this time is not for the purpose of interfering with the expeditious disposition of this lawsuit.

I would like to finish my remarks by pointing out that somehow or other the issue seems to have developed as to whether or not Mr. Hughes will or will not be available on a particular date [24807] and whether or not the tool company will or will not make further production of documents, rather than the question which basically the Tool Company has sought to bring on for disposition, and that is whether or not this Court should entertain any further the action commenced by this complaint. And I think at this point perhaps I should address myself, unless it would be preferable that I wait in connection with the application which is being made to withdraw the motion to dismiss the counterclaims——

The Court: I assume that would be in answer to what they have to say, because you still do have at the present time the counterclaims pending; so even if you were successful on a motion to dismiss the complaint, you still have counterclaims totaling $385 million for which Mr. Hughes' deposition is also scheduled.

You can answer that after we hear from the plaintiff and the additional defendants on the question of the production of the so-called tax documents, and then I will come back to you, Mr. Davis, because I am sure you will be answering that question on the counterclaims.

[24808] Mr. Davis: All right, your Honor.

The Court: Who wants to start off—Mr. Sonnett or Judge Bromley?

Mr. Bromley: May it please the Court, I take it from what we have just heard that Mr. Davis does not now dispute the correctness of the special master's finding that good cause has been shown for the production of the documents requested under the Rule 34 motion; that said docu-

ments are all relevant; that it does not present a new or novel contention because the plaintiff many months ago was put on notice that we wanted these documents; that we were making the contention that the Tool Company made a profit and received tax advantages from its transsactions.

I take it that he no longer disputes that the documents are important and necessary and that his sole argument is related to the burden and that he wants more time.

Well, the master recognized that there was a burden, but found that it was not an unreasonable one and that he should comply, because it was highly important that we have the documents prior to the taking of the deposition of Mr. Hughes.

[24809] Now, as your Honor has indicated, I am not at all concerned with his motion directed toward the complaint because I am perfectly clear that the counterclaims will stand, and I assert that I have a right to examine Mr. Hughes and to get these documents all in relation to my examination with respect to the counterclaims.

I therefore take it that it is perfectly clear that the special master's action should be affirmed by you and that we should proceed to give our attention to the question of how serious, if at all, the question of burden really is. And I think you, Mr. Sonnett, should express your views in that respect of that matter to his Honor.

The Court: Mr. Sonnett.

Mr. Sonnett: Yes, your Honor. I have a short answering affidavit in connection with Mr. Davis' appeal on the tax document matter. With the Court's permission I would like to serve it and file a copy now. It has some facts which I think should be in the record before your Honor on this question of burden.

The Court: Go ahead.

Mr. Sonnett: Does your Honor wish to [24810] examine that affidavit or shall I paraphrase it?

The Court: You might as well paraphrase it.

Mr. Sonnett: In paragraph 2, your Honor, the affidavit adverts to the findings by the special master based on his intimate familiarity with the discovery matters in this case.

The burden of production on the Hughes Tool Company of these documents at this time is in fact reasonable.

Secondly, in paragraph 2 of the affidavit we refer to that portion of the special master's ruling in which he adverted to the fact that employees and counsel of Houston, Texas, who have for many years represented Tool Company generally as well as in its tax matters, could assist in the production to such an extent that the burden upon Mr. Chester C. Davis and his associates in connection therewith should not be great.

In paragraph 3, your Honor, the affidavit develops the fact—and we believe it to be the fact—that a substantial amount of work has been done previously in assembling various material which will be of help in connection with this matter. [24811] such as supporting papers, work papers relating to financial statements, and other detailed financial information.

That became known to us first about a year ago when they were producing documents at Houston, Texas, and at that time they withheld two or three boxes of work papers which were said to contain supporting work papers relating to financial statements and the like. That matter was brought to the attention of the special master on March 22, 1962, and it resulted in a direction by consent to effect that that material be held in the custody of Mr. Davis's firm for delivery as might be required later.

In paragraph 4 of the affidavit we point out that the Andrews, Kurth, Campbell & Jones firm, which is undoubtedly one of the leading firms in Texas, has been counsel for the Hughes Tool Company for some 50 years; that Mr. Cook has been personally engaged in the legal and financial matters of Hughes Tool Company for over 10 years, this by their own statements.

Accordingly it seems to us that with the resources available to the Andrews, Kurth firm, the [24812] production could, where there is a will to do it, be made promptly and, indeed, should be made by Wednesday, recognizing, however, that the matter of production of documents is always a burden on any litigant, as it has been, I can assure the Court, in the case of TWA, where we have produced hundreds of thousands of hundreds of thousands of documents at great expense to our minority stockholders—recognizing that burden. However, our proposal in this affidavit is that your Honor direct that whatever is available now be produced by January 30, 1963, as the master has directed; that your Honor further direct that there be a production on a day-to-day basis thereafter until the production is complete, and that it should be complete on February 6, 1963, which would mean about a week's extension of time to make the production, which the master has found, in fact, could reasonably have been made on the 30th of January.

Now, as to the importance of the TWA viewpoint in these documents, I think it speaks for itself, your Honor. We want them not only for the deposition of Mr. Hughes, but it is my opinion and belief that these documents, when we get them, may [24813] be of considerable assistance for the motion which Mr. Davis is now at long last going on and insisting be pressed to your Honor for the Hughes deposition.

I think that materiality is evidence, your Honor, from the fact that I hold in my hand documentary proof from the Bank of America files of statements made by Mr. Hughes himself in 1960 and statements made by Mr. Noah Dietrich in 1960 specifically pointing out that the 102 tax problems had always been and were at the heart of the Hughes problem, and I propose to establish on the record to date, and certainly so out of Hughes' mouth when he is deposed, that because of the tax problems of Hughes Tool Company and Mr. Hughes personally they engaged in the course of conduct alleged in our complaint and that that course of conduct undeniably violates the antitrust laws and was not and could not be exempted or dealt with by the CAB.

So I would like to have these papers in connection with his motion as well as in connection with the deposition.

Thank you, your Honor.

The Court: Mr. Chandler?

[24814] Mr. Chandler: I have nothing to add to the statements of Mr. Sonnett, your Honor.

The Court: Mr. Stewart?

Mr. Stewart: I join very heartily in the statements that Judge Bromley and Mr. Sonnett made.

The Court: All right.

Mr. Davis: May I reply?

The Court: Surely.

Mr. Davis: If your Honor please, I don't know about the facts referred to in Mr. Sonett's affidavit. I do have a recollection about some arrangements that some work papers were to be kept by Mr. Cook pending some determination of confidentiality. As far as I know, they were all produced, but I don't know what the facts are in that regard.

What I would like to address myself to primarily, however, is to the assumptions made by Judge Bromley in his

remarks that I am conceding that there was good cause or relevancy in the documents called for. That, of course, is not an accurate statement of my position. My position is at this point I am not prepared to address myself to [24815] that request or to that review of the special master's order. I simply have not had time to prepare in view of my efforts to work on the brief.

May I point out, first of all, how the additional defendants are affected by whether or not the Tool Company made a profit or did not make a profit or obtained some tax advantages reviewed by the Bureau of Internal Revenue with respect to its control or exercise of control of TWA, I just don't see how that establishes any relationship whatever to their defense.

In so far as plaintiff TWA is concerned, Mr. Sonnett just said that this will indicate to give an explanation as to why Mr. Hughes engaged in the course of conduct allegedly in violation of the antitrust laws.

I respectfully submit, your Honor, we are not concerned as to why someone violated the antitrust laws; we are concerned with whether they were violated, and I respectfully submit that whether or not the Tool Company did or did not make a profit in transactions which were reviewed and approved by the CAB and whether or not the purpose or objection or reasons why the Tool Company acquired 78 per cent [24816] control of TWA was because it would put it in a position where it could employ its cash and thereby avoid whatever is to be avoided against an improper accumulation of cash, and whether or not that was done by buying more securities of TWA or by providing funds for the acquisition of aircraft by TWA, I just don't understand how that can be said to be seriously documents that they have to have for the purpose of establishing

either that the Tool Company or Mr. Hughes engaged in a violation of the antitrust laws or how they could conceivably afford a defense to any of the counterclaims.

It is respectfully submitted at this point, however, that I am expressing this as what seems to me to be a rational reaction to the statement that I have heard, and I respectfully request the Court for an opportunity to address more fully on that question.

The Court: You have had this problem for a long, long time. I don't think you need any more time to present your point of view on this.

There is nothing new; it has been hanging around for several weeks.

Mr. Davis: What has been hanging around [24817] for several weeks, your Honor?

The Court: This production of the documents. What was the date of your affidavit before the special master?

Mr. Davis: The special master's ruling——

The Court: You prepared yourself to oppose the ruling of the master, you must have prepared yourself for this too. What is the date of the Hupper affidavit?

Mr. Bromley: January 9th.

The Court: Today is January 28th.

Mr. Davis: That is correct, your Honor, and I can assure you that between January 9th and now I have been on one matter or the other constantly in connection with this litigation.

I would also like to point out that I have lost two, almost three days of the time that was allotted to me by the Court in connection with the preparation of this material relating to this motion to dismiss. One of them was I received a request to attend a subcommittee of the Senate Judiciary Committee, it is called some Antimonopoly Committee, with

Senator Kefauver with reference to the Pan American-
[24818] TWA merger and whether or not there was any pressure being applied on Mr. Hughes or the Tool Company in connection with this Pan-American-TWA merger. I have received two calls today from the Justice Department on the same question, and between times your Honor knows I have had to prepare papers and appear before the Court of Appeals——

The Court: This is your choice, not mine.

Mr. Davis: I understand that, but nevertheless I don't believe the circumstances here present indicate that the Hughes Tool Company is not entitled to whatever efforts it is entitled to make in order to protect what it believes to be its rights. I don't think there can be any question that if, in fact, as we claim we are going to be able to satisfy your Honor shortly, this complaint lacks merit and is a matter which is not properly before this Court but should be properly before the CAB, I respectfully submit that there is a grave injustice being done by requiring the Tool Company to do any more than it already has done.

The Court: You already have boxes of this stuff that you have gone through. Turn it over.

[24819] Mr. Davis: That is what happens when we get the facts piecemeal. That is not compliance with the schedule that Mr. Hupper has stated. That was compliance with your Honor's order as construed by the special master with respect to what we in fact did produce on March 15th and April 15th of last year.

The Court: You have it, haven't you, and it has been gone through?

Mr. Davis: They have been made available, your Honor.

The Court: These three boxes, I understand, have not been made available.

Mr. Davis: Your Honor, all I know is that Mr. Cook assumed the responsibility with respect to that production. The special master required that somebody be done, and it was done. There was a ruling with respect to treating it with confidentiality.

If what we are talking about is this affidavit by Mr. Hupper, I frankly do not know what is in this affidavit, and I am not in a position to either analyze what is in those boxes, if there are any such boxes——

[24820] The Court: Mr. Cook is, though, isn't he?

Mr. Davis: Mr. Cook has been engaged as I have been——

The Court: Let us get one thing straight. Has the material in the three boxes been turned over to parties in this litigation?

Mr. Davis: Have they been?

The Court: Yes.

Mr. Davis: I haven't the slightest idea.

The Court: Why don't you ask Mr. Cook tonight. If they haven't, turn them over.

Mr. Davis: I will do that.

Mr. Bromley: Of course not. They have been refused.

The Court: He has had them for a long time.

Mr. Davis: Your Honor, I cannot say any more sincerely than I have already said that it seems to me—and I believe I have authority to support it, if I had time to present it to your Honor—that there is a serious motion to dismiss this complaint.

[24821] The Court: You have argued that before the Court of Appeals.

Mr. Davis: No, your Honor. The only thing I have argued before the Court of Appeals was whether or not the order of this Court with respect to privileged documents was appealable and therefore reviewable.

The Court: I read what you said before the Court of Appeals. You went beyond that narrow point, Mr. Davis.

Mr. Davis: Now, your Honor, if your Honor has the record of the argument before the Court of Appeals and the notice of appeal that was filed, you are fully informed as to what took place there. All I can say, your Honor, is that it was one order which covered the production of the privileged documents and referred to other material. In order to obtain a stay from the Court of Appeals it was necessary for me to have an appealable order and my understanding of what the Court of Appeals did was to refuse to recognize that the order requiring the production of documents was appealable and thereby denied me a stay and did not consider my [24822] writ of prohibition——

The Court: Did not.

Mr. Davis: Did not.

The Court: I think Judge Lumbard directed you to argue all three items before him. It says so in the record.

Mr. Davis: If your Honor please, it turned out to be that I was denied leave to file it. That is what the order of the court was.

Mr. Sonnett: It was on our cross motion which was before the court.

Mr. Davis: I came back from Washington your Honor, on Tuesday, late Tuesday afternoon, having spent the day with this Kefauver committee, which, like everybody else, takes the position, an independent branch of the government—I tried to tell them I was busy in a court proceeding—that it is none of their concern, and found myself in the Court of Appeals the next day; and I respectfully submit to your Honor that I did not argue my writ of prohibition and that all that has happened so far has been that the order of this Court with respect to privileged docu-

ments was held to be nonreviewable, and I am prepared to follow whatever [24823] procedure is the appropriate procedure to follow in order to obtain what may be a reviewable order.

The Court: Well, I come back. It appears that Mr. Cook has two or three file boxes of work papers supporting the financial statements sent to the special master which had been held pending determination of their confidentiality, which means they have been reviewed and you know what is in them, and they have been there since March of 1962.

Mr. Davis: I will be perfectly happy, your Honor, to get what the facts are and submit them to your Honor. I am just not in a position to give you the information that you are asking me for.

The Court: Call me tomorrow morning and let me know.

Mr. Davis: I did not hear what your Honor said.

The Court: Call me tomorrow morning after you have spoken to Mr. Cook. At your suggestion Mr. Cook has them, according to this transcript before the special master, if Mr. Sonnett has correctly reproduced the transcript.

Mr. Davis: I will undertake to give the facts to your Honor tomorrow morning.

[24824] The Court: But I can't see any reason for any more time to argue why these things should not be submitted. You have had that same problem with even a greater degree in the attorney-client privilege asserted by you.

Secondly, I haven't heard anything about the question of, assuming that the complaint is dismissed, which is what your goal is now, the six counterclaims that are still pending in this court asserted by you against the plaintiff and the additional defendants.

In regard to the plaintiff, the plaintiff has moved to withdraw its motion to dismiss the counterclaims, and the additional defendants have filed their answers to those counterclaims, and Mr. Hughes is being deposed on those as well as upon the complaint, so I can't see why this material can't be furnished.

And let me hear from you, Mr. Sonnett, on your motion to withdraw your motion to dismiss the counterclaims.

Mr. Sonnett: Yes, your Honor. Before coming to that, and in order that the record be perfectly clear, may I call to your Honor's attention [24825] pages 18 and 19 of the transcript of January 23rd before the special master, because there, as again I believe here, what Mr. Davis was contending was that he had received information from Mr. Cook, because obviously Mr. Cook is the source of all Mr. Davis' information on the matter of these documents.

At the top of page 19 of that transcript what Mr. Davis said, which I think he has again said here, is that it would take weeks to try to gather all of the material called for if the Tool Company were in fact properly required to produce such material.

I am confident, your Honor, that on the basis of the 50 years that Andrews, Kurth has represented the Tool Company and the over 10 years that Mr. Cook has been in intimate contact with their financial and other matters that firm is quite capable of producing within 48 hours 90 per cent of the material called for by this motion, including the three boxes of work papers in connection with financial statements that were segregated a year ago.

It seems to me that they therefore should be required to produce that which is now available and to continue producing until some date [24826] prior to the Hughes deposi-

tion and complete it so that we have the opportunity of looking at the documents.

Mr. Davis' problems about understanding the relevance of the tax aspects of this can be set at rest if he would only read the statements that Mr. Howard Hughes made to the Bank of America in December of 1960 because Mr. Hughes understood the relevance very clearly of his tax problems and the course of conduct which he followed with respect to TWA.

The Court: What about your motion to withdraw your motion to dismiss the counterclaim?

Mr. Sonnett: Yes, your Honor.

We served our motion on January 25th, your Honor. As my affidavit indicates——

The Court: I wish you had done it a couple of weeks before. I have wasted a lot of time.

Mr. Sonnett: I can only suggest to your Honor the question of Pandora's box, or the lady and the tiger, and perhaps only your Honor would be the one to know, but I do regret that it wasn't done sooner. My only excuse for that is that I know [24827] how much the Court has to do anyway on this and other cases, and that is that when I was advised, as I was, that the additional defendants had seen fit to answer these counterclaims and took the position, as I did, that that was a matter for them and not for TWA, in view of the fact that they were going to answer the counterclaims, it seemed to me that the procedural morass that would then result was one that TWA should try to avoid and, in the interest of trying to avoid that, it seemed to me I should ask your Honor's leave to withdraw the motion to the extent indicated in our motion papers, namely, to the extent that we seek now to keep the motion alive, in effect, only with respect to a portion of counterclaim 2, that

is to say, a portion of our attack on counterclaim 2, and with respect to paragraph 6——

The Court: You mean it doesn't state a claim under 408; is that the part you are keeping alive?

Mr. Sonnett: Yes, your Honor. It fails to state a cause of action.

In so far as we pressed on your Honor a highly technical and complicated set of motions [24828] addressed to the point that the counterclaims were not proper under Rule 13, in light of the present posture of the case, and the fact that the additional defendants have answered, it seems to me TWA's interests are best served by our withdrawing the motion to that extent and asking your Honor for leave to reply to the counterclaims when we have examined Mr. Hughes.

On that point the derivative nature of the counterclaims, assertedly derivative nature of the counterclaims that would be left in the case, I think, make it particularly appropriate if we give Mr. Hughes a chance to tell us what he knows, not only about the allegations of the complaint, which I take the stand denied, regardless of this motion, but as well as the allegations in the counterclaim which, so far as TWA knows to date, are not true.

That is our position, your Honor.

The Court: Mr. Davis.

Mr. Davis: Your Honor, the reason given by Mr. Sonnett for withdrawing his motion on the counterclaims is indeed fascinating because the reason that the additional defendants did not answer [24829] the counterclaims was, when they argued before the special master that they should not be required to answer the counterclaims by reason of the motion to dismiss which was pending, the special master over my objection granted the request of the additional

defendants to delay answering the counterclaims while the motion to dismiss was pending; and now, if I understand Mr. Sonnett correctly, upon hearing that the defendants were ready to answer the counterclaims, he withdraws his motion.

I appreciate, your Honor, I haven't had time to really think about what this maneuver really means, because at the same time I understand that counsel for the additional defendants is bringing on a motion returnable the 18th of February to dismiss the counterclaims with prejudice as punishment for alleged contempt by reason of the fact that I have withheld these privileged documents.

What it appears to be, your Honor—and this is a matter of extreme seriousness, and unfortunately it involves matters which are not before the Court relating to this Pan American-TWA merger—but what this means, your Honor, is a development [24830] of a sacrosanct——

The Court: Thank you.

Mr. Davis: —date, February 11th.

Now, what is it about February 11th, or any other date in the neighborhood of February 11th, which is of such vital importance to this plaintiff or these defendants where even our effort to have a most serious motion to dismiss considered by the Court, nothing should interfere with the date of February 11th? That became——

The Court: Let me ask you a question, Mr. Davis. If the date was April 11th, could I have had your motion to dismiss the complaint for summary judgment?

Mr. Davis: Yes, your Honor.

The Court: I would have?

Mr. Davis: Your Honor, let me put it this way. That motion was made, as I believe the rules require, upon the basis of the complaint. My Rule 11 motion was——

Pretrial Hearing, January 28, 1963

The Court: If you had noticed it for argument and if I had fixed the date of Mr. Hughes' deposition for April 11th——

Mr. Davis: Of '63?

[24831] The Court: —and adjourned the master's fixing of the date of February 11th?

Mr. Davis: Your Honor, whether I was right or wrong on this, let me at least explain to you what I was doing, and this is basically a problem which I think is an interesting one from the point of view of the rules.

We have the concept that a complaint does not have to be as explicit as it used to be in some pleadings. Therefore, we then approach it next that a plaintiff who has seriously brought on a claim—I would not say in this case the plaintiff is represented by counsel who is inept at drafting pleadings, but in other cases it may be—I understand some of the rulings of the Court of Appeals to be that courts lean over backwards in giving a plaintiff opportunity to adequately explain or demonstrate what it is he is complaining about.

The Court: Pardon me, Mr. Davis. I have just one question to ask you, and I think the answer can be a simple one.

If on January 10th I had adjourned the deposition of Mr. Hughes from February 11th to April [24832] 11th, and if I had acceded to your request that you proceed with the deposition of Ben-Fleming Sessel and Mr. Wadsworth, do you tell me that I still would have received a notice of motion from you dated January 14th to dismiss the complaint for summary judgment?

Mr. Davis: Your Honor, the answer is yes to your Honor, but let me say there is only one thing that I don't want to be misunderstood on, and that is what I was waiting for was not a decision about Ben-Fleming Sessel or Wad-

sworth; the only thing that might have delayed my bringing on the motion to dismiss until January 14th was or would have been the ruling with respect to the answer to interrogatories under Rule 16.

Had your Honor on January 9th granted the application for a Rule 16 proceeding that we made, referring to the special master or to the Court, or had your Honor required the interrogatories to be answered, then there is no question in my mind that I would have withheld the making of the motion, because then I would have made a motion both under Rules 11 and 56.

Now let me say one other thing, your [24833] Honor. At the present time the motion, the papers that I will file with you on February 1, by noon, in whatever condition they may be——

The Court: They will be in good condition, I am sure.

Mr. Davis: Not in the condition they should be in, your Honor.

I will call your Honor's attention that as a practical matter I am forced to abandon my Rule 56 motion and I have to proceed solely on the Rule 12 motion.

The other impetus which permits me to tell your Honor, with no question whatever in my mind that such a motion had been made, was a decision of the Supreme Court in the Panagra case.

The Court: You did not even know about it when you filed the papers with me.

Mr. Davis: Your Honor, I had been relying on the Panagra case for some time. To be sure, both sides had been using it.

The Court: You did not know when the Panagra case was coming down, and your papers were prepared before it came down.

Pretrial Hearing, January 28, 1963

Mr. Davis: The minute your Honor [24834] indicated to me that your Honor had decided not to give me a Rule 16 proceeding and no answers to interrogatories, at that point, so far as I was concerned, there was going to be no further opportunity to elicit from the plaintiff what the basis is for this complaint, what is the course of conduct on which they are relying, and at that point I had no more any reason whatsoever but to test the theory which I had adhered to from the time this complaint was filed, that this complaint and the subject matter of this complaint was improperly in this court.

However, I naturally, so long as the Court would permit me to adduce from the plaintiff what is (sic) is that the plaintiff was claiming—now, the notice for taking the deposition of Mr. Sessel, which had been made at the time the complaint was filed and which was covered by the earlier orders of the courts, your Honor—and, as I explained to the special master, I was treading water, your Honor, from October of 1962, until your order of January 9th, proceeding with taking oral depositions in the face of what the special master said on the record repeatedly, that there was no question that I was not [24835] going to be able to find out the facts I was seeking because TWA quite candidly said, "We don't know the facts." The facts are in the knowledge of counsel who investigated the facts and there is only one way to get at that and that is by interrogatories.

I could have examined every officer of TWA and know no more than I know today. I could have called your Honor's attention to Mr. Rummel's testimony, to Mr. Cocke's testimony, to Mr. Tillinghast's testimony. None of them know of any course of conduct violating antitrust laws. They say this complaint is because of what counsel recommended

because of their investigation. They asserted the work-product and attorney-client privilege, and here I am.

The minute your Honor denied me the answers to interrogatories until after we were examined—and there is no question that for the Tool Company to proceed with these depositions in Los Angeles will involve the expenditures of vast sums of money. Now, that has nothing to do with respect to the availability or lack of availability of Mr. Hughes and, so far as I am concerned, your Honor, I would have brought on that motion to [24836] dismiss, as I was prepared to argue that motion to dismiss shortly after it had been referred to your Honor for all purposes——

The Court: Except you acquiesced that it wasn't timely to bring on.

Mr. Davis: Your Honor, I always recognized, and I am prepared to recognize at this date, that I am prepared and I am so confident of my facts that I am prepared to let this plaintiff, any time he wants to, present whatever facts he wants; not for the purpose of raising an issue of fact, I will admit every fact he asserts and ask for a decision on the law, I will admit every answer he gives me on interrogatories.

It seems to me I should have an opportunity to do that. An issue of fact is raised, your Honor, only if I were to deny anything, if I were to deny what they say, but I need a statement under oath, I don't need a statement under oath by any officer of TWA claiming to have knowledge of the facts and I admit them. They can use those facts either for the purpose of construing the complaint or anything else they please, and I ask for a determination of the case on the law, and if I am wrong on [24837] that, your

Honor, I will make a commitment. Then we proceed to the assessment of damages.

Mr. Sonnett: What Mr. Davis just said—or else I am having trouble with my hearing—it is like someone once said, "Listening to him is like trying to nail a custard pie to a wall," but if he said that he admits the allegations of the complaint, TWA now moves for judgment on his admissions and for the relief sought in the complaint.

The Court: I don't think he said that.

Mr. Sonnett: I am not sure. I never know exactly what he is saying except that he wants to use the Federal Rules for himself, the Tool Company, but he doesn't want anybody else to use them.

The Court: All right. That takes care of three matters I have here.

Review the rulings of the special master regarding the production of the tax documents: I will give you until tomorrow to tell me about those three boxes of papers, Mr. Davis, and I will then decide the matter. I see no necessity for additional time for additional argument on the question of the counterclaims.

I assume everybody has finished talking [24838] about TWA's motion to withdraw the motion to dismiss the counterclaims. That motion is granted with leave to TWA to file their answer 10 days after the conclusion of the deposition of Howard Hughes.

I have an application here which I received at 2:30 this afternoon, and I assume other counsel have received it, from an attorney for Mr. Tillinghast——

Mr. Davis: I don't believe I have that, your Honor.

The Court: You don't have it?

Pretrial Hearing, January 28, 1963

Mr. Harrell: Mr. Davis, your office was served with it Friday evening.

The Court: —to answer the counterclaims within 10 days after the conclusion of the deposition of Howard R. Hughes.

Do you want to say anything in opposition to that, Mr. Davis?

Mr. Davis: No, your Honor. I suppose it is the same thing that TWA is doing.

The Court: Yes, the same disposition on that.

I have one other thing here, a question I wanted to ask you, Mr. Davis. [24839] You wrote me a letter January 23rd which has been made part of the record before the special master. I will just refer to the last three lines of the second sentence in that letter, which read:

> "I must respectfully decline to comply with your said orders, at least prior to a determination of this motion to dismiss now pending before your Honor."

The question I want to ask you about those three lines is: did you make this decision on your own, or did you discuss this with your client?

Mr. Davis: I discussed it with my client, your Honor.

The Court: All right. That is all.

Mr. Stewart: If your Honor please, one other item.

Additional defendant Dillon Read has not as yet answered the counterclaim, and under the prior state of the record had until 30 days after your Honor's decision on the motion of TWA to dismiss the counterclaim.

May I at this time apply for 30 days in which to formulate our reply to the counterclaims? [24840] Since the mo-

tion is now withdrawn, there will therefore be no decision, presumably, and we would like to have this additional time to prepare a reply.

The Court: I don't think you can have 30 days. I certainly think your answer ought to be in by February 11th, the date of the deposition.

Mr. Stewart: That would be perfectly satisfactory. That is fine.

The Court: All right.

Letter from Chester C. Davis to Metzner, J., January 29, 1963

[Doc. 448]

[Letterhead of Chester C. Davis, New York 5, N. Y.]

January 29, 1963

COPY

BY HAND

Re: *TWA* vs. *Hughes Tool Company, et al.*

Hon. Charles M. Metzner
United States District Judge
United States Court House
Foley Square
New York, N. Y.

Dear Judge Metzner:

Referring to the request of Your Honor for a report with respect to the material referred to in the affidavit of Mr. Sonnett served upon me in Court yesterday, and the conversations that Mrs. Lea had with your law clerk this morning, there is annexed hereto a self-explanatory telegram I have just received from Mr. Gray, a member of Messrs. Andrews, Kurth, Campbell & Jones of Houston, Texas.

The nine boxes of papers referred to by Mr. Gray are covered by rulings of the Special Master of March 22, 1962 that Toolco need not produce such documents. (Tillinghast Tr. pp. 3710-3715) To my knowledge those rulings were never altered or modified in any respect. However, should

the Court or Special Master so desire, I am prepared to arrange immediately for the shipment of those nine boxes to the Special Master so that he may satisfy himself as to the propriety and soundness of the March 22, 1962 rulings.

I respectfully renew my request for additional time so as to give me an opportunity to address myself in opposition to the ruling of the Special Master of January 22, 1963 which, in effect, would require Toolco to examine voluminous files which have already been examined, and from which full production has already been made pursuant to earlier orders, for the purpose of locating and producing additional documents, which I submit, have no bearing on any of the issues of the case to the extent that those issues are presently identified and, more particularly, in view of the pending motion to dismiss.

I and my staff have been working more than 16 hours a day 7 days a week since January 19, 1963 in an effort to prepare our papers on the motion to dismiss. In view of the number of unanticipated time-consuming matters which have arisen since that date with respect to this litigation, I respectfully request a reasonable extension of time for the submission to Your Honor of a brief in support of the motion to dismiss. In my opinion, I do not now have enough time within which to present an adequate analysis of the issues involved, particularly in the light of the statements made by Your Honor on the record, in conference, and in the January 19 order to the effect that you had a preconceived notion that the motion is premature, and that in your view it appears to be another attempt to postpone the deposition of Mr. Hughes. I understand that Your Honor wishes to consider the probable merit of said motion prior

to February 11. However, for reasons which I indicated on the record yesterday, I do not believe that the plaintiff and the additional defendants have any proper interest in insisting upon February 11 as the date on which the deposition of Mr. Hughes is to commence.

I would appreciate hearing from Your Honor with respect to the above.

Respectfully,

/s/ CHESTER C. DAVIS
Chester C. Davis

(Encl.)

cc: J. Lee Rankin, Esq.

All Counsel

(With enclosure)

Letter from Chester C. Davis to Special Master Rankin, February 4, 1963

[Doc. 458]

[Letterhead of Chester C. Davis, New York 5, N. Y.]

February 4, 1963

COPY

Re: *TWA* vs. *Hughes Tool Company, et al.*

J. Lee Rankin, Esq.
36 West 44th Street
New York 36, New York

Dear Mr. Rankin:

Referring to the order of Judge Metzner dated February 1, 1963 and our telephone conversation relating thereto, this is to confirm the following:

Friday evening, February 1, 1963, I requested Messrs. Andrews, Kurth, Campbell & Jones to forward to me immediately the nine boxes containing work papers which Toolco claims are not producible under your rulings and orders of the Court. The boxes have left Houston and as soon as I receive them, I will advise you promptly so that you may examine each document and rule thereon.

As I explained to you in our telephone conversation, Toolco is taking the action indicated above without prejudice to its position that at this time it may not be properly subjected to further discovery proceedings by plaintiff or the additional defendants. Rather than submit to fur-

ther discovery on the record to date, Toolco reserves the right, if it becomes necessary to do so, to elect not to defend on the merits.

It is, of course, the expectation of Toolco that the disposition of its pending motion to dismiss will obviate the necessity of pursuing the matter further. In addition, in connection with the claims being asserted by Toolco against the additional defendants, you are referred to the motion of the additional defendants, returnable February 18, for an order dismissing said claims with prejudice, and to the letter of Toolco to Judge Metzner dated February 1, 1963.

Sincerely,

/s/ CHESTER C. DAVIS
Chester C. Davis

cc: All Counsel

Letter from John F. Sonnett to Chester C. Davis, February 5, 1963

[Doc. 459]

[LETTERHEAD OF CAHILL, GORDON, REINDEL & OHL]

February 5, 1963

Re: *TWA* v. *Howard R. Hughes, et al.*

Dear Mr. Davis:

Reference is made to the provisions of the order of Judge Metzner dated February 1, 1963 which required among other things the day-to-day production of documents which were the subject of that order. None has been supplied to date.

We hereby request that you produce to us no later than 5:00 P.M. tomorrow for inspection and copying the 1961 and 1962 tax returns and financial statements of the Hughes Tool Company which have been ordered produced as described in subparagraphs (v) and (w) of the Special Master's opinion dated January 22, 1963.

Very truly yours,

Chester C. Davis, Esq.
120 Broadway
New York 5, New York

cc: Hon. Charles M. Metzner,
United States District Judge

Hon. J. Lee Rankin,
Special Master

All Counsel

JFS:MHC:pw

Toolco's Notice of Motion, February 6, 1963

[Doc. 170]

[CAPTION] 61 Civ. 2324

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE that upon the annexed "Complaint of Hughes Tool Company and Request for Investigation" which was filed with the Civil Aeronautics Board today and upon all proceedings herein, the undersigned will move before Honorable Charles M. Metzner, United States District Judge for the Southern District of New York, at such place as shall be fixed by him, on February 8, 1963, at 10:00 o'clock in the forenoon or at such other time as shall be fixed by the Court, for an order (1) that all further proceedings with respect to the counterclaims of Hughes Tool Company herein be stayed pending the entering of a final order by the Civil Aeronautics Board with respect to said "Complaint of Hughes Tool Company and Request for Investigation" and (2) for such other and further relief as to the Court may seem just and proper.

Dated: New York, N. Y.,
February 6, 1963.

Yours, etc.,

CHESTER C. DAVIS, Esq.
Attorney for Defendant
Hughes Tool Company
120 Broadway
New York 5, N. Y.

[To All Attorneys of Record]

Affidavit of Nazeeh S. Habashy, February 6, 1963

[3828]

[CAPTION]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

NAZEEH S. HABASHY, being duly sworn, deposes and says:

1. I am a law clerk employed by Cahill, Gordon, Reindel & Ohl, counsel for Trans World Airlines, Inc. ("TWA"), who has been specially cleared to handle confidential documents in the above-mentioned action.

2. On Wednesday, February 6, at 4:45 PM, I went to the offices of Chester C. Davis, counsel for the Hughes Tool Company ("Toolco"), and requested the production for inspection and copying of the 1961 and 1962 tax returns and financial statements of Toolco which have been ordered produced as described in subparagraphs (v) and (w) of the Special Master's Opinion of January 22, 1963.

[3829] 3. Counsel for Toolco refused to comply with this request.

(Sworn to by Nazeeh S. Habashy on February 6, 1963.)

[24842]

Pretrial Hearing, February 6, 1963

[CAPTION]

BEFORE:

HON. CHARLES M. METZNER
District Judge

[APPEARANCES:]

* * *

[24843] The Court: Before we commence arguing on motions, does anybody have a copy of the CAB order of December 29, 1960? That was not public, as far as I could find.

Mr. Davis: We could have it before the close of the argument.

The Court: Secondly, Mr. Sonnett, your brief, on page 40 you refer to intermediate orders of the CAB in this matter. Do you have copies of those?

Mr. Sonnett: I do not, your Honor, have them with me but I can get them readily, I think.

The Court: Would they indicate what the Board was asked to do aside from just a three or four-line alternate finding?

Mr. Sonnett: I can't answer that question until I have another look at that.

The Court: All right.

[24844] Mr. Davis, you may proceed.

Mr. Davis: May it please the Court, I would like to say preliminarily that I put my energies in the paper that

we prepared for submission to the Court and I am a little hoarse and hard of hearing today.

I would like, if I may, to reserve as much of the time that the Court would be inclined to allow me to reply to whatever argument counsel for TWA may present, because I believe that our position is adequately set forth in our memorandum and reply memorandum.

In that connection, your Honor, I am not personally aware of when that reply memorandum was in fact delivered to your Honor's chambers.

The Court: Before lunch.

Mr. Davis: May I assume that you are familiar with the contents of that memorandum?

The Court: It was read in detail. Luckily I did not have to hold court this afternoon because I had to review some 3500 material and grand jury minutes for the grand jury tomorrow morning. I spent all afternoon on your reply brief.

Mr. Davis: Then apart from answering [24845] whatever questions I may be able to answer, I can state my position very briefly.

I want to emphasize first of all that we are not bringing on the motion for summary judgment under Rule 56. We have withdrawn that motion for the reasons stated in our memorandum. I can expand those reasons, if they would be a matter of interest.

The Court: No, I don't think it is necessary. I disagree with the reason you give or the indication you are compelled to withdraw your motion.

Mr. Davis: Then I would like to emphasize that so far as the motion we are bringing on is concerned, we are relying solely on the allegations of the complaint; we are not going outside of it.

Pretrial Hearing, February 6, 1963

In the introductory statement of our memorandum in connection with the explanation I attempted to set forth reasons why we wanted to withdraw our motion for summary judgment. I did refer to the testimony of Mr. Tillinghast and other officers, and the comment of the special master with respect to that testimony but only for the purpose of explaining the [24846] posture that the Tool Company found itself in.

The Court: I think you have a problem we can overcome simply. I am going to decide this as a motion for judgment on the pleadings in so far as that particular claim of yours is concerned.

You are in a procedural dilemma. You are withdrawing the motion for summary judgment, and yet you have gone outside the face of the complaint, and necessarily so, because the face of the complaint does not mention the orders and exemptions which you rely on as your third affirmative defense. Consequently since you have answered and raised that issue by your third affirmative defense I will consider this as a motion for judgment on the pleadings to get over whatever procedural hurdle you would have in arriving at your first determination for the first grounds of dismissal.

Mr. Davis: May I state in that connection——

The Court: Under the Putnam case the complaint would withstand a motion to dismiss under 12(b)(6). We will get to the merits of your ground without being held up by any procedural problem.

[24847] Mr. Davis: May I merely state then that my position with respect to referring to the CAB orders, I did not refer to all of the many CAB orders which approve particular transactions between the Tool Company and

TWA because my position is that it is immaterial whether they were in fact in violation. If not, we were in violation of CAB orders; and if they were, we were not.

I refer to the orders issued by CAB under 408, because to my mind those are quasi-judicial decisions which under the law, as I understand it as reflected by the decision of the Supreme Court in Panagra, it is a matter which needs to be considered as a matter of law, the legal effect of those particular orders of the CAB.

Having made those observations, your Honor, I believe that I can only address myself to answering questions, answering the position taken by TWA. I can anticipate to some extent, I think, in my reply memorandum I have adequately made clear that there is no basis for the distinction between the conduct alleged in 1961 and that alleged prior to 1961, so far as the contention is that such conduct was in violation of the antitrust laws. I can [24848] expand on that, although my reply memorandum, it seems to me, adequately takes care of that contention.

I think I would just be taking up the Court's time unnecessarily if I repeated what I set forth in my memorandum, reply memorandum.

The Court: Mr. Sonnett.

Mr. Sonnett: TWA submits on the papers before your Honor, unless there is some question you have of me.

The Court: I have no question.

I received Mr. Davis' reply at noon last Friday. I received your brief at noon last Saturday, and I worked Friday night, Saturday, Sunday, Monday night and last night, and I called for this hearing on the chance that maybe Mr. Davis could persuade me that the conclusion I had reached on reading the briefs and studying them and

checking the law was wrong. Mr. Davis wants me to rely on his papers. Consequently I will deny the motion to dismiss the complaint. This is the order of the Court and a formal opinion will follow in the next day or two.

Mr. Davis: Your Honor, may I respectfully [24849] request then that in your opinion you certify the matter, 1292, so that I may obtain a discretionary review by the Court of Appeals?

The Court: The application is denied.

Mr. Davis: May I respectfully request your Honor to stay all further discovery proceedings by the plaintiff until I have had an opportunity to seek a discretionary review by the Court of Appeals?

The Court: Are you referring to the production of the documents under my pretrial order of January 19th or the tax papers covered by the orders of February 1st, or the deposition of Mr. Hughes, now scheduled for February 11th?

Mr. Davis: I was referring to all further pretrial proceedings, your Honor, because of the unquestioned burden and expense that the Tool Company will withstand if we are to continue to litigate with a view toward having a trial prior to our effort to obtain a review as to whether the determination made today on our motion to dismiss is not upheld.

It seems to me it is difficult, although I would be willing to cooperate if it would be helpful in any way, to separate how far to go and [24850] where to stop.

The desire of the Tool Company is to seek an early and expeditious disposition of this litigation, particularly since it is bearing 78 per cent of the cost of this prosecution. Therefore it would be extremely burdensome, assuming

that the Court of Appeals will review the basis for our motion to dismiss, upon the Tool Company to be incurring those very substantial expenses pending a review of that question by the Court of Appeals.

It seems to me, your Honor, that there is at least a very substantial question raised by the decision of the Supreme Court in the Panagra case as to whether or not this court should entertain jurisdiction of the questions raised by this complaint.

Granted that this decision in the Panagra case in some respects, as the dissenting opinion indicates, digressed from a prior determination of the Supreme Court and therefore to that extent may be regarded as a new and important question, but I find it difficult to conclude that the Court should not consider the fact that there is a very serious question involved, a question of law.

[34851] The Court: I will tell you what I will do. I will grant your application to the extent of staying all further discovery or deposition proceedings until 5 o'clock Friday. That will give you two days to make whatever application you wish to make to the Court of Appeals for a stay.

Mr. Davis: All right, your Honor.

The Court: Today is Wednesday, and you have tomorrow and Friday to draw your papers up and go to the Court of Appeals and ask for a stay. My stay will expire at 5 o'clock Friday, February 8th.

I have been bombarded with briefs, memoranda, motion papers and letters, and I have difficulty keeping abreast of them all. Let me see if I can find what I am looking for.

Mr. Davis: Is your Honor referring to this notice of motion that we made?

Pretrial Hearing, February 6, 1963

The Court: I am referring to a letter that you wrote to Judge Hall.

Mr. Davis: I wrote two. One was in response to a letter from Mr. Rankin to Judge Hall.

The Court: The earlier one you sent to Judge Hall without sending copies to the special [24852] master, who is counsel to the Court.

Mr. Davis: I received information that there had been communications with Judge Hall of which I did not receive a copy. I did not know what they were. The only information I received, I think, was at the time Mr. Sonnett filed with your Honor a memorandum indicating some representative had communicated with Judge Hall.

I never received a copy of any communication by anyone contacting Judge Hall until I received a copy of a letter by Mr. Rankin. Mr. Rankin has indicated that he would contact Judge Hall, and I was waiting for him to do so in order to address myself to that question. Then, as I recall it, I received a copy of a communication by Mr. Sonnett to your Honor indicating that someone in California had contacted Judge Hall and the United States marshal out there. That is what, as I recall, produced my first letter. Shortly thereafter, as I recall it, I received a copy of a letter from Mr. Rankin to Judge Hall and I addressed myself to that letter.

The Court: I can't find it offhand with all these papers that have come in in the last [24853] two weeks.

What I was looking for that letter for was an indication that you had made in that letter, as I recall it, that until the Court had ruled upon your motion to dismiss you saw no reason why arrangements should not be made—or why ar-

rangements should be made for the deposition of Mr. Hughes on February 11th.

In your letter of February 4th to the special master, a copy of which was furnished to me on February 5th by Mr. Hupper, of counsel to the insurance companies, the additional defendants in this case, you stated as follows:

> "As I explained to you in our telephone conversation, Toolco is taking the action indicated above without prejudice to its position that at this time it may not be properly subjected to further discovery proceedings by plaintiff or the additional defendants. Rather than submit to further discovery on the record to date Toolco reserves the right, if it becomes necessary to do so, to elect not to defend on the merits.
>
> "It is, of course, the expectation of Toolco [24854] that the disposition of its pending motion to dismiss will obviate the necessity of pursuing the matter further.
>
> "In addition, in connection with the claims being asserted by Toolco against the additional defendants, you are referred to the motion of the additional defendants, returnable February 18, for an order dismissing said claims with prejudice and to the letter of Toolco to Judge Metzner and dated February 1, 1963."

My reference to your letter to Judge Hall and to this communication is in the light of the ruling which I now have made regarding the sufficiency of a complaint and its validity against the attack you have made upon it.

I think, if I read the implications of your letter correctly, that if the Court's determination is final you would not proceed with the deposition in California on February 11th. If that is true, I think that it would be better for all people concerned, considering all the time and effort necessary to move the proceedings to Los Angeles, to indicate that as quickly as possible, so that arrangements which are now in progress are not carried forward at [24855] great expense to yourself, to the plaintiff, to the additional defendants, and the inconvenience to the court in Los Angeles which, as I understand it, is proceeding to make the necessary arrangements for this hearing to go forward on February 11th. This is a suggestion which I am making.

Mr. Davis: Your Honor, I am quite aware of that. I do intend and hope, perhaps tomorrow, that I will be in a position of advising all concerned, and particularly Mr. Rankin, to whom I have already pointed out the possibility, and I did expect that I would get some guidance as to what I will have to do next based upon today's ruling or observation that your Honor might make.

I will so advise the parties and try to work out an appropriate procedure so as to put the position of the Tool Company on the record.

Your Honor, I am wondering if it would be appropriate for me to make another suggestion or request, if I may.

In connection with the denial of our motion to dismiss and the time which I now have to apply to the Court of Appeals for whatever relief I can have, and more particularly in view of what I [24856] understand by your Honor's ruling denying the certification under 1292—I also understood that the reasons or the opinion of the Court in reaching that conclusion will not be available to me for

another day or two—I was wondering what I would have to present to the Court of Appeals as the basis of the Court's ruling on the one hand and my position on the other.

The Court: It is complicated. I must formalize my ruling and give you the reasons for it. But the two grounds which you are urging are fairly simple grounds.

I think you have set forth in your brief and in your reply brief—and I must say better in your reply brief than in your original brief—your position. I would assume that if you do not have a copy of my opinion by noon on Friday —and I will make every effort to see that you get it; I will have my secretary down tonight and tomororw night to get it out—even absent the formal reasons, the answer is I do not agree with you.

Mr. Davis: I know I can say that to the Court of Appeals, but in order——

The Court: I will make every effort to [24857] have it before you—it is not going to be too long and will probably run about 15 pages—but I think if you were to go to the Court of Appeals and, if it is necessary, say to them, "Judge Metzner disagreed with this position that I took on my briefs," it would suffice, because all I had before me were the briefs. I ruled upon the briefs and the complaint.

Mr. Davis: That is correct, your Honor. But obviously, and particularly in view of your ruling refusing certification of 1292, I was thinking that the Court of Appeals might like to know what the legal issue——

The Court: I think I flatly can say that I disagree with your interpretation of 408 and 414 as applicable to the specific orders involved here upon which you rely, the orders of 1944 and 1950. The scope of the order goes to the fact of acquisition, as I see it. It does not give you a license to engage in subsequent acts which may amount to restraint

of trade or attempts to monopolize, and I do not think the words in 414 are necessary to carry out what was authorized or approved by the Board encompassing such activity. That in [24858] brief is what the 15 pages are going to say.

Mr. Davis: Do I also understand that it is the conclusion of the Court that——

The Court: Let us leave it this way. You will have an opinion signed by 10 o'clock Friday morning.

Mr. Davis: Thank you, your Honor. I would prefer a stay for a couple of more days.

The Court: I can go on, but you may say what I said from the bench is not what I put in the opinion. I will go over the draft and polish it up.

Mr. Davis: I was really hoping for a little more time beyond Friday.

The Court: I am afraid not.

Mr. Hupper: Your Honor, if I may indulge the Court for a minute, my name is John Hupper and I appear here in the absence of Mr. Bromley, who unavoidably is out West today. I won't say exactly where.

I speak in connection with a paper that was served upon us around noon today involving an application for a stay of any further proceedings in this case on behalf of the additional defendants [24859] on the counterclaim by reason of a so-called complaint which has been filed today with the CAB. If I may say so, and I think I speak for all the additional defendants, our plans for California are well advanced. Many of our files are there and some of our people.

We believe it is very important to have a quick disposition of this application for a stay, which, as we view it, is simply another diversionary effort in some manner or other to avoid the deposition of Mr. Hughes.

Mr. Davis, in his notice, states that he is bringing on this motion on February 8th, or such other time as the Court may direct. We respectfully urge your Honor to hear Mr. Davis on this motion now so that we will know where we stand at the earliest possible moment.

The Court: I can listen to him. Does that mean I have to decide it too?

Mr. Hupper: We believe this motion to be just a——

The Court: I have read the complaint which Mr. Davis served upon you. He filed a copy with the Court. I read it this afternoon.

[24860] Would you say, Mr. Davis, in view of the determination of your motion on the complaint, that this motion which you served today, returnable at 4 o'clock Friday, need not be heard at 4 o'clock on Friday?

Mr. Davis: Need not be heard, your Honor?

Well, your Honor, it may very well be that the reasoning that the Court will give in its opinion will cover this also. However, based only upon what your Honor has indicated today, which, if I understand the remarks which obviously——

The Court: Which you are not going to hold against me.

Mr. Davis: Which I won't hold against anyone—indicate the views of the Court as to whether or not the orders obtained from the CAB covered the course of conduct alleged in the complaint.

We have, as your Honor is aware, a second independent ground on which we claim that this primary jurisdiction is in CAB based upon a Supreme Court decision in Panagra, and that is whether the CAB had the the power to approve.

To the extent to which your Honor, in [24861] denying my motion to dismiss, addressed himself also to that ques-

tion—and I recognize that inferentially, but I would like to have it for the record—you would be denying the basis upon which I claim that I would be precluded from pursuing the counterclaim in this court on the ground——

The Court: You wrote to me, as I recall, several days ago—and I think I have those papers right here; your letter of February 1st, that was last Friday—in which you gave me the impression that the reason you were going to move before the CAB and for a stay in this court with regard to the counterclaim was that, if the motion to dismiss had been granted, there would still be outstanding the counterclaims upon which the plaintiff and the additional defendants could proceed with depositions and, since you felt that those counterclaims dealt with the primary jurisdiction of the Board, if they were the only things left in the lawsuit at this time you were then going to move, with regard to the counterclaims, to remove them from the case and remove them as a possible basis for the deposition of Mr. Hughes on February 11th.

In view of the fact, however, that I [24862] have found that your motion to dismiss the complaint should be denied, I was wondering whether the reason for this last procedural step existed any longer.

Mr. Davis: It still exists to this extent. It is quite true that in my February 1st letter I was addressing myself to the situation which would exist if the complaint was dismissed and we had the counterclaims and what the basis of jurisdiction of the court was on the counterclaims absent the existence of the complaint.

Quite frankly I do not know the answer and I have not had an opportunity to research the question as to what is procedurally the question if you assume a complaint as being

validly before the Court and a counterclaim as to which primary jurisdiction rests in the Board.

Assume it is a compulsory counterclaim or not a compulsory one and then the question——

The Court: You think they are compulsory counterclaims, don't you?

Mr. Davis: Certainly some of them are.

The Court: Miss Lea argued that a year or so ago.

Mr. Davis: They are certainly com- [24863] pulsory permissive.

My problem, and the reason for the answer I am now giving you as to whether or not there is any question left, is that I believe there is a question left, although to be sure to the extent to which the Court is predicating denial of our motion to dismiss merely on the fact that 408 does not grant exemption of 414, that has nothing to do with the counterclaim because we do not claim that there were any 408 orders granting exemption of 414.

We do recognize, and our position has to be consistent, and is, we read the Panagra case, there is primary jurisdiction of CAB if the course of conduct alleged is one that the CAB could approve. Whether it did or not is besides the point. Whether it could approve under 408, that is the point.

Whatever the Court may do here, we are proceeding before the CAB for a determination by the CAB as to whether or not the course of conduct there involved—by "their involved" I mean the counterclaim—is something that they will find to be either in the public interest or not in the public interest.

Our view of the case, that is, the pre- [24864] requisite before we could recover anything in our counterclaim, if I

could rely on the ultimate conclusion of the Court that that is not so—and I have not even heard it today, but I assume your Honor will cover that aspect of the matter in your opinion—as I say, it may very well be that, as far as a need of argument or an extended argument or briefing on this question, it will be unnecessary in the light of whatever opinion the Court hands down in connection with the ruling made today, but so far as Toolco is concerned we most sincerely believe that the only proper interpretation is the Supreme Court direction in the Panagra case, because that was in fact the question before the court in the Panagra case, squarely before the court.

There was a situation where something had not been submitted to the CAB for approval. The CAB unquestionably had not issued any orders and the CAB had to act under 411, which was not involved in 414. Yet the Supreme Court dismissed the complaint because you must go to CAB first and let the CAB decide.

Presumably if the CAB—and I am talking about the Panagra situation now—were to [24865] decide that the manner in which Pan American and Grace were exercising control over Panagra was not in the public interest and they refused to bless it or sanction it or however it is done, then presumably whoever had an interest in the situation could resume litigation in the court on the basis of violation of the antitrust laws.

That, of course, was the second independent ground upon which we predicated our motion to dismiss. We were not relying exclusively on the existence of 408 orders.

The Court: Obviously.

Mr. Davis: To answer the suggestion of your Honor, we do—of course, if the complaint is to continue to be litigated, we are not asking to be stayed in our counterclaims,

and that is something I will have to think through between now and Friday.

As far as our pursuing our procedure before the CAB, we do not think we have any choice on that.

The Court: Well, I don't know what I can do about your motion. You have noticed it at least for Friday at 4 o'clock. I am in the [24866] ninth week of this criminal trial so I am tied up from 10 until 5 every day, except this afternoon, when we had this lucky break.

If you want your decision out on your motion to dismiss to show the Court of Appeals what I said, it is physically impossible to take this up.

Mr. Davis: I appreciate that.

May I suggest that the matter be left in abeyance, but tomorrow I will make an effort to also make a decision and take whatever action I am advised to take—either tomorrow or Friday—but I will advise the parties with respect to this Los Angeles date so that——

The Court: May I take your motion and hold it in abeyance and have argument on it?

Mr. Davis: Any time convenient to your Honor.

The Court: Mr. Hupper is not satisfied.

Mr. Hupper: Isn't it perfectly plain what Mr. Davis is trying to do here? He is going to have a decision some time Friday from the Court [24867] of Appeals on whether or not there is any merit to his attempt to get appellate review. At that point he will have something else which he can wave in front of you or some other court which he will use as a basis for arguing that the deposition of Hughes should not go ahead on Monday. There are still unresolved questions——

The Court: Will you agree, Mr. Hupper, if the Court of Appeals stays my determination, that you are not going to run out to Los Angeles Monday?

Mr. Hupper: I would not agree to that as a matter of law for this reason: The charges made against us in this CAB proceeding are quite entirely different than the charges made by the TWA people against the Tool Company completely. We have an additional question here which is a matter of discretion.

We have, for over a year or almost a year now, been engaged in this case, brought in by Toolco against our will, the Tool Company asserting claims of over $330 million against us and alleging that this court had jurisdiction over those counterclaims, and we have——

The Court: Mr. Davis said Panagra did [24867-A] not come down until——

Mr. Hupper: That is not applicable here at all. That involved Section 411.

The Court: I read it four times. Don't tell me that.

Mr. Hupper: It has not the slightest thing to do with this. We are not air carriers and we are not engaged in air transportation. It has nothing to do with this case. There is not a possible basis for it.

What Mr. Davis is doing here is using this motion as a basis after a year of dragging us down the garden path and making us spend hundreds of thousands as a last ditch attempt to stave off the deposition of Hughes.

We have a right to examine Mr. Hughes independently of whatever his position in that complaint is. As a matter of discretion we feel you ought to permit us to go forward on that examination if only for the fact that it would enable us perhaps to adduce facts which would be helpful to you in determining whether or not you have jurisdiction over the subject matter.

Pretrial Hearing, February 6, 1963

The Court: Mr. Davis, do you intend to [24868] pursue your counterclaims?

Mr. Davis: Not until we have a determination from the CAB.

The Court: In other words, you want to stay any proceedings regarding the counterclaims in this court until the CAB has spoken first?

Mr. Davis: That is our understanding of what the Supreme Court has held.

Of course, if I am told in some final manner that I am wrong in that regard, I want to be able to resume. That is our understanding of the Panagra case. It is a basis for our motion to dismiss. It will be the basis on which we will try to obtain a review at this time and therefore I don't understand why a defendant is so anxious to be prosecuted if I am willing to stay my claims against the additional defendants. So far as the facts in their petition, they are set forth in these proceedings before the CAB.

I fail to understand every time being accused of following some procedure for some improper motive. What is the motive of the additional defendants in feeling that they want to examine Mr. Hughes to defend themselves and I am permitted to [24869] keep their claim in abeyance until the CAB can make a ruling? Perhaps Mr. Hupper can explain it more clearly.

The Court: We will have to take Mr. Stewart first. This is his chance to be not the last man.

Mr. Stewart: Mr. Davis, as far as the additional defendant Dillon Read is concerned, for the first time in this case, after having been in it for a year, we have the opportunity presumably to prove that the counterclaims which are brought against us are absolutely baseless. It

is particularly compelling because this co-called complaint which Mr. Davis has brought before the CAB is absolutely meaningless as far as we are concerned.

Dillon Read is not an air carrier; it is not engaged in a phase of aeronautics, nor does he claim that we are so engaged. Nothing that the CAB says or does not say can affect us in any way.

We have no interlocking directorates and nobody in Dillon Read is on the board of Pan American or TWA or the Metropolitan or the Equitable. There is no possible way in which we can come into Section 411, which deals with unfair competition among air [24870] carriers. Nothing that the CAB decides in this complaint can affect us in any way.

For the first time in this litigation we have come close to being able to prove there is nothing to the charges in his counterclaim, and I suggest it is absurd for him to want to stay on the counterclaims he brought, bringing us into this action, at this particular juncture. I ask your Honor to deny it from the bench.

The Court: There are other problems in the CAB proceeding, are there not, Mr. Davis? You allege that Pan American World Airways and Mr. Juan Trippe were also co-conspirators during this whole time with the additional defendants named in your counterclaim.

Mr. Davis: There is no question, your Honor. Subsequent to the filing of our counterclaims I discovered additional facts which I am bringing to the attention of the CAB.

There is no question, however, that the course of conduct involved, which is a matter of concern, primary concern, to the CAB, is the same whether or not the addi-

tional defendants are limited or expanded by one more or less. The question [24871] basically is whether or not the CAB—for all I know, although I don't believe so, the CAB may approve this interlocking relationship between Metropolitan and Pan American. That is where we get into the question of where I am disagreeing with your conclusions.

It is clear to me, as the Supreme Court said, we are in a peculiar situation if on the one hand the Court were to entertain whether or not a course of conduct was or was not in violation of the antitrust laws and then the CAB should turn around and approve it and specifically grant exemption under 414, even though they never did it before.

The Court: Is the issue of whether any of the parties named in the complaint before the CAB are engaged in a phase of aeronautics a question for the CAB or for the Court under the counterclaim?

Mr. Davis: We allege and claim that they are engaged in a phase of aeronautics. The CAB has any number of decisions as to what they claim is a phase of aeronautics. I believe it is a question for the CAB to determine, subject to judicial review by the Court of Appeals.

There is no question; the Act uses a [24872] phrase "a phase of aeronautics," and there again we come to the question as to how we construe the Supreme Court direction or mandate which said the Act must be construed broadly and must be intended to empower the Board to correct the evils inherent in whatever it deals with.

There is no question but by 409, interlocking directorate relationship, and there is no question under 408, the Congress intended that agency to control and regulate the relationship between a person engaged in "a phase of aeronau-

tics" and an air carrier and transactions between them and what they do to each other.

You emasculate 408 if some independent such as the Court is going to define what a phase of aeronautics is or is not. There is no question of judicial review as to what the Board may determine. I don't have any question in my mind. I may be in the minority here today, but it is at least the primary jurisdiction, the expertise of the CAB, to determine in the first instance what they regard as a phase of aeronautics.

I know that throughout the years since the Act was passed a great many people have argued [24873] before the CAB that the kind of activities they were engaged in were not the manufacture of aircraft or parts of aircraft and therefore outside of the control of the CAB, and therefore they could do what they wanted to do, and CAB has rejected those arguments on a number of occasions and has developed CAB law as to what they claim constitutes a phase of aeronautics. That is unquestionably involved here.

Go back to reasons why I did what I have done and how things change. There is no question in my mind that the Panagra decision of the Supreme Court expanded what I was contending for prior to the Panagra decision.

If your Honor will recall I was accepting the decision of Judge Murphy in the Panagra case where he had excluded from the jurisdiction of the Court that area which had been covered by orders of the CAB, leaving to the CAB to interpret its own orders as to whether or not it did cover the conduct that was alleged.

The Court: He only went ahead, as I understand it, on the charge that Pan American had prevented Panagra from applying for additional routes [24874] from the Canal Zone to the United States.

Mr. Davis: That's correct. Before Judge Murphy the contention—there were two aspects of the claim. One was that one which was predicated upon an agreement between Grace and Pan American entered into before the Civil Aeronautics Act was adopted and therefore protected by the grandfather concept, and there were alleged violations of the antitrust laws by reason of the fact that control had been exercised over the air carrier in the use of ticket offices and some other things which were subject to orders of the CAB.

In our earlier brief back in August of 1961, I think it was, I was arguing that Judge Murphy had recognized the primary jurisdiction of CAB, leaving to the CAB the interpretation of its own orders as to what it was approving or not approving, because the CAB had acted in that area but assumed jurisdiction in the area they had not acted and at that time believed it could not act, namely, this exercise of control over Panagra and how the routes were being divided.

The Supreme Court came down and said that even in the area in which the CAB had not acted [24875] and in fact an area which the CAB did not believe it could act, nonetheless it said, "We are going to construe the Act so broadly as to infer a power in CAB to do something about this kind of exercise of control," dismissed the complaint, and this was a matter that CAB should act in.

That does not mean necessarily there has not been a violation of antitrust laws and after the CAB has acted and has found or failed to find it is in the public interest, thereafter if someone violated the antitrust laws they will be subject to whatever remedies the antitrust laws provide.

It is our view of the matter that until that determination is made for the reason given by the Supreme Court, it

would be odd indeed if a course of conduct which could be approved by CAB under 408 could run afoul of the antitrust laws.

So our position was not—that is what I meant in my opening remarks—I was not relying as a matter of fact on what CAB had or had not obtained but only on a recognition that the authority might be in the CAB to act on it. Tomorrow they may say that the way you exercised control over it was in the public interest and we approve [24876] it. That would preclude the enforcement of antitrust violations and therefore we believe that should be determined first.

The Supreme Court said that if you are claiming damages, there is no question the CAB cannot grant you relief for damages, in that footnote in the court decision referring to the Hewitt decision; that in that situation you ought to get a determination of the violation of the law with the possibility you have a remedy of the antitrust laws and go to the court and collect your damages.

The Court: Mr. Hupper, I am sorry, I am not in a physical condition to comply with your request. I am going upstairs now to get this opinion out. I am on trial all day tomorrow. I may have to work on the opinion again tomorrow night. I hope not.

Mr. Hupper: May I express my hope, your Honor, that the argument is not set down on the motion for a stay so as to interfere with our examination of Mr. Hughes starting Monday.

The reason I say that is that we believe very firmly that we have an independent right to examine him quite apart from what happens to Mr. [24877] Sonnett. We intend to vindicate——

The Court: What do you think of Mr. Davis' argument that I don't have jurisdiction on the counterclaim as opposed to the complaint?

Mr. Hupper: I am not sure I understand what his position is, but I do——

The Court: This is very simple. He is going to take you down to Washington.

Mr. Hupper: I think the very simple reference to these counterclaims will show you how completely different they are from the claims made in the complaint. The first counterclaim——

The Court: I know.

Mr. Hupper: The only reference that has anything to do with CAB is the second counterclaim. All the others are completely different. I want to join very wholeheartedly in what Mr. Stewart said about the time and expense that we have to go through in trying to get our first witness on the stand after we had to sit through the other deposition for a year. We want to proceed with this case and prove that there is absolutely no merit to these claims against us.

The Court: Well, all I have before [24878] me is a motion returnable on Friday for a stay of the discovery proceedings. I am telling you I can't hear you on Friday. It would be impossible. I will try some time tomorrow to read the complaint filed with the CAB with greater particularity than I remember it this afternoon and try to match them up.

Mr. Hupper: Do you suppose we could set it for the 18th, which is the return date for our motion to dismiss the counterclaim?

The Court: It is all right with me.

Mr. Hupper: That's all right with us.

The Court: The 18th? That is a Monday? Certainly. Does that dispose of it?

Mr. Hupper: I guess it does. I wish we could have heard and disposed of it right away. I know your problems.

The Court: I don't see how I could possibly do it.

Mr. Hupper: There is a minor thing. You did stay, as far as the TWA people were concerned, all further discovery production until 5 o'clock tomorrow.

The Court: I will put in the additional [24879] defendants too.

Mr. Hupper: The situation is different, Judge——

The Court: Let us not argue with the stay. It extends to all the additional defendants.

Mr. Hupper: Thank you.

Mr. Sonnett: Thirty seconds, your Honor, by way of a report. I don't want to get mixed up with this other question except to say the so-called derivative counterclaim, counterclaim 3, by no legerdemain of Mr. Davis or anybody else can possibly have anything to do with the CAB, and on behalf of TWA I have a very definite interest in that counterclaim. While Mr. Davis is deciding what he means when he says they may elect in effect to cop a plea, he better realize there are derivative counterclaims asserted by him, and for him to stand up and say "We default" is not going, in the judgment of TWA, to dispose of this case, if that is the way he thinks he can dispose of it; it won't meet the problem.

The other thing is a report. I would like to file with the Court an affidavit by one of [24880] my associates and serve a copy on Mr. Davis because this relates to the additional contempt committed and fully ripened prior to 5 o'clock today arising out of their failure to comply in any

respect with your order to make a day-to-day production of so-called tax documents.

Yesterday I wrote them and asked that they produce prior to 5 o'clock today, pursuant to your order, 1961 financial statements and tax returns, and the same for 1962, on the theory they could get those in five minutes. They have declined to do so. This affidavit is an affidavit that we asked for them at 5 today and they refused to do it.

The Court: All right. Thank you, gentlemen.

Affidavit of Bruce Bromley, February 15, 1963
[4871]

[CAPTION]

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

BRUCE BROMLEY, being duly sworn, deposes and says:

I am a member of the firm of Cravath, Swaine & Moore, attorneys for The Equitable Life Assurance Society of the United States, Metropolitan Life Insurance Company, James F. Oates, Jr. and Harry C. Hagerty, additional defendants on the first five counterclaims herein. I make this affidavit in support of a motion by said additional defendants pursuant to Rules 37(b)(2), 37(d), 41(b) and 41(c) for an order dismissing the first five counter- [4872] claims herein with prejudice as to them by reason of the repeated deliberate refusals of defendant Hughes Tool Company (Toolco) to make discovery in accordance with the Rules of Civil Procedure and lawful orders of this Court. This affidavit is also submitted in support of an application for immediate entry of judgment dismissing such counterclaims pursuant to Rule 54(b) and for an express determination that there is no just reason for delay of the entry of such judgment.

BASIS FOR THE MOTION SUMMARIZED

Toolco has repeatedly refused to produce two major categories of highly relevant documents and has also refused to produce its managing agent for examination before trial by the additional defendants. On January 23, 1963, Toolco refused to produce certain allegedly privileged

documents which it had been ordered to produce under Rule 34 on several occasions, most recently by an order of this Court dated January 19, 1963. On February 1, 1963, and on each day thereafter up to and including February 11, 1963, Toolco refused to produce certain so-called tax documents which it had been ordered to produce under Rule 34 by this Court on February 1, 1963. On February 8 and February 11, 1963, Toolco and Howard R. Hughes (Hughes), Toolco's managing agent, wilfully refused and failed to appear before the Special Master for examination before trial in accordance with several previous orders of this Court, the latest of which was dated January 19, 1963. Each of said refusals was intentionally made in direct contempt of a lawful order of this Court issued in accordance with the Rules of Civil [4873] Procedure and separately and together justifies dismissal with prejudice of the counterclaims herein.

The Tremendous Burden Imposed on the Additional Defendants by Toolco's Previous Prosecution of the Counterclaims

The counterclaims were filed and the action commenced as against the additional defendants on February 13, 1962. It thereupon became necessary for counsel immediately to begin day-by-day participation in the Toolco depositions already in progress, although we had not as yet had an opportunity to examine the facts sufficiently even to file a responsive pleading. Within days my clients were required to produce tens of thousands of pages of documents for production and copying by the Toolco attorneys. Within four weeks counsel for all parties were engaged in a full-scale discovery program which in the course of the next six

months produced for inspection and copying well over a million pages of documents. During the rest of the year 1962, with intermittent interruptions, the attorneys for Toolco enjoyed the exclusive right of conducting deposition discovery before the Special Master, in all of which counsel for the additional defendants were required to attend and participate. At the same time that those depositions were going forward it was necessary for us to copy, organize, analyze and summarize the tremendous quantity of documents which had been produced in discovery proceedings by all parties. It was also necessary to prepare for the cross-examination of various witnesses undergoing direct examination by the Tool Company and, during the last several months, to prepare for the examination of Toolco by Mr. Hughes. During the last few weeks before February 8 it was necessary for us to set up a special office in Los Angeles and to transfer to it over [4874] 800 binders of documents and other material. Those steps were necessary because Toolco's counsel refused to "function" on the matter of the Hughes deposition.

In this office alone the manpower requirements for the foregoing activities have involved the services of at least a dozen lawyers, several of them on a full time basis and for others a major portion of their time, as well as the hiring of a whole battery of file clerks and the like. To my personal knowledge such activities have involved direct expense to my clients for legal fees and disbursements of several hundred thousands of dollars through the end of last year—to say nothing of the obvious tremendous inconvenience and disruption of their regular business activities.

It is in this context of the case, after the Tool Company has enjoyed exclusive deposition discovery rights for a year at great inconvenience and expense to my clients, that its

peremptory and contemptuous refusal to afford us even preliminary discovery on obvious critical factual areas must be viewed.

This Court is familiar with the so-called "positions" of Toolco which have assertedly led to its refusal to comply with discovery orders. Such asserted "positions" of Toolco neither explain nor justify Toolco's contemptuous defiance in three major areas of the lawful orders of the Court, particularly in view of the record. Moreover, on the basis of our review of documentary and other information to date (more fully described in the affidavit of William C. Chanler), it is perfectly clear to me that the real reason for Toolco's refusal to make discovery is the certainty that such discovery would demonstrate that the counterclaims are merely a smokescreen designed to mask the reality of the depredations inflicted upon TWA for Toolco's own selfish purposes.

[4875] Toolco's Refusal to Produce the So-Called Privileged Documents

On February 14, 1962, the above-named additional defendants moved pursuant to Rule 34 of the Rules of Civil Procedure for an order requiring Toolco to produce for said additional defendants certain categories of documents for inspection and copying. (A copy of that motion is attached hereto as Appendix F and made a part hereof). The Special Master granted that motion on February 16, 1962 (Tr. 1482-1512 of 2/16/62). On March 15, 1962, Toolco produced certain of those documents in New York City, Houston, Texas and Los Angeles, California.

However, a number of documents admittedly called for by that Rule 34 motion and the Special Master's order

were withheld by Toolco under a claim that such documents were not subject to production because they were protected by the attorney-client privilege. Such documents were potentially of great significance to my clients' defense of the counterclaims because Toolco had for many years used its counsel as business agents and, indeed, the financing and voting trust agreements repeatedly referred to in the allegations of the counterclaims as having been forced upon Toolco as a result of my clients' alleged unlawful conduct were primarily negotiated on Toolco's behalf by its counsel. Accordingly, Toolco's claim of privilege was argued and briefed at great length before the Special Master. On April 17, 1962, the Special Master ruled that the privilege had been deliberately waived by Toolco through disclosure in several affidavits and in its pleadings and ordered such documents to be produced for the additional defendants (Tr. [4876] 4361-4391 of 4/17/62). That order of the Special Master was affirmed by this Court by order dated July 24, 1962. Thereafter, the same matter was reargued by Toolco before the Special Master on September 15, 1962. Again, the Special Master ordered the documents produced (Tr. 164-167 of 9/15/62). Again the Master's order was affirmed by the Court in its order dated January 10, 1963. In that order the Court directed that such documents be produced by 12 noon on January 14, 1963. At that time on January 14, we made specific demand on Toolco to produce those documents, but counsel for Toolco refused to make such production. It should be noted that the documents at the time of that demand were conveniently assembled in an envelope which counsel exhibited but refused to produce. (Attached hereto as Appendix A and made a part hereof is a transcript of the proceedings on January 14, 1963.)

Affidavit of Bruce Bromley, February 15, 1963

By the Court's order of January 19, 1963, Toolco was given until 12 noon on January 22, 1963 to produce the documents in question. At the Court's suggestion this date was by stipulation changed to 12 noon on January 23, 1963. Toolco attempted to obtain appellate review of the orders of January 10 and 19 and, particularly, sought a stay of that part of the orders requiring Toolco to produce the allegedly privileged documents pending such review. By stipulation we and other counsel consented to a stay of production until 5 P. M. on January 23, 1963, to enable Toolco to attempt to obtain a review and a further stay from the Court of Appeals for the Second Circuit. Such review was sought by way of notice of appeal under 28 U. S. C. § 1291 and by petition for a writ of mandamus. The appeal was dismissed on [4877] motion and the writ and stay were denied by the Court of Appeals on January 23, 1963. Accordingly, at 5 P. M. on January 23, 1963, we again demanded production of those documents and were again refused. (Attached hereto as Appendix B and made a part hereof is a copy of the transcript of the proceedings before the Special Master of January 23, 1963.)

Toolco's Refusal to Produce the So-Called Tax Documents

As a result of our study of the documents produced by Toolco on March 15, 1962, we were able to ascertain the probable existence of certain other documentary information primarily relating to Toolco's tax returns and financial statements which would, in our view, have established a complete defense to the allegations of the counterclaims. By notice of motion dated January 9, 1963, we moved for the production of such documents for inspection and copy-

ing. On January 22, 1963, the Special Master ordered Toolco to produce such documents. (The Special Master's opinion and order are annexed hereto as Appendix C and made a part hereof.) By order of February 1, 1963, this Court ordered Toolco to produce those documents on a day-to-day basis commencing on February 1, 1963, such production to be completed by February 11, 1963. As the affidavit of Donald I Strauber sworn to February 15, 1963 (attached hereto as Appendix D and made a part hereof) more fully shows, production of those documents in accordance with the Court's order was repeatedly demanded by letter and in person. Finally, on February 8, 1963, counsel for Toolco categorically refused to produce any of those documents and stated that he would not produce them [4878] (Tr. 58-9 of 2/8/63). Thus, those documents have also never been produced. Those documents also were readily available to counsel for Toolco. Indeed, I am informed that certain of the documents which Toolco was ordered to produce were exhibited to the Special Master on February 6, 1963.

Toolco's Refusal to Produce Its Managing Agent, Howard R. Hughes, for Examination

By notices dated February 14, 1962, the day after this action was commenced against the additional defendants, we noticed the deposition of Toolco by Hughes, its managing agent, for February 21, 1962. (Copies of those notices are annexed hereto as Appendix E and made a part hereof. See also Tr. 1099 *et seq.* of 2/14/62 and Tr. 1108 *et seq.* of 2/15/62 where service of such notices was acknowledged by counsel for Toolco.) The prompt examination of Hughes was critical to our defense against the

counterclaims, since not only was it Hughes' creature, Toolco, which had instigated the litigation against my clients, but it was the activities and eccentricities of Hughes which necessitated the financial and voting trust arrangements which were challenged by Toolco in its counterclaims.

Toolco has never challenged the right of the additional defendants to examine it through Hughes as managing agent, although it has consistently sought to postpone such examination to some undetermined future date.

On the strength of the chronological priority of the notices of February 14, 1962, the additional defendants moved for priority of discovery with respect to the allegations of the counterclaims. That motion was denied by the [4879] Special Master on February 16, 1962 (Tr. 1514-1515). The additional defendants appealed that ruling to this Court. By order of March 5, 1962, this Court granted the application of the additional defendants by modifying the deposition schedule in its previous order of February 7, 1962 (entered before institution of the counterclaims), to the following extent:

> "Defendant Hughes Tool Company may continue the depositions scheduled, limited, however, to evidence which bears on plaintiff's claims against Hughes Tool Company. Since a Special Master is presiding over the depositions on a day-to-day basis, he will see to the application of this limitation. Upon completion of this phase of defendant's depositions, the plaintiff shall proceed with its depositions in the order provided in the pretrial order of February 7, 1962. *The additional defendants may participate in such depositions conducted by plaintiff, in furtherance of their own deposition proceedings,*

> *or may separately schedule such depositions to follow upon the completion of plaintiff's depositions.* At the conclusion of the deposition proceedings by the additional defendants, the defendant Hughes Tool Company may then resume and complete its deposition proceedings." (Emphasis added.)

Thereafter, on September 6, 1962, Chester C. Davis, counsel for Toolco, accepted service of a subpoena duces tecum for Hughes as a witness on behalf of plaintiff, TWA, returnable on September 24, 1962, at the United States District Court House in Los Angeles, California. On September 15, 1962, the additional defendants joined in an application by TWA to the Special Master to suspend the then existing examination schedule so that the deposition of Hughes could be taken commencing on September 24, 1962 (Tr. 63-75 of 9/15/62). The Special Master denied that application. However, at that time the Master said in part:

> [4880] ". . . I am satisfied that there was authority for the service of the subpoena.
>
> "That the subpoena is binding upon Mr. Hughes, and as I construe the subpoena, it is binding upon Mr. Hughes to appear on September 24, 1962, or in the alternative, as fixed by the Court at any other time that the Court lawfully orders Mr. Hughes to appear in the courthouse at Los Angeles.
>
> "I feel that there is such a close connection between Mr. Hughes, as evidenced by some of the documents that I have seen, and the fact that he is the sole owner of the Hughes Tool Company, that the

Hughes Tool Company is responsible for Mr. Hughes with regard to this subpoena . . ." (Tr. 98.)

That order of the Special Master was appealed and on September 21, 1962, this Court issued an order affirming the Special Master and adjourning the date of the Hughes deposition to October 29, 1962. The Court went on to say:

"However, in connection with this denial the Special Master directed Chester C. Davis to write to Howard R. Hughes and inform him that the Special Master considered that the subpoena is binding upon Mr. Hughes and that he is subject to appear pursuant to that subpoena on September 24th, 1962 or at any other date fixed by the court. The Special Master stated for reasons set forth in the record that unless Howard R. Hughes communicated with him by today, Friday, September 21st, 1962 he would consider that Mr. Hughes has acquiesced in this interpretation and that if Mr. Hughes subsequently either attacked the validity of the subpoena on September 24th, 1962, or at any future time that the court might direct for the taking of the deposition of Mr. Hughes pursuant to that subpoena, he, the Special Master, would consider the imposition of sanctions upon the Tool Company, and that he would entertain a motion to strike the answer of the Tool Company and enter judgment against it.

"Without passing upon the power of the Special Master to grant the entry of such judgment, the court adopts the interpretation and conditions expressed by the Special Master. Any determination

by the Special Master on the application for a default judgment would, of course, be reviewable upon appeal to the court.

[4881] "On the hearing of this appeal the court inquired of Chester C. Davis as to whether he had followed the directions of the Special Master. Mr. Davis advised the court that he had written to Howard R. Hughes on Monday, September 17th, 1962, and enclosed the pages of the transcript of the hearing before the Special Master on September 15th, 1962 which contained the views of the Special Master. Howard R. Hughes has neither communicated with the Special Master nor the court as of 5:30 p.m. today, which is the end of the business day. Therefore, I find that Mr. Hughes has acquiesced in the interpretation and conditions expressed by the Special Master."

On February 8, 1963, counsel for Toolco stated with respect to the above rulings of the Special Master ". . . the Tool Company did not seek a review of those rulings of the special master by the Court and accepted in effect the responsibility placed upon it by that ruling." (Tr. 9 of 2/8/63).

On October 25, 1962, Toolco sought to adjourn the date for the examination of Hughes beyond October 29, 1962. We opposed that adjournment and asked that a firm date be set for our examination of Hughes (Tr. 48-50 of 10/25/62). The Special Master granted Toolco's application for adjournment, but set February 11, 1963, as a firm date for the Hughes examination (Tr. 53-63 of 10/25/62). At that time the Special Master fixed ten days from that

date as the time for any party to appeal from the order setting the Hughes deposition for February 11, 1963 (Tr. 72 of 10/25/62). Toolco did not appeal.

On December 11, 1962, Toolco brought on before the Special Master a motion to interpose the depositions of A. L. Wadsworth and Ben-Fleming Sessel before the deposition of Hughes. On December 28, 1962, the Special Master rejected that maneuver by Toolco, stating "I am now denying the [4882] application and motion of the Tool Company to depose Mr. Sessel and the Irving Trust Company by Mr. Sessel and Mr. Wadsworth and Dillon, Read & Company, Inc. at any time prior to taking of the deposition of Howard R. Hughes, which is to begin on February 11, 1963." (Tr. 11 of 12/28/62). At the same time the Master referred to his order of October 25, 1962, to clarify it so "that there may be no valid basis for misunderstanding it". (Tr. 8). Toolco then appealed the Master's decision to this Court.

In its order of January 10, 1963, this Court, among other things, affirmed the Master's ruling with respect to the Sessel and Wadsworth depositions and concluded (P. 3) that "the deposition of Howard R. Hughes by the plaintiff and the additional defendants should now go forward". Following the entry of that order, Toolco undertook a variety of stratagems transparently designed further to postpone the date for the Hughes examination, *e.g.*, Toolco's motion to dismiss the complaint; Toolco's "appeal" to the Second Circuit and its petition for a writ of mandamus; and Toolco's motion to stay prosecution of the counterclaims on the basis of its hurried commencement of a proceeding before the Civil Aeronautics Board in order, as this Court noted, "to see if what we claim is

wrong is really allright" (Tr. 27 of 2/8/63). All such diversionary efforts were unavailing. Finally, on February 8, 1963, counsel for Toolco, although accepting on behalf of Toolco the complete responsibility for producing Hughes in response to the notices of the additional defendants and the subpoena of TWA, refused to produce Hughes for either purpose (Tr. 1-63 of 2/8/63).

[4883] CONCLUSION

It is submitted that each separate refusal of Toolco to make discovery, in defiance of the orders of this Court, is independently more than sufficient justification for dismissal of the first five counterclaims with prejudice. It is also submitted that there is no just reason for delay in the entry of such a final judgment.

(Sworn to by Bruce Bromley on February 15, 1963.)

Affidavit of William C. Chanler, February 15, 1963

[4955]

[CAPTION]

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

WILLIAM C. CHANLER, being duly sworn, deposes and says:

I am a member of the firm of Winthrop, Stimson, Putnam & Roberts, attorneys for additional defendants Irving Trust Company and Ben-Fleming Sessel in the above-entitled case. I make this affidavit in support of the motion of said additional defendants pursuant to Rules 37(b)(2), 37(d), 41(b) and 41(c) of the Federal Rules of Civil Procedure, for an order dismissing with prejudice the counterclaims asserted against them herein by defendant Hughes Tool Company (Toolco), on the ground of Toolco's willful failure [4956] and refusal to comply with orders of this Court pertaining to discovery proceedings herein. I also make this affidavit in support of an application for the immediate entry of a final judgment of dismissal of the counterclaims, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

I have read the affidavit of Bruce Bromley which is submitted in support of the motion of the additional defendants, and I adopt the statements therein contained with respect to the procedural history of Toolco's defiance of discovery orders of this Court. I would also note that my clients have also incurred huge expenditures in defense of this lawsuit from the time they were brought in as additional defendants in February of 1962.

Affidavit of William C. Chanler, February 15, 1963

It is appropriate for me to observe that a notice to take the deposition of Toolco by Howard R. Hughes, its Managing Agent, was served and filed on behalf of my clients on or about February 23, 1962. A copy of this notice is annexed hereto as Exhibit A and made a part hereof. A motion for the production of documents by Toolco pursuant to Rule 34 of the Federal Rules of Civil Procedure was served and filed on behalf of my clients on or about February 26, 1962, and was granted by the Special Master on March 6, 1962 (Tr. 2760). Finally, my clients joined in the motion for the production by Toolco of the "tax" documents pursuant to Rule 34 (see Tr. of January 17, 1963, p. 24).

Thus, it is clear that Toolco's failure to proceed with the deposition of Hughes, its failure and refusal to produce documents pursuant to Rule 34 which were held not to be protected by the attorney-client privilege, and its failure and refusal to produce the "tax" documents, were in [4957] violation of the right to discovery afforded to my clients by the orders of this Court. Toolco's wilful and deliberate default in making discovery to my clients fully warrants the dismissal with prejudice of the counterclaims asserted against them.

Toolco has attempted to justify these defaults by an alleged eleventh hour discovery (after over a year of expensive and burdensome litigation) that its counterclaims should have been referred to the CAB at the outset, and by its assertion that the expense of further litigation will exceed the amount of damages recoverable from Toolco by plaintiff. It is quite apparent from evidence now in the possession of the additional defendants that these contentions are frivolous and sham, and are advanced in a patent attempt to conceal the true reason why Toolco has refused

to proceed. That reason is that the documents and testimony which Toolco has refused to produce in accordance with this Court's orders would conclusively establish that the delays in obtaining financing and necessary flight equipment, which Toolco's counterclaims allege caused damage to TWA in an amount exceeding $45,000,000, were the direct result of a deliberate and carefully planned scheme by Toolco and Hughes to reap millions of dollars in profits and tax savings at the expense of TWA, and were not caused by the additional defendants as alleged in the counterclaims (See, e.g., opinion and order of Special [4958] Master dated January 22, 1963 attached as Appendix C to the affidavit of Bruce Bromley).

(Sworn to by William C. Chanler on February 15, 1963.)

[fol. 4970]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
61 CIV. 2324

TRANS WORLD AIRLINES, INC., Plaintiff,

—against—

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY, Defendants,

—and—

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, METROPOLITAN LIFE INSURANCE COMPANY, IRVING TRUST COMPANY, ERNEST R. BREECH, DILLON, READ & CO. INC., BEN-FLEMING SESSEL, JAMES F. OATES, JR., HARRY C. HAGERTY and CHARLES C. TILLINGHAST, JR., Additional Defendants on Counterclaims.

ORDER TO SHOW CAUSE—February 16, 1963

On the pleadings, the pre-trial orders of this Court entered herein, the annexed affidavit of John F. Sonnett dated February 15, 1963, and on all the other proceedings heretofore had and papers heretofore filed herein, and good and sufficient reasons appearing therefor, it is

Order to Show Cause, February 16, 1963 and Affidavit of John Sonnett, February 15, 1963

Ordered that defendants Hughes Tool Company and Raymond M. Holliday show cause before this Court at 5 P.M. o'clock on February 21, 1963, in Room 1305 of the United States Court House, Foley Square, New York, New York, or as soon thereafter as counsel can be heard, why an order should not be issued herein;

[fol. 4971] A. Providing that the complaint be amended by striking the third numbered paragraph of Section I of the prayer which follows paragraph 70 of the complaint and substituting therefor a new numbered paragraph 3 reading as follows:

"That the defendants pay to plaintiff $135,000,000, or such other sum as shall be three times the damages sustained by plaintiff, together with costs and attorneys' fees;",

and further providing that the answer of defendant Hughes Tool Company, served and filed February 13, 1962, and the answer of defendant Raymond M. Holliday, served and filed March 26, 1962, shall each be deemed to relate to the complaint as so amended; and

B. Severing from these proceedings, from and after the date of such order, the claims herein made by plaintiff TWA against defendant Raymond M. Holliday; and

It Is Further Ordered that defendant Hughes Tool Company show cause before this Court at the same time and place why an order should not be issued herein:

C. Entering, pursuant to Rules 37(b), 37(d) and 55(b)(2) of the Federal Rules of Civil Procedure, a judgment by default against defendant Hughes Tool Company in favor of plaintiff on its complaint;

D. Adjudging and decreeing that defendant Hughes [fol. 4972] Tool Company, by the conduct alleged in the complaint, has violated Sections 1 and 2 of the Sherman Act, Section 7 of the Clayton Act, and, with respect to the First Claim for relief only, Section 3 of

the Clayton Act and, with respect to the Third Claim for Relief, has maliciously and wilfully injured the business of plaintiff, and that Hughes Tool Company thereby has caused the injuries to plaintiff alleged in the complaint;

E. Adjudging and decreeing that defendant Hughes Tool Company shall divest itself of all right, title or interest in the stock of plaintiff;

F. Directing that defendant Hughes Tool Company present to this Court within 30 days from the date of such order, for the consideration of this Court in framing the final decree and judgment to be entered herein, a plan providing for divestiture by sale to the public through a bona fide public offering, within a period ending no later than one year from the date of such order, of all right, title or interest of defendant Hughes Tool Company in or relating to the stock of plaintiff, and providing that thereafter plaintiff shall have 30 days within which to submit to this Court, if it shall be so advised, proposed amendments or modifications to such plan or a proposed alternative plan; and enjoining, until such time that this Court shall have found that the divestiture by Hughes Tool Company of all its right, title or interest in or relating to the [fol. 4973] stock of TWA shall have been fully effectuated in accordance with a plan approved by this Court, defendant Hughes Tool Company, its directors, officers and employees, and all persons in active concert or participation with them who receive actual notice of such injunction, from interfering with, attacking or otherwise impairing or attempting to impair the existence, operation or validity of the voting trust established by execution of an agreement entered into by defendant Hughes Tool Company, the plaintiff, and three voting trustees, and dated as of December 15, 1960; and

G. Setting an early date for a hearing to be held before this Court solely for the determination of the amount of the damages to be paid by defendant Hughes

Order to Show Cause, February 16, 1963 and Affidavit of John Sonnett, February 15, 1963

Tool Company to plaintiff by reason of the injuries alleged in the complaint to have been caused by Hughes Tool Company, together with the plaintiff's costs of suit and attorneys' fees; and

It Is Further Ordered that defendant Hughes Tool Company show cause before this Court at the same time and place why an order should not be issued herein:

H. Dismissing as against plaintiff TWA, with prejudice, pursuant to Rules 37(b), 37(d), 41(b) and 41(c) of the Federal Rules of Civil Procedure, each and every counterclaim asserted in the answer and [fol. 4974] counterclaims of defendant Hughes Tool Company served and filed February 13, 1962; and

I. Enjoining defendant Hughes Tool Company, its directors, officers and employees, and all persons in active concert or participation with them who receive actual notice of such injunction, from instituting or threatening to institute or causing to be instituted in any court in any jurisdiction within the United States any suit in which plaintiff, its directors, officers or employees, or any of them is a party and which contains or is based upon the allegations which are contained in said counterclaims of defendant Hughes Tool Company and from instituting or threatening to institute or causing to be instituted in any administrative or other agency within the United States any proceeding in which plaintiff, its directors, officers or employees, or any of them is a party and which is based upon such allegations; and

It Is Further Ordered that service of this order to show cause, together with a copy of the affidavit in support of this order, on Chester C. Davis, Esq., attorney for defendant Hughes Tool Company, on or before the 18th day of February, 1963, at 10 A. M. shall be deemed due and timely service.

Charles M. Meltzner, U.S.D.J.

Dated: New York, N. Y., February 16th, 1963.

Order to Show Cause, February 16, 1963 and Affidavit of John Sonnett, February 15, 1963

[fol. 4975]

ATTACHMENT TO ORDER

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 CIV. 2324

TRANS WORLD AIRLINES, INC., Plaintiff,

—against—

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY, Defendants,

—and—

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, METROPOLITAN LIFE INSURANCE COMPANY, IRVING TRUST COMPANY, ERNEST R. BREECH, DILLON, READ & CO. INC., BEN-FLEMING SESSEL, JAMES F. OATES, JR., HARRY C. HAGERTY and CHARLES C. TILLINGHAST, JR., Additional Defendants on Counterclaims.

AFFIDAVIT

State of New York,
County of New York, ss.:

John F. Sonnett, being duly sworn, deposes and says:

1. I am a member of the firm of Cahill, Gordon, Reindel & Ohl, attorneys for the plaintiff Trans World Airlines, Inc. ("TWA"), and am familiar with the prior proceedings had herein. This affidavit is submitted in support of plaintiff's application for an order to show cause seeking the issuance herein of certain orders set forth in such application and more fully described below. This motion is brought on by an order to show cause because of the paramount importance of an early determination of the rights of TWA in the present posture of this litigation.

[fol. 4976]

2. An order is requested amending the complaint herein with respect to the First Claim for Relief to pray for

judgment of $135,000,000 or such other amount as shall [redacted] threefold the damages suffered by TWA (instead of $105,000,000). (Paragraph A, Order to Show Cause.) As is stated in paragraph 54 of the complaint as filed, the figure of $35,000,000 was plaintiff's then first estimate of the minimum amount in which TWA had been damaged by defendants' wrongful acts. Subsequently defendant Hughes Tool Company ("Toolco") in its verified answer and counterclaims filed February 13, 1962 has estimated (paragraph 99) that TWA was damaged in excess of $45,000,000, the factors of damage listed (paragraph 98) [redacted]ng the same as the primary factors of damage listed in the complaint. Defendant Toolco, together with defendants Hughes and Holliday, was in control of TWA throughout most of the period when the damage was being suffered.

3. As I stated to the Court on February 8, 1963, our investigations have led us to the conclusion that the damages suffered by reason of the injury to TWA alleged in the First Claim for Relief in fact exceed $45,000,000. After trebling of this amount and addition of the more than $10,000,000 in damages prayed for in the Third Claim for Relief, TWA's total prayer for damages exceeds $145,000,000.

4. Since the filing of the complaint, the leading engineering firm of Coverdale & Colpitts has been retained to make a study to determine TWA's loss of net operating profits resulting (a) from delay in the delivery of 20 Convair 880 jet aircraft which TWA eventually got (Complaint, para- [fol. 4977] graphs 17 and 19), (b) from the diversion of 6 Convair 880's to Northeast Airlines (Complaint, paragraph 22), and (c) from the diversion of 6 Boeing 707's to Pan American World Airways (Complaint, paragraph 18). After months of intensive effort, Coverdale & Colpitts has completed its study of this matter and has advised that, in its opinion, the loss to TWA of net operating profits through delay in the delivery of the 20 Convair 880's was approximately $14,700,000; from the diversion of 6 Convair 880's to Northeast Airlines, approximately $9,000,000; and from the diversion of the 6 Boeing 707's to Pan American, approximately $20,000,000, or a total of $43,700,000.

Order to Show Cause, February 16, 1963 and Affidavit of John Sonnett, February 15, 1963

5. Other damages suffered by TWA through defendants' acts alleged in the First Claim for Relief are still under study, including particularly the increased costs to TWA of borrowing in 1960, due (a) to the general increase in the cost of money, and (b) to the change in TWA's financial condition which made it an inferior financial risk in 1960 from the standpoint of a lender. It is believed that such damage and the other factors of damage referred to in the First Claim for Relief of the complaint will increase the amount of TWA's loss when finally ascertained to substantially in excess of $45,000,000.

6. No rights or interests of defendants will be infringed by the requested amendment of the prayer for relief since the denials contained in the answers of both defendants who are now parties can be deemed to apply to the complaint as amended in accordance with this request.

[fol. 4978] 7. An order directing the severance from this cause of TWA's claim against defendant Holliday is requested (Paragraph B, Order to Show Cause), because it appears that Holliday has not yet chosen the course of deliberate, intentional and wilful default. On the other hand, plaintiff is entitled to maintain its claims against Holliday, and to the benefit of the prior proceedings herein insofar as they relate to those claims, at least until its claims against Toolco have been finally disposed of and the judgment thereon in favor of TWA has been satisfied. A severance is the simplest means of preserving the rights and present positions of the parties.

8. The next category of orders requested by plaintiff relates to entry of a default judgment in TWA's favor against Toolco for the relief requested in the complaint (Paragraphs C-G, Order to Show Cause).

9. The Court is fully familiar with the record of wilful, deliberate and intentional refusal on the part of Toolco to comply with the Court's orders, culminating in its direct and express refusal, first through a "Notice of Position" served and filed February 8, 1963, and thereafter on the record in open court at a hearing before this Court held the same day:

(a) to produce documents ordered to be produced by this Court's order of January 10, 1963, reaffirmed in this Court's order of January 19, 1963, an appeal from which orders was dismissed by the Court of Appeals for this Circuit on January 23, 1963, and as to which all stays have long expired, (b) to produce documents ordered to be produced by this [fol. 4979] Court's order of February 1, 1963, as to which all stays have expired, (c) to submit to any further discovery whatsoever in this action on behalf of plaintiff TWA, and (d) to produce a witness for examination before trial pursuant to the order of this Court, Toolco having expressly and with full knowledge of the consequences accepted the duty and obligation to produce such witness, and neither inability to produce such witness nor any other legal excuse for such refusal being presented.

10. As the record stands, there can be no question but that on the consent of Hughes Tool Company, and based on this series of deliberate defaults, plaintiff is entitled to apply to this Court for a judgment in its favor for the relief sought in the complaint. (See Transcript of Hearing, February 8, 1963, pp. 62-63.) Defendant Toolco now stands charged by the complaint with violations of the antitrust laws and (in the Third Claim for Relief) with intentional tortious interference with TWA's business relations. It has deliberately placed itself in the position, by refusing to defend against those charges, of admitting their accuracy.

11. The legal theory upon which plaintiff here proceeds is well established and indeed long predates the adoption of the Federal Rules of Civil Procedure in which it is now clearly embodied. It rests upon the "presumption that the refusal to produce evidence material to the administration of due process [is] but an admission of the want of merit in the asserted defense." *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322, 351 (1909).

[fol. 4980] 12. By thus wilfully and deliberately refusing to comply with the orders of this Court, Toolco must, it is respectfully submitted, be presumed to have admitted the want of merit in any defense it might assert to the complaint. It has intentionally and with due reflection elected

to default rather than let the truth come out. By so electing, Toolco has irrevocably abandoned any right to contest hereafter any allegation of the complaint, except as to the exact amount of money which it is to pay over to TWA for the injury it has admittedly caused TWA, and has abandoned as well any and all alleged defenses.

13. On previous motions in this cause, and particularly in connection with Toolco's motion to dismiss the complaint which this Court denied on February 6, 1963 (the opinion on which was filed February 7, 1963), we presented to this Court not only evidence of the legal merits of TWA's charges against the defendants, but evidence that the conduct of defendants was so deliberately and intentionally wrongful to TWA that, it is respectfully submitted, the wrong cannot be remedied without granting plaintiff both the divestiture and the injunctions which it seeks. The Court is respectfully referred to my previous affidavit dated February 1, 1963 and to the exhibits (A through D) filed in connection therewith, all of which are incorporated herein as if fully set forth in this affidavit, for evidence both of the wilful character of these wrongs and of the blatant nature of the violations of Sections 1 and 2 of the Sherman Act and of Section 7 of the Clayton Act charged in the complaint. The Supreme Court has held that divestiture is the specific and [fol. 4981] most appropriate remedy for such violations. *United States* v. *E.I. DuPont de Nemours & Co.*, 366 U.S. 316 (1961). It is submitted that, on the now indisputable violations of the antitrust laws set forth in the complaint, under the *DuPont* decision divestiture is not only appropriate but required.

14. Beyond this, even on the basis of the limited documentary discovery which TWA has had since it filed its complaint, the record herein contains compelling evidence of the need for divestiture. To cite but a few examples, Hughes, in November 1960, told an important Convair figure [Crown] that in return for financial support in staving off the Dillon, Read financing plan, Hughes would have TWA meet its future aircraft needs by purchases from Convair (Exhibit A19 to my affidavit of February 1, 1963).

Order to Show Cause, February 16, 1963 and Affidavit of John Sonnett, February 15, 1963

In February 1961 (after the voting trust had gone into effect) Hughes was questioned by Holliday and Convair about his intentions with respect to 13 Convair 990 aircraft then on order by Toolco (7 of which had been ordered after the voting trust took effect); Hughes said "It is not up to Convair to decide whether TWA will accept the so-called 97% of the airplanes. This has never been a matter for discussion. However I obtain TWA acceptance to this is my own problem; most likely HTCo will control TWA when that matter comes up" (Exhibit A35). The defendants' efforts to force these aircraft upon TWA are reflected in the report of a conference between Toolco's counsel and Dillon, Read in May 1961: "[Davis] said that we should know that his client had every intention of doing everything he could to 'bust up the Boeing deal'" (Exhibit A45). Similarly, it is patent from the other documents which make [fol. 4982] up Exhibit A that the defendants habitually exercised the unbridled power to determine when, if ever, how many, how, what and from whom aircraft were to be acquired by TWA. The Leslie "Appreciation" and Bew affidavit (Exhibits B and C to my affidavit of February 1, 1963) provide further evidence of how Toolco and the other defendants dealt with TWA and why divestiture is absolutely necessary herein.

15. Merely ordering that Toolco divest itself of all right, title or interest in TWA's stock by a sale to the public within one year is not, as experience has unfortunately and clearly demonstrated, the complete answer. Pending permanent removal of this incubus from this great airline, TWA must be free to act without those restraints and that interference which has heretofore characterized the conduct toward TWA of Toolco and those acting in concert with it. For this reason, it is submitted that Toolco must, during the interim period before divestiture is finally effectuated, be enjoined from interfering with, attacking or otherwise impairing or attempting to impair the existence, operation and validity of the voting trust which was agreed to by Toolco and which was intended to free, but has not fully freed, TWA from the vicious influence exerted by the defendants over its affairs (Paragraph F, Order to Show

Cause). Such relief would appear to be the minimum required to assure cessation by Toolco and those acting in concert with it of the wrongful acts of which they now have admitted guilt.

[fol. 4983] 16. TWA requests that a date be now fixed for the hearing on its damages before this Court (Paragraph G, Order to Show Cause). Plaintiff will be obligated to present evidence as to several different types of damage which will require it to arrange for a number of witnesses, including expert witnesses. Our present estimate is that the hearing for calculation of TWA's damages, costs and counsel fees should require no more than ten trial days, assuming reasonable cross examination of plaintiff's witnesses. The schedule to be followed in preparing for this hearing should be fixed at this time, and it is respectfully submitted that TWA's financial needs and the importance to it of securing the redress to which it is entitled are such that the date fixed should be as early as is practicable, in view of the Court's schedule, and, if possible, about one month from now.

17. The final category of orders requested by TWA relates to dismissal, with prejudice, of Toolco's counterclaims against TWA and certain injunctive relief in connection therewith (Paragraphs H and I, Order to Show Cause).

18. It is respectfully submitted that the sweeping refusal of Toolco to comply with previous discovery orders and to participate in any respect in further discovery proceedings in this litigation makes dismissal with prejudice of the counterclaims, as Rules 37(b), 37(d), 41(b) and 41(c) contemplate, the apropriate relief for TWA. The requested injunction against Toolco's raising again in some other jurisdiction or before some administrative agency the same alle-
[fol. 4984] gations which it here was unwilling to pursue (when the price of such pursuit was to let the facts be known) is closely related to TWA's other needs for injunctive relief (see *e.g.*, Paragraph G, Order to Show Cause). The propensity of Toolco and those acting in concert with it to turn to numerous forums within which to harass TWA and interfere in its affairs is clearly evident from the alle-

gations of the complaint which Toolco can no longer contest. It is a propensity which, it is respectfully submitted, this Court should now curb.

19. No previous application has been made for the relief sought herein.

WHEREFORE, I respectfully request that plaintiff TWA's application be granted and an order issued in the form annexed.

John F. Sonnett

Sworn to before me this 15th day of February, 1963.

THOMAS J. CERNA
Notary Public

Thomas J. Cerna, Notary Public, State of New York, No. 41-0607760, Qualified in Queens County, Certificate filed in New York County, Term Expires March 30, 1963.

Pretrial Hearing, February 21, 1963

[24946]

[CAPTION]

Before:

HON. CHARLES M. METZNER,
District Judge.

[APPEARANCES:]

* * *

[24948] The Court: Mr. Barr, I assume that this letter which you gave to the clerk a few minutes ago, with the attachment to it, is in relation to the motion by the additional defendants.

Mr. Barr: It is, your Honor. It merely refers to the documents, and they are not in the courtroom at the moment but they are outside.

The Court: That would be enough to scare anybody.

Mr. Davis: May I ask if that was a letter as to which the Tool Company should be aware?

The Court: A copy of this letter and index will be furnished to each counsel, it says.

Mr. Barr: That is right, your Honor. That is a list of the documents that have been on file before the special master, and I assume Mr. Davis has copies of all of them.

The Court: Have you given this to Mr. Davis?

Mr. Barr: We will, sir.

The Court: Do you want to give it to him now?

Mr. Barr: Yes, your Honor (handing to [24949] Mr. Davis).

The Court: The first think I want to dispose of is a notice of motion that was filed by the additional defendants

on January 25, 1963, returnable February 18, 1963, to dismiss with prejudice the counterclaims by the Hughes Tool Company on the ground that the Tool Company deliberately refused to comply with the order of the Court.

I assume that motion is withdrawn, and will be so marked by the Court, in view of the fact that you have embraced that as a ground of the motion returnable today to dismiss the counterclaims.

Mr. Bromley: That is right, your Honor.

The Court: I should also inform you, although you know it already, that the motion that was brought on by the Tool Company to stay the proceedings regarding the counterclaims pending an action by the CAB was denied at the time of the hearing on February 8th. That appears on page 56 of the transcript, and I have so endorsed those motion papers.

We then have a motion by the Hughes Tool Company which was filed with the Court on February 13th, at a quarter to 5, along with a notice of [24950] amendment to that notice of motion, which was filed with the Court this afternoon at 4 o'clock, which requests reargument of the Court's order and decision of February 6th and 7th, and also requests that an order be entered referring to the CAB certain questions set forth in that notice of motion, and also requests an order admitting as part of the record copies of various CAB orders in related proceedings under Section 408 of the Federal Aviation Act.

The notice of amendment of that notice of motion, which was received by the Court at 4 o'clock, requests the Court to stay all proceedings on the complaint as are directed to claims seeking an award of damages pending a final determination by the CAB as to whether the conduct of Toolco relating to equipment acquisitions and financing

of TWA was authorized, approved or required by any order of the CAB or whether such conduct was not inconsistent with the public interest and, secondly, pending a final determination by the CAB with respect to the complaint of Hughes Tool Company and request for investigation, which was filed by the Hughes Tool Company with the CAB on February 6th relating to the counterclaim.

[24951] The application for reargument is denied. The affidavit of Mr. Davis, sworn to on February 13, 1963, is not to be considered as part of this record.

Rule 9(m) of the General Rules of the Southern District requires that on a motion for reargument counsel submit to the court a memorandum setting forth wherein it feels the court erred. Such a memorandum was not submitted to the Court; and, secondly, the Court will not consider affidavits on application for reargument.

The application for an order referring certain questions to the CAB is also denied.

The application for an order admitting as part of this record certain orders of the CAB is also denied. The material that is sought to be admitted was not before the Court on the submission of the original motion and therefore will not be considered as part of that motion.

This refers to two orders of the CAB, those of '44 and 1950, known as 6 CAB 153 and 12 CAB 192. Those orders and the order of the CAB dated December 2, 1960, which is known as order No. E-161195, were considered by the Court and will be considered as part of the record.

[24952] In so far as the notice to amend the notice of motion, which I am now discussing, that motion is also denied. The Court will not stay any further proceedings in this action.

We come therefore to the motion by the plaintiff, TWA.

Mr. Davis: If your Honor please, before proceeding further, may I ask if your Honor would indicate on the record whether or not the affidavit which was annexed to the motion of February 13th, that is, my affidavit dated February 13th, I believe——

The Court: It is.

Mr. Davis: —may be part of the record. It was intended to be, in part at least, in support of the application for a stay.

The Court: Application for a stay of what?

Mr. Davis: The one that your Honor just denied a moment ago, namely, which was part B of the notice of motion dated February 13, 1963.

I understand that the notice of motion of February 13, 1963, sought, No. 1, an order granting reargument, which I understand has been denied.

The Court: Right.

[24953] Mr. Davis: It also sought a stay, which has also been denied.

The Court: That is right.

Mr. Davis: I understood your Honor to rule that my affidavit in support of both those motions was not to be considered as part of the record for the purpose of the consideration of the order denying reargument.

I am requesting, for clarification purposes, your Honor, whether or not that—all or part of it—may be a part of the record in connection with the motion for the stay, which I understand your Honor is also denying.

The Court: No, it may not be, because that goes to my fundamental decision of February 6th and 7th. Whatever was in the record before the Court on February 6th and 7th will be part of the record.

You applied for a stay at that time and I denied it to you, except that I gave you until 5 o'clock on Friday,

February 8th, to apply to the Court of Appeals for a stay, and you saw fit not to do it.

Mr. Davis: I have obtained the clarification I sought, your Honor.

[24954] The Court: Mr. Sonnett, on your motion, I am ready to hear you.

Mr. Sonnett: In order, your Honor, to get at least myself oriented to what is before the Court today, because I find the Tool Company papers disorient me——

The Court: You just address yourself to what you have asked the Court to do and then you will be oriented to that extent.

Mr. Sonnett: I would like to recall, before coming to the specific motion, to your Honor the portion of the transcript at the last previous hearing, commencing on the bottom of page 60 and going through to 63.

The Court: Go ahead.

Mr. Sonnett: That, as your Honor will recall, resulted in what I am sure the Court and everyone else clearly understood to be agreement by counsel for the Tool Company with a statement which your Honor made at page 62 as follows:

> "In other words, the understanding of the Court is that you"—meaning TWA—"have now an anticipatory default for failure to appear which will ripen at 10 o'clock Monday, February [24955] 11th, on consent of Hughes Tool Company, the only defendant here with the responsibility, I assume, to answer in money damages to your claim. And then you are free to move for a dismissal——"

The Court: There is a misprint in that. I thought he was going to say "Monday damages," but I don't know what they are.

Mr. Sonnett: Well, we will take them any day, your Honor.

It seems to me that that record was perfectly clear and understood by everybody, and I thought including the Hughes Tool Company.

Pursuant to that record, as your Honor knows, Monday came and Mr. Hughes did not appear. We submitted an order to show cause, supported by an affidavit of mine, and that order to show cause seeks, in terms of purely technical relief, that the prayer of the complaint—only the prayer of the complaint—with respect to the amount of damages be amended. I think I indicated—I am sure I did—the last time the reasons for that, and that is the substantive allegation in the complaint stated that we estimated the damages to be in excess of [24956] $35 million; the Tool Company in its counterclaims, referring to the same items of damages in sum identical, said that the damage was $45. Our investigation by our experts proves that the damages on the antitrust claims are in excess of $45 million.

We, I must say, had no reason to anticipate the default of the Tool Company, its wilful and deliberate choice to default, which occurred before this Court at the last session.

I think, therefore, that since the default judgment rule provides that on a default the plaintiff should get no more than the relief demanded in the complaint, the prayer of the complaint can and should be amended to conform to the substantive allegation and that we should thereafter have the hearing on damages which we have asked your Honor to order. No substantial right of the Tool Company has been or can be prejudiced by that amendment.

The Court: What about Rule 56(c)? I am sorry, I meant 54(c).

Mr. Sonnett: 54(c), your Honor, relates, I believe, only to the entry of the judgment by default. That is to say, that the judgment by default, when entered, shall not be different in [24957] kind from or exceed in amount that prayed for in the demand for judgment.

Prior to your Honor's entering a judgment in this action, I think your Honor has complete control over it and may permit amendments to the pleadings and may permit, as we request, a severance of the action as to Holliday. I think your Honor's power is plenary under the Rules until you have entered the final judgment to be entered into the case.

The Court: Let us take one point at a time.

Isn't it perfectly possible—I suppose I have to say this facetiously—isn't it perfectly true that a defendant may be willing to suffer a default for $105 million but will not suffer a default for $115 million? If he is willing to pay $105 million and if you say, "No, I want $115 million," haven't you put him over a barrel?

Mr. Sonnett: I see no tender in the papers of payment of $105 million. If that tender is made, I will be happy to take it up with the TWA board immediately.

The Court: Do you have to go that far?

[24958] Mr. Sonnett: I am afraid so, your Honor, because I think that the determination of the damages which are not liquidated damages—in this case, as the substantive allegation of our complaint points out, we estimated the damages to be in excess of $35 million—since they are not liquidated, it seems to us necessary to be a determination of the amount. That being so and since no default judgment has yet been entered, it seems to me your Honor has the power to grant amendments——

The Court: Yes, I understand that. But what you are saying is that you have a default and you want to hold on to

that default, but at the same time you want to recover more than you asked for in your complaint.

Mr. Sonnett: We don't have a default judgment, your Honor.

The Court: No, but you have a default, and based on that default you are asking for a judgment.

You want to let them off the hook on a default?

Mr. Sonnett: If the position of the Hughes Tool Company—which is what I indicated to [24959] your Honor when I started—had been confused, if their position before your Honor today is that they consent on the money side to your Honor entering a judgment today for $105 million, I can say to you that TWA will not oppose the entry of that judgment.

The Court: Their position has to be they defaulted. They cannot retreat from that position. They have stated on the record that they will not proceed with the deposition or any further discovery proceedings, and they said that Mr. Hughes would not appear on February 11th.

Then they say to you, "You can't get more than $105 million from us."

You say no, you want $135 million.

I have problems with that, Mr. Sonnett, so we will have to hold that for further research by the Court.

Mr. Sonnett: I think 54(c), your Honor, if I may suggest, the first sentence contemplates the situation where there is an entry of default judgment by the clerk, whether liquidated or capable of computation by the clerk under Rule 55(b)——

The Court: If they said that—and I think these rules are very carefully drafted—I [24960] think they would have referred to subdivision (a) of the rule you are referring to, which provides for entry of judgment by the clerk.

Subdivision (b) provides for an entry by the Court. The drafters of the rule did not see fit to distinguish between subdivisions (a) and (b), and therefore I would have to rule that the words in Rule 55, 54(c), "a judgment by default," must refer to both of them.

Mr. Sonnett: I have had called to my attention Moore and a citation purporting to sustain the proposition that where a hearing is had to determine the amount of unliquidated damages—certainly we have unliquidated damages by reason of the substantive allegation—and the defendant participates in the hearing, the court, in the exercise of sound discretion, may permit the claimant to amend his prayer for relief, citing a series of cases. I am reading from page 1823 of Moore's Federal Practice, Vol. 6.

I think your Honor has the power.

The Court: Perhaps we can clarify this whole thing by determining whether you are moving under a default judgment or whether you are really moving under Rule 37(b), subdivision 2 thereof, for [24961] failure to comply with an order of the court. Which are you moving under?

Mr. Sonnett: It was our intention to move under all the rules, your Honor, so as to be sure to get all the relief we think we are entitled to.

In terms of your Honor's discretion on that point, may I say that obviously, if substantively TWA and its minority stockholders are entitled to damages in excess of $35 million, I would think that your Honor's discretion should be moved to permit the amendment if your Honor has the power to permit it, and I think this case holds that you have.

The Court: All right. Go ahead.

Mr. Sonnett: In so far as the severance with respect to Holliday is concerned, your Honor, the reason why, we

had no way of knowing that the Hughes Tool Company was going to choose, as it did, deliberately, intentionally, wilfully, not to defend this case, and when that became apparent to us we then for the first time were confronted with the problem of what to do about Mr. Holliday. We think a severance as to Mr. Holliday is appropriate. We think that undoubtedly, after the judgment has been satisfied, [24962] there would be no occasion to proceed against Mr. Holliday because TWA would have been made whole.

There may be some question of particular injunctive relief that might be appropriate or necessary as to Mr. Holliday individually, but I don't think we need to take a position on that now, except to suggest that it is a possibility and we cannot tell.

The Court: Mr. Davis represents Mr. Holliday in addition to the Hughes Tool Company.

Mr. Davis, are you in a position to say that Mr. Holliday adopts the position of the Hughes Tool Company as indicated on February 8th?

Mr. Davis: Yes, I am, your Honor, and if it will help to solve the matter I am perfectly willing to do so.

The Court: You have objected to the severance in your papers.

Mr. Davis: I do not see any basis for a severance, your Honor. I don't understand what the plaintiff is trying to do by asking for a severance.

The Court: He is an individual defendant who has been served in this action and I am asking [24963] you, are you representing that Mr. Holliday takes the same position of the Hughes Tool Company so that they will be treated together and no severance is needed?

Mr. Davis: Yes, your Honor. The Tool Company is responsible for whatever Mr. Holliday did or did not do. It would have to——

The Court: I think that clarifies that point.

Mr. Sonnett: I would therefore request that our motion for severance of Mr. Holliday be withdrawn, or deemed withdrawn.

Turning to the substantive portion of our order to show cause, your Honor, we have asked in paragraph D for an adjudication that the Hughes Tool Company, by the conduct alleged in the complaint, has violated the relevant provisions of the anti-trust laws and, with respect to the third claim for relief, has maliciously and wilfully injured the business of plaintiff, and that Hughes Tool Company thereby has caused the injuries to plaintiff alleged in the complaint.

In that connection, as I read the affidavit served by counsel for Hughes Tool Company this [24964] afternoon, an effort is made in that affidavit to say that the legal effect of the consciously deliberate default is not or should not be an admission and should not lead to an adjudication such as we requested but rather they should be in substance free to go ahead and litigate any and all issues they would like to litigate.

Of course they would do this on the basis of selecting such evidence as they have that would be favorable to them but denying TWA access to any of that evidence, which is a strange method of procedure and I don't think it has ever been sanctioned by any court.

In so far as the legal effect of what they did and have done on this record, it seems to us clear, your Honor, under the cases, and certainly going back to the Hammond Packing case, that with respect to the deliberate, wilful, conscious choice not to defend against the complaint they have thereby admitted they have no defense. As the Supreme Court said in the Hammond case, they have admitted a want

in merit in any alleged defense, and therefore the allegations of the complaint must be taken to be admitted for the purpose of this proceeding.

[24965] One of the key allegations in the complaint of course is the allegation that the acts alleged caused the injuries described, and this allegation too must be admitted.

When they consented to a default judgment it seems to us, your Honor, that the Court could not issue a judgment of any kind; it would be beyond the judicial power of the Court to issue a default judgment with respect to relief in a private antitrust action without the judgment embodying the determination that the acts violated the law and, as the statute requires, that the acts caused injury to the property or business of the plaintiff.

While we do not urge that they have admitted the amount of the damages, except to say, as they do in the counterclaims, that the damages to TWA were $45 million, we do think that is an admission sufficient so that we can say to your Honor we want three times $45 million simply because of what they say in the counterclaim.

We think there has to be a hearing to determine what are the unliquidated damages. Nevertheless, the legal effect, the irrevocable legal effect, of what they have done is to admit what we [24966] have set forth in paragraph D of the order to show cause.

One additional and, I think, wholly independent point in that connection is that by the deliberate and conscious and wilful choice with respect to their default relating to the counterclaims they have there again put themselves, as a matter of choice, in the position where a dismissal of those counterclaims with prejudice is the natural and inevitable outcome, and, if that is so, the result, it seems to us, is that it is now or will be upon the entry of your Honor's

order to that effect res judicata that the injuries to TWA were not caused as alleged in the counterclaims and they would be estopped by the judgment to contend otherwise.

As to the next prayer for relief, your Honor, the adjudication that the Tool Company should divest itself of all its rights, titles or interests in the stock of plaintiff, I have to report to your Honor that our research has not yet discovered a private antitrust suit where divestiture has been ordered. Our research has not discovered a private case where divestiture has been refused. The three, I believe, cases that would be most helpful in rela- [24967] tion to Section 7 are not cases where the question was ever reached. It was not reached in the sugar case, although in that case the prayer in the complaint asked for divestiture. The fact is that the prayer was not pressed during the case, your Honor. So that we have no specific precedent relating to a private litigant.

However, I need not remind your Honor of the Du Pont case, or the words of the Supreme Court concerning remedy——

The Court: I had the Du Pont-General Motors minority stockholders suit. I am completely familiar with that.

Mr. Sonnett: Having mentioned the Du Pont case, let me pass to the point that if ever a case called for divestiture, this is the classic case that called for it, because these are the kinds of abuses which I think Section 7 was intended to reach.

In that connection, without pressing the facts unduly, your Honor will recall that in February of 1961, after the voting trust had been in effect, Hughes stated—we have his words and they are on a piece of paper, Exhibit A—that Convair need not concern itself about whether TWA would or would not [24968] take Convair 990 aircraft that

Hughes had on order; that Hughes would attend to that matter, and it might well be that Hughes would be back in control of TWA at that time.

I think the record before your Honor factually as well as legally compels the conclusion that the only suitable remedy here is the remedy of divestiture. Certainly any equitable relief short of divestiture will accomplish nothing. We have only to look at the record of what has happened since the voting trust, to which Hughes agreed in November, 1960, was signed and the campaign of attack and efforts by the defendants to impede that voting trust.

Here was a document that thick, worked on by dozens of lawers, articulating a voting trust fully accepted by the Tool Company, and the ink was hardly dry before they tried to tear it to shreds, as they are still doing. So that equitable relief short of divestiture would be no relief at all, your Honor.

As to prayer F of our order to show cause, we think the record before this Court warrants the conclusion that divestiture should not only occur but that it should occur promptly, because the need of TWA [24969] to be relieved of this incubus is still very real. We have the same campaign of harassment, the same attack on the directors, the same attempts to conduct end runs by going down to the CAB and stirring up a fuss there, the same type of harassment to interfere with a management and a board which is trying to do what is right for this air line.

We have curiously at the same time an unwillingness, as a matter of choice, deliberate decision by the Tool Company, to submit these claims to a court having jurisdiction for decision, hence the deliberate choice not to defend in your Honor's court.

Therefore, I submit, your Honor, that the record warrants and, indeed, requires the conclusion that divestiture should be had, and had promptly. There is no other way that this air line is going to be free of the pernicious influence of Hughes short of divestiture.

The final prayer, your Honor, is that we do have, as your Honor will recall, a request for an early date for a hearing to be held before the Court solely for the determination of the amount of damages. We think that is the only question that is open on this record, the amount of the damages, and that your [24970] Honor should have a hearing on that subject. We ask that your Honor have the hearing before the Court because we are confident, and the papers served by the Tool Company today make it all too evident, that a hearing on damages is going to require immediate, decisive rulings by the Court; and with the greatest respect for the excellent job the special master has done, I am confident that we will be running up here every day, interrupting your Honor's other work, or trying to, getting rulings on points that will have to be disposed of. The hearing will be pandemonium, really, in light of the affidavit.

For example, are we going to try the question of a Capitol 880 crash? What does that have to do with the allegations in our complaint and damage? They have admitted the allegations of the complaint and that those activities caused the injury which was described. The only question is how much.

Unless this has firm judicial control, the hearing will turn out to be 10 months instead of 10 days.

I can only say to your Honor, without trying to gild the lily in that regard, that all of [24971] the equipment program of this air line is suspended in terms of future equip-

ment. They have an acute need for short-range jets and for cargo ships. They cannot move on that, they cannot go forward at all on that, in light of this situation.

Your Honor may have noted in the Wall Street Journal that the chairman of the board of TWA said yesterday that if TWA received a substantial award of damages in this case—he was making a speech in Kansas City——

The Court: I do not read the Wall Street Journal. I apologize to any representative of the Wall Street Journal.

Mr. Sonnett: It is not only a fine newspaper, but it is also one of the few, which makes it even finer.

But they did report that Mr. Breech, during the course of a luncheon, I think, while speaking about the air line, stated that if TWA received a substantial award of damages in this case the terms of the proposed merger with Pan American would have to be reopened to renegotiate.

So we have not only the equipment program of the air line being suspended; we have this [24972] merger problem in the background.

In the meantime we have the Tool Company's minions running around Washington trying to create some kind of back fire, and the air line's need for an early determination is just as acute as its need for a full determination of its damages.

So that I am very mindful of the heavy schedule that your Honor has been fulfilling here for some months; and obviously not meaning any disrespect to the Court, but our associates have come to refer to this as the night court because your Honor sets sessions after the conclusion of a full day, which is a great sacrifice on your Honor's part, but I do think the administration of justice overall would be best served by your Honor conducting these hearings as soon as may be feasible, consistent with your Honor's schedule.

As to the counterclaims, your Honor, that will be argued to you by others. We have joined in the motion to dismiss the counterclaims with prejudice, and the only point, so far as TWA is concerned which it has that the additional defendants do not have, is our prayer in paragraph I of the order to show cause for interim injunctive relief.

[24973] There, as the Court will recall, we asked that there be injunction against impairing or interfering with the voting trust pending the consummation of divestiture. It seemed to us that that was the easiest, most effective, most precise and simplest way to maintain the status quo, at least in terms of additional attack by the Tool Company, until the divestiture could be consummated.

The other aspect of paragraph I which we think this record warrants, and, indeed, which TWA needs, is an injunction, also pending the consummation of divestiture, against instituting or threatening to institute or causing to be instituted suits in any other jurisdiction in which TWA, its directors, officers or employees are parties, which suits embody the allegations of the counterclaim. We think that we are entitled to that bill of peace.

The Tool Company had its opportunity to litigate all of these matters in this court with its eyes wide open and, I am sure, fully conscious that they were better off not to have the truth come out than to have it come out. They decided not to defend this case and not to press their counterclaim. I think they are entitled to peace and [24974] quiet until the Court finally issues the relief by way of judgment. We think we are entitled to the damages and divestiture.

That is all I have, your Honor, unless you have a question.

The Court: Mr. Davis.

Mr. Davis: We want the truth to come out. We would have the truth if we had answers to interrogatories.

So far as lack of financing that apparently is bothering TWA now and which in the past the Tool Company provided is also the basis for which this complaint has been filed against the Tool Company.

One thing that counsel for TWA says—and I am sure it must be inadvertent—and that is when he refers to the page of the transcript he referred to and then, in the course of his statement, makes references to the Tool Company having consented to a default judgment.

I want to make it clear that the Tool Company has not consented to a default judgment, does not consent to a default judgment and does not intend to.

The Court: You said you would not [24975] proceed and Mr. Hughes would not appear, and now the Court is presented with what it is going to do to you.

Mr. Davis: That is correct, your Honor. There is a big difference between saying that the Tool Company, for the reasons it stated at the time and by reason of the practical effects with which it was confronted, by reason of the proceedings today, to take the stand that it took, fully aware as to what might be the consequences should it prove to be wrong, and another thing to say that we are consenting to the entry of a default judgment. I believe that counsel for TWA is fully aware of the distinction, as well aware as I am sure the Court is.

Your Honor, I realize and I will apologize, if I should, for the time when we filed this affidavit in opposition to this motion brought on by an order to show cause, and I don't know whether or not to assume that your Honor has had an opportunity to even——

The Court: I read it very carefully, Mr. Davis.

Mr. Davis: Then it should not be [24976] necessary for me to repeat what is set forth in that affidavit.

There is one thing I would like however to address myself to most seriously, particularly in view of the decision of the Court with respect to our motion on reargument, and that is that it is still imperative that this Court determine what it is in terms of conduct by the Tool Company which is the basis for these alleged damages, as well as what is the scope of what is to be adjudicated by any default judgment.

In that connection I am sure it is not necessary for me to point out that the Court has a continuing duty to consider its jurisdiction based upon the development of facts whenever they occur in the course of this proceeding.

The Court: Mr. Davis, you are leading right back to directing Mr. Hughes to appear for examination. Is that where you want to go?

Mr. Davis: No, your Honor. I believe it was a decision by your Honor when this Court recognized that a plaintiff has the burden of satisfying the Court as to its jurisdiction; but however that may be, certainly the plaintiff has the [24977] burden of establishing what it is he claimed injured him, and there is no question that that must be causally connected to the alleged violation that the plaintiff is claiming, and I am merely suggesting to your Honor that we can approach this question of causal connection between damage or injury and a course of conduct when we know what the course of conduct is.

There is no question, based upon the position we have taken, all the well-pleaded facts of the complaint are binding upon us, not the conclusions of law set forth in the complaint.

For instance, let me refer to the offenses charged in paragraph 9, particularly paragraph 9(b) of the complaint —that was quoted in your Honor's decision of February 7th—where it is said that there was a combination to re-

strain interstate and foreign commerce in violation of Section 1 of the Sherman Act "by providing financing of the acquisition by plaintiff of aircraft, including jet-powered aircraft, only upon the condition that plaintiff acquire all such aircraft from defendant Tool Company." The key word there is "such."

It is a very well-drafted complaint, [24978] you Honor.

Now we can assume two states of facts. We can assume a state of facts where the Tool Company went to TWA after having acquired control and said, "TWA, we will provide you with all and any financing you need provided that you acquire all aircraft from us and only from us." I am sure that if Toolco had done that that it would be outside the scope of any authorization from CAB.

The other way that this reads, and in fact what has happened, is—because there is no question that TWA required aircraft from everybody, Martin, Lockheed, Boeing, Convair; that is in the record—what this says is, based upon the facts, what occurred is that the Tool Company, when TWA was unable to finance itself, would place the order for TWA, finance the aircraft and make them available to TWA. There is no question that the financing we provided in this case was only the financing for all the aircraft acquired from the Tool Company. That is also what the English in paragraph 9(b) means. That is the kind of conduct which I think was specifically approved by the CAB, because [24979] those are individual transactions which CAB approved.

Now, there are allegations in this complaint that there were delays in the acquisition of aircraft, on 880. All right. There were delays. Delays from when? Delays by reason of conduct by Toolco which is a violation of the antitrust laws or delays because Convair was unable to deliver or TWA

could not obtain financing from these monopolies who control the financing of aircraft?

TWA, who is so anxious to bring out the truth, but they don't want to tell us ever, and all the depositions we took of TWA officers they were unable to tell us ever, what it is that the Tool Company did. They can talk in terms of conclusions of violations of law and state in a complaint what the statutes say and say we violated them, but no officer of TWA has been able to do it to date, and the record is there for anybody to read, and the special master listened to all of it, to find out from responsible officers of TWA what it is that we did. That has yet to be established.

I am not suggesting that this Court conclude that this complaint states the cause of action. [24980] Let us find out what other facts are well pleaded which identify the course of conduct that Tool Company engaged in and from which we can relate any question of damage to TWA.

What is the course of conduct that the Tool Company engaged in while it was a 78 per cent owner of TWA which harmed TWA? What is the course of conduct that TWA engaged in which was outside the specific approval of CAB? Those problems still exist.

In opposition, as basically set forth in this affidavit, notwithstanding the risk we have taken, we respectfully submit that we still have a problem of some procedure of requiring the plaintiff, based upon what the plaintiff knows or claims to know we are not going to be in a position to pull out any evidence, as Mr. Sonnett has suggested to oppose them. Whatever testimony the Tool Company or Mr. Hughes otherwise would be able to adduce, we are barred from this. We take that handicap.

Let them put any officer of TWA, or whoever else they want—the lending institutions who participated in these

transactions—let them [24981] put them on and prove what we did or give some evidence of what we did. All I ask is to cross examine. Use their own documents. That is all I want to know: What did we do? That is what TWA has successfully resisted, but only in this sense. Your Honor affirmed the decision of the special master that they were to answer the interrogatories but provided they were to be answered only after the deposition of Mr. Hughes. We put that one to rest, at the risk we have taken, to be sure.

We have always claimed that we were in a position that, if TWA was required to state and identify what it is we did, with whatever intent they want to attribute to it, we admit it. Now what?

I believe the defendant has a right to do that if he is confident enough of his position and the facts. I don't think that conduct can be described as contemptuous or wilful, except that it is a wilful decision. It was and is a deliberate decision, fully aware of the risks involved. But that does not mean that we are to be punished because of our effort to save what otherwise would [24982] be the expenditure of millions of dollars because we had sufficient confidence that TWA, by no officer of TWA, by no other witnesses that exist in the world is capable of presenting a case identifying something which we did which can be attributed to a violation of the antitrust laws and damage to TWA, and I don't see any decision that I know of which would justify any other result but giving the plaintiff an opportunity to present its case, we merely to cross examine, and let us discover what the truth really is as to what the plaintiff claims.

They must know something, your Honor. If they were prepared to examine Mr. Hughes for so many months, they must know something. It isn't as though we refused to give them any information. We have given them all the docu-

ments in our file, and then some, relevant or irrelevant, that were called for.

What are these documents he is quoting from? They come from our files.

The Court: He would like to have the tax documents.

Mr. Davis: They have had tax documents, your Honor.

[24983] The Court: The ones I said you were supposed to give him and which you refused to give him.

Mr. Davis: We did furnish tax documents, your Honor, which were granted confidential treatment by the special master. That was very recently, and after we had your Honor's decision of January 10th counsel for the insurance companies then asked for additional tax documents, including the 1961 and 1962 tax returns and some work papers, as if whatever may appear in the tax documents could conceivably be a defense to the counterclaims against the lending institutions.

We have been having a game going on——

The Court: You asked for it. You filed counterclaims for $385 million.

Mr. Davis: There is no question that my client is going to have to take the consequences of whatever I have done, but I am merely pointing out that we are in a proceeding where we must carefully distinguish, when TWA asks for something, with those who control TWA, the additional defendants, deriving a benefit from the position taken by TWA, and when the present management of TWA conversely— [24984] which is all that is being represented in court, not the stockholders—takes a benefit out of the position being taken by those who install and are controlling that management, the lending institutions—I know they would like to prevent us from voicing our objections to the manner in which the air lines have been operated, to having

this air line continue to be controlled by these lending institutions who acquired control without approval of any agency, and I don't think it is proper to try and still us, and whether or not they approve or disapprove of any suggestions or comments made by the Tool Company in 1961 I don't think is a basis for seeking this injunctive relief which counsel representing the present lender-control management of TWA is seeking. All we have done is to take the position that we do not believe that this plaintiff can establish facts which cause damage to TWA.

We respectfully submit that before there can be any effort at determining what those damages are, it is essential and we think that finally we are going to be entitled to require TWA to identify that conduct, and then we will be able to determine the extent to which the Tool Company may be answerable [24985] in damages to its 78-per-cent-owned TWA, assuming that a prior position with respect to the jurisdiction of this court is not sustained.

I do want to point out, however, in this connection that it could very well be that in the course of the development of the facts as to the conduct which TWA establishes as a basis for these damages the Court may very well want to reconsider its jurisdictional decision, because, your Honor, if there is one thing——

The Court: Let me ask you this and maybe we can cut it short. Mr. Davis, are you interested in a quick review of my prior decisions? If you are, isn't it possible for you, counsel for the plaintiff and counsel for the additional defendants to get together and draw a judgment which would be appealable without reference to either the special master or myself for the ascertainment of the specific relief required?

I think the Court of Appeals might look upon that as a final judgment, and you can get up there as quick as you

want and have this all reviewed instead of spending the time and effort and the exorbitant amounts of money you refer to.

[24986] Mr. Davis: Your Honor, I will be glad to entertain that suggestion. I frankly would have to say to your Honor that I don't believe that is feasible.

We have been trying for some time, in fact, even before this case was assigned to your Honor for all purposes there was an effort made by Judge Ryan, to get the plaintiff to put up some statement as to what its position was——

The Court: We will pass that point now. All I am asking you is that if you are really interested in a fast determination of the propriety of my prior orders, especially the ones of February 6th and February 7th, would it be possible for you, Mr. Sonnett for TWA, Judge Bromley, Mr. Chanler and Mr. Stewart to get together and agree on a form of judgment which you think would be appealable and save all this time and effort and money which is undoubtedly going to have to be spent if you go through the long, drawn-out procedure of the hearing on the default judgment?

If I am wrong on what is the fundamental question as I see it from you, that this Court has no jurisdiction and you don't want a Panagra situation [24987] all over again, where you go through the court for seven years and the Supreme Court says you should not have been there, you should have been before the CAB, find that out now.

Mr. Bromley: I won't entertain your suggestion, your Honor, I will accept it right now.

Mr. Davis: May I address myself to something in that connection?

Mr. Bromley: All you need is a 54(b) certificate, your Honor, as far as the additional defendants are concerned.

The Court: We also have the problem of TWA as a plaintiff, and I would not want half of this to go up without the other half.

Mr. Bromley: I will be glad to join in that, your Honor.

Mr. Chanler: We join in that, your Honor.

Mr. Stewart: We join in that, your Honor.

Mr. Davis: I would love to join them, your Honor, if I thought I could get what we are all seeking to do. The problem I have is twofold. One is what my position is if I consent to a judg- [24988] ment——

The Court: The old antitrust consent judgments say you don't consent to anything even though you consent to the judgment.

Mr. Davis: I understand that, your Honor, but I have real concern based on the research I made to date on that question.

Unquestionably it would require certification under 1292(b), unless something which occurred today gives me a right of review.

More important than that, your Honor, and quite sincerely, I would much prefer to be in a position of obtaining a review by the Court of Appeals after we have put some meat on this complaint, and the meat that I am referring to, your Honor, is the identification of what we did, because, your Honor, the thing that is disturbing me—and I did not reach the same conclusion that your Honor did in his decision of February 7th—I have read that decision more often than I read the Panagra decision, and I think I understand it at times——

The Court: You mean me or Panagra?

Mr. Davis: Panagra I had no difficulty with. I galloped through it and enjoyed every [24989] moment of it.

It occurred to me, your Honor, that what I just demonstrated with respect to paragraph 9(b) of the complaint could very well be the key to the answer as to which way the decision ought to go. In other words, it is perfectly clear, your Honor, 408 refers to the acquisition of control, not merely the acquisition of stock. The acquisition of control necessarily means, by the rule of reason if nothing else, that you must be permitted to do something.

The Court: You were permitted to get control.

Mr. Davis: Does that mean sit there with the stock in my vaults? It is control over management and therefore decisions.

The Court: You and I are going to get into an argument about my decision, and let's not do that.

Mr. Davis: I am referring to the Court of Appeals, your Honor, and the desirability, if it is possible, in this procedural development—if it is possible for the purpose admittedly of furthering what has to be done in any event if they are right, [24990] that they are entitled to money damages—Mr. Sonnett just pointed out that they want that quickly and TWA needs money very badly. They have somebody else in control with more money than we have but apparently it isn't coming very easily. If we are going to get ourselves any posture to determine those damages, because there is no question we are not going to get together on that question——

The Court: The amount? They review it with the damages open. They have done that in the past.

Mr. Davis: If we are going to have to, or if we assume there is this damage which they are anxious to bring on as soon as possible, would it not make more sense, may I suggest, to have as a preliminary procedure an identification of this course of conduct which your Honor's prior decision

did hold was to be finished by the plaintiff which then would permit a much more definitive decision not only with respect to this question of primary and exclusive jurisdiction but also for the purpose of determining damages, assuming that is the result to be obtained?

The Court: If I am wrong you are not [24991] going to need such a statement to prove I am wrong. I spent a lot of time on this and I am convinced I am right until I am told I am wrong by those who can tell me I am wrong.

I am merely saying that your time, other counsel's time, and, I am sure, the tremendous amounts of money that would be involved before you ever got a review of my determination if you follow the course you are suggesting could be saved. If I am wrong on the question of exclusive primary jurisdiction, let us find it out now and get that out of the way before you spend another nickel; and if I am wrong, you can go down to the CAB and they can have all the fun with this lawsuit that I am having.

Why don't you do that now? And I am sure that in view of what Judge Bromley said and the other counsel for the additional defendants, although I have not heard from Mr. Sonnett yet, they would facilitate the preparation of such a document to completely protect you to the extent that you need protection and still would come up with a judgment that would be reviewable by the Court of Appeals.

[24992] Mr. Davis: Your Honor, I certainly will cooperate with anyone who submits to me a document that they think I ought to give serious consideration to. I am merely pointing out in all fairness that I do not believe that will solve the problem.

The Court: You mean if the Court of Appeals says that I am wrong and you should go down to the CAB, that does not solve the problem?

Mr. Davis: No, your Honor, I am referring to the procedure of our preparing or their preparing for my approval a proposed form of judgment that would be reviewable. That is what I do not believe will be feasible. It would require certification by your Honor, and I assume this implies you would be willing to do so.

The Court: I am not sure it involves a certification, but if it does I would be willing to certify.

Mr. Davis: The question is if they can prepare something which I am satisfied protects my clients' interests. That is a procedure I want to pursue. I am willing to try.

The Court: When do you want to sit [24993] down with counsel and try?

Mr. Davis: Any time they are prepared to submit something for me to consider.

Mr. Bromley: I will give him something tomorrow morning at 11:45, your Honor.

Mr. Davis: I am going to take this weekend off.

The Court: Give him the weekend, Judge Bromley.

Mr. Bromley: All right. I will, reluctantly.

The Court: Mr. Sonnett.

Mr. Sonnett: Your Honor said you had not heard from me on this subject, and I am most reluctant to try and agree with Mr. Davis on anything, even the form of a judgment, because I don't think we start from the same premise at all and I can see just wrangling and a waste of time involved.

My understanding is, and I believe it is the understanding of the Court, that the rule, 55, that we are talking about—55(b)(2)—is an outgrowth of the old equity rules, and it is my understanding that for at least a hundred years it has been settled under our rules that a decree pro confesso [24994] which is what we have here, in effect admits all the allegations in the complaint.

Pretrial Hearing, February 21, 1963

I would like to invite your Honor's attention to Thomas vs. Wooster in 114 US, page 104, that being a very thorough discussion of the pro confesso rules, the old equity rules, where the court stated at page 110, for example:

> "The defendants are concluded by that decree"—this being a decree entered on default—"so far at least as it is supported by the allegations of the bill taking the same to be true. Being carefully based on these allegations and not extending beyond them, it cannot now be questioned by the defendants unless it is shown to be erroneous by other statements contained in the bill itself. A confession of facts properly pleaded dispenses with proof of those facts and is as effective for the purposes of the suit as if the facts were proved and a decree pro confesso regards the statements of the bill as confessed."

Further, at page 111, the Supreme Court said, and it is only one sentence, your Honor, so I will trespass long enough to read it, if I may:

> [24995] "We may properly say therefore that to take a bill pro confesso is to order it to stand as if its statements were confessed to be true and that a decree pro confesso is a decree based on such statements assumed to be true and such a decree is as binding and conclusive as any decree rendered in the most solemn manner."

Mr. Davis: How about reading the other part, John?

Mr. Sonnett: I will give the book to you and you can read the balance of it. It might do you some good.

If what we are dealing with here was an effort to agree on the form of a judgment consistent with those rules and consistent with the Rules of Practice as I understand them, I would cheerfully sit down with Mr. Davis right now, but he would not start from those premises.

If he is prepared to do so, that is to say, to discuss only the form without consenting to or waiving whatever it is he wants to try to preserve on this record, if he is prepared to sit down and work on form and to take a form which carries out the [24996] complaint—and I think the form is very easily indicated in our order to show cause—I will be happy to sit down with him.

The Court: I have problems with the order to show cause. I am not sure you are entitled to relief under Section 7 of the Clayton Act. That is one example or one area that I will not agree with you on tonight.

Mr. Sonnett: I will be happy to file a brief or to present argument. I have the cases at hand, if you want to hear me——

The Court: No, not tonight. I think there is really no further point for argument on this motion, and perhaps not even on the motion by the additional defendants. I would suggest that if you don't want to join in this, we still have counterclaims around that can be disposed of and either Mr. Davis sit down with counsel for the additional defendants or the additional defendants can propose a proposed judgment to Mr. Davis which would be appealable, you can follow whichever course you want.

Mr. Bromley: We will follow the latter suggestion and hand him a proposed judgment.

[24997] The Court: All right.

Mr. Bromley: We will do that, so he will be good and rested, by Monday.

The Court: Mr. Davis will have his comments on your proposed suggestions back to you by Thursday night at 5 o'clock.

I hold in abeyance the application by TWA pending a possible resolution of the counterclaim problem.

All right.

A-2736

Order Re Leave To Appeal.

[5407]

[CAPTION]

Application for Leave to Appeal Under Section 1292(b) of Title 28, United States Code.

CHESTER C. DAVIS, New York, N. Y., for defendants Hughes Tool Company and Raymond M. Holliday.

Application to appeal the issues of (1) Whether the U. S. District Court for the Southern District of New York had jurisdiction of the action, and (2) Whether the exercise of its regulatory power by the Civil Aeronautics Board in the premises by issuance of orders permitting defendants to act as defendants acted constitutes a good defense to the anti-trust claim of plaintiffs [sic], is granted; and in all other respects the application is denied.

Proceedings before the district court or any master appointed to carry forward any proceedings below for the assessment of damages, or otherwise, are ordered stayed pending disposition of this appeal. Judge Friendly took no part in the consideration or the disposition of this application.

S. R. W.
J. J. S.
U. S. C. JJ.

6 June 1963

[fol. 28014]

SUPREME COURT OF THE UNITED STATES

No. 443—October Term, 1964

HUGHES TOOL COMPANY, et al., Petitioners,

v.

TRANS WORLD AIRLINES, INC.

ORDER ALLOWING CERTIORARI—November 16, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 28015]

SUPREME COURT OF THE UNITED STATES

No. 501—October Term, 1964

HUGHES TOOL COMPANY, Petitioner,

v.

TRANS WORLD AIRLINES, INC., et al.

ORDER ALLOWING CERTIORARI—November 16, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Orders of the United States Supreme Court Dismissing Certiorari in Nos. 443 and 501, March 8, 1965

SUPREME COURT OF THE UNITED STATES

HUGHES TOOL CO. ET AL.

—v.—

TRANS WORLD AIRLINES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 443. Decided March 8, 1965.

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

SUPREME COURT OF THE UNITED STATES

HUGHES TOOL CO.

—v.—

TRANS WORLD AIRLINES, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 501. Decided March 8, 1965.

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

Opinion of the Court of Appeals in Dockets No. 34902 and No. 35114, September 1, 1971

[CAPTION]

Before:

SMITH, KAUFMAN, and HAYS,

Circuit Judges.

Cross-appeals from a final judgment for plaintiff in the amount of $145,448,141.07, upon a previous default judgment entered on a complaint alleging violations of the antitrust laws, by the United States District Court for the Southern District of New York, Charles M. Metzner, *Judge*, following a hearing on damages before Special Master Herbert Brownell.

Modified with respect to interest on the judgment and as modified, affirmed.

JAMES V. HAYES (Ralstone R. Irvine, Mahlon F. Perkins, Jr., David A. Wier, *of counsel;* Donovan, Leisure, Newton & Irvine, New York, N. Y.; Davis & Cox, New York, N. Y., *on the brief*), *for defendants-appellants.*

DUDLEY B. TENNEY (Paul W. Williams, Immanuel Kohn, Marshall H. Cox, Jr., Abraham P. Ordover, Lawrence C. Browne, Michael P. Tierney, *of counsel;* Cahill, Gordon, Sonnett, Reindel & Ohl, New York, N. Y., *on the brief*), *for plaintiff-appellant.*

Opinion of the Court of Appeals,
September 1, 1971

KAUFMAN, *Circuit Judge*:

We are presented in this case with cross-appeals from a final judgment entered April 14, 1970, premised upon a previous default judgment, in favor of plaintiff Trans World Airlines, Inc. (TWA) against defendants-appellants Hughes Tool Company and its chief financial officer, Raymond M. Holliday (Toolco), which, the district court tells us, 312 F. Supp. at 480, is some thirty times greater than the next highest monetary award ever entered.

The extraordinary aspect of this complex litigation is in large measure attributable to the elusiveness of Howard R. Hughes, progenitor and sole owner of Toolco, protagonist in its operations, in a sense the central character of this litigation as well, and yet not a party to this appeal because Hughes himself, although named as a defendant in TWA's complaint, could not be located for service of process.

I.

Since the facts in this litigation have been set forth in detail in many prior reported decisions, *see* 214 F. Supp. 106 (S.D.N.Y. 1963), 32 F.R.D. 604 (S.D.N.Y. 1963); 332 F.2d 602 (2d Cir. 1964); 38 F.R.D. 499 (S.D.N.Y. 1965); 308 F. Supp. 679 (S.D.N.Y. 1969); 312 F. Supp. 478 (S.D.N.Y. 1970), in the interest of avoiding unconscionable length of this opinion, we will limit our own initial statement to a brief resume of the tortuous history of the case, sufficient to permit a meaningful statement of the issues raised.

More than a decade ago, by a complaint dated June 30, 1961, TWA filed its complaint in this action charging

Toolco and Hughes with violations of the Clayton and Sherman Acts, 15 U.S.C. §§1, 2, 11, and 18, as well as with a claim, for which pendent jurisdiction was asserted, alleging malicious and willful injury to the business of TWA.

Convoluted and protracted pre-trial maneuvers culminated in the failure of Toolco to produce Hughes for a deposition scheduled by court order to be taken on February 11, 1963. As a result of Hughes's confessed unwillingness to appear, as well as the nonproduction by Toolco of certain papers and documents whose disclosure to plaintiff had also been required by court order, the Rule 2 judge assigned to the action (Rule 2, *General Rules for the Southern and Eastern Districts of New York*), Judge Metzner, on May 3, 1963 filed two orders. One entered the default against Toolco and granted TWA's motion to increase the *ad damnum* clause of its complaint from $105,000,000 to $135,000,000, after trebling. In the second order Judge Metzner also found Toolco in default with respect to five counterclaims that Toolco had asserted against TWA and several additional defendants. Judge Metzner dismissed these counterclaims and also granted TWA's motion for summary judgment on a sixth counterclaim.

Opinion of the Court of Appeals, September 1, 1971

We granted leave to take an interlocutory appeal from the former order, after Judge Metzner had certified that an appeal was appropriate under 28 U.S.C. §1292(b). But we limited our review to considering whether the district court's jurisdiction over the antitrust action was ousted because primary jurisdiction lay with the Civil Aeronautics Board, which had approved various steps by which Toolco gradually assumed virtually complete control of TWA, holding about 78% of its stock at the time the complaint was filed, and whether certain of the CAB orders associated with those grants of approval constituted a good defense to TWA's action. The interlocutory appeal was consolidated with defendants' parallel appeal as of right from Judge Metzner's dismissal of the counterclaims. A panel of this court ultimately ruled that the district court did properly assert its jurisdiction and that the CAB orders did not constitute blanket approval of the claims in the complaint and hence were not a defense to TWA's action. In the appeal on the counterclaims, the orders of the district court were affirmed with one exception, not relevant here (determining that the CAB had exclusive jurisdiction over one of the dismissed counterclaims). 332 F.2d 602, *cert. granted,* 379 U.S. 92 (1964), *cert. dismissed as improvidently granted,* 380 U.S. 248, 249 (1965).

Judge Metzner's ruling adjudging Toolco in default necessitated an extensive hearing to determine damages. Herbert Brownell, Esq.,[1] appointed Special Master for this purpose, conducted hearings between May 2, 1966 and April 9, 1968. On September 1, 1968, in a thorough

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1 Hon. J. Lee Rankin, appointed Special Master during pre-trial proceedings, was replaced when he resigned in December 1965 to become Corporation Counsel for New York City.

report, the Master awarded TWA trebled damages of $137,611,435.95. Both sides filed objections. On December 23, 1969, Judge Metzner adopted Brownell's report in all respects, 308 F. Supp. 679, and then in a subsequent opinion awarded attorneys fees of $7.5 million and assessed costs in the amount of $336,705.12. 312 F. Supp. 478. On April 14, 1970, the district court entered its final judgment, with 6% interest to run from that date, in the sum—impressive even by space age and inflationary standards—of $145,448,141.07.[2]

II.

A. *Toolco Appeal*

The first thrust of the Toolco appeal is directed at the default judgment itself and primarily concerns issues that were not the focus of the damage hearing before Special Master Brownell. The broad question pressed by Toolco is whether TWA is entitled to recover any amount whatever on the record before us, regardless of the adequacy of its proof of damages. Toolco contends (discussed in part III below) that the default judgment was improperly entered against it, in violation of its due process rights, and should be vacated; that (part IV) even if the default judgment is valid, the judgment does not justify assessing damages against Toolco for any antitrust violations, since in Toolco's view the evidence in the record conclusively refutes the possibility that any such violations could have occurred; and that (part V) even if the default judgment establishes antitrust infractions, TWA has not proved that any damages it might have suffered as a result of acts of

[2] A prayer for equitable relief included in the original complaint was mooted when Toolco sold all its TWA stock in May, 1966.

mismanagement alleged in the complaint arose from anti-trust violations. On each of these questions, we affirm the judgment below in all respects.

Toolco also contests Special Master Brownell's calculations of the damages. It argues that (part VI), even if proximate causation was shown, the damages were in several respects wrongly computed. In each of these respects we also affirm the reasoning and conclusions of the Master and of Judge Metzner.

Additionally, Toolco challenges under F.R. Civ. P. 54(c) Judge Metzner's grant of TWA's motion to increase the *ad damnum* at the same time he entered the default judgment (part VIII). It also argues that the award of attorney's fees is excessive and unreasonable (part IX). We believe Judge Metzner properly permitted TWA to raise the *ad damnum* and that the payment allowed for legal services was within the bounds of his discretion.

B. *TWA Appeal*

TWA takes issue with only one item of Brownell's report, *viz.* certain interest charges credited in mitigation of damages (part X). We affirm the Master's disposition of this issue. TWA also appeals from the denial by Judge Metzner of moratory interest as an element of the damages to be trebled under Section 4 of the Clayton Act, 15 U.S.C. §15. It also questions Judge Metzner's holding that interest on the judgment should run from the date of the district court's judgment, rather than the date the Special Master filed his report, and contests the award of only 6% interest pursuant to New York judgments law, instead of the 7½% currently set by the state Banking Board as the maximum allowable commercial rate. We discuss these issues in part XI and affirm the district court

on the first two points but hold that proper interest under current New York decisional authority is 7½%. TWA's last assertion (part XII) is that it may recover $1.6 million compensation for fees paid to experts as a component of its "cost of suit," 15 U.S.C. §15. With this assertion we disagree.

III.

Toolco argues forcefully that Judge Metzner's entry of a default judgment having such drastic consequences resulted in a denial of due process and was otherwise an abuse of discretion under F. R. Civ. P. 37(b)(2)(iii) and 37(d). We are reminded not only of the severe nature of this particular default but of the fundamental importance of the right to an adversary hearing prior to judicial determination of rights and liabilities. We are in full accord with the general proposition, for which Toolco cites the three leading cases of *Hovey* v. *Elliott*, 167 U.S. 409 (1897), *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322 (1909), and *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958), that the totality of circumstances surrounding the failure to make discovery must be considered in determining what sanctions to apply under Rule 37. As we understand Toolco's argument, those portions of the "totality of circumstances" it considers to control the invalidity of the default here are these: that TWA did not itself comply with Toolco's efforts to pursue pre-trial discovery sufficiently to lay an adequate foundation for the attempt to depose Howard Hughes; that, to similar legal effect, Judge Metzner on January 10, 1963, improperly denied Toolco's request for a Rule 16 hearing and permitted TWA to delay answering interrogatories served on it by Toolco in the fall of 1962 until after the Hughes deposition sched-

uled for February 11, 1963; that its own compliance with TWA's requests for discovery was substantial and in good faith; and that TWA did not and indeed could never have shown a need to depose Hughes. In sum it argues that in the face of all this, the district court grossly abused its discretion in not resorting to a less drastic alternative remedy before putting an end to litigation on the merits with a default judgment.

Although we agree with TWA that these arguments are unpersuasive, for the sake of clarity we pause to reject TWA's alternative theory that we may not consider the merits of the default judgment because we are required by either res judicata or collateral estoppel to follow the affirmance by the earlier panel of this court of the default judgment entered against Toolco on its counterclaims. Res judicata is singularly inappropriate in this context. As we have noted, leave to Toolco to appeal from the default judgment entered on TWA's antitrust complaint was narrowly confined and the panel expressly reserved the very question at issue here, "[t]he propriety of the court's entering a default judgment against the defendants with respect to the complaint . . . ." Prior to the judgment now appealed from, there had simply been no "final judgment" entered with respect to the merits of TWA's cause of action against Toolco, and thus we lack the fundamental prerequisite for applying res judicata. See *Moore, Federal Practice* ¶0.405[1].

Nor will collateral estoppel avail TWA. The relevant issue "actually litigated and determined in the prior" appeal, *Lawler* v. *National Screen Service Corp.*, 349 U.S. 322, 326 (1955), was only that Judge Metzner properly entered the default on Toolco's counterclaims. This is a sharply distinguishable issue from the propriety of a dif-

ferent default judgment in favor of Toolco's adversary (this does not follow, as Toolco suggests, because the latter default is more drastic, but simply because the two questions are not the same). The issue of the propriety of the default here is not a right, question, or fact determined on the previous appeal. We believe we can fairly assume that TWA would not attempt to invoke collateral estoppel if the counterclaim had been asserted in a separate action. Combining two claims for trial as permitted for convenience under the Federal Rules does not dissolve the separate identities of the two claims or the two default judgments. Collateral estoppel and res judicata take aim at redundant litigation of identical issues or causes of action; they are not intended to foreclose consideration of the legal merits by analogy—however persuasive the analogies may be.

This is not to say that we will entirely disregard the obvious force of the prior determination on so closely related a question. This is foremost a matter of *stare decisis* and, of course, we *are* bound by collateral estoppel not to reopen subsidiary issues actually determined in the earlier appeal. We are persuaded that the most important considerations that prompted the earlier affirmance of the default on Toolco's counterclaims compel the same result here.

The essential details of the pre-trial proceedings that climaxed in the default are succinctly set out in Chief Judge Lumbard's earlier opinion, 332 F.2d 602, and we will endeavor to avoid unnecessary repetition. Because the factors bearing on the two default judgments are not identical, however, and in view of Toolco's attack on the district court's conduct of the pretrial proceedings, we cannot entirely avoid a brief sketch of the history of the litigation prior to the default.

Opinion of the Court of Appeals,
September 1, 1971

One relatively minor justification put forward by the earlier panel in affirming the default judgment on the counterclaims related to Toolco's noncompliance with two discovery orders entered upon motions made by certain defendants who had been joined in the litigation by Toolco's counterclaim. Toolco now asserts that these production orders concerned matters irrelevant or at least of marginal importance to TWA's complaint. However this may be—and it is virtually impossible, because of the default and the nonproduction of the documents to evaluate this claim—we agree that the failure to comply with orders granted in favor of the other litigants would most likely not in itself have warranted the severe remedy of a default judgment in favor of TWA on the principal action.

But it is also apparent that these production orders are of trivial importance to the propriety of the default judgment in question here, in light of Howard Hughes's deliberate, knowing, willful, and plainly announced refusal to comply with an order requiring his appearance for the taking of his deposition on February 11, 1963, and which had been served long in advance of the return day. The reason that entry of the default was inevitable after Hughes's nonappearance can only be understood against the background of TWA's intensive efforts, first undertaken on the very day that it filed its complaint, to compel Hughes's personal testimony, as a witness and "managing agent" of defendant Hughes Tool Co. under F. R. Civ. P. 37(b)(2). TWA has consistently maintained, and continues to do so, that quite aside from the fact that he was Toolco's alter ego, Hughes's pretrial testimony was absolutely essential for it adequately to frame the issues and prepare for trial because of Hughes's extraordinary secretive methods of doing business. It was the indispensable nature of Hughes's

personal testimony, according to TWA, that prompted its diligent pursuit of Hughes from the inception of the litigation. TWA's campaign to depose Hughes, which opened with a motion for leave to do so on the date it filed its complaint, was temporarily frustrated when the motion was denied and Toolco was granted priority in the taking of depositions. But TWA renewed its effort with a further unsuccessful motion and proposals to depose Hughes prior to Toolco's depositions. In early January, 1962, TWA adopted a new tactic and repeatedly sought with equal lack of success, to discover Hughes's whereabouts from Toolco. After further futile notices to depose Hughes served in January and February, 1962, TWA achieved a breakthrough when on June 4 the then Special Master rejected Toolco's objections to interrogatories directed to both Hughes and Toolco to locate Hughes so that he might be deposed. Toolco was ordered to answer the interrogatories unless Hughes should authorize counsel to accept service of a subpoena on his behalf for his appearance at the deposition.

On appeal the district court ordered that the interrogatories be answered as modified by it in an immaterial respect. Counsel for Toolco on July 27 informed the Master that Hughes had authorized counsel to accept service of a subpoena for Hughes to appear as a witness. An extended period of wrangling followed. Among other highlights of this period, Toolco refused a proposed stipulation and order to serve Hughes through Toolco's counsel, on the ground that agreeing to the stipulation might prejudice its right to object to the propriety of the deposition. Finally, on September 6, 1962, the same day that TWA charged that a purported authorization for counsel to accept service for Hughes was apparently a forgery, counsel for Toolco informed Judge Metzner that another lawyer,

Chester Davis, had in fact been served that day in California, pursuant to Hughes's personal authorization. On September 13, as part of its indignant response to the forgery allegation, Toolco submitted to the court the notice of deposition, a subpoena to Hughes, an affidavit of Davis stating his authority to accept service for Hughes, and a second affidavit from a Los Angeles notary stating that Hughes had indeed appeared in person before him and had acknowledged Davis's authority.

Subsequently, the district court adopted a decision of Special Master Rankin that Toolco would bear responsibility for Hughes's response to the subpoena, and stated that Hughes would be considered bound by this declaration unless he objected. No objections were ever made and there is, of course, no question that Toolco was responsible for the actions of the owner of all its stock. At Toolco's instance, the deposition date was twice postponed until by order of January 10, 1963, the court affirmed a final date set by Master Rankin requiring Hughes's appearance on February 11, a schedule "to be adhered to in the absence of extraordinary circumstances." Also on January 10, 1963, Judge Metzner denied an application for a Rule 16 pre-trial hearing that had been presented to it by Toolco on September 25, 1962, at the initial suggestion not of Toolco but of the Master. The motion was denied "without prejudice to renew on papers before the Court 30 days after the completion of the deposition of Howard R. Hughes." Judge Metzner also affirmed the denial by the Special Master of Toolco's motion to depose two financial institutions concerned primarily with issues raised by Toolco's counterclaim, the Irving Trust Co. and Dillon, Reed, & Co., on the ground that to grant the motion would interfere with the scheduled deposition of Howard Hughes.

Thus by mid-January Toolco had explored and exhausted myriad possible avenues for further delaying the day of reckoning. On February 8, 1963, the Friday prior to Hughes's scheduled appearance the following Monday, Toolco announced a strategy decision. That day Toolco's counsel served on TWA and filed with the court a "notice of position" stating that in view of the court's denial of its motion two days earlier to dismiss the complaint, the denial of a certification permitting review of that order under 28 U.S.C. §1292(b), and because of "the enormous expenses which would be incurred by Toolco . . . in further pre-trial *and trial* proceedings and the belief of Toolco *that such expenses would exceed the amount of damages provable by plaintiff under the complaint*" (emphasis added) Toolco "elects, subject only to whatever judicial relief it may hereafter obtain, to rest on the merits of its positions as heretofore taken so that it may avoid the burdens and expenses involved in further pre-trial *and trial* proceedings prior to the time that an appellate court has the opportunity to rule upon the decisions and orders heretofore made herein" (emphasis added).

At a hearing conducted February 8, 1963, Toolco's counsel, Davis, whose signature appeared on the "notice of position," admitted that "the subpoena on behalf of Mr. Hughes was valid, never was questioned." He also read from the record that portion of a ruling by the Special Master on September 15, 1962, imposing responsibility for Hughes's actions on Toolco, including the Master's comment that "I am piercing the corporate veil as to the Hughes Tool Company, and I am bringing what I hope is clear notice of very substantial sanctions" against Toolco "in case there should be at some later date a . . . failure to respond to the subpoena . . . ." Davis commented that

Toolco was "aware of these rulings" and had accepted the responsibility imposed on it by the Master. Davis further explained that he had described to Toolco the sanctions available in the event Hughes should not appear, with particular regard to F. R. Civ. P. 37(d). Davis further explained that the basis of Toolco's strategic judgment was that which had been expressed in the "notice" a calculation that TWA could not prove damages equal to the expenses of further litigation. Finally, Davis candidly and clearly recognized, and attributed the same awareness to Toolco, "that by insisting on a right to obtain a review on the legal questions which have been decided to date, and should it develop that they are in error . . . as a consequence *they may be deprived of further defending on the merits, other than on the question of damages*" (emphasis added). Davis described Toolco's decision to stand on Hughes's nonappearance as a "business decision" —the wisdom of which Davis himself pointedly would not vouch for—and responded affirmatively to the court's query whether Toolco's position was that "the plaintiff may take whatever proceedings it is advised to take by way of sanctions under Rule 37."

Short of express consent to the entry of a default judgment, a clearer case for the necessity and propriety of such a judgment could hardly be imagined. On appeal, as we have said, the complaint was held sufficient to state an antitrust claim under several theories and after all that was said at the February 8 hearing Toolco could hardly have been shocked that it then found itself left with nothing to litigate but damages.

The language of the panel on the previous appeal with respect to the Hughes non-appearance is as relevant in this context as it was to the issue presented by the default with respect to the counterclaims:

Opinion of the Court of Appeals, September 1, 1971

"When Hughes chose not to appear for this deposition—which action was taken deliberately and with full knowledge of the sanctions available to the additional defendants under Rule 37—Judge Metzner was fully justified in entering judgments dismissing the counterclaims against TWA and the additional defendants. The sanction of judgment by default for failure to comply with discovery orders is the most severe sanction which the court may apply, and its use must be tempered by the careful exercise of judicial discretion to assure that its imposition is merited. However, where one party has acted in willful and deliberate disregard of reasonable and necessary court orders and the efficient administration of justice, the application of even so stringent a sanction is fully justified and should not be disturbed."

Chief Judge Lumbard further elucidated in words pertinent on this appeal:

"beyond any question . . . the deposition of Hughes was necessary to all aspects of this litigation. Hughes has at all times been sole owner of Toolco and the guiding light behind all the transactions between Toolco and TWA. Both TWA and the additional defendants had the right to depose Hughes.

. . . .

Hughes' deposition was absolutely essential to the proper conduct of the litigation. Yet he and Toolco seized upon every opportunity to forestall this event. . . . Indeed, Hughes and Toolco seemed to look upon the entire discovery proceedings as some sort of a game, rather than as a means of securing the just and expeditious settlement of the important matters in dispute. It was only at the very eve of the Hughes

deposition—after the other litigants had been put to much delay and expense—that the defendants made a 'business decision' to terminate discovery.

Hughes' conduct is particularly intolerable in a large and complex litigation such as this one. The protracted antitrust suit taxes the energies and resourcefulness of each party to the litigation; and it consumes much time of the court and the special masters it appoints. Tactics such as Hughes' serve only to frustrate the implementation of the discovery machinery devised by the federal judiciary to expedite the handling of such complex litigation." 330 F.2d at 614-15.

Nor was that panel's references to the necessity of Hughes's deposition to "all aspects of this litigation" gratuitous. It was prompted by Toolco's position on the earlier appeal that Hughes's deposition was relevant *only* to the TWA action and not to the counterclaims. Even if we are not bound in a strict legal sense by the previous ruling that Hughes's deposition was essential to TWA's claim, that holding was manifestly correct. As will be seen, many of TWA's asserted charges relied on interpretations of intent and of the significance of ambiguous projects quickly aborted, and of possible exploratory actions taken by Toolco that may or may not have been relevant to TWA's several antitrust theories. The reality behind the charges could hardly be tested without the testimony of the one man who personally directed Toolco's activities throughout the relevant period and whose singular penchant for secrecy was, after two years of frustrating delay in the conduct of the litigation, well known to the Master and the trial court. Clearly the court was entirely correct in concluding that the litigation would

only continue its desultory course without the appearance on stage at the earliest possible moment of the hitherto unseen Prince of the drama. Thus, the court's decisions to postpone all further discovery by Toolco—discovery of the sort which had not substantially advanced the litigation in the past—were not only within its discretion but quite obviously correct. Indeed, in light of TWA's express reliance on Hughes himself to establish as much as 75% of its own case against Toolco, one would have expected that Toolco might have welcomed the opportunity to force TWA to play the card that it had proclaimed was so important to its case, in the expectation that a disappointing deposition would open the way for an early termination of the case favorable to Toolco. Toolco's argument that TWA had not by February 8 laid a sufficient foundation for its case thus falls as well, because by failing to produce Hughes, Toolco deprived both TWA and itself of the opportunity to establish their respective positions. Finally, the suggestion that the court might have resorted to some sanction short of a default judgment after Toolco had announced a policy decision to take an action that would give it the right to take an immediate appeal—which only a final judgment on the merits would accomplish—and following the willful refusal to produce a witness whom the court had rightly found central to the expeditious progress of the lawsuit, has such an air of unreality about it as to bear its own refutation. Contrast *Rosenberg, Sanctions to Effectuate Pretrial Discovery*, Colum. L. Rev. 480, 495 (1958) (giving party "second chance" desirable in appropriate case).

Toolco intimates that throughout the litigation TWA sought in bad faith to win a fabricated case by exploiting Hughes's known craving for solitude. Nothing in the record would justify any such finding, and in any event the

district court did offer to permit the deposition to be taken in as much privacy and under any other conditions that might suit Hughes's aversion to public appearance.

The cases relied on by Toolco are far afield and demonstrate by negative implication the inevitability of the default in this case. For example, in *Gill* v. *Stolow*, 240 F.2d 669 (2d Cir. 1957), the court reversed the entry of a default only upon a showing of a "real attempt to comply" with an order requiring the witness to travel from England to New York for the deposition, a trip the court found actually barred by his ill-health. There, the witness defied doctors' orders to appear for the deposition within two months of the time scheduled for taking it. As far as we know, defendants have never in the eight years since the default judgment represented that Hughes was willing to be deposed were the default vacated. *Von Der Heydt* v. *Rogers*, 251 F.2d 17 (D.C. Cir. 1958) (per curiam) reversed a default judgment only upon a conclusion that the district court had not adequately set forth its findings. Concurring separately, then Circuit Judge Burger commented that "if the information sought is material to the case and not privileged, and if appellant was able to produce it, failure to produce warrants dismissal." *Id.* at 19. That is precisely the case here, except that the information sought was more than merely "material." It was essential. It could prove to be the life or death of the action. In *Independent Productions Corp.* v. *Loew's, Inc.*, 283 F.2d 730 (2d Cir. 1960), we simply found full compliance with the only court order outstanding at the time of the default judgment and concluded that the default judgment was improperly entered merely because when the witness appeared for the deposition he raised a Fifth Amendment privilege. See also *Bon Air Hotel, Inc.* v. *Time, Inc.*, 376 F.2d 118 (5th Cir. 1967), *cert. denied*, 393 U.S. 815 (1968).

(petitioner's failure to comply due to inability brought about neither by its own conduct nor by circumstances within its control did not warrant default judgment). Finally, *Societe Internationale* v. *Rogers,* 357 U.S. 197 (1957), as in *Gill,* reversed a default judgment only on the strength of findings by the Special Master, adopted by the district court, and approved by the court of appeals, that the party had made good faith and diligent efforts to execute a production order where compliance would have violated Swiss law.

Indeed, the circumstances mandating entry of a default judgment here are stronger than in *Hammond Packing Co.* v. *Arkansas,* 212 U.S. 322 (1909), where the party against whom a default judgment was entered claimed a privilege that it urged justified its noncompliance. Despite this, the Court ruled that because the Hammond Co. "absolutely declined to obey the order," which required production of evidence that the court could only "assume was material," in view of the non-compliance, the default judgment was proper. As in this case, Hammond too relied on the denial of pretrial motions by the defaulting party that would have postponed compliance with or modified the order. The Court found no abuse of the district court's broad discretion to control pretrial procedures.

In light of the foregoing, it would appear that were less at stake in this litigation, the propriety of the default judgment would not have deserved the full discussion we have afforded it. The entry of the default judgment was inescapable and virtually invited by Toolco.

IV.

Toolco, assuming arguendo that we would hold that the default judgment was properly entered against it on TWA's

complaint, seeks nevertheless to avoid any liability for the antitrust violations alleged by TWA on the ground that we are required to find as a matter of law that facts essential to establish any such violations, although alleged in the complaint, are in fact untrue and could not have been proved by TWA at a trial. To the extent that the allegations of antitrust infringements are not conclusively disproved, so Toolco asserts, the allegations themselves are either too vague or conclusory or otherwise insufficient to support any recovery whatever. We disagree.

Despite inevitable sharp contrasts of tone and emphasis in the voluminous briefs, the parties do not seem to disagree that Judge Metzner, in preliminary rulings prior to the damage hearing and again in his decision adopting the report of the Master, applied an entirely correct standard in defining the legal effect of a default judgment. We too find Judge Metzner's discussions of the law in this complicated area unexceptionable. Extracting justiciable standards from the venerable but still definitive case, *Thomson* v. *Wooster*, 114 U.S. 104 (1885), Judge Metzner ruled that by its default Toolco admitted every "well pleaded allegation" of the complaint, a term of art which Judge Metzner interpreted to permit finding an allegation not to be "well pleaded" only "in very narrow, exceptional circumstances:"

> "For example, an allegation made indefinite or erroneous by other allegations in the same complaint is not a well-pleaded allegation. Other examples . . . are allegations which are contrary to facts of which the court will take judicial notice or which are not susceptible of proof by legitimate evidence, or which are contrary to uncontroverted material in the file of the case." 308 F. Supp. at 683.

Judge Metzner then discussed the meaning that the much-mooted phrase "judicial notice" should take in the present context, as distinguished from the much different circumstance of a full trial, and summarized his previous discussion as implying that "only indisputable facts"—facts which could not possibly be rebutted if the non-defaulting party were permitted a trial—may be judicially "noticed" to rebut factual material otherwise admitted by a default. Toolco now attempts to hoist Judge Metzner by his own petard in directing our attention away from the "judicial notice" standard to certain "material in the file of the case" introduced by Toolco during the hearing on damages which according to Toolco has not been "controverted" by TWA. But this argument stands the matter on its head and implies that it was TWA's responsibility to defend the allegations of its complaint by rebutting adverse matter introduced by Toolco in the damage hearing. TWA had no obligation to introduce any evidence whatever in support of the allegations of its complaint. Matter introduced by Toolco to disprove or mitigate damages which only *tends* to contradict the allegations of the complaint has no legal effect except as it bears on the question of damages unless it could not conceivably have been refuted and disproved by TWA had there been a trial and thus is "indisputable." It would usher in a new era in the dynamics of litigation if a party could suffer a default judgment to be entered against it and then go about its business as if the judgment did not exist and as though, despite the opportunities to comply with the court's orders and to defend on the merits which had been ignored, the slate was wiped clean and a new day had dawned. To state the proposition is to expose the folly of it.

The applicable principles are clearly implied from *Thomson* v. *Wooster, supra,* where the court held that defendants who had defaulted in a patent infringement suit would not be permited to show that the patent sued upon was invalid. Defendants had sought to introduce the original patent to show it differed from a reissued patent, which was the patent the plaintiffs sought to enforce. The court ruled that neither this proof nor evidence that defendants had delayed 14 years in seeking reissue were sufficient to defeat the contrary allegation of the validity of the patent contained in the complaint because, *inter alia,* the delay "might possibly have been explained, and the court could not say as a matter of law, it was insusceptible of explanation. . . ." We are instructed by *Wooster* that so long as the facts as painted by the complaint "*might* . . . have been the case" they may not now be successfully controverted by Toolco. There was a time for that and Toolco cannot elect to default and then defend on the merits. It cannot have its cake and eat it too.

Toolco's adversion to TWA's alleged failure to buttress its allegations in effect seeks to have us review the evidence presently in the record as though we were passing on a motion by Toolco for summary judgment supported by appropriate affidavits following normal discovery proceedings and prior to entry of any final judgment. In such a case, we would grant the motion unless TWA "set forth specific facts showing that there is a genuine issue for trial." F.R. Civ. P. 56(e). But TWA need not introduce any facts whatever in support of its complaint. Judgment has already been entered in its favor on a complaint held on the earlier appeal to this court to state a sufficient claim. Only damages remained to be determined. As Judge Metzner ruled "[w]here file material is involved, if the plaintiff did not have full opportunity to

meet or controvert such material, then it should not be used to nullify the allegation." This conclusion is the clear implication of the Court's refusal to permit the admission of the prior patent in *Thomson*.

We have, nevertheless, reviewed all the evidence introduced and relied on by Toolco in its attempt to negative its liability and conclude that Toolco has shown nothing that renders inconceivable the likelihood that TWA could have proved at trial that actions by Toolco which formed the basis for the award of damages were in fact, as alleged in the complaint, violations of the antitrust laws. Although we have found it desirable to set forth and affirm the propositions of law relied upon by the district court and by both Masters involved, it would serve no useful purpose to rehash in detail the arguments which defendants have repeatedly urged to show that the exacting test of *Thomson v. Wooster* has been met and which incidentally have been rejected both by Judge Metzner and Special Master Brownell in thorough and well-reasoned opinions.[3]

Briefly, as we said on the earlier appeal, the allegations of the complaint "state the outlines of a tying arrangement, an economic boycott of the defendants' competitors, and an attempt to monopolize commerce, all unlawful under the antitrust statutes." 332 F.2d 602, 611. Specifically, in the first of three claims set forth in the complaint—the only claim upon which TWA introduced evidence of damages—TWA contended that Toolco, 100% owned by Hughes throughout the relevant period, acquired control of TWA and made it a "captive market" for Toolco "with the primary purpose of restraining and monopolizing the trade

[3] We also are in agreement with the similar statements of the applicable principles of law contained in Brownell's report, as well as those in a preliminary opinion of Special Master Rankin dated July 30, 1965, and in an earlier opinion of Judge Metzner, reported at 38 F.R.D. 499 (S.D.N.Y. 1965).

and commerce" of TWA, which was alleged to constitute a substantial proportion of various defined markets for airplanes, including jets, and related equipment. TWA further alleged that defendants intended that Toolco would become the sole source of supply of jet-powered aircraft to TWA (thus by implication intending to monopolize a substantial portion of a defined market) and a dominant source of supply of jets to air carriers generally; that suppliers to TWA other than Toolco would be boycotted; and that defendants would cause Toolco to supply TWA with aircraft only upon condition that TWA would accept financing dictated by Toolco.

Quite apart from proof of intent, paragraph 9 of the complaint alleged that defendants conspired to restrain trade in violation of Section 1 of the Sherman Act; provided financing to TWA only on the condition that plaintiff buy all aircraft needed for its operations from Toolco; required TWA to boycott all suppliers of aircraft except Toolco; conspired to monopolize the TWA market in violation of Section 2 of the Sherman Act; attempted to monopolize the TWA market, also in violation of Section 2 of the Sherman Act; and sold and leased jets to TWA on the condition that TWA not buy or lease the goods of a competitor of Toolco, in violation of Section 3 of the Clayton Act.

Paragraphs 11 through 29 of the complaint set forth in detail specific acts performed in furtherance of the offenses charged and for the improper purposes alleged, as outlined above. Thus, according to the complaint, Toolco first acquired TWA with the intent to make it its own market for supplying aircraft, an intention which was carried through into the advent of the commercial jet age during the years 1955-56. In 1956, according to these

allegations, Toolco ordered a total of 33 Boeing jets and 30 additional Model 880 jets manufactured by General Dynamics Corporation ("Convair"). At the same time, defendants prohibited TWA from "making any arrangements for the acquisition, by sale, lease, or otherwise, of any jet-powered aircraft." The complaint goes on to say that throughout 1956-60, Toolco refused to assign to TWA the rights to acquire the jets on order from Convair and Boeing, despite TWA's requests that it do so and despite provisions in Toolco's contracts with Boeing and Convair that permitted it to do so. Jets leased to TWA by Toolco on a day-to-day basis in 1959-60 were the only jets made available to TWA during the years 1955 to 1960 and were inadequate to TWA's needs, it was charged. Each lease was conditioned on TWA's agreement and understanding that it would not purchase or lease aircraft from any other supplier. In 1960 six of the Convair 880's Toolco had ordered in 1956 were leased to Northeast Airlines, including three previously assigned to TWA. Similarly, in June, 1959, six of the Boeing jets ordered in 1956 were "diverted to the principal transatlantic competitor of TWA" (Pan Am). While thus restricting TWA's purchases of jets, the complaint alleged that Toolco also inhibited TWA's ability to obtain equity financing and caused TWA to rely chiefly on debt financing, thus rendering TWA unable to finance needed aircraft acquisitions except upon Toolco's approval. Toolco intended by this restriction to increase TWA's dependence on Toolco in furtherance of its unlawful purposes. From 1955-60 defendants prohibited TWA from obtaining financing for the acquisition of jets required for TWA's needs.

The damages which Brownell ultimately awarded to TWA consisted primarily of profits lost as a result of

(1) diversion of the six Convair's to Northeast; (2) temporary retention by Toolco of four additional of the ordered Convair's and the ultimate lease of those jets to Northeast; (3) diversion of the six Boeings to Pan Am; (4) the lease, instead of outright sale, of jets in 1959-60; and (5) late delivery of 47 of the 63 jets ordered in 1956, which would have been avoided if, by the allegations of the complaint, Toolco had not unlawfully constricted TWA's financing and acquisition of its own jet fleet. Although TWA also attempted to prove other damages resulting from Toolco's manipulation of its financing, and further damage arising from delayed sales of obsolete prop aircraft, Brownell found TWA's proof in these respects insufficient and TWA does not appeal from either determination. No damages were sought to be proved for alleged continuing antitrust violations by Toolco subsequent to December 15, 1960, when Toolco put all its TWA stock in a voting trust controlled by three voting trustees (including Holliday), thus relinquishing control of TWA, an action required as a condition of loans to TWA advanced by various banks and insurance companies to permit the purchase of new jets.

As it did before Brownell and Judge Metzner, Toolco now seeks to discredit primarily one part of paragraph three of TWA's complaint, in which TWA alleged that Toolco had been engaged since 1939 "in the development, manufacture and acquisition of aircraft and related equipment" and its "sale and lease" to air carriers, and to demonstrate the inadequacy of one antitrust theory that, according to Toolco, collapses if the allegations of paragraph three are untenable. Toolco thus would have us find *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947), to be the linchpin of TWA's complaint, without which the remainder cannot hold together. In *Yellow Cab*, the

Court reversed the grant of a motion to dismiss a complaint which had alleged that a company engaged in the business of manufacturing taxis had established control of a substantial segment of cab operations in four cities and had exploited its control by extracting exclusive purchasing agreements from its owned cabs and taxi companies, thus excluding other manufacturers from the affected market with the ultimate effect, as the Court said, that "the appellees effectively limited the outlets through which cabs may be sold in interstate commerce." *Id.* at 226. This argument fails at each of three points. Toolco has not established to our satisfaction that TWA could not possibly have proven violations analogous to those alleged in *Yellow Cab.* Even if it had, additional specific allegations of antitrust violations in the complaint other than the one which rests on the holding in *Yellow Cab* are not conclusively disproved by Toolco's evidence. Nor has Toolco demonstrated that TWA's postulates for recovery are in any other manner not "well pleaded."

To disprove the allegation of paragraph 3 that Toolco was a "manufacturer" of commercial airplanes, Toolco relies primarily on (1) CAB opinions and orders dating from 1944-50 that concluded Toolco was not then engaged in or planning the manufacture of airplanes for commercial use, (2) schedules to CAB Form 41 Reports filed by domestic trunk airlines pursuant to 49 U.S.C. §1377 indicating that between 1950 and 1966 none of these airlines purchased or leased a Toolco-made airplane, and (3) the fact that no TWA annual report ever mentioned the manufacture of a "Hughes plane." These documents, Toolco asserts, conclusively establish that Toolco was never a manufacturer of commercial aircraft and certainly not a competitor with the giant manufacturers—Boeing, Douglas, and Convair—and

thus the exclusive dealing arrangements alleged in the complaint are entirely innocuous and incapable of producing the kind of market foreclosure alleged in *Yellow Cab.* Toolco similarly sets out to undermine the allegation that it was a "dealer" in aircraft, again directing attention to CAB opinions and orders dated no later than 1950 finding no sales or leases of planes by Toolco to any airline but TWA; and again introducing the Form 41 Reports to the same effect but extending to 1961. The thrust of its argument is that under no view of the complaint, given the facts established by these documents, could TWA conceivably have proved more than that Toolco as a parent of TWA engaged in good-faith efforts to rescue it from financial crisis and to operate it as a successful business enterprise. Even if TWA could prove mismanagement by Toolco, that is insufficient, in Toolco's view, to intimate any possible foreclosure of competition—since Toolco was a mere manager or conduit and had no independent competitive significance—and accordingly TWA's theories must be found barren, since danger to free competition is the *raison d'etre* of the antitrust laws and some showing of such a danger in every case is a *sine qua non* of proving their infringement.

Both Judge Metzner and Master Brownell met Toolco's argument in this respect head-on, holding that courts could not consider as conclusively proven, facts merely recited in CAB orders and opinions and in airline reports that are the product of no adversary proceedings, distinguishing between the *existence* of such documents, of which courts might in an appropriate case take judicial notice, and the truthfulness of their contents, which would be subject to contrary proof had the trial precluded by Toolco's default actually been conducted. We agree with the reasoning of

both opinions and find the authorities there relied on to be in point and sound. See *Stasiukevich* v. *Nicolls,* 168 F.2d 474, 479 (1st Cir. 1958); *McCormick on Evidence* §328 at 704, §330 at 709 (1954); *Morgan, The Law of Evidence,* 1941-45, 59 *Harv. L. Rev.* 481, 482-87 (1946); *McNaughton, Judicial Notice,* 14 *Vand. L. Rev.* 779 (1961).

Moreover the documents described above, while (if their contents were accepted as true) showing that Toolco was not a major force as a supplier of aircraft other than to TWA, hardly negative the possibility that Toolco possessed independent economic significance, apart from its role as supplier to TWA, sufficient to support proof of any or all the antitrust theories limned by TWA's complaint. There is evidence in the record of activities by Toolco or Hughes that suggest significant movement by Toolco and Hughes toward actual or potential commercial manufacturer or dealership in airplanes, especially jets, and their parts. We cannot say that proof at a trial—prevented by Toolco's conduct—that Toolco was more than a conduit for TWA but rather possessed independent competitive significance with respect to the commercial aircraft market, would be insufficient, if combined with appropriate related proof of the intent, attempt, collusion, tying arrangements, boycotts, and monopolization alleged in the complaint, to support an antitrust judgment for TWA.

The evidence that Toolco's interests and ambitions in commercial air flights may have extended beyond mere management of TWA begins with Toolco's admitted role, initiated in World War II and continuing to the present day, as a substantial manufacturer of helicopters and aircraft parts for military purposes (and now of aerospace materials as well). Although Toolco stresses the non-commercial nature of this activity, it is clear that Toolco

throughout the relevant period had the technical capability and sophisticated "know-how," to enter the commercial market without untoward delay if it had so chosen. Early in its history, Toolco acquired the rights to the first forty Constellation aircraft developed in cooperation with Lockheed in the early 1940's. Twenty-five of these were intended by Toolco for sale to airlines other than TWA. 6 CAB 153, 155 (1944). During and after the war, Hughes actively engaged in the development (ultimately unsuccessful) of a plan worthy of Jules Verne, for a 700-passenger plywood flying boat for commercial development. Manufacture by Toolco of aircraft in association with AVRO of Canada, and of Caravelles as a licensee of Sud Aviacion of France, were considered during the middle 1950's. In 1956, Toolco ordered at least 300 Pratt & Whitney jet engines, later sold primarily to Boeing and Pan Am at a substantial profit. The engines could well have been intended for installation in the planned Toolco jets and in any event constituted Toolco as a competitor with other sellers of jet engines.

Also in 1956, secret discussions were commenced within the inner circles of Toolco and TWA for Toolco to manufacture commercial jets, a plan scuttled before the end of that year by the initiation of a CAB investigation into the matter which followed a TWA motion to the Board for approval to purchase up to 25 Toolco-manufactured commercial jets. Through most of 1955, Toolco was engaged with Convair in the development of a jet which again proved unfeasible. Evidence of these last mentioned aborted forays is consistent with allegations in paragraphs 14 and 15 of the complaint that defendants arranged with Convair to develop "a jet-powered aircraft to be manufactured by Convair and to be supplied by the defendants to

air carriers" and that "defendants also entered into a plan under which Toolco would itself" manufacture jets to be furnished "both to TWA and to other air carriers."

Additionally, there was testimony that Toolco ordered seven Convair 880s manufactured to the specifications of Capital Airlines and thirteen Convair 990s built for American Airlines' requirements.

Finally, Toolco's activities with respect to the 63-plane fleet ordered in 1956, only part of which was ever delivered to TWA, further support an inference that Toolco contemplated that it was or might become more than a manager for TWA. Thus, Toolco conditioned its order for the Convair 880's on a stipulation that the price to it would be reduced progressively as Convair was successful in selling more of the planes beyond the initial orders by Toolco and by Delta Airlines, Inc., a condition consistent with possible Toolco participation in marketing the 880. Non-assignment provisions in the purchase agreements do not conclusively negate the capacity of Toolco to have dealt in its Boeing and Convair contracts and priority rights with airlines other than TWA—and of course Toolco did not in fact exercise its right to assign the contracts to TWA. Ultimately, of course, as alleged in the complaint and demonstrated at the damages hearing, defendants did sell or lease 16 planes of the ordered 63-plane fleet to Pan Am and Northeast. As Master Brownell observed, the ability of Toolco to deliver these jets immediately may have given Toolco a significant competitive advantage over their own manufacturers. Late in 1959, Hughes negotiated with Lockheed for purchase of Electras at a time when Toolco's own actions indicated TWA was fully stocked with jets.

Toolco's response to most of these considerations is that each is consistent with a sole intent on its part to deal in

aircraft and aircraft parts solely for the benefit of TWA. However, the allegation in the complaint that Toolco refused to assign the rights to the ordered fleet to TWA, although it was empowered to do so under the contracts of sale, is consistent with a contrary inference.

In any event, the question is not whether one inference or another is the stronger but whether Toolco's evidence —in light of its default and thus the absence of a trial— absolutely forecloses the possibility that Toolco enjoyed actual or potential independent competitive significance in the commercial aircraft market sufficient to support a finding of an antitrust violation under any of the several hypotheses put forward in the complaint, including, in addition to the *Yellow Cab* theory, (1) unlawful *intent* to monopolize a substantial portion of the commercial aircraft market in restraint of trade; (2) unlawful conspiracy to do so, see *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 284 F.2d 1 (9th Cir. 1960), *rev'd on other grounds*, 370 U.S. 19 (1962); *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968); *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968); *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964); (3) enforcement of an illegal boycott, see *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457 (1941); *United States* v. *New York Great Atlantic & Pacific Tea Co.*, 173 F.2d 79 (7th Cir. 1949); *Klor's Inc.* v. *Broadway-Hale Stores*, 359 U.S. 207 (1959); (4) tying adequate financing of TWA to its purchase or lease of jets from Toolco, and vice-versa, see *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 502-03 (1969); and (5) the lease of Aircraft to TWA on the condition that TWA not purchase or lease aircraft from other suppliers, see *Inter-*

national Salt Co. v. *United States*, 332 U.S. 392 (1947); *Standard Oil Co. of California* v. *United States*, 337 U.S. 293 (1949).

Toolco's reply brief argues that the allegations of unlawful intent are unduly vague but this is unsupported by the cases it relies on, *Glenn Coal Co.* v. *Dickinson Fuel Co.*, 72 F.2d 885, 888 (4th Cir. 1934); *SCM Corp.* v. *Radio Corp. of America*, 407 F.2d 166 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969) (mere conclusory and vague allegations and nothing more, of unlawful attempt or conspiracy to monopolize or to restrain trade, or, simply, to violate the antitrust laws, were held insufficient). By contrast, TWA's complaint alleges specific acts by defendants allegedly pursuant to an intent to monopolize specified markets by means which are described in detail in the complaint. These allegations are both adequate as a matter of proper pleading and sufficiently definite to support an award of damages entered on the default judgment.

Toolco's argument that a conspiracy among Holliday and Hughes, as officers and shareholders of Toolco, with Toolco itself, is as a matter of antitrust law unprovable, is an illustration of the thrust of Toolco's approach to the question whether the decisive allegations in the complaint are "well-pleaded." Whether TWA might have proven such a conspiracy would have turned on the nature and weight of technical and secretive evidence bearing on the independent economic significance of each of the parties and also on subjective questions of intent and attempt. Toolco's conduct barred even initial exploration of these crucial factual issues. We are reminded that even summary judgment "should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged con-

spirators, and hostile witnesses thicken the plot." *Poller* v. *Columbia Broadcasting System, Inc., supra* at 473. See also *White Motor Co.* v. *United States,* 372 U.S. 253, 259-60 (1963). We should be far more reluctant to grant summary judgment for Toolco following entry of judgment for TWA, as it now in effect requests us to do, when its own default barred even initial exploration of the crucial factual issues.

V.

The opinions below and the briefs submitted to us on this appeal reveal some confusion as to the proper scope of the hearing on damages. As the authorities cited above illustrate, a default judgment entered on well-pleaded allegations in a complaint establishes a defendant's liability. Also, at the hearing before Special Master Brownell it was incumbent upon TWA to introduce evidence showing the extent of the damages which resulted from the antitrust violations established by the default judgment. The difficulty arises as to a question that Toolco refers to in part II of its main brief as one of "proximate cause." To what extent did the default judgment dispense with a plaintiff's normal obligation to show that damages alleged were proximately caused by Toolco's illegal actions? The answer seems to us inherent in the question.

The default had the effect of admitting or establishing that the acts pleaded in the complaint violated the antitrust laws and that those acts caused injury to TWA in the respects there alleged. Because, however, the damages were unliquidated and uncertain, F.R.Civ.P. 55(b), it was necessary for TWA at the hearing to establish the *extent* of the injuries established by the default. The outer bounds of the recovery allowable are of course measured by the principle of proximate cause. The default judgment did

not give TWA a blank check to recover from Toolco any losses it had ever suffered from whatever source. It could only recover those damages arising from the acts and injuries pleaded and in this sense it was TWA's burden to show "proximate cause." On the other hand, there was no burden on TWA to show that any of Toolco's acts pleaded in the complaint violated the antitrust laws nor to show that those acts caused the well-pleaded injuries, except as we have indicated that it had to for the purpose of establishing the extent of the injury caused TWA, in dollars and cents.

Thus, in *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 284 F.2d 1 (9th Cir. 1960), *rev'd on other grounds*, 370 U.S. 19 (1962), cited by Toolco, the court held that an antitrust plaintiff could not recover for losses attributable to a watered-down product rather than to defendant's acts. To the same effect are the other cases relied on by Toolco, e.g., *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F.2d 561 (7th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952) (plaintiff could not recover for losses based on defendant's illegal restriction on its distribution of first-run movies during a period when plaintiff's theatre was not equipped to show first-run movies). TWA purports to dispute Toolco's abstract statement of the appropriate scope of the damage hearing, relying on an unreported district court opinion whose reasoning on the issue of proximate causation we adopted in *Jones* v. *Uris Sales Corp.*, 373 F.2d 644 (2d Cir. 1967). While TWA cites *Jones* for the proposition that at the damage hearing it had no obligation to show proximate cause in any sense, the central language of the district court opinion in *Jones* which TWA relies upon belies its own assertion: "[t]he causal relationship is stated distinctly in the complaint by the allegation that

Penn diverted profits belonging to the defendant Uris. All that remained to be supplied were the identities of the accounts and the enterprise *to which they were diverted*, and the amount of *the profits diverted* . . . ." (Emphasis added.) Implicit in the limiting words we have emphasized is the proposition that it was plaintiff's obligation following the default to establish that any lost profits for which it sought recovery were in fact those whose unlawful diversion was established by the default judgment. The default judgment proved the fact of the diversion (the injury) and its illegality. But to recover damages, plaintiff was necessarily required to establish that those damages were attributable to the diversion. Thus, however well-pleaded the allegation that profits were diverted, plaintiffs in *Jones* could not avoid, to the extent necessary to establish the causal nexus for the recovery of damages, introducing evidence relating to the diversion alleged.

Nor do we believe, contrary to Toolco's assertion, that Special Master Brownell misunderstood this issue. His formulation that the "burden of establishing proximate cause is satisfied *as to liability* if proximate cause is adequately alleged in the complaint" (emphasis added) is consistent with our own understanding of the law and, as we will elucidate shortly, we find his application of the proper principles to have been unexceptionable. In fact, Toolco helpfully reminds us that Special Master Brownell disallowed two major elements of damage alleged by TWA. We have reference to those supposedly arising from the assertions in TWA's complaint that it was chronically underfinanced by Toolco and from TWA's claimed tardy sale of its prop fleet. His conclusions on this score were based on his determination that TWA's proof that those damages arose from the illegal acts and injuries established by the default judgment was inadequate.

Despite its present broad assertion (perhaps in an excess of caution), that "proximate cause" was in no sense an element essential to establishing recoverable losses, TWA's strategy at the hearing, with respect to the damages actually awarded, was in fact designed to prove causation. To illustrate, and to lay the foundation for our discussion of Toolco's various claims that in several respects TWA's proof of causation was inadequate, we conclude this portion of our opinion by sketching the contours of the evidentiary foundation of TWA's damage award.

TWA's most important witness was Robert W. Rummel, at the time of the hearing TWA Vice President for Planning and Research. Rummel testified to the effect that had Hughes and Toolco not interfered with TWA's operations in the manner alleged in TWA's complaint, TWA would have attempted to acquire in the commercial market a jet fleet of its own consisting of the same 63 airplanes we have made reference to—33 Boeing 707's and 30 Convair 880's—which Toolco did in fact order for TWA and which were ultimately delivered to Toolco in 1959-60. As we have noted, major elements in the damages awarded were losses incurred by TWA and caused by Toolco's diversion of 16 of these jets, 6 Boeings and 10 Convairs, to Pan Am and Northeast and delays in the delivery of the Boeings and Convairs that were not diverted. Brownell accepted only in part Rummel's testimony that the delays in the Convair deliveries were solely attributable to Hughes's misconduct, but he fully accepted Rummel's testimony as to the makeup of the "reconstructed" 63-jet fleet. His report concluded that only the Convair delays beyond those provided in a March 2, 1960, amendment to the original delivery schedule were chargeable to defendants, since delays reflected in that amendment were caused by Convair's own mismanagement.

John B. Connelly, Vice President and Assistant General Manager of Boeing Aircraft Division corroborated TWA's claim that delays in Boeing deliveries were caused by defendants' failure to negotiate with reasonable diligence for priorities in delivery dates in 1955 when jets were first offered commercially. The thrust of the Connelly-Rummel testimony was that if defendants had not, as alleged in the complaint, prevented TWA from negotiating for itself, it would have ordered and received a full 63-jet fleet sooner than it in fact received the abbreviated 47-jet fleet from Toolco. Apart from a portion of the Convair delays, Brownell credited this evidence in its entirety. The illegality of Toolco's arrogation of all authority for buying aircraft was, as we have said, conclusively established by the default judgment.

Two other fact witnesses for TWA testified as to losses caused by disruptions in the transition from prop to jet operations attributable to defendants' interference with the Convair 880 deliveries. The Special Master adopted their computations without reservation and, except for Toolco's attack on the underlying finding of disruption already referred to, Toolco does not seem to press its argument that the proof with respect to these items was inadequate.

The testimony of TWA's four expert witnesses fared somewhat worse with the Special Master than did that of its so-called "fact witnesses." Brownell rejected a "Comparative Profit Study" report comparing TWA's actual profits with two of its competitors during two separate periods offered in an effort to prove TWA's losses. The report was prepared by Coverdale & Colpits, a consulting engineering firm, and testimony concerning it was given by a partner in the firm, Edward L. Wemple. The Special Master did, however, accept the computations contained in

a second Coverdale report tracing in detail the operating losses attributable to Toolco's disruption of the jet fleet for the years 1959-63. These computations included an estimate of increased profits that would have accrued had TWA owned outright certain Boeing 707's which Toolco only leased to it in 1959-60, as well as of profits that would have been realized otherwise from timely delivery of the reconstructed fleet.

TWA also attempted to prove damages resulting from Toolco's inadequate financing of TWA by introducing a study prepared by Drexel Harriman Ripley, Inc. (the DHR study) testimony concerning which was given by its Senior Vice-President, Edward J. Morehouse. Morehouse testified that if TWA had been independently and competently managed during 1955-60, it could have financed the purchase of the reconstructed fleet at much lower costs than those actually incurred through Toolco's management. The program of independent financing described by the DHR study was rejected by Brownell, as was a report prepared by R. Dixon Speas Associates estimating TWA losses from belated sales of piston airplanes.

Finally, John C. Biegler, a partner of Price Waterhouse & Co., testified with respect to a report in evidence and prepared by his firm under his supervision which reconstructed TWA's historical financial posture on the basis of TWA's evidence of disruptions and their supposed effects which were caused by Toolco. The Price Waterhouse study, as supplemented at times during the hearing, was the vehicle through which evidence of both sides bearing on the effect on TWA operations of supposed Toolco disruptions was translated into differences between actual and hypothetical TWA profits.

Toolco's direct case consisted of testimony of four expert witnesses, Gene M. Woodfin, partner in Loeb, Rhoades

& Co., investment brokers, and Nathan S. Simat, Robert I. Helliesen and L. John Eichner, principals in the aviation consulting firm of Simat, Helliesen & Eichner, Inc. Each of defendants' experts sought to discredit the evidence of Wemple, Morehouse, and Speas.

Thus, as is apparent from the above summary, TWA did not rely only on its default judgment but introduced evidence linking each component of the damages claimed to the pleaded illegal acts of Toolco and injuries to TWA. Toolco contends, however, that TWA's proof should have been rejected by the Special Master and that TWA has not established that the delays in delivery, the diversions, or the Boeing leases caused any damage to TWA attributable to those acts and injuries.

VI.

Both sides agree that Special Master Brownell's findings, adopted by Judge Metzner, may not be disturbed at this juncture unless we agree with Toolco that they are "clearly erroneous," F.R.Civ.P. 52(a), the standard also properly applied by Judge Metzner himself in reviewing the Master's Report, F.R.Civ.P. 53(e)(2). Our function would seem to be in a sense redundant, since it appears that each of the substantial objections to the Master's conclusions raised by Toolco before us has already been considered and rejected by the district court. But because of the huge sums involved in this litigation, we have not been content to rest on Judge Metzner's appraisal of the Master's findings and have made our own independent review of those findings. We agree with Judge Metzner's assertion that it is relevant that Special Master Brownell's report is a product of "painstaking" analysis of highly complex questions following hearings on damages which extended over a period of

two years, consisting of hundreds of hours of testimony and producing a transcript of 11,000 pages. See *Badenhausen* v. *Guaranty Trust Co.*, 145 F.2d 40, 53 (4th Cir. 1944), *cert. denied*, 323 U.S. 797 (1945); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 274-75 (1949). We might add that his report reflects an extraordinary awareness of the issues raised and the applicable principles of law.

In this connection we observe that the Master, in considering the proof of both parties, did so with explicit reference to the classic statement of the applicable guidelines expressed in *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946), permitting an award in cases such as this to be based "upon probable and inferential, as well as direct and positive proof," and imposing on the wrongdoer any "risk of uncertainty which his own wrong has created," *id.* at 264. Indeed, the Supreme Court recently observed:

"Trial and appellate courts alike must also observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts."

Zenith Radio Corp. v. *Hazeltine Research Inc.*, 395 U.S. 100, 123 (1969). In this case the reference to risk in *Bigelow* would seem to have even greater application. Toolco must bear the responsibility for any lack of preciseness of proof, and there is good reason that this should be so. The fault itself by Toolco rendered precise proof of damages even more difficult than in the usual antitrust case, where

the plaintiff may avail itself of the full battery of discovery procedures to prove damages as well as to prove liability. Toolco cannot be permitted to block the discovery of precise, clear and direct evidence and then be heard to complain that the evidence should have been more convincing.

In any event, our answer to each of the many objections that Toolco raises to the specific findings of the Special Master as to the "proximate cause" of the damages awarded TWA, is that each of the challenged findings is amply supported by evidence introduced during the hearing and that none is "clearly erroneous." Toolco's arguments on this score are principally five, each of which we shall discuss sufficiently to demonstrate the basis for the Master's conclusions.

1. Toolco attacks first the validity of the entire basis of the damage award, the reconstructed 63-jet fleet which Brownell found constituted "a proper basis for computing damages." That he was justified in doing so is established first by Rummel's testimony that TWA *should* in fact have ordered the fleet that Toolco ordered for it, although with more dispatch. Rummel was TWA's senior engineer in 1943, chief engineer in 1949, elevated to Vice President in charge of Engineering in 1956, was throughout this period closely associated with Hughes himself in his early exploration of the commercial jet market and indeed may have been the only individual with whom Hughes entrusted a share of responsibility for aircraft procurement. Rummel testified that he reported directly to Hughes, had authority to commit funds under Toolco's contracts, and "the Toolco factory representatives at Boeing and Convair reported to me as special representative of Toolco responsible for the technical administration of the Toolco contracts . . . ." His primary responsibility throughout most

of his employment with TWA "has been to recommend what size and what type fleets to procure . . . ." In addition to the historical fact that Rummel, chief procurement officer for TWA at the time and Hughes' confidant, participated in and concurred in the decision to acquire the 63-jet fleet, the assumption that TWA would have acted approximately as did Toolco in the interest of exploiting to maximum financial benefit the enormous potential of the jet age is entirely reasonable. Indeed, in view of the well-pleaded allegations of the complaint, asserting that defendants did not always act in the best interest of TWA, and defendants' contrary assertion that it did always so act, it ill-behooves defendants now to suggest that a well-managed TWA would have acted differently in evaluating its jet fleet requirement than did Toolco.

Assuming then that an independent TWA would have attempted to acquire the same 63-jet fleet ordered by Toolco, defendants contend that TWA would not have been able to finance such an undertaking, which would have cost about $353 million or $93 million more than TWA actually spent for its 47-jet fleet. Toolco notes that $100 million of the financing for the 47-jet fleet was supplied by Toolco itself through its purchase of TWA subordinated debentures. We find untenable Toolco's characterization as insufficient to support the Special Master's contrary assumption that an independent TWA would and could have financed the full 63-jet fleet, the evidence that United, American, and Pan American Airlines each were in fact able to finance comparable ventures during the same period. Toolco directs our attention to financial reversals experienced by TWA during the period preceding the time Brownell assumed TWA would have financed the fleet (1958-59). But the well-pleaded allega-

tions of the complaint demonstrate conclusively that crippling TWA's financial posture and reducing it to a state of vassalage, dependent on Toolco's support, was part of defendants' overall antitrust violation. See Complaint ¶¶17, 18, 19, 22, 23, 24, 26, 50, 51, and 52(a). To the extent of negating Toolco's attempted reliance on TWA's asserted financial weakness, these allegations must be given effect. Any inferences other than that an independent TWA would have fared neither better nor worse than competing airlines in financing its jet fleet would have been unwarranted.

3. Assuming then that the 63-jet reconstructed fleet was a reasonable basis for assessing damages, Toolco nonetheless insists that Special Master Brownell erred in his findings that in several respects (concerning the delays in Boeing and Convair deliveries; the leasing of Boeings to TWA; and the diversion of 16 jets to TWA's competitors) an independent TWA would have been managed to better financial advantage. It first attacks the assumption, fully supported by testimony of Rummel and Boeing Vice-President Connelly, that more diligent bargaining for Boeing jets would have resulted in TWA enjoying approximately the same rights to priority in deliveries as did Pan Am, American and United. Rummel's testimony adequately supports the conclusion that TWA would and could have engaged in negotiations reasonably "calculated to preserve TWA's competitive position in the industry for early deliveries," to quote Brownell's words. Connelly, who was in a position to be entirely familiar with Boeing's policies with respect to delivery dates,[4] testified, contrary to

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4 Connelly testified that as Director of Contract Administration he was a member of a "headquarters group" at Boeing in 1955 and in 1956 became Vice President and General Manager in charge of the department at Boeing in which responsibility for commercial airline programs was centralized.

Toolco's present contentions, that more diligent efforts by TWA would in fact have resulted in substantial parity of priorities.

Because of Master Brownell's and Judge Metzner's thorough discussions of these questions, and in the interest of curtailing this necessarily protracted opinion, we will not continue to discuss each of the other fine-drawn points raised by Toolco in an attempt to discredit this testimony. It is sufficient that we note we have thoroughly considered each of them and found them insufficient to support a holding of clear error.

4. Special Master Brownell concluded that defendants' dalliance in securing Convair deliveries and its active interference with Convair's production schedule was responsible for delays beyond the amended delivery schedule. This finding is amply supported by evidence of (1) Hughes's refusal to accept delivery of the Convair 880's when Convair was ready to deliver them; (2) his assumption of personal control of all matters concerning the deliveries and his direction that TWA was not to proceed with any acceptance procedures without personal clearance from Hughes; and (3) Hughes's personal instructions to Toolco armed guards at one point to forcefully seize four CV-880's from the Convair production lines, thereby aggravating Convair's production difficulties. Moreover, it was uncontested that TWA received its planes on an average approximately 9.9 months later than provided in the original schedule, while deliveries to Delta were delayed by only 1.4 months.

5. Finally, the Master's assumption that TWA as a non-handcuffed independent operator would have pur-

chased outright nineteen Boeings leased to it by Toolco in 1959-60 is supported by evidence in the DHR study establishing that as a general rule outright ownership was more desirable than leasing under the conditions existing at that time, subject to certain exceptions not applicable. Also, in cross-examination, defendant's expert Woodfin, admitted that the 1959-60 leases were an interim and unsatisfactory arrangement. The Master's observation that, of 2,036 aircraft operated by certified route carriers on December 31, 1960, only 117 were leased, is also relevant.

VII.

Our response to Toolco's objections to certain calculations by Special Master Brownell of damages, given that the elements of injury to TWA—from late deliveries, non-deliveries, leases instead of sales, and resultant disruption—were properly established, as we believe, is based on the same rationale that underlies our conclusions in the preceding portion of this opinion. Once again, we find none of Brownell's findings to be clearly erroneous.

There are essentially two issues raised with respect to the calculation of damages, which seem to be subdivided for purposes of analysis and emphasis many times in the briefs. The first concerns the degree of injury due to Toolco's failure to deliver the 10 diverted Convairs and 6 diverted Boeings in light of the size of TWA's jet fleet over the period of five years, 1959-63, for which damages were assessed. Toolco claims alternatively that certain aircraft purchased by TWA during that period made up for at least part of the lost profits that would otherwise

have been incurred as a result of the lost 16 planes. Moreover, to the extent the losses were not thus compensated for, Toolco would attribute the fault not to the diversions but to the failure of TWA's new management to "mitigate" damages by purchasing other jets to replace the diverted ones (as we have noted, three voting trustees, two of whom were not controlled by defendants, assumed control of Toolco's voting stock on December 15, 1960). We do not believe that these claims are inconsistent, as TWA asserts. Rather they amount in the aggregate to a single contention that TWA did in fact partly mitigate damages but could and should have done so entirely, or at least to a greater extent.

The second issue raised is based on the argument that even if TWA's fleet size was decreased as a result of Toolco disruptions to the extent found by Brownell, one cannot calculate the extent to which the larger fleet would have increased TWA's profits.

A. *Fleet Size.*

All the issues raised with respect to the decrease in the size of TWA's fleet attributable to Toolco's mismanagement turn on the conflict between the testimony of Toolco's experts and that of TWA's expert, Wemple, of Coverdale & Colpitts, who prepared and gave testimony concerning two reports estimating damages, assuming TWA had received the full reconstructed 63-jet fleet on schedule, rather than 47 jets late. As we have said, Brownell rejected one report, the Comparative Profits Study, but accepted entirely the calculations of the other, which we will refer to as the Wemple study. To rebut the Wemple study, Toolco introduced a report by Simat of Simat, Hellieson & Eichner, Inc., which Brownell rejected in its entirety.

According to the evidence accepted by Brownell, the six Boeings were diverted to Pan Am between November 5, 1959 and June 8, 1960 (they would otherwise have been received by TWA between July 19, 1959 and May 9, 1960). The ten Convairs were to be received between December 1959 and September 1960. On March 5, 1959, Toolco told TWA that it would not receive the Convairs. Six were then diverted to Northeast (and in 1963 repurchased by TWA). The other four were retained for a time by Toolco, then sold to Northeast (and never bought by TWA).

Brownell accepted Wemple's estimates that the Convair diversions resulted in the loss to TWA of the use of 5.1 planes in 1960, 9.9 planes in 1961, the 10 planes in 1962, and 7.9 planes in 1963. The six Boeings, unlike the Convairs, were suitable for international as well as domestic use. Brownell accepted Wemple's conclusion that their diversion resulted in a loss to TWA of use of the following quantities of planes in the stated years, for international and domestic use:

	International	*Domestic*	*Total*
1959	0.2	none	0.2
1960	3.6	1.4	5.0
1961	3.7	2.2	5.9
1962	4.8	1.0	5.8
1963	0.9	0.5	1.4

The markedly lower figures in each category for 1963 reflect the purchase by TWA in that year of the six diverted Convairs and the lease for use in 1962 and 1963 of five Boeing B-331B's (as substitutes for the diverted B-331's).

Brownell also accepted Wemple's testimony that even if it had received its full 63-jet fleet on schedule, TWA would still have leased, as it in fact did, four B-720B aircraft (a

medium range late model Boeing) during 1961-62 and would also have purchased 18 additional B-131B fan jets in 1962. Thus, these purchases were not considered as mitigating the damage caused by Toolco's diversions.

Toolco argues that there is no justification for Brownell's refusal to consider the purchase and lease of these B-720B's and B-131B's as at least partially mitigating damages. Alternatively, it contends that there is no support for the conclusion that any deficiency in TWA's fleet existing in 1959-60 as a result of Toolco's diversions, could have had effects that lingered for four years, into 1963, three years after Toolco relinquished control of TWA. Rather, Toolco insists, at least by 1962 and 1963 any deficiencies in the TWA jet fleet must be attributed either to TWA's business judgment that investment in replacements was not economically justified (thus there could have been no damage resulting from the earlier diversions) or to TWA's unjustified refusal to mitigate damages. The cumulative thrust of this pincer argument is that if TWA would have profited, as Brownell found, from the lost jets, why did not TWA replace them? If it would not have profited, there can be no damages.

We find Wemple's testimony that the B-131B purchases and the B-720B leases did not represent "substitutes" for the lost jets justified by several considerations. First, these assumptions were based on Wemple's background of expertise, and there is no basis in the record for finding they were dictated by TWA's counsel, as Toolco maintains. Second, no airline which commenced using commercial jets in the period during which damages were assessed stood pat and remained contented with its originally acquired fleet during that time. Thus, between 1960 and 1963, Pan Am increased its jet fleet from 38 to 64; United

from 34 to 91; and American from 25 to 73 jets. It is entirely reasonable and appropriate to assume TWA would also have expanded its fleet. Thus, it was not for the Master to conclude that the damages caused by the diversions had been entirely mitigated as soon as TWA acquired a fleet of 63 jets, as it did during 1962. It was not until 1963, the last year for which damages were assessed, that TWA obtained a fleet comparable to the 63 jets it should have had in 1959-60, plus those that it acquired in the meantime. Moreover, the transcontinental but not international-range B-131s may not have been an effective substitute for either the lost intercontinental-range B-331's or the diverted intermediate range Convairs. Finally, we note that Toolco failed to present a single expert witness to challenge the claim that the interim acquisitions did not mitigate damages, or to present an alternative assumption; indeed, Simat, Toolco's own expert, relied on Wemple's contention in this respect.

In support of its claim that TWA failed to mitigate damages, Toolco specifically cites (1) TWA's termination of the B-720B leases in 1962; (2) the decision of a Flight Equipment Committee appointed by TWA in 1961 to lease *only* four B-720B's, instead of six, as recommended by Rummel; (3) a reduction in its order of the B-131B's from an original 20 to only 18 actually purchased in 1962; and (4) its refusal in 1961 to buy the four CV-880's retained by Toolco which were ultimately sold to Northeast.

It is sufficient response to the latter contention to note that the complaint alleges that Toolco offered the CV-880's only on the illegal condition that TWA would not buy jets from Boeing, and Toolco has not shown that this contention was not well-pleaded. This adequately explains TWA's refusal to purchase the CV-880's offered by Toolco. More-

over, there is evidence that neither the B-720B's nor the B-131B's were adequate substitutes for the diverted jets, and thus TWA's actions with respect to those planes are not necessarily indicative of its ability and thus of a deliberate refusal to compensate for the diverted aircraft. In any event, the burden of proof to establish failure to mitigate damages was on Toolco, see *Ellerman Lines Ltd.* v. *The President Harding*, 288 F.2d 288, 291 (2d Cir. 1961); *United States* v. *Warsaw Elevator Co.*, 213 F.2d 517, 518-19 (2d Cir. 1954); *United States* v. *Russel Electric*, 250 F. Supp. 2, 20 (S.D.N.Y. 1965), and Toolco failed to demonstrate TWA's financial capability to purchase substitute jets deliverable before 1963, or that any such jets were on the market. There is evidence in the record indicating that the lead time in the purchase of jet-powered aircraft, each of which is tailor-made in many respects for the specific customer, is several years. Finally, a holding, in the face of no evidence to the contrary offered by Toolco, that TWA was financially able in the time immediately after the transfer of control to restock its depleted fleet, would not be consonant with the allegation of ¶53(a) that Hughes's manipulations of TWA had left it financially debilitated.

B. *Lost Profits From Decreased Fleet Size*

Toolco also attacks Wemple's testimony credited by the Special Master, that even if TWA had received all 63 jets, the additional 16 jets would have enjoyed a "load factor" (measure of the number of passengers carried on an average trip) equal to the average load factor for all jets of the same types during the years for which damages were assessed. Toolco's principal argument is that its own expert was correct in (1) considering the probable depressing

effect on demand of introducing new jets into the commercial air flight market and (2) basing his estimates on TWA's specific records of profits for each of its separate jet routes.

But adding 16 planes to the market would have increased overall capacity of domestic American air carriers by only 3.7% at most. It is entirely reasonable to believe that TWA's new, modern jets would have attracted at least as many extra passengers to TWA as might have been lost because of the added capacity. Thus one does not have to strain to recognize that TWA's competitors would have borne a loss of passengers. In any event, the effect hypothesized by Toolco is highly speculative and Toolco has not carried its burden of proof on this score.

Moreover, Toolco's approach of calculating the potential market for the lost planes only by looking at the capacity of each existing TWA route to absorb the new capacity is too rigid and the Master was not clearly in error to reject it. There is no reason to believe TWA could not have arranged its schedules to maximize its profits.

Finally, there is simply no sound reason to accept Simat's assumption that international competitors of TWA would have increased their transatlantic jet flights by four for each flight added by TWA. The Master was justified in rejecting this guesswork.

C. *Accounting Adjustments in the Price Waterhouse Study*

Toolco seeks to challenge certain adjustments made in the Price Waterhouse financial analysis, upon which both parties relied throughout the hearing to show the financial impact on TWA of various competing or alternative assumptions, some of which were ultimately resolved in

favor of TWA, and some in favor of Toolco. Contrary to the claim in Toolco's reply brief, these adjustments were made by Price Waterhouse, not Beigler, who directed the study and testified concerning it. In Plaintiff's Exhibit 50, Biegler merely summarized the adjustments already made by Price Waterhouse and which were previously incorporated in its study. The exhibit included an index of references to the Price Waterhouse study that explained and justified each conclusion. Toolco raised no objections to any of these adjustments before the Special Master, although it had ample time to study the Price Waterhouse report prior to Brownell's decision and in the face of Judge Metzner's clearly expressed and entirely appropriate suggestion that any technical problems that might arise after Toolco had thoroughly scrutinized the report should first be referred to Brownell so that rebuttal evidence could be put in the record. Toolco's failure to do so is inexcusable, particularly in litigation as complex and difficult as this is. It is precluded from raising these issues now since its conduct has denied TWA an opportunity to submit its own evidence on these intricate accounting matters to the Special Master.

In any event, Brownell's acceptance of the adjustments relied on by both parties and to which no objections were made can hardly be assigned as plain error unless the defect is patent and obvious on the face of the report. We find none of the adjustments complained of clearly erroneous, and indeed most, if not all, seem clearly justified as reflecting reasonable accounting procedures.

VIII.

In its May 3, 1963 order entering the default judgment on TWA's complaint, as we have already noted, the district

court also granted TWA's motion to increase the trebled ad damnum from $105,000,000 to $135,000,000. Toolco assigns this as error under F.R.Civ.P. 54(c), which provides that "a judgment by default shall not . . . exceed in amount that prayed for in the demand for judgment." Although the authorities do not appear to be in agreement and this Circuit has not expressed itself on the question, we are of the view that there is no sound basis for restricting TWA to the precise damages originally sought in a case where damages alleged were unliquidated, and where defendant did not default by non-appearance, but rather because of non-compliance with discovery procedures, and indeed was granted a full trial on the question of damages actually caused by the allegations established by its default. See *Riggs, Ferris & Geer* v. *Lillibridge*, 316 F.2d 60, 62-63 (2d Cir. 1963); *Sarlie* v. *E. L. Bruce Co.*, 265 F. Supp. 371 (S.D.N.Y. 1967); 6 Moore, Federal Practice ¶¶54.61, 55.08 at 1206. Toolco cannot in good conscience complain of any unfairness or surprise, for, as we said in discussing the propriety of the default judgment, at no time has it sought to rectify its refusal to cooperate with the legitimate discovery orders, an act it easily could have performed after Judge Metzner granted the motion to increase the ad damnum. Moreover, at the February 8 hearing, prior to Hughes's non-appearance, TWA clearly announced its intention to apply for an increase in the prayer for damages to the trebled $135 million.

IX.

Judge Metzner awarded attorneys fees to TWA of $7.5 million based on the time expenditure of 56,000 hours and taking into consideration many relevant factors which are each thoroughly discussed in his opinion, 312 F. Supp. 478.

Toolco assigns the award as error largely on the basis that the hourly rate (about $128) is excessive, thus ignoring the unprecedented size of the judgment (the allowance for attorneys fees is less than 6% of the award of damages), the complexity of the proceedings, and the fact that the default judgment was the product of intensive pre-trial activity for two years and was followed by exhaustive appeals and intricate damages proceedings during which Toolco persistently attempted to undo the effects of its own default. In extraordinary litigation such as this, it would be artificial to fix an arbitrary hourly rate without regard to other relevant factors, for example, quality of the representation, the success achieved, and the size of the award. There are no exact formulations of which we are aware, that would require a precise maximum hourly fee to be fixed in a vacuum. Under all the circumstances, especially in view of Judge Metzner's meticulous discussion of the problem, we are unable to say that he exercised his broad discretion in this respect unreasonably. *W. Montague & Co.* v. *Lory*, 193 U.S. 39, 48 (1904); *Hanover Shoe, Inc.* v. *United Shoe Mach. Corp.*, 245 F. Supp. 258, 302 (M.D. Pa. 1965), *vacated on other grounds*, 377 F.2d 776 (3d Cir. 1967), *reversed in part on other grounds*, 392 U.S. 481 (1968).

TWA's Cross-Appeal

The five points raised by TWA on its appeal do not call for more than summary discussion.

X.

Its only objection to Brownell's computation of damages is that he sensibly permitted a deduction from TWA's

damages for the cost of capital that TWA would have incurred if it had independently purchased its 63-jet reconstructed fleet because of interest charges that TWA would have incurred if the necessary capital had been borrowed in 1958-59. The Special Master calculated a somewhat higher interest rate (6.3%) for the Convairs than for the Boeings (6%) because the Convairs under the reconstructed plan would have been delivered later than the Boeings. In arriving at a rate of 6.3%, the Master relied on average interest rates charged to other airlines for similar loans during this period, and indeed paid by TWA itself on its own comparable indebtedness during that period. The 6-6.3% rate is identical to that which TWA's expert Morehouse had computed in a portion of his rejected financing plan which contemplated some additional borrowing, in 1959, supplementing earlier financing in 1955 at lower rates.

In seeking a smaller deduction for interest costs, TWA relies on (1) its Exhibit No. 314, showing interest rates on debts outstanding to various airlines in 1960, but without regard to the times that the debts were incurred or the purposes for which they were incurred; (2) the rejected Comparative Profits Study; and (3) a Price-Waterhouse estimated financing charge premised on the rejected Morehouse report. For the reasons just indicated, each ground asserted is insufficient to establish that Special Master Brownell's adoption of the higher rate was clearly erroneous. In the absence of a viable alternative offered by TWA (and TWA does not contest the rejection of the Morehouse and Comparative Profits studies) the Master properly based his deduction for interest charges on the price of money at the time when financing would normally have been arranged for the 63-jet fleet.

Opinion of the Court of Appeals,
September 1, 1971

XI.

TWA also argues that the interest allowances on the damage award and the judgment itself were incorrect.

TWA contends that it was improperly denied moratory interest as an element of "the damages sustained" by it under Clayton Act §4, 15 U.S.C. §15, to be computed from the time the damages were sustained and trebled to the date of judgment. We agree with the Seventh Circuit's contrary resolution of this issue in *Locklin* v. *Day-Glo Color Corp.*, 429 F.2d 873, 877 (7th Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971). It is reasonable to interpret Congress's silence on the matter as indicating that trebled damages are sufficient penalty and that interest need not be included. See *Rodgers* v. *United States*, 332 U.S. 371 (1947). Moreover, trebled damages will more than adequately compensate TWA for its injuries. *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697 (1945). Thus, there is no inherent policy reason to award moratory interest here and not doing so avoids difficult questions of proof—including highly abstruse inquiries as to proper rates and the time from which interest should run. Since the trebled damage device in any event adequately serves the penal and remedial purposes of the antitrust laws, we believe that it is sounder, absent contrary express Congressional intent, to consider that these difficult and time-consuming inquiries are intended to be avoided.

TWA also urges that interest on the judgment should run from the time the Master filed his report, rather than from the date of the district court's judgment, contrary to the apparently clear language of 28 U.S.C. §1961, which speaks of an award of interest "from the date of the entry of the judgment" and applies by its terms to "any money judgment . . . recovered in a district court." TWA is not,

as it attempts to show, "penalized" in any sense by any delay in judgment occasioned by the court's discretionary referral of the case to a Master. To the contrary, the salutary device of having the highly complex questions in this case heard and analyzed by a Master served to expedite this litigation. TWA cites no authority in point for its position[5] and we perceive no good reason to adopt its novel argument in the face of the plain words of Section 1961.

We do, however, agree with TWA that under New York law, applicable here pursuant to 28 U.S.C. §1961 (interest on the judgment is calculated "at the rate allowed [on such judgments] by State law"), interest on the judgment should be at the rate of 7½% rather than the 6% allowed by Judge Metzner. Under N.Y.C.P.L.R. §5004, interest on money judgments in New York "shall be at the legal rate." When this section was first adopted in 1963, it clearly referred to the rate then set as the maximum allowable interest rate prescribed by Gen. Bus. Law §340 (6%). Section 340 was subsequently superseded by an identical provision codified as §5-501(1) of the N.Y. Gen. Obl. Law. In 1968, that provision was amended to give the State Banking Board discretion to set the maximum rate of interest allowable on loans or their equivalent. The 6% rate was thereafter to prevail only if the Board prescribed

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5 *Tilghman* v. *Proctor*, 125 U.S. 136 (1888), and other patent cases relied on by TWA do not involve the question of when interest begins to run on a judgment, but rather from when interest *as an element of damages* should be measured. The holding of the cases cited is that interest should run from the date that the fact and amount of damages cease to be "in earnest controversy and of uncertain issue," *id.* at 151, an event marked by the filing of the Master's report. Since we determine that moratory interest is inappropriate here, these cases are inapplicable. In *L. P. Larson, Jr., Co.* v. *Wm. Wrogley, Jr., Co.*, 20 F.2d 830 (7th Cir. 1927), a trademark and unfair competition case, the question at issue was also the time from which interest would be assessed "as an element of damages." *Id.* at 836. See also *Carter Products, Inc.* v. *Colgate-Palmolive Co.*, 214 F. Supp. 383, 417-18 (D. Md. 1963).

no other maximum lending rate. In February, 1969 (the Court's judgment was filed in 1970), the Board prescribed a rate of 7½%.

Ever since the amendment to Section 5-501(1), there has been a lively controversy among New York courts and commentators as to which rate governs money judgments — 6% or the rate set by the Board. The commentator to the C.P.L.R. argued persuasively in 1969 (see N.Y.C.P.L.R. 1970 Supp. at 146-49) that the sounder view was that the Board's rate should prevail, since the purpose of C.P.L.R. §5004 was to set interest on money judgments at the going rate at the time in New York State, and the purpose of amending Section 5-501(1) was to permit that rate to be responsive to changing economic conditions. The commenator saw no need for leaving the rate of interest on judgments rigid after the state had determined that for commercial purposes the rate should be more flexible.

We agree with this reasoning. Toolco relies on our contrary decision in *Caldecott* v. *L. I. Lighting Co.*, 417 F.2d 994 (2d Cir. 1969), where we followed the tentative view of the then highest state court ruling on this question, *Belcher* v. *Kesten*, N.Y.L.J. July 29, 1969, p. 11, col. 7 (Sup. Ct. Queens County). Since *Caldecott* was decided by us, the Appellate Division, First Department, has unanimously held in *Rachlin & Co.* v. *Tra-Max, Inc.*, 308 N.Y.S. 2d 153 (March 5, 1970), that the 7½% rate should apply to a money judgment on a claim founded in contract. We see no sound basis for distinguishing contract from tort actions in fixing the appropriate rate of interest on a judgment and since *Rachlin* is presently the most authoritative declaration of New York law interpreting C.P.L.R. §5004, we will modify the judgment of the district court and direct that interest run from the date of the judgment at the rate of 7½%.

XII.

TWA's last contention is that it should be compensated for fees paid to its experts as part of its "cost of suit," 15 U.S.C. §15. This precise issue has long since been decided contrary to TWA's position in this Circuit, *Straus* v. *Victor Talking Machine Co.*, 297 F. Supp. 791 (1924) and TWA has not persuaded us that that decision, or the unanimous host of cases relying on *Straus* in this and other jurisdictions should be overruled. See e.g., *Twentieth Century Fox Film Corp.* v. *Goldwyn*, 328 F.2d 190, 224 (9th Cir. 1964); *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F.2d 561 (10th Cir. 1961), cert. dismissed sub nom. *Wade* v. *Union Carbide & Carbon Corp.*, 371 U.S. 801 (1962); *Farmington Dowel Prods. Co.* v. *Forester Mfg. Co.*, 297 F. Supp. 924 (D. Me.), aff'd and remanded, 421 F.2d 61 (1st Cir. 1969).

The judgment is modified to allow 7½% interest on the judgment. In all other respects, the judgment of the district court is affirmed.

Orders of the Court of Appeals in Dockets No. 34902 and No. 35114, September 28, 1971

[CAPTION]

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellants Hughes Tool Company and Raymond M. Holliday, and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Chief Judge Friendly and Judge Mansfield took no part in the consideration of this petition.

HENRY J. FRIENDLY
Henry J. Friendly
Chief Judge

September 28, 1971.

[CAPTION]

A petition for a rehearing having been filed herein by counsel for the appellants Hughes Tool Company and Raymond M. Holliday,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Dated: September 28th, 1971

J. JOSEPH SMITH
J. Joseph Smith
IRVING R. KAUFMAN
Irving R. Kaufman
PAUL R. HAYS
Paul R. Hays

INDEX

Volume I

	PAGE
List of Relevant Docket Entries	A-x
TWA Complaint [Doc. 1]	A-1
Order Referring This Action to Judge Metzner for All Purposes, dated August 31, 1961 [Doc. 42]	A-33
Opinion and Order of December 5, 1961 [Doc. 50]	A-35
Pretrial Order, February 7, 1962 [Doc. 59]	A-36
Toolco's Answer and Counterclaims [Doc. 63]	A-41
Holliday's Answer [Doc. 83]	A-99
Pretrial Order, July 12, 1962 [Doc. 101]	A-116
Pretrial Order, September 21, 1962 [Doc. 122]	A-118
Pretrial Order, January 10, 1963 [Doc. 144]	A-122
Pretrial Order, January 19, 1963 [Doc. 146]	A-127
Opinion and Order of Special Master dated January 22, 1963, Exhibit C to Bromley Affidavit dated February 15, 1963 [Doc. 179]	A-133
Exhibit A to the Affidavit of John F. Sonnett, dated February 1, 1963 [Doc. 166]	A-143
Exhibits B and C to the Affidavit of John F. Sonnett, dated February 1, 1963 [Doc. 167]	A-226
Pretrial Order, February 1, 1963 [Doc. 168]	A-253
Opinion and Order, February 7, 1963 [Doc. 173]	A-255
Toolco's Notice of Position, dated February 8, 1963 [Doc. 174]	A-268
Transcript of Pretrial Hearing, February 8, 1963 [Doc. 188]	A-270
Transcript of Pretrial Hearing, May 2, 1963 [Doc. 204]	A-309

PAGE

Opinion and Order, dated May 3, 1963 [Doc. 191] A-317

Opinion and Order of May 3, 1963 Granting Additional Defendants' Motion to Dismiss (memorandum endorsed on motion papers dated February 15, 1963) [Doc. 179B] A-323

Judgment of the Court of Appeals on Interlocutory Appeal, Entered July 10, 1964 [Docket No. 28405] [Doc. 478] A-324

Judgment of the Court of Appeals Affirming Dismissal of the Counterclaims, Entered July 10, 1964 [Docket No. 28406] [Doc. 479] A-326

Opinion of the Court of Appeals in Dockets No. 28405 and No. 28406 [Doc. 478] A-328

Opinion and Order of Special Master J. Lee Rankin, dated July 30, 1965 [Doc. 481] A-357

Opinion and Order of Judge Metzner, dated November 16, 1965 [Doc. 487] A-396

Transcript of Hearing Before Judge Metzner on December 30, 1965 [Doc. 498] A-400

Opinion and Order of Judge Metzner Denying Defendants' Motion for a Pre-Hearing Order, dated January 4, 1966 [Doc. 496] A-422

Order by Judge Metzner of January 4, 1966 Designating Herbert Brownell as Special Master in Place of J. Lee Rankin [Doc. 497] A-424

Volume II

Excerpts from Testimony at Damage Hearing of Robert W. Rummel [Docs. 554-2 through 554-10] A-425

Testimony at Damage Hearing of John B. Connelly [Doc. 554-11] A-977

Volume III

PAGE

Excerpts from Testimony at Damage Hearing of Edward J. Morehouse [Docs. 554-13, 554-14] A-1209

Excerpts from Testimony at Damage Hearing of Edward Wemple [Docs. 554-15 through 554-18, 554-32] A-1243

Excerpts from Testimony at Damage Hearing of John C. Biegler [Doc. 554-19] A-1527

Volume IV

Excerpts from Testimony at Damage Hearing of Gene M. Woodfin [Docs. 554-23, 554-24] A-1567

Excerpts from Testimony at Damage Hearing of Nathan S. Simat [Docs. 554-25, -26, -27, -28, -30, -31] A-1575

Excerpts from Testimony at Damage Hearing of L. John Eichner [Docs. 554-31, -32] A-1727

Testimony at Damage Hearing of Van Court M. Hare, Jr. [Doc. 554-32] A-1773

Excerpts from Pretrial Deposition of Robert W. Rummel [Docs. 224, 225, 226] A-1797

Excerpts from Pretrial Deposition of Charles C. Tillinghast [Docs. 210 through 222] A-1850

Excerpts from Pretrial Deposition of Emmett O. Cocke [Docs. 228, 231, 233, 235] A-1913

Jones v. *Uris Sales Corp.*—Master's Report [not a part of the Record herein] A-1934

Volume V

Notice of Filing of Report of Special Master dated September 21, 1968 [Doc. 509] A-1965

Report of Special Master, Filed September 21, 1968 [Doc. 508] A-1966

PAGE

Defendants' Objections to the Report of the Special Master, dated November 1, 1968 [Doc. 511] A-1967

Opinion and Order, Filed December 23, 1969, Adopting and Confirming the Report of the Special Master [Doc. 519] A-2027

Opinion and Order of April 13, 1970 Awarding Attorney's Fee and Costs [Doc. 530] A-2060

Final Judgment Entered April 14, 1970 [Doc. 531] .. A-2073

Volume VI

Toolco's Notice of Motion to Dismiss TWA's Complaint, August 8, 1961 [Doc. 22] A-2075

Order by Judge Herlands, dated August 14, 1961 [Doc. 25] A-2077

Transcript of Pretrial Hearing Before Judge Metzner, September 6, 1961 [Doc. 47] A-2078

Pretrial Order of Judge Metzner, September 7, 1961 [Doc. 44] A-2112

Transcript of Pretrial Hearing Before Judge Metzner, October 2, 1961 [Doc. 48] A-2115

Pretrial Order of Judge Metzner, December 18, 1961 [Doc. 354] A-2138

Toolco's Notice of Motion Before Special Master J. Lee Rankin, February 15, 1962 [Doc. 66] A-2140

Transcript of Pretrial Hearing Before Judge Metzner, February 23, 1962 [Doc. 79] A-2141

Orders of Special Master J. Lee Rankin, April 17, 1962, contained in excerpts from transcript of deposition of Charles C. Tillinghast, Jr. [Doc. 217] A-2176

Interrogatory Propounded by TWA to Toolco, May 4, 1962 [Doc. 89] A-2197

PAGE

Interrogatory Propounded by TWA to Raymond M. Holliday, May 4, 1962 [Doc. 90] A-2203

Transcript of Pretrial Hearing Before Judge Metzner, May 17, 1962 [Doc. 96] A-2206

Portion of Transcript of Proceedings Before Special Master J. Lee Rankin, June 4, 1962 [Doc. 218] A-2233

TWA's Notice of Motion and Affidavit of John F. Sonnett, June 25, 1962 [Doc. 305] A-2234

Affidavit of John R. Hupper, July 2, 1962 [Doc. 315] A-2240

Transcript of Pretrial Hearing Before Judge Metzner, July 12, 1962 [Doc. 107] A-2245

Pretrial Order of Judge Metzner, July 23, 1962 [Doc. 103] A-2267

Pretrial Order of Judge Metzner, July 24, 1962 [Doc. 93] A-2268

Transcript of Pretrial Hearing Before Judge Metzner, July 26, 1962 [Doc. 113] A-2270

Affidavit of Robert G. Zeller, August 28, 1962 with Exhibits A-K [Doc. 110] A-2283

Memorandum Reviewing the History of TWA's Application for Permission to Propound an Interrogatory of Hughes Tool Company Concerning the Location of Howard R. Hughes, August 30, 1962 [Doc. 106] A-2297

Transcript of Pretrial Hearing Before Judge Metzner, September 6, 1962 [Doc. 355] A-2305

Affidavit of John F. Sonnett, September 14, 1962, and Exhibits C and D thereto [Doc. 117] A-2316

Portions of Transcript of Proceedings Before Special Master J. Lee Rankin, September 15, 1962 [Doc. 226] A-2382

PAGE

Transcript of Pretrial Hearing Before Judge Metzner, September 19, 1962 [Doc. 129] A-2391

Portions of Transcript of Discovery Proceedings Before Special Master J. Lee Rankin, October 25, 1962 [Doc. 226] A-2428

Transcript of Pretrial Hearing Before Judge Metzner, October 29, 1962 [Doc. 184] A-2438

Notice of Motion by Toolco, December 4, 1962, for Leave to Depose Sessel and Wadsworth [Doc. 338] A-2461

Transcript of Proceedings Before Special Master J. Lee Rankin, December 14, 1962 [Doc. 237] A-2462

Transcript of Proceedings Before Special Master J. Lee Rankin, December 28, 1962 [Doc. 237] A-2514

Transcript of Pretrial Hearing Before Judge Metzner, January 9, 1963 [Doc. 185] A-2523

Transcript of Proceedings Before Special Master J. Lee Rankin, January 14, 1963 [Doc. 237] A-2571

Notice of Motion by Toolco, January 14, 1963 [Doc. 145] A-2574

Transcript of Pretrial Hearing Before Judge Metzner, January 17, 1963 [Doc. 186] A-2576

Notice of Motion by Toolco, January 22, 1963 [Doc. 147] A-2602

Transcript of Proceedings Before Special Master J. Lee Rankin, January 23, 1963 [Doc. 237] A-2603

Notice of Motion by Toolco, January 25, 1963 [Doc. 152] A-2615

Transcript of Pretrial Hearing Before Judge Metzner, January 28, 1963 [Doc. 187] A-2616

Letter of Chester C. Davis to Judge Metzner, January 29, 1963 [Doc. 448] A-2642

PAGE

Letter of Chester C. Davis to Special Master J. Lee Rankin, February 4, 1963 [Doc. 458] A-2645

Letter from John F. Sonnett to Chester C. Davis, February 5, 1963 [Doc. 459] A-2647

Notice of Motion by Toolco, February 6, 1963 [Doc. 170] A-2648

Affidavit of Nazeeh Habashy, February 6, 1963 [Doc. 172] A-2649

Transcript of Pretrial Hearing Before Judge Metzner, February 6, 1963 [Doc. 187] A-2650

Affidavit of Bruce Bromley, February 15, 1963 [without exhibits] [Doc. 179] A-2676

Affidavit of William C. Chanler, February 15, 1963 [Doc. 179] A-2689

Order to Show Cause dated February 16, 1963, and Affidavit of John F. Sonnett, February 15, 1963 [Doc. 180] A-2692

Transcript of Pretrial Hearing Before Judge Metzner, February 21, 1963 [Doc. 189] A-2704

Order of the Court of Appeals for the Second Circuit dated June 6, 1963, Granting Leave to Appeal and Staying Damage Hearing Pending Appeal .. A-2736

Orders of the Supreme Court of the United States, dated November 16, 1964 Granting Writs of Certiorari A-2737

Orders of the Supreme Court, dated March 8, 1965, Dismissing the Writs of Certiorari as Improvidently Granted in *Hughes Tool Company et al.* v. *Trans World Airlines, Inc.*, Nos. 443 and 501 .... A-2738

Opinion of the Court of Appeals dated September 1, 1971, in Docket Nos. 34902, 35114, Affirming with Modifications the Judgment of the District Court A-2739

PAGE

Orders of the Court of Appeals, dated September 28, 1971, Denying Petitions for Rehearing and Rehearing *in banc* A-2799

Volume VII

PAGE

Excerpts from Transcript of Deposition of Charles C. Tillinghast, Jr. [Excerpts from Docs. 54, 210, 211, 216, 221] A-2800

Vol. 11 of Defendants' Exhibits to Deposition of Charles C. Tillinghast, Jr. (consisting of Exhibit 11, with subparts 11-A through 11-T, inclusive) [Doc. 238] A-3220

Opinions and Orders of the Civil Aeronautics Board with respect to the Hughes Tool Company—TWA Control Relationship, as follows:

(a) CAB Opinion and Order No. 3210, October 17, 1944 (officially reported at 6 C.A.B. 153) [not a part of the Record herein] A-3297

(b) CAB Order No. 4437, January 26, 1946 .... A-3307

(c) CAB Order No. E-922, October 29, 1947 .... A-3309

(d) CAB Opinion and Order No. E-1735, June 30, 1948 (officially reported at 9 C.A.B. 381) [not a part of the Record herein] A-3311

(e) CAB Opinion and Order No. E-4701, October 6, 1950 (officially reported at 12 C.A.B. 192) [not a part of the Record herein] A-3333

(f) CAB Opinion and Order No. E-16195, December 29, 1960 (officially reported at 32 C.A.B. 1363) A-3403

Excerpts From Transcript of Deposition of Charles C. Tillinghast

[Docs. 54, 210-211, 216, 221]

[604] By Mr. Davis:

Q. Mr. Tillinghast, let me try to establish a few independent facts, and I would appreciate it if you could answer my questions without feeling the necessity at this time of explaining the reasons for whatever decision may have been made.

I can assure you that you will have a full opportunity to explain anything that was done or was not done.

Isn't it a fact, in accordance with your understanding, that the Tool Company, as a result of the 1960 financing, held a hundred million dollar note of TWA?

A. It is.

Q. And that in connection with that 1960 financing TWA had obligated itself to make an offering to all of its stockholders not later than May 31, 1961 of either a hundred million dollars of debentures or $111 million of debentures, approximately?

A. Yes.

Q. Is it also a fact, in accordance with your understanding, that the Tool Company had obligated itself to subscribe to 78 per cent of such an offering, and to also subscribe to whatever portion the 22 per cent of the [605] stockholders failed to subscribe?

A. Up to a ceiling of $100 million.

Q. Up to a ceiling of $100 million?

A. That's correct.

Q. And that the Tool Company could acquire those new TWA debentures by surrendering all or part of its $100 million note in payment?

A. That is correct.

Q. Is it also a fact that in May 1961 the Tool Company asked TWA to consider a delay in the effective date of a TWA registration statement covering these debentures to be issued?

A. That is correct.

Q. Isn't it also a fact that the board of directors of TWA in fact refused to grant that request for a delay?

A. Yes.

Q. Isn't it also a fact that at that time the financial advisers of TWA, namely, Dillon, Read and others associated with them, advised TWA that it would be unadvisable to grant the request of the Tool Company for an extension of time?

A. It is.

Q. Isn't it also a fact that those financial ad- [606] visers made that recommendation on the ground that such a delay might have an adverse effect on the Boeing financing then contemplated?

A. That is correct.

Q. My understanding is that your conversations with Mr. McCone with respect to what you have testified to this morning took place after that action of the board meeting.

A. Yes.

Q. Isn't it a fact, then, that at the time you were discussing these matters with Mr. McCone the question or the issue as to what might or might not interfere with the Boeing financing was uppermost in your mind?

A. That was certainly one of the things that was uppermost in my mind when I was talking with Mr. McCone, yes.

Q. Now I am going to ask you if your recollection has been refreshed as to whether or not in your conversations with Mr. McCone, when you were discussing the desirability

or lack of desirability to "bail out the Hughes Tool Company," or whatever, the Boeing financing was very much on your mind?

A. Oh, yes, quite.

Q. Isn't that one of the reasons you gave to Mr. [607] McCone as to why it seemed to you that it would be undesirable to consider the 990 program?

A. I think it probably was, Mr. Davis, yes.

Q. And that it was discussed in the course of these communications relating to the decision that should be made?

A. Yes.

Q. Had you occasion to discuss with any of the lending institutions involved, or their representatives, what would adversely affect their financing commitment or arrangements?

A. At what time, Mr. Davis?

Q. I am still referring to that same period of time of from May 15th, if you please, to June 10th, but before the receipt of the three proposals reflected by Defendants' Exhibit 10. Let's make it June 8th, if you please.

A. Except to the extent that I may have discussed the matter with Mr. Sessel, the answer is no, I did not discuss it with the financing institutions.

Q. Isn't it also true that during that period you discussed with Mr. Breech the things which in your judgment or in his judgment might adversely affect this Boeing financing?

[608] A. I am sure I did.

Q. Did either Mr. McCone or Mr. Breech suggest to you that it would be desirable to investigate by communicating with the principal officers of the major participants in this lending institution group the question as to whether or not it would or would not adversely affect the Boeing financing?

A. Again making an exception in the case of Mr. Sessel, the answer is no.

Q. You understand my question was not what you did, but whether either Mr. McCone or Mr. Breech suggested your doing something or investigating?

A. My answer is that I don't think that they did suggest that.

Q. Did I understand your prior answer, when you said with the exception of Mr. Sessel, to say that they suggested Mr. Sessel?

A. I don't think that they suggested that I talk with Mr. Sessel. As you know, Mr. Davis, Mr. Sessel is a member of the board of directors of TWA, and in his capacity as a director, I am sure that I discussed this matter with him at the board meeting on the 17th, if not perhaps before that. I am not sure at the moment. I am quite sure that Mr. Sessel expressed [609] the view that it would be a mistake, so far as the financial institutions were concerned, to get into a 990 negotiation with Hughes Tool Company.

Q. Before we come to your conference with Mr. Sessel, I am interested in pursuing what took place between you and Mr. McCone or you and Mr. Breech, and my question to you is are you quite certain that neither of them suggested that you discuss the matter directly with a representative of the lending institutions?

A. I am quite sure that they made no suggestion. If they did, I have absolutely no recollection of it at the moment.

Q. I understand that Mr. McCone also, in the course of those conversations, suggested the possibility of reducing the Boeing order in part?

A. Yes.

Q. At the time that he made that suggestion, did you say to him, "But if we do that, that will change the amount of the financing arrangements that we have made with the lending institutions"?

A. No, I am sure I didn't say that.

Q. What did you say?

A. As I recall it, Mr. Davis, what I told him was that I thought that it would be uneconomical to try to [610] have, for example, half Boeings and half Convairs, that the operating—well, the operating lack of economy of relatively small fleets was very great, that from a standpoint of flexibility we would be far better off to have a homogenous fleet, and that quite apart from the problem of getting into possible endless negotiations with respect to the 990, and leaving the whole program in suspense, that I did not think it made sense, from an operating standpoint, to try to mix the two.

Q. You consider a fleet of 13 jets a very small fleet?

A. I don't know that I would say very small, but it is too small, in our opinion, to be effective from an operating standpoint.

Q. At that time, and I am referring to the time when you were having these conversations with Mr. McCone, you had already made studies investigating the operational advantages or disadvantages of 990s vs. Boeings or a combination of the two?

A. Oh, yes. Prior to the time that I came with TWA Mr. Rummel's department had made a very extensive investigation of this subject, and had come up with a recommendation with which you are familiar, and from the time that this question was first raised by you, I [611] had a number of discussions, repeated discussions, with Mr. Rummel on the subject, asking him to review the question and let me know whether anything that had happened changed, in any regard, his opinion.

Q. You are now referring to conversations you had with Mr. Rummel after you commenced to hear from me. I understand we are talking after May 26th, but I am still

referring to the period when you were discussing this matter with Mr. McCone, namely, from the time you received the May 26th letter and June 8th.

Are you addressing yourself to that period of time in your answer?

A. Yes. I had repeated discussions with Mr. Rummel about this.

Q. You discussed with Mr. Rummel, during that period of time, his views as to the possibility of a mixed fleet; is that correct?

A. Well, I can't say definitely, Mr. Davis, that I discussed that specifically between the 26th of May and the 10th of June. But in this general period I discussed it with him several times, and was quite familiar with his views on the subject.

Q. I understand that, Mr. Tillinghast. I am trying to ascertain what was the basis for the statements or [612] contentions that you were making in your conversation with Mr. McCone.

A. Well, at the time that I talked with Mr. McCone and made this statement I was quite familiar already with Mr. Rummel's views on this particular subject.

Q. They had been discussed, then, before May 26th?

A. Oh, yes.

Q. Was it before or after that Mr. Breech suggested to you that you should not involve yourself personally in this equipment problem?

A. That was some time prior to my visit to Seattle on the 25th and 26th of May.

Q. Let me understand. You went to Seattle the 25th or 26th of May?

A. I went in the afternoon of the 25th, and was there that evening and on the 26th.

Q. In connection with your visit to Seattle Mr. Breech had occasion to comment that he did not think it was desirable for you to become personally involved in the equipment selection; isn't that correct?

A. That is correct.

Q. Am I to understand, then, that between May 25th or 26th and June 8th you nevertheless pursued this question with Mr. Rummel so as to put you in a position to [613] make the remarks and comments you made to Mr. McCone?

A. That is not correct, Mr. Davis. I had been pursuing this question with Mr. Rummel since the 30th of March.

Q. What question had you been pursuing with Mr. Rummel since the 30th of March?

A. The equipment question generally, and what equipment TWA should select.

Q. In those discussions with Mr. Rummel you also discussed the 990s?

A. Yes. Mr. Rummel's study discussed 990s and several other different types of ships.

[614] Q. Was that on the basis that TWA was possibly interested in 990s, or expected to order some, or what was the nature of your conversation that you had from March 30th on with Mr. Rummel as to the 990s in relationship to the equipment program of TWA?

A. Well, Mr. Davis, your question is a little diffuse, but let me start.

I first talked with Mr. Rummel, I believe, on the 30th of March, at which time I think he gave me, although I may have had it a couple of days before that, his study on the 1961 equipment program, and from that time in March up to the time that you are speaking about I had a number of conversations with Mr. Rummel, as well as others, about this problem, because it obviously was a very major ques-

tion, and one that was going to come to a head very, very quickly.

Mr. Rummel's study, covered a number of different ships of the general sort in which TWA might be interested, and among others. This study covered 880s, 880Ms, and 990s. Whether or not the study itself mentions that Hughes Tool Company had some 990s on order, or whether Mr. Rummel told me that orally, I cannot at this moment recall. But early in the game I knew that one of the alternatives [615] that was under consideration was the 990. As a consequence, again early in the game, I had discussed with Mr. Rummel the pros and cons of the 990, and in particular the pros and cons of the thirteen 990s which were under order by Hughes Tool Company.

Does that answer your question?

Q. In part.

I believe you decided to become chief executive on March 20th?

A. That's correct.

Q. One of the things you immediately began to instruct yourself about, to obtain information, on becoming chief executive officer was this equipment program of TWA?

A. That was one of the things.

Q. You had a great many other things to do?

A. I did, an exceedingly great number of things to do.

Q. You reviewed with Mr. Rummel the studies he had made previous to your becoming a chief executive officer?

A. That's correct.

Q. You weren't reviewing with him studies which he had undertaken pursuant to your request?

[616] A. No. This had all been begun before I joined the company, or before I agreed to join the company.

Q. This was a discussion you had with Mr. Rummel based upon some written reports that Mr. Rummel had got-

ten up, or programs, or presentations?

A. This is a specific study, Mr. Davis, with which I think you happen to be familiar.

Q. I don't happen to be familiar with it, but whether I am or not, for the record, will you please answer my question.

A. It is a specific study, entitled, as I recall it, "1961 Equipment Program."

Q. Can you tell us about how much time you spent with Mr. Rummel studying this program?

A. When?

Q. At the time that you first began to discuss this matter with Mr. Rummel, and up to the period we are talking about, which is either May 26th or June 8th?

A. Well, in the aggregate, by June 8th I had probably, oh, spent an aggregate of, I would guess, 10 or 15 hours discussing the thing with Mr. Rummel, and I had spent considerable additional time reading the report and studying the report.

[617] Q. When was the decision made that the Boeing aircraft was the best suited or more desirable from TWA's point of view?

A. The decision made by whom?

Q. TWA.

A. Well, if you mean when was the decision made by the board of directors, the decision was made by the board of directors at their meeting in Kansas City on, I believe, the 27th of April.

Q. No, I am not referring to a decision by the board of directors. I mean the decision or the recommendation which resulted in a recommendation to the board for action. I am referring to the conclusion. When was the conclusion reached, so far as you were concerned?

A. So far as I was concerned?

Q. Yes.

A. Shortly before the meeting of the 27th.

Q. Of which month?

A. April.

Q. During this period between March 30th and April 27th you considered the possibility of 990s as well as Boeings, is that correct?

A. That's correct.

[618] Q. Did you also consider, during that period, the possibility of a mixed fleet?

A. There was some talk of it, yes.

Q. What do you mean by "some talk"? Can you identify the talk, and with whom?

A. I can't identify it specifically, Mr. Davis. I imagine I must have talked with Mr. Rummel. I am sure that it was discussed with him. On the 17th—

Q. Which month?

A. (Continuing) —of April, the first day that I took office, as I recall it, the afternoon was devoted to an equipment meeting which included Mr. Rummel, Mr. Cocke, Mr. Rourke, Mr. Fellows. I can't remember for certain—no, it didn't include Mr. Hall. I think it may have included Mr. Dunn. I am not positive.

Q. Let me ask you this: Did Mr. Rummel have occasion to review or revise this original report that he had and which you discussed with him shortly after you became chief executive officer?

A. Not that I can recall. Certainly not to any significant extent.

Q. So far as you were concerned, then, the recommendation which was made to the board, which was [619] decided upon on or about April 17th—

A. April 27th.

Q. That was board action?

A. Board action.

Q. I understand that the conclusion as to the recommendation to be made was made on or about the 17th, or shortly before the 17th.

Mr. Sonnett: What he testified to was shortly before the 27th.

Mr. Davis: I understand that. Then he found that was based upon some meeting that was held on the 17th.

Q. What are the facts, anyway, Mr. Tillinghast?

A. The facts are these, Mr. Davis, if that is what you want: The recommendation by the TWA operating people had already been reached before I came with the company. Obviously this was a matter of such great significance and importance that I wanted to review this recommendation, this conclusion that had already been reached, so prior to coming with the company I talked with Mr. Rummel, I read the equipment proposal, and the first day that I was there I had a meeting in the afternoon for the purpose of having a broader discussion of this to see myself as to whether I was [620] prepared to adopt this program and recommend it to the board at its meeting ten days later.

Q. If I understand your testimony, the operating people had already made up their own mind and made a recommendation before you became chief executive officer?

A. That's correct.

Q. Then you felt that you as chief executive officer ought to review it?

A. That's correct.

Q. As a result of the review that you made of it you subsequently recommended it to the board on April 27th?

A. Yes.

Q. What you recommended to the board on April 27th was, in substance, the recommendation of this operating personnel group, is that correct?

A. Yes.

Q. So what was recommended to the board on April 27th was, in effect, the conclusion reached by the operating people of TWA before you became chief executive?

A. That's correct.

Q. Do you know whether or not that was a program [621] or conclusion that was prepared by the operating people at TWA at the direction—at whose direction was that program or study made prior to your becoming chief executive officer, do you know?

A. Well, I can't be altogether positive about that. I believe that Mr. Rummel's department generated the study on its own, and that that study was brought by Mr. Rummel's department to a point where some action was required, and at a meeting of the board prior to the time that I took office there had been an equipment committee appointed specifically to deal with this problem.

Q. May I interrupt you by asking you to identify this equipment committee, because up to this point I was thinking everything was being done by this operating committee or operating personnel under Rummel.

A. Well, I can't remember—I can refresh my recollection, but at the moment the only people I can be sure of on that committee were Mr. Leslie, Mr. Cocke—

Q. All operating people?

A. Mr. Pierson, I believe, and I believe there were one or two others, but I can't remember for sure at the moment.

[622] Q. All operating personnel, in a broad sense?

A. I wouldn't guarantee that.

Q. Mr. Sessel?

A. There may have been an outside director on the committee. I just can't recall at this point.

Q. Mr. Sessel, perhaps?

A. I doubt—

Q. Mr. Breech?

A. No, I am sure Mr. Breech wasn't on that committee.

Q. When you were reviewing these recommendations did anyone of any importance or significance, or whose views would be material—

A. My recollection is that it consisted mainly of the inside directors.

Q. Inside directors or inside employees?

A. Inside directors; Mr. Leslie, Mr. Cocke, Mr. Hall. But there may have been one or two outside directors on it. I would have to refresh my recollection to be sure, Mr. Davis.

Q. So this was an equipment program which had been generated by this personnel at TWA at a time when TWA was without a voting trust—is that your understanding of the facts?

[623] A. No. I think it started before there was a voting trust, and ended after there was a voting trust, because the study itself was dated in March. I think maybe March 10th was the date of the study, and it is obviously the sort of study that had taken quite a time to prepare, and I believe, although I can't state positively, that it was commenced sometime in the latter part of 1960, and reached fruition in the early part of 1961.

Q. But so far as you know, the new management group or the new people in control of TWA had not impinged upon the study, they hadn't influenced it in any way, had they?

A. The new management people, you say?

[624] Q. Yes, the new persons who had acquired control of TWA.

A. Well, there weren't any new people in management, Mr. Davis, until I came in.

Q. What I am trying to say, Mr. Tillinghast, is the people who acquired control of TWA as a result of the voting trust did not exercise any influence or direction which is reflected by this study or report?

A. To my knowledge, Mr. Davis, neither the voting trustees nor the new directors stimulated, generated or directed the preparation of this study.

Q. You, some time shortly after March 30th, discussed this report with Mr. Rummel?

A. The first time was on March 30th, I believe.

Q. At that time the report was fairly well completed, but you wanted to review it before submitting it to the board; is that correct?

A. At that time the report was completed.

Q. That report contained an evaluation of the 990s?

A. It did.

Q. Did it also contain a comparison between the 990 and what Boeing had to offer?

A. It did.

Q. Am I to understand that it concluded that [625] the Boeing was more desirable?

A. It did.

Q. You had occasion of discussing with Mr. Rummel the nature and extent to which 990s might be available to TWA if the decision in fact was to take 990s?

A. Yes.

Q. Can you describe to me a little what was said at that time between you and Mr. Rummel or with respect to the availability or lack of availabilty or probable availability of the 990s?

A. What I was told, Mr. Davis, and I can't tie this to a specific discussion, but what I was told was that Hughes

Tool Company had some 990s on order, that they possibly would be available, that whether or not they would be available, and if so on what terms, wasn't definitely known.

However, Hughes Tool had some delivery positions which would be attractive if one were going to acquire 990s.

The 990s were in American Airlines' cockpit configuration, and if the 990s were purchased there would be a problem of delay in delivery and a problem of expense in converting the America cockpit—American [626] Airlines' cockpit configuration to a TWA cockpit configuration, and in that connection Mr. Rummel said that he had several times tried to discuss this question with Mr. Hughes because it seemed clear to him that if these planes were intended for TWA, and if TWA were going to take them over, it was important, had been important for a long time, that they be constructed with TWA cockpits and TWA systems rather than with American Airlines' cockpits and systems, but that he had never been able to discuss the matter with Mr. Hughes, and he understood, he had been told by Convair, that Mr. Hughes had given directions that Convair were not to discuss the 990s with him or any of the TWA people.

Q. Is that the full extent of your recollection as to what you discussed with Mr. Rummel relating to the 990s?

A. No, not relating to the 990s. We discussed far more than this relating to the 990s, but I thought your question was directed to the availability of the 990s.

Q. That is what I had in mind.

A. Well, as to the availability of the 990s, this is the substance of—well, I need to add one other [627] thing, that Mr. Rummel expressed the hope that we would not get into a 990 negotiation because he felt that if we did it would be typically long, involved and drawn out, and he felt very deeply that TWA needed planes just as quickly as it could get them, and he was afraid that the whole equipment pro-

gram would be delayed if we got into extensive negotiations on the 990s.

Q. Did he indicate at that time that for the terms and conditions under which the planes were available they would be or could be advantageously used by TWA, assuming that the terms and conditions were not a problem?

A. Mr. Rummel's view throughout was that if we were going to get any planes they ought to be Boeings, and that if we were going to get more planes we ought to get more Boeings so as to have a more homogeneous fleet.

Q. In other words, it was Mr. Rummel's position that it was undesirable from TWA's point of view to consider 990s, irrespective of any question of terms or conditions or delivery schedules?

A. Not entirely, Mr. Davis. I am sure that Mr. Rummel believed, felt—I had this discussion with him [628] at a later time—that there obviously were terms good enough that TWA should be interested in 990s, but they would have involved, as I recall the figure, knocking a million dollars or more off what he assumed computed would be the probable price.

Q. You say you had a discussion with Mr. Rummel at a later time.

Are you still referring to the period from March 30th to April 27th?

A. No, I am not. I am referring to a period in July.

Q. After this litigation started?

A. That's right.

Q. I am interested now in what took place during the period we are talking about.

A. Yes.

Q. Did you have any further conferences or discussions with Mr. Rummel between March 30th and April 17th that is of any consequence, relating to this subject?

A. Yes.

Q. May I call to your attention that your calendar appears to refer to a date on April 21st with Mr. Rummel, but that is the only one, I believe, [629] that we have been able to find.

A. Well, I have the feeling, Mr. Davis, and I may be wrong here, that I had two meetings with Mr. Rummel before I took office.

Q. Before you took office?

A. That's right. I know that I had a meeting with Mr. Rummel and Mr. Fellows, and that may have been this meeting on the 30th or it may have been a meeting the following week that we agreed upon when we met on this date.

I know that when I had the meeting with Mr. Rummel and Mr. Fellows that Mr. Fellows was there to discuss the traffic problem, and at the meeting of which I am speaking, at which Mr. Fellows was present, I had already made a quick review of this document, the equipment program I spoke about, and I was—wanted to have Mr. Fellows there because I understood that he was the man who could best answer the question of if we have all these planes, can we fill them sufficiently with passengers so that we will earn revenue with them, and I wouldn't be positive, but I have the feeling that I had one preliminary meeting with Mr. Rummel and then a meeting with Mr. Rummel and Mr. Fellows before the 17th of April.

[630] Q. Do you recall anything that was said by you or by Mr. Rummel at the subsequent meetings which relate to the availability of the 990s, the desirability of the 990s?

A. Well, I haven't discussed yet the desirability of the 990s.

I have told you, Mr. Davis, about all that I can recall about the availability of the 990s. I haven't testified about the desirability of the 990s.

Q. Did you discuss the desirability? For the purpose of shortening the record, I am not interested, on the desirability, any more than the report shows, by Mr. Rummel, unless you discussed whether or not there should be a change in the report.

Did you discuss any possible change in his report as to desirability of the 990s?

A. No. As a matter of fact, intensive discussions as to the desirability of the 990s didn't arise until some time after the 17th of May, when the controversy with Hughes Tool Company arose.

Q. There had been little or no discussion as to the desirability of the 990s prior to that time?

A. There had been some discussion, but it wasn't intensive discussion.

[631] As I recall it, Mr. Rummel discussed with me why it was that he preferred the Boeing 707 to any of the other ships, and we briefly discussed each of the other ships and its virtues and shortcomings, and why it was that he felt that on balance the 707 was the desirable ship for TWA to buy.

Q. Can you, as briefly as you can, summarize the recommendation that was made to the board of directors on April 27th?

A. Well, the recommendation was that TWA proceed with a program for the purchase of 26 Boeing aircraft, consisting of 20 707-131s and six 707-331s.

Q. Excuse me for interrupting, but to identify, the six Boeing 707-331s are a long-range aircraft primarily used in the international segment?

A. That's the intercontinental version.

Q. The 20 707-131s could be best described as short-range or medium-range jets?

A. Long-range, but not as long as the 331.

Q. Was that the competitor, so to speak, of the 990?

A. I believe that has greater range than the 990.

Q. The 990, in fact, is a shorter range than the 131?

[632] A. It is a little shorter than the 131.

The 131B, and these were both fan engine, the 131B is capable of trans-Atlantic utilization, whereas I do not believe that is true of the 990.

Q. For the purpose of following your testimony, the discussion you had with Mr. Rummel of the 990s versus the Boeing is really a comparison of the 131s of Boeing versus the Convair 990?

A. That's correct. The 990 isn't comparable at all with the 331B. It is broadly comparable with the 131B.

Q. I believe I interrupted you when you were going to summarize the recommendation that was made to the board when you said it was basically to take 20 131Bs and six 331s.

A. Well, that is all I intended to say. That was the recommendation.

Q. Between April 27th and your conversation with Mr. McCone had you had any occasion or opportunity to discuss the matter any further with either Mr. Rummel or Mr. Leslie or Mr. Cocke, and I am now referring to the subject of the desirability or lack of desirability of the 990s, or the nature or extent of the obligation of TWA to the Tool Company.

[633] A. Yes. As a matter of fact, during the period from the 17th of May through the period you have—

Q. June 8th?

A. June 10th.

Q. Prior to the June 10th letter, prior to the date of the June 10th letter, I am saying.

A. Between May 17th and June 10th this subject was a subject of very frequent discussion, and including an afternoon session, Mr. Davis, when you sat with us and stated at considerable length the reasons that you felt or reasons that you felt we should take into account.

Q. Can you identify the date of that meeting?

A. I believe that was the 2nd of June.

Do you confirm that that is right? It is not on my calendar here.

Q. I don't have my calendar with me, but I am willing to accept that. It is, I am told.

My question is was this conversation or series of conversations with Mr. McCone before or after June 2nd.

A. I can't distinctly recall these in relation to June 2nd. I would—my best recollection, Mr. Davis, would be that I had one before June 2nd and another [633A] after June 2nd, because I recall having told Mr. McCone that we either were having or had had a discussion of the specific matter with you.

[634] Q. Were these calls calls that were originated by Mr. McCone to you or from you to Mr. McCone?

A. Most of them originated from Mr. McCone to me.

Q. But during this period in which these conversations took place there were some calls from you to Mr. McCone?

A. Well, I think in every instance it was a case where Mr. McCone had called and I called him back.

Q. Where was Mr. McCone, where did he live or where was his business?

A. Well, his home was in California, his business was in California, but he was in New York a good deal.

Q. These conversations that you have previously described this morning, these were long distance telephone calls, weren't they?

A. At least one of them was. I may have had a telephone conversation with him when he was up at the Waldorf in New York. He made it a habit almost whenever he was in New York to call me up.

Q. This long distance call or calls that you had with Mr. McCone, which were originated by him, as you recall, but probably leaving word that he called, and you called him back—

A. Yes.

Q. (Continuing) —where would he be calling from in [635] California?

A. I can't tell you specifically, Mr. Davis, I would know only that I would receive a slip saying Mr. McCone called, call operator so and so, and my secretary would get him on the phone.

Q. You personally do not know where or how you would go about reaching Mr. McCone by phone without your secretary's assistance?

A. Well, I think I could find—well, I think I could find him without her assistance, but she took care of the problem.

Q. But you don't know where you would be reaching Mr. McCone in connection with these telephone conversations we are talking about, is that your testimony?

A. Well, I don't know specifically. I presume it was at the Joshua Hendy Company.

Q. Where, sir?

A. In Los Angeles.

Q. That is what I was trying to elicit from you.

I understood your testimony this morning to be that in the course of that telephone conversation you took some positive positions with Mr. McCone in connection with what he was urging you to consider or reconsider?

A. I expressed an opinion, yes.

[636] Q. That was based upon what you have described as to what had taken place as to your study of the equipment program that you have just testified about?

A. Well, it was based upon my appraisal of the whole situation.

Q. But specifically, it was based upon your study of the equipment program as programmed by Mr. Rummel and this equipment committee, et cetera, that you just testified about?

A. It included that.

Q. I would like you to describe, if you please, what, if anything, you did following this conversation with Mr. McCone to confirm your conclusions, if you did.

A. You mean to reconfirm—

Q. I may have misunderstood your testimony, the record will show what it was, but I understood it to be as to what you said and what Mr. McCone said with respect to this 990 program, and the desirability of considering bailing out the Tool Company.

A. Mr. Davis, this was the subject of very, very frequent discussion in the office. I was discussing it very frequently with Mr. Rummel and Mr. Leslie and Mr. Cocke, and I can't recall that as a consequence of this discussion with Mr. McCone I did anything specific.

[637] Q. Did you ever communicate with a representative of the Hughes Tool Company for the purpose of finding out to what extent the Tool Company was prepared to enter into a firm or more definitive commitment that would make 990s available to TWA, or the terms and conditions under which they would be made available?

A. Yes. I wrote you several times about that.

Q. You are referring to letters addressed to me?

A. I guess they were addressed to Mr. Holliday. I stand corrected. I believe they were addressed to Mr. Holliday.

Q. Can you identify those letters more specifically, Mr. Tillinghast?

A. If I had before me the correspondence covering the period from the 17th of April up to the middle of June I am quite sure I could. Also, if I recall correctly, Mr. Davis, at the meeting on the 2nd of June at which you were present I asked that if you wished seriously to pursue this you let us have some very definite terms just as promptly as possible.

Q. Will you produce at our next session your copies of letters to either Mr. Holliday or me or anyone whom you thought was a representative of the Tool Company during this period that you refer to which you have identified [638] or described as inquiries as to the availability or terms of the 990s?

Mr. Sonnett: You will have those, Mr. Davis. It would facilitate it if you produced the originals, and the witness can identify—

Mr. Davis: Mr. Sonnett, I cannot identify the letters from the witness' testimony. I do not know what letters he thinks constitute that kind of request. Quite frankly, I believe that I am fairly familiar with that correspondence. I must say I have never thought about it in quite this connection. We have been furnished with a great mass of material, to be sure. It would be very burdensome for us to try to identify what Mr. Tillinghast is talking about. I think that we will move more rapidly, since Mr. Tillinghast knows what he is talking about, he knows the letters he has in mind.

I am sure that we left the originals of those documents in Mr. Tillinghast's or TWA's possession, and I am sure

it will be no difficulty whatever, if Mr. Tillinghast is willing, pursuant to your advice, to identify or produce what he has in mind. I am perfectly willing to take in place of a physical production a sufficient identification of the letters [639] so we may find them among the documents supplied to us.

Mr. Sonnett: May I ask the witness a question? Maybe we can facilitate this.

We are dealing with letters written by you to Holliday during what period of time?

Mr. Davis: The record shows that.

Mr. Sonnett: I am sorry. I am just asking the question because I don't have in mind at the moment what the record shows.

The Witness: The period May 17th to, oh, the middle of June.

Mr. Sonnett: Isn't it perfectly simple to get out of your files the letters written by Mr. Tillinghast to Mr. Holliday during that period of time?

Mr. Davis: No, it is not, sir, because Mr. Holliday receives letters in Houston, Texas, he sometimes receives letters addressed to him at the Waldorf, and I probably have copies of them, if he has been efficient, but I still will not know what letters it is Mr. Tillinghast is referring to.

The Witness: If you will produce copies—

Mr. Davis: Mr. Tillinghast, my position is on the record. My only question now is whether you will [640] or will not produce the letters that you have been referring to as constituting what you described, you claimed they constitute.

Mr. Sonnett: Mr. Davis, we will produce them. My only point is I thought you might have them at hand, and it would save time to go ahead with the documents which Mr. Holliday received and which you presumably have.

Mr. Davis: If Mr. Tillinghast is prepared to identify the letters more specifically, we may be able to find them.

Mr. Sonnett: How many letters are we talking about?

The Witness: Oh, I would say, both ways, a dozen or 15 letters, somewhere in that vicinity.

Mr. Davis: May we take a luncheon recess now?

The Witness: I am probably thinking of a few telegrams in between.

Mr. Davis: I would prefer, in this area, Mr. Sonnett, to have the witness satisfied that he is referring to all of such documents, and I do not want to assume the burden of presenting Mr. Tillinghast with what he subsequently may feel is less than a complete reference to him as to the documents he has [641] in mind which supports the testimony he just gave.

Mr. Sonnett: You will have them after the luncheon recess.

Mr. Davis: When would you like to return after lunch? It is now a quarter of 1:00, ten of 1:00.

The Witness: 2:00 o'clock.

Mr. Sonnett: While we are on the scheduling, I still have Rummel and Cocke sitting by.

Mr. Davis: I am sure, as I told you before, Mr. Sonnett, you don't need to keep either of those gentlemen on tap. I will give you full, adequate notice, I believe, as to when we will be finished with Mr. Tillinghast, and when the next person may be expected—

Mr. Sonnett: All right. I want to know if you are now able to tell me when you are going to finish with Mr. Tillinghast.

Mr. Davis: I do not know at this point when I am going to be finished with Mr. Tillinghast, and as soon as I have any indication as to when I may be through, I will so advise you.

Mr. Sonnett: How far in advance do you propose to advise me?

Mr. Davis: As much as I can. How much time [642] would you like to have?

Mr. Sonnett: I would like several days' notice—

Mr. Davis: I will undertake to give you several days' notice before you have to produce the next individual.

Mr. Sonnett: On that assumption, you will need Mr. Tillinghast for tomorrow and Friday.

Mr. Davis: There is no point to making any assumptions like that.

We are now adjourning for lunch.

Mr. Sonnett: You are not telling me whether you want this witness tomorrow morning or not?

Mr. Davis: I will tell you that at 2:00 o'clock this afternoon. The fact of the matter is I am waiting for a communication—

Mr. Sonnett: If you can tell me at 2:00 o'clock, that is fine.

Mr. Davis: I will tell you when I know, and not before.

Mr. Sonnett: The witness will be here.

(Whereupon, at 12:45 p.m. a luncheon recess was taken.)

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[643] AFTERNOON SESSION

2:05 p.m.

CHARLES C. TILLINGHAST, resumed the stand and testified further as follows:

Mr. Sonnett: Are you ready, Mr. Davis?

Mr. Davis: Yes.

Mr. Sonnett: During the luncheon recess I obtained and now produce two files containing letters from Chester C. Davis at 120 Broadway and Raymond Holliday and others to and from Mr. Tillinghast and TWA, which you asked us to assemble and produce.

I have them here and now produce them.

I assume you want to mark them.

Mr. Davis: No. I wish you would hand them to the witness, Mr. Sonnett, if you please.

Mr. Sonnett: I think you ought to mark them before I hand them to the witness, just to identify them.

Would you like to mark them plaintiff's exhibits?

Mr. Davis: No, I am not prepared to mark them as exhibits, Mr. Sonnett.

[644] Mr. Sonnett: I won't show anything to the witness that is not identified on the record by a number.

Mr. Davis: I assure you that I will identify anything which the witness has identified.

The question, Mr. Sonnett, on the record, is, I believe, that I wanted this witness to identify the correspondence which he claimed in his testimony to constitute an effort on his part to determine from the Hughes Tool Company or any of its representatives on what terms and conditions 990s would be available to TWA, and I am not interested at this time in identifying a mass or a file of correspondence.

The question is, I believe, simple enough, and it is merely for Mr. Tillinghast, with the material which is now available to him, to identify, and then I will mark for identification for this record, all letters, telegrams, or other communications, which this witness claims constitute the support for his statement on the record that he made an effort to determine from the Hughes Tool Company or any of its

representatives or from anyone whom he thought was a representative of the [645] Hughes Tool Company, the terms and conditions under which 990 aircraft would be available to TWA.

Mr. Sonnett: Mr. Davis, let me suggest to you the following:

I know you are anxious, as usual, to continue to argue with the witness, but the subject matter of your request was for correspondence to TWA from yourself or Mr. Holliday or others which the witness thought related to interference with—

Mr. Davis: You are referring to a different request, Mr. Sonnett. I am referring to the request I made this morning, and the request I made was wholly unrelated to the request I made for the witness to identify the correspondence which he claimed constituted malicious or wilful interference with the affairs of TWA.

Which request are you now referring to?

Mr. Sonnett: Let me simplify your problem. I thought I was meeting your request. These, after all, are communications written by you, Mr. Davis, or your client, Mr. Holliday, or others of Hughes Tool. You should be very familiar with it.

I thought I was being cooperative in offering you the file of correspondence in this area which [646] you requested. We went to considerable length to get it at this late date for you.

As to the claims of TWA, the claims of TWA are that every document you wrote, Mr. Holliday wrote, was written in furtherance of the conspiracy charged in the complaint.

If you would like to debate the evidentiary weight of every one with me, we will debate it, but I don't propose to have you engage in an argument with the witness about it.

I am producing the documents. Do you want them or don't you?

Mr. Davis: You leave them right where they are.

Mr. Sonnett: You mark these as being produced now and available for inspection as Plaintiff's Exhibits 1 and 2, and then you can do what you like with them.

Mr. Davis: Will you use A and B instead of confusing them with 1 and 2?

Mr. Sonnett: They are plaintiff's exhibits, so I don't think there will be much confusion. We went to a lot of trouble to get these for you, and now you are standoffish about looking at them, [647] even though it is principally communications from you and Mr. Holliday.

Mr. Davis: Of course, Mr. Sonnett, I am not going to take the time to correct every misstatement you make—

Mr. Sonnett: You will never have an opportunity, because I don't make them.

Mr. Davis: I told you ten times that Mr. Holliday is not my client, and you persist in saying that. It is rather typical of your understanding of the facts.

Mr. Sonnett: You represent Hughes Tool Company, don't you?

Mr. Davis: That's right. Your statement a moment ago was I represent Mr. Holliday, and I do not believe that you are not capable of remembering something—

Mr. Sonnett: Is Mr. Holliday an officer of Hughes Tool Company?

Mr. Davis: Mr. Holliday is an officer of Hughes Tool Company. You said this morning you do not represent Mr. Breech. Do you represent every officer and stockholder of TWA?

Mr. Sonnett: I represent each of them, and [648] in that capacity, Mr. Howard Hughes.

Mr. Davis: In that capacity, you are using your best efforts for the Hughes Tool Company?

Mr. Sonnett: Certainly.

Mr. Davis: When the time comes, we will have to find out who you were trying to represent—

Mr. Sonnett: All of the stockholders of the company, Mr. Davis.

Mr. Davis: Will you mark those two files as Plaintiff's Exhibits 1 and 2 as requested, and then I will proceed with my questioning of the witness.

(Group of documents marked Plaintiff's Exhibit 1 for identification, as of this date.)

(Group of documents marked Plaintiff's Exhibit 2 for identification, as of this date.)

Examination (Cont'd) by Mr. Davis:

Q. Mr. Tillinghast, you have before you two files of numerous documents which have been produced by your counsel, and I ask you to identify each communication which supported the statement of yours this morning to the effect that you wrote on numerous occasions to the [649] Hughes Tool Company, or representatives of the Tool Company, with respect to the terms and conditions or the availability of 990s to TWA.

A. Mr. Davis, without admitting the accuracy of your characterization of my former testimony, I leafed quickly through these papers this noon, and my recollection is refreshed that I first raised this question at our meeting on June 2nd, that on June 8, 1961, Mr. Rowe, at my request, wrote a letter drawing attention to the request I made on June 2nd—

Q. Excuse me for interrupting, Mr. Tillinghast, but so there will be no misunderstanding, I want you, with respect

to each document that is in response to my question, I want to have it marked as a defendants' exhibit.

If you please, as you go along, I would appreciate it if you would refer to the letter, have it marked, and then you may make any comment or explanation that you wish with respect to it. It would be helpful if at the same time you could refer to the portion or the portions of any lengthy letter which you characterized as constituting a request for information as to the terms, conditions and availability of the 990s.

Mr. Sonnett: As purely a mechanical [650] suggestion, to avoid further wasting of time, may I suggest that when the witness identifies the date of a letter, and from and to whom, that instead of stopping with the reporter to physically mark it, we deem it marked the next defendants' exhibit. We can physically do the marking at the close of the session.

Mr. Davis: Let us furnish the witness with some paper clips then, so we will not spend too much time in doing that.

Mr. Sonnett: Fine.

Q. Mr. Tillinghast, we will have no objection, if you can, to identifying the portions of a letter if the letter relates to several subjects, so that it will not be necessary for me thereafter to pick up each document and ask you to indicate the portion of the letter which constituted a request within the scope of my question.

A. Mr. Davis, I do not have with me the transcript of the discussion on the 2nd of June.

However, I do have a copy here of Mr. Rowe's letter of June 8, 1961, and in this regard I call your attention to the next to the last paragraph.

Q. Which reads how?

[651] A. Well, it reads as it reads, Mr. Davis, but this particular—one particular part said, speaking of me: "What he clearly said was that if TWA is to consider the acquisition of Convair 990s it has to have a specific, definitive, written statement of the terms on which they would be available, including the question of whether or not Hughes Tool Company would be willing, in effect, to give us a delivery bond and pay us a penalty for every week of delay from the deliveries which you state."

Q. Will you hold that for a second so that we can save time, Mr. Tillinghast? This was a letter dated June 8th?

A. This is a letter dated June 8th.

Q. Written at your request?

A. Written at my request.

Q. Is that the first communication in answer to my question, or are you picking them up as you find them? Is it your recollection that was the first time such a request was made of Hughes Tool Company?

A. No. The first time, as I have said several times, Mr. Davis, was on June 2nd, at the meeting which we had in the board room of TWA, at which you were present.

[652] Q. I have a transcript of that.

A. And of which you have a transcript.

Q. Referring to that comment, is that reference to a bond where you were requesting that the Hughes Tool Company give TWA a bond for the performance by General Dynamics as to delivery dates of the aircraft?

A. That's correct.

Q. The next communication?

A. The next communication is on June 16, 1961, and consists of a letter from me to Mr. Holliday. In the first paragraph 4 of the letter to which I have just referred it

is stated: "It should be noted, however, that you have not even yet advised us of the purchase price of the planes, an obviously essential term. You have also failed to advise us of the form in which Hughes Tool Company would want payment for the assignment of its rights under the purchase agreement, whether in cash or subordinated obligations, or otherwise. These are all facts that in addition to the relative advantages to TWA of the Convair 990s and other equipment must be taken into consideration in weighing your proposal."

Q. This was a letter addressed to Mr. Holliday, replying to the three proposals in the letter of June [652A] 10th, which is Defendants' Exhibit 10?

A. That's correct.

[653] Q. Anything else?

A. That is all that I have discovered so far, Mr. Davis.

Q. Do you have in mind the existence of any other communication?

A. No, I don't have in mind any other communication, Mr. Davis. Perhaps there was a later reference to the subject, but I rather doubt it, and that is as far as I had time to go through the file.

Q. Does that indicate to you that you would like to change your testimony of this morning?

A. No, it does not.

Q. You feel that this morning you fairly described your efforts to obtain information from the Tool Company in the manner that you did?

A. Yes. There were several requests for specific information, none of which, so far as I can recall, was satisfied.

Q. The requests for information you are referring to are those that you have adverted to, including the transcript of what occurred on June 2nd?

A. That's correct.

Q. And that is all that you have in mind?

A. That is all that I have in mind.

[654] Mr. Davis, I have got to change that, because I believe, if I recall correctly, that Mr. Rowe had some oral conversations with you on the subject. I do recall that he was seeking a copy of the contract. He received a copy of the contract, and the price schedule was not attached to it. I believe, as I say, that in addition to what I have referred to here, Mr. Rowe had either correspondence or conversations or both with you on the subject.

Q. You recall, then, that Mr. Rowe, in connection with this letter of his that you have referred to, also asked for a copy of the contract with General Dynamics relating to the 990s?

A. That's correct.

Q. And he received same?

A. He did, minus certain schedules.

Q. Was that request of Mr. Rowe made pursuant to your suggestion or request to him?

A. Yes. I asked him to get the material.

Q. Up to that point TWA had not sought or obtained to seek a copy of the contract with specifications referred to in that contract between General Dynamics and Hughes Tool Company?

[655] A. Well, now, I can't answer that definitely. Whether somebody at some point had tried to get this information and failed, I don't know. The only thing I know for sure is that we didn't have it.

Q. Did you inquire of either Mr. Rummel or Mr. Leslie or Mr. Cocke if they had any information as to the price or how to go about determining the price of such aircraft?

A. I discussed that with Mr. Rummel on several occasions.

Q. I am referring to the time that you were seeking to obtain this detailed information from the Hughes Tool Company so as to be in a position to make a business decision.

A. I just can repeat that I discussed that with Mr. Rummel on several occasions.

Q. What did Mr. Rummel tell you?

A. Mr. Rummel told me that they had guessed at a price computed as best they could what Hughes Tool Company's price would be, but there were several variables in it, and he couldn't tell me either exactly what the Hughes Tool Company price would be or the terms on which we could take an assignment if there was in fact an assignment.

[656] Q. You understand that it is normal under a purchase contract with a manufacturer of aircraft that the exact price is subject to variation based upon events and change orders and various details relating to the aircraft?

A. Yes, I am quite conscious of that.

Q. A moment ago you estimated that the commitment of the Tool Company would be in the neighborhood, as you understood, of $5 million per aircraft, or $65 million for the 13—you remember testifying to that effect?

A. Yes.

Q. Was that estimate on your part based upon what Mr. Rummel had told you in these discussions you had with him?

A. It was.

Q. Have you had occasion to subsequently find out whether or not the estimate of $5 million per aircraft is fairly close to what you would anticipate would be the price for a 990 aircraft?

A. It is my understanding that it is fairly close to what I would anticipate the price of a 990 aircraft to be.

Q. Isn't it also true, Mr. Tillinghast, that in [657] order to determine the desirability of an aircraft you have to consider the cost of the aircraft for the purpose of determining whether its use along various segments of the route of the airplane will permit you to make money or lose money?

A. No doubt about it.

Q. I thought that you also explained that you had very carefully studied, between March 30th and April 27th, a report of the operating personnel that included their recommendations and evaluations of the 990 aircraft.

A. That's correct.

Q. Are you trying to tell me now, Mr. Tillinghast, that these studies made by TWA, evaluating the advantages and disadvantages of 990 versus the Boeing, this was done without any reliable information of any kind as to the cost of such aircraft?

A. It was done without any specific advice from Hughes Tool Company as to the price at which Hughes Tool Company would in fact assign these aircraft to TWA.

Q. But you knew even at that time, even with your short experience in the airline industry, or with TWA, that TWA had traditionally obtained aircraft from the [658] Hughes Tool Company at the Hughes Tool Company's cost?

A. I understood that that had happened on quite a number of occasions.

Q. Wasn't it your understanding that if these aircraft were, pursuant to past practices that Mr. McCone referred to, made available to TWA it would be, presumably, at the actual cost to the Tool Company, a figure which is not determinable until the aircraft are ready for delivery?

A. I did not know, and had no way of knowing, in fact, at what price the Tool Company would make them available.

Q. Am I to understand from your testimony, Mr. Tillinghast, that when you were discussing with Mr. McCone the advantage and lack of advantage of considering bailing out the Tool Company or the desirability of these aircraft you had no idea whatever as to what those aircraft would cost?

A. That is your statement, Mr. Davis, not mine.

Q. I am asking what yours was.

A. No, I had a knowledge of a global figure which 990s should cost. I had no knowledge as to the terms on which Hughes Tool Company would in fact make them available to TWA.

[659] Q. But you knew that the past practice of the Tool Company had been to make them available to TWA at no more than the cost of the Tool Company?

A. I knew in a general way what the past practice was, but I had no way of knowing whether the past practice would in fact be followed in the future, or, in fact, whether Hughes Tool Company would make the planes available.

Q. Mr. Tillinghast, isn't it true that at that time you were concerned in pursuing a financing program with the lending institutions relating to the Boeing aircraft and that is what primarily was on your mind?

A. That is not so, Mr. Davis.

Q. Are you aware of the extent to which Mr. Breech consulted or discussed this matter of additional jet aircraft with Mr. Rummel?

A. Except for discussions at the April 27th directors' meeting, and possibly also at the June directors' meeting, I have no knowledge that Mr. Breech ever discussed the question with Mr. Rummel.

Q. Excuse me for interrupting the train of thought, but it suddenly occurred to me that since your counsel produced these two files of documents marked Plaintiff's [660] Ex-

hibits 1 and 2, intermingling two requests of mine, let me go back for just a moment and ask you now to examine those two files and identify the documents which you previously testified constituted malicious and willful or other kind of interference by Hughes Tool Company or me or any representative of the Tool Company.

As before, I would appreciate it if you would clip the document so that it later may be marked for identification.

Mr. Sonnett: I think I will have to undertake to answer that question, Mr. Davis. It is argumentative.

It is the position of TWA that all communications by you and by Mr. Holliday in this connection were acts in furtherance of the conspiracy and other violations of law charged in the complaint.

Mr. Davis: I appreciate that, Mr. Sonnett.

My question is to the witness. You may direct the witness not to answer if you choose to.

Mr. Sonnett: I advise the witness that your question is argumentative, and therefore does not require an answer.

Q. Mr. Tillinghast, you recall testifying, do you [661] not, that you received and knew of communications by the Tool Company which you characterized as being unwarranted interference with the affairs of TWA—do you recall your testimony in that regard?

A. I recall my testimony in that regard.

Q. Do you also recall testifying that you had reference to dozens of communications and telegrams?

A. I don't think I said dozens, Mr. Davis.

Q. Have you finished your answer?

A. Yes.

Q. Without reference to the number of documents, which I believe you did testify to at one point, let me refer you to page 472 of your testimony. Let me start you, if I may, at page 471, when there was again some discussion between counsel as to the line of that inquiry.

At the bottom of page 471 you, as a witness, said:

> "Mr. Davis, let me say I am referring to all of the letters you wrote, which were very numerous and lengthy and considerable, from the period beginning about the 15th of May and continuing through the period really up to the present."

The next question was:

> [662] "Those are the communications which you feel constitute interference by the Tool Company in the affairs of TWA?
>
> "A. Oh, I didn't say that, Mr. Davis. I think some of the letters were appropriate, perhaps proper statements of position to management, and others were unwarranted interference in management of TWA."

The next question was:

> "Will you identify, if not by exact dates, the letters or the number of letters which you have in mind as letters which you felt constituted unwarranted interference in the affairs of TWA?"

Then, if you will recall, Mr. Tillinghast, just subsequently you felt that they were, on page 473, where your answer was:

> "Well, Mr. Davis, they were so numerous that it would be difficult for me to recall all of them."

You have before you, Mr. Tillinghast, the file prepared by your counsel which purports to include all the letters and communications which your counsel, in support of the complaint, feels constitute unwarranted interference. I am asking you to identify the [662A] communications which you had in mind when you testified as you did.

Mr. Sonnett: Are you through?

[663] Mr. Davis: I have asked a question, Mr. Sonnett.

Mr. Sonnett: You have made various references to what TWA's counsel feels or what these files are supposed to represent in the judgment of TWA's counsel, and you are quite incorrect.

They represent an effort to assemble for you, in response to a belated request, communications from you or Holliday or others acting on behalf of Hughes Tool Company to TWA, and, I think, and I am informed, that they represent all of the written communications that we have in the files.

As to their evidentiary significance, Mr. Davis, this is a matter that the Court is going to have to determine, and I don't propose to have you get into a debate with the witness as to what document proves what.

These are communications that you sent or received or Holliday sent or received. They speak for themselves. The best evidence of what they say is in the documents.

I don't suppose you want to quarrel with the authenticity of these copies, or of the originals, in same cases, bearing your own signature, but it seems to me you are taking an awful lot of time in nagging [664] at a question of let's debate what the documents prove.

If you call the witness' attention to any particular document in the series of communications, you want to ask him any questions about conferences, discussions, or whatever he did or said in response or in connection therewith, go ahead.

By Mr. Davis:

Q. Do you understand my question, Mr. Tillinghast?

A. Yes, I understand your question.

Mr. Davis: May he answer the question, Mr. Sonnett?

Mr. Sonnett: I don't understand the question, myself.

Mr. Davis: Will you read the question back to the witness? I know there was some lapse of time since my question.

Mr. Sonnett: You see, if you put questions without oratory we would be better off. Your reference as to what TWA's counsel intended or thought or believed or how these documents were assembled, was inaccurate. So I had to correct it.

(The question was read.)

Mr. Sonnett: I object to the form of the [665] question and advise the witness not to answer it.

Q. Mr. Tillinghast, will you identify from the material which is before you the letters or communications which you had in mind when you testified as you did at page 471 and 472 of the transcript?

A. Well—

Q. To avoid wasting time, you need not refer to communications which you described as being appropriate. I am interested solely in your identifying those documents

which you felt were unwarranted interference in management of TWA.

A. Well, Mr. Davis, let me first say this, that I think this whole line of correspondence was for the purpose and intent of interfering unduly with TWA's purchase of Boeing aircraft.

But dealing specifically with those letters which affirmatively caused interference, and leaving out the routine ones—

Q. You mean routine letters of interference? I don't want you to leave out anything, Mr. Tillinghast.

A. Then I will have to say, Mr. Davis, that your letter of May 16, 1961, written to the board of directors, saying that you had been retained by Hughes Tool Company in connection with its acquisition and possible distribution of [666] debentures—

Q. Wasn't that a letter by me as a member of the firm of Simpson, Thacher & Bartlett?

A. That's correct, yes.

Q. It was a letter by Simpson, Thacher & Bartlett to the board of directors of TWA, dated May 16th?

A. That's right.

Q. That is one letter that you had in mind as being an interference with TWA—

A. To the extent that it was part of an overall plan to interfere with the purchase of Boeing aircraft, although I suppose the letter, on its face, is, let us say, fairly innocuous and routine.

The letter of May 19, 1961, to the Securities and Exchange Commission, is, in my view, a clear interference with the management of TWA.

Your telegram of May 22, 1961 appears to be routine and harmless.

Q. Likewise, the telegram of May 22, 1961, which merely advises of Simpson, Thacher & Bartlett's withdrawal.

Please clip those. I think it will prevent any possible error by the reporter as he subsequently marks them, so we will be sure the court record will be complete as well as accurate.

[667] Mr. Sonnett: Let's be clear, so we don't have any further needless controversy, you are asking the witness to clip not the telegram from Simpson, Thacher advising of their withdrawal, you are asking him to clip only the ones which he characterizes as overt and clear indications of interference?

Mr. Davis: I am asking him to identify what he was referring to when he testified as he did at the parts in the record that I previously mentioned, Mr. Sonnett, and since in one of his answers he admitted that some of them were appropriate, I am telling him that I am not asking him to identify any communication which he thought was appropriate.

Mr. Sonnett: Okay. All right. Now we understand what you are supposed to do with the paper clips.

Mr. Davis: Whenever you are interested to pursue the subject as to what happened in connection with the withdrawal of Simpson, Thacher & Bartlett or my withdrawal from that firm in order to continue to represent Hughes Tool Company so as to bring out the facts, I will be very happy to pursue that subject either under oath or in appropriate affidavits to the Court.

Mr. Sonnett: Mr. Davis, I know the firm of [668] Simpson, Thacher & Bartlett for many years, and I regard it as an outstanding and very distinguished firm.

A. A letter of May 24, 1961, from Mr. Settles to Mr. Duckworth, which, on its face, is harmless, except in the light of the purpose for which it was written.

The same—well, on May 25, 1961, there is a letter to Mr Hocker of the Securities and Exchange Commission, which I deem to have been for the purpose of delaying the effectiveness of TWA's registration.

On May 25, 1961 there was a letter from Mr. Settles addressed to me, on its face unobjectionable, except for the purpose for which it was written.

The same may be said for the second letter—I will clip the two of them together here—from Mr. Settles as of the same date.

On May 26, 1961 there is a letter from Mr. Davis to the Irving Trust Company, the Equitable Life Assurance Society, Metropolitan Life Insurance Company, the director of Trans World Airlines, and Messrs. Breech, Olds and Holliday, the purpose of which, in my opinion—the purpose and effect of which, in my opinion, was to interfere with the affairs of TWA.

There is a letter dated May 26, 1961, from Mr. [669] Holliday to Mr. Breech, Mr. Olds and Mr. Holliday, which, on its face, appears to be harmless.

There is a letter dated May 26, 1961—

Q. Excuse me. I don't think you finished your last answer.

Mr. Davis: Read back what Mr. Tillinghast said.

(The answer was read.)

Q. Is that what you said, Mr. Tillinghast?

A. Yes.

Q. I am not asking you to identify those that you consider harmless.

A. I am sorry. There is a letter dated May 26th—I will skip that.

Telegram dated May 31, 1961, from Hughes Tool to Boeing Aircraft Company.

Letter dated May 31st—it should be telegram dated June 1, 1961, from Chester C. Davis to Mr. Rowe.

Telegram dated June 2, 1961, from Mr. Holliday to me.

Letter dated June 4, 1961, from Mr. Davis to Mr. Rowe.

Letter dated June 4, 1961, from Mr. Davis to Mr. Olds.

[670] Letter dated June 8, 1961, from Mr. Davis to Mr. Breech.

Letter dated June 9, 1961, from Mr. Holliday to me, which on its face appears harmless, and appears objectionable only so far as it is part of a plan and conspiracy.

A letter from Mr. Holliday to Trans World Airlines, Mr. Breech, Mr. Olds, Mr. Holliday, Irving Trust Company, Equitable Assurance Society, Metropolitan Life Insurance Company.

Q. When you refer to Irving Trust Company, isn't it addressed to Irving Trust Company as agent?

A. Yes, it is.

Mr. Sonnett: You haven't given the date.

A. Dated June 10, 1961.

Q. Is that what has previously been marked as Defendant Exhibit 10 as containing several proposals (handing to witness)?

A. Yes.

Mr. Davis: Actually, the record might show it is addressed to Messrs. Breech, Olds and Holliday as voting trustees.

Mr. Sonnett: From?

Mr. Davis: From Hughes Tool Company, by Mr. Holliday.

[671] Mr. Sonnett: The same Mr. Holliday?

Mr. Davis: Oh, yes.

Mr. Sonnett: Now I understand the true meaning of the song I'm Going To Sit Right Down And Write Myself A Letter.

Mr. Davis: When they do that, please send it COD to Mr. Sonnett, because we don't want to pay for it.

Mr. Sonnett: I will pay for it. It was worth it, Mr. Davis.

[672] A. A telegram dated June 20, 1961, from Mr. Holliday to Mr. Sessel, a copy of which, I think, or a telegram similar to which was sent to each of the other directors.

A letter dated June 21, 1961, from Mr. Holliday to the board of directors of TWA.

A letter from Mr. Davis to Mr. Rowe of June 21, 1961.

Letter from Mr. Settles dated June 27, 1961.

Letter of June 30, 1961, from Mr. Davis to Mr. Reed.

I think that covers the list, Mr. Davis, up to the filing of the complaint.

Mr. Davis: Will the reporter then mark all those documents identified by Mr. Tillinghast as Defendants' Exhibit 11, and each document identified with a letter.

• • • • •

[857] Q. Then I believe you testified that the other occasions that you recall, when you discussed the [858] financial condition or financial problems, as I understood them, of the Tool Company, was in connection with this subordinated debenture offering?

A. Yes.

Q. And that was a discussion at that time that you had with Mr. Leslie?

A. Yes.

Q. What was the occasion for that discussion? Can you give me the substance of what was said?

A. Well, the occasion for the discussion, Mr. Davis, as best I recall it, is that Mr. Leslie came into my office one day and said that he had been talking with a Mr. Forrester whom he knew—I believe they both live in Greenwich—and that Mr. Forrester said that he had been retained just a day or two before in order to handle a proposed public offering of Hughes Tool Company share—secondary offering of the Hughes Tool Company share of our subordinate debentures.

He said that Mr. Forrester wanted to talk with us about a possible delay of the effective date of our offering so as to accommodate this.

I remember saying to Mr. Leslie, or asking Mr. Leslie what did he think this was all about, and did he have any recommendation. He went on to say—

[859] Q. "He," being Leslie?

A. Leslie. He went on to say that he had been associated with Mr. Hughes for years, and knew him like a book, and that one thing he knew about Mr. Hughes was that if he was planning to go across the street to buy a package of cigarettes, that he would say that he was going in the other direction to go to the bathroom.

He said, "You better take a good, hard look at this before you say anything about it."

We discussed why Hughes Tool Company wished to dispose of these. Whether it presaged a decision to sell out its interest in TWA or whether it indicated something else, and without having a very clear recollection in my mind just what he had to say about the details of the Hughes Tool

Company's finances, I do recall that there was some discussion of it at that time.

Q. That offering by TWA was one which was being undertaken pursuant to the agreements entered into in the December 1960 financing, isn't that right?

A. That is correct.

Q. That offering by TWA was not designed to raise any cash by TWA, was it?

A. No, that was merely to re-finance the obligation to Hughes Tool.

[860] Q. The $100 million interim note to Hughes Tool?

A. That is right.

Q. So that the timing of that offering would not result in TWA having any more or less equity money or working capital or cash, isn't that right?

A. That is correct.

Q. Except perhaps to the limited extent to which the Tool Company had an option to subscribe to an additional $11 million-some odd of these debentures?

A. So far as the timing is concerned.

Q. That offering was for $11 million, but only the Tool Company had an option to subscribe to the additional $11 million; isn't that correct?

A. Substantially, yes.

Q. Mr. Leslie discussed with you an approach made to him by Mr. Forrester; is that correct?

A. Right.

Q. Mr. Forrester is a senior executive of Merrill, Lynch, Fenner & Bean; is that correct?

A. He is a member of the firm. I am not sure just what his seniority is.

Q. You never had any reason to doubt the bona fides of Mr. Forrester or Merrill, Lynch, have you?

A. No.

[861] Q. And Mr. Leslie reported to you that apparently the Hughes Tool Company was interested in making a secondary offering?

A. That is correct.

Q. And did that indicate to you that therefore the Hughes Tool Company was interested in effect of realizing some cash?

A. Well, that would indicate that, yes.

Q. Was it your understanding that the Hughes Tool Company had furnished a great deal of cash in connection with the aircraft equipment obtained by TWA as a result of orders placed, or the transactions which took place in 1959 and 1960?

A. Yes, I was aware of that.

Q. And the Tool Company in connection with the 1960 financing, had received this $100 million interim note rather than cash?

A. That is right.

Q. The $100 million note in effect reflected the cash investment made by the Tool Company in connection with the aircraft obtained by TWA?

A. That is my understanding.

Q. And now apparently the Tool Company indicated an interest or desire to get some cash back; is that right?

[862] A. Yes.

Q. And you thought in your discussions with Mr. Leslie that there was some underlying motive of the Tool Company that should be explored?

A. Mr. Leslie raised that question, yes.

Q. That was when Mr. Leslie explained to you that based upon his prior association with Mr. Hughes, he felt that Mr. Hughes was likely to go a long way around to buy a package of cigarettes?

A. Right.

Q. Was there any discussion at that time as to what would the Tool Company do with all this cash if it once got that secondary offering—if it was successful?

A. I think, as I recall it, Mr. Davis, there was some discussion of whether the Tool Company was hard up and really needed this money, and what they would do with it. I don't remember much of the detail of what was said, but I know that general subject was discussed.

Q. I would like you to concentrate on that conversation with Mr. Leslie, if you will, please. I would like you to tell me whether or not in effect there was a discussion with Mr. Leslie speculating as to whether or not the Hughes Tool Company might have in mind a plan for re-financing the TWA debt to the lending institutions?

[863] A. I believe, Mr. Davis, that there was some mention of that possibility.

Q. It was discussed, wasn't it?

A. I believe it was discussed.

Q. That was an important subject to you, was it not?

A. Not terribly, no, sir.

Q. If you recall, when you were hired as president, one of the matters of concern to you—whether you raised the subject or Mr. Breech did—had to do with the possibility of the Tool Company ever being able to re-finance?

A. That is correct.

Q. And here we were in the same year, in May of the same year, and there was a move made by the Tool Company which on the surface at least appeared desirous of producing about $100 million in cash, and you didn't associate the two possibilities at all in your mind, Mr. Tillinghast?

A. Mr. Davis, I am sure that I must have associated the two things in my mind in a broad sense. It has been my feeling, however, that so far as the management of TWA is concerned, its job is to manage TWA—to try to further the interests of the corporation and all of its [864] stockholders—and not be concerned with matters personal to particular stockholders.

Q. I am not inquiring at this point as to your views as to the duties of the management of TWA. I am interested in what took place when Mr. Leslie reported to you that Mr. Forrester had been asked by the Tool Company to develop a program designed to effect a secondary offering which would have given the Tool Company, or replenished the Tool Company with more or less $100 million.

A. I have reported it as best I can, Mr. Davis.

Q. Do you think you have fairly and adequately and fully described your conversation with Mr. Leslie in discussing or speculating as to what Mr. Hughes or the Hughes Tool Company was up to?

A. As best I can recall it at the moment, yes.

Q. Do you have any notes or letters or communications that you made to anyone else which would help you to refresh your recollection?

A. Not on this subject, no.

Q. Do you have any notes, in Defendants' Exhibit 1, your calendar, that would help you to identify about when it was you had this conversation with Mr. Leslie?

A. Yes, I can tell you when it was. If I am not [865] mistaken, it was on the 11th of May, because I believe it was the day before I sat down with Mr. Forrester and some other people to discuss this specific request.

Q. As a result of your conversation with Mr. Leslie, you asked him to arrange for a meeting between you and Mr. Forrester and others?

A. Yes. I believe that the purpose of Mr. Leslie's coming in to my office was in order to say that Mr. Forrester wanted to come up and discuss the matter with me.

Q. You find that entry on May 12th, do you not?

A. That is correct, yes.

Q. And Mr. Leslie spoke to you about that on May 11th, the day before?

A. That is correct.

Q. Before you met with Mr. Forrester, didn't you call Mr. Breech to tell him about the information?

A. No, I am quite sure I called Mr. Breech after I talked with Mr. Forrester.

Q. You mean on the 12th?

A. On the 12th, yes.

Q. Tell us about your meeting with Mr. Forrester on the 12th then.

A. Mr. Forrester came up with his lawyer, Mr. Hagarty.

[866] Q. Of the Sherman, Sterling firm?

A. Yes. We discussed this thing, and he outlined it.

Q. What did he outline to you?

A. He outlined the proposal that they wanted to make.

Q. Who is "they"?

A. Merrill, Lynch—wanted to make for the secondary offering, and their desire to obtain a week's postponement of our offering, in order that they might do a secondary.

I told them that I was very concerned about the fact that we had committed ourselves to the Boeing Company for planes that we had to have our financing completed by the end of the month, by the 31st of May, as I recall it, and that one thing that I had to be concerned about was whether or not a postponement of this might interfere in any way with the consummation of the Boeing program, and the obtaining of the commitments necessary to carry out the Boeing program.

[867] Q. Will you explain at this point your understanding as a chief executive of TWA, what the relationship was of this offering by TWA of these convertible debentures, which would not produce any cash for TWA, the financing arrangements with the lending institutions, which was related to this Boeing purchase program—

Mr. Sonnett: Would you mind reading that back?

(The question was read.)

A. One of the obvious questions in my mind, Mr. Davis, was whether or not if we ran into a serious delay on this, whether or not it might in any way affect our Boeing financing. With that in mind, I talked with Mr. Brandi.

Q. Of Dillon, Read?

A. Yes, to ask him whether in his opinion it would make any difference one way or another to the consummation of the Boeing financing. He said he thought it would. He thought it would be undesirable to get mixed up in anything that would involve a serious sag in the schedule.

For that reason I was very concerned at the time of this meeting with Mr. Forrester to see whether [868] or not he could say anything that would change my judgment.

Q. Let me see if we can get this straightened out in my mind.

A. May I finish?

Q. Please continue.

A. My judgment that it was the most unlikely thing that one could suddenly bring in a third party, and in one week's time turn an offering of this sort into an underwritten public offering.

I specifically taxed Mr. Forrester and Mr. Hagarty with the question of whether or not they could assure me that in fact this could be done, and told them my own limited ex-

perience in the securities field—told me that even under the best circumstances it would be most unlikely that one could do this within that period of time. And I thought if Mr. Hughes was genuine in wishing to make an offering of his interest, that we would extend to him every cooperation on a secondary offering, and indeed the lawyers discussed how by stickering the prospectus, this could be done immediately following our offer.

To come to the end of the discussion, I told Mr. Forrester that I quite appreciated his interest [869] in engaging in this activity, but personally I thought it was an impractical thing to do, and that while it was not a matter on which I wished to make a decision myself without consulting my chairman, in fairness to him I could only say that my recommendation would be that we not postpone our offering, but that we go right ahead with it, and extend to Hughes Tool, if it wished to do so, every courtesy with respect to a secondary offering at an immediately following date.

Q. Is that the end of your answer?

A. That is the end of my answer.

Q. Now let us go back to May 11th, when Mr. Leslie first talked to you. Do you understand?

A. Yes.

Q. That was the first time that you heard of the plan of the Tool Company to make a secondary, is that correct?

A. That is correct.

Q. The next day, the 12th, you met with Mr. Forrester?

A. That is correct.

Q. Am I to understand that between the 11th and the 12th, you consulted with Mr. Brandi of Dillon, Read?

[870] A. That is correct.

Q. In other words, after Mr. Leslie made his report to you to the effect that Mr. Forrester wanted to speak to you—

A. That is right.

Q. You became concerned and sought the advice of someone else?

A. That is correct.

Q. The first thing I want you to explain to me is your concern as a chief executive of TWA, to what was the problem that you envisaged that required you to consult someone.

A. The question in my mind, Mr. Davis, was that raised by Mr. Leslie, and I will have to amplify slightly what I have already testified to.

One thing that Mr. Leslie said in the course of this conversation relative to Mr. Hughes, was that one of the particular proclivities was delaying and trying to get extensions of time, and if you can't get it decided the way you want it now, just postpone it and postpone it.

He raised the question at that time as to whether or not this would be just the beginning of a series of postponements, the net effect of which would be to [871] derail—would be to prevent the consummation of the subordinate debenture financing on the schedule provided, and by that derail the Boeing financing which we had until the 31st of May to complete.

I was naturally very concerned with seeing to it that nothing was done which would prejudice the Boeing financing.

Q. I would like to take this one at a time, Mr. Tillinghast.

A. All right.

Q. The 1960 financing required TWA to make this debenture offering on or before May 31st?

A. Right.

Q. That was an agreement between the Tool Company on the one hand, and TWA on the other, is that correct?

A. Right.

Q. And that financing was not going to produce any cash to TWA—that offering?

A. Not unless we sold more than $100 million.

Q. Whether you sold more than $100 million was solely at the election of the Tool Company?

A. That is right.

Q. Mr. Leslie indicated to you that this request was about to be made on behalf of the Tool Company, on [872] May 11th—that might have the effect of delaying this transaction beyond May 31st, if you granted further and subsequent delays?

A. That is right.

Q. You had a feeling that Mr. Hughes or the Hughes Tool Company would make repeated requests that might delay this offering beyond May 31st? That was your concern, was it not?

A. That is correct.

Q. That would have involved possibly some new agreement or understanding between the Tool Company and TWA, because you had a commitment to do it by May 31st, is that correct?

A. That is correct.

Q. What I am failing to understand is, the relationship between that obligation to the Tool Company and the financing of the Boeing acquisition, that you had been negotiating with the lending institutions.

Can you explain how you, as a chief executive officer—what was concerning you? What relationship was there between a delay in this offering by TWA, and the financing of the Boeing purchase?

A. Mr. Davis, there were really two things that concerned me.

[873] Q. Excuse me for a moment before you answer. I am not interested at this moment what Mr. Brandi told you. I am asking you what was concerning you before you went to see Mr. Brandi.

A. I was concerned about two things. One, whether this was a diversionary tactic.

Q. Diversionary tactic by whom?

A. By Hughes Tool Company.

Q. Diversion from what?

A. An attempt by Hughes Tool Company somehow to interfere with and prevent the consummation of the Boeing deal.

Q. At that point you had not received any letters from anyone from the Tool Company objecting to the Boeing deal?

A. That is correct.

Q. In fact, you hadn't disclosed the proposed Boeing deal to the Tool Company?

A. Yes, we had.

Q. In what way?

A. In the minutes of the directors' meeting, and quite a number of things that Mr. Holliday had received.

Q. You anticipated that the Tool Company might [874] have some views different from or adverse to those held by the TWA management with respect to the Boeing program, is that correct?

A. That question came up in my mind when Mr. Leslie talked with me on the 11th.

Q. And therefore you were suspicious that this move by Mr. Hughes or the Tool Company might be used in what way that would interfere with the Boeing program?

A. As a means of preventing the consummation of the financing that would make the Boeing deal possible.

Q. How could that happen other than possibly the re-financing of the existing indebtedness, you mean?

A. Mr. Davis, that very nearly did happen as a consequence of your efforts.

Q. The re-financing?

A. No, the consummation of the Boeing financing was in fact almost upset as a result of your actions between this time and the two weeks subsequent to that.

Q. I appreciate that. At the moment, however, I am trying to understand how the successful secondary offering by the Tool Company, which would have put into cash $100 million, more or less, how that fact in your judgment, on May 11th, contributed to your feeling [875] that the Tool Company might have some devious plan to interfere with your Boeing program?

A. The secondary offering, the successful secondary offering in and of itself would have presented no problem at all, Mr. Davis. What I was concerned about was that this was not a genuine proposal, and that the effect of granting a week's delay would have been—a week's delay which in my opinion was quite unrealistic.

The effect of that would have been to delay and perhaps prevent the consummation of the subordinate debenture financing, and that if we were mired down in that problem, that the financial institutions would not honor the very informal commitments that we had at that time to go ahead with the financing, and that as a consequence of this, the whole situation would be upset.

Q. I am having difficulty in understanding, Mr. Tillinghast, and I want to give you a full opportunity to explain why you concluded that the possibility which you thought was remote, perhaps, of accomplishment with just a week's delay—why the possibility that the Tool Company

might realize $100 million in cash, would have an adverse effect, or mire you down, or bog you down in your Boeing program.

[876] A. You keep trying to put words in my mouth. I tried to say before that the consummation of the secondary offering by the Hughes Tool Company would not have been any problem whatever.

Indeed, I would have welcomed it. But what I was concerned about was not that we were dealing with a secondary offering, and the realization of money by the Hughes Tool Company, but rather a maneuver which would have the effect of preventing consummation of our offering. And through that would upset and prevent the Boeing financing.

Q. Was there some condition in the negotiations with the lending institutions in connection with this Boeing financing that you had in mind, that would be upset, if for any reason this offering by TWA, which was not going to realize any cash, was delayed beyond May 31st?

A. There was no condition, Mr. Davis. I can only say that the consummation of the secondary financing—I am sorry—the consummation of the debenture offering on the time schedule originally planned was one of the background factors in everyone's contemplation in connection with the financing for the Boeing plans.

I was deeply conscious of the fact that I had [877] expended $850,000, and was committed for $187 million, for which I had to get my financing nailed down, and I wasn't going to do anything that carried with it a serious threat of unhinging that financing.

Q. Mr. Tillinghast, let me lead you a little, if I may. Prior to this additional financing of Boeing, for this $187 million and a half—the amount due the financing institutions was how much?

A. Before this?

Q. Before the Boeing financing, what was the amount due to these lending institutions?

A. I am not sure of the amount actually due at that time, but the amount of the commitment was $165 million, all of which I don't think—

Q. Isn't it true if the Tool Company realized $100 million in the marketplace, that it might be close enough to the goal of refinancing that $165 million?

A. That was certainly a possibility.

Q. And you discussed it?

A. Yes.

Q. It was very important to you that the additional financing with the lending institutions for $147 million be an accomplished fact before the Tool Company could raise a sum of money that conceivably might [878] permit it to refinancing the 1960 debt, isn't that right?

A. No, it is not.

Q. Isn't it true, Mr. Tillinghast, that in February 1961, you discussed with Mr. Breech, the Tool Company would have difficulty in refinancing for additional jet equipment?

A. At the time I talked with Mr. Breech on the 28th, I was concerned with the question as to whether or not I wanted to seriously entertain the possibility of becoming a chief executive of this company. Subsequent to that time, in pursuance of the discussions had at that time, I worked out a contract which I thought put me in a position to call the shots as I saw them, without concern as to whether or not the control of TWA stayed in one place rather than the other.

At the time you speak of, and since that time, I have tried to conduct the affairs of TWA in such a way as not to favor or prejudice any particular stockholder, and I think my job is to call them as I see them, without regard to these things that you are concerned about.

Q. But it is a fact that the May 31st date with respect to the issuance of these debentures by TWA [879] was a time limit [which] had been placed for the benefit of the Tool Company rather than for the benefit of TWA?

A. So far as I know, yes.

Q. So that if there had been a delay beyond May 31st, or if in fact TWA should have consented to delays beyond May 31st, it would have been basically a detriment to the Tool Company rather than TWA?

A. It would have been a detriment to the TWA if it in any way affected the Boeing financing.

Q. The only way in which it could have affected the Boeing financing is that the Tool Company would have had a lot of cash in its pocket?

A. No, it is not, Mr. Davis, and you know a lot better than that.

Q. Isn't it true, Mr. Tillinghast, that it was Mr. Breech who suggested to you that before you took the position you ought to consult with Mr. Brandi of Dillon, Read for expert advice?

A. It is not my recollection. At the moment I don't have any recollection of having talked with Mr. Breech about this until after I talked with Mr. Forrester. Possibly if I did, but if I did, it doesn't stick in my mind.

As I recall it, that was something that Mr. [880] Leslie and I agreed on as the result of this discussion which I have already described.

Q. I am trying to refresh your recollection that the first time you talked to Mr. Brandi of Dillon, Read, was after your first meeting with Mr. Forrester, and after you talked to Mr. Breech, who warned you or suggested to you that before you took a position in this matter, you ought to consult "the financial advisers"?

A. No. As a matter of fact, I talked with Mr. Brandi just before I talked with Mr. Forrester.

Q. On the 12th?

A. On the 12th.

Q. After talking to him on the 11th?

A. I don't think I talked with him on the 11th.

Q. After your conversation with Mr. Leslie?

A. No, I think I talked with Mr. Brandi, so far as I can recall, only on the 12th.

Q. Was that a telephone conversation, a meeting or a conference?

A. It was a meeting in my office.

Q. Who else was there?

A. Mr. Leslie, Mr. Rowe was there, I think.

Q. Mr. Rowe, the general counsel of TWA?

[881] A. Mr. Rowe who sits down there.

Q. Counsel for TWA?

A. Yes. I am trying to remember when he got there. Mr. Reed, I think, was also there.

Q. Of the Hughes, Hubbard firm?

A. Yes.

Q. Counsel for the voting trustees?

A. Yes. At the time of the discussion with Mr. Forrester—and I think he was there at the time of the discussion with Mr. Brandi as well. I think that is the extent of it.

The Special Master: Let us take a five-minute recess.

(Whereupon, a short recess was taken.)

By Mr. Davis:

Q. Mr. Tillinghast, before the recess, you were about to finish to identify the meeting at your office with Dillon, Read, and others. But before you resume at that point, I

overlooked asking you whether at or about that time you had a discussion with Mr. Sessel as to what the plans or purposes or consequences to TWA might be if the Tool Company was able to raise a substantial amount of cash.

A. No, I don't think I did, Mr. Davis. I am [882] quite sure that somewhere within this period, I mean sometime between the 11th of May and the board meeting on the 17th of May, I discussed this with Mr. Sessel, and I know Mr. Sessel was quite concerned that this was a delaying tactic, and should be dealt with as such.

Q. That was between May 11th and May 17th?

A. Yes. I can't tell you exactly when it was in the progression of things, but I know that I discussed the thing with Mr. Sessel, to get his view as to how the banks would react to the thing.

Q. Do you recall more specifically what Mr. Sessel said to you at that time as to what his ideas were of the objectives of the Tool Company, and the plans?

A. No, I don't recall discussing that with him as such. The one thing that sticks in my mind was that Mr. Sessel said not once, but several times, that Hughes always wants time, he wants a week if he can get a week, and if he can't, a day, and if he can't get an hour, he will want half an hour. His view was very definite and strong that if we gave a week's delay, then that would be followed by a request for a further delay and a further delay, and it would be an endless matter.

[883] Q. Did he express the point of view that such delays would be injurious to TWA?

A. Yes, he expressed the view that failure to carry out a consummation of the subordinate debenture offering might raise questions as to what it was all about.

Q. Raise questions in whose mind?

A. The financing institutions' minds, and might prejudice the Boeing financing.

Q. You keep referring to problems being raised in people's minds. It is not clear to me that you have identified to me what problem you had in your mind or you understood them to be referring to, Mr. Tillinghast.

A. I personally was concerned about the fact that we had a very short time within which to finalize our Boeing financing.

Q. I understand that.

A. And I didn't want to do anything that might give anyone any reason or concern for not carrying through with the financing on the basis of the informal commitments given. It was my strongly held view then, as it is now, that when you are dealing in figures of this magnitude, that the sooner you get the thing signed, sealed and delivered, and definitely nailed down, the better off you are.

[884] Q. Do you know who Bob Kerr is?

A. Yes.

Q. Who is he?

A. Mr. Sessel's assistant.

Q. Is he at the Irving Trust?

A. Yes.

Q. Only for the purpose of refreshing your recollection, Mr. Tillinghast, let me refer you to some notes of a telephone conversation between Mr. Kerr and Mr. Gordon of the Bank of America.

Mr. Sonnett: Would you mind marking that and identifying the source, Mr. Davis?

Mr. Davis: I will identify it.

By Mr. Davis:

Q. I want you to look at this, and particularly call to your attention the line which says "Odlum and Bautzer are in New York scurrying around on this matter. Ben thinks only one reason why Hughes wants money—to buy out a voting trust. Crown might come up with balance of money."

That is dated May 16, 1961. Does that refresh you at all as to what Mr. Sessel was in fact saying to you as to what the problems and dangers were?

[885] Mr. Sonnett: Have we identified this document yet?

Mr. Davis: At this moment I merely want to know if this refreshes the witness' recollection. We will get the documents in when we get the Bank of America.

Mr. Sonnett: You have shown something to the witness. It hasn't been marked and identified.

Mr. Davis: I will mark it for identification.

(Transcript of telephone conversation, marked Defendants' Exhibit 22 for identification, as of this date.)

By Mr. Davis:

Q. Now I refer you to Defendants' Exhibit 22 for identification.

Mr. Sonnett: These are notes by who?

The Witness: Mr. Gordon, I gather.

Mr. Davis: Bank of America, Bob Gordon's files.

The Witness: No, it does not.

Q. That was about the time we are now discussing the offering by TWA?

A. Yes, this would have been about the time I talked with Mr. Sessel.

Q. And it is your clear recollection that when you discussed this matter with Mr. Sessel, before the board [886] meeting of the 17th, that this subject, if not in those exact words, but the same subject matter did not come up for discussion?

A. Mr. Davis, it is not my clear recollection that this subject did not come up. My only recollection that is distinct of my discussions with Mr. Sessel was to the effect that he was very concerned about this being a delaying and diversionary tactic, and his feeling that it would be a mistake, and maybe spread some doubt and concern among the financial institutions if we failed to go ahead with the debenture offering within the time required by the original—

Q. How about the possibility of the voting trust terminating—that was important, wasn't it?

A. Not to me.

Q. It wasn't?

A. Not in this context.

Q. Do you think the termination of the voting trust might have adversely affected the financing?

A. I am sure it would have.

Q. When you come right down to it, the interference that might have taken place in the Boeing financing program was that if the Tool Company was able to raise that much money, conceivably they might make an effort to [887] terminate the voting trust, and in turn that would affect the lending institutions, isn't that right?

A. No, Mr. Davis. The only way the voting trust could be terminated would be by buying out the whole financing. My concern was not with that. Indeed we expressed the willingness repeatedly to cooperate in every way—

Q. Expressed willingness to whom, sir?

A. To Mr. Forrester, and it seems to me to other people, but I know particularly in the case of Mr. Forrester, and I will stick with him. We repeatedly expressed the willingness to cooperate in every way with a secondary offering just as rapidly as the Tool Company wanted to do it, and except for delaying the orderly progression of [our] own financing plans, we did everything we could to cooperate with the Tool Company in anything they wanted to do.

Q. Delaying what financing plans, Mr. Tillinghast?

A. Mr. Davis, I have repeatedly testified to the—the financing that we had to have committed for by the 31st of May.

Q. You are referring to the financing by the lending institutions for the Boeing program?

A. Correct.

Q. And you are saying, as I understand you, that any [888] delay in the offering by TWA of debentures which would not produce any cash to TWA, but which would produce cash to the Tool Company would have an adverse effect on the lending institution?

A. Might have.

Q. And this would be by reason of the possibility that the Tool Company might be in a position to terminate the voting trust?

A. No, those are your words.

Q. Explain in what respects, if you please.

Mr. Sonnett: Explain what?

Q. In what respects would the financing of the Boeing program by the lending institutions be adversely affected because of a delay in the debenture offer by TWA, which was not going to produce any cash to TWA?

Mr. Sonnett: I think this has been answered twice already, but if this is the last time, I won't object to it. I think the witness twice covered the subject matter. What counsel is doing is arguing with the witness.

A. Mr. Davis, at this point we had informal assurances from the executives of the financial institutions that they would recommend to their committees participation in the financing to the extent required. There obviously [889] was a serious question in my mind as to whether any substantial delay or change in the program might have the effect of unhinging some of these informal commitments, and I was not going to take any chances of having the financing of the Boeings, even though the chances might be slight.

I talked with Mr. Brandi, and asked his opinion as to whether or not delaying the debenture offering might have an effect on our financing, and his opinion was yes, it might have a serious effect on it, and on the basis of that I wasn't going to take the chance of having this financing abort, and lose either the program or the down payment of $850,000.

Q. Now, Mr. Tillinghast, let us go to the meeting which you had in your office on the 12th of May. Do you recall you identified Mr. Rowe being there?

A. Yes.

Q. Mr. Leslie?

A. Yes.

Q. Yourself?

A. Yes.

Q. And who else?

A. Mr. Forrester, Mr. Hager, and one other person has come to mind—Mr. Joy, who is an assistant of Mr. Reed.

[890] Q. Prior to that meeting you had a conversation with Mr. Brandi of Dillon, Read?

A. That's correct.

Q. And that was a conversation you had with him over the telephone?

A. That was a conversation in my office.

Q. Prior to the meeting when these other gentlemen arrived?

A. Which other gentlemen?

Q. Mr. Forrester, Mr. Carl Rowe, and these others.

A. It was prior to the arrival of Mr. Forrester and Mr. Hager, but as I recall it, after the arrival of Mr. Rowe and Mr. Reed and Mr. Joy, and Mr. Leslie.

Q. In other words, Mr. Brandi joined you at your offices on May 12th?

A. That's correct.

Q. Before Mr. Forrester and his attorney showed up?

A. Correct.

Q. And you were gathering there ahead of time to discuss what position you would take with Mr. Forrester?

A. Correct.

Q. That was based upon the report made to you by Mr. Leslie the day before?

A. In part based on that.

[891] Q. You had not talked with Forrester between times, had you?

A. No.

Q. Before Mr. Forrester's lawyer arrived, will you describe the substance of what took place insofar as it relates to the subject under discussion, namely, the position of TWA with respect to Mr. Forrester's anticipated request?

A. Yes. We discussed the subject with Mr. Brandi, and said that we were presented with this request, and we would like his views on the position that we should take.

I said that I was particularly concerned with one thing, and that is that we had this big program, and to me a very important program in midstream. I wanted to assure myself that nothing that was done in this regard might in any way prejudice the consummation of our financing with the financial institutions.

I said my own limited experience in the securities field made it seem to me a little unrealistic about effecting all of the things that would have to be affected within a week's time. I said even under the best of circumstances, with somebody who had a greater reputation than Mr. Hughes for being easy to negotiate with, I thought this was a tremendously ambitious schedule, and [892] that I personally doubted it could be effected within that period of time.

I said, "I would like your views as to whether this might have any effect on the financing or not."

He said that he felt that it might have a serious effect on the financing. The financial institutions were willing to make the commitments they had made on the assumption that TWA had achieved a degree of independence, and was free to proceed with programs that it considered to be in the best interest of the company, and that if you got into a situation that dragged on and got bogged down in a controversy of one sort or another, he felt no assurance at all that you could count on the financing continuing to be available, and that his very strong recommendation would be that we not postpone the financing, but go ahead—

Q. You are referring to which financing?

A. The subordinate debenture financing—but go ahead on our predetermined time schedule, and if there was a genuine secondary offering in the wind, that could be handled as such.

Q. Let us take this piecemeal. Prior to this gathering in your office, to your knowledge had anyone told Mr. Brandi what the meeting was about?

[893] A. I believe Mr. Leslie had talked with him.

Q. Mr. Leslie was fully familiar with the nature and details of Mr. Forrester's request?

A. He was the most familiar one, yes. He had talked with Mr. Forrester.

Q. Wasn't the purpose of the meeting to find out from Mr. Forrester what it is exactly that they proposed to do?

A. The purpose of the meeting was for him to explain in as much detail as he cared to exactly what they proposed to do, and to obtain TWA's agreement to a postponement.

Q. Isn't it fair to say that all Mr. Forrester told Mr. Leslie up to that point was that he had been approached by the Tool Company to see if they would undertake some sort of a secondary, and that Mr. Forrester would like to sit down with you, or whoever, and discuss a program?

A. No, I am sure that isn't the case, because I am quite sure that when this first was mentioned to me, the matter of the delay was in the conversation already.

Q. But my question is whether or not it is your testimony that Mr. Forrester discussed in detail what he proposed with Mr. Leslie on the 11th.

[894] A. My impression is that most of what had been discussed—most of what was discussed in my presence on the 12th, already had been discussed with Mr. Leslie.

Q. And it is your understanding that you asked Mr. Leslie to call Mr. Brandi to arrange this meeting, and tell him what it is that Merrill Lynch wanted to do?

A. It is my recollection that I asked Mr. Leslie to get in touch with Dillon, Read, explain the nature of the request, and get their views as to what effect, if any, it would have on the new financing.

Q. And he is the one who arranged for Mr. Brandi meeting at your office the next day, the 12th?

A. I believe so.

Q. You made this suggestion to Mr. Leslie without having heard from Mr. Breech?

A. That is my best recollection. As I recall it at the moment, the first time I talked with Mr. Breech was after I talked with Mr. Forrester.

Q. These gentlemen met in your office before Mr. Forrester and his lawyer arrived?

A. Correct.

Q. At that time there took place the conversation that you described a moment ago?

A. That's correct.

[895] Q. Without having heard what Mr. Forrester and his lawyer had to say?

A. No.

Q. Somebody must have described what Mr. Forrester and his lawyer were proposing. Who did that? Did Mr. Leslie, did you?

A. Mr. Forrester outlined—

Q. I am talking about before Mr. Forrester arrived.

A. Before Mr. Forrester arrived—excuse me, I misunderstood you. Mr. Leslie, in the prior conversation, I believe, outlined what was proposed.

Q. To Mr. Brandi and Mr. Rowe and Mr. Joy, Mr. Reed's associate or partner. Is Mr. Joy a partner of the firm of Hughes, Hubbard?

A. I don't think so, no. I think he is an associate.

Q. At that time, as I understand your prior testimony—but I want you to change it if it is not accurate—Mr. Brandi in effect confirmed your views, or confirmed the view that the lending institutions that made advances to

TWA on the assumption that TWA would maintain a certain degree of independence, I believe you said—

A. That's right.

Q. And if there was anything which might take place to jeopardize that degree of independence, it might have [896] an adverse effect on the Boeing financing?

A. What he said, as I recall it, was that if this degenerated into another Hughes controversy, and it appeared that the company had not achieved the ability to deal objectively with its problems, that it might have a serious effect on the financing.

Q. Mr. Sessel was not there?

A. Mr. Sessel was not there.

Q. So far as you know, how and when was Mr. Sessel first informed about this approach by Merrill Lynch?

A. I can't say. It would have been by Mr. Leslie or myself. Which it was and exactly when it was, I can't recall.

Q. You believe you may have been the one?

A. Possibly, I think it is more likely that it was Mr. Leslie, but it conceivably could have been I.

Q. Before Mr. Forrester and his lawyer arrived, did you or Mr. Leslie, or anyone else at that meeting, suggest that this move by the Hughes Tool Company might be part of a plan to refund or refinance or terminate the voting trust?

A. I don't recall any such discussion, Mr. Davis.

Q. Do you think you would recall it if it had taken place?

[897] A. I think I probably would, but I just don't recall it at this time.

Q. Do you recall with clarity what concepts Mr. Brandi was expressing in suggesting that this discussion by Merrill Lynch might interfere with the Boeing financing?

A. I think I have already testified as fully as I can about that.

Q. You are satisfied that is as full and as clear a description as you are capable of giving us?

A. At this time, yes.

Q. Do you think there is anything you might do to help you refresh your recollection?

A. Not that I can think of, no. If I re-discussed it with everyone present, it undoubtedly would refresh my recollection somewhat, but as I sit here now, that is the best recollection I can give you.

Q. Did this group arrive at some consensus of opinion? Did anyone express a different point of view in that group?

A. No, I think I summed up the meeting by saying that I wasn't prepared to take any reasonable risk of unseating the Boeing financing, and that unless people could give me assurances that that wouldn't happen, that it was going to be my position that we deny the request.

[898] Q. Did Mr. Brandi suggest that perhaps he ought to discuss it with some of the lending institutions or their representatives before giving any firm views?

A. I don't recall any such thing, Mr. Davis.

Q. Do you recall whether or not he telephoned anyone for the purpose of getting some other points of view?

A. He didn't telephone anyone from my office.

Q. Who were the individuals who were negotiating on behalf of the lending institutions, this Boeing financing?

A. I am not sure I know exactly. I think it was Mr. Kerr, so far as the Irving Trust was concerned—either Mr. Keehn or one of his subordinates so far as the Equitable was concerned. I guess it was Jenkins at Metropolitan, and then each of the banks had a representative involved in it. I know Gordon of the Bank of America was one.

Q. You said the senior officer of TWA, negotiating on behalf of TWA, was Mr. Leslie?

A. That's correct.

Q. You did not assume any personal functions in negotiating?

A. That's correct, at this time. On the 29th of May, I very much got into it, but up until that time—

[899] Q. Mr. Leslie had been handling it?

A. Mr. Leslie had been handling it.

Q. To what extent had Dillon, Read been participants?

A. They had been very active participants, I believe, because they were our financial advisers, and they had been very active in the whole thing.

Q. You mean they had been. I don't understand what you mean by saying "they had been your financial advisers."

A. They were our financial advisers at the time.

Q. As a continuation of the 1960 financing?

A. They handled the 1960 financing, and then separately represented us with respect to the 1961 financing.

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[914] Q. Was the consummation of the 1961 financing involved, difficult or complex?

A. I would say it wasn't nearly as difficult or complex as I understand the 1960 financing was. It was not, however, without some difficulties and complexities, particularly as things developed in the matter.

Q. Will you describe the nature of the difficulties and complexities that were involved in the 1961 financing, and if you know, to what extent those were complexities and difficulties that did not exist in the 1960 financing.

A. I would say this, Mr. Davis, that one of the problems of the 1961 financing was the fact that at the time I joined TWA, this had pretty well taken form.

Q. The 1961 financing?

[915] A. The 1961 financing had substantially taken form. One of the things that were contemplated was the participation of the Prudential Insurance Company, to the extent, as I recall it, of $39 million.

We had received informal assurances from Mr. Chappelear—

Q. Of the Prudential?

A. Of the Prudential, that he would recommend it, and he felt confident that his committee would go along.

Then as the result of the publicity and controversy that was raised by Hughes Tool Company, the Prudential pulled out of the deal, and we were then faced with the problem of what we would do in order to take up the slack left by the Prudential.

We had various discussions with Dillon, Read. Dillon, Read, I know, spent a substantial amount of time and effort trying to find other insurance companies who would participate in this and take the Prudential's place without success.

Then later on, when it became apparent that the revenue and earnings forecast which had been made in the first part of 1961, in late February or March, I believe, were not being realized, and that TWA would have a cash problem of meeting the payment schedules under the [916] proposed financing, then it became necessary to work out a modification of the deal, and then more recently, as a consequence, let us say failure of the Caravelle program to materialize, it was necessary once again to try to work out with the financial institutions a further modification of the program.

I would say if one looks at it by hindsight, the 1961 financing has been, let us say, more than averagely complicated.

[917] Q. I understood you to say that this fee had been fixed, at least by the time of the board meeting of July 19, 1961?

A. That's correct.

Q. Were you at that time anticipating those complexities that developed in connection with the Caravelle program, which I understood from your prior testimony was around September?

A. No, we certainly didn't anticipate that at that time. In July we were in the middle of what I referred to as the Hughes problems, and the complexities springing from that, both past and potential, were realized at that time.

I would say this fee of $200,000 was, as I recall, the figures in Mr. Leslie's memo, a more or less average fee for an offering or a financing of this size.

Q. What were the complexities of the Hughes problem at that time, namely, prior to July 19, 1961?

A. Well, I don't know how deeply you want me to go into this, Mr. Davis.

Q. As factually as you can.

A. Going back to the period that we were talking about yesterday, when the question was first raised by Mr. Forrester of Hughes Tool Company's desire to have us [918] postpone for a week the offering of the subordinated debentures—

Q. On May 12th or 11th?

A. On May 12th or 11th—on the 17th we had a TWA board of directors meeting, at which time it had been planned to fix the final details of the offering and become effective the next day.

Q. The price amendment to the registration statement?

A. Yes. As you will recall, you appeared for the first time at that directors meeting, and made a rather lengthy statement at the directors meeting, the substance of which was that unless TWA was prepared to agree to the extension that was being requested, you were going to file, or you were going to object on a variety of grounds to the ade-

quacy of the registration statement, and in fact, that same day, if you recall correctly, you sent a letter to the SEC, and we suddenly found ourselves in a highly publicized situation not calculated to make easy the consummation of the financial arrangements.

Q. Excuse me for interrupting you. You are still referring to making difficult the financial arrangement in connection with this convertible debenture issue, all of which was going to go to Hughes Tool Company? Is that the one you are referring to?

[919] A. I wasn't referring primarily to that, but I would include that also.

Q. You are referring to the publicity—

Mr. Sonnett: I object to the witness being interrupted in the middle of an answer which was perfectly responsive to a question, and then Mr. Davis attempting to cut him off before he is through. I think the witness should be allowed to finish the answer which he was in the middle of making when he was once again interrupted by counsel.

The Special Master: Let us try to let him finish his answers.

Mr. Davis: Will you pick up Mr. Tillinghast's answer?

(The record was read.)

By Mr. Davis:

Q. It would help me when you refer to the financial arrangements—when you are referring to financial arrangements for the lending institutions, I wish you would identify it. When you are referring to the financial arrangements relating to the issuance of convertible debentures by TWA, I wish you would refer to that arrangement and when you

are referring to some other financial arrangement, I would appreciate it if you would identify [920] it. I think it would save time in the long run if in your answer you would identify the financial arrangements that you have in mind.

A. (Continuing)—the middle of the following week, the committees of the insurance companies were scheduled to meet, to give committee approval to the tentative arrangement that had been made for the Boeing financing. We learned to our disappointment, I think on Wednesday, the 24th, but I wouldn't be sure within a day or so, that Prudential had withdrawn because the committee would have nothing to do with this situation.

That, of course, presented us with a difficult problem of what to do about our financing, and left us in the position where we had only a week left in which to firm up our financing under the Boeing agreement, and being short at that point $39 million.

Q. Have you finished describing the complexities involved involving Hughes Tool that had a bearing?

A. At this particular point, yes.

Q. You have been referring to the complexities—you had in mind in connection the fixing of the fee of Dillon, Read?

A. Among other things, yes.

Q. In your last answer you referred to the committee—[921] I believe the committee of the insurance companies—reporting they would have nothing to do with the situation? Did you say something to that effect?

A. Yes.

Q. Will you please identify the committee, the insurance company, or whoever was on that committee, and what situation they would have nothing to do with?

A. Mr. Davis, I know this only third or fourth hand.

Q. From whom did you hear?

A. I believe I heard it from Mr. Leslie, and I believe he in turn heard it from Mr. Wadsworth, and I believe Mr. Wadsworth talked with the insurance companies. As it was reported back to me, the Prudential was not satisfied that there might not be some way that the voting trust would be upset, and they didn't want to get into that situation.

As I recall—it was reported to me that Chappalear told Wadsworth that you couldn't re-open this matter with a crowbar.

Q. Did you understand what was meant by saying, "You could not re-open the situation with a crowbar"?

A. There was no point in going back and trying to re-open the matter.

Q. Re-open what matter?

[922] A. The matter of their participation in the financing.

Q. The 1961 financing?

A. Yes, the 1961 financing, Mr. Davis.

Q. Since yesterday, did you have occasion of refreshing your recollection with anyone, particularly with respect to the note I showed you referring to Mr. Sessel and his comment?

A. No, I have not, Mr. Davis.

Q. Did you make an effort to communicate with anyone?

A. No.

Q. You made no effort to refresh your recollection at all as to what transpired in that period beginning about May 11th?

A. I have been turning a number of these things over in my mind trying to refresh my recollection, but I haven't talked with anyone about it.

Q. You didn't call anyone?

A. No.

Q. Mr. Sessel?

A. No.

Q. You weren't surprised at what had been marked Defendants' Exhibit 22, which are the notes from the Bank of America, a telephone conversation presumably made by Mr. Kerr of the Irving Trust? You remember that?

[923] A. Yes.

Q. That did not cause you to inquire of Mr. Sessel whether that was true, or what he meant by it?

A. No.

Q. When was a decision made to refuse to the Tool Company this week's extension, or any extension of time that was being requested through Merrill Lynch?

A. It was made at the board of directors meeting on the 17th, following your appearance at the directors meeting, and the position that you stated there.

Q. Mr. Tillinghast, I don't mean when was a record made of the decision. I am asking you when, in fact, was a decision made by the TWA management.

A. The decision was, in fact, made on the 17th by the board of directors. As I told you yesterday, Mr. Davis, at the time of my discussion with Mr. Forrester, I told Mr. Forrester that I frankly didn't think that it was realistic under the best of circumstances to accomplish this within a week. I didn't think, and he concurred in that, that he or anyone else could give me any assurance that this could be accomplished within a week, and that while it was something that I felt that I would not want to take the responsibility for answering myself, and would want to have my chairman [924] share my decision, I thought in fairness I could only tell him that my recommendation would be that the extension not be granted.

I then called Mr. Breech—

Q. When was this?

A. This was on the 12th. I then called Mr. Breech and explained to him the request that had been made, the discussion that had been had, and said that I didn't want to make a decision in the thing without discussing it with him.

He said that he thought this was a matter that the whole board ought to consider, and that neither he nor I should make a decision.

He said, "Let us plan to take it up at the directors meeting."

In the meantime, we authorized counsel to do some preliminary work, so that further time would not be lost if the board decided that we should grant an extension. The matter, however, was not decided until the board meeting on the 17th, after your appearance at the board meeting.

Q. In other words, Mr. Tillinghast, you are quite sure that as chief executive officer of TWA, the decision to deny this request to the Tool Company was not made by [925] TWA until the board meeting of the 17th of May, and it was made at that meeting?

A. That's correct.

Q. You are quite sure of that?

A. I am quite sure of that.

Q. Would there be anyone else at TWA who could make such a decision without your knowing it?

A. I don't believe so, Mr. Davis.

Q. You had not delegated to anyone else the duty or responsibility of making the inquiry or the decision?

A. No, this decision to the extent that it was a decision would have been made either by me or by the board of directors. As I told Mr. Forrester from the beginning, my own recommendation was against it, and I proposed to take

that position with the board, but no final decision was made until the board meeting.

[926] Q. I understand that you discussed that conclusion with Mr. Breech on the 12th of May, is that right?

A. Yes, I did.

Q. Did you discuss it with any other director of TWA prior to the 17th?

A. I think I probably, although I can't tell you the exact time or circumstances, discussed it with Mr. Sessel sometime before the 17th.

Q. So you discussed it with Mr. Breech and with Mr. Sessel?

A. Yes.

Q. Do you have a recollection of having discussed that decision or recommendation with anyone else?

A. Well, I certainly discussed it with Mr. Leslie, who was a director.

Q. Do you recall when?

A. Well, he was present on the 12th, and undoubtedly discussed it with him sometime between the 12th and the 17th, I am sure.

Q. Any other director that you can recall?

A. Possibly Mr. Cocke.

Q. Mr. Cocke being an officer. I mean with outside directors primarily.

A. At this time, Mr. Davis, I have no recollection [927] of having discussed it with any of the other outside directors. I won't say that it is impossible that I did, but I have no recollection.

Q. You are aware, are you not, that on the morning of the 17th, there was filed with the SEC an amendment to the registration statement, which contained a reference to the fact that TWA had not consented to the delay?

A. Yes.

Q. And that was something which you instructed counsel to do in anticipation of the board action on the 17th, is that correct?

A. Well, I was aware that counsel was doing it, yes.

Q. Were you aware that the statement filed on the morning of the 17th with the SEC contained a statement as to whether or not TWA would or would not grant this delay requested by the Hughes Tool Company?

A. I think at that point the material filed with the SEC just said that we had not agreed to the delay.

Q. So that the language may be clear to you, and without bothering to mark in evidence the public record, let me hand you the registration statement of TWA at that time, and refer you to page 4, so that you may construe the language —at least your understanding of what it means. I think it is the top paragraph, Mr. Tillinghast.

[928] A. Yes.

Q. You construe that to mean merely that TWA had not agreed to grant the request, but still might?

A. I think it speaks for itself, Mr. Davis, that we had not agreed to grant the request.

Q. But so far as you were concerned, no decision had been made to deny or refuse the request?

A. No decision was made until the meeting of the board, Mr. Davis. As I said before, I knew what my own views on the subject were, and what I proposed to urge upon the directors, but no decision was made until the directors' meeting.

Q. Let me refer you to Defendants' Exhibit 22, which you will note purports to be a note from the Bank of America of a telephone conversation with Mr. Kerr of the Irving Trust, with Mr. Gordon. You will note a portion of this reads: "TWA management and board has declined to give

the extension on advice of own investment counsel who say a week won't do."

That was dated May 16th.

Mr. Sonnett: Have you a typed copy of that?

Mr. Davis: No, not of this one.

By Mr. Davis:

Q. Do you see that?

[929] A. Yes.

Q. You see there is no basis whatever for Mr. Kerr or anyone else making such a statement, is there?

A. Mr. Davis, the board hadn't met by this date.

Q. I understand that.

A. I can only assume that Mr. Kerr was predicting what the board was going to do.

Q. You don't think Mr. Kerr was referring to the fact, when Mr. Sessel and Mr. Breech got together, that was a decision?

A. No, I don't think when Mr. Breech and Mr. Sessel got together, that was a decision.

Q. You think when Mr. Breech, Mr. Sessel and you got together, it was a decision?

A. Not in this particular situation.

Mr. Davis: May I have this marked for identification?

(Handwritten notes from Dillon, Read's files, marked Defendants' Exhibit 23 for identification, as of this date.)

Mr. Sonnett: May I read the paragraph you referred to?

Mr. Davis: I am not offering that in evidence now.

[930] Mr. Sonnett: You purported to refer to a paragraph and you incorrectly described the contents of the paragraph. I think the record should describe correctly what the paragraph says.

Mr. Davis: You can read the whole thing into the record. The exhibit will be part of the record, and you have a copy of the document.

Mr. Sonnett: You offered me the opportunity to read it all in the record, and I would like to have it copied. My initial suggestion was to read the one paragraph.

The Special Master: Let us have the one paragraph that the witness was referred to.

Mr. Sonnett: The paragraph reads as follows:

"TWA management and board has declined to give the extension on advice of own investment counsel, who say a week won't do."

By Mr. Davis:

Q. I am going to hand you what has been marked as Defendants' Exhibit 23, Mr. Tillinghast. I represent to you that these are parts of notes that we obtained from the files of Dillon, Read. I believe those to be handwritten notes of Mr. Wadsworth at Dillon, Read. You don't have to be influenced in your answer by reason of [931] what you see on this exhibit. The handwriting may be difficult to read without Mr. Wadsworth, but let me read to you the way I read it.

It is dated June 13, 1961, and presumably refers to—I am suggesting it may refer to a telephone conversation between Mr. Wadsworth and Mr. Sessel.

"Sessel—will be faced with decision. Meeting at Hagarty-Haycock, Keehn, Somers, Olds, Breech and

Sessel. Ecker for a little while. Will lenders continue to be lenders without voting trust in either old credit or new credit."

"Tillinghast will write short lender to lenders." I think it means short letter.

"Answer is no, except not certain on Bank of America. Tillinghast will come to us and ask us whether we could replace present lenders for $165 million plus new financing—$147 million—Boeing."

Then another entry under same date "Attended closing on subordinated debentures."

The next entry dated June 14, 1961 is, "Met with Langmuir, notes attached."

Do you know who Langmuir is?

A. It doesn't mean anything to me.

Q. Perhaps from Prudential?

[932] A. I don't know.

Q. Then a note under the heading of June 15, 1961, "Talked to Leslie. Reported meeting with Langmuir. He advised us of letter he was writng us, and lenders, re: Ability to finance."

You still don't know who Langmuir is?

A. No, I don't.

Q. That, in fact, related to what transpired when TWA received the offer of the Tool Company reflected by its letter of June 10, 1961?

A. That is correct.

Q. It had nothing to do with the subject under discussion, namely, the refusal to delay?

A. This was a month later.

Q. Now continuing with what took place in May, following the meeting with Dillon, Read and Forrester on Friday,

May 12th, did you subsequently receive a written confirmation of the conclusion of that meeting?

A. A written confirmation of the conclusion of the meeting?

Q. Yes.

A. No, not that I would describe as that, Mr. Davis.

Q. What I am referring to is a letter you received from Mr. Brandi. I believe you received it from Mr. [933] Brandi.

A. Oh, yes. Mr. Brandi at my request wrote a letter to have at the board meeting on the 17th.

Mr. Davis: May I have this marked for identification, please?

(Letter dated May 15, 1960 to Mr. Tillinghast from Dillon, Read, marked Defendants' Exhibit 24 for identification, as of this date.)

Mr. Davis: I think I would like to have the record show what has been marked as Defendants' Exhibit 24 was numbered document 88 as part of Defendants' Exhibit 12, as being part of the documents made available to us for the first time on January 31, 1962, which we had never received before.

Mr. Sonnett: If you want to make a point in that connection, I will have to go back and we can have a lot of time wasted to find out whether your statement is correct or not. Apart from the editorial comment, I think you got the piece of paper you have in your hand on January 31st, so you had it for some time. I think the editorial comment only gets us both into colloquy which wastes time and money.

By Mr. Davis:

Q. Mr. Tillinghast, let me hand you Defendants' Ex-
[934] hibit 24, and ask you if you can identify it.

A. Yes, I recognize that letter.

Q. It is a letter you received from Mr. Brandi which referred—confirming the advice they gave you at the meeting of the preceding Friday, namely, May 12th, is that correct?

A. That is correct.

Q. Does this letter accurately confirm the advice that you received on May 12th?

A. It accurately summarizes the advice given orally on the 12th.

Q. Are you now satisfied that in your testimony of yesterday you described all of the reasons given by Dillon, Read for the conclusion reflected by Defendants' Exhibit 24?

A. Repeat that, please.

(The question was read.)

A. Yes.

By Mr. Davis:

Q. And the reasons as so given to you satisfied you?

A. They did.

Q. You did not feel it necessary to inquire of anybody else to see whether or not others might have a different opinion or reach a different conclusion?

[935] A. No, I didn't, Mr. Davis. I was very concerned personally by the things that he mentioned and he confirmed, and saw no need for further investigating the matter.

Q. At that time were you aware of the financial arrangements with Dillon, Read?

A. Aware of what financial arrangements with Dillon, Read?

Q. With respect to the fee payable to them, or fees for either 1960 or 1961? Do you have to refer to the memorandum from Mr. Rowe? I am only interested in your independent recollection, Mr. Tillinghast.

A. So far as I can recall at this time, I just can't recall at this time, Mr. Davis, when I first became—let me think here. I know I became aware of the arrangement by the 17th, because I know when you appeared before the board, one of the things you questioned was this fee, and later you sent a telegram, or somebody sent a telegram saying that you wanted to withdraw any objection that you had made to the fee. So I know that by that time I was aware of the amount of the fee.

How much before that I was aware of it, I would hesitate to say now. I probably was aware of it at this time, but I just have no independent recollection of it.

[936] Q. I am sure you didn't intend to confuse the facts with your last answer, Mr. Tillinghast. I think I know what you are referring to, but for the sake of the record let us see if we can't straighten it out.

The drafts of registration statements filed with the SEC, and the next to the last draft, for the first time contained, as is normal, a description of fees to be incurred?

A. Yes.

Q. And the relationship of the parties?

A. Yes.

Q. And that registration statement disclosed an amount due or payable to Dillon, Read?

A. It is very likely that was when I first learned of the amount.

Q. And you were referring to a communication while I was a member of the firm of Simpson, Thacher & Bartlett, to the effect that our various objections to the proposed financing did not relate to the question of fees?

A. That is right.

Q. Do you recall in relationship to this date of May 12th or May 16th when this information came to you about the fee arrangement, the $750,000 payable in three installments in 1960, and the question as to the amount [937] of fee to be fixed for the 1961 financing?

A. My recollection is that the question of the amount to be fixed as the fee for the 1961 financing came up substantially later than this. So far as the 1960 financing is concerned, I have no independent recollection as to exactly when I first learned about the amount of the fee. I have no mental association that I can recall that fixes that date with respect to the 12th of May.

Q. The first time you heard about it, did you find it shocking, surprising, large, usual, unusual?

A. I thought it was a lot of money.

Q. I understand that, but when you heard about it, did it impress you as being something indicating that something out of the order had happened?

A. I knew, Mr. Davis, that a good deal out of the order had happened. The fee struck me as a very substantial one, a lot of money. As I said before, this was a heritage from the past, and on the basis of the knowledge I had, I had no reason to think it wasn't quite reasonable for the services rendered even though it impressed me as a lot of money you would have to pay.

Q. Did it raise some concern on your part that you might have to pay a comparable amount with respect to [938] the $147 million then contemplated to be planned

through the same lending institutions, through the same Dillon, Read?

A. I certainly hoped and expected that we were not talking about $750,000 for the subsequent financing, which turned out to be the case.

Q. On May 12th you telephoned Mr. Breech and reported what had transpired?

A. That is correct.

Q. Do you have a clear recollection of that telephone conversation?

A. I have a recollection of one part of it, and that was his saying that he or I should not take the responsibility for deciding this, and it was of sufficient importance that it ought to be decided by the board.

Q. You reported to him the approach made by Merrill Lynch?

A. That is correct.

Q. At that time he heard of it from some other quarters, or were you giving him the information for the first time?

A. I think this was the first he had heard of it, Mr. Davis.

Q. And you told him that you had a meeting with—

[939] A. Mr. Forrester.

Q. That morning?

A. It was in the afternoon.

Q. The meeting on the 12th was in the afternoon?

A. I am sure it was in the afternoon.

Q. And this telephone call to Mr. Breech was in the evening?

A. No.

Q. Right after the meeting?

A. My recollection is that it was right after the Forrester meeting.

Q. After they left?

A. Yes. I may be wrong on that, but I know it might even have been the next day, but I know following the meeting I tried to get in touch with him as soon as I could, to explain the situation to him.

Q. Do you recall whether or not there were other people in the room when you were talking to Mr. Breech and explaining to him what happened?

A. I have no recollection of other people in the room at the time, Mr. Davis.

Q. Did Mr. Breech show some interest at what you were telling him?

A. He was obviously interested in it.

[940] Q. Do you recall what Mr. Breech said and what you said to him?

A. I recall this much. I recall that I went through an explanation of the request, the discussion with Brandi, the meeting with Forrester, summarizing what was said in those discussions. I said I felt very strongly that it would be a mistake to get started on a program that very likely would lead from postponement to postponement.

Q. You told him that?

A. I did. That my own experience told me that it was very unrealistic to expect to do something like this within a week's time, and that if we granted a week's delay, that I was morally certain that we would at the end of the week be faced with the question of a further delay. And I felt that we ought to deny the request but I didn't want to do so without discussing it with him and getting his concurrence.

If I recall what he said, he said, "Charlie, this is one that neither you nor I should decide. We better put this before the whole board."

Q. When you said to him that based on your own experience a week was not sufficiently long, what experience were you referring to?

A. Such limited experience as I had had with regis-
[941] tration statements.

Q. You had had experience with registration statements?

A. Limited experience, yes.

Q. Was it your understanding at that time that the same registration statement that had been prepared by TWA would be used?

A. With such modifications as were necessitated by bringing in a new party.

Q. Did you understand why Merrill Lynch wanted a week's time?

A. I know what they said.

Q. What did they say?

A. They said they wanted a week's time in order to permit them to put together an underwriting syndicate, and to make the necessary changes in the registration statement in order to effect a public offering.

Q. Were you familiar with putting together an underwriting syndicate?

A. Not directly.

Q. Indirectly?

A. I guess limited.

Q. Would you describe your experience in putting together an underwriting syndicate?

[942] A. It is hearsay, Mr. Davis. I never actually engaged directly in putting one together. I have been on the fringes enough to have some idea.

Q. Describe as well as you can what indirect experience you have had in putting together an underwriting syndicate?

A. I was quite active in the distribution by General Motors of the Bendix stock which General Motors sold, as I recall it, in the first part of 1947. During the time I was at Hughes, Hubbard, there were a good many offerings around the office that I didn't directly participate in, but got some impressions about.

In 1950 something or other—I don't remember when—I represented the underwriters in an offering of the stock of the Edo Corporation, and was active in that.

I know enough about it—I don't represent myself as an expert in this field. I know you have to have underwriting agreements, and you have to give information to the underwriters on the company, and you have to give an opportunity to the underwriters that are interested to investigate the company. You have to have meetings.

Q. Isn't it true that all that work, the investigation of the company, material to be disclosed to the [943] public—all that work had been done by Dillon, Read and the Chadbourne firm, for the public offering by TWA, had it not?

A. A certain amount of that had been done.

Q. Merely a certain amount of it?

A. May I finish?

Q. Yes, certainly. I was quite aware of the fact that if you brought in new underwriters, the discharge of their responsibility would require them to make at least a casual investigation of the company. I can't believe that a firm of the standing of Merrill Lynch would make an offering without taking some steps to familiarize themselves with the company, the company's future, the company's problems. They would bring in new counsel who would have to go over the registration statement, educate himself sufficiently to be in a position to pass the registration statement on behalf of his client.

It would bring in Hughes Tool Company as an active party, and Hughes Tool Company, as it turned out on the 17th, had many serious questions about the adequacy of the registration statement.

By the time that you had gotten a new set of counsel in for the underwriters, by the time you had [944] gotten Hughes Tool Company counsel in, no one in this world could convince me there was a reasonable prospect of getting that offering off the boards and ready to go public in a week's time.

Indeed, I said as much to Mr. Forrester, and particularly to Mr. Hager, his counsel, and Mr. Hager, in substance agreed with me, and I said, "What sort of a guarantee can you gentlemen give me that this can be accomplished within a week's time?"

They said, in substance, "Obviously we can't give you any guarantee. All we can say is we will do our best."

[945] Q. When you refer to a week's time, you are not quite accurate, are you? We are talking about a request made on May 11th. They were seeking a week's adjournment from the contemplated May 17th, so it was two weeks' time, wasn't it?

A. No, it wasn't two weeks' time. I was talking with them on the 12th of May, which was a Friday, and the proposal was to become effective on the 24th, which was 12 days later.

Q. 12 business days?

A. No, not 12 business days.

Q. 12 days?

A. 12 days including Saturday and Sunday.

Q. Do you think that is closer to two weeks, or one week?

A. That is 12 days. I will say, Mr. Davis, unless there be any confusion on the subject, that what I say is to the impossibility of accomplishing this, in my opinion, applies equally to 12 days as it does to one week.

Q. Will you admit that you have had no experience really, or you don't consider yourself to be an expert as to how long it takes to get together an underwriting group, leaving aside for the moment—

[946] Mr. Sonnett: I object to that as to form. It is argumentative. The witness has fully described his experience.

The Special Master: I think he already said he isn't an expert.

By Mr. Davis:

Q. In connection with this request to Merrill Lynch, you were not concerned with the problems that Merrill Lynch might encounter in achieving their objective, were you? I will withdraw the question.

Did you consider Merrill Lynch was being adequately advised by experienced people, legal people, so that they fully understood what they were proposing to do? Were you satisfied about that?

A. Yes.

Q. Did Merrill Lynch say to you that they thought that they could put together an underwriting group if TWA, or its management, would delay the effective date of their registration statement from the 17th to the 24th? Did they say that to you?

A. They might well have.

Q. Did they or didn't they, Mr. Tillinghast?

A. I wouldn't put it exactly that way, but let me say this, that there was no real question in my mind [947] as

to their ability to get together an underwriting group. That wasn't the problem. The problem was the problem of becoming effective.

Q. You mean how much longer it would take to become effective if they got together an underwriting group?

A. That's correct. The problem that I was interested in, Mr. Davis, was not how long it took them to get together an underwriting group. I was concerned with the question of if we granted this delay, when we would become effective.

Q. And you thought that if they formed an underwriting group, it might delay beyond the 24th the effective date of the registration statement?

A. I felt if we tried to go to an underwriting on this, that the probability was that it would delay it far beyond the 24th.

Q. Did you try to make an estimate as to how much of a delay you thought would occur?

A. I thought that under the best of circumstances, that you were talking about, roughly, a month.

Q. Did anyone tell you that?

A. I discussed that with our own counsel. I discussed it—

Q. How do you mean by your own counsel?

[948] A. Mr. Rowe. I discussed it with Mr. Brandi. I discussed it with Mr. Forrester and Mr. Hager, and expressed that viewpoint.

Q. This was on the 12th?

A. On the 12th. None of the experts in this field seriously disputed that expression of viewpoint by me.

Q. In other words, you are saying now that on the 12th of May, Mr. Forrester and Mr. Hager, of Sherman Sterling, agreed with the views which you expressed out loud, that it would take an additional month in order to become effective?

A. Let me say, Mr. Davis, to be more accurate, that they did not disagree with that expression of viewpoint by me.

Q. You assumed from that they were in accord with your point of view?

A. I did. As I said before, Mr. Davis, they repeated—Mr. Forrester repeated they would do their best. They were hopeful that they might succeed in doing it, but certainly couldn't assure us that it was possible.

Q. Was it as a result of this meeting that a group was formed, included Mr. Reed, who was at that meeting, wasn't he?

A. He was.

[949] Q. Mr. Reed and Mr. Hager of Sherman, Sterling, to get up a lot of papers from the Tool Company, requesting the Tool Company to give a firm letter of commitment to Merrill Lynch, preparing resolutions, and they worked an entire weekend over it? You were aware of that, weren't you?

A. I was. I believe it was after the meeting that someone said would we be willing to have the lawyers work over the weekend in order to make such progress as they could, so that if the decision was an affirmative one, no time would be lost.

I authorized them to go ahead and start working.

Q. In fact the Hughes, Hubbard firm sent bills to TWA and others with respect to the work that was done to get the Tool Company committed to Merrill Lynch, following this meeting on the 12th?

A. I wouldn't say worked to get the Tool Company committed to Merrill Lynch, but they did work over this weekend, and I believe—

Q. Doing what—do you know?

A. Working on an underwriting agreement, and they worked on a letter of commitment that the Tool Company would give. Just what else they worked on, I don't know.

[950] Q. Do you recall a discussion about trying to get the Tool Company to agree to guarantee one year's interest on these debentures?

A. Yes, I do. That came up on the 12th. Mr. Forrester said at that time that one of the problems that they had run into was that it very likely would be necessary for someone to guarantee the interest for a year, in order to make these publicly favorable.

Q. The meeting on the 12th, with Mr. Forrester and the others there, broke up on the basis of all this work to be done, these problems to be solved, get the Tool Company to consider guaranteeing a year's interest, an underwriting agreement to be worked on—that was what everybody started to do upon the break-up of this meeting?

A. No, it was not. If I recall correctly, that did not come up at the meeting. It came up after the meeting, and I got a telephone call, I believe from Mr. Reed, saying that they wanted to go ahead so that there wouldn't be any waste of time, and I told him in effect that so long as it doesn't involve expense on the part of TWA, and as long as it is clearly understood what my position is in the thing, go ahead and extend every cooperation, and see what progress you can make.

[951] Q. Did Hughes, Hubbard in fact send a bill to TWA for the legal work that they did during that period?

A. I think they sent one to the Tool Company, didn't they?

Q. I know they did, but I am asking you if they also sent one to TWA.

A. Not for the work. I think this was all paid for by the Tool Company, Mr. Davis.

Q. And it is your understanding that following that meeting, they worked on a proposed underwriting agreement between the Tool Company and Merrill Lynch?

A. Yes.

Q. Do you recall saying that before anything else would happen, you would want to see a firm letter of commitment from the Tool Company to Merrill Lynch?

A. Offhand I don't, no.

Q. Have you ever heard that Merrill Lynch was ever asked to obtain from the Tool Company a firm irrevocable letter of commitment?

A. Not that I recall, Mr. Davis. I remember that there was some sort of a commitment letter, and there was question as to the adequacy of the commitment letter, but I don't recall that TWA asked for that. As I recall it, it was volunteered by the Tool Company.

[952] Q. Without drawing a distinction who TWA is, do you know of any individual, whatever association he may have with anyone, who asked Merrill Lynch to obtain such a firm letter of commitment from the Tool Company?

A. Not offhand, Mr. Davis. I don't recall it at this point.

Q. Is it still your testimony that on May 12th, at this meeting you indicated, and it was your personal opinion, that the whole thing was absolutely impossible, and it was just a waste of time?

A. That's correct.

Q. And it is your testimony that you believed that Mr. Forrester and Mr. Hager understood that point of view, and did not disagree with it?

A. Yes, although I would have to say in fairness that they obviously wanted to go ahead with this thing, and let us say with viewing it in the most optimistic light from that

standpoint. I specifically put the question to them as to whether or not they could give me any assurance that this would be completed in the time suggested, and the answer was no, they couldn't.

Q. Was there any discussion at that meeting as to what the Tool Company would do with all that money, with all that cash?

[953] A. No, there was not, at least I am sure there was no question as to what the Tool Company would do with that money.

Q. Then you called Mr. Breech and expressed your own personal view that this request of the Tool Company was not feasible, is that correct?

A. That's right.

Q. What else do you remember telling Mr. Breech?

A. I have already testified—

Q. Excuse me for interrupting you. Did Mr. Breech express any personal views based upon his experience as to whether or not this would be feasible or not?

A. Not that I recall. He certainly didn't disagree with what I said. I don't recall at this moment his having expressed any independent opinion on the feasibility of it or not.

Q. Would you say that Mr. Breech had had more experience than you as to the problems of feasibility of forming an underwriting group, or the length of time it takes to carry out that kind of a project?

A. I would think he had had considerably less experience than I.

Q. In that telephone conversation, would you say you did most of the talking or did Mr. Breech do a substantial [954] amount of the talking?

A. I am not sure those are alternatives. I did most of the talking, and Mr. Breech did a substantial amount of talking.

Q. Did you tell Mr. Breech what Mr. Leslie had discussed with you on May 11th?

A. If I did, I don't recall it at this moment. I don't think so.

Q. Mr. Tillinghast, isn't it true that at that time at least there was a great deal of interest on your part as to what the Tool Company was trying to do? Are you saying that you did not discuss that, or express some views or report to Mr. Breech along these lines?

A. No, I am not saying that, Mr. Davis. I certainly was concerned very much with whether or not this request was genuine, or whether it was a maneuver.

Q. What kind of a maneuver?

A. A delaying maneuver.

Q. For what purpose?

A. For the purpose of upsetting the Boeing financing.

Q. Not for the purpose of raising $100 million?

A. Not for the purpose of raising $100 million.

Q. Not because of any concern because without that money the voting trust might terminate?

[955] A. That's correct.

Q. And that is what you told Mr. Breech?

A. I told Mr. Breech that I was very concerned that this was a delaying tactic, that if we become involved in this, that questions would arise, that the thing would go from delay to delay, and we would find ourselves up against a deadline without our subordinate debenture financing complete.

Q. Did Mr. Breech give you any reasons why he thought this was a matter that should be acted upon by the board?

A. I don't remember any specific reasons, but it was of an obvious importance that one might well take that point of view, and indeed I didn't disagree with it.

Q. At this point, Mr. Tillinghast, I am more interested in what Mr. Breech actually said, than your reasoning. I know you have many justifications for what took place. I am interested in what happened.

A. As best as I can recall it at this time, Mr. Davis, what happened was that Mr. Breech said that he thought this was something of a magnitude that neither he nor I nor the both of us together ought to decide it, and it ought to be decided by the board.

Q. Based upon a recommendation made by you, or to be [956] made by you and him?

A. He didn't go into that, that I can recall.

Q. Did he indicate that he agreed with your reasoning and conclusions?

A. He certainly didn't disagree with them. My recollection, so far as I can recall it, Mr. Davis, is that he was generally in agreement with what I had to say, but didn't want to take the responsibility of deciding it.

Q. Mr. Tillinghast, there was a purpose in your calling Mr. Breech, wasn't there? Wasn't it for the purpose of gossiping?

A. No. The purpose of calling him was for the obvious purpose of acquainting him with this development, because I thought (1) that I should not handle it by myself.

Q. So you wanted his advice? You wanted him to help in making a decision, didn't you?

A. That's correct.

Q. I am trying to find out what Mr. Breech said to you that helped you to make a decision.

A. He didn't say anything to me to help me make a decision, other than that he and I should not make the decision, that it should be taken to the board.

Q. I believe you said that you expressed to Mr. [957] Breech your views that this was part of a maneuver by the Tool Company to interfere with the Boeing program, is that correct?

A. That's correct.

Q. On that date on May 12th, what evidence had you had, what reasons did you have to believe that the Tool Company was interested or desired or wished to interfere with the Boeing purchase program?

A. Well, I really had none directly, Mr. Davis, because up until this particular time there had been no indication one way or the other as to what viewpoint the Tool Company would take on this matter. Based on my conversations with Mr. Leslie, and as I mentioned before, the fact that I didn't consider this a realistic proposal, a durable project, I was suspicious—I became suspicious as to whether or not this was a genuine proposal, or whether it was a diversion. My suspicions undoubtedly were more readily aroused by such knowledge as I had of the delays and attempted delays and diversions that had taken place in connection with the 1960 financing, and the general reputation that Mr. Hughes had, as I understood it, of being one at the last minute to seek a delay, and to prevent things from coming to a conclusion.

[958] This matter of the offering of the subordinate debentures had been something that had been on the fire for many months.

Q. Pursuant to an agreement with the Tool Company?

A. Pursuant to the agreement embodied in the 1960 financing.

Q. With the Tool Company?

A. With the Tool Company and others. Obviously one of the questions in my mind was the question of why had Hughes waited until the 11th hour to suggest something like this, if in fact it was a genuine proposal, and from what Mr. Leslie had said, from the lateness that this question had been raised, from what I had heard about Mr. Hughes' negotiating tactics, I was suspicious that this might not be genuine, and indeed, on the 17th when you appeared, my suspicions were richly fulfilled.

Q. Thank you, Mr. Tillinghast. At that time what was the market price of the TWA common stock?

A. I don't remember exactly. It was higher than it is now, as I recall it.

Q. Substantially so. Was it around 22?

A. No, it was 19 or 20, or somewhere in there.

Q. Had you had discussions with Dillon, Read, as to the probable offering price of these convertible [959] debentures?

A. Yes. There had been discussions.

Q. What were the nature of those discussions, without the detail? I am interested in what they said to you with respect to the probable offering price.

A. Well, I am not sure that I had direct discussions with Dillon, Read at that point. I think most of my discussions were with Mr. Leslie. It was hoped—I have got to refresh my recollection and think about this.

Q. Would you like to take a short recess?

A. Let me finish this answer first. We were talking. I believe at that time half a point higher.

Q. Than what?

A. Than the price finally fixed, if I recall correctly, in the delay that took place, we lost half a point in the conversion price.

Q. You are referring to the period between May 17th and the day it actually became effective. I am talking about May 12th. What was the price you were discussing with Dillon, Read on or about May 12th, or prior to May 17th?

A. I think it was half a point higher than the conversion price ultimately fixed.

[960] Q. And that was what figure?

A. It was 20½ and 21½.

Q. That was the conversion price?

A. Yes.

Q. What was the offering price of the debentures? Actually wasn't it an offering debenture with warrants?

A. Yes. There wasn't an offering price. It was an offering to the shareholders.

Q. Weren't the shareholders given an opportunity to subscribe to subordinated debentures?

A. Yes.

Q. With warrants?

A. With warrants attached.

Q. The warrants gave you the right to convert, or turn in the debenture for stock?

A. That's right.

Q. But the stockholders were going to be given the opportunity of buying a debenture?

A. Right.

Q. Was this financing something that you didn't pay any particular amount of attention to?

A. I wouldn't say I didn't pay any particular attention to. It was one of many, many things I was dealing with at the time, and it was something that had started in motion long before I got there. Mr. Leslie was carrying [961] the responsibility on it. I was generally familiar with it, but I was not deeply involved in it.

Q. Would it be fair to say that you as chief executive officer of TWA wasn't paying too much attention to this whole program?

Mr. Sonnett: I think that is repetitive and argumentative. I object to it on that ground.

The Special Master: I think the witness' answer has shown how much attention he paid to it, unless you have something further.

Q. Can you tell us, Mr. Tillinghast, what this offering consisted of?

A. Yes. It consisted of $100 million of subordinate debentures.

Q. At what price?

A. At par.

Q. The offering price was going to be par, is that correct?

A. Par.

The Special Master: We will have a five-minute recess.

(Short recess taken.)

By Mr. Davis:

Q. Am I correct that Defendants' Exhibit 24, which is [962] a letter from Dillon, Read, dated May 15th, referring to the meeting Friday, was received by you because you requested such a letter?

A. That's correct.

Q. Do you recall when you requested the letter?

A. No, I don't, Mr. Davis. It might either have been on the 12th or on Monday. I can't recall at this point.

Q. Did you have any subsequent meetings with Mr. Forrester, or his counsel after this meeting on the 12th?

A. Yes. If you call it a meeting. I think it was probably the 16th. It was either the 15th or 16th. Mr. Forrester and Mr. Fredley, of Sherman, Sterling, showed up without prior appointment, and as I recall—

[963] Q. Showed up where?

A. At 380 Madison Avenue. As I recall, I was in the process of going from a meeting that was just finishing in my office down to something else in the conference room, and I spoke to them just briefly, standing outside of my office, where my secretary sits, and apologized for being pressed so that I couldn't sit down and talk with them.

They handed me a letter summarizing, as I recall it, what they wanted to accomplish.

Q. There was no discussion with them at all?

A. Very limited, almost none at all, because I was just running from one meeting to another.

Q. Mr. Breech was there?

A. He was not there, no.

Q. Mr. Breech was in town?

A. Mr. Breech was in town.

Q. When did he come to town?

A. I notice here that on the 15th I have a note that says, "Breech in town." Which would be in accordance with his normal custom, so I imagine he came in the late afternoon or evening of the 15th.

Q. At that time did you have a further discussion or conference of what had transpired on the 11th or [964] the 12th?

A. Mr. Davis, I have no specific recollection. The probabilities are that I did, but I can't at this point tell you certainly that I did, and where we had the meeting.

Q. Are you quite certain it was not Mr. Breech who suggested that you ought to get a letter from Mr. Brandi confirming the position to be taken?

A. I can't be absolutely positive. I don't think so, Mr. Davis. If I recall correctly, that was my own idea.

Q. Do you know if Mr. Breech had any discussions or conversations with anyone else—any director, Dillon, Read, or Mr. Sessel of the Irving Trust, or anyone else—relating to this maneuver by the Tool Company?

A. There are none that I can recall, Mr. Davis.

Q. Have you ever heard that he did have such conversation or conversations with anyone?

A. Not that I can recall at the moment.

Q. Was there also a meeting in the evening of the 16th with Mr. Forrester and Mr. Eaton?

A. With me?

Q. That you know of, relating to this matter—with [965] anyone?

A. I am sure there wasn't a meeting with me, Mr. Davis. Conceivably he may have met and talked with the lawyers who were working on this.

Q. Do you mean Mr. Reed or Mr. Rowe?

A. My recollection is they were both involved in it.

Q. Did Mr. Reed undertake to keep you informed as to what was going on in connection with his activities with Merrill Lynch and Sherman, Sterling?

A. I knew he was actively working on it.

Q. I understand that, but my question is, did he report to you or keep you informed of what was developing?

A. I think he did generally, yes.

Q. What did he tell you?

A. Well, I recall, and I can place this exactly, but I recall there was a question of directors' indemnification, and there were two or three open questions on this proposed Hughes Tool agreement.

Q. Will you explain what you mean by "questions about directors' indemnification"?

A. I think one of the questions, if I recall correctly, that was involved in the discussions with [966] Hughes Tool was the extent to which Hughes Tool would indemnify the directors of TWA for any liability by reason of this offering by Hughes Tool Company.

Q. And you discussed that with Mr. Reed?

A. I believe I did, yes.

Q. What was the result of that discussion?

A. My position was that we ought to get every indemnity position. Let us say it was generally in accordance with the customs of the trade.

Q. Mr. Reed is counsel for the two voting trustees—the two outside voting trustees?

A. That's right.

Q. And Mr. Breech came to town on Monday the 15th?

A. That's correct.

Q. Do you know to what extent Mr. Reed discussed with Mr. Breech this matter?

A. I don't have a specific recollection, Mr. Davis, but I am quite sure that Mr. Reed must have discussed it at some length with Mr. Breech.

Q. But not in your presence?

A. I just can't be sure. It is entirely possible, although I have no independent recollection of it now, that on the evening of the 15th, the three of us may [967] have had dinner together.

Q. And discussed this matter?

A. That is quite possible, yes, but I have no independent recollection of it.

Q. Whether it was exactly that evening or another time, do you remember the discussion when sitting with Mr. Breech and Mr. Reed, maybe fairly casually, speculating as to what the Tool Company was up to?

A. I have no independent recollection, Mr. Davis. It is entirely likely that we did, but I would be misleading you if I said I could specifically recall such a discussion.

Q. And is it your testimony that on the 16th it was the only other meeting that you had of any significance with Mr. Forrester or Sherman, Sterling?

A. I am quite sure that was the only meeting I had with them, Mr. Davis.

Q. And that was when you were going from your office to the conference room?

A. That's right.

Q. You just met them in the hall?

A. That's right.

Q. And then handed you a piece of paper?

A. That's correct.

[968] Q. And you were on your way to a conference?

A. That's correct.

Q. Can you tell us what that piece of paper was that they handed you?

A. As I recall it, it was an outline—if I saw it, I am sure I would recognize it—an outline of their proposal for this offering, and I believe it had attached to it a copy of a draft of the Hughes Tool Company agreement, and perhaps it also had a Hughes Tool Company resolution.

Q. A corporate resolution?

A. A corporate resolution.

Q. I sat up all night and the night before to get it.

A. So be it.

Q. What conference was it you were going to with this piece of paper in your hand?

A. At this point I can't remember.

Q. It had nothing to do with this at all?

A. No. Mr. Davis, I am sure you appreciate this was shortly after I had come to TWA. I had a million things

that I was trying to digest, and some things stick in my mind, and many things do not.

Q. This was late in the afternoon, or fairly late?

[969] A. I guess 3:30 or 4:00, or somewhere in there.

Q. Then what did you do with this piece of paper and attachments?

A. I took them with me and presented that to the board meeting.

Q. The next day?

A. I am not sure whether it was the board meeting the next day or two days later.

Q. We have been referring to a board meeting on the 17th?

A. That's right. I am not absolutely sure whether this was the 15th or the 16th that they were there.

Q. You kept this piece of paper in your pocket for the one day or two days until the board meeting?

A. Yes. One of the letters that you wrote refers to this by correct date but incorrectly says that Mr. Breech was there, because it wasn't a meeting with him. It was just a quick handshake in my outer office.

Q. I understand that part of it, Mr. Tillinghast. What I am trying to establish is, this document with attachments that Mr. Forrester of Merrill Lynch, and Mr. Eaton of Sherman, Sterling handed you on the 15th or 16th; did you put it in your pocket and keep it until the board meeting on the 17th?

[970] A. I kept it until the board meeting. Whether I put it in my pocket or put it with some other papers that I had with me, I just couldn't recall.

Q. And you presented that to the board on the 17th?

A. Yes.

Q. You didn't discuss it with anyone in between?

A. I wouldn't say that I didn't discuss it with Mr. Reed. It is quite possible that I did, because this was the material he was working on.

Q. Wasn't this an important piece of paper that you had to consider in connection with your recommendation to the board on the 17th?

A. As I recall it, except with respect to the matter of the nature of the commitments that the Tool Company was making, there was nothing particularly new about it.

Q. You mean so far as you were concerned, a decision had been made?

A. No. So far as I was concerned, I had reached a conclusion.

Q. Which you had reached on the 12th?

A. Which I had reached on the 12th. This did not really add or subtract anything significant to the picture as I saw it.

[971] Q. You read it pretty carefully, didn't you?

A. I am sure I read it carefully.

Q. But you didn't consult anyone about it?

A. I didn't say that. I am quite certain, although I can't tell you when and where, that I discussed it with Mr. Reed.

Q. Let me show you Defendants' Exhibit 3—would you like to consult with your counsel?

Mr. Sonnett: I have a message I want to give him while you are marking something.

Mr. Davis: I never have any objection, where you think, if it would help you to give me a complete answer, to consult with your counsel.

Mr. Sonnett: I waited until you finished your question and answer, and you were about to mark an exhibit. It has nothing to do with your question.

Mr. Davis: I have no objection.

Mr. Sonnett: I didn't want it to appear on the record that you had some profound or puzzling question.

Mr. Davis: There is nothing personal in it. In a deposition I always like to get all the facts, and any time a person wants to consult, [972] whether it be their lawyer or someone else, I have no objection. I want Mr. Tillinghast to understand that.

Mr. Sonnett: That is very generous of you, and I will follow the same practice when you examine Mr. Hughes. If you want to mark the document—

Mr. Davis: I have no document to mark.

Mr. Sonnett: Go ahead.

By Mr. Davis:

Q. Referring to Defendants' Exhibit 3, Mr. Tillinghast, which is a diary, which I believe was kept by your secretary, and which I hand you, I refer you to the entry on Tuesday, May 16th, indicating that at 5:00 o'clock, the stock option committee met in Suite 36H of the Waldorf, the Irving Trust suite, and indicating that those who attended or might have attended were Hood, Leithead, Sessel, yourself, and Mr. Breech, with a question mark.

Does that help refresh your recollection as to what was going on on the late afternoon of May 16th?

A. Yes. Mr. Davis, I would have to say—I don't have a very distinct independent recollection, but I am quite sure that what this was was a meeting of the [973] stock option committee, and I believe that the record would show that at the directors' meeting of the 17th, a whole series of stock options were confirmed by the board. I am quite sure this was a meeting that we had the night before, or the afternoon before, consisting of those people, and I believe Mr. Breech was also in attendance, although he was not a member of the stock option committee—at which we went over the whole stock option program.

I had made recommendations—I hesitate here, because I can't be certain at this point whether this was a meeting at which we had a preliminary discussion of general amounts and approaches to the stock option problem, or whether this was the meeting—whether this was the time they were actually granted. They were granted either in May or June. I am inclined to think that it was in May, but I do have a recollection of a preliminary discussion where we discussed the broad principles to be followed but didn't actually award stock options.

Q. That meeting was held, wasn't it, on May 16th?

A. I am quite sure there was a meeting.

Q. You attended it?

A. I attended it.

[974] Q. And Mr. Breech was there?

A. I think in all probability he was, yes. Yes, I am quite sure he would be, because he was in town, and if there had been such a meeting, he would have been there, I am quite sure.

Q. It also indicates that a number of the directors were in town then on the 16th, doesn't it?

A. Those who were there.

Q. Do you know if others also came into town on the 16th?

A. I am sure that having a meeting on the 17th, that several had been in town the night before.

Q. Do you know to what extent Mr. Breech on the 16th discussed with individual directors, particularly the outside directors, the action to be taken on the 17th, or any matter that would come up on the 17th?

A. No, I don't, Mr. Davis. My recollection is that Mr. Breech was in the office that afternoon, but that I was involved in some meetings, and didn't see him or talk with him during the main body of the afternoon.

Q. Referring you to Exhibit 22 again, you will note that purports to be notes of a telephone conversation between Mr. Kerr and Mr. Gordon. You will note the time there is 8.06 a.m.

[975] A. Yes.

Q. At that time of the year, what was the time differential between the West Coast, California, where Mr. Gordon is, and New York—do you know?

A. It is three hours, isn't it?

Q. If it is on Daylight Time, it might be four.

A. Isn't it always three hours?

Q. That would indicate that the call from New York, that would have been about 11:00 o'clock that day?

A. Yes.

Q. Does that refresh your recollection in any way that by 11:00 o'clock of that day the management and the directors of TWA made a decision?

A. No, it does not, Mr. Davis, and I am quite sure that that wasn't the case. Mr. Breech has a 1 William Street meeting on that day, and I am quite sure that he was at 1 William Street—at the 1 William Street meeting all morning.

Q. Do you know whether or not he stopped in to see Mr. Sessel that day?

A. I just would have no knowledge of that. I would doubt it, but I just don't really know.

Q. You think Mr. Kerr was wrong, if these notes are correct?

[976] A. I think Mr. Kerr obviously was anticipating something that hadn't happened.

Q. You have no idea as to how Mr. Kerr could have anticipated this action?

A. No, I would just be speculating.

Q. And then, on the 17th, at the board, you made your recommendation; is that correct?

A. That's correct.

Q. Did Mr. Breech make a recommendation also?

A. Well, he certainly joined in mine.

Q. Do you remember how he did it?

A. My best recollection is, Mr. Davis, that this came up after you had appeared at the meeting and made a rather lengthy statement, and that the matter was then taken up.

My recollection is that I repeated my views on the subject, expressed the viewpoint that if we started getting into postponements, that I thought that there might well be no end of the road, and I thought that the Boeing program was so important to TWA's future, that we ought to proceed with the Boeing program and avoid doing anything that might have the effect of unhinging it.

Q. That is what you said?

[977] A. That is what I said.

Q. What did Mr. Breech say—the same thing? Did he say, "I agree with everything Mr. Tillinghast said"?

A. The only thing I can recall Mr. Breech saying was, "After all, Mr. Hughes has had months to do this. If he really wanted to do it, I don't feel we should feel under any compulsion at this late date to upset a program that the management of TWA is anxious to effect in order to accommodate a last-minute change of heart, if that is what in fact it is."

Q. And the program which the management of TWA was anxious to effect was which program?

A. The Boeing program.

Q. Did you or Mr. Breech explain to those directors the connection between this offering of subordinate debentures and this Boeing program?

A. I explained, and the letter from Mr. Brandi was read, that I didn't feel any assurance that if we failed to meet the deadline on the subordinate debentures, that we wouldn't get into technical arguments and postponements that might have the effect of causing our financing to fall apart, and in view of the importance and magnitude of the program, I thought the thing that ought to take precedence over everything [978] else was to make certain that we did nothing that might involve any reasonable possibility of upsetting the program.

Q. Were any of the directors there present who asked any questions?

A. There was a lengthy discussion.

Q. How long a discussion?

A. My best recollection is, Mr. Davis, that this went on for three-quarters of an hour or so. I would hesitate to say exactly, but that is my present recollection.

Q. Let us see if we can establish some facts here, Mr. Tillinghast.

When did the board meet—what time in the morning?

A. At 9:30.

Q. This discussion and consideration was after the presentation which I made; is that correct?

A. That's correct.

Q. Was there some business taken up before I was invited to appear at the board meeting?

A. I believe there were just some routine things, like approval of minutes taken up.

Q. When would you say I was invited to appear [979] before the meeting—around 10:00 o'clock?

A. My guess would be around 10:00 o'clock, yes, sir.

Q. Do you think the presentation I made was a fairly lengthy one?

A. I think it took about an hour.

Q. An hour? As much as that?

A. That would be my recollection. Maybe that is too much.

Q. That would bring us up to 11:00 o'clock?

A. Let us say a quarter to eleven or eleven, yes.

Q. And then there was some discussion among the directors to decide what to do; is that right?

A. Yes.

Q. Do you know at what time the signal was given for Mr. Rowe to file the amendment before the SEC?

A. I know Mr. Rowe was laboring under a pressure of time.

Q. Isn't it a fact that at 11:00 o'clock he went to make a telephone call to his colleague at Washington, to file the price amendment? Mr. Rowe is right here, you know.

A. Yes, I know he is here.

It is possible, although that wouldn't make [980] things happen faster than I thought they did.

Q. Would you like to confer with Mr. Rowe, that he made that telephone call just before 11:00 o'clock?

Mr. Sonnett: I object to that. I think we ought to go ahead with this witness.

The Special Master: I think you can get all the knowledge the witness has, and if he doesn't recall anything of that kind, he can say so, and that will be in the record.

By Mr. Davis:

Q. Isn't it a fact, Mr. Tillinghast, at that board meeting you were told by your counsel that the price amendment had to be voted by the board, and the time was noted on the minutes when the price amendment—

A. I recall there was a question of time, and that Mr. Rowe had to make a telephone call. That he in fact did make a telephone call. Whether it was 11:00 o'clock or 11:30 I wouldn't be sure. The minutes of the meeting, I am sure, would show it. My recollection is that the meeting commenced, and just about the first thing of any substance we did was to have you come in. You talked at some length. I think I recall that your discussions were perhaps drawn [980A] to a conclusion so that we could meet this deadline, whatever it was.

[981] (Discussion off the record.)

A. The answer is I was wrong in my recollection.

What happened was that before you entered the meeting, Mr. Davis, that there was a general outline and discussion of the matter, and that some of the things which I said I thought had taken place after you left, in fact had taken place before you came into the meeting.

By Mr. Davis:

Q. Let us start at the beginning. You don't have the first page. Let me say that the meeting did meet at 9:30.

A. I believe that was the time the meeting began.

Q. And normally the first action of the board is to approve the minutes of the prior meeting?

A. That is correct.

Q. And then the next subject was a discussion of the proposed offering of subordinated debentures?

A. That is correct.

Q. At that time Mr. Rowe, counsel for the corporation, made some presentation as to the registration statement, and what was needed in connection with it?

A. Yes, although I don't recall there was much with respect to the registration statement itself. I think [982]

it was mainly with respect to the question raised by Mr. Forrester's request.

Q. And then in fact, Mr. Holliday was present, and advised the meeting that the Hughes Tool Company had retained Simpson, Thacher & Bartlett?

A. That is correct.

Q. And asked if Mr. Davis of that firm would be invited to the meeting for the purpose of discussing the financing plan?

A. Before that there had been some discussion of the request of Merrill Lynch, and I had made the recommendation, which I testified to before, that it not be acceded to. Mr. Breech had made his comment, which I alluded to, that he thought there had been a lot of time to do this, and there was no point—

Q. I want to follow what happened at that meeting. It is very important to me. With the minutes there to help you to refresh your recollection, is it a fact that after Mr. Rowe suggested, or made some remarks with respect to the registration statement, Mr. Holliday made some remarks with respect to the retention of Simpson, Thacher & Bartlett and asking Mr. Davis be invited?

A. That's right.

Q. The next thing that happened—I am asking you for [983] your own independent recollection now—because you have got the minutes there to refresh you, but if you think something happened that the minutes don't fairly reflect, I want you to say so.

A. All right.

Q. The next thing that happened was that the chairman —that is Mr. Breech, is that correct?

A. Yes.

Q. He said that before acting on the request of inviting Mr. Davis to the meeting, the meeting should be informed of any recent developments relating to the subject?

A. Right.

Q. That is what happened, isn't it?

A. That is correct.

Q. And then Mr. Rowe advised the meeting—Mr. Rowe sitting here, of the Chadbourne firm?

A. That is correct.

Q. And he is the one who then described to the meeting that a request had been made on May 11th to postpone the offering of the debentures for one week?

A. That is correct.

Q. Will you read that paragraph of the minutes, and let me ask you whether or not that fairly summarizes the [984] description made by Mr. Rowe?

A. It is a condensation of it.

Q. It took a little bit longer than that?

A. In substance it is correct, as I recall it.

Q. Mr. Rowe said, he stated "A number of meetings had been held with representatives of Merrill Lynch Fenner & Smith, who were proposing to attempt to arrange such an underwriting."

What number of meetings was he referring to?

A. I think he was referring to the meeting we had with Mr. Forrester, about which I have testified, and several meetings that had been held between Friday and the following Wednesday, between the lawyers, to accomplish as much as they could while this thing was awaiting decision.

Q. Let me see if I understand you, Mr. Tillinghast. There was a meeting on May 12th?

A. That is correct.

Q. At which you concluded that the whole thing was wholly unrealistic and unfeasible, is that correct?

Mr. Sonnett: If counsel will not characterize the testimony. We have covered the May 12th meeting three or four times, I think.

By Mr. Davis:

[985] Q. I want to understand what the testimony is. You then asked Mr. Brandi for a letter, either on the 12th, but anyway you got one dated the 15th?

A. That is correct.

Q. And after that, the only meeting you were aware of was the one, this passing meeting, when you were going from your office to some conference?

A. That is not correct, Mr. Davis. The only meeting that I am aware of in which I participated was that. I know there were a series of meetings going on between the the lawyers.

Q. You mean Mr. Rowe and Mr. Reed?

A. Mr. Rowe and Mr. Reed, and people representing the underwriters, and representing Hughes Tool Company.

Q. Was it your understanding those were serious meetings to work out and develop a practical plan?

Mr. Sonnett: I object to the form of that question. It is argumentative. The witness has testified in detail as to his understanding of what the lawyers were doing and why they were doing it. This is just argument.

The Special Master: I think it is a reasonable inquiry. He may answer the question.

A. The purpose of that meeting, Mr. Davis, or those [986] meetings, and the activity of the lawyers, was to make certain that if the board should have a different feeling than I had, that no time would have been lost by reason of the passage of days between Friday and Wednesday.

By Mr. Davis:

Q. And then, referring you back to the minutes of tha meeting, you, Mr. Tillinghast, reported further on meet ings and other discussions with representatives of Merril Lynch Pierce Fenner & Beane, and Hughes Tool Company on this subject. Do you see that?

A. Yes, I do.

Q. What reports and meetings of other discussions d these minutes refer to?

A. The only thing that I reported on—the only meeting that I had—and let me say I don't recall any discussio with any representative of Hughes Tool Company relativ to this.

Q. You think the minutes are in error in that respect

A. So far as I can recall now, they are, Mr. Davis.

Q. Do you know who prepared these minutes?

A. Mr. Duckworth.

Q. Do you know whether or not he prepared them wit [987] the aid and assistance of Mr. Rowe?

A. I think Mr. Rowe reviews them, yes. I review the also.

Q. And Mr. Duckworth was present at the meeting?

A. Mr. Duckworth was at the meeting.

Q. And Mr. Rowe was at the meeting?

A. Mr. Rowe was at the meeting.

Q. Mr. Reed was not at the meeting?

A. Yes, he was there part of the meeting.

Q. And Mr. Duckworth had not been aware of what ha been transpiring with respect to these discussions wit Merrill Lynch prior to what he heard at the meeting, isn that right?

A. That is generally correct, yes.

Q. Is it your testimony now that in your opinion Mr. Duckworth just misunderstood the nature and scope of your report when he made these notes?

A. I would have to say so, because I don't have any recollection of any meetings with Hughes Tool Company. It is barely possible that Mr. Holliday and I talked briefly about this, but I have no recollection of it at the moment, Mr. Davis.

Mr. Holliday, perhaps would remember whether we did. My present recollection is that I talked only [988] with Merrill Lynch on the two occasions that I mentioned.

Q. Is it customary for Mr. Duckworth to make notes at the meetings themselves, from which he subsequently prepares the minutes?

A. I presume so, yes. I am quite sure he does.

Q. I am interested in the procedure that is followed in the preparation of these minutes, Mr. Tillinghast. Then are these first put in draft form?

A. Yes, he ordinarily circulates a draft.

Q. And that draft is circulated among whom?

A. Well, I see it and Mr. Rowe sees it, and insofar as I know, that is every one who sees it.

Q. And it is not unusual for some corrections to be made by either you or Mr. Rowe?

A. I think that is quite common.

Q. And then you return the drafts with your comments to Mr. Duckworth?

A. I do.

Q. And then he puts the minutes in final form?

A. That is correct.

Q. And then they are mailed out to the individual directors?

A. That is correct.

Q. Prior to the next meeting?

[989] A. Usually prior. Sometimes he doesn't get the job done until just at the time of the meeting, but he is supposed to have them out in advance of the meeting.

Q. And at the following meeting the minutes are read and the directors are asked if they want to approve the minutes as read?

A. No, the minutes are not normally read. Normally they have been distributed to the directors, and they are not read at the meeting.

Q. Does it ever happen that the directors point out some errors in the minutes of a prior meeting, and suggests that they be corrected?

A. I think there have been some suggested corrections, yes.

Q. Do you have any recollection that any different procedure was followed in connection with the minutes of the meeting of May 17, 1961?

A. I do not.

Q. Will you now tell us to the best of your recollection the nature of the reports that you made to the directors at this meeting of May 17th?

A. Except for being refreshed that I reported on this before you came into the meeting, rather than after you came into the meeting, I would think my testimony already [990] given, was correct.

Q. You understood, did you, that at that time the board was meeting with a possibility they might have a different point of view than the one you shared, is that right?

A. That is correct.

Q. Are you now testifying that you made a full presentation of all aspects of the problem?

A. I made a presentation which, with what Mr. Rowe had already said, I thought adequately outlined the problem.

Q. Are you now testifying that what you did in effect was substantially endorsed by what Mr. Rowe, the counsel, had said to the board.

A. He had explained certain portions of this, and I elaborated on what he said.

Q. I would like to know now what it was that you explained, Mr. Tillinghast, because while I believe the record does disclose what your views and opinions were on May 12th, subsequent to that time you had an opportunity to look at this piece of paper that was handed to you on the 16th, and you had the benefit of meeting with, perhaps informally, some other directors, and now I would like you to testify as accurately as you can the [991] report that you made to those directors, and the explanation that you gave as to what was being proposed, and the views and recommendations of the management, and the reasons for those views and recommendations, to the best of your recollection.

Mr. Sonnett: Mr. Rankin, I am under the impression that the witness testified previously and set forth what he could recall as to what he said to the board of directors, and that the witness has just said that except for when he said it, his prior testimony sets forth fully his recollection.

I think this, therefore, is repetitive and wasting time.

The Special Master: I am not clear from the record just what the witness finds in conflict with his testimony in the minutes.

Mr. Sonnett: Only that what he said to the board, he said before Mr. Davis was invited in, rather than his earlier testimony that he thought it was after Mr. Davis made his presentation.

The Special Master: What is this about the Tool Company meetings that he questions whether the minutes accurately reflects?

A. I have no recollection at this time of any meet- [992] ing with the Tool Company, or any Tool Company representative pertaining to this.

The Special Master: Do the minutes purport to say that you so reported?

The Witness: They do.

The Special Master: That you did have such meetings?

The Witness: Yes, it says I reported further on meetings and other discussions with representatives of Merrill Lynch Fenner & Smith and Hughes Tool Company on this subject. Literally, this doesn't say that they were meetings that I had with Hughes Tool Company, although one conceivably could infer that.

My testimony is that I cannot recall having had any meetings with representatives of Hughes Tool Company, if that is what the minutes purport to state.

The Special Master: I think at this point the parties are entitled to determine exactly what the witness said to the board of directors in regard to this matter so that we can have it in one place.

The Witness: I would merely have to repeat what I said before, which is that I discussed my discussions with Mr. Forrester, explained—

The Special Master: Can you describe in sub-
[993] stance what you said, and anything that anybody else said, so that we can get something more than just discussions?

The Witness: Mr. Rankin, I am afraid that I would be somewhat misleading if I purported to be quoting what one person said and what another person said, because it is not that clear in my mind.

The only thing I can say is that as I recall it, I mentioned that I had met with Mr. Forrester and Mr. Rowe and Mr. Reed and Mr. Joy, and Mr. Hagarty, and Mr. Leslie, and that they had outlined their proposal. That I said to them that I was extremely doubtful that such a program was possible of accomplishment. That I did not think it was realistic, and from what limited experience I had had in the securities field told me that it would be quite impossible to bring two new parties into a financing, and with a week's delay resolve all the problems that might arise in getting out a registration statement, and getting all the problems solved so that everyone was in agreement.

I said that I thought that the Boeing program and its accomplishment was of great importance to TWA, and that I was concerned as to whether this [994] embarking on such a program as was suggested would lead to anything other than delays, and that I was afraid we might get into a situation where we missed our date of May 31st, which was the deadline for the offering of the subordinated debentures, and also the deadline for meeting the financing requirements of the Boeing program, and I thought it would be a great mistake to run any risk in trying to do

what seemed to me very unlikely of accomplishment—any risk of interfering with our settling of the financing of the Boeing deal.

I said that I had told Mr. Forrester very frankly that that was my point of view. That none of the people present had been willing to give me or express any opinion. That one could with assurance accomplish this within the postponement requested, and in my mind, it would be an unwise thing for TWA to do.

Q. And that, you feel, was the complete statement of what you reported to the board?

A. As far as I can recall it today.

Q. Following the minutes which read "He also read to the directors a letter from Dillon, Read & Co. concerning the effect of a delay in the offering of the [995] debentures." That is Defendants' Exhibit 24?

A. That is right.

Q. You read that in its entirety—this letter?

A. I believe that was read in its entirety. I should have added to my testimony that I said that I had felt that I should consult with Dillon, Read as to the possible effect on our financing, and obtain their opinion as to whether or not the fears I had were substantial, or were groundless, and at my request they prepared a letter summarizing their views.

Q. At that point do you recall any of the directors asking questions or for explanations, either based upon the Dillon, Read letter, or the statement that you had made? Did everybody remain quiet?

A. No. I am sure there was a discussion. I believe I recall Mr. Slack entering into the discussion.

Q. Do you recall what he said?

A. I don't have any recollection of anyone having quarreled with the position or seriously questioned the position I took on the matter of delay.

Q. Would you say that the directors there predicated acquiescence in what you said?

A. Yes. The attitude was one of general agreement.

Q. And then, referring to the minutes, Mr. Tillinghast then read also to the meeting [996] a letter dated May 16, 1961, from Merrill Lynch Pierce Fenner & Smith outlining the proposal for their underwriting, the interest of Hughes Tool Company in the proposed offering of subordinate debentures.

Did you do that?

A. Yes.

Q. That was the letter you had received the previous day, which had these attachments?

A. That is correct.

Q. Did you read the entire letter to the board?

A. I read the letter. I don't believe I read all the attachments.

Q. Then Mr. Breech made some comments—turn to page 3. The next paragraph refers to the recommendation you made, which I assume you have described, isn't that right?

A. Yes.

Q. Then Mr. Breech commented on the lateness of the proposal by Hughes Tool Company, and suggested the alternative or secondary offering of the debentures by the Hughes Tool Company, and offered the cooperation of the corporation in such an offering. Do you remember that?

[997] A. Yes.

Q. Did Mr. Breech comment at some length on his views?

A. I don't think I can add anything to what I have already testified.

Q. I am trying to understand to what extent Mr. Breech made any comments?

A. I already testified to that.

Q. Were they lengthy comments?

A. No, I don't think they were lengthy.

Q. They were brief?

A. They were relatively brief.

Q. Did he in effect say "I agree with Mr. Tillinghast, and I don't think we ought to grant this request of the Tool Company"?

A. I don't recall his having said specifically "I agree with Mr. Tillinghast."

My recollection is rather he sort of picked up where I left off, and said "After all, Mr. Hughes has had months to decide to do this if he wanted to. This thing has been pending for quite a period of time, and I think that he can, if he is sincerely interested in a distribution of his interest, that he can do it by means of a secondary offering, and it is not necessary to post- [998] pone TWA's offering for that purpose."

Q. You referred to Mr. Slack who had formerly been counsel for the Hughes Tool Company?

A. Yes.

Q. Do you recall if he made any remarks based upon his prior experience with the Tool Company or Mr. Hughes?

A. My recollection is that he said this was a fairly typical Hughes maneuver.

Q. What maneuver was he talking about? Did he indicate to the board the maneuver involved?

A. I don't recall he elaborated it.

Q. But everybody understood it?

A. Everybody understood what he meant.

Q. And then you will note at 10 o'clock Mr. Davis was invited to attend the meeting?

A. Yes.

Q. All you described took place between 9:39 and 10 o'clock?

A. That is right.

The Special Master: We will adjourn until 2 o'clock.

(Whereupon, at 12:45 p.m., the hearing adjourned until 2:00 p.m.)

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[999] AFTERNOON SESSION

2:00 P.M.

The Special Master: Are you ready to proceed?

Charles C. Tillinghast, Jr., resumed the stand and testified further as follows:

Examination (cont'd) by Mr. Davis:

Q. Is it your testimony that the decision of the board was made during this period from 9:30 to 10 o'clock?

A. No, it is not. The decision of the board was made after you left.

Mr. Davis: I don't know exactly how or why it happened, that we have not received copies of the complete minutes of the board of directors from January 1, 1961 to the date of the request. It may

be through a misunderstanding or confusion that took place.

I understand that we were furnished with excerpts of certain minutes, and it may have been that there was a confusion as to whether we were requesting excerpts from the minutes or the minutes themselves of the meetings which were clipped when we went over the documents.

In any event, may I now request TWA furnish [1000] us as soon as possible with a photostatic copy of the minutes of the meetings of the board of directors or meetings of the committees of the board of directors for 1961, including any reports or documents which were annexed as part of the minutes, or which were presented to the meeting of the board involved.

The Witness: Mr. Holliday gets all of the minutes of the board.

Mr. Davis: It may be, but if he has received them as a director, they are not presently available to the Tool Company. What Mr. Holliday has done with the minutes he received, I do not know. It may very well be, that as you know, Mr. Holliday spends a great deal of time traveling, and I am not sure that all were received by him.

It would facilitate and expedite our efforts to discover the facts if it would not be too much of an inconvenience to TWA to make that material available to us. I can also make an appropriate motion.

The Witness: Let me say for TWA that this has been made available to you. If by any chance any of it hasn't been made available to you, it will [1001] readily be made available to you.

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[1069] Q. I understand your prior testimony to be that the actual decision by the board to reject the request of the Tool Company was not made until after I appeared before the board at 10 o'clock, is that correct?

A. That is correct, yes.

Q. Do you have the minutes of that meeting before you?

A. I have an excerpt from the minutes of that meeting before me.

Q. You mean the first page is missing?

A. I don't know just how much is missing.

Q. The pages are numbered. Do you see the page number at the top of the page? Yours starts with page 2?

A. Yes.

Q. Let me show you my copy. Do you see that the first page is missing? Do you satisfy yourself as to that, Mr. Tillinghast?

A. Yes.

Q. You have page 2?

A. It starts with page 2.

Q. And you have page 3?

A. Page 3.

Q. You have got page 4?

A. Page 4.

[1070] Q. And 5?

A. And 5.

Q. And 6?

A. And 6.

Q. And 7?

A. No.

Q. It stops at page 6?

A. Yes.

Q. You see that Mr. Davis left the meeting at 10:45?

A. Yes.

Q. That appears at page 4?

A. Yes.

Q. Do you have any doubts that the minutes correctly reflect when Mr. Davis left the meeting?

A. No, that would accord roughly with my recollection as to how long you were there.

Q. At this point Mr. Reed, counsel for the voting trustees, entered the meeting, isn't that correct?

A. Yes.

Q. That is what the minutes reflect?

A. That is correct.

Q. That is in accordance with your recollection?

A. That is in accordance with my recollection.

[1071] Q. He was apprised of the discussions held on the subject of the financing with particular reference to Mr. Davis' comments?

A. That is correct.

Q. He was brought up to date for the comments that were held from 10 to 10:45?

A. Yes.

Q. The minutes read, "At this point Mr. Francis C. Reed, counsel for the voting trustees, entered the meeting, and was apprised of the discussions held on the subject of the financing with particular reference to Mr. Davis' comments."

A. Correct.

Q. That is in accordance with your recollection?

A. That is correct.

Q. Then the minutes read "After further discussion, it was moved, seconded, and carried that the corporation should decline the request set forth in the letter of May 16, 1961 from Merrill Lynch Pierce Fenner & Smith, for a postponement."

Do you see that paragraph?

A. Yes.

Q. After 10:45, Mr. Reed came into the meeting, is that correct?

[1072] A. That is correct.

Q. And someone—do you recall who—purported to bring him up to date as to what had transpired from 9:30 to 10:45?

A. Yes. At this point I don't have any distinct recollection as to who summarized what had transpired before then.

Q. Then following bringing Mr. Reed up to date, a motion was made denying the request of Merrill Lynch, isn't that right?

A. That is correct.

Q. It was acted upon?

A. It was acted upon.

Q. Look at the minutes at the bottom of page 4—Mr. Holliday advised the meeting that on the advice of counsel he would not accept the responsibilities as a director for the statements in the prospectus, and withdrew the power of attorney previously given by him authorizing others to sign amendments to the registration statements as his agent. That took place, did it?

A. Yes.

Q. After that at the top of page 5, "After full discussion, upon motion duly made and seconded, the following resolutions were adopted, Mr. Holliday opposed."

[1073] A. Yes.

Q. There appears four resolutions relating to fixing the price as to which the debentures were to be offered?

A. Yes.

Q. That was after a full discussion as to the price?

A. I don't believe there was very much discussion as to price.

Q. The statement appearing in the minutes, "After full discussion," does not accurately describe what took place?

A. I didn't say that. I said I don't recall that there was any extensive discussion as to price.

Q. There was some discussion?

A. Certainly the price was stated. My recollection is it was discussed.

Q. At the meeting?

A. At the meeting.

Q. By the directors?

A. The price was explained to the directors. I do not recall that the price was the subject of extensive discussion

Q. Do you recall who made the presentation with re

[1074] spect to the price?

A. I believe Mr. Rowe did.

Q. How long do you think he spoke on that subject?

A. I would guess that the whole matter of price occupied a minute or two.

Q. Were the actual resolutions read in toto?

A. The resolutions were before the meeting. I do not recall they were read in toto. I think each director had copy of the resolutions.

Q. Are you quite sure of that?

A. No, I would not say I am quite sure of it. I think that was the case. I would be surprised if it wasn't.

Q. On page 6, "Mr. Holliday requested that the time of the adoption of the foregoing resolutions be recorded as 11:02 a.m."

A. Correct.

Q. Is that a correct statement of the minutes?

A. I think it is certainly substantially correct.

Q. Whoever made it recorded it as 11:02 a.m."?

A. I am sure if Mr. Holliday had been badly off when he made this request, that somebody would have argued with him, so I presume 11:02 is substantially correct.

Q. Isn't that what Mr. Duckworth did, to record the [1075] time as 11:02?

A. It says Mr. Holliday requested that the time of the adoption of the foregoing resolutions be recorded as 11:02 a.m.

Q. Then the next sentence, "Mr. Rowe temporarily left the meeting at 11:02 a.m. to direct that amendment No. 4 to the registration statement be filed immediately with the Securities and Exchange Commission"?

A. That is correct.

Q. You have no doubt these minutes correctly reflect what happened?

A. I have no doubt.

Q. Between 10:45, when Mr. Davis left the meeting, and 11:02, first Mr. Reed was brought up to date as to what had happened?

A. Right.

Q. Then there was a discussion with respect to the request of Merrill Lynch for an extension of time?

A. Right.

Q. Then Mr. Holliday made some statement with respect to withdrawing his power of attorney?

A. Right.

Q. And then there was a full discussion or some discussion of the price amendment?

[1076] A. Right.

Q. And all that took place between 10:45 and 11.02?

A. I believe that is correct.

Q. Now will you please tell me what the discussion was that took place, and what was said to the directors there

present relating to the action to be taken on the request of Merrill Lynch for an extension of time?

A. My recollection is that after you had left, and after the situation had been summarized by Mr. Reed, someone made a motion, I think myself, that the request of Merrill Lynch Pierce Fenner & Smith be respectfully denied, and that we express our readiness to cooperate in every way in a secondary offer.

Q. Therefore at that time there was no further discussion of the merits or lack of merits of the request?

A. As I recall it, there was some more discussion and some more comment on the thing, all of which, as I recall it, were to the point that it didn't seem to be of any interest to TWA to grant this request.

Q. Do you recall who made what comments? Did you make some further comments?

A. I don't at this point remember any specific comments, but I am quite sure there were some, Mr. Davis.

Q. Isn't it a fair statement, Mr. Tillinghast, that [1077] the deliberations, or to the extent to which there were deliberations, as to this decision to be made by the board at that meeting, took place between 9:30 and 10 o'clock, and that after my presentation it was really a matter of a formality of someone making a motion and denying the request?

A. The burden of the discussion certainly took place before. I think, Mr. Davis, that it would be only fair to say that your appearance there, and the things that you said, did a great deal, I think, to solidify the opinion of the directors that this request ought not be granted.

Q. Can you identify the things that were said during the 45 minutes that I was at the meeting, which you have characterized as solidifying the conclusion or the feelings of the board?

A. Yes, Mr. Davis. I don't know to what extent you want me to go through the whole discussion, as I recall it.

Q. Just answer the question, if you can.

Mr. Davis: Will you read the question back to the witness?

(The question was read.)

A. Yes, Mr. Davis. You stated in effect several [1078] times that unless TWA was prepared to acquiesce in the request of Merrill Lynch in this event as a business matter, your client was prepared to waive the objections of Hughes Tool to our registration statement. That you proposed to oppose the effectiveness of the registration on the ground that the registration statement was incomplete and improper, and you went through quite a list of specific matters with which you took issue.

Q. Isn't it a fact, Mr. Tillinghast, that a portion of that 45 minutes was devoted to my explaining that the Tool Company was confronted with the necessity of either stating its position with respect to the 990 program, and other related matters, and that if a registration statement went to the public, particularly if it was to be used in connection with a secondary offering, in fact, the Hughes Tool Company would have lost the right to thereafter assert any claims in that regard? Isn't that the substance of what took place?

A. That is not entirely correct, because I do not recall, and do not think that you said anything about if it is to be used in connection with a secondary offering.

Q. The purpose was to urge the directors to give favorable consideration to the request of Merrill Lynch, [1079] was it not?

A. That is right. What I understood you to say was that if we were prepared to give favorable consideration to Merrill Lynch, you would forget about the inadequacies of the registration statement, and that was a business decision your client was proposing to make, but if we weren't prepared to do that you had no choice but to bring to the attention of the Securities and Exchange Commission, what you considered to be a number of inadequacies in the registration statement.

Q. Do you recall what those inadequacies were that were presented by me at that meeting?

A. I remember some of them. You are quite correct in stating that you said initially that Hughes Tool Company was faced with a problem, that if it maintained silence it might be deemed to have waived or acquiesced in certain things, and then you went on, as best I can recall at this time, to say that you felt that the registration statement was deficient in not pointing out the voting trust might be terminated, otherwise in accordance with its terms, and you were presently studying, and not in a position yet to give an opinion as to its invalidity of the voting trust as a consequence of certain circumstances of its creation.

[1080] You talked about my employment contract. I think you said that you thought that the registration statement was deficient in not having pointed out facts relative to prior connections that I may have had with the financial institutions.

You talked about the 990s, and said the registration statement was deficient in its failure to contain a statement as to whether or not we proposed to claim that we were entitled to the 990s, and you also said, if I recall correctly, that it was deficient in failing to state whether there was any obligation on the part of TWA to take the 990s, and you

said you were studying that question, and hadn't yet formed an opinion.

You also talked about the fact that maybe Hughes Tool Company would be considered an underwriter. I believe you also stated that you felt that the registration statement should say something about the financial institutions being controlling persons.

At the moment that is as much as I can recall of the specific objections you mentioned.

[1081] Q. And those are the remarks which solidified the opinion or conclusion of the board, is that correct?

A. No, Mr. Davis, it wasn't those particular remarks so much as I think it was the remarks that preceded them, when you appeared at the meeting and said that there were two subjects that you wanted to talk about. One was the matter of the Merrill Lynch proposal, and the other was another matter which you were not at liberty to disclose until the first matter had been disposed of. That you had given a commitment to Merrill Lynch that you wouldn't raise the second question until the first one had been dealt with.

As I recall it, you talked in that vein for a couple of minutes, and I believe both Mr. Slack and I separately said "Why don't you come to the point and tell us what it is. You assume to be threatening us with something. Now, let us get it out on the table."

At that point my recollection is that after having said again you had told Merrill Lynch that you wouldn't get into this second matter until the first matter was disposed of, you said, "Well, all right, here is what the problem is."

I got the impression, as indeed I think did most of the other people there, and this became clearer as you [1082] left, that we were being threatened with the fact that either

we went along with the Merrill Lynch proposal, or you were going to raise trouble with our registration.

Q. To see if I can sharpen your recollection a little, Mr. Tillinghast—as you have testified, when I came in I indicated that there were two matters I wished to discuss?

A. That's correct.

Q. The first one was whether or not the Merrill Lynch request for an extension of time was to be granted or not?

A. That's correct.

Q. And I inquired whether or not a decision had yet been made?

A. That's correct.

Q. Do you recall the answer that was given as to whether a decision had yet been made?

A. The answer was given that a decision had not yet been made.

Q. That's right. Then I in effect said that that created a problem to me?

A. You continue.

Q. Do you recall my advising the board that the Tool Company had committed itself to Merrill Lynch to proceed [1083] with a secondary offering, and had furnished Merrill Lynch with a document to that effect?

A. Yes.

Q. And if the Merrill Lynch request was granted, the Tool Company was prepared to waive asserting certain claims which it felt it had, or possibly might have in connection with the matters you have described—the voting trust, et cetera?

A. My recollection with respect to this latter part is that you did not get to the point of stating the dilemma of Hughes Tool Company, and their willingness to waive their objections to the registration statement, until after you had talked for some time with respect to the proposed un-

derwriting, and had at least twice stated that you couldn't deal with the second matter until the first one had been disposed of, because you had assured Merrill Lynch that you would not do so.

Q. And the second matter being the objections which the Tool Company had to the registration statement?

A. That's right.

Q. And that the nature of those objections of the Tool Company would obviously be affected by whether or not it was going to participate in the secondary offering?

[1084] A. That's correct.

Q. I recall prior testimony to be that in your telephone conversation with Mr. Breech, Mr. Breech in substance indicated to you that this request of Merrill Lynch was a matter which should be decided by the board, and not by you or by him, is that correct?

A. That's correct.

Q. This was the board meeting at which the decision was to be made?

A. That's correct.

Q. There had been no decision made on the day before?

A. There had been no decision made the day before.

Q. And in that half hour between 9:30 and 10:00, before I appeared in the room, is when there was that discussion?

A. That's correct.

Q. That is, after taking care of the preliminary formalities of the meeting, and the description of the offering?

A. Yes.

Q. Are you satisfied that you have fully and completely and adequately described the nature of the discussion and consideration that was given by these directors, particularly the outside directors, with respect to [1085] this request of the Tool Company?

A. As far as I can specifically recollect, Mr. Davis, as developed earlier in the day, we had the day before, in the late afternoon, a meeting of the Audit and Compensation Committee, to deal with the matter of granting options under the stock option plan. I would be surprised with that many directors present if there weren't some discussion of it at that time.

However, I have no specific recollection of any discussion of it at the meeting, and I mention this merely to say that I think the directors who were there very likely got some of the background on the thing before the meeting the next day. So far as any decision being made, I am quite sure that there was none.

Q. Most of those outside directors had become directors after the 1960 financing, isn't that correct?

A. There were only two. Yes, there were three outside —excuse me. The answer is yes.

Q. And those were directors, therefore, who were unfamiliar with the nature of this commitment between the Tool Company and TWA with respect to this offering to be made of subordinated debentures, isn't that correct?

A. I think they were broadly and generally familiar with it. I don't believe they were familiar with the [1086] details of it, except in the case of Mr. Sessel, who undoubtedly was quite familiar with it.

Q. Did you describe or explain to those directors that after all TWA was not going to realize any financing, any new money as a result of this new offering?

A. I doubt very much that I said that.

Q. Did you say anything which conceivably might have been construed or interpreted by the directors present that this offering was primarily for the benefit of the Hughes Tool Company?

A. I doubt that I said that. Possibly I might have, but I really doubt it.

Q. Did you explain or say anything to those directors present that might have been construed by them as an indication that this deadline of May 31st was a deadline in the agreement between the Tool Company and TWA?

A. I don't believe I stated it exactly that way, although I know that I discussed with some people—I don't think with directors at this time—I think it was with the people at the time we had the meetings on the 12th, the question of just what the effect might be if we missed the date, and whether or not we would get into a technical controversy over the effect of failing to do this before the 31st.

[1087] Q. Did either Mr. Breech or Mr. Rowe, or anyone else present at that meeting, attempt to explain to the directors there present the matter indicated by my last two or three questions?

A. What time are you speaking of?

Q. At that board meeting—to those directors who were there to meet and act upon this question.

A. I don't recall it.

Q. Did you or Mr. Breech or anyone else there present make any statements to the effect that the granting of this extension of time would adversely affect the financing of the Boeing program?

A. Oh, yes.

Q. You said that, did you?

A. Yes, and I have already testified to it several times.

Q. Mr. Breech said that too, did he?

A. I don't remember Mr. Breech having said that. I am sure I said it. That was the burden of my position, and I had the letter from Mr. Brandi dealing with that subject.

Q. Did you explain to them how and why it would interfere with the financing of the Boeings?

A. It wasn't the question of how it would interfere.

[1088] Q. How it would, or why?

A. How it might interfere.

Q. Did you describe to them how it might interefere?

A. I did.

Q. In any way other than what you have testified to?

A. No, as I testified to here.

Q. Did you say anything at all with respect to what possible advantage there might be to TWA to grant this request of the Tool Company, or of Merrill Lynch on its behalf?

A. Yes. We discussed the question of the possibility of realizing another $11-½ million out of it, and felt that on the terms on which it was available, that it wasn't a a sufficiently attractive inducement to warrant taking this risk.

Q. Did you point out to those directors that the Merrill Lynch proposal would in effect give TWA an underwriting for some $11-½ million worth of debentures at no cost to TWA?

A. No. I believe you stated that, and that, I believe, was in the Merrill Lynch letter. That was quite clearly understood.

Q. That would have given TWA an additional $11-½ million of equity moneys?

[1089] A. Not equity moneys.

Q. The subordinated debentures?

A. Subordinated debentures.

Q. Income debentures?

A. Income debentures—6-½ per cent debentures.

Q. At no cost to TWA in raising this additional money?

A. That's right.

Q. And it also provided a guarantee by the Tool Company of one additional year's interest on all these income

debentures, including those that would go to the public? Did you explain that to them also?

A. That was clear. Again, that was in the Merrill Lynch proposal.

Q. It is not quite clear to me to the extent to which you had read the Merrill Lynch letter in its entirety to the board. Do you recall whether you read it in its entirety?

A. I believe the covering letter was read in its entirety.

Q. I am interested in the letter or documents handed to you the preceding day, which described the proposal itself. Did you read that out at length?

A. You mean with all the attachments?

[1090] Q. What did you do, Mr. Tillinghast?

A. I have testified several times that my recollection is that I read the Merrill Lynch letter, but not the attachments.

Q. What did the attachments consist of?

A. The attachments consisted of, as I recall it, a resolution of the board of directors of the Hughes Tool Company and Merrill Lynch.

Q. And is it your testimony that there was a rather full discussion of the advantage and disadvantage to TWA with this proposal?

A. There was the discussion that I have already described, Mr. Davis.

Q. As chief executive officer of TWA, is it your testimony that it was a full and complete or adequate, discussion, from your point of view?

A. From my point of view as chief executive officer, it was an adequate discussion.

Q. I believe you also testified that you read to the board the Dillon, Read letter of May 15th, which is Defendants' Exhibit 24?

A. That's right.

Q. You read that in full?

A. I believe so, yes.

[1091] Q. I notice the sentence at the end of the third paragraph which reads:

> "We do not believe that the inducement offered would adequately compensate TWA for the risk entailed in this delay."

There was no representative of Dillon, Read present at the meeting, was there?

A. No.

Q. Did you describe to the board what Dillon, Read meant by the inducement offered?

A. I don't know that I discussed it specifically as such. I think that it was obvious that they were talking about the cost or expense of underwriting the additional $11-½ million of debentures.

Q. Do you now recall whether any directors asked a question "What inducement is Dillon, Read talking about?"

A. I have no recollection that anyone did.

Q. I notice in that same paragraph the statement "We confirm to you that after consideration of the facts, we have advised you that we believe a postponement of the offering would not be in the best interest of TWA, because it might well have a detrimental effect on the completion of the $147 million in financing necessary to purchase new equipment."

[1092] A. That's correct.

Q. Did any director ask you to explain what Dillon, Read meant by that statement?

A. Not that I recall.

Q. Do you now recall giving any more detailed explanation as to the meaning of that sentence, other than what you have already testified to?

A. No.

Q. As I understand your testimony, this was Dillon, Read's first approach to this problem—presented to them on Friday, May 12th, and this was a letter dated May 15th, over the weekend. Did you indicate to the directors that Dillon, Read reached that conclusion after, at best, a hasty consideration of the problem?

A. I am quite sure I told the directors that I had talked with Mr. Brandi on Friday, and asked him to confirm this, which he had done subsequent to that date.

[1093] Q. My question to you is whether or not you called to the attention of those directors that the question had been put to Dillon, Read on Friday, and that this was a letter dated the following Monday.

A. I didn't specifically call that to their attention, I am quite sure. I should say, Mr. Davis, just to keep the record straight, that I believe this question was first put to Dillon, Read by Mr. Leslie the day before, when Mr. Brandi visited me in my office—that was not the first time, I am quite sure, that he had heard of the matter.

Q. Did you or anyone else at the meeting indicate that the lending institutions had been contacted to get some reaction or point of view or feeling as to how they would feel towards proceeding with the then contemplated Boeing financing?

A. Not that I recall, Mr. Davis. I don't think anyone said that.

Q. Mr. Tillinghast, I want to be fair to you, but I am frankly somewhat puzzled, if I may say so. I understand your testimony to be that the primary concern that you had

which caused you to recommend rejection of this proposal by Merrill Lynch was your concern over this Boeing financing?

[1094] A. That's correct.

Q. And that the Boeing financing was something which had been in the works at least informally prior to your becoming chief executive, but it was progressing fairly satisfactorily?

A. That's correct.

Q. And you are now saying, as I understand, that you did not think it was important for anyone to communicate with these lending institutions to find out if, in fact, such a delay, or any delay in this subordinated offering, would, in fact, jeopardize this financing?

A. Mr. Davis, I didn't talk with the financing institutions. So far as I know, Mr. Leslie didn't talk with the financial institutions, except that both of us talked at some point, I am sure, with Mr. Sessel.

Q. Who talked to Mr. Sessel?

A. I say I am sure that both of us at some point talked with Mr. Sessel.

Q. You mean between May 11th and May 17th?

A. Yes, I have already testified to that, Mr. Davis.

Q. Proceed. I do not want to interrupt your [1095] train of thought at the moment.

A. I was quite content to discuss this with Mr. Brandi and take Mr. Brandi's view on the subject, because indeed that is one of the reasons that we retain Dillon, Read.

Q. I am not suggesting that you did not previously describe this meeting or conversation with Mr. Sessel, but it just happens to escape me. Would you mind referring back to what you have in mind about a meeting or discussion with Mr. Sessel relating to this subject?

A. Well, I think I testified before, Mr. Davis, that somewhere between the time this first came up in the directors' meeting, that I had at least one conversation with Mr. Sessel during the course of which he said in substance, "This is a standard Hughes maneuver, to wait until the eleventh hour and then ask for time. He will ask for a week, and if he can't get a week, he will ask for a day; and if he can't get a day, he will ask for an hour; and if he can't get an hour, he will ask for a half hour."

Q. I remember that now. I would like you to explain how that meeting was called about and what was the purpose of the meeting. Was it for the purpose [1096] of discussing this very proposal?

A. Mr. Davis, I have no specific recollection of just when and where this was. It may have been by telephone. As we already established, I saw Mr. Sessel at the audit and compensation committee meeting.

Q. At 5:00 o'clock on the 16th?

A. On the 16th. It may have been there. Mr. Sessel occasionally drops in when he has an uptown meeting in the morning—he will just drop in for 10 or 15 minutes, and it may have been an occasion such as that.

At this point I can't tell you exactly when it was, but I do recall his warning to be very careful about getting into a situation where we had a delay.

Q. Did Mr. Sessel in those casual conversations with you or the meetings or discussions to which you are now referring, was he speaking for and on behalf of the lending institutions as a group?

A. No, I don't think he was speaking formally for the lending institutions. I think he was speaking more as a director of TWA.

Q. I am concerned at this moment at the effort made, or how you satisfied yourself that the lending [1097] institutions, or how the financing by the lending institutions was going to be jeopardized by a favorable consideration of this Merrill Lynch request.

A. Mr. Davis, I have been through that several times. I will try to do it again.

Q. I don't ask you to repeat anything you have already said.

A. Then I am afraid I have already said it all.

Q. Then I will repeat the question this way:

What efforts did you make, or anyone else on behalf of TWA, that you know about—what efforts did they make to communicate with the lending institutions as such for the purpose of determining their views or positions?

A. At this point, Mr. Davis, I cannot recall that anyone made any approach to the lending institutions other than the conversations that I had, and perhaps Mr. Leslie had, with Mr. Sessel—whether or not those are an approach to the financing institutions.

Q. So far as you know, Mr. Breech made no effort to communicate or contact any one of those lending institutions; is that right?

A. I know of none. I can't recall any at this [1098] point.

• • • • •

[1217] By Mr. Davis:

Q. Mr. Tillinghast, resuming to the events that you were describing, which occurred at the meeting of the board of directors of TWA on May 17, 1961, it is a fact, is it not, that the Securities and Exchange Commission failed to accelerate the price amendment which was filed

on that date with the Securities and Exchange Commission?

A. That is correct.

Q. And it is correct, is it not, that subsequent to that date, TWA filed further amendments to its registration statements, other than the price amendment?

A. That is correct.

Q. And it is correct, also, that those additional changes or amendments to the registration statement of TWA were made as a result of conferences between TWA or its counsel and the staff of the Securities and Exchange Commission?

A. Certainly in part at least, Mr. Davis. I could [1218] not state at this moment whether all of them resulted from that, but that was true of the main body of them.

Q. Isn't it correct that one of the amendments that was made as a result of these conferences with the staff of the Securities and Exchange Commission was the disclosure of additional facts with respect to the position of certain lending institutions, in relationship to the control or management of TWA?

A. Mr. Davis, the only thing that I particularly recall at the moment is that there were rather copious quotations from a letter that you had written, which were embodied in the final prospectus. I believe there were also some related changes in the prospectus, but they don't come immediately to mind.

Q. It is a fact, is it not, that TWA, through its representatives, insisted upon, or requested a hearing before the Commission, itself, with respect to the price amendment, or the acceleration of the price amendment? You were aware of that, weren't you?

A. Mr. Davis, it is not clear in my mind who asked for the hearing before the Commission. I know there was a

hearing before the Commission, but I am not sure at this point whether we asked for it or you asked for it.

[1219] Q. As I understand, at that time TWA and its management, and you in particular, felt that it was of extreme importance to TWA to have this registration become effective as soon as possible. That is correct, isn't it?

A. That is true.

Q. And you do understand that there was an oral presentation made to the Commission itself?

A. I do.

Q. Do you know on what day that was?

A. I hesitate to be positive about that. My recollection is that there were a couple of appearances before the Commission.

Q. Isn't it a fact it was on the 18th?

A. I was going to say if I had to guess, I would say the first one was on the 18th, and there was one subsequently, a week or so later, on the 24th or 25th.

Q. When the registration statement was eventually permitted to become effective by the Securities and Exchange Commission?

A. That is correct.

Q. I am referring to the first one, which was on either the 18th or the 19th—is that your recollection or do you have a recollection it was on the 18th?

[1220] A. I wouldn't be positive about that. I think it was probably on the 18th, but I have no way of specifically ascertaining that.

Q. But you do know that as a result of this oral presentation before the Commission, the Commission refused to accelerate the price amendment filed by TWA?

A. That is correct.

Q. And it is also your information that the Commission requested the Tool Company, through its counsel, to submit within 24 hours a letter setting forth, or confirming what had been stated to the Commission orally?

A. That is correct.

Q. Let me refer you to Defendants' Exhibit 12, and ask you if you can identify that as being in fact the letter which was addressed to TWA, and the Securities and Exchange Commission under date of May 19, 1961, which was sent by the Tool Company or its counsel at the request of the Securities and Exchange Commission?

A. Mr. Davis, without checking every page of it, that appears to be the letter, yes.

Q. In the course of your deposition, you identified a number of documents and letters as reflecting, as I understood your testimony, what you considered to be part of malicious and wilful interference, or some other [1221] kind of interference, by the Tool Company or its agents and representatives in the affairs of TWA. Do you recall your testimony in that regard?

A. Yes, I do.

Q. Do you identify this same letter, Defendants' Exhibit 12, as one of the communications that you considered and regarded as part of that interference?

A. Mr. Davis, I can't recall. The record will show whether I did, in fact, so identify it. If you are asking me the question now, I will say yes, I would identify it now as such a document.

Q. Will you please explain in what respects you regard this letter of May 19, 1961 as a wilful or other kind of interference by the Tool Company in the affairs of TWA?

Mr. Sonnett: I think the question is argumentative. He wants the witness to argue as to what the

document says, and as to what construction he puts upon it. I think if he wants argument, that should be for counsel.

The Special Master: I think he may answer.

A. I feel as I do, Mr. Davis, because of the fact that it was made, I thought quite clear by yourself, that this letter was written for the purpose of inter-[1222]fering with the plans and programs of TWA. You told us at the directors meeting on the 17th that unless we were prepared to co-operate in a program that you wanted to put forward, in which event you would overlook these alleged deficiencies, that you would take steps to assert these things that are embodied in that letter.

The purpose for which it was written, in my opinion, was for the purpose of interfering with the running of the business of TWA by its management, as it thought it ought to be run, and to have it run in favor of the special and private interests of a specific stockholder.

Q. So that your recollection may be clear, Mr. Tillinghast, let me refer you to page 666 of your deposition.

Mr. Sonnett: Are you going to read from the record? If so, I will accept your reading of it.

Mr. Davis: Yes.

By Mr. Davis:

Q. (continuing) The question was following some others:

"Q. That is one letter that you had in mind as being an interference with TWA—

[1223] "A. To the extent that it was part of an overall plan to interfere with the purchase of Boeing

aircraft, although I suppose the letter, on its face, is, let us say, fairly innocuous and routine. • • •

I would refer to a letter dated May 16th. Then you continued as follows:

"A. • • • The letter of May 19, 1961 to the Securities and Exchange Commission is, in my view, a clear interference with the management of TWA."

Do you now recall your testimony in that regard?

A. I am sure I so testified, Mr. Davis.

Q. Would you like to change that testimony now?

A. No. Are we talking about the same thing here?

Q. The letter of May 19th. May I show you Defendants' Exhibit 12 as the letter of May 19th?

A. My testimony is now, and apparently my testimony was then that I considered this a clear interference or an attempt to interfere in carrying on the business of TWA.

Q. I now would like you to explain the manner in which you believe this letter interfered with the management of TWA.

A. Well, it was done, in my opinion, for the purpose [1223A] and with the partial effect of delaying our registration becoming effective, with an aim, I believe, of so involving that registration in delay and controversy as to cause Boeing financing to abort, and to make it impossible for us to finalize our Boeing financing on the 31st of May.

[1224] Q. Mr. Tillinghast, I am going to respect your opinions as being your personal opinions. At this point I would like to ask you to state as fully as you can the facts and circumstances which had come to your attention, which is the basis of that opinion.

Mr. Sonnett: May I object to the form of that question. I think the witness gave a responsive answer to the question.

The Special Master: Isn't this a further development of that question?

Mr. Sonnett: I think with the wind-up that Mr. Davis gives his question, it is argumentative in form, he having asked the witness for his views, then says in effect he is not interested in those, he now wants to talk about something else. I think he just ought to put the question, and if so I will object on the ground it is repetitive, because the facts and circumstances preceding the date in question, the witness has testified to at great length a number of times. The record is full of it. This is a letter of May 19th.

The Special Master: If you ask the question as to the basis for his opinion, and confine it to anything he has not already described—

[1225] By Mr. Davis:

Q. I do not ask you, Mr. Tillinghast, to repeat anything that you have already said. You may incorporate anything you have already said by reference. I am interested in your stating as fully as you care to, the basis for the opinion you have just reiterated.

A. Mr. Davis, yesterday or the day before, I testified to the various circumstances which raised a great question in my mind as to whether or not this request for a week's delay was a genuine request, or was part of a scheme or device to delay the effectiveness of our registration and the offering of our debenture, and through that means to upset the consummation of the Boeing transaction.

I testified once before, I believe, although on the chance I am mistaken, I will say again that one of the reasons that convinced me of this was a statement that you are alleged to have made, to the effect that one thing that just was not negotiable was the Boeing purchase transaction in that you would do everything in your power to prevent its being consummated.

Q. Who reported to you these alleged statements attributed to me?

[1226] A. Mr. Reed.

Q. When?

A. I would say at about the end of May, or the first of June. I can't remember the exact date.

Q. Let me understand something else then, Mr. Tillinghast. Is it your testimony that at the time this letter of May 19th to the Securities and Exchange Commission and TWA came to your attention, you did not then consider it an interference with the affairs of TWA, is that correct?

A. No, that is not correct, Mr. Davis. I did so consider it.

Q. Then I would like you to refer to the facts that you had on or before May 19, 1961, which led you to the opinion you have expressed, and to what you have described as an aim on the part of the Tool Company to upset the Boeing transaction, and again I want to say before Mr. Sonnett interrupts me, that I am not asking you to repeat anything that you have previously testified to. You may refer to that by reference.

A. I think I have several times testified, Mr. Davis, about those things which led me, let us say from the outset, to be very concerned with whether this was a diversionary maneuver.

[1227] I have also testified about your own appearance at the board meeting, and the things that you said, which convinced me that my original suspicion that the aim of this was to divert and to delay, was a correct conclusion.

Q. In other words, your conclusion or opinion was based upon the facts that you have described in some detail in your deposition to date, is that correct?

A. That is correct.

Q. Is it fair to say that your characterization of the other documents that you identified on your deposition of January 10th, is also based upon those facts that you have heretofore described in your deposition?

A. Without going through each one of them, Mr. Davis, I would say generally yes, and I think I should add one other thing as part of the background against which this matter had to be viewed. I did not have any participation in them myself, but I was told by various people at various times that numerous attempts on the part of the voting trustee to meet with Mr. Hughes, or to find some basis for establishing a modus operandi, and the constant frustration of those efforts, and I am sure that what I had heard [1228] in that regard was one of the bits of background against which my judgment was formed as to what the purpose and aim of these various letters and actions was.

Q. Let me refer you to page—excuse me, are you finished? Let me refer you to page 668 of your testimony, Mr. Tillinghast, where your answer starts at the top of the page, when you refer to a letter of May 24, 1961, from Mr. Settles to Mr. Duckworth, which on its face is harmless except in the light of the purpose for which it was written, and then you continue as follows:

"The same—well, on May 25th, 1961, there is a letter to Mr. Hocker of the Securities and Exchange Commission,

which I deemed to have been for the purpose of delaying the effective[ness] of TWA's registration."

Do you see that testimony?

A. Yes.

Q. Let me hand you Defendants' Exhibit 11-D, which is a letter by me dated May 25, 1961, to Mr. Hocker, and ask you if that is not in fact the letter that you identified was referred to on page 668 of your testimony? Your answer is that it is, is that right?

A. Yes.

[1229] Q. Who called that letter to your attention, Mr. Tillinghast?

A. May I see it again, Mr. Davis, please?

Q. Yes.

A. I am not altogether sure that I can say at this point, Mr. Davis. I think I received a copy of it in the mail, but possibly counsel gave it to me. I am just not sure at this point. Perhaps my own copy of it would refresh my recollection, but from that I can't tell you positively.

Q. Did someone explain to you the meaning or effect of this letter?

A. I don't believe so.

Q. Let me call this portion of the letter to your attention. After the first sentence of the second paragraph, which reads as follows, "As I told Mr. Hocker, my client Hughes Tool Company disclaims any liability or responsibility with respect to said registration statement, or any statements which appear therein or omissions therefrom.

"Said registration statement was prepared without consultation with or approval by Hughes Tool Company or its counsel. Furthermore, Hughes Tool Company has not acquiesced in, nor does it acquiesce in the [1230] accelera-

tion of the effective date of said registration statement. However based upon a limited review of amendment No. 6 thereto, and amendment No. 7 which was received by me late yesterday afternoon, Hughes Tool Company has no desire to delay appropriate action by the Securities and Exchange Commission in the circumstances making said registration statement effective."

Did you give consideration to that portion of this Defendant's Exhibit 11 in connection with your testimony, Mr. Tillinghast? Had you given consideration to that portion of the letter I just called to your attention, in connection with your testimony?

A. Mr. Davis, answering a question that you asked me a moment ago about how did I get this, I notice from the last paragraph that a copy of it was sent to me, and I am sure I received it in the normal course.

Answering your question about when I testified the other day did I particularly notice and ponder the significance of the part that you have just read—no, I did not.

Thirdly, is my answer changed? No, it is not.

Q. May I ask you another question? Isn't it a fact that when this letter was written to the Securities and Exchange Commission, the registration statement [1231] of TWA had in fact become effective?

A. I gather that is the case, and that is why I think the statement to which you referred was more a polite acquiescence of the inevitable rather than any gesture in our favor.

Q. What I am trying to get at, Mr. Tillinghast, is for you to explain to me what are the facts which support your conclusion that a letter acquiescing to what has taken place constitutes an interference with the affairs of TWA.

A. At the risk of being repetitive, Mr. Davis, let me say once again that I considered that this whole line of corres-

pondence, this whole line of activity, had but one purpose in mind—strike "but one purpose in mind"—had as its principal purpose the disruption of the Boeing purchase contract. I believe you said as much yourself. It is all part of one plan and scheme, in my judgment, and every piece of paper written in pursuance of that plan and scheme constitutes, in my opinion, an improper interference with the affairs of TWA.

Q. Did you discuss with anyone those views and opinions at or about the time that you developed them?

A. Oh, yes, I am sure I discussed them with [1232] numerous people.

Q. Would you please identify the people with whom you discussed them most seriously?

A. Well, I am sure that I have expressed these views and to a degree discussed them with each of the directors of TWA. I have discussed them with counsel. I have discussed them with counsel for the voting trustees.

Q. When you referred to counsel before that, you mean Mr. Rowe?

A. Mr. Rowe.

Q. And counsel for the voting trustees, you mean Mr. Reed?

A. Mr. Reed. I am quite sure that on at least one occasion, maybe more, I discussed them with Mr. Olds.

I guess I would have to say, Mr. Davis, that I discussed them with probably everyone who had any legitimate interest in discussing the subject with me.

Q. Mr. Breech?

A. Oh, yes.

Q. Several times?

A. Many times.

Q. Mr. Sessel?

[1233] A. Mr. Sessel.

Q. Any of the other representatives of the lending institutions, insurance companies in particular?

A. At some time or another, and I can't place it right at the moment, I am sure that I discussed this with Mr. Keehn.

Q. Of the Equitable?

A. Of the Equitable, yes.

Q. Anyone from Metropolitan?

A. I would have to get my dates straight to be sure, but I have a recollection that I discussed it with Mr. Hagerty, at Mr. George Bovneizer's funeral.

Q. With respect to that one, can you give us an approximate time and date?

A. If you can find out when Mr. Bovneizer's funeral was, I can give you an exact date, but I met Mr. Hagerty by chance at Mr. Bovneizer's funeral, and standing on Riverside Drive, in front of the Riverside Church—

Q. Was this in May, June, July?

A. It was in the warm weather. I would say it was in May or June, although I would want to check to be absolutely certain. I remember running into Mr. Hagerty at that time, which I believe was only the [1234] second time or third time, I guess, I had seen Mr. Hagerty, in talking with him about things. I believe we discussed the flood of letters that were then coming from you, and which we all were receiving, and the purpose and significance thereof.

Q. Was this more than a very casual conversation?

A. This was in a very casual conversation.

Q. Did Mr. Hagerty express any point of view, or make any statement to you which either confirmed the views you expressed, or which tended to indicate any disagreement with the views you expressed?

A. No. The only thing I can particularly—I am not sure that I can remember anything he particularly said, except that I think he said, "You have to get used to this," or something to that effect.

Q. Do you have a recollection of about when you had occasion of discussing this with Mr. Keehn?

A. Mr. Davis, I am going to change what I said, because on the 29th of May I saw both Mr. Keehn and Mr. Hagerty separately, and I am quite certain that I discussed this at that time.

Q. Did you have in mind another meeting with Mr. Keehn, other than this one on May 29th?

A. Yes. Subsequent to May 20th, I am sure there [1235] was at least one occasion, perhaps a couple of occasions, when I talked with Mr. Keehn about something on the telephone, and mentioned all the letter writing that was going on.

Q. That was a relatively brief and casual discussion?

A. As I recall it now, yes.

Q. Now going to this May 29th date, I understand that you on that day saw Mr. Keehn and Mr. Hagerty on separate occasions.

A. That is right.

Q. Let us pursue Mr. Hagerty for the moment. Was that at Mr. Hagerty's office or where was it?

A. That was at Mr. Hagerty's office.

Q. Do you remember when—in the morning or afternoon?

A. In the afternoon, around 3:30 or 4 in the afternoon.

Q. You will note that on Defendants' Exhibit 1, your calendar, there is no notation to that effect. Are you still quite confident it was on that date?

A. Yes. I am quite confident it was on that date.

Q. Was this before or after you had met with Mr. Keehn?

[1236] A. This was both before and after I met with Mr. Keehn, because I met with Mr. Keehn, and then I met with Mr. Hagerty, and then I met with Mr. Keehn again.

Q. Perhaps you ought to describe then what was the occasion or circumstance that brought about this meeting or conference between you and these gentlemen?

A. Well, as I mentioned before, some time, a day one way or the other of the 24th of May, we got word that the Prudential would not participate in our financing.

Q. Excuse me for interrupting. I don't want to do it any more than absolutely necessary, but it would assist me if when you make an expression like, "we got word," if you would indicate someone reported something to you.

A. I think I already testified to that, Mr. Davis. We received word through Mr. Wadsworth that the Prudential would not participate in our financing. That left me in the unhappy position of being $39 million short of the amount of money that I needed to have in hand on the 31st of May.

As a consequence of that, I did some scurrying around, and succeeded in setting up a meeting or meetings with Mr. Keehn and Mr. Hagerty and Mr. Sessel [1237] and Mr. Wadsworth for the afternoon of the 29th, which, since it was the day between the weekend—Memorial Day was a very slow day in the financial community—it is that which helps me place it exactly.

Mr. Leslie and I went to Mr. Keehn's office, and if I recall correctly, we met Mr. Sessel and Mr. Wadsworth there. Mr. Wadsworth, I believe, previously had talked with Mr. Keehn. The purpose of our visit was to urge upon Mr. Keehn that the Equitable, along with the Metropolitan take up the rather substantial slack that was left by the Prudential's withdrawal from the financing.

I urged it with all the vigor at my command, and pointed out that I was in the position where I had a deadline on the 31st.

[1238] Q. That was a deadline by reason of your negotiating with Boeing?

A. Under the Boeing contract we had until the 31st of May to firm up our financing.

Q. Satisfactory to Boeing?

A. And to us. We had the right to cancel at a penalty of $850,000 on the 31st, if we didn't have our financing solid. After the 31st, the contract became firm.

I said to Mr. Keehn that I didn't think that I could go to my board or to the Executive Committee and obtain authority to let this dating by, unless I had the financing in hand, and that I felt that there was nothing that we could do but ask them to increase their participation.

Mr. Wadsworth had already worked out some tentative deal which would involve having the banks take $10 million more than originally planned. So that the amount of the insurance companies as a group would put up would drop from $117 million to $107 million.

What I was urging upon the Equitable was that they increase their participation from $39 million to $53-½ million, I guess the mathematics.

Mr. Keehn was very anxious that we find other [1239] insurance company money to participate in this, because he said that they had as deep a participation as they would like, and very much wished that we could find some other participant. He said he thought it would do TWA good in any event to broaden the number of companies with which it did financing, and broaden its credit picture as a consequence.

I suggested that they commit for this subject, with the understanding that first we try to obtain additional insur-

ance company participation, and that if we did, their share would be reduced.

He was worried about a technical problem in this regard, because insurance companies apparently cannot be underwriters, and he was afraid that if they agreed to take whatever was left, somebody might consider that they were improperly acting as an underwriter.

We suggested then—

Q. Who is "we"?

A. Mr. Wadsworth, or I. I can't remember exactly. That they commit for the full amount, and that without any commitment one way or the other for a scaling down of that in the event we found other insurance companies to participate, that we would, because we were equally anxious to obtain additional insurance company [1240] participation—that we would engage in an attempt to find additional insurance companies that would participate, and when, as and if we were successful in that regard, we would come back and renegotiate the deal.

Before we came to any conclusion in the matter, we went down to the Metropolitan, because we had a specific date—I can't remember whether it was 3:30 or 4:00, but we had a date at a specific time with Hagerty—we went down there and had a similar discussion with Mr. Hagerty, and I believe with Mr. Jenkins who was there.

Mr. Hagerty was, I would say, more appreciative of our problem, and more ready to act than Mr. Keehn, and I would say in approximately half an hour's time, we had what I took to be his personal commitment that he would recommend to his committee that their amount be increased up to the higher figure.

Q. $53-½ million instead of $39 million?

A. If that is the exact figure. Yes, I think that's right. Then we went back again to Mr. Keehn's office, and dis-

cussed the situation further with Mr. Keehn, and Mr. Keehn said that he would call a meeting of his committee on Wednesday, the 31st—yes, I am quite sure it was Wednesday, the 31st—that he would [1241] have a special meeting of his committee, and let me know the first thing on the 31st what he would be able to do.

He said that he personally was inclined to favor what we were suggesting, but that he didn't feel that he could say anything at all definitively until he had a meeting of his committee.

I should also add that during these discussions, Mr. Sessel indicated that he thought that it was entirely feasible for the banks to take another $10 million, but that he didn't think the banks would be willing to go beyond the $10 million limit.

Then we broke up and went in several directions.

Q. In your answer you referred to some discussion you had, I believe with Mr. Keehn, about the effort that would be made to get additional insurance companies to participate in this loan. Would you describe the effort that had been made, both prior to that meeting and subsequent to that meeting, by you or by TWA, or any of the representatives?

A. So far as I am personally concerned, Mr. Davis, I had made no effort at all. I am not sure to what extent, if any, Dillon, Read made an effort beyond trying to bring in the Prudential. My recollection [1242] is that Dillon, Read was concentrating on bringing in the Prudential as a third company, and as one, at least, of the very few companies that had indicated an interest in airline financing, and that no great effort had been put forward to bring in anyone else until after the Prudential fell through, following which Dillon, Read made several efforts.

Q. Can you describe what those were?

A. I know they approached, as I recall it, about five other insurance companies—Northwest Mutual, I believe was one of them. Massachusetts Mutual, I think, was one of them—and after having been turned down approximately five times, Mr. Wadsworth recommended they cease their efforts there, because he felt all this was doing was making a negative record for TWA, and it would be a mistake to continue the effort.

Q. I understand now the circumstances which brought about this meeting. Going now to the first meeting, which was with Mr. Keehn at the office of the Equitable—

A. That's right.

Q. I understand you were accompanied with Mr. Wadsworth?

A. Mr. Wadsworth was there when we got there, I [1243] believe.

Q. You went there with Mr. Sessel?

A. No. I think we met Mr. Sessel there. I went there with Mr. Leslie.

Q. You and Mr. Leslie went to Mr. Keehn's office?

A. Yes.

Q. And there you met Mr. Wadsworth and Mr. Sessel?

A. That is my recollection.

Q. Who else was present at that meeting, in addition to Mr. Keehn?

A. Mr. Keehn had either one or two other people with him, and I can't at this point remember who they were, Mr. Davis. I am quite sure it wasn't Bill Cowie, whom I know. I think it was someone—

Q. From the Legal Department, perhaps?

A. Possibly. Mandel something.

Q. M-a-n-d-e-l?

A. Mandel, perhaps, whom I wasn't familiar with.

Q. And the primary purpose of the meeting was to discuss the extent to which the Equitable would be willing to increase its participation from $39 million to $53½ million, is that correct?

A. The purpose of the meeting was to get a definite commitment out of them that I thought gave [1244] me the protection I needed on the 31st.

Q. In that connection you or someone else had occasion to refer to the activities of the Tool Company?

A. That's correct.

Q. Will you please describe how that came about, how the subject was introduced into the conversation, and what was said by the various persons there?

A. I can't, I am sure, Mr. Davis, remember everything that was said by everyone, but I know that among other things, I said that I thought that this was a very critical question. That I was satisfied that Hughes Tool Company was doing everything it could to prevent the consummation of the Boeing Transaction. That it was a clear example, I thought, of Hughes Tool trying to prevent the management from doing what the management considered to be in the best interests of TWA.

That they had set up a voting trust for the purpose of giving TWA an independent management that would run the company in an independent businesslike way, and that this was the first test the new management was being put to.

I thought if the management was to have power [1245] to run the company as it thought was in the best interest of the company, it at this time needed their support sufficient to enable the management to go ahead with the Boeing deal on the 31st.

Q. Do you recall what Mr. Keehn said, in substance?

A. What Mr. Keehn said in substance was that he quite appreciated that and understood it, and he felt unquestion-

ably some way of working this out would be found, and we should not worry too much. That undoubtedly there would be some solution, and I told him that I didn't think that I could go before my board or Executive Committee and just express the hope and speculation that something would work out that would make everything all right. That I felt that I had to have on the 31st a definite commitment for my financing, and that [if] I did not have a definite commitment for my financing, I did not see how I could go ahead with the Boeing contract.

Q. Did you also explain or have occasion to remark at the apparent efforts of the Tool Company to seek funds with which they might try to upset the voting trust?

A. No, I did not, Mr. Davis. I don't believe I discussed that.

[1246] Q. As I recall your prior testimony on or about May 17th you were very much concerned about the activity of the Tool Company, because it might adversely affect this financing arrangement. You were no longer concerned about the 29th?

A. I don't understand your question, Mr. Davis.

Q. You do recall testifying, do you not, that on May 17th your concern that the efforts of the Tool Company through Merrill Lynch to obtain a delay in the offering of the subordinated debentures was because of the impact it might have on this financing?

A. Yes.

Q. You were concerned about that?

A. I certainly was.

Q. As I understand, prior to the 29th you had not explored the validity of that concern with the insurance companies, had you?

A. If I may digress a moment, Mr. Davis, on that subject I would like to, let us say, amplify some of my testimony of yesterday.

As a result of talking with Mr. Rowe and scratching my own head and doing some thinking overnight, I am quite certain that Mr. Leslie on or about the 11th or 12th, possibly the 15th—somewhere along there—[1247] talked with the insurance companies, and asked them whether a delay would make any difference with respect to the financing. I believe, if I recall correctly, that he got a letter, a response that the insurance companies wouldn't take a definite position on it, but maybe it might.

I asked counsel to see if he could find, and they haven't yet, what I think is a memo that Mr. Leslie—either a memo for the files, or a memo he wrote me, let us say, just summarizing what the insurance companies had said. I just wanted to clarify that, since we got into this, and I am afraid I have lost the other.

Q. You say it is a memo that you are looking for at the moment?

A. Yes.

Q. May I request that when you find it, you furnish me with a copy of it?

A. Sure. I am not absolutely positive of that, Mr. Davis, but I think I am right, and I think we will find it sooner or later.

Q. You may be thinking of the memo you received with respect to conversations relating to the June 10th letter?

[1248] A. That is one of the things that troubles me, because I am trying to sort out the two things in my mind. But I think there is a memo anyway. Let me see if I can find it. I am, from thinking about it, quite sure that Mr. Leslie did talk—I am not sure whether he talked with

all three or not, but I know he talked with some of the insurance companies, and got some sort of a maybe out of it.

Q. Now to go back to the thread we were on. I recall your prior testimony to be, starting on May 11th, thoughts occurred to you of the possible efforts the Tool Company might make to refinance the existing moneys, or some other way terminate this voting trust. Do you recall that?

A. In order to clarify that, because I am not sure I would put it quite as you have—my recollection is that when Mr. Leslie first told me about this, and said some of the things to which I have already testified, we had a casual speculation as to what the probable purpose and meaning of this thing was, and that one of the things that was said at that time was that maybe what Hughes is trying to do is to raise enough money so that he can find some way of refinancing.

[1249] Q. And such efforts on the part of the Tool Company could have had, in your opinion an adverse effect on the additional financing that was then contemplated with respect to the Boeing program?

A. No, I don't think that—you have to assume a lot of things, Mr. Davis. I would suppose, and I am not sure that I really thought about it this way—I would suppose that I would have to agree that if there were a complete financing, and a termination of the voting trust, you obviously would have had a very real question as to what you did for further funds. But that was something, let us say, in the power and knowledge of Hughes Tool Company and not particularly within mine.

Q. Basically within those efforts on the part of the Hughes Tool Company, which in your view was jeopardizing the Boeing financing?

A. No, they weren't, Mr. Davis.

[1250] Q. I understood that you felt the delay in the offering of the subordinated debentures, which, admittedly, was not going to produce any more cash to TWA, was having or potentially would have an adverse effect on this Boeing financing. That is correct, isn't it?

A. Yes.

Q. That was the underlying basis for refusing the request of the Tool Company?

A. That's right. Let me say, Mr. Davis, that was one of the reasons.

Q. For refusing the request of the Tool Company?

A. That's right.

Q. The other reasons are reasons you have already described?

A. Yes. Everything that I would add as additional reasons has already been described.

Q. You felt that the insurance companies were likely to withdraw their support of the Boeing financing if for some reason this offering by TWA was delayed; is that correct?

A. I am not sure that I would say they were likely to. The question in my mind was whether there was any risk that they might, and I wasn't prepared to take [1251] any substantial risk.

Q. Did you ever understand the factual basis for that risk that the insurance company might withdraw their support if there was a delay in the offering by TWA?

Mr. Sonnett: I do not think you understand the purport of that question in the light of the witness' prior testimony.

By Mr. Davis:

Q. Do you understand my question?

A. I am not sure that I did. Perhaps if the reporter will read it back I will get it straight.

(The question was read.)

A. Let me answer that this way, Mr. Davis: I was very much afraid that if this thing were delayed—

Q. The offering of the subordinated debentures?

A. The effective date—and then we got into a controversy of the sort in part that we got into beginning on the 17th of May, that this might well upset the financing, and indeed my fears, or the substance of my fears was too clearly indicated, too clearly substantiated when, in fact, the Prudential did fall out.

Q. I understand that you felt that this occurrence [1252] might well upset the financing, and in fact it caused the Prudential to pull out.

What I want you to describe to me now, apart from your opinions, is what is the factual basis for that opinion. What were you relying upon—what anybody told you, or what did you think was going to happen? Why did you think it might upset the financing? Do you follow what I am trying to get from you?

A. Mr. Davis, I think I have testified to most of this several times, but I will take one more try at it here.

TWA had had a heritage of tremendous controversy, a heritage of tremendous controversy, delay and uncertainty, with respect to its financing.

The quarrels, disagreements, difference of viewpoint between Hughes and a number of financial institutions were well known.

We had a very important plane program involving a vast amount of money, which had a deadline.

I considered it a real risk, which I did not want to take, that if we got bogged down in delay, if we missed the date of the 21st for the offering of the subordinated debentures, if the Hughes Tool Company took a technical position, which I understand [1253] they have taken many times in the past, we might find ourselves going into June, July, August, in the midst of controversy, all of which involved the risk, in my opinion, that we might unhinge our financing, which seemed to be very nicely set up on a reasonably favorable basis, and that was a chance that I just was not willing to take. I thought it certainly would not be in the interest of TWA to take it.

Q. Have you discussed yesterday's testimony with anyone other than Carl Rowe?

A. No, sir. I will have to modify that. Mr. Sonnett was present down in the main hall here when I talked with Mr. Rowe.

Q. At that time in May you had been the president of TWA, or chief executive officer, for a couple of months?

A. I had been chief executive officer just one month on the 17th of May.

Q. Who had told you about this heritage of controversy and difficulties with the financing institutions? What facts had been called to your attention, or were you relying solely on newspaper accounts, or what is sometimes described as "what everybody knows"?

[1254] Mr. Sonnett: It is, then, what he has already testified to. He has been over this repeatedly about the account in Fortune Magazine—he has been all over this several times.

By Mr. Davis:

Q. Were you relying on the same thing as what you described, what you knew at the time you had your meeting with Mr. Breech on February 28, 1961?

A. No, between February 28th and this time I had learned quite a number of things in conversations with executives of TWA and conversations with directors of TWA, and conversations with Mr. Reed, conversations with Mr. Rowe. Rightly or wrongly, Mr. Davis, I developed the impression that Hughes was not an easy person with whom to do business, nor particularly a straightforward one.

Q. Will you identify the officers or directors of TWA with whom you had those discussions between February 1961 and May, from whom you obtained information which, in your judgment, was sufficiently reliable to permit you to formulate the opinion you have expressed?

A. I have already mentioned Mr. Leslie.

Q. Mr. Sessel?

[1255] A. Yes.

Q. Mr. Slack?

A. Yes.

Q. Mr. Breech?

A. Mr. Breech, Mr. Reed.

Q. Let us keep lawyers out of the way for the moment. Let us talk about people that I can interrogate more easily.

A. Mr. Cocke, Mr. Rummel, Mr. Rowe.

Q. You mean the attorney, Mr. Rowe?

A. Attorney, Mr. Rowe.

Q. And lesser people?

A. Several of the directors, lesser people.

Q. You mean some of the directors other than those included in this list? Mr. McBain, for instance?

A. No, I don't recall anything particularly from Mr. McBain.

Q. Mr. Maestre?

A. Mr. Maestre.

Q. Any of the newly selected directors—Mr. Leithead, Mr. Hood?

A. No, I don't remember anything. I think it is unlikely they had much to say about this, because their association with the situation was very new also.

[1256] Q. Is it fair to say that all those people told you substantially the same thing, or did you get a lot of varying accounts from these people that you have identified?

A. Numerous, varying accounts. Most of this was in the course from time to time of casual conversations, various remarks about this, that and the other thing. It is an impression that I developed.

I might say that what I had read in the press perhaps made it a fertile field to give significance to some of the things.

Q. Can you recall or can you identify any particular conversation that you would be willing to describe as a serious conversation, where the effort was to describe or detail facts?

A. I mentioned one conversation with Mr. Leslie, and I don't know whether that really qualifies or not. I don't recall, with the possible exception of Mr. Rowe, having had what you would call serious conversations on this subject.

If you mean, for example, my calling someone in and sitting down and saying, "What do you think of Mr. Hughes," the answer is that I didn't do that.

Q. No, I am not thinking of personal [1257] characterizations of Mr. Hughes.

Do you know anyone who knows Mr. Hughes well personally?

A. No. I guess I would be safe in saying that I don't.

Q. You know many who would like to?

A. I know, for example, a person like Mr. Six, of Continental—some people say he knows Mr. Hughes well.

I don't know whether he does know him well or not, but I don't know anyone who I know first-hand knows Mr. Hughes well.

Q. My question was directed, really, Mr. Tillinghast, to facts relating to transactions or relations between the Tool Company, or Mr. Hughes, and these financial institutions which formed the basis for your conclusion that TWA had a heritage of delays, or unsatisfactory financing relations.

A. Mr. Davis, so far as that is concerned, I would have to go back to the article in Fortune.

Q. That is what you were relying on primarily?

A. The Spook and The Banker—with respect to relations between Hughes and the financial institutions. I have been told—

[1258] Q. By whom?

A. I believe by Mr. Rowe and by Mr. Sessel, and possibly others that I don't recall at the moment—that that was a very accurate article. From Mr. Reed and Mr. Rowe I know that all sorts of difficulties were encountered in actually getting delivery of the 880s.

I also know it from Mr. Rummel. That Mr. Hughes had agreed to deliver pursuant to the 1960 settlement.

I know that Mr. Hughes was at least difficult in permitting Hughes' directors to constitute a quorum of the meeting of TWA following the 1960 settlement.

Q. By "settlement" you mean financing?

A. The 1960 financing, yes. I had no reason to feel that I could count on any different tactics from Mr. Hughes

than those which apparently had taken place, and I had no intention, having been in this position approximately a month, of being caught with a big plane order on my hands and no financing to cover it.

Q. Did anyone ever tell you that should the Hughes Tool Company be successful in refinancing this [1259] 1960 financing, it would become impossible for TWA to obtain financing necessary for the Boeing program?

A. No.

Q. Nobody ever told you that?

A. No.

Q. And you were satisfied that could be done, even though the voting trust terminated; is that correct?

A. No, I wasn't satisfied one way or the other, Mr. Davis. So far as I was concerned, when, as and if Hughes Tool Company could terminate the voting trust according to the provisions thereof, it was perfectly free to do so, and that was none of my business.

My business was to run TWA in accordance with the interests of TWA and neither to favor Hughes Tool Company nor to discriminate against Hughes Tool Company, and that is the way I have tried to run it.

Q. So that your concern as to the inability of TWA to finance Boeing was wholly related to the possibility of Hughes Tool Company realizing some $100 million in cash or thereabouts if it had been permitted to have a secondary at the time of that TWA primary offering of subordinated debentures?

[1260] A. That's correct.

Q. And the report to you by Mr. Leslie that this might be what Mr. Hughes or the Tool Company had in mind, that was not a matter that concerned you at all?

A. I didn't consider what the Hughes Tool Company proposed to do in a financial way was any proper concern of mine.

Q. And you consider your testimony today to be consistent with the testimony you have given heretofore?

A. I do.

Q. Going back to this meeting of May 29th, did you have occasion at that time to discuss the interfering activities by the Tool Company, or its representatives, or counsel, with Mr. Keehn?

A. Yes, I have already testified to that.

Q. You have testified that you did. Now I would like you to tell me how that meeting came up and what you said in that regard.

A. I just testified to that about 10, 15 minutes ago.

Q. I don't believe that you have other than to advert to the fact that you were worried that Mr. [1261] Hughes might be doing something.

I would like you to tell me, did you discuss with Mr. Keehn the letters to the Securities and Exchange Commission?

A. No.

Q. Just what did you discuss? Can you tell me what took place in relation to the activities of the Tool Company which you felt were interference with the management of TWA?

A. I said, in effect, Mr. Davis, that I considered that the recent actions of the Tool Company had been for the purpose of preventing consummation of the Boeing purchase; that they had already succeeded in frightening out one of the insurance companies; that this represented the first, let us say, large project of an independent TWA management; and that if they were to accomplish what they sought

by setting up a voting trust, that I thought in this hour of crisis, if you will, they ought to support the management of TWA doing what it considered to be in the best interests of the company.

And if in this particular instance Hughes proved his ability to prevent the management doing what their judgment told them they should do, that to [1262] my mind it presages a breakdown of the whole situation.

Q. Will you please explain how the Prudential was frightened off?

A. By the letter that you wrote, and by the fact that they didn't want to get into a controversial situation with a controversial person.

Q. Which letter that I wrote do you believe frightened them off? May I refer you to a letter dated May 26, 1961, which is Defendants' Exhibit 11F. Although I don't want to suggest to you this is the letter, but I am guessing, but I want to help you, if I can.

A. No, this isn't the letter.

Q. The letter to the SEC?

A. The letter to the SEC.

Q. The May 19th letter?

A. The publicity connected therewith.

Q. What is the basis for your believing that Prudential was frightened off by reason of this letter of May 19th to the SEC?

A. I would say two facts, Mr. Davis: one is that obviously it would have that effect, that potential effect; and, secondly, that Mr. Wadsworth told me from conversations he had with Chappalear, [1263] he was convinced that was the sole reason.

Q. Your conclusion to that effect was based upon what Mr. Wadsworth of Dillon, Read told you?

A. That's correct, plus what seemed to me obvious on the face of it.

Q. Obvious on the face of the letter?

A. Obvious on the face of the situation.

Q. You are still referring to the situation as developed in your testimony?

When did Prudential indicate directly or indirectly that it was withdrawing from this financing program?

A. Approximately the 24th of May.

[1264] Q. How was that done?

A. It was done in a conversation with Mr. Wadsworth, to which I have already testified.

Q. Between Mr. Chappalear and Mr. Wadsworth?

A. I believe it was Mr. Chappalear.

Q. Can you give me the substance of what Mr. Wadsworth told you was the conversation he had with Mr. Chappalear or any one else at Prudential?

A. All that I can remember at this particular time was that there were several conversations, the first one or two of which had to do with requests by the Prudential for information relative to the voting trust and possible means by which it might be terminated.

I can't bring to mind exactly what the problem is at this moment, but they had some problem troubling them as to the permanence of the voting trust, and the ability to satisfy themselves that it couldn't be circumvented.

Then the final conversation was one in which Chappalear called Wadsworth, and told him that he was very embarrassed. I believe he said this was the first time he had ever been turned down by the committee on something which he had recommended, but that they were not going to get into this situation, and he said that [1265] this is one you couldn't reopen with a crowbar. There is no point in coming back.

Q. And Wadsworth told you this on the 26th of May; is that correct?

A. Wadsworth told me this—I don't know exactly when. He didn't tell it to me on the 26th of May, because I was in Seattle that day. I believe, in fact, he first told Mr. Leslie, and Mr. Leslie told me at some subsequent date. I don't remember exactly when I discussed it with him myself.

Q. But some time before the 29th?

A. I am not sure that I discussed it with him myself before the 29th. As I say, I am quite sure that I first learned about it through Mr. Leslie.

Q. I understood you to say that on the 29th you were telling Mr. Keehn that the Prudential had been frightened off?

A. Yes.

Q. So somebody had told you that before the 29th?

A. Yes. Mr. Leslie told me the day it happened, which was either the 23rd or the 24th.

Q. You just said that you were aware of several requests by the Prudential—about the requests on the voting trust, and how it could be terminated.

[1266] A. All I can recall at this point is that they spoke to Ted Wadsworth, and wanted some information relative to it. I believe he called Mr. Leslie, and I learned of it through Mr. Leslie.

Q. Do you know what Mr. Wadsworth told the Prudential?

A. I think I did know. I am quite sure I did not. I can't bring to mind at the moment just what the point in issue was. I knew it at the time.

Q. How long had the Prudential been interested in participating in this financing?

A. I don't know exactly. Ever since I got into the picture they had been considered a party to the financing.

Q. Is there a question in your mind but that the Prudential had been aware for some time as to the existence of this voting trust?

A. There is no question about that.

Q. Have you any reason to believe, or did anyone ever tell you that the Prudential withdrew from this possible participation because of the possibility that the Hughes Tool Company might re-finance the 1960 financing, and thereby terminate the voting trust?

A. No.

[1267] Q. Did anyone ever tell you as to why the Prudential was so interested for detail information as to the circumstances under which the voting trust could be terminated?

A. I had the impression that they had before them, and were concerned with the question of whether the voting trust was sufficiently copper-riveted that they would be prepared to take the plunge in face of the fact that there seemed to be a controversy developing.

Q. So you understood that the Prudential was interested in a copper-riveted voting trust?

A. That is correct.

Q. Who told you that?

A. Mr. Leslie and/or Mr. Wadsworth.

Q. Mr. Sessel?

A. No, I don't believe I talked of this with Mr. Sessel.

Q. Did you ever make an effort to communicate with the Prudential to urge them to consider continued participation in this financing?

A. I personally?

Q. Yes.

A. No.

Q. Did you have any particular conversation with [1268] anyone to act on behalf of TWA, to make efforts to persuade them to remain interested in this financing?

A. I can't recall, Mr. Davis, whether my conversations were solely with Mr. Leslie or with Mr. Leslie and Mr. Wadsworth, but I know it was Mr. Wadsworth's strongly expressed opinion that there wasn't any chance of reopening the thing.

I think, as a matter of fact, he did have some further conversations the next day, and his advice was that this was a completely closed matter, and "You might as well forget about it."

Q. I don't understand what you mean by reopening the thing, and something being a closed matter, Mr. Tillinghast. Could you explain what it meant to you, if that was the expression used by Mr. Wadsworth?

A. I have already several times said that Mr. Wadsworth was told this was something you couldn't reopen with a crowbar.

Q. What thing was something which couldn't be reopened with a crowbar?

A. The Prudential turndown.

Q. Did he explain to you what brought about this change of mind on the part of the Prudential who had been interested in this thing since before you became [1269] president, and this turndown?

A. Yes. He said that in his opinion it was the fuss being kicked up by Hughes Tool Company.

Q. By that you mean the request for the extension of time—what you described from May 11th until the registration statement became effective on the 24th?

A. Yes, the sequence of events. I am talking principally about the position which you took on the 17th of May.

Q. Before the board of directors?

A. And the SEC.

Q. And the SEC?

A. Mostly the SEC.

Q. And you were told by Mr. Wadsworth that it was the efforts made by the Tool Company to raise $100 million in cash through a secondary offering that closed the door down tight, that could not be reopened? Is that your testimony?

A. No, it is not my testimony.

Q. What is it that Mr. Wadsworth told you to explain to you, as chief executive officer, as to why the Prudential, who had been interested in this financing for some time, some time prior to the time you even took office, in this period of May, the thing was closed, [1270] could not be reopened, and forget it. How did you satisfy yourself that was a fact?

A. To my mind, Mr. Davis, the likelihood of this was so obvious, that I didn't go around asking questions such as "Do you think financial institutions are some times scared away by controversy?" Of course, they are. It was perfectly obvious what the problem was, and I have no doubt you intended it to be that way.

Q. Let us state on the record the fact which made it so obvious. Assume for the moment I don't understand the obvious facts as readily. Will you please do that for me? What was it that was so obvious to you, that the Prudential Insurance Company should have withdrawn from its participation in this financing between May 11th and May 24th?

A. All I can say, Mr. Davis, is that my experience makes it sort of self-evident to me, that financial institutions prefer frequently not to put large amounts of money into situations which are fraught with controversy.

Q. What controversy was in existence between the Tool Company and TWA during this period we are talking about? At this point, Mr. Tillinghast, let me remind you that unless you are looking into a crystal ball, [1271] you had no idea of what was going to develop subsequently, did you?

A. I had a suspicion that turned out to be frighteningly accurate.

Q. Do you think the Prudential had the same crystal ball?

A. I suspect they had enough foresight to suspect some of the things that might lie in store.

Q. The effort of the Tool Company to re-finance and terminate the voting trust?

A. No.

Q. What controversy were you expecting, or you understood the Prudential was visualizing, as a result of the request made by the Tool Company through Merrill Lynch on May 11th for an opportunity to arrange some $100 million, and turn this interim note from the 1960 financing into cash?

A. That is not what I am talking about.

Q. Let us put it on the record.

A. Let me finish. What I am talking about is the letter you wrote to the SEC on the 17th, I believe, of May, which contained numerous charges, and was well publicized in the papers, and certainly was fraught with controversy.

[1272] Q. Let me hand you now Defendants' Exhibit 12. Please indicate the portions of that letter which you considered to be these "numerous charges," which in your judgment was the basis for the Prudential withdrawing from this financing.

A. Mr. Davis, beginning on page 11 of this letter where it says:

"Mr. Davis, who is approving this letter, states that based upon every fact known to him to date, including conversations had with Mr. Howard Hughes, and other representatives of the Tool Co., the position being taken by the Tool Co. is not a device or an effort on the part of the Tool Co. to interfere with the offering contemplated by TWA to its common stockholders."

Beginning with that sentence, and reading on through the following paragraphs—and I will try to pick up here where to stop—but the part to which I am referring is that part commencing where I just read, and continuing on—

Mr. Davis: May I suggest while the witness is looking at this, a recess be taken. Perhaps the witness, with the assistance of his counsel, will be able to identify the portions of the letter [1273] more readily.

The Special Master: Let us take a seven-minute recess.

(Whereupon, a short recess was taken.)

The Special Master: Do you want the question read to you?

By Mr. Davis:

Q. You were in the process of identifying—

A. I want to get the question accurately, so I can give you an accurate answer.

(The question was read.)

A. Continuing on to the end of the letter.

Q. Did anyone tell you that it was those portions of the letter which frightened the Prudential?

A. No.

Q. This letter was addressed to TWA and the SEC, was it not?

A. Correct.

Q. And it is dated May 19th, and presumably was mailed on or about that date. Do you know when you received your copy?

A. I presume my copy would show that it was the next day or so. You say it was mailed on the 19th, which was a Friday.

[1274] Q. Actually, it was not until Saturday, because if you will recall, your counsel indicated anxiety of receiving it as soon as possible. The SEC required it be done in 24 hours, and the operation was a little behind schedule.

A. I think I probably first saw it on Monday, the 22nd.

Q. And it is addressed to TWA, to your attention, and to the SEC, the attention of Mr. Hocker?

A. That is correct.

Q. Do you know or can you explain how this letter came to the attention of Prudential?

A. Not specifically, Mr. Davis, no.

Q. What is your information as to how it got to the attention of Prudential? May I suggest to you perhaps Dillon, Read sent it to them?

A. I just don't know, Mr. Davis. I would just be guessing.

Q. If you received this letter on Monday, the 22nd, I thought you testified that you heard the reaction from the Prudential about the 24th of May, didn't you?

A. That is correct.

Q. And you have no information whatever as to how this letter got into the hands of the Prudential so [1275] as to frighten them?

A. Mr. Davis, I don't know whether this letter, as such, got into their hands. At the moment I have no recollection of any knowledge as to whether it did. It may have gotten to them, or excerpts from it may have gotten to them through the revised registration statement, because, as you will recall, portions of this were—

Q. In the registration statement?

A. Yes.

Q. That was by reason of action between counsel for TWA and the staff of the SEC, wasn't it?

A. That is correct. They may have read about it in the newspapers. At this particular point in time I just can't tell you how they learned about it, but I am quite sure that they were aware of it.

Q. Do you know who, if anyone, undertook to make a copy of this letter available to the other lending institutions, other than the Prudential?

A. Well, at this particular sitting, I can't say positively that a copy of it was made available to them, but I presume that at some point along the line they obtained copies.

[1276] Q. When you had this meeting on the 29th, was Mr. Keehn and Mr. Hagerty, or their associates, who were present, had they seen a copy of the letter? Did they comment upon it?

A. I am sure they were aware that a letter had been sent, and were generally familiar with its contents. Whether they had actually received copies of the letter, I would have difficulty in saying at this point.

Q. Mr. Tillinghast, if you considered the letter to contain statements which to you seemed obviously interfering

this serious financing program, are you certain that you did not make any inquiry to discover as to how this damaging letter got into the hands of the financial institutions?

A. I am sure that I didn't make any inquiry. It may well be that at the time I knew whether it had gotten into their hands, and if so, how it had gotten into their hands.

Q. But it was not an important fact so far as you were concerned?

A. The important fact was they did know about it, and indeed properly they should. Whether they had exact copies, which parts of it they read, wasn't a [1277] matter of any concern at all to me. We had a controversy on our hands. It was well known, and that was the important circumstance.

Q. I believe we started this line of questioning, Mr. Tillinghast, because I was trying to find out what had been discussed between you and certain other people.

A. Yes, sir.

Q. This feeling of yours that the Tool Company was attempting to interfere with something or other. I would like you to address yourself once more to that meeting of May 29th in Mr. Keehn's office, and those there present, and ask you if you can recall anything else that was said by anyone at that meeting, either agreeing with your statements, as you have testified to, or disagreeing to portions of it, or making any comment whatever.

Would you like to have your previous testimony as to what you said at that meeting read back to you?

A. No. As I said before, Mr. Davis, Mr. Wadsworth and I and Mr. Keehn did most of the talking. As I recall it, Mr. Leslie had very little to say. Mr. Sessel commented on what he thought the banks would be prepared to do in order to increase their participation.

[1278] At the moment I can't recall anything significant that was said over and beyond that to which I have already testified.

Q. You then went to Mr. Hagerty's office?

A. That is correct.

Q. Who attended that meeting?

A. Mr. Wadsworth, Mr. Sessel and I.

Q. And who was there from the Metropolitan?

A. As I testified before, Mr. Hagerty and Mr. Jenkins.

Q. I gather from your prior testimony that that was a relatively short meeting?

A. My recollection is that it lasted just about exactly half an hour.

Q. Will you describe what took place, what was said by you or Mr. Wadsworth, Mr. Hagerty or Mr. Jenkins?

A. Well, as I recall it, I made substantially the same statement to Mr. Hagerty as I made to Mr. Keehn, pointing out what I considered the importance of supporting TWA in its efforts to acquire the flight equipment which it considered that it needed.

I alluded to the problem that was presented by the withdrawal of the Prudential.

[1279] Mr. Wadsworth outlined the modified proposal that he thought would be a feasible and satisfactory one.

I believe Mr. Sessel again stated what he thought the banks would be prepared to do.

Q. Without repeating what took place before the Equitable, I am interested primarily as to what was said about the Prudential withdrawing or not withdrawing, the activities of the Tool Company, the effect upon the financing—that is the area I am interested in, Mr. Tillinghast. I assume that you discussed, as you did with Mr. Keehn,

whether they would take $53.5 million instead of $39 million?

A. That is right.

Q. Now the rest of the conversation.

A. I don't at this point, Mr. Davis, recall much, if anything, that was said about Prudential, other than the fact of their having withdrawn, and our desire to find a substitute insurance company to take their place, and the impossibility of achieving this before the 31st of May.

Q. Let me hand you what has been marked as Defendants' Exhibit 22, which if you will recall, are the notes of the telephone conversation between Mr. Kerr [1280] and Mr. Gordon of the Bank of America, on May 16, 1961, and direct your attention to what appears at the bottom of those notes, beginning with the line which reads "Ben"—referring to Ben Sessel—"this is only one reason why Hughes wants money—to buy out a voting trust. Crown might come up with balance of money. Dillon, Read and other"—something "banks, three insurance companies (including Prudential), plus Ben, and Bob Kerr attended meeting with lawyers for lenders and TWA lawyers. Meeting was to determine that insurance companies were together on major points of 1961 financing."

"Choate"—who is Choate, is he counsel for Irving?

A. He is counsel for the group of banks.

Q. "Choate says he would not approve anything that would not preserve the voting trust."

That would seem to indicate, Mr. Tillinghast, that Mr. Sessel, based upon some information he obtained as to the approach that had been made by Merrill Lynch, indicated the possibility that Hughes may want to buy out the voting trust, doesn't it—at least somebody thought that?

A. Yes.

Q. You were not unaware of that, were you—of [1281] that possibility?

A. I have already testified to that.

Q. And Dillon, Read and other banks, and the three insurance companies, including Prudential, and Ben and Bob Kerr, attended a meeting. You were not aware of that?

A. I am sure I was aware of it. The lawyers were working on the detail of the agreements with the financial institutions, and I gather this was a meeting for that purpose.

Q. This was obviously sometime on or before May 16th, wasn't it?

A. I would think so, yes.

Q. That was before any letter on behalf of the Hughes Tool Company, that contained any nasty implications, isn't that right?

A. Yes.

Q. There was a meeting with lawyers for lenders. Who were the lawyers for the lenders?

A. I am not sure that I know, Mr. Davis. I think probably someone from the Cravath firm for the insurance companies, and Choate, or someone from his firm for the banks.

Q. Who were the TWA lawyers?

[1282] A. I presume Mr. Rowe, or one of the partners or associates.

Q. Anyone else?

A. I don't know specifically who was there.

Q. There was a meeting—the meeting was to determine that the insurance companies were together on major points of 1961 financing. Was that a meeting held without your knowledge, acquiescence, or any information as to what that meeting was about? Were there any reports on the meeting?

A. A whole series of meetings were going on about this time, and about the only thing I knew about them was that the lawyers and people working on the detailed negotiations were meeting and trying to work out the deal.

Q. At that meeting the Irving Trust was represented, wasn't it?

A. All I know is what appears from here.

Q. And the Irving Trust was aware of the possibility that Hughes might want some money to buy out the voting trust, isn't that a fact?

A. Mr. Davis, you can read this just—

Q. I am asking about the facts you were aware of, Mr. Tillinghast. After all, you were the chief [1283] executive of TWA.

A. I have no knowledge specifically about this meeting, or what Mr. Kerr told somebody at the Bank of America.

Q. And Choate says that he would not approve anything that would not preserve the voting trust. Are you quite sure that Mr. Sessel, the Irving Trust, or someone explained to you as the chief executive officer of TWA, that the condition of this new financing was on the condition of a preservation or continuation of this voting trust, and that anything that might happen or give the likelihood that the Hughes Tool Company might "buy out the voting trust" would jeopardize or adversely affect the Boeing program?

A. You include several things in there, but I was never told by Mr. Sessel, nor as far as I can recall by anyone else, that the buying out of the voting trust by Hughes would jeopardize this financing.

From the first time that the subject of the voting trust in connection with this financing was mentioned, it was my understanding that the financial institutions would insist on some sort of a voting trust protection, so long as the financ-

ing was outstanding. But beyond that, the answer to your ques- [1284] tion is no.

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[3626] The Special Master: There is this problem, Mr. Davis, that in accordance with Judge Metzner's order, after certain depositions are taken, one of the depositions scheduled is that of Mr. Hughes.

If he is not served—there is the problem of getting that accomplished. On the other hand, if it is within my power, the power of the Federal Court, and my appointment as Special Master, to see that that service is accomplished before the day arrives rather than have to wait until that time, I have the problem now of whether I should do anything to interrupt in order to accomplish that.

I am not sufficiently knowledgeable to know the full extent of the power of the Special Master in that area.

On the other hand, as I have said, I am not disposed to just let an important individual, insofar as he might be able to contribute to the facts in this matter, just avoid participating at his will, if the Court has the power to make it otherwise.

I think probably the best way is to proceed [3627] with Mr. Tillinghast's deposition, and for anyone who cares to, of any of the parties to the litigation, to submit a week from Monday briefs as to whatever authority the Court has to demand from the Hughes Tool Company, or anyone else over which it has such power, the present whereabouts at any particular time of Mr. Howard Hughes, so as to be of assistance in making it possible to take his deposition in accordance with the Court's order—I think that will permit us to go ahead, and then we will all have an opportunity to develop the law in regard to the rights.

Mr. Davis: I have no objection to that, Mr. Rankin, of course. I am merely trying to point out at this time that when these discovery proceedings commence, at that time Mr. Sonnett will be in a position to examine officers of the Tool Company, and I assume that a proper area of discovery would be the location, if known, by those individuals, or which individual would be likely to know who is a person subject to the jurisdiction of the Tool Company.

The point I am making now is, and I am sure [3628] it is not always intentional on the part of counsel of TWA, is to, in effect, interfere with the priority which also has been established, much more clearly, than the suggestion that the Court order the deposition of Mr. Hughes.

It merely recognized that a notice for the taking of Mr. Hughes' deposition as a witness was served, and that deposition, together with any other deposition of the Hughes Tool Company, was to await until the Hughes Tool Company had an opportunity to complete its discovery proceedings.

While we recognize the importance of dates and the necessity of proceeding expeditiously, we are doing everything but that, through the device of interrupting at all possible occasions the oral examination which the Hughes Tool Company has a right to pursue and continue.

The only thing which the Court has done, that I am aware of, to this date, has merely been to provide, contrary to the usual practice, but for reasons which undoubtedly existed here by reason of what was asserted, that it was essential and important to furnish this plaintiff and these additional defendants—the Court with respect to [3629] this plaintiff, and the Special Master's ruling with respect to additional defendants—with documents, so that they could adequately prepare themselves and participate in these oral examina-

tions which are now being conducted by the Hughes Tool Company.

In one way or another, and ever since this complaint was filed, counsel for TWA has been seeking ways and means to upset or defeat or frustrate the orders of this Court with respect to the priority which the Hughes Tool Company has obtained in this discovery proceedings, and that is what I am objecting to.

I have no objection whatever, of course, to any time the Special Master wishes a particular point of law to be briefed, to undertake to do so, within the time allowed for the preparation of such briefs.

But I do respectfully submit that there is a point in what Judge Bromley said this morning, that we are continuously spending time in diversions.

I think it would be helpful if we all could agree that having produced the documents that were required to be produced, and I do not know [3630] why the Hughes Tool Company should be treated differently than anybody else with respect to the production of documents—we now have done that, however long it may take Mr. Sonnett to complete his microfilming process—and now let us return to where we were, without taking away from the Tool Company the right to conduct its oral examination, and complete it before counsel for the Tool Company has to go into fishing expeditions—whether on or off the record—it is interfering with what I am required to do.

I do not understand why I should be required to take the time of myself or my staff to make a lot of inquiries of all the employees of the Hughes Tool Company to find out if anybody knows where Mr. Hughes is.

Mr. Sonnett: I think there is a very good reason why counsel should do exactly that.

I think it is about time that counsel came to grips with the problem that the Federal Court has the power to enforce and protect and secure its jurisdiction.

A lot of tougher guys than Howard Hughes learned that, including John Lewis, when the [3631] Court dealt with his attempt to thumb his nose at Court orders.

I refer to page 3455—the master said you communicate with Mr. Hughes and get Mr. Hughes to respond in writing, after he has seen a certified copy of the order, whether he has documents or not.

The only communication sent to Hughes was sent to 7000 Romaine, and Hughes is not there.

This is illusory. If counsel is going to communicate with Hughes, I want a copy of the communication, and it ought to be sent to where Hughes is.

That will solve the problem. If he does not know how to reach him, let him say so.

If counsel is willing to represent that nobody at Hughes' company knows where this man is hiding, let us have it out on the table, and then I feel warranted in continuing to spend thousands of dollars trying to find him.

But a lot of this money is minority stockholders' money. It is not just Hughes' money. I think it is time we came to grips with the real problem.

[3632] What happens here is a delaying battle by Mr. Davis. He says he does not represent Hughes, but represents the corporation—with the idea of keeping this man beyond reach of Federal process.

I think when the Master directs counsel to communicate with Mr. Hughes, counsel has got to communicate with him effectively. I think it is that simple.

I think if Hughes Tool Company knows where he is, they should be obliged to tell.

Mr. Hughes will be represented by able counsel in due course in this case, whether Mr. Davis or somebody else.

His rights are not being offended by Hughes Tool Company being required to disclose where he is, so that the process of the Court can be brought to bear.

The Special Master: I will take that question up right after I receive the briefs a week from Monday.

Mr. Sonnett: Yes, sir.

Mr. Davis: So there will be no question on the record with respect to the activities of [3633] counsel, by addressing communication to 7000 Romaine Street, is the only way that I know of to make a communication available to Mr. Hughes. There is no mystery about anything.

It is where messages or communications are to be addressed, and when Mr. Hughes, who was known for years to have been a person who does not necessarily stay in one place any particular length of time—when he calls in and finds out what messages are there for him, and what other communications, and then, through some courier arrangement, sends somebody and picks it up. There is no particular mystery about it.

I just want to make it clear in addressing the communication which I did address, which, by the way, is not the one Mr. Sonnett is referring to, because the communication I addressed to 7000 Romaine Street was the one pursuant to the instruction of the Special Master, I sent a notice to Mr. Hughes inviting him to participate in these depositions, as I recall it. I stated this morning, as counsel for TWA well knows, that I have not purported to take any steps whatever with respect to whatever directions were [3634] given by the Special Master last Tuesday. I will attend to it just as soon as I have an opportunity to do that.

The Special Master: I shall assume that the communication directed to 7000 Romaine Street in Los Angeles to Mr.

Hughes got to him, unless he comes into court under oath and establishes that he not only did not get it, but also that he did not have a reasonable opportunity to get it.

Mr. Davis: You may rest assured, Mr. Special Master, that the communication will reach Mr. Hughes.

The only problem I have is when it may reach him. It may not reach him the day that it arrives at 7000 Romaine Street, but at some point in time, it will reach Mr. Hughes.

* * * * *

[3640] *Examination (cont'd) By Mr. Davis:*

Q. Mr. Tillinghast, before the luncheon recess you indicated that if you were given the opportunity to do so, you might be able to refresh your recollection as to the persons with whom you might have discussed in a serious manner the contents of the letters of June 10th and June 9th, which have been marked as Defendants' Exhibits 56 and 57. Have you had an opportunity to think the matter over?

A. Not any substantial opportunity, Mr. Davis. Most of the time I was away from here was spent in discussing other matters, and as a consequence I do not have any materially different recollection than [3641] I had before.

Q. Do you think it is possible that you might have had a serious discussion with respect to the contents of these two letters and not recall it at this time?

A. Quite possibly.

Mr. Sonnett: I take it that question does not mean a serious discussion of these letters at lunch today, just so we are clear about it. I take it the witness so understood.

The Witness: That's right.

By Mr. Davis:

Q. Do you have Defendants' Exhibit 56 before you?

A. I do.

Q. Do you recall the other day you were explaining the reasons why you felt that this letter or portions of this letter constituted an interference, an improper interference with the affairs of TWA?

A. I recall that I testified regarding that.

[3642] Q. Referring to what has now been marked Defendants' Exhibit 56, which is the letter of June 10th, but which has your marginal notes, I first find on the top of page 3, in connection with the sentence which reads—at the bottom of page 2—"Hughes Tool Company is prepared to place in escrow securities of a value commensurate with such undertaking, which would be forfeited in the event that Hughes Tool Company fails to perform in accordance with any obligation it undertakes pursuant to this proposal."

Do you see that sentence?

A. Yes.

Q. In the margin you have a line and the note "What securities?"

Do you see that?

A. Yes.

Q. That is in your handwriting?

A. It is, all of this is in my handwriting.

Q. At the top of the page you have "Securities of TWA —listed securities."

I take it that those notes were made at the time that you received this letter, and before you had any discussion of the letter with anyone, [3643] isn't that correct?

A. I wouldn't say before I had any discussion of the letter with anyone, Mr. Davis. As I recall the circumstance

when this letter came in, before I had had a chance to read it carefully, and I think make these notes, there were very brief discussions with Mr. Cocke and Mr. Leslie merely of the fact that a letter had come in. It may well be that those discussions preceded the making of these notes. I believe these notes were made before I had any discussion of the substance of the letter with anybody.

Q. You mean you heard from Mr. Cocke and Mr. Leslie, or you mentioned the fact to them that such a letter had been received—this might have happened before you began to study the contents of the letter, is that what you mean?

A. That is what I said, yes.

Q. My question to you is, these notes which I have just referred to you, were made by you the first time you sat down to consider the contents or merits or lack of merits of this letter?

A. I believe they were made the first time that I read the letter carefully.

[3644] Q. And that was before you had any of these personal or telephone conversations with Mr. Rowe, Mr. Reed or Mr. Leslie, or posibly Mr. Breech?

A. Having to do with the substance of the letter.

Q. Having to do with the substance of the letter?

A. Yes.

Q. Can you explain, or does this refresh your recollection as to what these two notes I have referred to mean?

A. I was just curious as to what securities were being talked about, and whether they were securities of TWA, whether they were the subordinateds, debentures, or whether they were other securities such as listed securities.

Q. In other words, at the time that you began to seriously consider this proposal No. 1, you were interested in whether or not—or what the Hughes Tool Company pro-

posed to do by its statement that it would put in escrow securities of a value commensurate with the undertaking described?

A. Yes. What I had in mind, as I recall it, was that there would be a substantial difference between TWA's own securities, and, for example, listed securities, which were independent of and [3645] had a value independent of TWA and TWA's securities.

Q. TWA's securities are listed, are they not?

A. Yes, these particular ones were.

Q. The TWA common stock is listed?

A. Yes, Mr. Davis.

Q. The debentures which have been issued in May of 1961 were listed?

A. Yes.

Q. The warrants that were issued in connection with those income debentures are listed?

A. Yes.

Q. But you were, as I understand your testimony, interested in the difference between the possibility of escrowing TWA securities, or some other kind of listed securities?

A. Yes, I had two questions. I believe one is whether we were talking about securities of TWA, and whether we were talking about listed securities. What I had in mind was the question of what in the event that we entered on such program, and there was a default, what we would have by way of security.

Q. Do you think that was important for you or for TWA to determine what kind of securities the Tool Company was prepared to put in escrow as [3646] security for the performance of any undertaking it was making?

A. I think anyone who is taking securities in escrow, would be curious as to what securities he was taking.

Q. Did you make any inquiry as to what securities the Tool Company contemplated placing in escrow?

A. I would have to refresh my recollection by looking at the letter, but my recollection is that in my reply to this letter I raised that question.

Q. You mean you would like to look at a letter which you wrote in reply to this letter? Is that what you mean?

A. I said if my recollection is correct, I referred to this in a letter which I wrote in response to this letter.

Q. I am asking you to describe or identify what you did to determine what securities the Tool Company contemplated placing in escrow. Is your answer that the only inquiry you made was whatever you said in a letter which you wrote in response to this?

A. That is my recollection.

Q. You don't recall what the inquiry was?

[3647] A. Yes, I recall what the inquiry was. If I am correct it was an inquiry made in my letter.

Q. Do you know what the nature of the inquiry was?

A. What securities were contemplated.

Mr. Davis: May I have marked for identification as Defendants' Exhibit 58 letter dated June 16, 1961 from Mr. Tillinghast to Mr. Holliday?

(Letter dated June 16, 1961 from Mr. Tillinghast to Mr. Holliday marked Defendants' Exhibit 58 for identification, as of this date.)

Q. Let me hand you what has been marked as Defendants' Exhibit 58, being a letter dated June 16, 1961, addressed to Mr. Holliday, and ask you if that is the letter to which you have reference?

A. Yes, that is the letter. I see here on page 2 a paragraph marked "A" covers this.

Q. I notice that this letter was addressed—a blind copy was sent to Mr. Breech, Mr. Olds, and Mr. Reed, and a copy to Mr. Rowe. Do you see that at the bottom of page 5 of the letter?

A. Yes.

Q. Had you discussed with either of those [3648] gentlemen your reply, or this letter of June 16th, Exhibit 58, before sending it?

A. I have the recollection, Mr. Davis—I am not positive of this, but I think I sent a draft of my letter to each one of these individuals, and to each of the directors.

Q. A draft?

A. A draft.

Q. Do you recall about when?

A. It obviously would have been between the 12th and 16th. I would guess on the 13th or 14th.

Q. Do you know what happened to those drafts?

A. No, I don't, Mr. Davis.

Q. Do you have any recollection of having destroyed the draft?

A. I am sure I didn't.

Q. Your recollection is that you sent that draft to each of the directors, with the possible exception of Mr. Holliday?

A. I think that is right, Mr. Davis, yes.

Q. You did not send a copy of that to Mr. Holliday?

A. No, I don't think I sent a copy to Mr. Holliday.

[3649] Q. But to Mr. Leslie and Mr. Cocke?

A. I believe to all of the directors.

Q. When was the last time you saw that draft?

A. I would guess about the 16th of June.

Mr. Davis: Mr. Special Master, I realize this witness has not personally assumed the responsibility,

quite understandably, of the production of documents. I wonder if the question could be addressed to counsel for TWA as to whether or not they are satisfied that any draft which may be in existence, either in the files of Mr. Leslie or Mr. Cocke, or anywhere else, is still in existence.

I am informed that we did not receive any such draft.

Mr. Sonnett: I cannot answer that without making inquiry. I will make inquiry.

May I note on the subject of Mr. Holliday, that this was apparently—what the witness is describing is the draft of a reply to a letter which Mr. Holliday sent, to, among others, himself as voting trustee. It would be strange to send Mr. Holliday a draft of a proposed reply to Mr. Holliday's letter. However, we will [3650] make inquiry.

I don't know whether the drafts were produced or are available. If they are, they certainly will be.

A. Let me say, Mr. Davis, that I have the impression that drafts of letters that turned into final letters are rather regularly disposed of in the normal course, and are not kept permanently in the file. If I am correct in my recollection, however, there should be a covering letter.

Q. That is what I am looking for too?

A. Sending the draft to the directors.

Mr. Sonnett: You needn't ask if there are covering letters. We will produce those too if they are around, and haven't been produced.

The Special Master: All right.

Q. Do you recall receiving any comments from anyone with respect to this draft that you circulated to all the directors?

A. I am sure I received a few comments. My recollection is, Mr. Davis, that there were not very many. Maybe if I glance at this—

[3651] Please do, because my next question was going to be to ask you to describe what change of any substance you recall was made between the draft and the letter that was actually sent.

A. One comes to mind, Mr. Davis. Referring to page 2 of Defendants' Exhibit 56, and particularly to that portion, the last sentence of the page, which reads "Should you question the ability of Hughes Tool Company to perform, or its good faith in submitting the offer represented by this proposal."

My recollection is that my first draft of this reply contained a slightly sarcastic remark to the effect that I was not surprised that you would raise a question as to whether we thought this was in good faith.

Mr. Reed suggested that it was not an act of statesmanship to be smart or sarcastic.

Q. Do you recall any other change that you might consider a change of any substance?

A. It is my recollection that the first full paragraph on page 3, which reads "You are mindful," and so forth—

Q. Which letter are you referring to now?

A. Defendants' Exhibit 58. —was suggested [3652] by someone else, I think by Mr. Leslie, but possibly someone else. My recollection is that the following paragraph relating to the approval of the Civil Aeronautics Board was somewhat expanded and elaborated as a result of suggestions from others.

Q. Do you know who?

A. My recollection is that that came from counsel, but I wouldn't want to be positive. In a quick reading through of Exhibit 58, Mr. Davis, those are the only changes that occur to me at this time, although I wouldn't want to represent that I recall this exactly enough to say those were the ones.

Q. Those are the only changes in substance which come to your mind?

A. That's correct.

Q. Do you recall the nature of the remark that you originally contemplated making, which Mr. Reed suggested might better be eliminated?

A. I don't remember it exactly, Mr. Davis. I remember at the time I thought it was rather well phrased, but at the moment all I can recall is that if was something to the effect that I wasn't surprised that you would recognize the possibility that we [3653] might question the good faith of Hughes Tool Company in submitting this proposal.

Q. Did you have any question in your mind as to the ability of the Hughes Tool Company to perform, as distinguished from its good faith?

A. I had some question, yes, Mr. Davis. When I say that I don't mean, as I recall it, that I had substantive information that entitled me to have an opinion that they couldn't perform, but there was an obvious question in my mind as to whether in fact they could perform and would perform.

Q. But there was not such a question in your mind that caused you to question it in your response or in your discussions with others, is that correct?

A. I didn't question it in my response. I don't recall particularly questioning it in my discussions with others.

Q. At that time you were aware of the securities of TWA, at least, which were held by the Tool Company, were you not?

A. Yes, I was.

Q. Did you have any idea what the market value of those securities were at the time that you were considering this letter, namely, on or about June [3654] 10th or June 12th?

A. No, I can't bring that to mind, Mr. Davis, except I recall that during this period they were slipping in value. The market, as I recall it, was shrinking fairly rapidly.

Q. Do you recall when in fact the offering was made of these debentures?

A. The offering had been made the latter part of the preceding month.

Q. Do you recall when the closing was had with respect to those debentures?

A. I don't recall when the closing was had, but I think the debenture offering—the offering became effective about the 24th or 25th of May.

Q. But that was when the registration statement became effective. I am talking about the closing. Don't you recall, Mr. Tillinghast, that there was some question, and a great deal of correspondence you referred to, as to whether or not there should be some delay in the closing so as to permit full and adequate consideration of proposal No. 2, namely, the subscription of another $11 million of debentures?

A. Yes, I do, Mr. Davis, but if I am not mistaken, the debentures with warrants attached were [3655] admitted to trading, and were being quoted in advance of the closing.

Q. I understand that, but I am trying to understand your testimony with respect to the value of TWA securities had begun to slip on or about June 10th or June 12th,

and I am trying to address your mind to the offering price that had in fact been paid by the public at or about the time of the closing, as distinguished from at or about the time of the offering.

A. I remember, Mr. Davis, that when they were first offered and admitted to trading, they were selling on a when-issued basis at a substantial premium, and by the time the subscription period was complete, that premium had disappeared, and they continued to go down.

From almost the day they were quoted first, they appeared to go down, and at this point I can't relate exactly to you in relation to the 12th of June.

Q. You recall, do you not, that at closing, Hughes Tool Company was going to surrender a $100 million interim note, and receive subordinate debentures in the face value of $100 million?

[3656] A. Yes.

Q. And those debentures had just been offered to the public pursuant to a registration statement by TWA at par, isn't that right?

A. No, they weren't offered to the public, Mr. Davis.

Q. As to the stockholders?

A. Rights to subscribe were offered to the stockholders.

Q. The right to subscribe at par?

A. The right to subscribe at par, that's right.

Q. Approximately $18 million to $20 million of those debentures were in fact subscribed for by the minority stockholders, or the public to purchase rights?

A. That's correct.

Q. And subscribed to those debentures at par?

A. That's right.

Q. Did that indicate to you that at or about that time the Hughes Tool Company received the securities or cash of a value of approximately $100 million?

A. I am sorry, I am not sure I understood your question

[3657] (The question was read.)

A. The Hughes Tool Company didn't receive cash. The Hughes Tool Company surrendered a note for the securities.

Q. And the cash. Isn't it a fact, Mr. Tillinghast—you seem surprised.

A. That's right.

Q. Isn't it a fact that all of the cash realized by the subscription from the public, of approximately $18 million to $20 million was to be paid to the Hughes Tool Company in reduction of the note, or the interim note?

A. That's correct.

Q. And the balance the Tool Company had agreed to accept these subordinated income debentures?

A. Right.

Q. Which had just been offered to the public, through rights offered to the stockholders, which rights offerings were traded to the public?

A. That's correct.

The Special Master: How about a little recess?

(Whereupon, a short recess was taken.)

[3658] By Mr. Davis:

Q. At that time you knew, did you not, that the Tool Company also held approximately 78 per cent of the outstanding common stock of TWA?

A. That is correct.

Q. And is it correct that at that time the market price was in the neighborhood of $20 a share?

A. That would be approximately so, yes.

Q. Did you know at that time about how many shares the Tool Company owned of TWA stock?

A. Yes, I did.

Q. What was that?

A. You mean the numerical number of shares?

Q. Yes.

A. It was five million odd out of six million six outstanding.

Q. The market price of $20 a share—did you go through that mental computation at least when you made that note "Securities of TWA, listed securities"?

A. I am not sure I went through the complete mental process, Mr. Davis, but the question in my mind as to whether or not, and it seemed to me quite significant in its context—whether or not you were talking about seccurities of TWA, which in the event of a default on the under-[3659]taking to subscribe additional equity would depreciate very substantially in value, or whether they related to negotiable or listed securities which would not be affected by any default, and would therefore be a better security than TWA's own securities.

Q. I appreciate that, but at the moment I am directing myself more to the doubt in your mind, or whatever was in your mind, as to the ability of Hughes Tool Company to perform what it was proposing or undertaking to do.

Isn't it a fact that 5,200,000 shares, more or less, of TWA common stock at that time represented marketwise, at least, something in excess of one hundred million dollars?

A. Yes.

Q. And that would be one hundred million dollars worth of securities in addition to the one hundred million dollars of cash and income debentures that the Tool Company had

received at the closing which took place in the early part of June?

A. That is correct.

Q. Am I to understand from your testimony that you still had some doubts in your mind as to the ability of the Tool Company to perform any undertaking described in [3660] this letter of June 10, 1961?

A. Of course, Mr. Davis, the ability of the Tool Company to perform would not depend alone on the assets it had, but would also depend on the liabilities it had. As to what the liabilities of the Tool Company were, I didn't know.

Q. Did you make any inquiry?

A. No. I remind you again, Mr. Davis, these were notes I was making as I was reading the letter and these questions were coming to my mind.

Q. I appreciate that, but at the moment I am interested in what you in fact did in connection with this letter which you received. You noted, did you not, the paragraph on the last page of Defendants' Exhibit 56, which reads "Mr. Chester C. Davis, who is empowered to discuss all or any of the above proposals, and to take whatever action is necessary to commit Hughes Tool Company with respect thereto, will be continually available to you during the next ten days."

Do you see that?

A. Yes.

Q. My question to you is, did you make any effort to communicate with me with respect to all or any of the above proposals, or any doubts or problems which you had [3661] in your mind as to the ability or good faith of the Tool Company?

A. I communicated with you, Mr. Davis, through Defendants' Exhibit 58.

Q. You mean the letter which you addressed to Mr. Raymond Holliday, at the Hughes Tool Company, the Gulf Building, Houston 2, Texas?

A. Yes, and a copy of which was sent to you or delivered to you in New York.

Q. Did you make any other effort to communicate with Mr. Davis?

A. Not that I recall.

Q. Did you ask anyone else representing TWA—Mr. Leslie, or counsel—to communicate with Mr. Davis with respect to the proposals, and the extent to which he might be prepared to commit the Hughes Tool Company, or anything of that sort?

A. No, I did not.

Q. Was this a matter of any discussion between yourself and anyone else as to the desirability of communicating for the purpose of discussing any of these proposals, or any doubts that you might have had in your mind as to the ability of the Tool Company to perform, or the good faith of the Tool Company, or anything of [3662] the like?

A. Yes, Mr. Davis. These were discussed, and I discussed them, I am sure, with Mr. Rowe and Mr. Reed principally, I think. I know it was my own judgment based on those discussions that in view of the way this proposal had been made, in view of the fact that Mr. Holliday, who had been requested by me to come in and sit down and discuss anything of interest had chosen not to do that, but write a letter of this sort, which seemed to me to be more a letter for the record than anything else. That the appropriate way to respond to the letter was to write a formal response, and that is what was done.

Q. Was that the conclusion you reached as a result of a conference or discussion with Mr. Breech or Mr. Sessel or any of the other directors to whom you sent a draft of this proposed letter of June 16th, Exhibit 58?

A. I think, Mr. Davis, it was my own initial reaction and one with which no one disagreed. I can't recall at this point with exactly whom I discussed it. No doubt I discussed it with some others, but my recollection is what seemed to be a carefully phrased letter should have a written reply.

Mr. Davis: May I have this document marked [3663] as Defendants' Exhibit 59 for identification.

(Copy of Western Union Telegram dated June 19, 1961, marked Defendants' Exhibit 59 for identification, as of this date.)

By Mr. Davis:

Q. Let me hand you what has been marked as Defendants' Exhibit 59, Mr. Tillinghast, which is a telegram from Mr. Holliday addressed to you as president of TWA, under date of June 19, 1961, and I call your attention to the lower right-hand corner, the date of June 19, 1961, and underneath that appears "President's Office."

My question is, is it a fact that is a telegram which you received on June 19, 1961, from Mr. Holliday?

A. That is correct.

Q. And that telegram stated or called to your attention that the letter of June 16, 1961 stated that Mr. Davis was authorized to discuss with you and commit the proposal of Hughes Tool Company, and refers also to another letter dated June 13, 1961, reaffirming that Mr. Davis was avail-

able to consider those proposals with you, and you received that on June 19th, did you not?

A. I received Defendants' Exhibit 59 on June 19th.

Q. You see at the bottom of that exhibit, "Copy made for C. S. Rowe, Esq.," and underneath that [3664] in handwriting "Who supplied copy of reference to C. C. Davis"?

A. Whose handwriting is that?

Q. It was not until you received the telegram from Mr. Holliday on June 19th that you took steps to arrange for Mr. Rowe to deliver a copy of that letter, isn't that a fact, Mr. Tillinghast?

A. No, it is not a fact, Mr. Davis. In fact, it refreshes my recollection that before this was received I had already asked Mr. Rowe to be sure to see that a copy was delivered to you. I note that June 19th was the Monday immediately following the Friday on which the letter of the 16th was sent out.

Q. Now that your recollection has been refreshed as to what you did with respect to seeing to it that Mr. Davis received a copy of your letter of June 16th, can you tell us what your present total recollection is as to what took place with respect to the desirability or lack of desirability of communicating directly with Mr. Davis with respect to the extent to which the Tool Company was prepared to commit itself, or discuss any of these proposals that were outlined in the letter of June 10th?

A. Mr. Davis, I don't recall any discussion of that [3665] particularly. I wrote the letter to Mr. Holliday because it was in response to a letter that was written to me by Mr. Holliday. It had been my custom that counsel communicated with counsel, and principals communicated with principals.

When I got the letter from Mr. Holliday, I considered it, I am sure without any great thought, but the normal thing was to reply to Mr. Holliday.

Knowing that you were active in this, I asked Mr. Rowe to see that you got a copy of it.

Q. There was no litigation extant at that time, was there?

A. No.

Q. When you gave the consideration which you gave to the letter of June 10th, were you aware of the fact that the letter by Mr. Holliday advised you that Mr. Davis was the person to contact or communicate with, with respect to the subject matter of the letter?

A. I know what the letter said, Mr. Davis, but as I recall it, Mr. Holliday did not suggest to me that I should reply to a letter from him to somebody else.

Q. Did anyone suggest to you directly or indirectly that it would be inadvisable for you to communicate directly with Mr. Davis?

[3666] A. Not that I can recall. I don't believe anyone did.

Q. Did you understand that there was a time limit within which the proposal could be considered, unless an extension of time was obtained?

A. Mr. Holliday's letter so stated.

Q. Referring you to Defendants' Exhibit 56, the first full paragraph appearing on page 3, besides the sentence which reads "The foregoing proposal is open for consideration by you for a period of ten days from the date hereof." Next to it you have a note "Too short."

Do you see that?

A. Yes.

Q. That is a note in your handwriting?

A. Yes.

Q. Did that indicate at the time you read the letter you felt that ten days was too short a time within which to adequately consider the proposal set forth in the letter?

A. It suggested this to me, Mr. Davis, that these proposals which you refer to were by no means complete proposals which could be accepted merely by saying yes.

They seemed to me obviously, if in good faith, [3667] at best, proposed basis for discussion.

It seemed to me abundantly apparent that ten days was nowhere nearly a long enough time within which to work out an arrangement such as was suggested by you in this letter.

Q. So that in effect you concluded ten days was too short a period of time?

A. Yes, I think I commented on that in my letter.

Yes, I said here "It clearly will not be possible to dispose of the equity financing proposal within ten days period suggestion in your letter."

Q. Did that suggest to you that if you wanted to get more time for consideration of the proposal, it would be desirable to communicate with Mr. Davis as soon as possible for the purpose of at least asking for an extension of time?

A. I was quite sure, Mr. Davis, and in fact it was the case, that we would be in communication before the ten day period expired.

Q. You are referring to the letter which you wrote to Mr. Holliday in Houston, Texas, dated June 16th?

A. Yes, a copy of which was delivered to you on the 19th.

Q. Did you understand that that was a letter pri- [3668] marily for the purpose of asking for an extension of time?

A. No, it was not.

Q. Did you give consideration as to the desirability of asking for more time to consider these proposals?

A. I felt, Mr. Davis, that if this proposal were in good faith and had any substance, that the time consideration would be quite immaterial.

Q. You have indicated in your prior testimony that you seriously questioned that these proposals were submitted in good faith.

A. I did.

Q. What facts or assumptions were you making at that time that made you question the good faith of these proposals?

A. Well, I would have to go back, Mr. Davis, and start with the matters that began on the 12th of May, or indeed I would have to go back beyond that. I would have to go back to the fact that since I had become president, Mr. Holliday had been completely unavailable and unresponsive to my suggestion that we might sit down and discuss matters of common interest.

I refer to the fact that we had this proposal for a postponement of our rights offering, a proposal [3669] which in my opinion was not a genuine proposal, but was aimed at delaying and impeding and interfering with our Boeing financing.

I had the fact to which I testified that Mr. Reed had advised me that you had told him that the matter of the Boeing purchases was something that could not be compromised.

I had in mind the fact, and this goes back to your request for an adjournment, that you had told us in effect if we would postpone our offering as requested, you would waive and forget about what you considered serious deficiencies, and if I may paraphrase, a fraud on the public, in our registration statement.

I have in mind the fact that after talking a lot about Hughes Tool Company's desire to distribute its subordinate debentures to the public as soon as that ceased to be a possible tool for delaying our registration, Hughes Tool Company showed no interest whatever in following up on our proffered cooperation for a secondary offering which could have been done quite as quickly as the offering that the Tool Company purportedly was interested in.

I am referring to the fact that prior to this time the Tool Company had made a public statement that [3670] it was considering throwing onto the market its rights to purchase the subordinate debentures which had the effect of very, very seriously unsettling the market.

To my mind the high probability was that this letter which had been written by Mr. Holliday about things which he might have come in and talked with me about, if he were genuine, was a letter designed to put us on the spot, to interfere with the progress of our Boeing program and the financing thereof.

Q. Is that all?

A. That is all I remember at this time.

Q. Do you think you could remember more if you had more time?

A. Additional circumstances might occur to me later. I think that is quite enough to indicate that I had very serious ground for suspicion, and I guess I will have to add one more here that does occur to me at this time, and that is that Defendants' Exhibits 57 contained a statement which I considered to be false and known by Hughes Tool Company to be false, and that is that TWA was under an obligation to acquire the 990 aircraft.

Q. Now, do you think you have had an adequate amount of time to fully describe all the facts and assumptions that

underlie your feeling that the proposals [3671] set forth in Defendants' Exhibit 56 were not being submitted in good faith?

A. I think I have recited enough circumstances, Mr. Davis, to provide a very clear and cogent reason for suspecting that this was not a genuine attempt to achieve an appropriate objective, but rather, an attempt to disrupt, divert and delay.

Q. At that time were you concerned with the possibility that the Tool Company might be able to carry out some of these proposals if accepted by TWA, and thereby avoid the necessity of this additional $150 million, more or less, of the 1961 financing?

A. No. I was not, Mr. Davis. I would have been very happy with any genuine program that would have brought substantial additional equity to TWA.

Q. Did you discuss these suspicions with anyone?

A. I am sure I did.

Q. Can you identify—

A. I am sure I discussed them with Mr. Rowe. I am sure I discussed them with Mr. Reed.

[3672] Q. And those were suspicions that you discussed with them following the receipt of this letter of June 10th?

A. Before and after the receipt of the letter of June 10th.

Q. You mean before you received the letter of June 10th you were suspicious of the lack of good faith of the proposals that might be contained in the letter of June 10th?

A. No, I am not saying that. I am saying that prior to June 10th I was suspicious of the Tool Company's motivations, and what they were seeking to accomplish. Prior to the receipt of this letter I had on several occasions discussed with Mr. Reed and Mr. Rowe and the directors of

TWA what the Tool Company seemed to be seeking to accomplish.

I discussed the background against which this letter of June 10th appeared.

Q. And discussing with them what seemed to you the Tool Company was seeking to accomplish, what did you mean by that? The intention to terminate the voting trust?

A. No, the abortion of the Boeing equipment purchase.

[3673] Q. Did you discuss with them your fears or feelings with respect to any possible effort on the part of the Tool Company to terminate the voting trust?

A. If you mean to terminate it as set forth in your letter, your letter of May 16th, to the Securities and Exchange Commission, or May 17th—

Q. I believe you are referring to a May 19th letter, or you may be referring to a May 26th letter.

A. The letter you wrote to the SEC.

Q. May 19th.

A. You referred there to questions as to whether there were circumstances that entitled the Tool Company to terminate the voting trust.

That letter, and that much of the termination of the voting trust was discussed.

If you are talking about the re-financing of the situation, and the termination of the voting trust through refinancing the situation, the answer is that I do not recall ever having discussed that with the directors.

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[3738] *Examination (Cont'd) by Mr. Davis:*

Q. Mr. Tillinghast, let me refer you to page 3668 of the transcript of your testimony, where you [3739] made an effort to identify the facts or assumptions underlying your

conclusion that the proposal made by the Hughes Tool Company was not in good faith. You see at line 21 your statement:

> "Mr. Holliday had been completely unavailable and unresponsive to my suggestion that we might sit down and discuss matters of common interest."

I would like you to identify the time, place and the nature of suggestions you made to Mr. Holliday prior to June 10, 1961, that you sit down with him and discuss matters of common interest.

A. I had written him a letter, Mr. Davis—I can't tell you from memory exactly when it was; I would guess it was some time in the early part of May—asking him to come in and sit down and discuss matters of mutual interest.

Q. You have reference to that one letter?

A. Yes. I think that's the only direct communication I had with Mr. Holliday.

Q. Do you have in mind any indirect communications that you had with Mr. Holliday?

A. No, I don't recall any indirect communications.

[3740] Q. So at that point in your testimony you were referring to this one letter which you believe you wrote some time in early May, is that correct?

A. Yes, although I would have to add I guess one other thing to that, Mr. Davis. At some point along in this period, and I can't tell you exactly when it was, I am sure I had one or more conversations with Mr. Reed, during the course of which Mr. Reed said that he thought it would be a good idea if I could find an opportunity to sit down and talk with Mr. Holliday, and I told him that I would very much welcome an opportunity to sit down and talk with Mr. Holliday any time that he was in town and available.

Q. That is what you told Mr. Reed?

A. Yes.

Q. Can you identify the occasion or the substance of this letter of early May to Mr. Holliday to which you are referring?

A. As I recall it, Mr. Davis, it was merely what one might call a courtesy letter, saying that I hoped he would come in and sit down and discuss matters of mutual interest. At this point, I don't remember any more about it than that.

[3741] Q. Do you recall whether or not it was a letter prior to the May 12th date, when you learned that the Tool Company was interested in a public offering?

A. I would think it was probably prior to May 12th, although I am not absolutely certain about it. I think it probably was, yes.

Q. Do you recall the circumstances which made you write such a courtesy letter?

A. No. It was merely that I thought it would be a constructive thing to do, to invite Mr. Holliday, with whom I had not had any chance to talk at all, to come in and get acquainted.

You may recall that—from my prior testimony—that on the 20th of March I had gone down to 380 Madison Avenue for the purpose of meeting some of the directors, principally Mr. Holliday, but Mr. Holliday had suddenly disappeared and wasn't available, and consequently I believe the only time I had even seen Mr. Holliday was when I made a very brief appearance at the directors meeting on the 20th of March, and since he was one of the voting trustees and a director of TWA I thought it would be a very constructive thing to meet him and get [3742] acquainted and have a chance to discuss matters of mutual interest, of which obviously there would be many.

Q. Why do you say that Mr. Holliday "suddenly disappeared"?

A. Because that is what I was told.

Q. Who told you that?

A. Oh, I can't remember specifically. I think it was Mr. Reed, although I wouldn't be positive. There were many people there on the 20th when I went to TWA. I understood, if I recall, that I was told that he had rather suddenly received a phone call and he had to go somewhere to take the phone call.

Q. I don't understand what you mean by saying that someone told you that he received a phone call and he suddenly had to take the phone call.

A. That is what I was told.

Q. Who, Mr. Reed, only Mr. Reed?

A. Mr. Davis, I wouldn't be positive who told me that. I think it was probably Mr. Reed, but there were a number of people there on that date, and I wouldn't want to say positively it was Mr. Reed.

Q. At this point, Mr. Tillinghast, I am interested [3743] in discovering your descriptive tendencies, and I would appreciate it if you would make as much of an effort as you can to describe what facts, what events, or what you were told, that caused you to describe the failure of Mr. Holliday to meet with you as a sudden disappearance.

A. Well, merely that I had been called to come down to 380 Madison Avenue, as I recall it, about 11 o'clock, to meet some of the directors, and particularly Mr. Holliday, and I got down there, Mr. Holliday never showed up, and I was told that he had received a phone call and suddenly had to leave to take—apparently to take a phone call.

Q. Do you think it is rather unusual to have to suddenly take a phone call?

A. I didn't say it was unusual, Mr. Davis.

Q. Then when you said a moment ago that Mr. Holliday suddenly had to disappear, you didn't think it was anything unusual?

A. Well, I thought it was a little unusual that he didn't show up at all when I had gone down there for the purpose, among others, of meeting him, but I didn't—I knew nothing in particular of the circumstances.

[3744] Q. I have been noting, Mr. Tillinghast, in your testimony, that when you report discussions that you have had with respect to some of these matters you recall conversations with Mr. Reed and Mr. Rowe, two attorneys, and you never refer to Mr. Breed or Mr. Sessel or any of the other directors. Is that deliberate on your part?

Mr. Sonnett: I object to the form of that question. It misstates the record.

It is argumentative and incorrect in fact from what the witness' testimony has been.

The Special Master: I don't think it advances the examination, Mr. Davis.

Mr. Davis: I am trying to find out, Mr. Special Master, whether or not this witness recognizes a conscious effort on his part to avoid referring to conversations he may have had with others than lawyers.

The Special Master: I think that if the record shows, the further record, shows that he does that, whether conscious or otherwise, you can draw what inferences are proper at the time it is presented.

The Witness: Mr. Davis, let me say, [3745] since you have raised this question, that it was Mr. Reed who called me on the telephone and asked me to come down, and it was Mr. Reed who was sort of showing me around.

By Mr. Davis:

Q. Mr. Holliday did attend a meeting of the board of directors on May 17th, did he not?

A. Yes, part of it.

Q. Do you recall if prior to that board meeting he had a private conversation with you [or] Mr. Breech?

A. No, he did not.

Q. Do you know whether he had a private conversation with Mr. Breech prior to that time?

A. Not that I recall. Quite possibly he did, but I don't recall it.

Q. When you saw Mr. Holliday on May 17th, that was not the first time you had seen Mr. Holliday, was it?

A. As I recall it, that was the second time, Mr. Davis. I think the first time I saw Mr. Holliday was at the board meeting on the 20th of March, at which I had appeared very briefly and been introduced to a whole group of people, including Mr. Holliday, and I believe the next time I saw Mr. Holliday was [3746] at the board meeting to which you have just referred.

Q. Referring to your testimony at page 3668, you say that "Mr. Holliday had been completely unavailable and unresponsive to my suggestion that we might sit down and discuss matters of common interest." That is your testimony there, Mr. Tillinghast?

A. Yes.

Q. Does this refer to the facts that you have described, your going to this board meeting on March 20th, meeting Mr. Holliday there, Mr. Holliday's sudden disappearance, and your not seeing Mr. Holliday again until May 17?

Mr. Sonnett: Plus the letter that was written, and if you are going to summarize the testimony, summarize it accurately.

Q. What you have testified to date in its entirety, Mr. Tillinghast, that is what you mean by saying that Mr. Holliday "had been completely unavailable and unresponsive to my suggestion that we might sit down and discuss matters of common interest," is that correct?

A. Well, let me say, Mr. Davis, beginnng with the 20th of March, which I have just described, and continuing then up until the time in June, the [3747] only times that I had seen Mr. Holliday, that Mr. Holliday had, to my knowledge, appeared at TWA, that Mr. Holliday had come to a directors meeting or stockholders meeting, was the occasion when he came to the meeting of May 17th, the circumstances of which have been covered, as I recall it, rather completely in the record.

Mr. Holliday had, at least as far as I was aware, indicated no interest whatever in coming in and discussing common problems. He had, let's say, been completely absent from the scene, and I could only assume that his absence from the scene was not accidental, but was due to a desire on his part, which, of course, was his prerogative, not to come in and sit down and become acquainted and seek, in a constructive way, to deal with our common problems.

Q. You met the board at the meeting held in March, which was March 20th?

A. That's correct.

Q. The next board meeting was the one which was held on April 27th?

A. That's right.

Q. The next meeting of the board after that was the one on May 17th?

[3748] A. That's right.

Q. And you actually took office when?

A. The 17th of April.

Q. April 17th?

A. Right.

Q. So that by June 10th you concluded that Mr. Holliday had been completely unavailable and unresponsive to your suggestion that you might sit down and discuss matters of common interest?

A. That was my view, yes.

Q. That is one of the matters which made you feel that this letter of June 10th was probably not sent in good faith?

A. That's correct, Mr. Davis, and I would want, if I may, to state further in that connection that it is my view that if Hughes Tool Company had had a real interest in a constructive solution to some of the problems that the most natural and proper thing in the world would have been for Mr. Holliday, who was a voting trustee and director of TWA, to come in, sit down, discuss the problem, try to deal with it as sensibly and dispassionately as possible.

[3749] When I received the letter in Mr. Holliday's name on a very complicated subject, which letter I am quite confident you prepared, suggesting that conversations be carried on not with Mr. Holliday but with yourself, it seemed to me that this was obviously a maneuver, a tactical move in a controversy rather than a genuine attempt to come to a solution to these problems and to accomplish the things that the letter tried to create the impression it was the purpose to accomplish.

Q. Prior to this meeting of May 17th do you recall the efforts of Mr. Holliday to sit down with you and Mr. Breech to discuss this public offering that the Tool Company was desirous of making?

A. No, I don't remember any attempts to sit down with me, Mr. Davis, at all.

Q. Were you unaware of the efforts made by Mr. Holliday, Mr. Bautzer, together with Mr. Forrester of Merrill

Lynch, to sit down with you and Mr. Breech for the purpose of discussing the secondary offering?

A. I have no recollection of any attempt by Mr. Holliday or Mr. Bautzer to sit down with me. If Mr. Holliday had wanted to sit down with me my door would have been open to him any day he wanted to come in.

Q. You made no effort to contact Mr. Holliday [3750] except that one letter?

A. That's correct, other than what I testified before, my agreeing with Mr. Reed that I thought it would be a desirable thing to find an occasion to sit down with Mr. Holliday.

Q. Now let me refer you to page 3669 of the transcript of your testimony, Mr. Tillinghast, and you see at line 19 you said:

> "Hughes Tool Company showed no interest whatever in following up on our proffered cooperation for a secondary offering . . . ," et cetera.

All I want at this time is for you to first identify what you refer to as your "proffered cooperation for a secondary offering." What are you referring to?

A. Well, I am referring to the fact that the first time I discussed this with Mr. Forrester I assured him that we would give every cooperation to the Tool Company and Merrill Lynch in any secondary offering that they might want to carry out. At the board meeting on the 17th of May the board formally took that position, and it is my recollection that whenever and whatever form the question came up, we said "We are ready to give you every cooperation that you want in [3751] effecting a secondary offering."

Q. Let's see if we can identify some facts, Mr. Tillinghast.

You say that statements were made to Mr. Forrester?

A. That's correct.

Q. Do you know by whom?

A. By me.

Q. Those were statements to the effect that in the future TWA would cooperate with Merrill Lynch in connection with any public offering of these income debentures that the Tool Company might receive?

A. Not in the future, at least in the sense that I think you are using it, Mr. Davis. Right now, and so far into the future as they might wish it.

Q. Would you describe or identify what you said to Mr. Forrester that makes you testify that you told him that TWA was prepared to cooperate "right now"?

A. Well, the conversation at the meeting on the 12th of May included a discussion of the possibility and the ease of stickering the prospectus and having a secondary offering right on the heels of the offering to shareholders, and as I recall it, it was principally the lawyers who were discussing the mechanics of it, [3752] but I personally told Mr. Forrester that we would give them every cooperation that they might want in such an offering if they were interested in proceeding.

Q. Were you referring to cooperation for an offering that would come right on the heels of the TWA offering, or were you referring to cooperation that would develop right on the heels of the 1961 financing?

A. I was talking about one that would come right on the heels of the rights offering of the subordinated debentures.

Q. At that time, though, you were claiming, were you not, it was your position, that this rights offering by TWA could not be delayed or postponed because it jeopardised the 1961 financing?

A. It was.

Q. So weren't you telling Mr. Forrester, in effect, that the cooperation you were prepared to give was only to follow the 1961 financing? That is the reason why you were not willing to delay it otherwise, isn't it?

A. No, Mr. Davis, that is quite wrong. So far as I recall, an offering, secondary offering by the Tool Company, so long as it didn't delay the offering of our [3753] subordinate debentures, wouldn't have been any problem at all in connection with the 1961 financing. The two things could have gone along simultaneously without any problem whatsoever.

Q. What was the problem in having the TWA offering simultaneously with the Tool Company's offering?

A. The problem was simply this, Mr. Davis, one of delay, and I have been over this time and time again—

Q. Delay of what, Mr. Tillinghast?

A. The delay of the completion of our offering of the subordinate debentures and the possible effect of that on the firming up of our 1961 financing, concerning which I have testified already at the greatest of length.

Q. Still referring you to page 3669, the bottom of that page, you state, as one of the facts which made you feel that the Tool Company's offer of June 10th was not made in good faith, that "The Tool Company had made a public statement that it was considering throwing on the market its rights to purchase the subordinate debentures which had the effect of very, very seriously unsettling the market."

What public statement of the Tool Company are you referring to, Mr. Tillinghast?

[3754] A. As I recall it, Mr. Davis—I am a little fuzzy as to the detail—the Tool Company made a statement I believe to the Stock Exchange—

Q. I think you are right.

A. (Continuing)—that it might sell all or part of its rights.

Q. What else do you know about the events relating to the statement made by Hughes Tool Company to the New York Stock Exchange?

A. I am not sure, Mr. Davis, that I know much beyond that.

Q. Do you know whether or not TWA had made an effort to obtain trading prices on the New York Stock Exchange with respect to those rights?

A. Yes, I know that we made an attempt, and we did list them for trading.

Q. Don't you know as a fact that the New York Stock Exchange insisted that the Tool Company make a statement to the Exchange as to its intention with respect to the very substantial amount of rights it was to receive as a condition to the granting of trading prices on the Exchange?

A. I think that is very possible, yes. I think that's correct.

[3755] Q. It is more than possible; you were told that, were you not?

A. Well, I am not sure I was told that, Mr. Davis, but I think that's correct, yes.

Q. Your testimony at the bottom of page 3669 refers to the statement made by Hughes Tool Company to the New York Stock Exchange pursuant to their request, is that correct?

A. That's right.

Q. Is that correct?

A. That's correct.

Q. That is one of the facts that you consider indicated the probable lack of good faith by Hughes Tool Company when it made its offer of June 10th?

A. Yes, the fact that the Hughes Tool Company gave the impression that it might sell its rights when in fact it didn't, and I suspected never had any intention of doing so.

Q. What is the basis for your "suspecting that it never had any intention of selling any of its rights"?

A. Well, I am not sure, other than just a conclusion that I came to in the light of all the circumstances that existed at the time.

Q. What circumstances existed at the time which led [3756] you to that conclusion, Mr. Tillinghast?

A. Well, Mr. Davis, I would have to go back and repeat everything I have testified to as to the things that had been happening.

Q. No, Mr. Tillinghast, I don't think it is necessary to do that. I am merely asking you to identify the facts or circumstances which made you conclude that the Tool Company had no intention of selling any of its rights.

Mr. Sonnett: Mr. Rankin, may I object to the question unless it is understood that the witness is being asked only if there is any fact or circumstance which he has not previously testified to which bears on the question. He has just said everything that happened up to that date was what he based his conclusion on.

Mr. Davis: No, Mr. Rankin, I don't think that that would be satisfactory for me. This witness, who presumably understands how to reach a conclusion like a rational person, has just testified that in his opinion he reached a conclusion that the statement made by the Hughes Tool Company to the New York

Stock Exchange was false or misleading, and that in fact the Tool Company [3757] did not have any intention to sell any of those rights.

I believe I am entitled to discover at this point what facts or circumstances, which facts and circumstances, this witness is relying upon, what he has been told by anyone, what he believed to be true, which justifies such a conclusion.

Mr. Sonnett: He has already testified everything that happened up to that time is what he based his conclusion on. Does Mr. Davis want an argument, or does he want information?

The Special Master: Mr. Davis, you are not asking for a repetition of his testimony up to date, are you?

Mr. Davis: No, I am not asking him for repetition of testimony up to date, but I want him to identify, without repeating, whatever fact it is that he claims supported his conclusion as a rational human being.

The Witness: Mr.—

Mr. Sonnett: Just a minute, Mr. Tillinghast. I think that makes it perfectly obvious that what counsel is trying to do is argue. He is not engaged in discovery.

[3758] He wants to argue with the witness. The witness has said that all of the facts concerning which he has fully testified are what led him to his conclusion.

Mr. Davis would like to sit and waste time here debating that, and I don't think it is proper as to form, and I am certainly clear that under no circumstances should he be allowed to waste time by requiring the witness to testify as to all events that

preceded the formulation of this conclusion, concerning which he has fully testified.

The Special Master: The witness may answer as to anything additional, if there is anything that he has not already testified to, as the basis for his conclusion.

The Witness: I would say in addition to what I have already testified to, Mr. Special Master, the one thing I might say is that in fact the Hughes Tool Company hadn't taken any steps actually to sell its rights, did not take any steps actually to sell its rights, and the fact that I was under the impression that the Hughes Tool Company was not likely, at that point, to dilute its percentage interest.

[3759] By Mr. Davis:

Q. What were the facts that gave you the impression that the Tool Company was not likely to dilute its percentage interest?

A. As best I can recall, Mr. Davis, a conversation with Mr. Leslie. I recall, and it is not very sharp in my mind, that Mr. Leslie—that I discussed briefly with Mr. Leslie the question of whether he thought the Tool Company actually would sell their rights, and he expressed a negative opinion.

Q. You said that the Tool Company took no steps to sell its rights. Are you aware of the effort that was made by the Tool Company to get the voting trustees to transfer the rights from the voting trustees to the Tool Company so they could be saleable?

A. Not at the moment.

Q. You mean Mr. Rowe did not tell you, Mr. Reed did not tell you, no one told you, that the Tool Company wrote

letters, made an effort to have the rights which were issued to the stockholders of record, namely, the voting trustees, transferred to the Tool Company?

A. I don't remember any problem of that sort, Mr. Davis.

[3760] Q. I am not talking about a problem. I am asking you if you do not know that in fact it was done.

A. You mean that the rights were transferred so that they would be saleable?

Q. That the Tool Company requested the voting trustees to transfer the rights to the Tool Company.

A. Mr. Davis, I don't distinctly recall it. I do recall that there was some question of getting the rights in the right name, but I don't—it doesn't stick clearly in my mind as to just what the problem was, and I don't recognize it in terms of what you say.

Q. In what terms do you recognize it?

A. Well, it is very fuzzy in my mind, but I do remember that there was some problem—I thought it was the other way around—that the voting trustees had in getting some transfer or—in getting the Hughes Tool Company to transfer something so as to put them in a position so that these could be listed with the Stock Exchange. I am sorry. It is very fuzzy in my mind. I can't remember just what it was. But I remember there was a—some problem of that sort. But I don't recognize the problem that you apparently are referring to now.

Q. Mr. Tillinghast, don't you know to whom the [3761] rights were issued?

A. The rights were issued to the voting trustees.

Q. Because they were the stockholders of record?

A. That's right.

Q. Until the voting trustees transferred those rights from themselves to the Tool Company the Tool Company could not sell them, could it? Isn't that self-evident to you?

A. Well, I am not sure, Mr. Davis, whether that is so or not. I don't know just what steps would have to be gone through in order to put the Tool Company in a position to sell them.

Mr. Davis: In order to permit me to continue with the witness at this point, I would like to refer to this document, Mr. Special Master, but our duplicating facilities haven't caught up with me.

I will have it marked, just this one copy, as Defendants' Exhibit 60.

(Photostatic copy of letter dated May 26, 1961, to New York Stock Exchange, from Raymond M. Holliday, consisting of two pages, marked Defendants' Exhibit 60 for identification as of this date.)

[3762] By Mr. Davis:

Q. Defendants' Exhibit 60, Mr. Tillinghast, was produced by you. There is at the lower right-hand corner the following: "May 29, 1961, president's office."

Since I do not have extra copies of this now, let me read that letter into the record.

A. May I look at it?

Q. Certainly (handing to witness).

Mr. Sonnett: That will simplify matters, I think.

Q. You see that letter?

A. I see the letter, yes.

Q. That was in your files, was it not?

A. Apparently, yes.

Q. This is a letter by Mr. Holliday to the New York Stock Exchange?

A. Yes.

Q. Can you explain how that letter got into your files?

A. Not at this point, no. I presume somebody sent me a copy of it.

Q. You don't know who?

A. At this point, I don't, Mr. Davis.

[3763] Q. You notice it is dated May 26th?

A. I do.

Q. You see the second paragraph, which reads:

> "This is to inform you that we did not know until approximately 2:30 this afternoon whether we would be able to make arrangements with the voting trustees of TWA common stock beneficially owned by Hughes Tool Company and L. A. Church & Company, the registered holder of the voting trust certificates, to receive these rights."

A. I see that.

Q. You were aware of that then, weren't you, Mr. Tillinghast?

A. I undoubtedly, if this came through my office, read it at that time.

Q. There is no doubt that it went through your office, is there?

A. No, I don't think so, Mr. Davis.

Q. Do you recall the offering period that TWA fixed for the exercise of those rights?

A. As I recall it, it was 15 days.

Q. Are you sure about that?

A. No, I am not. I think it was about 15 days. That figure sticks in my mind. But I would have to [3764] check it. It is very easily ascertainable.

Q. Do you also recall whether or not it went over a holiday weekend? Do you know how many trading days there were available for those rights?

A. Well, I am not sure at this point. If the total period was 15—well, I would have to, Mr. Davis, recall, and I don't recall whether the Exchange was open on the 29th of May, which was the day before Memorial Day, or whether it was closed that day, but if it was open that day, there would have been approximately 11.

Q. Is that your recollection?

A. Well, I have no independent recollection, Mr. Davis, just how many trading days—

Q. Do you have any recollection as to whether or not you gave any consideration as to what would be a reasonable or fair or appropriate period of time for those stockholders to trade in those rights?

A. I personally did not, Mr. Davis.

Q. Do you know who did?

A. Well, the people who were arranging the offering.

Q. Who are you referring to, Dillon, Read?

A. Dillon, Read, Mr. Leslie, Mr. Rowe, the people [3765] who had this in charge.

Q. And you did not give that matter any personal consideration?

A. No. The matter of the length of the trading period I gave—the period in which to exercise rights, I don't recall I gave any consideration whatever.

Q. At page 3670 of your testimony, Mr. Tillinghast, you testified that as a result of the advice that the Tool Company gave to the New York Stock Exchange pursuant to

their request, you say, "Which had the effect of very, very seriously unsettling the market."

You see that?

A. Yes, I do.

Q. Now will you describe the facts which you describe as having had a very, very serious unsettling effect on the market?

A. Well, as I recall it, Mr. Davis, somebody, I think it was Mr. Wadsworth, possibly it may have been Mr. Leslie, but I think it was Mr. Wadsworth, said that they were very concerned about the situation, that people who were making the market in these rights were extremely concerned that the Tool Company might dump great quantities of rights on the market and leave those who were making the market in a very bad position, [3766] and my recollection is that these rights opened at a very substantial value, and by the end of the exercise period had gone to practically nothing, and my impression was that a major cause of this had been the uncertainty as to whether the Tool Company was or wasn't going to dump onto the market a great number of rights.

Mr. Davis: May I have that answer read to me now, please?

The Special Master: You may.

(The answer was read.)

Q. When did this somebody tell you this, Mr. Tillinghast?

A. Well, my recollection is, Mr. Davis, it was at some point after the Tool Company had taken the position that it might sell all or part of its rights.

Q. Some time after May 26th?

A. Yes. It seems to me—

Q. That letter to the Exchange was dated May 26th, wasn't it?

Mr. Sonnett: That didn't say you had made a decision. If you had read the balance of the paragraph it would have been clear.

A. Well, at this point, Mr. Davis, I am not [3767] altogether clear whether that is the only letter, or whether there was a subsequent letter.

Q. But it was something said to you during this offering period?

A. That's correct.

Q. You think it was Mr. Wadsworth?

A. I think it was Mr. Wadsworth, but it might have been Mr. Leslie.

Q. Do you recall the occasion for this information?

A. No, I don't recall the occasion. I have been trying to think here exactly what the occasion was, but I don't recall the specific occasion.

Q. Do you recall his saying something about the length of the offering period in connection with this problem?

A. No, I do not.

Q. Who were the people "making a market in those rights"?

A. I can't tell you who the specific people were.

Q. Describe them for me. What did Mr. Wadsworth or that somebody tell you?

A. I don't think he told me anything, other than to refer to them as the people making the market in the rights.

[3768] Q. Do you know of a very substantial number of rights that were "sold on the market" by the Dreyfus Fund?

A. No, I am not familiar with that.

Q. Do you identify that sale as marking the moment from which those rights began to drop in market price fairly rapidly?

A. I am not familiar with that, Mr. Davis.

Q. Did Mr. Wadsworth discuss with you the problem that is inherent when a very substantial amount of securities have to be disposed of in a relatively very short period of time?

A. Not in this connection.

Q. What do you recall about what was said to you apart from these conclusions that somebody told you that some people, unidentified, were making a market and were concerned?

Mr. Sonnett: I think this is obviously argumentative.

If he wants to know whether the witness recalls anything more than he has testified to he can ask it.

Mr. Davis: Mr. Special Master, may I point out that this complaint specifically alleges that [3769] the Tool Company interfered with the subordinated debenture offering.

The Special Master: I overrule the objection. He has a right to ask whatever he was told, what he can recall about it.

Mr. Sonnett: I have no problem with that, Mr. Rankin, but I thought the witness already testified to that once, or several times. It calls for a repetition of that. It would be the third time.

The Special Master: If there is anything further—

The Witness: There is nothing further that I recall at this time.

By Mr. Davis:

Q. Is that the entire testimony you care to give as a basis for your testimony that this had the effect of very, very seriously unsettling the market?

A. Yes.

I have testified, Mr. Davis, as fully as I can recall as to the circumstances relating to the unsettling of the subordinate debenture—

Q. In other words, what you have testified to is your complete testimony as to all the facts and [3770] circumstances which justify or support your testimony at the bottom of page 3669 and the top of 3670?

Mr. Sonnett: If that question is to be understood by its literal meaning, I have no objection to it.

If Mr. Davis is trying to exclude the witness' testimony as to all the prior history in this question, I do object. It is argumentative.

The Special Master: We have a right to assume the question shall be taken literally unless it is otherwise directed.

The Witness: Excuse me. Would you read back the page reference? I just want to be sure.

(The question was read.)

A. Yes, Mr. Davis, I have testified to everything that I can presently recall that bears on the statement contained or the statement referred to in your question.

[3771] Q. You testified, Mr. Tillinghast, that these rights opened strong?

A. Yes.

Q. And then weakened in price?

A. Yes.

Q. Fairly suddenly?

A. Well, rather steeply, as I recall it.

Q. You also testified that to your knowledge the Tool Company made no effort to sell any of those rights, is that correct?

A. That's correct.

Q. Is it also a fact, Mr. Tillinghast, that when those rights opened on the New York Stock Exchange the public statement to which you referred had already been made by the Tool Company?

A. That is not my recollection, Mr. Davis.

Q. Isn't it a fact, Mr. Tillinghast, that the New York Stock Exchange insisted on a statement by the Tool Company before they would admit the rights to trading? You testified to that a moment ago, didn't you?

A. Mr. Davis, I am just not sure of that. My recollection, and maybe I am wrong in my time, but my recollection is that it was somewhere in the—[3772] during the rights period that I, at least, became aware that the Tool Company had taken this position.

Q. You are quite right about during the period of the rights period, Mr. Tillinghast. We are talking about the trading, the market price of those rights, which is not the same period.

Isn't it a fact that there was a delay between the opening of the rights period and obtaining trading privileges on the New York Stock Exchange?

A. I just have to say I don't remember, Mr. Davis. The facts will show what the situation was.

Q. I am trying to establish the facts, Mr. Tillinghast.

Mr. Sonnett: The witness has said he doesn't remember. I think if counsel has a question he ought to put it.

The Special Master: Yes.

Mr. Davis: I am trying to save time, Mr. Special Master, because, to be sure, I can establish those facts in a lengthy, laborious manner, which would be simplified if the witness could be joggled memory-wise so as to admit a fact which admittedly is relatively easily provable, except I need it as a foundation.

[3773] The Special Master: I will let you exhaust his recollection, Mr. Davis, but when he says he doesn't recollect, unless you can give give him something to refresh his memory, then we reach the end of the road.

By Mr. Davis:

Q. Let me refer you to—

Mr. Bromley: It would help me a great deal, Mr. Special Master, if Mr. Davis will tell me whether the public statement by Toolco that he keeps referring to is Exhibit 60 or something else.

Mr. Davis: I am referring to the testimony of Mr. Tillinghast, Judge Bromley, which appears at the bottom of page 3669 of the transcript.

Mr. Bromley: You keep referring to Toolco's public statement. What is that?

Mr. Davis: That is what the witness testified to, and he has testified to a statement made by the Tool Company to the New York Stock Exchange. That is the testimony so far.

The Special Master: Is that clear, Judge?

Mr. Bromley: No.

The Special Master: Look at page 3669, [3774] the bottom of the page there.

Mr. Bromley: All I wanted to do was to get the Toolco public statement. I know what the witness said.

Mr. Davis: If you will look at the letter that I have marked for identification as Defendants' Exhibit 60, Judge Bromley—

Mr. Bromley: I have looked at it, Mister, and all I asked you was is that the public statement that you keep referring to.

Mr. Davis: I am referring to the public statement that the witness is referring to.

Mr. Bromley: Then you are not referring to Exhibit 60?

Mr. Davis: We are trying to establish what the witness is referring to.

Mr. Bromley: Exhibit 60 doesn't say anything like you say it does.

Mr. Davis: The witness has testified, as I recall it—I will establish it on the record again, if you please.

By Mr. Davis:

Q. At the bottom of page 3669, you testified to a public statement, and my question to you now, Mr. [3775] Tillinghast, is whether or not you were referring to the statement made by the Hughes Tool Company to the New York Stock Exchange, or are you referring to something else?

A. Well, I am referring, Mr. Davis, I think, to a statement that appeared—

Mr. Sonnett: Off the record.

(Discussion off the record.)

Mr. Davis: Where are we?

(The record was read.)

A. (Continuing)—in the wire services, and perhaps in the press, that was based on the statement made by the Hughes Tool Company to the New York Stock Exchange.

Q. Is it your understanding, Mr. Tillinghast, it was that statement to the New York Stock Exchange which appeared subsequently in the press which the Exchange required as a condition to permitting trading in the rights?

A. I am not altogether clear, Mr. Davis, whether or not this statement was a statement required by the New York Stock Exchange. I think it very likely was, but I am not sure.

Q. In any event, you were informed, were you [3776] not, that in order to permit the rights to be traded on the Exchange it was necessary for the Tool Company to make a statement of some kind to the Exchange?

A. I am not sure that I was advised of that. Very possibly I was, but I can't remember any specific advice at this point.

Q. Are you clear that the trading of those rights on the Exchange is an event which occurred after the beginning of the rights period?

A. I am not clear at this point as to these dates, Mr. Davis. They are very easily established, but I don't at this point have them in mind.

Mr. Sonnett: While we are waiting, Mr. Rankin, for Mr. Davis to commence his next question, may I inquire through you whether the Hughes Tool Company has produced in the production which commenced March 15th any and all copies of drafts and/

or actual press releases or statements to the press on the subject Mr. Davis is now examining about?

I see, for example, in one of these clippings, the Kansas City Star of June 2nd, a statement that the Hughes Tool Company, which [3777] will receive the stamped rights, has notified the Stock Exchange that it intends to sell the rights it received up to an amount which will depend on market conditions but in an amount not to exceed 85 per cent of its holdings.

I would like to know whether they have produced any statements they made to the press in this connection. We can save an awful lot of time if they have.

The Special Master: Mr. Davis, do you know whether that has been produced?

Mr. Davis: I am quite confident that there are no press releases with respect to the subject matter we are now discussing, because this was handled through my office, and I think I can satisfy the inquiry, really Judge Bromley's inquiry, by marking and producing at this time the letter by the Hughes Tool Company to the New York Stock Exchange which released the publicity. I can state on the record the Hughes Tool Company did not issue any publicity whatever with respect to its intentions as to these rights.

Mr. Sonnett: Did its public relations [3778] representatives do so?

Mr. Davis: No, no one.

Mr. Sonnett: I notice the press quotes a public relations representative who apparently was informing the press about Mr. Davis' views on various subjects.

Mr. Davis: You are making a statement which I do not believe is accurate.

Mr. Sonnett: You should read the newspapers—

Mr. Davis: I know, but I am not like Mr. Tillinghast, Mr. Sonnett.

Mr. Sonnett: Much to my regret, I suspect to many others, that you are not.

Mr. Davis: I deal in facts, Mr. Sonnett.

Mr. Sonnett: Good. Let's start.

Mr. Davis: Will you mark this as Defendants' Exhibit 61.

(Copy of letter dated May 31, 1961, to New York Stock Exchange, from Hughes Tool Company, marked Defendants' Exhibit 61 for identification, as of this date.)

Mr. Davis: If we may take the morning recess now, I may have both this exhibit and the [3779] other one reproduced, and we will—

The Special Master: All right. Let's take a short recess.

(Whereupon, a short recess was taken.)

Mr. Davis: While we are waiting for more reproduction to take place, Mr. Special Master, it is my recollection that yesterday Mr. Sonnett, in connecnection with the production of documents from Mr. Breech's files, also produced a list of documents which had been withdrawn on the ground that privilege was being asserted. As I understand it, it was a privilege being asserted by counsel for Mr. Breech.

The Special Master: That was my understanding.

Mr. Davis: We don't seem to be able to locate that document. I believe it was produced as one sheet and was to be reproduced by somebody.

Mr. Sonnett: I am sure we can get you another copy. Had Mr. Cox asked Mr. Ordover, you would have had it, and saved a page of the record.

Mr. Davis: It was marked, as I recall, as an exhibit, and I was wondering if perhaps [3780] the Special Master picked it up.

The Special Master: I could have.

Mr. Davis: Or perhaps Mr. Tillinghast.

The Witness: No, I did not.

Mr. Davis: Thank you. I have just been handed a photostatic copy.

The Special Master: I have these, but those don't seem to be what you are talking about (handing to counsel).

Mr. Davis: No (handing to Special Master).

Mr. Special Master, prior to the recess I made a statement on the record that the Hughes Tool Company had not issued any publicity with respect to its intentions as to the rights. That statement is correct, but requires additional explanation.

As previously indicated, the letter to the Exchange, dated May 31, 1961, which has been marked as Defendants' Exhibit 61, closed by saying that it "was authorized to release publicity to the above effect."

I was told, and as I recall, that the Exchange had communicated with Mr. Settles, who was then associated with me, and stated that the [3781] Exchange had no facilities for releasing the information to the press, that the information should be released to the public, and Mr. Sessel at that point—

The Witness: Mr. Settles.

Mr. Davis: (Continuing)—Mr. Settles at that point dictated a press release which is entitled

"Press Release from Chester C. Davis, Counsel for Hughes Tool Company," and I would like to make that explanation on the record. I would like to mark those for identification, and produce them at this time.

Mark them as Defendants' Exhibits 62A and 62B.

(Photostatic copy of press release from Chester C. Davis, counsel for Hughes Tool Company, as dictated May 31, 1961, marked Defendants' Exhibit 62A for identification, as of this date.)

(Photostatic copy of press release from Chester C. Davis, counsel for Hughes Tool Company as dictated May 31, 1961, marked Defendants' Exhibit 62B for identification, as of this date.)

Mr. Davis: At this point, Mr. Special Master, I have the necessary copies of Defendants' Exhibit 62, which I am making available to opposing [3782] counsel.

I also have at this time additional copies of Defendants' Exhibit 60, which I am making available to opposing counsel.

By Mr. Davis:

Q. Now, Mr. Tillinghast, let me hand you Defendants' Exhibit 61, which is a letter from the Hughes Tool Company to the New York Stock Exchange, and let me hand you Defendants' Exhibit 62A and B, which constitute the statements to the press pursuant to the arrangements made with the New York Stock Exchange, and let me ask you if those are the public statements by Hughes Tool Company which you had in mind and referred to in your testimony begin-

ning at the bottom of page 3669 and continuing to the top of page 3670 (handing to witness).

A. Yes, they are, Mr. Davis. If you had disclosed these before we would have saved an awful lot of time.

Mr. Davis: Mr. Special Master, I don't appreciate that remark by the witness. After all, he is the one who is testifying, and presumably who knows what is the factual basis for his wholly unwarranted assertions that the Hughes Tool Company was not acting in good faith.

[3783] Mr. Sonnett: Can we get on with the deposition, Mr. Rankin? I appreciate, in behalf of TWA, the production of these documents now.

May I ask, since Mr. Davis has seen fit to produce them now, that any other statements to the press put out by his office like these also be produced at their early convenience.

The Special Master: I assume that has been done in the production, so far as they are known.

With regard to the witness' remarks, the questions were inquiries as to his recollection, and there is no obligation on the part of counsel to furnish information to him to try to have him recall. Insofar as you can produce anything that may help his recollection, when we reach the end of his recollection, it does help us to advance the depositions. But you have a right to do that as you progress with your examination in your own manner.

Mr. Davis: May I point out also, Mr. Special Master, that these documents—I will withdraw the remark.

By Mr. Davis:

Q. Mr. Tillinghast, will you now please tell us [3784] when the material reflected by Defendants' Exhibits 61 and 62A and B first came to your attention?

A. I don't recall, Mr. Davis, that I have ever seen 62A and 62B before.

I believe I have seen or at least been aware of the existence of Exhibit 61. I am reasonably certain that the fact that such a letter had been written came to my attention within a day or two of the time it was written.

Q. In other words, you have a recollection that the letter by the Hughes Tool Company to the New York Stock Exchange came to your attention, or the substance of it?

A. The fact that the Hughes Tool Company had made the statement which is embodied in Exhibit 61 came to my attention very shortly after it was made.

Q. But referring to Defendants' Exhibit 62A and 62B, you never saw those before, did you?

A. I have no recollection of having seen them before, Mr. Davis.

Q. Now will you explain what were the public statements which you had in mind on June 10, 1961, which led you to conclude that those public statements justified a conclusion that the Tool Company was not [3785] acting in good faith?

A. Well, I am not sure, Mr. Davis, where the date June 10th comes from in your question. If your question refers to the period from June 12th, when I received your letter of June 10th, to June 16th, when I answered it, I would say the substance of May—of the letter of May 31, 1961, Defendants' Exhibit 61, and the publicity in the press and the wire services springing from that, were the circumstances which I had in mind.

Q. Will you identify, either by referring to Defendants' Exhibit 62A or 62B, or from the publicity which you recall having seen, the part or portions thereof which led you to conclude that those were public statements not made in good faith?

A. Well, I don't refer—strike that.

I don't come to the conclusion—to that conclusion just within the four corners of the document, Mr. Davis. The statement to which I refer is a statement that Hughes Tool Company intends to sell rights received by it up to an amount which under no circumstances will exceed 85 per cent of such rights.

Q. Yes?

[3786] A. That is the statement to which I refer. The fact that they weren't offered, and the other many facts to which I have already testified, were what led me to conclude that this was a statement not made in good faith.

Mr. Sonnett: If that is the end of the answer, and before there is another question, and in the interests of avoiding any confusion, may I ask, Mr. Davis, whether the reference in Exhibit 62A in the first two lines, reading, "The following is an excerpt of a letter to the New York Stock Exchange from the Hughes Tool Company," is a reference to the letter a copy of which is Exhibit 61, or is there some other letter?

Mr. Davis: My recollection of the events, Mr. Sonnett, if it will assist you in any way, is that Mr. Settles originally sent a letter to the New York Stock Exchange for the purpose of permitting the issuance by the Exchange of whatever publicity was required or they deemed desirable, and then he was informed they did not have the facilities, could not do it themselves, and expected that information to be [3787]

made available to the press directly, and that is what Mr. Settles did.

I do not know at the moment of any other letter to the Exchange by my office on this subject other than the ones which I have marked for identification.

Mr. Sonnett: May I invite to the attention of the Special Master, because I am loath to make such grave charges until the record is perfectly clear, that on the basis of the statement that counsel has just made the press release is a false release.

If the Special Master will look at the second and last sentence in the second paragraph of Exhibit 61, and look at what is represented in the press release to be a copy of that sentence, the Special Master will note a highly material change. So the statement in the press release that the following is an excerpt of a letter to the New York Stock Exchange from the Hughes Tool Company is false, and I think the record ought to reflect that fact here and now.

Mr. Davis: The statement of Mr. Sonnett, as usual is not completely accurate, but [3788] whenever it is the turn for Mr. Sonnett or TWA to establish any facts that they care to establish, I would have no objection to their doing so.

At the moment I do object, Mr. Special Master, to this continuous interference with my efforts to discover the facts that I wish to develop.

I have attempted to cooperate, primarily because of suggestions made by the Special Master, in furnishing information to TWA and its counsel out of turn. But it is perfectly apparent that counsel for TWA is either trying to establish precedence or a course of conduct which I consider as materially in-

terfering with the efforts of the Tool Company to conduct its discovery proceedings in an orderly manner.

[3789] The Special Master: Mr. Davis, I think the remarks at this point may be well taken in light of that language. I am not saying it was intentional, but it says Hughes Tool Company does, however, intend to make such an offering in the press release, and the letter says intends to consider the desirability. I think that is the point that is being raised.

Mr. Davis: The point I am raising, Mr. Special Master, let us assume for the purpose of this discussion that something very wrong has been done by the Hughes Tool Company, my point is that the time to develop those facts is not now. This is not the time where TWA is attempting to discover what took place or did not take place to support their contentions. This is the time when I am trying to discover the facts from TWA.

This is a contention which undoubtedly requires an explanation. But my point is that if every time TWA or its counsel feels that it is appropriate or helpful to whatever strategy he may be undertaking at a particular time to open up and inquire into what the Tool Company did or did not do it is interfering with my [3790] discovery proceedings.

I am not prepared at this time to develop the facts as to what the Tool Company in fact did, other than to develop the facts in the possession of TWA and of this witness with respect to what they did.

I was perfectly willing, in a gesture of cooperation, although I do not believe that I was required to, to identify on the record these documents at this time,

leaving aside for the moment the question as to the requirement of producing those documents to TWA for whatever use they wish to make of them when their turn comes.

The point that I am making now, Mr. Rankin, is that if I am going to be required to pursue this I am not pursuing my discovery proceedings.

The Special Master: I think your point is well taken, except for the problem, Mr. Davis, that counsel inquires as to whether there is any other letter that might explain the difference in light of the fact that these are being used to refresh the memory of the witness, insofar as they might refresh—

[3791] Mr. Davis: Mr. Rankin, again, these were not produced for that purpose.

The witness testified he had never seen them.

They did not come out of TWA's files. If they had been in TWA's files. they were producible, at least to the same extent they were producible out of mine.

Therefore, they are not documents which have been produced for the purpose of refreshing Mr. Tillinghast's memory with respect to what he had in mind at the time about which I was inquiring of him.

They were produced, again, primarily in the expectation that if I did I would no longer have Mr. Sonnett interfering with my deposition.

I thought that was the quick way of doing it.

Now it develops that having done so, he would like to pursue the matter further, and my point simply is that whether or not they were producible or not producible, I have no objection to producing

them, they can have them, and they can do with them what they want.

But I am seriously objecting to being [3792] required to pursue lines of inquiry which occur to Mr. Sonnett from time to time.

The Special Master: I recognize the soundness of your objection generally, but I think that the record shows that you did ask the witness if he had any recollection as to these particular documents, and he said he didn't, but you made such an inquiry as to 62A and B, as I recall the record—

Mr. Davis: That's correct.

The Special Master: (Continuing)—and as to 61, he had a recollection that he had actually received a copy, or at least it had been called to his attention, and presumably had a copy in his files. So to that extent you were inquiring into his memory and recollection, and whether or not those documents would refresh his recollection.

Whether or not you knew at the time that he never knew anything about 62A or B, I couldn't tell from the record until the answer was given, and just what approach you were making.

I don't intend to let an interference be made with the proper conduct of your examination. But I think the inquiry at this time as [3793] to whether or not there was some other letter was a reasonable one that would occur to any of us. You don't have to follow that up by supplying such at this time.

Mr. Davis: I have no particular objection to developing the facts, but it seems to me that either we are going to conduct discovery proceedings where each side takes its turn in developing the facts, or we are going to try to develop the facts jointly.

Mr. Sonnett: I would like to be heard, Mr. Rankin, on the question of the obligation of Hughes Tool Company and its counsel to produce from Mr. Davis' files any statements that he issued to the press or communications of this type.

You inquired yesterday about whether this was a Hughes Tool Company office or a Chester Davis office. We were in this matter of production of documents that might be located here.

I don't know that it is the proper function of counsel to be issuing press releases to the Daily Mirror and the other list of press [3794] associations appearing on Exhibit 62A. But counsel having done so, it seems to me that the documents in question are Hughes Tool documents that should have been produced.

It so happens that 62A and 61 taken together constitute, in my opinion, very significant evidence tending to establish in a very material way an important allegation of TWA's complaint. I should have had that evidence when they produced the documents of Hughes Tool Company, and Mr. Davis shouldn't feed it out piecemeal, whether he is trying to refresh the recollection of a witness or not.

One of two things is true here. Either they made a false statement to the Stock Exchange or they made a false statement to the press of the United States, and I intend to explore that very thoroughly, and I am entitled to have any press releases they put out.

The Special Master: You may proceed, Mr. Davis, with your examination of the witness.

By Mr. Davis:

Q. Mr. Tillinghast, do you know whether or not—

Mr. Bromley: Wait a minute. Before you [3795] proceed, I think the record ought to show right now, in connection with Mr. Sonnett's remarks, that neither Exhibit 62A nor 62B is a true and correct copy of Exhibit 61. They are quite different, and substantially different.

All you have to do is compare them to find out that the statement in 62A and B is not at all what is said in Exhibit 61.

The Special Master: It doesn't require your speech to establish that fact. Anybody can compare them.

Mr. Bromley: Nobody has compared them, and why should this record go on the assumption that they are accurate quotes when they aren't?

The Special Master: I have already compared them, and said in the record the difference.

Mr. Bromley: Said the difference?

The Special Master: Yes.

Mr. Bromley: You haven't at all, sir.

The Special Master: I am sorry. I beg your pardon. Look in the record.

Mr. Bromley: What?

The Special Master: You look in the record when you receive it.

[3796] Mr. Bromley: You mean you have pointed out the differences, in paragraphs 1 and 2, between 61 and 62A and B?

Mr. Sonnett: May I suggest that I called this to the attention of the Master because this was the

point that disturbed me. When I asked Mr. Davis whether there was another letter to the Stock Exchange referred to at the top of 62A other than Exhibit 61, and was informed by Mr. Davis that there was not, I then called attention to the fact that 62A was a false statement, and the Master did consider that, I believe, and disposed of it.

My application was that by reason thereof, and since these are Hughes Tool documents, I be supplied, on behalf of TWA, with any and all press releases issued from Chester Davis' office on behalf of Hughes Tool Company.

Mr. Bromley: Maybe I was asleep, but I thought your only point was in the heading.

The Special Master: The language was recited to the reporter right here. I don't know whether you are hearing what is going on or not, Judge Bromley, but it was recited in detail [3797] by Mr. Sonnett in his objection, and it was recited by me.

Mr. Sonnett: May I—

The Special Master: And I inquired directly to Mr. Davis about it.

Mr. Sonnett: May I, on behalf of TWA, apologize for the low level of my voice. It is true that I have had my back toward Judge Bromley. It is also true that because of fatigue my voice is low. So to the extent that I have contributed to the confusion, I apologize. The fact, however, is very clear, that one of two things is necessarily true. Either a false statement was made to the Stock Exchange on May 31st, or a false statement was made to the press on May 31st, and in any event, a false statement was made to the press on May 31st on a highly material

issue. That was my point, and I want all of the documents which constitute press releases from the office of Chester Davis as counsel for Hughes Tool Tool Company. I think I am entitled to have them.

Mr. Bromley: I must apologize to the Master and to you, because I did not hear either one of you point out the many discrepancies which [3798] occur both in paragraph 1 and paragraph 2.

Mr. Stewart: Mr. Special Master, I believe there are still other discrepancies between the various documents which I believe Mr. Sonnett did not point out. I have reviewed them with Judge Bromley briefly, and there are several inconsistencies between the various exhibits.

I believe Mr. Sonnett mentioned perhaps the principal one.

Mr. Sonnett: One at a time, I always believe in. I think the record is pretty clear.

Mr. Davis: Now, Mr. Special Master, may I say that all these statements on the record have taken a great deal of time.

I don't think they furthered the discovery of the facts from this witness.

Mr. Settles, who handled this matter, and who is not now associated with me, will be available at the appropriate time to explain to these interested gentlemen what actually happened, and when they find out what the facts are they will find that, as with their other general accusations, they are baseless.

Mr. Sonnett: I think on the basis of that [3799] statement we are entitled to know right now whether Mr. Davis did or did not approve the press release

which is Exhibit 62A and the statement which is 62B at the time.

The Special Master: I will overrule that. Let's proceed with the examination of the witness.

By Mr. Davis:

Q. Mr. Tillinghast, I hope that you haven't forgotten the testimony that you were giving prior to these colloquies from your counsel and others. Have you?

A. No.

Q. My question to you now, so the record may be entirely clear, is whether or not Defendants' Exhibits 62A and 62B came to your attention prior to today.

A. I have already testified to that, Mr. Davis.

Q. Would you mind repeating it, please?

A. Not that I recall.

Q. Would you recall it if it had?

A. Not necessarily.

Q. You say that Defendants' Exhibit 61 came to your attention, you remember that?

A. I said. Mr. Davis, that I either saw 61 or was advised of its contents. I am not absolutely sure [3800] that I have seen 61, but the substance of it is familiar to me.

Q. Do you recall who called it to your attention?

A. No. It may have been that I saw it, it may have been Mr. Leslie, it may have been Mr. Rowe, it possibly might have been Mr. Wadsworth.

Q. You have no recollection as to how a letter to the Exchange came to your attention which is not now included in your files?

A. I have—the only recollection I have is what I have already testified to.

Q. Will you identify, on the basis of what you knew in June 1961, the period June 10th to June 16th—what did you know at that time which is the basis for the testimony that you gave at the bottom of page 3669 and the top of page 3670?

A. Mr. Davis, I have testified to that as fully as my recollection permits.

Q. Based upon that testimony, is that the complete basis for your conclusion that that was a fact which you considered as indicating the lack of good faith in the offers made by the Tool Company by its letter of June 10th?

A. I have testified, Mr. Davis, as fully as I [3801] can as to the reasons why I felt this was not in good faith.

Q. I understand that, Mr. Tillinghast, but what I want you to tell me now is whether or not you have now fully disclosed all of the facts that you had in the period June 10th to June 16th to support the answer you gave at page 3669 of the transcript.

A. As far as I can presently recall them, I have.

Q. You believe that if you had some more time you could recall some more?

A. I have no specific reason to think so. I might.

Q. Is there anyone in particular with whom you would like to have an oportunity to discuss the matter so as to refresh your recollection?

Mr. Sonnett: Mr. Rankin, I think counsel ought to be directed to stop this sort of nonsense. He has gone through this exercise a hundred times. It is very naive, improper, and a waste of time. It is about time he stopped arguing with the witness or playing it up to a jury, or whatever he thinks he is doing, and put questions seeking information. This is completely wasteful of time.

He is worried about Hughes. Every time he [3802] puts another dollar's worth of this sort of stuff on the record it is costing his client. I think he says 78 cents. I think his client is getting gypped.

The Special Master: Answer the question if there is anyone that you know of that might help you recollect more.

A. Not specifically, Mr. Davis.

As you well know, when one sits down, particularly with a number of people who have been familiar with events, and goes through them, discusses them back and forth, one's recollection is inevitably refreshed, and if I sat down with all the people involved in these events and asked them their recollection, told them mine, perhaps other things would come to mind.

But I have no specific reason to think beyond that any particular person would refresh my recollection.

Q. I am interested in the persons with whom you discussed what you considered to be evidence of the bad faith on the part of the Tool Company with respect to its proposals of June 10th.

Mr. Sonnett: Other than counsel, I assume.

Mr. Davis: Yes, other than counsel.

[3803] Q. I believe, Mr. Tillinghast, being a lawyer, you understand I am not asking you to refer to advice that you received from counsel. You understand that, do you?

A. Well, I didn't understand that, Mr. Davis. But if you tell me so, I will try to remember that.

Q. You were aware, at least in connection with your testimony on the change of the meeting of the board of directors

from Chicago to New York, that you were free to protect the attorney-client privilege?

A. I recall that Mr. Sonnett asserted the attorney-client privilege.

Q. You understand that that is a privilege that can be waived by the client?

A. I do.

Mr. Sonnett: You should further understand, Mr. Davis, that Mr. Tillinghast doesn't have the power to waive it even if he were asked to waive it or wanted to waive it.

The power is vested in the Special Committee of the board of directors of TWA, of which Mr. Tillinghast is not a member, and which board has the entire authority of the board of directors with respect to this litigation. So let's get [3804] that settled.

Mr. Davis: But Mr. Special Master, I don't think that we need to have on the record Mr. Sonnett's legal conclusions, however sound or unsound they may be.

The Special Master: Do we have a question before the witness?

(The question was read.)

A. Well, other than counsel, I discussed it with Mr. Reed, I am sure with Mr. Breech, although that discussion doesn't stick particularly in my mind, with Mr. Leslie. Those are the only ones I recall specifically. It is very possible that I discussed it with Mr. Sessel. I think that would be about the sum total of the group.

Q. Mr. Reed is counsel for the voting trustees?

A. Mr. Reed is counsel for the voting trustees.

Q. When you discussed it with him you were discussing it with him as counsel for the voting trustees?

A. Yes.

Q. Do you recall the circumstances when you discussed that with him?

A. I have the feeling that I discussed it with him twice, Mr. Davis. The first time was shortly after the [3805] letter was received, and the second time was when the letter was finalized, I, in the interim, having prepared a draft and sent it to him and some others.

Q. Have you located that draft?

A. No, I haven't, Mr. Davis.

Q. Have you located letters of transmittal with respect to that draft?

A. No, and I am inclined to feel that I may have been wrong in recalling that I sent copies of the draft to all of the directors.

I think what I am thinking of is that I sent copies of the final letter to all of the directors, but I understand that there is no transmittal letter in our file, and I am quite sure that if I had in fact sent a draft of this to each of the directors that I would have had a copy—that there would be a copy in our files of the transmittal letter.

Q. Did you perhaps send it merely to a few selected directors?

A. I think that is quite possible.

Q. Will you identify those selected directors to whom you sent a draft of the letter?

A. Well, Mr. Davis, let me make it clear that I cannot say positively to whom I sent it. But I think [3806] I sent it to Mr. Leslie and Mr. Breech.

Q. That is all you can remember?

A. That is all that I can remember, and I don't want to be absolutely positive about that. But my best recollection is I sent it to Mr. Leslie and to Mr. Breech.

Q. Is it your recollection that the final copy of the letter was sent to all the directors?

A. Yes. The minutes of the June meeting so recite.

Q. Describe the meeting that you had with Mr. Reed shortly after this June 10th letter, Defendants' Exhibit 56, was received.

A. Well, I didn't say I had a meeting with Mr. Reed. I may have, or I may have talked with him on the telephone. I have a recollection that I talked with Mr. Reed merely about the fact that I was going to prepare a draft of reply, and that the letter seemed more designed to make a record and put the people to whom it was addressed on the spot than it was to achieve any constructive purpose.

Q. That is what you told Mr. Reed?

A. As I recall it, that is what I told Mr. Reed, and what Mr. Reed agreed was the case.

Q. Mr. Reed agreed with your statement?

[3807] A. Yes.

Q. Did he say why, did he give you any facts, any reasons?

A. No, not that I recall, and indeed, I would have thought it obvious enough to him that I wouldn't have asked him, "Why do you think that?"

Q. You thought what was obvious enough to him?

A. That this was a maneuver, a letter for the record, rather than a genuine attempt to achieve something.

Q. And Mr. Reed agreed with you with respect to that also?

A. Not "also." That is what I just testified to.

Q. Was that a long telephone conversation?

A. Mr. Davis, as I said before, I am not sure whether it was a telephone conversation or a meeting.

I just remember as much as I have testified to now.

[3808] Q. Identify the meeting or discussion that you had with Mr. Breech. I am still referring to your statement or conclusion, which was obvious to you, as I gather from your testimony, that the offers reflected by the letter of June 10th were obviously a maneuver, not in good faith?

A. Mr. Davis, I don't specifically recall the conversation that I had with Mr. Breech about this. I am quite sure I had a conversation. My certainty in that regard springs in part from the fact that I am quite sure that I wouldn't have dealt with this without having talked with him. But just what we talked about I don't have a distinct recollection of, and I would be very largely supposing.

Q. By referring to your calendar can you identify whether or not you had a meeting with Mr. Breech during this period?

A. My calendar indicates nothing in this regard, Mr. Davis, but I have a vague recollection of Mr. Breech having been in town at this time. I can't be certain whether I talked with him or whether I—whether I talked with him face-to-face or whether I talked with him on the telephone.

Q. Can you recall the substance of what Mr. Breech [3809] said to you?

A. No, I cannot, Mr. Davis. As I said before, I don't have a distinct recollection of a conversation with Mr. Breech about this, although I am quite confident I must have talked with him about it, and I have a vague recollection of his having been in New York and spoken to him about it in New York.

Q. What is it that you recall which makes you feel that you must have talked to Mr. Breech about it?

A. As I said before, I am quite sure I wouldn't have dealt with a letter of this sort without having talked with Mr. Breech, and I—this may have been a time when Mr. Breech and Mr. Olds had a meeting at 380 Madison Avenue with, as I recall it, Mr. McCone, who was in town, if it is the occasion I think of, and I talked with him, if that is the occasion, very briefly, and it may be that I mentioned—we discussed this very briefly at that meeting.

Q. Do you remember this meeting between Breech and Olds at 380 Madison Avenue?

A. I remember a meeting that Mr. Breech and Mr. Olds had at 380 Madison Avenue, during part of which, as I recall it, Mr. McCone dropped in, and I was busy with something else, and just went in and talked with [3810] them for a few minutes. I remember they were in Mr. Pierson's room.

Q. Do you know what the purpose of that meeting was?

A. Not at this point, other than to say that my recollection is that they were generally discussing TWA problems or voting trust problems.

Q. When you say you don't remember at this point, did you know at any time what was the purpose of the meeting?

A. I don't think I knew specifically. I knew that Mr. Breech and Mr. Olds were having a meeting. I presumed it was to discuss some of the recent occurrences, and if it was at the time—if I am correct in thinking it was about the 12th of June, I have no doubt that they were discussing all of these things that I have been testifying about.

Q. But you don't recall discussing it with either Mr. Breech or Mr. Olds?

A. Well, my recollection, Mr. Davis, is that—I am quite sure of this—that at that particular meeting I merely made an appearance, oh, for a short period of time, maybe 15

minutes, or something of that sort, I was not a participant in the meeting. I think if in fact this was more or less coincidental with the [3811] receipt of your June 10th letter that that is probably the time I discussed it with Mr. Breech.

Q. Assuming that that was probably the time that you discussed it, do you recall the discussion?

A. I don't, Mr. Davis, beyond the fact that I was the one to answer it.

Q. Was that decision that you were the one to answer it a decision arrived at by someone other than yourself alone?

A. Well, I am sure that that was in conversation or that I discussed that particular aspect of it with Mr. Reed and Mr. Rowe. I think probably, again, if I am correct as to this meeting between Mr. Breech and Mr. Olds having been held when I said, or having been held at about the time of the receipt of this letter—I think that is probably the time that I had my initial conversation with Mr. Reed about preparing a draft and circulating it to him on behalf of the voting trustees and some others, and entertaining his comments.

Q. What was the reason for discussing this strategy, or whatever you were discussing, with Mr. Reed? Was it because he was counsel for the voting trustees?

A. Yes.

Q. And also counsel for Mr. Breech individually?

[3812] A. No, I don't know that he was counsel for Mr. Breech individually.

Q. Did you consider that this letter of June 10th which you received was a matter that required discussion with the voting trustees or their counsel?

A. Yes, to the extent that this was addressed to a variety of people, including the voting trustees. It was my

view that TWA should answer it because it dealt primarily with questions relating to aircraft and management questions that were proper interests of TWA itself, alhough not all of the questions were in this category, and as I recall the situation, I said to Mr. Reed that I proposed to reply to it on behalf of TWA, dealing with it on the merits, even though I had the feeling that it wasn't written really to be dealt with on the merits, and he agreed that that was the thing to do.

Q. Do you recall your discussion with Mr. Leslie with respect to the facts that indicated to you or tended to indicate to you that this was not a letter to be dealt with on its merits?

A. I am afraid, Mr. Davis, that you have just reversed my testimony.

The Witness: Do you want to read that back?

[3813] (The question was read.)

A. I have just testified, Mr. Davis, that I felt that despite the fact that the letter was not written in good faith that we should deal with it on its merits.

Q. What I am inquiring into now, Mr. Tillinghast, are the facts which you had, which came to your attention, or which you discussed with anyone, tending to indicate that the letter was not in good faith.

A. If that is the question you ask, I don't recall anything with respect to Mr. Leslie, except that Mr. Leslie and I discussed the question of whether there was any realism in the condition that the voting trust be terminated, and he expressed the opinion that there wasn't any, in his opinion, serious possibility of that, and I asked him to please communicate with the financing institutions and obtain from them expressions as to whether or not, under the

circumstances proposed in this letter, they would consider a termination of the voting trust.

Q. But, Mr. Tillinghast, you keep slipping from the question I am directing to you. At the moment I am not inquiring into the consideration given as to the realism of any possibility or desirability of the basic [3814] terms. I am interested in your statement, in your testimony, to the effect that you believed that the offer made was not made in good faith, and I am asking you to identify the persons with whom you discussed that subject, the existence or lack of existence of good faith.

Mr. Sonnett: May I object to the form of the present question, and ask the Master to direct there be stricken the comment that the witness is slipping from the question.

The record makes perfectly plain that the witness was trying to find the question out of Mr. Davis' various passes at the point, and then said "If that is your question, this is my answer."

I don't think that the record ought to be cluttered with this kind of comment.

The Special Master: The statement the witness is slipping may go out. The rest of it, in which Mr. Davis is trying to make plain the nature of his inquiry, will stay in.

A. Mr. Davis, the only persons with whom I can recall having specifically discussed the question of good faith are Mr. Reed and Mr. Rowe.

Q. Not Mr. Breech?

[3815] A. I have no specific recollection of having discussed it with Mr. Breech, although I have to say to

you that it is entirely possible, entirely likely, that I did. But I don't have any specific recollection of it.

Q. With Mr. Leslie?

A. I may have with Mr. Leslie, but again, I have not a specific recollection of it, except as I have already testified, that I know I discussed with him this question of the voting trust and the realism of expecting a quick termination of it, and involved in that discussion, at least implicitly, I am sure was the matter of whether this was a genuine expectation or something being written for the record.

Q. You previously testified that one of the persons with whom you may have discussed this matter was Mr. Sessel?

A. That's correct.

Q. Will you now describe your discussions with Mr. Sessel on the same subject?

A. Well, the only thing, Mr. Davis, I specifically remember having discussed with Mr. Sessel was the matter of the position that the banks would take, and I recall that Mr. Sessel talked with me on the telephone [3816] about it, and said that the banks had taken a uniformly negative position, with the exception of the Bank of America, and he said they took a qualified position which in his view was really no, but he felt that in view of the dual relationship in which they found themselves as bankers for both Hughes Tool and TWA, that they were playing it carefully, and not taking an out-and-out position.

He further stated that in his opinion, if this ever got beyond the preliminary stage, that the Bank of America's position would turn out to be a negative position.

Q. Do you recall where this conversation took place?

A. My recollection is it was a telephone conversation.

Q. You recall that one fairly clearly, do you?

A. For some reason, that sticks in my mind.

Q. Did you discuss the probable good faith or lack of good faith in the making of the proposal?

A. I have no distinct recollection of it, Mr. Davis, but I would be quite sure that we did.

Q. You can't recall what he said to you in that regard or what you said to him in that regard?

[3817] A. Not specifically, no, Mr. Davis, but I am quite sure for some reason, and it is undoubtedly conversations that I have had with him, that Mr. Sessel thought that this was purely a maneuver, and he undoubtedly said so, and I undoubtedly agreed with him, but I cannot recall the specific conversation.

Q. Without trying to recall the specific conversation, do you recall any fact advanced or stated to you by Mr. Sessel to support this conclusion?

A. No, I do not, Mr. Davis.

Q. Do you have any recollection of asking him, in substance, "Well, I think the same thing also, but I am interested in knowing what makes you conclude that way"—nothing of the kind took place?

A. No, Mr. Davis, and I would volunteer the comment that I don't recall having asked anyone why he thought this, or having been asked by anyone why he thought this. I think the circumstances made it so apparent that no one labored the point or asked "Why do you think this?"

Q. You say that the persons, then, that you discussed this existence of good faith or lack of good faith with were Mr. Reed and Mr. Rowe?

A. That's correct.

Q. In your discussion with Mr. Rowe you were seeking [3818] legal advice from Mr. Rowe, or were you discussing it because of what knowledge he generally had with respect to the Tool Company?

A. I was seeking legal advice in the sense that I was discussing with him the matter of how this letter should be treated and how it should be replied to.

Q. I am referring now to the discussion as to the existence of facts which tend to support your conclusion that the Tool Company was not making these proposals in good faith.

Mr. Sonnett: I think the witness has already testified that he recalls no such discussion with anyone.

Mr. Davis: I believe the record is not to that effect, Mr. Special Master. I believe he said the only people he discussed that with were Mr. Reed and Mr. Rowe.

Mr. Sonnett: No, no. The witness testified a little while ago, when he said he would be bold enough to volunteer, that he recalled no discussion with anyone in which anybody said "My reasons for believing this are thus and so," or "What are your reasons for believing this?" The witness made that very plain.

[3819] So before you get down a false trail about a discussion with Mr. Rowe, I think the question has already been answered negatively.

The Special Master: That is my recollection of the record, Mr. Davis.

He has constantly been asked, and he said he did discuss with Mr. Reed and Mr. Rowe, but when you got down to any specifics he never recollected.

Mr. Davis: We can satisfy my problem, Mr. Special Master, by merely asking him now.

By Mr. Davis:

Q. In your discussions with Mr. Reed and Mr. Rowe did either of them—let's talk of Mr. Rowe alone; I have covered Mr. Reed.

Let me rephrase my question this way: In your discussion with Mr. Rowe did Mr. Rowe advert to any fact or circumstance which confirmed your conclusion that this offer by the Tool Company was not in good faith?

Mr. Sonnett: May I have a moment with Mr. Rowe?

The Special Master: Yes.

(Discussion off the record.)

Mr. Sonnett: Having conferred with Mr. Rowe, [3820] I will not assert, in behalf of TWA, any claim of privilege with respect to this conversation to which the witness refers.

The Special Master: You may answer the question.

A. Mr. Davis, I will repeat once again that I don't recall any specific review of facts and circumstances that led anyone to the conclusion that this was not written in good faith.

I do recall that I discussed with both Mr. Reed and Mr. Rowe the fact that this letter appeared to be written for the record and to put TWA on the spot to serve as a means of impeding the Boeing program, and my recollection is that we all agreed that this was the case, and I have no recollection that anyone went into detail and said "Now, you tell me why it is that you think this is the case."

Q. In your answer, Mr. Tillinghast, you said you don't recall any specific review of the facts and circumstances, and I would be satisfied if you could give me any statement

of facts and circumstances, whether or not you would regard it as a specific review.

A. I recall no statement of the facts and circumstances.

Q. Thank you.

[3821] Now you say that you did discuss with Mr. Rowe and Mr. Reed the fact that this letter appeared to "put TWA on the spot."

Will you describe what you said or they said indicating that this letter would put TWA on the spot?

A. Well, without at the moment distinguishing between Mr. Reed and Mr. Rowe, what I said, in substance, was that I felt this was written for the record, that it was an attempt to create a situation where TWA would seem to be put in the position of refusing to accept a proffer of a very substantial amount of equity unless it interrupted and interfered with its Boeing program, and that it seemed to me just another step in the Davis campaign which had then been going on for some period of time, and that it was not a genuine attempt to work out a basis of additional equity.

I also said, and they agreed, that we had to deal with it as if it were genuine, and had to keep the doors open and the means open by which, if in fact it did turn out to have substance, we would exhaust the matter on its merits.

Q. Did you understand that the only condition to the offer of proposal No. 1 was a termination of the voting trust?

[3822] A. That was a stated condition. There were obviously a good many other questions involved in it, Mr. Davis. This was not a situation where we just could say "I accept," and we suddenly had a $100 million of equity. You had inherent in this numerous questions of the form of the equity, the price of the equity, what the terms would be, a dozen things that weren't covered here, but the only

specific stated condition was the termination of the voting trust or—and the fact that it be acted upon within ten days or any agreed upon extension thereof.

Q. In this discussion you had with Mr. Rowe and Mr. Reed did they point out to you that if the proposal was acceptable to TWA, TWA would be free to supplement its jet fleet either with Boeing aircraft or Convair aircraft or any combination?

A. Well, they didn't, as I recall it, particularly point that out, Mr. Davis. The letter so states.

We were, however, I was, deeply conscious of the fact that you were at the time turning heaven and earth to try to prevent the Boeing deal, and very frankly, I just didn't believe what it said.

Q. Did you discuss in what way these proposals to TWA constituted or would constitute an interference with [3823] the Boeing program.

A. Well, it seemed to me perfectly obvious that if you got into a discussion of the termination of the voting trust, that one of the possibilities, very real possibilities, inherent in that was further delay of our Boeing financing, and my feeling was that this was an attempt, if you will, to drag a red herring across the path and get TWA into a position where it was discussing things that would interfere and delay—interfere with and delay consummation of its Boeing financing, and ultimately cause the abortion of the Boeing program.

Mr. Davis: Shall we take a luncheon recess at this point?

The Special Master: We will adjourn until 2 o'clock.

(Whereupon, a luncheon recess was taken.)

[3824] AFTERNOON SESSION

2:00 p.m.

(Thomas D. Barr, appeared for the afternoon session.)

CHARLES C. TILLINGHAST, JR., resumed the stand and testified further as follows:

Mr. Davis: Mr. Special Master, there are two matters I want to take up before resuming with Mr. Tillinghast. The first is that I just received a call from Los Angeles to the effect that equipment which we had to alert us in the event anybody should be trying to use x-ray equipment in taking pictures of these documents did alert us. As previously indicated, some of the documents we are producing are masked.

Apparently this gadget, whatever it is, went on today, and the men there double-checked it and believe at the moment, at any rate, that the equipment being used includes x-ray equipment, which presumably would only be designed to inquire into masked material. There is [3825] always a possibility that equipment malfunctioned, of course.

I have directed, therefore, that all photographing be stopped until an expert could be obtained to double-check the matter. I just wanted to report to you that I have given those instructions until I can satisfy myself as to what kind of activities are actually going on.

Mr. Sonnett: May I suggest, Mr. Rankin, that rather than Mr. Davis assuming the functions of the court, to direct that the order not be complied with, that he produce either here before you under oath the people involved or we will go to California, if you are agreeable, and take their testimony under oath on Monday.

I think it is highly presumptuous of Mr. Davis to issue any such directions without leave of the Court. I regard his action as contemptuous, without leave of the Court, and I think we are entitled to have the people put on the stand and examined under oath.

The Special Master: Mr. Barr, do you want to contribute any information?

[3826] Mr. Barr: I saw this machine. I wonder, Mr. Davis said it indicated that something was amiss, do you know how it indicated that?

Mr. Davis: I am not familiar with the equipment. I know that at the time that this photographing equipment was to be brought in a question was raised with me as to the possibility of that equipment taking pictures of material that is under mask, and someone suggested they could obtain equipment which I understand has a needle which is activated whenever x-ray equipment is in use.

It may be the needle may be activated for some other reason.

At the moment I am not suggesting that anything improper is going on. I just wanted to report to the Special Master that on the basis of the evidence that this protective equipment has been activated, whether or not it can be determined as to whether or not there is some x-ray equipment in use on the premises, I have advised the person in charge of production to stop photographing until I could report the matter to the Special Master [3827] and take appropriate steps for protecting the Hughes Tool Company.

Mr. Barr: Let me give you a little report on this machine. This has been there. It is like a little box. It appears to be a form of Geiger counter, as far as I could tell. We all picked it up and handled it, and it was a source of much amusement.

This machine, since the time we were there, the needle has been bouncing back and forth and the lights have been flashing on and off. If that is the kind of signal it is giving, it has been giving that signal since Saturday, to my knowledge.

I am not an expert on this sort of machine, but I am just telling you that that is what the machine had been doing all the time we were there.

The Special Master: Are you an expert on the question of whether any x-ray machines are being used?

Mr. Barr: Let me say, I am not. Our people are not in there. We left the premises on Wednesday. None of our people are in there [3828] at the present time. I certainly didn't see any x-ray machine or anything I thought was an x-ray machine while I was there.

Mr. Sonnett: I have a statement to make and an application, may it please the Special Master.

First, I apply for a direction that Hughes Tool Company produce here on Monday to the Special Master all masked documents.

Secondly, I apply for a direction by the Special Master that the microfilming of non-masked documents be resumed forthwith.

The Special Master: Mr. Davis, did your order apply to the non-masked documents as well as the others?

Mr. Davis: The instruction I merely gave was to stop photographing—I just got the call; that is one of the reasons why I was almost a minute late—until I could bring the matter up before you, sir.

As I say, there is someone now under way to the premises to determine whether or not this equipment is or is not the kind of equipment which could take pictures of masked material. I would assume, and I can confirm the fact,

[3829] that this should be ascertainable in a matter of an hour or two.

I understand, contrary to the statement just made by Mr. Barr, as reported to mé by the person who has been there in charge of the production of documents, that this is the first time that they noticed the protective device becoming activated.

At this point I merely wanted to report that we wanted to have an opportunity to double-check the equipment now being used for photographing our documents.

The Special Master: Is there any reason why they can't proceed with those documents which are not masked? Do you want to say anything about that request?

Mr. Davis: I have no objection to proceeding with documents which are not masked, no. I have no objection to that.

The Special Master: Your request that they proceed with the documents that are not masked will be granted.

Mr. Sonnett: As to the other matter, Mr. Rankin, it seems quite evident that we are [3830] running into a problem here which is going to create a good deal of difficulty about masked documents. I needn't, I suppose, say it, but I will, that if anybody has used any kind of contrivance to try and penetrate the masks, it is unauthorized by TWA, and they will be held fully accountable.

I think we are running into another one of the Hughes exercises. I think that the Court has the power and should direct that all masked documents be delivered here Monday morning. I think that the Special Master should examine that which has been masked, and keep the matter under the control of the Court so we won't be playing games of cops and robbers, and get the matter laid to rest.

I don't want to run into a situation like we ran into today

where Mr. Davis this morning wasn't aware that he put out a press release and found that he had.

The simple solution is to bring the masked documents in here before the Court. That is where they belong.

The Special Master: Mr. Sonnett, [3831] I accept your statement that any such action, if it is occurring, is without authority. I would assume that, unless it was established otherwise.

With regard to your application to produce the masked documents here, I will reserve ruling on that until 4 o'clock, with the thought that by that time we will have a report as to the accuracy of the machine.

Mr. Barr: May I make a suggestion, sir? I take it we are going to make some inquiries in California. I think it might be very well to find out whether any more machines have been brought in out there. If there haven't been any more brought in, then that machine, this little Geiger counter, has been in the room with all these other machines ever since we began, and if it is accurate and effective, presumably it would have picked up something days ago.

Mr. Davis: I have a call in now.

Mr. Sonnett: There is a simpler solution than that. I will deliver to the custody of the Special Master every microfilm that contains pictures of any document that has been [3832] masked. It is quite simple. The Master can look at them. If there is any hanky-panky, this red herring bit that Mr. Davis is dragging out, then any masking that has been penetrated surreptitiously the Master can deal with, and I can deal with whoever was responsible, if, indeed, it happened, and I doubt that it did.

Mr. Davis: Mr. Special Master, I want to make it clear that we are not claiming that anybody is doing anything improper. It may very well be that someone thinks it is amusing to have introduced in the room something that

would make this instrument activate itself to perhaps unduly alarm someone. The only request that I made at this point is for an opportunity to satisfy those who are on the scene charged with the production of documents, let them satisfy themselves that something improper is not going on.

At this point I have no intention of claiming or charging hanky-panky, as Mr. Sonnett would like to call it, by anyone.

The Special Master: I am not going to assume that anyone is using any devices to [3833] penetrate the masking until we have something than can be relied upon as far as a showing is concerned.

I am also not going to examine a lot of masked documents in microfilm form if I can avoid it on the assumption that something has been done improperly when I don't know that it has.

I think that Mr. Sonnett and Mr. Barr, in any way they want to arrange it, might find out from their people anything that they wish to report by 4 o'clock, and I hope that Mr. Davis will have his report by then, and then we will act on your request.

Mr. Barr: Let me make clear, sir, none of the additional defendants have any of the people in the building. They have not been there since Wednesday.

Mr. Davis: May I be excused for a moment to take the call that is coming in now?

The Special Master: Maybe this will answer it.

Mr. Sonnett: I assume that Mr. Cox will here represent him.

[3834] Let me say one other thing. We have hired Recordak, which is a highly reputable organization, to do the job. I have no reason to doubt that they are doing anything except doing the job, and I don't want to get drawn into one of these red herring games.

I don't give a continental what any alleged expert that they bring in says or doesn't say. In the first place, whatever he says, if he says anything contrary to what I believe, I will want to cross-examine him. So we are getting no place with that.

The substantive question, I think, is whether information which has been masked should be withheld properly from TWA. That is point 1, and on that we are going to have to have rulings by the Special Master anyway.

Point 2, if any of the microfilms penetrated the mask, and we are not entitled to that information, obviously it should be suppressed and taken away from us.

So that I think the only way to resolve it, without getting drawn into one of these diversionary moves again, is to have the masked [3835] documents brought back here, have a statement given to the Master as to why they were masked, and have rulings made.

We will, as I say, in the same breath, we will lock up the microfilms on masked documents until the Master has ruled. But this is calculated to produce another delay of a week or two weeks before we get at the documents. That is what I think it is calculated to do.

The Special Master: Mr. Sonnett, were you taking into account the possibility that the expert may say that there is nothing that happened so far as penetrating the mask?

Mr. Sonnett: He may or may not, but I don't really care much what he says, because if there was a penetration of the mask it is unintentional, and it is in violation, certainly, of any instructions given by TWA, and if there was an inadvertent violation, the microfilm can be suppressed, if it should be.

But I am saying that the whole exercise here is a diversionary move to delay the question of your ruling on

whether we can see what [3836] is masked out or not. I think we ought to have that resolved.

The Special Master: Maybe you have an answer.

Mr. Davis: Yes. The information is coming in.

They are apparently at the moment photographing non-masked documents, and the photographing is continuing. The expert on the machine was just arriving during the course of the conversation, and will examine the equipment to see if it is malfunctioning or what caused it to malfunction if it is malfunctioning.

Mr. Barr: The only point I wanted to make, sir, was if this machine is malfunctioning it has been malfunctioning since Saturday, before there were ever any machines brought in there. This light was flashing and this thing was going back and forth like crazy from the very beginning.

The Special Master: I accept your statement of that fact, Mr. Barr, but I don't have any basis for knowing how it is functioning now.

[3837] Mr. Barr: I understood Mr. Davis to say that that was what it was doing now.

Mr. Davis: I have never seen the machine.

We are taking an awful lot of time, Mr. Special Master, on an issue which, so far as I am concerned, does not require any more of the time of this witness.

The Special Master: I will reserve the question until 4 o'clock. Let's proceed to the witness.

Mr. Sonnett: May I respectfully suggest, not to delay the witness, but I think the simple solution to this is let's not play any games. I think you ought to have the masked documents put before you on Monday. You are going to have to rule on them sooner or later. We will suspend—and it is only TWA who is doing it—we will suspend any

microfilming of masked documents if there is some kind of a technical problem until you have ruled on the masked documents, and then you are going to tell us whether we can microfilm them or whether we can't.

I don't like to charge this, but I am [3837A] afraid we are running into at least that kind of confusion which has so characterized so much of what we have seen on the part of Hughes Tool Company on documents, and I don't want to run into delays.

Mr. Barr: Mr. Rankin, may I put in a little something?

[3838] The Special Master: One minute.

Mr. Barr: One minute is all I will take.

I think Mr. Sonnett is right, that you are going to have to look at these masked documents.

I can give you some examples. There are examples where letters have been produced. the whole letter is produced, but the addressee is masked out, for example.

These call sheets, there are great portions of those in the middle of conversations which are masked out. I have seen them.

You are obviously going to have to go over them at some point.

The Special Master: In regard to that, I am willing to go over them, but I am not going to be able to with the schedule I have until at least next Friday, which may delay you over what you would otherwise get if you wait.

Mr. Sonnett: It won't, sir. That is my point. His problem is that he doesn't want the Recordak people to microfilm documents with masks on.

Our problem is we want you to examine what is under the mask.

[3839] It seems to me that the simple thing to do, if this is creating some big problem, is to stop the microfilming of

masked documents, have them sent here, have you rule on them, and then whatever we are entitled to microfilm we will.

The Special Master: Is that any problem to you?

Mr. Davis: No, the production of the documents here is perfectly all right, Mr. Special Master, but I respectfully urge that we receive equal treatment from the Special Master, and that all documents and diaries that were masked by TWA be likewise produced for similar examination.

Mr. Sonnett: No objection to that. You identify them, and we will produce them.

I don't think we produced anything masked from TWA's files. I think you are thinking about Breech's files, and you will have to talk to his lawyer.

Mr. Davis: You seem to distinguish between Mr. Breech as an officer of TWA and TWA.

Mr. Sonnett: There is no objection to that. I wish Mr. Davis would stop stalling. His favorite technique, when he is caught with his [3840] pants down, is to say, "You are another." Let's have the documents in here. You are not going to hide them forever.

The Special Master: If you will produce by next Friday the masked documents of the Hughes Tool Company, I will go into the question of the masking, and I will direct that the same be done as to any TWA documents that were masked, and as soon as we have Mr. Breech before the Court, or I examine the question as to who can act for him, I will do the same as to Mr. Breech's documents.

Mr. Sonnett: I am sure there will be no problem there, Mr. Rankin.

Mr. Davis: Before the luncheon recess a question was asked of me by Mr. Sonnett, which I thought at that time and still think was out of order. The Special Master indicated some interest in the subject, and before resuming the

questioning of the witness I would be pleased to state the facts for the record and for your information, sir.

The Special Master: Excuse me. Off the record.

[3841] (Discussion off the record.)

Mr. Davis: This is with respect to what transpired in the so-called publicity release and letter to the New York Stock Exchange.

I had an opportunity to confirm the facts during the luncheon period.

They were vague in my mind at the time the inquiry was made by the Special Master, and that was really my underlying basis for objecting to interfering with my discovery proceeding.

The letter to the New York Stock Exchange was prepared by Mr. Cox, who is here with me.

I revised the letter. The letter that actually went to the Exchange was the letter as revised by me.

However, the carbon copies of the letter as drafted by Mr. Cox had not been all destroyed. When the Exchange called and asked that we undertake to release to the press the statement that had been made to the New York Stock Exchange Mr. Settles undertook to do that. He took excerpts from the letter that had been drafted by Mr. Cox rather than the copy of the letter that went to the Exchange.

[3842] That is the explanation of the difference between the statement that went to the press as an excerpt from the letter to the Exchange and the actual letter that did go to the Exchange.

That fact was called to my attention shortly after that occurred. I did not think that the difference was of sufficient materiality to require any further action on the part of the Tool Company.

The Special Master: Thank you.

Mr. Davis: I do not know of any other release of any kind that was prepared or issued by my office with this limited exception: In connection with applications that were made to the CAB, and relating to Northeast, or the acquisition of control of Northeast, which was withdrawn by either Atlas or Northeast, a statement came out by the CAB relating to that withdrawal which was not satisfactory to the Tool Company.

I communicated with the CAB and advised them that the Tool Company had no objection to making public the memorandum of understanding which had originally been filed with the CAB relating to the acquisition of Northeast, and that the request for confidential treatment which had [3843] been made by Atlas and Northeast was not a request made on behalf of Hughes Tool Company.

Following that discussion with the CAB the Tool Company decided to release to the press the memorandum of understanding which had been filed as a joint memorandum and which had been withdrawn.

I understand that a representative of Carl Byoir & Associates undertook to advise the press of the position taken by Hughes Tool Company and made available to them the memorandum of understanding.

If that was done in the form of a press release, it was done by Carl Byoir & Associates, I never saw it. But I do know that that took place.

So far as the production to TWA of any of such releases is concerned, my statement made several times on the record still holds good, that I believe that we have fully complied with the production called for.

I have not made any special or particular inquiry as to what or which releases, available or in existence, were in

fact included among the [3844] documents produced either at Houston or Romaine Street.

With the permission of the Special Master, I do believe that my position is proper and sound, that while the Tool Company is engaged in discovery proceedings, oral examination of TWA and of this witness, it should not be interrupted for the purpose of permitting TWA or the additional defendants to engage in what in effect amounts to an indirect oral examination or discovery proceeding.

The Special Master: I wish to allow Mr. Sonnett to comment, if he wants to, upon your statement, and then we will proceed.

Mr. Sonnett: I not only want to, but I feel obliged to, Mr. Rankin.

What counsel had just said, if I understand him, is that the document which he produced, and which has been marked Defendants' Exhibit 61, and which bears at the top the words "By hand," and next to it, in handwriting, "11:50 a.m.," is not in fact a copy of the communication sent to the New York Stock Exchange.

He now describes it, if I understand him, [3845] as a draft—

Mr. Davis: No, sir, you misunderstand me. Let me explain it to you again.

Mr. Cox originally prepared a letter for the New York Stock Exchange in final form with copies annexed.

He came to me with it before sending it. I changed it, and what went to the New York Stock Exchange is the letter as revised by me.

However, there was left in the office copies of the letter as prepared by Mr. Cox and before I revised it.

Mr. Sonnett: Therefore, I am quite correct. We do not have a copy of the letter as sent to the Stock Exchange.

Mr. Davis: Yes, sir. That is Defendants' Exhibit 61.

Mr. Sonnett: I am sorry, it isn't, from what you have just said. Where is the change that you made? I don't understand you at all.

Mr. Davis: Can you explain it to him, Mr. Special Master?

Mr. Sonnett: Why don't you? It was your handiwork.

[3846] The Special Master: The way I understand Mr. Davis' statement is that Mr. Cox made a draft—

Mr. Davis: It was a letter in final form, sir.

Mr. Sonnett: Where is it?

Mr. Davis: Destroyed.

Mr. Sonnett: It was destroyed?

Mr. Davis: It was destroyed at the time. It was never sent. I assume you never revise the work of your associates. I do.

Mr. Sonnett: So there is no copy of the document he started out with. That is my point.

Mr. Davis: Yes, there is, in excerpt form, because that is exactly what Mr. Settles sent to the press.

Mr. Settles made excerpts of the carbon copy of the letter as prepared by Mr. Cox. The letter that went to the Exchange was the letter prepared by Mr. Cox as revised by me.

If that isn't clear I will do it once more.

The Special Master: I understand it.

Is there any question about it, Mr. Sonnett?

Mr. Sonnett: Yes. Quite frankly, I may be [3847] stupid today.

The Special Master: Mr. Cox prepared a letter in a final form. Mr. Davis revised it. Exhibit 61 is the revision that was sent.

Mr. Settles took excerpts from Mr. Cox's draft and sent them as the press release. Mr. Davis thought there was

not sufficient change between the press release and the document, Exhibit 61, that he need to change the press release.

That is what he says.

Mr. Davis: That's right. The point is that Mr. Cox's letter was not in draft form, and therefore, when Mr. Settles found lying around a copy of a letter addressed to the Exchange that did not have "draft" on it he assumed that it was a carbon copy of the letter which in fact was sent to the Exchange.

Mr. Sonnett: Is Mr. Davis saying that at 6:00 p.m. on May 31, 1961—

Mr. Davis: 6:00 p.m.?

Mr. Sonnett: That is what it says on Exhibit 62A.

(Continuing)—that Mr. Settles dictated to [3848] the Daily Mirror, the Daily News, the Herald Tribune, The New York Journal American, The New York Times, The New York Post, The New York World-Telegram, Associated Press, United Press International and the Wall Street Journal a press release without Mr. Davis' approval?

Mr. Davis: That is correct, in this sense, Mr. Sonnett, that I had approved a letter to the New York Stock Exchange which was delivered to the Exchange at 11:50 a.m.

The Exchange called and asked that we send out to the newspapers the statement of the letter sent to them.

Mr. Settles undertook to do that.

He was instructed to send to the newspapers an excerpt of the letter as sent to the Exchange.

Mr. Settles, unfortunately, got ahold of a carbon copy of a letter in final form as prepared by Mr. Cox which had not been sent to the Exchange, and transmitted that as an excerpt of the letter to the Exchange.

That fact came to my attention several days later, and I didn't think that the difference between what Mr. Settles

sent to the newspapers and [3849] what I had approved as a letter to the Exchange required any further action by Hughes Tool Company.

Mr. Sonnett: Would Mr. Davis identify who in the Exchange asked them to issue this press release to the press?

The Special Master: I don't think we should go into that at this time, Mr. Sonnett.

When you get to your case I will give you all opportunity to go into those questions.

Mr. Sonnett: I have a variety of questions. In light of your ruling, I will not press them. But they are very interesting, indeed, on this subject matter, such as who made the decision reflected in the exhibit, whether Mr. Davis made it, Mr. Hughes made it, how it was made, and a series of interesting questions such as that.

If I understood correctly, on the question of production of documents, Mr. Davis said a little while ago that he had no idea whether the Carl Byoir press releases had been or had not been produced.

I am interested in the press releases they put out in their press campaign about the so-called [3850] counterclaims. They should be produced, including all drafts.

The Special Master: I understood Mr. Davis to represent that there had been a full production, including any such press releases, as they were called for by various motions and orders.

Mr. Sonnett: I may be in error, Mr. Rankin. I thought he just said that he did not know whether or not the press handouts of Carl Byoir had been produced.

The Special Master: What I understood was that he said he hadn't checked that as a particular item.

Will you enlighten us on that, Mr. Davis?

Mr. Davis: You are correct, Mr. Special Master.

The Special Master: Now we will proceed with the deposition of Mr. Tillinghast.

Examination (cont'd) by Mr. Davis:

Q. Before the luncheon recess, Mr. Tillinghast, I believe you were explaining how this offer by the Tool Company reflected by Defendants' Exhibit 56 had put TWA on the spot.

Do you recall your testimony along those lines?

[3851] A. Well, I wouldn't consider that an accurate characterization, Mr. Davis, but I recall what I was testifying about.

Q. Then you also testified to the effect that you considered this letter of June 10, 1961 as an interference with the Boeing program?

A. No, I didn't. As an attempted interference.

Q. And you were explaining how this proposal by the Tool Company constituted such an attempt at interference with the Boeing program.

Do you recall your testimony along those lines?

A. Broadly, yes.

Q. And I inquired from you if you understood from this proposal that it was not a condition of the proposal that TWA undertake to acquire either Boeing aircraft or Convair aircraft.

You recall your testimony—

A. I do.

Q. Will you explain further how the proposals, or any one of the proposals set forth in this letter of June 10, 1961, might constitute an attempt at interference with the Boeing program? You need not repeat any testimony that you have already given.

A. Well, Mr. Davis—

[3852] Q. You may to the extent you feel it is necessary in order to make a sensible answer.

Mr. Sonnett: You are not asking him for an argument, I take it. You seem to be.

Mr. Davis: Just looking for facts.

Mr. Sonnett: You are asking an argumentative question, in light of the record. This has been testified to at length. Mr. Davis is interested in arguing with the witness. He is not asking for discovery. He wants Mr. Tillinghast to behave as an advocate.

[3853] The Special Master: You don't have to be an advocate. Just tell the facts, Mr. Tillinghast.

A. Repeating, at least in part, what I have already testified to, Mr. Davis, this impressed me as an attempt to get us involved in a negotiation which would go on for an extended period of time, and which would raise questions which would have the effect of interfering with and postponing the consummation of the financing which was necessary to go ahead with the Boeing program.

Q. Did you understand that the proposals submitted by Defendants' Exhibit 56 could be accepted in a form so as to constitute a commitment on the part of the Tool Company without the delay that might take place with respect to an actual offering of equity securities to the public?

A. It was my understanding, Mr. Davis, that the so-called proposals involved in Defendants' Exhibit—what is the number?

Q. 56.

A. (Continuing) —were not such—

Q. Don't you have Defendants' Exhibit 56 before you?

A. No, I do not, Mr. Davis. I have a copy of it, [3854] but it doesn't have the exhibit number on it. I will write it on, and then we won't have any problem.

It was not my understanding, Mr. Davis, that the proposals contained in Plaintiff's Exhibit 56 were sufficiently complete with respect to the essential terms that they were subject to a simple acceptance by TWA. It seemed to me obvious that any one of the proposals, had it been "accepted," would have merely been a prelude to extended negotiations to settle the essential terms.

The Special Master: I don't think that is the question, Mr. Tillinghast.

The Witness: I am sorry.

The Special Master: The question was whether or not you thought that it could be accepted without the offering being made to the public. Wasn't that the question?

Mr. Davis: That's right.

The Witness: Well, yes. There was no public offering involved.

Was that your question? I am sorry.

Q. I don't know to what extent you understood either at the time or now the proposal. Let me refer you to page 2.

[3855] Mr. Sonnett: May I ask the Master—

The Special Master: You want the question read?

Mr. Sonnett: Yes, and I would like to have that comment stricken. I think that is unnecessary. The question was involved, and frankly I understood it as the witness did. Maybe we both were confused.

The Special Master: Read the question.

Mr. Davis: It was the answer which brought about the remark.

Mr. Sonnett: The witness has been trying to help you.

(The record was read.)

By Mr. Davis:

Q. Mr. Tillinghast, let me refer you to page 2 of the exhibit, under proposal No. 1, and you see the portion which reads "Hughes Tool Company will agree to subscribe to a pro rata share of any such new offering and will subscribe to any portion unsubscribed by the other stockholders of TWA up to a maximum amount of $100 million."

A. Yes, I see that, Mr. Davis. I was mistaken.

Q. At the time that you received this letter you [3856] understood it, did you not?

A. I think I understood it, and I will come back to your question before, and I think your question was in two parts, and that is, whether or not this could be accepted, and I say again that in a legal sense I don't think this proposal, or any of them, was capable of acceptance.

The Special Master: I say to you again, Mr. Tillinghast, that wasn't the question. The question was whether it could be accepted without the public offering.

The Witness: My answer, Mr. Special Master, it couldn't be accepted with or without the public offering.

It just wasn't capable of acceptance.

Q. Mr. Tillinghast, my question to you is whether or not you understood that proposal No. 1 could be developed

into a firm commitment by Hughes Tool Company without involving delays that might be attendant to a public offering.

A. If that is your question, Mr. Davis, the answer is yes.

Q. You understood that?

A. I didn't understand that. I understand your [3857] question now.

Q. My question to you is whether you understood that at the time that you were considering the June 10th letter.

A. At the time I was considering the June 10th letter I was very much impressed by the fact that this was nowhere near being a complete proposal, and that obviously to develop it into a complete proposal capable of acceptance would require a very considerable amount of negotiation and consequent delay.

Q. With respect to this delay that you are referring to, I am trying to establish the fact as to whether or not you understood that it would not be a delay occasioned by the necessity of a public offering.

A. That's correct.

Q. What delay did you contemplate with respect to the terms that would have to be negotiated or the problem of obtaining an adequate commitment of the Tool Company with respect to proposal No. 1?

A. Well, obviously, Mr. Davis, as you well know, the terms connected with any underwriting or guarantee of a public offering are many and varied. But I call your attention to the fact that the most essential ones, as to type of security and price, were not even touched [3858] on in this proposal.

Q. I understand that, but are you aware of the fact that the Tool Company, in connection with the December 1960 financing, committed itself to subscribe to a hundred million dollars worth of income debentures of TWA?

A. I am.

Q. And that commitment of the Tool Company did not describe in detail the nature or type or terms of the securities that TWA would offer, did it?

A. It did to some degree, as I recall it.

Q. In a general way?

A. In a general way.

Q. And the Tool Company firmly committed itself to not only subscribe to its proportionate share of any equity security which TWA might offer, but also undertook to subscribe to any portion which the other stockholders did not subscribe to—you understood that as the 1960 agreement, didn't you?

A. I don't recall that that involved an equity security, Mr. Davis.

Q. I understand you draw a distinction between equity security and these subordinated income debentures.

A. I do.

[3859] Q. Do you understand or did you understand proposal No. 1 as one whereby the Tool Company was offering to commit itself to subscribe to an offering of equity securities to be determined by TWA?

A. No, I did not, Mr. Davis. I did not understand this to be a commitment by the Tool Company to buy equity securities of any type or form which TWA might be disposed to offer.

Q. I understand that the letter of June 10th was not in that form. Did you understand that the proposal was to discuss and agree upon a form of commitment by the Tool Company?

A. I understood the proposal to be an invitation, if in good faith, to discuss and agree upon, yes.

Q. Did you understand from the paragraph on page 3 that if you were favorably disposed to an acceptance of this

proposal the matter could be indicated to Mr. Davis and then whatever details necessary discussed and worked out?

A. I read what it says, Mr. Davis.

Q. At this point I am interested in the understanding that you had at the time.

A. My understanding at the time, Mr. Davis, was that at best this was an invitation to become engaged [3860] in a lengthy negotiation.

Q. Is there any particular part of this Defendants' Exhibit 56 which to you means that it was an invitation to engage in extended negotiations?

A. Well, I think, Mr. Davis, the whole thing smacks of that.

Q. Is there any particular part of it to which you can refer as giving it that flavor?

Mr. Sonnett: I don't know, Mr. Rankin, whether this is producing anything. What it seems to be designed to do is to engage the witness in a debate about the meaning of words. He is not asking the witness whether he understood what was said in the letter, whether he didn't understand it. He keeps going back to the question repeatedly, which the witness has testified to at least a hundred times, about his basic evaluation of the letter.

If we start down a path here about whether this sentence or that sentence or the other sentence conveyed to the witness some meaning other than the words normally conveyed, we are getting into a debate. This is all Mr. Davis is trying to do. He is wasting, I think, a great deal of time.

[3861] The witness has made, I think, very clear his evaluation of the letter, of the proposals in it, the reasons why he had the views he had, and the

witness is certainly capable of reading and understanding the English language. We are at cross purposes here always.

The Special Master: I don't understand how there is any debate involved, Mr. Sonnett. It seems to me the witness can say "I understood the language" in whatever way he did at the time. The language may say something else to you or to me or Judge Bromley, and the English may be different. But it is what the witness understood and what he did about it that the question asks for.

It doesn't ask here for what he did about it, but it does ask what he understood about it. He drew certain conclusions from it, and he is asked to tell what parts of it he drew those conclusions from.

Mr. Sonnett: He has already testified from the entire letter, sir.

The Special Master: Now he is asked for particular parts.

[3862] Mr. Sonnett: He is being asked whether any particular part.

The Special Master: That's right.

Mr. Sonnett: And if so, what.

The Special Master: Yes.

Mr. Sonnett: The witness has said the entire letter. What are we getting into but a debate about particular sentences?

The Special Master: If he can't find anything except the general letter, he can say so.

Mr. Sonnett: I thought he had. That is the basis of my objection.

The Special Master: If he can't find any particular part that he can point to, he can say so. That is all the question asks for.

A. I don't think my feeling, Mr. Davis, was based upon particular parts of the letter. I think it was based upon the total letter.

Q. But you understood that the letter was divided into three separate proposals, did you not?

A. I did.

Q. Now we are addressing ourselves to proposal No. 1, and only proposal No. 1.

A. Yes.

[3863] Q. Did you understand that proposal No. 1 was open for only a period of ten days?

A. Subject to an extension.

Q. Subject to an extension of time only if you indicated that you were favorably disposed toward proposal No. 1, isn't that right?

A. That's correct.

Q. Isn't it a fact that under proposal No. 1 you had ten days within which to indicate whether or not TWA was favorably disposed toward proposal No. 1?

A. It so states.

Q. And it was up to TWA to act as quickly or slowly, within the ten-day period, as it wished, isn't that right?

A. It so states.

Q. That is what you understood?

A. To the extent that I accept this as being in good faith, that is what it says.

Q. But I understood you to say a moment ago that while you had these suspicions as a result of conferences with Mr. Rowe and Mr. Reed, you decided to treat the letter as though it were in good faith, isn't that right?

A. In a sense, yes.

[3864] Q. And in a sense no?

A. Well, no. I think—I guess I have to say the answer to that is yes, Mr. Davis. I proposed to deal with it as if

it were a good faith proposal to see what might conceivably come of it.

Q. Making that assumption, which was an assumption that you were making sometime between June 10th and June 16th—

A. June 12th and June 16th.

Q. June 12th and June 22nd?

A. June 16th.

Q. (Continuing)—you understood that you had ten days in which to indicate whether or not you were favorably disposed?

A. That's correct.

Q. Did you intend your letter of June 16, 1961 to indicate that you were favorably disposed toward proposal No. 1?

A. No, I didn't, Mr. Davis. I intended, in my letter of June 16th, so far as proposal No. 1 is concerned, to indicate certain serious questions associated with proposal No. 1, as to which I thought we needed answers from you.

Q. Is it a fact that TWA concluded that it was [3865] not favorably disposed toward proposal No. 1?

A. No. I think TWA's position on proposal No. 1 was that we were interested in equity financing if it could be arranged, but that the suggestion that had been made here contained an obviously impossible condition, and one probably recognized by you as being impossible.

Q. What condition did you recognize as being impossible?

A. The termination of the voting trust.

Q. What was the basis for your conclusion that this was an impossible condition?

A. That the Hughes Tool Company had turned heaven and earth during 1960 in an attempt to arrange financing

without a voting trust, and had not succeeded in doing

Q. Did you consider or discuss with anyone the fact t a hundred million dollars of additional equity capital mi give the lending institution such additional security t they might no longer be interested in the voting trust

A. Yes.

Q. With whom did you have such a discussion?

A. With Mr. Leslie, I believe.

Q. Anyone else?

[3866] A. I probably mentioned it to Mr. Rowe, a also to Mr. Reed. But my main discussion of that, so f as I can recall, was with Mr. Leslie.

Q. Will you describe the nature of the discussion whi you had with Mr. Leslie on this aspect?

A. Well, I remember asking Mr. Leslie whether thought the financial institutions would think this sufficie to do away with the voting trust, and he said he didn think there was any chance of it.

Q. Did he give you any reasons or facts to support th conclusion?

A. Well, I don't remember, Mr. Davis, exactly. It very hard for me to be sure that I associate things that have been told with specific conversations.

I was aware of the fact, and I think he touched on t fact, that the voting institutions were—I am sorry—t financial institutions were very concerned with the manag ment problem and with the discontinuity of manageme that had existed, that he didn't feel that with the Boei financing, which, by this time, had already been informal committed for, coming along, that the financial institutio would be willing to go ahead with the commitment and the same time accept a termination of the voting trust.

[3867] The Special Master: We will take a short recess.

(Whereupon, a short recess was taken.)

Mr. Davis: During the recess I received a report, but perhaps we can hold that until after Mr. Tillinghast is through. It is very simple. It might give everybody a chance to think about their position at the end by merely stating that the expert has been there, has found the battery has run down.

May we discuss the matter further at the close of the session, if it requires further discussion?

Mr. Sonnett: Mr. Davis, will you bring him in and see whether he can get you to run down? That would be even more helpful.

The Special Master: I am glad that is the end of it. You may proceed.

Mr. Sonnett: I still think, however, that we ought to have the documents produced. They have got to be ruled on sooner or later.

Mr. Special Master: I think that is the understanding.

Mr. Davis: That's correct.

[3868] By Mr. Davis:

Q. In connection with your discussions with Mr. Leslie, that you were testifying about before the recess, Mr. Tillinghast, you referred to the concern of the lending institutions as to the management of TWA. Do you remember discussing that aspect of it with Mr. Leslie?

A. As to the discontinuity of the management of TWA.

Q. At the time you were discussing this matter with Mr. Leslie did you or did he refer to the first sentence of paragraph (b) which appears at page 4, reading:

"If this proposal is accepted, it would not be the intention of Hughes Tool Company to change the present management of TWA"?

A. No, Mr. Davis, I can't remember whether we mentioned that at that time or not. I think we probably touched on it at least in part.

Q. Did Mr. Leslie have available to him a copy of the letter itself?

A. I believe so. I am under the impression, it is my recollection, that when the letter came in I had photostats made and gave them to Mr. Leslie and Mr. [3869] Cocke. He was familiar with the letter, I am quite sure.

Q. But you don't recall any particular discussion or consideration given to the meaning of what particular sentence?

A. Well, I think maybe, Mr. Davis, as I think about it, that we did discuss that. I have a feeling that these marginal notes, which say "Right to default whole loan,"—

Q. Are you referring to the marginal note which appears next to that paragraph in the letter?

A. Yes, I am. I am sure there is only one that reads substantially that way. What does yours say?

Q. There is the word "of" (handing to witness)?

A. No, there isn't, Mr. Davis. It says "Right to default whole loan."

Q. May I refer you to this (indicating)? Doesn't it look like "o-f"?

A. That, Mr. Davis, is a "T" at the end of "default," d-e-f-a-u-l-t.

The Witness: Would you pick me up, please?

Q. That is in your handwriting, isn't it?

A. That is in my handwriting. I can appreciate [3870] your difficulty in reading it.

(The answer was read.)

A. (Continuing)—were the consequence of a discussion with Mr. Leslie, and if I am correct in my recollection, Mr. Leslie pointed out that with a maintenance of management position—provision of the type referred to in subparagraph (b) on page 4, TWA would be in the position where if there was some change in management the outstanding indebtedness of TWA could be accelerated, and that leads me to think that the answer to the question you first asked is yes, I did discuss paragraph (b) with Mr. Leslie.

Q. Will you give us your present recollection, then, of the discussion that you had with Mr. Leslie in that regard?

A. Well, my recollection, Mr. Davis, is merely that I discussed with him, as I have several times testified, the question of whether or not the financial institutions would accept a termination of the voting trust, as to which he expressed a negative opinion, and discussed the possible acceptability of a maintenance—management provision, as to which he observed first that he doubted that the financial institutions would accept it, and secondly, that this [3871] might create a serious problem from TWA's standpoint in that it might accelerate all of TWA's indebtedness if there was a management change.

Q. Is that the entire substance of the discussion you had with Mr. Leslie with respect to the likelihood of the lending institutions—

A. Well, as I testified before, I asked Mr. Leslie to get in touch with the financial institutions and obtain from them such expression of views as he could as to whether they

would or would not give serious consideration to termination of the voting trust on the assumption that there was a equity investment of the sort referred to in the letter.

Q. I appreciate that, but at the moment I am interested in what was said by you and by Mr. Leslie before he went to see the lending institutions.

A. So far as I can recall it at this point, Mr. Davis, I have testified to all that was said.

Q. I understand your testimony as to the opinion, expressed by Mr. Leslie, as you recall it.

I am now trying to develop what you said or he said in support of that conclusion.

Was there any discussion as to why the lending institutions should be opposed or should not be opposed, whether [3872] a particular effort should be made by TWA to try to convince the lending institutions that it was to their interest to acquiesce in the condition?

A. Mr. Davis, I don't remember any discussion beyond that to which I have already testified.

Q. Are you testifying that in fact there was no discussion as to the reasons why the lending institutions would or would not approve other than the statement of his opinion that they would not be likely to acquiesce?

A. No, I am not so testifying.

Q. Was there a discussion as to the reasons that the lending institutions would have for not consenting or acquiescing in the condition?

A. Not that I can recall, Mr. Davis.

Q. Did you indicate to Mr. Leslie that when contacting the lending institutions he ought to make every possible effort to persuade them favorably?

A. No, I did not.

Q. What was the purpose of your discussion with Mr. Leslie?

A. The purpose of my discussion with Mr. Leslie, so far as I can recall it, was to obtain his opinion and to ask him to obtain the views of the lending [3873] institutions.

Q. Was it to get the views of the lending institutions on the assumption that TWA was favorably disposed toward the proposal, or from the point of view that TWA was not favorably disposed, or from the point of view that TWA didn't care one way or the other?

A. I would say, Mr. Davis, that I regarded this question of the voting trust as being one primarily between Hughes Tool Company and the financial institutions, which, as I said before, had been the subject of the most long and drawn out and strenuous negotiations just a few months before this.

I personally very much doubted that in the light of that there was any serious likelihood that the financial institutions, so quickly after they had succeeded in establishing the voting trust, would have a sudden change of heart.

Nevertheless, I felt that we should go to them and ask them, and I felt that so far as I was concerned I should ask Mr. Leslie whether he shared my views on the subject, or, more accurately, what his opinion was. His opinion happened to coincide with mine, and that being the case, I asked him to go and find [3874] out from the financial institutions whether that was in fact their state of mind.

Q. My question now is whether or not this conversation you had with Mr. Leslie could be construed as a direction or instruction to Mr. Leslie to approach the lending institutions on the basis that TWA was or was not favorably disposed to proposal No. 1, subject to whatever position they would insist upon.

A. Well, I must come back and say once again, Mr. Davis, that I am sure that our discussion was colored some

what by the feeling that I had that this was not a serious or genuine proposal.

I did not, as I recall it, give Mr. Leslie any instructions, either to urge the financial institutions to agree to this or urge them not to agree to it.

I had an opinion as to the position they probably would take. I wanted to find out from him whether he shared the opinion, and through him to find out whether or not in fact I was correct in the opinion I thought they would take on the subject.

Q. Did you discuss with Mr. Leslie your views that the receipt of this proposal by TWA was likely to interfere with the Boeing program?

[3875] A. Mr. Davis, I would have to say that what you say is not a quite accurate summation of my views. I think it highly probable, although I don't recall a specific discussion, that I at least mentioned to Mr. Leslie that I considered that this was another step in the series of attempts to upset and interfere with the Boeing program.

Q. My question is whether or not there was a discussion of that aspect of your views, whatever they were.

A. I tried to say that I have no recollection at the present of a specific discussion.

Q. Do you recall whether or not generally, if not specifically, you at the time told Mr. Leslie "This letter, of course, is nothing but an effort to interfere with the management of TWA or the Boeing program," or something of the like?

A. I think it is very likely that I said that to him, Mr. Davis, but I don't have a specific recollection.

Q. Do you have a recollection of saying that to anyone else other than Mr. Rowe and Mr. Reed?

A. No, I don't, although I would have said that to anyone with whom I was discussing the letter [3876] to whom such a statement might have been appropriate.

Q. You don't recall saying that to anyone?

A. I don't recall any specific discussions of it other than those to which I have testified.

Q. You are referring to your discussions with Mr. Rowe and Mr. Reed?

A. Yes.

Q. You are not referring to any discussion with Mr. Breech or Mr. Sessel?

A. Well, I don't recall specifically, but I would be very surprised if I hadn't stated that to both of those gentlemen.

Q. But you have no recollection of having done so?

A. I don't have a specific recollection, no, Mr. Davis.

Q. Going back to Exhibit 56, page 3, at the bottom of that page, I see another note with the figure 44,000, it appears to be. Do you see that?

A. I see that.

Q. You think that might have meant 44,000,000 instead of 44,000?

A. At the moment, Mr. Davis, I haven't the slightest idea what it refers to.

[3877] Q. Let me suggest to you that at that time you were contemplating the financing of approximately $148 million, more or less, and you see that that note is next to the paragraph which reads:

> "Hughes Tool Company would guarantee to TWA an additional $100 million of equity capital."

You think that the 44,000,000 or 44,000, as it appears in the note, might refer to the difference between $100 million and the amount needed for the Boeing program?

A. Well, if it were 42.5 instead of 44 it would have been the difference between $100 million and $147.5 million. But it isn't 42.5. Why it is 44, I just don't recall.

Q. It may have been just a rough figure, a notation that you made as you were reading along. Let me ask you this: Did you give consideration as to what the financing requirements of TWA would be if proposal No. 1 were to become a reality?

A. Yes, I did, Mr. Davis. It would have meant that our borrowings would have been a little over $200 million, about $210 million, over and above the $100 million of subordinate debentures, or [3878] $300-odd million including them.

Q. I don't understand the arithmetic you just did, Mr. Tillinghast.

When you say "borrowing," let us eliminate from the borrowing concept the income debentures that were issued to the public and to Hughes Tool Company, and let's think of those in terms of securities.

A. Well, Mr. Davis, it is as simple as this. I add to $165 million of the 1960 financing $42.5 million over and above the $100 million for the 1961 Boeing program, and I come, I guess, to $207,500,000, and one of the things that I was thinking about, and this may be the reason for this note here, is that even with the $100 million we would still be in a position where we would need extensive outside debt financing, even before we got to the stage 3 or short-range program.

Q. I understand there was always a problem of further and future additional requirements.

A. That's right.

Q. For the moment I am addressing myself to what was then immediate and contemplated by TWA.

A. So far as what was immediate and contemplated [3879] by TWA, I would have to say that whenever one talked about equity financing that brought to my mind the question of the third phase short-range program, and in connection with a $100 million of additional equity, I looked at that in terms not only of the 1960 program and the 1961 Boeing program, but also the short-range program that would have to come on beyond that, for which we would unquestionably need financing.

Q. In connection with your discussion with Mr. Leslie, did you attempt to compute the difference between the interest requirements of the program as then contemplated as against the payments which might have to be made, if earned, on equity securities or additional subordinated income debentures, or the like type of security?

A. We may well have, Mr. Davis. I don't recall it specifically at the moment, but it is very likely.

Q. Can you give me your best recollection as to what study or the conclusion of any such study—

A. Well, I am quite sure there was no study. The task of figuring the difference between interest on $100 million and the cost of $100 million of equity is a very simple problem that one can do very readily in his head—

[3880] Q. Would you mind doing it for me now?

Mr. Sonnett: The witness hadn't quite finished his answer.

Mr. Davis: I am sorry.

The Witness: Would you read back what I started to say?

(The answer was read.)

A. (Continuing)—and I don't recall that there was any specific study made or that there was anything beyond the stage of casual conversation.

Q. Would you give me now this computation that you say—

A. Obviously, Mr. Davis, if you have $100 million of debt at 6 per cent a year, that is $6 million a year, and if you assume that you save half of it by taxes, that is $3 million. So that the cost after taxes of $100 million of debt is $3 million, and if you don't have debt, but you have equity instead, the earnings of the company are $3 million higher than they otherwise would have been.

Q. You are assuming, of course, that with a debt you will be able to earn so as to have taxable income rather than a loss?

A. I said it is $6 million before taxes and $3 [3881] million after taxes. You make whatever assumption you want as to whether you have made profits and have paid taxes or not.

Q. What assumption did you make?

A. Mr. Davis, I don't think I made any assumption

Q. At that time were you expecting 1961 to be a profitable income taxable year for TWA?

A. If I recall the time correctly, that was becoming an increasingly dubious prospect.

Q. At that time, when you were considering this June 10th proposal, you did think it was rather dubious as to whether or not TWA, in 1961, would have any earnings

Q. Well, it was about this time that there seemed to be a pretty serious question about it, Mr. Davis. I can't recall exactly what the picture was on June 12th, but the signs were certainly beginning to appear by then.

[3882] Q. Do you recall whether that aspect of it was included in your discussion with Mr. Leslie, or possibly Mr. Breech, or Mr. Sessel?

A. No, I don't, Mr. Davis, and I have to come back and say again that my views as to the nature of this proposal limited the time and effort that I thought it prudent to spend on running down such things, and I also point out that you don't look at these things from the standpoint of one year alone, you look at them from the standpoint of an extended period of time.

Q. At this point, Mr. Tillinghast, I am trying to obtain as completely as possible from you the extent to which serious consideration was given to this proposal, on the assumption that it might have been proffered in good faith, contrary to your suspicions, perhaps, and it is in that connection that I am asking you what consideration was given or suggestions that you may have had.

A. Mr. Davis, there was no, I think, particular question in anyone's mind, certainly in my mind, that it would be desirable to add to TWA's equity base if possible. The problem wasn't the desirability or lack of desirability of adding to TWA's equity base. The problem was the realism or lack thereof of the proposal.

[3883] Q. Because of the condition relating to the voting trust?

A. And because of the question of whether it was in good faith or just another maneuver in a series in which you seemed to be engaged at the time.

Q. But if we assume that it was in good faith, then the only problem was whether or not the lending institutions could be persuaded to acquiesce in the voting trust condition?

A. Not the only problem, Mr. Davis, but the big threshold problem was the problem of whether there was any

reasonable—any realistic possibility whatever of securing a termination of the voting trust.

Q. You referred to the third stage financing requirements that you had in mind at that time. Did you consider obtaining a commitment for a hundred million dollars of equity capital was something which would further the interests of TWA or adversely affect those interests?

A. Mr. Davis, I have said I don't know how many times now that I thought in and of itself the addition of equity to TWA was a desirable thing, and I so stated in the letter which I wrote to Mr. Holliday.

Q. Was that aspect discussed out loud with these [3884] persons that you have identified as having discussed the matter?

A. I have no specific recollection of it at the moment, Mr. Davis. It very likely was.

Q. If you assume that the proposal was made in good faith, the terms of the proposal would not interfere with the business or objectives of TWA?

A. Well, that is hard to separate, Mr. Davis, from the condition that was placed on it.

I think you—if out of the question one of the most important parts of the proposal—it seemed to me that it was not a genuine, serious proposal, but rather it was a maneuver.

I said before, and I will say for about the tenth time, that additional equity in and of itself I considered good, and if it were just as simple as getting a hundred million dollars of additional equity capital, that was fine and good, and I was all for it.

Q. Is it fair to say, then, that the only part of this letter which disturbed you was your belief that it was not made in good faith?

A. Well, now, are you talking about the whole letter, or proposal No. 1, which we have been talking about?

[3885] Q. I am talking about proposal No. 1, and I am conscious of your prior testimony that you considered the receipt of this letter as a maneuver and effort to interfere with the affairs of TWA.

You recall your testimony, that you identified this letter as one of those letters?

A. Oh, yes, I do. You don't need to state that still another time, Mr. Davis.

Q. Now I am asking you if it is a fact that the only aspect of this proposal No. 1 which made you feel that it was an interference, an improper interference, with the affairs of TWA was because of your feelings, assumptions or conclusions that it was not made in good faith.

A. Well, Mr. Davis, I don't think that is quite so. I think I just have to refer you to my very lengthy prior testimony on the subject, and to point out that this contained what seemed to me the impossible condition about termination of the voting trust, it raised a question of CAB approval, it raised the question, about which I have testified, as to whether or not the company might get in a position where a management problem would accelerate its entire indebtedness.

But I think all these things are secondary to [3886] the main concern, which was that it was not a good faith proposal.

Q. I understand that, Mr. Tillinghast, but what I am trying to determine is what aspects of this proposal No. 1 were, in your view, an improper interference with the affairs of TWA, if you assume that it was made in good faith.

Mr. Sonnett: And excluding prior testimony, I take it.

Mr. Davis: Without repeating prior testimony.

A. I just have to repeat my prior testimony, Mr. Davis.

Q. You referred to CAB approval, and I note that on page 4, at the top of the page, this note appears: "CAB approval." That is also in your handwriting?

A. That's correct.

Q. What does that refer to?

A. That refers to the fact that any such arrangement of this sort would obviously require CAB approval.

Q. You note that this appears with respect to the part of the proposal which reads:

"Hughes Tool Company would guarantee to TWA an additional $100 million of equity capital which [3887] would not only further secure the lending institutions, but would enable TWA to undertake an aggressive program for acquiring additional jet aircraft which, according to our understanding of your position, are unquestionably desired by TWA."

Mr. Sonnett: That is not the complete paragraph.

Mr. Davis: That is the end of the sentence, the "CAB approval" note appears at the top of the page there, doesn't it?

Mr. Sonnett: That is what you left out of your question.

Q. The balance of it reads:

"Furthermore, with such additional equity capital TWA should be able to obtain without difficulty adequate financing from the present lending institutions or others for expanding its present jet aircraft fleet

with either Boeing aircraft or Convair aircraft or both as may be determined by the management of TWA."

With respect to that paragraph, you have a note, "CAB approval."

Mr. Sonnett: I think you ought to ask the [3888] witness whether the note relates to that paragraph or something else. That is my problem. I don't know what it relates to. The note is at the top of the page.

Mr. Davis: May I proceed?

Q. Does that note refer to the CAB approval which would be required with respect to a transaction between Hughes Tool Company and TWA?

A. It does.

Q. In other words, you were aware of the fact that any commitment by Hughes Tool Company to subscribe or enter into any transactions with TWA involving more than $200 was subject to CAB approval—that is what you were aware of, weren't you?

A. I believe I was aware of that at this time, Mr. Davis, but I don't think that that was specifically what I had in mind.

I had in mind the observation of the Civil Aeronautics Board in its opinion approving the voting trust that in the event of the termination of the voting trust there would have to be the most careful—I can't remember just what their words were—

Q. Searching inquiry.

A. (Continuing)—most searching inquiry as to [3889] whether or not this would serve the public interest.

Q. That was a statement that appeared in the ex part order of the CAB that was issued in connection with th 1960 financing?

A. Well, it was in the order that approved the settin up of the voting trust.

Q. When you say "the order which approved the settin up of the voting trust," you are referring to the order whic has been previously identified and which approved of th transaction between the Tool Company and TWA, are yo not, relating to the 1960 financing?

A. Let me say, Mr. Davis, it is the one that has been, believe, already marked in evidence, to which I ha referred before.

Q. Did you discuss with anyone what the attitude of t CAB was likely to be in approving or disapproving th further transaction between the Tool Company and TW if it were to become a reality?

A. As far as I can recall, Mr. Davis, the only thing th I did was, I believe in talking with Mr. Rowe, observe th obviously there was a question of what the CAB would with this if it got that far.

Q. What was the nature of that discussion?

[3890] A. Well, it was about, as I recall it, about pre-emptory as that, merely to note there was a ve obvious question.

Q. A very obvious question?

A. Right.

Q. But did anybody say anything to you indicating likelihood or unlikelihood of problems that might encountered with CAB?

A. Not that I recall, Mr. Davis.

Q. Did TWA make any effort to contact or communic with CAB as to their views or attitude, or what it might in connection with such a transaction?

A. Not so far as I can recall.

Q. Do you recall discussing that matter with Mr. Breech?

A. No, I don't.

Q. Do you recall that Mr. Breech at one time had indicated he had discussed with CAB the subject of his becoming a voting trustee?

Mr. Sonnett: I object to the question as repetitious, and as calculated to produce the further wastage of another hour or more in going over what has been gone into in great detail.

The Special Master: What purpose—

[3891] Mr. Davis: My question was intended solely to elicit whether or not he recalled his testimony in that regard.

Mr. Sonnett: I have no objection to that question.

Q. Do you recall your testimony in that regard?

The Witness: Would you read back exactly what he said my testimony was?

Mr. Sonnett: He is withdrawing his characterization of the testimony, as I understand it. He is just asking whether you recall the testimony.

The Witness: I am sorry. I lost the thought.

Mr. Sonnett: May we have a fresh question?

Q. Do you recall your testimony with respect to statements made by Mr. Breech as to his conversations with the staff of CAB at the time he became or contemplated becoming a director or voting trustee?

A. Well, Mr. Davis, I think I do recall my testimony, and I think I also recall that I said that I think I must have been mistaken in that particular testimony.

Q. The purpose of this line at this time is to try to refresh your recollection as to whether or not [3892] in any conversation you had with Mr. Breech Mr. Breech indicated that he might be helpful before CAB, or that he had some particular information as to the attitude of CAB.

A. No, Mr. Davis, I don't recall having discussed this aspect of this letter with Mr. Breech at all.

Q. I note that next to the portion of the paragraph that appears at the top of page 4, which reads, in part, "TWA should be able to obtain without difficulty adequate financing . . . ," et cetera, you have a double line to emphasize it.

Is there any particular significance to that? Does that indicate that you discussed this matter with anyone in particular?

A. No, I think that just indicates, Mr. Davis, that that raised a question which was really at the meat of the coconut, would such an arrangement as we were talking about here in fact put us in a position to obtain without difficulty adequate financing for expanding our jet fleet.

Q. That doesn't indicate that this portion of the proposal was one which you felt required particular exploration or discussion with anyone?

A. Well, let me state it this way, Mr. Davis, [3893] that I think I was emphasizing that because, assuming that this proposal was in good faith, this got really to the meat of the question, and that is, would this enable us to obtain adequate financing for fleet requirements.

Q. My question is whether or not that indicates, since it was the meat of the question, whether you discussed it with anyone.

A. I am sure I did.

Q. You are sure you did?

A. I am sure I did.

Q. Can you identify with whom you discussed this aspect?

A. Oh, I am sure that I discussed that with Mr. Leslie, very likely with Mr. Rowe, and possibly others, possibly Mr. Sessel.

Q. Do you recall the substance of the discussion that you had with Mr. Leslie and Mr. Sessel and Mr. Rowe relating to this aspect of the proposal which you accentuated?

A. Well, Mr. Davis, without now distinguishing between the particular individuals, I am sure that I stated to one or more of them that the real question, as I saw it, taking this proposal at face value, was [3894] whether or not it would make it easier or more difficult to obtain the financing necessary for jet fleet purposes for TWA.

Q. Now I am interested in what you said, what they said, or your recollection, would it make it easier or more difficult.

A. My recollection of the discussion was that this just got us back to the question of whether or not the financing institutions would (a) accept termination of the voting trust and (b), if they did, would they continue to lend money in the quantities that might be required for these purposes.

Q. This was really the meat of the question, wasn't it?

A. That's right.

Q. Did you personally discuss this with any representative of the leading institutions, proposal No. 1?

A. I may have, and I think it is probable that I discussed it with Mr. Sessel.

Q. Are you referring to that telephone conversation you mentioned previously?

A. No, I am not, because that came at the end of the discussion, in a sense, after he had talked with the financing

institutions. I have a recollection [3895] that some time before then I had talked with him and discussed the question of whether or not this would or wouldn't enhance TWA's ability to finance.

Q. Now I would like you to give us your total recollection with respect to that discussion or meeting.

A. Well, I can't identify it, Mr. Davis, as either a telephone discussion or a face-to-face meeting. I can't recall much more of what I said than I have already testified to.

As to what Mr. Sessel said, the only thing that sticks in my mind was that he doubted—he didn't believe that the financial institutions would have any interest whatever in financing TWA without the voting trust.

Q. Do you recall whether that was a discussion you had in private with Mr. Sessel, or was it a conversation which involved others?

A. My best recollection, but I wouldn't be positive of this, Mr. Davis, is that it was a telephone call.

Q. Was it a lengthy discussion, was it a very brief one, casual, serious?

A. My recollection, as best I can recall it, is [3896] that after this was received by Irving Trust Company Mr. Sessel called me up and asked me had I seen this, and I think, so far as I can remember, that it was in the course of that telephone conversation.

Q. Tell me what happened when Mr. Sessel called you up and asked you if you had seen this.

Mr. Sonnett: You mean anything that he hasn't already testified to, Mr. Davis?

[3897] Mr. Davis: I don't believe that we have covered this before.

Mr. Sonnett: The witness has testified as to his recollection of the conversation, and said he didn't

remember whether it was in person or by telephone. We are talking, apparently, about some conversation prior to the board meeting, at which this was discussed in great detail, at which Sessel and others were present.

But the witness has described his recollection, and he has now said his best recollection is it was probably a telephone call. He has already described what was said. I hope he is not being asked to repeat that again.

A. I really don't remember, Mr. Davis, anything beyond that.

Q. Beyond what?

A. Beyond what I just testified to.

Q. I didn't understand that you have testified yet as to what Mr. Sessel said to you or you said to him when he called you. I understand you to have testified that you believe you had a discussion with Mr. Sessel, the occasion being when Mr. Sessel called you to say "Have you seen this letter which I have received?"

[3898] Now I am asking you to tell me what took place in that conversation, by telephone or otherwise, when Mr. Sessel for the first time asked you if you had seen this letter of June 10th, a copy of which he had received, since one was addressed to the Irving Trust Company.

A. Mr. Davis, so far as I can recall it, and I don't want to just guess at what I suppose was said here, as far as I can recall it, Mr. Sessel called me up and asked me if I had received this letter. I undoubtedly told him that we had. We discussed it, as I recall it, very briefly, and I don't recall any specifics of the discussion beyond what I have already testified to.

Q. That is the sum total of the contact that you personally made with the lending institutions to discuss the meat of the problem?

Mr. Sonnett: Oh, Mr. Rankin, what contact did he make. He got a telephone call. Mr. Davis is just provoking argument.

The Special Master: The inquiry that Mr. Davis started out with was what contact Mr. Tillinghast made himself with the lending institutions.

[3899] Mr. Sonnett: The answer was he didn't recall any.

The Special Master: Oh, no. He said he thought that he had made contact with Mr. Sessel, and he was the only one, and that was through a telephone conversation.

Mr. Sonnett: Not that he made contact.

The Special Master: That he had a conversation.

Mr. Sonnett: That is why I am objecting to the form of the question. It just produces argument.

The Special Master: If that is not clear, the witness should say whether or not he ever made any effort to contact the lending institutions himself.

A. As I recall it, Mr. Davis, I had no discussion of this with the lending institutions other than conversations that I had with Mr. Sessel.

Q. But the question to you, Mr. Tillinghast, is whether or not you, as chief executive officer of TWA, made personally a contact or attempted to contact or communicate with any representative of the lending institutions with respect to proposal No. 1.

[3900] Mr. Sonnett: Directly or through someone else, Mr. Davis? We are going to go right back into that same exercise.

The Special Master: Leave it directly first, and let's get that answered.

A. Not that I recall.

Q. This is a matter you left entirely to Mr. Leslie?

A. As I recall it, I asked Mr. Leslie to get in touch with the financial institutions, and I did not do so myself.

Q. And you did not ask anyone else on behalf of TWA to approach the lending institutions with respect to this matter other than Mr. Leslie?

A. No, I am quite sure I didn't, because Mr. Leslie would have been the natural one to talk with them.

Q. But whether or not he would have been the natural one, the thing I would like to establish at this point is whether you asked anyone other than Mr. Leslie to communicate with the lending institutions with respect to this proposal No. 1, any problems that it might create, or anything else relating to that proposal.

A. I said no.

Q. Did you communicate with the financial advisers [3901] of TWA? I am referring to Dillon, Read primarily.

A. I don't recall having done that, Mr. Davis, and I doubt it. It is possible I did, but I have no recollection of it.

Q. You think it is possible that you may have?

A. It is possible, but I don't think so.

Q. Was there any particular reason for not discussing this matter with the financial advisers, Dillon, Read in particular?

A. Mr. Davis, there was one very compelling reason, and that was that—particularly at this time, and I guess it has been true ever since I have been at TWA—the greatest single problem that I have had is how I would apportion

my time, and while I appreciate that this particular matter was something to which you were privileged to spend practically—to devote practically all of your time, I had a thousand and one things that were pressing to be done, and I had constantly to make judgments as to what it was fruitful and profitable to spend my time on and what it wasn't, and as I recall the circumstances at the time, I did not consider that an exploration in depth of this subject with all of the people with whom it might have been explored was something to which I should devote my time and attention.

[3902] Q. You had been discussing with Dillon, Read the 1961 financing, had you not, during that period?

A. Well, it depends on what you mean by this period.

Q. I am referring to the period during which you were considering, on the assumption that it might have been in good faith, this letter of June 10th.

Mr. Sonnett: I object to the form of the question. It is an incorrect summary of the testimony. Mr. Davis ought to stop testifying.

We get into more wasting of time and money because he insists on trying to improve the record. If he would just refer to the subject matter the witness testified about, and let the record stand, we would do a lot better.

The Special Master: Could you rephrase the question?

Mr. Davis: What is the question as it now stands on the record?

(The question was read.)

Q. I am referring to the period between June 12th and June 22nd.

A. Well, Mr. Davis, let me point out I replied to this letter on June 16th. But anyway, taking the longer [3903] period from June 12th to June 22nd, I have no present recollection of having been in particular contact with Dillon, Read during that period.

Q. June 22nd was the date on which the ten days expired by reason of a subsequent letter you received stating that since the June 10th letter was not received by you until June 12th the offer would remain open until June 22nd, that is the reason for the period June 12th to June 22nd, and the question is whether or not it is not true that during that period of time you were actively concerning yourself with the general problem of the 1961 financing and the Boeing program.

A. That is not my recollection, Mr. Davis. My recollection is that—so far as my personally being concerned is involved—that I was quite concerned in the last week of May, and that after that crisis was over Mr. Leslie carried it along pretty much through the month of June.

Q. Wasn't it at or about that period that you had discussed with Mr. Leslie a fee of $200,000 for Dillon, Read?

A. It may have been, but I don't consider that being involved with Dillon, Read on the financing.

[3904] Q. Wasn't it during that period that you also had considered the $750,000 fee which had been paid to Dillon, Read in connection with the 1960 financing?

A. It possibly was. I just don't recall those dates, Mr. Davis. They are easily established.

Q. But you are quite certain that you did not discuss with a representative of Dillon, Read this proposal No. 1, or any of the problems which it created?

A. No, I am not quite certain, Mr. Davis. That is not my testimony. I said I had no recollection of it.

If in fact I had, during this period, some contact with someone from Dillon, Read, it would have been very natural to have discussed this, and I very likely did.

I am merely saying that I have no present recollection of having discussed this with someone from Dillon, Read.

Q. If there was any discussion, then, it was a rather casual discussion?

A. All I can say is I have no recollection of any discussion with someone from Dillon, Read.

Q. Do you know if anyone representing or purport- [3905] ing to represent TWA discussed this matter with Dillon, Read?

Mr. Sonnett: Mr. Davis, or Mr. Rankin—perhaps we will get at it faster—Mr. Davis' questions are often very blind as to time. I don't know whether the minutes of the board of directors meeting of TWA of June 21st, in which there is extensive discussion of this subject matter and resolutions of the board, have been marked or not, but if he has a blind question, as he has as to time, we are only getting a lot of confusion here.

The Special Master: Do you want to show the minutes to the witness so as to refresh his recollection?

Mr. Sonnett: If Mr. Davis is saying prior to the board meeting of the 21st, and if he proposes to show the minutes to the witness, all right. But this way I don't know what the record means, whether he is talking at any time, before, during or after the board meeting, when this matter was disposed of.

Mr. Davis: I have no objection to counsel for TWA refreshing the witness' recollection.

[3906] Mr. Sonnett: If the minutes haven't been marked, I suggest they be shown to the witness and marked, and let's get on with it. This way the record is meaningless.

The Special Master: If it will help to refresh his recollection, Mr. Davis has already said you could tell him—

Mr. Sonnett: I invite the attention of Mr. Davis and the witness and the Master to the minutes of June 21st, page 2, at which, under the heading, "Relations with Hughes Tool Company," there commences about four pages of discussion of this subject matter, discussion of Mr. Holliday's letter, discussion of Mr. Tillinghast's reply, the resolutions of the board. It is all set forth in detail. This is a very wasteful way of going about it.

The Special Master: I suggest that the witness look at that over the recess, and before the next session, and see if he refreshes his recollection in the meantime, and give us his recollection the next time we meet.

Mr. Sonnett: The difficulty is the question was blind as to time, and I didn't know whether he [3907] was seeking to elicit something that happened at the board meeting on the 21st of June, or sometime thereafter, or sometime before. That is the problem.

Mr. Davis: Mr. Special Master, I think the record is clear that I was not inquiring as to what happened at the board meeting on June 21st.

I was inquiring the extent to which, during the period of time when presumably consideration was being given to this proposal, this witness, or any other representative of TWA, discussed the matter with Dillon, Read.

Mr. Sonnett: We have just gone through a series of questions the terminal date of which was June 22nd, the day after the TWA board, as he knows, because he has the minutes, reviewed it in extenso, and took resolutions on the subject matter. That is the problem. It is perfectly blind as to time. We don't know what he is talking about, and it wastes an awful lot of time.

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[5514] Q. Mr. Tillinghast, I would like to turn to a different subject.

Have you had an opportunity to fully refresh your recollection with respect to the minutes of the meeting of the board of directors which took place on June 21, 1962?

A. I refreshed my recollection as to a particular portion of them.

Q. In that connection did you also have occasion to view [5515] the notes of Mr. Duckworth?

A. No, I did not.

Q. To orient your thinking, I am going back to the events which occurred between the time that TWA received the letter of June 10th from the Tool Company, and the board meeting which took place on June 21st.

I would like you to refer now to what has been marked as Defendants' Exhibit 11-P.

You will note that Defendants' Exhibit 11-P—can you identify what Exhibit 11-P is? If you will recall your testimony is that is one of the documents you identified when you identified a number of documents which you felt constituted part of the Tool Company's interference with the affairs of TWA.

A. What is your question?

Q. Can you identify Defendants' Exhibit 11-P?

A. I believe that is a telegram that you sent to each of the directors of TWA on June 20, 1961.

Q. Defendants' Exhibit 11-P is a document which is entitled in parentheses, "(Telegram received by Irving Trust Company, New York City, 8:11 p.m., June 20, 1961—Telephone to Mr. Sessel at home)."

Then it appears to be addressed to Mr. Ben-Fleming Sessel and signed Raymond M. Holliday, Hughes [5516] Tool Company.

Do you see that?

A. Yes.

Q. First I would like to understand how this happened to be in the files of TWA?

A. That I don't know, Mr. Davis. Indeed I don't really know where this came from.

Q. Do you see that little number on the lower left-hand side—"98"?

A. If you say this came from our files, I will take your word for it.

Q. It was handed to us by your counsel as coming from your files, and it is one of the documents that you identified from the originals.

Do you remember when the files, certain files, of TWA were put before you and you identified those documents which you felt constituted part of this interference by the Tool Company?

A. Yes, I do.

Q. And each one of those exhibits were identified as Defendants' Exhibit 11 with an identifying letter after it?

A. I don't recall the particular letter, but if you say so, I will accept it.

[5517] Q. You have no information at all as to how this document happened to be in TWA's file?

A. No, I don't, Mr. Davis.

Q. Can you identify or explain in what respects this telegram is interference by the Tool Company?

Mr. Williams: I think that is a conclusion—a legal conclusion that he is asking the witness for, and I object to it.

He has produced the letter. The telegram speaks for itself.

Mr. Davis: Apparently Mr. Williams is not aware of the testimony given by this witness, which identifies this telegram as one, or part of the course of conduct by the Tool Company which he has described as malicious and willful interference in the affairs of TWA.

Mr. Williams: Does he have to argue with you as to why he thinks so?

Mr. Davis: No, I am asking him to point out what portion, if any, of this telegram he regards or considers to be an improper interference with the affairs of TWA.

Mr. Williams: He has said the whole telegram.

Mr. Davis: He has identified the document.

[5518] Maybe he would like to adopt your answer. I will take it if that is his answer.

Mr. Williams: Do you want to argue a legal point with the witness?

Mr. Davis: No.

Mr. Williams: Then I will object to the question.

The Special Master: I think the objection is good. If you want to ask him whether there is some portion that he considers an interference—

Mr. Davis: Perhaps my question was poorly worded. That is what I had in mind.

By Mr. Davis:

Q. What portion, if any, any particular portion of this telegram, do you consider to have had the effect of interfering with the affairs or the management of TWA?

Mr. Williams: You mean if not the whole, then what portion?

Mr. Davis: No.

Mr. Williams: I don't understand.

Mr. Davis: I am sure the witness understands, because he claims this telegram has constituted some kind of interference, and I am trying to find out how this telegram either had the effect of interfering, or [5519] what effect it had on anybody, how it interfered with the business.

Mr. Williams: That is a legal argument—what effect it had on anybody. It is a conclusion.

The Special Master: He can ask what they did as a result of the telegram.

Mr. Williams: I don't mind that.

By Mr. Davis:

Q. This is a telegram that was addressed to all the directors of TWA so far as you know, is that right, Mr. Tillinghast?

A. That's correct.

Q. This particular document was one which was addressed to Mr. Ben Fleming Sessel?

Mr. Williams: It says so. Yes, it says so. He doesn't have to answer that.

Go ahead.

Mr. Davis: I do not know that he even knows it is a telegram that Ben-Fleming Sessel received.

Mr. Williams: He found it in the files.

By Mr. Davis:

Q. Did someone telephone to you and inform you that Mr. Sessel had received this telegram?

A. Not that I can recall, Mr. Davis.

[5520] Q. Did you receive such a telegram?

A. I believe I did.

Q. How did you find out that all the directors had received similar telegrams?

A. I believe that enough of them told me that they had received such a telegram, that I got the impression that everyone had received one.

Q. Can you identify any portion of this telegram which had the effect of interfering with whatever TWA management was trying to do?

Mr. Williams: I object to the question on the grounds I already stated.

It is impossible to answer that question.

The Special Master: Sustained.

We will have a short recess.

(A short recess was taken.)

[5521] By Mr. Davis:

Q. Mr. Tillinghast, can you explain why TWA's files do not contain the telegram which you received?

A. No, I haven't the slightest idea, Mr. Davis.

Mr. Davis: May I request at this time that TWA through its counsel if need be advise us whether or not the telegram received by Mr. Tillinghast and others of TWA, exist in the files of TWA.

The Special Master: Can you include in that request the number it was identified by? Isn't that 11-P?

Mr. Davis: The telegram, or the original of the telegram of Defendants' Exhibit 11-P.

The Special Master: You may request it.

Mr. Williams: I will inquire into it.

By Mr. Davis

Q. Do you recall, Mr. Tillinghast, any conversation with Mr. Sessel with respect to Defendants' Exhibit 11-P?

A. Not specifically, no, Mr. Davis.

Q. Do you recall something generally?

A. I think unquestionably I had some words with Mr. Sessel and most of the other directors about the fact of the telegram having been sent, but I can't recall a specific conversation with Mr. Sessel.

[5522] Q. Do you recall a conversation on this subject with Mr. Breech?

A. No, I don't recall a conversation with any specific person, Mr. Davis, although I am sure that this was the subject of at lest a casual comment at the directors meeting.

Q. With that answer you include Mr. Rowe or Mr. Reed?

A. I don't know about Mr. Reed. It would include Mr. Rowe, I think.

Q. Does that mean that you recall a discussion with Mr. Reed?

A. I do not recall any discussion with Mr. Reed. Mr. Rowe was at the directors meeting, I believe, and undoubtedly participated in such discussion of it as took place there.

Mr. Davis: May I have marked for identification the minutes of the board meeting of June 21, 1961, as Defendants' Exhibit 76.

(Minutes of the board meeting of June 21, 1961, marked Defendants' Exhibit 76 for identification, as of this date.)

Mr. Davis: May I have marked as Defendants' Exhibit 77 for identification the Duckworth notes relating to that same board meeting?

(Duckworth notes relating to board meeting marked Defendants' Exhibit 77 for identification, as of this date.)

[5523] By Mr. Davis:

Q. Mr. Tillinghast, let me hand you what has been marked as Defendants' Exhibits 76 and 77. First I will ask you do the minutes of the board meeting of June 21st fairly and accurately reflect what took place at that meeting?

A. I believe they do.

Q. Who prepared those minutes?

A. I believe Mr. Duckworth did.

Q. Do you recall whether or not you had occasion to review and revise those particular minutes?

A. No, I don't recall that, Mr. Davis.

Q. Do you recall whether or not they were reviewed or revised by counsel for TWA?

A. I am sure they were submitted to counsel for TWA. They are in the regular course. What revisions counsel may have suggested in them I just would not recall at the moment.

Q. Will you look at Defendants' Exhibit 77? Can you identify those as notes in the handwriting of Mr. Duckworth, Secretary?

A. I believe they are.

Q. Do those notes reflect substantially the order in which matters were taken up at that meeting?

A. Mr. Davis, I presume they do. I have not seen these [5524] before, and so I could not be positive about that, but I would assume that they do reflect the order in which things were considered.

Mr. Williams: I wouldn't presume or assume anything.

By Mr. Davis:

Q. You were at the meeting?

A. Yes, I was at the meeting, but I don't believe at this point I could remember the order in which things were taken up.

Q. If you look at Defendants' Exhibit 76, which are the minutes themselves, you will see the first business referred to after the approval of the minutes of the prior meeting is the financial review, and a report made by Mr. Leslie, is that correct?

A. Yes.

Q. If you look at Defendants' Exhibit 77, you will see that these notes refer to a report made by Mr. Leslie relating to the 1961 financing, among other things.

A. Yes, I see that.

Q. Look at page 2 of Defendants' Exhibit 77, which refers to the financing by the Met and the Equitable and the banks, totaling $147 million. Do you see that?

A. Yes, I see that.

[5525] Q. And then the note is "Same general plan as described at May meeting." Do you see that?

A. Yes.

Q. Is it a fact that at this meeting of June 21, 1961, Mr. Leslie advised the board that negotiations with respect to the 1961 financing were proceeding in accordance with the plan outlined to the May meeting of the board. That is what took place?

A. I believe so, yes.

Q. So that these communications which had been received from the Tool Company had not interfered with the financing plans, because they were proceeding in accordance with the May plan, were they not?

Mr. Williams: I object.

By Mr. Davis:

Q. Had anything happened to interfere with the financing plan as developed or presented to the May meeting?

A. Yes, Mr. Davis, and I believe I have testified about that at considerable length already.

Q. Can you explain what the board of directors were told on June 21st by Mr. Leslie which is recorded in the minutes as "Mr. Leslie advised that negotiations with respect to the 1961 financing were proceeding in accordance with the plan outlined to the May meeting of the board."

[5526] In that connection I refer you to Mr. Duckworth's notes which read "Same general plan as described at May meeting."

My question to you is whether or not did the 1961 financing plan that had been described to the May meeting, whether it had changed in any material respect by June 21, 1961?

A. I will just have to refer you to my former very extensive testimony about the Prudential dropping out and all the things that happened at that time.

Q. I understand about the Prudential dropping out. My question now is whether it isn't a fact you, Mr. Leslie or the management of TWA, reported to the board at the meeting of June 1961, that the 1961 financing program was proceeding with the plan presented to the board at the May meeting?

A. With the exceptions noted, yes.

Q. The exceptions being that the Prudential was not to be included as a lender?

A. That was one of the exceptions, yes.

Q. What other exception of any material significance are you referring to?

A. I don't think there was any other major change other than that occasioned by the withdrawal of the Pru- [5527] dential.

Q. Now looking at Defendants' Exhibit 77, Mr. Duckworth's notes include the following:

"Except change in security requirements."

That thought does not appear in the minutes themselves. Will you tell us now what was said at this board meeting by Mr. Leslie or by you or anyone else, describing "Change in security requirements"?

A. I couldn't tell you that, Mr. Davis, without refreshing my recollection. My best recollection is that there were

some changes in the detail of the security requirements, but I cannot right offhand bring them to mind.

Q. You don't think they were material changes?

A. I don't think they were of major importance.

Q. In answering my prior question you said that you could not answer that without refreshing your recollection. What would you need to do in order to refresh your recollection, besides look at these documents?

A. Go back and find out just what the changes were, and see whether or not that refreshed my recollection as to any discussion of them at the board meeting.

Q. Who would be familiar with those changes of security requirements other than yourself?

A. Mr. Leslie, counsel.

[5528] Q. Dillon, Read?

A. Probably, yes.

Q. But you have no recollection of what was presented to the board on June 21st relating to a change of security requirements?

A. Not at this time.

Q. May I try to determine this then? Were those changes in security requirements related in any way to communications received from Hughes Tool Company or any of its representatives?

A. I don't know, Mr. Davis. Until I knew what they were, I don't believe I could answer that question.

Q. At the present time you are not aware of any change in security requirements that was the result of any letter sent by the Tool Company to TWA or to the lending institutions or the voting trustees or the SEC?

A. That is correct.

Q. Will you go to the third page of Defendants' Exhibit 77? You will note on the top of the page, it apparently relates to what appears to [be] the fourth paragraph; the

notes read: "Boeing progress payment $13 million, postponed from July 1st to August 1st at 5 per cent interest cost TWA has paid 7 million plus to date."

Will you first identify the progress payments which [5528A] were postponed from July 1st to August 1st?

A. As I am sure you know, there were progress payments due under the contract. There was a payment of $15 million due on July 1st which was postponed to August 1st, as I recall it, because of the incomplete nature of the negotiations relating to the contract.

[5529] Q. What caused this postponement of the progress payment?

A. I just said that as I recall it, the incomplete nature of the contractual negotiations.

Q. Between TWA and Boeing?

A. Between both TWA and Boeing, and TWA and the lenders, I believe. I am not absolutely sure of that, but I think that we were in a state of flux on both fronts.

Q. Can you describe the circumstances under which this five per cent interest was negotiated?

A. Well, it is a regular practice of Boeing to charge five per cent interest as a condition of the postponement of advance payment dates.

Q. In other words, there was no particular negotiation involved? It is a common practice which is generally recognized?

A. That is my understanding, yes.

Q. Who handled that part of the relationship with Boeing? Was that Mr. Leslie primarily?

A. I am not sure whether that was Mr. Leslie or Mr. Rummel. It might have been either of them.

Q. It was not a matter which was particularly taken up with you?

A. I was aware of it at the time, and discussed it at [5530] the time, but at this point I can't remember whether Mr. Rummel or Mr. Leslie actually talked with Boeing about it.

Q. The minutes themselves do not reflect the next statement which appears in Duckworth's notes, namely "TWA has paid $7 million plus to date."

What does that refer to?

A. Just what it says.

Q. I don't understand what it says. Does that mean TWA has paid $7 million plus interest to date to Boeing?

A. No, it paid $7 million on the contract.

Q. On account of a $13 million progress payment, you mean?

A. No. We had made progress payments of $7 million.

Q. When were those progress payments made?

A. The first one was made when the contract was signed, which was May 1st, and the next one was made about the 7th of June, if I recall correctly.

Q. Do you recall approximately the amount that was paid when the contract was signed in May, and the amount paid on or about the 7th of June?

A. I have a recollection that we paid $700,000 in signing the contract. My recollection is it was about $700,000. It was less than $1 million. I believe the balance of it was paid in the first part of June.

[5531] Q. In other words, something in excess of $6 million was paid by TWA to Boeing as a progress payment in the first part of June?

A. That's correct.

Q. Can you tell us whether that was paid before or after receiving that June 10th letter of the Tool Company?

A. It was before, Mr. Davis, and I think it was either the 8th or the 9th. I know it was approximately a week after your technical presentation.

Q. Are you referring to my presentation on June 2nd?

A. Yes.

Q. And it was well after the receipt of the letter that the Tool Company wrote to the SEC, and the subsequent letter of May 26th or thereabouts to the lenders?

A. It was in June.

Q. Do you recall whether or not that $6 million plus was paid to Boeing, whether that was paid in a routine manner, or was it the subject of a discussion or conference, either at TWA or with Boeing as to whether it should be paid or should not be paid?

A. As I recall it, Mr. Davis, that amount was originally due either on the 31st of May or the 1st of June, and it was postponed for about a week for the reason, at least in part, that you made your presentation on the 2nd of June, [5532] and we wanted Mr. Rummel and his people to review the situation in the light of what you had presented at that time, so that they could either confirm or withdraw their prior recommendation that we go ahead, or that we purchase the 26 planes from Boeing.

Q. Did you participate in the decisional process to pay this $6 million plus to Boeing?

A. I participated in the decision. I indeed made the decision to go ahead with the Boeing program. So far as the actual payment of the money was concerned, Mr. Leslie took care of that, and I did not, as I recall it, make the decision to send them the check.

Q. Can you tell me how soon after June 2nd you made that decision?

A. Well, as I recall it, it was the end of the next week, either Thursday or Friday of the next week.

Q. June 2nd was on a Friday?

A. Yes.

Q. Does that help you by referring to your calendar?

A. No, it doesn't help me, Mr. Davis. All I can say is that my recollection is that Mr. Rummel studied this matter with his people, and brought in a draft of a report on this subject. I remember because of the pressure of time, he brought his report in in draft form before it was [5533] finally completed. That, I think most likely, was Thursday of that week, and I discussed the matter with him, and decided to go ahead with the program.

Q. You notice on Wednesday, June 7th, you saw Mr. McCone at 9:30 in the morning?

A. I see that.

Q. And Cahill and others at 2:30 that afternoon?

A. I see that.

Q. Does that help you to identify as to when a decision was made? Do you think it was made on Thursday, the 8th?

A. Answering the first of your two questions, no, that does not help me with respect to when the decision was made. My best recollection is that it was either Thursday or Friday of that week that the decision was made.

Q. Look at the next page. At this time Mr. Duckworth is making notes relating to the presentation made by Mr. Cocke, which appears in the minutes under the heading "Operations Review." Under the heading "Domestic"—I am referring to the heading in Mr. Duckworth's notes. He has "New York-Chicago market penetration down 5 per cent. TWA up from 11 to 20 per cent."

Can you explain what that means?

A. I can tell you what the latter part means. That TWA's percentage had gone up from 11 to 20 per cent. At

[5534] about that time we substantially increased our jet service to Chicago, and as a consequence of that, the percentage went up from 11 to 20.

Q. That was the percentage of the entire market from New York to Chicago?

A. That's right. I don't understand what is meant by the prior note. It just doesn't make any sense to me.

Q. The minutes state that he, referring to Cocke, reported that "since the inauguration of Convair 880 aircraft schedules in the New York-Chicago market, the TWA share of the market had increased from 11 per cent to 20 per cent."

Can you tell us when the 880 aircraft schedule was inaugurated in the New York-Chicago market?

A. No, I can't, Mr. Davis.

Q. Can you explain the meaning of the note "San Francisco not so serious"?

A. Yes, the San Francisco traffic wasn't down to the extent that the Los Angeles traffic was down.

Q. That would be referring to New York-San Francisco versus New York-Los Angeles?

A. That's correct.

Q. Then we come to "Relations with Hughes Tool Company." If you turn the page, you will see Mr. Duckworth's notes. That was the report which you made to the board of [5535] directors?

A. That's correct,

Q. Look at Mr. Duckworth's notes, you will see he has a date of May 31st "Went ahead with Boeing plans. See executive committee minutes."

A. I see that.

Q. Those executive committee minutes are the ones we have already spent some time on in your prior testimony?

A. That's correct.

Q. And then you refer to the technical presentation which had taken place on June 2nd?

A. That's correct.

Q. If you turn the page you will see under date of June 9th "Second payment made to Boeing."

Does that confirm what we were looking for a moment ago, that it was on June 9th that decision was made to go ahead with this $6 million plus payment to Boeing?

A. If you will refer to the prior note here under the date of 6/8 which says "Rummel analysis and other data reviewed by equipment committee," it suggests to me that the decision may have been made on Thursday rather than Friday, although apparently the payment was actually made on Friday.

[5536] Q. Can you identify what is the other data that was reviewed by the equipment committee?

A. I can't be altogether positive, Mr. Davis. I think that the other data probably consisted mainly of the original equipment report. The only things that I can remember at this point that we had were, I believe, on the 8th—I may be wrong about this—a draft, an almost final draft of the Rummel report, plus the original equipment report.

Q. You see that Mr. Duckworth indicated that your report to the board—that on June 13th there had been a management policy committee meeting?

A. Yes, I have already testified about that, I believe.

Q. And that this management policy committee reviewed the program and agreed to proceed with the Boeing program?

A. That's correct.

Q. Where are the minutes of that management policy committee meeting—do you know?

A. I suppose with Mr. Duckworth.

Mr. Davis: Mr. Special Master, our records do not indicate that we have received the minutes of that meeting.

The Special Master: You can request them now.

Mr. Davis: I would like to request them now, with some explanation, if there is one, as to why they [5537] were not previously produced.

Mr. Williams: I will make inquiry.

A. It may be, Mr. Davis, that at this point in time no minutes were kept of the management policy committee meetings. This must have been either the first or second such meeting. It may be that we didn't actually start the practice of keeping minutes until a somewhat later date. I am not sure of that, but I think that is a possibility.

Q. I don't seem to be able to recall whether you covered that in your prior testimony or not, Mr. Tillinghast, but did you take up that June 10th letter at this management policy committee meeting of June 13th?

A. No, I am quite sure we didn't take up the June 10th letter as such.

Q. Without taking it up as such, did you discuss at that meeting the possible availability of four 880s, or thirteen 990s?

A. I just can't remember, Mr. Davis, whether we did or didn't. The matters set forth in there would not be matters which I would be disposed to take up with the management policy committee, except as it related to the question of equipment.

So far as the equipment side of it is concerned, it is entirely possible that I drew their attention to the so-[5538] called proposals that had been made, but I can't say that I have a specific recollection of having done so.

Q. Can you tell us who attended that meeting?

A. I can't be sure from memory as to who was there and who wasn't there, but so far as I can recall, it was the whole management policy committee.

Q. Every one of them?

A. So far as I can recall, but I wouldn't be sure of it.

Q. At that time you had not begun to draft your reply to the June 10th letter?

A. I think not.

Q. Will you look at the minutes of the meeting itself, Defendants' Exhibit 76. If you turn to page 3 you will see where the sentence which reads "He" referring to you "further stated that generally Mr. Rummel who was present at the meeting analyzed the various points raised by Mr. Davis, and submitted a report on the subject."

To whom did Mr. Rummel submit a report?

A. I believe it was to me. Possibly it was to the flight equipment committee, but my best recollection is that it was to me.

Q. Was it a written or oral report?

A. A written report.

Mr. Davis: May I have marked for identification [5539] this report dated June 8th.

(Report dated June 8, 1961, marked Defendants' Exhibit 78 for identification, as of this date.)

By Mr. Davis:

Q. Let me hand you what has been marked as Defendants' Exhibit 78. It has a fly sheet dated June 8, 1961 which appears to be addressed to you from Mr. Rummel, with copies to Cocke, Hall, Leslie, Pierson, Rook and Rowe, and with the word "comments?" on it. Is this the written

report you received from Mr. Rummel which is referred to in the minutes of the board meeting of June 21st?

A. I believe this is the final draft of this report, which was changed, as I recall it, just slightly in the final.

Q. I notice there is some handwriting on the fly leaf. Can you identify whose handwriting that is?

A. No, I cannot.

Q. Who wrote the word "Confidential" on it?

A. No, I can't identify that.

Q. I notice it is marked "Final Draft." There were prior drafts of this report, were there not?

A. I don't know, Mr. Davis. If I am correct in what this is, this is the first and only draft of it that I saw.

Mr. Davis: Mr. Special Master, we have not [5540] received, so far as we know, prior drafts of this document. May I request whether or not prior drafts have been produced to the extent which they may exist?

The Special Master: You may.

Mr. Williams: I will inquire into that.

By Mr. Davis:

Q. You see the persons to whom copies were sent of this report?

A. Yes, I do.

Q. They were at that time the members of which committee?

A. The equipment committee.

Q. Not the management policy committee?

A. That's correct.

Q. On the final draft I see Mr. Rowe's name does not appear, but the fly sheet includes Mr. Rowe. Was Mr. Rowe a member of that committee?

A. No, he was not.

Q. Is this the report which formed the basis for the decision that was arrived at at the management policy committee meeting of June 13th?

A. This report in its final form was one of the things considered by the management policy committee. I should point out, Mr. Davis, that the management policy committee in one sense at least did not make a decision, because that is [5541] an advisory group rather than a group having decisional authority.

But the conclusion to which they came was based in part on this report.

Q. What else was it based upon so far as the relevant material?

A. The discussion of the members of the committee who were present.

Q. Looking at the fly leaf of Defendants' Exhibit 78, in the upper right-hand corner, you see "BAC" and then a number. Does that refer to a Boeing contract number?

A. No. It looks to me like airplane numbers.

Q. 131-B, 331-B and 720?

A. It looks very much like that.

Q. You don't know what the significance of it is?

A. Those are models of airplanes to which this refers.

Q. What does the word "negotiations" refer to—do you know?

A. No.

Q. Then continuing with Mr. Duckworth's notes, Defendants' Exhibit 77, does that indicate to you that you presented to the board a letter you received from Mr. Holliday under date of June 10th?

A. It does.

[5542] Q. This date of June 12th, Mr. Duckworth's notes indicate the date on which you received that letter, isn't that right?

A. I guess that is what he had in mind.

Q. Did you also present to the board your reply of June 16th?

A. Yes.

Q. Will you describe what took place at that point. Did you undertake to describe at the meeting these three proposals that were contained in that letter of June 10th, or were all the directors already familiar with that?

A. Again, Mr. Davis, I have to point out that you have asked me several questions. Which do you want me to answer?

Q. I want you to describe what took place at the board meeting at this juncture when you referred to the letter of Mr. Holliday and your reply of June 16th.

A. I reviewed the letter which had been received. I summarized its contents. I advised them that I had replied to it. I advised them that no response had been received to my letter by the time of the meeting.

I then went on, apparently, to discuss the virtues and shortcomings of the proposals, and pointed out that a substantial increase in equity would be attractive, but that it appeared to me that the offer might be merely for the [5543] record.

I discussed or pointed out the fact that in addition to $100 million of equity, we would need broadly $200 million of other financing.

I believe, Mr. Davis, recalling it the best I can at this time, I said to the board that I didn't think that any of these proposals provided something on the basis of which we should take affirmative action, but that we should con-

tinue to keep the door open on the equity proposal to see whether anything developed that might be of interest to TWA.

Q. All the directors had received your reply of June 16th, had they not?

A. I believe that's correct.

[5544] Q. In connection with forwarding your reply of June 16th, you had not sent to all the directors a copy of the letter of June 10th?

A. No, and I would have to refresh my recollection as to whether you sent a copy of the letter of June 10th either. I am sure either you had sent it or else I sent it along with my reply.

I am sure I didn't send them a reply without the letter to which it referred.

Q. Now, I would like to have you describe what was said by any of the directors there present in connection with the remarks or presentation that you had made?

A. Before I say that, Mr. Davis, I should say one other thing that I said, and that was that I thought it would be a serious mistake were we to interrupt consummation of the Boeing program for the purpose of chasing what probably would turn out to be a will-o'-wisp so far as these so-called proposals of the Tool Company were concerned.

At this point I have some difficulty in recalling who said what, but I remember that Mr. Leslie discussed and described the inquiries that he had made of the financial institutions and Dillon, Read relative to the ability to obtain financing in the event of the termination [5545] of the voting trust, and read the letters that had been received.

Q. In your answer I think you said that you advised the directors that in your opinion it would not be advisable to interrupt or interfere with the Boeing program in order to chase a will-o'-the wisp, or something.

Were you referring to the proposals contained in the June 10th letter?

A. Yes, I am.

Q. You understood at the time that proposal No. 1 did not require TWA to change its mind with respect to the Boeing program?

A. Yes, I am quite aware of that, Mr. D[illegible], and I am equally aware of the fact that had we set out to negotiate something of that magnitude, it would have held up for a matter of months consummation of the Boeing financing, and unless and until we had something a lot more tangible than we had at that point, I wasn't about to recommend to the board that we interrupt and further jeopardize our Boeing financing at least so soon after having gone through the experience that we went through when the Prudential pulled out.

Q. Do you recall what comments or statements Mr. Breech made?

[5546] Q. My recollection is refreshed by a reference in Mr. Duckworth's notes here, to the effect that he felt it was in the best interest of TWA to continue the present course until the Tool Company presents a complete financing program.

Q. What do you mean by "continuing the present course"?

A. Of proceeding with the Boeing procurement. I believe, if I recall correctly, that Mr. Breech pointed out that he had had a number of discussions, one with Mr. Odlum, and other discussions with other people whose identity I can't recall at the moment, suggesting that Mr. Hughes was prepared to do this or Mr. Hughes was prepared to do that, and in each case nothing came of it.

I believe he made the point if we interrupt the program we are on now, we wouldn't know whether we really have

a new and different program, or don't, and he thought it would be a great mistake until we had—even to spend a great deal of time and effort on the matter—until we had a complete program which we could accept or reject.

Q. Do you recall what Mr. Sessel said on the subject?

A. No, at the moment, Mr. Davis, I have no recollection of Mr. Sessel having said anything. Yes, I do. I am mistaken. I believe Mr. Sessel repeated what he had told me over the telephone about the Bank of America, in response [5547] to his inquiring, having said that under certain conditions they might be willing to lend money without the voting trust, but that it was his opinion that in fact it wouldn't be possible actually to find a basis for doing this, and that he thought that the answer of the Bank of America was understandably influenced by the fact that they were the bankers for the Tool Company as well as for TWA.

Q. Do you recall whether either Mr. Sessel or Mr. Breech referred to the meeting they had, or to a meeting on June 16th, that they had with Mr. Hagerty and the insurance company lawyers?

A. Not that I recall, Mr. Davis, because I had no recollection of such a meeting until the other day here when I saw the memo that referred to it.

Q. Do you think you could state with some certainty that neither Mr. Sessel nor Mr. Breech described to the board the meeting or a meeting with Mr. Hagerty in connection with this June 10th letter?

A. I can only say, Mr. Davis, that I have no recollection of it whatsoever.

Q. If you look at the minutes themselves, page 3 of Defendants' Exhibit 76, it states that you pointed out in connection with proposal No. 1 that "An extremely impor-

tant fact was the effect that the acceptance of such proposal, [5548] including the condition that the present voting trust be terminated, would have on the ability of the corporation to obtain additional needed financing, particularly additional debt financing."

Do you recall what you said to the meeting that is reflected by that portion of the minutes?

A. As far as I can recall, Mr. Davis, I pointed out that the $100 million would not be sufficient to relieve us of the necessity of institution financing, not only for the present program, but for any short-range jet program that might be coming along.

I thought it vital in considering this thing to look at the totality of TWA's financial needs, and the possibilities of satisfying those needs if we went the route being proposed by the Tool Company.

Q. As I recall your prior testimony, you personally had not had any communication with the lending institutions in connection with this proposal No. 1, isn't that right?

A. Except as I have already testified.

Q. As I recall your prior testimony, you had this report from Mr. Leslie but you had not personally communicated with any representative of any lending institution?

A. I don't think that is correct, Mr. Davis.

[5549] Q. But you adverted to your understanding as to the attitude that the lending institutions were taking in connection with proposal No. 1?

A. I am not sure I adverted to it at this particular point, but from the first time that I read the June 10th letter up to and including the present time, it has seemed to me obvious that in appraising the desirability from TWA's standpoint of this proposal, one had to look at the totality of TWA's probable financial needs, and possible means of satisfying them, and that until and unless one did that, he

couldn't possibly form a considered judgment on this so-called proposal.

Q. In connection with the remarks that you made, neither Mr. Breech nor Mr. Sessel supplemented those remarks by whatever experience they had had in any discussions which they may have had with the lending institutions, is that correct?

Mr. Williams: You mean they didn't speak at the board meeting?

Mr. Davis: Yes.

Mr. Williams: Did they speak at the board meeting after you had made these remarks?

The Witness: Yes, I am sure that both of them spoke, and as I testified just a moment ago, I recall [5550] Mr. Sessel having spoken about the position of the Bank of America.

By Mr. Davis:

Q. I am referring now to the position of the insurance companies. He didn't refer to that?

A. Mr. Sessel?

Q. Yes.

A. I have no recollection of his having referred to the position of the insurance companies, but possibly he did.

Q. How about Mr. Breech?

A. I don't recall either Mr. Breech having referred to the position of the insurance companies or the banks, except I have a faint recollection that after Mr. Leslie had summarized the communications with the financial institutions, Mr. Breech remarked that in view of the position they were taking, it looked as if we are a long way from having anything that we could really deal with.

Q. Still referring to this page 3 of the minutes of the meeting, Defendants' Exhibit 76, in that same paragraph you notice the sentence which reads, "He", referring to you, "said that you had asked Mr. Leslie whether or not the corporation could arrange additional needed debt financing if the voting trust were terminated, as proposed in the [5551] letter of June 10, 1961, and that Mr. Leslie had reported that in his opinion this would not be possible under the circumstances."

Are you referring now to the June 19th report that you received from Mr. Leslie, which we have previously covered?

A. Yes, and my oral discussions with him.

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[5559] *Examination by Mr. Davis*:

Q. Mr. Tillinghast, will you refer to the minutes of the meeting of June 21st, which has been marked Defendants' Exhibit 76, and also to the handwritten notes of Mr. Duckworth relating to that meeting, which have been marked as Defendants' Exhibit 77?

A. Yes.

Q. Did you present to that board meeting the report of Mr. Leslie dated June 19th?

A. What report of Mr. Leslie dated June 19th?

Q. In your prior testimony we identified a so-called [5560] report from Mr. Leslie to you, which was dated June 19th. On page 3 of Defendants' Exhibit 76 the minutes state that you indicated that Mr. Leslie had reported that in his opinion this would not be possible under the circumstances.

Mr. Zeller: Are you quoting, or are you summarizing, and if so, where are you quoting from, or what are you summarizing?

Mr. Davis: If you look at the last paragraph on page 3, the minutes indicate that Mr. Tillinghast pointed out something. That is the first sentence.

The next sentence, the minutes reflect that he, referring to Mr. Tillinghast, said that he had asked Mr. Leslie whether or not the corporation could arrange additional needed debt financing if the voting trust were terminated as proposed in the letter of June 10, 1961, and that Mr. Leslie had reported that in his opinion, et cetera.

By Mr. Davis:

Q. I show you Defendants' Exhibit 69, Mr. Tillinghast, which is a memorandum from Mr. Leslie to you, dated June 19, 1961. My question to you is whether or not at the board meeting you presented Defendants' Exhibit 69.

A. That would depend a little bit, I think, Mr. Davis, on what you mean by presented. To the best of my [5561] recollection at the present time, this was not read in its entirety. My recollection is that I had it with me, I referred to it, but I don't recall that it was read in its entirety, although I could be wrong about that.

Q. Were the letters received from the lending institutions presented to the meeting?

A. Well, again you get into the question of what you mean by presented. If I recall correctly, Mr. Leslie had all those letters and referred to them. I cannot recall offhand whether he read each of them. I note from Mr. Duckworth's notes that Mr. Leslie read the Dillon, Read letter, and that would be in accordance with my recollection.

My best recollection is that the other letters were referred to and were stated to be in the hand, but were not read in their entireties.

Q. Did any of the directors, or Mr. Breech, make any comments, or say anything with reference to this Dillon, Read letter, Defendants' Exhibit 75, which you recall was read to the meeting?

A. I don't remember any specific comment addressed to that.

Q. Do you remember any comment with respect to Mr. Leslie's report or your description of his report reflected [5562] by the minutes of the meeting, which appear in the last paragraph on page 3?

A. I don't understand your question. Would you repeat the question, please?

(The question was read.)

Mr. Zeller: I am confused too, Mr. Davis. Do you mean a discussion with respect to the report itself?

Mr. Davis: No. I am particularly referring to what apparently was presented to the meeting, namely, that if the corporation were to accept the $100 million of additional equity, in his opinion, or in Mr. Leslie's opinion, or in Dillon, Read's opinion, it would not be possible to arrange additional needed debt financing.

My inquiry is whether any of the directors there present questioned or remarked or commented on the presentation of that information.

Mr. Zeller: And in particular, the presentation of the Leslie report, is that right?

Mr. Davis: That's correct.

A. Mr. Davis, I find it difficult or impossible to recall specific comments by specific people, but my recollection is that the consensus was that obviously this [5563] proposal

of equity financing of $100 million had to be looked at in terms of the total needs of the company and its ability to obtain debt financing in the event of termination of the voting trust.

It is also my recollection that the consensus was this so-called proposal was more for the record than real.

Q. When you say "the consensus was," I don't understand what you mean. I appreciate you not being able to identify the words used by the various directors, but can you identify what the directors as a group said, what Mr. Breech said, what Mr. Sessel said? Was it put to a vote?

A. Mr. Davis—

Mr. Zeller: There are a number of questions there, Mr. Davis. I suggest we take them one at a time.

Mr. Davis: I would like to have the witness give us his total recollection as to what in fact transpired in connection with the presentation to the board of this report, as to the ability of TWA to obtain the needed financing, [illegible] financing, in the event Proposal No. 1 were to be accepted.

Mr. Zeller: I take it that is precisely what the witness has just done in his last answer. If you have a specific question, why don't you ask him?

[5564] Mr. Davis: My question is, I do not understand what he means by saying "it was the consensus."

Mr. Zeller: Are you asking him to explain what he means when he says "it was the consensus"?

Mr. Davis: Yes.

A. I mean merely, Mr. Davis, as best as I can recall it, not being able to recall specific statements by specific

people, the general opinion or attitude was as I have testified.

Q. But you have no recollection of any statement made by any particular director on that question?

A. I believe that Mr. Breech made some statement to the effect that the purpose of this was to put us on the spot, and to divert us from going ahead with the Boeing program. Somebody, and I think it was Mr. Breech, said that if Toolco was serious about this they ought to bring in a complete financing package that took care of the debt side of it as well as the equity side of it.

I believe Mr. Leslie said something to the effect that only the Tool Company could make the necessary arrangements to provide other and different debt financing, and it was idle for TWA people to try to figure out what could be done if Hughes were prepared to do certain things, such as pledging certain assets, and so forth and so on.

[5564A] Beyond that I have great difficulty in associating any particular statements with particular people.

[5565] Q. You do not recall any statements made by Mr. Seasel with respect to the attitude of the lending institutions towards Proposal No. 1.

A. Not beyond that to which I have already testified.

Q. As I recall your prior testimony, you said that Mr. Breech did not refer to or describe a meeting with Mr. Hagerty, which presumably had taken place a few days before?

A. I have no recollection of any such statement.

Q. Referring to Defendants' Exhibit 77, the Duckworth notes, the page which is marked 756 in the lower left-hand corner, you will notice at the top of that page the statement "Any substantial increase in equity is attractive," and then it goes on.

Who said that—do you know?

A. I believe I did.

Q. The next item in Mr. Duckworth's notes reads "In addition to $100 million TWA would require additional $200 million other financing."

A. Yes.

Q. Is that something else that you said?

A. I believe so.

Q. Would you explain this additional $200 million of other financing that TWA would require?

[5566] Mr. Zeller: You mean you are asking him what he had in mind at the time he said that, is that right?

Mr. Davis: I am not so sure of that. It's what explanation he gave, if any.

A. I don't recall, Mr. Davis, that I gave any particular explanation of that. You will recall, I am sure, that we were talking about $165 million on the 1960 jet program, and we were talking about $147 million on the 1961 jet program, and together those add up to something over $300 million, and if you subtract $100 million, you get approximately $200 million.

Q. In other words, you are assuming, or the statement that you were making was to the effect that if Proposal No. 1 were accepted, and the Tool Company put $100 million of additional equity money in, this debt financing would not be available to TWA?

A. No, Mr. Davis.

Mr. Zeller: I object to that.

By Mr. Davis:

Q. You already had arranged the $165 million and $147 million?

A. We were just in the process of finalizing the $147 million. Both of those were conditioned upon the voting trust. Your $100 million was conditioned upon the [5567] termination of the voting trust. We were told that these funds would not be available if the voting trust were terminated, and we had the question of what about that other $200 million.

Q. Is it fair to say that what you explained to the board was that if Proposal No. 1 was accepted, based upon what you have already described as the attitude of the lending institutions, TWA would have to find another $200 million?

A. Whatever the attitude of the financial institutions was, if we received another $100 million from the Tool Company, that left $200 million that we had to find somewhere else, and which had to be obtained by debt financing.

Q. The telegram from Mr. McCone, was that presented to the meeting?

A. My recollection is that it was read to the meeting.

Q. It was read to the meeting?

A. Yes.

Q. Was there any comment made by any of the directors present to the substance of the remarks of Mr. McCone as reflected by that telegram?

A. Could I see the telegram to refresh my recollection, Mr. Davis, please?

Mr. Davis: Let the record show I am handing the witness Defendants' Exhibit 21.

[5568] A. I don't recall any particular discussion about the telegram, Mr. Davis, except that I believe that I

commented on the last portion having to do with the possible obligation on the part of TWA to take the 880s and 990s, and I believe stated with respect to that, that I had made several very thorough investigations as to the possible existence of liability, and I convinced myself that there was no such obligation, and I believe Mr. Rowe who was at the meeting confirmed that point of view. Beyond that I don't recall any particular discussion of the telegram as such, most of its contents having been the subject matter of the prior discussion about the Toolco proposal.

Q. Do you recall whether or not that telegram was read or presented to the meeting before or after these investigations that you have described as consensus of opinion as to the purpose of the June 10th proposal?

A. My recollection, Mr. Davis, is that this came rather towards the end of those expressions.

Q. These notes of Mr. Duckworth's reflect what took place at the meeting in the order in which it took place, do they not?

A. So far as I know, Mr. Davis, that's correct, yes.

Q. And you see at the bottom of the page which has 758 at the lower left-hand corner, there is reference to [5569] remarks by Mr. Breech?

A. Yes.

Q. Are those the remarks that you previously attributed to Mr. Breech, or do you have a recollection of Mr. Breech's remarks other than as appear here?

A. I could not say, Mr. Davis.

Q. You notice on that same page there is a reference to remarks by Mr. Slack. Do you recall Mr. Slack's comments?

A. My best recollection of Mr. Slack's comments are that he very much doubted that this proposal was made in good faith, but that he felt that whether or not it was,

we should carefuly consider and examine the proposal as if they were in complete good faith.

Q. Will you turn to the preceding page of Mr. Duckworth's notes, that has the number 757. You will see that page is headed "Possible Proposed Action."

A. I do.

Q. Who outlined "Possible Proposed Action"?

A. I am not absolutely sure, Mr. Davis. I have been trying to remember that. It may have been Mr. Breech, but I would not be positive about that. As I recall the meeting, there was a statement by somebody—I think Mr. Breech—of proposed action that the board should take, and just about the time that the proposed action was stated, the [5570] discussion drifted on and off into other matters, and that proposed action got lost in the shuffle and was never acted upon.

Q. You note that Mr. Duckworth's notes under the heading "Possible Proposed Action" indicate notes as to action by Toolco, action by TWA, action by CAB?

A. Yes.

Q. Next to proposed action by Toolco, the following appears "Can possibly arrange financing." Will you describe what that refers to?

A. I think the thrust of that, Mr. Davis, was that TWA didn't feel under the circumstances that it could possibly arrange the needed debt financing under the proposed circumstances, and that therefore we should go back to the Tool Company and say in effect that it would be necessary for them, if this was to be entertained, to arrange a complete package that would include the debt financing as well as the additional equity.

Q. Was it Mr. Leslie's remarks that possibly the Tool Company could arrange this additional financing?

A. As I recall what Mr. Leslie said, it was to the effect that only the Tool Company could work out the necessary arrangements, and possibly they could if they really wanted to, but that was something that only they could [5571] determine and not TWA.

Q. The next item under possible proposed action by TWA "Should TWA take time to attempt to develop program to support Toolco proposal."

Then there is an additional note "or support Toolco in getting CAB."

Will you describe who described the possible action by TWA raising the question? What does this note refer to?

A. I am not sure that I can be altogether precise about that, Mr. Davis, but I believe that someone, and probably Mr. Breech, was raising the question of whether TWA could justify the taking of the time and going to the efforts to go to the financial community to explore further the development of a program of debt financing which would support the Tool Company proposal.

As I remember the purport of what he said, it was to the effect that this was something that Toolco should do, and it wasn't something that TWA ought to spend a great deal of time and effort on in view of the circumstances that existed.

Q. Do you recall what the other directors said, if anything, in connection with this suggestion?

A. Not beyond what I have already testified to, Mr. Davis.

[5572] Q. The third item is "Possible Proposed Action By CAB," and there the note reads "Possibility CAB would raise public interest question if Toolco should force cancellation of trust agreement."

Do you recall what that note referred to?

A. That refers to the same thing I referred to in my letter, I believe, Mr. Davis, and that is the obvious question of whether in the event all of this could be achieved, which appeared doubtful, the Civil Aeronautics Board would, in view of the statements in its last order, approve it.

Q. Does this note again refer to remarks made by Mr. Breech primarily?

A. If I am correct that Mr. Breech was the one who was posing these questions, yes. My recollection is that he started by suggesting that he would take a try at proposing appropriate action, and it then drifted into a discussion rather than really a proposal of action.

Q. Do you recall your saying anything to the directors as to this area, as to the possibility of what the CAB might do if the Tool Company should force cancellation of the trust agreement?

A. Of course, Mr. Davis, this was in my letter, a copy of which I had sent to each of the directors. I have [5573] no independent recollection of having raised the point at the meeting, but I may well have. I just don't recall.

Q. Do you recall what was said either by Mr. Breech or anyone else that Mr. Duckworth is describing as "If Toolco should force cancellation of trust agreement"? I am particularly referring to the use of the word force."

A. No, I have no recollection of the word "force cancellation of the trust agreement" being used. Maybe it was. I just have no recollection of it.

Q. Look at page 4 of the minutes of the meeting, Defendants' Exhibit 76. I call your attention to the paragraph which starts "The meeting was advised that Mr. Chester Davis," et cetera. The next sentence reads "After discussion the directors concluded that in view of Mr. Davis' numerous and lengthy prior communications to the Board

and the management, no purpose would be served by granting Mr. Davis' request."

I believe you previously testified that these minutes were prepared by Mr. Duckworth?

A. I believe that's correct.

Q. You don't recall having revised them?

A. No, I do not, Mr. Davis.

[5574] Q. Can you identify the "numerous and lengthy prior communications to the board" referred to in that portion of the minutes?

A. I might say that this refers to numerous and lengthy prior communications to the board and the management. I think they need to be dealt with together. The first lengthy communication was that at the May meeting of the board, at which time you appeared and spoke at some length.

You had prior to this time sent, I don't know how many letters and telegrams.

Q. Excuse me for interrupting you at this point.

Are you referring to any letters or telegrams other than those that you have already identified?

A. I believe not. You had had numerous conversations with Mr. Reed and Mr. Rowe. We had had the meeting of June 2nd, at which you held forth at considerable length, as I recall it, for approximately two hours.

I think that is principally what we had in mind, Mr. Davis.

Q. Your last reference is to the June 2nd presentation relating to the 990s?

A. That's right.

Q. In these communications with Mr. Reed and Mr. Rowe, can you identify the conversations to which you are having [5575] reference?

A. I may not be able to identify them specifically, Mr. Davis, but my recollection is that at the May meeting of the

board of directors, after you left, Mr. Reed and Mr. Rowe left to go into session with you, and that from then through the period which when you were seeking to block the effectiveness of our registration of the subordinate debentures, and after that, through the period we have been discussing here, up until July 21st, that you were in conversation with Mr. Reed or Mr. Rowe at least several times a week, and perhaps daily.

Q. You notice there is a resolution, or at least at the bottom of that page 4 there is a statement as to the sense of the meeting.

Refer to the minutes, Mr. Tillinghast. Is it your understanding that this was also prepared by Mr. Duckworth?

A. I am not altogether sure, Mr. Davis. My guess would be that Mr. Duckworth and Mr. Rowe collaborated on this, although I could not at this point tell who prepared the first draft.

Q. Was it the sense of the meeting that this letter of June 10th and the proposal contained was an interference with the affairs of TWA?

Mr. Zeller: Which paragraph are you referring [5576] to, Mr. Davis?

Mr. Davis: I am asking the question.

A. I think the consensus was, Mr. Davis, that this was a step in the Tool Company's efforts to prevent the Boeing transaction from going through.

Q. But there was no resolution to that effect, or statement made that it be recorded as the sense of the meeting?

A. I believe that's correct.

Q. Looking at paragraph 1 at the bottom of page 4 of the minutes, it reads:

"The corporation could not at this time accept proposal No. 1."

I am emphasizing the words "at this time." Was it the sense of the meeting that it could accept proposal No. 1 at some other time?

A. Only if certain other conditions were satisfied, which had not been satisfied at this time.

Q. You are now referring to what you previously testified about the need for $200 million?

A. Yes.

Q. You will notice at the bottom of page 759 of Mr. Duckworth's notes, Defendants' Exhibit 77, the photocopy has some of the words at the bottom of that page chopped off. [5577] I believe the original reads:

"Counsel to confer with Davis for the purpose of developing a written proposal to present to board."

I find no reference in the minutes of the meeting itself to any decision that counsel for TWA was to confer with Davis for the purpose of developing written proposals to present to the board.

I am asking you if you can explain why the minutes of the meeting do not reflect that decision or action.

A. Well, I believe, Mr. Davis, that it is covered in the minutes on page 4 in the middle paragraph where, in the third sentence, it reads:

"However, Mr. Rowe was requested to talk to Mr. Davis to determine whether he had any specific additional information or proposals that he wished to submit to the board."

Q. That refers to Mr. Rowe being asked to leave the meeting to speak to Mr. Davis who was waiting outside, in order to answer questions if anyone had any questions? Is that what is referred to?

A. That's correct.

Q. Am I to understand from your testimony that the directors there present expected Mr. Rowe to go out and [5578] come back with some written proposals?

A. The directors asked Mr. Rowe—I believe it was the chairman who asked Mr. Rowe to go out and talk with Mr. Davis and to find out whether he had any new information or new proposals, and if he did, to please put it in writing so we would know exactly what they were and we could consider them.

Q. The minutes as written up on page 4 read as they read, but I read those, Mr. Tillinghast, that Mr. Rowe reported back merely that Mr. Davis did not have any writings to submit to the board at that time.

Mr. Duckworth's notes, if read literally, read that counsel for TWA was to confer with Mr. Davis for the purpose of developing written proposals to present to the board.

A. I don't believe, Mr. Davis, that Mr. Duckworth's notes are in that regard anything but rough and hastily written notes.

Q. The thing I am trying to establish, Mr. Tillinghast, is simply this: Did, so far as you know, TWA make an effort with any representative of the Tool Company to develop written proposals for submission to the board, or to present to the board?

A. Yes, Mr. Davis. In my letter of the 16th, I believe [5579] I suggested that you let us have any proposals you might have, and Mr. Rowe, when he was sent out to confer with you, was asked to see whether you had any additional

information or proposals as requested in my letter, and to please have them put in writing.

Q. Subsequent to this meeting on June 21st, so far as you know, did TWA or any of its representatives or counsel make an effort to develop written proposals for submission to the board?

A. Not so far as I know. I believe they talked with you several times, and made it clear that we would entertain with seriousness any proposals that you might find it possible to submit, that might meet the problems that we had outlined.

Q. You are referring now to the conversation that Mr. Rowe had during the course of the meeting, which he reported to the board when he returned, as reflected on page 4?

A. No. I am referring to various conversations which they had with you subsequent to the meeting of June 21st.

Q. When you say "they," who are you referring to?

A. Mr. Rowe and Mr. Reed.

Q. Will you identify your information as to such conversations relating to the development of proposals to present to the board relating to the June 10th letter?

A. I know nothing about the development of proposals [5580] as such. We repeatedly tried to make it clear, and it is my understanding that they so stated to you, that we were prepared to give serious consideration to any proposal which you might wish to develop that would meet our problems.

As I recall it, we did not direct them to try to develop proposals, but rather to make it clear to you that if you had a proposal that you thought might be acceptable by TWA, that we would give it the most serious consideration.

Q. Now, turning the page of Mr. Duckworth's notes—the page should be page 760—you see the heading, "Back to 6-A"?

A. Yes, I do.

Q. That refers back to the item on the agenda of action?

A. Yes.

Q. You see the notes read:

"Reported Rowe discussion with Davis, and he will put his comments to board in writing."

A. That's correct.

Q. Did he put his comments to the board in writing?

A. You should know.

Q. I am referring to Mr. Rowe.

A. You are "he."

Q. Let me see if we understand Mr. Duckworth's notes the same way, Mr. Tillinghast.

On that day Mr. Davis did not make any comments [5581] to the board, did he?

A. No. I believe what happened was that Mr. Rowe returned. He reported his discussion with you and said that you would put your comments to the board in writing.

Mr. Zeller: Let me invite your attention, Mr. Davis, to the fact that the minutes seem to me very clearly so to state on page 4.

Mr. Davis: I do not want to argue this out, Mr. Zeller.

Mr. Zeller: I did not mean to argue; I thought you were looking for a fact.

Mr. Davis: I am quite familiar with what transpired at that board meeting. As the testimony has already developed, or one of the letters that has not

yet been marked but will be marked in a moment—I was outside the board meeting, and information was given to the board that I was prepared to comment to the board or answer questions with respect to this June 10th letter proposal, et cetera.

During the course of the meeting Mr. Rowe came to me and asked me if I had anything in writing to submit to the board, and I said no, but I was prepared to talk to them.

Then he advised me that the board did not have [5582] any interest or any questions to ask me orally.

The minutes reflect exactly what took place—that Mr. Rowe left and came back and returned and reported that.

That seems to me to be quite different from a suggestion which so far as I know the Tool Company never received, that the Tool Company was to develop any more proposals to submit to the board.

Mr. Zeller: Mr. Davis, you and I do not read the English language the same way because what I am looking at:

> "Mr. Rowe stated that upon being requested to advise him of anything Mr. Davis wished to transmit to the board, Mr. Davis declined to do so, but indicated that he would put what he had to say in writing and submit it in that form."

Mr. Davis: That is quite clear to me. What is not clear to me is the action of the board, if it was action, that proposals were to be developed.

However, I am clear on what the facts are. I want to be sure I understand what took place.

(Whereupon, a short recess was taken)

[5583] Q. Continuing with Mr. Duckworth's notes, Mr. Tillinghast, which are Defendants' Exhibit 77, you see the notes that he has on the resolution?

A. Yes, I do.

Q. Numbered 1, 2 and 3. No. 1 would seem to refer to Proposal No. 1, is that correct?

A. I am not sure that deals entirely with Proposal No. 1. Let me take a look.

Q. The note is "Give consideration to any sound program to increase capitalization subject to compatibility with overall financing program."

That refers to Proposal No. 1 of the June 10th letter?

A. I believe it does.

Q. The next item is "Refer advice of financial advisers."

That refers to the Dillon, Read letter that was presented at the meeting, does it not?

A. I presume so, yes.

Q. And then the next note is "Without interfering with orderly program"?

A. Yes.

Q. What is "Without interfering with orderly program"?

A. I believe that refers to the avoidance of interference with the orderly progress of the jet equipment [5584] program.

Q. The notes on the resolution are now reflected in the minutes, Defendants' Exhibit 76, on page 4, under Item 1, at the bottom of the page, isn't that right?

A. I believe so, yes.

Q. You see next to Item 2 the notes of Mr. Duckworth are "Motion to support management position on 2 and turn down offer." That indicates that someone made a motion to support the management position on Proposal No. 2, and turn down Proposal No. 2, isn't that correct?

A. That's correct.

Q. You stated the position of the management, or did Mr. Breech?

A. I believe I have already testified to that, Mr. Davis.

Q. You were the one at that meeting who stated the position of management?

A. Yes.

Q. And that was to turn down Proposal No. 2, isn't that right?

A. That's correct.

Q. And that management position, for the reasons that you have already described?

A. Yes.

[5585] Q. None others?

A. I would have to go back and refresh my recollection as to whether I have described all of the reasons. I believe I have adequately described them, but I am not absolutely sure.

Q. Can you, without repeating what you have already testified to, at least identify the major or principal or basic reasons for the management position to turn down Proposal No. 2?

Mr. Zeller: I object to this, your Honor. I think it has already been testified to. I think the only proper thing would be whether the witness has anything else in mind to add to that.

Mr. Davis: I did ask him that.

Mr. Zeller: He said he didn't have anything else in mind at this time.

Mr. Davis: I thought he said he would have to read it.

Mr. Zeller: I understood him to say that he didn't have now clearly in mind what he had testified to earlier. I submit that is no reason to take him back

to what he testified to earlier, Mr. Special Master. I think the proper thing to do is instead of rehashing all that testimony, ask him whether he [5586] has anything else in mind, and if he hasn't, let us go on to something else.

Mr. Davis: I am not asking him to rehash any testimony or anything he previously testified to. I am asking him, if he can now, to identify the major bases for the position of management for turning down Proposal No. 2.

By Mr. Davis:

Q. Can you identify them and say what the principal ones were, if there was more than one?

A. The principal reason, Mr. Davis, was that we did not want model 990 aircraft.

Q. This was without any reference to the possibility of acquiring four 880s?

A. Quite apart from the 880 question, we had come to the conclusion that it would not be in the interest of TWA to acquire 990 aircraft.

Q. With respect to Proposal No. 3, the motion made, according to Mr. Duckworth's notes, was "To support management. That door opened, but without more details cannot consider."

What was the management position that this refers to?

A. I think the position stated in my letter of June [5587] 16th.

Q. The minutes of the meeting on page 5 refer to what is entitled "Acquisition of Boeing flight simulator, additional funds for construction at Kansas City," and under that a motion was adopted to acquire Boeing flight simulators at a cost of $1,386,100. Was this flight simulator an item relating to the 1961 Boeing program?

A. Yes. It was an item relating to the 1961 program, but not exclusively.

Q. Not exclusively?

A. That's correct.

Q. Can you explain what this item is that the directors acted upon after giving consideration to the June 10th letter?

A. This is just what its name implies—a Boeing flight simulator, to be used in Kansas City for training purposes, with respect to all Boeing aircraft.

Q. TWA did not have one before that?

A. Yes, we had one, but wanted another.

Q. Was this needed because of the progress that had been made or the plans of TWA relating to the acquisition of additional Boeings?

A. In part, but as I recall it, it wasn't exclusively for that reason.

[5588] Q. Now will you refer to page 10 of the minutes of the meeting? Part of the report of the president—there is an item which appears under "A"—"Jet aircraft program. The status of the Boeing long-range aircraft program was reviewed."

You reviewed that to the board, did you not?

A. I did.

Q. What was the status of the Boeing long-range program which you described to the board? What did you report to them with respect to that Boeing long-range program?

A. I believe that I just reviewed the status of it, where we were. If I recall correctly, between the prior meeting of the board and this meeting of the board I had been to Seattle, where I had looked at the 727 mock-up of Boeings, and had talked with them about the 727 program.

Q. You were referring to what has been described as the 1961 Boeing program?

A. I was talking about two things here, I think. One, the status of the long-range program, and where we stood on that. The second was—

Q. You mean long-range program or long-range aircraft?

A. Long-range aircraft program. I also talked about the requirements for short-range jet aircraft.

[5589] Q. And the substance of that report was that it was progressing satisfactorily, or can you identify the substance of your report on the status of the long-range aircraft program and the short-range aircraft program, if there was one?

A. I believe that this has been partly summarized earlier in the meeting, and I did not repeat here what I had already covered. My recollection is, Mr. Davis, that this was pretty summary so far as the long-range program was concerned, and dealt more with the short-range problem than the long-range problem.

Q. What was the nature of your report then on the short-range aircraft program?

A. As best I recall it today, I stated that I had been to Seattle and talked with the Boeing people. I had seen the mock-up of the Boeing 727. That this was one of the planes to which serious consideration needed to be given with respect to the short-range jet program of TWA. That unless and until we had the long-range program all wrapped up and out of the way, it was too early to talk definitively about a short-range program, what the obvious financing problems involved, but that we were beginning to make preliminary studies as to the relative virtues of different planes, and that I would at a later meeting of the board

[5590] bring some more definitive statement to them as to what I felt we should do about the short-range program.

I believe, partly refreshed by the minutes here, that I also discussed the fact that we had an option under the Boeing purchase agreement to obtaining—we had an option for ten additional 707 aircraft, with a protected delivery position. We were supposed to act on that, it says here, by the end of October, although my recollection is that it was earlier than that. In any event I recall that we discussed obtaining an extension of the option period. It was my recommendation that we do this even though I was doubtful that we would want in fact to exercise the option for the additional ten.

Q. I am particularly interested in that portion of the minutes which state "And that in view of the current financing situation, the possibilities of leasing this type of aircraft were being investigated."

First, will you identify the current financing situation to which you apparently referred?

A. I think by the current financing situation I was referring to the fact that we probably had as much debt incurred or committed for as would be wise, and that in all probability further debt financing would require some increase in equity, and that it was doubtful that we [5591] could just go out and borrow money for further jet programs of any magnitude.

Q. You were not referring to the anticipated losses in operations?

A. Not particularly, Mr. Davis, I think.

Q. What leasing arrangements were being investigated?

A. I think probably, Mr. Davis, that at this time the leasing possibilities with respect to the Caravelles had become the subject of some discussion, and if I recall cor-

rectly, we were feeling out Boeing at this time as to the possibility of leasing 727s.

Q. Had you discussed that to the point where terms were being discussed?

A. No, I don't think so. I think this was in the very preliminary stage in June.

Q. Refer to Mr. Duckworth's notes, Mr. Tillinghast, at the page marked 762, which appears to cover what you have been describing—under the heading "Report of President, Jet Aircraft Program," he has first "Short-range problem"?

A. Yes.

Q. What was the short-range problem?

A. I have testified to that at great length, Mr. Davis.

Q. You are referring now to the short-range problem?

[5592] A. The problem of short-range jets—the need for short-range jets.

Q. The next item is "Financing problems prohibited purchase"?

A. Yes.

Q. This is what you just identified a moment ago that in view of the amount of debt, or difficulties in debt financing, TWA was not in a position to consider purchase of aircraft?

A. Yes. You will recall, Mr. Davis, from my prior testimony that at the end of May, when the Prudential pulled out of our financing program, and I was successful in arranging for greater commitments from the Equitable and the Metropolitan, that Mr. Keehn of the Equitable made it clear that that was the bottom of the barrel so far as they were concerned. It seemed to me clear in view of the Prudential's withdrawal, what Mr. Keehn had said, our unsuccessful efforts to find other insurance companies to participate in such a financing, that we were substantially at

the end of the road so far as debt financing was concerned.

Q. And therefore in order to be in a position to acquire short-range jets, it would be necessary to either lease or do some equity financing?

[5593] A. That's correct.

Q. Did you discuss at that time in connection with current financing situation, the possibility of doing some equity financing?

A. I don't think in this point of time, Mr. Davis, we got even down to any real discussion of the possiblities of equity financing. That came along later.

Q. The next item is that you reported on investigating the leasing possibilites. Did you describe that as a desirable approach from TWA's point of view, of leasing aircraft rather than developing a program through equity financing, or otherwise, of purchasing aircraft?

A. I think we described it merely as one of the possibilities that we were investigating.

Q. The point I am trying to get at is whether or not at that meeting you indicated to the board that from TWA's point of view it would be desirable to be able to lease.

A. No, I don't think so.

[5594] Q. What does "July report" mean in the last line?

A. I don't know, Mr. Davis. Perhaps it means I was going to report on it again at the July meeting, but I really don't know what it means.

Q. Was it supposed to be a report on the leasing possibilities, or was it a general report that was to be made in July?

A. I am not sure what it means, but if it does refer to reporting on the subject in July, it was a general report as

to the short-range program rather than any specific report as to leasing.

Q. Do you recall making a July report?

A. I am sure that I did. I am sure I have discussed equipment programs at substantially every meeting of the board, at least through this period of time.

Q. It was not a written report?

A. No.

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[5622] Q. Mr. Tillinghast, you have identified Defendants' Exhibit 11Q as an instance of an interference by the Tool Company in the affairs of TWA. Will you identify or describe the portions of Defendants' Exhibit 11Q which you claim constitute or constituted interference in the affairs?

A. Mr. Davis, there are no particular parts. As I have said several times before, this was, as I saw it, one in a series of communications aimed at preventing and [5623] interfering with our going ahead with the Boeing program.

Q. There is no particular part of this letter which you feel constituted a particular interference?

A. No part more than any other part.

Mr. Davis: May I have marked for identification as Defendants' Exhibit 79 this letter from Mr. Rowe addressed to Mr. Davis, dated June 22, 1961.

(Letter from Mr. Rowe to Mr. Davis, dated June 22, 1961, marked Defendants' Exhibit 79 for identification, as of this date.)

By Mr. Davis:

Q. I hand you what has been marked Defendants' Exhibit 79. Can you identify that as a letter from Mr. Rowe to Mr. Davis?

A. That appears to be, yes, Mr. Davis.

Q. Was this communication discussed with you at all?

A. I believe it was.

Q. Do you know of any other communication for or on behalf of TWA to the Hughes Tool Company, or any of its representatives, advising them of the action taken by the board at its meeting of June 21st?

A. I would have to check the file to be certain, Mr. Davis, but offhand I can't recall any written communication other than Defendants' Exhibit 79.

[5624] Q. Can you think of any oral communication relating to advising the Tool Company of the action taken by the board?

A. As I have said several times before, I know that Mr. Rowe and Mr. Reed were having conversations with you from time to time, and I believe that the action of the board was a subject of discussion between you and Mr. Rowe. Perhaps I am wrong, but I think that is the case.

Q. You referred to this more than once, Mr. Tillinghast. May I ask you what your understanding of what the subject of discussion was between Mr. Rowe and Mr. Reed and Mr. Davis?

A. The controversy between Hughes Tool Company and TWA.

Q. But no more than there were discussions relating to the controversy?

A. What more could there be?

Q. You keep referring to your being informed that advice or information was communicated to the Tool Company by reason of conversations taking place between counsel for TWA and counsel for the Tool Company. What I am asking you now is, can you identify or are you aware of or have you been informed of any particular communication,

or is it your understanding that any particular advice relating to the proposals covered by the June 10th letter, was conveyed [5625] by either Mr. Rowe or Mr. Reed to the Tool Company?

Mr. Zeller: Your Honor, I think there are about three questions wrapped up in there. If he is asking just a simple question, whether the witness now has any specific recollection of any communication other than this, I have no objection to it.

Mr. Davis: If your Honor please, I asked him if he was aware of any. He said none other than conversations. I asked him what conversation, and he said conversation as to the controversy. Now I am asking him in one question, if I may, whether or not he is aware of any communication.

The Special Master: Why don't you ask him to describe any communication, whatever it was, that he knows about?

Mr. Davis: That is what I was trying to elicit from the witness.

By Mr. Davis:

Q. Will you describe whatever communication you were aware of, which took place between anyone, Mr. Rowe or Mr. Reed representing TWA, to anyone representing the Tool Company, with respect to the proposals of the June 10th letter, or the action taken by the board?

A. I recall merely, Mr. Davis, that Mr. Rowe and Mr. [5626] Reed were in frequent conversation with you at that time, and that Mr. Rowe, I believe I recall, had talks with you about the action of the board, and explained to you the board's position.

I recall that Mr. Rowe and you had an argument over extending the date on the closing of the subordinate debentures and over the interest that was payable on the subordinated debentures.

It is my impression today, as I say, these conversations with you were practically daily, and that both Mr. Reed and Mr. Rowe were explaining to you and discussing with you the position of TWA.

Exactly what they said, I am not sure that I can recall at this moment to the extent that I may have known, but I am sure they were discussing these things with you, and advising you of TWA's position.

Q. You are not aware of any communication relating to the action taken by the board other than Defendants' Exhibit 79?

A. I believe I recall Mr. Rowe telling me he discussed it with you and explained it to you.

Q. Do you recall what Mr. Rowe told you?

A. Not beyond what I just said.

Mr. Davis: May I have marked for identification [5627] copies of a letter dated June 26, 1961, addressed to Mr. Holliday, from Mr. Tillinghast.

(Copies of a letter dated June 26, 1961, to Mr. Holliday from Mr. Tillinghast, marked Defendants' Exhibit 80 for identification, as of this date.)

Q. Can you identify Defendants' Exhibit 80 as being in fact a letter which you sent on June 26th to Mr. Holliday?

A. It appears to be.

Q. And copies were sent to each of the directors?

A. I believe so.

Mr. Davis: Again, Mr. Special Master, I note we have only been furnished a copy of this letter. Pre-

sumably copies of this letter should be in TWA's files or the files of Mr. Cocke, Mr. Leslie, Mr. Hall.

Mr. Zeller: We will investigate and advise you, Mr. Davis.

Mr. Davis: In that connection, Mr. Rankin, I would like to inquire whether or not the files of counsel for TWA, particularly of the Chadbourne firm, have also been examined for the possible existence of documents in their files which normally would be in the files of TWA.

[5628] The Special Master: I think you should make some statement about that, Mr. Zeller, or Mr. Sonnett when he returns, so as to clarify whether a search has been made in those files, not as to any confidential documents, I assume.

Mr. Davis is not asking that. But all documents that would otherwise be responsive to the subpoena, if they were not in the files of the attorneys.

Mr. Zeller: Very well, sir. I will be glad to.

y Mr. Davis:

Q. Mr. Tillinghast, I notice that a blind copy of this tter was sent to Mr. Reed and Mr. Olds. Was there a rticular reason for sending them copies of this letter?

Mr. Zeller: You mean blind copies.

Mr. Davis: Copies of the letter.

A. Because I thought they would be interested in the bject matter.

Q. Did anyone participate with you in the drafting or paration of this letter?

A. It's very possible that Mr. Rowe looked this over, although at the moment I have no distinct recollection of it.

Q. Did you discuss the contents or the substance of the reply with Mr. Breech?

[5629] A. I rather doubt it.

Q. With Mr. Reed?

A. Possibly. I just don't recall for some reason the preparation of this letter, Mr. Davis, and I am not sure whether I did this all myself, or whether I prepared a draft and submitted it to Mr. Rowe and/or Mr. Reed, and obtained their comments.

Mr. Davis: Mr. Rankin, may I request at this time that a search be made for the existence of any drafts which may have been sent to Mr. Rowe or Mr. Reed?

The Special Master: You may.

Mr. Zeller: Again, I don't know the answer to that, but I will advise you, Mr. Davis.

By Mr. Davis:

Q. I call your attention to page 2, the third full paragraph, and the sentence reads "We find ourselves faced by widespread refusal by the present holders of our senior debt, either to consent to a termination of the voting trust or to lend additional monies except on the condition that the voting trust continue."

My question is, what were you referring to, or were you referring to merely what you have described in your prior testimony?

[5630] A. I am referring to what I have already testified to several times.

Q. By that time, June 26th, you had not made any contact or communicated with the lending institutions other than the extent to which you have already described it?

A. I believe that is the case.

Q. So far as you know, no one on behalf of TWA had communicated or contacted lending institutions except to the extent you have already described it?

A. That's correct.

Q. By that time you had not had any discussion with Mr. Breech or Mr. Reed relating to any meetings that Mr. Breech or Mr. Reed may have had with either counsel for or the lending institutions themselves?

A. Not except as I have already testified.

Q. Now let me refer you to page 3 of Defendants' Exhibit 80, and particularly the last sentence of that paragraph which reads, "Obviously the resolutions which you suggest for adoption cannot be dealt with until that time, except that as you will be happy to hear the steps suggested at the bottom of page 5 and the top of page 6 already have been taken."

Your reference to the bottom of page 5 and the top of page 6 refers to the bottom of page 5 and top of page 6 [5631] of Defendants' Exhibit 11-Q, does it not? This is your reply to Mr. Holliday's letter of June 21st?

A. Yes.

Q. Looking at the bottom of page 5 and the top of page 6 of Defendants' Exhibit 11-Q, you will note that Mr. Holliday was—will you identify the steps suggested to which you were referring in that paragraph of your letter, which you say had already been taken.

A. A step of contacting the financial institutions to make inquiry as to whether in the event of termination of the voting trust and the subscription to additional equity in the

sum of $100 million, they would be prepared to continue present loans and to make future loans to TWA.

Q. If you look at Defendants' Exhibit 11-Q, at the bottom of page 5, you will see that Mr. Holliday was referring first to resolutions to be adopted by the board of directors. You weren't referring to that as a step which had already been taken, were you?

A. I think not.

Q. Then at the very bottom of the page "The president and chairman of the board of the company be directed to communicate with appropriate representatives of the lending institutions," et cetera.

The president was you and the chairman of the [5632] board was Mr. Breech?

A. That's correct.

Q. Had you or Mr. Breech communicated with appropriate representatives of the lending institutions by June 26th?

A. Not directly, Mr. Davis. Through Mr. Leslie we had.

Q. You mean that your letter of June 26th, when it stated that the step suggested by Mr. Holliday had already taken place, you were referring only to what you have already described in your testimony?

A. Yes, Mr. Davis.

Q. Was it your understanding that Mr. Leslie had communicated with these lending institutions on behalf of Mr. Breech and on your behalf?

A. On behalf of TWA, Mr. Davis. I don't think I considered it particularly important that the president and the chairman of the board do it. To my mind the substance of what Mr. Holliday was suggesting was that we obtain, or that we communicate with the lending institutions for the purpose of obtaining certain information.

Q. You will recall, Mr. Tillinghast, that I called to your attention some notes of Mr. Wadsworth, I believe, of Dillon, Read, indicating that Mr. Breech and his lawyers had met with Mr. Hagerty and his lawyers?

[5633] A. Yes, I remember that.

Q. I want you to try to refresh your recollection as to whether or not this letter was not drafted by Mr. Reed for you?

A. Which letter?

Q. Your letter of June 26th, which has been marked Defendants' Exhibit 80?

A. I am quite sure it wasn't, Mr. Davis. This reads very much like my own composition, and I am quite confident that I drafted that myself.

Q. Therefore by the sentence which I read to you from Defendants' Exhibit 80, you were referring to the contacts made with the lending institutions that you have already identified and described, is that correct?

A. That's correct.

Q. Turning again to Defendants' Exhibit 11-Q, page 6, the suggestion at the top of page 6 was "The president and chairman of the board be requested to submit a report in writing to the directors of the company with respect to the efforts made with such lending institutions. The result of such efforts, and the position or attitude taken by such lending institutions, together with their recommendation with respect to Proposal No. 1, and the basis for such recommendation."

[5634] Q. Was that done?

A. I have already testified, Mr. Davis, with respect to that, and I don't think I can add to what I have already said.

Q. Are you referring to what took place at the directors meeting of June 21st?

A. I am.

Q. Do you know of any report in writing by either the president or the chairman of the board?

A. No, there wasn't a report in writing by the president or the chairman of the board. However, we did, as I have already testified, present to the board and describe to the board and in part read to the board the communications to and from the lending institutions. To my mind we had complied with at least the substance of what Mr. Holliday was talking about.

Q. In any event, that is what you had reference to by your sentence in your letter?

A. That's correct.

Q. Now we look at the last paragraph on page 3, which refers to Mr. Rowe being in communication with Mr. Davis, et cetera.

Mr. Zeller: Page 3 of Defendants' Exhibit 80?

Mr. Davis: Yes.

[5635] Q. Can you identify more than you already have your understanding of any communication between Mr. Rowe and Mr. Davis with respect to any extension of time?

A. No, I don't think I can add to what I have already testified to.

Q. Did you get any report from Mr. Rowe indicating that TWA could have or could not have an extension of time to consider Proposal No. 1?

A. I believe there was one communication. I can't remember the precise identification of it for the moment. I am wrong. What I am thinking of is an extension to the 22nd of June, rather than an extension—I do not recall that you did anything in the way of extending the time, Mr. Davis.

Q. Did Mr. Rowe report to you that he had requested an extension of time which had been rejected?

A. No. My letter of the 16th and this letter of the 26th, I think, made it quite clear that we would be happy to receive any extension of time that you were prepared to make available to us, and my recollection is that none other than the extension to the 22nd was made available.

Q. Am I correct in understanding your testimony to be that your letter of June 16th and this letter of June 26th reflect whatever effort TWA made to obtain an extension [5636] of time?

A. That's correct.

Q. Let me hand you what has been marked as Defendants' Exhibit 11-F, being a letter dated May 26, 1961, from Mr. Davis to the lending institutions, the board of directors and the voting trustees. Will you describe what you did or what took place upon your receipt of this letter?

A. Mr. Davis, I don't remember what I did with this at the time it was received.

Mr. Davis: From the production, it indicates it comes from the president's office. May I request that copies of this letter sent to other directors of TWA, or officers or employees of TWA, be produced if they have not been destroyed?

The Special Master: You may.

Mr. Zeller: Off the record.

(Discussion off the record.)

Mr. Zeller: I will investigate that and advise you, Mr. Davis.

By Mr. Davis:

Q. Upon receipt of this letter of May 26th, Defendants' Exhibit 11-F, did you discuss it with anyone?

A. Yes, I think I discussed it with Mr. Reed and Mr. Rowe, I believe.

[5637] Q. Anyone else?

A. I think I also discussed it with Mr. Leslie and Mr. Cocke.

Q. Not Mr. Breech?

A. It may have been that I discussed it with Mr. Breech by telephone, although I don't specifically recall it.

Q. You don't recall if you had any discussion over the telephone that was a serious discussion of the letter, or did you have a serious discussion over the telephone with Mr. Breech.

A. I don't recall, Mr. Davis. I think it is very likely that I did discuss it with him, but I have no specific recollection of the discussion.

Q. How about Mr. Sessel?

A. Not that I recall, although again it is possible that I discussed it with him.

Q. You notice that the letter was also addressed to the Irving Trust as agent?

A. I see that.

Q. That does not refresh your recollection as to whether you discussed it, or did you discuss it with someone else representing the Irving Trust, other than Mr. Sessel?

A. No. If I discussed it with anyone, it was with Mr. [5638] Sessel, I am quite sure.

Q. Your recollection is that you didn't discuss it with anyone at the Irving?

A. It's not my recollection that I did not discuss it with anyone at the Irving. I have no recollection of having discussed it.

Q. It is also addressed to the Equitable. Did you discuss it with anyone representing or associated with the Equitable?

A. Not that I recall.

Q. I notice the letter is also addressed to the Metropolitan. Did you discuss it with anyone associated with or connected with the Metropolitan?

A. I do not believe so.

Q. Did you discuss it with Mr. Olds? It is addressed to the voting trustees.

A. I do not believe I discussed it with Mr. Olds.

Q. Give me your best recollection as to your discussions which you had with Mr. Reed?

A. I remember, Mr. Davis, one small thing relative to my discussion with Mr. Reed, which comes to mind, and that is I happen to remember remarking to him appreciating the generous statements you made about me at the bottom of page 8.

[5639] I believe I discussed with Mr. Reed, as well as Mr. Rowe, the question of whether this required a reply, or what should be done about it.

I remember expressing the view with which both of them concurred, that this was another Davis blast, and didn't really contain anything new.

I remember discussing with them the desirability of having any general town meeting of all these different people to discuss this matter, and concluding that no worthwhile purpose would be served by such a meeting.

I recall having expressed the view that this seemed to be aimed mainly at our Boeing deal, and that that was a management matter which ought to be dealt with by the management as such, and that we would be happy to discuss this with any representatives the Tool Company wanted to discuss it, but I doubted the wisdom of discussing what

was largely a technical problem in some sort of a large meeting with diverse interests.

That is about as much as I can remember at the present time, Mr. Davis.

[5640] Q. You referred to Mr. Reed and Mr. Rowe together. Was this a meeting or conference with Mr. Reed and Mr. Rowe?

A. Not that I recall, Mr. Davis. My best recollection is that it was two separate telephone conversations.

Q. In other words, you had a telephone conversation with Mr. Reed and you had a telephone conversation with Mr. Rowe?

A. That is my best recollection, although I wouldn't want to be positive of that, because I had a variety of discussions with them during this period of time relative to this controversy, and most of the time I had separate telephone conversations with them, but I know there were at least a number of times when we met in my office and discussed some of these things.

Q. In essence, but independently both Mr. Reed and Mr. Rowe reached the same conclusion that you have described?

A. That is my recollection.

Q. In those independent telephone conversations, both Mr. Reed and Mr. Rowe agreed with you that the letter did not require a reply, is that correct?

A. I believe so, Mr. Davis, although I must say that is a little hazy in my mind, but I think that's right.

[5641] Q. Is it fair to say that you did not pay much attention to the letter?

A. No, I don't think it would be fair to say that, although I did have the distinct feeling there wasn't anything new in the letter, and that this was just more of the same.

Q. By "more of the same," you are referring to the May 19th letter?

A. I am referring to the whole campaign that had been going on since your first letter.

Q. Wasn't the May 19th letter the first letter?

A. Perhaps. I don't recall offhand, but if that was the first letter, that's correct.

Q. Do you recall whether it was in your conversation with Mr. Rowe or Mr. Reed that you discussed the desirability or lack of desirability of having a meeting with these diverse interests?

A. My recollection is that I discussed it with both of them.

Q. But I recall your prior testimony to be that the conclusion was reached that no useful purpose would be served in having a town hall meeting?

A. A town meeting.

Q. A town meeting?

[5642] A. That's correct.

Q. I am asking you if you recall whether that was something discussed in your telephone conversation with Mr. Reed or Mr. Rowe?

A. I believe I discussed it with both.

Q. You previously indicated that you also discussed or may have discussed it with Mr. Leslie and Mr. Cocke. Will you describe what took place in connection with any discussion you may have had with those gentlemen?

A. Well, I have a recollection of Mr. Cocke having come into my office with his copy of this, having made some semi-facetious remark about Davis being quite a letter writer, or something to that general effect, and my having said something to the general effect, "I guess we will have to get used to reading all this material."

So far as Mr. Cocke is concerned, I don't remember much beyond that.

Q. You did not discuss with him the desirability of meetings with these diverse interests?

A. I don't recall any such discussion.

Q. What was the nature or substance of any discussion with Mr. Leslie?

A. I really don't remember offhand, Mr. Davis, just what is the substance of the discussion was with Mr. Leslie, al- [5643] though I am quite sure I talked with him about the letter, but just what was said I can't recall at this moment.

Q. Do you recall anything being said by any of these gentlemen with whom you discussed this letter as to the effect that it might have on TWA or its management or its operations?

A. I would hesitate to say, Mr. Davis, because it just isn't clear enough in my mind. I have the feeling that a remark was made by someone about this being part of the war of nerves, but I can't tell you with certainty who it was.

Q. Do you have any recollection of discussing it with any of the other directors of TWA—with Mr. Slack?

A. No, I don't believe I discussed it with Mr. Slack, because so far as I recall, he wasn't around at that time. The more I think about it, the more I think I discussed it with Mr. Sessel, and my recollecton is that Mr. Sessel called me up after he had gotten it, and asked me if I had received a copy of it, and what did I think of it.

Q. And then what happened?

A. I believe I told him that I thought it was just part of your campaign to block the Boeing purchase, and beyond that I don't recall what the conversation was.

Q. Let me direct your attention to the paragraph which [5644] begins at the bottom of the first page of the letter, which reads:

"It is the desire of Toolco to confer with you or your representative as soon as possible with the objective of working out an amicable solution wherever there may be a difference of opinion."

Do you recall discussing with anyone the desirability of arranging for such a conference?

A. I believe I discussed that with Mr. Reed and probably with Mr. Rowe, although I don't recall the conversation with Mr. Rowe particularly relating to this.

I believe Mr. Reed took the position that we should be prepared to sit down and discuss the matter if representatives of the Tool Company wished to do so, and I believe I told him that we would be happy to do so at any time if there was any real desire on the other part to sit down with us.

Indeed, as I recall it, it was later that week that we did sit down with you in connection with the 990 question.

Q. Are you referring to the June 2nd presentation relating to the 990s?

A. That's correct, yes. I believe that it was in connection with that discussion that we discussed the desirability of having sort of a town meeting discussion, and con-
[5645] cluded that with as many people and as many diverse interests involved, in all probability it would lead to no fruitful result.

Q. Did you decide to reply to that letter of May 26th?

A. No, I don't think I did. As I recall it, and as I look at my calendar here, this is the day—the day I received this was the day on which I was very busy trying to arrange to replace the Prudential part of our proposed financing program.

The next day was Memorial Day. Unless I am mistaken, by Wednesday or Thursday we already had some more

communications from you. We were receiving communications, as I recall it, faster than we were answering them, and then it was either Wednesday or Thursday that arrangements were made for a meeting on Friday.

If my recollection is correct, this letter was never really answered, and we just seemed to bounce from one communication and one discussion to another.

Q. When you refer to communications, insofar as written communications are concerned, are you referring to anything other than what you have already identified?

A. No.

Q. And in your reference to oral communications, are you referring only to those which related to the arrange-
[5646] ment for the presentation to be made relating to the 990s, which took place on June 2nd?

A. No.

The Witness: Read that question back.

(The question was read)

A. As I testified several times before, Mr. Davis, I think Mr. Reed and Mr. Rowe were talking with you rather frequently, perhaps daily, during this period. I am referring to all of those communications.

Q. You are unable to identify those communications any more than you have already done?

A. That's correct, yes.

Q. Do you know if any of the other addressees of this letter communicated with the Tool Company or any of its representatives with respect to any of its contents, or this objective stated in the paragraph beginning at the bottom of page 1?

A. I think the voting trustees communicated with you, at least orally, through Mr. Reed. I don't recall if I knew

the extent to which the financial institutions communicated with you.

Q. You never heard that they did or did not?

A. I have no present recollection of knowing whether they did or did not.

[5647] Q. And your reference to Mr. Reed having communicated on behalf of the voting trustees, can you refer to anything more specific than you have already identified?

A. No, I can't, Mr. Davis.

Q. Referring to page 5 of that communication, you will see among the specific areas identified on behalf of Toolco, are the following:

First, the arrangement with Boeing for the acquisition of additional Boeing aircraft.

With respect to that, were there any discussions involving that subject matter with the Tool Company, other than the June 2nd presentation relating to the desirability of 990s?

A. I know again, Mr. Davis, that Mr. Reed had a number of conversations with you, at least he so stated to me, to the general effect that the TWA people believed that the proposed Boeing program was in the best interests of TWA, and proposed to proceed with it.

Q. But again, you cannot identify these alleged conversations by Mr. Reed other than the extent to which you have?

A. That's correct.

Q. You see the paragraph beginning on page 6, of the financing program contemplated between TWA and the lending [5648] institutions constitute self-dealing, and Toolco objects to any such arrangement without its consent.

Do you know of any meeting, conference or communication relating to that subject, with the Tool Company or any of its representatives?

A. Again I know that is a subject Mr. Reed was discussing with you at the time.

Q. You are not any more familiar with the nature of any such discussion than you have already identified?

A. I cannot testify in more detail than I have already.

Q. Is it your understanding that Mr. Reed had discussed with a representative of the Tool Company this subject of self-dealing?

A. I believe, Mr. Davis, that he had discussed with you the views that you were putting forth that this constituted self-dealing. I believe that he was taking the position that it was not that.

Q. I refer you to page 7, the paragraph beginning at the bottom of the page, which reads:

> "Toolco hereby requests that you immediately advise the undersigned as to the status of the program described in the current prospectus relating to the purchase of Boeing equipment . . ." et cetera, and "the current negotiations with the lending institutions," [5649] et cetera.

Did, so far as you know, TWA advise the Tool Company or any of its representatives as requested by the portion I just read to you?

A. I believe that the Tool Company was advised, or had been kept advised up to this point as to the general status of the program, and that during the course of the week of May 29th was advised that TWA was continuing with the program.

Q. I am at the moment referring particularly to the furnishing of information as requested by that paragraph.

Mr. Zeller: What is the question?

The Special Master: I do not think there is a question.

Mr. Zeller: I don't think there is.

Mr. Davis: I asked him if he knows to what extent, if any, TWA furnished any of the information requested by that paragraph.

He answered by saying that he understood that during the week of May 29th the Tool Company was advised that TWA was proceeding.

My question is whether you have any information, or is it your understanding that the information requested was furnished?

[5650] A. As I understand the letter you request information as to the status of the program, and I believe you were advised that the status of the program was that it was proceeding in the normal course.

Q. Was any detailed information as to the program itself furnished to the Tool Company?

A. May I finish my answer?

Q. I thought you were finished.

A. I believe, I would have to refresh my recollection, that Mr. Rowe somewhere along the line here, sometime during this week, wrote you to that effect, although perhaps I am wrong.

As to the current negotiations with the lending institutions, I believe that you were merely advised that they were proceeding.

So far as reviewing the papers, I believe that we took the position that in view of the antagonistic position being taken by the Tool Company, that we did not think it appropriate to advise them of the details of the negotiations.

Mr. Zeller: May we have five minutes?

The Special Master: Let us take a five-minute recess.

(Whereupon, a short recess was taken)

[5651] By Mr. Davis:

Q. In your prior answer, Mr. Tillinghast, you said that it was your understanding that the Tool Company had been kept advised of the general status of the program. What was the basis for your statement that it was your understanding that the Tool Company had been kept advised of the general status of that program?

A. Mr. Holliday got copies of all the directors' minutes, and indeed at the early stages he was at one of the directors meetings at which this program was discussed. It is my recollection, more particularly at the time we are talking about, at the end of May, the first part of June, that you were advised by Mr. Reed and/or Mr. Rowe, and were aware that we were moving ahead as planned with the program.

Q. So far as Mr. Holliday was concerned, and apart from any discussion between counsel, you are referring to what is disclosed by the minutes of the meeting of the board of directors?

A. Yes. I think the memorandum relative to financing that had been distributed to the directors, which you have already identified.

Mr. Davis: May I have marked for identification a letter from Mr. Rowe to Mr. Davis, dated June 8, 1961.

[5652] (Letter from Mr. Rowe to Mr. Davis, dated June 8, 1961, marked Defendants' Exhibit 81 for identification, as of this date.)

Q. Do you have what has been marked as Defendants' Exhibit 81 before you, Mr. Tillinghast?

A. Yes, I do.

Q. Can you identify that as a letter by Mr. Rowe on behalf of TWA?

A. Yes.

Q. Do you recall any discussion with Mr. Rowe as to what was to be said in this letter?

A. I recall, Mr. Davis, discussing the last paragraph with Mr. Rowe.

Q. Are you referring to the paragraph which states in part "I believe it would be inappropriate for me to furnish at this time with all the 'detailed terms of the financing currently being negotiated by TWA with certain lending institutions' "?

A. That's correct.

Q. And you adverted to that as the position of TWA in your prior testimony?

A. That's correct.

Q. Did you discuss it with anyone other than Mr. Rowe, by that I mean anyone else related to or associated with TWA?

A. Not that I recall.

[5653] Q. The portion of it which read "In view of the recent statement and attitude of Hughes Tool Company," that refers to the letters and communications that you previously had identified?

A. To the campaign which in my mind you were carrying on as evidenced in part by the letters and telegrams.

Q. When you say "evidence in part," you do not have in mind any other communication between the Tool Company or any of its representatives with TWA or any of its representatives, as part of that campaign which you have not already identified?

A. That's correct.

Q. Let me refer you to Defendants' Exhibit 39 for identification, which is a letter dated May 29th, to Mr. Holliday from you, with a copy to Mr. Davis. This was a letter from you to Mr. Holliday referring to Defendants' Exhibit 11F?

A. That's correct.

Q. And that is a May 29th letter which is referred to by Mr. Rowe in his letter, which has been marked as Defendants' Exhibit 81?

A. Yes.

Mr. Zeller: Let me hand this document to the Special Master because I think this illustrates [5654] a problem that has been occurring to me as we have gone through this.

As your Honor will see, that letter refers—that is a letter to Mr. Holliday as a representative of Tool Company, expressing Mr. Tillinghast's willingness to sit down with a representative of the Tool Company, obviously occasioned by Mr. Davis' letter of May 26th, which he was questioning Mr. Tillinghast about just before the recess.

The witness obviously didn't have that in mind. I don't see how he could keep in mind all of these documents.

Mr. Davis: It is not necessary. His answers have always been other than as previously identified. This was already identified in the record.

Mr. Zeller: As long as the record clearly so shows, because my point is a limited one. It is simply that as we get these more or less omnibus questions, and I am not suggesting there is a better way to do it, I just don't know how we can avoid getting a record

which is necessarily misleading if you look at just the four corners of the record.

Mr. Davis: I appreciate that. The problem is this. We have marked something for identification [5655] before. We have an understanding that to save time I was requested before that we never have to repeat anything previously identified or marked. I am not calling to his attention something previously identified and marked. My point is that I am trying to discover whether there is anything else which exists in the witness' mind other than what he has already testified to, which relates to this contention that these letters were part of an effort to interfere with the affairs of TWA.

Mr. Zeller: As long as we are clearly agreed on that. There won't be any quotations in the brief from the record on the failure to identify a particular document at a particular point in the deposition, that that indicates there wasn't anything else.

Mr. Davis: You can brief how you want to from the record. My only point is that I took the time and trouble to be sure that we have not overlooked anything in fairness to the witness for that very reason. But I am entitled to know from the chief executive officer of TWA what it is that he claims constitutes this conduct with which we are charged. I have tried to be fair about identifying all the [5656] documents which have been called to our attention and furnished to us. I won't guarantee that I won't overlook any.

You will have an opportunity, if you care to do so, at this time or later on to produce whatever you want to produce.

The Special Master: Are you making an objection, Mr. Zeller?

Mr. Zeller: No, sir, I am not. I wanted to call this to your attention and counsel's attention as a problem that we are faced with because of the magnitude of the documents primarily.

Mr. Davis: That is one of the reasons why it takes so much time. Your partners think I ought to do it in two days.

Mr. Zeller: I agree with him.

By Mr. Davis:

Q. The second area specifically mentioned on behalf of Toolco in Exhibit 11F appears on page 8, which refers to "Independently of the outcome of the Boeing purchase, another matter which requires discussion is the seventeen Convair jet aircraft."

By the seventeen Convair jet aircraft, you understood it to refer to the thirteen 990s and the four 880s?

[5657] A. That's right.

Q. And it was that matter which was the subject of a presentation on June 2nd? We have identified the minutes of that conference on June 2nd.

A. Without conceding the accuracy of your characterization, yes.

Q. The next item specifically referred to is the question of your employment contract. It is referred to in paragraph 3?

A. That's correct.

Q. You previously said that you recalled that there was some discussion of that with Mr. Reed?

A. No, I don't think I did so testify.

Q. Or Mr. Reed made a passing reference to it?

A. I think I made a passing reference to it. I might say when I say "it," not to the employment contract, but to the kind words of the first sentence of paragraph 3.

Q. Was paragraph 3, as you view it, any part of the alleged interference by the Tool Company with the affairs of TWA?

A. I just think this whole thing was part of a war of nerves, a campaign to put pressure on TWA to get TWA to forego the Boeing program.

Q. In other words, when you identified this letter [5658] which has been marked Exhibit 11F, as part of the interference into the affairs of TWA, you do not have in mind any particular part of the letter, it is the letter in its entirety, is that correct?

A. Yes, I think the letter in its entirety was a calculated pressure move to bring about the interruption of the Boeing program.

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A-3220

Defendant's Exhibit 11-A.

[19142]

SIMPSON THACHER & BARTLETT
120 BROADWAY
NEW YORK 5, N. Y.

Commerce Building
1700 K Street, N.W.
Washington 6, D. C.

May 16, 1961

The Board of Directors
Trans World Airlines, Inc.
New York, N. Y.

Dear Sirs:

We have been retained to advise Hughes Tool Company in connection with matters pertaining to its beneficial ownership of approximately 78% of the outstanding common stock of Trans World Airlines, Inc. (TWA), and in connection with its acquisition and possible distribution of debentures to be acquired by it from TWA, pursuant to the offering described in a registration statement filed with the Securities and Exchange Commission (File No. 2-17847).

Based on a limited investigation to date, we are concerned that said registration statement may be deficient in certain material respects, and that our client may be subjected to liabilities under the Securities Act of 1933, even though it has not participated in the preparation of said registration statement and has not been consulted with respect to its contents.

In the circumstances, we must request an opportunity to present to the persons constituting the Board of Directors of TWA various matters which require consideration [19143] before the contemplated registration statement becomes effective. Some of these matters are based upon

the position of our client with respect to action taken by the management of TWA since the establishment of a Voting Trust at the insistence of certain lending institutions presently controlling the Voting Trustees, and with respect to the fiduciary duties and obligations which said lending institutions, the Voting Trustees and the Board of Directors elected by the Voting Trustees, owe to our client as the beneficial owner of more than 78% of the presently outstanding common stock of TWA.

We have been requested by our client to make every effort to resolve in an amicable manner any difference of opinion which may exist, and we would welcome an opportunity to discuss these matters with such persons as you may designate. Please communicate with Mr. Chester C. Davis in connection with this matter.

Very truly yours,

SIMPSON THACHER & BARTLETT

A-3222

Defendant's Exhibit 11-B.

[19144]

May 19, 1961

Re Registration Statement of Trans
World Airlines, Inc.
(Registration No. 2-17847)

Trans World Airlines, Inc.
380 Madison Avenue
New York, N. Y.

Attention: Mr. Charles C. Tillinghast, Jr., President

Securities and Exchange Commission
Washington 25, D. C.

Attention: Mr. Ralph C. Hocker

Gentlemen:

At the hearing held before the Securities and Exchange Commission on Thursday, May 18th, relating to the request of Trans World Airlines, Inc. (TWA) that the effective date of the above Registration Statement (Registration Statement) be accelerated so as to become effective on May 18, 1961 and the objection made by Hughes Tool Company (Toolco) to the entry of an order granting such request, this firm was directed by the Commission to confirm to TWA and to the Commission in writing today certain undertakings made by this firm at such hearing on behalf of Toolco, and was further directed to provide TWA with a detailed statement as to the respects in which [19145] the Registration Statement may be deficient. This letter is being delivered in response to and, to the best of our ability and knowledge at the present time, in compliance with such direction.

Defendant's Exhibit 11-B.

Mr. Chester C. Davis, a member of this firm, was retained on Monday, May 15, 1961 to advise Toolco in connection with matters pertaining to its beneficial ownership of 78% of the outstanding Common Stock of TWA and in connection with its acquisition and possible distribution of that portion of the 6-½% Subordinated Income Debentures (Debentures) with Common Stock Purchase Warrants (Warrants) attached to be offered by TWA to its stockholders as set forth in the Registration Statement which Toolco is obligated or entitled to acquire pursuant to existing agreements with TWA. Up to the present time Mr. Davis is the only person associated with this firm authorized by Toolco to commit Toolco with respect to any of the matters hereinafter set forth. This firm had not been previously retained by Toolco for any purpose. On Monday, May 15, 1961, this office undertook an examination of the extensive documentary material relating to the rights and relationships between Toolco and TWA and the information contained in the Registration Statement filed by TWA with the Commission. At that time the only Registration Statement available for examination by this firm and to other representatives of Toolco available in New York City were the Registration Statement originally filed with the Commission on or about [19146] March 30, 1961, Amendment No. 1 filed May 11, 1961 and Amendment No. 2 filed May 12, 1961. On the following day we requested and received from counsel for TWA copies of exhibits to the Registration Statement.

On this same day, Mr. Davis met with Mr. Forrester, an officer of Merrill Lynch, Pierce, Fenner & Smith, Incorporated (Merrill Lynch) and two members of the firm of Shearman & Sterling, who were acting as counsel for Merrill Lynch, to consider a proposal contemplating the formation of an underwriting syndicate by Merrill Lynch to purchase from Toolco and distribute to the public Deben-

tures and Warrants to be acquired by Toolco from TWA pursuant to the agreements referred to above.

We are informed and believe that Toolco on Wednesday, May 10, 1961 for the first time decided to make a public distribution of the securities being offered by TWA to its common stockholders, and immediately thereafter negotiations were undertaken on behalf of Toolco with Merrill Lynch. At that time Merrill Lynch advised Toolco that it was prepared to undertake to form an underwriting syndicate for such a public distribution, provided that TWA would delay the effective date of its Registration Statement for one week, and with certain commitments by Toolco in satisfactory form. We are further informed and believe that Merrill Lynch discussed its proposal with Mr. Tillinghast, President of TWA, [19147] on Friday, May 12, 1961, with a request for the necessary postponement, after having discussed this matter with counsel for TWA, counsel for the Voting Trustees and Mr. Leslie, Financial Vice President of TWA, on the preceding day, Thursday, May 11, 1961. At that time Merrill Lynch was proposing to form an underwriting syndicate for a firm underwriting which would insure the receipt by TWA of more than $11,000,000 of new money at no cost to TWA, such cost to be borne entirely by Toolco.

On Monday, May 15, 1961, we were advised by Merrill Lynch that action on its proposal, including a possible postponement of the effective date of the Registration Statement, would be considered at a meeting of the Board of Directors of TWA to be held on Wednesday, May 17, 1961, and that any action on our part or any communication on our part to TWA or its counsel relating to possible deficiencies as to the Registration Statement then on file with the Commission would jeopardize favorable consideration by the Board of TWA. Mr. Forrester stated to representatives of Toolco, including Mr. Howard Hughes, the sole

owner of Toolco, that in its judgment, based in part on conversations with TWA or its representatives, this firm should not take a position or communicate with TWA or its counsel with respect to the adequacy of the Registration Statement until the Board of Directors of TWA, at a meeting to be held on Wednesday, May 17, had had an [19148] opportunity to consider and act upon the proposal and request of Merrill Lynch. At the same time Mr. Davis was requested by Merrill Lynch and its counsel to take appropriate steps to obtain the necessary corporate authority of Toolco so as to enable Mr. Holliday, a Vice President of Toolco, to enter into an appropriate firm commitment between Toolco and Merrill Lynch with respect to the public distribution desired by Toolco. The requirements of Merrill Lynch in this regard occupied Mr. Davis and others associated with this firm until approximately 1 A.M. Tuesday, May 16, 1961. In the meantime, another member of this firm and several other associates began to review the Registration Statement then available to this firm. There are attached as Exhibits A and B hereto certified copies of the excerpts of the minutes of the Board of Directors of Toolco adopted on Monday, May 15, 1961, and letter dated May 16, 1961 executed by Mr. Holliday and delivered to Merrill Lynch the evening of May 16, 1961.

We are informed and believe that copies of Exhibits A and B were delivered to TWA or its president advised of their existence on or before the meeting of the Board of Directors of TWA on May 17th. In the evening of Monday, May 15th, Merrill Lynch advised Toolco and Mr. Davis that it had made arrangements to meet with responsible representatives of TWA in the morning of Tuesday, May 16th, for the purpose of discussing further the merits of their proposal, its advantages [19149] to TWA, and their opinion that there could be no disadvantage to TWA in consenting to the requested postponement of the effective

date of the contemplated Registration Statement and offering. In order to eliminate a problem presented by Merrill Lynch to Toolco which had been discussed by Merrill Lynch with TWA or its counsel or counsel for the Voting Trustees, with respect to an assurance that the interest coupons on the proposed Debentures would be paid on June 1, 1962, Mr. Davis with other representatives of Toolco undertook to commit Toolco to provide the necessary funds in cash, in trust, to be available to Merrill Lynch, to assure such payment. The corporate action taken by Toolco in that regard is reflected by Exhibits A and B.

On Tuesday noon of May 16, 1961, Mr. Forrester of Merrill Lynch informed Mr. Davis that instead of meeting with representatives of TWA he desired a further meeting and conference with Mr. Davis and other representatives of Toolco to be held at 2 o'clock of that afternoon. Such a meeting, which lasted until after 4:30 of that afternoon, was held and attended by Mr. Davis. In that conference, Merrill Lynch expressed confidence that TWA would favorably consider the proposal submitted to it by Merrill Lynch. At the same time, Merrill Lynch and its counsel advised Toolco that any assertions by it with regard to deficiencies in the Registration Statement or in connection with possible [19150] claims arising out of the relationship between TWA and Toolco would seriously jeopardize the prospects for favorable consideration of the Merrill Lynch proposal by the Board of Directors of TWA. Merrill Lynch assured Mr. Davis and other representatives of Toolco that it was convinced that the Merrill Lynch proposal would receive full and fair consideration by the Board of Directors of TWA at the meeting to be held on Wednesday, May 17. Believing that TWA, having everything to gain and nothing to lose, would postpone the effective date of the Registration Statement and accept the Merrill Lynch proposal, Toolco instructed this firm to defer presentation of matters

of concern to us until after action by the Board of Directors of TWA, in the expectation that there would be adequate opportunity at such time to suggest revisions of the Registration Statement and permit consideration by TWA and Toolco of their respective positions upon various aspects of their prior relationship.

Some time after 6:00 P.M. of the evening of Tuesday, May 16, 1961, Mr. Forrester advised representatives of Toolco that a meeting had been had with Mr. Breech, Chairman of the Board, and Mr. Tillinghast, President of TWA, and that TWA had received a further presentation by Merrill Lynch. It now appears as a matter of record before the Commission that on Tuesday, May 16, 1961, there [19151] was filed Amendment No. 3 (hereinafter referred to as the Prospectus) to the Registration Statement, containing the statements appearing on page 4 thereof that a request for postponement of the contemplated offering had been received on May 11, 1961 and that TWA "has not agreed to such a postponement".

This firm on the morning of May 18, 1961 received a copy of the preliminary prospectus dated May 16, 1961. This Prospectus was the latest information available to this firm at the time of the hearing before the Commission on the evening of May 18th. This firm knew that there had been filed Amendment No. 4. A request to counsel for TWA was made for a copy of said Amendment No. 4 which was rejected or, at least, not complied with prior to said hearing. During the course of May 18th this firm was informed that on that day TWA had also filed Amendment No. 5. All statements and positions taken by or on behalf of Toolco at the hearing and in this letter were and are based upon what appears in the Prospectus.

Up until 7 P.M. on May 19th, Mr. Davis had been continuously occupied on urgent matters on behalf of Toolco, including efforts relative to arrangements for an under-

writing syndicate to participate in a public distribution of Toolco's share of the TWA offering and, being the only individual of this firm familiar with all the [19152] facts, was not able to commence consideration of the statements appearing in this letter and to correct drafts prepared by his partners and associates until that time. This firm has not had an adequate opportunity to inquire into or investigate the facts set forth in the Prospectus or any omission to state material facts therein.

Prior to the hearing, Toolco's representative stated to Mr. Reed of Hughes, Hubbard, Blair & Reed, representing the Voting Trustees, that Toolco was prepared to offer to TWA to reimburse it for any expenses incurred by TWA caused by the postponement requested by Merrill Lynch, such as the reprinting of Warrants or other documents containing a date which would have to be changed. At the hearing before the Commission Mr. Davis, with authority from Toolco and Mr. Hughes, restated such offer. The offer was not accepted by TWA and instead counsel for TWA vigorously resisted the efforts of Toolco for a reasonable delay. It is not clear to this firm whether the ruling or decision by the Commission in refusing to grant the request of TWA for acceleration of its Registration Statement was conditioned upon the payment by Toolco to TWA of such expenses or whether Toolco is obligated to continue its offer for a particular period of time. In order to avoid [19153] any misunderstanding, Toolco hereby renews until 10 A.M. E.D.S.T. Monday, May 22, 1961, its offer to pay such expenses. Toolco will in any event pay such expense if the payment thereof is a requirement of the Commission. This firm as counsel for Toolco does not, however, recognize that the imposition of such a condition by the Commission would be proper. In that connection, Toolco hereby notifies TWA that it questions the reasonableness of the estimated $600,000 for expenses set forth in Part II of the Registration Statement.

Defendant's Exhibit 11-B.

This firm will use its best efforts to furnish TWA and the Commission all information available to it which it considers pertinent to the preparation of a corrective amendment to the Registraiton Statement. When a corrective amendment has been filed which in our opinion complies with the requirements of the Securities Act of 1933 and regulations promulgated thereunder by the Commission, we will advise our client Toolco to join in a request for acceleration, provided that by so doing Toolco's legal and equitable rights are not prejudiced. This firm reserves an unqualified right to advise its client to refuse to acquiesce in, or to object to, any [19154] Registration Statement filed by TWA which has not received the prior affirmative consent in writing of Toolco.

Mr. Davis, who is approving this letter, states that based upon every fact known to him to date, including conversations had with Mr. Howard Hughes and other representatives of Toolco, the position being taken by Toolco is not a device or an effort on the part of Toolco to interfere with the offering contemplated by TWA to its common stockholders. The positions being taken by Toolco in that regard are the direct result of advice given by Mr. Davis of this firm to Toolco since Monday, May 15th. Mr. Davis was authorized by Toolco to make each and every representation made by him at the aforesaid hearing. Each statement of fact made by Mr. Davis at the said hearing was true to the best of his knowledge and belief.

As previously indicated, Toolco is the owner of 78% of the outstanding common stock of TWA and this stock is currently in a voting trust. This firm is currently investigating the circumstances in which Toolco was required, coerced, compelled or induced to place this stock in such voting trust. We have tentatively reached the [19155] conclusion that this voting trust was required, in circumstances not yet fully determined, by certain lending insti-

tutions and that, notwithstanding the legal power to act vested in the voting trustees, such voting trustees are under a fiduciary obligation to the common stockholders, including Toolco as the beneficial owner of common stock, to carry out the purposes of said voting trust within its lawful scope. Based upon information available to us which is admittedly incomplete, it is a tentative conclusion of this firm that said voting trust, if lawful, was entered into for the limited purpose of securing or protecting the lending institutions. In that connection, it is our understanding of the provisions of the voting trust agreement and related documents that the lending institutions have the absolute right to remove two of the three voting trustees for any reason whatsoever, the third voting trustee being designated by Toolco.

Contractual commitments entered into between TWA and Toolco in the so-called 1960 financing obligate TWA to make the contemplated offering on or before May 31, 1961. Toolco obligated itself to subscribe to this offering, including any amount unsubscribed for by the public, up to $100,000,000, and retained the right to subscribe to the remaining $11,000,000 or thereabouts. It will be noted that [19156] the obligation of TWA to make this offering on or before May 31 is, as we understand it, pursuant to a contractual obligation between TWA and Toolco. It should be further noted that Toolco has the right and option to subscribe to this offering by tendering 6½% interim notes heretofore issued by TWA and presently owned by Toolco. It is the present belief of this firm that in the circumstances here present Toolco is not covered by the Commission's Rule 142. It is also the present belief of this firm that Toolco may be exposed to possible liabilities under the Securities Act of 1933 by reason of the provisions of Section 15 and Section 2(11) of said Act. It will be noted that TWA has not given and refuses to give Toolco any indem-

nification agreement against liability by reason of the statements or omissions in the Registration Statement.

Although legal representatives of TWA or of the voting trustees have indicated to Mr. Davis in a general way that TWA would cooperate with Toolco in the preparation of a registration statement in the future should Toolco delay its present plans to make a public distribution of the securities it is entitled to obtain under the contemplated offering by TWA to its common stockholders, it is out understanding that no contractual obligation exists in this regard. It was also indicated by such [19157] representatives that, in connection with the preparation by TWA of any such future registration statement for use in an offering of securities to be made by Toolco, an agreement of indemnity and indemnity bond would be required by TWA.

In order that TWA may commence promptly the necessary steps to correct what we believe to be material deficiencies in the Prospectus, we confirm the comments heretofore made to TWA and which were stated to the Commission on May 18. All interested parties must understand, however, that these comments do not purport to be complete. They represent all the comments which this firm is in a position to make within the time limitations imposed by the Commission based upon all the facts currently available to this firm.

Toolco, on advice of this firm, has not acquiesced to the request for acceleration of the effective date of the Registration Statement filed by TWA on May 17 or May 18. Counsel for TWA argued before the Comfnission that Toolco had deliberately delayed in presenting its objections to the Prospectus. Such an argument is, we believe, unwarranted. The preliminary Registration Statement filed by TWA on March 30, 1961 did not contain any reference to the purchase of Boeing aircraft or to a credit arrangement involving some $147,000,000. At that time Toolco had no

intention to [19158] make a public distribution of any securities of TWA. Moreover, Toolco was without counsel experienced in matters of this kind until this firm was retained on Monday, May 15, 1961.

In the circumstances hereinabove described, we reserve the right to modify, correct or supplement any of the statements of fact hereinafter set forth relating to existing deficiencies. Each and every statement of fact herein appearing is, however, in accord with the knowledge and information available to Mr. Davis of this firm after as much inquiry and investigation as to those facts as time would permit.

1. At page 22, under the heading "Voting Trust", the identity of the lending institutions which appointed and have the unlimited power to remove Mr. Breech and Mr. Olds as voting trustees should be disclosed, since such lending institutions are in control of said voting trustees who constitute a majority of the voting trustees. Moreover, at page 14, under the heading "Introduction of Jet Aircraft", the lending institutions negotiating with TWA with respect to the financing of approximately $147,000,000 should be identified. We understand that those lending institutions are identical with those controlling the voting trustees, with the exception of the addition of one insurance company which we believe to be [19159] The Prudential Insurance Company of America. It is our view that (a) the lending institutions controlling the voting trustees should be described as controlling persons or "parents" of TWA and (b) that current negotiations with respect to this financing of $147,000,000, believed to be in the form of a private placement, constitute self-dealing. In that connection Toolco is informed and believes that said lending institutions propose to include as a condition in said financing a provision that in the event the voting trust is termi-

nated, even in accordance with its terms, the repayment of said $147,000,000 will be accelerated and immediately become due and payable.

2. It is the position of Toolco that the Board of Directors of TWA are subservient to the majority voting trustees who are controlled by the lending institutions. It is the further contention of Toolco that the lending institutions are primarily interested in the repayment of an existing loan to TWA in the amount of approximately $165,000,000. It is the further position of Toolco that the lending institutions, the majority voting trustees, and a controlling majority of the present Board of Directors of TWA are disregarding the best interest of the owners of the beneficial interest in the Common Stock of TWA. The position of Toolco with respect to the above is currently under investigation by this firm. It is the [19160] belief of this firm that those presently in control of TWA may have conflicting interests in relation to the management of the affairs of TWA or that from time to time such conflicting interests may develop. We believe that the Prospectus should disclose the understanding of the majority Voting Trustees with respect to the nature and extent of their duties to the lending institutions having the power to remove them from office, and to the beneficial owners of TWA; and that it should disclose the basis of that understanding, and all pertinent instructions by the lending institutions to the majority Voting Trustees or by the Voting Trustees to the members of the Board of Directors controlled by the majority Voting Trustees.

3. Under the heading "Voting Trust" at page 22 of the Prospectus, the statement relating to the circumstances in which the Voting Trust terminates is inadequate in that it does not describe the right of Toolco to repay the lending

institutions and thereby to cause a termination of the Voting Trust.

4. At page 23 of the Prospectus there appears an excerpt from a statement by the Civil Aeronautics Board. This firm is not fully familiar with the proceeding in which such statement was made, except that we understand that it was in connection with the arrangements commonly described as the 1960 financing, nor have we had an [19161] opportunity to study the adequacy of the disclosure reflected by the excerpt of the statement of the Board. Apparently the excerpt quoted in the Prospectus is designed to indicate that the Board, under the Federal Aviation Act of 1958, would have to take appropriate action under that Act in connection with any reassumption of control by Toolco over TWA by reason of its stock ownership. The quoted excerpt from an opinion of the Board is made without any statement as to the position of the present management of TWA or of its counsel as to their opinion, if any, with respect to the right of Toolco to reacquire the right to vote the shares of Common Stock it beneficially owns.

If it is the view of TWA or of the Commission that it is material to disclose to the public the possibility or probability that the Voting Trust may terminate and Toolco reacquire the right to vote the shares of stock it beneficially owns, then a more complete statement of the facts and circumstances with respect to the creation of the Voting Trust would be appropriate. It is the position of Toolco that it was compelled to enter into the Voting Trust under conditions which would warrant a termination of the Voting Trust otherwise than in accordance with the terms of the arrangements under which it was created. This position of Toolco is presently under in- [19162] vestigation by this firm. The information available to this firm in that regard is presently considered to be inadequate for the expression of an opinion. It is noted, however, that the lending insti-

tutions involved required that Toolco pay a penalty of 22% should Toolco choose to avail itself of the right to repay the full amount of the principal and interest due to the lenders. This circumstance leads us to believe that the contention of Toolco warrants careful consideration.

5. At page 14 of the Prospectus a statement appears which fairly implies, if it does not specifically state, that TWA during 1960 obtained from jet operations the same percentage of operating revenue as did its competitors. At page 20 of the Prospectus, however, a statement appears to the effect that, during 1960 and in the first quarter of 1961, TWA's share of domestic passenger traffic declined solely by reason of an alleged delay in the delivery to TWA of Convair 880 jet aircraft. It is the opinion of Toolco, which seems to us to be justified, that the statement appearing at page 20 of the Prospectus is misleading in that it fails to recognize that there were factors responsible for the traffic decline there mentioned other than delays in the delivery of Convair 880's. If in fact this decline was due solely to delays in the delivery of Convair 880's, the public could be led to believe that [19163] the condition would be non-recurring. If, on the other hand, this decline were caused by other factors which could be recurring, the true nature of the factors causing a passenger traffic decline during 1960 and the first quarter of 1961 should be disclosed. The information with respect to the responsible factors is peculiarly within the possession of TWA.

6. Referring to paragraph 5 above, the nature and extent of the delays in delivery of aircraft referred to at pages 20 and 22 of the Prospectus should be disclosed. If the delays referred to therein did in fact cause a substantial passenger traffic decline, the investing public should be advised of the detailed facts so that it may evaluate the

possibility or probability of delays in delivery of the Boeing aircraft which the present management of TWA proposes to commit the Company to purchase, as described on page 14 of the Prospectus. Furthermore, as will be hereinafter indicated, the availability to TWA of Convair 990's and 880's through Toolco at dates earlier than deliveries of any Boeing aircraft is a material fact which should be disclosed.

7. Since a substantial number of Convair jet aircraft are available to TWA by reason of the efforts and commitments heretofore made by Toolco, the Prospectus [19164] should contain appropriate statements covering: (a) whether the present management of TWA intends to avail itself of the opportunity to acquire such Convair equipment; (b) whether the Boeing equipment to be acquired is in addition to or in lieu of the Convair equipment; (c) the probable delivery schedules of Convair equipment as compared with Boeing equipment. Information with respect to the above should be provided particularly in view of the statements now appearing in the Prospectus as to the materiality and effect of delays in the delivery of jet aircraft.

8. Mr. Holliday, a Voting Trustee and Director, and the representative of Toolco, refused to subscribe to the Registration Statement and withdrew the power of attorney given by him to the Chairman of the Board of TWA. This fact should be disclosed, together with the facts and circumstances relating to such withdrawal. We are informed that at the meeting of the Board of Directors of May 17, 1961 Mr. Holliday stated that on advice of counsel he would not assume responsibility and liability as a director for the statements and omissions in the Prospectus. It seems to us that the action of Mr. Holliday, a representative of Toolco, is a material fact to be disclosed.

Defendant's Exhibit 11-B.

9. Under the caption "Summary of Consolidated Operations" at pages 8-10, footnote J states that the [19165] maximum annual interest requirements on the Debentures will be $7,230,333.50. This footnote would convey the impression that the interest requirements of the Debentures together with other interest requirements on long term debt, which are shown as $4,000,000 in 1960 in the table on page 9, are substantially exceeded by operating revenues. It is the understanding of Toolco that the annual interest requirements on indebtedness senior to the Debentures, which is described in the capitalization table, aggregates in excess of $10,000,000 and that the aggregate interest requirements upon such indebtedness together with the contemplated Debentures will be approximately equal to or somewhat in excess of the operating profits for the year 1960. In that connection, it seems to us that it would be desirable, if not necessary, to indicate the probable interest obligation which may develop by reason of the financing program of approximately $147,000,000 now underway with the lending institutions in control of TWA relating to the Boeing purchase program.

10. Under the heading "Agreement with Hughes Tool Company Concerning $50,000,000 Revolving Credit", appearing at page 24 of the Prospectus, reference is made to an obligation of Toolco to provide TWA with a revolving [19166] credit of $50,000,000 through the last day of the month next following the month in which TWA takes delivery of and pays for the last of the 20 Convair 880's theretofore mentioned in the Prospectus. We do not find any statement disclosing the date or estimated date when this obligation is likely to terminate. We are advised by Toolco that it believes that its obligation under that revolving credit agreement is likely to terminate on or

before September, 1961. This termination date is dependent upon a delivery schedule best known to Convair. Toolco does not know what inquiry, if any, has been made by TWA of Convair with respect to such schedule. In view of the inportance of this matter by reason of the amount involved, it seems to us that TWA should determine and disclose the probable termination date of this revolving credit.

11. Under the heading "Remuneration" the Prospectus discloses an employment contract with Mr. Tillinghast. Toolco objects to the terms of that employment contract and hereby notifies TWA that it has requested us to consider the possibility of action with respect to it. Toolco questions the necessity for entering into such a long-term contract in order to obtain the services of an adequate chief executive, and questions the propriety of action by the lending institutions, the majority Voting Trustees and the controlling [19167] members of the Board of Directors, elected by the majority Voting Trustees, to impose upon TWA such long-term obligations surviving the termination of the voting trust. We have not had an opportunity to consider the merits of these matters. Toolco further believes, and we concur, that the Prospectus should disclose any relationships or business dealings which may have previously existed between Mr. Tillinghast and any of the lending institutions or the majority Voting Trustees or corporations controlled by either of them.

12. With respect to the heading "Litigation" appearing on page 38 of the Prospectus, Toolco hereby notifies TWA that it is contemplating, and that this firm is investigating, the possibility of commencing an action, as the beneficial owner of approximately 78% of the Common Stock of TWA, against (a) the lending institutions controlling TWA, (b)

the majority Voting Trustees, and (c) the individual directors controlled by the majority Voting Trustees. Toolco is also contemplating, and this firm is investigating, the commencement of an action against the lending institutions relating to the terms and conditions imposed upon TWA and Toolco in connection with the 1960 financing and other matters which may affect the validity of the existing voting trust. Toolco has also requested [19168] this firm to investigate the possibility of enjoining the consummation of the Boeing purchase transaction described at page 14 of the Prospectus, or of taking action on behalf of TWA against the persons responsible for any commitments incurred or damage suffered by TWA in connection with such program, on the ground that such program (a) is contrary to the best interest of the stockholders of TWA, (b) has been promoted for the benefit of certain lending institutions, and (c) has been promoted for the purpose of interfering with the ability of TWA to discharge the indebtedness incurred in connection with the 1960 financing program and thereby to terminate the voting trust pursuant to its terms. This firm is not in a position at this time to disclose the information it has obtained to date. It is our view, however, that the very existence of such claims is of sufficient materiality to be required to be disclosed in the Prospectus.

In view of the limited period of time allowed to counsel for Toolco in the preparation of this letter, the above may not be assumed to be a full or complete description of the nature of the claims which Toolco may assert. The above is stated primarily for the purpose of advising the interested parties as well as the Commission that Toolco has disclosed to us within the past few days material information which justifies careful consideration by this firm as to the existence of meritorious claims of the nature indicated.

[19169] 13. Throughout the relationship between Toolco and TWA prior to the establishment of the voting trust it

was the practice of Toolco to investigate the need of TWA for and place orders for modern types of equipment for the ultimate use and benefit of TWA. At the present time, Toolco has on order 17 Convair jet aircraft, of which 13 are Convair 990's to be delivered on schedules comparable to scheduled deliveries to American Airlines, Inc., one of TWA's major competitors. Negotiations are in progress between TWA and Toolco for the acquisition by TWA of four Convair 880's on order by Toolco, but such negotiations are not disclosed in the Prospectus. With respect to the Convair 990's Toolco believes that these aircraft will be superior in speed and adaptibility to other available jet aircraft, including Boeing equipment proposed to be purchased by TWA, and will therefore be better suited to the needs and requirements of TWA than such Boeing equipment. Furthermore, the Convair equipment could be delivered to TWA and placed in service and effective utilization ahead of such Boeing equipment. Based upon information made available to us by Toolco, it appears that there may be a basis upon which TWA may assert an equitable right to the Convair equipment on order by Toolco; information made available to us by Toolco in this regard may not be disclosed at this time to the extent requested by the Commission, because a disclosure at this time of the [19170] information made available to us, without further investigation on our part, could be prejudicial to the interests of our client. The existence of such a right would be a material fact because of the definite advantage which would flow to TWA should TWA request and receive such equipment from Toolco. It also appears that the Convair equipment was ordered by Toolco with full knowledge on the part of operating personnel of TWA. Accordingly, TWA should state in the Registration Statement whether or not it claims such a right and whether or not it intends to ask Toolco to make such equipment available to it. Toolco

is satisfied that TWA has known for some time that the Convair equipment was available to it and hereby confirms to TWA that all or part of such equipment is available to it to the extent that the same may be needed by TWA. An unresolved question exists whether TWA is obligated to purchase such Convair equipment from Toolco at approximately its cost plus interest on invested funds. Toolco has requested this firm to review the pertinent facts and to advise as to the existence of such an obligation. We have not had an opportunity to commence the investigation so requested. The aggregate ultimate cost of the Convair equipment on order by Toolco is in excess of $75,000,000, and it is the position of Toolco that the possible existence of such an obligation on TWA should be disclosed in any registration statement to which Toolco [19171] may acquiesce. In addition, it should be stated in the Registration Statement whether or not the Boeing equipment recently ordered by TWA would be required or could be effectively utilized in the event that TWA is found to be obligated to purchase from Toolco the Convair equipment on order by it.

Very truly yours,

SIMPSON THACHER & BARTLETT

/s/ CHESTER C. DAVIS

by Chester C. Davis

A-3242

Defendant's Exhibit 11-C.

[19173]

CHESTER C. DAVIS
120 BROADWAY
NEW YORK 5, N. Y.

May 24, 1961

Attention of Ronald Duckworth, Secretary

Trans World Airlines, Inc.,
380 Madison Avenue,
New York 17, N. Y.

Dear Sirs:

In connection with our investigation of the matters set forth in the letter to you and the Securities and Exchange Commission dated May 19, 1961, we wish to obtain from you the following documents:

1. A copy of the Company's Certificate of Incorporation;
2. A copy of the Company's By-Laws;
3. A copy of all Minutes of all meetings of the Board of Directors since the institution of the Voting Trust Agreement;
4. Copies of all reports presented to the Directors or circulated at meetings of the Board.

Very truly yours,

CHESTER C. DAVIS

By ARTHUR I. SETTLES

A-3243

Defendant's Exhibit 11-D.

[19174]

ONE TWENTY BROADWAY
NEW YORK 5, N. Y.

May 25, 1961

Re: Registration Statement of Trans World Airlines, Inc. (Registration No. 2-17847)

Attention of Mr. Ralph C. Hocker

Securities and Exchange Commission
Washington 25, D. C.

Dear Sirs:

This will confirm my telephone conversation with Mr. Hocker yesterday afternoon with respect to the above Registration Statement of Trans World Airlines, Inc.

As I told Mr. Hocker, my client, Hughes Tool Company, disclaims any liability or responsibility with respect to said Registration Statement or any statements which appear therein, or omissions therefrom. Said Registration Statement was prepared without consultation with or approval by Hughes Tool Company or its counsel. Furthermore, Hughes Tool Company has not acquiesced in, nor does it acquiesce in, the acceleration of the effective date of said Registration Statement. However, based upon a limited review of Amendment No. 6 thereto, and Amendment No. 7 which was received by me late yesterday afternoon, Hughes Tool Company has no desire to delay appropriate action by the Securities and Exchange Commission, in the [19175] circumstances, making said Registration Statement effective. At the time I called Mr. Hocker, I had no information that the Commission had either already acted or was about to act with respect to said Registration Statement.

I also pointed out to Mr. Hocker that the statement appearing on page 25 of Amendment No. 6 to the effect that the delivery of the last of the Convair 880s was presently expected to occur by late summer of 1961, was substantially in accord with the latest information available to me from Hughes Tool Company as to its understanding, and was in accord with the information set forth in the letter of May 19, 1961. This information, however, and the understanding of Hughes Tool Company in that regard, is not based on recent information received from Convair. I advised Mr. Hocker that it should be understood by all concerned that although Hughes Tool Company does not question the accuracy of the statement made by Trans World Airlines, Inc. in that regard, such statement may not be based properly on anything stated in the May 19 letter.

I also pointed out to Mr. Hocker that the material appearing under the caption "Voting Trust" may not completely reveal the extent to which the two insurance companies named have been, and presumably continue to be, in control of the [19176] voting trustees, because the facts necessary for an intelligent application of the provisions of paragraph 3 of the Noteholders' Agreement dated as of December 1, 1960 are not, I believe, disclosed. I also stated to Mr. Hocker that the above comments were only for the guidance of the Commission and its staff. At the conclusion of our telephone conversation, I inquired if it was appropriate to be informed as to the current status of the Registration Statement, because I had received no information from TWA with respect thereto. Mr. Hocker then informed me that the Registration Statement either had become effective or was about to become effective at 5:30 p.m. of that day, May 24, 1961.

I am sending a copy of this letter to Trans World Airlines, Inc. attention of Mr. Charles C. Tillinghast, Jr., President, and to its counsel, Messrs. Chadbourne, Parke, White-

side & Wolff, and to Messrs. Hughes, Hubbard, Blair & Reed, counsel for the Voting Trustees, for their respective information.

Very truly yours,

CHESTER C. DAVIS
Chester C. Davis

A-3246

Defendant's Exhibit 11-E.

[19177]

ONE TWENTY BROADWAY
NEW YORK 5, N. Y.

BY HAND

May 25, 1961

Trans World Airlines, Inc.
380 Madison Avenue
New York 17, N. Y.

Attention of Mr. Charles C. Tillinghast, Jr.
President

Dear Sirs:

On behalf of the Hughes Tool Company, we request that there be made available to us, not later than the close of business on Friday, May 26, 1961, all papers relating to the proposed additional financing by Trans World Airlines, Inc., in the amount of $147 million referred to on page 14 of its Prospectus. We particularly request drafts of any loan agreements or other documents relating to this financing.

Very truly yours,

CHESTER C. DAVIS

By ARTHUR I. SETTLES

A-3247

Defendant's Exhibit 11-E.

[19178]

ONE TWENTY BROADWAY
NEW YORK 5, N. Y.

BY HAND

May 25, 1961

Attention of Mr. Charles C. Tillinghast, Jr.
President

Trans World Airlines, Inc.,
380 Madison Avenue,
New York 17, New York.

Dear Sirs:

On behalf of the Hughes Tool Company, we request that the following information with respect to the proposed purchase of Boeing aircraft by Trans World Airlines, Inc. (TWA), as described at page 11 of TWA's Prospectus, be furnished to us immediately by telephone or telegraph:

1. Has TWA received from Boeing Airplane Company an extension of the time within which to make arrangements for the financing of the purchase of such aircraft?

2. Has TWA requested any such extension of time and, if so, what response, if any, has been received from Boeing Aircraft Company?

3. Does TWA presently intend to request such an extension of time prior to May 31, 1961?

Very truly yours,

CHESTER C. DAVIS

By ARTHUR I. SETTLES

A-3248

Defendant's Exhibit 11-F.

[19179]

CHESTER C. DAVIS
Room 3113
ONE TWENTY BROADWAY
NEW YORK 5, N. Y.

WORTH 2-5220

May 26, 1961

To: Irving Trust Company as Agent for the Holders of the Equipment Notes of Trans World Airlines, Inc.

The Equitable Life Assurance Society of the United States

Attention: James F. Oates, Jr., Chairman and President

Metropolitan Life Insurance Company

Attention: Frederic W. Ecker, Chairman

The Board of Directors of Trans World Airlines, Inc.

Mr. Ernest R. Breech
Mr. Irving S. Olds
Mr. Raymond M. Holliday,
Voting Trustees.

Dear Sirs:

This letter is to confirm and supplement certain positions stated on behalf of Hughes Tool Company ("Toolco") in the letter of May 19, 1961 to Trans World

Airlines, Inc. ("TWA"), a copy of which is enclosed herewith.

It is the desire of Toolco to confer with you or your representative as soon as possible with the objective of working out an amicable solution wherever [19180] there may be a difference of opinion.

At the outset it is the position of Toolco that its title record of ownership of more than 78% of the outstanding common stock of TWA was put in a voting trust at the insistence of certain lending institutions and with the acquiescence of Toolco in order to assist the financing program of TWA and for the limited purpose of assuring the lending institutions the repayment in accordance with their terms of certain notes of TWA to be acquired by such lending institutions.

It is therefore the position of Toolco that the voting trust and related agreements are proper and lawful only when construed within the limits hereinabove described. It was not the purpose or intention of Toolco in placing its stock in a voting trust to confer upon others the unrestricted right to deal with the property interests of Toolco represented by its ownership of TWA.

Under paragraph 3 of the Noteholders' Agreement, the lending institutions holding the majority of said notes have the absolute right for any reason whatsoever to remove two of the three voting trustees and to select their successors, and thus have absolute control over such voting trustees and TWA. It is my understanding that at the present time two insurance companies, namely, Metropolitan Life Insurance Company and Equitable Life [19181] Assurance Society of the United States, own a majority of said notes and that they therefore have such absolute control. It would seem obvious that the lending institutions represent an interest different from, and at times adverse to, the interest of the owners.

Defendant's Exhibit 11-F.

The voting trustees, as I understand it, have elected a majority of the present directors of TWA who are removable without cause under the by-laws of TWA at the will of a majority of the stockholders of TWA. In the circumstances here present, therefore, the present Board of Directors is biddable and subservient to the voting trustees who, in turn, are biddable and subservient to the lending institutions and to the direction of Irving Trust Company as the agent of the lending institutions.

It is the position of Toolco that the present directors of TWA are confronted with the necessity of attempting to serve two masters, namely, the owners of TWA and the interest of the lending institutions; and that, in fact, since the voting trust has been established, the Board of Directors has ignored the interest of the owners and has been entirely subservient to the will and wishes of the voting trustees. It is the further position of Toolco that the normal concept that a Board of Directors may act in accordance with its independent [19182] judgment is not applicable to preclude the need for consultation in the instant situation and that the concept must be applied in such way as to do equity among the interested parties.

Toolco recognizes that the present Board of Directors of TWA has a duty or obligation to the lending institutions with respect to matters which may have an effect on the repayment of the notes held by them; at the same time, it is the position of Toolco that the lending institutions, the voting trustees, and the directors, also have a fiduciary duty and obligation to be responsive to the interests of the owners of TWA, including Toolco which continues to be the owner of more than 78% of TWA. In the circumstances here present, Toolco, in equity, would seem to be entitled to be consulted on business decisions which vitally affect its ownership interest in TWA because normally the directors would be responsive to its ownership interest. Toolco,

is of course also mindful of the minority ownership which has interests, similar to those of Toolco, also requiring protection. In this connection, Toolco believes that with respect to any matter which involves any dealings between TWA and the lending institutions, the directors and voting trustees have a duty and obligation to consult with [19183] and obtain the approval of the owners.

Based upon facts presently known to me, it would seem that the lending institutions, the voting trustees and the directors of TWA, have followed a course of conduct not in accordance with the principles above stated. This is particularly troublesome when decisions are made which are likely to impose on TWA obligations beyond the term of the voting trust. For the purposes of this letter, the term of the voting trust means any time when the voting trust may terminate in accordance with its terms.

In connection with the request for an opportunity to confer with appropriate representatives of the lending institutions, the voting trustees and the individual directors of TWA, you may assume that the representative of Toolco participating in such discussion will be duly authorized and empowered to work out a settlement of the particular problems hereinafter outlined.

Among the specific areas as to which Toolco is primarily concerned at this time, and which it would like to discuss with you or your representatives, are the following:

1. The arrangement with Boeing Airplane Company ("Boeing") for the acquisition by TWA of twenty Boeing 707-131B and six 707-331B jet aircraft. Toolco [19184] strenuously objects to any such commitment by TWA for several reasons, all of which may not be set forth in this letter. Basically, Toolco does not believe that such equipment is best suited to the needs of TWA, particularly when TWA may acquire jet aircraft from Convair pursuant to arrangements heretofore made by Toolco for the benefit of

TWA. Toolco does not understand how the Board of Directors may justify saddling TWA with long-term obligations or equipment contrary to the wishes of the owners of TWA, particularly when such equipment and obligations undoubtedly will extend beyond the terms of the Voting Trust.

The financing program contemplated between TWA and the lending institutions constitutes self-dealing and Toolco objects to the consummation of any such arrangement without its consent. Furthermore, it would seem that the financing program contemplated by TWA would adversely affect the ability of TWA to repay at the earliest possible date the aforementioned notes and thereby terminate the voting trust arrangement. Toolco believes that the equipment available to TWA from Convair is not only more suitable to the needs of TWA than the proposed Boeing equipment but would be more competitive with the equipment to be used by its principal competitors, [19185] and that the Convair equipment would be available to TWA at an earlier date than the Boeing equipment. The current Prospectus of TWA emphasizes the economic advantages of having jet equipment available to it at the earliest possible date.

Toolco has not been consulted with respect to the proposed Boeing commitment and does not appear to have information at this time as to the current plans of TWA. One of the purposes of this letter is to put all of you on notice that Toolco intends to take all action available to it to avoid the irreparable injury which would be caused by consummation of the program disclosed in the current Prospectus relating to the purchase of Boeing equipment and that Toolco, if such program is consummated, will have no alternative but to seek to hold responsible all persons, individual or corporate, who have participated in or controlled the course of conduct followed by TWA.

Toolco hereby requests that you immediately advise the

undersigned as to the status of the program described in the current Prospectus relating to the purchase of Boeing equipment and as to the current negotiations with the lending institutions so that Toolco may have an adequate opportunity to review the same [19186] before they are consummated. In that connection, Toolco hereby requests that the undersigned be furnished with copies of all pertinent documents.

Toolco understands that if the Boeing transaction is not consummated, TWA may lose as a penalty the sum of $850,000 heretofore paid by TWA to Boeing. Even though Toolco was not consulted prior to any commitment between TWA and Boeing, the undersigned or another representative of Toolco, in any discussion which may be held pursuant to the suggestion hereinabove made, will be authorized to discuss the proper allocation of any expense incurred, including any penalty which TWA may incur by reason of the termination of the proposed Boeing commitment.

2. Independently of the outcome of the proposed Boeing purchase, another matter which requires discussion is the 17 Convair jet aircraft which Toolco has contracted to purchase and the rights or obligations of Toolco and TWA with respect thereto.

3. Toolco does not question the background, personal integrity or ability of Mr. Charles Tillinghast, who has been employed as President of TWA under a long-term contract. Toolco, nevertheless, objects to any arrangement which has the effect of imposing on TWA an [19187] obligation which extends beyond the term of the voting trust, including an arrangement for the services of a chief executive who is not acceptable to Toolco as the owner of more than 78% of the common stock of TWA. Toolco recognises that in the discharge of their obligations to the lending institutions, the voting trustees and the directors have the responsibility for obtaining the services of a competent chief

executive. The position of Toolco is simply that the lending institutions, the voting trustees and the Board of Directors do not have the right to impose the long-term obligation, reflected by the employment contract with Mr. Tillinghast, without the approval or consent of the owners of TWA.

4. The failure of the Board of Directors of TWA to submit to the stockholders of TWA the merger negotiated between TWA and Northeast Airlines, Inc. (hereinafter "Northeast") is another matter of concern to Toolco. Prior to the creation of the voting trust, the management of TWA, with the approval of the majority of the owners of TWA, considered such a merger to be in the best interests of TWA. The lending institutions, the voting trustees and the Board of Directors permitted this agreement of merger to lapse without submitting the matter to the owners of TWA and without consulting Toolco. [19188] It is difficult to see how the lending institutions would have been adversely affected by such a merger since the notes held by them constitute a senior indebtedness of TWA. Toolco recognizes that the new Board of Directors and a new chief executive of TWA may not have the same business judgment as the prior management of TWA. Since the present Board of Directors of TWA is responsible to two masters who may have different interests, it would seem that the proper course of action would have been to submit the matter for appropriate action or direction by the owners of TWA. Toolco understands that unless immediate action is taken the opportunity to merge with Northeast may be lost forever. You are, therefore, requested to take immediate action to reinstitute discussions with Northeast looking toward such a merger, so as to minimize the possible irreparable injury which will be suffered by TWA should this opportunity be lost.

In the event that it is the position of the lending institu-

tions or the voting trustees or the Board of Directors that a merger with Northeast would impose a financial burden upon TWA, adversely affecting the position of the lending institutions, it is the position of Toolco that it is prepared to discuss the possibility of assuming any such financial risk.

[19189] The letter of May 19, 1961, addressed to TWA and the Securities and Exchange Commission is enclosed for your further information with respect to other positions taken by Toolco which are not mentioned herein but which are hereby reconfirmed. A letter was delivered by hand this morning, Friday, May 26, to TWA and its counsel Messrs. Chadbourne, Parke, Whiteside & Wolff, and to the voting trustees at the office of TWA, and to their counsel Messrs. Hughes, Hubbard, Blair & Reed, requesting information as to whether TWA has received from Boeing an extension of time within which to make arrangements for the financing of the contemplated purchase of equipment from it; whether TWA has requested any such extension of time, and if so, what response, if any, has been received from Boeing and whether TWA intends to request such an extension of time prior to May 31, 1961. It is respectfully requested that the undersigned be advised with respect to the queries set forth in said letter as soon as possible and not later than Monday noon, May 29.

The undersigned, together with other representatives of Toolco, will hold themselves available to meet with you at all convenient times.

[19190] A copy of this letter is being forwarded to Messrs. Chadbourne, Parke, Whiteside & Wolff, counsel for TWA, and to Messrs. Hughes, Hubbard, Blair & Reed, counsel for the voting trustees, for their respective information.

Very truly yours,

CHESTER C. DAVIS
Chester C. Davis

A-3256

Defendant's Exhibit 11-G.

[19191]

[WESTERN UNION TELEGRAM]

COPY — HAND DELIVERY TO MR. TILLINGHAST MAY 31, 1961

FAST WIRE

BOEING COMPANY
SEATTLE, WASHINGTON
and
BOEING COMPANY
45 ROCKEFELLER PLAZA, NEW YORK

REFERRING TO LETTER DATED MAY 25 ON BEHALF OF HUGHES TOOL COMPANY, THIS IS TO NOTIFY YOU THAT AS BENEFICIAL OWNER OF MORE THAN 78% OF THE OUTSTANDING COMMON STOCK OF TWA HUGHES TOOL COMPANY DISPUTES THE POWER AND AUTHORITY OF THE BOARD OF DIRECTORS OR THE MANAGEMENT OF TWA TO ENTER INTO, COMMIT ITSELF FOR OR CONSUMMATE THE PURCHASE OF JET AIRCRAFT FROM YOU PURSUANT TO THE AGREEMENTS DATED APRIL 30, 1961 OR OTHERWISE, OR TO ENTER INTO, COMMIT ITSELF FOR OR CONSUMMATE THE FINANCING ARRANGEMENTS CONTEMPLATED BY SAID AGREEMENTS. THE PRESENT BOARD OF DIRECTORS OF TWA AND MANAGEMENT OF TWA ARE CURRENTLY UNDER THE DIRECTION AND CONTROL AND ARE SUBSERVIENT TO CERTAIN LENDING INSTITUTIONS AND THEIR INTEREST, AND TO VOTING TRUSTEES SUBJECT TO CONTROL BY SAID LENDING INSTITUTIONS. SAID BOARD OF DIRECTORS AND MANAGEMENT OF TWA ARE NOT RESPONSIVE TO THE WISHES AND DESIRES OF THE OWNERS OF TWA AND ARE NOT CONCERNED SOLELY WITH THE BEST INTERESTS OF TWA. THE VOTING TRUST AGREEMENT IS SUBJECT TO TERMINATION PURSUANT TO ITS TERMS AT ANY TIME THAT NOTES HELD BY SAID LENDING INSTITUTIONS ARE PAID IN FULL, AT WHICH TIME TWA WILL REVERT TO THE CONTROL OF THE OWNERS OF TWA. THE AGREEMENTS AND FINANCING ABOVE MENTIONED WOULD IMPOSE OBLIGATIONS ON TWA BEYOND THE TERM OF SAID VOTING TRUST AND WOULD TEND TO PREVENT OR DELAY THE TERMINATION OF SAID VOTING TRUST, ADVERSELY AFFECTING THE OWNERS OF TWA. YOU ARE HEREBY NOTIFIED [19192] THAT ANY CONTRACT OR COMMITMENT FOR THE PURCHASE OF JET EQUIPMENT FROM YOU BY TWA SHOULD NOT BE CONSUMMATED OR IMPLEMENTED WITHOUT APPROVAL BY THE OWNERS OF TWA AND THAT YOU WILL BE PROCEEDING AT YOUR OWN RISK IF YOU PARTICIPATE IN IM-

Defendant's Exhibit 11-G.

POSING THE OBLIGATIONS CONTEMPLATED BY SAID AGREEMENTS AND RELATED FINANCING ON TWA. THE CURRENTLY PROPOSED FINANCING BY TWA INVOLVES UNJUSTIFIABLE SELF DEALING BY THE LENDING INSTITUTIONS NOW CONTROLLING TWA. YOU ARE HEREBY FURTHER REQUESTED NOT TO APPROVE, RATIFY OR CONSENT TO ANY PROPOSED FINANCING ARRANGEMENT WITH THE LENDING INSTITUTIONS CURRENTLY HAVING THE POWER TO CONTROL TWA OR ANY OTHER FINANCING WHICH INVOLVES, DIRECTLY OR INDIRECTLY, SELF DEALING, WITHOUT THE CONSENT OF THE OWNERS OF TWA. AS A SUBORDINATED CREDITOR OF TWA, HUGHES TOOL COMPANY ALSO OBJECTS TO THE IMPOSITION OF SENIOR INDEBTEDNESS AS CONTEMPLATED BY THE PROPOSED FINANCING RELATING TO SAID AGREEMENTS. WE ARE ADVISED BY TWA THAT NO AGREEMENT CONCERNING THE PROPOSED FINANCING HAS YET BEEN EXECUTED AND THAT TWA HAS NOT YET DETERMINED WHETHER OR NOT TO REQUEST AN EXTENSION OF CERTAIN DATES CONTAINED IN THE SAID AGREEMENTS. YOU ARE HEREBY REQUESTED TO NOTIFY CHESTER C. DAVIS OF 120 BROADWAY, NEW YORK, OUR COUNSEL, BEFORE YOU APPROVE OF ANY FINANCING ARRANGEMENT SUBMITTED TO YOU BY TWA PURSUANT TO THE PROVISIONS OF SAID AGREEMENTS SO THAT HE MAY TAKE APPROPRIATE ACTION TO PROTECT OUR INTERESTS.

HUGHES TOOL COMPANY

BY RAYMOND M. HOLLIDAY

A-3258

Defendant's Exhibit 11-H.

[19193]

HUGHES TOOL COMPANY

EXECUTIVE OFFICES
TWENTY-SECOND FLOOR GULF BUILDING
HOUSTON 2, TEXAS

Raymond M. Holliday
Vice President

May 31, 1961

BY HAND

Charles C. Tillinghast, Jr., Esq., President,
Trans World Airlines, Inc.,
380 Madison Avenue,
New York, New York.

Dear Sir:

This will confirm our telegram sent early this afternoon in response to your night letter telegram of May 29th and your letter of the same date which we received this morning. As we stated in our telegram we do have information, some of which has been recently developed, of which you have not been informed and which should be considered by the Board of Directors of TWA, in the interest of all the stockholders of TWA and others interested in its best management, concerning the relative superiority of the Convair aircraft for the operating needs of TWA and the advantages, including advantages with respect to financing, which would result from its acquisition of available Convair aircraft, based upon information and proposals to be presented to you.

Immediately upon the receipt of your letter we took steps to have the information which you requested for-

warded to us in New York. Much of that information is in the several [19194] offices of Hughes Tool Company, including the California office. Moreover, until we have received the material requested in our telegram we will not be in a position to present all relevant information as we have no way of knowing what information you have already received. Accordingly your suggestion of today that this information be delivered to you this afternoon was completely unreasonable and your insistence in that regard can only be interpreted as an indication that your letter of May 29th was not written in good faith.

We expect to present relevant information to you not later than Friday June 2nd and will be in touch with you to arrange for an appropriate meeting, assuming of course that you are still willing to carry out the intentions expressed in your letter to me dated May 29, 1961.

Very truly yours,

RAYMOND M. HOLLIDAY

A-3260

Defendant's Exhibit 11-I.

[19195]

COPY TELEGRAM DATED JUNE 1, 1961 10:42 P.M.

TO: C. S. ROWE OF CHADBOURNE PARKE

REFERRING TO HUGHES TOOL COMPANY LETTER AND TELEGRAM OF MAY 31, 1961, TO MR. TILLINGHAST PRESIDENT OF TWA THIS IS TO REQUEST THAT YOU ADVISE MR. TILLINGHAST THAT I WILL BE PREPARED BY 2 P.M. TOMORROW JUNE 2, 1961, TO PRESENT TO HIM AND SUCH MEMBERS OF THE EXECUTIVE COMMITTEE OF TWA AND OF ITS BOARD OF DIRECTORS AS HE BELIEVES SHOULD BE PRESENT. INFORMATION RELATING TO THE REQUEST MADE IN HIS MAY 29, 1961, LETTER TO MR. HOLLIDAY. BECAUSE OF THE IMPORTANCE OF THE MATTER TO THE VARIOUS INTERESTED PARTIES AND IN VIEW OF THE APPARENT DECISION ANNOUNCED BY MR. TILLINGHAST, HUGHES TOOL CO. REQUESTS THAT MR. BREECH AND MR. OLDS AS VOTING TRUSTEES BE PRESENT AT THE TIME THIS INFORMATION BE PRESENTED. ACCORDINGLY, I AM SENDING A COPY OF THIS TELEGRAM TO THEIR COUNSEL, MR. REED, AND I AM ALSO SENDING COPIES TO MR. BREECH AND MR. OLDS. I WOULD APPRECIATE IT IF YOU WOULD ADVISE ME AS SOON AS POSSIBLE IF 2 P.M. TOMORROW IS CONVENIENT FOR SUCH PERSONS TO BE PRESENT. IF SUCH TIME IS INCONVENIENT PLEASE ADVISE ME THE EARLIEST DATE AND TIME CONVENIENT TO ALL CONCERNED.

SIGNED: HUGHES TOOL CO.

BY: CHESTER C. DAVIS

RECEIVED 8:45 AM

A-3261

Defendant's Exhibit 11-J.

[19196]

[Western Union Telegram]

UDA028 UD-NA059
LONG RX PD NEW YORK NY 2 1256A EDT
CHARLES C TILLINGHAST JR, PRESIDENT TRANS WORLD AIRLINES INC
380 MADISON AVE DELR 19TH FLR RECEPTION DESK NYK

REFERRING TO YOUR LETTER OF MAY 29, 1961 TO ME IN WHICH YOU REQUESTED CERTAIN INFORMATION FROM HUGHES TOOL COMPANY AND TO THE PUBLIC ANNOUNCEMENTS ATTRIBUTED TO YOU TO THE EFFECT THAT TWA HAD ARRANGED FINANCING FOR THE PURCHASE OF BOEING EQUIPMENT AND HAD COMMITTED ITSELF TO THE PURCHASE OF SUCH EQUIPMENT, I, AS A DIRECTOR OF TWA, REQUEST THAT YOU NOTIFY ME AT ROOM 2000 WALDORF TOWERS, IMMEDIATELY, AND I ANY VENT BEFORE 2:00 P.M. JUNE 2, 1961, OF THE EXACT STATUS OF SAID FINANCING AND OF THE COMMITMENTS, IF ANY, TO BOEING FOR THE PURCHASE OF EQUIPMENT. I FURTHER REQUEST THAT I BE ADVISED IMMEDIATELY OF ANY CHANGE IN THE STATUS OF SAID FINANCING OR COMMITMENT TO PURCHASE. I AM SENDING A COPY OF THIS TELEGRAM TO MR. CARL ROWE COUNSEL TO TWA AND TO MR. FRANCIS C. REED COUNSEL TO THE VOTING TRUSTEES FOR THE INFORMATION OF HIS CLIENTS

RAYMOND M HOLLIDAY

29 1961 2028 2:00 2 1961.

A-3262

Defendant's Exhibit 11-K.

[19197]

CHESTER C. DAVIS
Room 3113
One Twenty Broadway
New York 5, N. Y.

Phone WOrth 2-5220

By Hand

June 4, 1961

Re Hughes Tool Company—TWA

Carl Rowe, Esq.
Chadbourne, Parke, Whiteside & Wolff
25 Broadway
New York, N. Y.

Dear Mr. Rowe:

There are enclosed two copies of transcription of notes taken on my behalf of the conference which we had Friday afternoon, which I have hastily reviewed and which seem to me fairly present the substance of the material I presented at such conference. Undoubtedly, some of the items identified by me in that conference deserve further consideration. I must emphasize that I have been able to present only the material which could be assembled in a very short period of time following Mr. Tillinghast's letter of May 29. I am asking other officers of Hughes Tool Company to review the enclosed notes of our conference. I am prepared to obtain such facts or data as you may need to

confirm the statements made by me on behalf of Hughes Tool Company relating to the desirability of Convair equipment for the needs of TWA.

[19198] Notwithstanding your statement that TWA has not exercised its right to an "out" from the Boeing commitment, I understood Mr. Tillinghast to say that consideration could still be given to Convair equipment, including the thirteen 990s on order by Hughes Tool Company, provided that certain conditions were promptly met. I am considerably disturbed at the suggestion of a penalty bond, because I understand that it is a most unusual request. It seems to me that we should be able to satisfy TWA and ourselves as to the delivery schedules of Convair equipment based upon a firm commitment by Convair as to its ability to meet a particular delivery schedule. It seems to me, therefore, that we should promptly arrange for a meeting with qualified representatives of Convair to discuss this matter.

Insofar as the terms on which the thirteen 990s on order by Hughes Tool Company are available to TWA, it is relatively easy to prepare such a tender in writing insofar as it relates to the overall price of such equipment, and progress payments, heretofore made or payable in the future, pursuant to the terms of the contract between Hughes Tool Company and Convair. It may be, however, that Mr. Tillinghast had in mind a proposal relating to a financing program by TWA. As previously indicated, I assume that the lending institutions with which TWA has been dealing in connection with the financing of the Boeing equipment would be [19199] equally available to TWA for the financing of the Convair equipment. It would be most disturbing indeed if it were otherwise. At the same time, as previously indicated to you and others, Hughes Tool Company by reason of its investment in TWA and its interest in the voting trust which it entered into in 1960 so as to enable

Defendant's Exhibit 11-K.

TWA to obtain financing at that time, has a substantial interest to protect in connection with any proposed financing program by TWA. Therefore, in order to expedite matters as much as possible, you are hereby requested to submit to me or to Mr. Holliday immediately the detailed terms of the financing currently being negotiated by TWA with certain lending institutions.

I am sending a copy of this letter and enclosures to Mr. Reed of Hughes, Hubbard, Blair & Reed, counsel for the voting trustees, so that he and his clients may likewise consider the above, as well as the subjects of the conference held Friday afternoon.

Very truly yours,

CHESTER C. DAVIS

Enclosures

A-3265

Defendant's Exhibit 11-L.

[19200]

COPY

[LETTERHEAD OF]

CHESTER C. DAVIS
ROOM 3113
120 BROADWAY
NEW YORK 5

June 4, 1961

BY HAND

Irving S. Olds, Esq.
14 Wall Street
New York 5, N. Y.

Dear Mr. Olds:

This refers to your letter to me of June 2, 1961. The views and objections of Hughes Tool Company relating to the Boeing purchases program by TWA go beyond a mere comparison of the types of aircraft manufactured by Boeing and Convair, and the preference of Hughes Tool Company for Convair jet equipment. The transactions described in the current prospectus of TWA, if consummated, would have serious long term economic consequences to TWA and to Hughes Tool Company. Notwithstanding an immediate response to the May 29 letter of Mr. Tillinghast, there appeared a public announcement on Thursday, June 1, attributed to Mr. Tillinghast, indicating that a decision had been made by the management of TWA committing it to the Boeing purchases program. For that reason, I requested on behalf of Hughes Tool Company, an

opportunity to present our views to you and Mr. Breech as voting trustees, so that you could consider exercising the legal rights vested in you as voting trustees for the protection of the beneficial interest of Hughes Tool Company.

[19201] At the present time, Hughes Tool Company, having put its ownership interest in TWA in a voting trust for the purpose of assisting TWA to consummate the 1960 financing, is dependent upon action by the voting trustees and the exercise of their legal powers as voting trustees for the protection of its ownership interest in TWA.

You may consider this letter as a request by Hughes Tool Company for a meeting at the earliest possible moment with you and Mr. Breech, so that you may consider the request of Hughes Tool Company that the voting trustees take appropriate action and exercise the powers vested in them for the protection of Hughes Tool Company. In that connection I would suggest that the management of TWA be notified, on behalf of the voting trustees, to maintain or restore the ability of TWA to reject the Boeing purchases at least until after such a meeting.

I am sending a copy of this letter to Mr. Reed of Hughes, Hubbard, Blair & Reed, counsel for the voting trustees. At the moment, the whereabouts of Mr. Breech are not known to us.

Very truly yours,

/s/ Chester C. Davis

A-3267

Defendant's Exhibit 11-M.

[19202]

CHESTER C. DAVIS
Room 3113
One Twenty Broadway
New York 5, N. Y.

Phone WOrth 2-5220

Air Mail

June 8, 1961

Mr. Ernest R. Breech
12723 Telegraph Road
Detroit 39, Michigan

Dear Mr. Breech:

Referring to your letter of June 6, 1961, I was not aware that Mr. Settles on my behalf had submitted a request for information directly to you. We have not yet received all of the information requested of TWA.

At the moment, I am particularly concerned as to the terms of the proposed financing which Mr. Tillinghast has described as progressing satisfactorily. I appreciate the importance of such financing to all parties concerned and, therefore, I hope that this matter will be discussed with me as a representative of Hughes Tool Company at the earliest possible moment so that any proposed arrangement may be reviewed from the point of view of Hughes Tool Company.

I also hope that you have no personal objection to the position which I am taking on behalf of Hughes Tool Company to the effect that the Voting Trustees, having the

legal power to control the Board of Directors and therefore the management of TWA, are proper persons to whom Hughes Tool [19203] Company may appeal for assistance or protective action consistent with the duties and obligations arising under the Voting Trust, which I am sure are recognized by all the Voting Trustees.

I am sending a copy of this letter to Mr. Reed of Hughes, Hubbard, Blair & Reed, counsel for the Voting Trustees, for his information.

Sincerely,

CHESTER C. DAVIS

A-3269

Defendant's Exhibit 11-N.

[19204]

HUGHES TOOL COMPANY
EXECUTIVE OFFICES
TWENTY-SECOND FLOOR GULF BUILDING
HOUSTON 2, TEXAS

Raymond M. Holliday
Vice President

June 9, 1961

Trans World Airlines, Inc.
380 Madison Avenue
New York 17, N. Y.

Attention: Mr. Charles C. Tillinghast, Jr.
President

Dear Sirs:

Referring to the representations made by Mr. Chester C. Davis on behalf of the Hughes Tool Company at a conference held the afternoon of June 2, 1961, this will confirm that Hughes Tool Company has currently on order from General Dynamics Corporation thirteen (13) Model 880 (formerly Model 600) aircraft which are available to Trans World Airlines, (TWA). Hughes Tool Company claims that TWA is obligated to acquire said aircraft in accordance with past practices. Said 13 aircraft are being manufactured by General Dynamics Corporation under a Purchase Agreement dated November 10, 1960, as amended February 22, 1961 (said Agreement as so amended being hereafter referred to as the "Purchase Agreement"). The Purchase Agreement provides for the delivery of the first of said aircraft in December, 1961 and of the remaining aircraft at the rate of 3 per month thereafter through April, 1962. You should note, however, that such delivery schedule is contingent upon certain [19205] customer equipment being furnished to General Dynamics Corporation by a

specified date, and that in order to maintain said delivery schedule immediate action is required by TWA. Hughes Tool Company assumes that you are fully familiar with said Purchase Agreement. If you do not have a copy thereof, you may inspect same at the offices of Chester C. Davis, 120 Broadway, Room 3113, New York, New York, or upon request a duplicate copy will be furnished to you.

Hughes Tool Company hereby reaffirms that it is prepared to assign to TWA all of its rights to acquire said aircraft pursuant to the Purchase Agreement, in accordance with past practices, namely, in consideration of an agreement by TWA to pay:

(1) The balance of the purchase price of said aircraft;

(2) All amounts hereafter payable for customer-furnished equipment installed or to be installed in said aircraft; and

(3) The undepreciated cost of said aircraft to Hughes Tool Company.

As in the past, the phrase "the undepreciated cost to Hughes Tool Company" means the sum of:

(a) All amounts Hughes Tool Company shall have paid the vendors (in cash or with notes) with respect [19206] to said aircraft including amounts paid vendors of customer-furnished equipment;

(b) All other costs, including expenses in connection with the aircraft or other related property; and

(c) An amount representing interest on items (a) and (b) at the rate of 5½% per annum, computed on the average amount of the outstanding payments applicable to such aircraft and by considering the payments made as outstanding from the

respective dates such payments were made and until repayment thereof to Hughes Tool Company.

With respect to the suggestion made by Mr. Tillinghast at the abovementioned conference concerning adequate assurances as to the delivery dates of such aircraft, Hughes Tool Company believes that this is a matter which should be discussed between TWA and General Dynamics Corporation. Hughes Tool Company is prepared to participate in any such discussions and to assist TWA to the extent possible in obtaining appropriate assurances from General Dynamics Corporation. In this connection TWA should recognize that, in accordance with past practices and prior to the change in management of TWA, it was customary for qualified personnel of TWA to be made available to General Dynamics Corporation as a contract representative or otherwise [19207] for the purpose of complying with the requirements of any purchase agreement and to assist in and expedite the ultimate delivery of the aircraft covered by such purchase agreement.

As to the terms of payments or payment dates to be made or met by TWA to Hughes Tool Company upon the assumption by TWA of the Purchase Agreement, Hughes Tool Company is prepared to discuss same with TWA at any time. Hughes Tool Company is also willing to furnish to TWA any further information available to Hughes Tool Company which TWA requires with respect to said aircraft and with respect to the advantages which Hughes Tool Company believes would inure to the benefit of TWA from the acquisition of said aircraft by TWA. Hughes Tool Company understands that General Dynamics Corporation is prepared to join in or otherwise cooperate in the assignment of the Purchase Agreement to TWA.

In addition to the above, Hughes Tool Company reaffirms its willingness to make available or to cause to be made available to TWA, on comparable terms, 4 Convair

880's which, according to General Dynamics Corporation, would be available for delivery to TWA as follows:

One in August, 1961
One in September, 1961
Two in October, 1961

The said 4 Convair 880's are in the process of completion with the configuration designed by TWA.

[19208] Furthermore, upon the assumption by TWA of the Purchase Agreement Hughes Tool Company would use its best efforts to cause General Dynamics Corporation to make available to TWA an additional 4 Convair 880 M's for delivery at approximately the same time as the 4 Convair 880's hereinabove mentioned.

The availability to TWA of the above mentioned aircraft depends upon immediate action by TWA.

In order to avoid any further delay in making available to TWA the 13 Model 990 aircraft and in order to insure the availability thereof to TWA, will you please indicate your willingness to accept an assignment of the Purchase Agreement by having a duly authorized officer of TWA execute in the space hereinbelow provided a duplicate of this letter enclosed for that purpose and return same to the undersigned or to Chester C. Davis, 120 Broadway, Room 3113, New York, New York.

Very truly yours,

HUGHES TOOL COMPANY

By RAYMOND M. HOLLIDAY
Vice President

ACCEPTED:

TRANS WORLD AIRLINES, INC.

By .....

Defendant's Exhibit 11-O.

[19209]

HUGHES TOOL COMPANY
EXECUTIVE OFFICES
TWENTY-SECOND FLOOR GULF BUILDING
HOUSTON 2, TEXAS

Raymond M. Holliday
Vice President

June 10, 1961

To:

Trans World Airlines, Inc.
380 Madison Avenue
New York 17, N. Y.

Attention: Mr. Charles C. Tillinghast, Jr.
President

Mr. Ernest R. Breech
Mr. Irving S. Olds
Mr. Raymond M. Holliday,
Voting Trustees

Irving Trust Company as Agent for the
Holders of the Equipment Notes of
Trans World Airlines, Inc.

Attention: Mr. Robert S. Kerr,
Vice President

The Equitable Life Assurance Society
of the United States

Attention: Mr. James F. Oates, Jr.
Chairman and President

Metropolitan Life Insurance Company

Attention: Mr. Frederic W. Ecker,
Chairman

Defendant's Exhibit 11-O.

Gentlemen:

Referring to previous correspondence and conferences relating to the need of Trans World Airlines, Inc. (TWA), for additional jet aircraft, the financing thereof, the interests of Hughes Tool Company and its positions relating thereto, and in an [19210] effort to arrive at a solution of the various questions involved, Hughes Tool Company hereby submits three separate and distinct proposals. You may accept any one or any two or all three of said proposals. This is also to advise you that Mr. Chester C. Davis is authorized to discuss with you said proposals and is fully empowered by Hughes Tool Company to commit Hughes Tool Company with respect to any or all of said proposals.

PROPOSAL NUMBER ONE

Hughes Tool Company hereby offers to guarantee subscription by the stockholders of TWA to an offering of 100 million dollars of additional common stock of TWA (or such other equity security or securities as may be mutually agreed upon), such guarantee to be comparable to the one agreed upon in the Hughes Financing and Subordination Agreement of December, 1960, in that Hughes Tool Company will agree to subscribe to a pro rata share of any such new offering and will subscribe to any portion unsubscribed by the other stockholders of TWA up to a maximum amount of 100 million dollars.

Should you question the ability of Hughes Tool Company to perform or its good faith in submitting the offer represented by this proposal, Hughes Tool Company is prepared [19211] to place in escrow securities of a value commensurate with such undertaking which would be forfeited in the event that Hughes Tool Company fails to perform in accordance with any obligation it undertakes pursuant to this proposal.

Defendant's Exhibit 11-O.

The foregoing proposal is open for consideration by you for a period of ten days from the date hereof. If, at the end of that period, you are favorably disposed to an acceptance of this proposal, but desire additional time for a definitive acceptance thereof, and so indicate in writing, Hughes Tool Company would give careful consideration to a reasonable request for an extension of time of the offer represented by this proposal.

It is not a condition of this proposal that TWA acquire, to supplement its fleet of jet aircraft, either Boeing aircraft or Convair aircraft or any combination thereof or any other type of aircraft. The foregoing offer, however, is conditioned upon termination of the existing voting trust with respect to the shares of common stock of TWA owned by Hughes Tool Company and the transfer and return of all of said shares to Hughes Tool Company.

In connection with your consideration of this proposal, Hughes Tool Company points out the following:

(a) Hughes Tool Company would guarantee to TWA an additional 100 million dollars of equity capital which would [19212] not only further secure the lending institutions, but would enable TWA to undertake an aggressive program for acquiring additional jet aircraft which, according to our understanding of your position, are unquestionably desired by TWA. Furthermore, with such additional equity capital, TWA should be able to obtain without difficulty adequate financing from the present lending institutions or others for expanding its present jet aircraft fleet with either Boeing aircraft or Convair aircraft or both as may be determined by the management of TWA.

(b) If this proposal is accepted, it would not be the intention of Hughes Tool Company to change the present management of TWA. The Mortgage Indenture of December 1960, securing the notes held by the lending institutions,

contains provisions which, upon termination of the voting trust, adequately protect the noteholders with respect to the management of the Company. If this proposal is accepted, Hughes Tool Company will agree to the continuance of these provisions, which are sometimes called "the management clause", without change.

PROPOSAL NUMBER TWO

Hughes Tool Company, in addition to its having guaranteed the purchase from TWA of 100 million dollars of subordinated income debentures currently offered to the stockholders of TWA, hereby offers to subscribe to an additional $11,235,900 principal amount of such debentures with warrants attached at the offering price thereof, payable in cash at the closing to be held Tuesday, June 13, 1961, provided that TWA will commit itself to acquire, and to apply said sum to [19213] amounts heretofore paid by Hughes Tool Company or now due and payable by it to General Dynamics Corporation with respect to, 13 Model 990 (formerly Model 600) jet aircraft which were heretofore ordered by Hughes Tool Company from General Dynamics Corporation for the benefit of TWA and which are available to TWA, pursuant to that commitment by Hughes Tool Company, upon terms and conditions similar to the terms and conditions under which Hughes Tool Company has heretofore made aircraft available to TWA. Said terms and conditions are more fully described under Proposal Number Three.

PROPOSAL NUMBER THREE

Hughes Tool Company hereby reaffirms that it is prepared to assign to TWA, at Hughes Tool Company's cost in accordance with past practices of Hughes Tool Company, all rights to acquire from General Dynamics Corporation 13 Model 990 (formerly Model 600) aircraft under a

purchase agreement dated November 10, 1960 as amended February 22, 1961 between Hughes Tool Company and General Dynamic Corporation. In addition, Hughes Tool Company reaffirms its willingness to make available or to cause to be made available to TWA on comparable terms four Convair Model 880's which, according to General Dynamics Corporation, will be available for delivery to TWA as follows: one in August, 1961; one in September, 1961 and two in October, 1961. [19214] Said four Convair 880's are in the process of completion by General Dynamic Corporation with the configuration designed by TWA. Upon the acceptance of this proposal Hughes Tool Company will use its best efforts to cause General Dynamics Corporation to make available, if TWA wishes to have them, an additional four Convair 880 M's for delivery at approximately the same time as the four Convair 880's. There is attached hereto, as a separate letter dated June 9, 1961, a more complete statement of this proposal.

You will notice that favorable consideration of Proposal Number Two hereinabove set forth requires action on your part on or before June 13, 1961, because Hughes Tool Company is informed that the availability of the debentures may expire on that date. If you feel that you need additional time to consider Proposal Number Two, Hughes Tool Company is prepared to discuss with you the feasibility of extending such time and to take such action as may be appropriate toward that end.

In order to expedite favorable consideration by you of the above, copies hereof are being delivered to Francis Reed, Esq., of Messrs. Hughes, Hubbard, Blair & Reed, counsel for the voting trustees and to Messrs. Cladbourne, Parke, Whiteside & Wolff, counsel for TWA. Mr. Reed has also been requested to communicate to appropriate individuals, by telephone or otherwise, as promptly as possible the substance of [19215] the above.

Defendant's Exhibit 11-O.

Mr. Chester C. Davis, who is empowered to discuss all or any of the above proposals and to take whatever action is necessary to commit Hughes Tool Company with respect thereto, will be continually available to you during the next ten days.

Very truly yours,

HUGHES TOOL COMPANY

By RAYMOND M. HOLLIDAY
Vice President

Defendant's Exhibit 11-P.

[19216]

(Telegram received by Irving Trust Co., New York City, 8:11 P.M. June 20, 1961—Telephoned to Mr. Sessel at home)

TO: MR. BEN-FLEMING SESSEL

"AS A DIRECTOR OF TWA I URGE YOU TO ATTEND THE MEETING OF THE BOARD OF DIRECTORS TO BE HELD ON JUNE 21, 1961, 9:30 AM. I AM INFORMED THAT ACTION WILL HAVE TO BE TAKEN AT THAT MEETING WITH RESPECT TO THE THREE PROPOSALS SUBMITTED BY HUGHES TOOL COMPANY TO TWA AS SET FORTH IN ITS LETTER DATED JUNE 10, 1961. ONE OF SAID PROPOSALS IS AN OFFER BY HUGHES TOOL COMPANY GUARANTEEING TO TWA $100,000,000 OF ADDITIONAL EQUITY CAPITAL. SAID PROPOSALS WILL EXPIRE JUNE 22, 1961 UNLESS ACTION IS TAKEN INDICATING A DISPOSITION TO ACCEPT SAID PROPOSAL. IF YOU ARE NOT FAMILIAR WITH THE TERMS OF SAID PROPOSAL, YOU MAY CALL ME AT THE WALDORF-ASTORIA HOTEL IN NEW YORK CITY, ROOM 2628 OR CHESTER C. DAVIS, 120 BROADWAY, NEW YORK CITY AT WORTH 2-5220."

RAYMOND M. HOLLIDAY

HUGHES TOOL COMPANY

A-3280

Defendant's Exhibit 11-Q.

[19217]

HUGHES TOOL COMPANY

EXECUTIVE OFFICES
TWENTY-SECOND FLOOR GULF BUILDING
HOUSTON 2, TEXAS

Raymond M. Holliday
Vice President

June 21, 1961

To the Board of Directors
of Trans World Airlines, Inc.

Dear Sirs:

I sincerely regret that due to ill health I was unable to attend today's meeting of the Board, as I had planned. As soon as I was able to do so, I sent a message to Mr. Tillinghast informing him that I would be unable to attend the meeting, that Mr. Davis, however, was available and waiting outside the Board room. I asked that Mr. Davis be given an opportunity to appear before the Board to discuss the proposals of Hughes Tool Company set forth in its letter of June 10, 1961 and present pertinent information with respect thereto. I understand that this request was not granted and that Mr. Davis was not given an opportunity to appear at the meeting.

The primary purpose of this letter is to present to you some of my views as a director of TWA.

At the outset, I should point out that Mr. Tillinghast's letter of June 16, 1961 addressed to me at Houston, [19218] Texas, should have been addressed to Mr. Davis, because the June 10 letter of Hughes Tool Company makes it clear that Mr. Davis is the one who is authorized to discuss the proposals made therein and to commit Hughes Tool Company with respect thereto. The approach taken by Mr.

Tillinghast in his letter, together with the fact that no one on behalf of TWA has communicated with Mr. Davis with respect to the proposals, indicates to me that an effort is being made to create a record to justify their rejection, rather than a bona fide effort to explore the advantages to TWA of the acceptance of one or more of those proposals and in particular the many important advantages to TWA in accepting Proposal Number One.

Mr. Tillinghast states in his letter that "TWA has suffered greatly from its under-capitalization of the past and we would wish to take every reasonable step to achieve an improvement in our debt-equity ratio." It seems to me, therefore, that immediate steps should be taken to indicate a desire on the part of TWA to accept Proposal Number One so that a reasonable extension of time may be sought from Mr. Davis for working out the implementation of that proposal. Mr. Tillinghast appears to be concerned that such implementation "would require approval by the Civil Aeronautics Board". It is my understanding, confirmed to me by Mr. Davis, that [19219] Proposal Number One is not conditioned upon any approval by the Civil Aeronautics Board. In other words, should Proposal Number One be accepted by TWA and should the parties to the voting trust arrangement consent to its termination, Hughes Tool Company would become committed to its guarantee to TWA of one hundred million dollars of additional equity capital pursuant to the terms of Proposal Number One, whether or not the Civil Aeronautics Board approved of such a termination of the Voting Trust or permitted a transfer of voting securities to Hughes Tool Company. Mr. Davis confirms to me that Hughes Tool Company is prepared to accept complete responsibility for obtaining whatever action may be necessary by the Civil Aeronautics Board in connection with the termination of the Voting Trust.

Defendant's Exhibit 11-Q.

Mr. Tillinghast, in his letter to me, does not appear to be adequately informed as to the circumstances which caused the lending institutions to require the Voting Trust in connection with the 1960 financing. The lending institutions were prepared to advance credit to TWA without a voting trust, based upon a management clause comparable to that in the Indenture of Mortgage, at a time when Mr. Thomas was the chief executive officer of TWA. It was only after Mr. Thomas resigned as President, leaving TWA without a chief executive, that the lending institutions insisted upon a [19220] voting trust. At a time when TWA was without a president, the management clause, obviously, did not afford adequate protection to the lending institutions because the management clause protected the lending institutions only against a change in management adverse to their interests. At present, TWA has a President and Chairman of the Board who are presumably satisfactory to the lending institutions. Thus, there would seem to be no justification for assuming that the lending institutions would unreasonably refuse to consider a termination of the Voting Trust under circumstances in which both they and TWA would have a great deal more to gain by an acceptance of Proposal Number One than by a continuation of the Voting Trust. In this connection, it should be noted also that the Indenture of Mortgage itself recognizes the possibility of the termination of the Voting Trust by providing that the management clause is to come into effect automatically when the Voting Trust terminates.

Mr. Tillinghast points out, "Present indications are that substantial financing will be needed in the next few years, additional to the equity proposed to be added." In addition to the many advantages which one hundred million dollars of additional equity capital would provide to TWA and to the lending institutions, a termination of the Voting Trust would bring about definite advantages with respect

to [19221] any needed additional debt financing. At the present time, a majority of the note holders have the absolute power to control a majority of the voting trustees, who in turn have the absolute power to control the Board of Directors. This situation unquestionably makes it difficult for the lending institutions now interested in TWA to negotiate the terms of additional debt financing without being subjected to the risks of self-dealing. A termination of the Voting Trust would eliminate that problem.

It is difficult for me as a director to understand what objection there may be from the point of view of TWA to an acceptance of Proposal Number One. I would appreciate, and even request, that each director give me whatever reasons he may have for opposing the acceptance of Proposal Number One. It seems to me that the Board of Directors in the discharge of its duties and obligations should adopt resolutions to the effect that it would be desirable for the Company to obtain on appropriate terms one hundred million dollars of additional equity capital without the payment of any underwriting fees or commissions; that from the point of view of the Company it would be desirable to accept Proposal Number One as submitted by Hughes Tool Company as set forth in its letter of June 10, 1961; that the President and Chairman of the Board of the Company be directed to communicate with [19222] appropriate representatives of the lending institutions presently holding the serial and sinking fund notes covered by the Indenture of Mortgage dated as of December 1, 1960 for the purpose of determining whether such lending institutions would consent to a termination of the Voting Trust in the event that the Company obtains a satisfactory guaranty of an additional one hundred million dollars of equity capital from its stockholders; and that the President and the Chairman of the Board be requested to submit a report in writing to the directors of the Company with

respect to the efforts made with such lending institutions, the results of such efforts and the position or attitude taken by such lending institutions, together with their recommendation with respect to Proposal Number One and the basis for such recommendation.

Mr. Tillinghast also appears not to have been adequately informed with respect to what has transpired concerning the Convair 880's, which are available to TWA. I definitely advised Mr. Leslie, Senior Vice President—Finance and Treasurer, that TWA could obtain those 880's on the basis of Hughes Tool Company's costs determined in accordance with past practice and defined in the letter of June 9 by Hughes Tool Company to TWA. My discussions with Mr. Leslie specifically informed him of the price to TWA for said aircraft. There can be no question but that TWA formally advised Hughes [19223] Tool Company that it desired said aircraft and there is no basis whatever for any implication by Mr. Tillinghast that TWA is uninformed as to the price or basis on which those planes have been available to TWA. It is true that at one time Mr. Ben Sessel, at a Board meeting, suggested that an effort should be made to obtain those planes at a distress price. Such a suggestion was, of course, rejected by Hughes Tool Company.

It seems to me that it is of extreme importance that TWA advise Mr. Davis immediately that it is favorably disposed to an acceptance of Proposal Number One, and perhaps also of the other proposals, and that the President or other responsible officer of TWA take the necessary steps to obtain from him a reasonable extension of time of the offers contained in the letter of June 10 by Hughes Tool Company.

Very truly yours,

RAYMOND M. HOLLIDAY

A-3285

Defendant's Exhibit 11-R.

[19224]

CHESTER C. DAVIS
ROOM 3113
ONE TWENTY BROADWAY
NEW YORK 5, N. Y.

PHONE WORTH 2-5220

June 21, 1961

Carl S. Rowe, Esq.
Messrs. Chadbourne, Parke,
Whiteside & Wolff
25 Broadway
New York 4, N. Y.

Dear Mr. Rowe:

This refers to your letter of June 20, 1961. You are in error if you are implying that I was suggesting an extension of time within which Hughes Tool Company could exercise its option to purchase the additional $11,235,900 principal amount of debentures. I made it perfectly clear to you and to Mr. Mathers that the Hughes Tool Company was not seeking any extension of time. I was merely trying to discuss with you and Mr. Mathers mechanics which would not involve the granting of time to Hughes Tool Company but which would, nevertheless, give additional time to TWA if TWA felt that it needed additional time in order to consider Proposal Number Two. The record is quite clear in that respect. The suggestion of an escrow arrangement would have required the Hughes Tool Company to exercise its option to purchase the additional $11,235,900 of deben-

tures and thereafter TWA at its option, not at the option of Hughes Tool Company, would have decided to accept or reject Proposal Number Two and concurrently received the money or cancelled the debentures issued depending on the decision of [19225] TWA with respect to Proposal Number Two.

At the closing, Mr. Mathers stated that a decision had been made by TWA. The closing proceeded, as the transcript of the closing shows, on the basis that TWA either had rejected Proposal Number Two or was unwilling to give itself additional time to consider the proposal.

I agree with you, however, that there would seem to be little purpose in continuing to correspond on the subject matter of your letter.

I am likewise sending copies of this letter to all those who received copies of prior correspondence on this subject.

Very truly yours,

CHESTER C. DAVIS

A-3287

Defendant's Exhibit 11-S.

[19226]

CHESTER C. DAVIS
ROOM 3113
ONE TWENTY BROADWAY
NEW YORK 5, N. Y.

PHONE WORTH 2-5220

June 27, 1961

Mr. Ronald Duckworth, Secretary,
Trans World Airlines, Inc.,
380 Madison Avenue,
New York 17, N. Y.

Dear Mr. Duckworth:

I have received your letter of June 23, 1961 and the materials enclosed therewith. In your letter you state:

> "In supplying you with the enclosed documents we do not intend to indicate that we believe we are obligated to furnish this information to you or to Hughes Tool Company.
>
> We do not believe that under all the circumstances Hughes Tool Company is entitled to receive all reports presented to the Board of Directors of TWA and we are, therefore, not enclosing such reports."

Whether or not Hughes Tool Company is entitled to receive all reports presented to the Board of Directors of TWA, Mr. Raymond M. Holliday, a director of TWA, is entitled to receive such reports. In this connection, I am requesting on behalf of Mr. Raymond M. Holliday, in his

capacity as a director of TWA, the following documents in addition to those sent by you on June 23, 1961:

(1) Copies of minutes of meetings of the Board of Directors of TWA held during 1960.

[19227] (2) Copies of minutes of meetings of the Executive Committee of the Board of Directors of TWA held during 1960.

(3) Copies of all reports presented to the directors or circulated at meetings of the Board during 1960 and 1961.

Very truly yours,

CHESTER C. DAVIS

By ARTHUR I. SETTLES

A-3289

Defendant's Exhibit 11-T.

[19228]

CHESTER C. DAVIS
Room 3113
One Twenty Broadway
New York 5, N. Y.

Phone WOrth 2-5220

June 30, 1961

Re TWA Voting Trust

Francis C. Reed, Esq.
Messrs. Hughes, Hubbard, Blair & Reed
One Wall Street
New York 5, N. Y.

Dear Mr. Reed:

This letter is addressed to you as counsel for Mr. Breech and Mr. Olds as Voting Trustees, pursuant to their request that any matter which should be brought to their attention as Voting Trustees should be done through you as their counsel.

1. The management of TWA installed by the Voting Trustees appears to have developed a serious antagonism toward Hughes Tool Company and its owner, Mr. Howard Hughes. You appreciate, of course, the ownership interest of TWA is held by Hughes Tool Company, a Delaware corporation, and that there is no possible justification why such ownership interest should be ignored or adversely affected by reason of any personal antagonism which may exist on the part of any director or directors of TWA or any of its operating personnel toward Mr. Howard Hughes.

This antagonism becomes particularly serious when it reflects itself in a course of conduct obviously designed to oppose or frustrate any proposal, [19229] suggestion or request which is made by anyone on behalf of Hughes Tool Company. The recent course of conduct by TWA would seem to indicate that its management is primarily interested in creating a record to justify the rejection of any proposal or suggestion made by Hughes Tool Company, rather than making an effort to consider the matter in good faith on the merits. Under such circumstances, Hughes Tool Company can look only to the Voting Trustees to protect its interest in TWA, and hereby requests that the Voting Trustees inquire into the existence of any personal antagonism toward Mr. Hughes or the Hughes Tool Company by any director or individual in the management of TWA.

2. Hughes Tool Company has repeatedly requested, directly and through Mr. Holliday, information from TWA as to matters which vitally affect its ownership interest in TWA, and TWA has repeatedly refused to furnish pertinent information with respect to such matters.

For example, on May 25, 1961, requests were made to TWA, the Voting Trustees and their respective counsel for relevant papers, and particularly drafts of proposed agreements, relating to proposed additional financing by TWA referred to in the current Registration Statement of TWA. On May 29, 1961, I received a letter from TWA's counsel which advised me that no agreement concerning this proposed financing had yet been executed. [19230] This letter, however, completely ignored the request for drafts of documents which was made so that Hughes Tool Company could inform itself as to what was being proposed.

Similarly, on June 1, 1961, Mr. Holliday requested by telegram that he be advised of the exact status of the

proposed financing. Mr. Holliday informs me that he has not received such advice, and that no details with respect to this proposed financing have ever been furnished to him. In this connection you ought to note that the proposed minutes of the meeting of the Board of Directors of TWA held on May 17, 1961 state:

> "Inasmuch as Mr. Raymond M. Holliday was not present, the Senior Vice President—Finance and Treasurer was requested to apprise Mr. Holliday of the details of the financing plan."

I am informed that neither the Senior Vice President—Finance and Treasurer nor any other representative of TWA has ever apprised Mr. Holliday of the details of the financing plan.

On June 4, 1961, I again requested TWA's counsel to submit to me or to Mr. Holliday the detailed terms of the proposed financing. On June 8, 1961 I was informed by counsel for TWA that it would be inappropriate for him to furniah to me the detailed terms of said financing. It is certainly known to TWA and its counsel that I am not only counsel for Hughes Tool Company but that I am also a vice president of the Company. It is likewise well known that Mr. Holliday is not only a director of TWA but also an officer of Hughes Tool Company.

On May 24, 1961, I requested certain documents from Mr. Duckworth, the secretary of TWA, including copies of all [19231] reports presented to the directors or circulated at meetings of the Board. On June 23, I received a reply from Mr. Duckworth stating:

> "We do not believe that under all the circumstances Hughes Tool Company is entitled to receive all reports presented to the Board of Directors of TWA and we are, therefore, not enclosing such reports."

I do not know what circumstances Mr. Duckworth has in mind.

It is quite apparent that if Hughes Tool Company did not have its ownership interest in TWA in a voting trust, it would be able to obtain all the information which it seeks. The Voting Trustees holding the legal title to the beneficial interest of Hughes Tool Company in TWA have the power to bring about a responsiveness to the legitimate interest of Hughes Tool Company in TWA. The Voting Trustees, therefore, are hereby requested to take appropriate action to this end as well as to see to it that Hughes Tool Company and its authorized representatives obtain all information requested of TWA pertinent to the affairs of TWA.

3. TWA has violated the terms of the Hughes Financing and Subordination Agreement which is an integral part of the arrangement resulting in the creation of the Voting Trust. It is clear that under the terms of said Agreement Hughes Tool Company was entitled to have its $100 million interim note of TWA [19232] refunded at the principal amount thereof plus accrued interest to the date of refunding. The closing with respect to the refunding of said interim note was to be held within three business days after the expiration of the subscription offer to stockholders of subordinated debentures. The closing was held in accordance with said Agreement on June 13, 1961. The fact that said refunding was to be accomplished with cash and with debentures does not change the obligation of TWA to Hughes Tool Company under Section 1.4 of said Agreement. The agreement by Hughes Tool Company to accept said debentures at the same price as offered to the public does not permit TWA to claim that Hughes Tool Company is obligated to accept said debentures at the offering price plus accrued interest. Said debentures are income debentures and do not carry a fixed interest obligation. It was

TWA and not Hughes Tool Company which elected to have the conditional interest on said debentures run from June 8, 1961. The amount of interest which TWA has failed to pay to Hughes Tool Company in accordance with said Agreement amounts to $72,089.55. This matter was brought to the attention of the President of TWA and the claim has been rejected by counsel for TWA. It is the position of Hughes Tool Company that this rejection amounts to a deliberate violation by TWA of the terms of said Agreement. The Voting Trustees are hereby requested to take appropriate [19233] action to correct this default and violation of said Agreement and the arrangement relative to the creation of the Voting Trust.

4. By letter dated June 10, 1961, hand delivered June 12, 1961, Hughes Tool Company submitted three separate and distinct proposals to TWA, the Voting Trustees and the lending institutions having an interest in TWA. Two of these proposals by their terms have now expired. As stated in said letter, I was the representative of Hughes Tool Company authorized and empowered to discuss said proposals and to commit Hughes Tool Company with respect thereto. I remained continuously available for such discussions but no one communicated with me with respect to such proposals. I waited in the offices of TWA for an opportunity to appear before the Board of Directors of TWA, in the absence of Mr. Holliday who unexpectedly became ill and was unable to attend, and I was refused such an opportunity.

On June 16, 1961, the president of TWA wrote a letter to Mr. Holliday which was clearly intended to create a record to justify a refusal by TWA to accept any of the proposals set forth in the letter of June 10. I received a copy of said letter when Mr. Holliday telegraphed TWA requesting that a copy be made available to me. Certain

aspects of the letter by Mr. Tillinghast were commented upon by Mr. Holliday in his letter [19234] of June 21, 1961 to the Board of Directors of TWA, a copy of which was forwarded to you as counsel for the Voting Trustees by letter dated June 21, 1961. The statement by Mr. Tillinghast that Hughes Tool Company had not advised TWA of the purchase price of the 13 Convair Model 990 aircraft, which were ordered by Hughes Tool Company from General Dynamics Corporation, and the implication that therefore TWA was not in a position to consider Proposal Number Three, is incredible.

I do not understand how TWA could have made an intelligent business decision to commit itself for additional Boeing aircraft without having obtained all available information as to the price of other available aircraft. If Mr. Tillinghast intended to imply that TWA did not know at what price Hughes Tool Company would make such aircraft available to TWA, such an implication cannot be justified even if it is assumed that Mr. Tillinghast has not had an opportunity to familiarize himself with respect to matters which occurred prior to his taking office. Proposal Number Three sets forth quite clearly the formula for determining the price for said 13 aircraft. Furthermore, at the request of counsel for TWA, Hughes Tool Company on June 19, 1961 furnished TWA with a copy of the purchase contract it has with Convair which sets forth the basic price for said aircraft. It is difficult to understand why it would be helpful to the president of [19235] TWA for us to make a dollars and cents computation which, of course, would change every day. It is inconceivable that the president of TWA is not aware that Mr. Bew, a TWA representative, is stationed at the Convair plant on a full time basis and that complete information as to the price of Convair aircraft and as to the payments made by Hughes Tool Company on account of said aircraft was available to TWA if,

in fact, the management of TWA was interested in the information.

With respect to Proposal Number Two, I realized that since the letter of June 10, 1961 was not delivered to the addressees until the morning of June 12, 1961, the management of TWA might find it difficult to make a decision on that proposal before the closing to be held on Tuesday, June 13, 1961. I refer you to my letter of June 13, 1961 as a partial indication of the effort made by Hughes Tool Company to discuss with TWA a procedure designed to give TWA additional time in which to consider the desirability of Proposal Number Two. I made a further effort at the closing held on Tuesday, June 13, 1961. TWA and its counsel reacted to those efforts by asserting that Hughes Tool Company was seeking to delay the closing and that TWA had no authority to delay the closing. The fact is, however, that the suggestions being made on behalf of Hughes Tool Company were not to delay any closing but rather to give TWA additional time, if the management [19236] of TWA felt that additional time was needed, for the purpose of considering Proposal Number Two.

It may be suggested by the management of TWA that the failure to react favorably to Proposal Number One is based upon an evaluation of the attitude which the lending institutions may have had toward that proposal. It is submitted that a management which in good faith desired to pursue the merits of Proposal Number One would have communicated with me and would have joined Hughes Tool Company in any communication with the lending institutions for the purpose of pointing out to them the many advantages to TWA as well as the lending institutions which the acceptance of the Proposal Number One would have had. I have never received a request for an extension of time for Proposal Number One. Presumably this is because the letter of June 10 clearly stated that any such re-

quest would have to be based upon a statement of a favorable attitude toward acceptance of the proposal.

5. Hughes Tool Company submits that immediate action by the Voting Trustees is required to protect its ownership interest in TWA. It further submits that the existence of the Voting Trust is not an indication or agreement on the part of Hughes Tool Company that its views on all matters affecting TWA are to be ignored, if not actively opposed. Hughes Tool Company [19237] is presently in a position of having to rely on the Voting Trustees for the protection of its equitable interests. The undersigned has been instructed by Hughes Tool Company to remain available to discuss the above and related matters with the Voting Trustes either with or without representatives of TWA and representatives of the lending institutions, if they will permit such a discussion.

Very truly yours,

CHESTER C. DAVIS

CAB Opinion and Order No. 3210, decided October 17, 1944

[The following document, which is not part of the Record in this case, has been printed in this Appendix at the instance of defendants.]

[CAPTION]

OPINION

BY THE BOARD:

Hughes Tool Company by application duly filed seeks approval by the Board "if such approval is deemed necessary" under section 408 of the Civil Aeronautics Act of 1938, as amended, of the acquisition by it of control through stock ownership of Transcontinental & Western Air, Inc., hereinafter called TWA, an air carrier within the meaning of section 1(2) of the Act.[1] After notice, hearing was held and briefs have been filed. The Department of Justice was permitted to intervene. An examiner's report was issued recommending approval subject to the conditions that commercial transactions between TWA and Hughes Tool, or between TWA and any subsidiary or affiliate of Hughes Tool, be limited to aircraft parts or accessories, the item price of which complete does not exceed $25, and to a total annual expenditure of $10,000. Provision for fulfillment of certain existing contracts concerning the purchase of Lockheed aircraft and for further action in this proceeding when necessary also was recommended. The only exceptions filed were those of public counsel directed to the substance of the conditions. Oral argument was waived by all parties.

[1] TWA holds certificates of public convenience and necessity under which it is authorized to perform air transportation over routes Nos. 2, 36, 37, 38, 44, 58, 61, and 67.

Under section 408 (a) (5) it is unlawful, unless approved by the Board, for any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever. By the language of section 408(b) the Board is required to grant such approval subject to such reasonable terms and conditions as are required in the circumstances unless it is found that the acquisition will not be consistent with the public interest. By the language of the application an issue as to our jurisdiction is raised; under the language of the Act the fundamental issue is whether the control sought to be held is or will be adverse to the public interest.

Hughes Tool is a Delaware Corporation, all the stock of which is owned by Howard R. Hughes. Its principal business, located at Houston, Tex., is and has been the manufacture of rock bits, tool joints, and high pressure valves for the oil-well-drilling industry. The company is a family enterprise, founded by the father of the present owner who was engaged in the oil industry. In its own field Hughes Tool has been and is highly successful. As of November 30, 1943, its capital and earned surplus aggregated nearly $21,500,000. Its current assets aggregated more than $22,000,000 against current liabilities of approximately $10,770,000.

Howard R. Hughes is a well known aviator and aeronautical engineer. As a pilot he has been the winner of various trophies and is the holder of various speed records. As an aeronautical engineer he has designed or collaborated in the design and alteration of aircraft for speed tests and more lately for air transport.

Hughes Tool first became interested in TWA in 1939 at the solicitation of the president of TWA, a personal friend of Howard R. Hughes. From time to time thereafter, either by purchase through brokers in the securities market or directly from the treasury of TWA, Hughes Tool acquired additional common stock of the air carrier until at the end of 1942 it was the owner of 440,050 shares, or 45.6 percent of the total shares outstanding. The total investment of Hughes Tool in the stock of TWA at the time of hearing in this proceeding exceeded $5,505,000.

For the purpose of this proceeding applicant concedes that the stock now owned constitutes control of the carrier. There is very little room to doubt that for all practical purposes such control has existed since the end of 1940 at least when 42.1 percent was owned. Ownership of so great a proportion of outstanding stock, the remainder of which is dispersed among many owners, represents such a dominating influence in the affairs of the corporation that, in the absence of circumstances indicating the contrary, control, either affirmative or negative, must follow. Much smaller interests have been found so to result.[2]

No individual holds or has held office in both Hughes Tool and TWA except for the employment in an advisory capacity by Hughes Tool of the president of TWA, Mr. Jack Frye.

Prior to 1939 the only activity of Hughes or of Hughes Tool associated with any phase of aviation was experimental and developmental work upon the privately owned and operated equipment of Mr. Hughes or the company.

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[2] *Rochester Telephone Corporation* v. *United States*, 307 U.S. 125, 146 (1939).

No activities of any character in commercial aviation existed. The first participation of Mr. Hughes in any phase of commercial aeronautics followed the acquisition of an interest in TWA. In the late spring and early summer of 1939, Messrs. Hughes and Frye collaborated in the preparation of specifications for a 4-motored airplane to be developed for use by TWA in commercial air transportation. They began negotiations with several aircraft manufacturing concerns regarding construction which resulted in an agreement between Hughes Tool and Lockheed Aircraft Corporation on June 30, 1939, before control of TWA by Hughes Tool was obtained. The contract called for the construction and delivery of five airplanes to be known as "Excalibur-A." The name later was changed to Constellation.

After various changes and modifications as to priorities, deliveries, and the number of aircraft to be purchased, this contract with the approval of Lockheed was assigned to TWA in 1942, Hughes Tool reserving an option to purchase through TWA 25 of the aircraft built under the Constellation specifications. The contract restricts the sale of such aircraft for use in domestic air transportation except by TWA during a certain future period. The aircraft are in process of manufacture and, by appropriate arrangement, are being sold and delivered at present as completed for military use, subject to an option by TWA and by Hughes Tool through TWA to reacquire 40 of them. The Constellation agreements were originally made by Hughes Tool with Lockheed for the benefit, and at the request, of TWA, and to evidence TWA's interest it was given the opportunity to be substituted for Hughes Tool as a direct contracting party. The obvious, if not the expressed, purpose of these arrangements was to give TWA the benefit of the

credit and financial standing of Hughes Tool in a transaction involving substantial financial responsibility. As to the 25 airplanes subject to the option of Hughes Tool, the record indicates that these, if the option is exercised, will be held for resale and for experimental use.

Since the Constellation contracts were made, Hughes Tool, directly or through subsidiaries or affiliates created for that purpose, has expanded and diversified its industrial production by manufacture of military aircraft parts and accessories in furtherance of the war effort. There is no evidence of an intention to continue such activities after the war, or to engage in any phase of supply for commercial aviation. There is evidence to indicate only that Hughes Tool may continue developmental and experimental work in aviation.

The jurisdiction of the Board in the proceeding is questioned by the application when it asks approval "if such approval is deemed necessary". Under the section of the Act involved, there are three elements of jurisdiction: (1) there must be an acquisition of control; (2) the party sought to be controlled must be an air carrier; and (3) the acquirer must be engaged in a phase of aeronautics. As to the first two there is no doubt. There has been an acquisition of control, and TWA is an air carrier. As to none of the elements was any serious objection to the Board's jurisdiction interposed during the course of the proceeding subsequent to the filing of the application. The pertinent question is whether at the time that Hughes Tool acquired control of TWA it was engaged in a phase of aeronautics as contemplated by section 408 of the Act. Particularly significant in this regard is the fact that at that time Hughes Tool was obligated, and at the present time still holds valuable rights, to purchase a substantial fleet of aircraft,

at least a part of which may be held for resale for commercial airline operation. It may under its contracts, if it has not already, become a dealer in such equipment and thus engage in a phase of aeronautics, which renders unlawful the acquisition of control of the air carrier without the consent of the Board. While some basis for a reasonable doubt in the mind of the applicant as to jurisdiction may have existed at the time control of TWA was obtained, we have none in view of the present plans of the applicant. Consummation of these plans is not essential to this conclusion.[8]

Under the present and contemplated operations of Hughes Tool no adverse effect upon the public interest can be foreseen. Applicant is not now engaged in, and has no plans contemplating, production of aircraft, aircraft parts, or facilities for use in commercial air transportation. So far as concerns the possibility of TWA's acquiring from the applicant aircraft which the applicant may purchase under existing agreements, the likelihood that TWA might be forced, through the control exercised by Hughes Tool, to purchase more than the economic operations of TWA require is remote, in view of what might be referred to as the paternalistic attitude which Hughes Tool has exhibited up to the present time. We find that the continuation of this relationship between the applicant and the air carrier would not be inconsistent with the public interest. Nevertheless because of the possibilities resting therein, it is proper that in observing the obligations imposed upon us by the Act we insure against any temptation which may later come to the applicant to take advantage of the rela-

[8] *Pan American Airways Co.* v. *Civil Aeronautics Board*, 121 F. (2d) 810 (1941).

tionship to its own profit and to the detriment of the public interest. This may be accomplished by granting approval subject to such reasonable conditions as will adequately protect the public interest in the future.

The Department of Justice urges that the restraint which has been placed upon the sale of Constellation type of aircraft for use in domestic air service, together with other facts in the case, be especially considered by the Board in determining the nature and scope of any order which may be entered. It urges further that the Board's approval, if granted, be based upon the fact that Hughes Tool is not now engaged in the manufacture of aircraft or aircraft parts for commercial use, and suggests that the Board reserve jurisdiction in the proceeding for the purpose of reconsideration in the event that this condition changes in the future.

Public counsel, while not opposing approval of the application herein, recommends the adoption of more stringent conditions. In summary, the conditions proposed by him would operate to forfeit the Board's approval of the acquisition of control in the event Hughes Tool or Hughes should engage in the manufacture, production, or disposition of aircraft or aircraft parts for use in interstate, overseas, or foreign air transportation, or in the event that Hughes should attempt to influence TWA with regard to the purchase, acceptance, or use by it of any aircraft or aircraft parts in the development or design of which he himself may have participated to a substantial degree.

Applicant opposes both the proposals of the Department of Justice and the conditions suggested by public counsel as harshly restrictive of its freedom of action and more burdensome than is necessary to satisfy the objectives of

section 408. Applicant suggests that any conditions attached by the Board to its approval provide that if Hughes Tool should commence manufacturing aircraft or aircraft parts suitable for commercial use and that if TWA should desire to acquire such aircraft or aircraft parts, then TWA and Hughes Tool should be required to return to the Board for further hearing upon continuation of the relations between TWA and Hughes Tool.

The conditions proposed by public counsel are complicated and seem to be somewhat indefinite and difficult of enforcement. The object of any condition to the continued control of TWA by Hughes Tool inserted at this time in the authority granted by the Board should be to protect the public interest from any improper coercion of the air carrier by a controlling company on account of any interest which that controlling company may have in some other phase of aeronautics. This can be accomplished by a reasonable limit upon commercial transactions between the acquirer and the acquired which may be had without further consideration in this proceeding by the Board.

We are not concerned herein with questions revolving about the inhibition of section 408(b) of the Act against the creation of monopolies contrary to the public interest by the acquisition of control. Hughes Tool has no present interest in any other operating air carrier or any other enterprise having to do with any phase of aeronautics except as already stated.

On the basis of the foregoing considerations and all of the facts of record, we find that acquisition of control of TWA by Hughes Tool through the purchase and ownership of a stock interest therein will not be inconsistent with the public interest so long as commercial transactions be-

tween them or between TWA and any affiliate or subsidiary of Hughes Tool are limited to transactions involving complete items of property, the price of which does not exceed $200 each, with the further limitation that the total annual expenditure involved in such commercial transactions by either party shall not exceed $10,000. As a further condition of our approval herein TWA should furnish with its annual report each year, so long as Hughes Tool retains the control herein approved, a statement showing the total cash price of all commercial transactions between it and Hughes Tool and/or any affiliate or subsidiary thereof, the maximum and minimum item price, the number of such transactions, and the general nature of commodities involved. These restrictions and requirements, however, will not be made to affect or apply to the existing contractual right of the applicant to reacquire Constellation aircraft through TWA.

An appropriate order will be entered.

Pogue, Chairman, Warner, Branch, Ryan, and Lee, Members of the Board, concurred in the above opinion.

Order

Hughes Tool Company, an industrial corporation, having filed an application requesting that the Board approve the acquisition of control, by the purchase of common stock, of Transcontinental & Western Air, Inc., under section 408 of the Civil Aeronautics Act of 1938, as amended, and a full public hearing having been held thereon, and the Board, upon consideration of the record in this proceeding, having issued its opinion containing its findings, conclusions and decision, which is attached hereto and made a part hereof,

CAB Opinion and Order, October 17, 1944

IT IS ORDERED, That the application of Hughes Tool Company be and it is hereby approved, subject to the following conditions:

1. That said approval shall be effective so long as commercial transactions between TWA and Hughes Tool Company and between TWA and any affiliate or subsidiary of Hughes Tool Company are limited to transactions involving complete items of property, the price of which does not exceed $200 each, with the further limitation that the total annual expenditure involved in such commercial transactions by either party shall not exceed $10,000;

2. That TWA shall furnish with its annual report to the Board a supplement thereto showing the total of all cash transactions between TWA and Hughes Tool Company and/or any affiliate or subsidiary thereof, the number of such transactions, the maximum and minimum price of items of property, and the general nature of the commodities involved; and

3. That nothing herein shall restrict or affect the right of purchase by Hughes Tool Company through TWA of aircraft, the purchase of which is provided for in existing agreements between them.

A-3307

Order Modifying Order Approving Acquisition of Control

[3910]

Orders
Serial Number 4437

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.,
on the 26th day of January, 1946

[CAPTION] Docket No. 1182

ORDER MODIFYING ORDER APPROVING ACQUISITION OF CONTROL

A petition in the form of a letter dated November 14, 1945, having been filed on behalf of Hughes Tool Company, an industrial corporation, for modification of the Board's Order, Serial No. 3210, issued October 17, 1944, in Docket No. 1182, in respect of the conditions attached to the Board's approval of the acquision of control by Hughes Tool Company of Transcontinental and Western Air, Inc.; and

The Board, acting pursuant to the powers vested in it by the Civil Aeronautics Act of 1938, as amended, particularly sections 205(a), 408 and 1005(d) thereof, and finding that the modification of the aforesaid Order in the manner requested would be consistent with the public interest;

IT IS ORDERED That the Board's Order, Serial No. 3210, issued October 17, 1944, in Docket No. 1182, be and it is hereby modified by striking paragraph numbered "3" of said Order and substituting therefor the following:

"3. That the terms of this order shall not restrict or affect the right of purchase by Hughes Tool Company through TWA of

(a) aircraft, the purchase of which is provided for in existing agreements between them; [3911] (b) transportation from TWA at regularly published rates;

(c) aviation fuel from TWA at prices charged by TWA to other purchasers;

(d) repairs, modifications, maintenance and overhaul service, including parts and materials necessary therewith, from TWA at prices charged by TWA to other purchasers."

By the Civil Aeronautics Board:

/s/ FRED A. TOOMBS
Fred A. Toombs
Secretary

(SEAL)

A-3309

Order Modifying Order Approving Acquisition

[3912]

Orders
Serial Number E-922

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.,
on the 29th day of October, 1947

[CAPTION] Docket No. 1182

ORDER MODIFYING ORDER APPROVING ACQUISITION

A motion having been filed by Hughes Tool Company for an order modifying Order Serial No. 3210 issued October 17, 1944 in Docket No. 1182, as amended by Order Serial No. 4437 issued January 26, 1946, so as to permit Hughes Tool Company to sell to Transcontinental & Western Air, Inc. at cost to Hughes Tool Company devices known as "Hughes Airline Radar Units"; and

The Board, acting pursuant to the powers vested in it by the Civil Aeronautics Act of 1938, as amended, particularly sections 205(a), 408 and 1005(d) thereof, and finding that the modification of Order Serial No. 3210, as amended by Order Serial No. 4437, hereinafter provided for is just and reasonable and is in the public interest;

IT IS ORDERED:

That Order Serial No. 3210 issued October 17, 1944, as amended by Order Serial No. 4437 issued January 26, 1946, be and it hereby is modified by adding thereto the following:

[3913] "4. That the terms of this order shall not restrict the right of Hughes Tool Company to sell to

TWA or the right of TWA to purchase from Hughes Tool Company devices known as "Hughes Airline Radar Units" in such quantities as TWA may wish to purchase; *Provided* that the sale price of such "Hughes Airline Radar Units" to TWA shall not exceed the lowest of the following: (a) the cost of such units to Hughes Tool Company; (b) the price at which similar sales of such equipment are made at or about the same time by Hughes Tool Company to any other air line; and *Provided* further that all sales of "Hughes Airline Radar Units" shall be reported to the Board in the manner provided in paragraph 2 of this order."

By the Civil Aeronautics Board:

/s/ M. C. Mulligan
M. C. Mulligan
Secretary

(SEAL)

CAB Opinion and Order No. E-1735, decided June 30, 1948

[The following document, which is not part of the Record of this case, has been printed in this Appendix at the instance of defendants.]

[CAPTION]

OPINION

BY THE BOARD:

This proceeding arises out of an order of the Board[1] instituting an investigation into a letter agreement between Hughes Tool Company (Toolco) and Transcontinental & Western Air, Inc. (TWA), dated January 8, 1947, and accepted by the board of directors of TWA on January 9, 1947. The letter agreement provides, among other things, for certain loans by Toolco to TWA, in exchange for the latter's 2¾-percent notes, convertible at Toolco's option into common stock of TWA, and for the reconstitution, upon the occurrence of certain events, of the board of directors of TWA. We instituted this proceeding to determine whether the letter agreement or any arrangement or action related thereto, or any change in the activities of Toolco in the field of aeronautics since October 17, 1944,[2] has resulted

[1] Order serial No. E-289, dated February 7, 1947.

[2] This is the date of the Board's approval of the original acquisition of control by Hughes Tool Company of TWA under section 408 of the Act, Docket No. 1182, *Transcontinental & W. A., Control by Hughes Tool*, 6 C. A. B. 153. The Board, however, placed several terms and conditions in its order of approval which in effect limit the right of Toolco to engage with TWA in commercial transactions involving aeronautical property. Certain clarifications were later made in this order of approval.

or will result in an acquisition of control of TWA for which its approval is required pursuant to section 408 of the Civil Aeronautics Act of 1938, as amended; to determine whether such acquisition of control, if any, is consistent with the public interest and fulfills the conditions of said section 408; and for the purpose of entering any such order or taking such further action as may be appropriate pursuant to the provisions of the Act.

Under section 408 (a) (5) of the Act, it is unlawful, unless approved by the Board, for any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of an air carrier in any manner whatsoever. By the provisions of section 408 (b) of the Act the Board is required to grant such approval upon such terms and conditions as it finds just and reasonable where that acquisition is found not to be inconsistent with the public interest, or not to violate other conditions laid down in that section.

On May 15, 1947, respondents Toolco and TWA filed a joint motion for an order to hear and determine separately the jurisdictional issue under section 408 (a) (5) of the Act before hearing and determining the issues under section 408 (b). Except for denying that portion of the motion of respondents with respect to their request for a limitation of the evidence to be adduced at the preliminary hearing, the motion was granted by order of the Board.[3] Hearings were held, pursuant to this latter order, before Examiner Edward T. Stodola in Los Angeles, Calif., on September 10 and 11, 1947.

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[3] Order serial No. E-657, dated June 18, 1947.

CAB Opinion and Order, June 30, 1948

In a report served on January 30, 1948, the examiner concluded that there has been no change in the aeronautical activities of Toolco since the date of our original approval of control in Docket No. 1182 for which further approval is required, but recommended that we find that the transactions evidenced by the letter agreement have resulted in a further acquisition of control by Toolco over TWA, requiring our approval under section 408 of the Act. He further recommended that a second hearing be held to determine whether such further or additional acquisition of control meets the requirements of section 408 (b) of the Act. Exceptions to said report and briefs in support thereof have been filed by respondents Toolco and TWA and oral argument has been heard by the Board.

We first address ourselves to the problem whether any change in the activities of Toolco in the field of aeronautics since October 17, 1944, has affected or altered the character of the control approved in Docket No. 1182. It is clear that a substantial change in the activities of Toolco in the field of aeronautics would result in a transaction subject to the Board's jurisdiction under section 408 by reason of the fact that the character and propriety of control originally approved might be altered or changed as a result thereof.

The Aircraft Division of Toolco, which is located in Culver City, Calif., is described in the record as "a large scale experimental plant." Its principal activity at the present time consists of experimental work on aircraft accessories and armament for the Army and Navy. Some of these experiments might result in the development of products which could be dedicated to commercial airline operations. The Aircraft Division of Toolco has also developed a device which works on the radar principle and is capable of warn-

ing an aircraft pilot of his proximity to any obstruction. These devices are now being sold by Toolco on a nonprofit basis to all commercial airlines that wish them. The sale of the radar device will also be made to TWA at cost. Purchase orders from that carrier have been received by Toolco, which recite that the purchases would be made subject to the terms and conditions of the Board's order approving control by Toolco as amended in Docket No. 1182.[4] Further aeronautical activities of Toolco consist of conversion work on the 14 C–47 aircraft, which represent Army surplus equipment acquired by Toolco for resale since January 1947.

The present aeronautical activities of Toolco clearly establish it as a person engaged in a "phase of aeronautics" within the meaning of section 408 (a) (5) of the Act. However, the record shows that there has been no substantial change in Toolco's operations in the field of aeronautics since the original order of approval of October 17, 1944, which would require our further consideration under section 408 of Toolco's control of TWA.

There is also before us, however, the question whether the transactions evidenced by the letter agreement of January 8, 1947, have resulted or will result in an acquisition of control of the carrier for which Board approval is required pursuant to the provisions of section 408 of the Act.

Toolco has never held more than 46.1 percent of the outstanding stock of TWA. The application for the original approval of control in Docket No. 1182 recited that Toolco owned 45.6 percent of 965,083 shares of TWA stock then

[4] On October 29, 1947, the Board, by order serial No. E-922, further modified the order approving the acquisition in Docket No. 1182 so as to permit Toolco to sell the radar warning units to TWA.

outstanding. At the time of the hearing herein it held 452,100 of the 985,984 shares of TWA stock issued and outstanding, again representing approximately a 45-percent stock interest in the carrier. The remaining stock holdings in the carrier are widely dispersed.

The letter agreement had its genesis in the failure of TWA and its principal stockholder, Toolco, to agree on a program of financing the carrier's capital needs after the termination of the war. As early as January 1945 there were some preliminary discussions between the management of TWA and the executive vice president of Toolco with respect to financing for the carrier. Both TWA and Toolco then recognized that any program of large-scale financing for the carrier ought to include a substantial measure of equity financing. Efforts directed toward agreement on a plan for additional financing, however, reflected a gradual but ever widening rift between the TWA management and Toolco with respect to operating plans and policies for the carrier.

Meanwhile, during November 1945 a program of debt financing was entered into with the Equitable Life Assurance Society of the United States, whereby Equitable purchased an issue of 3-percent sinking-fund debentures from the carrier in the principal amount of 30 million dollars. Then, in May 1946, Equitable purchased an issue of 2¼-percent sinking fund debentures in the amount of 10 million dollars from TWA. Sinking-fund payments of 4 million dollars annually were required under the two series of debenture loans. The Equitable loan was an equipment loan in that 80 percent of the proceeds thereof were to be used for the purchase of equipment.

There is nothing in the record to indicate that a successful flotation of stock in large volume could not have been

accomplished at any time during 1945 and during the greater part of 1946. Several plans for financing were explored during this period, but differences of opinion between the management of the carrier and its principal stockholder delayed favorable action on a definite program. In the end nothing was done until an alleged unfavorable turn in the security market about September 1946 made any large-scale equity financing difficult of promotion.

Toward the end of 1946 TWA's financial condition had become critical. Efforts at additional financing had failed. The record shows that in the closing months of 1946 the carrier could not attract any capital and was facing bankruptcy. The record further shows that Toolco was willing to be of financial assistance but was unwilling to furnish additional money to save the carrier unless it had further control of the spending thereof. The letter agreement of January 8 finally became the means chosen to reorganize the carrier and to save it from bankruptcy.

The agreement provides, among other things, for (1) a loan by Toolco to TWA in the amount of 10 million dollars and the issuance to Toolco of 2¾-percent notes due June 2, 1956, for such loan with an option to convert said notes into common stock of TWA; (2) diligent endeavor on the part of Toolco to arrange a 40-million-dollar loan of credit with the Reconstruction Finance Corporation;[5] (3) a rearrangement of the Equitable financing under the 40-million-dollar debenture loan; (4) a reconstitution of the

[5] The loan contemplated was also to be an equipment loan and was not being pressed immediately after the acceptance of the letter agreement because it was then concluded that the carrier did not need additional equipment. However, attempts were being made about the time of the hearing herein to secure a general credit from the RFC in the reduced amount of 10 million dollars.

board of directors of TWA so that the majority thereof will be nominees of Toolco;[4] and (5) a requirement that no change be made in the bylaws of the carrier without the written consent of Toolco until all the changes contemplated by the foregoing provisions have been made.

The notes may be converted by Toolco at any time prior to maturity into common stock of TWA at a price per share which shall be the average of the prices at which the last sale of such stock was made on the New York Stock Exchange on each of the last 10 business days preceding receipt by the carrier of notice of exercise of the option to convert, unless such average shall be less than $5 per share (the par value of the stock), in which event the conversion price shall be $5. TWA, however, may require Toolco to convert, at a price per share to be calculated by the same method, by notifying Toolco to this effect on January 1, 1950.

To provide for the possible conversion, 2,000,000 shares of TWA common stock at $5 par value have been authorized. Thus, if Toolco were to acquire the entire 2,000,000 shares authorized at the minimum conversion price, it would then be owner of about 80 percent of the common

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[4] Prior to January 8, 1947, all directors of the carrier were nominees of Mr. Jack Frye, then president of TWA. Immediately after the consummation of the letter agreement, the board of directors of TWA was reconstituted and 13 directors were added to the original 11 then on the board. The directors added were all nominees of Toolco. The regular annual stockholders' meeting of the carrier was held on April 24, 1947. The TWA board was then reduced from 24 to 14. The present board is dominated by Toolco nominees and there exists little probability of conflict over Toolco's policy for TWA. Moreover, the bylaws of the carrier were amended at said annual stockholders' meeting to make the new board more responsive to the stockholders' wishes.

stock of TWA issued and outstanding.[1] It should be noted that stock in TWA carries with it no preemptive rights, so that upon the issuance of additional shares present stockholders, other than Toolco, may not require that they be permitted to subscribe to shares proportionate to their present holdings in the carrier. Accordingly, the letter agreement gives Toolco an inalienable right to acquire up to a possible 80 percent of the stock in TWA. It should also be noted that the convertible notes given under the letter agreement further provide that TWA may not make payments on Toolco's loan before payment in full is made on the 40-million-dollar debenture loan held by Equitable, and any advances made to the carrier by the RFC.

On December 26, 1947, Toolco, in further agreement with TWA, waived all its rights to require payment of the aforementioned notes in money or in any form other than stock in the carrier in accordance with the conversion provisions of such notes. It was specified, among other things, that such waiver does not constitute an election by Toolco to convert said notes into stock as of the date of waiver. In consideration of this waiver, TWA agreed that it would enter into no final contract with the Lockheed Aircraft Corporation pursuant to negotiations then pending for the purchase of a number of Constellation Model 749 aircraft and spare parts, unless Toolco should have approved such contract of purchase in full. Such approval was subsequently given by Toolco on the condition that Lockheed Aviation Corporation enter into an agreement with TWA

[1] If Toolco converted at $15, the closing price of TWA stock on June 18, 1948, the date of the writing of this opinion, it would then own approximately 67 percent of all TWA stock outstanding.

requiring performance by Lockheed of certain modification work without cost to TWA. Toolco consented to subordinate the repayment due it in money under the convertible notes in order to assist the carrier in financing the purchase of the Lockheed equipment through a group of 14 lending banks. Under the circumstances, however, eventual conversion of the notes into stock cannot be avoided, save by bankruptcy of the carrier.

Under the section of the Civil Aeronautics Act involved, we are directed to assert jurisdiction over the acquisition, to the extent made necessary by the facts of record, by any person engaged in a phase of aeronautics of the control of an air carrier through the purchase of the latter's stock, or in any other manner whatsoever. Once the necessary jurisdictional elements are present, our action under the Act is mandatory. That TWA is an air carrier and that Toolco is a person engaged in a phase of aeronautics within the meaning of section 408 are not questioned. Since we have previously approved the acquisition of control of TWA by Toolco, the issue we face here is whether there has been a further or additional acquisition of control over the carrier within the meaning of the statute.

This question is a relatively simple one. It turns upon two basic problems. First we must decide whether, in view of our ratification of the relationship between Toolco and TWA on October 17, 1944, there can be another or additional acquisition of control as a matter of law; the second problem to be determined is whether, as a matter of fact, an additional acquisition of control is present in this proceeding.

That there can be more than one acquisition of control of an air carrier, as a matter of law, appears to be beyond

doubt. We have not heretofore had occasion to render decision upon the question whether, once an acquisition of control of an air carrier has been approved pursuant to section 408, subsequent transactions can result in a new or additional acquisition of control which must also be approved under that section. However, in the *Northeast* case[8] we took the position that the existence of control of an air carrier would not prevent us from asserting jurisdiction in a case where the extent or effectiveness of control was later increased.

The Interstate Commerce Commission has likewise, under an almost identical statute,[9] rendered decisions on the issue of the Commission's jurisdiction in cases where varying degrees of control already existed, and where further control was sought to be established.[10] It has consistently taken the position that the creation of a substantive measure of additional control, through stock purchase or otherwise, in

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[8] *Railroad Control of Northeast Airlines*, 4 C. A. B. 379 (1943).

[9] Section 408 of the Civil Aeronautics Act was borrowed, almost word for word, from section 213 of the Motor Carrier Act of 1935 (49 Stat. 555). Section 213 on the other hand, was patterned after paragraphs (4) and (5) of the Interstate Commerce Act, of which the Motor Carrier Act became Part II. Section 213 was repealed by the Transportation Act of 1940 (54 Stat. 905). This latter Act amended section 5 to add substantially the provisions of the repealed section 213.

[10] Accordingly, persuasive weight may be given herein to decisions of the Commission construing the word "control" and dealing with the concept of acquisition of control or changes in the extent or effectiveness thereof in relationships comparable to that before us in the instant proceeding. *Acquisition of Marquette by TWA—Supplemental Opinion*, 2 C. A. B. 409 (1940); *American President Lines et al., Petition*, 7 C. A. B. 799, 811 (1947); Cf. *U. S. Nav. Co. v. Cunard S. S. Co.*, 284 U. S. 474, 480–481 (1932).

an acquiring stockholder, whose preexisting control of a carrier was for one reason or another legally incomplete, represents an acquisition subject to the approval of the Commission under the Interstate Commerce Act.[11]

Section 408 of the Act does not define the "control" to be approved thereunder, nor does the statute specify the completeness of the acquisition over which we may assume jurisdiction. We have consistently held that the term "control" is not an absolute or unqualified concept, but rather one which may import various meanings and apply to and cover a variety of situations.[12] On the part of the person exercising control, the term implies the existence of a right or power to direct or dominate, whether actually exercised or existing in potential use. As the right or power to direct or dominate the affairs of a corporation, control cannot be held to constitute a unitary concept, which, once approved, covers every degree of direction or domination of the controlled carrier. Obviously the Act confers no jurisdiction where what is sought to be approved constitutes less than control. But it is just as obvious that there are many de-

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[11] *Control of Big Four by New York Central*, 72 I. C. C. 96 (1922); *Control of C., St. P., M. & O. Ry.*, 105 I. C. C. 543 (1926); *Peoria & E. Ry. Co., Control*, 236 I. C. C. 749 (1940); *Black Hills Stages, Inc., Purchase—Black Hills Transp.*, 25 M. C. C. 487 (1940); *Hogshire-Control-N. B. & C. Motor Lines, Inc.*, 35 M. C. C. 529 (1939); *Wheeling & Lake Erie Ry. Co., Control*, 267 I. C. C. 401 (1947); *Joliet & Chicago R. Co. & Louisiana & Missouri River R. Co. Control*, 267 I. C. C. 827 (1947); and *Dover & Rockway R. Co. Control*, 267 I. C. C. 828 (1948).

[12] *Railroad Control of Northeast Airlines, supra; Pan Am. Airways, Inc., Aerovias de Guatemala*, 4 C. A. B. 403 (1943); *Pan Am. Airways, Inc., Aeronaves de Mexico*, 4 C. A. B. 494 (1943); and *Pan Am. Airways, Acquisition of China National*, 6 C. A. B. 141 (1944).

grees of control, and that approval may be granted under the statute to an acquisition under which the controlling person may direct or dominate many but not all of the affairs of the controlled corporation. In the case of control acquired through the purchase of stock, the extent of control existing, absenting other relationships indicating influence on the part of the acquirer over the controlled company, will depend upon the specific quantum of stock interest held by the acquirer and the rights and privileges that attach thereto. In brief, a controlling person owning a substantial portion of the controlled carrier's stock may have acquired an actual or *de facto* control but not the full and complete legal control which flows from ownership of all, or substantially all, of the issued and outstanding stock of the carrier.

Full legal control of a corporation obviously implies power to dictate the complete corporate activities of the corporation. Both Toolco and TWA are Delaware corporations. Section 26 of the Delaware Corporation Law[13] provides that a corporation may amend its certificate of incorporation by adding to or decreasing its corporate powers, or by substituting certain powers and purposes in place of those already present therein, or by increasing or decreasing its authorized capital stock or reclassifying it, or by making any other change or alteration in its certificate that may be desired. Every such amendment, however, requires the affirmative vote of a majority of the stock of that corporation entitled to vote on such amendment. Under

[13] Revised Code of Delaware 1935, chap. 65, art. 1, par. 2058, sec. 26.

section 39 of the Delaware Corporation Law,[14] proceedings for dissolution of a corporation must be approved by two-thirds of the voting stock of said corporation, and under section 59 of that law[15] an agreement of merger between a Delaware corporation and another such corporation, or a corporation of any State, must, at least insofar as the Delaware corporation is concerned, have the approval of two-thirds of the total number of shares of its capital stock.

Toolco's 45-percent stock interest in TWA has given it sufficient power to determine many but not all of the corporate activities of the carrier. It now has sufficient power and influence to control the board of directors of TWA and thereby to manage and direct the usual day-to-day business and financial affairs of the airline. But unless assisted by other stockholders in the carrier, Toolco would, as the recital of the applicable Delaware law indicates, need at least a numerical majority to satisfy the provisions of the Delaware law with respect to amending the certificate of incorporation of the carrier, and at least a two-thirds stock interest in the carrier to take action with respect to such vital matters as merger, consolidation, or dissolution of TWA.

The Board's jurisdiction is challenged by respondents on the ground that the transactions represented by the letter agreement have not resulted, and could not result, in an

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[14] Revised Code of Delaware 1945, chap. 65, art. 1, par. 2071, sec. 39, as amended by 45 Laws of Delaware (1945) chap. 157, sec. 3, pp. 596–598.

[15] Revised Code of Delaware 1935, chap. 65, art. 1, par. 2091, sec. 59, as amended by 43 Laws of Delaware (1941) chap. 132, sec. 12, pp. 458–461.

additional or further acquisition of control either as a matter of law or as a matter of fact.

Respondents argue that the Board, in October 1944, in Docket No. 1182, approved the highest possible degree of control and that our decision in the original control proceeding is a complete and definitive answer to the question before us here. They point to the Board's final order in that proceeding, approving "the acquisition of control, by the purchase of common stock, of Transcontinental & Western Air, Inc.," and contend that the effect of the Board's order was to permit Toolco to acquire TWA stock without any limitation as to the amount of stock, time of purchase, or any other factor. In other words, it is argued that the Board's order in Docket No. 1182 originally approving control contemplates and covers the very type of transactions represented by the letter agreement of January 8, 1947. Accordingly, it is urged that the language of the Board's order in Docket No. 1182, approved full and complete control of TWA by Toolco and thus forecloses the present issue as a matter of law.

Perhaps an essential approach to an interpretation of the effect of the order in Docket No. 1182 is a recognition of the fact that our decisions in previous control proceedings, whether with respect to the issue of our jurisdiction, or the question of the consistency of the control acquired with the public interest, clearly relate to the quantum of control represented by the extent of ownership of stock in the controlled company at the time of the application.[16]

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[16] See, for example, *Railroad Control of Northeast Airlines, supra; Pan Am. Airways, Inc., Aerovias de Guatemala, supra; Pan Am. Airways, Inc., Aeronaves de Mexico, supra; Western A. L., Acquisition of Inland A. L.*, 4 C. A. B. 654 (1944); *Pan Am.*

In general, the important issue of jurisdiction presented for our determination in acquisition proceedings is whether or not the extent of ownership and influence established to exist in the acquirer has resulted or will result in "control" of the air carrier involved. In cases where the record has supported our assertion of jurisdiction, our decisions indicate whether the degree of domination or influence shown to exist in the acquirer was consistent with the public interest and met the requirements of section 408 (b).

To determine the precise scope of the approval we granted in Docket No. 1182, however, it is necessary to reexamine our final order therein and to interpret its purpose. It is elementary, of course, that in interpreting an administrative order it is necessary to read and construe the order and the accompanying opinion as a whole.

The opinion upon which the order is based was clearly couched in terms of factors then present and our order in that proceeding is based upon findings relating to the degree of control represented by the extent of the stock interest existing in the control carrier at the time of the Board's original order of approval. Our opinion in Docket No. 1182 recites that "control" for the purpose of that proceeding was stipulated, and the principal issue facing the Board for decision was whether Toolco, the acquirer, was a person engaged in a phase of aeronautics, within the meaning of section 408 (a) (5) of the Act. Finding that to be the fact, and together with the facts that the controlled corporation was an air carrier and that "control" was stip-

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Airways, Acquisition of China National, supra; American Air., Control of American Export Air., 6 C. A. B. 371 (1945); *National-Caribbean-Atlantic Control Case*, 6 C. A. B. 671 (1946); and *American Air., Control of Mid-Continent Air.*, 7 C. A. B. 365 (1946).

ulated, we approved the relationship subject to certain limitations relating to commercial transactions between Toolco and TWA. It is evident that in passing upon Toolco's original application for approval of its acquisition of control of the carrier we did not concern ourselves with more than the specific degree of control involved in the record before us. We stated:

> For the purpose of this proceeding applicant (Toolco) concedes that the stock *now owned* constitutes control of the carrier. There is very little room to doubt that for all practical purposes such control has existed since the end of 1940 at least when 42.1 percent was owned. Ownership of so great a proportion of outstanding stock, the remainder of which is dispersed among many owners, represents such a dominating influence in the affairs of the corporation that, in the absence of circumstances indicating the contrary, control, either affirmative or negative, must follow. Much smaller interests have been found so to result (*supra*, p. 154; emphasis supplied).

Our opinion also set forth Toolco's history of stock ownership in TWA from 1939 to the date of the opinion, when Toolco owned about 45 percent of TWA's shares then outstanding. Under the provisions of section 408, we were then directed to determine whether Toolco's control of TWA, stemming from the stock interest it then had in the carrier, was consistent with the public interest. On that question we then found as follows:

> • • • we find that acquisition of control of TWA by Hughes Tool through the purchase and ownership of

a stock interest therein will not be inconsistent with the public interest * * * (*supra*, p. 157; emphasis supplied).

It should be clear from the foregoing that we did not intend to, and did not, grant a blanket, unlimited, *in futuro* approval of the relationship between Toolco and TWA. All parties to the original proceeding concerned themselves with the control relationship then present. In construing our own order here, we have searched the contentions made by the parties to the original control proceeding in an effort to discover matters which would demonstrate a possible intent on our part to make the approval granted in Docket No. 1182 an unlimited one. But the record in that proceeding is clear to the effect that issue of a blanket *in futuro* approval was not raised or urged upon the Board. While the Board could have approved, upon an appropriate finding, more than that degree of control submitted by the applicant in the original control proceeding, such an unlimited approval would have been made in clear, unmistakable language. A reading of our opinion and order, in the light of the facts of record in that proceeding, definitely fails to show that such approval was either contemplated or granted. Indeed, it would be unreasonable to assume that our approval then of Toolco's 45-percent stock interest in TWA would forever constitute an unlimited ratification of any and all future acquisitions of ownership interest in the carrier.

In view of the foregoing, we do not believe that our order in Docket No. 1182 approved more than the specific quantum and degree of control represented by the 45-percent stock interest then owned by Toolco. That order shows

quite plainly that the Board was then dealing in terms of the then existing situation. In other words, the Board there approved a preexisting control relationship on a record which neither proposed nor showed prospects of a further acquisition of ownership interest in the carrier on the part of the acquirer.

Respondents insist that the mere existence of the words in our order approving "the acquisition of control, by the purchase of common stock" is sufficient to dispose of the issue of the type of approval we granted. But the words "by the purchase of stock" cannot be held to be words of art, importing a blanket, technical meaning and covering in umbrella-like fashion all subsequent transactions under which the acquirer may have obtained an additional substantive interest in the carrier. Rather the words "by the purchase of stock" may well be regarded, without impropriety, particularly when read in the light of the opinion supporting their use, as mere words of description, setting forth the manner in which control was acquired. It bears repeating that there is no support in either the record or the opinion for the contention that the words in question were intended as an expression of blanket approval of the relationship under consideration.[17]

Respondents further contend that, even if the letter agreement could result in a further acquisition as a matter

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[17] The Interstate Commerce Commission in the *Louisiana & Missouri* control case, *supra*, approved "further control" by one railway carrier over another as a jurisdictional acquisition within the meaning of section 5 (2) of the Interstate Commerce Act after it had previously permitted the acquirer to acquire "control through stock ownership", a phrase almost identical to that used in Docket No. 1182, which respondents claim approves control without limitation.

of law, the record in this proceeding fails to establish an additional acquisition as a matter of fact because (1) Toolco has not yet exercised its option under the letter agreement to acquire any greater stock interest in the carrier, and (2) Toolco at all times has exercised, and without converting the notes into stock can continue to exercise, complete legal control of the carrier.

We find that the right on the part of Toolco to acquire the additional TWA stock represented by the conversion feature of the notes has resulted in an increased measure of substantive control over the carrier and its corporate affairs. It would not appear that the actual exercise of the conversion privilege by Toolco is necessary to establish our jurisdiction. The existence of the nondefeasible conversion right, under agreements whereby TWA can accelerate but not avoid the conversion, substantially increases Toolco's power over the carrier and this power is of such a nature as to require our approval. Under Delaware law Toolco, with a majority stock ownership in TWA, alone and on its own initiative, can perform such important corporate acts as amending TWA's certificate of incorporation by adding to or decreasing its corporate powers, or by substituting certain powers and purposes in place of those already present therein, or by increasing its authorized capital stock or reclassifying it, or by making other changes or alterations in said certificate. Moreover, a two-thirds common-stock interest in TWA would enable Toolco, for the first time and using its sole voting power, to satisfy the provisions of Delaware law with respect to such important matters as merger, consolidation, or dissolution of the carrier.

The further basis for respondent's argument that Toolco's control over TWA has not increased and cannot increase as a matter of fact may be very briefly set at rest. It turns upon the claim that Toolco, by controlling management proxies since October 17, 1944, has, together with such proxies, had the power to take any corporate action necessary with respect to the carrier in compliance with Delaware law. An answer to this claim rests upon the distinction between having the required voting power under Delaware law upon the vote of Toolco alone, as against having such power dependent upon the use of proxies to vote stock owned by others, who may not always acquiesce. Further, while Toolco has been able to secure proxies sufficient to enable it to control the day-to-day affairs of the carrier, it may not be able to obtain that acquiescence in matters such as merger, consolidation, or dissolution of the carrier. But, even if it be assumed that Toolco could at all times obtain sufficient votes to put in effect any desired corporate action, the fact remains that the letter agreement, through the retirement of the indebtedness therein created by conversion to stock, makes unnecessary any dependence upon other stock interests in TWA. Certainly, therefore, a control relationship has been established where the controlled company, which formerly responded to orders from one person with assistance from others by proxies, or otherwise, now responds or may respond to one person at its sole instance.[18]

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[18] Significant also is the fact that under the supplementary agreement of December 26, 1947, modifying the letter agreement, TWA was required to come to Toolco to obtain consent of the latter before purchasing additional equipment. Certainly this transaction also represents an element of new and increased control arising out of the letter agreement.

On the basis of the foregoing considerations and all facts of record, we find that the transactions evidenced by the letter agreement between Toolco and TWA, dated January 8, 1947, and accepted by the board of directors of TWA on January 9, 1947, have resulted in a further acquisition of control by Toolco over TWA within the meaning of section 408 of the Act. Accordingly, we are ordering that a hearing be held on the merits of the substantive case in accordance with the provisions of paragraphs (2) and (3) of our order of investigation of February 7, 1947, serial No. E-289.

An appropriate order will be entered.

O'Connell, Chairman, Ryan, Lee, and Jones, Members of the Board, concurred in the above opinion. Adams, Member, did not take part in the decision.

ORDER

The Board, by order serial No. E-289, adopted February 7, 1947, having instituted an investigation in the above-entitled proceeding for the purpose of (1) determining whether a certain letter agreement dated January 8, 1947, between Hughes Tool Company and Transcontinental & Western Air, Inc., (hereinafter called TWA), accepted by the board of directors of TWA on January 9, 1947, or any arrangement or action related thereto, or any change in the activities of Hughes Tool Company in the field of aeronautics since October 17, 1944, has resulted or will result in an acquisition of control of TWA for which Board approval is required pursuant to section 408 of the Civil Aeronautics Act of 1938, as amended; (2) determining whether such acquisition of control, if any, is consistent

with the public interest and fulfills the conditions of s
section 408; and (3) entering any such order or taking
such further action herein as may be appropriate pursu
to the provisions of the Civil Aeronautics Act of 1938,
amended; and

The Board, by order Serial No. E-657, adopted June
1947, having ordered, *inter alia*, that a hearing first be h
to determine whether the transactions referred to in pa
graph (1) above have resulted or will result in an acqui
tion of control of TWA for which Board approval
required pursuant to section 408 of the Civil Aeronaut
Act of 1938, as amended, and that the hearing on the oth
issues raised by its order of February 7, 1947, be defer
pending the Board's decision on the aforesaid issue; and

The Board, after a public hearing and oral argume
with respect to the matters referred to in paragraph (
hereof, having issued its opinion containing its findin
conclusions, and decision which is attached hereto and ma
a part hereof,

It is Ordered, That a hearing be held with respect to t
issues contained in paragraphs (2) and (3) of the Boar
order of investigation of February 7, 1947, referred
above.

CAB Opinion and Order No. E-4701, decided October 6, 1950

[The following document, which is not part of the Record of this case, has been printed in this Appendix at the instance of defendants.]

[CAPTION]

Opinion

By the Board:

In a prior opinion and order, 9 C. A. B. 381, we held that the transactions evidenced by a letter agreement dated January 8, 1947, between the Hughes Tool Company and Trans World Airlines, Inc., (formerly Transcontinental & Western Air, Inc.) and accepted by the board of directors of TWA on January 9, 1947, resulted in further control of TWA by the Tool Company, for which Board approval is required under the provisions of section 408 (a) of the Civil Aeronautics Act.[1] We thereupon ordered further hearings on the merits, in accordance with provisions of paragraphs (2) and (3) of our order of investigation of February 7, 1947, serial No. E–289. The fundamental issue here is whether the further control sought to be held is consistent with the public interest under the language of section 408 (b) of the Act.

[1] In *Transcontinental & W. A., Control by Hughes Tool*, 6 C. A. B. 153 (1944) under Docket No. 1182 we approved an acquisition of control of TWA by the Hughes Tool Company at a time when the latter held approximately a 45-percent stock interest in the carrier. Pursuant to the transactions evidenced by aforesaid letter agreement, the Tool Company increased its stock interest in the carrier to approximately 73 percent.

After appropriate notice, public hearings were held before Examiner Edward T. Stodola in Los Angeles, Calif., from October 3 through October 7, 1949. Following briefs to him by all parties, the examiner issued his report, attached hereto, recommending that the Board approve the further acquisition of control of TWA by the Hughes Tool Company, subject to the same conditions imposed by the Board in Docket No. 1182. Public counsel filed exceptions to the report of the examiner and a brief in support thereof. No party has requested oral argument.

Public counsel argued that the control of TWA exercised by the Hughes Tool Company and Mr. Hughes, particularly during the period from October 17, 1944, to January 7, 1947, has been detrimental to the interest of the carrier and the public interest. However, he concluded that disapproval of the additional stock acquisition would not adequately remedy or mitigate the existing situation. He further argued that the Board does not have adequate power to deal with the situation, and was left no alternative than to approve such additional stock acquisition.

The record in this proceeding does not permit us to reach any other conclusion than that reached by the examiner, viz., that the further acquisition of control should be approved as being consistent with the public interest and the requirements of the Act. Accordingly, after consideration of the entire record and the examiner's report, together with the contentions of each party in briefs filed in this proceeding, we agree with and adopt the findings, conclusions, and recommended decision of the examiner.

In view of the foregoing and all facts of record, we find—

1. That the acquisition of further control of TWA by the Hughes Tool Company as a result of the transactions

evidenced by the letter agreement of January 8, 1947, should be approved as being consistent with the public interest and the requirements of the Act; *provided,* however, that any control exercised by the Hughes Tool Company over TWA pursuant to our approval herein shall be subject to the terms and conditions imposed in our order of October 17, 1944, Docket No. 1182, as amended.

2. That the proceeding instituted by our order, serial No. E-289, dated February 7, 1947, should be terminated.

An appropriate order will be entered.

Lee, Jones, and Adams, Members of the Board, concurred in the above opinion. Rentzel, Chairman, and Ryan, Vice Chairman, did not take part in the decision.

ORDER

A full public hearing having been held in the above-entitled proceeding, and the Board, upon consideration of the record, having issued its opinion containing its findings, conclusions, and decision, which is attached hereto and made a part hereof;

IT IS ORDERED, 1. That the additional acquisition of control of Trans World Airlines, Inc., (TWA) by Hughes Tool Company (Toolco), found to exist by the Board's opinion and order of June 30, 1948, (9 C. A. B. 381) be and it hereby is approved, *provided,* that such additional control shall be exercised in accordance with the terms and conditions of the Board's opinion and order, 6 C. A. B. 153, as amended, approving the original acquisition of control of TWA by Toolco.

2. That the investigation instituted by order serial No. E-289, dated February 7, 1947, be and it hereby is terminated.

REPORT OF EXAMINER EDWARD T. STODOLA

Recommended that the Board approve the further acquisition of control of Trans World Airlines, Inc., (formerly Transcontinental & Western Air, Inc.) which resulted from the transactions evidenced by the letter agreement, dated January 8, 1947, between the Hughes Tool Company and TWA, subject to the same conditions imposed by the Board in its approval of October 17, 1944, of the Hughes Tool Company-TWA relationship under Docket No. 1182 (6 C. A. B. 153, 158).

Recommended that the proceeding instituted by the Board by order serial No. E-289, dated February 7, 1947, be terminated.

APPEARANCES:

Thomas A. Slack (Andrews, Kurth, Campbell & Bradley) for Hughes Tool Company.

Gerald B. Brophy (Chadbourne, Wallace, Parke & Whiteside) for Trans World Airlines, Inc.

Harold Morgan and *James L. Highsaw, Jr.*, Public Counsel.

PRELIMINARY STATEMENT

On October 17, 1944, in Docket No. 1182, the Civil Aeronautics Board approved an acquisition of control by the Hughes Tool Company (hereinafter referred to as Toolco) of Transcontinental & Western Air, Inc., (now operating under the corporate name of Trans World Airlines, Inc.,

and hereinafter referred to as TWA) under section 408 of the Civil Aeronautics Act of 1938, as amended, subject to certain conditions.[1] In an opinion and order dated June 30, 1948, the Board found that the transactions evidenced by a letter agreement, dated January 8, 1947, between Toolco and TWA, and accepted by the board of directors of TWA on January 9, 1947, have resulted in a further acquisition of control by Toolco over TWA for which approval is required under said section 408 of the Act.[2] The Board thereupon ordered additional hearings to determine whether the new or further acquisition of control found to exist is in the public interest and fulfills the conditions of section 408, and whether any further order or action by the Board may be appropriate pursuant to the provisions of the Act.

After appropriate notice, public hearings were held at Los Angeles from October 3 to October 7, inclusive, 1949.[3] Briefs were filed with the examiner by all parties on February 14, 1950.[4]

THE ISSUES

Since TWA is an air carrier and Toolco is a "person engaged in any other phase of aeronautics,"[5] the further

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[1] *Transcontinental & W. A., Control by Hughes Tool,* 6 C. A. B. 153 (1944).

[2] *Transcontinental & W. A., Control by Hughes Tool,* 9 C. A. B. 381 (1948).

[3] A part of the evidence received at the hearings has been withheld from public disclosure until further order of the Board. See order serial No. E-3380, dated September 27, 1949.

[4] Throughout the preliminary procedural steps in the second phase of this proceeding, respondents Toolco and TWA made known their desire to reserve all rights to contest the Board's opinion and order of June 30, 1948, in the event the Board's decision on the merits of the substantive case is adverse. See Report of Prehearing Conference served February 11, 1949, page 8: transcript of hearing herein, page 3.

[5] See findings at pages 198 and 199, *infra.*

acquisition of control of the former by the latter falls within the provisions of section 408 (a) (5) of the Act, which makes such an acquisition unlawful unless approved by order of the Board. Section 408 (b) of the Act provides that the acquisition shall be approved, upon such terms and conditions as the Board shall find to be just and reasonable and with such modifications as the Board may prescribe, unless the Board finds that the acquisition of control "will not be consistent with the public interest," or that certain conditions specified in that section of the Act will not be fulfilled.

While all parties agreed that the ordering part of the Board's order of June 30, 1948, disposing of the jurisdictional phase of this proceeding, would govern as the issues in this second phase of the case, there was deep disagreement as to the precise scope of the inquiry ordered by the Board. On the question whether the further acquisition of control over TWA should be approved, the aforesaid part of the Board's order of June 30, 1948, ordered hearings with respect to the issues contained in paragraphs (2) and (3) of the Board's order originally instituting these proceedings.[4] Paragraph (2) of the latter order merely restates the tests of approval provided for in section 408 (b) of the Act, which, once jurisdiction has been established, are enjoined upon the Board in any event. Paragraph (3) of the same order provides for taking any such other action (presumably other than approval or disapproval of the further acquisition of control) as may be appropriate pursuant to the provisions of the Act. Accordingly, in determining whether the further acquisition should be approved

[4] Order serial No. E-289, dated February 7, 1947.

the primary question to be resolved is whether the transaction here under scrutiny is, or is not, consistent with the public interest.

Respondents Toolco and TWA both take the position that an inquiry as to whether or not the new or further acquisition of control which resulted from the letter agreement meets the public interest test of section 408 (b) of the Act must necessarily be limited to an examination of possible conflict between the aeronautical activities of Toolco and the increased measure of its control over TWA as an air carrier. In other words, it is their view that the Board in this second phase of the proceeding can look only to such conflict with the public interest as may exist, if any, between the aeronautical activities of the controlling company and the well-being of TWA as a certificated air carrier. Under this view, the hearings which are the subject of this report would have been limited to an inquiry into Toolco's plans, present and contemplated, for its aircraft division, and the propriety of approving the further acquisition would be tested only by the conflict of interest, if any, between Toolco's aeronautical pursuits and its control over the carrier. Public counsel, on the other hand, took the position that the inquiry must necessarily be a broader one; that in a control case of the type here under consideration the question as to whether the further acquisition of control is or is not in the public interest depends upon the application of the criteria set forth in section 2 of the Act to the facts and circumstances respecting Toolco's actions and policies with regard to TWA in the matters of financing, management, and related activities; and that in order to determine whether Toolco's increased measure of control is in the public interest it is pertinent to examine the

manner of the general exercise of Toolco's control since the date of the Board's original approval thereof.

The examiner was compelled to reject respondents' view.[7] There is nothing in the Act, however the problem of the true intent of Congress is approached,[8] which would have

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[7] Both at prehearing conference held February 4, 1949, as reflected in the Report of Prehearing Conference served February 11, 1949, pages 3 and 4, inclusive, and at the preliminary stages of the hearing herein, transcript pages 2 to 5, inclusive.

[8] Apparently upon the assumption that the meaning and significance of the phrase "public interest" were well understood, its purported function in the statute received little consideration from Congress, either at committee hearings or in debates on the floor. This phrase offers splendid illustration of the fact that critical words or phrases of statutes are rarely, if ever, entirely unambiguous or susceptible of precise definition or plain meaning. As is common with terms of this nature, their definition more often than not depends upon the interests of the party or person attempting to clothe the phrase with meaning.

It is, of course, elementary that a statute must be interpreted as a whole. Accordingly, it is necessary that the public-interest criteria set forth in the declaration of policy contained in section 2 of the Act be applied to the facts when determining whether a transaction arising under section 408 is consistent with the provisions thereof. It will, however, be observed that by virtue of the express language of section 2 the factors listed therein are not to be treated as exclusive.

Moreover, it will be remembered that under the Air Mail Act of 1934 (48 Stat. 933, Ch. 466) it was unlawful for any corporation engaged in any phase of aeronautics to acquire or hold any stock interest in a corporation holding an air mail contract. The Civil Aeronautics Act of 1938, which repealed the above-mentioned provisions of the Air Mail Act of 1934, provides that the Board may approve the acquisition of control of an air carrier by a corporation engaged in any other phase of aeronautics. But in clothing the Board with this authority, it is clear that Congress intended that it have very extensive powers over acquisitions of air carriers. See Report of Federal Aviation Commission, pp. 69-71 (1935); Hearings before Committee on Interstate and Foreign Commerce, House of Representatives, H. R. 5234, 75th Cong., 1st Session, pp. 265-266, 341-344; Hearings before Senate Subcommittee on Interstate Commerce, U. S. Seenate, S. 2, 75th Congress, 1st Session, pp. 414-415;

given the examiner the authority to proscribe the inquiry in this second phase of the proceeding to the limited question urged upon him by the respondents. On the contrary, it appears clear that, once jurisdiction over an acquirer of an air carrier is found to exist, the testing of the propriety of approving the acquisition requires a rather broad inquiry into the relationships between the controlling and the controlled companies.

An examination of the additional control relationship here involved in the light of the standards set forth in section 2 of the Act, which the Board has repeatedly found to be necessary in similar cases,[9] requires inquiry into the actions and policies of the controlling company with respect to TWA for the period during which the prior-approved control existed. Aside from any undesirable influence on an air carrier which might arise because of the acquirer's interest in a given phase of aeronautics, an acquirer of an air carrier is not without responsibility in other respects for an air carrier's general capacity to perform its public responsibilities. For inevitably the controlling company, by virtue of its investment in the acquired carrier, will endeavor to make itself accountable—as indeed the acquirer here under scrutiny had—for the managerial efficiency, the operating economy, and the financial integrity of the controlled carrier. Accordingly, in determining whether or not

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and Hearings before Committee on Interstate and Foreign Commerce, House of Representatives, H. R. 9738, 75th Congress, 3rd Session, pp. 44-45.

[9] *Western A. L., Acquisition of Inland A. L.*, 4 C. A. B. 654, 656 (1944); *National-Caribbean-Atlantic Control Case*, 6 C. A. B. 671, 676 (1946); *American Air., Control of Mid-Continent Air.*, 7 C. A. B. 365, 372-373 (1946); and *Central Air., Control Case*, 10 C. A. B. 538, 546-547 (1949).

a particular acquisition should be approved, it is necessary to consider the over-all impact of the acquirer's plans and policies with respect to the controlled carrier.

It must, however, be remembered that in the instant proceeding we are dealing with a relationship which in principal part has the sanction of the Board. Since October 1944 Toolco has exercised control under a 45-percent stock interest in TWA pursuant to Board approval. The specific question now to be resolved is whether the additional degree of control resulting from the letter agreement of January 8, 1947, is in the public interest. As a result of the letter agreement Toolco acquired a 73-percent stock interest in the carrier.[10] The presence of the additional 28-percent control, together with the prior existence of a 45-percent control on the part of the same acquirer, appear to make plain the specific problems to which the examiner must address himself in the second phase of this proceeding.

Complete actual and legal control has been made certain under the additional acquisition. This new complete control, by virtue of the 28-percent additional ownership, vests in not a new controller, but in the same company exercising the 45-percent control. It would therefore appear entirely proper to test what this same controller may do with complete, unqualified control with what it did under a 45-percent ownership of the carrier. If we are not to use this reasonable approach, we are left merely with the acquirer's prognostications and plans with respect to its future policies for the carrier. Accordingly, an examination of the additional control relationship here under consideration

[10] The details concerning the acquisition of the additional stock interest are set forth at pages 206 and 207, *infra*.

requires an examination of the activities of Toolco with respect to TWA for the period during which the prior approved control existed. Such an examination, it must be clear, cannot be made for any other purpose at this time but to indicate the kind and character of control which for the past years has been, and which may in the future continue to be, exercised by the same controller exercising the additional degree of control arising from the transactions evidenced by the letter agreement of January 8, 1947.

It should be clear from the definition of issues outlined above, with respect to which each party submitted considerable proof, that the examiner proposes no broader scrutiny of the transactions here under consideration than that dictated by law, which he is obliged to follow. The manner in which this proceeding has arisen, the law under which the Board acquired jurisdiction, and the situation of fact in which this proceeding is set may be novel under section 408 of the Act, but the principles applicable to the disposition of the primary issues before the examiner are familiar rules of law and policy long followed by other agencies and by the Board.[11] Under the circumstances, the

[11] See footnote 9 for C. A. B. precedents. Provisions of the Civil Aeronautics Act relating to consolidation, merger, and acquisition of control were modeled after similar provisions of the Interstate Commerce Act and amendments thereto. Although the Interstate Commerce Act does not have a provision analogous to section 408 (a) (5), under which the Board acquired jurisdiction herein, the merits of proposed acquisitions under the Interstate Commerce Act are tested by the identical standard of public interest. I. C. C. decisions on the control of one company by another in the case of both railroads and motor carriers indicate the Commission's concern with a wide variety of controlling factors as bearing upon the public interest, including, among others, specific benefits to the public or the lack thereof, the availability of newer equipment, and the propriety of contemplated financial arrangements. See,

nature and scope of the investigation ordered by the Board make it necessary that Toolco's past actions and policies with respect to TWA in matters of financing, management, and related activities be examined to determine the net effect of the additional acquisition upon the public interest.

THE FACTS

All of the outstanding stock of Toolco is owned by Howard R. Hughes, a well-known industrialist, movie producer, aviator, and aeronautical engineer. Mr. Hughes is president and a member of the board of directors of Toolco. The various Hughes enterprises are all operated either

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for example, *Nickel Plate Unification*, 105 I. C. C. 425 (1926); *Unification of Southwestern Lines*, 124 I. C. C. 401 (1927); *Control of B., R. & P. Ry.*, 131 I. C. C. 750 (1927); *Acquisition of Control by Panhandle & S. F. Ry. Co.*, 154 I. C. C. 342 (1929); *Richmond Greyhound Lines, Inc.—Control—Peninsula*, 5 M. C. C. 394 (1938); and *Wheeling & L. E. Ry. Co. Control*, 267 I. C. C. 163 (1946).

In administering the public-interest tests of sections 221 and 310 of the Communications Act of 1934 (the former concerned with consolidations, purchases, and acquisitions of control of one telephone company by another; the latter covering the transfer of licenses issued to radio broadcasting stations) the Federal Communications Commission has likewise relied upon a wide variety of public-interest factors in granting or withholding its approval. See, for example, *Lancaster Broadcasting Service, Inc., et al.*, 2 F. C. C. 164 (1935); *Parmer et al.*, 2 F. C. C. 172 (1935); *Crown Point Telephone Co., et al.*, 3 F. C. C. 152 (1936); and *Schield, Smithson, and Lewis et al.*, 7 F. C. C. 186 (1939).

Similarly, the Federal Power Commission, in exercising its authority to approve or disapprove leases or dispositions of property, mergers, or consolidations of facilities and purchases of securities, under the public-interest standard of section 203 of the Federal Power Act, has taken the position that the test of public interest is necessarily a broad and comprehensive standard embracing consideration of all the statutory purposes which that Act was designed to accomplish. See, for example, *Public Service Electric and Gas Co. of Newark*, 1 F. P. C. 546 (1938); *Pennsylvania Electric Company*, 3 F. P. C. 544 (1943); and *Southwestern Public Service Company*, 5 F. P. C. 703 (1946).

directly or as divisions under the corporate organization of Toolco. Closely associated with Mr. Hughes is Noah Dietrich, executive vice president of Toolco, who is responsible for the day-to-day business direction of the company.

Prior to Board approval of its original acquisition of control of TWA, Toolco had been interested in the development of the Constellation-type aircraft, and originally contracted with the Lockheed Aircraft Corporation for the manufacture of such aircraft, partly for the benefit of TWA. In 1942 Toolco assigned all of its rights to such contracts to TWA in consideration of TWA's assumption of Toolco's obligations thereunder. Apart from its interest in the development of the Constellation plane and its acquisition of control of TWA, Toolco has been engaged in certain other phases of aeronautics through a division operated under the name of Hughes Aircraft Company at Culver City, Calif. The present record, however, shows that there has been no appreciable change in Toolco's operations in the field of aeronautics since the Board's order of October 17, 1944, originally approving Toolco's control of TWA. The principal activities at present of the aircraft division of Toolco consist primarily of experimental work on aircraft armament and accessories for the armed services. Except for the manufacture by its aircraft division of an airplane warning device known as the Hughes Airline Radar,[12] Toolco has no plans at present to develop or produce either aircraft or aircraft equipment which might be

[12] The warning device is an instrument which works on the radar principle, and is capable of warning a pilot of his proximity to any obstruction. On October 29, 1947, the Board, by order serial No. [illegible], modified the original order approving acquisition of control under Docket No. 1182 so as to permit Toolco to sell the aforesaid radar units to TWA.

used in commercial aviation and sold to TWA or other air carriers.[18]

When the Board approved Toolco's control of TWA in 1944, TWA was already one of our largest domestic air carriers, operating from coast to coast and authorized to serve 7,743 route miles. At the time of that approval, Jack Frye, E. Lee Talman, and T. B. Wilson served as president, executive vice president, and chairman of the board of directors, respectively, of TWA. These men continued in their respective capacities until their resignation during the managerial reorganization of the carrier in the early months of 1947, except that the late Paul E. Richter returned to his duties as executive vice president in 1945 after service with the armed forces, and Mr. Talman thereafter served as senior vice president. John M. Lockhart served as treasurer of TWA during the foregoing period except for a leave of absence from the carrier for approximately a year, during which time that position was held by John B. Thurston. C. W. Perelle, once a vice president of Toolco, was in charge of the aircraft division of the company during a part of the period here under review.

In the years between 1944 and 1947 the Board authorized very substantial additions to the TWA system, including 21,108 miles of route in overocean or foreign air transportation and 3,365 additional miles of route in domestic service. TWA is one of four domestic airlines selected to operate on a major scale in the international field after the recent war. Of the four, TWA was awarded the most route

[18] A plywood flying boat, HK-1, which Toolco developed and built under a government contract, has commercial cargo possibilities; however, it was not intended to be used for anything but military purposes, and Toolco has no plans to build others like it.

miles.[14] At present, TWA is authorized to serve 11,582 miles in domestic air routes and 23,317 miles in international air routes, or a total of 34,899 miles.[15]

To accomplish the extraordinary expansion made necessary by the additional routes thus acquired, and to meet its ordinary reconversion needs for the postwar period, TWA began planning and providing, well before the war ended, for additional flying equipment, for stocks of spare parts, for new overhaul bases, ticket offices, communications facilities, and more trained personnel. The Frye management developed a new organization structure for the company, which, among other things, regionalized control over the carrier's traffic activities; it added a number of high-salaried executives to top-level positions; and it set up administrative offices in Washington at considerable expense.

At the end of 1944 TWA had only 38 planes in service, all of the DC–3 type. A number of DC–3 planes and the five Boeing Stratoliners delivered to the armed services early in the war were returned to the carrier while the war was still in progress, and were reconverted to commercial passenger use. As the war approached its end, TWA endeavored to obtain, through either purchase or lease, more of the planes being turned over by the Government to the airlines. The carrier, moreover, had an option on 40 of the Constellations originally assigned to the armed services, and a preferred delivery position on new versions of the same aircraft. By the end of 1945 TWA had a fleet

[14] *Northeast Air. et al., North Atlantic Routes*, 6 C. A. B. 319. The decision in this case was rendered on July 5, 1945.

[15] The above mileage figures include mileage served under exemptions as well as certificated mileage.

of 93 aircraft, of which 67 were owned and 26 were leased from the Government. Of the aircraft then on hand, 18 were Constellations and 8 were of the DC–4 type. In addition, 18 Constellations were expected for delivery in 1946.

At the end of 1944 TWA had only 4,987 employees engaged in its commercial services.[18] By the end of 1945, the number of employees in its commercial services had risen to 9,960, or an increase of approximately 100 percent. By the end of 1946 almost 4,000 additional employees had been hired.

During 1945 two large hangars and associated buildings, which were formerly a part of the North American Aviation Bomber Plant at Kansas City, Kans., were leased by TWA for an overhaul base; during the same year temporary maintenance and overhaul facilities for international operations were acquired at the Newark (N. J.) Municipal Airport; and a large-scale program of increasing and improving ticket and reservations offices and other facilities was begun in 1945. During the same year the Frye management developed plans for aircraft purchases at an estimated cost of approximately 125 million dollars.

Under Frye's leadership, TWA pioneered in the development of new types of aircraft and operating procedures. TWA was the first scheduled carrier to purchase and operate the Douglas DC-2 type aircraft, the forerunner of the widely used DC-3. In July 1940 TWA put into operation five Boeing 307's (Stratoliners), four-engine transports with pressurized cabins. TWA was the first carrier to use aircraft of this type in service within the continental United

[18] Approximately 1,800 others, however, were engaged in the carrier's war-contract services.

States. In 1939 the carrier had become interested in the development of a new four-engine aircraft (the Constellation already referred to) which was to be larger and faster than the Boeing 307. The carrier has also pioneered new operating standards, including safety devices made possible through technological improvements.

When Toolco began buying into TWA in 1939, Frye welcomed the interest and cooperation of Mr. Hughes, whom he considered one of the industry's ablest technicians.[17] They collaborated in the design and development of the Constellation-type air transport. They collaborated closely in other respects in the operation and management of TWA, notably in purchase of necessary equipment, such financing as was necessary before the end of the war, and the prosecution of TWA's announced intention of 1943 to seek certain international routes.[18]

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[17] Mr. Frye testified in part as follows in response to a question relative to the contributions of Mr. Hughes to the progress and welfare of TWA: "• • • One thing about Mr. Hughes that interested me, and I enjoyed—caused me to enjoy working with him over a period of years, is that he did have an understanding of the airplane. In fact, the airplane is not a developed field air transportation as yet. It has many years yet to go before it will be there, and in the meantime if it was attempted to be treated by either the Government or the airlines, or a combination of them, as any other fully developed business is, it will be very, very slow in ever attaining its growth and development. Air transportation may be a great business some day, as, if and when it can be operated safely and dependably, and on schedule, but until it gets there a great deal of money has to be spent and people who have understanding of the technical problems involved will have to devote time and effort to solving those problems.

"Now, Mr. Hughes is one of the few people in the industry that has any of that kind of understanding • • •" (Tr. pp. 373–374).

[18] In response to questions on matters of TWA policy which needed to be cleared with the controlling stockholder, Mr. Frye testified in part as follows: "Well, through the years I have been

There developed, however, a gradual but ever-widening rift between the Frye management and officials of Toolco, including Mr. Hughes, with respect to the management plans and operating policies for the carrier. In principal part, this breach was due to a growing dissatisfaction with the Frye management and developing differences over means of meeting the financial needs of the carrier, although the situation was not without its interplay of personalities and such clash of personal ambitions and views as often arise between the officials of a controlling corporation and the management of an affiliate.[19]

Tested by the property then owned, the volume of traffic carried, and the company's earning power, TWA appeared to be sufficiently capitalized during the war period. Thus, as of December 31, 1944, the carrier had a net worth in excess of 16 million dollars. It then had no long-term debt,

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in the airline business I have had a number of controlling stockholders such as General Motors and Pennsylvania Railroad and banking interests such as Lehman Brothers, and it was generally the practice of management to consult those groups when important decisions were to be made concerning expansion of the company, financing, purchases of equipment, and so forth * * *" (Tr. p. 365).

[19] Mr. Frye testified in part as follows concerning his relations with Mr. Hughes and Mr. Dietrich: "* * * Since his (Mr. Hughes') views paralleled mine * * * I was interested in helping bring about his acquisition of control of TWA. However, his people in Houston, headed by Mr. Dietrich, had entirely different views as to policies concerning the operation of an airline. They looked at the results as a business man would, right along with the result of other airlines who were not engaged in the type of pioneering and development and expansion that TWA was, and they compared the results critically. TWA, I think, was the first interest that Mr. Hughes had had in many years in which he didn't turn over the direction of to his Houston group. Those people naturally resented not being included in that picture * * *" (Tr. pp. 371-372).

a capital stock base of approximately 5 million dollars,[20] paid-in capital surplus of 4 million dollars, and earned surplus in excess of 7 million dollars. TWA's management, however, was acutely aware that substantial financing would be necessary to meet the carrier's postwar needs. The reason for their concern is obvious. TWA, like every other large certificated carrier, was suffering from a deficiency in air transport equipment before the war ended. Indeed, TWA had a substantial quantity of new-type planes on order even before this country entered the war. Moreover, the certification of TWA of extensive international routes in July 1945 made it imperative that the carrier take immediate steps to obtain capital sufficient to discharge its added responsibilities.

From February 1944 until the close of 1946 the management of TWA made repeated requests of Toolco for approval of plans to finance the carrier's expansion in routes and equipment. There were repeated discussions relative to financing within TWA's staff, between TWA's officers and the management of Toolco, and between officers of both Toolco and TWA on the one hand and various financial institutions and underwriting groups on the other. The principal officers of the carrier, particularly Messrs. Frye, Talman, Lockhart, and Thurston, were of one mind in contending that TWA's financial position needed to be strong enough to permit it to purchase equipment on a competitive basis with other airlines. To raise the necessary capital, they were convinced that the sale of equity securities in

[20] The carrier at that time had an authorized capitalization of 1,000,000 shares of common stock of the par value of $5 per share, of which 975,586 shares were then issued and outstanding.

substantial volume was decidedly preferable to reliance upon large borrowings. They took the further position that if a substantial proportion of TWA's total capital was to be represented by equity rather than by fixed obligations, it was necessary that the carrier perform its financing well in advance of actual expenditures. Moreover, they feared that the freezing of the common stock to the number of shares then existing would eventually affect the amount of senior financing (preferred stock and debt) which could be promoted and which, in turn, would keep TWA from having enough capital to meet its needs. Finally, they warned against the dangers of excessive debt and urged that the carrier take advantage of the strong capital market conditions before unfavorable factors set in to impair the popularity of airline securities.

Before additional common stock in any considerable amount could be sold, it was necessary that the agreement and act of consolidation, forming the certificate of incorporation or charter of TWA, be amended so as to increase the authorized shares of capital stock. The carrier is a Delaware corporation, and under Delaware law such an amendment, to be effective, had to be approved by the holders of the majority of the outstanding common stock of the company. Since Toolco held approximately 45 percent of the outstanding stock and the rest of the shares in the carrier were widely scattered, the consent of Toolco as the principal stockholder was, as a practical matter, required before the certificate of incorporation could be amended to increase the authorized common stock of the carrier. Accordingly, before any plan of financing the expansion of operations of the carrier by the sale of common stock could be effectuated by the TWA management, the charter of

the carrier required change to authorize the issuance of additional stock.[21]

There is no evidence that at any time during the long period of effort on the part of the carrier to get Toolco committed to some specific plan for financing, either Mr. Hughes or Mr. Dietrich disagreed with the management's basic position that substantial additional financing would be necessary, or that they denied TWA's representatives a hearing with respect thereto. However, Mr. Dietrich made it clear to Mr. Talman that the TWA management was not to make any commitments regarding financing without first clearing with him, and Mr. Frye had a specific understanding with Mr. Hughes that no common stock was to be issued without the approval of Mr. Hughes.

But in spite of numerous preliminary discussions and repeated efforts on the part of the Frye management to arrive at a mutual understanding with respect to a program for large-scale financing, TWA officials were not able to sit down with officials of Toolco to work out a detailed financing program agreeable to both until July 17, 1945, when Mr. Talman and Mr. Thurston met with Mr. Dietrich and Mr. Perelle at Houston, Tex. Mr. Dietrich then recognized that TWA's capital needs could not be financed without increasing the carrier's common-stock base. Mr. Dietrich stated he was willing to commit Toolco to vote its stock to permit a liberal amendment of a carrier's certificate

[21] Although the individual consent of Mr. Hughes was not technically required to amend the charter, Toolco and Mr. Hughes are used interchangeably herein as the principal stockholders of TWA for the purpose of consent to such amendment. It was conceded at the hearing that where, as in the instant case, a wholly owned corporation acts as a stockholder, its sole owner may be considered *in pari passu* with itself.

of incorporation to increase the carrier's authorized capital stock. However, Mr. Dietrich further informed Mr. Talman that final decision in the matter was up to Mr. Hughes, but indicated that he would do all he could to assist in obtaining Mr. Hughes' approval. It was tentatively agreed that TWA would need new financing to the extent of approximately 100 million dollars, and a financial plan was formulated whereby a substantial portion of such funds would be raised through the sale of common and preferred stock. Then, during the early days of August 1945, Mr. Frye, as president of the carrier, and Mr. Hughes had discussions during which Mr. Frye submitted plans to raise approximately 130 million dollars in new capital funds. Mr. Hughes, however, wanted further time to consider the plans and agreed to meet with Mr. Frye soon again for final agreement thereon. Thereafter, in mid-September 1945 Mr. Frye sent Mr. Hughes a strongly worded appeal urging immediate action with respect to financing for the carrier. Nothing, however, came of these efforts.

Toolco's reluctance to participate in any of the plans submitted by the Frye management, each of which proposed substantial equity financing, needs some specification at this point. Toolco's principal officers, including Mr. Hughes and Mr. Dietrich, feared that Mr. Frye's chief objective appeared to be expansion without regard to profit making. It was Mr. Dietrich's view that, in the years prior to 1947, TWA's management exercised less control over budgets and expenses than did the managements of such competitors as United and American. He attacked certain expenditures made in the immediate postwar period as being improvident. He complained that TWA had been carrying more than its proportionate share of the cost of pioneering for

the air transport industry. Both Mr. Hughes and Mr. Dietrich felt that Frye's recommended program for aircraft purchases was far too ambitious and would have seriously overequipped the carrier.[21]

As the financial overseer of the Hughes enterprises, Mr. Dietrich personally lacked confidence in the management of TWA for several years prior to 1947; gradually, he and his associates in the Houston offices of Toolco were successful in convincing Mr. Hughes that certain operating economies were absolutely necessary to the life and welfare of TWA, and that the existing management was not disposed to effectuate them. After the war ended, Mr. Dietrich's previously expressed desire for substantial equity financing for the carrier was somewhat modified by his lack of faith in the Frye management and by fears that the funds contemplated would not be wisely spent. Attempts at arriving at a financing program acceptable to Toolco were therefore impeded by the lack of faith on the part of Toolco officials in the Frye management.

Following the foregoing failures of TWA's management and Toolco to agree on a program to finance TWA's postwar needs, a number of other proposals to raise the required capital were considered.

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[21] Indeed, in his testimony at the hearing (September 11, 1947) on the first phase of this proceeding, Mr. Dietrich stated that TWA did not need additional equipment, and that in his opinion all the major airlines were then rapidly becoming overequipped. He contended then that the increase in available seats as the result of postwar equipment acquisitions of the major carriers was outstripping available traffic volumes and causing unprofitable operations. He also contended that the airlines should have limited their acquisitions to DC-4's after the close of the war, which were then available in large numbers as army surplus, and that the armed services should have borne the cost of developing new transports and thereafter leased them to the airlines.

CAB Opinion and Order, October 6, 1950

On October 3, 1945, TWA addressed a letter to the Export-Import Bank requesting a line of credit to the carrier of $150,000,000, to be provided jointly by the Export-Import Bank and the Reconstruction Finance Corporation.[33] Conversations were had from time to time with representatives of both institutions with respect to TWA's financing program. Meanwhile, in November 1945 a program of debt financing was entered into with the Equitable Life Assurance Society of the United States, whereby Equitable purchased an issue of 3-percent sinking-fund debentures from the carrier in the principal amount of $30,000,000.[34] On December 19, 1945, in a letter to the Reconstruction Finance Corporation, the carrier referred to previous conversations with the RFC and the Export-Import Bank concerning TWA's financial needs. The letter proposed a program covering $100,000,000 of general credit to TWA junior to the Equitable loan of $30,000,000, and secured by the equipment assets to be acquired through the use of this credit. The proposal was rejected.

When the anticipated loans from the Export-Import Bank and the RFC did not materialize, principally because the carrier had failed to establish that private financing was unavailable, both TWA and Toolco continued to search for major means of raising additional funds. On May 10, 1946, Equitable purchased an issue of 2¼-percent sinking-fund

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[33] TWA was about to inaugurate service on its international routes, and these operations were expected to require very substantial capital expenditures, including a large number of four-engine aircraft.

[34] The debentures were issued pursuant to a purchase agreement dated November 30, 1945, and in accordance with the provisions of a trust indenture dated December 1, 1945.

debentures in the amount of $10,000,000[25] from TWA. TWA next considered a financing proposal by the Bankers Trust Company of New York. This financing plan, which came into being shortly after the second Equitable loan, involved a proposed bank credit of $80,000,000, contingent upon the company's doing an added $20,000,000 in equity financing, presumably through the sale of common stock. Preliminary discussions on this proposal were had by Mr. Lockhart, TWA's treasurer, in company with Mr. Chauncey Dodds of the RFC, who was present because of TWA's prior negotiations for RFC credit. The Bankers Trust Company agreed to head the banking group providing the loan funds. It expected to be regarded as TWA's principal bank, and agreed to take $10,000,000 of the total loan. Nothing conclusive developed from these discussions, principally because Mr. Frye was unable to obtain a firm commitment from Mr. Hughes for the equity financing involved, although Toolco was in a position to take up a pro rata share of the contemplated stock offering.

There followed in June 1946 further negotiations and further discussions in attempt to arrive at a definite plan for financing the carrier. Representatives of several eastern financial institutions, including the Bankers Trust Company of New York, the Union Trust Company of Pittsburgh, and the First of Boston Corporation, were invited to meet with Mr. Hughes and Mr. Dietrich in Los Angeles for this purpose. Neither Mr. Frye nor Mr. Talman attended this meeting.

[25] This second series of debentures was issued under the trust indenture of December 1, 1945, as amended by a supplemental indenture dated June 1, 1946.

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The discussions of June 1946 led to further meetings in Los Angeles in the month of August of the same year. TWA was represented at these meetings by Mr. Talman. These discussions led to a proposal for large-scale financing through a group of banks headed by the Union Trust Company of Pittsburgh, now the Mellon National Bank and Trust Company. A complete plan was evolved which would have raised considerable capital. The underwriting was to be done by the First of Boston Corporation. This program embraced total financing of approximately 100 to 110 million, including the continuance or refunding of the Equitable loans. In the event Equitable stayed in the picture, the plan including a 35-million-dollar sale of stock by the carrier, 25 million dollars in direct credit from the banks, and an additional 10 million to be furnished by Toolco. The plan for the sale of equity securities was to be a flexible one, but it contemplated an offering of straight preferred stock in considerable volume. The amount of capital to be furnished by Toolco was all to be raised through the purchase of common stock from the carrier.

There was delay on the part of the parties concerned in reducing the various tentative lending and underwriting arrangements into formal agreements, even though Mr. Hughes had agreed to the substantial equity financing involved in the over-all plan. The bankers were apparently wary of a possible change in general market conditions which might make it difficult for the underwriters to carry out their part of the transaction. Moreover, the proposed financing was conditioned upon (a) a change in the management of TWA, (b) the security market's maintaining its relatively favorable mid-1946 level.

To meet its obligation in the proposed financing, Toolco, in a letter dated August 28, 1946, offered to purchase

222,222 shares of common stock from TWA at a price of $45 a share. However, a letter from Mr. Dietrich to Mr. Talman dated September 3, 1946, withdrew any previous offer of Toolco to purchase stock in the carrier since (a) Toolco's purchase of common stock, the public offering of stock securities, and the bank credit arrangements were to be concluded simultaneously, (b) neither the underwriters nor the bankers would make final commitments until the common-stock financing was accomplished, and (c) he, Dietrich, had been instructed by his company to withdraw the previous offer.

From its terms and from the testimony adduced with respect thereto, the apparent sense of the September 3 letter is that Toolco would not go through with the offer, since neither the underwriters nor the bankers would commit themselves on the entire program, and the bankers presumably would negotiate on the credit involved only after the equity financing had been completed. In the end the unresolved differences between Toolco and the management of TWA, plus Toolco's withdrawal of its proposed purchase of 222,222 shares of the carrier's common stock and a definite unfavorable turn in the security markets in September 1946, resulted in a complete abandonment of the so-called Union Trust plan.

TWA's financial condition deteriorated rapidly during the year 1946. In the months of November and December 1945, and during the first part of 1946, the previous months of relatively stable operations of the carrier were turned into severe losses, resulting primarily from the heavy expenses attending the inauguration of the international routes. The corner appeared turned in June 1946, when a slight profit was shown. In June and July, however, the

entire industry began suffering a decline in earnings as a result of a series of unfortunate accidents in May through July of that year. Immediately thereafter came two special developments, the pilots' strike and the grounding of the Constellations, which for the last half of 1946 resulted in the operation of only a skeleton service by TWA. In 18 months the stockholders' equity had been reduced from $18,665,483 at June 30, 1945, to $4,177,518 at December 31, 1946, a reduction of almost $14,500,000. Short-term debt amounted to $4,340,000, and long-term debt to $38,947,124. For the calendar year 1946, the carrier showed a net loss of approximately 14½ million dollars.

Toward the end of 1946 TWA's financial condition became most critical. All efforts of refinancing had failed. The record shows that in the closing months of 1946 TWA could not attract any capital, and was facing bankruptcy.[36] The record further shows that Toolco was willing to be of further financial assistance, but was unwilling to advance additional money to save the carrier without assurance that the management of the carrier would be replaced and the carrier reorganized and run in agreement with the wishes of the principal stockholder and/or its representatives.

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[36] The years 1946 and 1947 were a time of crisis not only for TWA but for most of the air transport industry. A number of carriers were in serious financial difficulties and nearly all suffered severe operating losses. Conditions became so alarming that in July of the latter year President Truman appointed the President's Air Policy Commission, and that was followed soon thereafter with action by Congress in setting up the Congressional Aviation Policy Board. Both investigating groups made inquiry into the causes of the industry's financial plight.

CAB Opinion and Order, October 6, 1950

On January 9, 1947, the TWA board of directors accepted a proposal of Toolco dated January 8, 1947, herein known as the letter agreement, under which Toolco agreed to lend TWA $10,000,000, and the board of directors would be reconstituted so that a majority of the directors of the carrier would be nominees of Toolco. On January 9, 1947, the board of directors was so reconstituted. Pursuant to the above-mentioned agreement between Toolco and TWA, Toolco lent TWA $10,000,000, in the period from January 9, 1947, through May 29, 1947, the loans being evidenced by TWA's subordinate convertible 2¾-percent notes due June 2, 1956.[17] These notes were convertible by the holder at any time before maturity into TWA's common stock at the par value thereof ($5), or at the average of the prices at which the last sale of such stock was made on the New York stock exchange on each of the last 10 business days preceding receipt by TWA of notice of exercise of the right to convert, whichever was greater. TWA could require the holder to convert on January 1, 1950, and on that day only, at a price calculated by the same method, by mailing to the holder notice of its election so to do.

On December 26, 1947, Toolco, in a further agreement with TWA, waived its right to require payments of these

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[17] The trust indenture under which TWA sold its debentures to Equitable contained certain restrictions against the creation of additional debt by the carrier. On January 31, 1947, Toolco, TWA, and Equitable entered into a so-called three-party agreement which provided, among other things, for Equitable's waiver of the covenants of the trust indenture to the extent necessary to permit TWA to incur the indebtedness evidenced by the convertible notes. Equitable has also waived compliance by TWA with other covenants of the trust indenture, as from time to time amended, on a number of occasions.

notes, or interest thereon, in money or in any form other than stock. On June 15, 1948, TWA's board of directors authorized an offer to Toolco to convert the $10,000,000 principal amount of the notes and interest accrued thereon to June 18, 1948, into TWA's common stock at a price of $10 per share. The offer was accepted by Toolco on June 8, 1948. The resulting agreement was approved by TWA's stockholders (including the holders of a majority of the common stock not owned by Toolco) on August 10, 1948.[28] The agreement was consummated on or about August 24, 1949, and 1,034,423 shares of common stock were issued upon surrender of the notes for retirement. Had TWA had the right to require conversion on June 18, 1948, the date of acceptance by Toolco of the proposal, the conversion price would have been $15.80 per share, and Toolco would have received 654,699 shares.[29]

As a result of the letter agreement, Toolco acquired an indefeasible right to a substantial additional stock interest

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[28] On the same day TWA's stockholders also voted to increase the total number of authorized shares of common stock of the carrier from 3,000,000 to 4,000,000 shares. The authority to issue common stock up to 3,000,000 shares had been voted the previous year.

[29] In recommending TWA's offer to convert at $10 per share to its stockholders, the board of directors of the carrier were of the opinion that the successful sale of equity securities in the future would be impaired so long as doubt existed as to the time of conversion of the 2¾-percent notes, or the price at which they may have been converted into common stock. The board of directors urged that conversion would eliminate doubt as to the time and price of conversion over the years pending the maturity of the notes, and that conversion was in the interest of the carrier. Efforts by a minority stockholder to enjoin the proposed conversion were denied by the U. S. District Court for the District of Delaware. *Sneider* v. *Transcontinental & Western Air.*, 79 Fed. Supp. 339 (1948).

in TWA.[20] After the conversion arrangements were consummated in August 1948, Toolco's ownership interest in the carrier rose from 45 to approximately 73 percent, thereby obtaining, as a result of the transactions evidenced by the letter agreement, complete legal control of the carrier. However, even before the conversion, and as a direct result of the letter agreement, Toolco had acquired complete management control of the carrier. Prior to January 9, 1947, all of the directors of TWA were nominees of Mr. Frye. Reconstitution of the TWA board of directors, pursuant to the letter agreement, made certain that the management of the carrier on and after January 9, 1947, was in agreement with the wishes of the principal stockholder and/or its representatives.

Drastic management changes followed the reconstitution of the board of directors. Frye, Wilson, Talman, and Richter resigned. A number of top-salaried executives were released. The new management instituted a vigorous program of economy by installing a rigid system of expenditure control and dismissing thousands of the carrier's employees. Further changes consisted of a revision of the management structure of TWA[21] and a critical review of the carrier's equipment program.

As a part of Toolco's program of retrenchment, TWA, after acquiring 4 Model 049 Constellations in March 1947, canceled its commitments for the Model 649 equipment program. But before that year was over, it became evident

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[20] See *Transcontinental & W. A., Control by Hughes Tool*, 9 C. A. B. 381, 385–391.

[21] Primarily in the change from the regionalized to a so-called straight-line type of organization.

that the carrier would need substantial additions to its aircraft fleet. However, TWA's heavy burden of debt seriously impaired its ability to finance on its own the necessary purchases of equipment. As of June 30, 1947, the carrier's short-term debt stood at more than $1,400,000 and its long-term debt amounted to approximately $53,800,000. As of September 30, 1948, the carrier had short-term debt outstanding in the excess of $4,000,000, and its long-term indebtedness amounted to $51,461,600. In spite of this heavy debt structure and the debt service on its fixed obligations,[22] TWA, with Toolco's aid, continued to expand its fleet of aircraft. The principal additions to its fleet in the years 1947 through 1949 were made possible through special credit arrangements with aircraft manufacturers and through borrowings from various banks.

The record shows that this equipment could not have been obtained without the financial assistance of Toolco. Of 6 Constellations acquired in 1947, 4 were financed largely from funds advanced by Toolco under the terms of the letter agreement of January 8 of that year. During 1948 previous outstanding purchase money obligations covering 9 Constellation airplanes were consolidated, with the aid of Toolco, with the financing of 12 new Constellations into a new chattel mortgage. In February 1949 TWA en-

[22] This service divides between interest payments and principal maturities approximately as follows:

Calendar year	Principal maturities	Interest	Total
1947	$ 674,000	$1,501,121	$2,175,121
1948	2,968,040	1,712,301	4,680,341
1949	6,806,980	1,669,071	8,476,051
1950 (est.)	7,168,400	1,384,190	8,552,590

tered into a conditional sales agreement with Toolco for 2 Constellations.[24] In August 1949 TWA entered into a bank credit agreement to assist in financing 20 more Constellations. As a part of this latter agreement, Toolco agreed to guarantee that the net worth of the carrier would not be less than $20,000,000 as of December 31, 1949. By agreement dated February 2, 1950, TWA purchased 6 more Constellations under a conditional sales agreement with Toolco.[25] The arrangements for the purchase of the airplanes covered by this sales agreement were entered into directly by Toolco to assist TWA in acquiring such airplanes. It is impossible now for TWA to acquire aircraft without obtaining prior consent or waivers under various financial agreements it has entered into in the past, including the trust indenture covering the debentures held by Equitable.[26]

Although TWA continued to lose money during the years 1947 through 1948, its over-all financial condition has shown considerable improvement. On December 31, 1945, the carrier's net worth was approximately $18,500,000; by the end of 1946 it had fallen to about $4,200,000; and by the end

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[24] Approved by order serial No. E-2404 in compliance with the conditions set forth in the Board's order under Docket No. 1182.

[25] This latter sales agreement was approved by order serial No. E-4160 to comply with the conditions set forth in the Board's order under Docket No. 1182.

[26] Since the date of the hearing herein, TWA has arranged to lease 12 Martin 202's (beginning July, 1950) and the carrier has very recently agreed to purchase 30 Martin 404's, the first to be delivered by April 30, 1951. The Martin 202's would replace the carrier's DC-3's serving on domestic routes, and will presumably be returned when the 404's are delivered. The financing details of the foregoing leasing and purchase agreements are not of record.

of 1947 the carrier had a negative net worth of about $3,210,000. Contrasted with this cumulative deterioration of the financial condition of the carrier is the marked improvement of its financial structure as shown by the return of the net worth to about $8,500,000 on December 31, 1948, and to approximately $21,000,000 on December 31, 1949.

This recovery in the carrier's financial position is due in substantial part to additional equity capital brought into the company during 1948 and 1949. As already noted, the 10 million dollars in convertible notes held by Toolco, with interest accrued thereon, was converted into TWA stock in August of 1948; in February 1949 the carrier offered 404,112 shares of stock to stockholders, 375,036 shares of which were sold pro rata to TWA stockholders at $10 per share, including 297,304 shares purchased by Toolco. The remaining unsubscribed shares were underwritten by a group of investment bankers.

Improved operating results between the years 1947 and 1949 also helped strengthen the carrier's financial position. The year 1947 had been one of consolidation and readjustment for the carrier; it concentrated on shaking down the carrier's expanded organization,[58] on reducing costs, and

[58] The record made in the public hearings shows that, before it was replaced, the Frye management had engaged Robert Heller and Associates, a firm of industrial consultants, for the purpose of improving the organization structure of the carrier. That firm's studies were still unfinished in January 1947, although they had submitted two preliminary reports to Mr. Frye prior to that date. None of the principal recommendations of the Heller surveys had been placed into effect by the Frye management. The record made in the public hearings also shows that, as part of the negotiations for substantial credit for the carrier during 1946, the bankers involved had been studying the carrier's operating record and its management structure. In principal part, the record made in the confidential session of the hearings concerns the details of the Heller reports and the survey of one of the negotiating banks,

on exploiting the traffic potential of its routes. The company's net loss for 1947 was approximately 8 million as compared with the previous year's loss of approximately 14½ million. The carrier's net loss was reduced to $452,000 in 1948. The company's better earning position in 1948 resulted principally from a substantial increase in gross revenues with a considerable decrease in over-all costs. The increased gross revenues were accounted for by increased traffic, higher passenger fares, and higher rates for the transportation of mail. For the calendar year 1949 the carrier showed a net profit after taxes of approximately $3,700,000.

Strong efforts were made after January 1947 toward the reduction of expenses. Significant yardsticks for measuring economy of operation in air transportation are costs per available ton-mile or per revenue ton-mile. Attached hereto as appendix No. 1 is a comparison of TWA's operating expenses with those of the other three of the so-called Big Four carriers (American, Eastern, and United) in terms of the foregoing yardsticks. Without attempting to assess the reasonableness of particular expenditures, the aforesaid tabulation shows that TWA's over-all costs for its domestic operations have improved considerably since the managerial reorganization of the carrier in 1947, and are generally in line at present with the costs of the other carriers.

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both of which were made for private use of TWA. Some evidence with respect to each of the foregoing is also contained in the public record. The examiner has considered the entire record made in aforesaid confidential session, and none of the matters contained in that part of the record can change or disturb the findings made in this report.

TWA's costs for its transocean operations over the Atlantic have likewise been considerably improved during the past 3 years and compare favorably on an over-all basis with the other two American-flag carriers, Pan American Airways and American Overseas Airlines, in that service. TWA's relative position is shown by the tabulation attached hereto as appendix No. 2.

Aside from the increased mail-pay support it has received, TWA's improvement in both earnings and financial structure since January 1947 can be attributed in large part to the direct assistance it has received from Toolco and Mr. Hughes. As already noted, Toolco took a hand in the early months of 1947 in initiating certain management changes, including a reduction in the working force and the installation of a rigid system of expenditure control. Moreover, it is clear that the carrier could not have survived the financial crisis it faced in the closing months of 1946 without the help of Toolco and Mr. Hughes. A substantial portion of the savings in TWA's operations were made possible by the addition to its service of new modern aircraft and consequent reduction of the carrier's seat-mile cost. Since January 1947 TWA has added, or will have added as soon as it obtains delivery, 44 Constellation aircraft.

In addition to saving the carrier from bankruptcy or reorganization, Toolco's purchase of the $10,000,000 in convertible notes under the letter agreement made it possible, as already noted, for TWA to use a part of said funds for the purchase of additional aircraft. Toolco helped further to improve the financial structure of the carrier by voluntarily agreeing in December 1947 to waive all right to obtain repayment of the debt evidenced by the letter

agreement of January 8 of that year, except through the issuance of stock in accordance with the terms of the convertible notes, and by effecting a conversion of the notes thereafter into common stock of $10 per share, notwithstanding the fact that conversion could not have been required by TWA until January 1, 1950. Further, Toolco's advanced commitment to take up its pro rata portion of the carrier's offering of 404,112 shares of stock in February 1949 made it possible for the carrier to undertake that financing at that time. In connection with a recent commitment by the carrier for 20 new Constellation aircraft, Toolco made the financing of this purchase by the banks possible by entering into a commitment with the banks that, if, as of December 31, 1949, the net worth of TWA had not been increased to $20,000,000, Toolco would undertake to provide the amount of the deficiency. This commitment was made by Toolco without any profit to itself. Finally, TWA has not only been a substantial beneficiary of the financial aid to the carrier by Toolco but the initiative and support of Mr. Hughes and Mr. Dietrich have been of constant help to the management and to the various operations departments of the carrier. It is also the judgment of the present management of the carrier, that Mr. Hughes has contributed enormously to the technical proficiency of TWA.

In reciting the foregoing facts with respect to Toolco's policies toward TWA since the date of the approval of the original acquisition of the carrier, greater stress was necessarily laid upon evidence relating to plans for financing the carrier than upon matters of management, attempts to acquire additional routes, and related activities, because in their dealings and relations with each other during the

period under review, Toolco and TWA were primarily concerned with ways and means of providing the necessary capital requirements for TWA. The greater part of the record in this investigation therefore reflects their preoccupation with efforts to finance the carrier. However, in fairness to respondents, and in order to set forth their position in the context of industry conditions, it is necessary to view briefly the experience of other air carriers and the air transport industry as a whole in planning for the capital requirements necessary in the immediate postwar period, and to examine respondents' stated reasons for resorting to so much debt financing to provide TWA's capital needs.

As the war ended, airline capital structures were almost entirely free of debt. Only two domestic carriers, Mid-Continent and Western, had long-term debt outstanding,[37] and those debts totaled only about $500,000. One carrier, United, had outstanding $10,400,000 of preferred stock. Of the long-term investment of approximately $143,000,000 in the 16 domestic trunk-line carriers, about $132,000,000 represented common-stock equity.

The industry's postwar expansion necessitated an extraordinary increase in capital funds. In the 3 years from the close of 1944 to the end of 1947 the 16 domestic trunk-line carriers alone acquired about 217 million dollars in new capital funds. Substantial amounts of new capital were also raised by the international carriers and the so-called feeder operators. However, despite the advantages of a

[37] Exclusive of advances from affiliates.

very favorable market,[35] the industry made only small use of common-stock financing in raising the capital necessary for postwar growth.

Thus, in the year 1945, notwithstanding the very favorable market, only 2 of the domestic trunk-line carriers, Delta and Northwest, marketed any appreciable amount of common stock.[36] In July of that year Pan American raised approximately $43,000,000, by the sale of common stock. In the year 1946, 5 of the domestic trunk-line carriers, Chicago and Southern, Colonial, National, Northwest, and Western marketed issues of common stock. In the same year American Overseas sold common stock in the amount of 12½ million dollars to its stockholders. In the year 1947 Colonial, Delta, and Northwest sold common stock. But 9 carriers, American, Mid-Continent, Braniff, Northeast, Continental, Capital, United, Eastern, and TWA failed to utilize common-stock issues to provide funds for postwar needs during the years 1945 to 1947.

The larger domestic carriers have financed their postwar expansion for the most part by the sale of preferred stock

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[35] Throughout the latter part of the war and in the early postwar period the market for airline stocks was excellent. Before the stock-market break in mid-1946, the appreciation in airline stocks was considerably greater than that for stocks generally. Between the year 1942 and early 1946, industrial stock prices doubled, while airline stock prices increased on the average more than five-fold. However, the break in stock prices in 1946 was much more severe in the case of airline stocks than in the case of stocks generally.

[36] As a matter of fact, the market for airline stocks was quite receptive during most of the calendar year 1944, but only two domestic carriers, National and Northwest, floated common-stock issues during that year.

and by borrowings. American sold $40,000,000 worth of sinking-fund debentures in the summer of 1946 and a like amount of preferred stock.[40] Earlier in that year this carrier had obtained a short-term bank loan of $25,000,000 as interim financing. In February 1948 American arranged for a stand-by credit of $7,500,000. Eastern made stand-by credit arrangements in December 1946 in the amount of $20,000,000. Along with its sale of common stock in October 1946, Northwest arranged for a $10,000,000 stand-by credit. This credit was replaced by an $18,000,000 credit in April 1947, and more than $9,000,000 was raised through the sale of preferred stock. TWA's heavy reliance on debt financing has already been noted. United made no financial provision for its large expansion program until early in 1947, when some $49,000,000 was raised—$12,000,000 by sale of debentures to two insurance companies, $28,000,000 by arrangements for a stand-by credit from a group of banks, and $9,000,000 by the sale of preferred stock. In August 1948 United sold 184,809 shares of common stock, netting the company nearly $2,000,000. At June 30, 1948, three large domestic carriers, American, Northwest, and United, had preferred stock outstanding to the extent of 42, 35, and 12 percent of their capitalizations, respectively.

The relative importance of long-term debt in the capital structures of the domestic carriers is shown by the com-

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[40] The underwriters experienced considerable difficulty in marketing this large issue of preferred stock. There was an offering earlier in the same year of 200,000 some shares of common, but the offering did not represent company financing; the shares were sold by the Aviation Corporation in compliance with a Board order to reduce its holdings in the carrier to not more than 4 percent.

parison of the percentages of debt in their reported capitalizations of June 30, in the years 1945 to 1949, inclusive:

Debt as a percentage of capitalization
(at June 30, years 1945-49, inclusive)

Carrier	1945	1946	1947	1948	1949
American	—	37	39	42	40
Braniff	—	—	39	48	33
Chicago and Southern	—	40	20	—	—
Capital	—	72	108	128	86
Colonial	—	21	—	11	2
Continental	—	—	30	20	36
Delta	—	—	16	12	30
Eastern	—	—	17	16	22
Inland	—	—	—	—	—
Mid-Continent	11	19	19	16	6
National	—	41	11	29	17
Northeast	—	20	—	15	32
Northwest	—	—	—	28	[a]40
TWA	—	63	103	116	78
United	—	—	32	46	39
Western	20	3	5	49	40

[a] As of September 30, 1949, in the case of Northwest.

TWA and Capital have, since the year 1946, had the highest ratio of debt to total capitalization. Like TWA, Capital ran into serious financial difficulties in the years 1946 and 1947, which were followed by major changes in management, large personnel lay-offs, and drastic cutbacks in prospective equipment purchases.

Except for TWA, the extent to which the various carriers relied on debt financing as a matter of deliberate choice does not appear of record. In the case of TWA, neither the Frye management nor Toolco nor its principal officers had a completely consistent philosophy with respect to the approximate amount of debt the carrier should carry. In the various proposals advanced by the Frye

management the ratio of debt to equity varied, although Mr. Frye and Mr. Talman continued to stress the desirability of financing a substantial portion of the carrier's capital needs through the sale of common stock. It was only after their failure to obtain the continuing support of Mr. Dietrich and the consent of Mr. Hughes for any one of its several early proposals to finance that the Frye management made overtures for large loans from the RFC and the Export-Import Bank.

In the long discussions and negotiations between the Frye management and Toolco, as represented by Mr. Dietrich and/or Mr. Hughes, neither of the latter ever definitely foreclosed the possibility of raising a substantial amount of the necessary capital needs of TWA through the sale of common stock. However, in defending the large borrowings of TWA since the war, Mr. Hughes stated that he was definitely in favor of debt financing as a matter of policy under the circumstances existing since the end of the war.[41] Mr. Dietrich stated that he likewise held out

[41] In addition to Toolco's expressed fears of providing large capital funds to what it considered to be an improvident management, Mr. Hughes' specific grounds for such a policy are hereinafter recited. Whether Mr. Hughes was motivated by other considerations the record does not show. Conceivably Mr. Hughes might have considered using Toolco's limited common-stock investment in the carrier as a leverage to magnify Toolco's potential profits on stock held, since the expected return on the carrier's over-all investment would be, normally, substantially higher than the cost of borrowed funds, thereby accomplishing what is known as "trading on equity." There is no evidence, however, that this motivated Mr. Hughes' reluctance to agree to any one of the several of Mr. Frye's proposals for substantial equity financing; nor does the record show that Mr. Hughes wished to avoid possible dilution of Toolco's control of the carrier, since he consistently stood ready to have Toolco take up its pro rata share of any common stock to be offered. Certainly the record will not support public counsel's charge of sheer arbitrariness on the part of Mr. Hughes in dealing with the various plans of the Frye management for large-scale financing.

for as much debt financing as might be available. Similarly, the present chairman of the board of directors of TWA, Warren Lee Pierson, indicated his preference for debt financing for air carriers.

Mr. Hughes stressed the low rates of interest at which debt financing could be accomplished and the tax advantage of financing by debt rather than the sale of capital stock.[48] Mr. Dietrich's preference for debt stemmed from his feeling that until TWA could have assessed its postwar capital needs fairly accurately it should not have attempted to raise a lot of money through the sale of common stock simply because the market was favorable, although he recognized that if a need for a substantial amount of new capital could have been satisfactorily demonstrated, the carrier's stock base of $5,000,000 of $5-par-value common stock during the years 1944–46 was far too low, and that the financing of all of the carrier's capital needs through debt would have resulted in an unbalanced capital structure. Mr. Pierson doubts the wisdom of selling the equity securities to finance the purchase of airplanes whose useful life is of such short duration. He stated in unequivocal language his preference for debt securities for

[48] The following testimony summarizes his defense of debt financing as a matter of policy during the years 1945-46: "* * * my position was that at that time debt financing was very attractive. Interest rates were low, and interest could be paid out of basic earnings before taxation. Equity financing, to leave a satisfied stockholder, probably should have returned something between seven and ten percent, and that would have been required to be paid out of earnings after taxation. So I think my position at this particular time was that I had to be convinced; or let me say I was not fully convinced that equity financing was desirable. In other words, if that financing could be obtained on proper terms, I was not fully convinced that debt financing might not be more desirable." (Tr. p. 116.)

this type of financing,[43] emphasizing that he felt that credit arrangements of the equipment-trust type, so widely used in the purchase of railroad equipment, should be utilized for the purchase of air transport equipment.[44] Both Toolco and TWA have taken the position that the sale of air carrier common stock to the general public at the high market prices which prevailed during 1945 and a portion of 1946 would be contrary to the policy, expressed in the Securities Act of 1933 and later the Securities Exchange Act of 1934, to protect the purchaser of securities against the vicissitudes of rising and falling financial markets. In other words, it is their contention that had TWA gone into the equity market at the time the market was most favorable and sold a substantial amount of common stock, that part of the public which purchased it would have suffered severe losses when the market for airline securities broke.[45] It is their further contention that the Board has an obligation to protect the investor in airline securities as part of its responsibility to the public interest.

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[43] "My testimony would be, Mr. Examiner, that as a matter of judgment, we did not go into the equity market." (Tr. pp. 61-62.)

[44] The use of the equipment trust to finance air carrier equipment was endorsed by both the President's Air Policy Commission and the Congressional Aviation Policy Board. See *Survival in the Air Age*, the report by the President's Air Policy Commission, issued January 1, 1948, pp. 116-118; and *National Aviation Policy*, 80th Congress, 2nd Session, Senate Report No. 949, pp. 25-26.

[45] "There seem to be feelings that at times it would have been a fine time for the aviation industry to have unloaded a lot of stock at high prices. I don't agree with that. I think it would have been unfortunate to have done so as far as TWA is concerned * * * It is a shocking conception to unload securities on the widows and orphans simply to give a temporary aid to a company, and then have to live with it the rest of your life * * *" (Testimony of Mr. Pierson, Tr. p. 66.)

Respondents contend that on the question of debt against equity financing under the conditions which prevailed in the industry during the period here under review there should be no criticism of anyone who, as a matter of policy, decided to follow one route or the other. They pointed to the fact that TWA had successfully weathered its postwar difficulties; that it has been able to meet its debt service obligations; and that both its financial structures and earnings position have been improved.

Respondents also take considerable comfort from the fact that not only the air transport industry but American industry generally relied heavily upon debt financing in the period following the war. To demonstrate the extent to which American business has been financing recent expenditures in ways other than through the sale of stock and the reasons therefor, respondents submitted for the record the so-called McCabe report.[46] This report discusses in scholarly fashion the question of debt and equity financing, and points out that stock financing by business corporations generally has been particularly low since the fall of 1946. The report states that new common-stock issues have averaged only about 10 percent of total new corporate security issues since that time. It goes on to state that since the fall of 1946 businesses had obtained funds for capital outlays primarily from bank and insurance company loans, and new bond issues and retained earnings, rather than from sales of stock on the market. Among other things, this report enumerates the various induce-

[46] *The Equity Capital Situation*, a personal statement by Thomas B. McCabe, Chairman of the Board of Governors of the Federal Reserve System, prepared at the request of a Subcommittee of the Committee on Banking and Currency of the U. S. Senate. Submitted August 5, 1949.

ments for business enterprises to finance their capital needs by means other than stock sales, including the high cost of equity capital, the low cost of debt, the availability of retained earnings, and the tax advantages of debt financing. The report also discusses the reasons for the failure of individual investors to buy more equity shares in American business, and expresses concern over the fact that the American people have shown a reluctance to buy stock, and that, as a result, the capital structures of corporate enterprises have in recent years been unduly expanded by means other than the issuance of equity capital. However, the report makes clear that in the interests of economic stability it is always better if both large and small enterprises finance more of their investment expenditures with equity and less with borrowed capital.

CONCLUSIONS

The basic question to be resolved in the present phase of this proceeding is whether the additional acquisition resulting from the letter agreement of January 8, 1947, is in the public interest. This controlling question of the public interest cannot be judged by any one single factor. Rather, it must be determined by the weighing of all the principal considerations disclosed by the evidence relating to the purposes and requirements of the Act. As indicated in the statement of issues in the forepart of this report, those considerations were framed during the prehearing conference as specific tests of the propriety of granting approval of the further acquisition. Evidence was adduced at the hearing with respect to those considerations by both respondents and by public counsel.

There is not, however, in issue in the present phase of this proceeding any question relating to Toolco's 45-percent stock interest in the carrier previously approved by the Board, except insofar as the record may warrant a recommendation that further action with respect thereto be taken in further proceedings. Moreover, Toolco's plans and policies for the carrier between the time of the Board's original order of approval and the date of the letter agreement are relevant only insofar as the record of Toolco's past control properly indicates what action should be taken with respect to the substantive public-interest issue presently before us.

Respondents' brief discusses the principal events relating to Toolco's relationship with TWA both before and after the date of the letter agreement, and respondents contend that each of the several considerations analyzed therein is sufficient to support the affirmative conclusion that the additional acquisition should be approved as being in the public interest. The brief argues that collectively those considerations offer overwhelming compulsion to that conclusion.

Public counsel's brief likewise reviews the evidence of record in terms of several considerations bearing upon the propriety of approving the additional acquisition, but he concludes that the record herein raises serious doubt whether the further acquisition should be approved, and whether any control by Toolco over TWA should be permitted to continue. His brief raises three possible alternatives as an answer to the ultimate question raised by this proceeding. As a first possible alternative, he appears to suggest that Toolco should not be permitted to solidify its control over the carrier as a result of the additional acquisition, but that some limitation be imposed on the exercise

of the rights flowing from the additional stock which Toolco has acquired in the carrier as a result of, and since, the letter agreement. The import of this proposed alternative is not entirely clear but presumably it contemplates a trusteeing of such stock for Toolco's benefit, subject to some condition that such stock remains nonvoting so long as it is in the hands of a trustee. Public counsel, however, dismisses this suggested alternative as being generally impractical and, for various reasons, undesirable. As a second possible alternative, public counsel suggests the possibility of rejecting approval of the additional acquisition, and reopening the proceeding under Docket No. 1182 for the purpose of determining whether or not all control of TWA by Toolco should be terminated. But public counsel appears to entertain serious doubt as to the Board's power to terminate a control previously approved.[47] As a third possible alternative, he suggests that the additional acquisition be approved but that Toolco's relationship with TWA, as portrayed by the record in this proceeding, be used by the Board as a case history for the purpose of demonstrating to Congress the need for public control of security issues by air carriers. Public counsel urges the examiner to recommend that the Board adopt this third suggested solution to the basic question posed by this proceeding.

Public counsel's condemnation of the manner of Toolco's control of TWA rests upon his contentions that Toolco

[47] The examiner's disposition of the ultimate issue raised by this proceeding, as hereinafter set forth, makes it unnecessary to rule on the question of the Board's authority to reopen the proceeding under Docket No. 1182. It is to be noted, however, that both counsel for TWA in the proceeding under Docket No. 1182 and counsel for Toolco in the present proceeding have, in effect, conceded that the Board has jurisdiction to reopen.

was directly and principally responsible for the carrier's present unbalanced capital structure, for its heavy burden of debt, and for such major financial disabilities as the carrier has experienced since the close of the war. These weaknesses in the carrier's financial structure are all alleged to have stemmed from the reluctance of Toolco to permit TWA to utilize equity financing when equity financing was feasible and advantageous.

Nowhere in public counsel's brief is there an affirmative recognition of any benefits which have accrued to the carrier as the result of having Toolco as its principal owner. That there have been such benefits, and that these benefits have been real and substantial, the record admits of no doubt. Nor will the record permit findings that Toolco alone is accountable for TWA's postwar difficulties, nor that its course of action with reference to the problem of financing the carrier was in all major respects inconsistent with the public interest.

In any candid accounting of Toolco's stewardship of the carrier since the Board's original approval of the control relationship, certain significant considerations affecting the public interest must be placed on the credit side of the ledger. At the outset, the record makes clear that there is no conflict of interest between Toolco's present or contemplated aeronautical activities and its control of an air carrier. On the contrary, the public interest favors Toolco's continued engagement in certain phases of aeronautics. It is of course a truism to state that any activities of benefit to the public are in the public interest. The contributions of Toolco's aircraft division and Mr. Hughes to the science of aeronautics, including their endeavors with respect to aircraft design instrumentation, aids to navigation, and

their developmental activities in behalf of both the armed services and civil aviation, have been and no doubt will continue to be of considerable general benefit to the entire industry. Additionally, and of specific importance to TWA, have been the contributions of Toolco and Mr. Hughes in the way of financial support to the carrier, in the selection and purchase of its equipment, and their advice and guidance to the engineering and operations departments of the carrier.

Even before TWA's financial crisis of late 1946, the financial resources of Toolco were used to provide credit for the carrier. For example, the credit arrangements provided by Toolco made possible the placing of the original order for the Constellation airplane with the Lockheed Aircraft Corporation. There is little doubt that the Constellation would not have been developed as early as it had without the aid of Mr. Hughes and his company. In addition to the technical assistance from Mr. Hughes and his engineers in Toolco, the financial commitment which was necessary to undertake and continue the project could never have been made and met by TWA. Moreover, the Lockheed Aircraft Corporation has been a substantial beneficiary of those efforts. Thus, in addition to the development of air transportation which has been achieved through these efforts, the aircraft manufacturing industry has been developed and encouraged as well. However, the responsibility of Mr. Hughes and his company for the development of the Constellation did not end with the development of the specifications and financing of the original contract with Lockheed. The subsequent acquisition by TWA of practically every Constellation aircraft in the TWA fleet now and those on order has been accomplished directly or

indirectly with the financial and technical assistance of Mr. Hughes and his company.

Among other contributions of Toolco and/or Mr. Hughes to the welfare and well-being of TWA, perhaps the most important have been the efforts at maintaining or improving the carrier's financial position following the war. Soon after the war ended Toolco obtained the commitment of Equitable for a loan of $30,000,000, shortly thereafter raised to $40,000,000, upon favorable interest terms, to finance the purchase of equipment and for other corporate purposes. While the examiner feels that the choice of this type of financing was unwise at that time, the formulation of a long-range postwar financial plan for TWA was complicated by serious differences between the carrier and its principal stockholder over the carrier's operating plans and policies. And, rightly or wrongly, Mr. Hughes had come to the conclusion that substantial debt financing was definitely to TWA's advantage. Barring unforeseen developments and the later need for considerably more capital than realized under the loans from Equitable, TWA's general financial condition appeared satisfactory at the time of the negotiations for the Equitable loans, and both Mr. Hughes and Mr. Dietrich were confident that the carrier could carry that much additional debt. It was not until November and December 1945 and the first part of 1946 that TWA ran into really serious losses, resulting primarily from the heavy expenses attending the inauguration of its international routes; except for a small profit in June of 1946, those losses continued and in fact became, for reasons already enumerated, even more aggravated during the remainder of that year.

The letter agreement of January 8, 1947, under which Toolco agreed to purchase $10,000,000 of the carrier's convertible notes saved TWA from utter financial failure in the darkest hour of its history. Thereafter, in December of 1947, in order to further improve the financial structure of the carrier, Toolco voluntarily agreed to waive all right to obtain repayment of this debt except through the issuance of stock in accordance with the terms of the notes. Then, in August of 1948, Toolco and Mr. Hughes further aided the financial structure of the company by effecting a conversion of the notes into stock at $10 per share, notwithstanding the fact that conversion could not have been required by TWA until January 1, 1950.

Aside from the question of whether TWA should have done more equity financing, and should have had Toolco's cooperation in planning for it at a much earlier date, Toolco and Mr. Hughes were of assistance to the carrier in still other respects. As already noted, without the participation of Toolco, TWA would not have been able to secure an underwriting of the common stock it sold in February 1949. In August 1949, as previously explained, Toolco made the financing of the purchase of 20 new Constellations possible by entering into a commitment with the banks that, if as of December 31, 1949, the net worth of TWA had not been increased to $20,000,000, Toolco would undertake to provide the amount of the deficiency. Since the close of the hearing herein, Toolco has aided TWA in purchase of other equipment. Moreover, Toolco's officers, particularly Mr. Hughes and Mr. Dietrich, have been generous in lending their services, time, and ability to the management of the carrier. Finally, TWA's improved operating results since the reorganization of the carrier in

the early months of 1947 are in considerable part due to Toolco's leadership.

The foregoing is a summary of the assistance of Toolco and Mr. Hughes to TWA without regard to the question of whether substantially more equity financing could or should have been accomplished by TWA before or shortly after the close of the war. Certain of the assistance here examined, such as the development of the Constellation, the engineering and managerial help to the carrier, and much of the financial aid during that period, has been of unquestionable benefit to TWA. On the other hand, if Toolco and its principal officers can be held wholly accountable for the manner in which TWA was financed during the immediate postwar period, as urged by public counsel, then our appraisal here of Toolco's control of the carrier must be debited with what is an obvious detriment to the public interest. It is manifest that the carrier's present capitalization, in spite of its considerable recent improvement, is neither reasonable nor sound. Its proportion of debt to total capitalization is far too large. Its burden of both long-term loans and short-term obligations has affected, and very likely will continue to affect, its capacity to acquire new capital. It is impossible now for TWA to acquire through additional debt more aircraft without obtaining prior consents or waivers under various financial agreements it has entered into in the past. Indeed, TWA's recent acquisition of the six used Constellations under arrangements whereby they were initially acquired by Toolco and resold to TWA on a conditional sales basis was necessary because the carrier could not have purchased them directly without the specific consent of its principal creditors. This transaction is illustrative of the

embarrassment which a debt-heavy capital structure can visit upon an air carrier.[48]

The examiner does not purport infallibly to hold that under all circumstances equity financing should be undertaken in preference to debt financing. Obviously, there may be occasion for borrowings on the part of air carriers. The condition of capital markets may at times make debt financing an unavoidable necessity; moreover, certain corporate needs, such as the acquisition of current assets or emergency equipment, may often be more advantageously financed through borrowings. However, the excessive use of debt and other senior securities is clearly undesirable. At the present stage of the industry's development, a sound and reasonable capitalization of an air carrier requires a heavy preponderance of common stock.

Local public-utility enterprises, such as electric power, telephone, and transit companies, as well as railroads, have historically relied heavily upon the issuance of debt to raise capital funds. But the financing of airlines raises special problems. It is, of course, elementary economics that the dependability and regularity of earnings is a prime consideration in determining the extent to which a public utility may issue debt securities. As in the case of other corporate enterprises, an air carrier's net earnings are the measure of its ability to meet fixed charges and earn a profit. Air-carrier operations, however, are char-

[48] TWA is perhaps more fortunate than another carrier driven to similar circumstances would be, since TWA's principal owner is one with substantial resources which have been consistently available to provide credit for the carrier. On the other hand, if public counsel's assessment of Toolco's responsibility for the TWA's failure properly to finance were taken as correct, it could be argued that Toolco had a bounden duty to come to the financial rescue of the carrier in the closing months of 1946 and thereafter.

acterized by typically high operating ratios,[40] leaving a relatively small margin for nonoperating expenses (including capital charges) and for profits. As a result, unless fluctuations in operating revenues are accompanied by proportionate trends in costs, small reductions in gross revenues may produce serious declines in net earnings. Although airline managements are demonstrating increasing control over costs, air-carrier costs are not always susceptible to easy or rapid adjustment in the event of drastic declines in traffic volumes. On the other hand, air traffic volumes have been unusually sensitive to fluctuation: bad weather, a series of accidents, technical difficulties with new aircraft, and cyclical changes in the business, are capable of creating substantial but unpredictable declines in demand for air transportation. An air carrier's capacity to meet expenses in the face of receding revenues is made much more difficult, of course, if heavy fixed charges in the form of interest and amortization payments on outstanding loans must also be met. Moreover, the rapid obsolescence of equipment deprives the industry of that more permanent and constant property base so characteristic of power, transit, and telephone utilities. And the dangers of financing equipment purchases through debentures, or other forms of debt whose maturities may outlast the life of the assets thereby acquired, are obvious.

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[40] Ratio of operating expenses to operating revenues. For the calendar years 1947, 1948, and 1949, the domestic trunk lines' operating expenses were 105.9, 99.5, and 94.6 percent, respectively, of their operating revenues. TWA's operating ratios for the same years were 109.6, 98.9, and 95.9 percent, respectively. In each case, the percentage of operating expenses to operating revenues is inclusive of revenues derived from mail pay.

There is no doubt that the air transport industry should have made more extensive use of equity financing in raising new capital for postwar needs. Indeed, it may reasonably be asserted that a sound capitalization for air transport companies at the present stage of the industry's development is one composed almost exclusively of equity stock. Because of the uncertainty of the continued net-revenue-producing power of an air carrier's assets, a substantial burden of debt is likely to cause financial embarrassment. Adversity in a carrier's earning position, either for the lack of sufficient gross revenues or ready ability to reduce operating expenses, may force the danger of failure to meet fixed charges and/or debt maturities. TWA found itself precisely in that predicament since the close of the war. Improvement in its revenue-producing capacity, achieved through better control over costs, larger traffic volumes, and some increased mail compensation, and a considerable restoration in its investment position, achieved largely through the assistance of Toolco has, however, enabled TWA to meet all its obligations.

A conservative capitalization for an enterprise operating under as narrow a profit margin as an airline, and subject to what have historically been the air transport industry's changing fortunes, requires the capital cushion provided by an adequate common-stock equity. The assets represented by common stock shares provide a margin of safety for a corporation's earnings and for such assets as may be represented by a corporation's senior obligations.[30]

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[30] For a more complete exposition of the common-stock cushion principle, see Barnes, *The Economics of Public Utility Regulation*, pp. 728-729, and the S. E. C. cases therein cited.

Obviously, the larger the common-stock investment in a carrier's capital structure, the greater the margin of financial safety and the less the risk of financial failure in the event of a serious recession in business.

The foregoing considerations cannot be brushed aside as delicate distinctions of financing theory. They are matters of substantial practical importance to both the industry and the Board. As already noted, the certificated trunk-line carriers emerged from the war period with relatively sound capital structures. The high earnings of the war years enabled most of them to retire outstanding indebtedness. Several of the carriers were able to garner considerable cash reserves. The war ended with a very favorable market for airline stocks. Yet the history of airline financing since the end of the war shows unwarranted reliance on borrowings as means of financing capital needs. The crisis in airline finance during the years 1946 and 1947 was unquestionably aggravated by service charges and repayment requirements on extensive borrowings.

This is not to imply that all of the trunk-line carriers failed to utilize equity financing to acquire capital funds for postwar needs. As previously noted, eight of the trunk-line carriers marketed common stock in years from 1944 through 1947, inclusive,[51] although for the most part in inadequate amounts. However, it is significant that the carriers which found themselves in most serious financial difficulties during the 1946-47 crisis in civil aviation, such as Capital and TWA, were among the carriers which failed to do any equity financing at all during that period.

It will no doubt be contended that a more liberal mail-pay policy on the part of the Board during and imme-

[51] Excluding Capital's sale of common stock in May 1944, involving the conversion of the outstanding preferred stock.

diately following the war would have helped to avoid the industry's postwar difficulties. On the other hand, it can be reasonably asserted that but for the subsidy provisions of the Civil Aeronautics Act individual carriers would have developed more conservative capital structures. It is certainly doubtful whether the lending institutions which obliged the carriers with credit arrangements in recent years would have been willing to risk the substantial funds lent in the absence of the so-called "need" mail-pay provisions of the Act.

The examiner intends no implication that the financial support to the industry required by the Act has been, or is, unwise or unnecessary. But the industry's capacity to maintain its credit and raise new capital depends upon more than a fair and adequate mail-pay policy. It depends to a major extent upon the promise of present and prospective nonmail earnings and the maintenance of reasonable capitalizations. The use of excessive debt will inevitably impair a carrier's capacity to meet current and continuing capital needs, or to obtain such needs at reasonable cost, thereby depriving it of the very means necessary to serve economically and efficiently new and expanding markets. As a result, the carrier may find itself in the straight jacket of excessive debt and faced with the alternative of postponing desirable new investments or issuing even more debt. Except for the financial assistance it has received from Toolco and Mr. Hughes, and increased temporary mail payments, TWA would, in all probability, have been forced to the wall in the early months of 1947.[83]

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[83] Whether a sounder and more simplified corporate structure would have been followed had the carrier been left to receivership and reorganization is, of course, a matter of speculation.

However, the extent to which Toolco and its principal officers can be held directly or principally responsible for TWA's present capital structure poses a most difficult problem. Rarely, if ever, are the principal owners of an enterprise entirely free to formulate a financial plan. Numerous factors, including, among others, the probable amount of new funds needed, the state of the securities' market, the time and cost involved in floating publicly or privately offered issues, and the necessary cooperation between a corporation's management and its proprietors, all operate to complicate and often delay agreement on a financial plan. In the situation under review here, though the general amount of TWA's capital requirements for its domestic operations was ascertainable before the war ended, the carrier could not have been expected to have raised the new capital needed for its international services until after it received notification of the Board's award thereof in July 1945. Moreover, Toolco was working with a management which it inherited when it bought into TWA, and with which it was at odds on matters of high operating policy for the carrier. And while the market was very favorable to equity financing near (and immediately after) the close of the war, the air transport industry, with industry generally, was faced with the practical problem of weighing the advantages of financing through means other than the sale of common stock. In addition to such inducements as continuing tax advantages of debt financing, and the higher cost of equity capital, both in terms of promotion and expected yields on the part of investors, it was necessary to decide whether, in spite of the high favor in which airline stocks were then held, the market would absorb the very substantial offerings required to

raise all needed capital requirements through common-stock sales, whether the market would continue favorable through the considerable period of time required by large-scale underwriting, and whether, if common-stock financing was to be used exclusively, it might not be wiser to wait for an even greater appreciation in common-stock prices.

The record shows that since the close of the war American business has financed new capital outlays largely through debt and the retention of past earnings. In spite of continuing high earnings and substantial inflationary pressures, the market for industrial stocks has been relatively dull and erratic. While the market for airline stocks has been very favorable during a considerable part of the period under review here, both in terms of dividends and earnings, and particularly so relative to book values, the years of 1944 and 1945 were years of war, with war's attendant uncertainties. Following the war's end, the air transport industry had less than a year in which to undertake equity financing before the market break in mid-1946 put a damper on the sale of airline stocks.

Nevertheless, a number of the carriers were successful in raising equity capital before the break in the market for airline stocks, notably Pan American's 43-million-dollar stock issue just before the war ended, although most of the capital necessary for the industry's postwar needs was raised through borrowings. Had the Frye management and Toolco's officials, including Mr. Hughes, been able to agree on a financing plan before the war ended, there is nothing in the record to indicate that TWA could not have successfully marketed common stock in substantial volume before the market broke about mid-1946.

It is true that during the entire period following the Board's original approval of the Toolco-TWA relationship, and up to the time of TWA's financial difficulties in late 1946, there were constant negotiations between the officials of Toolco and the management of TWA in an effort to accomplish a substantial measure of permanent financing. These negotiations finally bore fruit in the tentative agreements arrived at in Los Angeles meetings in June and August 1946, which would have raised approximately 100 million dollars in capital funds. These proposals failed of consummation primarily because the bankers apparently feared the market would not absorb the large offering of common stock involved. That their fears were not unjustified is evidenced by the fact that American's offering of 40 million in preferred stock was marketed only with considerable difficulty as early as June 1946, when the market for airline stocks began weakening.

But whatever were TWA's problems in promoting equity financing to meet its postwar capital needs, the insistence of Mr. Hughes and Mr. Dietrich on debt as a matter of deliberate policy to meet TWA's capital requirements right after the war ended must be condemned. Had such an attitude persisted, there would have been small hope of improving the carrier's faulty capitalization. Fortunately, both Mr. Hughes and Mr. Dietrich have been aware of the dangers of operating a carrier that may eventually need as much as 100 million dollars or more in invested capital with the relatively small common-stock capital base that TWA had at the time of its financial troubles in late 1946. They stood ready to commit Toolco to the substantial amount of equity financing involved in the program tentatively agreed upon at Los Angeles in the summer of

1946. Moreover, Toolco's recent agreement to convert the $10,000,000 loan evidenced by the letter agreement of January 8, 1947, into common stock, and its commitment to take up its pro rata portion of the large amount of common stock offered for sale by TWA in February 1949, have contributed considerably to the restoration of the carrier to a sounder capital structure.

Respondents' concern about the investors who may have purchased common stock in an air carrier at the time when the market for airline stocks was bullish, and who may have suffered losses when the market broke, hardly requires comment. Their solicitude for the "widows and orphans" who may have then bought airline stocks after the war is touching, to say the least; but they furnish no figures on the extent to which airline shares were then sold to that part of the investing public. The fact remains that the purchaser of common stock is the ultimate risk taker; in other words, the stock buyer is the real entrepreneur who, under our system of enterprise, stands either to gain or lose, depending upon the fortunes of the business he chooses to invest in. It would appear that respondents should show equal or—perhaps even greater—concern for those investors who, having already bought into an air carrier, stand to lose all should the carrier's excessive debt result in financial failure.

The measure of Toolco's responsibility on the single and narrow issue of equity vs. debt financing for TWA must be weighed against the contributions and value of Mr. Hughes and his company to the carrier. On balance, it must be concluded that the increased interest in TWA by Toolco is in the public interest, and that the further acquisition of control resulting from the letter agreement

of January 8, 1947, should be approved. Testing the propriety of approving the additional acquisition by weighing the net effect of Toolco's actions and policies with respect to TWA for the period since October 1944, the record requires a finding that Toolco's 45-percent control of TWA has been of substantial advantage not only to that carrier but to the industry as a whole. The beneficial nature of Toolco's control is demonstrated by the numerous instances of material and managerial assistance to TWA by Toolco and Mr. Hughes, particularly the manner in which Mr. Hughes and his company rallied to the support of the carrier during the financial crisis of late 1946 and early 1947.

At the time the Board first considered the application of Toolco for approval of control of the carrier under Docket No. 1182, it was the opinion of Mr. Frye, who was then president of TWA, that the interest of commercial air transportation as a whole, as well as the interest of TWA in particular, would be furthered by the association of Mr. Hughes with the carrier, since through such an association a portion of Mr. Hughes' time and his unusual talents in the field of aeronautics would be available for the development of airline equipment and the improvement of airline operations. Except for his differences with Mr. Hughes over the manner in which the carrier should have accomplished its financing for the postwar period, Mr. Frye is still of the opinion that the relationship of Mr. Hughes and his company to TWA is one of substantial public benefit to both the carrier and the industry.

While the examiner is of the conviction that Toolco officials, including Mr. Hughes, erred in not doing more to come to terms with the Frye management for the purpose

of promoting a substantial measure of equity financing before or immediately after the end of the late war, the record will not support a finding that failure of Mr. Hughes and his company in that regard alone makes Toolco's control of TWA inconsistent with the public interest. The policy followed by Toolco and Mr. Hughes was part of the general pattern of financing followed by most of the airline industry and, indeed, of American business generally. Moreover, the many instances of Toolco's assistance to the carrier have been of undoubted public benefit. It is also to be noted that no question has been raised during this proceeding concerning TWA's capacity to serve adequately all of its existing routes or its ability to extend its services to meet the requirements of the traveling public. Finally, TWA occupies a very important place in this country's domestic and international air transportation system. It is in the public interest to make and keep it a strong carrier to the end that it can continue effectively to serve the traveling public and effectively maintain its competitive position among our large carriers. TWA's failure to finance properly was part of industry's failure to do likewise, and that failure was but one of several failures of foresight which almost laid the industry low in the period of readjustment after the war. With Toolco's help, TWA's earnings position has recovered and its investment position is on the way to recovery. The continued interest of Toolco in TWA appears essential to the best interests of the carrier and the public. Accordingly, in the light of the record in this case and in recognition of the meaning of public interest as set forth in section 2 of the Act, the examiner finds that the additional control acquired by Toolco as a result of the letter agreement of January 8, 1947, is consistent with the public interest.

As hereinbefore noted, public counsel requests the examiner to recommend to the Board that this proceeding be used as a case history to show the need for Board control over the capital financing of air carriers. The examiner is convinced of the urgent need of public control of airline security issues to assure sounder airline financing. The principal objective of regulatory control over airline capital structures is the maintenance of sound airline credit. Unless a number of airline capitalizations are improved and maintained on a more conservative basis, with greater proportionality in junior securities, the industry will continue to be plagued with difficulties in financing the full development of air transportation. Further, for reasons which hardly need amplification here, the Board's efforts at effective regulation of the industry, particularly the promotion of economically sufficient air carriers, are seriously handicapped by the lack of Board authority to prevent unsound airline financing and the uneconomic consequences thereof. However, the Board is already on record with the Congress with respect to the problem and the purposes of effective public-security regulation. In its annual report for the year 1942, the Board recommended an amendment of the Act granting it control over the security issues and the capital structures of air carriers. The Board urged that the effective discharge of its powers to regulate the economic phases of air transportation required surveillance of airline financing to prevent the development of unusual capital structures.[28] Public counsel's request that the history of finan-

[28] "The Act should be amended to require the Board's approval of the issuance of securities or the assumption of obligations or liabilities by air carriers. No effective control over this subject is now authorized by law. Such lack of control constitutes a marked

cial difficulties of TWA as they developed during the postwar period be used as a case history by the Board in underscoring the need for regulatory supervision of airline security issues and capitalizations would be manifestly unfair to that carrier. Other carriers followed a similar financial policy during the postwar period, and several suffered financial disabilities almost as serious as those experienced by TWA. Under the circumstances, the Board ought to use the experience of the entire industry in support of its recommendations to the Congress on this matter.

In view of the foregoing, and upon the basis of all evidence of record, the examiner finds that Toolco's further acquisition of control over TWA resulting from the letter agreement of January 8, 1947, is in the public interest, and otherwise meets the requirements of section 408 (b) of the Act.[84] It is therefore recommended that—

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departure from other statutes regulating public utilities and common carriers where the need for Government control of security issues is almost universally recognized. The effective discharge of the Board's powers to regulate the economic phases of air transportation, which require the prevention of economically unsound capital structures, clearly requires that the Board be given power and responsibility to supervise, in the public interest, the development of the capital structures of the air carriers." *Annual Report of the Civil Aeronautics Board, 1942*, p. 14. The Board has renewed its recommendation for authority from Congress to control the issuance of securities by air carriers in its annual reports for the years 1943, 1944, 1945, 1946, 1947, 1948, and 1949, at pages 6, 9, 16, 21, 29, 38, and 43, respectively, of said annual reports.

[84] There is no occasion to be concerned here with the provision of section 408 (b) against the creation of monopolies contrary to the public interest by an acquisition of control of an air carrier. Toolco does not control any other air carrier. Its interest in aeronautics is limited to the activities hereinbefore described.

1. The Board approve the further acquisition of control which resulted from the transactions evidenced by aforesaid letter agreement of January 8, 1947, subject to the same conditions imposed by the Board in its approval of October 17, 1944, of the Toolco-TWA relationship under Docket No. 1182. (6 C. A. B. 153, 158.)

2. That the proceeding instituted by the Board by order serial No. E-289, dated February 7, 1947, be terminated.

APPENDIX No. 1

"Big Four" carriers—comparison of total operating expenses (including depreciation) per standard available ton-mile and per standard revenue ton-mile quarter ended, and 12 months ended, as indicated

Quarter ended—	Cents per standard available ton-mile				Cents per standard revenue ton-mile (passenger @ 190 lbs.)			
	American	Eastern	TWA	United	American	Eastern	TWA	United
12-31-45	——	——	——	——	——	——	——	——
3-31-46	38.96	32.06	43.38	36.70	50.50	39.97	60.48	49.55
6-30-46	35.12	28.81	35.32	29.04	46.13	37.95	48.72	40.31
9-30-46	32.44	27.44	46.92	29.63	43.29	39.13	60.42	40.99
12-31-46	31.66	25.76	47.87	34.27	45.98	41.01	75.50	51.52
3-31-47	34.56	27.67	36.22	38.49	58.07	42.79	68.32	63.29
6-30-47	31.19	29.18	31.27	32.92	46.75	46.06	51.01	48.18
9-30-47	26.76	27.76	28.41	27.34	45.82	58.48	50.38	44.10
12-31-47	33.88	27.64	32.46	31.48	57.22	55.85	56.97	53.16
3-31-48	36.75	28.33	32.10	35.89	66.19	50.99	60.08	62.71
6-30-48	27.04	29.82	30.74	29.21	53.33	55.06	54.79	49.72
9-30-48	24.46	29.11	27.26	27.88	52.34	59.38	55.68	52.04
12-31-48	26.04	29.38	26.89	30.36	49.44	60.28	58.55	57.74
3-31-49	25.94	27.76	26.87	31.47	52.36	53.31	66.35	61.91
6-30-49	24.49	28.14	25.59	26.97	44.14	56.06	47.84	46.85
9-30-49	23.36	27.96	24.66	24.96	44.60	60.76	47.59	43.79
12-31-49	25.39	26.63	27.43	27.16	48.21	58.15	53.08	52.04

APPENDIX No. 1 (Continued)

"Big Four" carriers—comparison of total operating expenses (including depreciation) per standard available ton-mile and per standard revenue ton-mile quarter ended, and 12 months ended, as indicated

Quarter ended—	Cents per standard available ton-mile				Cents per standard revenue ton-mile (passenger @ 190 lbs.)			
	American	Eastern	TWA	United	American	Eastern	TWA	United
12 months ended—								
12-31-45	35.71	29.81	38.78	34.31	41.95	36.67	44.44	38.89
3-31-46	36.59	30.63	39.92	35.07	44.21	37.97	48.34	41.62
6-30-46	36.71	30.48	38.90	33.26	46.19	37.12	50.35	42.38
9-30-46	35.78	29.93	40.50	32.12	46.48	39.60	55.10	43.35
12-31-46	33.82	27.96	42.74	31.96	46.03	39.58	59.38	45.09
3-31-47	33.25	27.27	40.89	32.76	47.88	40.35	60.98	48.13
6-30-47	32.38	27.48	39.37	33.12	47.95	42.27	61.81	50.01
9-30-47	30.75	27.58	34.02	32.54	48.55	46.63	58.51	50.58
12-31-47	31.29	28.01	31.72	31.89	51.42	50.63	55.54	50.99
3-31-48	31.66	28.17	31.01	31.41	52.70	52.65	54.46	50.83
6-30-48	30.38	28.41	30.89	30.46	54.50	54.79	55.39	51.18
9-30-48	29.39	28.71	30.43	30.48	56.39	55.09	56.76	53.57
12-31-48	27.55	29.15	28.99	30.24	54.23	56.14	57.17	54.73
3-31-49	25.81	28.98	28.33	29.62	51.83	56.77	58.50	54.89
6-30-49	25.18	28.55	27.11	29.02	49.30	57.03	56.29	53.96
9-30-49	24.89	28.28	26.41	28.19	47.30	57.39	54.00	51.48
12-31-49	24.74	27.61	26.52	27.40	47.01	56.54	52.71	50.16

APPENDIX No. 2

Comparison of total operating expenses including depreciation, per revenue ton-mile [1] quarters ended, and 12 months ended as indicated

	American Overseas	Pan American—Atlantic	TWA—International
Quarter ended—			
12-31-45 [2]			
3-31-46	120.11	91.79	193.16
6-30-46	89.63	88.36	116.32
9-30-46	80.02	138.33	125.68
12-31-46	131.29	144.72	203.75
3-31-47	150.86	127.28	135.04
6-30-47	81.96	73.41	87.53
9-30-47	81.42	82.22	78.86
12-31-47	119.40	107.30	121.33
3-31-48	142.84	127.07	128.86
6-30-48	86.92	90.86	109.18
9-30-48	69.14	82.85	88.87
12-31-48	76.73	94.27	92.06
3-31-49	99.75	105.83	104.01
6-30-49	84.88	102.66	85.22
9-30-49	85.83	99.71	81.88
12-31-49	104.17	101.81	90.02
Year ended—			
12-31-45 [2]			
3-31-46	[3] 144.15	125.52	[3] 196.61
6-30-46	113.86	105.59	129.53
9-30-46	95.34	111.41	127.70
12-31-46	102.53	116.91	145.70
3-31-47	110.46	123.64	140.55
6-30-47	103.87	109.77	126.13
9-30-47	101.18	96.68	107.78
12-31-47	98.38	93.07	100.13
3-31-48	97.24	94.99	100.54
6-30-48	99.31	99.55	106.01
9-30-48	94.20	99.39	108.54
12-31-48	85.22	95.97	101.26
3-31-49	81.10	92.71	97.60
6-30-49	80.80	95.85	91.22
9-30-49	85.79	100.42	89.18
12-31-49	92.81	102.22	89.10

[1] Does not include revenue ton-miles flown in nonscheduled operations for periods prior to January 1, 1947.

[2] Not available.

[3] Revenue ton-miles flown during the period April 1-June 30, 1945, are estimated.

A-3403

[3949]

Order No E-16195

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 29th day of December, 1960

[CAPTION] Docket 1182
Docket 2796

ORDER GRANTING EXEMPTION AND APPROVING INTERLOCKING RELATIONSHIP

By motion filed December 23, 1960, Trans World Airlines, Inc. (TWA), to the extent legally necessary, requests modification of Order 3210,[1] as amended and modified by subsequent orders, which restricts commercial [3950] transactions between TWA and Hughes Tool Co. (Toolco) and between TWA and any subsidiary or affiliate of Toolco to a maximum of $200 each and an aggregate annual expenditure in such transactions of $10,000. Approval, under section 408, is also requested, if necessary, for the transactions contemplated under the financing plan. Similarly sought is

[1] 6 CAB 153 (Docket 1182).

approval, to the extent necessary, under section 409 of the Act, of the interlocking relationships arising out of the designation of Raymond M. Holliday, as a representative of Toolco, and of Ernest R. Breech and Irving S. Olds as representatives of the banks and institutional investors, to serve as Voting Trustees under a Voting Trust set up for the Toolco-TWA stock.

The TWA motion herein is the culmination of a series of previously considered motions[2] designed to facilitate the refinancing of TWA's obligations and to provide for its acquisition of jet aircraft[3] and related engines and parts. The prior motions were granted by the Board in Order E-15430, June 23, 1960 and Order E-15561, July 21, 1960 which, among other things, gave general approval, under section 408 of the Act and in accordance with the provisions of Order 3210, to a refinancing plan for TWA of approximately $260,000,000 involving the participation of banks, insurance companies and Toolco. The present application presents a recasting of the original plan, which in its present form, accomplishes a significant modification of Toolco control of TWA.

The plan designed to finance the cost of the "Jet Flight Equipment Program" of TWA provides for (a) the delivery of $72,200,000 principal amount of 6% Equipment Mortgage Serial Notes of TWA, maturing serially on December 31, 1961, and quarterly thereafter through December 31, 1964;[4] (b) the issuance of $92,800,000 principal amount of 6½% Equipment Mortgage Sinking Fund Notes of TWA, due December 31, 1972;[5] and (c) the issuance of

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[2] The motions were filed April 1, 1960, April 14, 1960, May 6, 1960 (considered in Order E-15430, June 23, 1960), and July 1, 1960 (considered in Order E-15561, July 21, 1960).

[3] Boeing 707's and Convair 880's.

[4] The "December 1960 Loan Agreement" with Banks.

[5] The "Note Purchase Agreements" with Insurance Companies.

$100,000,000 principal amount of interim subordinated promissory notes of TWA to Toolco in payment *pro tanto* of the amounts owing by TWA to Toolco at an interest rate not exceeding 7% to mature not earlier than June 30, 1973.

In conjunction with the plan, TWA and Toolco provide for a "Final Accounting and Debenture Purchase Agreement." Under its terms Toolco will transfer title to aircraft, engines and parts to TWA and assign its rights in contracts to acquire such jet flight equipment. Upon the settlement of account of obligations to Toolco, TWA will pay Toolco cash in the amount of $54,892,499.35; $100,000,000 in Interim Subordinated Notes with interest at 6½%; and an additonal cash payment of $1,068,356.52, representing accrued interest on subordinated obligations. In addition, TWA agrees to [3951] make a subscription offer[6] to holders of common stock for an aggregate of not less than $100,000,000 and not more than $112,000,000 subordinated debentures with detachable warrant rights for the acquisition of common stock.[7] Under the "Hughes Financing and Subordination Agreement",[8] Toolco will acquire all the subordinated debentures not subscribed to by the remaining stockholders.[9] The issuance of the Subordinated Debentures will provide TWA the means for refunding the Interim Subordinated Notes in the sum of $100,000,000 issued to Toolco by the resulting cash proceeds or by exchange of

[6] On or before May 31, 1961.

[7] The terms of the debentures and of any stock warrants attached thereto will conform to the recommendations of a special committee appointed for that purpose by and from TWA's investment banking firms. For each $100 of subordinated debentures, the holder shall receive the right to purchase not more than 4 shares of TWA common. The maturity of the debentures may be as late as June 30, 1978.

[8] This agreement is among TWA, Toolco, Irving Trust Company (as Bank Agent), the Institutional Investors, and the Chemical Bank New York Trust Company, as Trustee under the Indenture of Mortgage.

[9] Toolco may not be called upon to purchase more than $100,000,000 worth.

Subordinated Debentures for Interim Subordinated Notes held by Toolco. As a result, the stock interest of Toolco in TWA, now 78%, may be increased.

Under the terms of the "Hughes Financing and Subordination Agreement," Toolco will provide a revolving credit of $50,000,000 in favor of TWA for the period expiring upon the acquisition of the last of 20 Convair 880's which TWA has the right to acquire under the Jet Flight Equipment Program. In addition, Toolco is obligated to lend TWA any sum necessary to insure a net working capital of $10,000,000 until acquisition of the last of the Convair 880's.[10]

Most significantly the financing plan provides measures of assurance regarding the management policies of TWA during the period the securities are outstanding. This is accomplished by a "Voting Trust Agreement,"[11] an "Option Agreement,"[12] and the "Noteholder's Agreement."[13] These agreements provide for a voting trust in respect of TWA stock now held by [3952] Toolco,[14] or thereafter acquired during the life of the trust. The Voting Trust will remain in effect until December 15, 1970, unless previously terminated or extended as provided therein. Toolco, under its right to designate one of the three Voting Trustees has appointed Raymond M. Holliday, a director of TWA. The Notes Agent, acting for the investors, designated the other

[10] TWA will issue subordinated notes for this obligation. Toolco's obligation to provide the net working capital shall cease if the outstanding subordinated notes equals $50,000,000. Repayment of the subordinated notes, during the period specified, is to be made out of any excess over the required working capital.

[11] This agreement is among TWA, the Voting Trustees and Toolco.

[12] This agreement is among Irving Trust Company (as Bank Agent), The Equitable Life Assurance Society of the United States and Metropolitan Life Insurance Company (the Institutional Investors) and Toolco.

[13] This agreement is among Irving Trust Company (as Bank Agent), the Institutional Investors and Irving Trust Company (as Note Agent).

[14] Now amounting to 5,221,301 shares of TWA stock.

two Voting Trustees. The Voting Trustees, acting by majority vote, are empowered to exercise their sole and absolute discretion in respect of the TWA stock deposited with them and will accordingly be in control over TWA management and policies. The Voting Trustees, under the trust, may also act as directors or officers of TWA and may engage in transactions with TWA.[18] Compensation for the services of the Voting Trustees is to be paid by Toolco.

Under the terms of the Option Agreement, Toolco is granted the non-transferable right and option, at any time after December 31, 1961, to purchase any outstanding Serial Notes by payment in full, and by payment in full of the outstanding Sinking Fund Notes plus a premium of 22% until March 31, 1962. The amount of the premium is thereafter reduced at the rate of ½ of 1% for each elapsed quarterly period of three months.

Upon the Board's grant of the requested modification of the limitations of Order 3210, and the consummation of the refinancing plan, a significant and fundamental change will have been accomplished in the control of TWA by Toolco. Upon the execution of the Voting Trust, the Toolco control of TWA will change drastically in both form and substance. No longer will the directors of Toolco be free to enforce their dictates or those of Toolco's controlling shareholder on TWA. Only one of the three voting trustees will represent directly these interests. Two of the voting trustees, selected by the financial institutions, will be independent of Toolco and of Mr. Hughes.

The voting trustees will not be restricted in their power to approve further financing for TWA, nor in their ability to sell, lease, transfer, hypothecate or otherwise dispose of, or manage TWA's assets. In short, their power to control

[18] Any approval herein of the plan of financing shall not, unless specifically so provided, be construed as an approval of any personal transactions between the Individual Trustees and TWA assuming such approval by the Board should be required under the Act.

TWA is as plenary as that of Toolco and its controlling shareholder.

We are advised that it was the insistence of the financial institutions upon the establishment and terms of the voting trust and of the conditions for its dissolution which have been the major stumbling block in recent weeks to the consummation of TWA's initial jet financing program.[10] We [3953] have not been told officially of the reasons which motivated the decision of the insurance companies and banks to seek this protection. However, we have not been unaware of TWA's problems.

For example, it is a matter of public record that TWA's major competitors arranged the financing for their jet fleets at a significantly earlier date than did TWA. The impact of this fact may be indeed far-reaching. This may have meant that those carriers obtained their financing at a time when funds could be raised on relatively more attractive terms. In any event, it is clear that TWA will pay substantially higher interest rates for its funds than its major competitors. The fact that this disparity in debt burden can play a significant part in the competitive picture is certainly clear.

Moreover, it is probable that the delay in arranging financing has also prevented TWA from securing delivery of a substantially large portion of the jet fleet which was ordered on its behalf. Thus, TWA was unable to take delivery of the twenty Convair 880's, most of which have been available for the past several months It appears that the failure to receive this equipment as planned may have played a substantial part in TWA's recent inability to maintain its traffic position relative to its principal competitors. Thus, we note, for example, that the carrier's preliminary

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[10] TWA has arranged for the acquisition of 47 jet aircraft. Comparable carriers have acquired, or are in process of acquiring, jet fleets in the neighborhood of twice this size.

traffic reports for the month of November 1960 show that TWA's share of the Big Four domestic passenger market has declined from 23.0 to 20.2 per cent. By way of contrast, United, which was behind TWA, has caught and passed it, increasing its share from 21.3 per cent to 29.0 per cent.[17] It appears to be significant that TWA's major competitors have already taken delivery of much larger jet fleets than TWA is operating and have firm orders for delivery of more.[18]

[3954] Under these circumstances, we think it clear that Board action to facilitate TWA's acquisition of jet equipment is in the public interest. At the same time, however, it is evident that Toolco's control of TWA, as exercised through Hughes, has presented substantial problems requiring the Board's attention.

In short, and without further description of these problems, the Board wishes to make clear the fact that it would anticipate the proper filing of an application under section 408 of the Act and the obtaining of the approval of the Board before Toolco would attempt to reassume control over TWA.[19] It is clear that such approval would not be

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[17] American suffered a much less severe decline from 32.0 to 30.5 per cent.

[18] Apart from the impact on relative traffic position, there are other respects in which TWA may have been adversely affected by the delays in financing and in the delivery of the Convairs. Thus, the delay may have created increased cost of jet crew qualification both in terms of retraining expense and in keeping such crews available pending delivery. (Such crews cannot be used interchangeably in piston equipment; therefore, the crews which have been qualified in Convairs have presumably not been employed in TWA's revenue service.) At least one of the aircraft has suffered from exposure. The cost of restoring the aircraft to operable condition may be sought to be imposed on TWA.

[19] The Option Agreement requires Toolco, in exercising the option, to provide a satisfactory opinion of counsel that the exercise of the option, by purchase of the notes, does not require governmental or regulatory approval or that such approval has been granted and is in force. No such provision could, of course, preclude dissolution of the voting trust after the ten-year term has expired. Nonetheless, it is clear that Toolco should not resume direct control at that time unless prior approval of the Board is sought and obtained.

forthcoming without a searching inquiry into the public interest factors affecting this control.[20]

We turn now to a consideration of the specific transactions and relationships upon which we must act. The applicants seek either a disclaimer of our jurisdiction or our approval of these transactions. Their need is for a prompt and definitive action by the Board in order that they might consummate the transactions by the December 29th date, set for the complicated closing arrangements. The application has necessarily been brief in its statement of these problems and the short period of time between the date of filing and the date by which our action has been sought has prevented our giving to these matters the study and consideration which would be warranted to resolve satisfactorily the question of jurisdiction. In circumstances such as these when we do not find the transactions contrary to the public interest, and where the parties do not contest our jurisdiction, it is certainly better to assume jurisdiction and to act promptly so that the parties might proceed to a satisfactory resolution of the business situation.

[3955] The basic terms of the financing, including the portion involving transactions directly between Toolco and TWA, are essentially the same as these heretofore approved by Orders E-15561, dated July 21, 1960, and E-15430, dated June 23, 1960. And we find that, as modified, they are in the public interest and should be approved under the terms of Order 3210 and by exemption under section 416 of the Act from the requirements of section 408.

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[20] *See Trans World Airlines, Inc., Further Control by Hughes Tool Company*, 12 C.A.B. 192, 196 (1950), Docket 2796. "Aside from any undesirable influence on an air carrier which might arise because of the acquirer's interest in a given phase of aeronautics, an acquirer of an air carrier is not without responsibility in other respects for an air carrier's general capacity to perform its public responsibilities. For inevitably the controlling company, by virtue of its investment in the acquired carrier, will endeavor to make itself accountable — as indeed the acquirer here under scrutiny had — for the managerial efficiency, the operating economy, and the financial integrity of the controlled carrier. Accordingly, in determining whether or not a particular acquisition should be approved, it is necessary to consider the over-all impact of the acquirer's plans and policies with respect to the controlled carrier."

To the extent that the Voting Trustees shall be considered as officers or directors of TWA and nominees of the directors of Toolco, the interlocking relationships between TWA and Toolco should be found in the public interest and approved.

Raymond M. Holliday, Vice President, Assistant Treasurer and Assistant Secretary of Toolco, is a member of TWA's Board of Directors. By Order E-14251, July 22, 1959, the Board approved the holding by Mr. Holliday of any directorships and offices within the system of affiliated and subsidiary companies composed of Toolco and TWA. In view of the previous approval of Mr. Holliday's interlocking relationships, his serving in addition as a Voting Trustee by Toolco nomination will not adversely affect the public interest. Accordingly, approval to the extent required under section 409(a) of the Act is granted herein.

Ernest R. Breech is Chairman of the Board of Directors of Aeronutronic Systems, Inc., a Ford subsidiary which is apparently engaged in research related to space vehicles and related matters chiefly for military purposes. This is his only association which appears to be an aeronautical enterprise.[21] Since it is not engaged in the sale of products to civil air carriers, it is consistent with our practice to approve this relationship.

ACCORDINGLY, IT IS ORDERED:

1. That the restrictions imposed on transactions between Toolco and TWA by Order 3210, as modified by Order E-15561, July 21, 1960, and by Order E-15430, June 23, 1960, are further modified herein to permit TWA to consummate the transactions described in the motion filed herein;

[21] Mr. Breech has offered and will be asked to submit in detail the full information required by Part 251 of the Economic Regulations. Should the information reveal any additional relationships, the Board would be free to act at that time.

[3956] 2. That TWA be and it hereby is, exempted pursuant to section 416, from the requirement of section 408 to the extent necessary to enable it to consummate the jet aircraft equipment purchases described and set forth in the motion herein;

3. That this order shall not be deemed a determination for rate-making purposes of the reasonableness of any of the transactions specified herein;

4. That to the extent required under section 409(a) of the Act, approval is granted of the relationships which will be created by Raymond M. Holliday, Ernest R. Breech, and Irving S. Olds, serving as Voting Trustees of the controlling stock interest of Toolco, in TWA, under a Voting Trust Agreement;

5. That this Order may be amended or revoked at any time in the discretion of the Board without hearing.

By the Civil Aeronautics Board:

/s/ Robert C. Lester

Robert C. Lester
Secretary

(SEAL)

INDEX

Volume AX-I

ITEM	PAGE
TWA Ex. 2 (Statement of Robert W. Rummel) ..	AX-1
TWA Ex. R-3 (Toolco-Convair Amended Agreement—Model 22, 6/4/56)	AX-63a
TWA Ex. R-5 (TWA-Toolco Purchase Agreement—May 9, 1960)	AX-64
TWA Ex. R-8(80) (FAA Registration Documents—B707-331, No. N771TW)	AX-73a
TWA Ex. R-8(81) (FAA Registration Documents—B707-331, No. N772TW)	AX-73k
TWA Ex. 3 (Affidavit of J. B. Connelly)	AX-74
TWA Ex. 4(b) (C. & C. Report—Comparative Profit Study)	AX-80
TWA Ex. 4(c)(1) (C. & C. Report—Financial Results from Reconstructed Jet Fleet)	AX-91
TWA Ex. 4(c)(4) (Exhibits B-J to C. & C. Report—Financial Results from Reconstructed Jet Fleet)	AX-167

Volume AX-II

TWA Ex. 5(a) (Drexel Harriman Ripley, Inc. Report—Parts I & II)	AX-336
TWA Ex. 5(b) (Exhibits to Drexel Harriman Ripley, Inc. Report)	AX-430

ITEM	PAGE
TWA Ex. 7(b)(1) (Price Waterhouse Study—Volume One)	AX-452
TWA Ex. 7(b)(2) (Price Waterhouse Study—Volume Two)	AX-480
Volume AX-III	
TWA Ex. 10 (Letter—Boeing to TWA re 707 Negotiations—12/29/54)	AX-643a
TWA Ex. 12 (Toolco-Convair CV-990 Purchase Agreement—11/10/60)	AX-644
TWA Ex. 13 (Holliday Call Sheet—Feb. 20-27, 1961)	AX-655
TWA Ex. 14 (CV-990 Purchase Agreement—Amendment of 2/22/61)	AX-660
TWA Ex. 22 (Rummel Call Sheets)	AX-665
TWA Ex. 23 (Letter Agreement—Sale of Six Boeings to Pan American)	AX-729
TWA Ex. 39 (Affidavit of Joseph P. Ripley)	AX-732
TWA Ex. 42 (C. & C. Report—Revision of Pages 63, 64, 71 & 72)	AX-735
TWA Ex. 43 (C. & C. Report—Revision of Page 51)	AX-740
TWA Ex. 46 (Jet and Turboprop Aircraft of TWA and Principal Competitors—1958-66)	AX-742
TWA Ex. 47 (Boeing Aircraft Employed on Routes Formerly Served by B-720Bs)	AX-743

ITEM	PAGE
TWA Ex. 50 (Price Waterhouse Report—Summary of Application of Assumptions)	AX-744
TWA Ex. 72 (TWA Annual Report—1939)	AX-745
TWA Ex. 73 (TWA Annual Report—1940)	AX-752
TWA Ex. 74 (TWA Annual Report—1941)	AX-758
TWA Ex. 75 (TWA Annual Report—1942)	AX-760
TWA Ex. 76 (TWA Annual Report—1943)	AX-763
TWA Ex. 77 (TWA Annual Report—1944)	AX-766
TWA Ex. 78 (TWA Annual Report—1945)	AX-769
TWA Ex. 79 (TWA Annual Report—1946)	AX-773
TWA Ex. 80 (TWA Annual Report—1947)	AX-779
TWA Ex. 81 (TWA Annual Report—1948)	AX-783
TWA Ex. 82 (TWA Annual Report—1949)	AX-788
TWA Ex. 83 (TWA Annual Report—1950)	AX-792
TWA Ex. 84 (TWA Annual Report—1951)	AX-797
TWA Ex. 86 (TWA Annual Report—1953)	AX-800
TWA Ex. 87 (TWA Annual Report—1954)	AX-805
TWA Ex. 88 (TWA Annual Report—1955)	AX-814
TWA Ex. 89 (TWA Annual Report—1956)	AX-819
TWA Ex. 90 (TWA Annual Report—1957)	AX-822
TWA Ex. 91 (TWA Annual Report—1958)	AX-842
TWA Ex. 92 (TWA Annual Report—1959)	AX-854
TWA Ex. 93 (TWA Annual Report—1960)	AX-856

ITEM	PAGE
TWA Ex. 94 (TWA Annual Report—1961)	AX-862
TWA Ex. 96 (TWA Annual Report—1963)	AX-866
TWA Ex. 128 (Pan American Annual Report—1959)	AX-868
TWA Ex. 132 (Pan American Annual Report—1963)	AX-869
TWA Ex. 155 (AAL Annual Report—1958)	AX-870
TWA Ex. 158 (AAL Annual Report—1961)	AX-871
TWA Ex. 159 (AAL Annual Report—1962)	AX-873
TWA Ex. 184 (UAL Annual Report—1959)	AX-874
TWA Ex. 186 (UAL Annual Report—1961)	AX-875
TWA Ex. 187 (UAL Annual Report—1962)	AX-876
TWA Ex. 192 (TWA Prospectus, 5/25/61 & Supplement, 6/20/61)	AX-877
TWA Ex. 194 (TWA Prospectus—6/17/57)	AX-883
TWA Ex. 223 (Pan American Prospectus—7/3/45—Supplement—7/24/45)	AX-889
TWA Ex. 249 (American Airlines Prospectus—6/11/46—Supplement—6/24/46)	AX-891
TWA Ex. 257 (TWA-Toolco Lease Agreements—Boeing Jets)	AX-893
TWA Ex. 264 (Toolco-Lockheed Purchase Agreement—L-1449A—12/23/54)	AX-901
TWA Ex. 266 (Toolco-Lockheed Purchase Agreement—L-1049G—9/26/55)	AX-908

ITEM	PAGE
TWA Ex. 267A (Letter, TWA to Toolco—1957 Common Stock Offering)	AX-919
TWA Ex. 267B (Letter, TWA to N.Y. Trust Co.—1957 Common Stock Offering)	AX-921
TWA Ex. 271 (Letter, Toolco to SEC—1957 Common Stock Offering)	AX-923
TWA Ex. 275 (TWA Board Minutes—April 26, 1945)	AX-925
TWA Ex. 276 (TWA Finance Committee Minutes—September 12, 1945)	AX-928
TWA Ex. 277 (Page from Banking Quotation Record)	AX-930
TWA Ex. 278 (TWA Board Minutes—November 8, 1946)	AX-931
TWA Ex. 279 (Special TWA Stockholders Meeting—December 23, 1946—Judges' Report)	AX-935
TWA Ex. 280A (Minutes—Adjourned Special TWA Stockholders Meeting—December 28, 1946)	AX-936
TWA Ex. 280B (Adjourned Special TWA Stockholders Meeting—December 28, 1946—Judges' Report)	AX-940
TWA Ex. 281A (Minutes—Adjourned Special TWA Stockholders Meeting—December 31, 1946)	AX-941
TWA Ex. 281B (Adjourned Special TWA Stockholders Meeting—December 31, 1946—Judges' Report)	AX-944

ITEM	PAGE
TWA Ex. 282 (Minutes & Judges' Report—Adjourned Special TWA Stockholders Meeting —January 6, 1947)	AX-945
TWA Ex. 283 (TWA Board Minutes—December 18, 1946)	AX-950
TWA Ex. 284 (TWA Board Minutes—December 27, 1946)	AX-956
TWA Ex. 285 (TWA Board Minutes—December 28, 1946)	AX-962
TWA Ex. 287 (TWA Board Minutes—January 9, 1947)	AX-966
TWA Ex. 288 (Minutes—Adjourned Special TWA Stockholders Meeting—January 13, 1947)	AX-974
TWA Ex. 290 (TWA Board Minutes—June 15, 1948)	AX-980
TWA Ex. 292 (TWA Proxy Statement—July 15, 1948)	AX-991
TWA Ex. 293 (TWA Prospectus—2/18/49 & Amendments—3/8/49)	AX-993
TWA Ex. 313 (Debt Outstanding & Available to TWA & Competitors—1961-63)	AX-1051
TWA Ex. 314 (Weighted Average Interest—TWA & Competitors—1960-63)	AX-1060
TWA Ex. 319 (Least Squares Analysis—S.H.E. Avg. Stage Length—B-331s)	AX-1065

ITEM	PAGE
TWA Ex. 320 (Least Squares Analysis—S.H.E. Avg. Stage Length—CV-880s)	AX-1066
TWA Ex. 321 (Least Squares Analysis—S.H.E. Avg. Stage Length—B-131s)	AX-1067
TWA Ex. 322 (Least Squares Analysis—S.H.E. Avg. Stage Length—B-131Bs)	AX-1068
TWA Ex. 328 (S.H.E.—Passengers Added/ Deleted—Reconstructed TWA)	AX-1069
TWA Ex. 331 (TWA Historical Load Factors— CV-880s—1962-1963)	AX-1071
TWA Ex. 336 (Comparison TWA Int'l vs. PAA-Atl.—1959)	AX-1072
TWA Ex. 345A (Price Waterhouse Comparison —C. & C. and S.H.E. (Revised))	AX-1073
TWA Ex. 351 (1965 CAB Handbook of Airline Statistics)	AX-1107
TWA Ex. 355 (Comparative Profit Study— TWA with AAL & UAL)	AX-1108
TWA Ex. 356 (Comparative Profit Study— TWA with All Other Domestic Trunks)	AX-1110
TWA Ex. 399 (Comparison, TWA Actual Jet Load Factors vs. S.H.E. Marginal Passenger Mile Factors)	AX-1112
TWA Ex. 401 (TWA B-131 Load Factors— April-July 1959)	AX-1113
TWA Ex. 420 (Price Waterhouse Comparison— C. & C. (Revised) and S.H.E.)	AX-1114

ITEM	PAGE
TWA Ex. 423 (Late Evening Flights—TWA 1961-1963)	AX-1129
TWA Ex. 424 (Cargo v. Passenger Revenue—TWA Late Evening Flights)	AX-1133
TWA Ex. 426 (Comparison of Selected A/C Numbers from S.H.E. Appendix A)	AX-1134
TWA Ex. 431 (Profitability of TWA A/C by Month—Computer Print-out)	AX-1135
TWA Ex. 432 (Profitability of TWA A/C by Month—Chart)	AX-1145
TWA Ex. 435 (Regression Analysis—Random Numbers)	AX-1146
TWA Ex. 436A (Regression Analysis—Random Numbers)	AX-1154
TWA Ex. 436B (Regression Analysis—Random Numbers)	AX-1157
TWA Ex. 436C (Regression Analysis—Random Numbers)	AX-1160
TWA Ex. 440 (Graph Illustrating Testimony of Prof. Hare)	AX-1163
TWA Ex. 441 (Regression Experiment—3/23/68)	AX-1164
TWA Ex. 444 (C. & C. Tabulation—Additional TWA Domestic Seat-Miles)	AX-1177

Volume AX-IV

ITEM	PAGE
DX4 (Toolco Order—30 P.&W. JT3C-4 Engines, 2/14/56)	AX-1178
DX5 (Letter—Toolco to P.&W. re Jet Engine Orders, 2/14/56)	AX-1181
DX6 (Toolco Order—90 Additional P.&W. JT4A-3 Engines, 2/15/56)	AX-1183
DX7 (Amendment—Toolco Order for 300 P.&W. Jet Engines, 9/7/56)	AX-1184
DX8 (Letter—P.&W. to Rummel re 300 Jet Engines, 9/7/56)	AX-1185
DX10 (Letter—Rummel to Collings re Boeing 707, 1/12/55)	AX-1186
DX11 (Notes of Convair Negotiations—March 24, 1955)	AX-1187
DX15 (Draft C.&C. Report—TWA Financial Forecast 1959-61)	AX-1192
DX19 (Page from *Aviation Week*, Jan. 10, 1955)	AX-1208
DX22 (*American Aviation*, June 20, 1955, pages 21-23)	AX-1209
DX26 (*American Aviation*, Sept. 12, 1955, pp. 84-85)	AX-1212
DX27 (*American Aviation*, Oct. 10, 1955, p. 68)	AX-1214
DX28 (Pages from *American Aviation*, Oct. 24, 1955)	AX-1215

ITEM	PAGE
DX29 (*Aviation Week*, Oct. 17, 1955, p. 7)	AX-1218
DX31 (*American Aviation*, Nov. 7, 1955, pp. 23-25, 27-28)	AX-1219
DX40 (TWA Board Minutes—June 21, 1961)	AX-1224
DX43 (Excerpts from Deposition of Robert W. Rummel)	AX-1229
DX44 (Letter of Damon, Dec. 6, 1955)	AX-1369
DX45 (Letter—Leslie to Dietrich, Dec. 19, 1955)	AX-1378
DX46 (Letter—Dietrich to Ayers, Dec. 21, 1955)	AX-1382
DX47 (Boeing-Toolco Purchase Agreement—8 B-131s, 1/10/56)	AX-1385
DX48 (Teletype—Boeing to Toolco re B707-131s, 11/11/56)	AX-1390
DX51 (Boeing Offer of B707-320s to Toolco, 1/6/56)	AX-1391
DX53 (Transcript of Telephone Conversation—Rummel & Connelly, 12/20/57)	AX-1393
DX54 (TWA Board Minutes—June 26, 1959)	AX-1402
DX57 (The Huntington Report—1960)	AX-1410
DX62 (TWA Fleet Requirements 1961-70, dated 3/1/61)	AX-1420
DX63 (TWA Financial Forecast 1959-61, dated 5/15/59)	AX-1433
DX64 (Letter to Thomas, dated 5/6/59)	AX-1438

ITEM	PAGE
DX65 (TWA Staff Engineering Report re Jets & Turboprops—4/19/56)	AX-1440
DX66 (Toolco-Boeing Contracts—B707-131s, 3/2/56)	AX-1445
DX67 (Toolco-Boeing Contracts—B707-331s, 3/19/56)	AX-1479
DX68 (Toolco-Convair Contracts—CV-880s, 9/10/56)	AX-1505
DX71 (Rummel Memo re TWA Equipment Program, 3/15/61)	AX-1536
DX72 (Telegram—Bew to Rummel—2/27/61)	AX-1538
DX73 (Letter—Leslie to Holliday—3/20/61)	AX-1539
DX74 (Letter—Leslie to Holliday—4/3/61)	AX-1540
DX77 (Letters—Toolco to TWA re Financing Additional Jets, 6/9-10/61)	AX-1541
DX78 (Letter—TWA to Holliday re Financing Proposals, 6/16/61)	AX-1553
DX79 (Pan American-Boeing Purchase Agreement—B707-120s, 10/13/55)	AX-1558
DX81 (Pan American-Boeing Purchase Agreement—B707-321s, 12/19/55)	AX-1564
DX85 (Boeing-AAL Purchase Agreement—B707-123s, 3/1/56)	AX-1576
DX95 (Allen Letter Announcing Boeing Jet, Nov. 19, 1954)	AX-1584
DX96 (Boeing Offer to Sell Pan American 25 B-120s, 6/23/55)	AX-1588

ITEM	PAGE
DX97 (Boeing Offer to Sell American 15 B-120s, 6/24/55)	AX-1591
DX98 (Boeing Offer to Sell United 15 B-120s, 6/24/55)	AX-1594
DX101 (Boeing 707 Delivery Positions)	AX-1597
Volume AX-V	
DX102 (Boeing Memorandum re 707 Over-Ocean Configuration, 11/2/55)	AX-1601
DX103 (Boeing Memorandum re TWA Delivery Positions, 12/23/55)	AX-1606
DX105 (Boeing Memorandum re Negotiations with TWA, 7/24/56)	AX-1608
DX106 (Letter—Rummel to Cook re Boeing Deliveries, 1/28/58)	AX-1611
DX107 (Letter—Rummel to Cook re Boeing Deliveries, 3/17/58)	AX-1615
DX108 (Letter—Price to Allen re Boeing Deliveries, 3/30/58)	AX-1618
DX109 (Letter—Toolco to Allen re Boeing Deliveries, 5/8/58)	AX-1621
DX116 (Rourke Memo to Rummel re CV-880 Deliveries, 1/15/60)	AX-1623
DX120 (TWA Memorandum re CV-880 Deliveries, 10/2/59)	AX-1624
DX122 (Bew Memorandum to Cannady re CV-880 Deliveries, 12/18/59)	AX-1625

ITEM	PAGE
DX124 (Parmet Memorandum to Rourke re CV-880 Deliveries, 1/13/60)	AX-1627
DX125 (TWA Memorandum re CV-880 Deliveries, 1/22/60)	AX-1629
DX127 (Rummel Memorandum to Rourke re Integration of CV-880s, 2/8/60)	AX-1630
DX128 (Letter—Rourke to Digges re Specification Modifications, 4/7/60)	AX-1638
DX130 (Bew Wire to Rourke re Convair Delays, 5/27/60)	AX-1640
DX135 (Letter—Convair to Bew re CV-880 Delivery, 1/6/61)	AX-1641
DX137 (Telegram—Bew to Rummel re Convair Delays, 2/16/61)	AX-1643
DX139 (Letter—Convair to Bew re Convair Delays, 3/16/61)	AX-1644
DX142 (Letter—Convair to Rourke re CV-880 Deliveries, 7/11/61)	AX-1647
DX143 (Letter—Rourke to Convair re CV-880 Deliveries, 8/2/61)	AX-1650
DX146 (Letter—Convair to Toolco re Model 30 Delivery Positions, 5/6/60)	AX-1652
DX148 (Toolco—General Dynamics Letter Agreement re 6 Model 30s, 7/14/60)	AX-1654
DX152 (Toolco—General Dynamics Letter Agreement re Additional Model 30s, 9/6/60)	AX-1655

ITEM	PAGE
DX156 (Telegram—Beall to Allen, et al. re PAA Negotiations, 9/28/55)	AX-1657
DX168 (Boeing Memorandum re Conversations with Howard R. Hughes, 9/23/55)	AX-1658
DX169 (Boeing Memorandum re Conversation with Howard R. Hughes, 10/31/55)	AX-1660
DX170 (Telegram—Boeing to Toolco re B707-331s, 7/21/59)	AX-1661
DX218 (C.&C. Letter to Leslie re TWA Financial Forecast, March 13, 1959)	AX-1664
DX219 (TWA Financial Forecast 1958-1962, dated 12/1/58)	AX-1666
DX237 (*Aviation Week & Space Technology*, 11/13/61, pages 42-43)	AX-1671
DX239 (*Airlift*, May 1962, p. 46)	AX-1673
DX254 (TWA Board Meeting, Aug. 16, 1961—Report of System General Manager)	AX-1674
DX255 (Statement of CAB Chairman Boyd, Jan. 29, 1960)	AX-1677
DX257 (*Aviation Week*, 1/30/61, pp. 36-37)	AX-1681
DX258 (Report to Directors of TWA—Oct. 13, 1961)	AX-1683
DX259 (CAB Order of Investigation—Dec. 28, 1961)	AX-1694
DX260 (Letter—Tillinghast to CAB, Jan. 29, 1962)	AX-1703

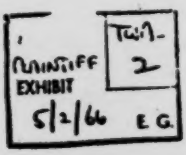
ITEM	PAGE
DX262 (Revised Pages 70-73 of TWA Ex. 4(c)(1))	AX-1708
DX270 (Report of Loeb, Rhoades & Co.)	AX-1712
DX271A (S.H.E. Report (Revised)—Volume One)	AX-1789
DX271B (S.H.E. Report (Revised)—Volume Two)	AX-1859
DX284 (TWA Prospectus—Nov. 20, 1952)	AX-1961
DX286 (TWA Board Minutes—Jan. 13, 1955)	AX-1967
DX287 (TWA Board Minutes—Dec. 13, 1955)	AX-1970
DX289 (TWA Board Minutes—April 26, 1956)	AX-1974
DX290 (Toolco-TWA Conditional Sale Contract—L-1049Gs, 6/6/56)	AX-1979
Volume AX-VI	
DX292 (Toolco-TWA Conditional Sale Contract—L-1649As, 4/19/57)	AX-1995
DX321 id. (CAB Orders & Documents)	AX-2012
DX322 id. (CAB Orders & Documents)	AX-2191
DX323 id. (CAB Orders & Documents)	AX-2347
Volume AX-VII	
DX334 (Correlation Coefficients—Substituted S.H.E. Table G-VII)	AX-2427
DX339 (B-120s Available to AAL, Actual vs. Reconstructed—1959)	AX-2428

ITEM	PAGE
DX341 (Domestic Carriers—Jets Assigned to Service, 1959-63)	AX-2429
DX342 (TWA's Share of Jets Assigned to Domestic Service, 1959-63)	AX-2430
DX348 (Revised Summary—Categories of Differences—Wemple vs. Simat)	AX-2431
DX358B id. (CAB Form 41 Reports—Northeast Airlines, 1957-1966)	AX-2452
DX358C id. (CAB Form 41 Reports—PAA, 1957-1966)	AX-2454
DX359A (Supplemental S.H.E. Report—Volume A)	AX-2458
DX364 id. (Excerpts from Deposition of Emmett O. Cocke)	AX-2843
DX367 (Combined Non-Stop Scheduled Frequencies Per Week—Aug. 1958-63)	AX-2851
DX368 (Combined Non-Stop Scheduled Frequencies Per Week—Aug. 1958-63)	AX-2853
DX371 (Summary—Categories of Differences—Wemple vs. Simat (Supplemental))	AX-2856
DX379 (Domestic Jet Seat Miles—Wemple vs. Historical)	AX-2867

TWA Ex. 2
(Statement of Robert W. Rummel)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK



TRANS WORLD AIRLINES, INC.,

Plaintiff,

-against-

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,

Defendants.

STATEMENT OF ROBERT WILAND RUMMEL

61 Civ. 2324

TABLE OF CONTENTS

	Page
Qualifications	1
Early jet developments	4
Orders for jet aircraft placed by Hughes Tool Company	8
Boeing 707 - reallocation of delivery dates to reflect equalization of delivery positions among TWA, Pan American and American	10
Convair 880 - acceleration of scheduled service to reflect timely deliveries of 30 aircraft to TWA	13
Piston aircraft - acceleration of TWA's retirement program	22

LIST OF ANNEXES

Description	ANNEX
List of Aircraft	A
R. W. Rummel reports on TWA's equipment position and jet transportation developments (1951-1953)	B(1)-B(4
Letter from R. W. Rummel to J. K. Collings dated December 9, 1955 relating to current aircraft and aircraft on order by competitors of TWA	C
TWA's Statement of Improvement of Delivery Positions	D
Letter from Boeing to R. W. Rummel dated July 27, 1959 relating to delivery dates	E
R. W. Rummel study showing dates of actual jet deliveries, actual piston retirements and timely jet deliveries and reconstructed dates of piston retirements	F

* Bound separately.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

TRANS WORLD AIRLINES, INC., Plaintiff, -against- HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY, Defendants.	STATEMENT OF ROBERT WILAND RUMMEL 61 Civ. 2324

Robert Wiland Rummel, Vice President, Planning and Research, Trans World Airlines, Inc. ("TWA"), respectfully states as follows:

QUALIFICATIONS

I was born in Dakota, Illinois, on August 4, 1915, and graduated from Curtiss-Wright Technical Institute, Glendale, California, in 1936. I am a member of the Aerospace Council of the Society of Automotive Engineers and an Associate Fellow of the American Institute of Aeronautics and Astronautics. I have participated in technical activities of the Air Transport Association since 1942 and in technical activities of the International Air Transport Association since 1949. I am a member of the National Aeronautics and Space Administration Research Advisory Committee on Aircraft Operating Problems.

In 1935, I served as Stress Analyst for the Hughes Aircraft Company in Burbank, California, and performed the stress analysis of the landing gear, wing skin and other

aspects of the Hughes [illegible], the aircraft with which Howard Hughes established the world's land plane speed record in 1935. Thereafter, I undertook a special research study of the efficiency of fuselage structures at the Curtiss-Wright Technical Institute.

In 1936, I assisted in the development of the Model 12 transport as a stress analyst for Lockheed Aircraft Corporation.

After the Lockheed project was completed, I was employed by Aero Engineering Corporation, Long Beach, California, as a detail designer and draftsman and assisted in the development of an all-metal commercial airplane.

After the Aero project was completed, I laid out basic designs for the fuselage, wing panels, center section and tail surfaces of a proposed United States Army trainer to be produced by National Aircraft Company of Alhambra, California.

Beginning in October 1937, I was employed by Rearwin Airplanes, Kansas City, Kansas, and designed two new series of aircraft, seven distinct models of which were certificated by the CAA and produced in quantity by the company. I also designed and was responsible for developing substantial improvements in aircraft models which had been produced previously. I was in charge of engineering, flight testing, aircraft inspection and installation of new facilities. In addition to serving Rearwin as Chief Engineer, I also served as Chief Engineer of the Ken Royce Engine Co. after its acquisition by Rearwin in 1938. As such, I redesigned two aircraft engine models. These were used by Rearwin and four other aircraft manufacturers. In 1941, I was elected to the Board of Directors of the successor of the two Rearwin

companies, Rearwin Aircraft and Engines, which I continued to serve as Chief Engineer. This company was succeeded by the Commonwealth Aircraft Corporation which I served as Chief Research Engineer.

On June 21, 1943, I joined TWA as Senior Engineer in charge of new aircraft studies and future fleet planning. I became Chief Engineer of TWA on August 10, 1949 and held that position until March 24, 1956, when I was elected Vice President, Engineering.

In 1958, I became Chairman of the TWA Jet Planning Committee and served in this capacity as well as Vice President, Engineering. The Jet Planning Committee was composed of vice presidents and major department heads and was responsible for planning for the introduction and efficient use of jet aircraft by TWA.

On April 27, 1959, I was elected to my present position of Vice President, Planning and Research.

From 1956 through 1960, when I was serving as Vice President, Engineering, and later Vice President, Planning and Research, of TWA, I was also employed by the Hughes Tool Company ("Toolco") as a consultant and special representative in connection with the acquisition of jet aircraft from the Boeing Company and General Dynamics Corporation (Convair Division) and the acquisition of jet engines from the Pratt & Whitney Aircraft Corporation and the General Electric Company. As Toolco's special representative during that period, I reported directly to Howard Hughes. I had authority to commit funds under Toolco's contracts, and the Toolco factory representatives at Boeing and Convair reported to me as

special representati[illegible] Toolco responsible for the technical administration of the Toolco contracts with such manufacturers.

Although my title has changed from time to time, my primary duty during most of the period of my employment by TWA has been to recommend what size and what type fleets to procure for TWA. I and members of my department consulted extensively with those departments of TWA which would either use or be affected by the procurement of the aircraft, and I consulted extensively with Mr. Hughes personally during the period from 1954 until 1961.

Since 1943, I have been actively engaged in all of TWA's major aircraft procurement programs and have been intimately concerned both with aircraft actually acquired through Toolco and also with aircraft which TWA considered for procurement, including the aircraft listed in Annex A. My activities included negotiations with aircraft manufacturers with respect to technical specifications, performance characteristics, provisioning and spare parts, delivery schedules, acceptance tests and other matters.

EARLY JET DEVELOPMENTS

As part of our responsibility for planning and research activities in connection with the acquisition of new aircraft for TWA, I and members of my department kept in close contact with manufacturers of aircraft and engines in order to keep abreast of significant new developments in the commercial aviation field. As early as 1946, I was aware of the probability that in due course jet transports would be feasible for commercial purposes. In this connection, I investigated numerous designs for commercial jet transports throughout the post-war years.

In 1951, I completed a report to John A. Collings, Vice President, Operations, of TWA with respect to TWA's equipment position vis-a-vis our major competitors. This was followed by reports in 1952 and 1953 that evaluated progress being made in turbine-powered transport developments. Copies of those reports are attached as Annex B(1)-B(4). A substantial portion of those reports was devoted to important developments in the field of jet transports and their potential impact upon TWA and the commercial aviation industry. At that time, British manufacturers were significantly further advanced in the commercial turbo-jet aircraft field than were United States manufacturers because of the early American emphasis on using jet aircraft strictly for military purposes. I stated in my reports, however, that United States developments would eventually surpass the British programs when sufficient interest was aroused here to provide financial support for American research and development in the commercial jet aviation field.

Those early reports also contained a detailed discussion of the operational aspects of turbine-powered aircraft and developments in power plants for turbo-prop and turbo-jet aircraft. I concluded that TWA should by-pass the British manufactured DeHavilland Comet and await the availability of United States jet equipment.

Subsequent to my reports, TWA continued its strong interest in jet air frame and engine developments. My staff and I continued to follow developments by all United States manufacturers and were particularly interested in the rapid progress being made by the Boeing Company.

By early 1954, Boeing was promoting its basic 707 designs and was very interested in developing airline interest

in its jet transport proposals. Boeing supplied TWA with the latest performance data derived from the use of a prototype 707 which was first flown during the summer of 1954. This contact was made through me because my department was responsible for reviewing manufacturers' proposals for various jet designs and also because of my known association with Mr. Hughes. At about the same time, Boeing was also discussing its jet aircraft with Pan American World Airways, Inc., and probably other carriers as well.

We engaged in numerous discussions with Boeing representatives throughout 1954 and thereafter. Among those participating in the negotiations in addition to myself were Mr. Hughes and numerous TWA employees, including Mr. Ralph Damon, then TWA President, and numerous Boeing employees.

In 1955, TWA and Toolco recognized that in order for TWA to maintain its competitive position, it would require a fleet of jet-powered aircraft substantially as soon as its principal competitors and that orders for such equipment should not be delayed. In the fall of 1955, the development of jet aircraft reached the point at which TWA should have made definite commitments for a fleet of medium to long range jet aircraft which would be sufficient to meet TWA's initial needs for its domestic and international routes. I recommended to Mr. Hughes at that time that TWA should place orders for jet aircraft so that it would have the aircraft available at or before the time its competitors did.

In addition to such aircraft as the Boeing 707 then under consideration, it was then appropriate for TWA to contemplate the need for aircraft of somewhat smaller size and perhaps shorter range. However, in the fall of 1955, the Convair 880

jet aircraft had not yet been developed and TWA was not aware that it would ultimately acquire that particular aircraft. (TWA also did not at that time foresee that it would acquire in 1957 and 1958 four Lockheed 1049H piston aircraft and four Lockheed 1649A aircraft.)

One of my responsibilities as Vice President of Engineering of TWA was to keep TWA's senior management currently informed with respect to the number and types of aircraft ordered by TWA's principal competitors, the anticipated delivery dates for such aircraft and the anticipated effect of such acquisitions upon TWA's competitive position. By the fall of 1955, various air carriers had submitted firm orders for the acquisition of medium to long range jet aircraft and the anticipated effect upon TWA's competitive position made it important for TWA to do likewise. A list of aircraft ordered by TWA's competitors on or before December 9, 1955 was transmitted to Mr. Collings, Mr. Damon and others, including representatives of Toolco, on or about that date and a copy is attached as Annex C. That list shows that by December 9, 1955, various air carriers had placed the following firm orders for a total of 186 jet aircraft, including 95 Douglas and 59 Boeing jet aircraft:

Airline	Manufacturer and Type	Quantity
Pan American	Douglas DC-8	25
Pan American	Boeing 707	20
United	Douglas DC-8	30
National	Douglas DC-8	6
Eastern	Douglas DC-8	26
BOAC	Comet IV	20
American	Boeing 707	30
Braniff	Boeing 707	5
Air France	Caravelle	12
KLM	Douglas DC-8	8
Continental	Boeing 707	4

ORDERS FOR JET AIRCRAFT PLACED BY HUGHES TOOL COMPANY

In 1956 and 1957, Toolco entered into agreements providing for the purchase by Toolco of a fleet of 63 jet aircraft: 15 Boeing 707-131 jet aircraft, 18 Boeing 707-331 jet aircraft, and 30 Convair 880 jet aircraft.

These agreements were as follows:

(1) Purchase of 15 Boeing 707-131 jet aircraft. On March 2, 1956, Hughes Tool Company, by F. W. Ayers, and Boeing Airplane Co., by J. B. Connelly, entered into a contract known as Agreement No. 7.(1) That contract originally provided for the purchase by Toolco of 8 Boeing 707-131 jet aircraft. The number of 707-131 jet aircraft to be purchased was increased to 9 (Supplemental Agreement No. 1, dated March 19, 1956), and then to 12 (Supplemental Agreement No. 2, dated September 28, 1956), and finally to 15 jet aircraft (Supplemental Agreement No. 3, dated January 10, 1957). The Boeing 707-131 jet aircraft (which has a shorter effective range than the 707-331 jet aircraft) was part of the Boeing 707-120 Series and was suitable for use on TWA's domestic routes.

(2) Purchase of 18 Boeing 707-331 jet aircraft. On March 19, 1956, Toolco, by C. H. Price, and Boeing, by J. B. Connelly, entered into a contract known as Agreement No. 9, which provided for the purchase by Toolco of 18 Boeing 707-331 jet aircraft.(2) The

(1) Plaintiff TWA's Exhibit No. R-1.

(2) Plaintiff TWA's Exhibit No. R-2.

Boeing 707-331 jet aircraft was part of the Boeing 707-320 Series and was suitable for use on TWA's international routes.

(3) Purchase of 30 Convair 880 jet aircraft. By agreements dated June 7, 1956 and September 10, 1956, Toolco, by Raymond Hollfday, and General Dynamics Corporation (Convair), by J. V. Naish, entered into a contract providing for the purchase by Toolco of 30 Convair Model 880 (22) jet aircraft.(1)

TWA did not receive this 63-plane fleet. On March 5, 1959, I was informed by Leonard Schwartz and Raymond Cook of Toolco that the number of jet aircraft TWA was to receive had been reduced. TWA ultimately received the 15 Boeing 707-131 jet aircraft ordered by Toolco. However, it received only 12 Boeing 707-331 jet aircraft, not 18; the remaining 6 Boeing 707-331 jet aircraft were diverted to Pan American and were not replaced until 5 Boeing 707-331B jet aircraft were leased in 1962-1963. It would not have been necessary for TWA to lease these aircraft if it had received the 6 Boeing 707-331 jet aircraft diverted to Pan American. Instead of 30 Convair 880 jet aircraft, TWA received only 20. The remaining 10 Convair 880 jet aircraft were disposed of as follows: 6 aircraft, 3 of which had been previously assigned by Toolco to TWA, were delivered to Northeast Airlines through an arrangement between Toolco and Convair entered into in November 1960 and were ultimately

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(1) Plaintiff TWA's Exhibit Nos. R-3 and R-4.

acquired by TWA from Convair in 1963; 4 aircraft were retained by Toolco and are currently being operated by Northeast Airlines under lease or other arrangement with Toolco.(1)

By the end of 1960, TWA's jet fleet totaled only 28 aircraft, not 63. That 28-plane fleet was grossly inadequate for TWA's needs. Moreover, even if all 47 jet aircraft ultimately received by TWA from Toolco had been received by TWA by the end of 1960, TWA's jet fleet would not have been adequate to meet TWA's needs at that time. In my opinion, the 63-plane fleet, in the numbers and types ordered by Toolco, had it been ordered and delivered on a timely basis, would have been adequate to meet the needs of TWA for jet aircraft through 1960.

BOEING 707 - REALLOCATION OF DELIVERY DATES TO REFLECT EQUALIZATION OF DELIVERY POSITIONS AMONG TWA, PAN AMERICAN AND AMERICAN

If orders for jet aircraft for TWA had been placed at least as early as TWA's competitors placed their orders, the initial order would have been placed in about October 1955. In order to meet TWA's initial domestic and international needs, 15 Boeing 707-131 jet aircraft and 18 Boeing 707-331 aircraft should have been ordered at that time.

The study which is attached as Annex D shows the effect which such timely placement of orders would have had in accelerating deliveries of jet aircraft to TWA if TWA had received equal treatment with Pan American and American Airlines, its major competitors, in accordance with prevailing practices in the

(1) Plaintiff TWA's Exhibit Nos. R-5, R-6 and R-7.

industry and the specific procedures followed by the Boeing Company. The reallocation referred to in the study has been prepared on the basis of the following assumptions, each of which reflects prevailing industry practices and Boeing's production and sales policies as I know them to have been during the period under consideration:

(1) Pan American, American and TWA ordered Boeing 707 jet aircraft in the quantities actually ordered in 1955 and 1956 by Pan American, American and Hughes Tool Company, respectively, and TWA ordered at about the same time as Pan American and American.

(2) Pan American, TWA and American all sought as early delivery positions as Boeing would provide.

(3) Pan American obtained the first three delivery positions of the 120 Series, such aircraft to be used in the Boeing certification program.

(4) Boeing's deliveries to American of the 120 Series would have reflected Boeing's efforts at least to equalize early delivery positions as between TWA and American.

(5) TWA obtained the first three delivery positions of the 320 (330) Series, such aircraft to be used in the Boeing certification program.

(6) Boeing would have delivered the remaining aircraft of the 320 (330) Series on a basis which would have provided Pan American and TWA with substantially equivalent numbers of 320 (330) aircraft by the end of

the first six months after the delivery of the first aircraft to TWA, with deliveries to Pan American and TWA made on a substantially equivalent basis per month.

The reallocation of delivery dates of Boeing 707-320 (330) Series jet aircraft has been prepared on the further assumption that if Pan American had not received the 6 Boeing 707-331 jet aircraft ordered by Toolco, the earliest delivery dates for six 707-320 jet aircraft which Pan American could have obtained from Boeing upon ordering 6 such jet aircraft in July 1959 (the date of its arrangements with Toolco for delivery of such 6 aircraft) would have been the dates indicated in a letter addressed by Boeing to me dated July 27, 1959, which reflects my determination of the best delivery schedule obtainable from Boeing at such time. A copy of this letter is attached as Annex E.

For purposes of the study, actual delivery dates of aircraft are taken from FAA Registration Certificates(1) and the "ready for delivery" dates for 2 Boeing 707-331 jet aircraft actually delivered to TWA on April 1 and April 5, 1960 are taken from Boeing invoices.(2)

My conclusion is that if TWA had ordered its Boeing jet aircraft at about the time Pan American and American did so, TWA would have received 15 Boeing 707-131 and 18 Boeing 707-331 jet aircraft in accordance with the following schedules:

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(1) Plaintiff TWA's Exhibit No. R-8.

(2) Plaintiff TWA's Exhibit No. R-9.

REALLOCATED DATES OF DELIVERY TO TWA OF 15 BOEING 707-131 JET AIRCRAFT

November 30, 1958	May 10, 1959
December 31, 1958	May 13, 1959
January 31, 1959	May 24, 1959
February 27, 1959	May 28, 1959
March 30, 1959	June 13, 1959
April 3, 1959	June 29, 1959
April 18, 1959	July 10, 1959
	July 27, 1959

REALLOCATED DATES OF DELIVERY TO TWA OF 18 BOEING 707-331 JET AIRCRAFT

July 19, 1959	December 30, 1959
August 22, 1959	January 18, 1960
August 28, 1959	February 29, 1960
September 22, 1959	March 23, 1960
October 6, 1959	April 26, 1960
October 27, 1959	April 29, 1960
November 5, 1959	May 9, 1960
November 10, 1959	June 8, 1960
December 15, 1959	July 1, 1960

CONVAIR 880 - ACCELERATION OF SCHEDULED SERVICE TO REFLECT TIMELY DELIVERIES OF 30 AIRCRAFT TO TWA

In 1954, 1955 and 1956, I participated in discussions and negotiations between Howard Hughes and Convair which preceded Convair's agreement to proceed with a development program for a somewhat shorter range jet aircraft ultimately designated as Convair's Model 880 (22). Convair was unwilling to undertake the program until it had firm commitments for the purchase of 40 aircraft.

On June 7, 1956, Toolco entered into an agreement with General Dynamics Corporation (Convair) for the purchase of 30 Convair Model 880 (22) jet aircraft.(1) The agreement contemplated that an additional 10 such jet aircraft would be purchased by Delta. It was my opinion then and it is still my opinion that all 30 Convair 880 jet aircraft ordered by Toolco were required by TWA in order to supplement the 15 Boeing 707-131 jet aircraft and 18 Boeing 707-331 jet aircraft previously ordered by Toolco and to meet TWA's needs for jet aircraft through 1960.

Article 2 of the Toolco-Convair agreement provided for deliveries of all 40 aircraft on the following schedule:

Month of Delivery	Number of Aircraft
November 1959	1
December	1
January 1960	2
February	2
March	3
April	4
May	4
June	5
July	6
August	6
September	6

This delivery schedule was incorporated by reference in Article 2 of the subsequent purchase agreement of September 10, 1956 between Toolco and Convair.(2) The allocation of deliveries between Toolco and Delta was subject to an agreement between Toolco and Delta which was to be incorporated in the Toolco and Delta purchase contracts with Convair.

The allocation of deliveries between Toolco and Delta was the subject of discussions and correspondence among

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(1) Plaintiff TWA's Exhibit No. R-3.

(2) Plaintiff TWA's Exhibit No. R-4.

Convair, Toolco and Delta for an extended period following the execution of the purchase contracts. In the fall of 1958, the production of Convair 880 jet aircraft reached a point at which it became essential to allocate particular aircraft between Toolco and Delta so that aircraft would proceed through the production line in the sequence in which they were to be delivered. At that time, Convair allocated deliveries between Toolco and Delta.

On November 18, 1958, Delta confirmed the Convair allocation and executed "Amendment No. 3" to its purchase agreement with Convair.(1) This Amendment provided for delivery schedules to Delta as follows:

DELTA DELIVERIES
As Per Amendment No. 3
November 18, 1958

Month of Delivery	Number of Aircraft
January 1960	1
February	0
March	1
April	1
May	1
June	1
July	1
August	1
September	3
	10

At approximately the same time, Convair informed Toolco that Convair was proceeding with production of the 30 aircraft ordered by Toolco on the basis of a delivery schedule complementary to the Delta schedule. I actively participated in the preparations made by Toolco and TWA for the receipt and utilization of these aircraft. Such preparations were based upon the following schedule:

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(1) Plaintiff TWA's Exhibit No. R-10.

SCHEDULED DELIVERIES OF CONVAIR 880 AIRCRAFT TO TOOLCO AND TWA

Month of Delivery	Number of Aircraft
November 1959	1
December	1
January 1960	1
February	2
March	2
April	3
May	3
June	4
July	5
August	5
September	3
	30

This schedule appears in a document entitled "Hughes Tool Company Airplane Program Delivery Schedule", dated November 18, 1958(1) (the same date that Delta executed its own delivery schedule)(2) and in TWA Jet Plans and Premises - Aircraft Availability - Convair 880 Delivery - March 24, 1959.(3)

The delivery schedules of both Delta and Toolco, dated November 18, 1958(4) are completely consistent with the delivery schedule for 40 aircraft contained in the Toolco-Convair agreement of June 7, 1956, as shown in the following table:

Month of Delivery	June 7, 1956 Contract	Toolco Schedule Nov.18,1958	Delta Am. No. 3 Nov.18,1958
November 1959	1	1	0
December	1	1	0
January 1960	2	1	1
February	2	2	0
March	3	2	1
April	4	3	1
May	4	3	1
June	5	4	1
July	6	5	1
August	6	5	1
September	6	3	3
	40	30	10

(1) Plaintiff TWA's Exhibit No. R-11.
(2) Plaintiff TWA's Exhibit No. R-10.
(3) Plaintiff TWA's Exhibit No. R-12.
(4) Plaintiff TWA's Exhibits Nos. R-10 and R-11.

TWA's plans for the integration of Convair 880 jet aircraft were made by jet planning groups under my supervision. With the knowledge of Toolco, these plans had, since the purchase contract was executed in 1956, been premised on the assumption that all 30 aircraft on order by Toolco would be assigned to TWA pursuant to the terms of the Toolco-Convair contract.(1)

After March 5, 1959, when I was informed by Leonard Schwartz and Raymond Cook of Toolco that TWA would receive only 20 of the 30 Convair 880 jet aircraft on order by Toolco, TWA's planning estimates were revised to reflect the reduction from 30 to 20.(2) Deliveries of the 30 aircraft were allocated between Toolco and TWA on the basis of the following schedule, which is set forth in "Hughes Tool Company Airplane Program Delivery Schedule", dated September 4, 1959:(3)

Month of Delivery	TWA	Toolco
November 1959	1	0
December	0	1
January 1960	1	0
February	1	1
March	2	0
April	2	1
May	2	1
June	2	2
July	4	1
August	3	2
September	2	1
	20	10

The foregoing delivery schedule is consistent with the original contract delivery dates set forth in the Toolco-Convair agreement of June 7, 1956.(4) The following table reflects a composite delivery schedule for the 40 aircraft ordered by Toolco and Delta:

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(1) Plaintiff TWA's Exhibit No. R-3, Art. 6; Plaintiff TWA's Exhibit No. R-4, Art. 16.

(2) Plaintiff TWA's Exhibit No. R-13.

(3) Plaintiff TWA's Exhibit No. R-14.

(4) Plaintiff TWA's Exhibit No. R-3.

Month of Delivery	TWA	Toolco	Delta	Contracts
November 1959	1	0	0	1
December	0	1	0	1
January 1960	1	0	1	2
February	1	1	0	2
March	2	0	1	3
April	2	1	1	4
May	2	1	1	4
June	2	2	1	5
July	4	1	1	6
August	3	2	1	6
September	2	1	3	6
	20	10	10	40

The Toolco-Convair contract provided for FAA certification of the Convair 880 jet aircraft no later than May 1, 1960.(1) TWA planning, based upon such a certification date, envisioned the commencement of scheduled operations in May 1960.(2) Early in 1959, however, TWA believed that Convair would be able to complete certification requirements in February 1960. TWA planning estimates reflected a planning date for start of service of March 15, 1960, based upon the anticipated February 1960 certification date(3) and deliveries of 20 aircraft to TWA in accordance with the table set forth above.

Convair did not meet the February certification date, but did fulfill its contractual commitments with regard to certification by completing the requirements on May 1, 1960.(4)

TWA received only one Convair 880 jet aircraft in all of 1960.(5) On December 30, 1960, Toolco finally assigned

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(1) Plaintiff TWA's Exhibit No. R-4, Art. 2(b).
(2) Plaintiff TWA's Exhibit No. R-15.
(3) Plaintiff TWA's Exhibit No. R-16.
(4) Plaintiff TWA's Exhibit No. R-17.
(5) Plaintiff TWA's Exhibit No. R-18.

to TWA rights with respect to 19 Convair 880 jet aircraft. Within the next few days, Convair commenced deliveries to TWA and in January 1961, TWA commenced scheduled service utilizing these aircraft.

The following table lists the actual delivery dates of 36 Convair 880 jet aircraft in the order in which these aircraft were actually delivered to Delta, TWA and Northeast as shown in official FAA documents:(1)

DELIVERIES OF CONVAIR 880 JET AIRCRAFT

Date of Delivery	Delivered to
January 31, 1960	Delta
May 4, 1960	Delta
May 6, 1960	Delta
May 18, 1960	TWA
June 2, 1960	Delta
July 4, 1960	Delta
August 4, 1960	Delta
October 1, 1960	Delta
October 23, 1960	Delta
November 21, 1960	Delta
November 30, 1960	Northeast
December 5, 1960	Northeast
December 8, 1960	Northeast
December 12, 1960	Delta
December 14, 1960	Northeast
January 1, 1961	TWA
January 5, 1961	TWA
January 6, 1961	TWA
January 8, 1961	TWA

(1) Plaintiff TWA's Exhibits Nos. R-7, R-18 and R-19.

Date of Delivery	Delivered to
January 12, 1961	TWA
January 21, 1961	TWA
January 21, 1961	Northeast
January 30, 1961	Northeast
February 2, 1961	TWA
February 15, 1961	TWA
March 15, 1961	TWA
March 18, 1961	TWA
March 20, 1961	TWA
April 26, 1961	TWA
May 6, 1961	TWA
May 25, 1961	TWA
June 9, 1961	TWA
July 9, 1961	TWA
August 10, 1961	TWA
September 2, 1961	TWA
October 13, 1961	TWA

The 6 aircraft delivered to Northeast Airlines, as indicated in the foregoing table, were originally ordered by Toolco and delivered to Northeast Airlines pursuant to an agreement between Toolco and Convair dated November 10, 1960 and an agreement between Convair and Northeast Airlines dated November 17, 1960.(1) Subsequently, these 6 aircraft were repossessed by Convair and sold to TWA. Two of these aircraft were delivered to TWA in July 1963, one in August 1963 and three in September 1963.(2)

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(1) Plaintiff TWA's Exhibit Nos. R-6 and R-7.

(2) Plaintiff TWA's Exhibit Nos. R-6, R-7 and R-20.

The tables below compare the contract delivery dates for both Delta and TWA with the dates upon which delivery was actually made. The monthly delay is calculated for each airline and the results shown.

DELIVERIES OF CONVAIR 880 JET AIRCRAFT TO DELTA

Contract	Actual	Mo. Delay
January 1960	January 1960	0
March 1960	May 1960	2
April 1960	May 1960	1
May 1960	June 1960	1
June 1960	July 1960	1
July 1960	August 1960	1
August 1960	October 1960	2
September 1960	October 1960	1
September 1960	November 1960	2
September 1960	December 1960	3

Delay 14 months for 10 aircraft or average delay of 1.4 months per aircraft.

DELIVERIES OF CONVAIR 880 JET AIRCRAFT TO TWA

Twenty-Plane Fleet

Scheduled	Actual	Mo. Delay
November 1959	May 1960	6
January 1960	January 1961	12
February 1960	January 1961	11
March 1960	January 1961	10
March 1960	January 1961	10
April 1960	January 1961	9
April 1960	January 1961	9
May 1960	February 1961	9
May 1960	February 1961	9
June 1960	March 1961	9
June 1960	March 1961	9
July 1960	March 1961	8
July 1960	April 1961	9
July 1960	May 1961	10
July 1960	May 1961	10
August 1960	June 1961	10
August 1960	July 1961	11
August 1960	August 1961	12
September 1960	September 1961	12
September 1960	October 1961	13

Delay 198 months for 20 aircraft or average delay of 9.9 months per aircraft.

As the purchaser of the Convair 880 jet aircraft, Toolco assumed responsibility for all matters pertaining to deliveries of the aircraft and I was instructed by Toolco that no TWA employee was to become involved in such matters. If TWA, rather than Toolco, had been the purchaser of the Convair 880 jet aircraft, it is my opinion that Convair would have made deliveries of the planes in advance of the dates upon which deliveries actually occurred and that TWA's overall delivery experience would have closely approximated that of Delta. It is my further opinion that TWA would have commenced scheduled service with its Convair 880 fleet at least as early as May 15, 1960 and would have accepted deliveries of aircraft in advance of this date for the purpose of training of flight and ground personnel in the belief that Convair would better its actual certification date of May 1, 1960.

In addition, if TWA, rather than Toolco, had been the purchaser of the Convair 880 jet aircraft, it is my opinion that by the end of 1960, TWA's fleet would have consisted of all 30 Convair 880 aircraft instead of the 20 aircraft referred to in the previous table. The reduction of the size of this fleet was effected by Toolco over my opposition. I have consistently maintained that TWA required all 30 aircraft to fulfill its needs through 1960.

PISTON AIRCRAFT - ACCELERATION OF TWA'S RETIREMENT PROGRAM

Earlier deliveries of Boeing jet aircraft and Convair jet aircraft would have enabled TWA to retire much of its

outmoded piston equipment far earlier than it was actually able to do so and at least as early as TWA's competitors did so. When TWA's jet aircraft were actually delivered, TWA moved quickly to dispose of its obsolescent piston aircraft and it is my opinion that TWA would have done so on the same basis if deliveries of jet aircraft to TWA had come earlier.

I have reconstructed the dates on which TWA would have retired its piston equipment if deliveries of Boeing jet aircraft had been made on the reallocated dates of delivery to TWA of 15 Boeing 707-131 jet aircraft and 18 Boeing 707-331 jet aircraft, set forth at page 13 above, and if deliveries of 30 Convair 880 jet aircraft had been made to TWA on the dates shown in the Toolco Schedule of November 18, 1958(1) referred to on page 16 above. In making the reconstruction, I have followed the same procedure which TWA followed in retiring piston aircraft on the basis of actual deliveries of jet aircraft. An illustration of the method used in computing the reconstructed piston retirement dates is as follows:

> The actual retirement date of 4 Martin 202A piston aircraft is December 31, 1958 and is timed to the actual delivery of a Boeing 707-131 jet aircraft on January 29, 1959. The timely delivery date for that Boeing jet is November 30, 1958 or a gain of 60 days over the actual schedule. The 60-day gain is then applied to the actual retirement date of the 4 Martins, giving a reconstructed retirement date for the 4 Martin aircraft of November 1, 1958.

---

(1) Plaintiff TWA's Exhibit No. R-11.

For purposes of this reconstruction, the dates of actual deliveries of jet aircraft are taken from official FAA Registration Certificates.(1) The dates of actual retirement of piston aircraft are the dates on which TWA considered the aircraft sold and are taken from reports by TWA to the Civil Aeronautics Board on Form 41, Schedule B-8, attached as annexes to the report of R. Dixon-Speas.(2)

The reconstruction of retirement dates of piston aircraft has been made on the basis of a 63-jet plane fleet (the full fleet ordered by Toolco). A total of 103 piston aircraft which were actually retired in connection with the receipt by TWA of its first 63 jet aircraft are used in the calculations. I have calculated reconstructed retirement dates for each of these aircraft using the method outlined above. My calculations are set forth in the chart attached as Annex F.

/s/ Robert Wiland Rummel
Robert Wiland Rummel

(1) Plaintiff TWA's Exhibit Nos. R-8, R-18 and R-21.

(2) Plaintiff TWA's Exhibit No. S-1.

VERIFICATION

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Robert Wiland Rummel, being duly sworn, deposes and says that he has read the foregoing statement and Annexes A through F referred to therein, and knows the contents thereof and that the same are true as stated.

/s/ Robert Wiland Rummel
Robert Wiland Rummel

Subscribed and sworn to before
me this 25th day of April, 1966.

/s/ Katherine H. W. Swift
Notary Public

Katherine H. W. Swift
Notary Public, State of New York
No. 31-9268000
Qualified in New York County
Commission Expires March 30, 1968

[Notarial Seal]

List of Aircraft

Avro

Avroliner

Boeing

B-377
131, 331, 720B, 131B, 331B and 727 jet

Bristol

Britannia

Convair

YB-60, 110, 240, 340 and C-99
880 jet

DeHavilland

Comet jets

Douglas

DC-4, DC-6, DC-6B, DC-7, DC-7B and DC-7C
DC-8 jet

Lockheed

Constellation Models 049, 649, 749, 749A, 1049A, 1049G, 1049H and 1649A
Electra
Hercules

Martin

202, 202A, 303 and 404

Northrop

Trimotor
B-35 Flying Wing

Republic

Rainbow

Sud Aviation

Caravelle jet

Vickers

Vanguard

COPY CHRONOLOGICAL

Mr. John A. Collings
200 Airport
Kansas City, Missouri

R. W. Rummel
206 Airport
Kansas City, Mo.
Dec. 9, 1955

Messrs.
R. S. Damon
J. W. Allen
E. O. Cocke
H. D. Fellows
G. Gilmore
A. V. Leslie
W. L. Pierson
R. Quinlivan

Current and Aircraft on Order

Reference: Letter, R. W. Rummel to J. A. Collings, May 11, 1955, same subject

We are providing herewith as attachment "A" a list of current and aircraft on order by our main competitive airlines, which revises and supersedes our previous listing transmitted by the reference letter. Attachment "B", which provides a comprehensive list of current and aircraft on order of all the airlines of the world, has also been revised and supersedes the previous issue.

There is another listing preceding attachments "A" and "B" which will be of considerable interest, as it provides a ready reference "box score" of turbine powered aircraft purchases as of this date, and also includes other possible purchases.

Changes in attachments "A" and "B" reflect equipment received and to the best of our knowledge, the latest information on anticipated deliveries.

/s/ R. W. Rummel

R. W. Rummel

JHB:LB

Attachments

(CC: Messrs. N. Dietrich, and Ray Cook - 12/19)

Copy to C. Denis
5-24-61

051394

TRANS WORLD AIRLINES, INC.
Staff Engineering

FIRM TURBOJET TRANSPORT ORDERS

Delivery	Airline	Manufacturer & Type	Quantity	Engine	Passengers
Early 1960	PAA	Douglas DC-8	25	JT5	108F/31T
Early 1959	PAA	Boeing 707	20	JT3	104F/12ST
Mid 1959	United	Douglas DC-8	30	JT3	112F/14CT
Early 1959	National	Douglas DC-8	6	JT3	
Mid 1959	Eastern	Douglas DC-8	18	JT3	
		Douglas DC-8	8	JT5	
Late 1958	BOAC	Comet IV	20		
	American	Boeing 707	30	JT3	
	Braniff	Boeing 707	5	JT5	
	Air France	Caravelle	12	Avon	
	KLM	Douglas DC-8	8	JT3	
	Continental	Boeing 707	4		

PROBABLE TURBOJET TRANSPORT ORDERS

Northwest	Boeing 707 or Douglas DC-8	8 - 10
Air France	Boeing 707 or Douglas DC-8	About 10
SAS	Douglas DC-8	5 - 7
Japan Air Lines	Douglas DC-8	About 3
Swissair	Douglas DC-8	About 3

RD:LB
23/9/58

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5-24-61

051395

TRANS WORLD AIRLINES, INC.
Staff Engineering

FIRM TURBO PROP TRANSPORT ORDERS

Delivery	Airline	Manufacturer & Type	Quantity	Engine
Mid 1958	American	Lockheed Electra	35	T56
Mid 1958	Eastern	Lockheed Electra	40	T56
Late 1955	BOAC	Britannia	33	
1957	BOAC	Viscount	12	
1957	Canadian Pacific	Britannia	3	
Early 1957	El Al	Britannia	3	
1957	KLM	Viscount	12	
In Progress	Capital	Viscount	60	
In Progress	BEA	Viscount	49	
In Progress	TCA	Viscount	25	
In Progress	Trans-Australia	Viscount	12	
Completed	Air France	Viscount	12	
	Continental	Viscount	8	
	Braniff	Electra	12	

PROBABLE TURBO PROP TRANSPORT ORDERS

	Western	Lockheed Electra	7
	National	Viscount	12
	Canadian Pacific	Britannia	3*
	El Al	Britannia	2*
	BEA	Vanguard	30

* Option

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051396

146

Trans World Airlines, Inc. - Staff Engineering

ATTACHMENT A

CURRENT & AIRCRAFT ON ORDER AS OF DEC. 1, 1955

Airline	On Hand Number	Type	Ordered Number	Delivered	Type	Estimated Delivery
AA	74	CV-240	4	0	DC-6A	Early 1956
	9	DC-4 (Cargo)	12	0	DC-6B	Late 1957
	30	DC-6	14	0	DC-7	Early 1956
	3	DC-6A (Cargo)	30	0	B-707	1959
	25	DC-6B	35	0	Electra (Turboprop)	Late 1958
	25	DC-7				
Air France	12	Brequets	5	0	S-55 Helicopters	
	37	DC-3	24	0	Hurel HD-32	
	19	DC-4	12	0	Caravelle (Jet)	
	19	L-749A	12	0	L-1649A	1956
	9	L-1049C				
	10	L-1049G				
	6	Languedoc				
	12	Viscount				
BOAC	18	S-377	15	0	Brittania 100	1956
	9	L-749A	8	0	Brittania 300	1956
	7	L-749	10	0	Brittania (Long Range)	1957
	2	L-1049**	20	0	Comet IV	1959
	1	DC-4M2	10	0	DC-7C	Late 1956
	9	Hermes IV				
	4	York III (Cargo)	** On lease from SAS.			
	22	Argonauts				
KLM	1	Auster VJ/1	10	0	DC-7C	Middle 1957
	7	CV-240	9	0	Viscount 800	Early 1957
	14	CV-340	2	0	F-27	
	16	DC-3	8	0	DC-8	
	7	DC-4				
	6	DC-6				
	2	DC-6A (Cargo)				
	6	DC-6B				
	10	L-749A				
	8	L-1049B				
	4	L-1049E				
	4	L-1049G				
SAS	7	DC-3	8	0	DC-7	
	17	DC-4				
	7	DC-6B				
	10	S-377				
	4	L-1049G				

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051397

Trans World Airlines, Inc. - Staff Engineering

ATTACHMENT A

Airline	On Hand Number	On Hand Type	Ordered Number	Ordered Delivered	Ordered Type	Ordered Estimated Delivery
PAA-Atlantic	11	B-377	PAA - All Divisions. Divisional Assignment of Ordered Equipment Unknown.			
	7	DC-4				
	1	DC-4A (Cargo)				
	28	DC-6B	15	0	DC-7C	Early 1956
	4	DC-7B	18	0	DC-7C	Early 1957
			25	0	DC-8	Early 1960
			20	0	B-707	Early 1959
PAA-Latin	5	CV-240				
	4	DC-3				
	7	DC-4				
	2	DC-4A (Cargo)				
	15	DC-6B				
	8	L-049				
PAA-Pacific	6	DC-4				
	4	DC-6B				
	15	B-377				
TWA	5	DC-3	8	0	1049G	Middle 1956
	4	DC-4	25	0	1649A	Early 1957
	7	DC-4 (Cargo)				
	11	B-202A				
	39	B-404				
	32	L-049				
	27	L-749A				
	12	L-749				
	10	L-1049				
	20	L-1049G				
UAL	55	CV-340	5	0	DC-6A	Early 1956
	13	DC-3	10	0	DC-6B	Early 1956
	9	DC-4	11	0	DC-6B	Early 1957
	10	DC-4 (Cargo)	17	0	DC-7	Early 1957
	42	DC-6	30	0	DC-8	Middle 1959
	21	DC-6B				
	27	DC-7				

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12/1/55

Trans World Airlines, Inc. - Staff Engineering

SCHEDULED UNITED STATES AIRLINE FLEETS

ATTACHMENT B

DOMESTIC TRUNKS	DC-3	DC-4	DC-6	DC-6B, A & C	DC-7, B & C	Convair	Super Convair	CV-240	CV-340	Viscount 700	B-404	Others
American		9	50	28 16*	25 14*			74				30 B-707* 35 Electra (Turboprop)*
Braniff	23		9		7*	2			26			5 B-707*
Capital	21	14				12				55* 5		
Caribair	4											
Colonial	8	5										
Continental (Pioneer)	21			5					6 3*			1 DC-6B under lease.
Delta	16		7		10 7*				20			5 CV-440*
Eastern		1			32 8*	19	29 10*				60	40 Electra* 26 DC-8*
Hawaiian	10								5			
National			4	8	4				12			9 Lodestars, 6 CV-440*, 6 DC-8*
Northeast	13			10*				7				
Northwest	7	17		7	8*		4					10 B-377
Trans Pacific	6											
TWA	5	11				71	30 8*				39	11 M-202A 25 L-1649A*
United	13	19	42	21 26*	27 17*				55			30 DC-8*
Western	9	5		9 5*				9				
ALASKA												
Alaska Airlines	3	2										1 C-46
Cordova	2											1 Catalina
N. Consolidated	3											
Pacific Northern	4	2				3						
Reeve Aleutian	3											
Ellis Alaska	3											3 C-46

* On Order

05135

TWA Ex. 2, Annex C, page 6 of 15
(Statement of Robert W. Rummel)

AX-33

Trans World Airlines, Inc. - Staff Engineering

SCHEDULED UNITED STATES AIRLINE FLEETS (Continued) ATTACHMENT B

	DC-3	DC-4	DC-6	DC-6B, A & C	DC-7, B & C	Convair	Super Convair	CV-240	CV-340	Viscount 700	B-404	Others
INTERNATIONAL												
Panagra	6	3	5	8	5*							26 B-377
Pan American	4	20		50	4 33*	8		5				25 DC-8*, 20 B-707*
LOCAL												
Allegheny	14											3 M-202
Bonanza	5											
Central	9											
Frontier	13											
Lake Central	8											
Mohawk	11							3				
North Central	18											
Ozark	16											
Piedmont	16											
Southern	17											
Southwest	10											5 M-202B
Trans Texas	16											
West Coast	12											
Totals	343	108	117	136 57*	102 99*	115	63 18*	98	124 3*	5 55*	99	

* On Order

051400

AX-35

TWA Ex. 2, Annex C, page 8 of
(Statement of Robert W. Rummel

Trans World Airlines, Inc. - Staff Engineering

CANADIAN SCHEDULED AIRLINE FLEETS

ATTACHMENT B

CARRIER	DC-3	DC-4	DC-6B, A & C	Super Connie	CV-240	C-46	Catalina	Bristol 170	Cargo	Canadair	Viscount 700	Others
Canadian Pacific	15	3	4 2*		5	8	2					
Canadian Central	9							1	3			
Quebecair	5											
Green Charlotte	2								2			
Saskatchewan									1			
TCA	27			8 1*				3		23	7 15*	
Wheeler									1			
Totals	58	3	4 2*	8 1*	5	8	2	4	7	23	7 15*	

* On Order

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AX-36

TWA Ex. 2, Annex C, page 9 of 15
(Statement of Robert W. Rummel)

Trans World Airlines, Inc. - Staff Engineering

LATIN AMERICA SCHEDULED AIRLINE FLEETS

ATTACHMENT B

	DC-3	DC-4	DC-6	DC-6B, A & C	DC-7, B & C	Constellation	Super Constellation	CV-240	CV-340	Viscount	C-46	Others
LATIN AMERICA												
Argentina												
Aerolineas Argentinas	20	6	6					5				6 Sandringham
Bolivia												
Lloyd Aereo	13											3 B-17
Brazil												
Aeroviao Brasil	21	7	2								5	10 Nord 2501*
Catarinense	4											
Cruzeiro do Sul	38								4*			
Loide Aereo	5										4	
Nacional	4										3	
Real						7						5 Catalina
Renair do Brasil	17				3*				8*			
Sovet	32											
Transportes	6											
Vasp	8											
Varig	16											5 + 4* Scandia
	23						3	5	2 3*		13	
British Guiana												
B. Guiana Airways	3											
Chile												
LAN	16			1 2*								2 M-202
Colombia												
Aviance	25	10				2	3				5	
Lansa	16											
Vasp								2				

* On Order

- 4 -

2 05142

Trans World Airlines, Inc. - Staff Engineering

LATIN AMERICA SCHEDULED AIRLINE FLEETS (Continued)

ATTACHMENT B

	DC-3	DC-4	DC-6	DC-6B, A & C	DC-7, B & C	Connie	Super Connie	CV-240	CV-340	Viscount	C-46	Others
Ecuador												
Aerovias Equatorianas	3											2 Stratoliner
Peru												
Faucett	7	4										
Grupo de Transportes	8											4 Catalina
Uruguay												
Pluna	6											
Venezuela												
Avensa	20	2							3*			
Taca de Venezuela	13											
LAV	21					2	2			5*	2	2 M-202
CENTRAL AMERICA												
Costa Rica												
Lineas Aereas	3								2*		4	
Guatemala												
Expresa Guatemala	7										1	
Honduras												
Servicio Aereo	4											
TACA DE Honduras	10											

* On Order

051403

JNR:LB 12/1/55

Trans World Airlines, Inc. - Staff Engineering

LATIN AMERICA SCHEDULED AIRLINE FLEETS (Continued) ATTACHMENT B

Fleets	DC-3	DC-4	DC-6	DC-6B, A & C	DC-7, B & C	Connie	Super Connie	CV-240	CV-340	Viscount	C-46	Others
Aerovias de Mexico	23	2							4*			
Aerovias Transcontinentales	5											
Aerovias Oeste		3										
Taliesa	8											
Trans Mar	11											
Aerolineas de Aviacion	20	6	4	2	4							
Panama												
Cia Panamena	6											
Salvador												
TACA International	21	5										
Caribbean												
LACSA	2									3		6 Viking
Aerovias "Q"	6											
Cubana	6	1				3	3*					
Cia Dominicana	2										4	
Caribbean Atlantic	3						3					
Cubana	6					4	1				3	
							2*					
Totals	488	46	12	3	4	18	10	12	2	3	44	
				2*	3*		5*		24*	5*		

* On Order

051404

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Trans World Airlines, Inc. - Staff Engineering

SCHEDULED EUROPEAN AIRLINE FLEETS

ATTACHMENT B

	DC-3	DC-4	DC-6	DC-6B A & C	DC-7, B & C	Constellation	Super Constellation	CV-240	CV-340 & 440	Viscount	Viking	Bristol 170	Others
Aer Lingus	13								1	4		4	
Aero O/Y	9								3				
				9									1 Stratoliner
Aigle Azur (MAT)	12	4		3*								2*	2 SO-30, 3 C-46
Air Algerie	2	5				2							1 L-749 from AF
Air Atlas/Air Maroc		3											4 C-46, 6 SO-30
													12 Brequets,
													6 Languedoc,
													5 S-55 Helicopters*
													24 Hurel HDJ2*
													12 Caravelle (Jet)*
Air France	37	19				19	19			12			12 16494*
Air Work	3			3*						3*	13	2	5 Hermes
				3									
Alitalia		1		2*					5				3 Brittania 300 LR
Aviaciony												6	3 Languedoc
Aquila													2 Solent, 2 Hythe
													1 DC-3 (Dart)
													8 DH-89A
													20 + 1 Airspeed Ambassadors
BEA	8									26	30		12 V800*, 20 V900*
BKS Air Trans (UK)	5												
													9 Hermes, 1 DC-4M2,
													18 B-377, 22 Argonauts
													4 York III (Cargo)
													33 Brittania*
BOAC					10*	16	2						20 Comet IV*
Braathens	1	3					1						
							1*						
Cyprus	6												
DLH (Turkish)	18												

* On Order

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051405

TWA Ex. 2, Annex C, page 12 of 15
(Statement of Robert W. Rummel)

Trans World Airlines, Inc. - Staff Engineering

SCHEDULED EUROPEAN AIRLINE FLEETS (Continued) ATTACHMENT B

	DC-3	DC-4	DC-6	DC-6B A & C	DC-7, B & C	Connie	Super Connie	CV-240	CV-340 & 440	Viscount	Viking	Bristol 170	Others
Aerolineas Argentinas											12		
Aviaco	3												3 Catalina
Channel Airways	3	1					4 4*		4*				
Hunting-Clan	4									3 3*	8		3 York
Iberia	16	6					3					4	
JAT (Jugoslavia)	20								3				1 Auster VJ/1 2 F-27*, 8 DC-6*
KLM	16	7	6	8	10*	10	16	7	14	9*			28 York
Lancashire/Skyways	4												
Loftleider		1											
LAI (Italy)	18		3	3									6 S-55
Sabena	28	8	4	9	6* 3*			2	12*				
Scottish Airlines	2												3 York
SAS	10	4	12	14	14*				11			3* 14	6 Scandias
Silver City	3												
Swissair	9	3		6	2*			7	8				
TAE (Greece)	14	3											
TAI (France)		3		5									
TAP (Portugal)	6	3					3						
Transair (UK)	7												
Totals	277	72	25	55 8*	43*	47	48 5*	16	45 16*	45 15*	44	30 5*	

* On Order

051406

JHB:LB 12/1/55

Trans World Airlines, Inc. - Staff Engineering

SCHEDULED AFRICAN AND AUSTRALIAN AIRLINE FLEETS

ATTACHMENT B

	DC-3	DC-4	DC-6	DC-6B A & C	DC-7, B & C	Connie	Super Connie	CV-240	CV-340	Viscount 700	Viking	Bristol 170	Others
AFRICA													
Central African	4									5*	10		
DTA Angola	5												
DTA Mozambique	4												
East African	9												
Ethiopian	8							2					
Liberian National	1												
Sudan Airways	2												
SAA	3	7			3*	4							
Swazi Air	4												
West African	4											5	1 Langnedoc
Totals	40	7			3*	4		2		5*	10	5	
AUSTRALIA													
Ansett Airways	6								1*				
ANA	26	9	2	2 2*								3	
Butler Airways	6												
Guinea	3												
MacRobertson-Miller	3												
Mandated Airlines	2												
Queensland Air	2												
Quantas	13	5				5	10						4 Sandringham, 4 Catalina 2 1049H (Carro)
TAA	24	4						5		6 3*			
Totals	85	18	2	2 2*		5	10	5	1	6 3*		3	
NEW ZEALAND													
NZ NAC	23												
Tasman Empire			3										5 Solents
Totals	23		3										

* On Order

JHB:LB 12/1/55

051407

Trans World Airlines, Inc. - Staff Engineering

SCHEDULED ASIAN AIRLINE FLEETS

ATTACHMENT B

	DC-3	DC-4	DC-5	DC-6B, A & C	DC-7, B & C	Convair	Super Convair	CV-240	CV-340	Viscount 700	Viking	Bristol 170	Others
MIDDLE EAST													
Afghan Airways	6												
Air Jordan	2												
Air Liban	4	2											3 Languedoc
Arab Airways	2												1 C-46
Arkia (Israel)													
El Al						5	2*			3*	4		
Israel Airways													
Jordan Airways	5	2											
Middle East	7												
Nigeair										3*	8		4 Languedoc
Saudi Arabian	15					5			5*			5	
Syrian	3												
INDIA, PAKISTAN, CEYLON, BURMA													
Air Ceylon	2												
Air India		1				3	2* 5						
Indian Airlines	72	2								5*	12		
Orient Airways	11						3	2					
Union of Burma	9									3*			
FAR EAST													
Air Vietnam	3	3										4 2*	21 C-46 2 Catalina
CAT Formosa	10												
Cathay Pacific	2	1	1										6 Catalina
Civair	22			3*				8	8*				
Japan Air Lines		8		4	3*								
Korean National	3	1											
Taiwan Airways	17												4 C-46
PAL	26								6				4 N178 Helicopters 4 SO-30
Siree (Saigon)	5												
Thai Airways	4	5				2*							
Totals	224	25	1	4 3*	3*	13 2*	8 10 4*	10	6 13*	14	24	9 2*	

* On Order

JTB:LB 12/1/55

051408

Annex D
to Statement of
R. W. Rummel

TWA'S STATEMENT OF IMPROVEMENT OF DELIVERY POSITIONS

To measure the improvement in delivery dates which TWA would have obtained over the actual delivery dates of aircraft it received had TWA ordered jet aircraft from Boeing at about the same time as Pan American and American and in comparable numbers, the actual delivery dates of Boeing jet aircraft to Pan American, TWA and American are reallocated among those three customers.

Since a substantial production effort of Boeing would have been directed to serving Pan American, TWA and American, as was the fact, and without changing the delivery positions Boeing in fact reserved and used for other customers, this Statement uses such actual delivery dates of aircraft to these three customers as the best available indication of when Boeing could have delivered such aircraft to Pan American, TWA and American. Actual delivery dates are used rather than contract delivery dates since, to the extent there may have been variations or improvements by Boeing over contract dates, as was the fact, the actual delivery dates are the most reliable.

The reallocation reflects the following assumptions:

(1) Pan American, American and TWA ordered Boeing 707 jet aircraft in the quantities actually ordered in 1955 and 1956 by Pan American, American and Hughes Tool Company respectively, and TWA ordered at about the same time as Pan American and American.

(2) Pan American, TWA and American all sought as early delivery positions as Boeing would provide.

(3) Pan American obtained the first three delivery positions of the 120 series, such aircraft to be used in the Boeing certification program.

(4) Boeing's deliveries to American of the 120 series would have reflected Boeing's efforts at least to equalize early delivery positions as between TWA and American.

(5) TWA obtained the first three delivery positions of the 320 (330) series, such aircraft to be used in the Boeing certification program.

(6) Boeing would have delivered the remaining aircraft of the 320 (330) series on a basis which would have provided Pan American and TWA with substantially equivalent numbers of 320 (330) aircraft by the end of the first six months after the delivery of the first aircraft to TWA, with deliveries to Pan American and TWA made on a substantially equivalent basis per month.

707-120 Series

The following sets forth the actual delivery dates of aircraft of the Boeing 707-120 Series to Pan American, American and TWA:

TWA	PAA	AAL
	8/15/58	
	9/29/58	
	10/16/58	10/23/58
	10/30/58	
	11/30/58.	
	12/19/58	12/31/58
1/29/59		1/23/59
		1/31/59
		2/13/59
		2/27/59
3/17/59		3/27/59
3/30/59		
4/3/59		4/9/59
4/18/59		4/23/59
4/29/59		
5/10/59		5/4/59
5/13/59		5/12/59
5/24/59		5/21/59
5/28/59		5/28/59
6/13/59		6/5/59
		6/24/59
		6/29/59
7/1/59		7/27/59
7/10/59		7/31/59
7/14/59		
8/1/59		8/12/59
		8/24/59
		9/15/59
		10/5/59
		10/14/59
		10/28/59
		11/20/59

Reallocation

The following sets forth a delivery pattern using actual delivery dates reallocated among Pan American, American and TWA. It is posited that Pan American was selected by Boeing as the first customer rather than TWA and therefore received the first three 120 aircraft, and further, that American received the fourth such aircraft (which was the fact).

REALLOCATION

	Boeing Production (PAA, AA, TWA) Available for Month	PAA	AA	TWA
1958				
August	1	8/15/58 (P)		
	Number in Fleet	1		
September	1	9/29/58 (P)		
	Number in Fleet	2		
October	3	10/16/58 (P)	10/23/58 (A) 10/30/58 (P)	
	Number in Fleet	3	2	
November	1			11/30/58 (P)
	Number in Fleet	3	2	1
December	2	12/19/58 (P)		12/31/58 (A)
	Number in Fleet	4	2	2
1959				
January	3	1/23/59 (A)	1/29/59 (T)	1/31/59 (A)
	Number in Fleet	5	3	3
February	2		2/13/59 (A)	2/27/59 (A)
	Number in Fleet	5	4	4
March	3	3/17/59 (T)	3/27/59 (A)	3/30/59 (T)
	Number in Fleet	6	5	5

REALLOCATION

	Boeing Production (PAA, AA, TWA) Available for Month	PAA	AA	TWA
1959				
April	5		4/9/59 (A)	4/3/59 (T)
			4/23/59 (A) 4/29/59 (T)	4/18/59 (T)
	Number in Fleet		8	7
May	8		5/4/59 (A)	
			5/12/59 (A)	5/10/59 (T)
			5/21/59 (A)	5/13/59 (T)
			5/28/59 (A)	5/24/59 (T)
				5/28/59 (T)
	Number in Fleet		12	11
June	4		6/5/59 (A)	
				6/13/59 (T)
			6/24/59 (A)	
				6/29/59 (A)
	Number in Fleet		14	13
July	5		7/1/59 (T)	
			7/14/59 (T)	7/10/59 (T)
			7/31/59 (A)	7/27/59 (A)
	Number in Fleet		17	15
August	3		8/1/59 (T) 8/12/59 (A) 8/24/59 (A)	
	Number in Fleet		20	

REALLOCATION

	Boeing Production (PAA, AA, TWA) / Available for Month	PAA	AA	TWA
1959				
September	1		9/15/59 (A)	
	Number in Fleet		21	
October	3		10/5/59 (A) 10/14/59 (A) 10/28/59 (A)	
	Number in Fleet		24	
November	1		11/20/59 (A)	
	Number in Fleet		25	

T - TWA)

P - PAA) As Originally Delivered

A - AA)

707-320 Series

The following sets forth the actual delivery dates on which aircraft of the Boeing 707-320 Series were delivered to Pan American and TWA. The aircraft designated "H" were those ordered by Toolco but in fact delivered to Pan American.

The aircraft delivered to TWA on April 1, 1960 was in fact ready for delivery February 29, 1960 and not delivered then because Toolco did not present payment. The aircraft delivered to TWA on April 5, 1960 was ready for delivery on March 3, 1960 and similarly was not delivered then because Toolco did not present payment. Accordingly, with respect to these two aircraft the "ready for delivery" date is set forth as well as the actual delivery date and the "ready for delivery" date will be used in reallocation.

	TWA	PAA
		7/19/59
		8/22/59
		8/28/59
		9/ 1/59
		9/22/59
		10/ 2/59
		10/ 6/59
		10/19/59
		10/27/59
		10/29/59
	11/ 5/59 (H)	
	11/10/59	
	11/10/59	
	11/25/59	
	12/15/59 (H)	12/ 8/59
	12/23/59	12/13/59
	12/30/59 (H)	
	1/18/60	1/13/60
		1/28/60
	3/23/60 (H)	3/ 5/60
[Ready 2/29/60 3/ 3/60]	4/ 1/60	4/26/60
	4/ 5/60	4/28/60
	4/14/60	
	4/29/60 (H)	
	5/ 9/60	
	5/25/60	
	6/ 8/60 (H)	
	7/ 1/60	
	7/ 1/60	

Reallocation

The following sets forth the delivery dates of the 707-320 Series to TWA and Pan American had TWA been selected as the first customer for the 320 Series and therefore received the first three such aircraft.

The six aircraft ordered by Toolco which were ultimately delivered to Pan American (identified by "H") are included in this reallocation. This reallocation assumes that had Pan American not received the six 707-331 jet aircraft ordered by Toolco, the earliest delivery dates for six 707-320 jet aircraft which Pan American could have obtained from Boeing upon ordering six such jet aircraft in July, 1959 (the date of its arrangements with Toolco for delivery of the six aircraft), would have been one aircraft in February, 1961, two aircraft in March, 1961, two aircraft in April, 1961 and one aircraft in May, 1961. These, if ordered, would have been received subsequent to the period covered by this reallocation:

ALLOCATION

	Boeing Production (PAA & TWA) Available for Month	TWA	PAA
1959			
July	1	7/19/59 (P)	
	Number in Fleet	1	
August	2	8/22/59 (P) 8/28/59 (P)	
	Number in Fleet	3	
September	2	9/22/59 (P)	9/ 1/59 (P)
	Number in Fleet	4	1
October	5	10/ 6/59 (P) 10/27/59 (P)	10/ 2/59 (P) 10/19/59 (P) 10/29/59 (P)
	Number in Fleet	6	4
November	4	11/ 5/59 (H) 11/10/59 (T)	11/10/59 (T) 11/25/59 (T)
	Number in Fleet	8	6
December	5	12/15/59 (H) 12/30/59 (H)	12/ 8/59 (P) 12/13/59 (P) 12/23/59 (T)
	Number in Fleet	10	9

REALLOCATION

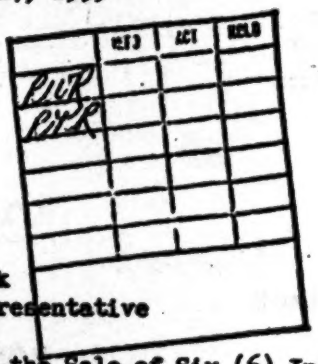
1960	Boeing Production (PAA & TWA) Available for Month	TWA	PAA
January	3	1/18/60 (T)	1/13/60 (P)
			1/28/60 (P)
	Number in Fleet	11	11
February	1	2/29/60 (T)	
	Number in Fleet	12	
March	3		11
			3/ 3/60 (T)
		3/23/60 (H)	3/ 5/60 (P)
	Number in Fleet	13	
April	4		13
		4/26/60 (P)	4/14/60 (T)
		4/29/60 (H)	4/28/60 (P)
	Number in Fleet	15	
May	2	5/ 9/60 (T)	15
	Number in Fleet	16	5/25/60 (T)
June	1	6/ 8/60 (H)	16
	Number in Fleet	17	
July	2	7/ 1/60 (T)	16
	Number in Fleet	18	7/ 1/60 (T)
			17

- PAA
- TWA

} As Originally Delivered

BOEING AIRPLANE COMPANY
TRANSPORT DIVISION
RENTON, WASHINGTON

July 27, 1959



TELEPHONE BROADWAY 2121
IN REPLY REFER TO
6-1100-60-137

Mr. R. W. Rummel
10 Richards Road
Kansas City, Missouri

Through: Mr. Edwin Zak
Resident Representative

Subject: Proposal for the Sale of Six (6) Increased Gross Weight Model 707-331 Aircraft to Hughes Tool Company

Gentlemen:

We wish to amend and supplement letter proposal 6-1100-2-591 to reflect delivery schedules of the six (6) Boeing Model 707-331 aircraft.

Please be advised that the present paragraph III, "Delivery Schedule" of letter proposal 6-1100-2-591 is stricken in its entirety and the following is hereby substituted in lieu thereof:

"III. Delivery

The six (6) Model 707-331 aircraft will be delivered according to the following schedules:

If a firm commitment is made by Hughes Tool Company by August 1, 1959

Month of Delivery	Quantity
February 1961	1
March 1961	2
April 1961	2
May 1961	1

If a firm commitment is made by Hughes Tool Company by September 1, 1959

Month of Delivery	Quantity
March 1961	1
April 1961	2
May 1961	2

BOEING AIRPLANE COMPANY
TRANSPORT DIVISION
RENTON, WASHINGTON

If a firm commitment is made by Hughes Tool Company by October 1, 1959

Month of Delivery	Quantity
April 1961	1
May 1961	2
June 1961	2
July 1961	1"

All other provisions of the letter proposal 6-1100-2-591 remain unchanged.

Very truly yours,

BOEING AIRPLANE COMPANY
Transport Division

T. L. Spalding, Manager
Contract Administration

ANNEX F TO STATEMENT OF R. W. RUMMEL

ACTUAL JET DELIVERIES -- ACTUAL PISTON RETIREMENTS

Actual Delivery Jet Aircraft No.	Type	Date	Retirement of Pistons as of Delivery of each Jet No.	Type	License	Date
			1	202A	N93201	12-31-58
			2	202A	N93203	12-31-58
			3	202A	N93210	12-31-58
			4	202A	N93212	12-31-58
1	131	1-29-59				
			5	404	N40426	2-16-59
			6	404	N40429	3-12-59
2	131	3-17-58				
			7	404	N40425	3-25-59
3	131	3-30-59				
4	131	4- 3-59				
5	131	4-18-59				
6	131	4-29-59				
7	131	5-10-59				
8	131	5-13-59				
9	131	5-24-59				
10	131	5-28-59				
11	131	6-13-59				
			8	DC-4	N34577	6-26-59
12	131	7- 1-59				
			9	DC-4	N34538	7- 4-59
			10	DC-4	N44994	7- 4-59
			11	DC-4	N45344	7- 4-59
			12	DC-4	N45346	7- 4-59
			13	202A	N93205	7-10-59
13	131	7-10-59				
14	131	7-14-59				

TIMELY JET DELIVERIES -- RECONSTRUCTED PISTON RETIREMENTS

Type	Jet-Gain Days	Timely Jet Delivery	Piston-Gain Days	Reconstructed Piston Retirement
			60	11- 1-58
			60	11- 1-58
			60	11- 1-58
			60	11- 1-58
131	60	11-30-58		
			76	12- 2-58
			76	12-26-58
131	76	12-31-58		
			59	1-26-59
131	59	1-31-59		
131		2-27-59		
131		3-30-59		
131		4- 3-59		
131		4-18-59		
131		5-10-59		
131		5-13-59		
131		5-24-59		
131		5-28-59		
			18	6- 8-59
131	18	6-13-59		
			11	6-23-59
			11	6-23-59
			11	6-23-59
			11	6-23-59
			11	6-29-59
131	11	6-29-59		
131		7-10-59		

TWA Ex. 2, Annex F, page 1 of 6
(Statement of Robert W. Rummel)

ACTUAL JET DELIVERIES -- ACTUAL PISTON RETIREMENTS

Actual Delivery Jet Aircraft No.	Type	Date	Retirement of Pistons as of Delivery of each Jet No.	Type	License	Date
			14	202A	N93209	7-20-59
			15	202A	N93207	7-28-59
			16	1049G	N7121C	7-31-59
15	131	8-1-59				
			17	202A	N93204	8-3-59
			18	404	N40431	8-4-59
			19	202A	N93202	8-11-59
			20	049	N9412H	8-26-59
			21	202A	N93206	10-1-59
			22	202A	N93208	10-1-59
			23	749A	N6009C	10-27-59
			24	404	N40440	11-6-59
16	331	11-10-59				
17	331	11-10-59				
			25	404	N40439	11-12-59
18	331	11-25-59				
19	331	12-23-59				
			26	1049	N6905	1-6-60
			27	404	N40428	1-15-60
20	331	1-18-60				
			28	404	N40406	2-25-60
			29	404	N40412	3-12-60
			30	1049	N6906	4-1-60
21	331	4-1-60				
22	331	4-5-60				
23	331	4-14-60				
24	331	5-9-60				
25	880	5-18-60				
26	331	5-25-60				

TIMELY JET DELIVERIES -- RECONSTRUCTED PISTON RETIREMENTS

Type	Jet-Gain Days	Timely Jet Delivery	Piston-Gain Days	Reconstructed Piston Retirement
			13	7-7-59
			13	7-15-59
			13	7-18-59
331	13	7-19-59		
			106	4-19-59
			106	4-20-59
			106	4-27-59
			106	5-12-59
			106	6-17-59
			106	6-17-59
			106	7-13-59
			106	7-23-59
131	106	7-27-59		
331		8-22-59		
			89	8-15-59
331	89	8-28-59		
331		9-22-59		
			104	9-24-59
			104	10-3-59
331	104	10-6-59		
			157	9-21-59
			157	10-7-59
			157	10-27-59
331	157	10-27-59		
331		11-5-59		
331		11-10-59		
880		11-15-59		
880		12-15-59		
331		12-15-59		

TWA Ex. 2, Annex F, page 2 of 6
(Statement of Robert W. Rummel)

ACTUAL JET DELIVERIES -- ACTUAL PISTON RETIREMENTS							TIMELY JET DELIVERIES -- RECONSTRUCTED PISTON RETIREMENTS				
Actual Delivery Jet Aircraft			Retirement of Pistons as of Delivery of each Jet								
No.	Type	Date	No.	Type	License	Date	Type	Jet-Gain Days	Timely Jet Delivery	Piston-Gain Days	Reconstructed Piston Retirement
			31	404	N40409	6-30-60				184	12-29-59
			32	404	N40427	6-30-60				184	12-29-59
			33	404	N40432	6-30-60				184	12-29-59
			34	404	N40436	6-30-60				184	12-29-59
			35	404	N40438	6-30-60				184	12-29-59
			36	404	N40441	6-30-60				184	12-29-59
27	331	7-1-60					331	184	12-30-59		
28	331	7-1-60					880		1-15-60		
			37	1649A	N7305C	9-12-60					
			38	404	N40408	9-30-60				349	9-29-59
			39	404	N40422	9-30-60				349	10-17-59
			40	1649A	N7307C	10-3-60				349	10-17-59
			41	1049	N6901	12-14-60				349	10-20-59
29	880	1-1-61								349	12-31-59
30	880	1-5-61					331	349	1-18-60		
31	880	1-6-61					880		2-15-60		
32	880	1-8-61					880		2-15-60		
33	880	1-12-61					331		2-29-60		
34	880	1-21-61					880		3-15-60		
35	880	2-2-61					880		3-15-60		
			42	404	N40435	2-3-61	331		3-23-60		
36	880	2-15-61								306	4-5-60
37	880	3-15-61					880	306	4-15-60		
38	880	3-18-61					880		4-15-60		
39	880	3-20-61					880		4-15-60		
40	880	4-26-61					331		4-26-60		
			43	049	N90831	4-30-61	331		4-29-60		
41	880	5-6-61								362	5-5-60
							331	362	5-9-60		

TWA Ex. 2, Annex F, page 3 of 6
(Statement of Robert W. Rummel)

ACTUAL JET DELIVERIES -- ACTUAL PISTON RETIREMENTS

Actual Delivery Jet Aircraft No.	Type	Date	Retirement of Pistons as of Delivery of each Jet No.	Type	License	Date
			44	049	N9409H	5-12-61
			45	049	N6000C	5-16-61
			46	049	N86517	5-24-61
42	880	5-25-61				
43	880	6-9-61				
			47	049	N90830	6-23-61
			48	404	N40402	6-29-61
44	880	7-9-61				
			49	404	N40434	7-11-61
45	720B	7-22-61				
46	720B	8-2-61				
47	880	8-10-61				
			50	1649A	N7320C	8-11-61
48	720B	8-27-61				
			51	1649A	N7308C	8-30-61
			52	1049H	N5401V	9-2-61
49	880	9-2-61				
			53	1049H	N5404V	9-10-61
			54	1049H	N5402V	9-15-61
			55	1049H	N5403V	9-21-61
50	720B	9-30-61				
51	880	10-13-61				
			56	1049G	N7109C	11-10-61
			57	DC-4	N45343	11-20-61
			58	749A	N6017C	11-24-61
			59	404	N40401	12-31-61
			60	404	N40405	12-31-61

TIMELY JET DELIVERIES -- RECONSTRUCTED PISTON RETIREMENTS

Type	Jet-Gain Days	Timely Jet Delivery	Piston-Gain Days	Reconstructed Piston Retirement
			375	5-2-60
			375	5-6-60
			375	5-14-60
880	375	5-15-60		
880		5-15-60		
			420	5-13-60
			420	5-19-60
880	420	5-15-60		
			409	5-28-60
331	409	6-8-60		
880		6-15-60		
880		6-15-60		
			438	5-29-60
880	438	6-15-60		
			444	6-12-60
			444	6-15-60
880	444	6-15-60		
			456	6-11-60
			456	6-16-60
			456	6-22-60
331	456	7-1-60		
880		7-15-60		
			622	2-26-60
			622	3-8-60
			622	3-12-60
			622	4-18-60
			622	4-18-60

ACTUAL JET DELIVERIES -- ACTUAL PISTON RETIREMENTS					TIMELY JET DELIVERIES -- RECONSTRUCTED PISTON RETIREMENTS				
Actual Delivery Jet Aircraft			Retirement of Pistons as of Delivery of each Jet						
No.	Type	Date	No.	Type	License	Date	Type	Jet-Gain Days	Timely Jet Delivery	Piston-Gain Days	Reconstructed Piston Retirement
			61	404	N40407	12-31-61					
			62	404	N40410	12-31-61				622	4-18-60
			63	404	N40411	12-31-61				622	4-18-60
			64	404	N40413	12-31-61				622	4-18-60
			65	404	N40414	12-31-61				622	4-18-60
			66	404	N40415	12-31-61				622	4-18-60
			67	404	N40417	12-31-61				622	4-18-60
			68	404	N40418	12-31-61				622	4-18-60
			69	404	N40419	12-31-61				622	4-18-60
			70	404	N40420	12-31-61				622	4-18-60
			71	404	N40421	12-31-61				622	4-18-60
			72	404	N40423	12-31-61				622	4-18-60
			73	404	N40424	12-31-61				622	4-18-60
			74	404	N40430	12-31-61				622	4-18-60
			75	404	N40433	12-31-61				622	4-18-60
52	131B	3-29-62					880	622	7-15-60		
			76	049	N86500	3-31-62				634	7-5-60
			77	049	N86501	3-31-62				634	7-5-60
			78	049	N86502	3-31-62				634	7-5-60
			79	049	N86503	3-31-62				634	7-5-60
			80	049	N86504	3-31-62				634	7-5-60
			81	049	N86506	3-31-62				634	7-5-60
			82	049	N86509	3-31-62				634	7-5-60
			83	049	N86514	3-31-62				634	7-5-60
			84	049	N86515	3-31-62				634	7-5-60
			85	049	N86516	3-31-62				634	7-5-60
			86	049	N86526	3-31-62				634	7-5-60
			87	049	N86536	3-31-62				634	7-5-60
			88	049	N90814	3-31-62				634	7-5-60
			89	049	N90815	3-31-62				634	7-5-60
			90	049	N90816	3-31-62				634	7-5-60

TWA Ex. 2, Annex F, page 5 of 6
(Statement of Robert W. Rummel)

ACTUAL JET DELIVERIES -- ACTUAL PISTON RETIREMENTS						TIMELY JET DELIVERIES -- RECONSTRUCTED PISTON RETIREMENTS				
Actual Delivery Jet Aircraft			Retirement of Pistons as of Delivery of each Jet							
No.	Type	Date	No.	Type	License	Date	Type	Jet-Gain Days	Timely Jet Delivery	Piston-Gain Days	Reconstructed Piston Retirement
			91	049	N90817	3-31-62				634	7-5-60
			92	049	N90818	3-31-62				634	7-5-60
			93	049	N90823	3-31-62				634	7-5-60
			94	049	N90825	3-31-62				634	7-5-60
			95	049	N90826	3-31-62				634	7-5-60
			96	049	N90924	3-31-62				634	7-5-60
			97	049	N90926	3-31-62				634	7-5-60
			98	049	N9410H	3-31-62				634	7-5-60
			99	049	N9414H	3-31-62				634	7-5-60
			100	049	N54214	3-31-62				634	7-5-60
53	131B	4-10-62					880	634	7-15-60		
54	131B	4-30-62					880		7-15-60		
55	131B	5-18-62					880		7-15-60		
56	131B	5-24-62					880		8-15-60		
57	131B	5-30-62					880		8-15-60		
			101	1049	N6903	6-1-62				670	7-31-60
			102	1049	N6904	6-1-62				670	7-31-60
58	131B	6-16-62					880	670	8-15-60		
59	131B	6-28-62					880		8-15-60		
			103	749A	N6012C	7-20-62				707	8-12-60
60	131B	7-23-62					880	707	8-15-60		
61	131B	8-1-62					880		9-15-60		
62	131B	8-2-62					880		9-15-60		
63	131B	8-21-62					880		9-15-60		

CONVAIR
A DIVISION OF GENERAL DYNAMICS CORPORATION

CHRONOLO

GENERAL OFFICES
SAN DIEGO 12 CALIFORNIA
TELEPHONE CYPRESS 6-8011

P-2 TWA R-3
EXHIBIT
5/2/66
E d

4 June 1956

Hughes Tool Company
Houston, Texas

Gentlemen:

Pursuant to discussions with your company and at your request, we hereby agree to amend the Agreement between our companies for the purchase and sale of thirty (30) Model 22 (Skylark 600) Aircraft, and the same is hereby amended, as follows:

By striking Article 4 (a) of said Agreement and inserting in lieu thereof the following: "(a) Except for Buyer's obligation to reimburse a portion of CONVAIR's costs as expressly provided below, this contract shall be and become null and void and of no force and effect unless (1) within fifteen (15) days from the date hereof (or such longer period as Buyer and CONVAIR may mutually agree upon in writing) the Agreement between CONVAIR and Delta has been executed as contemplated by Article 8 (d) hereof, and unless (2) within a period of sixty (60) days from the date hereof (or such longer period as Buyer and CONVAIR may mutually agree upon in writing) Buyer and CONVAIR complete and execute a mutually satisfactory definitive purchase agreement and detail specification. In the event of termination on account of the failure of the first condition set out in the preceding sentence, all liabilities and obligations of every kind between the parties will thereby be discharged. In the event of termination on account of the failure of the second of the said two conditions, all liabilities and obligations of every kind between the parties will thereby be discharged except that Buyer shall pay one-half of CONVAIR's costs expended on the Model 22 program from the date of this Agreement to the date of termination but not to exceed $100,000."

Hughes Tool Company -2- 4 June 1956

We would appreciate the return to us of two copies of this letter, executed by an appropriate official of your company, simultaneously with the return of the aforesaid Agreement similarly executed.

Very truly yours,

GENERAL DYNAMICS CORPORATION

By _____
Executive Vice President
Convair Division

Accepted and agreed to this
7th day of June, 1956

HUGHES TOOL COMPANY

By Raymond W. Holliday

Title Vice President

THIS AMENDMENT (hereinafter called the "Agreement") entered into as of this 7th day of June, 1956, by and between: GENERAL DYNAMICS CORPORATION, a Delaware corporation, having an office (Convair Division) at San Diego, California (hereinafter called "CONVAIR"), and HUGHES TOOL COMPANY, with its offices at Houston, Texas (hereinafter called "Buyer");

WITNESSETH:

WHEREAS, Buyer desires to purchase aircraft of the type hereinafter described and CONVAIR desires to manufacture and sell the same to Buyer; and

WHEREAS, CONVAIR anticipates entering into a similar agreement with Delta Air Lines, Inc., hereinafter called "Delta" relating to the manufacture and sale of not less than ten (10) Convair Model 22 (Skylark 600) aircraft, containing the same provisions as to price as hereinafter set out, and

WHEREAS, CONVAIR is unwilling to enter into a program of manufacturing said aircraft unless and until it has firm agreements covering the manufacture and sale of a substantial number of such aircraft, or unless Buyer herein and Delta will participate in CONVAIR's losses in the event it fails to sell thirty (30) Model 22 commercial aircraft in addition to the aircraft sold to Buyer and Delta as hereinafter set out, and

WHEREAS, Buyer desires CONVAIR to initiate such program and is therefore willing to participate in CONVAIR's losses in the event CONVAIR fails to [illegible] thirty (30) of such aircraft in addition to the aircraft sold to Buyer and Delta as herein set out, to the extent and in the manner hereinafter provided; and

NOW, THEREFORE, in consideration of the mutual covenants herein

ARTICLE A.

Subject Matter of Sale

CONVAIR shall manufacture and sell and deliver to Buyer, and Buyer shall purchase from CONVAIR the following:

(a) Thirty (30) Convair Model 22 (Skylark 600) Aircraft (hereinafter called "Aircraft") to be manufactured by CONVAIR in accordance with the terms of this Agreement.

Delivery of Aircraft

(a) Delivery Schedule

(1) CONVAIR shall manufacture aircraft for delivery on the following schedule:

Month of Delivery		Number of Aircraft
November	1959	1
December	1959	1
January	1960	2
February	1960	2
March	1960	3
April	1960	4
May	1960	4
June	1960	5
July	1960	8
August	1960	6
September	1960	6

X The above schedule represents the first forty (40) Model 22 aircraft to be manufactured and delivered by CONVAIR, thirty (30) of which shall be delivered to Buyer subject to (b) below, ready for flight. Prior to execution of the definitive purchase agreement referred to in Article 4 hereof, Buyer shall designate the Aircraft by manufacturing number to be delivered to Buyer with due regard to delivery positions desired by Delta Air Lines as an initial purchaser of Model 22 aircraft with Buyer. X

(2) CONVAIR recognizes the importance to Buyer of early deliveries

of the Aircraft hereunder and agrees to use its best efforts to better the above delivery schedule.

(3) Upon delivery to Buyer of each Aircraft in accordance with the terms hereof, title to and risks in connection with such Aircraft shall pass from CONVAIR to Buyer.

(4) In the event any Aircraft is ready for delivery and CONVAIR so notifies Buyer of this fact but delivery of any such Aircraft is delayed by Buyer (whether or not such delay is out of Buyer's control) Buyer shall promptly reimburse CONVAIR for all cost or expense, including, but not limited to, reasonable compensation for storage, insurance and all taxes of every nature whatsoever, incurred by CONVAIR during, or paid or incurred as a result of any such delay in excess of one (1) week. The provisions of this paragraph (a)(4) shall not apply to delays in delivery, if any, referred to in paragraph (b) of this Article, occurring prior to final certification.

(b) Certification

(1) The schedule of CONVAIR's performance hereunder provides for completion of all ground and flight tests required by the Civil Aeronautics Administration to obtain final airworthiness and type certificates by 1 May 1960. Because of the importance to Buyer of early issuance of the airworthiness and type certificate, CONVAIR agrees to use its best efforts to better the above date.

(2) Prior to receipt of final certificates as defined in sub-paragraph (1) above, CONVAIR will have employed each of the Air-

craft ready for delivery in all respects except for such final certificates, and CONVAIR will tender delivery to Buyer of all such Aircraft and Buyer will accept delivery from CONVAIR of such completed Aircraft to the extent that they can be used by Buyer for pilot training and/or other purposes, but conditioned upon and subject to CONVAIR's obtaining final certificates at a later date. CONVAIR may require return of such delivered Aircraft for purposes of obtaining such final certificates and Buyer agrees to make them available for this purpose, upon reasonable notice, in such manner as CONVAIR may direct. Subject to the provisions of the following sub-paragraphs (3) and (4), all costs, if any, in connection with obtaining such final certificates shall be borne by CONVAIR.

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(3) If any law, directive, order, proclamation, regulation or ruling of the United States Government or any agency thereof, becomes effective after the date of this Agreement which requires any change, addition or modification to any Aircraft delivered in order to obtain an Airworthiness Certificate from the United States Civil Aeronautics Administration, such change, addition or modification shall be made and evidenced by a Change Order specifying the effect, if any, of such change on design, performance, weight, balance and time of delivery. The cost of making any such change, addition or modification shall be borne equally by CONVAIR and Buyer; subject, however, to negotiation of definitive purchase agreement provisions that CONVAIR bear such costs solely for its own account in event the parties mutually agree upon an appropriate price increase in consideration thereof.

2.1.2

(4) " If any law, directive, order, proclamation, regulation or ruling of the United States Government or any agency thereof, other than one required to obtain certification of an Aircraft as set forth in the preceding paragraph becomes effective after the date of this agreement, which requires any change, addition or modification to any Aircraft in order that Buyer may operate any of said Aircraft as it requires, such change, addition or modification shall be offered to Buyer as a Change Order specifying the effect, if any, of such change on price, design, performance, weight, balance and time of delivery. The cost of making such change, addition or modification shall be borne by Buyer; subject, however, to negotiation of definitive purchase agreement provisions that CONVAIR bear such costs solely for its own account in event the parties mutually agree upon an appropriate price increase in consideration thereof. "

ARTICLE 2

Price of and Payment for Aircraft

(a) Price. The total Base Price of the Aircraft purchased hereunder shall be $112,500,000.00, computed on a unit Base Price of $3,750,000.00 per unit delivered in accordance with Article 2 hereof, subject to adjustments as set forth in Exhibit A hereto attached and made a part hereof.

(b) Payments. The total Base Price of the Aircraft purchased hereunder shall be paid as follows:

(1) $16,250,000.00 upon execution of the definitive purchase agreement referred to in Article 4 hereof, representing $675,000.00 per aircraft for each of the thirty (30) Aircraft, and

(2) The balance of the unit Base Price upon delivery of each of the Aircraft.

"Definitive Purchase Agreement and Detail Specification

(a) The parties shall, commencing immediately following execution of this Agreement, define the terms and conditions of a mutually satisfactory definitive purchase agreement and detail specification, and it is hereby agreed that both parties will, in good faith, use their best efforts to complete and execute such definitive purchase agreement and detail specification within sixty (60) days from date hereof, and failure to so complete and execute shall operate to terminate this Agreement except that said sixty (60) day period may be extended by mutual written agreement of the parties hereto. In the event of such termination, Buyer shall pay one-half of CONVAIR's costs expended on the Model 22 program from the date of this Agreement to the date of termination, but not to exceed $100,000.

(b) Said definitive purchase agreement will include other terms and conditions usually incorporated in contracts for the manufacture of commercial transport aircraft, including but not limited to, warranties, considerations of spare parts, changes, indemnity against patent infringement, taxes, customer furnished equipment, data and handbooks, Buyer's representatives and inspection, demonstration and test flights, and excusable delays.

(c) In developing the definitive purchase agreement and detail specification, CONVAIR shall give due and proper consideration to Buyer's desires. CONVAIR shall make such further reasonable changes in the detail specification agreed upon at the time of

execution of the definitive purchase agreement, prior to and during aircraft manufacture, as Buyer desires, subject to Buyer's acceptance of reasonable price increase or decrease and reasonable and normally related delivery and specification effects. It is the mutual desire of the parties that Buyer shall fully disclose, and CONVAIR shall fully take into account, specific existing operating experience and needs as known to Buyer, to the end that the Aircraft shall have excellent characteristics of performance, versatility, growth possibilities, passenger comfort and appeal, and operating and maintenance utility and economy; with the detail specification so reflecting in a manner no less qualified or restricted than is normal among aircraft manufacturers. The parties shall fully cooperate in implementation of the foregoing, and full mutual consideration shall be given to all feasible alternatives known or foreseeable concerning such matters as cockpit and cabin interior arrangements and furnishings, and choice of engines and aircraft equipment and systems. The warranties applicable to the engines shall be satisfactory to Buyer.

ARTICLE 5

Warranties

(a) Subject to the provisions of Article 2(b), CONVAIR warrants that the Aircraft delivered under or pursuant to this Agreement will be certificated by the United States Civil Aeronautics Administration with an appropriate airworthiness and type certificate in the transport category within the meaning of the Civil Air Regulations issued by the Civil Aeronautics Board, and that such certificate will permit the operation of such Aircraft in scheduled passenger service.

(b) CONVAIR's warranties with respect to design, workmanship, and materials will be set forth in the definitive purchase agreement referred to in Article 4 hereof.

Assignments

(a) This Agreement shall inure to the benefit of and be binding upon each of the parties hereto and their respective successors and assigns, but it may not be voluntarily assigned, in whole or in part, by either party without the prior written consent of the other party, except that either party's interest shall be assignable through merger, consolidation or reorganization which includes voluntary sale or transfer of substantially all of its assets, provided, however, that CONVAIR may assign any of its fixed or contingent rights to receive money hereunder, and Buyer may assign any of its contingent rights to the Aircraft or any of them for the purpose of securing any obligation for the repayment of monies loaned or advanced by any financial institution to finance in whole or in part the purchase of the Aircraft. Notwithstanding the foregoing, Buyer shall have the right to assign this Contract in whole or in part without such consent to TRANS WORLD AIRLINES, INC., and upon such assignment and full notice thereof to CONVAIR, TRANS WORLD AIRLINES, INC. shall succeed to such of the rights and obligations of the Buyer hereunder as are so assigned and the Buyer shall cease to have or be subject to such rights or obligations so assigned; provided, that Buyer shall, in the event of the assignment to TRANS WORLD AIRLINES, INC., of Buyer's payment obligations under this Contract, guarantee the due and punctual payment of such obligations by said assignee.

ARTICLE 7

Contracts with Other Purchasers

(a) If subsequent to the date of this Agreement CONVAIR shall contract to sell to any other commercial purchaser any of the first one thousand (1,000) aircraft of the same basic model at a price less than (i) $1,500,000 each or (ii) the then adjusted Unit Base Price to be paid by Buyer in accordance with Exhibit A hereof, whichever is lower, plus or minus appropriate adjustments for labor and material escalation and for variations in specifications and equipment, or on other terms and conditions materially more favorable than those incorporated in the definitive purchase agreement mentioned in Article 4 hereof, except in respect to financing requirements, the purchase price of all Aircraft to be delivered hereunder shall be reduced to the lowest price to be paid by any such other purchaser and such other more favorable terms and conditions shall by appropriate amendment be offered to Buyer.

ARTICLE 8

Miscellaneous

(a) Each party hereto shall, within sixty (60) days after the execution of this Agreement, deliver to the other party a certified copy of a resolution of its Board of Directors, or Executive Committee thereof, duly adopted at a meeting thereof duly held, evidencing the authority of the officer or officers executing this Agreement to execute same in the name of or in behalf of said party or ratifying the execution of same by such officer or officers.

(b) The terms "Civil Aeronautics Administration" and "Civil Aeronautics Board" as used in this Agreement shall be deemed to include any other authority that shall be designated to perform the duties corresponding to the duties now performed by said Administration or by said Board.

(c) This Agreement shall not be varied in its terms by any oral agreement or representation or otherwise than by an instrument in writing of even or subsequent date hereto, executed by both parties by their officers thereunto duly authorized.

(d) This Agreement shall terminate fifteen (15) days from the date hereof unless the agreement referred to in the Second Whereas clause hereof has been executed by CONVAIR and Delta; and CONVAIR shall immediately execute such agreement and tender same to Delta for execution. CONVAIR shall notify Buyer in writing immediately upon the execution of such agreement by Delta and CONVAIR. CONVAIR will strive diligently to

effect as many additional sales as possible and to enhance a profitable position for the Model 22 program.

Executed in quadruplicate as of the day and year first above written.

GENERAL DYNAMICS CORPORATION

By /s/ J. V. Naish
J. V. Naish

Title Executive Vice President,
Convair Division

Attest:

/s/ Elmond Burke
Assistant Secretary

HUGHES TOOL COMPANY

By /s/ Raymond M. Holliday
Raymond M. Holliday

Title Vice President

By _____

Title _____

Attest:

/s/ C. S. Johnson
C. S. Johnson
Secretary

1. The Unit Base Price of $3,750,000 stated in Article 3(a) of this Agreement shall be reduced, without regard to the proviso in paragraph 2 below, at the rate of $8,333.33 per Aircraft for each commercial sale of Model 22 Aircraft from No. 41 through No. 70 for a total reduction of $250,000 per Aircraft.

2. The Unit Base Price shall be further adjusted as additional commercial sales of Model 22 Aircraft are made beyond the forty (40) Aircraft covered by this Agreement and the agreement with Delta referred to in the Second Whereas Clause hereof, as follows:

(i) A reduction of $5,000 per Aircraft for each commercial sale from No. 41 through No. 100, resulting in an adjusted Unit Base Price of $3,200,000 at such 100th sale.

(ii) A reduction of $5,000 per Aircraft for each commercial sale from No. 101 through No. 150, resulting in an adjusted Unit Base Price of $2,900,000 at such 150th sale.

(iii) A reduction of $3,400 per Aircraft for each commercial sale from No. 151 through No. 200, resulting in an adjusted Unit Base Price of $2,730,000 at such 200th sale.

(iv) A reduction of $1,600 per Aircraft for each commercial sale from No. 201 through No. 250, resulting in an adjusted Unit Base Price of $2,650,000 at such 250th sale.

(v) An appropriate reduction per Aircraft for each commercial sale from No. 251 through No. 1,000, consistent with reasonable accounting procedures on a basis of computation consistent with the principles followed in computing reductions as set out in (i) through (iv) above resulting in an Adjusted Unit Base Price of $2,500,000 at such 1,000th sale;

provided, however:

(a) that each of the Adjusted Unit Base Prices listed in sub-paragraphs (i) through (iv) shall in no event become finally effective, nor shall CONVAIR be required to give final effect thereto, if any such Adjusted Unit Base Price would operate to reduce the combined total price of all the Model 22 commercial aircraft then sold below the actual cost of such aircraft to CONVAIR as charged or to be charged against the Model 22 commercial program under CONVAIR's usual accounting procedures which shall be in accordance with sound accounting practice; and,

(b) that each of the Adjusted Unit Base Prices listed in sub-paragraph (v) above shall in no event become finally effective, nor shall CONVAIR be required to give final effect thereto, if any such Adjusted Unit Base Price would operate to reduce CONVAIR's overall gross profit on all the Model 22 commercial aircraft then sold below six per cent (6%) of the actual cost of such aircraft to CONVAIR as charged or to be charged against the Model 22 commercial program under CONVAIR's usual accounting procedures which shall be in accordance with sound accounting practice; and,

(c) that the foregoing provisos shall be applied, insofar as the abatement of reductions is provided for therein, only pro tanto to the extent and during the period required to avoid violation of the terms of such provisos.

3. It is recognized by the parties hereto that CONVAIR may invoke the proviso in paragraph 2 above before or after payment for the Aircraft or a portion thereof by Buyer in accordance with Article 3(b) of this Agreement. In

such event, and upon the establishment of facts required to bring such proviso into operation, Buyer shall promptly pay such additional sums for the Aircraft as are determined necessary to give effect to such proviso, but such additional sums shall in no event be payable with respect to any particular Aircraft prior to delivery thereof.

4. The Unit Base Price reductions shown above are without effect on other price elements; i.e., the total purchase price of each of the 30 Aircraft covered by the contract with HUGHES TOOL COMPANY shall consist of the adjusted Unit Base Price increased or decreased as the case may be by specification changes, and other price elements expressly provided by the contract.

5. The term "commercial sales" means any arrangement, firm by ordinary standards prevailing in the aircraft manufacturing industry, under which CONVAIR agrees to deliver Aircraft for commercial use to any other person, firm, corporation or other entity, whether passage of title be involved or pursuant to conditional sale, chattel mortgage, lease, or otherwise; and, subject to the other provisions of this Exhibit A and definitive administrative provisions to be contained in the definitive purchase agreement referred to in Article 4 hereof, the Unit Base Price reductions provided hereby shall become initially effective upon CONVAIR entering into any such arrangement.

the price adjustments contemplated by this Exhibit A have been computed without reference to the possibility of sales of Model 22 type aircraft to the United States Military Forces. The effect of any such sales as a possible element of price adjustment has been the subject of preliminary discussions between the parties and it is mutually agreed that the matter shall be further analyzed and resolved incidental to development of the definitive purchase agreement and appropriate provisions recording such resolution shall be contained therein. CONVAIR shall promptly notify Buyer of any Model number change which, because of fundamental dissimilarity of the new model from prior production, in CONVAIR's opinion would operate to exclude aircraft of the new Model from the price adjustment provisions contained in Article 3 and Exhibit A hereof, and CONVAIR and Buyer shall promptly negotiate the effect of such model change upon such price adjustment provisions. Failure of CONVAIR to notify Buyer of any such Model number change within fifteen (15) days after the effective date of such change shall constitute a waiver by CONVAIR of the effect thereof on the aforesaid price adjustment provisions.

7. Notwithstanding any provisions to the contrary elsewhere contained, the final adjusted Unit Base Price of each Aircraft shall in no event exceed the applicable Unit Base Price set out below, in event CONVAIR's total sales, including the forty (40) Aircraft covered by this Agreement and the Agreement with Delta referred to in the second WHEREAS clause hereof, become 150 or greater;

Applicable Unit Base Price	Total Sales
$3,075,000	150
$2,805,000	200
$2,725,000	250

The applicable Unit Base Price for total sales between the total sales numbers above specified shall be computed on an equal, straight line basis; for example, the applicable Unit Base Price in event of total sales of 151 is $3,069,600; in event of total sales of 152 is $3,064,200; in event of total sales of 201 is $2,803,400; etc. The provisions of this paragraph 7 are independent of the provisions of paragraphs 1 and 2 of this Exhibit A and vice versa; i.e., no reduction is applicable pursuant to this paragraph 7 in event total sales are less than 150 nor on account of total sales in excess of 250; and the provisos of paragraph 2 and all matters relating to such provisos have no application to this paragraph 7.

8. Each payment by Buyer, at the time of delivery of an Aircraft and as part of the purchase price thereof, of any sum to whose return Buyer subsequently becomes entitled as representing a reduction in Unit Base Price pursuant to any of the provisions of this Exhibit A shall bear interest at the rate of three and one-half per cent (3-1/2%) per annum computed on the basis of a year of 365 days, for the period from the date of such payment to the date of such return. Interest due to Buyer pursuant to this paragraph shall be paid by CONVAIR to Buyer, or credited to Buyer's account, quarterly, as long as it accrues.

TWA EXHIBIT R-5
6/2/66 E.G.

HUGHES TOOL COMPANY
Gulf Building
Houston 2, Texas

May 9, 1960

Trans World Airlines, Inc.
380 Madison Avenue
New York 17, N. Y.

Attention: Mr. A. V. Leslie

Re: Purchase of Boeing Model 707-131 and 707-331 Jet Aircraft and Convair Model 880 Jet Aircraft

Dear Sirs:

If accepted by you this proposal will state our agreement and understanding concerning the conditions under which Trans World Airlines, Inc. (hereinafter called "TWA") may acquire from Hughes Tool Company (hereinafter called "Hughes") Hughes' interest in Boeing Model 707-131 and Boeing Model 707-331 jet aircraft, Convair Model 880 jet aircraft and spare parts, equipment and provisioning therefor.

1. Hughes hereby agrees to sell to TWA and, subject to the provisions of paragraph 9(c) hereof, TWA agrees to purchase from Hughes two Boeing Model 707-131 jet aircraft, Manufacturer's Serial Nos. 17671 and 17672, FAA Nos. N744TW and N745TW respectively, manufactured by Boeing Airplane Company and one Boeing Model 707-331 jet aircraft, Manufacturer's Serial No. 17679, FAA No. N765TW, manufactured by Boeing Airplane Company under Purchase Agreement No. 9 dated March 19, 1956, as amended, between Boeing Airplane Company and Hughes (hereinafter called the "331 Purchase Agreement").

Upon notice from TWA prior to June 30, 1960, Hughes shall transfer good title to such three aircraft to TWA free

and clear of all liens and encumbrances. TWA shall pay to Hughes Hughes' net book value of aircraft FAA Nos. N744TW and N745TW on the date title thereto is transferred from Hughes to TWA. As to aircraft FAA No. N765TW, TWA shall pay Hughes Hughes' undepreciated cost with respect to such aircraft.

Upon the acquisition of title thereto by TWA rental under the existing lease from Hughes of aircraft FAA No. N765TW will be cancelled from the beginning. The existing leases on aircraft FAA Nos. N744TW and N745TW and on the aircraft described in Exhibit 2 will be cancelled as of the acquisition of title by TWA. The provisions in paragraph 10(b) of such leases for payments by one party to the other to reflect differences in time since last overhaul of engines shall be inapplicable to all aircraft purchased by TWA hereunder.

As used herein and elsewhere in this agreement Hughes' net book value with respect to any aircraft shall mean the sum of

(i) The amounts Hughes shall have paid Boeing Airplane Company for such aircraft;

(ii) The amounts Hughes shall have paid vendors of customer-furnished equipment thereon;

(iii) All other costs of Hughes, including expenses, in connection with such aircraft, and

(iv) An amount representing interest on items (i), (ii) and (iii), at a rate per annum to be negotiated between the parties prior to the closing of TWA's long-term financing plan (computed on the average amount of the outstanding payments applicable to such aircraft by considering the payments made as outstanding from the respective dates such payments were made and until delivery of such aircraft to TWA under the respective day-to-day leases of such aircraft from Hughes to TWA);

such cost to Hughes to be depreciated (a) as to airframes, over a 10-year life with a 10% residual value, (b) as to JT-3 engines, over a 5-year life with a 10% residual value and (c) as to JT-4 engines, over a 7-year life with a 10% residual value.

As used herein and elsewhere in this agreement Hughes' undepreciated cost with respect to any aircraft, equipment, spare parts or provisioning shall mean the sum of

(i) The amounts Hughes shall have paid the vendors with respect thereto (including the amounts paid the vendors of customer-furnished equipment with respect to an aircraft);

(ii) All other costs, including expenses, in connection with the aircraft or other property, and

(iii) An amount representing interest on items (i) and (ii) at a rate per annum to be negotiated between the parties prior to the closing of TWA's long-term financing plan (computed on the average amount of the outstanding payments applicable to such aircraft or other property by considering the payments made as outstanding from the respective dates such payments were made and until the acquisition of such aircraft or property by TWA under this agreement).

2. Hughes hereby assigns to TWA the rights of Hughes to acquire from Boeing Airplane Company 2 Boeing Model 707-331 jet aircraft (Manufacturer's Serial Numbers 17685 and 17690) currently being manufactured by Boeing Airplane Company under the 331 Purchase Agreement. Subject to the provisions of paragraph 9(c) hereof, TWA agrees to purchase from the manufacturer pursuant to the 331 Purchase Agreement each such aircraft when manufactured in accordance with the terms of the 331 Purchase Agreement and tendered for delivery pursuant thereto. In exercising such rights to acquire each aircraft TWA shall pay Boeing Airplane Company the balance of the purchase price of said aircraft and shall agree to pay to the

vendors involved the balance due for customer-furnished equipment installed on such aircraft. In addition, TWA shall pay Hughes Hughes' undepreciated cost with respect to such aircraft.

3. Hughes hereby assigns to TWA the rights of Hughes to acquire from General Dynamics Corporation 20 Convair Model 880 jet aircraft currently being manufactured by General Dynamics Corporation under Purchase Agreement, dated as of September 10, 1956, as amended, between General Dynamics Corporation and Hughes (hereinafter called the "880 Purchase Agreement"). The 20 Convair Model 880 jet aircraft covered by such assignment are more specifically described in Exhibit 1 hereto.

Subject to the provisions of paragraph 9(c) hereof, TWA agrees to purchase from the manufacturer pursuant to the 880 Purchase Agreement each such aircraft when manufactured in accordance with the terms of the 880 Purchase Agreement and tendered for delivery pursuant thereto. In exercising such rights to acquire each aircraft TWA shall pay General Dynamics Corporation the balance of the purchase price of said aircraft and shall agree to pay to the vendors involved the balance due for customer-furnished equipment installed on such aircraft. In addition, TWA shall pay Hughes Hughes' undepreciated cost with respect to such aircraft.

4. Hughes hereby confirms that TWA has the exclusive right and privilege to acquire from Hughes the 13 Boeing Model 707-131 jet aircraft and 4 Boeing Model 707-331 jet aircraft heretofore leased to TWA on a day-to-day basis and not covered by paragraph 1 hereof, said aircraft being more specifically described in Exhibit 2 attached hereto. Subject to the provisions of paragraph 9(c) hereof, Hughes will sell and TWA will purchase such 17 aircraft upon the terms and

H.H.H.

conditions outlined in paragraph 5 hereof.

5. TWA may purchase the aircraft referred to in paragraph 4 hereof by at least two days' notice to Hughes given on or prior to June 30, 1960 and upon payment to Hughes of Hughes' net book value thereof. Hughes agrees that upon such payment by TWA it will transfer to TWA good title to such aircraft, free and clear of all liens and encumbrances.

6. Hughes hereby confirms that TWA has the exclusive right and privilege to acquire from Hughes Hughes' right to acquire from the manufacturers, or Hughes' interest in, as the case may be, the spare engines for the Boeing 331 and Convair 880 jet aircraft, more specifically described in Exhibit 3, and all other spare parts, equipment and provisioning owned or on order by Hughes for the Boeing or Convair jet aircraft (such engines, spare parts, equipment and provisioning hereinafter referred to as the "Spares").

7. Subject to the provisions of paragraph 9(c) hereof, TWA agrees to purchase the Spares from time to time, from the vendors or Hughes, as the case may be, (a) as to Spares of which title has vested in Hughes upon payment to Hughes of Hughes' undepreciated cost and (b) as to the remainder, upon payment of Hughes' undepreciated cost and TWA's agreement to assume all liabilities and obligations of Hughes to the manufacturers applicable to the Spares acquired by TWA, including the payment of any balance of the purchase price. Upon notice from TWA to Hughes, specifying such Spares, Hughes will transfer to TWA good title, free and clear of all liens and encumbrances, to such Spares that are owned by Hughes and all Hughes' rights as to other Spares specified in such notice.

8. Payments from TWA to Hughes pursuant to this agreement up to a total of $100,000,000 (less the principal amount of $5,811,000 on TWA's note, due December 1, 1960,

L.L.S

Rec'd

held by Hughes, plus interest thereon) may be made by means of subordinated debentures of TWA in the form that such subordinated debentures may be offered to all stockholders of TWA in connection with the proposed financing plan of TWA. Pending the issuance of subordinated debentures in connection with such financing plan, payments from TWA to Hughes pursuant to this agreement shall be made by delivery to Hughes of subordinated notes, on which interest is payable only if earned and on which no principal payment will be made so long as any senior debt is outstanding except out of the proceeds of the sale of subordinated obligations issued under the definitive financing program or of the sale of capital stock. The interest rate on such subordinated notes, and on the subordinated obligations issuable by TWA to Hughes pursuant to agreements between TWA and Hughes dated April 1, 1960 and April 14, 1960, respectively, shall be the same as that agreed upon by TWA and the lending banks for the temporary loans to TWA pending completion of the proposed definitive financing program for TWA.

9. Notwithstanding any of the above provisions it is further agreed that:

(a) This agreement is entered into subject to approval of the Civil Aeronautics Board and until an order has been entered by the Civil Aeronautics Board permitting the transaction covered by this agreement no sums shall be payable by TWA to Hughes hereunder.

(b) This agreement is subject to the necessary consents of the holders of obligations issued by TWA under its outstanding indentures, chattel mortgages and loan agreements. TWA will diligently endeavor to secure such consents, but in the absence of such consents no sums shall be payable by TWA to Hughes hereunder.

G.S.B. Rust

(c) TWA's obligation to make any payment, deliver any subordinated obligations or assume any liabilities or other obligations with respect to the purchase of any aircraft or other property hereunder is in each case subject to completion of financing arrangements (either temporary or definitive) relating thereto completely satisfactory to TWA.

If the foregoing is acceptable to TWA please so wledge by executing and returning the enclosed copy of this letter.

Very truly yours,
HUGHES TOOL COMPANY
By Raymond M Holliday
Vice President

Accepted as of the 9th day
of May, 1960
TRANS WORLD AIRLINES, INC.
By Gordon L Gilmore
Vice President

TWA Ex. R-5, Exhibit 1
(TWA-Toolco Purchase Agreement, May 9, 1960)

Exhibit 1

Description of Convair 880 Jet Aircraft Assigned to TWA

Model 880 Manufacturing Number Assigned by Convair	Month in which Delivery Is Presently Scheduled
10	May
20	"
22	"
24	June
25	"
27	July
28	"
31	"
2	"
32	Aug.
33	"
35	"
3	Sept.
40	"
42	"
14	Oct.
15	"
19	"
6	Nov.
8	"

G.L.G.

Prust

TWA Ex. R-5, Exhibit 2
(TWA-Toolco Purchase Agreement, May 9, 1960)

Exhibit 2

DESCRIPTION OF AIRCRAFT

Boeing Model 707-131 Jet Aircraft, FAA No.	Date of Lease
N731TW	January 30, 1959
N732TW	March 17, 1959
N733TW	March 30, 1959
N734TW	April 3, 1959
N735TW	April 18, 1959
N736TW	April 29, 1959
N737TW	May 10, 1959
N738TW	May 13, 1959
N740TW	May 24, 1959
N739TW	May 28, 1959
N741TW	June 13, 1959
N742TW	July 1, 1959
N743TW	July 10, 1959

Boeing Model 707-331 Jet Aircraft, FAA No.	Date of Lease
N762TW	November 6, 1959
N761TW	November 8, 1959
N763TW	November 17, 1959
N764TW	December 27, 1959

TWA Ex. R-5, Exhibit 3
(TWA-Toolco Purchase Agreement, May 9, 1960)

Exhibit 3

Description of Spare Engines to be Assigned to TWA

General Electric Aircraft Engines
Model CJ805 for the Convair 880 Aircraft(1)

30 Model CJ805 aircraft engines being manufactured by General Electric Company under contract with Hughes Tool Company, dated October 1, 1956, said engines to be assigned to TWA in accordance with TWA's needs currently estimated as follows:

May	1
June	8
July 1 to 15	5
July 16 thru 31	2
August	4
September	5
October	4
November	1
	30

Pratt & Whitney Aircraft Engines
Model JT4A(2)

10 Pratt & Whitney aircraft engines Model JT4A on order by Hughes Tool Company from United Aircraft Corporation under contract dated February 14, 1956 and from Boeing Airplane Company under contract dated January 14, 1959, such engines to be assigned to TWA in accordance with its needs currently estimated to be at the rate of one engine per week commencing May 2, 1960.

(1) TWA has heretofore succeeded to the interest of Hughes Tool Company in 8 CJ805 engines per telegram agreements dated April 25, 1960. The engines herein described are in addition to the first 8 of such engines covered by the April 25 order.

(2) TWA has heretofore succeeded to the interest of Hughes Tool Company in 25 JT4A engines manufactured by United Aircraft Corporation under contract dated February 14, 1956. The engines herein described are in addition to said 25 engines.

Pratt

GLL

(FAA Registration Documents - B707-331, No. N771TW)

FEDERAL AVIATION AGENCY

TWA EXHIBIT R-8 (80) 5/2/66 E.G.

CERTIFICATE OF TRUE COPY

I HEREBY CERTIFY that the attached {~~is a true copy~~ / are true copies} of the ~~original~~ aircraft records as described on the attached Schedule A consisting of seven (7) pages pertaining to Boeing 707-331 aircraft, serial number 17688, registration number N771TW,

which is in the Aircraft Registration Branch, Federal Aviation Agency.

Signed and dated at Oklahoma City, Oklahoma

this 7th day of January, 1966

by Margaret E. Hood

Supervisory Conveyances Examiner
(Title)

****

I HEREBY CERTIFY that Margaret E. Hood

who signed the foregoing certificate is now, and was, at the time of signing Supervisory Conveyances Examiner, Public Documents Section,

and that full faith and credit should be given his certificate as such.

IN WITNESS WHEREOF, I have hereunto subscribed my name and caused the seal of the Federal Aviation Agency to be affixed this 7th day of January, 1966 at Oklahoma City, Oklahoma

Peter Robinson
(Signature)

Chief, Aircraft Registration Branch
(Title)

Data Services Division
(Organization of the Federal Aviation Agency)

SCHEDULE A

1. Certificate of registration issued July 18, 1960, in the name of Trans World Airlines, Inc.
2. Bill of sale recorded July 18, 1960, as document number A121347.
3. Application for registration dated July 1, 1960, in the name of Trans World Airlines, Inc.
4. Letter dated July 1, 1960, from Trans World Airlines, Inc. to Federal Aviation Agency.

(FAA Registration Documents - B707-331, No. N771TW)

FEDERAL AVIATION AGENCY

CERTIFICATE OF REGISTRATION

NATIONALITY AND REGISTRATION MARKS	MAKE AND MODEL OF AIRCRAFT	AIRCRAFT SERIAL NO.
N— 771 TW	Boeing 707-331	17688

Trans World Airlines, Inc.

NAME OF OWNER

10 Richards Road

ADDRESS OF OWNER—NUMBER AND STREET

Kansas City | Missouri

CITY | ZONE | STATE

THIS CERTIFICATE MUST BE CARRIED IN THE AIRCRAFT AT ALL TIMES

It is hereby certified that the above described aircraft has been duly entered on the register of the Federal Aviation Agency, United States of America, in accordance with the Convention on International Civil Aviation dated 7 December 1944, and with the Federal Aviation Act of 1958 and regulations issued thereunder.

DATE ISSUED JUL 18 1960

FOR THE ADMINISTRATOR
Victor C. Forbes
CHIEF, AIRCRAFT & AIRMAN RECORDS BRANCH

JAN 11 1961 U. A. F.

Forward This Copy and the Duplicate Copy to Washington.

(OVER)

AX-73d

Delivered to Bruce Mann in person - 7-18-60

25

BILL OF SALE

A 1 2 1 3 4 7

For and in consideration of $1.00 & other the undersigned owner of the full legal and beneficial title of the aircraft described as follows:

AIRCRAFT MAKE AND MODEL: Boeing 707-331

SERIAL NO.: 17688

REGISTRATION MARKS: N— 771 TW

DOC. RECORDED

50 PM '60

FEDERAL AVIATION AGENCY

does this 1st day of July 1960 hereby sell, grant, transfer, and deliver all of his right, title and interest in and to such aircraft unto:

(Name and address of purchaser—same as on Parts A and B of this form)

Trans World Airlines, Inc.
10 Richards Road
Kansas City, Missouri

and to its executors, administrators, and assigns, to have and to hold singularly the said aircraft forever, and certifies that same is not subject to any mortgage or other encumbrance except

KIND OF ENCUMBRANCE	AMOUNT	DATE
None	----	----

IN FAVOR OF

In testimony whereof we have set our hand and seal this 1st day of July 1960

NAME OF SELLER: Boeing Airplane Company

BY (SIGN IN INK): [signature]
(If executed for co-ownership, all must sign)

TITLE: Attorney-in-Fact
(If signed for a corporation, partnership, owner, or agent)

ACKNOWLEDGMENT

State of Washington

County of King

On this 1st day of July 1960 before me personally appeared the above named seller, to me known to be the person described in and who executed the foregoing bill of sale, and acknowledged that he executed the same as his free act and deed, and, if said bill of sale be that of a corporation swore that he was duly authorized to execute the same. Given under my hand and official seal the day and year written above.

(SEAL)

[signature]
NOTARY PUBLIC

MY COMMISSION EXPIRES Oct. 5, 1960

FORWARD THIS COPY TO WASHINGTON—Retain Duplicate Copy.

3

AIRCRAFT AND AIRMEN
RECORDS BRANCH
FAA

Jul 6 10 52 AM '60

WASHINGTON, D.C.

AX-73g

TWA Ex. R-8 (80), page 7
(FAA Registration Documents - B707-331, No. N771TW)

NAME AND ADDRESS OF APPLICANT (Same as that shown on Part A of this form)	REGISTRATION MARKS
Trans World Airlines, Inc. 10 Richards Road Kansas City, Missouri	N— 771 TW
	AIRCRAFT MAKE AND MODEL Boeing 707-331
CHECK WHETHER OWNERSHIP IS ☒ CORPORATION ☐ PARTNERSHIP ☐ CO-OWNERSHIP ☐ INDIVIDUAL OWNER	SERIAL NO. 17688

I HEREBY CERTIFY that the above-described aircraft is not registered under the laws of any foreign country; that all persons whose names appear hereon as applicants are citizens of the United States as defined in Section 101(15) of the Federal Aviation Act of 1958; that the applicants are the legal owners of the aircraft, or the purchasers under a contract of conditional sale submitted as evidence of ownership for the purpose of registration; and that both copies of Part A and a copy of Part B of Form FAA-500 and legal evidence of ownership were forwarded to the Federal Aviation Agency, Washington, D. C.

Trans World Airlines, Inc.

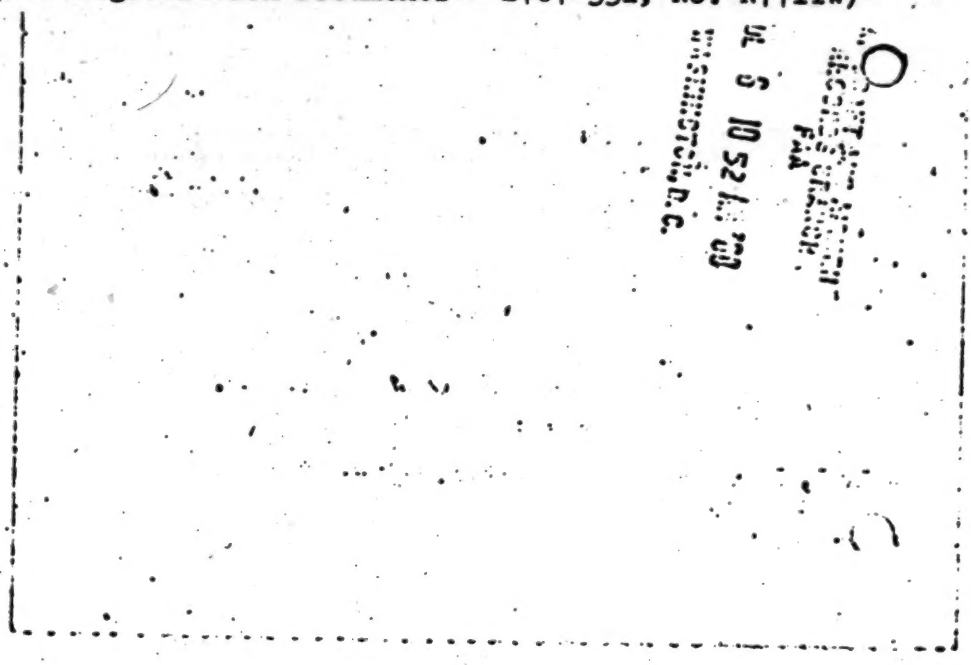
SIGNATURE OF APPLICANT (See item 9) By: [signature]
(If executed for co-ownership, all must sign)

July 1, 1960 — DATE OF APPLICATION

TITLE: Attorney-in-Fact

I the above statements are true and made in good faith, the aircraft described above may be operated, if registration or notification from the Federal Aviation Agency, provided airworthiness requirements of applicable Civil Air Regulations are complied with.

FORWARD THIS COPY TO WASHINGTON — Retain Duplicate Copy



TWA

TRANS WORLD AIRLINES, Inc.

Seattle, Washington

JUL 1 19

Federal Aviation Agency
Examination & Records Division
Home State Life Building
621 N. Robinson
Oklahoma City, Oklahoma

Gentlemen:

Transmitted herewith are the below listed documents in connection with the purchase and registration of Boeing 707-331 airplane Serial No. 17688, Registration No. N771TW.

1. Form ACA 500, Part A - original and duplicate
2. Form ACA 500, Part B - original
3. Form ACA 500, Part C - original
4. Power of Attorney, Boeing Airplane Company
5. Power of Attorney, Trans World Airlines, Inc.
6. Check payable to the Federal Aviation Agency in the amount of $4.00 to pay for the registration and recordation fee.

The $10.00 fee for registration number reservation has been previously paid.

You are requested to mail the registration certificate to the following address:

Mr. R. M. Dunn
Vice President - Technical Services
Trans World Airlines, Inc.
Mid-Continent International Airport
Kansas City 8, Missouri

Yours very truly,

Edwin Zak

Enclosures

Rcvd 7-18-60

4

AIRCRAFT AND ENGINE
RECORDS BRANCH
FAA

Jul 6 10 52 AM '60

WASHINGTON, D.C.

TWA EXHIBIT R-8 (81)
5/2/66 E.G.

CERTIFICATE OF TRUE COPY

I HEREBY CERTIFY that the attached {~~is a true copy~~ / are true copies} of the original aircraft records as described on the attached Schedule A consisting of seven (7) pages pertaining to Boeing 707-331 aircraft, serial number 17690, registration number N772TW,

is the Aircraft Registration Branch, Federal Aviation Agency.

Signed and dated at Oklahoma City, Oklahoma

this 7th day of January, 1966

by Margaret E. Hood

Supervisory Conveyances Examiner
(Title)

I HEREBY CERTIFY that Margaret E. Hood

whose signature appears to the foregoing certificate is now, and was, at the time of signing Supervisory Conveyances Examiner, Public Documents Section,

that full faith and credit should be given his certificate as such.

IN WITNESS WHEREOF, I have hereunto subscribed my name and caused the seal of the Federal Aviation Agency to be affixed this 7th day of January, 1966

at Oklahoma City, Oklahoma

Peter J. Robinson
(Signature)

Chief, Aircraft Registration Branch
(Title)

Data Services Division
(Organization of the Federal Aviation Agency)

TWA Ex. R-8 (81), page 2
(FAA Registration Documents - B707-331, No. N772TW)

SCHEDULE A

1. Certificate of registration issued July 18, 1960, in the name of Trans World Airlines, Inc.
2. Bill of sale recorded July 18, 1960, as document number A121346.
3. Application for registration dated July 1, 1960, in the name of Trans World Airlines, Inc.
4. Letter dated July 1, 1960, from Trans World Airlines, Inc. to Federal Aviation Agency.

(FAA Registration Documents - B707-331, No. N772TW)

FEDERAL AVIATION AGENCY

CERTIFICATE OF REGISTRATION

NATIONALITY AND REGISTRATION MARKS	MAKE AND MODEL OF AIRCRAFT	AIRCRAFT SERIAL NO.
N— 772 TW	Boeing 707-331	17690

Trans World Airlines, Inc.
NAME OF OWNER

10 Richards Road
ADDRESS OF OWNER—NUMBER AND STREET

Kansas City, Missouri
CITY ZONE STATE

THIS CERTIFICATE MUST BE CARRIED IN THE AIRCRAFT AT ALL TIMES

It is hereby certified that the above described aircraft has been duly entered on the register of the Federal Aviation Agency, United States of America, in accordance with the Convention on International Civil Aviation dated 7 December 1944, and with the Federal Aviation Act of 1958, and regulations issued thereunder.

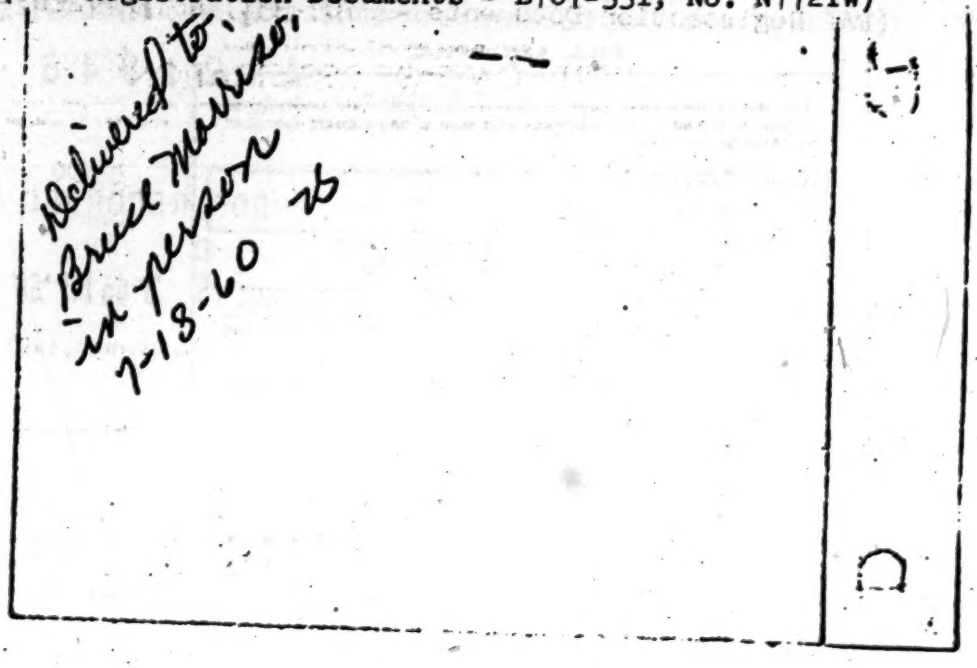
ISSUED: JUL 18 1960

FOR THE ADMINISTRATOR
Robert L. Nixon
CHIEF, AIRCRAFT & AIRMAN RECORDS BRANCH

A. P.

(OVER)

A Copy and the Duplicate Copy to Washington.


Delivered to
Bruce Morrison
in person
7-13-60

AX-730

TWA Ex. R-8 (81), page 5
(FAA Registration Documents - B707-331, No. N772TW)

BILL OF SALE

A 1 2 1 3 4 6

For and in consideration of $ 1.00 & other the undersigned owner of the full legal and beneficial title of the aircraft described as follows:

AIRCRAFT MAKE AND MODEL: Boeing 707-331

SERIAL NO.: 17690

REGISTRATION MARKS: N— 772 TW

DOC. RECORDED
JUL 18 3 48 PM '60
FEDERAL AVIATION AGENCY

does this 1st day of July 1960 hereby sell, grant, transfer, and deliver all of his right, title and interest in and to such aircraft unto:

(Name and address of purchaser—same as on Parts A and B of this form)

Trans World Airlines, Inc.
10 Richards Road
Kansas City, Missouri

and to its executors, administrators, and assigns, to have and to hold singularly the said aircraft forever, and certifies that same is not subject to any mortgage or other encumbrance except

KIND OF ENCUMBRANCE	AMOUNT	DATE
None	---	---

IN FAVOR OF

In testimony whereof WE have set OUR hand and seal this 1st day of July 1960

NAME OF SELLER: Boeing Airplane Company

BY (SIGN IN INK): W H Miller
(If executed for co-ownership, all must sign)

TITLE: Attorney-in-Fact
(If signed for a corporation, partnership, owner, or agent)

ACKNOWLEDGMENT

State of Washington
County of King

On this 1st day of July 1960 before me personally appeared the above named seller, to me known to be the person described in and who executed the foregoing bill of sale, and acknowledged that he executed the same as his free act and deed, and, if said bill of sale is that of a corporation swore that he was duly authorized to execute the same. Given under my hand and official seal the day and year written above.

(SEAL)

W H Miller
NOTARY PUBLIC

MY COMMISSION EXPIRES Oct 26, 1960

FORWARD THIS COPY TO WASHINGTON— Retain Duplicate Copy.

TWA Ex. R-8 (81), page 6
(FAA Registration Documents - B707-331, No. N772TW)

AIRCRAFT AND AIRMEN
RECORDS BRANCH
FAA
Jul 6 10 52 AM '60
WASHINGTON, D.C.

AX-73q TWA Ex. R-8 (81), page 7

(FAA Registration Documents - B707-331, No. N772TW)

41-R888.4

(2) ADDRESS OF APPLICANT (Same as that shown on Part A of this form) Trans World Airlines, Inc. 10 Richards Road Kansas City, Missouri	REGISTRATION NUMBER N— 772 TW AIRCRAFT MAKE AND MODEL Boeing 707-331
CHECK WHETHER OWNERSHIP IS ☒ CORPORATION ☐ PARTNERSHIP ☐ CO-OWNERSHIP ☐ INDIVIDUAL OWNER	SERIAL NO. 17690

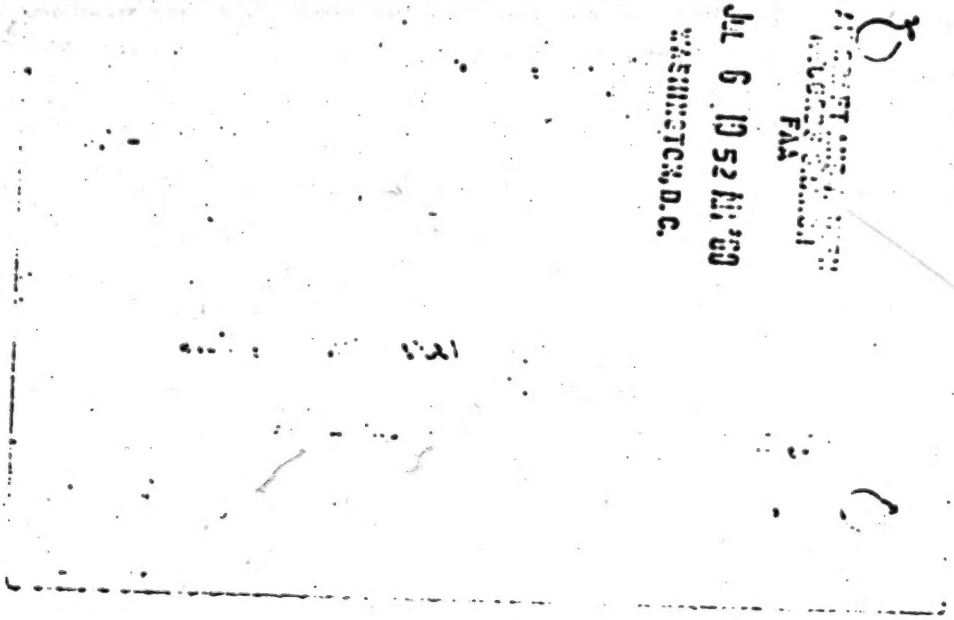
I HEREBY CERTIFY that the above-described aircraft is not registered under the laws of any foreign country; that all persons whose names appear hereon as applicants are citizens of the United States as defined in Section 101(13) of the Federal Aviation Act of 1958; that the applicants are the legal owners of the aircraft, or the purchasers under a contract of conditional sale submitted as evidence of ownership for the purpose of registration; and that both copies of Part A and a copy of Part B of Form FAA-500 and legal evidence of ownership were forwarded to the Federal Aviation Agency, Washington, D. C.

SIGNATURE OF APPLICANT (IN INK) Trans World Airlines, Inc.
By: [signature]
(If executed for co-ownership, all must sign)

July 1, 1960 (DATE OF APPLICATION) TITLE Attorney-in-Fact

If the above statements are true and made in good faith, the aircraft described above may be operated, pending receipt of a registration or notification from the Federal Aviation Agency, provided airworthiness requirements of applicable Civil Air Regulations are complied with.

FORWARD THIS COPY TO WASHINGTON — Retain Duplicate Copy.


FAA
JUL 9 10 52 AM '60
WASHINGTON, D.C.

FCJA

TRANS WORLD AIRLINES, Inc.

Seattle, Washington

JUL 1 1960

Federal Aviation Agency
Examination & Records Division
Home State Life Building
621 N. Robinson
Oklahoma City, Oklahoma

Gentlemen:

Transmitted herewith are the below listed documents in connection with the purchase and registration of Boeing 707-331 airplane Serial No. 17690, Registration No. N772TW.

1. Form ACA 500, Part A - original and duplicate
2. Form ACA 500, Part B - original
3. Form ACA 500, Part C - original
4. Power of Attorney, Boeing Airplane Company
5. Power of Attorney, Trans World Airlines, Inc.
6. Check payable to the Federal Aviation Agency in the amount of $4.00 to pay for the registration and recordation fee.

The $10.00 fee for registration number reservation has been previously paid.

You are requested to mail the registration certificate to the following address:

Mr. R. M. Dunn
Vice President - Technical Services
Trans World Airlines, Inc.
Mid-Continent International Airport
Kansas City 8, Missouri

Yours very truly,

Edwin Zak

Enclosures

Acyd 7-18-

AIRCRAFT AND AIRMEN
RECORDS BRANCH
FAA

Jul 6 10 52 AM '60

WASHINGTON, D.C.

PLAINTIFF EXHIBIT 3 5/2/66 E.G

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

TRANS WORLD AIRLINES, INC.,

Plaintiff,

-against-

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,

Defendants.

- x

STATEMENT OF J.B. CONNELLY

61 Civ. 2324

STATE OF WASHINGTON)
: ss.:
COUNTY OF KING)

J.B. Connelly being duly sworn, deposes and says:

I am Vice President - Assistant General Manager of The Boeing Company, Airplane Division, and am familiar with the development, production, sales and deliveries of commercial jet aircraft by The Boeing Company during the period 1954 to 1961 and, in particular, the jet aircraft known as the Boeing 707-120 Series and the Boeing 707-320 Series.

I participated in or was generally familiar with the negotiations between Boeing and Pan American World Airways in 1955 and thereafter concerning the sale to Pan American of Boeing 707-120 and Boeing 707-320 jet aircraft. I also participated in or was generally familiar with the negotiations between Boeing and American Airlines in 1955 and thereafter respecting the sale to American of Boeing 707-120 jet aircraft.

I am familiar with the policies followed by Boeing concerning the sale of commercial jet aircraft to commercial air carriers throughout the period 1955 to 1961 and with Boeing's reasons for entering into the agreements with Pan American and American providing for the delivery of jet aircraft to such customers starting in 1958.

I also participated in or was generally familiar with negotiations between Boeing and other air carriers in 1955 and thereafter respecting the sale of Boeing jet aircraft to such customers.

Based upon my knowledge of the foregoing, it would be my testimony that:

1. In 1955, Boeing wished to sell substantial numbers of 707 jet aircraft to TWA. In accordance with its policies, Boeing would have afforded TWA substantially as early delivery positions as those afforded to other customers of comparable interest to Boeing:

(a) Had TWA commenced negotiations and ordered jet aircraft comparable in number to those ordered by Pan American and American, respectively, at about the same time as such other customers ordered jet aircraft from Boeing, Boeing would have afforded TWA substantial equality in early delivery positions with Pan American and American. Boeing would have sought to provide substantial equality of early delivery positions as between Pan American and TWA

with respect to jet aircraft useful primarily on international routes and substantial equality of early delivery positions as between American and TWA with respect to jet aircraft useful primarily on domestic routes;

(b) Boeing would have agreed, assuming that TWA had placed such orders, to deliver and would have delivered to TWA Boeing 707-120 and Boeing 707-320 jet aircraft earlier than such aircraft were in fact delivered under the Boeing agreements with Hughes Tool Company, the first of which agreements was not made until after Pan American and American had contracted for delivery of substantial numbers of Boeing 707 jet aircraft;

(c) If there were major differences in configuration and equipment between such customers, such as in the past existed between Pan American, American and TWA, the Boeing and FAA certification flight test programs would limit Boeing's ability to certify more than one configuration of aircraft at a time and this factor would require that some minimum number of aircraft of each type, probably three, would be delivered to one customer before the next received any;

(d) Since Pan American, TWA and American would all have been seeking early delivery positions of the 120 series, Boeing might have

TWA Ex. R-5, Exhibit 3
(TWA-Toolco Purchase Agreement, May 9, 1960)

Exhibit 3

Description of Spare Engines to be Assigned to TWA

General Electric Aircraft Engines
Model CJ805 for the Convair 880 Aircraft(1)

30 Model CJ805 aircraft engines being manufactured by General Electric Company under contract with Hughes Tool Company, dated October 1, 1956, said engines to be assigned to TWA in accordance with TWA's needs currently estimated as follows:

May	1
June	8
July 1 to 15	5
July 16 thru 31	2
August	4
September	5
October	4
November	1
	30

Pratt & Whitney Aircraft Engines
Model JT4A(2)

10 Pratt & Whitney aircraft engines Model JT4A on order by Hughes Tool Company from United Aircraft Corporation under contract dated February 14, 1956 and from Boeing Airplane Company under contract dated January 14, 1959, such engines to be assigned to TWA in accordance with its needs currently estimated to be at the rate of one engine per week commencing May 2, 1960.

(1) TWA has heretofore succeeded to the interest of Hughes Tool Company in 8 CJ805 engines per telegram agreements dated April 25, 1960. The engines herein described are in addition to the first 8 of such engines covered by the April 25 order.

(2) TWA has heretofore succeeded to the interest of Hughes Tool Company in 25 JT4A engines manufactured by United Aircraft Corporation under contract dated February 14, 1956. The engines herein described are in addition to said 25 engines.

GLL

Pratt

FEDERAL AVIATION AGENCY

TWA EXHIBIT R-8 (80) 5/2/66 E.G.

CERTIFICATE OF TRUE COPY

I HEREBY CERTIFY that the attached {~~is a true copy~~ / are true copies} of the original aircraft records as described on the attached Schedule A consisting of seven pages pertaining to Boeing 707-331 aircraft, serial number 17688, registration number N771TW,

are in the Aircraft Registration Branch, Federal Aviation Agency.

Signed and dated at Oklahoma City, Oklahoma

this 7th day of January, 1966

by Margaret E. Hood

Supervisory Conveyances Examiner
(Title)

****

I HEREBY CERTIFY that Margaret E. Hood

who signed the foregoing certificate is now, and was, at the time of signing Supervisory Conveyances Examiner, Public Documents Section,

and that full faith and credit should be given his certificate as such.

IN WITNESS WHEREOF, I have hereunto subscribed my name and caused the seal of the Federal Aviation Agency to be affixed this 7th day of January, 1966

at Oklahoma City, Oklahoma

Walter G. Peterson
(Signature)

Chief, Aircraft Registration Branch
(Title)

Data Services Division
(Organization of the Federal Aviation Agency)

SCHEDULE A

1. Certificate of registration issued July 18, 1960, in the name of Trans World Airlines, Inc.
2. Bill of sale recorded July 18, 1960, as document number A121347.
3. Application for registration dated July 1, 1960, in the name of Trans World Airlines, Inc.
4. Letter dated July 1, 1960, from Trans World Airlines, Inc. to Federal Aviation Agency.

AX-78c

TWA Ex. R-8 (80), page 3
(FAA Registration Documents - B707-331, No. N771TW)

FEDERAL AVIATION AGENCY

CERTIFICATE OF REGISTRATION

NATIONALITY AND REGISTRATION MARKS	MAKE AND MODEL OF AIRCRAFT	AIRCRAFT SERIAL NO.
N— 771 TW	Boeing 707-331	17688

Trans World Airlines, Inc.
NAME OF OWNER

10 Richards Road
ADDRESS OF OWNER—NUMBER AND STREET

Kansas City — Missouri
CITY — ZONE — STATE

THIS CERTIFICATE MUST BE CARRIED IN THE AIRCRAFT AT ALL TIMES.

It is hereby certified that the above described aircraft has been duly entered on the register of the Federal Aviation Agency, United States of America, in accordance with the Convention on International Civil Aviation dated 7 December 1944, and with the Federal Aviation Act of 1958 and regulations issued thereunder.

DATE OF ISSUE JUL 18 1960

FOR THE ADMINISTRATOR
Victor C. Forbes
CHIEF, AIRCRAFT & AIRMAN RECORDS BRANCH

JAN 11 1971 U.S. A.F.

Forward This Copy and the Duplicate Copy to Washington.

(OVER)

Delivered to Bruce Mann in person - 7-18-60

26

AX-73e

TWA Ex. R-8 (80), page 5

(FAA Registration Documents - B707-331, No. N771TW)

7

BILL OF SALE

A 1 2 1 3 4 7

For and in consideration of $ 1.00 & other the undersigned owner of the full legal and beneficial title of the aircraft described as follows:

AIRCRAFT MAKE AND MODEL	
Boeing 707-331	DOC. RECORDED
SERIAL NO.	REGISTRATION MARKS
17688	N— 771 TW

does this 1st day of July 19 60 hereby sell, grant, transfer, and deliver all of his right, title and interest in and to such aircraft unto:

50 PM '60

FEDERAL AVIATION AGENCY

(Name and address of purchaser—same as on Parts A and B of this form)

Trans World Airlines, Inc.
10 Richards Road
Kansas City, Missouri

and to its executors, administrators, and assigns, to have and to hold singularly the said aircraft forever, and certifies that same is not subject to any mortgage or other encumbrance except

TYPE OF ENCUMBRANCE	AMOUNT	DATE
None	---	---
IN FAVOR OF		

In testimony whereof we have set our hand and seal this 1st day of July 19 60

NAME OF SELLER Boeing Airplane Company

BY (SIGN IN INK) M. Green Jr. Atty-in-Fact

(If required for co-ownership, all must sign)

TITLE Attorney-in-Fact

(If signed for a corporation, partnership, owner, or agent)

ACKNOWLEDGMENT

State of Washington

County of King

On this 1st day of July 1960 before me personally appeared the above named seller, to me known to be the person described in and who executed the foregoing bill of sale, and acknowledged that he executed the same as his free act and deed, and, if said bill of sale be that of a corporation swore that he was duly authorized to execute the same. Given under my hand and official seal the day and year written above.

(SEAL)

MY COMMISSION EXPIRES Oct. 26, 1960

L. M. Miller

NOTARY PUBLIC

FORWARD THIS COPY TO WASHINGTON—1 Retain Duplicate Copy.

AIRCRAFT AND AIRMEN
RECORDS BRANCH
FAA
Jul 6 10 52 AM '60
WASHINGTON, D.C.

(FAA Registration Documents - B707-331, No. N771TW)

NAME AND ADDRESS OF APPLICANT (Same as that shown on Part A of this form) Trans World Airlines, Inc. 10 Richards Road Kansas City, Missouri	REGISTRATION MARKS N— 771 TW
	AIRCRAFT MAKE AND MODEL Boeing 707-331
CHECK WHETHER OWNERSHIP IS ☒ CORPORATION ☐ PARTNERSHIP ☐ CO-OWNERSHIP ☐ INDIVIDUAL OWNER	SERIAL NO. 17688

I HEREBY CERTIFY that the above-described aircraft is not registered under the laws of any foreign country; that all persons whose names appear hereon as applicants are citizens of the United States as defined in Section 101(13) of the Federal Aviation Act of 1958; that the applicants are the legal owners of the aircraft, or the purchasers under a contract of conditional sale submitted as evidence of ownership for the purpose of registration; and that both copies of Part A and a copy of Part B of Form FAA-500 and legal evidence of ownership were forwarded to the Federal Aviation Agency, Washington, D. C.

Trans World Airlines, Inc.

SIGNATURE OF APPLICANT (IN INK) By: [signature]
(If executed for co-ownership, all must sign)

July 1, 1960 — DATE OF APPLICATION

TITLE: Attorney-in-Fact

I the above statements are true and made in good faith, the aircraft described above may be operated, as registration or notification from the Federal Aviation Agency, provided airworthiness requirements of applicable Civil Air Regulations are complied with.

FORWARD THIS COPY TO WASHINGTON — Retain Duplicate Copy.

selected TWA as the first customer but most probably would have selected Pan American as the first customer for the 120 series, affording Pan American the first three delivery positions. TWA and American would have been afforded substantial equality in early deliveries thereafter, particularly in light of the usefulness of the 120 series over domestic routes. American might have been afforded some preference in light of the reconstruction supplied in paragraph (e) below;

(e) TWA would most probably have been selected as the first customer for the 320 series, particularly in light of Boeing's selection of Pan American as the first customer for the 120 series. TWA would have, in that case, received delivery of the first three 320's and, thereafter, TWA and Pan American would have received substantial equality in early delivery positions.

(f) If TWA would not have compromised delivery positions contemplated in paragraph (e) in order to gain non-essential specific detailed configurations, then the extent of configuration variance that existed between Boeing's standard specification aircraft and the first Pan American 320 actually produced would not have been exceeded by TWA with respect to the cumulative gross effect on production or certification of the 320 (330) series.

2. The equality of early delivery positions described above would most probably have been provided as follows:

(a) With respect to the 120 series, under the agreements which Boeing probably would have made with Pan American, American and TWA, Boeing would have delivered to Pan American, TWA and American substantially the same number of aircraft approximately by the end of the first six months with substantially equivalent deliveries per month thereafter to American and TWA;

(b) With respect to the 320 series, under the agreements which Boeing probably would have made with Pan American and TWA, Boeing would have delivered to Pan American and TWA substantially the same number of aircraft by the end of the first six month period. The actual deliveries would not have been in exact rotation but would probably have been made on a substantially equal number per month basis.

3. I have examined TWA's Statement of Improvement of Delivery Positions* which reflects a reallocation of certain actual delivery dates of Boeing 707-120 and 707-320 aircraft. The Statement is a reasonable estimate of the improvement in delivery positions which TWA would have obtained, based upon the foregoing. The exact delivery dates which Pan American, TWA and American would have received can, of course, only be estimated. The necessities of Boeing's production line would

* A copy of such Statement is attached as Exhibit A.

not have permitted Boeing to agree that aircraft would come off the line and be delivered to such customers in an inflexible pari passu sequence, nor would such have been practicable. Rather, deliveries to such customers would have tended over the period of the deliveries to have afforded TWA early delivery positions at least as advantageous as those afforded Pan American and American.

4. With reference to the six Boeing 707-331 jet aircraft which were originally ordered by Toolco, and delivered to Pan American under Pan American's arrangements with Toolco, the earliest delivery positions Pan American could have obtained from Boeing for six 707-331 jet aircraft if such had been ordered in July 1959 from Boeing, in light of the lead time then required, were: one in February, 1961, two in March, 1961, two in April, 1961, and one in May, 1961. These are the same delivery positions as those which, in fact, Boeing offered to TWA at that time.

I have read the foregoing statement and it is true to the best of my knowledge, information and belief.

J. B. CONNELLY

STATE OF WASHINGTON, }
COUNTY OF KING, } ss.

WALTER W. RENSCHLER, County Clerk of King County, and ex-officio Clerk of the Superior Court, of the State of Washington, for the County of King, the same being a Court of Record, and having a Clerk and Seal, do hereby certify that N. H. Carlyon the person whose name is subscribed to the annexed acknowledgment, certificate of proof or affidavit, and before whom the same was taken, was at the date thereof, and is now a Notary Public in and for the said State, duly appointed and commissioned; that by virtue of his said office, he is authorized to take acknowledgments and proofs of deeds or conveyances of land, tenements, hereditaments, mortgages and other instruments in writing required to be recorded or acknowledged in said State, and to administer oaths.

I DO FURTHER CERTIFY that I am acquainted with the handwriting of said Notary Public and the name subscribed to the said annexed acknowledgment, certificate or proof or affidavit, is his proper and genuine signature, and the same is executed according to the laws of the State of Washington, which do not require the impression of the seal of such Notary Public to be filed in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, King County, Washington, this 8 day of March A.D., 19 61

WALTER W. RENSCHLER, Clerk

By ..... Deputy

AX-80

TWA Ex. 4(b)
(C. & C. Report-Comparative Profit Study)

REPORT ON

TRANS WORLD AIRLINES, INC.

COMPARATIVE PROFIT STUDY

1959 – 1963
1964 – 1965

MAY 2, 1966

COVERDALE & COLPITTS
CONSULTING ENGINEERS
120 WALL STREET
NEW YORK 5, N. Y.

TWA Ex. 4(b)
(C. & C. Report-Comparative Profit Study)

REPORT ON

TRANS WORLD AIRLINES, INC.

COMPARATIVE PROFIT STUDY

1959 - 1963
1964 - 1965

May 2, 1966

AX-82

TWA Ex. 4(b), page 1
(C. & C. Report-Comparative Profit Study)

COVERDALE & COLPITTS

CONSULTING ENGINEERS

120 WALL STREET

NEW YORK, N.Y. 10005

WHITEHALL 3-7400

CABLE ADDRESS: COVERCOL

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GEORGE W. BURPEE
AUGUSTUS P. FARNSWORTH
CONSULTANTS

WILLIAM H. COVERDALE (1904-1948)
WALTER W. COLPITTS (1913-1951)

May 2, 1966

Cahill, Gordon, Reindel & Ohl
80 Pine Street
New York 5, New York

Dear Sirs:

You have asked us to calculate the extent to which the operating profits earned by Trans World Airlines, Inc. ("TWA") during the years 1959-1963, inclusive, fell short of the profit TWA would have attained had its profits for those years been on the same level, vis-a-vis other air carriers, as the profits earned by it during the years 1964 and 1965.

In response to that request, we made a series of computations to determine how TWA's profits during the base years 1964 and 1965 compared with profits during those years of the other air carriers which, in our opinion, are most nearly comparable in operations to TWA. We then calculated the profits TWA would have earned for the years 1959 through 1963 if the ratio of its profits to those of such comparable air carriers had been the same as the ratio of its profits to those of the other carriers during the base years. Having made these computations, we can inform you that, had TWA achieved during the years 1959 through 1963 the profits vis-a-vis comparable air carriers which it reached in 1964 and 1965, its total operating profits during that five-year period would have been greater by approximately $170 million.

In making our comparisons between TWA and other airlines for purposes of this study, we note that TWA's 1959-1963 route structure was not materially different from what it was in 1964 and 1965, and that the route structures of the airlines we selected for comparison with TWA were also not materially different in 1959-1963 from what they were in 1964-1965.

TWA is unique among airlines in holding certificates of public convenience and necessity which authorize it both to provide international air transportation including transatlantic service and to provide U. S. domestic air transportation including transcontinental service. In order to select other air carriers with operations most nearly comparable to TWA, it is necessary to select both the most comparable air carrier competing with TWA internationally and the most comparable air carrier competing with TWA domestically.

In our opinion, this calculation of operating profit for TWA's International Division must be made on the basis of a comparison with the Atlantic Division of Pan American World Airways, Inc. ("PAA-Atl."). A map showing the routes operated by TWA's International Division and by the Atlantic Division of Pan American World Airways, Inc., and their comparability, is annexed hereto as Exhibit A. The Atlantic Division of Pan American provides the only other scheduled transatlantic air transportation of passengers by a United States flag air carrier.

It is also our opinion that this calculation of operating profit for TWA's Domestic Division operation, in 1964 and 1965 as compared with the period 1959-1963, should rest upon a comparison with American Airlines, Inc. ("American") which we consider to be the air carrier with domestic operation most comparable to TWA's Domestic Division operation. A map showing domestic routes operated by TWA and American and their comparability is annexed hereto as Exhibit B.

The operating profits during the base years 1964 and 1965 of TWA's Domestic and International Divisions and of the air carriers selected by us for purposes of comparison were as follows:

	1964	1965	Average
	(Millions)		
TWA International	$34.6	$47.6	$41.1
TWA Domestic	50.9	49.8	50.3
PAA-Atlantic	26.1	33.7	29.9
American (Domestic)	61.2	70.9	66.1

The ratios of TWA's operating profits to those of the air carriers selected for comparison in 1964 and 1965 were as follows:

	1964-1965 Average Operating Profit (Millions)	Ratio, TWA to Other
TWA International	$41.1	1.37
PAA-Atlantic	29.9	
TWA Domestic	$50.3	.76
American (Domestic)	66.1	

The operating profits (losses) in each of the years 1959 through 1963 of TWA and the selected air carriers were as follows:

	1959	1960	1961	1962	1963	Total
	(Millions)					
PAA-Atlantic	$17.5	$16.6	$ 4.5	$12.5	$33.3	$ 84.4
American (Domestic)	24.5	24.7	19.1	19.3	43.9	131.5
TWA International	(-7.8)	17.1	(-13.5)	15.3	23.3	34.4
TWA Domestic	26.3	(-0.9)	(-24.2)	(-7.4)	17.5	11.3

Application of the TWA profit ratios determined for the base years 1964 and 1965 to the total 1959-1963 profits of the selected air carriers, establishes that TWA's profits would have been as set out below if TWA had attained a profit level comparable to that reached by TWA in 1964 and 1965:

TWA Ex. 4(b), page 4
(C. & C. Report-Comparative Profit Study)

1959-1963 Profits		1964-1965 Profit Ratio, TWA to Other	Calculated 1959-1963 TWA Profits
	(Millions)		(Millions)
PAA-Atlantic	$ 84.4	1.37	$115.6
American (Domestic)	131.5	.76	99.9

The difference between the profits calculated by this method and TWA's actual profits are as follows:

Comparison Airline	Calculated 1959-1963 TWA Profits	Actual TWA Profits		Difference
	(Millions)		(Millions)	
PAA-Atlantic	$115.6	TWA International	$34.4	$ 81.2
American (Domestic)	99.9	TWA Domestic	11.3	88.6
				$169.8

The operating profits earned by TWA's International Division in the period 1959 through 1963 were about $81 million less than they would have been if that Division's profit, as compared with PAA-Atl., had been as high as in the years 1964 and 1965. The operating profits earned by TWA's Domestic Division in the period 1959 through 1963 were about $89 million less than they would have been if that Division's profit, as compared with American, had been as high as in the years 1964 and 1965. These figures are graphically illustrated in Exhibit C hereto.

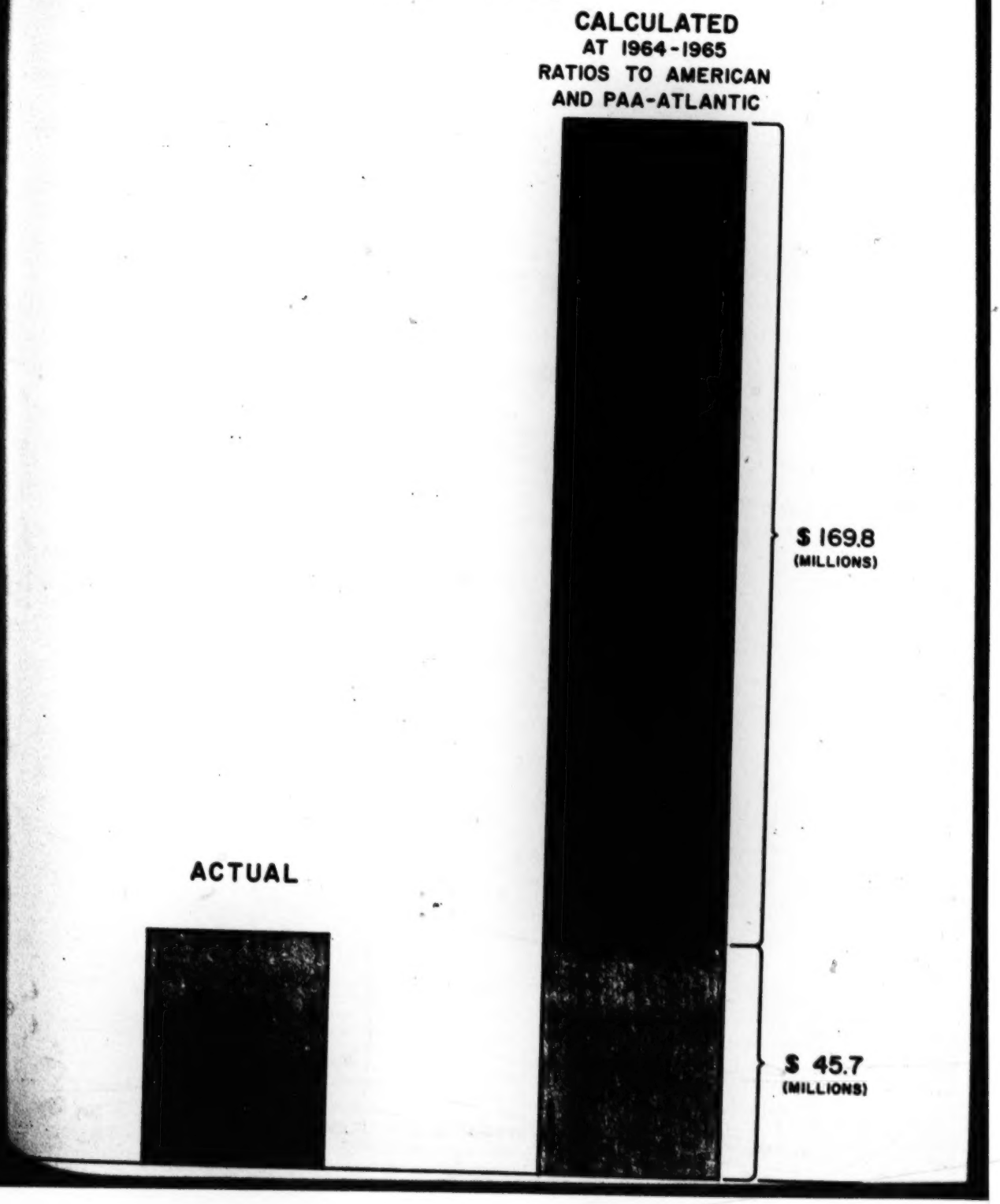
Respectfully submitted,

Corridden & Colpitts

Consulting Engineers

TWA SYSTEM OPERATING PROFIT

1959 - 1963



AX-91

TWA Ex. 4(c)(1)
(C. & C. Report-Financial Results from Reconstructed Jet Fleet)

REPORT ON
FINANCIAL RESULTS FROM OPERATIONS
FOR
TRANS WORLD AIRLINES, INC.
1959 – 1968

MAY 2, 1966

Volume I
Text

COVERDALE & COLPITTS
CONSULTING ENGINEERS
120 WALL STREET
NEW YORK

TWA Ex. 4(c)(1)
(C. & C. Report-Financial Results from Reconstructed Jet Fleet)

TABLE OF CONTENTS

VOLUME I

Text

Chapter		Page
	INTRODUCTION	1
	Jet Aircraft and Dates	1
	Additional Jet Aircraft and Earlier Dates	3
	Average Number of Jet Aircraft	4
	Limit on Estimates	6
I	OWNERSHIP OF B-131 AND B-331 AIRCRAFT	8
	Gain or Loss from Operations	9
II	SIX ADDITIONAL B-331 JET AIRCRAFT	10
	Use of B-331 Aircraft	10
	Northeast Airlines' Lease	11
	B-131B Aircraft	11
	B-331B Aircraft	12
	Additional Number Available	12
	International Division	14
	Reduced Piston Operation	16
	Transatlantic Flights	18
	IATA Flights and Passengers	20
	Transatlantic Seats	23
	Additional Passengers	25
	Additional Revenues	26
	Domestic Division	27
	Piston Aircraft Operation	29
	Cargo Revenues	31
	System Additional Revenues	32
	Operating Expenses	33
	Flying Operations and Maintenance Expense	34
	Aircraft Servicing Expense	34
	Passenger Service Expense	35
	Traffic Servicing Expense	35
	Servicing Administration Expense	35
	Promotion and Sales Expense	36
	General and Administrative Expense	36
	Depreciation and Amortization	36
	Summary of Changes	36
	Gain or Loss from Operations	38

TABLE OF CONTENTS - 2

VOLUME I

Text

Chapter		Page
III	EARLIER RECEIPT OF B-131 AND B-331 AIRCRAFT	40
	Commencing Revenue Service	41
	Average Number of Aircraft	41
	Domestic Division	42
	Piston Plane-Miles	44
	Revenues	45
	International Division	45
	Transatlantic Seats and Passengers	46
	Cargo Revenues	48
	Incidental Revenues	49
	System Revenues	49
	Operating Expenses	49
	Gain or Loss from Operations	50
IV	RECEIPT OF CV 880 AIRCRAFT ON CONTRACT DELIVERY DATES	52
	Number of Aircraft Available	53
	Plane-Miles	53
	Seat-Miles	54
	Passenger-Miles	55
	Cities Served	55
	30 Pairs of Cities	57
	Service Increase	61
	Piston Service Decrease	61
	Revenue Increase	63
	Operating Expenses	63
	Gain or Loss from Operations	64
V	FLEET OF THIRTY CV 880 AIRCRAFT	65
	Passenger-Miles	66
	Service with Thirty CV 880 Aircraft	67
	Revenue Increase	70
	Operating Expenses	71
	Gain or Loss from Operations	72
VI	FINANCIAL GAIN OR LOSS FROM OPERATIONS SUMMARY	73

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AUGUSTUS P. FARNSWORTH
CONSULTANTS

May 2, 1966

Cahill, Gordon, Reindel & Ohl
80 Pine Street
New York 5, New York

Dear Sirs:

In accordance with your request we have estimated changes that would have occurred in the annual financial gain or loss from operations for Trans World Airlines, Inc., (TWA) for each of the years 1959 through 1963 if the air line had:

I - Owned the Boeing B-131 and B-331 jet aircraft that were leased in 1959 and 1960.

II - Received six additional Boeing B-331 aircraft that were, in fact, delivered to Pan American World Airways, Inc. (PAA) in 1959 and 1960.

III - Received Boeing B-131 and B-331 aircraft on certain earlier dates in 1958-1960.

IV - Received the fleet of twenty Convair 880 aircraft on the 1959-1960 delivery dates provided in the purchase contract.

V - Received a fleet of thirty (rather than twenty) Convair 880 aircraft on the 1959-1960 delivery dates provided in the purchase contract.

JET AIRCRAFT AND DATES

In the years 1959-1963, TWA received jet aircraft of the following numbers and general characteristics, on the dates listed in the following table, for passenger service. Certain cargo-only jet aircraft that TWA received are not included in this list or in analyses that follow because the numbers and receipt dates of cargo-only jet aircraft are unchanged by the conditions for the estimates in this report.

Actual Number of Jet Aircraft and Receipt Dates

Number of Aircraft	Model	Cruising Speed(a)	Range(a) (Miles)	Seats(b)	Dates Received(c)
15	B-131	585 mph	3,300	119	Jan. 1959 to Aug. 1959
12	B-331	600 mph	5,700	142	Nov. 1959 to July 1960
20	CV 880	615 mph	2,994	94	May 1960 to Oct. 1961
4(d)	B-720B	622 mph	4,100	111	July 1961 to Sept. 1961
18	B-131B	622 mph	4,200	119	Mar. 1962 to Oct. 1962
5	B-331B	600 mph	6,000	142	Nov. 1962 to Mar. 1963
6	CV 880	615 mph	2,994	94	July 1963 to Sept. 1963
76+4(d)					

(a) From the August 1964 Official Airline Guide, World Wide Edition, Typical Performance Section, Page C-1002.
(b) Normal seating capacity as shown in TWA Passenger Capacities Bulletins numbers 63-502 and 63-102 dated May 29, 1963. Normal seating capacity for B-720B from TWA Sales Management Control Bulletin number 62-107 dated June 28, 1962.
(c) From TWA Schedules 3-66M.
(d) These four B-720B aircraft were leased in 1961 and returned in the latter part of 1962.

The above-listed aircraft model numbers that begin with a "B" are model 707 jet aircraft manufactured by the Boeing Airplane Company (Boeing). The final B indicates aircraft equipped with fan-jet engines that have lower fuel consumption and certain other advantages. "CV" identifies aircraft manufactured by the Convair Division of General Dynamics Corporation (Convair).

Only the B-331 and B-331B jet aircraft have sufficient range to be well-suited for TWA's International Division transatlantic flights. These aircraft can perform non-stop scheduled service between New York and Rome, and they also have the speed and range to be good competitive aircraft for non-stop U. S. transcontinental service. The B-720B and B-131B aircraft also are well-suited for non-stop U. S. transcontinental service. The B-131 aircraft were used for non-stop transcontinental service, but their slower speed resulted in a competitive disadvantage. For normal operating conditions, the CV 880 is practically limited to less-than-transcontinental flights without stops. The

flights TWA operated with these jet aircraft and with various piston aircra
are shown in detail by the Employees' Timetables for the years 1959-1963, w
are Exhibit A, Volumes II and III of this report.

Additional Jet Aircraft and Earlier Dates

You gave us assumptions as to additional jet aircraft and earlier
receipt dates whereby TWA would have had the following jet aircraft fleets.

Number of Aircraft	Model	Cruising Speed	Range (Miles)	Seats	Dates Received
Revised Numbers of Aircraft and/or Receipt Dates(a)					
15	B-131	585 mph	3,300	119	Nov. 1958 to July 195
18	B-331	600 mph	5,700	142	July 1959 to July 196
30	CV 880	615 mph	2,994	94	Nov. 1959 to Sept. 196
Unchanged Numbers and Dates					
4(b)	B-720B	622 mph	4,100	111	July 1961 to Sept. 196
18	B-131B	622 mph	4,200	119	Mar. 1962 to Sept. 196
81+4(b)					

(a) Given to us by Cahill, Gordon, Reindel & Ohl.
(b) These four B-720B aircraft were leased in 1961 and returned in 1962.

Note:
Performance characteristics and normal seating capacities as shown in the preceding table.

These additional aircraft and earlier dates would have revised the numbers an
types of jet aircraft TWA would have recieved by the end of each year through
1963, as follows:

Year	TWA Jet Aircraft Received by the End of Each Year							
	Very Long-Range, Transatlantic and Transcontinental B-331 and B-331B		Non-Stop Transcontinental				Shorter-Range, CV 880	
			Well-Suited, B-720B and B-131B		Usable, B-131			
	Actual	Revised	Actual	Revised	Actual	Revised	Actual	Revised
1958	-	-	-	-	-	2	-	-
1959	4	10	-	-	15	15	-	2
1960	12	18	-	-	15	15	1	30
1961	12	18	4	4	15	15	20	30
1962	14	18	18	18	15	15	20	30
1963	17	18	18	18	15	15	26	30

The total numbers of jet aircraft on hand at the end of each year, actual and revised are:

Year	Jet Aircraft on Hand at the End of Each Year		
	Actual	Revised	Increase
1958	-	2	2
1959	19	27	8
1960	28	63	35
1961	51	67	16
1962	67	81	14
1963	76	81	7

By the end of 1963 there is a relatively small difference between actual and revised numbers of jet aircraft on hand.

Average Number of Jet Aircraft

The average number of jet aircraft available for commercial service is calculated by TWA each month for each type of aircraft. We used these monthly average numbers of aircraft to calculate the annual averages shown in the upper half of the table on the following page and in Exhibit B, Volume IV.

Using revised numbers of jet aircraft and receipt dates as listed on the previous page, we calculated revised monthly and annual average number of jet aircraft TWA would have had available for commercial service. These calculations are shown in Exhibit C. The revised annual average numbers are

(C. & C. Report-Financial Results from Reconstructed Jet Fleet

Year	TWA's Annual Average Number of Jet Aircraft Available for Commercial Service						
	Very Long-Range, Transatlantic and Transcontinental		Non-Stop Transcontinental			Shorter-Range	Total
			Well-Suited		Usable		
	B-331	B-331B	B-720B	B-131B	B-131	CV 880	
	Actual						
1959	0.3	-	-	-	8.9	-	9.2
1960	8.8	-	-	-	15.0	-	23.8
1961	11.7	-	1.4	-	14.8	14.6	42.5
1962	12.0	0.2	3.1	8.2	15.0	20.0	58.5
1963	12.0	4.6	-	18.0	15.0	22.1	71.7
(See Exhibit B for details.)							
	Revised						
1959	2.0	-	-	-	10.3	-	12.3
1960	15.1	-	-	-	15.0	15.4	45.5
1961	17.6	-	1.4	-	14.8	29.7	63.5
1962	18.0	-	3.1	8.2	15.0	30.0	74.3
1963	18.0	-	-	18.0	15.0	30.0	81.0
(See Exhibit C for details.)							

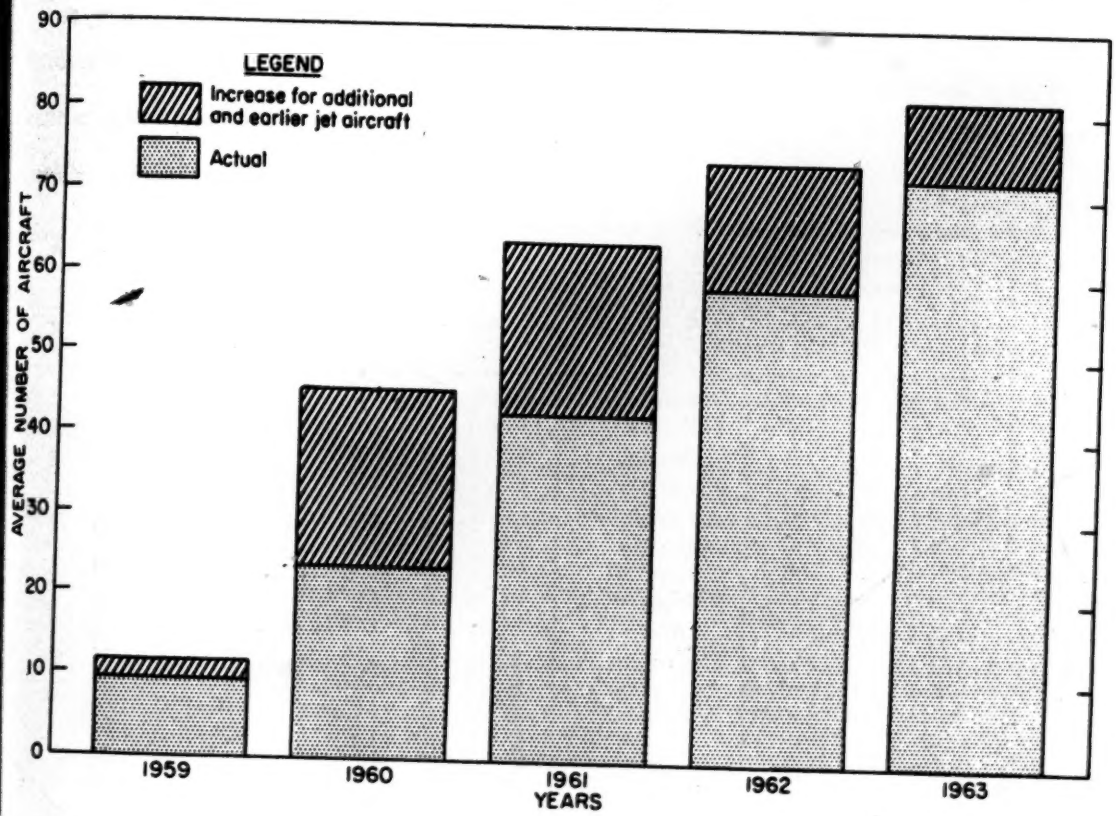
The additional jet aircraft and earlier receipt dates would have giv

TWA the following increases in annual average number available.

Year	Annual Average Number of Jet Aircraft Available for Commercial Service			
	Actual (a)	Revised (a)	Increase	
			Number (b)	Percent (b)
1959	9.2	12.3	3.1	34%
1960	23.8	45.5	21.7	91
1961	42.5	63.5	21.0	49
1962	58.5	74.3	15.8	27
1963	71.7	81.0	9.3	13

(a) From total columns in preceding table.
(b) By subtraction and calculation.

Average Number of Jet Aircraft Available for Commercial Service



As shown by the table at the bottom of the previous page and the chart above, the additional and earlier jet aircraft would have given TWA quite substantial increases in the average number of jet aircraft available in the years 1960-1962, and especially in 1960.

LIMIT ON ESTIMATES

With your approval we will limit to the years 1959 through 1963 our estimates of change in financial gain or loss from operations for the additional B-331 and CV 880 aircraft (Chapters II and V that follow) because by the end of 1963 the difference between actual and revised numbers of these types of aircraft is relatively small. Our estimates for aircraft ownership and earlier receipt

dates (Chapters I, III and IV that follow) will be limited to the years in wh
those changes would have had the principal effect. Accordingly, the years fo
which estimates are prepared are:

	1959	1960	1961	1962	19
I - Ownership of B-131s and B-331s	X	X			
II - Six additional B-331s	X	X	X	X	
III - Earlier receipt of B-131s and B-331s	X	X			
IV - Earlier receipt of twenty CV 880s		X	X		
V - Receipt of thirty CV 880s		X	X	X	

CHAPTER I

OWNERSHIP OF B-131 AND B-331 AIRCRAFT

This Chapter outlines the development of our estimates of changes in financial results from operations that would have occurred if TWA had owned rather than leased B-131 and B-331 jet aircraft in 1959 and 1960. The receipt dates, leasing and ownership of these aircraft were:

Fleet of Fifteen B-131 Jet Aircraft			
Registration Certificate Number	Receipt Date	Leased or Owned on Receipt	Ownership Date
N 731TW	Jan. 29, 1959	Leased	Dec. 30, 1960
N 732TW	Mar. 17, 1959	Leased	Dec. 30, 1960
N 733TW	Mar. 30, 1959	Leased	Dec. 30, 1960
N 734TW	Apr. 3, 1959	Leased	Dec. 30, 1960
N 735TW	Apr. 18, 1959	Leased	Dec. 30, 1960
N 736TW	Apr. 29, 1959	Leased	Dec. 30, 1960
N 737TW	May 10, 1959	Leased	Dec. 30, 1960
N 738TW	May 13, 1959	Leased	Dec. 30, 1960
N 740TW	May 24, 1959	Leased	Dec. 30, 1960
N 739TW	May 28, 1959	Leased	Dec. 30, 1960
N 741TW	June 13, 1959	Leased	Dec. 30, 1960
N 742TW	July 1, 1959	Leased	Dec. 30, 1960
N 743TW	July 10, 1959	Leased	Dec. 30, 1960
N 744TW	July 14, 1959	Leased	May 18, 1960
N 745TW	Aug. 1, 1959	Leased	May 18, 1960
Source: TWA Official List of Aircraft, Schedule 3-66M, issues of July 31, 1959 and August 31, 1959.			
Fleet of Twelve B-331 Jet Aircraft			
N 761TW	Nov. 10, 1959	Leased	Dec. 30, 1960
N 762TW	Nov. 10, 1959	Leased	Dec. 30, 1960
N 763TW	Nov. 25, 1959	Leased	Dec. 30, 1960
N 764TW	Dec. 23, 1959	Leased	Dec. 30, 1960
N 765TW	Jan. 18, 1960	Owned	Jan. 18, 1960
N 766TW	Apr. 1, 1960	Owned	Apr. 1, 1960
N 767TW	Apr. 5, 1960	Owned	Apr. 5, 1960
N 768TW	Apr. 14, 1960	Owned	Apr. 14, 1960
N 769TW	May 9, 1960	Owned	May 9, 1960
N 770TW	May 25, 1960	Owned	May 25, 1960
N 771TW	July 1, 1960	Owned	July 1, 1960
N 772TW	July 1, 1960	Owned	July 1, 1960
Source: TWA Official List of Aircraft, Schedule 3-66M, January 31, 1961.			

The change from lease to ownership of these aircraft would have eliminated rentals expense in the years 1959 and 1960. Such expense for B-131 and B-331 aircraft is shown on Civil Aeronautics Board (CAB) Form 41 reports, Schedule P-5.2, as follows:

Year	Rentals Expense		
	Domestic Division (B-131)	International Division (B-331)	Total
	(Millions)		
1959	$ 7.6	$0.2	$ 7.8
1960	12.5	3.9	16.4

Price Waterhouse & Co. advised us that, based on their study of Depreciation and Amortization Expense, the change from leasing to ownership for the fifteen B-131 and twelve B-331 jet aircraft would have altered such non-cash charges in 1959 and 1960 as follows:

Year	Change In Depreciation and Amortization Expense		
	Domestic Division	International Division	System Total
	(Millions)		
1959	$+4.2	$+0.2	$+4.4
1960	+6.4	+2.1	+8.5

GAIN OR LOSS FROM OPERATIONS

The changes in Gain or Loss from Operations we calculate for ownership rather than leasing B-131 and B-331 jet aircraft in 1959 and 1960 are summations of the expense changes described above, as follows:

Year	Changes In		Total Improvement In Gain from Operations
	Rentals Expense	Depreciation and Amortization	
	(Millions)		
1959	$ -7.8	$+4.4	$3.4
1960	-16.4	+8.5	7.9

CHAPTER II

SIX ADDITIONAL B-331 JET AIRCRAFT

This Chapter outlines the development of our estimates of changes in financial results of operations that would have resulted from TWA having the six additional B-331 jet aircraft that, in fact, were delivered to PAA between November 1959 and June 1960. This would have given TWA eighteen B-331 very long-range jet aircraft as follows:

TWA's Fleet of Twelve B-331 Aircraft and Actual Receipt Dates	
Registration Certificate Number	Date Received(a)
N 761TW	November 10, 1959
N 762TW	November 10, 1959
N 763TW	November 25, 1959
N 764TW	December 23, 1959
N 765TW	January 18, 1960
N 766TW	April 1, 1960
N 767TW	April 5, 1960
N 768TW	April 14, 1960
N 769TW	May 9, 1960
N 770TW	May 25, 1960
N 771TW	July 1, 1960
N 772TW	July 1, 1960

Additional Six B-331 Aircraft, and PAA's Receipt Dates Which are Assumed to be Those for TWA	
Registration Certificate Number	Date Received(b)
N 701	November 5, 1959
N 702	December 15, 1959
N 703	December 30, 1959
N 704	March 23, 1960
N 705	April 29, 1960
N 706	June 8, 1960

(a) From TWA Official List of Aircraft, Schedule 3-66M dated July 31, 1960.
(b) From CAB Form 41 Report, Schedules B-7, for quarters ending December 31, 1959, March 31, 1960 and June 30, 1960, submitted by PAA.

USE OF B-331 AIRCRAFT

TWA used its twelve B-331 aircraft for commercial service on both International and Domestic Division flights. The International Division flights were primarily transatlantic and the Domestic Division flights generally were U. S. transcontinental as shown in the Employees' Timetables of Exhibit A. The usage of B-331 aircraft for service in each Division in the period 1959-1963 is

shown by the annual average number of aircraft available for commercial service for each Division, as follows:

Year	Annual Average Number of B-331 Aircraft Available for Commercial Service(a)		
	International Division	Domestic Division	Total
1959	0.3	-	0.3
1960	6.1	2.7	8.8
1961	7.3	4.4	11.7
1962	9.8	2.2	12.0
1963	9.9	2.1	12.0

(a) From Exhibit B.

Northeast Airlines' Lease

In addition to the above-listed usage of the B-331 aircraft by TWA, commencing in December 1959 and continuing through April 1961 TWA leased time equivalent to about one-half an aircraft to Northeast Airlines, Inc. Northeast flew the aircraft from New York to Miami and return during the time between TWA's New York-Europe flights. For the estimates of this Chapter, we will assume Northeast would have continued to lease only this same amount of aircraft time although additional time might have been available.

Northeast paid TWA for the use of the aircraft and TWA credited against this income the applicable operating expense. The net amount of lease receipts less expense was recorded as Incidental Revenues in TWA's monthly Financial Report.

B-131B Aircraft

TWA's usage of B-331 aircraft changed in 1962 when TWA received and put into operation a fleet of eighteen B-131B aircraft. The B-131B aircraft, like the B-331 aircraft, is well-suited for non-stop U. S. transcontinental service. Reference to the table above shows that in 1962 there was a significant shift of B-331 aircraft from Domestic to International Division service,

as the B-131B aircraft became available to cover Domestic Division flights. For the estimates in this Chapter, we will assume this 1962 shift of B-331 aircraft from Domestic to International Division service occurred at the same time and in the same proportion as the expanded B-331 fleet.

B-331B Aircraft

In December 1962 TWA commenced operating a new fleet of leased B-331B aircraft which are very long-range like the B-331 aircraft (but are equipped with fan-jet engines). The five aircraft of this B-331B fleet were all in service by April 1963. Average usage for each Division was:

Year	Annual Average Number of B-331B Aircraft Available for Commercial Service(a)		
	International Division	Domestic Division	Total
1962	0.1	0.1	0.2
1963	4.3	0.3	4.6

(a) From Exhibit B.

We believe it is reasonable to assume TWA would not have ordered these five B-331B aircraft for delivery in 1962-1963 if TWA had purchased and received the six additional B-331 aircraft in 1959-1960. Accordingly, the service actually operated with B-331B aircraft would have been performed by the additional B-331s.

Additional Number Available

We calculated the additional average number of B-331 aircraft that would have been available for commercial service for the six additional B-331s. This calculation, shown in Exhibit D, was made in accordance with TWA's procedure. The results are:

Year	Additional Annual Average Number of Aircraft Available, for the Six Additional B-331s
1959	0.2
1960	5.0
1961	5.9
1962	6.0 (Including aircraft assigned
1963	6.0 to cover B-331B service)

We apportioned these additional numbers of aircraft to International and Domestic Division service in accordance with the actual usage of B-331 and B-331B aircraft each year. For 1960 and 1961 the apportionment was adjusted to reflect Northeast Airlines' leasing of aircraft time between International Division flights. Details of these calculations are shown in Exhibit D. The resulting apportionment of the six additional B-331s between Divisions is as follows:

Year	Annual Average Number of B-331 Aircraft Available for Commercial Service, for the Six Additional B-331s		
	International Division	Domestic Division	Total
1959	0.2	-	0.2
1960	3.6	1.4	5.0
1961	3.7	2.2	5.9
1962	4.9	1.1	6.0
1963	5.2	0.8	6.0

If the number of B-331B aircraft available in 1962 and 1963 is deducted from the figures above, the following is the net increase in number of very long-range aircraft available for commercial service, resulting from having the six additional B-331s.

1962	4.8	1.0	5.8
1963	0.9	0.5	1.4

In summary, our estimates of these changes in TWA's number of very long-range jet aircraft are:

TWA Ex. 4(c)(1), page -14-
(C. & C. Report-Financial Results from Reconstructed Jet Fleet)

Year	Annual Average Number of B-331 and B-331B Aircraft Available for Commercial Service					
	Actual (B-331 and B-331B)			Revised (B-331 Only)		
	International Division	Domestic Division	Total	International Division	Domestic Division	Total
1959	0.3	-	0.3	0.5	-	0.5
1960	6.1	2.7	8.8	9.7	4.1	13.8
1961	7.3	4.4	11.7	11.0	6.6	17.6
1962	9.9	2.3	12.2	14.7	3.3	18.0
1963	14.2	2.4	16.6	15.1	2.9	18.0

Source:
Actual figures are from table on page 11. For 1962 and 1963 the actual figures in table on page 11 are combined with figures shown in table on page 12 to reflect the inclusion of B-331B aircraft available for commercial service. Revised figures are a combination of figures shown in tables on pages 11, 12 and 13.

INTERNATIONAL DIVISION

Most of TWA's operation with the very long-range B-331 and B-331B aircraft, as shown above, was and would have been on International Division service. International Division operations with both jet and piston aircraft in the years 1959-1963 produced the "passenger revenue plane-miles" listed in the table that follows. These are miles an aircraft is flown carrying paying passengers on scheduled flights, extra sections and charter flights. This definition excludes ferry, non-revenue and all-cargo flights. We will use the abbreviated term "plane-miles" in the text and tables that follow.

Year	Plane-Miles, International Division		
	Jet	Piston	Total
	(Millions)		
1959	0.3	21.5	21.8
1960	10.7	7.0	17.7
1961	13.0	2.7	15.7
1962	17.4	0.3	17.7
1963	24.4	0.3	24.7

Source:
TWA's December Financial Reports, Schedule 3-2M; the Schedules 3-71M and the October-December 1963 3-453M Reports.

The International Division plane-miles per jet aircraft available were low during the first month of B-331 service, in December 1959, and then were reasonably uniform during the years 1960-1963 as shown in the table that follows. This table shows jet plane-miles for only B-331 and B-331B aircraft (deleting a miscellaneous 0.1 million plane-miles flown in 1959 with B-131 aircraft on International Division charter flights).

Year	International Division		
	Plane-Miles, Jet(a)	Average Number of Jet Aircraft Available B-331 and B-331B(b)	Ratio, Plane-Miles Per Aircraft(c)
	(Millions)		
1959	0.2	0.3	0.67
1960	10.7	6.1	1.75
1961	13.0	7.3	1.78
1962	17.4	9.9	1.76
1963	24.4	14.2	1.72

(a) From table on preceding page, adjusted to only B-331 and B-331B plane-miles.
(b) From Exhibit B and table on page 14.
(c) By calculation.

At these actual ratios of plane-miles per aircraft, TWA would have operated the following additional International Division plane-miles with the additional jet aircraft.

Year	International Division		
	Additional Jet Aircraft Available(a)	Ratio(b)	Additional Jet Plane-Miles(c)
			(Millions)
1959	0.2	0.67	0.1
1960	3.6	1.75	6.3
1961	3.7	1.78	6.6
1962	4.8	1.76	8.4
1963	0.9	1.72	1.5

(a) From Exhibit D and tables on page 13.
(b) From table above.
(c) By calculation.

Reduced Piston Operation

Reference to the table on page 14 shows that in the 1960-1963 period while jet aircraft plane-miles were increasing, International Division piston aircraft plane-miles were reduced to the minimal annual amount of 0.3 million by 1962. With the additional B-331 aircraft to operate more jet aircraft plane-miles in 1960 and 1961, TWA would have reduced piston aircraft operations earlier.

There was in 1960 and for a part of 1961 a special situation whereby TWA operated piston flights in North Africa and at Colombo, Ceylon because it was not feasible to operate jet aircraft at these locations. This service to Colombo (and thence to Bangkok) was terminated in July 1961 and service to North Africa was terminated in October 1961. For this study we assume TWA would have operated weekly piston aircraft flights to Colombo and Bangkok and to North Africa through July and October 1961, respectively, and a connecting weekly piston transatlantic round trip between New York and Rome via Madrid through October 1961, although there would have been enough jet aircraft available to cover this transatlantic flight. Our calculations for this special situation reflect:

(a) The weekly round trip from New York to Rome via North Africa points and from Rome to Colombo and Bangkok would average approximately 100,000 plane-miles per month.

(b) The weekly round trip from New York to Rome via North Africa would average about 45,000 plane-miles per month.

Source:
Calculated from TWA Schedule 3-15P showing CAB airport to airport mileages.

There was another special situation in 1960 whereby TWA operated a number of transatlantic charter flights with L-1049H (Lockheed Constellation) aircraft with high-density seating for approximately 100 persons. We will

assume this special service would have been operated with L-1049H aircraft in 1960 although additional B-331 aircraft were available. In 1960 the International Division recorded:

L-1049H plane-miles 0.4 million

Source:
From Annual Summary of plane-miles shown in Schedules 3-71M.

For this study we will assume the minimal 0.3 million piston plane-miles that were operated in the years 1962 and 1963 would have been operated then and also in 1960 and 1961 although additional jet aircraft would have been available.

Our estimates of the reductions of piston aircraft plane-miles that would have taken place in 1959-1963 as the result of TWA receiving the additional B-331s are as follows:

Year	Jet Plane-Miles			Piston Plane-Miles			
	Actual (a)	Additional Available (b)	Total (c)	Actual (a)	Special (d)	Required (e)	Estimated Reduction, with Additional Jets (f)
	(Millions)						
1959	0.3	0.1	0.4	21.5	-	21.4	0.1
1960	10.7	6.3	17.0	7.0	1.6	0.3	5.1
1961	13.0	6.6	19.6	2.7	0.8	0.3	1.6
1962	17.4	8.4	25.8	0.3	-	0.3	-
1963	24.4	1.5	25.9	0.3	-	0.3	-

(a) From table on page 14.
(b) From table on page 15.
(c) Sum of (a) and (b) under jet plane-miles.
(d) As discussed above for North Africa, Colombo and L-1049H charter flights.
(e) For regular and minimal service.
(f) Actual piston plane-miles minus Special and Required amounts.

These reductions in piston aircraft plane-miles would have been Lockheed L-1649A plane-miles because, as shown by Employees' Timetables in Exhibit A, nearly all International Division piston aircraft scheduled service from December 1959 through 1961 was operated with L-1649A aircraft.

In summary, our estimates of changes in International Division plane-miles are:

Year	Plane-Miles, International Division Operation						
	Actual			Revised			Net Increase
	Jet	Piston	Total	Jet	Piston	Total	
	(Millions)						
1959	0.3	21.5	21.8	0.4	21.4	21.8	-
1960	10.7	7.0	17.7	17.0	1.9	18.9	1.2
1961	13.0	2.7	15.7	19.6	1.1	20.7	5.0
1962	17.4	0.3	17.7	25.8	0.3	26.1	8.4
1963	24.4	0.3	24.7	25.9	0.3	26.2	1.5

Source:
The jet and piston columns above are from prior tables; the total and net increase columns are calculated.

Transatlantic Flights

In the period 1960-1963, as TWA operated substantial and increasing amounts of jet aircraft plane-miles on International Division service, the ratio of the number of transatlantic flights to millions of plane-miles was relatively uniform as follows:

Year	Transatlantic Flights (a)	Plane-Miles (b)	Ratio, Flights/ Plane-Miles (c)
		(Millions)	
1960	3,347	17.7	189
1961	3,104	15.7	197
1962	3,775	17.7	213
1963	5,094	24.7	206

(a) Summaries of IATA monthly statistics.
(b) From table above.
(c) By calculation.

A proportionate increase of transatlantic flights for the net increase in International Division plane-miles given in the preceding table would have been:

Year	Plane-Miles, International Division			Number of Transatlantic Flights		
	Actual (a)	Revised (a)	Percent Increase (b)	Actual (c)	Increase, At Percent Increase of Plane-Miles (b)	Revised (b)
	(Millions)					
1959	21.8	21.8	-	3,399	-	3,399
1960	17.7	18.9	6.8%	3,347	228	3,575
1961	15.7	20.7	31.8	3,104	987	4,091
1962	17.7	26.1	47.5	3,775	1,793	5,568
1963	24.7	26.2	6.1	5,094	311	5,405

(a) From table at top of page 18.
(b) By calculation.
(c) Summaries of IATA monthly statistics.

These additional flights would have produced the following additional transatlantic seats for sale by TWA.

Year	Additional Flights(a)	Seats Per B-331 Aircraft(b)	Additional Seats(c)
			(Thousands)
1959	-	-	-
1960	228	130.5	29.8
1961	987	136.2	134.4
1962	1,793	140.0	251.0
1963	311	141.4	44.0

(a) From table above.
(b) Annual average number of seats per B-331 aircraft calculated from TWA statistics shown in Schedule 3-71M.
(c) By calculation.

There would have been a further increase in TWA's transatlantic seats when jet aircraft replaced piston aircraft because there are more seats in the jet aircraft. The table that follows shows our calculation of this increase in number of seats. (The number of flights for which jet aircraft would have replaced piston aircraft is calculated using a plane-miles ratio.)

(C. & C. Report-Financial Results from Reconstructed Jet Fleet)

Year	Actual Flights	Ratio of Plane-Miles for Jets Replacing Pistons, to Total Actual Plane-Miles(a)	Jet Flights Replacing Piston Flights (Actual Flights x Ratio)	Additional Seats In the Jet Aircraft (b)	Additional Seats(c)
					(Thousands)
1959	3,399	0.1/21.8	16	68.7	1.1
1960	3,347	5.1/17.7	964	61.5	59.3
1961	3,104	1.6/15.7	317	62.9	19.9

(a) From tables on pages 17 and 18.
(b) Additional annual average number of seats per aircraft (B-331 minus L-1649A) calculated from TWA statistics shown in Schedule 3-71M.
(c) By calculation.

In summary, the additional transatlantic seats TWA would have had available are:

Year	Additional Seats		
	From Additional Flights With Jets	From Jets Replacing Piston Flights	Total
	(T h o u s a n d s)		
1959	-	1.1	1.1
1960	29.8	59.3	89.1
1961	134.4	19.9	154.3
1962	251.0	-	251.0
1963	44.0	-	44.0

Source:
From preceding tables.

IATA Flights and Passengers

We analyzed data on transatlantic flights and passengers for TWA, PAA and the foreign flag carriers that are members of the International Air Transport Association (IATA). We limited this analysis to flights between the U.S.A. and Europe. The number of such transatlantic flights operated each year between the U. S. A. and Europe by TWA, PAA and the foreign flag carriers that are members of IATA, and TWA's percentage of this IATA total are:

Year	Transatlantic Flights				TWA's Percent
	TWA	PAA	Foreign	Total	
1958	4,145	6,787	15,120	26,052	15.9%
1959	3,399	4,810	16,522	24,731	13.7
1960	3,347	4,825	15,226	23,398	14.3
1961	3,104	6,373	16,778	26,255	11.8
1962	3,775	7,394	19,098	30,267	12.5
1963	5,094	8,364	20,006	33,464	15.2

Source:
Summaries of IATA monthly statistics.
TWA's percent by calculation.

(The table above and those that follow from IATA data on transatlantic service cover only scheduled passenger flights and extra sections. IATA statistics are not available for charter flights for 1958-1962.)

The transatlantic passengers carried each year by TWA, PAA and the foreign flag air lines, and TWA's percentage of this IATA total are:

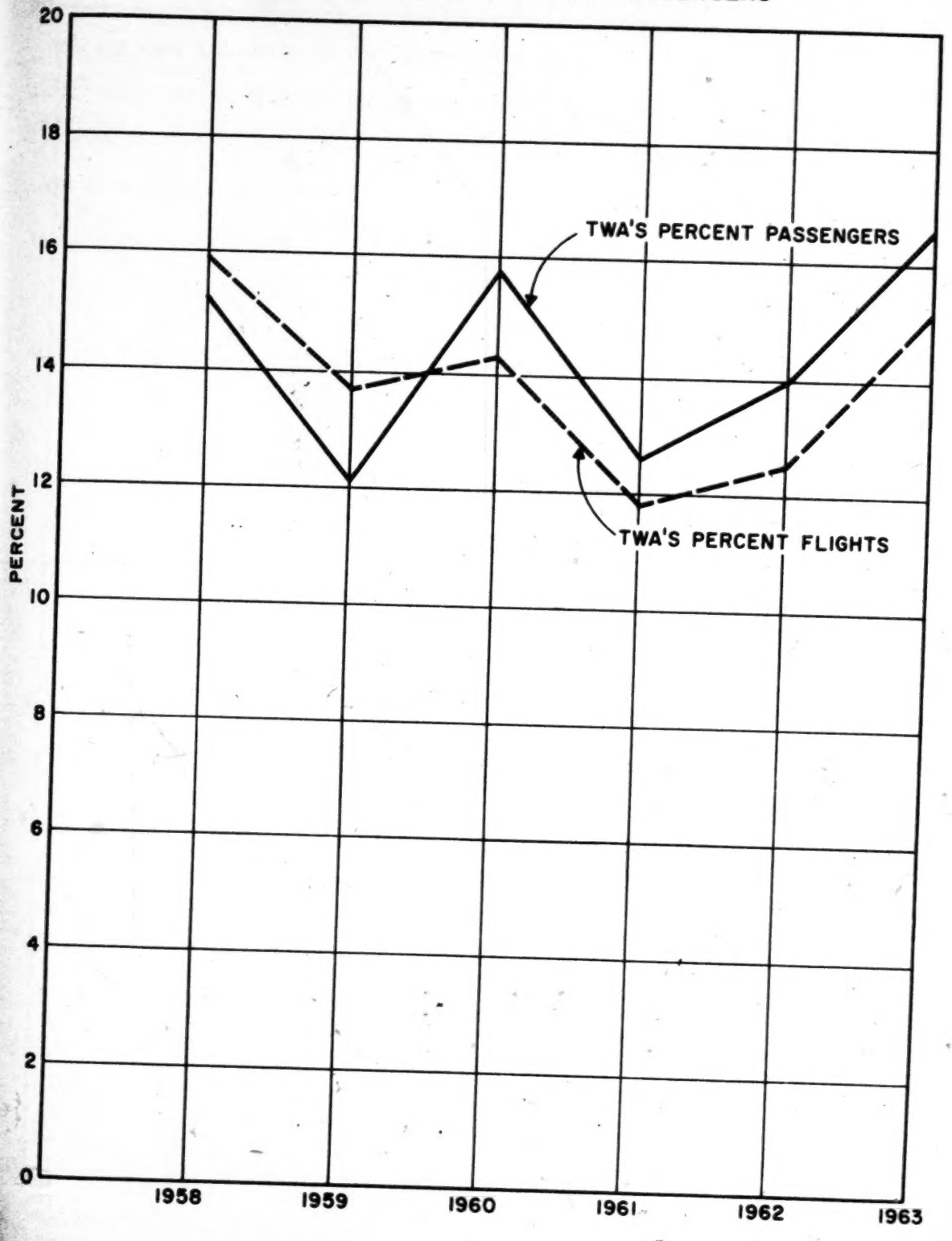
Year	Transatlantic Passengers				TWA's Percent
	TWA	PAA	Foreign	Total	
	(Thousands)				
1958	160	278	617	1,055	15.2%
1959	146	336	722	1,204	12.1
1960	243	368	923	1,534	15.8
1961	208	404	1,042	1,654	12.6
1962	277	449	1,255	1,981	14.0
1963	359	539	1,267	2,165	16.6

Source:
Summaries of IATA monthly statistics.
TWA's percent by calculation.

The chart that follows shows that TWA's percentage of IATA passengers varied generally with TWA's percentage of IATA transatlantic flights.

(C. & C. Report-Financial Results from Reconstructed Jet Fleet)

TRANSATLANTIC FLIGHTS AND PASSENGERS



The 1958 and 1959 data points shown on the chart on the preceding page are for essentially an all-piston fleet operation by TWA, although principal competitors were operating jets. Commencing in 1960 TWA's transatlantic operations were primarily with jet aircraft, and from 1960 through 1963 TWA's percentage of transatlantic passengers was slightly higher than its percentage of flights.

Transatlantic Seats

The seats available each year on transatlantic flights by TWA and the other carriers, and TWA's percentages of the IATA totals are:

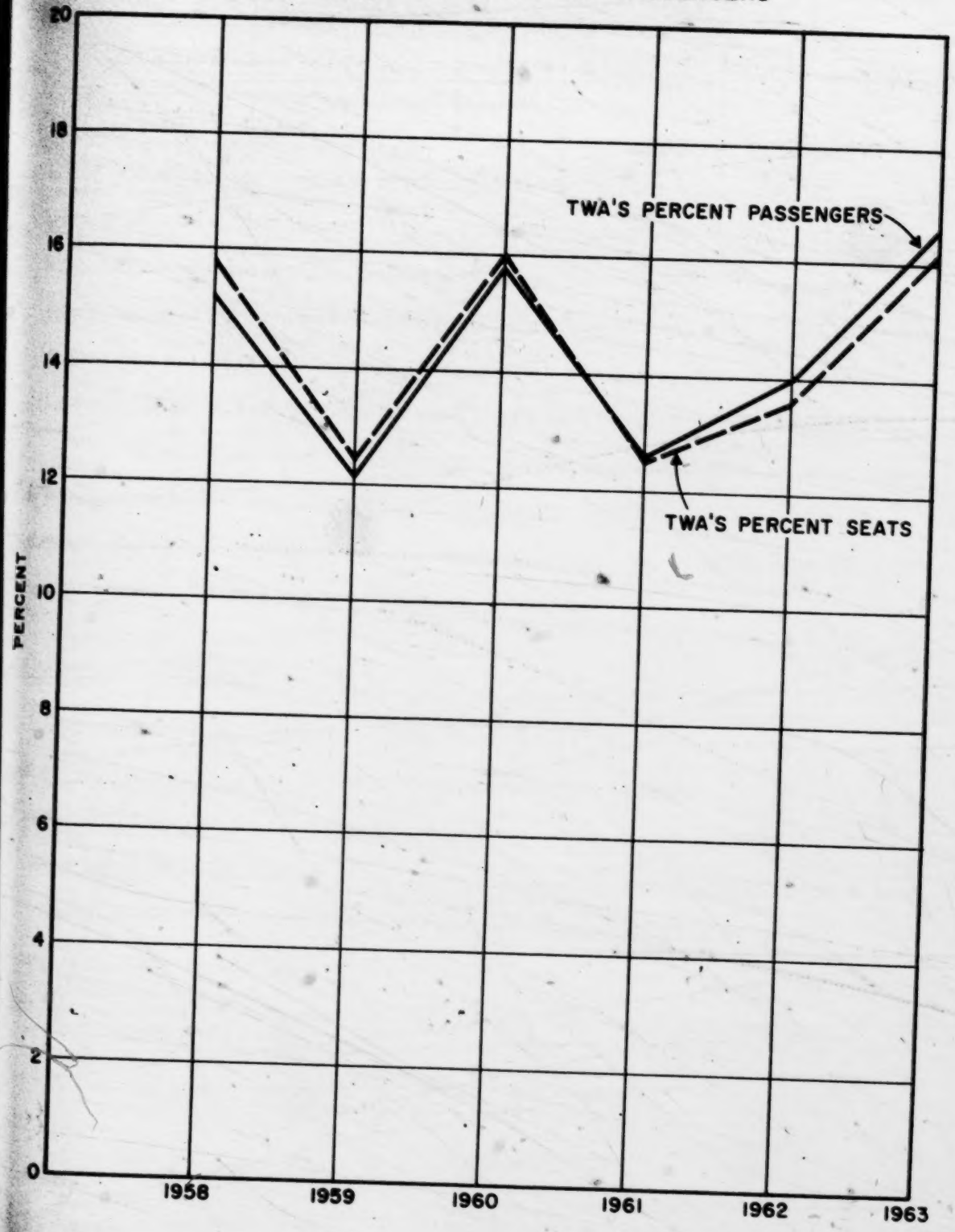
Year	Transatlantic Seats Available				TWA's Percent
	TWA	PAA	Foreign	Total	
	(Thousands)				
1958	276	443	1,024	1,743	15.8%
1959	226	427	1,170	1,823	12.4
1960	386	537	1,490	2,413	16.0
1961	412	759	2,115	3,286	12.5
1962	529	906	2,456	3,891	13.6
1963	720	1,071	2,666	4,457	16.2

Source:
Summaries of IATA monthly statistics.
TWA's percent by calculation.

These TWA percentages of IATA seats correlate well with TWA percentages of passengers, as illustrated by the following chart.

(C. & C. Report-Financial Results from Reconstructed Jet Fleet)

TRANSATLANTIC SEATS AND PASSENGERS



As shown by the preceding chart, TWA's percentage of the IATA air lines' passengers is nearly the same as TWA's percentage of the seats available.

Additional Passengers

The foregoing historical evidence for a six-year period is the basis for our calculations that follow for TWA's additional transatlantic passengers in accordance with the additional seats available by operating the additional B-331 aircraft. The jet flights replacing piston flights would have increased the "quality" of TWA's available transatlantic seats. The seats in additional (not replacement) jet flights would have been in aircraft fully competitive with those flown by other transatlantic air lines.

For our calculations of numbers of additional transatlantic passengers TWA would have obtained with the additional jet aircraft, we selected the premise that the total number of transatlantic passengers carried by the IATA air lines would have been unchanged. For 1959 and 1960 we used the premise you gave us that the additional seats offered by TWA would have been, in effect, a transfer of seats from PAA because TWA's additional aircraft would have been transfers from PAA. You advised us that PAA could have obtained replacements in the spring of 1961. For the other years, namely 1961, 1962 and 1963, we selected the premise that the annual total numbers of transatlantic seats available would have been increased by the number of additional seats offered by TWA. We believe these selections, on balance, result in an understatement of the additional number of passengers TWA would have carried. Accordingly, TWA's revised percentages of IATA seats would have been as follows:

(C. & C. Report-Financial Results from Reconstructed Jet Fleet)

Year	Total IATA Seats (Actual)(a)	TWA Seats			IATA Seats, Revised (Except 1959 and 1960)(c)	TWA's Percent of IATA	
		Actual (a)	Increase (b)	Revised (c)		Revised (c)	Actual (d)
	(Thousands)						
1959	1,823	226	1	227	1,823(e)	12.5%	12.4%
1960	2,413	386	89	475	2,413(e)	19.7	16.0
1961	3,286	412	154	566	3,440	16.5	12.5
1962	3,891	529	251	780	4,142	18.8	13.6
1963	4,457	720	44	764	4,501	17.0	16.2

(a) From summaries of IATA monthly statistics.
(b) From table on page 20.
(c) By calculation
(d) From table on page 23.
(e) Attention is directed to the explanation on page 25.

We calculated TWA's additional passengers in accordance with the changes in TWA's percentages of IATA seats, as follows:

Year	TWA's Percentages of IATA Seats Ratio, Revised to Actual(a)	TWA's Percentage of Passengers(b)		IATA Total Passengers (c)	TWA Transatlantic Passengers		
		Actual	Revised		Revised (b)	Actual (c)	Percent Increase (b)
				(Thousands)	(Thousands)		
1959	12.5/12.4	12.1%	12.2%	1,204	147	146	1%
1960	19.7/16.0	15.8	19.4	1,534	298	243	23
1961	16.5/12.5	12.6	16.6	1,654	275	208	32
1962	18.8/13.6	14.0	19.3	1,981	382	277	38
1963	17.0/16.2	16.6	17.4	2,165	377	359	5

(a) From table above.
(b) By calculation.
(c) From summaries of IATA monthly statistics.

Additional Revenues

These additional transatlantic passengers set forth above would have been accompanied by a proportionate increase in International Division revenues as follows:

Year	Actual International Division Passenger Revenue(a) (Millions)	Percent Increase Transatlantic Passengers With Additional B-331 Aircraft(b)	Estimated Additional Passenger Revenue(c) (Millions)
1959	$ 59.5	1%	$ 0.6
1960	82.0	23	18.9
1961	63.9	32	20.4
1962	77.5	38	29.5
1963	105.0	5	5.3

(a) From TWA Financial Reports, Schedule 2-2M, and includes passenger revenue from scheduled flights, extra sections, charters and MATS contract operations.
(b) From table on preceding page.
(c) By calculation.

DOMESTIC DIVISION

As set forth on page 13, we estimate that the availability of six additional B-331 aircraft would have given the following net increase in TWA's average number of aircraft available for Domestic Division commercial service.

Year	Additional Average Number of B-331 Available
1960	1.4
1961	2.2
1962	1.0 (After adjustment for
1963	0.5 the B-331B operation)

With these additional B-331 aircraft available in 1960, we believe TWA would have advanced the inauguration date of some longer-distance Domestic Division flights that were operated with B-720B, B-131B and CV 880 aircraft commencing in 1961 and 1962. Some of these earlier inaugurations could have been Domestic "legs" of overseas flights such as Flight 800 which operates from Kansas City to Chicago, New York, Paris and Rome. The Kansas City-Chicago-New York portion of this international flight is classified as Domestic Division service because intra-U. S. A. passengers are carried.

The ratios of the plane-miles operated per average number of B-331 aircraft used for Domestic Division service were as listed below. These ratios and the additional number of aircraft available give the following additional plane-miles.

Year	Actual Operation			Estimated Operation	
	Plane-Miles (a)	Number of Aircraft (b)	Ratio, Million Miles Per Aircraft(c)	Additional Aircraft (d)	Additional B-331 Plane-Miles (c)
	(Millions)				(Millions)
1960	3.8	2.7	1.41	1.4	2.0
1961	6.5	4.4	1.48	2.2	3.3
1962	3.0	2.2	1.36	1.0	1.4
1963	2.8	2.1	1.33	0.5	0.7

(a) From TWA Financial Report (Final), December Schedule 3-1M and Annual Summary of Monthly Operating Statistics, Schedule 3-70M and Report 3-452M.
(b) From Exhibit B.
(c) By calculation.
(d) From tables on pages 13 and 27.

Using actual numbers of seats per aircraft and actual load factors for B-331 aircraft in Domestic Division service, we calculate passenger-miles for the additional jet aircraft operation as follows:

Year	Additional B-331 Plane-Miles(a)	Average Seats Per B-331 Aircraft(b)	Load Factor(c)	Additional Passenger-Miles(d)
	(Millions)			(Millions)
1960	2.0	120.8	64.5%	156
1961	3.3	126.7	49.3	206
1962	1.4	129.2	41.8	76
1963	0.7	139.5	43.1	42

(a) From table above.
(b) These are annual average figures calculated from monthly data in TWA Schedules 3-70M and Reports 3-452M.
(c) These are annual average figures calculated from monthly data of available seat-miles operated and revenue passenger-miles flown in B-331 aircraft, in the same TWA reports.
(d) By calculation.

Piston Aircraft Operation

The Domestic Division piston aircraft operations, measured in terms of plane-miles, decreased from 1958 through 1963 as the jet aircraft operations increased, as follows:

Year	Domestic Division Plane-Miles				
	Piston		Jet		Total Amount (a)
	Amount (a)	Annual Decrease (b)	Amount (a)	Annual Increase (b)	
	(Millions)				
1958	94.1	-	-	-	94.1
1959	81.8	12.3	12.4	12.4	94.2
1960	61.5	20.3	26.4	14.0	87.9
1961	35.3	26.2	46.8	20.4	82.1
1962	23.3	12.0	64.6	17.8	87.9
1963	18.6	4.7	78.9	14.3	97.5

(a) From TWA Financial Report (Final), December, Schedule 3-1M and Summary of Monthly Operating Statistics, Schedule 3-70M and Report 3-452M.
(b) By calculation.

Following this pattern of change, we believe the Domestic Division operations with the additional B-331 aircraft would have resulted in a proportionate, further decrease in piston aircraft operations. Our calculation of this further decrease is based on actual ratios of piston plane-miles decrease to jet plane-miles increase, as follows:

Year	Actual Ratio Piston Plane-Miles Decrease/ Jet Increase	Additional Jet Plane-Miles Increase	Additional Piston Plane-Miles Decrease
		(Millions)	
1960	20.3/14.0	2.0	2.9
1961	26.2/20.4	3.3	4.2
1962	12.0/17.8	1.4	0.9
1963	4.7/14.3	0.7	0.2

Source:
Righthand column calculated, other figures from preceding tables.

TWA Ex. 4(c)(1), page -30-
(C. & C. Report-Financial Results from Reconstructed Jet Fleet)

Using the actual numbers of seats and load factors of TWA's longest-range piston aircraft used in Domestic Division service in 1960-1963, we calculate reduced piston aircraft passenger-miles as follows:

Year	Piston Plane-Miles Reduction(a)	Long-Range Piston Aircraft	Average Number of Seats(b)	Load Factor(c)	Passenger Miles Reduction, Piston Aircraft(d)
	(Millions)				(Millions)
1960	2.9	L-1649A	72.0	58.8%	123
1961	4.2	L-1049G	71.6	60.4	182
1962	0.9	L-1049G	80.1	60.6	44
1963	0.2	L-1049G	79.7	57.5	9

(a) From table on preceding page.
(b) Annual averages calculated from monthly data on TWA Schedules 3-70M and Reports 3-452M.
(c) Annual averages calculated from monthly available seat-miles operated and revenue passenger-miles flown, in the same TWA Reports.
(d) By calculation.

The net increase in passenger-miles, in accordance with the foregoing, would have been as listed below. Using TWA's annual average "yield" (Domestic Division passenger revenue per passenger-mile), the increase in Domestic Division revenues for the additional B-331 aircraft operations would have been as follows:

Year	Passenger-Miles			Average Revenue (Yield) (d)	Domestic Division Revenue Increase (e)
	Increase In Jets (a)	Decrease In Pistons (b)	Net Increase (c)		
	(Millions)				(Millions)
1960	156	123	33	5.645¢	$1.9
1961	206	182	24	5.882	1.4
1962	76	44	32	6.104	2.0
1963	42	9	33	5.845	1.9

(a) From table on page 28.
(b) From table above.
(c) (a) minus (b).
(d) Calculated by dividing Domestic Division annual passenger revenue shown in TWA Financial Report, Schedule 2-1M, by Domestic Division annual passenger-miles shown in same report, Schedule 3-1M.
(e) By calculation.

CARGO REVENUES

The TWA System (Domestic and International Divisions combined) has material amounts of revenue from transportation of various types of cargo including mail, express, freight and excess (weight) baggage. Operating revenues from these sources varied from 9 to 12 percent of total operating revenues for the years 1959-1963 as follows:

Year	Domestic Division			International Division			System		
	Cargo Revenue	Total Revenue	% Cargo	Cargo Revenue	Total Revenue	% Cargo	Cargo Revenue	Total Revenue	% Cargo
	(Millions)			(Millions)			(Millions)		
1959	$19.3	$273.6	7.1%	$12.3	$ 74.7	16.5%	$31.6	$348.3	9.1%
1960	21.8	277.1	7.9	16.3	101.0	16.1	38.1	378.1	10.1
1961	23.6	279.6	8.4	17.6	83.3	21.1	41.2	362.9	11.4
1962	24.8	298.8	8.3	23.3	102.1	22.8	48.1	400.9	12.0
1963	29.3	343.4	8.5	26.2	133.1	19.7	55.5	476.5	11.6

Source:
From TWA Financial Reports, Schedules 2-1M and 2-2M; percentages by calculation.

These cargo revenues are for transportation of such items on flights carrying passengers and on the less numerous all-cargo flights. Information is not, however, readily available as to the exact amount of the revenue that is produced by the cargo carried on either passenger or all-cargo flights.

During the 1959-1963 period, as the number of jet aircraft available for commercial service increased, cargo revenue per plane-mile increased as follows:

Year	Annual Average Number of Jet Aircraft Available for Commercial Service(a)	System Cargo Revenue(b)	System Plane-Miles (Including Charter and Cargo)(c)	Mail, Express, Freight, Excess Baggage, Revenue Per Plane-Mile(d)
	(Millions)			
1959	9.2	$31.6	119.6	$0.26
1960	23.8	38.1	110.2	0.35
1961	42.5	41.1	103.4	0.40
1962	58.5	48.1	110.1	0.44
1963	71.8(e)	55.5	127.0	0.44

(a) From Exhibit B.
(b) From TWA Financial Reports Schedule 2 M.
(c) From TWA Financial Reports Schedule 3-1M.
(d) By calculation.
(e) 71.7 passenger jets from Exhibit B plus 0.1 all-cargo jet.

With these data showing that revenues from mail, express, freight and excess baggage totaled 9 to 12 percent of System operating revenues and that these revenues increased per plane-mile as jet aircraft replaced piston aircraft, but without suitable data to segregate revenues from cargo carried on all-cargo flights, we selected 5 percent of our estimated additional passenger revenue as reasonable to use to calculate additional mail, express, freight and excess baggage revenues for the six additional B-331 aircraft.

SYSTEM ADDITIONAL REVENUES

The above-described changes in revenues that would have been the result of TWA having six additional B-331 aircraft would have increased TWA's System operating revenues as follows, for the five-year period.

Year	Additional Passenger Revenue With 6 Additional B-331s			Additional Mail, Express, Freight, Excess Baggage Revenue At 5 Percent	Total Additional Revenue With 6 Additional B-331s
	International	Domestic	System		
	(Millions)				
1959	$ 0.6	-	$ 0.6	-	$ 0.6
1960	18.9	$1.9	20.8	$1.0	21.8
1961	20.4	1.4	21.8	1.1	22.9
1962	29.5	2.0	31.5	1.6	33.1
1963	5.3	1.9	7.2	0.4	7.6

Source:
Estimated additional passenger revenue from tables on pages 27 and 30; other figures were calculated.

OPERATING EXPENSES

The above additional revenues for operating with the additional B-331 aircraft would, logically, have been accompanied by an increase in certain operating expenses.

TWA reports operating expense quarterly and annually on CAB Form 41 reports by type of aircraft for each Division for the following functional classifications and many sub-accounts of each as set up by the CAB for trunk air lines

Flying Operations
Maintenance
    Direct Maintenance
    Applied Maintenance Burden
Depreciation and Amortization

Other expenses are reported quarterly and annually only by Division, not by type of aircraft. Descriptions of the types of expense allocated to each functional classification are set forth in Exhibit E.

We examined detailed expense reports for the period 1959-1963 and selected the sub-account expenses that varied with operations activity. We then calculated, as set forth in Exhibit F, changes in expense that would have taken place if TWA had the six additional B-331 aircraft. The following paragraphs

illustrate the methods we used to calculate changes in the variable expenses. (Certain expenses would not have been changed by the additional B-331 aircraft, such as the President's salary.)

Flying Operations and Maintenance Expense

Flying Operations and Maintenance Expense are those incurred for the operating and maintaining of the aircraft. Some of these expenses varied generally in accordance with changes in plane-miles and number of aircraft available for commercial service with the additional B-331 aircraft. We calculated changes in certain Flying Operations and Maintenance expenses in proportion to the change in plane-miles or number of aircraft available. To illustrate, for Aircraft Fuels expense which is a part of the Flying Operations expense group:

Aircraft Fuels expense for B-331 aircraft used in 1960 for the International Division service was $5.1 million
Actual B-331 plane-miles in 1960 for International Division service were 10.7 million
Estimated additional B-331 plane-miles in 1960 for International Division service are 6.3 million
Calculation of Aircraft Fuels expense for the additional B-331 operation is by ratio of plane-miles:

$$\$5.1 \times \frac{6.3}{10.7} = \$3.0 \text{ million additional expense}$$

Aircraft Servicing Expense

This expense generally has to do with ground activities for aircraft, and is recorded only by Division (not by type of aircraft). We selected plane-miles as the index to use for our calculation of changes in some of this expense, on the basis that, for example, the estimated net increase of plane-miles operated would have been roughly proportional to the increase in number of flights processed on the ground.

Passenger Service Expense

This expense has to do with passengers while in flight and if the flight is interrupted, and is recorded only for each Division. Expenses for cabin personnel (which are a part of Passenger Service Expense) have varied generally in proportion to plane-miles operated, and expenses for food, supplies and liability insurance have varied generally with passenger revenues. We used changes in plane-miles and passenger revenues to calculate changes in various Passenger Service expenses. To illustrate, for Passenger Food expense which is a part of the Passenger Service Expense group:

Passenger Food expense for the International Division in 1960 was $1.5 million
Passenger revenues for the International Division in 1960 were $82.0 million
International Division estimated additional passenger revenues in 1960 with the additional B-331 aircraft are $18.9 million
Calculation of the International Division Passenger Food expense increase that would have occurred in 1960 with the additional B-331 aircraft is by ratio of passenger revenues:

$$\$1.5 \times \frac{\$18.9}{\$82.0} = \$0.3 \text{ million additional expense}$$

Traffic Servicing Expense

This expense has to do with handling passenger and cargo traffic on the ground, and is recorded only for each Division. We selected transportation revenues (passengers plus cargo) for calculating proportionate changes in expense for most of the Traffic Servicing sub-accounts, which is generally in accordance with TWA's experience.

Servicing Administration Expense

This expense has to do with supervisory and administrative activities for Aircraft Servicing and Traffic Servicing and is recorded only for each Division. We used changes calculated for the Aircraft Servicing and Traffic Servicing expense to calculate a proportionate change in the Servicing Administration expense.

Promotion and Sales Expense

This expense has to do with selling, reservations, city ticket offices, advertising and publicity activities, and is recorded only for each Division. We selected transportation revenues for calculating proportionate changes in principal elements of Promotion and Sales Expense, which is generally in accordance with TWA experience.

General and Administrative Expense

This expense has to do with corporate matters and certain activities such as financial accounting, legal and general operational administration that are not directly applicable to one of the above-listed functional classifications, and is recorded only by Division. We selected transportation revenues to calculate proportionate changes in certain of the General and Administrative Expense sub-accounts. To illustrate, for Record Keeping and Statistical Personnel expense which is a part of the General and Administrative Expense group:

Record Keeping and Statistical Personnel expense in 1960 for the International Division was $1.4 million
Transportation Revenue for 1960, International Division, was $98.4 million
A simulated Transportation Revenue increase for the International Division for 1960 with the additional B-331 aircraft is $19.8 million. This is calculated by apportioning the estimated additional System cargo revenue mentioned on page 33, to each Division, plus the estimated passenger revenue increase
Calculation of additional expense for Record Keeping and Statistical Personnel in 1960 for the International Division is by ratio of Transportation Revenue:

$$\$1.4 \times \frac{\$19.8}{\$98.4} = \$0.3 \text{ million additional expense}$$

Depreciation and Amortization

Price Waterhouse & Co. furnished the changes in this expense.

Summary of Changes

The tables that follow summarize our estimates of changes in TWA Operating Expense that would have occurred with the additional B-331 aircraft.

Estimated Changes in Operating Expenses That Would Have Occurred With the Six Additional B-331 Aircraft

Operating Expense	International Division	Domestic Division	System
		(Millions)	
1959			
Flying Operations	-	No Change	-
Maintenance	$ +0.2		$ +0.2
Aircraft Servicing	-		-
Passenger Service	-		-
Traffic Servicing	-		-
Servicing Administration	-		-
Promotion and Sales	+0.1		+0.1
General and Administrative	-		-
Depreciation and Amortization(A)	-		-
	$ +0.3		$ +0.3
1960			
Flying Operations	$ -0.3	$-0.6	$ -0.9
Maintenance	-1.0	-1.4	-2.4
Aircraft Servicing	+0.2	-0.2	-
Passenger Service	+0.8	-	+0.8
Traffic Servicing	+0.5	+0.1	+0.6
Servicing Administration	+0.1	-	+0.1
Promotion and Sales	+3.0	+0.2	+3.2
General and Administrative	+0.5	+0.1	+0.6
Depreciation and Amortization(A)	+2.7	+1.1	+3.8
	$ +6.5	$-0.7	$ +5.8
1961			
Flying Operations	$ +4.9	$-0.8	$ +4.1
Maintenance	+2.7	-1.4	+1.3
Aircraft Servicing	+1.1	-0.2	+0.9
Passenger Service	+1.9	-	+1.9
Traffic Servicing	+0.7	+0.1	+0.8
Servicing Administration	+0.2	-	+0.2
Promotion and Sales	+4.0	+0.1	+4.1
General and Administrative	+0.8	-	+0.8
Depreciation and Amortization(A)	+3.3	+1.8	+5.1
	$+19.6	$-0.4	$+19.2

(A) Furnished by Price Waterhouse & Co.

Source:
Exhibit F.

Operating Expense	1962		
	International Division	Domestic Division	System
	(Millions)		
Flying Operations	$ +8.3	$+0.7	$ +9.0
Maintenance	+4.3	+0.3	+4.6
Aircraft Servicing	+1.9	+0.1	+2.0
Passenger Service	+2.9	+0.2	+3.1
Traffic Servicing	+1.0	+0.1	+1.1
Servicing Administration	+0.2	-	+0.2
Promotion and Sales	+5.4	+0.3	+5.7
General and Administrative	+1.0	+0.1	+1.1
Depreciation and Amortization(A)	+3.5	+0.8	+4.3
	$+28.5	$+2.6	$+31.1
	1963		
Flying Operations	$ -1.3	$+0.4	$ -0.9
Maintenance	+2.1	+0.2	+2.3
Aircraft Servicing	+0.3	+0.1	+0.4
Passenger Service	+0.5	+0.2	+0.7
Traffic Servicing	+0.2	+0.1	+0.3
Servicing Administration	-	-	-
Promotion and Sales	+0.9	+0.3	+1.2
General and Administrative	+0.2	-	+0.2
Depreciation and Amortization(A)	+3.0	+0.6	+3.6
	$ +5.9	$+1.9	$ +7.8

(A) Furnished by Price Waterhouse & Co.

Source:
Exhibit F.

GAIN OR LOSS FROM OPERATIONS

The changes in Gain or Loss from Operations that we estimate would have occurred if TWA had received the six additional B-331 aircraft, for the years 1959-1963, are calculated using the foregoing estimates of additional revenue and operating expense, as follows:

(C. & C. Report-Financial Results from Reconstructed Jet Fleet)

Year	Additional Revenue(a)	Additional Expense(b)	Improvement In Gain or Loss from Operations(c)
	(M i l l i o n s)		
1959	$ 0.6	$ 0.3	$ 0.3
1960	21.8	5.8	16.0
1961	22.9	19.2	3.7
1962	33.1	31.1	2.0
1963	7.6	7.8	-0.2
			$21.8

(a) From page 33.
(b) From pages 37 and 38.
(c) By subtraction.

CHAPTER III

EARLIER RECEIPT OF B-131 AND B-331 AIRCRAFT

This Chapter outlines the development of our estimates of changes in financial results from operations that would have occurred if TWA had received fifteen B-131 jet aircraft and eighteen B-331 jet aircraft on certain earlier, timely dates as listed below.

Fifteen B-131 Aircraft	
Actual Receipt Dates(a)	Earlier Receipt Dates(b)
January 29, 1959	November 30, 1958
March 17, 1959	December 31, 1958
March 30, 1959	January 31, 1959
April 3, 1959	February 27, 1959
April 18, 1959	March 30, 1959
April 29, 1959	April 3, 1959
May 10, 1959	April 18, 1959
May 13, 1959	May 10, 1959
May 24, 1959	May 13, 1959
May 28, 1959	May 24, 1959
June 13, 1959	May 28, 1959
July 1, 1959	June 13, 1959
July 10, 1959	June 29, 1959
July 14, 1959	July 10, 1959
August 1, 1959	July 27, 1959

(a) From TWA Official List of Aircraft, Schedule 3-66M, issues of July 31, 1959 and August 31, 1959.
(b) Furnished to us by Cahill, Gordon, Reindel & Ohl.

Eighteen B-331 Aircraft	
Actual and Assumed Dates (From page 10)	Earlier Receipt Dates(c)
November 5, 1959	July 19, 1959
November 10, 1959	August 22, 1959
November 10, 1959	August 28, 1959
November 25, 1959	September 22, 1959
December 15, 1959	October 6, 1959
December 23, 1959	October 27, 1959
December 30, 1959	November 5, 1959
January 18, 1960	November 10, 1959
March 23, 1960	December 15, 1959
April 1, 1960	December 30, 1959
April 5, 1960	January 18, 1960
April 14, 1960	February 29, 1960
April 29, 1960	March 23, 1960
May 9, 1960	April 26, 1960
May 25, 1960	April 29, 1960
June 8, 1960	May 9, 1960
July 1, 1960	June 8, 1960
July 1, 1960	July 1, 1960

(c) Furnished to us by Cahill, Gordon, Reindel & Ohl.

COMMENCING REVENUE SERVICE

We estimate these earlier receipt dates would have advanced the dates TWA commenced revenue service with each type of aircraft, as listed below. These estimated dates are based on TWA's experience as to time between receipt dates and commencing service.

	Actual Dates TWA Commenced Revenue Service(a)	Estimated Earlier Dates for Revenue Service
B-131	March 20, 1959	January 6, 1959
B-331	November 23, 1959	August 19, 1959

(a) From TWA Schedule 3-66M dated January 31, 1960.

AVERAGE NUMBER OF AIRCRAFT

We calculated the monthly and annual average number of aircraft available for commercial service for the earlier receipt dates for fifteen B-131 and eighteen B-331 aircraft, as listed in Exhibit C. The annual average number available also are listed below in comparison with actual and other estimated numbers available, for the years affected by the earlier receipt dates.

	1959	
B-131 Aircraft		
Actual average number available (from Exhibit B)	8.9	
Earlier receipt number available (from Exhibit C)	10.3	
Additional number available	1.4	
	1959	1960
B-331 Aircraft		
Actual average number available with a total fleet of twelve aircraft (from Exhibit B)	0.3	8.8
Estimated number available with actual and assumed receipt dates for a total fleet of eighteen aircraft (from page 14)	0.5	13.8
Estimated number available with earlier receipt dates for a total fleet of eighteen aircraft (from Exhibit C)	2.0	15.1
Additional number available (over the number estimated in Chapter II)	1.5	1.3

These B-131 aircraft received on the earlier dates would have been assigned to Domestic Division service as the aircraft were when TWA did receive them. We assigned the earlier B-331 aircraft in 1959 and 1960 to service for the Domestic Division and for the International Division in accordance with TWA's actual Divisional allocation of B-331 aircraft in 1960. This gives aircraft available for each Division and the following additional number of aircraft available.

	Annual Average Number of Aircraft Available for Commercial Service	
	Domestic Division	International Division
B-131 Aircraft, Year 1959		
Actual (Exhibit B)	8.9	-
Estimated for Earlier Receipt (Exhibit C)	10.3	-
Additional Number	1.4	-
B-331 Aircraft, Year 1959		
Estimated for Chapter II (page 14)	-	0.5
Estimated for Earlier Receipt (Exhibit C)	0.6	1.4
Additional Number	0.6	0.9
B-331 Aircraft, Year 1960		
Estimated for Chapter II (page 14)	4.1	9.7
Estimated for Earlier Receipt (Exhibit C)	4.8	10.3
Additional Number	0.7	0.6

DOMESTIC DIVISION

The additional number of jet aircraft available for commercial service in 1959 and 1960 for Domestic Division operation would have been used by TWA to operate a proportionate additional number of plane-miles and to produce corresponding increases in available seats and passenger-miles. Our calculations follow.

1959

B-131 Aircraft

12.4 million actual B-131 plane-miles(a) x $\frac{1.4}{8.9}$ ratio of additional number of aircraft to actual number of aircraft = 1.9 million additional B-131 plane-miles.

1.9 additional B-131 plane-miles x 111.6 seats per aircraft(b) x 83.1% actual B-131 passenger load factor(b) = 176 million additional passenger-miles in B-131 aircraft with early receipt dates.

(a) TWA Financial Report, December 1959, Schedule 3-1M.
(b) Calculated from statistics shown in TWA monthly schedules 3-70M for 1959.

We used B-131 statistics for B-331 calculations for 1959 because there were no B-331 aircraft operated in Domestic Division revenue service in that year.

B-331 Aircraft

12.4 million actual B-131 plane-miles(a) x $\frac{0.6}{8.9}$ ratio of additional number of B-331 aircraft to actual number of B-131 aircraft = 0.8 million additional B-331 plane-miles.

0.8 million additional B-331 plane-miles x 111.6 seats per B-131 aircraft x 83.1% actual B-131 passenger load factor = 74 million additional passenger plane-miles in B-331 aircraft with the earlier receipt dates.

(a) TWA Financial Report, December 1959, Schedule 3-1M.

Source:
See calculation immediately above and the table on the previous page.

The total B-131 and B-331 additional plane-miles and passenger-miles for 1959 would have been:

	Additional for 1959	
	Plane-Miles	Passenger-Miles
	(Millions)	
B-131	1.9	176
B-331	0.8	74
Total	2.7	250

1960

B-331 Aircraft

5.8 million estimated B-331 plane-miles(a) x $\frac{0.7}{4.1}$ ratio of additional number of aircraft to estimated number of aircraft = 1.0 million additional B-331 plane-miles.

1.0 million additional B-331 plane-miles x 120.8 seats per aircraft(b) x 64.5% actual load factor(b) = 78 million additional passenger-miles with earlier receipt.

(a) Calculated from statistics on page 28, i.e., 3.8 + 2.0 = 5.8.
(b) Calculated from statistics shown in TWA monthly schedules 3-70M for 1960.

Piston Plane-Miles

We believe the above-described additions of jet aircraft plane-miles would have been accompanied by proportionate reductions of piston aircraft plane-miles. As noted on page 29, in 1959 the actual piston plane-miles reduction nearly equaled the jet plane-miles addition. In 1960 there was a 20.3 million piston plane-miles decrease versus a 14.0 million jet plane-miles increase. Our calculations of piston aircraft plane-miles reductions for earlier receipt of B-131 and B-331 jet aircraft are as follows:

The 1959 piston aircraft plane-miles reduction would have been equal to the jet plane-miles addition of 2.7 million (page 43)

The 1960 piston aircraft plane-miles reduction would have been:

1.0 million jet plane-miles addition x $\frac{20.3}{14.0}$ ratio of actual piston plane-miles reduction to jet plane-miles addition = 1.4 million piston aircraft plane-miles reduction for earlier receipt of B-331 aircraft.

Using statistics for L-1649A aircraft which were the longest-range piston aircraft in use in 1959 and 1960, we calculate passenger-miles reductions as follows:

For 1959
2.7 million L-1649A plane-miles reduction x 67.7 average number of seats per aircraft(a) x 70.2% actual passenger load factor(a) = 128 million passenger-miles reduction, for 1959, with earlier receipt of B-131 and B-331 aircraft.

For 1960
1.4 million L-1649A plane-miles reduction x 72.0 average number of seats per aircraft(b) x 58.8% actual passenger load factor(b) = 59 million passenger-miles reduction, for 1960, with earlier receipt of B-331 aircraft.

(a) Calculated from statistics shown in TWA monthly schedules 3-70M for 1959.
(b) Calculated from statistics shown in TWA monthly schedules 3-70M for 1960.

Revenues

These changes in passenger-miles resulting from earlier receipt of B-131 and B-331 aircraft would have affected TWA's Domestic Division passenger revenues as follows:

Year	Passenger-Miles			Yield (c)	Passenger Revenues Increase (b)
	Jet Addition (a)	Piston Reduction (a)	Net Increase (b)		
	(M i l l i o n s)				(Millions)
1959	250	128	122	5.487¢	$6.7
1960	78	59	19	5.645¢	$1.1

(a) From previous pages and above.
(b) By calculation
(c) Calculated as described in note (d) at the bottom of page 30.

INTERNATIONAL DIVISION

The additional number of B-331 jet aircraft available for International Division service with the earlier receipt dates would have given TWA an increase in International Division jet plane-miles for 1960 as follows:

17.0 million B-331 plane-miles estimated on page 17 x $\frac{0.6}{9.7}$ ratio of additional number of B-331 aircraft to estimated number from page 14 = 1.1 million additional B-331 plane-miles with earlier receipt dates.

Our calculation for 1959 uses 1960 statistics because there was so little B-331 actual operation in 1959, i.e., only 0.3 million plane-miles as noted on page 17, and we believe 1960 B-331 operations are more nearly representative of what TWA would have done with the additional B-331's in 1959. The calculation is:

17.0 million x $\frac{0.9}{9.7}$ = 1.6 million additional B-331 plane-miles (these figures are from the table on page 42 and the 1960 calculation above).

We estimate this 1959 addition of 1.6 million B-331 plane-miles would have been accompanied by an equal reduction of 1.6 million piston aircraft plane-miles, leaving the International Division total plane-miles unchanged at 21.8 million (see page 18). We estimate the 1960 addition of 1.1 million B-331 plane-miles would have been a net addition with no further reduction of piston plane-miles because of certain irreducible requirements for piston aircraft flights discussed on pages 16, 17 and 18. Accordingly, the total plane-miles for the International Division in 1960 would have been increased to 20.0 million (18.9 million mentioned on page 18 + 1.1 million = 20.0 million).

Transatlantic Seats and Passengers

We calculate the additional transatlantic seats available and passengers TWA would have realized in 1959 and 1960 with the earlier receipt of B-331 aircraft, in accordance with the analysis system used in Chapter II for the International Division estimates, as follows:

1959

In 1959 additional transatlantic seats would have been only from the difference in size of the B-331 jet and L-1649A piston aircraft which would have been replaced. (There would have been no increase in total plane-miles or transatlantic flights.)

3,399 flights x $\frac{1.6}{21.8}$ ratio of millions additional jet to total plane-miles x 68.7 additional seats per jet aircraft = 17,000 additional transatlantic seats.
(Reference to pages 19, 20 and 46.)

227,000 TWA transatlantic seats as estimated in Chapter II + 17,000 = 244,000 seats with B-331 earlier receipt ÷ 1,823,000 IATA total seats x 100 = 13.4% seats for TWA of the IATA total.
(Reference page 26, for calculations above and below.)

$\frac{13.4}{12.5}$ ratio of TWA's percent seats for B-331 earlier receipt to TWA's percent seats estimated in Chapter II x 12.2% passengers for TWA of the IATA total passengers as estimated in Chapter II = 13.1% passengers for TWA of the IATA total passengers, with earlier receipt of B-331 aircraft.

1,204,000 IATA passengers x 13.1% = 157,500 TWA passengers with earlier receipt of B-331 aircraft.

157,500 TWA passengers ÷ 147,000 TWA passengers estimated in Chapter II = 1.07, for a 7% increase in transatlantic passengers with earlier receipt of B-331 aircraft.

($59.5 + $0.6) million passenger revenue from Chapter II x 7% = $4.2 million additional revenue with earlier receipt of B-331 aircraft.
(Reference page 27.)

1960

The 1960 increase of 1.1 million B-331 plane-miles with earlier receipt of B-331 aircraft would have increased TWA's transatlantic flights in proportion, and available seats as follows:

3,575 TWA transatlantic flights as estimated in Chapter II x $\frac{1.1}{18.9}$ ratio of additional millions of plane-miles to millions of plane-miles estimated in Chapter II x 130.5 seats per aircraft = 27,000 additional transatlantic seats with earlier receipt of B-331 aircraft.
(Reference page 19.)

475,000 TWA seats as estimated in Chapter II + 27,000 seats (previous page) = 502,000 seats.
502,000 seats ÷ 2,413,000 IATA seats x 100 = 20.8% seats for TWA with earlier receipt of B-331 aircraft.
(Reference page 26.)

$\frac{20.8}{19.7}$ ratio of TWA's percent IATA seats with earlier receipt of B-331 aircraft to TWA's percent IATA seats estimated in Chapter II x 19.4% passengers for TWA of the IATA total passengers as estimated in Chapter II = 20.5% passengers for TWA with earlier receipt of B-331 aircraft.
(Reference page 26.)

20.5% x 1,534,000 IATA passengers = 314,500 TWA passengers with earlier receipt of B-331 aircraft.
(Reference page 26.)

314,500 ÷ 298,000 TWA passengers estimated in Chapter II = 1.06 for a 6% increase in TWA transatlantic passengers with earlier receipt of B-331 aircraft.
(Reference page 26.)

$82.0 million + $18.9 million = $100.9 million TWA passenger revenue estimated in Chapter II x 6% = $6.1 million additional passenger revenue with earlier receipt of B-331 aircraft.
(Reference page 27.)

CARGO REVENUES

Using the 5 percent for additional revenues from various types of cargo including mail, express, freight and excess baggage, as developed on pages 31 and 32, we calculate additional revenues from cargo for earlier receipt of B-131 and B-331 aircraft as follows:

Year	Additional Passenger Revenues			Additional Mail, Express, Freight and Excess Baggage Revenues, at 5%
	Domestic Division (a)	International Division (b)	System (c)	
	(Millions)			
1959	$6.7	$4.2	$10.9	$0.5
1960	1.1	6.1	7.2	0.4

(a) From page 45.
(b) From page 47 and above.
(c) By calculation.

INCIDENTAL REVENUES

We believe the additional number of B-331 aircraft available for commercial service in 1959 with the earlier receipt dates would have enabled TWA to lease aircraft to Northeast Airlines (as described on page 11) two months earlier beginning October 1, 1959, which would have given TWA some additional Incidental Revenues. Net Incidental Revenues in October and November 1960 from the Northeast lease were $221,977 (from TWA accounting records); we therefore estimate the additional net Incidental Revenues from this source in October and November 1959 would have been a like amount, $0.2 million.

SYSTEM REVENUES

Our calculation of the total additional System Operating Revenues that TWA would have realized as the result of earlier receipt of B-131 and B-331 aircraft is as follows:

Year	Additional Passenger Revenues (a)	Additional Cargo Revenues (a)	Additional Incidental Revenues (b)	Total Additional System Operating Revenues with Earlier Receipt of B-131 and B-331 Aircraft
	(Millions)			
1959	$10.9	$0.5	$0.2	$11.6
1960	7.2	0.4	-	7.6

(a) From page 48.
(b) As discussed above.

OPERATING EXPENSES

We estimated changes in Operating Expenses that would have been the result of earlier receipt of B-131 and B-331 aircraft, generally in accordance with the methods and considerations used for Operating Expense estimates for Chapter II. The B-131 and B-331 aircraft would have been owned by TWA on the earlier receipt dates, in accordance with the basic assumption you gave us for

Chapter I The calculation details of these Chapter III Operating Expense estimates are set forth in Exhibit G. The table that follows summarizes the estimated changes.

Estimated Changes in Operating Expenses That Would Have Occurred With Earlier Receipt of B-131 and B-331 Aircraft

Operating Expense	1959		
	Domestic Division	International Division	System
	(Millions)		
Flying Operations	$+0.4	$-0.2	$+0.2
Maintenance	-	-0.1	-0.1
Aircraft Servicing	+0.1	-	+0.1
Passenger Service	+0.3	+0.2	+0.5
Traffic Servicing	+0.3	+0.1	+0.4
Servicing Administration	-	-	-
Promotion and Sales	+0.6	+0.7	+1.3
General and Administrative	+0.2	+0.1	+0.3
Depreciation and Amortization(A)	+1.2	+0.8	+2.0
	$+3.1	$+1.6	$+4.7
	1960		
Flying Operations	$-0.3	$+1.0	$+0.7
Maintenance	-0.8	+0.6	-0.2
Aircraft Servicing	-0.1	+0.2	+0.1
Passenger Service	+0.1	+0.4	+0.5
Traffic Servicing	+0.1	+0.2	+0.3
Servicing Administration	-	-	-
Promotion and Sales	+0.1	+1.0	+1.1
General and Administrative	-	+0.2	+0.2
Depreciation and Amortization(A)	+0.8	+0.9	+1.7
	$-0.1	$+4.5	$+4.4

(A) Furnished by Price Waterhouse & Co.

GAIN OR LOSS FROM OPERATIONS

We calculate the changes in financial Gain or Loss from Operations that would have occurred for TWA as the result of earlier receipt of B-131 and B-331 jet aircraft as follows:

(C. & C. Report-Financial Results from Reconstructed Jet Fleet)

Year	Additional Revenue(a)	Additional Expense(b)	Improvement In Gain or Loss from Operations(c)
	(Millions)		
1959	$11.6	$4.7	$6.9
1960	7.6	4.4	3.2

(a) From page 49.
(b) From page 50.
(c) By subtraction.

CHAPTER IV

RECEIPT OF CV 880 AIRCRAFT ON CONTRACT DELIVERY DATES

This Chapter outlines the development of our estimates of changes in financial results of operations that would have occurred if TWA had received its fleet of twenty CV 880 jet aircraft on the delivery dates provided in the purchase contract for the aircraft. These contract delivery dates were earlier than the dates TWA actually received the aircraft, as follows:

Aircraft Received	Aircraft Receipt Dates		Months Difference
	Actual	Contract(a)	
1st	May 18, 1960	November 1959	6
2nd	January 1, 1961	January 1960	12
3rd	January 5, 1961	February 1960	11
4th	January 6, 1961	March 1960	10
5th	January 8, 1961	March 1960	10
6th	January 12, 1961	April 1960	9
7th	January 21, 1961	April 1960	9
8th	February 2, 1961	May 1960	9
9th	February 15, 1961	May 1960	9
10th	March 15, 1961	June 1960	9
11th	March 18, 1961	June 1960	9
12th	March 20, 1961	July 1960	8
13th	April 26, 1961	July 1960	9
14th	May 6, 1961	July 1960	10
15th	May 25, 1961	July 1960	10
16th	June 9, 1961	August 1960	10
17th	July 9, 1961	August 1960	11
18th	August 10, 1961	August 1960	12
19th	September 2, 1961	September 1960	12
20th	October 13, 1961	September 1960	13
			198

(a) Furnished to us by Cahill, Gordon, Reindel & Ohl.

You advised us to assume that with receipt of CV 880 aircraft on the contract delivery dates, TWA would have commenced revenue service with CV 880 aircraft on May 15, 1960. TWA did, in fact, commence CV 880 revenue service eight months later on January 12, 1961, as noted on TWA Schedule 3-66M dated July 31, 1961.

NUMBER OF AIRCRAFT AVAILABLE

We calculated the average number of CV 880 aircraft TWA would have had available for commercial service in 1960 and 1961 with receipt of the aircraft on the contract's dates. We assumed each aircraft would have been received on the 15th of the month specified in the contract. The results of these calculations are shown in the table that follows, in comparison with the actual number available. The table also shows our calculation of the increase in number of aircraft available with receipt on the contract's dates.

Average Number of CV 880 Aircraft Available for Commercial Service						
1960	Actual Receipt	Contract Dates Receipt		1961	Actual Receipt(a)	Contract Dates Receipt
January	None			January	3.6	20.0
February				February	7.3(b)	17.6(b)
March				March	10.4	20.0
April				April	11.6	20.0
May		4.9		May	14.0	20.0
June		10.1		June	15.7	20.0
July		13.2		July	16.7	20.0
August		16.6		August	17.7	20.0
September		19.1		September	18.9	20.0
October		20.0		October	19.6	20.0
November		20.0		November	20.0	20.0
December		20.0		December	20.0	20.0
Annual Average		10.3		Annual Average	14.6	19.8
Increase		10.3		Increase		5.2

(a) From Exhibit B.
(b) Affected by the strike.

Plane-Miles

Using TWA data for 1961 operation of CV 880 aircraft, we calculated the additional CV 880 plane-miles TWA would have operated with receipt of the aircraft on the contract's dates, as follows:

For 1961:

TWA did operate 16.5(a) million plane-miles with an average of 14.6(b) CV 880 aircraft available in 1961. (These CV 880 plane-miles were on Domestic Division service, only.) The 5.2(c) increase in number of aircraft that would have been available in 1961 with contract receipt would have given the following proportionate increase in plane-miles.

$$16.5 \times \frac{5.2}{14.6} = 5.9 \text{ million additional plane-miles}$$

(a) Annual summary of figures shown in Schedule 3-70M for 1961.
(b) Exhibit B, Sheet 1.
(c) Table on previous page.

For 1960:

Using 1961 data on number of aircraft and plane-miles, we calculate a proportionate increase in plane-miles operated in 1960 with CV 880 aircraft as follows:

$$16.5 \times \frac{10.3 \text{(previous page)}}{14.6} = 11.6 \text{ million plane-miles}$$

Seat-Miles

Using TWA's average number of 88.3(d) seats offered for sale per CV 880 aircraft in 1961, we calculate additional CV 880 seat-miles as follows:

For 1961:

5.9 million plane-miles x 88.3 = 521 million additional seat-miles

For 1960:

11.6 million plane-miles x 88.3 = 1,024 million additional seat-miles

(d) Calculated from annual summaries of statistics shown in Schedules 3-70M

Passenger-Miles

Using TWA's 1961 average CV 880 passenger load factor of 65.5(a) percent, we calculate additional passenger-miles for 1961 in CV 880 aircraft as follows:

521 million seat-miles x 65.5% = 341 million additional passenger-miles

TWA did not have CV 880 aircraft to operate on commercial service in 1960. TWA did, however, operate with B-131 and B-331 jet aircraft on Domestic Division service in 1960 and these jet aircraft averaged 68.6 percent passenger load factor (calculated from data in CAB Form 41 Report, Schedule T-3, for 1960). Using this actual jet aircraft load factor, we calculate additional passenger-miles for 1960 in CV 880 aircraft as follows:

1,024 million seat-miles x 68.6% = 702 million additional passenger-miles

(a) Calculated from annual summaries of statistics shown in Schedules 3-70M.

CITIES SERVED

The Employees' Timetables of Exhibit A for the period January 1961-September 1962 show that TWA used CV 880 aircraft to provide service between as many as 30 pairs of cities (U. S.), as shown on the following page.

The summation data at the bottom of the preceding table shows that TWA was operating essentially a full schedule with CV 880 aircraft commencing in September 1961, and operated with this daily westbound schedule of about 34,500 plane-miles through March 1962. We selected the March 1962 daily westbound flight schedule for the analysis that follows.

30 Pairs of Cities

In March 1962 TWA schedules provided daily westbound service with CV 880 aircraft for 30 pairs of cities. These same pairs of cities also were served with other types of aircraft by TWA as follows:

Type of Aircraft	Service to the 30 Pairs of Cities		Average Segment Length (Miles)
	Flight Segments	Daily Westbound Scheduled Plane-Miles	
CV 880 Jets	45	34,547	768
Other Jets	22	18,539	843
All Jets	67	53,086	
Piston	20	8,070	404
Total	87	61,156	

The types of jet and piston aircraft used to serve each pair of cities are shown on the table that follows.

These 30 pairs of cities had most of the CV 880 service during the entire period of September 1961-September 1962, as demonstrated by the following:

	Daily Westbound Scheduled Service with CV 880 Aircraft		
	All CV 880 Plane-Miles	The 30 Pairs of Cities	
		CV 880 Plane-Miles	Percent of Total
September 1961	34,540	33,745	98%
December 1961	34,914	34,361	98
March 1962	34,547	34,547	100
June 1962	33,577	29,170	87
September 1962	32,923	30,243	92

We tabulated daily westbound service scheduled for the 30 pairs of cities for three-month intervals beginning with March 1960 through September 1962, with both jet and piston aircraft. This daily service is shown in detail on the following page and is summarized below. The table below also lists the average number of CV 880 aircraft TWA actually has available for commercial service in these months, from Exhibit B.

Year and Month	Daily Westbound Service Between the 30 Pairs of Cities			Average Number of CV 880 Available for Commercial Service
	Jet Aircraft	Piston Aircraft	Total	
	(P l a n e - M i l e s)			
1960				
March	8,354	44,246	52,600	-
June	9,434	45,196	54,630	-
September	11,959	42,027	53,986	-
December	13,745	33,151	46,896	-
1961				
March	26,377	23,957	50,334	10.4
June	38,341	17,943	56,284	15.7
September	49,502	14,569	64,071	18.9
December	53,239	10,150	63,389	20.0
1962				
March	53,086	8,070	61,156	20.0
June	52,257	7,851	60,108	20.0
September	54,457	6,027	60,484	20.0

Service Increase

It is apparent from the preceding tables that TWA substantially increased the amount of service to the 30 pairs of cities in September 1961 when essentially a full schedule of CV 880 flights was operated. With receipt of the CV 880 aircraft on the contract's delivery dates, TWA could have effected this increase in service by September 1960, a year earlier.

Piston Service Decrease

The preceding table on page 60 shows a decrease of piston aircraft service scheduled for the 30 pairs of cities during the period from introduction to full-schedule operation with CV 880 jet aircraft. The decrease in scheduled piston service from December 1960, the month before the CV 880 aircraft were put into service, to September 1961 when full-schedule operation of CV 880 aircraft commenced and the corresponding jet aircraft service increase were:

	Daily Westbound Scheduled Plane-Miles Between the 30 Pairs of Cities	
	Jet	Piston
December 1960	13,745	33,151
September 1961	49,502	14,569
Change	+35,757	-18,582

The piston service decrease was 52 percent of the jet service increase, calculated as follows:

$$\frac{18.6}{35.8} \times 100 = 52\%$$

Applying this 52 percent factor to the previously calculated additional CV 880 plane-miles (page 54), we calculate the further reduction of piston plane-miles as follows:

For 1961:
5.9(a) million additional CV 880 plane-miles x 52% = 3.1 million reduction of piston aircraft plane-miles

For 1960:
11.6(a) million additional CV 880 plane-miles x 52% = 6.0 million reduction of piston aircraft plane-miles

(a) From page 54.

As shown by data in the table on page 60, the majority of the reduction in piston aircraft scheduled service, between December 1960 and September 1961, was in L-1049G flights. Accordingly, we will use L-1049G statistics for our calculations that follow, as representative of the several types of piston aircraft used for service between the 30 pairs of cities.

Our calculation of passenger-miles for this reduction of piston service is based on TWA's actual average numbers of seats offered for sale in L-1049G piston aircraft,

1960 79.3 Seats
1961 71.6 Seats

Source:
Calculated from annual summaries of information contained in Schedule 3-70M.

and the actual L-1049G average passenger load factors, as follows:

Year	Piston Plane-Miles Deleted (a)	Average Seats Per Aircraft (L-1049G) (b)	Average Passenger Load Factor (L-1049G) (c)	Passenger-Miles for Reduced Piston Service (d)
	(Millions)			(Millions)
1960	6.0	79.3	60.2%	286
1961	3.1	71.6	60.4%	134

(a) From table above.
(b) Calculated from annual summaries of information contained in Schedule 3-70M.
(c) Same as above.
(d) Calculated; a x b x c = d.

REVENUE INCREASE

These changes in passenger-miles and TWA's actual yields would have given the following passenger revenue increase for receipt of CV 880 aircraft on contract delivery dates.

Year	Passenger-Miles			Yield (c)	Net Increase of Passenger Revenue (d)
	Additional CV 880 (a)	Reduced Piston (a)	Net Increase (b)		
	(M i l l i o n s)				(Millions)
1960	702	286	416	5.645¢	$23.5
1961	341	134	207	5.882¢	$12.2

(a) From previous pages 54, 55 and 62.
(b) Calculated.
(c) As explained on previous page 30.
(d) Calculated; b x c = d.

Using the 5 percent additional revenue for various kinds of cargo including mail, express, freight and excess (weight) baggage as mentioned on page 31, we calculate additional revenue for these types of cargo for contract dates receipt of CV 880 aircraft as follows:

Year	Additional Passenger Revenue	Additional Revenue from Various Types of Cargo, at 5%	Additional System Revenue
	(M i l l i o n s)		
1960	$23.5	$1.2	$24.7
1961	$12.2	$0.6	$12.8

OPERATING EXPENSES

We estimated changes in Operating Expenses that would have been the result of TWA receiving its fleet of twenty CV 880 aircraft on the dates specified in the aircraft purchase contract, generally in accordance with the method and considerations used for expense estimates of prior Chapters of this report. The details of these estimates are set forth in Exhibit H. The table below summarizes the estimates.

AX-157

Estimated Changes in Operating Expenses That Would Have Occurred if TWA had Received its Fleet of Twenty CV 880 Aircraft on the Dates in the Purchase Contract

Operating Expense	1960	1961
	(Millions)	
Flying Operations	$ +4.4	$ +2.2
Maintenance	+3.5	+1.6
Aircraft Servicing	+1.1	+0.6
Passenger Service	+1.8	+0.9
Traffic Servicing	+1.4	+0.7
Servicing Administration	+0.1	+0.1
Promotion and Sales	+2.4	+1.3
General and Administrative	+0.6	+0.4
Depreciation and Amortization(A)	+5.4	+2.6
	$+20.7	$+10.4

(A) Furnished by Price Waterhouse & Co.

GAIN OR LOSS FROM OPERATIONS

We calculate the change in Gain or Loss from Operations that would have occurred if TWA had received the twenty CV 880 aircraft on the dates provided in the purchase contract, as follows:

Year	Additional Revenue(a)	Additional Expense(b)	Improvement In Gain or Loss from Operations(c)
	(Millions)		
1960	$24.7	$20.7	$4.0
1961	$12.8	$10.4	$2.4

(a) From page 63.
(b) From above.
(c) By subtraction.

CHAPTER V

FLEET OF THIRTY CV 880 AIRCRAFT

This Chapter outlines the development of our estimates of changes in financial results of operations that would have occurred if TWA had received a fleet of thirty CV 880 jet aircraft rather than twenty aircraft, on the dates listed below. You instructed us to use the monthly receipt dates for twenty of the aircraft that were used for previous Chapter IV estimates and other dates for the additional ten aircraft as follows:

Aircraft Received	Dates for 20 Aircraft, from Chapter IV, Page 52	Dates for Additional 10 Aircraft
	1959	
1st	November	
2nd		December
	1960	
3rd	January	
4th	February	
5th		February
6th	March	
7th	March	
8th	April	
9th	April	
10th		April
11th	May	
12th	May	
13th		May
14th	June	
15th	June	
16th		June
17th		June
18th	July	
19th	July	
20th	July	
21st	July	
22nd		July
23rd	August	
24th	August	
25th	August	
26th		August
27th		August
28th	September	
29th	September	
30th		September

As mentioned in Chapter IV, we will base our calculations that follow on each CV 880 aircraft being received on the 15th of the month, and we will follow your instruction that May 15, 1960 would have been the first day of revenue service with CV 880 aircraft.

Our calculation of the additional number of CV 880 aircraft available for commercial service that TWA would have had with the fleet of thirty versus the fleet of twenty described in Chapter IV, is summarized as follows.

Year	Annual Average Number of CV 880 Aircraft Available for Commercial Service			
	20 CV 880s		30 CV 880 (c)	Additional, With 30 CV 880(d)
	With Contract Delivery Dates(a)	Actual (b)		
1960	10.3	-	15.4	5.1
1961	19.8	-	29.7	9.9
1962	-	20.0	30.0	10.0
1963	-	22.1	30.0	7.9

(a) From page 53.
(b) From Exhibit B.
(c) From Exhibit C.
(d) Difference.

The figure of 22.1 actual aircraft available in 1963 reflects TWA's receipt of six CV 880 aircraft in July-September 1963(from TWA Schedule 3-66M, September 30, 1963). Our estimates for this Chapter are based on the assumption you gave us that these six 1963 aircraft would have been among the thirty aircraft received in 1959-1960.

PASSENGER-MILES

Our calculation of the additional passenger-miles TWA would have recorded each year with the thirty CV 880s is similar to calculations used for Chapter IV, as follows.

Year	Additional Average Number of CV 880 Aircraft Available With 30 CV 880s (a)	Ratio, Million of Plane-Miles to Aircraft Available	Additional Plane-Miles Per Year(b) (Millions)	Seats Per Aircraft	Load Factor	Additional CV 880 Passenger-Miles With 30 CV 880s (b) (Millions)
1960	5.1	16.5/14.6(c)	5.8	88.3(c)	68.6%(c)	351
1961	9.9	16.5/14.6(c)	11.2	88.3(c)	65.5 (c)	648
1962	10.0	23.2/20.0(d)	11.6	91.9(d)	56.2 (d)	599
1963	7.9	26.4/22.1(d)	9.4	93.9(d)	57.3 (d)	506

(a) From previous page.
(b) By calculation.
(c) See pages 54 and 55 for explanatory discussion of these figures.
(d) Actuals for TWA's CV 880 fleets in these years.

SERVICE WITH THIRTY CV 880 AIRCRAFT

We believe the service operated by TWA with thirty CV 880 aircraft would have been similar to that TWA actually operated with the fleet of twenty commencing in 1961 and with the fleet of twenty-six commencing in 1963. Service operated with the fleet of twenty CV 880 aircraft is illustrated by the schedule of March 1962 with 34,547 plane-miles of daily westbound scheduled flights (see pages 57 and 58). Service operated with twenty-six aircraft is illustrated by the schedule of October 1963 with 44,086 plane-miles of daily westbound scheduled flights. The ratio of these schedules of plane-miles is comparable to the ratio of number of aircraft available, as follows:

Daily westbound scheduled plane-miles, October 1963 and March 1962:

$$\frac{44,086}{34,547} = 1.28$$

Average number of CV 880 aircraft available for commercial service, October 1963 and March 1962:

$$\frac{26.0}{20.0} = 1.30$$

TWA's October 1963 daily westbound scheduled flights with CV 880 aircraft served 36 pairs of cities, as shown by the details of an Employees' Timetable in Exhibit A. These 36 pairs of cities in October 1963 also had TWA

These 36 pairs of cities had TWA service in the period between December 1960 and October 1963 as listed below. (The plane-miles have been calculated from information in the Employees' Timetables of Exhibit A.)

	Daily Westbound Plane-Miles Scheduled Between 36 Pairs of Cities Served with CV 880 Aircraft in October 1963, by Type of Aircraft							
	B-131	B-331	B-720	CV 880	B-131B	All Jets	All Piston	Total
December 1960	18,644	740	-	-	-	19,384	35,115	54,499
March 1962	15,838	4,965	2,337	28,202	-	51,342	12,493	63,835
October 1963	17,481	1,157	-	44,086	8,495	71,219	8,424	79,643

This pattern of change in service whereby jet service increases, piston service decreases and total service increases is generally similar to that of the 30 pairs of cities analyzed for estimates of previous Chapter IV. In March 1962, using the fleet of twenty CV 880 aircraft and again in October 1963 using the fleet of twenty-six CV 880 aircraft, TWA substantially increased total service to these 36 pairs of cities as compared with the service of December 1960.

The overall change in service to these 36 pairs of cities between December 1960, which was the month before any CV 880 service started and October 1963 when the full fleet of twenty-six aircraft was in service, was as follows:

	Daily Westbound Scheduled Service Plane-Miles		
	Jet Aircraft	Piston Aircraft	Total
December 1960	19,384	35,115	54,499
October 1963	71,219	8,424	79,643
Change	+51,835	-26,691	+25,144

The reduction of piston aircraft service was 51 percent of the jet aircraft service added.

Using this pattern of changing service for the fleet of thirty CV 880 aircraft, we calculate the reduction of piston aircraft service as follows:

Year	Additional Jet Plane-Miles With 30 CV 880s (a)	Piston Plane-Miles Reduction, at 51%(b)	Seats Per Average Piston Aircraft(c)	Average Piston Aircraft Load Factor(c)	Passenger-Miles for Reduced Piston Service(b)
	(Millions)	(Millions)			(Millions)
1960	5.8	3.0	68.0	60.2%	123
1961	11.2	5.7	68.3	60.4	235
1962	11.6	5.9	67.9	61.7	247
1963	9.4	4.8	68.2	59.6	195

(a) From page 67.
(b) By calculation.
(c) Calculated from data in TWA's Schedule 3-70M.

REVENUE INCREASE

The foregoing changes in passenger-miles, at TWA's average yields, would have produced a passenger revenue increase as follows:

Year	Passenger-Miles			Average Yield (d)	Net Increase of Passenger Revenue(c)
	Additional CV 880(a)	Deleted Piston (b)	Net Increase (c)		
	(M i l l i o n s)				(Millions)
1960	351	123	228	5.645¢	$12.9
1961	648	235	413	5.882	24.3
1962	599	247	352	6.104	21.5
1963	506	195	311	5.845	18.2

(a) From page 67.
(b) From table above.
(c) By calculation.
(d) From page 30.

Using the 5 percent additional revenue for various kinds of cargo including mail, express, freight and excess (weight) baggage as mentioned on pages 63 and 31, we calculated additional revenue for these types of cargo and total additional revenue with a fleet of thirty CV 880 aircraft, as fol-

Year	Additional Passenger Revenue(a)	Additional Revenue from Various Types of Cargo, at 5%(b)	Total Additional Revenue(c)
	(Millions)		
1960	$12.9	$0.6	$13.5
1961	24.3	1.2	25.5
1962	21.5	1.1	22.6
1963	18.2	0.9	19.1

(a) From previous page.
(b) By calculation.
(c) By addition.

OPERATING EXPENSES

We estimated changes in Operating Expenses that would have occurred if TWA had received a fleet of thirty CV 880 aircraft rather than twenty aircraft generally in accordance with the method and considerations used for expense estimates of previous Chapters of this report. The details of our estimates are set forth in Exhibit J. The table below summarizes these estimates.

Estimated Changes in Operating Expenses That Would Have Occurred if TWA had Received Thirty CV 880 Aircraft

Operating Expense	1960	1961	1962	1963
	(Millions)			
Flying Operations	$ +2.2	$ +4.2	$ +4.2	$ +3.1
Maintenance	+1.8	+3.6	+3.9	-
Aircraft Servicing	+0.6	+1.2	+1.3	+1.1
Passenger Service	+1.0	+1.9	+1.6	+1.4
Traffic Servicing	+0.8	+1.5	+1.5	+1.3
Servicing Administration	+0.1	+0.1	+0.1	+0.1
Promotion and Sales	+1.3	+2.6	+2.4	+2.2
General and Administrative	+0.3	+0.8	+0.6	+0.5
Depreciation and Amortization(A)	+2.7	+5.7	+5.4	+4.4
	$+10.8	$+21.6	$+21.0	$+14.1

(A) Furnished by Price Waterhouse & Co.

GAIN OR LOSS FROM OPERATIONS

We calculate the change in Gain or Loss from Operations that would have been the result of TWA receiving thirty rather than twenty CV 880 aircraft as follows:

Year	Additional Revenue(a)	Additional Expense(b)	Improvement In Gain or Loss from Operations(c)
	(Millions)		
1960	$13.5	$10.8	$2.7
1961	25.5	21.6	3.9
1962	22.6	21.0	1.6
1963	19.1	14.1	5.0

(a) From table at top of page 71.
(b) From table at bottom of page 71.
(c) By subtraction.

CHAPTER VI

FINANCIAL GAIN OR LOSS FROM OPERATIONS SUMMARY

The foregoing estimates of change in TWA's Financial Gain or Loss from Operations (also called Operating Profit) are summarized in the following table for the changes in jet aircraft ownership, numbers and receipt dates.

Change in Jet Aircraft	Change in Gain or Loss from Operations				
	1959	1960	1961	1962	1963
	(Millions)				
I- Ownership rather than lease of 15 B-131 and 12 B-331 jets	$ +3.4	$ +7.9	-	-	-
II- Six additional B-331 jets	+0.3	+16.0	$ +3.7	$+2.0	$-0.2
III- Earlier receipt of 15 B-131 and 18 B-331 jets	+6.9	+3.2	-	-	-
IV- Receipt of 20 CV 880 jets on dates in purchase contract	-	+4.0	+2.4	-	-
V- Fleet of 30 rather than 20 CV 880 jets	-	+2.7	+3.9	+1.6	+5.0
Annual Totals	$+10.6	$+33.8	$+10.0	$+3.6	$+4.8

In addition to the estimated changes listed above, Price Waterhouse & Co. calculated for the assumptions you gave us for Chapters I through V changes in Depreciation and Amortization Expense for other years affecting the Gain or Loss from Operations as follows:

Calculated by Price Waterhouse & Co.					
I- Ownership rather than lease of 15 B-131 and 12 B-331 jets	-	-	$ +1.0	$+0.1	$+0.3
II- Six additional B-331 jets	-	-	-	-	-
III- Earlier receipt of 15 B-131 and 18 B-331 jets	-	-	-0.1	-	-0.3
IV- Receipt of 20 CV 880 jets on dates in purchase contract	-	-	-	+0.8	-0.6
V- Fleet of 30 rather than 20 CV 880 jets	-	-	-	-	-
Annual Totals	-	-	$ +0.9	$+0.9	$-0.6
Grand Total	$+10.6	$+33.8	$+10.9	$+4.5	$+4.2

Total for All Years: $+64.0

Respectfully submitted,

Coverdale & Colpitts

Consulting Engineers

TWA Ex. 4(c)(4)
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

REPORT ON
FINANCIAL RESULTS FROM OPERATIONS
FOR
TRANS WORLD AIRLINES, INC.
1959 – 1963

MAY 2, 1966

Volume IV
Exhibits B Through J

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TWA Ex. 4(c)(4)
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

TABLE OF CONTENTS

VOLUME IV
Exhibits B Through J

Exhibit B (2 Sheets)
Average Number of Jet Aircraft Available for Commercial Service Each Month, 1959-1963, By Type of Aircraft, for the Domestic and International Divisions and the System, Actual, from TWA Operating Statistics

Exhibit C (5 Sheets)
Revised Average Number of Jet Aircraft Available for Commercial Service, for Additional Jet Aircraft and Earlier Receipt Dates

Exhibit D (2 Sheets)
Additional Annual Average Number of B-331 Jet Aircraft Available for Commercial Service Each Month, 1959-1963 for the Domestic and International Divisions and System Calculated for Six Additional B-331 Jet Aircraft, Using PAA's Receipt Dates

Exhibit E (4 Sheets)
General Description of Expenses Allocated to CAB Functional Classifications Based on Section 11, CAB Uniform System of Accounts and Reports, June 1, 1961

Exhibit F (64 Sheets)
Calculation Details for Operating Expense Changes, Chapter II, for Six Additional B-331 Aircraft
Sheets 1 and 2 - Introduction
Sheets 3 through 5 - International Division, 1959
Sheets 6 through 12 - International Division, 1960
Sheets 13 through 20 - Domestic Division, 1960
Sheets 21 through 27 - International Division, 1961
Sheets 28 through 35 - Domestic Division, 1961
Sheets 36 through 42 - International Division, 1962
Sheets 43 through 50 - Domestic Division, 1962
Sheets 51 through 56 - International Division, 1963
Sheets 57 through 64 - Domestic Division, 1963

Exhibit G (35 Sheets)
Calculation Details for Operating Expense Changes, Chapter III, for Earlier Receipt of B-131 and B-331 Aircraft
Sheets 1 and 2 - Introduction
Sheets 3 through 11 - Domestic Division, 1959
Sheets 12 through 19 - International Division, 1959
Sheets 20 through 27 - Domestic Division, 1960
Sheets 28 through 35 - International Division, 1960

Exhibit H (19 Sheets)
Calculation Details for Operating Expense Changes, Chapter IV, for Receipt of CV 880 Aircraft on Contract Delivery Dates
Sheet 1 - Introduction
Sheets 2 through 10 - Domestic Division, 1960
Sheets 11 through 19 - Domestic Division, 1961

Exhibit J (36 Sheets)
Calculation Details for Operating Expense Changes, Chapter V, for a Fleet of Thirty CV 880 Aircraft
Sheets 1 and 2 - Introduction
Sheets 3 through 10 - Domestic Division, 1960
Sheets 11 through 19 - Domestic Division, 1961

TWA Ex. 4(c)(4), Exhibit C, page 1 of 5
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

REVISED AVERAGE NUMBER OF JET AIRCRAFT AVAILABLE FOR COMMERCIAL SERVICE, FOR ADDITIONAL JET AIRCRAFT AND EARLIER RECEIPT DATES

We calculated the revised monthly and annual average number of jet aircraft TWA would have had available for commercial service if TWA had the additional jet aircraft and the earlier receipt dates for jet aircraft mentioned on Introduction page 3. We made these calculations for each type of jet aircraft in accordance with the procedure which is set forth in TWA's Statistics Procedure Manual, pages:

04.40.13	04.02.31	04.02.37
04.40.14	04.02.32	04.02.38
04.40.11	04.02.33	04.02.39
04.40.25	04.02.34	04.02.40
04.02.30	04.02.35	04.02.41
	04.02.36	04.02 42

For our calculations we used:

(a) The revised numbers of jet aircraft and earlier receipt dates tabulated on following pages, (and mentioned on Introduction page 3) as given to us by Cahill, Gordon, Reindel & Ohl.

(b) Our estimates of the first day each new aircraft would have been placed in commercial service, for the additional aircraft and aircraft received on earlier dates. These estimates are based on TWA's and in some instances, other air lines' actual time interval between receipt and commercial service of aircraft.

(c) Our selection of a 15th of the month date for CV 880 aircraft described to us as being received in a particular month but not on a specific date within the month.

(d) Actual or a proportionate number of aircraft-days not used because of strikes, aircraft on lease to Northeast Airlines or aircraft out of service for other causes.

(e) Assignment of B-331 and B-331B fleets to Domestic and International Division service in proportion to the actual assignment of these types of aircraft to each Division's service.

REVISED AIRCRAFT RECEIPT DATES,

INCLUDING ADDITIONAL AND/OR EARLIER JETS

Type	Delivery Sequence	Receipt Date
B-131	1	November 30, 1958
	2	December 31, 1958
	3	January 31, 1959
	4	February 27, 1959
	5	March 30, 1959
	6	April 3, 1959
	7	April 18, 1959
	8	May 10, 1959
	9	May 13, 1959
	10	May 24, 1959
	11	May 28, 1959
	12	June 13, 1959
	13	June 29, 1959
	14	July 10, 1959
	15	July 27, 1959
B-331	1	July 19, 1959
	2	August 22, 1959
	3	August 28, 1959
	4	September 22, 1959
	5	October 6, 1959
	6	October 27, 1959
	7	November 5, 1959
	8	November 10, 1959
	9	December 15, 1959
	10	December 30, 1959
	11	January 18, 1960
	12	February 29, 1960
	13	March 23, 1960
	14	April 26, 1960
	15	April 29, 1960
	16	May 9, 1960
	17	June 8, 1960
	18	July 1, 1960

Type	Delivery Sequence	Receipt Date
CV 880	1	November, 1959
	2	December, 1959
	3	January, 1960
	4	February, 1960
	5	February, 1960
	6	March, 1960
	7	March, 1960
	8	April, 1960
	9	April, 1960
	10	April, 1960
	11	May, 1960
	12	May, 1960
	13	May, 1960
	14	June, 1960
	15	June, 1960
	16	June, 1960
	17	June, 1960
	18	July, 1960
	19	July, 1960
	20	July, 1960
	21	July, 1960
	22	July, 1960
	23	August, 1960
	24	August, 1960
	25	August, 1960
	26	August, 1960
	27	August, 1960
	28	September, 1960
	29	September, 1960
	30	September, 1960

(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

ADDITIONAL ANNUAL AVERAGE NUMBER OF B-331 JET AIRCRAFT AVAILABLE FOR COMMERCIAL SERVICE EACH MONTH, 1959-1963 FOR THE DOMESTIC AND INTERNATIONAL DIVISIONS AND SYSTEM CALCULATED FOR SIX ADDITIONAL B-331 JET AIRCRAFT, USING PAA'S RECEIPT DATES

(Source: Pages 10, 12, 13 and Exhibit C)

Period	International Division	Domestic Division	System
1959			
January			
February			
March			
April			
May			
June			
July			
August			
September			
October			
November	0.6	-	0.6
December	2.0	-	2.0
Annual Average	0.2	-	0.2
1960			
January	2.1	0.9	3.0
February	2.1	0.9	3.0
March	2.3	1.0	3.3
April	2.9	1.2	4.1
May	3.6	1.4	5.0
June	4.1	1.7	5.8
July	4.3	1.7	6.0
August	4.3	1.7	6.0
September	4.3	1.7	6.0
October	4.3	1.7	6.0
November	4.3	1.7	6.0
December	4.3	1.7	6.0
Annual Average	3.6	1.4	5.0
1961			
January	3.8	2.2	6.0
February(Strike)	3.1	1.9	5.0
March	3.8	2.2	6.0
April	3.8	2.2	6.0
May	3.8	2.2	6.0
June	3.8	2.2	6.0
July	3.8	2.2	6.0
August	3.8	2.2	6.0
September	3.8	2.2	6.0
October	3.8	2.2	6.0
November	3.8	2.2	6.0
December	3.8	2.2	6.0
Annual Average	3.7	2.2	5.9

ADDITIONAL ANNUAL AVERAGE NUMBER OF B-331 JET AIRCRAFT AVAILABLE FOR COMMERCIAL SERVICE EACH MONTH, 1959-1963 FOR THE DOMESTIC AND INTERNATIONAL DIVISIONS AND SYSTEM CALCULATED FOR SIX ADDITIONAL B-331 JET AIRCRAFT, USING PAA'S RECEIPT DATES

(Source: Pages 10, 12, 13 and Exhibit C)

Period	International Division	Domestic Division	System
1962			
January	4.9	1.1	6.0
February	4.9	1.1	6.0
March	4.9	1.1	6.0
April	4.9	1.1	6.0
May	4.9	1.1	6.0
June	4.9	1.1	6.0
July	4.9	1.1	6.0
August	4.9	1.1	6.0
September	4.9	1.1	6.0
October	4.9	1.1	6.0
November	4.9	1.1	6.0
December	4.9	1.1	6.0
Annual Average	4.9	1.1	6.0
1963			
January	5.2	0.8	6.0
February	5.2	0.8	6.0
March	5.2	0.8	6.0
April	5.2	0.8	6.0
May	5.2	0.8	6.0
June	5.2	0.8	6.0
July	5.2	0.8	6.0
August	5.2	0.8	6.0
September	5.2	0.8	6.0
October	5.2	0.8	6.0
November	5.2	0.8	6.0
December	5.2	0.8	6.0
Annual Average	5.2	0.8	6.0

GENERAL DESCRIPTION OF EXPENSES ALLOCATED TO CAB FUNCTIONAL CLASSIFICATIONS BASED ON SECTION 11, CAB UNIFORM SYSTEM OF ACCOUNTS AND REPORTS, JUNE 1, 1961

Flying Operations, CAB Account 5100

Expenses incurred directly for the in-flight operation of aircraft and expenses attaching to the holding of aircraft and aircraft operational personnel in readiness for assignment to an in-flight status.

This includes flight crew salaries, group health and retirement benefits, flight crew training including instructors, payroll taxes, fuel and oil, aircraft hull insurance and aircraft rentals.

Maintenance, CAB Account 5400

Direct Maintenance, CAB Account 5200

The costs of labor, materials and outside services consumed directly in periodic maintenance operations and the maintenance and repair of property and equipment of all types and classes, regardless of the location at which incurred.

This includes costs incurred directly in overhaul, maintenance and repair of air-frames and aircraft engines and related flight equipment.

Maintenance Burden, CAB Account 5300

The overhead or general expenses used directly for the activities involved in periodic maintenance operations and the maintenance and repair of property and equipment of all types and classes, including the cost of direct labor, materials and outside services used in the maintenance and repair of Maintenance and Engineering Equipment and Maintenance Buildings and Improvements. It also includes expenses related to the administration of maintenance stocks and stores, the keeping of pertinent maintenance operations records, and the scheduling, controlling, planning and supervision of maintenance operations.

Also costs of shop supplies and expendable small tools used in maintaining and servicing equipment when not directly assignable to a specific repair job, group health and retirement benefits, payroll taxes, vacation pay and maintenance training related to direct labor personnel.

Passenger Service, CAB Account 5500

Expenses chargeable directly to activities contributing to the comfort, safety and convenience of passengers while in flight and when flights are interrupted.

It includes salaries and related payroll expenses of hostesses and pursers and of ground supervisory and administrative personnel, hostess and purser training, in-flight food and supplies and passenger liability insurance.

Aircraft and Traffic Services, CAB Account 6400

Aircraft Servicing, CAB Account 6100

These expenses are the salaries and related payroll expenses of ground personnel and other expenses incurred on the ground incident to the protection and control of the in-flight movement of aircraft, scheduling or preparing aircraft operational crews for flight assignment, landing and parking aircraft, routine checking, servicing and fueling aircraft and other expenses incurred on the ground incident to readying for take-off and arrival of aircraft.

Traffic Servicing, CAB Account 6200

The compensation of ground personnel and other expenses incurred on the ground incident to handling traffic of all types and classes on the ground subsequent to the issuance of tickets.

Also expenses attributable to the operation of airport traffic offices and expenses incurred both in enplaning and deplaning traffic as well as expenses incurred in preparation for enplanement and all expenses subsequent to deplanement.

Servicing Administration, CAB Account 6300

Expenses of a general nature incurred in performing supervisory or administrative activities relating solely and in common to subfunctions 6100 Aircraft Servicing and 6200 Traffic Servicing.

Promotion and Sales, CAB Account 6700

Reservations and Sales, CAB Account 6500

Expenses incident to direct sales solicitation, documenting sales, controlling and arranging or confirming aircraft space sold, and in developing tariffs and schedules for publication and expenses attributable to the operation of city ticket offices. Travel agents' commissions also are included in this classification.

Advertising and Publicity, CAB Account 6600

Expenses incurred in creating public preference for the air carrier and its services; stimulating development of the air transport market; and promoting the air carrier or developing air transportation generally.

It includes the cost of newspaper, radio and other advertising media and publicity and the salaries and related payroll expenses of administrative personnel responsible for advertising and publicity functions.

General and Administrative, CAB Account 6800

Expenses of a general corporate nature and expenses incurred in performing activities which contribute to more than one of the above functions such as financial accounting and purchasing activities, corporate legal matters and general operational administration not directly applicable to a specific area of functional responsibility.

Depreciation and Amortization, CAB Account 7000

Charges to record losses suffered through current exhaustion of the serviceability of property and equipment due to wear and tear from use and the action of time and the elements, which are not replaced by current repairs, as well as losses in serviceability occasioned by obsolescence, supersession, discoveries, change in popular demand or action by public authority. It also includes charges for the amortization of capitalized developmental and preoperating costs including training flight crews and other personnel in connection with the acquisition of new types of aircraft.

CALCULATION DETAILS FOR OPERATING EXPENSE CHANGES, CHAPTER II

FOR SIX ADDITIONAL B-331 AIRCRAFT

For our calculations of operating expense changes that would have occurred if TWA had received the six additional B-331 jet aircraft on the PAA receipt dates as mentioned on page 10, we used operating statistics and financial results mentioned in the text of Chapter II and the following which were not mentioned in the text.

	1959	1960	1961	1962	1963
	(Millions)				
International Division					
Plane-miles(a)					
B-331 aircraft	0.2	10.7	13.0	17.3	16.8
B-331B aircraft	-	-	-	0.1	7.6
L-1649A aircraft(b)	17.0	6.8	4.8	-	-
Division Total(b)	23.6	19.2	17.8	20.2	27.3
Transportation Revenue(c)	$73.6	$ 98.4	$ 81.7	$100.8	$131.3
Domestic Division					
Plane-miles(d)					
B-331 aircraft		3.8	6.5	3.0	2.8
B-331B aircraft		-	-	-	0.4
L-1649A aircraft		7.8	-	-	-
L-1049G aircraft		-	10.3	10.0	9.4
Division Total(b)		91.0	85.6	89.9	99.6
Passenger Revenue(e)		$253.3	$252.2	$273.0	$311.8
Transportation Revenue(e)		$275.5	$276.1	$298.5	$341.5

(a) Calculated annual summaries of figures shown in Monthly Operating Statistics, Schedule 3-71M (Report 3-453M since October 1963).
(b) Including all-cargo plane-miles.
(c) From TWA December Financial Reports, Schedule 2-2M (Report 2-2M since October 1963).
(d) Calculated annual summaries of figures shown in Monthly Operating Statistics, Schedule 3-70M (Report 3-452M since October 1963).
(e) From TWA December Financial Reports, Schedule 2-1M (Report 2-1M since October 1963).

To obtain annual figures of the estimated net change in plane-miles, we subtracted the estimated decrease in piston plane-miles listed on page 29 from the estimated additional B-331 plane-miles listed on page 28 as follows:

	1960	1961	1962	1963
	(Millions)			
Domestic Division				
Additional B-331 plane-miles(a)	2.0	3.3	1.4	0.7
Piston plane-miles decrease(b)	2.9	4.2	0.9	0.2
Net Change	-0.9	-0.9	+0.5	+0.5

(a) From page 28.
(b) From page 29.

To obtain simulated Transportation Revenue figures for each Division, we apportioned to each Division the estimated additional revenue for cargo including mail, express, freight and excess baggage listed on page 33, as follows:

Year	Estimated Additional Mail, Express, Freight, Excess Baggage Revenue(a)	Estimated Additional Passenger Revenue		Apportionment of Additional Mail, Express, Freight, Excess Baggage Revenue		Simulated Additional Transportation Revenue	
		International Division (b)	Domestic Division (c)	International Division	Domestic Division	International Division	Domestic Division
	(Millions)						
1960	$1.0	$18.9	$1.9	$0.9	$0.1	$19.8	$2.0
1961	1.1	20.4	1.4	1.0	0.1	21.4	1.5
1962	1.6	29.5	2.0	1.5	0.1	31.0	2.1
1963	0.4	5.3	1.9	0.3	0.1	5.6	2.0

(a) From page 33.
(b) From page 27.
(c) From page 30.

The pages that follow set forth the details of our calculations of operating expense changes with the six additional B-331 jet aircraft for the International and Domestic Divisions for the years 1959-1963.

CALCULATION DETAILS FOR CHAPTER II

INTERNATIONAL DIVISION, 1959

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
FLYING OPERATIONS EXPENSE		
For B-331 Jet Aircraft	$ 0.2	$+0.1

This expense was incurred for operating B-331 aircraft 0.2 million plane-miles (Exhibit F, Sheet 1). We estimate the additional 0.1 million B-331 plane-miles mentioned on page 15 would have increased this expense proportionately. The calculation is:

$$\$0.2 \times \frac{0.1}{0.2} = \$0.1 \text{ million increase}$$

For L-1649A Piston Aircraft		
A. Pilots and copilots, other flight personnel, personnel expenses, aircraft fuels, aircraft oils, taxes-other than payroll, insurance-employee welfare, taxes-payroll and various miscellaneous expenses	$17.4	$-0.1

This expense was incurred for operating L-1649A aircraft 17.0 million plane-miles (Exhibit F, Sheet 1). We estimate the reduction of 0.1 million L-1649A plane-miles mentioned on page 17 would have decreased this Group A expense proportionately. The calculation is:

$$\$17.4 \times \frac{0.1}{17.0} = \$0.1 \text{ million decrease}$$

B. Purchased public liability and property damage insurance	$ 0.7	NC
Total, L-1649A Aircraft	$18.1	$-0.1
For Other Aircraft and Generally Nonrevenue	$10.1	NC
Total Flying Operations Expense	$28.4	NC

NC - No significant change estimated for these expenses.

TWA Ex. 4(c)(4), Exhibit F, page 4 of 64
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER II

INTERNATIONAL DIVISION, 1959

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
MAINTENANCE EXPENSE		
Direct Maintenance Expense		
For B-331 Jet Aircraft Flight Equipment	$ 0.2	$+0.1

This expense was incurred for operating B-331 aircraft 0.2 million plane-miles (Exhibit F, Sheet 1). We estimate the additional 0.1 million B-331 plane-miles mentioned on page 15 would have increased this expense proportionately. The calculation is:

$$\$0.2 \times \frac{0.1}{0.2} = \$0.1 \text{ million increase}$$

For L-1649A Piston Aircraft Flight Equipment	$ 5.9	NC
For Other Aircraft and Generally Nonrevenue	$ 2.5	NC
For General Ground Property and Equipment	$ 0.2	NC
Total Direct Maintenance Expense	$ 8.8	$+0.1
Applied Maintenance Burden Expense		
For B-331 Jet Aircraft Flight Equipment	$ 0.1	$+0.1(a)

This $0.1 million B-331 Applied Maintenance Burden expense was incurred in connection with the $0.2 million B-331 Direct Maintenance expense shown above. We estimate the $0.1 million increase for B-331 Direct Maintenance would have been accompanied by a proportionate increase in Applied Maintenance Burden. The calculation is:

$$\$0.1 \times \frac{\$0.1}{\$0.2} = \$0.05 \text{ million increase(a)}$$

For L-1649A Piston Aircraft Flight Equipment	$ 3.4	NC
For Other Aircraft and Generally Nonrevenue	$ 1.3	NC
For General Ground Property and Equipment	$ 0.1	NC
Total Applied Maintenance Burden Expense	$ 4.9	$+0.1
Total Maintenance Expense	$13.7	$+0.2

(a) The actual calculation is $0.05 million which we have rounded to $0.1 million.

TWA Ex. 4(c)(4), Exhibit F, page 5 of 64
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER II

INTERNATIONAL DIVISION, 1959

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
AIRCRAFT SERVICING EXPENSE	$ 7.2	
PASSENGER SERVICE EXPENSE	$ 5.4	
TRAFFIC SERVICING EXPENSE	$ 3.1	
SERVICING ADMINISTRATION EXPENSE	$ 0.8	
GENERAL AND ADMINISTRATIVE EXPENSE	$ 3.1	
Total for these Expenses	$19.6	NC

This expense was incurred in connection with operating 23.6 million plane-miles and transportation revenues of $73.6 million (Exhibit F, Sheet 1). Assuming the additional B-331 aircraft, we estimated no change in total plane-miles (page 18) and a very small increase of $0.6 million in revenues (page 33), and we estimate no significant change in the above-listed expenses.

PROMOTION AND SALES EXPENSE	$11.3	$+0.1

This $11.3 million expense was incurred in connection with $59.5 million passenger revenues (page 27). For the $0.6 million increase in passenger revenues mentioned on page 27 , we estimate a proportionate increase in Promotion and Sales expense. The calculation is:

$$\$11.3 \times \frac{\$\ 0.6}{\$59.5} = \$0.1 \text{ million increase}$$

DEPRECIATION AND AMORTIZATION EXPENSE		
For flight equipment including airframes, engines, spares, other flight equipment and expendable spare parts obsolescence	$ 8.2	NC
For ground property and equipment	$ 0.8	NC
For amortization of developmental and pre-operating expense	$ 0.7	NC
Total Depreciation and Amortization Expense	$ 9.7	NC

Note: These figures were given to us by Price Waterhouse & Co.

TOTAL OPERATING EXPENSE	$82.7	$+0.3

TWA Ex. 4(c)(4), Exhibit F, page 6 of 64
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER II

INTERNATIONAL DIVISION, 1960

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
FLYING OPERATIONS EXPENSE		
For B-331 Jet Aircraft		
A. Pilots and copilots, other flight personnel, personnel expenses, aircraft fuels, aircraft oils, taxes-other than payroll, insurance-employee welfare, taxes-payroll and various miscellaneous expenses	$ 8.9	$+5.2

This expense was incurred for operating B-331 aircraft 10.7 million plane-miles (Exhibit F, Sheet 1). We estimate the additional 6.3 million B-331 plane-miles mentioned on page 15 would have increased this Group A expense proportionately. The calculation is:

$$\$8.9 \times \frac{6.3}{10.7} = \$5.2 \text{ million increase}$$

B. Purchased public liability and property damage insurance	$ 0.9	$+0.5

This expense is primarily for aircraft hull insurance for 6.1 B-331 aircraft available for commercial service (page 11). We estimate the 3.6 increase in the number of available aircraft mentioned on page 13 would have increased this insurance expense proportionately. The calculation is:

$$\$0.9 \times \frac{3.6}{6.1} = \$0.5 \text{ million increase}$$

Total B-331 Flying Operations Expense	$ 9.8	$+5.7
For L-1649A Piston Aircraft		
A. Pilots and copilots, other flight personnel, personnel expenses, aircraft fuels, aircraft oils, taxes-other than payroll, insurance-employee welfare, taxes-payroll and various miscellaneous expenses	$ 8.0	$-6.0

This expense was incurred for operating L-1649A aircraft 6.8 million plane-miles (Exhibit F, Sheet 1). We estimate the reduction of 5.1 million L-1649A plane-miles mentioned on page 17 would have decreased this Group A expense proportionately. The calculation is:

$$\$8.0 \times \frac{5.1}{6.8} = \$6.0 \text{ million decrease}$$

CALCULATION DETAILS FOR CHAPTER II

INTERNATIONAL DIVISION, 1960

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
B. Purchased public liability and property damage insurance	$ 0.2	NC
Total L-1649A Flying Operations Expense	$ 8.2	$-6.0
For Other Aircraft	$ 3.1	NC
For Generally Nonrevenue	$ 0.5	NC
Total Flying Operations Expense	$21.6	$-0.3

MAINTENANCE EXPENSE

Direct Maintenance Expense

For B-331 Jet Aircraft Flight Equipment	$ 3.9	$+2.3

This expense was incurred for operating B-331 aircraft 10.7 million plane-miles (Exhibit F, Sheet 1). We estimate the additional 6.3 million B-331 plane-miles mentioned on page 15 would have increased this expense proportionately. The calculation is:

$$\$3.9 \times \frac{6.3}{10.7} = \$2.3 \text{ million increase}$$

For L-1649A Piston Aircraft Flight Equipment	$ 3.3	$-2.5

This expense was incurred for operating L-1649A aircraft 6.8 million plane-miles (Exhibit F, Sheet 1). We estimate the reduction of 5.1 million L-1649A plane-miles mentioned on page 17 would have decreased this expense proportionately. The calculation is:

$$\$3.3 \times \frac{5.1}{6.8} = \$2.5 \text{ million decrease}$$

For Other Aircraft	$ 0.5	NC
For Generally Nonrevenue	$ 0.1	NC
For General Ground Property and Equipment	$ 0.2	NC
Total Direct Maintenance Expense	$ 8.0	$-0.2

TWA Ex. 4(c)(4), Exhibit F, page 8 of 64
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER II

INTERNATIONAL DIVISION, 1960

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
Applied Maintenance Burden Expense For B-331 Jet Aircraft Flight Equipment	$ 1.5	$+0.9

This $1.5 million B-331 Applied Maintenance Burden expense was incurred in connection with $3.9 million B-331 Direct Maintenance expense shown on the previous page. We estimate the $2.3 million increase for B-331 Direct Maintenance expense (previous page) would have been accompanied by a proportionate increase in Applied Maintenance Burden expense. The calculation is:

$$\$1.5 \times \frac{\$2.3}{\$3.9} = \$0.9 \text{ million increase}$$

For L-1649A Piston Aircraft Flight Equipment	$ 2.2	$-1.7

This $2.2 million L-1649A Applied Maintenance Burden expense was incurred in connection with $3.3 million L-1649A Direct Maintenance expense shown on the previous page. We estimate the $2.5 million decrease in L-1649A Direct Maintenance expense (previous page) would have been accompanied by a proportionate decrease of Applied Maintenance Burden expense. The calculation is:

$$\$2.2 \times \frac{\$2.5}{\$3.3} = \$1.7 \text{ million decrease}$$

For Other Aircraft	$ 0.6	NC
For Generally Nonrevenue	#	NC
For General Ground Property and Equipment	$ 0.1	NC
Total Applied Maintenance Burden Expense	$ 4.4	$-0.8
Total Maintenance Expense	$12.4	$-1.0

This symbol is used to designate an amount too small to be significant in these estimates which are rounded to the nearest $0.1 million.

CALCULATION DETAILS FOR CHAPTER II

INTERNATIONAL DIVISION, 1960

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
AIRCRAFT SERVICING EXPENSE		
A. Aircraft control personnel, trainees and instructors, rentals, landing fees, shop and servicing supplies, insurance-employee welfare and taxes-payroll	$ 3.5	$+0.2

This expense was incurred in connection with operating 19.2 million plane-miles (Exhibit F, Sheet 1). We estimate the 1.2 million plane-miles net increase mentioned on page 18 would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$3.5 \times \frac{1.2}{19.2} = \$0.2 \text{ million increase}$$

B. General aircraft and traffic handling personnel, communications personnel, record keeping and statistical personnel, personnel expenses, communications purchased, other services-outside, other supplies and various miscellaneous expenses	$ 3.5	NC
Total Aircraft Servicing Expense	$ 7.0	$+0.2
PASSENGER SERVICE EXPENSE		
A. Other flight personnel, other personnel, personnel expenses and taxes-payroll	$ 2.7	$+0.2

This expense was incurred in connection with operating 17.7 million plane-miles (page 14). We estimate the 1.2 million plane-miles net increase mentioned on page 18 would have been accompanied by a proportionate increase of this Group A expense. The calculation is:

$$\$2.7 \times \frac{1.2}{17.7} = \$0.2 \text{ million increase}$$

B. Passenger food expense, other supplies, insurance-traffic liability and other services-outside	$ 2.8	$+0.6

This expense was incurred in connection with passenger traffic producing $82.0 million revenue (page 27). We estimate the $18.9 million increase in revenue from passengers mentioned on page 27 would have been accompanied by a proportionate increase in this Group B expense. The calculation is:

$$\$2.8 \times \frac{\$18.9}{\$82.0} = \$0.6 \text{ million increase}$$

CALCULATION DETAILS FOR CHAPTER II

INTERNATIONAL DIVISION, 1960

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
Interrupted trips expense and various miscellaneous expenses	$ 0.2	NC
Total Passenger Service Expense	$ 5.7	$+0.8

TRAFFIC SERVICING EXPENSE

A. General aircraft and traffic handling personnel, passenger handling personnel, cargo handling personnel, other services-outside, rentals, other supplies and taxes-payroll — $ 2.4 — $+0.5

This expense was incurred in connection with $98.4 million transportation revenues (Exhibit F, Sheet 1). We estimate the $19.8 million increase in simulated transportation revenue (Exhibit F, Sheet 2) would have been accompanied by a proportionate increase of this Group A expense. The calculation is:

$$\$2.4 \times \frac{\$19.8}{\$98.4} = \$0.5 \text{ million increase}$$

B. Stationery, printing and office supplies, clearance, customs and duties, other expenses and various miscellaneous expenses — $ 0.8 — NC

Total Traffic Servicing Expense — $ 3.2 — $+0.5

SERVICING ADMINISTRATION EXPENSE

Total Servicing Administration Expense — $ 0.9 — $+0.1

This expense was incurred in connection with Aircraft Servicing and Traffic Servicing expense of $7.0 and $3.2 million, respectively (previous page and above). We estimate the increases in Aircraft and Traffic Servicing expense of $0.2 and $0.5 million respectively (previous page and above) would have been accompanied by a proportionate increase in the Servicing Administration expense. The calculation is:

$$\$0.9 \times \frac{(\$0.2+\$0.5)}{(\$7.0+\$3.2)} = \$0.1 \text{ million increase}$$

Total Servicing Administration Expense — $ 0.9 — $+0.1

CALCULATION DETAILS FOR CHAPTER II

INTERNATIONAL DIVISION, 1960

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
PROMOTION AND SALES EXPENSE		
Reservations and Sales		
A. General aircraft and traffic handling personnel, passenger handling personnel, record keeping and statistical personnel, traffic solicitors, other personnel, personnel expenses, commissions-passenger, communications purchased, commissions-property, rentals, other expenses, insurance-employee welfare and taxes-payroll	$11.1	$+2.2

This expense was incurred in connection with $98.4 million transportation revenues (Exhibit F, Sheet 1). We estimate the $19.8 million increase in simulated transportation revenue (Exhibit F, Sheet 2) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$11.1 \times \frac{\$19.8}{\$98.4} = \$2.2 \text{ million increase}$$

B. Communications personnel, general management personnel, light, heat, power and water, other services-outside, other supplies, stationery, printing and office supplies and various miscellaneous expenses	$ 0.8	NC
Total Reservations and Sales Expense	$11.9	$+2.2
Advertising and Publicity		
A. Other personnel, advertising and tariffs, schedules and timetables	$ 4.0	$+0.8

This expense was incurred in connection with $98.4 million transportation revenue (Exhibit F, Sheet 1). We estimate the $19.8 million increase in simulated transportation revenue (Exhibit F, Sheet 2) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$4.0 \times \frac{\$19.8}{\$98.4} = \$0.8 \text{ million increase}$$

B. Other promotional and publicity expenses, professional and technical fees and expenses and various miscellaneous expenses	$ 0.6	NC
Total Advertising and Publicity Expense	$ 4.6	$+0.8
Total Promotion and Sales Expense	$16.5	$+3.0

CALCULATION DETAILS FOR CHAPTER II

INTERNATIONAL DIVISION, 1960

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
GENERAL AND ADMINISTRATIVE EXPENSE		
A. Record keeping and statistical personnel, purchasing personnel, other personnel, personnel expenses, rentals, stationery, printing and office supplies, insurance-employee welfare and taxes-payroll	$ 2.6	$+0.5

This expense was incurred in connection with $98.4 million transportation revenue (Exhibit F, Sheet 1). We estimate the $19.8 million increase in simulated transportation revenue (Exhibit F, Sheet 2) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$2.6 \times \frac{\$19.8}{\$98.4} = \$0.5 \text{ million increase}$$

B. General management personnel, communications purchased, professional and technical fees and expenses, taxes-other than payroll, purchased public liability and property damage insurance, legal fees and expenses and various miscellaneous expenses	$ 0.9	NC
Total General and Administrative Expense	$ 3.5	$+0.5
DEPRECIATION AND AMORTIZATION EXPENSE		
A. For flight equipment including airframes, engines, spares, other flight equipment and expendable spare parts obsolescence	$ 9.4	$+2.3
B. For ground equipment including leasehold improvements	$ 0.6	NC
C. For amortization of developmental and pre-operating expense	$ 1.3	$+0.4
Total Depreciation and Amortization Expense	$11.3	$+2.7

Note: These figures were given to us by Price Waterhouse & Co.

TOTAL OPERATING EXPENSE	$82.1	$+6.5

TWA Ex. 4(c)(4), Exhibit F, page 13 of 64
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER II

DOMESTIC DIVISION, 1960

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
FLYING OPERATIONS EXPENSE		
For B-331 Jet Aircraft		
A. Pilots and copilots, other flight personnel, personnel expenses, aircraft fuels, insurance-employee welfare and various miscellaneous expenses	$ 3.2	$+1.7

This expense was incurred for operating B-331 aircraft 3.8 million plane-miles (Exhibit F, Sheet 1). We estimate the additional 2.0 million B-331 plane-miles mentioned on page 28 would have increased this Group A expense proportionately. The calculation is:

$$\$3.2 \times \frac{2.0}{3.8} = \$1.7 \text{ million increase}$$

B. Purchased public liability and property damage insurance	$ 0.3	$+0.2

This expense is primarily for aircraft hull insurance for 2.7 B-331 aircraft available for commercial service (page 28). We estimate the 1.4 increase in the available number of aircraft mentioned on page 28 would have increased this insurance expense proportionately. The calculation is:

$$\$0.3 \times \frac{1.4}{2.7} = \$0.2 \text{ million increase}$$

Total B-331 Flying Operations Expense	$ 3.5	$+1.9
For L-1649A Piston Aircraft		
A. Pilots and copilots, other flight personnel, trainees and instructors, personnel expenses, aircraft fuels, aircraft oils, taxes-other than payroll, insurance-employee welfare and various miscellaneous expenses	$ 6.7	$-2.5

This expense was incurred for operating L-1649A aircraft 7.8 million plane-miles (Exhibit F, Sheet 1). We estimate the reduction of 2.9 million L-1649A plane-miles mentioned on page 29 would have decreased this Group A expense proportionately. The calculation is:

$$\$6.7 \times \frac{2.9}{7.8} = \$2.5 \text{ million decrease}$$

CALCULATION DETAILS FOR CHAPTER II

DOMESTIC DIVISION, 1960

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
B. Purchased public liability and property damage insurance	$ 0.2	NC
Total L-1649A Flying Operations Expense	$ 6.9	$-2.5
For Other Aircraft and Generally Nonrevenue	$63.6	NC
Total Flying Operations Expense	$74.0	$-0.6

MAINTENANCE EXPENSE

Direct Maintenance Expense		
For B-331 Jet Aircraft Flight Equipment	$ 1.3	$+0.7

This expense was incurred for operating B-331 aircraft 3.8 million plane-miles (Exhibit F, Sheet 1). We estimate the additional 2.0 million B-331 plane-miles mentioned on page 28 would have increased this expense proportionately. The calculation is:

$$\$1.3 \times \frac{2.0}{3.8} = \$0.7 \text{ million increase}$$

For L-1649A Piston Aircraft Flight Equipment	$ 3.7	$-1.4

This expense was incurred for operating L-1649A aircraft 7.8 million plane-miles (Exhibit F, Sheet 1). We estimate the reduction of 2.9 million L-1649A plane-miles mentioned on page 29 would have decreased this expense proportionately. The calculation is:

$$\$3.7 \times \frac{2.9}{7.8} = \$1.4 \text{ million decrease}$$

For Other Aircraft and Generally Nonrevenue	$30.1	NC
For General Ground Property and Equipment	$ 0.8	NC
Total Direct Maintenance Expense	$35.9	$-0.7

CALCULATION DETAILS FOR CHAPTER II

DOMESTIC DIVISION, 1960

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
Applied Maintenance Burden Expense		
For B-331 Jet Aircraft Flight Equipment	$ 0.5	$+0.3

This $0.5 million B-331 Applied Maintenance Burden expense was incurred in connection with $1.3 million B-331 Direct Maintenance expense shown on the previous page. We estimate the $0.7 million increase for B-331 Direct Maintenance (previous page) would have been accompanied by a proportionate increase in Applied Maintenance Burden expense. The calculation is:

$$\$0.5 \times \frac{\$0.7}{\$1.3} = \$0.3 \text{ million increase}$$

For L-1649A Piston Aircraft Flight Equipment	$ 2.5	$-0.9

This $2.5 million L-1649A Applied Maintenance Burden expense was incurred in connection with the $3.7 million L-1649A Direct Maintenance expense shown on the previous page. We estimated the $1.4 million decrease for L-1649A Direct Maintenance expense (previous page) would have been accompanied by a proportionate decrease in Applied Maintenance Burden expense. The calculation is:

$$\$2.5 \times \frac{\$1.4}{\$3.7} = \$0.9 \text{ million decrease}$$

For Other Aircraft and Generally Nonrevenue	$20.6	NC
For General Ground Property and Equipment	$ 0.8	NC
Total Applied Maintenance Burden Expense	$24.4	$-0.6
Total Maintenance Expense	$60.3	$-1.3

TWA Ex. 4(c)(4), Exhibit F, page 16 of 64
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER II

DOMESTIC DIVISION, 1960

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
AIRCRAFT SERVICING EXPENSE		
A. General aircraft and traffic handling personnel, aircraft control personnel, trainees and instructors, personnel expenses, other services-outside, rentals, landing fees, other supplies, insurance-employee welfare and taxes-payroll	$18.5	$-0.2

This expense was incurred in connection with operating 91.0 million plane-miles (Exhibit F, Sheet 1). We estimate the net reduction of 0.9 million plane-miles (Exhibit F, Sheet 2) would have been accompanied by a proportionate decrease in this Group A expense. The calculation is:

$$\$18.5 \times \frac{0.9}{91.0} = \$0.2 \text{ million decrease}$$

B. Communications personnel, communications purchased, light, heat, power and water, other services-associated companies, shop and servicing supplies, stationery, printing and office supplies, other uncleared expense credits and various miscellaneous expenses	$ 2.9	NC
Total Aircraft Servicing Expense	$21.4	$-0.2
PASSENGER SERVICE EXPENSE		
A. Other flight personnel, other personnel, personnel expenses, insurance-employee welfare and taxes-payroll	$ 8.7	$-0.1

This expense was incurred in connection with operating 87.9 million plane-miles (page 29). We estimate the net reduction of 0.9 million plane-miles (Exhibit F, Sheet 2) would have been accompanied by a proportionate decrease in this Group A expense. The calculation is:

$$\$8.7 \times \frac{0.9}{87.9} = \$0.1 \text{ million decrease}$$

CALCULATION DETAILS FOR CHAPTER II

DOMESTIC DIVISION, 1960

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
B. Passenger food expense, other supplies, insurance-traffic liability and other services-outside	$12.9	$+0.1

This expense was incurred in connection with passenger traffic revenue of $253.3 million (Exhibit F, Sheet 1). We estimate the $1.9 million increase in revenue from passenger traffic mentioned on page 30 would have been accompanied by a proportionate increase in this Group B expense. The calculation is:

$$\$12.9 \times \frac{\$\ 1.9}{\$253.3} = \$0.1 \text{ million increase}$$

C. Trainees and instructors, interrupted trips expense, other expenses and various miscellaneous expenses	$ 0.6	NC
Total Passenger Service Expense	$22.2	NC

TRAFFIC SERVICING EXPENSE

A. General aircraft and traffic handling personnel, passenger handling personnel, cargo handling personnel, other services-outside, rentals, other supplies, insurance-employee welfare, taxes-payroll and injuries, loss and damage	$15.4	$+0.1

This expense was incurred in connection with $275.5 million transportation revenue (Exhibit F, Sheet 1). We estimate the $2.0 million increase in simulated transportation revenue (Exhibit F, Sheet 2) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$15.4 \times \frac{\$\ 2.0}{\$275.5} = \$0.1 \text{ million increase}$$

B. Other personnel, communications purchased, light, heat, power and water, other services-associated companies, stationery, printing and office supplies, other expenses and various miscellaneous expenses	$ 1.5	NC
Total Traffic Servicing Expense	$16.9	$+0.1

TWA Ex. 4(c)(4), Exhibit F, page 18 of 64
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER II

DOMESTIC DIVISION, 1960

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
SERVICING ADMINISTRATION EXPENSE		
Total Servicing Administration Expense	$ 1.9	NC

This expense was incurred in connection with Aircraft Servicing and Traffic Servicing expense of $21.4 and $16.9 million respectively (shown previously). We estimate the changes in Aircraft and Traffic Servicing expenses of $-0.2 and $+0.1 million respectively (previous page) would have been accompanied by a proportionate change in the Servicing Administration expense. The calculation is:

$$\$1.9 \times \frac{(\$-0.2+0.1)}{(\$21.4+16.9)} = \$0.005 \text{ million decrease}$$

Total Servicing Administration Expense	$ 1.9	NC
PROMOTION AND SALES EXPENSE		
Reservations and Sales		
A. General aircraft and traffic handling personnel, passenger handling personnel, record keeping and statistical personnel, traffic solicitors, other personnel, personnel expenses, commissions-passenger, communications purchased, tariffs, schedules and timetables, rentals, other expenses, insurance-employee welfare and taxes-payroll	$21.8	$+0.2

This expense was incurred in connection with $275.5 million transportation revenue (Exhibit F, Sheet 1). We estimate the $2.0 million increase in simulated transportation revenue (Exhibit F, Sheet 2) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$21.8 \times \frac{\$\ 2.0}{\$275.5} = \$0.2 \text{ million increase}$$

B. Communications personnel, general management personnel, light, heat, power and water, other services-outside, other supplies, stationery, printing and office supplies, memberships and various miscellaneous expenses	$ 2.2	NC
Total Reservations and Sales Expense	$24.0	$+0.2

CALCULATION DETAILS FOR CHAPTER II

DOMESTIC DIVISION, 1960

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
Advertising and Publicity		
A. Other personnel, advertising and tariffs, schedules and timetables	$ 4.7	NC

This expense was incurred in connection with $275.5 million transportation revenue (Exhibit F, Sheet 1). We estimate the $2.0 million increase in simulated transportation revenue (Exhibit F, Sheet 2) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$4.7 \times \frac{\$\ 2.0}{\$275.5} = \$0.03 \text{ million increase}$$

B. Other promotional and publicity expenses, professional and technical fees and expenses, personnel expenses, rentals and various miscellaneous expenses	$ 0.7	NC
Total Advertising and Publicity Expense	$ 5.4	NC
Total Promotion and Sales Expense	$29.4	$+0.2

GENERAL AND ADMINISTRATIVE EXPENSE

A. Record keeping and statistical personnel, purchasing personnel, other personnel, personnel expenses, rentals, stationery, printing and office supplies, other expenses, insurance-employee welfare and taxes-payroll	$ 6.2	NC

This expense was incurred in connection with $275.5 million transportation revenue (Exhibit F, Sheet 1). We estimate the $2.0 million increase in simulated transportation revenue (Exhibit F, Sheet 2) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$\ 6.2 \times \frac{\$\ 2.0}{\$275.5} = \$0.04 \text{ million increase}$$

TWA Ex. 4(c)(4), Exhibit F, page 20 of 64
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER II

DOMESTIC DIVISION, 1960

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
B. Uncollectible accounts	$ 0.7	NC

This expense was incurred in connection with $275.5 million transportation revenue (Exhibit F, Sheet 1). We estimate the $2.0 million increase in simulated transportation revenue (Exhibit F, Sheet 2) would have been accompanied by a proportionate increase in this expense. The calculation is:

$$\$0.7 \times \frac{\$\ 2.0}{\$275.5} = \$0.005 \text{ million increase}$$

C. General management personnel, communications purchased, professional and technical fees and expenses, memberships, corporate and fiscal expenses, taxes-other than payroll. purchased public liability and property damage insurance, legal fees and expenses, other services-outside, other supplies and various miscellaneous expenses	$ 4.3	NC
Total General and Administrative Expense	$11.2	NC
DEPRECIATION AND AMORTIZATION EXPENSE		
For flight equipment including airframes, engines, spares, other flight equipment and expendable spare parts obsolescence	$27.9	$+0.9
For ground property and equipment	$ 3.8	NC
For amortization of developmental and pre-operating expense	$ 2.6	$+0.2
Total Depreciation and Amortization Expense	$34.3	$+1.1

Note: These figures were given to us by Price Waterhouse & Co.

TOTAL OPERATING EXPENSE	$271.6	$-0.7

CALCULATION DETAILS FOR CHAPTER II

INTERNATIONAL DIVISION, 1961

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
FLYING OPERATIONS EXPENSE		
For B-331 Jet Aircraft		
A. Pilots and copilots, other flight personnel, trainees and instructors, personnel expenses, rentals, aircraft fuels, aircraft oils, taxes-other than payroll, insurance-employee welfare, taxes-payroll and various miscellaneous expenses	$13.3	$+6.8

This expense was incurred for operating B-331 aircraft 13.0 million plane-miles (Exhibit F, Sheet 1). We estimate the additional 6.6 million B-331 plane-miles mentioned on page 15 would have increased this Group A expense proportionately. The calculation is:

$$\$13.3 \times \frac{6.6}{13.0} = \$6.8 \text{ million increase}$$

B. Insurance purchased-general	$ 0.8	$+0.4

This expense is primarily for aircraft hull insurance for 7.3 B-331 aircraft available for commercial service (page 11). We estimate the 3.7 increase in the number of available aircraft mentioned on page 13 would have increased this insurance expense proportionately. The calculation is:

$$\$0.8 \times \frac{3.7}{7.3} = \$0.4 \text{ million increase}$$

Total B-331 Flying Operations Expense	$14.1	$+7.2
For L-1649A Piston Aircraft		
A. Pilots and copilots, other flight personnel, personnel expenses, aircraft fuels, aircraft oils, insurance-employee welfare, taxes-payroll and various miscellaneous expenses	$ 6.9	$-2.3

This expense was incurred for operating L-1649A aircraft 4.8 million plane-miles (Exhibit F, Sheet 1). We estimate the reduction of 1.6 million L-1649A plane-miles mentioned on page 17 would have decreased this Group A expense proportionately. The calculation is:

$$\$6.9 \times \frac{1.6}{4.8} = \$2.3 \text{ million decrease}$$

CALCULATION DETAILS FOR CHAPTER II

INTERNATIONAL DIVISION, 1961

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
B. Insurance purchased-general	$ 0.1	NC
Total L-1649A Flying Operations Expense	$ 7.0	$-2.3
For Other Aircraft and Generally Nonrevenue	$ 0.4	NC
Total Flying Operations Expense	$21.5	$+4.9

MAINTENANCE EXPENSE

Direct Maintenance Expense

For B-331 Jet Aircraft Flight Equipment	$ 4.4	$+2.2

This expense was incurred for operating B-331 aircraft 13.0 million plane-miles (page 15). We estimate the additional 6.6 million B-331 plane-miles mentioned on page 15 would have increased this expense proportionately. The calculation is:

$$\$4.4 \times \frac{6.6}{13.0} = \$2.2 \text{ million increase}$$

For L-1649A Piston Aircraft Flight Equipment	$ 2.0	$-0.7

This expense was incurred for operating L-1649A aircraft 4.8 million plane-miles (Exhibit F, Sheet 1). We estimate the reduction of 1.6 million L-1649A plane-miles mentioned on page 17 would have decreased this expense proportionately. The calculation is:

$$\$2.0 \times \frac{1.6}{4.8} = \$0.7 \text{ million decrease}$$

For Other Aircraft and Generally Nonrevenue	$ 0.1	NC
For General Ground Property and Equipment	$ 0.3	$+0.1

This expense was incurred in connection with operations that produced $81.7 million transportation revenues (Exhibit F, Sheet 1). We estimate the additional B-331 aircraft would have produced an increase of $21.4 million simulated transportation revenues (Exhibit F, Sheet 2). We select $0.1 million increase in Direct Maintenance expense for Ground Property and Equipment to reflect a cost increase that may have taken place.

Total Direct Maintenance Expense	$ 6.8	$+1.6

CALCULATION DETAILS FOR CHAPTER II

INTERNATIONAL DIVISION, 1961

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
Applied Maintenance Burden Expense		
For B-331 Jet Aircraft Flight Equipment	$ 3.2	$+1.6

This $3.2 million B-331 Applied Maintenance Burden expense was incurred in connection with $4.4 million B-331 Direct Maintenance expense shown on the previous page. We estimate the $2.2 million increase for B-331 Direct Maintenance (previous page) would have been accompanied by a proportionate increase in Applied Maintenance Burden expense. The calculation is:

$$\$3.2 \times \frac{\$2.2}{\$4.4} = \$1.6 \text{ million increase}$$

For L-1649A Piston Aircraft Flight Equipment	$ 1.6	$-0.6

This $1.6 million L-1649A Applied Maintenance Burden expense was incurred in connection with $2.0 million L-1649A Direct Maintenance expense shown on the previous page. We estimate the $0.7 million decrease in L-1649A Direct Maintenance expense (previous page) would have been accompanied by a proportionate decrease in Applied Maintenance Burden expense. The calculation is:

$$\$1.6 \times \frac{\$0.7}{\$2.0} = \$0.6 \text{ million decrease}$$

For Other Aircraft and Generally Nonrevenue	$ 0.1	NC
For General Ground Property and Equipment	$ 0.2	$+0.1

This $0.2 million Applied Maintenance Burden expense was incurred in connection with $0.3 million Direct Maintenance expense (previous page). We estimate the $0.1 million increase shown on the previous page would have been accompanied by a proportionate increase in Applied Maintenance Burden expense. The calculation is:

$$\$0.2 \times \frac{\$0.1}{\$0.3} = \$0.1 \text{ million increase}$$

Total Applied Maintenance Burden Expense	$ 5.1	$+1.1
Total Maintenance Expense	$11.9	$+2.7

CALCULATION DETAILS FOR CHAPTER II

INTERNATIONAL DIVISION, 1961

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
AIRCRAFT SERVICING EXPENSE		
A. Aircraft control personnel, trainees and instructors, rentals, landing fees, shop and servicing supplies, insurance-employee welfare and taxes-payroll	$ 3.8	$+1.1

This expense was incurred in connection with operating 17.8 million plane-miles (Exhibit F, Sheet 1). We estimate the 5.0 million plane-miles net increase mentioned on page 18 would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$3.8 \times \frac{5.0}{17.8} = \$1.1 \text{ million increase}$$

B. General aircraft and traffic handling personnel, communications personnel, record keeping and statistical personnel, personnel expenses, communications purchased, other services-outside, stationery, printing and office supplies, other supplies and various miscellaneous expenses	$ 3.1	NC
Total Aircraft Servicing Expense	$ 6.9	$+1.1
PASSENGER SERVICE EXPENSE		
A. Other flight personnel, other personnel, personnel expenses, rentals, insurance-employee welfare and taxes-payroll	$3.2	$+1.0

This expense was incurred in connection with operating 15.7 million plane-miles (page 14). We estimate the 5.0 million plane-miles net increase mentioned on page 18 would have been accompanied by a proportionate increase of this Group A expense. The calculation is:

$$\$3.1 \times \frac{5.0}{15.7} = \$1.0 \text{ million increase}$$

B. Passenger food expense, other supplies, insurance-traffic liability and other services-outside	$ 2.7	$+0.9

This expense was incurred in connection with passenger traffic producing $63.9 million revenue (page 27). We estimate the $20.4 million increase from passengers mentioned on page 27 would have been accompanied by a proportionate increase in this Group B expense. The calculation is:

$$\$2.7 \times \frac{\$20.4}{\$63.9} = \$0.9 \text{ million increase}$$

C. Interrupted trips expense and various miscellaneous expenses	$ 0.2	NC

CALCULATION DETAILS FOR CHAPTER II

INTERNATIONAL DIVISION, 1961

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
TRAFFIC SERVICING EXPENSE		
A. General aircraft and traffic handling personnel, passenger handling personnel, cargo handling personnel, other services-outside, rentals, other supplies, insurance-employee welfare and taxes-payroll	$ 2.7	$+0.7

This expense was incurred in connection with $81.7 million transportation revenues (Exhibit F, Sheet 1). We estimate the $21.4 million increase in simulated transportation revenue (Exhibit F, Sheet 2) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$2.7 \times \frac{\$21.4}{\$81.7} = \$0.7 \text{ million increase}$$

B. Clearance, customs and duties, stationery, printing and office supplies, other expenses and various miscellaneous expenses	$ 0.7	NC
Total Traffic Servicing Expense	$ 3.4	$+0.7
SERVICING ADMINISTRATION EXPENSE		
Total Servicing Administration Expense	$ 1.0	$+0.2

This expense was incurred in connection with Aircraft Servicing and Traffic Servicing expense of $6.9 and $3.4 million, respectively (previous page and above). We estimate the increase in Aircraft and Traffic Servicing expense of $1.1 and $0.7 million, respectively (previous page and above) would have been accompanied by a proportionate increase in the Servicing Administration expense. The calculation is:

$$\$1.0 \times \frac{(\$1.1+0.7)}{(\$6.9+3.4)} = \$0.2 \text{ million increase}$$

Total Servicing Administration Expense	$ 1.0	$+0.2

CALCULATION DETAILS FOR CHAPTER II

INTERNATIONAL DIVISION, 1961

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
PROMOTION AND SALES EXPENSE		
Reservations and Sales		
A. General aircraft and traffic handling personnel, passenger handling personnel, record keeping and statistical personnel, traffic solicitors, other personnel, personnel expenses, commissions-passenger, communications purchased, commissions-property, rentals, other expenses, insurance-employee welfare and taxes-payroll	$ 9.8	$+2.6

This expense was incurred in connection with $81.7 million transportation revenue (Exhibit F, Sheet 1). We estimate the $21.4 million increase in simulated transportation revenue (Exhibit F, Sheet 2) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$9.8 \times \frac{\$21.4}{\$81.7} = \$2.6 \text{ million increase}$$

B. Communications personnel, general management personnel, light, heat, power and water, other services-outside, other supplies, stationery, printing and office supplies and various miscellaneous expenses	$ 0.8	NC
Total Reservations and Sales Expense	$10.6	$+2.6
Advertising and Publicity		
A. Other personnel, advertising, tariffs, schedules and timetables	$ 5,3	$+1.4

This expense was incurred in connection with $81.7 million transportation revenue (Exhibit F, Sheet 1). We estimate the $21.4 million increase in simulated transportation revenue (Exhibit F, Sheet 2) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$5.3 \times \frac{\$21.4}{\$81.7} = \$1.4 \text{ million increase}$$

B. Other promotional and publicity expenses and various miscellaneous expenses	$ 0.2	NC
Total Advertising and Publicity Expense	$ 5.5	$+1.4
tal Promotion and Sales Expense	$16.1	$+4.0

CALCULATION DETAILS FOR CHAPTER II

INTERNATIONAL DIVISION, 1961

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
GENERAL AND ADMINISTRATIVE EXPENSE		
A. Record keeping and statistical personnel, purchasing personnel, other personnel, personnel expenses, uncollectible accounts, rentals, stationery, printing and office supplies, other expenses, insurance-employee welfare and taxes - payroll	$ 3.2	$+0.8

This expense was incurred in connection with $81.7 million transportation revenue (Exhibit F, Sheet 1). We estimate the $21.4 million increase in simulated transportation revenues (Exhibit F, Sheet 2) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$3.2 \times \frac{\$21.4}{\$81.7} = \$0.8 \text{ million increase}$$

B. General management personnel, communications purchased, professional and technical fees and expenses, taxes-other than payroll, purchased public liability and property damage insurance, other uncleared expense credits, legal fees and expenses and various miscellaneous expenses	$ 0.8	NC
Total General and Administrative Expense	$ 4.0	$+0.8
DEPRECIATION AND AMORTIZATION EXPENSE		
A. For flight equipment including airframes, engines, spares, other flight equipment and expendable spare parts obsolescence	$11.3	$+2.8
B. For Ground property and equipment	$ 0.8	NC
C. For Amortization of developmental and pre-operating expense	$ 1.6	$+0.5
Total Depreciation and Amortization Expense	$13.7	$+3.3

Note: These figures were given to us by Price Waterhouse & Co.

TOTAL OPERATING EXPENSE	$84.6	$+19.6

CALCULATION DETAILS FOR CHAPTER II

DOMESTIC DIVISION, 1961

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
FLYING OPERATIONS EXPENSE		
For B-331 Jet Aircraft		
A. Pilots and copilots, other flight personnel, trainees and instructors, personnel expenses, aircraft fuels, insurance-employee welfare and various miscellaneous expenses	$ 5.9	$+3.0

This expense was incurred for operating B-331 aircraft 6.5 million plane-miles (Exhibit F, Sheet 1). We estimate the additional 3.3 million B-331 plane-miles mentioned on page 28 would have increased this Group A expense proportionately. The calculation is:

$$\$5.9 \times \frac{3.3}{6.5} = \$3.0 \text{ million increase}$$

B. Insurance purchased-general	$ 0.4	$+0.2

This expense is primarily for aircraft hull insurance for 4.4 B-331 aircraft available for commercial service (page 28). We estimate the 2.2 increase in the available number of aircraft mentioned on page 28 would have increased this insurance expense proportionately. The calculation is:

$$\$0.4 \times \frac{2.2}{4.4} = \$0.2 \text{ million increase}$$

Total B-331 Flying Operations Expense	$ 6.3	$+3.2
For L-1049G Piston Aircraft		
A. Pilots and copilots, other flight personnel, trainees and instructors, personnel expenses, aircraft fuels, aircraft oils, taxes-other than payroll, insurance-employee welfare, taxes-payroll and various miscellaneous expenses	$ 9.8	$-4.0

This $9.8 million expense was incurred for operating L-1049G aircraft 10.3 million plane-miles. We estimate the reduction of 4.2 million piston aircraft plane-miles mentioned on page 29 would have reduced piston aircraft Flying Operations expense generally in proportion to the mileage reduction. The calculation using L-1049G statistics is:

$$\$9.8 \times \frac{4.2}{10.3} = \$4.0 \text{ million decrease}$$

CALCULATION DETAILS FOR CHAPTER II

DOMESTIC DIVISION, 1961

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
B. Insurance purchased-general	$ 0.1	NC
Total L-1049G Flying Operations Expense	$ 9.9	$-4.0
For Other Aircraft and Generally Nonrevenue	$61.9	NC
Total Flying Operations Expense	$78.1	$-0.8
MAINTENANCE EXPENSE		
Direct Maintenance Expense		
For B-331 Jet Aircraft Flight Equipment	$ 2.3	$+1.2

This expense was incurred for operating B-331 aircraft 6.5 million plane-miles (Exhibit F, Sheet 1). We estimate the additional 3.3 million B-331 plane-miles mentioned on page 28 would have increased this expense proportionately. The calculation is:

$$\$2.3 \times \frac{3.3}{6.5} = \$1.2 \text{ million increase}$$

For L-1049G Piston Aircraft Flight Equipment	$ 4.4	$-1.8

This expense was incurred for operating L-1049G aircraft 10.3 million plane miles (Exhibit F, Sheet 1). We estimate the reduction of 4.2 million piston aircraft plane-miles mentioned on page 29 would have reduced piston aircraft Direct Maintenance expense in proportion to the mileage reduction. The calculation using L-1049G statistics is:

$$\$4.4 \times \frac{4.2}{10.3} = \$1.8 \text{ million decrease}$$

For Other Aircraft and Generally Nonrevenue	$25.5	NC
For General Ground Property and Equipment	$ 0.9	NC
Total Direct Maintenance Expense	$33.1	$-0.6

CALCULATION DETAILS FOR CHAPTER II

DOMESTIC DIVISION, 1961

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
Applied Maintenance Burden Expense For B-331 Jet Aircraft Flight Equipment	$ 1.6	$+0.8

This $1.6 million B-331 Applied Maintenance Burden expense was incurred in connection with $2.3 million B-331 Direct Maintenance expense shown on the previous page. We estimated the $1.2 million increase for B-331 Direct Maintenance (previous page) would have been accompanied by a proportionate increase in Applied Maintenance Burden expense. The calculation is:

$$\$1.6 \times \frac{\$1.2}{\$2.3} = \$0.8 \text{ million increase}$$

For L-1049G Piston Aircraft Flight Equipment	$ 4.0	$-1.6

This $4.0 million L-1049G Applied Maintenance Burden expense was incurred in connection with the $4.4 million L-1049G Direct Maintenance expense shown on the previous page. We estimated the $1.8 million decrease for L-1049G Direct Maintenance expense (previous page) would have been accompanied by a proportionate decrease in Applied Maintenance Burden expense. The calculation is:

$$\$4.0 \times \frac{\$1.8}{\$4.4} = \$1.6 \text{ million decrease}$$

For Other Aircraft and Generally Nonrevenue	$17.8	NC
For General Ground Property and Equipment	$ 1.1	NC
Total Applied Maintenance Burden Expense	$24.5	$-0.8
Total Maintenance Expense	$57.6	$-1.4

CALCULATION DETAILS FOR CHAPTER II

DOMESTIC DIVISION, 1961

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
AIRCRAFT SERVICING EXPENSE		
A. General aircraft and traffic handling personnel, aircraft control personnel, trainees and instructors, personnel expenses, other services-outside, rentals, landing fees, other supplies, insurance-employee welfare and taxes-payroll	$19.0	$-0.2

This expense was incurred in connection with operating 85.6 million plane-miles (Exhibit F, Sheet 1). We estimate the net reduction of 0.9 million plane-miles (Exhibit F, Sheet 2) would have been accompanied by a proportionate decrease in this Group A expense. The calculation is:

$$\$19.0 \times \frac{0.9}{85.6} = \$0.2 \text{ million decrease}$$

B. Communciations personnel, communications purchased, light, heat, power and water, other services-associated companies, shop and servicing supplies, stationery, printing and office supplies, other uncleared expense credits and various miscellaneous expenses	$ 3.4	NC
Total Aircraft Servicing Expense	$22.4	$-0.2
PASSENGER SERVICE EXPENSE		
A. Other flight personnel, other personnel, personnel expenses, insurance-employee welfare and taxes-payroll	$ 9.0	$-0.1

This expense was incurred in connection with operating 82.1 million plane-miles (page 29). We estimate the net reduction of 0.9 million plane-miles (Exhibit F, Sheet 2) would have been accompanied by a proportionate decrease in this Group A expense. The calculation is:

$$\$9.0 \times \frac{0.9}{82.1} = \$0.1 \text{ million decrease}$$

(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER II

DOMESTIC DIVISION, 1961

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
B. Passenger food expense, other supplies, insurance-traffic liability and other services-outside	$13.2	$+0.1

This expense was incurred in connection with passenger traffic revenue of $252.2 million (Exhibit F, Sheet 1). We estimate the $1.4 million increase in revenue from passenger traffic mentioned on page 30 would have been accompanied by a proportionate increase in this Group B expense. The calculation is:

$$\$13.2 \times \frac{\$\ 1.4}{\$252.2} = \$0.1 \text{ million increase}$$

C. Trainees and instructors, rentals, interrupted trips expense and various miscellaneous expenses	$ 0.6	NC
Total Passenger Service Expense	$22.8	NC

TRAFFIC SERVICING EXPENSE

A. General aircraft and traffic handling personnel, passenger handling personnel, cargo handling personnel, insurance-employee welfare, injuries, loss and damage, taxes-payroll, other services-outside, rentals and other supplies	$16.0	$+0.1

This expense was incurred in connection with $276.1 million transportation revenue (Exhibit F, Sheet 1). We estimate the $1.5 million increase in simulated transportation revenue (Exhibit F, Sheet 2) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$16.0 \times \frac{\$\ 1.5}{\$276.1} = \$0.1 \text{ million increase}$$

B. Other personnel, personnel expenses, communciations purchased, light, heat, power and water, other services-associated companies, stationery, printing and office supplies, insurance-traffic liability, other expenses and various miscellaneous expenses	$ 1.6	NC
Total Traffic Servicing Expense	$17.6	$+0.1

CALCULATION DETAILS FOR CHAPTER II

DOMESTIC DIVISION, 1961

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
SERVICING ADMINISTRATION EXPENSE		
Total Servicing Administration Expense	$ 2.2	NC

This expense was incurred in connection with Aircraft Servicing and Traffic Servicing expense of $22.4 and $17.6 million respectively (previous page). We estimate the changes in Aircraft and Traffic Servicing expense of $-0.2 and $+0.1 million respectively (previous page) would have been accompanied by a proportionate change in the Servicing Administration expense. The calculation is:

$$\$2.2 \times \frac{(\$-0.2+\$+0.1)}{(\$22.4+\$17.6)} = \$0.006 \text{ million decrease}$$

Total Servicing Administration Expense	$ 2.2	NC

PROMOTION AND SALES EXPENSE

Reservations and Sales

A. General aircraft and traffic handling personnel, passenger handling personnel, record keeping and statistical personnel, traffic solicitors, other personnel, personnel expenses, commissions-passenger, communications purchased, commissions-property, rentals, tariffs, schedules and timetables, other expenses, insurance-employee welfare and taxes-payroll	$22.0	$+0.1

This expense was incurred in connection with $276.1 million transportation revenue (Exhibit F, Sheet 1). We estimate the $1.5 million increase in simulated transportation revenue (Exhibit F, Sheet 2) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$22.0 \times \frac{\$\ 1.5}{\$276.1} = \$0.1 \text{ million increase}$$

B. Communications personnel, general management personnel, light, heat, power and water, other services-outside, stationery, printing and office supplies, other supplies and various miscellaneous expenses	$ 2.2	NC
Total Reservations and Sales Expense	$24.2	$+0.1

TWA Ex. 4(c)(4), Exhibit F, page 34 of 64
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER II

DOMESTIC DIVISION, 1961

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
Advertising and Publicity		
A. Other personnel, advertising and tariffs, schedules, and timetables	$ 6.3	NC

This expense was incurred in connection with $276.1 million transportation revenue (Exhibit F, Sheet 1). We estimate the $1.5 million increase in simulated transportation revenue (Exhibit F, Sheet 2) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$6.3 \times \frac{\$\ 1.5}{\$276.1} = \$0.03 \text{ million increase}$$

B. Other promotional and publicity expenses, rentals and various miscellaneous expenses	$ 0.6	NC
Total Advertising and Publicity Expense	$ 6.9	NC
Total Promotion and Sales Expense	$31.1	$+0.1

GENERAL AND ADMINISTRATIVE EXPENSE

A. Record keeping and statistical personnel, purchasing personnel, other personnel, personnel expenses, uncollectible accounts, rentals, stationery, printing and office supplies, other expenses, insurance-employee welfare and taxes-payroll	$ 9.1(a)	NC

This expense was incurred in connection with $276.1 million transportation revenue (Exhibit F, Sheet 1). We estimate the $1.5 million increase in simulated transportation revenue (Exhibit F, Sheet 2) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$9.1(a) \times \frac{\$\ 1.5}{\$276.1} = \$0.049 \text{ million increase}$$

(a) This expense includes a $715,000 uncollectible bill for the sale of piston aircraft.

CALCULATION DETAILS FOR CHAPTER II

DOMESTIC DIVISION, 1961

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
B. General management personnel, communications purchased, professional and technical fees and expenses, other services-outside, other supplies, memberships, corporate and fiscal expenses, taxes-other than payroll, insurance purchased-general, other uncleared expense credits, legal fees and expenses and various miscellaneous expenses	$ 4.7	NC
Total General and Administrative Expense	$13.8	NC
DEPRECIATION AND AMORTIZATION EXPENSE		
A. For flight equipment including airframes, engines, spares, other flight equipment and expendable spare parts obsolescence.	$34.5	$+1.6
B. For ground property and equipment	$ 4.6	NC
C. For amortization of developmental and pre-operating expense	$ 4.2	$+0.2
Total Depreciation and Amortization Expense	$43.3	$+1.8

Note: These figures were given to us by Price Waterhouse & Co.

TOTAL OPERATING EXPENSE	$288.9	$-0.4

CALCULATION DETAILS FOR CHAPTER II

INTERNATIONAL DIVISION, 1962

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
FLYING OPERATIONS EXPENSE		
For B-331 Jet Aircraft		
A. Pilots and copilots, other flight personnel, trainees and instructors, personnel expenses, rentals, aircraft fuels, aircraft oils, taxes-other than payroll, insurance-employee welfare, taxes-payroll, and various miscellaneous expenses	$16.3	$+8.0

This expense was incurred for operating B-331 aircraft 17.3 million plane-miles (Exhibit F, Sheet 1). We estimate the additional 8.4 million B-331 plane-miles mentioned on page 15 plus the 0.1 million B-331 plane-miles that would have replaced B-331B plane-miles (Exhibit F, Sheet 1) would have proportionately increased this Group A expense. The calculation is:

$$\$16.3 \times \frac{8.4+0.1}{17.3} = \$8.0 \text{ million increase}$$

B. Insurance purchased-general	$ 0.7	$+0.4

This expense is primarily for aircraft hull insurance for 9.8 B-331 aircraft available for commercial service (page 11)., We estimate the 4.9 increase in the number of available aircraft mentioned on page 13 would have increased this insurance expense proportionately. The calculation is:

$$\$0.7 \times \frac{4.9}{9.8} = \$0.4 \text{ million increase}$$

Total B-331 Flying Operations Expense	$17.0	$+8.4
For B-331B Jet Aircraft	$ 0.1	$-0.1

Our estimates assumed the substitution of B-331 aircraft for B-331B aircraft, which eliminates this B-331B expense.

For Other Aircraft and Generally Nonrevenue	$ 3.9	NC
Total Flying Operations Expense	$21.0	$+8.3

CALCULATION DETAILS FOR CHAPTER II

INTERNATIONAL DIVISION, 1962

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
MAINTENANCE EXPENSE		
Direct Maintenance Expense		
For B-331 Jet Aircraft Flight Equipment	$ 4.8	$+2.4

This expense was incurred for operating B-331 aircraft 17.3 million plane-miles (Exhibit F, Sheet 2). We estimate the additional 8.4 plus 0.1 million B-331 plane-miles (Flying Operations, previous page) would have increased this expense proportionately. The calculation is:

$$\$4.8 \times \frac{8.5}{17.3} = \$2.4 \text{ million increase}$$

For B-331B Jet Aircraft Flight Equipment	#	NC
For Other Aircraft and Generally Nonrevenue	$ 1.7	NC
For General Ground Property and Equipment	$ 0.3	$+0.1

This expense was incurred in connection with operations that produced $100.8 million transportation revenue (Exhibit F, Sheet 1). We estimate the additional B-331 aircraft would have produced an increase of $31.0 million simulated transportation revenue (Exhibit F, Sheet 2). We select $0.1 million increase in Direct Maintenance expense for Ground Property and Equipment to reflect a cost increase that may have taken place.

Total Direct Maintenance Expense	$ 6.8	$+2.5
Applied Maintenance Burden Expense		
For B-331 Jet Aircraft Flight Equipment	$ 3.4	$+1.7

This $3.4 million B-331 Applied Maintenance Burden expense was incurred in connection with $4.8 million B-331 Direct Maintenance expense shown above. We estimate the $2.4 million increase for B-331 Direct Maintenance (above) would have been accompanied by a proportionate increase in Applied Maintenance Burden expense. The calculation is:

$$\$ 3.4 \times \frac{\$2.4}{\$4.8} = \$1.7 \text{ million increase}$$

For B-331B Jet Aircraft Flight Equipment	#	NC
For Other Aircraft and Generally Nonrevenue	$ 1.0	NC

CALCULATION DETAILS FOR CHAPTER II

INTERNATIONAL DIVISION, 1962

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
For General Ground Property and Equipment	$ 0.2	$+0.1

This $0.2 million Applied Maintenance Burden expense was incurred in connection with $0.3 million Direct Maintenance expense (previous page). We estimate the $0.1 million increase shown on the previous page would have been accompanied by a proportionate increase in Applied Maintenance Burden expense. The calculation is:

$$\$0.2 \times \frac{\$0.1}{\$0.3} = \$0.1 \text{ million increase}$$

Total Applied Maintenance Burden Expense	$ 4.6	$+1.8
Total Maintenance Expense	$11.4	$+4.3

AIRCRAFT SERVICING EXPENSE

A. Aircraft control personnel, trainees and instructors, rentals, landing fees, shop and servicing supplies, insurance-employee welfare and taxes-payroll	$ 4.6	$+1.9

This expense was incurred in connection with operating 20.2 million plane-miles (Exhibit F, Sheet 1). We estimate the additional 8.4 million plane-miles (page 18) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$4.6 \times \frac{8.4}{20.2} = \$1.9 \text{ million increase}$$

B. General aircraft and traffic handling personnel, communications personnel, record keeping and statistical personnel, personnel expenses, communications purchased, other services-outside, other supplies and various miscellaneous expenses	$ 3.0	NC
Total Aircraft Servicing Expense	$ 7.6	$+1.9

CALCULATION OF DETAILS OF CHAPTER II

INTERNATIONAL DIVISION, 1962

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
PASSENGER SERVICE EXPENSE		
A. Other flight personnel, other personnel, personnel expenses, rentals, insurance-employee welfare and taxes-payroll	$ 4.1	$+1.9

This expense was incurred in connection with operating 17.7 million plane-miles (page 14). We estimate the additional 8.4 million plane-miles (page 18) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$4.1 \times \frac{8.4}{17.7} = \$1.9 \text{ million increase}$$

B. Passenger food expense, other supplies, insurance-traffic liability and other services-outside	$ 2.6	$+1.0

This expense was incurred in connection with passenger traffic revenue of $77.5 million (page 27). We estimate the $29.5 million increase in revenue from passenger traffic mentioned on page 27 would have been accompanied by a proportionate increase in this Group B expense. The calculation is:

$$\$2.6 \times \frac{\$29.5}{\$77.5} = \$1.0 \text{ million increase}$$

C. Interrupted trips expense and various miscellaneous expenses	$ 0.2	NC
Total Passenger Service Expense	$ 6.9	$+2.9
TRAFFIC SERVICING EXPENSE		
A. General aircraft and traffic handling personnel, passenger handling personnel, cargo handling personnel, other services-outside, rentals, other supplies, insurance-employee welfare and taxes-payroll	$ 3.3	$+1.0

This expense was incurred in connection with $100.8 million transportation revenue (Exhibit F, Sheet 1). We estimate the $31.0 million increase in simulated transportation revenue (Exhibit F, Sheet 2) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$3.3 \times \frac{\$\ 31.0}{\$100.8} = \$1.0 \text{ million increase}$$

CALCULATION DETAILS FOR CHAPTER II

INTERNATIONAL DIVISION, 1962

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
B. Clearance, customs and duties, stationery, printing and office supplies, other expenses and various miscellaneous expenses	$ 0.7	NC
Total Traffic Servicing Expense	$ 4.0	$+1.0
SERVICING ADMINISTRATION EXPENSE		
Total Servicing Administration Expense	$ 0.9	$+0.2

This expense was incurred in connection with Aircraft Servicing and Traffic Servicing expense of $7.6 and $4.0 million, respectively (previous page). We estimate the addition in Aircraft and Traffic Servicing expense of $1.9 and $1.0 million respectively (previous page and above) would have been accompanied by a proportionate increase in the Servicing Administration expense. The calculation is:

$$\$0.9 \times \frac{(\$1.9+\$1.0)}{(\$7.6+\$4.0)} = \$0.2 \text{ million increase}$$

Total Servicing Administration Expense	$ 0.9	$+0.2

PROMOTION AND SALES EXPENSE

Reservations and Sales		
A. General aircraft and traffic handling personnel, passenger handling personnel, record keeping and statistical personnel, traffic solicitors, other personnel, personnel expenses, commissions-passenger, communications purchased, commissions-property, rentals, other expenses; insurance-employee welfare and taxes-payroll	$11.4	$+3.5

This expense was incurred in connection with $100.8 million transportation revenue (Exhibit F, Sheet 1). We estimate the $31.0 million increase in simulated transportation revenue (Exhibit F, Sheet 2) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$11.4 \times \frac{\$\ 31.0}{\$100.8} = \$3.5 \text{ million increase}$$

CALCULATION DETAILS OF CHAPTER II

INTERNATIONAL DIVISION, 1962

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
B. Communications personnel, general management personnel, other services-outside, other supplies, stationery, printing and office supplies and various miscellaneous expenses	$ 0.9	NC
Total Reservations and Sales Expense	$12.3	$+3.5
Advertising and Publicity		
A. Other personnel, advertising, tariffs, schedules and timetables	$ 6.1	$+1.9

This expense was incurred in connection with $100.8 million transportation revenue (Exhibit F, Sheet 1). We estimate the $31.0 million increase in simulated transportation revenue (Exhibit F, Sheet 2) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$6.1 \times \frac{\$\ 31.0}{\$100.8} = \$1.9 \text{ million increase}$$

B. Other promotional and publicity expenses and various miscellaneous expenses	$ 0.3	NC
Total Advertising and Publicity Expense	$ 6.4	$+1.9
Total Promotion and Sales Expense	$18.7	$+5.4

GENERAL AND ADMINISTRATIVE EXPENSE

A. Record keeping and statistical personnel, purchasing personnel, other personnel, personnel expenses, uncollectible accounts, rentals, stationery, printing and office supplies, other expenses, insurance-employee welfare and taxes-payroll	$ 3.4	$+1.0

This expense was incurred in connection with $100.8 million transportation revenue (Exhibit F, Sheet 1). We estimate the $31.0 million increase in simulated transportation revenue (Exhibit F, Sheet 2) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$3.4 \times \frac{\$\ 31.0}{\$100.8} = \$1.0 \text{ million increase}$$

CALCULATION DETAILS FOR CHAPTER II

INTERNATIONAL DIVISION, 1962

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
B. General management personnel, communications purchased, professional and technical fees and expenses, taxes-other than payroll, insurance purchased-general, other uncleared expense credits, legal fees and expenses and various miscellaneous expenses	$ 1.0	NC
Total General and Administrative Expense	$ 4.4	$+1.0
DEPRECIATION AND AMORTIZATION EXPENSE		
A. For flight equipment including airframes, engines, spares, other flight equipment and expendable spare parts obsolescence	$ 9.7	$+3.0
B. For ground property and equipment	$ 0.8	NC
C. For amortization of developmental and pre-operating expense	$ 1.4	$+0.5
Total Depreciation and Amortization Expense	$11.9	$+3.5

Note: These figures were given to us by Price Waterhouse & Co.

TOTAL OPERATING EXPENSE	$86.8	$+28.5

CALCULATION DETAILS FOR CHAPTER II

DOMESTIC DIVISION, 1962

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	

FLYING OPERATIONS

For B-331 Jet Aircraft

A. Pilots and copilots, other flight personnel, trainees and instructors, personnel expenses, aircraft fuels, insurance-employee welfare and various miscellaneous expenses — $ 3.2 — $+1.6

This expense was incurred for operating B-331 aircraft 3.0 million plane-miles (Exhibit F, Sheet 1). We estimate the additional 1.4 million B-331 plane-miles mentioned on page 28 (plus 0.1 million plane-miles to replace B-331B plane-miles eliminated. The B-331B plane-miles were too small to record (Exhibit F, Sheet 1)) would have increased this Group A expense proportionately. The calculation is:

$$\$3.2 \times \frac{1.5}{3.0} = \$1.6 \text{ million increase}$$

B. Insurance purchased-general — $ 0.1 — $+0.1

This expense is primarily for aircraft hull insurance for 2.2 B-331 aircraft available for commercial service (page 28). We estimate the 1.1 increase in the available number of aircraft mentioned on page 13 would have increased this insurance expense proportionately. The calculation is:

$$\$0.1 \times \frac{1.1}{2.2} = \$0.1 \text{ million increase}$$

Total B-331 Flying Operations Expense — $ 3.3 — $+1.7

For L-1049G Piston Aircraft

A. Pilots and copilots, other flight personnel, trainees and instructors, personnel expenses, aircraft fuels, aircraft oils, taxes-other than payroll, insurance-employee welfare, taxes-payroll and various miscellaneous expenses — $ 9.8 — $-0.9

This expense was incurred for operating L-1049G aircraft 10.0 million plane-miles (Exhibit F, Sheet 1). We estimate a reduction of 0.9 million L-1049G plane-miles as mentioned on page 29 would have decreased this Group A expense proportionately. The calculation is:

$$\$9.8 \times \frac{0.9}{10.0} = \$0.9 \text{ million decrease}$$

CALCULATION DETAILS FOR CHAPTER II

DOMESTIC DIVISION, 1962

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
B. Insurance purchased-general	#	NC
Total L-1049G Flying Operations Expense	$ 9.8	$-0.9
For B-331B Jet Aircraft	$ 0.1	$-0.1

Our estimates assumed the substitution of B-331 aircraft for B-331B aircraft, which eliminates this B-331B expense.

For Other Aircraft and Gen-rally Nonrevenue	$69.2	NC
Total Flying Operations Expense	$82.4	$+0.7

MAINTENANCE EXPENSE

Direct Maintenance Expense

For B-331 Jet Aircraft Flight Equipment	$ 1.0	$+0.5

This expense was incurred for operating B-331 aircraft 3.0 million plane-miles (Exhibit F, Sheet 1). We estimate the additional 1.4 million B-331 plane-miles mentioned on page 28 (plus 0.1 million plane miles to replace B-331B plane-miles eliminated (Flying Operations, page 43) would have increased this expense proportionately. The calculation is:

$$\$1.0 \times \frac{1.5}{3.0} = \$0.5 \text{ million increase}$$

For L-1049G Piston Aircraft Flight Equipment	$ 4.9	$-0.4

This expense was incurred for operating L-1049G aircraft 10.0 million plane-miles (Exhibit F, Sheet 1). We estimate the reduction of 0.9 million piston aircraft plane-miles mentioned on page 29 would have reduced piston aircraft Direct Maintenance expense in proportion to the mileage reduction. The calculation using L-1049G statistics is:

$$\$4.9 \times \frac{0.9}{10.0} = \$0.4 \text{ million decrease}$$

For B-331B Jet Aircraft Flight Equipment	#	NC
For Other Aircraft and Generally Nonrevenue	$29.2	NC
For General Ground Property and Equipment	$ 1.6	NC
Total Direct Maintenance Expense	$36.7	$+0.1

CALCULATION DETAILS FOR CHAPTER II

DOMESTIC DIVISION, 1962

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
Applied Maintenance Burden Expense		
For B-331 Jet Aircraft Flight Equipment	$ 1.0	$+0.5

This $1.0 million B-331 Applied Maintenance Burden expense was incurred in connection with $1.0 million B-331 Direct Maintenance expense shown on the previous page. We estimated the $0.5 million increase for B-331 Direct Maintenance (previous page) would have been accompanied by a proportionate increase in Applied Maintenance Burden expense. The calculation is:

$$\$1.0 \times \frac{\$0.5}{\$1.0} = \$0.5 \text{ million increase}$$

For L-1049G Piston Aircraft Flight Equipment	$ 3.7	$-0.3

This $3.7 million L-1049G Applied Maintenance Burden expense was incurred in connection with the $4.9 million L-1049G Direct Maintenance expense shown on the previous page. We estimated the $0.4 million decrease for L-1049G Direct Maintenance expense (previous page) would have been accompanied by a proportionate decrease in Applied Maintenance Burden expense. The calculation is:

$$\$3.7 \times \frac{\$0.4}{\$4.9} = \$0.3 \text{ million decrease}$$

For Other Aircraft and Generally Nonrevenue	$18.8	NC
For General Ground Property and Equipment	$ 1.9	NC
Total Applied Maintenance Burden Expense	$25.4	$+0.2
Total Maintenance Expense	$62.1	$+0.3

CALCULATION DETAILS FOR CHAPTER II

DOMESTIC DIVISION, 1962

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
AIRCRAFT SERVICING EXPENSE		
A. General aircraft and traffic handling personnel, aircraft control personnel, trainees and instructors, personnel expenses, other services-outside, rentals, landing fees, other supplies, insurance-employee welfare and taxes-payroll	$20.4	$+0.1

This expense was incurred in connection with operating 89.9 million plane-miles (Exhibit F, Sheet 1). We estimate the net additional 0.5 million plane-miles (Exhibit F, Sheet 2) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$20.4 \times \frac{0.5}{89.9} = \$0.1 \text{ million increase}$$

B. Communications personnel, communications purchased, light, heat, power and water, other services-associated companies, shop and servicing supplies, stationery, printing and office supplies, other uncleared expense credits and various miscellaneous expenses	$ 3.3	NC
Total Aircraft Servicing Expense	$23 7	$+0.1
PASSENGER SERVICE EXPENSE		
A. Other flight personnel, other personnel, personnel expenses, insurance-employee welfare and taxes-payroll	$ 9.9	$+0.1

This expense was incurred in connection with operating 87.9 million plane-miles (page 29). We estimate the net additional 0.5 million plane-miles (Exhibit F, Sheet 2) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$9.9 \times \frac{0.5}{87.9} = \$0.1 \text{ million increase}$$

CALCULATION DETAILS FOR CHAPTER II

DOMESTIC DIVISION, 1962

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
B. Passenger food expense, other supplies, insurance-traffic liability and other services-outside	$12.3	$+0.1

This expense was incurred in connection with passenger traffic revenue of $273.0 million (Exhibit F, Sheet 1). We estimate the $2.0 million increase in revenue from passenger traffic mentioned on page 30 would have been accompanied by a proportionate increase in this Group B expense. The calculation is:

$$\$12.3 \times \frac{\$\ 2.0}{\$273.0} = \$0.1 \text{ million increase}$$

C. Trainees and instructors, rentals, interrupted trips expense and various miscellaneous expenses	$ 0.7	NC
Total Passenger Service Expense	$22.9	$+0.2

TRAFFIC SERVICING EXPENSE

A. General aircraft and traffic handling personnel, passenger handling personnel, cargo handling perscnnel, insurance-employee welfare, injuries, loss and damage, taxes-payroll, other services-outside, rentals and other supplies	$20.1	$+0.1

This expense was incurred in connection with $298.5 million transportation revenue (Exhibit F, Sheet 1). We estimate the $2.1 million increase in simulated transportation revenue (Exhibit F, Sheet 2) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$20.1 \times \frac{\$\ 2.1}{\$298.5} = \$0.1 \text{ million increase}$$

B. Other personnel, personnel expenses, trainees and instructors, communications purchased, light, heat, power and water, other services-associated companies, stationery, printing and office supplies, insurance-traffic liability, other expenses and various miscellaneous expenses	$ 1.6	NC
Total Traffic Servicing Expense	$21.7	$+0.1

CALCULATION DETAILS FOR CHAPTER II

DOMESTIC DIVISION, 1962

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
SERVICING ADMINISTRATION EXPENSE		
Total Servicing Administration Expense	$ 2.4	NC

This expense was incurred in connection with Aircraft Servicing and Traffic Servicing expense of $23.7 and $21.7 million, respectively (shown previously). We estimate the addition in Aircraft and Traffic Servicing expense of $0.1 and $0.1 million, respectively (previous pages) would have been accompanied by a proportionate increase in the Servicing Administration expense. The calculation is:

$$\$2.4 \times \frac{(\$\ 0.1+\$\ 0.1)}{(\$23.7+\$21.7)} = \$0.01 \text{ million increase}$$

Total Servicing Administration Expense	$ 2.4	NC
PROMOTION AND SALES EXPENSE		
Reservations and Sales		
A. General aircraft and traffic handling personnel, passenger handling personnel, record keeping and statistical personnel, traffic solicitors, other personnel, personnel expenses, commissions-passenger, communications purchased, commissions-property, rentals, tariffs, schedules and timetables, other expenses, insurance-employee welfare and taxes-payroll	$23.4	$+0.2

This expense was incurred in connection with $298.5 million transportation revenue (Exhibit F, Sheet 1). We estimate the $2.1 million increase in simulated transportation revenue (Exhibit F, Sheet 2) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$23.4 \times \frac{\$\ 2.1}{\$298.5} = \$0.2 \text{ million increase}$$

B. Communications personnel, general management personnel, light, heat, power and water, other services-outside, stationery, printing and office supplies, trainees and instructors, other supplies and various miscellaneous expenses	$ 2.4	NC
Total Reservations and Sales Expense	$25.8	$+0.2

CALCULATION DETAILS FOR CHAPTER II

DOMESTIC DIVISION, 1962

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
Advertising and Publicity		
A. Other personnel, advertising, tariffs, schedules and timetables	$ 8.2	$+0.1

This expense was incurred in connection with $298.5 million transportation revenue (Exhibit F, Sheet 1). We estimate the $2.1 million increase in simulated transportation revenue (Exhibit F, Sheet 2) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$8.2 \times \frac{\$\ 2.1}{\$298.5} = \$0.1 \text{ million increase}$$

B. Personnel expenses, other promotional and publicity expenses, rentals and various miscellaneous expenses	$ 0.7	NC
Total Advertising and Publicity Expense	$ 8.9	$+0.1
Total Promotion and Sales Expense	$34.7	$+0.3

GENERAL AND ADMINISTRATIVE EXPENSE

A. Record keeping and statistical personnel, purchasing personnel, other personnel, personnel expenses, uncollectible accounts, rentals, stationery, printing and office supplies, other expenses, insurance-employee welfare and taxes-payroll	$ 7.5	$+0.1

This expense was incurred in connection with $298.5 million transportation revenue (Exhibit F, Sheet 1). We estimate the $2.1 million increase in simulated transportation revenue (Exhibit F, Sheet 2) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$7.5 \times \frac{\$\ 2.1}{\$298.5} = \$0.1 \text{ million increase}$$

TWA Ex. 4(c)(4), Exhibit F, page 50 of 64
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER II

DOMESTIC DIVISION, 1962

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
B. General management personnel, communications purchased, professional and technical fees and expenses, other services-outside, other supplies, memberships, corporate and fiscal expenses, taxes-other than payroll, insurance purchased-general, other uncleared expense credits, legal fees and expenses and various miscellaneous expenses	$ 4.2	NC
Total General and Administrative Expense	$11.7	$+0.1
DEPRECIATION AND AMORTIZATION EXPENSE		
A. For flight equipment including airframes, engines, spares, other flight equipment and expendable spare parts obsolescence	$35.1	$+0.7
B. For ground property and equipment	$ 4.8	NC
C. For amortization of developmental and pre-operating expense	$ 5.2	$+0.1
Total Depreciation and Amortization Expense	$45.1	$+0.8

Note: These figures were given to us by Price Waterhouse & Co.

TOTAL OPERATING EXPENSE	$306.7	$+2.6

CALCULATION DETAILS FOR CHAPTER II

INTERNATIONAL DIVISION, 1963

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
FLYING OPERATIONS EXPENSE		
For B-331 Jet Aircraft		
A. Pilots and copilots, other flight personnel, trainees and instructors, personnel expenses, rentals, aircraft fuels, aircraft oils, taxes-other than payroll, insurance-employee welfare, taxes-payroll and various miscellaneous expenses	$16.0	$+8.7

This expense was incurred for operating B-331 aircraft 16.8 million plane-miles (Exhibit F, Sheet 1). We estimate the additional 9.1 million B-331 plane-miles (estimated additional 1.5 million B-331 plane-miles (page 15) plus 7.6 million plane-miles (Exhibit F, Sheet 1) to replace the B-331B plane-miles eliminated) would have increased this Group A expense proportionately. The calculation is:

$$\$16.0 \times \frac{9.1}{16.8} = \$8.7 \text{ million increase}$$

B. Insurance purchased-general	$ 0.7	$+0.4

This expense is primarily for aircraft hull insurance for 9.9 B-331 aircraft available for commercial service (page 11). We estimate the 5.2 increase in the number of available aircraft mentioned on page 13 would have increased this insurance expense proportionately. The calculation is:

$$\$0.7 \times \frac{5.2}{9.9} = \$0.4 \text{ million increase}$$

Total B-331 Flying Operations Expense	$16.7	$+9.1
For B-331B Jet Aircraft	$10.4	$-10.4

Our estimates assumed the substitution of B-331 aircraft for B-331B aircraft, which eliminates this B-331B expense.

For Other Aircraft and Generally Nonrevenue	$ 4.9	NC
Total Flying Operations Expense	$32.0	$-1.3

TWA Ex. 4(c)(4), Exhibit F, page 52 of 64
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER II

INTERNATIONAL DIVISION, 1963

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
MAINTENANCE EXPENSE		
Direct Maintenance Expense		
For B-331 Jet Aircraft Flight Equipment	$ 3.3	$+1.8
This expense was incurred for operating B-331 aircraft 16.8 million plane-miles (Exhibit F, Sheet 1). We estimate the 9.1 million (7.6 plus 1.5 million, Flying Operations on previous page) additional plane-miles (page 155) would have increased this expense proportionately. The calculation is: $\$3.3 \times \frac{9.1}{16.8} = \$1.8$ million increase		
For B-331B Jet Aircraft Flight Equipment	$ 1.0	$-1.0
Our estimates assumed the substitution of B-331 aircraft for B-331B aircraft, which eliminates this B-331B expense.		
For Other Aircraft and Generally Nonrevenue	$ 1.0	NC
For General Ground Property and Equipment	$ 0.4	NC
Total Direct Maintenance Expense	$ 5.7	$+0.8
Applied Maintenance Burden Expense		
For B-331 Jet Aircraft Flight Equipment	$ 3.1	$+1.7
This $3.1 million B-331 Applied Maintenance Burden expense was incurred in connection with $3.3 million B-331 Direct Maintenance expense shown above. We estimate the $1.8 million increase for B-331 Direct Maintenance (above) would have been accompanied by a proportionate increase in Applied Maintenance Burden expense. The calculation is: $\$3.1 \times \frac{\$1.8}{\$3.3} = \$1.7$ million increase		
For B-331B Jet Aircraft Flight Equipment	$ 0.4	$-0.4
Our estimates assumed the substitution of B-331 aircraft for B-331B aircraft, which eliminates this B-331B expense.		
For Other Aircraft and Generally Nonrevenue	$ 0.7	NC
For General Ground Property and Equipment	$ 0.3	NC
Total Applied Maintenance Burden Expense	$ 4.5	$+1.3
Total Maintenance Expense	$10.2	$+2.1

(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER II

INTERNATIONAL DIVISION, 1963

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
AIRCRAFT SERVICING EXPENSE		
A. Aircraft control personnel, trainees and instructors, rentals, landing fees, shop and servicing supplies, insurance-employee welfare and taxes-payroll	$ 5.8	$+0.3

This expense was incurred in connection with operating 27.3 million plane-miles (Exhibit F, Sheet 1). We estimate the additional 1.5 million plane-miles (page 18) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$5.8 \times \frac{1.5}{27.3} = \$0.3 \text{ million increase}$$

B. General aircraft and traffic handling personnel, communications personnel, record keeping and statistical personnel, personnel expenses, communications purchased, other services-outside, other supplies and various miscellaneous expenses	$ 2.4	NC
Total Aircraft Servicing Expense	$ 8.2	$+0.3
PASSENGER SERVICE EXPENSE		
A. Other flight personnel, other personnel, personnel expenses, rentals, insurance-employee welfare and taxes-payroll	$ 5.7	$+0.3

This expense was incurred in connection with operating 24.7 million plane-miles (page 14). We estimate the additional 1.5 million plane-miles (page 18) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$5.7 \times \frac{1.5}{24.7} = \$0.3 \text{ million increase}$$

B. Passenger food expense, other supplies, insurance-traffic liability and other services-outside	$ 3.8	$+0.2

This expense was incurred in connection with passenger traffic revenue of $105.0 million (page 27). We estimate the $5.3 million increase in revenue from passenger traffic mentioned on page 27 would have been accompanied by a proportionate increase in this Group B expense. The calculation is:

$$\$3.8 \times \frac{\$\ 5.3}{\$105.0} = \$0.2 \text{ million increase}$$

C. Various miscellaneous expenses	$ 0.2	NC
Total Passenger Service Expense	$ 9.7	$+0.5

CALCULATION DETAILS FOR CHAPTER II

INTERNATIONAL DIVISION, 1963

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
TRAFFIC SERVICING EXPENSE		
A. General aircraft and traffic handling personnel, passenger handling personnel, cargo handling personnel, other services-outside, rentals, other supplies, insurance-employee welfare and taxes-payroll	$ 4.2	$+0.2

This expense was incurred in connection with $131.3 million transportation revenue (Exhibit F, Sheet 1). We estimate the $5.6 million increase in simulated transportation revenue (Exhibit F, Sheet 2) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$4.2 \times \frac{\$\ 5.6}{\$131.3} = \$0.2 \text{ million increase}$$

B. Clearance, customs and duties, stationery, printing and office supplies, insurance-traffic liability, injuries, loss and damage, other expenses and various miscellaneous expenses	$ 1.0	NC
Total Traffic Servicing Expense	$ 5.2	$+0.2
SERVICING ADMINISTRATION EXPENSE		
Total Servicing Administration Expense	$ 1.3	NC

This expense was incurred in connection with Aircraft Servicing and Traffic Servicing expense of $8.2 and $5.2 million, respectively (previous page and above). We estimate the addition in Aircraft and Traffic Servicing expense of $0.3 and $0.2 million, respectively (previous page and above) would have been accompanied by a proportionate increase in the Servicing Administration expense. The calculation is:

$$\$1.3 \times \frac{(\$0.3+\$0.2)}{(\$8.2+\$5.2)} = \$0.048 \text{ million increase}$$

Total Servicing Administration Expense	$ 1.3	NC

CALCULATION DETAILS FOR CHAPTER II

INTERNATIONAL DIVISION, 1963

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
PROMOTION AND SALES EXPENSE		
Reservations and Sales		
A. General aircraft and traffic handling personnel, passenger handling personnel, record keeping and statistical personnel, traffic solicitors, other personnel, personnel expenses, commissions-passenger, communications purchased, commissions-property, rentals, other expenses, insurance-employee welfare, taxes-payroll	$14.0	$+0.6

This expense was incurred in connection with $131.3 million transportation revenue (Exhibit F Sheet 1). We estimate the $5.6 million increase in simulated transportation revenue (Exhibit F, Sheet 2) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$14.0 \times \frac{\$\ 5.6}{\$131.3} = \$0.6 \text{ million increase}$$

B. Communications personnel, general management personnel, light, heat, power and water, other services-outside, other supplies, stationery, printing and office supplies and various miscellaneous expenses	$ 1.0	NC
Total Reservations and Sales Expense	$15.0	$+0.6
Advertising and Publicity		
A. Other personnel, advertising and tariffs, schedules and timetables	$ 6.5	$+0.3

This expense was incurred in connection with $131.3 million transportation revenue (Exhibit F, Sheet 1). We estimate the $5.6 million increase in simulated transportation revenue (Exhibit F, Sheet 2) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$6.5 \times \frac{\$\ 5.6}{\$131.3} = \$0.3 \text{ million increase}$$

B. Various miscellaneous expenses	$ 0.2	NC
Total Advertising and Publicity Expense	$ 6.7	$+0.3
Total Promotion and Sales Expense	$21.7	$+0.9

CALCULATION DETAILS FOR CHAPTER II

INTERNATIONAL DIVISION, 1963

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
GENERAL AND ADMINISTRATIVE EXPENSE		
A. Record keeping and statistical personnel, purchasing personnel, other personnel, personnel expenses, uncollectible accounts, rentals, stationery, printing and office supplies, other expenses, insurance-employee welfare and taxes-payroll	$ 4.4	$+0.2
B. General management personnel, communications purchased, professional and technical fees and expenses, taxes-other than payroll, insurance purchased-general, other uncleared expense credits, legal fees and expenses and various miscellaneous expenses	$ 1.1	NC
Total General and Administrative Expense	$ 5.5	$+0.2
DEPRECIATION AND AMORTIZATION EXPENSE		
A. For flight equipment including airframes, engines, spares, other flight equipment and expendable spare parts obsolescence.	$ 8.8	$+3.0
B. For ground property and equipment	$ 0.9	NC
C. For amortization of developmental and pre-operating expense	$ 1.8	NC
Total Depreciation and Amortization Expense	$11.5	$+3.0

This expense was incurred in connection with $131.3 million transportation revenue (Exhibit F, Sheet 1). We estimate the $5.6 million increase in simulated transportation revenue (Exhibit F, Sheet 2) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$4.4 \times \frac{\$\ 5.6}{\$131.3} = \$0.2 \text{ million increase}$$

Note: These figures were given to us by Price Waterhouse & Co.

TOTAL OPERATING EXPENSE	$105.3	$+5.9

CALCULATION DETAILS FOR CHAPTER II

DOMESTIC DIVISION, 1963

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
FLYING OPERATIONS EXPENSE,		
For B-331 Jet Aircraft		
A. Pilots and copilots, other flight personnel, trainees and instructors, personnel expenses, aircraft fuels, insurance-employee welfare and various miscellaneous expenses	$ 3.2	$+1.3
This expense was incurred for operating B-331 aircraft 2.8 million plane-miles (page 28). We estimate the additional 1.1 million B-331 plane-miles (estimated additional 0.7 million B-331 plane-miles (page 28) plus 0.4 million plane-miles (Exhibit F, Sheet 1) to replace the B-331B plane-miles eliminated) would have increased this Group A expense proportionately. The calculation is: $\$3.2 \times \frac{1.1}{2.8} = \$1.3$ million increase		
B. Insurance purchased-general	$ 0.1	NC
This expense is primarily for aircraft hull insurance for 2.1 B-331 aircraft available for commercial service (page 28). We estimate the 0.8 increase in the number of available aircraft mentioned on page 13 would have increased this insurance expense proportionately. The calculation is: $\$0.1 \times \frac{0.8}{2.1} = \$0.04$ million increase		
Total B-331 Flying Operations Expense	$ 3.3	$+1.3
For L-1049G Piston Aircraft		
A. Pilots and copilots, other flight personnel, trainees and instructors, personnel expenses, aircraft fuels, aircraft oils, taxes-other than payroll, insurance-employee welfare, taxes-payroll and various miscellaneous expenses	$ 9.7	$-0.2
This expense was incurred for operating L-1049G aircraft 9.4 million plane-miles (Exhibit F, Sheet 1). We estimate the reduction of 0.2 million L-1049G plane-miles mentioned on page 29 would have decreased this Group A expense proportionately. The calculation is: $\$9.7 \times \frac{0.2}{9.4} = \$0.2$ million decrease		

TWA Ex. 4(c)(4), Exhibit F, page 58 of 64
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER II

DOMESTIC DIVISION, 1963

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
B. Insurance purchased-general	#	NC
Total L-1049G Flying Operations Expense	$ 9.7	$-0.2
For B-331B Jet Aircraft	$ 0.7	$-0.7

Our estimates assumed the substitution of B-331 aircraft for B-331B aircraft, which eliminates this B-331B expense.

For Other Aircraft and Generally Nonrevenue	$74.2	NC
Total Flying Operations Expense	$87.9	$+0.4

MAINTENANCE EXPENSE

Direct Maintenance Expense

For B-331 Jet Aircraft Flight Equipment	$ 0.4	$+0.2

This expense was incurred for operating B-331 aircraft 2.8 million plane-miles (page 28). We estimate the 1.1 million (0.7 plus 0.4 million, Flying Operations, page 57) additional plane-miles would have increased this expense proportionately. The calculation is:

$$\$0.4 \times \frac{1.1}{2.8} = \$0.2 \text{ million increase}$$

For L-1049G Piston Aircraft Flight Equipment	$ 4.9	$-0.1

This expense was incurred for operating L-1049G aircraft 9.4 million plane-miles (Exhibit F, Sheet 1). We estimate the reduction of 0.2 million L-1049G plane-miles mentioned on page 29 would have decreased this expense proportionately. The calculation is:

$$\$4.9 \times \frac{0.2}{9.4} = \$0.1 \text{ million decrease}$$

For B-331B Jet Aircraft Flight Equipment	#	NC
For Other Aircraft and Generally Nonrevenue	$23.1	NC
For General Ground Property and Equipment	$ 2.0	NC
Total Direct Maintenance Expense	$30.4	$+0.1

CALCULATION DETAILS FOR CHAPTER II

DOMESTIC DIVISION, 1963

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
Applied Maintenance Burden Expense		
For B-331 Jet Aircraft Flight Equipment	$ 0.3	$+0.2

This $0.3 million B-331 Applied Maintenance Burden expense was incurred in connection with $0.4 million B-331 Direct Maintenance expense shown on the previous page. We estimate the $0.2 million increase for B-331 Direct Maintenance (previous page) would have been accompanied by a proportionate increase in Applied Maintenance Burden expense. The calculation is:

$$\$0.3 \times \frac{\$0.2}{\$0.4} = \$0.2 \text{ million increase}$$

For L-1049G Piston Aircraft Flight Equipment	$ 3.5	$-0.1

This $3.5 million L-1049G Applied Maintenance Burden expense was incurred in connection with $4.9 million L-1049G Direct Maintenance expense shown on the previous page. We estimate the $0.1 million decrease for L-1049G Direct Maintenance (previous page) would have been accompanied by a proportionate decrease in Applied Maintenance Burden expense. The calculation is:

$$\$3.5 \times \frac{\$0.1}{\$4.9} = \$0.1 \text{ million decrease}$$

For B-331B Jet Aircraft Flight Equipment	#	NC
For Other Aircraft and Generally Nonrevenue	$17.8	NC
For General Ground Property and Equipment	$ 2.2	NC
Total Applied Maintenance Burden Expense	$23.8	$+0.1
Total Maintenance Expense	$54.2	$+0.2

TWA Ex. 4(c)(4), Exhibit F, page 60 of 64
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER II

DOMESTIC DIVISION, 1963

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
AIRCRAFT SERVICING EXPENSE		
A. General aircraft and traffic handling personnel, aircraft control personnel, trainees and instructors, personnel expenses, other services-outside, rentals, landing fees, other supplies, insurance-employee welfare and taxes-payroll	$23.2	$+0.1

This expense was incurred in connection with operating 99.6 million plane-miles (Exhibit F, Sheet 1). We estimate the net additional 0.5 million plane-miles (Exhibit F, Sheet 2) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$23.2 \times \frac{0.5}{99.6} = \$0.1 \text{ million increase}$$

B. Communications personnel, communications purchased, light, heat, power and water, shop and servicing supplies, stationery, printing and office supplies, other uncleared expense credits and various miscellaneous expenses	$ 3.3	NC
Total Aircraft Servicing Expense	$26.5	$+0.1
PASSENGER SERVICE EXPENSE		
A. Other flight personnel, other personnel, personnel expenses, insurance-employee welfare, taxes-payroll and rentals	$11.5	$+0.1

This expense was incurred in connection with operating 97.5 million plane-miles (page 29). We estimate the additional 0.5 million plane-miles (Exhibit F, Sheet 2) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$11.5 \times \frac{0.5}{97.5} = \$0.1 \text{ million increase}$$

CALCULATION DETAILS FOR CHAPTER II

DOMESTIC DIVISION, 1963

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
B. Passenger food expense, other supplies, insurance-traffic liability and other services-outside	$14.8	$+0.1

This expense was incurred in connection with passenger traffic revenue of $311.8 million (Exhibit F, Sheet 1). We estimate the $1.9 million increase in revenue from passenger traffic mentioned on page 30 would have been accompanied by a proportionate increase in this Group B expense. The calculation is:

$$\$14.8 \times \frac{\$\ 1.9}{\$311.8} = \$0.1 \text{ million increase}$$

C. Trainees and instructors, interrupted trips expense and various miscellaneous expenses	$ 0.5	NC
Total Passenger Service Expense	$26.8	$+0.2

TRAFFIC SERVICING EXPENSE

A. General aircraft and traffic handling personnel, passenger handling personnel, cargo handling personnel, insurance-employee welfare, injuries, loss and damage, taxes-payroll, other services-outside, rentals and other supplies	$22.5	$+0.1

This expense was incurred in connection with $341.5 million transportation revenue (Exhibit F, Sheet 1). We estimate the $2.0 million increase in simulated transportation revenue (Exhibit F, Sheet 2) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$22.5 \times \frac{\$\ 2.0}{\$341.5} = \$0.1 \text{ million increase}$$

B. Communications personnel, other personnel, personnel expenses, communications purchased, light, heat, power and water, stationery, printing and office supplies, insurance-traffic liability, other expenses and various miscellaneous expenses	$ 1.7	NC
Total Traffic Servicing Expense	$24.2	$+0.1

CALCULATION DETAILS FOR CHAPTER II

DOMESTIC DIVISION, 1963

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
SERVICING ADMINISTRATION EXPENSE		
Total Servicing Administration Expense	$ 2.9	NC

This expense was incurred in connection with Aircraft Servicing and Traffic Servicing expense of $26.5 and $24.2 million, respectively (previous pages). We estimate the addition in Aircraft and Traffic Servicing expense of $0.1 and $0.1 million, respectively (previous pages) would have been accompanied by a proportionate increase in the Servicing Administration expense. The calculation is:

$$\$2.9 \times \frac{(\$\ 0.1+\$\ 0.1)}{(\$26.5+\$24.2)} = \$0.01 \text{ million increase}$$

Total Servicing Administration Expense	$ 2.9	NC
PROMOTION AND SALES EXPENSE		
Reservations and Sales		
A. General aircraft and traffic handling personnel, passenger handling personnel, record keeping and statistical personnel, traffic solicitors, other personnel, personnel expenses, commissions-passenger, communications purchased, commissions-property, rentals, tariffs, schedules and timetables, other expenses, insurance-employee welfare and taxes-payroll	$27.7	$+0.2

This expense was incurred in connection with $341.5 million transportation revenue (Exhibit F, Sheet 1). We estimate the $2.0 million increase in simulated transportation revenue (Exhibit F, Sheet 2) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$27.7 \times \frac{\$\ 2.0}{\$341.5} = \$0.2 \text{ million increase}$$

B. Communications personnel, general management personnel, light, heat, power and water, other services-outside, stationery, printing and office supplies, trainees and instructors, other supplies and various miscellaneous expenses	$ 2.6	NC
Total Reservations and Sales Expense	$30.3	$+0.2

CALCULATION DETAILS FOR CHAPTER II

DOMESTIC DIVISION, 1963

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
Advertising and Publicity		
A. Other personnel, advertising and tariffs, schedules and timetables	$10.8	$+0.1

This expense was incurred in connection with $341.5 million transportation revenue (Exhibit F, Sheet 1). We estimate the $2.0 million increase in simulated transportation revenue (Exhibit F, Sheet 2) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$10.8 \times \frac{\$\ 2.0}{\$341.5} = \$0.1 \text{ million increase}$$

B. Personnel expenses, other promotional and publicity expenses, rentals and various miscellaneous expenses	$ 0.7	NC
Total Advertising and Publicity Expense	$11.5	$+0.1
Total Promotion and Sales Expense	$41.8	$+0.3

GENERAL AND ADMINISTRATIVE EXPENSE

A. Record keeping and statistical personnel, purchasing personnel, other personnel, personnel expenses, uncollectible accounts, rentals, stationery, printing and office supplies, other expenses, insurance-employee welfare and taxes-payroll	$ 8.5	NC

This expense was incurred in connection with $341.5 million transportation revenue (Exhibit F, Sheet 1). We estimate the $2.0 million increase in simulated transportation revenue (Exhibit F, Sheet 2) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$8.5 \times \frac{\$\ 2.0}{\$341.5} = \$0.049 \text{ million increase}$$

TWA Ex. 4(c)(4), Exhibit F, page 64 of 64
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER II

DOMESTIC DIVISION, 1963

	Actual Expense With Revisions of Chapter I	Estimated Change In Expense, For Chapter II
	(Millions)	
B. General management personnel, communications purchased, light, heat, power and water, professional and technical fees and expenses, other services-outside, other supplies, memberships, corporate and fiscal expenses, taxes-other than payroll, insurance purchased-general, other uncleared expense credits, legal fees and expenses and various miscellaneous expenses	$ 4.4	NC
Total General and Administrative Expense	$12.9	NC
DEPRECIATION AND AMORTIZATION EXPENSE		
A. For flight equipment including airframes, engines, spares, other flight equipment and expendable spare parts obsolescence	$31.6	$+0.5
B. For ground property and equipment	$ 3.9	NC
C. For amortization of developmental and pre-operating expense	$ 4.6	$+0.1
Total Depreciation and Amortization Expense	$40.1	$+0.6

Note: These figures were given to us by Price Waterhouse & Co.

TOTAL OPERATING EXPENSE	$317.3	$+1.9

CALCULATION DETAILS FOR OPERATING EXPENSE CHANGES, CHAPTER III

FOR EARLIER RECEIPT OF B-131 AND B-331 AIRCRAFT

For our calculation of operating expense changes that would have occurred if TWA had earlier receipt of fifteen B-131 and eighteen B-331 jet aircraft as mentioned on page 40, we used operating statistics mentioned in the text of Chapter III, certain operating statistics and expense estimates from Exhibit F, expense data from CAB Form 41 annual reports and the following statistics.

	Millions
Actual Plane-Miles, Domestic Division, 1959	
L-1649A (including cargo plane-miles)	8.6
All passenger (cargo plane-miles not included)	94.2
Division total (including cargo plane-miles)	96.0

These are calculated annual summaries of figures shown in Monthly Operating Statistics, Schedule 3-70M.

Actual Passenger Revenues, Domestic Division, 1959	$252.7
Actual Transportation Revenues, Domestic Division, 1959	$272.4

These are calculated from TWA December Financial Reports, Schedule 2-2M.

Estimated Net Decrease in Domestic Division Plane-Miles, 1960, Calculated from Estimates on Page 44, i.e.,	-0.4

1.0 million additional B-331 plane-miles minus 1.4 million reduction of piston aircraft plane-miles = 0.4 million net change.

Simulated Transportation Revenue Increase	Domestic Division (Millions)	International Division (Millions)
1959 Increase	$7.0	$4.4
1960 Increase	$1.2	$6.4

These are calculated by apportioning the additional revenue estimated for mail, express, freight and excess baggage stated on page 48, to each Division in accordance with the additional passenger revenue estimated for each Division (also shown on page 48).

	Millions
Estimated Chapter II L-1649A International Division Plane-Miles, 1959 Actual (Exhibit F, Sheet 1) plus Chapter II Estimate (pg. 17) 17.0 - 0.1 = 16.9	16.9
Estimated Chapter II B-331 Domestic Division Plane-Miles, 1960 Actual (Exhibit F, Sheet 1) plus Chapter II Estimate (pg. 28) 3.8 + 2.0 = 5.8	5.8
Estimated Chapter II L-1649A Domestic Division Plane-Miles, 1960 Actual (Exhibit F, Sheet 1) plus Chapter II Estimate (pg. 29) 7.8 - 2.9 = 4.9	4.9
Estimated Chapter II Total Plane-Miles Including Cargo Service, Domestic Division, 1960 Actual (Exhibit F, Sheet 1) plus Chapter II Net Reduction (Exhibit F, Sheet 2) 91.0 - 0.9 = 90.1	90.1
Estimated Chapter II Plane-Miles (Passenger Service Only) Domestic Division, 1960 Actual (pg. 29) plus Chapter II Net Reduction (Exhibit F, Sheet 2) 87.9 - 0.9 = 87.0	87.0
Estimated Chapter II Passenger Revenues, Domestic Division, 1960 Actual (Exhibit F, Sheet 1) plus Chapter II Estimate (pg. 30) $253.3 + $1.9 = $255.2	$255.2
Simulated Chapter II Transportation Revenues, Domestic Division, 1960 Actual (Exhibit F, Sheet 1) plus Chapter II Calculation (Exhibit F, Sheet 2) $275.5 + $2.0 = $277.5	$277.5
Estimated Chapter II B-331 International Division Plane-Miles, 1960 Actual (Exhibit F, Sheet 1) plus Chapter II Estimate (pg. 15) 10.7 + 6.3 = 17.0	17.0
Estimated Chapter II L-1649A International Division Plane-Miles, 1960 Actual (Exhibit F, Sheet 1) plus Chapter II Estimate (pg. 17) 6.8 - 5.1 = 1.7	1.7
Estimated Chapter II Total Plane-Miles Including Cargo Service, International Division, 1960 Actual (Exhibit F, Sheet 1) plus Chapter II Estimate (pg. 18) 19.2 + 1.2 = 20.4	20.4
Estimated Chapter II Plane-Miles (Passenger Service Only) International Division, 1960 Actual (pg. 14) plus Chapter II Estimate (pg. 18) 17.7 + 1.2 = 18.9	18.9
Simulated Chapter II Transportation Revenues, International Division, 1960 Actual (Exhibit F, Sheet 1) plus Chapter II Calculation (Exhibit F, Sheet 2) $98.4 + $19.8 = $118.2	$118.2

The pages that follow set forth details of our calculations of operating expense changes with earlier receipt of B-131 and B-331 aircraft, for the Domestic and International Divisions, for 1959 and 1960.

CALCULATION DETAILS FOR CHAPTER III

DOMESTIC DIVISION, 1959

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter III
	(Millions)	
FLYING OPERATIONS EXPENSE		
For B-131 Jet Aircraft		
A. Pilots and copilots, other flight personnel, personnel expenses, aircraft fuels, aircraft oils, taxes-other than payroll, insurance-employee welfare and various miscellaneous expenses	$ 8.7	$+1.3

This expense was incurred for operating B-131 aircraft 12.4 million plane-miles (page 43). We estimate the additional 1.9 million B-131 plane-miles mentioned on page 43 would have increased this Group A expense proportionately. The calculation is:

$$\$8.7 \times \frac{1.9}{12.4} = \$1.3 \text{ million increase}$$

B. Purchased public liability and property damage insurance	$ 1.8	$+0.3

This expense is primarily for aircraft hull insurance for 8.9 B-131 aircraft available for commercial service (page 41). We estimate the 1.4 increase in the available number of aircraft mentioned on page 41 would have increased this expense proportionately. The calculation is:

$$\$1.8 \times \frac{1.4}{8.9} = \$0.3 \text{ million increase}$$

Total B-131 Flying Operations Expense	$ 10.5	$+1.6
For B-331 Jet Aircraft		
A. Pilots and copilots, other flight personnel, personnel expenses, aircraft fuels, insurance-employee welfare and various miscellaneous expenses	#	$+0.7

In 1960 TWA operated 3.8 million B-331 plane-miles and incurred therefor $3.2 million Group A expense (Exhibit F, Sheet 13). We believe the estimated 0.8 million additional B-331 plane-miles mentioned on page 43 would have caused TWA to incur a proportionate amount of expense, calculated as follows:

$$\$3.2 \times \frac{0.8}{3.8} = \$0.7 \text{ million increase}$$

Note: There was no B-331 Domestic Division service in 1959, so 1960 statistics are used for this calculation.

\# This symbol is used to designate an amount too small to be significant in these calculations which are rounded to the nearest $0.1 million.

CALCULATION DETAILS FOR CHAPTER III

DOMESTIC DIVISION, 1959

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapters III
	(Millions)	
B. Purchased public liability and property damage insurance	#	$+0.1

In 1960 TWA had 2.7 B-331 aircraft available for commercial service and incurred $0.3 million expense for this insurance (Exhibit F, Sheet 13). We estimate the 0.6 increase in B-331 aircraft available (page 42) would have been accompanied by a proportionate increase in this expense. The calculation is:

$$\$0.3 \times \frac{0.6}{2.7} = \$0.1 \text{ million increase}$$

Note: There was no B-331 Domestic Division service in 1959, so 1960 statistics were used for this calculation.

Total B-331 Flying Operations Expense	#	$+0.8
For L-1649A Piston Aircraft		
A. Pilots and copilots, other flight personnel, trainees and instructors, personnel expenses, aircraft fuels, aircraft oils, taxes-other than payroll, insurance-employee welfare and various miscellaneous expenses	$ 6.4	$-2.0

This expense was incurred for operating L-1649A aircraft 8.6 million plane-miles (Exhibit G, Sheet 1). We estimate the reduction of 2.7 million L-1649A plane-miles mentioned on page 44 would have decreased this Group A expense proportionately. The calculation is:

$$\$6.4 \times \frac{2.7}{8.6} = \$2.0 \text{ million decrease}$$

B. Purchased public liability and property damage insurance	$ 0.3	NC
Total L-1649A Flying Operations Expense	$ 6.7	$-2.0
For Other Aircraft and Generally Nonrevenue	$ 54.1	NC
Total Flying Operations Expense	$ 71.3	$+0.4

NC - No significant change estimated for these expenses.

CALCULATION DETAILS FOR CHAPTER III

DOMESTIC DIVISION, 1959

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter III
	(Millions)	
MAINTENANCE EXPENSE		
Direct Maintenance Expense		
For B-131 Jet Aircraft Flight Equipment	$ 6.0	$+0.9

This expense was incurred for operating B-131 aircraft 12.4 million plane-miles (page 43). We estimate the additional 1.9 million B-131 plane-miles mentioned on page 43 would have increased this expense proportionately. The calculation is:

$$\$6.0 \times \frac{1.9}{12.4} = \$0.9 \text{ million increase}$$

For B-331 Jet Aircraft Flight Equipment	#	$+0.3

In 1960 TWA operated 3.8 million B-331 plane-miles and incurred therefor $1.3 million expense (Exhibit F, Sheet 14). We believe the estimated 0.8 million additional B-331 plane-miles mentioned on page 43 would have caused TWA to incur a proportionate amount of expense, calculated as follows:

$$\$1.3 \times \frac{0.8}{3.8} = \$0.3 \text{ million increase}$$

Note: There was no B-331 Domestic Division service in 1959, so 1960 statistics were used for this calculation.

For L-1649A Piston Aircraft Flight Equipment	$ 3.3	$-1.0

This expense was incurred for operating L-1649A aircraft 8.6 million plane-miles (Exhibit G, Sheet 1). We estimate the reduction of 2.7 million L-1649A plane-miles mentioned on page 44 would have decreased this expense proportionately. The calculation is:

$$\$3.3 \times \frac{2.7}{8.6} = \$1.0 \text{ million decrease}$$

For Other Aircraft and Generally Nonrevenue	$ 22.4	NC
For General Ground Property and Equipment	$ 0.6	NC
Total Direct Maintenance Expense	$ 32.3	$+0.2

TWA Ex. 4(c)(4), Exhibit G, page 6 of 35
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER III

DOMESTIC DIVISION, 1959

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter III
	(Millions)	
Applied Maintenance Burden Expense		
For B-131 Jet Aircraft Flight Equipment	$ 1.8	$+0.3

This $1.8 million B-131 Applied Maintenance Burden expense was incurred in connection with $6.0 million B-131 Direct Maintenance expense shown on the previous page. We estimate the $0.9 million increase for B-131 Direct Maintenance (previous page) would have been accompanied by a proportionate increase in Applied Maintenance Burden expense. The calculation is:

$$\$1.8 \times \frac{\$0.9}{\$6.0} = \$0.3 \text{ million increase}$$

For B-331 Jet Aircraft Flight Equipment	#	$+0.1

In 1960 TWA incurred $0.5 million B-331 Applied Maintenance Burden expense in connection with $1.3 million Direct Maintenance expense (Exhibit F, Sheet 15). We estimate the $0.3 million increase in Direct Maintenance expense (shown above) would have been accompanied by a proportionate increase in Applied Maintenance Burden expense. The calculation is:

$$\$0.5 \times \frac{\$0.3}{\$1.3} = \$0.1 \text{ million increase}$$

Note: There was no B-331 Domestic Division service in 1959, so 1960 statistics were used for this calculation.

For L-1649A Piston Aircraft Flight Equipment	$ 2.0	$-0.6

This $2.0 million L-1649A Applied Maintenance Burden expense was incurred in connection with $3.3 million L-1649A Direct Maintenance shown in Exhibit G, Sheet 5. We estimate the $1.0 million decrease for L-1649A Direct Maintenance expense (previous page) would have been accompanied by a proportionate decrease in Applied Maintenance Burden expense. The calculation is:

$$\$2.0 \times \frac{\$1.0}{\$3.3} = \$0.6 \text{ million decrease}$$

For Other Aircraft and Generally Nonrevenue	$ 14.6	NC
For General Ground Property and Equipment	$ 0.5	NC
Total Applied Maintenance Burden Expense	$ 18.9	$-0.2
al Maintenance Expense	$ 51.2	NC

CALCULATION DETAILS FOR CHAPTER III

DOMESTIC DIVISION, 1959

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter III
	(Millions)	
AIRCRAFT SERVICING EXPENSE		
A. General aircraft and traffic handling personnel, aircraft control personnel, trainees and instructors, personnel expenses, other services-outside, rentals, landing fees, other supplies, insurance-employee welfare and taxes-payroll	$ 17.0	$+0.1
This expense was incurred in connection with operating 96.0 million plane-miles (Exhibit G, Sheet 1) which remain unchanged (44). However, we select a $0.1 million increase for additional landing fees, as a possible increase in Aircraft Servicing expense.		
B. Communications personnel, communications purchased, light, heat, power and water, other services-associated companies, shop and servicing supplies, stationery, printing and office supplies, other uncleared expense credits and various miscellaneous expenses	$ 3.4	NC
Total Aircraft Servicing Expense	$ 20.4	$+0.1
PASSENGER SERVICE EXPENSE		
A. Other flight personnel, other personnel, personnel expenses, insurance-employee welfare and taxes-payroll	$ 8.0	NC
This expense was incurred in connection with operating 94.2 million plane-miles (Exhibit G, Sheet 1) which remain unchanged.		
B. Passenger food, other supplies, insurance-traffic liability and other services-outside	$ 10.7	$+0.3
This expense was incurred in connection with passenger traffic revenue of $252.7 million (Exhibit G, Sheet 1). We estimate the $6.7 million increase in revenue from passenger traffic mentioned on page 45 would have been accompanied by a proportionate increase in this Group B expense. The calculation is: $10.7 x $\frac{\$ 6.7}{\$252.7}$ = $0.3 million increase		

CALCULATION DETAILS FOR CHAPTER III

DOMESTIC DIVISION, 1959

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter III
	(Millions)	
C. Trainees and instructors, interrupted trips expense, other expenses and various miscellaneous expenses	$ 0.5	NC
Total Passenger Service Expense	$ 19.2	$+0.3
TRAFFIC SERVICING EXPENSE		
A. General aircraft and traffic handling personnel, passenger handling personnel, cargo handling personnel, other services-outside, rentals, other supplies, insurance-employee welfare, taxes-payroll and injuries, loss and damage	$ 13.5	$+0.3

This expense was incurred in connection with $272.4 million transportation revenues (Exhibit G, Sheet 1). We estimate the $7.0 million increase in simulated transportation revenue (Exhibit G, Sheet 1) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$13.5 \times \frac{\$\ 7.0}{\$272.4} = \$0.3 \text{ million increase}$$

B. Other personnel, communications purchased, light, heat, power and water, other services-associated companies, stationery, printing and office supplies, other expenses and various miscellaneous expenses	$ 1.3	NC
Total Traffic Servicing Expense	$ 14.8	$+0.3
SERVICING ADMINISTRATION EXPENSE		
Total Servicing Administration Expense	$ 1.4	NC

This expense was incurred in connection with Aircraft Servicing and Traffic Servicing expense of $20.4 and $14.8 million respectively (previous page and above). We estimate the increase in Aircraft and Traffic Servicing expenses of $0.1 and $0.3 million respectively (previous page and above) would have been accompanied by a proportionate increase in Servicing Administration expense. The calculation is:

$$\$1.4 \times \frac{(\$\ 0.1+\$\ 0.3)}{(\$20.4+\$14.8)} = \$0.016 \text{ million increase}$$

Total Servicing Administration Expense	$ 1.4	NC

CALCULATION DETAILS FOR CHAPTER III

DOMESTIC DIVISION, 1959

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter III
	(Millions)	

PROMOTION AND SALES EXPENSE

Reservations and Sales

A. General aircraft and traffic handling personnel, passenger handling personnel, record keeping and statistical personnel, traffic solicitors, other personnel, personnel expenses, commissions-passenger, communications purchased, tariffs, schedules and timetables, rentals, other expenses, insurance-employee welfare and taxes-payroll — $ 21.0 — $+0.5

This expense was incurred in connection with $272.4 million transportation revenues (Exhibit G, Sheet 1). We estimate the $7.0 million increase in simulated transportation revenues (Exhibit G, Sheet 1) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$21.0 \times \frac{\$\ 7.0}{\$272.4} = \$0.5 \text{ million increase}$$

B. Communications personnel, general management personnel, light, heat, power and water, other services-outside, other supplies, stationery, printing and office supplies, memberships and various miscellaneous expenses — $ 1.8 — NC

Total Reservations and Sales Expense — $ 22.8 — $+0.5

Advertising and Publicity

A. Other personnel, advertising and tariffs, schedules and timetables — $ 4.8 — $+0.1

This expense was incurred in connection with $272.4 million transportation revenues (Exhibit G, Sheet 1). We estimate the $7.0 million increase in simulated transportation revenues (Exhibit G, Sheet 1) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$4.8 \times \frac{\$\ 7.0}{\$272.4} = \$0.1 \text{ million increase}$$

TWA Ex. 4(c)(4), Exhibit G, page 10 of 35
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER III

DOMESTIC DIVISION, 1959

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter III
	(Millions)	
B. Other promotional and publicity expenses, professional and technical fees and expenses, personnel expenses, rentals and various miscellaneous expenses	$ 0.7	NC
Total Advertising and Publicity Expense	$ 5.5	$+0.1
Total Promotion and Sales Expense	$ 28.3	$+0.6

GENERAL AND ADMINISTRATIVE EXPENSE

A. Record keeping and statistical personnel, purchasing personnel, other personnel, personnel expenses, rentals, stationery, printing and office supplies, uncollectible accounts, other expenses, insurance-employee welfare and taxes-payroll	$ 6.1	$+0.2

This expense was incurred in connection with $272.4 million transportation revenues (Exhibit G, Sheet 1). We estimate the $7.0 million increase in simulated transportation revenues (Exhibit G, Sheet 1) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$6.1 \times \frac{\$\ 7.0}{\$272.4} = \$0.2 \text{ million increase}$$

B. General management personnel, communications purchased, professional and technical fees and expenses, memberships, corporate and fiscal expenses, taxes-other than payroll, purchased public liability and property damage insurance, legal fees and expenses, other services-outside, other supplies and various miscellaneous expenses	$ 2.4	NC
Total General and Administrative Expenses	$ 8.5	$+0.2

TWA Ex. 4(c)(4), Exhibit G, page 11 of 35
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER III

DOMESTIC DIVISION, 1959

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter III
	(Millions)	
DEPRECIATION AND AMORTIZATION EXPENSE		
For flight equipment including airframes, engines, spares, other flight equipment and expendable spare parts obsolescence	$ 23.9	$+1.2
For ground property and equipment	$ 3.1	NC
For amortization of developmental and pre-operating expense	$ 1.6	NC
Total Depreciation and Amortization Expense	$ 28.6	$+1.2

Note: These figures were given to us by Price Waterhouse & Co.

TOTAL OPERATING EXPENSE	$243.7	$+3.1

TWA Ex. 4(c)(4), Exhibit G, page 12 of 35
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER III

INTERNATIONAL DIVISION, 1959

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter III
	(Millions)	

FLYING OPERATIONS EXPENSE
For B-331 Jet Aircraft

A. Pilots and copilots, other flight personnel, aircraft fuels and various miscellaneous expenses (Exhibit F, Sheet 3: $0.2 + $0.1 = $0.3) — $ 0.3 — $+1.3

In 1959 there were only 0.2 million B-331 plane-miles on International Division service and we estimated increase of only 0.1 million for Chapter II. For Chapter III conditions, we estimate a much larger increase of 1.6 million B-331 plane-miles (page 46). We believe it is reasonable to use 1960 operating expenses as the basis for 1959 calculations of B-331 Flying Operations and Maintenance expenses for Chapter III because we believe 1960 expenses are more nearly comparable to those that would have been incurred in 1959 with the substantial increase in B-331 plane-miles. The calculation is:

$8.9 million Group A actual expense, B-331, 1960 (Exhibit F, Sheet 6)
10.7 million B-331 actual plane-miles, 1960 (Exhibit F, Sheet 6)

$$\$8.9 \times \frac{1.6}{10.7} = \$1.3 \text{ million increase}$$

B. Purchased public liability and property damage insurance — # — $+0.1

This expense is primarily for aircraft hull insurance. Using 1960 data for B-331 actual operations, with our estimate of 0.9 increase in the number of available aircraft for 1959 mentioned on page 42, we calculate a proportionate increase as follows:

$0.9 million Group B actual expense, B-331, 1960 (Exhibit F, Sheet 6)
6.1 million B-331 aircraft available for commercial service, 1960 (Exhibit F, Sheet 6)

$$\$0.9 \times \frac{0.9}{6.1} = \$0.1 \text{ million increase}$$

Total B-331 Flying Operations Expense — $ 0.3 — $+1.4

CALCULATION DETAILS FOR CHAPTER III

INTERNATIONAL DIVISION, 1959

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter III
	(Millions)	
For L-1649A Piston Aircraft		
A. Pilots and copilots, other flight personnel, personnel expenses, aircraft fuels, aircraft oils, taxes-other than payroll, insurance-employee welfare, taxes-payroll and various miscellaneous expenses (Exhibit F, Sheet 3: $17.4 - $0.1 = $17.3)	$ 17.3	$-1.6

This expense was incurred for operating L-1649A aircraft 16.9 million plane-miles (Exhibit G, Sheet 1). We estimate the reduction of 1.6 million L-1649A plane-miles mentioned on page 46 would have decreased this Group A expense proportionately. The calculation is:

$$\$17.3 \times \frac{1.6}{16.9} = \$1.6 \text{ million decrease}$$

B. Purchased public liability and property damage insurance (Exhibit F, Sheet 3)	$ 0.7	NC
Total L-1649A Flying Operations Expense	$ 18.0	$-1.6
For Other Aircraft and Generally Nonrevenue (Exhibit F, Sheet 3)	$ 10.1	NC
Total Flying Operations Expense	$ 28.4	$-0.2

MAINTENANCE EXPENSE

Direct Maintenance Expense

For B-331 Jet Aircraft Flight Equipment (Exhibit F, Sheet 4: $0.2 + $0.1 = $0.3)	$ 0.3	$+0.6

In 1960, TWA operated 10.7 million B-331 plane-miles and incurred therefor $3.9 million Direct Maintenance expense (Exhibit F, Sheet 7). We believe the estimate of 1.6 million additional B-331 plane-miles mentioned on page 46 would have caused TWA to incur a proportionate increase in expenses. The calculation is:

$$\$3.9 \times \frac{1.6}{10.7} = \$0.6 \text{ million increase}$$

TWA Ex. 4(c)(4), Exhibit G, page 14 of 35
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER III

INTERNATIONAL DIVISION, 1959

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter III
	(Millions)	
For L-1649A Piston Aircraft Flight Equipment (Exhibit F, Sheet 4)	$ 5.9	$-0.6

This expense was incurred for operating L-1649A aircraft 17.0 million plane-miles (Exhibit F, Sheet 1). We estimate the reduction of 1.6 million L-1649A plane-miles mentioned on page 46 would have decreased this expense proportionately. The calculation is:

$$\$5.9 \times \frac{1.6}{17.0} = \$0.6 \text{ million decrease}$$

For Other Aircraft and Generally Nonrevenue (Exhibit F, Sheet 4)	$ 2.5	NC
For General Ground Property and Equipment (Exhibit F, Sheet 4)	$ 0.2	NC
Total Direct Maintenance Expense	$ 8.9	NC
Applied Maintenance Burden Expense		
For B-331 Jet Aircraft Flight Equipment (Exhibit F, Sheet 4: $0.1 + $0.1 = $0.2)	$ 0.2	$+0.2

In 1960, TWA incurred $1.5 million Applied Maintenance Burden expense in connection with $3.9 million B-331 Direct Maintenance expense (Exhibit F, Sheet 8). We estimate the $0.6 million increase for B-331 Direct Maintenance expense (previous page) would have been accompanied by a proportionate increase in Applied Maintenance Burden expense. The calculation is:

$$\$1.5 \times \frac{\$0.6}{\$3.9} = \$0.2 \text{ million increase}$$

For L-1649A Piston Aircraft Flight Equipment (Exhibit F, Sheet 4)	$ 3.4	$-0.3

This $3.4 million L-1649A Applied Maintenance Burden expense was incurred in connection with the $5.9 million L-1649A Direct Maintenance espense shown above. We estimate the $0.6 million decrease for L-1649A Direct Maintenance expense (above) would have been accompanied by a proportionate decrease in Applied Maintenance Burden expense. The calculation is:

$$\$3.4 \times \frac{\$0.6}{\quad} = \$0.3 \text{ million decrease}$$

CALCULATION DETAILS FOR CHAPTER III

INTERNATIONAL DIVISION, 1959

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter III
	(Millions)	
For Other Aircraft and Generally Nonrevenue (Exhibit F, Sheet 4)	$ 1.3	NC
For General Ground Property and Equipment (Exhibit F, Sheet 4)	$ 0.1	NC
Total Applied Maintenance Burden Expense	$ 5.0	$-0.1
Total Maintenance Expense	$ 13.9	$-0.1

AIRCRAFT SERVICING EXPENSE

A. Aircraft control personnel, trainees and instructors, rentals, landing fees, shop and servicing supplies, insurance-employee welfare and taxes-payroll — $ 3.7 — NC

This expense was incurred in connection with operating 23.6 million plane-miles which remains unchanged (Exhibit F, Sheet 1). Therefore, we estimate no significant change in the above expense.

B. General aircraft and traffic handling personnel, communications personnel, personnel expenses, communications purchased, other services-outside, other supplies, other expenses and various miscellaneous expenses — $ 3.5 — NC

Total Aircraft Servicing Expense — $ 7.2 — NC

PASSENGER SERVICE EXPENSE

A. Other flight personnel, other personnel, personnel expenses, insurance-employee welfare and taxes-payroll — $ 3.0 — NC

This expense was incurred in connection with operating 21.8 million plane-miles (46) which remains unchanged. Therefore, we estimate no significant change in this expense.

CALCULATION DETAILS FOR CHAPTER III

INTERNATIONAL DIVISION, 1959

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter III
	(Millions)	
B. Passenger food expense, other supplies, insurance-traffic liability and other services-outside	$ 2.2	$+0.2

This expense was incurred in connection with $60.1 million passenger revenue (page 47; $59.5 + $0.6 = $60.1). We estimate the $4.2 million increase in passenger revenue mentioned on page 47 would have been accompanied by a proportionate increase in this Group B expense. The calculation is:

$$\$2.2 \times \frac{\$\ 4.2}{\$60.1} = \$0.2 \text{ million increase}$$

C. Interrupted trips expense, other expenses and various miscellaneous expenses	$ 0.2	NC
Total Passenger Service Expense	$ 5.4	$+0.2

TRAFFIC SERVICING EXPENSE

A. General aircraft and traffic handling personnel, passenger handling personnel, cargo handling personnel, other services-outside, rentals, other supplies, insurance-employee welfare and taxes-payroll	$ 2.3	$+0.1

This expense was incurred in connection with $74.2 million transportation revenue (Exhibit F, Sheet 1 and page 33; $73.6 + $0.6 = $74.2). We estimate the $4.4 million increase in simulated transportation revenue (Exhibit G, Sheet 1) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$2.3 \times \frac{\$\ 4.4}{\$74.2} = \$0.1 \text{ million increase}$$

B. Other personnel, communications purchased, clearance, customs and duties, other expenses and various miscellaneous expenses	$ 0.8	NC
Total Traffic Servicing Expense	$ 3.1	$+0.1

CALCULATION DETAILS FOR CHAPTER III

INTERNATIONAL DIVISION, 1959

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter III
	(Millions)	
SERVICING ADMINISTRATION EXPENSE		
Total Servicing Administration Expense	$ 0.8	NC

This expense was incurred in connection with Aircraft Servicing and Traffic Servicing expense of $7.2 million and $3.1 million respectively (previous page). We estimate the increase of $0.1 million in these expenses (previous page) would not have resulted in any significant increase in Servicing Administration expenses.

Total Servicing Administration Expense	$ 0.8	NC
PROMOTION AND SALES EXPENSE		
Reservations and Sales		
A. General aircraft and traffic handling personnel, passenger handling personnel, record keeping and statistical personnel, traffic solicitors, other personnel, personnel expenses, commissions-passenger, communications purchased, commissions-property, rentals, other expenses, insurance-employee welfare and taxes-payroll	$ 7.7	$+0.5

This expense was estimated in connection with $74.2 million transportation revenue (shown previously). We estimate the $4.4 million increase in simulated transportation revenue (Exhibit G, Sheet 1) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$7.7 \times \frac{\$\ 4.4}{\$74.2} = \$0.5 \text{ million increase}$$

B. General management personnel, light, heat and power, other services-outside, stationery, printing and office supplies, other supplies and various miscellaneous expenses	$ 0.6	NC
Total Reservations and Sales Expense	$ 8.3	$+0.5

CALCULATION DETAILS FOR CHAPTER III

INTERNATIONAL DIVISION, 1959

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter III
	(Millions)	
Advertising and Publicity		
A. Other personnel, advertising and tariffs, schedules and timetables	$ 2.9	$+0.2

This expense was incurred in connection with $74.2 million transportation revenue (shown previously). We estimate the $4.4 million in simulated transportation revenue (Exhibit G, Sheet 1) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$2.9 \times \frac{\$\ 4.4}{\$74.2} = \$0.2 \text{ million increase}$$

B. Other promotion and publicity expenses, professional and technical fees and expenses and various miscellaneous expenses	$ 0.2	NC
Total Advertising and Publicity Expense	$ 3.1	$+0.2
Total Promotion and Sales Expense	$ 11.4	$+0.7

GENERAL AND ADMINISTRATIVE EXPENSE

A. Record keeping and statistical personnel, purchasing personnel, other personnel, personnel expenses, uncollectible accounts, rentals, stationery, printing and office supplies, other expenses, insurance-employee welfare and taxes-payroll	$ 2.4	$+0.1

This expense was incurred in connection with $74.2 million transportation revenue (shown previously). We estimate the $4.4 million increase in simulated transportation revenue (Exhibit G, Sheet 1) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$2.4 \times \frac{\$\ 4.4}{\$74.2} = \$0.1 \text{ million increase}$$

CALCULATION DETAILS FOR CHAPTER III

INTERNATIONAL DIVISION, 1959

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter III
	(Millions)	
B. General management personnel, communications purchased, taxes-other than payroll, insurance purchased-general, other expenses, other uncleared expense credits, legal fees and expenses and various miscellaneous expenses	$ 0.7	NC
Total General and Administrative Expense	$ 3.1	$+0.1
DEPRECIATION AND AMORTIZATION EXPENSE		
For flight equipment including airframes, engines, spares, other flight equipment and expendable spare parts obsolescence	$ 8.3	$+0.7
For ground property and equipment	$ 0.8	$+0.1
For amortization of developmental and pre-operating expense	$ 0.7	NC
Total Depreciation and Amortization Expense	$ 9.8	$+0.8

Note: These figures were given to us by Price Waterhouse & Co.

TOTAL OPERATING EXPENSE	$ 83.1	$+1.6

CALCULATION DETAILS FOR CHAPTER III

DOMESTIC DIVISION, 1960

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter III
	(Millions)	

FLYING OPERATIONS EXPENSE

For B-331 Jet Aircraft

A. Pilots and copilots, other flight personnel, personnel expenses, aircraft fuels, insurance-employee welfare and various miscellaneous expenses (Exhibit F, Sheet 13: $3.2 + $1.7 = $4.9) — $ 4.9 — $+0.8

This expense was calculated for operating B-331 aircraft 5.8 million plane-miles (Exhibit G, Sheet 2). We estimate the additional 1.0 million B-331 plane-miles mentioned on page 44 would have increased this Group A expense proportionately. The calculation is:

$$\$4.9 \times \frac{1.0}{5.8} = \$0.8 \text{ million increase}$$

B. Purchased public liability and property damage insurance (Exhibit F, Sheet 13: $0.3 + $0.2 = $0.5) — $ 0.5 — $+0.1

This expense is primarily for aircraft hull insurance for 4.1 B-331 aircraft available for commercial service (page 42). We estimate the 0.7 increase in the available number of aircraft mentioned on page 42 would have increased this insurance expense proportionately. The calculation is:

$$\$0.5 \times \frac{0.7}{4.1} = \$0.1 \text{ million increase}$$

Total B-331 Flying Operations Expense — $ 5.4 — $+0.9

For L-1649A Piston Aircraft

A. Pilots and copilots, other flight personnel, trainees and instructors, personnel expenses, aircraft fuels, aircraft oils, taxes-other than payroll, insurance-employee welfare and various miscellaneous expenses (Exhibit F, Sheet 13: $6.7 - $2.5 = $4.2) — $ 4.2 — $-1.2

This expense was calculated for operating L-1649A aircraft 4.9 million plane-miles (Exhibit G, Sheet 2). We estimate the reduction of 1.4 million L-1649A plane-miles mentioned on page 44 would have decreased this Group A expense proportionately. The calculation is:

CALCULATION DETAILS FOR CHAPTER III

DOMESTIC DIVISION, 1960

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter III
	(Millions)	
B. Purchased public liability and property damage insurance (Exhibit F, Sheet 14)	$ 0.2	NC
Total L-1649A Flying Operations Expense	$ 4.4	$-1.2
For Other Aircraft and Generally Nonrevenue (Exhibit F, Sheet 14)	$ 63.6	NC
Total Flying Operations Expense	$ 73.4	$-0.3
MAINTENANCE EXPENSE		
Direct Maintenance Expense		
For B-331 Jet Aircraft Flight Equipment (Exhibit F, Sheet 14: $1.3 + $0.7 = $2.0)	$ 2.0	$+0.3

This expense was calculated for operating B-331 aircraft 5.8 million plane-miles (Exhibit G, Sheet 2). We estimate the additional 1.0 million B-331 plane-miles mentioned on page 44 would have increased this expense proportionately. The calculation is:

$$\$2.0 \times \frac{1.0}{5.8} = \$0.3 \text{ million increase}$$

For L-1649A Piston Aircraft Flight Equipment (Exhibit F, Sheet 14: $3.7 - $1.4 = $2.3)	$ 2.3	$-0.7

This expense was calculated for operating L-1649A aircraft 4.9 million plane-miles (Exhibit G, Sheet 2). We estimate the reduction of 1.4 million L-1649A plane-miles mentioned on page 44 would have decreased this expense proportionately. The calculation is:

$$\$2.3 \times \frac{1.4}{4.9} = \$0.7 \text{ million decrease}$$

For Other Aircraft and Generally Nonrevenue (Exhibit F, Sheet 14)	$ 30.1	NC
For General Ground Property and Equipment (Exhibit F, Sheet 14)	$ 0.8	NC
Total Direct Maintenance Expense	$ 35.2	$-0.4

TWA Ex. 4(c)(4), Exhibit G, page 22 of 35
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER III

DOMESTIC DIVISION, 1960

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter III
	(Millions)	
Applied Maintenance Burden Expense		
For B-331 Jet Aircraft Flight Equipment (Exhibit F, Sheet 15: $0.5 + $0.3 = $0.8)	$ 0.8	$+0.1

This $0.8 million B-331 Applied Maintenance Burden expense was estimated in connection with $2.0 million B-331 Direct Maintenance expense shown on the previous page. We estimate the $0.3 million increase for B-331 Direct Maintenance expense (previous page) would have been accompanied by a proportionate increase in Applied Maintenance Burden expense. The calculation is:

$$\$0.8 \times \frac{\$0.3}{\$2.0} = \$0.1 \text{ million increase}$$

For L-1649A Piston Aircraft Flight Equipment (Exhibit F, Sheet 15: $2.5 - $0.9 = $1.6)	$ 1.6	$-0.5

This $1.6 million L-1649A Applied Maintenance Burden expense was estimated in connection with $2.3 million L-1649A Direct Maintenance expense shown on the previous page. We estimate the $0.7 million decrease for L-1649A Direct Maintenance expense (previous page) would have been accompanied by a proportionate decrease in Applied Maintenance Burden expense. The calculation is:

$$\$1.6 \times \frac{\$0.7}{\$2.3} = \$0.5 \text{ million decrease}$$

For Other Aircraft and Generally Nonrevenue (Exhibit F, Sheet 15)	$ 20.6	NC
For General Ground Property and Equipment (Exhibit F, Sheet 15)	$ 0.8	NC
Total Applied Maintenance Burden Expense	$ 23.8	$-0.4
Total Maintenance Expense	$ 59.0	$-0.8

CALCULATION DETAILS FOR CHAPTER III

DOMESTIC DIVISION, 1960

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter III
	(Millions)	
AIRCRAFT SERVICING EXPENSE		
A. General aircraft and traffic handling personnel, aircraft control personnel, trainees and instructors, personnel expenses, other services-outside, rentals, landing fees, other supplies, insurance-employee welfare and taxes-payroll (Exhibit F, Sheet 16: $18.5 - $0.2 = $18.3)	$ 18.3	$-0.1

This expense was estimated in connection with operating 90.1 million plane-miles (Exhibit G, Sheet 2). We estimate the net reduction of 0.4 million plane-miles (Exhibit G, Sheet 1) would have been accompanied by a proportionate decrease in this Group A expense. The calculation is:

$$\$18.3 \times \frac{0.4}{90.1} = \$0.1 \text{ million decrease}$$

B. Communications personnel, communications purchased, light, heat, power and water, other services-associated companies, shop and servicing supplies, stationery, printing and office supplies, other uncleared expense credits and various miscellaneous expenses	$ 2.9	NC
Total Aircraft Servicing Expense	$ 21.2	$-0.1
PASSENGER SERVICE EXPENSE		
A. Other flight personnel, other personnel, personnel expenses, insurance-employee welfare and taxes-payroll (Exhibit F, Sheet 16: $8.7 - $0.1 = $8.6)	$ 8.6	NC

This expense was estimated in connection with operating 87.0 million plane-miles (Exhibit G, Sheet 2). We estimate the net reduction of 0.4 million plane-miles (Exhibit G, Sheet 1) would have been accompanied by a proportionate decrease in this Group A expense. The calculation is:

$$\$8.6 \times \frac{0.4}{87.0} = \$0.04 \text{ million decrease}$$

CALCULATION DETAILS FOR CHAPTER III

DOMESTIC DIVISION, 1960

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter III
	(Millions)	
B. Passenger food expense, other supplies, insurance-traffic liability and other services-outside (Exhibit F, Sheet 17: $12.9 + $0.1 = $13.0)	$ 13.0	$+0.1

This expense was estimated in connection with passenger traffic revenue of $255.2 million (Exhibit G, Sheet 2). We estimate the $1.1 million increase in revenue from passenger traffic mentioned on page 48 would have been accompanied by a proportionate increase in this Group B expense. The calculation is:

$$\$13.0 \times \frac{\$\ 1.1}{\$255.2} = \$0.1 \text{ million increase}$$

C. Trainees and instructors, interrupted trips expense, other expenses and various miscellaneous expenses (Exhibit F, Sheet 17)	$ 0.6	NC
Total Passenger Service Expense	$ 22.2	$+0.1

TRAFFIC SERVICING EXPENSE

A. General aircraft and traffic handling personnel, passenger handling personnel, cargo handling personnel, other services-outside, rentals, other supplies, insurance-employee welfare, taxes-payroll and injuries, loss and damage (Exhibit F, Sheet 17: $15.4 + $0.1 = $15.5)	$ 15.5	$+0.1

This expense was estimated in connection with $277.5 million transportation revenue (Exhibit G, Sheet 2). We estimate the $1.2 million increase in simulated transportation revenue (Exhibit G, Sheet 1) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$15.5 \times \frac{\$\ 1.2}{\$277.5} = \$0.1 \text{ million increase}$$

B. Other personnel, communications purchased, light, heat, power and water, other services-associated companies, stationery, printing and office supplies, other expenses and various miscellaneous expenses (Exhibit F, Sheet 17)	$ 1.5	NC
Total Traffic Servicing Expense	$ 17.0	$+0.1

CALCULATION DETAILS FOR CHAPTER III

DOMESTIC DIVISION, 1960

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter III
	(Millions)	
SERVICING ADMINISTRATION EXPENSE		
Total Servicing Administration Expense (Exhibit F, Sheet 18)	$ 1.9	NC
This expense was estimated in connection with Aircraft Servicing and Traffic Servicing expense of $21.2 and $17.0 million respectively (shown previously). Our above-estimated changes in Aircraft Servicing and Traffic Servicing expenses of $-0.1 million and $+0.1 million respectively add to no change in the total, and we therefore estimate no change in Servicing Administration expense.		
Total Servicing Administration Expense	$ 1.9	NC
PROMOTION AND SALES EXPENSE		
Reservations and Sales		
A. General aircraft and traffic handling personnel, passenger handling personnel, record keeping and statistical personnel, traffic solicitors, other personnel, personnel expenses, commissions-passenger, communications purchased, tariffs, schedules and timetables, rentals, other expenses, insurance-employee welfare and taxes-payroll (Exhibit F, Sheet 18: $21.8 + $0.2 = $22.0)	$ 22.0	$+0.1
This expense was estimated in connection with $277.5 million transportation revenue (Exhibit G, Sheet 2). We estimate the $1.2 million increase in simulated transportation revenue (Exhibit G, Sheet 1) would have been accompanied by a proportionate increase in this Group A expense. The calculation is: $\$22.0 \times \frac{\$\ 1.2}{\$277.5} = \$0.1$ million increase		
B. Communications personnel, general management personnel, light, heat, power and water, other services-outside, other supplies, stationery, printing and office supplies, memberships and various miscellaneous expenses (Exhibit F, Sheet 18)	$ 2.2	NC
Total Reservations and Sales Expense	$ 24.2	$+0.1

TWA Ex. 4(c)(4), Exhibit G, page 26 of 35
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER III

DOMESTIC DIVISION, 1960

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter III
	(Millions)	
Advertising and Publicity		
A. Other personnel, advertising and tariffs, schedules and timetables (Exhibit F, Sheet 19)	$ 4.7	NC

This expense was estimated in connection with $277.5 million transportation revenue (Exhibit G, Sheet 2). We estimate the $1.2 million increase in simulated transportation revenue (Exhibit G, Sheet 1) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$4.7 \times \frac{\$\ 1.2}{\$277.5} = \$0.02 \text{ million increase}$$

B. Other promotional and publicity expenses, professional and technical fees and expenses, personnel expenses, rentals and various miscellaneous expenses	$ 0.7	NC
Total Advertising and Publicity Expense	$ 5.4	NC
Total Promotion and Sales Expense	$ 29.6	$+0.1

GENERAL AND ADMINISTRATIVE EXPENSE

A. Record keeping and statistical personnel, purchasing personnel, other personnel, personnel expenses, uncollectible accounts, rentals, stationery, printing and office supplies, other expenses, insurance-employee welfare and taxes-payroll (Exhibit F, Sheets 19 and 20)	$ 6.9	NC

This expense was estimated in connection with $277.5 million transportation revenue (Exhibit G, Sheet 2). We estimate the $1.2 million increase in simulated transportation revenue (Exhibit G, Sheet 1) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$6.9 \times \frac{\$\ 1.2}{\$277.5} = \$0.03 \text{ million increase}$$

CALCULATION DETAILS FOR CHAPTER III

DOMESTIC DIVISION, 1960

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter III
	(Millions)	
B. General management personnel, communications purchased, professional and technical fees and expenses, memberships, corporate and fiscal expenses, taxes-other than payroll, purchased public liability and property damage insurance, legal fees and expenses, other services-outside, other supplies and various miscellaneous expenses	$ 4.3	NC
Total General and Administrative Expense (Exhibit F, Sheet 20)	$ 11.2	NC
DEPRECIATION AND AMORTIZATION EXPENSE		
For flight equipment including airframes, engines, spares, other flight equipment and expendable spare parts obsolescence	$ 28.9	$+0.6
For ground property and equipment	$ 3.8	$+0.1
For amortization of developmental and pre-operating expense	$ 2.8	$+0.1
Total Depreciation and Amortization Expense	$ 35.5	$+0.8

Note: These figures were given to us by Price Waterhouse & Co.

TOTAL OPERATING EXPENSE	$271.0	$-0.1

TWA Ex. 4(c)(4), Exhibit G, page 28 of 35
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER III

INTERNATIONAL DIVISION, 1960

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter III
	(Millions)	
FLYING OPERATIONS EXPENSE		
For B-331 Jet Aircraft		
A. Pilots and copilots, other flight personnel, personnel expenses, aircraft fuels, aircraft oils, taxes-other than payroll, insurance-employee welfare, taxes-payroll and various miscellaneous expenses (Exhibit F, Sheet 6: $8.9 + $5.2 = $14.1)	$ 14.1	$+0.9
This expense was estimated for operating B-331 aircraft 17.0 million plane-miles (Exhibit G, Sheet 2). We estimate the additional 1.1 million B-331 plane-miles mentioned on page 46 would have increased this Group A expense proportionately. The calculation is: $\$14.1 \times \frac{1.1}{17.0} = \$0.9$ million increase		
B. Purchased public liability and property damage insurance (Exhibit F, Sheet 6: $0.9 + $0.5 = $1.4)	$ 1.4	$+0.1
This expense is primarily for aircraft hull insurance for 9.7 B-331 aircraft available for commercial service (page 42). We estimate the 0.6 increase in the number of available aircraft mentioned on page 42 would have increased this insurance expense proportionately. The calculation is: $\$1.4 \times \frac{0.6}{9.7} = \$0.1$ million increase		
Total B-331 Flying Operations Expense	$ 15.5	$+1.0
For L-1649A Piston Aircraft		
A. Pilots and copilots, other flight personnel, personnel expenses, aircraft fuels, aircraft oils, taxes-other than payroll, insurance-employee welfare, taxes-payroll and various miscellaneous expenses (Exhibit F, Sheet 6: $8.0 - $6.0 = $2.0)	$ 2.0	NC
This expense was estimated for operating L-1649A aircraft 1.7 million plane-miles (Exhibit G, Sheet 2). We estimate there would have been no further reduction in L-1649A plane-miles (page 46) and therefore, no change in this Group A expense.		

CALCULATION DETAILS FOR CHAPTER III

INTERNATIONAL DIVISION, 1960

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter III
	(Millions)	
B. Purchased public liability and property damage insurance (Exhibit F, Sheet 7)	$ 0.2	NC
Total L-1649A Flying Operations Expense	$ 2.2	NC
For Other Aircraft and Generally Nonrevenue (Exhibit F, Sheet 7)	$ 3.6	NC
Total Flying Operations Expense	$ 21.3	$+1.0
MAINTENANCE EXPENSE		
Direct Maintenance Expense		
For B-331 Jet Aircraft Flight Equipment (Exhibit F, Sheet 7: $3.9 + $2.3 = $6.2)	$ 6.2	$+0.4

This expense was estimated for operating B-331 aircraft 17.0 million plane-miles (Exhibit G, Sheet 2). We estimate the additional 1.1 million B-331 plane-miles mentioned on page 46 would have increased this expense proportionately. The calculation is:

$$\$6.2 \times \frac{1.1}{17.0} = \$0.4 \text{ million increase}$$

For L-1649A Piston Aircraft Flight Equipment (Exhibit F, Sheet 7: $3.3 - $2.5 = $0.8)	$ 0.8	NC

This expense was estimated for operating L-1649A aircraft 1.7 million plane-miles (Exhibit G, Sheet 2). We estimate there would have been no further reduction in L-1649A plane-miles (page 46) and, therefore, no change in this expense.

For Other Aircraft and Generally Nonrevenue (Exhibit F, Sheet 7)	$ 0.6	NC
For General Ground Property and Equipment (Exhibit F, Sheet 7)	$ 0.2	NC
Total Direct Maintenance Expense	$ 7.8	$+0.4

TWA Ex. 4(c)(4), Exhibit G, page 30 of 35
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER III

INTERNATIONAL DIVISION, 1960

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter III
	(Millions)	
Applied Maintenance Burden Expense		
For B-331 Jet Aircraft Flight Equipment (Exhibit F, Sheet 8: $1.5 + $0.9 = $2.4)	$ 2.4	$+0.2

This $2.4 million B-331 Applied Maintenance Burden expense was estimated in connection with $6.2 million B-331 Direct Maintenance expense shown on the previous page. We estimate the $0.4 million increase for B-331 Direct Maintenance expense (previous page) would have been accompanied by a proportionate increase in Applied Maintenance Burden expense. The calculation is:

$$\$2.4 \times \frac{\$0.4}{\$6.2} = \$0.2 \text{ million increase}$$

For L-1649A Piston Aircraft Flight Equipment (Exhibit F, Sheet 8: $2.2 - $1.7 = $0.5)	$ 0.5	NC

This $0.5 million L-1649A Applied Maintenance Burden expense was estimated in connection with $0.8 million L-1649A Direct Maintenance expense shown on the previous page. We estimate there would have been no change in this $0.8 million L-1649A Direct Maintenance expense and, therefore, no change in this Applied Maintenance Burden expense.

For Other Aircraft and Generally Nonrevenue (Exhibit F, Sheet 8)	$ 0.6	NC
For General Ground Property and Equipment (Exhibit F, Sheet 8)	$ 0.1	NC
Total Applied Maintenance Burden Expense	$ 3.6	$+0.2
Total Maintenance Expense	$ 11.4	$+0.6

CALCULATION DETAILS FOR CHAPTER III

INTERNATIONAL DIVISION, 1960

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter III
	(Millions)	

AIRCRAFT SERVICING EXPENSE

A. Aircraft control personnel, trainees and instructors, rentals, landing fees, shop and servicing supplies, insurance-employee welfare and taxes-payroll (Exhibit F, Sheet 9: $3.5 + $0.2 = $3.7) — $ 3.7 — $+0.2

This expense was estimated in connection with operating 20.4 million plane-miles (Exhibit G, Sheet 2). We estimate the 1.1 million plane-miles increase mentioned on page 46 would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$3.7 \times \frac{1.1}{20.4} = \$0.2 \text{ million increase}$$

B. General aircraft and traffic handling personnel, communications personnel, record keeping and statistical personnel, personnel expenses, communications purchased, other services-outside, other supplies and various miscellaneous expenses (Exhibit F, Sheet 9) — $ 3.5 — NC

Total Aircraft Servicing Expense — $ 7.2 — $+0.2

PASSENGER SERVICE EXPENSE

A. Other flight personnel, other personnel, personnel expenses and taxes-payroll (Exhibit F, Sheet 9: $2.7 + $0.2 = $2.9) — $ 2.9 — $+0.2

This expense was estimated in connection with operating 18.9 million plane-miles (Exhibit G, Sheet 2). We estimate the 1.1 million plane-miles increase mentioned on page 46 would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$2.9 \times \frac{1.1}{18.9} = \$0.2 \text{ million increase}$$

TWA Ex. 4(c)(4), Exhibit G, page 32 of 35
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER III

INTERNATIONAL DIVISION, 1960

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter III
	(Millions)	
B. Passenger food expense, other supplies, insurance-traffic liability and other services-outside (Exhibit F, Sheet 9: $2.8 + $0.6 = $3.4)	$ 3.4	$+0.2

This expense was estimated in connection with passenger traffic producing $100.9 million revenue (page 48). We estimate the $6.1 million increase in revenue from passengers mentioned on page 48 would have been accompanied by a proportionate increase in this Group B expense. The calculation is:

$$\$3.4 \times \frac{\$\ 6.1}{\$100.9} = \$0.2 \text{ million increase}$$

C. Interrupted trips expense and various miscellaneous expenses (Exhibit F, Sheet 10)	$ 0.2	NC
Total Passenger Service Expense	$ 6.5	$+0.4

TRAFFIC SERVICING EXPENSE

A. General aircraft and traffic handling personnel, passenger handling personnel, cargo handling personnel, other services-outside, rentals, other supplies and taxes-payroll (Exhibit F, Sheet 10: $2.4 + $0.5 = $2.9)	$ 2.9	$+0.2

This expense was estimated in connection with $118.2 million transportation revenues (Exhibit G, Sheet 2). We estimate the $6.4 million increase in simulated transportation revenue (Exhibit G, Sheet 1) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$2.9 \times \frac{\$\ 6.4}{\$118.2} = \$0.2 \text{ million increase}$$

B. Stationery, printing and office supplies, clearance, customs and duties, other expenses and various miscellaneous expenses (Exhibit F, Sheet 10)	$ 0.8	NC
Total Traffic Servicing Expense	$ 3.7	$+0.2

TWA Ex. 4(c)(4), Exhibit G, page 33 of 35
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER III

INTERNATIONAL DIVISION, 1960

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter III
	(Millions)	
SERVICING ADMINISTRATION EXPENSE		
Total Servicing Administration Expense (Exhibit F, Sheet 10: $0.9 + $0.1 = $1.0)	$ 1.0	NC
This expense was estimated in connection with Aircraft Servicing and Traffic Servicing expense of $7.2 and $3.7 million respectively (shown previously). We estimate the increase in Aircraft and Traffic Servicing expense of $0.2 and $0.2 million respectively (shown previously) would have been accompanied by a proportionate increase in the Servicing Administration expense. The calculation is: $1.0 x ($0.2+$0.2)/($7.2+$3.7) = $0.04 million increase		
Total Servicing Administration Expense	$ 1.0	NC
PROMOTION AND SALES EXPENSE		
Reservations and Sales		
A. General aircraft and traffic handling personnel, passenger handling personnel, record keeping and statistical personnel, traffic solicitors, other personnel, personnel expenses, commissions-passenger, communications purchased, commissions-property, rentals, other expenses, insurance-employee welfare and taxes-payroll (Exhibit F, Sheet 11: $11.1 + $2.2 = $13.3)	$ 13.3	$+0.7
This expense was estimated in connection with $118.2 million transportation revenue (Exhibit G, Sheet 2). We estimate the $6.4 million increase in simulated transportation revenue (Exhibit G, Sheet 1) would have been accompanied by a proportionate increase in this Group A expense. The calculation is: $13.3 x $6.4/$118.2 = $0.7 million increase		
B. Communications personnel, general management personnel, light, heat, power and water, other services-outside, other supplies, stationery, printing and office supplies and various miscellaneous expenses (Exhibit F, Sheet 11)	$ 0.8	NC
Total Reservations and Sales Expense	$ 14.1	$+0.7

CALCULATION DETAILS FOR CHAPTER III

INTERNATIONAL DIVISION, 1960

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter III
	(Millions)	
Advertising and Publicity		
A. Other personnel, advertising and tariffs, schedules and timetables (Exhibit F, Sheet 11: $4.0 + $0.8 = $4.8)	$ 4.8	$+0.3

This expense was estimated in connection with $118.2 million transportation revenue (Exhibit G, Sheet 2). We estimate the $6.4 million increase in simulated transportation revenue (Exhibit G, Sheet 1) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$4.8 \times \frac{\$\ 6.4}{\$118.2} = \$0.3 \text{ million increase}$$

B. Other promotional and publicity expenses, professional and technical fees and expenses and various miscellaneous expenses (Exhibit F, Sheet 11)	$ 0.6	NC
Total Advertising and Publicity Expense	$ 5.4	$+0.3
Total Promotion and Sales Expense	$ 19.5	$+1.0

GENERAL AND ADMINISTRATIVE EXPENSE

A. Record keeping and statistical personnel, purchasing personnel, other personnel, personnel expenses, rentals, stationery, printing and office supplies, insurance-employee welfare and taxes-payroll (Exhibit F, Sheet 12: $2.6 + $0.5 = $3.1)	$ 3.1	$+0.2

This expense was estimated in connection with $118.2 million transportation revenue (Exhibit G, Sheet 2). We estimate the $6.4 million increase in simulated transportation revenue (Exhibit G, Sheet 1) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$3.1 \times \frac{\$\ 6.4}{\$118.2} = \$0.2 \text{ million increase}$$

CALCULATION DETAILS FOR CHAPTER III

INTERNATIONAL DIVISION, 1960

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter III
	(Millions)	
B. General management personnel, communications purchased, professional and technical fees and expenses, taxes-other than payroll, purchased public liability and property damage insurance, legal fees and expenses and various miscellaneous expenses (Exhibit F, Sheet 12)	$ 0.9	NC
Total General and Administrative Expense	$ 4.0	$+0.2
DEPRECIATION AND AMORTIZATION EXPENSE		
For flight equipment including airframes, engines, spares, other flight equipment and expendable spare parts obsolescence	$ 11.7	$+0.6
For ground property and equipment	$ 0.6	$+0.1
For amortization of developmental and pre-operating expense	$ 1.7	$+0.2
Total Depreciation and Amortization Expense	$ 14.0	$+0.9

Note: These figures were given to us by Price Waterhouse & Co.

TOTAL OPERATING EXPENSE	$ 88.6	$+4.5

TWA Ex. 4(c)(4), Exhibit H, page 1 of 19
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR OPERATING EXPENSE CHANGES, CHAPTER IV

FOR RECEIPT OF CV 880 AIRCRAFT ON CONTRACT DELIVERY DATES

For our calculation of operating expense changes that would have occurred if TWA had received its fleet of twenty CV 880 jet aircraft on the dates provided in the purchase contract for the aircraft as mentioned on page 52, we used operating statistics mentioned in the text of Chapter IV, certain operating statistics and expense estimates from Exhibits F and G, expense data from CAB Form 41 annual reports and the following statistics.

	Millions
Actual Plane-Miles, Domestic Division, 1960 L-1049G	14.5
This is a calculated annual summary of figures shown in TWA's Monthly Operating Statistics, Schedule 3-70M.	
Estimated Chapter III Passenger Revenues, Domestic Division, 1960 Chapter II Estimate (Exhibit G, Sheet 2) plus Chapter III Estimated Change (pg. 48) $255.2 + $1.1 = $256.3	$256.3
Simulated Chapter III Transportation Revenues, Domestic Division, 1960 Chapter II Simulated Transportation Revenues (Exhibit G, Sheet 2) plus Chapter III Additional Simulated Transportation Revenues (Exhibit G, Sheet 1) $277.5 + $1.2 = $278.7	$278.7
Estimated Chapter III Passenger Revenues, Domestic Division, 1961 Actual (Exhibit F, Sheet 1) plus Chapter II Estimate (pg. 30) $252.2 + $1.4 = $253.6	$253.6
Simulated Chapter III Transportation Revenues, Domestic Division, 1961 Actual (Exhibit F, Sheet 1) plus Chapter II Additional Simulated Transportation Revenues (Exhibit F, Sheet 2) $276.1 + $1.5 = $277.6	$277.6

The pages that follow set forth details of our calculations of operating expense changes with contract date receipt of the twenty CV 880 aircraft, for the Domestic Division in 1960 and 1961.

CALCULATION DETAILS FOR CHAPTER IV

DOMESTIC DIVISION, 1960

	Actual Expense With Revisions of Chapters I, II and III	Estimated Change In Expense, For Chapter IV
	(Millions)	

FLYING OPERATIONS EXPENSE
For CV 880 Jet Aircraft

A. Pilots and copilots, other flight personnel, trainees and instructors, personnel expenses, aircraft fuels, insurance-employee welfare and various miscellaneous expenses. --- $+9.3

In 1961 TWA operated 16.5 million CV 880 plane-miles (page 54) and incurred $13.3 million expense for this Group A expense. We believe the estimated 11.6 million CV 880 plane-miles operation in 1960 (page 54) would have caused TWA to incur proportionate amount of expense, calculated as follows:

$$\$13.3 \times \frac{11.6}{16.5} = \$9.3 \text{ million increase}$$

Note: There was no CV 880 Domestic Division service in 1960, so 1961 statistics are used for this calculation.

B. Purchased public liability and property damage insurance --- $+0.6

In 1961 TWA had 14.6 CV 880 aircraft available for commercial service (page 54) and incurred $0.8 million expense for this insurance. We estimate the 10.3 CV 880 aircraft available in 1960 (page 53) would have incurred a proportionate amount of this expense. The calculation is:

$$\$0.8 \times \frac{10.3}{14.6} = \$0.6 \text{ million increase}$$

Note: There was no CV 880 Domestic Division service in 1960, so 1961 statistics are used for this calculation.

Total CV 880 Flying Operations Expense --- $+9.9

TWA Ex. 4(c)(4), Exhibit H, page 3 of 19
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER IV

DOMESTIC DIVISION, 1960

	Actual Expense With Revisions of Chapters I, II and III (Millions)	Estimated Change In Expense, For Chapter IV
For L-1049G Piston Aircraft		
A. Pilots and copilots, other flight personnel, personnel expenses, aircraft fuels, aircraft oils, taxes-other than payroll, insurance-employee welfare and various miscellaneous expenses	$13.3	$-5.5

This $13.3 million expense was incurred for operating L-1049G aircraft 14.5 million plane-miles (Exhibit H, Sheet 1). We estimate the reduction of 6.0 million piston aircraft plane-miles mentioned on page 62 would have reduced piston aircraft Flying Operations expense generally in proportion to the mileage reduction. The calculation is:

$$\$13.3 \times \frac{6.0}{14.5} = \$5.5 \text{ million decrease}$$

B. Purchased public liability and property damage insurance	$ 0.2	NC
Total L-1049G Flying Operations Expense	$13.5	$-5.5
For Other Aircraft and Generally Nonrevenue	$59.6	NC
Total Flying Operations Expense (Exhibit G, Sheet 21: $73.4-$0.3= $73.1)	$73.1	$+4.4

MAINTENANCE EXPENSE

Direct Maintenance Expense For CV 880 Jet Aircraft Flight Equipment	---	$+6.0

In 1961 TWA operated 16.5 million CV 880 plane-miles page 54 and incurred therefor $8.5 million Direct Maintenance expense. We believe the estimated 11.6 million CV 880 plane-miles operation in 1960 (page 54) would have caused TWA incur a proportionate amount of expense, calculated as follows:

$$\$8.5 \times \frac{11.6}{16.5} = \$6.0 \text{ million increase}$$

Note: There was no CV 880 Domestic Division service in 1960, so 1961 statistics are used for this calculation.

NC - No significant change estimated for these expenses.

CALCULATION DETAILS FOR CHAPTER IV

DOMESTIC DIVISION, 1960

	Actual Expense With Revisions of Chapters I, II and III	Estimated Change In Expense, For Chapter IV
	(Millions)	
For L-1049G Piston Aircraft Flight Equipment	$ 6.8	$-2.8

This expense was incurred for operating L-1049G aircraft 14.5 million plane-miles (Exhibit H, Sheet 1). We estimate the reduction of 6.0 million piston aircraft plane-miles mentioned on page 62 would have decreased this expense proportionately. The calculation is:

$$\$6.8 \times \frac{6.0}{14.5} = \$2.8 \text{ million decrease}$$

For Other Aircraft and Generally Nonrevenue	$27.2	NC
For General Ground Property and Equipment	$ 0.8	NC
Total Direct Maintenance Expense	$34.8	$+3.2
Applied Maintenance Burden Expense For CV 880 Jet Aircraft Flight Equipment	---	$+2.3

In 1961 TWA incurred $3.2 million CV 880 Applied Maintenance Burden expense in connection with $8.5 million Direct Maintenance expense for CV 880 aircraft. We estimate the $6.0 million CV 880 Direct Maintenance expense (shown above) for 1960 would have been accompanied by a proportionate increase in Applied Maintenance Burden expense. The calculation is:

$$\$3.2 \times \frac{\$6.0}{\$8.5} = \$2.3 \text{ million increase}$$

Note: There was no CV 880 Domestic Division service in 1960, so 1961 statistics are used for this calculation.

For L-1049G Piston Aircraft Flight Equipment	$ 4.8	$-2.0

This $4.8 million L-1049G Applied Maintenance Burden expense was incurred in connection with $6.8 million L-1049G Direct Maintenance expense (shown above). We estimate the $2.8 million decrease for L-1049G Direct Maintenance expense (shown above) would have been accompanied by a proportionate decrease in Applied Maintenance Burden expense. The calculation is:

$$\$4.8 \times \frac{\$2.8}{\$6.8} = \$2.0 \text{ million decrease}$$

TWA Ex. 4(c)(4), Exhibit H, page 5 of 19
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER IV

DOMESTIC DIVISION, 1960

	Actual Expense With Revisions of Chapters I, II and III	Estimated Change In Expense, For Chapter IV
	(Millions)	
For Other Aircraft and Generally Nonrevenue	$17.8	NC
For General Ground Property and Equipment	$ 0.8	NC
Total Applied Maintenance Burden Expense	$23.4	$+0.3
Total Maintenance Expense	$58.2	$+3.5

AIRCRAFT SERVICING EXPENSE

A. General aircraft and traffic handling personnel, aircraft control personnel, trainees and instructors, personnel expenses, other services-outside, rentals, landing fees, other supplies, insurance-employee welfare and taxes-payroll (Exhibit G, Sheet 23: $18.3 - $0.1 = $18.2) — $18.2 — $+1.1

This expense of $18.2 million was estimated in connection with operating 89.7 million plane-miles (Exhibit G, Sheet 23: 90.1 - 0.4 = 89.7). We estimate the addition of 5.6 million plane-miles (page 62 : 11.6 - 6.0 = 5.6) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$18.2 \times \frac{5.6}{89.7} = \$1.1 \text{ million increase}$$

B. Communications personnel, communications purchased, light, heat, power and water, other services-associated companies, shop and servicing supplies, stationery, printing and office supplies, other uncleared expense credits and various miscellaneous expenses (Exhibit G, Sheet 23) — $ 2.9 — NC

Total Aircraft Servicing Expense — $21.1 — $+1.1

CALCULATION DETAILS FOR CHAPTER IV

DOMESTIC DIVISION, 1960

	Actual Expense With Revisions of Chapters I, II and III	Estimated Change In Expense, For Chapter IV
	(Millions)	
PASSENGER SERVICE EXPENSE		
A. Other flight personnel, other personnel, personnel expenses, insurance-employee welfare and taxes-payroll (Exhibit G, Sheet 23: $8.6)	$ 8.6	$+0.6
B. Passenger food expense, other supplies, insurance-traffic liability and other services-outside (Exhibit G, Sheet 24: $13.0 + $0.1 = $13.1)	$13.1	$+1.2
C. Trainees and instructors, interrupted trips expense, other expenses and various miscellaneous expenses (Exhibit G, Sheet 24)	$ 0.6	NC
Total Passenger Service Expense	$22.3	$+1.8

This expense of $8.6 million was estimated in connection with operating 86.6 million plane-miles (Exhibit G, Sheet 23: 87.0 - 0.4 = 86.6). We estimate the additional 5.6 million CV 880 plane miles (page 62: 11.6 - 6.0 = 5.6) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$8.6 \times \frac{5.6}{86.6} = \$0.6 \text{ million increase}$$

This $13.1 million expense was estimated in connection with passenger traffic revenue of $256.3 million (Exhibit H, Sheet 1). We estimate the $23.5 million increase in revenue from passenger traffic mentioned on page 63 would have been accompanied by a proportionate increase in this Group B expense. The calculation is:

$$\$13.1 \times \frac{\$\ 23.5}{\$256.3} = \$1.2 \text{ million increase}$$

TWA Ex. 4(c)(4), Exhibit H, page 7 of 19
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER IV

DOMESTIC DIVISION, 1960

	Actual Expense With Revisions of Chapters I, II and III	Estimated Change In Expense, For Chapter IV
	(Millions)	
TRAFFIC SERVICING EXPENSE		
A. General aircraft and traffic handling personnel, passenger handling personnel, cargo handling personnel, other services-outside, rentals, other supplies, insurance-employee welfare, taxes-payroll and injuries, loss and damage (Exhibit G, Sheet 24: $15.5 + $0.1 = $15.6)	$15.6	$+1.4

This $15.6 million expense was estimated in connection with $278.7 million transportation revenue (Exhibit H, Sheet 1). We estimate the $24.7 million increase in simulated transportation revenue (page 63 would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$15.6 \times \frac{\$\ 24.7}{\$278.7} = \$1.4 \text{ million increase}$$

B. Other personnel, communications purchased, light, heat, power and water, other services-associated companies, stationery, printing and office supplies, other expenses and various miscellaneous expenses (Exhibit G, Sheet 24)	$ 1.5	NC
Total Traffic Servicing Expense	$17.1	$+1.4
SERVICING ADMINISTRATION EXPENSE		
Total Servicing Administration Expense (Exhibit G, Sheet 25)	$ 1.9	$+0.1

This $1.9 million expense was estimated in connection with Aircraft Servicing and Traffic Servicing expense of $21.1 and $17.1 million respectively (shown previously). We estimate the increase in Aircraft and Traffic Servicing expenses of $1.1 and $1.4 million respectively (shown previously) would have been accompanied by a proportionate increase in Servicing Administration expense. The calculation is:

$$\$1.9 \times \frac{(\$\ 1.1 + \$\ 1.4)}{(\$21.1 + \$17.1)} = \$0.1 \text{ million increase}$$

Total Servicing Administration Expense	$ 1.9	$+0.1

CALCULATION DETAILS FOR CHAPTER IV

DOMESTIC DIVISION, 1960

	Actual Expense With Revisions of Chapters I, II and III	Estimated Change In Expense, For Chapter IV
	(Millions)	
PROMOTION AND SALES EXPENSE		
Reservations and Sales		
A. General aircraft and traffic handling personnel, passenger handling personnel, recordkeeping and statistical personnel, traffic solicitors, other personnel, personnel expenses, commissions-passenger, communications purchased, tariffs, schedules and timetables, rentals, other expenses, insurance-employee welfare and taxes-payroll (Exhibit G, Sheet 25: $22.0 + $0.1 = $22.1)	$22.1	$+2.0

This $22.1 million expense was estimated in connection with $278.7 million transportation revenue (Exhibit H, Sheet 1). We estimate the $24.7 million increase in simulated transportation revenue (page 63) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$22.1 \times \frac{\$\ 24.7}{\$278.7} = \$2.0 \text{ million increase}$$

B. Communications personnel, general management personnel, light, heat, power and water, other services-outside, other supplies, stationery, printing and office supplies, memberships and various miscellaneous expenses (Exhibit G, Sheet 25)	$ 2.2	NC
Total Reservations and Sales Expense	$24.3	$+2.0
Advertising and Publicity		
A. Other personnel, advertising and tariffs, schedules and timetables (Exhibit G, Sheet 26)	$ 4.7	$+0.4

This $4.7 million expense was estimated in connection with $278.7 million transportation revenue (Exhibit H, Sheet 1). We estimate the $24.7 million increase in simulated transportation revenue (page 63) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$4.7 \times \frac{\$\ 24.7}{\$278.7} = \$0.4 \text{ million increase}$$

TWA Ex. 4(c)(4), Exhibit H, page 9 of 19
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER IV

DOMESTIC DIVISION, 1960

	Actual Expense With Revisions of Chapters I, II and III	Estimated Change In Expense, For Chapter IV
	(Millions)	
B. Other promotional and publicity expenses, professional and technical fees and expenses, personnel expenses, rentals and various miscellaneous expenses (Exhibit G, Sheet 26)	$ 0.7	NC
Total Advertising and Publicity Expense	$ 5.4	$+0.4
Total Promotion and Sales Expense	$29.7	$+2.4

GENERAL AND ADMINISTRATIVE EXPENSE

A. Recordkeeping and statistical personnel, purchasing personnel, other personnel, personnel expenses, uncollectible accounts, rentals, stationery, printing and office supplies, other expenses, insurance-employee welfare and taxes-payroll (Exhibit G, Sheet 26) $ 6.9 $+0.6

This $6.9 million expense was estimated in connection with $278.7 million transportation revenue (Exhibit H, Sheet 1). We estimate the $24.7 million increase in simulated transportation revenue (page 63) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$6.9 \times \frac{\$\ 24.7}{\$278.7} = \$0.6 \text{ million increase}$$

B. General management personnel, communications purchased, professional and technical fees and expenses, memberships, corporate and fiscal expenses, taxes-other than payroll, purchased public liability and property damage insurance, legal fees and expenses, other services-outside, other supplies and various miscellaneous expenses (Exhibit G, Sheet 27)	$ 4.3	NC
Total General and Administrative Expense	$11.2	$+0.6

CALCULATION DETAILS FOR CHAPTER IV

DOMESTIC DIVISION, 1960

	Actual Expense With Revisions of Chapters I, II and III	Estimated Change In Expense, For Chapter IV
	(Millions)	
DEPRECIATION AND AMORTIZATION EXPENSE		
For flight equipment, expendable spare parts obsolescence, ground property and equipment, and amortization of developmental and pre-operating expense (Exhibit G, Sheet 27: $35.5 + $1.0 = $36.5)	$36.5	$+5.4

Note: These figures were given to us By Price Waterhouse & Co.

TOTAL OPERATING EXPENSE	$271.1	$+20.7

TWA Ex. 4(c)(4), Exhibit H, page 11 of 19
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER IV

DOMESTIC DIVISION, 1961

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter IV
	(Millions)	
FLYING OPERATIONS EXPENSE		
For CV 880 Jet Aircraft		
A. Pilots and copilots, other flight personnel, trainees and instructors, personnel expenses, aircraft fuels, insurance-employee welfare and various miscellaneous expenses	$13.3	$+4.8
This $13.3 million expense was incurred for operating CV 880 aircraft 16.5 million plane-miles (page 54). We estimate the additional 5.9 million CV 880 plane-miles mentioned on page 54 would have increased this expense proportionately. The calculation is: $\$13.3 \times \frac{5.9}{16.5} = \$4.8$ million increase		
B. Purchased public liability and property damage insurance	$ 0.8	$+0.3
This $0.8 million expense is primarily for aircraft hull insurance for 14.6 CV 880 aircraft available for commercial service (page 54). We estimate the 5.2 increase in the available number of aircraft mentioned on page 54 would have increased this expense proportionately. The calculation is: $\$0.8 \times \frac{5.2}{14.6} = \$0.3$ million increase		
Total CV 880 Flying Operations Expense	$14.1	$+5.1
For L-1049G Piston Aircraft		
A. Pilots and copilots, other flight personnel, trainees and instructors, personnel expenses, aircraft fuels, aircraft oils, taxes-payroll, taxes-other than payroll, insurance-employee welfare and various miscellaneous expenses (Exhibit F, Sheet 28: $9.8 - $4.0 = $5.8)	$ 5.8	$-2.9
This $5.8 million expense was estimated for operating L-1049G aircraft 6.1 million plane-miles (Exhibit F, Sheet 28: 10.3 - 4.2 = 6.1). We estimate the reduction of 3.1 million piston aircraft plane-miles mentioned on page 62 would have reduced these Group A Flying Operations expenses generally in proportion to the mileage reduction. The calculation using L-1049G statistics is: $\$5.8 \times \frac{3.1}{6.1} = \$2.9$ million decrease		

CALCULATION DETAILS FOR CHAPTER IV

DOMESTIC DIVISION, 1961

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter IV
	(Millions)	
B. Insurance purchased-general	$ 0.1	NC
Total L-1049G Flying Operations Expense	$ 5.9	$-2.9
For Other Aircraft and Generally Nonrevenue	$57.3	---
Total Flying Operations Expense (Exhibit F, Sheet 29: $78.1 - $0.8 = $77.3)	$77.3	$+2.2
MAINTENANCE EXPENSE		
Direct Maintenance Expense For CV 880 Jet Aircraft Flight Equipment	$ 8.5	$+3.0

This $8.5 million expense was incurred for operating CV 880 aircraft 16.5 million plane-miles (page 54 .We estimate the additional 5.9 million CV 880 plane-miles mentioned on page 54 would have increased this expense proportionately. The calculation is:

$$\$8.5 \times \frac{5.9}{16.5} = \$3.0 \text{ million increase}$$

For L-1049G Piston Aircraft Flight Equipment (Exhibit F, Sheet 29: $4.4 - $1.8 = $2.6)	$ 2.6	$-1.3

This $2.6 million expense was estimated for operating L-1049G aircraft 6.1 million plane-miles (Exhibit F, Sheet 29: 10.3 - 4.2 = 6.1). We estimate the reduction of 3.1 million piston aircraft plane-miles mentioned on page 62 would have reduced piston aircraft Direct Maintenance expense generally in proportion to the mileage reduction. The calculation is:

$$\$2.6 \times \frac{3.1}{6.1} = \$1.3 \text{ million decrease}$$

For Other Aircraft and Generally Nonrevenue	$20.5	NC
For General Ground Property and Equipment	$ 0.9	NC
Total Direct Maintenance Expense	$32.5	$+1.7

TWA Ex. 4(c)(4), Exhibit H, page 13 of 19
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER IV

DOMESTIC DIVISION, 1961

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter IV
	(Millions)	
Applied Maintenance Burden Expense For CV 880 Jet Aircraft Flight Equipment	$ 3.2	$+1.1

This $3.2 million CV 880 Applied Maintenance Burden expense was incurred in connection with $8.5 million CV 880 Direct Maintenance expense shown on the previous page. We estimate the $3.0 million increase for CV 880 Direct Maintenance (previous page) would have been accompanied by a proportionate increase in Applied Maintenance Burden expense. The calculation is:

$$\$3.2 \times \frac{\$3.0}{\$8.5} = \$1.1 \text{ million increase}$$

For L-1049G Piston Aircraft Flight Equipment (Exhibit F, Sheet 30: $4.0 - $1.6 = $2.4)	$ 2.4	$-1.2

This $2.4 million L-1049G Applied Maintenance Burden expense was estimated in connection with $2.6 million L-1049G Direct Maintenance expense shown on the previous page. We estimate the $1.3 million decrease for L-1049G Direct Maintenance expense (previous page) would have been accompanied by a proportionate decrease in Applied Maintenance Burden expense. The calculation is:

$$\$2.4 \times \frac{\$1.3}{\$2.6} = \$1.2 \text{ million decrease}$$

For Other Aircraft and Generally Nonrevenue	$17.0	NC
For General Ground Property and Equipment	$ 1.1	NC
Total Applied Maintenance Burden Expense	$23.7	$-0.1
Total Maintenance Expense	$56.2	$+1.6

CALCULATION DETAILS FOR CHAPTER IV

DOMESTIC DIVISION, 1961

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter IV
	(Millions)	
AIRCRAFT SERVICING EXPENSE		
A. General aircraft and traffic handling personnel, aircraft control personnel, trainees and instructors, personnel expenses, other services-outside, rentals, landing fees, other supplies, insurance-employee welfare and taxes-payroll (Exhibit F, Sheet 31: $19.0 - $0.2 = $18.8)	$18.8	$+0.6
B. Communications personnel, communications purchased, light, heat, power and water, other services-associated companies, shop and servicing supplies, stationery, printing and office supplies, other uncleared expense credits and various miscellaneous expenses (Exhibit F, Sheet 31)	$ 3.4	NC
Total Aircraft Servicing Expense	$22.2	$+0.6
PASSENGER SERVICE EXPENSE		
A. Other flight personnel, other personnel, personnel expenses, insurance-employee welfare and taxes-payroll (Exhibit F, Sheet 31: $9.0 - $0.1 = $8.9)	$ 8.9	$+0.3

This $18.8 million expense was estimated in connection with operating 84.7 million plane-miles (Exhibit F, Sheet 31: 85.6 - 0.9 = 84.7). We estimate the additional 2.8 million plane-miles (page 6: 5.9 - 3.1 = 2.8) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$18.8 \times \frac{2.8}{84.7} = \$0.6 \text{ million increase}$$

This $8.9 million expense was estimated in connection with operating 81.2 million plane-miles (Exhibit F, Sheet 31: 82.1 - 0.9 = 81.2). We estimate the additional 2.8 million plane-miles (page 6: 5.9 - 3.1 = 2.8) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$8.9 \times \frac{2.8}{81.2} = \$0.3 \text{ million increase}$$

CALCULATION DETAILS FOR CHAPTER IV

DOMESTIC DIVISION, 1961

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter IV
	(Millions)	
B. Passenger food expense, other supplies, insurance-traffic liability and other services-outside (Exhibit F, Sheet 32: $13.2 + $0.1 = $13.3)	$13.3	$+0.6

This $13.3 million expense was estimated in connection with passenger traffic revenue of $253.6 million (Exhibit H, Sheet 1). We estimate the $12.2 million increase in revenue from passenger traffic mentioned on page 63 would have been accompanied by a proportionate increase in this Group B expense. The calculation is:

$$\$13.3 \times \frac{\$\ 12.2}{\$253.6} = \$0.6 \text{ million increase}$$

C. Trainees and instructors, rentals, interrupted trips expense and various miscellaneous expenses (Exhibit F, Sheet 32)	$ 0.6	NC
Total Passenger Service Expense	$22.8	$+0.9

TRAFFIC SERVICING EXPENSE

A. General aircraft and traffic handling personnel, passenger handling personnel, cargo handling personnel, insurance-employee welfare, injuries, loss and damage, taxes-payroll, other services-outside, rentals and other supplies (Exhibit F, Sheet 32: $16.0 + $0.1 = $16.1)	$16.1	$+0.7

This $16.1 million expense was estimated in connection with $277.6 million transportation revenue (Exhibit H, Sheet 1). We estimate the $12.8 million increase in simulated transportation revenue (page 63 would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$16.1 \times \frac{\$\ 12.8}{\$277.6} = \$0.7 \text{ million increase}$$

CALCULATION DETAILS FOR CHAPTER IV

DOMESTIC DIVISION, 1961

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter IV
	(Millions)	
B. Other personnel, personnel expenses, communications purchased, light, heat, power and water, other services-associated companies, stationery, printing and office supplies, insurance-traffic liability, other expenses and various miscellaneous expenses (Exhibit F, Sheet 32)	$ 1.6	NC
Total Traffic Servicing Expense	$17.7	$+0.7
SERVICING ADMINISTRATION EXPENSE		
Total Servicing Administration Expense (Exhibit F, Sheet 33)	$ 2.2	$+0.1

This $2.2 million expense was estimated in connection with Aircraft Servicing and Traffic Servicing expenses of $22.2 and $17.7 million respectively (shown previously). We estimate the increase in Aircraft and Traffic Servicing expenses of $0.6 and $0.7 million respectively (shown previously) would have been accompanied by a proportionate increase in Servicing Administration expense. The calculation is:

$$\$2.2 \times \frac{(\$\ 0.6 + \$\ 0.7)}{(\$22.2 + \$17.7)} = \$0.1 \text{ million increase}$$

Total Servicing Administration Expense	$ 2.2	$+0.1

TWA Ex. 4(c)(4), Exhibit H, page 17 of 19
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER IV

DOMESTIC DIVISION, 1961

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter IV
	(Millions)	
PROMOTION AND SALES EXPENSE		
Reservations and Sales		
A. General aircraft and traffic handling personnel, passenger handling personnel, recordkeeping and statistical personnel, traffic solicitors, other personnel, personnel expenses, commissions-passenger, communications purchased, commissions-property, rentals, tariffs, schedules and timetables, other expenses, insurance-employee welfare and taxes-payroll (Exhibit F, Sheet 33: $22.0 + $0.1 = $22.1)	$22.1	$+1.0
B. Communications personnel, general management personnel, light, heat, power and water, other services-outside, stationery, printing and office supplies, other supplies and various miscellaneous expenses (Exhibit F, Sheet 33)	$ 2.2	NC
Total Reservations and Sales Expense	$24.3	$+1.0
Advertising and Publicity		
A. Other personnel, advertising and tariffs, schedules and timetables (Exhibit F, Sheet 34)	$ 6.3	$+0.3

This $22.1 million expense was estimated in connection with $277.6 million transportation revenue (Exhibit H, Sheet 1). We estimate the $12.8 million increase in simulated transportation revenue (page 63 would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$22.1 \times \frac{\$\ 12.8}{\$277.6} = \$1.0 \text{ million increase}$$

This $6.3 million expense was estimated in connection with $277.6 million transportation revenue (Exhibit H, Sheet 1). We estimate the $12.8 million increase in simulated transportation revenue (page 63, would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$6.3 \times \frac{\$\ 12.8}{\$277.6} = \$0.3 \text{ million increase}$$

CALCULATION DETAILS FOR CHAPTER IV

DOMESTIC DIVISION, 1961

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter IV
	(Millions)	
B. Other promotional and publicity expenses, rentals and various miscellaneous expenses (Exhibit F, Sheet 34)	$ 0.6	NC
Total Advertising and Publicity Expense	$ 6.9	$+0.3
Total Promotion and Sales Expense	$31.2	$+1.3

GENERAL AND ADMINISTRATIVE EXPENSE

A. Recordkeeping and statistical personnel, purchasing personnel, other personnel, personnel expenses, uncollectible accounts, rentals, stationery, printing and office supplies, other expenses, insurance-employee welfare and taxes-payroll (Exhibit F, Sheet 34)	$ 9.1	$+0.4

This $9.1 million expense was estimated in connection with $277.6 million transportation revenue (Exhibit H, Sheet 1). We estimate the $12.8 million increase in simulated transportation revenue (page 63 would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$9.1 \times \frac{\$\ 12.8}{\$277.6} = \$0.4 \text{ million increase}$$

B. General management personnel, communications purchased, professional and technical fees and expenses, other services-outside, other supplies, memberships, corporate and fiscal expenses, taxes-other than payroll, insurance purchased-general, other uncleared expense credits, legal fees and expenses and various miscellaneous expenses	$ 4.7	NC
Total General and Administrative Expense	$13.8	$+0.4

CALCULATION DETAILS FOR CHAPTER IV

DOMESTIC DIVISION, 1961

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter IV
	(Millioons)	
DEPRECIATION AND AMORTIZATION EXPENSE		
For flight equipment, expendable spare parts obsolescence, ground property and equipment, and amortization of developmental and pre-operating expenses (Exhibit F, Sheet 35: $43.3 + $1.8 = $45.1)	$45.1	$+2.6

Note: These figures were given to us by Price Waterhouse & Co.

TOTAL OPERATING EXPENSE	$288.5	$+10.4

CALCULATION DETAILS FOR OPERATING EXPENSE CHANGES, CHAPTER V

FOR A FLEET OF THIRTY CV 880 AIRCRAFT

For our calculation of operating expense changes that would have occurred if TWA had received a fleet of thirty CV 880 jet aircraft rather than twenty aircraft, as mentioned on page 65, we used operating statistics and expense estimates from Exhibits F and H, expense data from CAB Form 41 annual reports and the following statistics.

	Millions
CV 880 Actual Plane-Miles, Domestic Division, 1962	23.2
CV 880 Actual Plane-Miles, Domestic Division, 1963	26.4

These plane-miles are our annual summaries of figures shown in TWA's Monthly Operating Statistics, Schedule 3-70M and, as of October 1963, Report 3-452M.

Chapter IV Simulated Transportation Revenues, Domestic Division, 1960 — $303.4
Chapter III Simulated Transportation Revenues (Exhibit H, Sheet 1) plus Chapter IV Additional System Revenues (pg. 63):
$278.7 + $24.7 = $303.4 million

Chapter IV Simulated Transportation Revenues, Domestic Division, 1961 — $290.4
Chapter III Simulated Transportation Revenues (Exhibit H, Sheet 1) plus Chapter IV Additional System Revenues (pg. 63):
$277.6 + $12.8 = $290.4 million

Chapter IV Simulated Transportation Revenues, Domestic Division, 1962 — $300.6
Actual (Exhibit F, Sheet 1) plus Chapter II Additional Simulated Transportation Revenues (Exhibit F, Sheet 2):
$298.5 + $2.1 = $300.6 million

Chapter IV Simulated Transportation Revenues, Domestic Division, 1963 — $343.5
Actual (Exhibit F, Sheet 1) plus Chapter II Additional Simulated Transportation Revenues (Exhibit F, Sheet 2):
$341.5 + $2.0 = $343.5 million

	Millions
Flying Operations Expense (excluding Insurance Purchased-General), 1961	
L-1049G Aircraft; Estimated from Exhibit H, Sheet 11: $5.8 - $2.9 = $2.9 million	$ 2.9
L-749 Aircraft; Actual from CAB Form 41, Schedule P-5.2	10.7
L-049 Aircraft; Actual from CAB Form 41, Schedule P-5.2	9.2
Flying Operations Expense for L-1049G, L-749, L-049	$22.8
Direct Maintenance Expense, 1961	
L-1049G Aircraft; Estimated from Exhibit H, Sheet 12: $2.6 - $1.3 = $1.3 million	$ 1.3
L-749 Aircraft; Actual from CAB Form 41, Schedule P-5.2	3.9
L-049 Aircraft; Actual from CAB Form 41, Schedule P-5.2	2.6
Direct Maintenance Expense for L-1049G, L-749, L-049	$ 7.8
Applied Maintenance Burden Expense, 1961	
L-1049G Aircraft; Estimated from Exhibit H, Sheet 13: $2.4 - $1.2 = $1.2 million	$ 1.2
L-749 Aircraft; Actual from CAB Form 41, Schedule P-5.2	4.0
L-049 Aircraft; Actual from CAB Form 41, Schedule P-5.2	2.8
Applied Maintenance Burden Expense for L-1049G, L-749, L-049	$ 8.0

The pages that follow set forth details of our calculations of operating expense changes with a fleet of thirty rather than twenty CV 880 aircraft for the Domestic Division in the years 1960-1963.

CALCULATION DETAILS FOR CHAPTER V

DOMESTIC DIVISION, 1960

	Actual Expense With Revisions of Chapters I through IV	Estimated Change In Expense, For Chapter V
	(Millions)	
FLYING OPERATIONS EXPENSE		
For CV 880 Jet Aircraft		
A. Pilots and copilots, other flight personnel, trainees and instructors, personnel expenses, aircraft fuels, insurance-employee welfare and various miscellaneous expenses	$ 9.3	$+4.7
This $9.3 million estimated expense (Exhibit H, Sheet 2) was for operating CV 880 aircraft 11.6 million plane-miles. We believe the estimated 5.8 million additional CV 880 plane-miles (67) would have caused TWA to incur a proportionate increase in this expense, calculated as follows: $\$9.3 \times \frac{5.8}{11.6} = \$4.7$ million increase		
B. Purchased public liability and property damage insurance	$ 0.6	$+0.3
This $0.6 million estimated expense was for 10.3 CV 880 aircraft available for commercial service (Exhibit H, Sheet 2). We estimate the additional 5.1 aircraft available (page 66) would have incurred a proportionate increase in this expense. The calculation is: $\$0.6 \times \frac{5.1}{10.3} = \$0.3$ million increase		
Total CV 880 Flying Operations Expense	$ 9.9	$+5.0
For L-1049G Piston Aircraft		
A. Pilots and copilots, other flight personnel, personnel expenses, aircraft fuels, aircraft oils, taxes-other than payroll, insurance-employee welfare and various miscellaneous expenses	$ 7.8	$-2.8
This $7.8 million expense (Exhibit H, Sheet 3: $13.5 - $5.5 = $7.8) was estimated for operating L-1049G aircraft 8.5 million plane-miles (Exhibit H, Sheet 3: 14.5 - 6.0 = 8.5). We estimate the reduction of 3.0 million plane-miles mentioned on page 70 would have reduced expense proportionately. The calculation is: $\$7.8 \times \frac{3.0}{8.5} = \$2.8$ million decrease		

CALCULATION DETAILS FOR CHAPTER V

DOMESTIC DIVISION, 1960

	Actual Expense With Revisions of Chapters I through IV	Estimated Change In Expense, For Chapter V
	(Millions)	
B. Purchased public liability and property damage insurance	$ 0.2	NC
Total L-1049G Flying Operations Expense	$ 8.0	$-2.8

Note: The above piston aircraft expense change calculation and certain others that follow use statistics for the L-1049G aircraft. We selected statistics for this aircraft to be representative of several types of Lockheed Constellation aircraft which would have shown reduced plane-miles with additional CV 880 aircraft available for commercial service.

For Other Aircraft and Generally Nonrevenue	$59.6	NC
Total Flying Operations Expense (Exhibit H, Sheet 3: $73.1 + $4.4 = $77.5)	$77.5	$+2.2

MAINTENANCE EXPENSE

Direct Maintenance Expense For CV 880 Jet Aircraft Flight Equipment	$ 6.0	$+3.0

This $6.0 million expense (Exhibit H, Sheet 3) was estimated for operating CV 880 aircraft 11.6 million plane-miles. We believe the estimated 5.8 million additional plane-miles (page 67) would have caused TWA to incur a proportionate increase in this expense, calculated as follows:

$$\$6.0 \times \frac{5.8}{11.6} = \$3.0 \text{ million increase}$$

For L-1049G Piston Aircraft Flight Equipment	$ 4.0	$-1.4

This $4.0 million expense (Exhibit H, Sheet 4: $6.8 - $2.8 = $4.0) was estimated for operating L-1049G aircraft 8.5 million plane-miles (Exhibit H, Sheet 4: 14.5 - 6.0 = 8.5). We estimate the reduction of 3.0 million plane-miles mentioned on page 70 would have reduced expense proportionately. The calculation is:

$$\$4.0 \times \frac{3.0}{8.5} = \$1.4 \text{ million decrease}$$

NC - No significant change estimated for these expenses.

TWA Ex. 4(c)(4), Exhibit J, page 5 of 36
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER V

DOMESTIC DIVISION, 1960

	Actual Expense With Revisions of Chapters I through IV	Estimated Change In Expense, For Chapter V
	(Millions)	
For Other Aircraft and Generally Nonrevenue	$27.2	NC
For General Ground Property and Equipment	$ 0.8	NC
Total Direct Maintenance Expense (Exhibit H, Sheet 4: $34.8 + $3.2 = $38.0)	$38.0	$+1.6
Applied Maintenance Burden Expense For CV 880 Jet Aircraft Flight Equipment	$ 2.3	$+1.2

This estimated $2.3 million expense (Exhibit H, Sheet 4) is in connection with $6.0 million Direct Maintenance expense shown above. We estimate the $3.0 million increase in Direct Maintenance expense shown above would have been accompanied by a proportionate increase in Applied Maintenance Burden expense. The calculation is:

$$\$2.3 \times \frac{\$3.0}{\$6.0} = \$1.2 \text{ million increase}$$

For L-1049G Piston Aircraft Flight Equipment	$ 2.8	$-1.0

This $2.8 million Applied Maintenance Burden expense (Exhibit H, Sheet 4: $4.8 - $2.0 = $2.8) was estimated in connection with $4.0 million Direct Maintenance expense shown above. We estimate the $1.4 million reduction in Direct Maintenance shown above would have been accompanied by a proportionate decrease in Applied Maintenance Burden expense. The calculation is:

$$\$2.8 \times \frac{\$1.4}{\$4.0} = \$1.0 \text{ million decrease}$$

For Other Aircraft and Generally Nonrevenue	$17.8	NC
For General Ground Property and Equipment	$ 0.8	NC
Total Applied Maintenance Burden Expense	$23.7	$+0.2
Total Maintenance Expense (Exhibit H, Sheet 5: $58.2 + $3.5 = $61.7)	$61.7	$+1.8

TWA Ex. 4(c)(4), Exhibit J, page 6 of 36
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER V

DOMESTIC DIVISION, 1960

	Actual Expense With Revisions of Chapters I through IV	Estimated Change In Expense, For Chapter V
	(Millions)	
AIRCRAFT SERVICING EXPENSE		
A. General aircraft and traffic handling personnel, aircraft control personnel, trainees and instructors, personnel expenses, other services-outside, rentals, landing fees, other supplies, insurance-employee welfare and taxes-payroll	$19.3	$+0.6

This $19.3 million expense (Exhibit H, Sheet 5: $18.2 + $1.1 = $19.3) was estimated in connection with operating 95.3 million plane-miles (Exhibit H, Sheet 5: 89.7 + 5.6 = 95.3). We estimate the additional 2.8 million plane-miles (70: 5.8 - 3.0 = 2.8) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$19.3 \times \frac{2.8}{95.3} = \$0.6 \text{ million increase}$$

B. Communications personnel, communications purchased, light, heat, power and water, other services-associated companies, shop and servicing supplies, stationery, printing and office supplies, other uncleared expense credits and various miscellaneous expenses (Exhibit H, Sheet 5)	$ 2.9	NC
Total Aircraft Servicing Expense	$22.2	$+0.6
PASSENGER SERVICE EXPENSE		
A. Other flight personnel, other personnel, personnel expenses, insurance-employee welfare and taxes-payroll	$ 9.2	$+0.3

This $9.2 million expense (Exhibit H, Sheet 6: $8.6 + $0.6 = $9.2) was estimated in connection with operating 92.2 million plane-miles (Exhibit H, Sheet 6: 86.6 + 5.6 = 92.2). We estimate the additional 2.8 million CV 880 plane-miles (70: 5.8 - 3.0 = 2.8) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$9.2 \times \frac{2.8}{92.2} = \$0.3 \text{ million increase}$$

CALCULATION DETAILS FOR CHAPTER V

DOMESTIC DIVISION, 1960

	Actual Expense With Revisions of Chapters I through IV	Estimated Change In Expense, Pr Chapter V
	(Millions)	
B. Passenger food expense, other supplies, insurance-traffic liability and other services-outside	$14.3	$+0.7

This $14.3 million expense (Exhibit H, Sheet 6: $13.1 + $1.2 = $14.3) was estimated in connection with passenger traffic revenue of $279.8 million (Exhibit H, Sheet 6: $256.3 + $23.5 = $279.8). We estimate the $12.9 million increase in revenue from passenger traffic mentioned on page 70 would have been accompanied by a proportionate increase in this Group B expense. The calculation is:

$$\$14.3 \times \frac{\$\ 12.9}{\$279.8} = \$0.7 \text{ million increase}$$

C. Trainees and instructors, interrupted trips expense, other expenses and various miscellaneous expenses (Exhibit H, Sheet 6)	$ 0.6	NC
Total Passenger Service Expense	$24.1	$+1.0

TRAFFIC SERVICING EXPENSE

A. General aircraft and traffic handling personnel, passenger handling personnel, cargo handling personnel, other services-outside, rentals, other supplies, insurance-employee welfare, taxes-payroll and injuries, loss and damage	$17.0	$+0.8

This $17.0 million expense (Exhibit H, Sheet 7: $15.6 + $1.4 = $17.0) was estimated in connection with $303.4 million simulated transportation revenue (Exhibit J, Sheet 1). We estimate the $13.5 million increase in revenue mentioned on page 71 would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$17.0 \times \frac{\$\ 13.5}{\$303.4} = \$0.8 \text{ million increase}$$

TWA Ex. 4(c)(4), Exhibit J, page 8 of 36
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER V

DOMESTIC DIVISION, 1960

	Actual Expense With Revisions of Chapters I through IV	Estimated Change In Expense, For Chapter V
	(Millions)	
B. Other personnel, communications purchased, light, heat, power and water, other services-associated companies, stationery, printing and office supplies, other expenses and various miscellaneous expenses (Exhibit H, Sheet 7)	$ 1.5	NC
Total Traffic Servicing Expense	$18.5	$+0.8
SERVICING ADMINISTRATION EXPENSE		
Total Servicing Administration Expense	$ 2.0	$+0.1

This $2.0 million expense (Exhibit H, Sheet 7: $1.9 + $0.1 = $2.0) was estimated in connection with Aircraft Servicing and Traffic Servicing expense of $22.2 and $18.5 million respectively (shown previously). We estimate the increase in Aircraft and Traffic Servicing expenses of $0.6 and $0.8 million respectively (shown previously) would have been accompanied by a proportionate increase in Servicing Administration expense. The calculation is:

$$\$2.0 \times \frac{(\$\ 0.6 + \$\ 0.8)}{(\$22.2 + \$18.5)} = \$0.1 \text{ million increase}$$

Total Servicing Administration Expense	$ 2.0	$+0.1
PROMOTION AND SALES EXPENSE		
Reservations and Sales		
A. General aircraft and traffic handling personnel, passenger handling personnel, recordkeeping and statistical personnel, traffic solicitors, other personnel, personnel expenses, commissions-passenger, communications purchased, tariffs, schedules and timetables, rentals, other expenses, insurance-employee welfare and taxes-payroll	$24.1	$+1.1

This $24.1 million expense (Exhibit H, Sheet 8: $22.1 + $2.0 = $24.1) was estimated in connection with $303.4 million simulated transportation revenue (Exhibit J, Sheet 1). We estimate the $13.5 million increase in revenue mentioned on page 71 would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$24.1 \times \frac{\$\ 13.5}{\$303.4} = \$1.1 \text{ million increase}$$

CALCULATION DETAILS FOR CHAPTER V

DOMESTIC DIVISION, 1960

	Actual Expense With Revisions of Chapters I through IV	Estimated Change In Expense, For Chapter V
	(Millions)	
B. Communications personnel, general management personnel, light, heat, power and water, other services-outside, other supplies, stationery, printing and office supplies, memberships and various miscellaneous expenses (Exhibit H, Sheet 8)	$ 2.2	NC
Total Reservations and Sales Expense	$26.3	$+1.1
Advertising and Publicity		
A. Other personnel, advertising and tariffs, schedules and timetables	$ 5.1	$+0.2

This $5.1 million expense (Exhibit H, Sheet 8: $4.7 + $0.4 = $5.1). was estimated in connection with $303.4 million simulated transportation revenue (Exhibit J, Sheet 1). We estimate the $13.5 million increase in revenue mentioned on page 71 would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$5.1 \times \frac{\$\ 13.5}{\$303.4} = \$0.2 \text{ million increase}$$

B. Other promotional and publicity expenses, professional and technical fees and expenses, personnel expenses, rentals and various miscellaneous expenses (Exhibit H, Sheet 9)	$ 0.7	NC
Total Advertising and Publicity Expense	$ 5.8	$+0.2
Total Promotion and Sales Expense	$32.1	$+1.3

TWA Ex. 4(c)(4), Exhibit J, page 10 of 36
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER V

DOMESTIC DIVISION, 1960

	Actual Expense With Revisions of Chapters I through IV	Estimated Change In Expense, For Chapter V
	(Millions)	
ENERAL AND ADMINISTRATIVE EXPENSE		
A. Recordkeeping and statistical personnel, purchasing personnel, other personnel, personnel expenses, uncollectible accounts, rentals, stationery, printing and office supplies, other expenses, insurance-employee welfare and taxes-payroll	$ 7.5	$+0.3

This $7.5 million expense (Exhibit H, Sheet 9: $6.9 + $0.6 = $7.5) was estimated in connection with $303.4 million simulated transportation revenue (Exhibit J, Sheet 1). We estimate the $13.5 million increase in revenue mentioned on page 71 would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$7.5 \times \frac{\$\ 13.5}{\$303.4} = \$0.3 \text{ million increase}$$

B. General management personnel, communications purchased, professional and technical fees and expenses, memberships, corporate and fiscal expenses, taxes-other than payroll, purchased public liability and property damage insurance, legal fees and expenses, other services-outside, other supplies and various miscellaneous expenses (Exhibit H, Sheet 9)	$ 4.3	NC
tal General and Administrative Expense	$11.8	$+0.3
PRECIATION AND AMORTIZATION EXPENSE		
For flight equipment, expendable spare parts obsolescence, ground property and equipment, and amortization of developmental and pre-operating expenses (Exhibit H, Sheet 10: $36.5 + $5.4 = $41.9)	$41.9	$+2.7

Note: These figures were furnished by Price Waterhouse & Co.

AL OPERATING EXPENSE (Exhibit H, Sheet 10: $271.1 + $20.7 = $291.8)	$291.8	$+10.8

CALCULATION DETAILS FOR CHAPTER V

DOMESTIC DIVISION, 1961

	Actual Expense With Revisions of Chapters I, II and IV	Estimated Change In Expense, For Chapter V
	(Millions)	
FLYING OPERATIONS EXPENSE		
For CV 880 Jet Aircraft		
A. Pilots and copilots, other flight personnel, trainees and instructors, personnel expenses, aircraft fuels, insurance-employee welfare and various miscellaneous expenses	$18.1	$+9.1
This $18.1 million expense (Exhibit H, Sheet 11: $13.3 + $4.8 = $18.1) was estimated for operating CV 880 aircraft 22.4 million plane-miles (Exhibit H, Sheet 11: 16.5 + 5.9 = 22.4). We estimate the additional 11.2 million CV 880 plane-miles mentioned on page 67 would have increased this expense proportionately. The calculation is: $\$18.1 \times \frac{11.2}{22.4} = \$9.1$ million increase		
B. Insurance purchased-general	$ 1.1	$+0.5
This $1.1 million expense (Exhibit H, Sheet 11: $0.8 + $0.3 = $1.1) was estimated primarily for hull insurance for 19.8 CV 880 aircraft available for commercial service (Exhibit H, Sheet 11: 14.6 + 5.2 = 19.8). We estimate the additional 9.9 CV 880 aircraft available mentioned on page 66 would have increased this expense proportionately. The calculation is: $\$1.1 \times \frac{9.9}{19.8} = \$0.5$ million increase		
Total CV 880 Flying Operations Expense	$19.2	$+9.6

TWA Ex. 4(c)(4), Exhibit J, page 12 of 36
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER V

DOMESTIC DIVISION, 1961

	Actual Expense With Revisions of Chapters I, II and IV	Estimated Change In Expense, For Chapter V
	(Millions)	
For L-1049G, L-749 and L-049 Piston Aircraft		
A. Pilots and copilots, other flight personnel, trainees and instructors, personnel expenses, aircraft fuels, aircraft oils, taxes-payroll, taxes-other than payroll, insurance-employee welfare and various miscellaneous expenses	$22.8	$-5.4

This $22.8 million expense is developed in detail in Exhibit J, Sheet 2. In 1961, the L-1049G aircraft actually operated 10.3 million plane-miles (Exhibit F, Sheet 1) and TWA incurred Group A Flying Operations expense of $9.8 million for L-1049G aircraft. Using L-1049G Group A expense as representative of Lockheed four-engine Constellation aircraft that would have flown fewer plane-miles with the additional CV 880 operations, we estimate the reduction of 5.7 million piston plane-miles mentioned on page 70 would have reduced Group A expenses as follows:

$$\$9.8 \times \frac{5.7}{10.3} = \$5.4 \text{ million decrease}$$

B. Insurance purchased-general	$ 0.2	NC
Total L-1049G, L-749 and L-049 Flying Operations Expense	$23.0	$-5.4
For Other Aircraft and Generally Nonrevenue	$37.3	NC
Total Flying Operations Expense (Exhibit H, Sheet 12: $77.3 + $2.2 = $79.5)	$79.5	$+4.2

MAINTENANCE EXPENSE

Direct Maintenance Expense For CV 880 Jet Aircraft Flight Equipment	$11.5	$+5.8

This $11.5 million expense (Exhibit H, Sheet 12: $8.5 + $3.0 = $11.5) was estimated for operating CV 880 aircraft 22.4 million plane-miles (Exhibit H, Sheet 12: 16.5 + 5.9 = 22.4). We estimate the additional 11.2 million CV 880 plane-miles mentioned on page 67 would have increased this expense proportionately. The calculation is:

$$\$11.5 \times \frac{11.2}{22.4} = \$5.8 \text{ million increase}$$

CALCULATION DETAILS FOR CHAPTER V

DOMESTIC DIVISION, 1961

	Actual Expense With Revisions of Chapters I, II and IV	Estimated Change In Expense, For Chapter V
	(Millions)	
For L-1049G, L-749 and L-049 Piston Aircraft Flight Equipment	$ 7.8	$-2.4

This $7.8 million expense is developed in detail in Exhibit J, Sheet 2. In 1961, the L-1049G aircraft actually operated 10.3 million plane-miles (Exhibit F, Sheet 1) and TWA incurred Direct Maintenance expense of $4.4 million for L-1049G aircraft. Using L-1049G expense as representative of Lockheed four-engine Constellation aircraft that would have flown fewer plane-miles with the additional CV 880 operations, we estimate the reduction of 5.7 million piston plane-miles mentioned on page 70 would have reduced Direct Maintenance expense as follows:

$$\$4.4 \times \frac{5.7}{10.3} = \$2.4 \text{ million decrease}$$

For Other Aircraft and Generally Nonrevenue	$14.0	NC
For General Ground Property and Equipment	$ 0.9	NC
Total Direct Maintenance Expense	$34.2	$+3.4
Applied Maintenance Burden Expense For CV 880 Jet Aircraft Flight Equipment	$ 4.3	$+2.4

This $4.3 million Applied Maintenance Burden expense (Exhibit H, Sheet 13: $3.2 + $1.1 = $4.3) was estimated in connection with the $11.5 million Direct Maintenance shown above. We estimate the $5.8 million increase in Direct Maintenance shown above would have been accompanied by a proportionate increase in Applied Maintenance Burden expense. The calculation is:

$$\$4.3 \times \frac{\$\ 5.8}{\$11.5} = \$2.4 \text{ million increase}$$

TWA Ex. 4(c)(4), Exhibit J, page 14 of 36
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER V

DOMESTIC DIVISION, 1961

	Actual Expense With Revisions of Chapters I, II and IV	Estimated Change In Expense, For Chapter V
	(Millions)	
For L-1049G, L-749 and L-049 Piston Aircraft Flight Equipment	$ 8.0	$-2.2

This $8.0 million expense is developed in detail in Exhibit J, Sheet 2. In 1961, the L-1049G aircraft were assigned $4.0 million Applied Maintenance Burden expense in connection with the $4.4 million L-1049G Direct Maintenance expense previously shown. Using L-1049G expense as representative of Lockheed four-engine Constellation aircraft that would have flown fewer plane-miles with the additional CV 880 operations, we estimate the reduction of $2.4 million in Direct Maintenance would have reduced piston aircraft Applied Maintenance Burden as follows:

$$\$4.0 \times \frac{\$2.4}{\$4.4} = \$2.2 \text{ million decrease}$$

For Other Aircraft and Generally Nonrevenue	$10.2	NC
For General Ground Property and Equipment	$ 1.1	NC
Total Applied Maintenance Burden Expense	$23.6	$+0.2
Total Maintenance Expense (Exhibit H, Sheet 13: $56.2 + $1.6 = $57.8)	$57.8	$+3.6

AIRCRAFT SERVICING EXPENSE

A. General aircraft and traffic handling personnel, aircraft control personnel, trainees and instructors, personnel expenses, other services-outside, rentals, landing fees, other supplies, insurance-employee welfare and taxes-payroll	$19.4	$+1.2

This $19.4 million expense (Exhibit H, Sheet 14: $18.8 + $0.6 = $19.4) was estimated in connection with operating 87.5 million plane-miles (Exhibit H, Sheet 14: 84.7 + 2.8 = 87.5). We estimate the additional 5.5 million plane-miles (70: 11.2 - 5.7 = 5.5) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$19.4 \times \frac{5.5}{87.5} = \$1.2 \text{ million increase}$$

CALCULATION DETAILS FOR CHAPTER V

DOMESTIC DIVISION, 1961

	Actual Expense With Revisions of Chapters I, II and IV	Estimated Change In Expense, For Chapter V
	(Millions)	
B. Communications personnel, communications purchased, light, heat, power and water, other services-associated companied, shop and servicing supplies, stationery, printing and office supplies, other uncleared expense credits and various miscellaneous expenses (Exhibit H, Sheet 14)	$ 3.4	NC
Total Aircraft Servicing Expense	$22.8	$+1.2

PASSENGER SERVICE EXPENSE

A. Other flight personnel, other personnel, personnel expenses, insurance-employee welfare and taxes-payroll — $ 9.2 — $+0.6

This $9.2 million expense (Exhibit H, Sheet 14: $8.9 + $0.3 = $9.2) was estimated in connection with operating 84.0 million plane-miles (Exhibit H, Sheet 14: 81.2 + 2.8 = 84.0). We estimate the additional 5.5 million plane-miles (70: 11.2 - 5.7 = 5.5) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$9.2 \times \frac{5.5}{84.0} = \$0.6 \text{ million increase}$$

B. Passenger food expense, other supplies, insurance-traffic liability and other services-outside — $13.9 — $+1.3

This $13.9 million expense (Exhibit H, Sheet 15: $13.3 + $0.6 = $13.9) was estimated in connection with passenger traffic revenue of $265.8 million (Exhibit H, Sheet 15: $253.6 + $12.2 = $265.8). We estimate the $24.3 million increase in revenue from passenger traffic mentioned on page 70 would have been accompanied by a proportionate increase in this Group B expense. The calculation is:

$$\$13.9 \times \frac{\$\ 24.3}{\$265.8} = \$1.3 \text{ million increase}$$

C. Trainees and instructors, rentals, interrupted trips expense and various miscellaneous expenses (Exhibit H, Sheet 15) — $ 0.6 — NC

Total Passenger Service Expense — $23.7 — $+1.9

TWA Ex. 4(c)(4), Exhibit J, page 16 of 36
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER V

DOMESTIC DIVISION, 1961

	Actual Expense With Revisions of Chapters I, II and IV	Estimated Change In Expense, For Chapter V
	(Millions)	
TRAFFIC SERVICING EXPENSE		
A. General aircraft and traffic handling personnel, passenger handling personnel, cargo handling personnel, insurance-employee welfare, injuries, loss and damage, taxes-payroll, other services-outside, rentals and other supplies	$16.8	$+1.5

This $16.8 million expense (Exhibit H, Sheet 15: $16.1 + $0.7 = $16.8) was estimated in connection with $290.4 million simulated transportation revenue (Exhibit J, Sheet 1). We estimate the $25.5 million increase in total revenue mentioned on page 71 would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$16.8 \times \frac{\$\ 25.5}{\$290.4} = \$1.5 \text{ million increase}$$

B. Other personnel, personnel expenses, communications purchased, light, heat, power and water, other services-associated companies, stationery, printing and office supplies, insurance-traffic liability, other expenses and various miscellaneous expenses (Exhibit H, Sheet 16)	$ 1.6	NC
Total Traffic Servicing Expense	$18.4	$+1.5
SERVICING ADMINISTRATION EXPENSE		
Total Servicing Administration Expense	$ 2.3	$+0.1

This $2.3 million expense (Exhibit H, Sheet 16: $2.2 + $0.1 = $2.3) was estimated in connection with Aircraft Servicing and Traffic Servicing expenses of $22.8 and $18.4 million respectively (shown previously). We estimate the increase in Aircraft and Traffic Servicing expenses of $1.2 and $1.5 million respectively (shown previously) would have been accompanied by a proportionate increase in Servicing Administration expense. The calculation is:

$$\$2.3 \times \frac{(\$\ 1.2 + \$\ 1.5)}{(\$22.8 + \$18.4)} = \$0.1 \text{ million increase}$$

Total Servicing Administration Expense	$ 2.3	$+0.1

CALCULATION DETAILS FOR CHAPTER V

DOMESTIC DIVISION, 1961

	Actual Expense With Revisions of Chapters I, II and IV	Estimated Change In Expense, For Chapter V
	(Millions)	
PROMOTION AND SALES EXPENSE		
Reservations and Sales		
A. General aircraft and traffic handling personnel, passenger handling personnel, recordkeeping and statistical personnel, traffic solicitors, other personnel, personnel expenses, commissions-passenger, communications purchased, commissions-property, rentals, tariffs, schedules and timetables, other expenses, insurance-employee welfare and taxes-payroll	$23.1	$+2.0

This $23.1 million expense (Exhibit H, Sheet 17: $22.1 + $1.0 = $23.1) was estimated in connection with $290.4 million simulated transportation revenue (Exhibit J, Sheet 1). We estimate the $25.5 million increase in total revenue mentioned on page 71 would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$23.1 \times \frac{\$\ 25.5}{\$290.4} = \$2.0 \text{ million increase}$$

B. Communications personnel, general management personnel, light, heat, power and water, other services-outside, stationery, printing and office supplies, other supplies and various miscellaneous expenses (Exhibit H, Sheet 17)	$ 2.2	NC
Total Reservations and Sales Expense	$25.3	$+2.0
Advertising and Publicity		
A. Other personnel, advertising and tariffs, schedules and timetables	$ 6.6	$+0.6

This $6.6 million expense (Exhibit H, Sheet 17: $6.3 + $0.3 = $6.6) was estimated in connection with $290.4 million simulated transportation revenue (Exhibit J, Sheet 1). We estimate the $25.5 million increase in total revenue mentioned on page 71 would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$6.6 \times \frac{\$\ 25.5}{\$290.4} = \$0.6 \text{ million increase}$$

CALCULATION DETAILS FOR CHAPTER V

DOMESTIC DIVISION, 1961

	Actual Expense With Revisions of Chapters I, II and IV	Estimated Change In Expense, For Chapter V
	(Millions)	
B. Other promotional and publicity expenses, rentals, and various miscellaneous expenses (Exhibit H, Sheet 18)	$ 0.6	NC
Total Advertising and Publicity Expense	$ 7.2	$+0.6
Total Promotion and Sales Expense	$32.5	$+2.6

GENERAL AND ADMINISTRATIVE EXPENSE

A. Recordkeeping and statistical personnel, purchasing personnel, other personnel, personnel expenses, uncollectible accounts, rentals, stationery, printing and office supplies, other expenses, insurance-employee welfare and taxes-payroll $ 9.5 $+0.8

This $9.5 million expense (Exhibit H, Sheet 18: $9.1 + $0.4 = $9.5) was estimated in connection with $290.4 million simulated transportation revenue (Exhibit J, Sheet 1). We estimate the $25.5 million increase in total revenue mentioned on page 71 would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$9.5 \times \frac{\$\ 25.5}{\$290.4} = \$0.8 \text{ million increase}$$

B. General management personnel, communications purchased, professional and technical fees and expenses, other services-outside, other supplies, memberships, corporate and fiscal expenses, taxes-other than payroll, insurance purchased-general, other uncleared expense credits, legal fees and expenses and various miscellaneous expenses (Exhibit H, Sheet 18) $ 4.7 NC

Total General and Administrative Expense $14.2 $+0.8

CALCULATION DETAILS FOR CHAPTER V

DOMESTIC DIVISION, 1961

	Actual Expense With Revisions of Chapters I, II and IV	Estimated Change In Expense, For Chapter V
	(Millions)	
DEPRECIATION AND AMORTIZATION EXPENSE For flight equipment, expendable spare parts obsolescence, ground property and equipment, and amortization of developmental and pre-operating expenses (Exhibit H, Sheet 19: $45.1 + $2.6 = $47.7)	$ 47.7	$ +5.7

Note: These figures were furnished by Price Waterhouse & Co.

TOTAL OPERATING EXPENSES (Exhibit H, Sheet 19: $288.5 + $10.4 = $298.9)	$298.9	$+21.6

TWA Ex. 4(c)(4), Exhibit J, page 20 of 36
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER V

DOMESTIC DIVISION, 1962

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter V
	(Millions)	
FLYING OPERATIONS EXPENSE		
For CV 880 Jet Aircraft		
A. Pilots and copilots, other flight personnel, trainees and instructors, personnel expenses, aircraft fuels, insurance-employee welfare and various miscellaneous expenses	$18.9	$+9.5
This $18.9 million expense was incurred for operating CV 880 aircraft 23.2 million plane-miles (Exhibit J, Sheet 1). We estimate the additional 11.6 million CV 880 plane-miles mentioned on page 67 would have increased this expense proportionately. The calculation is: $\$18.9 \times \frac{11.6}{23.2} = \$9.5$ million increase		
B. Insurance purchased-general	$ 1.0	$+0.5
This $1.0 million expense was incurred primarily for hull insurance on 20.0 aircraft available for commercial service (Exhibit II). We estimate the increase of 10.0 CV 880 aircraft available mentioned on page 66 would have increased this expense proportionately. The calculation is: $\$1.0 \times \frac{10.0}{20.0} = \$0.5$ million increase		
Total CV 880 Flying Operations Expense	$19.9	$+10.0
For L-1049G Piston Aircraft		
A. Pilots and copilots, other flight personnel, trainees and instructors, personnel expenses, aircraft fuels, aircraft oils, taxes-other than payroll, insurance-employee welfare, taxes-payroll and various miscellaneous expenses	$ 8.9	$-5.8
This $8.9 million expense (Exhibit F, Sheet 43: $9.8 - $0.9 = $8.9) was estimated for operating L-1049G aircraft 9.1 million plane-miles (Exhibit F, Sheet 43: 10.0 - 0.9 = 9.1). We estimate the reduction of 5.9 million plane-miles mentioned on page 70 would have been accompanied by a proportionate reduction in this kind of expense. The calculati		

$\$8.9 \times \frac{5.9}{9.1} = \$5.8$ million decrease

CALCULATION DETAILS FOR CHAPTER V

DOMESTIC DIVISION, 1962

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter V
	(Millions)	
B. Insurance purchased-general	#	NC
Total L-1049G Flying Operations Expense	$ 8.9	$-5.8
For Other Aircraft and Generally Nonrevenue	$54.3	NC
Total Flying Operations Expense (Exhibit F, Sheet 44: $82.4 + $0.7 = $83.1)	$83.1	$+4.2
MAINTENANCE EXPENSE		
Direct Maintenance Expense For CV 880 Jet Aircraft Flight Equipment	$11.8	$+5.9

This $11.8 million expense was incurred for operating CV 880 aircraft 23.2 million plane-miles (Exhibit J, Sheet 1). We estimate the additional 11.6 million CV 880 plane-miles mentioned on page 67 would have increased this expense proportionately. The calculation is:

$$\$11.8 \times \frac{11.6}{23.2} = \$5.9 \text{ million increase}$$

For L-1049G Piston Aircraft Flight Equipment	$ 4.5	$-2.9

This $4.5 million expense (Exhibit F, Sheet 44: $4.9 - $0.4 = $4.5) was estimated for operating L-1049G aircraft 9.1 million plane-miles (Exhibit F, Sheet 44: 10.0 - 0.9 = 9.1). We estimate the reduction of 5.9 million plane-miles mentioned on page 70 would have been accompanied by a proportionate reduction in this kind of expense. The calculation:

$$\$4.5 \times \frac{5.9}{9.1} = \$2.9 \text{ million decrease}$$

For Other Aircraft and Generally Nonrevenue	$18.9	NC
For General Ground Property and Equipment	$ 1.6	NC
Total Direct Maintenance Expense	$36.8	$+3.0

This symbol is used to designate an amount too small to be significant in these estimates which are rounded to the nearest $0.1 million.

TWA Ex. 4(c)(4), Exhibit J, page 22 of 36
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER V

DOMESTIC DIVISION, 1962

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter V
	(Millions)	
Applied Maintenance Burden Expense For CV 880 Jet Aircraft Flight Equipment	$ 6.2	$+3.1

This $6.2 million expense was incurred in connection with the $11.8 million Direct Maintenance expense shown above. We estimate the $5.9 million increase shown above would have been accompanied by a proportionate increase in this expense. The calculation is:

$$\$6.2 \times \frac{\$\ 5.9}{\$11.8} = \$3.1 \text{ million increase}$$

For L-1049G Piston Aircraft Flight Equipment	$ 3.4	$-2.2

This $3.4 million Applied Maintenance Burden expense (Exhibit F, Sheet 45: $3.7 - $0.3 = $3.4) was estimated in connection with the $4.5 million Direct Maintenance expense shown above. We estimate the $2.9 million decrease in L-1049G aircraft Direct Maintenance expense would have been accompanied by a proportionate decrease in Applied Maintenance Burden expense. The calculation is:

$$\$3.4 \times \frac{\$2.9}{\$4.5} = \$2.2 \text{ million decrease}$$

For Other Aircraft and Generally Nonrevenue	$14.1	NC
For General Ground Property and Equipment	$ 1.9	NC
Total Applied Maintenance Burden Expense	$25.6	$+0.9
Total Maintenance Expense (Exhibit F, Sheet 45: $62.1 + $0.3 = $62.4)	$62.4	$+3.9

CALCULATION DETAILS FOR CHAPTER V

DOMESTIC DIVISION, 1962

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter V
	(Millions)	

AIRCRAFT SERVICING EXPENSE

A. General aircraft and traffic handling personnel, aircraft control personnel, trainees and instructors, personnel expenses, other services-outside, rentals, landing fees, other supplies, insurance-employee welfare and taxes-payroll — $20.5 — $+1.3

This $20.5 million expense (Exhibit F, Sheet 46: $20.4 + $0.1 = $20.5) was estimated in connection with operating 90.4 million plane-miles (Exhibit F, Sheet 46: 89.9 + 0.5 = 90.4). We estimate the 5.7 million plane-miles net increase mentioned on page 70 (11.6 - 5.9 = 5.7) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$20.5 \times \frac{5.7}{90.4} = \$1.3 \text{ million increase}$$

B. Communications personnel, communications purchased, light, heat, power and water, other services-associated companies, shop and servicing supplies, stationery, printing and office supplies, other uncleared expense credits and various miscellaneous expenses (Exhibit F, Sheet 46) — $ 3.3 — NC

Total Aircraft Servicing Expense — $23.8 — $+1.3

PASSENGER SERVICE EXPENSE

A. Other flight personnel, other personnel, personnel expenses, insurance-employee welfare and taxes-payroll — $10.0 — $+0.6

This $10.0 million expense (Exhibit F, Sheet 46: $9.9 + $0.1 = $10.0) was estimated in connection with operating 88.4 million plane-miles (Exhibit F, Sheet 46: 87.9 + 0.5 = 88.4). We estimate the net additional 5.7 million plane-miles mentioned on page 70 (11.6 - 5.9 = 5.7) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$10.0 \times \frac{5.7}{88.4} = \$0.6 \text{ million increase}$$

CALCULATION DETAILS FOR CHAPTER V

DOMESTIC DIVISION, 1962

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter V
	(Millions)	
B. Passenger food expense, other supplies, insurance-traffic liability and other services-outside	$12.4	$+1.0

This $12.4 million expense (Exhibit F, Sheet 47: $12.3 + $0.1 = $12.4) was estimated in connection with $275.0 million of passenger traffic revenue (Exhibit F, Sheet 47: $273.0 + $2.0 = $275.0). We estimate the $21.5 million increase in revenue from passenger traffic mentioned on page 70 would have been accompanied by a proportionate increase in this Group B expense. The calculation is:

$$\$12.4 \times \frac{\$\ 21.5}{\$275.0} = \$1.0 \text{ million increase}$$

C. Trainees and instructors, rentals, interrupted trips expense and various miscellaneous expenses (Exhibit F, Sheet 47)	$ 0.7	NC
Total Passenger Service Expense	$23.1	$+1.6

TRAFFIC SERVICING EXPENSE

A. General aircraft and traffic handling personnel, passenger handling personnel, cargo handling personnel, insurance-employee welfare, injuries, loss and damage, taxes-payroll, other services-outside, rentals and other supplies	$20.2	$+1.5

This $20.2 million expense (Exhibit F, Sheet 47: $20.1 + $0.1 = $20.2) was estimated in connection with $300.6 million simulated transportation revenue (Exhibit J, Sheet 1). We estimate the $22.6 million increase in total revenue mentioned on page 71 would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$20.2 \times \frac{\$\ 22.6}{\$300.6} = \$1.5 \text{ million increase}$$

B. Other personnel, personnel expenses, trainees and instructors, communications purchased, light, heat, power and water, other services-associated companies, stationery, printing and office supplies, insurance-traffic liability, other expenses and various miscellaneous expenses (Exhibit F, Sheet 47)	$ 1.6	NC
Total Traffic Servicing Expense	$21.8	$+1.5

CALCULATION DETAILS FOR CHAPTER V

DOMESTIC DIVISION, 1962

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter V
	(Millions)	
SERVICING ADMINISTRATION EXPENSE		
Total Servicing Administration Expense	$ 2.4	$+0.1

This $2.4 million expense (Exhibit F, Sheet 48: $2.4 + NC = $2.4) was estimated in connection with Aircraft Servicing and Traffic Servicing expense of $23.8 and $21.8 million respectively (shown previously). We estimate the addition in Aircraft and Traffic Servicing expenses of $1.3 and $1.5 million respectively (shown previously) would have been accompanied by a proportionate increase in the Servicing Administration expense. The calculation is:

$$\$2.4 \times \frac{(\$1.3 + \$1.5)}{(\$23.8 + \$21.8)} = \$0.1 \text{ million increase}$$

Total Servicing Administration Expense	$ 2.4	$+0.1

PROMOTION AND SALES EXPENSE

Reservations and Sales

A. General aircraft and traffic handling personnel, passenger handling personnel, recordkeeping and statistical personnel, traffic solicitors, other personnel, personnel expenses, commissions-passenger, communications purchased, commissions-property, rentals, tariffs, schedules and timetables, other expenses, insurance-employee welfare and taxes-payroll — $23.6 — $+1.8

This $23.6 million expense (Exhibit F, Sheet 48: $23.4 + $0.2 = $23.6) was estimated in connection with $300.6 million simulated transportation revenue (Exhibit J, Sheet 1). We estimate the $22.6 million increase in total revenue mentioned on page 71 would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$23.6 \times \frac{\$22.6}{\$300.6} = \$1.8 \text{ million increase}$$

B. Communications personnel, general management personnel, light, heat, power and water, other services-outside, stationery, printing and office supplies, trainees and instructors, other supplies and various miscellaneous expenses — $ 2.4 — NC

Total Reservations and Sales Expense	$26.0	$+1.8

TWA Ex. 4(c)(4), Exhibit J, page 26 of 36
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER V

DOMESTIC DIVISION, 1962

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter V
	(Millions)	
Advertising and Publicity		
A. Other personnel, advertising, tariffs, schedules and timetables	$ 8.3	$+0.6

This $8.3 million expense (Exhibit F, Sheet 49: $8.2 + $0.1 = $8.3) was estimated in connection with $300.6 million simulated transportation revenue (Exhibit J, Sheet 1). We estimate the $22.6 million increase in total revenue mentioned on page 71 would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$8.3 \times \frac{\$\ 22.6}{\$300.6} = \$0.6 \text{ million increase}$$

B. Personnel expenses, other promotional and publicity expenses, rentals and various miscellaneous expenses (Exhibit F, Sheet 49)	$ 0.7	NC
Total Advertising and Publicity Expense	$ 9.0	$+0.6
Total Promotion and Sales Expense	$35.0	$+2.4

GENERAL AND ADMINISTRATIVE EXPENSE

A. Recordkeeping and statistical personnel, purchasing personnel, other personnel, personnel expenses, uncollectible accounts, rentals, stationery, printing and office supplies, other expenses, insurance-employee welfare and taxes-payroll	$ 7.6'	$+0.6

This $7.6 million expense (Exhibit F, Sheet 49: $7.5 + $0.1 = $7.6) was estimated in connection with $300.6 million simulated transportation revenue (Exhibit J, Sheet 1). We estimate the $22.6 million increase in total revenue mentioned on page 71 would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$7.6 \times \frac{\$\ 22.6}{\$300.6} = \$0.6 \text{ million increase}$$

CALCULATION DETAILS FOR CHAPTER V

DOMESTIC DIVISION, 1962

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter V
	(Millions)	
B. General management personnel, communications purchased, professional and technical fees and expenses, other services-outside, other supplies, memberships, corporate and fiscal expenses, taxes-other than payroll, insurance purchased-general, other uncleared expense credits, legal fees and expenses and various miscellaneous expenses (Exhibit F, Sheet 50)	$ 4.2	NC
Total General and Administrative Expense	$11.8	$+0.6
DEPRECIATION AND AMORTIZATION EXPENSE For flight equipment, expendable spare parts obsolescence, ground property and equipment, and amortization of developmental and pre-operating expenses (Exhibit F, Sheet 50: $45.1 + $0.8 = $45.9)	$45.9	$+5.4

Note: These figures were furnished by Price Waterhouse & Co.

TOTAL OPERATING EXPENSE (Exhibit F, Sheet 50: $306.7 + $2.6 = $309.3)	$309.3	$+21.0

TWA Ex. 4(c)(4), Exhibit J, page 28 of 36
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER V

DOMESTIC DIVISION, 1963

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter V
	(Millions)	
FLYING OPERATIONS EXPENSE		
For CV 880 Jet Aircraft		
A. Pilots and copilots, other flight personnel, trainees and instructors, personnel expenses, aircraft fuels, insurance-employee welfare and various miscellaneous expenses	$21.5	$+7.7
This $21.5 million expense was incurred for operating CV 880 aircraft 26.4 million plane-miles (Exhibit J, Sheet 1). We estimate the additional 9.4 million plane-miles mentioned on page 67 would have been accompanied by a proportionate increase in this expense. The calculation is: $\$21.5 \times \frac{9.4}{26.4} = \$7.7$ million increase		
B. Insurance purchased-general	$ 1.1	$+0.4
This $1.1 million expense was incurred for hull insurance for 22.1 CV 880 aircraft available for commercial service. We estimate the additional 7.9 aircraft available mentioned on page 66 would have been accompanied by a proportionate increase in this expense. The calculation is: $\$1.1 \times \frac{7.9}{22.1} = \$0.4$ million increase		
Total CV 880 Flying Operations Expense	$22.6	$+8.1
For L-1049G Piston Aircraft		
A. Pilots and copilots, other flight personnel, trainees and instructors, personnel expenses, aircraft fuels, aircraft oils, taxes-other than payroll, insurance-employee welfare, taxes-payroll and various miscellaneous expenses	$ 9.5	$-5.0
This $9.5 million expense (Exhibit F, Sheet 57: $9.7 - $0.2 = $9.5) was estimated for operating L-1049G aircraft 9.2 million plane-miles (Exhibit F, Sheet 57: 9.4 - 0.2 = 9.2). We estimate the reduction of 4.8 million plane-miles mentioned on page 70 would have been accompanied by a proportionate reduction in this kind of expense. The calculat $\$9.5 \times \frac{4.8}{9.2} = \$5.0$ million decrease		

CALCULATION DETAILS FOR CHAPTER V

DOMESTIC DIVISION, 1963

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter V
	(Millions)	
B. Insurance purchased-general	#	NC
Total L-1049G Flying Operations Expense	$ 9.5,	$-5.0
For Other Aircraft and Generally Nonrevenue	$56.2	NC
Total Flying Operations Expense (Exhibit F, Sheet 58: $87.9 + $0.4 = $88.3)	$88.3	$+3.1
MAINTENANCE EXPENSE		
Direct Maintenance Expense For CV 880 Jet Aircraft Flight Equipment	$ 7.9	$+2.8

This $7.9 million expense was incurred for operating CV 880 aircraft 26.4 million plane-miles (Exhibit J, Sheet 1). We estimate the additional 9.4 million plane-miles mentioned on page 67 would have been accompanied by a proportionate increase in this expense. The calculation is:

$$\$7.9 \times \frac{9.4}{26.4} = \$2.8 \text{ million increase}$$

For L-1049G Piston Aircraft Flight Equipment	$ 4.8	$-2.5

This $4.8 million expense (Exhibit F, Sheet 58: $4.9 - $0.1 = $4.8) was estimated for operating L-1049G aircraft 9.2 million plane-miles (Exhibit F, Sheet 58: 9.4 - 0.2 = 9.2). We estimate the reduction of 4.8 million plane-miles mentioned on page 70 would have been accompanied by a proportionate reduction in this kind of expense. The calculation is:

$$\$4.8 \times \frac{4.8}{9.2} = \$2.5 \text{ million decrease}$$

For Other Aircraft and Generally Nonrevenue	$15.8	NC
For General Ground Property and Equipment	$ 2.0	NC
Total Direct Maintenance Expense	$30.5	$+0.3

This symbol is used to designate an amount too small to be significant in these estimates which are rounded to the nearest $0.1 million.

TWA Ex. 4(c)(4), Exhibit J, page 30 of 36
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER V

DOMESTIC DIVISION, 1963

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter V
	(Millions)	
Applied Maintenance Burden Expense For CV 880 Jet Aircraft Flight Equipment	$ 4.1	$+1.5

This $4.1 million CV 880 Applied Maintenance Burden expense was incurred in connection with the $7.9 million Direct Maintenance expense shown above. We estimate the $2.8 million increase in the CV 880 Direct Maintenance expense shown above would have been accompanied by a proportionate increase in Applied Maintenance Burden expense. The calculation is:

$$\$4.1 \times \frac{\$2.8}{\$7.9} = \$1.5 \text{ million increase}$$

For L-1049G Piston Aircraft Flight Equipment	$ 3.4	$-1.8

This $3.4 million expense (Exhibit F, Sheet 59: $3.5 - $0.1 = $3.4) was estimated in connection with the $4.8 million L-1049G Direct Maintenance expense shown above. We estimate the $2.5 million reduction in Direct Maintenance expense shown above would have been accompanied by a proportionate reduction in this Applied Maintenance Burden expense. The calculation is:

$$\$3.4 \times \frac{\$2.5}{\$4.8} = \$1.8 \text{ million decrease}$$

For Other Aircraft and Generally Nonrevenue	$14.2	NC
For General Ground Property and Equipment	$ 2.2	NC
Total Applied Maintenance Burden Expense	$23.9	$-0.3
Total Maintenance Expense (Exhibit F, Sheet 59: $54.2 + $0.2 = $54.4)	$54.4	---

CALCULATION DETAILS FOR CHAPTER V

DOMESTIC DIVISION, 1963

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter V
	(Millions)	
AIRCRAFT SERVICING EXPENSE		
A. General aircraft and traffic handling personnel, aircraft control personnel, trainees and instructors, personnel expenses, other services-outside, rentals, landing fees, other supplies, insurance-employee welfare and taxes-payroll	$23.3	$+1.1
B. Communications personnel, communications purchased, light, heat, power and water, shop and servicing supplies, stationery, printing and office supplies, other uncleared expense credits and various miscellaneous expenses (Exhibit F, Sheet 60)	$ 3.3	NC
Total Aircraft Servicing Expense	$26.6	$+1.1
PASSENGER SERVICE EXPENSE		
A. Other flight personnel, other personnel, personnel expenses, insurance-employee welfare, taxes-payroll and rentals	$11.6	$+0.5

This $23.3 million expense (Exhibit F, Sheet 60: $23.2 + $0.1 = $23.3) was estimated in connection with operating 100.1 million plane-miles (Exhibit F, Sheet 60: 99.6 + 0.5 = 100.1). We estimate the 4.6 million plane-miles net increase mentioned on page 70 (9.4 - 4.8 = 4.6) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$23.3 \times \frac{4.6}{100.1} = \$1.1 \text{ million increase}$$

This $11.6 million expense (Exhibit F, Sheet 60: $11.5 + $0.1 = $11.6) was estimated in connection with operating 98.0 million plane-miles (Exhibit F, Sheet 60: 97.5 + 0.5 = 98.0). We estimate the net additional 4.6 million plane-miles mentioned on page 70 (9.4 - 4.8 = 4.6) would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$11.6 \times \frac{4.6}{98.0} = \$0.5 \text{ million increase}$$

TWA Ex. 4(c)(4), Exhibit J, page 32 of 36
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER V

DOMESTIC DIVISION, 1963

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter V
	(Millions)	
B. Passenger food expense, other supplies, insurance-traffic liability and other services-outside	$14.9	$+0.9

This $14.9 million expense (Exhibit F, Sheet 61: $14.8 + $0.1 = $14.9) was estimated in connection with passenger traffic revenue of $313.7 million (Exhibit F, Sheet 61: $311.8 + $1.9 = $313.7). We estimate the $18.2 million increase in revenue from passenger traffic mentioned on page 70 would have been accompanied by a proportionate increase in this Group B expense. The calculation is:

$$\$14.9 \times \frac{\$\ 18.2}{\$313.7} = \$0.9 \text{ million increase}$$

C. Trainees and instructors, interrupted trips expense and various miscellaneous expenses (Exhibit F, Sheet 61)	$ 0.5	NC
Total Passenger Service Expense	$27.0	$+1.4

TRAFFIC SERVICING EXPENSE

A. General aircraft and traffic handling personnel, passenger handling personnel, cargo handling personnel, insurance-employee welfare, injuries, loss and damage, taxes-payroll, other services-outside, rentals and other supplies	$22.6	$+1.3

This $22.6 million expense (Exhibit F, Sheet 61: $22.5 + $0.1 = $22.6) was estimated in connection with $343.5 million simulated transportation revenue (Exhibit J, Sheet 1). We estimate the $19.1 million increase in total revenue mentioned on page 71 would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$22.6 \times \frac{\$\ 19.1}{\$343.5} = \$1.3 \text{ million increase}$$

CALCULATION DETAILS FOR CHAPTER V

DOMESTIC DIVISION, 1963

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter V
	(Millions)	
B. Communications personnel, other personnel, personnel expenses, communications purchased, light, heat, power and water, stationery, printing and office supplies, insurance-traffic liability, other expenses and various miscellaneous expenses (Exhibit F, Sheet 61)	$ 1.7	NC
Total Traffic Servicing Expense	$24.3	$+1.3
SERVICING ADMINISTRATION EXPENSE		
Total Servicing Administration Expense	$ 2.9	$+0.1

This $2.9 million expense (Exhibit F, Sheet 62) was estimated in connection with Aircraft Servicing and Traffic Servicing expenses of $26.6 and $24.3 million respectively (shown previously). We estimate the increase in Aircraft and Traffic Servicing expenses of $1.1 and $1.3 million respectively (shown previously) would have been accompanied by a proportionate increase in Servicing Administration expense. The calculation is:

$$\$2.9 \times \frac{(\$1.1 + \$1.3)}{(\$26.6 + \$24.3)} = \$0.1 \text{ million increase}$$

Total Servicing Administration Expense	$ 2.9	$+0.1

TWA Ex. 4(c)(4), Exhibit J, page 34 of 36
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER V

DOMESTIC DIVISION, 1963

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter V
	(Millions)	
PROMOTION AND SALES EXPENSE		
Reservations and Sales		
A. General aircraft and traffic handling personnel, passenger handling personnel, recordkeeping and statistical personnel, traffic solicitors, other personnel, personnel expenses, commissions-passenger, communications purchased, commissions-property, rentals, tariffs, schedules and timetables, other expenses, insurance-employee welfare and taxes-payroll	$27.9	$+1.6

This $27.9 million expense (Exhibit F, Sheet 62: $27.7 + $0.2 = $27.9) was estimated in connection with $343.5 million simulated transportation revenue (Exhibit J, Sheet 1). We estimate the $19.1 million increase in total revenue mentioned on page 71 would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$27.9 \times \frac{\$\ 19.1}{\$343.5} = \$1.6 \text{ million increase}$$

B. Communications personnel, general management personnel, light, heat, power and water, other services-outside, stationery, printing and office supplies, trainees and instructors, other supplies and various miscellaneous expenses (Exhibit F, Sheet 62)	$ 2.6	NC
Total Reservations and Sales Expense	$30.5	$+1.6
Advertising and Publicity		
A. Other personnel, advertising and tariffs, schedules and timetables	$10.9	$+0.6

This $10.9 million expense (Exhibit F, Sheet 63: $10.8 + $0.1 = $10.9) was estimated in connection with $343.5 million simulated transportation revenue (Exhibit J, Sheet 1). We estimate the $19.1 million increase in total revenue mentioned on page 71 would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$10.9 \times \frac{\$\ 19.1}{\$343.5} = \$0.6 \text{ million increase}$$

CALCULATION DETAILS FOR CHAPTER V

DOMESTIC DIVISION, 1963

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter V
	(Millions)	
B. Personnel expenses, other promotional and publicity expenses, rentals and various miscellaneous expenses (Exhibit F, Sheet 63)	$ 0.7	NC
Total Advertising and Publicity Expense	$11.6	$+0.6
Total Promotion and Sales Expense	$42.1	$+2.2

GENERAL AND ADMINISTRATIVE EXPENSE

A. Recordkeeping and statistical personnel, purchasing personnel, other personnel, personnel expenses, uncollectible accounts, rentals, stationery, printing and office supplies, other expenses, insurance-employee welfare and taxes-payroll	$ 8.5	$+0.5

This $8.5 million expense (Exhibit F, Sheet 63) was estimated in connection with $343.5 million simulated transportation revenue (Exhibit J, Sheet 1). We estimate the $19.1 million increase in total revenue mentioned on page 71 would have been accompanied by a proportionate increase in this Group A expense. The calculation is:

$$\$8.5 \times \frac{\$\ 19.1}{\$343.5} = \$0.5 \text{ million increase}$$

B. General management personnel, communications purchased, light, heat, power and water, professional and technical fees and expenses, other services-outside, other supplies, memberships, corporate and fiscal expenses, taxes-other than payroll, insurance purchased-general, other uncleared expense credits, legal fees and expenses and various miscellaneous expenses (Exhibit F, Sheet 64)	$ 4.4	NC
Total General and Administrative Expense	$12.9	$+0.5

TWA Ex. 4(c)(4), Exhibit J, page 36 of 36
(Exhibits B-J to C. & C. Report-
Financial Results from Reconstructed Jet Fleet)

CALCULATION DETAILS FOR CHAPTER V

DOMESTIC DIVISION, 1963

	Actual Expense With Revisions of Chapters I and II	Estimated Change In Expense, For Chapter V
	(Millions)	
DEPRECIATION AND AMORTIZATION EXPENSE For flight equipment, expendable spare parts obsolescence, ground property and equipment, and amortization of developmental and pre-operating expense (Exhibit F, Sheet 64: $40.1 + $0.6 = $40.7)	$ 40.7	$ +4.4

Note: These figures were furnished by Price Waterhouse & Co.

TOTAL OPERATING EXPENSE (Exhibit F, Sheet 64: $317.3 + $1.9 = $319.2)	$319.2	$+14.1

INDEX

Volume AX-I

ITEM	PAGE
TWA Ex. 2 (Statement of Robert W. Rummel) ..	AX-1
TWA Ex. R-3 (Toolco-Convair Amended Agreement—Model 22, 6/4/56)	AX-63a
TWA Ex. R-5 (TWA-Toolco Purchase Agreement—May 9, 1960)	AX-64
TWA Ex. R-8(80) (FAA Registration Documents—B707-331, No. N771TW)	AX-73a
TWA Ex. R-8(81) (FAA Registration Documents—B707-331, No. N772TW)	AX-73k
TWA Ex. 3 (Affidavit of J. B. Connelly)	AX-74
TWA Ex. 4(b) (C. & C. Report—Comparative Profit Study)	AX-80
TWA Ex. 4(c)(1) (C. & C. Report—Financial Results from Reconstructed Jet Fleet)	AX-91
TWA Ex. 4(c)(4) (Exhibits B-J to C. & C. Report—Financial Results from Reconstructed Jet Fleet)	AX-167

Volume AX-II

TWA Ex. 5(a) (Drexel Harriman Ripley, Inc. Report—Parts I & II)	AX-336
TWA Ex. 5(b) (Exhibits to Drexel Harriman Ripley, Inc. Report)	AX-430

ITEM	PAGE
TWA Ex. 7(b)(1) (Price Waterhouse Study—Volume One)	AX-452
TWA Ex. 7(b)(2) (Price Waterhouse Study—Volume Two)	AX-480
Volume AX-III	
TWA Ex. 10 (Letter—Boeing to TWA re 707 Negotiations—12/29/54)	AX-643a
TWA Ex. 12 (Toolco-Convair CV-990 Purchase Agreement—11/10/60)	AX-644
TWA Ex. 13 (Holliday Call Sheet—Feb. 20-27, 1961)	AX-655
TWA Ex. 14 (CV-990 Purchase Agreement—Amendment of 2/22/61)	AX-660
TWA Ex. 22 (Rummel Call Sheets)	AX-665
TWA Ex. 23 (Letter Agreement—Sale of Six Boeings to Pan American)	AX-729
TWA Ex. 39 (Affidavit of Joseph P. Ripley)	AX-732
TWA Ex. 42 (C. & C. Report—Revision of Pages 63, 64, 71 & 72)	AX-735
TWA Ex. 43 (C. & C. Report—Revision of Page 51)	AX-740
TWA Ex. 46 (Jet and Turboprop Aircraft of TWA and Principal Competitors—1958-66)	AX-742
TWA Ex. 47 (Boeing Aircraft Employed on Routes Formerly Served by B-720Bs)	AX-743

ITEM	PAGE
TWA Ex. 50 (Price Waterhouse Report—Summary of Application of Assumptions)	AX-744
TWA Ex. 72 (TWA Annual Report—1939)	AX-745
TWA Ex. 73 (TWA Annual Report—1940)	AX-752
TWA Ex. 74 (TWA Annual Report—1941)	AX-758
TWA Ex. 75 (TWA Annual Report—1942)	AX-760
TWA Ex. 76 (TWA Annual Report—1943)	AX-763
TWA Ex. 77 (TWA Annual Report—1944)	AX-766
TWA Ex. 78 (TWA Annual Report—1945)	AX-769
TWA Ex. 79 (TWA Annual Report—1946)	AX-773
TWA Ex. 80 (TWA Annual Report—1947)	AX-779
TWA Ex. 81 (TWA Annual Report—1948)	AX-783
TWA Ex. 82 (TWA Annual Report—1949)	AX-788
TWA Ex. 83 (TWA Annual Report—1950)	AX-792
TWA Ex. 84 (TWA Annual Report—1951)	AX-797
TWA Ex. 86 (TWA Annual Report—1953)	AX-800
TWA Ex. 87 (TWA Annual Report—1954)	AX-805
TWA Ex. 88 (TWA Annual Report—1955)	AX-814
TWA Ex. 89 (TWA Annual Report—1956)	AX-819
TWA Ex. 90 (TWA Annual Report—1957)	AX-822
TWA Ex. 91 (TWA Annual Report—1958)	AX-842
TWA Ex. 92 (TWA Annual Report—1959)	AX-854
TWA Ex. 93 (TWA Annual Report—1960)	AX-856

ITEM	PAGE
TWA Ex. 94 (TWA Annual Report—1961)	AX-862
TWA Ex. 96 (TWA Annual Report—1963)	AX-866
TWA Ex. 128 (Pan American Annual Report—1959)	AX-868
TWA Ex. 132 (Pan American Annual Report—1963)	AX-869
TWA Ex. 155 (AAL Annual Report—1958)	AX-870
TWA Ex. 158 (AAL Annual Report—1961)	AX-871
TWA Ex. 159 (AAL Annual Report—1962)	AX-873
TWA Ex. 184 (UAL Annual Report—1959)	AX-874
TWA Ex. 186 (UAL Annual Report—1961)	AX-875
TWA Ex. 187 (UAL Annual Report—1962)	AX-876
TWA Ex. 192 (TWA Prospectus, 5/25/61 & Supplement, 6/20/61)	AX-877
TWA Ex. 194 (TWA Prospectus—6/17/57)	AX-883
TWA Ex. 223 (Pan American Prospectus—7/3/45—Supplement—7/24/45)	AX-889
TWA Ex. 249 (American Airlines Prospectus—6/11/46—Supplement—6/24/46)	AX-891
TWA Ex. 257 (TWA-Toolco Lease Agreements—Boeing Jets)	AX-893
TWA Ex. 264 (Toolco-Lockheed Purchase Agreement—L-1449A—12/23/54)	AX-901
TWA Ex. 266 (Toolco-Lockheed Purchase Agreement—L-1049G—9/26/55)	AX-908

ITEM	PAGE
TWA Ex. 267A (Letter, TWA to Toolco—1957 Common Stock Offering)	AX-919
TWA Ex. 267B (Letter, TWA to N.Y. Trust Co.—1957 Common Stock Offering)	AX-921
TWA Ex. 271 (Letter, Toolco to SEC—1957 Common Stock Offering)	AX-923
TWA Ex. 275 (TWA Board Minutes—April 26, 1945)	AX-925
TWA Ex. 276 (TWA Finance Committee Minutes—September 12, 1945)	AX-928
TWA Ex. 277 (Page from Banking Quotation Record)	AX-930
TWA Ex. 278 (TWA Board Minutes—November 8, 1946)	AX-931
TWA Ex. 279 (Special TWA Stockholders Meeting—December 23, 1946—Judges' Report)	AX-935
TWA Ex. 280A (Minutes—Adjourned Special TWA Stockholders Meeting—December 28, 1946)	AX-936
TWA Ex. 280B (Adjourned Special TWA Stockholders Meeting—December 28, 1946—Judges' Report)	AX-940
TWA Ex. 281A (Minutes—Adjourned Special TWA Stockholders Meeting—December 31, 1946)	AX-941
TWA Ex. 281B (Adjourned Special TWA Stockholders Meeting—December 31, 1946—Judges' Report)	AX-944

ITEM	PAGE
TWA Ex. 282 (Minutes & Judges' Report—Adjourned Special TWA Stockholders Meeting —January 6, 1947)	AX-945
TWA Ex. 283 (TWA Board Minutes—December 18, 1946)	AX-950
TWA Ex. 284 (TWA Board Minutes—December 27, 1946)	AX-956
TWA Ex. 285 (TWA Board Minutes—December 28, 1946)	AX-962
TWA Ex. 287 (TWA Board Minutes—January 9, 1947)	AX-966
TWA Ex. 288 (Minutes—Adjourned Special TWA Stockholders Meeting—January 13, 1947)	AX-974
TWA Ex. 290 (TWA Board Minutes—June 15, 1948)	AX-980
TWA Ex. 292 (TWA Proxy Statement—July 15, 1948)	AX-991
TWA Ex. 293 (TWA Prospectus—2/18/49 & Amendments—3/8/49)	AX-993
TWA Ex. 313 (Debt Outstanding & Available to TWA & Competitors—1961-63)	AX-1051
TWA Ex. 314 (Weighted Average Interest—TWA & Competitors—1960-63)	AX-1060
TWA Ex. 319 (Least Squares Analysis—S.H.E. Avg. Stage Length—B-331s)	AX-1065

ITEM	PAGE
TWA Ex. 320 (Least Squares Analysis—S.H.E. Avg. Stage Length—CV-880s)	AX-1066
TWA Ex. 321 (Least Squares Analysis—S.H.E. Avg. Stage Length—B-131s)	AX-1067
TWA Ex. 322 (Least Squares Analysis—S.H.E. Avg. Stage Length—B-131Bs)	AX-1068
TWA Ex. 328 (S.H.E.—Passengers Added/ Deleted—Reconstructed TWA)	AX-1069
TWA Ex. 331 (TWA Historical Load Factors— CV-880s—1962-1963)	AX-1071
TWA Ex. 336 (Comparison TWA Int'l vs. PAA-Atl.—1959)	AX-1072
TWA Ex. 345A (Price Waterhouse Comparison —C. & C. and S.H.E. (Revised))	AX-1073
TWA Ex. 351 (1965 CAB Handbook of Airline Statistics)	AX-1107
TWA Ex. 355 (Comparative Profit Study— TWA with AAL & UAL)	AX-1108
TWA Ex. 356 (Comparative Profit Study— TWA with All Other Domestic Trunks)	AX-1110
TWA Ex. 399 (Comparison, TWA Actual Jet Load Factors vs. S.H.E. Marginal Passenger Mile Factors)	AX-1112
TWA Ex. 401 (TWA B-131 Load Factors— April-July 1959)	AX-1113
TWA Ex. 420 (Price Waterhouse Comparison— C. & C. (Revised) and S.H.E.)	AX-1114

ITEM	PAGE
TWA Ex. 423 (Late Evening Flights—TWA 1961-1963)	AX-1129
TWA Ex. 424 (Cargo v. Passenger Revenue—TWA Late Evening Flights)	AX-1133
TWA Ex. 426 (Comparison of Selected A/C Numbers from S.H.E. Appendix A)	AX-1134
TWA Ex. 431 (Profitability of TWA A/C by Month—Computer Print-out)	AX-1135
TWA Ex. 432 (Profitability of TWA A/C by Month—Chart)	AX-1145
TWA Ex. 435 (Regression Analysis—Random Numbers)	AX-1146
TWA Ex. 436A (Regression Analysis—Random Numbers)	AX-1154
TWA Ex. 436B (Regression Analysis—Random Numbers)	AX-1157
TWA Ex. 436C (Regression Analysis—Random Numbers)	AX-1160
TWA Ex. 440 (Graph Illustrating Testimony of Prof. Hare)	AX-1163
TWA Ex. 441 (Regression Experiment—3/23/68)	AX-1164
TWA Ex. 444 (C. & C. Tabulation—Additional TWA Domestic Seat-Miles)	AX-1177

Volume AX-IV

ITEM	PAGE
DX4 (Toolco Order—30 P.&W. JT3C-4 Engines, 2/14/56)	AX-1178
DX5 (Letter—Toolco to P.&W. re Jet Engine Orders, 2/14/56)	AX-1181
DX6 (Toolco Order—90 Additional P.&W. JT4A-3 Engines, 2/15/56)	AX-1183
DX7 (Amendment—Toolco Order for 300 P.&W. Jet Engines, 9/7/56)	AX-1184
DX8 (Letter—P.&W. to Rummel re 300 Jet Engines, 9/7/56)	AX-1185
DX10 (Letter—Rummel to Collings re Boeing 707, 1/12/55)	AX-1186
DX11 (Notes of Convair Negotiations—March 24, 1955)	AX-1187
DX15 (Draft C.&C. Report—TWA Financial Forecast 1959-61)	AX-1192
DX19 (Page from *Aviation Week*, Jan. 10, 1955)	AX-1208
DX22 (*American Aviation*, June 20, 1955, pages 21-23)	AX-1209
DX26 (*American Aviation*, Sept. 12, 1955, pp. 84-85)	AX-1212
DX27 (*American Aviation*, Oct. 10, 1955, p. 68)	AX-1214
DX28 (Pages from *American Aviation*, Oct. 24, 1955)	AX-1215

ITEM	PAGE
DX29 (*Aviation Week*, Oct. 17, 1955, p. 7)	AX-1218
DX31 (*American Aviation*, Nov. 7, 1955, pp. 23-25, 27-28)	AX-1219
DX40 (TWA Board Minutes—June 21, 1961)	AX-1224
DX43 (Excerpts from Deposition of Robert W. Rummel)	AX-1229
DX44 (Letter of Damon, Dec. 6, 1955)	AX-1369
DX45 (Letter—Leslie to Dietrich, Dec. 19, 1955)	AX-1378
DX46 (Letter—Dietrich to Ayers, Dec. 21, 1955)	AX-1382
DX47 (Boeing-Toolco Purchase Agreement—8 B-131s, 1/10/56)	AX-1385
DX48 (Teletype—Boeing to Toolco re B707-131s, 11/11/56)	AX-1390
DX51 (Boeing Offer of B707-320s to Toolco, 1/6/56)	AX-1391
DX53 (Transcript of Telephone Conversation—Rummel & Connelly, 12/20/57)	AX-1393
DX54 (TWA Board Minutes—June 26, 1959)	AX-1402
DX57 (The Huntington Report—1960)	AX-1410
DX62 (TWA Fleet Requirements 1961-70, dated 3/1/61)	AX-1420
DX63 (TWA Financial Forecast 1959-61, dated 5/15/59)	AX-1433
DX64 (Letter to Thomas, dated 5/6/59)	AX-1438

ITEM		PAGE
DX65	(TWA Staff Engineering Report re Jets & Turboprops—4/19/56)	AX-1440
DX66	(Toolco-Boeing Contracts—B707-131s, 3/2/56)	AX-1445
DX67	(Toolco-Boeing Contracts—B707-331s, 3/19/56)	AX-1479
DX68	(Toolco-Convair Contracts—CV-880s, 9/10/56)	AX-1505
DX71	(Rummel Memo re TWA Equipment Program, 3/15/61)	AX-1536
DX72	(Telegram—Bew to Rummel—2/27/61)	AX-1538
DX73	(Letter—Leslie to Holliday—3/20/61)	AX-1539
DX74	(Letter—Leslie to Holliday—4/3/61)	AX-1540
DX77	(Letters—Toolco to TWA re Financing Additional Jets, 6/9-10/61)	AX-1541
DX78	(Letter—TWA to Holliday re Financing Proposals, 6/16/61)	AX-1553
DX79	(Pan American-Boeing Purchase Agreement—B707-120s, 10/13/55)	AX-1558
DX81	(Pan American-Boeing Purchase Agreement—B707-321s, 12/19/55)	AX-1564
DX85	(Boeing-AAL Purchase Agreement—B707-123s, 3/1/56)	AX-1576
DX95	(Allen Letter Announcing Boeing Jet, Nov. 19, 1954)	AX-1584
DX96	(Boeing Offer to Sell Pan American 25 B-120s, 6/23/55)	AX-1588

ITEM	PAGE
DX97 (Boeing Offer to Sell American 15 B-120s, 6/24/55)	AX-1591
DX98 (Boeing Offer to Sell United 15 B-120s, 6/24/55)	AX-1594
DX101 (Boeing 707 Delivery Positions)	AX-1597
Volume AX-V	
DX102 (Boeing Memorandum re 707 Over-Ocean Configuration, 11/2/55)	AX-1601
DX103 (Boeing Memorandum re TWA Delivery Positions, 12/23/55)	AX-1606
DX105 (Boeing Memorandum re Negotiations with TWA, 7/24/56)	AX-1608
DX106 (Letter—Rummel to Cook re Boeing Deliveries, 1/28/58)	AX-1611
DX107 (Letter—Rummel to Cook re Boeing Deliveries, 3/17/58)	AX-1615
DX108 (Letter—Price to Allen re Boeing Deliveries, 3/30/58)	AX-1618
DX109 (Letter—Toolco to Allen re Boeing Deliveries, 5/8/58)	AX-1621
DX116 (Rourke Memo to Rummel re CV-880 Deliveries, 1/15/60)	AX-1623
DX120 (TWA Memorandum re CV-880 Deliveries, 10/2/59)	AX-1624
DX122 (Bew Memorandum to Cannady re CV-880 Deliveries, 12/18/59)	AX-1625

ITEM	PAGE
DX124 (Parmet Memorandum to Rourke re CV-880 Deliveries, 1/13/60)	AX-1627
DX125 (TWA Memorandum re CV-880 Deliveries, 1/22/60)	AX-1629
DX127 (Rummel Memorandum to Rourke re Integration of CV-880s, 2/8/60)	AX-1630
DX128 (Letter—Rourke to Digges re Specification Modifications, 4/7/60)	AX-1638
DX130 (Bew Wire to Rourke re Convair Delays, 5/27/60)	AX-1640
DX135 (Letter—Convair to Bew re CV-880 Delivery, 1/6/61)	AX-1641
DX137 (Telegram—Bew to Rummel re Convair Delays, 2/16/61)	AX-1643
DX139 (Letter—Convair to Bew re Convair Delays, 3/16/61)	AX-1644
DX142 (Letter—Convair to Rourke re CV-880 Deliveries, 7/11/61)	AX-1647
DX143 (Letter—Rourke to Convair re CV-880 Deliveries, 8/2/61)	AX-1650
DX146 (Letter—Convair to Toolco re Model 30 Delivery Positions, 5/6/60)	AX-1652
DX148 (Toolco—General Dynamics Letter Agreement re 6 Model 30s, 7/14/60)	AX-1654
DX152 (Toolco—General Dynamics Letter Agreement re Additional Model 30s, 9/6/60)	AX-1655

ITEM		PAGE
DX156	(Telegram—Beall to Allen, et al. re PAA Negotiations, 9/28/55)	AX-1657
DX168	(Boeing Memorandum re Conversations with Howard R. Hughes, 9/23/55)	AX-1658
DX169	(Boeing Memorandum re Conversation with Howard R. Hughes, 10/31/55)	AX-1660
DX170	(Telegram—Boeing to Toolco re B707-331s, 7/21/59)	AX-1661
DX218	(C.&C. Letter to Leslie re TWA Financial Forecast, March 13, 1959)	AX-1664
DX219	(TWA Financial Forecast 1958-1962, dated 12/1/58)	AX-1666
DX237	(*Aviation Week & Space Technology*, 11/13/61, pages 42-43)	AX-1671
DX239	(*Airlift*, May 1962, p. 46)	AX-1673
DX254	(TWA Board Meeting, Aug. 16, 1961—Report of System General Manager)	AX-1674
DX255	(Statement of CAB Chairman Boyd, Jan. 29, 1960)	AX-1677
DX257	(*Aviation Week*, 1/30/61, pp. 36-37)	AX-1681
DX258	(Report to Directors of TWA—Oct. 13, 1961)	AX-1683
DX259	(CAB Order of Investigation—Dec. 28, 1961)	AX-1694
DX260	(Letter—Tillinghast to CAB, Jan. 29, 1962)	AX-1703

ITEM	PAGE
DX262 (Revised Pages 70-73 of TWA Ex. 4(c)(1))	AX-1708
DX270 (Report of Loeb, Rhoades & Co.)	AX-1712
DX271A (S.H.E. Report (Revised)—Volume One)	AX-1789
DX271B (S.H.E. Report (Revised)—Volume Two)	AX-1859
DX284 (TWA Prospectus—Nov. 20, 1952)	AX-1961
DX286 (TWA Board Minutes—Jan. 13, 1955)	AX-1967
DX287 (TWA Board Minutes—Dec. 13, 1955)	AX-1970
DX289 (TWA Board Minutes—April 26, 1956)	AX-1974
DX290 (Toolco-TWA Conditional Sale Contract—L-1049Gs, 6/6/56)	AX-1979
Volume AX-VI	
DX292 (Toolco-TWA Conditional Sale Contract—L-1649As, 4/19/57)	AX-1995
DX321 id. (CAB Orders & Documents)	AX-2012
DX322 id. (CAB Orders & Documents)	AX-2191
DX323 id. (CAB Orders & Documents)	AX-2347
Volume AX-VII	
DX334 (Correlation Coefficients—Substituted S.H.E. Table G-VII)	AX-2427
DX339 (B-120s Available to AAL, Actual vs. Reconstructed—1959)	AX-2428

ITEM	PAGE
DX341 (Domestic Carriers—Jets Assigned to Service, 1959-63)	AX-2429
DX342 (TWA's Share of Jets Assigned to Domestic Service, 1959-63)	AX-2430
DX348 (Revised Summary—Categories of Differences—Wemple vs. Simat)	AX-2431
DX358B id. (CAB Form 41 Reports—Northeast Airlines, 1957-1966)	AX-2452
DX358C id. (CAB Form 41 Reports—PAA, 1957-1966)	AX-2454
DX359A (Supplemental S.H.E. Report—Volume A)	AX-2458
DX364 id. (Excerpts from Deposition of Emmett O. Cocke)	AX-2843
DX367 (Combined Non-Stop Scheduled Frequencies Per Week—Aug. 1958-63)	AX-2851
DX368 (Combined Non-Stop Scheduled Frequencies Per Week—Aug. 1958-63)	AX-2853
DX371 (Summary—Categories of Differences—Wemple vs. Simat (Supplemental))	AX-2856
DX379 (Domestic Jet Seat Miles—Wemple vs. Historical)	AX-2867

AX-336

Report Re:

THE FINANCING OF
TRANS WORLD AIRLINES, INC.
During the 1955 - 1960 Period

May 2, 1966

PARTS I and II

DREXEL HARRIMAN RIPLEY
INCORPORATED

TWA Ex. 5(a)
(Drexel Harriman Ripley, Inc. Report - Parts I & II)

Report Re:

THE FINANCING OF
TRANS WORLD AIRLINES, INC.
During the 1955 - 1960 Period

May 2, 1966

PARTS I and II

DREXEL HARRIMAN RIPLEY
INCORPORATED

TWA Ex. 5(a)
(Drexel Harriman Ripley, Inc. Report - Parts I & II)

PART I

QUALIFICATIONS

TWA Ex. 5(a)
(Drexel Harriman Ripley, Inc. Report - Parts I & II)

DREXEL HARRIMAN RIPLEY
INCORPORATED
60 BROAD STREET
NEW YORK, NEW YORK 10004
TELEPHONE: 787-7300

November 18, 1966

Memorandum for
Mr. Dudley B. Tenney
Cahill, Gordon, Reindel & Ohl

Re: Report of Drexel Harriman Ripley, Inc.
(TWA Ex. 5-A)

We have furnished you with copies of pages 37 and 38 of our TWA Report, revised to correct certain erroneous data which appeared in our Report as filed. Set forth below are certain other changes which should be made in the Report to correct typographical errors and mistakes of transcription which we have discovered.

Part II - page 7

Third paragraph under Boeing:

First line should read "From then on (meaning with the 1956 ....." (not 1957)

Part II - page 54

Note to table at top of page:

Last line should read "..... (See Exhibit: Trans World - 9.)" (not Trans World - 28)

Table at bottom of page:

Footnote (*) should read "See Exhibit: Trans World - 10." (not Trans World - 29)

Part II - page 72

Chapter XXXIII:

The dollar figure in the sixth line of the first paragraph should read "$34.3" (not $33.7)

Part III - Volume 1 - Exhibit: General - 10:

Table - Fifth line under Date should read "August 1948". (not June)

AX-340

TWA Ex. 5(a)
(Drexel Harriman Ripley, Inc. Report - Parts I & II)

November 18, 1966

Part III - Volume 2 - Exhibit: Financials - 17

The dollar figure appearing under 1961 Year Total on the line entitled "Limitation on Additional Funded Debt", i.e., the last figure in the table, should read "$103.4". (not $130.4)

E. J. Morehouse
Senior Vice President

TWA Ex. 5(a)
(Drexel Harriman Ripley, Inc. Report - Parts I & II)

DREXEL HARRIMAN RIPLEY
INCORPORATED
60 BROAD STREET
NEW YORK, NEW YORK 10004
TELEPHONE: 797-7200

May 2, 1966

Messrs. Cahill, Gordon, Reindel & Ohl
80 Pine Street
New York, New York 10005

Dear Sirs:

This is written in response to your request that we submit information in regard to the activities of Harriman Ripley & Co., Incorporated in the investment banking business pertaining to the issue of corporate securities. The undersigned Drexel Harriman Ripley, Incorporated is the successor, as of February 1, 1966, to Harriman Ripley & Co., Incorporated.

On Exhibit A herewith we submit tabulations which give in summary form figures indicating the volume of the underwriting and private placement activities of Harriman Ripley & Co., Incorporated. Shown separately are the figures for such financing activities with respect to air transport and aviation manufacturing.

The following is a brief extract from the description of Harriman Ripley & Co. appearing on page 102 of the Corrected Opinion of Federal Judge Harold Medina in U.S.A. vs. H. S. Morgan et al.

> "Harriman Ripley is not only a leading managing underwriter, but it is, in addition, an important distributing organization. It was at the beginning, and has continued to be, a large investment banking house, with a well staffed and aggressive buying, selling and distributing organization."

On Exhibit B herewith we submit information as to each individual who has signed this report on behalf of Drexel Harriman Ripley, Incorporated.

Yours truly,

Drexel Harriman Ripley, Incorporated
by

Joseph P. Ripley
Honorary Chairman

Edward J. Morehouse
Senior Vice President

AX-342

TWA Ex. 5(a), Exhibit A
(Drexel Harriman Ripley, Inc. Report - Parts I & II)

RECORD OF HARRIMAN RIPLEY & CO., INC.
in
THE UNDERWRITING OF NEGOTIATED PUBLIC OFFERINGS
AND THE MAKING OF PRIVATE PLACEMENTS
OF SECURITIES OF U. S. AND FOREIGN CORPORATIONS

For the Period: June 16, 1939 to December 31, 1965

AVIATION
Air Transport

	Amount	HRCo Participation	Number of Issues
		$000 omitted	
Public Offerings:			
Managed or co-managed by HRCo.	73,401	8,018	6
Managed by others	463,454	11,909	14
Total	536,855	19,927	20
Private Placements:			
Managed or co-managed by HRCo.	162,000	162,000	4
Managed by others	-	-	-
Total	162,000	162,000	4
Total - Public and Private	698,855	181,927	24
Public Offerings and Private Placements:			
Managed or co-managed by HRCo.	235,401	170,018	10
Managed by others	463,454	11,909	14
Grand Total	698,855	181,927	24

AVIATION
Manufacturing

	Amount	HRCo Participation	Number of Issues
		$000 omitted	
Public Offerings:			
Managed or co-managed by HRCo.	226,353	29,380	11
Managed by others	324,456	8,755	14
Total	550,809	38,135	25
Private Placements:			
Managed or co-managed by HRCo.	125,000	125,000	2
Managed by others	-	-	-
Total	125,000	125,000	2
Total - Public and Private	675,809	163,135	27
Public Offerings and Private Placements:			
Managed or co-managed by HRCo.	351,353	154,380	13
Managed by others	324,456	8,755	14
Grand Total	675,809	163,135	27

AVIATION
Total Aviation

	Amount	HRCo Participation	Number of Issues
		$000 omitted	
Public Offerings:			
Managed or co-managed by HRCo.	299,754	37,398	17
Managed by others	787,910	20,664	28
Total	1,087,664	58,062	45
Private Placements:			
Managed or co-managed by HRCo	287,000	287,000	6
Managed by others	-	-	-
Total	287,000	287,000	6
Total - Public and Private	1,374,664	345,062	51
Public Offerings and Private Placements:			
Managed or co-managed by HRCo	586,754	324,398	23
Managed by others	787,910	20,664	28
Grand Total	1,374,664	345,062	51

TWA Ex. 5(a), Exhibit A
(Drexel Harriman Ripley, Inc. Report - Parts I & II)

RECORD OF HARRIMAN RIPLEY & CO., INC.
in
THE UNDERWRITING OF NEGOTIATED PUBLIC OFFERINGS
AND THE MAKING OF PRIVATE PLACEMENTS
OF SECURITIES OF U. S. AND FOREIGN CORPORATIONS

For the Period: June 16, 1934 to December 31, 1965

AVIATION
Air Transport

	Amount	HRCo Participation	Number of Issues
		$000 omitted	
Public Offerings:			
Managed or co-managed by HRCo.	116,286	12,585	7
Managed by others	463,454	11,909	14
Total	579,740	24,494	21
Private Placements:			
Managed or co-managed by HRCo.	162,000	162,000	4
Managed by others	-	-	-
Total	162,000	162,000	4
Total - Public and Private	741,740	186,494	25
Public Offerings and Private Placements:			
Managed or co-managed by HRCo.	278,286	174,585	11
Managed by others	463,454	11,909	14
Grand Total	741,740	186,494	25

AVIATION
Manufacturing

	Amount	HRCo Participation	Number of Issues
		$000 omitted	
Public Offerings:			
Managed or co-managed by HRCo.	183,468	24,813	10
Managed by others	324,456	8,755	14
Total	507,924	33,568	24
Private Placements:			
Managed or co-managed by HRCo.	125,000	125,000	2
Managed by others	-	-	-
Total	125,000	125,000	2
Total - Public and Private	632,924	158,568	26
Public Offerings and Private Placements:			
Managed or co-managed by HRCo.	308,468	149,813	12
Managed by others	324,456	8,755	14
Grand Total	632,924	158,568	26

AVIATION
Total Aviation

	Amount	HRCo Participation	Number of Issues
		$000 omitted	
Public Offerings:			
Managed or co-managed by HRCo.	299,754	37,398	17
Managed by others	787,910	20,664	28
Total	1,087,664	58,062	45
Private Placements:			
Managed or co-managed by HRCo	287,000	287,000	6
Managed by others	-	-	-
Total	287,000	287,000	6
Total - Public and Private	1,374,664	345,062	51
Public Offerings and Private Placements:			
Managed or co-managed by HRCo	586,754	324,398	23
Managed by others	787,910	20,664	28
Grand Total	1,374,664	345,062	51

AX-344

TWA Ex. 5(a), Exhibit A
(Drexel Harriman Ripley, Inc. Report - Parts I & II)

RECORD OF HARRIMAN RIPLEY & CO., INC.
in
THE UNDERWRITING OF NEGOTIATED PUBLIC OFFERINGS
AND THE MAKING OF PRIVATE PLACEMENTS
OF SECURITIES OF U. S. AND FOREIGN CORPORATIONS

For the Period: June 16, 1934 to December 31, 1965

	OTHER CORPORATE		
	Amount	HRCo Participation $000 omitted	Number of Issues
Public Offerings:			
Managed or co-managed by HRCo	2,648,091	366,901	179
Managed by others	53,858,250	1,850,933	1,791
Total	56,506,341	2,217,834	1,970
Private Placements:			
Managed or co-managed by HRCo	610,660	372,946	69
Managed by others	86,116	4,878	7
Total	696,776	377,824	76
Total - Public and Private	57,203,117	2,595,658	2,046
Public Offerings and Private Placements:			
Managed or co-managed by HRCo	3,258,751	739,847	248
Managed by others	53,944,366	1,855,811	1,798
Grand Total	57,203,117	2,595,658	2,046

	TOTAL - AVIATION AND OTHER CORPORATE		
	Amount	HRCo Participation $000 omitted	Number of Issues
Public Offerings:			
Managed or co-managed by HRCo	2,947,845	404,299	196
Managed by others	54,646,160	1,871,597	1,819
Total	57,594,005	2,275,896	2,015
Private Placements:			
Managed or co-managed by HRCo	897,660	659,946	75
Managed by others	86,116	4,878	7
Total	983,776	664,824	82
Total - Public and Private	58,577,781	2,940,720	2,097
Public Offerings and Private Placements:			
Managed or co-managed by HRCo	3,845,505	1,064,245	271
Managed by others	54,732,276	1,876,475	1,826
Grand Total	58,577,781	2,940,720	2,097

Note: The dollar amounts set forth in this Exhibit represent the principal amounts of fixed interest-bearing securities, the par amounts of preferred stocks and the aggregate public offering prices of common stock issues.

TWA Ex. 5(a), Exhibit B-1
(Drexel Harriman Ripley, Inc. Report - Parts I & II)

QUALIFICATIONS

of

JOSEPH P. RIPLEY

Age: 77

Education: Graduate of Cornell University. Degree: Mechanical Engineer.

Experience in Investment Banking:

April 1922 - April 1925: With W. A. Harriman & Co. as staff member in the Buying Department.

April 1925 - June 1934: With The National City Company, successively as staff member in the Buying Department, Assistant Vice President, Vice President and Executive Vice President.

June 1934 - January 1966: Successively as President, Chairman, and Chairman of the Board of Directors of Harriman Ripley & Co., known as Brown Harriman & Co. from June 1934 to January 1939.

February 1, 1966 to date: Honorary Chairman of Drexel Harriman Ripley, Incorporated.

Experience in the Aviation Industry:

October 1928 - January 1929: Director of Boeing Airplane & Transport Corporation.

January 1929 - August 1934: Director of United Aircraft & Transport Corporation.

April 1934 - October 1937: Member of Reorganization Committee of United Aircraft & Transport Corporation.

July 1934 - November 1943: Voting Trustee of United Air Lines Transport Corporation (now known as United Air Lines).

August 1934 - November 1943: Director of United Air Lines Transport Corporation (now known as United Air Lines).

March 1939: Wrote report, dated March 4, 1939, regarding the Rate of Investment Return as influencing the Determination of Mail Rates on the San Francisco-Hong Kong Line of Pan American Airways; and testified in regard thereto before the Civil Aeronautics Authority.

April 1944 - February 1961: Director of United Aircraft Corporation.

Membership in an Aviation Society:

Founder Member of the Institute of Aeronautical Sciences, December 1932 - October 1938. Member of the same society (later the Institute of the Aerospace Sciences, and now the American Institute of Aeronautics and Astronautics, Inc.) July 1943 to date.

Experience in Underwriting and Private Placement of Aviation Securities Issues:

The following tabulation is a list of the aviation industry

securities issues in respect of the underwriting or private placement of which Joseph P. Ripley acted as the senior officer in charge of the operation for The National City Company or Harriman Ripley & Co., as indicated in the tabulation. The following abbreviations have the respective meanings indicated.

"Amount" means the approximate amount of the issue as measured by the principal amount of fixed interest-bearing securities, the par amount of preferred or preference stock issues, and the aggregate public offering price of common stock issues.

"N.C.Co." means The National City Company which was the securities affiliate of The National City Bank of New York, now known as First National City Bank.

"HRCo" means Harriman Ripley & Co., known as Brown Harriman & Co. from June 1934 to January 1939.

"P.O." means an underwritten public offering, managed solely by N.C.Co. or HRCo, with one exception indicated as a joint managership.

"P.P." means a private placement in which HRCo acted as the sole agent of the issuer.

Name of Issuer and Issue	Date of Issue	Amount	Managed by	Type
Combined Manufacturing and Transport				
Boeing Airplane & Transport Corp. Units consisting of Preferred and Common Stock	October 1928	$ 5,310,000	N.C.Co.	P.O.
United Aircraft & Transport Corp. Units consisting of Preferred and Common Stock	February 1929	15,000,000	N.C.Co.	P.O.
Total		$ 20,310,000		
Manufacturing - Solely				
United Aircraft Corporation Common Stock	October 1936	$ 3,837,000	HRCo	P.O.
Boeing Airplane Company Common Stock	June 1937	3,988,000	HRCo	P.O.
United Aircraft Corporation Common Stock	March 1939	6,263,000	HRCo	P.O.
United Aircraft Corporation Convertible Preference Stock	October 1955	24,347,000	HRCo	P.O.
United Aircraft Corporation Convertible Preference Stock	September 1956	31,810,000	HRCo	P.O.

TWA Ex. 5(a), Exhibit B-1
(Drexel Harriman Ripley, Inc. Report - Parts I & II)

Name of Issuer and Issue	Date of Issue	Amount	Managed by	Type
Manufacturing - Solely (cont'd.)				
Chance Vought Aircraft Convertible Subordinated Debentures	June 1957	$ 12,500,000	HRCo	P.O.
Boeing Airplane Company Senior Debentures	July 1958	40,000,000	HRCo(*)	P.O.
Boeing Airplane Company Convertible Subordinated Debentures	July 1958	30,598,000	HRCo(*)	P.O.
Total		$ 153,343,000		
Air Transport - Solely				
United Air Lines Transport Corporation Common Stock	October 1936	$ 3,840,000	HRCo	P.O.
United Air Lines Convertible Preferred Stock	December 1943	10,503,000	HRCo	P.O.
United Air Lines Convertible Preferred Stock	February 1947	9,477,000	HRCo	P.O.
United Air Lines Debentures, Series A	February 1947	12,000,000	HRCo	P.P.
United Air Lines Common Stock	August 1948	2,000,000	HRCo	P.O.
United Air Lines Debentures, Series B	February 1952	10,000,000	HRCo	P.P.
United Air Lines Convertible Preferred Stock	March 1952	22,386,000	HRCo	P.O.
United Air Lines Debentures, Series C	September 1954	20,000,000	HRCo	P.P.
United Air Lines Debentures, Series D	December 1955	120,000,000	HRCo	P.P.
United Air Lines Subordinated Convertible Debentures	November 1960	25,000,000	HRCo	P.O.
Total		$ 235,206,000		

(*) Jointly with Blyth & Co., Inc.

Summary

Combined Manufacturing and Transport	$ 20,310,000
Manufacturing - Solely	153,343,000
Transport - Solely	235,206,000
Total	$ 408,859,000

QUALIFICATIONS

of

EDWARD J. MOREHOUSE

Age: 45.

Education: Graduate of University of California (1941). Degree: B.S. (Business Administration).

Experience in Investment Banking:

July 1946 - January 1966. Successively as staff member in the Buying Department, Assistant Vice President, Vice President and Senior Vice President of Harriman Ripley & Co. A director from 1961 to January 1966.

February 1, 1966 to date: Senior Vice President and a director of Drexel Harriman Ripley, Incorporated.

Memberships:

Aerospace Analysts Society	1958 - 1963
Aviation Securities Committee, (Investment Bankers Association)	1960 - 1962 (Chairman 1961)

Experience in Underwriting and Private Placement of Aviation Securities Issues:

The following tabulation is a list of the aviation industry securities issues in respect of the underwriting or private placement of which Edward J. Morehouse actively participated as a member of the Buying Department of Harriman Ripley & Co. The following abbreviations have the respective meanings indicated.

"Amount" means the approximate amount of the issue as measured by the principal amount of fixed interest-bearing securities, the par amount of preferred or preference stock issues, and the aggregate public offering price of common stock issues.

"P.O." means an underwritten public offering managed solely by Harriman Ripley & Co., with one exception indicated as a joint managership.

"P.P." means a private placement in which Harriman Ripley & Co. acted as the sole agent of the issuer.

Name of Issuer and Issue	Date of Issue	Amount	Type
	Manufacturing		
United Aircraft Corporation Convertible Preference Stock	October 1955	$ 24,347,000	P.O.
United Aircraft Corporation Convertible Preference Stock	September 1956	31,810,000	P.O.
Chance Vought Aircraft Convertible Subordinated Debentures	June 1957	12,500,000	P.O.

TWA Ex. 5(a), Exhibit B-2
(Drexel Harriman Ripley, Inc. Report - Parts I & II)

Name of Issuer and Issue	Date of Issue	Amount	Type
Manufacturing (cont'd.)			
Boeing Airplane Company Senior Debentures	July 1958	$ 40,000,000(*)	P.O.
Boeing Airplane Company Convertible Subordinated Debentures	July 1958	30,598,000(*)	P.O.
United Aircraft Corporation Sinking Fund Notes	June 1961	75,000,000	P.P.
The Boeing Company Notes	May 1963	50,000,000	P.P.
United Aircraft Corporation Convertible Subordinated Debentures	August 1963	42,885,000	P.O.
Total		$ 307,140,000	

(*) Jointly managed with Blyth & Co., Inc.

Air Transport			
United Air Lines Common Stock	August 1948	$ 2,000,000	P.O.
United Air Lines Debentures, Series B	February 1952	10,000,000	P.P.
United Air Lines Convertible Preferred Stock	March 1952	22,386,000	P.O.
United Air Lines Debentures, Series C	September 1954	20,000,000	P.P.
United Air Lines Debentures, Series D	December 1955	120,000,000	P.P.
United Air Lines Subordinated Convertible Debentures	November 1960	25,000,000	P.O.
Total		$ 199,386,000	

Summary

Manufacturing	$ 307,140,000
Transport	199,386,000
Total	$ 506,526,000

AX-350

TWA Ex. 5(a)
(Drexel Harriman Ripley, Inc. Report - Parts I & II)

PART II - REPORT

PART II

Report re:

THE FINANCING OF
TRANS WORLD AIRLINES, INC.
During the 1955 - 1960 Period

May 2, 1966

TWA Ex. 5(a)
(Drexel Harriman Ripley, Inc. Report - Parts I & II)

TABLE OF CONTENTS

Chapter		Page No.
	QUESTION POSED AND SUMMARY OF CONCLUSIONS	1
I.	Approach to the Problem	3
II.	Abbreviations	3
III.	Fundamental Principles of Airline Finance	4
IV.	Premises and Assumptions	5
V.	The Air Transport Situation in Early 1955	6
VI.	The Comparative Financial Status - TWA and Its Competitors - Early 1955	8
VII.	The TWA Capital Expenditure Outlook - Early 1955 ..	10
VIII.	Estimated TWA Desirable Additional Equity - Early 1955	10
IX.	Comparative Earnings - TWA and Its Competitors - 1950 - 1954	10
X.	Interim Earnings - TWA and Its Competitors - Early 1955	13
XI.	Dividend Records - TWA and Its Competitors - 1954 - 1955	14
XII.	The General Stock Market Situation - 1954 and the First Half of 1955	15
XIII.	The TWA Stock Market Situation - 1950 Through the First Half of 1955	16
XIV.	Recommended TWA Equity Financing - May 1955	20
XV.	TWA Reconstructed Balance Sheet - September 30, 1955	23
XVI.	Flight Equipment Expendable Parts	26
XVII.	The TWA Reconstructed Situation - September 1955	26
XVIII.	Authorization of a Flight Equipment Mortgage	28
XIX.	Recommended TWA 1955 Flight Equipment Mortgage Loan	31
XX.	The TWA Reconstructed Situation - September 1956	34
XXI.	Leased Aircraft - 1957	38
XXII.	The TWA Reconstructed Situation - 1957 Through Mid-1958	39
XXIII.	Comparative Data - TWA and Its Competitors - Early 1959	44

TWA Ex. 5(a)
(Drexel Harriman Ripley, Inc. Report - Parts I & II)

TABLE OF CONTENTS
(continued)

Chapter		Page No.
XXIV.	The General Stock Market Situation - 1958 and the First Half of 1959	53
XXV.	The TWA Stock Market Situation - 1958 and the First Half of 1959	53
XXVI.	The TWA Reconstructed Situation - March 1959	58
XXVII.	The Recommended 1959 Financing	60
XXVIII.	Recommended 1959 Junior Financing	62
XXIX.	Amendment of the Flight Equipment Mortgage	63
XXX.	Conversion Price and Interest Rate for TWA Convertible Subordinated Debenture Issue in May 1959	63
XXXI.	Recommended TWA Convertible Subordinated Debenture Financing - May 1959	68
XXXII.	Recommended TWA 1959 Flight Equipment Mortgage Loan	69
XXXIII.	The TWA Reconstructed Situation - Post-1959 Financing through December 31, 1960	72
XXXIV.	Comparative Financial Status of TWA and Its Competitors at the End of the 1955 - 1960 Period	73
XXXV.	Comparison of the TWA Capital Structures - Historical and Reconstructed - At the End of the 1955 - 1960 Period	74
XXXVI.	Sources and Applications of Funds - Reconstructed - 1956 - 1960	75
XXXVII.	Comment Re: The Recommended Financing Program	75

Lists of the EXHIBITS are contained
in PART III, Volumes 1 and 2.

QUESTION POSED AND SUMMARY OF CONCLUSIONS

This report is written in response to the request of Cahill, Gordon, Reindel & Ohl that we give our opinion as to whether Trans World Airlines, Inc., if it had been under an independent and competent management not influenced by any consideration other than the prudent conduct of its operating and financial affairs, during the 1955-1960 period, could have financed its projected capital requirements for those years, including specifically the purchase of 15 Boeing 707-131s, 18 Boeing 707-331s, 30 Convair 880s, and all the piston aircraft which were purchased by it and delivered during the foregoing period; and, if so, that we describe the methods by which, in our opinion, such capital requirements should have been financed.

We have been advised, and assume for purposes of this report, that if Trans World Airlines had been adequately financed the 33 Boeing aircraft could and would have been ordered by an independent and competent management in the fall of 1955 for delivery in 1959 and 1960, and that the 30 Convair aircraft could and would have been ordered by such management in 1956 for delivery in 1960.

In our opinion Trans World Airlines could have financed, and if we had been advising it during the 1955-1960 period we would have advised it to finance, the acquisition of the foregoing aircraft and its other capital expenditures by means of the following program, which will be more fully described hereinafter, in addition to the estimated internally generated funds.

(A) Underwritten common stock issue offered preemptively on a share for share basis at $17.50 per share in May 1955 to provide net proceeds of $55.5 million. Application of Proceeds: (1) to redeem, on July 1, 1955, at 103-3/4 and interest, $35.0 million principal amount of 3-3/4% Equipment Mortgage Bonds; (2) to reimburse Hughes Tool Co. on June 1, 1955 for its down payment of $16.8 million on, and transfer to Trans World Airlines of, its contract with Lockheed for 25 L1649A aircraft, plus interest at 3%; and (3) deposit with Lockheed of $2.4 million for 5 L1049G aircraft.

(B) Private placement loan commitment with institutional investors in October 1955 on the following basis:

Amount:	$150 million minimum. $170 million maximum.
Designation:	Flight Equipment Mortgage Notes, Series A.
Interest Rate:	4% per annum.
Commitment Fee:	1/2% per annum on the unused portion.
Maturity:	October 1, 1980.
Price:	100% plus accrued interest.
Period of Availability:	To and including April 1, 1959.
Application of Proceeds:	All into a Flight Equipment Fund with the Trustee under the Flight Equipment Mortgage to be used for purchase of flight equipment including spare parts.

(C) Underwritten nonpreemptive offering of $60.0 million 5% convertible subordinated debentures at par flat in May 1959. Proceeds to be added to working capital.

(D) Private placement loan commitment with institutional investors in May 1959 on the following basis:

Amount:	$ 90 million minimum. $110 million maximum.
Designation:	Flight Equipment Mortgage Notes, Series B.
Interest Rate:	6% per annum.
Commitment Fee:	1/2% per annum on the unused portion.
Maturity:	July 1, 1984.
Price:	100% plus accrued interest.
Period of Availability:	To and including December 31, 1960.
Application of Proceeds:	All into a Flight Equipment Fund with the Trustee under the Flight Equipment Mortgage to be used for purchase of flight equipment including spare parts.

We have designed the foregoing financing program on the basis of projected and reconstructed capital expenditures prepared by Price Waterhouse & Co.; on the basis of reconstructed financial statements prepared by Price Waterhouse & Co.; and on the basis of forecasts of funds generated prepared by Coverdale & Colpitts. And we have used various statements of figures furnished to us by Trans World Airlines pertaining to historical balance sheets, income accounts, and certain other historical financial data.

I. Approach to the Problem

We are assuming for the purposes of this report that we were engaged by Trans World Airlines as its investment bankers throughout the 1955-1960 period, and that we were thus in intimate and frequent contact with the management and had access to all current information and data having a bearing on finance.

We approach the problem by making comparisons of the capital structure and financial status of Trans World Airlines and its three main competitors as of the early part of 1955. We select Pan American World Airways, American Airlines and United Air Lines as the competitors with which to make the comparisons. During the period under review, Trans World Airlines was in direct competition with Pan American World Airways in transatlantic operations and with both American Airlines and United Air Lines in domestic operations.(*)

II. Abbreviations

For convenience, the following abbreviations are used in this report and on the exhibits hereto.

TWA:	Trans World Airlines, Inc., and, prior to May 1950, Transcontinental & Western Air, Inc.
PAA and Pan American:	Pan American World Airways, Inc., and, prior to January 1950, its corporate predecessor, Pan American Airways, Inc.
AAL and American:	American Airlines, Inc.
UAL and United:	United Air Lines, Inc., and, prior to December 1943, its corporate predecessor, United Air Lines Transport Corporation.
HTCo:	Hughes Tool Company.
HRCo:	Harriman Ripley & Co., Inc. and its successor, Drexel Harriman Ripley, Incorporated.
C&C:	Coverdale & Colpitts.
PWCo:	Price Waterhouse & Co.
RDS:	R. Dixon Speas Associates.

(*) On some of the exhibits accompanying this report we submit comparisons with other airlines, such as Eastern Airlines, Delta, etc.

Debs.: Debentures.

Sen.: Senior.

Sub.: Subordinated.

Conv.: Convertible.

Equity: The sum of capital represented by preferred stock, common stock and surplus.

SPW: Stock Purchase Warrant.

AIMV: The Aggregate Indicated Market Value of equity derived by multiplying the market price of the common stock per share by the number of such shares outstanding, and adding the aggregate par value, if any, of the outstanding straight preferred stock and the aggregate market value of any outstanding convertible preferred stock which is selling over its par value.

NYSX. New York Stock Exchange.

III. Fundamental Principles of Airline Finance

The financial history of the airlines is characterized by wide variations in profits and by ever-increasing amounts of capital required. This situation has been brought about by the very rapid development of the aviation art, to which World War II and the subsequent defense program have greatly contributed.

We have consistently maintained that the fundamental principles which should be followed in airline finance, throughout the 1955-1960 period under review, are as follows.

The airline should get, or endeavor to get, its equity or junior capital prior to or simultaneously with getting its senior borrowed capital.

The airline should own its own equipment rather than lease it from other parties. However, there are exceptions to this principle. One is the seasonal interchange type of lease, such as UAL has had with Eastern Air Lines, by which Eastern leased some of its aircraft to UAL during the summer months when UAL's traffic was relatively heavy, and UAL, in turn, leased some of its aircraft to Eastern during the winter season when Eastern's traffic was relatively heavy. Another exception is the "through run" interchange type of lease such as UAL has had in past years with Western Air Express, by which UAL operated equipment owned by Western from Salt Lake City east, and Western operated equipment owned by UAL from Salt Lake City west to Los Angeles, the purpose being to give passengers a through run between Los Angeles and points east of Salt Lake City.

Contractual commitments for capital expenditures should be prepared for reasonably in advance of the time they are to become due. By this we mean that the airline should plan and arrange its financing program so as to have sufficient liquid capital and/or credit standing to afford reasonable expectation of obtaining the funds required to meet its forward commitments.

IV. Premises and Assumptions

The premises and assumptions on which we have designed the recommended financing program are as follows:

(1) That TWA's income (loss) before interest and income taxes during the years 1955 to 1958, both inclusive, would have been identical with what it actually was in those years, except for the following changes which have been supplied to us by PWCo.

(a) Loss before interest and income taxes for the year 1957 would have been approximately $100,000 lower because of a reduction in provision for depreciation of piston aircraft due to lower cost resulting from the assumption that the aircraft were acquired directly from Lockheed Aircraft Corporation rather than through HTCo.

(b) Income before interest and income taxes for the year 1958 would have been approximately $400,000 higher because of (i) a $100,000 (approximate) reduction in provision for depreciation for the same reason set forth in (a) above, and (ii) a $300,000 (approximate) increase in gain on sales of piston aircraft due to reconstruction of sales dates based on assumed earlier deliveries of jet aircraft.

(2) That TWA's income (loss) before interest and income taxes during the year 1959 and thereafter would have been as reconstructed by PWCo (see Exhibit: Financials - 29) on the basis of the timely delivery of the 63-plane jet fleet and related sales of piston aircraft. In asking us to make the foregoing assumption, Cahill, Gordon, Reindel & Ohl has also instructed us that, for purposes of the financing program, no reconstruction of TWA's income (loss) before interest and income taxes is to be made except in matters directly connected with the acquisition and financing of jet aircraft, and has advised us that no significant amount of jet operations would have been practicable before 1959. We do, however, give consideration to projections of cash flow made by Coverdale & Colpitts as of September 1955, September 1956 and April 1959 (see Exhibits: Financials - 9, 15 and 20) in the design of the financing program in terms of looking forward as of those dates.

(3) That TWA's proceeds and gains and losses from sale of capital assets other than flight equipment during the entire period 1955-1960, both inclusive, would have been identical under the recommended financing program with what they actually were.

(4) That TWA's proceeds and gains and losses from sale of flight equipment during the period September 30, 1955 through September 30, 1958 would have been the same as were actually experienced.

(5) That proceeds from sale of piston aircraft during the last quarter of 1958 and thereafter would have been as reconstructed by RDS on the basis of on-time delivery of the 63-plane jet fleet. We do, however, give consideration to a projection of proceeds from sale of piston aircraft made by C&C as of April 1959, in the design of the financing program in terms of looking forward as of the latter date (see Exhibit: Financials - 20). And -

(6) That TWA's capital expenditure program during the entire period 1955-1960, both inclusive, would have been as reconstructed by PWCo (see Exhibit: Financials - 31). We do, however, give consideration to projections of capital expenditures prepared by PWCo as of September 1955, September 1956 and March 1959 (see Exhibits: Financials - 8, 14 and 19) in the design of the financing program in terms of looking forward as of those dates.

V. The Air Transport Situation in Early 1955

Prior to 1955, the major airlines had experienced five years of good earnings with the trend generally upward. In early 1955 it was generally recognized that the jet age was coming and that large amounts of additional capital from outside sources would be required to acquire jet aircraft and other facilities. However, there were wide differences of opinion as to the type of jet aircraft which would be preponderant. One school of thought favored the "straight jet"; another favored the gas turbine driven propeller type, generally referred to as the "prop-jet" or "turbo-prop". None of the airlines, so far as we know, could at that time estimate with any degree of certainty just how much additional capital would be required. But it was generally recognized that the amounts would be very large.

The following paragraphs indicate the general nature of the opinions expressed in aircraft manufacturing circles at the time. The information has been taken from annual reports.

Boeing: In its 1954 annual report, published in the early part of 1955, Boeing refers to its B-47 (a jet bomber) as being "well established" in the military service, and states that considerable active interest had developed among airline operators in a commercial application of its jet prototype tanker-transport.

In its 1955 annual report, Boeing states that in venturing to build the 707 prototype (similar in general configuration to the jet tanker) it intended to demonstrate the advantages of jet transport to the military and to commercial airlines, and that to date (presumably early 1956) seven leading American and foreign commercial airlines had purchased eighty-four Boeing jet transports. And that additional sales were expected. Also, that the first American jet transport (the 707 prototype) was flown in July 1954.

From then on (meaning with the 1957 and subsequent annual reports), the Boeing Company indicates ever-increasing interest in commercial jet transports.

Douglas: In its 1955 annual report, published in early 1956, Douglas stated that in June 1955 it formally announced that it was ready to enter the jet transport market. (Prior thereto it appears that Douglas, although making progress with its "own jet transport project", was clinging to its piston-driven DC-7 as the suitable airplane for the airlines.) In its 1955 report, Douglas states that in November 1955 its DC-8 program was in "full swing", and that leading airlines had entered multimillion dollar contracts for it. Also, that as of the date of writing (early 1956) it had received orders for one hundred and five DC-8s.

From then on, Douglas, as with Boeing, indicates ever-increasing interest in, and sales of, jet transports.

Lockheed: This company appears to have been one of the turbo-prop school of thought in 1954 and 1955. Its 1954 annual report indicates that it was looking forward to the adaptation of its C-130 turbo-prop to commercial use. In its 1955 report, it states that it had won the American Airlines medium-range transport competition with its new prop-jet Electra. But Lockheed was apparently clinging to its piston-driven Constellation as a suitable airplane for long-distance operations of the airlines. The 1955 report also states that it would be very difficult for Lockheed simultaneously to develop and produce the Electra and a new turbo-jet.

General Dynamics - Convair: This company's 1956 annual report is the first one in which reference is made to a jet transport. It says that the Convair 880 was in the engineering and tooling stage, preparatory to production, and that forty had been ordered by Trans World Airlines and Delta Airlines.

Subsequent annual reports indicate increasing activity by Convair in the jet transport field.

We now turn to the annual reports issued by National Aviation Corporation, a well-known and, we think, well-qualified closed-end investment trust which limits its investments to securities of companies engaged directly or indirectly in the field of aviation. We summarize as follows certain portions of its annual reports.

National Aviation 1953 Report: This report states categorically that it was all but a certainty that the (then) piston-engined newcomers (presumably the DC-7 and the Lockheed Super Constellation) were the last of their kind for mass travel by air, the reason being that the few companies concerned with commercial transport were all working on jets.

National Aviation 1954 Report: This report refers to the British invasion of the U. S. domestic airline market with the Vickers Viscount turbo-prop. And it states that the new "shape of things to come in 1955-58 is in ferment * * * * *."

National Aviation 1955 Report: This report states that the airlines, after painstaking studies, were committing themselves for turbine-powered transports. It includes the following tabulation which it characterises as "approximations".

Domestic Trunk Airlines

Mid January 1956

Total Assets	$1,000,000,000
Net Worth	500,000,000
Orders for Turbine Aircraft	750,000,000

The report goes on to say that the above orders reflected only the initial commitments of seven of the thirteen trunk airlines which had reached a decision up to the date of the writing. A significant sentence in the report states that the airline industry had until (then) recently been restricted to short-term accomodations requiring high amortisation rates, and that 1955 would be remembered as the year when lenders - particularly the insurance industry - concluded that 20-40 year airline loans with sinking fund payments waived during the first 10 years were an acceptable risk

The report sums up by saying that the domestic trunk airlines were entering a period of intensified competition and were approaching a new era in powered flight.

National Aviation 1956 Report: This report deals extensively with the subject of commercial transports and, significantly, points out that the industry (meaning the airlines) would have to pay for over $1,500,000,000 of new flight equipment in the (then) next four years.

It seems reasonable to conclude from the foregoing that in 1955 a well-advised management of any one of the major trunk airlines would get its financial affairs in a strong position to meet the then oncoming rush of money requirements.

VI. The Comparative Financial Status TWA and Its Competitors

Early 1955

The tabulation on the following page shows, in summarized figures, the balance sheets of TWA and its main competitors at December 31, 1954. Figures of Revenue Airplane Miles Flown and Available Seat Miles in 1954 are included to give an approximate idea of relative size of the four airlines. (See Exhibit: Comparisons - 4.)

TWA Ex. 5(a), page 9 of 75
(Drexel Harriman Ripley, Inc. Report - Parts I & II)

Summarized Balance Sheets

December 31, 1954

	TWA	PAA	AAL	UAL
	(000 omitted)			
Net Current Assets	$ 4,089	$ 9,757	$ 37,656	$ 11,315
Property, Plant, Flight Equipment, etc. - Net	84,414	115,162	95,475	131,918
Other Assets, Deferred Items, etc.	1,682	19,607	3,874	4,284
Net Current & Fixed Assets	$ 90,185	$144,526	$137,005	$147,517
Funded Debt	$ 18,513	$ 28,375	$ 30,000	$ 50,262
Deferred Credits, Reserves, etc.	4,465	4,719	2,750	4,369
Reconciliation Adjustment (*)	-	5,137	-	-
Total Deductions	$ 22,978	$ 38,231	$ 32,750	$ 54,631
Book Net Worth	$ 67,207	$106,295	$104,255	$ 92,886
Capital Structure - Percent				
Funded Debt	21.6%	21.1%	22.3%	35.1%
Equity	78.4%	78.9%	77.7%	64.9%
Total	100.0%	100.0%	100.0%	100.0%
Revenue Airplane Miles Flown - 1954	89,087	67,256	99,736	98,331
Available Seat Miles - 1954 (**)	4,768	3,713	5,095	5,010

(*) For an explanation of this item, see Exhibit: Comparisons - 4

(**) Millions.

On the basis of Revenue Airplane Miles Flown and Available Seat Miles, respectively, TWA was 33% to 28% larger than PAA; 10% to 7% smaller than AAL; and 9% to 5% smaller than UAL. Based on the foregoing yardsticks, TWA was short of proprietary capital by from $69 million to $74 million in comparison with PAA; by from $27 million to $30 million in comparison with AAL; and by from $17 million to $21 million in comparison with UAL. It is to be noted that PAA was engaged in the hotel business and had a substantial stake in Pan American Grace; its 1954 annual report shows investments in, and advances to, affiliates in the aggregate amount of $13.5 million.

Another yardstick for comparing the relative size of TWA operations with those of PAA, AAL and UAL is overall available ton miles flown. Referring to Exhibit: Comparisons - 2, which has been prepared from figures published by the CAB, it is calculated that on the basis of 1954 figures TWA was 12.7% larger than PAA, 15.6% smaller than AAL, and 13.6% smaller than UAL. Based on

this yardstick, TWA was short of proprietary capital by $53 million in comparison with PAA, by $21 million in comparison with AAL, and by $13 million in comparison with UAL.

Thus, on the basis of the foregoing comparisons, it appears to us that in early 1955 TWA was very short of proprietary capital.

VII. The TWA Capital Expenditure Outlook

Early 1955

We doubt that in early 1955 the TWA management could make an accurate estimate of its forward capital expenditure program. But it seems reasonable to presume that the management would have at that time estimated the six-year total at over $300 million, and probably nearer to $400 million.

VIII. Estimated TWA Desirable Additional Equity

Early 1955

In the light of the foregoing, and recognizing that TWA was the only company conducting both U. S. transcontinental and transatlantic operations, we believe that TWA would have been well advised in early 1955 to obtain not less than $50 million of additional proprietary capital. TWA's book net worth at December 31, 1954 was only $67.2 million, a very low amount in relation to the capital expenditure program which it faced in the (then) next few years.

It is our opinion that we would have advised TWA in early 1955 to raise not less than $50 million of additional equity capital. And that it be raised by an underwritten preemptive offering of common stock.

IX. Comparative Earnings TWA and Its Competitors

1950 - 1954

The tabulation on the following page shows the results of TWA operations, year by year, in comparison with its three main competitors in the years 1950-1954, this being the five-year period immediately prior to the time when we are asked to assume that we would be advising TWA in regard to financial matters. (See Exhibit: Comparisons - 4.)

TWA Ex. 5(a), page 11 of 75
(Drexel Harriman Ripley, Inc. Report - Parts I & II)

Comparative Results of Operations - 1950-1954

	TWA	PAA	AAL	UAL
	(000 omitted)			
Total Operating Revenue:				
1950	$116,966	$153,802	$119,085	$104,095
1951	142,261	188,560	162,767	127,798
1952	160,702	205,243	187,344	159,008
1953	187,221	217,950	208,306	172,967
1954	203,671	213,524	214,766	200,719
Total	$810,821	$979,079	$892,268	$764,587
Net Operating Income:				
1950	$ 11,461	$ 3,392	$ 23,647	$ 12,629
1951	15,999	10,261	29,908	18,527
1952	14,787	6,566	26,383	24,328
1953	10,818	16,345	27,471	19,026
1954	22,677	14,941	20,912	21,887
Total	$ 75,742	$ 51,505	$128,321	$ 96,397
Net Income Including Capital Gains:				
1950	$ 7,882	$ 4,064	$ 10,400	$ 6,430
1951	7,660	6,546	10,549	8,563
1952	7,661	6,673	12,514	10,684
1953	5,064	10,803	13,413	9,072
1954	10,336	9,721	11,431	9,618
Total	$ 38,603	$ 37,807	$ 58,307	$ 44,367
Revenue Airplane Miles Flown:				
1950	60,285	53,060	60,560	55,868
1951	63,386	57,305	77,534	61,447
1952	69,557	60,185	89,444	74,820
1953	81,142	62,009	103,731	85,152
1954	89,087	67,256	99,736	98,331
Total	363,457	299,815	431,005	375,618
Available Seat Miles: (*)				
1950	2,264	1,995	2,610	2,166
1951	2,577	2,553	3,448	2,494
1952	3,155	2,894	4,039	3,306
1953	4,110	3,199	4,881	3,975
1954	4,768	3,713	5,095	5,010
Total	16,874	14,354	20,073	16,951
For the Five Years 1950-1954 Net Operating Income:				
Per Revenue Airplane Mile ¢	20.84	17.18	29.77	25.66
Per Million Available Seat Miles $	4,489.	3,588.	6,393.	5,687.
For the One Year - 1954 Net Operating Income:				
Per Revenue Airplane Mile ¢	25.45	22.22	20.97	22.26
Per Million Available Seat Miles $	4,756.	4,024.	4,104.	4,369.

(*) Millions

It is fair to say that in the aggregate, over the five-year period 1950-1954, as measured by Net Operating Revenue per Airplane Mile and by Net Operating Revenue per Million Available Seat Miles, TWA did particularly well in comparison with PAA, but not so well in comparison with AAL and UAL. However, in 1954, the last year of the five-year period, and using the same unit figures as yardsticks, TWA turned in a better performance than any of its three main competitors. The terrific growth of the operations of all four companies is noteworthy.

The following tabulation shows the TWA income account in more detail for the five years preceding 1955. (See Exhibit: Comparisons - 4.)

TWA Income Account - 1950-1954

	1950	1951	1952	1953	1954	Aggregate 1950 - 54	Annual Average
	(000 omitted)						
Net Operating Income	$11,461	$15,999	$14,787	$10,818	$22,677	$ 75,742	$15,148
Gain (loss) from Sale of Property and Equipment	(95)	306	512	504	(38)	1,189	238
Other Income	247	332	324	394	114	1,411	282
Income Available for Interest, Income Taxes, etc.	$11,613	$16,637	$15,623	$11,716	$22,753	$ 78,342	$15,668
Fixed Charges - Interest, etc.	1,712	1,889	1,928	1,786	1,467	8,782	1,756
Net Before Income Taxes	$ 9,901	$14,748	$13,695	$ 9,930	$21,286	$ 69,560	$13,912
Income Taxes	2,019	7,088	6,034	4,866	10,950	30,957	6,191
Net Income	$ 7,882	$ 7,660	$ 7,661	$ 5,064	$10,336	$ 38,603	$ 7,721
Depreciation Charges	$11,263	$12,125	$17,010	$23,465	$21,554	$ 85,417	$17,083
Cash Throw-Off	$19,145	$19,785	$24,671	$28,529	$31,890	$124,020	$24,804
Coverage of Fixed Charges:							
Including Capital Gains	6.8	8.8	8.1	6.6	15.5		9.2
Excluding Capital Gains	6.8	8.6	7.8	6.3	15.5		9.0
Net Income Per Share (*)	$3.25	$3.15	$2.30	$1.52	$3.10		$2.66

( ) Denotes red figure.

(*) Per share figures for 1950 and 1951 do not check with Exhibit: Financials - 2, which are taken from the annual report for 1954 and are on the basis of 3,337,000 shares outstanding throughout the period. The above figures are based on the number of shares outstanding at each year end.

X. Interim Earnings
TWA and Its Competitors

Early 1955

Under this heading we are examining into the news releases and interim earnings reports put out in the early part of 1955 by the four airlines. This is being done to throw light on the market climate for their common stocks at that time.

TWA

The following are brief summaries of the TWA news releases put out in the first half of 1955.

March 31, 1955

Earnings of $3.10 per share in 1954. Double those of 1953. No subsidy. Stockholder equity $20.14 per share.

May 5, 1955

First quarter loss $3,898,000 or $1.17 per share, as compared with first quarter of 1954 loss of $3,965,000 or $1.19 per share. Prospects for balance of 1955 are "bolstered" by increase in bookings and by addition of 20 Super-G Constellations to the TWA fleet.

PAA

This company did not release quarterly earnings statements until 1956. The following figures are those reported to the CAB and have been taken from the (then) current section of Moody's manual. It is to be noted that the caption is "Net Operating Income After Taxes", rather than "Net Income" or "Net Earnings". Thus, it appears that the figures do not include gain or loss on sale of aircraft. Also, the sum of the interim figures does not check out with the annual figures reported in the annual reports. With the foregoing qualifications, the PAA interim earnings figures for 1954 and the first half of 1955 are submitted as follows:

	1st Quarter	2nd Quarter	3rd Quarter
1954 - Quarterly			
Net Operating Income After Taxes (000 omitted)	$ 712	$3,478	$6,105
Equals per Share (*)	$0.12	$0.57	$1.00
1955 - Quarterly			
Net Operating Income After Taxes (000 omitted)	$3,357	$4,342	
Equals per Share (*)	$0.55	$0.71	

(*) Calculated by HRCo on basis of 6,091,822 shares outstanding at 1954 year end and 6,137,753 shares outstanding at 1955 year end.

AAL

The following figures were released by AAL. However, the 1954 figures are qualified as follows. The figure for the first quarter of 1954 includes a profit of $274,000, before tax, on sale of aircraft; and the figure for the second quarter was increased by $583,000 or $0.09 per share by a change in depreciation policy.

	1st Quarter	2nd Quarter	3rd Quarter
1954 - Quarterly			
Reported Net Income (000 omitted)	$ 446	$4,568	$ 452
Reported Net Income per Share	$0.01	$0.65	$0.02
1955 - Quarterly			
Reported Net Income (000 omitted)	$2,483	$6,054	
Reported Net Income per Share	$0.30	$0.79	

1954 - Cumulative	First Six Months	First Nine Months
Reported Net Income (000 omitted)	$5,014	$5,466
Reported Net Income per Share	$0.66	$0.68
1955 - Cumulative		
Reported Net Income (000 omitted)	$8,537	
Reported Net Income per Share	$1.09	

UAL

The published UAL interim figures for 1954 and the first half of 1955 have no qualifications. However, they differ from the pattern of the other three airlines because UAL published its earnings figures by quarters and also uniformly published not only the cumulative six months and nine months figures but also its cumulative figures for the (then) past twelve months. The figures are as set forth in the following tabulation. We are omitting the cumulative figures for six and nine months because we think that the cumulative twelve months figures are more enlightening.

	1st Quarter	2nd Quarter	3rd Quarter
1954 - Quarterly			
Reported Net Income (000omitted)	$(1,069)	$ 3,542	$ 5,961
Reported Net Income per Share	$(0.53)	$1.34	$2.32
1955 - Quarterly			
Reported Net Income (000omitted)	$ 466	$ 3,087	
Reported Net Income per Share	$0.09	$1.39	

1954 - Cumulative - 12 Months	Ended 3/31	Ended 6/30	Ended 9/30
Reported Net Income (000omitted)	$ 7,662	$ 7,477	$ 9,482
Reported Net Income per Share	$2.72	$2.64	$3.46
1955 - Cumulative - 12 Months			
Reported Net Income (000omitted)	$11,153	$11,417	
Reported Net Income per Share	$4.07	$4.20	

( ) Denotes loss.

XI. Dividend Records TWA and Its Competitors

1954 - 1955

On Exhibit: Comparisons - 13, figures are set forth showing the dividend records of TWA and its three main competitors from 1950 onward.

TWA did not pay any cash dividends in the period covered by the exhibit; however, in October of 1952 it declared a 10% stock dividend which it

paid in January 1953.

In 1954 and 1955, PAA was paying regular quarterly cash dividends of 20¢ per share.

AAL paid regular quarterly cash dividends of 15¢ per share in 1954 and 20¢ per share in 1955.

UAL paid regular quarterly cash dividends of 25¢ per share in each of the first three quarters of 1954 and 1955 and year-end cash dividends of 75¢ per share to stockholders of record in November 1954 and November 1955.

Thus, in 1955 TWA was paying no cash dividends and had no dividend record, whereas each of its three main competitors had a respectable cash dividend record; PAA and AAL were on a regular annual cash dividend basis of 80¢ per share; and UAL was on a regular annual cash dividend basis of $1.50 per share.

XII. The General Stock Market Situation

1954 and the First Half of 1955

The stock market in general was strong and advancing throughout 1954 and the first half of 1955. The Dow-Jones Industrials were as follows:

	High	Low
January 1954	293	280
June 1954	337	319
January 1955	409	388
June 1955	451	424
Percent Advance Jan. 1954 - June 1955	54%	51%
Percent Advance Jan. 1955 - June 1955	10%	9%

The market quotations for the common stocks of TWA's main competitors, as reported by the Bank and Quotation Record, were as follows. (TWA will be dealt with separately.)

	PAA		AAL		UAL	
	High	Low	High	Low	High	Low
January 1954	10-3/4	9-3/8	13-1/8	11-1/2	24-3/8	21-1/2
June 1954	12-1/8	10-3/4	14	11-7/8	23-5/8	21-1/2
January 1955	19-3/4	16-7/8	23-3/4	20-1/2	40-1/8	34-1/4
February 1955	20-1/2	18-1/8	26	23-1/2	43	38-3/4
March 1955	20-1/4	17-1/8	27-3/8	22-1/2	46	38-5/8
April 1955	20-1/2	18-1/4	28-3/8	26	48-3/8	43-1/4
May 1955	20-1/2	18-1/4	27-7/8	25-1/2	44-1/4	41-3/8
June 1955	22	19-1/4	29-1/8	27-1/8	48-3/8	43-1/2
Percent Advance -						
Jan. 1954-June 1955	104%	105%	122%	136%	98%	102%
Jan. 1955-June 1955	11%	14%	23%	32%	21%	27%

From the foregoing figures it will be noted that both over the one and one-half year period January 1954-June 1955 and for the six months' period January-June 1955, the stocks of TWA's three main competitors advanced in greater amounts, percentagewise, than the Dow-Jones Industrials.

XIII. The TWA Stock Market Situation

1950 Through the First Half of 1955

The following tabulation shows a comparison of the market prices of TWA stock with the Standard & Poor's Index of Air Transport Stocks. It also shows the AIMV of TWA and the book value of TWA shares. Relating the figures to those set forth in the preceding chapter, it will be noted that in the one and one half years January 1954-June 1955 TWA stock advanced in market price by a greater percentage than the advance of the Standard & Poor's Index of Air Transport Stocks, and by more than the advance of the Dow-Jones Industrials. Also, in the foregoing one and one-half year period TWA stock performed better than the stocks of its three main competitors. In the first half of 1955 TWA stock advanced about the same as the Dow-Jones Industrials, but not as much percentagewise as the stocks of its three main competitors.

TWA Stock Market and Related Figures

		TWA			
	S. & P.'s Index of Air Transport Stocks	Market Price per sh.	No. of Shares Outstanding (*)	AIMV (Approx.)	Book Value per sh. End of Month
			(000 omitted)		
December 31, 1950	16.49	23-3/4	2,427	$ 57,600	$10.55
December 31, 1951	21.58	24-1/8	2,430	58,600	13.75
December 31, 1952	18.83	17-7/8	3,330(**)	59,500	15.53
December 31, 1953	15.80	12-7/8	3,333	42,900	17.04
December 31, 1954	27.93	29-3/4	3,337	99,300	20.14
January 1955	28.18	29-1/4	3,337	97,600	19.92
February 1955	31.15	31-1/4	3,337	104,300	19.23
March 1955	31.85	31-1/2	3,337	105,100	18.94
April 1955	33.76	31-1/4	3,337	104,300	19.19
May 1955	32.77	31-5/8	3,337	105,500	19.67
June 1955	35.98	31-5/8	3,337	105,500	20.40
Percent Advance -					
December 1950 - December 1954	69%	-		-	
December 1953 - June 1955	128%	146%		146%	
December 1954 - June 1955	29%	6%		6%	

(*) At month end. Round number figures for 1955 are taken at the same amount as for December 1954; the change during 1955 was only 279 shares.

(**) 594,596 shares issued and sold in 1952. Also, a stock dividend of 10% was declared in October 1952 and paid in January 1953.

Note: Figures for Standard & Poor's Index are monthly averages of weekly price indexes. (See Exhibit: General - 6.) TWA stock prices are month end closing prices. (See Exhibit: Trans World - 9.)

Thus, the market for TWA stock in the first six months of 1955 showed no sign that investors were worried about the TWA losses reported for the first quarter. The seasonal character of TWA's operations and these of other airlines was generally recognized.

The following tabulation shows the volume of trading in TWA stock on the NYSE during 1954 and the first half of 1955, expressed in terms of numbers of shares and in approximate dollar amounts.

Volume of Trading - TWA Common Stock (*)

	1954			1955		
	Volume of Trading Shares(*)	Approximate Price per sh.(**)	Approximate Dollar Volume	Volume of Trading Shares(*)	Approximate Price per sh.(**)	Approximate Dollar Volume
January	29,700	14	$ 416,000	73,100	29	$ 2,120,000
February	14,300	14	200,000	94,600	30	2,835,000
March	20,100	14	282,000	83,600	30	2,508,000
April	35,200	15	528,000	65,100	32	2,083,000
May	16,300	15	244,000	52,300	30	1,569,000
June	36,500	16	584,000	111,700	33	3,686,000
July	46,000	17	782,000			
August	85,200	19	1,619,000			
September	56,300	19	1,072,000			
October	153,300	22	3,373,000			
November	87,200	24	2,093,000			
December	116,300	28	3,260,000			

(*) See Exhibit: Trans World - 10.

(**) Mean of the high and low prices during each month, rounded to the nearest dollar.

The following tabulation shows a comparison of the market prices of TWA stock with its book values at year ends over the five-year period preceding 1955, and at the middle of 1955.

TWA - Relationship of Book Value to Market Price

	Book Net Worth	Number of Shares Outstanding	Book Value per share	Market Price per share
	----(000 omitted)----			
December 31, 1950	$ 25,608	2,427	$10.55	23-3/4
December 31, 1951	33,406	2,430	13.75	24-1/8
December 31, 1952	51,699	3,330 (*)	15.53	17-7/8
December 31, 1953	56,804	3,333	17.04	12-7/8
December 31, 1954	67,207	3,337	20.14	29-3/4
June 30, 1955	68,075	3,337	20.40	31-5/8

(*) Including the 594,596 shares issued and sold in 1952 and the 10% stock dividend declared in December 1952 and paid in January 1953.

Note: Market prices are month-end closing prices. (See Exhibit: Trans World - 9.)

From the foregoing it will be noted that the market for TWA stock was strong in terms of price and trading volume in early 1955, and that market prices were much above book values.

We now turn to the relationship of market prices to earnings per share for TWA and its three main competitors. For this purpose we use the "Investment Guide Cards" put out by Standard & Poor's Corporation in 1955. It is to be noted that Standard & Poor's figures for TWA earnings per share for 1950 and 1951 differ from those given on Exhibit: Comparisons - 4, because Standard & Poor's gives effect retroactively to the TWA 10% stock dividend declared in December 1952 and paid in January 1953, whereas the figures for TWA shown on Exhibit: Comparisons - 4 are based on the actual number of shares outstanding at each year end. We think that the Standard & Poor's figures for TWA are the most appropriate ones to use, particularly so because they are comparable to the figures which Standard & Poor's published for the three other airlines.

The figures reported on the 1955 cards, for the five years preceding 1955, are as shown in the following tabulation.

	Comparative Earnings Per Share			
	TWA	PAA	AAL	UAL
1950	$2.94	$0.66	$1.39	$2.90
1951	2.87	1.07	1.42	3.58
1952	2.30	1.09	1.72	4.03
1953	1.52	1.77	1.86	3.28
1954	3.10	1.71	1.51	3.52
Average - 5 years 1950-54	$2.55	$1.26	$1.58	$3.46
Average - 3 years 1952-54	2.31	1.52	1.70	3.61
Average Market Price - April, May, June 1955 (*)	$31.67	$19.79	$27.33	$44.92

(*) Figures are the average of high and low prices taken from the Bank and Quotation Record.

Notes:

TWA - The 1954 TWA annual report shows $2.36 and $2.30 earned per share for 1950 and 1951, respectively, and states that the net income per share for all years has been calculated on the number of shares outstanding as of December 31, 1954. On this basis, the five-year average would be $2.32. It seems to us that the annual report method of presenting the figures does not allow for the entrance of $10 million of new capital through issuance of shares in two separate issues in 1952. (See Exhibit: Financials - 2.)

PAA - The 1955 annual report shows $1.69 earned per share for 1954.

AAL - Standard & Poor's states that the figure of $1.51 earnings per share for 1954 is before a "special credit" which equals $0.46 per share. Thus, including the "special credit" the earnings figure would be $1.97 per share for 1954; the five-year average would be $1.67; and the three-year average would be $1.85.

UAL - No corresponding differences in figures.

Translating the foregoing figures into price/earnings ratios (P/E), taking prices at average market price during April, May and June 1955, and using the Standard & Poor's figures of earnings per share, brings the following results.

	Price/Earnings Ratios - Times			
	TWA	PAA	AAL	UAL
Five-Year Average 1950-54	12.4	15.7	17.3	13.0
Three-Year Average 1952-54	13.7	13.0	16.1	12.4

Using the TWA 1954 annual report figures, the above five-year average P/E ratio of 12.4 times becomes 13.7 times. With AAL the ratios become 16.4 times and 14.8 times (instead of 17.3 times and 16.1 times) if the "special credit" for 1954 is included.

The higher P/E ratios for PAA and AAL, than for TWA, were probably due to the better long-term historical earnings records of those two companies, and to the absence of cash dividends on TWA stock. TWA was selling at about the same P/E ratios as UAL, although UAL had a better long-term historical earnings record than TWA and was paying cash dividends whereas TWA was not.

We now turn to the "Recommendation" which is uniformly set forth at the top of each Investment Guide Card put out by Standard & Poor's, our purpose being to see what investors were being advised by that service, in the first half of 1955, in regard to the stock of each of the four airlines.

TWA

The March 1 and May 25, 1955 cards say: "With favorable earnings indicated over the foreseeable future, the shares currently appear better held than sold."

PAA

In the cards issued under date of February 4 and May 11, 1955, it is said that "The stock may be held in speculative accounts".

AAL

In the cards issued under date of March 21 and June 1, 1955, it is said " * * * the Common is recommended for purchase".

UAL

In each of three cards issued February 1, March 23 and June 9, 1955, it is said "* * * we would buy the Common".

So, Standard & Poor's in the first half of 1955 was advising investors to hold TWA and PAA, and to buy AAL and UAL.

We next turn to Moody's Stock Survey, a weekly publication put out by Moody's Investor's Service, our purpose being to see what investors were being advised by that service, in the first half of 1955, in regard to airline stocks.

TWA

In its January 31, 1955 issue, Moody's Stock Survey says: "Trans World Airlines (27) to hold for speculative appreciation over a period is justified by present trends in the industry. This is far removed, however, from being a high-quality, investment issue."

PAA

Moody's Stock Survey did not say anything in 1955 regarding PAA stock until its June 20, 1955 issue, in which it said: "We suggest that Pan American World Airways stock be held for longer term speculative possibilities. The depressing effect of mail subsidy uncertainties has caused it to lag well behind other airline equities, but traffic growth should gradually lessen mail pay's importance."

AAL

In its April 11, 1955 issue, Moody's Stock Survey says: "Although American Airlines' common is close to its record high price and not immune to some interim irregularity, long-term growth potentialities are still considerable. We would hold it, but convert the preferred."

UAL

In its January 3, 1955 issue, Moody's Stock Survey says: "United Air Lines (38). The rise in price of this stock came earlier than we expected. It is now quite fully priced, but is one of the best airline issues."

So, Moody's Stock Survey in the first half of 1955 was advising investors to hold all four of the leading airline stocks.

XIV. Recommended TWA Equity Financing

May 1955

The tabulation on the following page summarizes the TWA capital stock situation as of May 1955.

TWA Stock Situation
May 1955 - Approximate

Capital Stock - Authorized, par value $5. per share	4,000,000 shares
- Outstanding	3,337,000 "
Book Net Worth - end of month	$ 65,600,000
Book Value per share - end of month	$19.67
Market Price per share	$31.00
AIMV	$103,400,000

Historic Earnings - Net Income:

	Company	Per Share (*)
1950	$ 7,882,000	$ 2.94
1951	7,660,000	2.87
1952	7,661,000	2.30
1953	5,064,000	1.52
1954	10,336,000	3.10
Total	$ 38,603,000	
Average - 1950-1954	$ 7,721,000	$ 2.55

(*) From Standard & Poor's.

We would have advised and urged TWA, in the spring of 1955, to put out a major equity issue in the first half of that year. The stock market was strong and its trend was upward. The first half of 1955 was the time for TWA to correct its obviously short proprietary capital position and prepare for the jet age.(*) We would have recommended that the equity financing be effected in April or May. The regular 1954 year end audit would comply with the SEC rule for listed companies.

The choice would have been between a convertible preferred stock and a common stock issue. With a preferred stock the conversion price recommended would have been close to the (then) market, the deliberate purpose being to sell (through conversion) common stock at a price higher than that at which it could have been sold as such. We would have recommended that the issue, whether preferred or common, be underwritten by a large group of investment houses, taking care that the group be representative of the cities served by TWA.

Neither PAA nor UAL had any preferred stock outstanding in early 1955. AAL had $22 million of convertible preferred bearing the very low dividend rate of 3-1/2%, which was quite certain to be converted in the (then) not distant future. In our opinion TWA, in 1955, could not have obtained a preferred dividend rate of less than 5% on an issue of any substantial amount, even though convertible which it would have to be. Moreover, TWA needed too large an amount of new money to make a preferred issue practicable. Expressed in another way, TWA had "missed the boat" for a preferred stock issue. (AAL issued $5 million of

(*) In February 1955 General Motors issued and sold $328 million of Common Stock. Goodyear Tire & Rubber sold $45 million in July.

4-1/4% Convertible Preferred Stock in 1940 and $40 million of 3-1/2% Convertible Preferred Stock in 1946. UAL issued a total of about $42 million of 4-1/2% Convertible Preferred Stock in 1943, 1947 and 1952.) Also, considering that the preferred dividend would not be deductible for corporate income tax purposes, and being faced with a huge capital expenditure program, we would not have recommended a preferred stock issue in 1955. We would have left preferred stock as a possible medium of equity finance for the future.

In our opinion we would have recommended a common stock issue to be offered preemptively to the TWA stockholders in May 1955 on the following basis. A stockholders' meeting would have been required to increase the authorized common stock upward from 4,000,000 shares. We would have recommended an authorization of 10,000,000 shares.

Recommended Preemptive Offering

Number of Shares Outstanding prior to offering, April 30..	3,336,546 shares (*)
Ratio	1 New for 1 Old
Number of Shares Offered	3,336,546 shares
Percent Maximum Dilution	50%
Market Price Prior to Announcement of Offering (approx.)..	$31.00 per share
Theoretical Minimum Subscription Price	$15.50 " "
Subscription Price	$17.50 " "
Percent Subscription Price to Theoretical Minimum Subscription Price	113%
Aggregate Amount of Offering at Subscription Price (approx.)	$ 58,390,000

Estimated Underwriting Spread:

	Per Share	Percent
Minimum	45¢	2.57%
Maximum	90¢	5.14%

Estimated Spread Realized (see Exhibit: General - 12):

Percent	4.5%
Aggregate Amount	$ 2,627,500
Estimated Expenses	$ 250,000
Estimated Total Cost of Issue	$ 2,877,500
Estimated Net Proceeds of Issue	$ 55,512,500
Estimated Net Proceeds of Issue (say)	$ 55,500,000
AIMV at Subscription Price, after offering	$116,800,000
As compared with AIMV Prior to Offering	$103,400,000
Increase	$ 13,400,000
As compared with Estimated Net Proceeds of Issue - as above	$ 55,500,000
Number of Shares Outstanding after offering, May 31	6,673,288 shares (**)
Book Value per share, May 31	$18.15
Book Net Worth, May 31	$121,134,000

Closing ..... June 1, 1955.

Application of Proceeds: (1) to redeem, on July 1, 1955, at 103-3/4 and interest, $35,000,000 principal amount of 3-3/4% Equipment Mortgage Bonds; (2) to reimburse HTCo on June 1, 1955 for its down payment of $16.8 million on, and transfer to TWA of, its contract with Lockheed for 25 L1649A aircraft, plus interest at 3%; and (3) deposit with Lockheed of $2.4 million for 5 L1049G aircraft.

(*) The number of shares outstanding April 30, 1955, which is assumed as the record date.

(**) Sum of 3,336,742 shares which were outstanding May 31, 1955 plus the 3,336,546 shares offered.

The foregoing equity program was, in our opinion, doable at the time. A question may arise as to why we have provided for the retirement of the 3-3/4% Equipment Mortgage Bonds. The answer is that we would have tried to get the holder of the issue to "roll it over" into the new loan which we outline further on in this report. But we do not see fit, for the purposes of this report, to assume that our effort would have been successful. Hence, we have provided for the retirement, by redemption, of the entire issue from the proceeds of the equity issue.

TWA had an open end of $5 million on its December 1954 Equipment Mortgage, and a $10 million revolving term credit agreement with banks which was arranged in 1954 and was secured by a chattel mortgage on some flight equipment. However, no borrowings were outstanding against the term bank credit agreement as of the time of the recommended equity financing. (The 1954 annual report, dated March 21, 1955, states that against the term bank credit agreement $2 million had been borrowed at December 31, 1954 but had since been repaid.) We would have recommended the cancellation of both the open end on the mortgage and the term bank credit agreement, so as to start with a clean slate for financing the large capital expenditure program.

XV. TWA Reconstructed Balance Sheet

September 30, 1955

Giving effect to the foregoing equity financing, TWA would have had a consolidated balance sheet, as of September 30, 1955, as set forth on the following page. (See Exhibit: Financials - 7.) We select September 30 because we believe that in the summer of 1955 TWA would have been negotiating for borrowed capital to meet a substantial part of its large capital expenditure program, and in the fall of 1955 would have been negotiating with Boeing for 33 jet transports.

TWA

Reconstructed Consolidated Balance Sheet
Giving Effect to the May 1955 Equity Financing
as at September 30, 1955

	(Millions)
Net current assets	$ 11.4
Flight equipment, at cost	186.3
Less - Reserves for depreciation and obsolescence	100.8
	$ 85.5
Deposits with manufacturers (*)	19.6
Construction work in progress - flight equipment, at cost.	0.3
Net flight equipment	$ 105.3
Net ground property and equipment	12.9
Net property, equipment and deposits with manufacturers	$ 118.3
Investments and long-term prepayments	3.4
Total tangible assets, less current liabilities	$ 133.1
Long-term debt	$ -
Other noncurrent liabilities	1.2
Deferred federal income taxes	5.9
Total noncurrent liabilities and deferred credit	$ 7.1
Tangible net worth	$ 126.0
Deferred debits	1.4
Book net worth	$ 127.4
Capital stock (**)	$ 33.4
Capital surplus	61.2
Retained earnings	32.8
Total stockholders' equity	$ 127.4
Book net worth per common share	$ 19.09

(*) Includes $19.2 million down payments with Lockheed on contracts for 25 L1649A aircraft and 5 L1049G aircraft.

(**) Represented by 6,673,371 shares, this being the sum of 3,336,825 shares outstanding historically on September 30, 1955 plus 3,336,546 shares issued in the May 1955 equity financing.

The tabulation on the following page sets forth, in summarized form, TWA's historical and reconstructed balance sheets in comparison with the AAL and UAL balance sheets, all four as of September 30, 1955. The PAA summarized balance sheet is as of December 31, 1955; we were not able to obtain a PAA balance sheet as of September 30, 1955.

TWA Ex. 5(a), page 25 of 75
(Drexel Harriman Ripley, Inc. Report - Parts I & II)

Summarized Balance Sheets

September 30, 1955

	TWA Historical	TWA Reconstructed	PAA (*)	AAL Actual	UAL
	(000 omitted)				
Net Current Assets	$ 10,800	$ 11,400	$ 23,817	$ 56,335	$ 15,447
Property, Plant, Flight Equipment, etc. - Net	98,900	118,300	130,472	89,164	125,450
Other Assets, Deferred Items, etc.	4,800	4,800	20,958	3,700	4,192
Net Current and Fixed Assets	$114,500	$134,500	$175,247	$149,199	$145,089
Funded Debt	$ 35,000	$ -	$ 53,225	$ 30,000	$ 37,012
Deferred Credits, Reserves, etc.	7,100	7,100	7,830	4,890	6,503
Reconciliation Adjustment (**)	-	-	1,670	-	-
Total Deductions	$ 42,100	$ 7,100	$ 62,725	$ 34,890	$ 43,515
Book Net Worth	$ 72,400	$127,400	$112,522	$114,309	$101,574
Capital Structure - Percent					
Funded Debt	32.6%	-	32.1%	20.8%	26.7%
Equity	67.4%	100.0%	67.9%	79.2%	73.3%
Total	100.0%	100.0%	100.0%	100.0%	100.0%
Statistics - Year 1955					
Revenue Airplane Miles Flown	97,249		80,068	121,686	110,031
Available Seat Miles (***)	5,405		4,327	6,409	5,892
Available Ton Miles	655,270		608,234	856,459	782,980

(*) From PAA balance sheet dated December 31, 1955. No September 30, 1955 balance sheet was published by PAA.

(**) For an explanation of this item, see Exhibit: Comparisons - 4.

(***) Millions.

It will be noted that TWA, reconstructed to give effect to the May 1955 equity financing, bears no similarity to the historical TWA. It is free of funded debt, conditional sales obligations and bank loans. It owns its flight equipment outright; and it has made $19.2 million down payments for 30 Lockheed aircraft.

XVI. Flight Equipment Expendable Parts

In this chapter we will outline how we deal with the above item in this report, and why we do so.

Effective January 1, 1957 the CAB changed its Uniform System of Accounts for Air Carriers in such manner as to include the cost of Flight Equipment Expendable Parts in Current Assets, whereas prior thereto it was included in Property and Equipment.(*) Flight Equipment Expendable Parts bears the account number 1310 in the aforementioned uniform system and is defined as including the cost of replacement parts of a type which ordinarily would be recurrently expended and replaced rather than repaired and reused. Thus, it does not include rotable parts and assemblies of material value which ordinarily are repaired and reused.

Throughout this report we are including Flight Equipment Expendable Parts in the cost of Flight Equipment, our reasons for doing so being: (1) for the purpose of uniformity of balance sheet presentation throughout the period of time dealt with herein; and (2) we propose to include this item, along with aircraft and engines, in the property to be mortgaged. (It is included in the mortgaged property under the provisions of the TWA Indenture of Mortgage dated December 1, 1960.)

XVII. The TWA Reconstructed Situation

September 1955

The TWA reconstructed balance sheet as of September 30, 1955 has been set forth in a previous chapter. And it has been pointed out that TWA would have been free of debt and would have owned its flight equipment outright. Its decks would have been cleared for its aircraft and facilities expansion program. We now proceed to deal with its projected capital expenditure program as of September 1955 and the financing thereof.

TWA's capital expenditure program, as projected by PWCo as of September 30, 1955, is set forth in summarized form in the following tabulation. (See Exhibit: Financials - 8.)

(*) It was not until its 1963 annual report that AAL complied with the revised treatment of this item in its published annual reports.

	Property and Equipment				
	Jet Fleet	Piston Fleet	Ground and Nonoperating	Deferred Debits	Total
	(Millions)				
1955 - 4th quarter	$ 9.0	$ 7.5	$ 2.1	$ (0.8)	$ 17.8
1956 - Year	38.5	26.1	7.3	1.3	73.2
1957 - Year	19.8	55.7	9.9	2.1	87.5
1958 - Year	23.6	2.2	6.6	0.7	33.1
1959 - Year	102.2	0.1	7.4	(0.5)	109.2
1960 - Year	46.0	-	8.0	0.5	54.5
Total	$239.1	$ 91.6	$ 41.3	$ 3.3	$375.3

( ) Denotes red figure.

With respect to the foregoing projection, it should be noted that:

(1) It includes provision for the cost of all piston-driven aircraft then on order and for advance, progress and final payments for the 33 Boeing jet transports for delivery prior to the end of 1960.

(2) It includes provision for a down payment of $25 million for the (as then) not selected medium/long-range airplane. And -

(3) The figures are over and above the $19.2 million advance payments for aircraft which are incorporated as a part of the book value of Flight Equipment in the reconstructed balance sheet as of September 30, 1955.

We now proceed to deal with the situation (i.e., TWA reconstructed in September 1955) in terms of projected money requirements. (See Exhibit: Financials - 10.) The following is a description of the basis on which Exhibit: Financials - 10 has been prepared.

(1) Figures for net income, deferred taxes and for depreciation and amortization are taken from the C&C forecast of funds generated as of September 1955. (See Exhibit: Financials - 9.) This C&C forecast is based on timely acquisition (meaning prior to December 31, 1960) of the 33 Boeing jet transports; but it makes no allowance for earnings from, or depreciation of, the medium/long-range transports not yet selected in September 1955.

(2) It (the projection of money requirements) makes no allowance for the sale of property.

(3) Like all projections of money requirements included in this report, it makes no allowance for the cost of required new capital such as interest, commitment fees, agency fees, etc.

(4) It provides for the capital expenditure program as projected by PWCo as of September 1955. And -

(5) It starts with the amount of reconstructed TWA working capital as at September 30, 1955 and provides for a desirable working capital of $10 million excluding Flight Equipment Expendable Parts.

The projection shows, on the foregoing basis, the amount of new money (meaning from outside sources) required quarter by quarter and cumulatively

from September 30, 1955. The following tabulation sets forth the figures in summarized year-by-year form.

TWA
Projection of Money Requirements
as of September 1955

	By Period	Cumulative from September 30, 1955
	------- Millions -------	
1955 - Fourth Quarter	$ 13.1	$ 13.1
1956 - Year	35.2	48.3
1957 - Year	44.8	93.1
1958 - Year	(16.0)	77.1
1959 - Year	59.6	136.7
1960 - Second Quarter - The Peak Point ...		153.4
1960 - Year	(13.2)	123.5

( ) Denotes red figure.

In a subsequent chapter we will estimate the amount of money which, in our opinion, TWA could and should have obtained in the form of a loan agreement in the fall of 1955.

XVIII. Authorization of a Flight Equipment Mortgage

We now deal with the matter of TWA borrowing, or arranging for the borrowing of, substantial amounts of money. This confronts us with the question as to what form of borrowing we would have recommended, i.e., whether by secured or unsecured loans. We would have strongly favored long term as the type of borrowing for the backbone of the program. We say this because, as already pointed out, the capital expenditure program was very large and the returns in the form of earnings from new flight equipment and other facilities would obviously have been several years off in the future. Thus, we would have wanted to avoid, insofar as practicable, short-term borrowing in the early stages of the period under review.

The three main competitors of TWA were financed during the entire period under review by unsecured loans. With $55 million of added common stock capital put into TWA in the first half of 1955, as outlined hereinbefore, it is possible that TWA could have obtained long-term borrowed capital

in 1955 on an unsecured basis. Nevertheless, we think that the TWA situation in 1955 indicated the adoption of a mortgage, rather than debenture issues or unsecured loans, as the appropriate form of borrowing. We say this although an air transport mortgage must be a headache to management and involves more expense (for the trustee, recording, etc.) than a debenture issue or an unsecured term loan agreement. As far back as 1945, TWA borrowed with a lien on its flight equipment (its stratocruisers). Several years prior to 1955, lenders to TWA were secured by mortgage or conditional sales agreement. Thus, lenders were accustomed to having mortgage or other form of security when lending to TWA.

We would have advised TWA in 1955 to try to obtain a loan on a debenture issue or an unsecured term loan agreement with suitable protective covenants and with contractual obligation margin requirements on some suitable basis. But we doubt that the effort would have been successful. For the purposes of this report we see no occasion to assume that our effort would have been successful. Thus, we are proceeding to design a mortgage as the instrument for TWA borrowing. And flight equipment constitutes the logical form of mortgage security.

In our opinion we would have recommended that TWA take the necessary corporate steps in the third quarter of 1955 to authorize a flight equipment mortgage along the following general lines.(*)

Flight Equipment Mortgage

To be dated:	(Say) October 1, 1955.
Trustee:	The _____ Trust Company or Bank.
Authorized Amount:	Open end. Issuable in series, at such interest rates, with such maturities, sinking funds, redemption premiums, etc., as the board of directors may from time to time determine (subject to the restrictions set forth hereinafter).
Security:	First chattel mortgage on all Flight Equipment owned by the Company including spare engines, spare rotable parts and expendable parts, and including after-acquired Flight Equipment and spare parts therefor.
Designation:	Flight Equipment Mortgage Notes, Series _____.
Limitation on Amount of Flight Equipment Mortgage Notes which may be issued and outstanding at any time:	The sum of 100% of cash on deposit with the Trustee in the Flight Equipment Fund plus 75% of the net book value of Flight Equipment owned by the Company, including spare engines, spare rotable parts, and expendable parts, plus 75% of advance payments and progress payments for Flight Equipment.

(*) We are not undertaking to design the mortgage in extenso, a task which would have been assigned to counsel.

Flight Equipment Fund:	To be held by the Trustee, and into which the entire proceeds of all Flight Equipment Mortgage Notes issued are to be paid. Moneys may be drawn down by the Company from time to time in aggregate amounts not in excess of the aggregate amount of advance payments, progress payments and final payments made by the Company subsequently to September 30, 1955 for Flight Equipment, including spare engines, spare rotable parts and expendable parts. Subject, however, to the foregoing Limitation on Amount of Flight Equipment Notes which may be issued and outstanding at any time. Proceeds of claims for insurance on, and proceeds of sale of released Flight Equipment also to be paid into the Fund.
Assignment of Flight Equipment Purchase Contracts:	Flight Equipment Purchase Contracts to be assigned to the Trustee together with all rights of the Company thereunder, including advance and progress payments for Flight Equipment, spare engines, spare rotable parts and expendable parts.
Purchase Money Mortgages:	Limited to 66-2/3% of the cost of after-acquired property other than Flight Equipment. None permitted for acquisition of Flight Equipment.
Conditional Sales Contracts:	Not permissible for acquisition of Flight Equipment.
Limitation on Aggregate Consolidated Funded Debt:	Voluntary action covenant based upon 60%, default based upon 65%, of Consolidated Net Tangible Assets.
Leasing of Flight Equipment:	Limited to seasonal and through-trip type of intercompany leases.
Leasing of Property Other than Flight Equipment:	Limited on the basis of some reasonable formula.(*)
Subsidiary Debt:	Limited on the basis of some reasonable formula.(*)
Maintenance and Insurance:	The usual provisions.(*)
Modification of Indenture:	The usual provisions based on the consent of the holders of two thirds of the Flight Equipment Mortgage Notes.
Consolidation, Merger or Sale:	The usual provisions.(*)
Recording and Filing:	The usual provisions.(*)

(*) We see no occasion for the purposes of this report, to design the formula.

Note: The term "expendable parts" is intended to mean only such parts as are related to Flight Equipment, and not to spare parts held in stock for use other than on Flight Equipment.

XIX. Recommended TWA 1955 Flight Equipment Mortgage Loan

Under the above heading we will deal first with the amount of mortgage loan commitment which in our opinion TWA could and should have obtained in the fourth quarter of 1955 and, second, with the interest rate thereon.

Amount:

As of September 1955, the five-year projection of TWA's money requirements indicates a need of approximately $153 million, with the peak point occurring in the second quarter of 1960. However, the 1955 projection is based upon a program of capital expenditures which includes only $25 million for the cost of an as then unselected fleet of medium/long-range aircraft. On the other hand, the C&C forecast of funds generated (Exhibit: Financials - 9) used in preparing the 1955 projection of money requirements makes no allowance for revenues from disposals of piston engine equipment. In view of these uncertainties inherent in the situation as it stood in September 1955, we believe that in negotiating the long-term financing it would have been logical for the airline to make arrangements which would allow some flexibility with respect to the timing and amount of its borrowings. In our opinion TWA, in the fourth quarter of 1955, could and should have obtained mortgage loan commitments from institutional investors which would provide, in segments over about the next three years, a minimum of $150 million and a maximum of $170 million.

Interest Rate:

Being privately placed, our proposed 1955 TWA long-term mortgage obligations would not have received a rating by Moody's Investors Service. We believe, however, that institutional investors would have viewed such long-term obligations of TWA as coming not far from but not quite up to Baa quality.

In our opinion investing institutions, such as life insurance companies, in the fourth quarter of 1955 would have charged TWA for properly set up long-term mortgage loans a commitment fee of 1/2% per annum on the unused portion and an interest rate of 4% on the used portion. The 1955 average yield on Moody's Baa industrials was 3.47% (see Exhibit: General - 2). (Moody's does not publish yield averages for bonds rated below Baa.)

Exhibit: Financials - 13 sets forth a comparison, as of September 30, 1955, of $170 million of 4% long-term mortgage obligations of TWA with term

debt securities of other airlines which were either then outstanding or were arranged for at dates within reasonable proximity to September 30, 1955. The following table presents certain of the data appearing in Exhibit: Financials - 13.

	TWA	PAA	AAL	UAL	Eastern	Northwest
Type of Issue	Mortgage Notes	Unsecured Notes	Unsecured Notes	Debentures	Unsecured Notes	Unsecured Notes
Coupon Rate	4%	3-3/4%	4%	4%	3-3/4% (/)	3-3/4%
Maturity Date	10/1/80	3/1/80	11/1/96	2/1/81	12/15/75	12/31/62
Amount ($000)	170,000	60,000	75,000	120,000	90,000	28,000
Total Pro Forma Capitalization ($000)	297,400	187,800	219,300	258,600	135,400	56,200
% Long-Term Debt	57.2	39.2	47.9	60.7	57.9	49.8
% Capital Stock and Surplus	42.8	60.8	52.1	39.3	42.1	50.2

Earnings(*) and Cash Flow(**) Coverage of Pro Forma Fixed Charges	Earn.	Cash Flow	Earn.	Cash Flow	Earn.	Cash Flow	Earn.	Cash Flow	Earn.	Cash Flow	Earn.	Cash Flow
1950	1.7	3.1	2.6	2.7	5.9	4.8	2.0	2.4	3.0	3.7	1.1	1.6
1951	2.4	3.3	4.3	2.8	7.4	5.5	3.0	2.5	6.3	3.9	3.5	1.8
1952	2.3	4.1	3.9	2.8	6.9	6.4	3.9	3.1	5.5	6.5	3.2	1.8
1953	1.7	4.7	6.8	3.5	7.3	7.2	3.3	3.3	6.3	8.1	3.7	1.8
1954	3.3	5.1	4.7	3.5	5.9	5.9	3.8	4.5	5.9	9.7	4.8	1.9
Average - 5 years 1950-1954	2.3	4.1	4.9	3.1	6.7	6.4	3.2	3.2	5.4	6.4	3.3	1.8

(*) Before interest and income taxes (without allowance for earnings on new funds).

(**) Before interest but after current income taxes (without allowance for earnings on new funds).

(/) On first $50 million; interest rate on remaining $80 million was tied to yield of U.S. Treasury 3's of 1995.

( ) Denotes loss.

It will be noted that TWA's pro forma long-term debt as a percentage of its total capitalization is somewhat higher than that of PAA, AAL and Northwest, but quite comparable to that of UAL and Eastern. On the average, TWA's pro forma earnings coverage figures are below those of the other five companies, while its cash flow coverage figures are better than those of PAA, UAL and Northwest. The TWA long-term debt would be secured by a mortgage on all flight equipment, whereas the long-term debt of the other five lines was unsecured.

1955 Loan Agreement

We would have recommended that TWA negotiate and enter into a loan agreement in the second half of 1955 along the following general lines. And, in our opinion, such a loan agreement could have been obtained from institutional investors.

Amount:	Minimum $150 million. Maximum $170 million.
Designation:	Flight Equipment Mortgage Notes, Series A.
To be dated:	October 1, 1955.
Procedure:	Private placement loan commitment with institutional investors.
Price:	100% plus accrued interest.

Interest Rate:	4% per annum, payable semi-annually April 1 and October 1.
Commitment Fee:	1/2% per annum on the unused portion, payable semi-annually April 1 and October 1.
General Redemption Prices:	104 and interest, sliding downward to 100 one year prior to maturity.
Sinking Fund Redemption Price:	100 and interest.
Non-Refundability Term:	12 years.
Availability:	To be designated by TWA within the following cumulative ranges:

By	Minimum	Maximum
October 1, 1956	$ 50,000,000	$100,000,000
October 1, 1957	100,000,000	150,000,000
April 1, 1959	150,000,000	170,000,000

Maturity:	October 1, 1980.
Sinking Fund:	Commencing October 1, 1965; equal annual instalments to retire 100% by maturity. Doubling up permitted annually to cumulative maximum of three annual instalments.
Security:	The Flight Equipment Mortgage.
Application of Proceeds:	All into the Flight Equipment Fund with the Trustee under the Flight Equipment Mortgage.
Trust Indenture Act of 1939:	Upon request of any of the holders of the Notes TWA will qualify the issue under the Trust Indenture Act of 1939.
Agency Fee:	0.15%.
Estimated Other Expenses:	0.033%.
Limitation on Payment of Cash Dividends and Redemption of Stock:	Limited to consolidated net income earned from September 30, 1955 onward plus some reasonable "cushion", say $5,000,000, plus net proceeds from sale of additional stock.
SEC Registrations:	On request of the holders of 66-2/3% of the Series A Notes.
Financial Reports:	Quarterly balance sheets and income accounts to be delivered to each holder of the Notes. Annual statements to be audited.
Closings:	Not more than one in 1955, two in each of the years 1956, 1957 and 1958, and one in 1959.
First Closing:	Assumed to be on October 1, 1955 in the amount of $50,000,000.

Projection of TWA Funded Debt Ratio and Leeway for Additional Funded Debt

The following table sets forth a five-year projection as it would have appeared in September 1955 showing, as of December 31 for each of the years 1956-1960 inclusive, (a) outstanding Series A Flight Equipment Mortgage Notes as a percentage of TWA's Consolidated Net Tangible Assets, and (b) TWA's leeway for incurring additional funded indebtedness within the 60% voluntary action limitation of the Mortgage. (See Exhibit: Financials - 11.)

As of 12/31	Projected Net Tangible Assets	Series A Notes Outstanding	Series A Notes as a percent of Net Tangible Assets	Leeway for Issuance of Additional Funded Debt
	------- Millions -------			- Millions -
1956	$193.9	$ 50.0	25.8	$165.8
1957	252.2	100.0	39.7	128.3
1958	263.4	100.0	38.0	145.1
1959	341.6	170.0(*)	49.8	87.4
1960	359.5	170.0(*)	47.3	114.2

(*) Assuming maximum take-down of Series A Notes.

Thus, it would have appeared that TWA, on the basis of the 1955 projections, could expect to be able to take down by 1959 the maximum of $170 million available to it from the Series A mortgage financing, while remaining comfortably within the 60% voluntary action limitation of the Mortgage.

XX. The TWA Reconstructed Situation

September 1956

For the purpose of this report we are to assume that TWA placed orders for 30 Convair 880 jet aircraft in September 1956, for delivery in 1960 (on the same terms as the order actually placed by HTCo). Total price of the aircraft, including spare parts, was $157,900,000. A downpayment of $26,300,000 was made at the time the orders were placed, with substantially no further payments required until the third quarter of 1959. We believe it reasonable to assume that on July 1, 1956 TWA would have taken down another $50 million of Series A Mortgage Notes to provide funds for this downpayment plus about $22 million other expenditures for Flight Equipment to be made during the balance of 1956.

Thus, it is appropriate for us to examine the financial posture of TWA as of September 1956, in the light of its then projected capital expenditure program, and to consider what, if any, further financing arrangements might have been indicated at that time.

TWA's reconstructed operating results during the first nine months of 1956 showed a net loss of $500,000 and internal cash generation of $17.5 million. (See Exhibit: Financials - 29 and 30.) The forecast of funds generated, prepared by C&C a year earlier in connection with the mortgage financing, had estimated that TWA would show net income of $10.2 million and funds generated of $30.2 million for the nine months ended September 30, 1956. (See Exhibit: Financials - 9.) So TWA by September 1956 was running well behind the C&C 1955 forecast. Furthermore, the new C&C forecast, prepared as of September 1956, estimated that TWA would have a net loss for the year 1957 in the amount of $5.2 million (see Exhibit: Financials - 15).

There follows in summary form a reconstructed balance sheet of TWA as of September 30, 1956 (see Exhibit: Financials - 27).

	-Millions-
Net Current Assets	$ 20.9
Total Net Property and Equipment	179.5
Flight Equipment Fund	28.1
Other Funds Restricted for Flight Equipment Purchases	0.3
Investments and Long-Term Prepayments	5.3
Total Tangible Assets, Less Current Liabilities	$234.1
Long-Term Debt	$100.0
Other Non-Current Liabilities	1.3
Deferred Federal Income Taxes	7.7
Total Non-Current Liabilities and Deferred Credits	$109.0
Tangible Net Worth	$125.1
Deferred Debits	1.8
Book Net Worth	$126.9
Capital Stock	$ 33.4
Capital Surplus	61.2
Retained Earnings	32.3
Total Stockholders' Equity	$126.9
Funded Debt as % of Net Tangible Assets	43.0%

It will be noted that, on the reconstructed basis, by September 30, 1956 TWA would have taken down $100 million of the $170 million (maximum) available under the 1955 mortgage financing. It should also be noted that

the September 30, 1956 reconstructed balance sheet is after giving effect to the down payment of $26.3 million required on the placing of the Convair order. Thus, at that date TWA had $70 million of committed long-term funds with which to meet its then indicated money requirements (subject, of course to its staying within the required ratios under the Mortgage). Working capital stood at $20.9 million as compared with the desired minimum of $10.0 million.

TWA's capital expenditure program, as projected by PWCo as of September 30, 1956, is set forth in summarized form in the following tabulation. (See Exhibit: Financials - 14.)

	Property and Equipment				
	Jet Fleet	Piston Fleet	Ground and Nonoperating	Deferred Debits	Total
	---------- Millions ----------				
1956 - Fourth Quarter	$ 4.9	$ 3.8	$ 1.3	$ 0.1	$ 10.1
1957 - Year	19.9	55.7	9.9	2.1	87.6
1958 - Year	24.0	2.2	6.6	0.7	33.5
1959 - Year	116.4	0.1	7.4	(0.5)	123.4
1960 - Year	144.3	-	8.0	0.5	152.8
1961 - Year	4.8	(2.2)	6.2	(0.3)	8.5
Total	$314.3	$ 59.6	$ 39.4	$ 2.6	$ 415.9

( ) Denotes red figure.

With respect to the foregoing projection it should be noted that:

(1) It includes provision for the cost of all piston-driven aircraft then on order and for advance, progress and final payments for the 33 Boeing and the 30 Convair jet transports for delivery prior to the end of 1960. (The figure of $4.8 million for jet fleet in 1961 consists principally of expenditures for rotable parts for these Boeing and Convair jets.) And -

(2) The figures are over and above the $61.3 million advance payments for aircraft and engines which are incorporated as a part of the book value of Flight Equipment in the reconstructed balance sheet as of September 30, 1956.

Exhibit: Financials - 16 shows a five-year projection of TWA's money requirements as they would have appeared in September 1956. The following is a description of the basis on which Exhibit: Financials - 16 has been prepared.

(1) Figures for net income (loss), deferred taxes, and for depreciation and amortization, are taken from the C&C forecast of funds generated as of September 1956. (See Exhibit: Financials - 15.) This C&C forecast is based on timely acquisition (meaning prior to December 31, 1960) of the 33 Boeing and the 30 Convair jet transports.

(2) It (the projection of money requirements) makes no allowance for the sale of property.

(3) Like all projections of money requirements included in this report, it makes no allowance for the cost of required new capital such as interest, commitment fees, agency fees, etc., although it does allow for such costs with respect to the Series A Flight Equipment Notes.

(4) It provides for the capital expenditure program as projected by PWCo as of September 1956. And -

(5) It starts with the amount of reconstructed TWA working capital as of September 30, 1956 and provides for a desirable working capital of $10 million excluding Flight Equipment Expendable Parts.

The projection shows, on the foregoing basis, the amount of new money (meaning from outside sources) required quarter by quarter and cumulatively from September 30, 1956. The following tabulation sets forth the figures in summarized year-by-year form.

TWA
Projection of Money Requirements
as of September 1956

	By Period	Cumulative from September 30, 1956
	--------Millions----------	
1956 - Fourth Quarter	$ (4.2)	$ (4.2)
1957 - Year	65.2	61.0
1958 - Year	(3.5)	57.5
1959 - Year	78.6	136.1
1960 - Third Quarter - The Peak Point ..		233.5
1960 - Year	89.6	225.7
1961 - Year	(79.9)	145.8

( ) Denotes red figure.

Thus, the September 1956 projections indicated a peak requirement, by the 1960 third quarter, of $233.5 million, which was $163.5 million more than the $70 million unused portion of the 1955 mortgage commitment. The projections indicated, however, that the availability of the $70 million commitment should enable TWA to get by without additional outside financing until about the first quarter of 1959.

Exhibit: Financials-17 is a projection, as of September 1956, of TWA's "leeway" for incurrence of additional funded debt under the restrictive provision of the Flight Equipment Mortgage. The projection indicates that in the third quarter of 1960, the period of expected peak money requirement, TWA could not have outstanding more than $64.1 million of additional funded debt

(3) Like all projections of money requirements included in this report, it makes no allowance for the cost of required new capital such as interest, commitment fees, agency fees, etc., although it does allow for such costs with respect to the Series A Flight Equipment Notes.

(4) It provides for the capital expenditure program as projected by PWCo as of September 1955. And -

(5) It starts with the amount of reconstructed TWA working capital as of September 30, 1956 and provides for a desirable working capital of $10 million excluding Flight Equipment Expendable Parts.

The projection shows, on the foregoing basis, the amount of new money (meaning from outside sources) required quarter by quarter and cumulatively from September 30, 1956. The following tabulation sets forth the figures in summarized year-by-year form.

TWA
Projection of Money Requirements
as of September 1956

	By Period	Cumulative from September 30, 1956
	------- Millions -------	
1956 - Fourth Quarter	$ (4.2)	$ (4.2)
1957 - Year	65.2	61.0
1958 - Year	(3.5)	57.5
1959 - Year	78.6	136.1
1960 - Year	89.6	225.7
1961 - First Quarter - The Peak Point		227.9
1961 - Year	(79.9)	145.8

( ) Denotes red figure.

Thus, the September 1956 projections indicated a peak requirement, by the 1961 first quarter, of $227.9 million, which was $157.9 million more than the $70 million unused portion of the 1955 mortgage commitment. The projections indicated, however, that the availability of the $70 million commitment should enable TWA to get by without additional outside financing until about mid-1959.

Exhibit: Financials - 17 is a projection, as of September 1956, of TWA's "leeway" for incurrence of additional funded debt under the restrictive provision of the Flight Equipment Mortgage. The projection indicates that in the first quarter of 1961, the period of expected peak money requirement, TWA could not have outstanding more than $41.0 million of additional funded debt

(over and above the $170,000,000 Series A Notes) without breaching the 60% funded debt to net tangible assets voluntary action covenant of the Mortgage. Thus, in September 1956 it would have been clear that further financing to meet the peak need by the third quarter of 1960 would have to include the sale of some form of junior security.

In summary, then, TWA's financial posture at September 30, 1956 was about as follows: It had experienced sizable operating losses during the nine-month period then ended, and C&C was forecasting further losses in 1957. TWA had a projected peak requirement for $163.5 million in new outside funds (over and above what had been provided for in the 1955 mortgage financing) and it appeared that some form of junior security would have to be included in the financing of this requirement. But the new money did not appear to be needed before the first quarter of 1959, almost 2-1/2 years hence.

We conclude that under the circumstances prevailing in September 1956 we would have recommended to TWA that it not attempt, at that time, to formalize further financing arrangements even though all indications were that it would have to do so later. We believe that TWA would have held conversations with its major institutional lenders to advise them of the enlargement of its projected money requirements, indicating (a) that it would be approaching them at a later date to discuss further borrowing arrangements, and (b) that it recognized the indicated need for junior financing prior to or in conjunction therewith.

It would not have been practical, in September 1956, to attempt to pinpoint a target date for a financing two years or so away. We believe that it would have been logical to plan in terms of a financing sometime in the latter part of 1958 or early in 1959. However, since the junior financing would doubtless involve the sale of common stock, either directly or through the use of a convertible security or warrants, we believe that TWA and we, as their investment bankers, would have been keeping a weather eye on the market for airline securities with a view toward a possible earlier financing should stock market conditions permit.

XXI. Leased Aircraft - 1957

TWA subleased five Lockheed L1049H aircraft which HTCo leased partly from California Eastern Aviation and partly from Resort Airlines.(*) Sublease

(*) We say "partly" because a change in ownership of one of the aircraft took place during the term of the sublease.

(over and above the $170,000,000 Series A Notes) without breaching the 60% funded debt to net tangible assets voluntary action covenant of the Mortgage. Thus, in September 1956 it would have been clear that further financing to meet the peak need by 1961 would have to include the sale of some form of junior security.

In summary, then, TWA's financial posture at September 30, 1956 was about as follows. It had experienced sizable operating losses during the nine-month period then ended, and C&C was forecasting further losses in 1957. TWA had a projected peak requirement for $157.9 million in new outside funds (over and above what had been provided for in the 1955 mortgage financing) and it appeared that some form of junior security would have to be included in the financing of this requirement. But the new money did not appear to be needed before mid-1959, over 2-1/2 years hence.

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payments began August 14, 1957. The aircraft were returned (one was destroyed) on various dates from January 10, 1961 to November 18, 1961, when the sublease was terminated. None of the aircraft was purchased by TWA. Lease payments were on the following basis.

For two of the aircraft - $40,000 per month per aircraft up to October 31, 1958 and $34,367 per month per aircraft thereafter, plus $16,066 per month for related spare parts for the two aircraft.

For the three other aircraft - $40,000 per month per aircraft plus $17,875 per month for related spare parts for all three aircraft.

$15.00 per engine (including spare engines) for each hour since last overhaul at time returned on termination of lease, less number of hours since overhaul on delivery at commencement of lease.

$12.50 per hour since last major overhaul on termination less number of hours flown between overhaul and commencement of lease.

The sublease was on a "net" basis, i.e., TWA paid maintenance and insurance costs. We are advised that monthly and annual rentals worked out at the following amounts.

		Monthly	Annual
Aircraft:			
Nos. 1251 and 1252	@ $34,367	$ 68,734	$ 824,808
Nos. 1253, 1254 and 1255	@ 40,000	120,000	1,440,000
Total Aircraft		$188,734	$2,264,808
Spare Parts:			
2 aircraft		$ 16,066	$ 192,792
3 aircraft		17,875	214,500
Total Spare Parts		$ 33,941	$ 407,292
Total Rental		$222,675	$2,672,100

In this report we are assuming that TWA had the identical sublease, or a direct lease on identical terms, from one or another outside party.

We realize that the Flight Equipment Mortgage has a provision against leasing of Flight Equipment which would have required TWA to obtain the necessary consents of the holders of the Series A Notes prior to entering into leasing arrangements with respect to the five Lockheed L1049H aircraft. We are assuming, for purposes of this report, that TWA could have obtained such consents.

XXII. The TWA Reconstructed Situation

1957 Through Mid-1958

We believe it reasonable to assume that TWA would have borrowed another $50 million under the 1955 Loan Agreement on April 1, 1957, and that on January 1, 1958 it would have borrowed the $20 million then remaining

available to it under such Loan Agreement. Thus, the takedowns under the 1955 Loan Agreement may be summarized as follows:

October 1, 1955	$ 50 million
July 1, 1956	50 "
April 1, 1957	50 "
January 1, 1958	20 "
Total	$170 million

Reconstructed generation of funds from internal sources for the 12 months ended September 30, 1957 turned out to be $13.9 million higher than forecast by C&C in September 1956 (including $3.0 million from plane sales which had not been allowed for in the September 1956 C&C forecast). However, in the last quarter of 1957 internal cash flow (reconstructed) was $4.8 million lower than the forecast for that quarter. The cash flow continued to lag behind the forecast in each of the next two quarters. The cumulative "lag" for the period from September 30, 1956 to June 30, 1958 was $3.5 million. (See Exhibits: Financials 15, 29 and 30.)

TWA committed itself, in the fourth quarter of 1957, to take over the purchase contract for four L1649A piston aircraft from Linee Aeree Italiene (LAI). Historically, TWA also committed itself in the fourth quarter of 1957 to purchase four L1049H piston aircraft. For the purposes of this report, Cahill, Gordon, Reindel & Ohl have instructed us to assume that these commitments were entered into, just as they were historically. Expenditures for these eight piston aircraft, however, were not included in the PWCo Projections of Capital Expenditures as of September 1955 and September 1956 because they were not foreseen as of those dates. Net cash expenditures by TWA for these aircraft totaled $17.3 million and were made as follows:

Year	Quarter	Four L1649As	Four L1049Hs	Total Expenditures
		millions		
1957	4	$ 7.6(*)	$ 2.2	$ 9.8
1958	1	-	-	-
1958	2	0.9	6.5	7.4
1958	3	-	0.1	0.1
	Total	$ 8.5(*)	$ 8.8	$17.3

(*) Net of proceeds from sale of LAI stock.

We believe it reasonable to assume that payment for these aircraft would have been provided out of the final takedown of $20 million Series A Mortgage Notes on January 1, 1958.

As a result of the foregoing factors, TWA would have been aware, by mid-1958, that funds required from outside sources to meet projected capital expenditures would be larger than indicated by the September 1956 projection. Timing of the money requirement had not changed, however. It appeared that the airline should be able to meet its scheduled progress payments on the jets, and its other capital requirements, without obtaining new funds from outside sources until the spring or summer of 1959.

TWA, however, was on "thin ice" with respect to the funded debt restrictions of the Flight Equipment Mortgage. Exhibit: Financials - 27 indicates that throughout the first half of 1958 TWA's reconstructed funded debt as a percentage of net tangible assets would have hovered right around the 60% figure set forth in the voluntary action covenant of the funded debt limitation. It did not appear that there was any immediate danger of reaching the 65% default level.

Under the circumstances outlined above it is probable that TWA would have given consideration to doing in 1958 some portion of the junior financing which had tentatively been scheduled for 1959, the purpose of such a step being to provide some additional "cushion" beneath its outstanding funded debt and thereby avoid the possibility of default under the 65% provision of the Flight Equipment Mortgage. Since junior financing would undoubtedly involve the issuance of common stock in one form or another, it is appropriate that we examine the market conditions for TWA's shares and for airline stocks generally which prevailed in early 1958.

The following tabulation shows a comparison of the market prices of TWA stock with the Standard & Poor's Index of Air Transport Stocks. It also shows the AIMV of TWA and the book value of TWA shares.

TWA Stock Market and Related Figures

	S. & P.'s Index of Air Transport Stocks	TWA - Historical			
		Market Price per share	No. of Shares Outstanding End of Month	AIMV (Approx.)	Book Value per share End of Month
			-----(000 omitted)-----		
December 31, 1953	15.80	12-7/8	3,333	$42,900	$17.04
December 31, 1954	27.93	29-3/4	3,337	99,300	20.14
December 31, 1955	31.19	25-1/4	3,337	84,300	21.76
December 31, 1956	29.97	19	3,337	63,400	21.07
December 31, 1957	18.45	10-1/4	6,674(*)	68,400	16.77
January 1958	20.89	12-1/2	6,674	83,400	
February 1958	21.57	12-1/4	6,674	81,800	
March 1958	21.43	12-3/4	6,674	85,100	15.09
April 1958	20.28	12-1/8	6,674	80,900	
May 1958	21.08	12-1/2	6,674	83,400	
June 1958	22.52	12-1/4	6,674	81,800	14.96
Percent Advance (Decline):					
Dec. 1953 - Dec. 1957	17%	(20)%		59%	
Dec. 1957 - June 1958	22%	20%		20%	

(*) 3,337,036 shares issued and sold in 1957.

Note: Figures for Standard & Poor's Index are monthly averages of weekly price indexes. (See Exhibit: General - 6.) TWA stock prices are month end closing prices. (See Exhibit: Trans World - 9.)

It will be noted that S. & P.'s Index of Air Transport Stocks had been declining throughout 1956 and 1957, and in March 1958 stood at 21.43, a little above the low point of 18.45 reached in December 1957. The price of TWA common had also declined steadily since reaching a high of 31-5/8 in mid-1955. The closing price of TWA common at the end of March 1958 was 12-3/4 as compared with a per share book value (historical) of $15.09 as of the same date.

The following excerpts from Moody's Stock Survey may be considered indicative of what investors were being advised as regards airline stocks in the first half of 1958.

In its February 3, 1958 issue, the Survey says:

"Airlines have said that the 6.6% temporary passenger-fare increase approved in January by the CAB is inadequate. Nevertheless it will almost certainly result in higher net income in 1958 for most - and perhaps all - of the companies.

"For example, we estimate that the increase alone would mean additional net income of about $1.15 a share for American Airlines, $2.90 for Eastern Air Lines, 85¢ for TWA, and $2.25 for United. These figures may be compared with our estimates of the same companies' earnings in the difficult year of 1957: American, $1.30; Eastern, $2.50; TWA, a 75¢ deficit; and United, $2.35. * * * * * * *

"Airlines' very large orders for new planes, especially costly jets, may leave them with difficult financing problems in spite of this fare rise. Thus we do not feel that the CAB action is sufficient reason for general bullishness toward airline stocks.

"At current depressed prices, they appear worth holding as long-term speculations. And we think that the per-share impact of the new rates would be large enough for Delta (20½), Eastern (35) and United (26) to make their stocks good values, and worth accumulating as speculations for later appreciation."

An article entitled "Selected Speculations in Airline Stocks", in the June 30, 1958 issue of Moody's Stock Survey says:

"For more than two years, airline earnings have worked steadily downward, and prices of domestic trunkline stocks have reflected this. Most look well deflated in spite of a moderate recovery after this year's 6.6% fare increase. Expectations for 1958 arouse little enthusiasm in us for airline stocks, but we see reasons for a good recovery in 1959 - and the market should begin to anticipate this.

"Though airline traffic has increased fast, these can't be called growth stocks. Instead, the speculative equities are primarily vehicles for short-term trading. On the year-ahead prospect, we recommend Eastern Air Lines and Pan American World Airways among the larger carriers, * * * * *

"Jets and turboprops will greatly improve riding qualities, helping business. Thus another round of orders for such planes (the first began in 1955) seems ahead, and full conversion will evidently be achieved no later than 1964. * * * * We figure that by the end of 1963 every carrier reviewed here will have debt (including capitalized rentals) above 60% of total capitalization.

"No line dares to stay out of this competition, though industry finances are far from comfortable. Several lines - most probably Capital, Delta, Northwest and TWA, may well have to do more equity financing. * * * * * * *"

So, throughout the first half of 1958 TWA's shares, and the shares of its principal competitors, were selling at prices only slightly recovered from their then recent lows. But the market generally seemed to be expecting an improved performance from airline shares during the forthcoming months. Since TWA's period of outside money need still appeared to be at least twelve months away, we believe that we would have recommended that TWA adhere to its plans for a financing in 1959 rather than attempt to accelerate part of the program. It appeared to be a good business risk that market conditions for an equity offering by TWA (which would clearly be the cornerstone of the financing) would be better by mid-1959 than they were in mid-1958.

Thus, commencing in the summer of 1958, we believe that TWA, in consultation with its lawyers, accountants, investment bankers, institutional lenders, etc., would have been engaged in the task of designing and preparing for a major financing in the spring or summer of 1959, involving the sale of both senior and junior securities.

XXIII. Comparative Data TWA and Its Competitors

Early 1959

We now proceed to present various earnings and other data relating to TWA and its principal competitors which would have been of interest to prospective investors in the early part of 1959.

Comparative Earnings 1954-1958

The tabulation on the following page shows the results of TWA operations (historical and reconstructed) year by year, in comparison with its three main competitors in the five-year period 1954-1958, inclusive. (See Exhibit: Comparisons - 4 and Exhibit: Financials - 29.)

TWA Ex. 5(a), page 45 of 75
(Drexel Harriman Ripley, Inc. Report - Parts I & II)

	TWA				
	Historical	Reconstructed	PAA	AAL	UAL
	(Millions)				
Total Operating Revenue:					
1954	$ 203.7	$ 203.7	$ 213.5	$ 214.8	$ 200.7
1955	217.4	217.4	238.1	260.8	235.6
1956	240.4	240.4	288.5	291.8	262.8
1957	263.7	263.7	312.7	305.9	281.9
1958	284.8	284.8	313.2	317.2	316.8
Total	$1,210.0	$1,210.0	$1,366.0	$1,390.5	$1,297.8
Net Operating Income (Loss):					
1954	$ 22.7	$ 22.7	$ 15.0	$ 20.9	$ 21.9
1955	11.5	11.5	13.0	39.3	24.7
1956	(4.1)	(4.1)	23.2	37.0	24.2
1957	(4.5)	(4.4)	14.3	18.0	12.3
1958	(0.4)	(0.3)	7.2	26.3	30.6
Total	$ 25.2	$ 25.4	$ 72.7	$ 141.5	$ 113.7
Net Income (Loss):					
1954	$ 10.3	$ 10.3	$ 9.7	$ 11.4	$ 9.6
1955	5.4	4.8	10.7	18.6	11.2
1956	(2.3)	(2.7)	14.7	19.6	14.7
1957	(1.6)	(1.8)	8.1	10.9	7.9
1958	(1.8)	(1.7)	5.1	16.1	14.3
Total	$ 10.0	$ 8.9	$ 48.3	$ 76.6	$ 57.7
Revenue Airplane Miles Flown:					
1954	89.1	89.1	67.3	99.7	98.3
1955	97.2	97.2	80.1	121.7	110.0
1956	107.5	107.5	94.8	133.4	121.7
1957	118.6	118.6	102.2	143.1	130.4
1958	117.8	117.8	103.9	134.4	135.5
Total	530.2	530.2	448.3	632.3	595.9
Available Seat Miles:					
1954	4,768	4,768	3,713	5,095	5,010
1955	5,405	5,405	4,327	6,409	5,892
1956	6,202	6,202	5,128	7,161	6,734
1957	6,985	6,985	5,784	7,926	7,537
1958	7,256	7,256	6,033	7,645	8,090
Total	30,616	30,616	24,985	34,236	33,263
For the Five Years 1954-1958 Net Operating Income:					
Per Revenue Airplane Mile	¢ 4.75	4.79	16.22	22.39	19.08
Per Million Available Seat Miles	$ 823.	830.	2910.	4135.	3418.
For the One Year - 1958 Net Operating Income (Loss):					
Per Revenue Airplane Mile	¢ (0.32)	(0.28)	6.97	19.60	22.55
Per Million Available Seat Miles	$ (52.)	(41.)	1199.	3446.	3777.

Operating results of each of the four lines during the five-year period showed the effects of the high costs of preparation for the introduction of jet equipment. TWA, however, with losses from operations in three out of the five years, turned in by far the poorest performance of the four lines.

TWA Reconstructed Income Account 1954 - 1958

The following tabulation shows the TWA income account (reconstructed) in more detail for the five years 1954-1958 inclusive. (See Exhibits: Financials - 2.) and 29.)

	1954	1955	1956	1957	1958	Aggregate 1954-1958	Annual Average
	(millions)						
Gain(Loss) from Operations before deprec. and amort.	$ 44.2	$ 31.8	$ 16.4	$ 22.3	$ 31.2	$145.9	$ 29.2
Depreciation and Amortization Charges	21.5	20.3	20.5	26.7	31.5	120.5	24.1
Gain(Loss) from Operations	$ 22.7	$ 11.5	$ (4.1)	$ (4.4)	$ (0.3)	$ 25.4	$ 5.1
Gain(Loss) on Sale of Property and Equipment	-	0.6	0.6	1.2	0.7	3.1	0.6
Other Income Credits(Charges) - Net	0.1	0.6	0.7	2.2	0.5	4.1	0.8
Income(Loss) before Interest and Income Taxes	$ 22.8	$ 12.7	$ (2.8)	$ (1.0)	$ 0.9	$ 32.6	$ 6.5
Net Interest Expense	1.5	2.6	2.7	3.3	4.0	14.1	2.8
Income(Loss) before Income Taxes	$ 21.3	$ 10.1	$ (5.5)	$ (4.3)	$ (3.1)	$ 18.5	$ 3.7
Income Taxes	11.0	5.3	(2.8)	(2.5)	(1.4)	9.6	1.9
Net Income (Loss)	$ 10.3	$ 4.8	$ (2.7)	$ (1.8)	$ (1.7)	$ 8.9	$ 1.8
Net Income(Loss) per share	$ 3.10	$ 0.72	$(0.40)	$(0.27)	$(0.25)		$ 0.27
Shares outstanding - end of year (000)	3,337	6,673	6,674	6,674	6,674		6,674

TWA News Releases

The following are brief summaries of the two TWA news releases put out in the first half of 1959.

April 1, 1959

Increased revenues and decreased expenses per revenue ton mile produced a $10,196,000 operating profit for TWA during the second half of 1958 as compared with an operating loss of $1,305,000 for the 1957 period * * * * * * * *.

* * * * * * * * *

Despite an operating loss of $10,571,000 for the first six months of 1958 and a costly 17-day strike in the final half, the full year operating loss was reduced to $375,000 compared with operating losses of $4,539,000 and $4,131,000 for the years 1957 and 1956 * * * * * * * * *.

* * * * * * * * *

The summary:

	1958	1957
	-------$000--------	
Operating Revenues	284,841	263,664
Net Loss	1,764	1,558
Per Share Loss (*)	26¢	23¢

(*) Based on 6,674,155 shares outstanding on December 31, 1958

April 23, 1959

Paced by record operating revenues for the quarter ending March 31, TWA reduced its net loss after taxes for the period to $3,778,000 from $10,401,000 in the same period last year * * * * * * * *

The first quarter results include an increase in depreciation charges of $1,722,000 due to a new policy effective January 1, 1959 which assigned lower residual values to latest type aircraft and engines.

* * * * * * * * *

The summary:

	1959	1958
	-------$000--------	
Total Revenues	70,638	59,544
Net Loss after taxes	3,778(*)	10,401(*)

(*) Figures include income tax credit adjustment of $379,000 in 1959 and $662,000 in 1958.

Interim Earnings - Early 1959
TWA and its Competitors

The following are summaries of items appearing in Moody's Transportation Manual - current section from January 1, 1959 to June 30, 1959, in regard to TWA and its three main competitors. The date preceding each item is the date of the Moody's supplement in which the item appeared.

TWA

March 28, 1959

Earnings, January (CAB report):

	1959	1958
Net income	$ 62,555	$ d3,646,000

April 3, 1959

Earnings, years ended December 31:

	1958	1957
Operating revenue	$284,840,956	$263,664,554
Net loss	1,764,381	1,558,446
Earned per share	d$0.26	d$0.23
No. of shares	6,674,155	6,674,155

April 14, 1959

Earnings, February (CAB report):

	1959	1958
Net loss	$ 2,898,118	$ 4,811,000
Earned per share	d$0.43	d$0.72
No. of shares	6,674,155	6,674,113

May 22, 1959

First half profit expected in place of $11,900,000 loss year ago. Company had profit in April though loss was expected. Load factors in jets are averaging 97%.

May 26, 1959

Earnings, 3 months to March 31 (CAB report):

	1959	1958
Net loss	$ 3,778,095	$ 10,401,000
Earned per share	d$0.57	d$1.56
No. of shares	6,674,155	6,674,113

June 2, 1959

Earnings, March:

	1959	1958
Net loss	$ 942,000	$ 2,606,000
Earned per share	d$0.14	d$0.39
No. of shares	6,674,155	6,674,113

June 12, 1959

Earnings, April (CAB report):

	1959	1958
Net income	$ 735,273	$ d1,882,000
Earned per share	$0.11	d$0.28

TWA Ex. 5(a), page 49 of 75
(Drexel Harriman Ripley, Inc. Report - Parts I & II)

PAA

March 20, 1959

Earnings, January (CAB report):

	1959	1958
Net loss	$ 820,000	$ 1,405,000

April 21, 1959

Earnings, February (CAB report):

	1959	1958
Net loss	$ 1,319,000	$ 1,425,000
Earned per share	d$0.22	d$0.23

2 months to February 28:

Net loss	$ 2,138,000	$ 2,830,000
Earned per share	d$0.33	d$0.46

May 1, 1959

Income Account, years ended December 31:

	1958	1957
Net Income	$ 5,090,000	$ 8,241,000

May 22, 1959

Earnings, three months to March 31 (CAB report):

	1959	1958
Net loss	$ 2,498,586	$ 3,360,451
Earned per share	d$0.38	d$0.55
No. of shares	6,573,348	6,136,120

June 12, 1959

Earnings, April (CAB report):

	1959	1958
Net loss	$ 364,000	$ 522,000
Earned per share	d$0.06	d$0.09

4 months to April 30:

Net loss	$ 2,863,000	$ 3,883,000
Earned per share	d$0.44	d$0.63
No. of shares	6,573,348	6,136,120

January 16, 1959

Proposed equity financing in 1959 may be undertaken despite completion of financing for equipment program, in order to increase equity base and to take advantage of market conditions, according to W. J. Hogan, executive vice-president-finance.

March 20, 1959

Consolidated Earnings, years ended December 31:

	1958	1957
Net after taxes	$ 16,080,252	$ 10,885,877
Earnings, common share	$1.97	$1.31

April 10, 1959

Earnings, January (CAB report):

	1959	1958
Net profit	$ d1,193,398	$ 625,434
Earnings, common share	d$0.20	$0.07

Consolidated Income Account, years ended December 31:

	1958	1957
Net profit	$ 16,080,252	$ 10,885,877

Five-Year Common Stock Record (in $):

	1958	1957	1956	1955	1954
Earnings per share ...	(1)1.94	(1)1.38	(1)2.40	(1)2.32	(1)1.51
Dividends	1.00	1.00	1.00	.80	.60
High	25-3/4	24-1/8	26-1/4	29-1/8	22-5/8
Low	14-3/8	14	22	20-1/2	11-1/2

Number of shares: 1958, 8,011,048; 1957, 7,898,192; 1956, 7,888,376; 1955, 7,873,362; 1954, 6,636,245.

(1) Based on average number of shares would be: 1958, $1.97; 1957, $1.31; 1956, $2.44; 1955, $2.42; 1954, $1.54.

May 21, 1959

Consolidated Earnings, March:

	1959	1958
Net profit	$ 868,087	$ 1,143,651

3 months to March 31:

Earnings, common share	d$0.12	$0.19
No. of common shares	8,107,454	7,891,792

May 26, 1959

Consolidated Earnings, April:

	1959	1958
Net profit	$ 2,131,982	$ 1,123,712

4 months to April 30:

Net profit	$ 1,395,498	$ 2,908,672
Earnings, common share	$0.15	$0.33

AAL
(continued)

June 26, 1959

Consolidated Earnings, May:

	1959	1958
Net income	$ 2,047,121	$ 1,418,220
5 months to May 31:		
Net profit	$ 3,504,132	$ 4,326,892
Earnings, common share	$0.41	$0.51

Private financing arranged through Lazard Freres & Co., New York, included sale of $30,000,000 5% notes due 1996, and $40,000,000 5% subordinated convertible debentures due 1985. Proceeds for general corporate purposes, including acquisition of jet aircraft.

UAL

March 10, 1959

Earnings, January (sys.):

	1959	1958
Net income	$ 1,074,801	$ d284,408
Earnings, common share	$1.00	d$0.07
Earnings as corrected; see below	$0.29	d$0.08

March 13, 1959

Earned Per Share - Correction: For month of January, earned per share was $0.29 in 1959 and d$0.08 in 1958, not as reported * * * *.

Debentures Sold: On February 27, $39,600,000 additional series D 4s, due 1981, were taken down. This was fourth and last installment under contracts dated December 22, 1955, and brought total amount of series D debentures sold to $120,000,000. * * * * *

March 17, 1959

Income Account, years ended December 31:

	1958	1957
Net profit	$ 14,300,262	$ 7,888,303

Five-Year Common Stock Record (in $):

	1958	1957	1956	1955	1954
Earnings per share	3.88	2.28	4.55	3.35	3.52

April 7, 1959

Earnings, February:

	1959	1958
Net loss	$ 467,060	$ 1,139,722
Earnings, common share	d$0.13	d$0.33
2 months to February 28:		
Net profit	$ 607,741	$ d1,424,130
Earnings, common share	$0.16	d$0.41

U A L
(continued)

May 5, 1959

Sales and Earnings, three months to March 31:

	1959	1958
Net after taxes	$ 1,851,710	$ d384,593
Earned per share	$0.50	d$0.11

May 12, 1959

Earnings, March:

	1959	1958
Net income	$ 1,243,969	$ 1,039,537
Earnings, common share	$0.34	$0.30

3 months to March 31:

Net income	$ 1,851,710	$ d384,593
Earnings, common share	$0.50	d$0.11

June 5, 1959

Earnings (system), April:

	1959	1958
Net income	$ 554,821	$ 1,367,280
Earnings, common share	$0.15	$0.39

4 months to April 30:

Net income	$ 2,406,531	$ 982,687
Earnings, common share	$0.65	$0.28

Dividend Records -
TWA and its Competitors
1958-1959

In 1958 and 1959:

TWA paid no dividends.

PAA was paying regular quarterly cash dividends of 20¢ per share (80¢ annual rate).

AAL was paying regular quarterly cash dividends of 25¢ per share ($1.00 annual rate).

UAL was paying regular quarterly cash dividends of 12.5¢ per share plus semi-annual 3% stock dividends (annual rate - 50¢ in cash and 6% in stock).

XXV. The General Stock Market Situation

1958 and the First Half of 1959

The stock market in general was strong and advancing throughout 1958 and the first half of 1959. The Dow-Jones Industrials were as follows:

	High	Low
January 1958	451	439
June 1958	479	466
January 1959	598	583
June 1959	644	618
Percent Advance Jan. 1958 - June 1959	43%	41%
Percent Advance Jan. 1959 - June 1959	8%	6%

The market quotations for the common stocks of TWA's main competitors, as reported by the Bank and Quotation Record, were as follows. (TWA will be dealt with separately.)

	PAN		AAL		UAL (*)	
	High	Low	High	Low	High	Low
January 1958	15-3/8	12-3/4	17-7/8	14-3/8	27-1/8	21-1/4
June 1958	17	15-3/4	20-1/4	18-5/8	27-7/8	26-1/8
January 1959	30-1/8	22-1/8	30-3/4	24-1/8	37-3/4	30-7/8
February 1959	28-3/4	25-3/4	30-1/2	27-3/4	36-7/8	33
March 1959	30-5/8	26-3/4	32-3/8	28-1/4	38-1/8	34-1/8
April 1959	35-1/4	30	33-3/8	29-1/4	40-3/8	35-1/4
May 1959	33	29-1/8	31-3/8	27-5/8	40-7/8	36-1/8
June 1959	30-1/8	27-1/8	31-1/4	27-5/8	41-3/8	35-3/8
Percent Advance -						
Jan. 1958 - June 1959	96%	113%	75%	92%	53%	66%
Jan. 1959 - June 1959	-	23%	2%	15%	10%	115%

(*) UAL prices are not adjusted to reflect retroactively the 3% stock dividends paid to holders of record May 15, 1958, November 14, 1958 and May 15, 1959.

From the foregoing figures, it will be noted that over the one and one half year period January 1958 - June 1959 the stocks of TWA's main competitors advanced in greater amounts, percentagewise, than the Dow-Jones Industrials.

XXV. The TWA Stock Market Situation

1958 and the First Half of 1959

The following tabulation shows a comparison of the market prices of TWA stock with the Standard & Poor's Index of Air Transport Stocks. It also shows the AIMV of TWA and the book value of TWA shares.

TWA Stock Market and Related Figures

	S. & P.'s Index of Air Transport Stocks	TWA - Historical: Market Price per Share	TWA - Historical: No. of Shares Outstanding End of Month	TWA - Historical: AIMW (Approx.)	TWA - Historical: Book Value per share End of Month
			---- (000 omitted) ---		
January 1958	20.89	12-1/2	6,674	$ 83,400	$
June 1958	22.52	12-1/4	6,674	81,800	14.95
January 1959	31.35	18-1/8	6,674	121,000	16.49
February 1959	32.20	18-1/2	6,674	123,500	16.05
March 1959	33.82	18-7/8	6,674	126,000	15.91
April 1959	36.01	20-1/4	6,674	135,100	16.02
May 1959	34.98	21-3/4	6,674	145,200	16.36
June 1959	35.00	23-1/4	6,674	155,200	16.71
Percent Advance-					
Jan. 1958 - June 1959	67.5%	86.0%			
Jan. 1959 - June 1959	11.6%	28.3%			

Note: Figures for Standard & Poor's Index are monthly averages of weekly price indexes. (See Exhibit: General - 6.) TWA stock prices are month end closing prices. (See Exhibit: Trans World - 28.)

TWA, although operating at a loss in the first quarter of 1959, was sharply reducing its loss in that quarter as compared with the corresponding quarter of 1958. TWA stock advanced strongly in price during the first half of 1959, in fact, more than double that of the Standard & Poor's Index of Air Transport Stocks. And it was selling well over its book value.

The following tabulation shows the volume of trading in TWA stock on the NYSE during 1958 and the first half of 1959, expressed in terms of numbers of shares and in approximate dollar amounts.

Volume of Trading - TWA Common Stock (*)

	1958: Volume of Trading Shares(*)	1958: Approx. Price per sh. (**)	1958: Approx. Dollar Volume	1959: Volume of Trading Shares(*)	1959: Approx. Price per sh. (**)	1959: Approx. Dollar Volume
January	54,900	$12	$ 659,000	149,300	$18	$2,687,000
February	57,700	13	750,000	56,100	18	1,010,000
March	33,100	13	430,000	105,100	19	1,997,000
April	32,400	12	389,000	143,100	21	3,005,000
May	61,700	13	802,000	98,700	22	2,171,000
June	41,900	12	503,000	96,900	23	2,229,000
July	71,200	13	926,000			
August	78,100	14	1,093,000			
September	84,800	14	1,187,000			
October	146,900	15	2,204,000			
November	82,900	16	1,326,000			
December	74,200	16	1,187,000			

(*) See Exhibit: Trans World - 29.
(**) The figures for market prices are the mean of the high and low prices during each month, rounded to the nearest dollar.

The following tabulation has been constructed to give a comparison of the market prices of TWA stock with its book values at year ends over the five-year period preceding 1959, and at the middle of 1959.

TWA - Relationship of Book Value to Market Price

	Historical			
	Book Net Worth	Number of Shares Outstanding	Book Value per share	Market Price per share
	(000 omitted)			
December 31, 1954	$ 67,207	3,337	$20.14	29-3/4
December 31, 1955	72,621	3,337	21.76	25-1/4
December 31, 1956	70,299	3,337	21.07	19
December 31, 1957	111,930	6,674(*)	16.77	10-1/4
December 31, 1958	110,166	6,674	16.51	16-7/8
June 30, 1959	111,528	6,674	16.71	23-1/4

(*) Including 3,337,036 shares issued and sold in 1957.

Note: Market prices are month end closing prices. (See Exhibit: Trans World - 9.)

We now turn to the relationship of market prices to earnings per share for TWA and its main competitors. For this purpose we use the "Investment Guide Cards" put out by Standard & Poor's Corporation in 1959. The figures reported on these cards, for the five years preceding 1959, are as shown on the following tabulation. The averages have been calculated by HRCo.

	Earnings Per Share			
	TWA Historical	PAA	AAL	UAL(**)
1954	$ 3.10	$ 1.71	$ 1.51	$ 3.62
1955	1.62	1.66	2.32	3.36
1956	(0.69)	2.31	2.40	4.55
1957	(0.23)	1.35	1.31	2.28
1958	(0.27)	0.82	1.97	3.88
Average - 5 years 1954-1958	$ 0.71	$ 1.57	$ 1.90	$ 3.52
Average - 3 years 1956-1958	(0.40)	1.49	1.89	3.57
Average Market Price - April, May, June 1959 (*)	$21.85	$30.77	$30.08	$38.23

( ) Denotes loss.

(*) Figures are the average of the high and low prices taken from the Bank and Quotation Record.

(**) Neither the earnings per share nor the market prices of UAL have been adjusted for the small stock dividends paid in 1957, 1958 and 1959.

Notes:

PAA - The 1955 annual report shows $1.69 per share for 1954.

AAL - Standard & Poor's states that the figure of $1.51 per share for 1954 is before a "special credit" of $0.46 per share. Including such "special credit", earnings per share for 1954 would be $1.97; and the five-year average would be $1.99.

TWA and UAL show no corresponding differences in figures.

Translating the foregoing figures into price/earnings ratios (P/E), and using the Standard & Poor's figures of earnings per share, brings the following results:

	Price/Earnings Ratios - Times			
	TWA	PAA	AAL	UAL
Five-Year Average 1954-1958	30.8	19.6	15.8	10.9
Three-Year Average 1956-1958	-	20.7	15.9	10.7

Note: Prices taken at average market price - April, May, June 1959. Using the AAL figures including the "special credit" for 1954, the ratio for the five-year average 1954-1958 becomes 15.1 times (instead of 15.8 times).

It will be noted that TWA shows no figure for the P/E ratio for the three-year period 1956-1958, the reason being that TWA operated at a loss in each of the three years. Its three main competitors operated profitably in each of the five years 1954-1958. Nevertheless, as stated hereinbefore, TWA stock was strong in the market in early 1959, doubtless because of anticipated future operating profits.

We now turn to the "Recommendation" which is uniformly set forth at the top of each Investment Guide Card put out by Standard & Poor's, to see what investors were being advised by that service in the first half of 1959 in regard to the stocks of each of the four airlines.

T W A

The February 18, 1959 card says: "Fourth largest in the domestic field, this carrier is also a major international factor. While the route structure is favorable, operations are subjected to pronounced seasonable factors. Emphasis on Lockheed equipment in the past has placed the company at a competitive disadvantage domestically. While receipt of turbines on order would do much to remedy this situation, financing of this equipment still lies ahead. On the premise that a satisfactory solution to the jet financing problem will be found, speculative holdings may be retained."

The June 12, 1959 card says: "Fourth largest in the domestic field, this carrier is also a major international factor. While the route structure is favorable, operations are subjected to pronounced seasonal factors and the company has been at an equipment disadvantage in the past. Now, however, a fair number of jets should be in domestic service this summer and fall, suggesting that sharply improved results may lie ahead. Also, recent entry into the Florida market should eventually take up some of the seasonal slack. Thus, despite equipment financing problems and expected absence of cash dividends for some time, we would stay with speculative holdings."

P A A

The January 15, 1959 card says: "Pan American operates the largest air transportation system in the world, serving all continents and roughly 70 countries, and it operates a guided missile range for the Air Force at Cape Canaveral on a cost-plus-fixed-fee basis. Approximately 40 affiliated and associated enterprises are owned, including hotel chains, but earnings of these are not consolidated.

As new jet planes will give the company a substantial equipment advantage over competition for nearly a year, sharply higher earnings are expected in 1959, and the speculative stock is well worth holding at this time."

The May 11, 1959 card says: "The largest international airline in the world, Pan American should enjoy a substantial competitive edge in 1959 and perhaps longer by virtue of its new jet equipment. The high load factors in prospect suggest that record earnings are possible in 1959. Elimination of losses on the important Latin American Division by putting the more efficient jets into service could mean another sizable profits gain in 1960. In view of the favorable earnings trend and the expectation of continued impressive growth over the long run, the shares are recommended for purchase by speculative accounts seeking capital gains."

AAL

The April 2 and April 13, 1959 cards say: "The largest domestic trunkline, this carrier has a well-balanced route structure and should enjoy a decided competitive equipment edge in 1959 and possibly longer by virtue of its early introduction of jets and turboprops. With costs on the new equipment expected to compare favorably with existing transports and margins likely to be lifted materially by the high load factors on these planes, sharply higher profits are possible in 1959. Both the Common and Convertible Preferred have above-average attraction for appreciation."

UAL

The January 28, 1959 card says: "With a major rival now providing jet service which United will offer initially this fall, the line will be at a temporary competitive disadvantage. Also, in the absence of a volume stimulant through strikes on other airlines and with costs trending higher, an earnings decline for 1959 seems unavoidable. However, in light of United's strong basic position and favorable longer-range prospects, holdings should be retained."

The June 5, 1959 card says: "In the months immediately ahead, United will be faced with intense competition from rival jets, and little or no growth in volume is possible. Profits could slip drastically. However, the carrier will get its own jets aloft this fall, restoring much of its competitive position. In view of the company's sound basic position and good long-range outlook, we would continue to hold the shares, notwithstanding the possibility of nearby price weakness."

Thus, Standard & Poor's was advising investors to hold TWA, buy PAA and AAL, and hold UAL.

We now turn to Moody's Stock Survey to see what that service was advising investors in the first half of 1959 in regard to airline stocks. The following is quoted from the only article which Moody's published on the subject at that time.

The Airline Stocks as Earnings Turn Upward

In its March 16, 1959 issue, Moody's Stock Survey says: "An above-average 15% gain in traffic is in prospect in 1959 for the eleven airlines we review here. Profit margins should improve, too, and our tentative estimate is that the group's earnings will be double what they were in 1958. * * * * * * *

"The important earnings gains will be made by lines taking early delivery of jet or turboprop planes, or by those hurt by strikes in 1958. * * * * * * * * *

"Most financing for original jet orders is completed, but only American is known to have wrapped up negotiations for its second-round purchases.* American is one of the better financed airlines, and probably could handle its re-equipment program without an equity issue. As even American is known to be actively considering such financing, however, it seems apparent that no airline (except possibly Eastern, which recently negotiated a $25 million convertible issue) can be considered free from further equity financing in the near future. But the current investment enthusiasm for convertible debentures makes it reasonably certain that few, if any, straight stock sales will be undertaken." (Nothing said pro or con regarding TWA.)

Thus, Moody's Stock Survey published a relatively bullish article on the subject of airline stocks in the spring of 1959. And it appeared to be noncommittal in regard to a choice as between the various companies. Both Moody's and Standard & Poor's were emphasizing the importance of the coming jet airplanes.

XXVI. The TWA Reconstructed Situation

March 1959

The TWA reconstructed balance sheet as of March 31, 1959 (see Exhibit: Financials - 27) was as follows:

	-Millions-
Net Current Assets	$ 10.3
Total Net Property and Equipment	275.1
Flight Equipment Fund	-
Other Funds Restricted for Flight Equipment Purchases	1.1
Investments and Long-Term Prepayments	3.0
Total Tangible Assets, Less Current Liabilities	$289.5
Long-Term Debt	$170.2
Other Non-Current Liabilities	1.2
Deferred Federal Income Taxes	11.4
Reserve for Overhaul of Jet Aircraft	.1
Total Non-Current Liabilities and Deferred Credits	$182.9
Tangible Net Worth	$106.6
Deferred Debits	12.0
Book Net Worth	$118.6
Capital Stock	$ 33.4
Capital Surplus	61.2
Retained Earnings	24.0
Total Stockholders' Equity	$118.6
Funded Debt as % of Net Tangible Assets	59.1%

Thus, TWA reconstructed on March 31, 1959 had $10.3 million of working capital and $170.2 million of funded debt. The relationship of funded debt to net tangible assets was 59.1%. It had received, and paid for,

5 out of the 33 Boeing jet transports which it had ordered.

TWA's capital expenditure program, as projected by PWCo. as of March 1959, is summarized in the following tabulation. (See Exhibit: Financials - 19.)

	Property and Equipment			Training and Integration Costs and Other Deferred Debits	Total
	Jet Fleet	Piston Fleet	Ground and Nonoperating		
1959 - Last 3 quarters	$102.9	$ 0.1	$ 6.0	$ 10.1	$ 119.1
1960 - Year	144.3	-	8.0	15.0	167.3
1961 - Year	4.8	(1.2)	6.2	(0.3)	9.5
1962 - Year	4.3	(1.3)	4.7	(0.6)	7.1
1963 - Year	(1.2)	0.7	5.8	0.1	5.4
Total	$255.1	$(1.7)	$30.7	$ 24.3	$ 308.4

( ) Denotes red figure.

With respect to the foregoing projection, it should be noted that:

(1) It includes provision for progress and final payments for 28 Boeing and 30 Convair jet transports for delivery prior to the end of 1960. (The figures under "Jet Fleet" for years subsequent to 1960 pertain principally to rotable parts for these jet transports.) And -

(2) The figures are over and above the $75.2 million advance payments for aircraft and engines which are incorporated as a part of the book value of Flight Equipment in the reconstructed balance sheet as of March 31, 1959.

Exhibit: Financials - 21 shows a five-year projection of TWA's money requirements as they would have appeared in March 1959. The following is a description of the basis on which the Exhibit has been prepared.

(1) Figures for net income, deferred taxes, and figures for depreciation and amortization, are taken from the C&C forecast of funds generated as of April 1959. (See Exhibit: Financials - 20.) This C&C forecast is based on timely acquisition (meaning prior to December 31, 1960) of the 33 Boeing and 30 Convair jet transports.

(2) It (the projection of money requirements) allows for cash flow from sales of piston aircraft during the years 1959-1962, inclusive. (See Exhibit: Financials - 20.)

(3) Like all projections of money requirements included in this report, it makes no allowance for the cost of required new capital such as interest, commitment fees, agency fees, etc., although it does allow for interest on the Series A Flight Equipment Notes.

(4) It provides for the capital expenditure program as projected by PWCo as of March 1959. And -

(5) It starts with the amount of reconstructed TWA working capital as of March 31, 1959 and provides for a desirable working capital of $10 million excluding Flight Equipment Expendable Parts.

The projection shows, on the foregoing basis, the amount of new money (meaning from outside sources) required quarter by quarter and cumulatively from March 31, 1959. The following tabulation sets forth the figures in summarized year-by-year form.

T W A
Projection of Money Requirements
as of March 1959

	By Period	Cumulative from March 31, 1959
	Millions	
1959 - Second Quarter	$ 21.4	$ 21.4
1959 - Third Quarter	10.1	31.5
1959 - Fourth Quarter	37.3	68.8
1960 - Third Quarter - The Peak Point.		160.7
1960 - Year	82.3	151.1
1961 - Year	(92.1)	59.0
1962 - Year	(82.6)	(23.6)
1963 - Year	(76.3)	(99.9)

( ) Denotes red figure.

It will be noted that the March 1959 projections indicated a peak requirement, by the 1960 third quarter, of $160.7 million.

The above projection is distorted in the years 1961 through 1963 because, under the basic assumptions upon which our report has been prepared, the projection does not allow for major capital expenditures by TWA beyond September 15, 1960, the date by which the report assumes that TWA would have received all of the flight equipment and substantially all of the ground equipment for which we have been asked to provide financing. On the basis of such assumptions, however, the March 1959 projection would have indicated that TWA could expect to have a substantial amount of liquid funds, beginning in 1962, with which to meet outlays for new equipment and facilities over and above that which our program has been designed to finance.

XXVII. The Recommended 1959 Financing

In estimating the appropriate "mix" between junior and senior financing to meet the peak need of $160.7 million which was projected by the third

quarter of 1960, the following points would have been particularly pertinent.

(1) As of March 31, 1959, reconstructed funded debt as a percent of net tangible assets was 59.1%.

(2) Thus, as of that date, assuming a total financing of, say, $160 million, not more than $100 million could have been raised via the issuance of additional equipment mortgage notes (or other senior securities) without TWA being in violation of the 60% voluntary action covenant of the Flight Equipment Mortgage.

(3) All of the new money, however, would not be required until the third quarter of 1960. And by that time TWA's net tangible asset position could be expected to show considerable improvement through retention of forecast earnings. The C&C April 1959 forecast (see Exhibit: Financials - 20) estimated that between March 31, 1959 and September 30, 1960 TWA would have net income of $21.8 million (before allowance for cost of the required new money).

Under the above circumstances, we believe that we would have recommended junior financing in the amount of $60 million. Subject to the sale of $60 million of junior securities, we believe that TWA could have obtained commitments from institutional investors for the private purchase of Series B Flight Equipment Mortgage Notes to provide, over the next two years, a minimum of $90 million and a maximum of $110 million.

The following table (see Exhibit: Financials - 22 sets forth, as of March 31, 1959, a projection of TWA's funded debt to net tangible asset ratio, quarter by quarter, through December 31, 1963, assuming $60 million of junior financing in May 1959 and sale of the maximum of $110 million Series B Flight Equipment Mortgage Notes. For the purposes of the Exhibit, takedowns of the latter Notes are projected to be $50 million on October 1, 1959 and $60 million on April 1, 1960.

As of:	Projection of Funded Debt as % of Net Tangible Assets
June 30, 1959	48.6%
September 30, 1959	47.3
December 31, 1959	54.6
March 31, 1960	57.1
June 30, 1960	61.7
September 30, 1960	59.4
December 31, 1960	59.7
March 31, 1961	61.7
June 30, 1961	59.4
September 30, 1961	56.0
December 31, 1961	55.9
March 31, 1962	57.6
June 30, 1962	55.0
September 30, 1962	53.1
December 31, 1962	52.9
March 31, 1963	53.8
June 30, 1963	52.5
September 30, 1963	50.8
December 31, 1963	50.6

It will be noted that the table indicates that TWA could expect to go slightly over the 60% voluntary action ratio in the second quarter of 1960 and again in the first quarter of 1961. From that point on, however, the ratio was projected to show a steady decline, reaching the 50% level sometime in the second half of 1963. The table indicates that TWA would remain comfortably below the 65% default ratio throughout the period shown. We believe that, although the forecast indicated that temporarily TWA would go slightly above the voluntary limitation, it would have been able to obtain from institutional lenders the necessary commitments to purchase up to $110 million of Series B Flight Equipment Mortgage Notes, assuming, of course, that the terms thereof were satisfactory to the lenders, and contingent upon the Company raising $60 million of junior capital.

XXVIII. Recommended 1959 Junior Financing

In our opinion a convertible subordinated debenture issue would have been the logical vehicle for a $60 million junior financing by TWA in 1959. To have sold $60 million of TWA common stock, in view of the poor earnings record, would have been difficult. The use of preferred stock (either straight or convertible) would have been, comparatively speaking, too costly because of the non-deductibility of the dividends for corporate income tax purposes. Another, though lesser, factor influencing the decision to select convertible debentures would have been that airline convertible debenture offerings were very much "in vogue" at that time. Between October 1958 and July 1959 there were four such financings by airlines (AAL, PAA, Eastern and KLM Royal Dutch); UAL also issued convertible debentures in November 1960.

We would have recommended that the TWA convertible subordinated debenture issue be underwritten, and that it be offered directly to the public rather than preemptively to TWA stockholders. Timing of the offering would have been at the earliest date in 1959 (probably late May) by which audited 1958 financials would be available for inclusion in a public prospectus.

The Securities and Exchange Commission would not permit the presentation of forecasts or projections of revenues or earnings in a public prospectus. It would have been feasible, however, to make available the 1959 C&C forecast of funds generated (Exhibit: Financials - 20), on a confidential basis, to the members of the proposed underwriting group. We believe that

the forecast would have satisfied the underwriters as to the basis soundness of the financing, particularly so in view of the assured delivery of the 63 jet transport fleet.

XXIX. Amendment of the Flight Equipment Mortgage

We have not in this report attempted to design, in detail, all of the provisions of the Flight Equipment Mortgage. We do not think, however, that the Mortgage as written in 1955 would, by its terms, have excluded subordinated debt from the definition of funded debt. Thus, we think that issuance of a TWA convertible subordinated debenture in 1959 would have required an amendment to the Mortgage.

In our opinion, TWA could have obtained, in early 1959, the required approval of the institutional holders of the Series A Notes to an amendment of the Flight Equipment Mortgage in such manner as to exclude Subordinated Debentures from the definition of Funded Indebtedness in an amount not exceeding $60 million, provided:

(a) Subordination feature of the Debentures is in all respects satisfactory to the holders of the Series A Notes, including provision that -

(i) Maturity of the Debentures is to be not sooner than July 1, 1984. (*)

(ii) Sinking Fund on the Debentures is not to start prior to July 1, 1969.

(iii) Sinking Fund on the Debentures is not to exceed 6-2/3% of the issue per year.

(b) Purchases, redemptions or acquisitions of, or prepayments of principal on, the Debentures (other than payments made in accordance with mandatory sinking fund requirements) are to be included with cash dividends on, and redemptions of, stock for purposes of the covenant in the Mortgage which limits cash dividends and redemptions of stock.

XXX. Conversion Price and Interest Rate for TWA Convertible Subordinated Debenture Issue in May 1959

Conversion Price

Conversion price is the most important single factor in the pricing of a new issue of convertible debentures. Assuming that the interest yield thereon is reasonably in line with that obtainable from similar outstanding securities, it is the relationship between the conversion price and the then market price of the related common stock which determines the relative attractiveness of the offering to investors. Obviously, the closer the conversion price is set to the common market price the smaller the premium that

(*) The maturity date of the Series B Flight Equipment Notes, the provisions of which are summarized later herein

the investor is paying for the underlying common shares and, therefore, the more attractive the offering becomes.

As managing underwriter of a TWA offering of convertible subordinated debentures in May 1959, it would have been our intent (and we would have so advised TWA) that the conversion price be set right on, or very close to, the then current market price of the TWA common stock. The historical market price of TWA's stock in mid-May 1959 was about $21.75. It is appropriate that we compare "TWA historical" with "TWA reconstructed", from the investor's viewpoint, in order to determine whether or not, in our opinion, some adjustment should be made in the historical market price of the TWA common stock as of mid-May 1959 to allow for the effects of reconstruction. The following table sets forth data, pertinent to the TWA common stock, on both historical and reconstructed bases, as such data were or would have been available to investors in May 1959. (See Exhibits: Comparisons - 4 and Financials - 4, 5, 28 and 29.)

	Historical			Reconstructed		
	Net Income (millions)	Shares Out-standing (000)	Net Income per share	Net Income (millions)	Shares Out-standing (000)	Net Income per share
Earnings						
Net Income (Loss)						
1954	$ 10.3	3,337	$ 3.10	$ 10.3	3,337	$ 3.10
1955	5.4	3,337	1.62	4.8	6,673	0.72
1956	(2.3)	3,337	(0.69)	(2.7)	6,674	(0.40)
1957	(1.6)	6,674	(0.24)	(1.8)	6,674	(0.27)
1958	(1.8)	6,674	(0.27)	(1.7)	6,674	(0.25)
Total	$ 10.0			$ 8.9		
Average 1954-58	$ 2.0		$ 0.70	$ 1.8		$ 0.58
3 months ended-						
March 31, 1958	$(11.1)	6,674	$(1.66)	$(11.2)	6,674	$(1.67)
March 31, 1959	(3.8)	6,674	(0.57)	(2.6)	6,674	(0.39)
As of March 31, 1959						
Book Net Worth	$ 106.2 million			$ 118.6 million		
Book Net Worth per share	$15.91			$17.77		

It is fair to say that, on the whole, there is little difference between the historical and reconstructed data shown above. Reconstructed book value per share ($17.77) is 12% higher than historical ($15.91). In the first quarter of 1959, the reconstructed loss is about $1.2 million less than the historical loss. On either basis, however, the improvement in the first

quarter of 1959, over the first quarter of 1958, was substantial.

We think, therefore, that it is not appropriate to adjust the historical market price of the TWA common stock as of May 1959 by reason of the assumed reconstruction of then available earnings and book value data. There are, however, two other factors relating to market price of the TWA common stock to which we should give consideration.

The first of these two factors is the possible downward influence of the announcement of a proposed major offering of TWA convertible subordinated debentures. In many cases when an issuer publishes such an announcement it will be followed by a decline in the market price of that company's stock, the usually accepted reason being that the market is reflecting the potential dilution effect upon per share earnings. Exhibit: General - 15 presents pertinent data relating to price behavior of the common stocks of a number of representative companies following the public announcement of proposed convertible debenture financings. The list includes about an equal number of preemptive and nonpreemptive offerings. It also includes five offerings by airlines - a nonpreemptive issue by Continental Air Lines in June 1958; a nonpreemptive issue by KLM Royal Dutch Airlines in March 1959; a preemptive issue by PAA in July 1959; a nonpreemptive issue by UAL in November 1960; and a preemptive issue by National Air Lines in May 1961.

The exhibit indicates that in 11 out of the 20 offerings shown the price of the common stock was lower on the offering date than it was one month prior to the announcement of the financing. (The reason for selecting a date one month prior to the announcement date is to avoid, to the extent possible, price distortions caused by news leaks in advance of the official announcement.) The extent of the price decline ranged from 1.7% to 14.8%, with the median decline 9.3%. In the case of PAA the decline was 13.6%; in the case of KLM Royal Dutch the decline was 1.5%. In the other 9 offerings the price of the common was higher on the offering date than it was one month prior to the announcement date. The price increases ranged from 0.9% to 24%.

The second factor, which we believe would have influenced the TWA market price upward as compared to what it was historically, would have been the fact that in 1959 TWA would have been much better financed under the reconstructed program than it was historically. And thus investors would have

been able to see that TWA was really going to get its jets in 1959 and 1960, whereas such was not the case in the absence of a sound and adequate financing program. The 1959 quotations from Moody's and Standard & Poor's previously set forth herein clearly indicate that investors were quite sensitive to the value of the coming jets.

In our opinion there is no way to estimate accurately what, if any effect the announcement of a $60 million convertible debenture offering would have had upon the price of the TWA stock in May 1959. Recognizing, however, that the potential dilution represented by an offering of that size was relatively large, we are going to assume a conversion price of $18.50, which is 15% below the approximate $21.75 price at which TWA's stock was selling in mid-May 1959. A conversion price of $18.50 compares with a reconstructed book value per share of $17.77 as of March 31, 1959.

Interest Rate

Assuming a conversion price set at or close to the then current market of the TWA stock, we believe that the recommended and doable interest rate on the TWA offering would have been 5%.

As a check on our pricing views, it is appropriate that we compare the TWA convertible subordinated debenture offering with similar issues put out by other airlines at dates within reasonable proximity to May 1959.

AAL sold such an issue in May 1959 via private placement. Eastern Airlines did likewise in October 1958. The KLM Royal Dutch issue was offered publicly in March 1959 and the PAA issue, in late July 1959.

Exhibit: Financials - 24 is a statistical comparison of a $60 million 5% convertible subordinated debenture issue of TWA with these four other issues. The following tabulation summarizes the data set forth therein.

	TWA Reconstructed	PAA	AAL	Eastern	KLM Royal Dutch
Coupon Rate	5%	4-7/8%	5%	5%	4-3/4%
Maturity Date	6/1/84	8/1/79	1/1/85	12/1/78	3/15/79
Amount Outstanding ($000)	40,000	46,971	40,000	25,000	18,500
Offering Price	100%	100%	100%	100%	100%
Total Pro Forma Capitalization ($000)	461,600	354,336	370,163	222,281	141,563
% Senior Debt	60.7	48.9	52.0	40.5	35.8
% this Issue and Pari Passu	13.0	13.3	10.8	11.2	13.1
% Total Long-Term Debt	73.7	62.2	62.8	51.7	48.9
% Capital Stock and Surplus	26.3	37.8	37.2	48.3	51.1
Earnings(*) and Cash Flow(**) Coverage of Total Pro Forma Fixed Charges	Earn. / Cash Flow	Earn. / Cash Flow	Earn. / Cash Flow	Earn. / Cash Flow	Earn. / Cash Flow
1954	1.4 / 2.1	1.9 / 1.2	2.3 / 3.3	4.2 / 6.9	2.1 / 2.4
1955	0.8 / 1.8	2.0 / 1.3	4.2 / 3.8	7.0 / 8.6	2.3 / 2.4
1956	(0.2) / 1.6	3.0 / 1.5	4.1 / 3.9	6.6 / 8.4	2.3 / 2.7
1957	(0.1) / 1.7	1.9 / 1.9	2.2 / 3.5	3.3 / 8.5	2.3 / 3.0
1958	0.1 / 2.0	1.2 / 1.3	3.1 / 4.6	3.0 / 7.6	0.6 / 2.9
Average - 5 years 1954-1958	0.4 / 1.8	2.0 / 1.4	3.2 / 3.8	4.8 / 8.0	1.9 / 2.7
12 months ended 3/31/59	0.6 / 2.6	1.4 / 1.3	2.6 / 4.6	3.1 / 8.4	0.4 / 2.8
% Conversion Price Over Market Price of Common at Time of Original Offering	(***)	7.6%	13.3%	11.1%	3.4%
Market Price - Date		8/12/59	Placed	Placed	5/15/59
Price (%)		107-1/8	Privately	Privately	109-1/4
Yield to Maturity (%)		4.32			4.07

(*) Before interest and income taxes (without allowance for earnings on new funds).
(**) Before interest but after current income taxes (without allowance for earnings on new funds).
(***) Assumed to be at or close to market price of common.
( ) Denotes loss.

Pertinent observations from the foregoing table are as follows:

(1) TWA's ratios of total funded debt and senior funded debt to total capitalization are the highest of the five airlines.

(2) TWA's earnings and cash flow coverage figures are the lowest of the five airlines, except that TWA's cash flow coverages are better than those of PAA.

(3) Interest rates for the four actual issues ranged from 4-3/4% to 5%.

(4) Spread between conversion price and market price at date of offering or private sale ranged between 3.4% and 13.3% for the four actual issues. In the case of TWA we have assumed a conversion price at or close to the market price of the common stock.

(5) Each of the publicly offered issues went to a substantial premium following the offering date. (Market price data are not available for the two privately placed issues.)

The PAA issue was rated Ba by Moody's and Bl by Standard & Poor's. The KLM Royal Dutch issue was rated Bl by Standard & Poor's. (Moody's does not rate issues by foreign corporations. Neither Moody's nor Standard & Poor's publishes ratings for private placements.) In view of the comparatively high debt ratio and low interest coverage figures, there is a

possibility that a TWA convertible subordinated debenture issue in May 1959 might have been rated no higher than B. On the other hand, the Moody's Ba category (Bl for Standard & Poor's) embraces a very broad spectrum of convertible subordinated issues differing substantially, one from another, in terms of investment quality. In arriving at a rating the services take into consideration a number of factors in addition to the purely statistical ones, including size of the issuer, position in the industry, future outlook, etc.

Generally speaking, however, rating is not nearly as important a factor in the pricing of a convertible debenture as it is in the pricing of a straight (non-convertible) debenture. In our opinion, regardless of whether it received a Ba or B rating, with an interest rate of 5% and a conversion price set at or very close to the market price of the common stock the TWA offering could have been successfully underwritten and marketed.

XXXI. Recommended TWA Convertible Subordinated Debenture Financing

May 1959

In our opinion, we would have recommended an offering of TWA convertible subordinated debentures, in about the latter part of May 1959, on the following basis. And, as stated above, we believe that the issue on these terms could have been underwritten and successfully marketed.

To be dated:	June 1, 1959.
Designation:	Subordinated Debentures.(*)
Amount:	$60 million.
Procedure:	Underwritten, nonpreemptive public offering.
Trustee:	The _____ Trust Company or Bank.
Price:	100%, flat.
Interest Rate:	5% per annum, payable semi-annually June 1 and December 1.
Maturity:	June 1, 1984.
General Redemption:	At any time on thirty days' notice at an initial price of 105% and on a decreasing scale through to one year prior to maturity.
Redemption for the Sinking Fund:	At any time on thirty days' notice, at 100% and interest.

Sinking Fund:	Annual amount of $3,000,000 (5%) commencing June 1, 1970.
Subordination:	In accordance with the definition of "Subordinated Debentures" set forth in the Flight Equipment Mortgage (as amended).
Conversion Privilege:	At any time prior to June 1, 1969 (ten-year term) at the conversion price of $18.50 per share.(**) Conventional dilution adjustment clauses.
Limitations on Payment of Cash Dividends and Redemption of Stock:	Earnings from December 31, 1958 onward plus a reasonable "cushion", plus net proceeds from sale of additional stock.
Application of Proceeds:	General corporate purposes.
Modification of Indenture:	The usual provisions based on 66-2/3% consent.
Underwriting Expenses:	$1,200,000 (2%).
Other Expenses of Issue:	$350,000.

Estimated Net Proceeds after underwriting and other expenses: $58,450,000.

Closing Date: June 1, 1959.

(*) Note re:
Name of Issue: The name of the issue would omit the word "Convertible" because, as indicated, the conversion privilege is to be limited to 10 years. (The word "Convertible" is sometimes included, when referring to the Debentures, for the purpose of convenience.)

(**) Total amount of common stock issuable upon conversion of a $60 million issue at the conversion price of $18.50 amounts to 3,243,244 shares. On the reconstructed (as well as historical) basis TWA, at March 31, 1959, had 3,326,000 shares of authorized but unissued capital stock out of a total authorization of 10,000,000 shares. Thus, it had slightly more authorized shares available than it would have had to reserve for conversions. We think, however, that good corporate practice would have indicated an increase in the authorized shares, which would have required stockholder approval. We would have recommended that authorized shares be increased to 15,000,000.

XXXII. Recommended TWA 1959 Flight Equipment Mortgage Loan

In our opinion TWA, in the second quarter of 1959, could and should have obtained commitments from institutional investors to purchase (subject to the prior sale of $60 million convertible subordinated debentures) Series B Flight Equipment Mortgage Notes in the amount of $90 million minimum to $110 million maximum. Period of availability to run through December 31, 1960.

Interest Rate

We believe that institutional investors, in the second quarter of 1959, would have charged TWA an interest rate of 6% on the used portion of the Series B Flight Equipment Notes, and a commitment fee of 1/2% per annum on the unused portion.

Exhibit: Financials - 26 sets forth a comparison, as of May 1959, of $110 million of 6% Series B Mortgage Notes of TWA with term debt securities of other airlines which were either then outstanding or arranged for at dates within reasonable proximity to May 1959. The following tabulation presents certain of the data appearing in the exhibit.

	TWA Reconstructed	PAA	AAL	UAL	Eastern	Delta	Northwest
Type of Issue	Mortgage Notes	Unsecured Notes	Unsecured Notes	Debentures	Unsecured Notes	Unsecured Notes	Unsecured Notes
Coupon Rate	6%	4-3/8%	5%	4%	3-3/4% - 4.13/8%	6%	6%
Maturity Date	7/1/84	3/1/80	11/1/96	2/1/81	12/15/75	10/1/78	10/1/78
Amount ($000)	110,000	30,000	30,000	120,000	90,000	25,000	40,000
Total Pro Forma Capitalization ($000)	441,600	354,300	370,200	281,800	222,300	91,500	88,200
% this Issue, Pari Passu and Senior Debt	60.7	48.9	52.0	53.7	40.5	60.1	45.4
% Subordinated Debt	13.0	13.3	10.8	-	11.2	-	-
% Total Long-Term Debt	73.7	62.2	62.8	53.7	51.7	60.1	45.4
% Capital Stock and Surplus	26.3	37.8	37.2	46.3	48.3	39.9	54.6
Earnings(*) and Cash Flow(**) Coverage of Pro Forma Fixed Charges on this Issue, Pari Passu and Senior Debt	Earn. Cash Flow	Earn. Cash Flow	Earn. Cash Flow	Earn. Cash Flow	Earn. Cash Flow	Earn. Cash Flow	Earn. Cash Flow
1954	1.7 2.6	2.5 1.4	2.9 4.1	3.9 4.3	5.7 9.4	1.1 1.3	1.5 3.1
1955	0.9 2.2	2.6 1.5	5.2 4.6	4.3 4.3	9.4 11.6	2.0 1.8	1:9 4.0
1956	(0.2) 1.9	4.0 1.7	5.1 4.8	5.2 4.9	9.0 11.4	3.6 1.9	2.7 4.8
1957	(0.1) 2.1	2.5 2.2	2.7 4.2	2.8 4.8	4.5 11.5	2.2 1.8	3.5 5.5
1958	0.1 2.8	1.6 1.4	3.8 5.6	5.3 6.1	4.1 10.3	1.0 2.3	5.4 8.2
Average - 5 years 1954-1958	0.5 2.2	2.6 1.6	4.0 4.7	4.3 4.9	6.5 10.8	2.0 1.8	3.0 5.1
12 months ended 3/31/59	0.7 3.2	1.8 1.5	3.2 5.6	6.1 6.6	4.3 11.4	3.1 2.7	6.2 9.2

(*) Before interest and income taxes (without allowance for earnings on new funds).
(**) Before interest and after current income taxes (without allowance for earnings on new funds).
( ) Denotes loss.

It will be noted that the TWA debt ratio is higher, and its earnings and cash flow coverages are lower, than the comparable figures for each of the other airlines shown in the comparison, with the exception that TWA's cash flow coverage exceeds that of PAA and Delta. On the other hand, TWA would have been able to present the following favorable factors.

(1) A strong forecast of earning power arising from the assured ownership, by December 1960, of a jet fleet which (we venture to think) would have equaled or surpassed the fleets of each of its three main competitors as of that time,

(2) A strong mortgage security, whereas the loans of each of the six other airlines used in the comparison were unsecured.

(3) A higher interest rate than that of any of the six other airlines except Delta and Northwest.

1959 Loan Agreement

We would have recommended that TWA negotiate and enter into a loan agreement in the second quarter of 1959 along the following general lines. And, in our opinion, such a loan agreement could have been obtained from institutional investors.

Amount:	Minimum $90 million. Maximum $110 million.
Designation:	Flight Equipment Mortgage Notes, Series B.
To be dated:	July 1, 1959.
Procedure:	Private placement loan commitment with institutional investors, subject to the sale of $60 million principal amount of Convertible Subordinated Debentures.
Price:	Par plus accrued interest.
Interest Rate:	6% per annum, payable semi-annually July 1 and January 1.
Commitment Fee:	1/2% per annum on the unused portion, payable semi-annually July 1 and January 1.
General Redemption Prices:	106% and interest, sliding downward to 100% one year prior to maturity.
Sinking Fund Redemption Price:	100% and interest.
Non-refundability Term:	12 years.
Availability:	To and including December 31, 1960.
Maturity:	July 1, 1984.
Sinking Fund:	Commencing July 1, 1969; equal annual instalments to retire 100% by maturity. Doubling up permitted annually to cumulative maximum of three annual instalments.
Security:	The Flight Equipment Mortgage.
Application of Proceeds:	All into the Flight Equipment Fund with the Trustee under the Flight Equipment Mortgage.
Trust Indenture Act of 1939:	Upon request of any of the holders of the Notes, TWA will qualify the issue under the Trust Indenture Act of 1939.
Agency Fee:	0.15%.
Estimated Other Expenses:	0.033%.

Limitation on Payment of Cash Dividends and Redemption of Stock:	Limited to consolidated net income earned from June 30, 1959 onward plus some reasonable "cushion", say $5,000,000, plus net proceeds from sale of additional stock.
SEC Registration:	On request of the holders of 66-2/3% of the Series B Notes.
Financial Reports:	Quarterly balance sheets and income accounts to be delivered to each holder of the Notes. Annual statements to be audited.
Closings:	Not more than three.
First Closing:	Assumed to be on October 1, 1959 in the amount of $50,000,000.

XXXIII. The TWA Reconstructed Situation Post-1959 Financing through December 31, 1960

During the nine months ended December 31, 1959 reconstructed funds generated from internal sources turned out to be $21.4 million higher than those forecast by C&C in April of that year. The improvement continued throughout all of 1960. As a result of the improved cash flow the reconstructed peak outside money need, which occurred in the third quarter of 1960, was $33.7 million lower than had been indicated by the projection of money requirements prepared in early 1959. (See Exhibits: Financials - 20 and 30.) We have assumed a $40.0 million takedown of Series B Flight Equipment Mortgage Notes as of April 1, 1960 (for a total of $90.0 million taken down by that date) which would have been ample to meet the reduced peak outside money need.

As mentioned above, the improvement in reconstructed funds generated (vis-a-vis those forecast) continued in the fourth quarter of 1960. On a cumulative basis, total reconstructed generation of funds from internal sources during the period between March 31, 1959 and December 31, 1960 was $46.3 million above the C&C forecast. Thus, we have assumed that TWA would not have taken down the remaining $20.0 million of Series B Flight Equipment Mortgage Notes, the availability of which ran out on December 31, 1960.

XXXIV. Comparative Financial Status of TWA and Its Competitors at the End of the 1955 - 1960 Period

The following tabulation sets forth summarized balance sheets of TWA and its three main competitors as of December 31, 1960. TWA is shown on both historical and reconstructed bases. (See Exhibit: Comparisons - 4 and Exhibit: Financials - 4 and 27.)

Summarized Balance Sheets

December 31, 1960

	TWA					
	Historical	Reconstructed	Increase (Decrease)	PAA	AAL	BNF
	See Exh.: Financials - 4 and 27			See Exhibit: Comparisons - 4		
	Millions					
Net Current Assets	$ 24.5	$ 38.1	$ 13.6	$ 16.4	$ 57.7	$ 8.5
Total Net Property and Equipment(*)	327.1	446.3	119.2	407.2	367.8	409.8
Other Tangible Assets	7.6	7.6	-	39.1	3.1	3.0
Total Tangible Assets Less Current Liabilities	$ 359.2	$ 487.0	$ 132.8	$ 462.7	$ 428.6	$ 416.3
Long-Term Debt: Senior	$ 123.2	$ 260.2	$ 137.0	$ 270.3	$ 188.8	$ 217.0
Subordinated	100.0	60.0	(40.0)	47.0	40.0	25.0
Total	$ 223.2	$ 320.2	$ 97.0	$ 317.3	$ 228.8	$ 242.0
Deferred Credits	$ 0.4	$ -	$ (0.4)	$ 6.4	$ -	$ -
Deferred Federal Income Taxes	20.3	35.8	15.6	15.2	34.3	25.9
Miscellaneous Reserves	3.8	8.4	4.6	17.0	-	7.3
Total Non-Current Liabilities, Reserves, etc.	$ 247.7	$ 364.5	$ 116.8	$ 355.9	$ 263.1	$ 275.2
Tangible Net Worth	$ 106.5	$ 122.5	$ 16.0	$ 106.8	$ 165.5	$ 141.1
Deferred Debits and Intangibles	$ 19.6	$ 30.9	$ 11.3	$ 31.7	$ 7.8	$ 7.0
Book Net Worth	$ 126.1	$ 153.4	$ 27.3	$ 138.5	$ 153.3	$ 148.1
Preferred Stock	$ -	$ -	$ -	$ -	$ 7.6	$ -
Common Stock	33.4	33.4	-	6.6	8.2	42.2
Capital Surplus	48.9	61.2	12.3	71.2	39.3	54.1
Earned Surplus	43.8	58.8	15.0	60.7	98.2	51.8
Total Stockholders' Equity.	$ 126.1	$ 153.4	$ 27.3	$ 138.5	$ 153.3	$ 148.1
Capital Structure - Percent						
Long-Term Debt - Senior	35.3	54.9		39.3	49.4	35.6
- Subordinated	28.6	12.7		10.3	10.5	6.4
- Total	63.9	67.6		69.6	59.9	42.0
Stockholders' Equity	36.1	32.4		30.4	40.1	38.0
Total	100.0	100.0		100.0	100.0	100.0

(*) Including expendable spare parts, advances for purchase of aircraft and engines, funds restricted for flight equipment purchases, etc.

XXXV. Comparison of the TWA Capital Structures - Historical and Reconstructed At the End of the 1955 - 1960 Period

Historical		Reconstructed	
	(000 omitted)		
Senior Long-Term Debt			
Equipment Mtge.S.F. Notes, 6-1/2% due Dec. 1972	$ 62,800	1955 Flight Equipment Mtge. Notes, 4%, Series A, due Oct. 1, 1980	$170,000
Equipment Mtge. Serial Notes, 6%, due quarterly $5,200 commencing Mar. 31, 1962	56,400	1959 Flight Equipment Mtge. Notes, 6%, Series B, due July 1, 1984	90,000
Conditional Sales Contract, 3-1/2%, due quarterly through Jan. 1, 1963	1,919		
Conditional Sales Contract, 3-1/2%, due quarterly through May 15, 1963	1,943		
Instalment Contracts due 1969	180		180
Total	$123,242	Total	$260,180
Subordinated Long-Term Debt			
6-1/2% Interim Subordinated Promissory Note to be replaced by Subordinated Debentures due not earlier than June 1973 (*)	$100,000	5% Subordinated Debentures due June 1984 (Convertible at $18.50)	$ 60,000
Total Funded Debt	$223,242	Total Funded Debt	$320,180
Capital Stock			
6,674,000 shares representing Stockholders' Equity of	$126,042	6,674,000 shares representing Stockholders' Equity of	$153,400
Book Value per share	$18.90	Book Value per share	$22.99
Shares reserved for warrants	2,700(000).	Shares reserved for conversions	3,243(000)
Annual Interest Charges			
On Senior Long-Term Debt			
Total	$ 7,480	Total	$ 12,200
On Subordinated Long-Term Debt			
Total	$ 6,500	Total	$ 3,000
On Combined Long-Term Debt			
Total	$ 13,980	Total	$ 15,200

(*) Replaced in May 1961 by $100,000,000 6-1/2% Subordinated Income Debentures due 1978 (with Warrants to purchase 2,700,000 common shares at $20 per share to 6/1/65 and $22 thereafter to 12/1/73).

XXXVI. Sources and Applications of Funds - Reconstructed 1956 - 1960

Figures for the reconstructed five-year money cycle (1956-1960) are set forth in Exhibit: Financials - 30. Working capital at each year end comes out as follows:

1956	$24.8 million
1957	18.7 "
1958	21.9 "
1959	50.8 "
1960	38.1 "

It will be noted that working capital comes out at figures which vary quite widely from year to year. The reason for the variations is that long-term financing operations cannot be arranged and carried out piecemeal in the precise amounts required from time to time by the money requirements program.

In actual practice, TWA would have had occasion to use bank credit to take care of the aforementioned variations and to provide for seasonal swings. We think that returns from excess working capital and idle money in the Flight Equipment Fund would counterbalance the cost of the bank credit.

XXXVII. Comment re: The Recommended Financing Program

We do not wish this report to be interpreted as meaning that we think the financing program recommended herein is the only program by which TWA might have been successfully financed to meet the Question Posed. There may well be other programs by which TWA might have been financed successfully in the period under review. As for the program which we have outlined, we believe that it is the one which, in our opinion, we would have recommended if we had been advising TWA in the years 1955-1960, and one which, if adopted, would have succeeded.

Drexel Harriman Ripley, Incorporated
by

Joseph P. Ripley
Honorary Chairman

Edward J. Morehouse
Senior Vice President

AX-430

TWA Ex. 5(b), Exhibit Trans World-2
(Exhibits to Drexel Harriman Ripley, Inc. Report)

EXHIBIT: TRANS WORLD-
Sheet 1 of 2

DIGEST
of
TWA PROSPECTUS
Common Stock Offering

February 1952

Date: February 28, 1952

Amount: 242,987 shares @ $21.25 per share. Gross proceeds: $5,000,000 approx.

Type of Offering: Public; preemptive.

Underwriting: None.

Undertaking by Hughes Tool: Hughes Tool agreed to purchase such number of shares as would give TWA $5,000,000 of proceeds net of expense.

Ratio of Offering: One share for each ten outstanding.

Purpose of Issue: General corporate purposes. TWA estimated that during 1952 it would make expenditures totaling approximately $51,257,000 for aircraft, sinking fund, interest, etc.

Capital Structure:

	Actual - February 2, 1952	
	Authorized	Outstanding
3½% S.F. Debs. Ser. A, due June 1, 1956	$24,437,000	$24,437,000
3½% S.F. Debs. Ser. B, due Dec. 1, 1955	6,480,000	6,480,000
3% Notes (Secured), due monthly to May 1953	4,771,000	4,771,000
3% Notes (Secured), due monthly to Apr.1955	9,371,000	9,371,000
3% Notes (Secured), due monthly to Apr.1956	12,850,000	3,486,000
Notes (Secured) due monthly to July 1956	10,000,000	None
Common Stock, $5 par	4,000,000 shs.	2,429,872 shs.

Relations with HTCo: HTCo at the time of the offering owned 74% of the outstanding stock of TWA. The prospectus reported that the CAB had approved certain transactions between TWA and HTCo including the conversion of $10,000,000 of TWA Subordinated Convertible 2-3/4% Notes held by HTCo into 1,034,423 shares of TWA Common Stock in August 1948. The CAB also approved the implementation of agreements dated April 5, 1950 and January 16, 1951 between HTCo, TWA and Equitable Life, by which TWA agreed to sell and HTCo agreed to purchase, if not otherwise sold, $5,000,000 of Common Stock by March 31, 1952, and an additional $5,000,000 by December 31, 1952.

The prospectus also refers to a Three-Party Agreement dated January 31, 1947 between HTCo, TWA and Equitable Life by which HTCo agreed to put its stock into a voting trust if TWA defaulted on its debentures all of which were held by Equitable Life. HTCo also gave Equitable Life its proxy to vote its holdings of TWA stock in case of a default of the debentures.

Conditional Sales Contracts: The prospectus refers to conditional sales contracts with HTCo covering purchase of aircraft.

TWA Ex. 5(b), Exhibit Trans World-2
(Exhibits to Drexel Harriman Ripley, Inc. Report)

Price Range of Common Stock:	Price 19-3/4 at time of offering. (Range not given.)	
Earnings per share:	1946	$ (9.11)
	1957	(4.76)
	1948	(2.57)
	1949	1.53
	1950	3.22
	8 months 1951	2.08
Book Value per share August 31, 1951:	$12.60	
Results of the Offering:	HTCo took up its pro rata share (178,383 shares) of the offering and purchased an additional 25,727 shares, a total of 204,110 shares. Others subscribed for 36,664 shares, bringing the total to 240,774 shares sold. Gross proceeds: $5,000,000 (approx.).	

Note: This digest does not purpose to be complete. Its only purpose is to set forth certain salient business information deemed of relevance to this report.

Source: Prepared by HRCo.

TWA Ex. 5(b), Exhibit Trans World-3
(Exhibits to Drexel Harriman Ripley, Inc. Report)

EXHIBIT: TRANS WORLD - 3
Sheet 1 of 2

DIGEST
of
TWA PROSPECTUS

Common Stock Offering

November 1952

Date: November 20, 1952.

Amount: 381,916 shares at $16 per share. Aggregate offering: $6,111,000 approx. 353,822 shares subscribed. Proceeds: $5,700,000 approx.

Type of Offering: Public; preemptive.

Underwriting: None.

Undertaking by HTCo: HTCo agreed to purchase sufficient shares (to the extent sufficient shares were not otherwise sold) to provide TWA with net proceeds, after deducting expenses payable by TWA, of at least $5,000,000.

Ratio of Offering: One share for each seven shares held.

Purpose of Issue: General corporate purposes.

Capital Structure - Actual November 5, 1952:

	As of November 5, 1952	
	Authorized	Outstanding
3-1/4% Sinking Fund Debentures (Series A) due June 1, 1956	$22,437,000	$22,437,000
3-1/4% Sinking Fund Debentures (Series B) due December 1, 1955	6,480,000	6,480,000
3% Notes (Secured) maturing in monthly instalments from November 30, 1952 to May 31, 1953 (1948 Notes)	2,087,202	2,087,202
3% Notes (Secured) maturing in monthly instalments from November 30, 1952 to April 30, 1955 (1950 Notes)	7,208,571	7,208,571
3% Notes (Secured) maturing in monthly instalments from November 30, 1952 to May 31, 1956 (Martin Notes)	11,571,200	11,571,200
3-3/4% Notes (Secured) maturing in monthly instalments from November 30, 1952 to May 31, 1956 (Martin Notes)	389,583	389,583
3-3/4% Notes (Secured) maturing in monthly instalments from November 30, 1952 to July 31, 1955 (Martin Notes)	2,805,000	2,805,000
3-3/4% Notes (Secured) maturing in monthly instalments from November 30, 1952 to July 31, 1956 (1049 Notes)	8,707,235	8,707,235
Common Stock, par value $5 per share	4,000,000 shs.	2,673,418 shs.

If all Common Stock being registered is sold, 3,055,334 shares will be outstanding. At November 5, 1952, TWA had outstanding other long-term debt aggregating $3,814,105, including $3,747,636 under conditional sale contracts. The interest on the Series A and Series B Debentures was increased from 3% to 3-1/4% effective March 1, 1951.

TWA Ex. 5(b), Exhibit Trans World-3
(Exhibits to Drexel Harriman Ripley, Inc. Report)

Relations with HTCo: By a Three-Party Agreement, dated January 31, 1947, between HTCo, TWA and Equitable Life, HTCo agreed that if TWA should at any time be in default in paying principal or interest on its Debentures (all of which are owned by Equitable), HTCo would, upon Equitable's request, subject to a Voting Trust Agreement, in a specified form, all shares of Common Stock of TWA (with certain exceptions) owned by HTCo on January 31, 1947 or acquired by it thereafter. Equitable would be entitled to nominate two voting trustees and HTCo (or, under certain conditions, the two voting trustees nominated by Equitable), the third. The voting trustees would be entitled to exercise all rights and powers with respect to all shares deposited under the Voting Trust Agreement, including the right to vote thereon or consent to any act of TWA. If made, the Voting Trust Agreement would terminate on (a) June 1, 1956, (b) the date of satisfaction of the Trust Indenture under which TWA's Debentures have been issued, or (c) the date on which Equitable terminates it, whichever is earlier.

By the Three-Party Agreement HTCo also constituted Equitable its proxy, effective at any time TWA should be in default in payment of principal of or interest on any Debentures, to vote and act with respect to all shares of Common Stock of TWA with respect to which HTCo would be entitled to vote and act, at any meeting of TWA stockholders. The proxy is to be valid until the Common Stock owned by HTCo is subjected to the Voting Trust Agreement, or until none of the Debentures is outstanding, whichever is earlier, but in no event beyond June 1, 1956.

Conditional Sales Contracts: TWA has entered into three conditional sales contracts with HTCo relating to twelve Constellation aircraft. At November 5, 1952, $252,000 principal remained to be paid under the first such contract, covering two Constellation 049 aircraft, in monthly instalments of $18,000 each, with interest at the rate of 3% per annum; $1,555,628.57 principal remained to be paid under the second such contract, covering six Constellation 049 aircraft, in monthly instalments of $51,854.28 each, with interest at the rate of 2-1/2% per annum, and $1,940,007.65 principal remained to be paid under the third such contract, covering four Constellation 749A aircraft, in monthly instalments of $46,188.85 each, with interest at the rate of 3% per annum.

Price Range of Common Stock: Price 18-1/4 at time of offering. Price range between October 1, 1952 through November 18, 1952, a high of 18-3/4 and a low of 16-3/8.

Earnings per share:

1946	$ (9.11)
1947	(4.76)
1948	(2.57)
1949	1.54
1950	3.25
1951	3.36
7 months 1952	1.23

Book Value per share July 31, 1952: $15.80

Results of Offering: 353,822 shares subscribed. Gross proceeds: $5,700,000 approx.

Note: This digest does not purport to be complete. Its only purpose is to set forth certain salient business information deemed of relevance to this report.

Source: Prepared by HRCo.

TWA Ex. 5(b), Exhibit Trans World-7
(Exhibits to Drexel Harriman Ripley, Inc. Report)

DIGEST
of
TWA PROSPECTUS

Common Stock Offering

1957

Date: June 17, 1957.

Amount: 3,337,036 shares of Common Stock.

Price: $13 per share. Aggregate, $43,381,000.

Type of Offering: Public; preemptive.

Underwriting: None.

Option to HTCo: To purchase all or any part of the unsubscribed shares with agreement on the part of HTCo to provide TWA with a minimum of $34,000,000 of proceeds, which exceeded HTCo's pro rata portion by $2,000,000 (approx.)

Ratio of Offering: Share for share.

Purpose of Issue, etc.: To pay or prepay amounts owed by TWA for purchase of 8 Lockheed Constellations and 25 Lockheed 1649As plus spare parts, etc. At May 1, 1957 $38,000,000 was owed; with subsequent deliveries a total of $51,000,000 additional will become owing; a total of $89,000,000. After applying the $34,000,000 of minimum stock proceeds, TWA will owe a balance of $55,000,000 which will be financed by a $25,000,000 bank loan payable in 36 equal monthly installments commencing January 1, 1958. An additional $10,000,000 to be provided by a temporary bank loan payable December 1, 1957. Federal tax refund, $9,000,000 approx. Discussions initiated for additional $25,000,000 of institutional loans. HTCo agreed to extend a revolving credit to TWA in the amount of the difference between (a) the sum of the additional institutional loans plus the excess proceeds from the sale of the shares over $34,000,000, and (b) $15,000,000; such revolving credit to mature December 1, 1960.

Capital Structure - Pro Forma - Giving Effect to Financing:

3-3/4% Equipment Mortgage S. F. Bonds due December 1, 1969	$40,000,000	
3% Secured Notes due May 31 and June 30, 1957	56,841	
4% Demand Notes	2,500,000	(1)
Common Stock	6,674,072 shs.	(2)

(1) Authorized $10,000,000; credit extended by HTCo. Unsecured. Subordinated to the 3-3/4% Equipment Mortgage S.F. Bonds. Amount of the credit to be reduced to $7,500,000 on August 1, 1957; to $5,000,000 on November 1, 1957; and to $2,500,000 on February 1, 1958. Credit to terminate April 30, 1958 "or at such earlier date as the Treasurer of HTCo deems necessary", etc. Interest at prime rate.

(2) Assuming sale of all shares offered.

TWA Ex. 5(b), Exhibit Trans World-7
(Exhibits to Drexel Harriman Ripley, Inc. Report)

EXHIBIT: TRANS WORLD - 7
Sheet 2 of 3

Relations with HTCo:

Ownership; 75% of shares.
Sale of Equipment: 8 Lockheed Constellations and 25 Lockheed 1649As at HTCo's cost plus interest pursuant to conditional sales contracts providing for payment to HTCo in monthly instalments over a period of five years.
Amount: $38,000,000.

Market Price of the Stock:

$14 per share at the time of the offering. Trend since March 31, 1956 steadily downward.

Earnings per Share:

Calendar year 1952	$2.30
1953	1.52
1954	3.10
1955	1.62
1956	(0.70)

The above earnings per share figures are based on the number of shares outstanding at the end of each year, adjusted retroactively for the 10% stock dividend declared in 1952.

The prospectus refers to a decision by the CAB to the effect that TWA had been overpaid by $8,153,000 for the carriage of mail on its international route for the 1946-1953 period.

Results of Operations:

	Operating Income (Loss)		Net Income (Loss)	
	1957	1956	1957	1956
	(000 omitted)		(000 omitted)	
January	$(2,583)	$(1,182)	$(1,452)	$(599)
February	(3,267)	(2,832)	(1,520)	(1,485)
March	(1,436)	(1,036)	(258)	(568)
April	(783)	(707)	39	(253)
Total	$(8,069)	$(5,757)	$(3,191)	$(2,905)

Book Value of the Shares, December 31, 1956:

$21. (approx.)

Reference to Jet Aircraft:

The prospectus indicates that TWA's major U. S. airline competitors had announced that they had ordered jet aircraft for delivery beginning in 1958; that the cost of jet aircraft would greatly exceed that of the latest models of piston aircraft; and that their use would require substantial investments in ground equipment, etc.

The prospectus says that TWA had placed no orders for jet aircraft, but that it believed such aircraft would be necessary and that the cost thereof, including spare parts, etc., would exceed $320 million.

The prospectus indicates that HTCo had placed orders, under contracts assignable to TWA, for 33 Boeing 707s and 30 Convair 880s, for delivery beginning in 1959; and that HTCo was not committed to sell any of such aircraft to TWA nor was the latter committed to buy any of them from HTCo.

TWA Ex. 5(b), Exhibit Trans World-7
(Exhibits to Drexel Harriman Ripley, Inc. Report)

Market Prices of the Rights:

Date	High	Low
6/18/1957	1/2	3/8
6/19	1/2	3/8
6/20	1/2	3/8
6/21	1/2	3/8
6/24	1/2	3/8
6/25	1/2	3/8
6/26	1/2	3/8
6/27	5/8	3/8
6/28	3/4	1/2
7/1	7/8	5/8
7/2	3/4	1/2
7/3	5/8	1/2
7/5	3/4	1/2
7/8/1957	3/4	5/8

Results of the Offering:

Total Shares Sold	3,337,036
Shares Purchased by HTCo	2,692,959
Shares Purchased by Stockholders other than HTCo	644,077

Note: This digest does not purport to be complete. Its only purpose is to set forth certain salient business information deemed of relevance to this report.

Source: Prepared by HRCo.

TWA Ex. 5(b), Exhibit Trans World-8
(Exhibits to Drexel Harriman Ripley, Inc. Report)

EXHIBIT: TRANS WORLD-8

AX-457

TWA

DATA ON COMMON STOCK ISSUES
EXCEPT ISSUES LIMITED TO EMPLOYEES
JANUARY 1, 1946 TO FEBRUARY 28, 1963 (1)

Offerings to Stockholders

Offering Date	Shares Issued	Par Value	Offering Price	Gross Proceeds	Costs of Flotation: Underwriters' Fees	Costs of Flotation: Other Expenses	Net Proceeds
2/16/49	404,112	$5.00	$10.00	$ 4,041,120	$85,921	$116,443	$ 3,838,756
2/27/52	240,774	5.00	21.25	5,116,448	-	116,429	5,000,019
11/19/52	353,822	5.00	16.00	5,661,152	-	79,102	5,582,050 (2)
6/17/57	3,337,036	5.00	13.00	43,381,468	-	192,490	43,188,978

Notes: (1) In addition to the offerings to stockholders listed herein (a) 1,034,423 shares of common stock were issued on August 24, 1948 in exchange for the surrender and retirement of Subordinated Convertible 2-3/4% Notes, owned by Hughes Tool Company, in the principal amount of $10,000,000 plus accrued interest; (b) a stock dividend of 302,724 shares of common stock was issued to stockholders of record December 15, 1952.

(2) Hughes Tool Company had agreed to purchase, if other purchasers were not available, sufficient shares to provide TWA with net proceeds of at least $5,000,000. It was not necessary for Hughes Tool Company to purchase more than 263,100 shares represented by its subscription rights.

Source: Prepared by HRCo. from prospectuses and annual reports.

COMPARATIVE RESULTS OF OPERATIONS

TWA - PAA - AAL - UAL

1955 - 1960

Historical

The following tabulation shows aggregate summarized operating figures for each of the four airlines for the 1955-1960 period. (See Exhibit: Comparisons - 4.)

	TWA	PAA	AAL	UAL
	000,000			
Total Operating Revenues	$1,733.1	$1,922.3	$1,981.9	$1,805.5
Net Operating Income	35.8	100.1	169.1	128.2
Net Income, including Capital Gains	15.6	53.4	97.9	73.1
Cash Dividends Declared:				
Preferred	None	None	3.3	0.5
Common	None	30.2	45.9	16.5
Total	None	$ 30.2	$ 49.2	$ 17.0
Revenue Airplane Miles Flown	670.9	574.3	794.8	746.1
Available Seat Miles	42,846.1	35,587.2	47,055.2	44,855.2
Net Operating Income:				
Per Revenue Airplane Mile ¢	5.33	17.42	21.27	17.18
Per Million Seat Miles $	835.	2,812.	3,593.	2,857.

In the 1955-1960 period TWA earned only $15.6 million as compared with $53.4 million for PAA, $97.9 million for AAL, and $73.1 million for UAL. TWA paid no dividends. PAA paid $30.2 million in dividends and kept $23.2 million; AAL paid $49.2 million in dividends and kept $48.7 million; and UAL paid $17.0 million in dividends and kept $56.1 million.

The tabulation on the following page shows corresponding figures year by year.

TWA Ex. 5(b), Exhibit Comparisons-10
(Exhibits to Drexel Harriman Ripley, Inc. Report)

EXHIBIT: COMPARISONS - 10
Sheet 2 of 2

	TWA	PAA	AAL	UAL
	(000 omitted)			
Total Operating Revenue:				
1955	$217,431	$238,059	$260,757	$235,578
1956	240,394	288,541	291,772	262,791
1957	263,664	312,678	305,956	281,947
1958	284,841	313,176	317,240	316,816
1959	348,458	356,810	377,702	329,225
1960	378,350	413,071	428,482	379,147
Net Operating Income (Loss):				
1955	$ 11,575	$ 13,024	$ 39,280	$ 24,734
1956	(4,131)	23,166	36,997	24,207
1957	(4,539)	14,329	18,037	12,312
1958	(375)	7,235	26,343	30,553
1959	17,263	16,958	24,409	20,898
1960	16,046	25,387	28,071	15,493
Net Income (Loss) Including Capital Gains:				
1955	$ 5,407	$ 10,669	$ 18,609	$ 11,245
1956	(2,327)	14,760	19,573	14,681
1957	(1,558)	8,089	10,886	7,888
1958	(1,764)	5,090	16,080	14,300
1959	9,568	7,724	21,013	13,799
1960	6,307	7,089	11,783	11,171
Revenue Airplane Miles Flown:				
1955	97,249	80,068	121,686	110,031
1956	107,480	94,827	133,368	121,692
1957	118,633	102,235	143,089	130,370
1958	117,752	103,867	134,410	135,514
1959	119,587	101,317	128,408	127,476
1960	110,213	91,996	133,872	120,969
Available Seat Miles: (*)				
1955	5,405	4,327	6,409	5,892
1956	6,202	5,128	7,161	6,734
1957	6,985	5,784	7,926	7,537
1958	7,256	6,033	7,645	8,090
1959	8,071	6,452	8,173	7,722
1960	8,926	7,864	9,823	8,881
Net Operating Income (Loss):				
Per Revenue Airplane Mile - ¢:				
1955	11.90	16.27	32.28	22.48
1956	(3.84)	24.43	27.74	19.89
1957	(3.83)	14.02	12.61	9.44
1958	(0.32)	6.97	19.60	22.55
1959	14.44	16.74	19.01	16.39
1960	14.56	27.60	17.98	12.81
Per Million Available Seat Miles - $				
1955	2142.	3010.	6129.	4198.
1956	(666.)	4518.	5166.	3595.
1957	(650.)	2477.	2276.	1634.
1958	(52.)	1199.	3446.	3777.
1959	2139.	2628.	2987.	2706.
1960	1798.	3228.	2450.	1745.

(*) Millions

Source: Prepared by HRCo from Prospectuses, Annual Reports and Moody's Manuals

TWA Ex. 5(b), Exhibit Pan American-1
(Exhibits to Drexel Harriman Ripley, Inc. Report)

EXHIBIT: PAN AMERICAN-1

DIGEST
of
PAA PROSPECTUS

Offering of Capital Stock
and Stock Purchase Warrants

1945

Date: July 3, 1945

Amount: 2,043,261 units, each consisting of 1 share of Capital Stock and a Stock Purchase Warrant giving the right to purchase one additional share of Capital Stock.

Price: $21.50 per unit. The Stock Purchase Warrant was exercisable at $18 per share. Warrants expired 2½ years after the offering. Amount of offering, $42,398,000 not including possible exercise of the Stock Purchase Warrants which, if completely exercised, would yield an additional $36,800,000. (See Exhibit PAA-2)

Type of Offering: Public; preemptive.

Underwriting: By a group of about 65 investment houses headed by Kuhn Loeb, Blyth, Lazard and Ladenburg, Thalmann.

Ratio of Offering: 1 unit for each 2 shares of capital stock.

Purpose of Issue: General corporate purposes. Prospectus said that the company had $37 million of outstanding demand bank loans, which had been made in anticipation of the proceeds from the sale of securities offered by the prospectus. Also "a substantial number of additional aircraft" was about to be acquired.

Capital Structure: Authorized capital stock: 3,000,000 shares, of which 1,993,261 were outstanding as of December 31, 1944. In February 1945 shares were split 2 for 1 and authorized capital stock was increased to 10,000,000 shares, whereupon 3,986,522 shares were outstanding. In June 1945, Atlas Corporation purchased 100,000 shares at $16 per share, realizing proceeds of $1,600,000.

Earnings: Company showed a profit on the net income line in each year of the previous 10 years, in varying amounts from a low of $47,000 in 1938 to a high of $3,780,000 in 1942. Net income for 1944 was $1,619,000.

Results of Offering: 1,932,619 units were subscribed by the stockholders. The balance of 110,642 units was taken up by the underwriters.

Note: This digest does not purport to be complete. Its only purpose is to set forth certain salient business information deemed of relevance to this report.

Source. Prepared by HRCo.

TWA Ex. 5(b), Exhibit Pan American-3
(Exhibits to Drexel Harriman Ripley, Inc. Report)

EXHIBIT: PAN AMERICAN-3
Sheet 1 of 3

DIGEST
of
PAA INSURANCE LOAN AGREEMENT
1955

Dated:	May 10, 1955
Parties:	PAA and eighteen insurance companies
Amount:	$60,000,000
Availability:	Until July 1, 1956
Borrowings:	$25,200,000 advanced May 10, 1955. Remainder in one or two instalments on or prior to July 1, 1956. If in two instalments, the first instalment shall be for not less than $10,000,000.
Rate:	3 3/4% per annum, payable semi-annually.
Maturity:	March 1, 1995.
Sinking Fund:	Fixed sinking fund payments of $3,900,000 on March 1, of each year from 1966 to 1979 and a payment of $5,400,000 on March 1, 1980. Such March, 1980, payment will be the final payment unless all or some of the 3 3/4% Promissory Notes are deferred (to a date not later than March 1, 1995), at the request of the Company and with the acceptance of the noteholders. No premium required for sinking fund payments.
Commitment Fee:	1/2 of 1% per annum (a) on amount(s) taken down(subsequent to initial $25,200,000 take down) computed from May 1, 1955, to date of closing(s); and (b) on balance not taken down as of July 1, 1956, computed from May 1, 1955.
Prepayments:	Permitted at any time at option of Company subject to a premium of 3 3/4 points if prepaid on or before March 1, 1956, the premium decreasing by 1/8 point for each succeeding 12-month period through the period beginning March 1, 1973; decreasing by 1/4 point for each 12-month period thereafter until par is reached with the 12-month period beginning March 1, 1979. However, prior to September 1, 1967, such prepayments may not be made with funds obtained through borrowings or the sale of non-convertible preferred stock having an interest or dividend rate of less than 3 3/4%.
Modification:	Holders of 66 2/3% of notes may waive covenants.
Negative Covenants:	No mortgages allowed besides (i) usual exceptions; and (ii) purchase money mortgages not exceeding $7,500,000 in the aggregate at any one time providing further that Asset Ratio is at least 100%. No additional debt (except subsequent amounts under this Agreement) unless thereafter pro forma Asset Ratio would be at least 100%. Asset Ratio must not be less than 100% at any time on or after July 1, 1957.

Negative Covenants, Continued:

No stock payments permitted if aggregate thereof subsequent to Dec. 31, 1954 would exceed aggregate of (i) $10,000,000 plus or minus (ii) net income or deficit after Jan. 1, 1955 plus (iii) the net proceeds from any class of stock after Dec. 31, 1954 up to but not in excess of expenditures after Dec. 31, 1954 for redemption, retirement, purchase or other acquisition of any shares of any class of stock of Company.

Company will not permit 25% of unpaid Rentals (commuted to present value on basis 3 3/4% per annum) for maximum period for which lessee may be obligated to aggregate more than 10% of the sum of Adjusted Fundable Assets.

No sale or merger, unless new company assumes all obligations of this Agreement. Should such happen and lien is involved, PAA will secure notes by prior lien.

Neither Company nor any Subsidiary will sell, lease, transfer or otherwise dispose of any substantial part of its assets if in the opinion of the Company, such transaction would adversely affect in a material degree the interests of the noteholders on the ability of the Company to meet all its obligations when they become due.

Definitions

Fundable Assets = sum of:

(i) Excess Current Assets (i.e., amount of current assets in excess of 180% of Adjusted Current Liabilities) plus

(ii) 75% of amount of Flight Equipment, Net of Depreciation plus

(iii) 25% of amount of Ground Equipment, Net of Depreciation minus

(iv) amount of reserves existing in connection self insurance.

If current assets are less than 180% of Adjusted Current Liabilities (i.e., current liabilities less amounts which would be included in Restricted Indebtedness) there shall be deducted from (ii) and (iii) the difference between 180% of Adjusted Current Liabilities and current assets.

Restricted Indebtedness shall mean

(i) Funded Debt

(ii) Current Debt

(iii) Unearned transportation revenue

(iv) 25% of amounts due within 6 months under Contractual Obligations

(v) 25% of aggregate unpaid Rentals for maximum period for which lessee is obligated

provided Restricted Indebtedness shall not include any Convertible Subordinate Debt.

TWA Ex. 5(b), Exhibit Pan American-3
(Exhibits to Drexel Harriman Ripley, Inc. Report)

Asset Ratio = Adjusted Fundable Assets / Adjusted Restricted Indebtedness

Adjusted Fundable Assets are Fundable Assets of the Company and of Subsidiaries adjusted to eliminate intercompany items such as would be eliminated in a consolidated balance sheet and taking into account as to each other item the percentage of ownership of such subsidiary held by the Company directly or indirectly through one or more subsidiaries.

Adjusted Restricted Indebtedness follows the same pattern as above in relation to Restricted Indebtedness.

Note:

This digest does not purport to be complete. Its only purpose is to set forth certain salient business information deemed of relevance to this report.

Source: Prepared by HRCo.

DIGEST
of
AAL PROSPECTUS

Offering of Debentures and Convertible Preferred Stock

1946

Date: June 11, 1946.

Amount: $40,000,000 of 3% Debentures and 400,000 shares of 3-1/2% Co vertible Preferred Stock.

Price: 100% for the Debentures and $102 per share for the Preferred Stock. Aggregate offering price, $40,000,000 for the Debent and $40,800,000 for the Preferred Stock, a total of $80,800,

Type of Offering: Public; not preemptive.

Underwriting: By about 180 underwriters headed by Kidder Peabody, Lehman Brothers and Glore Forgan.

Description of the Debentures: Interest rate 3%. Term 20 years. Closed issue. Redeemable a sliding scale of prices starting at 102½. Redeemable for t sinking fund at 100%. Debentures not secured by lien but pro tected by a negative pledge clause. Limitation of creation o additional funded debt on the basis of ratio of net current a fixed assets to be 175% of all funded debt. Limitation on pa ment of dividends.

Preferred Stock: Authorized issue 600,000 shares. Issuable in series. Initia series to bear 3½% dividend; redeemable on a sliding scale co mencing at $104 per share; initial series convertible at any time at $21 per share of common stock; subject to adjustment.

Purpose of Issue: General corporate purposes including payment of $25,000,000 of short-term bank loans. Estimated commitments to purchase flight equipment, etc., aggregated approximately $96,000,000, of which $19,000,000 had been paid prior to the date of the prospectus. Additional moneys were also required for capital expenditures, other than for flight equipment, amounting to a aggregate of $44,000,000 over the (then) next two years. Tota capital improvement program indicated as amounting to about $106,000,000, toward which the proceeds of the financing would be applied. Balance of about $20,000,000 to be obtained from undistributed earnings or possible future financing.

TWA Ex. 5(b), Exhibit American-1
(Exhibits to Drexel Harriman Ripley, Inc. Report)

EXHIBIT: AMERICAN-1
Sheet 2 of 2

Capital Structure: Pro forma, giving effect to financing - except employees stock -

Title of Issue	Amount authorized	Amount outstanding as of March 31, 1946	Amount presently to be outstanding
Funded Debt: *			
3% Sinking Fund Debentures, due June 1, 1966	$40,000,000	None	$40,000,000
Capital Stock:			
Preferred Stock, cumulative, issuable in series, $100 par value	600,000 shs.		
3½% Cumulative Convertible Preferred Stock		None	400,000 shs.
Common Stock - $1 par value	12,000,000 shs.**	6,452,836 shs.**/	6,452,836 shs.**/

* On March 31, 1946 there was outstanding $25,000,000 principal amount of short-term notes, issued February 28, 1946 to fifty-four commercial banks, bearing interest at the rate of 1½% per annum and payable 180 days from issue, which will be paid in connection with this financing. There were also outstanding on such date guarantees of certain similar short-term bank loans in the amount of $10,000,000 made by American Overseas Airlines, Inc.

** Giving effect, as of March 31, 1946, to the five-for-one split-up of Common and Employees Stock that became effective on April 22, 1946.

/ Without reflecting additional shares that may be hereafter issued as described under "Proposed Acquisition of Control of Mid-Continent Airlines, Inc." and under "Stock Options", or upon conversion of shares of the Preferred Stock being offered hereby.

Earnings. The record of earnings for the previous ten years, i.e., 1936-45, showed that AAL operated profitably in every year except 1937 when it showed a loss of $199,000. Net income in each of the three calendar years immediately prior to the offering was as follows:

1943	$3,193,000
1944	4,396,000
1945	4,339,000

For the three months ended March 1946, the company showed a loss of $448,000; this was probably due to seasonal reasons.

Results of the Offering: The Debenture offering was somewhat of a failure. As of June 21, 1946 approximately $23,300,000 of the Debentures remained unsold; and as of June 24, 1946 the offering price was reduced from 100% to 96.35%.

The result of the Preferred Stock offering is not readily available.

With the entire issue underwritten the Company realized the entire $80,800,000 (approx.) less expenses.

Note: This digest does not purport to be complete. Its only purpose is to set forth certain salient business information deemed of relevance to this report.

Source: Prepared by HRCo.

AX-446

TWA Ex. 5(b), Exhibit United-3
(Exhibits to Drexel Harriman Ripley, Inc. Report)

EXHIBIT: UNITED-3

BRIEF SUMMARY

of

UAL 1947 FINANCING

Principal Aspects:

(A)	Term Bank Loan	$28,000,000
(B)	Twenty-Year 3-1/2% Debentures, Series A	$12,000,000
(C)	4-1/2% Cumulative Convertible Preferred Stock ($100 par value)	94,773 shares

(A) By the terms of a Credit Agreement entered into with certain banks on February 6, 1947 the Corporation could borrow (subject to certain asset tests being met), on a revolving basis on or before July 1, 1948, up to an aggregate of $28,000,000 at any one time outstanding. Each such borrowing was to be evidenced by 1-1/2% notes, dated the day of the borrowing, and payable July 1, 1948. There was a commitment fee of 1/4 of 1% per annum on the average daily amount of the commitment unused prior to July 1, 1948.

The Agreement provided that, on July 1, 1948, the various banks would make term loans to the Corporation in the amount of the balance then remaining unpaid on borrowings under the revolving credit. Term loans so made would mature in 20 equal consecutive quarterly instalments, and would bear interest of 2%

As a condition to the first borrowing under the Credit Agreement the Corporation was required to raise not less than $20,750,000 through the sale of debentures and preferred stock.

(B) On February 11, 1947 the Corporation entered into agreements with Metropolitan Life and Mutual Life under the provisions of which the insurance companies agreed to purchase, at 100%, an aggregate of $12,000,000 Twenty-Year 3-1/2% Debentures, Series A. Such purchase was subject (a) to the sale by the Corporation, on or before March 12, 1947, of 94,773 shares of 4-1/2% Cumulative Preferred Stock at a price to produce minimum net cash proceeds of $8,900,000, and (b) to the execution, on or before March 12, 1947, of the Credit Agreement described above.

(C) On February 11, 1947, 94,773 shares of 4-1/2% Cumulative Preferred Stock, $100 par value (convertible prior to 1957) were offered to stockholders, at $100 per share, in the ratio of one share of Preferred for each 19-1/2 shares of Common. Stockholders subscribed for 76,854 shares (81%). Underwriters took up the balance. Proceeds to the Corporation, after expenses and underwriting commissions, aggregated about $9,160,000.

Note: This summary does not purport to be complete. Its only purpose is to set forth certain salient business information deemed of relevance to this report.

Source: Prepared by HRCo from the relevant papers.

TWA Ex. 5(b), Exhibit United-4
(Exhibits to Drexel Harriman Ripley, Inc. Report)

EXHIBIT: UNITED - 4

BRIEF SUMMARY

of

UAL 1952 AND 1954 FINANCINGS

Principal Aspects:

(A)	Fifteen-Year 3-1/2% Debentures, Series B	$10,000,000
(B)	Call of outstanding shares of Preferred Stock (1947 Series) and issuance of Cumulative Preferred Stock, 4-1/2% Series of 1952	$22,386,500
(C)	Term Bank Loan	$45,000,000
(D)	Twenty-Year 3-3/4% Debentures, Series C	$20,000,000

(A) On February 1, 1952 the Corporation sold, at par, $10,000,000 of Fifteen-Year 3-1/2% Series B Debentures to the Metropolitan Life and the Mutual Life, pursuant to an agreement covering such sale which had been entered into in April 1951.

(B) On March 18, 1952 the Corporation called all of the then outstanding shares of its Preferred Stock (1947 Series). Of these, 445 shares were redeemed, at the call price of $102.50, and 36,073 shares were converted into 152,206 shares of Common Stock. On March 19, 1952, 223,865 shares of Cumulative Preferred Stock, 4-1/2% Series of 1952, $100 par value (convertible prior to 1962) were offered to stockholders, at $100 per share, in the ratio of one share of Preferred for each eleven shares of Common. Stockholders subscribed for 81,510 shares (36%). Underwriters took up the balance. Proceeds to the Corporation, after expenses and underwriting commissions, aggregated about $21,650,000.

(C) On July 1, 1952 the Corporation entered into an agreement with certain banks under which the banks agreed to lend up to $45,000,000 to the Corporation (subject to certain asset tests being met) at any time to and including December 31, 1954. Each borrowing thereunder was to be evidenced by a note dated as of the borrowing date, bearing interest at 3-1/4%, and payable in 18 equal quarter-annual instalments, the first of which would mature on April 1, 1955. There was a commitment fee of 1/2 of 1% per annum on the average daily amount of the commitment unused to and including December 31, 1954.

Upon completion of such standby credit agreement, the $7,000,000 balance of the 1947 term bank loan was paid off and the previous outstanding bank credit agreement of $16,000,000, entered into early in 1951, was cancelled.

(D) On July 20, 1954, the Corporation sold, at par, $20,000,000 of Twenty-Year 3-3/4% Series C Debentures to the Metropolitan Life and the Mutual Life.

On July 1, 1954, the 1952 standby credit agreement with the banks was amended so as, among other things, to reduce the aggregate amount of the available credit from $45,000,000 to $30,000,000 and to extend the availability date from December 31, 1954 to December 31, 1955.

Note: This brief summary does not purport to be complete. Its only purpose is to set forth certain salient business information deemed of relevance to this report.

Source: Prepared by HRCo from the relevant papers.

TWA Ex. 5(b), Exhibit United-6
(Exhibits to Drexel Harriman Ripley, Inc. Report)

DIGEST

of

UAL BANK CREDIT AGREEMENT

Dated March 1, 1955

Amount:	$30,000,000
Availability:	Until December 31, 1957
Rate:	3% per annum on Short Term Notes. Payable quarterly. 3 1/4% on Long Term Notes. Payable quarterly.
Maturities:	Short Term Notes mature January 1 of year following date loan is made or are convertible into Long Term Notes at such date. Long Term Notes payable in 20 equal consecutive quarterly instalments beginning April 1 following the date of Long Term loan. The last possible quarterly maturity April 1, 1963.
Prepayment:	Permitted without penalty on 3 days' notice unless prepayment is from proceeds of loans from other banks, in which case 1/2 of 1% premium to maturity is to be paid. Until December 31, 1957 re-borrowing permitted to the extent Short or Long Term Notes shall be prepaid.
Commitment Fee:	1/4 of 1% per annum on unused portion of credit, payable quarterly.
Termination or Reduction of Commitment:	Termination or reduction in multiples of $1,000,000 permitted on 5 days' notice.
Working Capital:	So long as the Agreement continues in effect: Minimum of $2,500,000 (excluding from current liabilities the current portion of bank loans.) To the extent that the excess of current assets over current liabilities shall be less than such minimum, any unused balance of the amount permitted to be borrowed under the Agreement shall, for the purposes of this restriction, be included in current assets; but in no event shall current liabilities exceed current assets.
Other Provisions:	So long as the Agreement continues in effect the consent of the bank is required for: (1) Mortgage or pledge of current assets or flight equipment; (2) Cash dividends on Common Stock to be paid out of earnings after December 31, 1954 plus $3,750,000 of prior earnings; (3) Merger or consolidation;

TWA Ex. 5(b), Exhibit United-6
Exhibits to Drexel Harriman Ripley, Inc. Report)

Other Provisions: (continued)

(4) Loans hereunder totaling more than 75% of the sum of flight equipment net of depreciation and cash deposits or advances on flight equipment ordered; and

(5) Creation or guaranty of debt including debt under this Agreement, but excluding debt due in one year or less, if the aggregate amount of all debt thereafter outstanding would exceed the lesser of $85,000,000 or net worth.

Note: This brief summary does not purport to be complete. Its only purpose is to set forth certain salient business information deemed of relevance to this report.

Source: Prepared by HRCo.

AX-450

TWA Ex. 5(b), Exhibit United-7
(Exhibits to Drexel Harriman Ripley, Inc. Report)

EXHIBIT: UNITED-7

DIGEST
of
UAL DEBENTURE PURCHASE CONTRACT
of
December 1955

Parties: United Air Lines, Inc. and three insurance companies.

Designation: 4% Debentures, Series D, due February 1, 1981.

Dated: February 1, 1956.

Interest Payable: February 1 and August 1.

Amount: $100,000,000 to $120,000,000.

Closing Dates: Between February 1, 1956 and March 1, 1959; to be designated by UAL but with not more than two closings in each of the years 1956, 1957 and 1958, and with not more than one closing in 1959.

Amounts at Closings: To be designated by UAL within the following cumulative ranges:

Minima	Maxima	By
$ 25,000,000	$ 30,000,000	December 31, 1956
60,000,000	70,000,000	December 31, 1957
80,000,000	90,000,000	December 31, 1958
100,000,000	120,000,000	March 1, 1959

Takedowns: UAL was limited in such manner that it could have not more than two closings in each of the years 1956, 1957 and 1958, and not more than one takedown in 1959.

Commitment Fee: 1/2%. Payable August 1, 1956 and February 1 and August 1 thereafter on the unused portion.

Non-Refundability Period: 12 years.

Sinking Fund: To commence December 15, 1966; payable each year thereafter in the amount of 6-2/3% of aggregate amount issued. (Equals 100% pay-back over the last fifteen years of the 25-year term.)

Amendment of Trust Indenture: So as to substitute 10% for 25% and 25% for 60% as the margin required for Contractual Obligations for the purchase of Flight Equipment and Contractual Obligations for the purchase of Other Operating Property and Equipment, respectively, in the calculation of the "Asset Ratio".

Bank Credit Agreement: The obligation of the insurance companies was subject to UAL having entered into a credit agreement with banks for $30,000,000.

Note: The above outline does not purport to be complete. Its only purpose is to set forth certain salient business information deemed of relevance to this report.

Source: Prepared by HRCo.

TWA Ex. 5(b), Exhibit United-8
(Exhibits to Drexel Harriman Ripley, Inc. Report)

EXHIBIT: UNITED - 8

DIGEST
of
UAL BANK CREDIT AGREEMENT

Dated December 21, 1955

Amount: $30,000,000.

Availability: Until December 31, 1960 in the form of Short-Term Notes.

Rate: Prime rate for Short-Term Notes. Prime rate plus 1/4% for the Long-Term Notes but not less than 3% nor more than 4%.

Maturities: Short-Term Notes to mature six months from date, but not later than December 31, 1960. Long-Term Notes, to be issued December 31, 1960 in the amount of the Short-Term Notes maturing December 31, 1960, to mature in twenty equal quarterly instalments commencing April 1, 1961.

Prepayment: Permitted without penalty on three days' notice unless prepayment is from proceeds of loans from other banks, in which case 1/4% per annum premium to maturity.

Commitment Fee: 1/4 of 1% per annum on unused portion of credit, payable quarterly April 1, etc.

Termination or Reduction of Commitment: Termination or reduction in multiples of $1,000,000 permitted on five days' notice. Fee: 1/2% on unused portion.

Working Capital: So long as the Agreement is in effect:

Minimum of $2,500,000 (excluding from current liabilities the current portion of the bank loans. To the extent that the excess of current assets over current liabilities is less than $2,500,000, any unused balance of the amount permitted to be borrowed under the Agreement shall, for the purposes of this restriction, be included in current assets; but in no event shall current liabilities exceed current assets.

Other Provisions: So long as the Agreement is in effect, the consent of the bank is required for:

(1) Mortgage or pledge of current assets or flight equipment.

(2)[4] Cash dividends on Common Stock to be paid out of earnings after December 31, 1955 plus $6,000,000 from prior earnings.

(3) Merger or consolidation.

(4) Total amount of borrowed money not to exceed $200,000,000.

(5) Asset Ratio of 105% required for any borrowing hereunder or elsewhere.

Note: This brief summary does not purport to be complete. Its only purpose is to set forth certain salient business information deemed of relevance to this report.

Source: Prepared by HRCo.

AX-452

TWA Ex. 7(b)(1)
(Price Waterhouse Study-Volume One)

TRANS WORLD AIRLINES, INC.

REPORT TO CAHILL, GORDON, REINDEL & OHL

ON

RECONSTRUCTION OF FINANCIAL STATEMENTS FOR THE PERIOD SEPTEMBER 30, 1955 - DECEMBER 31, 1963

AND

CALCULATION OF PRESENT VALUE AS OF DECEMBER 31, 1963 OF FUTURE PAYMENTS FOR DEBT SERVICE ON LONG-TERM DEBT

VOLUME I

Part 1 - Summary of procedures, assumptions and conclusions

Part 2 - Exhibits

PRICE WATERHOUSE & CO.

TWA Ex. 7(b)(1)
(Price Waterhouse Study-Volume One)

TRANS WORLD AIRLINES, INC.

REPORT TO CAHILL, GORDON, REINDEL & OHL
ON
RECONSTRUCTION OF FINANCIAL STATEMENTS
FOR THE PERIOD SEPTEMBER 30, 1955 - DECEMBER 31, 1963
AND
CALCULATION OF PRESENT VALUE AS OF DECEMBER 31, 1963 OF FUTURE PAYMENTS FOR DEBT SERVICE ON LONG-TERM DEBT

TABLE OF CONTENTS

		Page
VOLUME I:-		
Part 1 - Summary of procedures, assumptions and conclusions:		
Section I	Sources of historical financial data	1
II	Summary of principal assumptions underlying reconstruction of financial statements	2
III	Calculation of present value as of December 31, 1963 of future payments for debt service on long-term debt	4
IV	Summary of increased income and equity and reduction in present value of future debt service	5
Part 2 - Exhibits:		
Index		8
Exhibits		
VOLUME II - Detailed assumptions and their application:		
Section V	Detailed statement of assumptions used in reconstruction of financial statements	
VI	Application of assumptions	
	Schedules	
Appendices		

PRICE WATERHOUSE & CO.

60 BROAD STREET

NEW YORK 10004

May 2, 1966

Cahill, Gordon, Reindel & Ohl
80 Pine Street
New York, New York 10005

Dear Sirs:

In accordance with your instructions we have prepared the accompanying reconstructed financial data relating to Trans World Airlines, Inc. ("TWA") for the period September 30, 1955 - December 31, 1963. Such reconstructed financial data reflects the adjustment of the historical financial data of TWA for the period to give effect to the assumptions summarized in Section II and enumerated in Section V. In order to maintain consistency between the reconstructed and historical financial data, the adjustments to reflect the effect of these assumptions on the historical financial data for the period were made on bases which correspond in all material respects with the accounting methods which we understand were followed by TWA during such period.

We have also, in accordance with your instructions, calculated the present value, as at December 31, 1963, of future payments for debt service on the reconstructed and historical long-term debt of TWA set forth in Exhibit I B hereto. Section III enumerates the assumptions used for the purpose of these calculations and Exhibit VI summarizes the amounts thereof.

PART 1 - SUMMARY OF PROCEDURES, ASSUMPTIONS AND CONCLUSIONS

SECTION I - SOURCES OF HISTORICAL FINANCIAL DATA

The historical financial data of TWA, on which the reconstructed financial data contained herein is based, was obtained from the following documents supplied to us by TWA:

A. Consolidated financial statements of TWA for the years 1955 through 1963 as contained in the TWA annual reports to stockholders and in the related annual reports on Form 10-K prepared for filing with the U. S. Securities and Exchange Commission.

B. Schedules (other than those prefixed T, G and D) comprising TWA's quarterly reports prepared on Form 41 for filing with the Civil Aeronautics Board for the periods commencing with July 1, 1955 and ending with December 31, 1963.

The information contained in the foregoing documents has been supplemented, to the extent we considered necessary for the purpose of preparing the accompanying reconstructed financial data, with underlying detailed information obtained by reference to TWA's books and records.

The foregoing documents and supplementary data were used by us solely for the purpose of this report and none of the information contained in such documents or data has been audited by us; accordingly, we do not express any opinion thereon. However, the consolidated financial statements of TWA referred to in A above were examined and reported on by another firm of independent public accountants and the annual historical financial statements included in this report (as Exhibits I-1 and II-1) have been reconciled to such audited financial statements.

SECTION II - SUMMARY OF PRINCIPAL ASSUMPTIONS UNDERLYING RECONSTRUCTION OF FINANCIAL STATEMENTS

The principal assumptions which we have applied, in accordance with your instructions, in adjusting the historical financial data of TWA for the period September 30, 1955 - December 31, 1963 are summarized as follows:

1. TWA would not have purchased or leased aircraft from Hughes Tool Company ("HT Co.") and would not have received financing from HT Co. during the period under consideration, but instead would have acquired such aircraft directly from the manufacturers thereof through its own financing arrangements and resources.

2. TWA would have ordered in 1955 and 1956, and would have paid for, the 63 jet aircraft, consisting of 15 Boeing B131's, 18 Boeing B331's, and 30 Convair CV880's, actually ordered by HT Co. for delivery in 1959 and 1960, and related equipment. With respect to such aircraft:

   (a) Whereas TWA received only 12 B331's out of the 18 ordered by HT Co., it would have received all 18 such aircraft.*

   (b) All Boeing aircraft would have been ordered earlier than they were ordered by HT Co., for delivery in accordance with Exhibit V hereto.

   (c) All 30 Convairs would have been delivered to TWA on the contract delivery dates, whereas, historically, 20 were acquired subsequent to the contract delivery dates, 6 were not acquired until 1963 and the other 4 were never acquired by TWA.

3. The increase in gain from operations, before provisions for depreciation, obsolescence and amortization, for the years 1959 through 1963, had TWA acquired aircraft when and as described above, would have been as estimated by Coverdale & Colpitts in their report (Appendix B hereto).

4. The increased realization from sales of certain TWA piston aircraft, resulting from the changes in jet aircraft deliveries and delivery dates as in Paragraph 2 above, would have been as set forth in a summary schedule prepared by R. Dixon Speas Associates (Appendix E hereto).

5. TWA would have been financed as set forth in the report of Drexel Harriman Ripley, Incorporated (Appendix A hereto).

A detailed statement of the assumptions applied appears in Section V at the beginning of Volume II.

* And, consequently, would not have, in 1962 and 1963, leased five B331B's and purchased related equipment.

SECTION III - CALCULATION OF PRESENT VALUE AS OF DECEMBER 31, 1963 OF FUTURE PAYMENTS FOR DEBT SERVICE ON LONG-TERM DEBT

The calculations summarized in Exhibit VI of present value of future payments for debt service on long-term debt are based on tables included in Financial Compound Interest and Annuity Tables*, using the following assumptions supplied to us by you:

1. The use of an interest rate of 5-3/4%, compounded semiannually, which is the coupon rate on the historical TWA long-term debt issue closest to December 31, 1963, namely the 5-3/4% convertible subordinated debentures, issued in October and December 1963 and due in 1983.

2. The payment of debt service, including interest and principal payments to the sinking fund and at maturity, at the specified dates.

3. That there are no conversions of debentures into common stock.

4. That future payments relating to $.5 million of instalment contracts for purchase of bulk storage and other facilities, outstanding at December 31, 1963 on both reconstructed and historical bases, are excluded from the calculations.

5. No effect is to be given to income taxes.

* 3rd Edition, Financial Publishing Company, Boston, Mass., 1961.

SECTION IV - SUMMARY OF INCREASED INCOME AND EQUITY AND REDUCTION IN PRESENT VALUE OF FUTURE DEBT SERVICE

A summary of (A) the effect upon income and equity of the application to TWA's historical financial data for the period Septe 30, 1955 - December 31, 1963 of the assumptions summarized in Secti II and enumerated in Section V and (B) the excess of historical ove reconstructed present value as of December 31, 1963 of future payme for debt service (summarized on Exhibit VI) is as follows:

(A) Effect of application of assumptions:	
Increase in income and special items before provisions for income taxes(1)	$ 71.7 milli
Increase in capital surplus	12.3 milli
Decrease in capital stock(2)	
Increase in stockholders' equity before income taxes(3)	$ 84.0 milli
(B) Excess of historical over reconstructed present value of future payments for debt service	$ 20.3 milli
Sum of (A) and (B)	$104.3 milli

(1) The net amount of the increase in income and special items, after provisions for current and deferred income taxes (in the amount of $36.1 million), is $35.6 million.

(2) Amount is less than $.05 million.

(3) The increase in stockholders' equity, net after tax provisions, is $47.9 million.

The increase in income and special items represents the s of: (i) the cumulative difference between the income (loss) and sp items for the 8-1/4 year period ended December 31, 1963 as shown in reconstructed financial statements and the corresponding items on a historical basis, and (ii) the adjustments made as at September 30, 1955 to give effect to the 1955 equity financing set forth in the report of Drexel Harriman Ripley, Incorporated.

A statement of the reconstructed and historical results o operations for the period October 1, 1955 - December 31, 1963 is se forth on Exhibit II. The increase of $71.7 million in income and

special items before provisions for current and deferred income taxes is analyzed on Exhibit IV on the basis of the individual assumptions enumerated in Section V.

The increase of $12.3 million in capital surplus is accounted for by the difference between the net proceeds arising from the assumed 1955 equity financing and the net proceeds of the historical equity financing in 1957 as follows:

	Net proceeds (millions)
Assumed 1955 equity financing - 3,336,546 shares	$55.5
Historical 1957 equity financing - 3,337,036 shares	43.2
	$12.3

Since the number of shares of capital stock assumed to have been sold on June 1, 1955 was substantially the same as the number historically offered and sold by TWA in 1957 no difference arises between the reconstructed and historical capital stock accounts (as expressed in millions of dollars) at December 31, 1963.

Exhibit I presents a condensed statement of the reconstructed and historical financial positions of TWA at December 31, 1963. The factors which give rise to the increase of $73.0 million in the balance of net current assets at December 31, 1963 on a reconstructed basis as compared with the historical net current asset position at that date are set forth in the comparative statement of sources and applications of funds for the period October 1, 1955 - December 31, 1963 (Exhibit III).

The reconstructed and historical present values as of December 31, 1963 of future payments for debt service are summarized by years on Exhibit VI.

* * * * *

Volume II of this report sets forth the detailed assumptions used in arriving at the foregoing and describes the methods and procedures used by us in adjusting the historical financial data to give effect to such detailed assumptions. This volume also includes schedules which support the financial statements and show the effect of application of the assumptions.

Yours very truly,

Price Waterhouse

PART 2 - EXHIBITS

INDEX TO EXHIBITS

mary exhibits:

I - Reconstructed and historical statements of consolidated financial position - December 31, 1963

Notes to reconstructed and historical statements of consolidated financial position - December 31, 1963

I A - Reconstructed and historical property and equipment (including expendable parts) and deposits with manufacturers - December 31, 1963

I B - Reconstructed and historical long-term debt - December 31, 1963

II - Reconstructed and historical statements of consolidated income and retained earnings for the period October 1, 1955 - December 31, 1963

II A - Analysis of reconstructed and historical special charge in 1961 and special credit in 1963

III - Reconstructed and historical statements of consolidated sources and applications of funds for the period October 1, 1955 - December 31, 1963

III A - Reconstructed and historical summary of additions to property and equipment (including expendable parts) and deposits with manufacturers for the period October 1, 1955 - December 31, 1963

IV - Summary of increases (decreases) in reconstructed over historical net income and special credit (charge) before income taxes - by assumption for the period October 1, 1955 - December 31, 1963

V - Reconstructed and historical delivery and in-service dates - B131, B331 and CV880 jet aircraft

VI - Reconstructed and historical future payments for debt service and present value of future payments at December 31, 1963 at 5-3/4% per annum compounded semiannually

PART 2 - EXHIBITS (Cont'd)

INDEX TO EXHIBITS (Cont'd)

Annual exhibits:

I-1 - Reconstructed and historical statements of consolidated financial position - September 30, 1955 and December 31, 1955-63

I A-1 - Reconstructed and historical property and equipment (includ expendable parts) and deposits with manufacturers - September 30, 1955 and December 31, 1955-63

II-1 - Reconstructed and historical statements of consolidated income and retained earnings for the period October 1, 1955 - December 31, 1963

III-1 - Reconstructed and historical statements of consolidated sources and applications of funds for the period October 1, 1955 - December 31, 1963

TRANS WORLD AIRLINES, INC.

RECONSTRUCTED AND HISTORICAL STATEMENTS
OF CONSOLIDATED FINANCIAL POSITION

DECEMBER 31, 1963

(Amounts in millions)

	Reconstructed	Historical	Increase (decrease over historica
et current assets (Exhibit III)	$105.4	$ 32.4	$73.0
et property and equipment (including expendable parts) and deposits with manufacturers (Exhibit IA)	401.8	377.2	24.6
unds restricted for flight equipment purchases - other	.3	3.1	(2.8)
nvestments and long-term prepayments	4.0	4.3	(.3)
Total tangible assets, less current liabilities	511.5	417.0	94.5
oncurrent liabilities and deferred credits:			
Long-term debt (Exhibit IB)	320.5	310.8	9.7
Other noncurrent liabilities	1.2	1.2	
Deferred gain on instalment sales of aircraft	.2	.2	
Deferred federal income taxes	42.4	5.9	36.5
Total noncurrent liabilities and deferred credits	364.3	318.1	46.2
Total tangible assets, less liabilities and deferred credits	147.2	98.9	48.3
eferred debits - unamortized portion:			
Long-term debt expense	1.7	1.7	
Training and other costs applicable to new aircraft	.7	1.1	(.4)
Costs relating to new overhaul base and other	.3	.3	
Total deferred debits	2.7	3.1	(.4)
Excess of assets over liabilities and deferred credits	$149.9	$102.0	$47.9
tockholders' equity:			
Capital stock	$ 33.5	$ 33.5	
Capital surplus	61.6	49.3	$12.3
Retained earnings (Exhibit II)	54.8	19.2	35.6
Total stockholders' equity	$149.9	$102.0	$47.9

See notes attached hereto.

TRANS WORLD AIRLINES, INC.

NOTES TO RECONSTRUCTED AND HISTORICAL STATEMENTS
OF CONSOLIDATED FINANCIAL POSITION

DECEMBER 31, 1963

1. The foregoing statements should be read in conjunction with the notes to financial statements set forth on page 23 of the 1963 annual report of TWA, insofar as they relate to the 1963 statement of financial position.

2. On a reconstructed basis the portions of Note 4 set forth on page 23 of the 1963 annual report of TWA relating to the statement of financial position would be amended to read as follows:

"For purposes of reconstructed federal income taxes accelerated methods of depreciation have been used in lieu of the straight-line method of depreciation used for accounting purposes.

"Reconstructed costs of training flight crews and other costs incurred in connection with the acquisition and integration of new types of aircraft and other expenses related to future periods have been deferred for accounting purposes but have been considered as tax deductions in the year incurred. The definition of costs to be deferred and the period of amortization were revised at December 31, 1963 as stated on page 5 of the 1963 annual report to shareholders.

"The computed reconstructed investment credits available at December 31, 1963 and applicable to reconstructed property additions for 1962 and 1963 amount to $7.9 million and $.2 million, respectively. Since on a reconstructed basis TWA has a loss carry-forward for income tax purposes, no benefit was considered to be derived from these direct tax credits which would thus be available for offset against federal income taxes in future years. At December 31, 1963 the reconstructed loss carry-forward for tax purposes aggregated approximately $5.6 million and would expire in 1969. All of this loss carry-forward relates to the foregoing differences between recorded expenses and tax deductions claimed; accordingly, appropriate provisions for deferred taxes would be made when this loss carry-forward is applied to offset income which otherwise would be taxable. TWA would not be required to pay any federal income taxes until the entire loss carry-forward has been equalled by future taxable income."

3. On a reconstructed basis, the first paragraph of Note 5 set forth on page 23 of the 1963 annual report of TWA would be amended to read as follows:

"On a reconstructed basis, at December 31, 1963 TWA operated two jet cargo aircraft and related engines under short-term leases (annual rental approximately $2.7 million) with options to purchase the aircraft and engines."

TWA Ex. 7(b)(1), Exhibit I A
(Price Waterhouse Study - Volume One)

TRANS WORLD AIRLINES, INC.

RECONSTRUCTED AND HISTORICAL PROPERTY AND EQUIPMENT (INCLUDING EXPENDABLE PARTS) AND DEPOSITS WITH MANUFACTURERS

DECEMBER 31, 1963

(Amounts in millions)

	Reconstructed	Historical	Increase (decrease) over historical
Deposits with manufacturers	$ 29.7	$ 29.7	
Flight equipment, at cost	628.4	563.9	$64.5
Expendable parts, at cost	24.2	19.8	4.4
	652.6	583.7	68.9
Less - Reserves for depreciation and obsolescence:			
Flight equipment	308.7	264.3	44.4
Expendable parts	7.6	6.8	.8
	316.3	271.1	45.2
Net flight equipment and expendable parts	336.3	312.6	23.7
Construction work in progress - flight equipment, at cost	.5	.4	.1
Total	366.5	342.7	23.8
Ground property and equipment, at cost	61.3	59.4	1.9
Less - Reserves for depreciation	28.9	27.8	1.1
	32.4	31.6	.8
Construction work in progress - ground property and equipment, at cost	2.8	2.8	
Nonoperating property and equipment	4.1	4.1	
Less - Reserve for depreciation	4.0	4.0	
	.1	.1	
Net property and equipment (including expendable parts) and deposits with manufacturers	$401.8	$377.2	$24.6

Source: Exhibit I A-1

AX-466

TWA Ex. 7(b)(1), Exhibit I B
(Price Waterhouse Study - Volume On

TRANS WORLD AIRLINES, INC.

RECONSTRUCTED AND HISTORICAL LONG-TERM DEBT

DECEMBER 31, 1963

(Amounts in millions)

Reconstructed		Historical	
Subordinated Debentures, 5% due June 1, 1984; annual sinking fund payments of $3.0 million starting June 1, 1970. Convertible into common stock at any time prior to June 1, 1969 at $18.50 per share	$ 60.0	Subordinated Income Debentures, 6-1/2% due June 1, 1978; annual sinking fund payments in an amount equal to one tenth of the aggregate principal amount outstanding on June 30, 1973 are required each November 30 from 1973 to 1977, inclusive	$1
Flight Equipment Mortgage Notes:		Equipment Mortgage Sinking Fund Notes:	
Series A, 4% due October 1, 1980; equal annual sinking fund payments starting October 1, 1965 to retire 100% by maturity	170.0	6-1/2% due December 31, 1972; annual sinking fund payments required starting December 31, 1965 sufficient to redeem $11,600,000 principal plus accrued interest	
Series B, 6% due July 1, 1984; equal annual sinking fund payments starting July 1, 1969 to retire 100% by maturity	90.0	Series B, 6% due December 31, 1977; annual sinking fund payments required starting December 31, 1967 sufficient to redeem $10,000,000 principal plus accrued interest	
Instalment contracts for purchase of bulk storage and other facilities, final payment due in 1971	.5	Convertible Subordinated Debentures, 5-3/4% due October 1, 1983; annual sinking fund payments or prior cancellation of converted bonds sufficient to retire $1,800,000 principal amount are required each September 30 starting in 1973. Convertible into common stock at $22 per share	
		Instalment contracts for purchase of bulk storage and other facilities, final payment due in 1971	
Total	$320.5	Total	$1

Note - Under the most restrictive of the provisions of the Indentures relating to the foregoing long-term debt, the amount available at December 31, 1963 for cash dividends and redemption of stock is restricted to "earnings from December 31, 1958 onward plus a reasonable 'cushion,' plus net proceeds from sale of additional stock."

Note - Certain provisions of the Fourth Supplemental Indenture dated as of December 1, 1963 issued in connection with Equipment Mortgage Sinking Fund Notes will not presently permit the payment of cash dividends. During December 1963, in accordance with the provisions of the revolving credit agreement described on page 6 of the annual report to shareholders, TWA paid all of the then outstanding Equipment Mortgage Serial Notes. Stock purchase warrants originally attached to the Subordinated Income Debentures authorize purchase of 2,700,000 shares of stock at $20 a share to June 1, 1965 and at $22 a share thereafter to December 1, 1973

TRANS WORLD AIRLINES, INC.

RECONSTRUCTED AND HISTORICAL STATEMENTS OF CONSOLIDATED INCOME AND RETAINED EARNINGS

FOR THE PERIOD OCTOBER 1, 1955 - DECEMBER 31, 1963

(Amounts in millions)

	Reconstructed	Historical	Increase (decrease) over historical
n from operations before provisions for epreciation, obsolescence and amortization	$501.5	$378.4	$123.1
ess:-			
Provisions for depreciation and obsolescence	339.3	291.4	47.9
Provisions for amortization of:			
Training and other costs applicable to new aircraft	30.2	24.8	5.4
Cost of move to overhaul base and other	3.6	3.6	
	373.1	319.8	53.3
Gain from operations	128.4	58.6	69.8
n on sales or retirements of property and quipment - net	8.1	8.6	(.5)
er income credits - net	6.9	12.1	(5.2)
Income before interest and income taxes	143.4	79.3	64.1
interest expense	79.5	75.5	4.0
Income before income taxes	63.9	3.8	60.1
visions for income taxes:			
urrent taxes (refunds)	(9.7)	(9.3)	(.4)
eferred federal income taxes	44.1	4.8	39.3
djustments of prior years taxes	(1.4)	(1.4)	
Total provisions for income taxes	33.0	(5.9)	38.9
Net income	30.9	9.7	21.2
cial charge - net	(18.1)	(29.7)	11.6
ess - Applicable deferred federal income taxes	8.6	5.8	2.8
Net special charge /Exhibit II A/	(9.5)	(23.9)	14.4
Net income and special charge - net	21.4	(14.2)	35.6
ined earnings beginning of period	33.3	33.3	
ding differences	.1	.1	
ined earnings end of period /Exhibit I/	$ 54.8	$ 19.2	$ 35.6
ary of increase in income and special charge r periods ended December 31, 1963, before pro- isions for income taxes relating thereto:			
come before taxes	$ 63.9	$ 3.8	$ 60.1
cial charge - net	(18.1)	(29.7)	11.6
	$ 45.8	($ 25.9)	$ 71.7

TRANS WORLD AIRLINES, INC.

ANALYSIS OF RECONSTRUCTED AND HISTORICAL SPECIAL CHARGE IN 1961 AND SPECIAL CREDIT IN 1963

(Amounts in millions)

	Reconstructed	Historical	Decrease from historical
1961 special charge:-			
Revision of service lives and residual values of piston aircraft and related equipment:			
Flight equipment -			
Provision for depreciation of five repossessed aircraft (included in basis for calculation of reconstructed bad debts)		$ 2.7	$ 2.7
Provision for depreciation of aircraft with earlier sales dates		.6	.6
Provision for depreciation of piston aircraft with lower capital expenditures		.2	.2
Provision for depreciation of other flight equipment	$21.7	21.7	
Total	21.7	25.2	3.5
Provision for depreciation of ground property and equipment	.4	.4	
Provision for obsolescence of expendable parts	.4	.4	
	22.5	26.0	3.5
Losses incurred during 1961 on the sale of L1049H and L1649A aircraft (a)	.2	3.6	3.4
Excess of receivable over net book value at time of sale of aircraft being repossessed (included in basis for calculation of reconstructed bad debts)		.2	.2
Write-off of L1649A training and other costs	.1	.1	
Total charge	22.8	29.9	7.1
Less - Deferred federal income tax applicable thereto	11.0	5.9	(5.1)
Net special charge	$11.8	$24.0	$12.2

(a) For purposes of funds statements, Exhibit III, these amounts are included in net book value of property and equipment sold or retired.

	Reconstructed	Historical	Increase (decrease) over historical
1963 special (credit) (accounting policy changes):-			
Establishment of inventory of certain expendable parts	($ 4.1)	($ 3.2)	$ .9
Less - Reserve for obsolescence	1.5	1.3	.2
	(2.6)	(1.9)	.7
Write-off of undepreciated portion of interest capitalized in prior years on deposits with manufacturers:			
Not transferred to flight equipment		.3	(.3)
Transferred to flight equipment	9.1	1.9	7.2
	9.1	2.2	6.9
Less - Depreciation previously recorded	(3.2)	(.3)	(2.9)
	5.9	1.9	4.0
Write-off of deferred training and other costs applicable to new aircraft	9.7	11.4	(1.7)
Elimination of reserve for overhaul of jet aircraft	(17.7)	(11.6)	6.1
Total	(4.7)	(.2)	4.5
Less - Deferred federal income tax applicable thereto	2.4	.1	2.3
Net special credit	($ 2.3)	($ .1)	$ 2.2
Summary 1961 special charge and 1963 special credit:			
Total special charges and (credits)	$18.1	$29.7	$11.6
Less - Deferred federal income taxes applicable thereto	8.6	5.8	2.8
Special charges and credits, less applicable federal tax effect	$ 9.5	$23.9	$14.4

TRANS

RECONSTRUCTED AND HISTORICAL STATEMENTS OF CONSOLIDATED SOURCES AND APPLICATIONS OF FUNDS

FOR THE PERIOD OCTOBER 1, 1955 - DECEMBER 31, 1963

(Amounts in millions)

	Reconstructed	Historical	Incr (decr) ov histo
Sources of funds:-			
Funds provided by operations:			
Net income (loss) and special charge - net	$ 21.4	($ 14.2)	$ 35
Add back charges not involving use of funds -			
Provisions for depreciation and obsolescence	339.3	291.4	47
Provisions for amortization of -			
Training and other costs applicable to new aircraft	30.2	24.8	5
Cost of move to overhaul base and other	3.6	3.6	
Provisions for deferred federal income taxes included in -			
Net income	44.1	4.8	39
Special (charge) - net	(8.6)	(5.8)	(2
Net change in reserve for overhaul of jet aircraft	17.7	11.6	6
Portion of 1961 and 1963 special credit (charge) not involving use of funds	17.9	26.1	(8
Total funds provided by operations	465.6	342.3	123
Additions to long-term debt	321.6	703.9	(382
Reclassification from current to deferred federal income taxes	1.0	1.0	
Sale of capital stock	56.0	43.7	12
Net book value of property and equipment sold or retired	34.3	26.6	7
Total sources of funds	878.5	1,117.5	(239
Applications of funds:			
Additions to property and equipment	704.3	624.6	79
Net change in funds restricted for flight equipment purchases - other	.6	3.3	(2
Deferrals of training and other costs applicable to new aircraft	40.7	37.4	3
Reductions in long-term debt	36.1	428.1	(392
Net change in long-term debt expense	1.7	1.7	
Net change in investments and long-term prepayments	.6	.9	(
Net change in deferred gain on instalment sales of aircraft	(.2)	(.2)	
Other changes - net	.1	.1	
Total applications of funds	783.9	1,095.9	(312
Excess of funds provided over funds applied resulting in an increase in net current assets	94.6	21.6	73
Net current assets, beginning of period	10.8	10.8	
Net current assets, end of period	$105.4	$ 32.4	$ 73

Source: Exhibit III-1

TRANS WORLD AIRLINES, INC.

RECONSTRUCTED AND HISTORICAL SUMMARY OF ADDITIONS TO PROPERTY AND EQUIPMENT (INCLUDING EXPENDABLE PARTS) AND DEPOSITS WITH MANUFACTURERS FOR THE PERICD OCTOBER 1, 1955 - DECEMBER 31, 1963

(Amounts in millions)

	Number of aircraft		Additions		Increase (decrease) over historical
	R	H	R	H	
t fleet (a):					
B131	15	15	$ 84.7	$ 75.4	$ 9.3
B331	18	12	124.1	83.5	40.6
B331B (leased)		5		7.1	(7.1)
CV880 (new)	30	20	139.0	96.5	42.5
CV880 (used)		6		16.3	(16.3)
B131B	18	18	113.5	113.5	
B720B (leased)	4	4	.8	.8	
B727 (on order)			18.2	18.2	
B331C (on order) (b)			.1	.1	
B373C (leased)	2	2	.8	.8	
Deposits for future fleets			11.6	11.6	
Total			492.8	423.8	69.0
ston fleet (a):-					
Aircraft and spare engines:					
L1649A					
L1049G	25	25	68.4	69.5	(1.1)
L1049H	8	8	17.2	17.3	(.1)
L1649A	4	4	8.7	8.7	
Deposits with manufacturers	4	4	11.6	11.6	
Rotable parts and other flight equipment			(.2)	(.2)	
Total			18.4	18.4	
			124.1	125.3	(1.2)
her additions:-					
Capitalized interest on deposits with manufacturers			9.1	2.2	6.9
Net increase in expendable parts			20.1	16.6	3.5
Ground property and equipment			51.9	50.0	1.9
Nonoperating property and equipment			4.1	4.6	(.5)
Net increase in construction work in progress:					
Flight equipment			.2	.1	.1
Ground property and equipment			2.0	2.0	
Total			87.4	75.5	11.9
Total additions			$704.3	$624.6	$79.7

(a) Excluding interest capitalized and net increases in expendable parts and flight equipment construction work in progress, included in other additions.

(b) Deposits of $7.6 million on this fleet are included with deposits for future fleets.

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TWA Ex. 7(b)(1), Exhibit V, page 1 of 2
(Price Waterhouse Study - Volume One)

TRANS WORLD AIRLINES, INC.

RECONSTRUCTED AND HISTORICAL DELIVERY AND IN-SERVICE DATES B131, B331 AND CV880 JET AIRCRAFT

Delivery dates				In-service dates			
Reconstructed		Historical		Reconstructed		Historical	
B131 jet aircraft							
vember	30, 1958	January	29, 1959	April	15, 1959	July	9, 1959
cember	31, 1958	March	17, 1959	January	6, 1959	March	20, 1959
nuary	31, 1959	March	30, 1959	February	6, 1959	April	2, 1959
bruary	27, 1959	April	3, 1959	March	6, 1959	April	4, 1959
rch	30, 1959	April	18, 1959	April	5, 1959	April	24, 1959
ril	3, 1959	April	29, 1959	April	9, 1959	May	1, 1959
ril	18, 1959	May	10, 1959	April	24, 1959	May	27, 1959
y	10, 1959	May	13, 1959	May	16, 1959	May	29, 1959
y	13, 1959	May	24, 1959	May	19, 1959	May	29, 1959
y	24, 1959	May	28, 1959	May	30, 1959	June	1, 1959
y	28, 1959	June	13, 1959	June	3, 1959	July	7, 1959
ne	13, 1959	July	1, 1959	June	19, 1959	July	12, 1959
ne	29, 1959	July	10, 1959	July	5, 1959	July	12, 1959
ly	10, 1959	July	14, 1959	July	16, 1959	July	29, 1959
ly	27, 1959	August	1, 1959	August	2, 1959	August	4, 1959
B331 jet aircraft							
ly	19, 1959	November	10, 1959	August	19, 1959	November	23, 1959
gust	22, 1959	November	10, 1959	September	4, 1959	December	3, 1959
gust	28, 1959	November	25, 1959	September	9, 1959	December	9, 1959
ptember	22, 1959	December	23, 1959	October	5, 1959	January	9, 1960
tober	6, 1959	January	18, 1960	October	19, 1959	February	25, 1960
tober	27, 1959	April	1, 1960	November	10, 1959	April	24, 1960
vember	5, 1959	April	5, 1960	November	19, 1959	May	11, 1960
vember	10, 1959	April	14, 1960	November	23, 1959	April	28, 1960
tember	15, 1959	May	9, 1960	December	28, 1959	May	19, 1960
tember	30, 1959	May	25, 1960	January	12, 1960	May	28, 1960
uary	18, 1960	July	1, 1960	January	31, 1960	July	4, 1960
bruary	29, 1960	July	1, 1960	March	13, 1960	July	6, 1960
rch	23, 1960	(a)		April	5, 1960	(a)	
ril	26, 1960	(a)		May	9, 1960	(a)	
ril	29, 1960	(a)		May	12, 1960	(a)	
	9, 1960	(a)		May	22, 1960	(a)	
e	8, 1960	(a)		June	20, 1960	(a)	
y	1, 1960	(a)		July	14, 1960	(a)	

Delivery dates		In-service dates	
Reconstructed	Historical	Reconstructed	Historical
CV880 jet aircraft			
November 15, 1959	May 18, 1960	July 13, 1960	January 14, 19
December 15, 1959	(a)	May 15, 1960	(a)
January 15, 1960	January 1, 1961	May 15, 1960	January 12, 19
February 15, 1960	January 5, 1961	May 15, 1960	January 12, 19
February 15, 1960	(a)	May 15, 1960	(a)
March 15, 1960	January 6, 1961	May 15, 1960	January 12, 19
March 15, 1960	January 8, 1961	May 15, 1960	January 12, 19
April 15, 1960	January 12, 1961	May 15, 1960	January 22, 19
April 15, 1960	January 21, 1961	May 15, 1960	January 25, 19
April 15, 1960	(a)	May 15, 1960	(a)
May 15, 1960	February 2, 1961	May 25, 1960	February 10, 19
May 15, 1960	February 15, 1961	May 25, 1960	March 16, 19
May 15, 1960	(a)	May 25, 1960	(a)
June 15, 1960	March 15, 1961	June 25, 1960	March 30, 19
June 15, 1960	March 18, 1961	June 25, 1960	April 14, 19
June 15, 1960	(a)	June 25, 1960	(a)
June 15, 1960	(a)	June 25, 1960	(a)
July 15, 1960	March 20, 1961	July 25, 1960	April 1, 19
July 15, 1960	April 26, 1961	July 25, 1960	April 30, 19
July 15, 1960	May 6, 1961	July 25, 1960	May 20, 19
July 15, 1960	(a)	July 25, 1960	(a)
July 15, 1960	May 25, 1961	July 25, 1960	June 1, 19
August 15, 1960	June 9, 1961	August 25, 1960	June 15, 19
August 15, 1960	July 9, 1961	August 25, 1960	July 19, 19
August 15, 1960	August 10, 1961	August 25, 1960	August 18, 19
August 15, 1960	(a)	August 25, 1960	(a)
August 15, 1960	(a)	August 25, 1960	(a)
September 15, 1960	September 2, 1961	September 25, 1960	September 8, 19
September 15, 1960	October 13, 1961	September 25, 1960	October 20, 19
September 15, 1960	(a)	September 25, 1960	(a)

(a) Aircraft not delivered historically to TWA. These include: (1) Six B-331 jet aircraft ordered by HT Co. but thereafter diverted to Pan American World Airways, Inc. and delivered thereto on November 5, 1959, December 15, 1959, December 30, 1959, March 23, 1960, April 29, 1960 and June 8, 1960 respectively; (2) Six CV880 jet aircraft ordered by HT Co. but thereafter delivered to Northeast Airlines, Inc. on November 30, 1960, December 5, 1960, December 8, 1960, December 14, 1960, January 21, 1961 and January 30, 1961 respectively, pursuant to a lease agreement between Convair and Northeast (subsequently these six aircraft were repossessed by Convair and sold to TWA with deliveries to TWA occurring in the period July - September, 1963); (3) Four CV880 jet aircraft ordered by HT Co. and retained by it.

Sources:

1. Historical and Reconstructed delivery dates derived from the testimony of R. W. Rummel and Exhibits and Annexes thereto;

2. Historical and Reconstructed In-Service dates furnished by Coverdale & Colpitts, Appendix C attached.

TWA Ex. 7(b)(2)
(Price Waterhouse Study - Volume Two)

TRANS WORLD AIRLINES, INC.

REPORT TO CAHILL, GORDON, REINDEL & OHL

ON

RECONSTRUCTION OF FINANCIAL STATEMENTS FOR THE PERIOD SEPTEMBER 30, 1955 - DECEMBER 31, 1963

AND

CALCULATION OF PRESENT VALUE AS OF DECEMBER 31, 1963 OF FUTURE PAYMENTS FOR DEBT SERVICE ON LONG-TERM DEBT

VOLUME II

Detailed Assumptions and their Application,
Schedules and Appendices

PRICE WATERHOUSE & CO.

TRANS WORLD AIRLINES, INC.

REPORT TO CAHILL, GORDON, REINDEL & OHL
ON
RECONSTRUCTION OF FINANCIAL STATEMENTS
FOR THE PERIOD SEPTEMBER 30, 1955 - DECEMBER 31, 1963
AND
CALCULATION OF PRESENT VALUE AS OF DECEMBER 31, 1963
OF FUTURE PAYMENTS FOR DEBT SERVICE
ON LONG-TERM DEBT

TABLE OF CONTENTS

	Page
Volume II - Detailed Assumptions and their Application	
Index to schedules	1
Section V - Detailed statement of assumptions used in reconstruction of financial statements	4
VI - Application of assumptions:	
Introduction	12
A. 1955 equity financing	13
B. Reconstructed long-term debt	15
C. Elimination of historical debt financing	19
D. Gain (loss) from operations before provisions for depreciation, obsolescence and amortization	20
E. Capital expenditures for property and equipment	21
F. Provisions for depreciation and obsolescence	52
G. Gain (loss) on sales or retirements of property and equipment and collection of related proceeds	75
H. Deferred training and other costs applicable to new aircraft	90
J. Reserve for overhaul of jet aircraft	95
K. Provisions for income taxes	98
Appendices A - Report of Drexel Harriman Ripley, Incorporated*	
B - Report of Coverdale & Colpitts*	
C - Supporting information prepared by Coverdale & Colpitts	
D - Report of R. Dixon Speas Associates*	
E - Supporting information prepared by R. Dixon Speas Associates	

*Incorporated herein by reference.

INDEX TO SCHEDULES

A	Statements of reconstructed and historical consolidated financial position giving effect to reconstructed 1955 equity financing as at September 30, 1955
B	Reconstructed long-term debt for the period October 1, 1955 - December 31, 1963
B-1	Reconstructed interest expense for the period October 1, 1955 - December 31, 1963
B-2	Reconstructed long-term debt expense - unamortized portion for the period October 1, 1955 - December 31, 1963
B-3	Reconstructed flight equipment fund for the period October 1, 1955 - December 31, 1963
B-4	Reconstructed capital expenditures from flight equipment fund for the period October 1, 1955 - December 31, 1963
C	Historical long-term debt and interest expense for the period October 1, 1955 - December 31, 1963
C-1	Historical long-term debt expense - unamortized portion for the period October 1, 1955 - December 31, 1963
D	Gain from operations before depreciation, obsolescence and amortization for the period October 1, 1955 - December 31, 1963
D-1	Increases in gain from operations estimated by Coverdale & Colpitts for the period January 1, 1959 - December 31, 1963
E	Reconstructed and historical property and equipment (including expendable parts) and deposits with manufacturers for the period September 30, 1955 - December 31, 1963
E-1	Reconstructed and historical capitalized interest for the period October 1, 1955 - December 31, 1963
E-1a	Reconstructed capitalized interest - B131 airframes for the period October 1, 1955 - December 31, 1963
E-1b	Reconstructed capitalized interest - B131 spare engines for the period October 1, 1955 - December 31, 1963
E-2	Reconstructed and historical net additions to deposits with manufacturers for the period October 1, 1955 - December 31, 196
E-3	Reconstructed and historical additions and transfers to flight equipment - summary for the period October 1, 1955 - December 31, 1963
E-3a	Reconstructed and historical capital expenditures for jet flight equipment by category for the period October 1, 1955 - December 31, 1963

E-4 Reconstructed and historical net changes in expendable parts for the period October 1, 1955 - December 31, 1963

E-5 Reconstructed and historical net additions to construction work in progress - flight equipment for the period October 1, 1955 - December 31, 1963

E-6 Reconstructed and historical capital expenditures for ground property and equipment and nonoperating property and equipment for the period October 1, 1955 - December 31, 1963

F Reconstructed and historical reserves for depreciation of property and equipment and obsolescence of expendable parts for the period October 1, 1955 - December 31, 1963

F-1 Reconstructed and historical provisions for depreciation of flight equipment - summary for the period October 1, 1955 - December 31, 1963

F-1a Reconstructed and historical provisions for depreciation of jet flight equipment by category for the period October 1, 1955 - December 31, 1963

F-2 Reconstructed and historical provisions for obsolescence of expendable parts for the period October 1, 1955 - December 31, 1963

F-3 Reconstructed and historical provisions for depreciation of ground property and equipment and nonoperating property and equipment for the period October 1, 1955 - December 31, 1963

F-4 Reconstructed and historical service lives and common terminal dates used for calculation of depreciation of B131, B331 and CV880 jet flight equipment

F-5 Terms related to depreciation - definitions for purposes of this subsection

G Reconstructed and historical gain (loss) on sales or retirements of property and equipment for the period October 1, 1955 - December 31, 1963

G-1 Reconstructed funds restricted for flight equipment purchases - other for the period October 1, 1955 - December 31, 1963

G-2 Flight equipment with earlier sales dates - application of historical collection experience to reconstructed proceeds for the period October 1, 1955 - December 31, 1963

G-3 Flight equipment with earlier sales dates - historical collection experience

G-4 Reconstructed and historical other income credits (charges) - net for the period October 1, 1955 - December 31, 1963

H Reconstructed and historical training and other costs applicable to new aircraft - by aircraft type for the period October 1, 1955 - December 31, 1963

J Reconstructed and historical reserve for overhaul of jet aircraft for the period October 1, 1955 - December 31, 1963

J-1 Reserve for overhaul of jet aircraft - calculation of reconstructed net additions charged to maintenance expense - B331 aircraft for the period January 1, 1959 - December 31, 1963

K Reconstructed and historical provisions for income taxes for the period October 1, 1955 - December 31, 1963

K-1 Reconstructed and historical provisions for deferred federal income taxes for the period October 1, 1955 - December 31, 1963

K-2 Reconstructed and historical deferred federal income taxes

K-3 Excess of reconstructed tax depreciation over book depreciation - jet airframes and engines for the period October 1, 1955 - December 31, 1963

SECTION V - DETAILED STATEMENT OF ASSUMPTIONS USED IN RECONSTRUCTION OF FINANCIAL STATEMENTS

Listed below are the detailed assumptions which, in accordance with your instructions to us, we have followed in adjusting the historical financial data of TWA for the period September 30, 1955 - December 31, 1963.

Assumptions derived from the Drexel Harriman Ripley, Incorporated report:-

The assumptions set forth in Paragraphs A, B and C below are all derived from the report prepared by the investment banking firm, Drexel Harriman Ripley, Incorporated (Harriman Ripley), for use in this proceeding (Appendix A hereto).

A. 1955 equity financing:

1. On June 1, 1955, 3,336,546 shares of capital stock are to be sold at $17.50 per share. Net proceeds after underwriting fees and expenses are assumed to be $55.5 million.

2. The proceeds are to be used to:

a. Redeem $35.0 million principal amount of 3-3/4% Equipment Mortgage Sinking Fund Bonds on July 1, 1955.

b. Reimburse Hughes Tool Company (HT Co.) on June 1, 1955 for $16.8 million of deposits with Lockheed Aircraft Corporation (Lockheed) for twenty-five L1649A aircraft, plus interest on such amount for five months at 3% or $.2 million.

c. Deposit $2.4 million with Lockheed on September 29, 1955 pursuant to a contract for five L1049G aircraft.

3. As a consequence of the 1955 equity financing the effect of the sale in 1957 of 3,337,036 shares of capital stock at $13.00 per share is to be eliminated from the historical financial statements. Net proceeds to TWA were $43.2 million.

B. Reconstructed long-term debt:

1. Flight equipment mortgage -

a. TWA is to enter into a loan agreement dated October 1, 1955 relating to Series A flight equipment mortgage notes (minimum amount - $50.0 million; maximum amount - $170.0 million).

b. TWA is to enter into a loan agreement dated July 1, 1959 relating to Series B flight equipment mortgage notes (minimum amount - $90.0 million; maximum amount - $110.0 million).

c. Proceeds amounting to $50.0 million each on October 1, 1955, July 1, 1956 and April 1, 1957 and $20.0 million on January 1, 1958 from flight equipment mortgage notes, Series A, 4% are to be deposited in the flight equipment fund.

d. Proceeds amounting to $50.0 million on October 1, 1959 and $40.0 million on April 1, 1960 from flight equipment mortgage notes, Series B, 6% are to be deposited in the flight equipment fund.

e. Interest and commitment fees are to be calculated and paid in accordance with the terms of the flight equipment mortgage and the related mortgage notes.

f. Total agency fee and estimated other expenses of issue are to be assumed as .183% of the maximum amount, or $.3 million for Series A and $.2 million for Series B.

g. Moneys are to be drawn down from the flight equipment fund in accordance with the provisions of the 1955 flight equipment mortgage relating thereto.

2. Subordinated debentures, 5% -

a. On June 1, 1959, the net proceeds of $58.4 million from an issue of $60.0 million of subordinated debentures are to be received and deposited in the general funds.

b. Interest is to be calculated and paid in accordance with the terms of the debentures.

c. Total underwriting expenses and other expense of issue are to be $1.6 million.

d. Debentures are to be convertible into common stock at any time prior to June 1, 1969. There are to be no conversions through December 31, 1963.

C. Elimination of historical debt financing:

1. The debt financing program, referred to in Assumption B above, is to be considered as a substitute for the entire amount of debt financing, both long-term and short-term, reflected in the historical financial statements, except for minor amounts relating to instalment contracts for purchase of bulk storage and other facilities which are to remain unchanged.

2. Amounts for interest, commitment fees and debt expense, if any, relating to the eliminated historical debt are to be excluded.

Assumption derived from the Coverdale & Colpitts report:-

D. Gain (loss) from operations before provisions for depreciation, obsolescence and amortization:

Gain (loss) from operations before provisions for depreciation obsolescence and amortization is to be reconstructed to give effect to changes estimated by Coverdale & Colpitts, consulting engineers, in their report which has been prepared for use in this proceeding (Appendix B hereto).

Other assumptions:-

E. Capital expenditures for property and equipment:

1. Derived from Harriman Ripley report: "Capital expenditures" are to include the investment in flight equipment expendable parts in accordance with the flight equipment mortgage described in the Harriman Ripley report (Appendix A hereto); accordingly, expendable parts are to be classified with property and equipment for the entire period.

2. Derived from TWA's historical policy: The reconstructed cost of jet flight equipment is to include capitalized interest on funds deposited with aircraft and engine manufacturers (to the extent such deposits are financed from borrowed funds) from date of deposit to date of delivery of aircraft and engines.

3. The amount and timing of capital expenditures for property and equipment (including, where applicable, expenditures for aircraft, spare engines, rotable and expendable parts, other flight equipment and ground equipment) are to be adjusted to give effect to the following assumptions:

a. That the piston aircraft which TWA historically acquired from or through HT Co. during 1956-1958 were instead acquired directly from Lockheed; no change in dates of delivery is assumed.

b. That TWA acquired, directly from Boeing and on the earlier delivery dates set forth in the schedule of "Reconstructed and historical delivery and in-service dates - B131, B331, and CV880 jet aircraft" (Exhibit V) annexed hereto, each of the 33 Boeing aircraft which HT Co. ordered in 1956, as follows:

(i) 15 B131 jet aircraft historically leased and subsequently purchased from HT Co.

(ii) 12 B331 jet aircraft historically acquired which consisted of:

4 B331 jet aircraft historically leased and subsequently purchased from HT Co.

1 B331 jet aircraft historically purchased from HT Co.

7 B331 jet aircraft historically purchased from Boeing, after reimbursement to HT Co. for deposits previously made thereon; and

(iii) 6 B331 jet aircraft historically delivered to another airline.

c. That, since TWA would have acquired the 6 B331 jet aircraft ordered by HT Co. but historically delivered to another airline, TWA did not enter into a contract with Boeing dated April 30, 1961 to purchase 6 B331B jet aircraft, did not modify that contract by letter agreement dated December 1, 1961 to provide for the leasing of 5 B331B jet aircraft from Boeing and did not lease 5 B331B aircraft from Boeing in 1962 and 1963. In addition, that TWA did not lease and subsequently purchase the related complement of 20 engines for such 5 B331B aircraft and did not incur any other capital expenditures relating to these aircraft.

d. That TWA acquired directly from Convair and at the dates shown in Exhibit V all 30 CV880 jet aircraft which HT Co. historically ordered from Convair in 1956 (20 of which were historically acquired by TWA in 1960 and 1961 and 6 of which were historically acquired in a used condition by TWA in 1963).

The adjusted timing of reconstructed expenditures for rotable parts for the CV880 fleet is as set forth in Appendix C hereto, which has been prepared by Coverdale & Colpitts for use in this proceeding.

e. That expenditures for certain ground property and equipment relating to or resulting from the changes in TWA's jet fleet described above were reconstructed as set forth in Appendix C hereto, which has been prepared by Coverdale & Colpitts for use in this proceeding.

f. That TWA acquired directly from suppliers certain customer-furnished equipment and rotable and expendable parts for jet aircraft which were originally acquired by HT Co. That such acquisitions were made on the dates that suppliers' invoices were transmitted by TWA to HT Co. for payment.

F. Provisions for depreciation and obsolescence:

1. Derived from TWA's historical policy: The TWA accounting olicies relating to methods of depreciation, service lives and residual alues of depreciable assets are to be the same as those followed his-rically during the period.

2. Provisions for depreciation and obsolescence of property and uipment are to be reconstructed to give effect to assumed changes hich also appear as parts of Assumption E) in capital expenditures and -service dates relating to:

a. Piston aircraft assumed to have been acquired during 1956-1958 directly from Lockheed.

b. 15 B131 jet aircraft historically leased and subsequently purchased from HT Co. which are assumed to be acquired by TWA directly from Boeing.

c. 12 B331 jet aircraft which are assumed to be acquired by TWA directly from Boeing and which historically consisted of:

4 B331 jet aircraft historically leased and subsequently purchased from HT Co.

1 B331 jet aircraft historically purchased from HT Co.

7 B331 jet aircraft historically purchased from Boeing, after reimbursement to HT Co. for deposits previously made thereon, and

6 B331 jet aircraft which are assumed to have been acquired directly by TWA from Boeing and which historically were delivered to another airline.

d. 5 B331B jet aircraft which are assumed not to have been leased in 1962 and 1963. In addition, 20 engines for such aircraft are assumed not to be leased and subsequently purchased and no other capital expenditures are assumed to be incurred.

e. 30 CV880 jet aircraft which HT Co. historically ordered from Convair in 1956 (20 of which were historically acquired by TWA in 1960 and 1961 and 6 of which were historically acquired in a used condition by TWA in 1963).

f. The assumed earlier and additional expenditures for certain ground property and equipment relating to or resulting from the changes in TWA's jet fleet which were reconstructed as set forth in Appendix C hereto, which has been prepared by Coverdale & Colpitts for use in this proceeding.

G. Gain (loss) on sales or retirements of property and equipment and collection of related proceeds:

1. Derived from R. Dixon Speas Associates report and from Assumptions E and F: The gain (loss) on sales or retirements of property and equipment is to be reconstructed to give effect to:

a. The reconstructed sales dates and contract values for 103 piston aircraft as set forth in the report and a related schedule prepared for use in this proceeding by R. Dixon Speas Associates (RDSA), consultants in airline operations, and constituting Appendices D and E hereto.

b. Reconstructed capital expenditures and reconstructed provisions for depreciation, as applicable.

2. Derived from TWA's collection experience: The amount and timing of collections of proceeds from sales or retirements of proper and equipment are to be reconstructed based upon average historical collection experience relating to such property and equipment.

H. Deferred training and other costs applicable to new aircraft:

The amount and timing of expenditures for and amortization deferred training and other costs applicable to new aircraft ("defer training costs") are to be adjusted to give effect to the following assumptions (which also appear as parts of Assumption E3):

a. That TWA acquired, directly from Boeing and on the earlier delivery dates set forth in the schedule of "Reconstructed and historical delivery and in-service dates - B131, B331, and CV880 jet aircraft" (Exhibit V) annexed hereto, each of the 33 Boeing aircraft which HT Co. ordered in 1956, as follows:

(i) 15 B131 jet aircraft historically leased and subsequently purchased from HT Co.

(ii) 12 B331 jet aircraft historically acquired which consisted of:

4 B331 jet aircraft historically leased and subsequently purchased from HT Co.

1 B331 jet aircraft historically purchased from HT Co.

7 B331 jet aircraft historically purchased from Boeing, after reimbursement to HT Co. for deposits previously made thereon; and

(iii) 6 B331 jet aircraft historically delivered to another airline.

b. That TWA did not lease 5 B331B aircraft from Boeing in 1962 and 1963.

c. That TWA acquired directly from Convair and at the dates shown in Exhibit V all 30 CV880 jet aircraft which HT Co. historically ordered from Convair in 1956.

. The adjusted timing of reconstructed expenditures for deferred training costs for the CV880 fleet is as set forth in Appendix C hereto, which has been prepared by Coverdale & Colpitts for use in this proceeding.

J. Reserve for overhaul of jet aircraft:

Net additions to the reserve for overhaul of jet aircraft are be reconstructed as follows:

a. The portions of the historical net additions resulting from provisions charged to training and other costs applicable to new aircraft are to be adjusted in the same manner as expenditures for deferred training costs as set forth in Assumption H above.

b. The portions of the historical net additions resulting from net provisions charged to maintenance expense are to be adjusted in accordance with the proportionate increases in historical maintenance expense estimated by Coverdale & Colpitts (Appendix B hereto).

K. Provisions for income taxes:

Derived from TWA's historical policy: Calculations of provisions for current and deferred federal income taxes are to be made on basis consistent with the procedures historically followed by TWA in making tax computations during the respective periods.

SECTION VI - APPLICATION OF ASSUMPTIONS

ntroduction:

This section describes the methods used in making adjustments the historical financial data of TWA for the period September 30, 955 - December 31, 1963 to give effect to the assumptions enumerated in ection V. In order to apply these assumptions it was necessary to make orollary assumptions as to events or transactions which it is reas[illegible]- ble to assume would have taken place; these corollary assumptions are escribed herein.

Where practicable, the accounting methods used in making the djustments were consistent with the accounting methods historically llowed by TWA in the related periods. In the relatively few instances ere it was impracticable to use historical methods, bec[illegible]se the re- ired information was not available on a reconstructed basis, we used ternative methods which appeared reasonable in the circumstances and ich we believe produced results not materially different from those at would have been produced through the use of historical methods.

In preparing the reconstructed financial statements, historical ounts which were assumed to be different on a reconstructed basis were cluded and replaced by reconstructed amounts. The adjustments to give fect to these changes were applied to the historical financial data a calendar quarter by quarter basis.

Assumptions are discussed in this section in the same sequence which they are set forth in Section V. In each case, the assumption repeated and is followed by explanations of the application thereof related schedules. Letter designations of the subsections herein respond with those used in Section V. All amounts in this section stated in millions of dollars.

A. 1955 equity financing:

The assumptions

1. On June 1, 1955, 3,336,546 shares of capital stock are to sold at $17.50 per share. Net proceeds after underwriting fees and expenses are assumed to be $55.5 million.

2. The proceeds are to be used to:

a. Redeem $35.0 million principal amount of 3-3/4% Equipment Mortgage Sinking Fund Bonds on July 1, 1955.

b. Reimburse Hughes Tool Company (HT Co.) on June 1, 1955 for $16.8 million of deposits with Lockheed Aircraft Corporation (Lockheed) for twenty-five L1649A aircraft, plus interest on such amount for five months at 3% or $.2 million.

c. Deposit $2.4 million with Lockheed on September 29, 1955 pursuant to a contract for five L1049G aircraft.

3. As a consequence of the 1955 equity financing the effect o the sale in 1957 of 3,337,036 shares of capital stock at $13.00 per share is to be eliminated from the historical financial statements. proceeds to TWA were $43.2 million.

Application of the assumptions

Schedule A sets forth the adjustments applied to the histo ical statement of TWA's consolidated financial position as of Septe 30, 1955 to give effect to these assumptions. The adjustments are described below:

(i) Net proceeds of $55.5 million from the June 1, 1955 sale of capital stock were added to net current assets; an amount ($16.7 million) equal to the aggregate par value of the shares sold was added to capital stock and the balance ($38.8 million) was added to capital surplus.

(ii) Both long-term debt and net current assets were reduced by an amount of $35.0 million as a result of the assumed redemption on July 1, 1955 of the outstanding principal amount of 3-3/4% Equipment Mortgage Sinking Fund Bonds.

(iii) Additional adjustments to retained earnings as at September 30, 1955 assumed to result from the redemption given effect to in (ii) above, were as follows:

	Increase (decrease) in retained earnings
Redemption premium of 3-3/4%	($1.3)
Reversal of interest for months of July 1955 through September 1955, historically accrued at September 30, 1955 (interest on the issue was payable June 1 and December 1)	.3
Write-off of unamortized debt expense on the issue (less than $.05 million)	-
Less - Estimated reduction in provision for federal income taxes at September 30, 1955 resulting from preceding adjustments	(1.0)
Net decrease in retained earnings	.5
	($ .5)

(iv) Deposits with manufacturers were increased by $17.0 million as a result of the assumed reimbursement to HT Co. on June 1, 1955 of $16.8 million for deposits made by HT Co. with Lockheed for twenty-five L1649A aircraft, plus assumed interest on such amount for five months at 3%, or $.2 million.

(v) Deposits with manufacturers were increased by $2.4 million as a result of the assumed deposit of $2.4 million with Lockheed on September 29, 1955 for five L1049G aircraft. A contract dated September 24, 1955 between HT Co. and Lockheed (subsequently assigned to TWA) for purchase of these aircraft called for such a deposit within five days of the execution of the contract. See subsection E herein for description of additional reconstructed transactions related to this contract.

In addition to the foregoing adjustments made as of September 30, 1955, the effect of the equity financing carried out in 1957 has been excluded from the reconstructed financial statements. This adjustment consisted of reducing net current assets by the net proceeds of the financing ($43.2 million) and reducing the capital stock and capital surplus accounts by amounts of $16.7 million and $26.5 million, respectively.

Reconstructed long-term debt: -

1. Flight equipment mortgage:

The assumptions

a. TWA is to enter into a loan agreement dated October 1, 1955 ating to Series A flight equipment mortgage notes (minimum amount - 0.0 million; maximum amount - $170.0 million).

b. TWA is to enter into a loan agreement dated July 1, 1959 ting to Series B flight equipment mortgage notes (minimum amount - 0 million; maximum amount - $110.0 million).

c. Proceeds amounting to $50.0 million each on October 1, 1955, 1, 1956 and April 1, 1957 and $20.0 million on January 1, 1958 flight equipment mortgage notes, Series A, 4% are to be deposited the flight equipment fund.

d. Proceeds amounting to $50.0 million on October 1, 1959 and .0 million on April 1, 1960 from flight equipment mortgage notes, ies B, 6% are to be deposited in the flight equipment fund.

e. Interest and commitment fees are to be calculated and paid ccordance with the terms of the flight equipment mortgage and the ted mortgage notes.

f. Total agency fee and estimated other expenses of issue are to ssumed as .183% of the maximum amount, or $.3 million for Series A $.2 million for Series B.

g. Moneys are to be drawn down from the flight equipment fund in rdance with the provisions of the 1955 flight equipment mortgage ting thereto.

Application of the assumptions

The terms of the flight equipment mortgage and the notes issued thereunder, estimated expenses of issue, and transactions in th flight equipment fund created under the terms of the mortgage have bee given effect to in the reconstructed financial statements in accordanc with information relating thereto as set forth in the report of Harris Ripley (Appendix A hereto).

Gross proceeds of $260.0 million from sales of the Series A Series B notes were added to the reconstructed flight equipment fund (see below for description of other transactions in this fund). Sched ules B and B-3 show these additions to long-term debt and the related additions to the flight equipment fund, respectively.

Consistent with TWA's historical accounting methods, recon- structed agency fee and estimated other expenses of issue on the Series A and Series B notes ($.3 million and $.2 million, respectivel were assumed to have been deferred and amortized, on a straight-line basis, over the 25-year period ending with maturity of the notes. Schedule B-2 summarizes such long-term debt expense.

Reconstructed commitment fees were calculated at an annual rate of 1/2% on the unused portion of the maximum principal amount of authorized debt for the periods from the dates of the agreements to t dates of expiration of the commitments. As shown on Schedule B-1, reconstructed commitment fees have been included in interest expense.

Reconstructed gross interest expense on the Series A and Series B notes was calculated at annual rates of 4% and 6%, respectiv on outstanding principal. Reconstructed interest expense, commitment fees and amortization of deferred long-term debt expense are summari on Schedule B-1. As shown on this schedule, reconstructed gross inte expense was reduced by the amounts of interest assumed to have been capitalized on deposits with manufacturers; procedures used in calcu- lating reconstructed capitalized interest are described in subsectio

Transactions in the reconstructed flight equipment fund, summarized on Schedule B-3, are as follows:

Additions to flight equipment fund:

a. Gross proceeds from flight equipment mortgage notes,

b. Collections of receivables arising from sales of flight equipment (assumed to be the same as historical collections except for receivables attributable to piston aircraft assumed to have been sold at earlier dates and assumed increased retirements of jet engines and jet rotable parts - see subsection G) and

c. Proceeds of insurance claims on flight equipment (included on Schedule B-3 with collections of receivables).

Deductions from flight equipment fund:

Qualifying capital expenditures (expenditures for deposits with manufacturers, flight equipment, expendable parts and construction work in progress - flight equipment, but not including additions for capitalized interest). For any calendar quarter in which qualifying capital expenditures exceeded the balance of amounts in the fund, excess expenditures were "carried over" to the succeeding quarter to be then deducted from amounts in the fund, except that such excess expenditures that had been made prior to the first sale of Series B notes were not carried over to be deducted from the proceeds of the Series B notes. Reconstructed qualifying capital expenditures are summarized on Schedule B-4.

Under the terms of the assumed loan agreements relating to the Series A and Series B notes, no sinking fund payments or repayments of principal are required until after December 31, 1963.

To simplify the calculations, we have, with your concurrence, assumed that there is no interest income on amounts in the reconstructed flight equipment fund.

2. Subordinated debentures, 5%:

The assumptions

a. On June 1, 1959, the net proceeds of $58.4 million from an issue of $60.0 million of subordinated debentures are to be received and deposited in the general funds.

b. Interest is to be calculated and paid in accordance with the terms of the debentures.

c. Total underwriting expenses and other expense of issue are to be $1.6 million.

d. Debentures are to be convertible into common stock at any time prior to June 1, 1969. There are to be no conversions through December 31, 1963.

Application of the assumptions

The terms of this issue and related interest rate and issue expenses have been given effect to in the reconstructed financial statements in accordance with information relating thereto as set forth in the report of Harriman Ripley (Appendix A hereto).

The net proceeds (after deducting underwriting and other expense of issue) from this debt issue were added to net current assets. As with the flight equipment mortgage notes, issue expenses (in this case aggregating $1.6 million) were deferred and amortized, on a straight-line basis, over the 25-year period ending with maturity of the debentures. Interest expense was calculated at an annual rate of 5% from June 1, 1959. The proceeds, gross interest expense and issue expense are shown on Schedules B, B-1 and B-2, respectively.

TWA Ex. 7(b)(2), Schedule B-2
(Price Waterhouse Study - Volume Two)

TRANS WORLD AIRLINES, INC.

RECONSTRUCTED LONG-TERM DEBT EXPENSE - UNAMORTIZED PORTION

FOR THE PERIOD OCTOBER 1, 1955 - DECEMBER 31, 1963

(Amounts in millions)

Years ended December 31,		Flight equipment mortgage notes Series A, 4%	Flight equipment mortgage notes Series B, 6%	Subordinated debentures, 5%	Total Balance to Exhibit I-1, net change to Exhibit III-1
1955***	Deferral	$.3			$ .3
	Amortization(a)	*			*
	Ending balance	.3			.3
1956	Amortization(a)	*			*
	Ending balance	.3			.3
1957	Amortization(a)	*			*
	Ending balance	.3			.3
1958	Amortization(a)	*			*
	Ending balance	.3			.3
1959	Deferrals		$.2	$1.6	1.8
	Amortization(a)	(.1)	*	*	(.1)
	Ending balance	.2	.2	1.6	2.0
1960	Amortization(a)	*	*	(.1)	(.1)
	Ending balance	.2	.2	1.5	1.9
1961	Amortization(a)	*	*	(.1)	(.1)
	Ending balance	.2	.2	1.4	1.8
1962	Amortization(a)	*	*	*	*
	Ending balance	.2	.2	1.4	1.8
1963	Amortization(a)	*	*	(.1)	(.1)
	Ending balance	$.2	$.2	$1.3	$1.7

*Amount is less than $.05 million.

***Three months ended December 31, 1955.

(a) Amortization to Schedule B-1

C. Elimination of historical debt financing:

The assumptions

1. The debt financing program, referred to in Assumption B above, is to be considered as a substitute for the entire amount of debt financing, both long-term and short-term, reflected in the historical financial statements, except for minor amounts relating to instalment contracts for purchase of bulk storage and other facilities which are to remain unchanged.

2. Amounts for interest, commitment fees and debt expense, if any, relating to the eliminated historical debt are to be excluded.

Application of the assumptions

Adjustments to give effect to these assumptions were made by (1) determining the amounts included in the historical financial statements for the historical debt financing together with the related interest, commitment fees and debt expense and (2) excluding such amounts from the reconstructed financial statements. The items so excluded are:

a. All long-term borrowings made between October 1, 1955 and December 31, 1963, except the minor amounts described in the assumptions;

b. All repayments and transfers (to or from current liabilities) of long-term debt between October 1, 1955 and December 31, 1963, except the minor amounts described in the assumptions;

c. All gross interest expense related to the excluded debt;

d. All capitalized interest on deposits with manufacturers historically financed from proceeds of the eliminated debt issues and depreciation thereon;

e. The portion of the 1963 special item pertaining to the write-off of the unamortized portion of capitalized interest.

Historical long-term debt (including historical changes therein), interest expense and issue expense for the period October 1, 1955 to December 31, 1963 are summarized on Schedules C and C-1 attached. Historical capitalized interest is referred to in subsection E. Historical additions to or deductions from funds restricted for flight equipment purchases have been excluded from the reconstructed financial statements.

D. Gain (loss) from operations before provisions for depreciation, obsolescence and amortization:

The assumption

Gain (loss) from operations before provisions for depreciation, obsolescence and amortization is to be reconstructed to give effect to changes estimated by Coverdale & Colpitts, consulting engineers, in their report which has been prepared for use in this proceeding (Appendix B hereto).

Application of the assumption

Schedule D-1 summarizes estimates made by Coverdale & Colpitts of increases in gain from operations before provisions for depreciation, obsolescence and amortization. As shown on Schedule D, the estimated increases, aggregating $122.4 million, were added to historical amounts to determine reconstructed amounts.

A net amount of $.7 million, representing a portion of historical bad debts related to sales of flight equipment with earlier sales dates, has been excluded from the determination of reconstructed gain from operations. In the reconstructed financial statements, all bad debts relating to flight equipment with earlier sales dates are included in other income credits (charges) - net (see explanation in subsection G).

TWA Ex. 7(b)(2), Schedule D
(Price Waterhouse Study - Volume Two)

TRANS WORLD AIRLINES, INC.

GAIN FROM OPERATIONS BEFORE DEPRECIATION, OBSOLESCENCE AND AMORTIZATION

FOR THE PERIOD OCTOBER 1, 1955 - DECEMBER 31, 1963

(Amounts in millions)

Years ended December 31,	Historical (Exhibit II-1)	Add (deduct) - Increases estimated by Coverdale & Colpitts (Schedule D-1)	Provision for bad debts (a)	Reconstructed (Exhibit II-1)
1955*** **	$ 2.7			$ 2.7
1956**	16.4			16.4
1957**	22.3			22.3
1958**	31.2			31.2
1959	51.4	$ 17.0		68.4
1960	53.5	55.9		109.4
1961	46.1	23.4	$.8	70.3
1962	64.3	13.3	(.1)	77.5
1963	90.5	12.8		103.3
Total	$378.4	$122.4	$.7	$501.5

**Reconstructed and historical amounts are assumed to be identical.

***Three months ended December 31, 1955.

(a)Represents portion of historical bad debts, relating to flight equipment with earlier sales dates, included in this caption. See page 84 for summary of historical uncollected receivables.

AX-514

TWA Ex. 7(b)(2), Schedule D-1
(Price Waterhouse Study - Volume Two)

TRANS WORLD AIRLINES, INC.

INCREASES IN GAIN FROM OPERATIONS
ESTIMATED BY COVERDALE & COLPITTS
FOR THE PERIOD JANUARY 1, 1939 - DECEMBER 31, 1963
(Amounts in millions)

Years ended December 31,	As reported by Coverdale & Colpitts: Increases in gain from operations	Add (deduct) - increase (decrease) in depreciation, obsolescence and amortization included therein: Chapter I	Chapter II	Chapter III	Chapter IV	Chapter V	Increases in gain from operations before depreciation, obsolescence and amortization (Schedule D)
1959	$10.6	$ 4.4		$2.0			$ 17.0
1960	33.8	8.5	$ 3.8	1.7	$5.4	$ 2.7	55.9
1961	10.9	(1.0)	5.1	.1	2.6	5.7	23.4
1962	4.5	(.1)	4.3		(.8)	5.4	13.3
1963	4.2	(.3)	3.6	.3	.6	4.4	12.8
	$64.0	$11.5	$16.8	$4.1	$7.8	$18.2	$122.4

E. Capital expenditures for property and equipment:

Contents

	Page
Explanatory comments	22
Expendable parts	23
Capitalized interest	24
Piston aircraft	26
B131 jet aircraft	28
B331 jet aircraft	34
B331B jet aircraft	42
CV880 jet aircraft	43
Ground property and equipment	50
Nonoperating property and equipment	51
Schedules	

Explanatory comments:

This section of our report deals with reconstruction of t additions and transfers to the property and equipment accounts. Pr dures used to reconstruct sales or retirements (as shown on Schedul due to earlier disposition of piston aircraft and other changes are described in subsection G.

In order to facilitate adjustments, capital expenditures flight equipment, as shown in this subsection and attached schedule have been classified into somewhat different categories than those historically used by TWA for accounting purposes. The historical c gories and the categories adopted for purposes of this subsection a as follows:

F l i g h t e q u i p m e n t

Categories historically used by TWA	Categories for purposes of this subsection
Airframes	Aircraft
Aircraft engines	Aircraft (for original engine Spare engines
Aircraft propellers	Aircraft (for originally inst equipment) Other flight equipment
Aircraft communications and navigational equipment	Aircraft (for originally inst equipment) Other flight equipment
Miscellaneous flight equipment	Aircraft (for originally inst equipment) Other flight equipment
Improvements to leased flight equipment	Aircraft
Flight equipment rotable parts and assemblies	Rotable parts
Flight equipment expendable parts	Expendable parts

Expendable parts:

The assumption

E1. "Capital expenditures" are to include the investment in flight equipment expendable parts in accordance with the flight equipment mortgage described in the Harriman Ripley report (Appendix A hereto); accordingly, expendable parts are to be classified with property and equipment for the entire period.

Application of the assumption

Reconstruction of the amounts and timing of capital expenditures for expendable parts are discussed in the jet fleet subsections for periods in which such amounts differ from historical. Since it was impracticable to determine gross additions to expendable parts by jet fleet, net changes by fleet in the balances of expendable parts have been treated as the net amount of capital expenditures for expendable parts. Expendable parts are classified herein with property and equipment for the entire period. Historically, commencing January 1, 1957 expendable parts were classified as current assets.

Pursuant to an accounting policy change made historically by TWA at December 31, 1963 and reflected in the 1963 special item, working stocks of expendable parts previously expensed at time of issue to the maintenance shops were historically reinstated in the inventory accounts at that date, together with appropriate reserves for obsolescence. A similar adjustment was made, with your concurrence, on a reconstructed basis, which results in an increase of $.7 million in the net amount credited to the 1963 special item.

Capitalized Interest:

The assumption

E2. The reconstructed cost of jet flight equipment is to include capitalized interest on funds deposited with aircraft and engine manufacturers (to the extent such deposits are financed from borrowed funds) from date of deposit to date of delivery of aircraft and engines.

Application of the assumption

For purposes of calculation of reconstructed capitalized interest, the interest rate used with respect to each reconstructed deposit was the stated interest rate on the debt issue which was assumed to be the source of the funds. Consistent with TWA's historical method, this interest rate does not give effect to commitment fees or amortization of debt expense. No interest was capitalized in cases where payment of a deposit was made after an amount equivalent to the aggregate proceeds of the most recent long-term borrowing had been previously expended for deposits with manufacturers and property and equipment.

Reconstructed amounts of capitalized interest were added to property and equipment with corresponding decreases in the amounts of interest expense charged to income, as shown on Schedules E-1 and B-1, respectively. As of the reconstructed in-service date of each aircraft or delivery date of spare engines, the related amount of reconstructed capitalized interest was transferred to flight equipment (see Schedules E-1 and E-3). All historical additions to or transfers among property accounts relating to capitalized interest were excluded from the reconstructed financial statements.

The method used to calculate reconstructed capitalized interest for jet fleets is demonstrated for B131 aircraft and spare engine deposits on Schedules E-1a and E-1b, respectively.

A summary of reconstructed and historical amounts of capitalized interest for the period October 1, 1955 to December 31, 1963 follows:

Fleet	Reconstructed	Historical	Increase (decrease) over historical
B131	$1.9		$1.9
B331	3.3		3.3
CV880	3.9	$ .3	3.6
B131B		1.6	(1.6)
B727		.3	(.3)
Total	$9.1	$2.2	$6.9

The increases in the reconstructed amounts over the historical amounts for B131, B331 and CV880 aircraft result from the assumption that, on a reconstructed basis, TWA would have made deposits with manufacturers that historically were not made by TWA. Historical capitalized interest for B131B and B727 aircraft was excluded since reconstructed deposits for these aircraft would have been financed from general funds. (Reconstructed proceeds of borrowings would have been previously expended for other deposits and property and equipment.)

Pursuant to an accounting policy change made historically by TWA at December 31, 1963, the undepreciated portion of reconstructed capitalized interest was, with your concurrence, written off as a special charge as at that date.

Piston Aircraft:

The assumption

E3. The amount and timing of capital expenditures for property and equipment (including, where applicable, expenditures for aircraft, spare engines, rotable and expendable parts, other flight equipment and ground equipment) are to be adjusted to give effect to the following assumptions:

a. That the piston aircraft which TWA historically acquired from or through HT Co. during 1956-1958 were instead acquired directly from Lockheed; no change in dates of delivery is assumed.

Application of the assumption

Twenty-five L1649A aircraft - Assumption A states that TWA would have reimbursed HT Co. on June 1, 1955 for deposits of $16.8 million with Lockheed on these aircraft, plus interest of $.2 million, considered as additional cost of the aircraft. We have assumed, on your advice, that in May 1956 TWA would have made an additional deposit of $.4 million with Lockheed for purchase of these aircraft, this being the amount historically paid to Lockheed by HT Co. at that time. The historical reimbursement by TWA to HT Co. of $17.2 million in 1956 for deposits on these aircraft has been excluded from the reconstructed financial statements. In addition, on a reconstructed basis, consistent with the underlying assumption which we have been instructed to follow that aircraft and equipment purchases would have been made by TWA directly from the manufacturer and not from HT Co., we have assumed, on your advice, that an amount of $1.3 million described as "interest," historically paid by TWA to HT Co. in connection with acquisition of these aircraft and treated as additional cost of the aircraft, would not have been paid to Lockheed.

A reconciliation of reconstructed and historical capital expenditures for these aircraft and related spare engines is as follows:

Historical	$69.5
Deduct - "Interest" historically paid to HT Co.	(1.3)
Add - Reconstructed interest assumed to be paid to HT Co. in June 1955	.2
Reconstructed	$68.4

Eight L1049G aircraft - Consistent with the underlying assumption which we have been instructed to follow that aircraft and equipment purchases which were made by HT Co. would have been made by TWA directly from the manufacturer, we have assumed, on your advice: (i) that (as explained in subsection A above) on September 29, 1955 TWA would have made a deposit of $2.4 million with Lockheed for five aircraft (a contract between HT Co. and Lockheed dated September 24, 1955 covering purchase of these five aircraft called for such a deposit to be made within five days of the execution of the contract); (ii) that on October 15, 1955, TWA would have made an additional deposit of $1.5 million with Lockheed for three additional L1049G aircraft (an amendment to the above contract dated September 24, 1955, which granted an option to HT Co. to purchase three additional aircraft, required such a deposit by October 15, 1955 if the option were exercised); and (iii) that an amount of $.1 million described as "interest," historically paid by TWA to HT Co. in connection with acquisition of these aircraft and treated as additional cost of the aircraft, would not have been paid to Lockheed.

A reconciliation of reconstructed and historical capital expenditures for these aircraft and related spare engines is as follows:

Historical	$17.3
Deduct - "Interest" historically paid to HT Co.	(.1)
Reconstructed	$17.2

Four L1049H aircraft - Consistent with the underlying assumption which we have been instructed to follow that aircraft and equipment purchases which were made by HT Co. would have been made by TWA directly from the manufacturer, we have assumed, on your advice, that TWA would have made a deposit of $2.2 million with Lockheed in December 1957 as called for in a contract between HT Co. and Lockheed dated December 31, 1957 covering purchase of these aircraft. Historically, TWA made no deposits for these aircraft. No adjustments were made to historical cost of these aircraft since TWA historically made no "interest" payment thereon to HT Co.

B131 jet aircraft:

The assumptions

E3. The amount and timing of capital expenditures for property and equipment (including, where applicable, expenditures for aircraft, spare engines, rotable and expendable parts, other flight equipment and ground equipment) are to be adjusted to give effect to the following assumptions:

b. That TWA acquired, directly from Boeing and on the earlier delivery dates set forth in the schedule of "Reconstructed and historical delivery and in-service dates - B131, B331, and CV880 jet aircraft" (Exhibit V) annexed hereto, each of the 33 Boeing aircraft which HT Co. ordered in 1956, as follows:

(i) 15 B131 jet aircraft historically leased and subsequently purchased from HT Co.

f. That TWA acquired directly from suppliers certain customer-furnished equipment and rotable and expendable parts for jet aircraft which were originally acquired by HT Co. That such acquisitions were made on the dates that suppliers' invoices were transmitted by TWA to HT Co. for payment.

Application of the assumptions

Adjustments made to historical financial data to apply these assumptions are described in the succeeding paragraphs.

Deposits with manufacturers - We have assumed, on your advice, that TWA would have entered into a contract with Boeing in the fourth calendar quarter of 1955 for these fifteen aircraft and would have made deposits with Boeing in the same amounts and on the same relative time schedule as those called for in an agreement between Boeing and HT Co., dated March 2, 1956, and amendments thereto, which covered purchase of fifteen B131 jet aircraft; and that consequently the last deposit would have been made six months before the reconstructed delivery date of the first aircraft and preceding deposits would have been made at three-month intervals as specified in the HT Co. contract, except for the first deposit which would have been made in October 1955.

Also consistent with the underlying assumption which we have been instructed to follow that aircraft and equipment purchases which were made by HT Co. would have been made by TWA directly from the manufacturer, we have assumed, on your advice, that with respect to spare

engines at approximately the same time the aircraft were ordered TWA would have contracted with United Aircraft Corporation (Pratt & Whitney) for the same number of spare engines as historically acquired and that deposits would have been made of 5% of contract price at the time of order and an additional 15% nine months in advance of reconstructed delivery dates. These deposit terms are in accordance with the provisions of a purchase agreement between HT Co. and Pratt & Whitney, dated February 14, 1956, for JT3C-4 spare engines for B131 aircraft.

Reconstructed deposits were included in deposits with manufacturers. As of the reconstructed delivery dates of aircraft and spare engines, deposits were transferred pro rata to appropriate flight equipment categories. Historically, TWA made no deposits relating to this fleet.

Reconstructed deposits for B131 aircraft and spare engines are summarized as follows:

		Deposits made for		Less- transfers to flight equipment on delivery of		
Year	Quarter	Aircraft	Spare engines	Aircraft	Spare engines	Net additions (deductions)
1955	4	$ 3.4	$ .3			$ 3.7
1956	1	1.4				1.4
	2	1.4				1.4
	3	2.0				2.0
	4	2.0				2.0
	Year total	6.8				6.8
1957	1	2.1				2.1
	2	2.1				2.1
	3	2.0				2.0
	4	2.0				2.0
	Year total	8.2				8.2
1958	1	2.0	.1			2.1
	2	2.0	.1			2.1
	3		.4			.4
	4		.2	$ 3.0	$ .2	(3.0)
	Year total	4.0	.8	3.0	.2	1.6
1959	1			4.5	.2	(4.7)
	2			11.9	.5	(12.4)
	3			3.0	.2	(3.2)
	4					
	Year total			19.4	.9	(20.3)
	Total	$22.4	$1.1	$22.4	$1.1	-

Aircraft - In accordance with the underlying assumptions followed herein, we have assumed, on your advice, that capital expenditures for these aircraft would have consisted of (1) the amounts appearing on Boeing invoices to HT Co. for these aircraft, (2) the amounts historically paid by TWA to HT Co. for customer-furnished equipment and "other costs" and (3) TWA's historical acquisition costs. Reconstructed and historical expenditures for aircraft are as follows (differences are explained immediately following the table):

	Reconstructed	Historical	Increase (decrease) over historical	
Payments to Boeing	$69.0	$69.1	($ .1)	(a)
Customer-furnished equipment	1.9	1.9		
"Other costs" charged TWA by HT Co.	.2	.2		
Amount paid to HT Co. and described as "interest"		2.0	(2.0)	(b)
"Depreciation" allowed TWA by HT Co.		(11.3)	11.3	(c)
Acquisition costs	.5	.4	.1	(d)
Subsequent capitalized modifications	1.0	1.0		
	$72.6	$63.3	$ 9.3	

(a) The "Summary of Hughes - TWA Final Accounting for Closing on December 30, 1960" shows an aggregate amount paid to manufacturer by HT Co. of $69.1 million, whereas the Boeing invoices for these aircraft aggregate $69.0 million. The difference ($.1 million) between these two amounts has been excluded, since the nature of the items giving rise to the difference could not be identified.

(b) The amount of $2.0 million shown in the Hughes - TWA Final Accounting as "Interest at 5.5%" has been excluded, since on a reconstructed basis TWA would have purchased the aircraft directly from Boeing.

(c) No reconstructed "depreciation" allowance is assumed, since the aircraft would have been purchased new directly from Boeing.

(d) The difference of $.1 million in acquisition costs represents the amount historically amortized during the period the aircraft were leased.

Reconstructed (R) expenditures for fifteen aircraft have been substituted for historical (H) expenditures in the following periods:

Year	Quarter	Number of aircraft R	Number of aircraft H**	Capital expenditures R	Capital expenditures H
1958	4	2		$ 9.6	
1959	1	3		14.3	
	2	8		38.1	
	3	2		9.6	
	4				
	Year total	13		62.0	
1960	1			.7*	$ .7*
	2		2	.2*	9.3*
	3				
	4		13		53.2
	Year total		15	.9	63.2
1961	1				
	2				
	3				
	4			.1*	.1*
	Year total.			.1	.1
	Total	15	15	$72.6	$63.3

* Includes or represents subsequent capitalized modifications.

** Historically, all 15 aircraft were leased prior to purchase.

Spare engines - Consistent with the assumption that these fifteen aircraft would have been delivered at earlier dates than they were historically leased, we have assumed (in conformity with advice from Coverdale & Colpitts) that spare engines would have been delivered earlier and that the reconstructed number and cost of spare engines would have been the same as historical. Calculations of resulting

earlier timing of capital expenditures were made based upon maintaining historical ratios of cost of engines on hand to number of aircraft on hand as follows:

		Historical			Reconstructed			
							Cost of spare engines	
Year	Quarter	Number of leased aircraft on hand	Cumulative total cost of spare engines	"Spare engine investment" per aircraft	Number of aircraft on hand	"Spare engine investment" per aircraft	Cumulative total	Additions
1958	4				2	$.5	$1.0	$1.0
1959	1	3	$1.5	$.5	5	(3 at $.5) (2 at $.4)	2.2	1.2
	2	11	4.0	.4	13	.4	4.8	2.6
	3	15	5.9	.4	15	.4	5.9	1.1
	4							
	Year total							4.9
	Total							$5.9

In the reconstructed financial statements, reconstructed expenditures for spare engines have been substituted for historical amounts.

Rotable and expendable parts, construction work in progress and other flight equipment - We have assumed, with your concurrence, that, except as explained in the following paragraph, there would have been no changes in timing of capital expenditures in these categories since a calculation of the average number of days' delay between reconstructed delivery dates of these aircraft and the dates at which the same number of aircraft were historically leased indicates an average delay for the fleet of approximately 24 days, or less than one-third of one calendar quarter.

With respect to certain rotable and expendable parts and customer-furnished equipment originally acquired by HT Co. and subsequently resold to TWA, assumption E3f was applied by substituting expenditures on reconstructed dates for corresponding expenditures on historical dates.

The summaries below for the years in which reconstructed capital expenditures differ from historical show the effect of the assumption that TWA purchased directly from suppliers:

Year	Quarter	Historical	Add - Invoices transmitted to HT Co.	Deduct - Reimbursements to HT Co.	Reconstructed
Rotable parts:					
1958	4		$ .9		$ .9
1959	1	$ .3	1.1	$ .3	1.1
	2	1.6	2.7	1.6	2.7
	3	3.4		2.8	.6
	4	.4			.4
	Year total	5.7	3.8	4.7	4.8
			$4.7	$4.7	
Expendable parts:					
1958	4		$ .3		$ .3
1959	1	$ .1	.3		.4
	2	.2	.9	$ .2	.9
	3	.4		1.3	(.9)
	4	.5			.5
	Year total	1.2	1.2	1.5	.9
			$1.5	$1.5	
Construction work in progress:					
1958	1	$ .1			$ .1
	2	.1	$ .1		.2
	3	.1	.1		.2
	4	.1	.5	.2	.4
	Year total	.4	.7	.2	.9
1959	1	.1	.6	.4	.3
	2	.1	.4	1.0	(.5)
	3	.4	.2	.3	.3
	4	(.9)			(.9)
	Year total	(.3)	1.2	1.7	(.8)
			$1.9	$1.9	

B331 jet aircraft:

The assumptions

E3. The amount and timing of capital expenditures for property and equipment (including, where applicable, expenditures for aircraft, spare engines, rotable and expendable parts, other flight equipment and ground equipment) are to be adjusted to give effect to the following assumptions:

b. That TWA acquired, directly from Boeing and on the earlier delivery dates set forth in the schedule of "Reconstructed and historical delivery and in-service dates - B131, B331, and CV880 jet aircraft" (Exhibit V) annexed hereto, each of the 33 Boeing aircraft which HT Co. ordered in 1956, as follows:

(ii) 12 B331 jet aircraft historically acquired which consisted of:

4 B331 jet aircraft historically leased and subsequently purchased from HT Co.

1 B331 jet aircraft historically purchased from HT Co.

7 B331 jet aircraft historically purchased from Boeing, after reimbursement to HT Co. for deposits previously made thereon; and

(iii) 6 B331 jet aircraft historically delivered to another airline.

f. That TWA acquired directly from suppliers certain customer-furnished equipment and rotable and expendable parts for jet aircraft which were originally acquired by HT Co. That such acquisitions were made on the dates that suppliers' invoices were transmitted by TWA to HT Co. for payment.

Application of the assumptions

Adjustments made to historical financial data to apply these assumptions are described in the succeeding paragraphs.

General - The net increase of $43.1 million, from historical of $86.2 million to reconstructed of $129.3 million, in capital expenditures for the B331 fleet is accounted for as follows:

	Twelve aircraft		Six aircraft	
	Direct purchase new from Boeing	Earlier delivery	Purchase of additional aircraft	Total
Aircraft	($.7)		$33.9	$33.2
Spare engines			4.0	4.0
Rotable parts			3.3	3.3
Other flight equipment	—		.1	.1
	(.7)		41.3	40.6
Expendable parts	—	$.7	1.8	2.5
Net increase	($.7)	$.7	$43.1	$43.1

Deposits with manufacturers - In conformity with the underlying assumptions we have assumed, on your advice, that TWA would have entered into a contract with Boeing in the fourth calendar quarter of 1955 for these eighteen aircraft and consequently would have made deposits with Boeing at dates one quarter earlier than and in the same amounts as those called for in an agreement, dated March 19, 1956, between Boeing and HT Co. which covered purchase of eighteen B331 jet aircraft.

With respect to spare engines, we have assumed (in conformity with advice from Coverdale & Colpitts) that, at approximately the same time the aircraft were ordered, TWA would have contracted with Pratt & Whitney for 50% more spare engines than were historically acquired. We have consequently assumed, on your advice and in conformity with the underlying assumption that TWA made purchases directly from the manufacturers of aircraft and equipment, that deposits would have been made of 5% of reconstructed capital expenditures at the time of order and an additional 15% nine months in advance of reconstructed delivery dates; these deposit terms are in accordance with the provisions of a purchase agreement, dated February 14, 1956, between HT Co. and Pratt & Whitney for JT4A-3 spare engines for B331 aircraft.

Reconstructed deposits were included in deposits with manufacturers. As of the reconstructed delivery dates of aircraft and spar engines, deposits were transferred pro rata to appropriate flight equipment categories. Historically, TWA made no deposits relating to this fleet.

Reconstructed deposits for B331 aircraft and spare engines are summarized as follows:

		Deposits made for		Less - transfers to flight equipment on delivery of		
Year	Quarter	Aircraft	Spare engines	Aircraft	Spare engines	Net additions (deductions)
1955	4	$ 4.8	$ .5			$ 5.3
1956	1					
	2	1.9				1.9
	3	1.9				1.9
	4	2.9				2.9
	Year total	6.7				6.7
1957	1	2.9				2.9
	2	2.9				2.9
	3	2.9				2.9
	4	2.9				2.9
	Year total	11.6				11.6
1958	1	2.9				2.9
	2	2.9				2.9
	3	2.9				2.9
	4		.5			.5
	Year total	8.7	.5			9.2
1959	1		.5			.5
	2		.2			.2
	3		.4	$ 7.1	$ .6	(7.3)
	4		.1	10.6	.7	(11.2)
	Year total		1.2	17.7	1.3	(17.8)
1960	1			5.3	.3	(5.6)
	2			7.0	.5	(7.5)
	3			1.8	.1	(1.9)
	4					
	Year total			14.1	.9	(15.0)
	Total	$31.8	$2.2	$31.8	$2.2	-

Aircraft - In conformity with the underlying assumptions followed herein, we have assumed, on your advice, that reconstructed capital expenditures for the twelve aircraft would have consisted of (1) the amounts appearing on Boeing invoices to HT Co. for these aircraft, (2)

the amounts historically paid by TWA to HT Co. for customer-furnished equipment and "other costs" and (3) TWA's historical acquisition costs. We have further assumed, on your advice, that reconstructed capital expenditures for each of the additional six aircraft would have been equal to the average reconstructed capital expenditures for the twelve aircraft, all such aircraft being B331's. Reconstructed and historical expenditures for aircraft are as follows (differences are explained immediately following the table):

		Historical			Increase (decrease) over historical
	Reconstructed	Total	Payments to HT Co.	Payments to Others	
Payments to Boeing	$ 97.1	$65.0	$36.3	$28.7	($ .3) (a)) 32.4 (b))
Customer-furnished equipment	3.0	2.0	1.3	.7	1.0 (b)
"Other costs" charged TWA by HT Co.	.3	.2	.2		.1 (b)
Amount paid to HT Co. and described as "interest"		2.8	2.8		(2.8) (c)
"Depreciation" allowed TWA by HT Co.		(2.4)	(2.4)		2.4 (d)
Acquisition costs	.6	.4		.4	.2 (b)
Subsequent capitalized modifications	.9	.7		.7	.2 (b)
	$101.9	$68.7	$38.2	$30.5	$33.2

(a) The "Summary of Hughes - TWA Final Accounting for Closing on December 30, 1960" shows an aggregate amount paid to manufacturer by HT Co. of $36.3 million, whereas the total of Boeing invoices for five aircraft and the total net advances to Boeing made by HT Co. as shown on Boeing invoices for seven aircraft aggregate $36.0 million. The difference ($.3 million) between these two amounts has been excluded since the nature of the items giving rise to the difference could not be identified.

(b) Historical expenditures were increased by 50% to reflect the assumed increase from twelve to eighteen aircraft.

(c) The amount of $2.8 million shown in the Hughes - TWA Final Accounting as "Interest at 5.5%" has been excluded since on a reconstructed basis TWA would have purchased the aircraft directly from Boeing.

(d) No reconstructed "depreciation" allowance is assumed, since these aircraft would have been purchased new directly from Boeing.

Reconstructed (R) expenditures for eighteen aircraft have been substituted for historical (H) expenditures for twelve aircraft in the following periods:

Year	Quarter	Number of aircraft R	Number of aircraft H**	Capital expenditures R	Capital expenditures H
1959	3	4		$ 22.4	
	4	6		33.6	
	Year total	10		56.0	
1960	1	3		16.8	
	2	4	6	22.4	$35.3
	3	1	2	5.8	11.8
	4		4	.5 *	21.0 *
	Year total	8	12	45.5	68.1
1961	1			.6 *	.3 *
	2				.4 *
	3			(.3)*	
	4			.1 *	(.2)*
	Year total			.4	.5
1962	1				.1 *
	Total	18	12	$101.9	$68.7

* Includes or represents subsequent capitalized modifications.

** Dates of purchase; four aircraft were leased in earlier periods.

Spare engines - Consistent with the assumption that the original twelve aircraft would have been delivered at earlier dates, we have assumed (in conformity with advice from Coverdale & Colpitts) that spare engines would have been delivered earlier. We have further assumed (in conformity with advice from Coverdale & Colpitts) that reconstructed expenditures for spare engines and subsequent capitaliz modifications thereto are 150% of historical amounts. Calculations of

resulting amounts and earlier timing of capital expenditures were made based upon maintaining historical ratios of cost of engines on hand to number of aircraft on hand as follows:

		Historical			Reconstructed			
							Cost of spare engines	
Year	Quarter	Number of owned or leased aircraft on hand	Cumulative total cost of spare engines	"Spare engine investment" per aircraft	Number of aircraft on hand	"Spare engine investment" per aircraft	Cumulative total	Additions
1959	3				4	$.7	$ 3.0	$ 3.0
	4	4	$3.0	$.7	10	.7	6.7	3.7
Year total								6.7
1960	1	5	4.3	.8	13	.6	8.2	1.5
	2	10	6.7	.7	17	.6	10.7	2.5
	3	12	7.5	.6	18	.6	11.6	.9*
	4	12	7.7*	.6				
Year total								4.9
1962	2							
	3		7.9*				11.8	.2*
	4		8.1*				12.1	.3*
Year total								.5
Total								$12.1

* Includes or represents capitalized modifications.

In the reconstructed financial statements, reconstructed expenditures for spare engines and subsequent capitalized modifications have been substituted for historical amounts.

Rotable and expendable parts, construction work in progress and other flight equipment - We have assumed (in conformity with advice from Coverdale & Colpitts) that reconstructed capital expenditures in these categories would have been 50% greater than historical and would have been made one calendar quarter earlier; a calculation of the average number of days delay between reconstructed delivery dates of the original twelve aircraft and the dates at which the same aircraft were historically leased or purchased indicates an average delay for these aircraft of approximately 127 days.

With respect to certain rotable and expendable parts and customer-furnished equipment originally acquired by HT Co. and subsequently resold to TWA, Assumption E3f was applied by substituting expenditures on reconstructed dates for corresponding expenditures on historical dates.

The summaries below show the effect of the assumption that TWA purchased directly from suppliers:

Year	Quarter	Historical	Add - Invoices transmitted to HT Co.	Deduct - Reimbursements to HT Co.	Adjusted historical
Rotable parts:					
1959	3		$ .3		$ .3
	4		.6		.6
	Year total		.9		.9
1960	1				
	2	$3.5		$ .9	2.6
	3	.9			.9
	4	.5			.5
	Year total	4.9		.9	4.0
			$ .9	$ .9	
Expendable parts:					
1959	4		$ .3		.3
1960	1	.6			.6
	2	1.0		$ .3	.7
	3	.2			.2
	4	.5			.5
	Year total	2.3		.3	2.0
			$ .3	$ .3	
Construction work in progress:					
1959	1		$ .1		.1
	2		.2		.2
	3	.2	.3		.5
	4	.1	.6		.7
	Year total	.3	1.2		1.5
1960	1	.1	.2		.3
	2	.1	(.1)	$ .7	(.7)
	3	.3		.2	.1
	4	(.2)		.4	(.6)
	Year total	.3	.1	1.3	(.9)
			$1.3	$1.3	

The summaries below show the effects of the assumptions that TWA's reconstructed (R) capital expenditures in these categories would have been 50% greater than adjusted historical (AH), from the preceding table, and would have been made one quarter earlier:

		Rotable parts		Expendable parts		Construction work in progress		Other flight equipment	
Year	Quarter	R	AH	R	AH	R	AH	R	H
1958	4					$ .1			
1959	1					.3	$ .1		
	2	$ .4				.8	.2		
	3	.9	$ .3	$ .4		1.0	.5		
	4	.1	.6	1.0	$ .3	.5	.7		
	Year total	1.4	.9	1.4	.3	2.6	1.5		
1960	1	3.9		1.1	.6	(1.0)	.3	$.3	
	2	1.2	2.6	.3	.7	.2	(.7)	.1	$.2
	3	.7	.9	.7	.2	(.9)	.1	.1	
	4	1.1	.5	.9	.5	(.9)	(.6)	(.4)	.1
	Year total	6.9	4.0	3.0	2.0	(2.6)	(.9)	.1	.3
1961	1	.7	.7	(.5)	.6	(.1)	(.6)		(.3)
	2	.1	.5	(.4)	(.3)	.1	(.1)		
	3	.4		.4	(.3)		.1		
	4		.3	(.3)	.3	(.1)			
	Year total	1.2	1.5	(.8)	.3	(.1)	(.6)		(.3)
1962	1	.5		.2	(.2)	.1			
	2	.1	.4	.3	.1	.1	.1		
	3	.1		.4	.2				
	4	.1		.2	.3	(.1)			
	Year total	.8	.4	1.1	.4	.1	.1		
1963	1		.1	.3	.2		(.1)		
	2	(.3)		(.3)	.2				
	3		(.2)	(.7)	(.2)	(.1)			
	4			1.2*	(.5)				
	Year total	(.3)	(.1)	.5	(.3)	(.1)	(.1)		
	Total	$10.0	$6.7	$5.2	$2.7	-	-	$.1	-

* Amount is 150% of historical capital expenditures made in the first calendar quarter of 1964.

B331B jet aircraft:

The assumption

E3. The amount and timing of capital expenditures for property and equipment (including, where applicable, expenditures for aircraft, spare engines, rotable and expendable parts, other flight equipment and ground equipment) are to be adjusted to give effect to the following assumptions:

c. That, since TWA would have acquired the 6 B331 jet aircraft ordered by HT Co. but historically delivered to another airline, TWA did not enter into a contract with Boeing dated April 30, 1961 to purchase 6 B331B jet aircraft, did not modify that contract by letter agreement dated December 1, 1961 to provide for the leasing of 5 B331B jet aircraft from Boeing and did not lease 5 B331B aircraft from Boeing in 1962 and 1963. In addition, that TWA did not lease and subsequently purchase the related complement of 20 engines for such 5 B331B aircraft and did not incur any other capital expenditures relating to these aircraft.

Application of the assumption

In applying this assumption, historical capital expenditures for B331B aircraft have been excluded from the reconstructed financial statements. Such expenditures consisted of $9.8 million for deposits with manufacturers, $7.1 million for flight equipment and $.9 million for expendable parts. Lease deposits for five B331B aircraft historically made in 1962 amounting to $.3 million have been excluded from reconstructed "Investments and long-term prepayments."

CV880 jet aircraft:

The assumptions

E3. The amount and timing of capital expenditures for property and equipment (including, where applicable, expenditures for aircraft, spare engines, rotable and expendable parts, other flight equipment and ground equipment) are to be adjusted to give effect to the following assumptions:

d. That TWA acquired directly from Convair and at the dates shown in Exhibit V all 30 CV880 jet aircraft which HT Co. historically ordered from Convair in 1956 (20 of which were historically acquired by TWA in 1960 and 1961 and 6 of which were historically acquired in a used condition by TWA in 1963).

The adjusted timing of reconstructed expenditures for rotable parts for the CV880 fleet is as set forth in Appendix C hereto, which has been prepared by Coverdale & Colpitts for use in this proceeding.

Application of the assumptions

Adjustments made to historical financial data to apply these assumptions are described in the succeeding paragraphs.

General - The net increase of $28.2 million, from historical of $115.4 million to reconstructed of $143.6 million, in capital expenditures for the CV880 fleet is accounted for as follows:

	Twenty aircraft		Ten aircraft	Six aircraft	
	Direct purchase from Convair	Earlier delivery	Purchase of additional aircraft	Not purchased	Total
Aircraft	($4.1)		$39.2	($16.2)	$18.9
Spare engines			2.8		2.8
Rotable parts			4.4	(.1)	4.3
Other flight equipment			.2		.2
	(4.1)		46.6	(16.3)	26.2
Expendable parts		$.5	1.4		1.9
Construction work in progress			.1		.1
	($4.1)	$.5	$48.1	($16.3)	$28.2

Deposits with manufacturers - Consistent with the underlying assumption which we have been instructed to follow that aircraft and equipment purchases which were made by HT Co. would have been made by

TWA directly from the manufacturer, we have assumed, on your advice, that TWA would have entered into a contract with Convair in the third calendar quarter of 1956 for these thirty aircraft and would have made a deposit of $26.3 million with Convair at that time (an agreement dated September 20, 1956, between HT Co. and Convair for purchase of thirty CV880 aircraft having required such a deposit); and that TWA would have made no deposits for spare engines (an agreement dated October 1, 1956 between General Electric Company (GE) and HT Co., which covered purchase of fifty-eight CJ805-1 spare engines, having required no deposit).

Historically, in December 1960 TWA reimbursed HT Co. for deposits on this fleet of $17.5 million, plus "interest at 5.5%" of $4.1 million, and "other costs" of $.3 million. The aggregate reimbursement of $21.9 million was historically classified as a deposit with manufacturer.

In the reconstructed financial statements, reconstructed (R) deposits for aircraft have been substituted for historical (H), as follows:

		Deposits		Less - Transfers to flight equipment on delivery		Net additions (deductions)	
Year	Quarter	R	H	R	H	R	H
1956	3	$26.3				$26.3	
1959	4			$ 1.7		(1.7)	
1960	1			4.4		(4.4)	
	2			8.8		(8.8)	
	3			11.4		(11.4)	
	4		$21.9		$ 1.0		$20.9
	Year total		21.9	24.6	1.0	(24.6)	20.9
1961	1				12.1		(12.1)
	2				4.4		(4.4)
	3				3.5		(3.5)
	4				.9		(.9)
	Year total				20.9		(20.9)
	Total	$26.3	$21.9	$26.3	$21.9	-	-

Aircraft - We have assumed, on your advice, that reconstructed capital expenditures for twenty aircraft would have consisted of the historical capital expenditures for these aircraft less the amount paid t

HT Co. and described as "interest;" and that reconstructed capital expenditures for each of the additional ten aircraft would have been equal to the average reconstructed capital expenditures for the twenty aircraft, all such aircraft being CV880's. Reconstructed and historical capital expenditures for these aircraft are as follows (differences are explained immediately following the table):

		Historical			Increase (decrease) over historical
			Payments to		
	Reconstructed	Total	HT Co.	Others	
Payments to Convair	$115.2	$76.8	$17.5	$59.3	$38.4 (a)
Credit from Convair for nonrecurring engineering charges	(.1)	(.1)		(.1)	
"Other costs" charged TWA by HT Co.	.5	.3	.3		.2 (a)
Amount paid to HT Co. and described as "interest"		4.1	4.1		(4.1) (b)
Acquisition costs	1.1	.6		.6	.5 (a)
Subsequent capitalized modifications	.3	.2		.2	.1 (a)
	$117.0	$81.9	$21.9	$60.0	$35.1

(a) Historical expenditures were increased by 50% to reflect the assumed increase from twenty to thirty aircraft.

(b) The amount of $4.1 million shown in the Hughes - TWA Final Accounting as "Interest at 5.5%" has been excluded, since on a reconstructed basis TWA would have purchased the aircraft directly from Convair.

The amount of $59.3 million shown above as historical payment to Convair is after reduction for rebates of $6.4 million allowed by Convair (related to number of aircraft sold). Reconstructed rebates of $9.6 million (150% of $6.4 million) have been deducted on a pro rata basis per aircraft in arriving at the reconstructed payments to Convair of $115.2 million. We have assumed, with your concurrence, that the amount of reconstructed rebate per aircraft allowed on the respective reconstructed delivery dates would be the same as the rebate actually allowed by Convair on one aircraft historically delivered to TWA in May 1960, approximately the middle of the reconstructed delivery schedule; and that the remaining reconstructed rebates would have been received in July 1963, the time of the historical final settlement between Convair and TWA.

Reconstructed (R) expenditures for thirty aircraft have been substituted for historical (H) expenditures for twenty aircraft in the following periods:

		Number of aircraft		Capital expenditures	
Year	Quarter	R	H	R	H
1959	4	2		$ 7.8	
1960	1	5		19.6	
	2	10	1	39.2	$ 4.0
	3	13		51.0	
	4			.2*	
	Year total	28	1	110.0	4.0
1961	1		11	.1*	45.3
	2		4		16.9
	3		3		12.6*
	4		1		8.2*
	Year total		19	.1	83.0
1963	1				(3.9)
	3			(.9)	(1.2)
	Year total			(.9)	(5.1)
	Total	30	20	$117.0	$81.9

*Includes or represents subsequent capitalized modifications.

Historical capital expenditures for six used aircraft acquired in 1963 have been excluded.

Spare engines - Consistent with the underlying assumption which we have been instructed to follow that aircraft and equipment purchases which were made by HT Co. would have been made by TWA directly from the manufacturer, we have assumed, on your advice, that spare engines would have been acquired from GE in quantities and at delivery dates specified in a contract between GE and HT Co, dated

October 1, 1956. This contract originally covered fifty-eight spare engines, which we understand was the contemplated provisioning for thirty aircraft; however, historically only thirty-eight spare engines were acquired by TWA. To simplify the calculations, we have further assumed, with your concurrence, that reconstructed cost per engine is the same as the average historical cost per engine.

A summary of reconstructed (R) and historical (H) capital expenditures for spare engines is as follows:

Year	Quarter	Number of engines		Capital expenditures	
		R	H	R	H
1959	3	2		$ .3	
	4	16		2.3	
	Year total	18		2.6	
1960	1	18		2.6	
	2	18	11	2.6	$1.6
	3	4	10	.5	1.5
	4		17		2.4
	Year total	40	38	5.7	5.5
	Total	58	38	$8.3	$5.5

In the reconstructed financial statements, reconstructed expenditures for spare engines have been substituted for historical amounts.

Rotable parts - We have assumed (in conformity with advice from Coverdale & Colpitts) that reconstructed capital expenditures for rotable parts would have been 50% greater than historical; the timing of reconstructed expenditures is as set forth in Appendix C

hereto, which was prepared by Coverdale & Colpitts for use in this proceeding. In the reconstructed financial statements, reconstructed (R) expenditures have been substituted for historical (H), as follows:

Year	Quarter	R	H
1959	3	$ 1.0	
	4	1.6	
	Year total	2.6	
1960	1	1.3	
	2	2.6	$3.0
	3	2.2	1.7
	4	1.1	.4
	Year total	7.2	5.1
1961	1	.9	2.5
	2	.9	.2
	3	.2	.1
	4	.5	.4
	Year total	2.5	3.2
1962	1	.1	.1
	2	.5	.1
	3		.1
	4		
	Year total	.6	.3
1963	1		(.1)
	2		(.1)
	3	.1	.2
	4		
	Year total	.1	-
	Total	$13.0	$8.6

The historical capital expenditures relating to six used aircraft acquired in 1963 have been excluded.

Expendable parts, construction work in progress and other flight equipment - We have assumed (in conformity with advice from Coverdale & Colpitts) that reconstructed capital expenditures in these categories would have been 50% greater than historical expenditures and would have been incurred three calendar quarters earlier; a calculation of the average number of days delay between reconstructed

and historical delivery dates of the original twenty aircraft shows an average delay of 299 days. In the reconstructed financial statements, reconstructed (R) expenditures have been substituted for historical (H) as follows:

		Other flight equipment		Expendable parts		Construction work in progress	
Year	Quarter	R	H	R	H	R	H
1957	4					$.1	
1958	1					.1	
	2					.1	
	3					.1	
	4					.1	$.1
	Year total					.4	.1
1959	1					.1	
	2					.1	
	3	$.5		$1.0		.7	.1
	4	.2		.5		(.2)	.1
	Year total	.7		1.5		.7	.2
1960	1	.5		.3		.1	
	2	(.7)	$.3	.7	$ .7	(.7)	.5
	3		.2	.2	.4	.3	(.1)
	4	.1	.4	(.6)	.2	(.2)	.1
	Year total	(.1)	.9	.6	1.3	(.5)	.5
1961	1		(.5)	(.1)	.5	(.7)	(.5)
	2			.2	.1		.2
	3	.1	.1	.4	(.4)		(.1)
	4			.3	(.1)	.2	(.5)
	Year total	.1	(.4)	.8	.1	(.5)	(.9)
1962	1			.6	.1	(.1)	
	2			.1	.3		(.1)
	3			(.1)	.2		.2
	4			.2	.4		(.1)
	Year total			.8	1.0	(.1)	-
1963	1				.1		
	2			.2*	(.1)		
	3			.2*	.2		.1
	4			.4*			
	Year total			.8	.2		.1
	Total	$.7	$.5	$4.5	$2.6	$.1	-

*Amounts are 150% of historical capital expenditures made in the first three calendar quarters of 1964, respectively.

Ground property and equipment:

The assumption

E3. The amount and timing of capital expenditures for property and equipment (including, where applicable, expenditures for aircraft, spare engines, rotable and expendable parts, other flight equipment and ground equipment) are to be adjusted to give effect to the following assumptions:

e. That expenditures for certain ground property and equipment relating to or resulting from the changes in TWA's jet fleet described above were reconstructed as set forth in Appendix C hereto, which has been prepared by Coverdale & Colpitts for use in this proceeding.

Application of the assumption

The adjustment by calendar quarters as supplied to us by Coverdale & Colpitts were added to historical capital expenditures in the respective calendar quarters to determine reconstructed capital expenditures. As shown on Schedule E-6, the adjustments resulted in an aggregate increase in capital expenditures of $1.9 million.

Nonoperating property and equipment:

On a reconstructed basis an amount of $.5 million, historically included in capital expenditures for nonoperating property and equipment in 1960 and resulting from value assigned to the 5 M202 aircraft received as trade-ins, has been considered to be proceeds from sales of flight equipment and accordingly is included in reconstructed funds restricted for flight equipment purchases. See subsection G.

Provisions for depreciation and obsolescence:

Contents

	Page
Explanatory comments	53
Depreciation policies	53
Piston aircraft	54
B131 jet aircraft	55
B331 jet aircraft	60
B331B jet aircraft	66
CV880 jet aircraft	67
B131B jet aircraft	72
Ground property and equipment	73
Nonoperating property and equipment	74
Schedules	

Explanatory comments:

This section of our report deals with reconstruction of provisions for depreciation and obsolescence of property and equipment resulting from changes in capital expenditures and earlier in-service dates for jet aircraft. Changes in provisions for depreciation resulting from reconstructed sales or retirements of property and equipment are described in subsection G.

Schedule F-5 sets forth definitions of various terms used in this section of our report; such terms are set off in quotation marks the first time each is used in this section.

Depreciation policies:

The assumption

F1. The TWA accounting policies relating to methods of depreciation, service lives and residual values of depreciable assets are to be the same as those followed historically during the period.

Application of the assumption

For jet flight equipment, historical depreciation policies are described in the B131 subsection herein and the service lives used for the B131, B331 and CV880 jet fleets are summarized on Schedule F-

Piston aircraft:

The assumption

F2. Provisions for depreciation and obsolescence of property and equipment are to be reconstructed to give effect to assumed changes (which also appear as parts of Assumption E) in capital expenditures relating to:

a. Piston aircraft assumed to have been acquired during 1956-1958 directly from Lockheed.

Application of the assumption

Reconstructed capital expenditures for twenty-five L1649A aircraft and eight L1049G aircraft are assumed to be $1.1 million and $.1 million, respectively, less than historical capital expenditures (see subsection E). Reconstructed provisions for depreciation were calculated for these aircraft by reducing historical provisions for depreciation of the airframes to reflect the ratio of reconstructed cost to historical cost.

A reconciliation of reconstructed (R) and historical (H) provisions for depreciation due to lower cost, described above, and assumed earlier retirement of 103 aircraft, described in subsection G, is as follows:

Year	H	Decrease resulting from assumed*: Reduction in cost of L1649A and L1049G aircraft	Decrease resulting from assumed*: Earlier retirements of 103 aircraft**	R
1955 (4th quarter)	$ 1.5			$ 1.5
1956	18.2			18.2
1957	23.7	$.1		23.6
1958	26.9	.1		26.8
1959	26.6	.2	$ .3	26.1
1960	20.7	.1	1.8	18.8
1961	19.8	.1	1.6	18.1
1962	14.9	.1		14.8
1963	6.0	.1		5.9
	$158.3	$.8	$3.7	$153.8

*In addition to these decreases in provisions for depreciation of piston aircraft, the amount of the revision of service lives and residual values of piston aircraft and related equipment included in the 1961 special item was reduced by $.2 million, resulting from the assumed reduction in cost of L1649A and L1049G aircraft, and by $.6 million, resulting from the assumed earlier retirements of 103 aircraft.

**These decreases in provisions for depreciation expense resulted in corresponding increases in net book value of aircraft retired.

B131 jet aircraft:

The assumptions

F2. Provisions for depreciation and obsolescence of property and equipment are to be reconstructed to give effect to assumed changes (which also appear as parts of Assumption E) in capital expenditures and in-service dates relating to:

b. 15 B131 jet aircraft historically leased and subsequently purchased from HT Co. which are assumed to be acquired by TWA directly from Boeing.

Application of the assumptions

General - Adjustments made to historical financial data to apply the assumptions are described in the succeeding paragraphs. The adjustments resulted in an increase of $11.3 million (from historical $28.5 million to reconstructed of $39.8 million) in the provisions for depreciation of flight equipment. There was no change in the provision for obsolescence of expendable parts. This increase is summarized as follows:

	Provisions for Depreciation of flight equipment	Provisions for Obsolescence of expendable parts	Tot
Historical provisions	$28.5	$.7	$2
Additional provisions relating to:			
Direct purchase from Boeing, including $.7 million depreciation of capitalized interest	10.5		1
Earlier in-service dates which averaged 24 days per aircraft, including $.1 million depreciation of capitalized interest	.8		
Reconstructed provisions	$39.8	$.7	$

Depreciation of airframes - In order to facilitate adjustments, capital expenditures for flight equipment, as shown in subsection E and attached schedules, have been classified into somewhat different categories than those historically used by TWA for accounting purposes. The categories included in the aircraft caption are shown in subsection E. For purposes of calculating reconstructed provisions for depreciation, TWA's historical categories were used.

Reconstructed airframe costs for the 15 aircraft are summarized as follows:

Capital expenditures for aircraft (including $1.0 million of subsequent capitalized modifications)		$72.6
Deduct:		
"Original engines," depreciated separately as engines	$8.8	
"Installed equipment," depreciated separately as other flight equipment	1.1	
		9.9
		62.7
Add - Capitalized interest		1.9
Airframe costs		$64.6

Based upon historical depreciation policies, the reconstructed cost of each airframe, less "residual value" of 10% of "typical cost," was depreciated on a straight-line basis over a "service life" of 120 months. Depreciation commenced with the "in-service date" of the aircraft and was calculated on a daily basis during the first month and on a monthly basis thereafter. (If the in-service date was prior to the 16th of the month, that month was considered to be a full month in determining the number of months of remaining service life.) The costs of subsequent capitalized modifications were depreciated over the period beginning with the month following the expenditures for the modifications and terminating at the end of the service life of the airframe. It was assumed that expenditures for these modifications were made at the middle of the calendar quarter.

Reconstructed (R) provisions for depreciation of airframes have been substituted for historical (H) provisions for depreciation in the following periods:

Year	Quarter	Provisions for depreciation	
		R	H*
1959	1	$ .2	
	2	.8	
	3	1.4	
	4	1.4	
	Year total	3.8	
1960	1	1.5	
	2	1.4	$ .1
	3	1.4	.2
	4	1.5	.3
	Year total	5.8	.6
1961	Year total	5.8	6.4
1962	Year total	5.8	5.8
1963	Year total	5.9	5.8
	Total	$27.1	$18.6

*Historically, all 15 aircraft were leased prior to purchase.

Depreciation of engines - Based upon historical depreciation policies, the reconstructed cost of each original engine, less residual value of 10% of typical cost of the engine type, was depreciated on a straight-line basis over a service life of 60 months through December 31, 1961 after which a service life of 120 months was used. This change coincides with a historical change made at that time. Service life began with the in-service dates of the aircraft.

The reconstructed cost of "spare engines," less residual value of 10%, was depreciated on a straight-line basis over the same service life as original engines, except that lives were shortened, where necessary, so as not to extend beyond the "common terminal date of the fleet." Depreciation commenced at the middle of the quarter in which the expenditures were made, but not earlier than the reconstructed in-service date of the first aircraft.

Reconstructed (R) provisions for depreciation of original and spare engines have been substituted for historical (H) provisions in the following periods:

Year	Quarter	Cumulative reconstructed number of aircraft in service	Cumulative reconstructed cost				Total engine depreciation	
			Original engines	Spare engines	Less - Engine retirements	Total	R	H
1958	4			$1.0		$ 1.0		
1959	1	3	$1.8	2.2		4.0	$ .1	
	2	12	7.0	4.8		11.8	.4	$ .1
	3	15	8.8	5.9		14.7	.6	.2
	4	15	8.8	5.9		14.7	.7	.3
	Year total						1.8	.6
1960	Year total	15	8.8	5.9		14.7	2.6	1.2
1961	Year total	15	8.8	5.9	$.6	14.1	2.6	2.7
1962	Year total	15	8.8	5.9	.7	14.0	.8	.8
1963	Year total	15	8.8	5.9	.7	14.0	.8	.8
	Total						$8.6	$6.1

Depreciation of "other flight equipment" and rotable parts - Based upon historical depreciation policies, reconstructed costs of other flight equipment were depreciated, with no residual value, on a straight-line basis over a service life of 120 months. Depreciation commenced in the month following the date of purchase, but not prior to the month following the "midpoint month" (April 1959) of the fleet. The service life was shortened, where necessary, so as not to extend beyond the common terminal date of the fleet.

Reconstructed costs of rotable parts were depreciated in the same manner as other flight equipment, except that engine rotable parts were depreciated based on a service life of 60 months through December 31, 1961 after which a service life of 120 months was used.

Reconstructed (R) provisions for depreciation of other flight equipment and rotable parts have been substituted for historical (H) provisions in the following periods:

Year	Quarter	Cumulative reconstructed number of aircraft in service	Cumulative reconstructed cost: Other flight equipment: Installed equipment	Other	Rotable parts	Less - retirements of rotable parts	Total	Provision for depreciation R	H
1958	4				$ .9		$ .9		
1959	1	3	$ .2		2.0		2.2		
	2	12	.9		4.7		5.6	$ .1*	
	3	15	1.1	$.4	5.3		6.8	.3	$
	4	15	1.1	.4	5.7		7.2	.2	
	Year total							.6	
1960	Year total	15	1.1	.4	6.4		7.9	1.1	1
1961	Year total	15	1.1	.2	7.1	$.4	8.0	1.1	
1962	Year total	15	1.1	.2	7.4	.4	8.3	.7**	
1963	Year total	15	1.1	.2	6.0	.5	6.8	.6	
	Total							$4.1	$

*Midpoint month was April 1959.

**Prior to January 1, 1962, $2.7 million of engine rotable parts were depreciated over a service life of 60 months.

Obsolescence of expendable parts - Historically, TWA provided for obsolescence of expendable parts in amounts deemed sufficient to reduce the net carrying value of the expendable parts at the terminal date of the related aircraft type to estimated recoverable value at that time. Since reconstructed capital expenditures for expendable parts for this fleet are unchanged in total, it was assumed that reconstructed provisions for obsolescence of expendable parts are the same as historical provisions.

B331 jet aircraft:

The assumptions

F2. Provisions for depreciation and obsolescence of property and equipment are to be reconstructed to give effect to assumed changes (which also appear as parts of Assumption E) in capital expenditures and in-service dates relating to:

c. 12 B331 jet aircraft which are assumed to be acquired by TWA directly from Boeing and which historically consisted of:

4 B331 jet aircraft historically leased and subsequently purchased from HT Co.

1 B331 jet aircraft historically purchased from HT Co.

7 B331 jet aircraft historically purchased from Boeing, after reimbursement to HT Co. for deposits previously made thereon, and

6 B331 jet aircraft which are assumed to have been acquired directly by TWA from Boeing and which historically were delivered to another airline.

Application of the assumptions

General - Adjustments made to historical financial data to apply the assumptions are described in the succeeding paragraphs. These adjustments resulted in an increase of $19.1 million (from historical of $27.5 million to reconstructed of $46.6 million) in the provisions for depreciation of flight equipment and of $.3 million in the provisions

for obsolescence of expendable parts. These increases are summarized as follows:

	Provisions for Depreciation of flight equipment	Provisions for Obsolescence of expendable parts	Tot
Historical provisions	$27.5	$.4	$27.
Additional provisions relating to:- 12 aircraft:			
Direct purchase from Boeing, including $.7 million depreciation of capitalized interest	2.1		2.
Earlier in-service dates which averaged 127 days per aircraft, including $.2 million depreciation of capitalized interest	2.2		2.
	31.8	.4	32.
6 additional aircraft, including $.3 million depreciation of capitalized interest	14.8	.3	15.
Reconstructed provisions	$46.6	$.7	$47.

Depreciation of airframes - Reconstructed airframe costs for the 18 aircraft are summarized as follows:

Capital expenditures for aircraft (including $.9 of subsequent capitalized modifications)		$101.9
Deduct:		
Original engines, depreciated separately as engines	$15.3	
Installed equipment, depreciated separately as other flight equipment	1.7	17.0
		84.9
Add - Capitalized interest		3.2
Airframe costs		$ 88.1

*Does not include capitalized interest of $.1 million on deposits for spare engines.

Reconstructed (R) provisions for depreciation of airframes were calculated in the same manner as for B131 aircraft and have been substituted for historical (H) provisions for depreciation in the following periods:

Year	Quarter	Cumulative number of aircraft in service		Provisions for depreciation	
		R	H*	R	H*
1959	3	3		$ .1	
	4	9	3	.7	
	Year total			.8	
1960	1	12	5	1.2	
	2	17	10	1.5	$ .4
	3	18	12	2.0	.9
	4	18	12	2.0	.9
	Year total			6.7	2.2
1961	Year total	18	12	8.0	5.5
1962	Year total	18	12	7.8	5.3
1963	Year total	18	12	8.0	5.2
	Total			$31.3	$18.2

*Historically, 4 aircraft were leased prior to purchase at December 30, 1960.

Depreciation of engines - Reconstructed provisions for depreciation of original and spare engines were calculated in the same manner as for B131 aircraft except that the service life was 84 months through December 31, 1961 after which a service life of 120 months was used. Reconstructed modifications of $.8 million were assumed to relate to spare engines and were depreciated commencing in the month following the modification.

Reconstructed (R) provisions for depreciation of original and spare engines have been substituted for historical (H) provisions in the following periods:

Year	Quarter	Cumulative reconstructed number of aircraft in service	Cumulative reconstructed cost: Original engines	Spare engines (including capitalized modifications)	Less - Engine retirements	Total	Total engine depreciation R	H
1959	3	3	$ 2.5	$ 3.0		$ 5.5		
	4	9	7.7	6.8*		14.5	$ .4	
1960	1	12	10.2	8.3		18.5	.6	$
	2	17	14.5	10.8	$1.2	24.1	.6	
	3	18	15.3	11.7	1.2	25.8	.8	
	4	18	15.3	11.7	1.2	25.8	.8	
	Year total						2.8	1
1961	Year total	18	15.3	11.7	1.2	25.8	3.3	2
1962	Year total	18	15.3	12.2	1.2	26.3	2.1	1
1963	Year total	18	15.3	12.2	1.2	26.3	2.3	1
	Total						$10.9	$6

*Includes $.1 million of capitalized interest.

Depreciation of other flight equipment and rotable parts - Reconstructed costs of other flight equipment and rotable parts were depreciated in the same manner as those related to the B131 fleet, described above, except that engine rotable parts were depreciated bas on a service life of 84 months through December 31, 1961 after which a service life of 120 months was used.

Reconstructed (R) provisions for depreciation of other flight equipment and rotable parts have been substituted for historical (H) provisions in the following periods:

Year	Quarter	Cumulative reconstructed number of aircraft in service	Cumulative reconstructed cost: Other flight equipment: Installed equipment	Other	Rotable parts	Less - retirements of rotable parts	Total	Provisions for depreciation: R	H
1959	2				$ .4		$ .4		
	3	3	$ .3		1.3		1.6		
	4	9	.9		1.4		2.3		
1960	1	12	1.2	$.3	5.3		6.8	$ .1*	
	2	17	1.7	.4	6.5		8.6	.2	$ .1
	3	18	1.7	.5	7.2		9.4	.3	.1
	4	18	1.7	.1	8.3		10.1	.2	.2
Year total								.8	.4
1961 Year total		18	1.7	.1	9.5	$.1	11.2	1.3	.9
1962 Year total		18	1.7	.1	10.3	.1	12.0	1.2**	.8
1963 Year total		18	1.7	.1	10.0	.2	11.6	1.1	.8
Total								$4.4	$2.9

*Midpoint month was January 1960.

**Prior to January 1, 1962, $4.3 million of engine rotable parts were depreciated over a service life of 84 months.

Obsolescence of expendable parts - Reconstructed provisions for obsolescence of expendable parts were calculated (in conformity with advice from Coverdale & Colpitts) by increasing historical provisions by 50% and recording them one quarter earlier than historical provisions, in the same manner as reconstructed capital expenditures for expendable parts.

Reconstructed (R) provisions for obsolescence have been substituted for historical (H) provisions in the following periods:

Year	Quarter	R	H
1960	2	$.1	
	4	.1	$.1
	Year total	.2	.1
1961	2	.1	
	3	.1	.1
	Year total	.2	.1
1962	2	.1	
1963	3	.1	.1
	4	.1	.1
	Year total	.2	.2
	Total	$.7	$.4

B331B jet aircraft:

The assumption

F2. Provisions for depreciation and obsolescence of property and equipment are to be reconstructed to give effect to assumed changes (which also appear as parts of Assumption E) in capital expenditures and in-service dates relating to:

d. 5 B331B jet aircraft which are assumed not to have been leased in 1962 and 1963. In addition, 20 engines for such aircraft are assumed not to be leased and subsequently purchased and no other capital expenditures are assumed to be incurred.

Application of the assumption

Since historical capital expenditures for the B331B fleet were excluded on a reconstructed basis, historical provisions for depreciation of flight equipment of $.3 million were excluded from reconstructed provisions for depreciation.

CV880 jet aircraft:

The assumptions

F2. Provisions for depreciation and obsolescence of property and equipment are to be reconstructed to give effect to assumed changes (which also appear as parts of Assumption E) in capital expenditures and in-service dates relating to:

e. 30 CV880 jet aircraft which HT Co. historically ordered from Convair in 1956 (20 of which were historically acquired by TWA in 1960 and 1961 and 6 of which were historically acquired in a used condition by TWA in 1963).

Application of the assumptions

General - Adjustments made to historical financial data to apply the assumptions are described in the succeeding paragraphs. These adjustments resulted in an increase of $21.8 million (from historical of $24.7 million for 20 aircraft to reconstructed of $46.5 million for 30 aircraft) in the provisions for depreciation of flight equipment and of $.3 million in the provisions for obsolescence of expendable parts. (Historical provisions for depreciation of $.6 million, relating to 6 CV880 used jet aircraft purchased in 1963 are excluded from reconstructed provisions for depreciation.) These increases are summarized as follows:

	Provisions for Depreciation of flight equipment	Provisions for Obsolescence of expendable parts	Total
Historical provisions, 20 aircraft	$24.7	$.2	$24.9
Additional provisions relating to:			
20 aircraft - Earlier in-service dates which averaged 299 days per aircraft, including $.8 million depreciation of capitalized interest	6.3	.1	6.4
	31.0	.3	31.3
10 additional aircraft, including $.4 million depreciation of capitalized interest	15.5	.2	15.7
Reconstructed provisions, 30 aircraft	$46.5	$.5	$47.0

Depreciation of airframes - Reconstructed airframe costs for the 30 aircraft are summarized as follows:

Capital expenditures for aircraft (including $.3 million of subsequent capitalized modifications)		$117.0
Deduct:		
Original engines, depreciated separately as engines	$17.2	
Installed equipment, depreciated separately as other flight equipment	1.7	18.9
		98.1
Add - Capitalized interest		3.9
Airframe costs		$102.0

Reconstructed (R) provisions for depreciation of airframes were calculated in the same manner as for B131 aircraft and have been substituted for historical (H) provisions for depreciation in the following periods:

Year	Quarter	Cumulative number of aircraft in service		Provisions for depreciation	
		R	H	R	H
1960	2	16		$ .5	
	3	30		1.8	
	4	30		2.3	
	Year total			4.6	
1961	1	30	10	2.3	$ .5
	2	30	16	2.3	1.1
	3	30	19	2.3	1.4
	4	30	20	2.3	1.9
	Year total			9.2	4.9
1962	Year total	30	20	9.3	6.8
1963	Year total	30	20	8.8	5.4
	Total			$31.9	$17.1

The historical provisions for depreciation of $.5 million, relating to 6 used aircraft acquired in 1963, have been excluded from the reconstructed provisions for depreciation.

Depreciation of engines - Reconstructed provisions for depreciation of original and spare engines were calculated in the same manner as for B131 aircraft except that the service life was 84 months through December 31, 1961 after which a service life of 120 months was used.

Reconstructed (R) provisions for depreciation of original and spare engines have been substituted for historical (H) provisions in the following periods:

Year	Quarter	Cumulative reconstructed number of aircraft in service	Cumulative reconstructed cost: Original engines	Cumulative reconstructed cost: Spare engines	Less - engine retirements	Cumulative reconstructed cost: Total	Total engine depreciation R	Total engine depreciation H
1959	3			$ .3		$ .3		
	4			2.6		2.6		
1960	1			5.2		5.2		
	2	16	$ 9.1	7.8		16.9	$ .2	
	3	30	17.2	8.3		25.5	.7	
	4	30	17.2	8.3		25.5	.8	
	Year total						1.7	
1961	1	30	17.2	8.3		25.5	.9	$ .2
	2	30	17.2	8.3		25.5	.8	.3
	3	30	17.2	8.3		25.5	.8	.3
	4	30	17.2	8.3		25.5	.8	.3
	Year total						3.3	1.1
1962	Year total	30	17.2	8.3		25.5	2.1	1.5
1963	Year total	30	17.2	8.3	$.4	25.1	2.1	1.6
	Total						$9.2	$4.8

The historical provisions for depreciation of $.1 million, relating to 6 used aircraft acquired in 1963, have been excluded from the reconstructed provisions for depreciation.

Depreciation of other flight equipment and rotable parts - Reconstructed costs of other flight equipment and rotable parts were depreciated in the same manner as those related to the B131 fleet except that engine rotable parts were depreciated based on a service life of 84 months through December 31, 1961 after which a service life of 120 months was used.

Reconstructed (R) depreciation provisions for other flight equipment and rotable parts have been substituted for historical (H) provisions for depreciation in the following periods:

Year	Quarter	Cumulative reconstructed number of aircraft in service	Cumulative reconstructed cost: Other flight equipment: Installed equipment	Other flight equipment: Other	Rotable parts	Less - retirements of rotable parts	Total	Provisions for depreciation: R	Provisions for depreciation: H
1959	3			$ .5	$ 1.0		$ 1.5		
	4			.7	2.6		3.3		
1960	1			1.2	3.9		5.1		
	2	16	$ .9	.5	6.5		7.9		
	3	30	1.7	.5	8.7		10.9	$ .2*	
	4	30	1.7	.6	9.8		12.1	.4	
	Year total							.6	
1961	1	30	1.7	.6	10.7		13.0	.3	$ .1
	2	30	1.7	.6	11.6		13.9	.5	.2
	3	30	1.7	.7	11.8		14.2	.4	.3
	4	30	1.7	.7	12.3		14.7	.4	.3
	Year total							1.6	.9
1962	Year total	30	1.7	.7	12.9	$.1	15.2	1.6**	1.1
1963	Year total	30	1.7	.7	13.0	.1	15.3	1.6	.8
	Total							$5.4	$2.8

*Midpoint month was July 1960.

**Prior to January 1, 1962, $5.6 million of engine rotable parts were depreciated over an 84-month life.

Obsolescence of expendable parts - Reconstructed provisions for obsolescence of expendable parts were calculated (in conformity wit advice from Coverdale & Colpitts) by increasing historical provisions by 50% and recording them three quarters earlier than historical provisions, in the same manner as reconstructed expenditures for expendable parts.

Reconstructed (R) provisions for obsolescence have been substituted for historical (H) provisions in the following periods:

Year	Quarter	R	H
1961	1	$.1	
	4	.1	$.1
	Year total	.2	.1
1962	1	.1	
1963	1	.1	.1
	4	.1	
	Year total	.2	.1
	Total	$.5	$.2

B131B jet aircraft:

Since reconstructed deposits with manufacturers for B131B jet aircraft would have been financed from general funds there was no reconstructed capitalized interest thereon. (See capitalized interest under subsection E.) Accordingly, the amount of depreciation ($.2 million) related to the historically capitalized interest of $1.6 million was excluded from the reconstructed provisions for depreciation of B131B aircraft.

Ground property and equipment:

The assumption

F2. Provisions for depreciation and obsolescence of property and equipment are to be reconstructed to give effect to assumed changes (which also appear as parts of Assumption E) in capital expenditures relating to:

f. The assumed earlier and additional expenditures for certain ground property and equipment relating to or resulting from the changes in TWA's jet fleet which were reconstructed as set forth in Appendix C hereto, which has been prepared by Coverdale & Colpitts for use in this proceeding.

Application of the assumption

Provisions for reconstructed depreciation of ground property and equipment were determined by adding to or deducting from historical depreciation provisions the amount of depreciation resulting from the effect of the adjustments to capital expenditures for ground property and equipment. Consistent with historical methods, depreciation was calculated on a straight-line basis, with no residual value, over historical service lives. It was assumed that the increase or decrease in capital expenditures occurred at the middle of a calendar quarter and provisions for depreciation commenced in the second month of the calendar quarter.

In the reconstructed financial statements, reconstructed provisions for depreciation of ground property and equipment have been substituted for historical provisions. Application of the assumption resulted in an increase of $1.1 million in provisions for depreciation of ground property and equipment.

Nonoperating property and equipment:

Since on a reconstructed basis an amount equivalent to the value historically assigned to the 5 M202 aircraft received as trade-ins has been considered to be proceeds from sales of flight equipment and included in reconstructed funds restricted for flight equipment purchases (see subsection G hereinafter), no amount was included in reconstructed nonoperating property and equipment. Accordingly, historical depreciation of $.4 million was excluded from reconstructed depreciation of nonoperating property and equipment.

TRANS WORLD AIRLINES, INC.

RECONSTRUCTED AND HISTORICAL PROVISIONS FOR OBSOLESCENCE OF EXPENDABLE PARTS

FOR THE PERIOD OCTOBER 1, 1955 - DECEMBER 31, 1963

(Amounts in millions)

	Years ended December 31,												
	1959		1960		1961		1962		1963		Total		Increase (decrease) over
	R	H	R	H	R	H	R	H	R	H	R	H	historical
t fleet:													
B131			$ .1	$ .1	$.3	$.3	$.2	$.2	$.1	$.1	$ .7	$ .7	
B331			.2	.1	.2	.1	.1		.2	.2	.7	.4	$.3
CV880 (new)					.2	.1	.1		.2	.1	.5	.2	.3
B131B**							.1	.1			.1	.1	
B720B**					.1	.1	.1	.1			.2	.2	
Total			.3	.2	.8	.6	.6	.4	.5	.4	2.2	1.6	.6
ston fleet**	$.2	$.2	1.6	1.6	.1	.1	.3	.3	.3	.3	2.5	2.5	
Total Schedule F	$.2	$.2	$1.9	$1.8	$.9	$.7	$.9	$.7	$.8	$.7	$4.7	$4.1	$.6

**Reconstructed and historical amounts are assumed to be identical.

gend:
R = Reconstructed
H = Historical

TRANS WORLD AIRLINES, INC.

RECONSTRUCTED AND HISTORICAL SERVICE LIVES AND COMMON TERMINAL DATES USED FOR CALCULATION OF DEPRECIATION OF B131, B331 AND CV880 JET FLIGHT EQUIPMENT

Service lives in months

	Airframes	Engines	Other flight equipment and rotable parts	Common terminal dates R	Common terminal dates H
rior to January 1, 1962:-					
B131:					
Airframes	120		120	4/69	6/69
Engines		60	60	4/64	6/64
B331:					
Airframes	120		120	1/70	3/70
Engines		84	84	1/67	3/67
CV880:					
Airframes	120		120	6/70	2/71
Engines		84	84	6/67	2/68
nuary 1, 1962 - December 31, 1963:					
B131	120	120	120	4/69	6/69
B331	120	120	120	1/70	3/70
CV880	120	120	120	6/70	2/71

Legend:
R = Reconstructed
H = Historical

TRANS WORLD AIRLINES, INC.

TERMS RELATED TO DEPRECIATION

DEFINITIONS FOR PURPOSES OF THIS SUBSECTION

Common terminal date of the fleet - the last month of a period commencing with the month following the "midpoint month" and extending over the "service life" of the airframe or engine type.

In-service date - the date at which an aircraft is first placed in scheduled (revenue) service.

Installed equipment - communications and navigational equipment and miscellaneous flight equipment installed in the aircraft at time of acquisition by TWA.

Midpoint date (of a fleet) - the date midway between the first in-service date and the last scheduled delivery date of the aircraft in the initial fleet purchase of an aircraft type.

Midpoint month (of a fleet) - the month in which the "midpoint date" occurs (if the midpoint date is prior to the 16th of the month, the "midpoint month" is the preceding month).

Original engines - the engines installed on the aircraft at time of acquisition by TWA.

Other flight equipment - installed equipment and capital expenditures described as other on Schedule E-3a.

Residual value - the estimated recoverable value at the end of a "service life".

Service life - the period over which a capital asset is depreciated.

Spare engines - engines acquired as separate units (as contrasted to original engines).

Typical cost - the net cost of an airframe or engine, estimated to be representative of the new unit cost of all airframes or engines in the initial fleet purchase of an aircraft type.

G. Gain (loss) on sales or retirements of property and equipment and collection of related proceeds:

Contents

	Page
Gain (loss) on sales or retirements of property and equipment:-	
Flight equipment with earlier sales dates:	
Proceeds	76
Cost	76
Reserves for depreciation	77
Summary	78
Other flight equipment:	
Piston aircraft	79
Jet aircraft	79
Summary	81
Ground property and equipment and nonoperating property and equipment	82
Collection of proceeds from sales or retirements of property and equipment:-	
Introduction	83
Collection of proceeds from sales of flight equipment with earlier sales dates:	
Historical collection experience	84
Restatement of historical collection experience on a common time basis	86
Application of restated historical collection experience to reconstructed proceeds	88
Collection of proceeds from sales of other flight equipment	89
Schedules	

Gain (loss) on sales or retirements of flight equipment with earlier sales dates:

The assumption

G1. The gain (loss) on sales or retirements of property and equipment is to be reconstructed to give effect to:

a. The reconstructed sales dates and contract values for 103 piston aircraft as set forth in the report and a related schedule prepared for use in this proceeding by R. Dixon Speas Associates (RDSA), consultants in airline operations, and constituting Appendices D and E hereto.

Application of the assumption

Proceeds - Reconstructed proceeds from sales of 103 piston aircraft were obtained from Appendix E hereto, prepared by RDSA. Corresponding historical proceeds were excluded.

A reconciliation of historical and reconstructed proceeds is as follows:

Historical (Schedule G)	$15.5
Add back - Reduction of historical proceeds resulting from repossession of 5 piston aircraft, considered to be a disposition of receivables, see page 88	3.0
	18.5
Add - Increased realization shown by RDSA	6.9
Reconstructed (Schedule G)	$25.4

Cost - In the reconstructed financial statements, the property accounts were relieved of the gross costs of the airframes, engines, propellers and communications and navigational equipment in the calendar quarters in which the related reconstructed proceeds were recorded. It was assumed that historical cost adjustments, primarily modifications, that occurred between historical and the earlier reconstructed retirement dates would have taken place at the earlier dates. The difference of $2.8 million between cost reliefs historically reported by TWA and reconstructed cost reliefs is set forth below:

Historical cost reliefs (Schedule G)	$92.1
Add - Amount historically reported by TWA as a deduction from cost reliefs on recapitalization of repossessed aircraft	3.0
Deduct - Reduction in cost of L1649A and L1049G piston airframes resulting from assumed reductions in capital expenditures	(.2)
Reconstructed cost reliefs (Schedule G)	$94.9

Reserves for depreciation - It was assumed that reliefs of reserves for depreciation attributable to the 103 aircraft should be adjusted to include the effect of (a) assumed reconstructed cost adjustments and (b) any provisions for depreciation historically recorded between the historical dates of retirements and the earlier reconstruct dates. This latter adjustment is referred to herein as "depreciation rollback." For airframes and engines, the depreciation rollback was calculated by reference to the property ledgers which set forth depreciation for specific airframes and engines identified by serial number. Since it was impracticable to identify specific propellers and communications and navigational equipment, depreciation rollback for these categories was calculated by applying the reduction in the percentage of net book value to cost of all such equipment between the reconstructed and historical months of sale to the historical cost of the equipment sold. (For example, if the cost of all propellers and communications equipment were $1,000 and the aggregate net book values were $600 at the historical sales date and $800 at the reconstructed sales date, reduction in percentage would be 20%; this reduction, applied to historical cost of propellers and communications and navigational equipment under study of say $100 would yield a rollback of $20.)

For each transaction, the depreciation rollback was excluded from the calendar quarters in which it was historically recorded. The aggregate depreciation rollback is summarized as follows:

	Reductions in historical		
	Provisions for depreciation	1961 special item	Total
Airframes	$2.9	$.5	$3.4
Engines	.5	.1	.6
Propellers and communications and navigational equipment	.3		.3
	$3.7	$.6	$4.3

After calculation of the adjustment for depreciation rollback, reserves for depreciation were further adjusted to include the effect of reductions in cost of L1649A and L1049G piston airframes. Reliefs of the reconstructed reserves for depreciation were shifted in time to the calendar quarters in which the related reconstructed costs were retired. The difference of $4.4 million between reliefs of reserves for depreciation historically reported by TWA and reconstructed reliefs of reserves for depreciation is set forth below:

Historical reliefs of reserves for depreciation (Schedule G)		$79.5
Deduct:		
Depreciation rollback, as above	($4.3)	
Reduction in reserves resulting from reduced cost of L1649A and L1049G	(.1)	
		(4.4)
Reconstructed reliefs of reserves (Schedule G)		$75.1

Summary - The change in gain on sales or retirements of flight equipment with earlier sales dates, resulting from the adjustments described above, is summarized as follows (see Schedule G):

	Proceeds	Cost	Reserves for depreciation	Net book value	Gain
Historical	$15.5	$92.1	$79.5	$12.6	$2.9
Adjustments	9.9	2.8	(4.4)	7.2	2.7
Reconstructed	$25.4	$94.9	$75.1	$19.8	$5.6

Historically, in 1961 loss on sale of certain piston aircraft was reclassified to the special charge. A similar reclassification relating to aircraft with earlier sales dates was not made on a reconstructed basis since the related aircraft are assumed to be sold prior to 1961.

Gain (loss) on sales or retirements of other flight equipment:

The assumption

G1. The gain (loss) on sales or retirements of property and equipment is to be reconstructed to give effect to:

b. Reconstructed capital expenditures and reconstructed provisions for depreciation, as applicable.

Application of the assumption

Piston aircraft - As set forth in subsection E of this report reconstructed costs were determined by reducing historical costs for twenty-five L1649A and eight L1049G aircraft for certain payments to HT Co. described as "interest." Appropriate adjustments were made to reconstructed provisions for depreciation (and related reserves for depreciation) and, where applicable, to gain (loss) on sales or retirement. Consequently, cost and reserves for depreciation of piston aircraft with earlier sales dates were reduced by $.2 million and $.1 million, respectively, as shown on pages 77 and 78. In addition, the cost and reserves for depreciation of other piston aircraft sold reflect a reduction of $.2 million and $.1 million, respectively.

Jet aircraft - As set forth in subsection E of this report, reconstructed capital expenditures reflect assumed earlier delivery dates of B131, B331 and CV880 jet fleets, increases in B331 and CV880 fleet size, and exclusion of 5 leased B331B aircraft and 6 used CV880 aircraft. Although there were no historical sales or retirements of jet aircraft through December 31, 1963, there were cannibalizations and retirements of jet engines and rotable parts. It was assumed, with your concurrence, that historical gain (loss) recorded on retirements of property should be adjusted to give effect to these changes in capital expenditures as set forth below.

Proceeds: Historical proceeds from dispositions of B331 and CV880 engines were increased by 50% and recorded one calendar quarter earlier and three calendar quarters earlier, respectively. No changes were made with respect to B131 engines.

Historical proceeds from dispositions of B331 and CV880 rotable parts were increased by 50% and recorded one calendar quarter earlier and three calendar quarters earlier, respectively. No changes were made to proceeds from dispositions of B131 parts. Proceeds from dispositions of B331B rotable parts were excluded. Since historical proceeds from retirements of rotable parts were not identified by plane type, historical calendar quarter proceeds were allocated to plane types in proportion to the net book values of rotable parts retired.

Cost: For B131, B331 and CV880 engines, reconstructed costs of engines retired were calculated by multiplying the average reconstructed cost per engine by the historical number of B131 engines retired and by 150% of the historical number of B331 and CV880 engines retired. Reconstructed cost reliefs for dispositions of B331 and CV880 engines were recorded one calendar quarter earlier and three calendar quarters earlier, respectively. No change was made to timing of B131 cost reliefs.

Historical cost reliefs of B331 and CV880 rotable parts retired were increased by 50% and recorded one calendar quarter earlier and three calendar quarters earlier, respectively. No change was made in B131 cost reliefs. B331B cost reliefs were excluded.

Reserves for depreciation: Reliefs of accumulated reconstructed reserves for depreciation for dispositions of engines and rotable parts were recorded in the reconstructed calendar quarters of retirement for the B131, B331 and CV880 engines and rotable parts retired. B331B reliefs of reserves were excluded.

Summary - The piston and jet adjustments described above increased gain on retirements of other flight equipment by $.2 million as follows:

	Proceeds	Cost	Reserves for depreciation	Net book value	Gain
Historical (Schedule G)	$14.9	$49.6	$37.3	$12.3	$2.6
Piston aircraft:					
Reduction in cost and related reserves for depreciation of other piston aircraft (see page 79)		(.2)	(.1)	(.1)	.1
Reduction in gross cost and related reserve for depreciation of one repossessed piston aircraft sold in 1963 (see page 88)		(.2)	(.2)		
Jet aircraft - effect of assumed changed retirements of:					
Jet engines	.7	1.1	.4	.7	
Jet rotable parts	.1	.1	.1		.1
	.8	.8	.2	.6	.2
Reconstructed (Schedule G)	$15.7	$50.4	$37.5	$12.9	$2.8

Gain (loss) on sales or retirements of ground property and equipment and nonoperating property and equipment:

Five M202 aircraft historically received as trade-ins and subsequently sold are assumed for purposes of this report to be a part of the collection experience related to the sale of M404 aircraft for which the trade-ins were received (see table on page 84). Accordingly, the subsequent historical sales of this nonoperating property have been excluded. The amounts excluded are as follows (see Schedule G):

Proceeds		$.1
Less:		
Cost	$.5	
Reserve	(.4)	
		.1
Gain		-

No other adjustments were made to sales or retirements of ground property and equipment and nonoperating property and equipment.

Collection of proceeds from sales or retirements of property and equipment:

The assumption

G2. The amount and timing of collections of proceeds from sales or retirements of property and equipment are to be reconstructed based upon average historical collection experience relating to such property and equipment.

Application of the assumption

Introduction:

Under the terms of the reconstructed flight equipment mortgage, reconstructed proceeds from the sales of flight equipment are to be paid into the flight equipment fund. In the reconstructed financial statements all proceeds from sales of flight equipment were recorded as additions to a restricted receivable (funds restricted for purchases of flight equipment - other) and cash collections thereof were transferred to the flight equipment fund. Reconstructed amounts added to the restricted receivable are as follows (see Schedule G-1 attached):

Reconstructed proceeds from sales of flight equipment with earlier sales dates	$25.4
Reconstructed proceeds from sales of other flight equipment	15.7
Total reconstructed proceeds	41.1
Reconstructed and historical deferred instalment gain at December 31, 1963 attributable to other flight equipment, not yet reported as proceeds	.2
Total reconstructed additions to the restricted receivable	$41.3

For simplicity of calculation, we have assumed, with your concurrence, that proceeds from sales of expendable parts were added to net current assets, rather than to the restricted receivable, because (a) it was impracticable to determine the proceeds of sales of expendable parts except for those sold under contracts for flight equipment with earlier sales dates, and (b) with respect to these latter contracts, it was impracticable to allocate historical collections of long-term receivables to expendable parts.

Collection of proceeds from sales of flight equipment with earlier sales dates:

Collections by calendar quarter of reconstructed proceeds from sales of the 103 piston aircraft were calculated by applying average historical collection experience on these sales to the reconstructed proceeds. Calculation of reconstructed collections consisted of: (a) analysis of historical collection experience relating to sales of the 103 aircraft; (b) restatement of historical collection experience on the common basis of number of calendar quarters elapsed since date of sale (described herein as the "homogeneous basis") and computation of the average calendar quarter collection experience expressed as a percentage of the total amount of the contracts; and (c) application of restated average quarterly collection experience to reconstructed proceeds and calculation of the resulting reconstructed collections and bad debts.

Each of these steps is described in this section.

Historical collection experience - Historical gross contract values of $20.9 million on the sales of the 103 aircraft were accounted for as follows:

Gross contract values		$20.9
Less - Uncollected receivables, accounted for as:-		
Bad debts charged to:		
Gain from operations	$ .7	
Other income - net	.9	
1961 special item	.2	
Gain on sales or retirements of property and equipment	.1	
Write-offs against deferred instalment gain	.2	
Charge included in 1961 special item as revision of service lives and residual values, relating to repossessed aircraft	2.7	
Depreciation and loss on sales of five M202 aircraft received as trade-ins (nonoperating property)	.4	5.2
Total "collections"		$15.7
Collections comprised:		
Cash collections from customers (including spare parts valued at $.3 million considered as the equivalent of cash)		$15.3
Cash sales value of five M202 aircraft received as trade-ins		.1
Net recapitalized value of five repossessed aircraft returned to revenue service (see page 88)		.3
Total "collections"		$15.7

The amounts used to calculate the average historical collection experience percentage, to be applied to reconstructed proceeds, are summarized as follows:

	Gross contract values	Collections	Uncollected receivables
Historical amounts shown in preceding table	$20.9	$15.7	$5.2
Deduct:			
Bad debts charged to gain on sale of property (a)	(.1)		(.1)
Uncollected receivables written off against deferred instalment gains (b)	(.2)		(.2)
Base (see Schedule G-3)	$20.6	$15.7	$4.9
Percentage	100%	75.9%	24.1%

(a) This amount is excluded from the base since it was historically reported by TWA as a deduction from proceeds and is already deducted from RDSA reconstructed proceeds.

(b) These write-offs are excluded from the base since the original deferred gains had not been historically reported by TWA as proceeds and are excluded from RDSA reconstructed proceeds.

A reconciliation between the gross contract values used as historical collection base of $20.6 million and the actual contract values of $18.5 million, shown by RDSA, follows:

Historical collection base		$20.6
Deduct:		
Contract values attributable to expendable parts	$1.0*	
Contract values historically treated as reimbursement of selling expenses	.6*	
Proceeds attributable to miscellaneous flight equipment, rotable parts and certain spare engines, not included in RDSA amounts	.6	
		2.2
		18.4
Add - Difference between historical proceeds allocated to propellers and communications and navigational equipment by RDSA and actual contract amounts		.1
Actual contract values shown by RDSA		$18.5

*Amount not historically reported by TWA as net proceeds from sales of property and equipment.

Restatement of historical collection experience on a common time basis - This calculation forms the basis for calculation of assumed calendar quarter collections of reconstructed proceeds. Since specific customers or contracts were not identifiable on a reconstructed basis, reconstructed timing of collections and write-offs of bad debts are based upon average historical timing of collections; reconstructed bad debts are assumed to be written off in the calendar quarter following the last reconstructed collection of cash or property but not later than December 31, 1963.

In order to calculate average timing of historical collections, all historical contracts were restated on the same basis in terms of elapsed time (the "homogeneous basis"). This is illustrated below, using nominal amounts:

		Historical			
Year	Month	Total	Contract A	Contract B	Contract C
1959	December		*		
1960	January	$100		$100*(1)	
	February	50		50 (2)	
	March	150	$150(1)		
	April	150	150(2)		
	May				*
	June	200			$200(1)
	July	75			75(2)
		$725			

	Homogeneous			
Month	Total	Contract A	Contract B	Contract C
0	$100	*	$100*(1)	*
1	250		50 (2)	$200(1)
2	75			75(2)
3	150	$150(1)		
4	150	150(2)		
	$725			

*Date of contract
(1) First payment
(2) Second payment

The result of analyzing all historical collections in the manner illustrated is set forth on Schedule G-3. A summary is as follows:

Homogeneous

Calendar quarter	Months	Amount	%
0	0- 2	$ 5.4	26.2%
1	3- 5	1.0	5.1
2	6- 8	1.4	6.6
3	9-11	1.3	6.4
4	12-14	1.0	5.0
5	15-17	1.9	9.0
6	18-20	1.1	5.3
7	21-23	1.7	8.1
8	24-26	.1	.5
9	27-29	.1	.3
10	30-32	.1	.3
11	33-35	.1	.3
12	36-38		.3
13-18*	39-56	.5	2.5
Total collections		15.7	75.9
Total uncollected receivables		4.9	24.1
Aggregate adjusted contract values		$20.6	100.0%

*Calendar quarters 13 to 18 are grouped in order to effect all collections and recognize all bad debts by December 31, 1963.

Application of restated historical collection experience to reconstructed proceeds - The result of applying average quarterly historical collection percentages to the quarterly reconstructed proceeds is summarized as follows:

Reconstructed		Reconstructed collections			Reconstructed bad debts		
Quarter	Proceeds	Period	Amount	%	Period	Amount	%
4th 1958	$ 1.2	4th 1958-1st 1962	$ 1.0	75.9%	2nd 1962	$ .2	24.1%
1st 1959	.3	1st 1959-2nd	.2	"	3rd	.1	"
2nd	1.7	2nd -3rd	1.3	"	4th	.4	"
3rd	3.8	3rd -4th	2.9	"	1st 1963	.9	"
4th	4.4	4th -1st 1963	3.3	"	2nd	1.1	"
1st 1960	.6	1st 1960-2nd	.4	"	3rd	.2	"
2nd	9.4	2nd -3rd	7.1	"	4th	2.3	"
3rd	4.0	3rd -4th	3.1	"	4th	.9	"
	$25.4		$19.3			$6.1	

Schedule G-2 presents the details of these figures by calendar quarter.

Of the reconstructed proceeds of $25.4 million added to the restricted receivable for flight equipment purchases, $19.3 million was assumed to be collected and $6.1 million was charged to reconstructed nonoperating income as bad debts. Of the $19.3 million of collections, $19.0 million, assumed to represent cash, was added to the flight equipment fund and $.3 million, equal to historical net recapitalized value of repossessed aircraft (see page 84), was charged to flight equipment in 1961 at the same time that the aircraft were historically repossessed. The net recapitalized value of these aircraft is summarized as follows:

Gross recapitalized value, historically reported by TWA as reduction of proceeds (see page 76)	$3.0
Amount charged to historical 1961 special item as revision of service lives and residual values of piston aircraft	2.7
Net recapitalized value	$ .3

The result of recording these aircraft in the reconstructed financial statements at net recapitalized value was to reduce by $.2 million each the gross cost and related reserve for depreciation written off in 1963 when one of these aircraft was sold (see page 81).

Collection of proceeds on sales of other flight equipment:

It is assumed that calendar quarter collections of proceeds attributable to flight equipment other than that with earlier sales dates would have been the same as the amount of proceeds historically reported by TWA, adjusted for the net changes in related historical long-term receivables (the net amount thus representing the historical increase in net current assets). Since it was impracticable to distinguish such increases in net current assets as between cash and short-term receivables, it is assumed that these increases represent cash and accordingly they were treated in the reconstructed financial statements as transfers to the flight equipment fund.

It is assumed that increased proceeds from sales of jet property were collected in cash at the time of sale since historical dispositions resulted solely in increases in net current assets.

Reconstructed cash collections on these items are summarized on Schedule G-1.

TWA Ex. 7(b)(2), Schedule G-4
(Price Waterhouse Study - Volume Two)

TRANS WORLD AIRLINES, INC.

RECONSTRUCTED AND HISTORICAL OTHER INCOME CREDITS (CHARGES) - NET
FOR THE PERIOD OCTOBER 1, 1955 - DECEMBER 31, 1963

(Amounts in millions)

Years ended December 31,	Historical /Exhibit II-1/	Add back - Historical bad debts (a)	Deduct - Reconstructed bad debts /Schedule G-1/	Reconstructed /Exhibit II-1/
1955***	$ .2			$ .2
1956	.7			.7
1957	2.2			2.2
1958	.5			.5
1959	1.5			1.5
1960	1.3			1.3
1961	1.7			1.7
1962	2.4		$ .7	1.7
1963	1.6	$.9	5.4	(2.9)
	$12.1	$.9	$6.1	$6.9

***Three months ended December 31, 1955.

(a)Represents portion of historical bad debts, relating to flight equipment with earlier sales dates, included in this caption. See page 84 for summary of all historical uncollected receivables.

H. Deferred training and other costs applicable to new aircraft:

The assumptions

The amount and timing of expenditures for and amortization of deferred training and other costs applicable to new aircraft ("deferred training costs") are to be adjusted to give effect to the following assumptions (which also appear as parts of Assumption E3):

a) That TWA acquired, directly from Boeing and on the earlier delivery dates set forth in the schedule of "Reconstructed and historical delivery and in-service dates - B131, B331, and CV880 jet aircraft" (Exhibit V) annexed hereto, each of the 33 Boeing aircraft which HT Co. ordered in 1956, as follows:

(i) 15 B131 jet aircraft historically leased and subsequently purchased from HT Co.

(ii) 12 B331 jet aircraft historically acquired which consisted of:

4 B331 jet aircraft historically leased and subsequently purchased from HT Co.

1 B331 jet aircraft historically purchased from HT Co.

7 B331 jet aircraft historically purchased from Boeing, after reimbursement to HT Co. for deposits previously made thereon; and

(iii) 6 B331 jet aircraft historically delivered to another airline.

b) That TWA did not lease 5 B331B aircraft from Boeing in 1962 and 1963.

c) That TWA acquired directly from Convair and at the dates shown in Exhibit V all 30 CV880 jet aircraft which HT Co. historically ordered from Convair in 1956.

The adjusted timing of reconstructed expenditures for training costs for the CV880 fleet is as set forth in Appendix C hereto, which has been prepared by Coverdale & Colpitts for use in this proceeding.

Application of the assumptions

Adjustments made to historical financial data to apply these assumptions are described in the succeeding paragraphs.

Deferrals:

We have assumed, with your concurrence, that, except as explained in the following sentence, there would have been no changes in amount or timing of expenditures for B131 deferred training costs since (a) there is no change assumed in the size of the B131 fleet and (b) a calculation of the average number of days' delay between reconstructed delivery dates of these aircraft and the dates at which the same number of aircraft were historically leased indicates an average delay for the fleet of approximately 24 days, or less than one third of one calendar quarter. Consistent with the assumed direct acquisition of the aircraft from Boeing, it is assumed that rental costs for this fleet and the portion ($.1 million) of aircraft acquisition costs historically amortized during rental of the fleet, which were historically included with deferred training costs, would not have been incurred; these amounts have been excluded from reconstructed deferrals.

We have assumed (in conformity with advice from Coverdale & Colpitts) that, except as explained in the following sentence, expenditures for B331 deferred training costs would have been 50% greater than historical and would have been made one calendar quarter earlier since (a) the assumed fleet size is 50% greater than historical and (b) a calculation of the average number of days' delay between reconstructed delivery dates of the original twelve aircraft and the dates at which the same aircraft were historically leased or purchased indicates an average delay for these aircraft of approximately 127 days. Consistent with assumed direct acquisition from Boeing of 4 B331 aircraft historically leased, it is assumed that rental costs for these aircraft historically included with deferred training costs, would not have been incurred. In the reconstructed financial statements, reconstructed expenditures for B331 deferred training costs have been substituted for historical amounts.

Consistent with the assumption that B331B aircraft would not have been leased, it is assumed that no B331B deferred training costs would have been incurred. Accordingly, historical B331B deferred training costs have been excluded from reconstructed deferrals.

We have assumed (in conformity with advice from Coverdale & Colpitts) that reconstructed expenditures for CV880 deferred training costs would have been 50% greater than historical, the percentage increase in fleet size (there were no historical deferred training costs relating to 6 CV880 aircraft acquired in 1963). Timing of reconstructed expenditures has been estimated by Coverdale & Colpitts. In the reconstructed financial statements, reconstructed expenditures for CV880 deferred training costs have been substituted for historical amounts.

Expenditures for reconstructed and historical deferred training costs are shown on Schedule H. The increase in total deferrals is summarized as follows:

	B131	B331	B331B	CV880	Other jet fleets and L1649A*	Total
Historical	$7.7	$7.2	$3.4	$ 9.0	$10.1	$37.4
Deduct:						
Rental costs historically deferred	.7	.4				1.1
Portion of aircraft acquisition costs historically amortized during rental of fleet	.1					.1
Exclusion of fleet			3.4			3.4
	6.9	6.8	-	9.0	10.1	32.8
Add - Increase of 50% due to increase in fleet size		3.4		4.5		7.9
	$6.9	$10.2	-	$13.5	$10.1	$40.7

*Reconstructed and historical amounts are assumed to be identical.

Amortization:

Historical procedures used to calculate reconstructed amortization consisted of writing off deferred training costs on a straight-line basis over a five-year period. For each fleet, this period began with the month following the date midway between the in-service date of the first aircraft and the anticipated in-service date of the last aircraft. Expenditures deferred after amortization had begun were amortized over the remainder of the five-year period, commencing in the month following the expenditure. No costs were deferred after the in-service date of the last aircraft.

For calculation of reconstructed amortization, it was assumed that expenditures for deferred training costs took place in the middle of each reconstructed calendar quarter.

Amortization of reconstructed and historical deferred training costs is shown on Schedule H. The increase in the total amortization is summarized as follows:

	B131	B331	B331B	CV880	Other jet fleets and L1649A*	Total
Historical	$7.1	$5.5	$.6	$5.0	$6.6	$24.8
Deduct:						
Rental costs historically deferred	.6	.3				.9
Portion of aircraft acquisition costs historically amortized during rental of fleet	.1					.1
Exclusion of fleet			.6			.6
	6.4	5.2	-	5.0	6.6	23.2
Add:						
Additional amortization resulting from earlier in-service dates (decrease in amount included in 1963 special item)		.1		1.0		1.1
Increase of 50% in fleet size		2.7		3.2		5.9
Reconstructed	$6.4	$8.0	-	$9.2	$6.6	$30.2

*Reconstructed and historical amounts are assumed to be identical.

Historically in 1963 the five-year amortization period for deferred training costs was reduced to three years and the definition of deferred training costs was narrowed "to exclude items with limited future benefit" (TWA 1963 annual report, page 5). Consistent with historical change in accounting policy, we have assumed, with your concurrence, that such reduction of amortization period and narrowing of definition also occur in 1963 on a reconstructed basis. The resulting reconstructed write-off is included in the 1963 special item. Also, a write-off of $.1 million, of L1649A deferred training costs, historically included in the 1961 special charge is included on a reconstructed basis.

The decrease in the amount included in the special items is summarized as follows:

	B131	B331	B331B	CV880	Other jet fleets and L1649A*	Total
Historical	$.6	$1.7	$2.5	$3.9	$2.8	$11.5
Deduct:						
Rental costs historically deferred	.1	.1				.2
Exclusion of fleet			2.5			2.5
Increase in amount of amortization, resulting from earlier in-service dates		.1		1.0		1.1
	.5	1.5	-	2.9	2.8	7.7
Add - Increase of 50% in fleet size		.7		1.4		2.1
Reconstructed	$.5	$2.2	-	$4.3	$2.8	$ 9.8

*Reconstructed and historical amounts are assumed to be identical.

Summary:

A summary of reconstructed (R) and historical (H) training costs for the period October 1, 1955 to December 31, 1963 is as follows (annual amounts are shown on Schedule H):

Fleet	Deferrals		Deduct: Amortization		Deduct: Amount included in special items		Balance December 31, 1963	
	R	H	R	H	R	H	R	H
B131	$ 6.9	$ 7.7	$ 6.4	$ 7.1	$ .5	$ .6		
B331	10.2	7.2	8.0	5.5	2.2	1.7		
B331B		3.4		.6		2.5		$ .3
CV880	13.5	9.0	9.2	5.0	4.3	3.9		.1
Other jet fleets*	5.8	5.8	2.4	2.4	2.7	2.7	$.7	.7
L1649A*	4.3	4.3	4.2	4.2	.1	.1		
Total	$40.7	$37.4	$30.2	$24.8	$9.8	$11.5	$.7	$1.1

*Reconstructed and historical amounts are assumed to be identical.

J. Reserve for overhaul of jet aircraft:

The assumptions

Net additions to the reserve for overhaul of jet aircraft are to be reconstructed as follows:

a. The portions of the historical net additions resulting from provisions charged to training and other costs applicable to new aircraft are to be adjusted in the same manner as expenditures for deferred training costs, as set forth in Assumption H above.

b. The portions of the historical net additions resulting from net provisions charged to maintenance expense are to be adjusted in accordance with the proportionate increases in historical maintenance expense estimated by Coverdale & Colpitts (Appendix B hereto).

Application of the assumptions

General:

Adjustments made to historical financial data to apply the assumptions are described in the succeeding paragraphs. These adjustments result in an increase of $6.1 million (from historical of $11.6 million to reconstructed of $17.7 million) in the net provisions for overhaul of jet aircraft. Consistent with a historical change of accounting policy, as of December 31, 1963 the balance in the reconstructed reserve is, with your concurrence, written off as at that date and included in the 1963 special credit. The increases in the net provisions from 1959 through 1963 are summarized as follows:

				CV880		Other jet	
	B131	B331	B331B	(new)	(used)	fleets*	Total
Historical	$1.9	$2.2	$1.0	$3.6	$.2	$2.7	$11.6
Add - Increases due to earlier in-service dates and additional aircraft	.2	1.7		5.4			7.3
Deduct - Fleets eliminated			(1.0)		(.2)		(1.2)
Reconstructed	$2.1	$3.9	-	$9.0	-	$2.7	$17.7

*Reconstructed and historical amounts are assumed to be identical.

Details of increases by fleet are shown on Schedule J.

Historical accounting policies:

In 1959, TWA began making monthly provisions for periodic overhauls of jet airframes and engines. To the extent that the aircraft were utilized for training flights, provisions were included in deferred training costs. To the extent that aircraft were flown in revenue service, provisions were included in maintenance expense. Actual costs of overhauls were charged to maintenance expense as incurred; concurrently, amounts equal to the actual costs of overhauls were transferred from maintenance expense and charged to the overhaul reserve (as if actual costs had been charged directly to the reserve).

Reconstructed:

Consistent with adjustments made to historical expenditures for training costs, reconstructed net additions to the reserve for overhaul charged to deferred training costs applicable to B331 and CV880 jet aircraft were (in conformity with advice from Coverdale & Colpitts) increased by 50% and recorded one calendar quarter and three calendar quarters earlier, respectively. The reconstructed (R) and historical (H) amounts are summarized as follows:

		B331		CV880 (new)	
Year	Quarter	R	H	R	H
1959	3	$.2		$.1	
	4	.1	$.1	.1	
	Year total	.3	.1	.2	
1960	1	.1	.1	.1	
	2		.1		
	3			.3	$.1
	4			.1	.1
	Year total	.1	.2	.5	.2
1961	1				
	2				.2
	3				.1
	Year total				.3
		$.4	$.3	$.7	$.5

No changes were made to amounts relating to other jet fleet

Historical net additions to the reserve for overhaul charged to maintenance expense and applicable to B131, B331 and CV880 aircraft have been increased in accordance with the proportionate increase in each year's historical maintenance expense as estimated by Coverdale & Colpitts. Amounts applicable to B331B and used CV880 aircraft were excluded. Calculations of the increases were made by division, to conform with methods used by Coverdale & Colpitts. In certain early reconstructed years, B331 and CV880 aircraft are assumed to be in revenue service, but historically none were in service; consequently, there were no related historical provisions for overhaul charged to maintenance expense. In these cases, reconstructed net additions to the reserve for overhaul for such years were assumed to be amounts arrived at by the following formula:

$$\text{Reconstructed net addition to reserve for overhaul for next succeeding year} \times \frac{\text{Reconstructed maintenance expense current year}}{\text{Reconstructed maintenance expense next succeeding year}} = \text{Reconstructed net addition to reserve for overhaul for current year}$$

As an illustration, calculation of reconstructed net additions charged to maintenance expense is shown for the B331 fleet on Schedule J-1.

In calculating reconstructed net additions for the B131, B331 and CV880 fleets, it was assumed that historical amounts in the reserve not attributable to charges or credits to maintenance expense or training and other costs applicable to new aircraft would not have changed. These amounts were not significant.

TWA Ex. 7(b)(2), Schedule J-1
(Price Waterhouse Study - Volume Two)

TRANS WORLD AIRLINES, INC.

RESERVE FOR OVERHAUL OF JET AIRCRAFT
CALCULATION OF RECONSTRUCTED NET ADDITIONS
CHARGED TO MAINTENANCE EXPENSE
FOR THE PERIOD JANUARY 1, 1959 - DECEMBER 31, 1963
B331 AIRCRAFT

(Amounts in millions)

	Years ended December 31,	Maintenance expense (a) R(b)	Maintenance expense (a) H	Percentage of R to H	Net increase in reserve charge to maintenance expense R(c)	Net increase in reserve charge to maintenance expense H
Domestic division:						
	1959	$ .4			$ .1(d)	
	1960	3.2	$1.8	175.7	.7	$ .4
	1961	5.9	3.9	151.2	.2	.1
	1962	3.1	2.1	148.2	(.3)	(.2)
	1963	.9	.6	147.0	.2	.2
International division:						
	1959	1.3	.3	487.6	.5	.1
	1960	9.2	5.4	170.5	1.1	.6
	1961	11.4	7.6	150.1	.5	.4
	1962	12.3	8.2	150.0	.5	.3
	1963	9.9	6.4	154.6	*	*
System (Schedule J):						
	1959				.6	.1
	1960				1.8	1.0
	1961				.7	.5
	1962				.2	.1
	1963				.2	.2

* Amount is less than $.05 million.

(a) Includes direct maintenance expense and applied maintenance burden.

(b) Derived from data shown on Exhibits F and G in report of Coverdale & Colpitts.

(c) Calculated by multiplying historical net addition to reserve by percentage in preceding column, except for domestic division 1959.

(d) Amount is the same percentage of the reconstructed amount in the succeeding year as 1959 reconstructed maintenance expense is of 1960 reconstructed maintenance expense (apparent difference is due to rounding).

Legend:
R = Reconstructed
H = Historical

K. Provisions for income taxes

The assumption

Calculations of provisions for current and deferred federal income taxes are to be made on a basis consistent with the procedures historically followed by TWA in making tax computations during the respective periods.

Application of the assumption

Reconstructed provisions for current and deferred federal income taxes were calculated by applying TWA's historical procedures to reconstructed financial data and were substituted in the reconstructed financial statements for corresponding historical provisions.

Provisions for (refunds of) current taxes:

Historically, TWA based its annual provisions for (refunds of) current federal income taxes, at rates then applicable, upon income before taxes with adjustments for certain items which were treated differently for financial accounting ("book") and tax purposes and for net operating loss carry-backs and carry-forwards. Reconstructed provisions for (refunds of) current taxes are calculated after giving effect to similar adjustments. The various adjustments for tax purposes are summarized on Schedule K and are explained as follows:

Net excess of tax depreciation over book depreciation, jet fleet - This adjustment results from TWA's policy of providing accelerated depreciation on jet airframes and jet engines on the double-declining balance method (150% of declining balance with respect to used equipment) for tax purposes but on the straight-line method for book purposes. Reconstructed accelerated depreciation of such jet equipment was calculated based upon reconstructed costs and in-service dates and is summarized on Schedule K-3.

In 1960, TWA historically made an adjustment of $.7 million dollars to its calculation of 1959 taxable income for tax provision purposes; such adjustment resulted from additional tax depreciation of jet equipment for 1959. A similar adjustment of $.7 million is made in 1960 on a reconstructed basis and is included in the $1.0 million prior year adjustment shown on Schedule K.

Net excess of tax depreciation over book depreciation, other - The differences between book and tax deductions in this category result from (a) TWA's historically providing depreciation on certain piston airframes, piston engines and ground equipment on the accelerated double-declining balance method for tax purposes but on the straight-line method for book purposes and (b) amortization over 60 months for tax purposes of emergency facilities under certificates of necessity relating to certain piston flight equipment, compared with straight-line depreciation over a longer period for book purposes.

Differences between reconstructed and historical amounts shown on Schedule K for this item represent adjustments relating to 103 piston aircraft assumed to have been sold at earlier dates. The adjustments made consist of (a) exclusion of historical differences between book and tax depreciation provisions subsequent to the reconstructed sales dates (see subsection G for explanation of exclusion of related book depreciation) and (b) an equal and offsetting reduction in the excess of accumulated tax over book depreciation at the date of sale, i.e., the difference in gain on sale for tax and book purposes.

Training and other costs applicable to new aircraft - Historically, TWA deducted currently for tax purposes expenditures in this category which, for book purposes, were deferred and subsequently amortized. Historical amounts shown on Schedule K for this caption are equal to the annual net change in the corresponding balance sheet caption except in 1959 and 1960; the difference of $.4 million in each of those years represents acquisition costs on leased B131 jet aircraft, deferred for both book and tax purposes.

The reconstructed amounts shown on Schedule K for this caption are equal to the annual net change in the corresponding balance sheet caption. The above historical differences of $.4 million in 1959 and 1960 do not arise since, on a reconstructed basis, B131 jet aircraft are purchased rather than leased and acquisition costs thereof are charged directly to flight equipment.

Other deferred debits - These amounts represent the net amou of certain book deferrals deducted currently for tax purposes. No adju ments to historical book and tax differences are required since no adju ments are made to historical book amounts.

Reserve for overhaul of jet aircraft - Historical net increas in this reserve were not deducted for tax purposes, nor was the write-o of the balance in 1963 treated as taxable income. The reconstructed an historical amounts shown on Schedule K for this caption are equal to th annual net change in the corresponding balance sheet caption, except in 1959 and 1960. Historically, in 1959 the net increase in the reserve for overhaul of jet aircraft exceeded the corresponding tax adjustment by $1.0 million, while in 1960 the tax adjustment exceeded the net increase in the reserve by $1.0 million. These two differences are retained in the reconstructed figures.

Instalment sales - The amounts shown represent net historical tax adjustments resulting from reporting certain sales of aircraft on th instalment basis for tax purposes and on the accrual basis for book purposes. No adjustments are made to historical amounts to reflect earlier sales of certain piston aircraft since the amounts are not significant and there would have been no net effect during the period.

Miscellaneous - The amounts shown represent the net effect of a number of income and expense items treated differently for book and tax purposes. The difference of $.6 million between reconstructed and historical amounts for the 8-1/4 year period represents assumed increase in provisions for obsolescence of expendable parts (see Schedule F-2); book provisions for obsolescence were not historically deducted for tax purposes by TWA.

Losses carried back to periods ending before October 1, 1955 - Historically, the net operating loss of $.9 million in the fourth quarter of 1955, together with an adjustment to 1955 income made in 1956, reduced taxable income for that year to $5.2 million. The 1956 historical net operating loss of $15.0 million was carried back in full to 1954. The amount of loss carried back from 1957 was limited to 1955 taxable income of $5.2 million since the period over which net operating losses could then be carried back was two years.

The $1.0 million effect of reconstructed equity financing prior to October 1, 1955 and the increase of $.2 million in reconstructed net operating loss in the fourth quarter of 1955 together reduced taxable income for the year 1955 from a historical amount of $5.2 million to a reconstructed amount of $4.0 million. The 1956 reconstructed net operating loss of $15.8 million is carried back in full to 1954. The difference of $.8 million between the reconstructed and historical 1956 carrybacks to 1954 is the net difference between aggregate reconstructed and historical amounts shown on Schedule K as losses carried back to periods ending before October 1, 1955. The amount of reconstructed loss carried back from 1957 is limited to reconstructed 1955 taxable income of $4.0 million.

Losses carried back and forward to periods ending after September 30, 1955 - The amounts shown on Schedule K for these two captions represent carry-backs and carry-forwards within the statutory period of three years and seven years, respectively.

Revisions to taxable income subsequently made - The adjustments made historically are made in the same amounts on a reconstructed basis. The $1.0 million adjustment in 1960 includes $.7 million relating to 1959 jet fleet tax depreciation, as explained above.

Summary - Amounts shown on Schedule K for reconstructed provisions for (refunds of) current income taxes result from applying appropriate federal income tax rates to reconstructed taxable income. The net reconstructed and historical refunds of $10.3 million and $9.9, respectively, for the 8-1/4 year period relate to net operating losses carried back to periods ending before October 1, 1955, No adjustments are made to provisions for state taxes since the amounts are not significant.

Provisions for deferred federal income taxes:

Provisions for deferred federal income taxes are summarized on Schedule K-1 and an analysis of balancesof amounts on which deferred federal income taxes are provided is presented on Schedule K-2. Consistent with historical policy, reconstructed deferred taxes are provided, generally at 50%, with respect to the items shown on Schedule K-1 only to the extent that a current tax benefit could be received.

In 1960 TWA historically provided deferred taxes at 25%, or $.1 million, with respect to a deferred instalment gain of $.4 million, representing a portion of the excess of book over tax basis of a piston aircraft sold in 1960; the unamortized balances of the deferred tax and deferred instalment gain of $.1 million and $.3 million, respectively, were written off in 1961 when the aircraft was repossessed. The same adjustments are made on a reconstructed basis.

The amounts shown on Schedule K-1 as the increase or decrease in net operating loss carry-forwards representing tax deductions over book deductions are equal to the net operating losses arising in each year, as shown on Schedule K, except in 1961 and 1962. In those two years, the historical net operating losses arising therein exceeded gro tax over book deductions in each year. Because of increases in reconstructed book income, reconstructed net operating losses are made up solely of tax over book deductions.

The amounts underlying deferred federal income tax balances, shown on Schedule K-2, represent the cumulative amounts shown for the corresponding captions on Schedule K except as explained in the footnot

Summary:

A condensed summary of tax provisions for the 8-1/4 year period is as follows:

	Reconstructed	Historical	Increase (decrease) over historica
Income (loss) and special credit (charge) before income taxes	$45.8	($25.9)	$71.7
Net (refunds) of current taxes	($10.3)	($ 9.9)	($ .4)
Provisions for state taxes	.6	.6	-
Adjustments of provisions made in prior years			
Net provisions for deferred income taxes	(1.4)	(1.4)	-
Total provisions for (refunds) of income taxes	36.5	-	36.5
	$25.4	($10.7)	$36.1
Net operating loss carry-over at December 31, 1963	$ 5.6	$49.3	($43.7)
Unused investment credit carry-over at December 31, 1963*	$ 8.1	$ 8.4	($ .3)

*Reconstructed and historical investment credits arising in 1962 and 1963 were not usable through December 31, 1963 since there were no federal income taxes payable.

APPENDIX A

REPORT OF DREXEL HARRIMAN RIPLEY, INCORPORATED

(Incorporated herein by reference)

APPENDIX B

REPORT OF COVERDALE & COLPITTS

(Incorporated herein by reference)

APPENDIX C

SUPPORTING INFORMATION PREPARED BY COVERDALE & COLPITTS

AA-634

COVERDALE & COLPITTS

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WILLIAM A. GORDON
SAMUEL R. BROWN
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120 WALL STREET
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WILLIAM H. COVERDALE (1904-1948)
WALTER W. COLPITTS (1913-1951)

WHITEHALL 3-7400
CABLE ADDRESS: COVERCOL

May 2, 1966

Price Waterhouse & Co.
60 Broad Street
New York, New York

Attention: Mr. Donald H. Trautlein

Dear Sirs:

Pursuant to your request we hand you herewith statements showing:

1. Historical and Estimated In-Service Dates for TWA, B-131, B-331, and CV 880 Jet Aircraft (2 pages)

2. Estimated Quarterly TWA Capital Expenditures for Training and Integration Costs for the Fleet of 30 CV 880 Aircraft, 1958 - 1960

3. Estimated Quarterly TWA Capital Expenditures for Rotable Parts for the Fleet of 30 CV 880 Aircraft, 1958 - 1963

4. Estimated Quarterly Additional TWA Capital Expenditures for Ground Property and Equipment for the Assumed Additional and Earlier Receipt of Jet Aircraft, 1959 - 1962

Respectfully submitted,

Coverdale & Colpitts

Consulting Engineers

cc: Mr. D. B. Tenney
Cahill, Gordon, Reindel & Ohl

HISTORICAL AND ESTIMATED IN-SERVICE DATES FOR TWA B-131, B-331, and CV 880 JET AIRCRAFT

B-131 JET AIRCRAFT

Historical In-Service Dates, from TWA Schedules 3-66M
15 Aircraft

July 9, 1959	May 1, 1959	July 7, 1959
March 20, 1959	May 27, 1959	July 12, 1959
April 2, 1959	May 29, 1959	July 12, 1959
April 4, 1959	May 29, 1959	July 29, 1959
April 24, 1959	June 1, 1959	August 4, 1959

Estimated Dates In-Service for Earlier Delivery
15 Aircraft

April 15, 1959	April 9, 1959	June 3, 1959
January 6, 1959	April 24, 1959	June 19, 1959
February 6, 1959	May 16, 1959	July 5, 1959
March 6, 1959	May 19, 1959	July 16, 1959
April 5, 1959	May 30, 1959	August 2, 1959

B-331 JET AIRCRAFT

Historical In-Service Dates, from TWA Schedules 3-66M
12 Aircraft

November 23, 1959	February 25, 1960	May 19, 1960
December 3, 1959	April 24, 1960	May 28, 1960
December 9, 1959	April 28, 1960	July 4, 1960
January 9, 1960	May 11, 1960	July 6, 1960

Estimated Dates In-Service for Earlier Delivery
18 Aircraft

August 19, 1959	November 19, 1959	April 5, 1960
September 4, 1959	November 23, 1959	May 9, 1960
September 9, 1959	December 28, 1959	May 12, 1960
October 5, 1959	January 12, 1960	May 22, 1960
October 19, 1959	January 31, 1960	June 20, 1960
November 10, 1959	March 13, 1960	July 14, 1960

CV 880 JET AIRCRAFT

Historical In-Service Dates, from TWA Schedules 3-66M
20 CV 880 Aircraft

January 14, 1961	February 10, 1961	June 1, 1961
January 12, 1961	March 16, 1961	June 15, 1961
January 12, 1961	March 30, 1961	July 19, 1961
January 12, 1961	April 14, 1961	August 18, 1961
January 12, 1961	April 1, 1961	September 8, 1961
January 22, 1961	April 30, 1961	October 20, 1961
January 25, 1961	May 20, 1961	

Historical In-Service Dates, from TWA Schedules 3-66M
6 CV 880 Aircraft

August 18, 1963	September 8, 1963	September 30, 1963
August 24, 1963	September 24, 1963	October 4, 1963

Estimated Dates In-Service for a Fleet of 30 Aircraft
30 Aircraft

July 13, 1960	May 25, 1960	July 25, 1960
May 15, 1960	May 25, 1960	July 25, 1960
May 15, 1960	May 25, 1960	August 25, 1960
May 15, 1960	June 25, 1960	August 25, 1960
May 15, 1960	June 25, 1960	August 25, 1960
May 15, 1960	June 25, 1960	August 25, 1960
May 15, 1960	June 25, 1960	August 25, 1960
May 15, 1960	July 25, 1960	September 25, 1960
May 15, 1960	July 25, 1960	September 25, 1960
May 15, 1960	July 25, 1960	September 25, 1960

ESTIMATED QUARTERLY TWA CAPITAL EXPENDITURES FOR TRAINING AND INTEGRATION COSTS FOR THE FLEET OF 30 CV 880 AIRCRAFT

1958 - 1960

Year / Quarter	1958	1959	1960	Grand Total
	(Millions)			
1st Quarter	$ -	$ -	$ 4.0	
2nd Quarter	-	-	4.0	
3rd Quarter	0.1	0.8	3.0	
4th Quarter	-	1.6	-	
Total	$0.1	$2.4	$11.0	$13.5

The figures above provide a 50 percent increase in historical capital expenditures for training and integration expenditures for a fleet of 20 CV 880 aircraft, which we believe is a reasonable increase to use to calculate reconstructed capital expenditures for the 50 percent larger fleet of 30 CV 880 aircraft. The allocation of such expenditures to various quarters has been done with reference to the quarters in which the historical expenditures were recorded, the historical CV 880 aircraft receipt dates and the estimated dates the aircraft of the larger fleet of 30 would have been available for revenue service.

ESTIMATED QUARTERLY TWA CAPITAL EXPENDITURES FOR ROTABLE PARTS FOR THE FLEET OF 30 CV 880 AIRCRAFT

1958 - 1963

Year / Quarter	1958	1959	1960	1961	1962	1963	Grand Total
	(M i l l i o n s)						
1st Quarter	$ -	$ -	$1.3	$0.9	$0.1	$ -	
2nd Quarter	-	-	2.6	0.9	0.5	-	
3rd Quarter	-	1.0	2.2	0.2	-	0.1	
4th Quarter	-	1.6	1.1	0.5	-	-	
Total	$ -	$2.6	$7.2	$2.5	$0.6	$0.1	$13.0

The amounts listed above provide a 50 percent increase over historical expenditures in 1959-1963 for rotable parts for TWA's fleet of 20 CV 880 aircraft, which we believe is a reasonable increase to use to calculate reconstructed capital expenditures for a 50 percent larger fleet of 30 CV 880 aircraft. The allocation of such expenditures to various quarters has been done by us with reference to the quarters in which the historical expenditures were recorded, the CV 880 aircraft's historical receipt dates and the dates assumed for the fleet of 30 CV 880 aircraft.

TWA Ex. 7(b)(2), Appendix C, page 6 of 6
(Price Waterhouse Study - Volume Two)

ESTIMATED QUARTERLY ADDITIONAL TWA CAPITAL EXPENDITURES FOR GROUND PROPERTY AND EQUIPMENT FOR THE ASSUMED ADDITIONAL AND EARLIER RECEIPT OF JET AIRCRAFT

1959 - 1962

Year and Quarter	Ramp Equipment	Maintenance and Engineering Equipment	Miscellaneous Ground Equipment		Other (A)	Estimated Additions
			Simulator	Other		
	(Millions)					
1959						
1	$ -	$ -	$ -	$ -	$0.1	$ 0.1
2	-	-	-	0.1	0.1	0.2
3	0.2	0.2	-	0.1	0.1	0.6
4	0.1	0.4	1.1	-	0.1	1.7
Total	$ 0.3	$ 0.6	$ 1.1	$0.2	$0.4	$ 2.6
1960						
1	$ 0.3	$ 0.6	$ -	$ -	$0.1	$ 1.0
2	0.2	-	(1.1)	-	-	(0.9)
3	0.3	0.2	-	-	-	0.5
4	0.6	0.1	-	-	-	0.7
Total	$ 1.4	$ 0.9	$(1.1)	$ -	$0.1	$ 1.3
1961						
1	$(0.2)	$(0.2)	$ -	$ -	$ -	$(0.4)
2	(0.2)	(0.1)	-	-	-	(0.3)
3	(0.1)	(0.2)	-	-	-	(0.3)
4	(0.1)	(0.2)	-	-	-	(0.3)
Total	$(0.6)	$(0.7)	$ -	$ -	$ -	$(1.3)
1962						
1	$(0.6)	$(0.1)	$ -	$ -	$ -	$(0.7)
2	-	-	-	-	-	-
3	-	-	-	-	-	-
4	-	-	-	-	-	-
Total	$(0.6)	$(0.1)	$ -	$ -	$ -	$(0.7)

(A) For other buildings, maintenance buildings, and furniture and fixtures.

We estimated the above increases in TWA's capital expenditures for ground property and equipment items on account of the assumed additional and earlier receipt of jet aircraft, with reference to historical expenditures for such items in 1955-1963 and TWA's historical and assumed jet aircraft fleets and receipt dates thereof through 1962. No increases estimated for 1963.

APPENDIX D

REPORT OF R. DIXON SPEAS ASSOCIATES

(Incorporated herein by reference)

TWA Ex. 7(b)(2), Appendix E
(Price Waterhouse Study - Volume Two)

APPENDIX E

SUPPORTING INFORMATION PREPARED BY R. DIXON SPEAS ASSOCIATES

R. DIXON SPEAS ASSOCIATES
Aviation Consultants

MANHASSET, LONG ISLAND, NEW YORK – 516 MA 7-7460
CABLE-SPEASAV MANHASSET NY

May 2, 1966

Price Waterhouse & Co.
60 Broad Street
New York, New York

Dear Sirs:

Attached to this letter as Annex A is a schedule of quarterly values of aircraft retirement contracts relating to 103 specific piston engine aircraft sold by TWA in the period from December 31, 1958 to July 20, 1962. The data in this schedule is derived from our report to Cahill, Gordon, Reindel & Ohl dated May 2, 1966 and entitled "Determination of TWA Financial Loss Attributable to Late Disposal of Piston Engine Aircraft."

The schedule shows by quarter the RDSA assigned value of the contracts to be reconstructed grouped according to actual retirement date, and the best estimate of the reconstructed contracts grouped by reconstructed retirement date. These reconstructed contract values by quarter are the sums of the original contract amounts redistributed to the quarters of reconstructed retirement plus the best estimate of the respective increased realizations which would have been occasioned by the earlier retirement of these 103 aircraft as determined by a detailed statistical analysis described in the subject report.

Very truly yours,

R. DIXON SPEAS ASSOCIATES

By R. Dixon Speas
R. Dixon Speas

QUARTERLY VALUES OF AIRCRAFT RETIREMENT CONTRACTS

ACTUAL AND RECONSTRUCTED FOR THE 103 TWA AIRCRAFT FOR WHICH RECONSTRUCTED RETIREMENT DATES WERE PROVIDED

Quarter Ended	Actual Contracts to be Reconstructed RDSA Values	Reconstructed Contracts		
		Original Contract Amount	Increased Realization	Total
12/31/58	$ 581,000	$ 1,104,000	$ 37,000	$ 1,141,000
3/31/59	783,000	261,000	4,000	265,000
6/30/59	120,000	1,671,000	82,000	1,753,000
9/30/59	2,150,000	3,406,000	393,000	3,799,000
12/31/59	1,048,000	3,893,000	557,000	4,450,000
3/31/60	875,000	318,000	347,000	665,000
6/30/60	1,422,000	7,088,000	2,247,000	9,335,000
9/30/60	1,684,000	822,000	3,214,000	4,036,000
12/31/60	1,672,000	-	-	-
3/31/61	89,000	-	-	-
6/30/61	451,000	-	-	-
9/30/61	4,076,000	-	-	-
12/31/61	2,790,000	-	-	-
3/31/62	407,000	-	-	-
6/30/62	279,000	-	-	-
9/30/62	136,000	-	-	-
Totals	$18,563,000	$18,563,000	$ 6,881,000	$25,444,000

Notes

1) The RDSA Assigned Values for the Actual Contracts reflect the amounts for airframes, engines, propellers and radios as drawn from TWA Form 41, Schedule B-8 submissions to the CAB. Where not specified by aircraft, the amounts for propellers and radios were prorated as explained in the RDSA study.

2) The Original Contract Amount column represents the redistribution of the Actual Contract Values to the Reconstructed Sales Dates.

INDEX

Volume AX-I

ITEM	PAGE
TWA Ex. 2 (Statement of Robert W. Rummel) ..	AX-1
TWA Ex. R-3 (Toolco-Convair Amended Agreement—Model 22, 6/4/56)	AX-63a
TWA Ex. R-5 (TWA-Toolco Purchase Agreement—May 9, 1960)	AX-64
TWA Ex. R-8(80) (FAA Registration Documents—B707-331, No. N771TW)	AX-73a
TWA Ex. R-8(81) (FAA Registration Documents—B707-331, No. N772TW)	AX-73k
TWA Ex. 3 (Affidavit of J. B. Connelly)	AX-74
TWA Ex. 4(b) (C. & C. Report—Comparative Profit Study)	AX-80
TWA Ex. 4(c)(1) (C. & C. Report—Financial Results from Reconstructed Jet Fleet)	AX-91
TWA Ex. 4(c)(4) (Exhibits B-J to C. & C. Report—Financial Results from Reconstructed Jet Fleet)	AX-167

Volume AX-II

TWA Ex. 5(a) (Drexel Harriman Ripley, Inc. Report—Parts I & II)	AX-336
TWA Ex. 5(b) (Exhibits to Drexel Harriman Ripley, Inc. Report)	AX-430

ITEM	PAGE
TWA Ex. 7(b)(1) (Price Waterhouse Study—Volume One)	AX-452
TWA Ex. 7(b)(2) (Price Waterhouse Study—Volume Two)	AX-480
Volume AX-III	
TWA Ex. 10 (Letter—Boeing to TWA re 707 Negotiations—12/29/54)	AX-643a
TWA Ex. 12 (Toolco-Convair CV-990 Purchase Agreement—11/10/60)	AX-644
TWA Ex. 13 (Holliday Call Sheet—Feb. 20-27, 1961)	AX-655
TWA Ex. 14 (CV-990 Purchase Agreement—Amendment of 2/22/61)	AX-660
TWA Ex. 22 (Rummel Call Sheets)	AX-665
TWA Ex. 23 (Letter Agreement—Sale of Six Boeings to Pan American)	AX-729
TWA Ex. 39 (Affidavit of Joseph P. Ripley)	AX-732
TWA Ex. 42 (C. & C. Report—Revision of Pages 63, 64, 71 & 72)	AX-735
TWA Ex. 43 (C. & C. Report—Revision of Page 51)	AX-740
TWA Ex. 46 (Jet and Turboprop Aircraft of TWA and Principal Competitors—1958-66)	AX-742
TWA Ex. 47 (Boeing Aircraft Employed on Routes Formerly Served by B-720Bs)	AX-743

ITEM	PAGE
TWA Ex. 50 (Price Waterhouse Report—Summary of Application of Assumptions)	AX-744
TWA Ex. 72 (TWA Annual Report—1939)	AX-745
TWA Ex. 73 (TWA Annual Report—1940)	AX-752
TWA Ex. 74 (TWA Annual Report—1941)	AX-758
TWA Ex. 75 (TWA Annual Report—1942)	AX-760
TWA Ex. 76 (TWA Annual Report—1943)	AX-763
TWA Ex. 77 (TWA Annual Report—1944)	AX-766
TWA Ex. 78 (TWA Annual Report—1945)	AX-769
TWA Ex. 79 (TWA Annual Report—1946)	AX-773
TWA Ex. 80 (TWA Annual Report—1947)	AX-779
TWA Ex. 81 (TWA Annual Report—1948)	AX-783
TWA Ex. 82 (TWA Annual Report—1949)	AX-788
TWA Ex. 83 (TWA Annual Report—1950)	AX-792
TWA Ex. 84 (TWA Annual Report—1951)	AX-797
TWA Ex. 86 (TWA Annual Report—1953)	AX-800
TWA Ex. 87 (TWA Annual Report—1954)	AX-805
TWA Ex. 88 (TWA Annual Report—1955)	AX-814
TWA Ex. 89 (TWA Annual Report—1956)	AX-819
TWA Ex. 90 (TWA Annual Report—1957)	AX-822
TWA Ex. 91 (TWA Annual Report—1958)	AX-842
TWA Ex. 92 (TWA Annual Report—1959)	AX-854
TWA Ex. 93 (TWA Annual Report—1960)	AX-856

ITEM	PAGE
TWA Ex. 94 (TWA Annual Report—1961)	AX-862
TWA Ex. 96 (TWA Annual Report—1963)	AX-866
TWA Ex. 128 (Pan American Annual Report—1959)	AX-868
TWA Ex. 132 (Pan American Annual Report—1963)	AX-869
TWA Ex. 155 (AAL Annual Report—1958)	AX-870
TWA Ex. 158 (AAL Annual Report—1961)	AX-871
TWA Ex. 159 (AAL Annual Report—1962)	AX-873
TWA Ex. 184 (UAL Annual Report—1959)	AX-874
TWA Ex. 186 (UAL Annual Report—1961)	AX-875
TWA Ex. 187 (UAL Annual Report—1962)	AX-876
TWA Ex. 192 (TWA Prospectus, 5/25/61 & Supplement, 6/20/61)	AX-877
TWA Ex. 194 (TWA Prospectus—6/17/57)	AX-883
TWA Ex. 223 (Pan American Prospectus—7/3/45—Supplement—7/24/45)	AX-889
TWA Ex. 249 (American Airlines Prospectus—6/11/46—Supplement—6/24/46)	AX-891
TWA Ex. 257 (TWA-Toolco Lease Agreements—Boeing Jets)	AX-893
TWA Ex. 264 (Toolco-Lockheed Purchase Agreement—L-1449A—12/23/54)	AX-901
TWA Ex. 266 (Toolco-Lockheed Purchase Agreement—L-1049G—9/26/55)	AX-908

ITEM	PAGE
TWA Ex. 267A (Letter, TWA to Toolco—1957 Common Stock Offering)	AX-919
TWA Ex. 267B (Letter, TWA to N.Y. Trust Co.—1957 Common Stock Offering)	AX-921
TWA Ex. 271 (Letter, Toolco to SEC—1957 Common Stock Offering)	AX-923
TWA Ex. 275 (TWA Board Minutes—April 26, 1945)	AX-925
TWA Ex. 276 (TWA Finance Committee Minutes—September 12, 1945)	AX-928
TWA Ex. 277 (Page from Banking Quotation Record)	AX-930
TWA Ex. 278 (TWA Board Minutes—November 8, 1946)	AX-931
TWA Ex. 279 (Special TWA Stockholders Meeting—December 23, 1946—Judges' Report)	AX-935
TWA Ex. 280A (Minutes—Adjourned Special TWA Stockholders Meeting—December 28, 1946)	AX-936
TWA Ex. 280B (Adjourned Special TWA Stockholders Meeting—December 28, 1946—Judges' Report)	AX-940
TWA Ex. 281A (Minutes—Adjourned Special TWA Stockholders Meeting—December 31, 1946)	AX-941
TWA Ex. 281B (Adjourned Special TWA Stockholders Meeting—December 31, 1946—Judges' Report)	AX-944

ITEM	PAGE
TWA Ex. 282 (Minutes & Judges' Report—Adjourned Special TWA Stockholders Meeting —January 6, 1947)	AX-945
TWA Ex. 283 (TWA Board Minutes—December 18, 1946)	AX-950
TWA Ex. 284 (TWA Board Minutes—December 27, 1946)	AX-956
TWA Ex. 285 (TWA Board Minutes—December 28, 1946)	AX-962
TWA Ex. 287 (TWA Board Minutes—January 9, 1947)	AX-966
TWA Ex. 288 (Minutes—Adjourned Special TWA Stockholders Meeting—January 13, 1947)	AX-974
TWA Ex. 290 (TWA Board Minutes—June 15, 1948)	AX-980
TWA Ex. 292 (TWA Proxy Statement—July 15, 1948)	AX-991
TWA Ex. 293 (TWA Prospectus—2/18/49 & Amendments—3/8/49)	AX-993
TWA Ex. 313 (Debt Outstanding & Available to TWA & Competitors—1961-63)	AX-1051
TWA Ex. 314 (Weighted Average Interest—TWA & Competitors—1960-63)	AX-1060
TWA Ex. 319 (Least Squares Analysis—S.H.E. Avg. Stage Length—B-331s)	AX-1065

ITEM	PAGE
TWA Ex. 320 (Least Squares Analysis—S.H.E. Avg. Stage Length—CV-880s)	AX-1066
TWA Ex. 321 (Least Squares Analysis—S.H.E. Avg. Stage Length—B-131s)	AX-1067
TWA Ex. 322 (Least Squares Analysis—S.H.E. Avg. Stage Length—B-131Bs)	AX-1068
TWA Ex. 328 (S.H.E.—Passengers Added/ Deleted—Reconstructed TWA)	AX-1069
TWA Ex. 331 (TWA Historical Load Factors—CV-880s—1962-1963)	AX-1071
TWA Ex. 336 (Comparison TWA Int'l vs. PAA-Atl.—1959)	AX-1072
TWA Ex. 345A (Price Waterhouse Comparison —C. & C. and S.H.E. (Revised))	AX-1073
TWA Ex. 351 (1965 CAB Handbook of Airline Statistics)	AX-1107
TWA Ex. 355 (Comparative Profit Study—TWA with AAL & UAL)	AX-1108
TWA Ex. 356 (Comparative Profit Study—TWA with All Other Domestic Trunks)	AX-1110
TWA Ex. 399 (Comparison, TWA Actual Jet Load Factors vs. S.H.E. Marginal Passenger Mile Factors)	AX-1112
TWA Ex. 401 (TWA B-131 Load Factors—April-July 1959)	AX-1113
TWA Ex. 420 (Price Waterhouse Comparison—C. & C. (Revised) and S.H.E.)	AX-1114

ITEM	PAGE
TWA Ex. 423 (Late Evening Flights—TWA 1961-1963)	AX-1129
TWA Ex. 424 (Cargo v. Passenger Revenue—TWA Late Evening Flights)	AX-1133
TWA Ex. 426 (Comparison of Selected A/C Numbers from S.H.E. Appendix A)	AX-1134
TWA Ex. 431 (Profitability of TWA A/C by Month—Computer Print-out)	AX-1135
TWA Ex. 432 (Profitability of TWA A/C by Month—Chart)	AX-1145
TWA Ex. 435 (Regression Analysis—Random Numbers)	AX-1146
TWA Ex. 436A (Regression Analysis—Random Numbers)	AX-1154
TWA Ex. 436B (Regression Analysis—Random Numbers)	AX-1157
TWA Ex. 436C (Regression Analysis—Random Numbers)	AX-1160
TWA Ex. 440 (Graph Illustrating Testimony of Prof. Hare)	AX-1163
TWA Ex. 441 (Regression Experiment—3/23/68)	AX-1164
TWA Ex. 444 (C. & C. Tabulation—Additional TWA Domestic Seat-Miles)	AX-1177

Volume AX-IV

ITEM	PAGE
DX4 (Toolco Order—30 P.&W. JT3C-4 Engines, 2/14/56)	AX-1178
DX5 (Letter—Toolco to P.&W. re Jet Engine Orders, 2/14/56)	AX-1181
DX6 (Toolco Order—90 Additional P.&W. JT4A-3 Engines, 2/15/56)	AX-1183
DX7 (Amendment—Toolco Order for 300 P.&W. Jet Engines, 9/7/56)	AX-1184
DX8 (Letter—P.&W. to Rummel re 300 Jet Engines, 9/7/56)	AX-1185
DX10 (Letter—Rummel to Collings re Boeing 707, 1/12/55)	AX-1186
DX11 (Notes of Convair Negotiations—March 24, 1955)	AX-1187
DX15 (Draft C.&C. Report—TWA Financial Forecast 1959-61)	AX-1192
DX19 (Page from *Aviation Week,* Jan. 10, 1955)	AX-1208
DX22 (*American Aviation,* June 20, 1955, pages 21-23)	AX-1209
DX26 (*American Aviation,* Sept. 12, 1955, pp. 84-85)	AX-1212
DX27 (*American Aviation,* Oct. 10, 1955, p. 68)	AX-1214
DX28 (Pages from *American Aviation,* Oct. 24, 1955)	AX-1215

ITEM	PAGE
DX29 (*Aviation Week*, Oct. 17, 1955, p. 7)	AX-1218
DX31 (*American Aviation*, Nov. 7, 1955, pp. 23-25, 27-28)	AX-1219
DX40 (TWA Board Minutes—June 21, 1961)	AX-1224
DX43 (Excerpts from Deposition of Robert W. Rummel)	AX-1229
DX44 (Letter of Damon, Dec. 6, 1955)	AX-1369
DX45 (Letter—Leslie to Dietrich, Dec. 19, 1955)	AX-1378
DX46 (Letter—Dietrich to Ayers, Dec. 21, 1955)	AX-1382
DX47 (Boeing-Toolco Purchase Agreement—8 B-131s, 1/10/56)	AX-1385
DX48 (Teletype—Boeing to Toolco re B707-131s, 11/11/56)	AX-1390
DX51 (Boeing Offer of B707-320s to Toolco, 1/6/56)	AX-1391
DX53 (Transcript of Telephone Conversation—Rummel & Connelly, 12/20/57)	AX-1393
DX54 (TWA Board Minutes—June 26, 1959)	AX-1402
DX57 (The Huntington Report—1960)	AX-1410
DX62 (TWA Fleet Requirements 1961-70, dated 3/1/61)	AX-1420
DX63 (TWA Financial Forecast 1959-61, dated 5/15/59)	AX-1433
DX64 (Letter to Thomas, dated 5/6/59)	AX-1438

ITEM	PAGE
DX65 (TWA Staff Engineering Report re Jets & Turboprops—4/19/56)	AX-1440
DX66 (Toolco-Boeing Contracts—B707-131s, 3/2/56)	AX-1445
DX67 (Toolco-Boeing Contracts—B707-331s, 3/19/56)	AX-1479
DX68 (Toolco-Convair Contracts—CV-880s, 9/10/56)	AX-1505
DX71 (Rummel Memo re TWA Equipment Program, 3/15/61)	AX-1536
DX72 (Telegram—Bew to Rummel—2/27/61)	AX-1538
DX73 (Letter—Leslie to Holliday—3/20/61)	AX-1539
DX74 (Letter—Leslie to Holliday—4/3/61)	AX-1540
DX77 (Letters—Toolco to TWA re Financing Additional Jets, 6/9-10/61)	AX-1541
DX78 (Letter—TWA to Holliday re Financing Proposals, 6/16/61)	AX-1553
DX79 (Pan American-Boeing Purchase Agreement—B707-120s, 10/13/55)	AX-1558
DX81 (Pan American-Boeing Purchase Agreement—B707-321s, 12/19/55)	AX-1564
DX85 (Boeing-AAL Purchase Agreement—B707-123s, 3/1/56)	AX-1576
DX95 (Allen Letter Announcing Boeing Jet, Nov. 19, 1954)	AX-1584
DX96 (Boeing Offer to Sell Pan American 25 B-120s, 6/23/55)	AX-1588

ITEM	PAGE
DX97 (Boeing Offer to Sell American 15 B-120s, 6/24/55)	AX-1591
DX98 (Boeing Offer to Sell United 15 B-120s, 6/24/55)	AX-1594
DX101 (Boeing 707 Delivery Positions)	AX-1597
Volume AX-V	
DX102 (Boeing Memorandum re 707 Over-Ocean Configuration, 11/2/55)	AX-1601
DX103 (Boeing Memorandum re TWA Delivery Positions, 12/23/55)	AX-1606
DX105 (Boeing Memorandum re Negotiations with TWA, 7/24/56)	AX-1608
DX106 (Letter—Rummel to Cook re Boeing Deliveries, 1/28/58)	AX-1611
DX107 (Letter—Rummel to Cook re Boeing Deliveries, 3/17/58)	AX-1615
DX108 (Letter—Price to Allen re Boeing Deliveries, 3/30/58)	AX-1618
DX109 (Letter—Toolco to Allen re Boeing Deliveries, 5/8/58)	AX-1621
DX116 (Rourke Memo to Rummel re CV-880 Deliveries, 1/15/60)	AX-1623
DX120 (TWA Memorandum re CV-880 Deliveries, 10/2/59)	AX-1624
DX122 (Bew Memorandum to Cannady re CV-880 Deliveries, 12/18/59)	AX-1625

ITEM	PAGE
DX124 (Parmet Memorandum to Rourke re CV-880 Deliveries, 1/13/60)	AX-1627
DX125 (TWA Memorandum re CV-880 Deliveries, 1/22/60)	AX-1629
DX127 (Rummel Memorandum to Rourke re Integration of CV-880s, 2/8/60)	AX-1630
DX128 (Letter—Rourke to Digges re Specification Modifications, 4/7/60)	AX-1638
DX130 (Bew Wire to Rourke re Convair Delays, 5/27/60)	AX-1640
DX135 (Letter—Convair to Bew re CV-880 Delivery, 1/6/61)	AX-1641
DX137 (Telegram—Bew to Rummel re Convair Delays, 2/16/61)	AX-1643
DX139 (Letter—Convair to Bew re Convair Delays, 3/16/61)	AX-1644
DX142 (Letter—Convair to Rourke re CV-880 Deliveries, 7/11/61)	AX-1647
DX143 (Letter—Rourke to Convair re CV-880 Deliveries, 8/2/61)	AX-1650
DX146 (Letter—Convair to Toolco re Model 30 Delivery Positions, 5/6/60)	AX-1652
DX148 (Toolco—General Dynamics Letter Agreement re 6 Model 30s, 7/14/60)	AX-1654
DX152 (Toolco—General Dynamics Letter Agreement re Additional Model 30s, 9/6/60)	AX-1655

ITEM	PAGE
DX156 (Telegram—Beall to Allen, et al. re PAA Negotiations, 9/28/55)	AX-1657
DX168 (Boeing Memorandum re Conversations with Howard R. Hughes, 9/23/55)	AX-1658
DX169 (Boeing Memorandum re Conversation with Howard R. Hughes, 10/31/55)	AX-1660
DX170 (Telegram—Boeing to Toolco re B707-331s, 7/21/59)	AX-1661
DX218 (C.&C. Letter to Leslie re TWA Financial Forecast, March 13, 1959)	AX-1664
DX219 (TWA Financial Forecast 1958-1962, dated 12/1/58)	AX-1666
DX237 (*Aviation Week & Space Technology*, 11/13/61, pages 42-43)	AX-1671
DX239 (*Airlift*, May 1962, p. 46)	AX-1673
DX254 (TWA Board Meeting, Aug. 16, 1961—Report of System General Manager)	AX-1674
DX255 (Statement of CAB Chairman Boyd, Jan. 29, 1960)	AX-1677
DX257 (*Aviation Week*, 1/30/61, pp. 36-37)	AX-1681
DX258 (Report to Directors of TWA—Oct. 13, 1961)	AX-1683
DX259 (CAB Order of Investigation—Dec. 28, 1961)	AX-1694
DX260 (Letter—Tillinghast to CAB, Jan. 29, 1962)	AX-1703

ITEM	PAGE
DX262 (Revised Pages 70-73 of TWA Ex. 4(e)(1))	AX-1708
DX270 (Report of Loeb, Rhoades & Co.)	AX-1712
DX271A (S.H.E. Report (Revised)—Volume Ome)	AX-1789
DX271B (S.H.E. Report (Revised)—Volume Two)	AX-1859
DX284 (TWA Prospectus—Nov. 20, 1952)	AX-1961
DX286 (TWA Board Minutes—Jan. 13, 1955)	AX-1967
DX287 (TWA Board Minutes—Dec. 13, 1955)	AX-1970
DX289 (TWA Board Minutes—April 26, 1956)	AX-1974
DX290 (Toolco-TWA Conditional Sale Contract—L-1049Gs, 6/6/56)	AX-1979
Volume AX-VI	
DX292 (Toolco-TWA Conditional Sale Contract—L-1649As, 4/19/57)	AX-1995
DX321 id. (CAB Orders & Documents)	AX-2012
DX322 id. (CAB Orders & Documents)	AX-2191
DX323 id. (CAB Orders & Documents)	AX-2347
Volume AX-VII	
DX334 (Correlation Coefficients—Substituted S.H.E. Table G-VII)	AX-2427
DX339 (B-120s Available to AAL, Actual vs. Reconstructed—1959)	AX-2428

ITEM	PAGE
DX341 (Domestic Carriers—Jets Assigned to Service, 1959-63)	AX-2429
DX342 (TWA's Share of Jets Assigned to Domestic Service, 1959-63)	AX-2430
DX348 (Revised Summary—Categories of Differences—Wemple vs. Simat)	AX-2431
DX358B id. (CAB Form 41 Reports—Northeast Airlines, 1957-1966)	AX-2452
DX358C id. (CAB Form 41 Reports—PAA, 1957-1966)	AX-2454
DX359A (Supplemental S.H.E. Report—Volume A)	AX-2458
DX364 id. (Excerpts from Deposition of Emmett O. Cocke)	AX-2843
DX367 (Combined Non-Stop Scheduled Frequencies Per Week—Aug. 1958-63)	AX-2851
DX368 (Combined Non-Stop Scheduled Frequencies Per Week—Aug. 1958-63)	AX-2853
DX371 (Summary—Categories of Differences—Wemple vs. Simat (Supplemental))	AX-2856
DX379 (Domestic Jet Seat Miles—Wemple vs. Historical)	AX-2867

AX-643a

BOEING AIRPLANE COMPANY
SEATTLE 14, WASHINGTON

December 29, 1954

TWA
EXHIBIT 10
6/7/66 W.B.

In your reply refer to
550-480.19

Mr. R. W. Rummel
Chief Engineer
Trans World Airlines, Inc.
10 Richards Road
Kansas City 5, Missouri

Dear Bob:

I tried to call you yesterday to extend a few felicitations for the coming year and to follow up with some planning re your "707" evaluation. I found you were taking a few days of well deserved vacation and as a result I am writing this letter so you will have it on your return.

So that you will be informed I am enclosing a copy of Wellwood Beall's wire to Howard Hughes along with a copy of Mr. Allen's letter to Ralph Damon. Mr. Allen's letter suggests that we try for the week of January 10th; actually this is somewhat previous for us due to our further revisions in our performance document and as an alternate I would like to offer the week of the 17th. We would also like to urge you to come to Seattle. We have the airplane here and can draw on our technical staff for detailed discussions. However, if this is not possible we can come to Kansas City and I am sure we can accomplish a great deal.

All for now, I'll call you Wednesday or Thursday of next week and perhaps we can solidify a few plans.

Kindest regards,

K. C. Gordon
Manager - Commercial Sales
BOEING AIRPLANE COMPANY

Enclosures (2)

AX-648b

CHRONOLOGICAL FILE

TWA Ex. 10, page 2
(Letter - Boeing to TWA re 707 Negotiations, 12/29/54)

CHRONOLOGICAL

December 27, 1954

Dear Ralph:

You indicated in your letter of November 26 that you would try to attend a 707 presentation scheduled for Kansas City the 13th and 14th of this month. Unfortunately, due to the heavy schedule of your technical people, the meeting and presentation were postponed and a new date has not been established.

I do want you to know that we are most anxious to make our presentations and I am confident that they will be of extreme interest to you. We are ready at any time convenient to you and at any location you desire. We would like to suggest Seattle due to the availability of our prototype airplane and our ability to draw upon our engineering staff for detail technical discussions. It will also permit you to review our other projects which have contributed so much to the success of our prototype.

Incidentally, we now have a total of fifty-nine flights for a total of ninety-two hours and thirty minutes on the prototype. We are more than pleased with the results to date.

Please let me know when your schedule will permit you to sit in on a presentation. We suggest the week of January 10.

Sincerely yours,

William M. Allen

Mr. R. S. Damon, President
Trans World Airlines, Inc.
10 Richards Road
Kansas City 5, Missouri

AX-643e

CHRONOLOGICAL FILE

TWA Ex. 10, page 3
(Letter - Boeing to TWA re 707 Negotiations, 12/29/54)

DECEMBER 23

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WUX /021/ SEAT SE 030 FR 12/23/54 11SP PC

MR. HOWARD HUGHES - PERSONAL

7000 ROMAINE ST - DELIVER

HOLLYWOOD 38, CALIF

AS A LITTLE CHRISTMAS PRESENT TO YOU MAY I LEAVE WITH YOU A SUGGESTION, AND THAT IS TO HAVE AN APPRAISAL MADE BY COMPETENT INDEPENDENT AUTHORITY AS TO THE EARLIEST DATE ANY AMERICAN BUILT TURBOPROP POWERED TRANSPORT WILL BECOME CERTIFICATED AND OPERATIONAL ON ANY AIRLINE, AS COMPARED TO WHEN THE BOEING 707 WILL BE OPERATIONAL ON ANY AIRLINE. IT IS A FACT THAT A TURBOJET POWER PLANT IS LESS COMPLICATED, FURTHER DEVELOPED AND THEREFORE WILL BE MORE RELIABLE IN SERVICE. FURTHERMORE, EVEN THOUGH THE DC-7 IS NOT AS COMFORTABLE TO RIDE IN AS THE DC-6 OR CONNIE, IT IS A FACT THAT IT IS TAKING BUSINESS AWAY FROM BOTH BECAUSE IT'S FASTER. THE TURBOJET TRANSPORT WILL BE AT LEAST ONE HUNDRED MILES PER HOUR FASTER THAN A TURBOPROP TRANSPORT. THESE FACTS SHOULD BE GIVEN SERIOUS CONSIDERATION WITH ALL THE SALES HOKUM ELIMINATED. HOPE YOU CAN COME TO SEATTLE SOON TO SEE OUR PROTOTYPE AND TO DISCUSS ECONOMICS, AIRPLANE PERFORMANCE AND DELIVERY POSITIONS WITH US. OTHERS ARE HERE.

MERRY CHRISTMAS AND HAPPY NEW YEAR.

WILLWOOD

AX-644

TWA Ex. 12
(Tooloo-Convair CV-990 Purchase Agreement-11/10/60)

CHRONOLOGICAL

TWA
EXHIBIT 12
9/16 W.B.

PURCHASE AGREEMENT

between

GENERAL DYNAMICS CORPORATION
(Convair Division)

and

HUGHES TOOL COMPANY
November 13, 1960

Relating to Manufacture of
Convair 600 Aircraft

Dated: 10 November 1960

EEE:HOUSTON
3947-3W1

TABLE OF CONTENTS

Article		Page Series
1	Subject Matter of Sale	1A
2	Delivery of Aircraft	2A
3	Price of and Payment for Aircraft	3
4	Spare Parts	4A
5	Changes	5A
6	Warranties	6A
7	Indemnity Against Patent Infringement	7A
8	Taxes	8
9	Effects of Delays	9A
10	Customer Vended Equipment	10A
11	Services, Training and Data	11A
12	Buyer's Representatives and Inspection	12A
13	Demonstration and Test Flights	13A
14	Title to Property and Risks	14
15	Cancellation for Insolvency	15A
16	Assignments	16A
17	Notices and Requests	17
18	Miscellaneous	18A

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13847-3W2

PURCHASE AGREEMENT

THIS PURCHASE AGREEMENT (hereinafter called the "Agreement") entered into as of this 10th day of November 1960, by and between GENERAL DYNAMICS CORPORATION, a Delaware corporation, having an office (Convair Division) at San Diego, California (hereinafter called "CONVAIR"), and HUGHES TOOL COMPANY with its offices at Houston, Texas (hereinafter called "Buyer"):

WITNESSETH:

WHEREAS, Buyer desires to purchase aircraft of the type hereinafter described for the transportation of passengers, mail, express and cargo, and CONVAIR desires to manufacture and sell the same to Buyer:

NOW, THEREFORE, in consideration of the mutual covenants herein contained, the parties hereto agree as follows:

ARTICLE 1

Subject Matter of Sale

CONVAIR shall manufacture (including the assembly of subcontracted and purchased parts) at its San Diego plant and sell and deliver to Buyer, and Buyer shall purchase and accept delivery of from CONVAIR the following:

(a) Six (6) Convair 600 aircraft (hereinafter called "Aircraft") to be manufactued by CONVAIR in accordance with the terms of this Agreement and CONVAIR's Detail Specification Report No. ZD-30-010, dated 1 August 1958, Revision 4 dated 16 November 1959 together with Addendum III dated May 3, 1960 (hereinafter called "Detail Specification") set forth in Exhibit A

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attached hereto and made a part hereof, as the same may be modified pursuant to Article 5 hereof.

(b) CONVAIR will manufacture, deliver and sell to Buyer, and Buyer will purchase from CONVAIR spare parts for said Aircraft in accordance with Article 4 hereof.

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ARTICLE 2

Delivery of Aircraft

(a) Delivery Schedule

(1) The Aircraft shall be tendered for delivery to Buyer, serviced except for fuel, ready for flight not later than the last day of the month set forth in the following schedule:

Month of Delivery	Number of Aircraft
July 1961	One (1)
August 1961	Two (2)
September 1961	Two (2)
October 1961	One (1)

(2) The point of delivery shall be such point in the United States as may be designated by Buyer and at which the Aircraft can be landed. All expenses of, and in connection with, fly-away from San Diego, California, shall be borne by Buyer.

(3) Upon delivery to Buyer of each Aircraft in accordance with the terms hereof, title to and all risks in connection with such Aircraft shall pass from CONVAIR to Buyer.

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(4) In the event any Aircraft is ready for delivery and CONVAIR so notifies Buyer of this fact but delivery of any such Aircraft is delayed by Buyer (whether or not such delay is out of Buyer's control), Buyer shall promptly reimburse CONVAIR for all cost and expense, including, but not limited to, reasonable compensation for storage, insurance, preservation, protection and all taxes of every nature whatsoever, incurred by CONVAIR during, or paid or incurred as a result of any such delay in excess of one (1) week.

(5) In the event any Aircraft is destroyed or damaged beyond repair prior to delivery, CONVAIR shall be obligated to deliver, as a replacement, the first available unsold aircraft of the same basic model; provided, however, that Buyer shall make written request therefor within thirty (30) days after receiving notice from CONVAIR of such destruction or damage, which notice shall specify the approximate date on which such replacement Aircraft will be delivered to Buyer; and provided further, that the time reasonably required by CONVAIR to furnish a replacement for such Aircraft shall be deemed an excusable delay under paragraph (a) of Article 9 hereof, except that neither Buyer nor CONVAIR shall have the right to terminate this Agreement

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provided in paragraphs (b) and (c) of said Article 9 by virtue of such delay; and provided further, that in the event the manufacture of additional aircraft to replace the Aircraft so destroyed or damaged beyond repair cannot be accomplished by CONVAIR without the reactivation of the Convair 600 type aircraft production line, or such part thereof as has been discontinued, CONVAIR shall have the right exercisable by delivery of notice to Buyer within sixty (60) days after the date of such destruction or damage beyond repair to terminate this Agreement as to such Aircraft. In the event of any such termination, or if Buyer shall not have made written request that CONVAIR deliver such replacement aircraft within thirty (30) days after receiving notice from CONVAIR of such destruction or damage, the number of Aircraft to be delivered hereunder shall be reduced by the Aircraft so damaged or destroyed and CONVAIR shall forthwith repay to Buyer all payments theretofore made by Buyer with respect to that Aircraft.

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ARTICLE 3

Price of and Payment for Aircraft

(a) Price. The total Base Price of the Aircraft purchased hereunder shall be $26,061,768, computed on a unit Base Price of $4,343,628 per unit delivered in accordance with Article 2 hereof. Said total Base Price of the Aircraft shall be increased or decreased as the case may be by Change Orders, if any, pursuant to the provisions of Article 5 hereof.

(b) Payments. The total price of the Aircraft purchased hereunder shall be paid as follows:

(1) An initial installment payment in the amount of $3,257,721, representing twelve and one-half percent (12-1/2%) of the total Base Price of the Aircraft, upon execution of the Agreement.

(2) Two (2) additional installment payments, each representing ten percent (10%) of the total Base Price of the Aircraft as follows:

Amount	Due Date
$2,606,176.80	February 1, 1961
2,606,176.80	May 1, 1961

(3) The balance of the Base Price of each Aircraft increased or decreased as the case may be by Change Orders, if any, pursuant to Article 5 hereof upon tender of delivery in accordance with Article 2 hereof, of each of the Aircraft manufactured in accordance with the terms of this Agreement and the Detail Specification.

(c) All payments provided for in this Agreement shall be made in United States dollars.

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ARTICLE 5

Changes

(a) The Detail Specification may be amended at the instance of either party from time to time by Change Orders in writing, which shall set forth in detail the particular specification involved, the changes to be made therein, and the effect, if any, of such change on price, design, performance, weight, balance and time of delivery. CONVAIR shall not unreasonably fail to offer for consideration as a change under this paragraph (a) any improvement developed by CONVAIR for incorporation in Convair 600 aircraft after the date of this Agreement and prior to delivery of all the Aircraft.

(b) CONVAIR reserves the right to substitute equivalent equipment, accessories, materials of construction or design whenever it is deemed that such substitution is necessary to prevent delay in manufacture or delivery, or meet requirements of the Federal Aviation Agency, or whenever CONVAIR deems that such substitution will improve the performance, stability and control, utility, maintenance, or appearance of the Aircraft, or installation; provided, that in no instance shall any such substitution increase the price of any Aircraft or affect CONVAIR's obligations under this Purchase Agreement and provided further, that CONVAIR promptly shall give written notice to Buyer of such substitution.

(c) All Change Orders shall show the Aircraft affected and the recurring and non-recurring charges or credits to Buyer occasioned thereby. The

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non-recurring charges or credits may be reflected on the invoice covering the first Aircraft to which the change is applicable, and the recurring charges or credits shall be reflected on invoices covering each Aircraft to which the change is applicable.

(d) Change Orders shall not be binding on either party and shall not be carried out unless and until mutually executed by persons respectively duly authorized in writing by CONVAIR and Buyer. No charges for extras shall be allowed or be collectible from Buyer unless authorized by a Change Order executed as aforesaid, except as otherwise provided herein.

(e) If any law, directive, order, proclamation, regulation or ruling of the United States Government or any agency thereof becomes effective after the date of this Agreement which requires any change, addition or modification to any undelivered Aircraft in order to obtain an Airworthiness Certificate in the transport category from the United States Federal Aviation Agency, such change, addition or modification shall be made and evidenced by a Change Order specifying the effect, if any, of such change on design, performance, weight, balance and time of delivery. The cost of making any such change, addition or modification shall be borne equally by CONVAIR and Buyer. CONVAIR shall consult with Buyer with respect to the method of accomplishing any such change with a view to reaching agreement on such method; provided, however, that if such agreement cannot be reasonably reached, CONVAIR may make such change without the consent of Buyer but shall do so in a reasonable manner.

(f) CONVAIR may, without Change order or Buyer's consent, make

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minor changes and corrections in the Detail Specification in order to correct defects or improve the Aircraft; provided, that such changes and corrections shall not adversely affect price, time of delivery, functional character or performance of any Aircraft to be purchased hereunder or the interchangeability or replaceability of parts therefor, nor appreciably affect the design, maintenance and service characteristics, weight or balance of any such Aircraft; and provided further, that CONVAIR promptly shall give written notice to Buyer or Buyer's Factory Representative detailing such change and corrections and other effect, if any, upon any and all of the matters enumerated in this paragraph (f).

HHC HOUSTON

ARTICLE 9

Effects of Delay

(a) CONVAIR shall not be responsible nor be deemed to be in default on account of delays in the performance of this Agreement due to causes beyond CONVAIR's control and not occasioned by its fault or negligence, including, but not being limited to, war; warlike operations; armed agression; insurrections; strikes; riots; fires; floods; explosions; earthquakes; serious accidents; any act of Government; Governmental priorities, allocation regulations or orders affecting materials, facilities or completed Aircraft; failure or refusal of the Government to issue final airworthiness and type certificates; failure of the Government to release for commercial use the model or type engine specified for installation in the Aircraft; acts of God or the public enemy; failure of transportation; epidemics; quarantine restrictions; or labor troubles causing ceasation, slow-down, or interruption of work (said delays being herein called "Excusable Delays"); provided, however, that the existence of such cause shall not excuse CONVAIR for the delay resulting therefrom unless CONVAIR shall have given Buyer written notice of any Excusable Delay referred to above within thirty (30) days (or such additional time as may be approved by Buyer) after CONVAIR has actual knowledge that such occurrences will result in a delay in delivery.

(b) Buyer shall have the option to terminate this Agreement with respect to any undelivered Aircraft, and undelivered spare parts, data and other items purchased for said Aircraft, in the event that the delivery of said Aircraft shall

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be delayed for a period of nine (9) months after the end of the calendar month in which delivery is otherwise required hereunder by reason of any one or more Excusable Delays referred to in (a) above. Such termination shall not affect any other undelivered Aircraft (and spare parts, data and other items purchased therefor), the delivery of which shall not have been delayed for a period of nine (9) months. Notice of such termination must be given in writing within fifteen (15) days after the end of such nine (9) month period.

(c) Buyer or CONVAIR shall have the option to terminate this Agreement with respect to all undelivered Aircraft, and undelivered spare parts, data and other items purchased for undelivered Aircraft, in the event that the delivery of any Aircraft shall be delayed by reason of any one or more of the Excusable Delays referred to in (a) above for a period of twelve (12) months after the end of the calendar month in which delivery is otherwise required hereunder. Notice of such termination must be given in writing within fifteen (15) days after the end of such period of twelve (12) months or at such earlier time mutually agreed upon by the parties based upon reasonable proof of such delay.

(d) Buyer or CONVAIR shall have the option to terminate this Agreement with respect to all undelivered Aircraft, and undelivered spare parts, data and other items purchased for undelivered Aircraft, in the event that the delivery of any Aircraft shall be delayed for a period of twenty (20) months after the end of the calendar month in which delivery is otherwise required hereunder by reason of one or more of the Excusable Delays referred to in

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(a) above. Notice of such termination may be given in writing at any time after the end of such twenty (20) month period.

(e) The phrase "calendar month in which delivery is otherwise required hereunder" shall mean for all purposes of this Article 9 the month specified in Article 2(a) of this Agreement for delivery of the particular Aircraft.

(f) Termination pursuant to the preceding paragraphs (b), (c), and (d) shall discharge and terminate all obligations and liabilities of the parties hereunder as to said terminated Aircraft and said terminated spare parts, data, and other items purchased therefor, except that CONVAIR shall refund the Buyer all payments theretofore made by Buyer with respect to said terminated Aircraft and said terminated spare parts, data and other items.

(g) In event CONVAIR terminates this Agreement as to any Aircraft, CONVAIR agrees that it will not sell such Aircraft to any other customer without first offering for a period of thirty (30) days to sell such Aircraft to Buyer at a price and on terms and conditions not less favorable to Buyer than CONVAIR proposes to offer to such other customer.

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ARTICLE 12

Buyer's Representatives and Inspection

(a) Commencing with the date of this Agreement and until the delivery of the last Aircraft, CONVAIR shall, without additional charge, furnish office space conveniently located with respect to its plant for the accommodation of not more than five (5) personnel of Buyer. Commencing within three (3) months after the date of this Agreement and until delivery of the last Aircraft, Buyer shall maintain a duly authorized representative, or representatives, (one of whom shall be designated as the "Factory Representative") at CONVAIR's plant, at San Diego, California, where the Aircraft are manufactured. Subject to CONVAIR's general rules and regulations, CONVAIR's construction of Aircraft pursuant to this Agreement, and all materials and parts obtained by CONVAIR therefor, and tests related thereto made at CONVAIR's plant at San Diego, California, shall at all reasonable times during business hours be open to inspection by any duly authorized representative or representatives of Buyer, except that if access to any portion of CONVAIR's plant where construction is in progress or material or parts are stored is restricted by the United States Government or any agency thereof, CONVAIR shall be allowed a reasonable time to make the items available for inspection to the extent practicable elsewhere than in a restricted portion of the plant. Buyer shall obtain for such personnel of Buyer proper United States Government military security clearance for access to CONVAIR's plant at San Diego, California. CONVAIR shall use its best

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efforts to obtain correspondingly adequate and reasonable inspection rights for Buyer's representatives with respect to work in process at the plants of CONVAIR's subcontractors.

(b) Any inspection accomplished by Buyer shall be performed so as not to unduly delay or hinder the manufacture, construction or performance by CONVAIR under this Agreement. CONVAIR shall not be obligated to remove parts already installed, remove lining and cover materials or open areas previously closed because of any failure of Buyer to have inspection representatives available at CONVAIR's plant, provided that CONVAIR shall advise Buyer in writing at least thirty (30) days in advance of the scheduled date of arrival of the first Aircraft to be delivered hereunder into the primary assembly stage.

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ARTICLE 13

Demonstration and Test Flights

(a) CONVAIR shall conduct demonstration flights of the first Aircraft to be delivered hereunder (or such other aircraft agreed by Buyer as being aerodynamically similar to Buyer's Aircraft) not in excess of ten (10) flying hours (not including preliminary shakedown flights) in order to demonstrate to Buyer compliance with the performance guarantees specifically designated in the Detail Specification for demonstration to Buyer, the results of which shall be made available to Buyer upon request. For the purposes of the above flights all said demonstration shall be accomplished utilizing fully calibrated aircraft instruments and no special installations shall be required for this purpose. CONVAIR shall also conduct demonstration flights of all other Aircraft hereunder not in excess of three (3) flying hours (not including preliminary shakedown flights) in order to demonstrate to Buyer the satisfactory functioning of the Aircraft and its equipment. It is understood that CONVAIR may use, prior to delivery of any of the Aircraft, not more than three (3) of the Aircraft for certain flight and ground tests to the extent necessary to obtain the required certification of the Aircraft, pursuant to the provisions of the Detail Specification. Buyer shall permit such use of such Aircraft by CONVAIR but upon delivery of any Aircraft equipped with brakes, tires and/or other equipment and accessories, or with any engines, so used for such ground and flight tests, such brakes, tires and/or other equipment and such engines shall not be materially worn. Notwithstanding any provision

IDENTIFICATION

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of this Agreement to the contrary, no tax resulting from or payable in connection with such use shall be the obligation of Buyer.

(b) Prior to delivery of the first Aircraft, CONVAIR shall furnish to Buyer a report, certified by an officer of CONVAIR to be correct, of flight tests conducted on an aircraft of the same model as the Aircraft to be delivered hereunder (except that the interior may be different). The test results set forth in such report shall be deemed to establish the compliance of each Aircraft with the performance guarantees set forth in the Detail Specification except for those items specifically designated in the Detail Specification for demonstration to Buyer.

(c) Buyer shall be given reasonable advance notice of the time and place of all demonstration flights and shall be permitted to have not more than three (3) representatives participate as observers on any and all such flights. CONVAIR, however, shall have complete control of all demonstration flights, shall bear all costs and expenses incident thereto and shall be solely liable for all injuries to and deaths of persons and damage to or destruction of property arising out of or in connection with the operation of the respective Aircraft during all tests and flight thereof prior to delivery to Buyer except injury to or death of representatives or employees of Buyer or loss or damage to property of Buyer aboard the Aircraft.

(d) If, during any demonstration flights as herein required, any of the Aircraft or any accessory, equipment or part thereon shall fail to conform to or comply with the Detail Specification or shall fail to function properly, CONVAIR promptly and without charge to Buyer shall correct the defects and deficiencies involved and conduct such additional demonstration flights

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as may be necessary to demonstrate the proper correction thereof.

(e) Promptly upon the completion of manufacture in accordance with the Detail Specification, each Aircraft shall be submitted at CONVAIR's plant for final inspection including systems checkout and upon completion of the flight tests herein provided for, shall be submitted for technical approval by Buyer. Technical approval of each Aircraft shall be contingent upon conformance of the Aircraft with the requirements of this Agreement and the Detail Specification. Buyer's technical approval or non-approval shall be given within twenty-four (24) hours after completion of Buyer's final inspection of the Aircraft and shall be indicated by endorsement on packing sheets supplied by CONVAIR for such purpose. In the event of technical non-approval of an Aircraft for reasons justified by this Agreement, CONVAIR promptly and without charge to Buyer shall correct the defects and deficiencies upon which such non-approval is based. Promptly after Buyer's technical approval, CONVAIR shall tender delivery of the Aircraft as provided in Article 2 and Buyer shall accept same.

(f) The making of inspections, examinations and tests hereunder by Buyer, its acceptance of any workmanship, material, accessories, equipment or parts as satisfactory and its final inspection and technical approval of any Aircraft shall not relieve CONVAIR from responsibility under its warranties hereunder.

HTS - HOUSTON
SW 41

ARTICLE 14

Title to Property and Risks

(a) Risk of loss of, or damage to, each Aircraft and Spare Part shall pass from CONVAIR to Buyer upon, but not prior to, delivery thereof in accordance with the terms of this Agreement.

(b) Upon the delivery of each Aircraft and final payment of the Base Price of such Aircraft, adjusted for changes in accordance with Article 5 hereof, CONVAIR shall deliver to Buyer or such of the persons, firms, or corporations referred to in Article 16 as Buyer may designate in writing at least five (5) days before delivery, a bill of sale duly vesting in Buyer, or such other persons, firm or corporation as Buyer may designate, good title to such Aircraft free and clear of all liens, claims, charges and encumbrances of every kind whatsoever, and such other appropriate documents of title with respect thereto as Buyer may reasonably require.

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ARTICLE 16

Assignments

(a) This Agreement shall inure to the benefit of and be binding upon each of the parties hereto and their respective successors and assigns, but it may not be voluntarily assigned, in whole or in part, by either party without the prior written consent of the other party, except that either party's interest shall be assignable through merger, consolidation or reorganization which includes voluntary sale or transfer of substantially all of its assets; provided, however, that CONVAIR may assign any of its fixed or contingent rights to receive money hereunder, and Buyer may assign any of its contingent rights to the Aircraft or any of them for the purpose of securing any obligation for the repayment of monies loaned or advanced by any financial institution to finance in whole or in part the purchase of the Aircraft. Notwithstanding the foregoing, Buyer shall have the privilege to assign this Agreement in whole or in part without such consent to Trans World Airlines, Inc., and upon such assignment and full notice thereof to CONVAIR, Trans World Airlines, Inc. shall succeed to such of the rights, privileges, liabilities and obligations of the Buyer hereunder as are so assigned and the Buyer shall cease to have or be subject to such rights, privileges, liabilities or obligations so assigned; provided, that Buyer shall, in the event of assignment to Trans World Airlines, Inc., involving payment obligations under this Agreement, guarantee the due and punctual payment of such obligations by said assignee.

(b) Buyer and its successors and assigns may not, without first obtaining CONVAIR's written consent (which shall not be unreasonably withheld)

HOUSTON

JW 45

resell or lease any Aircraft, or agree to do so, until the expiration of two (2) years after delivery of the first Aircraft hereunder. This limitation shall be expressly included in any assignment made by Buyer under this Article, and be expressly agreed to by the assignee. CONVAIR's permission is hereby granted, however, for lease of the Aircraft to any company for use incidental to equipment interchange or seasonal lease agreement; Buyer may, and at Buyer's request CONVAIR shall, take any action reasonably required for the purpose of causing any Aircraft to be subjected to an equipment trust, conditional sale, lien or other arrangement for the financing by Buyer of the purchase of any such Aircraft; provided, however, that no such action shall subject CONVAIR to any liability which it would not otherwise be subjected to hereunder or modify in any respect CONVAIR's contract rights hereunder or require CONVAIR to divest itself of title to or possession of any such Aircraft until delivery thereof and payment therefor as provided in this Agreement; and Buyer may resell or lease any such Aircraft to Trans World Airlines, Inc.

HTC : HOUSTON

3W 46

(e) Buyer shall, within thirty (30) days after the execution of this Agreement, designate a person residing in the United States of America as an authorized representative for all purposes under and in connection with this Agreement, including the execution upon behalf of Buyer of written instruments amending this Agreement or the Detail Specification. Such person may also be the Factory Representative of Buyer referred to in Article 12 hereof. Buyer may from time to time designate a different person as said representative. Wherever used in this Agreement, the term "Buyer's representative" shall be construed to mean the person so designated from time to time by Buyer pursuant to this paragraph (e).

(f) This Agreement shall be construed and the performance thereof shall be determined according to the laws of the State of California.

Executed in quadruplicate as of the day and year first above written.

GENERAL DYNAMICS CORPORATION

By _____

Title President - Convair Division

Attest:

_____
Assistant Secretary

By _____

Title _____

HUGHES TOOL COMPANY

By _____

Title Vice President

Attest:

_____
Assistant Secretary

By _____

Title _____

HOUSTON

AX-655

(Holliday Call Sheet-Feb. 20-27, 1961)

HOLLIDAY, RAYMOND

TWA 13-ID

HTC ROMAINE

CHRONOLOGICAL

496

Mon., 2/20/61

:30 p.m. Regarding CF engines - have been advised by OK that if HTCO wants to cancel the ten excess CJ805's it must do so by Monday 2/20.

TWA

EXHIBIT 13

9/1/66 W.B.

:00 p.m. Advised.

:30 p.m. Cancel the engines provided we have the privilege to reinstate.

Regarding the Convair negotiations: I urge as follows: Regarding the claim that I would take AAL specs for the model 600's - this is true as to the original specs and at no time have I indicated any hesitation or uncertainty concerning the acceptance of the original AAL specs. At no time did I say that HTCO would take any subsequent change orders placed by AAL without approval of same first.

Convair's argument "why obtain TWA's opinion regarding 3% of the airplanes when TWA will not accept the other 97% is completely improper for the following reasons;

It is not up to Convair to decide whether TWA will accept the so-called 97% of the airplanes. This has never been a matter for discussion. However I obtain TWA's acceptance to this is my own problem; most likely HTCO will control TWA when that matter comes up.

In any event, it is not Convair's worry; the 97% is HTCO's problem.

Now, regarding the 3%; Convair is mistaken in saying it is HTCO's fault that this matter was not resolved because HTCO failed to give decisions; this is an invalid and improper decision which Convair is seeking to take; for this reason we do not want these 3% of changes. We have a signed specification and that specification is the airplane we want. Failure by HTCO to accept changes ordered by AAL simply means by omission that HTCO has elected to take the airplanes without any changes and contractually unless you and R. Cook have permitted a default by failure to make payments, Convair is not obligated to give us the airplane in accordance with the original specifications.

If Convair says HTCO has failed to give a decision with respect to the change orders the anser is simply we failed to order the changes when offered and therefore I say again we elected not to take the changes and this is the way we want the airplane. Convair has no right whatsoever to bill HTCO for the 70 thousand dollars. HTCO demands the airplanes according to the original specifications and does not want any of the changes.

At no time have we agreed to take blanket changes by AAL or any of them for that matter and I do not want them. In other words, Convair wants an answer regarding the change orders and here it is: The answer is no regarding all change orders regarding the original specs. Quite obviously Convair wants HTCO to accept these change orders in the interest of saving Convair money which naturally results from making the HTCO plans identical with the AAL planes. If Convair went ahead and put some of these changes into the HTCO planes it was done not because Convair thought we wanted them and not because Convair was uncertain as to whether we wanted them but simply because Convair wanted to

2175

HOLLIDAY, RAYMOND

CHRONOLOGICAL

49

Mon., 2/20/61 (continued)

put them into the planes and charge us for them fo. the simple reason that this would save Convair a great deal of money over the other route, namely, to build the planes in accordance with the contract.

I want you to recite all of the above to Convair in detail and I want you to say in spite of my feelings that this is a very bad deal for HTCO and that it is costing HTCO approximately a million dollars for changes which I do not want in the airplane. Nonetheless, in the interest of getting the entire matter resolved HTCO is willing to do the following:

Give Convair promissory notes as negotiated by you; make no other changes whatsoever in any of the contracts except the one which Convair has requested concerning the 70 thousand dollars of change orders. HTCO will accept that provision exactly as it presently exists as a result of your negotiation with Convair. There are to be, however, absolutely no other changes at this time. This means the contracts will remain as presently drafted concerning delivery. Convair and HTCO to have the following oral understanding: (Not intended to be legally binding but hoped to be morally effective) A statement of intentions that Convair recognize and negotiate and that with respect to items which may be mutually agreed deleted Convair will be reasonable in the pricing. HTCO will arrange for contract administration concerning all aircraft on order in a manner in keeping with Convair's desires either by Bev or someone else (if it is not to be Bev HTCO will make every effort to find someone acceptable to Convair and will submit his name to Convair for discussion prior to assigning him to the position).

Regarding deliveries - HTCO recognizes that present schedule is unrealistic and will sit down with Convair without delay to review proposed new scheduling taking in every way a reasonable viewpoint provided the relative slippage between AAL and TWA is as Convair represents, not disadvantageous to TWA in relation to AAL as compared to their relative position prior to slippage.

In regard to deliveries, you might point out HTCO has had long experience with Boeing, Lockheed and Martin in purchasing transport aircraft; is well aware they rarely come out on time and that you cannot get blood out of a rock so that if the deliveries have slipped then they have slipped and there is nothing we can do about it. You might point out HTCO has never sought to cancel any one of its numerous contracts with airplane manufacturers for reasons of retarded delivery and from the best of my knowledge has never sought to cancel any airplane contract for any other reason. The best evidence of this is the fact that Convair has released us from all liability under the 22M's and we still do not want to cancel this contract and are fighting to avert its cancellation.

Regarding the informal understanding - regarding the four additional 880's; I say that HTCO desires that the contract for these airplanes remains undisturbed. HTCO will notify Convair promptly of the disposition of the airplanes. HTCO has offered the four airplanes to TWA. If TWA does not take them HTCO will notify Convair promptly of what is desired to be done with these airplanes. In any event, in accordance with Convair's last proposal HTCO does not make any commitment at this time to Convair in any way affecting these airplanes either for cancellation or otherwise and they

HOLLIDAY, RAYMOND

CHRONOLOGICAL

441

Mon., 2/20/61 (continued)

are not allocated to TWA; nor are any other unallocated airplanes to be allocated to TWA until TWA makes at least a satisfactory oral agreement with HTCO with respect to these four additional airplanes.

Regarding the 224's, HTCO is aware that Convair contends that Convair is no longer obligated contractually to HTCO with respect to these airplanes. HTCO does not consent to or acquiesce to this position by Convair but at the same time Convair does not change the documents to be signed at this time or desire anything toward reinstatement of the 224 contract.

However, HTCO will appreciate very much indeed Convair withholding for as many days as is humanly possible any action toward destruction of these aircraft nor commitment to anyone else concerning them as HTCO is making an immediate all-out effort for TWA to accept these aircraft; taking all measures toward this objective and HTCO has confidence in this respect in spite of Convair's apparent receipt of information tending to indicate that TWA is not interested in these airplanes. In addition to this HTCO is approaching certain bankers immediately as to the possibility of obtaining financing for the purchase of these aircraft independent of any possible disposition to TWA. HTCO is determined to purchase these aircraft; does not want them destroyed or disposed of to others under any circumstances. HTCO will make a most determined effort to satisfy Convair immediately of HTCO's determination and financial ability to accept and pay for the aircrafts promptly/its obligation in regard to these airplanes without delay.

In summary, you could point out to Convair that the settlement HTCO is proposing would give Convair everything that Convair wants in regard to revised specs and/additional $70 thousand dollars added to the price of each model 600 airplane and would put HTCO completely at the mercy of Convair in regard to any adjustment of this matter. I consider this concession completely and utterly unfair but I am proposing it as an indication that we want to give and take and we are therefore placing ourselves at Convair's mercy in respect to the adjustment of this matter if Convair should ever decide in Convair's own arbitrary judgment to condescend to make any judgment.

Also, it should be noted that with respect to the seven 224's, which we so urgently want, again we would be completely at Convair's mercy in regard to any hope of obtaining these airplanes inasmuch as under the proposal I am making no new papers would be signed concerning these aircraft and therefore Convair's present written notice of cancellation would stand unchanged and in full effect.

Make full use of and emphasize most strongly with respect to the two points below: (a) the revised specs and $70 thousand of additional price; (b) cancellation of the seven 224's to HTCO - we would be completely at the mercy of Convair in any possible discussion concerning a judgment or disposition of these matters.

Then point out to what extent it may seem advisable that in return for HTCO placing itself completely at Convair's mercy in respect to the above points, it seems little enough that Convair trust HTCO to sit down immediately

HOLLIDAY, RAYMOND

CHRONOLOG

491

Mon. 2/20//61 (continued)

and discuss the proposed new delivery schedule and to revise the agreement in accordance therewith promptly and without delay.

I urge that you put this to Convair tonight rather than waiting until tomorrow morning unless you feel that this might be undesirable and I urge in the meantime while Convair is considering the above that you consider immediately and report back to me a plan of action in accordance with the following:

That HTCO obtain immediately necessary cash to pay all defaulted amounts; that I am advised as to how much this would be; and I also want to know from you, assuming we could borrow from B of A with a week, how much we could bleed on a temporary and emergency basis of the HTCO cash; and if we could borrow through a loan from the two Houston banks.

I want to know the cash required on the two batches of 600's separately, and how much we owe on the 224's contract to make it fully effective. I want these three figures separately.

Thu. 2/23/61

1:00 p.m. Please stand by at the Beverly Wilshire Hotel with Cook because I am talking to Carver at 2 o'clock and when I get through talking to him I want to be able to reach you both, and I want you to be in a position to go to the bank when I so advise you.

1:20 p.m. Ans: Advised - will be at the hotel.

Fri., 2/24/61

12:30 p.m. We have returned from the meeting at B of A, but we have to go back at 1:45 p. They had to break for a luncheon engagement. At this point I have nothing to report.

HOLLIDAY, RAYMOND

CHRONOLOGICAL

467

Fri., 2/24/61 (continued)

[redacted] He said that he was in doubt as to whether or not they would agree to the substitution of collateral and he said he couldn't wait until Monday for a formal presentation, so I enumerated what collateral would be available on the alternate basis and he said he was glad to have it then as he couldn't wait for a formal presentation on Monday because he had to meet with the Committee on Monday at 8:30 a.m.

Mon., 2/27/61

[illegible] a.m. You and Cook may proceed on the 1 p.m. flight to Los Angeles everything with the Bank of America has been taken care of.

[illegible] a.m. Advised.

AMENDMENT NO. 1

to
Purchase Agreement dated 10 November 1960
by and between

GENERAL DYNAMICS CORPORATION
(Convair Division)

and

HUGHES TOOL COMPANY

****

THIS AGREEMENT (hereinafter called "Amendment No. 1") entered into as of this 22nd day of February 1961, by and between GENERAL DYNAMICS CORPORATION, a Delaware corporation, having an office (Convair Division) at San Diego, California (hereinafter called "Convair") and HUGHES TOOL COMPANY, with its general offices at Houston, Texas (hereinafter called "Buyer"):

WITNESSETH:

WHEREAS, Buyer and Convair have entered into a Purchase Agreement dated 10 November 1960 relating to the purchase and sale of six (6) Convair 600 aircraft (said Purchase Agreement hereinafter referred to as the "Agreement"); and

WHEREAS, Buyer and Convair now desire to amend said Agreement to provide for the purchase and sale of seven (7) additional Convair 600 aircraft; and

WHEREAS, Convair's Detail Specification Report No. ZD 30-010 dated 1 August 1958, Revision 4, dated 16 November 1960, together with Addendum III dated 3 May 1960 referred to in the Agreement does not properly describe

HTC-HOUSTON

the aircraft which are the subject matter of the Agreement; and

WHEREAS, Buyer and Convair desire to amend said Agreement to properly describe said aircraft and to otherwise reflect the agreement of the parties hereto;

NOW, THEREFORE, in consideration of the mutual covenants herein contained, the parties hereto agree to and do hereby amend the Agreement as follows:

1. By deleting paragraph (a) of Article 1 in its entirety and substituting in lieu thereof the following new paragraph (a):

"(a) Six (6) Convair 600 aircraft (hereinafter called "Group A Aircraft") and seven (7) Convair 600 aircraft (hereinafter called "Group B Aircraft"), both groups sometimes hereinafter collectively called "Aircraft". Such Aircraft shall be manufactured by Convair in accordance with the terms of this Agreement and Convair's Detail Specification Report No. ZD 30-010 dated 1 August 1958, Revision 4 dated 16 November 1960, together with Addendum III dated 3 May 1960 and Report ZM-645 dated 11 January 1961, revised 21 February 1961 (hereinafter collectively called "Detail Specification") as set forth in Exhibit A attached hereto and made a part hereof, as the same may be modified pursuant to Article 5 hereof."

2. By deleting Article 2(a)(1) in its entirety and substituting in lieu thereof the following new Article 2(a)(1):

"(1) The Aircraft shall be tendered for delivery to Buyer, serviced except for fuel, ready for flight, not later than the last day of the month set forth in the following schedule:

RTC: HOUSTON
JW 56

Month of Delivery	Number of Aircraft
Group A Aircraft	
December 1961	One (1)
January 1962	Three (3)
February 1962	Two (2)
Group B Aircraft	
February 1962	One (1)
March 1962	Three (3)
April 1962	Three (3)"

3. In Article 3, paragraph (a), by deleting the figure "$26,061,768" and inserting in lieu thereof the following figure: "$5o,467,164".

4. By deleting Article 3(b) in its entirety and inserting in lieu thereof the following new paragraph (b):

"(b) Payments. The total price of the Aircraft purchased hereunder shall be paid as follows:

(1) An initial installment paymen: applicable to Group A Aircraft in the amount of $3,257,721, receipt of which is hereby acknowledged.

(2) Two (2) additional installment payments applicable to Group A Aircraft as follows:

Amount	Due Date
$2,606,176.80	February 1, 1961
$2,606,186.80	May 1, 1961

The above installment payment due February 1, 1961 may be made in the form of a negotiable promissory note bearing interest at the rate of six percent (6%) per annum payable to Convair and due and payable June 1, 1961.

HTC HOUSTON

(3) An initial installment payment in the amount of $5,827,700.90, together with interest thereon at six percent (6%) per annum from February 1, 1961 until paid, applicable to Group B Aircraft, upon execution of this Amendment No. 1. Said installment payment may be made in the form of a negotiable promissory note bearing interest at the rate of six percent (6%) per annum dated February 1, 1961 payable to Convair and due and payable June 1, 1961.

(4) Two (2) additional installment payments applicable to the Group B Aircraft as follows:

Amount	Due Date
$2,153,715.55	June 1, 1961
$2,153,715.55	November 1, 1961

(5) The balance of the Base Price of each Aircraft increased or decreased as the case may be by Change Orders, if any, pursuant to Article 5 hereof upon tender of delivery in accordance with Article 2 hereof, of each of the Aircraft manufactured in accordance with the terms of this Agreement and the Detail Specification."

HTC-HOUSTON

Except as specifically amended hereby, all terms and conditions of the Agreement shall remain in full force and effect.

Executed in quadruplicate the day and year first above written.

GENERAL DYNAMICS CORPORATION

Attest.

Edmund Rust
Assistant Secretary

By _____

Title President - Convair Division

HUGHES TOOL COMPANY

By C A Price

Title Vice President

Assistant Secretary

HTC HOUSTON

RUMMEL, BOB

EXHIBIT
9/1/06 W.B.

463

2/15/56

6:15 p.m. Spec. Reminder: Have you talk with Rummel, Woolman, & Allen?
9:30 p.m.

Thu., 2/23/56 - At Boeing Plant - OLive 3414, Ext. 1516 or Ext. 1781

11:50 a.m. (1) Boeing re-examining their delivery position in light of the recent additional Pan American five small jets.

(2) Zevely called requesting Rummel confer with Convair on the small jets. Do you have any interest in this for Rummel to confer with Convair?

Fri., 2/24/56

2:15 p.m. Called re above message. Would like to talk to HRH.

Mon., 2/27/56

HRH should talk to him per Bill Gay.

Tue., 2/28/56

12:55 a.m. HRH talked to Rummel.

7:05 a.m. Locate.

7:10 a.m. At hotel. Will have breakfast in room and wait for HRH's call. Should leave at 8:30 a.m. to get to Boeing.

Wed., 2/29/56

11:07 p.m. Must talk to HRH before the beginning of the working day Thursday. (In Seattle)

RUMMEL, BOB

HTC ROMAINE

405

Wed., 3/ 7/56

Mr. Rummel will arrive in Cincinnati at 5:30 p.m. and will stay at the Terrace Plaza Hotel. He will return to Kansas City around 7:00 p.m. Thursday.

Sat., 3/10/56

1:15 p.m. I have a meeting with John Collings tomorrow afternoon. I would appreciate a call from HRH before that meeting, either tonight or in the morning.

5:15 p.m. Message given to Roy Crawford.

Tues., 3/20/56

11:59 a.m. Wants to know if he should come to the coast now in view of the Boeing development. (Rea Hopper had asked that Rummel come out Wed., 3/21. Rummel's flight leaves early afternoon Wed. and would like to be advised one way or the other tonight or Wed., morning.)

2:20 p.m. Message given to Roy Crawford.

Wed 3/21/56

5:50 p.m. Locate.

8:45 p.m. Mr. Rummel located and staying at the Hollywood Knickerbocker HO 5-3171 Rummel met with Rea Hopper and Gen. Baker at Gen. Baker's home.

9:25 p.m. HRH advised of the above. Call and tell Bob that I will not be able to call him tonight but will call him tomorrow. Get his itinerary.

Thurs., 3/22/56

9:50 p.m. HRH asked for Mr. Rummel's locate.

3:50 p.m. Wants to know if he can leave tonight or do you have anything further for him (NOTE: This cancelled later in evening by Rummel. Bob doing a job for HRH tomorrow, and he is leaving for Kansas City Friday night.)

200624

RUMMEL, BOB

HTC ROMAINE

965

Mon., 3/26/56

55 p.m. Contact Jack Zevely and arrange for the Convair people to come and meet with you wherever it would be most convenient for you. Perhaps, I suppose, it would be better in Seattle but I suppose it will take several days to assimilate the information and since you are going to be in Seattle, I suppose it would be best for them to come there. Anyway, I want as good a comparison as you can work out between the Convair, the proposed small Boeing and the Boeing 120. I want as good an analysis as you can work out within the next few days as I am going to have to have some answer within a week on it so that I can discuss it with Collings and come to a decision on which airplane we want. Give me the best analysis you can come to. I do not want this to interfere with the work on the specifications of the 320 and therefore, Convair's people will be happy to spend as much of this week as you desire either in Los Angeles, Seattle or Kansas City. You may prefer to have the work go on in Kansas City where some of your technicians are located or you can have them come to Seattle, whichever you prefer. Conviar is waiting to send the people tomorrow because I have promised Gen. McNearney an answer right away.

:10 p.m. Well, the meeting in Seattle isn't until the end of next week. The proposed meeting has been called off, so I'll probably want to meet them in Kansas City. I'll talk to Zevely tomorrow and let you know.

Thur: 3/29/56

:50 a.m. Would like to speak with HRH today regarding a new developement. At his office until 4 p.m. home from 5:30 to 8 p.m. Back home after 11 p.m. KC time/

Fri., 3/30/56

:55 p.m. When advised, HRH said, "That can wait."

Sun., 4/1/56

:30 p.m. Get in touch with him and have him find out the details on this plane crash and report to you periodically.

:50 p.m. You have all the details we have at the present time. I was unofficially told that the tower thought they saw fire in the plane just before it crashed, but this was not official. We can't get anything from the pilot or co-pilot as they are still incoherent from shock. A plane leaving from Kansas City at 9:00 pm to go to Pittsburgh to investigate, a crew of our people will be there at Pittsburgh and I'm sending a man on that 9:00 pm plane. They are investigating Pittsburgh now.

RUMMEL, BOB

HTC ROMAINE

465

Thurs., 4/5/56

6:45 p.m. Call him wherever be is - either in Kansas City or Seattle - and tell him you're sending this package up to him. Tell him that we'll have another one for him sent up in the morning. Do not have Bob himself pick up the package, just have one of his men pick it up as soon as it arrives.

Sun., 4/8/56

10:55 p.m. I have the equipment study that HRH requested two weeks ago pretty much in shape now and can discuss it at HRH's convenience. I'll be at Boeing most of the day Monday, tomorrow - OLive 3414, Ext. 1657; will probably leave around 5:30 pm to catch UAL Flt. 672 to San Francisco, leaving at 6:40 pm, then will go on East on Tuesday morning.

Tues., 4/10/56

3:20 p.m. Locate.

3:25 p.m. In NY at the Statler Hotel - Pennsylvania 6-4000, Rm 1657. In SAE meeting tomorrow morning from 9-11 am NY time. In TWA executive offices after 2 pm NY time. Leaving NY on TWA flight #63 at 5:30 pm and will arrive back in Kansas City at 9:14 pm.

Sat., 4/14/56

7:10 p.m. Have HRH call me.

11:20 p.m. HRH advised, but said he couldn't call him then.

Sun., 4/15/56

2:55 a.m. Get him in the morning without awakening him. Tell him I won't be able to call him before Monday night. Get a locate for Monday night.

6:50 a.m. Will make it a point to be home Monday night awaiting the call.

RUMMEL, BOB

HTC ROMAINE

465

Mon., 4/16/56

9:15 p.m. Reminded HRH to call Rummel. HRH said to call him and tell him: HRH is going to be unable to call you until tomorrow morning. Find out where he will be. Ask him also if he has been in touch with Mr. Collings. HRH doesn't want Collings waiting up for HRH's and maybe Rummel will know what Collings is doing. Have Rummel call Collings # and let it ring 3 or 4 times if he doesn't answer, we will assume he is in bed. If Rummel gets him on the phone, tell him HRH will call him in the morning.

9:17 p.m. Advised Rummel and he said he would call.

Tues., 4/17/56

5:45 a.m. Reminded HRH to call Rummel. Per Rummel, they talked.

Sat., 4/21/56

1:15 p.m. REMINDER: HRH has to speak to him about Jim Floyd.

Weds., 4/25/56

1:32 p.m. Locate.

AT his office until 5:00 pm., home this evening. (They talked)

2:35 p.m. Rummels' secretary (Jackie)
Dictate to hereverything that we have received from Zevely in the last few days. Just read the pertinent and important items, if there is any doubt let her t: talk to Bob and get the doubt straightened out. We only want those figures that have to do with the cost of the airpland. The basic price is $3,300,000. with certain reductions we are to receive back after Convair sell various increments of the airpland. Some of the figures Convair will mention are cost of tooling, cost of development and how Convair arrived at the prices. All these figures must be transmitted.
Sec: When you are through reading it all to Bob before you type it up and see if there is something else he needs.

Note: There were but two sheets with figures received and these were read to Jackie, Rummel's sec. by Gordon.

Fri., 4/27/56

4:15 p.m. INFO - HRH asked for his number at this time (they talked).

RUMMEL, ROB

HTC ROMAINE 465

Monday 4/30/56

3:00 pm. A contingent of the Lockheed Co. is arriving there (KC) tomorrow morning for the purpose of explaining or proving that the Convair will not do what the Convair people say it wil do. I want you to give this the most thorough & complete study & airing. Please do not approach it with any prior conclusion. Go into it with an open mind and as soon as you have reached a conclusion, call into my office. Keep the Lockheed people in Kansas City in case thereare any questions I want answered. Be sure & report to my office as soon as you have anything to report. (see below the list of the Lockheed people going to KC)

Ans: Tomorrow is a bad day, but we'll take care of them some way.

Lockheed men going to Kansas City to meet Rummel:

James Boyce
Mr. Danford
Wm. Kennedy
Phillip Coleman
Wm. Statler

these men are leaving at 7:00 am Wed. TWA# 96 arriving in KC at 3:30 Wed. afternoon. (Per gross)

Wed: 5/2/56

HRH: Call him in KC early in the morning relative to something HRH discussed with Schwartz this evening.

7:15 p.m. Call him about 8 a.m. KC time at home or at the office if he has left home and tell him that HRH isngoing to be able to call during the morning and wonders where you will be. PLEASE do not interrupt or interfere with the work you are doing with the Lockheed people while awaiting HRH's call.

Thur., 5/3/56

3:15 p.m. Gave HRH reminder, as he requested.

5:40 p.m. Tell HRH things are progressing fairly well here but that Lockheed indicated that they may pull out in a while. I feel the entire team should stay here until we get to the bottom of the question they raised.

Monday, 5/7/56

7:50 pm. Cancel call of 5/3 Rummel said the call is unimportant at present. They (TheLockheed people) will stay in KC until Wed.

RUMMEL, BOB

HTC ROMAINE

465

Friday, 5/11/56

1:25 pm. Mr. Gwynn of Pratt & Whitney, wishes to resolve our engine order by June 1. If extraordinary events arise within P&W indicating need for earlier resolution, Gwynn will contact me. If he does not contact me by June 1, he will allow an addotopnm; 3 weeks (June 22) in which to resolve this issue. (If Operns is not able to deliver to HRH by late tomorrow afternoon, notify Bob Rummel)

Sun., 5/13/56

5:30 p.m. Call given to HRH.

Monday, 5/14/56

Put him on the Priority list a week before June 1st., unless Rummel has notif- Kay (Office) of a postponed deadline.

Thurs., 5/17/56

7:30 p.m. Very much like to talk to HRH.

8:25 p.m. Above message given to HRH.

8:25 p.m. Have him go to his hotel room and HRH will call him back at his room.

8:50 p.m. Rummell located and above message given.

10:00 p.m. Call him and tell him if it's extremely urgent, I'll call him at midnight. However, I'd rather talk to him tomorrow.

10:10 p.m. Not extremely urgent - it's about Convair situation. Tomorrow is OK.

Friday 18/56

40 pm. Locate.

Palo Alto number.

57 pm. Remove him from any list you may have him on.

RUMMEL, BOB

LTO ROMAINE

Fri., 5/25/56

465

7:30 p.m. Advised HRH of reminder on Priority list.

7:50 p.m. Find out the score on the deadline.

8:50 p.m. Rummel said the deadline concerned engines, Pratt & Whitney engine order. He has been able to get the deadline advanced from June 1 to June 15 and is still working to get it advanced to August. Said there was no need for HRH to call him over the weekend. Rummel said he would phone Kay on Monday with further particulars. (HRH did not say to call Rummel but Kay unavailble so we had to)

Sat 6/2/56

9:20 a.m. Leonard Schwartz told HRH that Lockheed has developed a study which shows conclusively that a program of Boeings 120's and Lockheeds Electras will result far better financially for TWA than Convairs. HRH wants you to individually and collectively make a careful and considered study and anajysis of this presentation by Lockheed and be in a postion to report your unqualified recommendation to him emphasizing how much better this program is and why. How much difference in savings(money) it represents. What are the values or advantages of this program. Be ready early Tuesday the 5th of June to report to HRH fully and completely. He truly hopes you will make yourselves geographically available to each other to accomplish this and if you want another Lockheed man in KC to give you additional information, please let HRH know.
(For BG) A lockheed man is visiting with Leslie over the weekend and is going to KC to meet with Rummel on Monday. BG is to follow this project up with Leonard Schwartz.

Mond 6/4/56

9:20,pm. Locate.

9:23 p.m. At home.(HRH said he would call)

Wed., 6/6/56

11:15 am Collings, Leslie and Fullerton and myself have met on the required subject and we will be ready to report at 1:15 p.m. LA time. (Grand 1-4400 until they notify us differently)

9:00 p.m. HRH advised of the above call. (HRH told Kay to tell anyone who was waiting up for a call that he wouldn't be able to call until tomorrow. The above group was informed via Vic Leslie by Kay and Kay told HRH that he so advised them)

RUMMEL, BOB

MRS ROMAINE

465

Thurs., 6/7/56

4:00 p.m. HRH advised of Rummel's call again.

4:30 p.m. They do not have to get together tonight if they are planning to be together tomorrow (by they HRH means Rummel, Leslie, Collings & Fullerton). I can talk to two of them separately tonight. Leslie & Collings or Leslie & Rummel.

5:05 p.m. Mr. Leslie will be at my place at 5:45 pm LA time and will wait for HRH's call.

5:15 p.m. Advised HRH.
5:45 p.m. Advised HRH again and they talked.

HRH I have a decision re Pratt & Whitney that has to be made by the 15th of June. It involves a lot of money so if you do not hear from Rummel by the 10th to the effect that we have an extension on this date, then say something to me about it. First try to give it to me when I ask for my calls for a couple of days but if I do not ask for them by the 12th, then volunteer it to me. When you volunteer anything to me, wait until I have been up sometime and working for a while before you volunteer it.

Monday, 6/11/6

4:30 pm. HRH advised of Pratt & Whitney deadline. (Full message above not read.)

4:30 pm Call him early in the morning and see if he was able to obtain the extension with Pratt & Whitney. Have a report for HRH later in the day Tues.
(Cancel... BG had this information.)

Saturday, 6/30/56

7:19 pm Reach him and find out if he thinks they collided in a thunderstorm or if the thunderhead was sufficiently severe to cause structural failure. If Rummel thinks they collided, were they on instruments or VFR?

7:21 pm See side sheet C/S 6/30/56

Wednesday, 7/11/56

7:30 p.m. Per BG (1) 1649A Props (2) Info he has From Boeing re future delivery position including the MX plane.
HRH said he wanted to talk to Rummell & Gordon told him Rummel wanted to talk to HE and HH said he would call. (Message not read)

7:00 p.m. Locate.

8:1 p.m. Out to dinner until then. Will now be in my bunglow all evening.

They talked, per Rummel

200631

RUMMEL, BOB

HTC ROMAIN- 465

Fri., 7/13/56

3:45 p.m. Tell Bob that Mr. Erle Martin, Hamilton Standard, has a call in for HRH. HRH wishes you would call him and tell him that Mr. Hughes has been terribly upset about this accident. He took such a torture during the 10 days that followed the accident that he simply had to get away from Los Angeles for a while. Just as he was getting ready to leave he called me to see how things were coming along on the propeller situation. I told him the information I had and then he gave me the full recitation of what he wanted done. He is at a place now where it is practically impossible to talk on the telephone. Mr. Rummel should do his utmost to handle this thing so that it isn't necessary for HRH to call. Check with Rummel about Tuesday of next week to see how he came out on this thing. I want to check with Rummel even though he may not call in.

7:06 p.m. Message given to Rummel. Mr. Rummel will do his best to carry out the above instructions.

Sat., 7/28/56

5:45 p.m. HRH advised of Rummel's name on his working list.

Sun., 7/29/56

1:30 p.m. Ask Bob who the top TWA man in Kansas City is that Bob would recommend that HRH talk to in regard to the operation of the latest engines. Someone who is right up-to-date on the operational techniques (not just theory) of engines. HRH is particularly interested in the CB-16, in the Martin, not the one in the Connie.

2:45 p.m. CLARK FISHER - HEdrick 2-4685 - is the top man in our operation and is in Kansas City. However, you might mention to HRH that he is completely absorbed in some engine operating problems of an urgent and immediate operational nature, just in case HRH is thinking of taking him away from his job for any length of time. His assistant (also works for Rummel) and the next man I'd recommend is NORM R. PARMET - Del Mar 3-8736 - but he is enroute to San Diego and will be there this evening around 9 pm.

4:00 p.m. HRH advised of above message.

Fri., 8/ 3/56

INFO Wife's mother died and is leaving San Diego for Kansas City tomorrow on TWA #102. Returning to San Diego on Monday, 8/6.

RUMMEL, BOB

Thurs., 8/ 9/56

2:15 p.m. Convair, for the first time now, is beginning to make noises. Innuendos along the lines of perhaps a possible delay in the program.

Fri., 8/17/56

12:10 a.m. Peter Masefield, managing director (Pres.) of the Bristol Airplane Co., Bristol, England, would like to make the Britania available to HRH for inspection and to fly if HRH is interested. Sunday would be the best day and would be glad to bring the ship into the LA area (ship in San Diego today)
Convair deal has been extended to September 10th. (INFO: HRH requested at an earlier time an extension of 30 days. We got one extension of 10 days plus this extension, which makes the 30 days) Extension was arranged on Convair's part voluntarily.

11:00 p.m. Masefield says Saturday is preferred; they can have it available to noon Sunday, or return it to LA on Tuesday afternoon (special flight).

Sat., 8/18/56

12:40 p.m. Advised HRH of Rummel's reminder on working list (Pratt & Whitney deadline) and also of Rummel's call of 8/17. HRH said to locate and have available for me re: Britania.

2:30 p.m. Located Rummel at Disneyland Hotel - KEystone 5-8171, Ext. 460.

Sun., 8/19/56

3:30 p.m. Peter Masefield called to say they are ahead of schedule and could make the plane available early Tuesday for HRH. Must know by Monday morning, however.

7:30 p.m. Advised HRH of Rummel's call and he said to tell Bob to go on to bed or whatever he has planned and that HRH would call him fairly late tonight.

9:00 p.m. Advised Rummel and he said that would be fine.

Monday, 8/20/56

6:40 pm. I am going to sleep now and may not be awake to call theses people until it is too late. Tell them it is uncertain whether HRH will be able to call tonight. HRH does not want to interfer with your plans for the evening. If you have not heard from HRH by 9:30 - 10:00 pm. or the time you are ready to go to bed, please go on to bed whenever you are ready. He will call you tomorrow.
Note: Rummel saidd he would expect a call tomorrow.

RUMMEL, BCH

HTC ROMAINE

465

Mon., 8/27/56

5:35 p.m. HRH again reminded of P&W decision deadline, 8/31. Tell him I am on my way to the East Coast and you are not going to be able to contact me. I will be completely out of touch with the office until tomorrow night. I will be enroute and stopping in Texas you you'll have no way of reaching me before tomorrow night and conceivably it might be Wednesday morning. The minute I arrive, you will be able to get ahold of me and I will call immediately. (Don't let this P&W thing get past me after the next 1 or 2 days)

6:10 p.m. I'm leaving KC on Flight #103 at 2:55 pm, Tuesday, arriving LA 7:50 pm; I'll call you when we arrive in LA. Back in San Diego toward midnight.

Tue., 8/28/56

7:50 p.m. Still very anxious for an answer

Thu., 8/30/56

7:30 p.m. HRH reminded again of Pratt & Whitney decision.

Mon., 9/ 3/56

11:45 p.m. BG reminded HRH again of the 9/4 deadline on P&W decision.

Tue., 9/ 4/56

7:45 p.m. Locate

10:25 p.m. At home for rest of evening.

10:40 p.m. HRH advised.

Sun., 9/ 9/56

11:00 p.m. Must talk to HRH at the earliest possible moment.

Mon., 9/10/56

20063

?:?0 p.m. Today is the day we're to go over the Convair deal, per terms of Contract.

RUMMEL, BOB

HTC ROMAINE 465

Mon., 8/27/56

5:35 p.m. HRH again reminded of P&W decision deadline, 8/31.
Tell him I am on my way to the East Coast and you are not going to be able to contact me. I will be completely out of touch with the office until tomorrow night. I will be enroute and stopping in Texas you you'll have no way of reaching me before tomorrow night and conceivably it might be Wednesday morning. The minute I arrive, you will be able to get ahold of me and I will call immediately. (Don't let this P&W thing get past me after the next 1 or 2 days)

6:10 p.m. I'm leaving KC on Flight #103 at 2:55 pm, Tuesday, arriving LA 7:50 pm; I'll call you when we arrive in LA. Back in San Diego toward midnight.

Sun., 9/ 9/56

11:00 p.m. Must talk to HRH at the earliest possible moment.

Mon., 9/10/56

200634

:0 p.m. Today is the day we're to go over the Convair deal, per terms of Contract.

RUMMEL, BOB

HTC ROMAINE

Sat., 9/15/56

INFO — HRH talked to Rummel about the Pratt & Whitney decision and they decided to take the engines. Rummel's name on HRH's working list was taken off on the basis of this.

Mon., 9/17/56

1:20 p.m. — The Convair deal isn't progressing as it should. Suggest you call Zevely or myself. (Rummel said the deadline is tonight at midnight and Convair just might let it go by so that they will have a legal position to sell the 30 planes to someone else - Pan American, perhaps.)

5:00 p.m. — Above call can be cancelled, as they are making a fairly favorable counter offer; Zevely, however, still expects a call from HRH.

Tue., 9/18/56

9:35 p.m. — Zevely is agreeing to the majority of items we put to him today. He is not agreeing to the item on GE because he says there is no such arrangement between GE and Convair and never has been. He is agreeing to all these items providing HRH agrees to release 3 of our delivery positions to Pan American. He wants 1 in July, 1 in Aug. and 1 in Sept., and we will get 3 additional in October. He wants to be able to offer this to PanAm without reference to the Boeing situation; in other words, Zevely is making this a condition of the deal.

Wed., 9/19/56

8:30 p.m. — Above call omitted; Rummel advised that he had talked with HRH.

Thur., 9/20/56

12:01 a.m.
7:20 a.m. — I've just talked to Zevely and it's very important I talk to HRH tonight - it involves this whole deal.

7:20 a.m. — (Call given to REC to try to get to HRH.)

12:00 noon — (Call omitted - they talked, per HRH.)

RUMMEL, BOB

Tue., 10/2/56

:30 p.m. 1. You should call Woolman re deliveries to Delta.
2. Vickers is no longer holding their delivery dates open for us.
(Call given REC 10/2)

Thurs., 10/ 4/56

:30 a.m. Advised HRH of Rummel's call by Bill Gay.

Mon., 10/22/56

:00 pm HRH should call him re: Lockheed per BG.

Tuesday, 10/23/56

:00 p.m. HRH advised of above call.

Friday, 26, 1956

pm. Unfortunately HRH is not going to be able to call you until tomorrow afternoon or evening. HRH wanted you to know that he is not going to call tonight so that you will feel free to go to sleep whenever you desire. Get his complete itinerary for the afternoon and evening.

:37 pm. At home or will call.

pm. Put on REMINDER LIST for Saturday afternoon or evening.

Sun., 10/28/56

:45 p.m. Locate for this afternoon.

:00 p.m. Home all afternoon or will call.

:30 p.m. Ask HRH to call any time tonight, no matter how late; I'll leave the phones up.

AX-680

RUMMEL, ROBERT

HIC ROMAINE

1956

Monday, 29/ October, 1856

465

8:30 am. Still ... ted in talking to Mr. Hughes. Will be in office today until 4:00 p and am then leaving on United's 358 for NY where I'll be staying at the Waldorf.

Fril, 11/2/56

12:40 pm (RED) HRH not aware of the urgency of this. Please advise him.

Thur., 11/8/56

10:00 pm HRH advised by BC to call Rummel & urgency of Boeing situation.

Saturday, 11/10/56

INFO At 5:20 p.m. HRH asked if we had a locate on Rummel. Advised he was in KC last heard from him, but that we hadn't heard from him today.

Sun., 11/11/56

5:30 p.m. Rummel advised he had talked to HRH; his calls of 10/2 to 10/29 therefore omitt (Rummel stated HRH was to call him back again today.)

Thursday, 11/15/56

INFO Rummel leaving Los Angeles on TWA #102 for KC. Leaving Los Angeles at 11:45 p arriving at Kansas City at 7:30 am.

Tue., 12/11/56

8:10 p.m. Back in KC. Want to talk to HRH re Pratt & Whitney.

Wed., 12/12/56

4:50 p.m. Important.

20063

RUMMEL, ROBERT

465

Monday, 29/ October, 1856

[illegible] am. Still interested in talking to Mr. Hughes. Will be in office today until 4:00 pm. and am then leaving on United's 353 for NY where I'll be staying at the Waldorf.

Saturday, 11/10/56

[illegible] At 5:20 p.m. HRH asked if we had a locate on Rummel. Advised he was in KC last we heard from him, but that we hadn't heard from him today.

Sun., 11/11/56

[illegible]30 p.m. Rummel advised he had talked to HRH; his calls of 10/2 to 10/29 therefore omitted. (Rummel stated HRH was to call him back again today.)

Thursday, 11/15/56

[illegible]0 Rummel leaving Los Angeles on TWA #102 for KC. Leaving Los Angeles at 11:45 pm., arriving at Kansas City at 7:30 am.

Tue., 12/11/56

[illegible]0 p.m. Back in KC. Want to talk to HRH re Pratt & Whitney.

Wed., 12/12/56

[illegible]0 p.m. Important.

Rummel, Bob

Wednesday, 12/19/56

6:10 p.m. Locate. At home.

6:20 p.m. HRH advised.

I had troubl getting through to him. Call his home and see if he's there now. (While Rummel was on line, until 10:15 PM, HRH carried on discussion with him Rich of Boeing 120 deliveries, how many we should buy, delivery dates and posit comparison with American and Pan-American delivery positions, certification dat etc.) All right, many thanks, and tell him I'll call him tomorrow night.

Thu., 12/20/56

INFO BobRummel has had Roark & Carroll out at BHH working on a Lockheed project for HRH. Rummel says Carroll is returning. Roark will be at Lockheed this afternoon after 1 pm at Bob Reedy's office, in case we need to locate him.

Fri., 12/21/56

1:30 p.m. Locate where HRH can call.

2:19 p.m. Out shopping, word left at his residence to call us when he returns.

2:35 p.m. HRH doesn't have to talk to you today but would like to know where he can reach you over the weekend. He has to be at a phone where he has an amplifier so he can hear better. Please do not talk to Allen or anyone from Boeing until HRH speaks to you. Do not refuse the call in a way that will offend them but if you have some way to monitor your calls that would be best.

2:40 p.m. I just won't answer the phone and have theOPr. leave word for me to call back.

Wednesday, 1/2/57

8:00 p.m. According to your instructions I have not talked to anyone at Boeing. However Boeing has been trying to reach me regarding their new model jet transport. release on this plane will be made in a few days.

1

Thursday, 1/3/57

1:20 a.m. Call him at the BHH at 8:30 am and find out where he is going to be all after that HRH can call him. Tell him HRH promised Mr. Allen that Mr. Rummelvould Seattle today but that HRH intends to handle the matter by telephone instead. suggests that you not talk to them at Boeing until he talks to you and brings up to date.

RUMMEL, BOB

HTC ROMAINE

Sat., 1/5/57

7:45 pm Find out where he will be 2-3 hours from now so I can call him.

10:45 p.m. At home for the night.

Wed., 1/9/57

10:45 p.m. HRH given reminder to call Rummel. HRH said he would not be able to call him until tomorrow, but he didn't want him waiting up for a call tonight.

Thurs., 1/10/57

INFO Bob Rummel in NYC until Suday evening 1/13 - see Kardex

Wed., 1/16/57

:45 p.m. Some time ago HRH asked that I refrain from contacting the Boeing officials. Does this still hold? Boeing peoplewill be down here early next week and I should be able to talk to these people.

Thurs., 1/17/57

30 p.m. Advised HRH of Rummel's call and HRH said to keep the instructions in effect. Advised Rummel and his call cancelled on that basis.

Mon., 2/4/57

50 a.m. Get ahold of him at home in Kansas City at 8 am KC time (6 am LA time) and give him this message: "Please roll out the red carpet for Lambert of Vickers and show him every courtesy and consideration. I talked with Edwards this morning in London. These people have been more than decent to us and I want to reciprocate by treating Lambert like a king while he is in KC. Give him the best of everything. Also please understand fully the Vanguard airplane with the thought of deliveries totaling 12 by the end of June, 1961. You can inform Lambert that Mr. Edwards has quoted these to me on the basis of increased production. I believe this quote is, however, extremely confidential and I urge that you not disclose to anyone else in or out of TWA that we are considering the Vanguard airplane at all - or that these deliveries have been quoted.

Message delivered to Rummel personally.

RUMMEL, BOB

Mon., 2/4/57

5:45 a.m. I have a situation relative to the Pratt & Whitney situation that I must speak to you about.

Mon., 2/25/57

INFO HRH reminder to contact Allen at Boeing 12/20 omitted per BG-NH. This matter has been discussed.

Tues., 2/26/57

8:45 p.m. Need to have clearance to talk to top Boeing people--most desirable that I go to Seattle Wed. night 2/27.

Thu., 2/28/57

6:29 p.m. Peter Masefield, Managing Director, Bristol Airplane Company, England, called and said he would be pleased to meet with HRH and show him the Bristol Britannia (which is now in San Francisco). He would be glad to bring the plane to HRH's airport if that is convenient for HRH. It could be be available Tuesday or Wednesday (3/5 and 3/6) in LA or anytime in SF. It is presently undergoing engine change in SF. He plans to fly non-stop from New York to Rome on Thursday (3/7). He is at the Mark Hopkins Hotel now. BOAC have several of these planes in service from London to Johannesburg. Inaugurating London-NY service July 1. London-Far East in about a month.

Mon., 3/4/57

7:00 a.m. If HRH is unable to contact me re: Vivkers, I think I'd better call them tomorrow; otherwise it may be embarassing.

Tue., 3/5/57

6:15 a.m. I must call Peter Masefield today. I'll tell him HRH has been "out of touch."

RUMMEL, BOB

465

Tue., 3/12/57

7:15 a.m. Sir George Edwards quite disturbed that HRH has not called. Is leaving country Wednesday evening (3/12). Sir George can be reached at the Gotham Hotel in NY at Circle 7-3515.

Sat., 3/16/57

INFO HRH talked to Sir George Edwards this morning. Rummel's calls above cancelled on that basis.

Tue., 4/16/57

INFO Leaving Chicago at 3:00 pm Chi. time for Seattle on NW #107. ETA Seattle 8:40 pm/ Staying at Olympic Hotel. (See folder for itinerary Wed.)

Thurs., 5/9/57

2:35 p.m. See if I can talk to him now.

2:36 p.m. At home for 1/2 hour, then out of touch for a half hour. Back home as of 5:30 p.m. (KC time) and HRH can call then. (Hillcott 2-4838)

:36 p.m. HRH advised.

Fri., 5/10/57

:01 a.m. Capital Airlines is unable to accept the last 15 Vicounts they had on order and they have extended the first opportunity to purchase if we want them. The price is 400,000 pounds. (per BG)

:15 a.m. Mr. Hughes is going to want to reach you before too long and would like to know where you are going to be. If you are going to lunch can you tell us what time you will be back. He would like you to please call Mr. Clarkson in NY (of the Vickers Co.) and find out where he is goin g to be right through the week end, starting immediately, so that if we want to reach him we can.

Mr. Hughes has promised Sir George Edwards that he would give him an answer by next Wednesday and with that in mind Mr. Hughes asks that you put through a request that you obtain information as to where Mr. Burgess, Cocke or anyone involved in this decision would be through

RUMMEL, BOB

Fri., 5/10/57 (Continued)

this week end so that we will know where to contact them. HRH doesn't want them to stay home but would like very much to be able to reach them by phone if necessary over this week end.

11:07 a.m. Rummel will have this info re: Clarkson, Burgess, Cocke and Leslie will check in with NY Opr. of TWA as to their location. Rummel will be at home today and week end except for short periods of unavailability.

(Cancel 12:01 a.m. call per Rummel)

Sun., 5/12/57

9:00 a.m. I would like to talk with you sometime after the next two hours. If you have something planned, please go ahead as I don't want to interfer with those plan but I would appreciate it if you could let me know when you will be back or where I might reach you so that I may call you.

11:20 a.m. I've talked to him several times, but plan on being home.

2:35 p.m. Advised HRH of Rummel's answer above.

7:10 p.m. Due to unforseen circumstances I will not be able to call tonight but will call tomorrow. I am terribly sorry if I have inconvenienced you and I hope that you will forgive me.

7:45 p.m. No trouble at all. Glad HRH took time off to call. (See Kardex)

Mon. 5/13/57

2:30 p.m. Locate so that I can talk to him in about 1½ hours from now.

2:55 p.m. Office until 4:00 pm then home by 4:30 pm for the evening, LA time.

3:30 p.m. HRH advised.

3:30 p.m. Should talk to you before you talk to Sir George Edwards again. (Out from 9:30 to 10:30 tonight, then home.

10:45 p.m. Put him on the list for tomorrow but do not call him either tonight or tomorrow unless I tell you.

RUMMEL, BOB

465

Tues., 5/14/57

1:00 a.m. HRH advised.

1:00 a.m. HRH asked for Rummel's office number.

Wed. 5/15/57

4:50 p.m. Find out where he is going to be this evening.

5:05 p.m. Will be at home all evening - Emicott 2-4838.

Tues. 5/21/57

3:20 p.m. Find out where I can reach him this evening. (Staying at Lee House District 7-4800)

Wed., 5/22/57

6:50 a.m. Leaving Wash. airport about 12:30 p.m. EDT and arrive in St. Louis around 4:30 p.m. Traveling on the special "Jetstream" flight. Attending the cocktail party and dinner for Carter Burgess. Will call Opns. when in St. Louis. Don't know where party being held. Tentatively plans to leave St. Louis around midnight for Dallas then from Dallas to KC in the jet "Caravelle". (This is subject to HRH's request for Rummel to be available. If Rummel takes this jet to KC from Dallas he won't be available until around noon Thurs.)

7 a.m. Find out where they are and find out the score on the plane's arrival in St. Louis.
ON plane and ETA St. Louis is 3:30 St. Louis time.

5 a.m. HRH advised.

5 a.m. Do not prevent him from participating in the festivities but be sure we know how to reach each of them tonight for HRH to call, particularly Rummel and Sessel.

5 p.m. I'm at the Racquet Club, St. Louis, Forest 1-2100 - Room L or M, which is for everyone here. Will be in the Banquet Room. Am leaving for Kansas City at 12:30 a.m., Daylite tiem (10:30 pm LA time) and will arrive at 12:42 a.m. Central standard time, 1:42 LA time. Lvg via TWA 159

5 p.m. Does the same apply to Mr. Rummel? (Same as message to Sessel) No, I want to talk to him. You have a fix on him? Positive.

RUMMEL, ROE

HTC ROMAINE

Fri., 5/24/57

5:55 p.m. Locate.

6:16 p.m. Will be at the Terrace Grill - Muelebach Hotel - Grand 1-1400 for dinner and back home after. Dont' know when we will return as it's my daughter's birt probably about 2 hours.

10:40 p.m. HRH advised.

Mon., 5/27/57

3:20 p.m. Locate so that I can talk to him privately.

3:30 p.m. Office until 5:30 pm (KC time) and 30 min. to get home. Home until 7 pm, out from 7:00 - 7:30 pm (half hour). Home from 7:30 - 9:45 pm and then out for 45 minutes again.

Tue., 5/28/57

12:20 a.m. Caravelle leaving at 8:30 am, LA time instead of noon. Very important that y call either myself or Gen. Tesseyier (GRand 1-1400 Rm 1738) re landing instructions prior to take-off time. They may cancel LA stop if any delay is evidenced.

12:47 a.m. Requested to give Caravelle info to HRH. He said, Why give it to me now, I c do anything about it. My answer was that we are working against a deadline in the situation. HRH said, he would call in later about it.

1257 a.m. HRH given complete message.

7:25 a.m. (Per JP) Call Rummel in KC and find out from him where HRH can call him up until the last minute to give landing instructions.

7:35 a.m. They have moved their departure time up until 9 am. I will try to hold thes until the call is received. I will be here at the office - Grand 1-4400.

7:55 a.m. HRH advised.

8:45 a.m. Call Rummel when he gets back to his office and find out if these people will stop for fuel, where, eta for fuel; if not stopping for fuel, what is the ETA at the plant airport.

10:00 a.m. Left at 9:55 am (LA time) and expect to be flying 3½ hours, ETA in LA around 1:30 pm.

RUMMEL, BOB

HTC ROMAINE 465.

Wed., 5/29/57

5 p.m. Goffref, Gauthier, and Geramaud arriving to meet the General on TWA 3, ETA 6:27 pm, 5/30, Thurs. These 3 people have had special handling across Atlantic and the US. No arrangements made for arrival at LAX as we do not know your desires. If we are not advised we will assume that your Hollywood office willl handle or TWA - LA will handle.

Rea Hopper advised and will handle.

Thur., 5/30/57

8 a.m. Have you heard from him? Yes, sir. Last evening. I meant this morning? Negative.

8 a.m. He asked that I get in touch with Gordon MacGregor (Pres. of Trans American) I have tried to get him and he is tied up where he cannot be reached. I have made an appointment call for 1:30 pm, KC time, which is the earliest he will be available. I will talk to him at 1:30 and immediately call the office and advise. (Rummel has changed his itinerary from yesterday. He will ret: return hom from the cemetery at 11 am, KC time.)

8 a.m. HRH advised.

8 a.m. When Rummel calls into you today tell him I may be unavailable to call for a while but that I would like to be constantly apprised of his whereabouts in in the afternoon so that I may call him. I hope that Rummel has the necessary information so that we can reach MacGregor this evening if we need to. If you do not perhaps you can get it from his secretary without bothering MacGregor. If Rummel conceives I want to talk to MacGregor, then it would be desirable to reach him. If I am to talk to another party, be sure we can reach him. If I am to talk to another party, be sure we can reach him.

12 p.m. Mr. Gordon McGregor cannot make an airplane available in the US because of TCA's second schedule increase being made Saturday. He regrets he cannot release an airplane for 48 hours use in the U.S. because of serious curtailment of increasing a and already publicized schedules. He would be happy for Mr. Hughes to come to Montreal to fly a Viscount for 2 to 4 hours. He would make top pilot or any other personnel available to Mr. Hughes to discuss Viscount operations or other aspects. Mr. McGregor suggests that either he or Mr. Herb Seagram (Montreal TCA) be contacted regarding detail arrangements. Mr. McGregor is glad to cooperate and insists that this be done at TCA's full expense not Mr. Hughes'.

Rummel will be at home at 3:30 pm LA time andwill leave word if he leaves. McGregor will probably be unavailable tomorrow. Mr. Herb Seagram's office number is UNiversity 6-5671 in Montreal.

8 p.m. Advised HRH and he said he would call Rummel. Rummel's calls omitted on that basis.

...EL, BOB

HTC ROMAINE

45

Tues., 6/4/57

10:00 p.m. Call him back and tell him that I won't be calling him this evening (HRH previ... thought he would talk to Rummel if he couldn't reach Leslie) and I'm sorry th... I had to bother him on that Leslie locate. (Find out where I can reach his t... in case I want to call him.

10:25 p.m. Leaving KC to NY on Flt 102 arriving NY at 2:15 p.m. At Idlevild 45 minutes (... be reached through the station manager) then to La Guardia. Leaving La Guard... at 4:00 PM on Wright Co. airplane and flown to a Lodge in the Pennsylvania Mountains. Will call and give the number of the lodge. (See Locate Book)

Wed., 6/5/57

12:35 a.m. EST Do not call him today, tomorrow or anytime until I tell you.

Tues., 6/11/57

INFO
9:10 a.m. His father (Howard Rummel) had a heart attack and Bob has gone to Mt. Carroll, Illinois (2874) this morning. His office will know the length of his stay.

Thurs., 6/13/57

9:02 a.m. We're having trouble with the 1649A. I would like to appraise HRH of this immediately. Am at my office now.

Sat., 6/15/57

11:00 a.m. At office, Definitely want to talk to HRH.

1:18 p.m. It will be later this evening before HRH can call you as we are out of touch with him. Where will you be?

2:00 p.m. I will be at home, Endicott 2-4838 all evening, to receive HRH's call.

INFO HRH tried to reach Rummell this afternoon, but due to telephone trouble couldn't reach him.

7:10 p.m. I'm at home (ENdicott 2-4838) and would like to talk to HRH. Very important. Advised Ben Dicicco 9:10 p.m.

RUMMEL, BOB

HTC ROMAINE

461

Sun., 6/16/57

7:50 a.m. ERH did not call last night. Very important that he does. Have BG call also.

6:00 p.m. Very important to reach HRH.

6:15 p.m. Given BG.

Tues. 6/18/57

INFO Previous calls omitted - they talked per BG.

Thurs., 6/20/57

12:35 p.m. Has urgent message for HRH before he flies the plane. (At Windsor Locks, Conn. - National 3-1621, Ext. 557 - until 4 PM EST, then returning to New York; will be at TWA office, at STA. 521 or thru Carter Burgess' phone, most of evening, except for dinner. Staying at Lexington Hotel.) (Given to CW at 12:45 PM.)

Fri., 6/21/57

INFO 6-20 call omitted - Per BG.

Sun., 6/23/57

:35 p.m. Has the info ERH wanted. Home all day. (Endicott 2-4838)

:45 p.m. Quite important regarding itinerary and several other things. I'd like to talk either to HRH or BG.

FO: BG advised 9:55 p.m. LA time. Can't call now, will call first thing in the morning.

Tue., 6/25/57

:00 a.m. Locate. (As of 10:10 AM, over SD in AAL #114 - landing delayed due to fog.)

:45 a.m. At Town & Country in SD. BG asked him to wait there for ½ hour and [illegible] would try to have HRH call him. 200647

:15 p.m. ERH hasn't called; leaving TAC for lunch at Mission Valley Inn - CY 8-8231, then at Convair - Commercial Mock-up Room.

RUMMEL, BOB

Thur., 6/26/57

465

Info. HRH talked to Rummel this morning, per Rummel.

4:08 p.m. Doesn't as yet have all the information HRH requested. Will have the rest Friday a.m. Leaving LAX at 6 p.m. for Kansas City. ETA KC 2:00 a.m. via TWA Flight #78.

Mon., 7/1/57

7:00 p.m. Tell him that HRH will not be able to call him tonight, but that he will call him tomorrow. Find out where he will be. (Per BG)

Ans: Leaving 7-8 a.m., driving from Mt. Carroll to K.C. (445 miles) - should arrive about 4 or 5 p.m.

INFO HRH talked to Rummel, (Per B. Rummel)

Tue., 7/23/57

6:55 p.m. Please do not let anyone go near the resort plane regardless.

8:10 p.m. OK, I'll call Bill re: starting the engines.

Sun., 8/11/57

2:40 p.m. Per BG: Locate for a call later today or tonight.

2:50 p.m. Will be at Estes Park, Colo., Stanley Hotel, Phone 23, Room C-6 or C-7.

4:50 p.m. BG Advised.

Mon., 8/12/57

11:05 a.m. Have Interim Report for HRH on two projects I am working on.

RUMMEL, BOB

HTC ROMAINE

Wed., 8/14/57

4:45 p.m. Locate. Still at Estes Park, Colorado. OK.

7:02 p.m. Per BG: Call him and see if he can receive a call now.
At the Hotel and can talk now, but must take Vickers people to dinner shortly.

INFO They talked per Rummel.

Sun., 8/18/57

9:25 pm. (Per BG) HRH will call later tonight when circuits are better. Do not wait up for call. Ans: I am lvg KC on TWA #78 tonite 12:30 a.m., arriving NYC 7:25 a.m. and will be at the office there on HRH business. Staying at Lexington Hotel. (BG advised thru G. Bench 10:45 pm)

Wed., 8/21/57

4:10 p.m. Like to give report on situation. (BG advised)

Thurs., 8/22/57

3:10 p.m. Want to talk.

Sun., 8/25/57

9:38 p.m. I haven't talked to HRH yet. I have been standing by and will be in KC through Thursday, 8/29.

Thurs., 8/29/57

6:30 a.m. I would like to talk to HRH sometime today. He will know what it is. Very important. (Given BG at 2:00 pm)

RUMMEL, BOB

465

Sun., 9/1/57

12:01 a.m. Per Rich Anderson: Locate. HRH wants to call you Sunday night.

6:00 p.m. Advised. At Mt. Carroll, Ill., c/o Howard Rummell, phone 2874 until Tuesday eve.

8:30 p.m. HH advised for referral to BG.

Tue., 9/3/57

3:30 p.m. (Per Rich Anderson) Locate. How late will you be up? HRH will not call later than that since he does not want to work the slightest hardship on you at this ti

5:15 p.m. Will be at Hotel this evening. However, the only phone is at the desk. Will call later if the problem can be solved.

Wed., 9/4/57

12:30 a.m. HRH advised. Took numbers in Mt. Carroll of the hotel and the father's home. Do not call Rummel; I will call him when necessary.

Sun., 9/8/57

4:20 p.m. Would like to talk today. Can be reached at Mt. Carroll 5414 until 9:30 or 10:00 p.m., then will be back at Mt. Carroll 7681. (Given to RA).

5:15 p.m. (Per Rich A.) Locate. Will be at Mt. Carroll 5414 until 9:30 or 10:00 pm CST & then will be at 7681. I won't retire until I get the call. I'm very anxious to talk.

Tue., 9/17/57

INFO: Omit all previous calls. They talked, per Rummel.

Fri., 9/20/57

5:30 a.m. (Per Operator) Where can I reach him? Seattle, Mutual 7700 X825.

RUMMEL, BOB

HTC ROMA

Tue., 9/24/57

1:00 p.m. Like to talk on the Bristol situation.

465

Wed., 9/25/57

7:15 a.m. I did not talk to HRH. The deadline is Friday on one of the deals. (Given BG at 2:05 p.m.)

Sun., 10/ 6/57

10:40 a.m. Rummel's calls of 9/24 & 9/25 cancelled, per Rummel this date. Rummel said he would be in KC this week. Rummel talked to HRH and he was to have called them back this evening, but the matter is pretty well taken care of as far as urgency is concerned.

Wed., 10/30/57

1:55 a.m. I would like to talk with HRH, preferably before he talks to Sir Geo. Edwards.

Thur., 11/ 7/57

6:10 p.m. Still waiting to talk to HRH.

Tues., 11/12/57

2:05 p.m. I would like to be able to reach him this afternoon. Ask him to please have everything at his fingertips on the Vickers deal.
Ans: I'll be at the office until 5 pm unless I call you to the contrary and will be home by 5:40 pm. I'll take everything with me.

Sat., 11/16/57

5:25 p.m. Locate.

200651

5:35 p.m. At Warner's house Ridicott 2-3014. He can talk but he does not have his papers with him. It will take about 30 minutes to go home and get them. He can talk privately at this number. He does not need his papers and I will call him at the number.

RUMMEL, BOB

HTC ROMAINE

465

Sat., 11/16/57

8:52 p.m. Call him and tell him I'm not going to disturb him this evening, that I will call tomorrow instead. It will probably be evening (his time) when I call him.

8:55 p.m. Thank you. If you do not hear from me I will be at home except I will be gone about 1-1½ hours to church between 10:30 am and 12:00 noon.

Sun., 11/17/57

9:30 a.m. Call him and tell him that I'm not going to call him back until this evening. If he has any plans for the day, go ahead as I don't want to interfere with them and I'll call him this evening. (Rummel's call of 11/7 cancelled - they talk

9:35 a.m. Thanks very much. I plan on being in and out during the day but not for very long periods of time. I will be home this evening.

1:15 p.m. Advised HRH of Rummel's reply.

Thu., 11/21/57

7:30 a.m. Where is he now? Seattle, Wash.; Olympic Hotel.

8:12 a.m. He's not in Seattle, but is flying to somewhere. Call his sec'y and get his locate. Don't intercept him, but find out where he can talk comfortably later.

8:15 a.m. AIS: Lv Seattle UAL 945 at 8:20 a.m., arr. Denver 2:25 p.m., lv Denver Continental 76 at 3:20 p.m., arr KC 5:20 p.m., home (Ellicott 2-4833)

11:10 p.m. Do we have any locate on Rummel? Yes sir, he should be in Kansas City, at home. He arrived there at 5:20 p.m. this evening and was home around 7:00 pm. Well, I won't call him tonight.

Sat., 11/23/57

REMINDER HRH has to call

12:05 p.m. Advised HRH of his reminder to call.

Sun., 11/24/57

5:15 p.m. Locate.

5:20 p.m. Will be at home all evening.

5:45 p.m. Advised HRH and they talked.

200652

RUMMEL, BOB

#65

Mon., 11/25/57

9:30 p.m. Harry West is arriving on TWA 5 tomorrow (Tuesday) I am meeting Bill Allen in Seattle on Tues, 12/3; preferrel not to meet sooner because he has relatives in town in Seattle over Thanksgiving.

10:20 p.m. Advised HRH of Rummel's 9:30 p.m. call.

Sun., 12/ 1/57

11:55 a.m. Locate. At home this afternoon - Emerson 2-1838. (Was going to LA tomorrow but have a fever so will cancel. Still planning on going to Seattle on Tuesday and may come to L.A. Tuesday evening. Advised HRH.

Mon., 12/ 2/57

8:30 p.m. I have the list HRH wanted and have given it to Bartles.

Tue., 12/ 3/57

12:15 p.m. Available all day for HRH. (Opns has above list Rummel mentions)

Wed., 12/ 4/57

INFO Omit calls of 12/2 and 12/3, they talked (Per Rummel).

Sat., 12/ 7/57

6:20 p.m. Locate. Ask him if he can take a call.

6:25 p.m. Will be at home all evening. Will be going to bed about midnight.

8:12 p.m. HRH advised.

Thur., 12/12/57

[illegible]:50 p.m. Locate and have him get to a phone where he can talk privately.

200653

RUMMEL, BOB

HTC ROMAINE

465

Sat., 11/16/57

8:52 p.m. Call him and tell him I'm not going to disturb him this evening, that I will call tomorrow instead. It will probably be evening (his time) when I call him.

8:55 p.m. Thank you. If you do not hear from me I will be at home except I will be gone about 1-1½ hours to church between 10:30 am and 12:00 noon.

Sun., 11/17/57

9:30 a.m. Call him and tell him that I'm not going to call him back until this evening. If he has any plans for the day, go ahead as I don't want to interfere with them and I'll call him this evening. (Rummel's call of 11/7 cancelled - they tal

9:35 a.m. Thanks very much. I plan on being in and out during the day but not for very long periods of time. I will be home this evening.

1:15 p.m. Advised HRH of Rummel's reply.

Thu., 11/21/57

7:30 a.m. Where is he now? Seattle, Wash.; Olympic Hotel.

8:12 a.m. He's not in Seattle, but is flying to somewhere. Call his sec'y and get his locate. Don't intercept him, but find out where he can talk comfortably later.

8:15 a.m. AMS: Lv Seattle UAL 945 at 8:20 a.m., arr. Denver 2:25 p.m., lv Denver Continental 76 at 3:20 p.m., arr KC 5:20 p.m., home (Millicott 2-4833)

11:40 p.m. Do we have any locate on Rummel? Yes sir, he should be in Kansas City, at home. He arrived there at 5:20 p.m. this evening and was home around 7:00 pm. Well, I won't call him tonight.

Sat., 11/23/57

REMINDER HRH has to call

12:05 p.m. Advised HRH of his reminder to call.

Sun., 11/24/57

5:15 p.m. Locate.

5:20 p.m. Will be at home all evening.

5:45 p.m. Advised HRH and they talked.

200652

RUMMEL, BOB

Mon., 11/25/57

9:30 p.m. Harry West is arriving on TWA 5 tomorrow (Tuesday) I am meeting Bill Allen in Seattle on Tues, 12/3; preferred not to meet sooner because he has relatives in town in Seattle over Thanksgiving.

10:20 p.m. Advised HRH of Rummel's 9:30 p.m. call.

Sun., 12/ 1/57

11:55 a.m. Locate. At home this afternoon - Endicott 2-1838. (Was going to LA tomorrow but have a fever so will cancel. Still planning on going to Seattle on Tuesday and may come to L.A. Tuesday evening. Advised HRH.

Mon., 12/ 2/57

8:30 p.m. I have the list HRH wanted and have given it to Bartles.

Tue., 12/ 3/57

12:15 p.m. Available all day for HRH. (Opns has above list Rummel mentions)

Wed., 12/ 4/57

INFO Omit calls of 12/2 and 12/3, they talked (Per Rummel).

Sat., 12/ 7/57

6:20 p.m. Locate. Ask him if he can take a call.

6:25 p.m. Will be at home all evening. Will be going to bed about midnight.

8:12 p.m. HRH advised.

Thur., 12/12/57

10:50 p.m. Locate and have him get to a phone where he can talk privately.

200653

RUMMEL, BOB

HTC ROMAINE

Thur., 12/12/57 (Continued)

1:20 p.m. At Olive 8057, Renton, Washington.

1:45 p.m. Advised Mr. Hughes of locate.

Wed., 12/18/57

7:45 p.m. West, Harry (Per Rummel, Bob) Ready to talk to HRH before we can proceed (H can talk to either Rummel or West).

Mon., 1/13/58

5:35 p.m. (Per BG) Re developement at Lockheed (re planes). (See locate book).

Sun., 1/19/58

INFO (Per Rummel) Omit call of 12/18/57 and 1/13/58. Have talked with HRH.

Thu., 2/13/58

11:30 a.m. Would like to talk before 4 pm today, EST, if possible. I'm with Earl Marti of Hamilton Standard - National 3-1621, Ext. 319, Windsor Locks, Conn.

Sat., 2/22/58

12:45 p.m. I have discussed the LAI and the California Eastern Airlines at length with Cocke and Ray Dunn. With respect to CEA, the completion dates prior to this discussion were as follows: Serial 1255 - March 2; Serial 1253 - March 9; Serial 1254 - March 16. These dates have been moved forward as follows: Se 1255 - Feb. 27; Serial 1253 - March 6; Serial 1254 - March 8. These are fi away dates ready for service.

With respect to the LAI aircraft, it now appears that TWA may be able to ha minimum modifications in it's Kansas City overhaul shops. Whether or not th is feasible depends upon final resolution of minimum modification lists. T resolve this phase, as well as the workload that must be accomplished prior ferrying the aircraft, the following group has been established: John Roche

RUMMEL, BOB

HTC ROMAINE

465

Sat., 2/22/58 (Continued)

Chairman; Peschote - Inspector; H. Reynard - Provisioning; F. Austin - Flight Operations; David Midgley - Traffic; Earl Cannady - Engineering (Rummel's representative).

Unless advised otherwise, Messers Roche, Peschote, Reynard and Cannady will arrive in LA tomorrow morning to permit expeditious handling. Messers Austin and Midgley are already in LA. To permit resolutions minimum modification list, at least one of the airplanes should be made available to the group for Sunday inspection. Dunn is planning to prepare the airplane for ferry work with TWA LAX personnel supplemented, if necessary, with Kansas City base personnel. If the airplanes cannot be made immediately available, part of the effectiveness of of the group will be lost. I hope that the making of the airplanes available will meet HRH's plans and that HRH will agree. If for some reason HRH thinks that this handling is not satisfactory I would appreciate knowing quickly. I would prefer not to call the group off since all are thoroughly cognizant of Mr. Hughes request that the whole matter be expedited. In view of the strong likelyhood that minimum modifications can be accomplished at TWA Kansas City overhaul base, I am not providing information concerning alternative sources and completion dates as requested by Mr. Hughes. Unless advised otherwise I will assume this is satisfactory.

7:05 p.m. (Per BG) Do not send those men out. HRH will talk to you later tonight. I'll do my best to intercept them and will call you right back if I am unable to intercept them. I'm leaving now for Majestic Steak House (Valentine 1-9293) until 8:30 or 9:00 p.m., then back home.

8:55 p.m. HRH advised. Tell him HRH tried to reach him but was unable to. Therefore he will call tomorrow. Please don't disrupt any plans for tomorrow, HRH will call until he gets him. (Per BG)

Sun., 3/ 2/58

1:00 p.m. Urgent I talk to HRH.

5:20 p.m. Advised HRH.

Tues., 3/4/58

11:20 a.m. Locate.

11:30 a.m. (Per Sec.) In a meeting but can be called out to his office quickly.

Mon., 3/17/58

200655

9:30 a.m. (Per J. Holmes) HRH will have some information for you regarding the 1649 later today and he will call you around 5-6pm EST time.

[illegible] a.m. At office til 1:1[illegible]pm. At GR 1440 Rm 304 from 1:30 to 4pm. Then I'll leave word.

RUMMEL, BOB

Mon., 3/17/58

465

1:35 p.m. Advised ERH of Rummel's locate.

Wed., 3/18/58

5:00 p.m. (Per BG) Re exterior paint on Boeings.

Thur., 3/20/58

12:10 p.m. Would like planes #2 and #3 delivered as soon as possible.

6:15 p.m. ERH advised.

6:15 p.m. ERH will get one of the planes over to you over the weekend between now and Monday morning. Unless you are going to do substantial amount of work on the planes over the weekend, he would prefer to get it to you Monday morning. If you are going to have your people on the payroll and are going to do some work on the plane, he will try to get it to you the early part of the weekend. Regarding the 3rd plane, he will not be able to get it to you before the latter part of next week at the earliest and will talk with you regarding the date on that one. He hopes you will please not call Jack Price, Bruce Burke, or anyone at the Burbank hangar or anyone at Culver City concerning these planes. Anything you might need or any item you might have to use urgently, even if you think those things are just right across the field, please do not contact the above people. Just get the request to my office and I will tell you what to do.

7:20 p.m. Ans: We won't plan on the planes before Monday morning unless Ellinger or I call you .

Sat., 3/29/58

12:01 p.m. We have received an extension from Boeing for the external paint job until Monday morning. (Given BG)

INFO Omit, they talked.

7:00 p.m. Get ahold of him as soon as he returns this evening and tell him that I want him to be very careful not to say anything to anyone, by that I mean anyone connected with Boeing or anyone connected with our company or anyone else, concerning our contractual relationship with Boeing or any of the things that were said to us at the time that we entered into our contract. In other words, tell him that we (HHCo) are going to write a letter to Boeing charging all manner of collusion, misrepresentation, etc. and I do not want any possibility that you nor any of your people might say anything to Boeing or to anyone in TWA or to anyone else outside that might be contrary to the charges that we are making in this letter or that might soften them. Just to give you an example, we are going to charge in this

RUMMEL, BOB

465

Sat., 3/29/58

7:00 p.m. (Continued)

letter that Boeing made the statement at the time we signed for our 120's, that they were not giving, and had not given a sequence of delivery to anyone else. I want you to know that I am relying on you to back me up in this statement. I do not want any possibility that somebody might get ahold of you or anyone else connected with you or in your department and extract anything, for example a statement that you or one of your people doesn't remember any such representation made or at least wasn't made to him. I am not asking you, at this time, for any testimony but I do not want any possibility that anything will be said that might be contrary to the testimony that I hope you are going to give if we get into any sort of argument. I am just afraid that somebody will try to discuss the matter with you or your people and try to get you or them to admit that you don't remember any such statement being made. That will weaken the testimony that you will later give. Just to be safe, I think it is best that neither you or any of your people have any discussion with Boeing or TWA or anyone else pertaining to our contractual relationship with Boeing or any statements or representations that were made by Boeing at the time we entered into the contract or on any statements or representations that were made by Boeing since then. That would mean, in effect, that I do not want any discussion which would even involve a discussion of the recent negotiations you have had with Boeing apropos to improving our deals. They record everything there at Boeing, so when they receive this letter they might try to get you or someone else on the telephone and extract something out of you on the telephone that would weaken our postion. I urge that you and your people not get into any conversation on the telephone at all and any other conversations, confine them to the technical issues involved and not get involved outside of those areas. Just to be safe, avoid completely, any telephone conversations with Boeing completely. They will be recorded as soon as this letter is dropped in their laps. If it is necessary to have any discussions with Boeing apropos to the current technical changes on the airplane, I suggest that you have them in person at the factory in Seattle or in Kansas City, rather than on the telephone. In any such talks I would still like the conversation to be confined strictly to the necessary issues at hand and not get into the area we are talking about. I think you ought to talk to Ray Cook tomorrow and discuss with him what instructions, if any, we should give to our representatives in Seattle concerning the issuance of change orders and such. Such documents might be contrary to the letter or the intent of this letter we are going to hand them. In other words, the thought I have in mind here is that if this letter states or should state that we violated the agreement, then the signing of routine change orders and other such documents in Seattle might possibly invalidate the effect of our letter. Bob should talk to Ray Cook or Harry West tomorrow after the letter is written and have them decide to what extent our man in Seattle can operate from now on without weakening the effect of this letter. You should decide what instructions should be given to our people in Seattle and also at KC concerning any documents that are to be signed. It might be well just to hold up signing of any documents for the time being. Regardless of what Cook or or West might say about that, I want the strictest directive issued to your people and I want you to follow it as well, so until I alter these instructions to you, I want you and your people to (A) have no telephone conversations with the people at Boeing concerning anything and (B) if conversations are needed, they should be had in person either in Seattle or KC and during such conversations, nothing shoul be discussed except the immediate and current engineering problems of the airplane. Do not digress from these subjects at all. The no telephone conversations will apply to anyone connected with Boeing, whether they are in Seattle or anywhere else. In any person to person, in person, conversations, I want the discussion confined strictly to the current technical problems that are necessary to be discussed and

(continued)

RUMMEL, BOB

Sat., 3/29/58

#65

7:00 p.m. (Continued)
I do not want the discussions to deviate into any other area whatsoever. Concerning correspondence, I want everything, whether it is letters or telegrams from KC, or in the form of notations, change orders, memos and such that might be signed by our men in Seattle; the conduct of those matters I want to be thoroughly discussed with Ray Cook and Harry West and then have them dictate what should be done so that there will not be any mitigation of our position whatsoever. There should be no further discussions had by you concerning deliveries. I know that you have had some discussions regarding deliveries but until these instructions are countermanded I want that to cease. Be particularly careful to avoid completely any discussion of our contractual letters, avoid completely any discussion of deliveries in any way, shape or form, any discussion of statements that may have been made by us at the time of our discussions of the contract and since that time. regardless of what you get from Cook and West. I think there should be a temporary complete blackout of correspondence. The only thing that I can think of that might require taking care of would be a minor engine change and I don't see why that would have to be done immediately. I think we ought to change this to a complete blackout concerning telephone calls and correspondence. The only thing that you will discuss with Cook then would be change orders and memos. In other words, we remove the correspondence part of this thing to be discussed with Cook and West. As it stands now, the instructions come from me for a complete blackout and cessation of any correspondence, telegrams, telephone calls, etc. The only way that anything can be transmitted to Boeing is in an in-person conversation either at KC or in Seattle. This would leave the only thing up in the air is written change orders, written memos that are necessary in handling the normal routine of inspection by our representatives in Seattle. On that score, this is what I want discussed with Cook and West, and Cook should give the very strictest interpretation to protect our position. So, the only thing left to discuss with Cook and West will be the routine change orders and memos that normally have to be executed and signed by our representative in Seattle. In fact, I don't even like memos in that category so we better put them in the classification of the letters and correspondence. That leaves only the change orders to be discussed with Cook and West.

10:15 p.m. Rummel advised.

4:15 p.m. ERH advised.

Sun., 3/30/58

7:20 p.m. Reminding ERH that we will need the plane tomorrow morning.

Mon., 3/31/58

INFO Cancel call of 3/30/58, they talked.

RUMMEL, BOB

HIC ...

465

Wed., 4/2/58

11:30 a.m. Locate him for a call this evening.

2:10 p.m. Ans: Will be home this evening and up until 11:30 p.m., CST. (Was told not to wait up for the call past 11:30 p.m.)

8:00 p.m. (Per Karl S.) Call him and tell him I will not be able to talk tonight and to go to bed and I will talk to him tomorrow.

8:25 p.m. Advised.

Fri., 4/ 4/58

4:25 p.m. I am extremely sorry but apparently your telephone was out of order. I waited on the line for about 15 minutes while we tried to get back to you. We even had the HKoperator and everybody else working on the line but couldn't get a connection. I could hear you but apparently you could not hear me. I will call you tomorrow instead.
Ans: I'm very sorry this happened and I will try to see what the trouble was. I should be here at home all day tomrrow. I may be in and out but unless you hear from me I will be at home.

Sat., 4/12/58

3:15 p.m. Locate. Probably at home, his line is busy.

4:10 p.m. Ans: Will stand by at home for the call.

5:00 p.m. HRH advised, and they talked.

Wednesday - 4/30/58

2:23 p.m. Locate.

2:25 p.m. A office until 5 or 5:30 pm (CDT 1 hour difference) then home in 1/2 hour after leaving office.

Thur., 5/ 1/58

9:40 p.m. My man Norman R. Parmet here will have information tomorrow. (GR 1-4400). He is enroute from Seattle and will call operations when he arrives Friday and is ready. If Parmet cannot be located, Walter Sherwood here also has info. I will call operations upon my return from Chicago late Friday night (11:30 pm or later).

RUMMEL, BOB

Mon., 5/ 5/58

12:15 p.m. ERH advised.

INFO Call omitted, they talked.

465

[illegible] 5/7/58

1:27 p.m. See if ERH can talk to him conveniently now.

1:29 p.m. Yes, he can call me on X 67 but I'm leaving for NY at 3 PM KC time and will be available at the Waldorf tonight around 10:30 pm NY time. At TWA office Thursday. OX 5-4525.

1:35 p.m. ERH advised.

7:30 p.m. I called Wellwood Beall and he was most agreeable. The meeting will be held on Monday, 5/19. I would appreciate an opportunity to discuss the situation in detail with you prior to my departure for Seattle.

Tue., 5/13/58

9:50 p.m. Would like to know upon return to NYC from Puerto Rico (see itinerary) whether to proceed to Seattle.

Sat., 5/17/58

5:30 p.m. Leaving at 6:00 a.m. to go to Seattle. Like instructions before leaving.

Sun., 5/18/58

8:20 a.m. Go on to Seattle but don't get into any business or technical discussion or any discussion relating in any way to the planes Boeing is building for us, before I talk with you. (The meeting he has scheduled Sunday was originally set for Monday and if I don't get him on the phone, he will have to postpone this meeting to its original Monday time.) Please be friendly and courteous with Wellwood Beall because I feel I am working something out with him, but please do not have any business or technical discussions until I talk with you.

5:05 a.m. Rummel advised in Chicago. (Rummel's calls of 5/7, 5/13 and 5/17 cancelled, per above instructions)

RUMMEL, BOB

46

465

Mon., 5/19/58

30 a.m. ERH will not be able to call you until tonight around 8 pm, Seattle time, and he has told Mr. Beall that he will not be able to call him until then. Therefore, would you please go ahead with the meeting that was previously contemplated before ERH started his last series of discussions with Mr. Beall. In other words, I would like the meeting to be limited to their explanations of the engineering reasons for the delivery situation and also any discussions which you feel desirable relative to engineering changes or improvements that you desire in the airplanes. If you finish this meeting comparatively early in the day, please do not drag it out for any reason as there is no point of taking up their time unnecessarily or progressing the negotiations any further until I talk to Beall tonight. I am working with Beall on something and I'm anxious to develop it before any negotiations with Boeing take an unexpected turn that would change the complexion of matters as they now stand. However, I do want you to have the meeting with them as I don't want any possibilility of their feeling we are trying to stall things. In other words, they are disappointed that the meeting wasn't held before today and therefore, I do not want a report going to the fiscal officers of the company that we are perpetrating any kind of delaying action. However, as I said, there is no point of this meeting being delayed when there will be no discussion of the matters that I have just listed. I have sent word to Beall that I am going to talk to him tonight. I feel that I am making some progress with him of a plan which I hope will lead to an immediate settlement of our dispute with Boeing. Now Bob, this part is very, very important. Please do not agree to anything today; please do not make any statements whatsoever of our position; please do not acknowledge that anything they propose is fair; please do not acknowledge that their position on the deliveries is reasonable or anything of that kind. In other words, let them do the talking. Do not quarrel with them unnecessarily but please do not put them in a position which they have made heretofore, that my people agree with them that their position is reasonable and that we have no reason to feel that we are being discriminated against. In other words, I do not want them to be in a position of saying that you or any of your people, either in the meeting today or any other time, have agreed with them on any points of this dispute or have acknowledged that their positionis proper in any detail.
Note: Mr. Rummel, this is such a long message and you are not writing it down. ERH suggested that I read it again to you. (After the second reading, ask him if there is any portion that he wants read a third time.)

05 a.m. Advised Rummel and the message was re-read a second time.

Tues., 5/20/58

0 a.m. Call him, person to person, and when you get him tell him I've been trying to get him since 2:10 a.m.

a.m. When you get him tell the Operator to cut in on me but very quietly and if I don't hear it the first time then just whisper the second time but not to talk loud.

7 a.m. Rummel called in and ERH advised at same time as ERH on line inquiring about Rummel.

RUMMEL, BOB

465

Tues., 5/20/58 (continued)

11:25 p.m. Tell him I am extremely sorry I will not be able to call this evening and I will call tomorrow. Ask him what time he intends going to Boeing. (He has a 9 a.m. meeting.) Well, then, confirm that and find out what would be the best time to call in the morning so that I would not interfere with his breakfast or catch him in the bath. The later in the morning the better for me. I am extremely sorry I won't be able to call tonight and tell him I'm sorry I disturbed him last night.

11:35 p.m. The best time will be after 9 a.m. on our private line into Boeing, which is Alpine 5-8057, Seattle.

Wed., 5/21/58

9:10 a.m. (Per Sternler) Mr. Hughes will not be able to call until tonight but please go ahead with whatever you can accomplish at Boeing so you will be able to discuss this with HRH tonight.

10:29 a.m. (Kay Glenn advised Rummel) Should like to talk to HRH before tonight because of this situation.

7:15 p.m. HRH will call you around 11:00 pm tonight, PDT.

8:20 p.m. I'll be back to the hotel before that time but if you need me before then, I'll be in the Outrigger Room of the hotel for the next few hous in case you would like to reach me before I get back to the room.

9:30 p.m. HRH is terribly sorry but he will not be able to call you this evening. He is at a telephone where he cannot talk and when he gets back to the hotel it will be so late to be irpossible to talk, so he would suggest that you go on to sleep and he will call you in the morning. If you would like to go to bed now, fine and then HRH will not feel bad about calling you in the morning early.

9:40 p.m. That will be fine. I was planning on leaving in the morning but I will put that over until tomorrow afternoon because I would like to talk to HRH before leaving to see if there is anything left to do in Seattle.

Thu., 5/22/58

9:25 a.m. How do I get him? MAin 4-7400, Room 710.

RUMMEL, BOB

Fri., 5/23/58

4:45 p.m. Anxious regarding latest deal, it falls far short. Beall is leaving Seattle on Monday and is going overseas on Friday.

465

7:30 p.m. HRH advised. I definitely would like you to stay in Seattle this weekend, particularly if Beall is leaving Monday because it appears that Saturday and Sunday are our only days to work with him. I will be available to talk to you and Mr. Beall on the weekend. The only reason I didn't call today was because, as you know, we are having the Directors' meeting in NY and I have had serious problems there. I was on the telephone with Ray Cook continuously starting at 5:30 am, PDT and that's why I failed to call you today, please forgive me. I will be available all weekend to talk to both you and Beall and I do urgently request (I know he doesn't like to be away from KC over the weekend) you stay in Seattle over this weekend and I urge that you keep Harry West there. I will call you real early in the morning. I hope that you will sleep until I call, that is I hope you will not leave a call with the switchboard girl to awaken you in preparation for my call. I will call very early and awaken you when I call. I hope that you will be sure that Beall is going to be in town and available both Saturday and Sunday. I hope that you will tell Beall that I will be available on the telephone both days and that I have requested you (Rummel) to remain there and we will try and get this thing solved in order that it won't drag on. This request is in case Mr. Beall is making plans to go away over the weekend.

8:45 p.m. Advised Mr. Rummel and he said he would call Beall but that he had to go back to KC tomorrow afternoon for sure. His wife just wasn't feeling too well and he had to return. He will have Harry West remain, but will discuss this with HRH in the morning.

Sat., 5/24/58

12:20 p.m. Locate for HH to call right back.

12:21 pm In room 1206 of hotel.

1:25 p.m. HRH advised. (thru Jeannie)

They talked.

5:00 p.m. HRH is calling Mr. Beall right now. He was delayed in reaching Mr. Beall because he wasn't at home for two hours following HRH's conversation with you. HRH cannot call you now and he hopes that you will be kind enough to wait there in Seattle and he will call you tomorrow before noon, Seattle time. Please keep Mr. West in Seattle with you.

5:10 p.m. Advised Rummel and he said he would have to place a call home and find out how things were there. If they are any worse, he will leave and go on back to KC and that Mr. West would remain. Will let us know.

RUMMEL, BOB

HTC ROMAINE

Sun., 5/25/58

465

2:00 p.m. HRH called you at this time at [illegible] and page were DA. He will not be able to call you now until this evening. Mr. Allen has just returned to Seattle. I have had a long talk with Mr. Beall and he said he would have a long talk with Mr. Allen and he would get back to me after he sees if he can change his attitude. I do not think it is strategically wise for me to call Mr. Beall again. If you could plan to stay and remain in Seattle until Monday night, I would be truly grateful. As long as you are there, I think we have a logical reason for us to get this thing cleared up in a hurry because of your trying to get back to KC. I am confident that you can leave tomorrow night because if we do not get a favorable answer by then, I suppose we will not get it. I just wish that you could arrange your affairs to stay but if you cannot and you have a critical situation at home and have to go back, I'll understand.

10:15 p.m. Ans: Things are much better at home so I will be able to stay over. I'll be here in my room or at least in the hotel. Call as late as you wish.

Mon., 5/26/58

9:00 a.m. Mr. Hughes is waiting to hear from Mr. Beall, Beall has made an appointment with Allen and Beall has promised to contact HRH when he is finished with Allen. HRH would like you to spend the rest of the day in Seattle and he is hopeful of getting you out this evening or in the morning. Once HRH gets the answer from Beall he would like you to be there and guide this thing and instruct Harry West and West can remain in Seattle to follow up.

9:35 a.m. OK, that's fine. Will be at the Hotel or at the Plant in Ed Zak's office, the private number there is Alpine 5-8057.

2:05 p.m. Bruce Conley, VP in charge of the Transport Div. of Boeing, called me just a few minutes ago following the meeting with Allen and wanted to see me at 3 pm, PST. He went on to say that Beall had left town and that they didn't change the basic deal since Beall had talked to me. Suggested that they might then, after the meeting at 3 pm, go and see Mr. Allen. Like to talk to HRH before 3 pm, PST.

3:05 p.m. HRH advised of above.

3:05 p.m. Please do your very utmost with both Conley and Allen to get what we want on the use of the prototype. I think it is a good idea, in fact highly desirable for you to see Allen and give him your reasons why you feel we could have the prototype for the period we want it without being fatal to their program. Try to convince Allen that it is our firm belief and opinion that if they wanted to they could do this for us. Try to convince them that their saying they cannot do it isn't really factual. If they say they will not do it, then that is brought out by the facts but we firmly and sincerely believe, after all their explanations, that if they really wanted to do this thing they could. Make a real solid pitch to persuade Allen to overrule his other people. Be sure and tell Allen that if they will do this for us - the prototype - we will pay up the amount of money that has been withheld immediately and pay the interest

RUMMEL, BOB

HTC ROMAINE

Sun., 5/25/58

465

2:00 p.m. HMH called you at this time and the room and page were DA. He will not be able to call you now until this evening. Mr. Allen has just returned to Seattle. I have had a long talk with Mr. Beall and he said he would have a long talk with Mr. Allen and he would get back to me after he sees if he can change his attitude. I do not think it is strategically wise for me to call Mr. Beall again. If you could plan to stay and remain in Seattle until Monday night, I would be truly grateful. As long as you are there, I think we have a logical reason for us to get this thing cleared up in a hurry because of your trying to get back to HC. I am confident that you can leave tomorrow night because if we do not get a favorable answer by then, I suppose we will not get it. I just wish that you could arrange your affairs to stay but if you cannot and you have a critical situation at home and have to go back, I'll understand.

10:15 p.m. Ans: Things are much better at home so I will be able to stay over. I'll be here in my room or at least in the hotel. Call as late as you wish.

Mon., 5/26/58

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2:05 p.m. HMH advised of above.

RUMMEL, BOB

HTC ROMAINE

265

Mon., 5/26/58 (Continued)

that they are contending. We will make no further protest about the delivery positions and that the entire wound between Boeing and TWA will be healed. To accomplish that purpose, it would justify some considerable concession on the prototype. I recognize that it will be a concession and that it will interfere with some of their programs, but it would be worth it. Tell Allen that HRH stood by all day waiting to talk to Mr. Beall and that you (Rummel) feel that this is going to be terribly disappointing if you have to tell HRH that this is still up in the air. Do not make any other concessions other than this. Do not agree or concede to a compromise. If a compromise is proposed, just say you will discuss it with HRH. If it is just a feeble compromise then just say outright "no, not under any circumstances". If the compromise comes close to what we want, then say you will have to discuss it with HRH. Particularly make it a firm proposal directly to Allen that his whole thing will be solved and the whole matter of the payments, interest and everything would be concluded immediately. I feel that unless Allen feels that this is going to end this difficulty, he doesn't have any incentive to try and bring this to a successful conclusion. Impress on him that this is and absolute firm proposal by me and that if they will do it, the thing is done. Do not commit to anything less than the whole. That would mean that we would get the plane commencing on the 9th of July, except for the time to get it ready.

3:10 p.m. Ans: Advised Mr. Rummel.

6:55 p.m. I had the meeting this afternoon. We went over the things as outlined and I held our position all through the meeting. They had a meeting with their people all morning and he is not going to in anyway accede in Mr. Hughes behalf. They made a study and said that they have already been put in jeopardy. He feels that the contract has not been complied with. I asked him if I could show them that these tests could be run in alternate ways to make the prototype available without injury. He said his men have already made a study, that they have already reviewed this and he has complete confidence in their decision. If he didn't have confidence in them that he would replace them. I made every effort to sell Allen and I held the position that I felt they could do these tests if they wanted to. They denied that. They made an offer in writing in terms they feel Mr. Hughes understands. I told them that they in no way meet the requirements. Mr. Allen wishes Mr. Hughes would call him and they could probably then come to some agreement. He feels that Boeing's position is sound, that they had a contract and they should be paid. I believe the best course would be for Mr. Hughes to get in touch with Allen directly. I see no reason to remain and would like to leave tonight.

7:20 p.m. HRH advised of the above per KS.

7:20 p.m. (Per KS) Tell him that I appreciate his staying over and I have no objections to his leaving tonight. Harry West can also leave unless you object. Many thanks for your efforts.

7:30 p.m. Ans: I will try to get out tonight.

RUMMEL, BOB

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7:20 p.m. HRH advised of the above per KS.

7:20 p.m. (Per KS) Tell him that I appreciate his staying over and I have no objections to his leaving tonight. Harry West can also leave unless you object. Many thanks for your efforts.

7:30 p.m. Ans: I will try to get out tonight.

RUMMEL, BOB

HTC ROMAINE

Mon., 7/28/58

7:50 a.m. (Per Hurley) What is his number? Home is Endicott 2-4838 and the office is Grand 1-4400. They talked.

Thu., 9/ 4/58

12:20 p.m. Re Convair deliveries.

Tue., 9/16/58

10:45 a.m. (Per Hurley): Call him and tell him that the agreement on the prototype s be with the KDCo and not TWA and that it has been consumated. Be sure tha nobody in TWA signs or executes any other documents which will be presented TWA.
Ans: Kay advised Mr. Rummel.

Sun., 10/19/58

11:15 p.m. Locate him and have the hotel get him on the line and then have them ring very lightly and I'll P/U the call.

11:20 p.m. Located Rummel at home - ENdicott 2-4838, EC. (They talked) Rummel's call 9/4 cancelled on this basis.

Sun., 11/23/58

3:45 p.m. Call him and find out what his schedule is for the remainder of the day. would like very much to call him sometime about 2 to 2½ hours from now (a it about 5:45 to 6:15 pm PST) if that would be convenient.

3:55 p.m. Ans: That would be fine. I will be at home and usually don't retire unt around midnight.

Thu., 12/11/58

INFO They talked.

RUMMELL, BOB

HTC ROMAINE

Thu., 12/11/58

465

4:20 p.m. [illegible] this information: First, the airplane is not going to fly tomorrow; Edwin Zak, home #GLencourt 4-6283, Seattle Wash.; direct office # Alpine 5-8057, Renton, Washl; # thru Boeing plant CEdar 7-2656. (Zak is plant representative in engineering).

Fri., 12/12/58.

INFO: Omit. (information only contained in call of 12/11/58.)

Tue., 12/16/58

11:50 a.m. Locate.

11:55 a.m. Reached him just as was leaving for KC. Leaving at 5:30 pm, Arr KC 8:30 pm.

Mon., 12/22/58

10:15 a.m. Locate him and ask him if he will go home where I can call him.

10:30 a.m. Ans: Will be home - ENdicott 2-4838.

10:00 p.m. Advised HRH.

Sun., 1/ 4/59

6:25 p.m. I want to talk tonight if possible. I can't reveal what it is about.

Tue., 1/ 6/59

1:45 p.m. HRH advised.

Wed., 1/14/59

[illegible]:05 p.m. Advised HRH.

200667

RUMMEL, BOB

HRH DOMAINE

Mon., 1/19/59

3:00 p.m. HRH advised of Call by Raymond Cook.

Thu., 1/22/59

9:30 a.m. Very important I speak to you.

Sat., 1/24/59

12:40 a.m. Notify Boeing that the acceptance flight will positively be Sunday or Monday. It will not be later than Monday for sure. We will let them know which it will be - Sunday or Monday - but we do not want it tomorrow. If the plane is completely ready for flight, then I would like the plane to remain idle. If there is any work that can be done tomorrow - without flying the plane - then let the needed and necessary workmen do what should be done to accomplish this, otherwise lock the plane up.

5:00 a.m. Rummel advised.

Sun., 2/ 1/59

11:30 a.m. Locate. He's at home (Kay had just talked to him) in KC, Mo. - ENdicott 2-4838. Advised HRH and they talked. Rummel's calls of 1/4 and1/22/58 omitted on this basis.

4:45 p.m. I talked to HRH but did not get into anything. Still important I talk to him.

7:45 p.m. They are expecting a call (either Rummel or Rourke). Call them and find out what time or what time they are retiring and if I haven't called by that time they should please go on to bed and not wait for my call. It may be impossible for me to call them tonight and I will call them in the morning.

8:00 p.m. Advised, not expecting a call.

Tue., 2/ 3/59

3:45 p.m. I want to be able to talk to either one or the other, whichever has the report that I was looking for on Sunday (Rummel or Rourke).

5:55 p.m. Hilland 4-8505 until 8:30 pm, PST, then leaving for NYC.

9:05 p.m. HRH advised.

RUMMEL, PCB

HTC ROMAINE

Tue., 3/10/59

7:00 p.m. Boeing just returned from it's FAA acceptance flight on the 102; the flight was unsuccessful in that there were a major spots requiring additional flight time and I'll advise further as soon as we have a better idea of what the schedule for correctingthe defficiencies is; the majority of the trouble was electronics.

Fri., 3/13/59

5:10 p.m. Progress report on the Boeing situation: Flight last evening was a five hour flight manned by a special flight test crew. It was an effort to get to the bottom of the difficulties. Flight boarded three late due to failure in primary hydrolic system which caused instant loss of hydrolic fluid. They seem to have isolated the compass problem to the flux valve installation. They expected to fly around noon today but further review revealed too much work and presently they have scheduled additional Boeing and CAA flights for 10:20 am tomorrow morning.
Some things that still need correction: (1) Compass, (2) Auto Pilot, (3)Air Conditioning system, (4) Replace #2 engine reverser because of sticking problem, (5) Generator problem I'm sure has been taken care of, (6) Fue tanks have two small leaks but we can't do that now without typing up the plane. Will have to have fixed after this next flight prior to acceptance flight.
If they make the 10:00 an date then the soonest that we could conduct acceptance flight would be Sunday morning. Then if all things are acceptable to both Boeing and CAA, and with our flight on Sunday, if it is perfect, we would go ahead with delivery Sunday night which has been agree to. If so, we could still have plane in San Francisco by Monday morning.

Sun., 3/15/59

7:15 p.m. Airplane just took off on its acceptance flight (TWA) at 6:32 pm, estimating at 3 to 5 hours; possible it may pass but not probable. Will call later with the info.

Mon., 3/16/59

12:03 a.m. The TWA flight is down and we have had our debriefing; it's a dirty, sick airplane; most of the trouble with the exception of one item which we had before is still there plus others that we have picked up. Boeing's crew will be working all night. It definitely will not be available 3/16 and probably as a guess we'll be lucky to have it 3/17 so we're in a very bad situation under start of service date.

RUMMEL, BOB

Mon., 3/16/59 (Contined)

7:45 p.m. Progress report: Test flight is scheduled for 6:30 am in the morning. Will be working on plane through the night. A flight was scheduled for 5:00 pm this afternoon, then rescheduled for 1?:CO pm. There is a good chance this flight tomorrow will be successful. If so, we will leave immediately for Portland delivery. If we get there in time we should still get the plane to San Francisco tomorrow night. I will call tomorrow.

Tue., 3/17/59

5:40 p.m. We took delivery on the first KC Jet in Portland this morning and delivered it to TWA in San Francisco and it left Frisco on the first leg of the FAA proving run at 3:23 pm PST for NYC scheduled toarrive at 11 pm EST 3/17; with good luck we'll make our start of service date. Back (the plane) in Frisco 3/18.

INFO Cancel all pending calls prior to 3/17 except the 3-1 call per the 3/17 message. See later call.

Mon., 3/30/59

4:50 a.m. Get him located for a call in 20 minutes and have him completely private. If by any chance that airplane is taking off before 6 am, have Rummel hold it until I talk to him.

5:00 a.m. Ans: Advised. W/b at home and can talk.

5:10 a.m. HRH advised and they talked. (Calls canceled on that basis)

INFO 9:00 am: The airplane has left Seattle. If left at 7:26 am Seattle time with a 3 hour flight plan and will arrive in KC 12:26 pm KC time. Boeing is aware I do not have the money yet, but have agreed to bring the plane in on HRH's personal assurances that the money will be delivered today. I have made arrangements with Boeing for use of the airplane even though we do not consummate the transaction later today, but it is important that the money be gotten. Let me know just how it is going to get here. HRH said he may get it on the 12 o"clock flight, or maybe wire it. Don't press this with HRH, as he is aware of all this; I'm just giving it to you for information purposes. Though we talked, I did not cover the information in my previous calls, so wish them to remain on your record there.

INFO Kay called him at 1:45 pm and notified him that funds had been officially transferred to Pacific National Bank, Seattle, in the amount of $3,521,079.64 for the Boeing account to accomplish the completion of the delivery of #3 airplane - N733TW, Manufacturer's #17660, Production #103. Evan Nelson, Boeing treasurer - JU6-2286 - confirmed this.

RUMMEL, BOB

HTC [illegible]

Thu., 7/2/59

4/61

70 Bob Rummel reported the following as bits of information he has received on the Milan-Paris bound TWA crash: That the flight cleared Milan and was cleared to the range station; the last radio message was at 10 thousand feet circling and climbing and 3 minutes after that it was on the ground having crashed between the range station and the airport. It is very clear that the craft broke up in the air; it is clear that the wing came off; it's clear that there was a bulging explosive type action inside the wing where it parted from fuselage. From the distribution it appears that it was somewhat progressive, it could have blown off. It appears that the engine power plants were not the source of the fire; it appears that it was not a propeller malfunction and it was not a PRT malfunction. Some of men are en route home this weekend; there will be further conferences, etc., and thereafter more information will be available. I will keep you posted.

Wed., 7/29/59

:55 p.m. Without committing me to an exact time find out what his schedule will be for the remainder of the day and evening. (HRH may not need to call Rummel after speaking to Rourke.)

:30 p.m. Ans: Leaving for home now and be there in 30 minutes (EMdicott 2-4838 or 2-8622)

Sat., 10/10/59

1:30 a.m. (Per BJ) Call your Chief Inspector at Convair and instruct him to not commit the Eurhes Tool Company to the acceptance of any or all of the contracted airplanes that have any appreciable defects or have the worm appearance corrosion on major skin assemblies. Also, I would like you to discuss this problem with Harry West so that anything the inspector may say or sign, or by the omission of saying or signing something may be construed as the acceptance of the airplanes. Please, Bob, I do not want any big furor caused in the inspection department that would stir up Convair, so please handle it as carefully as you can.

:10 p.m. Ans: Advised by BG.

Thu., 2/11/60

:45 p.m. (Per BG) (1) Have had wire from Diggs of Convair requesting permission to train 6 FAA air carrier flight inspectors using our No. 5 airplane; they want to train 2 immediately and it will require 5 hours of flying; (2) Want permission to take a 331 into San Francisco to get the San Francisco clearance which is required by the SF Port Authority on the 17th and 18th of February. SF City ordinances require that the airplane and pilots have experience in and out prior to its flying in and out on regular passenger flights.

RUMMEL, BOB

Sat., 2/13/60

INFO Omit, they talked

461

Mon., 5/23/60

3:55 p.m. Would like to talk as soon as he can.

Ans: (As of 4 pm en route home; left word with wife.)

4:55 p.m. HRH advised.

INFO Omit. They talked.

7:45 p.m. Find out if it is convenient to call him in the morning.

8:00 p.m. Ans: Will leave for the office at 3:30 a.m. PDT and arrive at 8:30 PDT.

Tue., 5/24/60

7:30 p.m. HRH asked me to call him person to person at the office and that way it would right through to him. Nothing critical on my part but he wanted to be kept of the accident details; now have further info and am prepared to discuss it him.

Wed., 5/25/60

2:30 p.m. (Per Johnny) Line him up for a call at about 5 o'clock.

Ans: (Per Mrs: He is enroute home from Virginia and I don't expect him home before 11 o'clock EDT; If he calls me before then I will have him call Opas immediately.)

9:15 p.m. Ans: Advised.

Fri., 5/27/60

10:15 a.m. Available by phone without pinpointing an hour for today and this early even

Ans: (Left word - en route from Bristol, Va. to NYC via auto.)

200672

RUMMEL, BOB

HTC

Tue., 5/31/60

5:30 a.m. Locate him for a call.

5:31 a.m. Ans: In my office.

INFO They talked.

465

Wed., 6/ 1/60

7:45 a.m. (Per BG) Delta had a failure in the #2 hydraulic system on the flight out of Idlevild this morning. The #2 system which is backed by the third and fourth engines. The pilot immediately went into low hydraulic throw and opened the temporary control system and then he noticed that the #1 and #2 systems were starting to fail and he then repeated the same procedure and decided to return to Idlevild. When he got back to Idlevild he was unable to free fall the nose gear so he used the hand pump which forced the gear into the down and locged position. He put the flaps down to 20 degrees and there are 2 conflicting reports. Some say that there was some Dutch roll coming in and some say he did not. But in any event, he dropped the left wing slightly and then dropped the right wing and when he dropped the right wing the 4th nacelle scraped. The fitting in both systems was cracked and the question is whether it was broken in flight. One system they know was broken in flight but the second system may have broken when they hit the ground. There is no publicity on it. The incident occurred after HRH talked to Thomas.
Delivery date on the #11 Boeing will be June 21; on the #12, June 28.

9:55 a.m. HRH advised by BG.

11:15 a.m. (Per George) Get him on the line for HRH.

INFO They talked.

Fri., 6/ 3/60

3:30 a.m. Get a complete copy of the report of the accident and EW to type two copies which are to be delivered to the parties concerned by G.Grace.

3:30 a.m. Ans: No report is available at the present time so far as I know. In view of the confidential nature of such information it would be very difficult to get the report before the official inquiry is held. Charles Collar is the man in charge of the investigation and Dr. Wilbur is the man on the human factor team who gave out the information that HRH already has. Heading the human factor team is Bernie Doyle of the CAB. (Dr. Wilbur's remarks dicated and typed by EW and delivered to parties by G. Grace.)

RUMMEL, BOB

Sun., 6/ 5/60

5:20 p.m. (Per Johnny) Get him on the phone now.

5:30 p.m. Ans: Mr. Rummel en route to Los Angeles on #71. Arrive 10:55 p.m. Staying at the Hyatt House. Stops in St. Louis for a short time at 8 p.m. PDT.

INFO They talked in St. Louis.

465 ✓

Mon., 6/6/60

8:15 a.m. Am at the Hyatt House. Ready to talk to HRH.

10:00 a.m. Get him on the line so I can talk to him.

10:00 a.m. Ans: Advised.

INFO Omit; they talked.

Wed., 6/ 8/60

7:05 a.m. Find out if he has a wake up time and if so ring him 45 mins later and tell him I would like to talk to him.

7:45 a.m. Ans: Will get a bite to eat and then wait for the call.

INFO Rummel was given a message from HRH by BG, and is expecting a call tonight from HRH.

Thu., 6/ 9/60

8:00 a.m. Convair plans to conduct the test at Edwards Air Force Base today contrary to HRH,s orders. Did he authorize these tests. If so - fine.

INFO Cancel; Rummel called Diggs.

Fri., 6/10/60

7:45 a.m. Tell him that if he has finished at Lockheed I don't want him to go to San D til Monday morning. I have spoken to the people at Convair and made arrang for Monday morning. If there is nothing further he can do at Lockheed and h associates want to go home, it is OK providing they obtain Mr. Thomas' cons he and his men would like to remain in Los Angeles I am sure the weekend wi be entirely wasted and probably arrangements can be made to go to San Dieg

RUMMEL, BGS

Fri., 6/10/60 (Continued) 461

to negotiate with Convair people concerning a number of matters. So if he and his men elect to stay over the weekend which I think probably would be wise, now that I reconsider the matter, for many reasons, then he could spend another day at Lockheed if he thinks it would be of any value at all or perhaps he could take it easy here in Los Angeles until I could speak to him this evening which I will do without fail.

8:00 a.m. Ans: Advised.

Sat., 6/11/60

9:45 a.m. (Per GP-BG) HRH does not want you to leave town until he talks to you later this afternoon.

9:46 a.m. Ans: Advised; will be at the hotel (please page) or will advise.

10:30 a.m. Where is he? In his hotel room or within the hotel. Get him where he is completely private in his room; he can have Rourke next door in his room but not in Rummel's room so he can talk privately as I may wish to have Rummel ask Rourke some questions but don't want him in the same room.

10:35 a.m. Ans: In my room; will work it out.

Sun., 6/12/60

10:00 a.m. (Per [illegible]) Rummel and Rourke to remain in town until HRH talks to them.

10:30 a.m. Ans: Advised.

Mon., 6/13/60

10:00 a.m. (Per BG) To be placated, and held in town. HRH wants Rummel & Rourke to have a meeting with the doctors this evening, so it is important that they remain here. However, HRH does not want them to meet with any of the doctors until HRH talks to them.

10:15 a.m. Ans: (Per BG) Advised.

Tue., 6/14/60

[illegible] a.m. I will call them this morning. Please ask them to wait at the hotel. They wont have to wait there very long.

RUMMEL, BOB

HTC ROMAINE

Tue., 6/14/60 (Continued)

8:30 a.m. Ans: Advised.

12:20 p.m. (Per HRH Operator) Be sure he is where I can reach him.

12:25 p.m. Ans: In my room.

2:20 p.m. (Per George) Get him on the line now.

INFO They talked.

9:20 p.m. (Per Johnny) Placate him; get him to sleep; HRH does not want him to leave LA tomorrow and HRH will finish his discussions with him then. Rummel can tentatively plan to go to SD day after tomorrow but do not make any appointments or anything with any of those people until after HRH finishes his discussions with him tomorrow

9:45 p.m. Ans: Advised.

Wed., 6/15/60

11:30 a.m. (Per George) Have them standing by immediately until they are called. HRH expects to call them right away.

11:50 a.m. Ans: Advised.

1:25 p.m. If they want to leave their hotel room this afternoon, tell them to feel free to do so. Tell them I have been working very hard all day and I finally got something to eat and apparently over-ate and it made me sleepy, so I'm going to lay down for two or three hours. I will want to call later on this afternoon, or if not this afternoon, this evening for certain, so would be very grateful if they can be in their hotel rooms this evening. This will not delay their departure for San Diego in the morning.

1:40 p.m. Ans: Advised; will be out, but will check with Cons.

Thu., 6/16/60

7:30 a.m. OK for him and Mr. Rourke to go to San Diego but don't reveal to anyone from Convair that they are down there. Please wait in their hotel rooms for a call from HRH and be sure not to talk to Haish until they hear from Mr. Hughes.

7:30 a.m. Ans: Advised. Leaving in a couple of hours.

12:15 p.m. Am here in SD now and ready to talk.

RUMMEL, BOB

HTC ROMAINE

Thu., 6/16/60 (Continued)

5:40 p.m. HRH advised by note - Johnny.

INFO Cancel call of 12:15 p.m. It is information only, and HRH has been advised.

9:25 p.m. I will not be able to call them for a while (Rourke & Rummel). If they feel they could go to sleep now or some time soon, then I would suggest they go right ahead and try to do so and I will call them tomorrow at any hour they would prefer to have me call. On the other hand, if they do not feel they could go to sleep for quite a while yet, in that event I wonder if they could tell you (Opns) what time they think is the earliest that they will be able to sleep or call Opns when they get sufficiently sleepy so that they think they can go to sleep. On the one hand, if they can go to sleep now, fine, I will call them in the morning; but if they think they cannot go to sleep for quite a while then please tell Opns what is the earliest they think they would be able to go to sleep, or if they have no way of knowing this, then why don't they just relax and look at the Tokyo riots on the TV so they can tell me about it, and call Opns whenever they feel that they are sufficiently sleepy that they could go to sleep. If I have not been able to call them by then, I will call in the morning. The reason it occurred to me that they might be able to go to sleep this early is that by New York time it is already 12:30, and I know they are basically adjusted to New York time even though they have been here a while.

9:40 p.m. Ans: Advised; will be up for a while; tell HRH since he is so terribly busy he can call any time during the night and not worry about upsetting our sleep too much.

Fri., 6/17/60

11:55 a.m. (Per GF) Make sure that he and Rourke are available for a call from HRH at any time; HRH expects to call them at any time, probably this afternoon. HRH wants them to make appointments for tonight or in the morning with the people that they want to meet with down there, at any time, but don't tell them anything until HRH talks to you.

12:15 p.m. Ans: Advised; will be in the room or in and about the hotel.

Sat., 6/18/60

2:00 p.m. The second training airplane (#30) is on a flight test now and depending upon the results of the test it will be ready for delivery. We expect to have the airplane ready late today for Monday morning 6/20 delivery.

6:00 p.m. Contrary to our early expectations the airplane is not ready due to a fault in the hydraulic system. It is not expected to be ready for delivery before Monday or Tuesday at the earliest.

[redacted], 203

[redacted]

Fri., 6/17/50

11:55 a.m. (Per CF) Make sure that he and Rourke are available for a call from HWH at any time; EPH expects to call them at any time, probably this afternoon. HWH wants them to make appointments for tonight or in the morning with the people that they want to meet with down there, at any time, but don't tell them anything until he talks to you.

12:15 p.m. Ans: Advised; will be in the rooms or in and about the hotel.

Sat., 6/18/50

2:00 p.m. The second training airplane (420) is on a flight test now and depending upon the results of the test it will be ready for delivery. We expect to have the airplane ready late today for Monday morning 6/20 delivery.

5:00 p.m. Contrary to our early expectations the airplane is not ready due to a fault in the hydraulic system. It is not expected to be ready for delivery before Monday or Tuesday at the earliest.

RUMMEL, EC3

HTC ROMAINE

461

Sun., 6/19/60

5:00 p.m. Very anxious to talk.

INFO Call of 6/18 2:00 p.m. cancelled per call of 6:00 p.m.

Wed., 6/22/60

4:30 p.m. #20 is satisfactory for training; certainly like to talk; need his guidance.

INFO Cancel call of 6-18 per later call.

8:40 p.m. Contrary to what I told you a little earlier the #20 airplane must have another 30" flight to check the compass but we are virtually assured that there will be no problem. However, while the flight is scheduled for 6/23 morning Convair has taken the position they will not make the flight, which would in effect be an acceptance flight until they are absolutely sure we are going to take the airplane.

Fri., 6/24/60

10:30 a.m. (Per BG) If he wants to go home for the weekend that would be alright.

10:35 a.m. Ans: Advised; I have a couple of my children here, so will remain here over the weekend, but Rourke may decide to go home for the weekend.

Tue., 6/28/60

INFO Cancel call of 6-22-60 at 4:30 pm per later call.

Thu., 7/ 6/60

7:00 p.m. Locate for a call tonight.

7:10 p.m. Ans: Available all evening. If I go out I leave a number.

RUSSEL, BOB

HIC ROMAINE

Sat., 7/ 9/60

4:15 p.m. Locate for the evening.

4:30 p.m. Ans: Advised; will keep checked in.

461

Thu., 7/14/60

4:30 p.m. Convair has written me a letter which advises that if #20 isn't delivered by Mo 7/18 they are going to put it back into production and complete it for passenger service which is about a three week job. Need to talk to HRH to get a decision.

Sun., 7/17/60

11:00 a.m. (Per BG) Call him and tell him or intimate at least that Mr. Hughes has said th wants nothing further done about #20 until he has had a chance to discuss it wit Mr. Maish.

6:00 p.m. Ans: Advised. Will contact the people concerned.

Mon., 7/18/60

INFO Call of 7/14 cancelled. BG discussed the matter this morning with Digges and Digges extended the deadline until tomorrow, 7/19. HRH must now call Digges regarding the matter.

Tue., 7/19/60

3:35 a.m. (Per George) Get him on the line for me.
(HRH Operator dialed number and they talked.)

INFO Omit all previous calls; they talked.

Mon., 8/22/60

8:00 a.m. Get him on the line for me and have Russell Rourke with him
(Rourke in San Diego. Rummel in NYC)

INFO They talked.

RUMMEL, BOB

461

Tue., 8/23/60

5:55 a.m. Get him on the line for me. (BHH Operator dialed his home and was informed that he had already left for the office; Optr rang his office. Rummel had been delayed on a tie-up on the New Haven RR and was expected any minute. HRH was told this and requested that word be left for Rummel to call HRH as soon as he arrived at the office. At 6:15 a.m. Rummel called BHH and they talked.)

8:30 a.m. Get him on the line for me.

DPO They talked.

8:45 a.m. Call Rummel and give him the following message. In addition to the program that I urged him to conduct with respect to United Airlines that I suggest in addition to that he have Rourke get to Seattle as quickly as possible and ask Rourke to conduct a comparable program with the 720 alone first, in Seattle. Conduct a program comparable to what we are planning to do with United Airlines if there is going to be any delay about pacing the 720 and the 120 along side of each other. 1 - Accelerate Rourke's arrival in Seattle. Make it as quickly as possible. 2 - Ask Rourke to immediately without a minute's delay try to carry out in Seattle a program with the 720 alone comparable to what I asked Rummel to do with United Airlines. This is to be done in Seattle first and to be followed by the original program in Seattle involving the pacing of the 720 along side of the 120. The reason for carrying out the program with the 720 alone first being that I think this could be done more quickly than to prevail upon Boeing to pace the 720 along side the 120. I think we could get Boeing to permit Rourke to fly in the 720 alone. Therefore, I suggest that Rourke carry that program out first to be followed by the program of pacing the 720 along side the 120.

:00 a.m. Ans: Advised.

Wed., 8/24/60

0 a.m. Get him on the line for me right away.
(BHH Operator dialed his office. Rummel had not yet arrived but was expected any minute. HRH advised of this and left word for Rummel to call as soon as he arrived.)

Called the BHH and asked for HPS at 6:55 am. They talked.

0 p.m. I have some of the information that HRH wanted me to get and advise him of. Tell him that Rourke's flight did not come off because the airplane simply was not ready. It was put off hour by hour all day and finally cancelled. It is set for 8 am 8/25. I have a little more information and would be glad to discuss it with you at your convenience.

200-8...

RUMMEL, BOB

HTC ROMAINE

Fri., 8/26/60

5:45 p.m. Find out where he is going to be this evening and be sure he can reach Rourke.

9:20 p.m. Advised and will be at home.

Tue., 8/30/60

6:00 a.m. Get him on the line for me.

6:05 a.m. At home and they talked.

Mon., 9/26/60

5:25 p.m. Tell HRH that Bob Murphy of Boeing called and advised in confidence that Eastern Airlines signed up today for 40 727's. That's the short to medium haul tri-motor for delivery starting late in 1963. Further, United have their Board meeting coming up on Thursday and Boeing is confident that United at that time will confirm its order.

Sat., 11/ 5/60

9:30 a.m. Please up-date my previous call and tell HRH that Eastern has confirmed their order and signed a contract. United has sent a letter of intent for 40 of these planes. American is seriously considering an order; as are several other airlines.

Tue., 11/22/60

12:30 p.m. I have received a letter from Convair setting December 9 as deadline for delivery of the 880's.

Fri., 12/ 2/60

9:30 a.m. Like to talk re letter from Convair of 11/23/60 on new delivery schedule.

Houston, Texas
June 25, 1959

TWA
EXHIBIT 23
9/1/66 W.B.

Pan American World Airways, Inc.
135 East 42nd Street
New York 17, New York

Dear Sirs:

The undersigned is a party to a contract (identified as "Agreement No. 9") dated March 19, 1955, with the Boeing Airplane Company (hereafter referred to as "Boeing") relating to the purchase of 18 Boeing 707-331 airplanes, a copy of which has been initialed by us and delivered to you. Copies of all exhibits, amendments, supplements and change orders thereto, which provide for a total purchase price of approximately $5,500,000 per aircraft, will be furnished to you promptly after your acceptance of the offer set forth below.

We hereby offer to transfer to you, subject to any necessary consent of Boeing, in the form of a novation or otherwise, (which consent both you and we will use our best efforts to secure) the orders under this contract relating to six airplanes. These six airplanes shall be the second, fifth, eighth, eleventh, fourteenth and seventeenth scheduled deliveries. At the time when Boeing signifies such consent you will assume all further obligations of the undersigned to Boeing in respect to these airplanes, including any notes given by the undersigned to Boeing in lieu of installment payments, and will reimburse the undersigned for all cash installment payments theretofore made in respect thereof, together with interest on such cash installment payments at the same rates as you would have capitalized under your standard accounting procedures if you had made each of such installment payments at the dates when these were made by the undersigned, and will further reimburse us for any interest or principal paid by us to Boeing on the notes referred to above. Subject to our obtaining any necessary consents of vendors, you will also take over our obligations for a proportionate share of the spare engines, spare parts and Buyer-Furnished Equipment that we have ordered for our 331 airplanes, and will reimburse us for all cash payments (together with interest thereon at the appropriate rate determined as set forth above) made by us with respect to the purchase price thereof.

HTC - HOUSTON

3396

49

By accepting this offer you will grant the undersigned an option, exercisable to and including September 30, 1959, to purchase from you your entire fleet of six Boeing 707-121 aircraft (or such of them as are in existence at the date of exercise of the option and at the dates of deliveries hereafter specified), related spare engines and such spare parts as are applicable only to those aircraft. The price shall be your original cost (including capitalized interest during manufacture) for the air frames, together with cost less depreciation at your established rates and appropriate adjustment for overhead in the case of engines and spare parts. The undersigned shall designate the place of delivery, but if this is other than Idlewild International Airport, will reimburse you for any costs entailed thereby. The undersigned will also be responsible for any sales taxes in connection with the delivery of the airplanes and spares. The airplanes will be accepted in good operable condition, and the undersigned will promptly remove all Pan American insignia therefrom. You will assign any warranties or other rights against the manufacturer which may be assignable and we will accept any obligations to the manufacturer required by your purchase contract with the manufacturer in connection with sale of such aircraft. The first 121 shall be delivered two weeks after your receipt of the first 331 as above provided, and each of the additional 121's shall be delivered two weeks after the date of the delivery of the corresponding 331. While it is intended that this letter, if accepted by you, shall constitute a binding agreement, this option will be embodied in a formal document to be promptly prepared and executed, which will provide that your obligation to consummate the sale of your 121 aircraft shall be subject to such approval or exemption by the Civil Aeronautics Board as may be required.

Unless Boeing's consent referred to above is obtained within thirty (30) days from the date of this offer, either party by written notice may terminate all its obligations hereunder.

-2-

3

49

If you desire to accept this offer, kindly so indicate in the place provided below.

Very truly yours,

HUGHES TOOL COMPANY

By s/ RAYMOND M. HOLLIDAY
Vice President

ACCEPTED: June 25, 1959.

PAN AMERICAN WORLD AIRWAYS, INC.

By s/ JUAN S. TRIPPE
PRESIDENT

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

TRANS WORLD AIRLINES, INC., Plaintiff, -against- HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY, Defendants.	:	61 Civ. 2324 Before the Hon. Herbert Brownell Special Master

AFFIDAVIT OF JOSEPH P. RIPLEY

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JOSEPH P. RIPLEY, being duly sworn, deposes and says:

1. I am a citizen and resident of New York, residing at 570 Park Avenue, New York City, and am Honorary Chairman of Drexel Harriman Ripley, Incorporated.

2. I collaborated with Edward J. Morehouse in the preparation of the report of Drexel Harriman Ripley, Incorporated dated May 2, 1966 and entitled "Re: The Financing of Trans World Airlines, Inc. During the 1955-1960 Period", consisting of three volumes, which have been marked TWA Exhibits 5A, 5B and 5C for identification.

3. Until July of 1965, the preparation of the report was under my personal direction, with Mr. Morehouse acting as my principal assistant. During this period I fully expected to be

available to testify orally on behalf of TWA, but in July of 1965 I suffered a serious heart attack, and the final completion of the report was under Mr. Morehouse's direction. I continued however to collaborate with and assist Mr. Morehouse and am in full agreement with every opinion expressed in the final report, as is evidenced by my signature.

4. When I learned of the objection to the use of my name set forth in paragraph 1 of the "Defendants' Objections to Testimony of Edward J. Morehouse" dated November 21, 1966, on the ground that I was not offered as a witness, I desired to make myself available as a witness in order to obviate that objection. I urgently requested Dr. Irving S. Wright, my heart specialist, to permit me to testify, explaining that oral cross-examination would be involved. He refused to give his consent, and advised me that such oral cross-examination would be hazardous. His letter to this effect dated November 29, 1966 is annexed hereto as Exhibit A.

5. I have asked counsel to submit this affidavit on my behalf in order to make clear to the parties and the Special Master the reasons why I have been unable to offer myself for oral cross-examination.

Joseph P. Ripley

Sworn to before me this
12th day of January, 1967.

Notary Public

KATHERINE H. W. SWIFT
Notary Public, State of New York
No. 31-9268000
Qualified in New York County
Commission Expires March 30, 1968

EXHIBIT A

IRVING S. WRIGHT, M.D.

ALLEN W. MEAD, M.D. DONALD J. CAMERON, M.D.

450 EAST 69TH STREET, NEW YORK 21, N. Y.

LEHIGH 5-6060

November 29, 1966

To Whom It May Concern:

This is to certify that Mr. Joseph P. Ripley has been under my medical care intermittently since 1952. During the past year and a half he has been under my care through a series of illnesses affecting his heart for which he has had to have the installation of a pacemaker in order to control the rhythm. He has also had episodes of cerebral ischemia. It is my opinion that it is hazardous for Mr. Ripley to be subjected to cross examination at this time or in the future.

Sincerely yours,

Irving S. Wright, M.D.

ISW/jl

EXHIBIT 42
9/9/67 W.B.

Re: TWA v. Hughes

CHANGES IN IMPROVEMENT IN GAIN OR LOSS FROM OPERATIONS FOR A CORRECTION OF CERTAIN NUMBERS OF CV 8[redacted] AIRCRAFT THAT TWA ACTUALLY HAD IN 1961, WHICH CHANGES THE ANNUAL AVERAGE NUMBER AVAILABLE FROM 14.6 TO 14.5 AIRCRAFT, AND AFFECTS SLIGHTLY THE ESTIMATES OF CHAPTERS IV AND V

The pages from our Report, Volu[redacted] I and IV, attached hereto have been marked to show calculation revisions in accordance with the above. The net change in the Improvement In Gain From Operations is as follows:

Chapter IV, 1960	$+0.1 Million
Chapter V, 1961	+0.4 Million

February 7, 1967

REVENUE INCREASE

These changes in passenger-miles and TWA's actual yields would have given the following passenger revenue increase for receipt of CV 880 aircraft on contract delivery dates.

Year	Passenger-Miles			Yield (c)	Net Increase of Passenger Revenue (d)
	Additional CV 880 (a)	Reduced Piston (a)	Net Increase (b)		
	(Millions)				(Millions)
1960	~~709~~ ~~702~~	~~291~~ ~~286~~	~~418~~ ~~416~~	5.645¢	~~23.6~~ ~~$23.5~~
1961	341	134	207	5.882¢	$12.2

(a) From previous pages 54, 55 and 62.
(b) Calculated.
(c) As explained on previous page 30.
(d) Calculated; b x c = d.

Using the 5 percent additional revenue for various kinds of cargo including mail, express, freight and excess (weight) baggage as mentioned on page 31, we calculate additional revenue for these types of cargo for contract dates receipt of CV 880 aircraft as follows:

Year	Additional Passenger Revenue	Additional Revenue from Various Types of Cargo, at 5%	Additional System Revenue
	(Millions)		
1960	~~23.6~~ ~~$23.5~~	$1.2	~~24.8~~ ~~$24.7~~
1961	$12.2	$0.6	$12.8

OPERATING EXPENSES

We estimated changes in Operating Expenses that would have been the result of TWA receiving its fleet of twenty CV 880 aircraft on the dates specified in the aircraft purchase contract, generally in accordance with the methods and considerations used for expense estimates of prior Chapters of this report. The details of these estimates are set forth in Exhibit H. The table below summarizes the estimates.

Estimated Changes in Operating Expenses That Would Have Occurred if TWA had Received its Fleet of Twenty CV 880 Aircraft on the Dates in the Purchase Contract

Operating Expense	1960	1961
	(Millions)	
Flying Operations	$ +4.4	$ +2.2
Maintenance	+3.5	+1.6
Aircraft Servicing	+1.1	+0.6
Passenger Service	+1.8	+0.9
Traffic Servicing	+1.4	+0.7
Servicing Administration	+0.1	+0.1
Promotion and Sales	+2.4	+1.3
General and Administrative	+0.6	+0.4
Depreciation and Amortization(A)	+5.4	+2.6
	$+20.7	$+10.4

(A) Furnished by Price Waterhouse & Co.

GAIN OR LOSS FROM OPERATIONS

We calculate the change in Gain or Loss from Operations that would have occurred if TWA had received the twenty CV 880 aircraft on the dates provided in the purchase contract, as follows:

Year	Additional Revenue(a)	Additional Expense(b)	Improvement In Gain or Loss from Operations(c)
	(Millions)		
1960	~~$24.7~~ 24.8	$20.7	~~$4.0~~ 4.1
1961	$12.8	$10.4	$2.4

(a) From page 63.
(b) From above.
(c) By subtraction.

Year	Additional Passenger Revenue(a)	Additional Revenue from Various Types of Cargo, at 5%(b)	Total Additional Revenue(c)
	(Millions)		
1960	$12.9	$0.6	$13.5
1961	24.1	1.2	25.3
1962	21.5	1.1	22.6
1963	18.2	0.9	19.1

(a) From previous page.
(b) By calculation.
(c) By addition.

OPERATING EXPENSES

We estimated changes in Operating Expenses that would have occurred if TWA had received a fleet of thirty CV 880 aircraft rather than twenty aircraft generally in accordance with the method and considerations used for expense estimates of previous Chapters of this report. The details of our estimates are set forth in Exhibit J. The table below summarizes these estimates.

Estimated Changes in Operating Expenses That Would Have Occurred if TWA had Received Thirty CV 880 Aircraft

Operating Expense	1960	1961	1962	1963
	(Millions)			
Flying Operations	$ +2.2	$ +4.2	$ +4.2	$ +3.1
Maintenance	+1.8	+3.6	+3.9	-
Aircraft Servicing	+0.6	+1.2	+1.3	+1.1
Passenger Service	+1.0	+1.9	+1.6	+1.4
Traffic Servicing	+0.8	+1.5	+1.5	+1.3
Servicing Administration	+0.1	+0.1	+0.1	+0.1
Promotion and Sales	+1.3	+2.6	+2.4	+2.2
General and Administrative	+0.3	+0.8	+0.6	+0.5
Depreciation and Amortization(A)	+2.7	+5.7	+5.4	+4.4
	$+10.8	$+21.6	$+21.0	$+14.1

(A) Furnished by Price Waterhouse & Co.

GAIN OR LOSS FROM OPERATIONS

We calculate the change in Gain or Loss from Operations that would have been the result of TWA receiving thirty rather than twenty CV 880 aircraft as follows:

Year	Additional Revenue(a)	Additional Expense(b)	Improvement In Gain or Loss from Operations(c)
	(M i l l i o n s)		
1960	$13.5	$10.8	$2.7
1961	~~25.5~~ 25.6	21.6 3	~~3.9~~ 4.0 3
1962	22.6	21.0	1.6
1963	19.1	14.1	5.0

(a) From table at top of page 71.
(b) From table at bottom of page 71.
(c) By subtraction.

AX-740

TWA Ex. 43, page -1-
(C.&C. Report-Revision of Page 51)

~~Ref~~ TWA

EXHIBIT 43
ID 2/9/67 W.B.

Re: TWA v. Hughes

CHANGES IN IMPROVEMENT IN GAIN OR LOSS FROM OPERATIONS FOR A REDUCTION OF TWO PLANE MONTHS IN THE NUMBER OF B-131 AIRCRAFT THAT WOULD HAVE BEEN AVAILABLE FOR COMMERCIAL SERVICE IN 1959 WITH EARLIER RECEIPT OF FIFTEEN B-131 AIRCRAFT, CHAPTER III

The pages from our Report, Volumes I and IV, attached hereto have been marked to show calculation revisions in accordance with the above. The net change in the Improvement In Gain From Operations is as follows:

Chapter III, 1959 $-0.5 Million

February 7, 1967

Year	Additional Revenue(a)	Additional Expense(b)	Improvement In Gain or Loss from Operations(c)
	(Millions)		
1959	~~$11.6~~ 10.8	~~$5.2~~ 4.4	~~$0.9~~ 6.4
1960	7.6	4.4	3.2

(a) From page 49.
(b) From page 50.
(c) By subtraction.

Re: TWA v. Hughes

JET AND TURBOPROP AIRCRAFT ON HAND FOR TWA AND PRINCIPAL COMPETITORS, 1958-1966

Date	United Air Lines(A)		American Airlines(A)		Trans World Airlines(B)		Pan American Airways(A)		BOAC(C)		Air France(C)
	Jets	Turbo-Props	Jets	Turbo-Props	Jets	Turbo-Props	Jets	Turbo-Props	Jets	Turbo-Props	Jets(D)
June 30, 1958	-	-	0	0	-	-	-	-	N.A.	N.A.	N.A.
Dec. 31, 1958	-	-	0	0	-	-	6	-	8	32	0
June 30, 1959	2	-	16	17	11	-	6	-	N.A.	N.A.	N.A.
Dec. 31, 1959	17	-	25	25	19	-	21	-	19	32	3
June 30, 1960	34	-	25	35	26	-	38	-	N.A.	N.A.	N.A.
Dec. 31, 1960	46	-	35	35	28	-	47	-	34	31	17
June 30, 1961	61	41	49	35	43	-	50	-	N.A.	N.A.	N.A.
Dec. 31, 1961	76	47	51	35	51	-	50	-	35	29	16
June 30, 1962	87	47	65	35	59	-	55	-	N.A.	N.A.	N.A.
Dec. 31, 1962	87	47	66	35	67	-	62	-	39	17	19
June 30, 1963	87	47	71	35	70	-	64	-	N.A.	N.A.	N.A.
Dec. 31, 1963	91	47	73	35	76	-	64	-	38	12	22
June 30, 1964	107	47	84	35	84	-	79	-	N.A.	N.A.	N.A.
Dec. 31, 1964	115	47	91	35	102	-	83	-	52	3	24
June 30, 1965	129	47	104	35	111	-	94	-	N.A.	N.A.	N.A.
Dec. 31, 1965	149	47	112	35	115	-	98	-	41	0	24
June 30, 1966	174	47	140	35	N.A.	-	119	-	N.A.	N.A.	N.A.

N.A. = Not Available.

Sources:

(A) CAB Form 41, Schedule B-7.

(B) Volume I, C&C Report on TWA, dated May 2, 1966 and Schedule B-43, CAB Form 41 for December 31, 1965.

(C) International Civil Aviation Organization (ICAO) Fleet-Personnel FP Nos. Digest of Statistics.

(D) Air France statistics are only for long-range jet aircraft and do not include the Air France fleet of Caravelle aircraft.

February 7, 1967

Coverdale & Colpitts
Consulting Engineers
120 Wall Street, New York

AX-742 TWA Ex. 46
(Jet and Turboprop Aircraft of TWA and Principle Competitors, 1958-6

TYPES OF JET AIRCRAFT USED BY TWA IN MARCH 1962 FOR DAILY WESTBOUND SERVICE

FOR THE PAIRS OF CITIES LISTED ON PAGE 68 BUT ARE NOT LISTED ON PAGE 58

OF THE C&C REPORT DATED MAY 2, 1966

Pairs of Cities	Miles Between Cities	B-131 Flight Segments	B-131 Plane-Miles	B-331 Flight Segments	B-331 Plane-Miles	B-720 Flight Segments	B-720 Plane-Miles	Total Jet Flight Segments	Total Jet Plane-Miles
Los Angeles-Oakland	339								
Albuquerque-Las Vegas	487								
Philadelphia-Pittsburgh	267								
New York-Dayton	553			1	553			1	553
New York-Denver	1,638								
Boston-Pittsburgh	495								
Columbus-Chicago	297								
Chicago-Oakland	1,835								
Detroit-St. Louis	433	2	866					2	866
St. Louis-Los Angeles	1,591	3	4,773					3	4,773
Indianapolis-St. Louis	230								
New York-Cleveland	424								
Cleveland-Indianapolis	261								

Source:
The flight segments are from the Official Airline Guide, March 1962.
The intercity mileages are from TWA Schedule 3-14P showing official CAB non-stop mileage between airports.
The other numbers listed above were calculated as indicated.

February 7, 1967

Coverdale & Colpitts
Consulting Engineers
120 Wall St., New York

TWA Ex. 47
(Boeing Aircraft Employed on Routes Formerly Served by B-720Bs)
AX-743

AX-744

TWA Ex. 50

(Price Waterhouse Report-Summary of Application of Assumptions)

TRANS WORLD AIRLINES, INC.

CONDENSED SUMMARY OF EFFECT OF APPLICATION OF ASSUMPTIONS

(Amounts in millions)

Source in PW & Co. Report Vol. I	Vol. II		
	D-1	Increase in gain from operations before depreciation, etc.	
		Per Coverdale & Colpitts	$122.4
		Add back -	
	J	(1) Portion of increase in maintenance expense attributable to increased overhaul provisions-all reversed at 12/31/63	5.8
II A		(2) Portion of increase in maintenance expense attributable to expensing of expendable parts in the "pipeline"	.9
		Increase in provisions for depreciation and obsolescence due to different timing and size of fleets and cost thereof:	
IV		Total	(51.8)
II A		(1) To eliminate increased depreciation of capitalized interest - all reversed at 12/31/63	2.9
II A		(2) Additional obsolescence provision relating to expendable parts in the "pipeline" - set up at 12/31/63	(.2)
		Increase in provision for amortization of training and integration costs:	
IV		Total	(3.7)
	J	Eliminate portion thereof attributable to increased overhaul provisions - all reversed at 12/31/63	.3
		Increase in proceeds relating to earlier sale of 103 piston aircraft:	
Pg 76		Per Speas	6.9
pp.85&88		Less increase in "bad debts"	(1.2)
		Increase in gain on other property retirements	
	B-1 & C	Increase in gross interest cost	
	A	Redemption premium on 3-3/4% bonds, less $.3 interest savings	
Pg 5		Net increase - Reconstructed TWA over Historical TWA	

TRANSCONTINENTAL & WESTERN AIR, INC.

REPORT OF THE PRESIDENT

Kansas City, Mo.
February 23, 1940.

To the Stockholders:

This report on the affairs of TWA covers its operations for 1939 and other matters of current interest to Stockholders.

FINANCIAL REVIEW

The balance sheet as of December 31, 1939, together with other financial statements for the year ended that date and the report of our independent public accountants, are included in this report following this letter.

Operating Results

Operations during 1939 resulted in a loss of $188,827.03 as compared with a loss of $749,355.31 in 1938. The loss here stated for 1938 is less by $23,907.72 than the figure shown in last year's report principally because of retroactive mail pay adjustments.

Passenger Revenues

Passenger revenues, including excess baggage charges, were $5,195,789.12 in 1939, an increase of 39% over the preceding year, and amounted to 66% of total revenue as compared with 60% in 1938. This increase in revenues is the result of:

—growing appreciation by the traveling public of the fact that IT PAYS TO FLY and of the fact that air travel offers superior service

—improved service particularly in an increased number of schedules. TWA flew 12,097,962 revenue plane miles in 1939 as compared with 9,872,865 miles in 1938

—considerably improved reliability of service, aided by favorable weather conditions in 1939

—greater public confidence in the use of air travel brought about by the splendid safety record of TWA and of the entire air transport industry and fostered by the sound policies of the Post Office Department and the Civil Aeronautics Authority.

Many of the factors which produced this increase are still operating and we look forward to a substantial increase in passenger revenues in 1940, which increase will further be augmented by four engined airplanes, which we expect to place in scheduled service early this summer.

Mail Revenues

Mail revenues were $2,403,724.77 in 1939, an increase of 8% over the preceding year, and amounted to 30% of our total revenues in 1939. In December, 1939, in accordance with

authorization by the Post Office Department and certificates granted by the Civil Aeronautics Authority, TWA began the carriage of mail over what is known as Route 44, between:

Chicago and New York
Chicago and Pittsburgh
Chicago and Kansas City

TWA has carried on a passenger and express service over this route for many years but, until December, was not authorized to transport mail. No rate has yet been set for mail compensation on this route but a hearing by the Civil Aeronautics Authority on this matter is to commence on February 29, 1940. We have as yet accrued no revenues on our books because of the carriage of mail over Route 44.

At year end, we had applications pending before the Civil Aeronautics Authority asking for an equitable adjustment of mail revenues on all routes. The anticipated establishment of proper mail rates and the fact that now TWA is for the first time authorized to carry mail over all of its present routes, together point toward more satisfactory financial results in the future.

Express Revenues

Revenue from the carriage of air express amounted to $222,647.49 in 1939, an increase of $62,810.23 or 39% over 1938. It is expected that this business will continue to grow.

Expenses

Total expenses, including provision for taxes, in 1939 amounted to $8,003,125.34, an increase of 16.3% over the previous year. However, revenue miles flown increased 22.5% over the same period. As a result of these two factors, expenses expressed in terms of per revenue mile decreased from 69.7c per mile in 1938 to 66.2c per mile in 1939.

The principal factors which caused the increase in expenses are:

(1) Gasoline and oil expense increased $162,255.04, which was caused by the increased miles flown.

(2) Pay of flight personnel increased $187,530.27 because of new wage agreements and an increased number of personnel necessary to fly the increased miles.

(3) Salaries and wages other than flight personnel increased $354,673.83. This increase was caused by new wage agreements and the larger number of employees required to handle the greater volume of business.

(4) Passenger Supplies and Expenses increased $61,620.56 because of the increased number of passengers carried.

(5) Advertising and publicity expense increased $131,426.02, resulting principally from our participation in two world's fairs, the necessary publicity in connection with new schedules and competitive conditions. It is gratifying to note that our advertising program has contributed to a substantial increase in revenues and to an improvement in our competitive position in the industry.

(6) Insurance costs of flying operations increased $88,039.63. Part of this increase was caused by the increased number of miles flown and the increased number of passengers carried. The principal increase, however, was occasioned by the increase in our own self-insurance reserve for damage to aircraft in flight. At the end of 1938 this reserve amounted to $22,270.95. At the end of 1939, this reserve amounted to $130,000.00, an increase of $107,729.05, which sum was charged as an expense in our books in 1939. This increase was partially offset by a savings of $38,359.37 in premiums paid for aircraft hull insurance.

Working Capital.

Current assets at the end of 1939 amounted to $2,553,835.12 as compared with total current liabilities of $1,006,336.66 leaving a net working capital of $1,547,498.46.

OPERATIONS

Marquette

In October, 1939, TWA entered into a contract for the purchase of Marquette Airlines. The consummation of this contract is dependent upon the approval of the Civil Aeronautics Authority, whose decision is expected early this year. This purchase will add an operation between St. Louis, Cincinnati, Dayton, Toledo and Detroit to the present coast-to-coast system of TWA. It is planned to synchronize schedules so that air travelers in Detroit, Toledo and Cincinnati can make easy and quick connections with other TWA schedules.

La Guardia Field

In December, 1939, our transcontinental route was extended from Newark to La Guardia Field, New York Municipal Airport. La Guardia Field affords the most modern of airport facilities and the added advantages of more rapid ground transportation from the center of New York City, together with added convenience to travelers living in Long Island and Westchester County.

New York Air Terminal

A consolidated ticket office and air terminal, to be occupied by all the airlines operating out of New York, is under construction in New York City and will be ready for occupancy in 1940. This terminal is located on 42nd Street in the heart of the Grand Central area. The improved service and facilities provided by this terminal should contribute to the popularity of air travel in New York City.

Albuquerque Airport

TWA began operations from a new airport at Albuquerque, New Mexico, in the fall of 1939. This airport is operated by the New Mexico Airport Corporation, a wholly owned subsidiary. The financial and operating figures for this subsidiary company have been consolidated with those of TWA in the financial statements included with this report. In connection with the development and improvement of that airport, TWA expended $125,508.38 as advance payment, which will cover the rental over a 15-year period beginning when the airport is

entirely completed. The Albuquerque Airport is one of the finest of its kind and is important to our western operations. The improved safety of operations, the attractiveness and sales value of an airport of this character and the revenues derived from the sale of gasoline and other services to other airlines and agencies using this field should make this investment profitable.

New Routes

The routes flown by TWA have many advantages both geographical and meteorological. In many respects, however, the economic characteristics of our routes are not similarly advantageous. The western portion of our route between Wichita and Los Angeles is sparsely populated. While our western route serves both Los Angeles and San Francisco, we cannot provide direct air transportation between those two points at the present time. In the eastern portion of our route, the majority of our business is highly competitive. Furthermore, a considerable number of the feeder routes are operated by competitors. To illustrate, travelers departing from Boston must travel over a competitive line to connect with TWA and little opportunity exists for our obtaining transcontinental business from feeder lines operated by a transcontinental competitor.

In addition, because of the geographical location of our route, the feeder lines in the majority of instances find that they can obtain a longer haul by routing passengers over competitive lines rather than over TWA.

To correct difficulties of this type and to round out our route structure, TWA has filed applications for route certificates with the Civil Aeronautics Authority to permit us to operate over new routes, which would give us direct access into many of the larger traffic centers. It is our intention to prosecute these applications vigorously and our hope that the Civil Aeronautics Authority will grant us the desired remedies in our route structure and thus tend to place us in a position of equality with our transcontinental competitors.

SAFETY

TWA carried 163,456 revenue passengers for a total of over 100,175,000 passenger miles with a perfect safety record in 1939. This excellent record, coupled with the splendid showing of the entire industry, has resulted in increasing public confidence and patronage.

NEW EQUIPMENT

Early in 1939, TWA purchased three additional Sky-Clubs (Douglas DC-3). This purchase was financed by loans from banks which were paid off before the end of the year.

In the fall of 1939, we revised our contract with the Boeing Airplane Company to cover the purchase of five new Boeing S-307B airplanes. These airplanes are equipped with four engines and are similar to the United States Army's "Flying Fortress", with improvements to assure better adaptability for passenger service. We expect delivery of these Boeing airplanes in the first half of 1940 and their scheduled operations by early summer. TWA was the first airline to operate Douglas transport planes and will be the first to operate modern four-engined equipment in the United States.

The Boeing airplanes will accommodate 33 passengers by day and 25 by night. We anticipate that the cost per seat mile of operating these airplanes will be approximately the same as our present equipment. The cost per plane mile will be increased in proportion to the capacity of the airplane. From the viewpoint of passenger service and comfort, the Boeings will be larger, more comfortable and faster. They will operate in smooth air at "over-weather" altitudes. The cabins will be super-charged to maintain low-level comforts at the higher altitudes. The safety characteristics of the Boeing Stratoliners will be a real advance in air transportation. The added security of four engined performance and increased range and the ability to fly at a high altitude above any terrain are characteristics which should re-establish TWA's leadership insofar as equipment is concerned.

The general terms of a program to provide the required funds for the purchase of the Boeing Stratoliners and other capital expenditures have been tentatively arranged. We expect to be able to announce the terms of this arrangement at an early date and to the Stockholders at their annual meeting on March 21, 1940, if, as is expected, the details of this program are concluded by then.

TWA INCENTIVE PLAN

The Stockholders at their annual meeting will be asked to approve an incentive plan, which has been proposed by the Board of Directors, whereby a portion of annual earnings, after 50c a share on the common stock has been earned, will be made available as a bonus to officers of the company. This plan, which is described in the proxy and proxy statements for the annual meeting, was initiated and was recommended to the Stockholders by those Directors who are not participants in the plan, for the purpose of attracting and retaining the high degree of executive skill and competence required by this business. The capital invested and the earnings record of the air transport industry have not made possible the payment of salaries commensurate with the responsibilities involved. Other major industries and other airlines have attempted to meet this problem by various bonus and stock option plans. This plan is recommended by Directors who are not officers as being the plan best suited to the interests of the Stockholders of TWA.

ORGANIZATION CHANGES

In 1939, the number of Directors was reduced from 19 to 12, by amendment of the By-Laws. Members of the present Board who were not Directors at this time last year are Mr. Powel Crosley, Jr., President of The Crosley Corporation, Cincinnati, Ohio, and Mr. E. Lee Talman, Vice President and Treasurer of TWA. Mr. V. P. Conroy has been elected Vice President in Charge of Traffic and Sales, and Mr. J. C. Franklin Secretary, of TWA.

ANNUAL MEETING OF STOCKHOLDERS

The annual meeting of Stockholders will be held at 100 West 10th Street, Wilmington, Delaware at 12 o'clock Noon, on Thursday, March 21, 1940. Notice of this meeting, the required proxy statement and the proxy therefor are being mailed to Stockholders of record as of the close of business, February 15, 1940.

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estern Air, Inc. and Subsidiary
ted in Delaware)

E SHEET, DECEMBER 31, 1939

LIABILITIES

Current Liabilities:		
Accounts payable:		
Trade	$ 425,937.13	
Traffic	45,927.91	
Sundry	4,523.97	
Deposits received under air travel plans	382,075.00	
Accrued accounts:		
Salaries and wages	47,931.70	
Liability insurance	32,641.61	
Taxes (other than income)	62,108.46	
Expenses	5,190.88	
Total current liabilities		$1,00
Collections Under Employees' Stock Purchase Plan—Contra		8
Reserve for Aircraft Insurance—Contra		13
Deferred Credits:		
Unearned transportation	$ 77,129.15	
Other	750.00	
Total deferred credits		
Capital Stock and Surplus:		
Capital stock—authorized 1,000,000 shares, par value $5.00 per share; (50,000 shares reserved for employees, of which 39,820 shares are now subject to option to employees)—outstanding 830,846 shares	$4,154,230.00	
Capital surplus—paid in	2,684,562.23	
Total	$6,838,792.23	
Less deficit	1,494,181.59	
Net capital stock and surplus		5,3
Total		$6

(3) The Company has a contractual liability at December 31, 1939 in the amount of $385,000 in connection with purchase of Marquette Airlines, Inc., application for approval of which is pending before the Civil Aeronautics Authority.

(4) The amounts shown in the above statement include, as to New Mexico Airport Corporation, a wholly owned subsidiary, total assets of $18,644.06 and liabilities of $8,681.59.

TWA Ex. 72, page 10
(TWA Annual Report-1939)

Transcontinental and Western Air, Inc. and Subsidiary

STATEMENT OF CONSOLIDATED LOSS

FOR THE YEAR ENDED DECEMBER 31, 1939

Operating Revenue:		
Mail		$2,403,724.77
Transportation:		
Passenger	$5,143,966.97	
Excess baggage	51,822.15	
Express and freight	222,647.49	
Special flights	38,428.44	
Total transportation		5,456,865.05
Other—net		46,334.01
Total operating revenue		$7,906,923.83
Operating Expenses:		
Direct flying (including maintenance $872,597.52)	$3,513,283.77	
Indirect flying (including maintenance $383,700.38)	1,738,903.34	
Depreciation	935,651.16	
Traffic and advertising	1,179,396.41	
General and administrative	496,239.93	
Total operating expenses		7,863,474.61
Profit From Operations Before Taxes Assignable to Operations		$ 43,449.22
Taxes Assignable to Operations (other than Federal income)		139,650.73
Loss From Operations		$ 96,201.51
Other Income Charges:		
Amortization of airway lighting and communication equipment sold to United States Government and improvements to leased property abandoned	$ 26,167.39	
Interest	12,098.91	
Proportionate share (one-half) of estimated loss of Pittsburgh-Butler Airport, Inc., for the year 1939	6,000.00	
Provision for loss on deposit made in connection with purchase of airline	15,000.00	
Net loss on property, plant, and equipment sold or otherwise disposed of	42,589.31	
Miscellaneous	488.88	
Total other income charges		102,344.49
Gross Loss		$ 198,546.00
Deduct Income Credits:		
Cash discounts on purchases	$ 7,441.33	
Interest	1,348.40	
Profit on sale of materials and supplies	527.69	
Miscellaneous	401.55	
Total income credits		9,718.97
Net Loss for the Year		$ 188,827.03

REPORT OF THE PRESIDENT

To the Stockholders:

This report describes the operations of TWA in 1940 and other matters of current interest to the Stockholders.

FINANCIAL REVIEW

Financial statements and the certificate of the Company's auditors, Haskins & Sells, are included in this report.

Operating Results

A loss of $232,454.89 was incurred in 1940. Our Annual Report for 1939, issued in February, 1940, showed a loss of $188,827.03. However, in September of 1940, additional mail revenue was awarded TWA, a substantial part of which was applicable to 1939 and the remainder to 1940. When the results of 1939 are adjusted to reflect that award, that year shows a profit of $107,133.28.

Throughout this report, that additional revenue in both years and the provision for federal income taxes thereon are taken into account in the period in which the revenue was earned.

Operating Revenues

Operating revenues for 1940 as compared with those of 1939 were:

	Amount		Increase 1940 over 1939		Percent of Total	
	1940	1939	Amount	Percent	1940	1939
Passenger Revenue (including excess baggage)	$ 7,979,294.99	$5,195,789.12	$2,783,505.87	53.6%	68.9%	62.5%
Mail Revenue	3,158,491.81	2,805,064.07	353,427.74	12.6%	27.3%	33.8%
Express Revenue	299,751.93	222,647.49	77,104.44	34.6%	2.6%	2.7%
Special Flights and Other Revenue	134,682.34	84,762.45	49,919.89	58.9%	1.2%	1.0%
TOTAL	$11,572,221.07	$8,308,263.13	$3,263,957.94	39.3%	100.0%	100.0%

Passenger Revenues

TWA established a new record in the volume of its passenger business:

	1940	1939	Increase Amount	Increase Percent
Revenue Passengers (Scheduled Service)	256,086	162,779	93,307	57.3%
Revenue Passenger Miles (Scheduled Service)	155,096,235	99,651,484	55,444,751	55.6%
Load Factor	57.7%	49.7%	8.0%	—

EXPENSES

Operating Expenses in 1940 as compared with those in 1939 were:

	1940	1939	Increase 1940 Over 1939 Amount	Percent
FLYING COSTS (Excluding Depreciation)				
Direct Flying Operations	$ 4,031,283.94	$2,640,686.25	$1,390,597.69	52.7%
Direct Flying Maintenance	1,189,356.67	872,597.52	316,759.15	36.3%
Total	$ 5,220,640.61	$3,513,283.77	$1,707,356.84	48.6%
Indirect Flying Operations	$ 1,977,582.83	$1,355,202.96	$ 622,379.87	45.9%
Indirect Flying Maintenance	540,255.59	383,700.38	156,555.21	40.8%
Total	$ 2,517,838.42	$1,738,903.34	$ 778,935.08	44.8%
TOTAL FLYING COSTS	$ 7,738,479.03	$5,252,187.11	$2,486,291.92	47.3%
DEPRECIATION	$ 1,115,458.00	$ 935,651.16	$ 179,806.84	19.2%
TRAFFIC AND ADVERTISING	1,806,153.58	1,179,396.41	626,757.17	53.1%
GENERAL AND ADMINISTRATIVE	849,524.81	496,239.93	353,284.88	71.2%
TOTAL OPERATING EXPENSES	$11,509,615.42	$7,863,474.61	$3,646,140.81	46.4%

The principal reason for the increase in expense was the fact that 1940 was a year of expansion and improvement for TWA.

The most important equipment development in the air transport industry was the introduction of the Stratoliners by TWA. Before beginning service with the Stratoliners, a great amount of preparatory expense was necessary. Flight, maintenance, and ground crews had to be trained. New operating, meteorological, maintenance, and reservation procedures had to be developed. Non-revenue plane miles increased by 380,934 miles, or 111%, in 1940 over 1939, principally as a result of this work.

Another reason for the increase in expense was our operation under lease of the Marquette route between St. Louis and Detroit via Cincinnati, Dayton and Toledo. The present status of the proceedings for the purchase of that route is separately described in this report. However, it is appropriate to note here: first, that we have charged to expense $36,666.66 in 1940 to provide a reserve for possible loss on advances made on the purchase of this route in the event the purchase is not finally completed; secondly, that the beginning of operations of this route, which is not yet authorized to transport mail, was naturally unprofitable. Operating losses directly chargeable to this route in 1940 were $72,636.35. If our negotiations for the purchase of this company are favorably concluded, we believe that its cost and these losses, necessary during the introductory period, will be amply justified by the earnings of the route and by its importance as a feeder to our transcontinental system.

The improved standard of passenger service in 1940 increased expenses, principally because of improved food service and added service features, both aloft and on the ground. Additional radio, telegraph, and telephone communications, necessary to handle passenger reservations properly, also added to expenses.

A large increase in expenses, reflected principally in general and administrative expenses, resulted from the preparation and conduct of hearings before the Civil Aeronautics Board, primarily in connection with route matters.

Advertising and publicity expenses also increased $237,892.74 in 1940, reaching a total of $827,043.70. Part of this increase was incurred in connection with the introduction of the Stratoliners. Principally, it was spent to improve TWA's position—not only nationally but in the vital

New York-Chicago market. Before the passage of the Civil Acronautics Act, TWA was under a definite handicap because of a legal restriction on the number of schedules it could operate between New York and Chicago. As a result our competitors between those points gained a dominant position. Dominance in the New York-Chicago market is an important influence in the relative standing of carriers on transcontinental and other competitive routes. The considerable sum we have spent in advertising and improving our passenger service has substantially strengthened our position during 1940 and should continue to do so.

Federal Income Taxes

Certain items charged as expense on our books are not deductible for tax purposes. One principal item is the amount charged by the Company, $174,747.03 net in 1940, for self-insurance to cover damage to aircraft in flight. The disallowance of this and other expense items in determining net taxable income and the adjustment of our mail revenues have resulted in our having taxable income in both 1939 and 1940. We have estimated our Federal and State Income Tax liability at $16,641.33 for 1940 and at $96,618.00 for 1939, a total of $113,259.33.

Financial Position

Working capital position at the close of 1940 is shown in the following tabulation:

Current Assets	$3,916,454.15
Current Liabilities	2,697,951.89
Net Working Capital	$1,218,502.26

Inventory of materials and supplies increased by $522,177.01, from $365,535.15 at the end of 1939 to $887,712.16 at the end of 1940. The chief reasons for this increase were:

—Plane and engine parts for the Stratoliners.
—Protective buying against price increases and against delays in securing replacement parts.
—Engine mounts purchased in connection with new type engines for the DC-3 fleet.

Effective November 1, 1940, TWA entered into an agreement with a group of seven banks for a four-year unsecured revolving credit to provide for the purchase of new equipment and for other capital expenditures and corporate purposes.

The banks agreed, upon the terms, conditions and limitations set forth in the agreement, to extend a revolving credit to TWA in the following amounts and for the following periods:

Beginning	Ending	Amount
November 1, 1940	December 31, 1941	$2,500,000
January 1, 1942	December 31, 1942	2,250,000
January 1, 1943	December 31, 1943	1,750,000
January 1, 1944	December 31, 1944	1,000,000

TWA is permitted to borrow varying amounts within these limits, as its actual money requirements develop. All notes issued under this agreement shall bear interest at the rate of 2¼% per annum.

The participating banks are:

The Commercial National Bank and Trust Company of New York,
The New York Trust Company, New York,
The First National Bank of Kansas City,
Commerce Trust Company, Kansas City,
Harris Trust and Savings Bank, Chicago,
National Bank of Commerce, Houston,
The Farmers and Merchants National Bank of Los Angeles.

Capital Stock

Early in 1940, the Company sold at $14.00 a share 119,154 shares of its unissued capital stock to the Hughes Tool Company of Houston, Texas. Following this sale, TWA had outstanding 950,000 shares of capital stock. Of the total 1,000,000 shares authorized by the Certificate of Incorporation, 50,000 shares remain unissued but are reserved under option for sale to employees under the Employees' Stock Purchase Plan. During the year, the capital stock of the Company was listed on both the Los Angeles and San Francisco Stock Exchanges.

OPERATIONS

Operating Standards and Performance Factor

In the fall of 1940, TWA established new operating standards by which our requirements as to minimum flying weather were increased on a system-wide basis. Now, higher ceilings, greater visibility, and better en route weather are required by TWA than ever before since the development of instrument flying. We feel that this conservative policy will build enduring public confidence.

In 1940, we operated only 93.6% of our scheduled miles as compared to 96.7% in 1939. A part of this reduction in the performance factor is the result of higher operating standards and a substantial part is the result of unusually poor flying conditions in November and December of 1940. In this connection it is important to remember that our expenses are related to miles scheduled, not merely to miles operated. Hence, a reduction of 3.1 points in our performance factor not only adversely affected revenues for the year, but brought about an increase in expense because of the cost of providing ground transportation and related service for passengers whose flights had been delayed or cancelled.

Equipment Contracts

TWA in the late spring of 1940 entered into a contract with Douglas Aircraft Company for the purchase of 15 DC-3 airplanes. These new DC-3's are of an improved type in that they accommodate 24 passengers and are powered with 1200 horse power engines, whereas DC-3 equipment formerly accommodated only 21 passengers and was powered with 1100 horse power engines. We were originally promised delivery of 9 of these planes in 1940 and 6 in 1941. TWA received delivery in 1940 of 2 of these planes before the Priorities Board placed restrictions upon the delivery of equipment to all commercial airlines for national defense reasons. We have received releases to date on only 7 of the remaining 13 undelivered planes. At the end of January, 1941, 2 of the 7 planes released by the Board had been delivered, making a total delivery of 4 of the new DC-3's of the original order of 15. We are hopeful that delivery of the remaining 5 planes of those allotted to us by the Board will be made within the next few months and that, before the year is out, we may be able to secure delivery of all the planes ordered.

In August, 1940, TWA entered into an agreement with the Wright Aeronautical Corporation to purchase 111 aircraft engines (1200 horse power), trading-in to Wright, against the total purchase price thereof, the 66 engines (1100 horse power) then used on our DC-3 aircraft. Of the 111 new engines, 45 were to be used for the 15 new DC-3 planes described in the preceding paragraph and 66 were for replacement purposes. The conversion program of the 66 engines should be completed in the first half of 1941. Delivery of the engines for new aircraft is expected at the same time that we receive the planes.

These new engines will produce greater safety through improved single-engine performance of the airplanes and will bring about improved reliability of service, lower maintenance cost, and fuel economy. The installation of these new engines, which cost $10,050.00 each, also requires new engine mounts. Sums due the manufacturers of these engines and engine mounts were the principal reason for the increase in the accounts payable of the company at the end of the year.

At the close of 1940, TWA had contracted to sell for $37,500.00 each, certain of the 14-passenger DC-2 aircraft of which 13 were then operated. To date, 2 of these planes have been sold and delivered and the delivery of 2 additional planes is expected soon. Additional DC-2's may be sold providing we can secure the necessary 24-passenger DC-3's for replacement.

Airports

Important changes occurred in 1940 with respect to certain airports in the cities served by TWA.

All scheduled operations by commercial airlines into Newark, New Jersey, were halted on May 30, 1940, in accordance with an order of the Civil Aeronautics Authority, pending certain repairs and improvements. It is expected that this airport will be reopened in the near future.

At Los Angeles, definite plans are being developed for the transfer of the terminal of all air carriers from Burbank to the new municipal airport. The new municipal airport as planned will be comparable in its facilities to the finest airports in the country.

At Albuquerque, there is being established a major air base of the United States Army Air Corps at the airport which was developed jointly by TWA, federal agencies, and the City of Albuquerque. Similarly, the landing field presently used at Winslow has been found suitable for development in connection with the national defense. TWA and the City of Winslow are cooperating fully with the federal authorities in the development of this project, which should ultimately lead to enlargement and improvement of the airport.

New York Airlines Terminal

In January, 1941, the New York Airlines Terminal opened. This modern six-story building located on 42nd Street was constructed at an approximate cost of $5,000,000 by the Mutual Life Insurance Company of New York. This building is leased to the Airlines Terminal Corporation, which is a company jointly owned by TWA and other airlines serving New York City. The location, appearance and facilities of this terminal should increase our New York business. On the main floor, completely encircling the room, are the ticket offices of TWA and other airlines. The upper floors are devoted to reservation and traffic offices. Our regional office has been moved to this new location. We urge that you take the first opportunity of visiting the New York Airlines Terminal.

Interventions

Not only is it necessary to secure additional routes for TWA but it is equally necessary to prevent the encroachment of other air carriers into the territory properly served by TWA. Interventions in public hearings on new route applications of other air carriers before the Civil Aeronautics Board have been and will be made in those cases where our routes would be adversely affected.

New Route Applications

Hearings before the Civil Aeronautics Board have been held with respect to our applications for the following routes:

—Kansas City to Denver via Topeka and Salina.
—Amarillo to Houston and Dallas.
—Additional stops on Route 2 at Reading and Atlantic City.

No decisions have as yet been rendered with respect to these applications.

Among the more important route applications by TWA for which hearings have not yet been held are:

—New York to Boston, via New Haven and Worcester.
—Pittsburgh to Boston via Williamsport, Binghamton, Albany and Springfield.
—Dayton to Washington.
—St. Louis to Washington via Evansville and Louisville.
—Los Angeles to San Francisco.
—Detroit to Washington via Toledo, Columbus and Wheeling.
—Detroit to Indianapolis via Toledo and Ft. Wayne.
—Winslow to Los Angeles via Phoenix, El Centro and San Diego.

ORGANIZATION

Employees

The Company has grown from 1,553 employees at the end of 1939 to 2,806 employees at the end of 1940, an increase of 1,253, which means that at least 45% of our employees have been employed less than one year. This total increase was divided by departments as follows: 130 were added to the General Administrative, Financial and Accounting Staff; 200 in the Traffic Department; 233 as Flying Personnel; and 690 in ground Operations and Maintenance.

The task of training these additional employees and making their services most effective to TWA has been a gigantic one and is not yet concluded.

TWA has entered into salary and wage agreements with the following: Air Line Pilots Association, Skyline Association of Radio Operators, Airline Mechanics Association, and the Office Personnel Association. Negotiations relative to the basis of compensation of pilots flying 4-engine equipment are presently being conducted. The management is cognizant of the right of employee groups to bargain collectively and will continue to negotiate agreements that are fair and within the limits of sound business.

TRANSCONTINENTAL & WESTERN AIR, INC.

FINANCIAL POSITION

Working capital at the close of 1941 and 1940 was:

	1941	1940
Current Assets	$4,134,627.11	$3,916,454.15
Current Liabilities	2,219,340.74	2,697,951.89
Net Working Capital	$1,915,286.37	$1,218,502.26

Early in 1941 TWA borrowed $2,000,000 under the Bank Credit Agreement described in the 1940 Annual Report. Later in the year a net total of $1,000,000 was repaid, leaving a balance of $1,000,000 represented by notes due December 31, 1944. The purpose of this borrowing was to finance the purchase of new equipment and to meet short term credit requirements.

EQUIPMENT

STRATOLINERS

At the request of the War Department, TWA has transferred its fleet of five Boeing Stratoliners to the United States Government. This transfer will be reflected in our 1942 financial statements.

In announcing the transfer of the Stratoliners, the War Department issued the following statement: "In appreciation of TWA's patriotic action, the War Department has authorized as replacement equal seating capacity on aircraft of a type similar to those now being operated by TWA and other domestic airliners, with confidence that the traveling public will appreciate that Army requirements must be given priority of this long range equipment".

TWA is proud to have made this contribution to the nation's war effort, but the fact must be faced that the surrender of the Stratoliners will result in a substantial loss in revenues.

It has been the policy of your management to report fully and frankly all details of important transactions affecting the Company. At the moment, because of the secrecy which must surround all military matters, we are not permitted to report further details concerning this transaction.

CONSTELLATIONS

TWA had expected to place in transport service in 1942 a new fleet of high-speed, 64-passenger airplanes, known as the Constellations, to be manufactured by the Lockheed Aircraft Corporation. The Constellation is a new type transport of revolutionary performance and design. Delivery of these planes has been delayed because of the war, and we anticipate that it may be some time before they will be available for use in domestic transport operations.

DOUGLAS EQUIPMENT

TWA in the summer of 1940 entered into a contract with Douglas Aircraft Company, Inc., for the purchase of fifteen DC-3 airplanes. Because of the allocation of all DC-3 production to the military services, the Douglas Aircraft Company discontinued

delivery under this contract after TWA had received only nine of these aircraft. Late in 1941, in making an allocation of DC-3 airplanes to the various airlines, the Government allocated eleven DC-3's to TWA. We expect to secure delivery of all eleven planes in the late summer and early fall of 1942.

Early in 1941 the entire Douglas DC-3 fleet was equipped with new and more powerful Wright Cyclone engines.

NEW ROUTES

Marquette Airlines

The purchase of Marquette Airlines and the transfer of its certificate of public convenience and necessity to TWA, concerning which the Stockholders have previously been informed in detail, was concluded late in 1941. This certificate authorizes the carriage of passengers and express between St. Louis, Cincinnati, Dayton, Toledo and Detroit.

New Route Applications

The Company began service to Reading, Pennsylvania, on August 1 and to South Bend, Indiana, on December 1, 1941. Our application to stop at Atlantic City, New Jersey, was denied.

On April 24, 1941, the Civil Aeronautics Board announced that all new route certificates would contain a condition to the effect that such certificates would not become effective for operations until the Board notified the holders thereof that the national defense no longer required a delay in inauguration of services.

On December 12, 1941, following our entry into the war, the Civil Aeronautics Board announced that further action on all pending route applications would be indefinitely postponed, but that "the Board may assign hearings on certain applications, or direct that cases now pending at some intermediate step be carried to decision, if the Board finds that special considerations of national interest may require the early inauguration of the services involved".

In common with other airlines, TWA has a substantial investment in time and money in applications before the Civil Aeronautics Board. It would be to the advantage of all concerned if decisions could be rendered promptly on those applications where the hearing has been completed, even though the actual operation of the routes granted may necessarily be deferred until a later date.

TWA applications upon which hearings before the Civil Aeronautics Board have been held, but for which no decision has been rendered are:

—Amendment to Route 37 to permit a stop at Los Angeles and to authorize air mail service for Oakland over this route.

—Pittsburgh to Boston via intermediate points.

—St. Louis to Washington via intermediate points.

—Dayton to Washington via intermediate points.

—Kansas City to Denver via intermediate points.

—Amarillo to Houston and Dallas via intermediate points.

—Amendment to Routes 2 and 38 to permit a stop at Grand Canyon (Arizona State Airport).

—Amendment to Route 2 to permit a stop at Phoenix.

TRANSCONTINENTAL & WESTERN AIR, INC.

REPORT OF THE PRESIDENT

To the Stockholders:

The year 1942 was one of accomplishment for TWA, not merely when measured by conventional standards, but when measured by the only proper yardstick—contribution to the war effort of the nation. Operating results and the financial position of the Company are set forth later in this report.

WAR ACTIVITIES

Military Contract Services

TWA was able to pioneer in the undertaking of war projects for the Army Air Forces as a result of its operation of the Stratoliners in scheduled service beginning in July 1940. The use of these aircraft not only permitted TWA to improve transcontinental service before the war, but gave the Company a detailed knowledge of problems encountered in the operation of 4-engined long-range aircraft. Further, the organization necessary for the commercial operation of the Stratoliners made available a large number of technically trained personnel.

The first major war project undertaken by TWA for the Army Air Forces was the operation of the Stratoliners in overseas air transport services. The scope of this overseas service has since greatly increased. Planes operated by TWA now speed men and supplies to many of the fighting fronts of the world.

The value of TWA's experience is evidenced further by the fact that, prior to the outbreak of war, TWA organized and operated a 4-engine transition school for the Army, which set the pattern for the programs now conducted for the training of pilots, mechanics, navigators, meteorologists, radio operators and other flight specialists.

All of the Company's operating experience has been utilized in war projects. Many of the problems met in expanding the nation's wartime aviation program were problems which already had been encountered in pre-war scheduled operations. For example, TWA always has had to adapt its aircraft for seasonal operation and for particular types of service. Consequently, the Company has been able to do an effective job at its modification centers where combat aircraft are equipped for operation under the service conditions to which they have been assigned.

Equipment

The Constellation, conceived by Howard Hughes and by the President of the Company, completed its first test flight in January 1943. This airplane was built by Lockheed Aircraft Corporation for TWA's use in transcontinental and overocean service. As originally designed, the Constellation was a 4-engined aircraft carrying 57 passengers and a crew of 7

with a cruising speed making possible non-stop transcontinental flights in less than nine hours. Although the precise specifications of the Constellation are now secret, its value for military purposes is self-evident. Consequently, arrangements have been entered into whereby these aircraft will be sold to the Government at cost, subject to an option of TWA to repurchase them when they are no longer required for military service.

At the beginning of 1942, TWA had on order certain Douglas DC-3 aircraft and expected to receive additional DC-3 aircraft to replace the Stratoliners. Early in 1942, the Government decided that allocation and delivery of additional commercial aircraft should not then be made, and further decided to requisition aircraft from the domestic airlines. As a result, TWA's fleet was reduced to slightly more than half of its former size.

SCHEDULED TRANSPORT SERVICE

Because of the reduced fleet of aircraft available for commercial operations, TWA found it difficult during the latter part of the year to meet all demands upon it for service. Schedules operated with the smaller fleet were adjusted and increased utilization was obtained. Planes are now operated more hours per day than ever before in the history of the Company.

Not only have planes been operated more intensively, but payload utilization has been virtually at a maximum. Many flights were operated with capacity loads, and during the last quarter of the year an average utilization of approximately 90% of available payload was attained.

The demand for air transportation has been so great that it became necessary to establish a system of priorities for air passengers and air cargo. Under this system it is sometimes necessary to displace passengers in order that the airline may carry the essential war traffic. Despite problems arising from priorities and wartime operation, TWA has continued its high standards of passenger service.

Safety of operation has continued to be one of TWA's primary considerations. TWA has maintained its high safety standards through technological improvement, rigid policing of safety standards and an increase in man hours of maintenance per plane.

ORGANIZATION

During the year, the number of employees almost doubled. A total of 832 TWA employees have entered the Armed Forces. Employees individually have made further contributions to the war effort in a variety of ways, including the preparation of training manuals for the Army and technical assistance on special projects.

Executive personnel who have been granted leave of absence in order to accept posts of responsibility with the Army or Navy include: Mr. T. B. Wilson, Chairman of the

Board, now Colonel in the United States Army Air Forces and Chief of Transportation for General MacArthur in the Southwest Pacific; Mr. D. W. Tomlinson, formerly Vice President of Engineering, now Captain in the United States Navy and Chief of Staff for the Naval Air Primary Training Command; Mr. L. G. Fritz, formerly Vice President of Operations, now Colonel in charge of operations for the Air Transport Command under Major General Harold Lee George; and Mr. Paul E. Richter, formerly Executive Vice President, now Commander in the United States Navy and Operations Officer for the Naval Air Transport Service.

FINANCIAL REVIEW

The net profit for the year was $2,176,035.35 after taxes. In addition, $1,044,380.44 net after taxes was realized from the sales of planes, engines and accessory equipment, making a total increase in earned surplus for the year of $3,220,415.79. Fees earned under Government contracts amounted to only a small portion of the net profit.

Operating Revenues

Total operating revenues for 1942 were $16,044,632.55, an increase of $1,980,372.92, or 14% over 1941. Passenger traffic in 1942 contributed 67% of TWA's operating revenues; mail 22%; express 8%; and miscellaneous sources 3%.

Express Revenues

Almost half of the increase in total operating revenues was attributable to a gain in express revenues. Express pound miles increased 163% over 1941.

Mail Revenues

Mail revenues during the year were $3,628,447.61, an increase of $579,017.1 over 1941. The Civil Aeronautics Board on February 6, 1943, issued an order which established a rate of mail compensation for all routes on the TWA system of .3 of a mill per pound mile, effective January 1, 1943. During 1942 the average rate per pound mile was approximately .47 of a mill.

Passenger Revenues

Passenger revenues of $10,707,040.38 represent an increase of $426,446.01 despite a reduction in size of fleet by almost one-half. This increase in passenger revenues is due primarily to the increased average number of passengers per mile resulting from extraordinary traffic demands, but is due partly to the discontinuance on July 1, 1942, of the 10% round trip discounts and 15% Air Travel Plan discounts.

TRANSCONTINENTAL & WESTERN AIR, INC.

Working Capital and Equipment Replacement Fund

Proceeds from the sale of aircraft, spare engines, accessories and parts during the years 1942 and 1943 have been set apart and are being held for the purchase of new equipment when available.

Working capital and Equipment Replacement Fund at the close of each of the past three years were:

	1943	1942	1941
Current Assets	$9,972,133.00	$8,282,131.57	$4,134,627.11
Current Liabilities	5,384,348.21	4,542,691.89	2,219,340.74
Net Working Capital	$4,587,784.79	$3,739,439.68	$1,915,286.37
Equipment Replacement Fund	3,172,525.94	2,309,258.49	———
Total	$7,760,310.73	$6,048,698.17	$1,915,286.37

Contract operations for the War Department have continued to require a substantial amount of working capital. Accounts receivable due from the U. S. Government under war contracts amounted to $1,938,579.54 on December 31, 1943. Total accounts receivable due from the U. S. Government on that date were $3,591,790.70.

Incentive Plan

The Incentive Compensation Committee has authorized a maximum credit of $250,000 to the Incentive Plan Compensation Fund in respect of the year 1943 for distribution to supervisory, technical, administrative and executive personnel.

Employees Stock Purchase Plan

Income for 1943 was charged with $175,302, representing the difference between the cash paid by employees and market value of 14,178 shares of TWA capital stock issued to employees in 1943 under The TWA Employees Stock Purchase Plan, Class of 1938.

WAR ACTIVITIES

Contract Services for the Armed Forces

During 1943, TWA continued to utilize the experience and knowledge of its organization for the performance of special services for the Armed Forces. It will not be possible to render a full accounting of services for the Armed Forces until victory is attained and censorship lifted. TWA has undertaken every emergency activity requested by the Armed Forces, regardless of the difficulties involved. The performance of these activities has been such that you may well be proud of your Company.

The most important service was the continued operation of four-engine aircraft in overseas transport service. Foreign transport operations were inaugurated in February, 1942. By December 31, 1943, planes operated by TWA had completed 1,403 Trans-Atlantic crossings. The importance of this service is best indicated by the fact that the passengers transported by TWA have included President Roosevelt, Generals Marshall, Arnold, Eisenhower and George, Admirals King, Stark and Towers, Secretary of War Henry L. Stimson, Undersecretary of War Robert P. Patterson, Assistant Secretary of

War for Air Robert A. Lovett, Ambassador Joseph E. Davies, Ambassador Winant, Madame Chiang Kai-shek, General Henri H. Giraud, Queen Wilhelmina of the Netherlands, President Vargas of Brazil, Lord Mountbatten, King George of Greece, King Peter II of Yugoslavia and many other United Nations leaders.

In addition to these services a complete flight crew of TWA employees was granted leave of absence and temporarily commissioned in the Army of the United States for the purpose of flying President Roosevelt to the recent conferences at Cairo and Teheran. These employees have all returned to their duties with TWA.

Other war services in 1943 have included:

- Operation of military aircraft in transport service within the United States.
- Training of military pilots, navigators and other flight crew members.
- Technical training of Army ground personnel as mechanics, radio operators, etc.
- Operation of a temporary Modification Center for military aircraft.
- Experimental tests of aircraft fuels.
- Performance of technical experimental radio tests.
- Maintenance and overhaul service for Army and Navy aircraft.
- Assignment of trained technical personnel to the Army for special projects.

Total cost to the Government for services performed in 1943 was approximately $15,000,000. TWA received less than 3% of this amount in fees for those services.

Renegotiation proceedings are in process with respect to services provided in 1942 under contracts with the Army.

EQUIPMENT

At the beginning of the war, TWA assigned its rights to purchase 40 Constellation airplanes to the Army. This is the four-engine airplane conceived by Mr. Howard Hughes and Mr. Jack Frye, which was designed for use by TWA in transcontinental and overocean service. Production and use of the plane will be controlled by the Armed Forces until the end of the war. Some of the airplanes are flying and, although details regarding their specifications and performance are now secret, it may be stated that they have equaled or exceeded the original specifications in almost every respect. TWA has the right to repurchase the Constellations when they are no longer required in military service.

Early in 1943, one DC-3 plane was returned to TWA by the Government. During the latter months of 1943, three additional DC-3 planes were returned, making a total fleet of 28 DC-3 planes in scheduled airline operation on December 31, 1943.

AIRLINE OPERATIONS IN WAR TIME

One of the most important contributions to the war effort has been the increased efficiency of operations enabling TWA to provide a maximum amount of transportation with a minimum of equipment.

Continued improvements in scheduling and maintaining airplanes have resulted in a 22% increase in average revenue miles per plane over 1942. A comparison of average revenue miles flown per plane for the past five years follows:

	1943	1942	1941	1940	1939
Average Revenue Miles Per Plane	630,358	516,278	452,065	417,979	345,656

Because of the increase in revenue miles flown per plane and the demand for air transportation, which presently exceeds the capacity of the airlines, average revenue ton miles carried per plane increased 57% over 1942. Average revenue ton miles per plane have increased each year for the five-year period ending in 1943, as follows:

	1943	1942	1941	1940	1939
Revenue Ton Miles Per Plane	1,373,798	876,050	611,026	542,971	392,287

ORGANIZATION

On December 31, 1943, TWA had approximately 6,400 employees. Over 1,500 employees of TWA are serving in the Armed Forces.

Mr. Gilbert H. Scribner, of Chicago, Illinois, was elected to the Board of Directors on October 6, 1943.

Mr. Jack Nichols was elected Vice President on July 5, 1943.

Miss Myra E. Black was elected Assistant Secretary on October 6, 1943.

ROUTE DEVELOPMENT

DOMESTIC ROUTES

TWA has proposed a pattern of domestic airline expansion which has one basic principle; the development of its present territory by serving intermediate cities on or adjacent to its present routes.

These intermediate cities have interests in common with those presently receiving TWA service. It is TWA's policy to integrate their transportation needs to create an air service accommodating a maximum flow of traffic with a minimum extension of route miles.

On September 15, 1943, TWA filed with the Civil Aeronautics Board applications to provide trunk line service to 99 additional cities along the TWA route. These 99 additional cities would be added to the 34 cities now served or certificated, and it is proposed to join the total of 133 communities in a unified air transport system.

Application was filed on September 20 for the extension of transcontinental operations from Los Angeles and the co-terminal San Diego, California, to Honolulu, Hawaii.

During the past year the Civil Aeronautics Board granted approvals under which the following services have been inaugurated:

Transcontinental service between Washington, D. C., and Los Angeles, California, was started on August 16, 1943, after award of a new route between Dayton, Ohio, and Washington, D. C., via Columbus, Ohio, and Wheeling, West Virginia.

Phoenix, Arizona, was added as a stop on the transcontinental route on October 1, 1943.

Palm Springs, California, was added as a temporary stop on the transcontinental route for transportation of military personnel only.

Transcontinental service between New York and San Francisco via Los Angeles was inaugurated in September, 1943. This service was the result of approving Los Angeles as a stop between Las Vegas, Nevada, and Fresno, California, with the restriction that flights operating between Los Angeles and San Francisco may not originate or terminate west of Albuquerque, New Mexico.

The total cost to the Government for services performed under War Contracts in 1944 was approximately $10,700,000. TWA received compensation for performance of these services of only slightly more than 1.7% of the total costs.

Renegotiation of war contract services with respect to 1942 and 1943 has been completed. The Government determined that TWA's profits from war contracts in those years were not excessive, and consequently no adjustments were necessary.

AIRCRAFT

PRESENT EQUIPMENT

Despite TWA's high record in the previous year, further improvement in the operating efficiency of available aircraft was obtained. Improved scheduling, together with more closely coordinated maintenance, increased the revenue miles and revenue ton miles per plane over previous years, as follows:

	1944	1943	1942	1941	1940
Revenue Miles Per Plane	683,530	630,358	516,278	452,065	417,979
Revenue Ton-Miles Per Plane	1,527,137	1,373,798	876,050	611,026	542,971

At the end of 1944, TWA had 38 DC-3 planes in service and one in process of reconversion to commercial passenger use. Five additional DC-3 planes have been received thus far in 1945 from the Government. When planes now being reconverted are placed in service, TWA will have a fleet of 44 DC-3 planes and five Stratoliners in operation.

The five Stratoliners delivered to the Army early in 1942 were returned to TWA during the past year. These Stratoliners have been rebuilt at the Boeing factory with the latest type Flying Fortress wings and tail assemblies and more powerful engines. TWA is installing a new interior, including a ventilating and heating system of improved design. Upon completion, the Stratoliners will accommodate 38 passengers and a large volume of mail and express. With these new planes in service, TWA again will be the only airline operating four-engine aircraft in scheduled domestic service.

In allocating planes to the airlines, the Government appears to be attempting to restore airline fleets to their relative sizes at the time of Pearl Harbor. This policy ignores the substantial quantity of new type planes TWA had on order at that time to correct the then existing equipment deficiencies. As a result of the Government's policy, TWA has not received an equitable share of planes returned by the Government to the airlines.

The Government's plane allocation policy also appears to give little or no consideration to existing transportation needs of the important industries and communities on TWA's routes. Thus, TWA has been unable to offer the volume of air transportation required in the war effort to the same extent as its principal competitors. This serious situation is receiving continuous study by the management and every effort is being made to correct it, so that TWA will be enabled to provide adequate air transport service to the communities it serves.

FUTURE EQUIPMENT

The postwar era will see general adoption by major airlines of four-engine aircraft. In 1940, TWA first introduced such planes into regular service. During the year 1939 TWA began the development of the Constellation, an advanced type of four-engine aircraft, for use in both domestic and international service. Aviation history was made in April, 1944, when Howard Hughes together with the President of TWA flew the first Constellation from Burbank, California to Washington, D. C. in 6 hours, 58 minutes, establishing a new transcontinental record.

The war interrupted the Company's plans to put the Constellations into commercial service. All of these aircraft on order for TWA were assigned to the Army. TWA has an option on 40 of these Constellations and a preferred delivery position on new versions of these aircraft.

Thus, TWA achieved equipment leadership in the past and expects to maintain such leadership in the future.

The equipment requirements of the Company for domestic and international service will be substantial over the next few years and will necessitate a sizable volume of financing. Plans for financing these needs will be finally determined when the time and scope of such plans can be more accurately established.

ROUTE DEVELOPMENT

DOMESTIC ROUTES

In 1943, TWA announced a pattern of domestic airline expansion designed to integrate and develop air transportation in areas logically related to its existing route structure. Following this pattern, applications have been filed with the Civil Aeronautics Board to provide trunkline service to all important communities on or adjacent to its present routes.

In 1944, the Civil Aeronautics Board approved the applications to serve the following:

Boston to Pittsburgh via Binghamton and Albany, New York and Williamsport, Pennsylvania. (Service on this important route is scheduled to begin on May 1, 1945.)
Terre Haute, Indiana, as an intermediate stop on the transcontinental route.
Morgantown, West Virginia, as an intermediate stop between Columbus and Washington, D. C.
Topeka, Kansas, as an intermediate stop between Kansas City and Wichita.

The Civil Aeronautics Board denied applications for the following new services:
Indianapolis to Detroit and Cleveland via Anderson-Muncie, Marion and Fort Wayne, Indiana, and Toledo, Ohio.
Denver, Colorado as an intermediate stop on an alternate route between Kansas City and Los Angeles.
New York to Boston via intermediate stops.
Detroit and Cleveland as intermediate stops between Chicago and New York.
An alternate route from St. Louis to Amarillo via Joplin, Missouri and Tulsa and Oklahoma City, Oklahoma.

TWA has applications for new routes and amendments of existing certificates of convenience and necessity still pending before the Civil Aeronautics Board involving the addition of 57 smaller cities to its system. These proposed routes are shown in detail on the map on pages 8-9.

INTERNATIONAL ROUTES

After more than two years of extensive research and planning, TWA in June, 1944, filed its application for the round-the-world route shown on page 16. This application was filed only after the Company was completely satisfied as to the traffic-generating possibilities of the proposed route, and after TWA had carefully surveyed costs to assure its economic feasibility.

To some, this program may appear excessively ambitious. Such is not the case. The initial operations over this international route involve flying approximately 68,000 miles per day, this is less than the present scheduled daily mileage of TWA's domestic routes. The capital outlay to establish this round-the-world route is estimated at $3,500,000, which would consist principally of expenditures for aircraft. The Company's ability to finance is well in excess of such a sum.

TRANSCONTINENTAL & WESTERN AIR, INC.
(Incorporated in Delaware)
AND SUBSIDIARIES

CONSOLIDATED BALANCE SHEET, DECEMBER 31, 1944

LIABILITIES

CURRENT LIABILITIES:		
Accounts payable (including expenditures relating to United States Government contracts)	$ 971,825	
Accounts payable for aircraft purchased	374,189	
Deposits for air travel plan, less transportation used	750,863	
Transportation tax, employees' payroll deductions for income and social security taxes, United States War Bonds, insurance, etc.	431,163	
Other airlines—traffic balances payable	94,654	
Sundry accounts payable	224,608	
Accrued accounts:		
Salaries and wages	934,039	
Taxes (other than income)	216,631	
Federal and State income taxes	2,065,371	
Insurance, rent, etc.	208,226	$ 6,271,569
TRANSPORTATION SOLD BUT NOT USED		434,047
SPECIAL FUND RESERVES (Contra):		
Employees' Stock Purchase Plan	$ 62,527	
Aircraft insurance	340,283	
Advances by United States Government	2,535,019	
Employees' Incentive Compensation Plan	358,591	3,296,420
CAPITAL STOCK AND SURPLUS:		
Capital stock—authorized 1,000,000 shares, par value $5 per share (24,414 shares unissued, of which 10,607 shares are subject to option to employees)—outstanding 975,586 shares	$4,877,930	
Capital surplus—paid-in	4,073,807	
Earned surplus	7,300,272	16,252,009
TOTAL		$26,254,0

(For Notes 1 to 8, which are an integral part of this statement, see next page.)

REPORT OF THE PRESIDENT TO THE STOCKHOLDERS

Important developments occurring in 1945 opened a period of substantial expansion for TWA, the Trans-World Airline.

The Civil Aeronautics Board awarded TWA international routes extending TWA's air transportation system to Europe, North Africa, the Near and Middle East and India. Scheduled air service to Newfoundland, Ireland and France began on February 5, 1946. Air service to Portugal, Spain, Italy, Switzerland, Greece, Egypt and other countries on the routes is planned for the near future.

Eighteen four-engine Constellations, the fastest and most modern commercial transport planes yet built, were delivered to TWA in 1945 and early 1946. An additional 18 Constellations are scheduled for delivery late in 1946.

The volume of traffic carried reached an all-time high. Demand for air transportation continued in excess of capacity. Five four-engine Stratoliners and 13 additional Douglas DC-3 planes were placed in service during the year.

Arrangements were completed for the sale at par of $30,000,000 of 3% sinking fund debentures to provide additional capital. $10,000,000 of these debentures were issued in 1945.

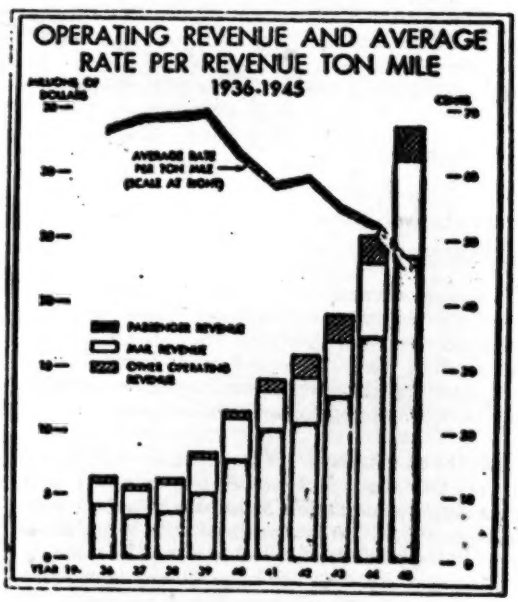
Financial Review

Earnings: Net income for 1945 after provision for income taxes was $1,813,576, or $1.84 per share of capital stock outstanding. In 1944, net income was $2,752,960, or $2.82 per share.

The lower 1945 earnings reflect: (1) reductions in passenger and airmail rates during 1945 adversely affecting operating revenues by approximately $4,250,000; (2) costs attributable to the introduction of new types of equipment; (3) costs of preparing for future expansion, including substantial expenses incurred in training additional personnel; and (4) a book loss of $290,374 after tax adjustments, resulting from the sale of two airports not currently used in TWA's operations.

Operating Revenues: The total volume of passengers, airmail, air express and air freight reached a record level of 72,663,873 revenue ton miles in 1945. Operating revenues of $33,776,106 were the highest in the Company's history.

Airmail rates were reduced from 60¢ per ton mile to 45¢ per ton mile effective January 1, 1945. Adjustments in passenger fares in May and August reduced average passenger rates to approximately 4½¢ per mile. As a result, average transportation revenues decreased from 52.1¢ per revenue ton mile in 1944 to 46.2¢ in 1945.

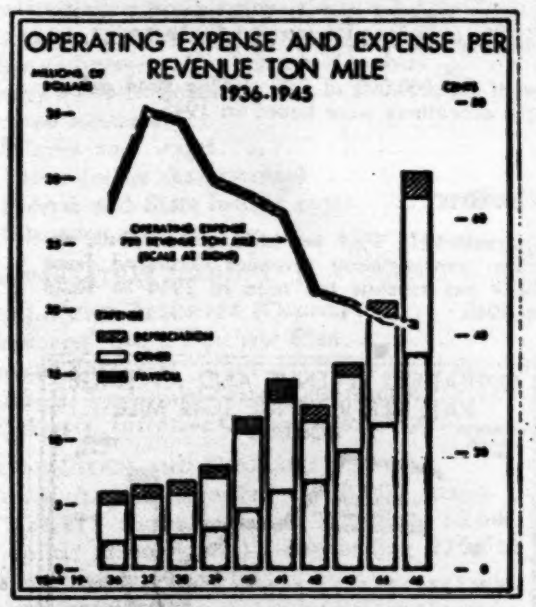


COMPARATIVE OPERATING REVENUES

	1945	1944	Percent Increase
Passenger	$23,895,949	$17,576,461	36%
Mail	7,237,379	5,653,224	28%
Express and Freight	2,031,992	1,618,471	26%
Other	610,786	492,579	24%
Total	$33,776,106	$25,340,735	33%

TRANSCONTINENTAL & WESTERN AIR, INC.

Operating Expenses: Operating expenses for the year were $30,575,841. Substantial operating economies achieved during the year were partially offset by increased wage and material costs and by expenses incurred during the latter part of 1945 in preparation for the introduction of the Constellations, as well as for the 1946 expansion in operations. Unit costs, as measured by revenue ton miles, decreased from 42.6¢ in 1944 to 42.1¢ in 1945.



Expenses directly attributable to pre-operating costs of the international route totaling $943,930 are not included in operating expenses, but have been deferred and will be amortized by charging operating expenses over a period of approximately seven years.

Additional Capital: To provide additional capital for the purchase of new aircraft and for other purposes, TWA has arranged to borrow $30,000,000 from the Equitable Life Assurance Society of the United States. The loan is represented by 3% sinking fund debentures due June 1, 1956. Sinking fund payments of $2,000,000 per year will begin June 1, 1947. TWA is permitted, within prescribed limitations, to incur additional secured or unsecured indebtedness. $10,000,000 of the total loan was received in December, 1945. An additional $7,000,000 was received in February, 1946, with the balance to be received prior to June 1, 1946.

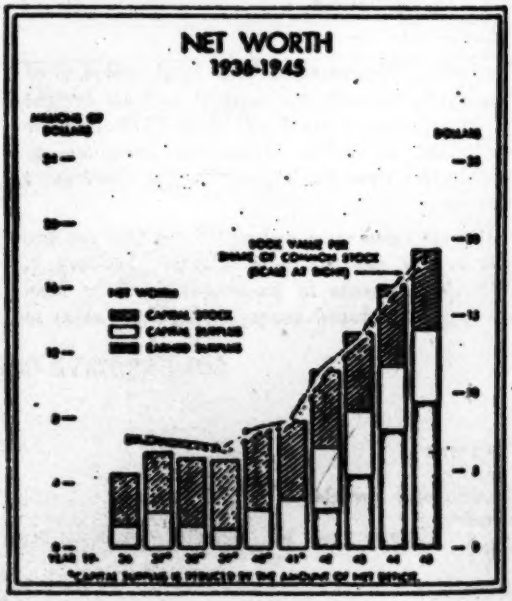
On August 1, 1945, TWA borrowed $1,700,000 from a group of banks for the repurchase and modernization of the five four-engine Stratoliners. This loan is payable in equal quarterly instalments over a five-year period and is secured by a chattel mortgage on the Stratoliners. The average interest rate for the five-year period is approximately 1.97%.

Net Working Capital: Net working capital was $7,801,000 on December 31, 1945.

	1945	1944
Cash & U. S. Government Securities	$12,011,980	$10,508,748
Other Current Assets	7,892,097	4,709,982
Total Current Assets	$19,904,077	$15,218,730
Current Liabilities	12,103,077	6,271,569
Net Working Capital	$ 7,801,000	$ 8,947,161

At the close of 1945, TWA's current liabilities included amounts payable for eight Douglas DC-4s and for large purchases of parts and materials for the operation of the Constellation and DC-4 airplanes. Other major factors affecting working capital were the receipt of $10,000,000 from the sale of debentures in December and $1,700,000 from the Stratoliner loan in August, and the purchase of flight equipment and related accessories during the year of a total value of approximately $14,500,000.

Net Worth: Capital stock, together with paid-in and earned surpluses, totaled $18,526,680 at the close of 1945. Net worth per share of capital stock outstanding was $18.80.

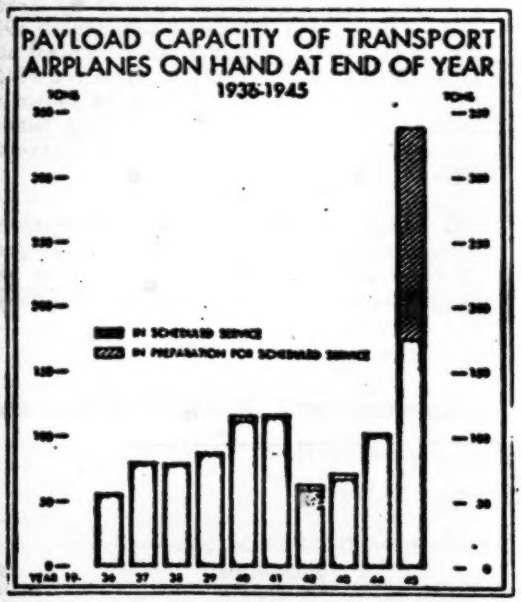


TRANSCONTINENTAL & WESTERN AIR, INC.

Earned and paid-in surpluses increased $2,225,176 during the year to $13,599,255 on December 31, 1945.

Aircraft

TWA, at the year end, had a fleet of 93 aircraft, of which 67 were owned and 26 were leased from the Government. Scheduled service was being conducted with 48 Douglas DC-3s and five Boeing Stratoliners. Five additional DC-3s were being used for pilot training. Ten Constellations and eight Douglas DC-4 Skymasters were being prepared for domestic and international service or were in use on special flights over the international route. Seventeen Douglas DC-3s were in process of conversion to commercial standards.



TWA was the first to place the Constellation in the skies. The Constellation sets new standards of passenger comfort with its pressurized cabin which provides low altitude comfort with high altitude speed and smoothness. On February 3, 1946, a TWA Constellation, piloted by Jack Frye, established a new transcontinental commercial record by flying non-stop from Burbank to New York with 45 passengers in seven hours and 28 minutes.

In addition to the 18 Constellations now on hand, TWA expects to receive, late in 1946, another 18 Constellations of an improved type with sleeping accommodations and other luxury features.

In February, 1946, nine-hour-and-45-minute service from Los Angeles to New York and 17-hour service from New York to Paris was started with Constellation planes. The Los Angeles to New York Constellation schedules contrast with 18-to-20 hour flights operated with DC-3s and 15-hour flights operated by TWA with the four-engine Stratoliners.

Ground Facilities

Two large hangars and associated buildings, which were formerly a part of the North American Aviation Bomber Plant at Kansas City, Kansas, have been leased by TWA for an overhaul base. The present overhaul base located on the Kansas City, Missouri, Municipal Airport will hereafter be used as a maintenance base only. Temporary maintenance and overhaul facilities for international operations have been obtained at the Newark, New Jersey, Municipal Airport. Contractual arrangements have been completed with the City of New York for the future use of the Idlewild Airport.

A large scale program of increasing and improving ticket and reservations offices and other facilities to accommodate the expected increased volume of passenger traffic was started in 1945 and will continue through 1946.

Route Development

International Routes: On July 5, 1945, the Civil Aeronautics Board awarded to TWA a certificate of public necessity and convenience to provide international air transport service from (1) the terminal points Boston, Chicago, Detroit, New York, Philadelphia and Washington to Newfoundland, Eire, France, Switzerland, Italy, Greece, Egypt, Palestine, Trans Jordan, Iraq, Saudi Arabia, Yemen, Oman, India and Ceylon; (2) from the same terminals in the United States to Portugal, Algeria, Tunisia, Lybia and Egypt; and (3) a connecting route from Portugal to Spain and Italy. Early in 1946, Baltimore was added as an additional terminal point for the foreign routes. This certificate was issued for a period of 7 years. Scheduled flights over the route from Washington and New York to Paris began on February 5, 1946, with Constellation and Skymaster planes.

Scheduled service over the balance of the routes will be established as rapidly as conditions permit.

There is now pending before the Civil Aeronautics Board an application for an extension of our international route from India and Cey-

TRANSCONTINENTAL & WESTERN AIR, INC.
AND SUBSIDIARIES

NOTES TO CONSOLIDATED BALANCE SHEET

1. The Company's present holdings in TACA Airways, S. A. represents approximately 28.81 per cent of the total outstanding common capital stock of that Company. TACA Airways has wholly-owned subsidiaries operating in several Central American countries, a majority-owned subsidiary operating in Brazil (Aerovias Brazil, S. A.), and a minority interest in other operating companies.

   Unaudited financial statements of TACA Airways and its partially-owned affiliates for the years 1944 and 1945 show that operations for those years resulted in substantial losses. No provision was made for this loss as a quoted over-the-counter bid price for TACA Airways, S. A. stock at December 31, 1945 indicated a valuation in excess of its cost to Transcontinental & Western Air, Inc.

   The convertible notes of TACA Airways, S. A. were converted into 50,000 shares of common capital stock in January 1946. In July 1945 the Company entered into an agreement for the purchase of an additional 60,000 shares of common capital stock of TACA Airways, S. A. at a price of $10.50 per share if purchased on or before July 1, 1946.

2. Pittsburgh-Butler Airport, Inc. wholly-owned subsidiary was dissolved during the year.

3. Federal income tax returns for the years 1942 to 1945, inclusive are subject to examination by the Bureau of Internal Revenue.

4. Renegotiation proceedings pursuant to the War Contracts Renegotiation Act have been concluded for the years 1942 and 1943 without refund to the Government. The Army Air Forces, Air Technical Service Command, have advised the Company that their assignment to conduct renegotiation proceedings for the years 1944 and 1945 has been cancelled and that while such cancellation does not operate as a release of liability under the Renegotiation Statute, no further action was contemplated.

5. The 3 per cent sinking fund debentures due in 1956 represent the portion received by Transcontinental & Western Air, Inc. in December 1945 on a total loan of $30,000,000. An additional amount of $7,000,000 was received in February 1946 and the balance of $13,000,000 is to be drawn on or before June 1, 1946. Annual sinking fund payments of $2,000,000 are required beginning on June 1, 1947.

6. The Company has entered into commitments aggregating approximately $29,000,000 for the purchase of additional aircraft, engines, and spare parts to be delivered during the years 1946 and 1947.

Summary of Property, Plant, and Equipment and Related Reserves For Depreciation and Amortization

For the Year Ended December 31, 1945

CLASSIFICATION OF PROPERTY	DECEMBER 31, 1945 — Property Accounts	Reserves for Depreciation and Amortization	Net Book Value	Net Book Value December 31, 1944
Aircraft	$12,929,322	$3,306,292	$ 9,623,030	$1,501,533
Engines	4,247,261	1,007,168	3,240,096	762,993
Communication, hangar, shop, and other equipment	2,938,822	1,182,868	1,755,954	670,000
Furniture, fixtures, and office equipment	905,058	235,336	669,722	385,237
Buildings, improvements on land owned, and leasehold improvements	1,151,724	530,334	621,390	417,286
Uncompleted work orders—not classified	833,721		833,721	507,364
Leased aircraft conversion costs	1,540,070	182,436	1,357,634	
Land	276		276	1,528
TOTAL	$24,516,257	$6,414,434	$18,101,823	$4,245,941

TWA Ex. 79, page 3
(TWA Annual Report-1946)

TO THE STOCKHOLDERS:

There is submitted herewith the consolidated income account of your company for the twelve-month period ended December 31, 1946, and the consolidated balance sheet as of that date, certified to by the company auditors, Messrs. Haskins & Sells.

Despite the heavy loss incurred during the year 1946, it is possible to look forward with much hope for the future. The equipment is of the highest standard and sufficient in total for near term requirements, and most important to all, your company has an organization of close to 13,000 skilled employees, who collectively implement a world-wide air transportation system unparalleled in its provision of service to the traveling public.

The Executive Committee
of the Board of Directors
Transcontinental & Western Air, Inc.

March 29, 1947.

TRANSCONTINENTAL & W

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ASSETS

CURRENT ASSETS:			
Cash on hand and demand deposits		$ 4,416,518	
United States Savings Bonds, Series G		50,000	
Accounts receivable:			
United States Government—passenger and mail transportation (see Note 1)	$1,922,742		
Governments outside the United States (See Note 1)	1,519,734		
Other airlines and agents—traffic and express balances	1,974,275		
Subscribers to air travel plan in excess of deposits	326,039		
Other accounts receivable	2,167,547		
Employees	202,524		
Total	$8,112,861		
Less reserve for doubtful receivables	757,479	7,355,382	
United States Government war contract expenditures and other charges	$2,071,698		
Less advance payment received of $1,355,000 and reserve of $340,898	1,695,898	375,800	
Federal income tax refund resulting from carry-back of 1946 operating loss	$2,105,843		
Less unpaid instalments of 1945 income tax	582,076		
Net refund (collected in January 1947)		2,523,767	
Deposit on option to purchase aircraft engines—refunded in January 1947		685,800	
Insurance claims receivable on aircraft losses		631,090	
Travel and other advances (less reserve $33,232)		180,168	
Inventory of parts and supplies, at average cost (less reserve, $225,955)		9,265,460	$25,533,985
SPECIAL FUNDS (Contra):			
Unreimbursed expenditures of funds advanced by United States Government		96,877	
Employees Incentive Compensation Plan—cash		48,881	
Other funds held in trust—cash		277,666	423,424
INVESTMENTS AND ADVANCES:			
TACA Airways, S. A.:			
Capital stock (275,000 shares of common, par value $5 per share)—stated at option sales price of $2 per share (see Note 2)	$ 550,000		
Accounts receivable	55,071	605,071	
City of New York Serial Bonds, face value $63,000 (deposited with City of New York as guarantee of lease performance—at cost, less amortization of premium		64,204	
Wholly-owned subsidiary not consolidated. TWA Agency, Ltd.		94,086	
Other investments in and advances to associated companies and others (see Note 3)		1,276,294	2,039,655
PROPERTY, PLANT, AND EQUIPMENT—At Cost (Boeing Stratoliners of a net book value of $1,432,000 pledged as collateral to chattel mortgage loan)		$45,415,970	
Less reserves for depreciation and amortization, and reserve of $226,000 for loss on equipment and other assets purchased from Foreign Liquidation Commission.		11,878,367	33,537,603
INTANGIBLE ASSET—Air route acquired through Marquette Airlines, Inc., wholly-owned subsidiary			309,801
DEFERRED CHARGES:			
International Division development expenses—unamortized portion (see Note 5)		$ 2,336,579	
Prepaid insurance, taxes, rent, etc.		399,444	
Unamortized expenditures relating to construction of municipal airports		363,168	
Long term debt expense—unamortized portion		226,523	
Miscellaneous		172,187	3,497,901
TOTAL			$65,342,369

IR, INC., AND SUBSIDIARIES

nce Sheet

LIABILITIES

CURRENT LIABILITIES:			
Notes payable to banks—portion due within one year in quarterly instalments beginning March 1, 1947		$ 340,000	
Sinking fund instalments to be applied as a reduction of indebtedness:			
Series A Debentures payable May 28, 1947	$2,000,000		
Series B Debentures payable November 27, 1947	2,000,000	4,000,000	
Accounts payable		7,722,706	
Transportation tax, employees' deductions, etc.		1,021,137	
Other airlines—traffic balances payable		1,607,892	
Air travel plan and other deposits, less transportation used		1,622,279	
Amount payable representing loss resulting from exercise of sales option on January 31, 1948 on 60,000 shares of TACA Airways, S. A. stock which the Company has agreed to purchase on or before July 17, 1947 (see Note 2)		525,750	
Accrued accounts:			
Federal income tax deficiency for the years 1942 and 1943 and interest thereon	$ 162,541		
Salaries and wages	1,888,240		
Taxes (other than income)	377,942		
Insurance premiums, legal fees, etc.	410,108		
Interest	108,156		
Income taxes	28,934	2,965,921	$19,805,685
TRANSPORTATION SOLD BUT NOT USED			2,455,660
SPECIAL FUNDS (Contra):			
Advanced by United States Government		$ 96,877	
Employees' Incentive Compensation Plan		48,881	
Other fund reserves		277,666	422,424
NOTES PAYABLE:			
Banks—maturing $85,000 quarterly beginning March 1, 1948 (final maturity $43,461)—five Boeing Stratoliners pledged as collateral			808,461
2% Notes issued in part payment for Constellation airplanes, payable in annual instalments of $494,331 in 1949 and 1950 and $250,000 in 1951 (see Note 4)			1,228,663
SINKING FUND DEBENTURES: (See Note 6)			
Series A 3% Debentures, due June 1, 1956—annual sinking fund instalments of $2,000,000 beginning May 28, 1948—(1947 instalment included in current liabilities)			28,000,000
Series B 2¼% Debentures, due December 1, 1951—annual sinking fund instalments of $2,000,000 beginning November 27, 1948—(1947 instalment included in current liabilities)			8,000,000
RESERVE PROVIDED FOR OBSOLESCENCE OF BOEING AND DOUGLAS DC3 SPARE PARTS AND ASSEMBLIES UPON RETIREMENT OF RELATED FLIGHT EQUIPMENT			406,590
NET EQUITY OF COMMON CAPITAL STOCK:			
Capital stock—authorized 1,000,000 shares par value $5 per share (14,071 shares unissued of which 214 shares are subject to option to employees) outstanding 985,929 shares	$4,929,645		
Capital surplus—paid in	4,508,229	$ 9,437,874	
Deduct net deficit at December 31, 1946		5,233,988	4,203,886
TOTAL			$65,342,369

The accompanying notes to financial statements constitute an integral part of this balance sheet.

TRANSCONTINENTAL & WESTERN AIR, INC.
AND SUBSIDIARIES

Statement of Consolidated Income
FOR THE YEAR ENDED DECEMBER 31, 1946

OPERATING REVENUE:		
Passenger		$45,416,[illegible]
Mail		6,211,811
Express and freight		2,981,[illegible]
Excess baggage		810,941
Charter and special flights		1,[illegible]
Other—net		250,[illegible]
Total		$57,[illegible]
OPERATING EXPENSES:		
Flying operations	$14,962,506	
Ground operations	13,282,328	
Flight equipment maintenance—direct	6,092,292	
Ground equipment maintenance—direct	805,427	
Equipment maintenance—indirect	7,021,509	
Passenger service	5,760,175	
Traffic and sales	6,586,063	
Advertising and publicity	2,082,830	
General and administrative	9,609,282	
Depreciation and amortization of operating property	5,473,310	
Extension and development expenses (includes amortization, $317,629)	604,784	72,[illegible]
LOSS FROM OPERATIONS		14,919,[illegible]
ADD OTHER CHARGES:		
Provision for loss resulting from sales options granted on TACA Airways capital stock (see Note 2)	$ 1,625,750	
Provision for loss on equipment and other assets purchased from Foreign Liquidation Commission	226,000	
Interest	852,794	
Provision for loss on escrow deposit made in connection with lease of office space in Washington, D. C.	108,003	
Loss on sale of non-operating property	103,624	
Provision for Federal income tax for prior years	89,460	
Additional compensation of officers and employees, representing excess of market value of capital stock issued under Employees' Stock Purchase Plan over amount paid for stock under options granted in 1938, 1939, and 1940	22,332	
Miscellaneous	69,904	3,097,[illegible]
Total		$18,017,[illegible]
DEDUCT OTHER CREDITS:		
Fees and net revenue on United States Government contracts	$ 189,111	
Interest, discounts, etc.	90,670	
Profit on sale of operating property	120,214	
Miscellaneous	163,696	563,[illegible]
NET LOSS BEFORE DEDUCTING REFUND OF FEDERAL INCOME TAXES RESULTING FROM CARRY-BACK OF 1946 LOSS		$17,453,[illegible]
DEDUCT REFUND OF FEDERAL INCOME TAXES RESULTING FROM LOSS CARRY-BACK		3,105,[illegible]
NET LOSS FOR THE YEAR		$14,347,[illegible]

See accompanying notes to financial statements which are an integral part of this statement.

TRANSCONTINENTAL & WESTERN AIR, INC.
AND SUBSIDIARIES

FOOTNOTES TO FINANCIAL STATEMENTS

1. The accounts receivable from the United States Government for passenger and mail transportation include $905,212.25 representing charges for carriage of mail on the North Atlantic route. Charges have been accrued at the temporary rate of 75 cents per United States ton mile as authorized by an order issued by Civil Aeronautics Board which states that the temporary rate is subject to determination of a final rate which may be higher or lower than the temporary rate. Application was filed by the Company in March 1947 with the Civil Aeronautics Board contending that the 75 cent rate was inadequate and requesting an increase in the rate to at least $1.00 per ton mile. The amount due from Governments outside of the United States includes unpaid foreign air mail charges aggregating $1,432,552 which are payable by the United States Government out of funds specifically appropriated by Congress for this purpose. No funds were available at December 31, 1946 and collection of these accounts will be delayed pending additional appropriation of funds by Congress.

At December 31, 1946 the Company was contingently liable in the amount of $614,599.88 on advances received from the United States Government on foreign air mail charges as any amounts so advanced to the Company which are not collected by the Government from the foreign countries are recoverable from the Company.

2. At December 31, 1946 the Company owned 275,000 shares of capital stock of TACA Airways, S. A., which were acquired at a cost of $6.00 per share. The Company is obligated to purchase an additional 60,000 shares of TACA stock on or before July 17, 1947 at a price of $10.50 plus an additional premium of 26¼ cents per share, and if it fails to do so, agrees to pay to the present owner of the stock the difference between $10.50 per share and any lower net price realized by the owner on the sale of such stock not purchased by Transcontinental & Western Air, Inc.

In January 1947 the Company granted options for the sale of the 275,000 shares of TACA stock owned and the 60,000 shares which it agreed to purchase. These options are exercisable at $2.00 per share on or before January 31, 1948, $2.50 on or before January 31, 1949, and $3.00 on or before July 31, 1949.

Provision has been made in the accompanying statements in the amount of $1,625,750 to cover the premium of $15,750 on the 60,000 shares and a loss of $1,610,000 which would result from the sale at $2.00 per share of the 275,000 shares owned and the 60,000 shares to be acquired at $10.50 per share on or before July 17, 1947.

3. Other investments in associated companies are stated at cost and do not purport to represent realizable values. Some of the investments in foreign airline companies are of doubtful value and the Company may suffer substantial losses on the sale or liquidation of these investments. No provision has been made in the accompanying statements for such probable losses.

4. The Company has entered into a repurchase agreement with Lockheed Aircraft Corporation which provides in substance that the Company may return to Lockheed any or all of five Constellation airplanes on which 2% notes were given in part payment, against cancellation of any then outstanding unmatured 2% notes or, if the principal of any notes shall have been prepaid or Lockheed shall not then be the owner of said notes, the Company may require Lockheed to pay it an amount equal to the principal of said notes prepaid and the principal of any notes outstanding and held by others.

5. International Division extension and development expense represents the unamortized portion of the excess of expenses over revenue received or earned relating to international air transportation service from its inception to April 1, 1946. The net expense charged to this account is being amortized over the period from April 1, 1946 to June 30, 1952, the latter date being the expiration date of the Temporary Certificate of Necessity issued by Civil Aeronautics Authority.

6. Under the indenture dated December 1, 1945, covering the outstanding sinking fund debentures, consolidated earned surplus of the companies at December 31, 1945, amounting to $9,113,848, is restricted as to payment of cash dividends. The indenture provides that no dividend other than stock dividends be declared if such dividend plus all other dividends declared subsequent to December 31, 1945 exceed the consolidated net income of the Company and its subsidiaries for the period subsequent to December 31, 1945 to and including the date of the declaration of such dividend.

Annual sinking fund payments of $2,000,000 are required beginning May 28, 1947 for the retirement of the 3% debentures due in 1956 and $2,000,000 beginning November 27, 1947 for the 2¼% debentures due in 1951.

An agreement dated May 10, 1946 made between Transcontinental & Western Air, Inc. and The Equitable Life Assurance Society of the United States in connection with the sale of 2¼% debentures of $10,000,000 due December 1, 1951 contains the following provision:

> "If between the date of this Agreement and May 1, 1947 we* shall not have acquired title to and taken delivery of thirty-one Constellation Airplanes (or other aircraft acquired by us in lieu of Constellations having substantially the same aggregate load-carrying capacity as such Constellations) costing not less than $23,000,000, we will place in Flight Equipment Fund a sum equal to the excess, if any, of $23,000,000 over the cost of so many of such Constellations (or such other aircraft) as shall have been so acquired during such period. We further agree that of the eighteen Constellations heretofore acquired by us and the thirty-one Constellations (or other aircraft acquired in lieu thereof as above provided) to be acquired by us hereafter, no more than three thereof shall be disposed of by us for the purpose of subjecting the same to any lien or any conditional sale or other title retention agreement as security for Limited Indebtedness."

During the period from May 10 to December 31, 1946 the Company purchased Constellation airplanes at an aggregate cost of $4,327,000.

In accordance with the provisions of a three-party agreement dated January 31, 1947 between Hughes Tool Company, Transcontinental & Western Air, Inc., and The Equitable Life Assurance Society of the United States, the Hughes Tool Company loaned to Transcontinental & Western Air, Inc. the sum of $5,000,000 on its subordinated convertible 2¾% note dated January 31, 1947 and maturing on June 2, 1956. Hughes Tool Company also agreed to lend the Company additional sums aggregating $5,000,000 on or before May 29, 1947, such loans to be evidenced by subordinated convertible 2¾% notes. The notes are convertible at any time prior to maturity into common stock.

In the three-party agreement dated January 31, 1947, The Equitable Life Assurance Society agreed to

*Meaning Transcontinental & Western Air, Inc.

TRANSCONTINENTAL & WESTERN AIR, INC.
AND SUBSIDIARIES

waive and amend certain restrictions and provisions of the indenture dated December 1, 1945 and the supplemental indenture dated June 1, 1946, subject, however, to the consummation of the borrowing from Hughes Tool Company of additional sums aggregating $5,000,000 on or before May 29, 1947.
The three-party agreement and the second supplemental indenture dated as of January 15, 1947 (to be executed upon consummation of the borrowing of the additional $5,000,000) provide for the extension of the maturity of the B debentures from 1951 to 1955, increase their annual interest rate from 2½% to 3%, and cancel the purchase agreement dated May 10, 1946 which required the establishment of a Flight Equipment Fund.

The second supplemental indenture dated January 15, 1947 provides for annual sinking fund payments on the Series A debentures of $500,000 on May 28, 1948; $1,000,000 on May 28, 1949; and $2,000,000 annually to and including May 28, 1955. The Series B debentures require sinking fund payments of $500,000 on November 27, 1948; $1,000,000 annually to and including November 27, 1953, and $2,000,000 on November 27, 1954.

Additional sinking fund payments are required annually beginning November 27, 1948 in an amount equal to the excess of net income of the Company for the preceding year plus interest accrued on the subordinated convertible notes, over the fixed annual sinking fund payments set forth in the preceding paragraph, the total sinking fund payments to be limited, however, to an amount equal to the sum of $4,000,000 multiplied by the number of fiscal years completed subsequent to December 31, 1946.

The debenture bonds are redeemable at the option of the Company prior to maturity at a premium varying from 3% on or before June 1, 1947 to ½% on or before June 1, 1955. The Series A debentures mature on June 1, 1956 and maturity of the Series B debentures will be extended under the supplemental indenture to December 1, 1955.

7. The Company's Federal income tax returns for the year 1944 and prior years have been examined by the Bureau of Internal Revenue. The Company obtained a refund in January 1947 of Federal income taxes paid for the years 1944 and 1945, such refund resulting from a carry-back of the operating loss for the year 1946.

8. All services performed by the Company for the United States Government under war contracts have been terminated at December 31, 1946.

Renegotiation proceedings pursuant to the War Contracts Renegotiation Act have been concluded for the years 1942 and 1943 without refund to the Government. The Army Air Forces, Air Technical Service Command has advised the Company that their assignment to conduct renegotiation proceedings for the years 1944 and 1945 have been canceled and that while such cancellation does not operate as a release of liability under the Renegotiation Statute, no further action was contemplated.

9. Final contracts and agreements relating to landing fees, rentals, etc. payable in foreign countries have not been consummated in all instances. The Company's actual liability for such fees, rentals, etc., for customs duties, for foreign income taxes, employees' bonus and other benefits accruing to employed Nationals, and other liabilities which may have accrued through laws or regulations of foreign countries, is not determinable.

The Company has made provision for such liabilities on the basis of estimates determined from various sources and available information, and in the opinion of the management such provision is adequate.

10. The basis of computing depreciation on owned and leased DC-3 aircraft and related engines and radios was changed effective January 1, 1946 to extend the estimated life from various dates in 1946 to December 31, 1947. As a result of this revision the provision for depreciation on this equipment for the year ended December 31, 1946 was approximately $765,000 less than would have been charged on the basis of depreciation rates used in the year 1945.

11. Operating expenses shown above have been reduced by the amount of $1,711,273.95 representing the excess of International Division expenses during the three months ended March 31, 1946 over total International Division revenue of $2,147,996.68 earned during that period. The excess of expenses over revenue was charged to International Division Extension and Development expense and, as set forth in Note 5, will be amortized over the remaining life of the Temporary Certificate of Necessity.
Operating revenue and expenses shown above include the amount of $2,147,996.68 in respect to operations of the International Division for three months ended March 31, 1946.

12. Commitments and Contingent Liabilities:
The Company had entered into contracts or commitments of substantial amounts for the purchase of aircraft and engines, parts, and accessories, but many of such contracts and commitments were canceled during January and February 1947. Cancellations had not been accepted by all vendors and the Company may be liable for damages resulting from such cancellations. The Company has also contracted for leasehold improvements on which the unexpended balance at December 31, 1946 amounted to approximately $815,000. Domestic and foreign leases covering rental of property from one to ten years have been consummated, and some of the leased property is presently occupied by the Company and some is to be occupied when construction or alterations are completed. The Company is presently attempting to cancel many of the leases and contracts for construction of leasehold improvements, but the exact status or actual amount of liability is not presently determinable.

The City of New York has agreed to construct certain hangars and other site area improvements at Idlewild Airport at an aggregate cost of $16,250,000, these facilities to be used and occupied by the Company. Annual payments covering the cost of the improvements are to be made by Transcontinental & Western Air, Inc. over a period of twenty-five to thirty years. The Company has also agreed to construct a hangar at Chicago airport at a cost of not less than $250,000, such improvement to revert to the lessor at the expiration of the lease.
The Company subscribed to 10% or 500 shares of the authorized capital stock of Iranian Airways at a price of 10,000 rials each or a total of 5,000,000 rials. Only one-half of the authorized capital stock was issued by Iranian Airways and demand was made for payment of 50% of the stock issued. Transcontinental & Western Air, Inc. has paid $25,000 representing one-half of the purchase price of 250 shares of stock and the remaining one-half is payable on call by Iranian Airways.

The Company is defendant in various lawsuits and claims, which in the opinion of counsel either do not involve damages in substantial amount or are adequately covered by the insurance carried by the Company.

TRANSCONTINENTAL & WESTERN AIR, INC.

TO THE STOCKHOLDERS AND EMPLOYEES:

The year 1947 has been one of consolidation and concentrated cost reduction, toward the goal of maximum operating efficiency, and to take full advantage of the route structure already developed by your Company.

During the year the Company placed in international service five additional DC-4's and acquired under favorable financing terms four additional Constellation airplanes which were placed in domestic service.

One of the year's most significant events was the decision to purchase 12 new long-range, transocean Constellations. Despite current conditions which have not been generally favorable to financing, your management at the time of writing has brought to its final stage a financing program for these airplanes on a satisfactory long-term payment basis.

The new Constellations are scheduled to go into service on TWA's overseas routes during the spring and summer of 1948, with the complete delivery of the fleet by early fall. This will not only permit increased schedule regularity and better operations abroad, but will also allow those Constellations now flying abroad to be released to the domestic routes of the Company, thus increasing service and potential revenues throughout the entire system.

An enviable record of reliable service during the winter months of this year has been established by all types of Company equipment, and particularly by the Constellations.

The number of passenger miles operated by TWA in 1947 was 1,043,761,000 as compared with 852,998,000 operated in 1946. At the same time, and with a decrease in personnel, operating efficiency improved to such an extent that more flights were scheduled and completed, more seat-miles were flown, additional non-stop flights were inaugurated, and the over-all service to the traveling public was materially improved.

This same mark of achievement is reflected in the increased cargo carried: 10,822,229 ton miles of air mail were carried in 1947 as compared with 8,409,219 ton miles in 1946; 9,505,515 ton miles of air express were carried in 1947 as compared with 4,880,312 ton miles in 1946; 4,920,493 ton miles of air freight were carried in 1947 as compared with 2,216,688 ton miles in 1946.

During 1947 TWA received awards from the CAB of a new route and a number of additional stops to previously certificated routes enabling TWA's service to be extended to new passenger and trade areas. Nine new domestic stops and two additional international stops were inaugurated in 1947. These were: Wilmington (Delaware), Allentown-Bethlehem (Pennsylvania), Cleveland, Mansfield and Zanesville (Ohio), Richmond (Indiana), Louisville (Kentucky), Prescott and Grand Canyon (Arizona), Jerusalem (Palestine) and Bombay (India).

While TWA still has some route applications pending before the Civil Aeronautics Board, it is the policy of your Company to devote its efforts primarily to the development to the utmost of the earning potentials of TWA's existing route structure.

TWA has thus brought to an end the intense expansion period of the recent past, and will place increased emphasis on reaping the potential benefits of the costly but vital pioneering.

Factors beyond the Company's control contributed materially to the financial loss experienced during the year 1947. These outside factors include the continued increase in the general level of prices, government regulation and competition.

TRANSCONTINENTAL & WESTERN AIR, INC.

TWA's major items of expense have increased 29% since 1939, while at the same time the purchasing power of the dollar has decreased 49%. Had your company only kept costs in balance with the dollar depreciation, it would have experienced cost increases of nearly 50%.

Another most important factor in the profit-and-loss equation is the fact that the United States mail revenue has been reduced from $1.97 per ton mile during 1939 to a present rate of 45 cents per ton mile, or a decrease of 77%. This means that if the 1939 mail pay rate had been received by TWA in 1947, your Company's revenue would have been increased more than $11,500,000.

As a result of competitive forces and efforts on the part of the Company to develop a large volume of traffic, our fares during 1947 were approximately the same dollar amount as in 1939 despite the fact that the purchasing power of the dollar today is 49% less than the 1939 dollar.

These problems of profitable operation are by no means peculiar to TWA. The recent reports of the President's Air Policy Commission and the Congressional Aviation Policy Board call attention to the serious financial condition of all air transport companies. This condition, it is pointed out in these reports, exists over and above any improvement which can come from within the industry as the result of increased operating efficiency. Thus the industry as a whole is faced with the need of immediate governmental action, resulting in an adequate payment for services rendered.

The consolidation of the Transcontinental and International Divisions accomplished during the year has knit the personnel of TWA more tightly together and it was solely through their collective effort that the improvements of 1947 were made possible.

The greatest single asset of TWA as a dynamic organization is the team of 13,000 men and women, dedicated to providing the traveling public with efficient and reliable air transportation.

Warren Lee Pierson, Chairman of the Board

LaMotte T. Cohu, President

March 29, 1948

TRANSCONTINENTAL & WESTERN AIR, INC.
AND SUBSIDIARIES

NOTES TO FINANCIAL STATEMENTS

1. The accounts receivable from the United States Government for passenger and mail transportation include $828,831 representing charges for carriage of mail on the International route which have been accrued on the basis of a temporary rate. An order issued by Civil Aeronautics Board in November 1947, increased the temporary rate retroactively to February 1946, but determination of final rate and decision on the Company's applications for increase in rates for carriage of foreign as well as domestic mail had not been made or rendered by the Civil Aeronautics Board at December 31, 1947.

   The amount due from governments outside the United States includes unpaid foreign air mail charges aggregating $664,223 which may be advanced by the United States Government out of certain specified funds. The Company was contingently liable at December 31, 1947 in the amount of $2,257,000 on previous advances, as any amounts advanced by the United States Government which are not collected from foreign countries are recoverable from the Company.

2. In January 1947 the Company granted options for the sale of all TACA Airways, S. A. stock presently owned. These options are exercisable at $2 per share on or before January 31, 1948, $2.50 on or before January 31, 1949, and $3 on or before July 31, 1949. The option expiring on January 31, 1948 was not exercised by the holder. The excess of the cost of TACA stock over the option price of $2 a share, amounting to $1,625,750, was written off in the year 1946. An over-the-counter market bid price on TACA Airways, S. A. stock was $1.50 per share at December 31, 1947 and 87½ cents per share on March 15, 1948. No provision has been made for any loss which may result from ultimate disposition of this stock.

   Some of the investments in other associated foreign airlines are of doubtful value and the Company may suffer losses in excess of the $50,000 reserve provided, on the sale or liquidation of these investments.

3. The unamortized portion of International Division development expense will be written off over the remaining period of the Temporary Certificate of Convenience and Necessity issued by Civil Aeronautics Board which expires on July 4, 1952. No additional charges were made to this account during the year 1947.

4. In 1946 the Company entered into a repurchase agreement with Lockheed Aircraft Corporation which provides in substance that the Company may return to Lockheed any or all of five Constellation airplanes on which 2% notes were given in part payment, against cancellation of any then outstanding unmatured 2% notes relating to the airplane or airplanes so returned or, if the principal of any such notes shall have been prepaid or Lockheed shall not then be the owner of said notes, the Company may require Lockheed to pay it an amount equal to the principal of said notes prepaid and the principal of any such notes outstanding and held by others.

   In May 1947 the Company issued instalment promissory notes, secured by chattel mortgages, of an aggregate amount of $2,815,180 in part payment of the purchase price of four additional Constellation airplanes.

5. Under the indenture dated December 1, 1945, covering the outstanding sinking fund debentures, consolidated earned surplus of the companies at December 31, 1945, amounting to $9,113,848, is restricted as to payment of cash dividends. The indenture provides that no dividend other than stock dividends be declared if such dividend plus all other dividends declared subsequent to December 31, 1945 exceed the consolidated net income of the Company and its subsidiaries for the period subsequent to December 31, 1945 to and including the date of the declaration of such dividend.

   A supplemental indenture executed in 1947 extended the maturity of the Series B debentures to December 1, 1955, and increased the annual interest rate of the Series B debentures to 3%. Series A debentures are due on June 1, 1956.

   Sinking fund payments required on the Series A debentures are $500,000 on May 28, 1948; $1,000,000 on May 28, 1949; and $2,000,000 annually to and including May 28, 1955; and on the Series B debentures are $500,000 on November 27, 1948, $1,000,000 annually to and including November 27, 1953, and $2,000,000 on November 27, 1954.

   Additional sinking fund payments for the retirement of Series A and B debentures are required annually beginning November 27, 1948 in the amount equal to the excess of net income of the Company for the preceding year plus interest accrued on the subordinated convertible notes issued in 1947 over the fixed annual sinking fund payments set forth in the preceding paragraph, the total sinking fund payments to be limited, however, to an amount equal to the sum of $4,000,000 multiplied by the number of fiscal years completed subsequent to December 31, 1946.

6. The authorized number of shares of capital stock was increased during the year 1947 to 3,000,000 shares of a par value of $5 each and the additional 2,000,000 shares were reserved for the conversion of the subordinated convertible notes which are payable only in capital stock of the Company.

   Under the terms of an agreement dated December 26, 1947, Hughes Tool Company agreed to waive all rights to payment on account of the subordinated convertible 2¾% notes in money or in any form other than stock of Transcontinental & Western Air, Inc. The notes and accrued interest thereon are convertible at any time on or before June 2, 1956 and the price per share at which such conversion shall be effected is the average of the prices at which the last sale of the Corporation's common stock was

TRANSCONTINENTAL & WESTERN AIR, INC.
AND SUBSIDIARIES

made in the New York Stock Exchange on each of the last ten business days of such Exchange preceding the date of receipt by the Corporation of notice of conversion, unless such average shall be less than the par value, in which event the conversion price shall be such par value.

7. The Company has made provision for landing fees, rentals, customs duties, foreign income taxes, and other liabilities accrued on account of operations in foreign countries on the basis of actual liability or estimates based on available information. In the opinion of management such provision is adequate.

8. The basis of computing depreciation on flight equipment was changed effective January 1, 1947 to revise the estimated life as follows: On owned and leased DC-3 aircraft and related engines and radios from December 31, 1947 to June 30, 1949; on owned DC-4 aircraft and related engines from various dates in 1950 and 1951 to December 31, 1950; and on Constellation aircraft and related engines from various dates in 1953 to December 31, 1953. As a result of this revision the provision for depreciation on this equipment for the year ended December 31, 1947 was approximately $1,850,000 less than would have been charged on the basis of depreciation rates used in the year 1946.

   During the year 1946, the basis of computing depreciation on owned and leased DC-3 aircraft and related engines and radio equipment was changed effective January 1, 1946 to extend the estimated life from various dates in 1946 and 1947 to December 31, 1947. As a result of this revision the provision for depreciation on this equipment for the year ended December 31, 1946 was approximately $765,000 less than would have been charged on the basis of depreciation rates used in the year 1945.

9. Commitments and Contingent Liabilities:

   The Port of New York Authority has agreed to construct certain hangars and other site area improvements at Idlewild Airport at an aggregate cost of not to exceed $16,350,000 subject to the Company's approval of plans for such hangars and improvements, these facilities to be used and occupied by the Company. Annual payments covering the cost of the improvements are to be made by the Company over a period of nine to twenty-nine years. The Company has also agreed to construct a hangar at Chicago airport at a cost of not less than $250,000, such improvement to revert to the lessor at the expiration of the lease.

   Commitments have been made for the purchase and delivery during 1948 of additional flight equipment and related engines and parts in an aggregate amount of $15,000,000; however, such commitments are subject to consummation of present negotiations for long-term financing of such purchases.

   The Company is defendant in various lawsuits and claims and has made provision for such known liabilities which in the opinion of management are not adequately covered by insurance.

10. Effective January 1, 1947 the Company revised its classification of income and expense accounts in accordance with Civil Aeronautics Board's revised system of accounts. For comparative purposes 1946 operating expenses of material amount have been reclassified to conform to the revised classification. The financial statements include TWA Agency Limited, a wholly-owned subsidiary not formerly consolidated.

TRANSCONTINENTAL & WESTERN AIR, INC.

TO THE STOCKHOLDERS AND EMPLOYEES:

Earnings

The company's consolidated net loss for the year 1948 was $179,000 resulting from gross revenues of $101,114,000. This compares with a net loss of $8,080,000 during the previous year and a net loss of $13,666,000 during 1946. The International Division produced a net profit of $656,000 which was offset by a net loss of $1,135,000 on the Transcontinental Division.

Improved results during the year 1948 occurred mainly through an increase of $22,274,000 in gross revenues while the increase in overall costs amounted to $13,325,000. The larger revenues included the sum of $8,929,000 from higher rates for the transportation of mail, $6,925,000 from increased passenger fares and the balance of $6,420,000 arose from an increase of approximately 15% in the volume of traffic handled in 1948 as compared with 1947.

Efforts were continued during the year toward reducing expenses. A significant yardstick for the measurement of economy of operation in air transportation is the cost per available ton mile. During 1948 TWA operated at a cost of 39.91¢ per available ton mile compared with a cost per available ton mile of 42.15¢ in 1947. A substantial portion of the savings were made possible by the addition to service of fourteen Constellation airplanes during the latter half of the year with but nominal increases in the overhead category of expense. A further indication of increased economy is the reduction of 680 persons in total employment as of December 31, 1948 compared with the end of the prior year although available ton mileage flown during December, 1948 was greater by 26% than in the closing month of 1947.

Net non-operating expense of $2,604,000 represented an increase of $1,348,000 for the year. Of this increase, $822,000 is attributable to a write-down of investments and $275,000 represents loss on the sale of engines formerly used on DC-3 aircraft, both non-recurring items. The greater part of the balance represents interest on additional indebtedness incurred in purchase of aircraft.

Financial Position

Net Working Capital at the year end aggregated $9,237,000. Cash was $10,646,000. Included therein was foreign currency held in banks abroad of $1,072,000, a major portion of which was required for working funds overseas. The conduct of the international operations involves acceptance of foreign currencies which for the greater part carry the right of conversion to U. S. dollars. An important proportion of operating expense, likewise, is in foreign funds. The year end foreign exchange position is considered satisfactory, although some burdensome restrictions on trade and travel are imposed by lack of free currency markets in many countries served.

Operating Property, which cost $71,371,000, had been depreciated to a net book value of $45,974,000. This plant value included a fleet of 122 airplanes consisting of 33 Constellations, 10 C-54's, 48 DC-3's and 5 Boeing Stratoliners owned by the Company and 24 DC-3's and 2 C-54's held under lease, plus the appurtenant facilities required in providing transportation at 71 points throughout the world.

Funded Debt totalled $56,217,000 of which $6,143,000 is payable during 1949. This represents a net increase of $11,658,000 for the year, which arises out of the financing of twelve new type Constellation airplanes, negotiations for which were mentioned in the previous Annual Report, less debt repayments made on funded obligations. Previously outstanding purchase money obligations covering nine Constellation airplanes were consolidated with the financing for the twelve Constellations into a new chattel mortgage payable in fifty-seven monthly installments commencing on September 30, 1948. The Company entered into a conditional sales agreement with Hughes Tool Company covering two additional Constellation airplanes during February, 1949 on substantially the same terms.

During August, 1948, after approval by the stockholders of TWA the $10,000,000, 2¾% subordinated convertible notes held by Hughes Tool Company plus $344,230 interest accrued thereon were converted into TWA stock at a price of $10 per share, thereby increasing common capital stock by 1,034,423 shares.

The assets of your Company at the year end were approximately $77,647,000 while term debt aggregated $56,217,000, all due within eight years. Since the year end, additional equity capital has been brought into the Company. Further plans for strengthening the Company's financial position are contemplated as the earnings record and capital markets justify.

TRANSCONTINENTAL & WESTERN AIR, INC.

Operations

Domestic

An important addition was made to the Constellation fleet in the Transcontinental Division during the last half of the year, with favorable results on earning power. The addition of twelve new Constellations to the International Division during the year permitted the transfer of six Constellations to domestic service; and the two Constellations acquired from Hughes Tool Company were placed in operation toward the end of the year. Constellation service was added to Washington, Dayton, Philadelphia, Pittsburgh and Albuquerque and additional Constellation schedules were provided to other points on the system including a new non-stop flight from San Francisco to Kansas City and two non-stop schedules from Chicago to Los Angeles and San Francisco respectively. DC-3 and Stratoliner services were maintained without significant change.

An equipment interchange agreement was entered into between your Company and Delta Air Lines, providing one plane service between Detroit-Columbus on TWA's route through Cincinnati to Atlanta-Miami on Delta's route. Results to date have been encouraging, and your Company will sponsor further cooperative undertakings of this nature as opportunity arises.

While the domestic airline industry as a whole reported a decrease in revenue ton mileage during 1948, the Transcontinental Division had an increase of 9% in traffic volume. Of the major categories going to make up this total, passenger miles increased 4%, mail ton miles 17%, express ton miles 8% and freight ton miles 103%.

International

Your management is particularly gratified by the continued growth of the International Division. Service over the international route was inaugurated in February 1946 producing gross revenues for the year of $17,000,000. For the year 1948 International Division revenue exceeded $39,000,000, approximately 40% of System total.

The development of this service under the unsettled and chaotic post-war conditions existing abroad presented many difficult problems for management to overcome. Results for the year 1948 have justified in substantial measure the efforts expended.

To meet the increasing demand for transportation on its routes, your Company, during the summer of 1948, placed in International service the twelve new Constellation airplanes, previously referred to. The non-recurring pre-service costs were charged to current operating expense.

At the end of 1948, International Division schedules called for 30,000 airplane miles per day, 23.7% above the daily average flown for the month of December, 1947. Your Company's schedules now call for 34 Atlantic crossings weekly. Of the 17 flights originating in the United States, two terminate at Paris, two at Rome, nine at Cairo and four at Bombay.

During the year, unstable political conditions in several of the areas which your Company serves have acted as major deterrents to trade and travel, and have also deferred the attainment of originally anticipated costs of operation. The shortage of U. S. dollars abroad constitutes an additional problem, but it is hoped that the high standard of our operations will find favor, not only with the American citizen abroad, but with the traveling public generally in spite of this difficulty.

As with the Transcontinental Division it has been our aim to increase the daily utilization of our fleet. As a result daily average utilization during 1948 was 27% above the previous year.

Volume of International Division traffic, measured by revenue ton miles hauled, increased 16% over 1947; passenger miles increased 13%, mail ton mileage 18% and cargo ton mileage 40%.

Rates

Passenger Fares

Domestic passenger rates were increased 10% during December, 1947, and 10% in September, 1948. As an offset, due to competitive requirements, the 10% extra fare on Constellation travel was eliminated and certain other promotional rates were established, including reduced family fares for travel during the early part of the week and the institution of a 5% round-trip discount.

Transatlantic passenger fares were increased $25.00 on April 1, 1948, and minor adjustments were made in intra-European and Middle East fares on August 31. On October 1 a seasonal excursion reduction of 33-1/3%, applying to round-trip transatlantic travel, was placed in effect for the winter months.

TRANSCONTINENTAL & WESTERN AIR, INC.

Mail Compensation

Mail compensation for domestic operations is being paid under a temporary rate order issued by the Civil Aeronautics Board, May 7, 1948 retroactive to January 1, 1948. Payments are made on a sliding scale formula, varying as to volume carried, and produced an average of 60.2¢ per ton mile for the year.

Two upward revisions of International mail rates were also made during 1948 by action of the Civil Aeronautics Board under temporary rate orders. On May 25 a temporary rate was granted retroactive to January 1 of 60¢ per plane mile flown, varying downward on a sliding scale from a base mileage of 30,000 plane miles per day.

On December 22, 1948 a further upward adjustment under the foregoing temporary rate order was established retroactive to January 1, increasing the base rate of compensation to 85¢ per plane mile. International mail compensation is computed solely on a mileage base without regard to mail volume carried.

Routes

During the year, the Civil Aeronautics Board authorized your Company to serve the additional points: Santa Fe, New Mexico; Worcester, Massachusetts; Johnstown and Wilkes-Barre-Scranton, Pennsylvania; Baltimore, Maryland and Zurich, Switzerland.

The Current Year

On January 25, 1949 Ralph S. Damon was elected President and Chief Executive Officer of the Company, a post which had been vacant since June 1, 1948. Mr. Damon's entire business life has been devoted to the aviation industry and he brings to your Company long experience in airline operations.

On February 16, 1949 rights were offered to stockholders to subscribe for 404,112 shares of additional common stock at $10 per share in the ratio of one new share for each five shares held. The stock was fully taken up by stockholders and underwriters and, after expenses, approximately $3,800,000 was thereby added to cash funds available for general corporate purposes.

On February 25, 1949 the Civil Aeronautics Board, recognizing the financial needs of the domestic airlines generally, issued a series of show-cause orders proposing further temporary mail pay increases to certain carriers. The order proposed to award TWA a lump payment of $2,748,000, $2,029,000 designed to eliminate the estimated operating loss incurred by the domestic operations during 1948, and $719,000 on account of a sum of $1,819,000 to reimburse losses incurred through the grounding of aircraft by the Civil Aeronautics Board's order in 1946. The balance of the grounding losses would be payable at the rate of $33,333 per per month, beginning January 1, 1949. That portion of the sums above relating to 1948 and prior periods are reflected in the financial results presented herewith.

Increasing recognition is being accorded by all Governmental authorities of the necessity for a sound air transport industry in the interest of the nation's commerce, the postal service and national defense. The Civil Aeronautics Board by its recent mail rate actions has demonstrated a policy which is wholly in accord with the purposes of the Civil Aeronautics Act and has achieved considerable success in solving the basic difficulties of the industry during the past few years.

Your Company is being operated by a group of 12,000 men and women whose aim is to provide safe and dependable air transportation throughout the world. In the opinion of your management the results of 1948 indicate that prospects for the future are much more favorable for profitable operation than a year ago and it is felt that many of the difficulties which confronted the air transport industry and TWA for the past two years are behind us.

By Order of the Board of Directors:

Chairman of the Board

President

March 29, 1949

TRANSCONTINENTAL & WESTERN AIR, INC.
AND SUBSIDIARIES

NOTES TO FINANCIAL STATEMENTS

1. The balance sheet includes approximately $2,351,516 of net current assets located in the foreign countries in which the Company operates. Of this amount approximately $842,463 relates to countries having restrictions at December 31, 1948 on conversion into United States dollars. The Company has provided a reserve of $122,000 for probable loss on conversion of these net current assets.

   In addition, the Company has materials and supplies amounting to $124,000 and ground equipment and spare parts of a net book value of $836,998 located at Cairo, Egypt, which were acquired principally for use at a maintenance base, operation of which has been curtailed by the Company. A reserve of $250,000 has been provided by the Company for loss on sale or disposition of the equipment, parts and supplies, a portion of which was sold to the Egyptian Government subsequent to December 31, 1948.

2. On February 25, 1949 the Civil Aeronautics Board issued an order directing the Company to "show cause" why the temporary air mail rates for its transcontinental system should not be increased by a lump sum payment of $2,748,000 for the period March 14 through December 31, 1948 and a monthly lump sum payment of $33,333 for the period on and after January 1, 1949.

   The payment of $2,748,000, if granted, represents $2,029,000 additional compensation for transportation of air mail of TWA's transcontinental system in the year 1948 and $719,000 to compensate TWA for the amortization, for the period from March 14, 1947 through December 31, 1948 of losses (estimated at $2,000,000 by the Board for the purpose of fixing the temporary rate) incurred in 1946 because of the grounding of Constellation aircraft by the Administration of Civil Aeronautics.

   The $2,000,000 estimated cost of grounding is to be amortized over a five year period, but for purposes of establishing the temporary rate, amortization of $400,000 a year will commence with March 14, 1947, the date of TWA's petition instituting mail rate proceedings. The monthly payments of $33,333 shall continue to October 1, 1951, or until the final rate of air mail pay for the transcontinental system has been established. The final air mail rate or rates may be lower or higher than the temporary rates specified in the order to "show-cause." The Company's acceptance of the "show-cause" order was filed with the Civil Aeronautics Board in March 1949.

   Effect has been given in the accompanying financial statements to the additional compensation granted under the "show-cause" order. Accounts receivable from United States Government includes the lump sum payment of $2,748,000 and air mail revenue for the year 1948 has been increased by the additional air mail revenue of $2,029,000 applicable to the year 1948. Earned surplus has been credited with the amount of $1,819,000 representing the presently known amount recoverable on the loss from grounding of Constellation aircraft.

   The unamortized portion of the Constellation grounding loss which amounts to $1,100,000, representing the portion collectible in monthly payments of $33,333 subsequent to January 1, 1949, has been classified as a deferred charge and will be written off over the period from that date to October 1, 1951 and the subsequent monthly collections of $33,333 will be credited to mail revenue with the result that net operating results of subsequent years will not be affected unless payments by the Government are discontinued.

3. See note to profit and loss statement for rate increase granted during the year 1948. Proceedings are pending with respect to final rates on both domestic and international routes and the temporary rates are subject to retroactive increase or decrease upon the fixing of final rates by the Civil Aeronautics Board.

4. For purposes of computing depreciation, the Company, as of January 1, 1948, extended the estimated useful life of owned and leased DC-3 aircraft and related engines to December 31, 1950 or the end of the lease (as regards leased aircraft), whichever was sooner, with the result that the provision for depreciation on this equipment for the year ended December 31, 1948 was approximately $500,000 less than would have been charged on the basis used for the year 1947.

5. Under the indenture dated December 1, 1945, relating to the outstanding sinking fund debentures, there are various restrictions on the payment of dividends, including a provision that cash dividends declared shall not exceed consolidated net income subsequent to December 31, 1945. Consolidated earned surplus at December 31, 1948 thus restricted was $9,113,848.

   The Series A debentures mature on June 1, 1956, but sinking fund payments for their retirement in advance of maturity are required in amounts of $1,000,000 on May 28, 1949 and $2,000,000 annually thereafter to and including May 28, 1955, leaving a balance of $16,500,000 payable on June 1, 1956, the maturity date.

   The Series B debentures mature on December 1, 1955 and similar sinking fund payments for retirement of these debentures are required in amounts of $1,000,000 annually beginning November 27, 1949 to and including November 27, 1953, $2,000,000 on November 27, 1954, and the remainder of $2,500,000 is payable on December 1, 1955.

   Additional sinking fund payments for the retirement of Series A and B debentures are required annually beginning November 27, 1949, in an amount equal to the excess of net income of the Company since December 31, 1948, plus

TRANSCONTINENTAL & WESTERN AIR, INC.
AND SUBSIDIARIES

interest accrued on the subordinated convertible notes issued in 1947, over all sinking fund payments previously made, the total sinking fund payments to be limited, however, to an amount equal to the product of $4,000,000 multiplied by the number of fiscal years completed subsequent to December 31, 1946, plus $4,000,000 in respect of the then current fiscal year.

6. In 1946 the Company wrote down its 275,000 share investment in TACA stock by the amount of $1,100,000 and also provided an additional $525,750 for loss on 60,000 shares of TACA stock which the Company was obligated to purchase and did purchase in 1947. The foregoing constituted a provision for the loss which would result from exercise of options for the sale of 335,000 shares of TACA stock at $2 a share.

In February 1949 options on 279,165 shares were canceled and 200,000 shares of TACA stock were sold at 50 cents per share. In 1948 the Company wrote off $569,999 representing the remaining portion of its investment in TACA stock, less the proceeds of $100,000 received in 1949 on the sale of 200,000 shares. The Company also reduced certain other investments in associated companies by an amount of $251,903 with the result that such charges against income for the year 1948 amounted to $821,902. Investments have been written down to estimated realizable values as indicated by latest available unaudited financial statements of the companies concerned.

7. The unamortized portion of International Division development expense will be written off over the remaining period of the Temporary Certificate of Convenience and Necessity issued by the Civil Aeronautics Board and expiring on July 4, 1952. No additional charges have been made to this account during the years 1947 and 1948.

8. In February 1949 the Company offered to its stockholders the right to subscribe at $10 a share, an aggregate of 404,112 shares of its common stock. On or before March 7, 1949 stockholders purchased 375,036 shares and 29,076 shares were purchased by underwriters. The net proceeds realized by the Company from the sale of the 404,112 shares, after underwriters commissions, but before expenses, amounted to $3,955,198.

9. Commitments, Contingent Liabilities, and Litigation:
The Port of New York Authority has agreed to construct, subject to the Company's approval of plans, certain hangars and other site area improvements at Idlewild Airport at an aggregate cost not to exceed $16,350,000. Under the terms of this agreement, the Company will be entitled to the use of such improvements but will not acquire title to them. Annual payments covering the cost of the improvements (with interest at rates related to the interest rates paid by the lessor on the serial bonds—still to be issued—the proceeds of which shall have been used to finance the construction of the respective site area improvements, adjusted to reflect any premium received by the lessor on the sale of such serial bonds) are to be made by the Company over a period of nine to twenty-nine years.

On February 1, 1949 the Company entered into an agreement to purchase from Hughes Tool Company two Constellation airplanes at a cost aggregating $1,090,000. After an initial payment of $28,000 as of February 1, 1949 the Company is to pay the remainder in monthly payments of $18,000 with interest at three per cent per annum on unpaid balance. The agreement provides that title to the planes shall not pass to the Company until the purchase price is paid in full. The Company received delivery of one of the airplanes in October 1948 and another in November 1948 and was permitted to use them without charge until the effective date of the contract.

The Company was contingently liable at December 31, 1948 in amounts aggregating $2,782,800 on advances made by the United States Government for foreign air mail charges. Although the Company has suffered no loss in the past, any such payments not recovered by the Government from foreign countries are recoverable from the Company.

An action has been commenced in the Supreme Court of the State of New York, County of New York, through the service of a summons without complaint by Edward Blatz, et al., plaintiffs, against forty-six defendants who appear to be certain present or former officers and directors of TACA Airways, S. A., and affiliated companies and individuals and corporations who now are or formerly were stockholders thereof and others, including TWA, the basis of which will be unknown to TWA unless and until a complaint is served therein. The summons was served on TWA on February 24, 1948.

Various other lawsuits and claims are pending against the Company. The management and legal counsel know of no litigation pending or threatened against the Company which might result in liability which, over and above any insurance coverage in respect thereof, would materially affect the Company's financial condition or interfere with its operations.

Lockheed Constellation

Summary of the Year

Your Company's net profit in 1949 was $3,708,845 which compared with adjusted net losses of $1,277,591 in 1948 and $5,376,525 in 1947.

Of the total earnings $722,543 were accounted for by the Domestic Division and $2,986,302 by the International Division. The financial position of your Company continued to improve in other respects and at the year-end the net working capital was $16,081,334, including cash of $15,364,119 and total assets of $81,747,840.

During the year TWA's fleet flew 64,686,000 miles, a total of 1,513,000 persons were transported 1,226,861,000 passenger miles. Revenue ton miles handled during the year, including passengers, cargo and mail, set a new high of 158,037,000, an increase of 10 per cent over the previous year. All major categories of income increased with the exception of compensation for carrying United States mail which was reduced by 8 per cent.

Operations and Service

During the year operating refinements and increased on-time performance characterized your Company's domestic and international operations.

There occurred in 1949 a noteworthy development in domestic air transportation represented by the expansion of passenger service through utilization of high capacity aircraft at low fares which in the industry is commonly designated "air coach" or "sky coach" service. TWA currently conducts such operations at fares ranging from 4¢ to 4½¢ per passenger mile between major traffic centers, utilizing 38-seat Boeing Stratoliners and 60-seat Douglas DC-4's. These rates compare with approximately 6¢ per passenger mile charged on TWA's standard flights.

Three Constellations are being converted to a capacity of 81 seats and will replace the DC-4's in the transcontinental coach operation, after which the latter aircraft will be reassigned to take the place of the Boeing Stratoliners on shorter route segments.

The air coach type of accommodation is still experimental in the eyes of the industry and of the Civil Aeronautics Board. While designed to explore the possibilities of a wider travel market, it is too early to determine the extent to which this can be done profitably and without diverting first-class patronage.

Changes in domestic service during the year included inauguration of flights to Lancaster, Pa., and discontinuance of operations at Johnstown, Pa., which had been conducted under a one-year temporary certificate. At the request of the Civil Aeronautics Board, the certificate of public convenience and necessity for Route 38 between Phoenix, Arizona, and Las Vegas, Nevada, via Prescott, Kingman, and Boulder City, was transferred to Bonanza Air Lines, Inc. This transfer does not affect TWA's right to conduct transcontinental service through Las Vegas, Phoenix and Boulder City; however, service to the latter point has been suspended because of airport conditions.

Several changes have been made in your Company's international service pattern. Early in 1949 Zurich, Switzerland, was added as a new traffic stop between Paris and Rome. This is in addition to the stop at Geneva, Switzerland. Cessation of hostilities in the Middle East permitted resumption of service to Jerusalem, served through the Lydda airport. During the year ground facilities were installed at Milan, Italy, and service to that point began early in 1950.

The international passenger fare and cargo rate structure was substantially affected as a result of the sterling devaluation in September, 1949. While this did not bring about any reduction in the fares or rates between the United States and the European gateway cities of Shannon, Paris and Lisbon (which are established in terms of U. S. dollars), it has resulted in an appreciably lower yield from traffic within Europe, the Near East and Asia, including through traffic between the United States and those areas.

Flight Equipment

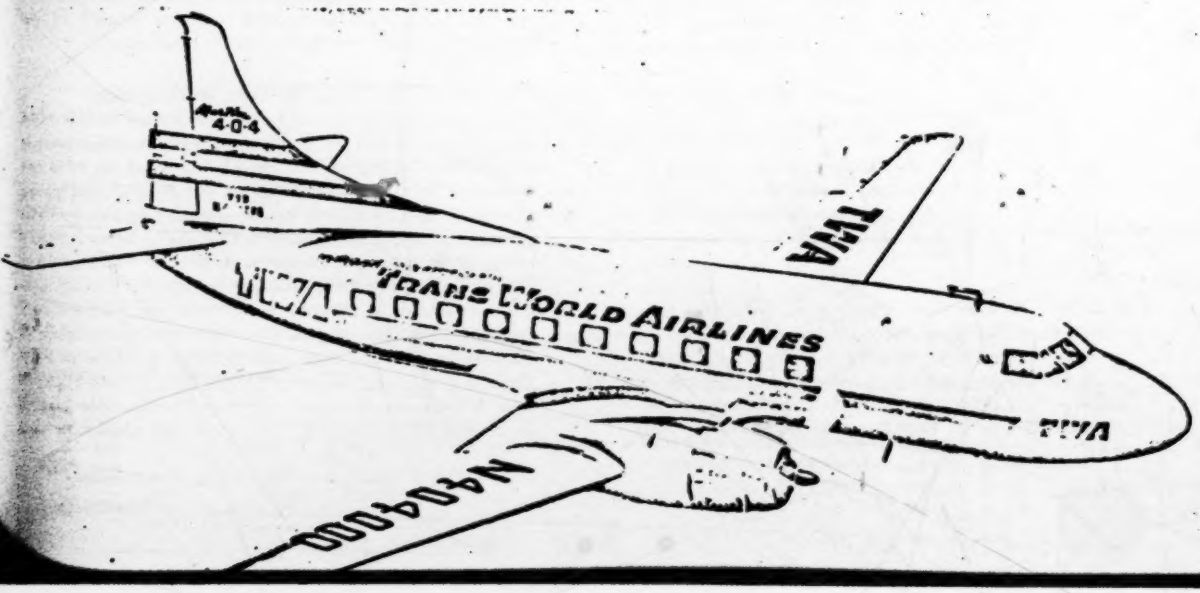
To maintain TWA's competitive position and accommodate the continually growing traffic, your Company entered into contracts during the year for the purchase of twenty additional Constellation aircraft of the latest type. Delivery of these airplanes is beginning at this time. This acquisition will be financed through a loan of twelve million dollars previously arranged with a group of seven banks and secured by chattel mortgage on the equipment.

Six additional Constellations were purchased through the Hughes Tool Company in February, 1950, three of which will be assigned to the international service and three to the domestic "sky coach" service. Hughes Tool Company made these aircraft available to TWA at cost. Receipt of the Constellations now on order will give your Company a total of sixty-one Constellations, the largest fleet of post-war four-engine equipment in the air transport industry.

Two additional DC-4 airplanes were purchased in 1949, and together with two of the Company's existing DC-4's, were modified by substantially increasing the seating capacity for use in the domestic "sky coach" service.

For some time TWA has been making plans for the replacement of its 21-passenger DC-3 aircraft serving its domestic routes. On March 7th your Company announced its intention to purchase thirty Martin Model 4-0-4 40-passenger airplanes in order to accomplish a part of this purpose. The Martin Model 4-0-4 is a new type of pressurized twin-engine airplane, delivery of which will begin in the Spring of 1951. In order to cover the interim period the Martin Company is leasing to TWA twelve Martin Model 2-0-2 aircraft now under construction, which will be returned when the 4-0-4 airplanes are delivered. Further steps for the improvement of your Company's airplane fleet are continually under consideration.

The Martin 4-0-4 is so stressed and designed that it can be converted to jet engine driven propellers when these power plants are released by the Military.



TRANSCONTINENTAL & WESTERN AIR, INC.

NOTES TO FINANCIAL STATEMENTS

1. On August 10, 1949 the Civil Aeronautics Board issued an order granting an increase of $5,039,333 in the temporary rate for carriage of United States mail on international routes for the period from February 5, 1946 through December 31, 1947.

   In its determination of additional mail compensation the Board deferred certain costs relating to involuntary grounding of aircraft and increased the amount of international route development costs to be deferred. All such costs incurred by the Company were written off as expense during the years 1944 to 1947, inclusive. Civil Aeronautics Board, in its determination of additional mail pay, increased the amortization charges to cover the increased deferred pre-operating development costs and other station and grounding costs. The Company adjusted its records to give effect to increased mail pay and to the deferment of the development and grounding costs as determined by the Board.

   The unamortized portion of the International Division development expenses and of costs relating to involuntary grounding of aircraft, amounting to $1,382,370 at December 31, 1949, will be written off over the remaining portion of the original five year period ending September 30, 1951 used by the Civil Aeronautics Board in its determination of temporary rates.

   The temporary rates granted are subject to determination of final rates by the Civil Aeronautics Board and such final rate, or rates, may be higher or lower than the temporary rate fixed by the Board.

2. On February 7, 1950, the Civil Aeronautics Board issued a show-cause order proposing a reduction in rates of compensation to be paid Transcontinental & Western Air, Inc. for the carriage of mail on its international routes, retroactive to January 1, 1949. This order, if made final, would reduce mail revenue for the year 1949 by approximately $1,800,000. The Company is opposing the proposed reduction, but the final outcome is not determinable at this time. Settlements made by the Post Office Department in 1950 covering international mail charges for November 1949 and subsequent months were based on the proposed reduced rates. Additional deductions have been made in 1950 by the Post Office Department from remittances covering billings from November 1949 to recoup alleged overpayments aggregating approximately $1,365,000 applicable to the ten months ended October 31, 1949, such deductions amounting to $1,000,000 on billings through February 1950.

3. Under the indenture dated December 1, 1945, relating to the sinking fund debentures, there are various restrictions on the payment of dividends, including a provision that cash dividends declared shall not exceed consolidated net income earned subsequent to December 31, 1945. Consolidated earned surplus at December 31, 1949 thus restricted was $9,113,848.

   The Series A debentures mature on June 1, 1956, but sinking fund payments for their retirement in advance of maturity are required in the amount of $2,000,000 annually from May 28, 1950 to May 28, 1955, inclusive, leaving a balance of $16,437,000 payable on June 1, 1956, the maturity date.

   The Series B debentures mature on December 1, 1955 and similar sinking fund payments for retirement of these debentures are required in amounts of $1,000,000 annually from November 27, 1950 to November 27, 1953, inclusive, and $2,000,000 on November 27, 1954, the remainder of $2,480,000 being payable on December 1, 1955.

   Additional sinking fund payments for the retirement of Series A and B debentures are required annually beginning November 27, 1950, in an amount equal to the excess of net income of the Company since December 31, 1946, plus $344,240, over all sinking fund payments previously made, the total sinking fund payments to be limited, however, to an amount equal to the product of $4,000,000 multiplied by the number of fiscal years completed subsequent to December 31, 1946, plus $4,000,000 in respect of the then current fiscal year.

4. No provision has been made for Federal income taxes as based on amended returns filed by the Company for the years 1946 to 1948, inclusive, the loss carry-over for prior years exceeds taxable net income for 1949.

   The amended returns which give effect to air mail pay increases, adjustment of international route development costs and amortization thereof, and a revision of depreciation on flying equipment, are subject to review by the Bureau of Internal Revenue.

5. The balance sheet includes approximately $190,000 of net current assets (representing foreign currency amounts of cash and accounts receivable, less accounts payable) located in the foreign countries in which the Company operates.

6. Commitments, Contingent Liabilities, and Litigation:
   The Company has contracted to purchase twenty Model 749A Constellation aircraft at an aggregate cost of approximately $19,000,000, delivery to be made between April 30, 1950 and January 31, 1951. Advance payments and deposits aggregating $8,000,000 have been made by the Company on this purchase contract and arrangements have been made to borrow from a group of seven banks a maximum amount of $12,000,000 to finance the balance of the purchase price of the twenty Constellation aircraft. A purchase contract was also executed as of February 1950 with Hughes Tool Company for purchase of six additional Constellation airplanes to be delivered in 1950. The total cost of approximately $3,750,000 is payable $100,000 upon delivery of each airplane and the balance in sixty monthly instalments. Contemplated acquisition of additional two-

TRANSCONTINENTAL & WESTERN AIR, INC.

NOTES

engine aircraft is set forth in letter included in the annual report.

On September 12, 1949 the Company entered into an agreement with the Port of New York Authority covering a proposed lease at New York International Airport which provides, in part, that, upon appropriate demand and an advance payment of 10% to be made by TWA prior to December 31, 1952, the Authority will construct hangars for TWA at a cost not to exceed $8,000,000. Under the terms of the agreement, the Company will be entitled to the use of such improvements but will not acquire title to them. Annual payments are to be made by the Company over a period of twenty-five years, the aggregate of which will equal 105% of the total cost of the hangars, plus interest at rates related to the interest rates paid by the lessor on its securities to be issued to finance the construction of the hangars.

The Company was contingently liable at December 31, 1949 in amounts aggregating [illegible],668,000 on advances made by the United States Government for foreign air mail charges, as any such payments not recovered by the Government from foreign countries are recoverable from the Company.

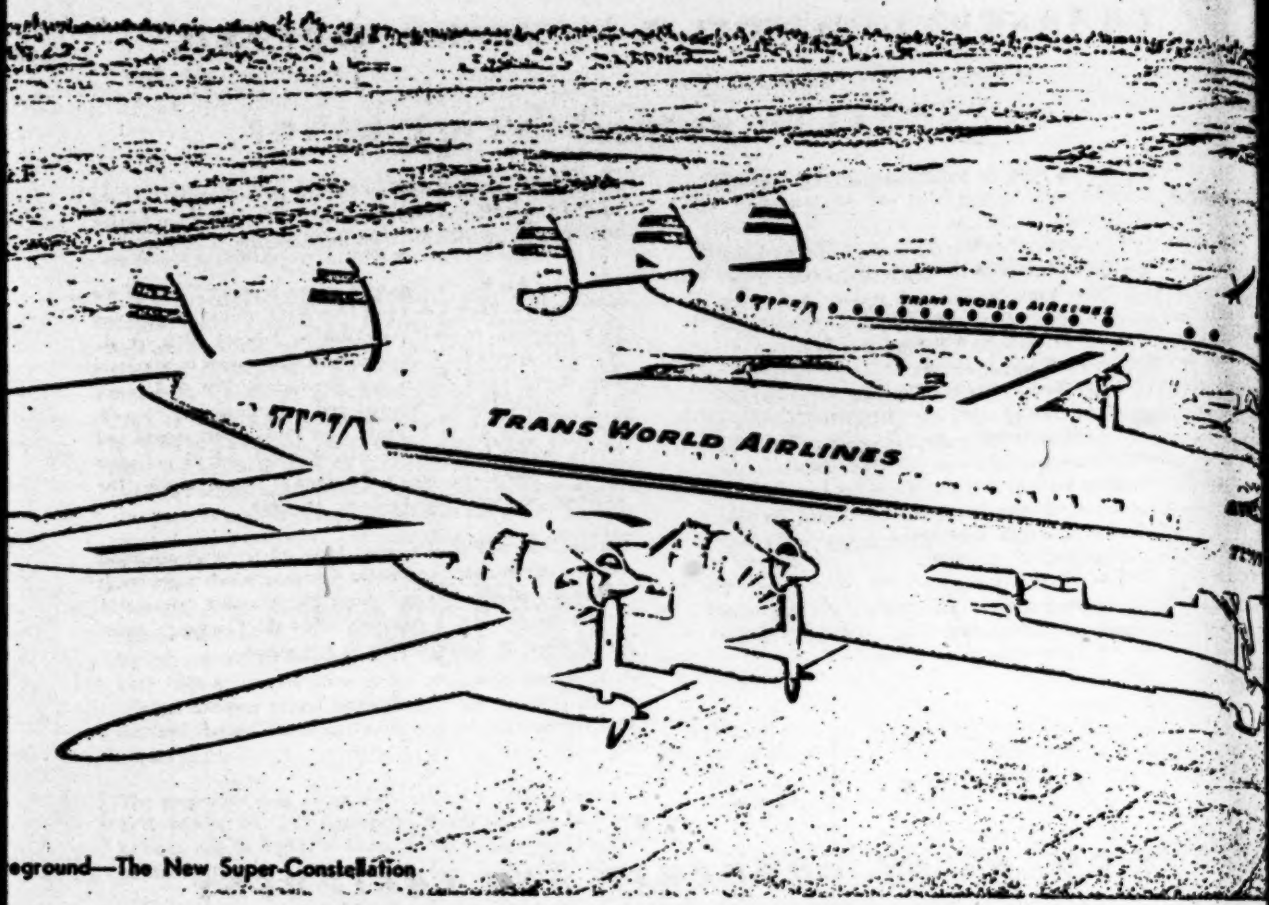
An action has been commenced in the Supreme Court of the State of New York, County of New York, through the service of a summons without complaint by Edward Blatz, et al., plaintiffs, against forty-six defendants who appear to be certain present or former officers and directors of TACA Airways, S. A., and affiliated companies and individualt and corporations who now are or formerly were stockholders thereof and others, including TWA, the basis of which will be unknown to TWA unless and until a complaint is served therein. The summons was served on February 24, 1948.

Management and legal counsel know of no other litigation pending or threatened against the Company which might result in liability which, over and above any insurance coverage in respect thereof, would materially affect the Company's financial position or interfere with its operations.

SUMMARY OF PROPERTY AND EQUIPMENT

AND RELATED RESERVES FOR DEPRECIATION, AMORTIZATION, AND OBSOLESCENCE FOR THE YEAR ENDED DECEMBER 31, 1949 AND NET BOOK VALUE DECEMBER 31, 1948

Classification of Property	December 31, 1949 — Property Accounts	Reserves for Depreciation, Amortization, and Obsolescence	Net Book Value	Net Book Value, December 31, 1948
Aircraft	$37,889,002	$19,327,391	$18,561,611	$22,017,255
Engines	11,144,726	4,794,831	6,349,895	7,971,301
Flight equipment spare parts and assemblies	6,985,481	1,518,337	5,467,144	6,316,274
Communication, hangar, shop, and other equipment	7,948,471	4,144,795	3,803,676	4,596,219
Furniture, fixtures, and office equipment	1,932,480	706,356	1,226,124	1,406,028
Buildings, improvements on land owned, and leasehold improvements	4,022,433	2,095,799	1,926,634	2,371,864
Leased aircraft conversion costs	133,083	133,083		539,496
Uncompleted work orders—not classified	732,439		732,439	699,348
Land	276		276	276
Total	$70,808,391	$32,740,592	$38,067,799	$45,918,061



eground—The New Super-Constellation

TO THE STOCKHOLDERS:

The improvement in your Company's sales and earnings continued during 1950. Despite a further slight reduction in compensation for transporting United States mail, consolidated operating revenues increased $11,427,982 to a new high of $117,073,341.

Financial Results

Net income before taxes was $9,961,696 and after income taxes was $6,494,713 or $2.68 per share of stock. This compares with a profit of $3,729,406 in 1949, and an adjusted loss of $1,278,373 for 1948. The financial position improved in many respects. For the first time, total assets exceeded $100,000,000 during 1950, and net worth increased to $27,531,679 at the year end.

Of the earnings before taxes, the Domestic Division contributed $5,627,486 and the International Division $4,307,515.

Operations

The improved net income resulted in part from the greater earning capacity of aircraft utilized in 1950. With a decrease of 4.8% in revenue plane miles flown, total revenue ton-miles transported increased 11.7% to 185,587,000. Revenue passenger miles increased by 19.3% to a new record of 1.5 billions.

Notwithstanding the added traffic and the resumption of inflationary tendencies during the last half of the year, your Company managed to reduce operating cost per revenue ton-mile by 9.1% in 1950.

Service

On July 10, 1950, the Civil Aeronautics Board and the President of the United States approved the acquisition by Pan American World Airways of the routes and net assets of American Overseas Airlines, Inc. The same order added London, England, and Frankfurt, Germany, to TWA's international route certificate and authorized the merged Pan American system to serve Paris and Rome. TWA service to London and Frankfurt was inaugurated September 27, 1950. Service to Milan, Italy, also was added during the year. Effective November 1, 1950, all international schedules were operated with Constellation aircraft. TWA introduced "Ambassador" flights to London and Paris, operating non-stop from New York. These flights feature spacious accommodations, special menus and other services.

In the Domestic Division, service to Marion, Ohio, was inaugurated, and that to Springfield, Ohio, and Richmond, Indiana, discontinued. Service improvements included the institution of transcontinental Constellation sky-coach service; replacement of DC-3 and Boeing sky-coach aircraft with Douglas DC-4's; installation of Martin 202A's on medium-length flights east of Kansas City; inauguration of transcontinental DC-4 all-cargo service; and extension of Constellation standard fare service.

Equipment

Because of the continually growing traffic, the order for 20 Model 749A Constellations mentioned in last year's report was increased to 25, of which 20 have been received and the remainder are scheduled to be delivered by July, 1951, at which time TWA will have 65 Constellations. The order for twin-engined Martin 404's was increased to 40, of which 30 are scheduled to be delivered in 1951 and 10 in 1952. Orders were placed recently for 10 Model 1049 Super-Constellations to be delivered early in 1952. The Super-Constellations and the Martin 404's will be designed for installation of jet-driven engines when they are obtainable commercially. When 30 Martin 404's have been received, the 12 Martin 202A's presently operated under lease will be returned to the manufacturer.

During 1950 the five Boeing Stratoliners were retired with a perfect 10 year safety record and 10 DC-3's that had been removed from scheduled service were sold; the balance of the DC-3's will be removed from service following delivery of the Martin 404's.

Financing Equipment Procurement

Funds for the procurement of the Martin fleet and the Super-Constellations will be provided 40% from cash and 60% by loans from a group of banks. These loans will be secured by chattel mortgages on the equipment and will be payable over periods of 50 months.

Regulatory Proceedings

As pointed out in last year's report, the mail compensation received by TWA since February 5, 1946, for the international services and since January 1, 1948, for the domestic services has been on a temporary basis, subject to retroactive revision either upward or downward. The Civil Aeronautics Board has issued several show-cause orders proposing retroactive reduction of the international mail compensation. Your management has resisted these proposed reductions and has urged the Board to determine permanent rates both for past periods and for the future. The ultimate outcome of these proceedings cannot now be determined.

Defense Activities

Upon the outbreak of hostilities in Korea, TWA was called upon to furnish four aircraft for the Pacific airlift, and later five DC-4's were leased for operation in that service.

For some time, representatives of the airlines have been engaged in joint studies with the responsible agencies of the United States Government to determine the mobilization pattern for air transport in the event of a greater national emergency. The subject matter of these discussions is classified information, but public statements of officers of the Government indicate an understanding of the necessity for continuation in wartime of the maximum possible amount of air transport under private civilian management.

Retirement Plan

Effective June 1, 1950, TWA installed a retirement plan for its officers and employees, pursuant to approval at the last meeting of stockholders. This plan provides for contributions by the Company and the employee toward the purchase of an annuity on the employee's retirement, except that the Company assumed the obligation of all payments accrued for service periods before the effective date of the plan. About 80% of the eligible employees are now participating in the plan.

The Outlook

The present outlook for domestic airline traffic in 1951 appears favorable; the trend in international traffic, because of its sensitivity to developments abroad, is more difficult to foresee but has started well in 1951.

Under the Excess Profits Tax Act of 1950, TWA would not be subject to excess profits taxes until income before income taxes increased substantially over the 1950 level.

Appreciation

The balance sheet accompanying this report does not record the value of TWA's greatest assets, which are:

1. A loyal, devoted and highly skilled corps of officers and employees, who have worked untiringly at home and abroad in TWA's interests.
2. The resultant good will of our patrons and of the communities which we serve, earned through years of good service and understanding.

Your Company's fleet includes the most modern aircraft available, and will be improved by the new equipment on order. The safety, comfort, courtesy and reliability of TWA's services in the United States, Europe, Africa and Asia are available at surprisingly low prices. Your management suggests you use these services whenever you travel or ship, and urge your friends to do likewise.

By Order of the Board of Directors:

Chairman of the Board

President

March 28, 1951

TWA Ex. 83, page 9
(TWA Annual Report-1950)

TRANS WORLD AIRLINES, INC.
AND SUBSIDIARIES

NOTES TO FINANCIAL STATEMENTS

1. The Civil Aeronautics Board has issued show-cause orders proposing reductions in rates of compensation to Trans World Airlines, Inc. for carriage of mail on its international routes. Should these orders become final, mail revenue for the years 1949 and 1950 would be reduced by approximately $1,815,000 and $1,564,000, respectively, or a total of $3,379,000. Of this amount, the Company has collected from the Post Office Department a total of $1,546,000, which includes repayment of deductions made by the Post Office Department in 1950 to recoup alleged overpayments. The balance of $1,833,000 of the alleged excessive billings remains in accounts receivable from the United States Government as of December 31, 1950. The Company is opposing the proposed reduction in mail pay rates, but final outcome is not determinable at this time.

Domestic and international mail rates presently in effect are temporary rates which are subject to determination of final rates by the Civil Aeronautics Board and such final rates may be higher or lower than the temporary rates now in effect.

2. Under the indenture dated December 1, 1945, relating to sinking fund debentures, there are various restrictions on the payments of dividends, including a provision that cash dividends declared shall not exceed consolidated net income earned subsequent to December 31, 1945. Consolidated earned surplus at that date thus restricted was $9,113,848.

The Series A debentures mature on June 1, 1956, but sinking fund payments for retirement in advance of maturity are required annually in the amount of $2,000,000 through 1955, leaving a balance of $16,437,000 payable on June 1, 1956, the maturity date.

The Series B debentures mature on December 1, 1953 and similar sinking fund payments for retirement of these debentures are required annually in the amount of $1,000,000 through 1953, and $2,000,000 on November 27, 1954, the remainder of $2,480,000 being payable on December 1, 1953.

Additional sinking fund payments for the retirement of Series A and B debentures are required annually on November 27, in an amount equal to (a) the excess of net income of the Company since December 31, 1946, plus $344,240, over (b) all sinking fund payments previously made, the total sinking fund payments to be limited, however, to an amount equal to the product of $4,000,000 multiplied by the number of fiscal years completed subsequent to December 31, 1946, plus $4,000,000 in respect of the then current fiscal year.

3. The Company's Federal income tax returns for the years 1946 to 1949, inclusive, have been examined by the Bureau of Internal Revenue. The net loss carry-over for prior years as determined by such examination, amounting to $1,050,000, was applied as a reduction of net taxable income in computing Federal income taxes for the year 1950. The Company is not subject to Federal excess profits taxes for the year 1950.

4. Commitments:

Under lease from the City of New York, assigned to The Port of New York Authority, and presently subject to the outcome of a suit for enforcement, the Authority is obligated to construct for the Company, as the Company may require, hangars and other site area improvements in Idlewild Airport at a cost not to exceed $16,350,000. The construction cost, plus interest, is to be repaid the Authority over an extended period of time after completion of the facilities. On September 12, 1949 the Company executed a supplementary agreement, to become effective upon the happening of certain other events (namely, the withdrawal of a pending suit against the Authority for enforcement of the original lease agreement), under the terms of which the Authority has agreed instead to construct for the Company, hangars and related improvements at a cost not to exceed $8,000,000.

The Company was contingently liable at December 31, 1950, in amounts aggregating $3,034,258 on advances made by the United States Government for foreign air mail charges, as any such payments not recovered by the Government from foreign countries are recoverable from the Company.

At December 31, 1950 the Company has contracted to purchase aircraft at an aggregate cost of approximately $38,000,000. The amount of commitments on purchase of related spare parts is not determinable at this time. Advance payments on these contracts and cash segregated for purchase of this equipment amounted to $11,436,606 at that date and

TRANS WORLD AIRLINES, INC.
AND SUBSIDIARIES

NOTES (Continued)

in January 1951 the Company made an additional payment of $3,211,728. Credit agreements have been entered into with a group of banks which will permit the Company to borrow a maximum of $24,650,000, the loans to be secured by chattel mortgages on the related aircraft and spare parts.

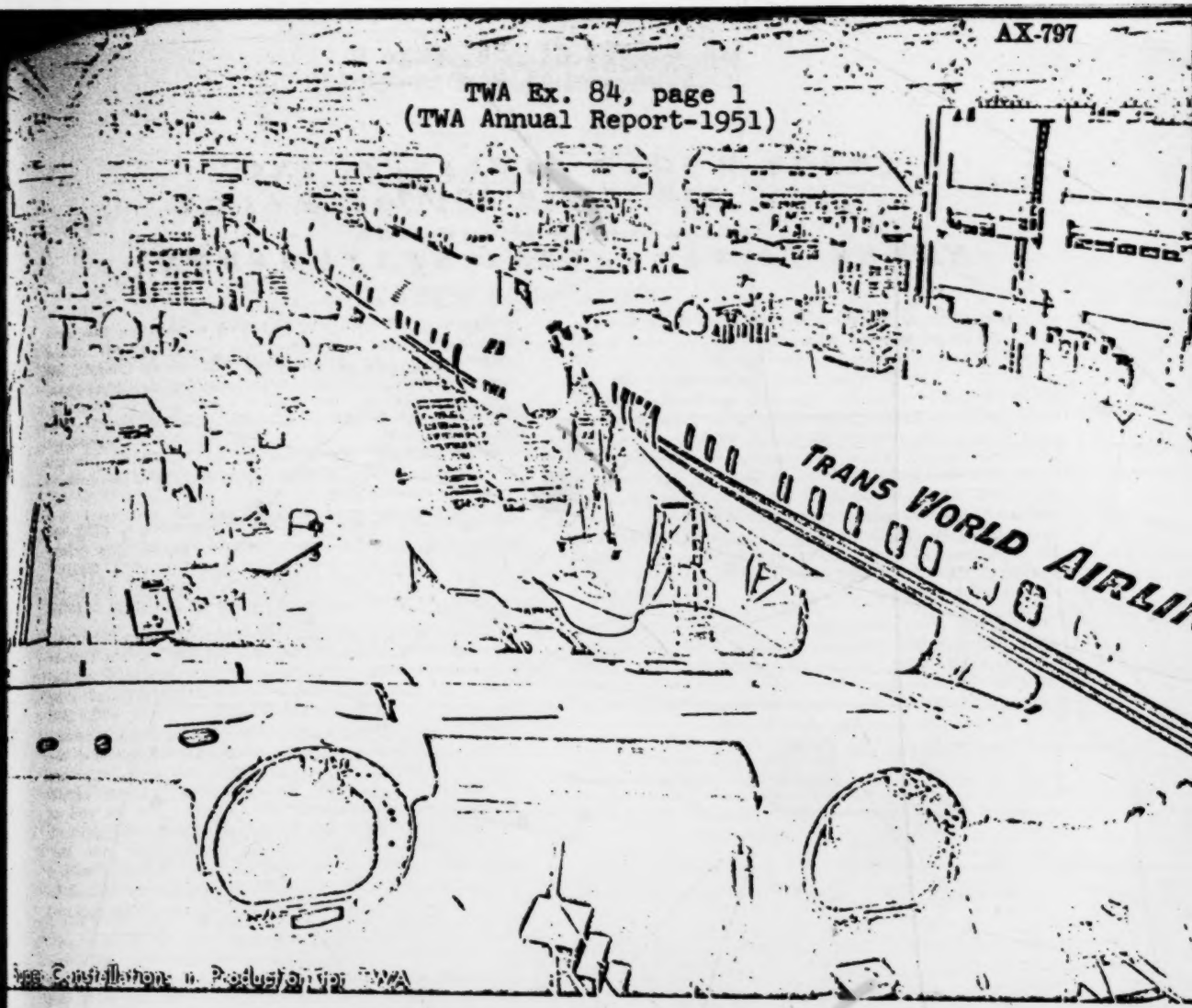
Under the terms of agreements between the Company, Hughes Tool Company, and The Equitable Life Assurance Society of the United States, the Company agrees to sell sufficient shares of its unissued stock to realize aggregate net proceeds of $10,000,000, of which $5,000,000 is to be sold on or before December 31, 1951, and $5,000,000 on or before December 31, 1952. Hughes Tool Company further agrees that if other purchasers are not available, Hughes, itself, will either purchase sufficient shares of stock to provide the net proceeds shown above, or lend said sums to TWA on subordinated convertible 2¾% notes. All obligations of Hughes Tool Company referred to above are subject to any approval of Civil Aeronautics Board which may be required by law.

An action has been commenced in the Supreme Court of the State of New York, County of New York, through the service of a summons without complaint by Edward Blatz, et al., plaintiffs, against forty-six defendants who appear to be certain present or former officers and directors of TACA Airways, S.A., and affiliated companies and individuals and corporations who now are or formerly were stockholders thereof and others, including TWA, the basis of which will be unknown to TWA unless and until a complaint is served therein. The summons was served on February 24, 1948.

TWA is one defendant, among other airlines and airline trade associations named defendants in the respective actions, in the following two actions: S.S.W. Incorporated is plaintiff in one action commenced in the United States District Court for the District of Columbia, alleging damages by a combination and conspiracies of the defendants in the restraint of air-borne trade and commerce, requesting judgment against defendants in the sum of $1,500,000 plus costs, and requesting that the defendants be perpetually enjoined from alleged conspiracies to restrain and monopolize air transportation. The complaint of S.S.W. Incorporated was dismissed on the motion of the defendants, and an appeal taken from such dismissal. Slick Airways, Inc. is plaintiff in one action commenced in the United States District Court for the District of New Jersey alleging damages from conspiracies to monopolize, monopolies, attempts to monopolize, and contracts, combinations, and conspiracies to restrain interstate and foreign trade and commerce in air freight transportation, requesting judgment against the defendants in the sum of $30,000,000 plus costs and requesting that defendants be perpetually enjoined from action similar to that complained of.

Management and legal counsel know of no other litigation pending or threatened against the Company which in their opinion would result in liability which, over and above any insurance coverage in respect thereof, would materially affect the Company's financial position or interfere with its operations.

TWA Ex. 84, page 1
(TWA Annual Report-1951)



TO THE STOCKHOLDERS:

Your Company enjoyed a record 1951. Sales and earnings were greater than in any previous year notwithstanding a number of factors, including the flood which affected our Kansas City Overhaul Base, increased operating costs, and a decrease in the rate of mail pay.

Operating revenues totalled $144,912,048 resulting in net income, before taxes, of $17,398,781. After income taxes, the net income was $8,510,974 equal to $3.50 per share of stock outstanding as of December 31, 1951.

Compared with 1950, as adjusted, the total revenue represented a 23.9 per cent increase, while the net profit was up 8.7 per cent over 1950.

Profit for TWA's domestic division, before taxes, was $12,702,394 and for the international division, $4,652,000.

Since the end of 1951, 242,987 shares of common stock in TWA have been offered to stockholders of record on February 27, 1952, at the subscription price of $21.25 per share. As of March 14, 1952, the end of the subscription period, 215,046 shares have been subscribed. The Hughes Tool Company is committed to purchase sufficient unsubscribed shares to produce a total net proceeds of $5,000,000, which will be added to the general funds of the Company.

The increased earnings for 1951 were due in part to a high level of business activity throughout the nation, as well as increasing mass demand for Sky Tourist flights, and public acceptance of air travel in general as a safe, comfortable, dependable and speedy means of transportation. Greater seating capacities and faster, more efficient aircraft are also an integral part of the picture.

TRANS WORLD AIRLINES, INC.
AND SUBSIDIARIES

NOTES TO FINANCIAL STATEMENTS

1. Mail rates presently in effect for carriage of U. S. Government mail on international routes are temporary rates which are subject to retroactive and prospective change by the Civil Aeronautics Board. The Board in November 1949, February and December 1950, and in September 1951 issued "show cause" orders proposing reduction in rates of compensation for carriage of mail on the Company's international routes. Should these orders become final, mail revenue for the years 1949, 1950, and 1951 would be reduced by approximately $1,815,000, $1,364,000, and $3,440,000, respectively, or a total of $6,819,000 with a consequent reduction in income taxes of approximately $735,100 for 1950 and $1,745,800 for 1951, there being no effect upon income taxes for the year 1949. The Company is opposing these proposed reductions in mail rates, but the outcome is not presently determinable.

   With respect to the proposed reduction of $6,819,000 in international air mail pay, the Company had collected from the Post Office Department a total of $3,179,950 and the balance of $3,639,050 remained in Accounts Receivable from U. S. Government as of December 31, 1951.

   The Company operates its international air routes under a temporary Certificate of Public Convenience and Necessity which expires on July 4, 1952. Application for renewal of the certificate on a permanent basis has been filed by the Company with the Civil Aeronautics Board.

   Permanent air mail rates for the Company's domestic routes were fixed by the Board, with the Company's consent, in its order dated September 19, 1951. As a result of this order, domestic air mail revenue as previously reported for the period from March 14, 1947 to December 31, 1949 was decreased $1,552,242 and for the year 1950 was decreased $107,401. The decrease for the period ended December 31, 1949 was charged to earned surplus and for the year 1950 was applied in the accompanying financial statements as a reduction of air mail revenue.

2. The amount shown under Deferred Debits as Flood Clearing Account—Net represents the cost or net book value of engine parts, aircraft parts, and accessories, and other inventories and property lost or damaged (and not salvaged) in the flood which occurred on July 14, 1951 at Kansas City, and rehabilitation costs to December 31, 1951, less an aggregate of $2,500,000 advanced by the insurers against recoverable loss. The actual amount recoverable from the insurers is not determinable at this date. Management, however, has provided, through charges to ground and indirect maintenance expense for the year ended December 31, 1951, a reserve of $2,000,000 against aggregate uninsured loss from the flood, exclusive of additional expense resulting from loss of maintenance and overhaul capacity, the cost of which is charged to operations as incurred. Charges aggregating $662,940 have been made against the reserve, for such losses, damages and rehabilitation costs presently appearing to be irrecoverable from the insurers.

3. Under the indenture dated December 1, 1945, relating to sinking fund debentures, there are various restrictions on the payment of dividends, including a provision that cash dividends declared shall not exceed consolidated net income earned subsequent to December 31, 1945. Consolidated earned surplus at that date thus restricted was $9,113,848.

   The Series A debentures mature on June 1, 1956, but sinking fund payments for retirement in advance of maturity are required annually in the amount of $2,000,000 through 1955, leaving a balance of $16,437,000 payable on June 1, 1956, the maturity date.

   The Series B debentures mature on December 1, 1955 and similar sinking fund payments for retirement of these debentures are required annually in the amount of $1,000,000 through 1953, and $2,000,000 on November 27, 1954, the remainder of $2,480,000 being payable on December 1, 1955.

   Additional sinking fund payments are required on November 27 of each year through November 27, 1955 in the amount of the excess of (a) the Company's net income from December 31, 1946 to the end of its fiscal year next preceding the November 27th on which payment is to be made plus $344,240 over, (b) the sum of all sinking fund payments made during the same period. However, the total of the fixed and additional sinking fund payments need not exceed $4,000,000 per year after December 31, 1946, the annual maximum being cumulative from that date to the end of the then current year. No additional sinking fund payment was payable in the year 1951 or in any prior year, but, based upon net income as reported herein, which is subject to final determination of international mail compensation as set forth in Note 1, payment of $2,532,000 will be required on November 27, 1952.

4. The Company's Federal income tax returns for 1949 and prior years have been examined by the Bureau of Internal Revenue, but further adjustments may still be made for the years 1948, 1949, and 1950. The income tax accrual for the year 1950 as previously reported has been reduced by approximately $1,396,000, resulting principally from the increased loss carry-over for 1948 arising from the following retroactive adjustments made by the Company in 1951: (a) Reduction in domestic air mail pay resulting from the order issued in September 1951 by the Civil Aeronautics Board, as mentioned in Note 1; and (b) accrual of $1,734,144 as to 1948 for employees' vacation-pay, based upon a study in 1951 by the Company of its employment contracts and vacation policies, to reflect in the appropriate years vacation-pay as it accrues rather than as it is paid. The effect of the change in vacation-pay accrual in years other than 1948 was relatively minor.

   The Company was exempted from Federal excess profits tax for the years 1950 and 1951.

5. Effective June 1, 1950 the Company adopted a retirement plan for its officers and employees which provides for contributions by the Company and the employees toward the purchase of an annuity on retirement. The past service cost of the plan is payable in ten equal annual instalments into a purchase payment fund on deposit with the insurer. The present annual cost of the retirement plan is estimated at

TRANS WORLD AIRLINES, INC.
AND SUBSIDIARIES

NOTES (Continued)

approximately $2,150,000. The unpaid balance of past service benefits after applying two payments of $658,000 each is estimated at $5,344,000 at December 31, 1951. The plan may be discontinued in whole or in part by the Company at any time.

6. Commitments and Contingent Liabilities:

Under lease from the City of New York, assigned to The Port of New York Authority, and presently subject to the outcome of a suit for enforcement, the Authority is obligated to construct for the Company, as the Company may require, hangars and other site area improvements in Idlewild Airport at a cost not to exceed $16,350,000. The construction cost, plus interest, is to be repaid the Authority over an extended period of time after completion of the facilities. On September 12, 1949 the Company executed a supplementary agreement, to become effective upon the happening of certain other events (namely, the withdrawal of the pending suit against the Authority for enforcement of the original lease agreement), under the terms of which the Authority has agreed instead to construct for the Company, hangars and related improvements at a cost not to exceed $8,000,000.

The Company's Board of Directors has authorized an expenditure not to exceed $3,000,000 for the construction of a hangar at the Chicago airport. Expenditures on this project to December 31, 1951 amounted to $166,000.

At December 31, 1951 the Company had contracted to purchase aircraft at an aggregate cost of approximately $28,544,000 and had commitments estimated at $3,133,000 on purchase of related spare parts. Advance payments on these contracts and cash segregated for purchase of this equipment amounted to $8,833,454 at that date. Credit agreements have been entered into with a group of banks which will permit the Company to borrow a maximum of $22,850,000, the loans to be secured by chattel mortgages on the related aircraft and spare parts. At March 7, 1952 the Company had borrowed a total of $4,046,907 of this amount in connection with the delivery of 12 Martin 404 aircraft and purchase of related spare parts.

In connection with a refinancing of The Glenn L. Martin Company, which has delivered 12 of a total of 40 Martin 404 aircraft ordered for the Company's fleet, the Company has made an agreement (the effectiveness of which is contingent upon completion of the refinancing) to increase the price of such 40 aircraft by $1,000,000 and to purchase additional Martin aircraft.

The Company was contingently liable at December 31, 1951, in amounts aggregating $3,352,996 on advances made by the United States Government for foreign government air mail charges, any such payments not recovered by the Government from foreign countries being recoverable from the Company.

By agreements between Hughes Tool Company, the Company and The Equitable Life Assurance Society of the United States, the Company agreed to sell enough of its common stock to realize net proceeds of $5,000,000 by March 31, 1952 and an additional $5,000,000 by December 31, 1952. Hughes Tool Company agreed to purchase such stock if not otherwise sold. Under certain conditions, Hughes Tool Company may lend the Company all or part of the required amounts on subordinated convertible notes of the Company. In February 1952 the Company offered its stockholders rights to subscribe to 242,987 shares of common stock at $21.25 per share on or before March 14, 1952.

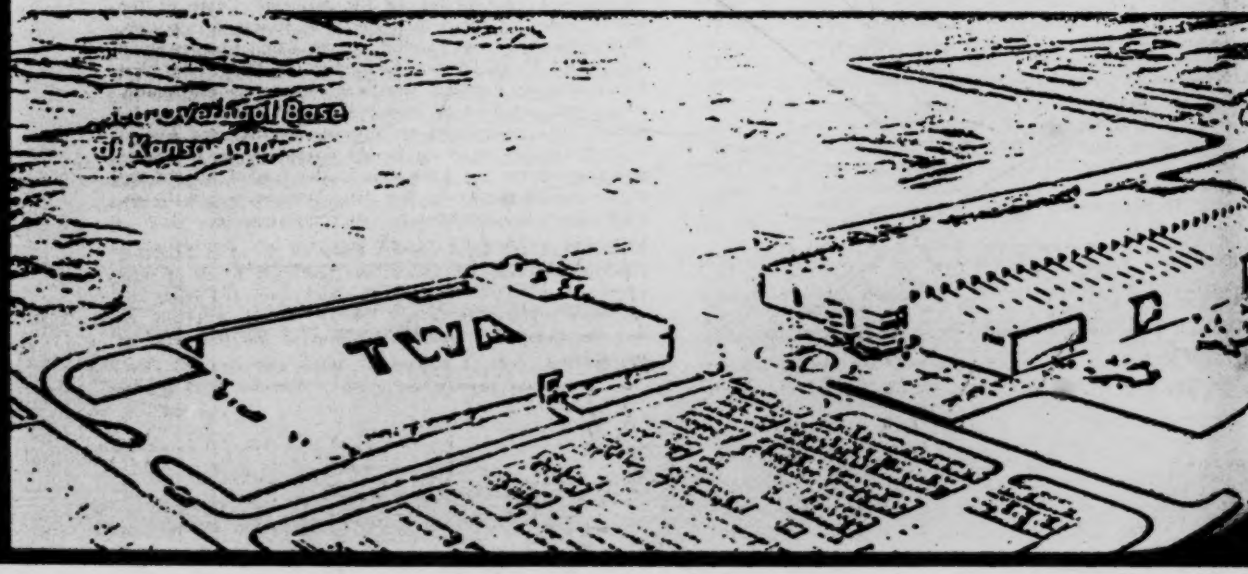
An action has been commenced in the Supreme Court of the State of New York, County of New York, through the service of a summons without complaint by Edward Blatz, et al., plaintiffs, against forty-six defendants who appear to be certain present or former officers and directors of TACA Airways, S.A., and affiliated companies and individuals and corporations who now are or formerly were stockholders thereof and others, including TWA, the basis of which will be unknown to TWA unless and until a complaint is served therein. The summons was served on February 24, 1948.

TWA is one defendant, among other airlines and airline trade associations named defendants in the respective actions, in the following two actions: S.S.W. Incorporated is plaintiff in one action commenced in the United States District Court for the District of Columbia, alleging damages by a combination and conspiracies of the defendants in the restraint of air-borne trade and commerce, requesting judgment against defendants in the sum of $1,500,000 plus costs, and requesting that the defendants be perpetually enjoined from alleged conspiracies to restrain and monopolize air transportation. The complaint of S.S.W. Incorporated was dismissed on motion of the defendant. On appeal the dismissal was reversed and the District Court was ordered to retain jurisdiction while S.S.W. Incorporated sought relief from the Civil Aeronautics Board. S.S.W. Incorporated has applied to the Supreme Court of the United States for a writ of certiorari to review this decision. Slick Airways, Inc. is plaintiff in one action commenced in the United States District Court for the District of New Jersey alleging damages from conspiracies to monopolize, monopolies, attempts to monopolize, and contracts, combinations, and conspiracies to restrain interstate and foreign trade and commerce in air freight transportation, requesting judgment against the defendants in the sum of $30,000,000 plus costs and requesting that defendants be perpetually enjoined from action similar to that complained of.

Management and legal counsel know of no other litigation pending or threatened against the Company which in their opinion would result in liability which, over and above any insurance coverage in respect thereof, would materially affect the Company's financial position or interfere with its operations.

. . . . a year of Growth

	1953	1952
	(000's)	
Services Sold	$187,221	$160,702
Employment Costs	77,014	65,806
Products and Services Bought	71,990	59,648
Wear and Obsolescence of Facilities	23,465	17,010
Interest and Financial Costs (Net)	800	1,055
Taxes *(Including Federal Taxes on Income)*	8,888	9,521
Total Costs	$182,157	$153,040
Net Income	$ 5,064	$ 7,661
Shareholders Equity	$ 56,804	$ 51,699



TO THE STOCKHOLDERS:

Your Company's traffic and revenues in 1953 were the highest in its history with gross revenues totalling $187,220,806 as compared with $160,702,790 in 1952. Net income after income taxes was $3,064,392, or $1.52 per share of stock outstanding at the year end. This compares with earnings of $7,660,588 or $2.30 per share in 1952.

The failure of net income to keep pace with the growth of the Company's business resulted primarily from two factors; an increase of $6,454,781 in depreciation charges resulting from additions to the airplane fleet and the continuation of temporary mail rates applying to the international division.

TWA's policy has been to utilize the Certificates of Necessity, which were granted to the Company on equipment purchased since January 1, 1950. They permit accelerated depreciation, for income tax purposes, over a period of five years. The income tax payments deferred by this policy amounted to $1,504,194 in 1953; but this amount, in addition to provision for current income taxes, has been charged against 1953 income. Depreciation charges are expected to decline about $3,200,000 in 1954.

As mentioned in last year's report, the temporary mail rate in the international division was designed by the Civil Aeronautics Board to yield no return on TWA's investment in that division. Actually, in 1953 the international division with gross revenues of $52,618,758, incurred a net loss of $155,390 before provision for income tax; whereas the domestic division on a non-subsidy mail pay basis, with revenues of $134,443,792, earned a profit before income tax of $10,051,876.

Your management has repeatedly urged upon the Civil Aeronautics Board that its temporary rate policy is unfair, especially in view of the fact that no permanent rate has been established during the entire eight years of TWA's international operation. A hearing covering a permanent rate, both retroactive and future, was completed in March, 1953, but no decision has yet been issued. The Company's officers continue to point out to the Board the urgency of reaching a final and equitable decision in this matter.

Net Worth

The stockholders' equity in the Company was $56,804,316 or $17.04 per share of stock outstanding at the year end, compared with $15.53 per share at the end of 1952. This compares with book value of $3.04 per share (for a smaller number of shares) at the end of 1948.

Finances

The Company's finances were strengthened during the year. Net working capital was $634,956—a decrease of $3,188,806 from the end of 1952. However, during the period a total of $6,276,260 was segregated into a special fund representing advance payments and cash and Government securities dedicated to the defraying of the purchase price of airplanes contracted for and to be delivered during 1954. Payments of $18,613,003 during the year reduced total debt to $41,883,042 as of December 31. Of this remaining total, $14,663,909 is scheduled to be paid in 1954.

Property and Equipment

Throughout 1953 TWA had in service the fleet of new aircraft on which deliveries were completed in 1952. The Company currently has on order 20 new Super Constellations for delivery early in 1955, at a total estimated cost, including spare parts, of $46,000,000. These airplanes, which will be powered by the latest turbo-compound engines, will be able to attain speeds competitive with comparable aircraft. They will be equipped with luxury appointments to maintain the prestige of TWA's first class, long range service in both the international and domestic divisions. Also, their entry into the first class service will permit conversion of additional airplanes from the existing fleet for Sky Tourist service. To finance the new airplanes, the Company has arranged a bank credit of $25,000,000 with the balance to be provided from Company funds.

Negotiations continue with the City of Kansas City, Missouri, for the construction and lease to TWA of new airplane and engine overhaul shops to be located at their new industrial airport. Progress on these negotiations during the past year has been slow, but it is hoped that construction can begin during the present year.

Routes

During 1953 the Company extended its international operations from Bombay, India to Colombo, Ceylon. Due to disturbed political conditions, the Company has never inaugurated service under its temporary certificate authorizing it to operate beyond Colombo to Shanghai. It is now prosecuting an application to substitute Tokyo for Shanghai and to make other temporary changes in intermediate points which would make it possible to institute service on this segment of our routes.

The Company now operates certain of its international flights to Lisbon, Madrid and Rome; to London and Frankfurt; and others to Paris and points in Switzerland, Italy and beyond. It has applied to extend the flights that now terminate at Frankfurt so as to connect with the other services at Zurich, Switzerland in the same manner the schedules to Lisbon connect with Rome. This integration of services will enable the Company to provide more efficient and economical operations.

Domestically, your Company is actively prosecuting a number of route applications to provide additional service to the cities of Cleveland, Detroit, Tulsa, Oklahoma City and Denver.

In 1953 the Company, in conjunction with Delta-C&S Airlines, inaugurated through service between New York and Houston via intermediate points. This service is provided under an equipment interchange agreement approved by the Civil Aeronautics Board in 1952.

During 1953 the Civil Aeronautics Board, by a 3 to 2 decision, reversed its earlier approval of an equipment interchange between TWA, Eastern and Braniff which would provide a through southern transcontinental service between Miami and California points via Tampa, Houston, Dallas and Amarillo. However, the Board has under advisement the petition of all three airlines and the affected cities for reconsideration.

Outlook for 1954

The air transport industry has shown continued growth since 1948, but the pace appears to have slackened somewhat since the latter part of 1953. This occurred at the same time other industries reported a down-turn in business activity. Similar variations in the growth rate have been characteristic of airline history, and we continue to be optimistic about the future development of air travel, particularly the promotion of mass traffic at tourist rates. The increasing tendency toward longer paid vacations and the desire of Americans to travel at home and abroad leads us to believe that 1954 will show an increase in airline revenues. TWA as a leader in the air tourist market should be able to capitalize on this opportunity.

One problem still facing the industry is the continued imposition of 15% excise tax on domestic passenger fares and 3% on air cargo. The passenger tax was placed at its present level for the purpose of restricting travel during the war time, and there is no continued justification for this tax. A removal of this tax—amounting to an almost 15% reduction in all passenger fares—would provide a great stimulant to the air transportation industry.

Your management and directors have considered the question of dividends but have decided at this time that the pressing financial demands for more modern and more expensive equipment plus the necessity of continuing to reduce the debt of your Company make it desirable to conserve all the cash possible in order that we may maintain a leading position in a fast-moving industry.

* * * * *

Your management desires to pay tribute to the efforts of its loyal, capable and enthusiastic employees and to express the confidence that in the coming highly competitive year of opportunity, this support will enable TWA to continue toward its goal of being the world's best airline. To that end, stockholders can also help by using and recommending TWA's services in the United States and overseas both for passenger travel and for the transportation of air mail, air parcel post, air express and air freight.

Presented on other pages in this report are significant statistics covering the present year's operations and a summary of those of the last ten years during which time your Company has shown progress in all phases of its activities.

By Order of the Board of Directors:

Warren Lee Pierson — R. A. McMurray

Chairman of the Board — President

March 15, 1954

TRANS WORLD AIRLINES, INC.
AND SUBSIDIARIES

NOTES TO FINANCIAL STATEMENTS

1. International mail rates presently in effect are temporary rates which are subject to retroactive and prospective change by the Civil Aeronautics Board.

   Hearings to establish permanent International United States mail rates for the period from the beginning of operations in February 1946 to date, and for future operations, are presently in progress, but the outcome is not determinable at this time.

2. The Company's Federal income tax returns for 1949 and prior years have been examined by the Internal Revenue Service but on account of various subsequent adjustments, the years 1948 and 1949 are subject to re-examination.

   In accordance with permission granted under certain necessity certificates, the Company is amortizing for income tax purposes, a portion of the cost of aircraft, engines, and its Chicago hangar, over a five year period instead of over the normal estimated life used as a basis for depreciation recorded in the accounts. Provision has been made from income for income taxes estimated to be payable in future years as a result of the aforesaid tax amortization.

   The Company was exempted from Federal excess profits tax for the current and prior years.

3. The present annual cost of the Company's retirement plan for its officers and employees is estimated at $2,600,000. The unpaid balance of past service benefits after applying four annual payments of $658,000 each is estimated at approximately $4,000,000. The plan may be discontinued in whole or in part by the Company at any time.

4. Under the indenture dated December 1, 1945 relating to sinking fund debentures, there are various provisions which presently restrict the payment of cash dividends.

   The Series A debentures amounting to $17,892,000 at December 31, 1953 mature on June 1, 1956 and the Series B amounting to $2,137,000 mature on December 1, 1955. Sinking fund payments of $2,000,000 for retirement of debentures in advance of maturity are required annually in May through 1955 on the Series A debentures and on November 27, 1954 on Series B. Additional sinking fund payments based upon net income, as defined in the indenture, are required on or before November 27 of each year. The cumulative total of the fixed and additional sinking fund payments need not exceed $2,000,000 per year on each series for the period after December 31, 1946.

   An additional sinking fund payment of $3,231,000 was made on November 5, 1953. Based upon net income for the year 1953, as defined in the indenture, no additional sinking fund payment will be required to be made on November 27, 1954.

5. In January 1954 the Company deposited $1,800,000 U. S. Government securities and $349,329 in cash in the 1954 Insurance Retention Fund.

6. Commitments and Contingent Liabilities:
   At December 31, 1953 the Company had contracted to purchase aircraft at an aggregate cost of approximately $40,000,000 and had commitments estimated at $6,000,000 on purchase of related spare parts. Advance payments of $1,655,180 have been made on the aircraft purchases and U. S. Government bonds and cash aggregating $4,621,080 have been segregated for further payments on such purchases. Credit agreements have been entered into with a group of banks which will permit the Company to borrow a maximum of $25,000,000, the loans to be secured by chattel mortgages on the related aircraft and spare parts. Delivery of these aircraft is presently scheduled for the first half of 1955.

   TWA, along with other airlines, is a defendant in two civil anti-trust suits, one for damages of $1,500,000 (in which proceedings are stayed until the plaintiff exhausts any remedies it may have before the Civil Aeronautics Board), and a second for treble damages of $30,000,000.

   Management and legal counsel know of no other litigation pending or threatened against the Company which in their opinion would result in liability which, over and above any insurance coverage in respect thereof, would materially affect the Company's financial position or interfere with its operations.

TWA Ex. 87, page 1
(TWA Annual Report-1954)

TRANS WORLD AIRLINES, INC.

10 Richards Road, Kansas City, Missouri

DIRECTORS

Fred W. Ayers	John A. Collings	Arthur B. Eisenhower	Warren Lee Pierson
John E. Bierwirth	Powel Crosley, Jr.	Oscar F. Holcombe	Harry Rogers
Palmer Bradley	R. S. Damon	A. V. Leslie	A. D. Simpson
E. O. Cocke	Noah Dietrich	Sidney Maestre	Thomas A. Slack
		Loyd Wright	

OFFICERS

Warren Lee Pierson	*Chairman of the Board*
R. S. Damon	*President*
John A. Collings	*Executive Vice President*
E. O. Cocke	*Vice President–Sales*
A. V. Leslie	*Vice President–Finance and Treasurer*
George H. Clay	*Vice President and Secretary*
Gordon L. Gilmore	*Vice President–Public Relations*
David W. Harris	*Vice President–Industrial Relations*
Thomas K. Taylor	*Vice President*
J. L. Weller	*Vice President and Assistant Secretary*
M. J. Plodinec	*Controller*
Ronald Duckworth	*Assistant Treasurer*
M. W. McQueen	*Assistant Treasurer*
E. Wiley Barker	*Assistant Secretary*
Myra E. Black	*Assistant Secretary*
C. W. Herre	*Assistant Secretary*

TRANSFER AGENT

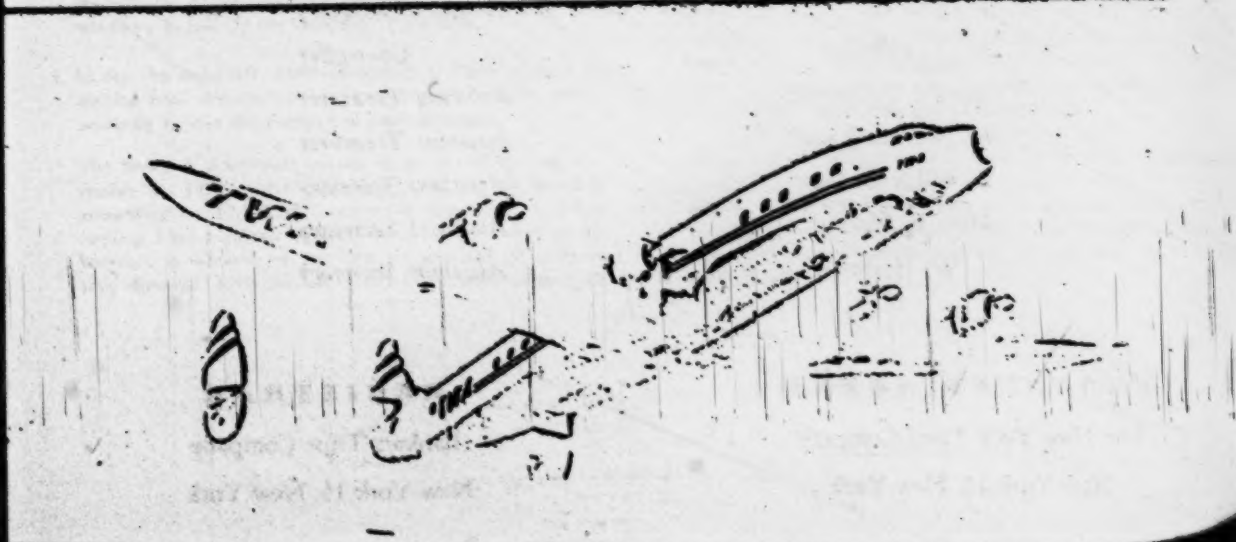
The New York Trust Company
New York 15, New York

REGISTRAR

Bankers Trust Company
New York 15, New York

. . . Another Year of Growth

	1954	1953
	(000's)	
Services Sold	$203,671	$187,221
Employment Costs	80,523	77,014
Products and Services Bought	74,263	71,990
Wear and Obsolescence of Facilities	21,554	23,465
Interest and Financial Costs (Net)	1,363	800
Taxes (Including Federal Taxes on Income)	15,632	8,888
Total Costs	$193,335	$182,157
Net Income	$ 10,336	$ 5,064
Long-Term Debt	$ 20,757	$ 41,936
Stockholders' Equity	$ 67,207	$ 56,804



TO THE STOCKHOLDERS:

The year 1954 was the 17th consecutive one in which TWA's traffic and revenues showed an increase over the previous annual period. Net income after provision for taxes was $10,336,000 — more than double the earnings for 1953. This was equal to $3.10 per share on the 3,336,546 shares of common stock outstanding at year end as compared with $1.52 for 1953.

Total operating revenues amounted to $203,671,000 — an increase of 9% over 1953. Operating income was $22,677,000 — up $11,859,000 or 110% over the previous year. Of the system operating income, $18,167,000 was derived from domestic operations on gross revenue of $145,239,000 and $4,510,000 from international operations on revenue of $58,432,000. Operating expense included depreciation amounting to $21,554,000 compared with $23,465,000 the year before.

After a poor start in the early part of the year, economic conditions for air transportation generally improved throughout 1954. Public acceptance of low-fare Sky Tourist service continued to grow, and your Company benefited from its commanding position reached through pioneering in this field.

At the same time, careful control was maintained over expenses, so that while revenue ton-miles in both divisions of the Company increased 11.1% in 1954, total operating expenses increased only 2.6%. Consequently, unit operating costs per ton-mile of service performed in both divisions declined and reached the lowest level since 1945, despite all the price inflation in the intervening period.

Your management would like to point out that these results for 1954 were achieved without any subsidy from the United States Government. In fact, TWA's domestic operations have been completely unsubsidized for many years, and its international operations have not received a penny of subsidy since 1952. To the best of our knowledge, your Company has thus become the first airline under either the United States or any foreign flag to operate trans-oceanic services without benefit of Government subsidy.

Net Worth

The stockholders' equity in the Company at the end of 1954 had grown to $67,207,000 or $20.14 per share of stock outstanding. Stockholders' equity per share has increased 176% in the past five years.

Financing

Total borrowings at the end of 1954 were reduced to $20,757,000 — the lowest level since 1945. As a result of the Company's favorable financial record in recent years, it became possible to refinance the existing debt structure, placing the maturities on a long-term basis.

A new $40,000,000 general mortgage loan due in 1969 was consummated with The Equitable Life Assurance Society of which only $15,000,000 was borrowed at the year end. This enabled TWA to pay off $16,049,000 of debentures due in 1956 and to cancel the $25,000,000 of five year bank credit which had been previously arranged to finance the 20 new Super-G Constellations being delivered in 1955. At the same time, bank loans amounting to $10,125,000 were paid off and a $10,000,000 revolving credit established extending to June 1, 1957. Against this credit $2,000,000 had been borrowed at December 31, 1954, but has since been repaid.

The $25,000,000 balance of the general mortgage loan will be obligated this year as the new airplanes are received.

Equipment and Facilities

Scheduled operations with the new Super-G Constellations will begin April 1, 1955, and the entire fleet of 20 airplanes will be in service by mid-summer. These airplanes are powered by the latest model of the Wright turbo-compound engine, and are the largest and most comfortable four-engined transports in service on any airline.

In order to maintain this leadership and to keep pace with the growth of demand for our services, careful study is being given to the latest proposed designs for high speed transport aircraft, including several which involve turbine and jet power plants.

To accommodate the increased fleet of aircraft and provide better service to patrons, TWA's ground facilities are constantly being improved. During 1954 the Company reached an agreement by which the City of Kansas City, Missouri, is financing and constructing at its new Mid-Continent International Airport, a centralized system overhaul base for TWA to replace the present base which has been outgrown. The new facilities were designed and planned by TWA and upon completion will be occupied under a 30-year lease. They are expected to create substantial economies in maintenance costs.

Long-term leases also were arranged in 1954 for new hangars at Greater Pittsburgh Airport; Lambert Field, St. Louis; Philadelphia Airport; and Orly Field, Paris. New airports and facilities are being planned at Toledo and Chicago, and negotiations continue for a new airport terminal building and an $8,000,000 TWA hangar at New York International Airport, this last to be financed by the Port of New York Authority and leased to TWA.

Routes and Rates

In 1954 the Company received Civil Aeronautics Board approval for an equipment interchange agreement with Braniff International Airways providing through service from Houston and Dallas to Los Angeles and San Francisco via intermediate points. Service was started in January, 1955.

During 1954 a number of applications of the Company for new service were actively prosecuted before the Civil Aeronautics Board. These include proposals to serve the cities of Cleveland, Denver, Detroit, Oklahoma City and Tulsa, on which we are awaiting decision.

Still pending before the Civil Aeronautics Board is TWA's proposal to link its trans-Atlantic route which now terminates at Frankfurt with its other trans-Atlantic route through Zurich and Rome. This junction of the two separate segments would greatly improve service and efficiency of operations.

The Civil Aeronautics Board has decided to defer action on the application of the Company for a renewal of our certificate covering the route beyond India and Ceylon to Shanghai. Operations over this route have not been possible because of Communist aggression in the area. The action of the Board would still permit the inauguration of service by the Company pending final decision if the route actually becomes operable. At the same time, the Civil Aeronautics Board denied our application for a temporary route from India and Ceylon to Tokyo through non-Communist countries which the Company hoped to be able to operate, while Communist areas are closed. The Civil Aeronautics Board is being requested to reconsider its decision in this respect.

Several cases involving TWA's domestic and international mail rates are pending before the Civil Aeronautics Board. Early in 1954 the Board commenced a proceeding to establish new domestic mail compensation to become effective April 1, 1954, and proposed a revised rate formula which would reduce the Company's gross mail revenues by something over a million dollars a year at present volume. This matter is still pending.

International mail rates are complicated by a maze of government proceedings. On December 2, 1954, the Civil Aeronautics Board fixed "final" mail compensation for the Company's international operations back to the date of the inauguration of service in 1946, and for the future. As the decision is written it would require the Company to repay $365,000 to the government for the years 1946-1951 which would mean a reduction for that period of approximately $175,000 in net income after tax

However, the decision contains a number of mathematical errors which, if corrected, will eliminate any recapture and will require additional payments from the government to TWA. These mathematical errors and serious questions of principle have been brought to the Board's attention in a petition for reconsideration filed by TWA. The Company has also petitioned the Court of Appeals for the District of Columbia for a review of the decision.

The decision of December 20, 1954, also provided that the mail compensation there determined for TWA's international division would be subject to further adjustment to the extent the Board shall find that TWA's domestic division earned any excess profits in the past. A proceeding on this subject is also pending before the Civil Aeronautics Board.

In addition, a third proceeding pending before the Board proposes to establish a new "service" rate (i.e., a rate free from subsidy) for TWA's international division, retroactive to April 8, 1954.

The Company has conducted international operations since 1946 and at no time since that date has it had final mail rates. In view of these proceedings still pending before the Civil Aeronautics Board, it appears likely that several more years may elapse before the situation becomes finalized.

Outlook for 1955

The year 1955 represents the 30th anniversary of TWA and its predecessor companies. Appropriate ceremonies keyed to a "30 Years of Service" theme are planned in conjunction with the activities of the Company throughout the year.

It is expected that 1955 will show the same trend of traffic expansion that has been evidenced in prior periods. However, as more new equipment is placed into service by all airlines, competition is continually becoming keener. Your management plans to take aggressive steps to ensure that your Company will maintain and improve its position in the entire industry.

One of these aggressive steps, begun in the second half of 1954, is TWA's new Time Pay Plan, an important selling tool which is expected to play an increasingly important part in broadening our market for both domestic and international services. Together with TWA's low-cost Sky Tourist services and tour programs, it provides a means for an increasing number of Americans to travel by air at home and abroad during their annual vacations.

During 1954 TWA, in cooperation with the Post Office Department and other airlines, also continued the experimental transportation of surface mail by air between certain selected domestic cities. We are firmly convinced that the public interest requires dispatch of all long-distance domestic letter mail by air in the very near future.

There was a substantial increase in air travel commencing in the month of April, 1954. Your management believes this was due in part to the reduction in that month of the wartime-imposed excise tax on domestic passenger fares from 15% to 10% — the 3% tax on air cargo continuing unchanged to this date. We believe it a mistake that there should continue at this time any part of a tax designed for the sole purpose of restricting travel during an emergency period. The elimination of this tax is long overdue.

The year 1954 marked a peak in both the volume of traffic and the net earnings of your Company. This volume was due to the continuing support of the traveling and shipping public who find our services, schedules and equipment designed to their needs. The satisfactory earnings were due to the untiring efforts of the 15,000 persons comprising the TWA team who Sell, Serve and Save.

We enlist the support of our stockholders in using and recommending their world-wide transportation system.

By Order of the Board of Directors:

Warren Lee Pierson — Chairman of the Board

R. A. Ammon — President

TRANS WORLD AIRLINES, INC. AND SUBSIDIARIES

STATISTICS

YEARS 1945-1954

FINANCIAL STATISTICS (000 Omitted)

	1954	1953	1952	1951	1950	1949	1948	1947	1946	1945
Operating Revenues:										
Passenger	$174,228	$159,878	$135,292	$114,408	$ 88,275	$ 78,143	$ 72,426	$ 62,020	$ 45,416	$ 24,003
Mail:										
United States—Transcontinental	6,137	5,742	4,970	5,367	5,746	5,335	5,589	4,349	2,921	7,237
United States—International	4,383	3,823	3,568	6,363	9,069	9,229	9,292	6,476	3,274	—
Foreign Governments	2,482	2,784	3,200	3,113	3,072	2,947	2,355	2,256	2,244	—
Freight and Express	11,130	10,635	9,504	8,687	7,437	6,608	6,113	5,268	2,982	2,032
Excess Baggage	2,341	2,022	1,721	1,349	1,220	1,382	1,398	1,232	811	286
Other—Net	2,750	2,337	2,447	2,975	2,147	1,616	1,494	1,352	1,940	218
Total Operating Revenues	$203,671	$187,221	$160,702	$142,262	$116,966	$105,460	$ 98,669	$ 83,153	$ 59,588	$ 33,776
Operating Expenses:										
Wages and Salaries	$ 77,100	$ 73,906	$ 62,921	$ 53,102	$ 45,382	$ 44,378	$ 47,803	$ 40,739	$ 36,924	$ 15,317
Depreciation, Amortization, Obsolescence	21,554	23,465	17,010	12,125	11,263	9,488	8,577	7,789	5,775	2,048
All Other	82,340	79,032	65,984	61,035	48,860	44,889	45,142	38,064	26,448	12,916
Total Operating Expenses	$180,994	$176,403	$145,915	$126,262	$105,505	$ 98,755	$101,522	$ 86,592	$ 69,147	$ 30,481
Operating Income or (Loss)	$ 22,677	$ 10,818	$ 14,787	$ 16,000	$ 11,461	$ 6,705	$ (2,853)	$ (3,439)	$ (9,559)	$ 3,295
Net Income or (Loss) After Taxes	$ 10,336	$ 5,064	$ 7,661	$ 7,660	$ 7,882	$ 3,736	$ (5,193)	$ (4,696)	$ (8,987)	$ 1,909
Net Income or (Loss) Per Share*	$ 3.10	$ 1.52	$ 2.30	$ 2.30	$ 2.36	$ 1.12	$ (1.56)	$ (1.41)	$ (2.69)	$ .57
Operating Ratio (Ratio of Expenses to Revenues)	88.9%	94.2%	90.8%	88.8%	90.2%	93.6%	102.9%	104.1%	116.0%	90.2%
Selected Balance Sheet Items:										
Current Assets	$ 41,646	$ 43,670	$ 30,829	$ 41,550	$ 34,928	$ 31,114	$ 24,616	$ 19,993	$ 18,644	$ 19,904
Current Liabilities	37,557	43,015	46,932	39,804	26,589	17,461	15,379	12,515	19,823	12,103
Net Working Capital	$ 4,089	$ 655	$ 3,897	$ 1,746	$ 8,339	$ 13,653	$ 9,237	$ 7,478	$ (1,179)	$ 7,801
Flight Equipment (Net)	$ 52,078	$ 65,033	$ 79,924	$ 47,858	$ 44,008	$ 30,379	$ 36,844	$ 29,309	$ 30,414	$ 12,863
Other Property (Net)	12,931	13,049	12,602	9,730	7,878	7,743	9,130	9,930	9,769	5,239
Total Property and Equipment (Net)	$ 65,009	$ 78,102	$ 92,526	$ 57,588	$ 51,886	$ 38,122	$ 45,974	$ 39,239	$ 40,183	$ 18,102
Stockholders' Equity	$ 67,207	$ 56,804	$ 51,699	$ 53,406	$ 25,608	$ 17,735	$ 10,192	$ 15,265	$ 9,741	$ 18,702
Shares of Common Stock Outstanding	3,337	3,333	3,330	2,430	2,427	2,425	2,021	986	986	985
Book Value Per Share	$ 20.14	$ 17.04	$ 15.53	$ 13.75	$ 10.55	$ 7.31	$ 5.04	$ 15.48	$ 9.88	$ 18.99

OPERATING STATISTICS (000 Omitted)

Number of Revenue Passengers	3,594	3,140	2,573	2,223	1,706	1,513	1,325	1,139	918	556
Miles Scheduled	89,787	83,600	71,247	65,820	60,358	62,846	66,948	57,634	44,152	33,807
Revenue Miles Flown	89,087	81,142	69,557	63,386	60,285	63,309	67,413	58,136	45,332	31,905
Revenue Passenger Miles	3,212,629	2,888,169	2,324,318	1,894,724	1,464,188	1,226,861	1,113,368	1,043,761	852,998	513,778
Available Seat Miles Flown	4,767,750	4,109,628	3,154,748	2,576,821	2,264,011	2,007,493	1,921,729	1,530,579	1,012,487	568,303
Revenue Passenger Load Factor	67.4%	70.3%	73.7%	73.5%	64.7%	61.1%	57.9%	68.2%	84.2%	90.4%
Revenue Ton Miles Flown:										
Passenger	309,051	278,432	225,262	184,657	143,423	120,154	109,052	102,875	83,750	51,378
Mail	23,506	19,676	16,994	17,715	13,938	13,133	12,655	10,822	8,409	16,211
Freight and Express	37,129	34,672	29,706	29,625	26,348	22,951	20,546	13,438	7,097	4,527
Excess Baggage	3,336	2,927	2,459	2,084	1,878	1,819	1,829	1,768	1,334	548
Total	373,022	335,707	274,421	234,081	185,587	158,057	144,082	128,903	100,590	72,664
Upload Factor (Ratio of Revenue Ton Miles Flown to Available Ton Miles)										

AX-810

TWA Ex. 87, page 6
(TWA Annual Report-1954)

TWA Ex. 87, page 11
(TWA Annual Report-1954)

TRANS WORLD AIRLINES, INC.
AND SUBSIDIARIES

STATEMENT OF CONSOLIDATED INCOME

FOR THE YEARS ENDED DECEMBER 31, 1954 AND 1953

	... Year Ended December 31 ...	
	1954	1953
OPERATING REVENUES:		
Passenger	$174,228,012	$159,878,043
Mail:		
United States—Transcontinental	6,156,506	5,741,654
United States—International	4,382,687	3,823,239
Foreign governments	2,482,605	2,784,374
Freight and express	11,129,747	10,635,236
Other	5,291,738	4,358,260
Total	$203,671,295	$187,220,806
OPERATING EXPENSES:		
Flying operations	$ 55,552,954	$ 50,514,508
Ground operations	21,452,505	20,605,804
Maintenance	29,613,908	31,352,810
Provision for depreciation, amortization, and obsolescence	21,553,717	23,464,566
Passenger service	11,304,523	10,801,815
Sales, advertising, and publicity	28,399,602	27,568,215
General and administrative	7,853,228	7,405,592
Employees' welfare (pension, social security, etc.)	5,263,463	4,689,174
Total	$180,993,900	$176,402,484
GAIN FROM OPERATIONS	$ 22,677,395	$ 10,818,322
OTHER INCOME CREDITS:		
Interest, discounts, etc.	$ 575,019	$ 585,161
Miscellaneous	135,054	104,676
Total	$ 710,073	$ 689,837
Total	$ 23,387,468	$ 11,508,159
OTHER INCOME CHARGES:		
Interest on long-term debt, etc.	$ 1,467,410	$ 1,786,051
Net loss (gain) on sale or retirement of property	38,537	(504,460)
Miscellaneous	595,685	296,546
Total	$ 2,101,632	$ 1,578,137
INCOME BEFORE PROVISION FOR INCOME TAXES	$ 21,285,836	$ 9,930,022
PROVISION FOR INCOME TAXES:		
Federal income taxes	$ 9,048,917	$ 3,111,571
Federal income taxes deferred—relating to accelerated amortization of emergency facilities	1,474,748	1,304,194
State and Foreign income taxes	426,039	249,865
Total	$ 10,949,704	$ 4,865,630
NET INCOME FOR THE YEAR	$ 10,336,132	$ 5,064,392

The accompanying notes to financial statements constitute an integral part of this statement.

TRANS WORLD AIRLINES, INC.
AND SUBSIDIARIES

STATEMENTS OF CONSOLIDATED EARNINGS EMPLOYED IN THE BUSINESS

AND CAPITAL IN EXCESS OF PAR VALUE OF STOCK
FOR THE YEARS ENDED DECEMBER 31, 1954 AND 1953

	Year Ended December 31	
	1954	1953
EARNINGS EMPLOYED IN THE BUSINESS		
BALANCE AT BEGINNING OF YEAR	$17,781,518	$12,721,517
NET INCOME FOR THE YEAR	10,336,132	5,064,392
Total	$28,117,650	$17,785,909
DEDUCT—Stock dividend—one share for ten at assigned value of $15.30 per share, 303.9 shares in 1954 and 287 shares in 1953	4,650	4,391
BALANCE AT END OF YEAR	$28,113,000	$17,781,518
CAPITAL IN EXCESS OF PAR VALUE OF STOCK		
BALANCE AT BEGINNING OF YEAR	$22,357,193	$22,327,397
ADD:		
Excess of market value over par value of capital stock issued under Employees' Stock Purchase Plan (3,121 shares in 1954, 2,870 shares in 1953)	50,655	26,840
Excess of assigned value of $15.30 per share over par value of capital stock issued as stock dividend	3,130	2,956
BALANCE AT END OF YEAR	$22,410,978	$22,357,193

SUMMARY OF PROPERTY AND EQUIPMENT

AND RELATED RESERVES FOR DEPRECIATION, AMORTIZATION, AND OBSOLESCENCE
AT DECEMBER 31, 1954 AND NET BOOK VALUE, DECEMBER 31, 1953

	December 31, 1954			
Classification of Property	Property and Equipment	Reserves for Depreciation, Amortization, and Obsolescence	Net Book Value	Net Book Value, December 31, 1953
Flight equipment, spare parts, and accessories	$140,005,255	$87,927,478	$52,077,777	$65,052,375
Ground equipment, buildings, leasehold improvements, etc.	22,009,635	10,298,271	11,711,364	11,155,645
Uncompleted work orders—not classified	1,220,199	—	1,220,199	1,893,716
TOTAL	$163,235,089	$98,225,749	$65,009,340	$78,101,736

TRANS WORLD AIRLINES, INC.
AND SUBSIDIARIES

NOTES TO FINANCIAL STATEMENTS

1. A proceeding is pending before the Civil Aeronautics Board for the fixing of rates of compensation for the carriage of U. S. mail on TWA's transcontinental division applicable to the period on and after April 1, 1954. The Board has issued a "show cause" order which, if it becomes effective, would reduce transcontinental mail revenues for 1954 by $587,000 with a consequent reduction in income taxes.

   Permanent mail rates established by the Civil Aeronautics Board Order No. E-8833 dated December 20, 1954 on TWA's international routes are subject to adjustment, but only to the extent that transcontinental operations may have available excess earnings for offset against past subsidy requirements of the international division.

2. The Company's Federal income tax returns for the year 1952 and prior years have been examined by the Internal Revenue Service.

3. The present annual cost of the Company's retirement plan for officers and employees is estimated at $2,800,000. The unpaid balance of past service benefits after applying five annual payments of $658,000 is estimated at approximately $3,400,000. The plan may be discontinued by the Company in whole or in part at any time.

4. In December 1954 the Company authorized an issue of $40,000,000 principal amount of 3¾% Equipment Mortgage Sinking Fund Bonds to mature on December 1, 1969.

   The Company sold on December 31, 1954 bonds of a principal amount of $15,000,000 and the proceeds were used to retire the remaining outstanding Series A and B debentures.

   The Bond Purchase Agreement dated December 30, 1954 provides for the sale by TWA of the remaining $25,000,000 principal amount of bonds upon delivery to the Company of twenty new Lockheed Constellation Model 1049G aircraft and engines which the Company expects to receive on or before December 1, 1955. Aircraft and engines owned and the new Constellation 1049Gs have been mortgaged as collateral.

   The Bond Indenture provides for fixed sinking fund payments of $1,500,000 on June 1 and December 1, 1957 and semi-annually thereafter to and including June 1, 1969 and additional annual sinking fund payments based on consolidated net income but not to exceed $2,000,000, are required beginning on June 1, 1957 to June 1, 1969.

   The Company has also established a revolving credit of an initial maximum of $10,000,000 with a group of banks. The credit will be reduced $333,333 monthly beginning on January 31, 1955 and terminating on June 30, 1957. Bank loans of $2,000,000 made in December 1954 under the revolving credit were liquidated on January 31, 1955.

5. In January 1955 the Company deposited $2,000,000 in U. S. Government securities and $171,635 in cash in the 1955 Insurance Retention Fund.

6. Commitments and Contingent Liabilities:
   The Company has contracted to purchase aircraft at an aggregate cost of approximately $40,000,000 to be delivered in 1955 and had commitments estimated at $6,000,000 on purchase of spare engines, spare parts, and accessories for such new aircraft. Advances aggregating $19,404,428 have been made and the balance of the purchase price will be paid with proceeds from the sale of the remaining unissued 3¾% Equipment Mortgage Sinking Fund Bonds and corporate funds.

   TWA, along with other airlines, is a defendant in two civil anti-trust suits, one for damages of $1,500,000 (in which proceedings are stayed until the plaintiff exhausts any remedies it may have before the Civil Aeronautics Board), and a second for treble damages of $30,000,000.

   Management and legal counsel know of no other litigation pending or threatened against the Company which in their opinion would result in liability which, over and above any insurance coverage in respect thereof, would materially affect the Company's financial position or interfere with its operations.

12/31/55

TWA

TRANS WORLD AIRLINES, INC.

1955

ANNUAL REPORT

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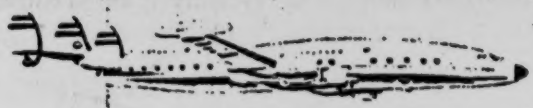
APR 3 1956

HARRIMAN RIPLEY & Co.
INCORPORATED

(TWA Annual Report-1955)



contents

The Year at a Glance	2
Letter to the Stockholders	3, 4
Passenger Sales	5
Passenger Capacity	5
New Aircraft	6, 7
Facilities	8, 9
Personnel	9
Routes	10, 11
The TWA Income Dollar	12
The TWA Expense Dollar	12
Statistics	13
Consolidated Balance Sheet	14, 15
Statement of Consolidated Income	16
Statements of Consolidated Earnings Employed in the Business	17
Notes to Financial Statement	18
Directors and Officers	19
Accountants' Certificate	19

The year at a glance

	1955	1954
	(000's)	
Services Sold	$217,431	$203,671
Employment Costs	89,038	80,523
Products and Services Bought	90,411	74,263
Wear and Obsolescence of Facilities	20,276	21,554
Interest and Financial Costs (Net)	299	1,363
Taxes (Including Federal Taxes on Income)	12,000	15,632
Total Costs	$212,024	$193,335
Net Income	$ 5,407	$ 10,336
Long-Term Debt	$ 35,000	$ 20,757
Stockholders' Equity	$ 72,621	$ 67,207

(TWA Annual Report-1955)

TWA Ex. 88, page 3
(TWA Annual Report-1955)
AA-816

TO STOCKHOLDERS AND EMPLOYEES

A Letter About Finances in 1955 and the Outlook for 1956

Your company's gross operating revenues attained a new high of $217,431,000 for the year 1955, representing an increase of 7% over the preceding year.

A decline of more than $2,600,000 in mail revenue, together with the loss of two Martin aircraft, and nonrecurring costs related to the introduction of 20 Super-G Constellations, aggregating $2,500,000, and a slight increase in the operating costs per revenue ton mile available were the chief factors which reduced net income after taxes from $10,336,000 in 1954 to $5,407,000 in 1955. This is equivalent to a reduction from $3.10 per share of outstanding common stock in 1954 to $1.62 in 1955.

Charges for depreciation were $20,276,000, compared to $21,554,000 for 1954.

The stockholders' equity increased to $72,621,000 or $21.76 per share at December 31, 1955, compared to $67,207,000 and $20.14 per share respectively at the end of 1954.

Acquisition of the 20 Super-G aircraft from Lockheed and other flight equipment purchased during 1955 added $52,120,000 to the flight-equipment account. Of this amount, $20,000,000 was financed under the mortgage loan arranged in 1954 with The Equitable Life Assurance Society, due in 1969. The balance came from general corporate funds. At the end of 1955, there was no debt outstanding other than the total of $35,000,000 due in 1969 under the 1954 general mortgage loan.

The powerful, comfortable new Super-G Constellations were introduced over both domestic and international routes with an enthusiastic reception by the public. Eight additional Super-G's will be delivered by the summer of 1956 and further improve our service between key domestic cities and overseas routes to Europe, Africa and Asia. Your fleet will be still further enhanced in 1957 when we will receive 25 model 1649-A long-range turbo-compound Constellations. Both new Constellation fleets will be acquired under Conditional Sales Contracts through the Hughes Tool Company and no other financing will be required for their purchase.

Although earnings were lower than in 1954, 1955 was a

year of accomplishments which should contribute greatly to the airline's future success. Important new cities were added to the domestic routes—Denver, Tulsa, and Oklahoma City. Detroit and Cleveland were given increased service featuring through flights to the East and West Coasts. These new and expanded markets will serve during the year of 1956 to provide greater opportunities for increased sales volume.

Your airline, which is the largest world-wide operator of modern 4-engine equipment, led the industry by reducing Sky Tourist coast-to-coast fares to $80 each way on round trips and was the first and only airline to offer "coach" service NON-STOP coast to coast on regularly scheduled flights. Increased sales and profits resulted from this service in the latter part of the year.

TWA continues to operate without subsidy in any form from the United States Government. Low-fare Sky Tourist service, which reaches a broader market of travelers than any other type of air service, will continue to set the pace for the entire industry. With the opening of the engine-overhaul portion of our new maintenance base in Kansas City in April 1956, we will have the most modern engine-overhaul facility in the world. It should substantially reduce operating costs.

Consistent with your Company's record of leadership in the development and operation of new aircraft types and models, we have studiously explored the problems incident to the introduction of jet propulsion to the air transport business. Advance preparations have been made all along the line for the technical problems of the jet age. We can announce with complete assurance that TWA will be ready to compete successfully in this field.

An important decision was recently announced which, while not affecting our 1956 results, will have a profound effect on future operations. An initial order has been placed with the Boeing Airplane Company for eight model 707 jet-propelled Stratoliners. Their delivery is expected beginning in April 1959. These aircraft will have speeds of over 550 miles per hour and will put us in a leading position in the operation of jets over coast-to-coast and international routes.

We are grateful for the support received from our customers, employees and stockholders during the past year. A continuation of this cooperation will assure a mutually profitable future.

BY ORDER OF THE BOARD OF DIRECTORS:

Warren L. Greenwood
Chairman of the Board

John A. Collings
Executive Vice President

March 15, 1956

TWA Ex. 88, page 4
(TWA Annual Report-1955)
AA-817

AIRLIN[illegible]S, INC.
IDIARIES

DECEMBER 31, 1955 AND 1954

LIABILITIES

	DECEMBER 31 1955	DECEMBER 31 1954
CURRENT LIABILITIES:		
Current maturities of long-term debt		$ 2,343,538
Accounts payable, employees' deductions, etc.	$ 15,646,890	9,959,934
Air travel plan deposits	3,115,569	2,831,267
Accrued Federal, state, and foreign income taxes (less United States Government tax notes: 1955, $3,000,000; 1954, $3,600,000)	544,659	6,509,962
Accrued salaries, wages, and vacation-pay	7,734,477	7,486,473
Unearned transportation revenue	5,788,749	4,925,397
Total current liabilities	$ 32,830,344	$ 33,956,641
LONG-TERM DEBT—Portion maturing after one year:		
3½% Equipment Mortgage Sinking Fund Bonds—Authorized, $40,000,000, outstanding (Note 4)	$ 35,000,000	$ 15,000,000
Notes payable to banks—maturing in monthly instalments—certain flight equipment mortgaged (Note 4)		1,200,000
Conditional sales contracts for purchase of aircraft, maturing in monthly instalments of varying amounts		2,313,520
Total long-term debt	$ 35,000,000	$ 18,513,520
DEFERRED FEDERAL INCOME TAXES—Relating to accelerated amortization of emergency facilities	$ 6,476,871	$ 4,464,871
STOCKHOLDERS' EQUITY:		
Capital stock—Authorized, 4,000,000 shares, par value $5 per share (378.7 shares of unissued stock, including stock dividend of 11.7 shares, are optioned to officers)—issued and outstanding, 3,336,824.7 shares in 1955 and 3,336,545.9 shares in 1954 (including 2,228.7 shares in 1955 and 2,395.9 shares in 1954 held for the redemption of outstanding fractional scrip)	$ 16,684,124	$ 16,682,730
Capital in excess of par value of stock	22,417,258	22,410,978
Earnings employed in the business	33,519,920	28,113,000
Total stockholders' equity	$ 72,621,302	$ 67,206,708
TOTAL	$146,918,517	$124,141,740

The accompanying notes to financial statements constitute an integral part of this statement.

TWA Ex. 88, page 15
(TWA Annual Report-1955)

TRANS WORLD AIRLINES, INC.
AND SUBSIDIARIES

STATEMENT OF CONSOLIDATED INCOME

FOR THE YEARS ENDED DECEMBER 31, 1955 AND 1954

	1955	1954
OPERATING REVENUES:		
Passenger	$189,230,538	$174,228,013
Mail:		
United States—Transcontinental	3,433,082	6,136,596
United States—International	4,626,656	4,382,657
Foreign governments	2,327,312	2,482,695
Freight and express	12,104,846	11,129,747
Other	5,708,486	5,291,738
Total	$217,430,930	$203,671,295
OPERATING EXPENSES:		
Flying operations	$ 63,071,475	$ 55,552,951
Ground operations	23,584,249	21,452,503
Maintenance (see Note)	36,961,695	29,613,993
Provision for depreciation, amortization, and obsolescence (see Note)	20,275,766	21,333,717
Passenger service	14,586,963	11,301,323
Sales, advertising, and publicity	31,978,610	28,399,602
General and administrative	8,841,776	7,853,228
Employees' welfare (pension, social security, etc.)	6,335,786	5,263,463
Total	$205,836,310	$180,993,900
GAIN FROM OPERATIONS	$ 11,574,640	$ 22,677,395
OTHER INCOME CREDITS:		
Interest, discount, etc.	$ 521,402	$ 575,019
Net gain (loss) on sale or retirement of property	557,578	(38,537)
Miscellaneous	127,787	133,054
Total	$ 1,206,767	$ 671,536
Total	$ 12,781,407	$ 23,348,931
OTHER INCOME CHARGES:		
Interest on long-term debt, etc	$ 1,239,473	$ 1,467,410
Miscellaneous	217,742	595,685
Total	$ 1,457,215	$ 2,063,095
INCOME BEFORE PROVISION FOR INCOME TAXES	$ 11,324,192	$ 21,285,836
PROVISION FOR INCOME TAXES:		
Federal income taxes	$ 3,711,000	$ 9,018,917
Federal income taxes deferred—relating to accelerated amortization of emergency facilities	2,012,000	1,474,743
State and foreign income taxes	194,000	425,959
Total	$ 5,917,000	$ 10,949,701
NET INCOME FOR THE YEAR	$ 5,407,192	$ 10,336,132

NOTE: In 1954, net retirement costs of cylinders, crankshafts, etc., were included in depreciation charges. In 1955, such net retirement losses amounting to approximately $3,300,000 were classified as maintenance expense.

The accompanying notes to financial statements constitute an integral part of this statement.

TWA Ex. 88, page 16
(TWA Annual Report-1955)

NOTES TO FINANCIAL STATEMENTS

1. In June 1955, the Civil Aeronautics Board, Order No. E-9284, established permanent mail rates for TWA's transcontinental routes for the period on and after April 1, 1954. As a result of this order, TWA's compensation for the carriage of mail on its transcontinental routes for the last nine months of 1954 was reduced by approximately $895,000, which amount has been applied as a reduction of 1955 mail revenue.

   In its Order dated August 30, 1955, the Civil Aeronautics Board granted to TWA the sum of $562,000 as additional compensation for carriage of United States mail on TWA's international routes for periods prior to 1954. The Company has filed a petition for review with the United States Court of Appeals for the District of Columbia, claiming the additional amount is inadequate.

   The Order dated August 30, 1955 provides that payment of the additional amount granted shall be stayed pending final determination of the extent to which TWA's domestic operations may have available excess earnings in periods prior to 1954 for offset against past subsidy requirements of the International Division. On November 23, 1955, an examiner of the Civil Aeronautics Board issued an initial decision finding that TWA had excess domestic earnings amounting to $8,715,000 available for offset against excess subsidies paid or payable to TWA for periods prior to 1954. TWA has taken exception to these findings and the matter has been submitted to the Civil Aeronautics Board for decision. No effect has been given in the accompanying financial statements to the above tentative mail and subsidy adjustments, pending final determination.

2. The Company's Federal income tax returns for the year 1952 and prior years have been examined by the Internal Revenue Service.

3. The present annual cost of the Company's retirement plan for officers and employees is estimated at $3,000,000. The unpaid balance of past service benefits, after applying six annual payments of $658,000, is estimated at approximately $2,840,000. The plan may be discontinued by the Company in whole or in part at any time.

4. The $3,000,000 Equipment Mortgage bonds unissued

   The Equipment Mortgage bond indenture provides for sinking fund payments of $1,500,000 on June 1 and December 1, 1957, and semi-annually thereafter to and including June 1, 1969. Additional sinking fund payments are required annually beginning June 1, 1957, equal to one-half of the consolidated net income for the preceding calendar year in excess of $3,000,000, but such additional annual sinking fund payment shall not exceed $2,000,000.

   Certain provisions of the Equipment Mortgage Indenture will not presently permit the payment of cash dividends.

   On February 1, 1956, the Company borrowed $4,500,000 from banks under a revolving credit agreement dated December 20, 1954. This amount represents the maximum amount available under the revolving credit agreement. The loan bears interest at 3% per annum and is repayable in monthly instalments of $284,706, the final instalment maturing on June 30, 1957.

5. In January, 1956, the Company deposited $2,400,000 in U. S. Government securities and $94,037 in cash in the 1956 Insurance Retention Fund.

6. Commitments and Contingent Liabilities:

   In November, 1955, the Company was granted options by Hughes Tool Company to acquire all of its rights under two contracts covering the purchase of aircraft at an aggregate price of approximately $74,000,000, to be delivered during 1956 and 1957. The options are exercisable by TWA during 1956, subject to CAB approval. It is contemplated that if these options are exercised such aircraft and certain engines and related spare parts would be acquired by TWA under conditional sales contracts, TWA paying to Hughes Tool Company, as the purchase price, the cost to Hughes Tool Company plus interest at 3% on advance payments made by Hughes Tool Company, in monthly instalments over 5-year periods.

   TWA, along with other airlines, is a defendant in a civil anti-trust suit for treble damages of $30,000,000. Management and legal counsel know of no other litigation pending or threatened against the Company which in their opinion would result in liability which, over and above any insurance coverage in respect

AX-818 TWA Ex. 88, page 18 (TWA Annual Report-1955)

TO THE STOCKHOLDERS:

The year 1956 was one of great change in TWA. At the outset, we suffered serious loss from the death of Ralph S. Damon who had served as President for the past seven years. His position was filled by the election in December of Carter L. Burgess, former Assistant Secretary of Defense, who comes to TWA with an outstanding record of accomplishment in government and business. Mr. Burgess entered into his duties on January 23 of the current year, bringing to TWA a new vigor and enthusiasm. Your Company looks to the future with heightened confidence.

The financial results of operations for 1956 were disappointing.

Gross operating revenues of the Company during 1956 were $240,394,000—an increase of $22,963,000 or 10.5% over 1955, however, over-all expenses increased by $38,992,000 resulting in a loss before provision for income taxes of $4,705,000.

After application of loss carry back tax credit of $2,516,000, net loss for the year was $2,327,000, or 70 cents per share on the 3,337,036 shares of common stock outstanding. This compares with a net profit during 1955 of $5,407,000 or $1.62 per share.

Charges to depreciation included in operating expense were $20,373,000 compared with similar charges of $20,276,000 the year before.

During the year the Company increased residual values on pressurized aircraft from 5% to 15% to conform to residual rates proposed by the Civil Aeronautics Board. This reduced depreciation which would otherwise have been charged, by $2,760,000—all as more fully described in Notes to Financial Statements.

Debt, of which $9,052,000 was due within the current year, increased from $35,000,000 at the end of 1955 to $74,960,000 December 31, 1956. This increase of $39,960,000 includes $5,000,000 borrowed under terms of our 1954 Equipment Mortgage; $16,476,000 additional Conditional Sales Contracts payable over a five-year period representing the funding of the purchase price of eight 1049G Constellation aircraft; and, similarly, $18,316,000 representing advance payments on twenty-five 1649A Constellation aircraft deliverable during 1957 to be funded into five-year Conditional Sales contracts.

New Overhaul Base

The largest single aggregation of TWA personnel is employed at the overhaul base operated outside Kansas City, Missouri. The facilities at Fairfax, Kansas, used for this purpose for the past ten years have grown inadequate, and new facilities have been under construction for some time at Mid-Continent International Airport—sixteen miles away. These facilities were partially completed in 1956 and a portion of TWA's activities were transferred to the

new base. Because of unfortunate construction delays, the entire base will not be completed until sometime in 1957. This has resulted in split operations between the two bases, increasing costs throughout 1956 and deferring the realization of the full advantage of the new facilities which, when completed, will be the finest in the world.

By April of this year, barring further construction delays, we should be fully installed at the new base.

Routes

The year 1956 brought important new route awards to TWA, giving it a strong position for future growth.

On the domestic scene, TWA was granted operating authority by the Civil Aeronautics Board to serve Tucson and Hartford. TWA was also authorized to operate between New York and Boston on flights originating or terminating at Dayton or points west. Similar authority with a similar restriction has previously been granted between New York and Washington.

Internationally, TWA was granted an extension of its temporary certificate so as to permit service beyond India and Ceylon to Manila via Bangkok. The award of this important link will enable TWA to connect up at Manila with Northwest Orient Airlines, permitting joint participation in the rapidly growing around-the-world travel market.

Competition on all routes of the Company continues to increase as the result of the activity of other carriers and the award of new routes to competitors for services paralleling those of the Company.

Equipment

During 1956 TWA received and placed into service eight new Super-G Constellations.

Equipment on order visualizes a more important role for TWA in the future. During 1957 it will receive 25 of the most modern Lockheed four-engine aircraft, and will be the first airline to place this new type in service. Hughes Tool Company, the owner of nearly three-fourths of TWA's outstanding stock, has ordered a huge fleet of Boeing 707 and Convair 880 jet aircraft for delivery beginning in 1959 under contracts assignable to TWA.

General

Organizational changes begun in 1956 have continued at an accelerated rate into 1957. Vigorous efforts are being made to improve performance and service as well as to reduce costs for the purpose of providing better public service and of developing a money-making enterprise of which all stockholders and employees can be proud.

BY ORDER OF THE BOARD OF DIRECTORS:

Warren L. Pierson

CHAIRMAN OF THE BOARD

7. On December 18, 1956 the Civil Aeronautics Board approved a $10,000,000 credit by Hughes Tool Company to TWA for its use as temporary operating capital through April 30, 1958. The amount of the credit will be reduced to $7,500,000 on August 1, 1957; $5,000,000 on November 1, 1957; $2,500,000 on February 1, 1958; and will terminate on April 30, 1958 or such earlier time as the Treasurer of Hughes Tool Company deems necessary. All loans made shall be on unsecured demand notes bearing interest at a rate equivalent to the then prevailing prime rate for commercial loans in New York. No commitment fee is required. On February 15, 1957 TWA borrowed $2,500,000 under the credit agreement.

8. On June 29, 1956 the Hughes Tool Company assigned to TWA all of its rights under a contract covering purchase of aircraft and related spare parts aggregating approximately $70,536,000. The aircraft are scheduled for delivery beginning on or about April 1, 1957.

TWA is obligated to acquire the aircraft and spare parts from Hughes Tool Company under conditional sales contracts payable in monthly instalments over a five year period commencing with the date of delivery of the aircraft. The purchase price to TWA will consist of the aggregate cost of the aircraft and spare parts to Hughes Tool Company plus 3% per annum on advance payments made by Hughes Tool Company from date of the deposit to delivery date of the aircraft.

A deposit of $17,212,500 previously made by Hughes Tool in connection with the purchase contract was also assigned to TWA. This deposit will be applied as a reduction of the purchase price and will be repaid to Hughes Tool Company by TWA by including this amount in the conditional sales contracts referred to in the preceding paragraph.

9. Commitments and Contingent Liabilities:

The Company has executed agreements or is presently negotiating for the construction for lease by TWA of an overhaul base, hangars, and a unit terminal, all of an aggregate cost of approximately $50,000,000.

Rental payments on these long-term leases (which vary from twenty to thirty years) will be based on the amortization of the construction costs, other charges, and interest on the unamortized portion.

In addition, the Company is planning to construct two additional hangars which are presently estimated to cost approximately $7,500,000.

Management and legal counsel know of no litigation pending or threatened against the Company which in their opinion would result in liability, which, over and above any insurance coverage in respect thereof, would materially affect the Company's financial condition or interfere with its operations.

HASKINS & SELLS
CERTIFIED PUBLIC ACCOUNTANTS

TEMPLE BUILDING
KANSAS CITY 6

March 4, 1957.

ACCOUNTANTS' CERTIFICATE

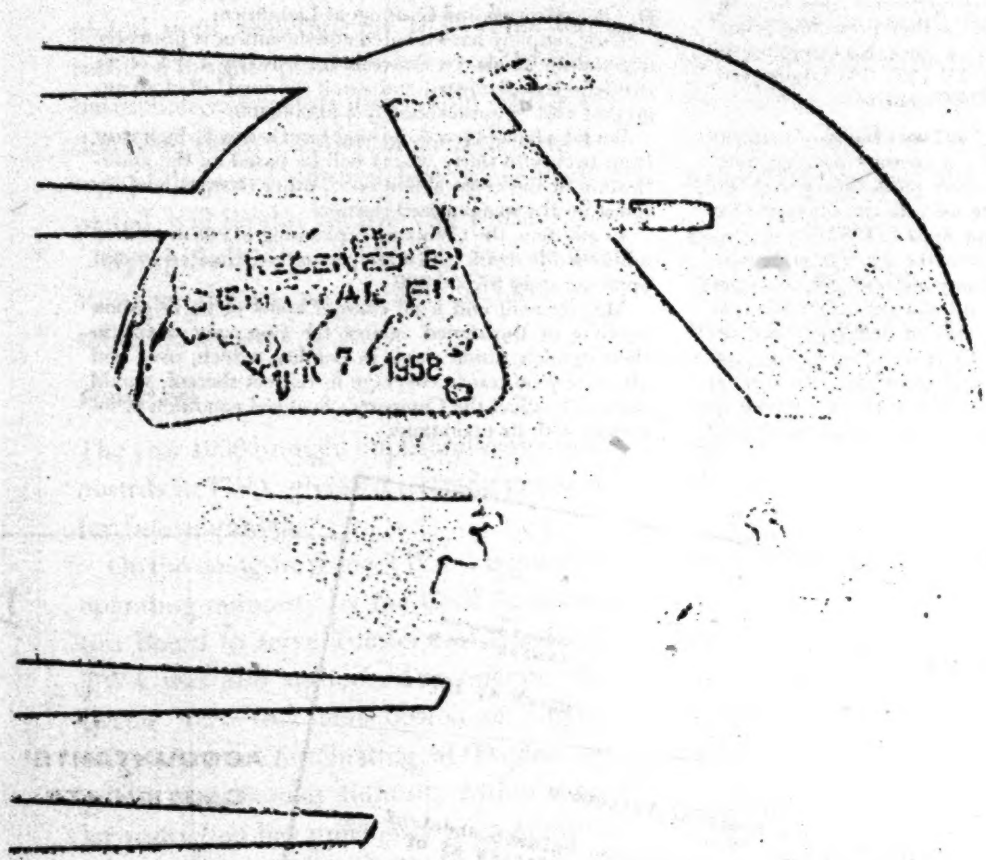
To the Stockholders and Board of Directors
of Trans World Airlines, Inc.:

We have examined the consolidated balance sheet of Trans World Airlines, Inc. and its subsidiaries as of December 31, 1956 and the related statement of consolidated income and supplemental financial statements for the year then ended. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion, except that final determination has not been made of the net amount which may be due to the United States Government on mail and subsidy payments applicable to years prior to 1954 (as set forth in Note 1 to financial statements), the accompanying consolidated balance sheet, statement of consolidated income, and supplemental financial statements, with their notes, present fairly the financial position of the companies at December 31, 1956 and the results of their operations for the year then ended, in conformity with generally accepted accounting principles applied (except for the deferral of moving, training and other costs and the change in the residual values of aircraft as stated in Notes 2 and 3 to the financial statements) on a basis consistent with that of the preceding year.

Haskins & Sells

12/31/61



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TWA

TRANS WORLD AIRLINES, INC.

TWA Ex. 90, page 2
(TWA Annual Report-1957)

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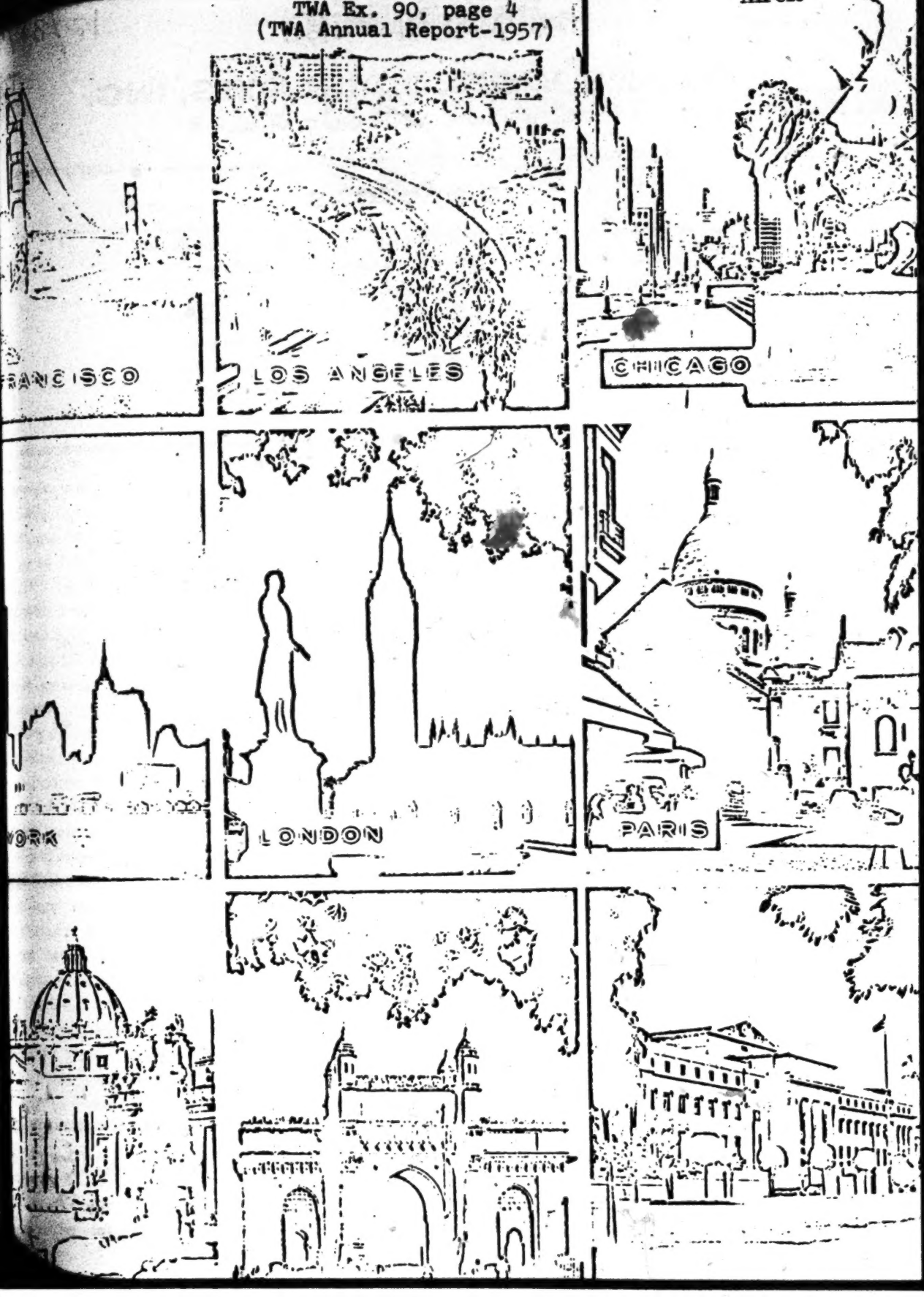
1735 Baltimore, Kansas City 8, Mo.

1957

TWA

TRANS WORLD AIRLINES

ANNUAL REPORT


LOS ANGELES
CHICAGO
LONDON
PARIS

TRANS WORLD AIRLINES, INC.

1735 Baltimore, Kansas City 8, Missouri

DIRECTORS

Fred W. Ayers	Noah Dietrich	Warren Lee Pierson
Palmer Bradley	Arthur Eisenhower**	C. H. Price
Carter L. Burgess*	Oscar F. Holcombe	Harry Rogers
George H. Clay	A. V. Leslie	Ben-Fleming Sessel
E. O. Cocke	Sidney Maestre	A. D. Simpson
John A. Collings	M. E. Montrose	Thomas A. Slack
		Loyd Wright

*Resigned **Deceased

OFFICERS

Warren Lee Pierson ....*Chairman of the Board and Acting President*
E. O. Cocke .....*Senior Vice President—Sales*
A. V. Leslie .....*Senior Vice President—Finance & Treasurer*

Vice Presidents

Frederick G. Betts, *Purchasing*	Clyde S. Fullerton, *General Sales Manager*
Frank E. Busch, *Operations*	Gordon L. Gilmore, *Public Relations*
John H. Clemson, *Vice President*	C. E. McCollum, *National Accounts*
Pierre G. Desautels, *Passenger Service*	R. W. Rummel, *Engineering*
R. M. Dunn, *Maintenance and Stores*	Thomas K. Taylor, *Washington*

J. Woodrow Thomas, *Civic Affairs*

Regional Vice Presidents—Sales

James D. Harrigan, *Chicago*	L. P. Marechal, *New York*
J. W. Letzkus, *Cairo*	Richard Mazzarrini, *Paris*

R. E. Montgomery, *Los Angeles*

Ronald Duckworth .....*Secretary*
B. H. Tumey .....*Controller*
James C. Crawford..*Asst. Vice President—Properties and Facilities*
W. E. Rooker.....*Assistant Treasurer*
E. Wiley Barker .....*Assistant Secretary*
Myra E. Black.....*Assistant Secretary*
C. W. Herre.....*Assistant Secretary*

TRANSFER AGENT: The New York Trust Company, New York 15, New York

REGISTRAR: Bankers Trust Company, New York 15, New York

TO THE STOCKHOLDERS

e financial results of your Company for 1957 reflect industry-wide trend of lower returns on substanly higher gross revenues. The latter totalled $263,-5,000, up $23,271,000 over 1956. In spite of this crease in business there was an operating loss of ,539,000 before applicable tax adjustments, comred with a loss of $4,131,000 in the previous year. Net loss in 1957 after taxes, amounted to $1,558,000 against $2,327,000 in 1956. Additional information out these results appears in the financial section of s report.

TWA made important traffic gains in 1957 with the roduction of its Jetstream airplanes. These have set w standards for performance, passenger comfort d service, on our long-haul routes. The Jetstream he ultimate development of piston-driven aircraft d will remain the outstanding commercial air transt until the turbojets are placed in service.

Significant route changes included extension of the ternational System eastward from Colombo to ngkok and Manila where TWA connects with rthwest Orient Airlines to provide a round-the-rld service.

Polar Route service direct to Europe from the West ast of the United States was inaugurated in the fall d it is now possible to fly non-stop by TWA from Virginia to Paris and London, a distance of almost 00 miles.

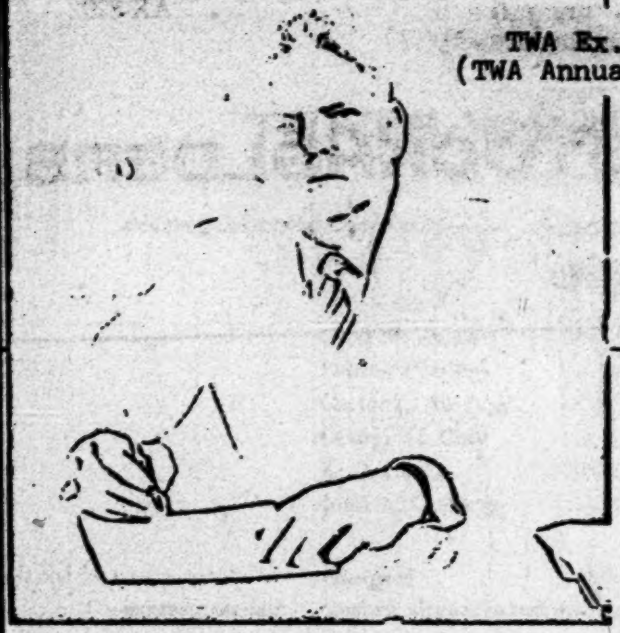
The United States has been unable to date to obtain consent of the British Government for us to extend existing New York-London-Frankfurt route to ich and thus integrate this operation with our other European services to the Middle and Far East. The attitude of the British is difficult to understand, especially in the light of the generous concessions already made by our Government to British air transport. We will continue to press for this modest extension of our service and hope for early approval by the British Government. Meanwhile, we are routing some flights non-stop from New York to Frankfurt and thence through Europe and beyond.

The growth of foreign airlines, many of them government-owned, is posing increasing problems for United States flag operators in their efforts to expand their foreign business. Since the United States is the world's most sought-after travel market, the pressures by foreign flag carriers to obtain access to it are tremendous. TWA welcomes this competition providing our Government is willing and able to obtain traffic rights of equivalent value for the world-wide operations of the air carriers of our own country.

Pending before the Civil Aeronautics Board are applications for routes to Florida which would provide direct service from the West Coast and the Midwest. These routes would be of substantial benefit in leveling out our traditional winter traffic slump. A decision is expected in the next few months.

Your Company is party to a General Fare Investigation by the C.A.B. for the purpose of determining adequate air fares.

Air fares were adjusted upward in February 1958 by 4% plus $1 per ticket pending completion of the Investigation. If the air carriers are to be able to furnish the service demanded by the public, a proper



Warren Lee Pierson
Chairman of the Board

rate of return must be forthcoming to finance the ever increasing cost of providing modern equipment and facilities. Until the recent temporary increase authorized by the C. A. B. the air carriers were operating at fares which were roughly the equivalent of the level charged in 1942. No other form of transportation has operated under such a handicap. We are, therefore, looking forward eagerly for further action by the C. A. B. which will establish a fare level adequate to maintain a United States air transportation system equal to the requirements of our country in today's economic and political atmosphere.

In the area of management, the Company regrets to record the year-end resignation of Mr. Carter L. Burgess, who had acted as President since January 1957, and whose devotion and energetic leadership were accountable for many improvements during the year.

The air transport industry, including your Company, is on the threshold of the Jet Age. Introduction of jet aircraft within the next year will be the most dramatic advance in air travel since the DC-2 was put into service by TWA in 1934. Flying times between our coasts and to Europe will be almost halved.

But this step forward creates many problems. Airports and terminal facilities must be improved at substantial cost. Airway navigation and communications systems must be modernized. Intensive training programs for both flight crew and ground personnel must be undertaken. To meet this challenge your Company has set up a jet planning group devoted exclusively to this project.

Flying and service techniques to take full benefit of the performance capabilities of the jets are under development and in many instances are being practiced today. For example, TWA has already in operation a Wind Analysis Unit comprised of meteorologists who daily review hundreds of wind and weather reports and from this data can predict wind directions and wind speeds at high altitudes to plan the fastest and smoothest course for our flights. Such procedure, developed to its present advanced state by TWA, will be an invaluable aid in future operations which will be conducted in the area of 40,000 feet.

In the period of transition from piston to jet aircraft, we must double our efforts to develop additional sources of traffic and to control costs of operation. This is being done with the wholehearted efforts of our thousands of loyal employees who have brought TWA to its present position of leadership in the industry. With their continued assistance I am confident TWA will be ready for the Jet Age.

BY ORDER OF THE BOARD OF DIRECTORS

Warren L. Pierson

CHAIRMAN OF THE BOARD
AND
ACTING PRESIDENT

FINANCE

A. V. Leslie
Senior Vice President—Finance & Treasurer

The scheduled airline industry continued its strong growth during 1957 with your Company's volume of traffic and revenue more than keeping pace. Overriding this trend, however, were price increases in every major area of expenditure: wages and salaries, materials and supplies, fuel, rents and fees for the use of airport facilities. No relief in rates was granted by our regulatory authority the Civil Aeronautics Board until after the close of the year, and thus the industry and your Company within it notwithstanding strict economy measures suffered a decline in income from operations.

Operating revenues for the year were $263,665,000 —an increase of $23,271,000 or 9.8% over 1956, the previous peak year. Passenger volume (which accounted for 87% of revenue) exceeded forecasts for the first eight months of the year. During September a far more than seasonal decline commenced which continued to the year end and paralleled the downward trend of activity observable in major spheres of business. The abrupt drop in volume is again a reminder that although our business is dynamic, much of our revenue is derived from travel of a non-necessitous nature and that the industry is a sensitive barometer of the Nation's general economic state.

Operating expenses at $268,203,000 were $23,678,000 above the year before and as a result operating loss increased to $4,539,000 which compares with the operating loss of $4,131,000 reported for 1956.

Detailed studies indicate that the cost of conducting the business increased by some $14,000,000 over the year before from changes in price levels inclusive of adjustments in wage and salary scales.

That we were so largely able to overcome this burden was due to major economies effected by the organization of which the most notable was the generation of a year-to-year increase of 16% in available ton miles flown with a 6% decrease in the cost of Fleet Maintenance and Overhaul. A great portion of this favorable result was due to occupancy of the new overhaul base at Kansas City, Missouri, of which mention was made in the 1956 Annual Report.

The net of income and expense from other than operations activity was a credit of $548,000 compared with a net charge of $574,000 for 1956. This favorable circumstance, despite substantially greater interest charges, was due to gain from sales of flight equipment which had become obsolete in our service, recoveries on prior years' damage claims and the refund of welfare insurance payments which experience proved had in the past exceeded actuarial requirements.

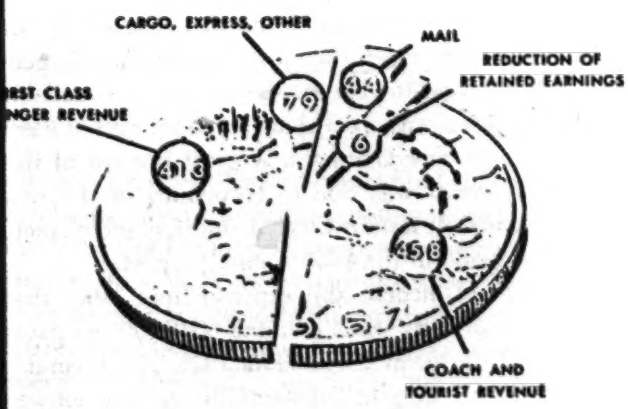
Loss carryback tax credits were $2,434,000 and net loss for the year $1,558,000 versus the net loss of $2,327,000 reported for 1956.

Cash generation—the sum of the net loss plus non cash charges for depreciation, amortization and obsolescence—was $25,206,000 for 1957 and $18,154,000 the year before.

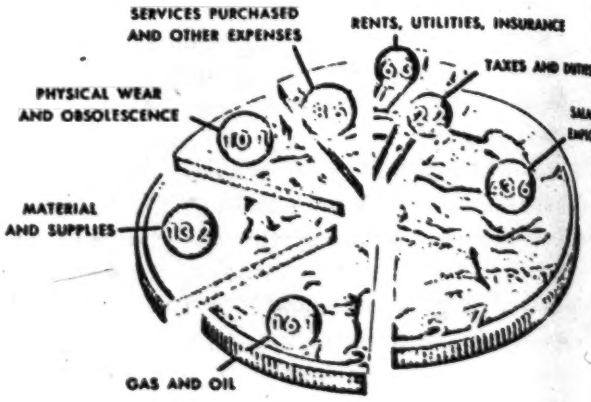
In June the Company offered rights to stockholders to subscribe to one additional share of stock for each share held at a price of $13 per share. The net proceeds to the Company from this offering totalled $43,189,000. During June and July the Company borrowed on a secured basis $35,000,000—$10,000,000 of which came due and was repaid on December 2, with the balance payable over a thirty-six month period commencing January 1, 1958.

With these funds, in total $78,189,000 plus other

THE TWA INCOME DOLLAR



THE TWA EXPENSE DOLLA



cash, the Company financed the purchase of 25 model 1649-A Constellation airplanes and the refinancing of 8 1049-G Constellation airplanes previously held under conditional sales contracts as well as appurtenant spare equipment having a total value of $79,400,000.

On December 2, the Company borrowed $5,811,000 from the Hughes Tool Company on a basis subordinate to the secured debt and on December 31, borrowed $12,000,000 from banks on a 90-day basis renewable for a further 90-day period. Payment of these notes is guaranteed by the Hughes Tool Company.

Also on December 31, 1957, the Company executed a conditional sales contract for the purchase of 4 model 1649-A Constellation airplanes. The unpaid portion of the purchase price $7,293,000 is payable in nineteen quarterly installments commencing July 1, 1958.

Details of the calendar year's results and year-end financial position as well as historical statistical data are to be found on the accompanying pages.

The general outlook for business is far less satisfa tory than a year ago. However, there are several p factors. The Company has integrated the 25 1649-A into its fleet, its service standards are at a peak a the Civil Aeronautics Board has taken some cogn zance of the industry's need for compensatory ra to match the continually increasing costs of doi business which we are hopeful is a precursor to a mo realistic approach toward the industry's necessiti

The rate increase effective February 10, 1958 domestic passenger traffic is 4% plus $1 per tick issued, palpably but a sop to the industry's needs it is to attract the capital required for the jet age. D ing the course of the current year we will addre ourselves actively to this problem since delivery the jet airplanes under order by the Hughes To Company under contracts assignable to TWA w commence during early 1959.

A.V.L.

SALES

E. O. Cocke
Senior Vice President—Sales

Sales of TWA services in 1957 increased 9.8% over the previous year. This compares favorably with the rate of industry growth during the year and sales achievements of your Company's leading competitors in air transportation. Advertising and sales costs in relation to revenues declined in 1957 compared with the previous year.

TWA's competitive position has been materially improved with the introduction into scheduled service in mid-1957 of its Jetstream equipment. The longest range commercial aircraft in service today, the Jetstreams have enabled your Company to provide additional non-stop, coast-to-coast service in the U.S.A. and to many foreign destinations. As the Jetstream fleet of 25 aircraft was not fully integrated into scheduled service until the closing months of 1957, the year's results do not fully reflect revenue potential of this new equipment.

Acquisition of Jetstream aircraft also placed your Company in a position to make a realistic bid for a larger share of the lucrative First Class air travel market. On October 14, 1957 Siesta Sleeper Seats were installed on all non-stop, coast-to-coast Jetstream equipment. Long a feature of luxury international air travel, TWA was the first to place Sleeper Seat service at the disposal of discriminating air travelers in this country. This service is meeting with gratifying public acceptance.

The addition of the 25 Jetstream aircraft to the fleet has also enabled your Company to revise its schedule pattern to provide improved and increased service to many important markets both here and abroad, a development that is likely to have an important bearing on future sales.

Contributing also to 1957 sales results and TWA's currently improved competitive position was the inauguration on September 29, 1957 of its Polar Route, providing twice-weekly round-trip service between the West Coast of the U.S.A. and Europe. Market potential of this service appears substantial and frequencies will be increased to four weekly flights beginning May 1, 1958.

On December 8, 1957 TWA extended service through Frankfurt to Zurich, Rome, Athens and beyond, thus providing additional opportunities for circular routings, as well as new service between important Western European markets and the Middle and Far East. On January 1, 1958 service was started between Colombo, Ceylon and Manila via Bangkok, linking up at Manila with Northwest Orient Airlines to provide a new round-the-world route. Today TWA serves 65 U.S. cities, 23 world centers overseas, and now operates 48,000 route miles.

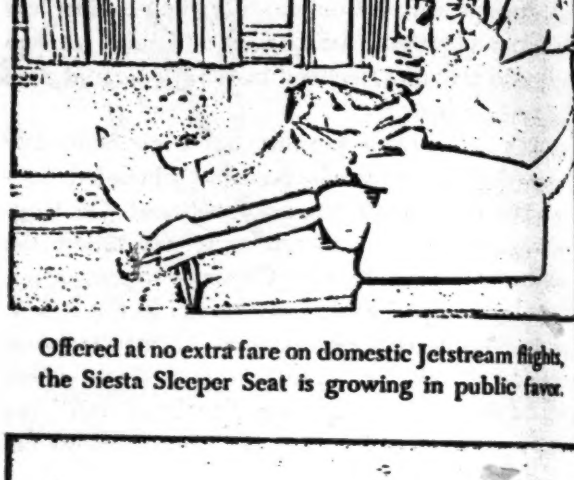
Despite uncertainties created by the Suez crisis in the early months of 1957, European travel during the year broke all records. During peak season TWA oper-

Jetstream luxury airli
is christened by charm
actress Miss Deborah K

ated 56 flights weekly across the North Atlantic—
icketed 153,641 international passengers during the
ear, a gain of 8.5% over the previous year. As a fur-
her impetus to international air travel, your Company
as joined with the industry in the development of a
ew Economy Fare Plan which will become effective
April 1, 1958. Forward bookings indicate another in-
ernational air travel record for 1958, and in antici-
ation your Company will operate 63 weekly flights
cross the North Atlantic during the summer months.

In 1957 tickets were sold to over 5,000,000 passen-
ers. During a typical day in high season the New
ork switchboard, as an example, serviced on the
verage of 10,000 phone calls every 24 hours. To keep
breast of the growing work-load and to improve
ccuracy and speed in reservations procedures and
the relaying of reliable flight information to the
ublic, TWA will shortly install in its major centers
utomatic electronic reservations units known as the
agnetronic Teleflite System. Operation of these
nits should expedite service and materially improve
ver-all efficiency at this vital contact point with our
atrons.

E.O.C.



Offered at no extra fare on domestic Jetstream flights,
the Siesta Sleeper Seat is growing in public favor.

Operating many flights non-stop, TWA inaugurated
Polar Route service between California and E

OPERATIONS

Frank E. Busch
Vice President—Operations

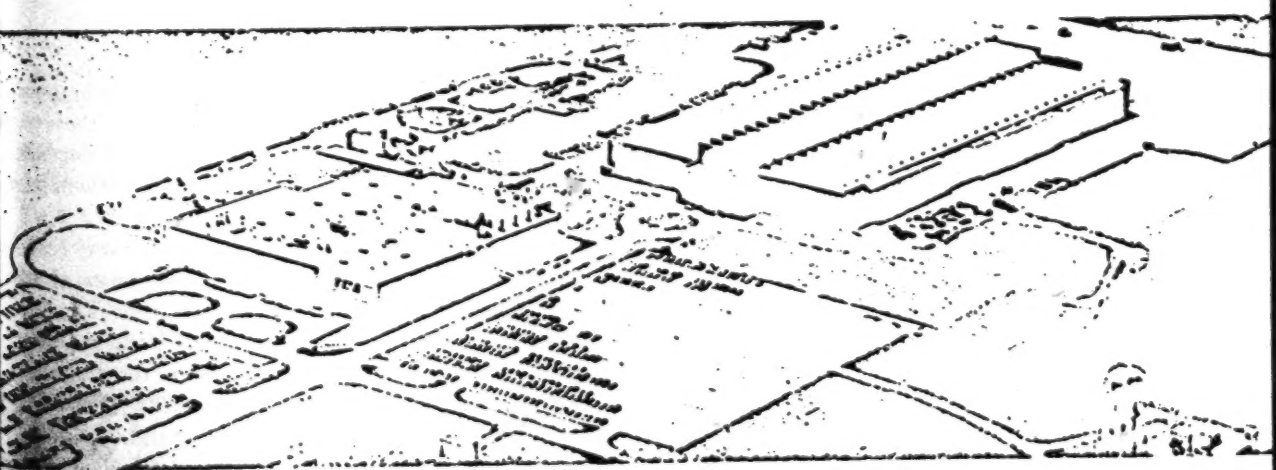
TWA's reliability of scheduled service to the traveling public increased markedly during 1957. Beginning in February, each month showed a higher percentage of completion of scheduled flying miles than the corresponding month of 1956. To the passenger, this meant fewer instances of cancelled flights and the attendant inconveniences. For the year 1957 better than 98% of the timetable miles were completed. This is the best record of the big three transcontinental carriers, and establishes TWA as a recognized first in reliability of service.

Similarly, on-time dependability improved substantially over the previous year. There were fewer delayed departures at originating stations, and a greater percentage of arrivals at terminating points were on-time. The latter reflects closer adherence to point-to-point scheduled flying times, and an ability to gain time on late operating flights, resulting from more enthusiastic effort on the part of flight and ground operations' personnel.

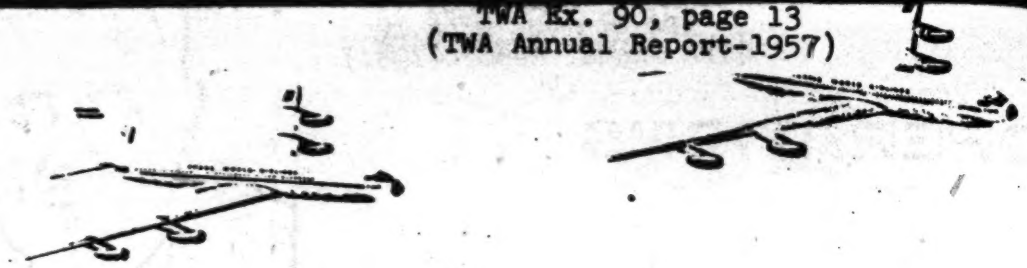
Equally effective in improving the service to the traveling public were the achievements of the maintenance and overhaul organization in bettering the quality and reliability of the overhauled product to the extent that engines alone, as an example, operated with 34% greater reliability than in 1956.

The over-all performance improvement of 1957 is most notable in the light of the introduction of 25 new Jetstream aircraft during the peak travel season. This new airplane was designed to be the most modern and luxurious long-range transport in the industry, and has been enthusiastically received in world travel markets. It has consistently outshown other aircraft in non-stop flights over the Polar Route between the West Coast of the U.S. and Europe. However, as a result of "shakedown" problems experienced when they were placed into scheduled service, added costs were incurred in maintaining a dependable level of operations.

While the operating performance of the TWA fleet was on the upgrade, costs were receiving equal attention. Based on available ton miles, the industry ac-



Finest and most modern facility in airline history, the new Maintenance and Overhaul Base at Kansas City became fully operative in 1957. Each of TWA's fleet of 190 planes regularly returns here for servicing.



cepted standard of cost comparison, TWA's unit costs for flight operations and maintenance were reduced by 3.32% from the previous year. This was accomplished in the face of rapidly rising costs of wages and materials necessary to operate the airline.

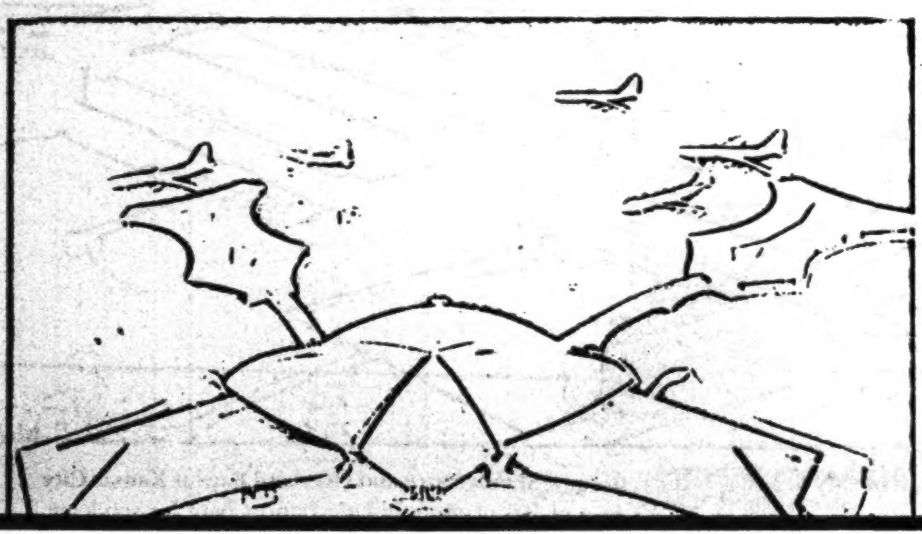
Improved communications facilities made it no longer necessary to employ flight radio operators on international flights, a cost reduction which will be reflected during the coming year.

The move of the Company's main overhaul base to the new facility at Mid-Continent International Airport north of Kansas City, begun in 1956 with the transfer of engine overhaul activities, was completed during 1957 with the move of airframe overhaul. The planning and design work which preceded the move has proved more than worthwhile. The engine overhaul unit is an outstanding example of the application of modern production techniques in the overhaul of aircraft engines, and has gained wide recognition in the airline industry.

To meet the expansion of both international and domestic operations, new hangar facilities at Ne York International Airport (Idlewild) and San Fra cisco International Airport have been under constru tion during 1957. Occupation of these aircraft servi ing bases is planned for the first quarter of 1958.

The training phase of the Company's planning f the introduction of jet aircraft began during the ye With the cooperation of the aircraft, engine an accessory manufacturers, and the Air Force, traini instructors and supervisory personnel were give familiarization courses, and an introductory traini manual was prepared and distributed to flight crew Late in the year "paper" jet operations were inaug rated on the transcontinental and trans-Atlantic rout to develop flight planning and dispatch procedur covering the radically different operating concep inherent in jet-powered flight. Analysis of the resul of these simulated daily operations is yielding va able data on the new factors to be encountered wh these airplanes are placed in service in 1959.

F. E. B.



Functional and beautiful in design is TWA's modern uni terminal now being built at New York's Idlewild Airport When completed, it will incorporate every convenien for the air patron of today and tomorrow. Through all-glass walls, travelers may view the dramatic spectacle of jet planes arriving and departing. The new terminal will serv international as well

Trans World Airlines, Inc. and Subsidiaries

Assets

	DECEMBER 31 1957	DECEMBER 31 1956
CURRENT ASSETS:		
Cash	$ 26,497,729	$ 14,799,757
United States Government securities	3,500,000	8,900,000
Accounts receivable:		
United States Government—Mail, passenger, and other	5,071,583	4,213,809
Governments outside the United States	710,185	982,618
Net traffic and express balances and other receivables—less reserve of $432,500 in 1957 and $275,900 in 1956	15,781,321	12,609,321
Estimated refunds of Federal income taxes arising from loss carry-backs (Note 2)	2,488,775	7,825,000
Inventory of spare parts, materials, and supplies, at average cost—less reserve for obsolescence of $2,176,733 in 1957 and $2,186,559 in 1956 (Note 6)	13,771,723	14,000,492
Prepaid insurance, rents, etc.	2,286,984	2,235,487
Total current assets	$ 70,108,300	$ 65,566,484
SPECIAL FUNDS, INVESTMENTS, AND OTHER NON-CURRENT ASSETS:		
Deposits on purchase of aircraft, etc.		$ 19,038,420
Investments, advances, etc.	$ 507,327	3,302,037
Proceeds from sale of flight equipment deposited with Trustee under terms of indenture and mortgage relating to long-term debt	923,750	
Notes and accounts receivable	484,191	622,851
Total special funds, investments, and other non-current assets	$ 1,915,268	$ 22,963,308
PROPERTY AND EQUIPMENT—Less reserves for depreciation and amortization—See summary (approximately all flight equipment is mortgaged to secure long-term debt). (Note 6)	$172,073,965	$103,208,108
INTANGIBLE ASSET—Air route acquired through subsidiary dissolved in 1947	$ 309,801	$ 309,801
DEFERRED DEBITS:		
Long-term prepayments	$ 1,669,092	$ 1,672,452
Costs relating to new overhaul base—unamortized portion (Note 2)	2,665,228	987,034
Training and other costs applicable to new aircraft acquired or to be acquired—unamortized portion (Note 2)	4,153,836	854,764
Miscellaneous	713,529	455,274
Total deferred debits	$ 9,201,685	$ 3,969,524
TOTAL	$253,609,019	$196,017,225

ONSOLIDATED BALANCE SHEET, December 31, 1957 and

Liabilities

	.... DECEMBER 31 1957	1956
CURRENT LIABILITIES:		
Short-term notes payable to banks (Notes 4 and 5)	$ 12,000,000	
Current maturities of long-term debt	12,151,791	$ 9,052,392
Accounts payable, employees' deductions, etc.	21,621,562	19,966,963
Air travel plan deposits	3,652,426	3,405,318
Accrued Federal, state, and foreign income taxes	475,041	439,263
Accrued salaries, wages, and vacation-pay	9,160,789	8,897,088
Unearned transportation revenue	5,794,039	5,352,539
Total current liabilities	$ 64,855,648	$ 47,113,563
LONG-TERM DEBT—Portion maturing after one year (Notes 4 and 5):		
3¾% Equipment Mortgage Sinking Fund Bonds	$ 34,000,000	$ 37,000,000
5¼% chattel mortgage notes payable to banks	16,666,667	
Conditional sales contract for purchase of aircraft	6,525,493	
Payable to Hughes Tool Company:		
Subordinated note payable due December 1, 1960	5,811,000	
Conditional sales contracts for purchase of aircraft and spare parts, maturing in monthly installments of varying amounts to 1961		12,728,512
Deposits on purchase of aircraft, etc., scheduled for delivery in 1957—to be included in conditional sales contracts		16,179,703
Installment contract for purchase of bulk storage facilities, final payment due in 1962	167,704	
Total long-term debt	$ 63,170,864	$ 65,908,215
DEFERRED FEDERAL INCOME TAXES (Note 2)	$ 13,652,280	$ 12,696,331
STOCKHOLDERS' EQUITY:		
Capital stock—Authorized, 10,000,000 shares (1956—4,000,000 shares), par value $5 per share (125 shares of unissued stock are optioned to an officer)—issued and outstanding, 6,674,113 shares in 1957 and 3,337,036.4 shares in 1956 (including 2,098.4 shares in 1956 held for the redemption of outstanding fractional scrip)	$ 33,370,565	$ 16,685,182
Capital in excess of par value of stock	48,925,025	22,420,851
Earnings employed in the business (Notes 1 and 5)	29,634,637	31,193,083
Total stockholders' equity	$111,930,227	$ 70,299,116
TOTAL	$253,609,019	$196,017,225

STATEMENT OF CONSOLIDATED INCOME

FOR THE YEARS ENDED DECEMBER 31, 1957 AND 1956

	YEAR ENDED DECEMBER 31	
	1957	1956
OPERATING REVENUES:		
Passenger	$231,076,850	$210,279,423
Mail:		
United States—Domestic	4,284,309	4,235,447
United States—International	5,336,726	5,106,240
Foreign governments	2,015,235	2,126,419
Freight, express, and excess baggage	14,958,333	14,773,776
Other	5,993,101	3,872,517
Total	$263,664,554	$240,393,822
OPERATING EXPENSES:		
Flying operations	$ 82,397,707	$ 71,550,704
Ground operations	38,035,802	33,420,114
Maintenance	50,581,405	53,464,054
Provision for depreciation, amortization, and obsolescence	26,050,121	20,372,877
Amortization of deferred costs	714,700	107,431
Passenger service	17,076,344	16,858,870
Promotion and sales	34,044,616	32,555,556
General and administrative	11,176,772	8,997,704
Employees' welfare (pension, social security, etc.)	8,125,988	7,197,491
Total	$268,203,455	$244,524,801
LOSS FROM OPERATIONS	$ 4,538,901	$ 4,130,979
OTHER INCOME CREDITS:		
Interest, discounts, etc.	$ 769,944	$ 639,112
Net gain on sale or retirement of property	1,192,475	612,762
Recoveries on prior years' damage claims	895,047	
Refund of prior years' welfare insurance payments	1,080,915	
Miscellaneous	149,362	120,521
Total	$ 4,087,743	$ 1,372,395
Remainder	$ 451,158	$ 2,758,584
OTHER INCOME CHARGES:		
Interest on long-term debt, etc.	$ 2,865,046	$ 1,849,210
Loss on foreign exchange	391,622	
Miscellaneous	284,325	97,089
Total	$ 3,540,993	$ 1,946,299
LOSS BEFORE PROVISION FOR INCOME TAXES	$ 3,992,151	$ 4,704,883
PROVISION FOR INCOME TAXES (Note 2):		
Estimated refundable Federal income taxes, 1957, $2,488,775; 1956, $7,825,000—Less portion of refunds ($1,027,388 and $5,309,000, respectively) deferred to future years	$(1,461,387)	$(2,516,000)
Federal income taxes of subsidiary	7,067	9,530
State and foreign income taxes	20,445	128,245
Prior years' income tax and refund adjustments—net (including $71,439 applicable to deferred income taxes)	(999,830)	
Total	$(2,433,705)	$(2,378,225)
NET LOSS FOR THE YEAR	$ 1,558,446	$ 2,326,658

STATEMENTS OF CONSOLIDATED EARNINGS

employed in the business and capital in excess of par value of stock

FOR THE YEARS ENDED DECEMBER 31, 1957 AND 1956

Earnings employed in the business

	YEAR ENDED DECEMBER 31 1957	1956
BALANCE AT BEGINNING OF YEAR	$31,193,083	$33,519,920
DEDUCT:		
Loss for the year	1,558,446	2,326,658
Stock dividend applicable to stock issued under Employees' Stock Purchase Plan		179
Total	$ 1,558,446	$ 2,326,837
BALANCE AT END OF YEAR (Notes 1 and 5)	$29,634,637	$31,193,083

Capital in excess of par value of stock

BALANCE AT BEGINNING OF YEAR	$22,420,851	$22,417,258
ADD:		
Excess of selling price of $13 per share over par value of 3,337,036 shares of capital stock sold in 1957 (less expenses relating to sale of stock, $192,490)	26,503,798	
Amounts arising from issuance of capital stock under Employees' Stock Purchase Plan	376	3,593
BALANCE AT END OF YEAR	$48,925,025	$22,420,851

Summary of property and equipment

AND RELATED RESERVES FOR DEPRECIATION AND AMORTIZATION AT DECEMBER 31, 1957 AND NET BOOK VALUE, DECEMBER 31, 1956

	... DECEMBER 31, 1957 ...			
—Classification of Property—	Property and Equipment (At Cost)	Reserves for Depreciation and Amortization	Net Book Value	Net Book Value December 31, 1956
Flight equipment and accessories (Note 6)	$281,861,870	$137,283,387	$144,578,483	$ 83,191,033
Ground equipment, buildings, leasehold improvements, etc.	36,309,706	14,646,274	21,663,432	17,717,689
Uncompleted work orders—not classified	5,832,050		5,832,050	2,299,386
Total	$324,003,626	$151,929,661	$172,073,965	$103,208,108

NOTES TO FINANCIAL STATEMENTS

The Civil Aeronautics Board, by orders issued in 1956, found TWA had been over-paid by $8,153,000 for the carriage mail on its international route for the period 1946-1953. This ulted from the decision of the Board that TWA's domestic e allegedly had excess earnings during that period which uld be applied to reduce the need for subsidy with respect TWA's international operations. TWA filed a petition for re- with the United States Court of Appeals for the District Columbia, and on January 23, 1958, the Court vacated the r of the Civil Aeronautics Board and remanded the case to Board for reconsideration.

nding final determination, no provision has been made in accounts or in the accompanying financial statements for e orders.

In its Federal income tax returns for 1956 and certain prior rs, TWA has claimed accelerated amortization of property r certificates of necessity and used accelerated methods of eciation for other properties in lieu of the straight-line hod of depreciation used for accounting purposes. If the treatment is employed for 1957, the excess of amortization depreciation as determined for income tax purposes over eciation recorded in the accounts would amount to approxi- ly $11,200,000 for that year.

der a policy adopted by TWA in 1956, costs of training t crews and other personnel in connection with the acqui- n of new types of aircraft are deferred and are amortized a five-year period from the date the equipment is placed vice.

ring 1956 and 1957 TWA occupied the new overhaul constructed for the Company by the City of Kansas City, uri. Moving costs and other expenditures relating to the ase have been deferred and are being written off over a ar period from dates of occupancy.

ining and moving costs and other similar charges, which been deferred for accounting purposes, are claimed as ctions for income tax purposes in the year incurred. The ss of such charges over amortization recorded on the books 57 amounted to $5,124,000.

propriate provision has been made for deferred income x in respect of the foregoing differences between the books x returns.

e deduction for income tax purposes of accelerated amor- on and depreciation not recorded on the books and of ng and moving expenses deferred on the books, as noted efore, results in a loss for income tax purposes in 1957 ely in excess of the amount required to recoup all Fed- ome taxes previously paid for 1955.

und of Federal income taxes of $8,869,030 was received 57 as a result of the carry-back of the 1956 loss, as ad- ted tax basis, to 1954. This refund exceeded by approxi- ely $1,044,000 the amount estimated at December 31, 1956 receivable and the additional refund is recorded in 1957 adjustment of prior years' taxes.

eral income tax returns for the years 1953 to 1956, in- sive, were examined by the Internal Revenue Service during 1957 and additional taxes of $169,130 were assessed which amount has been charged against income for 1957. Net Federal income taxes paid for the years 1950 to 1957, inclusive, are subject to further adjustment upon final determination of foreign income taxes, but it is believed that net adjustments to income from such sources should not be material.

3. The present annual cost of the Company's retirement plans for officers and employees is estimated at $3,800,000. The unpaid balance of past service benefits, after applying eight annual payments of $658,000 is estimated at approximately $1,436,000. The plans may be discontinued by the Company in whole or in part at any time.

4. During 1957 stockholders approved an increase in the authorized capital stock of the Company from 4,000,000 shares to 10,000,000 shares of $5 par value each. On June 17, 1957 TWA offered rights to its stockholders to subscribe to one additional share of stock for each share then owned at a subscription price of $13 per share. The net proceeds realized from the sale of 3,337,036 shares of stock under this offering amounted to $43,188,978.

In accordance with the terms of a loan agreement and a chattel mortgage indenture dated May 15, 1957, TWA borrowed $35,000,000 from certain banks during June and July, 1957. Of this amount, $10,000,000 was repaid at maturity on December 2, 1957. The remainder is payable in thirty-six equal monthly installments beginning January 1, 1958.

Under the terms of an agreement dated June 7, 1957, entered into in connection with the above financing program, TWA borrowed the maximum amount available thereunder ($5,811,000) from Hughes Tool Company on December 2, 1957 and applied the proceeds thereof in part payment of the chattel mortgage notes which matured on that date as set forth above. The note payable to Hughes Tool Company is subordinated as to principal and interest to the Equipment Mortgage bonds and all notes payable to banks except for those set forth in the next paragraph; interest accrues on this note at rates equal to the prime rate for commercial loans by New York banks.

On December 31, 1957, TWA borrowed $12,000,000 from banks on 90-day 5¼% unsecured notes guaranteed by Hughes Tool Company. The related loan agreement provides that these notes may be renewed for a single 90-day period if the renewal notes are similarly guaranteed.

On December 31, 1957, TWA entered into a conditional sales contract for the purchase of four model 1649-A aircraft from Lockheed Aircraft Corporation. The unpaid portion of the purchase price, $7,293,199, is payable in nineteen equal quarterly installments of $383,853 beginning on July 1, 1958. The contract bears interest at a rate of 4½% until July 1, 1958 at which time the rate will be adjusted to the rate then being charged Lockheed on its borrowings by New York banks. No principal installment payment may be made on any conditional sales contract which would reduce to an amount less than $12,000,000 the aggregate of TWA's cash on hand or on deposit in the United States and TWA's marketable U.S. Government securities.

5. The Equipment Mortgage bond indenture provides for semi-annual sinking fund payments of $1,500,000 in June and December to and including June 1, 1969. Additional sinking fund payments are required annually in June equal to one-half of the consolidated net income for the preceding calendar year in excess of $3,000,000 but such additional annual sinking fund payment shall not exceed $2,000,000.

Certain provisions of the Equipment Mortgage and Chattel Mortgage Notes indentures will not presently permit the payment of cash dividends. In addition, a supplemental indenture dated December 27, 1957 provided that no payment would be made on the principal of unsecured indebtedness that would reduce the net working capital of the Company below $15,000,000.

6. Effective January 1, 1957, TWA revised its classification of accounts in accordance with the Civil Aeronautics Board's revised system of accounts. In addition to regrouping of various expenses, flight equipment spare parts, less obsolescence reserve, in the amount of $11,316,397 at December 31, 1957 previously stated as property have been reclassified as current assets. For comparative purposes the financial statements previously reported for 1956 have been reclassified in the accompanying statements to conform to the new classification.

7. Commitments and Contingent Liabilities:

Hughes Tool Company has placed orders, under contracts assignable to TWA, for four Lockheed 1049H aircraft for delivery in 1958 and for fifteen Boeing 707-131 aircraft, eighteen Boeing 707-331 aircraft, and thirty Convair 880 aircraft, for delivery beginning in 1959. These contracts are subject to modification as to number and model of aircraft covered and as to specifications of the aircraft, including seating capacity. Hughes is not committed to sell any of these aircraft to TWA nor is TWA committed to buy any of them from Hughes. Any such transaction between TWA and Hughes requires approval of the Civil Aeronautics Board.

Leases for TWA's overhaul base, hangars, office space, etc. are for varying terms and rentals. The aggregate annual rental under such leases in effect at December 31, 1957 was approximately $5,200,000.

TWA has executed agreements or is presently negotiating for the construction for lease by TWA of two hangars and a new terminal, all of an aggregate cost of approximately $30,000,000. Rental payments on these long-term leases (which vary from twenty to thirty years) will be based on the amortization of the construction costs, other charges, and interest on the unamortized portion.

TWA is presently constructing hangars at Los Angeles and San Francisco, California. The estimated additional cost to complete these hangars amounted to $5,000,000 at December 31, 1957.

Management and legal counsel know of no litigation pending or threatened against TWA other than that described in Note 1 which in their opinion would result in liability which over and above any insurance coverage in respect thereof would materially affect TWA's financial condition or interfere with its operations.

ACCOUNTANTS' CERTIFICATE

HASKINS & SELLS
CERTIFIED PUBLIC ACCOUNTANTS

TEMPLE BUILDING
KANSAS CITY 6

March 4, 1958.

To the Stockholders and Board of Directors
of Trans World Airlines, Inc.:

We have examined the consolidated balance sheet of Trans World Airlines, Inc. and its subsidiaries as of December 31, 1957 and the related statement of consolidated income and supplemental financial statements for the year then ended. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion, except that final determination has not been made of the net amount which may be due to the United States Government on mail and subsidy payments applicable to years prior to 1954 (as set forth in Note 1 to financial statements), the accompanying consolidated balance sheet, statement of consolidated income, and supplemental financial statements, with their notes, present fairly the financial position of the companies at December 31, 1957 and the results of their operations for the year then ended, in conformity with generally accepted accounting principles applied (except for the inclusion of flight equipment spare parts in current assets as stated in Note 6 to the financial statements) on a basis consistent with that of the preceding year.

Haskins & Sells

FINANCIAL STATISTICS (000 Omitted)

Operating Revenues:	1957	1956	1955	1954	1953	1952	1951	1950	1949	1948
Passenger	$231,077	$210,279	$189,231	$174,228	$150,878	$135,292	$114,408	$ 88,275	$ 78,143	$ 72,426
Mail:										
United States–Domestic	4,284	4,236	3,433	6,157	5,742	4,970	5,367	5,746	5,533	5,589
United States–International	5,337	5,106	4,627	4,383	3,823	3,568	6,363	9,069	9,229	9,292
Foreign Governments	2,015	2,126	2,327	2,482	2,784	3,200	3,113	3,072	2,947	2,335
Freight and Express	11,720	11,959	12,105	11,130	10,635	9,504	8,687	7,437	6,608	6,115
Excess Baggage	3,238	2,815	2,500	2,541	2,022	1,721	1,349	1,220	1,382	1,398
Other	5,993	3,873	3,208	2,750	2,337	2,447	2,975	2,147	1,616	1,494
Total Operating Revenues	$263,664	$240,394	$217,431	$203,671	$187,221	$160,702	$142,262	$116,966	$105,460	$ 98,669
Operating Expenses:										
Wages and Salaries	$110,476	$100,725	$ 84,758	$ 77,100	$ 73,906	$ 62,921	$ 53,102	$ 45,382	$ 44,378	$ 47,803
Depreciation, Amortization, Obsolescence	26,764	20,480	20,276	21,554	23,465	17,010	12,125	11,263	9,488	8,577
All Other	130,963	123,320	100,822	82,340	79,032	65,984	61,035	48,860	44,889	45,142
Total Operating Expenses	$268,203	$244,525	$205,856	$180,994	$176,403	$145,915	$126,262	$105,505	$ 98,755	$101,522
Operating Income or (Loss)	$ (4,539)	$ (4,131)	$ 11,575	$ 22,677	$ 10,818	$ 14,787	$ 16,000	$ 11,461	$ 6,705	$ (2,853)
Net Income or (Loss) After Taxes	$ (1,558)	$ (2,327)	$ 5,407	$ 10,336	$ 5,064	$ 7,661	$ 7,660	$ 7,882	$ 3,736	$ (5,193)
Net Income or (Loss) Per Share*	$ (.23)	$ (.35)	$ .81	$ 1.55	$ .76	$ 1.15	$ 1.15	$ 1.18	$ .56	$ (.78)
Operating Ratio (Ratio of Expenses to Revenues)	101.7%	101.7%	94.7%	88.9%	94.2%	90.8%	88.8%	90.2%	93.6%	102.9%
Selected Balance Sheet Items:										
Current Assets**	$ 70,108	$ 65,566	$ 41,733	$ 38,046	$ 43,670	$ 50,829	$ 41,550	$ 34,928	$ 31,114	$ 24,616
Current Liabilities	64,855	47,113	32,910	33,957	43,015	46,932	39,804	26,589	17,461	15,379
Net Working Capital**	$ 5,253	$ 18,453	$ 8,823	$ 4,089	$ 655	$ 3,897	$ 1,746	$ 8,339	$ 13,653	$ 9,237
Flight Equipment (Net)**	$143,641	83,191	$ 87,822	$ 52,078	$ 65,033	$ 79,924	$ 47,858	$ 44,008	$ 30,379	$ 36,844
Other Property (Net)	28,433	20,017	15,760	12,931	13,049	12,602	9,730	7,878	7,743	9,130
Total Property and Equipment (Net)**	$172,074	$103,208	$103,582	$ 65,009	$ 78,102	$ 92,526	$ 57,588	$ 51,886	$ 38,122	$ 45,974
Stockholders' Equity	$111,931	$ 70,299	$ 72,621	$ 67,207	$ 56,804	$ 51,699	$ 33,406	$ 25,608	$ 17,735	$ 10,192
Shares of Common Stock Outstanding	6,674	3,337	3,337	3,337	3,333	3,330	2,430	2,427	2,425	2,021
Book Value Per Share	$ 16.77	$ 21.07	$ 21.76	$ 20.14	$ 17.04	$ 15.53	$ 13.75	$ 10.55	$ 7.31	$ 5.04

OPERATING STATISTICS (000 Omitted)

Number of Revenue Passengers	4,818	4,428	4,048	3,594	3,140	2,573	2,223	1,706	1,513	1,325
Miles Scheduled	120,346	111,005	98,979	89,787	83,600	71,247	65,820	60,358	62,846	66,948
Revenue Miles Flown	118,636	107,480	97,249	89,087	81,142	69,557	63,386	60,285	63,309	67,413
Revenue Passenger Miles	4,396,498	3,977,405	3,502,931	3,212,629	2,888,169	2,324,318	1,894,724	1,464,188	1,226,861	1,113,368
Available Seat Miles Flown	6,985,286	6,202,455	5,405,489	4,767,750	4,109,628	3,154,748	2,576,821	2,264,011	2,007,493	1,921,729
Revenue Passenger Load Factor	62.9%	64.1%	64.8%	67.4%	70.3%	73.7%	73.5%	64.7%	61.1%	57.9%
Revenue Ton Miles Flown:										
Passenger	422,320	382,288	336,832	309,051	278,432	225,262	184,657	143,423	120,154	109,052
Mail	24,080	23,869	23,677	23,506	19,676	16,994	17,715	13,938	13,133	12,655
Freight and Express	41,613	41,901	41,253	37,129	34,672	29,706	29,625	26,348	22,951	20,546
Excess Baggage	4,401	3,722	3,259	3,336	2,927	2,459	2,084	1,678	1,819	1,829
Total	492,414	451,780	405,021	373,022	335,707	274,421	234,081	185,587	158,057	144,082
Payload Factor (Ratio of Revenue Ton Miles Flown to Available Ton Miles)	57.2%	60.7%	61.8%	64.2%	65.7%	67.8%	66.8%	61.2%	60.2%	57.9%

The financial statistics published with prior years' reports have been restated to reflect in the proper year retroactive adjustments recorded in later years. *Net income or loss per share for all years has been calculated on the number of shares outstanding as of December 31, 1957. **For year 1956, flight equipment spare parts in the amount of $11,445,000 have been reclassified from property to current assets to conform with 1957 (see Notes to Financial Statements No. 6).

TWA Ex. 90, page 20
(TWA Annual Report–1957)

12/31/58 Exp 2

TWA

TRANS WORLD AIRLINES, INC.
1735 Baltimore, Kansas City 8, Missouri

1958 ANNUAL REPORT

HIGHLIGHTS

	1958	1957
Operating Revenues	$284,841,000	$263,664,000
Operating Expenses:		
Cash Operating Expenses	$253,585,000	$241,439,000
Depreciation and Amortization	31,631,000	26,764,000
Total Operating Expenses	$285,216,000	$268,203,000
Loss From Operations	$ 375,000	$ 4,539,000
Interest and Other Charges and Credits	2,749,000	(547,000)
Provision for Income Taxes (Credit)	(1,360,000)	(2,434,000)
Net Loss For the Year	$ 1,764,000	$ 1,558,000
Working Capital	$ 15,491,000	$ 5,253,000
Long Term Debt	$ 67,088,000	$ 63,171,000
Stockholders' Equity	$110,166,000	$111,930,000
Revenue Passenger Miles	4,592,675,000	4,396,498,000
Revenue Ton Miles	514,289,000	492,414,000
Passenger Load Factor	63.3%	62.9%
Number of Employees	18,633	19,863

CHARLES S. THOMAS, *President*

President's Letter

I joined your Company as its President on July 15, 1958. In the past year I have had, therefore, the unusual opportunity of observing and knowing TWA from two points of view, first as an interested customer and second from the inner vantage point of President and chief executive.

Nothing has occurred during this period that has changed in the slightest my original conviction that within TWA are all the potentials for becoming one of the greatest transportation systems of modern times. Our routes traverse the United States through the most populous areas. Overseas, we serve the principal capitals of Europe and the age old "trade routes" to the Middle East and beyond. The TWA insignia, those three letters T-W-A, are quickly and easily identifiable anywhere and known worldwide. Most important of all, TWA people embrace as fine a collection of airline skills and knowledge as there is in the industry.

The TWA organization has all of the necessary abilities to reverse the losses of the past three years. To accomplish this purpose, I would like to tell you some of the action that has been taken since last July to improve the immediate picture and also give you a preview of some of the plans and programs ahead.

In August of 1958 task force teams were formed to study every area of expenditure and through their recommendations significant economies were effected which were not alone reflected in the second half of 1958 results but are of continuing benefit.

At the same time, routes and schedules were carefully analyzed and each segment of each schedule was examined to see whether or not it returned a profit or a loss. As a result our schedules were completely revised. Unprofitable flights were eliminated wherever possible, and a greater use was made of the long-haul segments of our route structure which carry the greatest profit potential. This, as with expense control, is a continuing program.

As a result of these two basic actions and other factors, an operating profit of $10,196,000 was realized in the last six months of 1958.

This is the highest profit for the last half year since 1954 and shows marked improvement over the operating loss of $1,305,000 during the last six months of 1957.

Despite an operating loss of $10,571,000 for the first six months of 1958 and a costly 17-day strike in the final half of the year, the full year operating loss was reduced to

$375,000 compared with operating losses of $4,539,000 and $4,131,000 for the calendar years of 1957 and 1956.

The net loss for 1958 was $1,764,000—$206,000 greater than the year before, due chiefly to lesser gains on sale of equipment and lower tax credits and other non-recurring items as set forth in more detail in the report. (Had it not been for the actual losses suffered during the strike itself and the adverse effect on traffic, both prior to and after the strike, it is estimated your Company would have made a profit in 1958.)

During January 1959 TWA flew 30% more revenue passenger miles than the previous January and with 1,051 less personnel. The improvement in operating results is continuing.

Now for the longer range. Exhaustive studies have been made of the Company's organization structure with the result that we are modifying our present form of organization to provide for clearer cut lines of authority and delegation, and the elimination of overlapping effort and expense. Part of this plan is a new budgeting system which will be much more effective in control of expenses. The new organization structure will, throughout, be streamlined to afford better lines of communication and command suitable to a company serving four continents and attuned to jet transportation.

In 1958 the groundwork was laid for another significant TWA milestone in aviation history—entrance into the Jet Age. On March 20, 1959 TWA inaugurated the only non-stop jet service between New York and San Francisco using the famous and proven Boeing 707 jets. Within the weeks and months ahead the TWA jet network will spread to Los Angeles, Chicago, Washington, Philadelphia and St. Louis. Later this year, TWA jets will span the Atlantic to our principal gateway cities and beyond.

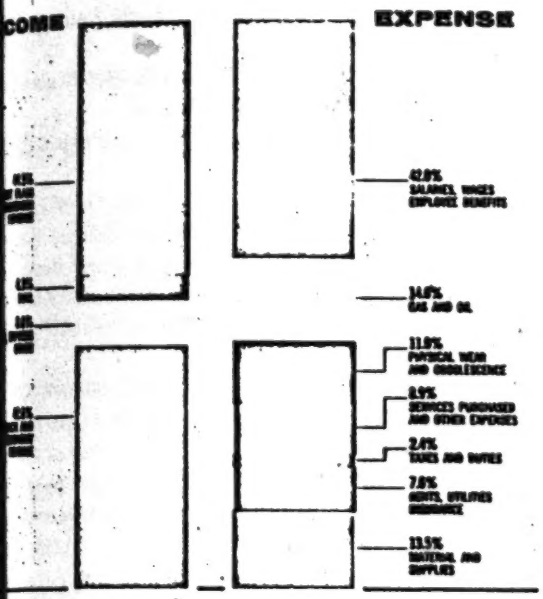
In closing, I would like to submit the following as our self established goal: for TWA to so order its affairs that it will be an acknowledged leader in providing safe, swift air transportation to the public; to accept fully its appropriate obligation in the sphere of national defense; to accord secure employment at a proper level of compensation for its loyal and dedicated personnel, and to accomplish these objectives with the final result of a profitable operation.

I can assure you that I speak for everyone in your Company when I say, "TWA looks to the future with confidence."

Sincerely,

C. S. Thomas

REVIEW OF THE YEAR



1958 was a year of cross currents in the airline industry and your Company. During the early part of the year, the domes segment of the business was under the influence of a recessi in general business activity which persisted until mid-year- period during which traffic volume fell substantially below tl year before. During the latter half, there was a resumption the growth pattern at a rate only slightly below that which h persisted for a number of years, only to be interrupted by strik against several of the major carriers during the last two month

The international flow of traffic—and for TWA this mear substantially transatlantic travel—showed the greatest growt in any post war year.

Domestically, the industry was awarded passenger-fare in creases during February and October which for TWA aggre gated roughly 7%. Internationally, a new economy class o service across the Atlantic carrying a rate 20% below touris class was inaugurated during April. Over half of the passenge volume, exclusive of first class, chose to travel at the lower rate despite the more austere accommodations.

FINANCIAL

Gross Revenues at $284,841,000 were $21,177,000 or 8% above a year ago which resulted from carrying a 5% greater volume of traffic at an average rate higher by 3%.

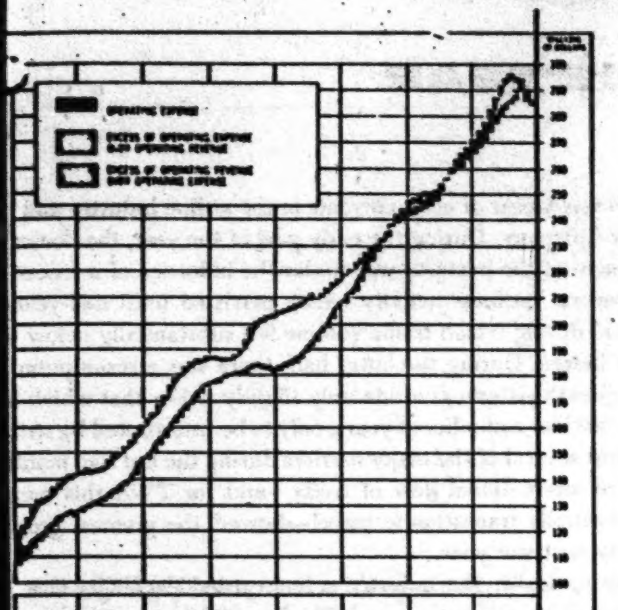
Cash Operating Expenses at $253,585,000 were higher by $12,146,000 or slightly over 5%. Non-cash charges for Depreciation and Amortization at $31,631,000 were up $4,867,000 or 18%, largely reflecting the increase in average fleet investment.

Increases in labor rates, rents and costs of materials and services continued to inflate the basic costs of doing business.

Loss from operations was reduced to $375,000 compared with a loss of $4,539,000 the year before.

Non-operating expense was $2,749,000 compared with non-operating income of $547,000 for 1957. The figure for 1958 reflects less gain on the sale of equipment obsolete to our service and the non-recurring nature of certain items reported for 1957, notably recoveries on prior years' damage claims and refund of prior years' welfare insurance payments.

The Company and five other airlines are parties to a Mutual Aid Agreement, which provides that in the event the operations of one of the parties are shut down, as a result of a strike which is unlawful or which has been called to enforce demands in excess of or opposed to the recommendations of a Presidential Emergency Board convened under the provisions of the Railway Labor Act (which governs labor matters in the airline industry), each party will pay to the struck carrier an amount



OPERATING REVENUE, EXPENSE, AND PROFIT OR LOSS

equal to the increased revenues of that party less addi direct expenses incident thereto. Reflected in 1958 result net benefits to TWA of $1,343,000 under this agreement.

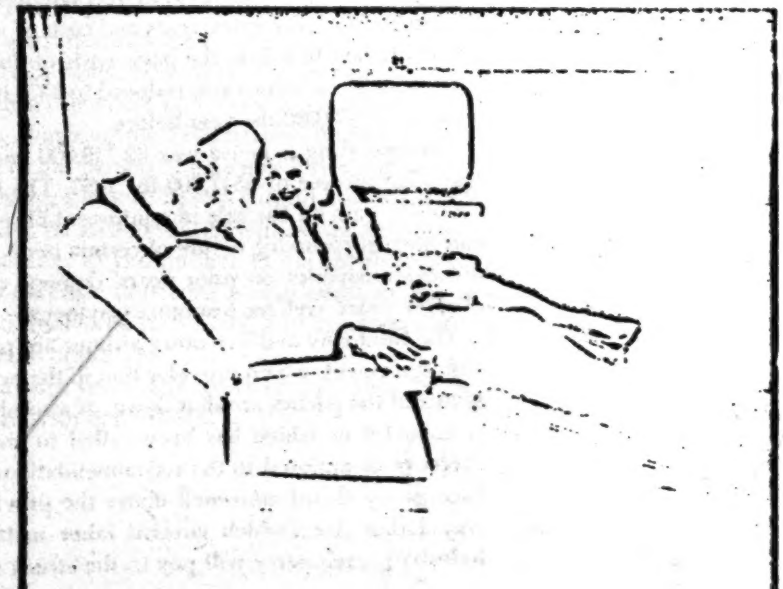
Net tax credit was $1,360,000 arising chiefly from amor tion of deferred taxes.

As a final total, net loss for the year was $1,764,000 comp with the net loss of $1,558,000 the year before.

Net Working Capital increased during the year to $15,40 from $5,253,000 at the end of 1957.

There were additions to the property account of $21,00 encompassing facilities and equipment to provide for the tinued expansion of our business. The largest single items $9,400,000 representing four 1049H Constellation airplanes spares and $5,000,000 for hangar, maintenance and tra facilities.

Long term debt at the year end totalled $67,088,00 increase of $3,917,000 for the year and reflects payme $12,805,000 regular maturities on debt outstanding at the vious year end; the transfer of $12,000,000 short term payable to banks to long term category upon their purcha the Hughes Tool Company at maturity July 1, 1958; increase of $4,534,000 in Conditional Sales Contracts due s to May 15, 1963 executed in connection with the purch four 1049H Constellation aircraft; and installment contra purchase of bulk storage facilities and ground equipment ling $65,000.



Siesta Sleeper Seats, availabl on all transcontinental Jetstream aircraft, are enjoye here by Natalie Wood and husband Robert Wagner, motion picture stars.

...personalities urge foreign travel. Overseas traffic ...stimulated by the appearance, in TWA advertising, ...well-known travelers. Here, Maurice Chevalier, inter... ...al celebrity, invites TWA patrons to visit Paris.

modest return on investment, although undertaken at lower than scheduled service rates.

We believe the scheduled international carriers should share more largely in this military transportation movement on a basis making it sound business in itself, and as a contribution to national defense.

In the realm of sales service to our patrons, TWA in August activated the latest in electronic reservations equipment—the Magnetronic Reservisor—in four of its major markets, New York, Chicago, Los Angeles and San Francisco.

This equipment is designed to accommodate more economically and efficiently a greatly expanded volume of requests for seats. The benefits of this system to both our customers and Company will gradually be extended to all TWA cities.

PASSENGER SERVICE

Continuing refinements were made in our program to upgrade service to our passengers, while at the same time preparing for the increased number of customers expected with introduction of jets in 1959.

Greater emphasis was placed on training personnel, and increased efficiency in provisioning our flights under a constant cost control program. More than five million meals were served our passengers in flight during the past year through the facilities of seven TWA food units supplemented by 42 commercial caterers. This involved, for example, the purchase and preparation of more than a million pounds of meat and poultry products.

Plans were made and work begun on a new hostess training school to be located in the Company's building at Mid-Continent International Airport at Kansas City, Missouri.

This installation, together with arrangements for improved housing facilities for the students, ensures a more modern and efficient hostess training program without the necessity of constructing a separate facility for this activity.

A complete "new look" in service is planned, featuring new and distinctive passenger service items tailored to blend with the decor of the TWA jet aircraft. Provisions have been made to expedite our handling of greater numbers of passengers in keeping with the accelerated tempo of jet travel. This has involved the design and ordering of new, self-propelled loading equipment, including new methods and equipment for the loading and unloading of baggage.

Expanded use of closed-circuit TV for ramp surveillance and research for use of light-weight transistorized two-way radio communications promise more efficient and faster handling of our aircraft, customers and cargo.

Trans World Airlines, Inc. and Subsidiaries

CONSOLIDATED BALANCE SHEET

DECEMBER 31, 1958 AND 1957

ASSETS	DEC. 31 1958	DEC. 31 1957
CURRENT ASSETS:		
Cash	$ 23,451,549	$ 26,497,729
United States Government securities—at cost plus accrued interest (approximates market)	17,708,518	3,500,000
Accounts receivable:		
United States Government—Mail, passenger, and other	5,266,258	5,071,588
Governments outside the United States	496,343	710,185
Net traffic and express balances and other receivables—less reserve of $418,085 in 1958 and $432,500 in 1957	18,187,985	15,781,321
Estimated refund of Federal income taxes arising from loss carry-back (Note 2)		2,488,775
Inventory of spare parts, materials, and supplies, at average cost—less reserve for obsolescence, $2,176,738	12,494,547	13,771,728
Prepaid insurance, rents, etc.	2,572,783	2,226,984
Total current assets	80,177,983	70,108,300
SPECIAL FUNDS, INVESTMENTS, AND OTHER NON-CURRENT ASSETS	3,027,436	1,915,986
PROPERTY AND EQUIPMENT—Less reserves for depreciation and amortization—See summary (approximately all flight equipment is mortgaged to secure long-term debt). (Note 3)	161,196,862	172,073,985
INTANGIBLE ASSET—Air route acquired through subsidiary dissolved in 1947	309,801	309,801
DEFERRED DEBITS:		
Long-term prepayments	1,716,025	1,669,092
Costs relating to new overhaul base—unamortized portion (Note 2)	2,041,330	2,665,228
Training and other costs applicable to new aircraft acquired or to be acquired—unamortized portion (Note 2)	4,662,372	4,153,330
Miscellaneous	1,136,672	713,389
Total deferred debits	9,556,399	9,201,085
TOTAL	$254,268,481	$253,609,019

The accompanying notes to financial statements constitute an integral part of this st

LIABILITIES	DEC. 31 1958	DEC. 31 1957
CURRENT LIABILITIES:		
Short-term notes payable to banks		$ 12,000,000
Current maturities of long-term debt	$ 14,207,616	12,151,791
Accounts payable, employees' deductions, etc.	31,182,650	21,621,562
Air travel plan deposits	3,762,184	3,652,426
Accrued Federal, state, and foreign income taxes	215,831	475,041
Accrued salaries, wages, and vacation-pay	9,633,594	9,160,789
Unearned transportation revenue	5,685,090	5,794,039
Total current liabilities	64,686,965	64,855,648
LONG-TERM DEBT—Portion maturing after one year—see summary	67,087,773	63,170,864
DEFERRED FEDERAL INCOME TAXES (Note 2)	12,327,317	13,652,280
STOCKHOLDERS' EQUITY:		
Capital stock—Authorized, 10,000,000 shares, par value $5 per share—issued and outstanding, 6,674,155 shares in 1958 and 6,674,113 shares in 1957	33,370,775	33,370,565
Surplus paid-in for, or assigned to, capital stock in excess of par value	48,925,395	48,925,025
Earnings employed in the business (Note 1 and Note to summary of long-term debt)	27,870,256	29,634,637
Total stockholders' equity	110,166,426	111,930,227
TOTAL	$254,268,481	$253,609,019

The accompanying notes to financial statements constitute an integral part of this statement.

Trans World Airlines, Inc. and Subsidiaries

STATEMENT OF CONSOLIDATED INCOME

FOR THE YEARS ENDED DECEMBER 31, 1958 AND 1957

	DEC. 31 1958	DEC. 31 1957
OPERATING REVENUES:		
Passenger	$248,119,354	$231,076,[illegible]
Mail:		
United States—Domestic	4,648,165	4,284,[illegible]
United States—International	5,821,694	5,336,[illegible]
Foreign governments	1,725,863	2,015,[illegible]
Freight, express, and excess baggage	14,610,082	14,958,[illegible]
Other	9,915,768	5,993,[illegible]
Total	284,840,956	263,664,[illegible]
OPERATING EXPENSES:		
Flying operations	87,191,963	82,397,707
Ground operations	41,496,457	38,035,[illegible]
Maintenance	54,490,854	50,581,[illegible]
Provision for depreciation and amortization	30,054,622	26,050,[illegible]
Amortization of deferred costs	1,575,976	714,[illegible]
Passenger service	19,036,480	17,076,[illegible]
Promotion and sales	34,864,418	34,044,[illegible]
General and administrative	9,687,021	11,178,[illegible]
Employees' welfare (pension, social security, etc.)	8,161,101	8,125,[illegible]
Net contributions from airlines under "mutual aid" pact	(1,342,707)	
Total	285,216,185	268,203,[illegible]
LOSS FROM OPERATIONS	375,229	4,538,[illegible]
OTHER INCOME CREDITS:		
Interest, discounts, etc.	629,213	769,[illegible]
Net gain on sale or retirement of property	432,564	1,192,[illegible]
Recoveries on prior years' damage claims		895,[illegible]
Refund of prior years' welfare insurance payments		1,060,[illegible]
Miscellaneous	203,263	149,[illegible]
Total	1,265,040	4,067,[illegible]
Remainder	889,811	(451,[illegible])
OTHER INCOME CHARGES:		
Interest on long-term debt, etc.	3,715,286	2,865,[illegible]
Loss on foreign exchange	81,191	391,[illegible]
Miscellaneous	217,382	284,[illegible]
Total	4,013,859	3,540,[illegible]
LOSS BEFORE PROVISION FOR INCOME TAXES	3,124,048	3,992,151
PROVISION FOR INCOME TAXES (Note 2):		
Reversal of deferred Federal income taxes applicable to loss for the year	(1,324,963)	
Estimated refundable Federal income taxes, $2,488,775, less portion of refund, $1,027,388, deferred to future years		(1,461,387)
Federal income taxes of subsidiary	21,975	7,[illegible]
State and foreign income taxes	22,750	20,[illegible]
Prior years' income tax and refund adjustments	(79,429)	(999,[illegible])
Total	(1,359,667)	(2,433,[illegible])
NET LOSS FOR THE YEAR	$ 1,764,381	$ 1,558,[illegible]

The accompanying notes to financial statements constitute an integral part of this st[illegible]

Trans World Airlines, Inc. and Subsidiaries

STATEMENTS OF CONSOLIDATED EARNINGS

mployed in the business and surplus paid-in for, or assigned to, apital stock in excess of par value

FOR THE YEARS ENDED DECEMBER 31, 1958 AND 1957

EARNINGS EMPLOYED IN THE BUSINESS	DEC. 31 1958	DEC. 31 1957
BALANCE AT BEGINNING OF YEAR	$29,634,637	$31,193,083
DEDUCT:		
Loss for the year	1,764,381	1,558,446
BALANCE AT END OF YEAR (Note 1 and Note to summary of long-term debt)	27,870,256	29,634,637
SURPLUS PAID-IN FOR, OR ASSIGNED TO, CAPITAL STOCK IN EXCESS OF PAR VALUE		
BALANCE AT BEGINNING OF YEAR	48,925,025	22,420,851
ADD:		
Excess of selling price of $13 per share over par value of 3,337,036 shares of capital stock sold in 1957 (less expenses relating to sale of stock, $192,490)		26,503,798
Amounts arising from issuance of capital stock under Employees Stock Purchase Plan	370	376
BALANCE AT END OF YEAR	$48,925,395	$48,925,025

SUMMARY OF PROPERTY AND EQUIPMENT

nd related reserves for depreciation and amortization at December 31, 1958, nd net book value, December 31, 1957

	DECEMBER 31, 1958			
Classification of Property	Property and Equipment (At Cost)	Reserves for Depreciation and Amortization	Net Book Value	Net Book Value, December 31, 1957
Flight equipment and accessories	$291,572,631	$160,745,472	$130,827,159	$144,578,483
Ground equipment, buildings, leasehold improvements, etc.	41,740,032	17,098,442	24,641,590	21,663,432
Accumulated work orders—not classified	5,728,113		5,728,113	5,832,050
Total	$339,040,776	$177,843,914	$161,196,862	$172,073,965

The accompanying notes to financial statements constitute an integral part of this statement.

Trans World Airlines, Inc. and Subsidiaries

SUMMARY OF LONG-TERM DEBT, DECEMBER 31, 1958

	LONG-TERM PORTION DEC. 31 1958	DEC. 31 1957
Equipment Mortgage Sinking Fund Bonds, 3¾%, due December 1, 1969, payable $1,500,000 semi-annually to and including June 1, 1969; additional annual sinking fund payments equal to one-half of the consolidated net income for the preceding year in excess of $3,000,000 but such additional annual payment not to exceed $2,000,000	$31,000,000	$34,000,000
Chattel Mortgage Notes, 5¼%, payable in equal monthly instalments of $694,444 through December 1, 1960	8,333,334	16,666,667
Conditional Sales Contracts, 3½%, assigned to banks:		
For purchase of four Lockheed Model 1649A aircraft, dated December 31, 1957, payable in equal quarterly instalments of $383,853 through January 1, 1968	4,990,083	6,525,436
For purchase of four Lockheed Model 1049H aircraft, dated in April and May, 1958, payable in equal quarterly instalments of $323,822 through May 15, 1963	4,533,506	
Instalment contracts for purchase of bulk storage and other facilities, final payment due in 1968	176,345	167,704
Notes payable to Hughes Tool Company, subordinated to Equipment Mortgage Bonds and Chattel Mortgage Notes:		
Bank loan dated December 31, 1957, 5¼%, purchased by Hughes Tool Company on July 1, 1958	12,000,000	
Note dated December 2, 1957, plus accrued interest (at prime commercial rate)	6,054,505	5,811,000
Total	$67,087,773	$63,170,804

NOTE:
No principal instalment payment may be made on any conditional sales contract which would reduce to an amount less than $12,000,000 the aggregate of TWA's cash on hand and on deposit in the United States and TWA's marketable U. S. Government securities. Certain provisions of the Equipment Mortgage and Chattel Mortgage Notes indentures will not presently permit the payment of cash dividends. In addition, a supplemental indenture dated December 27, 1957 provides that no payment will be made on the principal of unsecured indebtedness that would reduce the net working capital of TWA below $15,000,000.

NOTES TO FINANCIAL STATEMENTS

1. The Civil Aeronautics Board, by orders issued in 1956, found that TWA had been over-paid by $8,153,000 for the carriage of mail on its international route for the period 1946-1953. This resulted from the decision of the Board that TWA's domestic route allegedly had excess earnings during that period which should be applied to reduce the need for subsidy with respect to TWA's international operations. TWA filed a petition for review with the United States Court of Appeals for the District of Columbia, and on January 23, 1958, the Court vacated the order of the Civil Aeronautics Board and remanded the case to the Board for reconsideration.

Pending final determination, no provision has been made in the accounts or in the accompanying financial statements for these orders.

2. In its Federal income tax returns for 1958 and certain prior years, TWA has claimed accelerated amortization of property under Certificates of Necessity and used accelerated methods of depreciation for other properties in lieu of the straight-line method of depreciation used for accounting purposes. In its 1957 return TWA discontinued the use of accelerated depreciation on certain property but continued to use such methods of depreciation on other properties acquired during 1955 and 1956. If the same treatment is employed for 1958, the excess of depreciation recorded in the accounts over amortization and depreciation as determined for income tax purposes would amount to approximately $540,000 for that year.

Under a policy adopted by TWA in 1956, costs of training flight crews and other personnel in connection with the acquisition of new types of aircraft, moving costs to a new overhaul base, and other developmental activities are deferred and amortized over suitable five-year periods. These charges, which have been deferred for accounting purposes, are claimed as deductions for income tax purposes in the year incurred. The excess of amorti-

AX-853

zation recorded on the books over such charges for 1958 amounted to $97,500.

A refund of Federal income taxes of $2,488,775 was received in 1958 as a result of the carry-back of the 1957 loss, as adjusted to a tax basis, to 1955. All Federal income taxes paid for the year 1955 have been recovered under this carry-back.

Net Federal income taxes paid for the years 1950 to 1957, inclusive, are subject to further adjustment upon final determination of foreign income taxes, but it is believed that net adjustments to income from such sources should not be material.

3. Effective January 1, 1958, TWA increased residual values on certain aircraft and engines as ordered by the Civil Aeronautics Board. As of the same date, provision for depreciation of other flight equipment (propellers, radios, accessories, etc.) was related to the estimated terminal dates of the aircraft with which such equipment is identified instead of service lives previously used, resulting in longer service lives for some items and shorter service lives for others. These changes in depreciation policy resulted in provision for depreciation on flight equipment for the year 1958 approximately $2,100,000 less than if prior residual values and service lives had been used.

4. The present annual cost of TWA's retirement plans for officers and employees is estimated at $3,650,000, based upon current actuarial studies and interest rates. The unpaid balance of past service benefits, after applying nine annual payments of $658,000, is estimated at approximately $765,000. The plans may be discontinued by TWA in whole or in part at any time.

5. Commitments and Contingent Liabilities:

Hughes Tool Company has placed orders, under contracts assignable to TWA, for fifteen Boeing 707-131 aircraft, eighteen Boeing 707-331 aircraft, and thirty Convair 880 aircraft, for delivery beginning in 1959. These contracts are subject to modification as to number and model of aircraft covered and as to specifications of the aircraft, including seating capacity. Hughes is not committed to sell any of these aircraft to TWA, nor is TWA committed to buy any of them from Hughes. Any such transaction between TWA and Hughes requires approval of the Civil Aeronautics Board.

Leases for TWA's overhaul base, hangars, office space, etc. are of varying terms and rentals. The aggregate annual rental under such leases in effect at December 31, 1958 was approximately $3,700,000.

In addition, TWA has executed agreements or is presently negotiating for the construction for lease by TWA of a hangar, a second hangar with related terminal facilities, and a unit terminal, all of the aggregate cost of approximately $32,000,000. Rental payments under these long-term leases (which vary from twenty-five to thirty years) will be based on the amortization of the construction costs, certain charges, and interest on the unamortized portion.

Certain additional contingent liabilities exist but management is of the opinion that the possibility of material payments thereunder is remote.

Management and legal counsel know of no litigation pending or threatened against TWA other than that described in Note 1 which in their opinion would result in liability which, over and above any insurance coverage in respect thereof, would materially affect TWA's financial condition or interfere with its operations.

ACCOUNTANTS' CERTIFICATE

HASKINS & SELLS
CERTIFIED PUBLIC ACCOUNTANTS

TEMPLE BUILDING
KANSAS CITY 6

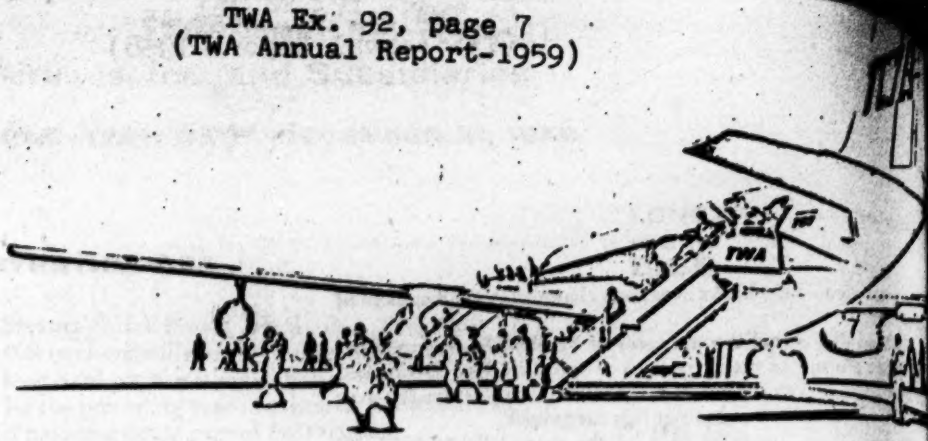
March 4, 19

To the Stockholders and Board of Directors
of Trans World Airlines, Inc.:

We have examined the consolidated balance sheet of Trans World Airlines, Inc. and its subsidiaries as of December 31, 1958 and the related statement of consolidated income and supplemental financial statements for the year then ended. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion, except that final determination has not been made of the net amount which may be due to the United States Government on mail and subsidy payments applicable to years prior to 1954 (as set forth in Note 1 to financial statements), the accompanying consolidated balance sheet, statement of consolidated income, and supplemental financial statements, with their notes, present fairly the financial position of the companies at December 31, 1958 and the results of their operations for the year then ended, in conformity with generally accepted accounting principles applied (except for changes in depreciation policy as stated in Note 3 to the financial statements) on a basis consistent with that of the preceding year.

Haskins + Sells



TWA Reservations Sales Office; courteous, well-trained agents using modern electronic equipment are able to confirm reservations requests quickly and accurately.

A flight crew is briefed at Idlewild International Airport, for a non-stop flight to London. Enroute weather is studied and the operation of the entire flight carefully pre-planned.

Captain on the flight deck of a TWA SuperJet. TWA is proud of its million-mile flight crews—thoroughly trained for exacting duties.

Gracious hostesses serve delicious in-flight meals. Galleys in TWA's Jetliners are designed to make it easier for hostesses to serve passengers with friendly efficiency.

Training courses are conducted continually for flight and ground personnel. TWA's major Training Center is at Kansas City, but extensive on-the-job training is also conducted at various field locations.

Highly trained maintenance personnel examine major components of TWA aircraft at well-equipped maintenance and overhaul bases.

Skilled mechanics inspect and repair a precision-built jet engine. These dependable engines with enormous power are a marvel of engineering achievement.

Financing

TWA is negotiating with proposed lenders, both banks and insurance companies, for a long term financing of its jet equipment requirements and for a refunding of existing long term debt. Pending firm commitments for such long term financing TWA has operated its jet fleet, consisting of 15 Boeing 707-131 (transcontinental) and 5 Boeing 707-331 (SuperJet intercontinental) on day-to-day leases from the Hughes Tool Company. With a minor exception no rental payments have as yet been made under such leases and none is contemplated until consummation of the long term financing. At the year end the accrued and unpaid rentals on these leases amounted to $8,682,000. During 1960 the Company will operate additional Boeing 707-331 aircraft and a fleet of Convair 880 jet aircraft.

During 1959 TWA improved its long term borrowing capabilities by reducing its debt for money borrowed from $81,295,000 to $52,866,000.

Additions to the property account of $20,084,000, approximately the same as the year before, mainly represent provisioning and spare engines for the jet fleet, costing $15,019,000, and additional ground equipment principally for jet service, amounting to $4,794,000. Beyond this, the Company capitalized $10,117,000 of jet integration costs, to be amortized over a five-year period.

New Organizatior

While the story of 1959 is essentially the success story of TWA jets, it obviously required an infinite amount of planning, organizing and preparation to integrate this faster, larger aircraft into the fleet

Trans World Airlines, Inc. and Subsidiaries

SUMMARY OF LONG-TERM DEBT

	LONG-TERM PORTION	
	December 31, 1959	December 31, 1958
Equipment Mortgage Sinking Fund Bonds, 3¾%, due December 1, 1969, payable $1,500,000 semi-annually to and including June 1, 1969; additional annual sinking fund payments equal to one-half of the consolidated net income for the preceding year in excess of $3,000,000 but such additional annual payment not to exceed $2,000,000	$26,000,000	$31,000,000
Chattel Mortgage Notes, 5¼%, payable in equal monthly instalments of $694,444 through December 1, 1960		8,333,334
Conditional Sales Contracts, 3½%, assigned to banks:		
For purchase of four Lockheed Model 1649A aircraft, dated December 31, 1957, payable in equal quarterly instalments of $383,853 through January 1, 1963	3,454,673	4,990,083
For purchase of four Lockheed Model 1049H aircraft, dated in April and May, 1958, payable in equal quarterly instalments of $323,822 through May 15, 1963	3,238,219	4,533,506
Instalment contracts for purchase of bulk storage and other facilities, final payment due in 1968	259,043	176,345
Notes payable to Hughes Tool Company, subordinated to Equipment Mortgage Bonds and Chattel Mortgage Notes:		
Bank loan dated December 31, 1957, 5¼%, purchased by Hughes Tool Company on July 1, 1958		12,000,000
Note due December 1, 1960, plus accrued interest (at prime commercial rate)		6,054,505
TOTAL	$32,951,935	$67,087,773

NOTE:
No principal instalment payment may be made on any conditional sales contract which would reduce to an amount less than $12,000,000 the aggregate of TWA's cash on hand and on deposit in the United States and TWA's marketable U. S. Government securities. Certain provisions of the Equipment Mortgage and Chattel Mortgage Notes indentures will not presently permit the payment of cash dividends. In addition, a supplemental indenture dated December 27, 1957 provides that no payment will be made on the principal of unsecured indebtedness that would reduce the net working capital of TWA below $15,000,000.

ACCOUNTANTS' OPINION

TO THE STOCKHOLDERS AND BOARD OF DIRECTORS OF TRANS WORLD AIRLINES, INC.:

We have examined the consolidated balance sheet of Trans World Airlines, Inc. and its subsidiaries as of December 31, 1959 and the related statements of consolidated income and earnings employed in the business for the year then ended and the supplemental summary schedules of property and long-term debt. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion, except that final determination has not been made of the net amount which may be due to the United States Government on mail and subsidy payments applicable to years prior to 1954 (as set forth in Note 1 to financial statements), the accompanying financial statements and supplemental schedules present fairly the financial position of the companies at December 31, 1959 and the results of their operations for the year then ended, in conformity with generally accepted accounting principles applied (except for changes in depreciation policy and as to accumulation of reserves for overhaul of jet aircraft as stated in Notes 3 and 6, respectively, to the financial statements) on a basis consistent with that of the preceding year.

Kansas City, Missouri
March 4, 1960

Haskins & Sells

TWA

ANNUAL REPORT 1960

decor and appointments of the TWA Convair SuperJet lounge
the speed, luxury and quiet smoothness of jet flight.

CONTENTS

Page 3: Highlights
3: Chairman's Letter
5-9: Review of the Year
10-11: Consolidated Balance Sheet
12: Statement of Consolidated Income
13: Statement of Consolidated Earnings
14: Accountants' Opinion
15: Notes to Financial Statements
16-17: 10 Year Comparative Statistics
17: Directors and Officers

...h the Government stressing increased travel by Euro-...ns to the U.S., TWA is placing added emphasis on the ...Travel USA" bureaus established in several European ...ities early in 1960. The bureaus, which supply information ...d brochures on travel in the United States, are proving ...remely popular with potential travelers.

...ternational Division Celebrates ...fteenth Anniversary

TWA's International Division celebrated fifteen ...rs of outstanding service to the traveling public ...February 5, 1961.

Pioneering the first scheduled commercial pas-...ger flight between the United States and Paris, ...sleek new Constellation took off from New York's ...Guardia Field on February 5, 1946. Carrying ...e than-record total of 36 civilian passengers, ...e Connie flew to Paris via Gander, Newfound-...d, and Shannon, Ireland, in 16 hours and 21 ...utes. Fifteen years later the same pilot, Capt. ...ld Blackburn, lifted a huge Boeing SuperJet ...the runway at New York International Airport ...nded in the French capital just 6 hours and ...minutes later.

In between the two historic trips, TWA operated ...,307 trans-Atlantic flights, transporting 1,808,-...passengers. On all international services dur-...these fifteen years TWA logged 8,383,053,000 ...passenger miles and flew 117,715,372 ...miles of air freight.

...a board of directors accepted the resignation of Charles S. Thomas as president in July 1960. For the remainder of the year, policy decisions normally made by the chief executive were made by the executive committee consisting of six directors. Three of these were officers of the Company: Warren Lee Pierson, chairman, E. O. Cocke and A. V. Leslie. The other members were Sidney Maestre, Harry E. Rogers and Thomas A. Slack.

With regret the directors learned of the death on December 25 of A. D. Simpson, who had served the company as a board member since 1947. Mr. Simpson was a leading figure in the financial, business and community life of Houston, Texas.

TRANSPORTATION AND TECHNICAL SERVICES

TWA emerged as the industry leader in domestic on-time performance and reliability during 1960. With the transportation and technical services departments working hand in hand, TWA's jet performance reliability for some months was as much as 15 per cent better than its principal competitors. Newspapers, aviation trade magazines and other publications applauded the TWA reliability lead in their news columns.

Another major accomplishment was the improved jet maintenance schedules which now save TWA about $2,000,000 annually. Because of the excellent technical services program, TWA was authorized by the Federal Aviation Agency to extend the time between major overhauls of jet engines and airframes. This gave TWA in 1960 the highest jet engine reliability rating ever granted by the FAA.

An industry first was the symposium of TWA officials and representatives of manufacturers and suppliers to study methods of halting the fast-rising costs of products and supplies. As a result, substantial cost reductions were effected. A pooling arrangement of jet spare parts with ten international airlines resulted in estimated savings of $1,000,000 for TWA.

NEW LOOK

TWA's corporate image as the Friendly, Reliable airline was considerably enhanced by many new service features.

The projection of a "new look" for TWA began early in the year, as a long-range program to restyle all facilities and equipment got under way. A new corporate insignia was introduced, retaining the traditional red block TWA letters in a new setting of a gold outline of interlocking hemispheres symbolizing TWA's world-wide services. The insignia is being affixed to all TWA facilities and equipment.

Passenger service facilities, both in flight and on the ground, received fresh emphasis. Menu choices were increased for in-flight meals; new recipes were developed. Higher standards for first class service were initiated.

At New York International Airport, exterior work on the $15,000,000 terminal designed by Eero Saarinen was completed and interior work begun. New or expanded facilities are also being completed at Chicago, Los Angeles, San Francisco, London, Paris and Madrid.

SALES

An aggressive sales effort produced the second largest revenue gain in TWA history. Operating revenues showed an 8.6 per cent increase over 1959—the year in which the jets were introduced.

The problem of increasing TWA's share of the cargo market received high priority during 1960. A specially reorganized and enlarged sales force concentrated on development of business for an expanded all-cargo fleet of long-range Jetstreams. Six of the Jetstreams were converted to all-cargo Super Sky Merchants, making possible a 70 per cent increase in cargo schedules. New shippers were being attracted through the use of newly developed containers designed especially to handle fragile items and perishable commodities. The "booked air freight" program providing for reserved space on specific flights was expanded and improved.

Reservations and ticket offices in ten major cities throughout the world were expanded and improved. The Teleflite electronics reservations system was extended to several off-line cities. Eight new sales and ticket offices were opened overseas. In the U. S. additional sales outlets were obtained through the installation of teletype ticketing machines in travel agencies and offices of major commercial accounts. A system of "air-check tickets" enabled passengers to write their own tickets.

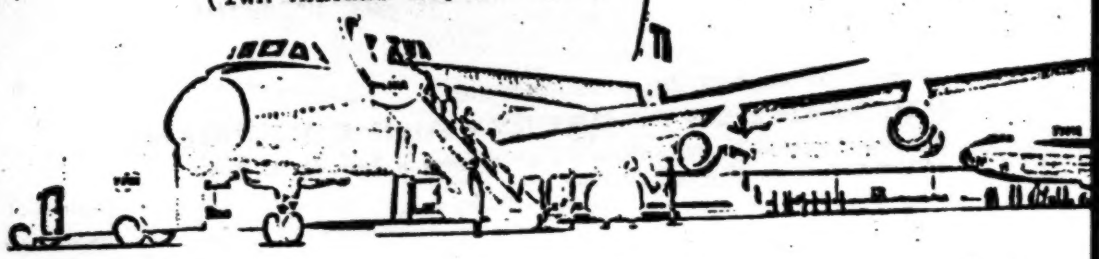
OUTLOOK FOR 1961

While the financial outlook of your Company in 1961 is to a degree dependent on business conditions generally, several developments within the Corporation itself hold forth promise for a successful year.

The immediate and enthusiastic public acceptance of the Convair SuperJets, 20 of which will be in service this year, will provide a greater opportunity to participate in profitable domestic markets. Also TWA will have all its international jet aircraft in operation for the full season, a factor which will help to offset the greatly increased competition from foreign flag carriers across the North Atlantic.

On February 28 of this year a special stockholders meeting, called by Voting Trustees Ernest R. Breech and Irving S. Olds, elected six new members of the board of directors as follows: Mr. Breech; George R. Brown, partner of Herman Brown and George R. Brown Engineering and Investments, of Houston, Texas; Clifford F. Hood, formerly President of U. S. Steel; Barry T. Leithead, President of Cluett, Peabody & Co., Inc.; Hughston M. McBain, a Director of Marshall Field and Co., the First National Bank of Chicago and other companies; and John A. McCone, Chairman of Joshua Hendy Corp. and former Chairman of the Atomic Energy Commission.

The newly reconstituted Board on March 2, 1961 elected Charles C. Tillinghast, Jr. President and Chief Executive Officer effective April 17. He will also serve on the Board of Directors. At the time of his election to the TWA presidency, Mr. Tillinghast was Vice President International Operations for The Bendix Corporation as well as a member of the Board of Directors and of the Administration Committee for that company. Before joining Bendix in 19[illegible] Mr. Tillinghast was a partner in the New York law firm of Hughes, Hubbard, Blair and [illegible]



TRANS WORLD AIRLINES, INC. AND SUBSIDIARIES

STATEMENT OF CONSOLIDATED EARNINGS EMPLOYED IN THE BUSINESS

For the Years Ended December 31, 1960 and 1959

	YEAR ENDED DECEMBER 31 1960	1959
BALANCE AT BEGINNING OF YEAR	$37,271,867	$27,870,256
NET INCOME FOR THE YEAR	6,473,466	9,401,611
BALANCE AT END OF YEAR (Note 1 and Note to summary of long-term debt)	$43,745,333	$37,271,867

SUMMARY OF LONG-TERM DEBT

December 31, 1960 and 1959

	LONG-TERM PORTION DECEMBER 31 1960	1959
Equipment Mortgage Sinking Fund Notes, 6½%, due December 31, 1972; annual sinking fund payments required starting December 31, 1965 sufficient to redeem $11,600,000 principal plus interest on each December 31; additional annual special fund payments of $6,100,000 required each December 31 from 1965 to 1969, inclusive	$ 62,800,000	
Equipment Mortgage Serial Notes, 6%, maturing $5,200,000 quarterly commencing March 31, 1962	56,400,000	
Equipment Mortgage Sinking Fund Bonds, 3¾%, due December 1, 1969, refinanced in 1960		$26,000,000
Conditional Sales Contracts, 3½%, assigned to banks:		
For purchase of four Lockheed Model 1649A aircraft, dated December 31, 1957, payable in equal quarterly instalments of $383,853 through January 1, 1963	1,919,263	3,454,673
For purchase of four Lockheed Model 1049H aircraft, dated in April and May, 1958, payable in equal quarterly instalments of $323,822 through May 15, 1963	1,942,932	3,238,219
Instalment contracts for purchase of bulk storage and other facilities, final payment due in 1969	179,675	259,043
Interim subordinated promissory note due Hughes Tool Company, dated December 30, 1960; to be replaced by June 30, 1961 by subordinated debentures due not earlier than June 30, 1973	100,000,000	
Total	$223,241,870	$32,951,935

NOTES:

1. Under provisions of the Indenture of Mortgage dated as of December 1, 1960 covering Equipment Mortgage Sinking Fund Notes and Equipment Mortgage Serial Notes, retained earnings at December 31, 1960 are not available for payment of cash dividends.
2. No principal instalment payment may be made on any conditional sales contract which would reduce to an amount less than $12,000,000 the aggregate of TWA's cash on hand and on deposit in the United States and TWA's marketable U.S. Government Securities.
3. Under an agreement dated as of December 1, 1960 Hughes Tool Company established a revolving credit in favor of TWA. Under certain conditions, TWA may borrow up to $50,000,000 under this agreement.
4. See also Note 4 to Financial Statements.

The accompanying notes to financial statements constitute an integral part of this statement.

TRANS WORLD AIRLINES, INC. AND SUBSIDIARIES

SUMMARY OF PROPERTY AND EQUIPMENT

and related reserves for depreciation and amortization at December 31, 1960, and net book value, December 31 ,1959

CLASSIFICATION OF PROPERTY	DECEMBER 31, 1960			
	PROPERTY AND EQUIPMENT (AT COST)	RESERVES FOR DEPRECIATION AND AMORTIZATION	NET BOOK VALUE	NET BOOK VALUE DECEMBER 31, 1959
FLIGHT EQUIPMENT, AND ACCESSORIES	$425,343,639	$185,561,070	$239,782,569	$114,610,815
GROUND EQUIPMENT, BUILDINGS, LEASEHOLD IMPROVEMENTS, ETC.	54,122,952	23,000,878	31,122,074	29,699,963
UNCOMPLETED WORK ORDERS— Not classified (including deposits with aircraft manufacturer)	23,847,545		23,847,545	1,150,233
Total	$503,314,136	$208,561,948	$294,752,188	$145,461,011

The accompanying notes to financial statements constitute an integral part of this statement.

ACCOUNTANTS' OPINION

TO THE STOCKHOLDERS AND BOARD OF DIRECTORS OF TRANS WORLD AIRLINES, INC.:

We have examined the consolidated balance sheet of Trans World Airlines, Inc. and its subsidiaries as of December 31, 1960 and the related statements of consolidated income and earnings employed in the business for the year then ended and the supplemental summary schedules of property and long-term debt. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion, except that final determination has not been made of the net amount which may be due to the United States Government on mail and subsidy payments applicable to years prior to 1954 (as set forth in Note 1 to financial statements), the accompanying financial statements and supplemental schedules present fairly the financial position of the companies at December 31, 1960 and the results of their operations for the year then ended, in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year.

Kansas City, Missouri
March 4, 1961

Haskins & Sells

NOTES TO FINANCIAL STATEMENTS

1. The Civil Aeronautics Board, by orders issued in 1956, found that TWA had been over-paid by $8,153,000 for the carriage of mail on its international route for the period 1946-1953. This resulted from the decision of the Board that TWA's domestic route allegedly had excess earnings during that period which should be applied to reduce the need for subsidy with respect to TWA's international operations. TWA filed a petition for review with the United States Court of Appeals for the District of Columbia and, on January 23, 1958, the Court vacated the order of the Civil Aeronautics Board and remanded the case to the Board for reconsideration.

Pending final determination, no provision has been made in the accounts or in the accompanying financial statements for these orders.

2. In its Federal income tax returns for certain prior years TWA claimed accelerated amortization of property under Certificates of Necessity and used accelerated methods of depreciation for other properties in lieu of the straight-line method of depreciation used for accounting purposes. In its 1959 return, TWA continued to use such methods of depreciation on certain properties acquired during 1955 and 1956 and on air-frames and related engines placed in service in 1958 and 1959. If the same treatment for tax purposes is employed for 1960 (and as used in the accompanying statements), the excess of depreciation and amortization determined for income tax purposes over depreciation recorded in the accounts would amount to approximately $3,275,000 for that year.

Under a policy adopted by TWA in 1956, costs of training flight crews and other personnel in connection with the acquisition of new types of aircraft, other developmental activities, etc., are deferred and amortized over suitable five-year periods. These charges, which have been deferred for accounting purposes, are claimed as deductions for income tax purposes in the year incurred. The excess of such charges for 1960 over amortization recorded on the books amounted to $3,163,000.

Net Federal income taxes paid for years subsequent to 1949 are subject to further adjustment upon final determination of foreign income taxes, but it is believed that net adjustments to income from such sources should not be material.

3. The present annual cost of TWA's retirement plans for officers and employees is estimated at $3,120,000. The past service benefits are substantially paid up. The plans may be discontinued by TWA in whole or in part at any time.

4. On December 30, 1960, TWA concluded a loan agreement with nine banks for borrowings totalling $72,200,000, evidenced by 6% equipment mortgage serial notes, of which $66,200,000 had been made available at December 31, 1960; the balance of $6,000,000 has been received in 1961. On the same date loan agreements were concluded with two insurance companies for a total of $92,800,000, evidenced by 6½% equipment mortgage sinking fund notes, of which $62,800,000 had been made available at December 31, 1960; the balance of $30,000,000 has been received in 1961.

In addition an interim subordinated promissory note in the amount of $100,000,000 was issued by TWA on December 30, 1960. See accompanying summary of long-term debt.

5. During 1960, TWA purchased fifteen Boeing 707-131 aircraft and twelve Boeing 707-331 aircraft, including those previously leased from Hughes Tool Company. In addition TWA purchased one Convair 880 aircraft and acquired from Hughes Tool Company rights to acquire and deposits made with the manufacturer on nineteen additional Convair 880 aircraft, of which eight were purchased during January and February 1961. Additional payments due to the manufacturer on the foregoing nineteen aircraft approximated $60,000,000 at December 31, 1960.

6. Commitments and Contingent Liabilities:

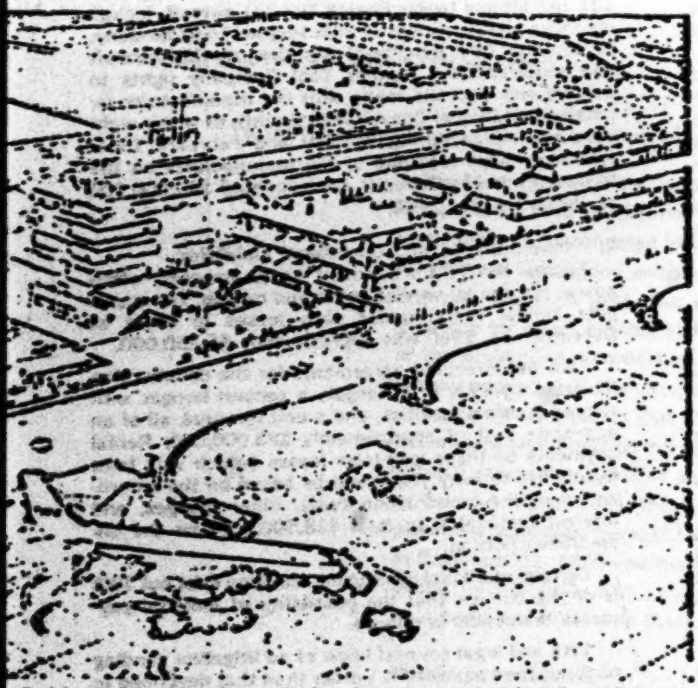
Leases for TWA's overhaul base, hangars, office space, etc. are for varying terms and rentals. The aggregate annual rental under such leases in effect at December 31, 1960 was approximately $6,250,000.

TWA has executed agreements for the construction for lease by TWA of a hangar, a second hangar with related terminal facilities, and a unit terminal, all of an aggregate cost of approximately $23,000,000. Rental payments on these long-term leases (which vary from twenty-five to forty years) will be based on the amortization of the construction costs, other charges, and interest (estimated to total $18,500,000) on the unamortized portion.

Certain additional contingent liabilities exist but TWA is of the opinion that the possibility of material payments thereunder is remote.

TWA and legal counsel know of no litigation pending or threatened against TWA other than that described in Note 1 which in their opinion would result in liability which, over and above any insurance coverage in respect thereof, would materially affect TWA's financial condition or interfere with its operations.

ANNUAL REPORT 1961



Parisian visitors will welcome the luxurious new terminal facilities at Orly Field.

CONTENTS

Page 2	Board of Directors
3-4	President's Letter
5-9	Review of the Year
10-11	Consolidated Balance Sheet
12	Statement of Consolidated Income
13	Statement of Consolidated Earnings Summary of Property and Equipmen
14	Summary of Long-Term Debt
15	Notes to Financial Statements and Accountants' Opinion
16-17	Ten Year Comparative Statistics
17	Officers

...et TWA's Board of Directors

...ST R. BREECH
...MAN
...er chairman of the ...d Ford Motor Co., Mr ...h was elected TWA ...chairman on April 27, ...He formerly served as ...ent and chairman of ...American Aviation, ...and as a director of ...ntinental & Western ...c. in the early thirties.

CHAS. C. TILLINGHAST, JR.
PRESIDENT
A former vice president—international operations, for The Bendix Corporation, Mr. Tillinghast assumed office as president and chief executive officer of TWA on April 17, 1961. He is a former partner in the New York law firm of Hughes, Hubbard, Blair and Reed.

E. O. COCKE
SENIOR VICE PRESIDENT, INDUSTRY AFFAIRS
Mr. Cocke, 33-year veteran with TWA, was named senior vice president—industry affairs last September. Named to the TWA board in 1948, he has held numerous executive positions. He is a member of the executive committee of IATA.

FLOYD D. HALL
SENIOR VICE PRESIDENT, SYSTEM GENERAL MANAGER
Mr. Hall was named senior vice president and system general manager on September 1, 1961, from his position as vice president and general transportation manager. A veteran pilot, he was elected to the TWA board last April.

A. V. LESLIE
SENIOR VICE PRESIDENT, FINANCE AND TREASURER
Mr. Leslie, senior vice president—finance and treasurer, was elected to the TWA board in 1947. His wide financial experience includes executive positions with the Carnegie Corporation, Mellon National Bank and Trust Co. and Hughes Tool Co.

...M R. BROWN
...wn is executive vice ...nt of Brown & Root, ...Houston engineering ...nstruction firm. In addition to other activities, he ...man of the board of ...s of Rice University.

CHARLES S. HOBBS
Mr. Hobbs, president and general manager of Hale Brothers Stores, San Francisco, was elected to the TWA board on Feb. 21, 1962. He replaces John A. McCone, the new director of the CIA.

RAYMOND M. HOLLIDAY
Mr. Holliday is executive vice president of the Hughes Tool Co. In December, 1960 he was named as one of three Voting Trustees for the TWA stock owned by the Hughes Tool Co.

CLIFFORD F. HOOD
A member of the board and executive committee and former president of the United States Steel Corp., Mr. Hood served previously as president of Carnegie-Illinois Steel Corp.

BARRY T. LEITHEAD
Mr. Leithead is president ...Cluett, Peabody & Co., Inc. and a director of The B. F. Goodrich Co., Manufacturers Trust Co., The Travelers Insurance Co. and West Virginia Pulp & Paper Co.

...T HOUSTON
...ston has served as a ...r of the TWA board ...1939. Chairman of the ...d of the Mercantile ...Co., the St. Louis in...stitution is widely known ...civic activities.

HUGHSTON M. McBAIN
A director and former chairman of the board of Marshall Field & Co., Mr. McBain is also a director of Illinois Bell Telephone, First National Bank of Chicago and Libby, McNeil & Libby.

WARREN LEE PIERSON
Mr. Pierson served TWA with distinction for 14 years as board chairman, representing the company and his country in industry affairs and matters of international trade.

BEN-FLEMING SESSEL
Mr. Sessel, senior vice president of Irving Trust Company, New York, and widely known investment and security authority, has served on the TWA board of directors since 1953.

THOMAS A. SLACK
Mr. Slack is a retired Houston, Texas, lawyer. Former vice president and general counsel of the Hughes Tool Co., he has been a member of TWA's board of directors since 1958.

TO ALL SHAREHOLDERS

1961 was a year of reorganization and rebuilding. Although a disappointing one financially for the airline industry as a whole and for TWA in particular, the year was marked by positive steps which should enable us to capitalize on jet age opportunities for service and profits in the years ahead.

When I became president of your Company on April 17, 1961, TWA had been without an executive head since July, 1960. First quarter losses before tax credits of $16,678,000 had been incurred. Delays in the acquisition of turbine-powered aircraft were having a deep impact on TWA's competitive position and profitability.

TWA owned insufficient jets even to retain for long its then deteriorated competitive position in domestic and trans-Atlantic markets. It was quite apparent that if the Corporation were to avoid a further erosion of its industry position, one or more major re-equipment programs would have to be undertaken without delay.

With the benefit of studies and negotiations already under way, orders were promptly placed and financial arrangements concluded for 26 of the newest and most modern Boeing turbo-fan jet aircraft for delivery in 1962. Concurrently four Boeing 720B turbo-fan jets were leased and shortly placed in service along with the 20 Convair 880 jets which were integrated into the fleet during the year.

This prompt order enabled your Company to obtain advantageous delivery positions and to avoid certain pending price increases. Early in 1962 an additional order was placed for Boeing short-to-medium range turbo-fan jets, and the 1961 order was modified. The Boeing orders will now provide, exclusive of the four 720B's under temporary lease, 18 long range 707-131B turbo-fan jets this year, five super long range 707-331B turbo-fan jets roughly at year's end, and ten 727 short-to-medium range turbo-fan jets in 1964.

In step with modernizing our flight equipment, programs to provide the finest in ground facilities for our passengers' convenience and comfort were carried forward. Outstanding new terminal facilities, some with out-of-the-weather boarding, were opened in Atlanta, Columbus, Dayton, Los Angeles, Nashville, Tulsa, Rome and Paris. In the first part of 1962, a magnificent new terminal was opened in Chicago, soon to be followed by the internationally acclaimed Trans World Flight Center at New York International Airport.

During 1961, we expanded our Teleregister electronic reservations system which, when completed, will provide almost instantaneous reservations service over the entire Domestic and International system. By increasing communications speed and reducing the incidence of communications error, it will also help to minimize the vexatious and expensive problems of no-shows and inadvertent over-bookings.

These steps reflected a basic decision that in the long run TWA could maintain a sound competitive position only through the pursuit of the highest standards of quality. Thus in the necessary effort to achieve savings in a year of airline depression, economies were limited to areas which would not impair the basic excellence of TWA's services.

Success in maintaining the essential quality of TWA's services is attested by the Company's continued leadership in jet on-time arrivals and departures. As shown by statistics on file with the Civil Aeronautics Board, TWA consistently led its transcontinental competitors in this field throughout most of the year. Great credit is due to our flight, ground service and maintenance personnel for making this possible.

A major factor in TWA's record of on-time performance was the excellence of its jet engine maintenance. The best measure of a carrier's success in this area is the Time Between Overhauls (TBO) permitted by the Federal Aviation Agency on the basis of actually experienced engine performance. Since the introduction of jet engines, TWA has been a leader in this field and at year's end it achieved a new high in becoming the first and only carrier to be allowed a TBO of 2600 hours on the JT3 engines which power its domestic Boeings. Nothing could speak more eloquently of the quality of TWA's technical services.

As the year progressed, TWA showed significant progress in achieving greater market penetration. Your Company's share of the domestic trunk market increased to 15 per cent in the second half from 14 per cent in the first half. Internationally our share of the market rose from 11.7 per cent in the first half to 13.1 per cent in the second.

While committed to a policy of maintaining the highest standard of quality, your management recognized its responsibility for maintaining a tight rein on expenses. Close budgetary control, flight scheduling for better utilization, and careful management planning resulted in economies, which with a wider utilization of jet aircraft, reduced our unit cost per available ton mile 1.9 cents or 6 per cent below 1960. This compares very favorably with major competitors.

Notwithstanding these economies, the past year was one of substantial losses. Due to a variety of factors, a number of which are reported herein, revenues fell approximately $16,000,000 below those of the year before, totaling $362,453,000 compared to $378,350,000 in 1960. Starting with a first quarter deficit of $9,326,000 after tax credits, your Company lost $14,745,000 from operations, after tax credits, and after interest charges which were $12,737,000 greater than the year before. Extraordinary losses on the sale of used piston aircraft amounted to $2,689,000 net of taxes. This amount is

TRANS WORLD AIRLINES, INC. AND SUBSIDIARIES

SUMMARY OF LONG-TERM DEBT

December 31, 1961 and 1960

	LONG-TERM PORTION DECEMBER 31	
	1961	1960
Subordinated Income Debentures, 6½%, due June 1, 1978, plus accrued interest $623,614; annual sinking fund payments in an amount equal to one-tenth of the aggregate principal amount outstanding on June 30, 1973 are required each November 30 from 1973 to 1977 inclusive	$100,523,614	
Interim subordinated promissory note due Hughes Tool Company		$100,000,000
Equipment Mortgage Sinking Fund Notes:		
6½%, due December 31, 1972; annual sinking fund payments required starting December 31, 1965 sufficient to redeem $11,600,000 principal plus accrued interest	92,800,000	62,800,000
Series B, 6%, due December 31, 1977; annual sinking fund payments required starting December 31, 1967 sufficient to redeem $10,000,000 principal plus accrued interest	22,000,000	
Equipment Mortgage Serial Notes:		
6%, maturing $5,200,000 quarterly commencing March 31, 1963; additional payment of $15,000,000 required on September 30, 1963 to redeem extended notes originally maturing $9,800,000 on December 31, 1961 and $5,200,000 on March 31, 1962 (see Notes)	56,600,000	56,400,000
Series B, 5½%, maturing $10,000,000 annually commencing December 31, 1963	8,000,000	
Conditional Sales Contracts, 3½%, assigned to banks:		
For purchase of four Lockheed Model 1049H aircraft, dated in April and May 1958, payable in equal quarterly instalments of $323,822 through May 15, 1963	647,644	1,942,932
For purchase of four Lockheed Model 1649A aircraft, dated December 31, 1957, payable in equal quarterly instalments of $383,853 through January 1, 1963	383,853	1,919,263
Instalment contracts for purchase of bulk storage and other facilities, final payment due in 1970	109,378	179,675
Total	$281,064,489	$223,241,870

NOTES:

Under provisions of the First Supplemental Indenture dated as of July 1, 1961 covering Equipment Mortgage Sinking Fund Notes and Equipment Mortgage Serial Notes, retained earnings at December 31, 1961 are not available for payment of cash dividends.

No principal instalment payment may be made on any conditional sales contract which would reduce to an amount less than $12,000,000 the aggregate of TWA's cash on hand and on deposit in the United States and TWA's marketable U. S. Government securities.

Loan agreements with banks and insurance companies provide that TWA may borrow, on or before December 31, 1962, an additional $85,000,000 evidenced by 6% Equipment Mortgage Sinking Fund Notes, Series B and an additional $10,000,000 evidenced by 5½% Equipment Mortgage Serial Notes, Series B. Payment of extended Equipment Mortgage Serial Notes originally maturing $9,800,000 on December 31, 1961 and $5,200,000 on March 31, 1962 is required no later than September 30, 1963; however, if earlier payment can be made within the provisions of the First Supplemental Indenture dated July 1, 1961, as amended, TWA shall pay the first-named note on September 30 or December 31, 1962 and the second-named note on December 31, 1962.

See Note 5 to Financial Statements.

FINANCIAL RESULTS

Revenues

During 1963, TWA reached an all-time high in traffic. This resulted in rec revenues for the year of $476,533,000, an improvement of $73,504,000 or 1 percent over 1962. The major improvement was in passenger revenue, wh increased $64,113,000 or 18.4 percent. Air cargo revenue, which consists of m freight and express, also rose sign icantly and reached $52,240,0 up $7,562,000 or 16.9 percent o 1962.

A breakdown of 1963 re nues between domestic and int national operations is shown Table I.

Table I

	Amounts in Thousands		
	1963	1962	Better (Worse)
Domestic Operations:			
Passenger	$310,454	$270,814	$39,640
Cargo	27,108	22,616	4,492
All Other	5,883	7,481	(1,598)
Total Domestic	$343,445	$300,911	$42,534
International Operations:			
Passenger	$101,450	$ 76,977	$24,473
Cargo	25,132	22,062	3,070
All Other	6,506	3,079	3,427
Total International	$133,088	$102,118	$30,970
Total Revenues	$476,533	$403,029	$73,504

Expenses

Total expenses for the y rose to $456,962,000, an increas $44,181,000 or 10.7 percent o 1962 levels. This resulted larg from a 23.2 percent increase available ton miles produced. A comparison with 1962 expenses is summari in Table II.

Depreciation and amortization expense was $5,401,000 lower than 19 The 1962 expense reflected non-recurring write-downs of piston aircraft resid values amounting to $3,100,000 and ground facilities amounting to $900,0 The absence of such charges plus a $1,400,000 decrease in 1963 depreciat expense, due to the retroactive adjustment of aircraft costs, accounts for major portion of the decrease in depreciation expense. Interest expense rose su stantially during 1963. This was due in part to the near full year effect in 19 of the $21,000,000 of bank borrowing and the $57,000,000 borrowed from ins ance companies at various interv in 1962. The new Convertible Su ordinated Debentures issue furth increased interest expense by $40 000 during 1963. The area of mi cellaneous income and expen showed a smaller net credit than 1962 because of miscellaneo write-offs and expense adjustmen

The lowering of TWA's o penses, on a unit cost basis, wa contributing factor to its restor profitability. In 1963, operati expense per available ton mile d creased from 25 cents in 1962 22 cents in 1963. Revenue ton mile unit costs dropped from 56 cents in 1962 50 cents in 1963.

Table II

	Amounts in Thousands		
	1963	1962	Better (Worse)
Operating Expenses:			
Cash operating expenses	$386,034	$338,773	$(47,261)
Depreciation and amortization	51,861	57,262	5,401
Total operating expenses	$437,895	$396,035	$(41,860)
Income Charges (Credits)			
Interest — net	$ 19,250	$ 17,722	$(1,528)
Gain on sale of aircraft—net	(1,707)	(1,068)	639
Other—net	1,524	92	(1,432)
Total income charges—net	$ 19,067	$ 16,746	$ (2,321)
Total Expenses	$456,962	$412,781	$(44,181)

Earnings

TWA's turnaround resulted i

...ear. Income before taxes of $19,571,000 reflected an improvement of approxi...ly $29,323,000 over the loss (before tax credits) sustained in 1962. The ...arison with 1962 is shown in Table III.

Net income for the year, after special item, of $19,840,000 was a dramatic ...ery from last year's net loss of $5,704,000.

The Company's domestic business earned $622,000 on a pre-tax basis, in...g special item in 1963, an improvement of $22,414,000 over the pre-tax ...curred in 1962. This improvement resulted largely from sharply increased ...factors coupled with a 16.0 percent increase in domestic seat mile production.

...rofit from international oper... of $19,149,000 before tax ... and after special item also ... a substantial improvement ...the 1962 profit of $12,040,000.

Table III

	Amounts in Thousands		Bett... (Wor...
	1963	1962	
Operating Profit	$ 38,638	$ 6,994	$31,6...
Income Charges (Credits)	19,067	16,746	(2,3...
Income/(Loss) Before Provision for Taxes	$ 19,571	$ (9,752)	$29,3...
Provision for Income Taxes—Credit	169	4,048	(3,8...
Net Income/(Loss) for the year	$ 19,740	$ (5,704)	$25,4...
Special Item	100	—	...
Net Income/(Loss) for year and special item	$ 19,840	$ (5,704)	$25,5...

...unting Policy Changes

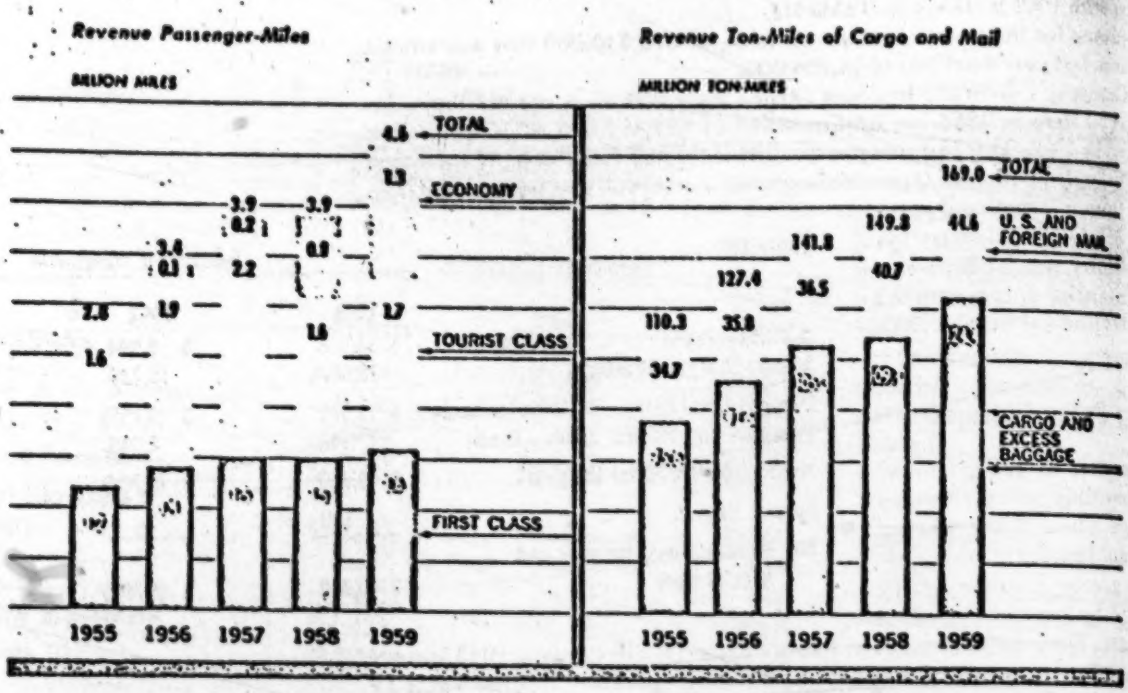
At the close of 1963, several ...r accounting policy changes ...effected. These changes bring ...A's accounting for the areas af...d into greater harmony with ...followed by most of the other ...airlines. Their implementation had no material effect upon 1963 income ...ill not affect materially the Company's future operating results. Table IV ...summarizes these changes and their effect upon 1963 income.

The elimination of the airframe and engine overhaul reserve will simplify ...counting for and the budgetary control of airframe and engine overhaul ...Under the new policy, TWA will charge to current period expense the actual ...overhauls as incurred. The inventory value established for certain aircraft ...parts represents asset recognition of TWA's investment in such parts that ...been allocated for use in its airframe and engine overhaul operations. These ...had previously been expensed when assigned to these operations. Concur..., a valuation reserve in the amount of $1,268,000 has been established ...for possible loss of value due to obsolescence. A further accounting ...change involves the narrow... ...the definition of jet aircraft ...costs to exclude items ...future benefit. Pursu... ...change, the Company ...off such costs which ...previously deferred. In addi... ...amortization period for the ...deferred costs has been ...from five to three years. ...changes will substantially ...the budgetary control ...involved. The write-off of ...interest conforms with ...accounting treatment of ...by the CAB for rate-making purposes. The interest costs involved were ...in the years 1961 and 1962.

Table IV

	Amounts in Thousa... Increase/(Decre... in 1963 Inco...
Elimination of airframe and engine overhaul reserves	$11,...
Establishment of inventory of certain aircraft repair parts—net	1,...
Write-off of deferred aircraft integration costs	(11,...
Write-off of capitalized interest on prior years' deposits with aircraft manufacturers	(1,...
Net improvement—before taxes	$ ...
Provision for deferred income taxes	...
Net improvement—after taxes (added to Net Income for the year as a special item)	$ ...

An ...itional accounting policy change, effective January 1, 1964, involves ...reciation and residual values of jet aircraft. In light of the presently ex... economic lives of jet aircraft and engines, their depreciable lives were ...from ten to eleven years. Concurrently, in recognition of the elimination



Government military traffic without interruption or delay even at a time when its civil operations are grounded because of labor disputes and work stoppages.

Unique, also, is the fact that the agreements carry no expiration dates, continuing indefinitely, unless terminated on two years' notice by the unions concerned.

Incorporated into the unions' regular contracts, these agreements assure the Government that Pan American can carry out airlift assignments in normal times as well as in national emergencies without risk of interruptions such as have occurred in the past in all forms of transportation.

These new contracts between your Company and its operating unions well illustrate the ability of free men in a democratic society to work voluntarily together for the security of all. The privileges and freedom of the individual are retained, but the national security is served without regimentation or dictatorship.

Flight Equipment

Fifteen of the larger long-range Boeing Intercontinental jets were delivered by year end, in addition to six smaller 707's received the previous year. Six long-range Intercontinentals were purchased from Hughes Tool Company during the year at a cost of $40,000,000. All 23 Intercontinentals will be delivered before June, 1960.

The first three of the 21 Douglas DC-8C Jet Clippers, largest jet airliner in the world, had been delivered by March, 1960. Weighing 25 tons more than the DC-8's, the new DC-8C's are capable of nonstop service between New York and any European city.

For the second winter season, several Pan American 707 jets were operated by National Airlines on its New York-Miami route under the lease agreement described in the previous Annual Report. In April, 1960, the Civil Aeronautics Board announced that it would approve the long-term lease but it would disapprove the stock transactions and allow the companies two years to dispose of shares already exchanged. Your Company has not yet determined its further course of action.

New Facilities

During the year all jet maintenance and overhaul were centered at New York and Miami. At Idlewild the $20,000,000 maintenance and overhaul base, largest in the industry, was opened in June. Jet engines are overhauled in New York

Notes RELATING TO FINANCIAL STATEMENTS

1. Other paid-in capital was reduced in 1963 by $3,299,000, a net of the $7,450,000 charge for the excess of cost over par value of 400,000 shares of capital stock reacquired from National Airlines, Incorporated in exchange for stock of that company and retired, and credits for the excess of consideration over par value of capital stock issued on conversion of $3,831,000 of subordinated debentures, $3,642,000, the result of exercise of stock options, $472,000, and sundry credits, $37,000.

2. Intercontinental Hotels Corporation (a wholly-owned associated company in which the Company has an investment of $14,600,000 and a commitment for a further investment of $900,000) and its subsidiaries had certain assets, consisting principally of investments in and advances to the hotels under their management, amounting to $25,529,000 at December 31, 1963, and $2,320,000 of capitalized net costs of the company's development period, which ended December 31, 1953. This group had liabilities of $14,580,000 and a net worth of $13,269,000. The consolidated net loss for 1963, after depreciation charges of $553,000 amounted to $345,000.

3. The Company, which owns 50% of the stock of Pan American-Grace Airways, Inc., has entered into an agreement with W. R. Grace & Co., owner of the other 50%, to purchase such interest for $10,625,000 or, at the election of the seller, for 391,300 shares of the Company's capital stock, such purchase being subject to the approval of the Civil Aeronautics Board, the agreement being terminable by either party unless so approved by April 15, 1964. The Board has stated its tentative conclusion that the Company should be ordered to divest itself of its interest in Pan American-Grace Airways, Inc. The Company believes this tentative conclusion is erroneous and plans to litigate the matter fully.

4. Effective January 1, 1963, in order to reflect current conditions including changes in maintenance patterns and procedures, the Company extended the estimated useful life of its jet flight equipment from ten years to twelve years while increasing residual values used in determining depreciation charges for this equipment, resulting in a reduction of depreciation expense for the year of $8,765,000; at the same time it eliminated the balance of and discontinued the further use of reserves for overhaul of all flight equipment by transfers to reserves for depreciation to offset established built-in overhaul residual values and by credit to maintenance expense, and reduced the residual values of propeller flight equipment, resulting in a reduction in maintenance expense of $7,832,000 and an increase in depreciation expense of $6,925,000. These changes resulted in an increase in net income after taxes of $1,441,000.

5. Deferred charges include costs related to future periods, deferred in accordance with the Company's established practice; amortization is provided during such periods. They include costs of introducing jet aircraft, installation and other preoperating costs of maintenance and building facilities, and costs of financing.

6. The convertible subordinated debentures are convertible into common stock at $30 per share, bear an interest rate of 4⅞%, and are due August 1, 1979; the Company is required to provide for the retirement of $2,800,000 annually from August 1, 1969, with the option to reduce this amount by debentures converted; at December 31, 1963 such conversions amounted to $3,831,600 and at February 28, 1964, $14,870,700.

On January 22, 1964, the Company issued $60,430,500 of subordinated debentures, convertible into common stock at $58.50 per share, with an interest rate of 4½%, and due January 15, 1984; the Company is required to provide for the retirement of $3,500,000 annually from January 15, 1974, with the option to reduce this amount by debentures converted.

Notes payable to insurance companies bear an interest rate of 3⅞% as to $60,000,000, 4¾% as to $30,000,000 and 6% as to $50,000,000. Repayment of the first two borrowings commences in 1966, to be made in fourteen annual installments of $5,850,000 with a fifteenth of $8,100,000; repayment of the third borrowing commences in 1967, to be made in thirteen annual installments of $3,500,000 with a fourteenth of $4,500,000.

The Company is fulfilling the financial conditions prescribed under the respective agreements; at December 31, 1963 retained earnings available for dividends amounted to $14,000,000.

7. The Company plans to propose to the stockholders at their next annual meeting that the Company Capital stock be split 2-for-1.

8. Under the terms of the ten-year Incentive Stock Option Plans of 1952 and 1961, options for 34,239 shares were exercised and options for 1,660 shares expired in 1963, and 57,160 shares remained reserved for options authorized. The options were priced at the fair market values of the stock on the dates the options were issued. Shares under option at December 31, 1963 were:

Date option granted	Shares	Price
June 5, 1956	1,875	$19- 9/16
October 1, 1957	17,315	14- 1/8
December 1, 1959	5,000	23- 1/8
April 5, 1960	3,125	17- 1/4
February 16, 1962	221,911	23-15/16
May 1, 1962	5,375	21- 1/4

Lounge of the Jet-Powered Electra reflects tasteful decor of entire interior.

ERICAN AIRLINES EQUIPMENT PROGRAM

erican Airlines, known to many as THE JET AIRLINE, was the first to ugurate jet service across the United States, with the Boeing 707 airplane. American was also the first to put the new Lockheed ctra into east-west service. Our experience with both of these new planes has been excellent and the fine service which they provide added to the prestige of the Company and should benefit its portunity for profit.

Our equipment program is, in our opinion, a sound program. It uld be increasingly beneficial to the Company. The airplanes ch we have on order have been well chosen for the service they expected to perform. They come from manufacturers with unex- ed experience in the field. They will do much to improve the serv- of American.

Our present program will involve continuing deliveries of modern ipment in the years 1959 through 1962. Our total order involves purchase of 110 turbine-powered airplanes, four of which had n delivered at the end of 1958:

25 707-123 Boeing Jets, primarily for long-distance operation, deliveries to be completed in 1959;

25 707-023 Boeing Jets for intermediate-range service, delivery to begin in the first half of 1960 and to be completed by mid-1961;

25 Convair 600 Jets especially designed for American's intermediate and long-range operations, with deliveries to begin in 1961 and to be completed in 1962. This new plane is expected to be the fastest in airline service, with performance of approximately 635 miles per hour;

35 Lockheed Electra Turboprops with deliveries to be completed early in 1960, adapted to our intermediate and shorter routes.

American has gained many unique advantages by its willingness and ability to aid in the designing and pioneering of more modern aircraft. It has been a leader in this field and intends to continue that leadership, and to have the most modern, best-balanced and most productive fleet in the industry.

FINANCING THE JET PROGRAM

Capital requirements for aircraft and supporting equipment in connection with the purchase of our 110 airplanes total approximately $365 million. In addition, arrangements were made during the year for the lease, rather than the purchase, of the powerplants and propellers for the Electras and of the powerplants for the Convairs and Boeing 707-023s. The net effect of the leases will be to reduce the total amount of capital that otherwise would have been required by approximately $80 million.

Thus, the total value of the new equipment we will operate comes in round numbers to $445 million, comprised of $365 million of direct capital outlays, and $80 million in lease arrangements. As of December 31, 1958, turbine equipment and related spare parts costing approximately $20 million had been delivered and paid for. Cash deposits with manufacturers as of December 31, 1958 amounted to about $59 million, leaving $286 million to be paid from other sources. Long-term debt financing had been arranged previously with two large insurance companies to cover $135 million, of which $85 million remained to be taken down. This leaves about $200 million to be paid for out of cash

AX-871

TWA Ex. 158, page 3
(AAL Annual Report-1961)

EARNINGS:

Net earnings for 1961 amounted to $7,278,000 ($.85 per share), compared with $11,783,000 ($1.40 per share) in 1960. Profit on sale of property and equipment was included to the extent of $1,234,000 ($.15 per share) in 1961 and $1,744,000 ($.21 per share) in 1960.

REASONS FOR DECLINE IN EARNINGS:

1. The industry's growth in passenger traffic was unusually low; for 1961 as a whole, domestic revenue passenger miles increased only 1% over 1960. A high percentage of total travel is business travel. Business travel during the first three quarters was low because of unfavorable economic conditions. During the fourth quarter of the year, there was a sharp recovery.

2. The Company's share of industry traffic was reduced by a strike of flight engineers in February and by the award to competitors of Texas-California routes, effective June 11. The award of these routes diverted a substantial portion of traffic formerly carried by American west of Texas. Due to continuing improvement of services, American gained in other sections of its system. In the last quarter, we transported 20.5% of the domestic traffic (seasonally adjusted), compared with 20.0% for all of 1961.

3. The benefit of a full year's operation at the higher fares granted in the last half of 1960 was virtually offset by a reduction in average fare per mile, because a higher proportion of total traffic was at air coach rates and a lower proportion at first class rates.

4. Wage rates and prices for purchased materials and services continued to advance at a rate higher than could be absorbed by increased operating efficiencies.

INDUSTRY EARNINGS ARE INSUFFICIENT:

American's earnings continue to be better than the industry average, but they are insufficient for a fair return on investment. The industry had net earnings of $60 million in 1959, had an approximate break-even in 1960, and in 1961 lost about $25 million.

In no year since 1955 has the industry earned a fair return on investment. Although total dollar profits in 1959 equalled the previous peak le 1955, the return for 1959 was lower, because there had been subst additions to the investment base.

The Civil Aeronautics Board established 10½% return on investme a reasonable rate. To earn that rate of return the industry would requ improvement of more than $300,000,000 per annum in earnings before To bring this about would necessitate (a) increasing revenues $300.0 while holding costs at a constant level; (b) reducing expenses by $300.0 without reduction in revenue; or (c) some combination of increasing nues and reducing expenses which would yield an improvement of 15%. It will be a big job and will require the best efforts of managemer the regulatory agency to get it done.

COSTS WHICH CONTINUE TO RISE:

Costs have been rising nearly continuously since 1955, for America for the industry. These increased costs have been only partly offs increases in passenger fares since 1957. For example, costs for Ame increased 11.2¢ per ton-mile sold between 1955 and 1961. Revenue creased 6.3¢ per ton-mile during the same period. The profit margin for was one-third that of 1955.

American Airlines has been able to report profits only by keeping its per revenue ton-mile below that of the industry as a whole. Last year A can had a lower unit cost per revenue ton-mile than any other trunkline ca

Experience proves that increased volume is not enough in itself to imp profit margins. From 1955 to 1961, industry revenue ton-miles increased and dollar volume nearly doubled, but unit production costs continue rise. Earnings are now so deficient that a repetition of this experience the next several years could place the industry in a dangerous fina position.

There is over-production in the industry and too much duplication, i air and on the ground. This must be reduced. Some of the reduction come about by better concerted effort on the part of industry member some of it must come about by corporate mergers.

OW LOAD FACTORS:

The airlines are producing too much transportation capacity and selling too little of it. In 1961, 44% of the passenger transportation produced was not sold. This situation has been brought about by:

1. Continuing additions to productive capacity at a rate in excess of market growth. When there are too many airlines on a route, and they must compete aggressively to retain a position in the market, the division of the total traffic among them will not permit profitable load factors.

2. The complexities of substituting large, fast jet airplanes for smaller, slower piston-engined airplanes. Capacity is boosted substantially by these jets unless there is a reduction in the total number of flights. It is exceedingly difficult to reduce flight frequencies, however, if there are too many airlines on the route. Each airline attempts to maintain convenient departures during the day and to match its competitors in frequencies.

These continuing additions to productive capacity, coupled with a low rate of total traffic growth, have brought about low load factors. In 1955, the industry sold 64% of its total passenger transportation production, and 36% went unsold. In 1961, the industry sold only 56% of its passenger transportation production.

American Airlines has regularly operated with load factors higher than the industry average, but our ratio has declined from 68% in 1955 to 61% in 1961.

If there is to be an industry recovery in earnings, an improvement in load factors is essential.

AMERICAN'S ASTROJET* FLEET:

American has and will continue to have the fastest and most efficient fleet in the industry.

The fan-type jet power plant is a remarkable new development, able to produce more power with less fuel consumption. This new engine gives our jet airplanes more speed, better landing and take-off performance and substantial fuel economies.

American has now equipped all of its forty-nine Boeing jets with fan-type engines. The new Convair 990, to be in scheduled service in March, is also equipped with these engines. Public response to our better Astrojet service

has been enthusiastic and the relative position of American within the industry has been improved by the high competitive quality of its service.

An order has been placed with Boeing for twenty-five 727 smaller jets in order to serve adequately segments where the mileage or traffic density is not suitable for large jets. These twenty-five 727 jets will be delivered during 1964 and 1965.

FINANCING AMERICAN'S EQUIPMENT PROGRAM:

To finance its jet fleet, American borrowed $85 million (at 5¾%) in 19 making a total of $290 million borrowed in the past five years. We anticip no need for additional financing now or soon. Payments for the 20 Com airplanes to be delivered in 1962-63 and for the 25 Boeing 727 jets to delivered in 1964-65 will be covered by present cash and future cash fl from depreciation allowances and sale of equipment.

All of the $290 million is on a long-term basis, with repayments from 19 to 1996. The Company has no short-term indebtedness other than the us trade obligations.

THE AMERICAN AIRLINES ORGANIZATION:

The service of American Airlines is provided by people, people who a skilled in their work and proud of their association with air transportatio That they do a good job for us, and for you, is proven by the high level competitive business which comes to American, and by the relatively hi load factors maintained on our services. We are proud of the people American, proud of their proven ability and worth. They are able to ser you well, and take pleasure in doing so.

DIRECTORS:

During the year, Hon. James H. Douglas, former Secretary of the Air Forc and, later, Under Secretary for Defense, and Hon. Elwood R. Quesad former Air Force Commander and, later, Administrator, Federal Aviatio Agency, joined the Board of American Airlines. Both are well experience in aviation, military and civilian, and their counsel will be of value to th Company.

We report with regret and sorrow the death of James A. Jackson, Directo on January 2, 1962. Mr. Jackson served the Company with distinction fo more than 10 years. We will miss his friendship and his counsel.

REPORT OF THE PRESIDENT

EARNINGS:

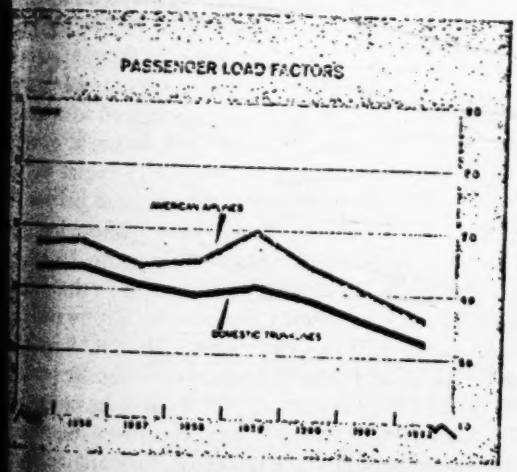
Net earnings for 1962 amounted to $7,098,000 ($3.83 per share), compared with $8,555,000 ($1.00 per share) in 1961. Profit on sale of property and equipment was included to the extent of $1,721,000 ($.21 per share) in 1962 and $1,234,000 ($.15 per share) in 1961.

Changes adopted in 1962 in accounting for leased engines and for depreciation on DC-7 aircraft resulted in an increase in net earnings of $300,000 in 1962 and $1,277,000 for 1961 over the amount previously reported for the latter year.

REASONS FOR DECLINE IN EARNINGS:

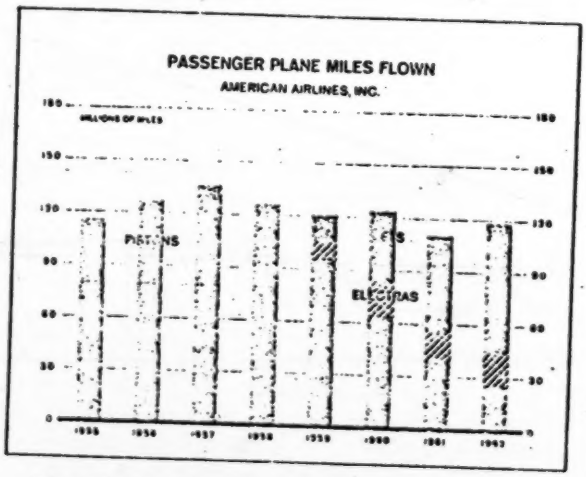
Load factors continued to decline and costs continued to increase. A three percent increase in fares, February 1962, was not sufficient to offset the effect of adverse factors.

The trunkline industry started out the year with too much productive capacity, manufacturing more transportation than could be sold. As the year progressed, additional capacity was added, at a rate in excess of the rate of traffic growth. The result was more marginal flights, lower load factors and reduced profit opportunity.



Government has licensed too many airlines on of the routes, more than are needed and can be supported by the existing level demand. There was no reduction in this competition in 1962.

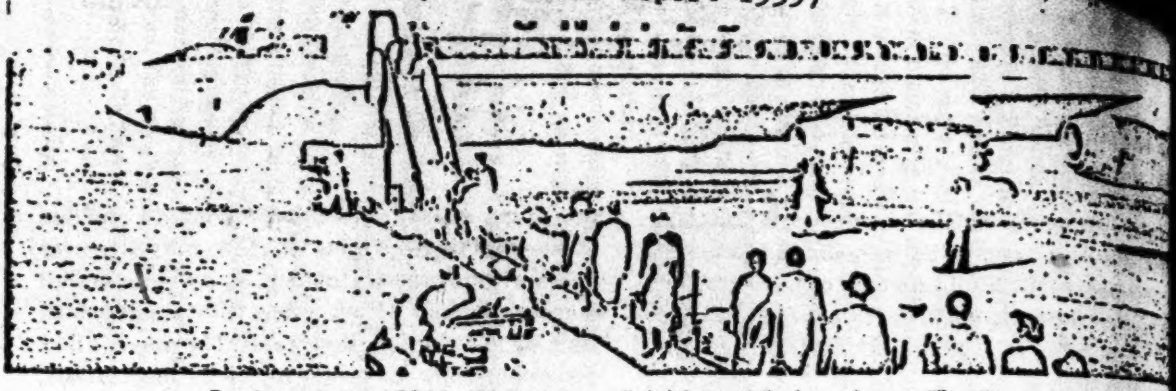
of the markets where there are too many ch tries to maintain or improve its position in the market. This brings about the addition of marginal flights, flights which do not fully cover costs of operation. Competing carriers match these additional flights, often with flights which also fail to cover fully their costs. The result is that the opportunity for profit, for all of the carriers, continues to be diluted.



There is, in addition, the continuing problem of substituting jet flights for flights formerly operated with piston engined airplanes. The jet airplanes are usually twice as large and twice as fast, with a net productive capacity of four times the average piston-engined airplane. In the usual case, two jet flights should be substituted for three or four piston-engined flights. But that cannot often be done without impairing the convenience of flight frequency. In the usual case, the substitution of jet flights has added to excessive capacity.

There was continuing discussion during the year, in the industry and in the government, about what can be done to remedy the situation resulting from licensing too many airlines. But little was done to reduce the number.

On American's system, while load factors continued to decline, the elements of cost continued to increase in price. American's earnings, while inadequate, were above the average for its principal competitors. These earnings were available only because those responsible for the operation were diligent in seeking more efficient methods and additional economies.



Travelers enplaning on DC-8 Jet Mainliners discover that air transportation has undergone still another great advance.

et age on the main line

E DC-8 JET MAINLINER

e first DC-8 was delivered to United Air Lines on June 3. his aircraft and several immediately following entered an in-nsive training program for flight crews and ground services rsonnel. A type certificate for the DC-8 domestic model with 57 engines was issued to the Douglas Aircraft Company by e Federal Aviation Agency on August 31—more than a month advance of the date specified in United's contract.

DC-8 proving runs began September 2 and in the 12 days llowing United's crews logged almost 40,000 miles. The FAA pproved the DC-8 for scheduled operations on September 15.

On September 18, climaxing more than a decade of research d planning, your company inaugurated DC-8 Jet Mainliner rvice between New York and San Francisco.

Introduction of the DC-8 on major routes proceeded rapidly the final quarter of the year. The new jetliner was placed in rvice between New York-Los Angeles, Chicago-San Francisco, icago-Los Angeles, San Francisco-Los Angeles and Los geles-Chicago-New York. Early in 1960 United inaugurated schedules at Washington/Baltimore and Philadelphia, with attle-Tacoma and Honolulu to follow in March. By mid-mmer DC-8 flights will be available at 12 of the chief traffic nerating cities on the Main Line.

DC-8 Jet Mainliner performance has been impressive by every ndard, fully justifying the 1955 decision to accept a temporary mpetitive disadvantage while waiting for the DC-8. Public sponse bore out the wisdom of devoting extra effort to im-ove cabin design and develop new passenger service features. though flying only 11 per cent of system airplane miles, the liners accounted for 21 per cent of revenue passenger miles January, 1960.

Among the considerations which influenced your co choice of the DC-8 Jet Mainliner was its structural ab receive future engines of greater thrust. The first of the D jetliners delivered to United were equipped with advanc & Whitney J-57 engines which produce 13,500 pounds o as compared with 13,000 pounds for standard models.

Twenty-two of United's fleet of 40 DC-8s will have vanced J-57s. These engines provide ample power t maximum passenger loads nonstop on transcontinental DC-8s so equipped cruise at the same speed as other co jetliners now in service. However, DC-8s outfitted with t recently developed Pratt & Whitney J-75 engine will cru 40 miles per hour faster than J-57 powered jetliners.

Fifteen of United's DC-8s will have J-75 engines. The be assigned to California-Hawaii routes in March, 19 ilarly equipped DC-8s will be placed in nonstop coast service as the year unfolds, replacing J-57 powered DC-8 will be transferred to other routes. The DC-8 with J-75 will be the most powerful jetliner in domestic service.

United's three remaining DC-8s will have Pratt & turbofan engines. The turbofan, a further improvem J-57, employs a newly engineered forward compress increases speed, range and lift. The turbofan-powered be delivered in mid-1961, will be able to fly nonstop Chicago and Honolulu. Your company has applied to Aeronautics Board for authority to offer such servic

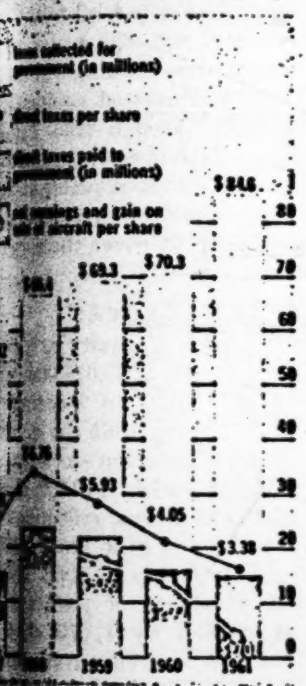
Fifteen DC-8s were delivered to United in 1959. By of 1960 your company will have taken delivery of 33 Mainliners, with the remaining seven to be received half of 1961.

D FACTORS

61 the passenger load factor
.1 per cent as compared with
per cent in 1960. The coach
ger load factor was 62.4 per
down from 70.8 per cent, and
st class load factor was 52.5
nt, down from 59.5 per cent.
ver-all payload factor was
per cent compared to 57.2 per
in 1960. The payload factor
ak even was 49.9 per cent in
arison to 54.9 per cent in 1960.

ES

al of $84,626,000 in taxes was
to, or collected for, Federal,
and local governments in 1961.
d's direct taxes, consisting of
al and state income taxes, so-
curity, unemployment, prop-



l taxes, amounted to
This is equivalent to
mmon share compared
s of 70¢ per share.
United remitted to the
rnment $36,396,000 in
taxes collected from
also paid $32,949,000
nd state withholding

taxes and social security taxes collected from employees. The President has recommended to Congress that the 10 per cent transportation tax on airline travel be reduced to a 5 per cent so-called "airway user charge." Additional user charges of 5 per cent on air freight, plus 2¢ per gallon on jet fuel would be imposed. Should the recommendation be adopted, half the tax now borne directly by passengers would be replaced chiefly by the user charge on fuel. This would require an increase in fares to offset the added cost to the airlines.

DIVIDENDS

The policy of limited cash payout, supplemented by stock dividends, was continued in 1961 to conserve cash. Quarterly cash dividends totaling 50¢ per share, together with a six per cent stock dividend, were paid during the year. Your company has paid dividends without interruption since 1950.

FINANCE

The Bank Credit Agreement with 34 banks in the amount of $165,000,000 may be drawn upon until June 30, 1962. As of February 1, 1962, total borrowings were $156,000,000. The remaining balance will be drawn down prior to June 30, 1962. This loan will be repaid in 23 equal consecutive quarterly installments commencing on January 1, 1963. Working capital at the end of the year was $23,314,000, up $2,058,000 over 1960.

ADDITIONS TO PROPERTY AND EQUIPMENT

Payments for property and equipment during the year totaled $146,411,000. New aircraft and related flight equipment accounted for $132,054,000, including $21,905,000 of advance payments, while $14,357,000 was spent for new and improved ground facilities and equipment.

At year end, commitments for property and equipment totaled $232,988,000, the major portion representing contracts for jet aircraft and related flight equipment for delivery through 1965. Projected funds from operations and the remaining funds available under the Bank Credit Agreement appear adequate to cover these commitments.

STOCKHOLDERS

Stockholders' equity at year end was $183,884,000, a 20 per cent gain due primarily to property acquired in the merger. Common shares outstanding at December 31, 1961, totaled 5,006,178, an increase of 788,972 shares. Also outstanding were 159,000 shares of 5½% cumulative preferred stock, $100 par value, issued in effecting the merger. The number of stockholders at the close of 1961 was 28,742 compared to 25,862 a year ago.

MERGER

Legal and financial steps merging United and Capital were complete on June 1. Capital's stockholders received 133,849 shares of United's common stock, representing 1.03 shares of United for each seven shares of Capital's common. In addition, five-year warrants to buy 200,775 shares of United's common at $38.83 per share were issued to Capital stockholders on the basis of 1.545 shares of United for each seven shares of Capital's common.

Holders of Capital's 4½% subordinated convertible debentures received 216,588 shares of United's common, representing 20.6 shares of United for each $1,000 of debentures held. Holders representing $1,486,000 of the $12,000,000 issue did not exchange their debentures.

Vickers-Armstrongs, Limited, the holders of Capital's secured promissory notes, received 159,000 shares of United's 5½% cumulative preferred stock; 61,800 shares of United's common stock; 7½ year warrants to buy 206,000 shares of United at $43.69 per share; and 15 Viscount turboprop aircraft.

now provide 76 per cent of United's total available seat miles as compared with 68 per cent at the close of 1961.

Revenue passenger miles increased 15 per cent over 1961, freight ton miles 26 per cent, express 15 per cent and mail 7 per cent. If, for comparison, Capital Airlines traffic for the first five months of 1961 is included, the passenger mile increase in 1962 would be 6 per cent instead of 15.

United carried 12,853,000 revenue passengers in 1962 and its fleet operated 8,453,033,000 revenue passenger miles, 130,481,000 freight ton miles, 55,994,000 mail ton miles and 17,299,000 express ton miles.

LOAD FACTORS

Continued expansion of the industry's jet capacity and slow market growth have resulted in generally lower load factors for the industry. In 1962 United's passenger load factor was 53.6 per cent as compared to 58.1 per cent in 1961. The coach passenger load factor was 57.8 per cent, down from 62.4 per cent, and the first class load factor was 47.9 per cent, down from 52.5 per cent. The overall payload factor was 48.8 per cent as compared with 51.3 per cent in 1961. The payload required to break even was reduced to 46.8 per cent in 1962 as compared with 49.9 per cent last year.

TAXES

A total of $100,448,000 in taxes was paid to, or collected for, Federal, state and local governments in 1962. United's direct taxes, consisting of Federal and state income taxes, social security, unemployment, property and fuel taxes, amounted to $22,130,000. This is equivalent to $4.39 per common share compared with net earnings of $1.36 per share.

Further, United remitted to the Federal Government $36,842,000 in transportation taxes collected from customers and also paid $41,476,000 in Federal and state withholding taxes and social security taxes collected from employees.

On November 16, 1962, the 10 per cent Federal tax on airline travel was reduced to five per cent. The five per cent—estimated to total $111,000,000 for the airline industry in 1963—serves to reimburse the Federal Government for airline use of the airways which, incidentally, are more heavily utilized by military and private planes.

DIVIDENDS

In 1962 the company continued its policy of limited cash payout, supplemented by stock dividends in order to conserve cash. Quarterly cash dividends totaling 50¢ per common share, together with a six per cent stock dividend, were paid during the year. Your company has paid dividends on its common stock without interruption since 1950. Quarterly dividends totaling $5.50 per share were paid on the outstanding 5½% Cumulative Preferred Stock.

FINANCE

The Bank Credit Agreement with 34 banks for $165,000,000 was modified in 1962 to extend the revolving credit expiration date from June 30, 1962, to December 31, 1964. Repayments will be made in 20 equal quarterly installments beginning July 1, 1965. Total borrowings under this agreement as of February 1, 1963, were $103,000,000 as compared with $156,000,000 on February 1, 19[illegible]. During the year, cash generated from depreciation, amortization and earnings totaled $75,800,000 equivalent to $15.03 per common share.

ADDITIONS TO PROPERTY AND EQUIPMENT

Payments for property and equipment in 1962 totaled $55,585,000. New jetliners and related flight equipment amounted to $47,8[illegible] 000, including $8,836,000 of advance payments, while $7,741,000 was spent for new and improved ground equipment and facilities.

Commitments for future capital expenditures totaled $195,670,000 at year end, the major portion representing Boeing 727 jet aircraft and related equipment for delivery through 1965. Projected funds from operations and the remaining funds available under the Bank Credit Agreement appear adequate to cover these commitments.

STOCKHOLDERS

Stockholders' equity at year end amounted to $183,015,000, up from $178,884,000 on December 31, 1961. During 1962 the number of shares of common stock outstanding increased by 319,238 shares to 5,325,416 shares, reflecting the six per cent stock dividend paid December 15, 1962. The number of shares of preferred stock decreased by 4,770 shares to 154,230 shares outstanding on December 31, 1962, which reflects the annual redemption requirement for this issue. The number of stockholders at the close of 1962 was 29,118 as compared with 28,742 a year ago.

TWA

EXHIBIT 192
7/8/64 W.B.

SUPPLEMENT TO PROSPECTUS
DATED MAY 25, 1961

$100,000,000 principal amount of Debentures, together with attached Warrants to purchase 2,700,000 shares of Common Stock, offered by the Prospectus have been sold. $19,037,900 principal amount was subscribed for upon exercise of the Rights and the Oversubscription Privilege and $80,962,100 principal amount was purchased by Hughes Tool Company pursuant to its obligation as described in the Prospectus under Subscription Offer—Agreement with Hughes Tool Company. Hughes Tool Company applied $80,962,100 of the principal amount of the Company's 6½% interim subordinated note in the total principal amount of $100,000,000 in payment for the Debentures purchased by it. The Company paid Hughes Tool Company $19,037,900 in cash in payment of the balance of the principal of said 6½% interim subordinated note (See Purpose of Issue in the Prospectus).

June 20, 1961

TRANS WORLD AIRLINES, INC.

Subscription Price	Discounts and Commissions	Company(1)(2)

4 81

PROSPECTUS

Trans World Airlines, Inc.

$111,235,900 6½% Subordinated Income Debentures Due June 1, 1978
with
Warrants to Purchase 3,003,369 Shares of Common Stock

Trans World Airlines, Inc., hereby offers to its stockholders $111,235,900 principal amount Debentures for subscription, at the Subscription Price, on the basis of $100 principal amount Debentures for each 6 shares of Common Stock held of record at the close of business on May 25, 19 Certificates evidencing Rights include an Oversubscription Privilege at the same price, subject allotment. The offer will expire at 3:30 P.M., E.D.S.T., on June 8, 1961. (See SUBSCRIPTION OFFER herei

The Debentures are subordinate to all Senior Indebtedness to the extent set forth herein. Inter is cumulative but, until maturity, is payable only to the extent of Available Income. (See DESCRIPTION OF DEBENTURES herein). The Warrants entitle the holders thereof to purchase 2.7 shares of Comm Stock for each $100 principal amount of Debentures to and including June 1, 1965 at a price of $20 per share, and thereafter to and including December 1, 1973 at $22.00 per share, in each case subj to adjustment, payable in cash or by surrender of Debentures at their principal amount. The Warra are not exercisable or detachable prior to November 1, 1961, and expire on December 1, 1973. (S DESCRIPTION OF WARRANTS herein).

THESE SECURITIES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION NOR HAS THE COMMISSION PASSED UPON THE ACCURACY OR ADEQUACY OF THIS PROSPECTUS. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

	Subscription Price	Underwriting Discounts and Commissions	Proceeds to Company(1)(2)
Per Unit	$100	None	$100
Total	$111,235,900	None	$111,235,900

(1) Assuming that all Debentures are sold. Under an agreement between the Company and Hughes Tool Comp the beneficial owner of Voting Trust Certificates issued with respect to 5,221,301 shares (approximately 71.2 of the Company's outstanding Common Stock, Hughes Tool Company may purchase, at the Subscription P all or any part of the Debentures not subscribed pursuant to the Subscription Offer, and has agreed that it purchase such number of Debentures as will, with Debentures purchased by it and others pursuant to Subscription Offer, equal at least $100,000,000 principal amount. Hughes Tool Company may apply the Comp 6½% interim subordinated note in the principal amount of $100,000,000 held by Hughes Tool Company to purchase price of Debentures purchased by it. See PURPOSE OF ISSUE and RELATIONS WITH HUGHES TOOL Com herein.

(2) Before deduction of expenses payable by the Company estimated at $600,000.

The Date of this Prospectus is May 25, 1961.

TWA Ex. 192, page 3
(TWA Prospectus, 5/25/61 & Supplement, 6/20/61)

No person is authorized to give any information or to make any representations, other than those contained in this Prospectus, in connection with the offer contained in this Prospectus. This Prospectus does not constitute an offering in any jurisdiction in which such offering may not lawfully be made.

TABLE OF CONTENTS

	Page
The Company	3
Subscription Offer	3
Offering to Stockholders	3
Agreement with Hughes Tool Company	3
New Developments	4
Expiration Date	4
Method of Subscription	4
Purchase and Sale of Rights	4
Foreign Stockholders	5
Listing and Trading	5
Purpose of Issue	5
Capitalization	6
Price Range of Common Stock	6
Summary of Consolidated Operations	8, 9
History and Business	11
Routes and Services	11
Introduction of Jet Aircraft	14
TWA Revenue and Traffic Data	15
Passenger Operations	16
Other Operations	18
Other Recent Developments	18
Regulation	19
Competition	20
Employee Relations	21
Insurance	22
General	22
Voting Trust	22
Relations with Hughes Tool Company	24
Acquisition of Jet Equipment	24
Agreement with Hughes Tool Company Concerning this Offering	24
Agreement with Hughes Tool Company Concerning $50,000,000 Revolving Credit	24
Guaranty of TWA Indebtedness	25
Sublease of 1049H Aircraft	25
Agreement Concerning Purchase of 1049H and 1649A Aircraft	25
Payment of $12,000,000 Note Acquired by Hughes Tool Company	25
Positions Recently Stated By Hughes Tool Company	25
Property	28
Securities of the Company	30
Description of Debentures	30
General	30
Subordination	31
Payment of Interest	32
Redemption	33
Sinking Fund	33
Restriction on Dividends, Redemptions and Other Payments	33
Concerning the Trustee	34
Events of Default and Notice Thereof and Certain Rights on Default	34
Modification of the Indenture	35
Satisfaction and Discharge of the Indenture	35
Description of Warrants	36
Description of Common Stock	36
Senior Indebtedness	37
Management	38
Directors and Officers	38
Remuneration	40
Options	41
Litigation	42
Legal Opinion	42
Experts	42
Additional Information	42
Opinion of Independent Public Accountants	43
Index to Financial Statements	43

THE COMPANY

Trans World Airlines, Inc. (herein sometimes called the Company or TWA) was incorporate as Transcontinental & Western Air, Inc. under the laws of the State of Delaware on December 2 1934 by the consolidation of two Delaware corporations engaged in air transportation, one of whic had instituted the first all-air coast-to-coast passenger service in 1930. The name of the Compan was changed to Trans World Airlines, Inc. on May 17, 1950.

The Company has been engaged in the transportation of persons, property and mail by air sinc its organization. During that time the Company has operated a transcontinental system in th United States and since 1946 it has operated an international system between the United State and points in Europe, Africa and Asia.

SUBSCRIPTION OFFER

Offering to Stockholders.

The Company hereby offers to the holders of its Common Stock, par value $5 per share, o record at the close of business on May 25, 1961 the following:

(1) *The Rights:* The right to subscribe for $111,235,900 principal amount of Debenture with Warrants to purchase a total of 3,003,369 shares of its Common Stock, at the Sub scription Price set forth on the cover page of this Prospectus, on the basis of $100 princip amount of Debentures for each 6 shares of Common Stock then held of record, and

(2) *The Oversubscription Privilege:* The privilege, on the part of the holders of shares o Common Stock (other than the 5,221,301 shares referred to in the next succeeding paragrap with respect to which Voting Trust Certificates have been issued), of subscription, at th Subscription Price, subject to allotment as hereinafter set forth, for any of the unsubscribe Debentures not subscribed for upon exercise of Rights by such holders (up to the $24,214,20 principal amount in the aggregate available for subscription by such holders).

The Rights and the accompanying Oversubscription Privilege will be evidenced by Subscriptio Certificates in registered form transferable at the office of the Agent, Irving Trust Company, Ou Wall Street, New York 15, N. Y.

Agreement with Hughes Tool Company

Under an agreement between the Company and Hughes Tool Company, the beneficial own of Voting Trust Certificates issued with respect to 5,221,301 shares (approximately 78.23%) the Company's outstanding Common Stock, Hughes Tool Company may purchase, at the Sub scription Price, all or any part of the unsubscribed Debentures not subscribed pursuant to th Subscription Offer, and has agreed that it will purchase, not later than 3 business days after th Expiration Date, such number of Debentures as will, with Debentures purchased by it and othe pursuant to the Subscription Offer, equal at least $100,000,000 principal amount. Hughes To Company may apply the Company's 6½% interim subordinated note in the principal amount $100,000,000 held by Hughes Tool Company to the purchase price of Debentures purchased by See PURPOSE OF ISSUE and RELATIONS WITH HUGHES TOOL COMPANY herein.

New Developments

On May 11, 1961 the Company was requested to postpone the offering covered by this Prospectus in order to enable Hughes Tool Company to make arrangements for an underwriting of its obligation and its right to purchase Debentures with attached Warrants for the purpose of making a public distribution of its Rights or the Debentures and Warrants. The Company did not agree to such a postponement. The Company does not know what plans Hughes Tool Company may have to distribute its Rights or the Debentures and Warrants but it is possible that certain selling arrangements will be entered into. See also RELATIONS WITH HUGHES TOOL COMPANY—Positions Recently Stated By Hughes Tool Company herein.

Expiration Date

The Subscription Certificates will expire at 3:30 P.M., Eastern Daylight Saving Time, on the Expiration Date set forth on the cover page of this Prospectus.

Method of Subscription

One Right will be issued for each share of outstanding Common Stock and 6 Rights will be required to subscribe for $100 principal amount of Debentures with an attached Warrant to purchase 2.7 shares of Common Stock. Subscriptions must be for $100 principal amount of Debentures or multiples thereof. Subscription may be made by delivering (by mail or otherwise) the Subscription Certificate, properly filled in and signed, to the Agent, Irving Trust Company, One Wall Street, New York 15, N. Y., accompanied by payment in full for the Debentures subscribed for, prior to 3:30 P.M., Eastern Daylight Saving Time, on the Expiration Date. However, subscriptions will be accepted (subject to actual receipt of duly executed Subscription Certificates) if, prior to the Expiration Date, the Agent receives the Subscription Price in full together with a written or telegraphic guarantee from a bank, trust company, or member firm of the New York Stock Exchange that the requisite Subscription Certificates, duly executed, with certificate numbers thereof specified, have been or will promptly be forwarded to the Agent.

The Oversubscription Privilege may be exercised only if the Rights represented by the Subscription Certificates are exercised for the full number of Debentures covered thereby and only if accompanied by payment in full for the Debentures subscribed for pursuant to the Oversubscription Privilege. After 3:30 P.M., Eastern Daylight Saving Time, on the Expiration Date any Debentures available for the Oversubscription Privilege will be allotted pro rata to the holders of Subscription Certificates who also exercise the Oversubscription Privilege. Subject to the requirement that subscriptions shall be for $100 principal amount of Debentures or multiples thereof, such pro rata allotment will be based upon the ratio which the number of Rights exercised by each person exercising the Oversubscription Privilege bears to the total number of Rights exercised by all persons exercising the Oversubscription Privilege. If, after such allotment, unallotted Debentures remain, such Debentures will, successively in the manner above described, be allotted among those holders whose subscriptions have not been filled in full. The Agent will advise each person as to the principal amount of Debentures to which he is entitled pursuant to the exercise of the Oversubscription Privilege and the Agent will refund payments in excess of the amount required for full payment for such Debentures.

Purchase and Sale of Rights

The Rights may be bought or sold through banks or brokers. The Company has been advised by the New York Stock Exchange that the Exchange has not yet acted to admit the

Rights to trading on the Exchange since the Company does not know what plans Hughes Tool Company may have to distribute its Rights or the Debentures and Warrants.

For the convenience of holders of Subscription Certificates, the Company has made arrangements whereby the Agent, as agent for such holders, will sell all surplus Rights up to 5 or will buy sufficient Rights (not more than 5) to permit subscription for $100 principal amount of Debentures or multiples thereof. These services will be rendered by the Agent without charge to such holders, other than for the cost of any Rights purchased.

The Agent may match buying and selling orders, and its execution of orders is subject to its ability to do so, or to find other sellers or buyers. Charges and credits upon purchases and sales of Rights, including matched orders, on each day Rights are bought and sold, will be at the average price paid or received by the Agent in the open market for Rights on such day. Holders of Subscription Certificates will receive a bill for the cost of Rights purchased (to be paid before the Debentures are delivered) or a check for the net proceeds of Rights sold.

Foreign Stockholders

Subscription Certificates will not be mailed to stockholders with registered addresses at military post offices or outside the continental United States and Canada but will be held by the Agent for the account of such holders until 12 o'clock noon, Eastern Daylight Saving Time, on the last business day preceding the Expiration Date, at which time (if no instructions for the disposition thereof have been received) the Agent will endeavor to sell the Subscription Rights and hold for or remit to such holders their pro rata share of any net proceeds.

Listing and Trading

The Company has applied for listing of the Debentures on the New York Stock Exchange and for listing of the Warrants on the American Stock Exchange. The National Association of Securities Dealers, Inc. advises that any market price quoted with respect to Warrants after the initial public offering of the Debentures with Warrants attached will represent the market price of the right to purchase one share of Common Stock at the then operative warrant exercise price even though a Warrant may represent the right to purchase more than one share.

PURPOSE OF ISSUE

As more fully set forth in RELATIONS WITH HUGHES TOOL COMPANY, the Company paid in part for the cost of the acquisition of jet aircraft by the issuance to Hughes Tool Company of a 6½% interim subordinated note in the principal amount of $100,000,000. As part of the same transaction and in connection with the issuance of the Company's Equipment Mortgage Notes, the Company agreed to make this offering to stockholders and to use the proceeds thereof, to the extent required, to pay such interim subordinated note at 100% of the principal amount thereof (to the extent such note is not applied directly by Hughes Tool Company to purchase Debentures pursuant to its obligation referred to above). Accordingly, the proceeds from the sale of the Debentures will be applied to the payment of such interim subordinated note and the Company will pay the expenses of this offering. Any balance of proceeds resulting from the sale of the Debentures, after payment of such expenses, will be used by TWA for general corporate purposes. See Introduction of Jet Aircraft below.

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19

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PROSPECTUS

160

3,337,036 Shares

Trans World Airlines, Inc.

Common Stock

(par value $5 per share)

TWA is offering to the holders of its Common Stock the right to subscribe for 3,337,036 shares of its Common Stock at the rate of one additional share for each share held of record at the close of business on June 17, 1957. The subscription offer will expire at 3:30 P. M., Eastern Daylight Saving Time, on July 8, 1957.

	Subscription Price	Underwriting Discounts or Commissions	Proceeds to TWA*
Per Unit	$13	**	$13**
Total	$43,381,468	**	$43,381,468**

*Assuming that all shares are sold. Under an agreement between TWA and Hughes Tool Company (hereinafter sometimes called Hughes), the holder of 2,476,142 shares of TWA's Common Stock, Hughes may buy, at the subscription price above stated, all or any part of the shares of Common Stock not subscribed for under the subscription offer herein described, and has agreed that if it purchases less than all unsubscribed shares it will purchase such number thereof as will, with shares acquired by it on the exercise of Warrants, provide TWA with aggregate net proceeds of at least $34,000,000 from the shares acquired by Hughes. See RELATIONS WITH HUGHES TOOL COMPANY.

**TWA will pay fees of 25¢ per share to members of the National Association of Securities Dealers, Inc., who obtain subscriptions from original holders of Warrants other than Hughes Tool Company. Assuming full subscription by such original holders and payment of fees on all such subscriptions, the proceeds to TWA shown above would be reduced by a maximum of $215,223.50. See SOLICITING DEALERS.

THESE SECURITIES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION NOR HAS THE COMMISSION PASSED UPON THE ACCURACY OR ADEQUACY OF THIS PROSPECTUS. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

The date of this Prospectus is June 17, 1957.

151

No person has been authorized to give any information or to make any representation other than those contained in this prospectus, in connection with the offer contained in this prospectus. This prospectus does not constitute an offering in any jurisdiction in which such offering may not lawfully be made.

Neither the delivery of this prospectus nor any sale made through its use shall imply that there has been no change in the affairs of TWA since the date hereof.

TABLE OF CONTENTS

	Page
The Company	3
Subscription Offer	3
Purpose of Issue	4
Capitalization	5
Price Range of Common Stock	5
Results of Operations	6
History and Business	7
Property	14
Relations with Hughes Tool Company	15
Common Stock	17
Long Term Debt	18
Directors and Executive Officers	18
Soliciting Dealers	20
Litigation	21
Legal Opinion	21
Experts	21
Additional Information	21
Certificate of Independent Public Accountants	22
Index to Financial Statements	23

DURING THE SUBSCRIPTION PERIOD, HUGHES TOOL COMPANY MAY, UNDER CERTAIN CONDITIONS, MAKE BIDS FOR OR PURCHASES OF WARRANTS. SUCH TRANSACTIONS MAY BE EFFECTED ON THE NEW YORK, MIDWEST OR PACIFIC COAST STOCK EXCHANGES. AS A RESULT, THE MARKET PRICE OF THE WARRANTS AND OF THE COMMON STOCK MAY BE MAINTAINED AT A LEVEL ABOVE THAT WHICH MIGHT OTHERWISE PREVAIL IN THE OPEN MARKET. SUCH TRANSACTIONS, IF COMMENCED, MAY BE DISCONTINUED AT ANY TIME.

19

THE COMPANY

162

Trans World Airlines, Inc. (herein sometimes called TWA) was incorporated as Transcontinental & Western Air, Inc. under the laws of the State of Delaware on December 27, 1934 by the consolidation of two Delaware corporations which had previously been engaged in air transportation. Its name was changed to Trans World Airlines, Inc. on May 17, 1950. TWA's principal business office is at 380 Madison Avenue, New York 17, New York.

TWA has been engaged in the transportation of persons, property and mail by air since its organization. During that time it has operated a transcontinental system in the United States, and since 1946 it has operated an international system between the United States and points in Europe, Africa and Asia.

SUBSCRIPTION OFFER

Basis of Offering.

TWA hereby offers to the holders of its Common Stock of record at the close of business on June 17, 1957, Rights to subscribe for 3,337,036 shares of its Common Stock at the subscription price set forth on the cover page of this prospectus at the rate of one share of such Common Stock for each share held. See SOLICITING DEALERS for fees payable by TWA on certain subscriptions.

Agreement with Hughes Tool Company.

Under an agreement between TWA and Hughes Tool Company, the holder of 2,476,142 shares of TWA's Common Stock, Hughes may buy, at the subscription price, all or any part of the shares of Common Stock not subscribed for under the subscription offer, and has agreed that if it purchases less than all unsubscribed shares it will purchase such number thereof as will, with the shares acquired by it on the exercise of Warrants, provide TWA with aggregate net proceeds of at least $34,000,000 from the shares acquired by Hughes. For additional information regarding said agreement see RELATIONS WITH HUGHES TOOL COMPANY.

Warrants.

Rights to subscribe will be evidenced by transferable Warrants. One Right will be issued for each share of Common Stock and one Right is required to subscribe for each share of Common Stock. The Warrants may be divided or combined.

Expiration Date.

Rights to subscribe will expire at 3:30 P. M., Eastern Daylight Saving Time, on the Expiration Date set forth on the cover page of this prospectus, and the Warrants will thereafter be void.

Subscription Agent.

The Company has appointed The New York Trust Company, 100 Broadway, New York 15, New York, as Agent in connection with the subscription offer.

19

164

CAPITALIZATION

The capitalization of TWA as of May 1, 1957, and as adjusted to give effect to this financing is as follows:

	Authorized	Outstanding	Adjusted for this financing
3½% Equipment Mortgage Sinking Fund Bonds due December 1, 1969	$40,000,000	$40,000,000	$40,000,000
3% notes (secured) maturing monthly from May 31, 1957 to June 30, 1957	55,841	55,841	55,841
4% demand notes	10,000,000(1)	2,500,000	2,500,000
Common Stock, par value $5 per share	10,000,000 shs.(2)	3,337,036 shs.	6,674,072 shs.(3)

(1) For terms of this credit see RELATIONS WITH HUGHES TOOL COMPANY.

(2) Of which 166 shares are reserved for issuance upon the exercise of an option outstanding under The TWA Employee Stock Purchase Plan.

(3) Assuming all shares offered hereby are sold.

On the same date, TWA had outstanding other long term debt aggregating approximately $38,000,000 represented by conditional sale contracts as described under RELATIONS WITH HUGHES TOOL COMPANY. For present plans with respect to payment of this debt by the use of the proceeds of the shares and of $15,000,000 of bank credit, see PURPOSE OF ISSUE. For information concerning the extent of obligations under leases on real property see Notes 12 and 14 to the financial statements.

PRICE RANGE OF COMMON STOCK

The following table shows the high and low sale prices, as reported by The Commercial and Financial Chronicle, of TWA's Common Stock on the New York Stock Exchange from March 31, 1956 through June 14, 1957:

Period	High	Low
Quarter ended June 30, 1956	$26⅛	$20¾
Quarter ended September 30, 1956	23¼	18⅛
Quarter ended December 31, 1956	21⅛	16⅛
Quarter ended March 31, 1957	20¼	15⅛
Period from April 1, 1957 through June 14, 1957	16¾	13⅞

The closing price on June 14, 1957 was $14.

173

piston-engine aircraft (although they will have greater speed and capacity) and their use will require substantial investments in ground equipment and will pose major problems relating to operations, traffic control, maintenance and airport availability.

TWA has placed no orders for jet aircraft, but its management believes that it will be necessary for TWA to operate such aircraft if it is to maintain its competitive position and that the cost of the required aircraft, spare parts and engines will exceed $320,000,000. Accordingly, TWA is making plans for the operation of Boeing 707 and Convair 880 jets.

Hughes has placed orders, under contracts assignable to TWA, for 15 Boeing 707-131 aircraft, 18 Boeing 707-331 aircraft, and 30 Convair 880 aircraft, for delivery beginning in 1959. These contracts are subject to modification as to number and model of aircraft covered and as to specifications of the aircraft, including seating capacity. Hughes is not committed to sell any of these aircraft to TWA, nor is TWA committed to buy any of them from Hughes. Any such transaction between TWA and Hughes requires approval of the Civil Aeronautics Board.

One of TWA's competitors is operating turbo-prop aircraft and others have ordered such aircraft. TWA has not ordered such aircraft, but is considering these and other types of new aircraft for future use.

PROPERTY

As of June 1, 1957, TWA was operating a fleet of 175 aircraft, of which 149 were assigned to its domestic system and 26 to its international system. All aircraft in use are maintained in airworthy condition in accordance with procedures approved by the Civil Aeronautics Administration. The aircraft above referred to are as follows:

Type	Number	Approximate Age in Years	Standard Available Seats* Domestic	Standard Available Seats* International
FOUR ENGINE:				
Lockheed 1649A	10	0	64C	75T
Lockheed Constellation 1049G	28	1– 2	60C-68C	49C
Lockheed Constellation 1049	9	5	64F	
Lockheed Constellation 749A	27	6– 7	55F	61T
Lockheed Constellation 749	12	9	55F	
Lockheed Constellation 049	32	11–12	80T	
Douglas C-54	9	12–13	**	
TWO ENGINE:				
Martin 404	37	5	40F	
Martin 202A	11	7	36F	

* The seating configuration of an aircraft depends on its use in first class, tourist or combination first class and tourist services, upon the extent to which sleeper seats and berths are installed, and upon whether the aircraft is used in domestic or international service. The seating configuration is frequently changed to meet the requirements of the available traffic. The data given above reflect the approximate configurations at June 1, 1957. In the above table, "F" means first class, "T" means tourist and "C" means combined first class and tourist.

** All but one (standard available seats—70T) used in cargo service.

All these aircraft are mortgaged to secure funded debt except the ten Lockheed 1649As and eight of the Lockheed Constellation 1049Gs which are subject to conditional sale contracts. Fifteen additional Lockheed 1649As are deliverable over the next few months under one of such conditional sale contracts. For information as to the estimated service lives of aircraft, see Note 3 to the financial statements.

TWA also owns a Fairchild C-82 aircraft used as an engine carrier.

177

The Indenture of Chattel Mortgage dated as of May 15, 1957, securing the bank and institutional loans referred to under PURPOSE OF ISSUE and LONG TERM DEBT, contains restrictions substantially identical to those summarized above.

LONG TERM DEBT

Bonds

At May 1, 1957, $10,000,000 of 3¼% Equipment Mortgage Sinking Fund Bonds due December 1, 1969, were outstanding. Semi-annual sinking fund payments, sufficient to retire $1,500,000 principal amount of the bonds, are payable June 1 and December 1 in each year from June 1, 1957, through June 1, 1969. Contingent sinking fund payments are payable each June 1st from 1957 through 1969 in an amount equal to one-half of the consolidated net income for the preceding calendar year in excess of $3,000,000, but no such contingent sinking fund payment shall exceed $2,000,000.

Bank and Institutional Loans

By a loan agreement dated as of May 15, 1957, a group of banks have agreed to lend TWA an aggregate of $35,000,000 to be secured by the 1049G and 1649A aircraft and related engines being purchased from Hughes. $10,000,000 of these loans, with interest at the rate of 5% per annum, will be payable December 1, 1957, and the remaining $25,000,000, with interest at the rate of 5¼% per annum, will be payable in 36 equal monthly instalments beginning January 1, 1958. TWA will pay a commitment fee at the rate of ½ of 1% per annum on the unused portion of the $25,000,000 credit during the period from August 1, 1957 to December 1, 1957.

The Indenture of Chattel Mortgage dated as of May 15, 1957, securing such bank loans, provides for the securing, equally and ratably with the bank loans, of up to $25,000,000 of additional institutional loans. TWA has initiated discussions regarding such loans, but the amount and terms thereof cannot presently be forecast.

For a description of conditional sale contracts covering the 1049G and 1649A aircraft, and related spare parts and engines being purchased from Hughes, see RELATIONS WITH HUGHES TOOL COMPANY.

DIRECTORS AND EXECUTIVE OFFICERS

Name	Office
Fred W. Ayers	Director
Palmer Bradley*	Director
Carter L. Burgess*	Director, President
George H. Clay	Director, Vice President—Administrative Services
E. O. Cocke	Director, Senior Vice President—Sales
John A. Collings*	Director
Noah Dietrich*	Director
Arthur Eisenhower	Director
Oscar Holcombe	Director
A. V. Leslie	Director, Senior Vice President—Finance and Treasurer
Sidney Maestre	Director
M. E. Montrose	Director
Warren Lee Pierson*	Director, Chairman of the Board of Directors
C. H. Price	Director
Harry E. Rogers*	Director
Ben-Fleming Sessel	Director
A. D. Simpson	Director
T. A. Slack	Director
Loyd Wright	Director

TWA Ex. 223, page 1
(Pan American Prospectus, 7/3/45-Supplement, 7/24/45)

TWA 223

Pan American Airways Corporation

Supplement to Prospectus dated July 3, 1945

Of the 2,043,261 Units offered for subscription by holders of transferable Subscription Warrants ... among stockholders as stated in this Prospectus, 1,932,619 Units were subscribed for by ... holders prior to the expiration on July 23, 1945 of such Warrants, leaving a total of 110,642 ... to be purchased from the Corporation by the several Underwriters at $21.50 per Unit pursuant ... Underwriting Agreement referred to in this Prospectus under the heading "Underwriting". Such ... subscribed for are to be so purchased by the several Underwriters on July 26, 1945 (the ... Date).

The Corporation is advised that the representatives of the Underwriters have determined not ... make a general public offering on behalf of the several Underwriters of the Units (or shares of ... or Warrants comprised therein) to be purchased from the Corporation by the several Under... ; that the 110,642 shares of capital stock and Stock Purchase Warrants for a corresponding ... of shares comprised within said Units are to be delivered to the respective Underwriters pur... the same from the Corporation; and that, accordingly, the several Underwriters may sell their ... shares of stock and Stock Purchase Warrants at such times and at such price or prices as ..., respectively, may determine. To the extent that any Underwriter sells Units purchased by it (*i. e.*, ... of stock and a Stock Purchase Warrant for one share) at a price in excess of $21.50, such ... will realize a profit which will be in addition to its share of the underwriting discounts and ... (aggregating $1,532,445.75) referred to in this Prospectus. On July 23, 1945, the reported ... sale price of capital stock of the Corporation on the New York Stock Exchange was $17.25 per ... and the reported closing sale price of Stock Purchase Warrants on the New York Curb Exchange ... $5.375 per warrant for one share, or a total of $22.625 per Unit. If the shares of stock and ... Purchase Warrants comprised within the 110,642 Units to be purchased by the several Under... were sold at the above-mentioned closing prices, the Underwriters would receive additional ... of $1.125 per Unit or a total of $124,472.25.

... 24, 1945.

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TWA Ex. 223, page 2
(Pan American Prospectus, 7/3/45-Supplement, 7/24/45)

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HARRIMAN RIPLEY & CO. INCORPORATED

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Pan American Airways Corporation

Capital Stock, par value $2.50 per share
and
Subscription Warrants and Stock Purchase Warrants Relating Thereto

THESE SECURITIES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION.

Pan American Airways Corporation has registered the securities by filing certain information with the Commission. The Commission has not passed on the merits of any securities registered with it.

IT IS A CRIMINAL OFFENSE TO REPRESENT THAT THE COMMISSION HAS APPROVED THESE SECURITIES OR HAS MADE ANY FINDINGS THAT THE STATEMENTS IN THIS PROSPECTUS OR IN THE REGISTRATION STATEMENT ARE CORRECT.

Prospectus filed under Rule 430 of the Securities Act of 1933

2,046,322 shares of Capital Stock of the Corporation, par value $2.50 per share, are being originally offered to stockholders of the Corporation, through the distribution of transferable Subscription Warrants of the Corporation to stockholders of record at the close of business on July 2, 1945. The Subscription Warrants entitle the holders to subscribe during the subscription period ending at 3 P. M., Eastern War Time, on July 23, 1945, *when unexercised Subscription Warrants will expire and become void*, at the offering price of $21.50 per Unit, for a total of 2,043,261 Units, each Unit consisting of one share of Capital Stock of the Corporation, par value $2.50 per share, and of the right, evidenced by a transferable Stock Purchase Warrant, to purchase, for $18 per share, one additional share of Capital Stock of the Corporation, at or before 3 P. M., New York Time, on December 30, 1947, when unexercised Stock Purchase Warrants will expire and become void. Such Subscription Warrants are being distributed to such stockholders of record at the rate of one-half Unit for each share of Capital Stock of the Corporation held of record at such record time. 2,043,261 shares of Capital Stock of the Corporation (included in the 4,086,522 offered to stockholders) are issuable upon the exercise of Stock Purchase Warrants included in the Units referred to above.

No fractional shares of stock or fractional Stock Purchase Warrants will be issued, but Subscription Warrants for fractional Units are being issued as required, which, when appropriately combined, entitle the holders to subscribe for whole Units during the subscription period ending July 23, 1945.

Subject to the terms and conditions of the Underwriting Agreement, a summary of certain provisions of which appears herein under the heading "Underwriting", the several Underwriters named under said heading have agreed to purchase from the Corporation, at $21.50 per Unit, such of the 2,043,261 Units as are not subscribed for by holders of Subscription Warrants, and, as compensation to the several Underwriters for such commitments, the Corporation has agreed to pay them 7½¢ per Unit in respect of each of such 2,043,261 Units (whether or not subscribed for upon the exercise of Subscription Warrants), or a total of $1,532,445.75.

	Total	Per Unit
Net cash proceeds to the Corporation	$42,397,665.75	$20.75
Underwriting discounts and commissions*	1,532,445.75	.75
Price to holders of Subscription Warrants	43,930,111.50	21.50

* Not including the value of the option (the cash value of which cannot be computed), more fully described herein under the heading "Cancellation of Prior Underwriting Agreement", exercised by Atlas Corporation on June 30, 1945, under which the Corporation issued and sold to Atlas Corporation 100,000 shares of Capital Stock of the Corporation at the option price of $16 per share, or a total of $1,600,000. On June 30, 1945 the reported closing sale price of the stock on the New York Stock Exchange was $28 per share. Subscription Warrants for 50,000 Units are being distributed to Atlas Corporation, as the holder of said 100,000 shares.

In respect of sales by the Underwriters of shares of Capital Stock and/or Stock Purchase Warrants comprised within Units, or of the Units, purchased by the Underwriters from the Corporation, the Underwriters may realize profits or losses, independent of the commissions stated above, such profits or losses being dependent upon the price or prices at which any such securities shall be actually sold by the several Underwriters. Prior to the issue of this Prospectus, trading in Capital Stock of the Corporation "ex-Subscription Warrants", or in Subscription Warrants, Stock Purchase Warrants or Units, has not been permitted, and there are not, therefore, any market quotations applicable thereto. The reported high and low sales prices of the Corporation's stock on the New York Stock Exchange during the month of June, 1945, were $28.50 and $20.50, respectively, and approximately 371,900 shares of such stock were traded on such Exchange. On June 30, 1945 the reported closing sale price of such stock on the New York Stock Exchange was $28 per share. The values included in such prices attributable to the Subscription Warrants to be issued to stockholders cannot be stated (the holder of each share receiving the right to subscribe for ½ Unit at $21.50 per Unit). Upon sales by Underwriters of Units (or shares of stock and Warrants comprised therein), if made at a price in excess of $21.50 per Unit, the profit thereon, in addition to the above-mentioned underwriting commissions, would be the amount of such excess multiplied by the number of Units which the Underwriters may be required to purchase. The foregoing recital of prices is not to be construed as a representation as to the future value or market price of stock of the Corporation. The net cash proceeds to the Corporation set forth above is before deducting cash expenses of the Corporation in connection with the offering (in addition to underwriting commissions), estimated at approximately $340,000. Reference is made to the indemnification agreements between the Corporation and the Underwriters enumerated herein under the heading "Underwriting".

The foregoing tabulation does not reflect the proceeds which may be realized by the Corporation from the exercise of the Stock Purchase Warrants, all of which are exercisable at the price of $18 per share. Based on the assumption that all the Stock Purchase Warrants are exercised, the Corporation would receive an aggregate of $36,778,698, making the total proceeds which would be received by the Corporation from the sale of the securities covered by the Registration Statement $80,708,809.50, before deduction of underwriting discounts and commissions, or $79,176,363.75 after making such deduction. However, the extent to which the Stock Purchase Warrants will be exercised cannot be predicted.

The Underwriters have not determined at the date hereof whether they would make one or more public or other offerings of the Units or of the shares of Capital Stock and/or Stock Purchase Warrants comprised in the Units, either prior or subsequent to the expiration of the Subscription Warrants. The price or prices and terms and conditions of any such offering or offerings will be determined as described herein under the heading "Underwriting" and will be set forth in an amendment to the Registration Statement. The Corporation has agreed to file such amendments or supplements as may be appropriate.

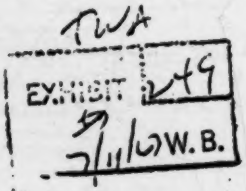
A complete list of the principal Underwriters is set forth herein under the heading "Underwriting". Among such principal Underwriters are:

KUHN, LOEB & CO. — **BLYTH & CO., INC.**

LAZARD FRÈRES & CO. — **LADENBURG, THALMANN & CO.**

The date of issue of this Prospectus is July 3, 1945.

TWA Ex. 249, page 1
(American Airlines Prospectus, 6/11/46-Supplement, 6/24/46)



AMERICAN AIRLINES, INC.

Supplement to Prospectus Dated June 11, 1946

The Prospectus, dated June 11, 1946, of American Airlines, Inc. is amended and supplemented by adding thereto the following:

The Company has been advised by the Representatives of the several Underwriters referred to under the heading "Underwriting" in the Prospectus that the public offering price with respect to the 3% Sinking Fund Debentures, due June 1, 1966, has been changed, effective June 24, 1946, from 100% of the principal amount thereof plus accrued interest from June 1, 1946 to 96.35% of the principal amount thereof plus accrued interest from June 1, 1946; that such Representatives have been authorized by the Underwriters of the Debentures to extend the Agreement among Underwriters with respect to the Debentures for such period not to exceed twenty days from June 25, 1946 as the Representatives may determine; and that the Representatives have been authorized by such Underwriters to offer, sell and deliver for the account of such Underwriters all or any part of their unsold Debentures at such changed offering price to such person or persons as the Representatives shall select. The Company has been advised by such Representatives that as of the close of business on June 21, 1946 approximately $23,300,000 principal amount of Debentures remained unsold.

Dated, June 24, 1946.

AX-892

MA Ex. 249, page 2

STATE (American Airlines Prospectus, 6/11/46-Supplement, 6/24/46)

OCT 22 1946

PROSPECTUS

HARRIMAN RIPLEY & CO. INCORPORATED

63 WALL ST.

American Airlines, Inc.

$40,000,000 3% Sinking Fund Debentures, due June 1, 1966

400,000 Shares 3½% Cumulative Convertible Preferred Stock

(par value $100 per share)

INCLUDING RIDERS CONTAINING SUPPLEMENTAL INFORMATION ATTACHED TO AND MADE A PART PAGES: Cover, 2, 3,

THESE SECURITIES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION

American Airlines, Inc. has registered the securities by filing certain information with the Commission. The Commission has not passed on the merits of any securities registered with it.

IT IS A CRIMINAL OFFENSE TO REPRESENT THAT THE COMMISSION HAS APPROVED THESE SECURITIES OR HAS MADE ANY FINDING THAT THE STATEMENTS IN THIS PROSPECTUS OR IN THE REGISTRATION STATEMENT ARE CORRECT.

		Price to Public*	Underwriting Discounts and Commissions**	Net Cash Proceeds to the Company*†
Per Unit	Debentures	100%	1¼%	98¾%
	Preferred Stock	$102	$2.00	$100
Total	Debentures	$40,000,000	$500,000	$39,500,000
	Preferred Stock	$40,800,000	$800,000	$40,000,000

* Plus accrued interest on the Debentures and accrued dividends on the Preferred Stock, from June 1, 1946 to the date of delivery.

** Reference is made to "Underwriting" herein for information regarding indemnification agreements between the Company and the Underwriters.

† Without allowing for expenses payable by the Company.

The Debentures and Preferred Stock are offered by the Underwriters subject to the terms of offering set forth herein. It is expected that the Debentures and the certificates for the Preferred Stock, in temporary form, will be ready for delivery on or about June 14, 1946 at the office of Kidder, Peabody & Co., 17 Wall Street, New York 5, New York, against payment therefor in New York funds.

A complete list of Underwriters, including those named below, appears under the caption "Underwriting" in this Prospectus.

Kidder, Peabody & Co. — Lehman Brothers

Glore, Forgan & Co. — Emanuel, Deetjen & Co.

This Prospectus does not constitute an offer by any Underwriter to sell securities in any state to any person to whom it is unlawful for such Underwriter to make such offer in such state.

The date of issue of this Prospectus is June 11, 1946.

TWA Ex. 257, page 1
(TWA-Toolco Lease Agreements-Boeing Jets)

TWA 257

TWA v. Hughes, et al.

INDEX

Document No.	Description
1	Lease Agreement between Hughes Tool Company ("Lessor") and Trans World Airlines, Inc. ("Lessee"), dated January 30, 1959 relating to one Boeing Model 707-131 aircraft bearing FAA No. N 731-TW, including four Pratt & Whitney JT 3C-6 Engines.
2	Same, dated March 17, 1959 relating to 707-131 aircraft, FAA No. N 732-TW.
3	Same, dated March 30, 1959 relating to 707-131 aircraft, FAA No. N 733-TW.
4	Same, dated March 30, 1959 relating to 707-131 aircraft, FAA No. N 734-TW.
5	Same, dated April 18, 1959 relating to 707-131 aircraft, FAA No. N 735-TW.
6	Same, dated April 29, 1959 relating to 707-131 aircraft, FAA No. N 736-TW.
7	Same, dated May 10, 1959 relating to 707-131 aircraft, FAA No. N 737-TW.
8	Same, dated May 13, 1959 relating to 707-131 aircraft, FAA No. N 738-TW.
9	Same, dated May 28, 1959 relating to 707-131 aircraft, FAA No. N 739-TW.
10	Same, dated May 24, 1959 relating to 707-131 aircraft, FAA No. N 740-TW.
11	Same, dated June 13, 1959 relating to 707-131 aircraft, FAA No. N 741-TW.

Document No.	Description
12	Same, dated July 1, 1959 relating to 707-131 aircraft, FAA No. N 742-TW.
13	Same, dated July 10, 1959 relating to 707-131 aircraft, FAA No. N 743-TW.
14	Same, dated July 14, 1959 relating to 707-131 aircraft, FAA No. N 744-TW.
15	Same, dated August 1, 1959 relating to 707-131 aircraft, FAA No. N 745-TW.
16	Amendment of Lease Agreements relating to aircraft Nos. N 732-TW through N 741-TW (docs 2-11, this Index) to extend date of latest termination from June 30, 1959 to September 30, 1959; dated June 30, 1959
17	Amendment of Lease Agreements relating to aircraft Nos. N 732-TW through N 745-TW (docs 2-15, this Index) to extend latest termination date beyond September 30, 1959 and until terminated by either party upon twenty-four hours written notice by either party; dated September 28, 1959.
18	Lease Agreement between Hughes Tool Company ("Lessor") and Trans World Airlines, Inc. ("Lessee"), dated November 8, 1959 relating to one Boeing Model 707-331 aircraft bearing FAA No. N 761-TW, including four Pratt & Whitney JT 4A-3 Engines.
19	Same, dated November 6, 1959 relating to 707-331 aircraft, FAA No. N 762-TW.
20	Same, dated November 17, 1959 relating to 707-331 aircraft, FAA No. N 763-TW.
21	Same, dated December 17, 1959 relating to 707-331 aircraft, FAA No. N 764-TW, as amended.

W. G. R.

THIS AGREEMENT entered into as of the 30th day of January 1959 by and between Hughes Tool Company, a Delaware corporation ("Lessor") and Trans World Airlines, Inc., a Delaware corporation ("Lessee"):

WITNESSETH:

1.

Lessor hereby agrees to lease to Lessee and Lessee hereby agrees to hire and take from Lessor, subject to the terms and conditions herein provided, one Boeing Model 707-131 aircraft bearing FAA No. N731-TW (Manufacturer's Serial No. 17656), including four Pratt and Whitney JT3C-6 Engines (Serial Nos. SNP 629419B, SNP 629201B, SNP 629202B, and SNP 629200B), herein sometimes referred to as "the Aircraft."

2.

The lease of the Aircraft shall commence on delivery of the Aircraft to Lessee and shall continue from day-to-day until terminated by either of the parties. The lease shall terminate upon twenty-four hour written notice to such effect from one party to the other. The Aircraft shall be delivered to Lessee hereunder at Kansas City, Missouri, on January 30, 1959 or on the delivery of the Aircraft to Lessor by Boeing Airplane Company, whichever is later.

3.

(a) At the time of commencement of this lease the Aircraft shall have a current provisional Certificate of Airworthiness issued under Special Civil Air Regulation No. 425, adopted by the Civil Aeronautics Board on June 20, 1956, permitting crew training, service testing and simulated carrier operations but not permitting carriage of passengers for hire. Lessee agrees to accept the Aircraft in its present

condition and Lessor makes no warranties or representations whatsoever as to condition of the Aircraft, and none shall be implied in law.

Such warranties and guarantees from manufacturers and suppliers of the Aircraft and its equipment as can be effectively assigned for the term of this lease are hereby assigned by Lessor to Lessee for the term of this lease to the extent of Lessee's interest accruing during the term of such lease.

(b) Upon the termination of this lease, Lessee agrees to return the Aircraft to Lessor (at Mid-Continent International Airport, Kansas City, Missouri, or such other place as may be mutually agreed) in the same condition and equipped with the same equipment as it was at the commencement of the lease, except for reasonable wear and tear from ordinary use.

4.

During the term of the lease Lessee may at its own expense remove from the Aircraft such items of equipment, and may install on the Aircraft such additional items of equipment, as Lessee may consider reasonably necessary to fit such Aircraft for use by Lessee; provided, however, that no such removal or installation which shall cause permanent change in the structure of the Aircraft shall be made without the prior written consent of Lessor unless such removal or installation is made pursuant to a mandatory FAA requirement. Such items as shall be so removed may be either retained in the custody of Lessee, or returned to Lessor, but in either event they shall be reinstalled on the Aircraft prior to the return of the Aircraft to Lessor. Items of non-mandatory nature that shall have been installed in the Aircraft shall be removed prior to the return of the Aircraft to Lessor.

5.

Lessee shall perform all necessary maintenance, overhaul and servicing on the Aircraft during the term of the lease in accordance with the requirements of the Federal Aviation Agency.

6.

If, during the term of the lease of Aircraft pursuant to this agreement, the Federal Aviation Agency or any other governmental agency having jurisdiction shall make mandatory the installation, removal or modification (other than mere inspection) of items on the Aircraft, then compliance shall be effected promptly at Lessor's expense.

7.

Lessee shall be liable for any loss of, or damage to, any Aircraft while leased from Lessor hereunder. During all times that the Aircraft is leased hereunder, Lessee shall, at its own cost and expense, keep the Aircraft, insured against loss or damage from crash, fire, wind storm, collision, strike, riots, insurrection, civil commotion or other accident or casualty (except war risk and engine ingestion) with Lessor named as a co-insured and shall furnish Lessor with a certificate of insurance therefor. The amount of such insurance shall not be less than $4,700,000 per Aircraft, with flight deductible and ground deductible clauses substantially equivalent to those currently in force in Lessee's other insurance policies. In the event of damage to the Aircraft, during the term of the lease, from a risk required to be covered by such insurance, Lessee will repair the damage at its own expense. Upon complying with the foregoing provision, Lessee shall be entitled to retain (or, in the case of receipt by Lessor, to receive from Lessor) all proceeds of insurance with respect to such damage. In the event the Aircraft is lost, destroyed or damaged beyond

repair, Lessee will pay to Lessor, as their interests may appear, for such Aircraft the sum of $4,700,000 (U.S. currency), less any amounts that might have been paid to and retained by Lessor as proceeds from the insurance, which shall constitute payment for all right, title and interest of Lessor in the Aircraft which shall thereupon pass to Lessee. The policies providing the insurance required by this agreement shall include customary provisions that Lessor shall not be responsible for the representations and warranties of Lessee and that Lessor shall receive notice prior to cancellation or expiration (unless the policy is being renewed) of any policy.

8.

Lessee agrees to defend, indemnify and hold harmless Lessor from and against all losses, including cost and expenses by reason of claims for injury or death of persons and loss or damage to property arising out of or in any manner connected with possession, use or operation by Lessee of the Aircraft leased hereunder during the term of such lease. During such term the Lessee shall keep in force and effect liability insurance in the amounts recommended by Lessee's Senior Vice-President-Finance.

9.

Lessee agrees that no aircraft leased pursuant hereto will be used during the term of the lease in any manner which shall violate any law or regulation of any government or governmental agency having jurisdiction and that any fine, penalty or forfeiture resulting from any such violation shall be the sole responsibility of Lessee.

10.

(a) As rent for the Aircraft leased hereunder Lessee shall pay to Lessor the sum of $2,500.00 for each full day during the term of the lease. The rental shall be paid on the last day of each month.

(b) Lessee shall also pay to Lessor in respect of each of the engines on the Aircraft $31.00 per hour for each hour since the last overhaul on such engine at the time returned to Lessor on the termination of the lease less the number of hours since manufacture or overhaul on such engine on the delivery of the Aircraft to Lessee.

If the hours since last overhaul on any engine at the time it is returned to Lessor on termination of the lease are less than the number of hours since manufacture or overhaul on such engine on delivery of the Aircraft to Lessee, Lessor shall pay to Lessee $31.00 for each hour of difference between the two figures.

Settlement under this subparagraph (b) shall be made within 15 days after the end of the term of the lease.

11.

Lessee shall have no right to consent to any lien or liens on the Aircraft. Any liens incurred by Lessee shall be discharged at the cost and expense of Lessee, who shall indemnify and save Lessor harmless against any such lien or liens. Lessee shall pay all operating taxes and licenses applicable to the Aircraft or the operation thereof, and also shall pay all property taxes assessed against Lessee or Lessor with respect to the Aircraft by any state, county, or other political subdivision to which Lessor would not ordinarily pay property taxes, except for the use of the Aircraft by Lessee hereunder. Lessee also shall pay any and all

6.

state, federal, county and local sales and use taxes assessed against either Lessee or Lessor resulting from the lease or use hereunder of the Aircraft.

12.

Notwithstanding any of the above provisions it is further agreed that

(a) This lease agreement is entered into subject to approval of the Civil Aeronautics Board and until an order has been entered by the Civil Aeronautics Board permitting the transaction covered by this agreement no rental shall be paid hereunder;

(b) This lease is subject to the necessary consents of the holders of obligations issued by Trans World Airlines, Inc. under its outstanding indentures, chattel mortgages and loan agreements. In the absence of such consents no rental shall be paid hereunder.

IN WITNESS WHEREOF, each of the parties hereto has caused this agreement to be executed in its name and in its behalf by its officer or agent thereunto duly authorized.

TRANS WORLD AIRLINES, INC.

By A W Redlich

HUGHES TOOL COMPANY

By Raymond A Cook

Raymond Cook as Agent.

1162

CHRONOLOGICAL Contract No. ID-138

PURCHASE AGREEMENT

Lockheed Constellation

THIS AGREEMENT entered into in duplicate as of the 23rd day of December, 1954, by and between LOCKHEED AIRCRAFT CORPORATION, a California corporation (hereinafter sometimes called "Seller"), with an office at Burbank, California, and HUGHES TOOL COMPANY, a Delaware corporation (hereinafter sometimes called "Buyer"), with its principal place of business at Houston, Texas. In consideration of the mutual covenants herein contained, the parties hereto agree as follows:

ARTICLE 1 - NUMBER AND DESCRIPTION OF AIRPLANES

(a) Seller shall sell and Buyer shall purchase on the terms and conditions hereinafter set forth twenty-five Model 1049A-01-120 airplanes of the Lockheed Constellation type (hereinafter referred to as the "Airplanes") manufactured in accordance with Lockheed Report No. 1920-1, dated December 17, 1954, revised December 22, 1954, (which Report, hereinafter referred to as the "Specification", is attached hereto, made a part hereof and marked "Appendix 1"). In the event of conflict or inconsistency between any provision of the Specification and any other provision of this agreement, the latter provision shall prevail.

ARTICLE 2 - CHANGE ORDERS

(a) The terms and conditions of this agreement, including the Specification, may be amended by Change Orders signed by persons respectively duly authorized by Buyer and Seller.

(b) Seller shall make such reasonable changes in the Specification prior to and during manufacture and in such of the Airplanes, during their manufacture and assembly, as Buyer may desire, and appropriate Change Orders shall be mutually executed and delivered by Buyer and Seller setting forth such changes, provided Buyer accepts (by appropriate provisions in said Change Orders) all, if any, effects which are reasonably occasioned by such changes upon the design, performance, weight, time of delivery and/or the basic price of the affected Airplanes. If credits to the basic price of any Airplane result from any such change, Buyer shall have the benefit thereof.

(c) For the purpose of expediting the work hereunder the parties may, prior to, and pending, the execution of a formal Change Order as herein prescribed, amend the terms and conditions of this agreement, including the Specification, by an exchange of telegrams or letters authorizing any change and covering the subject matter thereof, including the effect thereof on basic

price and generally, to the extent available, the effect thereof, if any, on the design, performance, weight and time of delivery of the affected Airplanes, which exchange of telegrams or letters shall refer to this paragraph (c) of this ARTICLE 2 and shall be signed by persons duly authorized by Buyer and Seller. Any such telegraphic or letter amendment shall, as soon as reasonably possible, be reflected in an appropriate Change Order which shall set forth in detail the effect, if any, on the design, performance, weight, time of delivery and/or the basic price of the affected Airplanes, it being agreed that such Change Order shall supersede such telegraphic or letter amendment. Within forty-five days after any such telegraphic or letter amendment Seller shall submit to Buyer the Change Order to cover such amendment to which shall be attached appropriate revised Specification page or pages, except that revised pages showing weight and performance changes need not be submitted until the final specification is made.

(d) Where the Specification provides for the approval of Buyer of the use of materials, methods, processes, equipment or designs, Seller shall give to Buyer's Representative a written notice together with such information with respect to any such proposed item in such detail as shall reasonably permit the evaluation thereof by Buyer. Buyer shall, within ten (10) business days from the date of such notice, notify Seller of Buyer's approval or disapproval, and in the event Seller is not notified of Buyer's disapproval within such period, Seller's proposal shall conclusively be deemed to have been approved by Buyer. In the event Buyer shall notify Seller, within such period, of its disapproval of such proposed item, the notice of such disapproval shall be accompanied by Buyer's counter-proposal in reasonable detail. If such counter-proposal is, in Seller's reasonable and good faith opinion, feasible and practicable, Seller shall as soon as practicable notify Buyer's Representative of the effect thereof, if any, on design, time of delivery of the affected Airplanes, basic price and guaranteed weight and performance. Unless, within five (5) business days from the date Seller so notifies Buyer, Buyer shall notify Seller that it does not authorize Seller to proceed on the basis of such counter-proposal, Seller shall so proceed and shall, as soon as reasonably possible, submit to Buyer an appropriate Change Order in the premises and Buyer shall promptly execute and deliver the same. In the event that such counter-proposal is not, in Seller's reasonable and good faith opinion, feasible and practicable, or in the event that Buyer shall notify Seller within said period of five (5) business days that it does not authorize Seller to so proceed, then Seller may proceed with respect to such item in accordance with Seller's original proposal, with due regard to Buyer's desires insofar as Seller deems practicable in the light of its contractual obligations.

0164

Contract No. LD-138

ARTICLE 3 - DELIVERY

(a) Each Airplane shall be delivered to Buyer in good operating condition at Burbank, California, on or as soon as practicable before the date specified in the following schedules

Airplane	Date	Airplane	Date
1st	January 31, 1957	14th	June 30, 1957
2nd	February 28, 1957	15th	June 30, 1957
3rd	February 28, 1957	16th	June 30, 1957
4th	March 31, 1957	17th	June 30, 1957
5th	March 31, 1957	18th	July 31, 1957
6th	April 30, 1957	19th	July 31, 1957
7th	April 30, 1957	20th	July 31, 1957
8th	April 30, 1957	21st	July 31, 1957
9th	May 31, 1957	22nd	August 31, 1957
10th	May 31, 1957	23rd	August 31, 1957
11th	May 31, 1957	24th	August 31, 1957
12th	May 31, 1957	25th	August 31, 1957
13th	May 31, 1957		

(b) If seasonably requested in writing by Buyer, Seller shall deliver any or all of the Airplanes at a place other than Burbank, California, provided an amendment hereof, reflecting the delay, if any, in delivery and the increase in the purchase price occasioned by delivery at such other place, is executed.

ARTICLE 4 - PRICE

(a) The basic price of each Airplane shall be $2,690,817 increased or decreased as set forth in Change Orders entered into in accordance with ARTICLE 2 hereof.

(b) The purchase price of each Airplane shall be the sum of the basic price and

(i) Increases or decreases in accordance with the instrument attached hereto marked "Exhibit A", entitled "Price Adjustment Conditions" and by this reference made a part hereof; and

(ii) Increases or decreases equal to the aggregate excess over or deficiency under the prices in the instrument attached hereto marked "Exhibit E", entitled "Escalation List" and by this reference made a part hereof, of the cost to Seller of the items set forth in such instrument and incorporated in such Airplane, it being agreed that Seller shall use its best efforts to obtain such items at the most advantageous prices available;

provided, however, that the aggregate increases or decreases occasioned by the operation of the provisions of subparagraph (i) of this paragraph (b) shall not exceed, as to each Airplane, an amount equal to five per cent of the basic price of such Airplane, and provided, further, that no increases occasioned by the operation of the provisions of subparagraphs (i) and (ii) of this paragraph (b) shall be assessed against Buyer as to any Airplane with respect to any periods after the delivery of such Airplane is delayed beyond the time provided for the delivery thereof pursuant to the provisions of ARTICLE 3 (a) hereof as the result of a cause not expressly provided as being or being deemed to be excusable as elsewhere in this agreement provided.

(c) In addition to the purchase price of each Airplane, Buyer shall pay to Seller, upon demand (i) the cost, including without limitation reasonable compensation for the preservation and protection of such Airplane, incurred by Seller by reason of delay in delivery of such Airplane for any period in excess of one week during which delivery is delayed by Buyer's fault or upon its responsibility, and (ii) any tax, other than a tax upon the income of Seller, paid by Seller by virtue of the sale, delivery, storage or transfer of such Airplane or its use by, or any act of, Buyer after delivery. If claim is made against Seller for any such tax, Seller shall immediately notify Buyer. If reasonably requested by Buyer in writing, Seller shall not pay any such tax except under protest after using all reasonable efforts to avoid payment and, if payment be made, shall use all reasonable efforts to obtain a refund thereof. If all or any part of such tax be refunded, Seller shall repay to Buyer so much thereof as Buyer shall have paid. Buyer shall pay to Seller, upon demand, all expenses reasonably incurred by Seller in protesting payment of such tax and in endeavoring to obtain such refund.

(d) Prior to the delivery of each Airplane, Seller shall give to Buyer a notice in writing stating whether or not, and the amount, if any, by which, the price of such Airplane has increased or decreased solely by reason of the operation of the provisions contained in said Exhibit A,

and solely by reason of the operation of the provisions of paragraph (b) (ii) of this ARTICLE, and summaries, in reasonable detail, of the respective factors occasioning such increases or decreases.

(c) The basic price of each Airplane shall be reduced to an amount not in excess of the lowest basic price at which Seller may contract to sell, during the period of twelve months from and after the date of this agreement, any Lockheed Model 1649A Constellation airplanes (which Constellation airplanes are hereinafter in this paragraph (c) sometimes referred to as "subsequent airplanes"), excluding, for the purposes hereof, any and all airplanes sold or contracted to be sold to the Government of the United States or to any foreign government or any branch or department or agency of any thereof (but not excluding airplanes sold or contracted to be sold or delivered to commercial airlines engaged in the carriage of passengers or cargo for hire), after giving appropriate, reasonable and equitable effect in the determination of such lowest basic price to differences, if any, in the respective specifications and in the respective agreements relating to the supplying or furnishing to Seller of items of equipment by the respective purchasers applicable to or for incorporation in, as the case may be, the Airplanes and to or in the subsequent airplanes and after giving appropriate, reasonable and equitable effect in the determination of such lowest basic price to differences between the factors of price escalation set forth in this agreement and those, if any, set forth in the contract or contracts relating to the subsequent airplanes. In the event Seller enters into a contract for the sale of any of the subsequent airplanes on a fixed price basis rather than on the basis of a basic price with escalation, then in giving effect to the intent of this paragraph (c) the final purchase price of each Airplane, for purposes of comparison with such fixed price, shall be deemed to have obtained throughout the term of this agreement prior to the delivery of such Airplane as the fixed price thereof and post-delivery adjustment, if any be required in accordance with such intent, shall be made between Buyer and Seller with respect to the purchase price of such Airplane; provided, however, that in the event the fixed price of any subsequent airplane is one hundred and five per cent (105%) or more of the basic price of the Airplanes, after giving effect to the differences hereinabove mentioned, then for all of the purposes of this paragraph (c) the fixed price of such subsequent airplane and the basic price and the final purchase price of each of the Airplanes shall be deemed to be the same, or in the event such fixed price of any subsequent airplane is less than one hundred and five per cent (105%) of the basic price of any Airplane, then the amount of adjustment to be made with respect to such Airplane, if any be required in accordance with such intent, shall not be greater than the difference between (i) such fixed price and (ii) one hundred and five per cent (105%) of the basic price of such Airplane or the final purchase price of such Airplane, whichever is the lower. As an exception to all of the foregoing, it is expressly understood and agreed that the foregoing

Contract No. LD-133

provisions of this paragraph (c) only relate and are intended to relate only to a contract or contracts entered into within the said period of twelve months with a single purchaser when the number of subsequent airplanes covered by such contract or contracts is twenty-five or less and that none of the airplanes covered by any such contract or contracts shall be deemed to be subsequent airplanes for the purposes of this paragraph (c) in the event such contract with a single purchaser covers, or such contracts with a single purchaser cover an aggregate of, more than twenty-five airplanes.

ARTICLE 5 - PAYMENT

(a) The purchase price of each Airplane shall be paid by Buyer to Seller in installments as provided by letter agreement SL/93053 supplemental to this Contract No. LD-133, executed contemporaneously herewith, and by this reference made a part hereof.

(b) All payments made pursuant to this agreement shall be made in lawful money of the United States of America or by check drawn upon and duly certified by a member bank of the United States Federal Reserve System and payable in such money. All payments made by Buyer to Seller hereunder shall be made, unless otherwise expressly provided, at Seller's office in Burbank, California.

(c) If this agreement is terminated, in whole or as to any Airplane or Airplanes, by Seller under ARTICLE 6 (a) hereof, or by Buyer under ARTICLE 6 (a) hereof under circumstances, relating to the time of termination, which do not permit the retention by Seller of amounts of money on account of such termination, or by Buyer or by Seller under ARTICLE 14 (a) hereof, or by reason of a material default of Seller, then Seller shall forthwith repay to Buyer each installment, theretofore paid by Buyer to Seller, of the purchase price of each Airplane with respect to which such termination is effective. Except as aforesaid, and except as otherwise provided in said letter agreement SL/93053, Seller shall be under no obligation to repay any installment of the purchase price of any Airplane to Buyer.

Contract No. LL-138

ARTICLE 19 - BENEFITS AND ASSIGNMENTS

(a) This agreement shall inure to the benefit of and shall be binding upon each of the parties hereto and their respective successors and assigns, but it may not be voluntarily assigned wholly or in part by either party without the prior written consent of the other party; except that Seller may assign any of its fixed or contingent rights to receive money hereunder and Buyer may assign any of its contingent rights to the Airplanes or any thereof for the purpose of securing any obligation for the repayment of moneys loaned or advanced by any financial institution to finance in whole or in part the purchase of the Airplanes. Notwithstanding the foregoing, Buyer shall have the right to assign this Contract in whole or in part without such consent to Trans World Airlines, Inc., and upon such assignment Trans World Airlines, Inc., shall succeed to such of the rights and obligations of the Buyer hereunder as are so assigned and the Buyer shall cease to have or to subject to such rights or obligations so assigned; provided, that Buyer shall, in the event of the assignment to Trans World Airlines, Inc., of Buyer's payment obligations under ARTICLE 5 (a) hereof, guarantee the due and punctual payment of such obligations by said assignee.

ARTICLE 20 - NOTICES

(a) Any notice or communication pertaining to this agreement shall be deemed to have been duly given by a party hereto if served upon the other or if sent to the other by registered mail or by telegraph. Buyer shall forthwith and may from time to time thereafter, specify by written notice to Seller the address to which notices shall be sent to Buyer. Service of any such notice upon, or the sending thereof to, Buyer's representative shall be deemed to be service of notice upon, or the sending of notice to, Buyer, as the case may be.

(b) The date upon which any such notice or communication is served, or the date upon which it is received by the addressee, shall be deemed to be the date of such notice and the date it is given irrespective of any date appearing therein.

ARTICLE 21 - AMENDMENTS

(a) This agreement may not be varied or amended except by an instrument in writing executed concurrently with or subsequent to the execution of this agreement and signed on behalf of Buyer and of Seller by persons respectively thereunto duly authorized.

ARTICLE 22 - APPLICABLE LAW

(a) This agreement shall be construed and performance thereof shall be determined according to the laws of the State of New York.

ANDREWS, KURTH, CAMPBELL & BRADLEY,
ATTORNEYS
3300 PLOSS GULF BUILDING
HOUSTON 2, TEXAS

September 26, 1955

Re: Contract LD-147 with Lockheed
Aircraft Corporation

Mr. C.M. Price
Hughes Tool Company
5425 Polk Street
Houston, Texas

Dear Mr. Price:

I enclose herewith duplicate copies of the following instruments in connection with the aforementioned contract, each executed by an authorized officer of Lockheed, to-wit:

1. Basic contract dated September 24, 1955.

2. Letter Agreements Nos. 1-10, inclusive, each undated but reciting concurrent execution.

This contract has been approved by Mr. Hughes for execution and has been authorized by the Hughes Tool Company Board of Directors according to its resolution adopted September 15, 1955. For identification, I have initialed in pencil each of the places where you should sign.

When these instruments have been signed, one executed copy of each should be transmitted promptly to Lockheed. Since there is no transmittal letter from Lockheed, it makes no difference to whose attention these are sent; but I would suggest for their convenience that you send the contract to

the attention of Mr. Carl B. Squier.

Mr. John Collings of T.W.A. has asked me to call him by telephone as soon as the contract has been signed by both parties; accordingly I will appreciate your calling me at that time. At your convience I would also appreciate your furnishing us with two photostatic copies of each of these documents.

Yours very truly,

Raymond A Cook

43
Encls.

INDEX

Lockheed Aircraft Corporation Contract Number LD-147

PURCHASE AGREEMENT

Article 1 - Number and Description of Airplanes
Article 2 - Change Orders
Article 3 - Delivery
Article 4 - Price
Article 5 - Payment
Article 6 - Excusable Delay
Article 7 - Warranty
Article 8 - Spare Parts
Article 9 - Technical Data
Article 10 - Pilots Instructions, Flight Tests and Information
Article 11 - Plant Representatives
Article 12 - Certification
Article 13 - Patent Indemnity
Article 14 - Insolvency
Article 15 - Title and Risks
Article 16 - Reproduction
Article 17 - Buyers Representative
Article 18 - Customer Furnished Equipment
Article 19 - Benefits and Assignments
Article 20 - Notices
Article 21 - Amendments
Article 22 - Applicable Law
Article 23 - Contract Number

Exhibit A - Price Adjustment Conditions

Exhibit B - Escalation List

HTC-HOUSTON

Contract No. LD-147

PURCHASE AGREEMENT

Lockheed Constellation

THIS AGREEMENT entered into in duplicate as of the 24th day of September, 1955, by and between LOCKHEED AIRCRAFT CORPORATION, a California corporation (hereinafter sometimes called "Seller"), with an office at Burbank, California, and HUGHES TOOL COMPANY, a Delaware corporation (hereinafter sometimes called "Buyer"), with its principal place of business at Houston, Texas. In consideration of the mutual covenants herein contained, the parties hereto agree as follows:

ARTICLE 1 - NUMBER AND DESCRIPTION OF AIRPLANES

(a) Seller shall sell and Buyer shall purchase on the terms and conditions hereinafter set forth five Model 1049G-82-110 Airplanes of the Lockheed Constellation type, (hereinafter referred to as the "Airplanes"), manufactured in accordance with Lockheed Report No. 7579-18, revised June 7, 1954, as amended by Specification Changes One through Twenty-eight, and as further amended by Constellation Master Changes 730 and 731, dated July 15, 1955, revised September 6, 1955, (which Report, as so amended, hereinafter referred to as the "Specification", is attached hereto, made a part hereof, and marked "Appendix 1"). In the event of conflict or inconsistency between any provision of the Specification and any other provision of this Agreement, the latter provision shall prevail.

ARTICLE 2 - CHANGE ORDERS

(a) The terms and conditions of this Agreement, including the Specification, may be amended by Change Orders signed by persons respectively duly authorized by Buyer and Seller.

(b) Seller shall make such reasonable changes in the Specification prior to and during manufacture and in such of the Airplanes, during their manufacture and assembly, as Buyer may desire, and appropriate Change Orders shall be mutually executed and delivered by Buyer and Seller setting forth such changes, provided Buyer accepts (by appropriate provisions in said Change Orders) all, if any, effects which are reasonably occasioned by such changes upon the design, performance, weight, time of delivery and/or the basic price of the affected Airplanes. If credits to the basic price of any Airplane result from any such change, Buyer shall have the benefit thereof.

(c) For the purpose of expediting the work hereunder the parties may, prior to, and pending, the execution of a formal Change Order as herein prescribed, amend the terms and conditions of this agreement, including the Specification, by an exchange of telegrams or letters authorizing any change

and covering the subject matter thereof, including the effect thereof on basic price and generally, to the extent available, the effect thereof, if any, on the design, performance, weight and time of delivery of the affected Airplanes, which exchange of telegrams or letters shall refer to this paragraph (c) of this ARTICLE 2 and shall be signed by persons duly authorized by Buyer and Seller. Any such telegraphic or letter amendment shall, as soon as reasonably possible, be reflected in an appropriate Change Order which shall set forth in detail the effect, if any, on the design, performance, weight, time of delivery and/or the basic price of the affected Airplanes, it being agreed that such Change Order shall supersede such telegraphic or letter amendment. Within forty-five days after any such telegraphic or letter amendment Seller shall submit to Buyer the Change Order to cover such amendment to which shall be attached appropriate revised Specification page or pages, except that revised pages showing weight and performance changes need not be submitted until the final specification is made.

(d) Where the Specification provides for the approval of Buyer of the use of materials, methods, processes, equipment or designs, Seller shall give to Buyer's Representative a written notice together with such information with respect to any such proposed item in such detail as shall reasonably permit the evaluation thereof by Buyer. Buyer shall, within ten (10) business days from the date of such notice, notify Seller of Buyer's approval or disapproval, and in the event Seller is not notified of Buyer's disapproval within such period, Seller's proposal shall conclusively be deemed to have been approved by Buyer. In the event Buyer shall notify Seller, within such period, of its disapproval of such proposed item, the notice of such disapproval shall be accompanied by Buyer's counter-proposal in reasonable detail. If such counter-proposal is, in Seller's reasonable and good faith opinion, feasible and practicable, Seller shall as soon as practicable notify Buyer's Representative of the effect thereof, if any, on design, times of delivery of the affected Airplanes, basic price and guaranteed weight and performance. Unless, within five (5) business days from the date Seller so notifies Buyer, Buyer shall notify Seller that it does not authorize Seller to proceed on the basis of such counter-proposal, Seller shall so proceed and shall, as soon as reasonably possible, submit to Buyer an appropriate Change Order in the premises and Buyer shall promptly execute and deliver the same. In the event that such counter-proposal is not, in Seller's reasonable and good faith opinion, feasible and practicable, or in the event that Buyer shall notify Seller within said period of five (5) business days that it does not authorize Seller to so proceed, then Seller may proceed with respect to such item in accordance with Seller's original proposal, with due regard to Buyer's desires insofar as Seller deems practicable in the light of its contractual obligations. For purposes of this paragraph (d), Buyer approval secured under Contract No. LD-111 or Contract No. LD-138, in identical application, shall be deemed to be Buyer approval secured pursuant to this paragraph (d).

Contract No. LD-147

0006

ARTICLE 3 - DELIVERY

(a) Each Airplane shall be delivered to Buyer in good operating condition at Burbank, California, on or as soon as practicable before the date specified in the following schedule:

Airplane	Date
1st	June 30, 1956
2nd	June 30, 1956
3rd	July 31, 1956
4th	July 31, 1956
5th	August 31, 1956

(b) If seasonably requested in writing by Buyer, Seller shall deliver any or all of the Airplanes at a place other than Burbank, California, provided an amendment hereof, reflecting the delay, if any, in delivery and the increase in the purchase price occasioned by delivery at such other place, is executed.

48001-TW 6
HTC-HOUSTON

Contract No. LD-147

ARTICLE 4 - PRICE

(a) The basic price of each Airplane shall be $1,929,000 increased or decreased as set forth in Change Orders entered into in accordance with ARTICLE 2 hereof.

(b) The purchase price of each Airplane shall be the sum of the basic price and

(i) Increases or decreases in accordance with the instrument attached hereto marked "Exhibit A", entitled "Price Adjustment Conditions" and by this reference made a part hereof; and

(ii) Increases or decreases equal to the aggregate excess over or deficiency under the prices in the instrument attached hereto marked "Exhibit B", entitled "Escalation List" and by this reference made a part hereof, of the cost to Seller of the items set forth in such instrument and incorporated in such Airplane, it being agreed that Seller shall use its best efforts to obtain such items at the most advantageous prices available;

provided, however, that the aggregate increases or decreases occasioned by the operation of the provisions of subparagraphs (i) and (ii) of this paragraph (b), other than increases and decreases in the prices of engines and of propellers over the unit prices therefor set forth in said Exhibit B, shall not exceed, as to each Airplane, an amount equal to five percent of the basic price of such Airplane, and provided, further, that no increases occasioned by the operation of the provisions of subparagraphs (i) and (ii) of this paragraph (b) shall be assessed against Buyer as to any Airplane with respect to any periods after the delivery of such Airplane is delayed beyond the time provided for the delivery thereof pursuant to the provisions of ARTICLE 3 (a) hereof as the result of a cause not expressly provided as being or being deemed to be excusable as elsewhere in this agreement provided.

(c) In addition to the purchase price of each Airplane, Buyer shall pay to Seller, upon demand (i) the cost, including without limitation reasonable compensation for the preservation and protection of such Airplane, incurred by Seller by reason of delay in delivery of such Airplane for any period in excess of one week during which delivery is delayed by Buyer's fault or upon its responsibility, and (ii) any tax, other than a tax upon the income of Seller, paid by Seller by virtue of the sale, delivery, storage or transfer of such Airplane or its use by, or any act of, Buyer after delivery. If claim is made against Seller for any such tax, Seller shall immediately notify Buyer. If reasonably requested by Buyer in writing, Seller shall not pay any such tax except under protest after using all reasonable efforts to avoid payment and, if payment be made, shall use all reasonable efforts to obtain a refund thereof. If all or any part of such tax be refunded, Seller shall repay to Buyer so much thereof as Buyer shall have paid. Buyer shall pay to Seller, upon demand, all expenses reasonably incurred by Seller in protesting payment of such tax and in endeavoring to obtain such refund.

(d) Prior to the delivery of each Airplane, Seller shall give to Buyer a notice in writing stating whether or not, and the amount, if any, by which, the price of such Airplane has increased or decreased solely by reason of the operation of the provisions contained in said Exhibit A, and solely by reason of the operation of the provisions of paragraph (b) (ii) of this ARTICLE, and summaries, in reasonable detail, of the respective factors occasioning such increases or decreases.

Contract No. LD-147

0009

ARTICLE 5 - PAYMENT

(a) The purchase price of each Airplane shall be paid by Buyer to Seller in two installments as follows:

(i) A first installment in an amount equal to twenty-five percent (25%) of the basic price set forth in ARTICLE 4 (a) hereof, shall be paid by Buyer to Seller within five (5) days following the execution and delivery of this Agreement.

(ii) A second installment in an amount equal to the balance of the purchase price, being the purchase price of such Airplane, as the same may be finally determined, less the amount theretofore paid thereon, shall be paid by Buyer to Seller upon the delivery of such Airplane.

(b) All payments made pursuant to this agreement shall be made in lawful money of the United States of America or by check drawn upon and duly certified by a member bank of the United States Federal Reserve System and payable in such money. All payments made by Buyer to Seller hereunder shall be made, unless otherwise expressly provided, at Seller's office in Burbank, California.

(c) If this Agreement is terminated, in whole or as to any Airplane or Airplanes, by Seller under ARTICLE 6 (a) hereof, or by Buyer under ARTICLE 6 (a) hereof under circumstances, relating to the time of termination, which do not permit the retention by Seller of amounts of money on account of such termination, or by Buyer or by Seller under ARTICLE 14 (a) hereof, or by reason of a material default of Seller, then Seller shall forthwith repay to Buyer each installment, theretofore paid by Buyer to Seller, of the purchase price of each Airplane with respect to which such termination is effective. Except as aforesaid, and as might result from the application of ARTICLE 6 (b) hereof, Seller shall be under no obligation to repay any installment of the purchase price of any Airplane to Buyer.

shall do so if the parties agree, prior to the time the manufacture and assembly of such Airplane is otherwise completed, on the extent of the delay in delivery and the amount and method of payment of Seller's charges for such incorporation. If Buyer fails to deliver an item of customer furnished equipment to Seller prior to the completion of the manufacture and assembly of the Airplane in which such item is scheduled for incorporation, then, notwithstanding any other provision of this Agreement, Seller shall tender delivery of such Airplane to Buyer, and Buyer shall accept delivery of such Airplane, without such item incorporated therein. In the event of the delivery of an Airplane without an item of customer furnished equipment incorporated therein, an equitable adjustment of the purchase price of such Airplane shall be made, giving effect to the nonincorporation therein by Seller of such item. If Seller's production requirements for an item of customer furnished equipment are deferred, Seller shall notify Buyer of the revised requirement date for the delivery of such item. Any item of customer furnished equipment, delivered by Buyer to Seller and not incorporated in an Airplane, shall be redelivered to Buyer by Seller at Burbank, California. In the event that an item of customer furnished equipment incorporated in an Airplane does not, after such incorporation, operate satisfactorily for any reason not occasioned by the fault or negligence of Seller or by the manner of incorporation thereof by Seller in such Airplane, then Buyer shall pay to Seller, upon demand, Seller's reasonable charges for removing such item of equipment and the reincorporation in such Airplane of another or the repaired item of equipment in lieu thereof, and for effecting the necessary ground and flight tests of such Airplane resulting from such reincorporation, and the time for the delivery of such Airplane shall be extended for the period necessary to accomplish such removal, reincorporation and testing. In the event of any termination of this Agreement as to undelivered Airplanes by Buyer or by Seller pursuant to ARTICLE 6 or ARTICLE 14 hereof, Buyer shall, at Seller's written request given at any time within sixty days from and after the date of such termination, sell to Seller all customer furnished equipment relating to such undelivered Airplanes at a price not exceeding Buyer's cost therefor plus Buyer's handling charges incurred in connection with the original delivery thereof as customer furnished equipment to Seller. If Seller does not make such request within said period, then promptly after the expiration of such period Seller shall deliver all such customer furnished equipment to Buyer at Lockheed Air Terminal, Burbank, California.

ARTICLE 19 - BENEFITS AND ASSIGNMENTS

(a) This Agreement shall inure to the benefit of and shall be binding upon each of the parties hereto and their respective successors and assigns, but it may not be voluntarily assigned wholly or in part by either party without the prior written consent of the other party; except that Seller may assign any of its fixed or contingent rights to receive money hereunder and Buyer may assign any of its contingent rights to the Airplanes or any thereof for the purpose of securing any obligation for the repayment of monies loaned or advanced by any financial institution to finance in whole or in part the purchase of the Airplanes. Notwithstanding the foregoing, Buyer shall have the right to assign this Contract in whole or in part without such consent to Trans World Airlines, Inc., and upon such assignment Trans World Airlines, Inc., shall succeed to such of the rights and obligations of the Buyer hereunder as are so assigned and the Buyer shall cease

to have or be subject to such rights or obligations so assigned; provided, that Buyer shall, in the event of the assignment to Trans World Airlines, Inc., of Buyer's payment obligations under ARTICLE 5 (a) hereof, guarantee the due and punctual payment of such obligations by said assignee.

ARTICLE 20 - NOTICES

(a) Any notice or communication pertaining to this Agreement shall be deemed to have been duly given by a party hereto if served upon the other or if sent to the other by registered mail or by telegraph. Buyer shall forthwith and may from time to time thereafter, specify by written notice to Seller the address to which notices shall be sent to Buyer. Service of any such notice upon, or the sending thereof to, Buyer's Representative shall be deemed to be service of notice upon, or the sending of notice to, Buyer, as the case may be.

(b) The date upon which any such notice or communication is served, or the date upon which it is received by the addressee, shall be deemed to be the date of such notice and the date it is given irrespective of any date appearing therein.

ARTICLE 21 - AMENDMENTS

(a) This Agreement may not be varied or amended except by an instrument in writing executed concurrently with or subsequent to the execution of this Agreement and signed on behalf of Buyer and of Seller by persons respectively thereunto duly authorized.

ARTICLE 22 - APPLICABLE LAW

(a) This Agreement shall be construed and performance thereof shall be determined according to the laws of the State of New York.

ARTICLE 23 - CONTRACT NUMBER

(a) This Agreement may, for identification, be referred to as "Contract No. LD-147".

IN WITNESS WHEREOF, each party hereto has executed this Agreement as of the day and year first above written.

LOCKHEED AIRCRAFT CORPORATION

By Kenneth Donaldson

HUGHES TOOL COMPANY

By C. A. Price

46001-T

TWA 277

EXHIBIT 267A
IDENTIFIED
7/14/67 M.B.

TWA

TRANS WORLD AIRLINES, Inc.

380 MADISON AVENUE,
NEW YORK 17, NEW YORK, U.S.A.

July 9, 1957

Hughes Tool Company
2200 Gulf Building
Houston 2, Texas

Attention: Mr. C. H. Price, Vice President

Dear Sirs:

With respect to our offering of 3,337,036 shares of our Common Stock to stockholders, we beg to advise that 3,291,119 shares were subscribed for at a total subscription price of $42,784,547. Of this number and amount, 2,476,142 shares were subscribed for directly by you at a total subscription price of $32,189,846, and we are advised by Merrill Lynch, Pierce, Fenner & Beane that they have subscribed for an additional 170,900 shares at the price of $2,221,700 for your account. Your aggregate purchases are therefore 2,647,042 shares at a price of $34,411,546.

This amount exceeds your minimum commitment to us under the agreement between us dated June 6, 1957, and confirmed June 14, 1957. You are, however, entitled to purchase under said agreement all or any part of the 45,917 shares unsubscribed for on said offering at the price of $13 per share.

With respect to telegraphic subscriptions (in which we have the subscription price and a guarantee of delivery of the warrants) it is possible that some warrants will not be delivered and we will be in a position to sell shares covered by these warrants to you also. If you wish to include these shares in your purchase we suggest that you advise us that you wish to purchase all unsubscribed shares. If, however, you do not wish to include these shares we suggest that you advise us of the number you wish to purchase.

Hughes Tool Company -2- July 9, 1957

Pursuant to said agreement between us you are to notify us not later than July 11, 1957, of the number of shares you wish to acquire in the event you wish to acquire more than the number of shares you have already purchased. You are to pay for all shares purchased pursuant to said agreement at such times and in such amounts as we may request. When we request you to purchase a block of shares we suggest that, if it is convenient for you, you pay for the same by depositing the amount of the purchase price to the credit of our account at the National Bank of Commerce, Houston, Texas, entitled "Trans World Airlines, Inc., General Account", with instructions that the bank is to notify us by wire of the date these funds are available for our use.

We will give appropriate instructions to our Transfer Agent so that a certificate for shares purchased will be forwarded to you promptly upon notification to us that such deposit has been made.

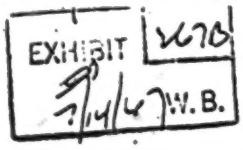
We will furnish you with information as to our net proceeds from the offering as soon as the data is completed. This information relates to the amount of the credit referred to in paragraph 7 of our above mentioned agreement with you.

Very truly yours,

W. E. Rooker

W. E. Rooker
Assistant Treasurer

AX-921



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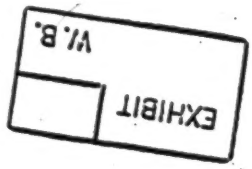

TRANS WORLD AIRLINES, INC.

380 Madison Avenue
New York 17, New York

July 11, 1957

The New York Trust Company
100 Broadway
New York 15, N. Y.

Attention: Mr. Edwin H. Dorman,
Assistant Secretary

Dear Sirs:

Please be advised that Hughes Tool Company has purchased 45,917 shares of our Common Stock, such shares being the portion of the 3,337,036 shares of such stock offered for subscription to stockholders and not purchased upon the exercise of warrants. Accordingly, you are hereby authorized and directed, pursuant to resolutions of our Board of Directors adopted at a meeting held June 14, 1957, and heretofore certified to you, as follows:

1. To issue, record and countersign as Transfer Agent of such Common Stock, one certificate bearing date of July 11, 1957, for said 45,917 shares in the name of Hughes Tool Company.

2. To deliver the certificate so recorded and countersigned to the Registrar of said Common Stock for registration and countersignature and to receive it from the Registrar when so registered and countersigned.

3. To mail said certificate to Hughes Tool Company at its address of record, by registered mail, addressed to the attention of Mr. C. H. Price, Vice President.

In connection with the Federal original issue payable with respect to the issue of said shares,

COPY

we request you to make payment of the tax and bill us for the cost thereof.

Very truly yours,

TRANS WORLD AIRLINES, INC.

By John H. Clinton
Vice President

COPY

HUGHES TOOL COMPANY

EXECUTIVE OFFICES
TWENTY-SECOND FLOOR GULF BUILDING
HOUSTON 2, TEXAS

June 7, 1957

TWA
EXHIBIT 271
7/24/67 W.B.

Securities and Exchange Commission
Division of Trading and Exchanges
Washington 25, D.C.

Attention: Mr. Edward H. Emerson

Dear Sirs:

Reference is made to the Registration Statement (File No. 2-13376) filed by Trans World Airlines, Inc. ("TWA") on May 23, 1957 for registration under the Securities Act of 1933 of an offering to stockholders, through issuance of subscription rights ("Rights"), of additional shares of TWA's common stock, and to the agreement to be entered into between this Company and TWA (a copy of which is Exhibit 13d to such Registration Statement) under which this Company may purchase part or all of the shares not subscribed for pursuant to such offering.

In view of the provision of the abovementioned agreement whereby TWA will, in the event this Company becomes the owner of 70% or more of TWA's outstanding stock, permit this Company to file consolidated tax returns for itself and TWA, this Company may wish, under certain conditions, to purchase Rights in the open market in order to increase its percentage of TWA stock. Assuming that Rule X-10B-6 under the Securities Exchange Act of 1934 would apply to any purchases of Rights by this Company, this Company could not legally purchase Rights even pursuant to Rule X-10B-8(d), as such purchases would not be made with a view to sale of the shares acquired upon exercise, and accordingly would not comply with subparagraph (a) of such Rule. This Company has no present intention to distribute any stock of TWA acquired upon exercise of Rights or otherwise, and in the abovementioned agreement with TWA will agree not to sell any Rights acquired by it.

Accordingly, it is respectfully requested, pursuant to Rules X-10B-6(f) and X-10B-8(f), that the Commission exempt from Rules X-10B-6 and X-10B-8, as not constituting

a manipulative or deceptive device or contrivance comprehended within the purpose of said Rules, any bids for or purchases of Rights by this Company during the subscription period, provided such bids or purchases are made in compliance with the conditions specified in subparagraphs (A) through (F) of paragraph (d) of Rule X-10B-3, without the limitation imposed by subparagraph (G) thereof.

Yours very truly,

HUGHES TOOL COMPANY

Original Signed By
C. H. Pike

By: _____
Vice President

cc: Andrews, Kurth, Campbell & Bradley
2200 Gulf Building
Houston, Texas

following officers and Executive Committee members were unanimously elected to hold office until their successors are chosen and qualified:

OFFICERS

T. B. Wilson	- Chairman of the Board
Jack Frye	- President
E. Lee Talman	- Executive Vice President
John A. Collings	- Vice President-Transportation
E. O. Cocke	- Vice President-Traffic
J. C. Franklin	- Vice President-Engineering and Maintenance
Otis F. Bryan	- Vice President-War Projects
C. E. Fleming	- Vice President
Jack Nichols	- Vice President
John B. Thurston	- Treasurer
A. M. Jens, Jr.	- Secretary
E. C. Peet	- Comptroller
C. A. Gress	- Assistant Secretary and Assistant Treasurer
M. W. McQueen	- Assistant Treasurer
W. D. Gay	- Assistant Treasurer-Financial
C. W. Herre	- Assistant Secretary
Myra E. Black	- Assistant Secretary
Margaret L. Ewell	- Assistant Secretary

EXECUTIVE COMMITTEE

Jack Frye - Chairman
Sidney Maestre
C. W. Perelle

Mr. Perelle was elected a member of the Executive Committee subject to approval of his election as a Director by the Civil Aeronautics Board.

CREATION AND ELECTION
OF A FINANCE COMMITTEE

It was suggested that a Finance Committee be created and elected in lieu of the former Bank Relations Committee.

After discussion, and upon motion duly made, seconded and carried, the following resolutions were unanimously adopted:

RESOLVED, that the Committee of the Board of Directors of the Corporation known as the Bank Relations Committee, be and it hereby is

abolished, and the authority of said Bank Relations Committee be and it hereby is terminated and revoked; and further

RESOLVED, that a Committee of the Board of Directors of the Corporation, to be known as the Finance Committee, consisting of four (4) members of the Board, including the President, be and it hereby is created; and further

RESOLVED, that Messrs. Jack Frye, Sidney Maestre, E. Lee Talman and (subject to the approval of the Civil Aeronautics Board of his acting as a Director of this Corporation) C. W. Perelle be and they hereby are elected as members of the Finance Committee of the Board of Directors of this Corporation, to hold office until their successors are elected and qualified.

POWERS AND DUTIES OF FINANCE COMMITTEE

Upon motion duly made, seconded and carried, the following resolutions were unanimously adopted:

RESOLVED, that the Finance Committee shall, among other powers granted to it by the Board, have authority to exercise the powers of the Board of Directors to open and close bank accounts, to designate persons authorized to sign checks with respect to said accounts and to terminate the authority of such persons, to determine the methods of signing checks and to authorize the use of autographic or facsimile signatures; and further

RESOLVED, that the Treasurer with the prior or subsequent written approval of a majority of the members of the Finance Committee be and he hereby is authorized in the name and on behalf of the Corporation to open and close bank accounts, to designate persons authorized to sign checks with respect to said accounts and to terminate the authority of such persons, to determine the methods of signing checks and to authorize the use of autographic or facsimile signatures; and further

RESOLVED, that any bank or banker be and he hereby is authorized to accept the certification of

the Secretary or any Assistant Secretary of the Corporation that the written approval of a majority of the members of the Finance Committee has been obtained; and further

RESOLVED, that the Secretary or any Assistant Secretary be and he hereby is authorized to certify the foregoing resolutions under the seal of the Corporation; and further

RESOLVED, that any prior resolution or resolutions inconsistent with the foregoing resolutions or authorizing any persons not named therein to act as therein provided is hereby superseded and abrogated, and the authority conferred by such resolution or resolutions is hereby terminated.

After discussion and upon motion duly made, seconded and carried, the following resolutions were unanimously adopted:

RESOLVED, that the Finance Committee consider and recommend to the Board of Directors a financing program for the procurement of additional funds through issuance of stock or borrowing, including the implementation of such program by utilizing the services of investment bankers; and further

RESOLVED, that the Finance Committee consider and recommend to the Board of Directors, for submission to the stockholders, a retirement plan for officers and employees; and further

RESOLVED, that the Finance Committee exercise such powers with respect to budgetary plans and compensation of personnel as the Board of Directors may by resolution from time to time authorize; and further

RESOLVED, that the Treasurer of this Corporation attend meetings of the Finance Committee and act as Secretary thereof.

EXPENSES OF OFFICERS - LAST HALF OF 1944

The Directors were advised that the expenses of the officers for the last half of 1944 aggregated $34,752.21 for

MEETING OF THE FINANCE COMMITTEE OF
THE BOARD OF DIRECTORS
September 12, 1945

A meeting of the Finance Committee was held at 3 p.m. in the Executive offices of the Corporation at 1740 G Street, N. W. Washington, D. C., September 12, 1945.

Members present were Mr. Jack Frye, Mr. Sidney Maestre, Mr. Charles Perelle, and Mr. E. Lee Talman. Present by invitation were Mr. LaMotte Cohu, Mr. Gilbert Scribner, Mr. Nelson Talbott, and Mr. John M. Lockhart.

Mr. Frye acted as Chairman.

FINANCING PROGRAM

After discussion it was resolved that the following recommendations should be submitted to the Board of Directors at its next meeting:

1. That the Board promptly call a meeting of stockholders to consider recommendations that (a) the number of authorized shares of common stock be increased from one million to four million and (b) a common stock dividend equal to 100% of the shares presently outstanding be declared.

2. That the Board of Directors, following stockholders' authorization, promptly sell a sufficient number of shares of common stock to raise not to exceed $20,000,000.

3. That consideration be given to the sale of preferred stock in amounts sufficient to raise not to exceed $25,000,000. Final decision on this point should be deferred pending discussion with investment bankers as to whether stockholders' authorization for this proposal should be requested at the same time as the authorization for sale of common stock, or whether the authorization to sell preferred should be deferred until the common stock financing has been accomplished.

4. That short term bank financing similar to the Stratoliner loan be arranged to provide funds for the purchase of the 18 C-69 Constellations and related equipment. It was the consensus of the Committee that debt should be kept at a minimum consistent with the maintenance of adequate working capital until equity financing has been completed and further, that no long term funded debt should be incurred at this time.

writer with whom the company would directly negotiate and that, while the company might indicate its preference for participants, negotiations with other participants should be handled by the principal investment banker. The Committee was in tentative agreement as to the selection of the principal investment banker, but no final decision was reached.

6. That no special Employees Stock Purchase Plan be incorporated in the present equity financing program. However, it was suggested that arrangements be made with the principal underwriter to give preference to requests of employees for subscriptions to the new stock.

RETIREMENT PLAN

The Committee directed that a proposal for an "ideal" retirement plan be submitted in writing to members of the Finance Committee prior to their next meeting so that a specific recommendation could be submitted to the Board of Directors at its October meeting.

SALARY AND WAGE BUDGET

The Committee approved the Salary and Wage budget submitted by the Executive Vice President. A summary of the approved budget is attached hereto.

CAPITALIZATION OF DEVELOPMENT EXPENSE AND OVERHEAD

The Committee discussed the capitalization of development expense and of overhead expense applicable to the conversion of aircraft. The Treasurer was directed to make a further study of this subject and to report thereon at the next meeting of the Finance Committee.

NEXT MEETING

It was resolved that the next meeting of the Finance Committee be held prior to the October meeting of the Board of Directors in order that definite recommendations to the Board relative to the matters discussed in this meeting may be submitted.

John M. Lockhart

AX-930

TWA Ex. 277
(Page from Banking Quotation record)

October, 1945

NEW YORK STOCK EXCHANGE—STOCKS

23

Aggregate Sales in shares Sept. 1 to Sept. 29	New York Stock Exchange STOCKS	Par	Prices Jan. 2, 1945 Opening or Bid	Ask	Sept. 1 Opening or Bid	Ask	Sept. 29 Closing or Bid	Ask	PRICES IN SEPTEMBER Lowest Sale Prices		Highest Sale Prices		RANGE SINCE JANUARY 1 Lowest Sale Prices	Highest Sale Prices
60,500	3,200,300	Sharp & Dohme	13¾	Sale	17¾	Sale	19⅝	Sale	15½	Sep 4	19⅝	Sep 29	12⅛	Mar 27	19⅝	Sep 29
300	4,200	$3.50 conv pfd series A	74½	75½	76½	78	76	77½	77½	Sep 19	77¾	Sep 14	74	May 15	79	Aug 6
13,600	161,500	Shattuck (Frank G)	14¼	Sale	14¾	Sale	20	Sale	14½	Sep 4	20¾	Sep 21	13½	Jan 23	20¾	Sep 21
640	7,900	Sheaffer (W A) Pen Co	63½	Sale	61	Sale	67	Sale	61	Sep 4	67	Sep 27	59	[illegible]	[illegible]	[illegible]
13,700	195,000	Shell Union Oil	26	Sale	25⅞	Sale	27⅜	Sale	25½	Sep 6	27⅜	Sep 29	24	Aug 21	28⅞	May 8
31,200	372,700	Silver King Coalition	7⅜	Sale	7⅜	Sale	7⅜	Sale	6⅝	Sep 5	7⅜	Sep 21	5½	Mar 26	8⅛	Jan 17
14,900	131,100	Simmons Co	32¾	Sale	240½	Sale	41	41½	39	Sep 17	41⅞	Sep 19	32½	Jan 2	41⅞	Sep 19
19,400	1,579,400	Simonds Saw & Steel Co	36	37	36½	37⅞	37	38	36	Sep 5	37½	Sep 19	30½	Feb 1	37½	Sep 19
5,400	130,300	Skelly Oil Co	19½	Sale	19	Sale	16½	Sale	15½	Sep 4	16¾	Sep 20	14½	Aug 22	17½	Mar 9
13,300	114,000	Sloss-Sheffield St & Iron— Common	41¾	Sale	47½	Sale	48	Sale	45¾	Sep 13	48	Sep 7	41¼	Jan 2	54½	Mar 7
1,020	3,450	$1.20 preferred	19½	Sale	18½	Sale	17½	18	16½	Sep 13	18½	Sep 26	15½	Aug 9	19½	Mar 6
4,600	97,970	Smith (A O) Corp	22¾	23¾	23	Sale	22¼	Sale	22	Sep 4	23½	Sep 20	22¼	Jun 22	24½	Jun 5
5,000	38,100	Smith & Corona Type	63	Sale	67	Sale	66	Sale	65	Sep 6	68	Sep 13	64½	Jan 22	77	Feb 26
43,600	1,924,300	Socony Vacuum Oil Co Inc	30½	30¾	30½	Sale	34½	Sale	33½	Sep 4	35	Sep 7	29½	July 27	35	Mar 7
22,500	410,400	South Amer Gold & Plat	13½	Sale	15½	Sale	15½	Sale	13½	Sep 17	16¾	Sep 4	13½	Jan 2	17½	Apr 24
8,400	91,500	Southeastern Greyhound	4¼	Sale	4¼	Sale	4¼	Sale	4¼	Sep 4	4¾	Sep 19	4¼	Aug 7	5¾	Feb 1
12,600	184,300	South Porto Rico Sugar	21½	Sale	22½	Sale	24¾	25¾	21½	Sep 15	25¼	Sep 26	20¾	Aug 20	27½	Sep 21
100	3,800	7% preferred	45	Sale	47	Sale	46½	Sale	44½	Sep 17	48	Sep 6	40¼	Apr 4	x51¾	Jun 14
14,700	133,100	Southern Calif Edison	161	162	159	Sale	159	Sale	157	Sep 8	162	Sep 4	152	Apr 20	172	Aug 22
4,700	10,400	Southern Natural Gas Co	26¾	Sale	31½	Sale	35	Sale	31¾	Sep 4	35	Sep 29	26½	Jan 22	35	Sep 29
22,000	1,430,100	Southern Pacific Co	19¼	Sale	21½	Sale	21½	Sale	20½	Sep 17	22	Sep 28	17	Jan 20	22	Sep 28
49,000	805,000	Southern Railway	43¾	Sale	47	Sale	51⅞	Sale	45½	Sep 5	52½	Sep 25	38½	Jan 31	57¼	Aug 21
1,000	110,700	5% preferred	64½	Sale	64½	Sale	63	Sale	62½	Sep 6	80	Sep 25	33½	Jan 22	82½	Jun 26
300	3,500	Standard & Ohio cfs	67½	Sale	72	74	79	Sale	72	Sep 8	79	Sep 28	64½	Jan 22	81½	Jun 26
1,800	109,200	Sparking (A O) & Bros Inc	80	82½	85	90	90	95	86	Sep 14	90	Sep 19	80½	Jan 3	90	Sep 19
34,700	479,300	Sperry Corp (The)	13½	Sale	16¾	Sale	17¾	Sale	16½	Sep 4	18¾	Sep 20	11½	Jan 24	18¾	Sep 25
1,800	32,900	Spicer Mfg Co	6¾	Sale	8¼	Sale	8¼	Sale	8¼	Sep 5	9	Sep 7	6¼	Mar 27	9	Sep 7
30	100	5.50 preferred	77	Sale	84½	Sale	13½	14½	13½	Sep 27	14½	Sep 4	77	Jan 2	154	Mar 1
2,400	84,900	Spencer Kellogg & Sons	72	80	89	97	96	97½	85	Sep 7	98	Sep 14	80	Feb 2	98	Sep 14
23,500	345,100	Sperry Corp (The)	33¼	Sale	39½	Sale	39½	40¾	38½	Sep 5	40¾	Sep 26	32	Mar 27	42¾	Aug 21
1,600	23,000	Spicer Mfg Co	28¼	Sale	30¾	Sale	33½	Sale	30¼	Sep 6	33¾	Sep 29	27½	Jan 24	36	Jun 20
38,500	572,700	[illegible]	48½	49	72	Sale	70½	71½	70	Sep 18	75	Sep 10	47½	Jan 12	75	Sep 10
3,000	22,100	[illegible]	13¾	Sale	17½	Sale	17¾	Sale	16½	Sep 17	17¾	Sep 11	13½	Mar 27	15¾	May 29
		Conv $4.50 preferred	78½	Sale	90½	Sale	89½	Sale	87½	Sep 19	90½	Sep 17	76½	Jan 6	92½	May 7
8,500	72,700	Square D Co	37¾	Sale	45½	Sale	46¾	47¾	44½	Sep 5	48¾	Sep 7	37½	Jan 10	48¾	Sep 7
1,300	3,070	5% conv preferred	113	118	116	Sale	117	119½	113	Sep 5	119½	Sep 24	109½	July 3	119½	Sep 24
1,100	17,100	Squibb (E R) & Sons	80	80½	77½	80	82	84	77½	Sep 6	84	Sep 24	58	Jan 30	84	Sep 24
280	2,380	$4 preferred	[illegible]	[illegible]	110	110½	109¾	110	109	Sep 22	110	Sep 5	107½	July 27	110½	Aug 24
27,500	304,100	Standard Brands	28½	Sale	38½	Sale	41½	Sale	38½	Sep 5	41½	Sep 20	28	Jan 2	41½	Sep 20
300	4,900	$4.50 preferred	111½	Sale	113½	115½	113½	113½	113½	Sep 18	113½	Sep 18	111½	Jan 2	115½	Aug 23
13,500	178,800	Standard Gas & Electric— $4 preferred	8¾	Sale	7¾	Sale	7¾	Sale	6¾	Sep 18	8¼	[illegible]	2¾	Jan 2	8¼	Jun 14
6,300	48,500	$6 prior preferred	71½	Sale	80½	Sale	97	Sale	86½	Sep 4	97	Sep 29	67½	Jan 23	97	Sep 29
12,400	177,200	$7 conv preferred	99½	Sale	101½	Sale	110	Sale	101	Sep 8	110	Sep 29	78½	Jan 23	110	Sep 29
47,700	647,800	Standard Oil of Calif	38½	Sale	41½	Sale	43½	Sale	40½	Sep 7	43½	Sep 29	38½	Jan 2	48½	Jun 27
18,700	471,200	Standard Oil Co of Ind	33	Sale	36½	Sale	37½	Sale	36½	Sep 4	38½	Sep 14	33½	Jan 2	39½	Jun 25
32,100	728,700	Standard Oil of N J	64½	Sale	61½	Sale	61½	Sale	60½	Sep 27	63½	Sep 12	56	Jan 24	64½	Jun 25
17,200	284,000	Standard Oil of Ohio	19	Sale	20½	Sale	23½	Sale	20½	Sep 27	23½	Sep 12	16	Jan 24	23½	Jun 25
41,700	819,400	Standard Steel Spring	3½	Sale	17	Sale	17½	Sale	15½	Sep 17	17½	Sep 29	13½	Aug 20	23½	Apr 18
1,800	24,000	Stanley Co (The)	36½	Sale	38½	Sale	38½	39½	37½	Sep 17	39	Sep 7	34	Jan 2	39½	Jun 25
5,200	68,600	Sterling Drug Inc	[illegible]	[illegible]	40	Sale	43½	Sale	39½	Sep 4	44	Sep 20	34½	July 26	44	Sep 20
800	800	3½% preferred	[illegible]	[illegible]	[illegible]	[illegible]	102	102½	101½	Sep 15	102½	Sep 20	101½	Sep 15	102½	Sep 20
18,900	348,500	Stewart Warner Corp	18¾	Sale	20½	Sale	22¾	Sale	19½	Sep 5	23½	Sep 19	16	Jan 22	23½	Sep 19
1,600	828,900	Stokely-Van Camp Inc	11	Sale	19½	Sale	23½	Sale	19½	Sep 4	24½	Sep 19	10¾	Jan 2	24½	Sep 19
19,0	8% prior preferred	18½	Sale	20½	Sale	20½	Sale	20	Sep 17	21	Sep 28	18½	Jan 2	21	Sep 28	
13,0	500,500	Stone & Webster	11½	Sale	14½	Sale	17¾	Sale	14½	Sep 5	17¾	Sep 19	10½	Jan 24	18¾	Sep 19
3,500	1,194,700	Studebaker Corp	19½	Sale	28¾	Sale	30½	Sale	28¾	Sep 17	30½	Sep 28	18½	Jan 2	30½	Sep 28
4,600	48,000	Sun Oil Co	88	Sale	89	90½	89¾	91½	90½	Sep 5	96	Sep 13	87	Aug 13	98	Sep 13
43	2,670	Cl A pref (1¾ conv)	120½	127	122½	123½	118	122	122	Sep 24	123½	Sep 12	121	Sep 24	127½	Mar 24
1,900	872,300	Sunray Oil Corp	6¼	Sale	6¼	Sale	6¼	Sale	5⅞	Sep 11	6¼	Sep 4	5¾	Aug 20	7¼	Jan 9
1,300	349,600	Superior Steel Corp	10¾	Sale	14½	Sale	15½	Sale	14½	Sep 17	15½	Sep 22	10	Mar 9	15½	Jan 21
2,300	207,500	Superheater Co (The)	24	Sale	25½	Sale	28¾	Sale	24	Sep 17	29½	Sep 28	22	Aug 21	29½	Sep 28
3,100	47,500	Superior Oil of Calif	74¾	80	97	100	103	107	97	Sep 5	104	Sep 28	86	Jan 3	122½	Apr 26
3,100	110,600	Superior Steel Corp	26	Sale	33	Sale	36	Sale	31	Sep 17	36	Sep 29	25	Jan 22	36	Sep 29
1,700	11,400	Sutherland Paper Co	32½	34	34½	35	38½	41	35½	Sep 8	37	Sep 13	31	Apr 11	37	Sep 13
1,800	[illegible]	Sweets Co of Amer (The)	17½	Sale	24½	Sale	31	32½	32	Sep 26	35	Sep 4	17½	Jan 2	35½	Aug 3
1,700	200,400	Swift & Co	21½	Sale	24½	Sale	25¼	Sale	24	Sep 4	25¾	Sep 27	20½	Apr 6	33½	Sep 27
3,100	216,900	Swift International Ltd	23½	Sale	25½	Sale	25¾	Sale	24	Sep 4	26½	Sep 20	21½	Mar 21	28½	May 9
1,700	233,900	Sylvania Elec Prod's Inc	30½	Sale	36½	Sale	37	Sale	31½	Sep 13	37½	Sep 25	29	Apr 6	37½	Sep 25
1,000	635,000	Symington-Gould Corp	7¼	Sale	10½	Sale	11¼	Sale	10	Sep 15	11¼	Sep 6	7¼	Jan 2	11¼	Sep 6
1,300	24,200	Tenn Corp (Tenn) Inc	7¾	8½	10½	Sale	10	10½	10½	Sep 14	10½	Sep 7	7¾	Jan 16	10½	Sep 7
1,300	95,000	Telautograph Corp	7¾	9½	8½	9	8½	Sale	8½	Sep 27	9¼	Sep 14	7½	Jan 2	10½	Jun 21
1,800	144,900	Tennessee Corp	11¾	Sale	14	Sale	14½	Sale	14	Sep 4	15	Sep 26	11¼	Jun 2	15½	Jun 25
400	3,400	Tennessee Gas & Trans— 5½ preferred	[illegible]	[illegible]	101	104½	107½	107½	106½	Sep 18	108½	Sep 13	103½	July 26	103½	July 13
370	347,100	Texas Co (The)	48¾	Sale	53½	Sale	53¼	Sale	52½	Sep 21	54½	Sep 14	48¾	Jan 2	65	Feb 19
1,0	3,01,100	Texas Gulf Producing Co— New	4½	Sale	7½	Sale	8	Sale	7½	Sep 17	8½	Sep 28	6½	Jan 2	9	Feb 14
2,0	147,700	Texas Gulf Sulphur	36½	[illegible]	41½	Sale	44½	Sale	42½	Sep 4	45½	Sep 21	30½	Jan 2	45½	Sep 21
7,0	443,600	Texas Pacific Coal & Oil	22	Sale	22½	Sale	21½	[illegible]	19½	Sep 17	22½	Sep 4	18½	Aug 21	26½	Jun 25
2,0	530,300	Texas Pacific Land Trust	14½	Sale	15	Sale	16½	Sale	15	Sep 5	16½	Sep 6	13½	Jan 22	20½	Jun 20
300	184,900	Texas & Pacific	34½	Sale	40½	41	40	[illegible]	38	Sep 17	43½	Sep 28	30½	Jan 30	44½	Jun 22
1,0	91,300	Thatcher Manufacturing	18½	Sale	18½	19	22½	Sale	18½	Sep 5	22½	Sep 24	14½	Mar 21	22½	Sep 24
1,0	27,500	$3 CO conv preferred	57	Fair	55	Sale	56½	57	55	Sep 4	57	Sep 11	44½	Mar 20	60½	Jun 23
1,0	11,200	The Fair Co	9½	9¾	9½	11	12½	Sale	10½	Sep 22	12½	Sep 29	8¼	Apr 6	12½	Sep 29
4,0	1,400	7% preferred	127	128	133	133	142	Sale	135½	Sep 24	142	Sep 27	125	Jan 3	142	Sep 29
4,0	1,400	6% preferred	94	Sale	98½	102	100½	102½	99	Sep 22	100	Sep 26	93¾	July 19	100	Aug 16
600	30,900	Thermoid Co	7	7½	10½	Sale	13½	Sale	12¾	Sep 17	13¾	Sep 7	8¾	Mar 27	13½	Sep 7
1,0	7,700	8½% div conv pfd	50	Sale	100½	Sale	101	Sale	98	Sep 28	101	Sep 4	83½	July 24	104	Aug 8
1,1	155,400	Third Ave Ry Transit Corp	16¾	Sale	18½	Sale	13½	13¾	13½	Sep 6	18½	Sep 29	10½	Aug 20	15½	Mar 1
2,0	11,600	Thompson (J R)	25	13	13½	14½	14½	15½	14½	Sep 12	15	Sep 19	12½	Jan 3	16½	Mar 6
1,0	42,700	Thompson Products	[illegible]	46½	Sale	51½	Sale	50	51½	Sep 4	52	Sep 20	45	July 17	60	Sep 20
1,0	300	4½% preferred	100	[illegible]	[illegible]	105	Sale	103½	107½	105	Sep 4	106	Sep 6	105½	Aug 30	109	Aug 22
1,0	314,700	Tidewater Assoc Oil	[illegible]	6½	8½	8	Sale	7	6½	Sep 8	8	Sep 19	4½	Jan 2	8	Jun 18
1,0	78,600	$3.50 preferred	[illegible]	31½	Sale	45½	Sale	47½	Sale	47½	Sep 5	52½	Sep 19	31	Jan 22	61½	Jun 14
1,0	425,100	Tide Water Associated Oil	10	16½	Sale	17½	Sale	19½	[illegible]	17½	Sep 5	19	Sep 28	16½	Jan 2	20½	Mar 7
1,0	[illegible]	$3.75 preferred	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	102	Sale	101	Sep 8	102½	Sep 22	101	Sep 8	103½	Sep 22
1,0	[illegible]	[illegible] Ash Co	10	37	Sale	45½	Sale	44½	[illegible]	43	Sep 17	45½	Sep 11	34½	Jan 22	45½	Sep 11
1,0	[illegible]	[illegible] Pacific	[illegible]	49½	50½	52	Sale	54	55	54	Sep 4	54	Sep 28	50	Apr 6	64	Sep 26
1,0	[illegible]	Transamerica Corp	2	11½	Sale	13½	Sale	13½	[illegible]	13	Sep 6	13½	Sep 21	10	Mar 26	14½	Jun 25
1,0	[illegible]	[illegible] Air Inc	1	4½	Sale	6½	Sale	5½	Sale	5½	Sep 4	6½	Sep 29	4½	Jan 2	6½	Jun 25
1,0	[illegible]	Trans & Western Air	[illegible]	18½	Sale	20½	Sale	20½	Sale	20	Sep 15	21½	Sep 13	15	Jan 15	24½	Sep 13
1,0	[illegible]	Tri-Continental Corp	1	[illegible]	[illegible]	[illegible]	Sale	[illegible]	Sale	[illegible]	Sep 5	[illegible]	Sep 19	13½	Jan 2	24½	Mar 8
1,0	[illegible]	$6 preferred	[illegible]	107½	Sale	102	Sale	103½	110	102	Sep 4	110	Sep 29	102	Jan 3	110½	Sep 22
1,0	119,200	Trans Texas Coal	[illegible]	11½	Sale	13	Sale	12½	Sale	12½	Sep 15	13½	Sep 19	10½	Mar 22	13½	July 24
1,0	[illegible]	Tubize Rayon	1	15½	Sale	20	Sale	20	Sale	20	Sep 15	20½	Sep 5	12½	Mar 24	20½	Aug 31
1,0	[illegible]	[illegible] preferred	100	[illegible]	[illegible]	101	107	104	106	101	Sep 26	104½	Sep 11	101½	Jan 3	107	Sep 29
1,0	[illegible]	6% Cent Pow Pipe Corp	[illegible]	23½	Sale	23½	Sale	24½	Sale	23½	Sep 4	27	Sep 27	20½	Mar 21	31½	Sep 27
1,0	[illegible]	[illegible] preferred	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
1,0	[illegible]	$3.50 prior preferred	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
1,0	[illegible]	5% City Ry Transit	[illegible]	9¾	Sale	11½	Sale	11½	Sale	11½	Sep 17	11¾	Sep 19	9¾	Jan 3	14½	Jun 13
1,0	[illegible]	Preferred	100	113½	119	123	Sale	124	130	122½	Sep 20	124	Sep 28	112½	Sep 20	137	Jun 13
1,0	[illegible]	[illegible] Coach	1	14¾	Sale	19	Sale	19½	Sale	17½	Sep 6	24	Sep 29	14½	Jun 3	24	Sep 29

* Footnotes, see page 25.

report to the Board on the current pilots strike situation which began on October 21, 1946. He recalled to the Directors his letter dated October 26, 1946, advising them of the situation up to that time, and various other communications which had been conveyed to them to keep them abreast of developments. The meeting was advised that on November 6th the Executive Vice President had executed an agreement to arbitrate all matters in dispute with the Air Line Pilots Association, which agreement was prepared and presented to the Corporation and to the Union for signature by the Chairman of the National Mediation Board. The meeting was advised that the Union had refused to execute the agreement although its counsel had assisted in its preparation. The arbitration agreement provided for the immediate return of the striking pilots to duty and that the award of the arbitrators would be accepted by both sides. The President requested ratification of the act of the Vice President in executing the arbitration agreement and authority to conclude negotiations with the Air Line Pilots Association through the National Mediation Board in order to effectuate arbitration of the matters in dispute and the restoration of our operations.

Upon motion duly made, seconded and carried, it was

RESOLVED, that the action of the Executive Vice President in executing on behalf of this Corporation an agreement providing for the arbitration of the matters in dispute with the Air Line Pilots Association and which are involved in the current pilots strike as submitted by the Chairman of the National Mediation Board, be, and it hereby is, ratified and approved, and in the event that such agreement is executed by the Air Line Pilots Association the proper officers of the Corporation are authorized to take all steps necessary to effectuate the provisions of the agreement; and further

RESOLVED, that the proper officers of the Corporation are authorized to continue discussions with the Air Line Pilots Association through the National Mediation Board, looking toward the execution of an arbitration agreement in form satisfactory to the officer or officers of this Corporation executing the same and upon such execution to carry out all of the terms thereof in the best interests of the Corporation.

INCREASE OF AUTHORIZED SHARES OF COMMON STOCK

The President recalled to the meeting that during the past

year financing plans under consideration had involved the issuance of common stock and that current plans being discussed also contemplated this feature. It was stated that the greatest delay in completing any financing involving common stock would result from the necessity of calling a stockholders' meeting in order to amend the charter of the Corporation to increase the number of shares of common stock authorized to be issued. The president explained that at least five weeks would be necessary for this purpose in view of Stock Exchange, SEC and legal requirements.

In order to put the Corporation in a position to finance readily when a program had been definitely adopted, it was proposed to set the machinery in motion to amend the charter to increase the authorized shares of common stock and to call a stockholders' meeting and otherwise comply with the statutory and other requirements which ordinarily produce delay. Accordingly, formal resolutions to this effect had been prepared for consideration by the directors.

Before acting on the proposal, the directors invited Mr. Noah Dietrich, Executive Vice President of Hughes Tool Company, and Mr. Palmer Bradley, Counsel for Hughes Tool Company, to join the meeting to discuss the proposed amendment and the general financing program of the Corporation. Prior to their arrival, Mr. Crosley withdrew from the meeting in order to leave Washington for a further engagement. The discussion which followed proceeded at some length. During the course of the discussion, the suggestion was made to include in the amendment of the charter provision for convertible preferred stock as well as common stock. In view of the uncertainty as to whether any new financing would involve convertible preferred stock and the inability to anticipate the preferences and privileges which the bankers would require in preferred stock of the Corporation for investment purposes, it was agreed that the amendment should propose only the increase in the authorized shares of common stock to an amount sufficient to make available enough common stock to support any security convertible into common stock as well as to provide common stock for issue directly in accordance with the numerous plans under consideration. It was agreed that an increase in the authorized shares of common stock up to 3,000,000 would be desirable to cover these contingencies.

On motion duly made and seconded, the following resolution was unanimously adopted:

> RESOLVED, that this Board of Directors hereby proposes, declares advisable and recommends to the stockholders the amendment of the Agreement and Act of Consolidation, constituting the Certificate of Incorporation, of this Company to effect the increase from 1,000,000 to 3,000,000 in the total number of shares of stock which the

Company shall have authority to issue, without change in the par value of the authorized shares of this Company; and, for this purpose, that the first paragraph of Article IV of the Agreement and Act of Consolidation, constituting the Certificate of Incorporation, of this Company now reading as follows:

"Article IV. The total number of shares of stock which the Company shall have authority to issue is one million (1,000,000), all of which shall be Common Stock and shall have a par value of Five Dollars ($5.00) a share, amounting in the aggregate to Five Million Dollars ($5,000,000)."

be amended so that, as amended, the first paragraph of such Article IV shall read as follows:

"Article IV. The total number of shares of stock which the Company shall have authority to issue is three million (3,000,000), all of which shall be Common Stock and shall have a par value of Five Dollars ($5.00) a share, amounting in the aggregate to Fifteen Million Dollars ($15,000,000)."

the remainder of such Article IV, other than the first paragraph thereof, to be unchaged by such amendment; and that a special meeting of the stockholders entitled to vote in respect thereof be and it hereby is called to be held at 100 West Tenth Street, Wilmington, Delaware, at ten o'clock in the forenoon on December 23, 1946 for the consideration of such amendment.

On motion duly made and seconded, the following resolutions were unanimously adopted:

RESOLVED, that the close of business on November 22, 1946 be and it hereby is fixed as the record date for the determination of stockholders entitled to notice of and to vote at the special meeting of stockholders of this Company called to be held at ten o'clock in the forenoon on December 23, 1946, including any and all adjournments of such meeting; and further

RESOLVED, that the Secretary or other proper officer of this Company be and he hereby is authorized and directed to prepare with the advice of counsel and cause to be filed with the Securities and Exchange Commission preliminary forms of notice of special meeting of stockholders called to be held December 23, 1946, proxy and proxy

statement with respect thereto; that the Secretary or other proper officer be and he hereby is authorized with the advice of counsel to make such changes in the forms of notice of meeting, proxy statement and proxy as may be considered desirable to conform to any suggestions made by the Securities and Exchange Commission or otherwise, and thereafter to cause notice of such stockholders meeting, proxy statement and form of proxy to be mailed to the stockholders of this Company of record at the close of business on November 22, 1946 and to cause to be filed with or mailed to the Securities and Exchange Commission and the New York Stock Exchange copies of such documents in the form in which they shall be released to stockholders; and further

RESOLVED, that, in the form of proxy so to be sent to stockholders, the Secretary or other proper officer be and he hereby is authorized to include Thomas B. Wilson, Jack Frye and Paul E. Richter, as the attorneys and proxies named therein, with power of substitution; and further

RESOLVED, that, if the stockholders approve the proposed amendment to the Agreement and Act of Consolidation, constituting the Certificate of Incorporation, of this Company, the proper officers of this Company be and they hereby are authorized to file and record or cause to be filed and recorded as required by the law of Delaware a Certificate of Amendment to give effect to such proposed amendment as authorized by the stockholders.

ADJOURNMENT

The meeting adjourned at 6:45 P. M.

C. W. Herre
Secretary of the Meeting

E. Lee Talman
Secretary of the Meeting during Mr. Herre's absence.

TWA Ex. 279
(Special TWA Stockholders Meeting, December 23, 1946-Judges' Report)

TRANSCONTINENTAL & WESTERN AIR, INC.

SPECIAL MEETING OF STOCKHOLDERS

DECEMBER 23, 1946

REPORT OF JUDGES

We, the undersigned, duly appointed Judges to conduct the vote of stockholders to be taken for and against the proposed amendment to the Agreement and Act of Consolidation, constituting the Certificate of Incorporation, at the special meeting of stockholders of TRANSCONTINENTAL & WESTERN AIR, INC., being held this 23rd day of December, 1946, do hereby report:

1. That we attended at the time and place appointed and before entering upon the performance of our duties we, each of us, took and subscribed an oath that we would faithfully execute the duties of such Judges at such meeting with strict impartiality and according to the best of our abilities.

2. That stockholders holding in the aggregate 218,563 shares of Common Stock of the Corporation, constituting less than a majority of the shares of such stock issued and outstanding and entitled to vote at said meeting on such proposed amendment, are present or are represented at said meeting.

Dated, December 23, 1946.

L. H. Hewgan

L. E. Grove

TRANSCONTINENTAL & WESTERN AIR, INC.

Special Meeting of Stockholders of December 23, 1946

Adjournment of December 28, 1946

A special meeting of stockholders of TRANSCONTINENTAL & WESTERN AIR, INC., a Delaware corporation, held pursuant to the notice of such meeting at the offices of the Corporation, 100 West 10th Street, Wilmington, Delaware, on Monday, December 23, 1946, at 10:00 o'clock in the forenoon and duly adjourned at such time was duly reconvened pursuant to such adjournment at the same place on Saturday, December 28, 1946 at 2:00 o'clock in the afternoon.

Mr. Paul E. Richter, Executive Vice-President of the Corporation and previously appointed Chairman of the meeting, called the meeting to order.

The Chairman stated that in the absence of Mr. A. H. Jens, Jr., Secretary of the Corporation, and of Mr. C. W. Herre, previously appointed Secretary of the meeting, Mr. Carter L. Burgess, Assistant Secretary of the Corporation, would act as Secretary of the meeting.

Mr. Burgess thereupon acted as Secretary of the Meeting and kept the records of the proceedings.

The Chairman stated that there had been presented to the meeting on December 23, 1946 a list of the stockholders of the Corporation of record at the close of business on November 22, 1946, the record date fixed by the Board of Directors of the Corporation for the determination of stockholders of the Corporation entitled to notice of and to vote at the meeting, which list contained the names and addresses of the holders of Common Stock of the Corporation and the number of shares held by them respectively, prepared and certified by Mr. C. W. Herre, an Assistant Secretary of the Corporation, and that such list was available for examination by any stockholder present. From such list, it appeared that there were outstanding on such record date and entitled to vote on all matters to come before the meeting 985,929 shares of Common Stock of the Corporation. The Secretary then ascertained the stockholders present in person or by proxy and the number of shares of Common Stock represented by each and reported that there were present in person or by proxy, the holders of the following number of shares of Common Stock of the Corporation entitled to vote at the meeting:

	NO. OF SHARES
Present in person	None
Represented by proxy to Thomas B. Wilson, Jack Frye and Paul E. Richter, and each of them; Paul E. Richter and George A. Spater as substitute proxy for Jack Frye being present at the meeting.	231,003
Represented by proxy to William Nugent; William Nugent being present at the meeting.	3,781
Total present in person or represented by proxy	234,784

The Chairman then suggested that, as Messrs. L. H. Herman and L. E. Gray had been duly elected to act as Judges to conduct the vote to be taken for and against the proposed amendment to the Agreement and Act of Consolidation, the consideration of which was the purpose of the meeting, that the Judges report on the stockholders present in person or by proxy. Proxies presented to the meeting were then delivered to the Judges, who examined same and took the roll of those present in person and, after examination of the certified list of stockholders previously presented, executed their written report which stated that there were represented in person or by proxy 234,784 shares of Common

Stock of the Corporation entitled to vote at the meeting, constituting less than a majority of the shares of such stock issued and outstanding and entitled to vote at said meeting.

The Secretary of the meeting then read the report of the Judges and on motion, duly made, seconded and carried, it was ordered filed with the records of the meeting. The Chairman then announced that due notice of the meeting had been given, but that the holders of less than a majority of all the issued and outstanding Common Stock of the Corporation entitled to vote at the meeting were present in person or by proxy, which was insufficient to constitute a quorum. In accordance with the By-laws of the Corporation, the Chairman then adjourned the meeting to reconvene at the same place on Tuesday, December 31, 1946, at 2:00 o'clock in the afternoon.

Secretary of the meeting

TWA Ex. 280B

(Adjourned Special TWA Stockholders Meeting, Dec. 28, 1946-Judges)

TRANSCONTINENTAL & WESTERN AIR, INC.

SPECIAL MEETING OF STOCKHOLDERS OF DECEMBER 23, 1946

ADJOURNMENT OF DECEMBER 28, 1946

REPORT OF JUDGES

We, the undersigned, duly appointed Judges to conduct the vote of stockholders to be taken for and against the proposed amendment to the Agreement and Act of Consolidation, constituting the Certificate of Incorporation, at the special meeting of stockholders of TRANSCONTINENTAL & WESTERN AIR, INC., called to be held on December 23, 1946 and on that day adjourned to this 28th day of December, 1946, do hereby report:

1. That we attended at the time and place appointed for such special meeting of stockholders, including the adjournment thereof held on December 28, 1946; and that before entering upon the performance of our duties we, each of us, took and subscribed an oath that we would faithfully execute the duties of such Judges at such meeting with strict impartiality and according to the best of our abilities.

2. That stockholders holding in the aggregate 234,7[illegible] shares of Common Stock of the Corporation, constituting less than a majority of the shares of such stock issued and outstanding and entitled to vote at said meeting on such proposed amendment, are present or are represented at the adjournment of said meeting held on December 28, 1946.

Dated, December 28, 1946.

[signature]

[signature]

[signature]

TRANSCONTINENTAL & WESTERN AIR, INC.

Special Meeting of Stockholders of December 23, 1946

Adjournment of December 31, 1946

A special meeting of stockholders of TRANSCONTINENTAL & WESTERN AIR, INC., a Delaware corporation, held pursuant to the notice of such meeting at the offices of the Corporation, 100 West 10th Street, Wilmington, Delaware, on Monday, December 23, 1946, at 10:00 o'clock in the forenoon and duly adjourned successively was duly reconvened pursuant to such adjournments at the same place on Tuesday, December 31, 1946 at 2:00 o'clock in the afternoon.

In the absence of the President and Mr. Richter, previously appointed Chairman of the meeting, Mr. John M. Lockhart, Treasurer of the Corporation, called the meeting to order and requested the appointment of a stockholder to act as Chairman. Upon motion duly adopted, Mr. Lockhart was appointed Chairman of the meeting and thereafter presided.

The Chairman stated that Mr. Burgess, previously appointed Secretary of the meeting, would act as Secretary of the meeting. Mr. Burgess thereupon acted as Secretary of the meeting and kept the records of the proceedings.

The Chairman stated that there had been presented to the meeting on December 23, 1946 a list of the stockholders of the Corporation of record at the close of business on November 22, 1946, the record date fixed by the Board of Directors of the Corporation for the determination of stockholders of

the Corporation entitled to notice of and to vote at the meeting, which list contained the names and addresses of the holders of Common Stock of the Corporation and the number of shares held by them respectively, prepared and certified by Mr. C. W. Herre, an Assistant Secretary of the Corporatio and that such list was available for examination by any stoc holder present. From such list, it appeared that there was outstanding on such record date and entitled to vote on all matters to come before the meeting 985,929 shares of Common Stock of the Corporation. The Secretary then ascertained the stockholders present in person or by proxy and the number of shares of Common Stock represented by each and reported that there were present in person or by proxy, the holders of the following number of shares of Common Stock of the Corporation entitled to vote at the meeting:

	NO. OF SHARES
Present in person	None
Represented by proxy to Thomas B. Wilson, Jack Frye and Paul E. Richter, and each of them; John M. Lockhart as substitute proxy for Thomas B. Wilson and Orvis Sowerwine as substitute proxy for Paul E. Richter being present at the meeting.	231,003
Represented by proxy to William Nugent; William Nugent being present at the meeting.	3,781
Total present in person or represented by proxy	234,784

The Chairman then suggested that, as Messrs. L. Herman and L. E. Gray had been duly elected to act as

to conduct the vote to be taken for and against the proposed amendment to the Agreement and Act of Consolidation, the consideration of which was the purpose of the meeting, that the Judges report on the stockholders present in person or by proxy. Proxies presented to the meeting were then delivered to the Judges, who examined same and took the roll of those present in person and, after examination of the certified list of stockholders previously presented, executed their written report which stated that there were represented in person or by proxy 234,784 shares of Common Stock of the Corporation entitled to vote at the meeting, constituting less than a majority of the shares of such stock issued and outstanding and entitled to vote at said meeting.

The Secretary of the meeting then read the report of the Judges and on motion, duly made, seconded and carried, it was ordered filed with the records of the meeting. The Chairman then announced that due notice of the meeting had been given, but that the holders of less than a majority of all the issued and outstanding Common Stock of the Corporation entitled to vote at the meeting were present in person or by proxy, which was insufficient to constitute a quorum. In accordance with the By-laws of the Corporation, the Chairman then adjourned the meeting to reconvene at the same place on Monday, January 6, 1947, at 2:00 o'clock in the afternoon.

TRANSCONTINENTAL & WESTERN AIR, INC.

SPECIAL MEETING OF STOCKHOLDERS OF DECEMBER 23, 1946

ADJOURNMENT OF DECEMBER 31, 1946

REPORT OF JUDGES

We, the undersigned, duly appointed Judges to conduct the vote of stockholders to be taken for and against the proposed amendment to the Agreement and Act of Consolidation, constituting the Certificate of Incorporation, at the special meeting of stockholders of TRANSCONTINENTAL & WESTERN AIR, INC., called to be held on December 23, 1946, and successively adjourned to this 31st day of December, 1946, do hereby report:

1. That we attended at the time and place appointed for such special meeting of stockholders, including the adjournments thereof held on December 28 and December 31, 1946; and that before entering upon the performance of our duties we, each of us, took and subscribed an oath that we would faithfully execute the duties of such Judges at such meeting with strict impartiality and according to the best of our abilities.

2. That stockholders holding in the aggregate 234,78 shares of Common Stock of the Corporation, constituting less than a majority of the shares of such stock issued and outstanding and entitled to vote at said meeting on such proposed amendment, are present or are represented at the adjournment of said meeting held on December 31, 1946.

Dated, December 31, 1946.

L. H. Hargraves

R. E. Gray

Judges

TRANSCONTINENTAL & WESTERN AIR, INC.

Special Meeting of Stockholders of December 23, 1946

Adjournment of January 6, 1947

A special meeting of stockholders of TRANSCONTINENTAL & WESTERN AIR, INC., a Delaware corporation, held pursuant to the notice of such meeting at the offices of the Corporation, 100 West 10th Street, Wilmington, Delaware, on Monday, December 23, 1946, at 10:00 o'clock in the forenoon and duly adjourned successively was duly reconvened pursuant to such adjournments at the same place on Monday, January 6, 1947 at 2:00 o'clock in the afternoon.

In the absence of the President and of Mr. Lockhart, the Chairman appointed to preside at the last adjournment, Mr. William Nugent called the meeting to order and requested the appointment of a stockholder to act as Chairman. Upon motion duly adopted, Mr. Nugent was appointed Chairman of the meeting and thereafter presided.

The Chairman stated that Mr. Burgess, previously appointed Secretary of the meeting, would act as Secretary of the meeting. Mr. Burgess thereupon acted as Secretary of the meeting and kept the records of the proceedings.

The Chairman stated that there had been presented to the meeting on December 23, 1946 a list of the stockholders of the Corporation of record at the close of business on November 22, 1946, the record date fixed by the Board of Directors of the Corporation for the determination of stockholders of

the Corporation entitled to notice of and to vote at the meeting, which list contained the names and addresses of the holders of Common Stock of the Corporation and the number of shares held by them respectively, prepared and certified by Mr. C. W. Herre, an Assistant Secretary of the Corporation, and that such list was available for examination by any stockholder present. From such list, it appeared that there were outstanding on such record date and entitled to vote on all matters to come before the meeting 985,929 shares of Common Stock of the Corporation. The Secretary then ascertained the stockholders present in person or by proxy and the number of shares of Common Stock represented by each and reported that there were present in person or by proxy, the holders of the following number of shares of Common Stock of the Corporation entitled to vote at the meeting:

	NO. OF SHARES
Present in person	None
Represented by proxy to Thomas B. Wilson, Jack Frye and Paul E. Richter, and each of them; Orvis Sowerwine as substitute proxy for Paul E. Richter being present at the meeting.	231,207
Represented by proxy to William Nugent; William Nugent being present at the meeting.	3,781
Represented by proxy to Carter L. Burgess; Carter L. Burgess being present at the meeting	100
Total present in person or represented by	

The Chairman then suggested that, as Messrs. L. H. Herman and L. E. Gray had been duly elected to act as Judges to conduct the vote to be taken for and against the proposed amendment to the Agreement and Act of Consolidation, the consideration of which was the purpose of the meeting, that the Judges report on the stockholders present in person or by proxy. Proxies presented to the meeting were then delivered to the Judges, who examined same and took the roll of those present in person and, after examination of the certified list of stockholders previously presented, executed their written report which stated that there were represented in person or by proxy 235,088 shares of Common Stock of the Corporation entitled to vote at the meeting, constituting less than a majority of the shares of such stock issued and outstanding and entitled to vote at said meeting.

The Secretary of the meeting then read the report of the Judges and on motion duly made, seconded and carried, it was ordered filed with the records of the meeting.

The Chairman then announced that the holders of less than a majority of all the issued and outstanding Common Stock of the Corporation entitled to vote at the meeting were present in person or by proxy, which was insufficient to constitute a quorum. Thereupon, a motion was made, seconded and unanimously carried that the meeting be adjourned to reconvene at the same place on Monday, January 13, 1947, at 2:00 o'clock in the afternoon, and, in accordance with such motion and in accordance with the By-laws of the Corporation, the Chairman

Monday, January 13, 1947, at 2:00 o'clock in the afternoon.

Secretary of the Meeting

SPECIAL MEETING OF STOCKHOLDERS OF DECEMBER 23, 1946

...

ADJOURNMENT OF JANUARY 6, 1947

REPORT OF JUDGES

We, the undersigned, duly appointed Judges to conduct the vote of stockholders to be taken for and against the proposed amendment to the Agreement and Act of Consolidation, constituting the Certificate of Incorporation, at the special meeting of stockholders of TRANSCONTINENTAL & WESTERN AIR, INC., called to be held on December 23, 1946, and successively adjourned to this 6th day of January, 1947, do hereby report:

1. That we attended at the time and place appointed for such special meeting of stockholders, including the adjournments thereof held on December 28 and December 31, 1946, and January 6, 1947; and that before entering upon the performance of our duties we, each of us, took and subscribed an oath that we would faithfully execute the duties of such Judges at such meeting with strict impartiality and according to the best of our abilities.

2. That stockholders holding in the aggregate 235,088 shares of Common Stock of the Corporation, constituting less than a majority of the shares of such stock issued and outstanding and entitled to vote at said meeting on such proposed amendment, are present or are represented at the adjournment of said meeting held on January 6, 1947.

Dated, January 6, 1947.

L. E. Gray

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MINUTES OF THE BOARD OF DIRECTORS MEETING
TRANSCONTINENTAL & WESTERN AIR, INC.

December 18, 1946

A regular meeting of the Board of Directors of Transcontinental & Western Air, Inc., was held at 9:30 A. M., Wednesday, December 18, 1946, at the offices of the Corporation, 1740 G Street, N. W., Washington, D. C. pursuant to notice dated December 14, 1946.

Directors present (as indicated in the minutes) were:

John A. Collings
Powel Crosley, Jr.
Jack Frye
Sidney Maestre
Warren Lee Pierson
Paul E. Richter
Gilbert H. Scribner
H. S. Talbott
E. Lee Talman
T. B. Wilson

constituting a quorum.

Directors absent were: LaMotte T. Cohu

General T. B. Wilson, Chairman, called the meeting to order and thereafter presided. Mr. Gerald B. Brophy, of counsel, was present by invitation.

Mr. Talman was appointed Secretary of the meeting.

PROOF OF NOTICE

Proof of notice of the meeting, in the form of an affidavit by A. H. Jens, Jr., Secretary, was presented to the meeting in order to file.

APPROVAL OF MINUTES

The minutes of the meeting of the Board of Directors held December 11, 1946, were presented to the Directors and after amendment and upon motion duly made, seconded and carried, were ratified and approved.

At this point, Messrs. Dietrich, Bradley, and Leslie, representing Hughes Tool Company, entered the meeting.

REORGANIZATION OF GREEK AIRLINE

The Chairman reported that a new company to operate the internal airlines in Greece was being formed and it was proposed that the interest of TWA in the present Greek Airline be transferred to the new company in exchange for a 24% interest. The British would, likewise, participate in the new company to the extent of 24% and the remaining 52% would be owned by Greek interests. The Chairman explained that the new company would be capitalized at $400,000. The 24% interest of TWA would amount to $96,000 compared to TWA's present interest of 30% or $60,000 in the existing company. The British would pay to TWA the sum of $120,000 for its interest in the present company, of which $96,000 would be invested by TWA in the new company. A portion of the remaining $24,000 might be held to underwrite the participation of the Greek government as a loan but, in any event, the reorganization would not involve the expenditure of any new funds by TWA.

Upon motion duly made, seconded, and unanimously carried, the proper officers of the company were authorized to take the necessary steps to effectuate the proposed reorganization.

APPROVAL OF NEW RESERVATIONS SYSTEM

The Executive Vice President described to the Board a proposed new reservations system which would reduce costs, fix responsibilities, and improve revenues. It was estimated that the capital outlay necessary to establish the new system would be approximately $53,000.

Upon motion duly made, seconded, and unanimously carried, the management was authorized to take the necessary steps to place the new system in operation and to make capital expenditures aggregating approximately $53,000 for that purpose.

At this point, Messrs. Scribner and Crosley entered the meeting.

FINANCING PROGRAM

The Chairman stated that the meeting had been called at the request of Messrs. Dietrich and Bradley to consider a proposed revision of the outstanding Equitable Life debentures, which had been discussed with the representatives of Equitable Life by Messrs. Dietrich and Bradley since the last meeting of the Board. A memorandum outlining the proposed revision, which had been transmitted to the President by Equitable Life, was read to the meeting. Among other things, it provided for a voting trust covering all of the Hughes Tool stock under which there would be two trustees, one representing Hughes Tool Company and one representing Equitable Life. It was pointed out by counsel that the memorandum did not purport to contemplate the $40,000,000 credit being discussed with the RFC for the purpose of providing adequate financing for the company to carry out its responsibilities in operating over the routes for which it has been certificated

by the United States government. It was agreed that the proposal contained in the memorandum was, for the most part, desirable except for the apparent elimination of the RFC credit.

At this point, the meeting recessed at 11:00 A. M. in order that Messrs. Dietrich and Bradley and a committee, consisting of all of the Board of Directors present who are not connected with management, and counsel for the company, might meet informally to discuss the problems arising out of the Equitable Life program.

The meeting reconvened at 1:45 P. M. at which time Mr. George A. Spater, of counsel, entered the meeting. Mr. Brophy reported, briefly, on the discussions which were taking place. Messrs. Pierson and Maestre were appointed as a committee of two to continue discussions with Messrs. Dietrich and Bradley and with Mr. Brophy.

The meeting was recessed at 2:00 P. M. and reconvened at 3:15 P. M. with Messrs. Maestre and Pierson absent from the meeting for the purpose of continuing discussions with Messrs. Dietrich and Bradley and with Mr. Brophy.

PROPOSED FINANCING OF TACA

At the request of the President, the Vice President - Administration read to the meeting two memoranda prepared by Hallgarten and Company regarding a proposal to permit the participation of Waterman Steamship Company in TACA. The program generally involved the sale by TACA of $1,500,000 of convertible debentures of which Waterman would buy $500,000 and have the right to buy an additional $1,000,000 at any time prior to July 1, 1947. Options to purchase 510,000 shares of stock of TACA would be granted to Waterman by TWA (335,000 shares), Pennroad (50,000 shares), and Yerex (125,000 shares) over periods of thirty months at varying prices of $2.00 to $7.00 per share. Management of TACA would be turned over to Waterman. The proposal contained other conditions embodied in the two memoranda read to the meeting.

On motion duly made, seconded, and unanimously carried, the program outlined to the meeting, was approved and the proper officers of the company were authorized to take all steps necessary to put the program into effect. The memoranda were ordered filed with the records of this meeting.

LEASE OF HANGARS AT WASHINGTON NATIONAL AIRPORT

The Vice President - Administration reported to the meeting on the proposed lease of two hangars at the Washington National Airport. He recalled that on September 11, 1945, the Board had authorized the company to enter into a lease for ten years of two hangars to be built at the expense of the government at the Washington National Airport. He advised that the government had revised this proposal and was now offering to lease the hangars for only a three-year period. The discussion indicated the desirability of leasing

both hangars, planning to sublease one of them if not immediately needed but reserving the right to reoccupy it in the event that it was required in the future. The lease would provide for annual rental of approximately $35,000 for each hangar plus the cost of maintenance.

After further discussion and on motion duly made, seconded and unanimously carried, the proper officers of the company were authorized to negotiate a lease of the two hangars on the terms outlined provided that the company obtain the right to sublease during the period of the lease.

At this point, Messrs. Maestre, Pierson, and Brophy rejoined the meeting. Messrs. Maestre and Pierson were advised of the action taken with respect to the TACA proposal and the Washington hangars, which action was approved by them.

RESUMPTION OF DISCUSSION OF FINANCING PROGRAM

Counsel for the company outlined to the Board a program, which had been agreed to with Messrs. Dietrich and Bradley, relating to the financing program, the designation of a new Senior Vice President responsible directly to the Board of Directors, the abolition of the Finance Committee previously appointed by the Board, and the designation of an Executive Committee with power to act between meetings of the Board.

Accordingly, upon motion duly made and seconded, the following resolutions were unanimously adopted:

RESOLVED, that the following program, developed and agreed to by a committee of the members of the Board of Directors not connected with Management and Messrs. Dietrich and Bradley, representing Hughes Tool Company, be adopted in order to proceed with the financing of the company:

(1) The officers of the company are to work with Messrs. Dietrich and Bradley to develop a program of financing that will include

a. Establishment of the credit with the R.F.C.

b. Revision of the Equitable loan

c. $10,000,000 of common stock

(2) Mr. Frye will continue as President, General Wilson as Chairman of the Board, and Mr. Richter as Executive Vice President.

(3) A committee consisting of Messrs. Pierson and Maestre is designated to work with Messrs. Dietrich and Bradley in recommending to the Board a Senior Vice President to be responsible directly to the Board of Directors.

(4) The bylaws are to be amended to provide the necessary authority to enable the Senior Vice President to carry out his responsibility to the Board of Directors.

FURTHER RESOLVED, that the persons designated in the foregoing resolution and the proper officers of the Corporation are authorized to carry out the program set forth therein.

ABOLITION OF FINANCE COMMITTEE

In accordance with the program agreed to with Messrs. Dietrich and Bradley, the following resolution was unanimously adopted:

RESOLVED, that the Finance Committee, created by resolution of the Board of Directors at its meeting held September 29, 1939, be and hereby is abolished.

AMENDMENT OF BYLAWS PROVIDING DUTIES OF SENIOR VICE PRESIDENT

In accordance with agreement with Messrs. Dietrich and Bradley, the following resolution was unanimously adopted:

RESOLVED, that Article IV of the bylaws be, and hereby is, amended so as to change the present Section 5 and Section 6 thereof to Section 6 and Section 7, respectively, and to insert as a new Section 5 the following:

Section 5. Powers and Duties of the Senior Vice President. The Senior Vice President shall be the chief financial officer of the Corporation and shall be directly responsible to the Board of Directors. He shall have direct authority over the Treasurer. He shall prepare all budgets for the President subject to the approval of the Board of Directors and shall be responsible for their enforcement. He shall require that all disbursements are in accordance with appropriations and, in general, he shall be responsible for the proper control of the financial affairs of the Corporation.

ESTABLISHMENT OF EXECUTIVE COMMITTEE

In accordance with program agreed to with Messrs. Dietrich and Bradley, the following resolution was unanimously adopted:

RESOLVED, that the bylaws of this Corporation be, and hereby are, amended to add to Article III thereof a new Section designated Section 11 reading as follows:

> Section 11. Executive Committee. The Board of Directors shall have authority to establish an Executive Committee of three members, consisting of the President, the Senior Vice President, and a third member who shall be chosen from members of the Board of Directors not a part of the management of the Corporation. The Executive Committee shall have and may exercise all of the powers of the Board of Directors in the management of the business and affairs of the Corporation between meetings of the Board.

FURTHER RESOLVED, that Executive Committee, authorized by the foregoing amendment to the bylaws, be and hereby is created and that the initial Executive Committee shall consist of Mr. Frye, President, Mr. Warren Lee Pierson, member of the Board of Directors, and the Senior Vice President when selected, which committee shall hold office until the next annual meeting of the Board of Directors and until their successors shall be elected and shall qualify.

ADJOURNMENT

There being no further business to come before the meeting, it was adjourned.

E. Lee Talman

E. Lee Talman
Acting Secretary

TWH
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MINUTES OF THE BOARD OF DIRECTORS MEETING
TRANSCONTINENTAL & WESTERN AIR, INC.

December 27, 1946

A special meeting of the Board of Directors of Transcontinental & Western Air, Inc., called to be held at 10:00 A. M. Friday, December 27, 1946 at the offices of the corporation, 1740 G Street, N. W., Washington, D. C., pursuant to notice of the Secretary convened at 10:30 A. M.

Directors present were: LaMotte T. Cohu
John A. Collings
Jack Frye
Sidney Maestre
Warren Lee Pierson
Paul E. Richter
Gilbert H. Scribner
H. S. Talbott
E. Lee Talman

constituting a quorum.

Directors absent were: Powel Crosley, Jr.
and
General T. B. Wilson

In the absence of the Chairman of the Board, Mr. Frye presided.

In the absence of the Secretary, Mr. E. Lee Talman was chosen Secretary of the meeting.

Messrs. Gerald B. Brophy and George A. Spater, of counsel, Admiral H. B. Miller, Vice President - Public Relations and Mr. Noah Dietrich, Executive Vice President of Hughes Tool Company, Colonel Palmer Bradley, Counsel for Hughes Tool Company and Mr. Victor A. Leslie, representing Hughes Tool Company, were present by invitation.

APPROVAL OF MINUTES

The minutes of the special meeting of the Board of Directors held December 18, 1946 were read to the meeting and on motion duly made and seconded were approved.

DISCUSSION OF FINANCING PROGRAM

The Chairman stated that the meeting had been called at the request of Hughes Tool Company and invited Mr. Dietrich to make any statement which he desired.

Mr. Dietrich expressed regret that Mr. Hughes could not be present but stated that he would be glad to come East to meet with the Board on

or later. He then advised that Hughes Tool Company would be willing to invest Ten Million Dollars ($10,000,000.) in the company if it could acquire control of the Board of Directors. Considerable discussion followed as to the conditions under which the Ten Million Dollars ($10,000,000.) might be made available to the company. Following this, the Board considered it advisable to have a written proposal from the Hughes Tool Company so that all of the conditions might be before the Board and if accepted would constitute an agreement between Hughes Tool Company and the company, subject to the approval of the Civil Aeronautics Board. Messrs. Dietrich, Bradley and Leslie withdrew from the meeting at 11:00 A. M. for the purpose of preparing a written proposal.

REQUEST FROM HUGHES TOOL COMPANY
FOR SPECIAL STOCKHOLDERS MEETING

The President read to the meeting a letter from Hughes Tool Company, dated December 27, 1946, requesting that a special meeting of stockholders be held on January 4, 1947 in Kansas City for the purpose of changing the date of the annual meeting of stockholders.

At the request of the President, counsel advised that under the By-laws stockholders had the right to request that a special meeting be held for the purposes specified in the notice. Counsel stated further that the notice in this case could not be complied with strictly because of the rules of the New York Stock Exchange as to the period of notice required before taking a record of stockholders entitled to vote at the meeting and the rules of the Securities and Exchange Commission relating to the solicitation of proxies. It was further pointed out that a serious legal question existed as to whether the terms of the directors could be shortened by changing the date of the annual meeting since under the By-laws directors are elected for one year. Upon motion duly made, seconded and unanimously carried, the President was authorized to reply to the letter from Hughes Tool Company acquainting it with the facts developed at this meeting and pointing out the inability of the company strictly to comply with the request.

FINANCING OF TACA

Mr. Talman advised that the previous proposal of Hallgarten & Company with respect to the financing of TACA had not met with the approval of the Waterman Steamship Company and a new proposal from Waterman was expected momentarily.

Upon motion duly made, seconded and unanimously carried a committee consisting of Messrs. Pierson, Talbott and Talman was appointed with full authority to negotiate with Waterman Steamship Company and TACA in order to develop a plan of financing for TACA.

The meeting recessed at 12:45 P. M. and reconvened at 3:30 P. M.

SUBMISSION OF PROPOSAL OF
HUGHES TOOL COMPANY

The meeting received a written proposal from the Hughes Tool Company as follows:

"December 27, 1946

"TO THE BOARD OF DIRECTORS
OF TRANSCONTINENTAL & WESTERN AIR, INC.:

"Hughes Tool Company, as the owner of approximately 46% of the capital stock of Transcontinental & Western Air, Inc., makes the following proposal to the Board of Directors of the latter company, contingent upon a final consummation of the present refinancing deal with Equitable Life Assurance Society, with which the Board is familiar, and subject to necessary approval of governmental authority:

"1. Hughes Tool Company will thereupon immediately lend Transcontinental & Western Air, Inc. the sum of $5,000,000.00 in cash, and on or before June 1, 1947, will lend Transcontinental & Western Air, Inc. an additional sum of $5,000,000.00 in cash. These loans shall be in the form of demand notes but shall be subordinate as to principal and interest to the Equitable debentures and shall bear the same rate of interest. During the life of the loans, and at any time after such stock is legally authorized to be issued, Hughes Tool Company shall have the option of converting said loans into common stock of the company on the following basis:

"At $19.00 per share, or, at Hughes Tool Company's option, at a price to be determined by the average of the closing market prices for the ten days preceding the date upon which Hughes Tool Company exercises its election to so convert by written notice to Transcontinental & Western Air, Inc.

"2. Upon final consummation of the present refinancing deal with Equitable Life Assurance Society, and delivery to Transcontinental & Western Air, Inc. of the first $5,000,000.00 in cash, and in no event later than January 10, 1947, six members of the present eleven directors of Transcontinental & Western Air, Inc. will resign and be replaced by six nominees of Hughes Tool Company, and in the meantime no changes will be made in the by-laws of the company except upon approval of Hughes Tool Company in writing.

Very truly yours,

HUGHES TOOL COMPANY

By NOAH DIETRICH
Executive Vice President"

The proposal was discussed and the meeting recessed again at 3:50 P. M. to enable the directors and counsel to study and analyze the proposal.

The meeting reconvened at 5:30 P. M. at which time the Hughes Tool Company proposal was discussed at length and it was agreed that certain objections made the proposal unsatisfactory. Counsel was requested to draft a response to the letter for further consideration by the Board.

The meeting recessed at 5:45 P. M. and reconvened at 9:30 P. M. to consider the draft of the response to the proposal of Hughes Tool Company. Certain changes were made in the draft during the course of discussion.

On motion duly made and seconded, the following letter was thereupon approved for signature by the President and for transmittal to the Hughes Tool Company:

"December 27, 1946

"Hughes Tool Company
Houston
Texas

Attention: Mr. Noah Dietrich
Executive Vice President

Gentlemen:

"Receipt is acknowledged of your communication dated December 27, 1946, in which you made a proposal to the Board of Directors of Transcontinental & Western Air, Inc., with respect to the financing of the company.

"In acting upon any proposal from the Hughes Tool Company as the holder of 46% of the common stock of Transcontinental & Western Air, Inc., you will, of course, agree that the terms must be scrutinized with extreme care so that the Board of Directors may determine whether it is in the best interest of the company and of the other stockholders.

"Accordingly, it is believed that before acting upon your proposal, we should raise question as to certain of its terms, some of which create doubt as to the fairness of the proposal from the standpoint of the other stockholders.

"Among other things, we wish to call your attention to the following:

"(1) Your proposal to lend $5,000,000 to the company immediately and an additional $5,000,000 on or before June 1, 1947, against the demand notes of the company does not

provide the working capital required by the company or the financial stability which the company must achieve. Immediately upon issuance of the demand note of the company, it would be within the power of the holder whether Hughes Tool Company, or its transferee, to demand payment thereof thus precipitating the company into a financial crisis resulting either in receivership or a new compromise with Hughes Tool Company, or its transferee.

"(2) Under your proposal, the second $5,000,000 presumably need not be made available until June 1, 1947, at the option of Hughes Tool Company. The needs of the company might require the additional funds in advance of that date. Consequently, it is believed that this sum should be made available on the call of the company, and your obligation should be in a form which is legally enforceable.

"(3) The suggestion of a 4% fixed interest rate seems inconsistent when compared with the same rate for the ten (10) year Equitable debentures on which interest would be payable only if earned during the first four years.

"(4) The conversion features of your proposal appear to be objectionable from the standpoint of the other stockholders of the company. It is believed that, in addition to the option in Hughes Tool Company to convert the notes into common stock, the company should have the right to require conversion at any time, since it has always been the view of the Board of Directors that the company should finance as much as possible through common stock. The company and the other stockholders should be protected against conversion at low rates when the market is higher. Consequently, the conversion price should not be fixed at $19 per share, or lower, at the option of Hughes Tool Company, but should be based upon the market at the time of conversion. The average of the closing market prices for the ten days preceding the date upon which conversion is effected might be the desirable solution to this question.

"(5) While your proposal states that it is contingent upon the final consummation of the present refinancing deal with Equitable, the nature of the transaction as described by you appears to be basically in conflict with the terms acceptable to Equitable as set forth in the memorandum previously delivered to us by Equitable in its letter dated December 17, 1946.

"Similarly your proposal makes no provision whatever for the $40,000,000 RFC financing which is available, and which the company requires in order to perform its obligations under its certificates of convenience and necessity issued by the United States Government. The proposal you have made should, therefore, be contingent not only upon consummation of the Equitable refinancing and necessary approval of governmental authority, but also upon the completion of the present financing already arranged with the Reconstruction Finance Corporation.

"(6) The interest of the Board of Directors is to arrive at the best solution for the benefit of the company and all of its stockholders. Under the present circumstances, the Board is still prevented from concluding other possible avenues for raising funds, because of its inability to sell stock to others. We urge that the Board be freed of this restraint which now exists so that it can fairly weigh your proposal in the light of all other possibilities. Consequently, we hope that there will be no further adjournments in the stockholders' meeting which, as the result of your previous request for adjournment, is now set for 2 P. M., December 28, 1946.

"Before advising of the acceptance or rejection of your proposal as contained in your letter of December 27, 1946, your views on the matters set forth herein would be appreciated.

For the Board of Directors of
Transcontinental & Western Air, Inc.

By Jack Frye,
President"

The meeting adjourned at 10:45 P. M. until 9:30 A. M. Saturday, December 28, 1946.

E. Lee Talman

E. Lee Talman
Secretary of the meeting

285 ID

MINUTES OF ADJOURNED BOARD OF DIRECTORS' MEETING
TRANSCONTINENTAL & WESTERN AIR, INC.

December 28, 1946

The special meeting of the Board of Directors of Transcontinental & Western Air, Inc. adjourned on December 27, 1946, convened at 9:30 A. M. Saturday, December 28, 1946, at the offices of the Corporation, 1740 G Street, Washington, D. C., pursuant to action taken at the session of the Board held December 27, 1946.

Directors present were: LaMotte T. Cohu
John A. Collings
Jack Frye
Sidney Maestre
Warren Lee Pierson
Paul E. Richter
Gilbert H. Scribner
Nelson S. Talbott

constituting a quorum.

Directors absent were: Powel Crosley, Jr.
E. Lee Talman
T. B. Wilson

Messrs. Gerald B. Brophy and George A. Spater of Counsel were present by invitation.

In the absence of the Chairman of the Board, Mr. Frye presided. In the absence of the Secretary, Mr. Gerald B. Brophy was chosen Secretary of the meeting.

DISCUSSION OF FINANCING PROGRAM

The Board renewed discussions of the previous evening with respect to the proposal of Hughes Tool Company and the response thereto made by the Board.

During the course of the discussion, Mr. Richter and Mr. Spater withdrew from the meeting to attend the adjourned special meeting of stockholders at the office of the Corporation in Wilmington.

RECEIPT AND DISCUSSION OF RESPONSE FROM HUGHES TOOL COMPANY

The response of the Hughes Tool Company to the letter from the Board, delivered to representatives of the Hughes Tool Company last evening, was received and read to the meeting. It is as follows:

"December 28, 1946

"TO THE BOARD OF DIRECTORS OF
TRANSCONTINENTAL & WESTERN AIR, INC.:

We acknowledge receipt of your letter of December 27 replying to our letter of the same date. Our letter speaks for itself.

We, of course, agree with you that the interest of the company and of all of the other stockholders is of primary concern. We have in the past, and will continue in the future, to act with this view in mind. Other specific replies to your several comments in this regard are deemed unnecessary.

We can answer the questions which you have raised as to terms and conditions of our proposal which you state create doubt as to the fairness of our proposal from the standpoint of other stockholders. The following numbered paragraphs correspond to the numbered paragraphs of your letter of December 27.

(1) Hughes Tool Company does not desire that the notes evidencing either the first $5,000,000 or any part of the second $5,000,000 be demand notes. It is agreeable with Hughes Tool Company that any and all of these notes have a maturity date on the date immediately following the maturity of any other indebtednesses to which these loans by Hughes Tool Company are subordinate. We think that this intent is perfectly clear from our original proposal.

(2) Hughes Tool Company has no objection to your request that the second $5,000,000 be made available when and as needed by you, such need to be determined by the executive committee contemplated by our discussions.

(3) Hughes Tool Company will have no objection to interest rates equal in all respects to the same rate payable on the present Equitable 5-year debentures.

(4) Hughes Tool Company's proposal of a conversion of its loans to common stock of Transcontinental & Western Air, Inc. at $19.00 per share, or at the option of Hughes Tool Company, on the average market price for the ten days preceding the date on which the election might be made, was based on the fact that the stock on December 27 was selling on the market at from $20.50 to $21 per share. The effect of our offer, we thought, was to offer financing to the other stockholders at a price considerably less

under all of the circumstances than could have been secured from any other known financing source. However, if this provision of our proposal is objectionable to the directors, Hughes Tool Company has no objection to changing the offer to the extent that the stock may be converted at a date elected by Hughes Tool Company with the price based on the average closing market price for the ten days preceding the date upon which the option is exercised by giving notice to your company in writing.

(5) We are not aware of any conflict between our proposal and the contemplated transaction with Equitable Life Assurance Society.

The only material point of difference in the Reconstruction Finance Corporation negotiations involves the voting trust, and we have proposed to the Reconstruction Finance Corporation that in the event their loan is ever in default our nominee will resign in favor of Reconstruction Finance Corporation's nominee. We have diligently endeavored to consummate the Reconstruction Finance Corporation loan and will continue to do so. Any intimation to the contrary is simply not true.

(6) Hughes Tool Company's interest is the same as that of all other stockholders. Our interest goes further than this. It extends to the public. We do not even have one representative on the Board of Directors.

We particularly call attention to the language of your letter in which you state that the stockholders meeting set for December 23 was adjourned at our request. To refresh your recollection, it was adjourned by agreement between us. Provided our proposal is accepted we will attend the meeting and vote to increase the authorized capital stock to 3,000,000 shares.

The effect of our offer is to inject $10,000,000 junior money into the picture to keep the doors of Transcontinental & Western Air, Inc. open and to permit further adequate financing.

Very truly yours,

HUGHES TOOL COMPANY

By NOAH DIETRICH
Executive Vice President

It was the opinion of the Board that the letter, in general, satisfied most of the questions raised by the Board in its response to the original proposal of the Hughes Tool Company dated December 27, 1946. It was felt, however, that upon certain of the points, further discussion should be had

TWA Ex. 285, page 4
(TWA Board Minutes, December 28, 1946)

based upon a draft which would be prepared by Counsel for the Corporation and that it would be advisable to adjourn the meeting until Monday, December 30, 1946, at 2:00 P. M. at the office of the Corporation in the Airlines Terminal Building, New York, New York, at which time it was hoped that representatives of the Equitable Life Assurance Society, Mr. Chauncey Dodds of the Reconstruction Finance Corporation, and Mr. James M. Landis, Chairman of the Civil Aeronautics Board, and representatives of the Hughes Tool Company might be present and discuss the whole program with the Board.

Upon being advised that this program was agreeable to the representatives of the Hughes Tool Company, the meeting was adjourned to the time and place above specified.

Gerald B. Brophy
Secretary of the Meeting

MINUTES OF ADJOURNED BOARD OF DIRECTORS' MEETING
TRANSCONTINENTAL & WESTERN AIR, INC.

January 9, 1947

The special meeting of the Board of Directors of Transcontinental & Western Air, Inc. adjourned on January 8, 1947, convened at 3:00 P. M., Thursday, January 9, 1947, at the offices of the Corporation, Airlines Terminal Building, New York, New York, pursuant to action taken at the session of the Board held January 8, 1947.

Directors present were: LaMotte T. Cohu
Jack Frye
Sidney Kaestre
Warren Lee Pierson
Paul E. Richter
Gilbert H. Scribner
Nelson S. Talbott

constituting a quorum.

Directors absent were: John A. Collings
Powel Crosley, Jr.
E. Lee Talman
T. B. Wilson

Mr. Gerald B. Brophy of Counsel was present by invitation.

In the absence of the Chairman of the Board, Mr. Frye presided.

In the absence of the Secretary, Mr. Gerald B. Brophy was chosen Secretary of the Meeting.

CONTRACT WITH CIVIL AERONAUTICS BOARD
FOR OPERATION OF NAVIGATION AND
COMMUNICATIONS FACILITIES, HASSANI AIRPORT, ATHENS

The Executive Vice President advised that the air navigation and airways communications facilities at Hassani Airport in Athens are now being operated by TWA at its own expense. A contract has been negotiated under which TWA will continue the operation for the account of the Civil Aeronautics Administration and for this service, TWA will be paid a fixed fee of $9,000 per month, plus certain expenses for necessary spare parts, for a period from the execution of the agreement to June 30, 1947. The contract contains other clauses required in agreements with government agencies.

Upon motion duly made, seconded and carried, the execution of the contract, upon the terms outlined, was approved.

thereon, in such manner as Waterman Airlines, Inc., may from time to time direct, and to provide further that this Corporation execute and deliver to Waterman Airlines, Inc., irrevocable proxies in a form to be annexed to said agreement, said agreement to contain such other terms and provisions as said officers shall deem necessary or appropriate;

6) to execute and deliver an instrument terminating the agreement dated December 13, 1945, between this Corporation and Lowell Yerex and cancelling and terminating all rights, interests, and privileges of this Corporation, created by said agreement of December 13, 1945, in, to, or concerning the 125,000 shares of stock of TACA Airways, S. A., which are the subject of said earlier agreement, and to join with Lowell Yerex in executing and delivering appropriate notification and instructions to The National City Bank of New York, Panama branch;

7) to pay or cause to be paid all stock transfer taxes imposed, upon the delivery thereof to the optionees named therein, on the options to be deposited with The Commercial National Bank and Trust Company of New York as hereinabove provided;

8) to apply to The Equitable Life Assurance Society of the United States for its consent, as holder of the debentures of this Corporation issued and outstanding under its Indenture dated as of December 1, 1945, as heretofore amended, to the consummation by this Corporation of the transactions hereinabove authorized, and to file such consent with the trustee under the aforesaid Indenture and to deliver a duplicate original thereof to Waterman Airlines, Inc.; and

9) to do or cause to be done all such other actions and things as said officers shall deem necessary or appropriate to carry out the intention of this resolution.

PROPOSAL OF HUGHES TOOL COMPANY

The meeting then proceeded with further discussion of the proposal of Hughes Tool Company contained in the letter dated January 8, 1947, presented to the meeting of the Board held on that date.

The Board reviewed the present financial condition of the Corporation including the cash forecast for the balance of January as augmented by the

anticipated refund of $2,500,000 expected to be received from the government before the end of the month as a tax refund on prior years resulting from losses sustained by the Corporation during the year 1946. The Board also reviewed the many attempts to finance during the past year and the likelihood that the funds proposed to be loaned by the Hughes Tool Company would be the only funds immediately available to the Corporation to carry on operations. It was felt that before acting upon any motion to accept the proposal of the Hughes Tool Company, some indication should be received from Hughes Tool Company, which, under the proposal would obtain control of the Board of Directors, as to its intentions with regard to the status of Mr. Fryo, General Wilson, and Mr. Richter as well as certain other executives of the Corporation whose retention was considered by the Board as essential to the Corporation.

At this point, letters were received by each of the Directors, by hand delivery, from Mr. T. I. Parkinson, President of Equitable Life Assurance Society of the United States, reading as follows:

"January 9, 1947

"To the Board of Directors of
Transcontinental & Western Air, Inc.,
and Mr. Howard Hughes,
Airlines Terminal Building,
80 East 42nd Street,
New York, N. Y.

Gentlemen:

In view of certain statements which have appeared in the press within the last few days regarding the financial plans of TWA, and the Equitable's status as a holder of $40,000,000 in principal amount of your Company's bonds, we wish to advise you as follows:

First, that no application is now pending with the Equitable for a further loan to your Company, and if such an application were made, it would have to be declined.

Second, in view of what we understand as to your Company's present financial condition, it seems to us that you are subjecting the interests of your stockholders and creditors to serious risk in continuing to preserve a situation which results in the Company's being unable to obtain the additional funds which it needs promptly in order to carry on operations. So far as our holding of bonds is concerned, we intend to hold those responsible strictly accountable for any loss which may arise from this continued inaction.

Yours very truly,

(Sgd.) Thomas I. Parkinson

The members of the Board expressed indignation over the contents of the letter from Mr. Parkinson. It was emphasized that every decision before the Board during this period had been weighed so as to afford the best possible protection to the creditors including Equitable Life Assurance Society as the principal creditor and all of the stockholders and with a view to discharging the responsibilities of the Corporation to the United States Government. It was recalled to the meeting that Equitable Life Assurance Society had been kept informed of developments continually and that the Corporation had been assured in three meetings with Mr. Parkinson that Equitable Life Assurance Society was in accord with the policies of the Corporation. Resentment was expressed by the Board over the change in position by Equitable without prior notice to the Board.

Counsel for the Corporation was requested to study the matter and advise to any further steps which should be taken.

Word was received that Mr. Hughes would like to enter the meeting for a discussion with the Directors not associated with the management of the Corporation. Accordingly, Messrs. Frye, Richter and Brophy withdrew and Mr. Hughes entered the meeting.

The meeting with Mr. Hughes covered mainly the problems relating to the status of the executives of the Corporation as discussed by the Board prior to the entry of Mr. Hughes in the meeting. Mr. Hughes advised that he did not wish to seek the resignation of any present members of the Board of Directors at this time but merely desired to have representatives of Hughes Tool Company added to the Board and that he had no present intention of disturbing the executives of the Corporation whose status was of concern to the Board.

After these discussions, Mr. Hughes withdrew from the meeting and was joined by a committee consisting of Mr. Cohu, Mr. Scribner, and Mr. Talbott to discuss specific arrangements with Mr. Frye, General Wilson and Mr. Richter in the event that the proposal of the Hughes Tool Company is accepted by the Board.

Messrs. Frye, Richter and Brophy reentered the meeting.

Messrs. Cohu, Scribner, and Talbott thereafter returned to the meeting and reported that Mr. Hughes had stated that he desired that Mr. Frye, General Wilson and Mr. Richter remain in the service of the Corporation in any capacity that might be agreed upon at least until the annual meeting of the stockholders at which time a new Board of Directors would be elected and that thereafter if they should leave the service of the Corporation by their own volition or at the request of the Corporation on or before July 1, 1947, they would receive twelve months' salary at their present rate of compensation from the date of termination of service.

It was the view of the Board that a formal commitment should be made to Mr. Frye, General Wilson and Mr. Richter as a result of this agreement so that this arrangement may form a part of their employment agreement with the Corporation.

Upon motion duly made, seconded and unanimously carried, the following resolutions were adopted, Mr. Frye and Mr. Richter not voting:

RESOLVED, that in consideration of the agreement of Paul E. Richter to remain in the employment of the Corporation until April 24, 1947, the date of the next Annual Meeting of Stockholders, in whatever executive or advisory capacity the Board of Directors of the Corporation may determine, this Corporation agrees that, in the event that he should leave the service of the Corporation after April 24, 1947 and on or before July 1, 1947 by his own volition or at the request of the Corporation, he shall receive a sum equal to twelve months' salary, from the date of termination of service, at his annual rate of compensation as of the present date, and that such amounts shall be payable in full upon the termination of service; and

FURTHER RESOLVED, that the proper officers of the Corporation are hereby authorized and directed to take such steps as may be necessary in order to give effect to the foregoing resolution.

Mr. Richter advised the Board that he accepted the action of the Board recorded in the foregoing resolutions.

Upon motion duly made, seconded and unanimously carried, the following resolutions were adopted, Mr. Frye and Mr. Richter not voting:

RESOLVED, that in consideration of the agreement of Jack Frye to remain in the employment of the Corporation until April 24, 1947, the date of the next Annual Meeting of Stockholders, in whatever executive or advisory capacity the Board of Directors of the Corporation may determine, this Corporation agrees that, in the event that he should leave the service of the Corporation after April 24, 1947 and on or before July 1, 1947 by his own volition or at the request of the Corporation, he shall receive a sum equal to twelve months' salary, from the date of termination of service, at his annual rate of compensation as of the present date, and that such amounts shall be payable in full upon the termination of service; and

FURTHER RESOLVED, that the proper officers of the Corporation are hereby authorized and directed to take such steps as may be necessary in order to give effect to the foregoing resolution.

Mr. Frye advised the Board that he accepted the action of the Board recorded in the foregoing resolutions.

Upon motion duly made, seconded and unanimously carried, the following resolutions were adopted, Mr. Frye and Mr. Richter not voting:

RESOLVED, that in consideration of the agreement of Thomas B. Wilson to remain in the employment of the Corporation until April 24, 1947, the date of the next Annual Meeting of Stockholders, in whatever executive or advisory capacity the Board of Directors of the Corporation may determine, this Corporation agrees that, in the event that he should leave the service of the Corporation after April 24, 1947 and on or before July 1, 1947 by his own volition or at the request of the Corporation, he shall receive a sum equal to twelve months' salary, from the date of termination of service, at his annual rate of compensation as of the present date, and that such amounts shall be payable in full upon the termination of service; and

FURTHER RESOLVED, that the proper officers of the Corporation are hereby authorized and directed to take such steps as may be necessary in order to give effect to the foregoing resolution.

Mr. Frye advised that he had been in telephone communication with General Wilson who authorized him to notify the Board that he accepted the action so taken.

The meeting then proceeded to vote upon the proposal of Hughes Tool Company contained in the letter dated January 8, 1947 and presented to the meeting held on that date.

Upon motion duly made, seconded and unanimously carried, the following resolutions were adopted:

RESOLVED, that the proposal of Hughes Tool Company embodied in a letter dated January 8, 1947, from Hughes Tool Company to this Board which, among other things, contemplates the borrowing by this Corporation from Hughes Tool Company of $10,000,000 to be evidenced by this Corporation's notes bearing interest at the rate of 2-3/4%

convertible into the common stock of this Corporation upon the terms set forth therein, the modification of the terms of this Corporation's Sinking Fund Debentures held by the Equitable Life Assurance Society of the United States and of the terms of the Indenture pursuant to which said Debentures were issued and terms otherwise set forth in said letter, be and it hereby is accepted, subject to approval by the Civil Aeronautics Board under the terms of the order of the Civil Aeronautics Board approving control of this Corporation by Hughes Tool Company, and the President of this Corporation be, and he hereby is, authorized and directed to signify the acceptance of the proposal of Hughes Tool Company by this Corporation by noting such acceptance upon the original and duplicate original of the proposal of the Hughes Tool Company and by affixing his signature thereto on behalf of this Corporation as President thereof; and

FURTHER RESOLVED, that the President or any Vice President and the Secretary or any Assistant Secretary of this Corporation be, and they hereby are, authorized and directed to execute and deliver, on behalf of this Corporation, any and all agreements which may be necessary or advisable with Hughes Tool Company, the Equitable Life Assurance Society of the United States, and the Trustee under the Indenture covering the Sinking Fund Debentures held by the Equitable Life Assurance Society of the United States and any other agreements which may be necessary or advisable in order to give effect to the terms of the agreement with Hughes Tool Company as evidenced by said letter dated January 8, 1947, from Hughes Tool Company to the Board of Directors of this Corporation and accepted by the foregoing resolution; and

FURTHER RESOLVED, that in the event that the Agreement and Act of Consolidation, forming the charter of this Corporation, is amended so as to increase the authorized shares of common stock from 1,000,000 to 3,000,000 shares as proposed to be voted upon at the adjourned special meeting of stockholders of the Corporation to be held on January 13, 1947, 2,000,000 of the authorized but unissued shares of the common stock of this Corporation resulting therefrom, being the maximum number of such shares available for the purpose, be reserved for issuance upon the conversion of the 2-3/4% notes of the Corporation to be issued to Hughes Tool Company as contemplated by said agreement dated January 8, 1947; and

FURTHER RESOLVED, that the officers of this Corporation be, and they hereby are, authorized and directed to do and perform all such acts and things and to sign all such documents and certificates and to take all such other steps as may be necessary or advisable or convenient and proper to carry out the intent of the foregoing resolutions and the provisions of said agreement between Hughes Tool Company and the Corporation as evidenced by said letter from Hughes Tool Company dated January 8, 1947, and accepted as authorized by the foregoing resolutions.

REQUEST OF HUGHES TOOL COMPANY FOR STOCKHOLDERS MEETING

The President stated that he had been informed by the representatives of Hughes Tool Company that the letter to the Corporation dated January 4, 1947, requesting a special meeting of stockholders be held February 5, 1947, had been withdrawn and no further action is required to be taken with respect thereto.

At this point, Messrs. Pearson and Maestre withdrew from the meeting.

AMENDMENT OF BY-LAWS TO INCREASE BOARD OF DIRECTORS

The President suggested to the meeting that it might be considered desirable while awaiting approval by the Civil Aeronautics Board of the loan from Hughes Tool Company to the Corporation contemplated by the agreement approved at this meeting, to reconstitute the Board of Directors at this meeting so as to provide that a majority of the Board would be nominees of Hughes Tool Company. The suggestion was favorably received by the directors present.

On motion duly made, seconded and unanimously carried, the following resolution was adopted:

RESOLVED, that, effective upon the conclusion of this meeting, Section 1 of Article III of the By-Laws of the Corporation be amended to increase the number of members of the Board from Eleven (11) to Twenty-Four (24) directors, so that said Section as amended shall read as follows:

> "Section 1. Number and Term of Office. The business and the property of the Corporation shall be managed and controlled by a board of twenty-four (24) directors. The directors shall be elected by ballot by plurality vote of the stockholders at the annual meetings of stockholders, and each director shall be elected to serve for the term of one year

TRANSCONTINENTAL & WESTERN AIR, INC.

Special Meeting of Stockholders of December 23, 1946

Adjournment of January 13, 1947

A special meeting of stockholders of TRANSCONTINENTAL & WESTERN AIR, INC., a Delaware corporation, held pursuant to the notice of such meeting at the offices of the Corporation, 100 West 10th Street, Wilmington, Delaware, on Monday, December 23, 1946, at 10:00 o'clock in the forenoon and duly adjourned successively was duly reconvened pursuant to such adjournments at the same place on Monday, January 13, 1947, at 2:00 o'clock in the afternoon.

In the absence of the President, Mr. H. B. Miller, Vice President of the Corporation, called the meeting to order stating that Mr. Nugent, the Chairman appointed to preside at the last adjournment, was present but preferred not to act and that another be chosen to act as Chairman, and requested the appointment of a stockholder to act as Chairman. Upon motion duly adopted, Mr. Miller was appointed Chairman of the meeting and thereafter presided.

The Chairman stated that Mr. Burgess, previously appointed Secretary of the meeting, would act as Secretary of the meeting. Mr. Burgess thereupon acted as Secretary of the meeting and kept the records of the proceedings.

The Chairman stated that there had been presented to the meeting on December 23, 1946 a list of the stockholders of the Corporation of record at the close of business

vember 22, 1946, the record date fixed by the Board of Directors of the Corporation for the determination of stockholders of the Corporation entitled to notice of and to vote at the meeting, which list contained the names and addresses of the holders of Common Stock of the Corporation and the number of shares held by them respectively, prepared and certified by Mr. C. W. Merre, an Assistant Secretary of the Corporation, and that such list was available for examination by any stockholder present. From such list, it appeared that there were outstanding on such record date and entitled to vote on all matters to come before the meeting 985,929 shares of Common Stock of the Corporation. The Secretary then ascertained the stockholders present in person or by proxy and the number of shares of Common Stock represented by each and reported that there were present in person or by proxy, the holders of the following number of shares of Common Stock of the Corporation entitled to vote at the meeting:

	NO. OF SHARES
Present in person	None
Represented by proxy to Thomas B. Wilson, Jack Frye and Paul E. Richter, and each of them; H. B. Miller as substitute proxy for Jack Frye and Orvis Scwerwine as substitute proxy for Paul E. Richter being present at the meeting.	231,580
Represented by proxy to William Nugent; William Nugent being present at the meeting.	3,761
Represented by proxy to Carter L. Burgess; Carter L. Burgess	100

Represented by proxy to Francis J. O'Hara, Jr.; Francis J. O'Hara, Jr. being present at the meeting. 435,050

Total present in person or represented by proxy 670,511

The Chairman then stated that the purpose of the meeting was to consider and vote upon an amendment to the Agreement and Act of Consolidation of the Corporation and that Messrs. L. H. Herman and L. E. Gray had on December 23rd been appointed as Judges for the purpose of conducting the vote to be taken for and against the proposed amendment and suggested that the meeting confirm the appointment of these men as such Judges. Thereupon, on motion duly made, seconded and unanimously adopted, the appointment of Messrs. L. H. Herman and L. E. Gray as the two Judges to conduct the vote for and against the proposed amendment was confirmed.

At the request of the Chairman such Judges again took and subscribed an oath faithfully to execute the duties of Judges to conduct the vote of stockholders to be taken for and against the proposed amendment to the Agreement and Act of Consolidation, with strict impartiality and according to the best of their abilities and to make a true certificate of the result of such vote. The Chairman ordered the oaths filed with the record of the meeting.

Proxies presented to the meeting were then deli

to the Judges who examined same and took the roll of those present in person and, after examination of the certified list of stockholders previously presented, executed their written report which stated that there were present in person or represented by proxy 670,511 shares of Common Stock of the Corporation entitled to vote at the meeting, constituting more than a majority of the shares of such stock issued and outstanding and entitled to vote at said meeting.

The Secretary of the meeting then read the report of the Judges and on motion, duly made, seconded and carried, it was ordered filed with the records of the meeting. The Chairman then announced that due notice of the meeting had been given and the holders of more than a majority of all the issued and outstanding Common Stock of the Corporation entitled to vote at the meeting being present in person or by proxy and constituting a quorum, the Special Meeting of Stockholders was duly convened and would proceed to consider the matters to come before it. He stated that the purpose of this meeting, as stated in the notice thereof, was to consider and vote upon a proposal recommended and declared advisable by the Board of Directors, to amend the first paragraph of Article IV of the Agreement and Act of Consolidation of the Corporation, so as to increase from 1,000,000 to 3,000,000 the total number of shares of authorized Common Stock. It was then moved and seconded that the following resolution be adopted:

RESOLVED, that the first paragraph of Article IV of the Agreement and Act of Consolidation, constituting the Certificate of Incorporation, of this Corporation now reading as follows:

> Article IV. The total number of shares of stock which the Company shall have authority to issue is one million (1,000,000), all of which shall be Common Stock and shall have a par value of Five Dollars ($5.00) a share, amounting in the aggregate to Five Million Dollars ($5,000,000).

be amended so that, as amended, the first paragraph of such Article IV shall read as follows:

> Article IV. The total number of shares of stock which the Company shall have authority to issue is three million (3,000,000), all of which shall be Common Stock and shall have a par value of Five Dollars ($5) a share, amounting in the aggregate to Fifteen Million Dollars ($15,000,000).

the remainder of such Article IV, other than the first paragraph thereof, to be unchanged by such amendment.

The Chairman announced that, pursuant to the Agreement and Act of Consolidation and the By-laws of the Corporation, each share of stock was entitled to one vote on the said resolution.

The Judges thereupon took charge of the polls and, all stockholders and proxies present having cast their ballots the Chairman declared the polls closed and the Judges having canvassed the votes cast, submitted their certificate of the result of the vote taken on the resolution.

The Chairman announced that, according to the Certi-

ficate of the Judges, 655,803 shares had been voted in favor of the resolution amending the first paragraph of Article IV of the Agreement and Act of Consolidation of the Corporation, so as to increase from 1,000,000 to 3,000,000 the total number of shares of authorized Common Stock, and 14,708 shares had been voted against the resolution and that, accordingly, such resolution, and the amendment set forth in the resolution, having received the favorable vote of the holders of more than a majority of the outstanding stock of the Corporation, had been duly adopted.

There being no further business presented, upon motion duly made, seconded and unanimously carried, the meeting was adjourned.

Secretary of the Meeting

MINUTES OF THE BOARD OF DIRECTORS MEETING
TRANSCONTINENTAL & WESTERN AIR, INC.

June 15, 1948

The special meeting of the Board of Directors of Transcontinental & Western Air, Inc. called to be held at 10:00 A. M., Tuesday, June 15, 1948, at the offices of the Corporation, 101 West 11th Street, Kansas City, Missouri, pursuant to notice dated June 11, 1948, convened at 10:00 A. M.

Directors present were: Messrs. John A. Collings
A. B. Eisenhower
A. V. Leslie
Warren Lee Pierson
Sidney Maestre

not constituting a quorum.

Directors absent were: Messrs. Palmer Bradley
Powel Crosley, Jr.
Noah Dietrich
Oscar Holcombe
Thomas W. Pew
A. D. Simpson
N. S. Talbott
Loyd Wright

Mr. Warren Lee Pierson, Chairman, called the meeting to order and thereafter presided. Mr. E. Wiley Barker, Assistant Secretary of the Corporation, was present by invitation.

The Assistant Secretary of the Corporation, Mr. E. Wiley Barker, acted as Secretary of the meeting.

Mr. Warren Lee Pierson stated that no business could be transacted, due to a lack of a quorum, and advised that a quorum could not be obtained until after 11:00 A. M., Tuesday, June 15, 1948.

Accordingly, upon motion duly made, seconded and carried, the meeting adjourned until Tuesday, June 15, 1948, at 11:15 A. M., at the offices of the Corporation, 101 West 11th Street, Kansas City, Missouri.

E. Wiley Barker

E. Wiley Barker
Acting Secretary

MINUTES OF THE ADJOURNED BOARD OF DIRECTORS MEETING
TRANSCONTINENTAL & WESTERN AIR, INC.

June 15, 1948

The special meeting of the Board of Directors of Transcontinental & Western Air, Inc., adjourned at 10:00 A. M. on June 15, 1948, convened at 11:15 A. M., Tuesday, June 15, 1948, at the offices of the Corporation, 101 West 11th Street, Kansas City, Missouri, pursuant to action taken at the session of the Board held at 10:00 A. M., June 15, 1948.

Directors present were: Messrs. John A. Collings
A. B. Eisenhower
Oscar Holcombe
A. V. Leslie
Sidney Knoestre
Warren Lee Pierson
A. D. Simpson
N. S. Talbott

constituting a quorum.

Directors absent were: Messrs. Palmer Bradley
Powel Crosley, Jr.
Noah Dietrich
Thomas W. Pew
Loyd Wright

Mr. Warren Lee Pierson, Chairman, called the meeting to order and thereafter presided. Mr. E. Wiley Barker, Assistant Secretary of the Corporation, was present by invitation.

The Assistant Secretary of the Corporation, Mr. E. Wiley Barker, acted as Secretary of the meeting.

RESOLUTION ON DEATH OF THE
SON OF MR. POWEL CROSLEY, JR.

The meeting was advised of the death on June 14, 1948, of the son of Mr. Powel Crosley, Jr.

Thereupon, on motion duly made, seconded and unanimously carried, the members of the Board of Directors authorized and requested the Chairman of the Board to express to Mr. Powel Crosley, Jr., their profound sorrow at the passing of his son and to extend to him and his family their deepest sympathy.

RESIGNATION OF MR. OTIS F. BRYAN AS VICE PRESIDENT

There was presented to the meeting a letter dated June 10, 1948, from Mr. Otis F. Bryan submitting his resignation as Vice President.

Upon motion duly made, seconded and carried, it was

RESOLVED, that the resignation of Mr. Otis F. Bryan as Vice President of this Corporation, effective June 15, 1948, be, and it hereby is, accepted with regret; and further

RESOLVED, that the Chairman of the Board be, and he hereby is, authorized and directed to advise Mr. Otis F. Bryan by letter of the Board's deep regret at his decision to resign and expressing in appropriate terms their appreciation for the many services which he so ably rendered while Vice President of this Corporation.

The following recommendations were then presented to the meeting by Mr. Warren Lee Pierson on behalf of the committee, consisting of Messrs. John A. Collings, A. V. Leslie, Warren Lee Pierson, and N. S. Talbott, which was appointed at the meeting of the Board on May 28, 1948, to consider the questions involved:

(a) The Board should not authorize the granting to Mr. Otis F. Bryan of an option to purchase this Corporation's stockholdings in Philippine Airlines, Inc.;

(b) On the basis of a commitment made by Mr. LaMotte T. Cohu while President of this Corporation, the Board should authorize payment to Mr. Otis F. Bryan of Separation Pay in the amount of one year's salary.

The recommendations of the committee were discussed at length, and it was the consensus of the Board that an option to purchase this Corporation's stock in Philippine Airlines, Inc. should not be granted to Mr. Otis F. Bryan, but that in view of Mr. Cohu's commitment to Mr. Bryan, Separation Pay in the amount of one year's salary should be paid to him. Thereupon, the Vice President and Treasurer was directed to take the necessary steps to effect payment to Mr. Otis F. Bryan of Separation Pay in the amount of one year's salary.

EXCHANGE OF TACA STOCK FOR DEBENTURES

The meeting was advised that the Waterman Steamship Company had asserted that unless it could secure a substantial equity position in TACA Airways, S. A., without further cost, it would discontinue its efforts to put TACA on a paying basis by investing money in it, and that Waterman had proposed that this Corporation exchange its stock in TACA for a new class of non-convertible debentures to be issued by TACA, such exchange to be made on the basis of one share of stock for $1 of principal amount of debenture.

The matter was discussed at length and it was the consensus of the meeting that Waterman's proposal should not be accepted, but the matter was referred to the Executive Committee for further consideration and final decision.

At this point, Mr. Noah Dietrich, Executive Vice President of Hughes Tool Company, and Mr. Tom Slack, attorney, entered the meeting.

MODIFICATION OF CONVERSION TERMS OF SUBORDINATED CONVERTIBLE 2-3/4% NOTES AND INCREASE OF AUTHORIZED SHARES OF COMMON STOCK

The Chairman stated that this meeting had been called to discuss the convertible debentures of TWA held by Hughes Tool Company which were issued last year to cover the loan of $10,000,000 which Hughes Tool Company made TWA. He said that Mr. Dietrich was present at the meeting at this time, not in his capacity as a director of TWA, but as Executive Vice President of Hughes Tool Company and that he thought it best for Mr. Dietrich to express his views on the outstanding debentures and the bearing which they have on the future financial problems of TWA.

Mr. Dietrich then read the following statement:

"It is my understanding that this meeting has been called to discuss the convertible debentures of TWA, which were executed and delivered to Hughes Tool Company pursuant to the $10,000,000 loan to TWA early last year. There has recently been considerable discussion among the members of the Executive Committee and also between myself and other members of the Board concerning the possibility of retiring the debentures. I think each of you is fully familiar with the situation and knows of the various instances in which it has been apparent that TWA would have been benefited by a previous retirement of the debentures.

"It is not my purpose to sit in this meeting today in my capacity as a Director of this Corporation. On the contrary, I wish everyone to know that I am here on request of the Chairman to state the position of Hughes Tool Company with respect to these debentures. Pursuant to informal discussions heretofore had, I have caused the controlling officials of Hughes Tool Company and particularly Howard Hughes to consider the matter of these debentures from the standpoint of what Hughes Tool Company would be willing to do to hasten their retirement. It is my sole purpose to inform you of the attitude of Hughes Tool Company, and to give you such explanation of this attitude as I hope will cause you to understand its basis.

"I am sure each of you is fully familiar with the financial situation of this company and with the various facts which have led Howard Hughes and myself to believe there is no logical rationalization of the quotations from the New York Stock Exchange on this company's stock. When the $10,000,000 loan was made from Hughes Tool Company to this company last year, it was at a time of immediately impending crisis. Although it was generally recognized that it was the desire and purpose of Hughes Tool Company to contribute to the capital of TWA and to receive stock representing such contribution, there was little time in which to work out an equitable basis for determining the price or value at which such stock should be taken. The formula set forth in the debentures whereby Hughes Tool Company was given the option to convert on the basis of New York Stock Exchange quotations seemed to be the best of those suggestions which were forthcoming at that time.

"I do not seek in any way to avoid the full force and effect of the agreement which Hughes Tool Company entered into at that time. It is perfectly willing to stand upon that agreement in all respects. It is not willing, however, to convert the obligations which it holds into stock in TWA at the prices presently being quoted on the New York Stock Exchange, or at any figure near such prices.

"I do not hesitate to state my own opinion, which I have freely expressed to Howard Hughes, that from any conceivable standpoint it is impossible logically to appraise this company as having a net value to the holders of its equities in excess of from one to two dollars per share. I do not believe there is a man present who would pay $5 per share of his own funds for the present common stock of TWA if he would be required to keep such stock indefinitely. There is no reason to elaborate upon this phase of the matter. I say these things merely by way of explanation of the appraisal which we as officers and directors of Hughes Tool Company make of this situation.

"Less than a year and a half ago, Hughes Tool Company advanced $10,000,000 to TWA when it was on the verge of financial collapse and when

it could not have obtained a similar loan from any other source. To be of assistance to TWA in its equipment purchasing program, Hughes Tool Company waived its right to insist upon repayment of that loan in money. The officials of Hughes Tool Company desire always to be of assistance to TWA, but they are not presently willing and do not feel that Hughes Tool Company should be asked to make any further concessions with respect to its position unless there is a corresponding concession from this company which will cause the final result to be something approaching fairness to all parties concerned.

"If it is the desire of the Directors of TWA that the debentures be converted into stock forthwith, then I recommend that you authorize such conversion on the basis of the par value of the stock, or $5 per share.

"If you are unwilling to agree to conversion at that figure, but desire to encourage conversion, then I propose by way of suggestion that you offer Hughes Tool Company the right to convert all the debentures held by it into common stock at a price which will be equal to $5 per share less than the closing price on the New York Stock Exchange on the day upon which notice of intention to convert may be given to you by Hughes Tool Company. I do not say positively that such proposition would be accepted by Hughes Tool Company. I do say that I think it is reasonably certain that it would be accepted, and I suggest that if you decide to make such a proposal, you permit it to remain open for sixty days to give the stockholders an opportunity to approve it.

"I will be happy to answer any questions which anyone may have to propound to me, and after that I ask your permission to retire from this meeting, because on this matter I am dealing with TWA at arm's length and solely in my capacity as Executive Vice President of Hughes Tool Company. Because of my relationship to TWA, I do not believe I should sit in on any discussion by the Board of Directors of the merits of this matter."

At this point Mr. Dietrich and Mr. Slack withdrew from the meeting.

The Directors considered the proposal at length and discussed many alternatives. It was the consensus of the meeting that his recommendations should not be carried out but that an offer to convert on some other basis should be made to Hughes Tool Company.

The meeting recessed at 1:05 P. M. for lunch and reconvened at 2:20 P. M.

The members of the Board present at the meeting agreed that the immediate conversion of the debentures into common stock was to the advantage of the company but that it would be more desirable from the standpoint of the company to agree upon a fixed price for conversion rather than one subject to market fluctuations during the time necessary for holding a stockholders meeting in order to consider and take action on the proposal. It was felt also that in submitting the plan to the stockholders it would be desirable to propose an amendment to the Agreement and Act of Consolidation, constituting the Certificate of Incorporation of the company, so as to increase the authorized shares of common stock from 3,000,000 to 4,000,000 shares.

After further discussion and on motion duly made and seconded, the following resolution was unanimously adopted:

RESOLVED, that this Board of Directors hereby proposes, declares advisable and recommends to the stockholders the amendment of the Agreement and Act of Consolidation, consituting the Certificate of Incorporation, of this Company to effect the increase from 3,000,000 to 4,000,000 in the total number of shares of stock which the Company shall have authority to issue, without change in the par value of the authorized shares of this Company; and, for this purpose, that the first paragraph of Article IV of the Agreement and Act of Consolidation, constituting the Certificate of Incorporation, of this Company now reading as follows:

> "Article IV. The total number of shares of stock which the Company shall have authority to issue is three million (3,000,000), all of which shall be Common Stock and shall have a par value of Five Dollars ($5.00) a share, amounting in the aggregate to Fifteen Million Dollars ($15,000,000)."

be amended so that, as amended, the first paragraph of such Article IV shall read as follows:

> "Article IV. The total number of shares of stock which the Company shall have authority to issue is four million (4,000,000), all of which shall be Common Stock and shall have a par value of Five Dollars ($5.00) a share, amounting in the aggregate to Twenty Million Dollars ($20,000,000)."

the remainder of such Article IV, other than the first paragraph thereof, to be unchanged by such amendment; and that a special meeting of the stockholders entitled to vote in respect thereof be, and it hereby is, called to be held at the office of the Company, No. 101 East 11th Street, Kansas City, Missouri at 10 o'clock in the forenoon, Central Standard Time, on August 10, 1948, for the consideration of such amendment, and such other matters as may properly come before the meeting.

On motion duly made and seconded, the following resolution was unanimously adopted:

RESOLVED, that the Chairman of the Board of this Company be, and he hereby is, authorized and directed, on behalf of this Company, to offer to Hughes Tool Company the right to convert the Subordinated Convertible 2-3/4% Notes of this Company, in the aggregate principal amount of $10,000,000, heretofore issued to Hughes Tool Company, plus accumulated interest thereon to the close of business Friday, June 18, 1948, of $344,239.75, into shares of this Company's common stock having a par value of $5.00 per share at a price of $10.00 per share, such offer to be open for acceptance until 12 o'clock noon, Central Standard Time, Friday, June 18, 1948, and such offer to be subject to and contingent upon:

1. Execution of such agreements with, or the securing of such consents from, the parties to the Agreement of March 25, 1948, between the Company, Hughes Tool Company, various Lending Banks referred to therein, Wright Aeronautical Corporation, Curtiss-Wright Corporation, Lockheed Aircraft Corporation and Bankers Trust Company and any other parties with whom this Company has financial arrangements, as the proper officers of this Company, with the advice of counsel, deem necessary or advisable, and

2. Approval by the holders of a majority of the common stock (exclusive of the stock of Hughes Tool Company) present in person or represented by proxy at the special meeting of the stockholders of this Company to be called for the purpose of considering such offer.

and that in the event this offer shall be accepted it shall be submitted to such stockholders for approval at the meeting of stockholders called to be held on August 10, 1948, for the purpose of acting on the proposal to increase the authorized shares of common stock of the Company in accordance with the foregoing resolution.

On motion duly made and seconded, the following resolutions were unanimously adopted:

RESOLVED, that the close of business on June 30, 1948, be, and it hereby is, fixed as the record date for the determination of stockholders entitled to notice of, and to vote at, the special meeting of stockholders of this Company called to be held at 10 o'clock in the forenoon, Central Standard Time, on August 10, 1948, including any and all adjournments of such meeting; and further

RESOLVED, that the Secretary or other proper officer of this Company be, and he hereby is, authorized and directed to prepare with the advice of counsel and cause to be filed with the Securities and Exchange Commission preliminary forms of notice of special meeting of stockholders called to be held August 10, 1948, proxy and proxy statement with respect thereto; that the Secretary or other proper officer be, and he hereby is, authorized with the advice of counsel to make such changes in the forms of notice of meeting, proxy statement and proxy as may be considered desirable to conform to any suggestions made by the Securities and Exchange Commission or otherwise, and thereafter to cause notice of such stockholders meeting, proxy statement and form of proxy to be mailed to the stockholders of this Company of record at the close of business on June 30, 1948, and to cause to be filed

with or mailed to the Securities and Exchange Commission and the New York Stock Exchange copies of such documents in the form in which they shall be released to stockholders; and further

RESOLVED, that, in the form of proxy so to be sent to stockholders, the Secretary or other proper officer be, and he hereby is, authorized to include Warren Lee Pierson, A. V. Leslie, A. B. Eisenhower and Nelson S. Talbott as the attorneys and proxies named therein, with power of substitution; and further

RESOLVED, that, if the stockholders approve the proposed amendment to the Agreement and Act of Consolidation, constituting the Certificate of Incorporation, of this Company, the proper officers of this Company be, and they hereby are, authorized to file and record or cause to be filed and recorded as required by the law of Delaware a Certificate of Amendment to give effect to such proposed amendment as authorized by the stockholders; and further

RESOLVED, that the proper officers of this Company be, and they hereby are, authorized and empowered to do or cause to be done all such further things that may be necessary or desirable for the purpose of carrying out all resolutions adopted at this meeting relating to the increase in the authorized shares of common stock of the Company and the offer to Hughes Tool Company with respect to the conversion of the Subordinated Convertible 2-3/4% Debentures of this Company and the intent thereof.

At this point Messrs. Dietrich and Slack re-entered the meeting and the Chairman of the Board outlined to Mr. Dietrich, as Executive Vice President of Hughes Tool Company, the offer to Hughes Tool Company of the right to convert the Subordinated Convertible 2-3/4% Notes of this Company into shares of its Common Stock on the terms and conditions outlined in the foregoing resolutions.

Thereupon, Messrs. Dietrich and Slack retired from the meeting.

RESIGNATION OF MR. ROBERT H. BIRON, JR., VICE PRESIDENT - INDUSTRIAL RELATIONS

There was presented to the meeting a letter dated June 15, 1948, from Mr. Robert H. Biron, Jr. submitting his resignation as Vice President - Industrial Relations.

Upon motion duly made, seconded and carried, it was

RESOLVED, that the resignation of Mr. Robert H. Biron, Jr. as Vice President - Industrial Relations of this Corporation, effective June 22, 1948, be, and it hereby is, accepted with regret.

APPOINTMENT OF MR. DAVID W. HARRIS AS DIRECTOR - INDUSTRIAL RELATIONS

Upon motion duly made, seconded and carried, the Board of Directors authorized the appointment of Mr. David W. Harris as Director - Industrial Relations, effective June 22, 1948, at an annual salary of $12,000.

IRANIAN AIRWAYS

After discussion, upon motion duly made, seconded and carried, it was

RESOLVED, that the proper officers of this Corporation be, and they hereby are, authorized to execute and deliver in the name and on behalf of Transcontinental & Western Air, Inc. a Power of Attorney authorizing such representative of this Corporation as may be designated by such officers to effect a mutual release and settlement of all claims and differences between this Corporation and Iranian Airways upon such terms and conditions as might appear in the discretion of such representative to be in the best interests of this Corporation, provided that such settlement and release shall not entail any expenditure of funds on the part of this Corporation.

ADJOURNMENT

There being no further business to come before the meeting, it was adjourned at 3:00 P. M.

E. Wiley Burke
E. Wiley Burke

thereof, in which event the conversion price is the par value. The Corporation may, on January 1, 1950 and on that date only, require the holder of the Notes to convert, at a price per share to be calculated by the same method. The holder of the Notes was given the option to convert unpaid accumulated interest into Common Stock or to receive cash therefor. By agreement dated December 26, 1947, Hughes Tool Company waived all its rights to require payment of these Notes in money or in any form other than stock in the Corporation in accordance with the convertibility provisions of such Notes. It was agreed that such Notes remain in full force insofar as they relate to stock acquisition and that they constitute the measure of and the basis for Hughes Tool Company's right to require additional stock in the Corporation in satisfaction of such Notes.

Pursuant to a resolution of the Board of Directors adopted on June 15, 1948, an offer was made to Hughes Tool Company to convert the Subordinated Convertible 2¼% Notes of the Corporation in the aggregate principal amount of $10,000,000, plus accumulated interest thereon to the close of business on June 18, 1948, of $344,239.75, into shares of the Corporation's Common Stock, having a par value of $5 per share, at a price of $10 per share. Such offer was open for acceptance until June 18, 1948 and was subject and contingent upon:

(1) The execution of such agreements with, or the securing of such consents from, the parties to the Agreement of March 25, 1948 between the Corporation, Hughes Tool Company, various Lending Banks referred to therein, Wright Aeronautical Corporation, Curtiss-Wright Corporation, Lockheed Aircraft Corporation and Bankers Trust Company, and from The Equitable Life Assurance Society of the United States as the holder of the Corporation's 3% Sinking Fund Debentures, as the proper officers of the Corporation with the advice of counsel may deem necessary or advisable. Such consents or agreements have not yet been secured.

(2) Approval by the holders of a majority of the Common Stock of the Corporation (exclusive of the stock held by Hughes Tool Company) present in person or represented by proxy at a special meeting of stockholders.

Such offer was accepted by Hughes Tool Company on June 18, 1948.

If this proposal is not adopted and if before January 2, 1956, the minimum conversion price of $5 per share becomes effective, upon conversion by Hughes Tool Company it would receive 2,000,000 shares of Common Stock representing the $10,000,000 principal amount of the Subordinated Convertible 2¼% Notes of the Corporation plus additional shares converted at $5 per share representing interest accrued at the rate of $275,000 per annum for each year during which the Notes were outstanding.

The Corporation cannot require conversion except on January 1, 1950 at whatever the conversion price may be on that date.

Had the Corporation the right to require conversion on June 18, 1948, the date of acceptance by Hughes Tool Company of this proposal, the conversion price would have been $15.80 per share and Hughes Tool Company would have received 654,699 shares.

The closing price of the Common Stock of the Corporation on the New York Stock Exchange on July 8, 1948 was $13.75 per share.

The purpose of this proposal is to eliminate the present uncertainty as to the number of shares of Common Stock which might be required to be issued upon conversion of the Notes, since the conversion rate fluctuates with the market, and to eliminate the obligation to issue additional shares of Common Stock in satisfaction of interest accruing on the Notes subsequent to June 18, 1948, and thus to place the Corporation in a better position to finance at the appropriate time.

If this offer is approved by the holders of a majority of the Common Stock (exclusive of the stock held by Hughes Tool Company) present in person or represented by proxy at the Special Meeting of Stockholders and if other requisite approvals under the Corporation's financial arrangements are obtained, the

Corporation will issue to Hughes Tool Company 1,034,423 shares of Common Stock and all the Subordinated Convertible 2¾% Notes of the Corporation will be surrendered and retired, after which Hughes Tool Company will own approximately 73% of the then outstanding Common Stock.

If this proposal is carried out no interest will be accumulated on these Notes for the period between June 18, 1948 and the date of surrender of such Notes. If the proposal is not carried out interest will continue to accrue after June 18, 1948 in accordance with the provisions of the Notes.

As of June 15, 1948, Hughes Tool Company owned of record and beneficially 452,100 shares, constituting approximately 45.85% of the issued and outstanding stock of the Corporation. All of the stock owned of record by Hughes Tool Company is also owned beneficially by Hughes Tool Company. Mr. Noah Dietrich, a director of the Corporation, who has not voted on the proposals in question, is also Executive Vice-President and a director of Hughes Tool Company. No director of the Corporation has any substantial interest in the matters to be acted upon at the meeting except as a stockholder of the Corporation and no director owns in excess of 200 shares.

In 1944 the Civil Aeronautics Board approved the acquisition of control of the Corporation by Hughes Tool Company under Section 408 of the Civil Aeronautics Act. The $10,000,000 represented by the Subordinated Convertible 2¾% Notes of the Corporation was loaned by Hughes Tool Company to the Corporation pursuant to an agreement dated January 8, 1947, which was filed with the Civil Aeronautics Board for approval if such approval was deemed necessary. The Corporation and Hughes Tool Company maintain that the Board's original order approving control of the Corporation by Hughes Tool Company made any further consideration of this question unnecessary. By order dated June 30, 1948, the Civil Aeronautics Board states that the agreement of January 8, 1947 constituted a further acquisition of control requiring approval under Section 408 of the Civil Aeronautics Act and directs that a hearing be held to determine whether such further acquisition should be approved.

Description of Common Stock

Dividend Rights. Except as set forth below under the following subheading Limitations in Indentures on Payment of Dividends, the Board of Directors of the Corporation may declare and pay dividends on the Common Stock out of any funds of the Corporation legally available therefor.

Limitations in Indentures on Payment of Dividends. The Indenture dated December 1, 1945 between the Corporation and The Commercial National Bank and Trust Company of New York, as subsequently amended, under which the 3% Sinking Fund Debentures of the Corporation have been issued, provides in substance that the Corporation will not declare any dividends (other than stock dividends) on any class of stock or authorize any payment for the purchase, redemption or other retirement of any stock or any distribution in respect thereof (such dividends, payments or distributions being herein called "Stock Payments"), unless, among other things, on the date of such declaration or authorization, after giving effect to the proposed Stock Payment and all other Stock Payments declared or authorized after December 31, 1945, each of the following conditions will be complied with:

(i) After deducting certain items, including provisions for income taxes, from both consolidated current assets and consolidated current liabilities of the Corporation and its subsidiaries, the remaining consolidated current assets shall be at least equal to 200% of the remaining consolidated current liabilities;

(ii) The consolidated net current assets of the Corporation and its subsidiaries shall be at least $7,000,000 or 10% of consolidated funded indebtedness as defined in such Indenture, whichever is greater; and

(iii) The sum of all Stock Payments subsequent to December 31, 1945, does not exceed the sum of (a) 50% of the consolidated net income of the Corporation and its subsidiaries for the period subsequent to December 31, 1945 to and including the date of the declaration or authorization of the proposed Stock Payment, plus (b) the aggregate cash proceeds of all stock of the Corporation during the period from December 31, 1945 to and including such date; provided that in no

TWA Ex. 293, page 1 of 58
(TWA Prospectus, 2/18/49 & Amendments, 3/8/49)

TWA 293 ID

TRANSCONTINENTAL & WESTERN AIR, INC.

Amendment to Prospectus dated February 18, 1949

Of the 404,112 shares of Common Stock offered to stockholders, 375,036 shares were purchased pon the exercise of Subscription Warrants, including the 297,304 shares purchased by Hughes Tool ompany. The Underwriters are purchasing from TWA the 29,076 unsubscribed shares at $10 per share bject to the provisions of the Purchase Contract. The aggregate underwriting commissions will be 5,921.20 and the proceeds to TWA on the 106,808 underwritten shares, after underwriting commissions t before expenses, will be $982,158.80, or approximately $9.20 per share.

TWA is advised by the representative of the several Underwriters that the Underwriters intend make a public offering of the 29,076 unsubscribed shares at an initial public offering price of $11⅛ r share and to allow a concession of 40¢ per share to certain dealers including Underwriters. If such ares are sold at this price, the Underwriters will realize an aggregate gross profit (before expenses and alers' concessions) of $39,979.50 in addition to the commissions payable to them by TWA as set forth ove. The closing price of the Common Stock on the New York Stock Exchange on March 7, 1949 s $11½ per share.

On February 25, 1949, the Civil Aeronautics Board issued a statement of policy with respect to its nomic program for 1949, and concurrently therewith served a number of orders which, among other ngs:

(1) Directed TWA to "show cause" why the temporary air mail rates for its transcontinental tem should not be increased by a lump-sum payment of $2,748,000 for the period March 14, 1947, ugh December 31, 1948. $2,029,000 of this amount, if granted, would represent additional compen- on for transportation of air mail on TWA's transcontinental system in the year 1948, and the remain- $719,000, if granted, would represent a payment by the Government to compensate TWA for the ortization, for the period from March 14, 1947, through December 31, 1948, of losses (estimated at 0,000 by the Board for the purpose of fixing the temporary rate) incurred in 1946 because of the ng of Constellation aircraft by the Administrator of Civil Aeronautics. Additional payments, rate of $33,333 per month, would be made after January 1, 1949, until complete amortization losses (except for the period from October 1, 1946, to March 14, 1947) had been accom-

(see over)

TRANSCONTINENTAL & WESTERN AIR, INC.

Amendment to Prospectus dated February 18, 1949 (Continued)

plished by October 1, 1951, or until the final rate of air mail pay for the transcontinental system had been established. The final air mail rate or rates may be lower or higher than the temporary rates specified in the order to show cause.

(2) Instituted an investigation into the reasons for the differences in air mail pay requirements between American Airlines, Inc., Eastern Air Lines, Inc., United Air Lines, Inc., and TWA, to determine to what extent, if any, these differences may be occasioned by uneconomical and inefficient management, and to explore remedial action to be taken by the Board or said air carriers to eliminate or decrease dependence upon the Government for "need" air mail payments.

(3) Instituted a proceeding to determine whether it would be in the public interest to alter, amend or modify certificates of public convenience and necessity of United Air Lines, Inc., TWA, Capital Airlines, Inc. or American Airlines, Inc. to prevent any one or more of such air carriers from engaging in one-stop or non-stop operations between Washington and Chicago.

In its statement of policy the Board indicated that it is engaged in an exhaustive study of the existing air route pattern and that during the year other action dealing with uneconomic situations therein might be taken.

On March 1, 1949, the Board acted on the motions of Public Counsel and TWA in the proceedings relating to the acquisition of assets of American Overseas Airlines, Inc. by Pan American Airways, Inc. (described under the caption "History and Business—Other Recent Developments") and instituted a proceeding to determine whether, if the proposed acquisition is approved, public convenience and necessity require the alteration, amendment or modification in whole or in part of the Certificates of American Overseas Airlines, Inc., Pan American Airways, Inc., and TWA for north Atlantic operations and to make such amendments, alterations and modifications thereof as may be found to be so required.

Dated, March 8, 1949.

INCLUDING RIDERS C... Ex. 293, page 3 of 58
...INFORMATION ... (TWA Prospectus, 2/18/49 & Amendments, 3/3/49)
...PROSPECTUS ... 2/18/49
MAR 7 - 1949
TRANS WORLD AIRLINES, INC. RECORD
FORMERLY RETURN TO
404,112 Shares
...RRIMAN RIPLEY INCORPORATED
63 WALL ST.

Transcontinental & Western Air, Inc.

Common Stock

(par value $5)

THESE SECURITIES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION NOR HAS THE COMMISSION PASSED UPON THE ACCURACY OR ADEQUACY OF THIS PROSPECTUS. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

As more fully set forth herein, Transcontinental & Western Air, Inc. (hereinafter called TWA) is offering to the holders of its outstanding Common Stock of record at the close of business on February 16, 1949, or on such later date as the within mentioned registration statement becomes effective, the right to subscribe at $10 a share for an aggregate of 404,112 shares of Common Stock at the rate of one-fifth of one share for each share then held. Such subscription rights will be evidenced by Subscription Warrants which will be exercisable (Fractional Subscription Warrants only in amounts calling for full shares) upon surrender thereof and payment of the subscription price at the office of The Commercial National Bank and Trust Company of New York, 46 Wall Street, New York 15, N. Y., at or before 3:00 o'clock P. M., Eastern Standard Time, March 7, 1949 (with certain provisions for telegraphic subscription), after which time such Subscription Warrants will be void. Prior to the mailing of the Subscription Warrants to stockholders, Hughes Tool Company, the holder of 1,486,523 shares of Common Stock of TWA, will have agreed to purchase for investment 297,304 shares of Common Stock through the exercise of Subscription Warrants issued to it. The several Underwriters named herein have agreed, subject to the conditions of the Purchase Contract, including the purchase by Hughes Tool Company of the above number of shares, to purchase at the subscription price any of the remaining 106,808 shares of Common Stock not purchased upon the exercise of Subscription Warrants. See the captions "Offering to Stockholders", "History and Business—Relations with Hughes Tool Company" and "Underwriting".

	Price to Public(1)	Underwriting Discounts and Commissions(2)			Proceeds to Company(2) (3)		
		As to 297,304 shs.	As to 106,808 shs.		As to 297,304 shs.	As to 106,808 shs.	
			Maximum	Minimum		Minimum	Maximum
Per Unit	$10	None	$1.25	$0.75	$10	$8.75	$9.25
Total	$4,041,120	None	$133,510	$80,106	$2,973,040	$934,570	$987,974

(1) The price to public is the subscription price payable upon exercise of Subscription Warrants.

(2) As compensation for the Underwriters' commitments referred to above TWA has agreed to pay an amount equal to 75¢ per share on the total of 106,808 shares of Common Stock mentioned above, plus an additional compensation on each unsubscribed share purchased by the Underwriters as follows: 10¢ if the number of such shares exceeds 10,681 and does not exceed 21,362; 20¢ if such number of shares exceeds 21,362 and does not exceed 32,042; 30¢ if such number of shares exceeds 32,042 and does not exceed 42,723; 40¢ if such number of shares exceeds 42,723 and does not exceed 53,404; and 50¢ if such number of shares exceeds 53,404. The maximum proceeds to TWA and the minimum underwriting discounts and commissions assume that all of the 106,808 shares are sold by TWA upon exercise of Subscription Warrants and the minimum proceeds and maximum discounts and commissions assume that none of such shares is so sold. See the caption "Underwriting" with respect to certain indemnification agreements between TWA and the several Underwriters.

(3) After deduction of underwriting commissions but without allowing for expenses payable by TWA estimated to be $118,260.

2,973,040.
982.
37,550.

Prior to the expiration of the Subscription Warrants the Underwriters may offer and sell firm or subject to allotment or to prior subscription through the exercise of Subscription Warrants, Common Stock at prices not less than the subscription price, less in the case of dealers the dealers' concession. During the same period such prices shall be not more than the last sale price of Common Stock on the New York Stock Exchange in the last preceding 24-hour period in which such stock was sold on said Exchange plus an amount equal to Stock Exchange brokerage commissions on sales thereof and which the Underwriters intend shall not be varied within any 24-hour period, except that such price may be reduced by the Underwriters within any such period. Such offer may include stock purchased by the Underwriters under any provisions of the Agreement Among Underwriters or through the exercise of Subscription Warrants or may be made in anticipation of the purchase of stock under the Purchase Contract or through the exercise of Subscription Warrants. During the calendar year 1948, TWA's Common Stock sold on the New York Stock Exchange at a low of $9¼ and a high of $22¾ per share; and the range for 1949 up to February 16 was between $10 and $13. The closing price on said Exchange on February 16, 1949 was $11¼ per share. After the expiration of the Subscription Warrants the Underwriters may or may not make one or more private or public offerings of Common Stock. The price or prices of any such offering have not been fixed as of the effective date of the registration statement but will be determined by the representative of the Underwriters after the expiration of the Subscription Warrants, see caption "Terms of Offering". As a result the Underwriters may realize profits or losses independent of the underwriting commissions stated above.

A complete list of the Underwriters appears herein under the caption "Underwriting".

Merrill Lynch, Pierce, Fenner & Beane

TWA's presently outstanding Common Stock is listed on the New York, San Francisco, Los Angeles and Chicago Stock Exchanges and applications have been made to said Exchanges for the listing thereon of the 404,112 shares of Common Stock offered hereby. Application has also been made to the New York Stock Exchange for the trading thereon of rights evidenced by the Subscription Warrants described herein.

The date of issue of this prospectus is February 18, 1949.

No dealer, salesman or any other person has been authorized to give any information or to make any representations, other than those contained in this prospectus, in connection with the offer contained in this prospectus, and, if given or made, such information or representations must not be relied upon as having been authorized by TWA or by the Underwriters. This prospectus does not constitute an offer by TWA or by any Underwriter to sell the Common Stock in any state in which such offer may not lawfully be made.

TABLE OF CONTENTS

	Page
Registration Statement	2
Offering to Stockholders	3
Purpose of Issue	4
Capitalization	5
Summary of Consolidated Operations	6
History and Business	7
Property	30
Funded Debt	31
Description of Common Stock	35
Directors and Executive Officers	36
Indemnification of Directors and Officers	37
Underwriting	38
Terms of Offering	39
Litigation	41
Legal Opinions	41
Experts	41
Index to Financial Statements included in Registration Statement	42
Certificate of Independent Public Accountants	43
Financial Statements	44-55
Additional Information	56

REGISTRATION STATEMENT

A registration statement relating to the 404,112 shares of Common Stock, $5 par value (herein called the Common Stock) of TWA and the Subscription Warrants evidencing the right to subscribe for such shares, has been filed with the Securities and Exchange Commission, Washington, D. C., under the Securities Act of 1933. For further information, reference is made to such registration statement, including the financial schedules therein and exhibits thereto.

IN CONNECTION WITH THIS OFFERING, THE UNDERWRITERS MAY EFFECT TRANSACTIONS WHICH STABILIZE OR MAINTAIN THE MARKET PRICE OF THE COMMON STOCK AND THE SUBSCRIPTION WARRANTS AT A LEVEL ABOVE THAT WHICH MIGHT OTHERWISE PREVAIL IN THE OPEN MARKET. SUCH TRANSACTIONS MAY BE EFFECTED IN THE COMMON STOCK ON THE NEW YORK, SAN FRANCISCO, LOS ANGELES AND CHICAGO STOCK EXCHANGES OR IN THE OVER-THE-COUNTER MARKET AND IN THE SUBSCRIPTION WARRANTS ON THE NEW YORK STOCK EXCHANGE OR IN THE OVER-THE-COUNTER MARKET. SUCH STABILIZING, IF COMMENCED, MAY BE DISCONTINUED AT ANY TIME. IN THIS CONNECTION SEE THE CAPTION "TERMS OF OFFERING" HEREIN.

404,112 Shares

Transcontinental & Western Air, Inc.

Common Stock
(par value $5)

Transfer Agent
THE COMMERCIAL NATIONAL BANK AND TRUST COMPANY OF NEW YORK

Registrar
BANKERS TRUST COMPANY

OFFERING TO STOCKHOLDERS

Terms of Offering. TWA is offering to holders of its outstanding Common Stock of record at the close of business on February 16, 1949, or on such later date as the above mentioned registration statement becomes effective, the right to subscribe at $10 per share for an aggregate of 404,112 shares of Common Stock, being at the rate of one-fifth of one share of Common Stock for each share of Common Stock then held. To evidence the subscription rights, TWA is issuing to such stockholders transferable Subscription Warrants. The right to subscribe expires at 3:00 o'clock P. M., Eastern Standard Time, on March 7, 1949, after which unexercised Subscription Warrants will be void and of no value.

Prior to the mailing of the Subscription Warrants to stockholders, Hughes Tool Company, the holder of 1,486,523 shares of Common Stock of TWA, will have agreed to purchase for investment 297,304 shares of Common Stock through the exercise of Subscription Warrants issued to it—see the caption "History and Business—Relations with Hughes Tool Company". The form of this agreement is filed as Exhibit 15z to the registration statement.

As is more fully set forth under the caption "Description of Common Stock", the Trust Indenture, as amended, under which TWA's Debentures are outstanding, contains various provisions restricting the payment of cash dividends, including a restriction based upon TWA's consolidated net income subsequent to December 31, 1945. For the period from December 31, 1945, to November 30, 1948, TWA had a consolidated net loss of approximately $24,700,000. TWA will have to have consolidated net income after November 30, 1948, in excess of said amount before it can pay dividends on the Common Stock.

Exercise of Subscription Warrants. Subscription Warrants may be exercised, after filling in and signing the subscription form on the back of the warrant, by surrender thereof to the Warrant Agent, The Commercial National Bank and Trust Company of New York, 46 Wall Street, New York 15, N. Y., accompanied by payment for the shares subscribed. No subscription for a fraction of a share will be accepted. All such payments should be made in cash or by check in New York funds to the order of The Commercial National Bank and Trust Company of New York. Warrant holders unable to surrender their Warrants in New York by the expiration date may exercise their subscription rights

by forwarding the subscription price by telegram or otherwise so as to be received by the Warrant Agent at or before 3 o'clock P. M., Eastern Standard Time, March 7, 1949, together with a guarantee in writing or by telegram from a bank, trust company or a member firm of the New York Stock Exchange that the Subscription Warrants with respect to the shares of Common Stock subscribed for have been transmitted by it, or are in its possession and will be transmitted immediately by it, to such Warrant Agent. Such subscriptions will be accepted subject to withholding of delivery of Common Stock subscribed for until receipt of the duly executed Warrants. Certificates for shares of Common Stock will be issued as soon as practicable after subscription and payment of the subscription price.

Subscription Warrants. The Subscription Warrants are of two kinds: Full Share Subscription Warrants and Fractional Subscription Warrants. The Full Share Subscription Warrants are in registered form and are transferable on the books of TWA on surrender thereof, properly assigned, at the office of the Warrant Agent. The Fractional Subscription Warrants are in bearer form and are transferable by delivery. Fractional Subscription Warrants may be exercised when accompanied by other Fractional Subscription Warrants, evidencing in the aggregate the right to subscribe for one or more full shares of Common Stock. Full Share Subscription Warrants and Fractional Subscription Warrants, upon surrender at the office of the Warrant Agent, may be exchanged for Full Share Subscription Warrants or Fractional Subscription Warrants evidencing the right to subscribe for the same aggregate number of shares as the Subscription Warrants so surrendered.

Foreign Stockholders. Subscription Warrants are not to be mailed to stockholders having registered addresses outside the United States and Canada, but are to be held for such stockholders by the Warrant Agent, subject to satisfactory arrangements being made with the Warrant Agent for exercise or sale or other disposition thereof, until 10:00 o'clock A. M., Eastern Standard Time, on March 4, 1949, the last full business day before the unexercised Subscription Warrants expire. The Subscription Warrants so held, as to which such other arrangements shall not have been made, are then to be sold, if possible; and, to the extent permitted by applicable laws and regulations, a pro rata share of the aggregate net proceeds, if any, therefrom is to be remitted to each stockholder on whose behalf such sale was made or, if such remittance is not permitted, held for the account of such stockholder subject to payment on receipt of lawful instructions.

Unsubscribed Shares. As set forth above the several Underwriters named herein have agreed, subject to the conditions of the Purchase Contract, including the purchase by Hughes Tool Company of 297,304 shares of Common Stock, to purchase at the subscription price any of the remaining 106,808 shares of Common Stock not purchased upon the exercise of Subscription Warrants—see the caption "Underwriting".

PURPOSE OF ISSUE

The net proceeds to be received by TWA from the sale of the 404,112 shares of Common Stock offered hereby are estimated to be approximately $3,789,350, after deducting expenses estimated to amount to $118,260 and the maximum amount of commissions to Underwriters in the amount set forth on the cover of this prospectus, and approximately $3,842,754, after deducting such estimated expenses and the minimum amount of commissions to Underwriters in the amount set forth on the cover of this prospectus.

The net proceeds will be added to and become part of the general funds of TWA. The general funds of TWA will be used for such corporate purposes as the management may determine. Since 1945, TWA's working capital requirements have increased as a result of the expansion of TWA's air transportation services. For the twelve-month period ended January 31, 1946, TWA's average monthly operating expenses (excluding amortization and depreciation) were approximately $2,475,000, while for the twelve-month period ended November 30, 1948, such average monthly operating expenses were approximately $7,524,000. Furthermore, in the last three years, operating losses and acquisition of new flight equipment have reduced net working capital. TWA is also obligated in 1949 to make payments on its funded debt (as presently constituted) of approximately $7,700,000, of which $4,100,000 is for principal payments, $2,000,000 is for sinking fund, and $1,600,000 is for interest.

After excluding from current liabilities principal, sinking fund and interest payments on funded debt for 1949, TWA's working capital at November 30, 1948, amounted to approximately $13,300,000. At the present time depreciation and amortization on its properties is at the rate of about $10,000,000 per annum. While the management believes that its working capital, the net proceeds received from the sale of the Common Stock offered hereby, funds retained on account of depreciation and amortization,

plus operating revenues after deducting depreciation and amortization, will be sufficient to finance its operating expenses and to meet the principal, sinking fund and interest payments on its funded debt, no representation is made that additional financings will not be necessary or desirable.

Of the net proceeds to be received from the sale of the shares of Common Stock offered hereby, an amount equal to the par value thereof (being $5 per share) will be credited to capital account and the balance will be credited to capital surplus—paid in.

CAPITALIZATION

	Amount as of February 1, 1949		
	Authorized	Outstanding	Giving effect to sale of all Common Stock being registered
3% Sinking Fund Debentures (Series A) due June 1, 1956	$29,500,000.00(A)	$29,500,000.00	$29,500,000.00
3% Sinking Fund Debentures (Series B) due December 1, 1955	$ 9,500,000.00(B)	$ 9,500,000.00	$ 9,500,000.00
3% promissory notes (secured) maturing in monthly instalments from September 30, 1948 to May 31, 1953(C)	$16,414,656.38(D)	$16,390,404.12	$16,390,404.12
2% promissory notes (secured) maturing serially from September 1, 1947 to June 1, 1950	$ 447,914.54(E)	$ 447,914.54	$ 447,914.54
Common Stock, $5 par value	4,000,000 shs.	2,020,560 shs.	2,424,672 shs.

(A) Originally $30,000,000, of which $500,000 principal amount has been retired through operation of the sinking fund. For 1949 a fixed sinking fund payment of $1,000,000 is required to be made on May 28 and additional sinking fund payments are required depending on net income as set forth under the caption "Funded Debt—Debentures".

(B) Originally $10,000,000, of which $500,000 principal amount has been retired through the operation of the sinking fund. For 1949 a fixed sinking fund payment of $1,000,000 is required to be made on November 27 and additional sinking fund payments are required depending on net income as set forth under the caption "Funded Debt—Debentures".

(C) For a statement respecting the guaranty of a portion of these notes by Lockheed Aircraft Corporation see the caption "Funded Debt—3% Promissory Notes".

(D) Originally $18,776,942.50. TWA has reduced commitments of the banks by $808,203.56, and paid $1,554,082.56 on account of principal of the $17,944,486.68 principal amount of notes delivered. $24,252.26 principal amount of notes may still be delivered as described under the caption "History and Business—Equipment". On the basis of the notes outstanding on February 1, 1949, the sum of $315,200.12 is due on account of principal on February 28, 1949 and a similar amount is payable each month thereafter.

(E) Originally $1,700,000.00. $1,252,085.46 has been paid on account of the principal of these notes, and $85,000.00 is to be so paid on or about March 1, 1949 and a similar amount is payable each quarter thereafter, with additional payments in certain events, as set forth under the caption "Funded Debt—2% Promissory Notes".

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TWA Ex. 293, page 8 of 58
(TWA Prospectus, 2/18/49 & Amendments, 3/8/49)

SUMMARY OF CONSOLIDATED OPERATIONS

The following summary of consolidated operations of TWA and subsidiaries, except for the eleven months period ended November 30, 1948, has been reviewed by Haskins & Sells, independent public accountants, and is included herein in reliance upon their opinion, set forth on page 43 hereof, and upon their authority as experts. The figures for said eleven months period have been prepared by TWA and are subject to audit and year-end adjustments.* The operations for the three years and seven months ended July 31, 1948, are set forth in greater detail in the financial statements hereinafter included in this prospectus and the summary of consolidated operations below should be read in conjunction with such financial statements and the footnotes thereto.

Year Ended December 31	Operating Revenue	Depreciation, Amortization, and Obsolescence of Operating Property(C)	Other Operating Expenses	Interest Expense	Other Income Charges (Credits)—Net	Income Taxes	Net Income (Loss)(G)
1938	A$ 6,220,770	$1,008,287	$ 5,913,651	$ 672	$ 46,626	———	A($ 748,466)
1939	A 8,308,263	935,651	7,060,128	12,099	87,873	$ 105,379	A 107,133
1940	11,572,221	992,981	10,603,034	3,408	54,129	16,641	(97,972)
1941	14,064,260	1,662,456	12,875,320	45,886	(31,789)	———	(487,613)
1942	16,044,632	B 1,126,548	11,527,864	34,938	D(314,628)	1,493,855	2,176,035
1943	19,212,939	B 949,703	14,870,825	12,047	D(239,829)	1,569,302	2,050,891
1944	25,340,735	B 949,932	19,619,541	37	D(41,445)	2,059,710	2,752,960
1945	33,776,106	2,047,542	28,528,299	37,362	D 179,472	1,169,855	1,813,576
1946	A 58,047,754	5,775,403	66,510,494	852,793	ED 1,591,922	F(3,016,382)	A(13,666,476)
1947	78,521,311	7,788,611	77,556,430	1,501,121	D(245,090)	———	(8,079,761)
Seven Months Ended July 31, 1948	A 53,607,549	4,644,788	51,814,539	1,006,972	E 1,149,491	———	A(5,008,241)
Eleven Months Ended November 30, 1948 (not examined by independent public accountants)	A 89,461,784	7,773,242	81,894,002	1,576,109	E 1,174,500	———	A(2,956,689)

Notes:

A. Operating revenue for the years 1938, 1939, and 1946 as previously reported, has been increased by the amounts of $24,797, $401,339, and $686,761, respectively, for retroactive mail rate increases granted by the Civil Aeronautics Board in 1939, 1940, and 1947. In December, 1948, the Company was granted an additional increase, retroactive to January 1, 1948, in the temporary rate for carriage of mail on its international route. The portions of such increase applicable to the seven months ended July 31, 1948 and to the eleven months ended November 30, 1948, amounting to approximately $1,680,800 and $2,670,904, respectively, have been included in operating revenue for those periods.

B. The substantial reduction in provision for depreciation for the years 1942 to 1944, inclusive, was due principally to the fact that during that period TWA turned over to the United States Government for use in the war, 16 of its 41 aircraft, which included all four-engined aircraft owned by TWA.

C. TWA has provided for depreciation on the basis of the estimated remaining useful life of the respective classes of property and such estimates have been revised from time to time whenever justified by experience. See Note 11 to Financial Statements regarding the effect on earnings of such revisions made during the three years and seven months ended July 31, 1948. Revisions made prior to that period had no material effect on earnings.

D. Fees and net revenue on United States Government contracts and recovery of fees and charges previously disallowed on such contracts are included in "Other Income Charges (Credits)—Net" as follows:

1942	$210,216
1943	412,728
1944	184,645
1945	172,515
1946	189,111
1947	155,098

E. "Other Income Charges (Credits)—Net" includes write-down of investments in foreign airlines amounting to $1,625,750 in 1946, $896,903 for the seven months ended July 31, 1948 and $921,902 for the eleven months ended November 30, 1948. See Note 3 to Financial Statements.

F. Income tax credit for the year 1946 represents Federal income tax refund of $3,105,842 resulting from carry-back of 1946 loss, less $89,460 additional income taxes applicable to prior years.

G. For restrictions as to payment of cash dividends, and for requirements as to sinking fund payments, see the captions "Description of Common Stock" and "Funded Debt—Debentures", and Note 6 to Financial Statements.

H. Reference is made to the information under the caption "History and Business—Earnings" relating to operations since November 30, 1948.

* The management estimates that December results and adjustments (of the usual year-end type) will result in loss for the full year 1948 at least $400,000 less than the eleven months loss. The management knows of no year-end adjustments which would have a material effect of an adverse nature on the results for the year or the financial condition at the end of the year.

HISTORY AND BUSINESS

General

TWA was incorporated under the laws of the State of Delaware on December 27, 1934, by the consolidation of Transcontinental & Western Air, Inc., a Delaware corporation incorporated in 1930 (hereinafter called the Old Company) and TWA, Inc., a Delaware corporation incorporated in 1934. TWA's principal business office is located at 101 West 11th Street, Kansas City 6, Missouri.

TWA has been engaged in the transportation of persons, property and mail by air since its organization and intends to continue in that business. The two consolidating corporations above named had been similarly engaged, the Old Company having instituted the first all-air coast-to-coast passenger service in 1930. The Old Company had been formed for that purpose by Transcontinental Air Transport, Inc. (which had inaugurated the first coast-to-coast air-rail service in 1929) and Western Air Express Corporation and Pittsburgh Aviation Industries Corporation, two other aviation pioneers.

TWA presently provides a transcontinental service in the continental United States and an international service between the United States and foreign countries. In the twelve-month period ended November 30, 1948, approximately 61% of TWA's operating revenue was derived from its transcontinental system and approximately 39% from its international system.

The only subsidiaries of TWA are three companies, none of which is engaged in air transportation and whose book assets, at November 30, 1948, aggregated less than $100,000. One of these subsidiaries is being dissolved.

Regulation by Civil Aeronautics Board

TWA is an air carrier as defined in the Civil Aeronautics Act of 1938 (hereinafter sometimes called the Act). Its operations are regulated by the provisions of the Act and by the Civil Aeronautics Board (hereinafter sometimes called the Board) which administers the Act. Among other things, the Act prohibits any air carrier from engaging in interstate, overseas or foreign air transportation or the transportation of mail by aircraft unless it holds a certificate of public convenience and necessity (hereinafter called a Certificate), issued by the Board, authorizing such transportation.

Certificates confer no proprietary, property, or exclusive right in the use of any air space, civil airway, landing area, or air-navigation facility, and the Board may, after notice and hearing, alter, amend, modify or suspend any Certificate if the public convenience and necessity so require, or revoke the same for intentional failure to comply with the Act, or with any order, rule or regulation issued thereunder, or with any term, condition or limitation of such Certificate, but no Certificate may be revoked unless the holder fails to comply, within a reasonable time, with an order of the Board commanding obedience to the Act or the order, rule, regulation, term, condition or limitation found to have been violated.

Under the Act the Board has power under certain conditions to exempt air carriers from various requirements of the Act. The Board has exempted certain air carriers from the requirement of obtaining a Certificate before engaging in air transportation.

The Act also requires an air carrier to file tariffs with the Board showing all rates, fares and charges for the air transportation of persons and property, and to adhere to the tariffs filed. The Board is empowered to reject or suspend any tariff, filing of which is required by the Act, and to take certain remedial or corrective action with respect to the rates, fares, charges and other matters stated therein.

The Act also provides that the Board shall fix rates of compensation for the transportation of air mail. In fixing such rates, the Act requires the Board to take into consideration, among other factors, the need of each air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenues of the air carrier, to enable it under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.

The foregoing statements with respect to the provisions of the Act do not purport to be complete and are qualified by the provisions of the Act, reference to which is hereby made.

Routes

Transcontinental

As of January 1, 1942, TWA operated under Certificates a transcontinental air transportation system over approximately 5,600 route miles, all within the continental United States, serving twenty-eight cities with a total metropolitan population (according to the 1940 census) in excess of 33,000,000. It was authorized to serve two additional cities, but was not providing such service because of airport conditions. By February 1, 1949, this transcontinental system had been expanded to approximately 7,000 route miles in the continental United States, all operated under Certificates, and TWA was serving fifty-five cities with a total metropolitan population (according to the 1940 census) in excess of 41,000,000. It was authorized to serve eight additional cities with a metropolitan population (according to the 1940 census) in excess of 400,000, but was not providing service because of airport conditions.

AX-1002

TWA Ex. 293, page 10 of 58
(TWA Prospectus, 2/18/49 & Amendments, 3/8/49)

TWA presently holds Certificates authorizing it to engage in air transportation of persons, property and mail in continental United States as follows:

Route 2—Between certain cities in the western part of the United States, including San Francisco and Los Angeles, and cities in the eastern part of the United States, including Cleveland, Boston, New York, Washington and Baltimore, via designated cities, including Kansas City, St. Louis, Chicago, Cincinnati and Pittsburgh.

Route 58—Between St. Louis and Detroit via designated cities. A proceeding is pending before the Board (Docket 2581 *et al.*) to consolidate Route 2 and Route 58, which, if successful, would permit a more flexible service.

Route 38—Between Phoenix, Ariz., and Las Vegas, Nev., via designated cities. TWA has agreed, subject to Board approval, to sell this route (together with certain operating rights in Arizona) to Arizona Airways, Inc. for 500 shares (100%) of the preferred stock and 5,000 shares (20%) of the common stock of the latter corporation. The Board has heard argument on an application for approval of this transaction (Docket 2005), and has indicated that it will not approve the transaction in the form submitted, but that a proposal modified in certain respects might be approved.

TWA was authorized at February 1, 1949, to serve the cities named below on its transcontinental system, there being no service at that date (because of airport conditions) at the cities designated by an asterisk.

Albany, N. Y.
Albuquerque, New Mex.
Allentown/Bethlehem, Pa.
Amarillo, Tex.

Baltimore, Md.
Bethlehem/Allentown, Pa.
*Binghamton, N. Y.
Boston, Mass.
Boulder City, Nev.

Chicago, Ill.
Cincinnati, Ohio
Cleveland, Ohio
*Columbia, Mo.
Columbus, Ohio

Dayton, Ohio
Detroit, Mich.

*Findlay, Ohio
Fort Wayne, Ind.
Fresno, Calif.

Grand Canyon, Ariz.

Hannibal, Mo./Quincy, Ill.
Harrisburg, Pa.
Indianapolis, Ind.
Johnstown, Pa.
Kansas City, Mo.
*Kingman, Ariz.
*Lancaster, Pa.
Las Vegas, Nev.
*Lima, Ohio
Los Angeles, Calif.
Louisville, Ky.
Mansfield, Ohio
*Marion, Ohio
*Morgantown, West Va.
New York, N. Y.
Newark, N. J.
Oakland, Calif.
Peoria, Ill.
Philadelphia, Pa.
Phoenix, Ariz.
Pittsburgh, Pa.
Prescott, Ariz.

Quincy, Ill./Hannibal, Mo.
Reading, Pa.
Richmond, Ind.
St. Louis, Mo.
San Francisco, Calif.
Santa Fe, New Mex.
Scranton/Wilkes-Barre, Pa.
South Bend, Ind.
Springfield, Ohio
Terre Haute, Ind.
Toledo, Ohio
Topeka, Kans.
Washington, D. C.
Wheeling, West Va.
Wichita, Kans.
Wilkes-Barre/Scranton, Pa.
Williamsport, Pa.
Wilmington, Del.
Winslow, Ariz.
Worcester, Mass.
Zanesville, Ohio

Authorization to serve Findlay, Lima, Mansfield, Marion, Springfield and Zanesville, Ohio, Richmond, Indiana and (on one segment) Fort Wayne, Indiana, expires on or about September 4, 1950. Authorization to serve Johnstown, Pennsylvania, expires on or about July 9, 1949. If TWA sells Route 38 it will no longer be authorized to serve Kingman and Prescott, Arizona.

The principal services provided by TWA's transcontinental system on February 1, 1949, are shown on the map at page 8.

TWA also holds authorizations from the states of Illinois and Pennsylvania to conduct intrastate operations in said states. These authorizations parallel, in the state, service authorized by TWA's Certificates, and require no separate operations. Intrastate operations of TWA are subject in certain respects to regulation by state authorities.

The Board has recently approved an agreement between TWA and Delta Air Lines, Inc. under which by exchange of aircraft at Cincinnati, Ohio, the two carriers are providing one-plane service over parts of their respective routes. Service began June 1, 1948. As of February 1, 1949, equipment interchange service was operated between the TWA points Detroit, Toledo, Columbus and Dayton, and the Delta points Lexington, Ky., Chattanooga and Knoxville, Tenn., Atlanta, Macon, Savannah and Brunswick, Ga., and Jacksonville and Miami, Fla. Equipment interchange by air carriers is as yet relatively untried. However, TWA's management believes that the equipment interchange between TWA and Delta Air Lines, Inc. will provide a service superior to the former connecting service at Cincinnati.

INTERNATIONAL SYSTEM
As of February 1, 1949
ATLANTIC OCEAN
INDIAN OCEAN
AZORES
NEWFOUNDLAND
LEGEND
ROUTES IN OPERATION
ROUTES NOT IN OPERATION
CITIES SERVED
CITIES NOT SERVED
AREAS CERTIFICATED FOR SERVICE

International

On July 5, 1945, TWA was granted a temporary Certificate, expiring July 4, 1952, authorizing it to engage in international air transportation of persons, property and mail. Under this Certificate, as amended to February 1, 1949, TWA is authorized to provide service between seven co-terminal points in the United States (Baltimore, Boston, Chicago, Detroit, New York, Philadelphia, and Washington, all of which are served by TWA's transcontinental system) and the countries or parts thereof and specifically designated cities named below:

Countries	Designated Cities
Algeria	Calcutta, India
Ceylon	Canton, China
Egypt	Hanoi, French Indo-China
Eire	Mandalay, Burma
France (except Marseille)	Shanghai, China
Greece	
India (south of 20th parallel of latitude)	
Iraq	
Italy	
Libya	
Newfoundland	
Oman	
Palestine	
Portugal	
Saudi Arabia	
Spain (except Barcelona)	
Switzerland	
Trans-Jordan	
Tunisia	
Yemen	

At February 1, 1949, TWA's international system was operating more than 18,000 route miles and was serving twenty-two cities, including six of the seven co-terminal points in the United States.

The principal services provided by TWA's international system on February 1, 1949, are shown on the map at page 10.

The international air transportation operations of TWA are for the most part carried on pursuant to bi-lateral air transport agreements between the United States and the respective countries served. Such agreements may be terminated upon varying periods of notice as provided therein. TWA is required also to comply with the laws and regulations of these countries. Service has been temporarily suspended at Jerusalem, Palestine, because of unsettled conditions in the Middle East and at Tripoli, Libya, because of airport conditions. TWA commenced service to Zurich, Switzerland, January 17, 1949. Service has not been inaugurated to Trans-Jordan, Yemen, Oman or to points east or south of Bombay, and no forecast can be made at present as to the date any of such services may be inaugurated.

Conditions on Certificates

Each of TWA's Certificates was issued subject to the provisions of Title IV of the Act and the orders, rules and regulations issued thereunder. TWA's Certificate for international air transportation is also conditioned upon its conducting its operations in accordance with all treaties and agreements between the United States and other countries. Certain of TWA's Certificates contain provisions restricting the service to be provided thereunder in varying ways, *i. e.*, prohibiting service of two or more designated points on the same flight; requiring flights serving certain designated points to originate or terminate at or beyond other designated points; and prohibiting certain non-stop service.

Copies of TWA's Certificates are filed as Exhibits 3a through 3d, and the authorizations of the states of Illinois and Pennsylvania as Exhibits 3e and 3f, to the registration statement. Reference is hereby made to such Exhibits for the detailed provisions thereof, and the statements with regard thereto in this prospectus are qualified in their entirety by such reference.

Proceedings before Regulatory Authorities

TWA has presently pending various applications to the Board affecting its Certificates and is a party to other proceedings before the Board relating to various matters incident to its Certificates and operations. Certain other air carriers have filed applications with the Board for routes and other relief, the granting of which would, in some cases, establish additional air transportation facilities competitive in varying degrees with those furnished by TWA. In those cases where TWA deems it advisable to protect its interests it has intervened for the purpose of opposing such applications. TWA is unable to forecast the outcome of any of these pending proceedings.

Some of these pending proceedings are described above under the subcaption "Routes", and below under the subcaptions "Air mail", "Air freight", "Relations with Hughes Tool Company", and "Other Recent Developments".

Business

Passenger service

The transportation of passengers, including charges for transporting passengers' excess baggage, provides the chief source of TWA's revenue. This revenue has increased substantially over the past ten years, due generally to increased acceptance of air transportation, expansion of service to new communities, and purchase and operation of high-speed, four-engine Constellation aircraft.

At February 1, 1949, TWA was operating, on its transcontinental system, one hundred and eight passenger flights daily, of which twenty-four traveled from coast to coast. At the same date it was operating thirty-four international passenger flights per week, of which eighteen originated or terminated at Cairo, six at Paris, six at Bombay and four at Rome. All thirty-four flights originated or terminated in the United States. The number of flights is increased or decreased from time to time to meet traffic demands.

On January 1, 1942, fares for TWA's transcontinental system were constructed (except for competitive fares, discounts, excursion rates and reductions for similar reasons) on the basis of a rate of 5.8¢ per mile. TWA progressively reduced this basic rate to 4.65¢ per mile on August 20, 1945, an over-all reduction of nearly 20%. With the cessation of hostilities, the trend to lower fares was reversed as costs increased. The passenger fare structure in the air transport industry in the United States is comparatively unstable at the present time, and no well-defined passenger fare pattern presently exists. While TWA's basic rate was revised on September 1, 1948, to a slightly higher level than that prevailing on January 1, 1942, a variety of competitive fares, round-trip discounts, excursion rates, and other special fare reductions, some of an experimental character, are in effect, offsetting to an indeterminate extent the increase in the basic rate. A number of these reductions are promotional in nature, designed to encourage travel during "off" periods, as, for example, certain days of the week, or, generally, during the slack winter months. Early in February, 1949, TWA began operating a so-called "sky coach" service between Kansas City and west coast points at rates approximating 4¢ per mile.

Passenger fares on TWA's international system are ordinarily fixed in accordance with unanimous agreements of the airlines participating in the Traffic Conferences of the International Air Transport Association, the agreements so arrived at being subject to approval by the Board for the United States and by the other interested governments. Basic rates have been substantially higher than on TWA's transcontinental system. Various excursion and other special reduced rates are in effect on the international system.

The tabulation on pages 16 and 17 sets forth data with respect to TWA's passenger service (excluding charter flights), as reported to the Civil Aeronautics Board.

The air transportation industry competes for passenger business with railroads, bus lines, and steamship lines, which, in general, provide a slower service at lower fares. In the past, established ground transportation media have had a broader public acceptance than was the case for the much newer air transportation. This condition has gradually changed, and the increase in acceptance of air transportation during the war years was particularly marked. The following table compares the passenger miles carried by air transportation, by first-class (Pullman) rail service, and by rail coach service (other than commutation) in the continental United States during the ten years from 1938 through 1947, but no representation is made that the decline in rail passenger miles since the war is the result of competition between air and rail transportation:

Year	Passenger miles—air* (Billions)	Passenger miles—First-class rail** (Billions)	Passenger miles—Rail coach†** (Billions)	Percentage of Air to First-class Rail	Percentage of Air to Rail coach†	Percentage of Air to Total Rail†
1938	.48	7.35	10.21	6.5	4.7	2.7
1939	.68	7.53	11.12	9.0	6.1	3.6
1940	1.05	7.29	12.48	14.4	8.4	5.3
1941	1.39	9.17	16.10	15.2	8.6	5.5
1942	1.42	17.85	31.06	8.0	4.6	2.9
1943	1.63	24.67	57.91	6.6	2.8	2.0
1944	2.18	26.94	63.29	8.1	3.4	2.4
1945	3.36	26.91	59.42	12.5	5.7	3.9
1946	5.95	39.84	39.00	30.0	15.3	10.1
1947	6.06	12.26	27.67	49.4	21.9	15.2

* CAA Statistical Handbook, 1945, and annual airline statistics—Civil Aeronautics Board, 1938 through 1947.

** Interstate Commerce Commission Annual Report on Statistics of Railways in the United States. Interstate Commerce Commission—statement No. M-250.

† Other than commutation.

In the years 1942 through 1945 there was a shortage of transport aircraft. TWA, for example, turned over 16 of its 41 aircraft to the United States as well as all aircraft on order. Aircraft turned over included all TWA's four-engine aircraft. Other air carrier fleets were similarly reduced. The management of TWA expects that TWA's passenger service will continue to be competitive with railroad-Pullman service and first-class passenger service on steamships, and to some extent with other classes of rail and steamship transportation.

Many of the air carriers operating under Certificates in the United States (herein sometimes called certificated air carriers) compete with TWA's transcontinental system. In performing its duties under the Act, the Civil Aeronautics Board is, among other things, required to consider competition to the extent necessary to assure the sound development of an air transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the postal service and of the national defense, as being in the public interest and in accordance with the public convenience and necessity. The air route pattern in existence in the United States when the Board took jurisdiction thereof was already competitive, and under the Board's administration of the Act competition has steadily increased, until almost all heavily traveled route segments are served by more than one air carrier. TWA's international system is competitive with two American-flag air carriers over the north Atlantic. It is also competitive with foreign-flag air carriers over the north Atlantic and east of Paris and Lisbon competes on various segments of its route with one or more foreign-flag airlines.

A class of air carriers (herein called irregular air carriers) which are entitled, under the regulations of the Board, to operate on a non-scheduled basis without a Certificate also compete with TWA's transcontinental system. Not being required to operate on schedule or to serve any particular route, irregular air carriers have been able to operate where traffic is densest and to arrange for departures when a full or nearly full load is available. Operating in this manner, and with standards of service different from those of certificated air carriers, irregular air carriers have provided transportation at rates substantially below the rates of the certificated air carriers. In 1947 the Board subjected irregular air carriers to some of the regulations affecting certificated air carriers and prohibited the former from carrying passengers in international operations. On August 6, 1948, the Board instituted a general investigation of the operations of these irregular air carriers. In the opinion of TWA's management the operations of these irregular air carriers have diverted a substantial amount of passenger traffic from certificated air carriers.

Since the war, the Board has issued temporary Certificates to a number of corporations authorizing service, on an experimental basis, to small cities and towns which, for the most part, had not previously had air transportation service. The competitive effects of the operations of these new air carriers (called feeder lines) is not yet apparent. Charter operations by certificated air carriers and others also compete to some extent with TWA's transcontinental and international services.

In 1947 TWA's transcontinental system ranked fourth in passenger miles flown among certificated air carriers operating in the United States, and third among the four certificated air carriers operating a transcontinental service. In the years 1938 through 1947 TWA's percentage of the revenue passenger miles flown by all certificated air carriers (other than feeder lines) operating in the United States has not in any year been lower than 12% or higher than 16%. In 1947 it was approximately 12.5%.

In 1947 TWA's international system ranked second in revenue passenger miles flown among the three American-flag air carriers operating over the north Atlantic. According to statistics published by the Civil Aeronautics Board, TWA carried 17.85% of the transatlantic passengers carried into or out of New York City by all United States and foreign scheduled air carriers during the year 1947. On this basis TWA ranked third among the three American-flag air carriers operating over the north Atlantic and ahead of each of the foreign-flag air carriers. Since only limited traffic statistics for TWA's foreign-flag competitors are available, TWA's relative position or importance with respect to such competitors cannot be determined. However, the management believes that TWA is an important competitive factor in the area it serves.

Air mail

TWA is required, under each of its Certificates, to provide adequate facilities and service for the transportation of United States mail and is entitled to receive reasonable compensation therefor. Such compensation is TWA's second most important source of revenue. TWA has carried air parcel post on its international system since March 15, 1948, and on its transcontinental system since September 1, 1948. Compensation for this service is on the same basis as air mail.

The volume of air mail carried by TWA's transcontinental system has increased very substantially since 1938 although the exceptionally high volume attained during the later war years has not been maintained. Air mail revenue for the transcontinental system has increased more gradually and dropped sharply after the war. The rate of air mail pay has also declined, though the downward trend appears to have been halted, at least for the moment. Prior to January 1, 1943 TWA was allowed a different rate for each of the five routes it then operated. On January 1, 1943 a system rate equivalent to 60¢ per ton mile became effective. On January 1, 1945 a lower rate of 45¢ per ton mile became effective.

On March 14, 1947, TWA filed a petition with the Board setting forth TWA's critical financial condition at that time and requesting immediate action to increase the existing rate of air mail pay for the transcontinental system effective January 1, 1946. The Board, on December 2, 1947, dismissed the part of the petition requesting an increase in air mail pay prior to the date of filing the petition on the ground that it lacked power to consider an increase prior to the date of the petition. The Board's decision was upheld by the Court of Appeals of the District of Columbia on August 2, 1948. The Supreme Court of the United States consented to review the decision and heard argument early in February, 1949.

The Board's decision did not affect TWA's petition insofar as it requested an increase in air mail pay on and after March 14, 1947. On March 29, 1948, the Board tentatively concluded that the rate of 45¢ per ton mile in effect since January 1, 1945 was a fair and reasonable rate of air mail pay for TWA's transcontinental system through December 31, 1947, and that on and after January 1, 1948, fair and reasonable permanent rates for TWA's transcontinental system should be on a sliding scale of 75¢ per ton mile for the first 2,500 ton miles per day, 70¢ per ton mile for the next 2,500 ton miles per day, with a further reduction of 5¢ per ton mile for each additional 5,000 ton miles per day, the lowest rate being 40¢ per ton mile for ton miles over 30,000 per day.

The Board directed TWA to show cause (1) why such rates should not be placed in effect on a permanent basis on and after January 1, 1948, and (2) why such rates should not be placed in effect on a temporary basis on and after January 1, 1948. TWA accepted the new rates on a temporary basis. Accordingly, the Board, on May 7, 1948, established the temporary rates of air mail pay above set forth for TWA, effective January 1, 1948. Under these rates TWA received an average of approximately 61¢ per ton mile of air mail carried on its transcontinental system for the first eleven months of 1948. TWA has filed objection to the failure of the Board to establish the new temporary rates as of March 14, 1947, however, and action by the Board on this objection is still pending.

TWA objected to the Board's conclusion that the rates set forth above should be the permanent rates of air mail pay on and after January 1, 1948. Therefore, in accordance with the regulations of the Board and the requirements of the Act a hearing will be held to determine the fair and reasonable permanent rates of compensation for the carriage of mail by TWA's transcontinental system on and after March 14, 1947. TWA does not know when the permanent rates for the transportation of mail on its transcontinental system will be fixed or what such rates will be when fixed. Such rates may be lower or higher than the present temporary rates.

No permanent rate of air mail pay has ever been fixed for TWA's international system. Since the inauguration of international service on February 5, 1946, TWA has been receiving compensation at temporary rates fixed by a series of orders of the Board. Each of these orders specifically provides that the proceeding relating to international air mail rates shall remain open pending entry therein of an order fixing final rates retroactive to such date as the Board may determine, which final rates may be lower or higher than the temporary rates fixed therein.

TWA has, on a number of occasions, requested the Board to fix a temporary rate of air mail pay for its international system at $1.00 per revenue airplane mile. Under the Board's orders to date, TWA has received, for the period from February 5, 1946, through June 30, 1947, 40¢ per revenue airplane mile; for the period from July 1, 1947, through December 31, 1947, rates based on ton miles of air mail flown over part of the international system and on revenue airplane miles flown over the remainder, which (according to TWA's calculations) produced approximately 21¢ per revenue airplane mile; for the period from January 1, 1948, through November 30, 1948, the sum of $8,542,000, estimated by TWA to be equivalent to approximately 85¢ per revenue airplane mile; and after November 30, 1948, a basic rate of 85¢ per revenue airplane mile.

This basic rate of 85¢ per revenue airplane mile is subject to modification, depending upon the amount of mileage scheduled per day. The temporary air mail pay rate of approximately 85¢ per revenue airplane mile from January 1, 1948, was fixed by the Board on December 22, 1948. Prior to such order, the temporary rate from January 1, 1948, was approximately 60¢ per revenue airplane mile. The

Board's award of $8,542,000 for the period January 1, 1948, through November 30, 1948, was approximately $2,670,900 in excess of the air mail pay receivable by TWA for that period at the 60¢ rate. For the purposes of the foregoing rates, revenue airplane miles are miles flown on schedules designated by the Postmaster General for the carriage of air mail. TWA does not know when a permanent rate of air mail pay will be fixed for its international system either for the past period or for the future, or what such rate will be when fixed.

TWA also carries air mail for certain foreign governments on its international system. Most of this mail travels westbound, to the United States. Payments for such carriage are ordinarily advanced by the United States government, but are recoverable from TWA if not collected from the foreign governments.

The tabulation on pages 16 and 17 sets forth data with respect to TWA's air mail service, as reported to the Civil Aeronautics Board.

United States air mail is divided among air carriers in accordance with rules prescribed by the Post Office Department. However, time of departure of flights and flying time affect the distribution of mail loads and there is competition for mail loads within the limits of the Post Office rules. As the air route pattern has become more competitive, a larger portion of available air mail has become subject to such competition.

From 1938 through 1947, TWA's transcontinental system has not, in any year, flown more than 25% nor less than 16% of the total ton miles of United States air mail flown by certificated air carriers (other than feeder lines) operating in the continental United States. In 1947 it flew approximately 23%. Of the total ton miles of air mail flown in 1947 over the north Atlantic routes of the three American-flag air carriers authorized to operate such routes, TWA flew approximately 42% of the United States air mail and approximately 48% of the foreign air mail.

Air express

TWA has for many years derived a portion of its total revenue from the transportation of air express on its transcontinental system under contract with Railway Express Agency, Incorporated. Under this contract, Railway Express Agency, Incorporated performs ground services, including pick-up and delivery, and TWA provides air transportation. After deducting the direct costs of Railway Express Agency, Incorporated from gross revenues, the balance is divided, 87½% being paid to TWA and 12½% being retained by Railway Express Agency, Incorporated. Railway Express Agency, Incorporated has similar contracts with the principal certificated air carriers operating in continental United States. Under such contracts air express rates are determined by the air carriers.

On September 8, 1948, the Board, in the *Air Freight Forwarder Case* (Docket 681 *et al.*), ordered Railway Express Agency, Incorporated to negotiate new contracts with the certificated air carriers with which it had contracts, as above described, pursuant to which Railway Express Agency, Incorporated would fix air express rates and the air carriers would provide air express transportation to Railway Express Agency, Incorporated at charges to be agreed upon, subject to Board approval. The Board directed Railway Express Agency, Incorporated to submit to the Board within six months any agreements which might be entered into as the result of such negotiations. TWA and other certificated air carriers have appealed from the Board's order.

TWA also carries air express on its international system, making its own arrangements for pick-up and delivery service. The contract with Railway Express Agency, Incorporated does not apply to such service.

In 1947 TWA's transcontinental system carried about nineteen times as many ton miles of air express as in 1938 and received about twelve times as much air express revenue. However, in both years air express revenue on the transcontinental system was less than 3% of TWA's total operating revenue.

On January 1, 1942, TWA's basic rate for air express on its transcontinental system was 80¢ per ton mile. This rate was reduced to 70¢ on July 15, 1943 and to 61.4¢ on January 1, 1946. The latter is the present basic rate. TWA's international air express rates have also been reduced. The basic rate over the north Atlantic was established at $1.15 per ton mile on July 31, 1946, has been reduced several times, and since April 1, 1948 has been 60¢ per ton mile for less-than-one-hundred-pound shipments and 45¢ per ton mile for shipments of one hundred pounds or more. Basic rates between points in Europe, Asia and Africa have also been reduced.

The tabulation on pages 16 and 17 sets forth data with respect to TWA's air express service, as reported to the Civil Aeronautics Board.

TWA Statistical Data*

(As reported to the Civil Aeronautics Board)

FINANCIAL	Twelve Months Ended November 30, 1948**	1947	1946	1945	1944	1943	1942	1941	1940	1939	1938
Operating Revenue—Dollars (000's omitted)											
Passenger and Excess Baggage:											
Transcontinental	$49,628	$42,338	$35,204	$24,182	$17,861	$13,138	$10,868	$10,375	$ 7,979	$ 5,196	$3,735
International	23,638	20,894	11,824	—	—	—	—	—	—	—	—
Air Mail:											
Transcontinental—U. S.	5,201	3,416	2,921	7,237	5,653	4,291	3,628	3,050	3,158	2,806(A)	2,223(A)
International —U. S.	8,789	2,977	1,734(A)	—	—	—	—	—	—	—	—
—Foreign	2,319	2,256	2,244	—	—	—	—	—	—	—	—
Air Express:											
Transcontinental	1,895	1,936	1,493	1,994(B)	1,618	1,539	1,296	482	300	223	160
International	2,255	2,184	901	—	—	—	—	—	—	—	—
Air Freight:											
Transcontinental	1,722	1,148	587	38(B)	—	—	—	—	—	—	—
Other(C):											
Transcontinental	425	432	180	220	141	198	225	142	68	77	103
International	746	870	1,661	34	—	—	—	—	—	—	—
Total	$96,638	$78,471	$57,949	$33,705	$25,273	$19,166	$16,017	$14,049	$11,505	$ 8,302	$6,221
Operating Revenue—Percent											
Passenger and Excess Baggage:											
Transcontinental	51.36	53.98	60.75	71.75	70.67	68.55	67.85	73.85	69.35	62.59	60.04
International	24.48	26.63	19.02	—	—	—	—	—	—	—	—
Air Mail:											
Transcontinental—U. S.	5.38	4.35	5.04	21.47	22.37	22.39	22.65	21.71	27.45	23.80(A)	35.73(A)
International —U. S.	9.10	3.79	2.99(A)	—	—	—	—	—	—	—	—
—Foreign	2.40	2.87	3.87	—	—	—	—	—	—	—	—
Air Express:											
Transcontinental	1.96	2.47	2.58	5.92(B)	6.40	8.03	8.09	3.43	2.61	2.69	2.57
International	2.33	2.78	1.56	—	—	—	—	—	—	—	—
Air Freight:											
Transcontinental	1.78	1.46	1.01	.11(B)	—	—	—	—	—	—	—
Other(C):											
Transcontinental	.44	.55	.31	.65	.56	1.03	1.41	1.01	.59	.92	1.66
International	.77	1.12	2.87	.10	—	—	—	—	—	—	—
Total	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00

	Twelve Months Ended November 30, 1948**	1947	1946	1945	1944	1943	1942	1941	1940	1939	1938
Operating Revenue—Dollars Per Unit(D)											
Passenger revenue per revenue passenger mile:											
Transcontinental	.0576	.0512	.0467	.0466	.0505	.0533	.0529	.0506	.0509	.0516	.0514
International	.0922	.0915	.0977	—	—	—	—	—	—	—	—
Air Mail revenue per ton mile:											
Transcontinental—U. S.	.5899	.4491	.4463	.4464	.5992	.5992	.9450	1.2249	1.5814	1.9664(A)	1.6841(A)
International —U. S.	3.3091	1.2211	1.2493(A)	—	—	—	—	—	—	—	—
—Foreign	2.3472	2.9035	4.7143	—	—	—	—	—	—	—	—
Air Express revenue per ton mile:											
Transcontinental	.3250	.3546	.3789	.4513(B)	.4580	.5132	.5407	.5285	.5803	.5899	.5614
International	.5669	.7172	.9585	—	—	—	—	—	—	—	—
Air Freight revenue per ton mile:											
Transcontinental	.1815	.2333	.2648	.3762(B)	—	—	—	—	—	—	—
OPERATIONS (000's omitted)(D)											
Revenue Passengers:											
Transcontinental	1,224	1,067	885	556	393	323	318	351	258	163	114
International	80	67	33	—	—	—	—	—	—	—	—
Revenue Passenger Miles:											
Transcontinental	850,644	817,884	744,291	513,039	347,841	242,003	201,784	202,483	155,096	99,651	71,775
International	248,165	220,418	108,707	—	—	—	—	—	—	—	—
Available Seat Miles Flown:											
Transcontinental	1,447,209	1,233,976	888,056	568,303	379,535	271,237	283,236	344,437	268,604	200,701	158,029
International	432,069	289,626	124,430	—	—	—	—	—	—	—	—
Revenue Passenger Load Factor (Percent):											
Transcontinental	58.78	66.28	83.81	90.28	91.65	89.22	71.24	58.79	57.74	49.65	45.42
International	57.44	76.10	87.36	—	—	—	—	—	—	—	—
Air Mail Ton Miles:											
Transcontinental—U. S.	8,817	7,607	6,545	16,211	9,434	7,[illegible]	3,839	2,490	1,997	1,427	1,320
International —U. S.	2,656	2,438	1,388	—	—	—	—	—	—	—	—
—Foreign	988	777	476	—	—	—	—	—	—	—	—
Air Express Ton Miles:											
Transcontinental	5,831	5,460	3,940	4,418(B)	3,533	2,959	2,397	912	517	378	285
International	3,984	3,045	940	—	—	—	—	—	—	—	—
Air Freight Ton Miles:											
Transcontinental	9,486	4,920	2,217	101(B)	—	—	—	—	—	—	—

* From time to time changes have been made in the method of computing statistical data shown on this tabulation, which accordingly does not show data on a completely comparable basis from year to year. Resulting variations in the data shown are considered to be immaterial for the purpose of describing TWA's business. The tabulation does not include data for subsidiaries.

** Data for the period January 1, 1948, through November 30, 1948, have not been audited and may be revised as a result of audit.

(A) Adjusted to include additional air mail pay applicable to such year but received in the following year, and credited to earned surplus (and so reported to the Board) in the year received, as follows: 1938—$24,797; 1939—$401,339; 1946—$686,761.

(B) Air Freight not segregated from Air Express prior to July 1, 1945.

(C) Includes revenue from charter flights.

(D) Does not include revenue or other data from charter flights.

Competitive conditions affecting TWA's air express service are similar to those described above with respect to its passenger service, except that as respects air express service on its transcontinental system, shipments are divided by Railway Express Agency, Incorporated among the competing air carriers having contracts with that corporation similar to TWA's contract, described above, on the basis of the considerations specified in such contracts. Irregular air carriers also compete with TWA's international system for air express shipments. From 1938 through 1947 TWA has never in any year flown less than 13% nor more than 21% of the air express ton miles flown by certificated air carriers (other than feeder lines) operating in the continental United States. In 1947 it flew approximately 18%. Of the total ton miles of air express flown in 1947 over the north Atlantic routes of the three American-flag air carriers authorized to operate such routes, TWA flew approximately 34%.

Air freight

Near the end of the war TWA and other certificated air carriers reinstated their pre-war programs of developing air freight services in an effort to attract shipments of commodities in bulk. Air freight is transported on passenger-carrying aircraft or on cargo aircraft which may also carry air mail and air express.

TWA's first air freight tariff filed with the Board became effective July 1, 1945. In an effort to develop a large volume of air freight and to meet the competition of other air carriers, particularly irregular air carriers operating without Certificates, rates were progressively lowered.

In 1947 the Board commenced an investigation of air freight rates and included in such investigation consideration of certain tariffs which reduced rates on specific commodities to approximately 13¢ per ton mile. On April 21, 1948, the Board determined to fix minimum air freight rates in the *Air Freight Rate Case* (Docket 1705 *et al.*). As modified June 2, 1948, the minimum air freight rates are 16¢ per ton mile for the first 1000 ton miles of any one shipment and 13¢ per ton mile for all ton miles in any one shipment in excess of 1000 ton miles. Application may be made to the Board for approval of lower rates in special circumstances and some approvals have been given. TWA has established rates applying to specific commodities between a number of domestic points which approximate 16¢ per ton mile.

The tabulation on pages 16 and 17 sets forth data with respect to TWA's air freight service, as reported to the Civil Aeronautics Board.

The competitive situation in the air freight field is similar to that described above with respect to TWA's passenger service on its transcontinental routes. Irregular air carriers compete for air freight business. The Board, by regulations effective June 10, 1947, classified as non-certificated cargo carriers certain irregular air carriers of cargo only, which were engaged on May 5, 1947, in carrying property by air and had applied to the Board for a Certificate authorizing such air transportation. Under the Board's regulations, non-certificated cargo carriers are permitted to continue operations until sixty days after final disposition of their respective applications for Certificates. Operations of each non-certificated cargo carrier are limited to points to or from which it had provided service (on other than a casual, occasional or infrequent basis) at any time during the twelve-month period ended May 5, 1947, if it had applied for a Certificate to serve such point or the region in which the point is located. The Board has heard argument on many of the applications of non-certificated cargo carriers in the *Air Freight Case* (Docket 810 *et al.*) but has not as yet rendered any decision. In the *Air Freight Forwarder Case*, mentioned above, the Board also exempted certain freight forwarders from the necessity of obtaining a Certificate before engaging in freight forwarder activities. TWA and other certificated air carriers have appealed from the Board's order.

In the *Air Freight Rate Case*, mentioned above, the Board related the minimum freight rates it fixed to the costs of the non-certificated cargo carriers and disregarded the contentions of TWA and other certificated air carriers that they could carry freight cheaper on a combined passenger-cargo operation than the non-certificated cargo carriers could on an operation carrying cargo only.

The air freight business has been expanding rapidly. Among certificated air carriers operating in the United States TWA ranked third in 1947 in ton miles of air freight flown, its share of the ton miles flown in that year by certificated air carriers operating in the United States being approximately 12%. However, very substantial amounts of air freight were flown by non-certificated cargo carriers in that year.

Miscellaneous

TWA also performs miscellaneous services for others, including particularly the operation of charter flights on a non-scheduled basis and the maintenance and modification of aircraft. Revenue from these services has exceeded 2% of TWA's total operating revenue in only one of the years from 1938 through 1947 and in that year, 1946, was slightly more than 3%. In 1946 TWA operated a substantial number of charter flights during the period when it was inaugurating its international service and also performed a considerable amount of modification of aircraft for foreign air carriers.

Earnings

TWA's earnings for the ten years and seven months ended July 31, 1948, and the eleven months ended November 30, 1948 (subject to audit and year-end adjustments) are set forth under the caption "Summary of Consolidated Operations" on page 6. Consolidated operating revenue for the eleven months ended November 30, 1948, giving effect to additional air mail pay for the international system awarded December 22, 1948, was approximately $89,461,000, and net loss for the same period was approximately $2,956,000. Prior to final month and year-end adjustments, preliminary results for December indicate a small net income for that month. The management estimates that December results and adjustments (of the usual year-end type) will result in loss for the full year 1948 at least $400,000 less than the eleven months loss. The management knows of no year-end adjustments which would have a material effect of an adverse nature on the results for the year or the financial condition at the end of the year.

In the past, TWA's traffic has been subject to seasonal decline in the winter months. On the basis of preliminary traffic statistics for January, 1949, the management anticipates a substantial loss for that month. Losses may also be incurred in the months immediately following. No representations are made as to the dollar amounts of any such losses, or as to the results of operations in succeeding months.

TWA had substantial earnings during the war years, when a shortage of transportation facilities coupled with an immense demand for transportation permitted near-capacity operation. Since the war substantial losses have been incurred. Costs have increased. Introduction of new equipment and development of new routes, both at home and abroad, have been expensive, and with the introduction of additional equipment and increased competition from other air carriers, load factors have declined. The grounding of all Constellation aircraft and a pilots' strike, both of which occurred in 1946, increased TWA's losses for that year. A stringent economy program has been inaugurated, intensive efforts to increase efficiency have been made, and passenger fares have been increased moderately, but these efforts have not completely offset the influences which have contributed to losses.

The following tabulation shows TWA's operating revenue and operating income or (loss), excluding subsidiaries and before non-operating income or charges, for the transcontinental and international systems, separately, for the months from January 1947 through November 1948, as reported to the Civil Aeronautics Board. Certain functions are performed jointly for both transcontinental and international systems and the expenses of such functions are allocated between the two systems by methods deemed by the management to be reasonable, but these methods have been changed from time to time during the period covered by the tabulation. The following figures include items of additional income

and expense applicable in whole or in part to prior months. The notes given below indicate certain non-recurring or unusual items of special significance.

	Transcontinental		International		Total	
1947	Operating revenues	Operating income or (loss)	Operating revenues	Operating income or (loss)	Operating revenues	Operating income or (loss)
Jan.	$2,646,829	$(1,672,870)	$1,326,951	$(657,069)	$ 3,973,781	$(2,329,939)
Feb.	2,434,552	(1,719,322)	1,336,604	(679,468)	3,771,157	(2,398,790)
Mar.	3,222,009	(345,597)(C)	1,805,800	(434,547)	5,027,809	(680,145)(C)
Apr.	3,900,361	(384,329)	2,168,362	88,337	6,077,723	(295,991)
May	4,398,081	225,123	2,475,472	19,581(D)	6,873,554	244,705(D)
June	4,726,904	182,785	2,773,564	126,849	7,500,468	309,635
July	4,369,759	(155,605)	2,984,723	79,363	7,354,474	(76,241)
Aug.	4,889,009	27,922(C)	3,138,686	510,292	8,027,695	538,215(C)
Sept.	4,964,336	426,049	3,103,761	320,893	8,068,298	746,942
Oct.	4,739,393	77,132	3,312,639(B)	377,140	8,052,033(B)	454,272
Nov.	4,230,653	(448,485)	2,279,918(B)	(362,857)	6,510,572(B)	(811,342)
Dec.	4,738,816	(1,259,900)(C)	2,474,935	(1,462,964)	7,233,752	(2,722,865)(C)
1948						
Jan.	4,406,045	(121,212)	1,824,168	(606,292)	6,280,213	(727,504)
Feb.	3,813,487	(629,465)	1,689,486	(856,462)	5,502,974	(1,485,928)
Mar.	4,854,349(A)	(481,570)	1,996,775	(815,975)	6,851,124(A)	(1,297,545)
Apr.	4,725,974	(449,216)	3,316,784(B)	339,275	8,042,758(B)	(109,941)
May	5,073,567	375,054(C)	2,956,618	(493,349)(C)	8,030,185	(118,294)
June	5,294,490	65,731	3,227,351	(51,302)	8,521,842	14,428
July	5,193,121	(632,333)(C)	3,470,516	(386,946)	8,663,647	(1,019,280)(C)
Aug.	5,408,088	578,356	3,525,209	273,151	8,933,213	851,507
Sept.	5,099,677	(70,324)	3,714,587	487,938	8,814,264	417,614
Oct.	5,463,482(E)	(141,355)	3,848,803	678,497	9,312,286(E)	537,141
Nov.	4,780,325(E)	(84,250)(C)	5,671,108(B)	2,621,799(D)	10,451,434(B)(E)	2,537,549(C)(D)

(A)—Includes retroactive increase in air mail pay of $421,440 applicable to January-March, 1948.

(B)—Includes retroactive increases in air mail pay as follows: $844,532 recorded in October, 1947, applicable to January-October, 1947; $179,675 recorded in November, 1947, applicable to July-October, 1947; $1,100,258 recorded in April, 1948, applicable to January-April, 1948; and $2,670,904 recorded in November, 1948, applicable to January-November, 1948.

(C)—Includes $406,767 reduction in rates of aircraft depreciation recorded in March, 1947, applicable to January-March, 1947; $114,567 communications expenses for March-July, 1947, recorded in August, 1947; $194,360 inventory adjustment for prior months added to operating expenses in December, 1947; $115,247 of ticket agents' commissions (on sales of international system tickets previously charged to transcontinental system) deducted from transcontinental system, and added to international system, operating expenses in May, 1948; $118,535 additional claim of California for sales and use taxes for August, 1933-June, 1948, added to operating expenses in July, 1948; and $232,505 reflecting the value of cylinders removed from engines during overhaul and subsequently determined to be reusable and added to inventory, deducted from operating expenses in November, 1948, but applicable to prior months.

(D)—Includes $141,630 amortization of international system development expense for January-April, 1947 (previously recorded in non-operating expenses) added to operating expenses in May, 1947; and $61,805 reflecting the value of cylinders removed from engines during overhaul and subsequently determined to be reusable and added to inventory, deducted from operating expenses in November, 1948, but applicable to prior months.

(E)—Includes $163,500 and $163,518 passenger revenues for September, 1948, in October and November, 1948, respectively.

TWA's business has been and will continue to be affected by such matters as changes in the levels of general business activity and employment, costs and wages; competitive conditions; new developments in air and surface transportation; changes in taxation; federal and state legislation; orders of regulatory bodies; and political and economic conditions abroad.

Equipment

For many years TWA has participated in the development of new aircraft. As a result of this participation, TWA was the first to purchase and operate the Douglas DC-2 type aircraft. The Douglas DC-3 type aircraft, a development of the Douglas DC-2 type aircraft, later became standard equipment for TWA and other United States air carriers during the war, and is still in general use.

In July, 1940, TWA put into operation five Boeing 307's (Stratoliners), four-engine transports with pressurized cabins. TWA was the first air carrier in the continental United States to operate aircraft of this type. At the beginning of the war TWA sold these five Boeing 307's to the United States government and operated them in an overseas service for the Army Air Forces. TWA repurchased

them, had them rebuilt and modernized by the manufacturer, and replaced them in service on its transcontinental system in April, 1945.

During the war years and immediately thereafter TWA purchased or leased a number of Douglas DC-3 and Douglas C-54 aircraft from agencies of the United States government. Such aircraft were modified for commercial operation to the extent necessary. TWA also purchased three Douglas C-54 aircraft from TACA Airways, S. A.

In 1939 TWA became interested in the development of a new four-engine aircraft which was to be larger and faster than the Boeing 307. This airplane, now known as the Constellation, was to be manufactured by Lockheed Aircraft Corporation (hereinafter sometimes called Lockheed), and TWA obtained contractual rights to a number of aircraft of this type. Manufacture of the Constellations was suspended for a time due to the war emergency and the government acquired TWA's rights to Constellation airplanes, subject to an option to repurchase. The option was exercised as to three of the aircraft, two of which were acquired for Hughes Tool Company as described below under the subcaption "Relations with Hughes Tool Company".

In 1945 TWA contracted with Lockheed to purchase eighteen Model 049 Constellations and eighteen Model 649 Constellations, the latter being a later model. Payment for these airplanes was to be made in cash. In 1946 TWA contracted for thirteen additional Model 049 Constellations to be paid for partly in cash and partly in notes. Delivery of Model 049 Constellations began in 1945 and the aircraft were put in service by TWA as rapidly as possible.

Normally, when new aircraft are introduced into airline service, the full benefits therefrom are not obtained for some time. Operational experience is needed for economical and efficient maintenance, and actual operations in scheduled service usually disclose the need for modifications of the aircraft. As a result, operating expenses for new aircraft are ordinarily high during the initial period of operations, and the utilization of the aircraft is low. In the case of the Constellations (as in the case of several other new aircraft introduced in the United States since the war) this initial period was extended due to the fact that the aircraft were grounded for a time. On July 11, 1946, following the crash of a TWA Constellation being used for flight training, the Administrator of Civil Aeronautics suspended the airworthiness certificates for this type of aircraft and they were accordingly grounded until a substantial number of engineering modifications had been made. Constellation service was resumed as rapidly as the modification work could be completed and new airworthiness certificates obtained, the first modified aircraft being returned to service in September, 1946.

During a financial crisis which was precipitated by a strike of pilots in October and November of 1946, following the grounding of the Constellations, TWA determined not to complete purchase of the Constellations it had ordered. It had already taken delivery of the eighteen Model 049's ordered in 1945 and of five of the thirteen Model 049's ordered in 1946. It therefore cancelled its commitments for the remaining eight Model 049's and the eighteen Model 649's.

In March, 1947, TWA purchased four additional Constellations (Model 049) from Lockheed, the purchase price (except for a small cash payment on each aircraft) being paid in notes secured by a chattel mortgage on the aircraft.

In November, 1947, TWA contracted for twelve Constellations (Model 749) for delivery in 1948. The entire purchase price of these aircraft together with certain engines therefor (purchased from Wright Aeronautical Corporation) and propellers and propeller assemblies therefor (purchased from Curtiss-Wright Corporation), as well as a supply of spare parts for the aircraft, engines, propellers and propeller assemblies, was financed under a Credit Agreement, dated March 25, 1948, pursuant to which credit in the maximum amount of $18,776,942.50 was made available to TWA to make the purchases indicated and to pay off the notes still outstanding with respect to the four Model 049 Constellations purchased in 1947 and the five Model 049 Constellations purchased in 1946. Notes evidencing the loans were secured by chattel mortgage on the nine Model 049 Constellations referred to, the twelve Model 749 Constellations purchased and the engines, propellers and propeller assemblies and spare parts for the twelve Model 749 Constellations. The Credit Agreement and chattel mortgage are described under the caption "Funded Debt—3% Promissory Notes".

Because of the expense involved it is TWA's present policy not to attempt to develop new aircraft, but rather to follow closely the efforts of aircraft manufacturers in that connection. Replacement of the present fleet of Douglas DC-3 aircraft operated by TWA depends upon the availability of a suitable replacement and the ability to finance the purchase. Studies have been and are being made of aircraft which might be used for such replacement.

The number and type of aircraft owned or operated under lease by TWA as of February 1, 1949, are shown in the table set forth under the caption "Property".

Relations with Hughes Tool Company

Hughes Tool Company, a Delaware corporation (hereinafter sometimes called Hughes), all the outstanding stock of which is owned by Howard R. Hughes, well-known industrialist, motion picture producer, aviator and aeronautical engineer, owns 1,486,523 shares of the Common Stock of TWA which is approximately 74% of the Common Stock outstanding. Hughes began purchasing Common Stock of TWA for investment in 1939 and by January 15, 1943 had acquired 440,050 shares, approximately 46% of the Common Stock then outstanding. 119,154 shares were purchased directly from TWA in March, 1940, and the balance was acquired on the open market and through investment firms. Prior to August 1, 1948, there was a net increase in the number of shares of TWA stock Hughes held to 452,100, which was further increased by the acquisition on or about August 24, 1948 of 1,034,423 shares upon the conversion of Subordinated Convertible 2¾% Notes as set forth below.

Hughes was and is primarily engaged in the manufacture of oil-well drilling equipment, but it had conducted some experimental work in aviation prior to the war, and during the war began manufacture of parts for military aircraft and the construction for the United States of certain experimental aircraft. Among other things, it had been interested in the development of Constellation-type aircraft and originally contracted with Lockheed for the manufacture of such aircraft, partly for the benefit of TWA. In 1942, Hughes assigned all its rights to such contracts to TWA in consideration of TWA's assumption of Hughes' obligations thereunder. TWA also paid $2,500 for Hughes' expenses in connection therewith, and agreed to resell some of such aircraft to Hughes at cost.

By the provisions of the Civil Aeronautics Act, control of TWA by Hughes became subject to the approval of the Civil Aeronautics Board because of Hughes' other activities in aeronautics. Application for such approval was filed in 1943 and in 1944 the Board found the control consistent with the public interest and approved it on the condition that commercial transactions between the two companies be limited to items not exceeding $200 in amount and totaling not more than $10,000 per year. By subsequent proceedings the condition has been modified to remove any limits on transportation purchased by Hughes from TWA at regularly published rates; to permit TWA to repair Hughes' aircraft and sell aviation fuel to Hughes at prices charged by TWA to others; and to permit TWA to purchase certain radar units from Hughes, provided the price did not exceed cost or the price of similar sales by Hughes to any other airline, whichever is lower. Transactions between TWA and Hughes and its subsidiaries (excluding air transportation purchased by Hughes) have been as follows:

Year	Due Hughes	Due TWA
1944	$ 0.00	$ 0.00
1945	372.56	2,209.37
1946	1,312.30	6,778.44
1947	19,353.06	17,474.38
1948 (first eleven months)	38,135.36	29,480.59

The foregoing tabulation does not include $125,000, the price of two military-type Constellation aircraft which TWA repurchased from the United States government and resold to Hughes at cost, in July, 1946, pursuant to rights reserved by Hughes at the time it assigned its contracts for Constellation aircraft to TWA. Sale of these two aircraft was permitted by the order of the Board approving control of TWA by Hughes.

By agreement dated October 1, 1948, Hughes agreed to resell to TWA one of these aircraft and to sell an additional military-type Constellation aircraft which Hughes had acquired from Lockheed, the sales price to be Hughes' cost but not more than an average of $545,000 per aircraft. Both aircraft have been converted, at Hughes' expense, to conform substantially with the Model 049 Constellation aircraft owned by TWA. The agreement, as amended by agreement dated December 1, 1948, provided for a conditional sale of the aircraft, title thereto to be retained by the seller until the purchase price of each aircraft is paid. Payment for each aircraft is to be made in monthly instalments of $9,000 with interest on the unpaid balance at the rate of 3%. After the Board had amended its order approving control of TWA by Hughes to permit TWA to acquire these two aircraft the conditional sale agreement was signed as of February 1, 1949. Prior thereto the aircraft were used by TWA without charge. The purchase price of Model 049 Constellation aircraft acquired by TWA from Lockheed in March 1947 was approximately $718,000 per aircraft.

Reference is hereby made to the agreement of October 1, 1948, the amendatory agreement of December 1, 1948, the letter agreement under which TWA used the aircraft prior to signing the conditional sale agreement, and the conditional sale agreement, which are filed as Exhibits 15u through 15w and Exhibit 15aa to the registration statement, for the detailed provisions thereof, and the foregoing statements are qualified in their entirety by such reference.

On January 9, 1947 the TWA Board of Directors accepted a proposal of Hughes, dated January 8, 1947, under which Hughes agreed to lend TWA $10,000,000, and the Board of Directors would be reconstituted so that a majority of the directors would be nominees of Hughes. On January 9, 1947 the Board of Directors was so reconstituted. Of the present directors, Messrs. Palmer Bradley, Oscar F. Holcombe, A. V. Leslie, A. D. Simpson and Loyd Wright were nominated by Hughes at that time. At the annual meeting of stockholders in 1948 the gentlemen named were reelected directors of TWA. At that meeting, stock owned by Hughes constituted a majority of the stock represented and voting.

Pursuant to the above-mentioned agreement between Hughes and TWA accepted January 9, 1947, Hughes lent TWA $10,000,000 in the period from January 9, 1947, through May 29, 1947, the loans being evidenced by TWA's Subordinated Convertible 2¼% Notes, due June 2, 1956. These notes were convertible by the holder at any time before maturity into TWA Common Stock at the par value thereof ($5), or at the average of the prices at which the last sale of such stock was made on the New York Stock Exchange on each of the last ten business days preceding receipt by TWA of notice of exercise of the right to convert, whichever was greater. TWA could require the holder to convert, on January 1, 1950 and on that day only, at a price calculated by the same method, by mailing to the holder notice of its election so to do.

On December 26, 1947, Hughes, in a further agreement with TWA, waived its rights to require payment of these notes, or interest thereon, in money or in any form other than stock.

On June 15, 1948, TWA's Board of Directors authorized an offer to Hughes to convert the $10,000,000 principal amount of the notes and the interest amounting to $344,239.75 accrued thereon to June 18, 1948, into TWA's Common Stock at a price of $10 per share. The offer was accepted by Hughes on June 18, 1948. The resulting agreement was approved by TWA's stockholders (including the holders of a majority of the Common Stock not owned by Hughes) on August 10, 1948. The agreement was consummated on or about August 24, 1948, and 1,034,423 shares of Common Stock were issued upon surrender of the notes for retirement. Had TWA had the right to require conversion on June 18, 1948, the date of acceptance by Hughes of the proposal, the conversion price would have been $15.80 per share and Hughes would have received 654,699 shares. See information under the caption "Litigation" regarding a stockholder's suit to enjoin the conversion of the notes by Hughes.

The agreement dated January 8, 1947, was filed with the Board for approval if such approval was deemed necessary. TWA and Hughes took the position that the Board's original order approving control of TWA by Hughes made any further consideration of the question unnecessary. However, by order dated June 30, 1948 the Board stated that the agreement constituted a further acquisition of control requiring approval under the Act and a hearing has been tentatively set for May, 1949, to determine whether such further acquisition should be approved.

By a Three-Party Agreement, dated January 31, 1947, between Hughes, TWA and The Equitable Life Assurance Society of the United States (hereinafter sometimes called Equitable) Hughes agreed that if TWA should at any time be in default in the payment of the principal of or interest on any of its Series A Debentures or Series B Debentures, Hughes would, within ten days after Equitable's request, cause to be subjected to a Voting Trust Agreement, to be dated as of the date of such request, in the form attached to said agreement as Exhibit C, all shares of Common Stock of TWA owned by Hughes on January 31, 1947, or acquired by Hughes prior to the execution and delivery of said Voting Trust Agreement (except any such shares theretofore transferred by Hughes by a sale in connection with which a registration statement became effective under the Securities Act of 1933) and TWA and Hughes agreed to take all action requisite on their part to cause said Voting Trust Agreement to be executed and delivered by them respectively and by the single voting trustee Hughes would be entitled to nominate. Equitable would be entitled to nominate the remaining two voting trustees, and in the event Hughes should not designate a voting trustee within said ten-day period, or if the person so designated should not execute said Voting Trust Agreement, the third voting trustee would be a person designated by the two voting trustees nominated by Equitable. The voting trustees would be entitled to exercise, in their discretion, all rights and powers with respect to all shares deposited under the Voting Trust Agreement, including the right to vote thereon or consent to any and every act of TWA. Hughes also agreed to subject to said Voting Trust Agreement all shares of Common Stock of TWA acquired after the execution and delivery thereof.

If made, the Voting Trust Agreement would terminate on (a) June 1, 1956, (b) the date of satisfaction of the Trust Indenture under which TWA's Series A Debentures and Series B Debentures have been issued, or (c) the date on which Equitable terminates it, whichever is earlier.

By the Three-Party Agreement Hughes also constituted Equitable its proxy, effective at any time TWA should be in default in payment of principal of or interest on any Debentures, to vote and act with respect to all shares of Common Stock of TWA, with respect to which Hughes would be entitled to vote

and act, at any meeting of TWA stockholders. The proxy is to be valid until the Common Stock owned by Hughes is subjected to the Voting Trust Agreement, or until none of the Debentures is outstanding, whichever is earlier, but in no event beyond June 1, 1956.

Reference is hereby made to the agreement accepted January 9, 1947, the agreement dated December 26, 1947, the offer dated June 15, 1948, and the acceptance thereof effective June 18, 1948, the Three-Party Agreement and the form of Voting Trust Agreement, referred to above, which are filed as Exhibits 15c through 15f and Exhibit 5, respectively, to the registration statement, for the detailed provisions thereof, and the foregoing statements are qualified in their entirety by such reference.

Relations with the Holder of Debentures

On November 30, 1945, TWA and Equitable entered into an agreement for the sale by TWA to Equitable of $30,000,000 principal amount of TWA's 3% Sinking Fund Debentures due June 1, 1956, to be issued under a Trust Indenture, dated as of December 1, 1945 (herein sometimes called the Trust Indenture) between TWA and The Commercial National Bank and Trust Company of New York, Trustee (herein sometimes called the Trustee) at the price of 100% of the principal amount of the Debentures plus accrued interest, and upon the other terms and conditions stated in the agreement. Pursuant to the agreement of November 30, 1945, TWA sold and Equitable purchased Debentures as follows:

Date	Principal Amount
December 3, 1945	$10,000,000
February 8, 1946	7,000,000
April 26, 1946	7,000,000
May 31, 1946	6,000,000
Total	$30,000,000

On May 10, 1946, TWA and Equitable entered into an agreement for the sale by TWA to Equitable of $10,000,000 principal amount of TWA's 2¼% Sinking Fund Debentures (Series B) due December 1, 1951 (herein sometimes called Series B Debentures) at the price of 100% of the principal amount of the Debentures plus accrued interest, and upon the other terms and conditions stated in the agreement. The Series B Debentures were to be issued under the Trust Indenture as amended by a Supplemental Indenture to be dated as of June 1, 1946. As holder of all outstanding Debentures, Equitable consented to the execution of the Supplemental Indenture.

The Supplemental Indenture, dated as of June 1, 1946 (herein sometimes called the Supplemental Indenture) was signed by TWA and the Trustee on October 3, 1946. By the Supplemental Indenture the Debentures due June 1, 1956 were designated 3% Sinking Fund Debentures (Series A) due June 1, 1956 (herein sometimes called Series A Debentures) and the Trust Indenture and the Series A Debentures were appropriately amended to provide for the issue of a maximum principal amount of $10,000,000 of Series B Debentures. On the same day TWA sold and Equitable purchased $10,000,000 principal amount of Series B Debentures.

On January 31, 1947, TWA, Hughes and Equitable entered into the Three-Party Agreement partly described above under the subcaption "Relations with Hughes Tool Company". By the Three-Party Agreement, Hughes agreed to lend TWA $10,000,000 against delivery of TWA's Subordinated Convertible 2¼% Notes (as contemplated by the agreement between Hughes and TWA accepted January 9, 1947, described above under the subcaption "Relations with Hughes Tool Company") and Equitable waived the covenants of the Trust Indenture, as amended, to the extent necessary to permit TWA to incur and remain liable for the indebtedness evidenced by said notes, and, subject to consummation of the loans by Hughes, consented to the execution by TWA and the Trustee of a Second Supplemental Indenture, to be dated as of January 15, 1947, in the form annexed to the Three-Party Agreement as Exhibit A.

In May, 1947, the $10,000,000 loan by Hughes to TWA having been consummated, TWA and the Trustee signed the Second Supplemental Indenture dated as of January 15, 1947 (herein sometimes called the Second Supplemental Indenture), by which the date of maturity of the Series B Debentures was extended from December 1, 1951, to December 1, 1955; the rate of interest thereon was increased from 2¼% to 3% from December 1, 1946, to maturity; and the redemption price thereof was increased. Fixed sinking fund payments for the Series A Debentures and Series B Debentures were substantially reduced, and a number of TWA's covenants and other provisions of the Trust Indenture, as amended, were modified by the Second Supplemental Indenture.

On March 25, 1948, and simultaneously with the signing of the Credit Agreement dated March 25, 1948 (described below under the caption "Funded Debt—3% Promissory Notes") Equitable and the parties

to the Credit Agreement entered into a Multi-Party Agreement under which Equitable consented to and approved the purchase by TWA of twelve Model 749 Constellation aircraft; the financing of such purchase and of the purchase of engines, propellers and spare parts and the refinancing of part of the purchase price of nine Model 049 Constellation aircraft, as provided in the Credit Agreement; and the subjecting to a chattel mortgage of the aircraft involved and the engines, propellers and spare parts to secure the amounts borrowed. Equitable also consented to the signing of a Third Supplemental Indenture, to be dated as of March 15, 1948, in the form annexed to the agreement as Exhibit A, and TWA agreed to enter into the same with the Trustee. Equitable received the right to acquire all, but not less than all, of the notes issued under the Credit Agreement at the principal amount thereof plus accrued interest, and the Trustee was given the right to cure or eliminate defaults of TWA under the chattel mortgage, any payments so made to be secured by the lien of the chattel mortgage, subject and subordinate, however, to the lien for, and the prior right to payment of, all other sums secured thereunder.

On the same day TWA and the Trustee signed the Third Supplemental Indenture dated as of March 15, 1948 (herein sometimes called the Third Supplemental Indenture), whereby the Trust Indenture was amended to permit the financing contemplated by the Credit Agreement and the Multi-Party Agreement, and among other changes, TWA's covenant with respect to insurance was changed to specify more particularly the insurance to be carried and to require the payment to the Trustee (for pro rata redemption of the Series A Debentures and Series B Debentures) of proceeds of insurance payable because of destruction, loss or confiscation of aircraft or damage thereto to an extent rendering repairs impracticable or uneconomic, except to the extent that such proceeds were payable to the trustee under the chattel mortgage above referred to or to the trustees under the Boeing Mortgage, described under the caption "Funded Debt—2% Promissory Notes".

On August 24, 1948 Equitable consented to the exchange by Hughes of the Subordinated Convertible 2¼% Notes of TWA for 1,034,423 shares of Common Stock as described above under the subcaption "Relations with Hughes Tool Company". Equitable has also waived compliance by TWA with one or more covenants of the Trust Indenture, as from time to time amended, on a number of occasions.

Reference is hereby made to the agreements dated November 30, 1945, and May 10, 1946, the Three-Party Agreement, the Multi-Party Agreement, the Trust Indenture, Supplemental Indenture, Second Supplemental Indenture and Third Supplemental Indenture, referred to above, which are filed as Exhibits 15a, 15b, 15f, 15j, and 7a through 7d, respectively, to the registration statement, for the detailed provisions thereof, and the foregoing statements are qualified in their entirety by such reference.

For a description of the Fourth Supplemental Indenture, dated as of February 1, 1949, see the caption "Funded Debt—Debentures".

Investments in, and Relations with, Certain Other Companies

In October, 1943, TWA contracted to purchase from TACA Airways, S. A., the equivalent of 225,000 shares of the latter's common stock. TACA Airways, S. A., through its subsidiaries, operated an extensive airline system in Central America and the Caribbean area. TWA endeavored to assist it in developing and modernizing its system and made available some of its experienced personnel and additional financial assistance. TWA's interest in TACA Airways, S. A. was increased by subsequent purchases to 335,000 shares. Operations of TACA Airways, S. A., were carried on at a substantial loss in the years from 1944 through 1946. In January, 1947, TWA granted options on 335,000 shares of TACA Airways, S. A. stock at a price of $2.00 per share on or before January 31, 1948, $2.50 per share on or before January 31, 1949, and $3.00 per share on or before July 31, 1949. At the same time, TWA granted the principal optionee an irrevocable proxy covering the voting of all of the optioned shares. The option had not been exercised prior to February 9, 1949, and at that date an over-the-counter market bid price for TACA Airways, S. A. stock was 62½¢ per share. TWA is presently considering a proposal under which the options on approximately 280,000 of these shares would be surrendered and 200,000 thereof would be sold at a price of 50¢ a share.

In October, 1943, TWA agreed to purchase from TACA Airways, S. A. 900 shares of the stock of Empreza de Transportes Aerovias Brasil, S. A., a Brazilian corporation conducting air transportation operations in Brazil and elsewhere. The purchase was subsequently consummated.

In 1946 TWA acquired 5,600 shares of the capital stock of Philippine Air Lines, Inc. at a cost of $420,000, of which $320,000 was paid in cash and $100,000 was paid in services. TWA's services consisted, among other things, of preparing a detailed plan of operation. The contractual arrangements were to continue for three years. TWA also provided services in connection with training personnel and obtaining necessary aircraft and equipment for which its costs were reimbursed by Philippine Air Lines, Inc. Performance of the contract by TWA has been substantially completed.

In 1945 TWA contracted with Iranian Airways Company to furnish the latter with aircraft and equipment, to provide and train personnel and to perform other services for which TWA was to receive its costs and a fee of $12,000 per year. The contract covered a five-year term. In 1946, pursuant to the contract, TWA acquired 250 shares of the capital stock of Iranian Airways Company at a cost of $25,000, part of which was paid in cash and part by credit against amounts due TWA under the contract. The stock was paid to the extent of 50%. The operations of Iranian Airways Company were not successful financially, and because of nonpayment of bills TWA early in 1947 refused it further credit and refused to continue performance of the contract. Negotiations for settlement of TWA's claims extended over a considerable period, in the course of which Iranian Airways Company disputed the amounts of the bills submitted by TWA and made claims against it for breach of contract. In April of 1947 a partial settlement was effected pursuant to which three Douglas C-47 aircraft were turned over to TWA on account of the amounts due, and final settlement was reached in September, 1948 pursuant to which the contract was terminated and Iranian Airways Company agreed to pay $50,000 to TWA in full settlement of TWA's claims. $10,000 of this amount was credited upon the stock owned by TWA, and TWA has been informed that, by subsequent action, the capital of Iranian Airways Company was reduced so that the 250 shares are now fully paid. The remaining $40,000 was evidenced by notes payable in equal quarterly instalments from November 1, 1948, to November 1, 1951. Iranian Airways Company has released TWA from all its claims and TWA has agreed to release Iranian Airways Company when it has paid its notes. Iranian Airways Company has paid the first two instalments totaling $6,666.68, due November 1, 1948 and February 1, 1949.

In 1946 TWA acquired a stock interest in Technical & Aeronautical Exploitations Company Ltd., a Greek corporation. TWA also undertook to supply technical supervisory personnel for this company and to obtain aircraft and spare parts for its operations. The company was able to commence operations in Greece in 1946 and, with minor interruptions, has continued operations since that date. It is now operating without TWA personnel. In 1947 disputes arose concerning the management of the company and the issuance of shares of stock of the company to various parties, including TWA, and litigation in the Greek courts resulted. The disputes and litigation were settled in August, 1947. As part of the settlement TWA agreed to continue to own 8,000 of the shares held by it until August 23, 1949. As of February 1, 1949, TWA owned 14,000 shares of stock of this company.

In September, 1946, pursuant to agreement between the Italian Minister of Aeronautics and TWA, Linee Aeree Italiane, an Italian air transportation corporation, was organized to carry on air transportation of persons, property and mail in Italy. TWA acquired 8,000 shares of the stock of such corporation, the balance of the stock being acquired by the Italian government and corporations and Italian nationals designated by the government and acceptable to TWA. TWA has the right to select four of the ten directors and has other rights with respect to management functions. TWA has also agreed to provide services (at cost) in connection with the procurement of aircraft and equipment. TWA has the right to sell such stock to the Italian government at the value shown by the latest balance sheet of Linee Aeree Italiane, plus a certain allowance for interest.

TWA's investment in the companies above named, the write-down of such investment, and the asset value on TWA's books at November 30, 1948, are shown on the following tabulation:

	Investment	Write-Downs	Asset Value November 30, 1948
TACA Airways, S. A.	$2,295,750	$2,295,749	$ 1
Empreza de Transportes Aerovias Brasil, S. A.	51,905	51,904	1
Philippine Air Lines, Inc.	320,000	175,000	145,000
Iranian Airways Company	35,000	34,999	1
Technical & Aeronautical Exploitations Company Ltd.	69,804	50,000	19,804
Linee Aeree Italiane	250,971	———	250,971
Total	$3,023,430	$2,607,652	$415,778

TWA does not own a majority of the stock, voting or otherwise, of any of the above companies.

In September, 1945, TWA made an agreement with the Imperial Ethiopian Government contemplating the organization of Ethiopian Air Lines. TWA was to provide and train personnel, obtain aircraft and equipment and perform other services, for which it was to receive its costs and a fee of $12,000 per year or a fee based on plane miles or pound miles flown by Ethiopian Air Lines, whichever amount

was larger. While Ethiopian Air Lines was primarily liable to TWA for costs and fees, the Ethiopian Government was secondarily liable. The agreement was to continue for seven years from the date when Ethiopian Air Lines was established with the right on TWA's part to renew the agreement for two additional periods of seven years each. Ethiopian Air Lines was incorporated December 26, 1945.

In September, 1946, TWA made an agreement with the Kingdom of Saudi Arabia (which superseded an earlier agreement under which TWA furnished flight personnel to the Kingdom) under which TWA agreed, for a period of five years from December 28, 1946 (the effective date of the agreement), to organize and operate Saudi Arabian Airlines and provide and train personnel, for which TWA is to receive its costs plus a fee of five cents for each mile flown by Saudi Arabian Airlines, but not less than $1,000 per month.

TWA has also entered into agency agreements with a number of foreign air carriers operating in all parts of the world, including some of those named above. While there are many exceptions, these agency agreements, in general, appoint TWA sole general agent of the foreign air carrier in the United States and non-exclusive agent at other places where it maintains ticket offices, and the foreign air carrier is similarly appointed sole general agent of TWA in the country where it maintains its head office, and non-exclusive agent at other places where it maintains ticket offices. Commissions are paid on tickets sold under the agency agreements.

TWA has also made investments in corporations organized by United States certificated air carriers to carry on certain cooperative enterprises. Among these are Aeronautical Radio, Inc., which serves as an agency for coordination of aeronautical communications matters of common concern to the air transportation industry; Air Cargo, Inc., which performs coordinating services in connection with the handling of air freight, particularly with respect to pick up and delivery services; Airlines Terminal Corporation, formed for the purpose of financing and operating airport terminal buildings and providing terminal services; and a number of corporations operating joint ticket offices.

Operations under War Contracts

At the beginning of the war TWA contracted with the Army Air Forces to operate an overseas air transport service. In addition to special missions, operations were carried on over both the north and south Atlantic. TWA also operated for the Army Air Forces a domestic cargo service, a modification center for the modification of combat and transport aircraft, and several training schools for Army Air Forces personnel, and performed other services.

Almost all TWA's operations under war contracts were on a cost-plus-a-fee basis. Contracts were renegotiated, but there was no recovery by the Government in renegotiation proceedings. Final settlements, or agreements for final settlements, have been arrived at with respect to all contracts with the exception of certain disputed items involving approximately $37,000, for which a reserve has been provided.

Insurance

TWA maintains all risks hull, public liability, passenger liability, property damage, baggage, domestic air cargo, and various other types of insurance. Premiums for such insurance are in many cases on a negotiated basis. The management of TWA considers its insurance adequate as to coverage and amount.

Employee Relations

Labor relations in the air transport industry are governed by the provisions of Title II of the Railway Labor Act, as amended. The Civil Aeronautics Act of 1938, as amended, provides that it shall be a condition upon the holding of a Certificate that the air carrier comply with Title II of the Railway Labor Act. The Act also requires air carriers to maintain rates of compensation, maximum hours and other working conditions and relations with pilots and copilots engaged in interstate air transportation in continental United States so as to conform with the decision numbered 83 made by the National Labor Board on May 10, 1934, and to maintain rates of compensation for pilots and copilots engaged in overseas or foreign air transportation, the minimum of which shall not be less, upon an annual basis, than the compensation required to be paid under said decision numbered 83 for comparable service within the continental United States. TWA is also subject to certain labor laws of the foreign countries through which its international system operates. At the end of 1948 TWA had more than 12,000 employees.

Approximately 46% of all TWA employees, including all flight personnel (except about sixty hostesses and flight pursers who are citizens of foreign countries) are presently represented by unions.

The largest group (nearly 4,000) are ground service employees of various classifications, represented by the International Association of Machinists. The second largest group (over 1,000) are pilots and copilots represented by Air Line Pilots Association, International, with which is affiliated Air Line Stewards and Stewardesses Association, International, representing the third largest group (nearly 600), the hostesses and flight pursers.

Agreements with the International Association of Machinists covering mechanics and related employees and guards expired December 31, 1948. The union has requested that a number of changes be made in the new agreements, including an increase in hourly wages of 15 cents per hour. TWA has offered a smaller increase in hourly pay in lieu of all the union's requests. TWA is informed that the union has invoked the mediation procedure provided under the Railway Labor Act. The agreement covering navigators expired January 1, 1949, and a new agreement is being negotiated. The union representing the navigators has requested various pay increases. It is impossible to forecast at this time the outcome of the negotiations for any of these new agreements. Other collective bargaining agreements expire at various dates from March through September, 1949.

In recent years TWA has been affected at times by the general labor unrest prevalent in the United States. Many of TWA's difficulties may be attributed to the great expansion in its operations which took place during and after the war. Expansion was accompanied by specialization of work, giving rise to new and difficult problems of employee classification and representation. New jobs, such as flight navigator, were established. In some cases existing unions were not prepared to represent new classes of employees and new unions were organized for the purpose. Introduction of new aircraft raised questions of compensation of flight personnel. Inauguration of TWA's international operations added further problems of representation and of compensation for foreign service.

As a result of these complications, disputes have been frequent. Both TWA and its employees have frequently invoked the services of the National Mediation Board, and on several occasions have submitted disputes to arbitration. One strike has actually occurred. In that case TWA and Air Line Pilots Association, International, were unable, after protracted negotiations, to agree on rates of pay and work rules for pilots and copilots of Lockheed Constellation and Douglas C-54 aircraft. On May 7, 1946, the President of the United States created an Emergency Board to consider the dispute. The Emergency Board submitted its report July 7, 1946. TWA accepted the report and put the recommendations of the Emergency Board into effect on August 8, 1946. The pilots and copilots struck on October 21, 1946, completely stopping TWA's scheduled operations. On November 15, 1946, the dispute was submitted to arbitration and scheduled operations were resumed. The dispute was settled by the arbitration award made January 22, 1947.

In the last two years problems of classification and representation of employees have gradually been clarified and grievance procedures have been established under the various collective bargaining agreements. These procedures have been and are still being used frequently and appear adequate to settle most of the routine grievances of employees.

TWA's labor policy in general has been directed toward recognizing and conforming with the standards of the air transport industry and maintaining parity between unorganized employees and those subject to collective bargaining agreements. Work rules and employee benefits have been liberalized over the past five years to conform with industry standards. The forty-hour workweek was adopted in January, 1946, and now constitutes the standard workweek for all ground employees. TWA's present practices with regard to sick leave, vacations, holidays, and overtime pay are substantially in accordance with those of other major United States air carriers and are substantially the same for organized and unorganized employees.

TWA Incentive Plan.

By action of the stockholders at their annual meeting held March 21, 1940, and of the directors at their meeting held April 5, 1940, the TWA Incentive Plan was adopted for the expressed purpose of attracting and retaining the high degree of executive ability and competence required by TWA's business. The Plan is administered by a Compensation Committee appointed by the Board of Directors from its members not eligible to the benefits of the Plan.

The Plan provides for the establishment of an Incentive Compensation Fund, to which there is credited each year in which the net earnings of TWA exceed 50 cents per share of Common Stock, such amount as the Compensation Committee determines, not exceeding 10% of the net earnings for that year and not exceeding the difference between the amount of such earnings and an amount equal to the number of shares of Common Stock outstanding at the end of the year multiplied by 50 cents. The Compensation Committee determines in each year the amount of the Fund to be distributed, the officers and employees to participate in the distribution and the amount and conditions of each award. The Fund may be held in cash or invested in TWA Common Stock and awards may be made either in cash or in such Common

Stock. If all of the Common Stock or cash available in any year is not distributed in that year, the undistributed balances may be carried forward in the Fund from year to year.

The Board of Directors may remove any member of the Compensation Committee at any time, may modify the Plan from time to time, repeal it entirely or discontinue allotments either temporarily or permanently, but no such modification may operate to annul an award once granted or to increase the amount of the award over the limits previously approved by the stockholders.

Awards were made under the Plan to officers and employees in the years 1942 through 1945, and no awards have been made since. Reference is hereby made to the TWA Incentive Plan and resolutions of stockholders and directors with respect to amendment thereof, which are filed as Exhibits 15m through 15p to the registration statement, for the detailed provisions thereof, and the foregoing statements are qualified in their entirety by such reference.

The TWA Employees Stock Purchase Plan.

Under The TWA Employees Stock Purchase Plan, approved by the stockholders at a meeting held April 1, 1937, the Board of Directors was authorized to grant options to purchase a total of 50,000 shares of Common Stock to officers and employees who, by their loyalty, ability and initiative, had contributed and in the future would contribute to the successful operation of TWA's business. Such options were granted in the years 1937 through 1940. Options for 36,137 shares have been exercised and no other options are presently outstanding although the Board of Directors has authority to grant additional options under the Plan or to amend or terminate it. The last options outstanding, held by two employees, covered 119 shares and were exercised in the period June 1, 1948, to December 1, 1948, at a price of $3.75 per share with respect to shares optioned in 1938, $5.85 per share with respect to shares optioned in 1939, and $7.06 per share with respect to shares optioned in 1940.

Other Recent Developments

On May 17, 1948, the Chairman of the Board of TWA, by letter to the Reconstruction Finance Corporation, requested consideration of a loan of $10,000,000. No formal application to the Reconstruction Finance Corporation for a loan was ever filed.

On September 28, 1948, a Douglas C-54 aircraft was destroyed by fire at La Guardia Airport while being serviced. There were no casualties, and TWA's uninsured loss was approximately $22,000 after salvage. Insurance proceeds of approximately $80,000 will be receivable in connection with this loss, and such insurance proceeds are payable to the Trustee under the Trust Indenture described under the caption "Funded Debt—Debentures" for redemption of Debentures.

On November 25, 1948, a Model 049 Constellation was destroyed by fire immediately following a landing at Los Angeles. There were no casualties, and the aircraft was insured for an amount in excess of the net book value thereof. The amount of insurance proceeds will not be ascertained until all usable parts of the aircraft have been salvaged. Any insurance proceeds receivable on account of this accident would have been payable to the trustee under the Constellation Mortgage, described under the caption "Funded Debt—3% Promissory Notes", for prepayment of 3% promissory notes. However, TWA requested the holders of participations in such notes to permit it to use the insurance proceeds to purchase and modify for its purposes another Constellation aircraft which would be subjected to the lien of the Constellation Mortgage and such permission has been obtained.

Pan American Airways, Inc., one of the two American-flag air carriers competing with TWA in operations over the north Atlantic, has submitted to the Board for approval several agreements, each dated December 13, 1948, under which, if approved and performed, it will acquire the property, assets and business (including the Certificate) of American Overseas Airlines, Inc., the other American-flag air carrier competing with TWA in such operations. TWA has filed a petition for leave to intervene. Public Counsel has filed a motion with the Board requesting it also to consider the entire north Atlantic route structure of American-flag air carriers and to make such amendments, alterations or modifications of the Certificates of American Overseas Airlines, Inc., Pan American Airways, Inc., and TWA as may be found to be required by public convenience and necessity. In supporting the motion Public Counsel

stated that, if there should only be two American-flag air carriers, the Board might want to make a new distribution of routes by enlarging and strengthening TWA's routes, but that American Overseas Airlines, Inc. might reconsider withdrawing from operations and there might be substantial reasons why either Pan American Airways, Inc. or TWA should be asked to withdraw instead. TWA has filed a somewhat similar motion requesting the Board to broaden the proceedings to arrive at a satisfactory pattern of transatlantic service, including, if necessary, amending and extending or making permanent TWA's and Pan American's international Certificates. TWA cannot forecast the outcome of these proceedings and makes no representation as to the effect thereof on its international Certificate.

PROPERTY

As of February 1, 1949, TWA owned or leased a total of one hundred twenty-four aircraft, of which ninety-eight were assigned to its transcontinental system and twenty-six to its international system. All aircraft in use are maintained in airworthy condition in accordance with procedures approved by the Civil Aeronautics Administrator. These aircraft are as follows:

Type	Total	Owned	Leased	Trans-continental	International	Approximate age
Douglas DC-3, twin-engine, 21-passenger	54	30	24	54	0	5½-12½ yrs.
Douglas DC-3, twin-engine, 24-passenger	8	8	0	8	0	8-8½ yrs.
Douglas DC-3, twin-engine, cargo and utility	10	10	0	8	2	4½-6½ yrs.
Boeing Stratoliner, four-engine, 38-passenger	5	5(1)	0	5	0	9 yrs.
Douglas C-54, four-engine, 40-passenger	5	5	0	0	5	4 yrs.
Douglas C-54, four-engine, 42-passenger	5	5	0	0	5	4-5 yrs.
Douglas C-54, four-engine, cargo	2	0	2	0	2	4 yrs.
Lockheed Constellation 049, four-engine, 51-passenger	23	21(2)	2(3)	23	0	2½-4 yrs.
Lockheed Constellation 749, four-engine, 44-passenger	12	12(4)	0	0	12	7-11 months
Totals	124	96	28	98	26	

(1) Subject to Boeing Mortgage, described under caption "Funded Debt—2% Promissory Notes".

(2) Eight of these aircraft are subject to Constellation Mortgage, described under caption "Funded Debt—3% Promissory Notes".

(3) Acquired from Hughes under conditional sale agreement dated as of February 1, 1949, as described under the caption "History and Business—Relations with Hughes Tool Company".

(4) Subject to Constellation Mortgage referred to in footnote (2).

Annual rental on the twenty-four Douglas DC-3 and two Douglas C-54 aircraft on lease aggregates $491,304 with a credit at the annual rate of $183,600 on account of conversion costs of the Douglas DC-3 aircraft, making the net annual cash payment $307,704. Leases of these aircraft expire at various dates in 1950.

TWA owns no real property with the exception of fourteen acres on which the passenger station and its hangars at Winslow Airport, Arizona, are located. TWA's general offices in Kansas City, Missouri, and executive offices in New York, N. Y., are in leased office space. TWA's principal overhaul base is located on leased property at Fairfax Airport, Kansas City, Kansas, where major overhauls on Constellation and other aircraft are performed. An overhaul base for the international system is maintained on leased property at New Castle County Air Base, Wilmington, Delaware, where overhauls of Douglas C-54 aircraft are performed.

At January 1, 1949, ticket offices were maintained in leased space in sixty-one cities in the United States and twenty-four cities outside the United States. At the same date, TWA was utilizing or had the right to utilize, under lease agreements or other arrangements, airports for its service at fifty-five cities in the United States and sixteen cities outside the United States. Where hangar or other improvements are made on leased land, upon termination of the leases the improvements revert to the municipalities or other agencies owning the land except in some instances where TWA has the right of removal. Leases are for varying terms and rentals. Although their expiration represents a continuing problem of the negotiation of new leases, it is not anticipated that any single expiration will materially affect TWA's operations adversely.

Rents and landing fees paid or accrued for the three years and seven months ended July 31, 1948, were as follows:

Period	Transcontinental System	International System	Subsidiaries	Total
1945	$ 768,996	$ 34,149	$ 1,997	$ 805,142
1946	1,429,189	629,469	20,520	2,079,178
1947	1,677,666	1,159,636	17,547	2,854,849
Seven months ended July 31, 1948	1,102,135	736,709	420	1,839,264

The aggregate of future rent and landing fee costs is difficult to estimate as such costs depend on variable factors, such as volume of traffic, number of schedules, types of equipment and routing thereof, terms yet to be negotiated, and municipal and other governmental policies. It is expected, however, that aggregate rent and landing fee costs will increase.

The amount of TWA's capital investment reflected, directly or indirectly, in fixed property, such as hangars, terminal buildings and other such facilities, is expected to increase substantially over the next few years. The proportion that such type of capital investment bears to flight and ground equipment may also increase. It is anticipated that large expenditures will have to be made for such items which may also involve payment therefor in the form of rentals which include the amortized costs of hangars, terminal buildings and other such facilities built initially at the cost of the lessor. One of the problems confronting the air transport industry is the inadequacy of the present terminal facilities at many cities in relation to the volume of traffic and type of equipment. In some instances, terminal buildings and related facilities may be jointly owned with other air carriers.

On August 31, 1945, TWA entered into a lease for the use of facilities at New York International Airport (formerly called Idlewild Airport) in Queens County, New York. This lease provides, among other things, for the construction of hangars and other improvements for TWA at a cost not to exceed $16,350,000, to be initially paid by the City and repaid, with interest, by TWA over a period of years.

The City has leased this airport to The Port of New York Authority and has assigned to the Authority the City's lease to TWA, the obligations of which were assumed by the Authority. The Authority has demanded that this lease, and similar leases of other air carriers, be renegotiated. TWA and other lessee air carriers are relying upon their leases with the City. A schedule of charges for use of the facilities at the airport recently promulgated by the Authority calls for fees and other charges which are different from those contained in the leases with the City.

After protracted discussions with respect to the controversy, TWA and seven other air carriers with similar leases brought an action against the Authority and others, the action being described below under the caption "Litigation".

FUNDED DEBT

2% Promissory Notes

To finance in part the repurchase price and the cost of rebuilding five Boeing Stratoliner aircraft, TWA, on August 1, 1945, delivered to nine banks forty-five promissory notes in the aggregate principal amount of $1,700,000 to evidence loans of like amount. The notes were payable in equal quarterly instalments from September 1, 1945, to June 1, 1950, with interest, payable quarterly at the rate of 1½% per annum on those notes with instalments maturing from September 1, 1945, through June 1, 1946, at the rate of 1¾% per annum on those notes with instalments maturing from September 1, 1946, through June 1,

1947, and at the rate of 2% per annum on those notes with instalments maturing from September 1, 1947, through June 1, 1950.

To secure such notes, TWA, on August 1, 1945, entered into an Indenture of Chattel Mortgage (herein sometimes called the Boeing Mortgage), dated that day, with The Commercial National Bank and Trust Company of New York and Charles H. Owens, as trustees, wherein it mortgaged the five Boeing Stratoliner aircraft with related engines and propeller assemblies, fifteen additional engines, and five additional propeller assemblies, to secure the notes.

The Boeing Mortgage permits TWA to prepay the notes at any time as a whole, or in part in amounts of at least $100,000, without premium, and requires it to prepay any amount by which the unpaid principal of the notes at any time exceeds 85% of the sum of the net depreciated cost of the mortgaged property (determined as provided in the Boeing Mortgage) and certain moneys held by, or insurance moneys payable to, the trustees under the Boeing Mortgage. The Boeing Mortgage also provides, among other things, that the principal of all the notes outstanding may become or be declared due and payable in the event of certain defaults specified therein; that there may be substitution of mortgaged property; and that modification of the provisions thereof may be made when approved by the holders of 75% in principal amount of the notes outstanding, but not to extend the time of payment of instalments of principal thereof, or interest thereon, reduce the principal thereof or rate of interest, affect the right of any holder of any note issued thereunder to enforce the same on or after the due date thereof or change the percentage necessary to approve modifications.

The foregoing summary does not purport to be complete, and reference is made to the Boeing Mortgage and the form of note included therein which are filed as Exhibit 7e to the registration statement for a full statement of the provisions thereof, and the foregoing summary is qualified in its entirety by such reference.

Debentures

At February 1, 1949, TWA had outstanding $29,500,000 principal amount of Series A Debentures (of a total issue of $30,000,000 principal amount) and $9,500,000 principal amount of Series B Debentures (of a total issue of $10,000,000 principal amount). Such Debentures are outstanding under a Trust Indenture, dated as of December 1, 1945, as amended by four Supplemental Indentures. Issuance of the Debentures and amendments of the Trust Indenture are described under the caption "History and Business—Relations with the Holder of Debentures."

The Series A Debentures bear interest at the rate of 3% per annum, mature June 1, 1956, and are redeemable at any time as a whole, or in part in multiples of $50,000 principal amount, at principal, accrued interest and a premium varying from 2½% for redemption on or before June 1, 1949, to ½% on or before June 1, 1955, and without premium after June 1, 1955. The Series B Debentures bear interest at the rate of 3% per annum, mature December 1, 1955, and are redeemable upon the same terms.

The Trust Indenture, as amended, provides for fixed sinking fund payments for the Debentures as follows:

Series A Debentures		Series B Debentures	
May 28, 1948	$ 500,000	November 27, 1948	$ 500,000
May 28, 1949	1,000,000	November 27, 1949	1,000,000
May 28, 1950	2,000,000	November 27, 1950	1,000,000
May 28, 1951	2,000,000	November 27, 1951	1,000,000
May 28, 1952	2,000,000	November 27, 1952	1,000,000
May 28, 1953	2,000,000	November 27, 1953	1,000,000
May 28, 1954	2,000,000	November 27, 1954	2,000,000
May 28, 1955	2,000,000		
Totals	$13,500,000		$7,500,000

Additional sinking fund payments are required on November 27th of each year from November 27, 1948, through November 27, 1955, in an amount equal (to the nearest multiple of $1,000) to the excess of (1) TWA's net income from December 31, 1946, to the end of TWA's fiscal year next preceding the November 27th on which the payment is to be made plus $344,239.75, over (2) the sum of all sinking fund payments made by TWA during the same period. However, the total of the fixed and additional sinking fund payments need not at any time exceed the aggregate of $4,000,000 plus $4,000,000 for each fiscal year of TWA completed after December 31, 1946, and prior to the date an additional sinking fund payment is to be made, and the amount of such additional sinking fund payment may be reduced accordingly. Additional sinking fund payments are to be applied equally (as nearly as may be) in respect of Series A Debentures and Series B Debentures. However, the total of the fixed and additional sinking fund payments in respect of the Series A Debentures shall not at any time exceed the aggregate of $2,000,000 plus $2,000,000 for each fiscal year of TWA completed after December 31, 1946, and prior to the date an additional sinking fund payment is to be made, and any excess shall be applied in respect of the Series B Debentures. No additional sinking fund payment was required to be made on November 27, 1948.

Among other provisions, the Trust Indenture, as amended, requires payment to the Trustee, for redemption of Debentures, of proceeds of insurance payable because of destruction, loss or confiscation of aircraft or certain damage thereto, except to the extent that such proceeds are payable to the trustees under the Boeing Mortgage (above described under the subcaption "2% Promissory Notes") or the trustee under the Constellation Mortgage (described below under the subcaption "3% Promissory Notes"); restricts the borrowing of money, the creation of liens on the property of TWA and its subsidiaries, the disposition of net proceeds from the sale of unpledged flight equipment, and the leasing of aircraft after March 15, 1948; prohibits the making of "Restricted Expenditures", which are expenditures for the purchase of any aircraft and (with certain exceptions) investments, loans and advances not made in the ordinary course of business, unless, immediately thereafter, consolidated net current assets of TWA and its subsidiaries are at least $20,000,000; and provides for the acceleration of the maturity of the Debentures in the event of certain defaults specified therein. Provisions restricting the payment of dividends on the Common Stock are summarized under the caption "Description of Common Stock". The Trust Indenture, as amended, may be further amended with the consent of holders of 66⅔% in principal amount of the outstanding Debentures, but not to extend the maturity of the Debentures, reduce the rate or extend the time of payment of interest thereon, reduce the principal thereof, reduce any premiums payable upon redemption thereof, or change the percentage of holders of Debentures required as above stated to consent to amendments.

As of February 1, 1949, TWA and the Trustee, with the consent of Equitable, entered into a Fourth Supplemental Indenture (hereinafter called the Fourth Supplemental Indenture), containing further amendments of the Trust Indenture, the most important of which are substantially to the following effect:

(a) purchase of two Constellation aircraft by TWA from Hughes, as described under the caption "History and Business—Relations with Hughes Tool Company", and purchase, modification and mortgaging of an additional Constellation aircraft, as described under the caption "History and Business—Other Recent Developments", is permitted;

(b) guaranties of indebtedness of corporations, the primary activity of which is the furnishing of services or facilities to three or more scheduled airlines, including TWA, and loans and advances to and investments in such corporations owned by three or more scheduled airlines, may be made by TWA, but amounts are limited; and

(c) capital assets (other than aircraft) formerly included in the category of "Restricted Expenditures" are removed therefrom and the amount of consolidated net current assets which TWA and its subsidiaries are required to have immediately after the making of any "Restricted Expenditures" is increased from $7,000,000 to $20,000,000, with a provision that the restriction shall not apply to the aircraft referred to in (a) above.

The foregoing statements concerning the Debentures and Trust Indenture, as amended, do not purport to be complete, and reference is made to the Trust Indenture and the Supplemental Indentures, which are filed as Exhibits 7a through 7d and Exhibit 7i to the registration statement for a complete statement of the terms and provisions thereof and the foregoing statements are qualified in their entirety by such reference.

3% Promissory Notes

At February 1, 1949, TWA had outstanding $16,390,404.12 principal amount of its 3% promissory notes, delivered as described under the caption "History and Business—Equipment". As a part of the same transaction it was entitled to deliver, in payment for equipment not delivered at that date, a maximum of $24,252.26 principal amount of said notes.

The notes are dated the dates the respective loans were made or credit was extended, bear interest at the rate of 3% per annum payable monthly on the last day of the month, and are payable in equal consecutive monthly instalments, beginning on September 30, 1948, or the last day of the month in which the note is dated (whichever is later) with the last payment on each note due May 31, 1953. TWA has the right, on five days' notice, to prepay the notes as a whole, or in part in amounts of at least $100,000, without premium, partial prepayments to be applied ratably upon all the notes and the amount payable on each note being applied to the equal reduction of all unpaid instalments of principal.

The notes have been and will be delivered under a Credit Agreement dated as of March 25, 1948. The Credit Agreement may be modified, except to alter the times of payment of principal of or interest on any notes or as to certain other excepted matters, with the written consent of holders of participations in the notes aggregating 75% of the unpaid principal amount thereof, and in cases of any such modification affecting the amount or extending the time of the guarantee thereof by Lockheed Aircraft Corporation, referred to in the following paragraph, or certain other specified matters, the consent of such corporation must also be obtained.

By Agreement dated as of the 25th day of March, 1948, Lockheed Aircraft Corporation, for the sole benefit of the banks which are parties to the Credit Agreement above mentioned, guaranteed payment of the principal of and interest on the notes, and the loans evidenced thereby, which represented the purchase price and the unpaid principal amount of notes given in part payment of the purchase price of certain Constellation aircraft and parts sold by it to TWA. As of February 1, 1949, $14,112,060.94 principal amount of these notes were guaranteed by Lockheed, and none of the remaining notes to be delivered will be entitled to this guarantee. To the extent that Lockheed is required to perform this guarantee, its rights against TWA are subordinated to the remaining rights of the lending banks.

The notes are secured by an Indenture of Chattel Mortgage dated as of March 25, 1948, between TWA and Bankers Trust Company, as Trustee, and by a number of supplemental chattel mortgages (the Indenture of Chattel Mortgage and the supplemental chattel mortgages being herein sometimes referred to collectively as the Constellation Mortgage), covering nine Model 049 Constellation aircraft (one of which was destroyed November 25, 1948, as described under the caption "History and Business—Other Recent Developments"), twelve Model 749 Constellation aircraft, and various engines, propellers, propeller assemblies and spare parts. The Constellation Mortgage requires payment to the trustee thereof, for prepayment of the notes, of proceeds of insurance payable because of total or substantially total destruction, loss or confiscation of, or damage (rendering repair impracticable or uneconomical) to, aircraft subject to the Constellation Mortgage, and requires TWA to pay to said trustee, for like prepayment, an amount equal to the excess of the net book value of such aircraft over the amount of such insurance proceeds. The Constellation Mortgage also provides, among other things, that the principal of all the notes outstanding may become or be declared due and payable in the event of certain defaults specified therein.

Modifications of the Constellation Mortgage may be made with the written approval of holders of participations in the notes aggregating 75% of the unpaid principal amount thereof, but no such modification shall alter the times of payment or amounts of principal or interest, or permit any subordination of principal or interest, or permit the release or subordination of the security under the Constellation Mortgage, or affect the right of a holder to enforce the same on or after the due date of the notes, or change the percentage, above stated, necessary to approve modifications. Without like consent, TWA may not merge, consolidate, dispose of all or a material part of its property or any of the property subject to the Constellation Mortgage, by sale, lease, or otherwise, retire indebtedness, other than the notes, prior to stated maturity, except in certain specified cases, or modify the Trust Indenture in certain respects, or the terms of the Three-Party Agreement dated January 31, 1947, described under the caption "History and Business".

The foregoing statements concerning the notes, the Credit Agreement, the Indenture of Chattel Mortgage and the supplemental chattel mortgages do not purport to be complete, and reference is made to the Credit Agreement (including the form of the notes as Schedule A thereto) which is filed as Exhibit 15i to the registration statement, and the Constellation Mortgage, which is filed as Exhibits 7f through 7h to the registration statement, for a complete statement of the terms and provisions thereof, and the foregoing statements are qualified in their entirety by such reference.

DESCRIPTION OF COMMON STOCK

The holders of Common Stock are entitled to such dividends as may be declared by the Board of Directors out of any funds of TWA legally available therefor, but the declaration of dividends is limited as below stated. Each holder of Common Stock is entitled to one vote for each share of Common Stock held and has cumulative voting rights in electing directors. In the event of any liquidation, dissolution or winding up of TWA, the holders of Common Stock are entitled to share equally and ratably in the balance, if any, remaining after payment of all debts and liabilities. No holder of stock of TWA shall be entitled as such, as a matter of right, to subscribe for or purchase any part of any new or additional issue of stock of TWA of any class or of any issue of securities convertible into stock. In the opinion of counsel for TWA, the outstanding shares of Common Stock are, and the shares being offered hereby (when issued and sold as set forth herein) will be, full-paid and non-assessable.

The foregoing statements include a brief summary of certain provisions with respect to the Common Stock set forth in the Agreement and Act of Consolidation of TWA, constituting its Certificate of Incorporation, and certificates amendatory thereof, copies of which are Exhibits 1a through 1e to the registration statement. Reference is made to said exhibits for a more complete statement of such provisions, and the foregoing statements are qualified in their entirety by such reference. The Common Stock and the rights of the holders thereof are subject to the law of the State of Delaware and no information is given with respect to such law.

In the Trust Indenture, as amended, TWA agreed not to declare any dividends (except stock dividends) or authorize any payment for the purchase, redemption or other retirement of any shares of stock or any distribution in respect thereof (such dividends, payments and distributions being hereinafter called Stock Payments), unless, among other things, after giving effect to the proposed Stock Payment and all Stock Payments currently declared or authorized and all other Stock Payments declared or authorized after December 31, 1945, each of the following conditions would be complied with:

(a) After deducting certain items, including provisions for income taxes, from both consolidated current assets and consolidated current liabilities of TWA and its subsidiaries, the remaining consolidated current assets should be at least twice the remaining consolidated current liabilities;

(b) The consolidated net current assets of TWA and its subsidiaries should be at least $7,000,000 or 10% of consolidated funded indebtedness, whichever is greater; and

(c) The sum of all Stock Payments subsequent to December 31, 1945, would not exceed the sum of (i) 50% of the consolidated net income of TWA and its subsidiaries for the period subsequent to December 31, 1945, to and including the date of the declaration or authorization of the proposed Stock Payment, plus (ii) the aggregate cash proceeds of all stock of TWA sold during the period from December 31, 1945, to and including such date, provided that in no event should any dividend (other than a stock dividend) be declared if such dividend plus all other dividends (except stock dividends) theretofore declared subsequent to December 31, 1945, would exceed consolidated net income of TWA and its subsidiaries for the period subsequent to December 31, 1945, to and including the date of the declaration of such proposed dividend. (For the period from December 31, 1945 to November 30, 1948, TWA had a consolidated net loss of approximately $24,700,000.)

It has not been determined whether the acquisition of stock by Hughes in August, 1948, described under the caption "History and Business—Relations with Hughes Tool Company" resulted in the receipt by TWA of "aggregate cash proceeds" for purposes of the provisions summarized above in paragraph (c).

The foregoing summary does not purport to be complete, and reference is made to Section 4.20 of the Trust Indenture, filed as Exhibit 7a to the registration statement, as amended by Article One, Section Ten, of the Second Supplemental Indenture, filed as Exhibit 7c to the registration statement, and Article One, Section Five, of the Third Supplemental Indenture, filed as Exhibit 7d to the registration statement, for a full statement of the limitations therein on the payment of dividends, and to the following Sections of said Trust Indenture: 1.03, 1.05 (as amended by Article One, Section One, of the Second Supplemental Indenture and Article One, Section One, of the Third Supplemental Indenture), 1.06 (as amended by Article One, Section Two, of the Second Supplemental Indenture), 1.07 (as amended by Article One, Section Three, of the Second Supplemental Indenture), 1.08, 1.09, 1.10 (as amended by Article One, Section Four, of the Second Supplemental Indenture), 1.11, 1.12, 1.13 (as amended by Article One, Section Five, of the Second Supplemental Indenture), 1.14 and 4.21 (as amended by Article One, Section Eleven, of the Second Supplemental Indenture) for definitions of certain of the terms used in said Section 4.20, and the foregoing summary is qualified in its entirety by such reference.

DIRECTORS AND EXECUTIVE OFFICERS

Name	Address	Office
Palmer Bradley	2200 Gulf Building, Houston 2, Texas	Director
E. O. Cocke	101 West 11th Street, Kansas City 6, Mo.	Director, Vice President—Traffic
John A. Collings	10 Richards Road, Kansas City, Mo.	Director, Vice President—Operations
Powel Crosley, Jr.	c/o Crosley Motors, Inc., 2530 Spring Grove Ave., Cincinnati 14, Ohio	Director
Ralph S. Damon	88-11th Street, Garden City, N. Y.	Director, President
A. B. Eisenhower	c/o Commerce Trust Company, 10th and Walnut Streets, Kansas City 10, Mo.	Director
Oscar Holcombe	City Hall, Houston, Texas	Director
A. V. Leslie	101 West 11th Street, Kansas City 6, Mo.	Director, Vice President and Treasurer
Sidney Maestre	c/o Mississippi Valley Trust Company, Broadway and Olive Street, St. Louis 2, Mo.	Director
Thomas W. Pew	720 Neils Esperson Bldg., Houston 1, Texas	Director
Warren Lee Pierson	630 Fifth Avenue, New York 20, N. Y.	Director, Chairman of the Board of Directors
A. D. Simpson	c/o The National Bank of Commerce, Houston, Texas	Director
N. S. Talbott	131 North Ludlow Street, Dayton 2, Ohio	Director
Loyd Wright	111 West 7th Street, Los Angeles 14, Calif.	Director
C. E. Fleming	806 Connecticut Ave., N. W., Washington 6, D. C.	Vice President—Regulatory Proceedings
George H. Clay	101 West 11th Street, Kansas City 6, Mo.	Secretary
Leo R. Gilleran	101 West 11th Street, Kansas City 6, Mo.	Controller

Mr. Pierson has served TWA as a director since October 25, 1945, and became Chairman of the Board of Directors on April 24, 1947. He had been President of American Cable and Radio Corporation since April, 1945, and for more than five years prior thereto had been President of Export-Import Bank of Washington.

Mr. Damon was elected President and a director of TWA on January 25, 1949, with compensation at the rate of $75,000 per year. He was Vice President and General Manager of American Airlines, Inc. from September, 1943, until June, 1945, when he was elected President of that company. He was President of American Airlines, Inc. until January 19, 1949. Hughes Tool Company recommended that TWA employ Mr. Damon and guaranteed that, if Mr. Damon's employment were terminated, TWA would perform its obligations to him with respect to severance pay.

Mr. Leslie has served TWA as a director since January 9, 1947, and became an officer October 1, 1947. Prior thereto and since November 1, 1946, he was Assistant to the Executive Vice-President of Hughes Tool Company and during the five preceding years had been Assistant Vice-President of Mellon National Bank & Trust Company, Pittsburgh, Pa., and its predecessor, The Union Trust Company of Pittsburgh.

Mr. Clay has been employed by TWA in various capacities since February 16, 1944 and was elected Secretary June 27, 1947. Prior to his employment by TWA he was engaged in the private practice of law. Mr. Gilleran became TWA's Controller February 25, 1947, having been in TWA's employ since September 15, 1945. For more than two years prior thereto he was Chief Accountant of Boeing Airplane Company, Wichita, Kansas. The other executive officers of TWA named in the above list have been actively engaged in TWA's business during the past five years.

The aggregate remuneration paid directly or indirectly by TWA during 1948 (none was paid by its subsidiaries) to each director or officer whose aggregate remuneration exceeded $25,000, and to all officers and directors as a group, for services in all capacities, was as follows:

Name or Group	Capacities in which remuneration was received	Directors' Fees and Salaries
Warren Lee Pierson	Chairman of the Board of Directors and Director	$ 50,000.00*
John A. Collings	Vice President—Operations, and Director	31,619.24*
A. V. Leslie	Vice President and Director	26,400.00
Otis F. Bryan	Vice President	29,999.96**
All persons (as a group) who were directors or officers of TWA at any time during 1948	All capacities	320,404.10

* TWA estimates that Mr. Pierson's and Mr. Collings' aggregate remuneration for the year 1949 will be approximately $59,167 and $35,000, respectively.

** Mr. Bryan resigned as an officer June 15, 1948.

TWA is advised that as of November 29, 1948, its directors and officers, as a group, owned or had an interest in less than 1% of the outstanding Common Stock. TWA is also advised that Mr. Noah Dietrich, who was a director of TWA from January 9, 1947 until January 7, 1949, is Executive Vice President and a director of Hughes Tool Company which on November 29, 1948 owned 1,486,523 shares, or approximately 74% of such stock beneficially and of record, no shares being owned of record and not beneficially, and no shares being owned beneficially and not of record.

INDEMNIFICATION OF DIRECTORS AND OFFICERS

Article III, Section 12, of the By-Laws of TWA is as follows:

"SECTION 12. *Indemnification of Directors and Officers.* Each director and each officer of the Corporation and any director or officer of any other company serving as such at the request of the Corporation and of which the Corporation is a stockholder or creditor, shall be indemnified by the Corporation against all expenses actually and necessarily incurred by him in connection with the defense of any action, suit or proceeding in which he is made a party, or with which he may be threatened, by reason of his being or having been a director or officer of the Corporation or of such other company, whether or not he continues to be a director or officer at the time of incurring such expenses. The expenses covered by the foregoing indemnity shall also include amounts of judgments against such director or officer or amounts paid in settlement by him, other than amounts payable or paid to the Corporation, but shall not include any expenses incurred in connection with (a) any matters as to which such director or officer shall be adjudged in such action, suit or proceeding, without such judgment being reversed, to be liable for negligence or misconduct in the performance of his duties as director or officer, or (b) any matters which shall be the subject of such action, suit or proceeding disposed of otherwise than by adjudication on the merits, unless in relation to such matters such director or officer was not liable for negligence or misconduct in the performance of his duties as director or officer. As to whether or not a director or officer was liable for negligence or misconduct in relation to such matters, the Board of Directors and each director and officer may conclusively rely upon the opinion of legal counsel selected by or in a manner designated by the Board of Directors. Upon written request of any director or officer, the Board of Directors shall submit any such matter to counsel so selected. The foregoing right of indemnification shall not be deemed exclusive of any other rights to which any such director or officer may otherwise be entitled and shall inure to the benefit of the heirs, executors and administrators of such director or officer."

Insofar as the foregoing By-Law may permit indemnification for liability arising under the Securities Act of 1933, TWA has been advised that the Securities and Exchange Commission is of the opinion that a By-Law containing such provision is against public policy as expressed in the Act and therefore unenforceable. In the event that a claim for such indemnification is asserted by an officer or a director, TWA, in the absence of controlling precedent, will submit to a court of appropriate jurisdiction the question whether or not indemnification by it is against public policy as expressed in the Act and therefore unenforceable and will be governed by the final adjudication of such issue.

UNDERWRITING

As set forth on the cover of this prospectus, Hughes Tool Company, the holder of 1,486,523 shares of Common Stock of TWA, will agree to purchase for investment 297,304 shares of Common Stock through the exercise of Subscription Warrants issued to it. Subject to the conditions of the Purchase Contract, including the purchase by Hughes Tool Company of said shares, the several Underwriters have agreed to purchase, at the subscription price stated on the cover of this prospectus below the legend "Price to Public", any of the remaining 106,808 shares of Common Stock not purchased upon the exercise of Subscription Warrants.

The names and addresses of the principal Underwriters and the percentage of unsubscribed stock which each Underwriter has severally agreed to purchase are as follows:

Name	Address	Percentage of Unsubscribed Stock to be Purchased
Merrill Lynch, Pierce, Fenner & Beane	70 Pine Street New York 5, N. Y.	34.462%
Glore, Forgan & Co.	40 Wall Street New York 5, N. Y.	18.725
White, Weld & Co.	40 Wall Street New York 5, N. Y.	18.725
Hornblower & Weeks	40 Wall Street New York 5, N. Y.	9.363
Paine, Webber, Jackson & Curtis	25 Broad Street New York 4, N. Y.	9.363
Hayden, Stone & Co.	25 Broad Street New York 4, N. Y.	4.681
W. E. Hutton & Co.	14 Wall Street New York 5, N. Y.	4.681
	Total	100.00%

None of the Underwriters is affiliated with TWA.

TWA is to pay the Underwriters for their commitments to purchase Common Stock the compensation set forth on the cover of this prospectus.

The Underwriters are not, on or before the public offering date, to own or be irrevocably bound to take up and pay for Common Stock. The Purchase Contract provides that the obligations of the Underwriters are subject to the performance by TWA of its obligations therein set forth, and to various conditions among which are conditions to the effect that the registration statement and any required post-effective amendment thereto shall have become effective within the time specified in the Purchase Contract and that no stop order shall have been issued or proceedings therefor initiated or threatened by the Securities and Exchange Commission prior to the date of delivery; that at the closing date, Merrill Lynch, Pierce, Fenner & Beane, as the Representative of the several Underwriters, shall have received, on behalf of the Underwriters, an opinion of counsel for TWA, in form and substance satisfactory to counsel for the Underwriters, and that counsel for the Underwriters shall have been furnished documents and opinions reasonably required to enable them to pass upon the matters referred to in, and the accuracy and completeness of the representations, warranties or conditions contained in, the Purchase Contract; that at the closing date the Representative shall have received a certificate of the President or a Vice President of TWA to the effect generally that certain specified events have not occurred; and that all proceedings taken by TWA in connection with the issue and sale of the Common Stock shall be satisfactory to the Representative, and to Underwriters' counsel.

The Purchase Contract further provides that it will become effective upon receipt of notice by the Representative from TWA that the registration statement has become effective and that Hughes Tool Company has entered into a written agreement to purchase through the exercise of Subscription Warrants the 297,304 shares of Common Stock not underwritten by the Underwriters. Until the Purchase Contract becomes effective, as aforesaid, either the Representative or TWA may prevent it becoming effective as therein set forth. The Representative may terminate the Purchase Contract at or prior to the closing date, if TWA shall have sustained a substantial loss on account of fire, accident or other calamity (regardless of whether or not insured) which would substantially adversely affect the business, opera-

tions, financial condition or income of TWA, if trading in securities on the New York Stock Exchange shall have been suspended or minimum prices for such trading shall have been fixed or maximum ranges of prices for securities shall have been required on such Exchange or if a banking moratorium shall have been declared either by Federal or New York authorities.

The Purchase Contract also contains certain provisions with respect to the rights of TWA and the Underwriters in the event any one or more of the Underwriters shall fail or refuse to purchase the Common Stock which it or they have agreed to purchase, including the right of TWA, if no arrangements are made for the purchase of the Common Stock to be purchased by the defaulting Underwriter, to terminate the Purchase Contract or to require the non-defaulting Underwriters to purchase and pay for the percentages of Common Stock which they have severally agreed to purchase.

In the Purchase Contract TWA has agreed to indemnify each Underwriter and each person who controls such Underwriter within the meaning of Section 15 of the Securities Act of 1933, as amended, to the extent provided in the Purchase Contract, against any loss, liability, claim, damage or expense as provided in the Purchase Contract in regard to untrue statements or alleged untrue statements or omissions or alleged omissions of material facts in the registration statement or in this prospectus. Each Underwriter severally has agreed to indemnify TWA and each of its officers and directors, and each person who controls TWA, within the meaning of Section 15 of the Securities Act of 1933, as amended, with respect to written information furnished by such Underwriter through the Representative for use in the registration statement and this prospectus.

A copy of the Purchase Contract is filed as Exhibit 14a to the registration statement. Reference is hereby made to such Exhibit for the detailed provisions of the Purchase Contract and the foregoing statements summarizing certain of such provisions are qualified in their entirety by such reference.

TERMS OF OFFERING

The Underwriters have advised TWA, through their Representative, as follows:

The Representative is authorized at any time prior to the expiration of the Subscription Warrants to (a) buy and sell Subscription Warrants in the open market or otherwise, such purchases and sales to be made for the accounts of the Underwriters as nearly as practicable in proportion to their respective underwriting obligations, on such terms and at such prices as the Representative may determine, and to exercise or determine not to exercise any Subscription Warrants so purchased and (b) offer and sell Common Stock for the accounts of the Underwriters as nearly as practicable in proportion to their respective underwriting obligations, either firm or subject to allotment or to prior subscription through the exercise of Subscription Warrants, by public offering, in the open market, at private sale, or otherwise, for long account to the extent of any Common Stock purchased for the accounts of the Underwriters under any provisions of the Agreement Among Underwriters or issuable upon the exercise of Subscription Warrants purchased for the accounts of the Underwriters under any provisions of the Agreement Among Underwriters or for short account in anticipation of the purchase of Common Stock by or for the accounts of the Underwriters (whether such shares be unsubscribed stock or Common Stock purchased through the exercise of Subscription Warrants), on such terms and at such prices as the Representative may determine, provided that in each instance the price shall be not less than the subscription price less the amount of any concession allowed to members of the National Association of Securities Dealers, Inc., and not more than the last sale price of Common Stock on the New York Stock Exchange in the last preceding 24-hour period in which such stock was sold on said Exchange plus an amount equal to Stock Exchange brokerage commissions on sales thereof and which the Underwriters intend shall not be varied within any 24-hour period except that such price may be reduced by the Underwriters within any such period; provided that at no time shall the net commitment of any Underwriter for short account or for long account resulting from purchases and sales of Subscription Warrants and/or Common Stock (Subscription Warrants being considered as the equivalent of the number of shares of Common Stock purchasable upon the exercise thereof) as so permitted and pursuant to the stabilization provisions exceed 15% of the maximum number of shares of Common Stock which such Underwriter has agreed to purchase under the Purchase Contract. In connection with any such offering of Common Stock the Representative may allow a concession to members of the National Association of Securities Dealers, Inc. (including any of the Underwriters) of not in excess of 60¢ per share. Each Underwriter has agreed that, prior to the expiration of the Subscription Warrants, it will not, for its own account, buy or sell Common Stock or Subscription Warrants, except with the written consent of the Representative and subject to such terms and conditions as the Representative may prescribe.

After the expiration of the Subscription Warrants, the unsubscribed stock, together with Common Stock purchased for the accounts of the Underwriters upon exercise of the Subscription Warrants,

or otherwise, may be sold by the Underwriters, or by the Representative for their respective accounts, as the Representative may determine, by general public offering or at private sale or otherwise and on such terms, and at such prices, as the Representative may determine. The Representative is authorized to determine whether there shall be a general public or private offering of such Common Stock, the time thereof, the initial public offering price (which may be changed from time to time by the Representative because of market conditions) the concessions to dealers, and to reserve for sale and to sell Common Stock to such dealers or to others. Sales to dealers are to be made pursuant to a Selected Dealers Agreement in substantially the form filed as Exhibit 14c to the registration statement.

The Agreement Among Underwriters provides that the Underwriters will not during the life of such Agreement, or such shorter period as the Representative may determine, buy or sell for their own account Common Stock or Subscription Warrants, except as otherwise provided in such Agreement; provided, however, that any Underwriter may sell Common Stock beneficially owned by it on the date of the Purchase Contract and may sell any Subscription Warrants issued with respect to Common Stock so owned and may exercise any such Subscription Warrants and sell Common Stock acquired upon such exercise, and may buy or sell Common Stock or Subscription Warrants as a broker pursuant to unsolicited orders. In the event that prior to the termination of the Selected Dealers Agreement the Representative purchases, or contracts to purchase, for the accounts of the several Underwriters, at or below the offering price, any Common Stock delivered to Selected Dealers, the Selected Dealer who received delivery of said Common Stock agrees to repay to the Representative for the accounts of the several Underwriters the amount of the concession to Selected Dealers plus brokerage commissions and transfer taxes paid in connection with such purchase or contract to purchase.

Under the Agreement Among Underwriters, any Common Stock sold by or through any of the Underwriters (other than through the Representative) which shall be purchased or contracted for during the life of the Agreement Among Underwriters by the Representative, at or below the public offering price thereof, shall be repurchased by the Underwriter by whom such Common Stock was originally purchased, at a price equal to the cost of such purchase plus tax on redelivery and commission, if any. In lieu of delivering such Common Stock to any Underwriter obligated to repurchase the same, the Representative may in its discretion sell the same for the account of such Underwriter, publicly or privately, at such price and upon such terms and to such persons, including any of the other several Underwriters, as it may determine, charging the amount of any loss and expense or crediting the amount of any profit, less any expense resulting from such sale, to such Underwriter.

The Agreement Among Underwriters further provides that, in order to facilitate the distribution of the Common Stock, the Representative, for the account of each Underwriter, during the life of the Agreement Among Underwriters, unless this authorization is sooner surrendered, may make purchases and sales of Subscription Warrants or Common Stock (but without obligation to do so), in the open market or otherwise for long or short account, on a when-delivered basis or otherwise, at such prices, in such amounts and in such manner as the Representative may determine, and, in arranging for sales to Selected Dealers, may over-allot for the account of such Underwriter, and may cover such over-allotments; provided that at no time shall the net commitment of such Underwriter, either for long or short account, resulting from such purchases or sales (including over-allotments) plus the net commitment summarized above, exceed 15% of the maximum number of shares of Common Stock which such Underwriter has agreed to purchase under the Purchase Contract (Subscription Warrants being considered as the equivalent of the number of shares of Common Stock purchasable upon the exercise thereof). Any long position resulting from such purchases shall be for the respective accounts of such Underwriters as nearly as practicable in proportion to their respective underwriting obligations, and each such Underwriter agrees to take up at cost on demand any such Subscription Warrants or Common Stock so purchased for its account, and any short position resulting from such sales (including over-allotments) shall be for the respective accounts of such Underwriters as nearly as practicable in proportion to their respective underwriting obligations, and each such Underwriter agrees to deliver on demand any such Subscription Warrants or Common Stock so sold or over-allotted. Purchases of Common Stock by the Representative prior to the execution of the Agreement Among Underwriters in connection with stabilization shall be treated as having been made for the accounts of the Underwriters pursuant to the foregoing authorization. The existence of the foregoing provisions is no assurance that the price of either the Common Stock or Subscription Warrants will be stabilized or such stabilizing, if commenced, may not be discontinued at any time. Any stabilizing operations may have an effect on the prices of the Subscription Warrants and the Common Stock of TWA.

The Agreement Among Underwriters provides that the Agreement shall terminate at the close of business on the 45th day after the closing date unless earlier terminated by the Representative.

The foregoing statements are based upon information furnished to TWA by the Underwriters through their Representative and are qualified in their entirety by the terms of the agreements governing the terms

of offering—the form of Agreement Among Underwriters and the form of Selected Dealers Agreement filed with the registration statement as Exhibits 14b and 14c, respectively, to which reference is hereby made.

LITIGATION

Reference is made to the caption "History and Business" and particularly to the subcaption "Proceedings before Regulatory Authorities" thereunder for a statement concerning proceedings under or pursuant to the Civil Aeronautics Act of 1938 in which TWA is involved.

An action has been commenced in the Supreme Court of the State of New York, County of New York, through the service of a summons without complaint by Edward Blatz et al., plaintiffs, against forty-six defendants who appear to be certain present or former officers and directors of TACA Airways, S. A., and affiliated companies and individuals and corporations who now are or formerly were stockholders thereof and others, including TWA, the basis of which will be unknown to TWA unless and until a complaint is served therein. The summons was served on TWA on February 24, 1948.

There is pending in the United States District Court for the District of Delaware an action by Paul Sneider, a TWA stockholder, against TWA, seeking a permanent injunction restraining the conversion into Common Stock of the Subordinated Convertible 2¼% Notes of TWA issued to Hughes Tool Compay. The plaintiff in this action sought a temporary injunction, which was denied by the court, following which the Common Stock was issued and the Subordinated Convertible 2¼% Notes were canceled, as described above under the caption "History and Business—Relations with Hughes Tool Company".

There are at present a number of suits pending against TWA in various courts for the purpose of seeking damages claimed to have resulted from deaths or injuries to passengers from accidents sustained by aircraft operated by TWA. Additional suits of this character may be instituted. TWA carries insurance, within substantial limits, against liability for injuries to or deaths of passengers, but in some of these suits damages claimed exceed such limits. Suits of this character are handled through insurance companies and their counsel. There are also pending against TWA certain insured and uninsured claims of the type commonly brought against air carriers, including, among others, claims for alleged delays, refusal to accommodate, and loss or damages in excess of prescribed tariff limits to baggage or other property transported by TWA. It is impossible to predict the result of this type of litigation, either as to who will prevail or the amount of damages in the event of a verdict adverse to TWA, but the management of TWA knows of no litigation of such type pending or threatened against TWA which might result in liability, over and above any insurance coverage in respect thereof, that would materially affect TWA's financial condition or interfere with its operations.

On December 13, 1948, an action was instituted by TWA and seven other air carriers, holding leases for the use of facilities at New York International Airport, against The Port of New York Authority, its commissioners, individually and as commissioners, and its Executive Director and its Director of Airport Development, for a declaration of the rights of the plaintiffs under their leases, and for injunctive and other relief, in the Supreme Court of the State of New York, Queens County. On January 14, 1949, all the defendants appeared specially and served notice of a motion returnable January 19, 1949, for an order and judgment dismissing the complaint on the grounds that it appears from the face of the complaint that the court has not jurisdiction of the persons of the defendants and has not jurisdiction of the subject of the action. Said motion was argued on January 19, 1949, all the defendants then contending in effect that they were immune from suit.

LEGAL OPINIONS

The legality of the Common Stock offered hereby, and of the Subscription Warrants, will be passed upon by Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York 4, N. Y., counsel for TWA. The legality of the Common Stock purchased from TWA by the Underwriters under the Purchase Contract described herein will be passed upon by Chadbourne, Hunt, Jaeckel & Brown, 70 Pine Street, New York 5, N. Y., counsel for the Underwriters.

EXPERTS

The financial statements and supporting schedules included in this prospectus and in the registration statement have been certified by Haskins & Sells. This firm of accountants has also reviewed the Summary of Consolidated Operations of TWA and subsidiaries for the ten years and seven months ended July 31, 1948, set forth on page 6 hereof. All such statements, schedules and information are included in the registration statement and this prospectus in reliance upon reports and opinions of such firm as experts.

TRANSCONTINENTAL & WESTERN AIR, INC.
AND SUBSIDIARIES

INDEX TO FINANCIAL STATEMENTS INCLUDED IN REGISTRATION STATEMENT

The following are included in the prospectus:

Certificate of Independent Public Accountants	43
Balance Sheets, July 31, 1948:	
Company and Consolidation	44-45
Statement of Consolidated Profit and Loss for the Three Years and Seven Months Ended July 31, 1948	46
Statement of Earned Surplus for the Three Years and Seven Months Ended July 31, 1948:	
Company and Consolidation	47
Statement of Capital Surplus for the Three Years and Seven Months Ended July 31, 1948:	
Company and Consolidation	47
Notes to Financial Statements	48-52
Supplementary Profit and Loss Information:	
Consolidation	53-55

The following schedules are included in the registration statement but are omitted from the prospectus:

Schedules:

V.	Property, Plant, and Equipment:	
	Company and Consolidation	S-1–S-4
VI.	Reserves for Depreciation, Amortization, and Obsolescence of Property, Plant, and Equipment:	
	Company and Consolidation	S-5–S-8
VII.	Intangible Asset:	
	Company and Consolidation	S-9
IX.	Funded Debt:	
	Company and Consolidation	S-10
XII.	Reserves:	
	Company and Consolidation	S-11
XIII.	Capital Shares:	
	Company and Consolidation	S-12
XV.	Other Securities:	
	Company and Consolidation	S-13

SCHEDULES OMITTED

The following schedules are omitted because of the absence of the conditions under which they are required:

Company —I, II, III, IV, VIII, X, XI, XIV, XVI, XVII.

Consolidation —I, II, III, IV, VIII, X, XI, XIV, XVII.

CERTIFICATE OF INDEPENDENT PUBLIC ACCOUNTANTS

TRANSCONTINENTAL & WESTERN AIR, INC.:

We have examined the financial statements and schedules of Transcontinental & Western Air, Inc., and of Transcontinental & Western Air, Inc. and its subsidiary companies consolidated, for the three years and seven months ended July 31, 1948, listed in the index on the preceding page. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances; it was not practicable to confirm receivables from United States Government departments and foreign governments but we have satisfied ourselves with respect to such receivables by means of other auditing procedures. Having previously made similar examinations for the seven years ended December 31, 1944, we also have reviewed the Summary of Consolidated Operations for the ten years and seven months ended July 31, 1948, which is included in this prospectus.

In our opinion, the accompanying balance sheets and statements of consolidated profit and loss and surplus, with their footnotes, present fairly the financial position of the companies at July 31, 1948 and the results of their operations for the three years and seven months then ended; the Summary of Consolidated Operations, with its footnotes, summarizes fairly the results of operations for the ten years and seven months ended July 31, 1948; and the schedules present fairly the required information for the three years and seven months ended July 31, 1948; all in conformity with generally accepted accounting principles which, except for the changes, which we approve, in the basis of providing for depreciation of flight equipment in 1946, 1947, and 1948, explained in Note 11 to Financial Statements, were applied on a consistent basis.

HASKINS & SELLS.

Kansas City, Missouri,
February 11, 1949.

As of October 4, 1948 (except with respect to the application of the retroactive increase granted in December 1948 in the temporary rate for carriage of mail on the Company's international route, as set forth in Note 8 to Financial Statements).

TWA Ex. 223, page 46 of 93
(TWA Prospectus, 2/19/48 [illegible] Amendments, 3/8/

TRANSCONTINENTAL & WESTERN AIR, INC.
AND SUBSIDIARIES

Balance Sheets, July 31, 1948

ASSETS

	Company	Consolidation
CURRENT ASSETS:		
Cash on hand and demand deposits (less reserve of $55,000 for foreign exchange loss—Note 1)	$ 6,947,129	$ 6,995,761
Special deposits—payroll withholding, transportation taxes, etc.	$ 1,206,165	$ 1,206,165
Accounts receivable:		
United States Government:		
Passenger and mail transportation (Note 8)	$ 4,409,919	$ 4,409,919
Other charges (less reserve $127,258)	18,017	19,145
Governments outside the United States	1,235,683	1,235,683
Other airlines and agents—traffic and express balances	2,818,364	2,818,364
Subscribers to air travel plan	1,736,290	1,736,290
Employees' travel and other advances and accounts	124,496	124,526
Indebtedness of affiliate—eliminated in consolidation	3,272	———
Other accounts receivable	1,750,242	1,761,360
Total accounts receivable	$12,096,283	$12,105,287
Less reserve for doubtful receivables	999,282	1,001,136
Net accounts receivable	$11,097,001	$11,104,151
Inventory of materials and supplies, at average cost (approximately $212,000 pledged as collateral to notes payable)	$ 1,701,193	$ 1,709,919
Total current assets	$20,951,488	$21,015,996
INVESTMENTS AND ADVANCES:		
Securities of affiliate—eliminated in consolidation (Note 2)	$ 123,523	———
Other security investments and advances (less reserve $82,506) (Note 3)	641,149	$ 641,149
Total investments and advances	$ 764,672	$ 641,149
PROPERTY, PLANT, AND EQUIPMENT, INCLUDING SPARE PARTS AND ASSEMBLIES (Note 1):		
Cost	$70,058,445	$70,178,640
Less reserves for depreciation, amortization, and obsolescence (Note 11)	22,255,138	22,289,072
Property, plant, and equipment—net book value (aircraft and spare parts of a net book value of approximately $19,713,000 pledged as collateral to notes payable)	$47,803,307	$47,889,568
INTANGIBLE ASSET—Air route acquired through Marquette Airlines, Inc. subsidiary dissolved in 1947 (Note 4)	$ 309,801	$ 309,801
DEFERRED CHARGES:		
International Division development expenses—unamortized portion (Note 9)	$ 1,663,927	$ 1,663,927
Prepaid insurance, taxes, rents, etc.	1,241,490	1,242,742
Unamortized expenditures relating to construction of municipal airports—deductible from rentals payable over remaining period of leases	349,206	349,206
Long-term debt expense—unamortized portion (Note 5)	232,068	232,068
Miscellaneous	44,479	44,479
Total deferred charges	$ 3,531,170	$ 3,532,422
Total	$73,360,438	$73,388,936

The above statement should be considered in conjunction with the accompanying "Notes to Financial Statements". With respect to commitments, contingent liabilities, litigation, long-term lease obligations, etc., reference should be made to Note 16.

TRANSCONTINENTAL & WESTERN AIR, INC.
AND SUBSIDIARIES

Balance Sheets, July 31, 1948

LIABILITIES

	Company	Consolidation
Current Liabilities:		
Notes payable to banks—portion due within one year	$ 3,452,206	$ 3,452,206
Sinking fund instalments on Series A and B debentures—due within one year (Note 6)	1,500,000	1,500,000
Accounts payable	3,126,514	3,136,557
Transportation tax, employees' deductions, etc.	1,134,228	1,136,483
Other airlines and agents—traffic balances payable	204,910	204,910
Air travel plan and other deposits	1,825,697	1,825,697
Accrued salaries and wages	1,683,356	1,688,035
Other accrued liabilities	1,456,990	1,458,390
Indebtedness to affiliate—eliminated in consolidation	3,113	———
Total current liabilities	$14,387,014	$14,402,278
Transportation Sold but Not Used (classified as non-current liability in conformity with Civil Aeronautics Board account classification)	$ 5,478,185	$ 5,478,185
Long-Term Debt—Portion maturing after one year:		
Notes payable to banks (Notes 7 and 14):		
2% Notes, maturing $85,000 quarterly beginning September 1, 1949 (final maturity $22,915)—five Boeing Stratoliners of a net book value of $837,000 pledged as collateral	$ 277,915	$ 277,915
3% Notes, maturing $282,928 monthly beginning August 31, 1949—twenty-one Constellation airplanes and certain related spare parts and materials, all of a net book value of $19,088,000, pledged as collateral	13,014,683	13,014,683
Sinking Fund Series A and B 3% Debentures (Note 6) (sinking fund instalments payable within one year included in current liabilities)	38,000,000	38,000,000
Instalment contracts for purchase of bulk storage facilities (instalments of $19,658 due within one year included in accounts payable)	71,945	71,945
Total long-term debt	$51,364,543	$51,364,543
Equity of Capital Stock and Convertible Notes:		
Capital stock—authorized 3,000,000 shares (increased to 4,000,000 shares in August 1948), par value $5 per share; 2,013,937 unissued, of which 1,034,423 shares were issued in August 1948 in conversion of 2¼% convertible notes and accrued interest thereon, and 74 shares are subject to option to employees; outstanding, 986,063 shares	$ 4,930,315	$ 4,930,315
Capital surplus—paid-in (per statements of capital surplus)	4,510,006	4,510,006
Subordinated convertible 2¼% notes and accrued interest thereon to June 18, 1948 (converted to common capital stock in August 1948 at $10 per share)	10,344,239	10,344,239
Total	$19,784,560	$19,784,560
Deduct earned surplus deficit (per statements of earned surplus) (see Note 6 as to dividend restrictions)	17,653,864	17,640,630
Equity of capital stock and convertible notes	$ 2,130,696	$ 2,143,930
Total	$73,360,438	$73,388,936

The above statement should be considered in conjunction with the accompanying "Notes to Financial Statements". With respect to commitments, contingent liabilities, litigation, long-term lease obligations, etc., reference should be made to Note 16.

TRANSCONTINENTAL & WESTERN AIR, INC.
AND SUBSIDIARIES

Statement of Consolidated Profit and Loss
For the Three Years and Seven Months Ended July 31, 1948

	Year Ended December 31			Seven Months Ended
	1945	1946	1947	July 31, 1948
Operating Revenue:				
Passenger	$23,895,949	$45,416,625	$62,019,704	$39,512,107
Mail (Note 8)	7,237,379	6,211,811	8,648,631	9,764,717
Express and freight	2,031,992	2,981,521	5,267,750	3,035,902
Excess baggage	286,056	810,941	1,231,968	792,299
Non-scheduled transportation services	106,496	1,680,658	802,230	222,013
Other—net	218,234	259,437	551,028	280,511
Total operating revenue	$33,776,106	$57,360,993	$78,521,311	$53,607,549
Operating Expenses (Note 9):				
Flying operations	$ 6,760,401	$14,878,597	$19,911,207	$15,934,870
Flight equipment maintenance—direct (Note 10)	2,314,745	6,092,292	9,364,808	6,098,365
Depreciation of flight equipment and amortization of leased aircraft conversion costs (Note 11)	1,659,784	4,813,340	5,738,716	3,586,628
Provision for obsolescence of flight equipment spare parts	61,199	76,318	721,374	301,094
Ground operations	5,096,737	11,367,829	11,399,449	7,199,464
Ground and indirect maintenance	2,044,617	7,609,754	9,089,075	5,369,160
Passenger service	2,781,369	5,739,904	6,336,161	3,738,039
Traffic and sales	3,802,146	8,361,312	9,547,155	6,244,809
Advertising and publicity	1,066,917	2,089,497	2,079,067	1,386,826
General and administrative	4,218,996	9,992,299	9,253,889	5,532,497
Provision for officers' and employees' incentive compensation	141,618	——	——	——
Depreciation and amortization of ground equipment and property	326,559	659,971	1,328,521	757,666
Extension and development expense	300,733	286,160	150,786	62,690
Amortization of International Division development expense (Note 9)	——	318,624	424,833	247,819
Total operating expenses	$30,575,841	$72,285,897	$85,345,041	$56,459,327
Loss (Profit) from Operations	($ 3,200,265)	$14,924,904	$ 6,823,730	$ 2,851,778
Other Income Charges:				
Interest on funded debt	$ 23,333	$ 797,583	$ 1,200,000	$ 697,500
Interest on subordinated convertible 2½% notes	——	——	216,158	128,082
Other interest	14,029	35,210	84,963	181,390
Additional compensation of employees, representing excess of market value of capital stock issued under Employees' Stock Purchase Plan over amount received for stock under options granted in 1938, 1939, and 1940 (Note 12)	392,527	22,332	1,270	491
Amortization of long-term debt expense	693	18,720	25,342	16,782
Net loss (gain) on sale or retirement of property	397,007	(16,589)	(99,263)	220,900
Provision for loss on investments (Note 5)	——	1,625,750	——	896,903
Provision for loss on equipment and other assets purchased from Foreign Liquidation Commission	——	226,000	——	——
Provision for loss of escrow deposit made in connection with lease of office space	——	108,002	——	——
Provision for foreign income taxes	——	——	50,000	——
Miscellaneous	19,729	51,184	106,542	121,725
Total other income charges	$ 847,318	$ 2,888,192	$ 1,585,012	$ 2,263,773
Total (credit)	($ 2,352,947)	$17,813,096	$ 8,408,742	$ 5,115,551
Other Income Credits:				
Fees and net recoveries on United States Government contracts	$ 172,515	$ 189,111	$ 155,098	——
Interest, discounts, etc.	101,529	78,281	54,500	$ 38,921
Dividends received on security investments	8,268	12,389	——	——
Reversal of insurance reserve provided in prior years	333,121	——	——	——
Miscellaneous	15,051	163,696	119,383	68,389
Total other income credits	$ 630,484	$ 443,477	$ 328,981	$ 107,310
Net Loss (Income) Before Provision for Income Taxes	($ 2,983,431)	$17,369,619	$ 8,079,761	$ 5,008,241
Provision for Federal and State Income Taxes (credit in 1946 representing $3,105,842 refund of Federal income taxes resulting from carry-back of 1946 loss, less $89,460 additional taxes for prior years)	1,169,855	(3,016,382)	——	——
Net Loss (Income) for the Period (Notes 8 and 17)	($ 1,813,576)	$14,353,237	$ 8,079,761	$ 5,008,241

The above statement should be considered in conjunction with the accompanying "Notes to Financial Statements".

TRANSCONTINENTAL & WESTERN AIR, INC. AND SUBSIDIARIES

Statements of Surplus

For the Three Years and Seven Months Ended July 31, 1948

Earned Surplus

	Company	Consolidation
Earned Surplus, January 1, 1945	$ 7,278,670	$ 7,300,272
Net Income for the Year 1945	1,806,345	1,813,576
Earned Surplus, December 31, 1945	$ 9,085,015	$ 9,113,848
Net Loss for the Year 1946 (Note 8)	14,345,371	14,353,237
Earned Surplus Deficit, December 31, 1946	$ 5,260,356	$ 5,239,389
Net Loss for the Year 1947	8,075,485	8,079,761
Total	$13,335,841	$13,319,150
Deduct—Portion of additional mail revenue applicable to year 1946 received from United States Government on retroactive rate increase on International route (Note 8)	686,761	686,761
Earned Surplus Deficit, December 31, 1947	$12,649,080	$12,632,389
Net Loss for the Seven Months Ended July 31, 1948	5,004,784	5,008,241
Earned Surplus Deficit, July 31, 1948	$17,653,864	$17,640,630

Capital Surplus

	Company	Consolidation
Balance, January 1, 1945	$ 4,073,807	$ 4,073,807
Add—Excess of market value over par value of 9,899 shares of capital stock issued in 1945 under Employees' Stock Purchase Plan (Note 12)	411,600	411,600
Balance, December 31, 1945	$ 4,485,407	$ 4,485,407
Add—Excess of market value over par value of 444 shares of capital stock issued in 1946 under Employees' Stock Purchase Plan (Note 12)	22,822	22,822
Balance, December 31, 1946	$ 4,508,229	$ 4,508,229
Add—Excess of market value over par value of 89 shares of capital stock issued in 1947 under Employees' Stock Purchase Plan (Note 12)	1,248	1,248
Balance, December 31, 1947	$ 4,509,477	$ 4,509,477
Add—Excess of market value over par value of 45 shares of capital stock issued in 1948 under Employees' Stock Purchase Plan (Note 12)	529	529
Balance, July 31, 1948	$ 4,510,006	$ 4,510,006

The above statements should be considered in conjunction with the accompanying "Notes to Financial Statements".

TRANSCONTINENTAL & WESTERN AIR, INC.
AND SUBSIDIARIES

Notes to Financial Statements

1. The Company is currently operating in fourteen foreign countries. Foreign currency amounts of cash, accounts receivable, and accounts payable, are expressed in United States dollars in the foregoing balance sheets at official rates of exchange in the absence of free market rates. Standard rates approximating official rates prevailing during the period are used in converting foreign currency revenues and expenses. The balance sheets include approximately $1,300,000 of such foreign net current assets (represented by cash of $651,479, receivables of $1,716,979, less payables of $1,087,961), of which approximately $800,000 (represented by Egyptian pounds of $505,150, Italian lire of $171,869, and Palestinian pounds of $107,818) relates to countries having restrictions at July 31, 1948 on conversion into United States dollars. The Company has provided a reserve of $55,000 for probable loss on conversion of foreign currency. With respect to the receivables from foreign governments, $1,235,683, there had been collected by December 31, 1948, according to cabled and other preliminary advices received by the Company, an aggregate of approximately $900,000.

   In addition, the Company has at overseas locations materials and supplies amounting to $270,000 and ground equipment and spare parts of a net book value of approximately $2,162,000, substantially all of which were purchased with United States dollars. These amounts include $139,000 of materials and supplies, and $1,040,000 (net book value) of ground equipment and spare parts located at Cairo, Egypt, which were acquired principally for use at a maintenance base, the operation of which has been curtailed by the Company. Due to restrictions by the Egyptian Government, only nominal amounts of the above property may be removed from that country for use elsewhere.

2. All subsidiaries are wholly-owned and are consolidated in the accompanying financial statements. As shown by its books at July 31, 1948 the Company's equity investment in New Mexico Airport Corporation was $13,234 less than the net worth of that company, as shown by the books of the latter. In consolidation this excess is included in earned surplus deficit. TWA Agency Limited, a subsidiary, is consolidated in 1946 and 1947 but was liquidated as of January 31, 1948, and is being dissolved. Marquette Airlines, Inc., a subsidiary, was dissolved in 1947.

3. In 1946 the Company wrote down its 275,000 share investment in TACA stock by the amount of $1,100,000 and also provided an additional $525,750 for loss on 60,000 shares of TACA stock which the Company was obligated to purchase and did purchase in 1947. The foregoing constituted a provision for the loss which would result from exercise of options for the sale of 335,000 shares of TACA stock at $2 per share.

   In July 1948 the Company wrote off $669,999 representing the remaining portion of this investment, and also reduced certain other investments in associated companies to estimated values as determined from latest available unaudited financial statements and supplemental data. The total of such charges against income for the seven months ended July 31, 1948 amounted to $896,903.

4. The intangible asset represents the excess of the cost of the entire outstanding capital stock of Marquette Airlines, Inc. over the Company's equity in the assets of that subsidiary at date of acquisition as shown by its books. Marquette Airlines, Inc. owned Certificate of Public Convenience and Necessity authorizing the carriage of passengers and express between St. Louis, Cincinnati, Toledo, and Detroit. The Certificate was subsequently transferred to Transcontinental & Western Air, Inc. No provision is made for amortization of this asset.

5. The long-term debt expense relating to the Series A and B Sinking Fund Debentures and the 3% notes payable to banks is being amortized on a straight-line basis over the life of these obligations.

6. Under the indenture dated December 1, 1945, relating to the outstanding sinking fund debentures, there are various restrictions on the payment of dividends, including a provision that cash dividends declared shall not exceed Consolidated Net Income subsequent to December 31, 1945. Consolidated earned surplus at December 31, 1945 thus restricted was $9,113,848.

   The Series A debentures mature on June 1, 1956, but sinking fund payments for their retirement in advance of maturity are required in amounts of $1,000,000 on May 28, 1949 and $2,000,000 annually thereafter to and including May 28, 1955, leaving a balance of $16,500,000 payable on June 1, 1956, the maturity date.

   The Series B debentures mature on December 1, 1955 and similar sinking fund payments for retirement of these debentures are required in amounts of $500,000 on November 27, 1948, $1,000,000 annually thereafter to and including November 27, 1953, $2,000,000 on November 27, 1954, and the remainder of $2,500,000 is payable on December 1, 1955.

   Additional sinking fund payments for the retirement of Series A and B debentures are required annually beginning November 27, 1948, in an amount equal to the excess of net income of the Company since

TRANSCONTINENTAL & WESTERN AIR, INC.
AND SUBSIDIARIES

Notes to Financial Statements—(Continued)

December 31, 1946, plus interest accrued on the subordinated convertible notes issued in 1947, over all sinking fund payments previously made, the total sinking fund payments to be limited, however, to an amount equal to the product of $4,000,000 multiplied by the number of fiscal years completed subsequent to December 31, 1946, plus $4,000,000 in respect of the then current fiscal year.

For particulars relating to negotiations consummated in February, 1949, between the Company and The Equitable Life Assurance Society of the United States (the holder of the Company's outstanding Series A and B Debentures), see the caption "Funded Debt—Debentures".

7. As of March 25, 1948, the Company entered into a credit agreement and various other agreements with banks and others for the purpose of financing the purchase of a maximum of $15,200,000 of additional Constellation airplanes and related engines, propellers, and spare parts, and refinancing $3,576,943 of 2% purchase money obligations which were issued during 1946 and 1947 in connection with the acquisition of nine Constellation airplanes. Pursuant to these agreements, the Company refunded the 2% purchase money obligations by the delivery of 3% promissory notes and at July 31, 1948 had received delivery of twelve new Constellation airplanes and certain related spare parts and assemblies at an aggregate cost of $12,549,947. The new airplanes purchased, the materials, and spare parts owned and maintained for use on the new aircraft, and the nine Constellation airplanes previously acquired, all of an aggregate net book value of $19,088,000 at July 31, 1948, were pledged under the terms of a chattel mortgage, as collateral to the 3% notes payable. For the loss of one of the nine Constellations above mentioned see the caption "History and Business—Other Recent Developments".

The notes which replaced the 2% purchase money obligations, as well as those delivered for the new aircraft, materials and spare parts bear interest of 3% per annum and are payable beginning September 30, 1948, in fifty-seven equal monthly instalments. Such notes delivered subsequent to September 30, 1948 are payable in equal monthly instalments beginning with the last day of the month of delivery and ending May 31, 1953.

Five Boeing Stratoliners of a net book value of $837,000 are pledged as collateral to the 2% notes payable outstanding at July 31, 1948.

At July 31, 1948 the aggregate net book value of Boeing Stratoliners, Constellation airplanes, parts and materials pledged as collateral to notes payable to banks was $19,925,000, consisting of materials and supplies of $212,000 (classified as current assets in the accompanying balance sheet) and property of a net book value of $19,713,000.

8. In November 1947 the Civil Aeronautics Board granted an increase retroactively to February 1946 in the temporary rate for carriage of United States mail on international routes (see Statement of Earned Surplus) and in May 1948 granted an additional increase, retroactive to January 1948, in rates for carriage of mail on both domestic and international routes. In December 1948 the Company was granted and received payment for an additional increase retroactive to January 1, 1948, in the temporary rate for carriage of mail on its international route. The portion of such increase applicable to the seven months ended July 31, 1948, amounting to approximately $1,680,800, has been given effect in the accompanying financial statements by its inclusion in mail revenue for the related period, and in accounts receivable from the United States Government as of July 31, 1948. Proceedings are pending with respect to final rates, and the temporary rates on both domestic and international routes are subject to retroactive increase or decrease upon the fixing of final rates by the Civil Aeronautics Board.

9. During 1945 the Company deferred and charged to International Division development expense, charges aggregating $943,930 relating to the development and extension of air routes to Europe and the Middle East. In the year 1946 operating expenses of the Company for that year were reduced by $1,711,273 representing the excess of International Division expenses during the three months ended March 31, 1946 over total International Division revenue of $2,147,996 earned on foreign air routes during that period, and such excess of expenses over revenue was also deferred and charged to International Division development expense. No additional charges have been made to this deferred expense account, which is being amortized over the period from April 1, 1946 to July 4, 1952, the latter date being the expiration date of the Temporary Certificate of Convenience and Necessity issued by the Civil Aeronautics Board.

10. Maintenance and repairs of property are charged to operating expenses. Major renewals, replacements, and betterments are capitalized, with the following exception. During the latter part of 1947 and the first half of 1948 the Company purchased a considerable number of war surplus engines for use on

TRANSCONTINENTAL & WESTERN AIR, INC.
AND SUBSIDIARIES

Notes to Financial Statements—(Continued)

Douglas DC-3 and Boeing Stratoliner planes at a cost per engine which is less than the cost of a complete engine overhaul. The Company estimates that during most of the remaining service life of the related planes the quantity of engines purchased will make possible the replacement of a used engine with a new engine at the time when complete engine overhaul is normally required. The engines purchased for this purpose were capitalized when acquired and are not depreciated but are charged to maintenance (in lieu of overhaul costs) when installed on the plane. Engines in service on the Boeing Stratoliners at the time the program was inaugurated were retained as stand-by equipment and are depreciated over the life of the related planes, but the engines replaced by new engines on DC-3 planes were scrapped and were written off in July 1948.

11. It is the Company's policy to provide for depreciation on the basis of the estimated useful life of the respective classes of property, such estimates being revised whenever justified by experience. The accumulated depreciation on properties sold or disposed of is treated as a reduction of the original cost, and the profit or loss on sale or other disposition is credited or charged to income.

The basis of computing depreciation and amortization of conversion costs on owned and leased DC-3 aircraft and related engines and radio installation costs was changed effective January 1, 1946 to extend the estimated life from various dates in 1946 and 1947 to December 31, 1947. Effective January 1, 1947, the estimated service life of this equipment was again extended, to June 30, 1949. In addition, the estimated service lives of other classes of flight equipment were changed effective January 1, 1947 as follows: owned C-54 aircraft and related engines from various dates in 1950 and 1951 to December 31, 1950; and Constellation aircraft from various dates in 1953 to December 31, 1953. As of January 1, 1948 the estimated service life of owned and leased DC-3 aircraft was again extended, to December 31, 1950 or the end of the lease (as regards leased aircraft) whichever was sooner. The changes in the basis of computing depreciation were not made retroactively to date of acquisition but were effected as of the beginning of the year in which the revision was made. The following shows a comparison of depreciation actually provided for the above flight equipment with what it would have been had the basis used during the seven months ended July 31, 1948 been in effect for the entire period of three years and seven months:

	Year Ended December 31—			Seven Months Ended
	1945	1946	1947	July 31, 1948
Depreciation actually provided	$1,104,000	$3,544,000	$3,998,000	$2,244,000
Depreciation computed on basis used during seven months ended July 31, 1948	311,000	2,274,000	4,166,000	2,635,000
Reduction (increase) in provision for depreciation which would have resulted	$ 793,000	$1,270,000	($ 168,000)	($ 391,000)

Due to the fact that shorter estimated service lives were used as bases for depreciation in the years above prior to 1948, the remaining undepreciated value of the affected aircraft at December 31, 1947 was less than it would have been had the basis used in 1948 been in effect during prior years. This resulted in a depreciation provision for the seven months ended July 31, 1948 which was less than it would have been had the estimated terminal dates used in 1948 been used throughout the three previous years.

On property and equipment other than that referred to hereinbefore, the following rates of depreciation and amortization are used:

Buildings and improvements:

On land owned—5% to 20% per annum.

On land not owned—based on term of lease or estimated useful life of building or improvement, whichever is shorter.

Flight equipment:

Lockheed Constellation airplanes (sleeper type) purchased in 1948, and related engines—based on period from date of receipt to June 30, 1955, less residual value.

Boeing Stratoliners and related engines and radios—20% per annum less residual value.

Engine and aircraft accessories, propellers, and communication equipment and accessories—25% to 33⅓% per annum.

Passenger service equipment—fixed complement not depreciated; replacements charged to expense.

TRANSCONTINENTAL & WESTERN AIR, INC.
AND SUBSIDIARIES

Notes to Financial Statements—(Continued)

Conversion costs of leased aircraft (other than Douglas DC-3)—amortized over life of lease.
Miscellaneous—25% to 33⅓% per annum.

Other equipment:

Used motorized vehicles and equipment purchased at overseas locations—on basis of estimated life of one year.

Other—5% to 33⅓% per annum.

12. Under the Employees' Stock Purchase Plan adopted by the Board of Directors in 1936 and approved by the stockholders in 1937, provision was made for the granting to officers and employees of options to purchase not in excess of 50,000 authorized but unissued shares of capital stock of the Company, in part consideration of services rendered and to be rendered.

The details of the credits to capital surplus and the charges to income arising from stock transactions pursuant to the above plan during the three years and seven months ended July 31, 1948 are summarized as follows:

Shares Issued	Per Share: Par Value	Per Share: Subscription Price	Credit to Capital Surplus—Excess of Market Price at Date of Issuance Over Par Value	Income Charge—Excess of Market Price at Date of Issuance Over Subscription Price
		Year Ended December 31, 1945		
249	$5.00	$3.75	$ 14,044	$ 14,356
408	5.00	5.85	20,547	20,200
9,242	5.00	7.06	377,009	357,971
9,899			$411,600	$392,527
		Year Ended December 31, 1946		
63	$5.00	$3.75	$ 3,591	$ 3,670
178	5.00	5.85	9,033	8,882
203	5.00	7.06	10,198	9,780
444			$ 22,822	$ 22,332
		Year Ended December 31, 1947		
55	$5.00	$3.75	$ 908	$ 976
20	5.00	5.85	200	183
14	5.00	7.06	140	111
89			$ 1,248	$ 1,270
		Seven Months Ended July 31, 1948		
45	$5.00	$5.85	$ 529	$ 491

At July 31, 1948 there remained 74 shares subject to option. These shares have since been issued.

13. For particulars of the Incentive Compensation Fund for officers and employees (under which the most recent award was that made for the year 1945) reference should be made to the caption "History and Business—Employee Relations".

14. For particulars of the guarantee by Lockheed Aircraft Corporation of certain 3% notes payable to banks, reference should be made to the caption "Funded Debt—3% Promissory Notes".

15. Effective January 1, 1947 the Company revised its classification of income and expense accounts in accordance with Civil Aeronautics Board's revised classification of accounts. For comparative purposes 1945 and 1946 operating expenses of material amount have been reclassified to conform to the revised classification.

16. Commitments, Contingent Liabilities, Litigation, Long-Term Lease Obligations, Etc.:

For particulars of agreement, as of October 1, 1948, between the Company and Hughes Tool Company with respect to the resale of certain aircraft by the latter, reference should be made to the caption "History and Business—Relations with Hughes Tool Company".

The Port of New York Authority has agreed to construct, subject to the Company's approval of plans, certain hangars and other site area improvements at Idlewild Airport at an aggregate cost not to exceed $16,350,000. Under the terms of the agreement, the Company will be entitled to the

TRANSCONTINENTAL & WESTERN AIR, INC.
AND SUBSIDIARIES

Notes to Financial Statements—(Concluded)

use of such improvements but will not acquire title to them. Annual payments covering the cost of the improvements (with interest at rates related to the interest rates paid by the lessor on the serial bonds—still to be issued—the proceeds of which shall have been used to finance the construction of the respective site area improvements, adjusted to reflect any premium received by the lessor on the sale of such serial bonds) are to be made by the Company over a period of nine to twenty-nine years. For the present status of this agreement see the caption "Property".

The Company was contingently liable at July 31, 1948 in amounts aggregating $3,300,757 on advances made by the United States Government for foreign government air mail charges, as such payments not recovered by the Government from foreign countries are recoverable from the Company.

Various lawsuits and claims are pending against the Company for a description of which see the caption "Litigation". The management and legal counsel know of no litigation pending or threatened against the Company which might result in liability which, over and above any insurance coverage in respect thereof, would materially affect the Company's financial condition or interfere with its operations. However, the Company and legal counsel are not informed as to the basis of the action brought by Edward Blatz et al., plaintiffs, described under the caption "Litigation", since no complaint has been served in such action.

At July 31, 1948 the aggregate annual amount of rentals on real property leased to Transcontinental & Western Air, Inc., and its subsidiaries, for terms expiring in future years, and the number of such leases, are as follows (exclusive of payments under the Idlewild Airport agreement referred to above):

Particulars	Aggregate Annual Amount of Rentals	Number of Leases
Leases on which rentals are prepaid through leasehold improvements—annual rentals determined by amortization of improvements over life of leases	$ 21,640	7
Leases on which rentals are payable in cash:		
Leases expiring during:	(Minimum Rentals:)	
Year ending July 31:		
1949	$ 46,906	9
1950	17,649	4
1951	250,255	31
1952	44,552	17
1953	203,249	10
1954	48,856	4
1955	26	2
1956	252,743	8
1957	30,169	3
1958	16,798	6
Five years ending July 31:		
1963	53,192	8
1968	47,680	7
1973	42,000	1
1978	1,161	1
Total	$1,055,236	111

For purposes of the above tabulation, leases involving payments under each of the above two main captions have been treated as separate leases under each of such captions.

17. An analysis of net loss (income) by domestic and international operations for the period subsequent to 1945 (based upon the Company's records and allocations, and without verification by the independent public accountants) is as follows:

Period	Total	TWA		Subsidiaries
		Transcontinental Division	International Division	
Year Ended December 31:				
1946	$14,353,237	$8,356,527	$6,005,958	($ 9,248)
1947	8,079,761	5,511,368	2,520,608	47,785
Seven Months Ended July 31, 1948	5,008,241	3,140,058	1,873,748	(5,565)
Eleven Months Ended November 30, 1948	2,956,689	3,261,514	(290,662)	(14,163)

TRANSCONTINENTAL & WESTERN AIR, INC.
AND SUBSIDIARIES

Supplementary Profit and Loss Information
For the Three Years and Seven Months Ended July 31, 1948

Item	Charged Directly to Operating Expenses	Charged to Other Accounts	Total
Year Ended December 31, 1945			
Maintenance and Repairs (Note 2)	$4,402,522	A$115,015	$4,517,537
Depreciation, Amortization, and Obsolescence of Fixed Assets (Note 2)	$2,047,542	B$ 12,903 A 584	$2,061,029
Taxes, Other Than Income and Excess Profits Taxes:			
Real estate and personal property	$ 14,990	*$ 1,672	$ 13,318
Social security	445,754	A 6,872	452,626
Franchise	6,779		6,779
Capital stock	62,625		62,625
Gasoline and oil (Note 3)	383,859	A 367	384,226
Miscellaneous	3,433	A 100	3,533
Total	$ 917,440	$ 5,667	$ 923,107
Management and Service Contract Fees	None	None	None
Rents (Note 5)	$ 770,993	A$ 34,149	$ 805,142
Year Ended December 31, 1946			
Maintenance and Repairs (Note 2)	$13,832,341		$13,832,341
Depreciation, Amortization, and Obsolescence of Fixed Assets (Note 2)	$ 5,775,629	A$60,980 B 3,223	$ 5,839,832
Taxes, Other Than Income and Excess Profits Taxes:			
Real estate and personal property	$ 30,190		$ 30,190
Social security	843,797		843,797
Franchise	10,438		10,438
Foreign payroll taxes	91,436		91,436
Gasoline and oil (Note 3)	534,269		534,269
Miscellaneous	24,236		24,236
Total	$ 1,534,366		$ 1,534,366
Management and Service Contract Fees	None	None	None
Rents (Note 5)	$ 2,079,178		$ 2,079,178

The Notes on the second page following are an integral part of this statement.

TRANSCONTINENTAL & WESTERN AIR, INC. AND SUBSIDIARIES

Supplementary Profit and Loss Information

For the Three Years and Seven Months Ended July 31, 1948—(Continued)

Item	Charged Directly to Operating Expenses	Charged to Other Accounts	Total
Year Ended December 31, 1947			
MAINTENANCE AND REPAIRS (Note 2)	$19,067,994		$19,067,994
DEPRECIATION, AMORTIZATION, AND OBSOLESCENCE OF FIXED ASSETS (Note 2)	$ 7,788,611	D$21,596	$ 7,810,207
TAXES, OTHER THAN INCOME AND EXCESS PROFITS TAXES:			
Real estate and personal property	$ 41,634		$ 41,634
Social security	877,819		877,819
Franchise	26,769		26,769
Foreign payroll taxes	103,949		103,949
Gasoline and oil (Note 3)	938,066		938,066
Clearance, customs, and duties (Note 4)	375,246		375,246
Miscellaneous	40,403	C$11,000	51,403
Total	$ 2,403,886	$11,000	$ 2,414,886
MANAGEMENT AND SERVICE CONTRACT FEES	None	None	None
RENTS (Note 5)	$ 2,854,849		$ 2,854,849
Seven Months Ended July 31, 1948			
MAINTENANCE AND REPAIRS (Note 2)	$11,687,995		$11,687,995
DEPRECIATION, AMORTIZATION, AND OBSOLESCENCE OF FIXED ASSETS (Note 2)	$ 4,644,788	D$8,132	$ 4,652,920
TAXES, OTHER THAN INCOME AND EXCESS PROFITS TAXES:			
Real estate and personal property	$ 27,946		$ 27,946
Social security	745,086		745,086
Franchise	17,745		17,745
Foreign payroll taxes	76,919		76,919
Gasoline and oil (Note 3)	618,284		618,284
Clearance, customs, and duties (Note 4)	178,619		178,619
Miscellaneous	137,040		137,040
Total	$ 1,801,639		$ 1,801,639
MANAGEMENT AND SERVICE CONTRACT FEES	None	None	None
RENTS (Note 5)	$ 1,839,264		$ 1,839,264

* Denotes credit—over-accrual of taxes on non-operating property.
A Charged to International Division deferred development expense.
B Allocated to Government contracts and others.
C Charged to long-term debt expense—documentary tax on extension of Series B Debentures.
D Charged to others.

The Notes on the following page are an integral part of this statement.

TRANSCONTINENTAL & WESTERN AIR, INC.
AND SUBSIDIARIES

Supplementary Profit and Loss Information
For the Three Years and Seven Months Ended July 31, 1948—(Concluded)

NOTES:

1. The amounts charged to operating expenses with the exception of depreciation are shown gross for the years 1945 and 1946 before deducting a small portion allocated as overhead to United States Government contracts on the basis provided for in such contracts, and, for the year 1946, before deducting portion charged to International Division deferred development expense. For the year ended December 31, 1947 and the seven months ended July 31, 1948 the amounts are gross before deducting portion allocated to construction work in progress and to cost of other revenue from services performed for others. The portions so charged are not allocated to separate detail expense accounts on the Company's records.

2. Provisions for obsolescence of flight equipment spare parts amounting to $61,199 in 1945 and $76,318 in 1946 are included above in depreciation and amortization to accord with treatment of this provision in 1947 and the subsequent period. The 1945 and 1946 provision for obsolescence was previously reported by the Company as maintenance and repairs. Sundry other reclassifications reducing maintenance expense by $30,587 in 1945 and $175,863 in 1946 are given effect above to accord with the account classification effective January 1, 1947 as mentioned in Note 16 to Financial Statements.

3. Gasoline and oil taxes do not appear with other taxes on previous statements for the years 1945 and 1946, but were, however, included with gasoline and oil expense in cost of operations.

4. Clearance, customs, and duties include an undeterminable amount of ocean freight not segregated in the accounts.

5. For particulars regarding "Rents", reference should be made to Note 16 to Financial Statements.

ADDITIONAL INFORMATION

This prospectus omits certain information contained in the registration statement on file with the Securities and Exchange Commission. The information omitted may be obtained from the Commission's principal office at Washington, D. C., upon payment of the fee prescribed by the rules and regulations of the Commission.

TRANSCONTINENTAL & WESTERN AIR, INC.

By WARREN LEE PIERSON
Chairman of the Board of Directors.

AX-1051

TWA Ex. 313, page 1
(Debt Outstanding & Available to TWA & Competitors, 1961-63)

EXHIBIT 313
DP 7/8/67 W.B.

TWA - PAA - AAL - UAL

Debt Outstanding and Available at December 31, 1960-63

S U M M A R Y

As of:	Outstanding					Outstanding Plus Available				
	---------- ($000) ----------									
	TWA					TWA				
	Hist.	Reconstr.	PAA	AAL	UAL	Hist.	Reconstr.	PAA	AAL	UAL
December 31, 1960	235,784	320,291	331,771	228,779	244,644	315,784	320,291	335,471	288,779	338,644
December 31, 1961	299,614	320,229	320,620	312,989	312,536	416,614	320,229	320,620	312,989	337,536
December 31, 1962	361,239	320,767	290,920	338,947	281,944	398,639	320,767	290,920	338,947	334,944
December 31, 1963	310,918	320,618	201,914	311,100	227,354	453,668	320,618	262,344	311,100	322,354

Details appear on the following sheets.

TWA - PAA - AAL - UAL

Debt Outstanding and Available at December 31, 1960

TWA - Historical	Outstanding(a)	Outstanding Plus Available(a)(b)
	($000)	
6½% Equip. Mtge. Sinking Fund Notes due 12/31/72(c)	62,800	92,800
6% Equip. Mtge. Serial Notes due 12/31/61-64(d)	66,200	72,200
Conditional Sales Contracts, 3½% (banks)		
For 4 L1649A aircraft	3,455	3,455
For 4 L1049H aircraft	3,238	3,238
Installment contracts for purchase of bulk storage and other facilities	291	291
Borrowings under 12/1/60 revolving credit agreement with HTCo.	None	50,000
6½% Subord. Income Debs. due 6/1/78 (e)	100,000	100,000
Total Debt	235,784	315,784

(a) Includes portion due within one year.
(b) Pro forma per prospectus dated 5/25/61.
(c) Issued to insurance companies under a note purchase agreement dated 12/1/60.
(d) Issued to banks under a loan agreement dated 12/1/60.
(e) Issued via prospectus dated 5/25/61, replacing interim subordinated promissory note due HTCo.

TWA - Reconstructed	Outstanding	Outstanding Plus Available
	($000)	
Flight equipment mortgage notes:		
4% due 10/1/80	170,000	170,000
6% due 7/1/84	90,000	90,000
Installment contracts for purchase of bulk storage and other facilities	291	291
5% Conv. Sub. Debs. due 6/1/84	60,000	60,000
Total Debt	320,291	320,291

PAA	Outstanding	Outstanding Plus Available(a)
	($000)	
Bank loans (b)	144,800 (c)	148,500 (c)
3 3/4% Notes due 3/1/95	60,000	60,000
4 3/4% Notes due 3/1/95	30,000	30,000
6% Notes due 8/1/80	50,000	50,000
4 7/8% Conv. Sub. Debs due 8/1/79	46,971	46,971
Total Debt	331,771	335,471

(a) Including $9.6MM 6% Notes due 8/1/80 taken down in January 1961 to repay an interim bank loan of equal amount.
(b) Issued under a credit agreement dated 10/31/58 as amended, under which up to $148.5MM may be borrowed on a revolving basis at the prime rate (4 1/2% as of 12/31/60) prior to 7/1/61. Borrowings outstanding at 6/30/61 will be payable in ten semi-annual installments beginning 12/31/61 and will bear interest at the 7/1/61 prime rate plus 1/2 of 1% but not more than 5%.
(c) Includes $14,480M due within one year.

TWA Ex. 313, page 3
(Debt Outstanding & Available to TWA & Competitors, 1961-63)

AAL	Outstanding	Outstanding Plus Available
	($000)	
3% S.F. Debentures due 6/1/66	23,779	23,779
4% Notes due 11/1/96	75,000	75,000
4 1/4% Notes due 11/1/96	60,000	60,000
5% Notes due 11/1/96	30,000	30,000
5 3/4% Notes due 11/1/96(a)	None	60,000
5% Subordinated Conv. Notes due 1/1/85	40,000	40,000
Total Debt	228,779	288,779

(a) To be issued to insurance companies during 1961 under a loan agreement dated 12/30/60.

UAL	Outstanding	Outstanding Plus Available
	($000)	
3½% Debentures due 2/1/67	11,144(a)	11,144(a)
3 3/4% Debentures due 8/1/74	17,500(a)	17,500(a)
4% Debentures due 2/1/81	120,000	120,000
4 3/4% Term loan notes (b)	71,000	165,000
4 7/8% Subord. Conv. Debs. due 12/1/85	25,000	25,000
Total Debt	244,644	338,644

(a) Includes portion due within one year.
(b) Issued and issuable under a credit agreement dated 12/20/57 as amended under which up to $165MM may be borrowed on a revolving basis at the prime rate plus 1/4 of 1% prior to 6/30/62. Borrowings outstanding on 6/30/62 will be due in 23 quarterly payments beginning 1/1/63. Interest from 6/30/62 to 6/30/64 will be at the prime rate plus 1/4 of 1% and after 7/1/64 at such prime rate plus 1/2 of 1%. The prime rate at 12/31/60 was 4 1/2%.

Sources: TWA, PAA, AAL and UAL 1960 annual reports, TWA prospectus dated 5/25/61, UAL prospectus dated 11/22/60, DHR Report.

TWA Ex. 313, page 4
(Debt Outstanding & Available to TWA & Competitors, 1961-63)

TWA - PAA - AAL - UAL

Debt Outstanding and Available at December 31, 1961

TWA - Historical	Outstanding(a) ($000)	Outstanding Plus Available (a) ($000)
Equipment Mortgage Sinking Fund Notes:		
6½% due 12/31/72	92,800	92,800
Series B, 6% due 12/31/77 (b)	22,000	107,000
Equipment Mortgage Serial Notes:		
6% due to 12/31/64	72,200	72,200
Series B, 5½% due 12/31/63 - 66 (c)	8,000	40,000
Conditional Sales Contracts, 3½% (banks)		
For 4 L1649A aircraft	1,919	1,919
For 4 L1049H aircraft	1,942	1,942
Installment contracts for purchase of bulk storage and other facilities	229	229
6½% Sub. Income Debs. due 6/1/78 plus accrued interest	100,524	100,524
Total Debt	299,614	416,614

(a) Includes portion due within one year.
(b) Issued and issuable to insurance companies under a note purchase agreement dated 7/1/61.
(c) Issued and issuable to banks under a loan agreement dated 7/1/61.

TWA - Reconstructed	Outstanding ($000)	Outstanding Plus Available ($000)
Flight Equipment Mortgage Notes:		
4% due 10/1/80	170,000	170,000
6% due 7/1/84	90,000	90,000
Installment contracts for purchase of bulk storage and other facilities	229	229
5% Conv. Sub. Debs. due 6/1/84	60,000	60,000
Total Debt	320,229	320,229

PAA	Outstanding ($000)	Outstanding Plus Available ($000)
5% Term bank loans	133,650 (a)	133,650 (a)
3 3/4% Notes due 3/1/95	60,000	60,000
4 3/4% Notes due 3/1/95	30,000	30,000
6% Notes due 8/1/80	50,000	50,000
4 7/8% Conv. Subord. Debs. due 8/1/79	46,970	46,970
Total Debt	320,620	320,620

(a) Includes $29.7MM due in 1962.

AAL	Outstanding ($000)	Outstanding Plus Available
3% S.F. Debentures due 6/1/66	22,989	22,989
4% Notes due 11/1/96	75,000	75,000
4 1/4% Notes due 11/1/96	60,000	60,000
5% Notes due 11/1/96	30,000	30,000
5 3/4% Notes due 11/1/96	85,000	85,000
5% Subord. Conv. Notes due 1/1/85	40,000	40,000
Total Debt	312,989	312,989

UAL	Outstanding ($000)	Outstanding Plus Available
3 1/2% Debentures due 2/1/67	9,552 (a)	9,552 (a)
3 3/4% Debentures due 8/1/74	16,500 (a)	16,500 (a)
4% Debentures due 2/1/81	120,000	120,000
4 3/4% Term loan notes (b)	140,000	165,000
4 1/4% Subord. Conv. Debs. due 7/1/76	1,486	1,486
4 7/8% Subord. Conv. Debs. due 12/1/85	24,998	24,998
Total Debt	312,536	337,536

(a) Includes portion due within one year.
(b) Issued and issuable under a credit agreement dated 12/20/57, as amended under which up to $165MM may be borrowed on a revolving basis at the prime rate plus 1/4 of 1% prior to 6/30/62. Borrowings outstanding on 6/30/62 will be due in 23 quarterly payments beginning 1/1/63. Interest from 6/30/62 to 6/30/64 will be at the prime rate plus 1/4 of 1% and after 7/1/64 at such prime rate plus 1/2 of 1%. The prime rate at 12/31/61 was 4 1/2%.

Sources: TWA, PAA, AAL, and UAL 1961 annual reports, UAL prospectus dated 11/22/60, DHR report.

(Debt Outstanding & Available to TWA & Competitors, 1961-63)

TWA - PAA - AAL - UAL

Debt Outstanding and Available
at December 31, 1962

TWA - Historical	Outstanding(a) ($000)	Outstanding Plus Available(a)
Equipment Mortgage Sinking Fund Notes:		
6½% due 12/31/72	92,800	92,800
Series B, 6% due 12/31/77 (b)	79,000	106,000
Equipment Mortgage Serial Notes:		
6% due 12/31/64	52,000	52,000
Series B, 5½% due 6/30/64-12/31/66 (c)	29,000	39,400
Conditional Sales Contracts, 3½% (banks)	648	648
Installment contracts for purchase of bulk storage and other facilities	767	767
6½% Subord. Income Debs. due 6/1/78 plus accrued interest	107,024	107,024
Total Debt	361,239	398,639

(a) Includes portion due within one year.
(b) Issued and issuable to insurance companies under a note purchase agreement dated 7/1/61.
(c) Issued and issuable to banks under a loan agreement dated 7/1/61.

TWA - Reconstructed	Outstanding ($000)	Outstanding Plus Available
Flight Equipment Mortgage Notes:		
4% due 10/1/80	170,000	170,000
6% due 7/1/84	90,000	90,000
Installment contracts for purchase of bulk storage and other facilities	767	767
5% Conv. Sub. Debs. due 6/1/84	60,000	60,000
Total Debt	320,767	320,767

PAA	Outstanding ($000)	Outstanding Plus Available
5% Term bank loans	103,950 (a)	103,950 (a)
3 3/4% Notes due 3/1/95	60,000	60,000
4 3/4% Notes due 3/1/95	30,000	30,000
6% Notes due 8/1/80	50,000	50,000
4 7/8% Conv. Subord. Debs. due 8/1/79	46,970	46,970
Total Debt	290,920	290,920

(a) Includes $29.7MM due in 1963.

AAL	Outstanding ($000)	Outstanding Plus Available
3% S.F. Debentures due 6/1/66	22,406	22,406
4% Notes due 11/1/96	75,000	75,000
4 1/4% Notes due 11/1/96	60,000	60,000
5% Notes due 11/1/96	30,000	30,000
5 3/4% Notes due 11/1/96	85,000	85,000
4 1/4% - 4 3/8% engine purchase obligations due 1970	26,541	26,541
5% Subord. Conv. notes due 1/1/85	40,000	40,000
Total Debt	338,947	338,947

TWA Ex. 313, page 7
(Debt Outstanding & Available to TWA & Competitors, 1961-63)

UAL	Outstanding	Outstanding Plus Available
	($000)	
3 1/2% Debentures due 2/1/67	7,960 (a)	7,960 (a)
3 3/4% Debentures due 8/1/74	15,500 (a)	15,500 (a)
4% Debentures due 2/1/81	120,000	120,000
4 3/4% Term Loan Notes (b)	112,000	165,000
4 1/4% Subord. Conv. Debs. due 7/1/76	1,486	1,486
4 7/8% Subord. Conv. Debs. due 12/1/85	24,998	24,998
Total Debt	281,944	334,944

(a) Includes portion due within one year.
(b) Issued and issuable under a credit agreement dated 12/20/57, as amended under which up to $165MM may be borrowed on a revolving basis prior to 12/31/64. Borrowings outstanding on 12/31/64 will be due in 20 quarterly payments beginning 7/1/65.

Sources: TWA, PAA, AAL, UAL 1962 annual reports, DHR Report.

(Debt Outstanding & Available to TWA & Competitors, 1961-63)

TWA - PAA - AAL - UAL

Debt Outstanding and Available
as of December 31, 1963

TWA - Historical	Outstanding (a)	Outstanding Plus Available (a)
	($000)	
Equipment Mortgage Sinking Fund Notes:		
6½% due 12/31/72	92,800	92,800
Series B, 6% due 12/31/77 (b)	79,000	106,000
Bank Loans under revolving credit agreement (c)	None	100,000
Conditional sales contracts (d)	None	15,750
Installment contracts for purchase of bulk storage and other facilities	618	618
6½% Sub. Income Debs. due 6/1/78	100,000	100,000
5 3/4% Conv. Sub. Debs. due 10/1/83	38,500	38,500
Total Debt	310,918	453,668

(a) Includes portion due within one year.
(b) Issued and issuable to insurance companies under a note purchase agreement dated 7/1/61.
(c) Issuable to banks under a loan agreement dated 11/1/63 under which up to $100MM may be borrowed on a revolving basis until 12/1/66. Borrowings outstanding at 12/1/66 will be due in 16 quarterly payments beginning 3/1/67.
(d) Commitments to cover the financing of $15,750M of the cost of three cargo jets under conditional sales contracts.

TWA - Reconstructed	Outstanding	Outstanding Plus Available
	($000)	
Flight Equipment Mortgage Notes:		
4% due 10/1/80	170,000	170,000
6% due 7/1/84	90,000	90,000
Installment contracts for purchase of bulk storage and other facilities	618	618
5% Conv. Sub. Debs. due 6/1/84	60,000	60,000
Total Debt	320,618	320,618

PAA	Outstanding	Outstanding Plus Available
	($000)	
5% Term bank loans	23,760	23,760
3 3/4% Notes due 3/1/95	60,000	60,000
4 3/4% Notes due 3/1/95	30,000	30,000
6% Notes due 8/1/80	50,000	50,000
4 7/8% Conv. Subord. Debs. due 8/1/79	38,154	38,154
4 1/2% Conv. Subord. Debs. due 1/15/84 (a)	None	60,430
Total Debt	201,914	262,344

(a) Issued via prospectus dated 1/8/64.

AAL	Outstanding	Outstanding Plus Available
	($000)	
3% S.F. Debentures due 6/1/66	21,100	21,100
4% Notes due 11/1/96	75,000	75,000
4 1/4% Notes due 11/1/96	60,000	60,000
5% Notes due 11/1/96	30,000	30,000
5 3/4% Notes due 11/1/96	85,000	85,000
5% Subord. Conv. Notes due 1/1/85	40,000	40,000
Total Debt	311,100	311,100

TWA Ex. 313, page 9
(Debt Outstanding & Available to TWA & Competitors, 1961-63)

UAL	Outstanding	Outstanding Plus Available
	($000)	
3 1/2% Debentures due 2/1/67	6,368 (a)	6,368 (a)
3 3/4% Debentures due 8/1/74	14,500 (a)	14,500 (a)
4% Debentures due 2/1/81	120,000	120,000
5% Notes due 2/1/84 (b)	None	60,000
4 3/4% Term loan notes (c)	85,000	120,000
4 1/4% Subord. Conv. Debs. due 7/1/76	1,486	1,486
Total Debt	227,354	322,354

(a) Includes portion due within one year.
(b) Issued to insurance companies on 2/5/64.
(c) Issued under a credit agreement dated 12/20/57, as amended under which up to $180MM may be borrowed on a revolving basis at the prime rate plus 1/2 of 1% prior to 12/31/65. This commitment was reduced $60MM on 2/5/64, concurrent with the sale of the 5% notes due 2/1/84. Borrowings outstanding on 12/31/65 will be due in 28 quarterly payments beginning 7/1/66 at the prime rate plus 1/2 of 1%. The prime rate was 4 1/2% on 12/31/63.

Sources: TWA, PAA, AAL and UAL 1963 annual reports, TWA prospectus dated 12/3/63, PAA prospectus dated 1/8/64, DHR Report.

AX-1060

TWA Ex. 314, page 1
(Weighted Average Interest Rates-TWA & Competitors, 1960-63)

TWA - PAA - AAL - UAL

Weighted Average Interest Rates on Debt
Outstanding at December 31, 1960 - 1963

S U M M A R Y

As of:	TWA Hist.	TWA Reconstr.	PAA	AAL	UAL
December 31, 1960	6.27%	4.75%	4.67%	4.32%	4.27%
December 31, 1961	6.27	4.75	4.88	4.67	4.38
December 31, 1962	6.21	4.74	4.87	4.65	4.25
December 31, 1963	6.27	4.74	4.74	4.68	4.41

Details of computations appear on the following sheets.

TWA Ex. 314, page 2
(Weighted Average Interest Rates-TWA & Competitors, 1960-63)

TWA - PAA - AAL - UAL

Weighted Average Interest Rate on Debt
Outstanding at December 31, 1960

TWA - Historical	Amount Outstanding ($000)	Interest (Am't x Rate)
6½% Equip. Mtge. Sinking Fund Notes due 12/31/72	62,800	4,082
6% Equip. Mtge. Serial Notes due 12/31/61-64	66,200	3,972
3½% Conditional Sales Contracts	6,693	234
Installment Contracts	291	-
6½% Subord. Income Debs due 6/1/78	100,000	6,500
Totals	235,784	14,788

Total interest = 6.27% of total debt outstanding.

TWA - Reconstructed	Amount Outstanding ($000)	Interest (Am't x Rate)
Flight equipment mortgage notes:		
4% due 10/1/80	170,000	6,800
6% due 7/1/84	90,000	5,400
Installment Contracts	291	-
5% Conv. Sub. Debs due 6/1/84	60,000	3,000
Totals	320,291	15,200

Total interest = 4.75% of total debt outstanding.

PAA	Amount Outstanding ($000)	Interest (Am't x Rate)
Bank loans @ 4 1/2%	144,800	6,516
3 3/4% Notes due 3/1/95	60,000	2,250
4 3/4% Notes due 3/1/95	30,000	1,425
6% Notes due 8/1/80	50,000	3,000
4 7/8% Conv. Sub. Debs. due 8/1/79	46,971	2,290
Totals	331,771	15,481

Total interest = 4.67% of total debt outstanding.

AAL	Amount Outstanding ($000)	Interest (Am't x Rate)
3½% S.F. Debentures due 6/1/66	23,779	832
4% Notes due 11/1/96	75,000	3,000
4½% Notes due 11/1/96	60,000	2,550
5% Notes due 11/1/96	30,000	1,500
5% Sub. Conv. Notes due 1/1/85	40,000	2,000
Totals	228,779	9,882

Total interest = 4.32% of total debt outstanding.

UAL	Amount Outstanding ($000)	Interest (Am't x Rate)
3½% Debentures due 2/1/67	11,144	390
3 3/4% Debentures due 8/1/74	17,500	656
4% Debentures due 2/1/81	120,000	4,800
4 3/4% Term bank loans	71,000	3,373
4 7/8% Sub. Conv. Debs. due 12/1/85	25,000	1,218
Totals	244,644	10,437

Total interest = 4.27% of total debt outstanding.

(Weighted Average Interest Rates-TWA & Competitors, 1960-63)

TWA - PAA - AAL - UAL

Weighted Average Interest Rate on Debt Outstanding at December 31, 1961

TWA - Historical	Amount Outstanding ($000)	Interest (Am't x Rate)
Equipment Mortgage Sinking Fund Notes:		
6½% due 12/31/72	92,800	6,032
6% due 12/31/77	22,000	1,320
Equipment Mortgage Serial Notes:		
6% due to 12/31/64	72,200	4,332
5½% due 12/31/63-66	8,000	440
3½% Conditional Sales Contracts	3,861	135
Installment Contracts	229	-
6½% Sub. Income Debs. due 6/1/78 (excluding accrued interest)	100,000	6,500
Totals	299,090	18,759

Total interest = 6.27% of total debt outstanding.

TWA - Reconstructed	Amount Outstanding ($000)	Interest (Am't x Rate)
Flight Equipment Mortgage Notes:		
4% due 10/1/80	170,000	6,800
6% due 7/1/84	90,000	5,400
Installment Contracts	229	-
5% Conv. Sub. Debs. due 6/1/84	60,000	3,000
Totals	320,229	15,200

Total interest = 4.75% of total debt outstanding.

PAA	Amount Outstanding ($000)	Interest (Am't x Rate)
5% Term bank loans	133,650	6,682
3 3/4% Notes due 3/1/95	60,000	2,250
4 3/4% Notes due 3/1/95	30,000	1,425
6% Notes due 8/1/80	50,000	3,000
4 7/8% Conv. Sub. Debs. due 8/1/79	46,970	2,290
Totals	320,620	15,647

Total interest = 4.88% of total debt outstanding.

AAL	Amount Outstanding ($000)	Interest (Am't x Rate)
3% Debentures due 6/1/66	22,989	690
4% Notes due 11/1/96	75,000	3,000
4½% Notes due 11/1/96	60,000	2,550
5% Notes due 11/1/96	30,000	1,500
5 3/4% Notes due 11/1/96	85,000	4,887
5% Sub. Conv. Notes due 1/1/85	40,000	2,000
Totals	312,989	14,627

Total interest = 4.67% of total debt outstanding.

UAL	Amount Outstanding ($000)	Interest (Am't x Rate)
3½% Debentures due 2/1/67	9,552	334
3 3/4% Debentures due 8/1/74	16,500	619
4% Debentures due 2/1/81	120,000	4,800
4 3/4% Term bank loans	140,000	6,650
4 1/4% Sub. Conv. Debs. due 7/1/76	1,486	63
4 7/8% Sub. Conv. Debs. due 12/1/85	24,998	1,219
Totals	312,536	13,685

Total Interest = 4.38% of total debt outstanding

TWA Ex. 314, page 4
(Weighted Average Interest Rates-TWA & Competitors, 1960-63)

TWA - PAA - AAL - UAL

Weighted Average Interest Rate on Debt Outstanding at December 31, 1962

TWA - Historical	Amount Outstanding ($000)	Interest (Am't x Rate)
Equipment Mortgage Sinking Fund Notes:		
6½% due 12/31/72	92,800	6,032
6% due 12/31/77	79,000	4,740
Equipment Mortgage Serial Notes:		
6% due to 12/31/64	52,000	3,120
5½% due 6/30/64 - 12/31/66	29,000	1,595
3½% Conditional Sales Contracts	648	-
Installment Contracts	767	-
6½% Sub. Income Debs. due 6/1/78 (excl. accrued int.)	100,000	6,500
Totals	354,215	21,987

Total interest = 6.21% of total debt outstanding.

TWA - Reconstructed	Amount Outstanding ($000)	Interest (Am't x Rate)
Flight Equipment Mortgage Notes:		
4% due 10/1/80	170,000	6,800
6% due 7/1/84	90,000	5,400
Installment Contracts	767	-
5% Conv. Sub. Debs. due 6/1/84	60,000	3,000
Totals	320,767	15,200

Total interest = 4.74% of total debt outstanding.

PAA	Amount Outstanding ($000)	Interest (Am't x Rate)
5% Term bank loans	103,950	5,197
3 3/4% Notes due 3/1/95	60,000	2,250
4 3/4% Notes due 3/1/95	30,000	1,425
6% Notes due 8/1/80	50,000	3,000
4 7/8% Conv. Sub. Debs. due 8/1/79	46,970	2,290
Totals	290,920	14,162

Total interest = 4.87% of total debt outstanding.

AAL	Amount Outstanding ($000)	Interest (Am't x Rate)
3% Debentures due 6/1/66	22,406	672
4% Notes due 11/1/96	75,000	3,000
4½% Notes due 11/1/96	60,000	2,550
5% Notes due 11/1/96	30,000	1,500
5 3/4% Notes due 11/1/96	85,000	4,888
4½%-4 3/8% Engine Purchase Obligations	26,541	1,161
5% Sub. Conv. Notes due 1/1/85	40,000	2,000
Totals	338,947	15,771

Total interest = 4.65% of total debt outstanding.

UAL	Amount Outstanding ($000)	Interest (Am't x Rate)
3½% Debentures due 2/1/67	7,960	279
3 3/4% Debentures due 8/1/74	15,500	582
4% Debentures due 2/1/81	120,000	4,800
4 3/4% Term bank loans	112,000	5,320
4 1/4% Sub. Conv. Debs. due 7/1/76	1,486	63
4 7/8% Sub. Conv. Debs. due 12/1/85	24,998	1,219
Totals	281,944	11,983

Total interest = 4.25% of total debt outstanding.

TWA Ex. 314, page 5

(Weighted Average Interest Rates-TWA & Competitors, 1960-63)

TWA - PAA - AAL - UAL

Weighted Average Interest Rate on Debt Outstanding at December 31, 1963

TWA - Historical	Amount Outstanding ($000)	Interest (Am't x Rate)
Equipment Mortgage Sinking Fund Notes:		
6½% due 12/31/72	92,800	6,032
6% due 12/31/77	79,000	4,740
Installment Contracts	618	-
6½% Sub. Income Debs. due 6/1/78	100,000	6,500
5 3/4% Conv. Sub. Debs. due 10/1/83	38,500	2,214
Totals	310,918	19,486

Total interest = 6.27% of total debt outstanding.

TWA - Reconstructed	Amount Outstanding ($000)	Interest (Am't x Rate)
Flight Equipment Mortgage Notes:		
4% due 10/1/80	170,000	6,800
6% due 7/1/84	90,000	5,400
Installment Contracts	618	-
5% Conv. Sub. Debs. due 6/1/84	60,000	3,000
Totals	320,618	15,200

Total interest = 4.74% of total debt outstanding.

PAA (Including 4½% Conv. Sub. Debs due 1/15/84 - offered 1/8/64)	Amount Outstanding ($000)	Interest (Am't x Rate)
5% Term bank loans	23,760	1,188
3 3/4% Notes due 3/1/95	60,000	2,250
4 3/4% Notes due 3/1/95	30,000	1,425
6% Notes due 8/1/80	50,000	3,000
4 7/8% Conv. Sub. Debs. due 8/1/79	38,154	1,860
4 1/2% Conv. Sub. Debs. due 1/15/84	60,430	2,719
Totals	262,344	12,442

Total interest = 4.74% of total debt outstanding.

AAL	Amount Outstanding ($000)	Interest (Am't x Rate)
3% Debentures due 6/1/66	21,100	633
4% Notes due 11/1/96	75,000	3,000
4½% Notes due 11/1/96	60,000	2,550
5% Notes due 11/1/96	30,000	1,500
5 3/4% Notes due 11/1/96	85,000	4,888
5% Sub. Conv. Notes due 1/1/85	40,000	2,000
Totals	311,100	14,571

Total interest = 4.68% of total debt outstanding.

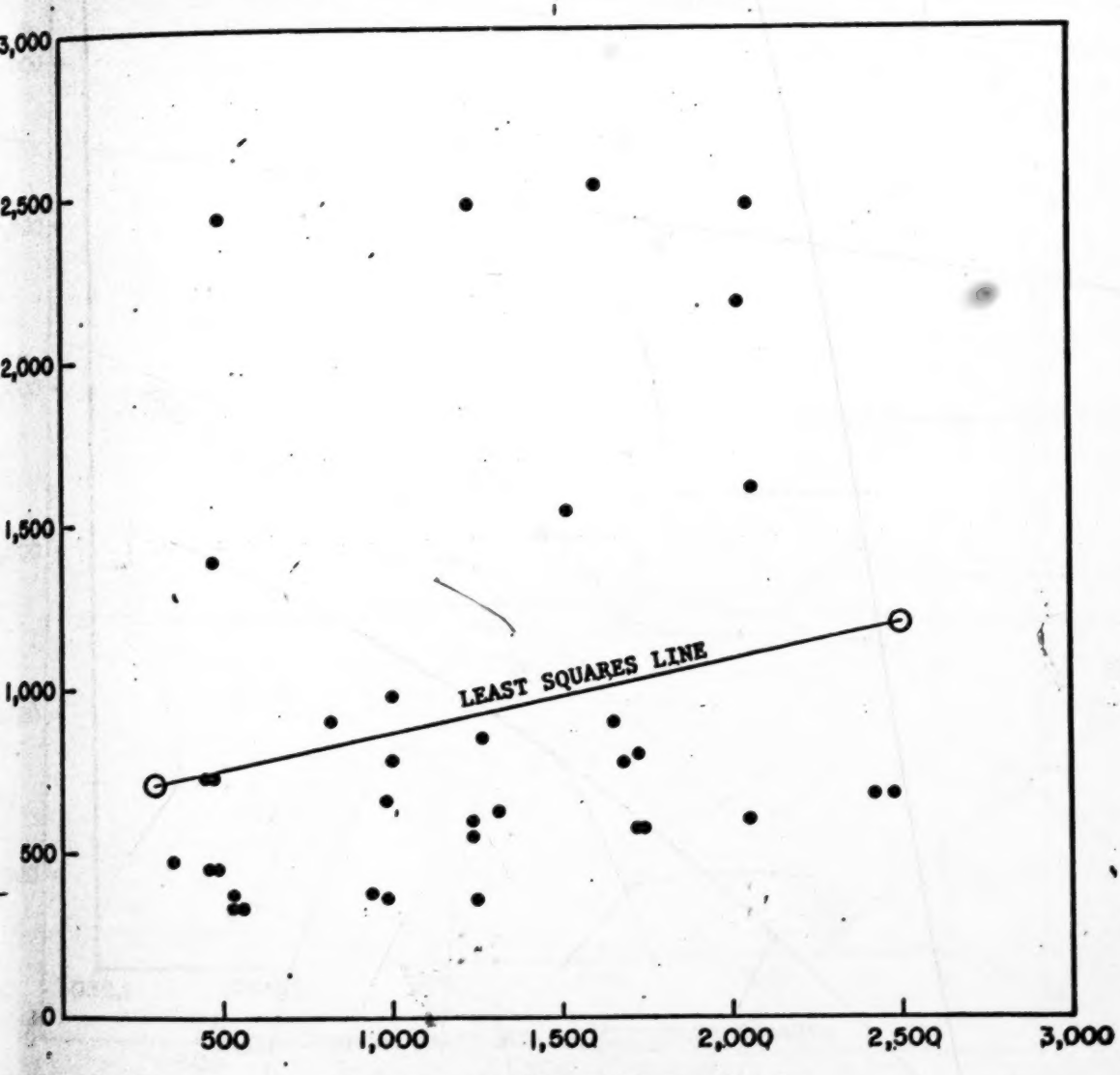
UAL (including 5% notes due 2/1/84)	Amount Outstanding ($000)	Interest (Am't x Rate)
3½% Debentures due 2/1/67	6,368	223
3 3/4% Debentures due 8/1/74	14,500	544
4% Debentures due 2/1/81	120,000	4,800
5% Notes due 2/1/84	60,000	3,000
4 3/4% Term bank loans	85,000	4,037
4½% Sub. Conv. Debs. due 7/1/76	1,486	63
Totals	287,354	12,667

Total interest = 4.41% of total debt outstanding.

TWA Ex. 319
(Least Squares Analysis-S.H.E. Avg. Stage Length - B-331s)

EXHIBIT 319
10/14/67 W.B.

GRAPH SHOWING POINTS OF AVERAGE STAGE LENGTH OF ADDED SERVICE AND AVERAGE STAGE LENGTH FOR THE PRIOR MONTH, FROM S.H.E. PRINT OUT NEW BOOK V, TABLE 16, B-30 (B-331 AIRCRAFT – FIRST ANALYSIS)

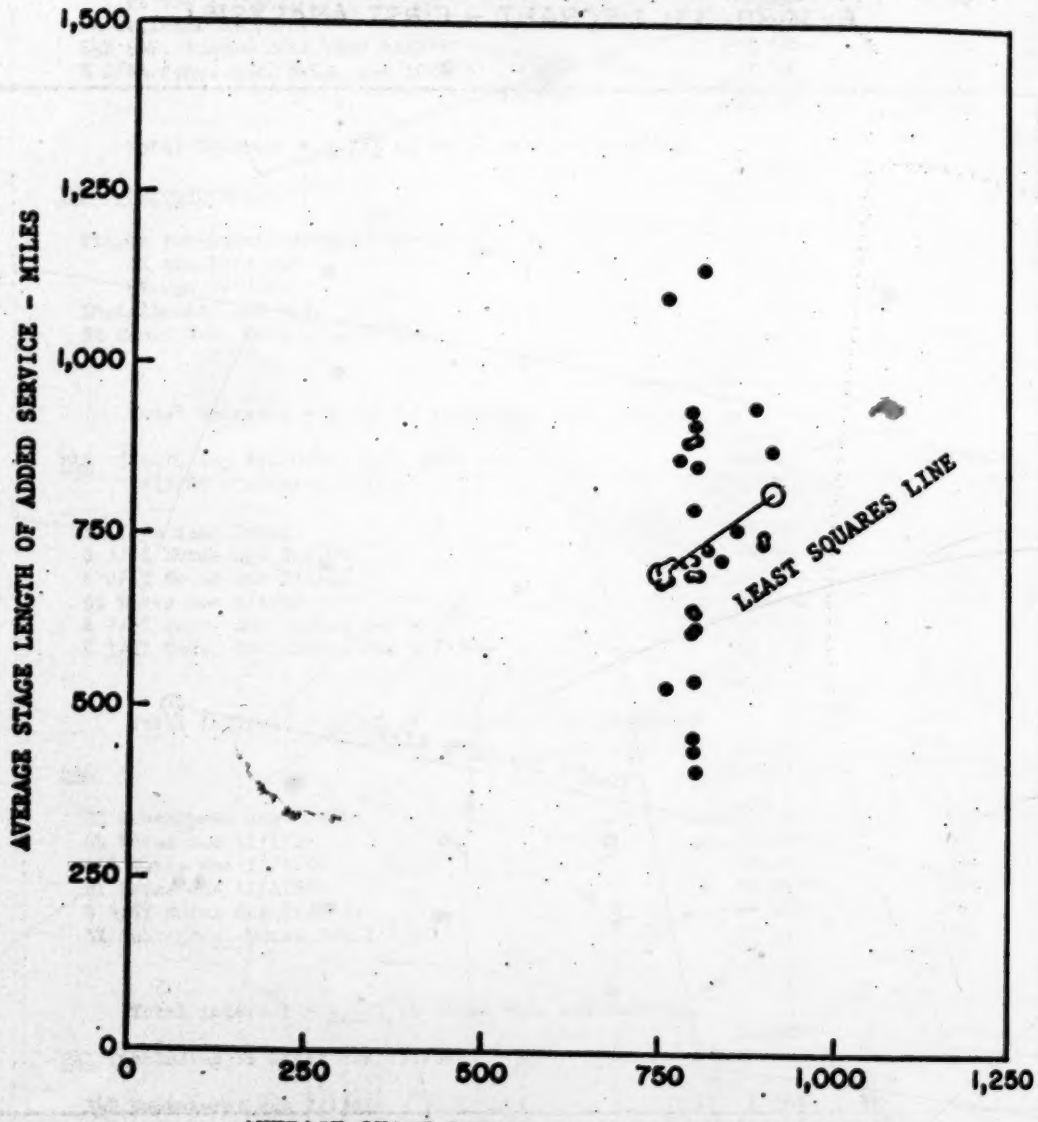


AX-1000

TWA Ex. 320
(Least Squares Analysis-S.H.E. Avg. Stage Length - CV-880s)

EXHIBIT

GRAPH SHOWING POINTS OF AVERAGE STAGE LENGTH OF ADDED SERVICE AND AVERAGE STAGE LENGTH FOR THE PRIOR MONTH, FROM S.H.E. PRINT OUT NEW BOOK V, TABLE 16, 880 (CV 880 AIRCRAFT - FIRST ANALYSIS)



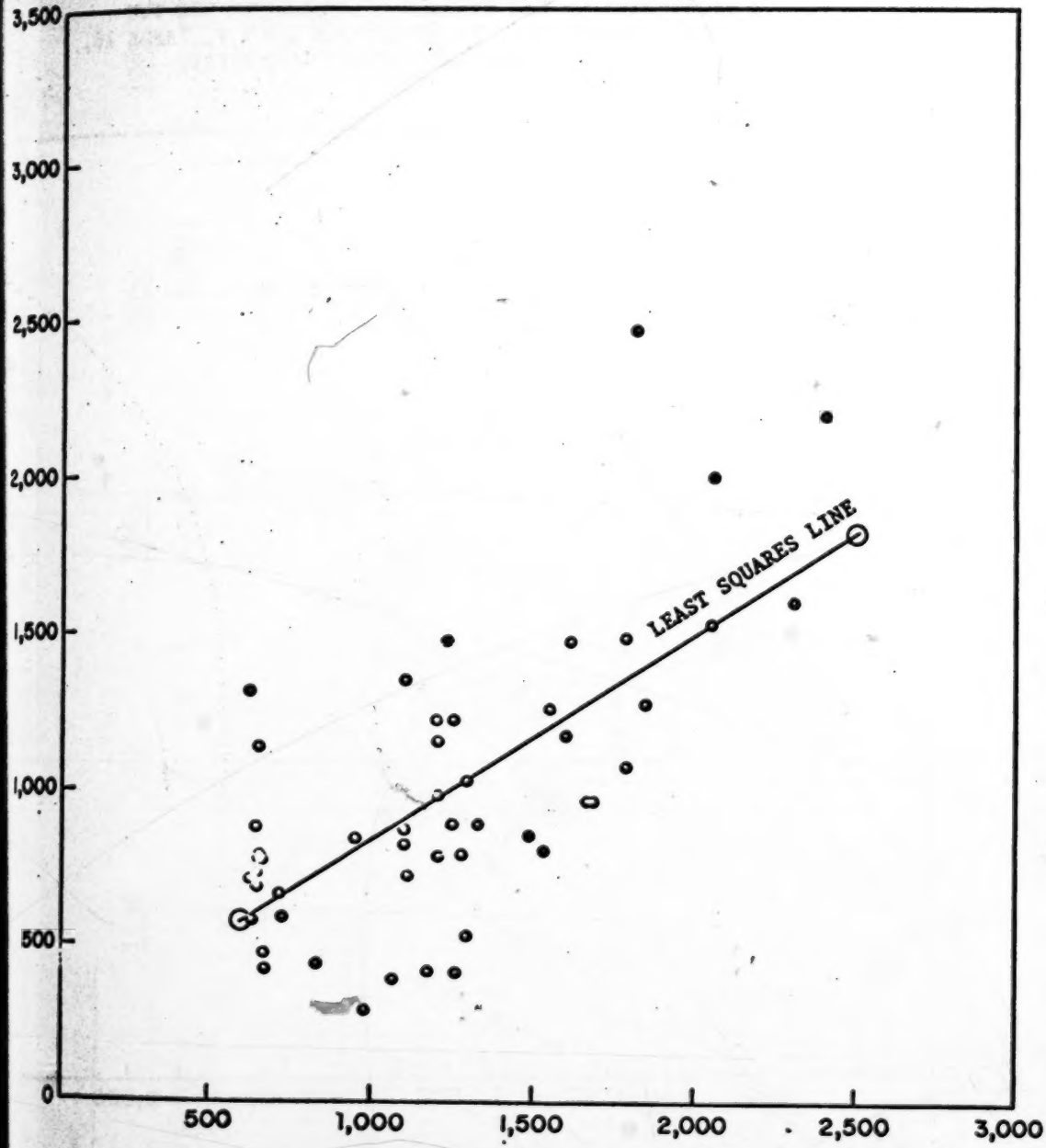
AA-1001

TWA Ex. 321

(Least Squares Analysis-S.H.E. Avg. Stage Length - B-131s)

EXHIBIT 321
10/16/62 W.

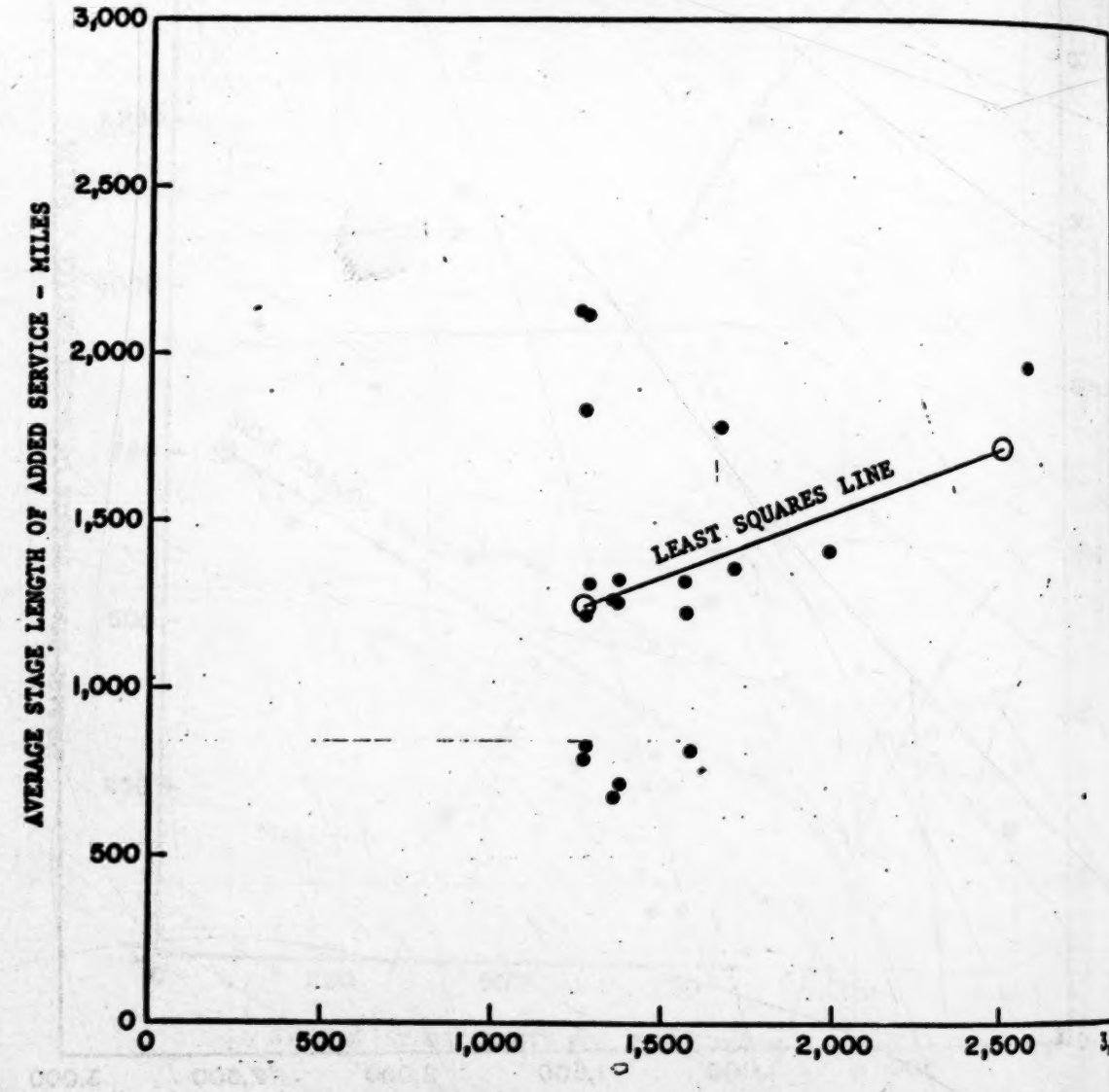
GRAPH SHOWING POINTS OF AVERAGE STAGE LENGTH OF ADDED SERVICE AND AVERAGE STAGE LENGTH FOR THE PRIOR MONTH, FROM S.H.E. PRINT OUT NEW BOOK V, TABLE 16, B-70 (B-131 AIRCRAFT - FIRST ANALYSIS)



TWA Ex. 322
(Least Squares Analysis-S.H.E. Avg. Stage Length - B-131B)

EXHIBIT

GRAPH SHOWING POINTS OF AVERAGE STAGE LENGTH OF ADDED SERVICE AND AVERAGE STAGE LENGTH FOR THE PRIOR MONTH, FROM S.H.E. PRINT OUT NEW BOOK V, TABLE 16, B-7F (B-131B AIRCRAFT - FIRST ANALYSIS)



PASSENGERS ADDED OR (DELETED)

Additional 6 B-707-331

		1959	1960	1961	1962	1963	Total
p. IV-27	additions	-	47,949	65,543	70,400	39,773	223,665
p. IV-33	deletions						
	M-404	-	(46,849)	(87,782)	-	-	(134,631)
	049/749	-	(49,342)	(68,309)	(101,851)	(11,173)	(230,675)
	1049	-	(28,298)	-	-	-	(28,298)
	1049G	-	(33,961)	(79,281)	(2,006)	(3,067)	(118,315)
	1049H	-	(420)	-	-	-	(420)
	1649A		(5,848)	(68,827)	-	(8,344)	(83,019)
	Totals		(164,718)	(304,199)	(103,857)	(22,584)	(595,358)
Early Delivery							
p. V-17	additions						
	707-131	47,811	-	-	-	-	47,811
	707-331	31,957	26,032	-	-	-	57,989
	Totals	79,768	26,032	-	-	-	105,800
p. V-20	deletions						
	M-404	(34,505)	(24,483)	-	-	-	(58,988)
	049/749	(71,394)	(24,742)	-	-	-	(96,136)
	1049	(10,222)	(13,893)	-	-	-	(24,115)
	1049G	-	(17,333)	-	-	-	(17,333)
	1049H	(6,767)	-	-	-	-	(6,767)
	1649A	(15,747)	(2,920)	-	-	-	(18,667)
	Totals	(138,635)	(83,371)	-	-	-	(222,006)

Attachment 3 - Passengers Added/Deleted-Reconstructed TWA)

	1959	1960	1961	1962	1963	Total
On Time Delivery 20 Convair 880						
p. VI-14 additions						
20 CV. 880	-	309,239	110,462	-	-	419,701
p. VI-18 deletions						
M-404	-	(283,310)	(20,103)	-	-	(303,413)
049/749	-	(290,677)	(237,463)	-	-	(528,140)
1049	-	(60,733)	-	-	-	(60,733)
1049G	-	(276,153)	(260,787)	-	-	(536,940)
1049H	-	(1,185)	-	-	-	(1,185)
1649A	-	(35,316)	(24,525)	-	-	(59,841)
Totals	-	(947,374)	(542,878)	-	-	(1,490,252)
10 Additional 880's						
p. VII-15 additions		163,487	211,693	494,193	422,976	1,292,349
p. VII-19 deletions						
M-404	-	(178,509)	-	-	-	(178,509)
049/749	-	(152,399)	(733,903)	(849,389)	(145,351)	(1,881,042)
1049G	-	(184,567)	(335,008)	(14,034)	(147,227)	(680,836)
1649A	-	(18,496)	-	-	(35,707)	(54,203)
Totals	-	(533,971)	(1,068,911)	(863,423)	(328,285)	(2,794,590)
GRAND TOTALS						
dded	79,768	546,707	387,698	564,593	462,749	2,041,515
eleted)	(138,635)	(1,729,434)	(1,915,988)	(967,280)	(350,869)	(5,102,206)
M-404	(34,505)	(533,151)	(107,885)	-	-	(675,541)
049/749	(71,394)	(517,160)	(1,039,675)	(951,240)	(156,524)	(2,735,993)
1049	(10,222)	(102,924)	-	-	-	(113,146)
1049G	-	(512,914)	(675,076)	(16,040)	(150,294)	(1,353,424)

EXH. J.: 331
14-4-67 W.B.

CONVAIR 880

	1962				1963			
	Aircraft Available for Commercial Service	Available Seat Miles (Millions)	Revenue Passenger Miles (Millions)	Load Factor %	Aircraft Available for Commercial Service	Available Seat Miles (Millions)	Revenue Passenger Miles (Millions)	Load Factor %
August	20.0	185	108	58.3%	22.2	223	145	65.0%
September	20.0	177	103	58.2%	24.7	228	132	57.8%
October	19.9	178	94	52.8%	25.7	254	147	57.9%
November	20.0	165	83	50.3%	25.9	234	124	52.9%
December	20.0	172	88	51.1%	25.6	248	139	56.0%
Totals		877	476	54.2%		1,187	687	57.9%

Source: C&C 3 (4) & (5); TWA Domestic Division Operating Statistics, 1962 and 1963 (Schedule 3-70M)

TWA Ex. 331 (TWA Historical Load Factors - CV-880s, 1962-1963) AX-1071

TWA
EXHIBIT 336
12/4/62 N.B.

AX-1072

COMPARISON OF PAN AMERICAN (ATLANTIC DIVISION) AND TWA (INTERNATIONAL DIVISION)

1959

	Pan American (Atl.)	TWA (Int'l)	
	Jet Load Factor	Jet Load Factor	Piston Load Factor
First Qtr.	90.6%	0	49.2%
Second Qtr.	91.5%	0	64.3%
Third Qtr.	91.1%	0	65.1%
Fourth Qtr.	75.5%	56.7%	53.1%
Annual Totals:			
Jet Available Seat Miles (000)	990,272	31,860	
Jet Available Revenue Passenger Miles (000)	848,840	18,052	
Jet Load Factor	85.7%	56.7%	
Jet % of Total A.S.M.	40.5%	2.5%	
Jet % of Total R.P.M.	49.7%	2.7%	
Piston Load Factor	58.8%	59.8%	

Source: T-3 Schedules Pan Am (Atl.) & TWA (Int'l) 1959, TWA Exhibits 54 and C&C 4 (39)

TWA Ex. 336
(Comparison TWA Int'l vs. PAA-AH - 1959)

TWA Ex. 345A
(Price Waterhouse Comparison - C. & C. and S.H.E. (Revised))

TRANS WORLD AIRLINES, INC.

COMPARISON OF CHANGE IN
OPERATING PROFITS IN REPORTS OF
COVERDALE & COLPITTS AND
SIMAT, HELLIESEN & EICHNER, INC.
(REVISED)

CHAPTERS II-V AND PARTS IV-VII, RESPECTIVELY

FOR THE PERIOD 1959-1963

* * * * *

This comparison reflects the following reports and exhibits:-

Coverdale & Colpitts:

1. Volumes I and IV of report dated May 2, 1966
2. TWA Exhibits 42, 42a, 43 and 43a
3. Defendants' Exhibit 262

Simat, Helliesen & Eichner, Inc.:

1. Report revised by computer print-outs designated as Chapters 1, 2, 3 and 4
2. Attachment A to letter, dated November 16, 1967, from Mr. Simat to Mr. Hayes

AX-1074

TWA Ex. 345A

(Price Waterhouse Comparison - C. & C. and S.H.E. (Revised)

TRANS WORLD AIRLINES, INC.

COMPARISON OF CHANGE IN OPERATING PROFITS IN REPORTS OF COVERDALE & COLPITTS AND SIMAT, HELLIESEN & EICHNER, INC. (REVISED)

CHAPTERS II-V AND PARTS IV-VII RESPECTIVELY

CONTENTS

SUMMARY BY:

Revenue and expense captions	A
Assumption	B
Assumption and caption	C
Assumption and year	D

NOTES TO SCHEDULES

	Combining schedules	Detail schedules
		I** (not used)
6 ADDITIONAL B331's:		
Total Domestic and International (1959-1963)	II	
Domestic (1960-1963)	II-1	
1960		II-2
1961		II-3
1962		II-4
1963		II-5
International (1959-1963)	II-6	
1959		II-7
1960		II-8
1961		II-9
1962		II-10
1963		II-11
EARLIER RECEIPT OF B131's AND B331's:		
Total Domestic and International (1959-1960)	III	
Domestic (1959-1960)	III-1	
1959		III-2
1960		III-3
International (1959-1960)	III-4	
1959		III-5
1960		III-6
RECEIPT OF CV880's ON CONTRACT DELIVERY DATES:		
Domestic (1960-1961)	IV	
1960		IV-1
1961		IV-2
FLEET OF 30 CV880's:		
Domestic (1960-1963)	V	
1960		V-1
1961		V-2
1962		V-3
1963		

TWA Ex. 345A, Schedule A
(Price Waterhouse Comparison - C. & C. and S.H.E. (Revised))

SUMMARY BY
REVENUE AND
EXPENSE CAPTIONS

TRANS WORLD AIRLINES, INC.

COMPARISON OF CHANGE IN OPERATING PROFITS IN REPORTS OF
COVERDALE & COLPITTS AND SIMAT, HELLIESEN & EICHNER, INC. (REVISED)

CHAPTERS II-V AND PARTS IV-VII RESPECTIVELY

FOR THE PERIOD 1959 - 1963

(Amounts in millions)

	C&C	SHE	*
Transportation revenues:			
Passenger revenues	$212.20	$ 7.61	$204.59
Other (Note A)	10.80	.36	10.44
Rounding		.02	(.02)
Total transportation revenues	223.00	7.99	215.01
Operating expenses:			
Flying operations	26.90)		
Direct maintenance	17.00)	14.78	32.12
Applied maintenance burden	3.00)		
Insurance	5.40	4.99	.41
Depreciation - jet aircraft (Note B)	44.10	44.10	
Rounding		.01	(.01)
	96.40	63.88	32.52
Aircraft servicing	9.40	(1.78)	11.18
Stewardess and related costs	16.00	2.54)	14.20
Other passenger servicing		(.74))	
Traffic servicing	10.70	(8.46)	19.16
Servicing administration	1.10	(.29)	1.39
Reservation and sales	21.00	3.15	17.85
Advertising and publicity	7.90	2.29	5.61
General and administrative	6.20	.77	5.43
Ground equipment maintenance and depreciation (Note B)	.30	.95	(.65)
Rounding		.03	(.03)
	72.60	(1.54)	74.14
Expenses covered in both reports	169.00	62.34	106.66
Depreciation - piston aircraft		(14.05)	14.05
Amortization (Note B)	2.30		2.30
Total operating expenses	171.30	48.29	123.01
Change in operating profits	$ 51.70	($40.30)	$ 92.00

*C&C over (under) SHE.

AX-1076

TWA Ex. 345A, Schedule B
(Price Waterhouse Comparison - C. & C. and S.H.E. (Revised)

BY ASSIGN

TRANS WORLD AIRLINES, INC.

COMPARISON OF CHANGE IN OPERATING PROFITS IN REPORTS OF COVERDALE & COLPITTS AND SIMAT, HELLIESEN & EICHNER, INC. (REVISED)

CHAPTERS II-V AND PARTS IV-VII, RESPECTIVELY

FOR THE PERIOD 1959 - 1963

(Amounts in millions)

	C&C	SHE	*
CHANGES COVERED IN BOTH REPORTS:-			
6 additional B331's:			
Transportation revenues	$86.00	$40.35	$ 45.
Less - Expenses	62.20	55.74	6.
	23.80	(15.39)	39.
Earlier receipt of B131's and B331's:			
Transportation revenues	18.40	3.86	14.
Less - Expenses	8.50	6.55	1.
	9.90	(2.69)	12.
Receipt of CV880's on contract delivery dates:			
Transportation revenues	37.60	(35.80)	73.
Less - Expenses	31.10	(14.95)	46.
	6.50	(20.85)	27.
Fleet of 30 CV880's:			
Transportation revenues	81.00	(.42)	81.
Less - Expenses	67.20	15.00	52.
	13.80	(15.42)	29.
Change in operating profits covered in both reports	54.00	(54.35)	108.
DECREASE IN PISTON AIRCRAFT DEPRECIATION		14.05	(14.
INCREASED AMORTIZATION FOR 6 ADDITIONAL B331's AND EARLIER RECEIPT OF B131's AND B331's	(2.30)		(2.
Change in operating profits	$51.70	($40.30)	$ 92.

*C&C over (under) SHE.

Source: Schedule C

TWA Ex. 345A, Notes To Schedules
(Price Waterhouse Comparison - C. & C. and S.H.E. (Revised))

TRANS WORLD AIRLINES, INC.

COMPARISON OF CHANGE IN OPERATING PROFITS IN REPORTS OF COVERDALE & COLPITTS AND SIMAT, HELLIESEN & EICHNER, INC. (REVISED)

CHAPTERS II-V AND PARTS IV-VII, RESPECTIVELY

S OF PREPARATION:

These comparative schedules were prepared from the reports of Coverdale & itts, Volumes I and IV (including revisions set forth in TWA Exhibits 42, 42a, 43 43a and DX262) and Simat, Helliesen & Eichner, Inc. (as revised by computer print- designated as Chapters 1, 2, 3 and 4 and revisions set forth in Attachment A to tter, dated November 16, 1967, from Mr. Simat to Mr. Hayes) in order to facilitate ev and analysis of the Simat, Helliesen & Eichner, Inc. report. These schedules ot indicate instances where calculations by C&C or SHE either resulted in amounts h were rounded to zero or resulted in no net changes in amounts.

E A:

Changes in "other transportation revenues" are set forth separately by estic and international division by SHE, but not by C&C. For purposes of s comparison, changes in "other revenues," which were determined by C&C to be of changes in total passenger revenues, have been allocated to the respective isions by applying this 5% rate to the change in each division's passenger enues.

Additional 1959 "incidental revenues" determined by C&C to be $.2 million Chapter III, "Earlier receipt of B131's and B331's," have been allocated lly to each division.

E B:

The caption "Depreciation - jet aircraft" on these comparative schedules ludes the following changes for each assumption:

	6 B331's	Earlier B131's and B331's	20 CV880's	30 CV880's	Total
ight equipment depreciation and expendable spare parts obsolescence	$14.80	$3.10	$6.50	$15.10	$39.50
preciation of ground property and equipment			.30		.30
ortization of developmental and preoperating expenses			1.20	3.10	4.30
	$14.80	$3.10	$8.00	$18.20	$44.10

C&C showed separate amounts for these categories in Chapters II and III, combined them in a single amount in Chapters IV and V. Since SHE accepted amounts shown above as their "added depreciation and amortization costs," their rease in ground property and equipment depreciation is apparently overstated.

BY INDIVIDUAL CARRIER AND CARRIER GROUP: CALENDAR YEARS 1954-64

Table 16. AMERICAN AIRLINES, INC., DOMESTIC OPERATIONS

Item	1954	1955	1956	1957	1958	1959	1960	1961	1962	1963	1964
ALL SERVICES											
Passenger revenue ton-miles (000)	324,045	408,787	460,660	478,817	466,076	533,836	597,616	566,688	607,623	611,883	762,467
Freight revenue ton-miles (000)	53,957 1/	67,030 1/	72,346 1/	80,466	91,177	100,571	112,325	125,014	153,824	160,359	187,137
Express revenue ton-miles (000)	8,581 1/	11,083 1/	10,750 1/	8,999	9,608	10,531	12,058	11,878	15,031	13,492	13,829
U.S. plus foreign mail rev. ton-miles (000)	16,472 1/	18,102 1/	20,042 1/	19,884	20,249	22,549	23,455	25,234	30,862	32,116	33,478
Excess baggage revenue ton-miles (000)	1,660 1/	1,874 1/	1,568 1/	2,314	5,486	5,749	5,888	4,946	3,765	3,078	2,914
Over-all revenue ton-miles (000)	404,715	508,876	567,416	590,480	592,596	673,236	731,383	734,676	812,426	821,016	999,825
Over-all available ton-miles (000)	671,080	838,896	938,342	1,034,073	1,038,034	1,113,268	1,188,108	1,344,182	1,536,898	1,707,888	2,044,458
Total number of employees	15,690	18,474	20,121	20,407	20,970	21,468	21,563	21,442	21,497	22,564	23,295
SCHEDULED SERVICE											
Revenue passenger-miles:											
First-class (000)	2,617,360	3,110,727	3,382,696	3,496,052	3,806,373	3,538,114	3,458,085	2,645,608	2,256,608	2,217,079	2,895,488
Coach plus economy (000)	734,500	1,155,235	1,410,327	1,540,287	1,680,497	2,082,311	2,759,167	2,672,678	3,102,321	4,514,598	5,127,983
Total revenue passenger-miles (000)	3,371,860	4,265,962	4,793,023	5,036,338	4,890,870	5,621,425	6,217,252	5,318,286	6,358,929	7,038,010	7,973,471
Coach plus economy as percent of total	22.4	27.1	29.4	30.6	34.4	37.1	44.7	55.5	64.5	64.2	64.3
Available seat-miles:											
First-class (000)	3,888,073	4,628,270	5,055,256	5,346,984	4,983,358	5,206,380	5,670,187	4,708,072	4,393,977	4,475,886	5,116,238
Coach plus economy (000)	1,065,589	1,645,935	1,946,673	2,210,219	2,424,855	2,770,682	3,919,172	4,937,088	6,561,188	7,533,395	8,862,714
Total available seat-miles (000)	4,953,662	6,274,205	7,001,929	7,737,203	7,408,213	7,979,062	9,589,358	9,639,099	11,159,805	12,008,642	13,978,952
Revenue passenger load factor:											
First-class (%)	67.3	67.2	66.9	65.0	69.3	67.8	61.0	56.2	51.1	49.6	56.6
Coach plus economy (%)	70.6	70.2	72.4	69.7	69.3	75.2	72.4	54.1	48.3	59.9	57.9
Total revenue passenger load factor (%)	68.1	68.0	68.5	64.9	66.0	70.4	65.3	62.4	57.0	58.6	57.0
Revenue passengers:											
Originations (000)	5,814	7,235	7,668	7,306	7,191	7,633	8,080	7,376	7,358	8,581	8,576
Enplanements (000)	y/	y/	y/	8,083	7,887	8,653	8,493	7,985	8,581	9,956	9,956
Revenue ton-miles:											
Passenger (000)	323,165	408,532	459,875	478,452	466,633	533,367	596,433	568,887	606,681	668,196	767,488
Freight (000)	53,910	67,021	72,203	80,468	91,160	100,501	112,284	124,989	153,747	160,858	187,115
Express (000)	8,581	11,083	10,750	8,999	9,608	10,531	12,058	11,878	15,031	13,492	13,829
Priority U.S. mail (000)	14,349	15,595	17,562	17,736	17,894	19,971	20,986	22,683	27,856	27,842	29,779
Nonpriority U.S. mail (000)	2,123	2,507	2,480	2,148	2,355	2,578	3,069	3,308	4,007	4,376	4,709
Foreign mail (000)	-	-	-	-	-	-	-	-	-	-	-
Excess baggage (000)	1,660	1,874	1,568	2,314	5,486	5,749	5,888	4,946	3,765	3,078	2,914
Over-all revenue ton-miles (000)	405,788	508,602	566,514	599,697	592,136	672,697	748,060	730,844	808,087	879,000	1,005,134
Over-all capacity and load factor:											
Over-all available ton-miles (000)	669,940	838,496	936,987	1,033,145	1,035,805	1,112,514	1,323,097	1,338,189	1,531,665	1,708,258	2,038,731
Over-all revenue load factor (%)	60.6	60.7	60.5	57.7	57.1	60.5	56.5	54.6	52.8	51.7	49.3
Aircraft revenue miles and hours:											
All-first-class service (000)	79,519	93,477	100,568	106,873	90,983	75,167	63,613	36,495	17,306	15,129	13,588
All-coach & all-economy services (000)	13,816	22,356	24,868	27,383	27,827	31,100	33,501	8,748	4,644	3,582	2,880
Mixed-class service (000)	-	-	-	14	5,012	20,287	45,295	66,582	93,514	101,318	113,240
All-cargo service (000)	3,998	4,586	5,145	5,699	4,838	7,041	7,883	7,655	8,582	8,588	8,588
Over-all aircraft revenue miles (000)	97,893	119,417	130,575	140,169	130,610	125,535	130,338	117,481	125,987	130,738	137,908
Over-all aircraft revenue hours	413,972	503,395	543,297	576,498	538,118	486,910	460,578	377,366	368,893	357,198	357,096
Over-all performance factor & departures:											
Aircraft miles scheduled (000)	97,739	120,589	130,379	141,955	131,927	126,912	133,016	120,013	128,345	130,369	140,173
Scheduled aircraft miles completed (000)	95,801	118,381	129,183	139,139	129,690	126,330	129,488	116,688	125,107	130,099	139,411
Percent scheduled aircraft miles completed	98.0	98.2	97.7	98.0	98.3	98.1	97.3	97.2	97.5	98.3	98.0
Aircraft revenue departures performed	320,373	352,589	365,148	373,998	335,534	322,910	323,680	276,405	271,756	257,588	253,706
Averages (passengers, seats, etc.):											
Revenue passengers per aircraft	36.1	37.4	38.8	37.5	38.5	47.4	51.1	53.9	56.1	57.4	60.6
Available seats per aircraft	53.3	54.6	55.8	57.7	59.9	67.3	78.3	87.8	91.0	98.1	101.6
Over-all revenue load per aircraft (tons)	4.2	4.3	4.3	4.2	4.5	5.4	5.7	6.2	6.4	6.7	7.2
Over-all capacity per aircraft (tons)	6.9	7.0	7.2	7.4	7.9	8.9	10.2	11.4	12.2	13.0	14.8
Over-all flight stage length (miles)	383.9	438.7	457.6	474.8	389.3	388.8	458.7	496.8	463.7	467.4	484.7
On-line passenger trip length (miles)	580.0	589.6	622.6	671.0	680.1	735.5	774.4	781.2	793.1	837.0	847.7
NONSCHEDULED SERVICE											
Revenue passenger-miles (000)	8,156	8,158	7,503	3,953	15,191	4,938	23,508	46,253	37,165	59,614	77,983
Available seat-miles (000)	9,572	8,738	9,552	4,615	17,995	5,580	41,143	52,911	42,388	34,987	36,714
Revenue [illegible] operations (000)	-	-	-	-	17	6	23	37	23	23	23
Average passenger trip length (miles)	1,165.6	537.7	899.7	847.4	908.7	1,130.8	1,478.3	1,861.6	1,385.7	1,547.1	2,093.8
Passenger revenue ton-miles (000)	88	253	789	368	1,443	600	1,183	1,401	1,538	4,782	5,081
Freight revenue ton-miles (000)	(57) y/	(19) y/	(111) y/	78	17	70	41	25	77	69	22
Other revenue ton-miles (000)	-	-	-	-	-	-	-	-	-	-	-
Over-all revenue ton-miles (000)	387	958	1,373	1,446	1,460	1,270	1,883	2,138	1,689	4,824	5,081
Over-all available ton-miles (000)	1,148	1,554	1,773	1,888	2,592	1,854	3,011	3,773	3,087	4,824	5,081
Over-all aircraft revenue miles (000)	828	880	1,000	1,158	1,388	1,268	1,857	2,437	2,448	2,983	3,219
Over-all aircraft revenue hours	1,811	895	908	635	1,588	1,268	1,857	2,437	2,448	2,983	3,219

1/ Includes all classes of property transported in nonscheduled service. No separation was required in prescribed reporting prior to 1957.
Does not include nonscheduled service.
y/ Not reported before 1957.

AX-1108

TWA Ex. 355, page 1
(Comparative Profit Study-TWA with AAL & UAL)

EXHIBIT

COMPARATIVE PROFIT STUDY
1959 - 1963
1964 - 1965
TWA INTERNATIONAL - PAA-ATLANTIC
TWA DOMESTIC - AMERICAN AND UNITED

	Operating Profits		
	1964	1965	Average
	(Millions)		
TWA International	$34.6	$47.6	$41.1
TWA Domestic	50.9	49.8	50.3
PAA-Atlantic	26.2	33.7	29.9
American Domestic	61.2	70.9	66.1
United Domestic	72.3	45.0	58.7

	1964-1965 Average Operating Profits (Millions)	Ratio, TWA to Other
TWA International	$ 41.1	
PAA-Atlantic	29.9	1.37
TWA Domestic	50.3	
American and United Domestic	124.8	.40

	Operating Profits (Losses)					
	1959	1960	1961	1962	1963	Total
	(Millions)					
PAA-Atlantic	$17.5	$16.6	$ 4.5	$12.5	$33.3	$ 84.4
American and United* Domestic	43.6	27.8	22.2	34.1	71.2	198.9
TWA International	(-7.8)	17.1	(-13.5)	15.3	23.4	34.5
TWA Domestic	26.3	(-0.9)	(-24.2)	(-7.4)	17.5	11.3

	1959-1963 Profits (Millions)	1964-1965 Profit Ratio, TWA to Other	Calculated 1959-1963 TWA Profits (Millions)
PAA-Atlantic	$ 84.4	1.37	$115.6
American and United Domestic	198.9	.40	79.6

Comparison Airline	Calculated 1959-1963 TWA Profits (Millions)	Actual TWA Profits		Difference (Millions)
PAA-Atlantic	$115.6	TWA International	$34.5	$ 81.1
American and United Domestic	79.6	TWA Domestic	11.3	68.3
				$149.4

Source: CAB Air Carrier Financial Statistics 1960-1965. (page numbers on attached sheet.)

* Includes Capital 1959-1961.

TWA Ex. 355, page 2
(Comparative Profit Study-TWA with AAL & UAL)

Source: 1959-1960
CAB Quarterly Report of Air Carrier Financial Statistics.
1959 - Report of December 1960, pages 19, 20, 34 and 36.
1960 - Report of December 1961, pages 19, 34, 36 and 38.

1961-1965
CAB Air Carrier Financial Statistics issued quarterly,
quarter ended December 31 and 12 months ended December 31.
1961 - Report of 1962, pages 6, 7, 25 and 27.
1962 - Report of 1963, pages 6, 7, 25 and 27.
1963 - Report of 1964, pages 6, 7, 24 and 26.
1964 - Report of 1965, pages 6, 7, 24 and 26.
1965 - Report of 1966, pages 6, 7, 24 and 25.

TWA Ex. 356, page 1
(Comparative Profit Study-TWA with All Other Domestic Trunks)

COMPARATIVE PROFIT STUDY
1959 - 1963
1964 - 1965
TWA INTERNATIONAL - PAA-ATLANTIC
TWA DOMESTIC - ALL DOMESTIC TRUNKS (EXCEPT TWA)

	Operating Profits		
	1964	1965	Average
	(Millions)		
TWA International	$ 34.6	$ 47.6	$ 41.1
TWA Domestic	50.9	49.8	50.3
PAA-Atlantic	26.2	33.7	29.9
All Domestic Trunks (except TWA)	245.9	366.4	306.2

	1964-1965 Average Operating Profits (Millions)	Ratio, TWA to Other
TWA International	$ 41.1	1.37
PAA-Atlantic	29.9	
TWA Domestic	50.3	
All Domestic Trunks (except TWA)	306.2	.16

	Operating Profits (Losses) (Millions)					
	1959	1960	1961	1962	1963	Total
PAA-Atlantic	$17.5	$16.6	$ 4.5	$12.5	$ 33.3	$ 84.4
TWA International	(-7.8)	17.1	(-13.5)	15.3	23.4	34.5
TWA Domestic	26.3	(-0.9)	(-24.2)	(-7.4)	7.5	11.3
All Domestic Trunks (except TWA)	78.9	35.7	13.1	82.3	111.7	321.7

	1959-1963 Profits (Millions)	1964-1965 Profit Ratio, TWA to Other	Calculated 1959-1963 TWA Profits (Millions)
PAA-Atlantic	$ 84.4	1.37	$115.6
All Domestic Trunks (except TWA)	321.7	.16	51.4

Comparison Airlines	Calculated 1959-1963 TWA Profits (Millions)	Actual TWA Profits		Difference (Millions)
PAA-Atlantic	$115.6	TWA International	$34.5	$ 81.1
All Domestic Trunks (except TWA)	51.4	TWA Domestic	11.3	40.1
				$121.2

Source: CAB Air Carrier Financial Statistics, 1960-1965 (page numbers on attached sheet)

parative Profit Study-TWA with All Other Domestic Trunks)

ce: 1959-1960

CAB Quarterly Report of Air Carrier Financial Statistics.

1959 - Report of December 1960, pages 15, 19, 34 and 36.

1960 - Report of December 1961, pages 15, 19, 34 and 36.

1961-1965

CAB Air Carrier Financial Statistics issued quarterly, quarter ended December 31 and 12 months ended December 31.

1961 - Report of 1962, pages 2, 6, 25 and 27.

1962 - Report of 1963, pages 2, 6, 25 and 27.

1963 - Report of 1964, pages 2, 6, 24 and 26.

1964 - Report of 1965, pages 2, 6, 24 and 26.

1965 - Report of 1966, pages 2, 6, 24 and 25.

(Comparison TWA Actual Jet Load Factors
vs. S.H.E. Marginal Passenger Mile Factors)

COMPARISON OF TWA ACTUAL JET
LOAD FACTORS AND S.H.E. VOLUME B
MARGINAL PASSENGER MILE FACTORS, JET

Year	A/c Type	TWA Actual (1)	SHE Volume B (2)
1959	B-707-131	83.1%	17.1%
1960	B-707-131	69.4%	21.9%
	B-707-331	64.5%	20.4%
1961	B-707-131	52.6%	22.1%
	B-707-331	49.3%	20.8%
	CV. 880	65.5%	20.6%
	B-720B	48.1%	22.1%
1962	B-707-131	48.6%	23.2%
	B-707-331	41.8%	22.4%
	CV. 880	56.2%	21.7%
	B-707-131B	42.1%	23.2%
	B-707-331B	36.7%	22.4%
	B-720B	49.8%	23.2%
1963	B-707-131	55.7%	22.5%
	B-707-331	43.1%	21.0%
	CV. 880	57.3%	21.0%
	B-707-131B	[illegible]	22.5%
	B-707-331B	44.3%	21.0%

(1) TWA Monthly Operating Statistics 370-M, TWA Exhibit C&C (3).

(2) S.H.E. P&L Program and Data Cards for Volume B, p. III-25.

(TWA B-131 Load Factors, April-July 1959)

LOAD FACTORS OF TWA BOEING 707-131 AIRCRAFT, APRIL-JULY 1959

	Seat Miles	Passenger Miles	Load Factor
April	30,161,049	28,985,591	96.1%
May	67,453,616	63,564,676	94.2%
June	100,065,054	95,873,847	95.8%
July	137,630,069	123,371,931	89.6%

Source: TWA Monthly Operating Statistics 370-M, C&C (3).

TWA Ex. 420
(Price Waterhouse Comparison - C. & C. (Revised) and S.H.E.)

TRANS WORLD AIRLINES, INC.

COMPARISON OF CHANGE IN OPERATING PROFITS IN REPORT OF COVERDALE & COLPITTS (REVISED) AND IN REPORTS OF SIMAT, HELLIESEN & EICHNER, INC.

PRICE WATERHOUSE & CO.

TWA Ex. 420
(Price Waterhouse Comparison - C. & C. (Revised) and S.H.E.)

TRANS WORLD AIRLINES, INC.

COMPARISON OF CHANGE IN
OPERATING PROFITS IN REPORT OF
COVERDALE & COLPITTS (REVISED)
AND IN REPORTS OF
SIMAT, HELLIESEN & EICHNER, INC.

FOR THE PERIOD 1959-1963

* * * * *

This comparison reflects the following:

Coverdale & Colpitts:

Chapters II - V, as set forth in "Comparison of Change in Operating Profits in Reports of Coverdale & Colpitts and Simat, Helliesen & Eichner, Inc. (Revised)," TWA Exhibit 345A.

Simat, Helliesen & Eichner, Inc.:

1. Supplemental Report, Volume B, Part III, pages III-25, -26 and -27.
2. TWA Exhibit 345A, as revised by letter, dated January 23, 1968, from Mr. Ronald J. Cayo of Donovan Leisure Newton & Irvine to Mr. Dudley B. Tenney of Cahill, Gordon, Sonnett, Reindel & Ohl.

The Supplemental Report furnished by Simat, Helliesen & Eichner, Inc. relates to the domestic division.

The international division, which has not been revised, has been included in this comparison in order to set forth the total differences between the estimates of Coverdale & Colpitts and Simat, Helliesen & Eichner, Inc.

TWA Ex. 420
(Price Waterhouse Comparison - C. & C. (Revised) and S.H.

TRANS WORLD AIRLINES, INC.

COMPARISON OF CHANGE IN OPERATING PROFITS IN REPORT OF COVERDALE & COLPITTS (REVISED) AND IN REPORTS OF SIMAT, HELLIESEN & EICHNER, INC.

FOR THE PERIOD 1959-1963

CONTENTS

	Combining schedules	Comparison schedules - by year	Summary schedules
COMPARISONS OF COVERDALE & COLPITTS AND SIMAT, HELLIESEN & EICHNER, INC.:			
Domestic and international			
Domestic and international	A-1		A
Domestic			
Domestic (C&C only)		B	B
Domestic (SHE only)	B-1		
	B-2		
International			
		C (by assumption)	C
COMPARISONS OF SIMAT, HELLIESEN & EICHNER, INC. REPORTS:-			
Added jet:			
Domestic			
Domestic			D
Domestic		D-1	
	D-2		
Deleted piston:			
Domestic			
Domestic			E
Domestic		E-1	
	E-2		

AX-1117

TWA Ex. 420, Schedule A
(Price Waterhouse Comparison - C. & C. (Revised) and S.H.E.)

DOMESTIC AND INTERNATIONAL

TRANS WORLD AIRLINES, INC.

COMPARISON OF CHANGE IN OPERATING PROFITS IN REPORT OF COVERDALE & COLPITTS (REVISED) AND IN REPORTS OF SIMAT, HELLIESEN & EICHNER, INC.

(Amounts in millions)

	C&C	S H E		*	
	TWA Exh. 345A	TWA Exh. 345A	TWA Exh. 345A & Supplemental report	TWA Exh. 345A	TWA Exh. 345A & Supplemental report
portation revenues:					
ssenger revenues	$212.20	$ 7.61	($50.07)	$204.59	$262.27
her	10.80	.36	(2.52)	10.44	13.32
nding		.02	.02	(.02)	(.02)
Total transportation revenues	223.00	7.99	(52.57)	215.01	275.57
rating expenses:					
ying operations	26.90		)		
rect maintenance	17.00	14.58 **	18.54)	32.32	28.36
plied maintenance burden	3.00		)		
surance	5.40	4.99	)	.41	
preciation - jet aircraft	44.10	44.10	49.13)		.37
nding		.01	)	(.01)	
	96.40	63.68	67.67	32.72	28.73
rcraft servicing	9.40	(1.78)	2.14	11.18	7.26
surless and related costs	16.00	2.54)	2.73)	14.20	17.18
her passenger servicing		(.74))	(3.91))		
affic servicing	10.70	(8.46)	(11.08)	19.16	21.78
rviting administration	1.10	(.29)	(.23)	1.39	1.33
neration and sales	21.00	3.15	(1.93)	17.85	22.93
vertising and publicity	7.90	2.29	.83	5.61	7.07
neral and administrative	6.20	.77	.36	5.43	5.84
und equipment maintenance nd depreciation	.30	.95	1.08	(.65)	(.78)
nding		.03	.08	(.03)	(.08)
	72.60	(1.54)	(9.93)	74.14	82.53
Expenses covered in both reports	169.00	62.14	57.74	106.86	111.26
preciation - piston aircraft		(14.05)	(14.40)	14.05	14.40
rtization	2.30			2.30	2.30
Total operating expenses	171.30	48.09	43.34	123.21	127.96
Change in operating profits	$ 51.70	($40.10)	($95.91)	$ 91.80	$147.61

*: Schedule A, TWA Exh. 345A and Schedule A-1 attached.
over(under) SHE.
** $1.2 million additional elimination of B331B flying operations expense set forth in the letter dated January 23, 1968 from Mr. Cayo to Mr. Tenney.

TWA Ex. 420, Schedule D
(Price Waterhouse Comparison - C. & C. (Revised) and S.H.E.)
ADDED JET

TRANS WORLD AIRLINES, INC.

COMPARISON OF CHANGE IN DOMESTIC OPERATING PROFITS
FROM ADDED JET SERVICES IN REPORTS OF
SIMAT, HELLIESEN & EICHNER, INC.

(Amounts in millions)

	TWA Exh. 345A	Supplemental Report	*
Transportation revenues:			
Passenger revenues	$136.53	$ 75.99	$60.54
Other	6.82	3.79	3.03
Rounding	.01	.01	
Total transportation revenues	143.36	79.79	63.57
Operating expenses:			
Flying operations, Direct maintenance, Applied maintenance burden	99.68	100.66	(.98)
Insurance(1)	3.60)		
Depreciation(1)	31.70)	35.00	.30
Rounding			
	134.98	135.66	(.68)
Aircraft servicing	15.73	18.15	(2.42)
Stewardess and related costs	5.44	5.54	(.10)
Other passenger servicing	7.87	4.59	3.28
Traffic servicing	8.08	4.85	3.23
Servicing administration	1.26	1.23	.03
Reservation and sales	12.42	7.11	5.31
Advertising and publicity	3.18	1.69	1.49
General and administrative	8.15	7.51	.64
Ground equipment maintenance and depreciation	5.34	5.36	(.02)
Rounding	.02	.05	(.03)
	67.49	56.08	11.41
Total operating expenses	202.47	191.74	10.73
Decrease in operating profits from added jet services	($ 59.11)	($111.95)	$52.84

(1) Depreciation and insurance are combined in the Supplemental Report.
Source: Schedule D-1 attached

* TWA Exh. 345A over(under) Supplemental Report.

TWA Ex. 420, Schedule E
(Price Waterhouse Comparison - C. & C. (Revised) and S.H.E.)

DELETED PISTON

TRANS WORLD AIRLINES, INC.

COMPARISON OF CHANGE IN DOMESTIC OPERATING PROFITS
FROM DELETED PISTON SERVICES IN REPORTS OF
SIMAT, HELLIESEN & EICHNER, INC.

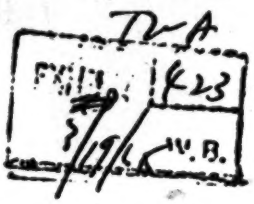
(Amounts in millions)

	TWA Exh.345A	Supplemental Report	*
portation revenues:			
senger revenues	$174.02	$171.16	$2.86
ther	8.71	8.56	.15
nding	(.01)	(.01)	
Total transportation revenues	182.72	179.71	3.01
rating expenses:			
lying operations	)		
irect maintenance	) 104.00	101.02	2.98
plied maintenance burden	)		
surance (1)	.34		.34
nding	(.01)		(.01)
	104.33	101.02	3.31
ircraft servicing	23.21	21.71	1.50
tewardess and related costs	5.38	5.29	.09
ther passenger servicing	11.03	10.92	.11
raffic servicing	18.25	17.64	.61
ervicing administration	2.20	2.11	.09
eservation and sales	16.78	16.55	.23
dvertising and publicity	3.56	3.53	.03
eneral and administrative	9.79	9.56	.23
round equipment maintenance and depreciation	5.24	5.13	.11
nding		(.02)	.02
	95.44	92.42	3.02
	199.77	193.44	6.33
epreciation and insurance (1)	10.55	10.90	(.35)
Total operating expenses	210.32	204.34	5.98
Increase in operating profits from deleted piston services	$ 27.60	$ 24.63	$2.97

Depreciation and insurance are combined in the Supplemental Report.
rce: Schedule E-1 attached

* TWA Exh.345A over(under) Supplemental Report.

TWA Ex. 423, page 1
(Late Evening Flights-TWA 1961-1963)



Schedules of Flight 15

Source: Employees' Timetables
(TWA Exhibit 4C(3))

Employees' Timetable -- Effective Date	Airport	Arrival Time	Departure Time
6/1/61	IDL		11:15 P.M.
	ORD	12:25 A.M.	12:55 A.M.
	LAX	2:50 A.M.	
7/2/61	IDL		11:15 P.M.
	ORD	12:25 A.M.	1:00 A.M.
	LAX	2:55 A.M.	
8/1/61	IDL		11:15 P.M.
	ORD	12:25 A.M.	1:00 A.M.
	LAX	2:55 A.M.	
9/1/61	IDL		11:15 P.M.
	ORD	12:25 A.M.	1:00 A.M.
	LAX	2:55 A.M.	
9/24/61	IDL		11:15 P.M.
	ORD	12:25 A.M.	1:05 A.M.
	LAX	2:00 A.M.	2:30 A.M.
	SFO	3:33 A.M.	
10/2/61	IDL		11:15 P.M.
	ORD	12:25 A.M.	1:05 A.M.
	LAX	2:00 A.M.	2:30 A.M.
	SFO	3:33 A.M.	
10/29/61	IDL		11:15 P.M.
	ORD	12:30 A.M.	1:15 A.M.
	LAX	3:15 A.M.	3:45 A.M.
	SFO	4:50 P.M.	

Effective Date	Airport	Arrival Time	Departure Time
12/1/61	IDL		11:15 P.M.
	ORD	12:30 A.M.	1:15 A.M.
	LAX	3:15 A.M.	3:45 A.M.
	SFO	4:50 A.M.	
1/1/62	IDL		11:15 P.M.
	ORD	12:30 A.M.	1:15 A.M.
	LAX	3:15 A.M.	3:45 A.M.
	SFO	4:50 A.M.	
2/1/62	IDL		11:15 P.M.
	ORD	12:30 A.M.	1:15 A.M.
	LAX	3:15 A.M.	3:45 A.M.
	SFO	4:50 A.M.	
4/1/62	IDL		11:15 P.M.
	ORD	12:30 A.M.	1:15 A.M.
	LAX	3:15 A.M.	3:45 A.M.
	SFO	4:55 A.M.	
4/29/62: (Through 6/26/62)	IDL		11:10 P.M.
	ORD	12:20 A.M.	1:10 A.M.
	LAX	3:08 A.M.	3:40 A.M.
	SFO	4:47 A.M.	
(6/27/62)	IDL		11:15 P.M.
	ORD	12:20 A.M.	1:10 A.M.
	LAX	2:55 A.M.	3:30 A.M.
	SFO	4:33 A.M.	
	(Terminates LAX After July 3 Origin)		
7/1/62	IDL		11:10 P.M.
	ORD	12:15 A.M.	12:55 A.M.
	LAX	2:40 A.M.	3:15 A.M.
	SFO	4:18 A.M.	
8/2/62	IDL		11:00 P.M.
	ORD	12:05 A.M.	12:45 A.M.
	LAX	2:30 A.M.	3:15 A.M.
	SFO	4:18 A.M.	

TWA Ex. 423, page 3
(Late Evening Flights-TWA 1961-1963)

Effective Date	Airport	Arrival Time	Departure Time
8/29/62	IDL		11:00 P.M.
	ORD	12:05 A.M.	12:45 A.M.
	LAX	2:30 A.M.	3:15 A.M.
	SFO	4:18 A.M.	
10/1/62	IDL		11:00 P.M.
	ORD	12:05 A.M.	12:45 A.M.
	LAX	2:30 A.M.	3:15 A.M.
	SFO	4:18 A.M.	
10/28/62	IDL		10:55 P.M.
	ORD	11:59 P.M.	12:40 A.M.
	LAX	2:35 A.M.	3:15 A.M.
	SFO	4:22 A.M.	
12/1/62	IDL		10:55 P.M.
	ORD	11:59 P.M.	12:40 A.M.
	LAX	2:35 A.M.	3:15 A.M.
	SFO	4:22 A.M.	
1/8/63	IDL		10:55 P.M.
	ORD	11:59 P.M.	12:40 A.M.
	LAX	2:25 A.M.	3:15 A.M.
	SFO	4:19 A.M.	
3/1/63	IDL		10:55 P.M.
	ORD	11:59 P.M.	12:40 A.M.
	LAX	2:25 A.M.	3:15 A.M.
	SFO	4:15 A.M.	
4/28/63	IDL		10:55 P.M.
	ORD	11:59 P.M.	12:40 A.M.
	LAX	2:28 A.M.	3:15 A.M.
	SFO	4:17 A.M.	
6/1/63	IDL		10:55 P.M.
	ORD	11:59 P.M.	12:40 A.M.
	LAX	2:28 A.M.	3:15 A.M.
	SFO	4:17 A.M.	

Effective Date	Airport	Arrival Time	Departure Time
7/1/63	IDL		10:55 P.M.
	ORD	11:59 P.M.	12:40 A.M.
	LAX	2:28 A.M.	3:15 A.M.
	SFO	4:17 A.M.	
	(First Class Seats Available Saturday and Sunday Only)		
8/1/63	IDL		10:50 P.M.
	ORD	11:54 P.M.	12:40 A.M.
	LAX	2:25 A.M.	3:15 A.M.
	SFO	4:15 A.M.	
	(First Class Seats Available Saturday and Sunday Only)		
8/22/63	IDL		10:50 P.M.
	ORD	11:54 P.M.	12:40 A.M.
	LAX	2:25 A.M.	3:15 A.M.
	SFO	4:15 A.M.	
	(First Class Available Saturday and Sunday Only)		
9/16/63	IDL		10:50 P.M.
	ORD	11:54 P.M.	12:40 A.M.
	LAX	2:25 A.M.	3:15 A.M.
	SFO	4:15 A.M.	
	(First Class Available Saturday and Sunday Only)		
10/1/63	IDL		10:50 P.M.
	ORD	11:54 P.M.	12:40 A.M.
	LAX	2:25 A.M.	3:15 A.M.
	SFO	4:15 A.M.	
	(First Class Available Saturday and Sunday Only)		
10/27/63	IDL		10:50 P.M.
	ORD	12:01 A.M.	12:40 A.M.
	LAX	2:32 A.M.	3:15 A.M.
	SFO	4:17 A.M.	
	(First Class Available Saturday and Sunday Only)		

TWA Ex. 424
(Cargo vs. Passenger Revenue-TWA Late Evening Flights)

ANALYSIS OF REVENUES
TWA FLIGHT 15
FOR DEPARTURES INCLUDED IN
S.H.E. TABLE G.G.
JANUARY 1962

TYPE OF TRAFFIC	YIELD FACTOR		REVENUES
PASSENGER			
$148,369(1) ÷ 1.05	--	=	$141,304
AIRMAIL			
117893 Ton Miles(2) X	$0.324(3)	=	$ 38,197
EXPRESS			
43,635 Ton Miles(2) X	$0.364(3)	=	$ 15,883
FREIGHT			
99,554 Ton Miles(2) X	$0.190(3)	=	$ 18,915
P. C. MAIL			
22,436 Ton Miles(2) X	$0.324(3)	=	$ 7,269
BAGGAGE			
$141,304 X	$0.0109(3)	=	$ 1,540
TOTAL REVENUES			$223,108
CARGO REVENUE ..... $ 81,804 PASSENGER REVENUE $141,304		=	58%

NOTES: (1) Total Revenue from S.H.E. Table GG
(2) Attachment B
(3) Attachment C

SOURCES:
S.H.E. Table G.G.
TWA On Board Reports, Form 3-422M, January 1962, attached.
TWA Financial Report January, 1962,
Schedule 2-1M and 3-1M. TWA Exhibits C & C (2)(37)

EXHIBIT 42
D
3/9/64 W.B.

COMPARISON OF SELECTED A/C NUMBERS FROM APPENDIX A

/c Type	Month/Year	A/C Num.	Avg. Stage Length	Avg. L.F.	Total Revenues	Total Op. Expenses	Table C.C. Departures	Profit/Loss
v. 880	June 1963	050	734.81	57.91	$264,496	$228,839	108	$35,657
v. 880	Nov. 1961	030	734.12	60.53	$264,858	$278,581	109	($13,723)
-131	Feb. 1960	090	2478.5	64.48	$288,179	$256,648	30	$31,531
-131	Mar. 1960	130	2474	65.90	$284,170	$277,588	29	$ 6,585

(Comparison of Selected A/C Numbers from S.H.E. Appendix

TWA Ex. 431, page 1
(Profitability of TWA A/C by Month - Computer Print-out)

C U M U L A T I V E C O M P U T E T S T W A APPENDIX A

YR	MO	CRAFT	TOTAL REV	A/C OPER	GRNDGIND	TOTAL OPER	PROFIT/LOSS	
59	04	13	1.536.640.75	399.533.78	350.360.51	749.894.29	786.746.46	
			1.536.640.75	399.533.78	350.360.51	749.894.29	786.746.46	*
59	05	13	3.365.800.59	1.189.657.60	769.955.17	1.959.612.77	1.406.187.82	
			3.365.800.59	1.189.657.60	769.955.17	1.959.612.77	1.406.187.82	*
59	06	13	5.090.128.13	1.766.430.21	1.180.802.31	2.947.232.52	2.142.895.61	
			5.090.128.13	1.766.430.21	1.180.802.31	2.947.232.52	2.142.895.61	*
59	07	13	5.862.875.58	2.342.802.28	1.398.475.76	3.741.278.04	2.121.597.54	
			5.862.875.58	2.342.802.28	1.398.475.76	3.741.278.04	2.121.597.54	*
59	08	13	9.721.971.42	3.694.089.73	2.340.555.43	6.034.645.16	3.687.326.26	
			9.721.971.42	3.694.089.73	2.340.555.43	6.034.645.16	3.687.326.26	*
59	09	13	9.720.972.27	3.805.043.51	2.374.500.91	6.179.544.42	3.541.427.85	
			9.720.972.27	3.805.043.51	2.374.500.91	6.179.544.42	3.541.427.85	*
59	10	13	9.308.076.41	3.871.716.24	2.296.777.00	6.168.493.24	3.139.583.17	
			9.308.076.41	3.871.716.24	2.296.777.00	6.168.493.24	3.139.583.17	*
59	11	13	7.462.278.04	3.727.290.76	1.922.278.48	5.649.569.24	1.812.709.40	
			7.462.278.04	3.727.290.76	1.922.278.48	5.649.569.24	1.812.709.40	*
59	12	13	7.722.497.31	3.773.000.11	1.973.833.45	5.746.833.56	1.975.663.75	
			7.722.497.31	3.773.000.11	1.973.833.45	5.746.833.56	1.975.663.75	*
			59.791.241.10	24.569.564.22	14.607.539.02	39.177.103.24	20.614.137.86	**

TWA Ex. 431, page 2
(Profitability of TWA A/C by Month - Computer Print-out)

C O V E R D A L E & C O L P I T T S I N A APPENDIX A

YR	MO	CRAFT	TOTAL REV	A/C OPER	GRND&IND	TOTAL OPER	PROFIT/LOSS	
60	01	13	8.153.390.35	3.706.925.31	2.296.357.76	6.003.283.07	2.150.107.28	
			8.153.390.35	3.706.925.31	2.296.357.76	6.003.283.07	2.150.107.28	*
60	02	13	5.832.039.18	3.135.288.92	1.719.564.39	4.854.853.31	977.185.87	
			5.832.039.18	3.135.288.92	1.719.564.39	4.854.853.31	977.185.87	*
60	03	13	6.644.018.01	3.631.661.64	2.004.109.90	5.635.771.54	1.308.246.47	
60	03	15	523.721.53	251.031.47	143.579.78	394.611.25	129.110.28	
			7.167.739.54	3.882.693.11	2.147.689.68	6.030.382.79	1.137.356.75	*
60	04	13	7.778.488.05	3.717.690.02	2.283.651.66	6.001.341.68	1.777.146.37	
60	04	15	674.251.50	265.917.92	177.299.49	443.217.41	231.034.09	
			8.452.739.55	3.983.607.94	2.460.951.15	6.444.559.09	2.008.180.46	*
60	05	13	8.394.037.48	4.122.393.89	2.497.814.21	6.620.208.10	1.773.829.38	
60	05	15	549.228.17	231.920.51	143.831.96	375.752.47	173.475.70	
			8.943.265.65	4.354.314.40	2.641.646.17	6.995.960.57	1.947.305.08	*
60	06	13	10.079.101.66	4.227.405.00	2.888.972.57	7.116.377.57	2.962.724.09	
60	06	15	844.485.97	275.969.74	213.159.42	489.129.16	355.356.81	
			10.923.587.63	4.503.374.74	3.102.131.99	7.605.506.73	3.316.080.90	*
60	07	13	10.053.377.33	4.250.335.14	2.892.329.78	7.142.664.92	2.910.712.41	
60	07	15	1.535.167.69	581.419.88	401.044.79	982.464.67	552.703.02	
			11.588.545.02	4.831.755.02	3.293.374.57	8.125.129.59	3.463.415.43	*
60	08	13	9.917.573.23	4.271.028.24	2.881.752.13	7.152.780.37	2.764.792.86	
60	08	15	1.991.962.55	766.512.27	516.837.97	1.283.350.24	708.612.31	
			11.909.535.78	5.037.540.51	3.398.590.10	8.436.130.61	3.473.405.17	*
60	09	13	8.999.030.87	4.061.993.62	2.665.168.55	6.727.162.20	2.271.868.67	
60	09	15	1.979.174.46	751.189.23	513.286.98	1.264.476.21	714.698.25	
			10.978.205.33	4.813.182.85	3.178.455.53	7.991.638.41	2.986.566.92	*

C O M P A R A T I V E P R O F I T S T A T E M E N T APPENDIX A

YR	MO	CRAFT	TOTAL REV	A/C OPER	ENGINE	TOTAL OPER	PROFIT/LOSS	
60	10	13	7.788.962.43	3.835.305.62	2.393.713.91	6.229.019.53	1.559.942.90	
60	10	15	1.747.139.74	792.472.40	476.321.31	1.268.793.71	478.346.03	
			9.536.102.17	4.627.778.02	2.870.035.22	7.497.813.24	2.038.288.93	
60	11	13	5.914.558.05	3.642.860.37	1.966.875.10	5.609.735.47	304.822.58	
60	11	15	1.238.395.47	745.767.25	364.736.31	1.110.503.56	127.891.91	
			7.152.953.52	4.388.627.62	2.331.611.41	6.720.239.03	432.714.49	*
60	12	13	6.576.451.22	3.740.260.27	2.113.262.72	5.853.542.99	722.908.23	
60	12	15	1.300.311.75	764.799.13	380.570.30	1.145.369.43	154.942.32	
			7.876.862.97	4.505.059.40	2.493.853.02	6.998.912.42	877.890.55	*
			108.514.906.67	51.770.147.54	31.934.261.02	83.704.408.36	24.810.497.83	**

TWA Ex. 431, page 3
(Profitability of TWA A/C by Month - Computer Print-out)

AX-1187

C O V E R D A L E & C O L P I T T S T W A APPENDIX A

YR	MO	CRAFT	TOTAL REV	A/C OPER	GRNDLING	TOTAL OPER	PROFIT/LOSS	
61	01	12	997.070.56	595.658.24	381.157.06	976.815.30	20.255.26	
61	01	13	6.599.753.52	3.354.938.35	2.297.842.61	5.652.780.96	946.972.56	
61	01	15	1.661.121.83	881.173.49	518.783.00	1.399.956.49	261.165.34	
			9.257.945.91	4.831.770.08	3.197.782.67	8.029.552.75	1.228.393.16	*
61	02	12	1.439.367.22	870.476.57	539.726.25	1.410.202.82	29.164.40	
61	02	13	3.636.349.62	2.376.418.51	1.340.465.68	3.716.884.19	80.534.57-	
61	02	15	857.748.16	644.643.43	294.581.10	939.224.53	81.476.37-	
			5.933.465.00	3.891.538.51	2.174.773.03	6.066.311.54	132.846.54-	*
61	03	12	2.760.477.62	1.457.036.57	1.017.493.33	2.474.529.90	285.947.72	
61	03	13	5.622.938.69	3.282.182.87	2.090.450.66	5.372.633.53	250.305.16	
61	03	15	1.462.418.42	939.075.66	499.394.28	1.438.469.94	23.948.48	
			9.845.834.73	5.678.295.10	3.607.338.27	9.285.633.37	560.201.36	*
61	04	12	3.080.336.57	1.655.288.34	1.131.908.51	2.787.196.85	293.139.72	
61	04	13	6.313.205.74	3.240.797.72	2.260.043.97	5.500.841.69	812.364.05	
61	04	15	1.160.737.22	737.215.09	382.524.53	1.119.739.62	40.997.60	
			10.554.279.53	5.633.301.15	3.774.477.01	9.407.778.16	1.146.501.37	*
61	05	12	4.569.326.81	2.569.420.97	1.775.440.16	4.344.861.13	224.467.68	
61	05	13	6.237.558.93	3.642.163.87	2.297.182.87	5.939.346.74	498.192.19	
61	05	15	1.148.614.52	726.629.36	378.667.19	1.105.296.55	43.317.97	
			11.955.482.26	6.740.214.20	4.449.290.22	11.189.504.42	765.977.84	*
61	06	12	5.887.949.20	2.979.607.86	2.191.010.09	5.170.617.95	717.331.25	
61	06	13	8.439.726.31	3.931.329.77	2.935.944.47	6.867.274.24	1.572.452.07	
61	06	15	1.423.556.60	694.948.54	425.600.93	1.120.749.47	302.807.13	
			15.751.232.11	7.605.886.17	5.552.755.49	13.158.641.66	2.592.590.45	*
61	07	12	5.837.373.23	3.274.267.79	2.262.374.37	5.536.642.16	300.736.07	
61	07	13	8.115.224.38	3.995.212.30	2.875.153.87	6.870.366.17	1.244.858.21	
61	07	15	1.097.623.49	580.723.66	329.226.14	915.950.00	181.673.49	
			15.050.226.10	7.850.203.95	5.466.754.38	13.322.958.33	1.727.267.77	*

TWA Ex. 431, page 4
(Profitability of TWA A/C by Month - Computer Print-out)

C O V E R D A L E & C O L P I T T S T W A APPENDIX A

YR	MO	CRAFT	TOTAL REV	A/C OPER	GROUNDING	TOTAL OPER	PROFIT/LOSS	
61	08	13	8.664.285.42	3.969.211.13	2.998.920.63	6.968.131.76	1.696.153.66	
61	09	15	1.481.349.90	674.116.40	430.985.96	1.105.102.36	376.247.54	
			17.040.981.55	8.222.601.69	6.027.997.80	14.250.599.49	2.790.382.06	*
61	09	12	6.961.959.82	3.939.076.32	2.750.355.87	6.689.432.19	272.567.63	
61	09	13	7.595.312.46	3.765.675.57	2.715.973.82	6.481.654.39	1.113.658.07	
61	09	15	1.258.630.84	575.890.11	304.285.92	940.146.03	318.544.81	
61	09	17	604.412.13	456.614.05	228.454.50	685.078.55	80.666.42-	
			16.420.415.25	8.737.226.05	6.059.069.11	14.796.311.16	1.624.104.09	*
61	10	12	6.567.774.18	3.610.304.03	2.616.098.36	6.426.402.39	141.371.79	
61	10	13	7.250.745.63	3.925.737.47	2.691.070.91	6.616.808.40	633.937.23	
61	10	15	799.545.99	449.653.04	250.855.24	699.909.08	99.636.91	
61	10	17	2.361.726.57	1.928.472.36	957.669.89	2.886.142.25	524.415.68-	
			16.979.792.37	10.113.567.72	6.515.694.40	16.629.262.12	350.530.25	*
61	11	12	5.869.969.90	3.707.682.00	2.420.450.43	6.128.132.43	238.162.53-	
61	11	13	4.725.421.19	3.021.163.56	1.906.964.75	4.929.128.31	202.207.12-	
61	11	15	1.113.758.43	802.470.21	394.384.11	1.196.854.32	83.095.89-	
61	11	17	875.125.40	846.333.69	364.635.64	1.210.969.53	335.844.13-	
			12.604.794.92	8.377.649.46	5.086.434.93	13.464.084.59	859.289.67-	*
61	12	12	6.086.382.67	3.701.548.59	2.421.139.95	6.122.688.54	36.305.87-	
61	12	13	5.485.534.10	2.906.290.20	2.008.267.50	4.914.557.70	570.976.40	
61	12	15	1.309.031.25	799.094.01	436.340.64	1.235.444.85	73.586.40	
61	12	17	1.049.686.37	832.675.25	394.697.52	1.227.372.77	177.686.40-	
			13.930.634.39	8.239.612.05	5.260.451.81	13.500.063.86	430.570.53	*
			155.325.084.12	85.927.866.33	57.172.835.12	143.100.701.45	12.224.382.67	**

AX-1139

C U V E K U A L E C C O L P I T T S T W A APPENDIX A

Yr	MO	CRAFT	TOTAL REV	A/C OPER	GRNDEIND	TOTAL OPER	PROFIT/LOSS	
82	01	12	6.467.6e7.16	3.859.191.28	2.608.720.09	6.467.911.37	244.21-	
82	01	13	5.534.956.60	2.766.396.94	2.054.795.75	4.821.192.69	713.764.11	
82	01	15	1.171.950.15	767.698.40	404.340.13	1.192.038.53	20.088.38-	
82	01	17	1.1e8.112.47	843.762.04	443.472.09	1.287.234.13	119.121.66-	
			14.342.e86.58	8.257.048.66	5.511.328.06	13.768.376.72	574.309.86	*
82	02	12	5.841.202.23	3.780.945.67	2.433.829.56	6.214.775.23	373.573.00-	
82	02	13	4.522.590.10	2.e60.050.73	1.811.269.94	4.471.320.67	61.269.43	
82	02	15	900.2e9.03	736.027.73	340.072.44	1.076.100.17	175.831.14-	
82	02	17	905.381.39	767.985.43	370.046.46	1.138.033.89	232.702.50-	
			12.179.392.75	7.945.009.56	4.955.220.40	12.900.229.96	720.837.21-	*
82	03	12	6.e34.133.98	4.099.e98.61	2.730.325.67	6.830.224.28	196.090.30-	
82	03	13	4.931.902.e6	2.829.107.04	1.961.080.34	4.790.187.38	141.715.48	
82	03	15	997.396.29	757.954.52	366.188.3e	1.124.142.88	126.746.59-	
82	03	17	1.012.265.22	851.739.71	416.941.70	1.268.681.41	256.416.19-	
			13.575.e98.35	8.538.e99.88	5.474.536.[illegible]	14.013.235.95	437.537.60-	*
82	04	12	6.226.930.75	3.688.1e6.81	2.530.563.35	6.218.762.16	8.168.59	
82	04	13	6.185.e52.16	3.350.1e7.33	2.440.e78.68	5.790.e46.01	394.806.15	
82	04	14	69.944.32	23.150.79	20.756.31	43.917.10	26.027.22	
82	04	15	574.020.36	478.263.63	207.033.80	685.317.43	111.297.07-	
82	04	17	1.305.102.99	879.e85.51	500.104.14	1.379.189.65	74.e86.66-	
			14.361.e50.58	8.418.e86.07	5.699.146.28	14.118.e32.35	243.e18.23	*
82	05	12	6.384.105.99	3.795.729.21	2.608.994.16	6.404.723.37	20.e17.38-	
82	05	13	6.879.272.54	3.e72.665.96	2.749.282.72	6.421.948.68	457.324.26	
82	05	14	815.420.09	363.488.e7	246.196.33	611.685.20	203.734.89	
82	05	17	1.267.446.72	859.937.59	474.965.08	1.334.902.67	67.506.95-	
			15.346.245.74	8.691.871.63	6.081.438.29	14.773.309.92	572.935.82	*
82	06	12	6.777.632.34	3.941.25e.36	2.739.223.09	6.680.481.45	97.350.89	
82	06	13	7.014.411.04	3.379.655.45	2.693.848.11	6.073.703.56	940.707.48	
82	06	14	797.7e7.17	370.6e3.92	245.e37.25	616.321.17	181.446.00	
82	06	17	1.495.761.00	e41.e51.16	523.255.05	1.364.906.21	131.454.79	
			16.085.771.55	8.532.846.89	6.201.763.50	14.734.e12.39	1.350.959.16	*

(Profitability of TWA A/C by Month - Computer Print-out)

"AX" Ex. 431, page 6

C U M U L A T I V E C O M P I L E D F O R T W A APPENDIX A

YR	MO	CRAFT	TOTAL REV	A/C OPER	GRNDEND	TOTAL OPER	PROFIT/LOSS	
62	07	13	6.482.473.61	3.164.928.63	2.493.342.90	5.658.271.53	824.202.08	
62	07	14	764.071.86	366.487.53	238.130.14	606.617.67	157.454.19	
62	07	17	1.353.934.43	847.671.88	486.306.39	1.333.978.27	19.956.16	
			14.847.253.29	8.202.486.30	5.785.344.02	13.987.830.32	859.422.97	*
62	08	12	6.640.834.43	3.778.560.22	2.661.884.45	6.440.444.67	200.389.76	
62	08	13	6.5o2.488.38	3.091.805.07	2.557.514.02	5.649.319.09	933.169.29	
62	08	14	5.302.629.26	1.737.211.45	1.735.579.45	3.472.790.90	1.829.838.36	
62	08	17	1.57Cx278.49	861.972.13	542.544.20	1.404.516.33	165.762.16	
			20.096.230.56	9.469.568.87	7.497.502.12	16.967.070.99	3.129.159.57	*
62	09	12	6.352.863.36	3.o70.319.12	2.564.847.04	6.235.166.16	117.697.20	
62	09	13	5.441.358.99	2.719.969.25	2.280.456.67	5.000.445.92	440.953.07	
62	09	14	5.452.973.31	2.486.653.50	1.866.565.27	4.357.218.77	1.095.754.54	
62	09	17	1.003.512.32	635.757.20	354.943.45	1.050.700.65	47.188.33-	
			18.250.747.98	9.566.719.07	7.066.812.43	16.653.531.50	1.597.216.48	*
62	10	12	5.835.965.94	3.710.023.90	2.459.412.83	6.169.436.73	333.470.79-	
62	10	13	5.217.389.19	2.928.332.52	2.259.372.54	5.087.705.06	129.664.13	
62	10	14	6.962.365.72	3.149.843.61	2.455.352.81	5.605.196.42	1.357.170.30	
62	10	17	232.677.13	477.104.60	85.625.71	562.730.31	330.053.18-	
			18.248.378.46	10.165.304.63	7.259.763.89	17.425.068.52	823.310.46	*
62	11	12	5.092.672.92	3.487.470.27	2.214.657.32	5.704.127.59	611.454.67-	
62	11	13	4.639.454.61	2.495.916.80	2.064.576.27	4.560.493.07	78.961.54	
62	11	14	7.401.463.93	3.165.620.77	2.608.750.67	5.774.371.44	1.627.092.49	
			17.133.591.46	9.151.007.84	6.887.984.26	16.038.992.10	1.094.599.36	*
62	12	12	5.493.912.46	3.672.527.09	2.378.315.80	6.050.842.95	556.930.47-	
62	12	13	4.628.656.55	2.472.809.54	2.035.378.37	4.508.187.91	120.468.64	
62	12	14	7.526.762.37	3.108.877.31	2.578.168.38	5.687.045.69	1.839.716.68	
			17.649.331.40	9.254.213.94	6.991.862.61	16.246.076.55	1.403.254.85	*
			192.116.979.22	106.193.665.34	75.432.901.93	181.626.567.27	10.490.411.95	**

TWA Ex. 431, page 7
Profitability of TWA A/C by Month - Computer Print-out)

AX-1141

C O V E R D A L E & C O L P I T T S T W A APPENDIX A

(Profitability of TWA A/C by Month - Computer Print-out)

TWA Ex. 431, page 8

MO	CRAFT	TOTAL REV	A/C OPER	GRND&IND	TOTAL OPER	PROFIT/LOSS	
01	12	5.484.621.97	3.072.476.40	2.060.371.84	5.132.848.24	351.773.73	
01	13	4.441.630.84	2.401.538.43	1.760.606.59	4.162.145.02	279.485.82	
01	14	7.364.647.37	3.388.364.12	2.273.100.54	5.661.464.66	1.703.182.71	
		17.290.900.18	8.862.378.95	6.094.078.97	14.956.457.92	2.334.442.26	*
02	12	4.795.978.72	2.721.157.72	1.819.730.55	4.540.888.27	255.090.45	
02	13	3.824.473.62	2.217.414.91	1.600.985.24	3.818.400.15	6.073.47	
02	14	5.849.879.27	3.040.973.07	1.937.542.34	4.978.515.41	871.363.86	
		14.470.331.61	7.979.545.70	5.358.258.13	13.337.803.83	1.132.527.78	*
03	12	5.638.852.74	3.087.105.64	2.094.792.57	5.181.898.21	456.954.53	
03	13	4.413.554.87	2.419.404.02	1.789.908.26	4.209.312.28	204.242.59	
03	14	6.836.926.32	3.317.757.60	2.172.968.28	5.490.725.88	1.346.200.44	
		16.889.333.93	8.824.267.26	6.057.669.11	14.881.936.37	2.007.397.56	*
04	12	5.562.970.06	2.758.098.38	1.997.891.11	4.757.989.49	804.980.57	
04	13	4.822.238.42	2.459.185.31	1.928.853.19	4.388.038.50	434.199.92	
04	14	8.117.415.36	3.403.820.59	2.461.538.90	5.865.359.49	2.252.055.87	
		18.502.623.84	8.623.104.28	6.388.283.20	15.011.387.48	3.491.236.36	*
05	12	6.463.723.04	3.204.367.74	2.354.885.99	5.559.253.73	904.469.31	
05	13	4.833.890.00	2.443.561.83	1.914.847.82	4.358.429.65	475.460.35	
05	14	7.425.251.53	3.495.804.21	2.416.252.68	5.912.056.89	1.513.194.64	
		18.722.864.57	9.143.753.78	6.685.986.49	15.829.740.27	2.893.124.30	*
06	12	8.275.699.95	3.451.097.19	2.759.871.86	6.210.969.05	2.064.930.90	
06	13	5.873.293.24	2.538.704.24	2.233.649.47	4.772.353.71	1.100.739.53	
06	14	9.189.107.90	3.364.691.30	2.676.023.89	6.040.715.19	3.148.392.71	
		23.338.301.09	9.354.492.73	7.669.745.22	17.024.237.95	6.314.063.14	*
07	12	7.700.543.26	3.448.025.72	2.633.348.82	6.081.374.54	1.619.168.72	
07	13	5.815.128.68	2.685.880.15	2.245.479.79	4.931.359.94	883.768.74	
07	14	9.321.698.69	3.554.668.08	2.780.542.74	6.335.210.82	2.986.487.87	
		22.837.370.63	9.688.573.95	7.659.371.35	17.347.945.30	5.489.425.33	*

C W E - K U A L E & C O L P I T T S T W A APPENDIX A

MO	CRAFT	TOTAL REV	A/C OPER	GRNDLING	TOTAL OPER	PROFIT/LOSS	
08	13	6.594.828.70	2.792.960.38	2.447.154.01	5.240.114.39	1.354.714.31	
08	14	10.106.223.71	3.503.889.56	2.900.924.85	6.404.814.41	3.701.409.30	
		25.361.860.20	9.905.347.48	8.217.037.05	18.122.384.33	7.239.475.67	*
09	12	7.907.662.03	3.702.715.44	2.747.776.28	6.450.491.72	1.457.370.31	
09	13	6.055.967.18	2.621.684.41	2.334.905.24	5.156.589.65	899.377.53	
09	14	8.174.771.26	3.190.171.19	2.454.991.56	5.645.162.75	2.529.608.51	
		22.138.600.47	9.714.571.04	7.537.673.08	17.252.244.12	4.886.356.35	*
10	12	8.774.041.89	4.165.301.38	3.105.822.94	7.271.124.32	1.502.917.57	
10	13	5.988.869.38	2.890.357.88	2.382.782.38	5.273.140.26	715.729.12	
10	14	8.313.051.67	3.390.965.73	2.518.695.29	5.909.661.02	2.403.390.65	
		23.075.962.94	10.446.624.99	8.007.300.61	18.453.925.60	4.622.037.34	*
11	12	7.429.532.91	3.966.344.40	2.761.665.10	6.749.009.50	681.523.41	
11	13	5.408.818.51	2.738.665.33	2.208.688.69	4.947.354.02	461.464.49	
11	14	6.498.027.69	3.095.511.77	2.071.996.85	5.167.508.62	1.330.519.07	
		19.336.379.11	9.820.521.50	7.042.350.64	16.862.872.14	2.473.506.97	*
12	12	8.446.937.81	4.247.924.75	3.061.064.38	7.308.989.13	1.137.948.68	
12	13	6.202.650.12	2.921.843.02	2.451.752.09	5.373.595.11	829.055.01	
12	14	7.725.166.10	3.354.798.35	2.393.084.81	5.747.883.16	1.977.282.94	
		22.374.754.03	10.524.566.12	7.905.901.28	18.430.467.40	3.944.286.63	*
		244.339.282.60	112.887.747.78	84.623.655.13	197.511.402.91	46.827.879.69	**

TWA Ex. 431, page 9
Profitability of TWA A/C by Month - Computer Print-out)

AX-1143

TWA Ex. 431, page 10
(Profitability of TWA A/C by Month - Computer Print-out)

760,087,493.73 381,348,991.51 263,771,192.22 645,120,183.73 114,967,310.00 ***

TOTAL RECORD COUNT 19,282

*** END OF JOB ***

TWA Ex. 435, page 1
(Regression Analysis-
Random Numbers)

THESE ARE THE RANDOM NUMBERS GENERATED TO SIMULATE OBSERVATIONS. THE NUMBER OF OBSERVATIONS IS

TWA
EXHIBIT 435
3/16/66 W.B.

OBSERVATION	VALUE
1	969221
2	546876
3	609407
4	675973

THESE ARE THE RANDOM NUMBERS IN DESCENDING ORDER. THE OLD OBSERVATION NUMBER AND THE NEW RANK ARE SHOWN.

RANK	OBSERVATION	VALUE
1	1	969221
2	4	675973
3	3	609407
4	2	546876

X Y

THE RANKED LIST ABOVE IS USED AS INPUT TO THE REGRESSION PROGRAM ATTACHED. THE INDEPENDENT VARIABLE, X, IS THE RANK OF THE OBSERVATION; THE VALUE OF THE OBSERVATION IS THE DEPENDENT

COLINR 16:03 THUR 02-22-63

S I M P L E L I N E A R R E G R E S S I O N

EQUATION: Y = A + B*X

HOW MANY OBSERVATIONS ON EACH VARIABLE? 4

VARIABLE	MEAN	VARIANCE	STD DEVIATION
X	2.5	1.25	1.11803
Y	700417.	2.61691 E 10	161769.

INDEX (R**2)	EXPL VAR	UNEXPL VAR	STD ERROR
.849273	2.22243 E 10	3.94424 E 9	62803.2

PARAMETER	VALUE	95 PCT CONFIDENCE LIMITS	
A	1.83377 E 6	862780.	1.2843 E 6
B	-133341.	-236332.	19649.9

ESTIMATED VALUES OF Y (FROM THE REGRESSION) AND CONFIDENCE LIMITS FOR INDIVIDUAL VALUES OF Y, FOR EACH VALUE OF X:

X-ACTUAL	Y-ACTUAL	Y-CALC	95 PCT CONFIDENCE LIMITS	
1	969221	900439.	454337.	1.34654 E 6
2	675973	767106.	377035.	1.15714 E 6
3	609407	633746.	243694.	1.02398 E 6
4	546876	500465.	54360.5	946447.

THESE ARE THE RANDOM NUMBERS GENERATED TO SIMULATE OBSERVATIONS. THE NUMBER OF OBSERVATIONS IS

OBSERVATION	VALUE
1	262265
2	217323
3	734219
4	791306

THESE ARE THE RANDOM NUMBERS IN DESCENDING ORDER. THE OLD OBSERVATION NUMBER AND THE NEW RANK ARE SHOWN.

RANK	OBSERVATION	VALUE
1	4	791306
2	3	734219
3	1	262265
4	2	217323

THE RANKED LIST ABOVE IS USED AS INPUT TO THE REGRESSION PROGRAM ATTACHED. THE INDEPENDENT VARIABLE, X, IS THE RANK OF THE OBSERVATION; THE VALUE OF THE OBSERVATION IS THE DEPENDENT VARIABLE, Y.

EQUATION: Y = A + BX

HOW MANY OBSERVATIONS ON EACH VARIABLE? 4

VARIABLE	MEAN	VARIANCE	STD DEVIATION
X	2.5	1.25	1.11803
Y	501403.	6.91064 E 10	262881.

INDEX (R=2)	EXPL VAR	UNEXPL VAR	STD ERROR
.871807	6.02474 E 10	8.85393 E 9	94122.1

PARAMETER	VALUE	95 PCT CONFIDENCE LIMITS	
A	1050254	793965.	1.30666 E 6
B	-219540.	-443325.	9744.83

ESTIMATED VALUES OF Y (FROM THE REGRESSION) AND CONFIDENCE LIMITS FOR INDIVIDUAL VALUES OF Y, FOR EACH VALUE OF X:

X-ACTUAL	Y-ACTUAL	Y-CALC	95 PCT CONFIDENCE LIMITS	
1	791306	830714.	168233.	1.49919 E 6
2	734219	611173.	266604.7	1.19574 E 6
3	262265	391633.	-199239.	976193.
4	217323	172093.	-426812.	870998.

THESE ARE THE RANDOM NUMBERS GENERATED TO SIMULATE
OBSERVATIONS. THE NUMBER OF OBSERVATIONS IS 6

OBSERVATION	VALUE
1	404413
2	903356
3	533311
4	326347
5	348516
6	63617

THESE ARE THE RANDOM NUMBERS IN DESCENDING ORDER.
THE OLD OBSERVATION NUMBER AND THE NEW RANK ARE SHOWN.

RANK	OBSERVATION	VALUE
1	2	903356
2	3	533311
3	1	404413
4	5	348516
5	4	326347
6	6	63617

THE RANKED LIST ABOVE IS USED AS INPUT TO THE
REGRESSION PROGRAM ATTACHED. THE INDEPENDENT
VARIABLE, X, IS THE RANK OF THE OBSERVATION;
THE VALUE OF THE OBSERVATION IS THE DEPENDENT
VARIABLE, Y.

COLINR 16:10 THUR 02-22-63

S I M P L E L I N E A R R E G R E S S I O N

EQUATION: Y = A + BX

HOW MANY OBSERVATIONS ON EACH VARIABLE? 6

VARIABLE	MEAN	VARIANCE	STD DEVIATION
X	3.5	2.91667	1.70783
Y	431673.	6.54517 E 10	255835.

INDEX (R=2)	EXPL VAR	UNEXPL VAR	STD ERROR
.873412	5.74935 E 10	7.95312 E 9	89203.3

PARAMETER	VALUE	95 PCT CONFIDENCE LIMITS	
A	923076.	861332.	1.04432 E 6
B	-140400.	-211636.	-69113.7

ESTIMATED VALUES OF Y (FROM THE REGRESSION) AND CONFIDENCE LIMITS FOR INDIVIDUAL VALUES OF Y, FOR EACH VALUE OF X:

X-ACTUAL	Y-ACTUAL	Y-CALC	95 PCT CONFIDENCE LIMITS	
1	903356	782677.	414553.	1.15080 E 6
2	533311	642277.	302888.	981666.
3	404413	501877.	177307.	826448.
4	348516	361478.	37407.4	685548.
5	326847	221078.	-118311.	560467.
6	63617	80673.3	-237441.	448787.

TIME: 3 SECS.

THESE ARE THE RANDOM NUMBERS GENERATED TO SIMULATE OBSERVATIONS. THE NUMBER OF OBSERVATIONS IS (15)

OBSERVATION	VALUE
1	465419
2	921397
3	963663
4	528452
5	1490
6	611746
7	750179
8	318494
9	72885
10	967790
11	499637
12	50599
13	232339
14	229764
15	144770

THESE ARE THE RANDOM NUMBERS IN DESCENDING ORDER. THE OLD OBSERVATION NUMBER AND THE NEW RANK ARE SHOWN.

RANK	OBSERVATION	VALUE
1	3	963663
2	10	967790
3	2	921397
4	7	750179
5	6	611746
6	4	528452
7	11	499637
8	1	465419
9	8	318494
10	13	232339
11	14	229764
12	15	144770
13	9	72885
14	12	50599
15	5	1490

THE RANKED LIST ABOVE IS USED AS INPUT TO THE REGRESSION PROGRAM ATTACHED. THE INDEPENDENT VARIABLE, X, IS THE RANK OF THE OBSERVATION; THE VALUE OF THE OBSERVATION IS THE DEPENDENT VARIABLE, Y.

TWA Ex. 435, page 6
(Regression Analysis-
Random Numbers)

COLINR 16:13 THUR 02-22-68

SIMPLE LINEAR REGRESSION

EQUATION: Y = A + B*X

HOW MANY OBSERVATIONS ON EACH VARIABLE? 15

VARIABLE	MEAN	VARIANCE	STD DEVIATION
X	8	18.6667	4.32049
Y	450903.	1.06246 E 11	325953.

INDEX [R^2]	EXPL VAR	UNEXPL VAR	STD ERROR
.974851	1.03574 E 11	2.67201 E 9	51691.5

PARAMETER	VALUE	95 PCT CONFIDENCE LIMITS	
A	1.04632 E 6	1.01536 E 6	1.07727 E 6
B	-74483.8	-81653.5	-67324.2

ESTIMATED VALUES OF Y [FROM THE REGRESSION] AND CONFIDENCE LIMITS FOR INDIVIDUAL VALUES OF Y, FOR EACH VALUE OF X:

X-ACTUAL	Y-ACTUAL	Y-CALC	95 PCT CONFIDENCE LIMITS	
1	968663	972330.	838739.	1.10592 E 6
2	967720	897841.	766772.	1.02891 E 6
3	921397	823352.	694455.	952250.
4	750179	748864.	621771.	875956.
5	611746	674375.	548784.	800046.
6	584452	599886.	475540.	724532.
7	409637	525397.	401371.	649424.
8	465419	450903.	327039.	574723.
9	318494	376419.	252393.	500446.
10	232339	301931.	177215.	426576.
11	229764	227442.	101771.	353113.
12	144770	152953.	25360.3	280546.
13	72885	78464.2	-50433.2	207362.
14	50599	3975.36	-127994.	135945.
15	1490	-70513.4	-204184.	63077.4

TIME: 4 SECS.

AX-1152

THESE ARE THE RANDOM NUMBERS GENERATED TO SIMULATE OBSERVATIONS. THE NUMBER OF OBSERVATIONS IS

(24)

TWA Ex. 435, page 7
(Regression Analysis-
Random Numbers)

OBSERVATION	VALUE
1	48 6743
2	625261
3	19 6133
4	36779
5	776275
6	179 662
7	49 1414
8	779 252
9	277855
10	732766
11	743840
12	109295
13	169310
14	149807
15	506199
16	267143
17	378236
18	46020
19	81226
20	243029
21	582547
22	786639
23	521655
24	777189

THESE ARE THE RANDOM NUMBERS IN DESCENDING ORDER.
THE OLD OBSERVATION NUMBER AND THE NEW RANK ARE SHOWN.

RANK	OBSERVATION	VALUE
1	22	786639
2	8	779252
3	24	777189
4	5	776275
5	11	743840
6	10	732766
7	2	625261
8	21	582547
9	23	521655
10	15	506199
11	7	491414
12	1	486743
13	17	378236
14	9	277855
15	16	267143
16	20	243029
17	3	196133
18	6	179662
19	13	169310
20	14	149807
21	12	109295
22	19	81226
23	18	46020
24	4	36779

THE RANKED LIST ABOVE IS USED AS INPUT TO THE REGRESSION PROGRAM ATTACHED. THE INDEPENDENT VARIABLE, X, IS THE RANK OF THE OBSERVATION; THE VALUE OF THE OBSERVATION IS THE DEPENDENT VARIABLE, Y.

TWA Ex. 435, page 8
(Regression Analysis-
Random Numbers)

COLINR 16:35 THUR 02-22-63

SIMPLE LINEAR REGRESSION

EQUATION: Y = A + BX

HOW MANY OBSERVATIONS ON EACH VARIABLE? 24

VARIABLE	MEAN	VARIANCE	STD DEVIATION
X	12.5	47.9167	6.92219
Y	414351.	6.86397 E 10	262040.

INDEX [R^2]	EXPL VAR	UNEXPL VAR	STD ERROR
.977392	6.65503 E 10	1.53937 E 9	39234.8

PARAMETER	VALUE	95 PCT CONFIDENCE LIMITS	
A	880196.	862350.	897542.
B	-37267.6	-39773.4	-34761.8

ESTIMATED VALUES OF Y [FROM THE REGRESSION] AND CONFIDENCE LIMITS FOR INDIVIDUAL VALUES OF Y, FOR EACH VALUE OF X:

X-ACTUAL	Y-ACTUAL	Y-CALC	95 PCT CONFIDENCE LIMITS	
1	78 6639	842928.	751538.	934319.
2	779252	805661.	715089.	896232.
3	777189	768393.	678457.	853329.
4	776275	731126.	641328.	820431.
5	743340	693858.	605117.	782599.
6	732766	656590.	563346.	744835.
7	625261	619323.	531506.	707139.
8	582547	582055.	494597.	669513.
9	521655	544787.	457617.	631958.
10	506199	507520.	420566.	594474.
11	401414	470252.	383443.	557062.
12	486743	432984.	346247.	519722.
13	378286	395717.	308980.	482454.
14	277385	358449.	271640.	445259.
15	267143	321182.	234227.	408136.
16	243982	283914.	196742.	371086.
17	196135	246646.	159183.	334109.
18	179602	209379.	121552.	297205.
19	169310	172111.	83366.6	260355.
20	142867	134843.	46102.2	223584.
21	169295	97575.7	8270.42	186881.
22	81886	60308.1	-29627.3	150244.
23	46826	23040.4	-67059.9	113672.
24	36770	-14227.2	-105617.	77162.1

TIME: 5 SECS.

AX-1154

TWA Ex. 436A, page 1
(Regression Analysis-Random Numbers)

COLLEGE [illegible] TIME [illegible]

SIMPLE LINEAR REGRESSION

EQUATION: Y = A + BX

HOW MANY OBSERVATIONS ON EACH VARIABLE?24

VARIABLE	MEAN	VARIANCE	STD DEVIATION
X	12.5	47.9167	6.92219
Y	532994.	7.54459 E 10	265417.

INDEX (R^2)	EXPL VAR	UNEXPL VAR	STD ERROR
.989472	6.97843 E 10	741678969	27833.7

PARAMETER	VALUE	95 PCT CONFIDENCE LIMITS	
A	1.00975 E 6	997710.	1.02179 E 6
B	-38149.5	-39879.8	-36431.2

ESTIMATED VALUES OF Y (FROM THE REGRESSION) AND CONFIDENCE LIMITS FOR INDIVIDUAL VALUES OF Y, FOR EACH VALUE OF X:

X-ACTUAL	Y-ACTUAL	Y-CALC	95 PCT CONFIDENCE LIMITS	
1	986433	971610.	908174.	1.03505 E 6
2	935845	933469.	870569.	996370.
3	916514	895329.	832992.	957665.
4	873522	857188.	795260.	919117.
5	840350	819048.	757451.	880644.
6	783031	780907.	719655.	842159.
7	746438	742767.	681812.	803722.
8	638623	704626.	643928.	765323.
9	637121	666486.	605972.	726999.
10	625165	628345.	567959.	688732.
11	578062	590205.	529948.	650463.
12	555118	552064.	491858.	612270.
13	545924	513924.	453712.	574136.
14	445447	475783.	415527.	536039.
15	432599	437643.	377286.	497999.
16	393435	399502.	338995.	459990.
17	388814	361362.	300655.	422069.
18	329639	323221.	262266.	384176.
19	269315	285081.	223829.	346333.
20	244381	246940.	185343.	308537.
21	218202	208800.	146811.	270788.
22	124491	170659.	108233.	233085.
23	193128	132519.	69609.7	195428.
24	53367	94378.1	30942.4	157814.

TIME: [illegible]

TWA Ex. 436A, page 2
(Regression Analysis-Random Numbers)

```
LIST

RANDT     12131    THUR   03-21-68

 1 DIM A(50)
 5 LET N=24
 6 PRINT "THESE ARE THE RANDOM NUMBERS GENERATED TO SIMULATE"
 7 PRINT "OBSERVATIONS.  THE NUMBER OF OBSERVATIONS IS  ",N
 8 PRINT
 9 PRINT "OBSERVATION", "VALUE"
15 FOR I = 1 TO N
20 LET A(I) = INT(1E6*RND(P))
25 PRINT I, A(I)
30 NEXT I
35 PRINT
36 PRINT
37 PRINT "THESE ARE THE RANDOM NUMBERS IN DESCENDING ORDER."
38 PRINT "THE OLD OBSERVATION NUMBER AND THE NEW RANK ARE SHOWN."
39 PRINT
40 PRINT "RANK", "OBSERVATION", "VALUE"
45 FOR L = 1 TO N
50 LET B = 0
55 FOR I = 1 TO N
60 IF A(I) <= B THEN 80
65 LET B=A(I)
70 LET K = I
80 NEXT I
85 PRINT L, K, A(K)
90 LET A(K) = 0
100 NEXT L
110 PRINT
120 PRINT
130 PRINT "THE RANKED LIST ABOVE IS USED AS INPUT TO THE"
135 PRINT "REGRESSION PROGRAM ATTACHED. THE INDEPENDENT "
140 PRINT "VARIABLE, X, IS THE RANK OF THE OBSERVATION;"
145 PRINT "THE VALUE OF THE OBSERVATION IS THE DEPENDENT"
150 PRINT "VARIABLE, Y."
999 END
```

THESE ARE THE [illegible] OBSERVATIONS. THE NUMBER OF OBSERVATIONS IS

OBSERVATION	VALUE
1	746488
2	196691
3	53367
4	323689
5	244321
6	625168
7	193129
8	935845
9	445447
10	262310
11	218802
12	783031
13	402599
14	848350
15	558118
16	980483
17	918514
18	873522
19	388814
20	393435
21	545924
22	578062
23	638623
24	637121

THESE ARE THE RANDOM NUMBERS IN DESCENDING ORDER.
THE OLD OBSERVATION NUMBER AND THE NEW RANK ARE SHOWN.

RANK	OBSERVATION	VALUE
1	16	980483
2	8	935845
3	17	918514
4	18	873522
5	14	848350
6	12	783031
7	1	746488
8	23	638623
9	24	637121
10	6	625168
11	22	578062
12	15	558118
13	21	545924
14	9	445447
15	13	[illegible]
16	20	393435
17	19	388814
18	4	323689
19	10	262310
20	5	244321
21	11	218802
22	2	196691
23	7	193129
24	3	53367

THE RANKED LIST ABOVE IS USED AS INPUT TO THE REGRESSION PROGRAM ATTACHED. THE INDEPENDENT VARIABLE, X, IS THE RANK OF THE OBSERVATION; THE VALUE OF THE OBSERVATION IS THE DEPENDENT VARIABLE, Y.

TWA Ex. 436B, page 1
(Regression Analysis-Random Numbers)

VARIABLE	MEAN	VARIANCE	STD DEVIATION
X	12.5	47.9167	6.92212
Y	266497.	1.76115 E 10	132703.

INDEX (R**2)	EXPL VAR	UNEXPL VAR	STD ERROR
.989472	1.74261 E 10	185416160.	13616.2

PARAMETER	VALUE	95 PCT CONFIDENCE LIMITS	
A	504375.	493355.	515395.
B	-19978.2	-19939.2	-[illegible]

ESTIMATED VALUES OF Y FROM THE REGRESSION AND CONFIDENCE LIMITS FOR INDIVIDUAL VALUES OF Y, FOR EACH VALUE OF X:

X-ACTUAL	Y-ACTUAL	Y-CALC	95 PCT CONFIDENCE LIMITS	
1	490242	485305.	454837.	517593.
2	467923	466735.	435268.	498199.
3	459257	447665.	416458.	479177.
4	436741	428594.	397659.	459533.
5	424175	409524.	378726.	440322.
6	391516	390454.	359928.	421580.
7	373844	371384.	340956.	401561.
8	319312	352313.	321964.	382664.
9	318561	333243.	302993.	363494.
10	312564	314173.	283995.	344351.
11	269331	295103.	264975.	325231.
12	279059	276032.	245933.	306135.
13	272962	256962.	226859.	287065.
14	232784	237892.	207764.	268020.
15	201366	218822.	188644.	248999.
16	196715	199751.	169497.	230005.
17	194497	180681.	150324.	211038.
18	161845	161611.	131134.	192088.
19	131155	142541.	111915.	173167.
20	122161	123473.	92679.1	154268.
21	109431	104400.	73406.1	135394.
22	93246	85332.8	54117.	116548.
23	96565	66262.7	34813.4	97731.
24	96434	47192.6	15491.7	78943.1

[illegible]

OBSERVATION	VALUE
1	373244
2	98346
3	26684
4	161845
5	122161
6	312584
7	96565
8	467923
9	222724
10	131155
11	109481
12	391516
13	201380
14	424175
15	279059
16	498242
17	459257
18	436761
19	194487
20	196718
21	272962
22	289031
23	319312
24	318561

THESE ARE THE RANDOM NUMBERS IN DESCENDING ORDER.
THE OLD OBSERVATION NUMBER AND THE NEW RANK ARE SHOWN.

RANK	OBSERVATION	VALUE
1	16	498242
2	8	467923
3	17	459257
4	18	436761
5	14	424175
6	12	391516
7	1	373244
8	23	319312
9	24	318561
10	6	312584
11	22	289031
12	15	279059
13	21	272962
14	9	222724
15	13	201380
16	20	196718
17	19	194487
18	4	161845
19	10	131155
20	5	122161
21	11	109481
22	2	98346
23	7	96565
24	3	26684

THE RANKED LIST ABOVE IS USED AS INPUT TO THE REGRESSION PROGRAM ATTACHED. THE INDEPENDENT VARIABLE, X, IS THE RANK OF THE OBSERVATION; THE VALUE OF THE OBSERVATION IS THE DEPENDENT VARIABLE, Y.

TIME: 2 SECS.

TWA Ex. 436B, page 3
(Regression Analysis-Random Numbers)

(B)

```
LIST

RANDT      12:38    THUR    03-21-68

 1 DIN A(50)
 5 LET N=24
 6 PRINT "THESE ARE THE RANDOM NUMBERS GENERATED TO SIMULATE"
 7 PRINT "OBSERVATIONS.  THE NUMBER OF OBSERVATIONS IS  ",N
 8 PRINT
 9 PRINT "OBSERVATION", "VALUE"
15 FOR I = 1 TO N
20 LET A(I) = INT(.5*1E6*RND(P)+.5)
25 PRINT I, A(I)
30 NEXT I
35 PRINT
36 PRINT
37 PRINT "THESE ARE THE RANDOM NUMBERS IN DESCENDING ORDER."
38 PRINT "THE OLD OBSERVATION NUMBER AND THE NEW RANK ARE SHOWN."
39 PRINT
40 PRINT "RANK", "OBSERVATION", "VALUE"
45 FOR L = 1 TO N
50 LET B = 0
55 FOR I = 1 TO N
60 IF A(I) <= B THEN 80
65 LET B=A(I)
70 LET K = I
80 NEXT I
85 PRINT L, K, A(K)
90 LET A(K) = 0
100 NEXT L
110 PRINT
120 PRINT
130 PRINT "THE RANKED LIST ABOVE IS USED AS INPUT TO THE"
135 PRINT "REGRESSION PROGRAM ATTACHED. THE INDEPENDENT "
140 PRINT "VARIABLE, X, IS THE RANK OF THE OBSERVATION;"
145 PRINT "THE VALUE OF THE OBSERVATION IS THE DEPENDENT"
150 PRINT "VARIABLE, Y."
999 END
```

SIMPLE LINEAR REGRESSION

EQUATION: Y = A + BX

HOW MANY OBSERVATIONS OR EACH VARIABLE?24

VARIABLE	MEAN	VARIANCE	STD DEVIATION
X	12.5	47.9167	6.92219
Y	166497.	1.76115 E 10	132708.

INDEX (R^2)	EXPL VAR	UNEXPL VAR	STD ERROR
.989472	1.74361 E 10	185416288	13616.8

PARAMETER	VALUE	95 PCT CONFIDENCE LIMITS	
A	454875.	398055.	416695.
B	-19078.2	-19939.9	-18260.6

ESTIMATED VALUES OF Y (FROM THE REGRESSION) AND CONFIDENCE LIMITS FOR INDIVIDUAL VALUES OF Y, FOR EACH VALUE OF X:

X-ACTUAL	Y-ACTUAL	Y-CALC	95 PCT CONFIDENCE LIMITS	
1	390242	385805.	354087.	417523.
2	367923	366735.	335280.	398189.
3	359257	347665.	316452.	378877.
4	336761	328594.	297603.	359585.
5	324175	309524.	278726.	340322.
6	291516	290454.	259828.	321080.
7	273244	271384.	240906.	301861.
8	219312	252313.	221960.	282666.
9	216561	233243.	202990.	263496.
10	212584	214173.	183995.	244351.
11	189631	195103.	164975.	225231.
12	179859	176032.	145929.	206135.
13	172962	156962.	126859.	187065.
14	122724	137892.	107764.	168020.
15	101309	118822.	88643.5	149000.
16	96718	99751.4	69498.2	130005.
17	94467	80681.1	50328.1	111034.
18	61845	61610.9	31133.5	92088.2
19	31155	42540.6	11914.7	73166.5
20	22161	23470.4	-7327.89	54269.7
21	9431	4400.15	-26594.	35394.3
22	-1654	-14670.1	-45883.	16542.9
23	-3435	-33740.3	-65194.7	-2286.01
24	-73316	-52810.6	-84528.3	-21092.9

TIME: 5 SECS.

TWA Ex. 436C, page 2
(Regression Analysis-Random Numbers)

OBSERVATION	VALUE
1	273244
2	-1654
3	-73316
4	61845
5	22161
6	212584
7	-5435
8	367923
9	122724
10	31155
11	9401
12	291516
13	101300
14	324175
15	179059
16	390242
17	359257
18	336761
19	94407
20	96718
21	172962
22	189031
23	219312
24	218561

THESE ARE THE RANDOM NUMBERS IN DESCENDING ORDER.
THE OLD OBSERVATION NUMBER AND THE NEW RANK ARE SHOWN.

RANK	OBSERVATION	VALUE
1	16	390242
2	8	367923
3	17	359257
4	18	336761
5	14	324175
6	12	291516
7	1	273244
8	23	219312
9	24	218561
10	6	212584
11	22	189031
12	15	179059
13	21	172962
14	9	122724
15	13	101300
16	20	96718
17	19	94407
18	4	61845
19	10	31155
20	5	22161
21	11	9401
22	2	0 -1654
23	7	0 -5435
24	3	0 -73316

THE RANKED LIST ABOVE IS USED AS INPUT TO THE REGRESSION PROGRAM ATTACHED. THE INDEPENDENT VARIABLE, X, IS THE RANK OF THE OBSERVATION; THE VALUE OF THE OBSERVATION IS THE DEPENDENT VARIABLE, Y.

TIME: 2 SECS.

RANDT 10:50 JUL 2 08-21-

```
 1 DIM A(50)
 5 LET N=24
 6 PRINT "THESE ARE THE RANDOM NUMBERS GENERATED TO SIMULATE"
 7 PRINT "OBSERVATIONS.  THE NUMBER OF OBSERVATIONS IS  ",N
 8 PRINT
 9 PRINT "OBSERVATION", "VALUE"
15 FOR I = 1 TO N
20 LET A(I) = INT(.5*1E6*RND(P) +.5 - 1E5)
25 PRINT I, A(I)
30 NEXT I
35 PRINT
36 PRINT
37 PRINT "THESE ARE THE RANDOM NUMBERS IN DESCENDING ORDER."
38 PRINT "THE OLD OBSERVATION NUMBER AND THE NEW RANK ARE SHOWN."
39 PRINT
40 PRINT "RANK", "OBSERVATION", "VALUE"
45 FOR L = 1 TO N
50 LET B=0
55 FOR I = 1 TO N
60 IF A(I) <= B THEN 80
65 LET B=A(I)
70 LET K = I
80 NEXT I
85 PRINT L, K, A(K)
90 LET A(K) = 0
100 NEXT L
110 PRINT
120 PRINT
130 PRINT "THE RANKED LIST ABOVE IS USED AS INPUT TO THE"
135 PRINT "REGRESSION PROGRAM ATTACHED. THE INDEPENDENT "
140 PRINT "VARIABLE, X, IS THE RANK OF THE OBSERVATION;"
145 PRINT "THE VALUE OF THE OBSERVATION IS THE DEPENDENT"
150 PRINT "VARIABLE, Y."
999 END
```

TWA 440

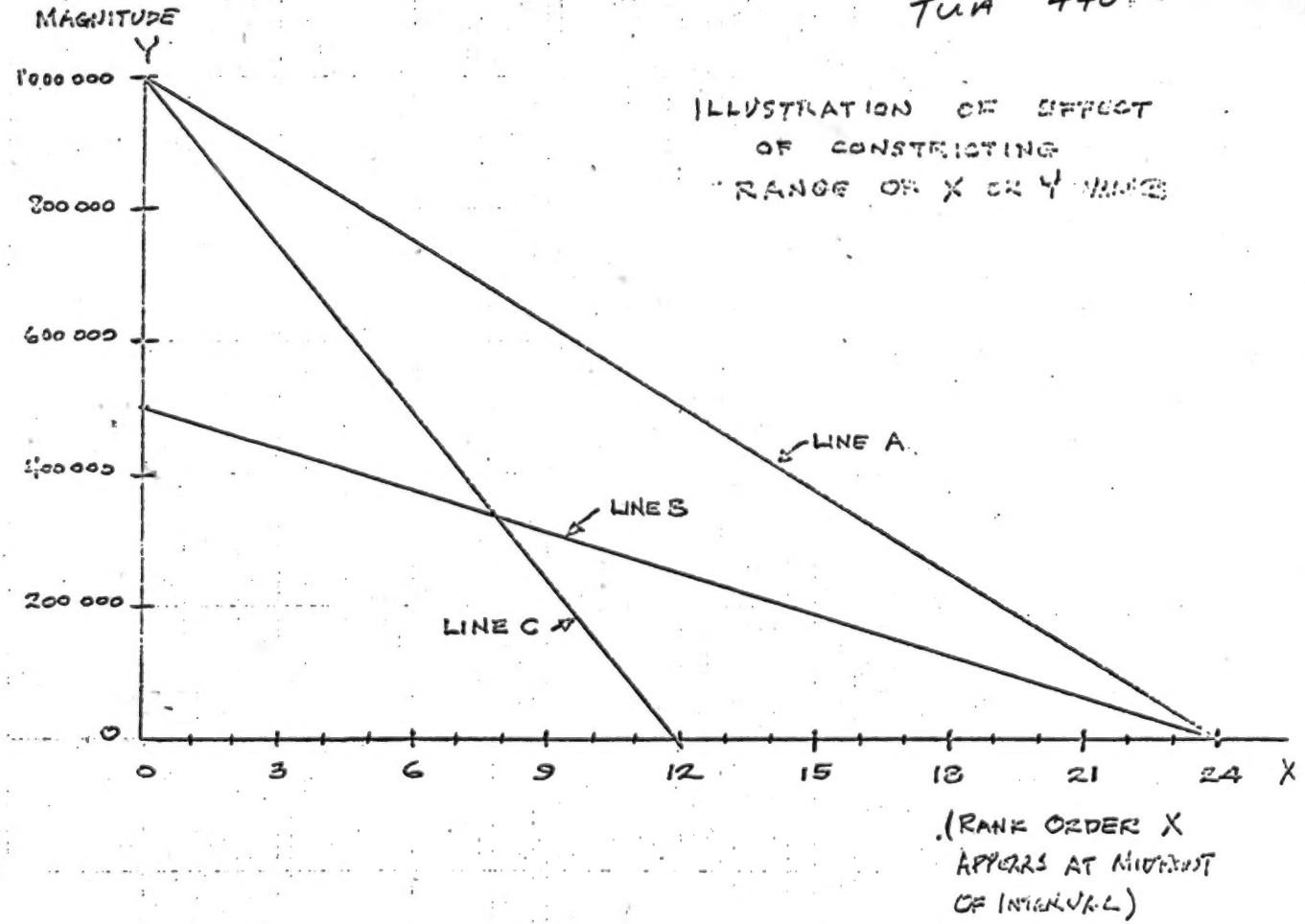


ILLUSTRATION OF EFFECT OF CONSTRICTING RANGE OF X OR Y VALUES

(RANK ORDER X APPEARS AT MIDPOINT OF INTERVAL)

TWA Ex. 440
(Graph Illustrating Testimony of Prof. Hare)

AX-1168

SUMMARY OF REGRESSION EXPERIMENT 3/23/68

Run No.	R^2	A	B	Std. Error	Std. Dev. of Y	Avg. Y
1	.981903	995130	-37500.6	35241.7	261958	526272
2	.983119	1047320	-44644.5	40496.2	311680	589260
3	.986267	1037060	-41047.0	33549.8	286295	523614
Average	.983763	1026570	-41064.0	36429.2	286647	513048
4	.978981	471174	-20223.2	20512.4	141484	218531
5	.985360	519025	-18417.1	15267.6	128395	260021
6	.991147	505638	-21979.1	14379.3	152822	260721
Average	.985200	498616	-20206.4	16719.8	140901	259758

Source: Data from Computer Printouts Numbered 1-6, Program COLLIN 3/23/68. Each Run uses a different set of 24 Random Numbers as Y, with Rank as X. Range of Runs 1-3 is 0-1,000,000. Range of Runs 4-6 is 0-500,000.

TWA Ex. 441, page 2
(Regression Experiment, 3/23/68)

VARIABLE	MEAN	VARIANCE	STD DEVIATION
X	18.5	47.2167	6.87219
Y	5[illegible].	[illegible] E 10	261961.

INDEX (R**2)	FACT VAL	DISPL VAL	STD ERROR
.931993	[illegible]	1.84171 E 9	35241.7

PARAMETER	VALUE	95 PCT CONFIDENCE LIMITS	
A	[illegible]	[illegible]	1.61071 E 6
B	-37[illegible]	-32751.4	-35[illegible]

ESTIMATED VALUES OF Y FROM THE [illegible] AND CONFIDENCE
LIMITS FOR INDIVIDUAL VALUES OF Y FOR EACH VALUE OF X:

X-ACTUAL	Y-ACTUAL	Y-CALC	95 PCT CONFIDENCE LIMITS	
1	9[illegible]3	[illegible]	[illegible]	[illegible]
2	935[illegible]	[illegible]	[illegible]	[illegible]
3	913514	[illegible]	861345.	963415.
4	873598	[illegible]	764911.	925845.
5	84[illegible]50	[illegible]	727917.	[illegible]
6	70[illegible]31	[illegible]	626463.	[illegible]
7	63[illegible]23	[illegible]	653747.	[illegible]
8	637191	[illegible]	614567.	[illegible]
9	62[illegible]0	[illegible]	579356.	[illegible]
10	557564	[illegible]	549519.	[illegible]
11	57[illegible]69	[illegible]	[illegible]	[illegible]
12	55[illegible]13	[illegible]	467513.	[illegible]
13	545324	[illegible]	499719.	[illegible]
14	445447	[illegible]	398147.	[illegible]
15	46[illegible]9	[illegible]	354516.	[illegible]
16	3[illegible]35	[illegible]	315[illegible].	[illegible]
17	3[illegible]14	[illegible]	279[illegible].	[illegible]
18	3[illegible]13	[illegible]	241[illegible].	[illegible]
19	2[illegible]31	[illegible]	[illegible]	[illegible]
20	2[illegible]1	[illegible]	169[illegible].	[illegible]
21	1[illegible]1	[illegible]	1[illegible].	[illegible]
22	1[illegible]1	[illegible]	[illegible]7.7	[illegible]
23	1[illegible]2	[illegible]	51[illegible].	[illegible]
24	5[illegible]7	[illegible]	15[illegible].	[illegible]

OBSERVATION	VALUE
1	196691
2	53367
3	323689
4	244321
5	625168
6	193129
7	935845
8	445447
9	262319
10	218802
11	783031
12	402599
13	848350
14	558118
15	980483
16	918514
17	873522
18	388814
19	393435
20	545924
21	578062
22	638623
23	637121
24	587564

THESE ARE THE RANDOM NUMBERS IN DESCENDING ORDER.
THE OLD OBSERVATION NUMBER AND THE NEW RANK ARE SHOWN.

RANK	OBSERVATION	VALUE
1	15	980483
2	7	935845
3	16	918514
4	17	873522
5	13	848350
6	11	783031
7	22	638623
8	23	637121
9	5	625168
10	24	587564
11	21	578062
12	14	558118
13	20	545924
14	8	445447
15	12	402599
16	19	393435
17	18	388814
18	3	323689
19	9	262319
20	4	244321
21	10	218802
22	1	196691
23	6	193129
24	2	53367

THE RANKED LIST ABOVE IS USED AS INPUT TO THE REGRESSION PROGRAM ATTACHED. THE INDEPENDENT VARIABLE, X, IS THE RANK OF THE OBSERVATION; THE VALUE OF THE OBSERVATION IS THE DEPENDENT VARIABLE, Y.

TIME: 2 SECS.

VARIABLE	MEAN	VARIANCE	STD DEVIATION
X	12.5	47.9167	6.92219
Y	523636.	8.19645 E 10	286295.

INDEX [R*2]	EXPL VAR	UNEXPL VAR	STD ERROR
.986267	8.08390 E 10	1.12559 E 9	33549.6

PARAMETER	VALUE	95 PCT CONFIDENCE LIMITS	
A	1.03766 E 6	1.02223 E 6	1.05189 E 6
B	-41074.	-43216.7	-39931.3

ESTIMATED VALUES OF Y [FROM THE REGRESSION] AND CONFIDENCE LIMITS FOR INDIVIDUAL VALUES OF Y, FOR EACH VALUE OF X:

X-ACTUAL	Y-ACTUAL	Y-CALC	95 PCT CONFIDENCE LIMITS	
1	999719	995987.	917839.	1.07414 E 6
2	977069	954913.	877414.	1.03241 E 6
3	853160	913839.	836935.	990744.
4	821163	872765.	796499.	949131.
5	803868	831691.	755809.	907574.
6	783178	790617.	715159.	866075.
7	772466	749543.	674451.	824635.
8	716846	708469.	633684.	783255.
9	661107	667395.	592856.	741935.
10	623202	626321.	551967.	700676.
11	623256	585247.	511016.	659478.
12	553291	544173.	470004.	618342.
13	552139	503099.	428930.	577268.
14	539496	462025.	387794.	536256.
15	497186	420951.	346597.	495306.
16	379189	379877.	305338.	454417.
17	365923	338803.	264018.	413589.
18	342532	297729.	222637.	372821.
19	215482	256655.	181197.	332113.
20	211305	215581.	139699.	291464.
21	139813	174507.	98142.	250872.
22	95215	133433.	56528.8	210338.
23	72165	92359.2	14860.1	169858.
24	53936	51285.2	-26862.9	129433.

	VALUE
1	211305
2	552139
3	783170
4	407186
5	999719
6	553291
7	821168
8	661107
9	379109
10	73165
11	977009
12	803368
13	90210
14	539496
15	365923
16	638202
17	623256
18	130018
19	853160
20	716846
21	218482
22	772466
23	53938
24	342532

THESE ARE THE RANDOM NUMBERS IN DESCENDING ORDER.
THE OLD OBSERVATION NUMBER AND THE NEW RANK ARE SHOWN.

RANK	OBSERVATION	VALUE
1	5	999719
2	11	977009
3	19	853160
4	7	821168
5	12	803868
6	3	783170
7	22	772466
8	20	716846
9	8	661107
10	16	638202
11	17	623256
12	6	553291
13	2	552139
14	14	539496
15	4	407186
16	9	379109
17	15	365928
18	24	342532
19	21	218482
20	1	211305
21	18	130018
22	13	90210
23	10	73165
24	23	5393[illegible]

THE RANKED LIST ABOVE IS USED AS INPUT TO THE REGRESSION PROGRAM ATTACHED. THE INDEPENDENT VARIABLE, X, IS THE RANK OF THE OBSERVATION; THE VALUE OF THE OBSERVATION IS THE DEPENDENT VARIABLE, Y.

TIME: 2 SECS.

S I M P L E L I N E A R R E G R E S S I O N

EQUATION: Y = A + BX

HOW MANY OBSERVATIONS OF EACH VARIABLE?24

VARIABLE	MEAN	VARIANCE	STD DEVIATION
X	12.5	47.9167	6.92219
Y	439268.	9.71442 E 10	311680.

INDEX [R^2]	EXPL VAR	UNEXPL. VAR	STD ERROR
.983119	9.55948 E 10	1.63994 E 9	40496.2

PARAMETER	VALUE	95 PCT CONFIDENCE LIMITS	
A	1.04732 E 6	1.02942 E 6	1.06523 E 6
B	-44644.5	-47230.9	-42058.1

ESTIMATED VALUES OF Y [FROM THE REGRESSION] AND CONFIDENCE LIMITS FOR INDIVIDUAL VALUES OF Y, FOR EACH VALUE OF X:

X-ACTUAL	Y-ACTUAL	Y-CALC	95 PCT CONFIDENCE LIMITS	
1	989371	1.00268 E 6	988351.	1.09701 E 6
2	985279	958035.	864490.	1.05156 E 6
3	952203	913391.	820564.	1.00622 E 6
4	874474	868746.	776570.	960922.
5	856517	824102.	732508.	915696.
6	827633	779457.	688376.	870538.
7	754925	734813.	644173.	825452.
8	736180	690168.	599898.	780433.
9	633676	645524.	555551.	735496.
10	497782	600879.	511130.	690629.
11	475212	556235.	466634.	645835.
12	473395	511590.	422065.	601116.
13	430871	466946.	377420.	556471.
14	420227	422301.	332701.	511901.
15	391976	377657.	287907.	467406.
16	349763	333012.	243039.	422985.
17	244579	288368.	198098.	378637.
18	251118	243723.	153084.	334363.
19	199469	199079.	107997.	290163.
20	145966	154434.	62840.2	246038.
21	104736	109790.	17613.3	201966.
22	96170	65145.1	-27612.	157972.
23	76776	20501.6	-73344.4	114046.
24	25133	-24142.9	-119472.	70184.3

[illegible]

OBSERVATION	VALUE
1	952203
2	985279
3	76776
4	96170
5	736180
6	856517
7	827633
8	874474
9	420227
10	430071
11	754923
12	475212
13	244579
14	633676
15	473895
16	201118
17	199469
18	145066
19	349768
20	104926
21	25133
22	391976
23	497782
24	989371

THESE ARE THE RANDOM NUMBERS IN DESCENDING ORDER.
THE OLD OBSERVATION NUMBER AND THE NEW RANK ARE SHOWN.

RANK	OBSERVATION	VALUE
1	24	989371
2	2	985279
3	1	952203
4	8	874474
5	6	856517
6	7	827633
7	11	754923
8	5	736180
9	14	633676
10	23	497782
11	12	475212
12	15	473895
13	10	430071
14	9	420227
15	22	391976
16	19	349768
17	13	244579
18	16	201118
19	17	199469
20	18	145066
21	20	104926
22	4	96170
23	3	76776
24	21	25133

THE RANKED LIST ABOVE I. USED AS INPUT TO THE REGRESSION PROGRAM ATTACHED. THE INDEPENDENT VARIABLE, X, IS THE RANK OF THE OBSERVATION; THE VALUE OF THE OBSERVATION IS THE DEPENDENT VARIABLE, Y.

TIME: 2 SECS

TWA Ex. 441, page 8
(Regression Experiment, 3/23/68)

VARIABLE	MEAN	VARIANCE	STD DEVIATION
X	12.5	47.9167	6.92219
Y	218334.	2.00177 E 10	141474.

INDEX OF FIT	EXPL VAR	UNEXPL VAR	STD ERROR
.978981	1.95969 E 10	420759456	20512.4

PARAMETER	VALUE	95 PCT CONFIDENCE LIMITS	
A	471174.	462106.	480243.
B	-20223.2	-21533.3	-18913.2

ESTIMATED VALUES OF Y (FROM THE REGRESSION) AND CONFIDENCE LIMITS FOR INDIVIDUAL VALUES OF Y, FOR EACH VALUE OF X:

X-ACTUAL	Y-ACTUAL	Y-CALC	95 PCT CONFIDENCE LIMITS	
1	433060	450951.	403171.	493731.
2	403536	430727.	383345.	478111.
3	397117	410504.	363435.	457524.
4	389595	390281.	343591.	436971.
5	336154	370058.	323663.	416453.
6	367146	349835.	303700.	395970.
7	337032	329612.	283700.	375523.
8	333100	309388.	263664.	355112.
9	318196	289165.	243591.	334739.
10	283997	268942.	223481.	314402.
11	273693	248719.	203334.	294104.
12	269353	228495.	183145.	273843.
13	169943	208272.	162925.	252619.
14	166749	188049.	142664.	233434.
15	153284	167826.	122365.	213286.
16	137933	147602.	102029.	193176.
17	93107	127379.	81655.1	173103.
18	97935	107156.	61244.6	153067.
19	85358	86932.7	40797.6	133068.
20	72256	66709.5	20314.7	113104.
21	54366	46486.2	-205.57	93176.1
22	18836	26263.	-20756.5	73282.5
23	17753	6039.77	-41343.3	53422.8
24	14779	-14183.5	-61963.3	33596.4

TIME: 6 SECS.

OBSERVATION	VALUE
1	433060
2	72286
3	166749
4	283997
5	153204
6	337033
7	403536
8	97985
9	14790
10	269353
11	169948
12	389595
13	137933
14	333100
15	273603
16	310196
17	17753
18	367146
19	397117
20	386154
21	24366
22	85358
23	98107
24	18836

THESE ARE THE RANDOM NUMBERS IN DESCENDING ORDER.
THE OLD OBSERVATION NUMBER AND THE NEW RANK ARE SHOWN.

RANK	OBSERVATION	VALUE
1	1	433060
2	7	403536
3	19	397117
4	12	389595
5	20	386154
6	18	367146
7	6	337038
8	14	333108
9	16	310196
10	4	283997
11	15	273603
12	10	269353
13	11	169948
14	3	166749
15	5	153204
16	13	137933
17	23	98107
18	8	97985
19	22	85358
20	2	72286
21	21	24366
22	24	18836
23	17	17753
24	9	14790

THE RANKED LIST ABOVE IS USED AS INPUT TO THE REGRESSION PROGRAM ATTACHED. THE INDEPENDENT VARIABLE, X, IS THE RANK OF THE OBSERVATION; THE VALUE OF THE OBSERVATION IS THE DEPENDENT VARIABLE, Y.

TIME: 2 SECS.

SIMPLE LINEAR REGRESSION

EQUATION: Y = A + BX

NO. PAIRS OBSERVATIONS ON EACH VARIABLE= 24

VARIABLE	MEAN	VARIANCE	STD DEVIATION
X	12.5	47.9167	6.92219
Y	238811.	1.64359 E 10	128198.

INDEX (R^2)	EXPL VAR	UNEXPL VAR	STD ERROR
.98556	1.62523 E 10	233106304	15267.8

PARAMETER	VALUE	95 PCT CONFIDENCE LIMITS	
A	519025.	512275.	525774.
B	-18417.1	-19392.2	-17442.

ESTIMATED VALUES OF Y (FROM THE REGRESSION) AND CONFIDENCE LIMITS FOR INDIVIDUAL VALUES OF Y, FOR EACH VALUE OF X:

X-ACTUAL	Y-ACTUAL	Y-CALC	95 PCT CONFIDENCE LIMITS	
1	483676	500607.	465944.	536171.
2	484616	482190.	446922.	517459.
3	454178	463773.	428776.	498771.
4	434344	445356.	410694.	480108.
5	407619	426939.	392486.	461472.
6	402868	408522.	374183.	442861.
7	395903	390105.	355932.	424278.
8	367189	371688.	337654.	405721.
9	346833	353271.	319349.	387192.
10	337936	334854.	301016.	368691.
11	339968	316436.	282655.	350217.
12	309191	298019.	264266.	331772.
13	304745	279602.	245849.	313355.
14	273433	261185.	227404.	294966.
15	269155	242768.	208931.	276605.
16	232709	224351.	190429.	258272.
17	203254	205934.	171900.	239967.
18	204809	187517.	153344.	221689.
19	174253	169100.	134760.	203439.
20	163423	150682.	116150.	185215.
21	131122	132265.	97513.8	167018.
22	115661	113848.	78850.7	148846.
23	76695	95431.2	60163.	130699.
24	31681	77014.1	41450.5	112578.

TIME: .4 SEC.

TWA Ex. 441, page 11
(Regression Experiment, 3/23/68)

1	[illegible]
2	[illegible]
3	[illegible]
4	[illegible]
5	[illegible]
6	[illegible]
7	337986
8	434844
9	131132
10	108661
11	367109
12	395903
13	346088
14	202209
15	454178
16	269155
17	163423
18	174258
19	31808
20	330968
21	203254
22	488676
23	407619
24	232709

THESE ARE THE RANDOM NUMBERS IN DESCENDING ORDER.
THE OLD OBSERVATION NUMBER AND THE NEW RANK ARE SHOWN.

RANK	OBSERVATION	VALUE
1	22	488676
2	4	484610
3	15	454178
4	8	434844
5	23	407619
6	1	402868
7	12	395903
8	11	367109
9	13	346088
10	7	337986
11	20	330968
12	3	309191
13	6	304748
14	5	273438
15	16	269155
16	24	232709
17	21	203254
18	14	202209
19	18	174258
20	17	163423
21	9	131132
22	10	108661
23	2	76602
24	19	31808

THE RANKED LIST ABOVE IS USED AS INPUT TO THE REGRESSION PROGRAM ATTACHED. THE INDEPENDENT VARIABLE, X, IS THE RANK OF THE OBSERVATION; THE VALUE OF THE OBSERVATION IS THE DEPENDENT VARIABLE, Y.

TIME: 2 SECS.

TWA Ex. 441, page 12
(Regression Experiment, 3/23/68)

VARIABLE	MEAN	VARIANCE	STD DEVIATION
X	12.5	47.9167	6.92819
Y	230911.	2.33544 E 10	152822.

INDEX [R+2]	EXPL VAR	UNEXPL VAR	STD ERROR
.991147	2.31477 E 10	206764512	14379.3

PARAMETER	VALUE	95 PCT CONFIDENCE LIMITS	
A	505650.	499293.	512007.
B	-21979.1	-22897.5	-21060.8

ESTIMATED VALUES OF Y [FROM THE REGRESSION] AND CONFIDENCE LIMITS FOR INDIVIDUAL VALUES OF Y, FOR EACH VALUE OF X:

X-ACTUAL	Y-ACTUAL	Y-CALC	95 PCT CONFIDENCE LIMITS	
1	484331	483671.	456177.	517165.
2	483695	461692.	428476.	494906.
3	460628	439713.	406752.	472674.
4	436315	417734.	385004.	450464.
5	421293	395755.	363232.	428278.
6	388179	373776.	341435.	406117.
7	375859	351797.	319612.	383981.
8	305873	329817.	297765.	361870.
9	291581	307838.	275891.	339786.
10	275966	285859.	253991.	317727.
11	264226	263880.	232065.	295695.
12	249518	241901.	210112.	273690.
13	193950	219922.	188133.	251711.
14	181657	197943.	166125.	229759.
15	170900	175964.	144086.	207832.
16	152247	153985.	122017.	185930.
17	116169	132006.	99918.6	164053.
18	114382	110026.	77788.2	142201.
19	91218	88047.2	55626.8	120374.
20	72335	66068.1	33435.1	98571.1
21	36648	44089.	11212.8	76793.2
22	25295	22109.9	-11051.	55039.7
23	5197	130.739	-33345.	33311.5
24	745	-21847.4	-55668.3	11645.5

TIME: 7 SEC.

OBSERVATIONS. THE N

OBSERVATION	VALUE
1	460698
2	484331
3	264226
4	745
5	305873
6	375089
7	159247
8	36442
9	483895
10	249818
11	25299
12	116169
13	114882
14	72385
15	170000
16	391293
17	193950
18	181657
19	275966
20	388179
21	91218
22	291501
23	400815
24	8197

THESE ARE THE RANDOM NUMBERS IN DESCENDING ORDER.
THE OLD OBSERVATION NUMBER AND THE NEW RANK ARE SHOWN.

RANK	OBSERVATION	VALUE
1	2	484331
2	9	483895
3	1	460698
4	23	400815
5	16	391293
6	20	388179
7	6	375089
8	5	305873
9	22	291501
10	19	275966
11	3	264226
12	10	249818
13	17	193950
14	18	181657
15	15	170000
16	7	159247
17	12	116169
18	13	114882
19	21	91218
20	14	72385
21	8	36442
22	11	25299
23	24	8197
24	4	745

THE RANKED LIST ABOVE IS USED AS INPUT TO THE REGRESSION PROGRAM ATTACHED. THE INDEPENDENT VARIABLE, X, IS THE RANK OF THE OBSERVATION; THE VALUE OF THE OBSERVATION IS THE DEPENDENT VARIABLE, Y.

TIME: 2 SECS.

TWA Ex. 444
(C. & C. Tabulation - Additional TWA Domestic Seat - Miles)

TWA v. HUGHES

TOTAL AVAILABLE SEAT-MILES OPERATED

DOMESTIC SCHEDULED SERVICE ONLY

TWA, UAL AND AAL

ALL AIRCRAFT TYPES, 1959-1963

Year	TWA, UAL and AAL Historical Seat-Miles (A)	TWA Estimated Additional Seat-Miles (B)	Percent Additions by TWA
	(Millions)		
1959	21,738	105	0.5%
1960	24,827	910	3.7
1961	29,020	1,018	3.5
1962	34,613	774	2.2
1963	37,969	638	1.7

TWA EXHIBIT 444 3/27/68 E.G.

Year	TWA Only Historical Seat-Miles (A)	TWA Estimated Additional Seat-Miles (B)	Percent Additions
	(Millions)		
1959	6,492	105	1.6%
1960	6,962	910	13.1
1961	7,487	1,018	13.6
1962	8,623	774	9.0
1963	10,042	638	6.4

(A) Source: CAB Handbook of Airline Statistics (1965 Edition).

(B) Source: C&C Report (May 2, 1966) Volume I, Chapters II-V; Exhibits TWA 42, 42A, 43A and DX 262.

Coverdale & Colpitts
Consulting Engineers
140 Broadway, New York
March 22, 1968

INDEX

Volume AX-I

ITEM	PAGE
TWA Ex. 2 (Statement of Robert W. Rummel) ..	AX-1
TWA Ex. R-3 (Toolco-Convair Amended Agreement—Model 22, 6/4/56)	AX-63a
TWA Ex. R-5 (TWA-Toolco Purchase Agreement—May 9, 1960)	AX-64
TWA Ex. R-8(80) (FAA Registration Documents—B707-331, No. N771TW)	AX-73a
TWA Ex. R-8(81) (FAA Registration Documents—B707-331, No. N772TW)	AX-73k
TWA Ex. 3 (Affidavit of J. B. Connelly)	AX-74
TWA Ex. 4(b) (C. & C. Report—Comparative Profit Study)	AX-80
TWA Ex. 4(c)(1) (C. & C. Report—Financial Results from Reconstructed Jet Fleet)	AX-91
TWA Ex. 4(c)(4) (Exhibits B-J to C. & C. Report—Financial Results from Reconstructed Jet Fleet)	AX-167

Volume AX-II

TWA Ex. 5(a) (Drexel Harriman Ripley, Inc. Report—Parts I & II)	AX-336
TWA Ex. 5(b) (Exhibits to Drexel Harriman Ripley, Inc. Report)	AX-430

ITEM	PAGE
TWA Ex. 7(b)(1) (Price Waterhouse Study—Volume One)	AX-452
TWA Ex. 7(b)(2) (Price Waterhouse Study—Volume Two)	AX-480
Volume AX-III	
TWA Ex. 10 (Letter—Boeing to TWA re 707 Negotiations—12/29/54)	AX-643a
TWA Ex. 12 (Toolco-Convair CV-990 Purchase Agreement—11/10/60)	AX-644
TWA Ex. 13 (Holliday Call Sheet—Feb. 20-27, 1961)	AX-655
TWA Ex. 14 (CV-990 Purchase Agreement—Amendment of 2/22/61)	AX-660
TWA Ex. 22 (Rummel Call Sheets)	AX-665
TWA Ex. 23 (Letter Agreement—Sale of Six Boeings to Pan American)	AX-729
TWA Ex. 39 (Affidavit of Joseph P. Ripley)	AX-732
TWA Ex. 42 (C. & C. Report—Revision of Pages 63, 64, 71 & 72)	AX-735
TWA Ex. 43 (C. & C. Report—Revision of Page 51)	AX-740
TWA Ex. 46 (Jet and Turboprop Aircraft of TWA and Principal Competitors—1958-66)	AX-742
TWA Ex. 47 (Boeing Aircraft Employed on Routes Formerly Served by B-720Bs)	AX-743

ITEM	PAGE
TWA Ex. 50 (Price Waterhouse Report—Summary of Application of Assumptions)	AX-744
TWA Ex. 72 (TWA Annual Report—1939)	AX-745
TWA Ex. 73 (TWA Annual Report—1940)	AX-752
TWA Ex. 74 (TWA Annual Report—1941)	AX-758
TWA Ex. 75 (TWA Annual Report—1942)	AX-760
TWA Ex. 76 (TWA Annual Report—1943)	AX-763
TWA Ex. 77 (TWA Annual Report—1944)	AX-766
TWA Ex. 78 (TWA Annual Report—1945)	AX-769
TWA Ex. 79 (TWA Annual Report—1946)	AX-773
TWA Ex. 80 (TWA Annual Report—1947)	AX-779
TWA Ex. 81 (TWA Annual Report—1948)	AX-783
TWA Ex. 82 (TWA Annual Report—1949)	AX-788
TWA Ex. 83 (TWA Annual Report—1950)	AX-792
TWA Ex. 84 (TWA Annual Report—1951)	AX-797
TWA Ex. 86 (TWA Annual Report—1953)	AX-800
TWA Ex. 87 (TWA Annual Report—1954)	AX-805
TWA Ex. 88 (TWA Annual Report—1955)	AX-814
TWA Ex. 89 (TWA Annual Report—1956)	AX-819
TWA Ex. 90 (TWA Annual Report—1957)	AX-822
TWA Ex. 91 (TWA Annual Report—1958)	AX-842
TWA Ex. 92 (TWA Annual Report—1959)	AX-854
TWA Ex. 93 (TWA Annual Report—1960)	AX-856

ITEM	PAGE
TWA Ex. 94 (TWA Annual Report—1961)	AX-862
TWA Ex. 96 (TWA Annual Report—1963)	AX-866
TWA Ex. 128 (Pan American Annual Report—1959)	AX-868
TWA Ex. 132 (Pan American Annual Report—1963)	AX-869
TWA Ex. 155 (AAL Annual Report—1958)	AX-870
TWA Ex. 158 (AAL Annual Report—1961)	AX-871
TWA Ex. 159 (AAL Annual Report—1962)	AX-873
TWA Ex. 184 (UAL Annual Report—1959)	AX-874
TWA Ex. 186 (UAL Annual Report—1961)	AX-875
TWA Ex. 187 (UAL Annual Report—1962)	AX-876
TWA Ex. 192 (TWA Prospectus, 5/25/61 & Supplement, 6/20/61)	AX-877
TWA Ex. 194 (TWA Prospectus—6/17/57)	AX-883
TWA Ex. 223 (Pan American Prospectus—7/3/45—Supplement—7/24/45)	AX-889
TWA Ex. 249 (American Airlines Prospectus—6/11/46—Supplement—6/24/46)	AX-891
TWA Ex. 257 (TWA-Toolco Lease Agreements—Boeing Jets)	AX-893
TWA Ex. 264 (Toolco-Lockheed Purchase Agreement—L-1449A—12/23/54)	AX-901
TWA Ex. 266 (Toolco-Lockheed Purchase Agreement—L-1049G—9/26/55)	AX-908

Item	Page
TWA Ex. 267A (Letter, TWA to Toolco—1957 Common Stock Offering)	AX-919
TWA Ex. 267B (Letter, TWA to N.Y. Trust Co.—1957 Common Stock Offering)	AX-921
TWA Ex. 271 (Letter, Toolco to SEC—1957 Common Stock Offering)	AX-923
TWA Ex. 275 (TWA Board Minutes—April 26, 1945)	AX-925
TWA Ex. 276 (TWA Finance Committee Minutes—September 12, 1945)	AX-928
TWA Ex. 277 (Page from Banking Quotation Record)	AX-930
TWA Ex. 278 (TWA Board Minutes—November 8, 1946)	AX-931
TWA Ex. 279 (Special TWA Stockholders Meeting—December 23, 1946—Judges' Report)	AX-935
TWA Ex. 280A (Minutes—Adjourned Special TWA Stockholders Meeting—December 28, 1946)	AX-936
TWA Ex. 280B (Adjourned Special TWA Stockholders Meeting—December 28, 1946—Judges' Report)	AX-940
TWA Ex. 281A (Minutes—Adjourned Special TWA Stockholders Meeting—December 31, 1946)	AX-941
TWA Ex. 281B (Adjourned Special TWA Stockholders Meeting—December 31, 1946—Judges' Report)	AX-944

ITEM	PAGE
TWA Ex. 282 (Minutes & Judges' Report—Adjourned Special TWA Stockholders Meeting —January 6, 1947)	AX-945
TWA Ex. 283 (TWA Board Minutes—December 18, 1946)	AX-950
TWA Ex. 284 (TWA Board Minutes—December 27, 1946)	AX-956
TWA Ex. 285 (TWA Board Minutes—December 28, 1946)	AX-962
TWA Ex. 287 (TWA Board Minutes—January 9, 1947)	AX-966
TWA Ex. 288 (Minutes—Adjourned Special TWA Stockholders Meeting—January 13, 1947)	AX-974
TWA Ex. 290 (TWA Board Minutes—June 15, 1948)	AX-980
TWA Ex. 292 (TWA Proxy Statement—July 15, 1948)	AX-991
TWA Ex. 293 (TWA Prospectus—2/18/49 & Amendments—3/8/49)	AX-993
TWA Ex. 313 (Debt Outstanding & Available to TWA & Competitors—1961-63)	AX-1051
TWA Ex. 314 (Weighted Average Interest—TWA & Competitors—1960-63)	AX-1060
TWA Ex. 319 (Least Squares Analysis—S.H.E. Avg. Stage Length—B-331s)	AX-1065

ITEM	PAGE
TWA Ex. 320 (Least Squares Analysis—S.H.E. Avg. Stage Length—CV-880s)	AX-1066
TWA Ex. 321 (Least Squares Analysis—S.H.E. Avg. Stage Length—B-131s)	AX-1067
TWA Ex. 322 (Least Squares Analysis—S.H.E. Avg. Stage Length—B-131Bs)	AX-1068
TWA Ex. 328 (S.H.E.—Passengers Added/ Deleted—Reconstructed TWA)	AX-1069
TWA Ex. 331 (TWA Historical Load Factors— CV-880s—1962-1963)	AX-1071
TWA Ex. 336 (Comparison TWA Int'l vs. PAA-Atl.—1959)	AX-1072
TWA Ex. 345A (Price Waterhouse Comparison —C. & C. and S.H.E. (Revised))	AX-1073
TWA Ex. 351 (1965 CAB Handbook of Airline Statistics)	AX-1107
TWA Ex. 355 (Comparative Profit Study— TWA with AAL & UAL)	AX-1108
TWA Ex. 356 (Comparative Profit Study— TWA with All Other Domestic Trunks)	AX-1110
TWA Ex. 399 (Comparison, TWA Actual Jet Load Factors vs. S.H.E. Marginal Passenger Mile Factors)	AX-1112
TWA Ex. 401 (TWA B-131 Load Factors— April-July 1959)	AX-1113
TWA Ex. 420 (Price Waterhouse Comparison— C. & C. (Revised) and S.H.E.)	AX-1114

ITEM	PAGE
TWA Ex. 423 (Late Evening Flights—TWA 1961-1963)	AX-1129
TWA Ex. 424 (Cargo v. Passenger Revenue—TWA Late Evening Flights)	AX-1133
TWA Ex. 426 (Comparison of Selected A/C Numbers from S.H.E. Appendix A)	AX-1134
TWA Ex. 431 (Profitability of TWA A/C by Month—Computer Print-out)	AX-1135
TWA Ex. 432 (Profitability of TWA A/C by Month—Chart)	AX-1145
TWA Ex. 435 (Regression Analysis—Random Numbers)	AX-1146
TWA Ex. 436A (Regression Analysis—Random Numbers)	AX-1154
TWA Ex. 436B (Regression Analysis—Random Numbers)	AX-1157
TWA Ex. 436C (Regression Analysis—Random Numbers)	AX-1160
TWA Ex. 440 (Graph Illustrating Testimony of Prof. Hare)	AX-1163
TWA Ex. 441 (Regression Experiment—3/23/68)	AX-1164
TWA Ex. 444 (C. & C. Tabulation—Additional TWA Domestic Seat-Miles)	AX-1177

Volume AX-IV

ITEM	PAGE
DX4 (Toolco Order—30 P.&W. JT3C-4 Engines, 2/14/56)	AX-1178
DX5 (Letter—Toolco to P.&W. re Jet Engine Orders, 2/14/56)	AX-1181
DX6 (Toolco Order—90 Additional P.&W. JT4A-3 Engines, 2/15/56)	AX-1183
DX7 (Amendment—Toolco Order for 300 P.&W. Jet Engines, 9/7/56)	AX-1184
DX8 (Letter—P.&W. to Rummel re 300 Jet Engines, 9/7/56)	AX-1185
DX10 (Letter—Rummel to Collings re Boeing 707, 1/12/55)	AX-1186
DX11 (Notes of Convair Negotiations—March 24, 1955)	AX-1187
DX15 (Draft C.&C. Report—TWA Financial Forecast 1959-61)	AX-1192
DX19 (Page from *Aviation Week,* Jan. 10, 1955)	AX-1208
DX22 (*American Aviation,* June 20, 1955, pages 21-23)	AX-1209
DX26 (*American Aviation,* Sept. 12, 1955, pp. 84-85)	AX-1212
DX27 (*American Aviation,* Oct. 10, 1955, p. 68)	AX-1214
DX28 (Pages from *American Aviation,* Oct. 24, 1955)	AX-1215

ITEM	PAGE
DX29 (*Aviation Week*, Oct. 17, 1955, p. 7)	AX-1218
DX31 (*American Aviation*, Nov. 7, 1955, pp. 23-25, 27-28)	AX-1219
DX40 (TWA Board Minutes—June 21, 1961)	AX-1224
DX43 (Excerpts from Deposition of Robert W. Rummel)	AX-1229
DX44 (Letter of Damon, Dec. 6, 1955)	AX-1369
DX45 (Letter—Leslie to Dietrich, Dec. 19, 1955)	AX-1378
DX46 (Letter—Dietrich to Ayers, Dec. 21, 1955)	AX-1382
DX47 (Boeing-Toolco Purchase Agreement—8 B-131s, 1/10/56)	AX-1385
DX48 (Teletype—Boeing to Toolco re B707-131s, 11/11/56)	AX-1390
DX51 (Boeing Offer of B707-320s to Toolco, 1/6/56)	AX-1391
DX53 (Transcript of Telephone Conversation—Rummel & Connelly, 12/20/57)	AX-1393
DX54 (TWA Board Minutes—June 26, 1959)	AX-1402
DX57 (The Huntington Report—1960)	AX-1410
DX62 (TWA Fleet Requirements 1961-70, dated 3/1/61)	AX-1420
DX63 (TWA Financial Forecast 1959-61, dated 5/15/59)	AX-1433
DX64 (Letter to Thomas, dated 5/6/59)	AX-1438

ITEM	PAGE
DX65 (TWA Staff Engineering Report re Jets & Turboprops—4/19/56)	AX-1440
DX66 (Toolco-Boeing Contracts—B707-131s, 3/2/56)	AX-1445
DX67 (Toolco-Boeing Contracts—B707-331s, 3/19/56)	AX-1479
DX68 (Toolco-Convair Contracts—CV-880s, 9/10/56)	AX-1505
DX71 (Rummel Memo re TWA Equipment Program, 3/15/61)	AX-1536
DX72 (Telegram—Bew to Rummel—2/27/61)	AX-1538
DX73 (Letter—Leslie to Holliday—3/20/61)	AX-1539
DX74 (Letter—Leslie to Holliday—4/3/61)	AX-1540
DX77 (Letters—Toolco to TWA re Financing Additional Jets, 6/9-10/61)	AX-1541
DX78 (Letter—TWA to Holliday re Financing Proposals, 6/16/61)	AX-1553
DX79 (Pan American-Boeing Purchase Agreement—B707-120s, 10/13/55)	AX-1558
DX81 (Pan American-Boeing Purchase Agreement—B707-321s, 12/19/55)	AX-1564
DX85 (Boeing-AAL Purchase Agreement—B707-123s, 3/1/56)	AX-1576
DX95 (Allen Letter Announcing Boeing Jet, Nov. 19, 1954)	AX-1584
DX96 (Boeing Offer to Sell Pan American 25 B-120s, 6/23/55)	AX-1588

ITEM	PAGE
DX97 (Boeing Offer to Sell American 15 B-120s, 6/24/55)	AX-1591
DX98 (Boeing Offer to Sell United 15 B-120s, 6/24/55)	AX-1594
DX101 (Boeing 707 Delivery Positions)	AX-1597
Volume AX-V	
DX102 (Boeing Memorandum re 707 Over-Ocean Configuration, 11/2/55)	AX-1601
DX103 (Boeing Memorandum re TWA Delivery Positions, 12/23/55)	AX-1606
DX105 (Boeing Memorandum re Negotiations with TWA, 7/24/56)	AX-1608
DX106 (Letter—Rummel to Cook re Boeing Deliveries, 1/28/58)	AX-1611
DX107 (Letter—Rummel to Cook re Boeing Deliveries, 3/17/58)	AX-1615
DX108 (Letter—Price to Allen re Boeing Deliveries, 3/30/58)	AX-1618
DX109 (Letter—Toolco to Allen re Boeing Deliveries, 5/8/58)	AX-1621
DX116 (Rourke Memo to Rummel re CV-880 Deliveries, 1/15/60)	AX-1623
DX120 (TWA Memorandum re CV-880 Deliveries, 10/2/59)	AX-1624
DX122 (Bew Memorandum to Cannady re CV-880 Deliveries, 12/18/59)	AX-1625

ITEM	PAGE
DX124 (Parmet Memorandum to Rourke re CV-880 Deliveries, 1/13/60)	AX-1627
DX125 (TWA Memorandum re CV-880 Deliveries, 1/22/60)	AX-1629
DX127 (Rummel Memorandum to Rourke re Integration of CV-880s, 2/8/60)	AX-1630
DX128 (Letter—Rourke to Digges re Specification Modifications, 4/7/60)	AX-1638
DX130 (Bew Wire to Rourke re Convair Delays, 5/27/60)	AX-1640
DX135 (Letter—Convair to Bew re CV-880 Delivery, 1/6/61)	AX-1641
DX137 (Telegram—Bew to Rummel re Convair Delays, 2/16/61)	AX-1643
DX139 (Letter—Convair to Bew re Convair Delays, 3/16/61)	AX-1644
DX142 (Letter—Convair to Rourke re CV-880 Deliveries, 7/11/61)	AX-1647
DX143 (Letter—Rourke to Convair re CV-880 Deliveries, 8/2/61)	AX-1650
DX146 (Letter—Convair to Toolco re Model 30 Delivery Positions, 5/6/60)	AX-1652
DX148 (Toolco—General Dynamics Letter Agreement re 6 Model 30s, 7/14/60)	AX-1654
DX152 (Toolco—General Dynamics Letter Agreement re Additional Model 30s, 9/6/60)	AX-1655

ITEM		PAGE
DX156	(Telegram—Beall to Allen, et al. re PAA Negotiations, 9/28/55)	AX-1657
DX168	(Boeing Memorandum re Conversations with Howard R. Hughes, 9/23/55)	AX-1658
DX169	(Boeing Memorandum re Conversation with Howard R. Hughes, 10/31/55)	AX-1660
DX170	(Telegram—Boeing to Toolco re B707-331s, 7/21/59)	AX-1661
DX218	(C.&C. Letter to Leslie re TWA Financial Forecast, March 13, 1959)	AX-1664
DX219	(TWA Financial Forecast 1958-1962, dated 12/1/58)	AX-1666
DX237	(*Aviation Week & Space Technology*, 11/13/61, pages 42-43)	AX-1671
DX239	(*Airlift*, May 1962, p. 46)	AX-1673
DX254	(TWA Board Meeting, Aug. 16, 1961—Report of System General Manager)	AX-1674
DX255	(Statement of CAB Chairman Boyd, Jan. 29, 1960)	AX-1677
DX257	(*Aviation Week*, 1/30/61, pp. 36-37)	AX-1681
DX258	(Report to Directors of TWA—Oct. 13, 1961)	AX-1683
DX259	(CAB Order of Investigation—Dec. 28, 1961)	AX-1694
DX260	(Letter—Tillinghast to CAB, Jan. 29, 1962)	AX-1703

Item	Page
DX262 (Revised Pages 70-73 of TWA Ex. 4(c)(1))	AX-1708
DX270 (Report of Loeb, Rhoades & Co.)	AX-1712
DX271A (S.H.E. Report (Revised)—Volume One)	AX-1789
DX271B (S.H.E. Report (Revised)—Volume Two)	AX-1859
DX284 (TWA Prospectus—Nov. 20, 1952)	AX-1961
DX286 (TWA Board Minutes—Jan. 13, 1955)	AX-1967
DX287 (TWA Board Minutes—Dec. 13, 1955)	AX-1970
DX289 (TWA Board Minutes—April 26, 1956)	AX-1974
DX290 (Toolco-TWA Conditional Sale Contract—L-1049Gs, 6/6/56)	AX-1979
Volume AX-VI	
DX292 (Toolco-TWA Conditional Sale Contract—L-1649As, 4/19/57)	AX-1995
DX321 id. (CAB Orders & Documents)	AX-2012
DX322 id. (CAB Orders & Documents)	AX-2191
DX323 id. (CAB Orders & Documents)	AX-2347
Volume AX-VII	
DX334 (Correlation Coefficients—Substituted S.H.E. Table G-VII)	AX-2427
DX339 (B-120s Available to AAL, Actual vs. Reconstructed—1959)	AX-2428

ITEM	PAGE
DX341 (Domestic Carriers—Jets Assigned to Service, 1959-63)	AX-2429
DX342 (TWA's Share of Jets Assigned to Domestic Service, 1959-63)	AX-2430
DX348 (Revised Summary—Categories of Differences—Wemple vs. Simat)	AX-2431
DX358B id. (CAB Form 41 Reports—Northeast Airlines, 1957-1966)	AX-2452
DX358C id. (CAB Form 41 Reports—PAA, 1957-1966)	AX-2454
DX359A (Supplemental S.H.E. Report—Volume A)	AX-2458
DX364 id. (Excerpts from Deposition of Emmett O. Cocke)	AX-2843
DX367 (Combined Non-Stop Scheduled Frequencies Per Week—Aug. 1958-63)	AX-2851
DX368 (Combined Non-Stop Scheduled Frequencies Per Week—Aug. 1958-63)	AX-2853
DX371 (Summary—Categories of Differences—Wemple vs. Simat (Supplemental))	AX-2856
DX379 (Domestic Jet Seat Miles—Wemple vs. Historical)	AX-2867

DX 4, page 1
(Toolco Order - 30 P. & W. JT3C-4 Engines, 2/14/56)

331

February 14, 1956

Re: Purchase Agreement for Pratt & Whitney Aircraft JT3C-4 Turbojet Engines

Pratt & Whitney Aircraft Division
United Aircraft Corporation
Rentschler Field
East Hartford 8, Connecticut

Attention: Mr. L.C. Mallet

Gentlemen:

Hughes Tool Company hereby places a firm order with you for thirty (30) Turbojet Engines on the following terms and conditions:

(1) Engine Model

P&WA Aircraft Model JT3C-4 engine with standard equipment in accordance with Pratt & Whitney aircraft specification No. 1712 dated June 22, 1955, revised August 16, 1955.

(2) Unit Net Price

$145,000.00 with standard equipment F.O.B. East Hartford, Connecticut.

(3) Quantity

Thirty (30) engines.

(4) Shipping Schedule

Engines are to be scheduled for shipment between Jul. 1, 1958 and December 31, 1959, with a more detailed delivery schedule to be mutually agreed upon.

71337

331

(5) Payment Terms

(a) Five per cent (5%) with order.

(b) Fifteen per cent (15%) additional nine (9) months in advance of scheduled deliveries.

(c) Balance within the usual thirty (30) day period after delivery of the engines.

(6) Conditions of Sale

It is understood that this order is subject to your standard conditions of sale and to release by the United States Government. As a further condition to this order, Hughes Tool Company agrees that if it sells or lends the engines to Trans World Airlines, Inc., it will require Trans World Airlines, Inc., in consideration of the extension to it by Hughes Tool Company of the provisions of United Aircraft Corporation's standard sales warranty, to agree to release and discharge Hughes Tool Company and United Aircraft Corporation from any and all liabilities and obligations whatsoever arising out of the purchase or use of such engines except as expressly assumed by United Aircraft Corporation in said warranty.

(7) Retrofit Plan

You will make available to us sometime after July 1, 1960, by means of your usual "50-0/0 Campaign Change" procedure, the material necessary to retrofit the JT3C-4 engines to qualify those engines for the same static sea level take-off thrust as the JT3C-5; provided that we notify you to that effect prior to the expiration of the "JT3C Overhaul Material Cost Plan".

(8) Overhaul Material Cost Plan

You agree to extend to us your "JT3C Overhaul Material Cost Plan", which establishes a ceiling on engine overhaul material costs during the early operation of JT3C turbine engines.

(9) It is understood that we will negotiate a general terms agreement which agreement when negotiated may be substituted by mutual consent for the standard conditions of sale.

(10) It is expressly understood that these engines are being bought for resale to and use by Trans World Airlines, Inc., and Trans World Airlines must accept the warranty disclaimer set forth in Paragraph (6) above.

Enclosed herewith is our check including the five per cent (5%) down payment for this order.

Yours very truly,

HUGHES TOOL COMPANY

By: [signature]
Vice President

AX-1181

331

February 14, 1956

Re: Purchase of JT3C-4 and JT4A-3 Engines

Pratt & Whitney Aircraft Division
United Aircraft Corporation
Rentschler Field
East Hartford 8, Connecticut

Attention: Mr. L. C. Mallet

Gentlemen:

Today Hughes Tool Company has placed orders for 30 JT3C-4 engines and 180 JT4A-3 engines. In connection with those orders Hughes Tool Company desires additional agreements, which are not proposed as conditions to the orders but which are submitted in the belief that they will be favorably considered by you. They are as follows:

1. The JT3C-4 engine will be C.A.A. certified for use at 15,000 lbs. of thrust and will be warranted for such use after an initial period not to exceed one (1) year from time of certification of the first commercial transport equipped with such engine. Prior to the expiration of such period, it is your intention to limit the warranty for use at 14,000 lbs. thrust.

2. If, after negotiation, United Aircraft Corporation extends to Trans World Airlines, Inc., or any of its other commercial customers more favorable warranty conditions than contained in the standard sales warranty described in the purchase orders,

AX-1182

DX 5, page 2
(Letter - Toolco to P. & W. re Jet Engine Orders, 2/14/56)

you will modify such warranty to include the more favorable conditions which may have been so negotiated.

3. To conform to expected requirement of the airframe manufacturer, engines being purchased under this order will be delivered as follows:

(a) JT3C-4 engine: 1 engine for training purposes on February 1, 1959, 10 engines for spares by April, 1959, 10 engines by May, 1959, and 9 engines by June, 1959; and

(b) JT4A-3 engine: 4 engines a month in June through November, 1959; 8 engines a month in December, 1959, through November, 1960. It is also desired that 10 spare engines a month be delivered in November, 1959, through April, 1960.

We will be glad to discuss these matters with you at any time.

Yours very truly,

HUGHES TOOL COMPANY

by _____
Vice President

WESTERN UNION

W. P. MARSHALL, PRESIDENT

AX-1188

CASH NO.	CHARGE TO THE ACCOUNT OF	TIME FILED
	Andrews, Kurth, Campbell & Bradley	

The following message, subject to the terms on back hereof, which are hereby agreed to

February 15, 1956

DX 6
(Toolco Order - 90 Additional P.& W. JT4A - 3 Engines, 2/15/56)

Pratt & Whitney Aircraft Division
United Aircraft Corporation
Rentschler Field
East Hartford 8, Connecticut

RUSH URGENT

Attn: Mr. U.F. Culm

Enter our order for an additional 90 JT4A-3 engines under the same terms and conditions as applying to our order for the 100 JT4A-3 engines with the further provision that Pratt & Whitney Aircraft may schedule this additional order into 1958. Advance payment of five per cent (5%) is being forwarded.

HUGHES TOOL COMPANY
By: Raymond H. Holliday
Vice President

43

HTC-1

AX-1184
DX 7
(Amendment - Toolco Order for 300 P. &W. Jet Engines, 9/7/56)

PRATT & WHITNEY AIRCRAFT

DIVISION OF UNITED AIRCRAFT CORPORATION
EAST HARTFORD 8, CONNECTICUT, U.S.A.
CABLE ADDRESS "AIRCRAFT"

DX 7

September 7, 1956

Hughes Tool Company
Executive Offices
22nd Floor Gulf Building
Houston 2, Texas

Attention: Mr. C. H. Price, Vice President

Gentlemen:

This will confirm the recent conversation between Mr. R. W. Rummel of Trans World Airlines and our Mr. Frank DuLyn concerning the final distribution of jet engines which you now have on order.

Your orders are evidenced by your letter of February 14, 1956 for 30 JT3C-4 (J57) engines, your letter of February 14, 1956 for 180 JT4A-3 (J75) engines and your telegram of February 15, 1956 for 90 JT4A-3 (J75) engines. Hence, there is a total of 300 jet engines on order which includes 270 J75 and 30 J57 engines.

It is our understanding that you desire to change such orders by increasing to 66 the number of J57 engines and by reducing to 234 the number of J75 engines. This change in the final engine distribution is acceptable to us.

If the foregoing is satisfactory to you please have an authorized official of your company sign one of the duplicate originals of this letter. Upon receipt by us of one of the duplicate originals so signed, we shall regard this as a binding amendment to each of the orders referred to above.

Very truly yours,

UNITED AIRCRAFT CORPORATION

By W. A. Parkins
W. A. Parkins, General Manager
Pratt & Whitney Aircraft Division

ACCEPTED:
Date C H Price
HUGHES TOOL COMPANY

AX-1185

Mr. C. H. Price, Vice President
Hughes Tool Company
22nd Floor Gulf Building
Houston 2, Texas

COPY

DX 8
(Letter - P. &W. to Rummel re 300 Jet Engines, 9/7/56)

September 7, 1956

Mr. R. W. Rummel, Chief Engineer
Trans World Airlines, Inc.
10 Richards Road
Kansas City 5, Missouri

Dear Bob:

This will confirm our telephone conversation during which you provided us with the final distribution of J57 and J75 engines on order for TWA.

As you know, the orders are evidenced by a letter from Hughes Tool Company of February 14, 1956 for 50 JT3C-4 (J57) engines, a letter from Hughes Tool Company of February 14, 1956 for 100 JT4A-3 (J75) engines and a telegram from Hughes Tool Company of February 15, 1956 for 90 JT4A-3 (J75) engines.

It is my understanding that it is your desire that Hughes Tool Company change such orders by increasing to 63 the number of J57 engines and by reducing to 254 the number of J75 engines and as I also indicated to you, this is agreeable to us. In order to make this arrangement contractually effective, we have written a letter to Hughes Tool Company along the lines indicated above and requested Hughes to sign a duplicate copy, thereby amending the orders issued to us by Hughes.

During our telephone conversation, you indicated that TWA desires to obtain the delivery of all commercial J57 and J75 engines produced by us until the orders for TWA engines are completed excepting for those engines on order for which we committed ourselves prior to our commitment for the TWA engines. As I pointed out to you, such an arrangement would not be acceptable to us and, in fact, would be highly undesirable. It is suggested that you give us your realistic delivery requirements to see if it is not possible for us to meet those in a normal manner. We must, of course, reconcile the duplicating orders between Boeing and TWA.

Best regards,

Very truly yours,

UNITED AIRCRAFT CORPORATION
Pratt & Whitney Aircraft

F. W. Dalyn
Chief - Commercial Sales

746556

DX 10

(Letter-Rummel to Collings re Boeing 707, 1/12/55)

EXHIBIT 10
D 6/11/56 W.B.

Mr. John A. Collings
200 Airport Building
Kansas City, Missouri

Mr. R. W. Rummel
206 Airport Building
Kansas City, Missouri
January 12, 1955

Mr. R

Boeing 707

I met with Boeing representatives Ken Gordon and Bill Taylor Monday morning, January 10, in Detroit and with George Schairer Monday afternoon.

Boeing is most anxious to enter into active specification negotiations with TWA at this time. While Boeing representatives are in no position at the moment to finalize any business arrangements, they, nevertheless, are anxious to design the commercial 707 to meet as many requirements of major potential customers as practical.

Boeing specification conferences have been under way with Pan American for nearly two weeks. Boeing is anxious to receive comments from TWA not only as a potential customer but since we operate both international and domestic service. This experience places us in a good position to indicate reasonable airplane design compromises to best satisfy both requirements. Boeing wishes to proceed with TWA specification conferences within the next two weeks.

I told the Boeing representatives that while we would like very much to go over Boeing 707 specifications in detail, we had been committed to certain work on the West Coast which would make this impractical on a large-scale basis for perhaps as long as two months. I told them, however, I would be glad to go over the specifications personally at the first opportunity with them but that we could not enter into any large-scale activities for the present.

Boeing is reluctant to agree to sell Pan American the twenty-five jets it wants for fear of losing TWA's potential order for fifteen jets. Pan American's Juan Trippe has insisted that Boeing deliver the first twenty-five airplanes to PAA and TWA's representative has insisted that Boeing deliver the first fifteen jet aircraft to it. Boeing has unsuccessfully attempted to resolve this issue. It appears obvious that as soon as the 1449A project is announced that Boeing will rapidly conclude a deal with Pan American for the delivery of its first commercial jet transports. Since the Boeing jet may well be the first practical jet airliner to see airline service and since PAA is so highly competitive to TWA, I suggest we try to work out some sort of option agreement with Boeing for a reasonable number of competitive delivery positions before February 15, the probable date of the 1449A announcement.

R. W. Rummel

RWR:JC

AX-1187

(Notes of Convair Negotiations-March 24, 1955)

KWR:JC

CONFIDENTIAL

March 24, 1955

EXHIBIT 11 W.B.

MEETING RECORD OF NEGOTIATIONS WITH CONVAIR

CHRONOLOGICAL FILE

CHRONOLOGICAL

rrived in San Diego on Saturday, March 19, toward evening. Early evening I tele-ed Jack Zevely to make arrangements for meeting either that evening or Sunday to uss the over-all situation. Jack indicated he could not get his people together uch short notice for a Sunday meeting but that he would be ready to go Monday ing. We did not discuss the over-all situation to any material extent.

unday evening we met with Zevelys at the Loomis' at which time arrangements for Monday meeting were confirmed but little was said about the deal. Monday morning, h 21, I met Zevely in the dining room at which time we briefly discussed the deal. mentioned, as I knew, that thirty airplanes were to be involved, that the price $4,750,000 each, and that delivery was intended during the middle of 1958, but confirmation of delivery dates would await word from Fort Worth, which was cted Monday afternoon. Jack explained that the present plan was for the airplanes e built in Fort Worth with Fort Worth detail engineering but with San Diego ling preliminary design and more or less governing the project. Jack said Bayless d be getting in touch with me shortly for a meeting Monday morning.

Bayless called about half an hour later and discussed plans for the meeting. eeting was arranged at the La Jollian for 9:30. Ralph said the following men of the project at Convair besides himself:

Frank Hass (predesign)
Art Carloff (Who handled the interior and preview drawings)
Crawford Truex (weight man)
Al Kidler (aero)
Jack Donaldson (Who works for Zevely)
Dick Waldo (Who also works for Zevely. Waldo has not been involved in the affair to any material extent since the Beverly Hills meeting.)

eeting at the La Jollian started about 9:30 and was attended by the following:

Ralph Bayless
Crawford Truex
Al Kidler
Bill Brown
Bob Rummel

e decided that the best way to proceed would be per my conversation with Zevely rning; that is, we would try to write a brief, preliminary, general objective specification which would be followed by the preparation of a detailed specifi-n during a sixty or ninety day period subsequent to signing the preliminary ract. The preliminary contract as discussed with Zevely would probably be in form — probably a letter type agreement — which would portray the essence e deal and permit approval by Convair's Board at the March 31 meeting. Zevely ving his people prepare a short form of contract for my review.

talled Harry West on Sunday and advised him of the probable need of his presence this week and confirmed this Monday evening at which time he stated he about midnight Tuesday for a Wednesday meeting here, after which he

CONFIDENTIAL

would have to attend the Albuquerque hearing on Thursday and Friday, but that he would return to La Jolla for Saturday and Sunday. In the event the Albuquerque hearing continues into Monday, he will be there at that time and return following the hearing to La Jolla for continuation of discussions if necessary.

I discussed West's presence with Collings by telephone and gave him very brief information on the details on Monday morning at which time he also confirmed that West should attend the Albuquerque hearing.

I did not mention earlier that one of the men who attended the conference, Bill Bru was new to the project and his work is specifications.

Hughes called Saturday evening asking for expedited handling of the contract and specifications. Hughes agreed at that time the brief form of specification and contract I suggested was exactly what he would like to have. He also called Monday morning again pointing out the need for urgent handling in view of the Lock situation and asked that we make an effort to find out what the CAA would require in the way of pre-service airplane testing, since Mr. Collings had indicated to him th it might run as much as a year. Now, the Lockheed situation is critical with respe to timing since the Lockheed management turned down the Lockheed Sales Department effort to build the 1049G fuselage on the new wing. Schwartz resurrected this pla on the basis of higher cost and on the basis that he could also sell KLM. However, KLM was to make its decision by Monday, March 21. I have not heard what KLM decid if anything, on that date and understand now there is still a possibility that Lockheed may wish to continue with this project. This airplane would be competitiv with the DC-7C on speed and could be as competitive on range and would be available for use during the Summer of 1957. The Convair project could be available, subject to confirmation by Fort Worth, for use during 1958, provided the CAA did not requir extensive route testing. The original schedule called for final certification by July of 1958 and initial certification by March of 1958. The first flight was scheduled twenty-seven months from go ahead, which, when originally set, was June, 1957. Now, Convair plans to have sixteen airplanes completed by the end of July, so presumably upon receipt of final certification, operations could commence rapid because pilot training could have taken place prior to that time. Convair has included in its time estimate 600 hours for CAA accelerated service tests and 300 hours for airline service tests. I agreed with Hughes to send a man to Washington to find out what he could about current CAA thinking on requirements for initial jet transport operations. He agreed this was the best method, provided it was done in a way which would not cause the CAA to become suspicious as to our activiti here on the Coast. I called Rourke and asked him to go to Washington to contact Konecny of the CAB and Henry Weeks of the CAA on other matters, bringing this subject into the conversation cleverly and adroitly so as to avoid these men attaching any significance to the question other than honest planning curiosity. Rourke was instructed to talk to Konecny about furthering the international regulation picture, about Malloy's activities on jet transport regulations, and to lead into the discussion at hand, after which he was to call me. Rourke planned t leave Kansas City Monday afternoon but due to the snow storm was forced to wait until Tuesday morning. He telephone me Tuesday advising of the delay and suggest that the approach to Weeks take the form of Rourke inquiring concerning the prep of a SAE paper on the subject at hand. I thought this was a good idea and told him that would be all right.

CONFIDENTIAL

Zevely called me Monday afternoon advising that he would not have the confirmed delivery information from Fort Worth until 5:00 Tuesday afternoon but that it appeared that Fort Worth would be able to confirm the original delivery estimate. I telephoned Hughes' office at Miami later Monday evening and left a message to the effect that the delivery information would not be available until 5:00 Tuesday and that I would call upon receipt of this information. During the Monday evening Ralph Bayless advised that it was Convair's intent to place the project at Fort Worth due to space available -- that they would prefer to do it at San Diego but felt it was necessary that the job be done at Fort Worth. His concern is the same as mine -- that is, the ploughing into the project the commercial know-how that exists at San Diego. Ralph said they plan to do this by having about twenty key men from Fort Worth participate in all detail negotiations and to have them work hand in hand with preliminary design in San Diego so that they would become imbued with airline know-how and could instill this information into others back at Fort Worth. This, of course, could not possibly take the place of airline know-how acquired previously through the years by direct contact with service experience problems, and if the project is done at Fort Worth, and it appears that it would be, this will be one of the things to watch carefully. I do not think this aspect is sufficiently important not to go ahead with the project. An example of this is the excellent results we had with the Martin Company by working closely with Martin and seeing that they did build the airplanes in accordance with TWA standards and provisions. There is some advantage to working with people who are interested in acquiring airline know-how but who do not know too much about it themselves initially. The contrast to this is attempting to sell Douglas or Lockheed on an airline problem when they figure they already know all about it, in some instances at least. Under these circumstances it is most difficult to put points over; whereas, if the Convair situation is properly cultivated this may not be a problem.

A short form of spec was discussed and Bayless instructed Bill Brown to proceed with the preparation of the spec for review today, Tuesday the 22nd. I also discussed at some length interior arrangements with Crawford Truex, who is currently having drawings prepared showing the up-to-date arrangement desired. I pointed out the need for very rapid convertibility from international to domestic, the need for multi-service type interior, as well as quick convertibility from it to sky coach to standard to siesta. Door locations were discussed, and I requested that a front left-hand door be installed for passenger use and that floor-length emergency exits be installed over the wing in lieu of the four window type exits now located there. The window type emergency exit is too high over the wing, being some six or seven feet above the wing contour and being located directly over the wide, sweeping curvature of the wing fillet so that a stable footing would be impossible whether the wing were wet or dry. This condition would especially be bad if the wing were washed. I also commented on the location of the forward life raft on the right-hand side which is located over the floor-length emergency exit just aft of the flight station. It was some six feet off the floor which would be difficult to lower to make ready for use. This should be located in a more convenient location. Other life rafts followed latest TWA thinking to be located immediately adjacent to the doors with the exception of the life raft at the main cabin door which was on the wrong side of the airplane.

On the multi-purpose interior, I requested that they look at locating the standard passengers forward and the sky coach passengers rearward because of the favorable cabin noise distribution. This means that the lounge presently located at the rear should be located either midship or forward and, similarly, it may mean

that the galley should be located farther forward to avoid servicing the first-class seats through the sky coach section. This problem is not yet solved but Convair agreed to lay it out and take a look at the over-all situation. The interior plan generally looked fine with respect to sky coach, standard and siesta type seating arrangements but did not do a good job with respect to the multi-purpose type interior for the reasons just mentioned. It appeared that the fuselage would have to be at least one seat row longer to accommodate our emergency exit request.

With respect to certification, Bayless advised that sixteen airplane months would be required from first flight to CAA certification. He figured that the minimum elapsed time was twelve to fourteen months. He did not recall the hours on the ships at the end of the test period. He went on to say that certification would not be his direct problem and that actually he should not be making an estimate but that these figures were the ones he recalled from the earlier preliminary discussions.

To deviate for a moment to explain the Lockheed situation, the basic problem Lockheed has as indicated by Leonard Schwartz is that Lockheed estimates that if they sell sixty 1649's, there is no profit potential and a real loss of $12,000,000 minimum. Some of Lockheed's management estimated that the loss could run as high as $24,000,000. The sixty airplane estimate is Schwartz's for the remaining commercial market for airplanes of this type which he feels Lockheed could capture. Schwartz stated that if we would pay for the pod development spread over twenty-five airplanes, the originally quoted price of $2,275,000 would be increased $61,364 or a total of $2,336,364. Schwartz said they had to have a firm order for twenty-five from TWA and that they would hold out seven delivery positions for KLM. TWA deliveries would run April - 4, (1957) May - 6, June - 4, July - 4, August - 4 and September - 3. KLM's May - 2, June - 2, July - 2 and August - 1. He further explained that Hughes wanted ten podded airplanes and fifteen with structural provisions. He stated the expected certification on the 156,000 pound non-podded airplane by the end of April, 1957, with the first flight scheduled for September of 1956. The first fifteen would not have wiring, plumbing, etc. built into the airplanes for the pods except the test airplane. Upon completion of certification of the non-podded airplane at 156,000 pounds, Lockheed would start certification with the podded airplane, the pods going on the test airplane already equipped with plumbing, wiring etc. Lockheed would then complete the last ten airplanes with pod provisions. Certification with pods would be expected the middle of September at which time we would have ten podded airplanes ready for operation. No price at this time was stated for the pods. Such airplanes delivered with pod provisions prior to certification could be used as non-podded airplanes — the pod installation being a relatively minor job.

During a subsequent conversation with Hughes, he advised that Lockheed could build fifteen ships by the end of June with structure for 165,000 pounds with the pods installed and 156,000 pounds without the pods and that the fuselages would have the new emergency exits but otherwise be the 1049G. The structural provisions for the pods on the first fifteen would increase the price so that each airplane would cost $2,300,000 each. This is $36,364 less than the Schwartz figure. He stated Lockheed would start immediately with pod installation engineering and that if pods were sold to others, would rebate on a prorated basis development costs to Hughes Tool. Minimum order of airplanes is twenty-five, the first podded airplane to be the sixteenth with certification with pods by August, 1957 and delivery schedule as follows: April - 4, May - 7, with certification at 156,000 pounds by the end

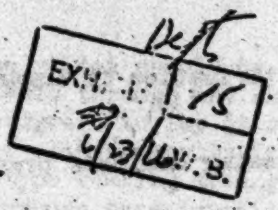
by, June - 4, with airplanes for KLM to follow and certification in August with pods.

During a meeting with Convair today, March 22, the following men were present:

Norman Robins
Frank Hass
Crawford Truex
Bill Brown (specification man)

Bayless and Al Ridler were also present.

DRAFT



June 26, 1959

Mr. A. V. Leslie
Senior Vice President-Finance and Treasurer
Trans World Airlines, Inc.
380 Madison Avenue
New York 17, New York

Dear Mr. Leslie:

In accordance with your request, we have made a study of TWA's Financial Forecast dated May 15, 1959 for 1959-1961, the plan of operation which is the basis for this Forecast, the premises used for the estimates which comprise the Forecast and pertinent industry data. From this study, we are of opinion that the Financial Forecast is a reasonable expectation for each of these three years, 1959-1961, for the intended plan of operation.

PLAN OF OPERATION

The principal element of TWA's plan of operation is the number and type of aircraft operated. At the end of the year 1958, TWA had a total of 189 piston-engine aircraft in its fleet. On March 20, 1959, the Airline commenced service with a jet-engine aircraft, and by the end of 1960 expects to have 45 jet aircraft in service and to have retired a number of piston aircraft. The principal characteristics of TWA's aircraft fleets of 1958 and proposed for 1961 are shown by the table on the following page. The second table following shows the expected schedule of transition of the fleet, by fiscal quarters, through 1959 and 1960.

NUMBER AND CHARACTERISTICS OF TWA'S AIRCRAFT, 1958 AND 1961

Units	Aircraft Model	Aircraft Name	Engines No.	Engines Kind	Seats (A) First	Seats (A) Tourist or Economy	Speed (mph)
		1958 Fleet					
29	L-1649A	"Jetstream"	4	Piston	26	40	320
9	L-1049H	Super H Constellation	4	Piston	-	97	315
28	L-1049G	Super G Constellation	4	Piston	33	39	315
9	L-1049A	Super Constellation	4	Piston	64	-	315
39	L-749	Constellation	4	Piston	49	-	310
32	L-049	Constellation	4	Piston	-	80	270
37	M-404	Martin	2	Piston	40	-	240
6	DC-4		4	Piston	-Cargo- & Charter		200
189							
		Proposed 1961 Fleet					
15	B-707-131	Boeing Jet	4	Jet	46	65	575
10	B-707-331	Boeing Int'l. Jet	4	Jet	50	71	595
20	CV-880	Convair Jet	4	Jet	48	64	600
8	L-1649A	"Jetstream"	4	Piston	26	40	320
32	L-049	Constellation	4	Piston	75	-	270
28	L-1049G	Super G Constellation	4	Piston	49	20	315
4	L-1049H	Super H Constellation	4	Piston	-Cargo- & Charter		315
117							

(A) Excluding lounge seats not normally sold.

ADDITIONS AND RETIREMENTS OF TWA'S AIRCRAFT, 1959-1960

Aircraft	Inventory at 1/1/59	Changes in Fleet(B) Quarters 1959 1st	2nd	3rd	4th	Quarters 1960 1st	2nd	3rd	4th	Inventory 1960
Additions										
Jet Engine										
B-707-131	-	2	6	7	-	-	-	-	-	
B-707-331	-	-	-	-	2	3	5	-	-	
CV-880	-	-	-	-	1	2	6	8	3	
Total	-	2	6	7	3	5	11	8	3	
Retirements (A)										
Piston Engine										
L-1649A	29	-	-	-	-	2	6	8	5	
L-1049H	9	-	-	-	-	-	-	-	5	
L-1049G	28	-	-	-	-	-	-	-	-	
L-1049A	9	-	-	-	9	-	-	-	-	
L-749A	39	-	-	-	-	-	9	15	15	
L-049	32	-	-	-	-	-	-	-	-	
M-404	37	3	-	2	1	5	10	8	8	
DC-4	6	-	-	6	-	-	-	-	-	
Total	189	3	-	8	10	7	25	31	33	
Totals in Use	189	188	194	193	186	184	170	147	117	

(A) TWA plans to sell these aircraft which are listed for retirement, but for purposes of the subject Forecast, these planes are assumed to be retired and depreciation credits continued.

(B) The dates indicated here for additions and retirements are based on present delivery schedules for new aircraft and present plans for flying certain routes and certain schedules. This, however, must be considered as only an approximate time schedule by which the transition of the fleet will take place.

As shown by the preceding tables, certain significant changes are planned for TWA's fleet between 1958 and 1961, as follows:

a. The number of aircraft in the operating fleet will be reduced by 1961, from 189 to 117 aircraft.

b. In the 1961 fleet, 38 per cent of the planes will be new jet-powered aircraft with speeds over 500 mph. These jet aircraft are larger, more comfortable and more attractive (in our opinion) than the present piston aircraft which make up the fleet.

c. The present 2-engine aircraft will be retired and the 1961 fleet will include only 4-engine aircraft.

d. Seating in the L-049 Constellation will be changed from an 80-seat, tourist-class interior to a 75-seat, first-class interior, and the L-049 will be used generally on the short-range flights in place of today's Martin 404 aircraft.

e. All other aircraft in the 1961 fleet will be of "mixed configuration", with both first-class and tourist seating, whereas the 1958 fleet had several types of aircraft with either all first-class or all tourist seats. The Super G Constellation in 1958 was operated with 33 first-class seats and 39 tourist seats. It is planned that this same aircraft in 1961 will be operated with a larger number, 49, first-class seats and only 20 tourist seats. The mixed configuration seating is expected to give TWA maximum opportunity to meet the demand for each type of seat. The percentage of each type of seat can be changed as the demand changes; for example,

more tourist seats can be provided during the summer months when the demand for tourist seats is high and the demand for first-class seats is low.

f. The principal transition from the current fleet to the fleet for 1961 will take place during the middle and latter parts of 1960.

The end result of the above-described changes is expected to provide an aircraft fleet which, although smaller in numbers, will be more attractive to the potential air traveler and will serve him better.

Competitors' Aircraft

TWA's 1958 aircraft fleet, as listed in a preceding table, was primarily Lockheed aircraft (model number has a prefix 'L'), whereas TWA's principal airline competitors have been using Douglas aircraft that are faster than comparable Lockheed models. The table which follows lists comparable speeds for various Lockheed and Douglas aircraft.

Aircraft	Speed
Lockheed Constellation L-749	305 mph
Douglas DC-6	315 mph
Lockheed Super G Constellation L-1049G	315 mph
Lockheed "Jetstream" L-1649A	320 mph
Douglas DC-7	340 mph
Douglas DC-7C (Overseas model)	350 mph

When TWA receives the Boeing and Convair jet-engine aircraft now ... order, it is expected to have a jet aircraft fleet with speeds equal to ... speeds of its principal competitors' jet fleets, as follows:

Aircraft	Speed
TWA's Jet Fleet	
Boeing B-707-131	575 mph
Boeing B-707-331	595 mph
Convair 880	600 mph
Competitors' Jet Fleets	
Boeing and Convair models that are identical with the above-listed TWA aircraft, plus:	
DC-8 with the JT3 jet engine	565 mph
DC-8 with the JT4 jet engine	595 mph
Convair 600	615 mph

So far as passenger comfort and attractiveness and nonstop range ... concerned, available data on seating plans, interior dimensions, plans ... decoration and arrangements of the plane interiors and performance expec... tions indicate that TWA's jet fleet can be as attractive to potential air ...velers as the competitors' jet fleets.

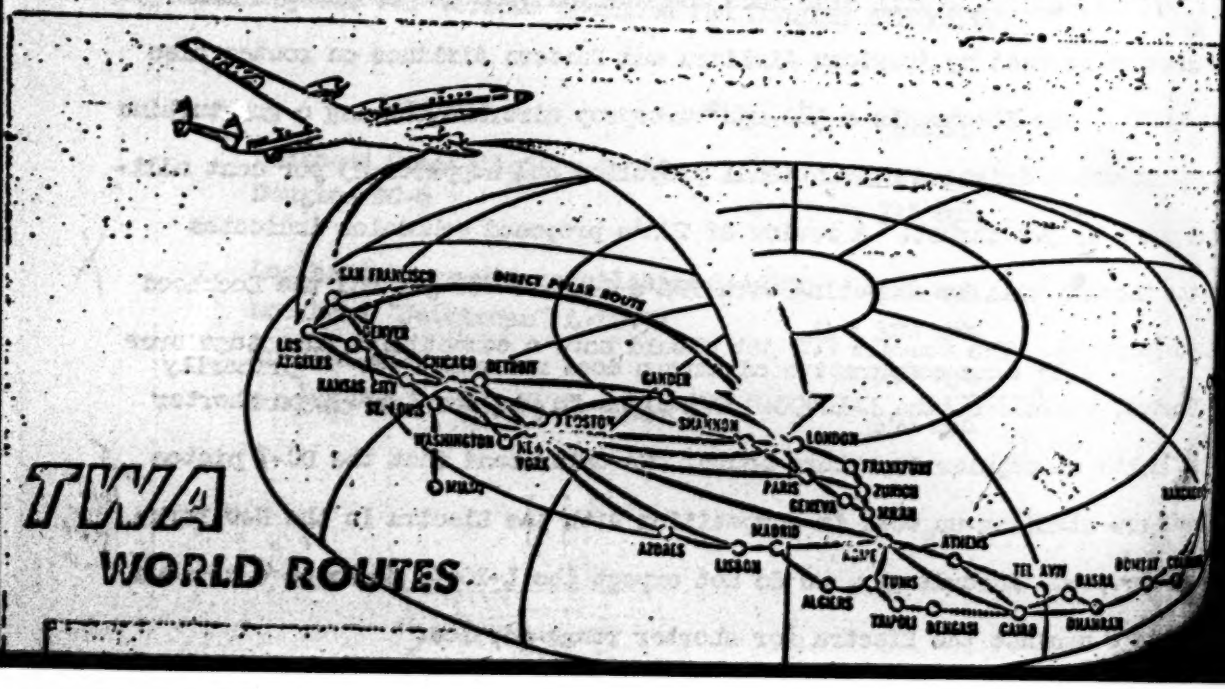
In addition to the above-listed competitors' jet aircraft, TWA will also face competition from the Lockheed L-188 ...ectra which is used by American Airlines and Eastern Airlines on routes also ...own by TWA. The Electra is a 380-mph turboprop aircraft, having a gas turbine ...wer plant which drives a conventional propeller and supplies 25 per cent addi... ...nal power by jet thrust. A review of TWA's proposed schedules indicates ...t the Electra will be competing with TWA's Convair 880 jet and the Lockheed ...0490 (piston). The Convair 880 jet should have a competitive advantage over ... Electra, but this same comparative advantage does not exist for primarily the L-1049G. TWA plans to use the L-1049G on shorter ...ge flights at popular departure hours. We understand that the DC-7 pistons ...rcraft are standing up well in competition with the Electra in the New York- ...go service. Accordingly, we do not expect the L-1049G to be at a serious ...ge against the Electra for shorter range service.

Route Certification

Another principal feature of TWA's plan of operation is the extent and nature of the routes which TWA is certificated to operate, this certification being by the United States and foreign Governments. This rigid governmental control of cities served and routes flown is expected to continue, and for the subject Financial Forecast it is assumed that the routes allocated to TWA throughout the period 1959-1961 will be essentially as they were in 1958, except that it has been assumed that American Airlines would be awarded non-stop rights between New York and San Francisco thereby dividing that market between TWA, United and American.

TWA, like most other airlines, is constantly seeking governmental approval of route changes such as certification for new long-range routes and permission to drop cities and routes with light traffic. TWA plans to continue this effort, but the Forecast is premised on no material change in certificates.

TWA's routes which are shown by the sketch which follows, are divided into two general categories, Domestic and International.



International Flights

The frequency and distribution of International flights scheduled on the transatlantic routes by TWA for the summer period of 1959 and as planned for 1961 are shown by the table which follows:

Scheduled Eastbound Transatlantic Flights By Routes	Summer Schedule Flights Per Week 1959	Proposed 1961
New York - London	7	14
Paris	9	14
Lisbon	5	6
Rome	2	0
Madrid	2	0
Shannon	3	0
Frankfurt	2	0
Boston - Paris	1	0
Shannon	3	1
Santa Maria	1	1
London	2	0
Detroit - Shannon	1	0
Chicago - Paris	1	0
London	2	0
Los Angeles - London	1	0
San Francisco - Paris	1	0
Total Transatlantic	43 (A)	36

(A) TWA's 1958 summer schedule included 48 flights per week.

The table above shows TWA's plan to concentrate International service the highest volume (and most profitable) routes, New York-London and Paris. is planned to serve Chicago-Paris (and other nonmajor traffic) by transfers New York City (or other principal terminals) and thus increase the load on principal transatlantic flights.

In addition to the above-listed transatlantic flights, TWA also operates a large network of routes east of the European gateway cities of London, and Lisbon, as far eastward as Bangkok. This area has a light density of traffic and is served on a relatively

low-frequency basis. In 1958 and 1959, this east of the gateways traffic represented 24.8 per cent and 27.0 per cent, respectively, of the International available seat-miles, and in 1961 is expected to represent only 18 per cent of the available seat-miles estimated for the International Division. The decreased percentage of available seat-miles east of the gateways by 1961 reflects TWA's planning to concentrate aircraft utilization on transatlantic service which has the highest passenger traffic potential. TWA plans, for the summer of 1960, to assign eight B-707-331 aircraft to transatlantic service and eight "Jetstream" aircraft to service east of the gateways with certain minor exceptions including four weekly transatlantic crossings with the "Jetstre and two weekly Boeing jet flights between Rome and Cairo.

International traffic has traditionally had a wide seasonal variation, always being high in June through September and quite low during winter months. TWA's plan for 1961 provides for less increase during the summer months, in the hope of reducing the wide seasonal variation. This "less increase in the summer' program has been started this year, 1959, and should improve TWA's profit (becaus of the Airline's inability to match wide variations in revenue with similar variations in expense).

By using aircraft as good as competitors on transatlantic service, TWA expects obtain to a full share of wintertime business and first-class traffic whid is less seasonal, again with toward the aim of reducing the seasonal variation that has made economic International operation so difficult in the past.

The Polar Route flights direct between California and Europe, which are included in the 1959 schedule pattern, are not in the 1961 plan. Travelers now using this route are assumed to switch to a routing via New York City.

We have examined the details of these plans, and believe the program to limit the number of aircraft assigned to summer service to less than the

demand, to use jet aircraft for transatlantic service that will be attractive to first-class travelers, and to use the lower capacity "Jetstream" for service east of the gateways is a sound plan directed toward profitable International operation.

AIRLINE INDUSTRY TRAFFIC

We believe it is desirable to consider the previously mentioned forecasts of TWA revenue passenger-miles, in comparison with data on total airline industry traffic volumes, to test the reasonableness of the TWA forecasts.

Domestic Trunk Airlines

TWA is the fourth largest member of the Domestic trunk airline industry. This industry comprises twelve airlines which carried the below-listed revenue passenger-miles in 1958:

Airline	1958 Revenue Passenger-Miles (Domestic Operations) (Thousands)
United	4,915,179
American	4,890,870
Eastern	3,811,239
TWA	3,661,807
Capital	1,413,041
Delta	1,400,031
Northwest	1,110,862
National	990,251
Braniff	913,073
Western	503,102
Continental	419,086
Northeast	407,116
Total - Domestic Trunk Lines	24,435,657

TWA's Jet Seat Availability

The table on the following page shows seats available in jet aircraft, by quarters, for TWA Domestic and its principal domestic competitors. TWA's percentage of jet seats reaches a maximum of 27.1 per cent in the third quarter of 1959, which is reflected in the previously mentioned high revenue passenger-miles forecast for 1959. Thereafter, TWA's percentage of jet seats (of these competing airlines) declines to 16.9 per cent by the end of 1961, and this is reflected in the modest increases forecast for revenue passenger miles for 1960 and 1961.

Total Jet Aircraft On Order

The total number of jet and turboprop aircraft on hand and on order by the principal competitors of TWA for use on routes generally competitive with TWA's routes, versus the piston aircraft, is as follows:

	Domestic Airlines (See list p.27)	Transatlantic Airlines (See list p.31)	Total
Piston Aircraft			
2-Engine or 4-Engine	185 (A)	25 (A)	210
	401	127 (B)	528
Total Piston	586	152	738
Turboprop Aircraft	105	14 (C)	119
Jet Aircraft	184	93 (C)	277
Total	875	259	1,134
Per Cent Jet of 4-Engine Piston, above	46%	73%	53%
Per Cent Jet of Total Piston	31%	61%	38%
Per Cent Jet plus Turboprop of Total Piston	49%	70%	54%

(A) Slower, DC-6 and B-377 aircraft with 4 engines.
(B) The DC-7 and Super Constellation aircraft.
(C) Excludes shorter range jet and turboprop aircraft also on order.

From the above, showing the percentage of these jet and turboprop aircraft at 54 per cent of the piston aircraft, it appears that a number of new aircraft have been ordered, and does not indicate a general oversupply of jet and turboprop seats.

It must be understood that although the new aircraft are very fast, and theoretically could produce a tremendous number of available seat-miles, the traveling public's repeated refusal to accept inconvenient departure hours

is expected to apply to the new aircraft, and to prevent practical utilization of the theoretical capacity. This situation also exists today with piston aircraft. The air transportation industry has many examples of public insistence on popular departure times. Chicago Midway and New York LaGuardia Airports are both seriously congested during the 4 P.M.-6 P.M. period each day, but are not at all congested during the midday hours. Airlines have tried many times offering midday flights to avoid this peak-hour congestion, but these flights prove to have uneconomic, light passenger loads and airlines are forced to continue maximum departures at the popular hours.

PASSENGER LOAD FACTOR

"Passenger load factor", the percentage of seats occupied by passengers on revenue flights, is an important index of airline operation. TWA's historical record of passenger load factors and those forecast for 1959-1961, for all Domestic flights in composite, are as follows:

TWA Domestic Passenger Load Factor

Year	Average of All Flights
1954	63.1%
1955	64.6
1956	64.4
1957	62.8
1958	64.5
Forecast	
1959	67.3%
1960	65.2
1961	65.3

The high load factor forecast for 1959 reflects TWA's favorable competitive position in having a number of jet aircraft in service during the second, third and fourth quarters of 1959, ahead of certain principal competitors. Both TWA and American have been averaging well over 90 per cent load factors on

The variations in the forecast revenues per passenger-mile, listed on the preceding page, are the result of small variations in the proportions of transatlantic and east of the gateways revenue passenger-miles estimated for each year.

Other revenues, those generally from mail, express, freight and charter services, have been and are estimated as follows:

Year	Domestic Mail, Express Freight Charter and Miscellaneous (Thousands)	Percentage Change Over Previous Year	International Mail, Express Freight Charter and Miscellaneous (Thousands)	Percentage Change Over Previous Year
1952	$13,284	-	$11,970	-
1953	15,070	13.4%	12,115	1.2%
1954	16,083	6.7	13,226	9.2
1955	14,514	-9.8	13,548	2.4
1956	15,472	6.6	14,391	6.2
1957	17,925	15.9	13,179	-8.4
1958	17,932	-	18,613	41.2
Forecast				
1959	$21,069	17.5%	$26,455	42.1%
1960	21,026	-0.2	16,785(A)	-36.6
1961	21,500	2.3	16,300	-2.9

(A) Reflects anticipated elimination of military charter flights.

Opinion on Forecast Revenues

As indicated in the foregoing, many hundreds of items have been considered and an equally large number of individual estimates have been made which, in total, comprise TWA's revenue forecast for the years 1959-1961. These revenue forecasts are conditional on many carefully considered premises and assumptions, especially the flight schedule pattern and assignment of aircraft proposed for 1961. From our detailed, independent study, we are of opinion that the estimates of total annual revenue included in TWA's Financial Forecast for 1959-1961 represent reasonable expectation for each of those years.

CONCLUDING REMARKS

In the preceding sections of this Report, we have:

a. Outlined the plan of operation which has been developed for TWA's operation for the ensuing three-year period, 1959-1961.

b. Shown various analyses which we have made of TWA's future plan of operation and financial estimates therefor.

c. Commented on the many estimates which comprise TWA's Financial Forecast dated May 15, 1959, for the years 1959-1961, generally concluding that they are reasonable.

Our opinion respecting TWA's Financial Forecast is predicated o

d. A continuing favorable condition of the economy of the United States and Europe, without a disruptive threat of war.

e. No long-term interruption of operations as a result of strikes, and no important change in air traveler enthusiasm such as might develop if there is a series of serious accidents.

f. Delivery of each airline's jet aircraft approximately on the schedule which exists today, and these jet aircraft giving performance in accordance with the performance forecasts by TWA's Staff Engineering.

g. Tariffs remaining at the present general rate level, except for the expected expiration of the jet surcharge for International trips.

h. TWA's rigid adherence to the principles of the present plan of operation for 1961, most important of which is the plan to limit aircraft to assignments which will produce the optimum net operating income.

Accordingly, we believe TWA's plan of operation for 1959-1961 is sound, and that the income estimates which are a part of the Financial Forecast of May 15, 1959, have good prospect of realization.

Respectfully submitted,

Consulting Engineers

AX-1208 DX 19

(Page from Aviation Week, Jan. 10, 1955). JANUARY 10, 19

EXHIBIT 19

Patterson Bombshell . . .

United to Spend $50 Million for DC-8 . . .

- **Expects delivery will start in 1960, possibly 1959, depending on Douglas commitment for USAF transport.**
- **Jet liners to use J57s; UAL chief calls turboprop talk 'shadowboxing,' says engines are unavailable.**

By William J. Coughlin

Los Angeles—United Air Lines will buy a fleet of jet transports this year, probably the Douglas DC-8 with Pratt & Whitney J57 engines, UAL president W. A. Patterson told AVIATION WEEK here exclusively last week.

Asked when he expected to place the order, Patterson answered: "I hope it is in the latter part of the year."

▷ $50 Million Plus—Although Patterson did not disclose the number of planes he expects to buy, he said that $50 million would be a conservative figure for the initial investment United Air Lines is prepared to make for a jet transport fleet. He added that he expects the DC-8 price to be about $4.5-million apiece, including engines.

Patterson said that he is aiming at a 1960 date to have his jet transport fleet in operation, since it will take about five years to get delivery. However, he indicated that this might be advanced to 1959. Reviewing United philosophy, he added: "I thought a year ago that our decision on jet transports would be made in 1956-1957."

Whereas the jet transport in the past has appeared uneconomical, he said: "In the last six months and from figures I received yesterday from the Douglas Co., it now is encouraging; and over 1,000-mi. stages the jet promises to be better than the DC-6B, which has been very satisfactory. It is that which has convinced me the time has come for jets."

▷ Rejects Boeing Jet—Patterson indicated that United Air Lines is not interested in buying the Boeing jet transport and said: "We disagree with Boeing in that we don't want an airplane designed for the military; we agree with Douglas in starting with an aircraft designed for commercial use."

Enlarging on this thinking, Patterson indicated that for the USAF jet tanker-transport competition, Douglas has proposed a military version of a commercial design, reversing the normal tendency to try to obtain a military contract first and then modify the design to meet civil requirements.

▷ No Word from AF—Apparently Douglas has convinced Patterson that it intends to proceed with its commercial DC-8 jet transport even if it loses the Air Force tanker competition. As of last Monday, Patterson said Douglas had received no word as to how it stood in that competition.

However, the manufacturer's commitment would depend upon release that the company could get from the military to build a commercial aircraft aside from tanker-transport production, should Douglas get a USAF order for the jets.

▷ No Turboprops—The United chief executive told AVIATION WEEK that turboprop transports are out of the picture so far as he is concerned.

"Talk about turboprops is shadowboxing. There is no engine available," he told this writer. "We will continue to buy the present type of aircraft, such as the Douglas DC-6B and DC[illegible] present service and then we will go [illegible] pure jet. "We think that if you [illegible] turboprop plane today, our competi[illegible] can buy a jet and whip you by [illegible] mph."

Patterson said that United is [illegible] off its present fleet of piston-engine [illegible] liners in five years. He also disclo[illegible] that the airline has any interest [illegible] turboprops for short hauls. "We're [illegible] ing to wear out the Convairs [illegible] said, and added that United [illegible] operate such an expensive new [illegible] into small cities.

▷ About 75 Passengers—He said he [illegible] pects the breakeven point on the [illegible] mercial DC-8 to be about 52%. [illegible] regard to seating, he pointed [illegible] "There is quite a debate about [illegible] We would like to see about 75 [illegible] gers. Others want to go to [illegible] more."

Patterson believes United [illegible] schedule more flights carrying a [illegible] number of passengers and in that [illegible] attract a larger total volume than [illegible] fewer, higher-density services.

Concerning the DC-8's P&W [illegible] Patterson said: "The J57 by that [illegible] (1960) will have hundreds of thou[illegible] of hours on it. I have been in c[illegible] with the military and they tell me [illegible] the figures on maintenance of th[illegible] gine are very fine."

NATO Entry: Mystere Light Tactical Fig[illegible]

A lightweight tactical fighter version of the Marcel Dassault Mystere is one of several entries submitted by North Atlantic Treaty Organization to Washington. In order of preference the designs are: Breguet, Mystere, Folland Gnat, Avro and Fiat G. 91.

Recommendations are based on [illegible] in comparison with NATO [illegible] for ground attack craft, which [illegible] why sonic-supersonic Gnat [illegible] third on list. French entries [illegible] ered by Bristol Orp[illegible]

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Jets or Turboprops? Airlines Face Big Decision

- Orders must be placed within next few months
- American signs $65-million order for 35 Lockheed 310s

By ROBERT LOEBELSON

TOP EXECUTIVES of the world's major airlines last week were faced with a decision they had postponed as long as possible. They not only had to choose between turboprop and turbojet transports, but also were compelled to place their orders within the next few months or lose ground competitively.

The stimulant came in the form of two announcements within 24 hours of each other:

• American Airlines signed a $65-million order with Lockheed Aircraft Corp. for 35 turboprop transports.

• Douglas Aircraft Co., which lost out to Lockheed in the AA turboprop competition, announced it would go ahead with construction of the DC-8 turbojet.

Certain to follow AA with orders in the very near future were two other carriers included in the so-called Big Four—Eastern Air Lines and United Air Lines.

• EAL board chairman E. V. Rickenbacker has indicated Eastern wants at least 100 turboprops delivered by 1960 that are capable of flying 425-450 mph on ranges up to 2,500 miles. He says Eastern expects to pay $250 million for the planes, plus an additional $50 million for facilities and equipment to handle the turboprops. EAL's requirement, however, is beyond the capabilities of the Lockheed Electra ordered by American.

• UAL president W. A. Patterson has said United's next long-range transport will be a turbojet and that the order will be placed within the next few months. United traditionally has been a Douglas customer, so no one would be surprised if it places an order with Douglas.

Another member of the Big Four, Trans World Airlines, had tried to buy a turboprop-powered version of the Lockheed Constellation, the Super G. But the Pratt & Whitney T34 engine could not meet the required performance specifications in time. As a result, TWA placed a $70-million order for 24 Model 1649s, using Turbo Compound piston engines, in April. The L-1649 can be fitted with turboprops when they become available.

Meanwhile, a report was heard that Howard Hughes, principal TWA stockholder, had started discussing a jet transport with Convair Division of General Dynamics Corp. However, J. G. Zevely, Convair's director of sales and contracts, who admitted that his firm is interested in developing a jet transport for either commercial or military use, said no discussions have taken place. "We would be delighted to have the opportunity to talk about such an airplane with Mr. Hughes, but the rumor that discussions have already started is without foundation."

• The American order for a turboprop was the result of a competition in which Convair, Douglas, Lockheed and Vickers participated (AMERICAN AVIATION, Jan. 31). When the range requirement was increased from 750 to 2,000 miles, only the Douglas and Lockheed entries remained. In ordering the Lockheed model, American (also a traditional Douglas buyer) gave the Burbank company its first AA order since the early 1930s when Lockheed Orions were used in mail service by what was then American Airways.

AA's anouncement of the order did not say that the engines used on the Electra would be the 3,750 hp. Allison 501 (T56s) used in Lockheed's design proposal. It was explained that the new plane is designed to use engines as high as 5,000 hp (possibly the Rolls-Royce RB-109) with few modifications.

Features of the Electra include "built-in" loading steps (consequently eliminating the need for "roil-up" loading ramps), provisions either to check or carry luggage aboard, an interior "several inches wider" than any transport now flying and resultant wider seats, and each seat will have its own table for eating or writing.

• New soundproofing techniques will reduce noise in the cabin and sightseeing windows (20 by 16 inches) will give passengers improved visibility. Weather avoidance radar and autopilots will be standard equipment. AA also says the reversing propellers will permit the Electra to operate from airports having 5,000-ft. runways without difficulty.

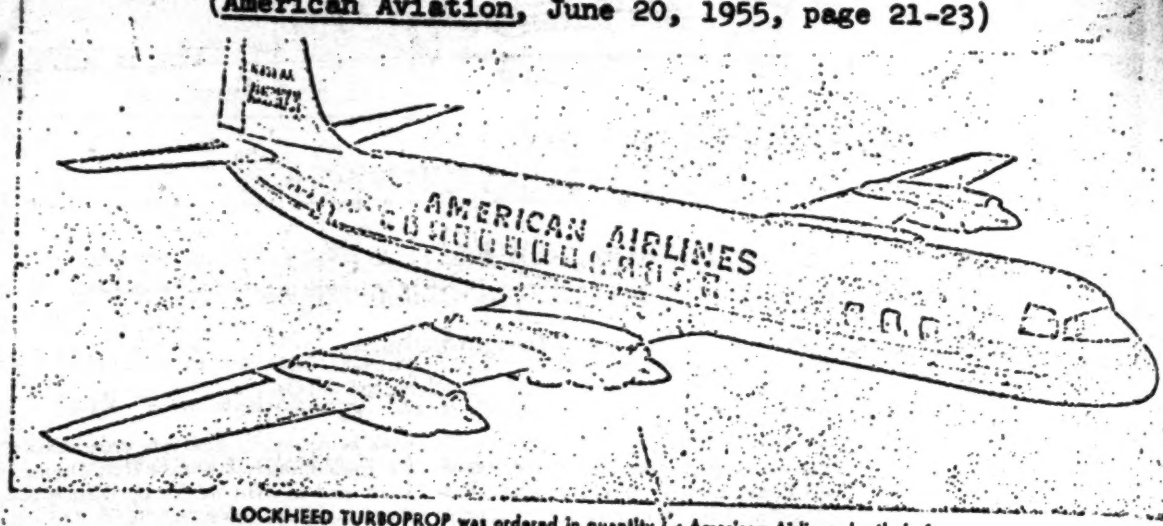
The DC-8, which may also be ordered by American, will be ready for

Lockheed Electra Specs

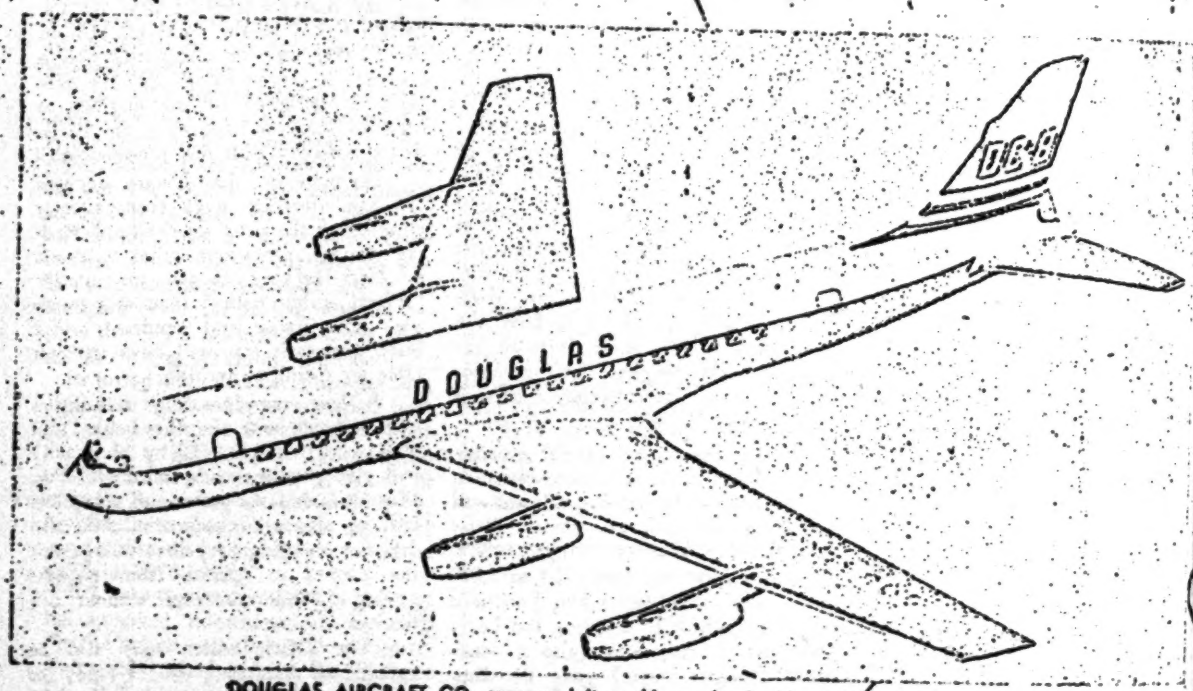
Design and performance data on the new Lockheed CL-310 Electra, 35 of which are to be delivered to American Airlines between the end of 1958 and mid-1959, include:

Gross Weight	[illegible],500 pounds
Cruising speed	[illegible]er 400 mph
Range	2000 miles
Seating capacity	64 plus 6 in lounge
Fuel capacity	4178 gallons
Cargo space	400 cu. ft. excl. of baggage space
Cargo capacity	4000 pounds
Cruising altitude	Up to 30,000 ft.
Powerplants	Undecided—design based on Allison T56
Length	101 ft. 4 in.
Wingspan	95 ft.
Overall height	34 ft.
Crew	5 (2 pilots, flight engineer, and 2 stewardesses)

(American Aviation, June 20, 1955, page 21-23)



LOCKHEED TURBOPROP was ordered in quantity by American Airlines shortly before . . .



DOUGLAS AIRCRAFT CO. announced it would go ahead with its DC-8 four-jet transport.

its first flight tests by December 1957, Douglas says, and airline deliveries will start in 1959.

The Santa Monica company made no reference to a prototype in announcing the go-ahead signal from the board of directors after a special meeting, indicating that Douglas will follow its usual procedure of starting with a production model. Full certification, according to estimates, could be completed by late summer 1959, and Douglas will probably have 12 or 15 ready for delivery at that time. No price was mentioned for the DC-8 but a figure of $4.5 million is said to be very close.

• Douglas has been working up the DC-8 for more than three years and the company's total investment to date, including the cost of preparing for the USAF's jet tanker competition, is placed at "several million dollars."

There are now at least three aircraft companies in the world with long-range jet transports beyond the paper stage:

• de Havilland in Britain with its Comet IV.

• Boeing at Seattle with its Model 707.

• Douglas at Santa Monica with the DC-8.

The British firm is struggling to retrieve its reputation, seriously damaged after a number of accidents to earlier Comets last year, and orders for the Comet IV (except from British Overseas Airways Corp.) have been slow coming in.

Boeing is hampered by its military commitments on the KC-135 jet tanker and is having difficulty in getting

nization for a commercial version of the advanced 7o7.

Douglas has no obligation to USAF, and therefore appears to be in a position to deliver the DC-8 first.

• Like the Boeing KC-135, the DC-8 uses four advanced Pratt & Whitney J57 turbojets mounted in pods. These engines, Douglas says, will give the DC-8 a cruising speed of 550 mph. The plane will carry between 80 and 125 passengers.

Overseas version of the DC-8 will have a maximum gross weight of 257,000 pounds, the domestic model 211,000 pounds. The plane will be able to operate from present airports "at costs even lower than current passenger models." Wingspan is given as 134.6 feet, length 140.6 feet, height, 40.2 feet.

Typical flight times of the Douglas jet were given as New York-Paris 6 hours 32 minutes; San Francisco-New York 4 hours 53 minutes; San Francisco-Honolulu 4 hours 23 minutes.

Thus, the long-delayed jet/turboprop era has arrived for U.S. and foreign flag carriers. Britain took the lead with the jet Comet and the turboprop Viscount but the two largest U.S. commercial plane builders have closed the gap. From here on, Burbank and Santa Monica are convinced, the world's airlines will have to start placing their orders.

• • •

Air Force Asks $60 Million More For Research and Development

By FRANCIS J. KEENAN

Growing Congressional concern over apparent inadequacies in military research and development programs—highlighted by vigorous Hoover Commission charges—has resulted in some action.

Air Force took the first step last week when it asked the Senate Appropriations Committee for an additional $60 million for "emergency" research and development programs.

The request was unexpected, coming as it did with the Administration's special request for funds to finance the AF speedup in B-52 production.

And while no "new money" is involved—it includes authority to transfer $60 million from another category into the R & D budget and restoration of a $10 million House emergency fund cut—the move did reflect awareness of growing Soviet airpower and recognition of Congressional doubts about the program.

The Hoover Commission report landed fortuitously in the middle of the Congressional furor roused by the first, cryptic Defense Department reports May 13 of Soviet gains. The Commission study, presumably already prepared, arrived two weeks later. In the meantime, several Senators were voicing complaints about U.S. progress in the development of advanced aircraft and missiles.

Sen. Stuart Symington (D-Mo.) estimated the USSR was ahead in work on the "ultimate" weapon, the Intercontinental Ballistic Missile. Sen. Richard Russell (D-Ga.), chairman of the Armed Services Committee, asserted that Defense R & D programs were "too scattered" but "might be sufficient" if better coordinated.

Sen. Henry M. Jackson (D-Wash.) emphasized qualitative requirements in secret hearings before his Military Applications subcommittee of the Joint Atomic Energy Committee.

Sen. Warren Magnuson (D-Wash.) blasted the Defense Department for its "failure" to recognize the role of R & D in maintaining airpower, which he said was reflected in too little training of scientists and too modest programs in developing new weapons and procedures.

The Hoover Report appears to confirm and elaborate on these charges. It warns that "the Armed Services are not sufficiently daring and imaginative in their approach to radically new weapons and weapon systems." It said even stepped-up R & D programs may be too late to maintain U.S. supremacy in weaponry, while current levels are entirely inadequate.

It maintains that Defense Department organization failed to provide sufficient opportunity for new approaches in weapon development. And it notes that "informal proddings" by civilian scientists and technologists accounted for most advances.

The Commission emphasizes that U.S. defense efforts depend basically on the success of its research programs. Therefore, it recommends these things are needed:

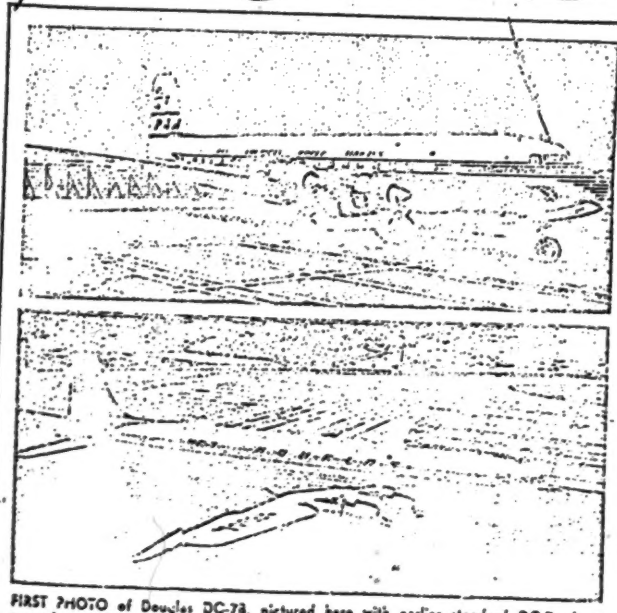
• Increased integration of R & D programs.

• Better personnel policies designed to keep military and civilian experts on the job.

• Greatly increased attention to basic research.

• More effective utilization of the nation's scientific and technical communities and private research facilities.

• An overall strengthening of the



FIRST PHOTO of Douglas DC-7B, pictured here with earlier standard DC-7, shows new wing saddle tanks fitted on Pan American's aircraft. Official difference between DC-7 and DC-7B is new Wright DA4 Turbo Compound engine. PanAm's DC-7Bs will have the extra-range tanks, but Eastern Air Lines' aircraft will not. PAA's airplane is approved for 126,000 gross takeoff weight, whereas EAL's is approved for 122,200 and Panagra's for 125,000 pounds.

(American Aviation, Sept. 12, 1955, pp. 84-85)

Airlines Weigh Jet Decision: DC-8 or 707?

Design vs. delivery advantages pose competitive problems; Pentagon security policy hurts foreign carriers.

A LARGE-SCALE jet transport buying spree by U.S. and foreign airlines has been temporarily sidetracked by behind-the-scenes jockeying by carriers for best competitive position in the future jet race.

Although firm jet orders from major U.S. airlines are still expected within weeks, and most certainly before the year-end, competitive aspects of the two available aircraft—Boeing's 707 and Douglas' DC-8—have created an unprecedented equipment procurement situation.

Carriers such as American, Pan American, Eastern and United, representing a market for about 100 jets, are weighing answers to the big question: Which aircraft will it be? Forcing the competitive equipment aspects right close to home is a fifth big airline, Trans World Airlines, historically a lone wolf in aircraft buying through its principal stockholder, Howard Hughes.

What the four carriers are now pondering boils down to a choice between the airplane they favor and a delivery schedule that will put them up front in jet operation.

• If they decide on the DC-8, fear is that Hughes would immediately step into the picture with a Boeing 707 order for TWA and gain a 1½ to two-year competitive edge in jet introduction in airline service.

• Should the decision favor the Boeing 707 to erase this threat, apprehension continues to exist as to whether they are getting the best jet buy for commercial airline service. First sign of this uncertainty came to light recently in a statement by United Air Lines' president W. A. Patterson.

Commenting on the relative merits of the two aircraft, Patterson noted that although the Boeing 707 prototype has been flying for a year, it has been built for military order. The DC-8, he said, is still in the design stage and is more flexible for tailoring to airline requirements.

General feeling among airline engineers is that any transport design being built primarily for military use is bound to suffer many hidden penalties in weight and performance when adapting it as a commercial transport vehicle.

A second factor that makes carriers hesitant to go "whole hog" for the 707 is the wealth of transport experience they have amassed in the postwar period with Douglas equipment, as contrasted with only limited experience by a few carriers with Boeing 377 Stratocruisers.

A third big element in the whole competitive scheme is that the high cost of jets makes it most profitable for the big carriers to deal with one manufacturer in order to realize the lowest per-unit costs possible. However, failure of one major airline to go along, as in the case of the Hughes-TWA combine, relegates the matter of pooled orders to an almost insignificant role.

• As a result, heads of two major airlines, C. R. Smith of American and Juan Trippe of Pan American, are reportedly in day-to-day discussions attempting to resolve their future course of action in an investment that could make or break their respective companies.

On the foreign airline scene, although it is taken for granted that orders from abroad will closely follow those of U.S. carriers, another obstacle has loomed. Negotiations for jet transports by these airlines, because of military security limitations of the classified Pratt & Whitney J57 engine, do not enjoy the same free exchange of performance data as do those of U.S. airlines.

For example, in dealing with a foreign airline, Boeing is permitted to give overall performance data on the 707 with J57s but cannot give details on engine performance. In theory, however, Boeing today can sell 707s to foreign airlines complete with J57s and the carrier could find out all there is to know about the engine.

By way of contrast, security-cleared U.S. carriers can learn all there is to know about J57 engine performance, a situation which foreign carriers feel represents a decided competitive advantage in negotiations for jet transports.

Attitude among aircraft manufacturers, here, as expressed by one official, is that the disadvantage, if it exists at all, is purely academic. Reason is that even if a foreign carrier were to order a jet today, it couldn't be made available until long after security wraps have been removed from the engine in question.

• The fact remains, however, that newly adopted Pentagon policy, which sets an arbitrary date on when classified jet engine data can be released, (see chart) gives U.S. carriers a full year's edge over foreign airlines in access to performance information as well as eligibility for delivery of any classified engine.

In the case of the J57 engine, which

How Pentagon Releases Jet Engine Data

New Pentagon policy of July 22 (Directive 5030.19) sets this release schedule for data on turbojet, turboprop and turbofan engines for commercial operation. Directive provides that changes in the international situation may either accelerate or retard release of data on a particular engine.

Type of Release	To Cleared U.S. Mfgrs.	To Cleared U.S. Airlines	U.S. Airline Operation	Foreign Airlines	Foreign Engine & Airplane Mfrs.
Prelim. Performance & Installation Data	After 50-hr. FRT	After 150-hr. ET	1 yr. after 150-hr. ET	1 yr. after 150-hr. ET	1 yr. after 150-hr. ET
Complete Performance & Installation Data	After 50-hr. FRT	1 yr. after 150-hr. ET	3 yrs. after 150-hr. ET	3 yrs. after 150-hr. ET	3 yrs. after 150-hr. ET
Delivery for Prototype Aircraft (Opn. and Maint. Data Only)	After 150-hr. ET	1 yr. after 150-hr. ET	2 yrs. after 150-hr. ET	3 yrs. after 150-hr. ET	3 yrs. after 150-hr. ET
Delivery for Production Aircraft & To Airlines	2 yrs. after 150-hr. ET	2 yrs. after 150-hr. ET	3 yrs. after 150-hr. ET	4 yrs. after 150-hr. ET	4 yrs. after 150-hr. ET
Production & Manufacturing Drawings	.....	.....	.....	.....	4 yrs. after 150-hr. ET

Notes: 50-hr. FRT—50-hour preliminary flight test rating.
150-hr. ET—Service approval of 150 hr. endurance test portion of engine qualification test.

received service approval of its 150-hour endurance test in July 1953, the magic date for release of data to foreign airlines comes in July 1955 and delivery of 707s to these carriers can start in July 1957. Since both dates precede any possible delivery of jet planes to either U.S. or foreign airlines, any advantage to U.S. operators by the one-year edge in Pentagon timing is obviously nullified.

• Big question, however, is whether this will continue to be true of future engine developments. Since most foreign carriers now involved in the purchase of U.S. transports are similarly associated with the U.S. in mutual defense activities, there appears to be equal question whether the penalty imposed on foreign airlines is not one borne of U.S. airline political pressures rather than of military necessity.

Last question to be answered is: Does the policy penalize U.S. engine producers in their negotiations with foreign operators? It has long been accepted that Pentagon restrictions on U.S. jet engine information have been an obstacle for manufacturers competing with British designs, and the arbitrary penalty imposed by the new policy might well mean the difference between selection of U.S. or British designs on aircraft of the future. • • •

CAB Resumes Nonsked Hearings Next Month

Civil Aeronautics Board will resume hearings October 5 in the Large Irregular Air Carrier Investigation which already has produced a record 30,000-page hearing transcript.

New hearings will be on the qualifications of 30 of the 60 nonscheduled airline applicants who did not previously get an opportunity to testify as to fitness, ability, etc. Examiners Ralph L. Wiser and Richard A. Walsh have tentatively scheduled the new hearings for Washington, Los Angeles, and Seattle.

In addition, the other 30 applicants who were heard on individual qualifications at previous sessions, will get a further opportunity to bring their cases up to date, either through supplemental briefs or possibly on the witness stand.

Meanwhile, the Board is expected to issue its decision soon on the policy phase of the case in which the nonscheduled industry's role for the next five years, at least, will be explained. Purpose of the new hearings is to determine which of the 60 applicants will be authorized to fill the spot outlined in the policy decision.

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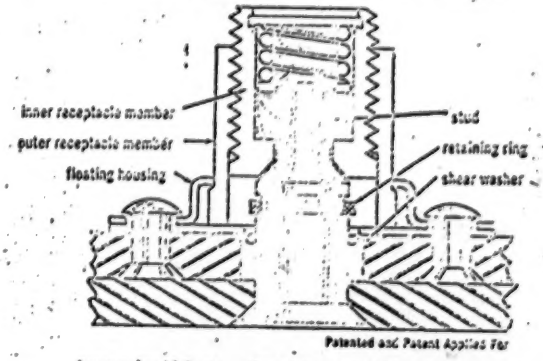

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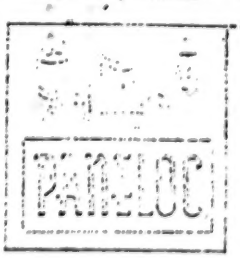

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West Coast Talk . . . By Fred S. Hunter

- DC-8 power problem puzzler for Douglas.
- Augmented J57 engine behind schedule.

IT HAS BECOME an open secret in Santa Monica that Douglas is confronted with a perplexing DC-8 power problem. It has been re-evaluating all its performance data on the projected jet transport.

It will be recalled that last June when Douglas broke out so dramatically with its DC-8 go-ahead announcement, it spelled out plans for two versions, one a domestic model having a gross takeoff weight of 211,000 pounds, the other an overwater model to tip the beam at 257,000 pounds. The company reported it would be ready for airline deliveries in 1959.

Hunter

At that time, there was no hint of any timetable differences between the two versions. Now, however, it seems the augmented J57 engine Douglas was counting on for its long-range, overwater model won't be ready until a year or more later than a less-augmented J57 suitable for the domestic version. This would put the start of deliveries on an overwater DC-8 back to 1960. And by that time—who knows?—a commercial version of P&W's new, higher-thrust J75 might very well be pushing into the picture.

No augmentation would be required for the J75. On the other hand, it is a heavier engine. Also, it will be more expensive. Douglas currently prices the J57-powered domestic DC-8 at $4,600,000, the overwater model at $4,650,000. With J75s, the overwater version's price would have to be increased about $300,000.

• •

The J57 complication centers around the necessity for extensive water augmentation to up the takeoff thrust if these big jet transports, like the Boeing 707 and the Douglas DC-8, are to be capable of operating long-range (without throwing away all the payload. Latest reports from Seattle say Boeing is allowing for 450 gallons of water for thrust augmentation for the 707.

Information from Santa Monica indicates Douglas contemplates a somewhat lesser quantity for the domestic DC-8, but substantially more for its overwater model. Extensive augmentation like this compounds the troubles of the engine-maker. It adds to the engine durability problem. To illustrate, 39 gallons of fluid fills the water injection needs of the Douglas DC-6B. A 22-gallon tank suffices for Convair's twin-engine 440. It's a big step up to 450 gallons and more.

• •

All this has an important bearing on an important customer—Pan American. Word has been about for some time that Juan Trippe, PAA president, has had his contract-signing fountain pen all filled and the cap off, ready to sign on the dotted line for 25 planes. But not for deliveries a year or more behind a domestic carrier or for an airplane possibly having less performance than a competitor. Thus the predicament as Boeing and Douglas jockey for key customers in the two markets.

In a similar quandary, incidentally, is Convair on its Model 36 design for TWA, which has to have aircraft suitable for transatlantic as well as domestic schedules. There are even hints from San Diego that Convair may decide its best course is to bow clear out, at least for now.

• •

P&W's J75 is programmed into both Convair's F-102B and North American's F-107 . . . Motorola's Phoenix plant is second source on new guidance system for the Navy Terrier . . . Designation for the new Nike is Nike B (not Nike 2) but the original design is simply the Nike, not Nike 1 . . . Wonder if it is true the Institute of the Aeronautical Sciences actually is considering building an office building on the back lot of its Los Angeles facility to lease to aviation firms and allied interests in the area?

• •

McCulloch Motors bought a Super 18 Beech from Norman Larson, its first venture in an executive aircraft . . . Southern California section, with more than 500 members, is the largest unit in the American Rocket Society . . .

INDUSTRY NEWS

PAA Orders Both Boeing and Douglas Jets

- Rash of orders from other major U.S. airlines expected as result of Pan Am's $269-million decision.
- First delivery of 707s scheduled for December, 1958; DC-8s to start arriving year later.

By WILLIAM V. HENZEY

PAN American World Airways — "broke the ice" this month with a $269-million order for 45 American-built jet transport aircraft, all of which are scheduled for delivery within the next five years.

As tension mounted among airlines in the race to be the first U.S.-jet purchaser and between manufacturers to be the first U.S.-jet seller, Pan Am solved both races by ordering 25 Douglas-built DC-8s and 20 Boeing 707s.

The order was expected to touch off a rash of orders from other major U.S. lines such as United, American, Eastern and possibly TWA. Because of its split nature, it was also seen as assuring virtual success for both manufacturers in the commercial jet field, since Pan Am alone has given each about one-third of the business said to be needed for break-even projects.

• First deliveries by Boeing will start in December, 1958, ending in November, 1959. In December, 1959, Douglas will start delivering DC-8s to Pan Am, with the order scheduled for completion in January, 1961.

The Boeing 707s will be powered by four Pratt & Whitney J57 engines, cost a total of $109 million, including spares, and will carry 104 first-class passengers and 125 in tourist configuration.

The DC-8s will use more powerful P&W J75 engines, cost a total of $160 million including spares, and will carry 108 first-class or 131 tourist passengers.

Both planes, according to Pan Am, are designed to cruise at 575 miles an hour at 30,000 feet. By way of emphasizing these facts, Boeing flew its prototype 707 on Oct. 16 from Seattle to New York in record time of 3 hrs., 58 minutes.

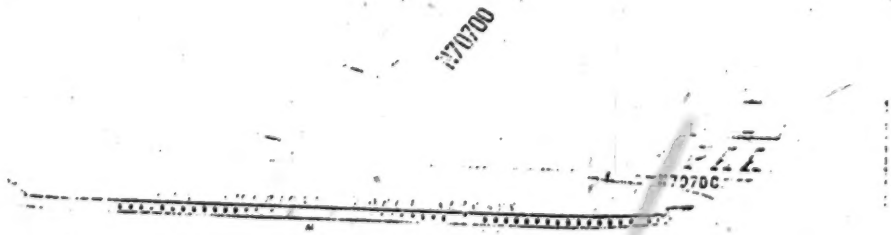
• Pan Am intends to place the new jets in transatlantic, South American, and transpacific services in the five-month period beginning December, 1958.

Sample times on proposed new schedules are: New York-Paris, 6 hrs., 35 minutes; New York-Buenos Aires, 11 hrs., 15 minutes, and Tokyo-Seattle 8 hrs., 32 minutes.

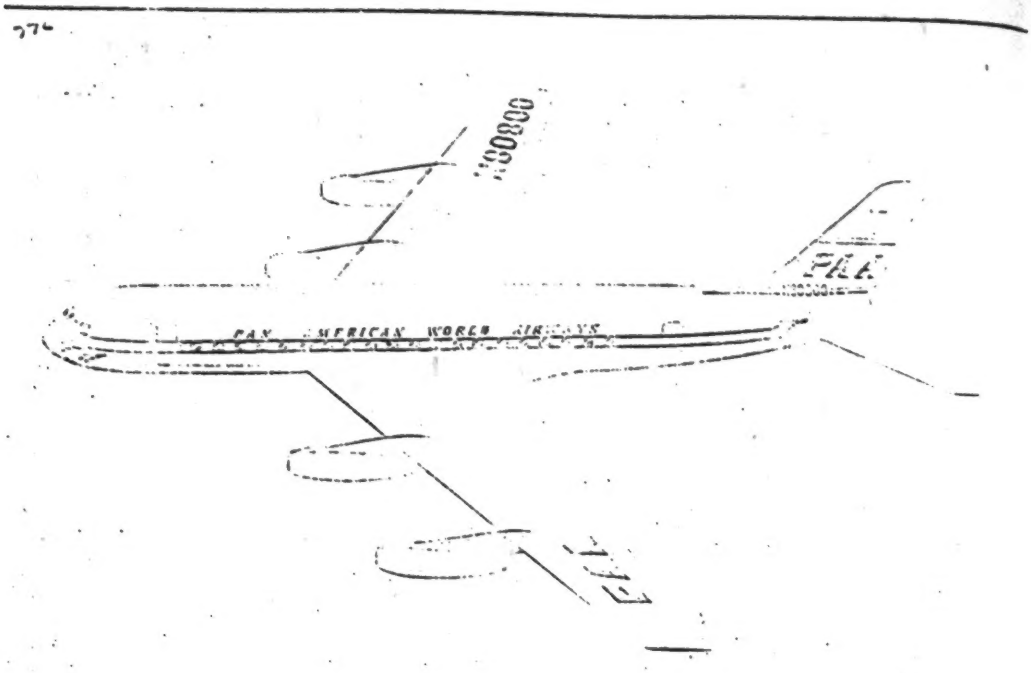
Donald W. Douglas, president of Douglas Aircraft, hailed his firm's deal with Pan Am as "the largest and most significant single contract in the history of commercial aviation . . . opening a new chapter in global aviation and bringing the jet age closer to the lives of millions throughout the world."

The Boeing-Pan Am contract "marks the beginning of a new era in air transportation," according to Boeing president William M. Allen, who added: "Introduction of the 707 Jet Stratoliner on Pan American's routes will, in effect, make the world 40% smaller."

• Pan Am's president, Juan T. Trippe said the new order plus PAA orders outstanding, which add up to a total aircraft commitment of $357 million, is "concrete evidence of Pan American's faith and confidence in the continued expansion of sound two-way international trade as well as greatly increased tourist travel between the U.S. and the 74 friendly foreign nations



Artist's sketch of Boeing 707 in Pan American dress.



Douglas DC-8 as it will look with Pan American markings.

which are regularly serviced by Pan American."

Vice President Richard Nixon, Secretary of Commerce Sinclair Weeks, Air Force Secretary Donald A. Quarles, and CAB Chairman Ross Rizley were among important Federal officials who hailed the Pan Am announcement as a tremendous lift to Aviation and a significant contribution to the national economy.

But while Pan Am, backed by a Douglas statement that the DC-8 purchase is the "first firm agreement for U.S.-built jet transports," appeared first in line, many other U.S. carriers gave evidence that little time advantage would be surrendered to competitors in the jet race.

Foremost in point of time, if not in size of order, was National Airlines, which still insists it has the first commitment for the Douglas DC-8. Last August, testifying under oath at CAB hearings in the New York-Florida Case, NAL president G. T. Baker said his company has placed orders for six DC-8s costing about $36 million.

Further, Baker said National has "firm delivery dates" for four DC-8s in 1959 and two in 1960. Whether Pan Am or National was first appeared to hinge on whether you wished to make a distinction between a written contract, such as Pan Am entered with Douglas, or an oral contract, which Baker says National entered with the DC-8 manufacturer.

United Air Lines was scheduled to make its recommendations to its directors on October 25. The Airlines' officials held final conferences with Boeing and Douglas in mid-October. UAL president W. A. Patterson, J. A. Herlihy, v.p.-engineering and maintenance, and W. C. Mentzer, chief engineer, headed the UAL team in the final talks.

• Eastern's board chairman, E. V. Rickenbacker recently said his company has allocated $125 million for 20 jet transports but had not yet made its mind up as between the DC-8 and the 707. A decision is expected at any time.

American, normally a heavy Douglas purchaser and a proud possessor of many "firsts" when it comes to new aircraft types, has not yet made its mind up and only last week had a team of engineering experts actively studying the 707 in Seattle.

Both American and Eastern, of course, previously announced so-called "gap-bridging" orders for turboprop Lockheed Electras.

• Trans World Airlines, a big question mark, is rumored interested in the 707 but such rumor must be considered as the purest speculation at this time.

Latest carrier to evidence jet interest was Continental Air Lines, whose president, Robert Six, was at Douglas in mid-October checking details with the DC-8 project group. Continental's interest in a jet transport is said to center around its equipment interchange operations.

Actually, none but the smallest U.S. lines can be eliminated from the race which, in terms of domestic orders alone, gives promise of a $1 billion pot to be divided between the two manufacturers. And this does not take into consideration inevitable orders from foreign airlines.

What effect increased orders have on pricing of the new jets remains to be seen. Early reports indicate the basic price of the Boeing 707 of $4.3 million will be adjusted downward to $4.1 million if 65 airplanes are sold.

• Price on the DC-8 powered with P&W J75 engines reportedly is just over the $5 million figure, or about $400,000 more than the basic price of the J57-powered DC-8.

The substantial cost of these planes, when related to past prices for piston-engined aircraft, is largely responsible for the cat-and-mouse game being played by various airlines.

Particularly adroit has been UAL's Patterson, who has alternately hinted at UAL leanings toward the DC-8 and the 707, and even suggested that U.S.

Oct. 24, 1955

777

companies may pool their orders with a unit price gain as a major advantage.

• Some indication of the amounts now required to stay in the competitive airline race can be obtained from the recent Pan Am order and that announced earlier by Eastern. Pan Am's total of $357 million for new equipment and Eastern's for $350 are each about equivalent to the total assets of the domestic trunkline industry ten years ago.

In fact, the combined net assets of the nine regional trunks and 13 local service airlines in 1954 was not as high as either of the two aircraft orders.

With such enormous amounts involved in each airline's order, therefore, even a 5% reduction in unit price, such as reportedly is contemplated by Boeing for quantity production, means substantial savings to the purchasers.

For example, the purchaser of 20 707s would gain $4 million or virtually the price of one additional plane if the 65-plane goal is exceeded. The same would hold true for Douglas purchasers, of course, if that firm is thinking along the same lines.

• But while extreme optimism has invaded the U.S. manufacturing picture, the potential U.S.-airline market for British de Havilland Comet jetliners appeared to be waning.

Pan Am's Boeing and Douglas orders appeared to wipe out PAA's previous order for three Comets. PAA's only comment was that it continues to be interested in de Havilland jet transports and there are "certain confidential understandings" between the two companies looking toward a "fruitful outcome."

There is, however, general industry belief that PAA's contract with de Havilland contained a clause nullifying the order if U.S.-built jets should be available for delivery at the same time.

Thus has the jet age in this country passed the talking stage. ◆◆◆

British Make New Bid For Turboprop Market

- Canadair, Bristol and Convair may join forces in production of Bristol Super-Britannia.
- British European Airways negotiating for fleet of Viscount 900s.

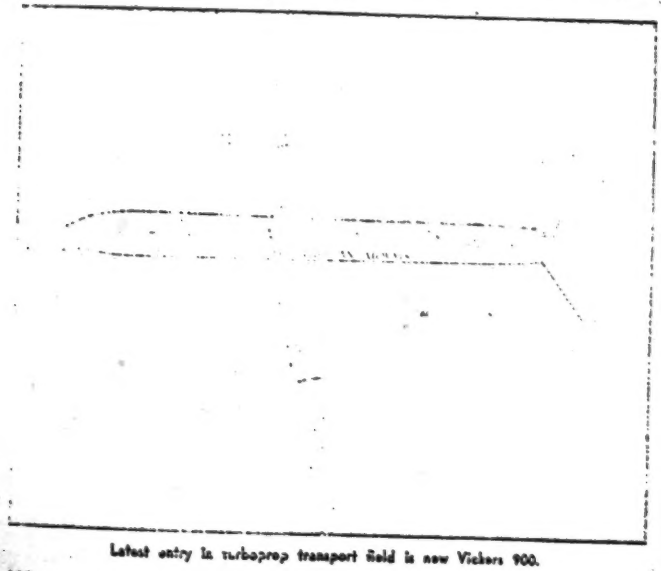
The role of British aircraft and engine producers as key contenders in the future turboprop transport market was further shaped last week in two major developments.

• Canadair, Ltd. disclosed first details of a projected three-nation tie-up under which it would join with Britain's Bristol Aeroplane Co. and Convair in the U.S. in the design and production of the Bristol Super Britannia turboprop.

• British European Airways announced it is negotiating with Vickers-Armstrongs Ltd. for a fleet (believed to be 30) of new Viscount 900 Vanguard turboprops for 1960 delivery.

Together, the new projects put British-designed turboprops powered by British engines in two open slots in the future transport picture.

The tri-nation Super Britannia project, if it materializes, will offer a 500-mph turboprop in the long-range, high-capacity category to fill the gap between the Lockheed Electra turboprop and Boeing/Douglas jets. On the other extreme, the new Vanguard provides a 425-mph turboprop for high-density operation at ranges up to 2,500 miles.



Latest entry in turboprop transport field is new Vickers 900.

Deal Not Yet Final

• Although the Canadair-Convair-Bristol deal is not yet finalized, Canadair officials conformed that it is currently "under intense study." But the project target, calling for 1960 delivery of the Super Britannia, virtually dictates that final decisions will have to come soon if the aircraft is to develop as a major entry in current airline re-equipment programs.

Best indications are that the plan would call for final assembly of the aircraft in the U.S. by Convair from components made partly at Convair and partly in Montreal by Canadair. In addition, other components would be imported from Bristol in England, as the new project does not affect that company's plans to build the Super Britannia in its Filton, England plant.

Use of Bristol's BE.25 "supercharged turboprop in the Super Britannia also makes probable the entry of a fourth major manufacturer, Curtiss-Wright Corp., in the project. Top officials of Convair and Bristol told AMERICAN AVIATION that both the engine and powerplant would have to be Americanized to give the Super Britannia its best chance of volume selling on the world market.

Current license agreements between Bristol and Curtiss-Wright are understood to give C-W "first refusal" on several Bristol engines, including the BE.25, thus making it the logical pro-

Oct. 24, 1955

AX-1218

DX 29
(Aviation Week, Oct. 17, 1955, p. 7)

Both 707s and DC-8s

PAA Orders First U.S. Turbojet Fleet

Pan American World Airways last week signed contracts totaling $269 million for the first major American turbojet airline fleet, ordering 25 Douglas DC-8s and 20 Boeing 707s.

Boeing's jet Stratoliners will be delivered first, beginning in December 1958. Within five months thereafter, Pan American says it will place these American-built, American powered transports in service on its trans-Atlantic, South American and trans-Pacific routes. Boeing will complete its deliveries by Nov. 1959.

Deliveries of the Douglas jet airliners are scheduled to begin in December 1959 and to be completed by January 1961.

Both aircraft will provide 550 mph. transocean and transcontinental service. The 707, larger and faster than the prototype now flying, will have a range of more than 5,000 miles nonstop. Douglas states that the DC-8 will be "capable of nonstop operations in either direction between New York and London or Paris, [illegible]."

Both are designed to cruise up to Mach .88, and the contracts guarantee cruising speeds of 575 mph. at 30,000 ft. altitude.

Pan American lists these potential flight times with the new jet airliners: New York to Paris, 6 hr. 35 min.; New York to Buenos Aires, 11 hr., 15 min.; Chicago to London, 6 hr., 45 min.; Tokyo to Seattle, 8 hr., 32 min. and Honolulu to San Francisco, 4 hr., 30 min.

The Boeing 707s, powered by Pratt & Whitney J57 engines, will carry 104 passengers in standard (first class) configuration and 125 in tourist. Each airplane will cost just under $7 million.

Douglas' DC-8, with a wing area approximately 7% greater than the 707, is designed to carry 108 passengers in standard seating arrangements or 131 tourist class passengers. Pan American says the DC-8 will have "slightly greater range and will be equipped with a larger type Pratt & Whitney jet turbine engine," the P&W J75 (commercial designation, JT4).

Douglas said that its August announcement of the DC-8 performance was based on the J-57, but "the Pan American planes covered by the present contract are designed to utilize jet engines of even greater power and versatility as and when they become available for commercial use."

The DC-8 purchase calls for expenditures in excess of $160 million for the 25 aircraft and spares.

Jet turbine silencers and reverse thrust mechanisms will be installed. With the silencers, Juan T. Trippe, president of PAA, says, "The new jets will make little more noise on the ground than present piston-engined planes." Reverse thrust will be used for braking effect after landing.

The order for jet airliners does not effect the existing $88 million order for 33 DC-7Cs with turbo-compound engines. The first of these will be delivered in the spring.

The combined commitments, totaling $357 million for new flight equipment, are "evidence of Pan American's faith and confidence in the continued expansion of sound two-way international trade as well as greatly increased tourist travel between the United States and the 74 friendly foreign nations which are regularly served by the Pan American Clippers," Trippe stated.

Pan American is non-committal about its long-standing, and perhaps still existing, order for de Havilland Comet 3s. In a statement to AVIATION WEEK, the company said: "PAA has a continuing interest in the de Havilland jet program. Certain confidential written understandings exist between the two companies looking toward a successful outcome."

NEWS DIGEST

U. S. Navy last week grounded the North American FJ-3 Fury jet fighter pending modification of its Wright J65 turbojet engine to prevent overheating.

Convair is discussing a 500 mph. turboprop airliner with Canadair (another General Dynamics division) and Bristol Aeroplane Co. The design for delivery in 1960 probably, is the advanced, thin-wing version of the Bristol Britannia (AW Oct. 25, 1954, p. 13). It will be powered by the Bristol B. [illegible] 25 engines. Canadair is building a military reconnaissance version of the Britannia for RCAF.

A new and complete helicopter control system providing full all-weather operating capability has been developed by Sperry Gyroscope Co., division of the Sperry Rand Corp. Sperry has just received clearance from USAF to announce details.

United Air Lines September traffic reached a new record for the month with 536,000,000 revenue [illegible] and 9,693,000 [illegible], 16 and 19% increases respectively over the same period last year. Freight shipments were up 35% to 4,096,000 ton-miles, express up 27% to 1,276,000 ton-miles and mail up 6% to 2,007,000 ton-miles. Late summer vacationists and school returnees are credited for the traffic increases.

Slick Airways carried a record 4,320,379 ton-miles of airfreight on domestic scheduled service in September, 14% more than the same month last year. Figure does not include the carrier's domestic and overseas charter flights. George M. Bain, Slick executive vice president, predicts a 30% increase in the airline's volume this year over 1954 and a 20% increase in airfreight for all airlines.

Wright Brothers Lecture will be delivered by Raymond L. Bisplinghoff on Dec. 17 in the auditorium of the U. S. Chamber of Commerce Building, Washington, D. C. The lecture is sponsored by The Institute of the Aeronautical Sciences.

Plastic Star, Nat Corp. of America reports $1,161,755 profit after federal taxes for nine months ended Aug. 31. Net sales totaled $14,941,443 compared with $17,086,429 for the same period last year. Firm has voted a 25 cents common dividend payable Nov. 1 to holders of record Oct. 15.

Prototype Saab delta fighter, reportedly capable of 1,000-mph. speeds, is scheduled to fly soon at Linkoping, Sweden. Developed as a result of flight studies with the tiny half-scale Saab Draken, the new multi-engine fighter is about 50 ft. long and has a span of approximately 35 ft. According to present estimates, orders for the delta will total some $150 million and is designed to provide the backbone of the Swedish Air Force in the late 1950s and early 1960s.

Bendix Radio settled its 39-day old strike last week by giving the International Association of Machinists (AFL) a six cents hourly raise with another six cent increase to follow in September 1956. The settlement, which may serve as a pattern for at least part of the avionics industry, included a seventh paid holiday and improved pension and insurance plans.

DX 31, page 1
(American Aviation, Nov. 7, 1955 pp. 23-25, 27-28)

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VOL. 19, NO. 13

Jet Race Quickens; UAL Orders 30 DC-8s

- Transport equipment on order may pass $1-billion mark before year is out.
- Biggest buying drive in industry history gets under way.

By ANTHONY VANDYK

JET and turboprop transport activity has moved further into the limelight. Less than two weeks after Pan American set the pace by ordering both the Boeing 707 and the Douglas DC-8, other developments came in rapid succession.

Before the year is out, transport equipment on order may well pass the $1 billion mark. Without question, the industry is in the midst of the biggest equipment drive in history.

The scramble for delivery positions is hectic. The destinies of many airlines may well hinge on how far up or down they may be on delivery schedules with relation to competitors.

More important than the actual orders announced to date is the back-stage maneuvering and negotiations now in progress. But the following are the latest tangible developments:

• United Air Lines, became the first U.S. domestic carrier to order jet transports with the purchase of 30 Douglas DC-8s at a total cost of $175 million for delivery in May 1959.

• Braniff Airways disclosed it is ordering four DC-8s (with an option on four more), has been given delivery positions by Boeing should it decide to order the 707 and is clickering for eight turboprop Lockheed Electras.

• Earlier National Airlines announced it had placed a firm order for six DC-8s, which were scheduled for delivery in early 1959. There were also reports that National was close to a decision on the purchase of a number of Vickers Viscounts. Earlier this year National announced a $65-million expansion program which included a provision for approximately 12 turboprop aircraft or undesignated make.

• At least half a dozen U.S. and as many foreign airlines were negotiating with Boeing, Douglas and Lockheed for delivery positions.

United plans to put its DC-8s in service in November 1959. They will be powered by P&W J57s while the 25 DC-8s ordered by PAA for delivery starting December 1959 will have the more powerful P&W J75. United's DC-8s will cruise at 550 to 575 mph. They will be able to seat 111 first class or up to 140 coach passengers and carry 7,000 lbs. of mail, express and freight.

United's president, W. A. Patterson, said: "Our studies conclusively indicate that on the basis of present-day costs, the per-seat-mile cost of operating the jet plane will be less than that for the latest piston-engine aircraft; this, combined with the traffic volume expected to be generated by the greater speed and comfort of the jet, will assure us of the profits necessary to support this new investment."

Meanwhile, the ever-present problem of the choice of new equipment is fast developing into a nightmare for airline managements the world over. At the International Air Transport Association's annual general meeting in New York last month it was generally conceded that never in commercial transport history has the dilemma been greater. Loaded with brochures and besieged by hordes of aircraft and engine salesmen, harassed top executives of carriers large and small were asking each other for advice on what to buy and when to buy it.

Douglas Announces Program

In the few months leading up to the New York meeting there had been news of various types to upset the most firmly established equipment plans. Douglas announced its program to build the DC-8; Lockheed unveiled its turboprop Electra with the announcement of an order from American; Kiwi, previously loyal to American equipment, ordered the Viscount; SAS and several other carriers gave the Convair-Liner a new lease of life buying the Model 440 Metropolitan; Eastern ordered the Electra.

On the negative side it became clear that the British were out of the running in the long-haul jet field; the British government has decided against putting the Vickers 1000 into production while the Comet has lost the support of all carriers except BOAC.

• Shortly before the New York IATA meeting opened the biggest news of all broke: PAA ordered the Boeing 707 and the DC-8. A few days later it became known that Canadair, Convair and Bristol were working on a joint design for a 500-mph turboprop transport for 1960 delivery. On October 17, opening day of the meeting, Vickers unveiled its turboprop Vanguard while Douglas and Lockheed revealed much new information on their DC-8 and Electra, respectively. By increasing the wing area, the Electra has been made into a 3600-mile range aircraft.

During the week-long IATA conference it was also disclosed that Canadian Pacific Airlines has ordered the Britannia and that Air France had decided to buy the SNCASE Caravelle jet.

These are only some of the developments which perplexed the executives attending the IATA sessions. It was clear that while a few of these developments were expected many came as a rude shock to the vast majority of the airline chiefs present in New York. The PAA order for 25 DC-8's and 25 Boeing 707s obviously caught competing European carriers off guard, as did

JET/TURBOPROP BOX SCORE

In the race so far for an estimated $7-billion jet and turboprop transport market are three U.S. manufacturers—Douglas (DC-8), Lockheed (Electra) and Boeing (707)—and four foreign producers—Vickers-Armstrong (Viscount and Vanguard), Bristol (Britannia), de Havilland (Comet 4) and SNCASE (Caravelle). Here's how orders by major world carriers shape up at deadline:

Firm Orders

Airline	Type	Number	Delivery
PAA	707	20	December '58
PAA	DC-8	25	December '59
United	DC-8	30	May 1959
American	Electra	35	August 1958
Eastern	Electra	40	August 1958
Capital	Viscount	60	In progress
National	DC-8	6	Early 1959
BOAC	Britannia	33	December 1955
BOAC	Comet 4	20	Fall 1958
BOAC	Viscount	12	1957
BEA	Viscount	49	In progress
TCA	Viscount	25	In progress
Air France	Viscount	12	Completed
TransAustralia	Viscount	12	In progress
KLM	Viscount	12	1957
Canadian Pacific	Britannia	3	1957
El Al	Britannia	3	March 1957

Pending and Currently Probable

Eastern	707 or DC-8	20
Eastern	Electra	30*
American	707 or DC-8	about 30
Braniff	DC-8	4 and 4*
Braniff	Electra	8*
Western	Electra	?
Northwest	707 or DC-8	8-10
National	Viscount	12
Continental	Viscount	15*
Canadian Pacific	Britannia	9*
El Al	Britannia	2*
Air France	707 or DC-8	about 10
Air France	Caravelle	12
KLM	DC-8	about 10
SAS	DC-8	5-7
Japan Air Lines	DC-8	about 3
Swissair	DC-8	about 3
BEA	Vanguard	30

Note: Space limitations prevent inclusion of all Viscount customers; 236 Viscounts have been ordered to date and contracts for more are under negotiation.

*Option.

the flurry of activity by other U.S. airlines in negotiating for delivery positions.

Major European airlines had assumed that the jet transport problem was not a particularly pressing one—something to be decided on in 1958, 1959 or maybe 1960. They were suddenly awakened to the fact that delivery positions are of utmost importance and that the prime positions are already gone or are going; they are now beginning to realize that a one or two-year time lag in deliveries may be disastrous to their dollar-earning, transatlantic business in the future.

Douglas Holds Advantage

• Despite the earlier availability of the Boeing 707 it was clear that most airline executives attending the IATA meeting in New York were more interested in the Douglas DC-8 than in the Seattle company's model. Lack of experience with Boeing products and highly satisfactory results with Douglas equipment seemed to be the main reason for this attitude. Boeing salesmen suffered a disadvantage in not knowing the airline men as well as did the Douglas representatives, who have made friends of many a top executive in the course of doing business with them for years.

Realizing that many airline presidents and high executives are confused by an abundance of technical data, Douglas tried to make its DC-8 presentation at New York as simple as possible. The company stressed that the DC-8, cruising at 550 mph, will carry more payload farther than any commercial aircraft in service or presently offered. It pointed out that the DC-8 can produce two and one-half times as many passenger miles, two and one-half times as many ton-miles, three times as much gross profit and one and one-fourth times as many ton-miles per dollar invested as the latest piston-engine equipment. Douglas also demonstrated with charts that the direct operating cost of the jet is nowhere nearly as high as turboprop advocates assert, even on short-haul routes.

In a DC-8 "flight profile" for a New York-Paris flight, the following revealing figures were disclosed: Take-off field length, 8350 ft.; take-off weight, 252,000 lbs.; payload, 34,110 lbs.; reserve fuel, 16,300 lbs.; block time, 6 hrs. 25 min.; average cruise speed, 550 mph (at 30,500 to 40,000 ft.); landing weight, 170,600 lbs.; landing field length, 6330 ft. (The reasonable landing field length is due to the use of reverse thrust.)

It is generally assumed that the powerplant of most DC-8s will be the J75, an engine which is making considerable progress. It passed a 50-hour test in August, reportedly at 15,800 lbs. thrust. It seems that use of the J75, possibly in a de-rated version, is preferable to the J57 with water injection; the weight of the water, running into several thousand pounds, would be a heavy penalty.

Nonetheless, availability of the J75, particularly to foreign carriers, is a big question mark at this time. An alternate foreign powerplant to both the J57 and the J75 is the Rolls-Royce Conway by-pass, although there is some doubt whether this engine will go into production.

Electra In Spotlight, Too

• Vying with the DC-8 as the center of attraction for delegates to the IATA New York meeting was the Electra. Elaborate displays provided tangible evidence that Lockheed will establish brand preference for the new model in the same way that it used advertising and promotional programs to build the Constellation and Super

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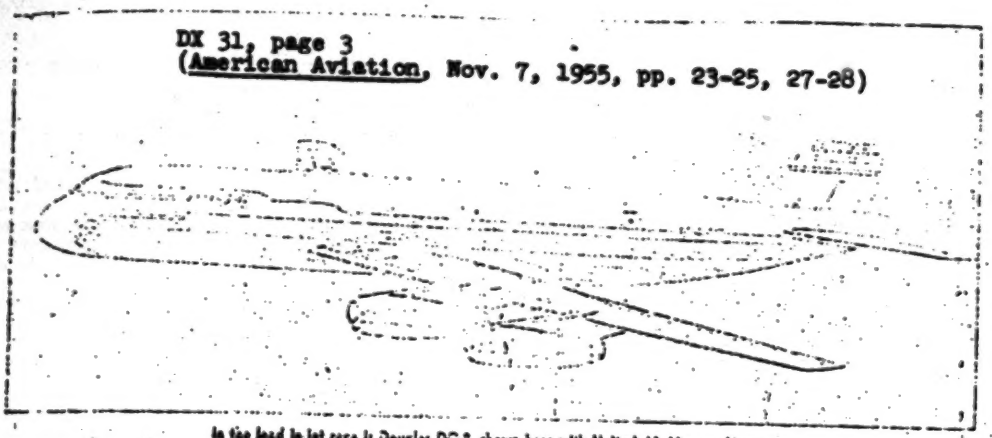
J-57 engine big question mark. Likely t

DX 31, page 3
(American Aviation, Nov. 7, 1955, pp. 23-25, 27-28)



In the lead in jet race is Douglas DC-8, shown here with United Air Line markings.

Constellation into the best-known transports in the world.

The turboprop plane needed little promoting in New York. Most of the airline men who saw it recognized that the Electra fulfills the need for an economical, wide-range transport. They liked its size (accommodating up to 91 passengers), its speed (over 400 mph cruise), its operational flexibility (permitting economical operations on short, medium and long routes) and its ability to use small airfields (it can take off or land in less than 5,000 ft.). Above all, they liked it because it looked right.

The technically-minded IATA delegates were impressed by the structural design of the Electra's airframe. This incorporates Lockheed's "fail-safe philosophy"—structural elements are arranged in such a manner that the failure of one element cannot result in the failure of the complete structural component. Larger structures such as forgings and integrally stiffened skins are used wherever practical in the Electra's design, avoiding the use of structural bits and pieces with their multiplicity of joints and connections.

The "fail safe" fuselage shell is of ring-stiffened skin-stringer structure with the rings attached directly to the skin. An inner shear metal grid, attached to the basic fuselage skin, gives effective area increase and stress reduction wherever the skin is perforated by rivets or other fasteners. This stress reduction where holes occur minimizes fatigue cracks in the skin.

If a crack should occur, or the skin should be ruptured by a foreign object, the grid would serve as a series of crack stoppers which would prevent or reduce the crack propagation. Similar fatigue crack propagation in the wing is minimized by the use of low tension stresses in the lower surface and integral skin reinforcing panels. Each surface is broken into spanwise panel strips about 20 inches wide so that if a crack originates in, and propagates across any one panel, the remaining panels have sufficient strength to support flight loads without failure.

While Lockheed had the maximum of information available on its Electra, Vickers was hesitant to disclose details of its Vanguard turboprop design. Inquiries about such basic matters as the new model's span, gross weight and price drew only approximative or evasive answers. Several airline executives at the IATA meeting commented that all they knew about the new Vickers design was what they had read in the press.

Vickers' coyness on the subject of the Vanguard apparently stems from the fact that the aircraft was designed to a British European Airways' specification which may not suit too many other operators. Developments of the original design are aimed, it would seem, to make the Vanguard competitive with the Electra.

If indications prove correct the Vanguard versus Electra sales battle will be a heated one, for the results of it may well determine whether Britain is in the world-wide commercial transport business for keeps or whether the Viscount was the exception that proves the rule. In all fairness, it should be said that at the New York meeting nothing but praise was heard about the Viscount. There is no question but that Vickers has won the first round . . . nor that the second will be the decisive one.

Meanwhile, despite all the talk of jets and turboprops, orders are still coming in for piston-engine equipment. Douglas and Lockheed are confident of selling many more commercial turbo-compound-powered DC-7s and Super Constellations. To a small airline operating nothing bigger than DC-4s, and there are many such operators today, the prospect of s leaping into the turbine era is frightening both financially and operationally. (In the latter respect several of the larger airlines will have difficulty in making use of a jet fleet because of the inadequate runways at the airports which they serve. Thus there are few carriers today which are without a serious equipment dilemma at this time. ◆◆◆

MORE ON JETS

For an up-to-the minute picture of airline jet financing read Selig Altschul's appraisal on page 27. Also in this issue see page 82 for Fred Hunter's views on Pan American's jet purchasing strategy.

Douglas Applies For DC-8 Certification

Formal application for certification of two models of its DC-8, a domestic and overwater version, has been filed with CAA by Douglas. Official paperwork was dated October 18 and submitted to CAA's west coast office by Douglas-Santa Monica chief engineer E. F. Burton.

Initial talks on DC-8 approval will get under way early this month when Harold Heckstra, Washington CAA engineering project officer visits Santa Monica. More detailed discussions with a team of CAA certification personnel are expected in December.

nautics, maintained, the Navy needed the planes for test and training purposes. Therefore, they decided to terminate the Westinghouse contract at about 150 engines and the McDonnell F3H-1 program at 66 airframes.

• This decision, originally challenged by the investigators as a belated one (it took effect in July, 1955), awaits the subcommittee's formal judgment.

In any event, Adm. Russell testified, the F3H-J40 program was not a total loss. Admiting "mistakes" were made, he argued the Navy "gained two years" in securing the high performance, all purpose F3H-2N fighter. He estimated benefits of testing, training, and flight time with the J40 at $50 million.

Total cost of the 60 F3H-1 aircraft delivered to the Navy, he said, was $154 million, including frame, engine, spares and other equipment. The J40 program, he added, cost the Government $147 million. This included termination costs to Westinghouse (though 6 of 11 contracts were no-cost terminations), and to Ford, which tooled up, but never produced, J40 engines. Additional termination costs were filed by Temco Aircraft Corp. of Dallas, Tex. ($8,930,000), and the Goodyear Aircraft Corp. ($303,000).

Russell, and Navy Assistant Secretary (Materiel) Raymond H. Fogler, stressed to the subcommittee that the Navy had learned from this bitter experience. They described their new FIRM plan ("Fleet Introduction of Replacement Models") as designed "to avoid large premature purchases and at the same time to permit early introduction into the fleet of new and improved planes."

• Nevertheless, subcommittee members had plenty to mull over:

• Can time and waste be further reduced when contract terminations are required?

• Is adequate liaison carried on between BuAer, its representatives in the field and research and materiel centers?

• Is proper care of Government property exercised by contractors?

• Can the U.S. have its pie and eat it, too—or, how great a "gamble" are we prepared to take in maintaining top levels of air power? ●●●

Financing Patterns to Change For Jet Transport Acquisitions

By SEIJO ALTSCHUL

With the announcement of major jet transport acquisitions, the airlines involved are also facing up to some far-reaching financing programs. It is becoming clear that past conventional financial patterns utilized by the air transport industry to acquire new equipment will undergo some radical revisions if the projected jet programs are to be realized.

This becomes clear when it is realized that the United Air Lines order for 30 DC-8s, plus spare parts, entail a capital expenditure of some $175 million. The company's net worth is less than $100 million and its outstanding long-term debt was last reported at around $37 million. Moreover, its net operating property, mostly aircraft, at June 30, 1955, was valued at about $127.6 million.

In other words, United's jet commitments for the future are in excess of its present net worth and outstanding long-term debt combined, as well as exceeding its present equipment book valuation.

• In fact, capital expenditures for the entire U.S. air transport industry are likely to be at least $1.5 billion and perhaps as high as $3 billion during the next ten years. By contrast, the group (including trunks, international, territorial and cargo), as of June 30, 1955, could boast of only $1.3 billion in net assets. This was supported by but $633.6 million in net worth and $234.6 million in long-term debt.

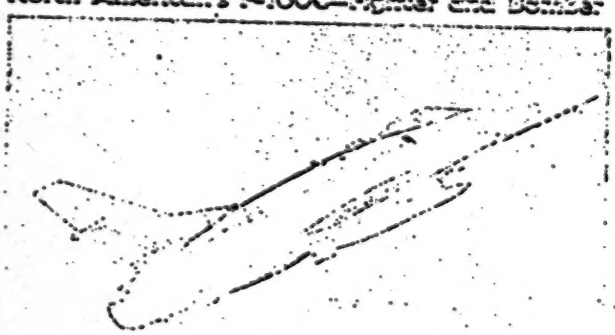
During the industry's past development stage, it was conventional to finance aircraft purchases through equity and interim self-liquidating debt. This picked up the period where the DC-3 represented an initial outlay of $100,000, moving on to the DC-4 with its $450,000 tag, up to the first Lockheed Constellations in the $750,000 class, the DC-6s around $1 million, the DC-6Bs for about $1.5 million and the Super-Constellations and DC-7s in the $2-million group.

Limited earnings were largely reinvested and supplemented from time to time by equity financing plus short-term loans. Long term debts were isolated exceptions, one being the $40 million in 20-year debentures sold by American Airlines in 1946. As aircraft were, and continue to be, written off over periods ranging from a minimum of four years to a high of seven years, substantial cash has been generated.

Further, in recent years, tax amortization certificates helped swell the cash flow. Such cash throw-offs were primarily applied to retire existing debt (created in past years to finance these purchases) and towards subsequent aircraft acquisitions. In this process, larger and larger capital formations were evolving in the air transport industry. For example, the domestic trunklines increased their total net assets from $387.1 million at the 1946 year-end to more than $894.5 million at the close of 1954. During this same period, net worth for the group increased from $130.5 million to $437.8 million.

• This pattern of large cash-throw-offs and the broader capital base of the industry would have been able to assimilate continuing aircraft acquisitions pretty much in the past conventional manner excepting for two significant

North American's F-100C—Fighter and Bomber



Fighter capabilities of Air Force's North American F-100C Super Sabre have been augmented in new line as a fighter-bomber. Photo shows conventional 500, 1,000 and 2,000-pound bombs slung under the wings of the supersonic fighter.

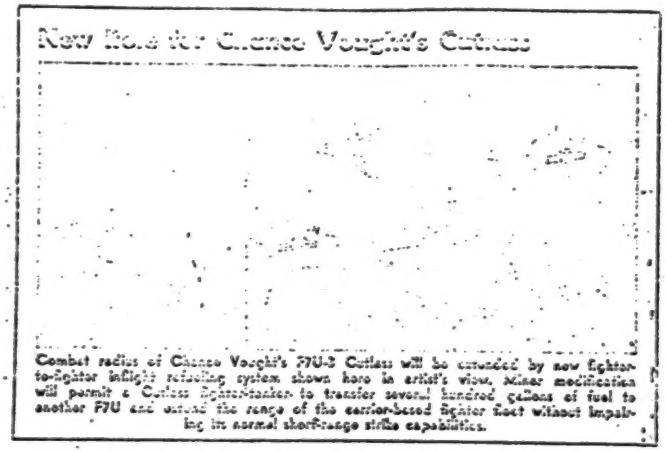
development. First, the cost of the jet transports, the Boeing 707 and the DC8, run from around $5.5 million to almost $6 million per copy, including spares and depending on the powerplant to be used.

This represents quite a jump in requirements from the capital formation stepped-up to the $3-million unit cost of a Super G or DC7. Secondly, it was not previously supposed that the initial jet transport orders would run to such individual large volumes. The sharp upward trend in traffic and the prospects of this condition continuing, however, are proving a strong motivation to have adequate equipment to meet anticipated demands four and five years hence. Despite the large number of aircraft orders in past years, the shortage of capacity available to a number of airlines at the present time is not without its effect on the entire industry in setting its future sights.

• The high unit cost of the jet transports and their number will therefore introduce greater elements of long-term debt to make their financing possible. The measure of stability being established and the broader equity base already established in the industry, further makes the long-term financing route feasible. A $6-million outlay for a single airplane may be regarded in the same light as a like expenditure for a brick and mortar industrial plant. In both cases, it may be anticipated that these expenditures will permit efficient and profitable operations to justify the outlay.

Moreover, the jet transport may be expected to have a useful life of at least ten years, perhaps longer. Financing plans accordingly will be geared to this expectation and be supported by depreciation charges and attendant cash-throw-offs geared accordingly. More importantly, it is the earning power expected to be generated by the new equipment which gives substance to the equipment acquisition and its financing. These planes cost more than double any planes flying in commercial service today but they are also expected to produce a seat-mile cost less than currently available from the latest piston-powered aircraft.

Thus far, none of the major airlines ordering jet transport equipment have indicated their definitive financing programs. Institutional investors, chiefly the insurance companies, will undoubtedly figure prominently in furnishing long-term funds. Banks will unquestionably remain in the picture with short-term credits. Equity financing in all of its facets, convertible debentures and preferred and common may be expected to emerge to complete financing programs.



Combat radius of Chance Vought's F7U-3 Cutlass will be extended by new fighter-to-fighter inflight refueling system shown here in artist's view. Minor modification will permit a Cutlass fighter-tanker to transfer several hundred gallons of fuel to another F7U and extend the range of the carrier-based fighter fleet without impairing its normal short-range strike capabilities.

• Pan American World Airways has a $259 million order for 707s and DC-8s. As of June 30, 1955, its total assets comprised $253.9 million supported by a net worth of $117.2 million and long term debt of $46.2 million. The company has an extensive line of credit yet unused but this is believed intended to finance the balance of DC-7s previously ordered.

Of course, four years from now the continuing depreciation cash throw-offs will transform the existing debt picture so that renewed borrowings will be readily available. No doubt, the anticipation of this projection will figure prominently in the financing plans that may soon evolve for Pan American.

American's order for Electra's entailing a capital commitment of some $65 million is unlikely to create any financing problem. However, should the company decide to move to jet transports, it is likely it may want to anticipate this requirement through long term financing.

• Capital Airlines, despite a present net worth position of $16.2 million is well on its way in acquiring 60 Viscounts costing some $67.5 million without any compulsion to arrange any financing. Paying for these planes as they are delivered over a 60-month period, the company can refund its obligations to the British in the American market when it finds it convenient to do so.

• Eastern, after ordering $125 million in Super Gs and DC-7s, made a commitment for forty Lockheed Electras entailing an expenditure of $100 million. This latest order, plus one to come for unidentified 20 jets of $125 million, will entail some new financing, including long-term funds.

• National has indicated an $85-million equipment expansion program including an order for six DC-8s and eight DC-7Bs. The company has stated that it will finance this entire program plus $10 million in other facilities through earnings, sale of some of the existing planes, depreciation charges and bank loans of some $25 million. This projected program is the most definite of any of the airlines acquiring jets and is further distinguished by the absence of any contemplated extensive long-term financing.

• United Airlines has publicly indicated that it will pay for its new equipment through a financing program "now being arranged." The company prepared the way for such financing by calling its preferred recently (American Aviation, Sept. 12, 1955, P. 24). It is probable that long-term loans, short-term bank credits and another convertible preferred may enter into the financing here.

It is important to note that the bulk of the financial requirements for the airlines ordering jets will not come until four years or so from now. This gives them time to work out financing programs. By the same token, until they do, the aircraft builders will shoulder major responsibilities. Progress payments from their customers may ease the builder's strain, but his outlay and risk will be substantial until deliveries and collections are completed.

In anticipation of this requirement, Lockheed sold $30 million in debentures earlier this year. Part of these proceeds was earmarked for the Electra program. It is reported that Douglas may soon enter the capital markets to bolster its resources to undertake its commitments, now aggregating some $785 million in civilian orders. In viewing the jet transport orders and their consequences, the builders have more than their prestige involved. ◆◆◆

MINUTES OF THE BOARD OF DIRECTORS MEETING

TRANS WORLD AIRLINES, INC.

June 21, 1961

The regular meeting of the Board of Directors of Trans World Airlines, Inc., was held on Wednesday, June 21, 1961 at 9:30 a.m., at the offices of the Corporation, 380 Madison Avenue, New York, New York.

Directors present were: Messrs. Ernest R. Breech
George R. Brown
E. O. Cocke
F. D. Hall
Clifford F. Hood
Barry T. Leithead
Albert V. Leslie
Sidney Maestre
Hughston M. McBain
Warren Lee Pierson
Ben-Fleming Sessel
Thomas A. Slack
Charles C. Tillinghast, Jr.

constituting a quorum.

Directors absent were: Messrs. Raymond M. Holliday
John A. McCone

Mr. Carl S. Rowe, of Counsel, was present by invitation.

Mr. Ernest R. Breech, Chairman, called the meeting to order and thereafter presided.

Mr. Ronald Duckworth, Secretary, acted as secretary of the meeting.

APPROVAL OF MINUTES

The minutes of the Board of Directors meeting of May 17, 1961 and of the Executive Committee meetings of May 18, 19, 24 (two), 25 and 31, 1961 were approved.

FINANCIAL REVIEW

Mr. Albert V. Leslie, Senior Vice President - Finance and Treasurer, presented the June financial review including an analysis and forecast of the market position of the Corporation for 1961.

Mr. Leslie also reported on the sale of Debentures in the amount of $100,000,000 during June and advised that a total of $19,037,900 had been subscribed for by shareholders generally and $80,962,100 were purchased by the Hughes Tool Company at the closing on June 13, 1961.

Mr. Leslie advised that negotiations with respect to the 1961 financing were proceeding in accordance with the plan outlined to the May meeting of the Board; that the Prudential Insurance Company of America will not be included as a lender; that the total of $147 million to be borrowed will be provided by the lending banks to a total of $40 million and $53.5 million each will be made available by The Equitable Life Assurance Society and the Metropolitan Life Insurance Company and that the closing of the financing was planned for the third week of July.

He advised that the contract progress payment of approximately $13 million due to Boeing Airplane Company on the additional jet aircraft had been postponed from July first to August 1, 1961, subject to the payment to Boeing of five per cent interest on such amount.

OPERATIONS REVIEW

Mr. E. O. Cocke, Senior Vice President and System General Manager, reported on system operations and described the steps being taken to improve passenger sales including introduction of Royal Ambassador Service in the International Division and increased advertising in both divisions. There was a lengthy discussion of the extreme competition on North Atlantic routes. He reported that since the inauguration of Convair 880 aircraft schedules in the New York/Chicago market, the TWA share of the market had increased from eleven per cent to twenty per cent. Mr. Cocke also advised that an intensive sales campaign was under way in all major TWA markets.

RELATIONS WITH HUGHES TOOL COMPANY

Mr. Tillinghast stated that following the meeting of the Executive Committee on May 31, 1961, at which it had been decided that no adequate reasons had been shown to justify a change in the Corporation's Boeing purchase program, a meeting was held with representatives of Hughes Tool Company to permit Hughes Tool Company to present to the Corporation technical information asserted to be available to Hughes Tool Company

relating to the question of whether or not the Corporation should acquire four additional Convair 880 jet aircraft and thirteen Convair 990 jet aircraft rather than the Boeing aircraft presently on order by the Corporation. He stated that such a meeting was held on June 2, 1961, and that Mr. Chester Davis, counsel for Hughes Tool Company, made a presentation on this subject to the Flight Equipment Committee and others, as the directors had previously been advised that no one with a technical background had assisted Mr. Davis at the meeting, that little of technical significance was developed at the meeting, and that the transcript of such meeting was available to any director. He further stated that subsequently, Mr. Rummel, who was present at the meeting, analysed the various points raised by Mr. Davis and submitted a report on the subject. This report was considered by members of the Flight Equipment Committee on June 8 and 9, 1961, and by the Management Policy Committee on June 13, 1961. The members of both Committees concurred in Mr. Rummel's conclusion that nothing of importance had been presented by Hughes Tool Company that had not previously been considered by the Flight Equipment Committee and that the previous recommendation that the Corporation should acquire Boeing rather than additional Convair 880 and Convair 990 aircraft should be confirmed.

Mr. Tillinghast then referred to the letter dated June 10, 1961 from Mr. Raymond Holliday to the Corporation and others, to which was attached a letter dated June 9, 1961 from Mr. Holliday to the Corporation. He stated that a copy of both of these letters had previously been forwarded to each director. He further stated that he had received that morning a telegram from Mr. Chester Davis advising that the ten-day period within which the three proposals contained in the letter of June 10, 1961 could be accepted by TWA was extended to June 22, 1961.

Mr. Tillinghast also referred to a letter dated June 16, 1961, which he had sent to Mr. Raymond Holliday commenting on the three proposals contained in the letter of June 10, 1961, and requesting certain additional supplemental information relating to such proposals. He stated that a copy of this letter had also been sent to each director.

Mr. Tillinghast pointed out that in connection with proposal number one of the letter of June 10, 1961, relating to a proposed increase in the equity capital of the Corporation, an extremely important fact was the effect that the acceptance of such proposal, including the condition that the present Voting Trust be terminated, would have on the ability of the Corporation to obtain additional needed financing, particularly additional debt financing. He said that he had asked Mr. Albert V. Leslie, Senior Vice President - Finance and Treasurer, whether or not the Corporation could arrange additional needed debt financing if the Voting Trust were terminated as proposed in the letter of June 10, 1961, and that Mr. Leslie had reported that in his opinion this would not be possible under the circumstances. Mr. Tillinghast also stated that letters had been addressed to the financial institutions presently holding the Corporation's outstanding notes asking whether they would be willing to terminate the Voting Trust on the conditions outlined in the letter of June 10, 1961, and whether, if the Voting Trust were

terminated these financial institutions would be interested in participating in the current financing program involving additional debt of $147 million. All but one of these financial institutions had responded formally or informally that they would not be willing to agree to the termination of the Voting Trust and would not be interested in participating in additional financing if the Voting Trust were terminated. He said that the Corporation had also requested the advice of its financial advisors Dillon, Read & Co., Lazard Freres & Co., and Lehman Brothers, as to whether or not, if the Voting Trust were terminated it would be possible to obtain other financial institutions to provide necessary debt financing and that he had received a letter from Dillon, Read, that was also concurred in by Lazard Freres and Lehman Brothers, to the effect that this would not be possible.

The meeting then proceeded to discuss the other two proposals contained in the letter of June 10, 1961.

The meeting was advised that Mr. Chester Davis, counsel for the Hughes Tool Company, would like to address the meeting. After discussion the directors concluded that in view of Mr. Davis' numerous and lengthy prior communications to the Board and the management, no purpose would be served by granting Mr. Davis' request, However, Mr. Rowe was requested to talk to Mr. Davis to determine whether he had any specific additional information or proposals that he wished to submit to the Board. Mr. Rowe then left the meeting. Upon his return he reported that Mr. Davis stated that he had nothing in writing to submit but would be glad to answer questions that any of the directors had and that he would like to discuss the proposals contained in the June 10, 1961 letter with the directors. Mr. Rowe stated that upon being requested to advise him of anything Mr. Davis wished to transmit to the Board, Mr. Davis declined to do so, but indicated that he would put what he had to say in writing and submit it in that form.

After discussion, upon motions duly made, seconded and unanimously carried, it was the stated sense of the meeting:

1. That the Corporation could not at this time accept Proposal Number One in the letter of June 10, 1961 from Hughes Tool Company, but that Hughes Tool Company should be advised that any reasonable program which would increase the Corporation's equity and make adequate provision for necessary additional financing for the Corporation, including the refunding of its existing debt and the financing needed for the aircraft now on order by it, would receive full and sympathetic consideration by the Board;

2. That the Corporation should not accept Proposal Number Two in the letter of June 10, 1961 from Hughes Tool Company, involving the offer by Hughes Tool Company to purchase an additional $11,235,900 principal amount of Subordinated Debentures with warrants attached on the condition that TWA commit itself to acquire thirteen Model 990 Convair jet aircraft previously ordered by Hughes Tool Company from General Dynamics Corporation; and

3. That with respect to Proposal Number Three of the letter of June 10, 1961, involving the offer that Hughes Tool Company assign to the Corporation its rights to acquire from General Dynamics Corporation thirteen Model 990 Convair jet aircraft and four Model 880 Convair jet aircraft, no facts had to date been presented to the Corporation that should change the prior decision of the Board to follow the recommendations of the Flight Equipment Committee on this matter, or that would indicate that the acquisition by the Corporation of four additional Convair 880 and thirteen Convair 990 aircraft rather than the additional Boeing aircraft ordered by the Corporation, would be in the best interests of the Corporation.

ACQUISITION OF BOEING FLIGHT SIMULATOR AND ADDITIONAL FUNDS FOR CONSTRUCTION AND EQUIPING OF FOOD UNIT AT KANSAS CITY

(3)

After discussion, upon motion duly made, seconded and carried, the following appropriations were approved:

Acquisition of Boeing Flight Simulator required to support training program related to acquirement of twenty-six additional Boeing Model 707 aircraft, and to provide annual recurrent training for Boeing flight crews	$1,386,100
Construction and equiping of food unit at Kansas City ($473,655 previously approved for this project)	$68,328

Upon motion duly made, seconded and carried, it was

RESOLVED, that the President or the Senior Vice President - Finance and Treasurer, or the Senior Vice President and System General Manager, or anyone authorized by any one of them in writing, be, and each hereby is, authorized in the name and

fwp

After considerable effort we--I say "we"; Convair, really, with my working with them--wound up with the Model 18. Contracts were developed, specifications were written. A lot of this work was done by me pretty much alone in the technical phases, although I did bring in some TWA experts on a secret and quiet basis because of wanting to hold this close because of a competitive thing, did bring in people from time to time. The further along the project went, the more people I brought in, along with the concurrence of Mr. Hughes.

I had lots of contacts with Mr. Hughes during this period.

The Model 18, for a number of reasons, was not--we didn't move forward with it. However, while we were developing it we also were working on the jet stream, we were working with AVRO Canada on the development of a very high-speed airplane, we were keeping negotiations alive at Boeing and when the Model 18 ceased to be a reasonable--reasonably practical possibility, Convair undertook the development of the Model 19, in a very preliminary way, to evaluate it, and that was followed with the Model 20, which got to the General Dynamic's board level, as I understand it, and was so advised at the time, and that's where it stopped, and some time later Convair came forward with the Model 880, and approache

Q Now can we proceed with Vickers?

A Certainly, surely.

Q Please do.

A Well, Vickers became of interest with the dev ment of a smallish four-engine turboprop airplane tha called the Viscount. I had followed the Viscount deve ment out of interest. It was originally developed through a joint effort involving BEA, Vickers and Ro Royce, and included as part of the development progr the installation of two Rolls-Royce turboprop engine and at least one, and maybe two, Dakotas. Dakota was English designation of the C-47 type. These were flown in passenger service, and all this was of tec interest. When the Viscount itself emerged I flew the experimental model, which, as I recall it, was called the model 630. I am not absolutely sure, but I think that was it.

The Viscount was reviewed by myself and my s Vickers were anxious to penetrate the world market, particularly the American market. This was a very important thing as far as they and I think most manu turers were concerned, so they made lots of data ava able for review.

We were frankly skeptical about the operatin

cost characteristics of the airplane, and I recommended on two different occasions to Mr. Hughes that we not move forward with the Viscount program.

The Viscount was also discussed within TWA, and, as I recall it, this view had the support of the knowledge able people within TWA. That is, the view that we not proceed.

In the meantime, the Viscount became a well established airplane in Europe, and a very popular airplane. Capitol Airlines purchased a sizable quantity. I am not certain of the sequence. I think they ordered 45, and then that order, I believe, was increased to 60, if I recall correctly, and then it was increased to 75 units.

Christopher Clarkson, who is the U. S. [illegible] representative for Vickers, did telephone me while I was at home in Kansas City, and advised that Capitol was forced to cancel, and was in the act of cancelling, these last 15 airplanes, and in view of our earlier discussions on the Viscount, and TWA's general equipment situation which he viewed to be that which represented generally a lack of equipment, would we be interested, and would I take this up with Mr. Hughes.

I said "Well, given the opportunity, I will be

A We both were, I think. I had the impression that he was. I was.

Mr. Hughes also requested that I see whether or not or let's say determine whether or not, if I could, TCA would be willing to give up a delivery position on the Viscounts that were then being produced for TCA at Weybridge, Weybridge being the Vickers factory in England. My understanding was that the delivery position, if TCA could make it available, would be for Mr. Hughes and not for TWA. I was glad to do this. I called Gordon McGregor a number of times, and in the end he agreed, after talking to Sir George Edwards, and getting his concurrence, to make one of TCA's positions available to Mr. Hughes.

This was all being done at a time that we were seriously considering the Viscount for TWA's use. By "we" I mean Hughes and myself, and then the people that we had doing these things.

The negotiation became extended.

Q Became what?

A Extended. That is, it covered a fairly extensive period of time. This was during the time that Carter Burgess was president of TWA. I don't recall if this started just before Mr. Burgess became president, or just afterward, but he was there during, I think, the larger part

of those negotiations.

It was clear that the Viscount could be improved with respect to payload range, for example, and that it should be, and part of the negotiation consisted in trying to sell Vickers on items of this type, although the Capitol airplanes had been committed for some time, and the whole configuration of the airplane in detail was circumscribed and limited by the construction progress that had been made and was continuing to be made on these particular 15 airplanes. But nonetheless, Vickers did agree to do some of these things and make these improvements. These were reported to Mr. Hughes from time to time.

The contract development--I might say Mr. Hughes asked that I coorindate and handle, be responsible for the development of the Vickers deal. I reported this to TWA. I arranged for our attorney to go to England to deal with Vickers house and Vickers, and upon request from Carter Burgess, arranged for Mr. Leslie to go over and work on the financial side of the deal, which he did.

Q Who was the attorney who went to England?

A Beg your pardon?

Q Who was the attorney that was sent to England to work on this?

A Mr. Harry L. West.

Q Of the Chadbourne firm?

A Yes, sir. During this time I had discussions by telephone with Sir George Edwards, and met with a number of his representatives over here, both on contract and technical matters. The nature of the deal was complicated, because it involved considerable use of foreign money rather than U. S. sources.

However, Mr. Hughes wanted to know one day what I thought about the deal, should we proceed or shouldn't we proceed, and I remember telling him that I didn't feel that with the recent change in TWA management that I would be--that I was confident in expressing the view of TWA. Mr. Burgess was relatively new, and that if he wanted an opinion from TWA that I could produce this more ably if I discussed it with him. He said "Well, by all means, do that."

Q "With him" meaning with Burgess?

A With Burgess. Well, "with him," with TWA management, certainly including Burgess.

Q Yes.

A The meeting was held in New York, with Burgess and others, and George Spater called me relating the results of the meeting. I wasn't able to be at the meeting, although I had Mr. Rourke there.

"DX 43, page 392
(Excerpts from Deposition of Robert W. Rummel)"

As I recall it, there were a number of stipulations which TWA management felt should be met prior to any commitment, but that if these were met then a commitment would be in order. This was passed on by me to Mr. Hughes.

Q Can you describe generally what those conditions were that the TWA management felt should be obtained prior to a commitment?

A Well, one that I remember is an increase in payload range that I mentioned earlier, one was financing of all except 20 per cent--

Q Of the total purchase price? 20 per cent of what?

A It was a package deal, Mr. Davis. It included more than the airplanes. It included airplanes, spares, and some other things, if we wanted them. We hadn't fully completed that part of it. Spare engines were included, for example. I don't want to mislead you. It wasn't a package deal all from Vickers, but several deals, all of which were wrapped up in a final package, we will say, simultaneously. At least, we were working toward that.

THE SPECIAL MASTER: The question is about the 20 per cent, what is the 20 per cent.

A The 20 per cent, I am a little vague on that. I think it's 20 per cent of the airplane and spares, to the extent that we committed for spares, to go with the airplane

from Vickers. I am not clear at the moment as to whether or not the 20 per cent applied to the engines, or if that was a hundred per cent, or what it was. I simply don't recall now. I am not clear as to the extent of spares we actually had in it at that time. I seem to recall the spares were, to some extent, an elective, that we either could or could not have them included.

Q I interrupted you when you were about to say that you reported to Mr. Hughes the conditions which the TWA management felt should be obtained prior to a commitment. Will you pick up from there?

A I mentioned two of them.

I am not certain on the others. I seem to recall there was one relating to price from TWA management, but I don't remember if this is really so or not. And there could have been possibly one more.

The result of reporting this to Hughes was that--

Q Before you give us the result of the reporting, can you tell me what happened when you reported?

A Well, that was what I was going--

Q I am sorry. I thought you were going to give me an end result as a result of reporting without telling me what happened when you reported to Mr. Hughes.

A I don't remember exactly what happened, except I

reported by phone, and the net result of that was that we set out to deal on the Viscounts, but in a way to comply with the stipulations from management.

Q Did Mr. Hughes encourage the management to try to get the Viscounts? That is what I am trying to get at.

A He had appointed me the coordinator on this project, that is, the development of the specifications and the contract, and kept, you might say, from time to time, tried to get this be expedited. I mentioned it had taken a little longer than I thought, and it sure did. So his directive or result of the conversation was that I should continue to work with Vickers, and bring them around to complying with these various items, although at the same time Mr. Hughes did or said he did, and I am sure he must have, to Sir George Edwards himself, and I don't know whether this was as a result of Sir George calling him or Mr. Hughes calling Sir George. I don't recall now.

I think another condition, if I can revert to that, was that the specifications be satisfactory to TWA.

Q To which?

A To TWA.

MR. WILLIAMS: That the specifications be satisfactory to TWA.

A This had been our intent, Hughes' and I. This had

been the understanding and intent in that respect.

At some point Hughes committed to Sir George Edwards for the procurement of these 15 airplanes, and Vickers had begun to prepare for the installation of some of the changes and modifications that we had required as a result of our specification negotiation. I don't have the impression at the moment that they had gone too far in the actual installation in aircraft, but I can't be certain now just how far they did go.

As I recall it now, and I have to give you this as my best recollection, Vickers met the 20 per cent criteria, they met the specifications criteria substantially--no one ever bats a hundred per cent, but we felt the specs were agreeable--and they did meet, as I mentioned earlier, the payload range aspects.

It was very, very late in this negotiation that it was discovered that the man in Vickers with whom we were dealing thought that he had an agreement on the airplane price when he in fact did not.

As a result of this, we undertook a price negotiation which became tedious and somewhat prolonged. It included discussions with a number of Vickers people who came over for the purpose, and included such things as escalation or let's say the establishment of the

reasonableness of asking price compared to what they had obtained or contracted for with other airlines, but considering things like labor inflation, parts cost rise and the like during the intervening period. It really became involved.

We were unable to come to agreement on price because we were unable--by "we" I mean I and the people that were helping me--I was unable to get Vickers to agree on to meet the objectives in price that I understood that Mr. Hughes desired.

This finally got to the point where Vickers said "Look, you make us an offer. We don't care what it is. Make any offer. We might take it."

I [illegible] this to Carter Burgess. Carter did not answer, but referred me to Mr. Leslie.

Mr. Leslie advised that I had no authority to make any offer of any sort, that in fact no offer could be made. This was the first I had heard of this.

MR. BARR: Could I have that last?

THE WITNESS: This was the first I had heard of this turn of events.

A I was in New York in the next few days and discussed it personally with both Mr. Burgess and Mr. Leslie, and they had the view that there wasn't, as I understood it,

that there wasn't any deal that could be made that TWA could enter into. However, unfortunately, by the time all this occurred, Mr. Hughes had already committed to Sir George Edwards to take at least 15 airplanes.

Vickers representatives were also in New York at the time, and told me that, look, they could understand that there might be problems. I might interject this, to say that TWA, in this particular period, had suffered a downturn in business, and this effected our ability to proceed. It wasn't a whimsical thing at all, I am sure. And that, referring to the Vickers representatives commen now, if there was anything that we desired, a different interest rate, maybe different terms, a different percenta of financing, just to say so. They weren't sure they cou do it, but they would be happy to try.

I reported this to Mr. Burgess and Mr. Leslie, and it was clear that we would be unable to proceed.

This was reported to Mr. Hughes, who seemed rathe upset to be so advised, although I had indicated earlier t it appeared TWA was cooling off some. I discerned nothing as definitive as I have described, but a sort of lack of enthusiasm let's say.

Mr. Hughes, I recall, said that he had committed t Sir George, that he would not change that commitment, that

it was worth more to him and his reputation in Europe to stick with his word than to back out, and that was that.

To complete the story, it must have been a year later, I don't know when it was exactly, but Mr. Hughes called me, and the only thing he said was that he just talked to Sir George Edwards, Sir George was satisfied that he had discharged all his responsibilities, and he wanted me to know that he had fulfilled all his obligations, and that things were now on even keel again with respect to our relations with Vickers.

Q And in fact TWA did not take any Viscounts?

A No, TWA did not take Viscounts. Indeed, Vickers didn't build them for us, because by the time it was determined that we couldn't get together on price and on [illegible] and other matters, Vickers simply stopped work and attempted to find other customers for the airplane.

One interesting aspect--it might be an interesting aspect--perhaps I should report here is that at no time, to my knowledge, did Vickers really understand, at least, the first number of months, whether this would be a Hughes Tool deal or a Howard Hughes deal or a TWA deal. I am sure they understood the airplanes would be used for TWA, and I was led to believe that the deal would ultimately in fact be a TWA deal, and not a Hughes deal, though it was

"DX 43, page 398A
(Excerpts from Deposition of Robert W. Rummel)"

Hughes and I that were negotiating it for TWA.

Q Would this be a convenient place--go ahead.

A Well, sure. Why not.

Q I don't want to break into your train of thought.

A This is a good place to stop.

THE SPECIAL MASTER: We will take a short recess.

(Whereupon, a short recess was taken.)

(Continued on page 399.)

BY MR. DAVIS:

Q Before continuing where we interrupted, Mr. Rummel, you might clarify for me one possibly two points.

At one time you referred to an effort which was made for obtaining a Viscount out of the delivery schedule for TCA, a Viscount for Mr. Hughes or the Hughes Tool Company?

A Yes, sir.

Q Was that for just one Viscount?

A As I recall it, it was one airplane.

Q Do you know what--

A I do not--I would not say at this time, because I don't recall, whether there might have been a request for more than one. We wound up with one, and as nearly as I can recall, that was a request that I made.

Q You did receive one then?

A No.

Q You made a request for one?

A As I testified, I worked with Mr. McGregor, so to speak, I discussed the situation with him--

Q Who is McGregor?

A He is the president of TCA.

(Continuing)--at Mr. Hughes' request. The request that I can recall is for one airplane, but I am not total

confident that I might not have backed off from a request for two or three and backed off to one. That is quite possible.

Q I understand. My question now is whether or not in fact one was received.

A To my best knowledge, none were received by anyone.

Q Do you recall what the purpose was or the reason for making a request for one or which came down to one?

A I am quite certain, I can't be positive, but I am quite certain that Mr. Hughes expressed the view that he wanted the one airplane for some sort of flight test purposes. It was definitely an airplane for Mr. Hughes and not for TWA, as far as I ever knew.

Q I am not sure that I am entirely clear as to the time period involved, as to when these discussions with Vickers or this flight that you had on an experimental model took place.

Can you identify approximately when it was that this--

A If you are referring to what I recall as being the old 630, that was at the time of the first Anglo-American technical conference at Brighton, which would put a fix on the time. I can only guess the time now, but--

Q Subject to correction, can you give me an idea

A 1952 or 1953.

Q It started as early as that?

A On the 630. The discussions on the procurement that I described in such a lengthy manner was considerably after that.

Q I see. That is the other thing I am trying to establish, because it seemed to me that there were two different periods involved that you were describing, and I am trying to separate them now before you continue.

Let me see if I understand you correctly, that approximately in 1952 or 1953 you developed this interest a Viscount and took a flight on an experimental model 630, is that correct?

A Put it in this perspective. We were following Viscount developments, as we tried to do many developments, to see whether or not we should have interest. I mentioned previously that we had analyzed and looked at the Viscount twice. This covers quite a period of time, and on two occasions I recommended to Mr. Hughes that we not move forward with a procurement program.

Q That is the other area I was trying to straighten out.

A We did not move forward with a procurement program. I think I mentioned in the testimony previously

just a few minutes ago that when I expressed this view to Hughes I did it with the confidence that I was also reflecting knowledgeable people in TWA.

Q I remember you testifying to that effect. I am trying to get you to give me an approximate time when that event occurred.

A I would be hard put to pin that down.

Q Was it still during the Myron regime?

A Yes, I think so.

Q What was Mr. Hughes' reaction to that report? I gather--

A It wasn't quite that formal. This was in the nature of a series of phone conversations, as I recall it, and the net result was that neither TWA nor Hughes procured the airplane.

Q You mean that airplane of the model 630 type?

A No, no. The 630 was not the production type airplane at all. The 630 was the prototype, and the production airplane was a larger and fairly substantially different model.

Q Now I am trying to get you to identify the model as to which you advised Mr. Hughes you would not recommend and which you felt reflected the views of TWA and as a result of which you did not move forward with

procurement negotiations, as distinguished from the type of aircraft as to which you did have these lenghty negotiations. That is what is confused in my mind from your prior testimony.

A Well, I don't recall the model number, Mr. Davis, of these airplanes. It was the kind that Vickers had slated for production for the delivery period that we were considering at the time.

Q Can you identify it, then, by the period, by the time period?

A Well, let me say I have the impression now that had TWA moved forward with Hughes in the first instance we would have far and away been the first to have Viscount in the States. We were, if not the first, among the first U. S. airlines to express interest in the Viscount.

Q I gather from your testimony that there was a model or type of Viscount being offered by Vickers which you felt was not suitable or desirable from TWA's point of view, and that at some later period, and that is what I am trying to identify, one period against the other, you did become interested in a Viscount, if certain specificational requirements were met, and--

A Maybe this will help, Mr. Davis. I may have confused the issue by talking about the 630 at all.

The 630 was a prototype, the first Viscount produced. It was the only such airplane produced. The airplane was re-engineered, the fusilage was lengthened, the fuel capacity changed somewhat, as I recall, and other changes made. Then it was placed in that subsequent configuration in production. That became the first production Viscount, the first group of which went to BEA.

From that time on Viscount remained in production as essentially the same basic airplane. There were changes, however, introduced at various times along the production line. The engine was uprated in power, other changes were made. I can't recall at the moment whether there was a still longer fusilage version or not. There might have been. Continental might have gotten a longer fusilage, for example.

So there was no splitting of the line or two distinctly dissimilar models. It was an evolution of the first type that was then produced in series, so to speak, in this one production line. I hate to take the time to elaborate on all these points, but in the interest of accuracy, when I say one production line, I am speaking figuratively, because the airplane was produced on more than one production line in England.

THE SPECIAL MASTER: Mr. Davis, I am not

clear about this airplane that they did recommend having a contract about, whether it was because it was an improved airplane or because it might be more attractive since Capitol was not able to take it.

Will you try to clarify that?

MR. DAVIS: I will, but my recollection of the testimony is that--and I am trying at the moment to do it by a time basis--my recollection of the testimony is that there came a time when TWA thought they might be interested in a Viscount if certain changes, features, were met, and that they had discussions along those lines, and Vickers agreed to do it, and that triggered off the negotiations.

[illegible]

Q What I wish you would do, Mr. Rummel, is to describe as well as you can what apparently were two periods, if not two types of aircraft; namely, the initial offering or approach that was made by Vickers, which resulted in your decision not to recommend the aircraft, and the event or events which occurred which developed into a new interest by TWA, and which resulted in the negotiations that you have described.

Do you follow what I am trying to get at, and what the Special Master is interested in developing?

A The trigger for a renewed look at the Viscount was the advice from Christopher Clarkson, which I then handed on to Mr. Hughes, that the 15 airplanes would be available.

Q That 15 airplanes would be available?

A Yes, as a result of the Capitol cancellation that Clarkson at this time seemed perfectly assured of.

Q Can you give me the approximate date when that event occurred? The date is always subject to correction. If you can associate it with an event--

A I can't be really specific. As I said before--

Q About the time Mr. Burgess came in?

A About the time he came in, or shortly before. I am not certain exactly which. It could have been shortly after he came in. It was a fairly unexpected development, I think, although many of us were surprised when Capitol ordered that many airplanes in the first place.

Q Then, if I understood you correctly, as a result of your reporting that to Mr. Hughes Mr. Hughes showed interest, and suggested or requested that you--

A I am not certain what additional testimony you are seeking at this point.

Q I am merely trying to develop all of the facts relative to what happened in connection with these efforts to negotiate and obtain or procure this Vickers product.

A Well, I indicated earlier that the result of the conversation with Hughes was a request that I explore the matter further with Vickers.

Q That was a response you received from Mr. Hughes when Mr. Clarkson of Vickers indicated that there were 15 Viscounts available as a result of the Capitol cancellation? Do I have it correctly now?

A Just as I testified previously, Mr. Davis.

THE SPECIAL MASTER: Mr. Rummel, to clarify what I was getting at, it seemed to me you made it clear that you would not recommend this airplane, and then later you came along with a recommendation.

I didn't get clear in my mind why you would, at a later date, recommend an airplane that you strongly recommended against. There must have been some factors there that you haven't made clear to me, anyway.

THE WITNESS: Well, there was quite an interval of time between the earlier recommendation and and the final recommendation. A number of things

had occurred. One was that the airplane became a better airplane, and the recommendation from TWA to move forward was conditioned upon the airplane being still better; that is, having more payload and more range.

The other situation which I think was slightly different was that the recommendation given to Mr. Hughes in the last case reflected results of a management meeting in New York, at which time certain conditions were arrived at, and while I discussed it slightly with Mr. Spater, I accepted that as the directive, and simply handed it on to Mr. Hughes, passed it on by phone to Mr. Hughes.

Q Then you also confirmed, if I recall, to a team visiting various airlines which had those Viscount in operation for the purpose of getting more statistical data and the report that TCA was cooperative. I am trying to place that timewise in relationship--

A That was part of the investigation of the Viscount that followed--

Q Clarkson's--

A (Continuing)--Clarkson's call and my conversation with Hughes. In fact, I discussed this approach with Mr. Hughes, as I recall it.

I must say that the general results of that investigation, as I recall it, led us to be somewhat more encouraged than we thought we would be when we undertook the investigation.

Particularly, as I recall it, TCA was quite content, and showed good--reasonably good operating cost factors.

MR. DAVIS: Does that clarify the record sufficiently?

THE SPECIAL MASTER: Yes.

Q I think, Mr. Rummel, that perhaps it would be appropriate for you now to complete your description of relations with Vickers when we took the recess.

A Vickers undertook the development of a fairly large four-engine jet in a preliminary way, and advised TWA of this, and I recall discussing this to some extent with Sir George Edwards and Derek Lambert at Weybridge during a visit there.

This particular project was subsequently dropped by Vickers.

Q Do you recall the time, approximately?

A No, I don't. I would have to reconstruct it now. I don't recall it.

After that Vickers undertook development of an

airplane model called the VC-10, and kept us reasonably well advised of what it was and what they intended to do. They finally developed--I guess that's the wrong tense--they finally decided to develop two models, the VC-10 and what was called the Super VC-10, both of which were ordered by BOAC.

Q Is that a jet?

A This is a large intercontinental four-engine jet. And even though commitments had been made for Boeings and Convairs, Vickers would, when it was convenient for them to do so, drop in and advise us of the progress and the general status of their program, but not with any serious efforts that could be discerned to sell us on the airplane.

Q Approximately when did that take place?

A Oh, the best I can recall, Mr. Davis, frankly, I don't remember, Vickers finally decided to go ahead full steam, but it was probably on the order of 1958, or thereabouts. None of the VC-10s are in service yet.

(Continued on page 411)

Q And you or TWA did not make any particular study or evaluation--

A Oh, yes, we certainly did. We calculated or estimated the operating cost, route characteristics, gave it a look see to the point where we were satisfied as to how it would compare with the Boeings and derivative models of the Boeings

Q What was the result of those studies, what conclusion did you or TWA arrive at?

A The final action was to buy additional Boeings.

Q What decision are you referring to referring to acquiring additional Boeings?

A The one made during 1961.

Q Did you have any conversations or communications with Mr. Hughes or the Hughes Tool Company or any of its representatives with respect to this Vickers VC-10 versus additional Boeings?

A Well, I don't recall discussing the VC-10 in this way, no.

Q Do you recall any discussion of any kind with either Mr. Hughes or the Hughes Tool Company or any of its representatives with respect to the decision to be made by TWA?

MR. WILLIAMS: You mean going back to 1958?

MR. DAVIS: I am referring to the offer or offering by Vickers of VC-10s and the evaluation made by TWA and

the decision, as I understand it, to acquire additional Boeings rather than acquiring Vickers VC-10s.

A I don't think I have been clear, Mr. Davis. I would like to try to clarify one point.

Q Please do.

A It was not really a contest between the Vickers and the Boeing. It was already clear to us that these airplanes, in our view, were of a different order, the better airplane by far, considering all factors, was the Boeing. It was not a contest between the two.

What I was trying to indicate was that the final result in terms of procurement action was that we didn't buy the VC-10, we finally bought Boeings.

Q And now I am trying to determine whether or not that final action or in connection with that final action there was any communication of any kind with either Mr. Hughes or the Hughes Tool Company or any of its representatives.

MR. WILLIAMS: Is this in 1961?

MR. DAVIS: No, relating to the action not to acquire VC-10s and acquire additional Boeings.

A Well, I had no discussion with Mr. Hughes in 1961 at all.

Q Prior thereto. My question still is as broad as I intended it to be, Mr. Rummel.

A The difficulty I have is tying it into the procurement of the Boeings.

Earlier in a phone conversation I am sure that I apprised Mr. Hughes to some extent of what the VC-10 was, and that it was being developed, but I do not recall any prolonged discussions with him on it. It was certainly not discussed in relation to the procurement of the 331Bs.

Q Now I am interested in what took place or what reaction you got from Mr. Hughes or anyone else representing the Hughes Tool Company.

A Well, I don't recall Mr. Hughes' reaction. I might say the 331B didn't even exist then, as I recall it. I don't recall any specific reaction to this.

Q Does this complete the Vickers story, if I may refer to it that way?

A That's all the salient points I can recall. I am sure that much more went on. I may have oversimplified some items, or I may have unintentionally omitted some others, but that is all that comes to mind at the moment.

MR. DAVIS: Mr. Special Master, we are at 4:25, and rather than open up the next subject, I would like to bring up the schedule for next week.

I know that I want to continue with Mr. Rummel next week.

were of lesser interest than some of the others.

Q Do you recall during what period of time it was that Handley Page was in the market of making offerings to United States airlines?

A I don't really know the extent to which they dealt with other airlines. I would only assume that since they were talking to us they were talking to other airlines.

Q I am trying to identify the period as well as you can do it, and always subject to correction, Mr. Rummel.

A Well, I can't be sure, but I think it falls in the period, oh, possibly 1956 or '57 on. I am not certain of that date, Mr. Davis.

Q During the jet age period?

A Essentially during the jet age, maybe with minor overtures just before that.

Q The next one that you identified was Bristol of England. Will you give us the same information with respect to that manufacturer of aircraft that you have with respect to the others?

A The first work with Bristol, as I recall it, predated the Anglo-American conference at Brighton that I mentioned a few days ago. I can't recall the exact time now, but Bristol put forward information which was

descriptive of the Britannia in an interest to--in an effort to interest us in it.

I visited the Bristol factory I believe twice on trips to England, and inspected the Britannias that were in production, and I think was kept generally apprised of the progress that Bristol was making in developing and selling the airplane.

The airplane was ordered by BOAC and a number of other airlines, and I believe was also ordered, and I don't recall if this was initially or later on, by British military services as a transport.

The airplane was a large four-engine turboprop that I believe I described heretofore.

Q Having identified it as a large turboprop, perhaps at this point it might be helpful if you would identify the other type of aircraft that might be considered as competitive with the Britannia, or with which the Britannia was competing for whatever market.

A When the Britannia was first discussed, Bristol anticipated delivering it much sooner than they finally did, and at that time, had it been produced when Bristol expected, it would have been competitive to contemporary U. S. piston airplanes, and later on with the Electra, and still later on with the jets.

It in fact wasn't produced when Bristol first thought it would be, so the competition that it found itself up against varied through the years.

Q The only other U. S. manufacturer of a turboprop was the Lockheed Electra, is that correct?

A Of a large turboprop, yes.

Q The one that would be competitive with the Britannia, the Viscount, or--

A The Britannia had much more range than the Electra. The Electra could have competed on some segments, but not on the extremely long-range segments.

Q You say that the original plans of Bristol, if they had been able to deliver as soon as they originally anticipated, the aircraft would have competed with the U. S. piston engine. Which U. S. piston engine aircraft would it have been competing with?

A The late Constellation series and the DC-7 series. It in fact did compete in international service with these airplanes. Again, the DC-7s and Connies were still in service when the Britannia finally appeared.

Q When I refer to the competition between types of aircraft I am--perhaps I should learn to use a different expression, Mr. Rummel--I am trying to determine the other types of aircraft which were available to airlines for

procurement for the purpose of determining to what extent airlines had a choice between procuring Britannias or Electras or Viscounts or Vanguards or whatever other types of aircraft, jets or piston engines, so far as that goes, for the purpose of determining what competition Bristol was facing as a manufacturer and would-be seller of aircraft, what kind of competition it was facing from other manufacturers of aircraft.

Have I made myself clear to you?

A In addition to those I have mentioned, I believe the Comet would have been construed by Bristol as being a competitor.

Q For clarity, would you mind now identifying, listing for me, so I can understand, the various types of aircraft which were in competition with the Bristol Britannia in the sense that I have just tried to explain to you?

A Well, this would be my personal opinion, but as I understood, you are asking what Bristol considered their competition to be at that time.

Q That's right, but from your point of view, as a person interested in choosing or deciding which type of aircraft to procure for the benefit or use of TWA, I am interested in your opinion and judgment as to which aircraft were competitively available to you. I do not mind

your giving me also, if you care to do so, your understanding as to what Bristol might have considered its competition, but I would appreciate it if you could do it separately.

A I will try, Mr. Davis. As I recall it, my distinct evaluation of Bristol at the time was that they could not reasonably be expected to produce the Britannia when they said they--when they were planning to produce it, so I tended personally to place the airplane in a bracket of time somewhat later than Bristol did.

Even so, in the beginning the Britannia would compete or did compete on the market with the later series of Constellations, the DC-7 and the Comet.

Later on the Britannia, once it was in production and fully certificated, and in service, it competed with jets from the standpoint of procurement, at least, Bristol made an effort in this direction.

As I recall it, Bristol claimed there was always a place for the Britannia, and that there was a place for jets as well, but obviously, to the extent that Britannias would be procured, it would, to some extent, displace the jet market.

It also competed, in this period, in this country, certainly, with the Lockheed Electra, but not in overseas service, because the Electra was not that kind of an airplane.

Q Perhaps I can approach what I am driving at a little differently, Mr. Rummel.

I understand your testimony to be that Bristol approached TWA or approached you some time before this conference at Brighton. You don't know the exact date.

Can you give me any idea of the year which you think that was?

A Well, it might have been around 1952, but I am not certain.

Q Around 1952. All right.

Apparently you gave some thought, made some studies, evaluated the possible use of the Bristol product, the Britannia, the possible use of that product by TWA, is that right?

A Yes, sir.

Q At the time that you were giving that consideration to this product what other aircraft from other manufacturers were also available to you or were being offered to the domestic airline industry which warranted consideration as an alternative to the Britannia? Can you describe or identify that situation for me?

A Well, I may have misunderstood, Mr. Davis. I thought that's what I did.

Q I think you did too, but in your answer I was getting

a little confused when you began to describe the fact that the aircraft was competing on the routes with another aircraft. It may be that the answer is still the same.

Let me put it this way: At that time, assuming it was approximately around 1952, was that the period of time when there was also being offered to TWA a choice of late model Constellations, Douglas DC-7s, Lockheed Electras, the Comet, Viscounts, was all this in the same period?

A I think I see what you mean. No. 1952 is the best date I can recall. It's around that period that I first visited the Bristol factory in England.

Q And you gave consideration to Bristol for what period of time following 1952, four or five years, two years, six months?

A I hadn't finished the thought I was trying to express.

Q I am sorry.

A I was going to add that at that time the Britannia was in the early stages of production. One may have flown or it may not have. I am not certain now. But it certainly was not available in the sense that airplanes could immediately be delivered.

Q That I understand, but a decision had to be made as to whether or not you were going to commit yourself for the

product, is that right?

A Well, I wouldn't say so, no. I think the explorations at Bristol and with Bristol were aimed toward resolving whether or not we should be interested in procuring an airplane, and if we should be interested, then when we could, and how to go about it, that sort of thing.

I think we looked on the Britannia as an extremely interesting airplane, one that should be watched closely, particularly with respect to what the competitor internationally might do with it, we were interested in the extent of interest on the part of other U.S. airlines in the possible procurement of it, but I think after examining the airplane we were quite content not to move in the direction of the Britannia, at least [illegible] remain of the true economic usefulness of the machine.

In other words, we, as I recall it, were content to see what happened and when it happened before we would have ranked it, for example, in the same competitive light, in terms of real interest, as we would have the late Constellation or the DC-7 series.

Nonetheless, the Britannia was given consideration, not only by TWA, but there were numbers of conversations with Mr. Hughes during which the airplane was described, performance aspects were discussed, power plant

4c

configuration was discussed, and that sort of thing.

Q With Mr. Hughes?

A Yes, between Mr. Hughes and myself, but I recall this, that there were a series of conversations. I couldn't begin to pinpoint the date, or precisely what was said in each one of them, but I do recall discussing the Britannia.

Q Can you give me an idea of the period of time during which it would be fair to say that TWA or you were giving active consideration to the possibility of procuring Britannias?

A Yes. Very active consideration was given to procuring Britannias during Mr. Burgess' regime as president.

Q So it began in 1952, during Mr. Damon's regime, 1952 or thereabouts, and continued until very active interest was shown by TWA during Mr. Burgess' regime, through 1958?

A I wouldn't say, Mr. Davis, throughout that period we would call it very active interest. There were periods when we did very little more than keep abreast of what was going on, be apprised by Bristol of what was going on.

The period of real active interest, where serious consideration was given to procurement of the airplane, was during the Carter Burgess regime.

Q At that time what other type of aircraft were you considering in lieu of the Britannia? What I am trying to

get at is--

MR. WILLIAMS: You mean during the Burgess regime?

MR. DAVIS: During the period when he was giving serious consideration to the Britannia, and I understand the Burgess regime was one of those times.

MR. WILLIAMS: He said procurement as contrasted with just looking at it, I gather, Mr.

My problem with your question, Mr. Davis, is that they were looking at it from 1952, and I understand the witness to say that serious consideration to procuring it was during the Burgess regime, and I want to make sure that the competitive factors that you are calling for are during that period.

Q Was it only during the Burgess regime that you gave serious consideration to the possibility of procuring the Britannia, or had you given consideration as to the possibility of procuring the Britannia prior to the Burgess regime?

A I would put it this way, Mr. Davis: During the Burgess regime procurement of the Britannia was a red hot issue. We had considered the Britannia prior to that time, but more with respect to determining, to the extent we could, whether or not we should be interested in it.

6c

My own personal view of the airplane, as I recall it now, was that we should wait and see.

During the Burgess regime, to answer your question as I understood it, the airplane wasn't directly competing at the time with anything, except to the extent that it was competing for available dollars, because by then the jetstreams had been procured--I am reconstructing this now from memory--we had done considerable work, I think in fact had ordered Convairs, and had ordered 131 and 331 Boeings--well, I will modify this to this extent: It probably did compete with the Electras and Lockheed efforts on the Electras, except we did not understand that the Electra was a coast to coast non-stop airplane, though as I recall it at the time Lockheed seemed to think it was, so we didn't put it in the same category as the Britannia, which clearly could fly coast to coast non-stop with no great difficulty.

The idea that seemed to be the main idea here behind interest in the Britannia stemmed from conversations with Mr. Hughes. It went along this line, that if we could procure a reasonable number of Britannias, which we at that time thought was probably quite a comfortable airplane to ride in, both with respect to noise and lack of vibration, and if we would put it in coast to coast one-stop or non-stop service, and if we could do it quickly, we would have

a very real advantage over the competition who at that time would still be flying piston aircraft.

Not only would it be more comfortable, the Britannia should have been considerably faster. We felt that if we could get a limited number of these airplanes, confine them, say, to New York-Los Angeles, New York-San Francisco, possibly a stop in Chicago, that we would, so to speak, have a leg up on American and United.

Now, we thought that we might be able to do this on a practical basis with a relatively few number of airplanes if we could make the right deal with Bristol and others so as to minimize the investment in tooling, spares and other support activities.

Various of plans were considered, including using Britannias in international service, but what I am saying is that it sort of finally boiled down, as I recall it, to the most serious interest finally being in a limited number of airplanes in this domestic service.

Bristol was quite anxious to make a deal, to the point where it was quite willing to re-arrange delivery schedules to the extent that it could in order to accommodate Mr. Hughes and TWA.

During this period I think that I was negotiating with Bristol on behalf of Mr. Hughes, but not having it

8c

clearly understood whether the airplanes would finally be ordered by Hughes or by TWA, although I believe the intent in this instance was to have them finally ordered by TWA.

The general Bristol situation at the time was somewhat confused, because for a number of reasons a number of airlines that had ordered the airplane were, as I recall it, seeking to change their orders for the airplane with Bristol.

One airline I think wanted to delay delivery. As I recall it now, I think that was Northeast.

Q Who?

A I believe Northeast.

Q Wanted to delay delivery of Britannias?

A Delay the delivery for a while. I don't recall the particulars, Mr. Davis, and I probably can't state it as a fact, but that is my recollection of the situation. Just why, I don't know at the moment.

Some of the smaller airlines not in this country had also approached Bristol in this respect, as I recall it, but as the negotiation continued Bristol approached numbers of them and others toward making airplanes available to--for TWA's use, believing, and I think they were certainly quite correct in this belief, that if they sold TWA they would have a strong wedge in the American

market, and if the airplane was anywheres nearly as good as they claimed, they would be able to sell others simply because we had it for competitive production.

I don't recall the range or number of airplanes that we discussed, but it varied from five to some substantially higher numbers, the higher numbers depending upon what could be made available by Bristol.

While negotiation was carried to the point of preliminary review of specifications, Bristol--the tender by Bristol of letters offering the airplane.

I made a trip to Montreal at Mr. Hughes' request to inspect a Britannia which was at Montreal at the time. It was my understanding that Mr. Hughes was in Montreal, and while I talked to him while I was there, I did not see him.

I did meet with men from Bristol. They indicated the airplane was available for Mr. Hughes to fly, and had been available for a number of days or weeks for that purpose.

I looked the airplane over and discussed a number of design features with the Bristol people, Bristol having opened the airplane up for that purpose.

By opening up, I mean opening inspection, the cowling and the like, things they could do without

dismantling the airplane.

This airplane was also examined during flight tests for air purity. In fact, we did it on the Britannia before we, as I recall it, did this relative to the Viscount that I mentioned earlier that TCA had made available.

Air samples were taken from various places in the cabin and in the cockpit. I discussed the test with Mr. Hughes in some detail before it was undertaken. He was quite particular on how he wanted some parts of the test run. The test, in the first place, was done at his suggestion, but I considered that it was a good thing to do. I was frankly concerned with this part of it.

The test results, once they were made available by the laboratory that assisted, were reviewed in some detail with Mr. Hughes.

Now, a corollary--corollary effort to these tests was to check into some of technical aspects of related items.

For example, at what temperature does the or would the fumes from various kinds of oil become toxic, if at all.

Now, this included petrolium based lubricants as well as synthetics. I recall being somewhat dismayed

"DX 43, page 458
(Excerpts from Deposition of Robert W. Rummel)"

so find that not a great deal of information appeared to be available, particularly with respect to synthetics, that is, synthetic lubricants.

This part of it was done by my power plant specialist operating out of Kansas City, who then made this information available to me for review and for purposes of discussing this along with the flight test results with Mr. Hughes.

The net results of these particular tests was that we found no evidence of toxicity in the airplane, or any danger from toxicity.

THE SPECIAL AGENT: I think this is a good place for a recess.

(Whereupon, a short recess was taken)

MR. DAVIS: Will you read to the witness the last portion of his answer to refresh his recollection as to where he was in his narrative?

(The answer was read.)

MR. WILLIAMS: Had you finished the answer, or do you want to add to it?

A I would like to add this, that, by way of explanation, the reason the tests were undertaken in the Britannia was because in this particular airplane the air that was pumped into the cabin and the cockpit for breathing during pressurized operations all flowed through the power plants themselves, where heretofore, generally, airplanes had the air that was breathed pumped in by separate pumps or superchargers, disassociated, except for the power drive, from the engines.

The question was whether or not the air passing through the engine could somehow become toxic, and this was the reason why it was felt appropriate to conduct the tests.

The Viscount was a different installation from the Britannia, but nonetheless we thought it appropriate in that case too.

Q Have you now fairly described the nature or scope of the investigation that was made by TWA relating to the desirability of procuring Britannias?

A No, I can elaborate somewhat.

While I was at Montreal Mr. Hughes requested that I contact Carter Burgess and invite Mr. Burgess and a number of his immediate staff to Montreal to fly in the Britannia.

My understanding of this exercise was that this would give Mr. Burgess and his staff an opportunity to evaluate the riding qualities of the airplane and perhaps with that perspective better visualize the kind of service that we were discussing.

I contacted Mr. Burgess, and he and a number of top people showed up at the Montreal Airport, where they were met by myself and a Bristol representative, taken to the Britannia, and then flown in it. It was a fairly short flight, as I recall it. I think it was possibly an hour and a half, or thereabouts.

On landing we returned to the airport, flew back to New York, had dinner there fairly late in the evening, and went our respective ways.

During this same period consideration was being given to procurement of 1049Hs, which is a Constellation type that had a fairly flexible interior. It was also during this period that Viscounts were being considered. I remember a meeting called by Mr. Burgess in his New York

office which was aimed at coming to a uniform position, so to speak, within TWA as to what TWA wanted presumably so that this information could be handed on to Mr. Hughes.

The results of the meeting were summarized and copies of the summary, as I recall it, given to myself, Mr. Burgess, possibly Mr. Leslie, so that we would have a uniform position, and if I recall correctly, considering the various equipment alternates that were available for consideration, it was recommended that we not move forward with the Britannia.

Q Can you tell me, while you are on that subject, who attended that meeting for the purpose of arriving at this uniform position within TWA?

A Well, the only people I recall are Mr. Burgess, Mr. Leslie and myself, although it is possible others were there.

Q Was there a difference of opinion within TWA as to which type of aircraft was best suited to TWA's needs?

A I think there were differences of view as to the relative desirability of various courses or combination of courses that we could undertake. I do not remember any sharp cleavage or arguments.

Q Do I understand you correctly that as a result of this meeting the decision of this group was not to go ahead

with the Britannia, is that correct?

A No, the decision was that we should recommend to Mr. Hughes, as I recall it, that we not move forward with the Britannia.

Q Was that done, was that recommendation transmitted to Mr. Hughes, do you know?

A I am sure it must have been, Mr. Davis. I don't recall specifically here, as to just how or who did it.

Q Was it after that meeting that negotiations with Bristol were terminated, or can you explain to me what then happened?

A I don't remember an act of terminating negotiations. The impression I have now of what happened then is simply that our interest waned, time went by, and it just ceased gradually to become an active negotiation.

Certainly Bristol continued for a while to make efforts to sell the airplanes.

Q Do you recall what views, if any, Mr. Hughes had with respect to the Britannia, as to its desirability from TWA's point of view?

A Well, the impression I had at the time, Mr. Davis, was that Mr. Hughes was very seriously interested in exploring all possibilities to determine feasibility of moving forward with the Britannia procurement program.

I would certainly view this as a serious, earnest effort. As to what was really in his mind in summary fashion at any one point, I don't think I could say. I had the impression that he was quite interested in going that way. He certainly knew how to ask a good many perceiving and detailed questions on the airplane, the general situation.

Q Can you tell me approximately when it was that this decision was made by this TWA personnel you had identified not to move forward with the Britannia?

A As I recall it, the decision not to recommend the Britannia was fairly late in 1957, but I really can't be sure of the exact time.

Q Did any domestic airline in the United States in fact procure Britannias?

A I don't believe any were delivered to any domestic airlines, but I think at least one and possibly more had at one time ordered Britannias. I think Northeast was one of these. This would bear some checking. It is possible that there is one other one, but I can't be that definite now.

Q Do you know what happened to those orders?

A Cubana did, but I do not consider them a U. S. airline.

Beg your pardon?

Q Do you know what happened to these orders that were

placed by other airlines?

A Not except to the extent that I indicated earlier.

Q You say that those Britannias became a red hot issue during Mr. Burgess' regime, but that prior thereto they also had been considered.

Can you identify a prior period when they had been seriously considered and abandoned?

MR. WILLIAMS: Seriously considered?

MR. DAVIS: Yes.

A Well, by "red hot issue" I meant it was an earnest and serious negotiation that called for final decision one way or the other. I don't recall any of the earlier reviews or investigations having gotten to that point.

(Continued on page 465.)

hn-1

Q In other words, is it fair to say, then, that from approximately 1952 the possibility of acquiring the Britannias was being explored more or less continuously with varying degrees of interest in their product until it reached a point that you have described in greater detail during the Burgess regime--

A No, I don't think it was explored more or less continuously. I think we had the fact that the Britannia would probably exist and then later did exist in mind through this period, and at times, when something new came up, new documents were received, new information became available, then we would give that some additional consideration.

Indeed certainly could have [illegible] specific effort that I don't at the moment recall from time to time.

Q What was your personal recommendation in this meeting with Mr. Burgess and others?

A Well, I can't be absolutely sure at the moment. I remember being concerned about the difficulty that I felt TWA would probably encounter in introducing or planning for the introduction of too many new types of airplanes simultaneously. If we procured Viscounts, and also procured Britannias, at the same time were preparing, which we were, to some extent, at least, for the intro-

duction of jets, it seemed to me that we were probably going to extend our organization beyond the reasonable point that it should be extended, and that we might not do all jobs as good as they should be done, whereas if we undertook a less ambitious program than trying to do all things, we would be far better off.

In a moment it may come to me, but I don't recall specifically where I put the Viscounts in relation to the Caravelle and the Us and other things that were being kicked around at the time.

Additionally, I remember at one point, when we were considering the forecasted maintenance and overhaul costs, I recommended, as a result of inspecting the airplane at Montreal, that for planning purposes we should double those costs. I recall not being favorably impressed with many mechanical aspects of the airplane from the standpoint of cost of maintenance.

Q Without trying to recall what your personal recommendations were, can you describe or identify what the reasons were for the conclusion which was reached at that meeting?

A Well, my difficulty is in specifically recalling all of the conclusions reached at the meeting, which I seem to be unable to do, Mr. Davis. Some of them were,

by nature, contingent on other conclusions.

As I recall it, the nature of it, and I don't recall the specific, was, well, if Viscounts are in fact procured, then Britannias should not be. It was more this kind of thing rather than simply that under no circumstances, as I recall it, should the Britannias be procured. But I don't recall exactly what came out of it in detail. The gist of it was that we felt it was better to forego the Britannias, as I recall it, as a broad assessment of one of the broad results of the meeting. I just don't recall the specifics.

Q And then proceed more actively with respect to the Viscount, or was it a decision to abandon all of them?

A Well, as I recall it now, the Viscount program was still active, and it was expected that would continue to be active.

Q Is Bristol still making offerings of a type of aircraft to the domestic airline industry?

A Yes, they are. They are building a twin-engine air bridge type airplane. I don't know of any airlines over here, though, that have procured it. It is in use in Channel services, and I believe a few other areas.

Q Have you completed your description of both the relations of TWA to Bristol and the scope or nature of

U. S. airlines?

A Well, I can't say I have stated every particular, but I have tried to give you the evolution, if you like, of our relations with Bristol.

Just for example, I recall that Bristol did report having had discussions with certain members of government, I think therefore some committee in Congress that was involved, with respect to [illegible] that would be imposed on Bristol by its other commitments. Bristol had suggested that a joint meeting be held with the government to help sell this plan, but we chose not to take that step at the time it was suggested.

In fact, we didn't take the step at all.

[illegible] airplane strictly from TWA's point of view, we looked at it in terms of its--in terms of what it would probably do for others, and then what that would do to us.

As I mentioned earlier, part of the objective of the negotiation with Bristol was to find a way to proceed without requiring much cash.

As I recall it, although I do not recall the particularity, part of the reason Bristol had for contacting the government was to make funds available for the program, and that Bristol felt to better do this it

would like to have some tangible evidence of interest, either a personal appearance, a letter, or something, and to my best recollection, it got no such tangible evidence.

Q You referred to production problems at Bristol. Those were production problems in relationship to available financing?

A Well, at one time part of the airplanes that Bristol were talking about making available to Hughes and TWA were airplanes on order by Scottish Clan. While I can't be certain at this time, I think Bristol felt the need for mending fences, if you like, ahead of time, with respect to releasing airplanes for this purpose.

I am sure they had discussions with Scottish Clan, and the exact degree to which this may have gotten into discussions at a government level, I can't be certain now, but I have the impression that it probably did.

Q Can you identify the Scottish Clan to which you were referring?

A Not except that it was an interest that had ordered a fairly small number of Britannias.

Q Were the financial resources of TWA at that time a factor in the decision or conclusion which was reached?

A Well, this would have been primarily a question that I would not have answered to from a management

"DX 43, page 469A
(Excerpts from Deposition of Robert W. Rummel)"

point of view. This would be a question Mr. Leslie would have, I suppose, been expected to take a position on with Mr. Burgess.

I have never knowna case yet, when ordering equipment, when finances weren't an important consideration.

(Continued on page 470)

fwp

Q What I am trying to determine is whether or not, to your knowledge, the financial resources available to TWA at that time were a major factor or consideration which was discussed at this meeting attended by Mr. Burgess, Mr. Leslie, yourself, and others.

A Well, I can't answer it, Mr. Davis, because I don't know what was made available or what would be made available either through TWA or through Hughes to TWA or what. This is an area that I didn't directly work with.

Q What I am trying to establish is whether or not this decision which was made at this meeting which you have previously identified, whether it is your understanding that the decision was predicated upon factors other than the availability of financing to TWA from whatever source.

A Well, I am quite certain that there were factors considered besides financing.

Q I understand that. I am trying to determine to what extent available financing or the willingness of the Tool Company to provide the financing or to commit its credit was a subject of discussion at this meeting or meetings at which the decision that you have described was made.

A I don't recall specifically.

Q I am interested in [illegible] involving Brie

Mr. Rummel.

You testified at one time that Bristol originally anticipated a delivery schedule which you felt they might not be able to keep.

Can you describe what the facts were in that regard, what was it that Bristol originally anticipated being able to do, and what in fact developed?

A I don't recall the schedules now, Mr. Davis. I recall, in going through the Bristol factory, having this in mind, and it was a sort of a personal evaluation, if you like, that as a result of what I saw, and as a result of the discussions I then had with them, they could not reasonably be expected to meet the delivery schedule that they were talking about and planning on. And by "delivery schedule," I am speaking now of the production of airplanes to their customers.

Q That is what I am talking about.

A Later on the delivery prospects were, again upset because the Britannia caught, so to speak, some backwash from the Comet program. As a result of the investigations that followed the Comet disasters, the British Government, acting, to a fair degree, I believe, in consert with industry, laid down some criteria which required extensive re-evaluation and retesting of not only the Comet, but

also the Britannia. Now, this in turn caused additional delay in producing Britannias.

Q Can you identify or describe the nature of that delay; was it a delay of months, a year?

A Well, I can certainly give you my recollection. I would be hard put to prove it at the moment. But I would say--I have the impression that the Britannia was delayed an additional year or possibly a year and a quarter, or thereabouts, as a result of the additional testing and re-evaluation, re-engineering and modifications that came out of the investigation of the Comet and the reinvestigation of the Britannia.

Q By reason of some mishap which had occurred?

A Because of the Comet disasters. I am not aware of any mishaps on the Britannia that called for this.

Q Now do you think you have adequately described the nature of the offerings made by Bristol and the relations of TWA to Bristol?

A Well, as I said, I am quite sure Bristol approached TWA after that sequence, but I seem to draw a blank right now as to what it was.

Q Have you fully and adequately described the participation of Mr. Hughes or the Hughes Tool Company or any representative of the Hughes Tool Company in that relation

ship?

A Well, to the extent that I presently recall it, we did not lose sight of the Britannia, it became a competitive factor in the Atlantic.

Q I am referring to the part played, if any, or the extent to which a part was played, either by Mr. Hughes or the Hughes Tool Company or any representative of the Hughes Tool Company.

A Well, that is all I recall at the moment, Mr. Davis. I am quite sure that we discussed the technical features of the airplane from time to time in the perspective of jet developments, what could be learned from it to be reapplied, and that sort of thing, but I don't remember any specifics.

Q The next manufacturer that I have listed is Short-Harlan.

A Yes. It has proposed primarily, as I recall it, cargo aircraft in various sizes from time to time.

Short-Harlan used to be Short Brothers, I believe. It is currently promoting, if you like, the use of a fairly sizeable freighter that it has under development.

This was not a particularly active relationship, and still isn't, although we did receive information from from time to time and would talk to them as they passed

DX 43
476

AFTERNOON SESSION

2:00 P.M.

ROBERT WILAND RUMMEL, resumed the stand and testified further as follows:

EXAMINATION (Cont'd) BY MR. DAVIS:

Q During the luncheon recess, Mr. Rummel, has anything else occurred to you that you haven't already identified or described?

MR. WILLIAMS: In connection with Short-Harlan?

MR. DAVIS: In connection with the manufacturers who from time to time may have made offerings to the airline industry. Is there anything you would like to add or change to your testimony to date?

A No, nothing occurred to me during luncheon, Mr. Davis.

Q Was there anything which has occurred to you since you began testifying here which you would like to modify or change?

A No.

Q The next manufacturer which I have on my list is Sud Aviation, or Aviation Sud--whichever you prefer.

A I visited the Sud people in Paris and the Sud factory at Toulouse sometime before the first Caravelle flew.

Q When was that?

A Probably in 1952 or 1953. I am not positive. I w

taken on a tour through the facility, and had somewhat tedious but interesting but technical discussions with their engineers--tedious because of the language problem.

Generally I became familiar with what they were doing, and the status of the project, and also the Sud facility, as well as their plans for producing the Caravelle.

Sud from time to time would send specifications and other descriptive data pertaining to the Caravelle project to my Kansas City office. I might say this was a particularly intriguing airplane design because of the engine location.

Part of the purpose of the visit was to try to establish as best I could whether or not Sud appeared to have the capability of developing and producing an airplane in this category, and in direct competition with others with whom we had been dealing.

The Caravelle was ordered by Air France who received the initial production lot, but additionally was sold to Air Algiers and a number of other European airlines.

Sometime later a Caravelle was flown across the Atlantic and flown on demonstration tour pretty much throughout the United States, and if memory serves correctly, touched a certain number of countries of South America.

This tour was a highly organized tour on the part

of Sud, involving demonstrating the airplane to most of the major airlines, but additionally in promoting the general cause of good U. S.-French relations. I recall being told at the time that the cost of the project was being shared by Sud and the French Government, although Sud is in fact primarily owned, I believe, by the French Government.

In making arrangements for the demonstration in Kansas City, Sud had been in touch with my office. I arranged for the handling of the demonstration with our operations department, and also arranged for our publicity people to work with the local Chamber of Commerce and with Sud towards setting up various meetings with town people that Sud wanted to meet with. This was a number of months in advance of the actual demonstration, as I recall it. I had the impression that this had been done elsewhere by Sud.

The airplane arrived at Kansas City, and was demonstrated to two or three plane loads of TWA personnel in combination with town officials and other prominent citizens that Sud had invited and who had accepted. I went on one of the flights and was tremendously favorably impressed with the comfort of the airplane from the passenger's point of view.

Sud advised that only two non-Sud pilots had be

cleared by Sud management to fly in the airplane. One was Charlie Lindbergh, and one was Mr. Hughes. They advised they wanted to demonstrate if at all possible the airplane to Mr. Hughes.

I got in touch with Mr. Hughes. I don't recall whether I left word at the Hughes' office or whether it was in the course of another call, but I recall advising him of this, and indicating my belief that the airplane had strong passenger appeal, although I recall indicating I wasn't then sufficiently familiar with the mechanical detail of the airplane to comment on the practicality of the system's structure, and whatnot.

It was either then or in a subsequent call which would have been approximately at that same time, Mr. Hughes requested that the airplane be flown to the Hughes Aircraft airport at Culver City so that he might inspect it and fly in it. I approached Sud with this in mind, and was able to report back to Mr. Hughes in due course, again in a fairly brief interval of time, that Sud was willing to fly the airplane to Los Angeles, and that in order to make it available, it was willing to readjust and rearrange its demonstration schedule to the extent that might be desired, although they hoped it would not require much. I think they planned to have the airplane available one day or a

(Excerpts from Deposition of Robert W.

day and a half, and sandwich it in, so to speak, with a minimum of modification to the Sud demonstration schedule.

There were numbers of conversations with Mr. Hughes, with me sort of being a middle man between Hughes and the Sud flight crew, during which recommendations were given to the flight crew as to how to route the airplane to the coast. Mr. Hughes seemed to be concerned with a tornado activity and possibilities of hurrand from some recent atomic tests, and was anxious that the plane be flown along certain routes to the west coast.

I did not accompany the airplane to the coast. However, General Tessier who is the U. S. representative for Sud, and others in the Sud party did. I recall he was joined there by Sud's treasurer. After arrival, the airplane was inspected by people from the aircraft division of the Hughes Tool Company--Ray Hopper's outfit. I don't recall at the moment how long the airplane was in Los Angeles, but I believe it to be in the order of a week to ten days, or thereabouts. Sud reported that Hughes did not fly the airplane. That he was indisposed at the time. That their contacts had been with Mr. Hopper primarily. Before leaving, however, either Tessier or the treasurer did talk by phone with Hughes.

As I recall it, Sud was finally forced to put the

airplane back into demonstration, and flew it from that area.

Sud had offered the Caravelle and it had outlined certain delivery positions for some quantity of aircraft. It became my lot to try to improve these delivery positions through negotiation with Sud. As I recall it now, Sud had plans to expand its Toulouse assembly facility, and at that time [illegible] manufacturing components in a number of French facilities.

After review, Sud gave us what appeared to be the best deliveries that it could offer. These still didn't seem to be quite good enough. As a result of a conversation with Hughes, we undertook on an exploratory basis an investigation of whether or not airplanes could be delivered sooner if they were manufactured by TWA or Hughes, rather than if they were manufactured by Sud.

To understand this, it is perhaps well to recall that Sud had commitments for some time in the future at this time, which tied up their deliveries for a while. The specific plan that was explored was, might be characterized as a backward or reverse approach to production. Instead of starting by manufacturing detailed parts, combining these into sub-assemblies, and then assemblies and then finally into an airplane, the idea was to start as nearly

as possible with the major components, possibly first joining a wing with a fuselage, to a landing gear, to nacelles, these all being imported in the beginning, and described in the thought that we were pursuing.

Then on the possible basis that perhaps Sud to supply certain components in the beginning, where they might not be able to provide completed airplanes because of facility limitations, the production line over here would gradually be expanded in depth to assemble more and more separate components, and finally if the quantities of airplanes justified, to back into the manufacturing business.

The discussion was sufficiently serious for Mr. Hughes to request that I ask Carter Burgess not to dispose of an overhaul facility that we were moving out of in Kansas City at the time that we were going to release it back to Kansas City, Kansas, the thought being this might be the initial site for the assembling of airplanes in the event all this worked out to some advantage.

(Continued on page 483.)

The reason, as I discussed it with Mr. Hughes, for the upper inspection of the airplane was that I felt the need for people somewhat more currently familiar with some of the manufacturing details than I was to take an independent look at it, and either support or disagree with the tentative conclusions that I had arrived at on this point.

There were numbers of discussions. The end point of it all was that we had to conclude that considering the time necessary to establish a manufacturing organization, whether it came partly from TWA or whenever it came from, whether it was a division of TWA or whatever it might be, would take time--more time than we probably had--and additionally, Sud, on exploring to greater depth than they had at that time the ability to manufacture components in these various factories throughout France, came to the conclusion that it could not, even though it wanted very much to establish a facility in the U. S.--came to the conclusion that at that time it could not expand its production of components sufficiently rapidly to accommodate a second production line in the States, at least to the point that it would accelerate production of the Caravelle.

This particular approach was abandonded after what I would view would be a very thorough exploration, such

as I have described briefly.

Our relations with Sud were always good. Sud kept in touch from time to time concerning delivery positions, orders to others, and so on.

Many of these contacts were through General Tessier, although occasionally others would be involved.

Considerably later on the Douglas Company and Sud became associated with respect to the Caravelle. During, I think it was 1959--I am not sure--United Airlines purchsed a fleet of 20 Caravelles of a somewhat later model than we had looked at earlier. These were delivered, I believe, during 1961.

The Caravelle, during this intervening period, became established as a very popular airplane in Europe. It was a comfortable airplane that the passengers seemed to enjoy. The Caravelle was and is a smaller jet with limited range characteristics, and appeared to be of a size that could nicely complement TWA's fleet of 880s and Boeings.

During 1961 both Douglas and Sud were in touch with TWA, and I understood to see what sort of a deal might be worked out with Sud for airplanes, all with full knowledge and concurrence of my superior, Mr. Tillinghast. The objective here was to come up with a deal, if possible,

that would require a minimum cash outlay, or if possible, would permit generating what cash might be required from the airline.

All in all Sud was cooperative. The deal went through a number of gyrations, and so did the airplane configuration, at least in some particularity. It wound up with General Electric power plants, for example, instead of Rolls-Royce. It was a slightly longer fuselage than, I think, United had. It had some aerodynamic refinements.

This airplane was slated for production commencing in January of 1963.

While the contract was signed for the procurement of 20 aircraft, it was allowed to expire.

Additionally, Sud have talked about supersonic transports, particularly recently. I have had occasion to review some of these plans with Satre and outside of Sud having discussed now and then whether or not it should continue the Caravelle as it was, or build a bigger caravelle, or smaller Caravelle, and outside of discussions of that character, I think this would be my nutshell recollection at the moment.

Q Why was the contract for Caravelles allowed to expire in 1961?

A I may have misled you. I don't know that it

technically expired in 1961. It has since expired. I think it was in 1962 when it technically expired.

Q I meant the arrangement that had been negotiated in 1961.

A As I understand it, the primary contingency that wasn't me-related to financing.

Q Financing available to TWA?

A Yes.

Q Have you fully described the participation of Mr. Hughes or of the Hughes Tool Company or any of its representatives in connection with the dealings with Sud?

A As nearly as I can recall it, I might say Mr. Hughes evidenced very keen interest in this exploratory process I described of seeing what could be done to accelerate production, and then also once TWA's requirements were reasonably satisfied, there may be a combination with that to possibly offer the airplane to others.

That is all I recall at the moment, Mr. Davis.

Q As I understand your testimony, Sud first approached TWA or you in around 1952 or 1953, is that correct?

A Yes. As I said, I am not entirely sure of that timing, but it was about that time. While visiting some of the factories in England, I extended the trip and

dropped in first at Paris for an afternoon's discussion, and then went on down to Toulouse, and returned to Paris for a half hour's discussion, and then left back for the States.

Q At that time Sud was offering a Caravelle?

A Well, it may be putting it a little strong. I think at that time they intended to offer and declared their intentions of wanting to sell the airplane.

As I recall it, they were most eager to try to penetrate the American market with this airplane, and at that time--I didn't know it when I went down there, but I soon learned we were the first airline to visit the Sud facility from the U. S.

Q What was the type or category of aircraft that Sud indicated it contemplated offering to the U. S. airlines?

A Pretty much like it is right now.

Q A jet?

A Oh, yes. I thought I described it the other day. It is a twin-engine.

Q I wasn't sure at that time in 1952 and 1953 they were planning and offering or intending to offer that kind of aircraft.

A Yes, sir. It is the same Caravelle. A Caravelle has always been the Caravelle. It is essentially the

same. There have been increases in the power of the power plant. There have been changes in fuel capacity and other refinements in the airplane, but essentially, if you were to look at two airplanes on the field, one made then and one made now you would immediately identify both as Caravelles.

MR. WILLIAMS: What was the passenger load of the Caravelle?

MR. DAVIS: I was going to ask my question a little more broadly. I was going to ask him to identify, if he would, the type or category of aircraft with which the Caravelle would be competitive.

A It would have been competitive with the Lockheed Electra.

Q Electra?

A Yes, and airplanes contemporary with that.

Q You identified it as a short-range aircraft?

A Short to medium, yes.

Q Can you identify the category of short to medium-range aircraft that would have been jet aircraft, which from TWA's point of view at least, were competitive for consideration with what was contemplated by Sud?

A As I recall it, the Caravelle had somewhat more range than the Viscount, but there were a number of route

segments where certainly both could serve and both were contemporary. The Viscount preceded it, but they could have appeared at that time.

Q In the category of jets, can you identify the types of jet aircraft which are or were contemplated to be competitive with the Caravelle?

A Because of economics the airlines tend to want to fly jets on as long trip lengths as they can. However, due to route necessity or availability of jets, or various reasons, a number of them fly, even bigger jets, on fairly short hauls. To the extent these aircraft would have been flown on the hauls for which--the length of hauls for which the Caravelle was suitable, to that extent they would have been competitive.

Q Competitive with what?

A With Convairs.

Q Convair 880s?

A Boeing.

Q Which one--the 131?

A I would say 131, or if you look at the Caravelle, say an airplane good for seven or ten years useage--let us say ten years--had we procured it, it would just be coming in and would be good for a long time.

I would include all these airplanes which would

fall route-wise into the category the Caravelle would fly, and that would include the 727, for example.

(Continued on page 490)

Q What I am interested in knowing is what was being offered in the sense of interest to manufacturers and manufacturing jet aircraft in 1952 or 1953, or at the time Caravelle first approached you--what choice, if any, did TWA have for a comparable type of jet aircraft?

A There were none available in 1952 or 1953. At that time, as I said, the first airplane was just being built in the factory. It was at an appreciable period that it flew and still later period that it was placed in production.

So there wasn't any availability then, and it would have been premature for any airline, other than a state airline to have entered into heavy commitments. It would have been a first-class gamble, and then some.

Q What I am trying to understand is this: Were there other manufacturers, domestic or foreign, which at that time, namely, when Caravelle was discussing with you its proposed program--what other aircraft manufacturers were offering or indicating an interest in offering a comparable jet aircraft. By comparable, meaning one that would have performed substantially the same service for TWA that the Caravelle might have.

A As I said, I am not real certain of the 1952 or 1953, I suppose it might have been 1953 or 1954. As I

recall it, the Caravelle emerged somewhat after the initial Comets were produced. The Comet was a long-haul airplane. It was also represented as a good medium-haul plane.

I suppose in a certain sense it could be considered competitive to the Caravelle, although I think we looked at the Caravelle more as a short-haul airplane.

Q As a short-haul jet aircraft, what I am trying to find out, Mr. Rummel, is whether at that time, whether it be 1952 or 1953 or even 1954--at the time the Caravelle was trying to interest or evoke an interest in TWA for its product, what other manufacturers were offering or programming or planning for a similar short-range jet aircraft.

A I don't recall any at that time except to the extent the Comet was short haul. As I said the other day, AVRO Canada did produce a small four-engine jet which was not too far removed from the Caravelle in terms of size, but that was quite awhile before this.

Q At that time were there any U. S. manufacturers, that is, Convair or Boeing, or Lockheed or anyone else, who were approaching the airlines with a program of manufacturing a comparable or competitive aircraft which might be competitive to what Sud was offering?

A. We had numbers of discussions from approximately 1946 on, and I think some clear back in 1945, with a number of U. S. manufacturers on the possibility of their producing jet airplanes.

Back in 1945 I had laid down and run a preliminary performance analysis on a small four-engine jet. I discussed this with Jack Franklin. We discussed it with Frye, and as the next step we discussed it with Douglas, and we found that coincidentally Douglas had laid down an airplane that was certainly not identical, but very similar to that.

I think in retrospect now both of them represented ing about the same state of the art at the time--performance figures were comparable, and so on.

Mr. Franklin indicated that both Mr. Hughes and Mr. Frye were interested in pursuing this further. We did have discussions with Douglas, but finally concluded that the state of engine development was just premature to move on into jets at that time.

Martin approached us at the time Mr. Franklin was still there with drawings of various jet possibilities. They had preview drawings of various sized machines. So did Convair. Both Martin and Convair at that time had a development contract with the military, and were

developing experimental jet bombers.

Mr. Franklin and I made one trip to San Diego during which we looked at the bomber at the shops while being constructed. We considered technical aspects and looked further at some of Convair's drawings.

I would say that both Martin and Convair at this particular time were exploring possibilities, rather than coming in with contracts and dripping pens.

We also gave consideration to other possibilities of having jets developed. One was a commercial version of the YB-60, which was a large eight-engine jet variant of the B-32 built by Convair.

By way of identification, I recall it as the machine that competed with the initial B-52 plane. I remember being asked by Mr. Hughes to discuss this possibility, or rather say to explore the plane that Convair had with respect to feasibility, which I did by visiting Fort Worth, and talking to their structural and performance engineers. I later was asked to visit Mr. Odlum at his ranch and discuss this with him, and I believe Mr. W. C. Rockefeller was there at the time, if I recall. He was there at several such meetings.

Q Was this at the time when Mr. Odlum was chairman of the board of Convair?

Q Now will you describe what was contemplated or offered by Douglas at that same time, or during that same period of time we are talking about, namely, from 1952 to 1954, or the time that Caravelle was being offered by Sud?

A I don't think the model 80 goes back as far as 1952. I am just not certain of the date. It would probably be more towards 1953 or 1954 possibly.

As I recall it, Douglas was still pretty well occupied with the DC-6B and DC-7 production, particularly during the latter part of that period. I don't recall exactly when the DC-7 appeared. I don't recall activity to any great extent along this line from Douglas, although they may have occasionally dropped in with some thoughts on jets.

Lockheed did look at jets fairly extensively, as time went on, from that time.

Q Is it fair to say that at that time Douglas had not developed any particular program of looking towards an offering of jet commercial transports to domestic airlines?

A I am a little vague on that point. I know later on they were giving active consideration to building and actually offering airplanes, and I did practically nothing with them, as I mentioned the other day. During this particular period we gave consideration to some piston air-

planes they were offering.

Q Which kind of airplanes?

A Piston. My recollection is that they were pretty well taken up with the piston airplanes, and that they were not anxious to move into jets.

Q They weren't interested in pioneering a jet commercial transport?

A My recollection is that they had the piston market, certainly not to themselves, but they had a big piece of it. The airplane was still being ordered. It was in heavy production, and they saw it continuing for some time. As I recall it, not too much was going on, as I knew it, at least, as I recall it, from Douglas with respect to jets.

Before then they looked particularly to the smaller jets that I mentioned earlier, although I would not want to go on record and say that they didn't show us previews a time or two. I don't recall the specific instance when they did.

Q How about Lockheed? What were they doing looking towards jet aircraft?

A The first Lockheed jet transport that I was at all familiar with that I can recall was during the time Lou Koepnick was in charge of staff engineering

That was a four-engine jet. As I recall it, the

to date?

A Yes, there is, Mr. Davis.

On further reflecting on the Caravelle situation, and recalling what was said yesterday, it seems to me that there might be some confusion as to the timing of the Caravelle demonstration here in the States.

You may recall I mentioned that we held on to a facility in Kansas City and that at Mr. Hughes' request I contacted Mr. Burgess.--I also contacted some others in this regard--But this was during the Burgess regime, obviously, which was in 1957. As I recall it, you kept interrogating me about a competitive situation that existed more toward the beginning of the Caravelle exercise, 1952 to 1954, and then 1955, and I said I wasn't exactly sure when this trip was, but I thought it was late in that period, and I just want to be clear, on further recollection I can establish that the Caravelle tour was in 1957. I think it was the first half of the year, but I am not sure of the exact dates even now.

Q So that in 1957, and after orders had been placed with Boeing and Convair for jet equipment--

A This is correct.

Q (Continuing)--TWA was still giving active consideration to the possibility of the Caravelle program, is that

be expedited, and I attempted to achieve this also in some of the conversations with Mr. Hughes and in talking to the Hughes office, because my talks with Hughes were of an intermittent nature.

I was cleared finally to go to San Diego, and asked to go there, which I did, but I was asked to please stand by until I heard further from Mr. Hughes, and not to talk to Convair.

During this period there were some conversations with Convair through Bew's office.

I did not personally meet with Convair, although I did meet some of the Convair people socially during the time I was there. I was there a number of weeks. At no time was I cleared to talk to Convair.

In the meantime, our overhaul base personnel plus some of my own working from Kansas City kept pushing Convair for the hydraulic system corrections, and Convair did come through with a crash program to make these improvements, and they were installed in the airplanes, including the airplane that we had in pilot training. This was a plan that followed these considerations. I am not saying that it all was completed while I was there, but it was jelled and became a plan then.

DX43

lation to this memorandum.

Q Why don't you give us your recollection, then, of the kind of discussions or assumptions you were asked to make by Mr. Tillinghast or others during that period, namely, in the summer of 1961, and describe and identify the various studies that you did in fact make, and the various assumptions that you made in connection with those studies?

A One study during that general period, and I do not recall if it was July, but it probably would have been around that period of time, was a--finally a very brief report, I think called the Tri-Fleet Program, or some such title as that, or Tri-Plane Fleet Program, and I think it showed the estimated cash or capital requirements for the acquisition of a certain number of 990s, 880-Ms, and I believe in addition 20 Caravelles, as I recall it now.

I don't recall the particularity of it, but I think such a study was made, and I think in that instance, as I recall it now, the assumption as to numbers of airplanes came from Mr. Tillinghast.

Q What was the conclusion of that study, before you leave it?

A I am not sure the study itself presented a conclusion. I would have to look at it.

As I recall it, it presented the capital require-

ments, it may have presented estimates of revenue generation, but I am not certain.

Q Can you tell us generally whether or not the result of that study was that it was desirable to have a tri-plane type fleet or that it was undesirable or that it was economical or uneconomical?

A Well, as I recall it, it was a piece of our overall equipment considerations at the time, and as such was related to studies of other fleets of equipment, and as I recall it, the relative value of that particular possibility measured against some of the others that were looked at was such that the others appeared to be better for TWA. But I don't recall that conclusion being in this study which was a plan which was being considered amongst other plans, you see.

Q I am not trying to get you to limit your recollection to a particular piece of paper or a particular plan. I am trying to get you to give us a birds-eye-view, if you please, of what you were considering, and, generally speaking, your conclusions, and those of management, your recommendations, the extent to which you were in accord or disaccord with what was taking place.

Before you start giving me that, let me clarify the record in one respect. You referred to a tri-plane type

fleet.

A I wasn't certain that was the exact title, Mr. Davis.

Q I am not talking about the title. I am talking about what you were describing.

Will you identify the three types of planes in the fleet that you were talking about so I understand what you mean by type? Boeing was one?

A No. As I indicated, as I recall it now, it was the 990s, the 880-Ms, and I think 20 Caravelles. I don't recall the numbers of the 880-Ms or 990s, but this is my recollection.

Q You considered the 990 type of aircraft so different from the 880-M?

The 880-M, by the way, is just an 880 with some modifications to it? What is the difference between the 880-M and the 880?

A There were several 880s. There was a group of 880-Ms initially manufactured to Capitol Airlines specifications, as I recall. Additionally, at one point we received a proposal from Convair for the manufacture of new 880-Ms, built substantially in compliance with the TWA 880 specifications, or Hughes Tool 880 specifications, if you like.

The salient or, I would say, significant differences that I recall between the 880-M and the 880 as types, setting aside for the moment detail differences that would come out of a direct comparison of specifications, but looking at only those items that are the same, the 880-Ms had leading edge devices on the wing which were slots and slats to improve the airflow during takeoff primarily and to some extent the smooth airflow during some of the approach conditions. As I recall it now, Convair had an airflow problem at one point, and they thought this might help it.

The 880-M I believe was offered with more fuel capacity and a somewhat higher rated engine in terms of power output, but I don't recall that difference being other than a transient one. That is, the 880 would finally catch up with it through engine modifications.

Essentially, but broadly speaking, the 880-M was closer as a type by far to the 880 than the 990 was.

Q Were those differences that you have described sufficient to require a classification of that aircraft as a different type of aircraft for fleet operations? In other words, from the point of view of TWA, and the problems of operating an air fleet, are those differences which you have described such that you would categorize an 880-M as a different type of aircraft than an 880?

MR. WILLIAMS: He didn't do so.

MR. DAVIS: Please. Yes, he has, in effect, because earlier I asked him to identify the three types of aircraft in the fleet, and he said 'What we were talking about was the 990, the 880-M and the Caravelle,' and I am asking him now to explain what the difference is between the 880-M and the 880, which they already had in their fleet.

MR. WILLIAMS: All right.

MR. DAVIS: You will have an opportunity to cross examine him.

MR. WILLIAMS: I only want the question to be clear. I have to understand it too.

Q Will you try to answer my question, Mr. Rummel, so that I can understand the nature of the problem of an air-carrier when procuring additional aircraft and intergrating additional aircraft into an existing fleet?

A When we considered the 880-Ms that had been procured for Capitol we had to recognize the differences in configuration between that airplane and the 880s that we were receiving, and by configuration I mean in this case the differences in systems, in cockpits, the items that I discussed heretofore. We tried to estimate the cost of standardizing those things which it made sense to standardize economically.

As I recall it, we looked at the estimate of the added cost of training pilots on the basis that we would not standardize the airplanes to see how that would come out. We looked at the costs of standardization and the cost of pilot training if the airplanes were standardized, and we compared the two. We took the added training costs over whatever it was, probably a five year period, and so on.

In other words, we tried to determine by analysis and estimating techniques the cost of adding this additional group of airplanes.

Now, I use the word "type" loosely, I guess, Mr. Davis. I think an 880-M is a different type because this designated a different type, and in this case it in fact was quite different from the 880s that we had.

The figure that comes to mind, and I can't be certain of this, was that the total estimated cost for mods, and it was a loose estimate in some respects, I think was a little less than $200,000 an airplane, but I am not completely sure of that. But this would indicate to some extent the differences, but in arriving at that we didn't totally standardize. We tried to standardize things which had economic or cost significance, or safety implications, so to speak.

Since the 880-Ms were different from what we had, and since they were being considered as to advisability of

THE WITNESS: Well, I think it was during 1954, the first meeting could have been in late 1963, I am not certain now--

MR. WILLIAMS: '53.

THE WITNESS: (Continuing)--1953, but in any event, through 1954 a series of highly secretive meetings were held from time to time with Convair people in order to determine what kind of an airplan could be developed or let's say if one could be developed that would be economical if used on TWA's routes and what it could be.

Now, this consisted of meetings sometimes participated in by Mr. Hughes and sometimes with me. As I recall it, Mr. Rourke attended one such meeting in the Beverly Hills Hotel, but I could be confused on that point.

I mentioned these earlier in the testimony. I mention them now to try to put them in perspective. That was the beginning, in a way, of talking to Convair about jets, at least in the period that would more or less directly lead up to the 880.

It was by no means the first time we talked to Convair about jets. I also mentioned earlier, to try to put this in perspective now, I will mention

it again, that we had looked at the commercial version of the YV-60 at Mr. Hughes' direct request. I say "we." I should have said I did, and then reported to Mr. Hughes my findings on it.

Q At that time what was the status of your dealings, if any, with Boeing? I am referring now to the time of these secret meetings with the Convair people in 1954 or late 1953.

MR. WILLIAMS: Excuse me. I object. I don't think that we should have questions interrupting his answer.

MR. DAVIS: It is for clarification, that is all.

MR. WILLIAMS: All right, if it is limited to that, Mr. Davis, I don't mind. But I would prefer to have a consecutive statement in his answer of what you called for.

THE SPECIAL MASTER: Let's have a consecutive answer to the question, unless there is some problem of clarification.

MR. WILLIAMS: Yes.

A (Continuing) Also I might say before this time we had considered whether or not the flying needle would offer any reasonable possibilities for use in mail or express

service, and whether or not a commercial varient of it would be practical. This was an exercise with Mr. Franklin, as I recall it.

I recall additionally, still to try to get all this in perspective, we had looked at turboprop versions of the twin-engine Convair, but I think that--I am not certain, but I believe most of these proposals came later.

In any event, they would not have been in direct competition with the big jets. But they were a jet type. That is why I mention it.

I don't know how many different airplanes and designs we looked at during this period. There were numbers of sizes and types. I tried to influence the development of these designs to the maximum extent I could to make them as practical as possible.

In this particular period of time there was grave doubt that the state of the art had advanced sufficiently to develop a practical and economical jet transport. In a way, this was an effort to try to push the state some, and to explore with Convair what might be done.

I recall that I was trying to determine whether or not one airplane type could be built to satisfactorily serve both international and domestic operations. If this

was feasible technically and economically, I felt there would be economy in this course of action, and I felt it would be better for the manufacturer because his market would be broadened and he would probably be more apt to proceed.

During the latter part of this period of time I became aware of, I believe initially through Convair, of the development of advanced engines which were rather quickly recognized as a potential difference between succe... and failure economically of jets.

When this occurred it became clear that rather than talk about turboprops and jets we had a chance of developing pure jets that would be suitable for international service, whereas up to this time there was doubts as to the range of the jets with jet engines now rather than turboprops.

Convair then proceeded to lay out various designs with myself participating.

On occasion, I would discuss design ramifications or possibilities with some of my associates in TWA, but generally it was a very closely held development. Sometimes it was discussed without specific reference to Convair or what it was doing. Sometimes I requested studies which I thought would produce information and might be of

the Lockheed negotiation going, and to undertake negotiation with Convair for the model 18.

I might say, the model 18 was not the model 880. It was a larger predecessor generally similar to what Boeing finally built, but at that time believed to be somewhat better than either Boeing or Douglas' offering, and to explain that I perhaps should say that my recollection is that at that time Boeing and Douglas were both offering domestic jets, and had not taken the step to international jets, where we were seeking, Hughes and I, to get an airplane that could serve both areas. I think I viewed all these efforts as representing TWA's best interest, and I certainly wasn't aware of any conflicts of interest.

The model 18 development spanned quite a period of time, during which specifications and contracts were developed. I reported to Hughes from time to time. I was cautioned not to discuss this with TWA management on numbers of occasions.

Mr. Hughes, however, knew and understood that I was bringing in TWA experts from time to time to aid and assist in specific areas.

Now, I am not saying that each and every person was cleared. I think he had that confidence in me.

He simply knew that I was doing this because I would ask if this would be quite all right, and he said on a limited basis, certainly, but keep the group small, as I recall it.

Hughes had numbers of discussions with Convair or let me say Convair reported he had had such discussions and while I can't be specific, I am quite sure that Mr. Hughes mentioned it a time or two.

The model 18 was tailored as much as I could make it to satisfy TWA's route needs and its requirements. We tried to make an economical airplane, and one that was advanced over what we understood Boeing and Douglas were offering, but in this period we were not doing any work with Douglas. This is one of the periods I mentioned earlier, where we weren't working with them.

The numbers of airplanes I am a little vague on. I remember some of the early drafts had as many as 30, but I don't recall the numbers ever having been really set with Convair. We were talking about getting the program under way, and I don't remember coming to any final numbers on the model 18, but this could have happened.

I think it was in--a little after mid 1955 that Convair came to the conclusion that there wasn't sufficient

difference between the model 18 and the airplane that Boeing and Douglas then proposed to justify the risk. During the period that preceded this, as I recall it, both Douglas and Boeing had announced international versions, and had also changed their fuselage around, as I remember, both enlarged the fuselage, and when they got through with these things, their improved airplanes, while different, were not spectacularly different from the one I had been working and Mr. Hughes had been working with Convair on.

Now, as far as I knew, during this particular period while there were some review meetings prior to the detail negotiation with Convair concerning the configuration of design, I don't recall meeting with Hughes particularly during that period we were working directly on the project. I think he was relying primarily on me to have the airplane configured to reflect TWA's requirements.

There were a number, however, of technical discussions between myself and Hughes on a good many features. Hughes was most keenly interested in almost myriads of technical aspects, and to the extent that I could, why, these would be discussed.

I was advised later that there were meetings during this period between Convair and Hughes that I

We also looked at additional four-engine airplanes which were arranged a little differently than the model 18. One of the bigger airplanes was an attractive appearing double-deck airplane, and laying it out, for example, we had gone through some structural analysis, an effort to determine whether it was more efficient to build a double-deck airplane or a large single diameter airplane, and we came to the conclusion, which Convair concurred in, that the double-deck was better.

Some of these ships I laid out to illustrate what I had in mind, and in order to interest Convair in exploring these possibilities further, because their frame of mind at the time was, as I recall it, was generally that they did not want to build large jets, but seemed to be bending toward building smaller jets.

Mr. Hughes showed fairly keen interest over the phone, as I recall it, in the double-deck airplane. I at the moment do not recall Mr. Hughes seeing the actual layout, but there could have been a meeting along this line.

This got to the point where Convair did become interested, and the project, as far as I was able to determine, had the support of the San Diego management, at least it had that support to the extent that it presented the plan for building this airplane to the General

Dynamics board, or at least it was so reported to me.

The board, as I indicated earlier, turned it down. The only explanation that I recall is that it was simply too much to undertake, and also that to undertake a big jet at that time, with Boeing and Douglas moving forward, and having already captured orders, did not make too much sense, because while all this was going on at San Diego, the delivery positions toward the end of this operation were in fact being snapped up by our competition at Boeing and Douglas.

Now, it was during part of this that we--I say "we"; it was a discussion with Hughes now that I am referring to--gave consideration to the need for TWA having jet aircraft, at least contemporaneously with our competition, and preferably before. We had not been unmindful of the time it would take to develop airplanes, but the emphasis was on developing these newer airplanes, and it became very clear that serious consideration should be given to procuring Boeings or Douglases.

Now, Boeing had a distinct advantage, in my view, in two areas. One was the background of experience in building big jets, and the other was that they had a significant lead over Douglas in initial production.

Negotiations were undertaken with respect to

DX 43

proposal by Convair. He asked that I review it. He described it briefly. He advised that Convair would be getting in touch with me.

The thing that sticks in my mind here that recalls this is that I had another commitment which prevented my seeing the Convair people right at that time, but it turned out that I saw them anyway, but under conditions somewhat different than had been planned. They chased me from Kansas City to Seattle, and we met at Seattle, and I believe this is the first time that the 880 was reviewed by myself or Rourke.

It was considerably smaller than the airplanes we had been working on. This was in the winter, I think, between 1955 and 1956, but I don't recall what month. I think fairly late in 1955.

We, as I recall it, were not particularly favorably impressed with the 880, and tended to favor, from TWA's point of view, placing a larger Boeing order. However, we continued to work with Convair.

Now, during this ensuing period, which I am not certain of the time precisely, but I think in early 1956, or maybe late 1955, Mr. West was requested to do some preliminary contract work at Convair with respect to the 880, and it's my impression that he worked quite closely with Mr.

Hughes during this period of time. He was out there quite a while. I also had a few discussions with Mr. Hughes on the 880, and Mr. West would occasionally discuss some phases of the contract.

I remember discussions as to the nature of the specifications which should be attached. At this point Mr. Hughes did not want my or TWA's active participation as he had had it before on the model 18 in the model 880.

In the meantime, we were proceeding with Boeing negotiations. I recall one meeting in San Francisco where Mr. West came up from San Diego to meet with me. I was attending a NASA--I think it was then NACA--committee meeting.

I reviewed the papers with Mr. West, and saw the need for contacting Mr. Hughes with respect to the specifications, and the way Convair apparently wanted to handle that part of the deal, and I placed a call and got him immediately in that case, discussed my views and the strategy I had in mind.

I had already discussed it with Mr. West, and he had agreed this would be a good thing if Mr. Hughes would agree, and he did agree, and as I recall it, that basic strategy was followed pretty much throughout the 880 deal on our part.

AVRO, and the project Greenland were still active.

Now, the project Greenland may have become active after this. This was the project that I had referred to earlier, perhaps not by the code word, but as, to identify it, as the one that involved the filing in Washington with respect to--that is, before the CAB, as I recall it--with respect to Hughes obtaining permission to build airplanes for TWA.

What I am trying to pin down, though, in mind, and I guess I am doing a poor job here, is whether at the time the order for the eighteen airplanes was signed we might have abandoned the AVRO, but I don't think so. The reason I don't think so is that the order for the 300 engines bore a relationship to either the AVRO or an AVRO-like project.

As I recall it, the order for the engines was placed before we went firm on the 880. At the moment I can't recall whether it was after we placed the order for the--well, no, I guess--well, I am not certain of my recollection, but it probably was after the order was placed for the 331s, but it might not have been.

I realize I may be being a bit confusing. I am trying to recall out loud probably what I ought to think through before I speak. Let me give you a reference that

would pin this down more, and that is this, that the thing that initially brought about the placing of the order for engines with Pratt & Whitney was the fact that Pratt & Whitney had announced a price rise--as I recall it, it was 5 per cent--in engine price to the industry. This had been announced a number of months before it was effective.

The down payment required to be made for Pratt to accept the order was also, as I recall it, 5 per cent, or thereabouts.

Since engines were generally in short supply, at least during the initial period, or it was thought they would be, because everybody, Douglas, Lockheed--excuse me--Douglas and Boeing, was clammoring for engines, and engine availability, as I recall it, was pacing the availability of the airplanes, since they were in short supply, it occurred to me that it would be a good move to order our spares and save the 5 per cent, because if we didn't order we would lose 5 per cent, but the worst that could happen, if we ordered and then something occurred so we didn't fulfill the obligation, would be to lose the 5 per cent down payment.

On the other hand, they were in short supply, and it seemed to me that it wasn't a bad investment.

The date would help bring this in focus. This is

a date which I am sure could be found somewhere, the price rise, the effective date of the price rise.

Now, I went to Hughes and saw him personally at this time. As I recall it, I had mentioned this engine problem, the proposition, on the phone earlier. I had occasion to see him--I think it was in the Beverly Hills Hotel--along with a chap from AVRO, and I took the opportunity to point out that we had a deadline on the engines, that if we were going to move, and he wanted to save this 5 per cent, and I thought he should, that we--he should be moving, and he at that point authorized me to negotiate with Bill Gwinn.

As I recall it, the instructions weren't specifically limited to talking to Bill, but dealing with the top people at Pratt & Whitney. But the idea was to obtain assurances of delivery positions, as I recall it, without actually ordering, and to obtain premium delivery positions.

Now, at this same time we were--well, this would help fix the date--as I recall it, we were still jockeying for delivery positions to some extent with Boeing, and certainly it was a factor in the AVRO consideration, so that we--in any event, let me say, Hughes wanted the earliest possible positions that he could get.

I undertook a telephone negotiation with Gwinn,

asking that, in effect, that positions be preserved, but that we put off the day of formal commitment.

(Continued on page 964)

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In the end, and it was some time later, a substantial order for spare engines was placed for the JT4, far in excess of the 60 that represented our estimate for the number that would be required to go with a fleet of eighteen, and for I believe 40, if I recall correctly, JT3s.

I might say the reasonableness of these numbers against the size of the fleet went like this, that if TWA obtained all of the airplanes, then it would need these engines. If another airline with somewhat comparable routes obtained the airplanes--I am not suggesting that this was a specific plan; I am just saying this was the reasonableness of it--that in that event, then it would probably require the same number of engines.

Now, if the fleet somehow became split between airlines, and were operated as two groups, or three or four, then reasonably the number of spare engines that would be required, I must say all things are not equal, but as a reasonable thing the total number of spares in that event that would be required would be greater than that which would be required for one airline and one fleet. But in any event the orders were finally placed.

Perhaps while I am on engines I ought to wind up this particular phase and then get back more directly to

what I think you asked.

As I recall it, we wound up with an exchange of wires with Pratt & Whitney that was based on--well, I think it was around 150 engines. I don't recall the precise number.

Mr. Cook was involved quite directly in this exchange of wires, I was, Mr. West was, and in the end, Mr. Gay was, as I recall it.

I had been unable to obtain the delivery positions that Mr. Hughes desired. I must say that the delivery positions that we asked of Pratt was based on an assumption of need that went like this:

First we had TWA's need for engines, which was related to the delivery schedule for the airplanes, all on the assumption that the airplanes were coming to TWA.

Then, additionally, I assumed, as had been discussed with Hughes, that assuming a minimum lead time requirement for the development of a new airplane such as the AVRO, in other words, assume that everything went their way with respect to moving forward with the project, completing it in the quickest time, and so on, what would the earliest need dates be for additional engines to do two things, be installed in the airplanes, and secondly, to provide spares for an assumed airline operation.

This was done, and this was the thing which I used as a basis for negotiating the specific requirements with Pratt, and I think at the time I had been instructed to not discuss the derivation of these need dates with anyone, and as I recall it, I did not discuss it with anyone, including Ray Cook and the others.

I remember when we got to the--an impasse, that is, when we did not succeed, when I did not succeed, in prevailing upon Pratt to produce the delivery positions that Hughes wanted, as I recall it, Ray Cook was in touch with Hughes, and at least I was advised the following day that the Hughes solution to the delivery problem was to double the order, and at that point the order was increased from 150,nominally--as I say, I don't remember the exact number--to about 300 engines, and wires went forward either that evening or thereabouts placing the order.

As I recall it, at that point Mr. West and I were at my home in Kansas City. I have the impression now that Ray Cook was in Houston and Bill Gay was in Los Angeles.

I was not talking directly to Hughes on this at that particular time, but there were many phone conversations back and forth that evening. I think we wound up around 1 or 2 o'clock with the papers finally being kicked out of Houston.

I should say I believe wires were sent out of Houston along with some money which made it a firm deal.

I am sure the people in TWA knew about the fact that we were negotiating for eighteen rather than some other number of 331s. I do not recall either being asked to clear that internally by Hughes or being a party to any such clearance, so I would have to assume at this point that it didn't happen.

Numbers of our equipment programs, though it was not unusual to obtain last minute expressions from TWA, I don't recall it in this case. I do not recall handling the papers in the end, that is, handling them on to Hughes Tool for signature or being asked to, although I did have numbers of discussions with Hughes during the development of the contract and the specifications or various points that he would inquire into or that I would bring up thinking he had an interest in it.

The papers were in fact signed by Hughes Tool. I think they probably went to Houston and the signatures were placed on them there, but I am not totally clear on exactly what happened at that point.

I mentioned earlier that TWA had handled provisioning for the Lockheed 1649As in the name of the Hughes Tool Company by its authority up until the time

that the contract for those airplanes was assigned to TWA, at which time TWA continued, except then it did it for itself.

The provisioning on the Boeings was handled in a similar way. There was an exchange of letters between Hughes Tool and TWA that set TWA up within certain monetary limits to provision the 131 fleet and the 331 fleet.

I might say that it was perfectly obvious then, as it is now, that a fleet of airplanes without provisioning is a pretty useless thing. Spare parts are needed to make the fleet productive, and normally provisioning goes hand in hand with airplane delivery, and to some extent actually precedes it, and the same rationale that I mentioned on spare engines applied to provisioning.

I estimated along with the collaboration of Mr. Shaunty, Mr. Reynard, the amount of money that could reasonably be required to provision the airplanes on the basis that these ships would be used by TWA.

I remember one meeting included Ray Dunn, at which time we thrashed over what appeared to be fairly high estimates in an effort to reduce the amount of provisioning money.

At this particular time the jets were new, they

have been told numbers of times that Hughes was interested in the DC-4E development. Here again, it was before my time with the company.

This development was a little unfortunate, because each airline apparently, as the story goes, wanted everything in the airplane, including a kitchen sink, and it became apparent that the airplane would not be finally the airplane that was envisioned when it was ordered.

As I understand it, Mr. Hughes followed this progress quite closely. I don't know whether it was through Frye, or directly or what. I might say the principal source I had for the story was through Mr. Ellinger who was close to things of this type that was going on in TWA.

Mr. Hughes set out to have a better airplane developed quicker. This finally resulted in the development of the Boeing Stratoliner, which turned out to be the first pressurized airplane in domestic--I think in service anywhere--that is, in commercial service anywhere. There had been pressurized ships before.

This was produced a considerable period before the DC-4, as distinguished now from the DC-4E, or the C-54 series finally emerged.

The DC-4E was cancelled, and when Hughes, or Hughes in combination with TWA worked a deal with Boeing,

then our participation in the Douglas deal for the DC-4E was dropped. It wasn't long after that, as the story goes, that the DC-4E folded as a project, but as I recall it, a prototype was developed and did fly, but it was not placed in production. It just didn't turn out as people thought it should.

Later on the DC-4 was developed, as far as I know, by Douglas, for the military. I should have said the C-54--which was what we had in the International or Intercontinental Division under contract with the government. As I recall it we received the first lot of those from the Douglas factory.

I might say the old Boeing Stratoliner, five of which were procured for TWA, and delivered after appreciable developmental delay, did wind up initially in the Intercontinental Division operation, and were later supplanted by the DC-4s.

Q Earlier in your testimony you said that "We looked some years ago at a Boeing Stratocruiser 307." Can you identify what you were referring to?

A The ship I was just referring to was called the Boeing Stratoliner. The number, as I recall, was the model 307. The Stratocruiser was entirely different--a later airplane that Boeing developed. So my earlier

testimony, if I said it was the 307 I was probably wrong, but now I can't think of the model number.

Q We will pick it up in sequence. Can you describe what information you have with respect to the acquisition or interest of TWA in the Boeing Stratoliner 307--the way it occurred, and what part, if any, Mr. Hughes or the Hughes Tool Company had in that regard?

A Here again this is long before I was with the company, Mr. Davis, and I can only relate hearsay and that sort of thing.

Q I would like to have your understanding of what took place.

A One of the activities, as I recall it, that occurred prior to the Stratoliner development, but which was finally related to it or influenced it, was the very high--what was then very high altitude flights by Tommy Tomilson in a Northrup Gamma, and I recall being advised by Tommy and others that Hughes had an extremely keen interest in the results of these high altitude flights.

I must say that I had the impression that he was instrumental, that is, he was having the flights undertaken. I can't state that as the fact. This is the story as I recall it.

In these flights TWA definitely showed leadership,

with respect to supercharger developments, which made the flights possible, and in high altitude navigation. I think it was with this background that Hughes and TWA went to Boeing.

I should say too that the 307 Stratoliners had, I believe, essentially the same wing configuration, and the same power plant arrangement, but not the mechanical configuration as the early B-17s, and that the big pressurized fuselage, and the airplanes developed for Hughes and TWA were an adaptation of B-17 techniques, were re-applied in an advanced way with pressurization and other things that the 307 had.

(Continued on page 1145)

I don't know whether this was initiated by Boeing or Hughes, but I understand the switch was made from Douglas to it.

After TWA received the five, they were placed in commercial service, and the five were later signed over to the military as were many of the DC-3s. That may have been what happened to some of the DC-3s. I am not sure now--at the start of hostilities.

After the war those five airplanes were taken back, completely renovated. Some new design features were put in, and then they were flown for a number of years in TWA commercial domestic service.

They finally retired them because of economic obsolescence.

Q That brings us to the period in which you were active.

A No, sir, I didn't quite make that clear. I was with the company at the time that the Stratoliners came back and were then operated.

Q Then, as I recall, you earlier referred to the development of the Lockheed aircraft--the fleet acquisition by TWA. I would like you to describe now what you know about that development, and what took place at TWA, and the part, if any, played by the Hughes Tool Company or

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A The next program finally resulted in the purchase of a fleet of 749As as I recall it. The 749A was competitiv with the DC-6B. At least, both were competing for Hughes' and TWA's business.

The discussions surrounding this acquisition involv Hughes personally, but also a great many people in TWA; Mr. Damon was involved, Mr. Leslie, Mr. Cocke, Mr. Collings, myself, and others.

There were numbers of conversations by phone with Mr. Hughes wherein performance figures were discussed on the airplanes, the direct operating costs were discussed, and so on, and I believe that it was during this negotiatio that the meeting at Douglas occurred that I referred to earlier.

As I recall it, at one point we ran a study showing the effect of--the economic effect of staying with a basic type that we already had, the Constellation, as compared to going to a new fleet.

Mr. Leslie participated in this, along with one or two of his people, along with Mr. Rourke and myself.

This information was done--this study was made at specific request of Mr. Hughes, as I recall it, and the results given to him as well as to Mr. Collings and M

I must say that I could be confusing this particular sequence with the 1049G negotiation, but I think it occurred at this time. I am not positive.

As I recall it, I favored the DC-6B, I believe that Mr. Collings favored the DC-6B, as I recall it, Mr. Hughes favored the DC-6B, although I must say that it wasn't always easy to know what Mr. Hughes favored and he didn't favor.

I couldn't always tell whether he was negotiating with me or what his position really was. Not that he had any purpose in negotiating with me, but sometimes he would seek out additional facts and take a position maybe to do this. I just didn't know. But I had that impression.

Mr. Damon was opposed to the DC-6B, or I had the impression he was opposed to dealing with Douglas at this time.

The result, as I recall it, of this state of affairs was that some additional studies were made, additional time went by, and finally Hughes agreed to go the Lockheed rather than Douglas.

Now, I might say that during this time things were somewhat in a state of limbo, so to speak. Negotiations continued with both parties, and both airplanes seemed to

am certain that this must have been done. And to Mr. Damon.

Whether there were any meetings after that or not, I don't recall.

Q I was referring to meetings at which representatives of competing manufacturers were invited to present these points favoring their respective products.

A Well, the time that I referred to when Lockheed and Douglas representatives came to Kansas City to come to agreement on performance claims, this was done I believe at the suggestion or request from Mr. Hughes.

It seemed to me to be a fairly delicate situation, as I recall it, and if I recall correctly, I approached the manufacturers myself suggesting that this be done, and that they have people available to do it. So I think it is safe to say that insofar as the contacts with manufacturers were concerned, that was arranged through me.

Now, whether Hughes had talked to them on that same point or not, I couldn't say at this time.

Q Who would attend on behalf of TWA, or who would attend--

A This particular meeting I am talking about, Mr. Davis, was purely a technical meeting to try to iron out who was right with respect to estimated performance, TWA, Lockheed or Douglas.

that. I had that impression too.

MR. DAVIS: Maybe I am wrong then.

THE SPECIAL MASTER: Mr. Rummel, if you will, clarify the difference between a turbojet and a turboprop, as we have been using the terms.

THE WITNESS: Mr. Zeller is correct, Mr. Special Master. A turbo-propeller, or turboprop, as it is called, is a turbine engine that drives a propeller. A turbojet is a turbo engine that has no propeller.

BY MR. DAVIS:

Q In 7, when you refer to a high speed turbine powered aircraft, you were referring to a pure jet?

A Well, not necessarily.

Q I didn't think so.

A Not necessarily. Item 6 and 7 are two different items.

Q In my question I was combining them to get you to, first of all, identify what happened--did the industry do something or did it not, was TWA a leader--and again I am trying to refresh your recollection as to what took place subsequent to or at or about 1951 rather than prior to 1951.

THE SPECIAL MASTER: The objection was made that the time should be fixed, and I take it the question

10, 1949. On April 18, 1950 that airplane was the first jet to fly mail in U. S. history. It flew between Toronto and New York.

I am merely now placing the time of the development of that particular vehicle.

The Comet first flew July 27, 1949, and the first Comet was delivered to BOAC on December 1, 1951. The first Comet IV was redelivered to BOAC on September 30, 1958. This was after major mods that were put in in the course of construction of that airplane which followed the grounding.

As I recall it, it was the Comet IV that Hughes was particularly interested in, that I testified to, which involved the Chicago meeting. The Comet IV first flew April 27, 1958.

The Electra development was undertaken in earnest by Lockheed, and by that I mean it became a full-fledged project, during the summer of 1955. The first delivery of the Electra was to Eastern Airlines on October 20, 1958.

The Britannia prototype first flew during August of 1952. The first production airplane first flew September of 1954 out of the Bristol factory in England.

Now, the Canadian variant of the Britannia was undertaken during April of 1954. The Canadian Britannia

there was some sort of a discussion with George that bore on that, or it wouldn't be in this letter.

Q That is what I am interested in.

A Well, I don't recall that specifically.

Q You don't recall what you were discussing with Mr. Spater at that time which produced this closing sentence?

A Well, it may have been--I am not sure of the timing--it may have been during this period that we were involved in Project Greenland, but I am really not sure about that.

That was the project I mentioned before, to recall it to you, that involved Hughes manufacturing his own airplanes.

But I am not--I can't be sure whether we got into that one at this time or later, but I think that may well have been in this particular period of time.

Q Do you recall discussing with Mr. Spater Project Greenland?

A Oh, yes. But not in relation specifically to this. That's my problem.

Q When we resume after lunch I would like to have you describe to me the nature and scope of your discussions with Mr. Spater with respect to Project Greenland.

A All right.

"DX 43, page 1766A
(Excerpts from Deposition of Robert W. Rummel)"

THE SPECIAL MASTER: We will recess until 2:00 o'clock.

(Whereupon, at 1:45 p.m., a luncheon recess was taken)

"DX 43, page 1767
(Excerpts from Deposition of Robert W. Rummel)"

AFTERNOON SESSION

2:00 p.m.

ROBERT WILAND RUMMEL, resumed the stand and testified further as follows:

EXAMINTION (cont'd) BY MR. DAVIS:

Q Mr. Rummel, do you have any better recollection now of the conversation that you had with Mr. Spater at or about the time of this letter marked as Defendants' Exhibit 174?

A I don't remember the conversation, Mr. Davis, but on mulling it over during the lunch hour, I am quite sure that it could not have been on Project Greenland, because trying to slot these things out in time, I am quite certain that Project Greenland occurred while we were still negotiating the Convair 880, which would have put it back some time in 1956, rather than at this time, so I think it is safe to say that it wasn't on that. I wasn't certain before lunch as to the timing.

Q Do you recall discussing the Project Greenland with Mr. Spater at some other time?

A Yes.

Q Let me have your recollection with respect to those discussions.

A All right.

Q Identifying the time, those present, if you recall,

how the subject came up, what the purpose of it was, related pertinent portions of the actual discussion which took place.

A All right. As I say, I don't think it had any relationship to this. I think this appeared very much later on. There was a meeting in Mr. Spater's office here in New York on Project Greenland attended by Raymond Cook, myself and Ray Hopper.

As I recall the discussion, it was primarily related to determining what reasonable substance an application could have to further Hughes' interest or apparent interest, at least, in manufacturing airplanes. This related to the development of an application that was later filed before the CAB along this same line.

I don't recall the exact length of the meeting, but it was several hours at least.

Q Do you recall approximately when that was?

A Well, not precisely, but it was, I am quite sure, during either spring or summer of 1956. It may have been the spring.

Q Can you recall or can identify the airplane which was being considered?

A No. One of the problems was that we couldn't identify the airplane.

Q Do you know what happened to Project Greenland, how long it was under consideration?

A Let me say the application was filed.

Q With the CAB?

A Yes.

Q Then what happened to it?

A Well, I don't recall precisely. I think the CAB set a hearing date. If I recall it correctly, the hearing date was put off at least once, and I do not know if the application was withdrawn or what happened, but I am quite sure it was never acted upon by the CAB.

Q Had you had some conversations with Mr. Hughes relating to the nature or scope of this project?

A There had been--there was at least one discussion, and possibly more, that dealt primarily with generalities. As I recall it, he did not want to definitize the airplane or limit it to a specific airplane project. He wanted it made clear that he intended to have the right to produce airplanes which were markedly superior to those that were then being offered, and a few generalities of that type.

I don't remember all the specifics. There was a meeting with some general whose name escapes me at the moment out in--well, in the Beverly Hills area.

One evening Ray Hopper and I and the general chatted about this project. I believe the general was Hughes' Washington representative, but I am not sure now. I should know the name, but I don't recall it.

Q Have you now given us everything that you can recall with respect, first, to the meeting in Mr. Spater's office attended by Mr. Cook and Mr. Hopper and yourself? Have you now fully described all that you recall with respect to that meeting or discussion?

A No, I don't think so.

Q Would you please do so then?

A I would be glad to. Ray Hopper, as I recall it, ventured the opinion that Hughes was primarily interested in building cargo airplanes, that he saw a tremendous market for cargo airplanes.

It developed, though, that Ray had not discussed this with Mr. Hughes, and as I recall it, at the time had not even been in touch with him for quite a long time. We had difficulty in handling the question of how to obtain CAB clearance on what appeared to be the desire, that is, broad authority, to manufacture airplanes for TWA, and I don't think it was limited to TWA, without being specific, other than talking about superior or better types.

As I recall it, the question addressed to Spater was one of obtaining his professional opinion with respect to handling matters at the CAB. I think, as I recall it, Mr. Cook was attempting to have the papers constructed in a way that reflected Mr. Hughes' desires, and I was attempting to handle those parts of it that had to do with defining and still not defining what the airplane might be, because I didn't know what it was going to be, as I recall it. But that's about all I recall now.

Q Do you have any further information with respect to the circumstances which developed relative to either a withdrawal of the application or what happened to it?

A Well, I have the impression that it was put off because Hughes was out of town. In other words, I have the impression that the hearing was postponed because specific instructions couldn't be obtained from Hughes.

I am not entirely sure, but this is what I recall Ray Cook telling me. I do not recall any of the circumstances relating to either its withdrawal or whether it ran out on some limitations factor. I just don't know.

I am quite sure, though, that it didn't--there was not a hearing on it.

Q Did the Hughes Tool Company ever take any steps to actually commence or prepare for the commencement of the manufacture of any aircraft that you know of?

A I don't know. The papers that came from the CAB asking for further and more specific data were distributed, I received a set of them, and these were discussed with Ray Cook, and, as I recall it, Ray advised not to go into any detail, simply to be cognizant of the papers, until I heard further. I might say too there was a preliminary meeting in Kansas City, or at least a discussion in Kansas City, prior to the meeting with Spater in New York, at which time Ray and I discussed--

Q At which what?

A At which time Ray and I discussed some of the facets of the proposal, including definition of airplanes.

Q Will you give us also your complete and total recollection of that meeting?

A Well, I am not clear, Mr. Davis, on exactly what happened. I have the impression now that the main topic of discussion was to broaden the language. It may well be that Ray had a draft at that time. I am not certain now, so I can't be specific.

Q Basically, it related to the application to be filed with the CAB, is that correct?

A Yes. It was my understanding Hughes had made the decision to build airplanes, and I think most of us assumed this was to be in Florida, and this application was filed to permit one heavily engaged in air transportation to also build airplanes.

Q Apart from the discussions, whatever took place in connection with the application to the CAB, and the request of the CAB for further information, do you know what, if anything else, was done by the Tool Company in preparation for or implementation of this decision which you have identified by Mr. Hughes to build airplanes? Do you know of anything else that the Tool Company did?

A I don't really know. I recall Ray indicating that Mr. Hughes had options on a great deal of land in Florida, and that he assumed that's where the factory would be built. But as to what they in fact did or didn't do, no, I don't know.

Q Apart from the possibility or whatever Mr. Cook told you as to options on land in Florida, is there anything else that you know that the Tool Company did?

A I don't recall anything at the moment, Mr. Davis.

Q Do you know of anybody else at TWA or associated with TWA who knows any more than you do about Project Greenland?

A No. I might say that the term "Greenland," as I recall it, was applied to the project by Ray Cook. This is a code word.

Q I understand that.

A No, as far as I know, this was one of those items that at the time was secret, and as I recall it, Hughes did not want anyone at TWA to know about it.

Now, whether anyone in fact did, let me say if they did, I don't recall having known about it.

Q Will you give me your full and total recollection of all conversations you may have had with Mr. Hughes relating to Project Greenland or related projects? By that I mean any plans, decisions, program, relative to the manufacture of aircraft or related equipment by Hughes Tool Company or Mr. Hughes.

A Well, that was pretty broad.

Q I meant it to be broad.

A I have already mentioned--

Q Without repeating what you have already testified. I want to have whatever else you may know.

MR. ZELLER: You don't want him to go over the testimony he gave about the Caravelles and the AVRO jetliners?

MR. DAVIS: That does not relate to any

manufacturing by Mr. Hughes or the Hughes Tool Company. However, I do not expect the witness to repeat any testimony that he has already given. I want this witness to tell me whether or not he has identified and fully described and given us his full and complete and total recollection of any conversation he had with Mr. Hughes relative to any decision on plans or programs for the manufacture of aircraft or related equipment either by Mr. Hughes or the Tool Company which he has not already given, if any.

A Let me say first--

MR. ZELLER: I don't agree with you about what his prior testimony--

MR. DAVIS: I understand. We will argue in court as to the effect of the testimony we have listened to. Let's get the facts now.

A I don't recall Hughes ever being specific as to what he planned to manufacture if he obtained CAB clearance.in .

Q That is not my question, Mr. Rummel. I want to know whether or not you have now given us your full, total and complete recollection of any conversation that you had with Mr. Hughes on the subject I have described.

A That's all I seem to recall now. I will be glad to offer more if I think of it.

Q Now my question to you is do you know of anyone else at TWA or associated with TWA who you believe has any information on the same subject matter which you have not fully or completely disclosed.

A Well, I just don't know.

Q You don't know of anyone else?

A As far as I know, I have disclosed it all. There were times when Rourke knew of certain phases of some projects.

Q Which projects are you referring to?

A Well, the advanced AVRO jet. I don't recall Russ being involved in the Project Greenland. I think the timing of the AVRO project was about--was somewhat coincident with the timing of this application, but I do not recall that ever being tied in together during Hughes' conversation to me. I would have to say as far as I know others in TWA did not know the Project Greenland, or let me say, if they did, I don't believe they got it from me.

Q It is correct, then, that you don't know of anyone else who has any information whatever with respect to this Project Greenland or any other intentions or efforts of Mr. Hughes or the Tool Company to manufacture aircraft

MR. ZELLER: Your question relates to people in TWA, I take it, as the preceding question did?

MR. DAVIS: That is what it was, people in TWA or associated with TWA.

A No, as far as I know, I have named those I can recall that were involved in the part of it that I was involved in.

Q Other than the people whom you have already identified, do you know of anyone outside of TWA who has, so far as you know, any knowledge or information with respect to the same subject matter?

A You mean other than Mr. Hughes and Mr. Cook and the general I mentioned and Mr. Hopper?

Q That's correct. The general that you have mentioned as a General. You can't identify him any better than that, can you?

MR. ZELLER: He did. I think he identified him as the Washington representative.

THE WITNESS: Well, now, I think he was. This meeting was at his home. He lived out there. I just simply have a lapse of memory at the moment on the man's name.

Q Apart from the people that you have mentioned, do you know of anyone outside of TWA?

A Are you speaking of prior to the filing?

Q No, Mr. Rummel, I am not referring to any filing now. The subject I am referring to is any plan or program or implementation of any plan or program relating to the manufacture of aircraft or related equipment by the Hughes Tool Company or Mr. Hughes.

A Well, yes, certainly. The reason I asked about filing, as I recall it, it was shortly after the filing that the Los Angeles newspapers carried tremendous headlines announcing Hughes' intention to build advanced jet transports in Florida.

Convair was quite shaken when they read this. We either had just signed or were about to sign the preliminary agreement for the 880.

Now, that would have put this in the spring.

Q Anything else?

A At that point there was no secret about it whatsoever. Boeing commented to me on it. I don't remember what they said, but they were not pleased with the prospects of another competitor.

Q Good. Anything else?

A Well, let me say that I don't remember anything specific, but it was a subject of dinner table discussions, I am sure, for some time, and would come up from time to

time. I might be asked was Mr. Hughes serious, because people knew I was working with him.

I don't remember any specific cases, but I know that once it was in the press it wasn't forgotten for a while.

Q What did you tell those people when they inquired as to whether Mr. Hughes was serious? Did you tell them any more than you have told us so far?

A No. I don't think I knew any more, Mr. Davis.

Q You say that Convair appeared to be shaken when this news item appeared relating to Mr. Hughes' intention. Will you describe to me how this came to your attention, who mentioned it to you, what was said, how did they appear to be shaken?

MR. ZELLER: Answer any one of them.

Q I am asking you to describe how Convair manifested to you either their knowledge with respect to Mr. Hughes' plans or their reaction to it. You can answer any one of my prior questions in addition. I want your counsel to be satisfied that you have told us everything you know, Mr. Rummel.

A I will tell you everything I presently recall.

Q I can't ask you to say something you don't recall.

MR. ZELLER: Doubtless you will.

A I am not sure I can be specific, Mr. Davis. The impression I recall now is that Jack Zevely and others indicated surprise, concern, disappointment, over the announcement.

I think they were concerned as to whether Hughes would move forward with the 880 or they wouldn't, or he wouldn't. They were not, as I recall it, a bit backwards about discussing this.

It apparently was a complete surprise to them when they read it in the newspapers.

Q At that time discussions had progressed to some extent relative to price, terms and what not? Can you give me an idea as to how far negotiations had progressed with Convair with respect to a possible 880 program?

A Yes. Well, as I recall it, this was shortly after or shortly before, I think, the letter of intent type of contract was written, and we intentionally left as many things open as we could, as I believe I explained earlier, particularly in specifications, the maximum extent we could on price.

We, as I recall it, negotiated to a much greater extent after that on rebate provisions, and other factors. We had a fairly skimpy skeleton of a form of contract, as I recall it, at the time that this announcement was made.

Q Does that reflect now your total recollection as to what transpired insofar as Convair was concerned relative to this announcement?

A Substantially so. The trouble now is to be specific as to names and incidents that long ago. I am sure it wasn't confined just to Zevely. I am sure others had comments, including probably the technical people.

But I can't say at this point exactly what was said by who when.

Q Now will you give me your total recollection as to the reaction or what was said by Boeing or any of its representatives?

A As I recall it, Boeings reaction was a little different from Convairs. It was more in the nature of being incredulous.

Q Incredulous?

A Yes. I think I got this from talking to George Sandborn, and possibly others.

Q What did they say to you that made you feel that they were incredulous?

A Gee, I am giving you what I recall is my impression now, Mr. Davis. I don't think I can say exactly what they said that led me to believe that, but I recall having that impression, that they were somewhat shocked,

(Excerpts from Deposition of Robert W. Rummel)

they found it difficult to believe, they hoped it wasn't so, and I don't think they thought that he would be building much better airplanes. At least, this is the general impression that I got, that it was an incredulous situation.

MR. ZELLER: Off the record.

(Discussion off the record.)

Q Can you tell me what was the state of negotiations with Boeing at or about the time this news was announced?

A Well, as I recall it, we had--rather, Hughes had purchased or agreed to buy the 131s, but I can't remember whether the 331 deal had been closed or not. It was about that time, as I recall it.

I think Boeing pretty much felt they had it in the bag. That's what I am saying now. I am not sure that is what I might have said then. But I believe they must have at that time.

Q You don't recall their saying something to the effect, my goodness, not another competitor in the manufacture of aircraft?

MR. ZELLER: In words or substance.

A Well, not exactly, no.

Q Now do we have a fairly complete identification of what took place in connection with that subject matter?

A I think so, Mr. Davis. That is all I can seem to

DX 44, page 1
(Letter of Damon, Dec. 6, 1955)

TRANS [illegible] AIRLINES, INC.

December 6, 1955

To the Directors

Gentlemen:

In 1955, TWA was granted the right to serve four new domestic routes involving new east-west service to five major U. S. cities as follows:

1. New York to Cleveland
2. New York to Detroit to Chicago
3. Chicago to Denver to Los Angeles and/or San Francisco
4. New York to Washington to Tulsa to Oklahoma City to Los Angeles and San Francisco

These new routes reflect not only excellent preparation by the TWA staff and excellent presentation by TWA counsel before the Civil Aeronautics Board, but they also reflect the opinion of the Civil Aeronautics Board that with most domestic trunk airlines now out of the subsidy classification, another case of added competition will be good for the domestic trunk airline industry.

This philosophy on the part of the Civil Aeronautics Board has applied not only to TWA but also to many of the other airlines, with the net result that TWA is faced with further substantial competition on routes and in cities where its competition previously has been limited or nonexistent.

For example, American Airlines has been put into direct competition now with TWA between Chicago and San Francisco on a non-stop basis, where the only previous competition was United Airlines. American Airlines has also been put into competition with us between Pittsburgh and New York where previously our only competition was Capital Airlines. American Airlines can now serve Dayton to New York, where we had no competition before, and also Columbus to New York where we had no competition before.

United Airlines will now be direct competition with TWA from Los Angeles to Kansas City, where we have never had any scheduled competition before, and with no obligation to serve any intermediate communities between these points, which obligation we still retain. United Airlines will also be competition between Kansas City and some point east of Chicago, so that they will become competition both east and west in Kansas City.

Continental Airlines will become direct competition with ourselves between Kansas City and Chicago where only Braniff existed as competition before.

It is possible, even probable, under the present philosophy of the Board, that in current cases Eastern Airlines and/or American Airlines will be given non-stop privileges from St. Louis to New York, where we now have no competition. There are other examples in the route cases already adjudicated and also in route cases now pending where, if the present philosophy of the Board continues (and I expect it will for a while), substantial additional competition in the present domestic trunk airline route structure will be established, so that the domestic trunk airline business will be much more competitive in the future than in the past. This will be a good thing for the able competitors and a bad thing for the less able competitors.

In the past seven years, TWA has earned and retained after taxes approximately $50,000,000 and has altered its equity-to-debt ratio from approximately one-sixth to double. But during this same period, TWA has not kept pace with the total growth of the domestic business, nor with the growth of its leading domestic competitors, American Airlines and United Airlines.

BIG-3 TRANSCONTINENTAL AIRLINES (TWA DOMESTIC ONLY)

OPERATING REVENUES

	1948 %	1953 %	1955 %
AAL	37.7	40.6	40.1
UAL	34.9	32.6	35.5
TWA	27.4	26.8	24.4
Total	100.0%	100.0%	100.0%

EX XX H 202

Admittedly our financial and other dilemmas prior to 1949 left us in a weakened position to accept properly all the opportunities in the period of dynamic growth during the past seven years. However, with the philosophy trend toward increased competition, and starting from here, the future should be a source of serious concern to us in order that we do not drift backwards through the field of airlines to a mediocre position among the also-rans.

The problem is further complicated at this time with the advent of substantial orders for very expensive high-performance jet airplanes already on order by our two leading competitors, American Airlines and United Airlines, and others, which will begin to face us competitively perhaps in 1959 and surely by 1960 and 1961. At the present time, jet airplanes have been ordered by American Airlines, United Airlines, National Airlines and Braniff Airways.

In a recent conversation with Captain Rickenbacker, he indicated that Eastern Airlines would be ordering theirs probably this month, which will leave TWA in a position of splendid isolation unless we make a similar move rather promptly.

The same condition applies to the shorter haul somewhat smaller and slower turbo-prop airplanes on which the present outstanding orders are 60 by American Airlines and 40 by Eastern Airlines, with minor quantities on order or in active negotiation by other airlines.

I do not think that the manufacturers' promised delivery dates currently quoted for licensed Boeing 707's to begin delivery in December 1958; or for licensed Douglas DC-8's to begin delivery in the summer of 1959; or for Lockheed Electras to begin delivery in 1958 will be met. After 19 years' experience building airplanes and 18 years' operating airplanes on airlines, I have found that unforeseen conditions of one nature or another generally delay expected deliveries and operations, particularly when such delivery

dates are given years in advance. Nevertheless, I do think that TWA may well face serious competition from the Lockheed Electras in 1959 and from both Boeing 707's and Douglas DC-8's in 1960.

At that time every airplane which TWA now owns or has on order or option will be either totally obsolete or heavily outclassed in speed, comfort, passenger acceptability, and economics on competitive routes. And by 1961, unless we have acquired practically complete replacement of our fleet and acquired for our domestic operation something on the order of 30 long-range jets and 50 Lockheed Electras or equivalent, we shall find that we have drifted backwards in the field from a position of fourth place as today to sixth, seventh or eighth place.

I realize the financial requirements of a fleet of this sort will run into money on the order of $250,000,000, and that our earnings in the intervening period plus our depreciation for the same period on our domestic routes will, in the next six years, probably provide only about 60 per cent of that amount even with reasonable good continuing business conditions. I expect that the other hundred million can be financed in accordance with our present manner by mortgages or other means.

INTERNATIONAL

On our international routes the problem is also important but fortunately not as pressing because other governments do not currently share the enthusiasm of our Civil Aeronautics Board for added competition at this time. But, if we are to maintain our position on the main trans-Atlantic lifeline into the important gateway points of London, Frankfurt, Paris and Rome, we must recognize the fact that by 1960, we will be facing heavy competition from Pan American with fast long-range jets. This challenge has already been

accepted by Scandinavian Airlines and by KLM, both of whom have ordered fast, long-range American-built jets, and by others, including the British who will probably follow.

Whether by 1960 the international airline business will have developed to a point where, for competitive or traffic reasons, we must supply long-range jet equipment beyond the gateway points I have mentioned above, I do not know. But, to provide truly competitive service and keep our place in the sun at the important gateway enumerated will require a minimum of 10 additional long-range jets at a total expenditure which I would estimate to be $60,000,000, of which, barring world-unsettling conditions, I would estimate profits and depreciation in the meantime would provide some $35,000,000 of cash, with the remainder necessary to be financed by debt or otherwise.

In our international routes picture, the acquisition of modern equipment is particularly important because all our international routes are on a temporary basis expiring in 1959 except our routes from stateside points to Paris and Rome. Hearings to extend the temporary routes will probably begin in 1958 and extend through the early part of 1959 by which time the full blast of the jet plane propaganda of our competitors will be sweeping the country and will be an important psychological factor in the decision of the Civil Aeronautics Board as to our "fitness, willingness and ability" as defined in the Civil Aeronautics Act, to compete in international routes. Not only do we have no chance of extending our international routes around the world but we may even be denied further operation of many points we now serve under temporary certificates, including London and Frankfurt, unless our plans are competitive equipmentwise at the time of the hearing and Civil Aeronautics Board decision.

to keep TWA in its present place in the field is slightly over $300,000,000, with approximately $125,000,000 of that amount to be financed in the next five to six years.

OTHER CONSIDERATIONS

The introduction of the jets is not merely a problem of supplying more new expensive airplanes. It is probable that between now and the time of introduction, many of the runways on most of the airports will have to be strengthened to take the gross weights involved. Some of the runways will have to be lengthened, and municipalities have shown an increasing reluctance to vote bond issues or taxes for this purpose. It is even possible that the airlines themselves will be required to do some of the financing, perhaps on a prepaid rent basis.

Perhaps even more important, the public relations of the airlines in the vicinity of airports particularly in big cities where the jet airplanes will first be used, have deteriorated heavily in the past few years both from a noise nuisance factor (which the jets will make substantially worse) and from a potential accident hazard to surrounding communities on the ground.

While I think it is inconceivable that airplanes will be outlawed from any existing airports or that ultimately jet airplanes will not be allowed on some from which they are currently barred (Idlewild as an example), the previous glamour of airports in communities is already somewhat tarnished and currently becoming more so.

There are many other problems in connection with the use of jet airplanes, such as airway traffic patterns, airport holding stacks, high altitude operation and upper air meteorology.

The jet airplanes also, because of their inherently larger size, will

require a longer terminal time for loading and unloading, and the current delayed baggage delivery nuisance on arrival will not be simplified.

In other words, the larger size of equipment necessary for economic success makes for terminal time losses whereby passengers have to check in earlier and take more time claiming their baggage after arrival.

Not all the airports currently served by TWA will accommodate either the long-range jets or the Lockheed Electra type turbo-props. We will therefore probably have to keep a residual number of our current Martin airplanes for service at airports such as Albany, Binghamton, Wilkes-Barre, Williamsport, Allentown-Bethlehem-Easton, Reading, Harrisburg, Wheeling, Toledo, Fort Wayne, South Bend, Terre Haute, Peoria and Santa Fe. This is a large array of minor cities but we are fortunate that in the past few years we have been able to omit service (generally transferred to feeder airlines) at approximately a dozen or more "headachy" points.

One other thought in this connection concerns the relative earning power of airplanes. In the nine months ended September 30th, on an evenly allocated overhead basis, only our domestic and international Constellation exclusively tourist flights had actually shown any net income. And in the nine months those 45 airplanes earned over $20,000,000 net operating income despite the fact that the company itself earned only $10,830,000 net operating income in the same period.

There are many reasons for the loss of revenue after full allocated overhead on the other types of equipment. For example, our 50 Martin airplanes showed a loss of $2,300,000 due to the type of short-haul service which we are required to perform and in which service we place them. Our twice-a-week Ambassador flights to London and Paris respectively lost half a million, and have always been accepted by us as loss leaders. Our DC-4 cargo flights

lost nearly $600,000 based only upon the revenue which they carry and with no charge to ourselves for all the non-revenue company equipment which they haul, etc., etc.

Even our first class Constellations lost money in this period, partly due to the type of intermediate city domestic service in which we place them; and our Super Constellations lost money because they are so heavily outclassed in speed and passenger preference in the competitive services we fly against American and United. In the case of the Super-G's, I think the loss figure will be eliminated as we step up the utilization per plane per day now that the airplanes are shaken down and now that the forward compartment is being used for tourist service on all flights.

Two Important facts remain:

1. Currently only our domestic and international Constellation tourist service makes us money.

2. Any airline which does not have competitive long-range jets (similar to the Boeing 707 or Douglas DC-8) and shorter range modern turbo-props (similar to the Lockheed Electra) by 1960 or 1961 will be practically out of business soon thereafter.

RECOMMENDATION

I recommend that the proper officers of this company be authorized to bring to the Board a specific recommendation for equipment and financing at the January 1956 or earliest possible Directors' Meeting thereafter; or, if the Directors prefer, that we revive the Equipment and Finance Committee of the Directors to accomplish the same purpose.

R. S. Damon

II XX 290

AX-1378

DX 45, page 1
(Letter-Leslie to Dietrich, Dec. 19, 1955)

DX 45

TRANS WORLD AIRLINES, Inc.

380 Madison Avenue
New York 17, New York, U.S.A.

A V LESLIE
VICE PRESIDENT FINANCE
AND COMPTROLLER

December 19, 1955

Dear Noah:

You have requested my views as to what TWA's near-term financial abilities may be, having regard to the options which it intends to execute taking over airplanes now under firm order by the Hughes Tool Company and against which the latter has made interim payments required by the manufacturer.

You have also requested my comment on TWA's abilities to contract for equipment of more advanced characteristics such as have been ordered by other major air lines with which we compete.

Existing equipment commitments which we propose to take over from the Hughes Tool Company are, in round figures, as follows:

	(Millions)
3 1049G Constellations	$15.2
Company Furnished Equipment	1.0
(Delivery dates June - September 1956)	$16.2
25 1649 Constellations	$58.0
Equipment Spares	11.0
Company Furnished Equipment	3.0
(Delivery dates April - September 1957)	$72.0
Grand Total	$88.2

There may be escalation involved and it is possible, and for planning purposes should be assumed, that the total program aggregates $90 million.

1. On April 1, 1956 (the beginning of our next budget period), working cash will be $12.0
2. Debt on that date will be 40.0
3. Net worth will be 73.0
4. Net Income in terms of Gross Revenues will aggregate the level presently projected for the 12 months ended September 30, 1956 2.50%
5. That equipment requirements can be funded as to 60% by secured notes running off in 5 years (a pattern for which we have precedence in the past).
6. That at any given time TWA requires working cash equal to three weeks cash operating expenses.

(Millions)

	3/1/56	1/1/57	1/1/58
Beginning Cash	$12.0	$ 9.2	$ 3.5
Increase Factors			
Net Income	*$ 8.0 (9 mo.)	$ 7.0	$ 7.8
Depreciation	18.7 (9 mo.)	36.0	35.0
Borrowings - 60% of A/C CFE and Spares	9.7	43.2	
	$ 36.4	$86.2	$42.8
Cash Requirements			
Property & Equipment ex A/C	$23.0	$13.0	$13.0
Flight Equipment	16.2	72.0	
Debt Repayment Equitable		5.0	5.0
8 1049G's		1.9	1.9
25 1649's			8.6
	$39.2	$91.9	$28.5
Cash Gain	($ 2.8)	($ 5.7)	$14.3
	12/31/56	12/31/57	12/31/58
Ending Cash	$ 9.2	$ 3.5	$17.8
Working Cash Deficiency	1.5	13.2	0.6 excess

*Assumed $3.0 net loss 1st quarter

Review of the preceding table indicates that the cash building ability of the company is such that it will be unable to carry the presently committed program with normal borrowings. This is so since, during a full two-year period, it will be deficient in its working cash balance to a maximum sum of $13.2 million under minimum requirements, this occurring about the end of 1957.

It is evident that TWA can handle the purchase of the eight 1049G's without difficulty, given 60% funding of the purchase price.

As to the 1649's, the Tool Company has made a payment to the manufacturer of 25% of the roundly $58 million cost of the 25 planes (ex spares and company furnished equipment), a sum of approximately $17 million.

Should the Tool Company be willing to continue to finance this purchase by TWA to the extent of this payment on a subordinated basis, it appears that TWA could finance the remaining portion through 60% funding plus cash generation. I would expect that arrangements could be made with the loaning agency which would allow us to pay the Tool Company against this receivable during the life of the borrowing to the extent that general fund cash exceeded reasonable working requirements. A forecast of cash on the foregoing basis is shown:

(Millions)	3/1/56	1/1/57	1/1/58
Beginning Cash	$12.0	$ 9.2	$10.3
Increase Factors			
Net Income	*$ 8.0(9 mo.)	$ 7.0	$ 7.8
Depreciation	18.7(9 mo.)	36.0	35.0
Borrowings 60% of A/C CFE &spares	9.7	33.0	
HTCo subordinate note		17.0	
	$36.4	$93.0	$42.8
Cash Requirements			
Property & equipment ex A/C	$23.0	$13.0	$13.0
Flight Equipment	16.2	72.0	
Debt Repayment Equitable		5.0	5.0
8 1049G's		1.9	1.9
25 1649's			6.6
	$39.2	$91.9	$26.5
Cash Gain	($ 2.8)	$ 1.1	$16.3
	12/31/56	12/31/57	12/31/58
Ending Cash	$ 9.2	$10.3	$26.6
Deficiency in Cash	1.5	6.4	9.4 excess

Mr. Noah Dietrich Page 4 December 19, 1955 nj

I believe the cash position indicated by the table would allow us to deal successfully with a financing agency for the amounts indicated and further give us hope that payment in some measure might be made to the Tool Company although this would be dependent upon a continuously profitable operation through 1958.

To your final question, the ability to finance additional equipment, we know that the manufacturer would require a down payment in the order of 25% and progress payments totaling at least another 25% during the succeeding 18 months from the signing of the contract.

However modest TWA's views might be the figures indicate it could not, even with Tool Company assistance to the extent indicated in preceding paragraphs, generate any excess cash until 1959 if we assume payment of the Tool Company note during 1958 (which is optimistic). Without laboring the point, I can only say, if TWA is to have additional aircraft requiring near-term cash, the Tool Company must accept the burden for a period extending at least beyond 1958.

Kindest personal regards,

A. V. Leslie

Mr. Noah Dietrich
Hughes Tool Company
7000 Romaine Street
Hollywood 38, California

AX-1382

DX 46, page 1
(Letter-Dietrich to Ayers, Dec. 21, 1955)

HUGHES TOOL COMPANY

HOUSTON, TEXAS

December 21, 1955

WEST COAST EXECUTIVE OFFICES
7000 ROMAINE STREET
HOLLYWOOD 38, CALIF.

Mr. Fred W. Ayers
Senior Vice President
Hughes Tool Company
P.O. Box 2539
Houston 1, Texas

Dear Fred:

Re: Equipment Program TWA

For several years it has been assumed in the air transport industry that jet aircraft would play a prominent role when their design reached the stage of development as to be commercially feasible. Early this year TWA engineers and representatives of the Tool Company concluded that the time was ripe to commence negotiations for the design and manufacture of jet airplanes which would suit the peculiar requirements of TWA. Because of the tremendous cost of newly designed jet aircraft it was a foregone conclusion that the Tool Company would have to lend substantial financial assistance to TWA. The exact form and extent of such support being left open, pending final determination as to the requirements and the existing financial capabilities of TWA itself.

Under such approach early this year representatives of the Tool Company surveyed the various potential manufacturers and then opened extensive negotiations with Convair for the design and manufacture of 30 turbo-jet transports of a design which would compete with both the Boeing 707 or Douglas DC-8.

These negotiations with Convair proceeded to the point of a detailed contract with accompanying specifications. The total purchase price in round figures for the 30 planes was $150,000,000. Recently, however, before the final draft of the contract could be presented to the Tool Company Board for approval Convair terminated the negotiations (presumably because of uncertainties as to performances and conflicting military commitments). If Convair is now able to obtain contracts for certain military aircraft, however, it will reopen negotiations and a final decision on such military contracts will be reached by February 1, 1956.

In the meanwhile our competitors, and many non-competing airlines, have placed large orders for jets with the other leading aircraft manufacturers. This is shown by Bob Rummel's memorandum to Collings, dated December 9, 1955, a copy of which you have previously been furnished. These manufacturers have few favorable delivery positions left. As insurance against the possibility that the contract with Convair will fail to materialize, representatives of the Company are presently discussing possible agreements with one

large and two smaller aircraft manufacturers.

The large scale purchases by other airlines undoubtedly prompted Ralph Damon's report, dated December 6, 1955, which he submitted to the TWA directors at their meeting on December 13, 1955. You will recall Damon's emphatic conclusion that "any airline which does not have competitive long-range jets (similar to the Boeing 707 or Douglas DC-8) and shorter range modern turbo-prop (similar to the Lockheed Electra) by 1960 or 1961 will be practically out of business soon thereafter".

It was his specific recommendation that TWA acquire for its domestic operation alone "something on the order of 30 long-range jets and 50 Lockheed Electras or equivalent". He estimated the financial requirements of a fleet of this sort as being on the order of $250,000,000. For international use he suggested the acquisition of a minimum of 10 additional long-range jets at a total expenditure of approximately $60,000,000. Damon's report dealt primarily with equipment requirements and did not undertake a detailed analysis of TWA's financial capabilities to meet such requirements. Feeling that such an analysis was vitally necessary I requested Vic Loslie to furnish me with his own views on the matter; and a copy of his report is enclosed herewith.

From Vic Loslie's report I would draw the following conclusions:

a. From independent lending sources TWA can finance the entire purchase under LD-147 of the eight 1049G airplanes presently contracted for, including the repayment to Hughes Tool Company of its down payment in the amount of $3,800,000.

b. From independent lending sources TWA can also finance the purchase under LD-138 of the twenty-five 1649 airplanes presently contracted for, but only provided that it not be required in 1957 to reimburse Hughes Tool Company for its down payment in the amount of approximately $17,000,000 (paid in December 1954).

c. Under the financial arrangements discussed in (a) and (b) above TWA will have a working cash deficiency until 1958.

d. TWA cannot finance, either from its own cash or from independent lending sources, any down payments or progress payments for additional equipment commitments in 1956, 1957 or 1958.

e. In no event can TWA, on its own, undertake the large scale jet program now under negotiation.

Because of the speculative course of jet airplane design and production,

substantial progress payments, in addition to the customary down payment, will have to be made if favorable deliveries are to be obtained from any manufacturer. Negotiations with the other manufacturers have suggested that for planning purposes we must assume a down payment of approximately $37,500,000 with a progress payment within 12 months of an additional $37,500,000. Those calculations assume a total jet commitment, exclusive of G.F.E. and spares, of $150,000,000. In order to obtain a favorable contract, however, it may be necessary to make an initial purchase in even a larger amount, possibly $175,000,000 or $200,000,000, in which event the down payment and progress payments would be proportionately increased.

The increasing magnitude of TWA's jet requirements, the known inability of TWA to finance them alone and the recent industry developments which demand an early commitment indicate to me that the Board should now formally approve a program of financial assistance to TWA which contemplates direct commitment by the Tool Company to contract for the jet aircraft required by TWA and payment by Tool Company of the down payment and progress payments called for by such contract. It is also suggested that the Board take such action as will enable the appropriate Company officers to postpone payment by TWA of the $17,000,000 due Tool Company in 1957. Board action relating to reimbursement of the payments to be made by the Company under the jet contract and to financing of the balance of the contract price can be taken at such time as the Board considers the formal contract negotiated by the Company's representatives.

The Company's representatives have also commenced negotiations for the purchase of turbo-jet equipment but the Board need not take any action until a definite contract has been proposed.

Yours very truly,

Vladeck Dietrich

VDietrich:hb
Enc.

DX 47, page 1
(Boeing-Toolco Purchase Agreement - 8 B-131s, 1/10/56)

January 6, 1956

Hughes Tool Company
2200 Gulf Building
Houston, Texas

Gentlemen:

We hereby offer to sell to you eight jet transport aircraft known as the Boeing Model 707-120 and described in Boeing Detail Specification D-16787 dated October 21, 1955 and revised November 9, 1955, on the following terms and conditions:

(a) Deliveries of such eight Model 707-120 aircraft will be made in accordance with the following schedule:

Month	Quantity
April 1959	1
May 1959	2
June 1959	2
July 1959	2
August 1959	1

and we agree that prior to the month in which the first of such aircraft is delivered to you we will not have delivered to other commercial customers, more than 12 Model 707 type aircraft.

(b) The basic price for each of such eight Model 707-120 aircraft fully equipped in accordance with such Detail Specification and for which an airworthiness certificate is to be in effect upon delivery, shall be $4,200,000, which shall be subject to an increase of $40,000 per aircraft to cover the cost of JT3C-4 engines in lieu of JT3B-2 engines and of either $14,000, in the case of first class arrangement, or $17,000 in the case of a combined first class and tourist arrangement, per aircraft to cover the cost of special customer interior features. Such price also shall be subject to adjustment for changes in the Detail Specification, including any changes you select from the list set forth in Exhibit A attached to this letter agreement which are included in the Detail Specification but have not been included in such basic price and to escalation as to

the cost to us of the auto pilot included in such price at $27,500 but without escalation as to the cost of any other item. We represent that the basic price of $4,200,000 and the other price elements set out in the foregoing two sentences are as favorable to you as the basis on which we have entered into contracts with any other customer and that our upward and downward basic price adjustments on account of specification changes you may desire will be no less favorable to you than to other customers.

(c) Payment for such eight aircraft shall be made as follows:

Due Date of Payment	Percentage of Aggregate Basic Aircraft Price
10 days after date of this agreement	5%
July 1, 1956	2%
October 1, 1956	2%
January 1, 1957	3%
April 1, 1957	3%
July 1, 1957	3%
October 1, 1957	3%
January 1, 1958	3%
April 1, 1958	3%
July 1, 1958	3%
October 1, 1958	3%

The balance of the payment in respect to each aircraft shall be made upon delivery.

All such payments shall be made in lawful money of the United States, to be unconditionally deposited to our account in a bank in the United States to be designated by us.

(d) Each of the parties hereto agrees to proceed immediately to determine the final Detail Specification for such eight Model 707-120 aircraft, and upon completion of such Detail Specification to enter into a definitive Purchase Agreement in a form substantially similar to the form of Purchase Agreement which we have previously furnished you marked "Proof of December 7, 1955." It is understood and agreed that neither the Boeing Detail Specification referred to in the first paragraph of this letter agreement nor the form of the purchase agreement marked "Proof of December 7, 1955" is completed or perfected, and the parties mutually desire and consider necessary that they be completed and perfected as soon as possible. We agree to make such

reasonable changes in the Specification prior to and during the manufacture of the aircraft as you desire with such price increase or decrease and effect upon weight and performance and time of delivery as may reasonably be incidental thereto, to give due and proper consideration to your desires for changes in the form of purchase agreement, and to offer to you alternate purchase agreement provisions which we offer generally to other customers. Such Purchase Agreement will incorporate by reference such Detail Specification, and it will contain the above mentioned matters together with such other terms and conditions not inconsistent therewith as the parties may agree upon.

It is understood that the definitive Purchase Agreement will involve implementation of this letter agreement in such manner as to leave either party free to request changes in the basic price for each of the type aircraft mentioned herein based on terms and conditions to be incorporated in such Purchase Agreement which are new or different from any terms and conditions expressly agreed to herein.

This letter agreement is understood to be subject to the conditions subsequent (a) that you shall have until 5 p.m. PST February 10, 1956, or such later date as may be mutually agreed upon, to negotiate with United Aircraft Corporation warranty provisions and a service policy satisfactory to you to be applicable to the engines to be installed on the aircraft and (b) that a definitive purchase agreement superseding this letter agreement will be executed by the parties hereto on or before 5 p.m. PST February 15, 1956 or such later date as may be mutually agreed upon. In the event (1) you are unable to negotiate such warranty provisions and service policy by 5 p.m. PST February 10, 1956 or an agreed extended date and you elect for that reason alone to cancel this letter agreement and give us written notice of such cancellation on or before 5 p.m. PST February 10, 1956, or an agreed extended date, or (2) such definitive purchase agreement is not so executed by 5 p.m. PST February 15, 1956, or an agreed extended date, then all obligations of both of the parties hereto shall cease and terminate as of the applicable date or extended date, except that payments hereunder will be forthwith refunded.

It is further understood and agreed that the rights of the Hughes Tool Company under this letter agreement or any definitive Purchase Agreement which may be entered into by the parties hereto superseding such letter agreement may be assigned to Trans World Airlines, Inc.

If the foregoing is satisfactory to you and you sign the carbon copy of

this letter enclosed for that purpose on or before 5 p.m. PST January 14, 1956 and return such copy to us, this letter will constitute a binding agreement between us.

Very truly yours,

BOEING AIRPLANE COMPANY

By _____
J. B. Connelly, Director of
Contract Administration

Accepted this 10th day of January 1956

HUGHES TOOL COMPANY

By _____

DX 47, page 5
(Boeing-Toolco Purchase Agreement - 8 B-131s, 1/10/56)

EXHIBIT A

The following Master Changes have been incorporated in the Model 707-120 Specification, D-16787, and the sales prices noted are not included in the basic price ($4,200,000) of the airplane:

Master Change No.	Description	Price/airplane
1	Addition of 3 Bladder Cells in Wing Center Section (1,970 Gallons)	$ 8,454
9	Addition of Totalizing Fuel Quantity Indicating System	2,480
15	Installation of Solcal	905
18	Increased Escape Slide (non-inflatable type) Stowage Provisions	746
30	Revision of Cabin Water Systems to Provide Both Hot and Cold Water Service	1,670
40	Installation of Drip Sticks in Tank Doors	3,007
41	Installation of Sundstrand Constant Speed Drive Unit Disconnect Clutch (3-Drive System)	2,820
65	Installation of De-icing System Manual Control	2,480
121A	Relocation and Revision of Radio Rack Without Access Hatch	1,500
263	4 Point Underwing Refueling System	3,598
	TOTAL	$27,660

DX 51, page 1
(Boeing Offer of B707-320s to Toolco, 1/6/56)

BOEING AIRPLANE COMPANY
SEATTLE 14, WASHINGTON
January 6, 1956

TELEPHONE, MOHAWK 3333
IN REPLY REFER TO

Hughes Tool Company
2200 Gulf Building
Houston, Texas

Gentlemen:

Consistent with our discussions, we have furnished you copies of our detail specification and other technical data concerning the Model 707-320 with a view toward your possible purchase of such aircraft. In furtherance of this goal, we are pleased to offer to sell such number of these aircraft between 22 and 30 as you may wish to purchase, on the following basis:

1. Basic specification: Boeing Detail Specification D17434 dated November 15, 1955, revised December 6, 1955.

2. Basic Price: $5,150,000 per aircraft, subject to adjustment for changes in detail specification and to escalation as to our cost of the auto pilot which has been included in the price at $27,500, but not subject to escalation as to the cost of any other item. The above price is also subject to reduction of $51,000 per aircraft, in the event you elect to furnish passenger seats.

3. Delivery Schedule: As set out in Attachment A.

4. Payment and other contractual provisions: Substantially similar to those contemplated with respect to the 8 Boeing Model 707-120 aircraft covered by letter agreement of even date.

If you should desire to order additional Model 707-120 aircraft we can furnish them at the price and terms and conditions set forth in letter agreement of even date for delivery as follows: One each month November 1959 through April 1960 provided you do not order any Model 707-320 aircraft for delivery in that month and one each month May and June 1960 and two each month thereafter even though you order Model 707-320 aircraft for delivery in those months in accordance with the schedule in Attachment A.

This offer is open for acceptance until 5 p.m. PST January 20, 1956.

Very truly yours,

BOEING AIRPLANE COMPANY

By _____
J. E. Connelly, Director of
Contract Administration

Attachment A

58-18-3

ATTACHMENT A

Delivery Schedule Model 707-320 Aircraft

Month	Quantity
November 1959	1
December 1959	1
January 1960	1
February 1960	1
March 1960	1
April 1960	1
May 1960	2
June 1960	1
July 1960	1
August 1960	2
2 per month thereafter to completion	

(Transcript of Telephone Conversation-Rummel & Connelly-12/20/57)

. . .

Connelly: . . . schedules involved here depends on whether we hit a target schedule or contract schedule. Ah, American will receive its first airplane (blank) --- dated airplane within a period of not less than sixty days prior to the month in which the next domestic customer receives aircraft.

Rummel: In other words they would deliver -- they would receive and you've agreed to deliver one NC airplane sixty days prior to

Connelly: No, no. I'm mentioning certificated airplanes.

Rummel: One NC airplane.

Connelly: No. They get an NC airplane earlier than that, Bob. Just the same as you do.

Rummel: Wait a minute. They get an NX earlier.

Connelly: Well, then, all right. It's an uncertificated airplane.

Rummel: Yeh. But your -- your arrangement relates to certificated rather than uncertificated aircraft.

Connelly: That's right.

Rummel: Is that what you're saying?

Connelly: That's right.

Rummel: Well, that what I say so if I understand what you're saying, you're saying that you have an agreement with American which requires you to deliver one NC -- that's the licensed airplane -- sixty days prior to delivering the first NC airplane to other domestic operators. Is that right?

Connelly: No. I don't you -- you have to go back to the wording I gave you.

Rummel: Well, would you give it to me again.

Connelly: Yeah. I say we have represented to American that we will deliver six certificated airplanes -- let's forget the uncertificated airplanes -- that we will deliver six certificated airplanes within a period of not less than sixty days prior to the month in which the next customer receives certificated airplanes.

Rummel: Well, how do you interpret that then? Does that mean that you'd meet the obligation if you deliver an American one airplane sixty days before our first?

Connelly: No.

Rummel: Well, you're not saying you have to deliver six airplanes

Connelly: We have to deliver six certificated airplanes to them prior to the month in which we deliver any airplanes to any other domestic customer.

Rummel: Well, that was certainly never explained to me. In fact I never heard the sixty days until now that I can remember.

Connelly: Well, it's not unreasonable to expect the first customer in, Bob, to -- all Howard wanted was the first thirty-three airplanes. So I think this is a very reasonable insistence on the part of American -- far less drastic than Howard was attempting to establish when he was first up at bat.

Rummel: Well, it's probably far less drastic than American would have established too.

Connelly: Well, ah

Rummel: But that's neither here nor there. The fact is that

Connelly: I mean -- ah -- let's look at it this way, Bob. We never made any representations on the 120 airplane and it was known at that time that both Pan American and American had signed up -- that there would be any possibility of TWA equalizing the situation with American. It just wasn't in the cards. We had to give them some preference by reason of having made the program firm, and, as I say, to be perfectly honest it's a very reasonable position for them as it stands now and certainly no more than we would agree to, Bob, when you compare it with what Howard was asking for when he was first up at bat. He said he'll take the first thirty-three airplanes or nothing, which would have put us out of business -- bing! I mean I just give you that as a

Rummel: Well, did you offer Howard a two-months lead over American?

Connelly: Well, I think he made the proposal himself and of course at that time, as you well know, there was considerable dickering with Convair.

Rummel: Well, I know there was.

Connelly: The point is

Rummel: Well, we hadn't purchased Convair at that time

Connelly: What?

Rummel: We didn't buy from Convair at that time. We didn't buy from Convair until long after we had purchased both models at Boeing.

Connelly: Well, all I can say is

Rummel: If you remember that — in fact I came to Boeing and wanted a -- the small airplane developed. Maybe you don't remember that but I sure did, and the one you came up with wasn't very good at that time -- that was

Connelly: We — we were in contact with Howard at -- well, during the course of negotiations with Pan American and offered delivery schedules and at that time he made the proposal that he'd buy the first thirty-three airplanes, period. Subsequently, ah -- well you appreciate the fact it's not easy to make contact there -- and ah — well the situation pretty well died out until the big airplane came into being, Bob.

Rummel: Well, Howard says that he has this understanding on the situation. I think what we ought to do — what I'd like to do is to sit down and become real clear -- probably you're right — we can't do it fully by telephone.

Connelly: No. I'm afraid this is an unsatisfactory way to do it, Bob, but I think we can convince you, Bob, that what we have offered and what we are prepared to offer is a very reasonable arrangement.

Rummel: Yeh. Well, I don't — I just don't understand even now -- ah, this will be a great shock to Howard to know that — (?) understand you had this prior agreement with them, but I don't understand how you can be led into the position that if you offer -- well, let me go back. When I was up there sometime ago I said we would like to have some more early positions -- at least I think we'd like to have them -- what can you offer so we can really give it serious consideration. And we wanted to offer — the objective was to, as I explained it, was to be able to more nearly start service at the time American Airlines were starting or to start with them simul -- start at the same time. And I was told well you didn't have positions available that early, but you'd see what you had available, which you then did and you made them available on the basis that we would -- if we took one early position, then to make it attractive to you, we'd take one later position, or a one for one ratio.

Connelly: Yeh.

Rummel: And, so what you're saying is that in order to give us early positions, we have to buy a later position, but then I was told last week that if we take the six positions you offered that naturally American would find themselves with three more airplanes before we got into those, and I don't understand that at all.

Connelly: Well

Rummel: Why the hell — In one hand -- dealing with us you say well we'll give you -- to get an early position you have to buy a late position but if you do that then you say to American, "Well, look TWA has bought airplanes. Now you can have some more earlier -- same ones -- you don't have to buy any more. We'll just move your deliveries up." What kind of a deal is that?

Connelly: Well, as [illegible] for any other [illegible] standpoint of [illegible] for thirty airplanes, [illegible]

Rummel: Well, do you have any agreements on international customers that involve American?

Connelly: Well, I think this is something, Bob, we ought to sit down and review on the table here. I have to check the contract on the big airplane. You, as I recall it, there's the provision in there that the position on the 33[illegible] that we quoted you, exclusive of the contracts we had already entered into prior to the date of that contract, and it lists the various contracts in there, making an exception of Lufthansa, who did not have a firm contract, that those were the next available [illegible] Now that isn't the exact wording but you could take a look at the [illegible] So that contract specifically accepts the contract that we're already entered into. And, obviously, Pan American being the first one in [illegible] a slight edge over TWA. But that was known at the time.

Rummel: Yeh. I think so.

Connelly: Yeh.

Rummel: But, in fact I think we have somewhat greater, more satisfactory leverage on the 331 than the 131

Connelly: Well, perhaps

Rummel: But you must remember, Bruce, that we have tried repeatedly to find the things we're talking about now, that is, exactly what was -- what is the early deliveries that you're proposing and what we got at our turn -- and I've heard this myself many, many times -- was statement that the position -- the relative position that existed at the time we bought the eight airplanes would be maintained -- not that it was a variable depending on what we ordered subsequently but that the relative positions would be maintained. As the whole program moved forward, those relative positions would be maintained.

Connelly: Well

Rummel: And after I look at the -- that was exactly it, and I have asked all their understanding and they have the same understanding. And --

Connelly: (Couple of words missed) Mr.

Rummel: When I look at the target schedules -- well, it is -- that's what it is. It's exactly what it was and there's no doubt about it.

Connelly: We can show you that this matter of relativity has been maintained.

Rummel: Well, it wasn't done last week.

Connelly: The eh -- you originally placed an order for eight airplanes, [illegible] at that time that you needed more small

Rummel:

Connelly: [illegible] we [illegible] to American [illegible] nature [illegible] of time that American [illegible] but [illegible] that we can otherwise

Rummel: It's the first deliveries that we're worried about.

Connelly: Well, Bob, a sixty-day look is a pretty nominal thing.

Rummel: Not in this business.

Connelly: Ah, when you've got to consider the bargaining position you're in with your first domestic customs for a large quantity of airplanes.

Rummel: Yeh.

Connelly: He has a right to expect some benefit by being first and you -- I mean that's evidenced by the position I am certain you would have taken had you been first.

Rummel: Well, we had -- that's right. And we had -- I can recall an agreement with Damon way back before -- practically before it existed -- Hollywood Reall and see whoelse was it -- myself -- were you there? I don't believe you were.

Connelly: No

Rummel: To the effect that you would not close with anyone else without first giving us the opportunity for a -- on an equal basis.

Connelly: Well, it's my understanding that that offer was made.

Rummel: Oh, I don't think so. Where was it made to?

Connelly: Well, there have been several telephone

Rummel: I don't think so. The first thing I knew that American had bought was when I read it in the newspapers. It sure wasn't made to me.

Connelly: Bob, I'll have to back off a little bit on that except that in talking to Ed Wells and Hollywood

(Dictaphone changed at this point.)

Rummel: Well! [illegible] the [illegible] time [illegible] San Fran is [illegible] printing out [illegible] I am sure Howe [illegible] Lemon.

Connelly: Yeh.

Rummel: Although I think he'd probably been apprised of it, but I don't understand — I know we pressed throughout the field for information on relative positions in detail and all that Hoeing would speak of was vague generalities. But with assurance

Connelly: Bob, I can't agree with that. Ah

Rummel: Well

Connelly: I'm sorry

Rummel: Why, why — look, Bruce. Why do you think we had to continue to pursue the argument which was never won on — by us at least — on sequence. Why did Ray Cook have to come up and pursue it further with you later - it's because we didn't have the information. We didn't know what to expect.

Connelly: (Couple of words missed.) had not given that information to anyone.

Rummel: Well, all right, but that's what I'm talking about. We did not have it

Connelly: Ah

Rummel: Well, look, Bruce. Why don't we — how do you want to proceed then? Do you want me to

Connelly: Any way that would be convenient for you, Bob.

Rummel: Well, I'd like to straighten it out if we can and at least know what we're going to fight about more clearly

Connelly: Yeh

Rummel: If we're going to.

Connelly: Well, no. I certainly think this is a time, Bob, when we ought to sit down and review this thing across the board and

Rummel: Well, I certainly do, too. I think it's long overdue.

Connelly: (Couple of words missed.) If you look at it in a broad light, it — w we have offered up to this time and what we are prepared to offer is certainly reasonable in light of the sequence of the commitments that were made.

Well, we have to look at it in the light of the -- what has been

Connelly: Yeh. as I think [illegible] we're wrong, I'd be glad [illegible] it.

Rummel: I'm sure you would, Bruce, and there isn't — I think that this whole thing probably arises -- I mean I have no thought but what Boeing thinks they have acted as they should, but it is not consistent with Mr. Hughes' understanding and certainly I had no understanding concerning constantly moving American forward as we buy additional airplanes. That just didn't even come into it. But we thought we were bettering our relative position when we went from the eight to the fifteen airplanes.

Connelly: No, as a matter of fact, you have, Bob.

Rummel: Well, not in the beginning -- not -- look, Bruce, not according to the target schedules

Connelly: (Cannot understand several words — both talking at the same time.)

Rummel: You've advanced -- on the target schedules you've advanced American and you have cut our rate down.

Connelly: No. No.

Rummel: Well, you certainly have.

Connelly: No

Rummel: But I'm speaking on the relative basis.

Connelly: Yeh. Well, your position has been improved, and this is something that could be clearly demonstrated.

Rummel: Well, it sure

Connelly: I'm talking now of an over-all fleet. Ah

Rummel: Well, I'm speaking of the relative — TWA's relative position to American Airlines. Well, look, I doubt if we can do this before Christmas now, Bruce, but I'll see how my trip to the Coast comes out.

Connelly: Well, why don't you do this, Bob. When you see your plans a little more clearly, give me a ring, and you can count on us being available at any time that is convenient for you.

Rummel: Well, I'd like to move right into it. I imagine Seattle is the better place to do it, don't you with all of your records up there?

Connelly: (Couple of words missed.)

Rummel: All right.

Connelly: Ah, the reason for it is that — a lot of this, as you know, is the -- a matter of telephone conversations between Howard and Bill, and I think it would be worthwhile if there becomes any misunderstanding on certain points to go over and have a talk with Bill on it.

Rummel: Well, [illegible].

Connelly: because [illegible] conversations, obviously, and I don't presume you have either [illegible].

Rummel: No, no. Not in [illegible] unless this was [illegible], naturally.

Connelly: So that's the [illegible] we were [illegible] the root of this thing better if it would be [illegible] for you to come up here because we have all of the facilities available that participated in this thing and I'm afraid if we [illegible] something would come up that we would need something from Bill or something from Hallwood or something from Bob Wells.

Rummel: Uhmm. Well, OK. I'll -- why don't we shoot for right after Christmas and I'll confirm it to it.

Connelly: You shoot me a wire.

Rummel: Unless I'm up next week, and in that event I'll give you a buzz, too.

Connelly: Fine, Bob.

Rummel: All right. Thank you, Mr. [illegible].

Connelly: Well, I hope you whip this flu bug now.

Rummel: Oh, it's one of those thing. I had the forerunner of it apparently in Seattle and I couldn't shake it and I didn't have sense enough to take a day or two off when it would have done some good.

Connelly: Yeh.

Rummel: One of those things, you know. But it's nothing serious. Thanks, Bruce. Have a happy Christmas season if I don't see you.

Connelly: Merry Christmas to you, Bob. (Considerable background noise) And we have the airplane taxiing out here right now.

Rummel: Oh, have you?

Connelly: Yeh. It's going to take off about noon, I think.

Rummel: Oh, are you? Hey, that's great.

Connelly: We're waiting for a little break in the weather.

Rummel: Well, I -- that's great. I'm glad to hear it. How's the second one coming?

Connelly: The second and third are in final assembly right now and coming along very well.

Rummel: Not out on the field yet?

Connelly: Not on the field yet.

(Transcript of Telephone Conversation-Rummel & Connelly-12/20/57)

Connelly: First one [illegible] of Fe'r a[illegible].

Rummel: Yeh. [illegible].

Connelly: Yeh.

Rummel: I thought it was due out before then. Well, that's fine, Bruce. I hope she -- I hope it comes out all right. I'm sure it will.

Connelly: Fine and dandy.

Rummel: OK.

Connelly: OK, Bob.

Rummel: Good-bye.

Connelly: Good-bye.

The regular meeting of the Board of Directors of Trans World Airlines, Inc. was held on Friday, June 26, 1959, at 9:30 a.m., at the offices of the Corporation, 380 Madison Avenue, New York, New York.

Directors present were: Messrs. Fred W. Ayers
E. O. Cocke
Raymond A. Cook
A. V. Leslie
Sidney Maestre
Warren Lee Pierson
C. H. Price
Ben-Fleming Sessel
A. D. Simpson
T. A. Slack
Charles S. Thomas
Milton H. West, Jr.

constituting a quorum.

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Directors absent were: Messrs. Palmer Bradley
John A. Collings
Oscar Holcombe
M. E. Montrose
H. E. Rogers
Loyd Wright (entered meeting later)

Mr. Carl S. Rowe of Counsel was present by invitation.

Mr. Warren Lee Pierson, Chairman of the Board, called the meeting to order and thereafter presided.

The Secretary of the Corporation, Mr. Ronald Duckworth, acted as Secretary of the meeting.

APPROVAL OF MINUTES

Minutes of the Board of Directors meeting of May 27, 1959, and of the Executive Committee meeting of June 4, 1959, were approved.

At this point, Mr. Loyd Wright entered the meeting.

REPORT OF THE CHAIRMAN OF THE BOARD

The Chairman of the Board reported on proceedings at the IATA E[illegible]

next meeting of the Committee would be held just prior to the Annual General Meeting in Tokyo, Japan, in October 1959.

He commented on the satisfactory financial results in 1958 of Ethiopian Airlines which is managed by this Corporation and on the benefits derived by both parties from this association.

REPORT OF THE SENIOR VICE PRESIDENT - FINANCE & TREASURER

The Senior Vice President - Finance & Treasurer, Mr. A. V. Leslie, reviewed financial statements for May 1959 and presented a financial forecast for June. He presented and discussed a series of charts comparing the current operations of the Corporation with those of American Airlines and United Air Lines and reviewed an analysis of the Corporation's employment and productivity statistics.

REPORT OF THE SENIOR VICE PRESIDENT & SYSTEM GENERAL MANAGER

The Senior Vice President & System General Manager, Mr. E. O. Cocke, presented a report on current operating performance and described in detail the operating problems encountered with the Boeing 707 jet aircraft.

REPORT OF THE PRESIDENT

The President, Mr. Charles S. Thomas, reported that the Corporation was operating at a profit in the current year compared with the loss of over $12 millio at the same date in 1958.

He advised that this improvement had resulted from several factors within the control of management -- including the recent organization plan, improved employee morale, and increased cost consciousness on the part of management.

He advised that with the completion of the basic organization plan for the Corporation, he would now devote his attention to the problems of the International Division which was currently operating at a substantial loss and, following an inspection of the route, would give a report to the Board of Directors at the August meeting.

He advised that the Corporation was studying the submission of bids for MATS' charter operations for the year beginning October 1, 1959, and stated that strong competition was expected for this business from all bidders.

AUTHORITY TO LEASE THREE ADDITIONAL BOEING MODEL 707-131 AIRCRAFT FROM HUGHES TOOL COMPANY

The President referred to the action of the Board at its meetings of January 30, February 27, and March 31, 1959, with respect to the leasing of Boeing Model 707-131 jet aircraft from Hughes Tool Company. He stated that he considered

it would be desirable if authority were given under which the Corporation might lease from Hughes Tool Company three Boeing Model 707-131 jet aircraft in addition to those for which authority had previously been given, making a total of fifteen such aircraft which could be leased from Hughes Tool Company on a day-to-day basis. It pointed out that all but one of the leases already executed provided that they would terminate in any event on June 30, 1959, and that it was proposed to extend this date to September 30, 1959.

The President further stated that pursuant to authorization of the Board at its meeting of March 31, 1959, the Corporation had purchased approximately $3,500,000 of spare parts and provisioning from Hughes Tool Company for use in connection with the operation of such jet aircraft. He advised that Hughes Tool Company owned or had on order additional 707-131 spare parts and provisioning, that Hughes Tool Company was willing to sell the balance of such spare parts and provisioning to the Corporation at Hughes Tool Company's cost when and if requested by this Corporation and that it would be desirable if authority were given under which the Corporation might purchase such spare parts and provisioning.

After discussion, upon motion duly made and seconded, the following resolutions were unanimously adopted (Messrs. Ayers, Price and Slack not voting):

RESOLVED, that the Chairman of the Board, or the President, or any Vice President of this Corporation be, and each hereby is, authorized to execute and deliver an agreement or agreements covering the leasing by this Corporation of up to a total of fifteen Boeing Model 707-131 jet aircraft (including the twelve such aircraft with respect to which authority had previously been given) from Hughes Tool Company on a day-to-day basis at a rental of $2,500 per aircraft per day, and on substantially the same terms and conditions as the Boeing Model 707-131 jet aircraft heretofore leased from Hughes Tool Company, such leases to be subject to the approval of the Civil Aeronautics Board and any necessary consents under applicable indentures of this Corporation.

RESOLVED, that the Chairman of the Board, or the President, or any Vice President of this Corporation be, and each hereby is, authorized to execute and deliver an agreement or agreements covering the purchase by this Corporation from Hughes Tool Company, at Hughes Tool Company's cost, of such additional 707-131 spare parts and provisioning as are owned by Hughes or are on order by Hughes Tool Company and are available for use in connection with the

operation by this Corporation of a total of fifteen Boeing Model 707-131 jet aircraft when leased to this Corporation by Hughes Tool Company, such agreement to be subject to approval of the Civil Aeronautics Board.

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AUTHORITY TO LEASE BOEING MODEL 707 AIRCRAFT TO NORTHEAST AIRLINES, INC.

The Senior Vice President & System General Manager advised the meeting that it was anticipated that during certain months and at off-peak travel hours, this Corporation would have Boeing Model 707 aircraft available for profitable lease to another carrier. He further advised that negotiations had been conducted with Northeast Airlines, Inc. relating to lease of Boeing 707-131 aircraft by this Corporation to Northeast to the extent necessary to enable Northeast to provide daily round-trip service between New York and Miami between late evening and morning hours. The lease would provide for use, during the first six months, of this Corporation's crews and maintenance. The base rental would be $3.10 per revenue plane mile, and Northeast would also pay to this Corporation 50% of the gross passenger revenue in excess of $4.50 per revenue plane mile during any month up to $5.30 per revenue plane mile, and 25% of such gross passenger revenue in excess of $5.30 per revenue plane mile.

There was presented to the meeting a letter of intent, not constituting a contract, between this Corporation and Northeast Airlines, Inc., dated June 17, 1959, contemplating such a lease commencing September 1, 1959, and continuing for nine months, terminable by either party on sixty days' notice. The letter of intent contemplates that Northeast crews would operate the flight after February 29, 1960, the rent being adjusted accordingly. It also contemplates that Boeing 707-331 aircraft sufficient to provide an additional daily round trip would be leased on similar terms when this Corporation has placed three such aircraft in operation, and at a later date sufficient 707-331 aircraft time for a third daily round trip would be arranged on similar terms. The proposed lease of Boeing 707-131 aircraft would be conditioned on this Corporation's being the operator of at least twelve such aircraft and on the terms of, and any necessary approvals under, indentures or financing agreements, approvals of persons having an interest in the airplanes or engines, and any necessary approval of the Civil Aeronautics Board. The letter of intent between this Corporation and Northeast Airlines, Inc., dated June 17, 1959, was ordered marked and filed with the Minutes of the meeting.

After discussion, upon motion duly made, seconded and carried, it was

RESOLVED, that the proper officers of this Corporation be, and they hereby are, authorized to negotiate, execute and deliver on behalf of this Corporation leases and agreements providing for lease by this Corporation of Boeing 707-131 and Boeing 707-331 aircraft to Northeast

Airlines, Inc. as outlined in the letter of intent dated June 17, 1959, with such modifications and other terms and conditions as the officer executing the same may deem to be in the best interests of this Corporation.

ELECTION OF MESSRS. W. L. TRIMBLE, S. L. HIGGINBOTTOM, AND JOHN P. MEAD AS OFFICERS

The President, Mr. Charles S. Thomas, referred to the action of the Board at its meeting of May 27, 1959, and to the action of the Executive Committee at its meeting of June 4, 1959, electing additional Officers and changing titles of other Officers to implement the Corporation's new organization plan.

He advised the meeting that in order to further activate the plan, it was desirable to elect Mr. W. L. Trimble as Regional Vice President - Transportation, Mr. S. L. Higginbottom as Assistant Vice President - Engineering, Flight Test and Inspection, and Mr. John P. Mead as Assistant Vice President - Industrial Relations.

After discussion, upon motion duly made and seconded, the following resolutions were adopted:

RESOLVED, that Mr. W. L. Trimble be, and he hereby is, elected Regional Vice President - Transportation of this Corporation at an annual salary effective June 26, 1959, of $25,500, to hold office in accordance with the By-Laws.

RESOLVED, that Mr. S. L. Higginbottom be, and he hereby is, elected Assistant Vice President - Engineering, Flight Test and Inspection of this Corporation at an annual salary effective June 26, 1959, of $20,000, to hold office in accordance with the By-Laws.

RESOLVED, that Mr. John P. Mead be, and he hereby is, elected Assistant Vice President - Industrial Relations of this Corporation at an annual salary effective June 26, 1959, of $22,000, to hold office in accordance with the By-Laws.

ADJUSTMENT IN SALARY OF MR. JOHN T. LOGAN

The Senior Vice President and System General Manager referred to the action of the Board at its meeting of April 23, 1959, electing Mr. John T. Logan as Assistant Vice President - Scheduling, and to the action of the Board at its meeting of May 27, 1959, increasing Mr. Logan's annual salary from $14,760 to $16,900.

He advised the meeting that in order to place Mr. Logan's position in proper relat ship with other corporate positions and to maintain a proper salary differential wi the Schedule Committee representatives reporting to Mr. Logan, it was deemed n essary that Mr. Logan's annual salary be increased to $18,000 effective April 23, 1959.

After discussion, upon motion duly made, seconded and carried, it wa

RESOLVED, that effective as of April 23, 1959, the salary of Mr. John T. Logan, Assistant Vice President - Scheduling, shall be at the annual rate of $18,000.

AUTHORITY TO ARBITRATE QUESTION OF PAYMENT TO AMERICAN AIRLINES UNDER MUTUAL ASSISTANCE AGREEMENT

The Chairman of the Board advised the meeting that there was a questi under the Mutual Assistance Agreement dated October 20, 1958, between this Corporation and five other airlines, as to whether or not payments were due by this Corporation and other airlines to American Airlines, based upon the strike of American pilots which commenced on December 19, 1958, and that as a result, it had been proposed that the question of whether or not such payments were due American be decided by an arbitrator and that the decision of the arbitrator on this question be binding on the parties. The meeting was further advised that the officers of the Corporation proposed to enter into an agreement with American Airlines, Capital Airlines, Eastern Air Lines, Pan American World Airways, and United Air Lines providing for such arbitration.

After discussion, upon motion duly made and seconded, the following resolution was unanimously adopted:

RESOLVED, that the proper officers of this Corporation be, and they hereby are, authorized to enter into an arbitration agreement between this Corporation and American Airlines, Inc., Capital Airlines, Inc., Eastern Air Lines, Inc., Pan American World Airways, Inc., and United Air Lines, Inc., providing for final determination by an arbitrator of whether or not, as a result of the strike of American Airlines' pilots commencing December 19, 1958, the Corporation and other airlines are obligated to make payments to American Airlines under the agreement dated October 20, 1958, between this Corporation and Americ Air Lines, Inc., Capital Airlines, Inc., Eastern

Jet Items	$ 787,400
Non-Jet Items	273,446
Reserve Budget	50,000
	$1,110,846

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It was pointed out that the net capital outlay under the above budget w be $801,846, because the budget included the amount of $309,000 for jet fuel-stora facilities at Boston, Kansas City and New York (La Guardia) which would be financ by fuel vendors without interest except for the amount of $13,000 on which interest 4-1/2% would be charged.

CHANGE IN DATE OF REGULAR MEETINGS OF BOARD OF DIRECTORS

It was suggested to the meeting that the date of the regular meetings Board of Directors be changed from the last Friday of each month to the last Thur of each month.

After discussion, upon motion duly made, seconded and carried, it

RESOLVED, that hereafter the regular meetings of the Board of Directors of this Corporation shall be held on the last Thursday of each month at such time and place as shall be designated in the notice of such meetings.

CONSENT TO SALE OF SIX BOEING MODEL 707 AIRCRAFT BY HUGHES TOOL COMPANY

The President referred to the eighteen Boeing Model 707-331 aircra on order by Hughes Tool Company under contracts assignable to the Corporation advised the meeting that he had been informed by Hughes Tool Company of its pr to assign its rights to six of such aircraft to Pan American World Airways, subje the approval of Boeing Airplane Company. The President stated that he had advi Hughes Tool Company that the Corporation had no objection to and consented to s assignment.

After discussion, upon motion duly made and seconded, the followi resolution was unanimously adopted (Messrs. Ayers, Price and Slack not voting

RESOLVED, that the action of the President in consenting to the assignment by Hughes Tool Company of its rights to six of the eighteen Boeing Model 707-331 aircraft on order by Hughes Tool Company under contracts assignable to this Corporation be, and it hereby is, ratified, confirmed and approved.

DX 54, page 8
(TWA Board Minutes-June 26, 1959)

ATE AND PLACE OF NEXT BOARD MEETING

It was the consensus of the meeting that the regular meeting of the Board f Directors scheduled to be held on July 30, 1959, should be cancelled and that the egular meeting scheduled to be held on August 27, 1959, should be held at 9:30 a. m. t the offices of the Corporation, 380 Madison Avenue, New York, New York.

DJOURNMENT

There being no further business to come before the meeting, it was adurned at 11:55 a. m.

Ronald Duckworth
Secretary

AX-1410

DX 57, page 1
(The Huntington Report-1960)

D.C. EXHIBIT H.S.

INDEX

SECTION

1. INTRODUCTION

   A. BACKGROUND
   B. THE PROPOSED MERGER AGREEMENT

2. DESCRIPTION OF NORTHEAST AIRLINES

   A. ECONOMIC CHARACTERISTICS OF NORTHEAST'S SYSTEM
   B. NORTHEAST'S EQUIPMENT SITUATION AND UTILIZATION THEREOF
   C. COMMENTS ON OTHER PROPERTIES, FACILITIES, ETC.
   D. HISTORY OF NORTHEAST'S OPERATING RESULTS
   E. COMMENTS ON POTENTIAL OF NORTHEAST'S SYSTEM

3. ADVANTAGES OF MERGER TO TWA

   A. INCREASED UTILIZATION OF EQUIPMENT
   B. INCREASED REVENUES FROM MERGER
   C. ECONOMIES RESULTING FROM MERGER

4. FINANCIAL ASPECTS OF PROPOSED MERGER

   A. BALANCE SHEETS
   B. INCOME STATEMENTS
   C. TERMS OF EXCHANGE OF STOCK
   D. COMMENTS ON TEMPORARY NATURE OF NORTHEAST'S FLORIDA AUTHORIZATIONS

5. APPROVAL BY REGULATORY AGENCIES

   A. CAB
   B. SEC
   C. APPROVAL BY THE PRESIDENT

AX-1411

DX 57, page 2
(The Huntington Report-1960)

1. INTRODUCTION

1. a. Background.

By agreement dated May 14, 1960, Hughes Tool Company and Atlas Corporation agreed to submit a proposed form of merger agreement to the Boards of Directors of the two airlines with their recommendations that it be approved.

On the same date, Hughes Tool Company (Toolco) and Northeast Airlines, Inc. (Northeast) entered into a loan agreement whereby Toolco agreed to make loans to Northeast aggregating $9,500,000. The stated purpose of the loan is to provide Northeast with additional funds for working capital and for use in connection with a program to commence operations with six Convair 880 aircraft, which will be made available to Northeast from the number of such aircraft ordered by Toolco. The agreement provides that the first loan shall be in the amount of $5,500,000 and shall be made by June 29, 1960. It also provides that if a merger is approved, the amount outstanding shall be converted, prior to the effective date of the merger, into stock of Northeast on the basis of one share of stock for each $5.25 of indebtedness. The loan is not dependent on the merger.

By letter dated May 17, 1960, the Chairman of the Board of Directors of Northeast advised the President of TWA that its Board of Directors had considered a form of proposed merger agreement between Northeast and TWA, and voted to recommend to its stockholders a merger with TWA in accordance therewith. Also, as stated in the letter, the

Board voted to authorize the members thereof to execute the merger agreement at any time on or before July 31, 1960, upon advice that the TWA Board of Directors has approved the terms of the Merger Agreement, and is prepared to execute the same subject to such changes as may be requested by TWA and approved by Northeast. A copy of the transmittal letter and the proposed form of Merger Agreement are attached hereto as Appendices 1-A and 1-B.

1. B. The Proposed Merger Agreement

Northeast shall be merged into TWA, which shall continue in existence as the Surviving Corporation, and thereafter the individual existence of Northeast shall cease.

The merger will be effected through conversion of the shares of Northeast into shares of the Surviving Corporation on the basis of one share of Common Stock of Northeast for one-third of one share of Common Stock of TWA, the Surviving Corporation.

TWA, as the Surviving Corporation, will acquire all of Northeast's property and assets, and will assume all of Northeast's liabilities and obligations, as provided in the Merger Agreement.

The Merger Agreement must be approved by a two-thirds vote of the stockholders of TWA and Northeast, as provided by law. In addition, in accordance with the terms of the Merger Agreement, it must be approved by a majority of the stockholders of TWA, other than Toolco, voting at the meeting.

The Merger Agreement may be terminated prior to the effective date (whether before or after submission to the stockholders of either

THE TWO AIRLINES, AND, AFTER JULY 31, 1962, AT THE ELECTION OF EITHER BOARD IF THE AGREEMENT HAS NOT BY THAT DATE RECEIVED THE NECESSARY APPROVAL OF THE CIVIL AERONAUTICS BOARD OR THE SECURITIES AND EXCHANGE COMMISSION OR CERTAIN OTHER EVENTS HAVE NOT OCCURRED AS SET FORTH IN ARTICLE EIGHTH OF THE PROPOSED MERGER AGREEMENT. IN ADDITION, IT MAY BE TERMINATED AT THE ELECTION OF EITHER BOARD IN THE EVENT THAT A SUBSTANTIAL ADVERSE CHANGE IN THE NATURE, CONDITION OR SCOPE OF THE PRESENT BUSINESS OF THE OTHER CORPORATION SHALL OCCUR SUBSEQUENT TO THE DATE OF THE AGREEMENT.

NORTHEAST AIRLINES, INC.
LOGAN INTERNATIONAL AIRPORT
BOSTON 28, MASSACHUSETTS

May 17, 1960

ATTENTION MR. CHARLES S. THOMAS, *President*

TRANS WORLD AIRLINES, INC.,
380 Madison Avenue,
New York, N. Y.

Dear Sirs:

We wish to inform you that the proposed Agreement of Merger annexed hereto (herein called the "Merger Agreement") has been submitted to and considered by the Board of Directors of this Corporation and that the Board of Directors has voted to recommend to the stockholders of this Corporation a merger of this Corporation with and into Trans World Airlines, Inc. (herein called "TWA") upon substantially the terms and conditions therein set forth and to instruct the Chairman of the Board of Directors to present the Merger Agreement forthwith to TWA for consideration by its Board of Directors. The Board of Directors of this Corporation has further voted to authorize the directors members thereof to execute the Merger Agreement as submitted, or with such changes therein as may be mutually agreed upon, at any time on or before July 31, 1960, upon approval of the Merger Agreement (with such changes, if any) by a majority of the directors of TWA.

In accordance with the action taken by the Board of Directors of this Corporation, the proposed Merger Agreement is submitted to you herewith for presentation to the Board of Directors of TWA. A majority of the directors of this Corporation are prepared to execute at any time on or before July 31, 1960 the Merger Agreement as so submitted, or with such changes therein requested by you as they may approve, forthwith upon receipt from you during such period of advice that the Merger Agreement (in the form in which it is proposed to be executed) has been approved by the Board of Directors of TWA and that a majority of the directors members thereof are similarly prepared to execute the same.

Very truly yours,

NORTHEAST AIRLINES, INC.

By .....
Chairman of the Board

3. ADVANTAGES OF MERGER TO TWA

3. A. INCREASED UTILIZATION OF EQUIPMENT.

THE PRESENT ROUTE STRUCTURE OF TWA HAS BUILT IN A WIDE VARIATION IN SEASONAL TRAFFIC LEVEL, TO THE DETRIMENT OF ITS EARNINGS ABILITY.

DOMESTICALLY, TWA'S ROUTES HAVE A WIDE RANGE IN TRAFFIC VOLUME BETWEEN THE SUMMER PEAK AND WINTER LOW OF SOME 50%. THE INTERNATIONAL DIVISION HAS EVEN GREATER VARIATION SINCE BETTER THAN 80% OF TRAFFIC ACROSS THE ATLANTIC IS CARRIED DURING THE FIVE MONTHS MAY-SEPTEMBER. A TABULATION OF TWA'S PASSENGER MILES AND PASSENGER REVENUE, BY MONTH, FOR 1959 AND THE FIRST QUARTER OF 1960 IS SET FORTH IN APPENDICES 3-A-1 AND 3-A-2. EXAMINATION OF THESE DATA SHOWS THAT TWA'S SYSTEM PASSENGER MILES IN 1959 TOTALED 1.03 BILLION FOR THE FIRST QUARTER AND 1.62 BILLION FOR THE THIRD QUARTER. THUS, THE THIRD QUARTER TRAFFIC WAS 155% OF THE FIRST QUARTER'S.

RELIEF OF THIS SITUATION WOULD BE THE ACQUISITION OF ROUTES WHERE THE HEAVIEST BALANCE OF VOLUME FALLS DURING TWA'S LOW PERIOD. COULD THIS BE DONE, HIGHER ANNUAL UTILIZATION OF EQUIPMENT WOULD RESULT WITH ATTENDANT ECONOMY IN THE NEED FOR CAPITAL INVESTMENT IN AIRCRAFT AND OVERHAUL FACILITIES AND INCREASED OPERATING EFFICIENCY.

A MERGER WITH NORTHEAST WHICH WOULD AFFORD TWA ACCESS TO THE NEW YORK-FLORIDA MARKET (WITH ITS HIGH WINTER TRAFFIC PEAK CORRESPONDING TO TWA'S LOW TRAFFIC SEASON) WOULD CONTRIBUTE TO

145

THE ALLEVIATION OF TWA'S EXISTING SEASONAL TRAFFIC IMBALANCE. THE COMPLEMENTARY NATURE OF FLORIDA'S AND TWA'S SEASONAL TRAFFIC VARIATIONS IS SHOWN IN CHART FORM IN APPENDIX 3-A-3 TO THIS REPORT. MIAMI'S DOMESTIC PASSENGER TRAFFIC IN THE FIRST QUARTER IS 137% OF THE THIRD QUARTER IN CONTRAST TO TWA'S VOLUME WHERE THE THIRD QUARTER SUBSTANTIALLY EXCEEDS THE FIRST.

1959	Miami Domestic Passengers
1st Quarter	996,535
3rd Quarter	726,410
Percent 1st Quarter of 3rd Quarter	137 %

DX 57, page 43
(The Huntington Report-1960)

3. INCREASED REVENUES FROM MERGER.

THE MERGED COMPANY WILL REALIZE INCREASED REVENUES FROM TWO SOURCES, (1) INCREASED PARTICIPATION IN FLORIDA TRAFFIC BY WAY OF GREATER UTILIZATION OF EQUIPMENT AND (2) INCREASED TRAFFIC ON TWA'S SYSTEM FROM NEW ONE-CARRIER SERVICE FOR NORTHEAST CITIES.

NO ESTIMATE HAS BEEN MADE AS TO THE EXACT AMOUNT OF THESE POTENTIAL INCREASES IN REVENUES. IT IS OBVIOUS, HOWEVER, THAT ADDITIONAL FREQUENCIES PROVIDED WITH AVAILABLE AND OTHERWISE UNUSABLE TIME COULD BE PROVIDED AT MINIMUM COST, AND THAT ADDITIONAL TRAFFIC ATTRACTED TO EXISTING SERVICES WOULD INCUR ONLY NOMINAL EXPENSE. IT DOES APPEAR, THEREFORE, THAT THE INCREASED REVENUES WILL BE SIGNIFICANT FROM THE PROFIT AND LOSS POINT OF VIEW.

'197

3. c. ECONOMIES RESULTING FROM THE MERGER.

ECONOMIES WILL BE REALIZED FROM TWO SOURCES: (1) INCREASED OPERATING EFFICIENCY AND PRODUCTIVITY OF PLANT, FACILITIES AND PERSONNEL DUE TO THE LEVELING OF TWA'S PRESENT SEASONAL IMBALANCE, AND (2) REDUCTION IN OPERATING EXPENSES FROM CONSOLIDATION OF PLANT, FACILITIES, ETC.

TWA'S STAFF HAS ESTIMATED THAT SAVINGS IN UNIT COSTS OF THE TWO AIRLINES ON A MERGED BASIS WOULD REPRESENT A REDUCTION OF ABOUT 1% FROM THE TOTAL OPERATING EXPENSES OF THE TWO AIRLINES UNMERGED. IF THERE WERE NO INCREASE IN VOLUME, THIS THEN WOULD MEAN SAVINGS OF ABOUT $4,000,000 FOR THE YEAR ENDING DECEMBER 31, 1961. AS MORE PROBABLY WILL BE THE CASE, VOLUME INCREASES FOR THE MERGED AIRLINE RESULTING FROM THE INCREASED UTILIZATION DESCRIBED IN SECTIONS 3-A AND 3-B WILL BE OF SUCH MAGNITUDE THAT THEY WILL (AS A MINIMUM) ABSORB THE PERSONNEL WHO OTHERWISE WOULD BE RELEASED AND WHOSE RELEASE WOULD PROVIDE A PORTION OF THE 1% SAVING.

4. c. TERMS OF EXCHANGE.

THE MERGER AGREEMENT CALLS FOR AN EXCHANGE OF TWA STOCK FOR NORTHEAST ON A 1 FOR 3 BASIS, OR ONE-THIRD OF ONE SHARE OF TWA COMMON STOCK FOR EACH SHARE OF COMMON STOCK OF NORTHEAST. THE EXCHANGE REPRESENTS THE APPROXIMATE RELATION OF THE MARKET PRICES OF THE TWO STOCKS DURING RECENT MONTHS. THE FOLLOWING TABLE SHOWS THE MARKET QUOTATIONS FOR THE TWO STOCKS ON MAY 13, 1960, THE DAY BEFORE THE PRELIMINARY AGREEMENT BETWEEN TOOLCO AND ATLAS:

	SALES	OPEN	HIGH	LOW	CLOSE°
NORTHEAST	900	4 3/4	5	4 3/4	5
TWA	1,100	13 5/8	14 1/8	13 5/8	14 1/8

° RATIO: 1-2.8

PAGE 1 OF APPENDIX 4-C-1 IS A CHART SHOWING THE AVERAGE PRICE OF THE TWO STOCKS FOR THE PAST TWO YEARS BY QUARTERS. PAGE 2 CONTAINS A LISTING OF THE HIGH, LOW AND AVERAGE PRICES OF THE TWO STOCKS BY QUARTERS FOR THE PERIOD 1957-1960 (1ST QUARTER).

AX-1420 TRANS WORLD AIRLINES

DX 62
(TWA Fleet Requirements 1961-70, dated 3/1/61)

TWA FLEET REQUIREMENTS

1961-1970

ISSUED: MARCH 1, 1961

PREPARED BY:

THE PLANNING AND RESEARCH DEPARTMENT
TRANS WORLD AIRLINES, INC.
380 MADISON AVENUE
NEW YORK CITY

DX 62 AX-1421

(TWA Fleet Requirements 1961-70, dated 3/1/61)

PREFACE

I INTRODUCTION I-1

II CONCLUSIONS II-1

III RECOMMENDATIONS III-1

IV RELATIONSHIP OF TWA'S MARKET POTENTIAL TO ITS AIRCRAFT FLEETS IV-1

DOMESTIC

DOMESTIC INDUSTRY GROWTH IN THE PERIOD 1961-1970 IV-2

TWA'S GROWTH POTENTIAL, 1961 TO 1970 IV-3

TWA'S GROWTH POTENTIAL COMPARED TO ITS PRINCIPAL COMPETITORS IV-4

ADEQUACY OF TWA'S EXISTING FLEET IV-5

CAPABILITY OF TWA'S PRINCIPAL COMPETITORS TO SERVE THEIR POTENTIAL MARKETS WITH FLIGHT EQUIPMENT ON HAND OR ON FIRM ORDER IV-6

COMPARISON OF TWA'S UNSERVED POTENTIAL MARKETS COMPARED TO THOSE OF ITS PRINCIPAL COMPETITORS IV-8

EFFECT OF A STATIC TWA FLEET PROGRAM IV-10

INTERNATIONAL

TRANSATLANTIC TRAFFIC GROWTH IN THE PERIOD 1961-1970 IV-13

TWA'S GROWTH POTENTIAL, 1961-1970 IV-14

TWA'S GROWTH POTENTIAL COMPARED TO ITS PRINCIPAL COMPETITORS IV-15

ADEQUACY OF TWA'S EXISTING FLEET IV-16

CAPABILITY OF TWA'S PRINCIPAL COMPETITORS TO SERVE THEIR POTENTIAL MARKETS WITH FLIGHT EQUIPMENT ON HAND OR ON FIRM ORDER IV-17

COMPARISON OF TWA'S UNSERVED MARKET POTENTIAL TO THE MARKET COVERAGE OF ITS PRINCIPAL TRANSATLANTIC COMPETITORS IV-19

EFFECT OF A STATIC TWA FLEET PROGRAM IV-20

E 15856

V	Equipment Availability	V-1
	Manufacturing Lead Time	V-2
	Significant Airplane Characteristics	V-2
	Short Term Vs. Long Term Solutions	V-3
	Airplane Descriptions	V-4
	Lease Possibilities	V-6
	Purchase Possibilities	V-8
	Aircraft Delivery Dates - Convair	V-10
	- Boeing	V-11
	- Douglas	V-13
	Capability of Various New Fleets to Generate Revenue	V-14
	Productive Seat Miles per Day per Airplane	V-15
	Productive Seat Miles per Airplane Fleet	V-17
VI	Economic and Operational Airplane Characteristics	VI-1
	Summary of Configuration and Weight Characteristics	VI-2
	Summary of Airplane Performance Characteristics	VI-3
	Payload Characteristics	VI-5
	Airport Characteristics	VI-5
	Application of the Available Airplane to TWA's Domestic and International Routes	VI-6
	Airplane Purchase Price	VI-7
	Summary of Seat Mile and Airplane Mile Direct Operating Cost	VI-9
	Economic Implications and Competitive Significance of Public Swing to Sky Coach	VI-12
	Airplane Support Evaluation	VI-12
	The Effect of Boeing Becoming the Primary Supplier of Jet Transports	VI-14
	Relative Standardization of Aircraft Fleets in TWA's Situation	VI-15
	Estimated Program Cost Requirements	VI-15

PART V

EQUIPMENT AVAILABILITY

CURRENT AVAILABILITY OF U. S. AIRCRAFT FOR LEASE AND/OR PURCHASE IS DISCUSSED AND ILLUSTRATED IN PART V OF THIS REPORT. FOREIGN BUILT AIRCRAFT, EXCEPT FOR THE DOUGLAS-CARAVELLE, ARE NOT DISCUSSED SINCE INVESTIGATIONS SHOW THEY CANNOT SATISFY AIRPLANE STANDARDIZATION AND SUPPORT REQUIREMENTS WITH PARTICULAR REFERENCE TO PROVIDING A SOLUTION TO TWA'S EQUIPMENT PROBLEM ON A NEAR TERM BASIS.

PART V POINTS OUT THAT LEAD TIME REQUIRED FOR DELIVERY OF AIRCRAFT CALLS FOR EARLY COMMITMENTS TO THE MANUFACTURER IN ORDER TO MINIMIZE TWA'S LOSS OF REVENUE GENERATION IN RELATION TO ITS MARKET POTENTIAL. THE REPORT ALSO POINTS OUT THAT ANY DELAY IN CONSUMMATING EQUIPMENT COMMITMENTS WILL BE REFLECTED IN NEARLY COMMENSURATE DELAY IN PROVIDING EQUIPMENT FOR TWA'S USE.

PART V IS DIVIDED INTO THE FOLLOWING SECTIONS:

- MANUFACTURING LEAD TIME
- SIGNIFICANT AIRPLANE CHARACTERISTICS
- SHORT TERM VS. LONG TERM SOLUTIONS
- AIRPLANE DESCRIPTIONS
- LEASE POSSIBILITIES
- PURCHASE POSSIBILITIES
- CAPABILITY OF VARIOUS NEW FLEETS TO GENERATE REVENUE

V EQUIPMENT AVAILABILITY V-1

MANUFACTURING LEAD TIME V-2
SIGNIFICANT AIRPLANE CHARACTERISTICS V-2
SHORT TERM VS. LONG TERM SOLUTIONS V-3
AIRPLANE DESCRIPTIONS V-4
LEASE POSSIBILITIES V-6
PURCHASE POSSIBILITIES V-8
AIRCRAFT DELIVERY DATES - CONVAIR V-10
- BOEING V-11
- DOUGLAS V-13
CAPABILITY OF VARIOUS NEW FLEETS TO GENERATE REVENUE V-14
PRODUCTIVE SEAT MILES PER DAY PER AIRPLANE V-15
PRODUCTIVE SEAT MILES PER AIRPLANE FLEET V-17

VI ECONOMIC AND OPERATIONAL AIRPLANE CHARACTERISTICS VI-1

SUMMARY OF CONFIGURATION AND WEIGHT CHARACTERISTICS VI-2
SUMMARY OF AIRPLANE PERFORMANCE CHARACTERISTICS VI-3
PAYLOAD CHARACTERISTICS VI-5
AIRPORT CHARACTERISTICS VI-5
APPLICATION OF THE AVAILABLE AIRPLANE TO TWA's DOMESTIC AND INTERNATIONAL ROUTES VI-6
AIRPLANE PURCHASE PRICE VI-7
SUMMARY OF SEAT MILE AND AIRPLANE MILE DIRECT OPERATING COST VI-9
ECONOMIC IMPLICATIONS AND COMPETITIVE SIGNIFICANCE OF PUBLIC SWING TO SKY COACH VI-12
AIRPLANE SUPPORT EVALUATION VI-12
THE EFFECT OF BOEING BECOMING THE PRIMARY SUPPLIER OF JET TRANSPORTS VI-14
RELATIVE STANDARDIZATION OF AIRCRAFT FLEETS IN TWA's SITUATION VI-15
ESTIMATED PROGRAM COST REQUIREMENTS VI-15

PART V

EQUIPMENT AVAILABILITY

CURRENT AVAILABILITY OF U. S. AIRCRAFT FOR LEASE AND/OR PURCHASE IS DISCUSSED AND ILLUSTRATED IN PART V OF THIS REPORT. FOREIGN BUILT AIRCRAFT, EXCEPT FOR THE DOUGLAS-CARAVELLE, ARE NOT DISCUSSED SINCE INVESTIGATIONS SHOW THEY CANNOT SATISFY AIRPLANE STANDARDIZATION AND SUPPORT REQUIREMENTS WITH PARTICULAR REFERENCE TO PROVIDING A SOLUTION TO TWA'S EQUIPMENT PROBLEM ON A NEAR TERM BASIS.

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V EQUIPMENT AVAILABILITY

MANUFACTURING LEAD TIME

PART IV OF THIS REPORT SHOWS THAT TWA'S REQUIREMENT FOR ADDITIONAL AIRCRAFT CALLS FOR EARLY SOLUTION IN ORDER TO RECAPTURE ITS LOST SHARE OF THE MARKET AND TO MORE FULLY SERVE ITS EXPANDING POTENTIAL MARKETS, BOTH DOMESTIC AND INTERNATIONAL.

NORMAL LEAD TIME FOR CONSTRUCTION OF A JET AIRLINER OF A TYPE ALREADY IN SUBSTANTIAL PRODUCTION IS ONE TO ONE AND ONE-HALF YEARS. LEAD TIME FOR NEW TYPE JET AIRCRAFT NOT IN PRODUCTION VARIES FROM THREE TO FOUR YEARS. THESE SIZABLE LEAD TIMES CALL FOR EARLY EQUIPMENT COMMITMENTS. FURTHER, IT SEEMS OBVIOUS THAT THE MOST ECONOMICAL AND QUICKEST WAY FOR TWA TO EXPAND ITS FLEET AND TO SATISFY ITS SHORT TERM MARKET REQUIREMENTS IS TO ACQUIRE ADDITIONAL AIRCRAFT OF SUBSTANTIALLY THE SAME TYPE IT NOW SUCCESSFULLY OPERATES AND WHICH TYPES ARE IN PRODUCTION. THIS COULD BE DONE EITHER BY LEASE OR PURCHASE OR A COMBINATION OF BOTH, DEPENDING ON FINANCING AND OTHER CONSIDERATIONS.

SIGNIFICANT AIRPLANE CHARACTERISTICS

A SUBSEQUENT PART OF THIS REPORT COMPARES AND ANALYZES THE ECONOMICAL AND OPERATIONAL ADVANTAGES AND DISADVANTAGES OF EACH TYPE OF AIRPLANE BEING CONSIDERED. HENCE, THIS SUBJECT WILL NOT BE CONSIDERED IN DETAIL HERE. HOWEVER, IT IS PERHAPS WELL TO POINT OUT AT THE OUTSET THAT DERIVATIVE AIRPLANE DESIGNS (I.E., THOSE DERIVED FROM THE ORIGINAL TYPES) NOW BEING PRODUCED SUCH AS THE SECOND GENERATION, FAN-POWERED BOEINGS, CONVAIRS AND DOUGLAS', WILL ALL OPERATE SO CLOSE TO THE SPEED OF SOUND THAT VIRTUALLY NO SPEED ADVANTAGES OF ONE TYPE COMPARED TO THE OTHER WILL EXIST BETWEEN AIRLINES HAVING THE TURBO-FAN POWERED JETS. THIS SITUATION WILL EXIST FOR SEVERAL YEARS AT LEAST.

CONSEQUENTLY, WHEN THE AIRLINES ARE EQUIPPED WITH FAN EQUIPMENT, DIFFERENCES IN SCHEDULES BETWEEN AIRLINES WILL REFLECT VARIATIONS IN AIRLINE ROUTES, OPERATIONAL PRACTICES AND SCHEDULE DECISIONS RATHER THAN AIRPLANE PERFORMANCE. FOR COMPARABLE FLIGHT SEGMENTS, SCHEDULED TIMES COULD BE VIRTUALLY THE SAME FOR ALL AIRLINES HAVING MODERN TURBO-FAN EQUIPMENT. THEREFORE, THE CHARACTERISTICS OF LATE MODEL TURBO-FAN EQUIPMENT OF GREATEST SIGNIFICANCE TO THE AIRLINE ARE:

1. AIRPLANE OPERATING COST CHARACTERISTICS IN RELATION TO THE MARKET TO BE SERVED. RELATIONSHIP OF PER MILE VS. SEAT MILE COST TO THE RELATIVE GROWTH OF THE FIRST CLASS AND SKY COACH MARKETS.

2. AIRPLANE AIRPORT PERFORMANCE CHARACTERISTICS. WILL THE AIRCRAFT PERFORMANCE CHARACTERISTICS MATCH AIRPORT CHARACTERISTICS IN THE MARKETS INTENDED TO BE SERVED?

3. PUBLIC ACCEPTANCE OF THE AIRPLANE. IS THE AIRPLANE COMFORTABLE AND ATTRACTIVE TO THE CUSTOMER? DOES IT HAVE RANGE AND OTHER CHARACTERISTICS REQUIRED TO FLY THE ROUTES THE CUSTOMER DESIRES? DOES THE AIRPLANE AND THE MANUFACTURER HAVE A GOOD REPUTATION?

4. AIRCRAFT SUPPORT PROGRAM. AVAILABILITY AND COST OF SPARE PARTS, GROUND SUPPORT EQUIPMENT, AND CORRECTIVE (MAINTENANCE) ENGINEERING.

5. SALES APPEAL. ADVERTISING IMPACT OF THE AIRCRAFT ON THE PUBLIC AND THE SERVICE OFFERED BY THE AIRCRAFT.

6. ECONOMIC AND MECHANICAL OBSOLESCENCE FACTORS.

7. AIRPLANE SIZE. IS THE AIRPLANE SIZE CORRECT IN RELATION TO THE MARKET TO BE SERVED?

IN ANY EVENT, HISTORY PROVES THAT COMPETITIVE SPEEDS CANNOT BE SACRIFICED TO ANY SIGNIFICANT EXTENT FOR ANY SIGNIFICANT PERIOD OF TIME WITHOUT ECONOMIC PENALTY TO THE AIRLINE. WHILE BEYOND THE SCOPE OF THIS REPORT, PERHAPS IT IS ADMISSABLE TO OBSERVE, THAT WITH SCHEDULE SPEED EQUALITY A VIRTUAL CERTAINTY IF TWA PROCURES MODERN TURBO-FAN JETS, TWA ADVERTISING CAN BEST BE DIRECTED TO OTHER AREAS OF INTEREST TO THE PASSENGER THAN SPEED - SCHEDULE CONVENIENCE, IN-FLIGHT PASSENGER SERVICE, COMFORT OF THE FLIGHTS. GROUND FACILITIES. INSTANT RESERVATIONS, ETC. THIS SUGGESTS TWA SHOULD BUILD TOWARD A PUBLIC IMAGE OF UNEXCELLED SERVICE AND CONVENIENCE RATHER THAN ALMOST WHOLLY CONCENTRATING ON BEING "SPEED MERCHANTS".

SHORT TERM VS. LONG TERM SOLUTIONS

WHILE TWA HAS URGENT NEED FOR ACQUIRING ADDITIONAL JET AIRCRAFT QUICKLY, IT MUST EXERCISE PRUDENCE LEST IT SOLVE ITS SHORT TERM PROBLEM AT THE EXPENSE OF ITS LONG TERM PROFIT OBJECTIVES. FOR EXAMPLE, TWA MIGHT ACQUIRE A SMALL FLEET OF NONSTANDARD AIRCRAFT WHICH WOULD BE MORE EXPENSIVE TO OPERATE THAN IF IT PROCURED STANDARD OR NEAR STANDARD TYPE AIRCRAFT BUT WHICH WOULD STILL BE PROFITABLE FOR THE NEXT YEAR OR SO. HOWEVER, CONTINUING EXTRA COSTS FROM AN UNNECESSARILY DIVERSE FLEET EXTENDED THROUGH THE YEARS COULD FAR OUTWEIGH THE INITIAL ADVANTAGE OF EARLY FLEET DELIVERY.

SIMILARLY, TWA MUST BE CAREFUL TO PROCURE OR LEASE AIRCRAFT WHICH CAN BE SMOOTHLY, EFFICIENTLY AND ECONOMICALLY INTEGRATED INTO TWA OPERATIONS. IN THIS RESPECT, AIRCRAFT BASIC TYPE STANDARDIZATION IS SIGNIFICANT AND IMPORTANT. LEASING RATHER THAN PURCHASING MAY AID THE SHORT TERM SOLUTION INSOFAR AS USE OF A NONSTANDARD TYPE AIRPLANE IS CONCERNED. THIS COURSE COULD OFFER ADVANTAGES FOR SHORT TERM FLEET USE IF ADEQUATE LEASE TERMINATION RIGHTS WERE OBTAINED. ON THE OTHER HAND, FOR LONG TERM USE IT WOULD PAY TO PURCHASE RATHER THAN LEASE AIRCRAFT OF A REASONABLY COMPATIBLE TYPE IF AT ALL POSSIBLE TO DO SO.

UNFORTUNATELY, SOME OF THE AIRPLANES WHICH MIGHT BE AVAILABLE THE QUICKEST ARE NOT CONFIGURED TO TWA STANDARDS.

REASONABLE ECONOMIC BALANCE BETWEEN SHORT TERM AND LONG TERM SOLUTIONS TO TWA'S EQUIPMENT PROBLEM IS ESSENTIAL. THIS IS RECOGNIZED AND THIS ASPECT IS TREATED MORE FULLY IN A LATER PORTION OF THIS REPORT.

AIRPLANE DESCRIPTIONS

CONVAIR 880 TWA

THE CONVAIR 880 "SUPERJET" IS PRESENTLY BEING INTRODUCED OVER TWA ROUTES. WHEN DELIVERIES ARE COMPLETED, THE FLEET WILL COMPRISE TWENTY AIRPLANES. THE AIRPLANE IS DESIGNED FOR OPERATION AT MEDIUM RANGE SUCH AS ONE OR TWO STOP TRANSCONTINENTAL OPERATION. FOUR ABREAST FIRST CLASS AND FIVE ABREAST TOURIST SEATING IS PROVIDED. ALL FIRST CLASS PASSENGER CAPACITY IS 84 PASSENGERS AND ALL TOURIST CAPACITY IS 105 PASSENGERS. THIS TYPE IS CURRENTLY BEING ADVERTISED AS THE "WORLD'S FASTEST".

CONVAIR 880M CAPITAL

THIS AIRPLANE IS A DERIVATIVE OF THE BASIC 880 AIRPLANE. WITH THE ADDITION OF MORE CENTER WING FUEL TANKS (NOT PRESENTLY INCLUDED) GREATER RANGE IS POSSIBLE. THE AIRPLANE HAS WING LEADING EDGE DEVICES DESIGNED TO PROVIDE IMPROVED TAKEOFF AND LANDING PERFORMANCE. THE ENGINE IS A NON-FAN DERIVATIVE OF THE GENERAL ELECTRIC CJ805 ENGINE NOW INSTALLED ON THE 880 AIRPLANE. THE COCKPIT INSTRUMENTATION IS CONFIGURED TO CAPITAL AIRLINES' REQUIREMENTS AND IS NOT STANDARD WITH THE TWA 880 COCKPIT. THE PASSENGER INTERIOR IS DIFFERENT IN COLOR SCHEME AND IN CONCEPT WHEN COMPARED TO THE TWA 880 ALTHOUGH IT HAS THE SAME SEATING CAPACITY. OTHER SYSTEM DIFFERENCES EXIST. THE 880M IS THE SAME SIZE BUT HEAVIER THAN THE 880.

CONVAIR 990 AMERICAN

THE CONVAIR 990 DESIGN IS DERIVED DIRECTLY FROM THE CONVAIR 880. THE AIRPLANE IS DESIGNED TO ACHIEVE A HIGHER MAXIMUM SPEED THAN THE 880, TO PROVIDE IMPROVED AIRPORT CAPABILITIES AND TO HAVE TRUE TRANSCONTINENTAL NONSTOP HIGH SPEED CAPABILITIES. TO ACCOMPLISH THESE OBJECTIVES, THE AIRPLANE UTILIZES THE GENERAL ELECTRIC TURBOFAN ENGINE, WING LEADING EDGE DEVICES, AND ANTI SHOCK BODIES ON THE WING. THE COCKPIT INSTRUMENTATION IS DESIGNED TO MEET AMERICAN'S REQUIREMENTS AND IS NOT STANDARD WITH THE TWA 880 COCKPIT. IN ADDITION, MAJOR SYSTEM DIFFERENCES EXIST BETWEEN IT AND THE 880 SUCH AS A DIFFERENT AUTOMATIC FLIGHT CONTROL SYSTEM. THE FUSELAGE IS THREE SEAT ROWS LONGER THAN THE 880 GIVING A TWELVE TO FIFTEEN PASSENGER GREATER SEATING CAPABILITY THAN THE 880 OR THE 880M.

CONVAIR 990 TWA

THIS AIRPLANE WOULD BE EQUIVALENT OF THE AMERICAN AIRLINES VERSION EXCEPT THAT THE COCKPIT CONFIGURATION, THE AUTOMATIC FLIGHT CONTROL AND OTHER SYSTEMS WOULD BE IDENTICAL OR NEARLY IDENTICAL TO THE 880 AIRPLANE. IN ADDITION, THE INTERIOR CONFIGURATION WOULD BE LAID OUT TO MEET CURRENT TWA REQUIREMENTS.

BOEING 720B

THIS AIRPLANE IS A DERIVATIVE MODEL OF THE BASIC BOEING JET SERIES. IT DIFFERS FROM THE BASIC TWA MODEL 131 IN THAT IT HAS A THREE SEAT ROW SHORTER FUSELAGE, P & W TURBOFAN ENGINES AND FULL SPAN WING LEADING EDGE DEVICES AND LEADING EDGE GLOVES. IT IS DESIGNED TO OPERATE AT MEDIUM RANGES FROM MEDIUM SIZED AIRPORTS, ALTHOUGH IT ALSO HAS THE ABILITY TO OPERATE AT NON-STOP TRANSCONTINENTAL RANGES IF ADDITIONAL FUEL TANKS ARE INSTALLED. THE SHORTER FUSELAGE LIMITS PASSENGER CAPACITY TO 12 TO 18 LESS PASSENGERS THAN TWA'S 707-131 AIRCRAFT. THIS, LIKE ALL THE BOEING JETS, PROVIDES SPACE FOR SIX WIDE TOURIST SEAT ROWS.

BOEING 131B

THIS AIRPLANE IS A DERIVATIVE OF TWA'S PRESENT BOEING DOMESTIC SUPERJET. MAJOR DIFFERENCES RESULT FROM THE ADDITION OF P & W TURBOFAN ENGINES AND MODIFICATION OF THE WING INCLUDING FULL SPAN LEADING EDGE DEVICES AND A LEADING EDGE "GLOVE". THESE CHANGES MAKE THE 131B A VERY VERSATILE AIRPLANE HAVING THE CAPABILITY OF TRANSATLANTIC NON-STOP OPERATION AS WELL AS HIGH SPEED DOMESTIC NON-STOP TRANSCONTINENTAL OPERATION. THIS AIRPLANE IS THE SAME SIZE AS THE BOEING 131'S TWA OPERATES IN TRANSCONTINENTAL SERVICE, BUT WOULD HAVE SOMEWHAT HIGHER GROSS WEIGHT.

BOEING 331A-9

THIS AIRPLANE IS ESSENTIALLY IDENTICAL TO THE TWA BOEING INTERCONTINENTAL MODEL 331 SUPERJET. THE SIGNIFICANT CHANGES ARE NEW LANDING GEAR AND BRAKES TO PROVIDE FOR INCREASED MAXIMUM GROSS WEIGHT. TWA'S 331'S CAN BE MODIFIED TO THIS CONFIGURATION.

BOEING 331A-11

THIS AIRPLANE IS ESSENTIALLY THE SAME AS THAT DESCRIBED ABOVE (A-9) EXCEPT THAT THE A-11 ENGINE HAS A HIGHER THRUST RATING PERMITTING IMPROVED AIRPORT PERFORMANCE AND IMPROVED HIGH ALTITUDE HIGH SPEED CAPABILITIES.

BOEING 331B

THIS AIRPLANE IS A DERIVATIVE OF THE TWA BOEING INTERCONTINENTAL SUPERJET. THIS MODEL IS CAPABLE OF VERY LONG RANGE OPERATION SUCH AS LOS ANGELES TO LONDON OR PARIS OR SAN FRANCISCO TO LONDON OR PARIS VIA THE POLAR ROUTE OR ROME-NEW YORK NON-STOP. THE AIRPLANE IS POWERED BY AN ADVANCED VERSION OF THE P & W TURBOFAN ENGINE. STRUCTURAL IMPROVEMENTS PROVIDE HIGHER MAXIMUM TAKEOFF WEIGHTS. THE HIGHER ALLOWABLE GROSS WEIGHT COMBINED WITH THE MORE ECONOMIC OPERATION OF THE TURBOFAN ENGINE PROVIDE THE EXTREME LONG RANGE CAPABILITY. ADDED POWER IMPROVES TAKEOFF PERFORMANCE FROM MARGINAL AIRPORTS SUCH AS LONDON, ENGLAND. THE FUSELAGE IS THE SAME SIZE AS THE MODEL 331 JETS TWA PRESENTLY FLYS IN INTERNATIONAL SERVICE.

BOEING 727

THIS AIRPLANE IS BOEING'S ENTRY IN THE SHORT TO MEDIUM HAUL MARKET. THIS ENTIRELY NEW AIRPLANE HAS BEEN ORDERED IN QUANTITY BY UNITED AND EASTERN AIRLINES. IT IS A TRIMOTOR PLANE WITH ALL THREE ENGINES MOUNTED ON THE REAR OF THE FUSELAGE. THE AIRPLANE UTILIZES HIGH LIFT DEVICES ON THE WING TO PERMIT UNLIMITED OPERATION FROM AIRPORTS SUCH AS LAGUARDIA AND MIDWAY. ITS FUSELAGE DIAMETER IS THE SAME AS THE 707, THUS PERMITTING SIX ABREAST SEATING IN TOURIST CONFIGURATION. ALL FIRST CLASS PASSENGER CAPACITY IS 70 AND ALL TOURIST CAPACITY IS 113.

DOUGLAS CARAVELLE VII

THIS IS A SHORT TO MEDIUM RANGE AIRPLANE DESIGNED BY SUD EST IN FRANCE AND MARKETED BY DOUGLAS IN THE UNITED STATES. IT IS POWERED BY TWO ENGINES MOUNTED IN THE REAR OF THE FUSELAGE. THIS AIRPLANE IS SIMILAR TO THE VERSION OF THE CARAVELLE PRESENTLY FLYING IN EUROPE EXCEPT THAT THE ENGINES ARE GENERAL ELECTRIC TURBOFANS GIVING THE AIRCRAFT IMPROVED AIRPORT AND FLIGHT PERFORMANCE. IT IS CONSIDERABLY SMALLER THAN THE BOEING OR CONVAIR COMMERCIAL JET SERIES SEATING 68 PASSENGERS IN ALL FIRST CLASS SERVICE AND 90 PASSENGERS IN ALL TOURIST CONFIGURATION.

THREE VIEW DRAWINGS, AS WELL AS DETAIL DIMENSIONAL, WEIGHT, CAPACITY AND PERFORMANCE DATA FOR THE AIRCRAFT DISCUSSED ABOVE ARE PROVIDED FOR REFERENCE PURPOSES IN APPENDIX D.

LEASE POSSIBILITIES

IT WOULD PECULIARLY HELP TWA'S SHORT TERM EQUIPMENT DILEMMA IF TWA COULD QUICKLY LEASE FLIGHT EQUIPMENT OF ESSENTIALLY THE SAME TYPE IT NOW OPERATES FOR EARLY USE. POSSIBILITIES FOR LEASING FLIGHT EQUIPMENT ARE EXTREMELY LIMITED:

1. LEASE A NUMBER OF NORTHEAST AIRLINES CONVAIR 880'S DURING THE SUMMER AND FALL SEASON. SINCE NEA HAS ONLY SIX CONVAIR 880'S, AND IN LIGHT OF JET COMPETITION FROM NATIONAL AIRLINES AND EASTERN AIRLINES, IT IS UNLIKELY THAT NEA MANAGEMENT WILL BE ABLE TO JUSTIFY LEASE OF JETS TO TWA. EVEN IF THE PENDING MERGER SHOULD BE CONSUMMATED SOON, IT IS NOT CLEAR THAT AIRCRAFT COULD BE DIVERTED FROM THE NEA FLORIDA ROUTES THIS SUMMER. HOWEVER, THE MERGER HAS NOT BEEN CONSUMMATED AND EQUIPMENT LEASE DISCUSSIONS ARE UNDERWAY.

2. LEASE UP TO FOUR CONVAIR 880'S FROM THE HUGHES TOOL COMPANY OR FROM CONVAIR, THE SOURCE DEPENDING ON OWNERSHIP. THESE AIRCRAFT, PART OF THE INITIAL 30 ORDERED BY THE HUGHES TOOL COMPANY FROM CONVAIR COULD BE MADE AVAILABLE FROM A MANUFACTURING POINT OF VIEW BY JUNE 30, 1961. THESE AIRCRAFT ARE BEING MANUFACTURED TO TWA'S STANDARD CONFIGURATIONS AND WOULD BE PRODUCTIVE ALMOST UPON DELIVERY. HOWEVER, WHETHER OR NOT A LEASE FROM EITHER PARTY COULD BE CONSUMMATED IS CURRENTLY HIGHLY PROBLEMATICAL OR EVEN DOUBTFUL. POSSIBILITIES FOR PURCHASING THESE AIRCRAFT IS DISCUSSED ELSEWHERE.

3. LEASE CONVAIR 880M'S. CONVAIR RECENTLY ADVISED THE HUGHES TOOL COMPANY THAT IT, CONVAIR, RESCINDED THE CONTRACT FOR THE CONSTRUCTION OF SEVEN CONVAIR 880M'S BECAUSE OF ALLEGED COMPLETE LACK OF PERFORMANCE ON THE PART OF THE HUGHES TOOL COMPANY. IT IS UNDERSTOOD THAT THE HUGHES TOOL COMPANY HAS NOT ACCEPTED CONVAIR'S ACT OF CONTRACT RESCISION AS FINAL. WHETHER CONVAIR WOULD BE WILLING TO LEASE 880M'S FOR TWA'S USE IS NOT KNOWN AT THIS WRITING. IT IS SUSPECTED THAT SINCE CONVAIR BELIEVES IT CAN SELL THESE AIRCRAFT SEVERAL TIMES OVER, THAT IT WOULD HAVE NO SUCH INTEREST UNLESS TWA AGREED TO PURCHASE ADDITIONAL AIRCRAFT. THESE AIRCRAFT ARE STILL INCOMPLETE BUT COULD BE MADE AVAILABLE DURING THE JUNE-DECEMBER 1961 PERIOD.

SEVERAL FACTORS MILITATE AGAINST LEASE OF 880M'S:

A. INHERENT RISK OF DEALING WITH CONVAIR UNDER EXISTING COMPLICATED TERMS OF REFERENCE.

B. THE 880M'S WERE CONTRACTED TO BE BUILT TO CAPITAL AIRLINES' SPECIFICATIONS. CASH COSTS FOR CONVERSION OF SEVEN AIRCRAFT TO TWA SPECIFICATIONS ARE ESTIMATED TO BE $1,400,000 AND WOULD DELAY USE APPROXIMATELY TWO MONTHS PER AIRPLANE.

IF THE AIRCRAFT SHOULD NOT BE STANDARDIZED, THE COST FOR ADDITIONAL TRAINING FOR FLIGHT CREWS AND NECESSARY SEGREGATION OF FLIGHT CREWS ARE ESTIMATED TO BE $600,000 THE FIRST YEAR AND APPROXIMATELY $470,000 PER RECURRING YEAR. THIS ITEM ALONE TOTALS $2,480,000 OVER FIVE YEARS. COSTS FOR NON-COMMON SPARES FOR

INITIAL PROVISIONING WOULD BE APPROXIMATELY $800,000. SPECIAL COSTS FOR PREPARING THESE AIRCRAFT FOR OPERATION IF NOT CONVERTED TO TWA STANDARD CONFIGURATIONS WOULD BE APPROXIMATELY $240,000.

c. DELIVERY UNCERTAINTY.

POSSIBILITIES OF PURCHASING THESE AIRCRAFT ARE DISCUSSED ELSEWHERE.

4. LEASE OF SIX BOEING 720B'S BUILT TO NORTHWEST AIRLINES SPECIFICATIONS.

WHILE BOEING WOULD PREFER TO SELL, IT WOULD PROBABLY BE WILLING TO LEASE THESE AIRCRAFT IF TWA PURCHASED A MINIMUM OF TEN NEW JETS FOR DELIVERY DURING 1962. THESE AIRCRAFT ARE NOT YET FULLY MANUFACTURED AND COULD BE MADE AVAILABLE TO TWA BEGINNING IN AUGUST, PROVIDED TWA CLOSES A DEAL WITH BOEING QUICKLY. TWO CAN BE MADE AVAILABLE IN AUGUST, TWO IN SEPTEMBER AND TWO IN OCTOBER. THESE WOULD BE TURBOFAN AIRCRAFT AND FULLY MODERN AND COMPETITIVE IN EVERY RESPECT. HOWEVER, SPECIAL COSTS TO OPERATE IN THE NWA CONFIGURATION WOULD BE APPROXIMATELY $1,600,000 FOR PROVISIONING, $510,000 FOR SPECIAL FLIGHT TRAINING THE FIRST YEAR AND $400,000 FOR RECURRING YEARS.

5. LEASE OF JET EQUIPMENT FROM OTHER U. S. OR FOREIGN AIRLINES. NO POSSIBILITY IS KNOWN TO EXIST SINCE ALL AIRLINES BELIEVE THEY ARE SHORT OF JET EQUIPMENT EVEN FOR THEIR OFF PEAK SEASONS.

NO SIMPLE LEASE AGREEMENT FOR JET AIRCRAFT IS KNOWN TO BE AVAILABLE. HOWEVER, THE MOST LIKELY PROSPECTS FOR EARLY CONSUMMATION OF AIRCRAFT LEASE AGREEMENTS WOULD BE FROM THE BOEING AEROPLANE COMPANY, BUT ONLY IF TWA AGREED TO PURCHASE ADDITIONAL BOEING JET AIRCRAFT FOR DELIVERY DURING 1962. (TEN IS BELIEVED TO BE THE MINIMUM NUMBER BOEING WOULD ENTERTAIN).

PURCHASE POSSIBILITIES

General Discussion

PURCHASE POSSIBILITIES CAN BEST BE REFLECTED BY SHOWING DELIVERY DATES FOR AIRCRAFT AVAILABLE FOR PURCHASE. ONLY MANUFACTURERS THAT CAN PRODUCE AIRCRAFT OF A TYPE SUITABLE FOR BOTH SHORT AND LONG TERM CORRECTIVE ACTION ARE CONSIDERED. SUCH MANUFACTURERS ARE:

1. THE BOEING AIRPLANE COMPANY
2. CONVAIR, A DIVISION OF GENERAL DYNAMICS
3. DOUGLAS AIRCRAFT COMPANY (SUD EST OF FRANCE)

THE FOLLOWING FOUR TABLES SHOW AIRPLANE AVAILABILITY BY: MANUFACTURER, AIRPLANE MODEL NUMBER, AIRPLANE CUSTOMER CONFIGURATION, REQUIRED COMMITMENT DATES, AND AIRPLANE DELIVERIES PER MONTH AND CUMULATIVELY.

IF AIRCRAFT ARE NOT PLACED ON FIRM ORDER BY THE COMMITMENT DATES SHOWN, DELIVERY DATES SHOWN CANNOT BE CONSIDERED VALID. UNUSUALLY SHORT LEAD TIMES ARE SHOWN FOR BOTH BOEING AND CONVAIR AIRCRAFT. THIS REFLECTS THE FACT THAT SOME OF THE AIRCRAFT ARE ALREADY UNDER CONSTRUCTION SUCH AS THE CONVAIR 880, 880M, AND 990 TYPES AND THE BOEING 720B TYPE BEING BUILT TO NWA SPECIFICATIONS. SHORT LEAD TIME ALSO REFLECTS THE MANUFACTURERS' INTEREST IN PROVIDING EARLY RELIEF TO TWA'S EQUIPMENT SHORTAGE PROBLEM. THIS APPEARS PARTICULARLY TRUE OF BOEING WHICH SEEMS MOST ANXIOUS TO CAPTURE TWA'S BUSINESS. BOEING IS OFFERING THE SHORTEST LEAD TIME IT HAS EVER OFFERED ANY COMMERCIAL CUSTOMER; HOWEVER, THERE IS LITTLE DOUBT CONCERNING BOEING'S ABILITY TO PRODUCE ON TIME.

IT CANNOT BE ASSUMED THAT ALL AIRCRAFT SHOWN CAN, IN FACT, BE MADE AVAILABLE TO TWA. THIS IS PARTICULARLY TRUE OF CONVAIR SINCE A NUMBER OF THE AIRCRAFT ARE PRESENTLY ON ORDER BY THE HUGHES TOOL COMPANY. FURTHER, THE SIX BOEING 720B'S BEING BUILT TO NWA'S SPECIFICATIONS ARE SPECIFICALLY AVAILABLE SUBJECT TO PRIOR SALE TO CONTINENTAL AIR LINES.

SIMILARLY, ALL UNCOMMITTED AIRPLANE DELIVERY POSITIONS ARE SUBJECT TO PRIOR SALE, ALTHOUGH IT IS EXPECTED BOEING WOULD GIVE TWA THE RIGHT OF FIRST REFUSAL ON ALL EXCEPT THE SIX 720B'S MENTIONED ABOVE.

SIMILARLY, IT CANNOT BE ASSUMED THAT ALL MODELS OF AIRCRAFT CAN BE AVAILABLE SIMULTANEOUSLY ON THE SPECIFIC DELIVERY DATES SHOWN. EACH FLEET CAN BE INDIVIDUALLY, BUT NOT ALL FLEETS, COMBINED. IN THIS RESPECT, THE BOEING AIRPLANE COMPANY IS IN A BETTER POSITION TO DELIVER AIRCRAFT AT A HIGHER MONTHLY RATE THAN EITHER CONVAIR OR DOUGLAS, ALTHOUGH CONVAIR COULD DELIVER EARLIER PROVIDED COMPLICATED INTER-CORPORATE (CONVAIR-HUGHES TOOL CO.-TWA) CONTRACTURAL ASPECTS COULD BE WORKED OUT FAVORABLY.

CONVAIR

CONVAIR'S ABILITY TO DELIVER ON THE DATES SHOWN IS BELIEVED LESS RELIABLE THAN BOEING'S ABILITY TO DELIVER ON THE DATES SHOWN. THIS VIEW IS HELD FOR SEVERAL REASONS:

1. TECHNICAL DESIGN DIFFICULTIES WITH THE MODELS 880M AND 990 THAT REQUIRE REDESIGN AND REDEVELOPMENT. SOLUTIONS TO THESE PROBLEMS ARE NOT CURRENTLY FULLY KNOWN. ON THE OTHER HAND, THE BOEING AIRCRAFT, EXCEPT FOR THE 331B TYPE, ARE ALREADY ENGAGED IN SUCCESSFUL AIRLINE OPERATIONS.

2. CONVAIR'S PRODUCTION PLANNING AND CONTROL ACTIVITIES ARE INADEQUATE AS EVIDENCED BY ITS FAILURE TO MEET MODEL 880 DELIVERY PROMISES TO TWA. IN CONTRAST TO THIS, BOEING HAS PRODUCED 720B'S AND 320'S AT MUCH HIGHER RATES AND ON TIME.

3. CONVAIR'S COMMERCIAL PRODUCTION LINE RESEMBLES A JOB SHOP RATHER THAN PRODUCTION LINE TYPE ACTIVITY. BOEING'S FACTORY IS CLEAN, ORDERLY AND EFFICIENT.

AIRCRAFT DELIVERY DATES

CONVAIR

MODEL	880 1/		880M 2/		990 3/		990 4/	
CONFIGURATION	TWA		CAP		AA		TWA	
DELIVERY DATE 5/	PER MONTH	TOTAL	PER MONTH	TOTAL	PER MONTH	TOTAL	PER MONTH	TOTAL
APRIL 1961	1	1						
MAY	3	4						
JUNE			1	1				
JULY			1	2				
AUG.			0	2				
SEPT.			1	3				
OCT.			2	5				
NOV.			1	6				
DEC.			1	7	1	1		
JAN. 1962					3	4		
FEB.					3	7		
MAR.					3	10		
APR.					3	13		
MAY							3	3
JUNE							3	6
JUL.							3	9
AUG.							3	12
SEPT.							3	15
OCT.							3	18
NOV.							3	21
DEC.							3	24
JAN. 1963							3	27
FEB.							3	30

1/ THESE AIRCRAFT ARE ON FIRM ORDER BY THE H.T. CO. AND ARE PART OF THE 30 880'S INITIALLY ORDERED FROM CONVAIR. DELIVERY TO TWA BY DATES SHOWN CONTINGENT ON EARLY GO-AHEAD.

2/ THESE SHIPS PARTIALLY CONSTRUCTED BUT ARE NOT NOW IN ACTIVE WORK. PRIMARY STRUCTURAL COMPONENTS HAVE BEEN MANUFACTURED AND STORED. THESE AIRCRAFT ARE NOT SOLD. IF BUILT TO TWA'S, RATHER THAN CAP'S, STANDARDS, INITIAL AIRCRAFT DELIVERY WOULD SLIP TO APPROXIMATELY OCTOBER. CONVAIR DOES NOT WISH TO COMPLETE THESE AIRCRAFT TO CAP STANDARDS. DELIVERIES SHOWN BASED ON IMMEDIATE GO-AHEAD.

3/ NINE OF THE THIRTEEN AIRCRAFT SHOWN ARE BELIEVED TO BE ON FIRM ORDER. THE REMAINING SEVEN ARE REPORTEDLY BEING BUILT BY CONVAIR UNDER AN ARRANGEMENT WITH THE H.T. CO. WHICH PERMITS CONVAIR TO RECOVER ITS COSTS IN THE EVENT THESE AIRCRAFT ARE NOT PLACED ON FIRM ORDER.

4/ THESE DELIVERY POSITIONS ASSUME THAT ALL THIRTEEN 990 AIRCRAFT DISCUSSED IN NOTE 3 WILL BE DELIVERED.

5/ ALL DELIVERIES BY MONTH END.

DX 63 AX-1433
(TWA Financial Forecast 1959-61, dated 5/15/59)

TRANS WORLD AIRLINES, INC.
380 Madison Avenue
New York City

FINANCIAL FORECAST

1959 - 1961

CONFIDENTIAL

Prepared by:

Trans World Airlines, Inc.
Finance Department

A. V. Leslie
Sr. Vice President & Treasurer

DX 63
(TWA Financial Forecast 1959-61, dated 5/15/59)

TRANS WORLD AIRLINES, INC.

CONTENTS

	Basic Forecast Assumptions	
Schedule I	Income Statement	- Annual
Schedule II	Statistics	- Annual
Schedule III	System Income Statement	- Quarterly
Schedule IV	Domestic Income Statement	- Quarterly
Schedule V	International Income Statement	- Quarterly
Schedule VI	Domestic Statistics	- Quarterly
Schedule VII	International Statistics	- Quarterly.

DX 63, page 1
(TWA Financial Forecast 1959-61, dated 5/15/59)

FINANCIAL FORECAST FOR YEARS 1959 - 1961

Basic Forecast Assumptions

I EQUIPMENT

A. Jet Aircraft - All jet aircraft to be in mixed service. 15 B-707-131's assigned to Domestic; 10 B-707-331's of which two are assigned to Domestic and eight to International; 20 CV-880's assigned to Domestic.

B. Piston Aircraft - This forecast reflects the retirement of the DC-4's, the 1049A's, the 749/A's, the Martin's and 21 of the 1649A's. Eight 1649A's will be retained in International mixed service; 28 1049G's will be retained in Domestic mixed service; 32 049's will be retained in Domestic first class service; the four TWA owned 1049H's will be retained in all cargo service.

C. Leased Aircraft - The five L-1049H leased aircraft will be operated in commercial and MATS charter service for the duration of the current lease agreement. It has been assumed the leases will not be renewed past their termination dates.

II ROUTES

A. Domestic - It has been assumed there will be no changes in TWA's or its major competitors route structures other than American Airlines will be granted non-stop rights NYC-SFO.

B. International - It has been assumed there will be no changes in TWA's or its major competitors route structures. Service to Manila, currently suspended, will not be resumed during the forecast period.

III INCOME STATEMENTS

A. Revenues - It has been assumed there will be no change in domestic fare levels presently in effect. For international, it has been assumed that the present jet surcharges will expire March 31, 1960 and will not be renewed. All other fares will be maintained at present level, however, there will be no berth or sleeper seat service on jet aircraft.

B. Operating Expenses

1. Direct Flying Expenses - In general, expense rates for projecting costs for piston engine aircraft now in service were based on most recent historical experience with the exception of items commented on below. Jet aircraft operating data, on which cost projections were based, was supplied by TWA's Staff Engineering and Maintenance Departments and is the result of their analysis and interpretation of manufacturers estimates for operating jet aircraft on TWA's routes and under TWA's planned operating policies and procedures. In addition, experience of limited commercial operations to date has been taken into account.

a. Salaries & Wages - Flight crew salary expense was based on rates stipulated in current flight crew contracts plus a percentage increase for contracts now open. (Pilot rates increased 12% for contract expired August 1, 1958.) A contract with the flight engineers was signed July 29, 1958 which extends through 1960 and covers pay rates for operating jet aircraft. All flight crew rates were increased an additional 5% for the year 1961.

Pilots pay for operating jet aircraft was based on a gross pay over that now paid for 1649A operations plus the 12% increase to cover a new contract. The increase for captains was placed at 22% above this adjusted 1649A scale and for co-pilots at 36% above this scale. Furthermore, this higher gross pay is for 75 scheduled hours per month as compared with the present 85 hours per month. In addition a third pilot has been added to Domestic service as well as to International service. The gross salary of the third pilot has been estimated at one third of the combined salaries for the captain and co-pilot on jet aircraft.

Navigators in International service have been retained through 1961. Their contract expires August 31, 1959 and pay scales beyond this period, for both jet and piston equipment, have been assumed at the third pilot rate since historically the navigator's rate has been comparable to that of the junior pilot.

b. Personnel Expenses - This includes flight crew travel and incidental expenses while on duty away from their domicile. The expense projection was based on actual experience and current contract provisions and no increase in these provisions is anticipated from current negotiations.

c. Aircraft Rentals - Represents the lease of five L-1049H aircraft at an annual expense of approximately 2.3 million. Leases terminate in the first quarter 1961 and it has been assumed, both in the revenue forecast and for expense purposes, that the leases will not be renewed.

d. Aircraft Fuel & Oil - Aviation gas and oil expense was based on current prices and experienced fuel consumption by type of aircraft. For 1960 - 1961, the cost per gallon for gasoline was increased approximately 5% to reflect a changed fueling pattern for piston equipment resulting from the introduction of jets into medium haul markets and the downgrading of piston equipment schedules. The average price per gallon for kerosene used in jet aircraft was based on actual bids received by TWA. Jet aircraft fuel consumption, which was based on engineering estimates, is now supported by limited commercial operations.

For the years 1960 and 1961 the average cost per gallon includes an allowance of 3¢ per gallon tax on kerosene consumed in the U.S. (presently not taxed) and an additional 1¢ per gallon tax on gasoline.

e. Aircraft Hull Insurance - Aircraft hull insurance for each year 1959 - 1961 has been included at the maximum estimated cost to TWA. The years 1960 and 1961 were based on TWA's actual insurance program for 1959 which includes jet aircraft. Non-operating aircraft are insured at reduced values.

f. Direct Maintenance - Flight Equipment - Direct maintenance expense for piston engine equipment was projected on actual experience hourly cost rates adjusted for certain known and expected changes. The major adjustment was to increase direct labor rates to reflect the full effect of the IAM contract settlement in the latter part of 1958. An additional 5% increase in labor rates has been added for the year 1961.

Direct maintenance expense for jet aircraft and engines was based on cost data worked out with TWA's Maintenance and Engineering Departments. This forecast assumes TWA will not construct a jet engine overhaul base and, instead, will phase in jet engine overhauls at present facilities as piston engine retirements permit. Consequently, a substantial portion of TWA's jet engine overhaul requirements for the forecast period will, necessarily, be contracted out and, the costing of this expense has been computed on this basis.

g. In-Flight Passenger Service - Hostess and purser salary and travel expense was projected on current experienced cost rates per block hour by type of aircraft. The compliment for jet aircraft was increased to four hostesses and/or pursers for both Domestic and International flights.

Passenger food and supplies expense was based on current actual rates per passenger mile depending on the type of aircraft and service proposed.

AX-1438

~~DX62~~
DX64

DX 64, page 1
(Letter to Thomas, dated 5/6/59)

(The below appears in someone's handwriting)

Copy of this letter in
report file FF 591

May 6, 1959

Mr. Charles S. Thomas, President
Trans World Airlines, Inc.
380 Madison Avenue
New York, N. Y.

Dear Mr. Thomas:

In accordance with your instructions we have been studying TWA's plan of operation for the year 1961, which year is expected to be the Airline's first full year of operation with its proposed new jet aircraft fleet. This fleet will consist of

15 Boeing 707-131 aircraft
10 Boeing 707-331 aircraft
20 Convair 880 aircraft

We have studied TWA's plans for use of these aircraft including detailed schedules, and we have analyzed the preliminary estimates of revenues and expenses for the year 1961 based on the use of the jet fleet listed above, plus a number of piston aircraft required to supplement the jet fleet; the result of these studies indicates a prospect of good financial accomplishment for that year.

In accordance with the findings of our studies to date, we are of opinion that the proposed jet fleet listed above, which is to be delivered to TWA by the end of 1960, provides a fleet of aircraft in types and numbers adequate for a sound, economic operation.

Respectfully submitted,

Consulting Engineers

bcc: Mr. C. S. Rowe
Chadbourne, Parke, Whiteside & Wolff
25 Broadway
New York

DX 64

May 6, 1959

Mr. Charles S. Thomas, President
Pan World Airlines, Inc.
200 Madison Avenue
New York, N. Y.

Dear Mr. Thomas:

In accordance with your instructions we have been studying PAA's plan of operation for the year 1961, which year is expected to be the Line's first full year of operation with its proposed new jet aircraft fleet. This fleet will consist of

15 Boeing 707-320 aircraft
10 Boeing 707-320 aircraft
20 Convair 990 aircraft

We have studied PAA's plans for use of these aircraft including detailed schedules, and we have analyzed the preliminary estimates of revenues and expenses for the year 1961 based on the use of the jet fleet listed above, plus a number of piston aircraft required to supplement the jet fleet; the results of these studies indicates a prospect of good direct operating accomplishments for that year.

In accordance with the findings of our studies to date, we are of opinion that the proposed jet fleet listed above, which is to be delivered in full by the end of 1960, provides a fleet of aircraft in types and numbers adequate for a sound, economic operation.

Respectfully submitted,

Consulting Engineers

cc: Mr. C. S. Rau
Shearman, Sterling, Wheatside & Wright
25 Broadway
New York

mh/cm

137

DX 65

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NOV 8 1962
CAB'S EXAMINERS

TRANS WORLD AIRLINES, INC.
Staff Engineering

DCT EXHIBIT 11/14/62 117A JH

EVALUATION OF VARIOUS JET AND TURBOPROP TRANSPORTS IN SHORT HAUL DOMESTIC SERVICE

Staff Engineering Report No. 3-2065

April 19, 1956

PREPARED BY:

R. K. Rourke, Manager - Aircraft Economic Analysis

M. B. Fannon, Supervisor - Aircraft Economic Analysis

D. J. Phelan, Supervisor - Engineering Aerodynamics

APPROVED BY:

R. W. Burnet, Vice President - Engineering

R. K. Rourke, Manager - Aircraft Economic Analysis

TRANS WORLD AIRLINES, INC.
Staff Engineering

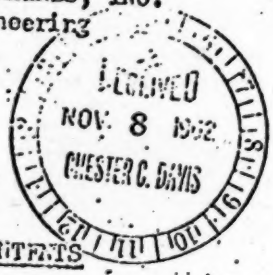

TABLE OF CONTENTS

		Page
I	PURPOSE	1.1
II	RECOMMENDATIONS	2.1
III	CONCLUSIONS	3.1
IV	PAYLOAD, BLOCK SPEED, BLOCK TIME COMPARISON	4.1
V	ECONOMIC COMPARISON	5.1
VI	CONSERVATISM OF CONVAIR MODEL 22 ECONOMIC ANALYSIS	6.1
VII	THE EFFECT OF HOT DAY CONDITIONS ON RANGE POTENTIAL	7.1
VIII	SEAT MILE PRODUCTION AND EARNING POTENTIAL ASSUMING A FIXED CAPITAL INVESTMENT	8.1
APPENDIX	ECONOMIC ANALYSIS ASSUMPTIONS	9.1

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NOV 8 1952
CHES. ENG. CAMS

I
PURPOSE

The purpose of this report is to evaluate the segment performance and economic potential of the Boeing 707-120, 020, Convair Model 22 and Lockheed Electra in domestic medium range service.

II
RECOMMENDATIONS

1. Based on sufficient traffic potential being available for economic load factors, TWA should procure additional 707-120's for internal medium range domestic service.

2. The 707-120's should, however, be procured with C-5 engines to cater to hot day airport performance.

3. Providing traffic is not available for an airplane the size of the Boeing, TWA should procure Convair Model 22.

4. The Electra should be considered only in limited numbers for minimum cost service. If Convair's are procured, the need for Electras is lessened.

TRANS WORLD AIRLINES, INC.
Staff Engineering

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NOV. 8 1962
CHESTER C. DAVIS

III
CONCLUSIONS

1. The Electra airplane cannot compete speedwise with jet transports and would not have as much passenger appeal.

2. The Convair Model 22 has a seat mile cost near enough to the Electra to make it attractive for an airline to acquire the Convair for short haul service in lieu of the Electra. This is particularly true when using more realistic drag estimates for the Convair.

3. The Boeing 120 and 320 have the lowest seat mile cost in short haul service, but their capacity and plane mile cost may be greater than traffic conditions will justify in this type of service.

4. The Boeing 020 is very marginal range and payloadwise as presently configured and not particularly attractive from an economic standpoint.

5. The Convair Model 22 is more flexible in short haul service than the Boeing 120 since it can provide frequency at relatively low cost per trip.

6. From short fields and under hot day conditions, the Convair has better range and payload capability for its operating cost than the Boeing 120 with C-4 wet engines.

7. To make the Boeing 120 usable in internal service, C-5 wet engines will have to be installed. (Such conversion cannot likely be undertaken until late 1960.)

8. The GE-CJ 805 turbojet engine in the Convair M-22 could be operationally more flexible. It is proposed with some deratement thereby suffering less from temperature accountability and it avoids the complexity of water injection.

9. Since TWA has purchased nine B-707 120's, an additional order would permit greater utilization for the entire Boeing fleet, savings in pilot training and maintenance costs.

10. For an equal number of trips between city pairs and considering limited traffic volume, the Electra and then the Convair will produce the revenue with the least cost.

PURCHASE AGREEMENT

Between

BOEING AIRPLANE COMPANY

And

HUGHES TOOL COMPANY

Relating to Boeing 707-120 Series Aircraft

Model 707-131

Dated March 2 , 1956

Agreement No. 7

TABLE OF CONTENTS

		Page
ARTICLE 1.	Subject Matter of Sale	1
ARTICLE 2.	Delivery of Aircraft	2
ARTICLE 3.	Price of Aircraft	3
ARTICLE 4.	Taxes	5
ARTICLE 5.	Payment	6
ARTICLE 6.	Warranty	9
ARTICLE 7.	Indemnity Against Patent Infringement . .	15
ARTICLE 8.	Warranties and Patent Indemnities from Other Manufacturers	16
ARTICLE 9.	Excusable Delay	17
ARTICLE 10.	Changes	21
ARTICLE 11.	Mandatory Modifications	22
ARTICLE 12.	Buyer-Furnished Equipment	23
ARTICLE 13.	Initial Spare Parts	24
ARTICLE 14.	Stock of Spare Parts	26
ARTICLE 15.	Services, Training and Data	29
ARTICLE 16.	Demonstration and Test Flights	41
ARTICLE 17.	Title to Property and Risks	44
ARTICLE 18.	Resale or Lease	44
ARTICLE 19.	Plant Representatives of Buyer	45
ARTICLE 20.	Termination for Insolvency	46
ARTICLE 21.	Assignment	47
ARTICLE 22.	Loss or Damage of Aircraft	48
ARTICLE 23.	Notices and Requests	49
ARTICLE 24.	Miscellaneous	49

HTC—HOU

PURCHASE AGREEMENT

Relating to

BOEING 707-120 SERIES AIRCRAFT

MODEL 707-131

THIS AGREEMENT entered into this 2nd day of March, 1956, by and between BOEING AIRPLANE COMPANY, a Delaware corporation, with its principal office in the City of Seattle, State of Washington (hereinafter called Boeing), and HUGHES TOOL COMPANY, a Delaware corporation, with its principal office in the City of Houston, State of Texas (hereinafter called Buyer):

W I T N E S S E T H :

WHEREAS, Buyer desires to obtain by purchase aircraft of the type hereinafter described for the transportation of passengers, mail, express and cargo, and Boeing desires to manufacture and sell the same to Buyer;

NOW, THEREFORE, in consideration of the mutual covenants hereinafter contained, the parties hereto agree as follows:

ARTICLE 1. Subject Matter of Sale.

Boeing shall manufacture, sell and deliver to Buyer, and Buyer shall purchase from Boeing, the following:

(a) Eight (8) Boeing Model 707-131 Aircraft (hereinafter called

Aircraft) to be manufactured by Boeing in accordance with the terms of this Agreement and the detail specification (hereinafter called Detail Specification) set forth in Exhibit A attached hereto and made a part hereof;

(b) Spare parts for the Aircraft, as more particularly set forth in Article 13 hereof.

ARTICLE 2. Delivery of Aircraft.

(a) Each Aircraft shall be delivered to Buyer assembled and completed ready for flight, and the Buyer shall accept delivery of such Aircraft at a suitable airport in the vicinity of Kansas City, Missouri, or at such other place outside the State of Washington as may be mutually agreed upon by a change order providing for delivery at such other place and for the payment to Boeing by Buyer of Boeing's increased costs, or the payment to Buyer by Boeing of Boeing's decreased costs, if any, occasioned thereby. The Aircraft shall be delivered during or before the months set forth in the following schedule:

Month of Delivery	Quantity of Aircraft
April 1959	1
May 1959	2
June 1959	2
July 1959	2
August 1959	1

(b) In the event Boeing gives Buyer at least seven (7) days' notice that it is ready to deliver any Aircraft hereunder, and at

the fault or upon the responsibility of Buyer delivery thereof is delayed, Buyer shall promptly reimburse Boeing for all cost or expense, including without limitation reasonable amounts for storage, insurance, preservation and protection, sustained by Boeing resulting from any such delay in excess of one (1) week.

(c) It is recognized that Boeing does not have maintenance, service and repair facilities and personnel at any airport in the vicinity of Kansas City, Missouri, and is not in a position to perform any maintenance, service or repair work at any such airport. Accordingly, provided the Aircraft is, when dispatched from Seattle, Washington, in condition meeting the requirements of the Detail Specification and this Agreement and in good operating condition, it is agreed that upon the undamaged arrival of an Aircraft at the airport agreed upon for delivery in the vicinity of Kansas City, Missouri, or at any other airport outside the State of Washington which may be agreed upon as the point of delivery, the Aircraft shall be deemed delivered to and accepted by Buyer, and Boeing's sole obligations thereafter as to any repair or correction of defects shall be in accordance with paragraphs (c) through (h) of Article 6 hereof. For the purpose of this paragraph, the term "arrival" shall be deemed to mean the point at which the Aircraft has come to a complete stop and the engines have been turned off.

ARTICLE 3. Price of Aircraft.

(a) The basic price of each Aircraft shall be Four Million Five Hundred Four Thousand Eight Hundred Twenty-six Dollars

($4,504,826), increased or decreased on account of price changes specified in Change Orders executed in accordance with Article 10 hereof. No charge for extras will be made unless set forth in a Change Order.

(b) The purchase price of each Aircraft shall be the basic price adjusted as follows:

(i) It shall be increased or decreased by the amount by which the cost to Boeing of the Automatic Pilot included in such Aircraft exceeds or is less than Twenty-Seven Thousand Five Hundred Dollars ($27,500.00), which Boeing represents was used by Boeing as the cost of such item in arriving at the basic price of the Aircraft. Boeing shall use its best efforts to obtain such item at a price which is reasonable under the circumstances and shall notify Buyer as to the firm price for such item as soon as possible but in any event before March 31, 1956; provided, that in the event such firm price is not available upon the above date, Boeing shall advise Buyer as soon as such price is available.

(ii) It shall be decreased by the amount by which Four Million Five Hundred Four Thousand Eight Hundred Twenty-six Dollars ($4,504,826) exceeds the lowest basic price for which Boeing, at any time before July 1, 1956, may have sold or contracted to sell any complete Boeing passenger model 707-120 series aircraft powered by Pratt & Whitney model JT3 engines (or any other aircraft of a type conforming to the basic engineering design of the Model 707-120 series aircraft except for body length) to any

other purchaser except the United States Government or any agency thereof, after appropriate adjustment for differences between the specification applicable to said aircraft and the Detail Specification applicable to the Aircraft sold hereunder.

(c) At least ten (10) days prior to the delivery date of each Aircraft, Boeing shall give to Buyer a written notice stating the increase or decrease in the basic price of such Aircraft by reason of the operation of the provisions contained in paragraph (b) above, and a summary in such reasonable detail as the Buyer may require of the factors occasioning such increase or decrease.

ARTICLE 4. Taxes.

(a) In addition to the purchase price of the Aircraft and Spare Parts, Buyer shall pay to Boeing, upon demand, any sales or use taxes or the amount of any new or increased gross receipts or excise taxes required to be paid by Boeing as a result of any sale, use (by Buyer after valid tender of delivery), delivery, storage (after valid tender of delivery), or transfer under this Agreement of any of the Aircraft, Spare Parts, services, instructions and data furnished or delivered hereunder.

(b) If claim is made against Boeing for any such tax, Boeing shall promptly notify Buyer. If seasonably requested by Buyer in writing, Boeing shall, at Buyer's expense, take such action as Buyer may reasonably direct with respect to such asserted liabil-

and shall not pay such tax except under protest, if protest is necessary. If payment be made, Boeing shall, at Buyer's expense, take such action as Buyer may reasonably direct to recover such payment and shall, if requested, permit Buyer in Boeing's name to file claim or commence an action to recover such payment.

ARTICLE 5. Payment.

(a) Advance Payments for Aircraft. Buyer has heretofore paid to Boeing as an advance payment on the Aircraft to be sold and delivered hereunder the sum of One Million Six Hundred Eighty Thousand Dollars ($1,680,000.00), receipt of which is hereby acknowledged by Boeing, which sum represents five per cent (5%) of the aggregate basic price of Four Million Two Hundred Thousand Dollars ($4,200,000.00) per Aircraft for eight (8) Boeing Model 707-120 type aircraft. Within ten (10) days after the date of execution of this Purchase Agreement, Buyer shall also pay to Boeing five per cent (5%) of the amount by which the aggregate basic price, computed from the basic price per Aircraft set forth in Article 3(a), exceeds Thirty-three Million Six Hundred Thousand Dollars ($33,600,000.00). Buyer shall also pay to Boeing as advance payments on the Aircraft to be purchased hereunder, in accordance with the following schedule (each percentage represents an amount equal to that percentage of the aggregate basic price of the Aircraft):

DOI

Due Date of Payment	Amount
July 1, 1956	2%
October 1, 1956	2%
January 1, 1957	3%
April 1, 1957	3%
July 1, 1957	3%
October 1, 1957	3%
January 1, 1958	3%
April 1, 1958	3%
July 1, 1958	3%
October 1, 1958	3%

amounting to a total, including the payments made under the first and second sentences above, of 33% of the aggregate basic price of the Aircraft.

(b) Payment for Aircraft. Upon the delivery of each Aircraft to Buyer hereunder, Buyer shall pay the purchase price thereof as follows: There shall be credited against such purchase price an amount determined by dividing the aggregate of the amounts advanced by Buyer to Boeing under paragraph (a) above less the aggregate amount of such advance payments previously credited against the purchase price of Aircraft delivered hereunder, by the number of Aircraft remaining to be delivered (including the one being delivered), and Buyer shall pay to Boeing the difference between the amount of such credit and the basic price of such Aircraft adjusted pursuant to Article 3(b) hereof

to the date of delivery of such Aircraft.

(c) Payment in U. S. Funds. All payments hereunder shall be made in lawful money of the United States, to be unconditionally deposited to the account of the party to receive payment in a bank in the United States to be designated by such party, or by such other method as may be mutually agreed upon by Boeing and Buyer.

(d) Repayment of Advance Payments. In any of the following events:

(i) delivery by Boeing to Buyer in accordance with the provisions of this Agreement of all of the Aircraft to be purchased hereunder;

(ii) termination of this Agreement by Buyer under Article 9(b) hereof and the payment to Boeing of all sums determined to be due to Boeing from Buyer pursuant to the provisions of said Article 9(b);

(iii) termination of this Agreement by Boeing under Article 9(b) or 9(c) hereof, or termination of this Agreement by Buyer under Article 9(c) hereof; or

(iv) termination of this Agreement by Buyer under Article 20 hereof as to all Aircraft and Spare Parts then undelivered hereunder;

then, in any such event, Boeing shall forthwith repay to Buyer the entire amount of the advance payments, if any, received by Boeing hereunder, less the aggregate amount of such advance pay-

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ments previously credited against the purchase price of Aircraft theretofore delivered to Buyer hereunder. In the event an Aircraft manufactured by Boeing for sale and delivery under this Purchase Agreement is lost or destroyed or damaged beyond repair and this Agreement is terminated or deemed terminated pursuant to the provisions of Article 22, Boeing shall forthwith repay to Buyer that portion of the advance payments, if any, received by Boeing hereunder which is equal to the ratio that one Aircraft bears to the total Aircraft to be sold and delivered hereunder.

(e) Additional Advance Payments. In addition to the advance payments to be paid under paragraph (a) above and subject to Boeing having a need to borrow funds for use in its operations, Buyer may also, on such terms and conditions as Buyer and Boeing may mutually agree upon, make additional payments to Boeing in advance of the delivery of all or any of the Aircraft to be delivered hereunder, and in such event Boeing shall pay Buyer interest on such additional advance payments from date of payment to date of liquidation at such rate as Buyer and Boeing may mutually agree upon.

ARTICLE 6. Warranty.

(a) Boeing agrees, represents and warrants that the Boeing Model 707 type aircraft will be certificated by the Civil Aeronautics Administration with a Type Certificate and that each Aircraft, prior to and at the time of delivery thereof, will be certificated by the Civil Aeronautics Administration with an

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not terminated.

(e) In the event that Boeing should exercise any right granted by paragraph (b) above to terminate this Agreement and thereafter Boeing completes the manufacture of the Aircraft scheduled to be manufactured for and delivered to Buyer, Boeing agrees that it will not sell such Aircraft to any other customer without first offering for a period of thirty (30) days to sell such Aircraft to Buyer at a price and on terms and conditions not less favorable to Buyer than those on which Boeing is offering to sell Model 707-120 series aircraft to others at that time.

(f) Boeing agrees that it will, to the extent and at the time that it becomes reasonably certain that there will be any material delay in the delivery of Aircraft or the performance of other obligations of Boeing hereunder, give Buyer written notice of the estimated delay.

ARTICLE 10. Changes.

(a) The Detail Specification and other terms and conditions of this Agreement may be amended from time to time by Change Orders in writing, which shall set forth in detail the particular specifications, terms or conditions involved, the changes to be made therein, and the effect, if any, of such changes on design, performance, weight, balance, time of delivery and basic price of the Aircraft or Spare Parts. Change Orders shall not be binding on either party until signed by persons respectively duly authorized in writing by Boeing and Buyer, but upon being so

signed shall constitute amendments to this Agreement.

(b) The Detail Specification also may be revised by Boeing without Change Order or Buyer's consent, to incorporate development changes where such changes do not adversely affect price, delivery, guaranteed weight or guaranteed performance of the Aircraft or interchangeability or replaceability of Spare Parts. Development changes are those changes of a minor nature deemed necessary to correct defects, improve the Aircraft, prevent delay, or insure compliance with this Agreement but which have no materially adverse effect on the design, weight, balance or functional characteristics of the Aircraft; provided, however, no change shall be made pursuant to this paragraph (b) to any of the equipment listed in Appendix 1 of the Detail Specification. Boeing shall notify Buyer of all changes made in the Detail Specification pursuant to this paragraph (b) by furnishing to Buyer revision insert pages for the Detail Specification.

ARTICLE 11. Mandatory Modifications.

Notwithstanding anything contained in this Agreement, if any law or governmental regulation or interpretation thereof by a governmental agency, the date of promulgation of which is subsequent to the date of this Agreement, shall require any change, addition or modification to the Aircraft prior to delivery thereof in order to obtain certification by the Civil Aeronautics Administration as provided herein, the parties hereto agree that such change, addition or modification shall be made in the Aircraft and Spare Parts affected, and agree to execute a Change

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tioning of the Aircraft and equipment as corrected.

ARTICLE 17. Title to Property and Risks.

(a) Title to and risk of loss of or damage to each Aircraft and Spare Part shall pass from Boeing to Buyer upon delivery thereof but not prior thereto.

(b) Upon the delivery of and the payment for each Aircraft, Boeing shall deliver to Buyer a bill of sale duly vesting in Buyer good title to such Aircraft free and clear of all liens, claims, charges and encumbrances of every kind whatsoever, and such other appropriate documents of title with respect thereto as Buyer may reasonably require.

ARTICLE 18. Resale or Lease.

(a) Buyer may not, prior to delivery to Buyer hereunder, without first obtaining Boeing's written consent, resell, lease, or transfer any Aircraft, or contract so to do, except that:

(i) Buyer may resell or lease any such Aircraft to any of Buyer's subsidiaries or affiliates, or to the United States Government or any agency thereof;

(ii) Buyer may, and at Buyer's request Boeing shall, take any action reasonably required for the purpose of causing any Aircraft to be subjected to an equipment trust, conditional sale, lien or other arrangement for the financing by Buyer of the purchase of any such Aircraft; provided, however, that no such action shall subject Boeing to any liability which it would not otherwise be subject to hereunder or modify in any respect Boeing's contract rights

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hereunder or require Boeing to divest itself of title to or possession of any such Aircraft until delivery thereof and payment therefor as provided in this Agreement; and

(iii) Buyer may resell or lease any such Aircraft to Trans World Airlines, Inc.

(b) In the event of the resale or lease of any Aircraft as permitted under this Agreement during a period of twenty-four (24) months after delivery thereof, all rights and benefits conferred under this Agreement upon Buyer with respect to such Aircraft shall inure to the benefit of such purchaser or lessee, as the case may be; provided, however, that Buyer shall obtain from such purchaser or lessee an express agreement, in writing, to be bound by and comply with all applicable terms and conditions set forth in Articles 6, 7, 14, 15 and 18 hereof, and Buyer shall promptly furnish to Boeing a true copy of such agreement.

(c) Upon the resale or transfer by Buyer of any of the Aircraft as permitted under this Agreement subsequent to the expiration of twenty-four (24) months after delivery thereof, Buyer shall include in the agreement of sale or transfer express provisions subjecting such purchaser or transferee to all the covenants and conditions and granting the same rights and privileges, subject to the same limitations, as are contained in Article 14.

ARTICLE 19. Plant Representatives of Buyer.

Boeing's construction of Aircraft pursuant to this Agreement, and all materials and parts obtained by Boeing therefor, including

Boeing's testing thereof, shall at all reasonable times during business hours be open to inspection by any duly authorized representative or representatives of Buyer, except that if access to any portion of Boeing's plant where construction is in progress or materials or parts are stored is restricted by the United States Government or any agency thereof, Boeing shall be allowed a reasonable time to make the items available for inspection elsewhere than in the restricted portion of the plant. Commencing with the effective date of this Agreement and until the delivery of the last Aircraft, Boeing shall furnish, without additional charge, suitable office space and equiment in, or conveniently located with respect to, its plant for the accommodation of up to but not exceeding fifteen (15) personnel of Buyer. Such office space and equipment need not exceed space and equipment for four desks and a secretary's desk at the administrative office and one desk in the factory. All inspections and examinations by Buyer and its representatives shall be performed in such manner as not unduly to delay or hinder the manufacture, construction or performance by Boeing.

ARTICLE 20. Termination for Insolvency.

Either Boeing or Buyer at its option may terminate this Agreement with respect to any or all of the Aircraft, Spare Parts, services, data and items to be furnished hereunder which are undelivered or not furnished on the effective date of such termination, by giving the other party written notice as hereinafter provided at any time after the other files a voluntary petition in bank-

ruptcy, or proceedings in bankruptcy are instituted against the other and it is thereafter adjudicated bankrupt pursuant to such proceedings, or a court takes and retains for a period of at least sixty (60) days jurisdiction of the other and its assets pursuant to proceedings under the provisions of any Federal reorganization act, or the other is adjudged insolvent, or a receiver of the other's assets is appointed on account of insolvency and is not discharged within a period of sixty (60) days thereafter, or the other is otherwise divested of its assets for a period of at least sixty (60) days, or the other makes a general assignment for the benefit of its creditors. Such notice of termination shall be given thirty (30) days prior to the effective date of termination, except that in the case of filing of a voluntary petition in bankruptcy or a voluntary general assignment for the benefit of creditors, such notice need not precede the effective date of termination.

ARTICLE 21. Assignment.

This Agreement shall inure to the benefit of and be binding upon each of the parties hereto and their respective successors and assigns, but it may not be voluntarily assigned, in whole or in part, by either party without the prior written consent of the other party, except that (1) either party's interest shall be assignable through merger, consolidation or reorganization, or voluntary sale or transfer of substantially all of its assets, (2) Boeing may assign any of its fixed or contingent rights to

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receive money hereunder, (3) Buyer may assign any of its rights hereunder to the extent expressly permitted in Article 18, and (4) Buyer may assign all its rights hereunder to Trans World Airlines, Inc.

ARTICLE 22. Loss or Damage of Aircraft.

In the event that prior to delivery thereof to Buyer an Aircraft being manufactured by Boeing for sale and delivery under this Purchase Agreement is lost, destroyed or damaged beyond repair, or damaged to the extent that it cannot be repaired by parts replacement to new condition and delivered in accordance with the delivery schedule set forth in Article 2, the time reasonably required by Boeing to furnish a replacement for such Aircraft or to accomplish such repair thereof shall be deemed an excusable delay under Article 9, provided Boeing promptly gives notice to Buyer of the estimated delay in delivery of the replacement or repaired Aircraft; provided, however, that in the event such Aircraft is lost, destroyed or damaged beyond repair, this Purchase Agreement shall be deemed terminated as to such one Aircraft unless Buyer gives Boeing written notice within thirty (30) days after the date of notification by Boeing of such loss, destruction or damage beyond repair that Buyer desires Boeing to manufacture and deliver to Buyer a replacement for such Aircraft, in which case Boeing shall manufacture and deliver to Buyer at Boeing's earliest uncommitted delivery date one Aircraft to replace the Aircraft so lost, destroyed or damaged beyond repair, and the

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SUPPLEMENTAL AGREEMENT NO. 1

TO

PURCHASE AGREEMENT NO. 7 DATED MARCH 2, 1956

BETWEEN

BOEING AIRPLANE COMPANY

AND

HUGHES TOOL COMPANY

RELATING TO BOEING 707-120 SERIES AIRCRAFT

MODEL 707-131

THIS SUPPLEMENTAL AGREEMENT entered into this 19th day of March, 1956, by and between BOEING AIRPLANE COMPANY, a Delaware corporation (hereinafter called Boeing), and HUGHES TOOL COMPANY, a Delaware corporation (hereinafter called Buyer):

W I T N E S S E T H :

WHEREAS, the parties hereto have entered into the agreement described above, which is hereinafter called "the Purchase Agreement"; and

WHEREAS, the parties desire to amend the Purchase Agreement as hereinafter provided,

NOW, THEREFORE, in consideration of the mutual covenants herein contained, the parties hereby agree that the Purchase Agreement is hereby amended as follows:

1. In paragraph (a) of Article 1, substitute the words and figures "nine (9)" for the words and figures "eight (8)".

2. In paragraph (a) of Article 2, the schedule for delivery of the aircraft is hereby revised in its entirety to read as follows:

"Month of Delivery	Quantity of Aircraft
April 1959	2
May 1959	2
June 1959	2
July 1959	2
August 1959	1 "

3. Within ten (10) days after the date of this Supplemental Agreement, Buyer shall pay to Boeing as an advance payment on the additional Aircraft to be sold and delivered under the Purchase Agreement as a result of the execution by the parties of this Supplemental Agreement, the sum of Two Hundred Twenty-Five Thousand Two Hundred Forty-one and 30/100 Dollars ($225,241.30); provided, however, that any payment made by Buyer to Boeing relating to one Model 707-131 Aircraft pursuant to an exchange of telegrams dated March 16, 1956 from Buyer and March 19, 1956 from Boeing, shall be deemed to be a payment made by Buyer under this paragraph.

4. It is understood and agreed between the parties hereto that the term "Boeing passenger Model 707-120 series aircraft powered by Pratt & Whitney Model JT3 engines (or any other aircraft of a type conforming to the basic engineering design of the Model 707-120 series aircraft except for body length)" as used in subparagraph (ii) of paragraph (b) of Article 3 of the Purchase Agree shall not be construed to include the Boeing 707 reduced gross weight aircraft designated the "Boeing Model 707-020" series aircraft.

EXECUTED IN DUPLICATE as of the day and year first above written.

BOEING AIRPLANE COMPANY

Witness:
L. A. Petera

By _____
J. B. Connelly
Vice President

HUGHES TOOL COMPANY

Witness:
Ruth Kailing

By _____
Vice President

SUPPLEMENTAL AGREEMENT NO. 2

TO

PURCHASE AGREEMENT NO. 7 DATED MARCH 2, 1956

BETWEEN

BOEING AIRPLANE COMPANY

AND

HUGHES TOOL COMPANY

RELATING TO BOEING 707-120 SERIES AIRCRAFT

MODEL 707-131

THIS SUPPLEMENTAL AGREEMENT entered into as of this 28th day of September, 1956, by and between BOEING AIRPLANE COMPANY, a Delaware corporation (hereinafter called Boeing), and HUGHES TOOL COMPANY, a Delaware corporation (hereinafter called Buyer):

W I T N E S S E T H :

WHEREAS, the parties hereto have entered into the agreement described above, which is hereinafter called "the Purchase Agreement"; and

WHEREAS, the parties desire to amend the Purchase Agreement as hereinafter provided,

NOW, THEREFORE, in consideration of the mutual covenants herein contained, the parties hereby agree that the Purchase Agreement is hereby amended as follows:

1. Paragraph (a) of Article 1. is hereby revised in its entirety to read as follows:

"(a) Twelve (12) Boeing Model 707-131 Aircraft (hereinafter called Aircraft) to be manufactured in accordance with the terms of this Agreement and

the detail specification (hereinafter called Detail Specification) set forth in Exhibit A attached hereto and made a part hereof, provided that Buyer shall have the right, by written notice to Boeing delivered prior to twelve (12) midnight Pacific Standard Time, October 29, 1956, to terminate without charge its obligation to purchase one (1) of such Aircraft scheduled to be delivered in August, 1959, as provided in paragraph (a) of Article 2 hereof;"

2. In paragraph (a) of Article 2, the schedule for delivery of the Aircraft is hereby revised in its entirety to read as follows:

"Month of delivery	Quantity of aircraft
April 1959	2
May 1959	2
June 1959	3
July 1959	3
August 1959	2"

3. A new paragrapn (d) is added to Article 2, Delivery of Aircraft, as follows:

"(d) Boeing shall deliver, and Buyer shall accept delivery of, one (1) of the Aircraft in December, 1958, notwithstanding that an appropriate Civil Aeronautics Administration type certificate has not then been issued for the Aircraft, for use by Buyer for flight and maintenance training, instruction and related purposes. At the time of such delivery such Aircraft otherwise shall comply with the provisions of Article 6 (b) except for some cabin interior features which may be incomplete. It is intended that such Aircraft shall be one of the Aircraft scheduled for delivery during the month of July 1959, as provided in paragraph (a) of this Article but in any event the delivery schedule set forth in said paragraph (a) shall be retained with respect to the delivery of certificated Aircraft. Boeing further agrees that consistent with its understandings

with other customers as to delivery schedules entered into prior to the signing of this Purchase Agreement it will use its best efforts to accelerate the redelivery of such Aircraft as a certificated Aircraft. Within seven (7) days after delivery to Buyer under this Purchase Agreement of the first certificated Aircraft or the expiration of nine (9) months after delivery of the uncertificated Aircraft under this paragraph whichever first occurs, the uncertificated Aircraft shall be returned to Boeing at a suitable location in the State of Washington designated by Boeing, and Boeing shall promptly incorporate in said Aircraft all of the changes or alterations required to cause said Aircraft at the time of redelivery to Buyer as hereinafter provided to conform to the Detail Specifications and to comply with the requirements of Article 6 (a), all at no cost to Buyer except that (i) the cost of changes required to be made in accordance with the provisions of Article 11 subsequent to delivery of the first certificated Aircraft shall be borne by Buyer and Boeing as therein provided and (ii) Boeing shall have no obligation to make changes or alterations necessitated by wear and tear resulting from Buyer's use; provided however that if such uncertificated Aircraft is returned to Boeing at the expiration of nine (9) months after delivery to Buyer under this paragraph (d), Boeing shall promptly upon such return, provided such Aircraft is then in as good condition as when delivered to Buyer except for reasonable wear and tear resulting from Buyer's use thereof in accordance with the provisions of this paragraph, refund to Buyer that portion of the purchase price paid by Buyer at the time of delivery to Buyer under this paragraph (d) and title to such aircraft shall thereupon revest in Boeing. Upon completion of the work by Boeing as required by the fifth

sentence of this paragraph, Boeing shall promptly redeliver such Aircraft to Buyer at a suitable airport in the State of Washington selected by Boeing and if a portion of the purchase price has been refunded to Buyer under the next preceding sentence, Buyer shall pay to Boeing upon such delivery the balance of the purchase price of such Aircraft then remaining unpaid. Notwithstanding the foregoing provisions of this paragraph (d) in the event Buyer does not desire to return said Aircraft to Boeing for incorporation therein of such changes or alterations, and if Boeing agrees thereto, Boeing will promptly after receipt of Buyer's Purchase Orders therefor, sell and deliver to Buyer without charge to Buyer, all necessary kits of parts to accomplish such changes or alterations to such Aircraft, and will pay to Buyer all reasonable charges for incorporation of such kits of parts in such Aircraft, and in such event said Aircraft shall be deemed for the purposes of this Purchase Agreement to have been delivered in accordance with paragraph (a), hereof, provided that the provisions of this sentence shall not relieve Boeing of its obligation to obtain an Air Worthiness Certificate for said Aircraft as provided in this Purchase Agreement. For the purposes of Article 9 of the Purchase Agreement, the phrase 'calendar month in which delivery is otherwise required hereunder' shall be deemed to be July 1959 with reference to the uncertificated Aircraft to be delivered under this paragraph (d)."

4. The basic price of each aircraft, as set forth in paragraph (a) of Article 3, is changed to Four Million Five Hundred Three Thousand Eight Hundred Seventy Dollars ($4,503,870).

5. The first two lines of paragraph (b) of Article 5 preceding the colon are amended to read as follows:

"Upon the delivery of each Aircraft to Buyer hereunder (including the

Aircraft to be delivered under paragraph (d) of Article 2 hereof) Buyer shall pay the purchase price thereof as follows."

6. Within ten (10) days after the date of execution of this Supplemental Agreement Buyer shall pay to Boeing as an advance payment on the first two additional Aircraft to be sold and delivered under the Purchase Agreement as a result of the execution by the parties of this Supplemental Agreement, the sum of Eight Hundred Nine Thousand Nine Hundred Twenty-three and 23/100 Dollars ($809,923.23). In the event that Buyer elects not to exercise its right to terminate its obligation to purchase the third of said additional Aircraft, as provided in paragraph (a) of Article 1, Buyer shall pay to Boeing on October 29, 1956, as an advance payment on said third additional Aircraft the sum of Four Hundred Five Thousand Three Hundred Forty-eight and 39/100 Dollars ($405,348.39). Such advance payment or payments shall constitute an advance payment or payments pursuant to Article 5 (a) of the Purchase Agreement, and shall be in lieu of any advance payment otherwise due with respect to the additional Aircraft covered by this Supplemental Agreement prior to January 1, 1957.

7. Notwithstanding the provisions of paragraph (f) of Article 15 as heretofore amended relating to the dates of delivery of technical data, Boeing will deliver at the earliest practicable time, but in no event later than the date of delivery of the Aircraft called for under paragraph (d) of Article 2, the technical data called for under paragraph (f) of Article 15 (some of which may be in preliminary form) in quantities reasonably required by Buyer in connection wi Buyer's use of said Aircraft for the purposes set forth in paragraph (d) of Article 2, provided, however, that the Airplane Flight Manual called for under subparagraph (1) thereof need not have been approved by the Civil Aeronautics Administration at such time.

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8. The last sentence or Article 11 is revised to read as follows:

"The cost of making any such change, addition or modification to undelivered Aircraft occasioned by such law, governmental regulation or interpretation thereof, the date of promulgation of which is subsequent to the date of delivery to Buyer of the first Certificated Aircraft, shall be borne equally by Boeing and Buyer."

The parties hereto further agree that by reason of the changes herein made to the Purchase Agreement, paragraph numbered 1. of that certain letter agreement dated March 2, 1956 between Boeing and Buyer, subject: "additional Agreements Relating to Purchase Agreement No. 7" is hereby amended to read as follows:

"1. Delivery. Boeing agrees that prior to the month in which the first certificated Aircraft is delivered to Buyer, Boeing will not have delivered to other commercial customers more than twelve (12) Model 707 type aircraft."

EXECUTED IN DUPLICATE as of the day and year first above written.

BOEING AIRPLANE COMPANY

By _____

Witness:

_____

HUGHES TOOL COMPANY

By _____

Witness:

_____

SUPPLEMENTAL AGREEMENT NO. 3

TO

PURCHASE AGREEMENT NO. 7 DATED MARCH 2, 1956

BETWEEN

BOEING AIRPLANE COMPANY

AND

HUGHES TOOL COMPANY

RELATING TO BOEING 707-120 SERIES AIRCRAFT

MODEL 707-131

THIS SUPPLEMENTAL AGREEMENT entered into as of this 10th day of January 1957, by and between BOEING AIRPLANE COMPANY, a Delaware corporation (hereinafter called Boeing), and HUGHES TOOL COMPANY, a Delaware corporation (hereinafter called Buyer):

W I T N E S S E T H :

WHEREAS, the parties hereto have entered into the agreement described above, which is hereinafter called "the Purchase Agreement"; and

WHEREAS, the parties desire to amend the Purchase Agreement as hereinafter provided,

NOW, THEREFORE, in consideration of the mutual covenants herein contained, the parties hereby agree that the Purchase Agreement as heretofore amended, is, hereby further amended as follows:

1. Paragraph (a) of Article 1, is hereby revised in its entirety to read as follows:

"(a) Fifteen (15) Boeing Model 707-131 Aircraft (hereinafter called Aircraft) to be manufactured in accordance with the terms of this

Agreement and the detail specification (hereinafter called Detail Specification) set forth in Exhibit A attached hereto and made a part hereof."

2. In paragraph (a) of Article 2, the schedule for delivery of the Aircraft is hereby revised in its entirety to read as follows:

"Month of Delivery		Quantity of Aircraft
April	1959	3
May	1959	4
June	1959	3
July	1959	4
August	1959	1"

3. The basic price of each aircraft, as set forth in paragraph (a) of Article 3. is changed to Four Million Five Hundred Three Thousand Four Hundred Eighty-nine Dollars ($4,503,489).

4. Within ten (10) days after the date of execution of this Supplemental Agreement Buyer shall pay to Boeing as an advance payment on the additional Aircraft to be sold and delivered under the Purchase Agreement as a result of the execution by the parties of this Supplemental Agreement, the sum of Two Million One Hundred Sixty-one Thousand One Hundred Seventy and 81/100 Dollars ($2,161,170.81). Such advance payment shall constitute an advance payment pursuant to Article 5 (a) of the Purchase Agreement, and shall be in lieu of any advance payment otherwise due with respect to the additional Aircraft covered by this Supplemental Agreement prior to April 1, 1957.

EXECUTED IN DUPLICATE as of the day and year first above written.

BOEING AIRPLANE COMPANY

Witness:

By _____
J. B. CONNELLY
VICE PRESIDENT

Phyllis E. Bruce

HUGHES TOOL COMPANY

Witness:

By C A Price

Raymond Stecciday

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BOEING AIRPLANE COMPANY
TRANSPORT DIVISION
RENTON, WASHINGTON

January 10, 1957

TELEPHONE: OLIVE 3414
IN REPLY REFER TO
6-1100-20-169

Hughes Tool Company
2200 Gulf Building
Houston, Texas

Attention: Mr. C. H. Price, Vice President

Through: Mr. Edwin Zak, Resident Representative

Subject: Supplemental Agreement No. 3 to
Purchase Agreement No. 7

Gentlemen:

In accordance with the understanding between Mr. Hughes and Mr. Allen in a telephone conversation on January 9, 1957, we have prepared and enclose herewith original, two reproducible copies and twenty-seven [illegible] copies of Supplemental Agreement No. 3 to Purchase Agreement No. 7, the purpose of which is to increase the number of aircraft to be manufactured and sold thereunder from eleven (11) to fifteen (15).

Paragraph 3. of Supplemental Agreement No. 3 changes the basic price of each aircraft as set forth in paragraph (a) of Article 3 of the Purchase Agreement to $4,503,489. This amounts to a reduction of $381 from the basic price as established by Supplemental Agreement No. 2, and is the result of a re-computation of the per-aircraft price of certain additional technical data required by Hughes Tool Company, to reflect the increased number of aircraft. This revised basic price does not, of course, take into account the effect upon price resulting from any Supplemental Agreement or Change Order other than Supplemental Agreements No. 2 and No. 3 and Change Order No. 1. Price changes which may have been made heretofore, or may be made hereafter from time to time, by Change Orders other than Change Order No. 1 will, according to the usual procedure, be taken into account in determining the final purchase price of the aircraft.

You will note that Supplemental Agreement No. 3 calls for payment of an additional advance payment of $2,161,170.81 within ten (10) days after execution of the Agreement. We have arrived at this figure by multiplying the aggregate basic price for the fifteen (15) aircraft by twelve percent (12%) and deducting advance payments heretofore paid under this Purchase Agreement.

39779 Tw-1-K

BOEING AIRPLANE COMPANY
TRANSPORT DIVISION
RENTON, WASHINGTON

Hughes Tool Company

6-1100-20-169
Page Two

If you find the enclosed Supplemental Agreement to be in order, we would appreciate your executing one (1) copy and returning the same to us on or before January 21, 1957.

Very truly yours,

BOEING AIRPLANE COMPANY
Transport Division

J. H. Connelly
Vice President - General Manager

Enclosure

(190.10)
(622)
(624)

BOEING AIRPLANE COMPANY
SEATTLE 14, WASHINGTON

March 28, 1956

TELEPHONE MOHAWK 3322
IN REPLY REFER TO
460-0-419

Hughes Tool Company
2200 Gulf Building
Houston 2, Texas

Attention: Mr. C. H. Price
Vice President and Treasurer

Subject: Purchase Agreement No. 7 Dated March 2, 1956, Between Boeing Airplane Company and Hughes Tool Company Relating to the Boeing Model 707-131 Aircraft

Gentlemen:

This will acknowledge receipt of your letter of March 23, 1956, in which you authorize Mr. R. W. Rummel, whose address is 10 Richards Road, Kansas City, Missouri to

(a) represent Hughes Tool Company and on its behalf, to conduct all negotiations and execute all change orders regarding specifications and other technical matters in connection with the subject Purchase Agreement, subject to the condition that, without the written approval of an officer of Hughes Tool Company, Mr. Rummel may not execute Change Orders evidencing any single change having a price effect per airplane of more than $30,000 or evidencing total changes which, in the aggregate, have a net price effect in excess of $150,000 per airplane, and to

(b) designate the plant representative who will office at our plant and represent Hughes Tool Company in matters arising here.

Pursuant to your request we will continue to furnish to your Houston office, to the attention of Mr. C. H. Price, copies of all Change Orders to the subject Purchase Agreement regardless of the amount involved.

PRICE

BOEING AIRPLANE COMPANY
SEATTLE 24, WASHINGTON

Hughes Tool Company
March 28, 1956
460-0-419

This will also acknowledge receipt of the fully executed duplicate copy of Supplemental Agreement No. 1 dated March 19, 1956, to subject Agreement.

Very truly yours,

BOEING AIRPLANE COMPANY

J. B. Connelly
Vice President

PRICE

AX-1479

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(Toolco-Boeing Contracts-B707-331s, 3/1

PURCHASE AGREEMENT

Between

BOEING AIRPLANE COMPANY

and

HUGHES TOOL COMPANY

Relating to Boeing 707-320 Series Aircraft

Model 707-331

Dated March 19, 1956

Agreement No. 9

55190 TH 31

TABLE OF CONTENTS

		Page
ARTICLE 1.	Subject Matter of Sale	1
ARTICLE 2.	Delivery of Aircraft	2
ARTICLE 3.	Price of Aircraft	3
ARTICLE 4.	Taxes	5
ARTICLE 5.	Payment	6
ARTICLE 6.	Warranty	9
ARTICLE 7.	Indemnity Against Patent Infringement . .	15
ARTICLE 8.	Warranties and Patent Indemnities from Other Manufacturers	16
ARTICLE 9.	Excusable Delay	17
ARTICLE 10.	Changes	21
ARTICLE 11.	Mandatory Modifications	22
ARTICLE 12.	Buyer-Furnished Equipment	23
ARTICLE 13.	Initial Spare Parts	25
ARTICLE 14.	Stock of Spare Parts	26
ARTICLE 15.	Services, Training and Data	29
ARTICLE 16.	Demonstration and Test Flights	40
ARTICLE 17.	Title to Property and Risks	43
ARTICLE 18.	Resale or Lease	44
ARTICLE 19.	Plant Representatives of Buyer	45
ARTICLE 20.	Termination for Insolvency	46
ARTICLE 21.	Assignment	47
ARTICLE 22.	Loss or Damage of Aircraft	48
ARTICLE 23.	Notices and Requests	49
ARTICLE 24.	Miscellaneous	50

PURCHASE AGREEMENT

Relating to

BOEING 707-320 SERIES AIRCRAFT

MODEL 707-331

THIS AGREEMENT entered into as of the 19th day of March, 1956, by and between BOEING AIRPLANE COMPANY, a Delaware corporation, with its principal office in the City of Seattle, State of Washington (hereinafter called Boeing), and HUGHES TOOL COMPANY, a Delaware corporation, with its principal office in the City of Houston, State of Texas (hereinafter called Buyer):

W I T N E S S E T H :

WHEREAS, Buyer desires to obtain by purchase aircraft of the type hereinafter described for the transportation of passengers, mail, express and cargo, and Boeing desires to manufacture and sell the same to Buyer;

NOW, THEREFORE, in consideration of the mutual covenants hereinafter contained, the parties hereto agree as follows:

ARTICLE 1. Subject Matter of Sale.

Boeing shall manufacture, sell and deliver to Buyer, and Buyer shall purchase from Boeing, the following:

(a) Eighteen (18) Boeing Model 707-331 Aircraft (hereinafter

called Aircraft) to be manufactured by Boeing in accordance with the terms of this Agreement and the detail specification (hereinafter called Detail Specification) set forth in Exhibit A attached hereto and made a part hereof;

(b) Spare parts for the Aircraft, as more particularly set forth in Article 13 hereof.

ARTICLE 2. Delivery of Aircraft.

(a) Each Aircraft shall be delivered to Buyer assembled and completed ready for flight, and the Buyer shall accept delivery of such Aircraft at a suitable airport in the vicinity of Kansas City, Missouri, or at such other place outside the State of Washington as may be mutually agreed upon by a change order providing for delivery at such other place and for the payment to Boeing by Buyer of Boeing's increased costs, or the payment to Buyer by Boeing of Boeing's decreased costs, if any, occasioned thereby. The Aircraft shall be delivered during or before the months set forth in the following schedule:

Month of Delivery	Quantity of Aircraft
November 1959	1
December 1959	2 /
January 1960	1
February 1960	2 /
March 1960	2 /
April 1960	3 /
May 1960	3 /
June 1960	4 /

55190 [illegible]

(b) In the event Boeing gives Buyer at least seven (7) days' notice that it is ready to deliver any Aircraft hereunder, and at the fault or upon the responsibility of Buyer delivery thereof is delayed, Buyer shall promptly reimburse Boeing for all cost or expense, including without limitation reasonable amounts for storage, insurance, preservation and protection, sustained by Boeing resulting from any such delay in excess of one (1) week.

(c) It is recognized that Boeing does not have maintenance, service and repair facilities and personnel at any airport in the vicinity of Kansas City, Missouri, and is not in a position to perform any maintenance, service or repair work at any such airport. Accordingly, provided the Aircraft is, when dispatched from Seattle, Washington, in condition meeting the requirements of the Detail Specification and this Agreement and in good operating condition, it is agreed that upon the undamaged arrival of an Aircraft at the airport agreed upon for delivery in the vicinity of Kansas City, Missouri, or at any other airport outside the State of Washington which may be agreed upon as the point of delivery, the Aircraft shall be deemed delivered to and accepted by Buyer, and Boeing's sole obligations thereafter as to any repair or correction of defects shall be in accordance with paragraphs (c) through (h) of Article 6 hereof. For the purpose of this paragraph, the term "arrival" shall be deemed to mean the point at which the Aircraft has come to a complete stop and the engines have been turned off.

ARTICLE 3. Price of Aircraft.

(a) The basic price of each Aircraft shall be Five Million, Thre

Hundred Fifteen Thousand, Eight Hundred and Forty-Six Dollars ($5,315,846), increased or decreased on account of price changes specified in Change Orders executed in accordance with Article 10 hereof. No charge for extras will be made unless set forth in a Change Order.

(b) The purchase price of each Aircraft shall be the basic price adjusted as follows:

(i) It shall be increased or decreased by the amount by which the cost to Boeing of the automatic pilot included in such Aircraft exceeds or is less than Twenty-seven Thousand Five Hundred Dollars ($27,500), which Boeing represents was used by Boeing as the cost of such item in arriving at the basic price of the Aircraft. Boeing shall use its best efforts to obtain such item at a price which is reasonable under the circumstances and shall notify Buyer as to the firm price for such item as soon as possible.

(ii) It shall be decreased by the amount by which Five Three Hundred Fifteen Thousand,Eight Hundred and Forty-Six Dol Dollars ($5,315,846) exceeds the lowest basic price for which Boeing, at any time before July 1, 1956, may have sold or contracted to sell any complete Boeing passenger model 707-320 series aircraft powered by Pratt & Whitney model JT4 engines (or any other aircraft of a type conforming to the basic engineering design of the Model 707-320 series aircraft except for body length powered by such engines) to any other pur-

chaser, except the United States Government or any agency thereof, after appropriate adjustment for differences between the specification applicable to said aircraft and the Detail Specification applicable to the Aircraft sold hereunder.

(c) At least ten (10) days prior to the delivery date of each Aircraft, Boeing shall give to Buyer a written notice stating the increase or decrease in the basic price of such Aircraft by reason of the operation of the provisions contained in paragraph (b) above, and a summary in such reasonable detail as the Buyer may require of the factors occasioning such increase or decrease.

ARTICLE 4. Taxes.

(a) In addition to the purchase price of the Aircraft and Spare Parts, Buyer shall pay to Boeing, upon demand, any sales or use taxes or the amount of any new or increased gross receipts or excise taxes required to be paid by Boeing as a result of any sale, use (by Buyer after valid tender of delivery), delivery, storage (after valid tender of delivery), or transfer under this Agreement of any of the Aircraft, Spare Parts, services, instructions and data furnished or delivered hereunder.

(b) If claim is made against Boeing for any such tax, Boeing shall promptly notify Buyer. If seasonably requested by Buyer in writing, Boeing shall, at Buyer's expense, take such action as Buyer may reasonably direct with respect to such asserted liability

and shall not pay such tax except under protest, if protest is necessary. If payment be made, Boeing shall, at Buyer's expense, take such action as Buyer may reasonably direct to recover such payment and shall, if requested, permit Buyer in Boeing's name to file claim or commence an action to recover such payment.

ARTICLE 5. Payment.

(a) Advance Payments for Aircraft. Buyer has heretofore paid to Boeing as an advance payment on the Aircraft to be sold and delivered hereunder the sum of Four Million Six Hundred Thirty-five Thousand Dollars ($4,635,000), receipt of which is hereby acknowledged by Boeing, which sum represents five percent (5%) of an assumed aggregate basic price of Ninety-two Million Seven Hundred Thousand Dollars ($92,700,000) for eighteen (18) Boeing Model 707-320 type aircraft. Within ten (10) days after the date of the signing of this Purchase Agreement, Buyer shall also pay to Boeing five percent (5%) of the amount by which the aggregate basic price, computed from the basic price per Aircraft set forth in Article 3(a), exceeds Ninety-two Million Seven Hundred Thousand Dollars ($92,700,000). Buyer shall also pay to Boeing as advance payments on the Aircraft to be purchased hereunder, in accordance with the following schedule (each percentage represents an amount equal to that percentage of the aggregate basic price of the Aircraft):

Due Date of Payment	Amount
July 1, 1956	2%
October 1, 1956	2%
January 1, 1957	3%
April 1, 1957	3%
July 1, 1957	3%
October 1, 1957	3%
January 1, 1958	3%
April 1, 1958	3%
July 1, 1958	3%
October 1, 1958	3%

amounting to a total, including the payments made under the first and second sentences above, of 33% of the aggregate basic price of the Aircraft.

(b) Payment for Aircraft. Upon the delivery of each Aircraft to Buyer hereunder, Buyer shall pay the purchase price thereof as follows: There shall be credited against such purchase price an amount determined by dividing the aggregate of the amounts advanced by Buyer to Boeing under paragraph (a) above less the aggregate amount of such advance payments previously credited against the purchase price of Aircraft delivered hereunder, by the number of Aircraft remaining to be delivered (including the one being delivered), and Buyer shall pay to Boeing the difference between the amount of such credit and the basic price of such Aircraft adjusted pursuant to Article 3(b) hereof

to the date of delivery of such Aircraft.

(c) Payment in U. S. Funds. All payments hereunder shall be made in lawful money of the United States, to be unconditionally deposited to the account of the party to receive payment in a bank in the United States to be designated by such party, or by such other method as may be mutually agreed upon by Boeing and Buyer.

(d) Repayment of Advance Payments. In any of the following events:

(i) delivery by Boeing to Buyer in accordance with the provisions of this Agreement of all of the Aircraft to be purchased hereunder;

(ii) termination of this Agreement by Buyer under Article 9(b) hereof and the payment to Boeing of all sums determined to be due to Boeing from Buyer pursuant to the provisions of said Article 9(b);

(iii) termination of this Agreement by Boeing under Article 9(b) or 9(c) hereof, or termination of this Agreement by Buyer under Article 9(c) hereof; or

(iv) termination of this Agreement by Buyer under Article 20 hereof as to all Aircraft and Spare Parts then undelivered hereunder;

then, in any such event, Boeing shall forthwith repay to Buyer the entire amount of the advance payments, if any, received by Boeing hereunder, less the aggregate amount of such advance pay-

ments previously credited against the purchase price of Aircraft theretofore delivered to Buyer hereunder. In the event an Aircraft manufactured by Boeing for sale and delivery under this Purchase Agreement is lost or destroyed or damaged beyond repair and this Agreement is terminated or deemed terminated pursuant to the provisions of Article 22, Boeing shall forthwith repay to Buyer that portion of the advance payments, if any, received by Boeing hereunder which is equal to the ratio that one Aircraft bears to the total Aircraft to be sold and delivered hereunder.

(e) Additional Advance Payments. In addition to the advance payments to be paid under paragraph (a) above and subject to Boeing having a need to borrow funds for use in its operations, Buyer may also, on such terms and conditions as Buyer and Boeing may mutually agree upon, make additional payments to Boeing in advance of the delivery of all or any of the Aircraft to be delivered hereunder, and in such event Boeing shall pay Buyer interest on such additional advance payments from date of payment to date of liquidation at such rate as Buyer and Boeing may mutually agree upon.

ARTICLE 6. Warranty.

(a) Boeing agrees, represents and warrants that the Boeing Model 707 type aircraft will be certificated by the Civil Aeronautics Administration with a Type Certificate and that each Aircraft, prior to and at the time of delivery thereof, will be certificated by the Civil Aeronautics Administration with an

not terminated.

(e) In the event that Boeing should exercise any right granted by paragraph (b) above to terminate this Agreement and thereafter Boeing completes the manufacture of the Aircraft scheduled to be manufactured for and delivered to Buyer, Boeing agrees that it will not sell such Aircraft to any other customer without first offering for a period of thirty (30) days to sell such Aircraft to Buyer at a price and on terms and conditions not less favorable to Buyer than those on which Boeing is offering to sell Model 707-320 series aircraft to others at that time.

(f) Boeing agrees that it will, to the extent and at the time that it becomes reasonably certain that there will be any material delay in the delivery of Aircraft or the performance of other obligations of Boeing hereunder, give Buyer written notice of the estimated delay.

ARTICLE 10. Changes.

(a) The Detail Specification and other terms and conditions of this Agreement may be amended from time to time by Change Orders in writing, which shall set forth in detail the particular specifications, terms or conditions involved, the changes to be made therein, and the effect, if any, of such changes on design, performance, weight, balance, time of delivery and basic price of the Aircraft or Spare Parts. Change Orders shall not be binding on either party until signed by persons respectively duly authorized in writing by Boeing and Buyer, but upon being so

signed shall constitute amendments to this Agreement.

(b) The Detail Specification also may be revised by Boeing without Change Order or Buyer's consent to incorporate development changes where such changes do not adversely affect price, delivery, guaranteed weight or guaranteed performance of the Aircraft or interchangeability or replaceability of Spare Parts. Development changes are those changes of a minor nature deemed necessary to correct defects, improve the Aircraft, prevent delay, or insure compliance with this Agreement but which have no materially adverse effect on the design, weight, balance or functional characteristics of the Aircraft; provided, however, no change shall be made pursuant to this paragraph (b) to any of the equipment listed in Appendix 1 of the Detail Specification. Boeing shall notify Buyer of all changes made in the Detail Specification pursuant to this paragraph (b) by furnishing to Buyer revision insert pages for the Detail Specification.

ARTICLE 11. Mandatory Modifications.

Notwithstanding anything contained in this Agreement, if any law or governmental regulation or interpretation thereof by a governmental agency, the date of promulgation of which is subsequent to the date of this Agreement, shall require any change, addition or modification to the Aircraft prior to delivery thereof in order to obtain certification by the Civil Aeronautics Administration as provided herein, the parties hereto agree that such change, addition or modification shall be made in the Air-

lities, damages, losses and judgments which may be suffered by, accrue against, be charged to or recoverable from Buyer and/or any of Buyer's observers, by reason of loss of or damage to property, or by reason of injury to or death of any person other than an officer, agent or employee of Buyer, arising out of or in connection with the operation of the Aircraft during all tests and flights thereof conducted under either Article 15 or Article 16 prior to delivery. Buyer shall fully protect and indemnify Boeing against all liability arising from injury to or death of Buyer's observers during each such flight; provided, however, the foregoing indemnity shall be applicable only to the extent of any liability not covered by or in excess of such valid and collectible insurance as Boeing may have in effect at the time such liability arises.

(e) If during any flight test herein required any Aircraft fails to comply with the Detail Specification and the performance guarantees therein set forth, or if during any flight test any Aircraft or any accessory, equipment or part thereof fails to function properly, Boeing promptly and without charge to Buyer shall correct or cause the correction of any such defects and deficiencies involved and shall conduct such supplemental flight testing as may be necessary to demonstrate the satisfactory functioning of the Aircraft and equipment as corrected.

ARTICLE 17. Title to Property and Risks.

(a) Title to and risk of loss of or damage to each Aircraft

and Spare Part shall pass from Boeing to Buyer upon delivery thereof but not prior thereto.

(b) Upon the delivery of and the payment for each Aircraft, Boeing shall deliver to Buyer a bill of sale duly vesting in Buyer good title to such Aircraft free and clear of all liens, claims, charges and encumbrances of every kind whatsoever, and such other appropriate documents of title with respect thereto as Buyer may reasonably require.

ARTICLE 18. Resale or Lease.

(a) Buyer may not, prior to delivery to Buyer hereunder, without first obtaining Boeing's written consent, resell, lease or transfer any Aircraft, or contract so to do, except that:

(i) Buyer may resell or lease any such Aircraft to any of Buyer's subsidiaries or affiliates, or to the United States Government or any agency thereof;

(ii) Buyer may, and at Buyer's request Boeing shall, take any action reasonably required for the purpose of causing any Aircraft to be subjected to an equipment trust, conditional sale, lien or other arrangement for the financing by Buyer of the purchase of any such Aircraft; provided, however, that no such action shall subject Boeing to any liability which it would not otherwise be subject to hereunder or modify in any respect Boeing's contract rights hereunder or require Boeing to divest itself of title to or possession of any such Aircraft until delivery thereof

and payment therefor as provided in this Agreement; and

(iii) Buyer may resell or lease any such Aircraft to Trans World Airlines, Inc.

(b) In the event of the resale or lease of any Aircraft as permitted under this Agreement during a period of twenty-four (24) months after delivery thereof, all rights and benefits conferred under this Agreement upon Buyer with respect to such Aircraft shall inure to the benefit of such purchaser or lessee, as the case may be; provided, however, that Buyer shall obtain from such purchaser or lessee an express agreement, in writing, to be bound by and comply with all applicable terms and conditions set forth in Articles 6, 7, 14, 15 and 18 hereof, and Buyer shall promptly furnish to Boeing a true copy of such agreement.

(c) Upon the resale or transfer by Buyer of any of the Aircraft as permitted under this Agreement subsequent to the expiration of twenty-four (24) months after delivery thereof, Buyer shall include in the agreement of sale or transfer express provisions subjecting such purchaser or transferee to all the covenants and conditions and granting the same rights and privileges, subject to the same limitations, as are contained in Article 14.

ARTICLE 19. Plant Representatives of Buyer.

Boeing's construction of Aircraft pursuant to this Agreement, and all materials and parts obtained by Boeing therefor, including Boeing's testing thereof, shall at all reasonable times during business hours be open to inspection by any duly authorized rep-

resentative or representatives of Buyer, except that if access to any portion of Boeing's plant where construction is in progress or materials or parts are stored is restricted by the United States Government or any agency thereof, Boeing shall be allowed a reasonable time to make the items available for inspection elsewhere than in the restricted portion of the plant. Commencing with the effective date of this Agreement and until the delivery of the last Aircraft, Boeing shall furnish, without additional charge, suitable office space and equipment in, or conveniently located with respect to, its plant for the accommodation of up to but not exceeding twenty (20) personnel of Buyer, including personnel of Buyer referred to in Article 19 of Purchase Agreement No. 7. Such office space and equipment need not exceed space and equipment for four desks and a secretary's desk at the administrative office and one desk in the factory. All inspections and examinations by Buyer and its representatives shall be performed in such manner as not unduly to delay or hinder the manufacture, construction or performance by Boeing. The office space and equipment to be furnished by Boeing hereunder may be the same office space and equipment furnished by Boeing under Purchase Agreement No. 7 and need not be in addition to the office space and equipment furnished under that agreement.

ARTICLE 20. Termination for Insolvency.

Either Boeing or Buyer at its option may terminate this Agreement with respect to any or all of the Aircraft, Spare Parts, services, data and items to be furnished hereunder which are undeli-

vered or not furnished on the effective date of such termination, by giving the other party written notice as hereinafter provided at any time after the other files a voluntary petition in bankruptcy, or proceedings in bankruptcy are instituted against the other and it is thereafter adjudicated bankrupt pursuant to such proceedings, or a court takes and retains for a period of at least sixty (60) days jurisdiction of the other and its assets pursuant to proceedings under the provisions of any Federal reorganization act, or the other is adjudged insolvent, or a receiver of the other's assets is appointed on account of insolvency and is not discharged within a period of sixty (60) days thereafter, or the other is otherwise divested of its assets for a period of at least sixty (60) days, or the other makes a general assignment for the benefit of its creditors. Such notice of termination shall be given thirty (30) days prior to the effective date of termination, except that in the case of filing of a voluntary petition in bankruptcy or a voluntary general assignment for the benefit of creditors, such notice need not precede the effective date of termination.

ARTICLE 21. Assignment.

This Agreement shall inure to the benefit of and be binding upon each of the parties hereto and their respective successors and assigns, but it may not be voluntarily assigned, in whole or in part, by either party without the prior written consent of the other party, except that (i) either party's interest shall be

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assignable through merger, consolidation or reorganization, or voluntary sale or transfer of substantially all of its assets, (2) Boeing may assign any of its fixed or contingent rights to receive money hereunder, (3) Buyer may assign any of its rights hereunder to the extent expressly permitted in Article 18, and (4) Buyer may assign all its rights hereunder to Trans World Airlines, Inc.

ARTICLE 22. Loss or Damage of Aircraft.

In the event that prior to delivery thereof to Buyer an Aircraft being manufactured by Boeing for sale and delivery under this Purchase Agreement is lost, destroyed or damaged beyond repair, or damaged to the extent that it cannot be repaired by parts replacement to new condition and delivered in accordance with the delivery schedule set forth in Article 2, the time reasonably required by Boeing to furnish a replacement for such Aircraft or to accomplish such repair thereof shall be deemed an excusable delay under Article 9, provided Boeing promptly gives notice to Buyer of the estimated delay in delivery of the replacement or repaired Aircraft; provided, however, that in the event such Aircraft is lost, destroyed or damaged beyond repair, this Purchase Agreement shall be deemed terminated as to such one Aircraft unless Buyer gives Boeing written notice within thirty (30) days after the date of notification by Boeing of such loss, destruction or damage beyond repair that Buyer desires Boeing to manufacture and deliver to Buyer a replacement for such Aircraft, in

SUPPLEMENTAL AGREEMENT NO. 5

TO

PURCHASE AGREEMENT NO. 9 DATED MARCH 19, 1956

BETWEEN

BOEING AIRPLANE COMPANY

AND

HUGHES TOOL COMPANY

RELATING TO BOEING MODEL 707-331 AIRCRAFT

THIS SUPPLEMENTAL AGREEMENT entered into as of this 3rd day of September, 1959 by and between BOEING AIRPLANE COMPANY, a Delaware corporation (hereinafter called Boeing), and HUGHES TOOL COMPANY, a Delaware corporation (hereinafter called Buyer):

W I T N E S S E T H:

WHEREAS, the parties hereto have entered into an agreement dated March 19, 1956, providing for the manufacture and sale by Boeing to Buyer of eighteen (18) Model 707-331 aircraft (which agreement as heretofore supplemented and amended is hereinafter called the "Purchase Agreement"); and

WHEREAS, on June 25, 1959, Buyer assigned, subject to Boeing's consent, six (6) of such aircraft to PAN AMERICAN WORLD AIRWAYS, INC., a New York corporation; and

WHEREAS, on July 22, 1959, Boeing granted its consent to said assignment and released Buyer from all of Buyer's obligations under the Purchase Agreement with respect to the six (6) aircraft so assigned; and

WHEREAS, the parties now desire to amend the Purchase Agreement to provide for the reduction of the number of aircraft subject to such agreement from eighteen (18) to twelve (12), and desire to further amend the Purchase Agreement as hereinafter provided;

NOW, THEREFORE, in consideration of the mutual covenants herein contained, the parties agree as follows:

1. Paragraph (a) of Article 1 of the Purchase Agreement is hereby revised in its entirety to read as follows:

"(a) Twelve (12) Boeing Model 707-331 aircraft (hereinafter called Aircraft) to be manufactured by Boeing in accordance with the terms of this Agreement and the detail specification (hereinafter called Detail Specification) set forth in Exhibit A attached hereto and made a part hereof;"

2. The delivery schedule set forth in paragraph (a) of Article 2 of the Purchase Agreement is hereby revised to read as follows:

"Month of Delivery	Quantity of Aircraft
November 1959	1
December 1959	1
January 1960	1
February 1960	1
March 1960	1
April 1960	2
May 1960	2
June 1960	3"

3. Paragraph (c) of Article 15 of the Purchase Agreement is amended by changing the number of hours referred to therein from twenty (20) to thirteen (13).

4. Paragraph (c) of Article 16 of the Purchase Agreement is amended by changing the number of Aircraft referred to therein from two (2) to one (1), and by changing the number of hours referred to therein from twenty (20) to thirteen (13).

EXECUTED IN DUPLICATE as of the day and year first above written.

BOEING AIRPLANE COMPANY

By Original signed by T. L. Spalding

Its Manager of Contract Administration

Witness:

_____

HUGHES TOOL COMPANY

By _____

Its _____

Witness:

_____

NOTE: BAC submitted Supplemental Agreement No. 5 directly to H. T. Co. for their handling.

FM1 STRAIGHT HOUTOXX HOUSTON, TEXAS , MARCH 16, 1956

WILLIAM M. ALLEN, PRES.,
BOEING AIRLXXXX AIRPLANE COMPANY,
7755 EAST MARGINAL WAY,
SEATTLE 14, WASHINGTON

CONFIDETXXXXX CONFIDENTIAL. CONFIRMING THE OFFER MADE TO YOU ON BEHALF ON THE HUGHES TOOL COMPANY BY OUR MR. HUGHES IN A TELEPHONE CONVERSATION YESTERDAY, HUGHES TOOL COMPANY HEREBY MAKES THE FOLLOWING FIRM OFFERS:

(A) TO PURCHASE FROM BOEING AIRPLANT COMPANY ONE ADDITIONAL MODEL 707-131 AIRPLANE FOR THE SAME UNIT PRICE AND UPON THE SAME TERMS AS SET FORTH IN THE PURCHASE AGREEMENT DATED MARCH 2, 1956 AND THE SUPPLEMENTAL SIDE LETTER RELATING THERETO DATED MARCH 2, 1956, 3XXXX EXCEPT THAT THE SAID ADDITIONAL AIRPLANE WILL BE DELIVERED IN APRIL, 1959; AND,

(B) TO PURCHASE FROM BOEING AIRPLANT COMPANY EIFHXXXXX EIGHTEEN MODEL 707-320 AIRPLANES FOR THE SAME UNIT PRICE AND UPON THE SAME TERMS AS STXXXX SET FORTH IN THE WRITTEN PROPOSAL DATED JANUARY 6, 1956, FROM BOEING AIRPLANE COMPANY TO SELL TOHXXXX TO HUGHES TOOL COMPANY TWENTY-TWO MODEL 707-320 AIRPLANES, EXCEPT THAT ONLY EIGHTEEN AIRPLANES ARE TO BE PURCHASED, AND THESE UPON THE DELIVERY SCHEDULE PXXXXX SPECIFIED IN THE TELEHXXXX TELEPHONE CONVERSATION YESTERDAY, RESULTING IN DELIVERIES OF ALL EIGHTEEN AIRPLANES BY THE END OF JUNE 1960; AND EXCEPT THAT THERE SHALL BE NO CONDITION SUBSEQUENT FOR NOT REACHING AN AGREEMENT WITH UNITED AIRCRAFT CORPORATION AND FURTHER THAT THE DATE FOR OUR REACHING A DEFINITIVE

AX-1502 /-NT FOR NOT REACHING AN AC[illegible]

·RATION AND FURTHER THA

REEMENT WITH BOEING AIRPLANE COMPANY SUPERSEDING THIS PROPOSAL

SHALL BE APRIL 15, 1956. FUNDS IN THE AMOUNT OF $4,860,241.30 WILL

BE MADE AVAILABLE TO YOU TODAY FOR OUR ACCOUNT, ~~ABCXXXXXX~~X REPRESENTING

THE FIVE PER-CENT DOWN PAYMENT ON THE PURCHASE PRICE OF THESE

NINETEEN AIRPLANES.

PLEASE ADVISE YOUR ACCEPTANCE OF THIS OFFER BY TELEGRAM OR LETTER

TRANSMITTED TO HUGHES TOOL COMPANY, ATTENTION C. H. PRICE, V. PRES.

2200 GULF BUILDING, HOUSTON, TEXAS.

HUGHES TOOMXXXX TOOL COMPANY

BY C. H. PRICE, VICE PRESIDENT

CONF 707-131 MARCH 2, 1956 MARCH 2, 1956 1959

707-320 JANUARY 6, 1956 707-320 JUHXXX JUNE 1960

APRIL 15, 1956 $4,860,241.30

GA PLS

IN TWO PLACES IN ABOVE MSG WHERE SAYS "BOEING AIRPLANT COMPANY" PLS

CHANGE TO READ "BOEING AIRPLANE COMPANY" GA

JUST A MIN OK THANK U

YR FIG ON LAST PAGE RDS $4'860'241.30 CANT READ IT

YO XX YOU SHOW APOSTROPHES NXXX INSTEAD OF COMMAS N XXX IN THIS

FIGURE. CORRECT FIGURE IS $4,860,241.30. GA PLS

RECD FHIWU

2043 PD LONG

WICHITA KANS MAR 19

HUGHES TOOL CO, ATTN C H PRICE

2200 GULF GLDG HOU

LIMITED

460-0-415.

THE FOOLS OF THE HUGHES TOOL COMPANY SET FORTH IN YOUR TEX DATED MARCH 16, 1956, RELATING TO ONE ADDITIONAL MODEL 707-131 AIRCRAFT AND 18 MODEL 707-320 AIRCRAFT ARE HEREBY ACCEPTED. THE DELIVERY SCHEDULE FOR THE 18 MO DEL 707-320 AIRCRAFT IS AS FOLLOWS

NOVEMBER 1959 1

DECEMBER 1959 2

JANUARY 1960 1

FEBRUARY 1960 2

MARCH 1960 2

APRIL 1960 3

MAY 1960 3

JUNE 1960 4

SINCE YOU ARE NOT PURCHASING THE REQUIRED NUMBER OF AIRCRAFT AND TO AVOID ANY POSSIBLE MIS-UNDERSTANDING WE POINT OUT THAT PARAGRAPH 2 OF A LETTER ALSO DATED JANUARY 6, 1956 AND RELATING TO INTERIOR ARRANGEMENTS OF THE MODEL 707-131 AIRCRAFT /REFERRED TO IN THAT LETTER AS THE 707-120/ IS INAPPLICABLE TO THIS TRANSACTION.

FURTHERMORE WE ASSUME THAT THE "FAVORED NATION" CLAUSE IN OUR 707-131 AGREEMENT WITH YOU WOULD NOT BE APPLICABLE TO THE PROPOSED LIGHT AIRPLANE WHICH WE HAVE DISCUSSED WITH MR HUGHES.

THE $4,138,241.30 TRANSFERRED ON MARCH 16, 1956 TO

FRI $4,060,241.30 TRANSF

ACIFIC NATIONAL BANK OF SEATTLE THROUGH THE NATIONAL BANK OF COMMERCE OF HOUSTON, TEXAS AND THE FEDERAL RESERVE BANK AND REPRESENTING 5 PERCENT OF THE BASIC PRICE OF ONE MODEL 707-131 AIRCRAFT AND 5 PERCENT OF THE BASIC PRICE FOR 18 MODEL 707-320 AIRCRAFT WILL BE ACCEPTED BY US TODAY AS THE FIRST ADVANCE PAYMENT ON SUCH AIRCRAFT.

A CONFIRMING LETTER AGREEMENT RELATING TO THE 18 MODEL 707-320 AIRCRAFT AND A CONFIRMING SUPPLEMENTAL AGREEMENT TO PURCHASE AGREEMENT NO 7 DATED MARCH 2, 1956, RELATING TO THE ONE MODEL 707-131 AIRCRAFT, BOTH OF WHICH WILL BE SIGNED ON BEHALF OF BOEING, WILL BE MAILED TO YOU IMMEDIATELY.

BOEING A

RPLANE CO SEATTLE WASH WILLIAM M ALLEN PRESIDENT.

MK RD FURTHERMORE WE ASSUME

460-0-415 16 1956 707-131 18 707-320 18 707-320 1959 1 1959 2 1960 1 1960 2 1960 2 1960 3 1960 3 1960 4 2 6 1956 707-131 707-120/ 707-131 $4,060,241.30 16 1956 5 707-131 5 18 707-320

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GENERAL DYNAMICS CORPORATION
(Convair Division)

and

HUGHES TOOL COMPANY

PURCHASE AGREEMENT

Relating to Manufacture of

Convair Model 880 Aircraft

Dated 10 September 1956

TABLE OF CONTENTS

Articles		Page Series
1	Subject Matter of Sale	1
2	Delivery of Aircraft	2A
3	Price of and Payment for Aircraft	3
4	Spare Parts	4A
5	Changes	5A
6	Warranties	6A
7	Indemnity Against Patent Infringement	7A
8	Taxes	8
9	Excusable Delays	9A
10	Customer Vended Equipment	10A
11	Services, Training and Data	11A
12	Buyer's Representatives and Inspection	12A
13	Demonstration and Test Flights	13A
14	Title to Property and Risks	14
15	Cancellation for Insolvency	15
16	Assignments	16A
17	Notices and Requests	17
18	Contracts with Other Purchasers	18
19	Miscellaneous	19

PURCHASE AGREEMENT

THIS PURCHASE AGREEMENT (hereinafter called the "Agreement") entered into of this 10th day of September, 1956, by and between GENERAL DYNAMICS CORPORATION, Delaware corporation, having an office (Convair Division) at San Diego, alifornia (hereinafter called "CONVAIR"), and HUGHES TOOL COMPANY with its offices Houston, Texas (hereinafter called "Buyer"):

W I T N E S S E T H:

WHEREAS, Buyer desires to purchase aircraft of the type hereinafter described r the transportation of passengers, mail, express and cargo, and CONVAIR desires manufacture and sell the same to Buyer:

NOW, THEREFORE, in consideration of the mutual covenants herein contained, parties hereto agree as follows:

ARTICLE 1

Subject Matter of Sale

CONVAIR shall manufacture (including the assembly of subcontracted and rchased parts) at its San Diego plant and sell and deliver to Buyer, and Buyer ll purchase and accept delivery of from CONVAIR the following:

(a) Thirty (30) Convair Model 880 (hereinafter called "Aircraft") to be nufactured by CONVAIR in accordance with the terms of this Agreement and NAIR's Detail Specification Report No. ZD-22-002 dated 6-1-56, revised 9-7-56, reinafter called "Detail Specification") set forth in Exhibit A attached vto and made a part hereof, as the same may be modified pursuant to Article 5 reof.

(b) Spare parts for said Aircraft, all as more particularly set forth in icle 4 hereof.

ARTICLE 2

Delivery of Aircraft

(a) Delivery Schedule

(1) The Aircraft shall be delivered to Buyer subject to (b) below, ready for flight not later than the dates set forth in the following schedule:

Month of Delivery	Number of Aircraft
January, 1960	1
February, 1960	1
March, 1960	1
April, 1960	2
May, 1960	2
June, 1960	2
July, 1960	3
August, 1960	4
September, 1960	5
October, 1960	5
November, 1960	4

The Aircraft covered by this Agreement shall be, in the order of priority of manufacture and delivery by CONVAIR of any Aircraft of the same basic model, as follows: The first through third, the fifth, the sixth, the eighth through the eleventh, the fifteenth through the twenty-first, the twenty-fourth through the thirty-third, and the thirty-seventh through the fortieth.

(2) CONVAIR recognizes the importance to Buyer of early deliveries of the Aircraft hereunder and shall endeavor continuously to better the above delivery schedule.

(3) The point of delivery shall be such point in the United States as may be designated by Buyer and at which the Aircraft can be landed. All expenses of, and in connection with, fly-away from San Diego, California, shall be borne by Buyer.

(4) Upon delivery to Buyer of each Aircraft in accordance with the terms hereof, title to and all risks in connection with such Aircraft shall pass from CONVAIR to Buyer.

(5) In the event any Aircraft is ready for delivery and CONVAIR so notifies Buyer of this fact but delivery of any such Aircraft is delayed by Buyer (whether or not such delay is out of Buyer's control) Buyer shall promptly reimburse CONVAIR for all cost and expense, including, but not limited to, reasonable compensation for storage, insurance and all taxes of every nature whatsoever, incurred by CONVAIR during, or paid or incurred as a result of any such delay in excess of one (1) week. The provisions of this paragraph (a) (5) shall not apply to delays in delivery, if any, referred to in paragraph (b) of this Article, occurring prior to final certification.

(6) In the event any Aircraft is destroyed or damaged beyond repair prior to delivery, CONVAIR shall be obligated to deliver, as a replacement, the first available unsold aircraft of the same basic model; provided, however, that Buyer shall make written request therefor within thirty (30) days after receiving notice from CONVAIR of such destruction or damage, otherwise the number of Aircraft to be delivered hereunder shall be reduced by the Aircraft so damaged or destroyed and CONVAIR shall forthwith repay to Buyer all payments theretofore made by Buyer with respect to that Aircraft.

(b) Certification

(1) The schedule of CONVAIR's performance hereunder provides for completion of all ground and flight tests required by the Civil Aeronautics Administration to obtain final airworthiness and type

certificates by July 1, 1960. Because of the importance to Buyer of early issuance of the airworthiness and type certificate, CONVAIR agrees to use its best efforts to better the above date.

(2) Prior to receipt of final certificates as defined in sub-paragraph (1) above, CONVAIR will have completed some of the Aircraft ready for delivery in all respects except for such final certificates, and CONVAIR will tender delivery to Buyer of all such Aircraft and Buyer will accept delivery from CONVAIR of such completed Aircraft to the extent that they can be used by Buyer for pilot training and/or other purposes, but conditioned upon and subject to CONVAIR's obtaining final certificates at a later date. CONVAIR shall not be considered to be in default of delivery as to any Aircraft not so accepted by Buyer. CONVAIR may require return of such delivered Aircraft for purposes of obtaining such final certificates and Buyer agrees to make them available for this purpose, upon reasonable notice, in such manner as CONVAIR may direct, but with due regard to reducing to a minimum the time out of service. Subject to the provisions of sub-paragraph (e) of Article 5 hereof, all costs, if any, in connection with obtaining such final certificates shall be borne by CONVAIR.

ARTICLE 3

Price of and Payment for Aircraft

(a) Price. The total Base Price of the Aircraft purchased hereunder shall be $112,500,000, computed on a Unit Base Price of $3,750,000 per unit delivered in accordance with Article 2 hereof.

(b) Payments. The total Base Price of the Aircraft purchased hereunder shall be paid as follows:

(1) $26,250,000 upon execution hereof, representing $875,000 per Aircraft for each of the thirty (30) Aircraft, and

(2) The balance of the Unit Base Price upon delivery of each of the Aircraft.

ARTICLE 5

Changes

(a) The Detail Specification may be amended at the instance of either party from time to time by Change Orders in writing, which shall set forth in detail the particular specification involved, the changes to be made therein, and the effect, if any, of such change on price, design, performance, weight, balance and time of delivery. Neither Buyer nor CONVAIR shall refuse unreasonably to execute any Change Order proposed by the other. CONVAIR shall offer to Buyer with reasonable promptness for consideration as a change under this paragraph (a) any improvement developed by CONVAIR for incorporation in Model 880 aircraft after the date of this Agreement and prior to delivery of all the Aircraft.

(b) The Detail Specification may also be amended by a change in any item of material, parts, accessories or equipment, specified therein by kind, type or source upon the written consent of Buyer's Factory Representative specifying the Aircraft affected. CONVAIR's substitution of items pursuant to such consent of Buyer's Factory Representative may thus be effected without Change Orders; but in no instance shall any such substitution increase the price of any Aircraft or affect CONVAIR's obligations under this Agreement or under the Detail Specification.

(c) All Change Orders shall show the Aircraft affected and the recurring and non-recurring charges or credits to Buyer occasioned thereby. The non-recurring charges or credits shall be reflected on the invoice covering the first Aircraft to which the change is applicable, and the recurring charges or credits shall be reflected on invoices covering each Aircraft to which the change is applicable. CONVAIR will, at the time of delivery of the last Aircraft hereunder, compute the effect of amortization of the non-recurring charges applicable to such changes over the total sales of aircraft at that time incorporating such changes, and shall reflect the credit, if any, due Buyer as a result of such further amortization in a Change Order hereto.

(d) Change Orders shall not be binding on either party and shall not be carried out unless and until mutually executed by persons respectively duly authorized in writing by CONVAIR and Buyer. No charges for extras shall be allowed or be collectible from Buyer unless authorized by a Change Order executed as aforesaid, except as otherwise provided herein.

(e) If any law, directive, order, proclamation, regulation or ruling of the United States Government or any agency thereof becomes effective after the date of this Agreement which requires any change, addition or modification to any undelivered Aircraft in order to obtain an Airworthiness Certificate in the transport category from the United States Civil Aeronautics Administration, such change, addition or modification shall be made and evidenced by a Change Order specifying the effect, if any, of such change on design, performance, weight, balance and time of delivery. The cost of making any such change, addition or modification shall be borne equally by CONVAIR and Buyer.

(f) CONVAIR may, without Change Order or Buyer's consent, make minor changes and corrections in the Detail Specification in order to correct defects or improve the Aircraft; provided, that such changes and corrections shall not adversely affect price, time of delivery, functional character or performance of any Aircraft to be purchased hereunder or the interchangeability or replaceability of parts therefor, nor appreciably affect the design, maintenance and service characteristics, weight or balance of any such Aircraft; and provided, further, that CONVAIR promptly shall give written notice to Buyer or Buyer's Factory Representative detailing such change and corrections and other effect, if any, upon any and all of the matters enumerated in this subparagraph (f).

ARTICLE 12

Buyer's Representatives and Inspection

(a) Commencing with the date of this Agreement and until the delivery of the last Aircraft, CONVAIR shall, without additional charge, furnish office space conveniently located with respect to its plant for the accommodation of not more than five (5) personnel of Buyer. Subject to CONVAIR's general rules and regulations, CONVAIR's construction of Aircraft pursuant to this Agreement, and all materials and parts obtained by CONVAIR therefor, and tests related thereto made at CONVAIR's plant at San Diego, California, shall at all reasonable times during business hours be open to inspection by any duly authorized representative or representatives of Buyer (one of whom shall be designated as the "Factory Representative"), except that if access to any portion of CONVAIR's plant where construction is in progress or material or parts are stored is restricted by the United States Government or any agency thereof, CONVAIR shall be allowed a reasonable time to make the items available for inspection to the extent practicable elsewhere than in a restricted portion of the plant. Buyer shall obtain for such personnel of Buyer proper United States Government military security clearance for access to CONVAIR's plant at San Diego, California. CONVAIR shall use its best efforts to obtain correspondingly adequate and reasonable inspection rights for Buyer's representatives with respect to work in process at the plants of CONVAIR's subcontractors.

(b) Any inspection accomplished by Buyer shall be performed so as not to unduly delay or hinder the manufacture, construction or performance by CONVAIR under this Agreement. CONVAIR shall not be obligated to remove parts already installed, remove lining and cover materials or open areas previously closed because of any failure of Buyer to have inspection representatives available at CONVAIR's plant, provided that CONVAIR shall advise Buyer in writing at least [illegible] of the scheduled date of arrival of the first

Aircraft to be delivered hereunder into the primary assembly stage.

ARTICLE 14

Title to Property and Risks

(a) Risk of loss of, or damage to, each Aircraft and Spare Part shall pass from CONVAIR to Buyer upon, but not prior to, delivery thereof in accordance with the terms of this Agreement.

(b) Upon the delivery of each Aircraft and final payment of the Base Price of such Aircraft, adjusted for changes in accordance with Article 5 hereof, CONVAIR shall deliver to Buyer or such of the persons, firms, or corporations referred to in Article 16 as Buyer may designate in writing at least five (5) days before delivery, a bill of sale duly vesting in Buyer, or such other persons, firm or corporation as Buyer may designate, good title to such Aircraft free and clear of all liens, claims, charges and encumbrances of every kind whatsoever, and such other appropriate documents of title with respect thereto as Buyer may reasonably require.

ARTICLE 16

Assignments

(a) This Agreement shall inure to the benefit of and be binding upon each of the parties hereto and their respective successors and assigns, but it may not be voluntarily assigned, in whole or in part, by either party without the prior written consent of the other party, except that either party's interest shall be assignable through merger, consolidation or reorganization which includes voluntary sale or transfer of substantially all of its assets; provided, however, that CONVAIR may assign any of its fixed or contingent rights to receive money hereunder, and Buyer may assign any of its contingent rights to the Aircraft or any of them for the purpose of securing any obligation for the repayment of monies loaned or advanced by any financial institution to finance in whole or in part the purchase of the Aircraft. Notwithstanding the foregoing, Buyer shall have the privilege to assign this Agreement in whole or in part without such consent, to TRANS WORLD AIRLINES, INC., and upon such assignment and full notice thereof to CONVAIR, TRANS WORLD AIRLINES, INC. shall succeed to such of the rights, privileges, liabilities and obligations of the Buyer hereunder as are so assigned and the Buyer shall cease to have or be subject to such rights, privileges, liabilities or obligations so assigned; provided, that Buyer shall, in the event of assignment to TRANS WORLD AIRLINES, INC., involving payment obligations under this Agreement, guarantee the due and punctual payment of such obligations by said assignee.

(b) Buyer and its successors and assigns may not, without first obtaining CONVAIR's written consent (which shall not be unreasonably withheld) resell or lease any Aircraft, or agree to do so, until the expiration of two (2) years after delivery of the first Aircraft hereunder. This limitation shall be

expressly included in any assignment made by the Buyer under this Article, and be expressly agreed to by the assignee. CONVAIR's permission is hereby granted, however, for lease of the Aircraft to any company for use incidental to equipment interchange or seasonal lease agreement; Buyer may, and at Buyer's request CONVAIR shall, take any action reasonably required for the purpose of causing any Aircraft to be subjected to an equipment trust, conditional sale, lien or other arrangement for the financing by Buyer of the purchase of any such Aircraft; provided, however, that no such action shall subject CONVAIR to any liability which it would not otherwise be subject to hereunder or modify in any respect CONVAIR's contract rights hereunder or require CONVAIR to divest itself of title to or possession of any such Aircraft until delivery thereof and payment therefor as provided in this Agreement; and Buyer may resell or lease any such Aircraft to TRANS WORLD AIRLINES, INC.

ARTICLE 18

Contracts with Other Purchasers

If subsequent to the date of this Agreement, CONVAIR shall contract to sell to any other commercial purchaser any of the first one thousand (1,000) aircraft of the same basic model at a Unit Base Price less than (i) $3,500,000.00 each or (ii) the then applicable Unit Base Price of the Aircraft hereunder, whichever is lower, plus or minus appropriate adjustments for labor and material escalation and for variations in specifications and equipment, or on other terms and conditions materially more favorable than those incorporated in this Agreement, except in respect to time and amount of down payments or progress payments set forth in Article 3(b) hereof, the purchase price of all Aircraft to be delivered hereunder shall be reduced to the lowest price to be paid by any such other purchaser and such other more favorable terms and conditions shall by appropriate amendment be offered to Buyer.

AMENDMENT NO. 4

TO

PURCHASE AGREEMENT BY AND BETWEEN

GENERAL DYNAMICS CORPORATION
(Convair Division)

AND

HUGHES TOOL COMPANY

Dated March 2, 1960

THIS AGREEMENT (hereinafter called "Amendment No. 4") entered into as of this 2nd day of March 1960, by and between GENERAL DYNAMICS CORPORATION, a Delaware Corporation, having an office (Convair Division) in San Diego, California, (hereinafter called "CONVAIR"), and HUGHES TOOL COMPANY, with its general offices at Houston, Texas (hereinafter called "Buyer"):

W I T N E S S E T H:

WHEREAS, Buyer and CONVAIR have entered into a Purchase Agreement dated 10 September 1956, relating to the purchase and sale of thirty (30) Model 880 Convair aircraft (hereinafter referred to as the "AGREEMENT"); and

WHEREAS, Buyer and CONVAIR now desire to amend said AGREEMENT as more specifically hereinafter set forth;

NOW, THEREFORE, in consideration of the mutual covenants herein contained, the parties hereto agree to amend the AGREEMENT as follows:

1. By deleting Article 2(a) (1) and telegraphic revision thereto from General McNarney to Mr. Price, dated September 17, 1956, and inserting in lieu thereof the following:

"(a) Delivery Schedule

(1) The Aircraft shall be delivered to Buyer, subject to (b) below ready for flight, not later, with respect to each of the Aircraft as hereinafter identified, than

the respective dates set forth in the following schedule:

Aircraft as Identified by Manufacturing No. Assigned According to Sequence of Original Convair Manufacturer	Month (during the year 1960) in which Aircraft is to be Tendered for Delivery	Position of Aircraft in Sequence of Convair Delivery to all Customers (including Buyer) of Commercial Jet Aircraft
10	May	4
12	May	5
20	May	7
22	May	8
23	June	10
24	June	11
25	June	12
26	June	13
27	July	14
28	July	15
30	July	17
31	July	18
2	July	19
5	August	20
32	August	21
33	August	22
34	August	23
35	August	24
3	September	26

Manufacture Sequence (Cont'd.)	Month (Cont'd.)	Delivery Sequence (Cont'd.)
39	September	29
40	September	30
42	September	32
13	October	33
14	October	34
15	October	35
18	October	36
19	October	37
6	November	38
9	November	39
8	November	40

(The numbers missing in regular numerical sequence from the first and third columns above represent those assigned, for manufacturing and delivery sequence purposes, respectively, to Delta Air Lines, Inc., except that the number 1, or first, jet aircraft in Convair's sequence of original manufacture is to be retained by Convair).

2. By deleting the second sentence in Article 5(c) and inserting in lieu thereof the following three sentences:

"All non-recurring charges or credits occasioned by Change Orders dated prior to, and affecting Aircraft delivered or to be delivered prior to, 30 November 1960, shall be reflected on an invoice issued by Convair on 30 November 1960. Non-recurring charges or credits occasioned by all other Change

Orders, to the extent such charges or credits have not theretofore or will not thereafter be included or includable in the invoice referred to in the next preceding sentence, shall be reflected on the invoices covering each Aircraft to which the charge is applicable. All recurring charges or credits shall be reflected on invoices covering each Aircraft to which the charge is applicable.

3. This Amendment No. 4 shall not be varied in its terms by any oral agreement or representation or otherwise than by an instrument in writing of even or subsequent date hereto, executed by both parties by their officers thereunto duly authorized.

4. Except as amended hereby, all terms and conditions of the AGREEMENT shall remain in full force and effect.

Executed in quadruplicate as of the day and year first above written.

GENERAL DYNAMICS CORPORATION
Convair Division

By _____

Title President

Attest:

_____

HUGHES TOOL COMPANY

By K. R. Hazlerigg

Title Vice President

Attest:

Amendment No. 6 to Purchase Agreement
between
General Dynamics Corporation (Convair Division)
and
Hughes Tool Company
dated 10 September 1956

THIS AGREEMENT (hereinafter called "Amendment No. 6") entered into as of this 10th day of November 1960, by and between GENERAL DYNAMICS CORPORATION, a Delaware corporation, having an office (Convair Division) in San Diego, California, (hereinafter called "CONVAIR") and HUGHES TOOL COMPANY, with its general offices at Houston, Texas (hereinafter called "Buyer"):

WITNESSETH:

WHEREAS, Buyer and CONVAIR have entered into a Purchase Agreement dated 10 September 1956, relating to the purchase and sale of thirty (30) Model 880 Convair aircraft (hereinafter referred to as the "AGREEMENT"); and

WHEREAS, Buyer and CONVAIR now desire to reduce the quantity of Model 880 Convair aircraft covered by the AGREEMENT from thirty (30) to twenty-four (24) and to that end desire to amend the AGREEMENT as more specifically hereinafter set forth;

NOW, THEREFORE, in consideration of the mutual covenants herein contained, the parties hereto agree to amend the AGREEMENT as follows:

1. By changing the word "Thirty (30)" where it appears in paragraph (a) of Article 1 to "Twenty-four (24)".

2. By deleting, from the delivery schedule set forth in Article 2(a)(1) (as provided in Amendment No. 4 to the AGREEMENT), the following six (6) aircraft, as identified by manufacturing number assigned according to sequence of original Convair manufacture: 5, 8, 12, 20, 22 and 23.

3. By deleting from Article 3(a) the figures "$112,566,000" and substituting therefor "$90,052,800".

4. By deleting Article 3(b) and by inserting in place thereof the following:

"(b) Payments. The total Base Price of the Aircraft purchased hereunder shall be paid as follows:

(1) $21,013,200 upon execution hereof, representing $875,550 per Aircraft for each of the twenty-four (24) Aircraft, and

(2) The balance of the Base Price of each Aircraft plus or minus charges or credits, if any, resulting from Change Orders heretofore or hereafter executed pursuant to Article 5 hereof, and other price elements expressly provided by this Agreement, upon tender of delivery, in accordance with Article 8 hereof, of each of the Aircraft manufactured in accordance with the terms of this Agreement and the Detail Specification."

5. By changing appropriately, in all Letters of Agreement and in all Change Orders, each reference to thirty (30) aircraft to reflect the reduction in quantity of aircraft to twenty-four (24) and to reflect the elimination from the AGREEMENT of the six (6) aircraft identified in paragraph 2. of this Amendment No. 6.

6. This Amendment No. 6 shall be construed in accordance with the laws of the State of California.

This Amendment No. 6 shall not be varied in its terms by any oral agreement or representation or otherwise than by an instrument in writing of even or subsequent date hereto, executed by both parties by their officers thereunto duly authorized.

Except as amended hereby, all terms and conditions of the AGREEMENT shall remain in full force and effect.

Executed in quadruplicate as of the day and year first above written.

GENERAL DYNAMICS CORPORATION

Attest:

By _____
J. V. Naish

Title President - Convair Division

HUGHES TOOL COMPANY

Attest:

By C. A. Green

Title Vice President

Assistant Secretary

CONVAIR

A DIVISION OF GENERAL DYNAMICS CORPORATION

GENERAL OFFICES
SAN DIEGO 12, CALIFORNIA
TELEPHONE CYPRESS 6 6611

Letter of Agreement No. 1

Hughes Tool Company
Houston, Texas

Gentlemen:

In consideration of the Purchase Agreement entered into concurrently herewith between General Dynamics Corporation and Hughes Tool Company relating to the manufacture of thirty (30) Convair Model 880 aircraft, the parties hereto agree that the Unit Base Price of $3,750,000 provided for in Article 3 of said Purchase Agreement shall be subject to adjustment as additional commercial sales of Model 880 aircraft are made beyond the forty (40) aircraft purchased by Hughes Tool Company and Delta Air Lines, Inc., said adjustment to be made on the following basis:

1. The Unit Base Price of $3,750,000 stated in Article 3(a) of said Purchase Agreement shall be reduced, without regard to the proviso in paragraph 2 below, at the rate of $8,333.33 per Aircraft for each commercial sale of Model 880 aircraft from No. 41 through No. 70 for a total reduction of $250,000 per Aircraft sold under said Purchase Agreement.

2. The said Unit Base Price of said Aircraft shall be further adjusted as additional commercial sales of Model 880 aircraft are made beyond the forty (40) Aircraft covered by said Purchase Agreement and the Purchase Agreement with Delta Air Lines, Inc., as follows:

(i) A reduction of $5,000 per Aircraft for each commercial sale from No. 41 through No. 100, resulting in an adjusted Unit Base Price of $3,200,000 at such 100th sale.

(ii) A reduction of $6,000 per Aircraft for each commercial sale from No. 101 through No. 150, resulting in an adjusted Unit Base Price of $2,900,000 at such 150th sale.

(iii) A reduction of $3,400 per Aircraft for each commercial sale from No. 151 through No. 200, resulting in an adjusted Unit Base Price of $2,730,000 at such 200th sale.

(iv) A reduction of $1,600 per Aircraft for each commercial sale from No. 201 through No. 250, resulting in an adjusted Unit Base Price of $2,650,000 at such 250th sale.

Hughes Tool Company
Houston, Texas

(v) An appropriate reduction per Aircraft for each commercial sale from No. 251 through No. 1,000, consistent with reasonable accounting procedures on a basis of computation consistent with the principles followed in computing reductions as set out in (i) through (iv) above, resulting in an adjusted Unit Base Price of $2,500,000 at such 1,000th sale; provided, however:

(a) that each of the adjusted Unit Base Prices listed in sub-paragraphs (i) through (iv) shall in no event become finally effective, nor shall CONVAIR be required to give final effect thereto, if any such adjusted Unit Base Price would operate to reduce the combined total price of all the Model 880 commercial aircraft then sold below the actual cost of such aircraft to CONVAIR as charged or to be charged against the Model 880 commercial program under CONVAIR's usual accounting procedures which shall be in accordance with sound accounting practice; and,

(b) that each of the adjusted Unit Base Prices listed in sub-paragraph (v) above shall in no event become finally effective, nor shall CONVAIR be required to give final effect thereto, if any such adjusted Unit Base Price would operate to reduce CONVAIR's overall gross profit on all the Model 880 commercial aircraft then sold below six per cent (6%) of the actual cost of such aircraft to CONVAIR as charged or to be charged against the Model 880 commercial program under CONVAIR's usual accounting procedures which shall be in accordance with sound accounting practice; and,

(c) that the foregoing provisos shall be applied, insofar as the abatement of reductions is provided for therein, only pro tanto to the extent and during the period required to avoid violation of the terms of such provisos.

3. It is recognized by the parties hereto that CONVAIR may invoke the provisos in paragraph 2. (v)(a) and (b) and (c) above before or after payment for the Aircraft or a portion thereof by Buyer in accordance with Article 3(b) of said Purchase Agreement. In such event, and upon the establishment of facts required hereunder to bring such proviso into operation, any initial effectiveness, pursuant to paragraph 5. hereof, theretofore given by way of price reduction shall be reversed to the extent final effectiveness would violate such proviso; i.e., if such initial effectiveness but subsequent reversal both occur prior to Aircraft delivery, Buyer shall make payment at the time of Aircraft delivery without benefit of such price reduction which has been reversed; and similarly, if such reversal occurs subsequent to Aircraft delivery, Buyer shall forthwith repay to CONVAIR any such price reduction so reversed which Buyer has theretofore enjoyed either as a sum Buyer did not pay at the time of Aircraft delivery or as a sum paid by CONVAIR to Buyer subsequent to Aircraft delivery.

4. The Unit Base Price reductions shown above are without effect on other price elements; i.e., the total purchase price of each of the thirty (30) Aircraft covered by the Purchase Agreement with HUGHES TOOL COMPANY shall consist of the adjusted Unit Base Price increased or decreased as the case may be by specification changes, and other price elements expressly provided by said Purchase Agreement.

5. The term "commercial sales" means any arrangement, firm by ordinary standards prevailing in the aircraft manufacturing industry, under which CONVAIR agrees to deliver Aircraft for commercial use to any other person, firm, corporation or other entity, whether passage of title be involved or pursuant to conditional sale, chattel mortgage, lease, or otherwise; and, subject to the other provisions of this letter agreement and the provisions contained in the said Purchase Agreement referred to in the first paragraph hereof, the Unit Base Price reductions provided hereby shall become initially effective upon CONVAIR entering into any such arrangement.

6. The price adjustments contemplated by this letter agreement have been computed without reference to the possibility of sales of Model 880 aircraft to the United States Military Forces, and no adjustment shall be made in relation to such sales except as hereinafter set out. It is mutually agreed that should the United States Military Forces purchase aircraft from CONVAIR in the same basic Model 880, passenger-transport configuration for delivery prior to delivery of Aircraft No. 100 of the commercial Model 880 aircraft, CONVAIR will determine the cost effect of such military purchases upon the Model 880 commercial program. Such determination will be based upon, but not limited to, a consideration of the effect of such military purchases upon the development costs of the said Model 880 aircraft, learning curves and/or resulting profit to CONVAIR applicable to the Model 880 program. Depending upon the extent to which the said military purchases may benefit the Model 880 commercial program, CONVAIR and the Buyer will negotiate as to whether any price revision to the Buyer is appropriate and, if so, the extent thereof.

7. CONVAIR shall promptly notify Buyer of any Model number change which, because of fundamental dissimilarity of the new model from prior production, in CONVAIR's opinion would operate to exclude aircraft of the new Model from the price adjustment provisions contained in this agreement. In the event there are sales of any such new Model, CONVAIR will determine the cost effect of such sales on the Model 880 program. Depending upon the extent to which such sales may benefit the Model 880 program, CONVAIR and the Buyer will negotiate as to whether any price revision to the Buyer is appropriate and, if so, the extent thereof. Failure of CONVAIR to notify Buyer of any such Model number change within fifteen (15) days after the sale of such changed Model shall constitute a waiver by CONVAIR of the effect thereof on the aforesaid price adjustment provisions.

8. Notwithstanding any provisions to the contrary elsewhere contained, the final adjusted Unit Base Price of each Aircraft shall in no event exceed the applicable Unit Base Price set out below, in event CONVAIR's total commercial sales, including the forty (40) aircraft covered by said Purchase Agreement and the Purchase Agreement with Delta Air Lines, Inc., become 150 or greater:

ghes Tool Company
ouston, Texas

Applicable Unit Base Price	Total Sales
$3,075,000	150
$2,805,000	200
$2,725,000	250 or more

e applicable Unit Base Price for total sales between the total sales numbers ove specified shall be computed on an equal, straight line basis; for example, e applicable Unit Base Price in event of total sales of 151 is $3,069,600; in ent of total sales of 152 is $3,064,200; in event of total sales of 201 is 2,805,400; etc. The provisions of this paragraph 8. are independent of the ovisions of paragraphs 1. and 2. of this letter agreement and vice versa; i.e., reduction is applicable pursuant to this paragraph 8. in event total sales are s than 150 nor on account of total sales in excess of 250; and the said pro- isos of paragraph 2. and all matters relating to such provisos have no application this paragraph 8.

. Each payment by Buyer, at the time of delivery of an Aircraft and as part of e purchase price thereof, of any sum to whose return Buyer subsequently becomes titled as representing a reduction in Unit Base Price pursuant to any of the ovisions of this letter agreement shall bear interest at the rate of three and e-half per cent (3-1/2%) per annum computed on the basis of a year of 365 days, the period from the date of such payment to the date of such return. Interest e to Buyer pursuant to this paragraph shall be paid by CONVAIR to Buyer, or redited to Buyer's account to the extent of amounts then due and owing from Buyer CONVAIR, at the same time as the sum upon which said interest has accrued comes due to Buyer. The maximum period with respect to which said interest shall payable as to any particular sum shall be five (5) years, regardless of the tent to which the actual length of the period applicable to such particular sum referred to in the preceding sentence may be greater than five (5) years, but is sentence shall not relieve CONVAIR of the obligation to pay said interest en due.

0. The phrase "applicable Unit Base Price of the Aircraft hereunder" as used in rticle 19 of the Purchase Agreement has reference to the Unit Base Price as djusted by the terms of this letter agreement.

would appreciate the return to us of two (2) copies of this letter indicating ur acceptance of the above, executed by an appropriate officer of your Company.

Very truly yours,

GENERAL DY[illegible]ORPORATION

By J W Lamb

Executive Vice President-Convair Division

epted and Agreed to

[illegible] Day of September 195[illegible]

[illegible]NG ANY

C H PRICE VICE PRESIDENT HUGHES TOOL CO

HOU

REFERENCE IS MADE TO OUR WIRE OF 17 SEPTEMBER 1956 AS AMENDED BY OUR WIRE DATED 19 SEPTEMBER 1956. SAID WIRE IS FURTHER AMENDED AS FOLLOWS.

THE AMENDMENTS TO LETTER OF AGREEMENT NO. 1 AS CONTAINED IN SUB PARAGRAPHS /7/ AND /8/ ARE STRICKEN AND THE FOLLOWING SUBPARAGRAPH IS INSERTED IN LIEU THEREOF.

SUBPARAGRAPHS /6/ AND /7/ ARE STRICKEN AND THE FOLLOWING IS SUBSTITUTED IN LIEU THEREOF.

"THE AIRPLANE DESCRIBED BY EXHIBIT A TO THE PURCHASE AGREEMENT AND ANY OUTGROWTH OR DERIVITIVE OF THAT AIRPLANE ARE EUQALLY INCLUDED FOR ALL PRICE ADJUSTMENT PURPOSES CONTEMPLATED BY THIS LETTER. AGREEMENT AND ARE INCLUDED IN THE SCOPE OF THE PHRASES "MODEL 880 COMMERCIAL AIRCRAFT. COMMERCIAL SALES, AND MODEL 880 COMMERCIAL PROGRAM". PROVIDED HOWEVER THAT WITH REGARD TO SALES TO THE UNITED STATES MILITARY FORCES IN COMPUTING PRICE ADJUSTMENTS THESE WILL BE TAKEN INTO ACCOUNT IN PROPORTION TO WHATEVER BENEFITS ACCRUE FROM THEIR PRODUCTION TO THE COMMERCIAL PRODUCTION PROGRAM AND VICE VERSA." IT SHOULD BE NOTED THAT THE ABOVE CHANGE WILL REQUIRE APPROPRIATE RENUMBERING OF THE PARAGRAPHS IN LETTER AGREEMENT NO. 1 AND WITH THIS EXCEPTION ALL OF THE REMAINDER OF OUR TELEGRAMS OF 17 SEPTEMBER 1956 AND 19 SEPTEMBER 1956 REMAIN UNCHANGED

JOSEPH T MCNARNEY

PRESIDENT

CONVAIR

VUA027 NL PD

WUX SANDIEGO CALIG SEP 21

C N PRICE VICE PRESIDENT HUGHES TOL CO

RECEIPT IS ACKNOWLEDGE OF YOUR TELEGRAM OF SEPT 21
CONFIRMING THAT THE CONTRACT DOCUMENTS RELATING TO THE
PURCHASE BY HUGHES TOOL COMPANY OF THIRTY 880 AIRCRAFT
HAVE BEEN EXECUTED WE FURTHER CONFIRM THAT DELTA AIR
LINES INC HAS ON THIS 21 DAY OF SEPTEMBER 1956 EXECUTED
A PURCHASE AGREEMENT COVERING THE PURCHASE BY DELTA OF
TEN OF THE FIRST FORTY CONVAIR 880 AIRCRAFT THEREFORE
THIS CONDITION IMPOSED BY OUR LETTER OF SEPT 8 1956
HAS BEEN FULFILLED AND THE PURCHASE AGREEMENT AND OTHER
CONTRACTURAL INSTRUMENTS COVERING THIRTY CONVAIR 880
AIRCRAFT EXECUTED BY HUGHES TOOL COMPANY ARE NOW IN FULL
FORCE AND EFFECT

JOSEPH T MCNARNEY PRESIDENT CONVAIR DIVISION
GENERAL DYNAMICS CORP

739A

21 1956 880 8 1956 880.

COPY

HUGHES TOOL COMPANY

EXECUTIVE OFFICES
TWENTY-SECOND FLOOR GULF BUILDING

HOUSTON 2, TEXAS
September 26,

1956

C. H. PRICE
VICE PRESIDENT
AND TREASURER

Re: General Dynamics Corporation (Convair Division)-Hughes Tool Company Purchase Agreement, dated September 20, 1956, Relating to Convair Model 880 Aircraft.

Convair Division
General Dynamics Corporation
3165 Pacific Highway
San Diego 12, California

Attention: Director of Contracts

Gentlemen:

Article 5 of the subject contract provides that change orders affecting amendments to the detail specification and other terms and conditions of the agreement may be executed from time to time by persons duly authorized by Convair and Hughes Tool Company. For the purpose of representing Hughes Tool Company in matters involving detail specification and other technical changes, we have named as our Special Representative, Mr. R.W. Rummel, whose address is 10 Richards Road, Kansas City, Missouri.

This letter is to evidence Mr. Rummel's authority to represent Hughes Tool Company and, on its behalf, to conduct all negotiations and execute all change orders regarding specifications and other technical matters in connection with the captioned contract; provided, however, that without the written approval of an officer of Hughes Tool Company, Mr. Rummel may not execute change orders evidencing any single change having a price effect per airplane of more than $30,000.00 or evidencing total changes which in the aggregate have a net price effect in excess of $150,000.00 per airplane. Please furnish to our Houston office, to the attention of Mr. C.H. Price, copies of all change orders regardless of the amount.

Side Letter of Agreement No. 18 relating to the capitoned agreement provides for notice to buyer's representative in those instances specified in the captioned agreement, side letters of agreement and detail specification requiring buyer's approval of the use of materials, methods, processes, equipment or design. This letter is to evidence buyer's representative to receive such notices, together with such information as is otherwise required, with authority to represent buyer in such matters.

In addition to Mr. Rummel's authority as hereinabove set out, we have also authorized him to designate the factory representative for Hughes Tool Company as that term is employed in the captioned contract and related agreements, and we have granted Mr. Rummel the authority to delegate the functions of the buyer's representative to other persons as he deems appropriate. You may, therefore, consider any designation of factory representative or delegation of authority of buyer's representative made by Mr. Rummel as approved by Hughes Tool Company

Yours very truly,

HUGHES TOOL COMPANY

By: Original Signed By C. H. Pitts
Vice President

AX-1536

DX 71, page 1
(Rummel Memo re TWA Equipment Program, 3/15/61) KC

DX 7 (in evid.)

Messrs. W. L. Pierson
E. O. Cocke
A. V. Leslie

R. W. Rummel

New York, New York
March 15, 1961

TWA Equipment Program

CONFIDENTIAL

IT SEEMS APPROPRIATE THAT THE TWA BOARD OF DIRECTORS AT ITS MARCH 20 MEETING TAKE THE FOLLOWING ACTION:

1. AUTHORIZE TWA TO LEASE UP TO SIX BOEING 720B'S.

2. AUTHORIZE TWA TO ENTER INTO A LETTER OF INTENT WITH BOEING (BY MARCH 31, 1961) FOR THE PROCUREMENT OF TWENTY 131B AND SIX 331B TYPE AIRCRAFT, TO BE FOLLOWED BY DEVELOPMENT OF A FIRM CONTRACT BY TWA MANAGEMENT FOR REVIEW BY THE BOARD AT ITS APRIL MEETING AND FOR CONSUMMATION BY APRIL 30, 1961.

3. AUTHORIZE TWA TO CONCLUDE ARRANGEMENTS REQUIRED TO SATISFY THE INITIAL CASH REQUIREMENTS OUTLINED IN THIS LETTER.

AUTHORITY FOR PROCUREMENT OF THE FORTY-EIGHT SPARE PRATT & WHITNEY ENGINES CAN BE DEFERRED UNTIL THE APRIL BOARD MEETING.

AFFIRMATIVE ACTION WILL AVOID THE NEED FOR INCURRING SUBSTANTIAL AIRPLANE PRICE AND ENGINE PRICE INCREASES ($6,752,000), PRESERVE DELIVERY POSITIONS AT INITIAL INVESTMENT, AND PROVIDE TWA WITH INTERIM LEASE AIRCRAFT. OF COURSE THE MARCH 31 LETTER OF INTENT WOULD CONTAIN ALL THE NECESSARY AND USUAL CONDITIONS SUCH AS BEING WHOLLY SUBJECT TO SUCCESSFUL CONCLUSION OF FINANCING ARRANGEMENTS, MUTUAL AGREEMENT ON SPECIFICATIONS, ETC.

WORTHWHILE PROGRESS HAS BEEN MADE WITH BOEING. BOEING WILL CARRY ALL PROGRAM RISKS THROUGH MARCH 31, 1961 AND WILL CONTINUE TO HOLD DELIVERY POSITIONS FOR THE TWENTY 131B'S, THE SIX 331B'S, AND THE SIX LEASE 720B'S UNTIL THEN.

A. BOEING IS NOW WILLING TO PROCEED ON THE BASIS OF A LETTER OF INTENT FOR THE 131B'S AND THE 331B'S, PROVIDING SUCH A LETTER IS SIGNED BY MARCH 31 AND FURTHER PROVIDED THAT WITHIN TEN DAYS THEREAFTER TWA MAKES AN INITIAL MODEST DOWN PAYMENT OF $25,000 PER AIRPLANE, OR $650,000 FOR THE TWENTY-SIX AIRCRAFT.

B. BOEING IS WILLING TO DEFER FINAL COMMITMENT UNTIL APRIL 30, 1961. WITHIN TEN DAYS THEREAFTER, OR ON MAY 10, BOEING WOULD REQUIRE COMPLETION OF THE 5% REQUIRED DOWN PAYMENT. THIS WOULD AMOUNT TO APPROXIMATELY $7,190,000 FOR THE TWENTY 131B'S AND SIX 331B'S. IF NECESSARY, BOEING MIGHT BE WILLING TO ALTER THE 5% DOWN PAYMENT REQUIREMENT UNTIL SUCH TIME AS SEEMS PRACTICAL. IN THIS CONNECTION, I ASSUME MR. LESLIE WOULD WANT TO NEGOTIATE WITH OUR FINANCIAL OFFICERS.

DX 71

MESSRS. W. L. PIERSON
E. O. COCKE
A. V. LESLIE

R. W. RUMMEL

MARCH 15, 1961

CONFIDENTIAL

C. BOEING NOW REQUIRES A FIRM CONTRACT FOR THESE AIRCRAFT BY APRIL 30 IN ORDER TO

1) HOLD AIRPLANE PRICE,

2) HOLD AIRPLANE DELIVERY POSITION.

ALTHOUGH THEY APPEAR VERY RIGID ABOUT THIS, PERHAPS STEPS A AND B COULD BE USED AS A NEGOTIATING BASIS TO GET AN EXTENSION OF THIS DATE.

AS PREVIOUSLY ADVISED, SOME TIME AGO BOEING ANNOUNCED TO THE INDUSTRY A $310,000 PRICE INCREASE EFFECTIVE MAY 1, 1961. UNLESS A FIRM CONTRACT, INCLUDING INITIAL PAYMENTS, IS CONSUMMATED BY THAT DATE, THE TWENTY 1313 AIRCRAFT WOULD INCREASE $5,800,000 IN PRICE. FURTHER, PRATT & WHITNEY HAS ANNOUNCED A 5% PRICE INCREASE ON SPARE ENGINES EFFECTIVE MAY 1, 1961. THIS AMOUNTS TO $552,000 FOR THE FORTY-EIGHT SPARE ENGINES THAT WILL BE REQUIRED FOR THE TWENTY-SIX AIRPLANES. IN THIS RESPECT, PRATT & WHITNEY REQUIRES A 5% DOWN PAYMENT WHICH IN THIS INSTANCE IS EQUIVALENT TO THE PRICE INCREASE. IN ORDER TO AVOID THESE PRICE INCREASES AIRPLANES AND ENGINES SHOULD BE PLACED ON FIRM ORDER PRIOR TO MAY 1.

I PROVIDED MR. LESLIE WITH AN ESTIMATED CASH SCHEDULE WITH MY LETTER OF MARCH 10. THESE DATA WERE SUBSEQUENTLY REVISED TO INCLUDE MORE RELAXED BOEING PROGRESS PAYMENT TERMS FOR THE 1963 AND 1964 AIRCRAFT. THE REVISED SCHEDULES WERE HANDED TO MR. LESLIE INFORMALLY AND ARE AVAILABLE TO OTHER RECIPIENTS OF THIS LETTER IF DESIRED.

USE OF THE LEASE 720B'S IS ENCOURAGING. THE PLAN OUTLINED IN MY LETTER OF MARCH 10 TO MR. LESLIE IS WORKING OUT FAVORABLY AND IT WOULD APPEAR LEASE OF FOUR OR SIX SUCH AIRCRAFT IS DEFINITELY WORTHWHILE. ORIGINAL TERMS HOLD EXCEPT THAT IT IS NO LONGER NECESSARY TO PROTECT BOEING'S INVESTMENT PRIOR TO MARCH 31. BOEING REQUIRES THAT THE LEASE BE SIGNED BY MARCH 31, THE SAME DATE REQUIRED FOR SIGNING THE AIRPLANE LETTER OF INTENT, AT WHICH TIME FIRST AND LAST MONTHS' LEASE PAYMENT WOULD BE IN ORDER. THIS AMOUNTS TO $160,000 PER AIRPLANE, OR $640,000 FOR THE FOUR AIRPLANES THAT ARE PRESENTLY OFFERED FOR LEASE ON A FIRM BASIS.

IN THE EVENT TWA WOULD NOT SIGN FINAL CONTRACTS FOR THE PURCHASE OF AT LEAST TEN NEW BOEING AIRPLANES, THEN THE LEASE OF THE 720B'S WOULD AUTOMATICALLY BECOME A SEVEN-YEAR LEASE. IN MY OPINION, IN THIS UNLIKELY EVENTUALITY THE RISK OF DISPOSING OF THE LEASE 720B'S IS NOT GREAT, PARTICULARLY IN LIGHT OF YESTERDAY'S CAB ACTION AWARDING TWO NEW TRANSCONTINENTAL ROUTES.

I RECOMMEND THAT THIS ALL BE PUT FORWARD TO TWA'S BOARD OF DIRECTORS FOR AFFIRMATIVE ACTION DURING ITS MARCH 20 MEETING.

ATTACHED FOR POSSIBLE REFERENCE PURPOSES IS A COPY OF BOEING'S CURRENT BRIEF PROPOSALS.

AX-1538

DX 72
(Telegram - Bew to Rummel - 2/27/61)

NKC91 0A086

O SDA008 NL PD SAN DIEGO CALIF 24

R W RUMME VICE PRESIDENT PLANNING AND RESEARCH
TRANS WORLD AIRLINES INC 380 MADISON AVE NYK

FOLLOWING IS COPY OF WIRE SENT TO NORMAN PARMET THIS DATE QUOTE
OUT OF SEQUENCE FLIGHTS OF AIRCRAFT NO 30 ON 21 FEB FOR TWO
HOURS 35 MINS. AND ONE HOUR 55 MINS A BOON-DOGGLE IN MY ESTIMATION.
AIRCRAFT NO 30 HAS APPROXIMATELY SEVENTY FIVE OUTSTANDING MODIFICATIO
TO BRING IT UP TO CONFIRUGRATION OF THE LAST AIRCRAFT DELIVERED.
THEREFORE, NO EXCUSE FOR THE EARLY FLIGHT OTHER THAN TO PREPARE
IT FOR DEMO FLIGHT FOR POTENTIAL CUSTOMERS. SINCE FRIDAY 17
FEB. THE EFFORT ON AIRCRAFT 30 AND 26 HAS FURTHER DILUTED THE
EXPERIENCED MAN POWER AND IMPAIRED OUR CHANCE OF EARLY MARCH
DELIVERIES OF 33 AND 35. WITH A CONTINUED EFFORT AND AN ASSIGNMENT,
AIRCRAFT 30 COULD DELIVER WEEK-END OF 17 MARCH WITH AIRCRAFT
26 COMING A WEEK LATER. AIRCRAFT NO 2 REVEALED SERIOUS FLAP

CLASS OF SERVICE
This is a fast message unless its deferred character is indicated by the proper symbol.

WESTERN UNION
TELEGRAM
W. P. MARSHALL, PRESIDENT

SYMBOLS
DL = Day Letter
NL = Night Letter
LT = International Letter Telegram

The filing time shown in the date line on domestic telegrams is LOCAL TIME at point of origin. Time of receipt is LOCAL TIME at point of destination

TRAILING EDGE MIS-ALIGNMENT DURING RIGGINGS CHECK NECESSITATING
RELOCATION OF RIGHT HAND INBOARD FLAP TRACKS THIS 80-ELAPSED-HOUR
JOB WILL CAUSE THREE DAY SLIPPAGE TO APPROXIMATE 10 MARCH 1961
TWO 12-HOUR SHIFTS 6 AND 7 DAYS A WEEK, HAS CONVAIR MEN EVIDENCING
FATIGUE AND INEFFICIENCIES FURTHER REORGINIZATION THIS WEEK
SAW FACTORY MANAGER PAUL OSBORNE RESIGNING AND STEVE BARINKA,
SUPERVISOR OF FIELD OPERATIONS, BEING REPLACED BY MR RUMBAUGH,
FROM PALMDALE. IN THE IMMEDIATE FUTURE I EXPECT TO SEE A REVISED
CONVAIR DELIVERY SCHEDULE COMING FROM THE OFFICE OF JOE FARME,
THE NEW ASSISTANT DIVISION MANAGER. CONVAIR CONTRACTS DIGGES
SAY THE HUGHES TOOL COMPANY HAS INDICATED THEY WILL OFFER ALL
UNASSIGNED 880 AIRCRAFT TO TWA AND THIS MAY ACCOUNT FOR CONVAIR

DX 73
(Letter - Leslie to Holliday - 3/20/61)

AX-1539

TRANS WORLD AIRLINES, INC.

March 20, 1961

Hughes Tool Company
2200 Gulf Building
Houston 2, Texas

Attention: Mr. Raymond M. Holliday

Gentlemen:

We have been informed that the Hughes Tool Company is willing to assign to TWA its rights to acquire from the manufacturer 4 Convair 880's, Nos. 29, 34, 9 and 16. TWA is interested in acquiring these airplanes if this can be arranged promptly and would like to discuss with you the terms and conditions on which this can be accomplished.

We suggest a meeting with your representative in this connection at the earliest possible date.

Very truly yours,

A. V. Leslie

3/20

[illegible] to Holliday
[illegible] might and [illegible] for
A.V.L.

AX-1540

DX 74
(Letter - Leslie to Holliday - 4/3/61)

TRANS WORLD AIRLINES, INC.

380 Madison Avenue
New York 17, New York, U.S.A.

A. V. LESLIE
SENIOR VICE PRESIDENT-
FINANCE AND TREASURER

April 3, 1961

Hughes Tool Company
2200 Gulf Building
Houston 2, Texas

Attention: Mr. Raymond M. Holliday

You have requested that we advise you of the terms and conditions under which we might be willing to accept the four additional Convair 880 aircraft covered by your agreement of September 10, 1956 with General Dynamics Corporation.

Subject to the conditions hereinafter set forth we would be willing to acquire such aircraft by (1) assuming payment to General Dynamics Corporation of the balance of the original purchase price specified in the agreement of September 10, 1956, as adjusted to reflect changes in specifications and as adjusted to reflect reductions in the purchase price pursuant to letter agreement No. 1 accepted September 20, 1956, as amended to date (including rights to reductions accruing after delivery of such aircraft), but not including any amounts that may be due from you to General Dynamics Corporation resulting from delayed delivery of such aircraft or from the delivery of any thereof to you prior to their completion or for any other reason, and (2) paying you amounts equivalent to the sum of your down payments on such aircraft, such amounts to be paid to you by a subordinated note (at an interest rate to be agreed upon) otherwise similar in terms to the interim subordinated 6 1/2% note of TWA presently held by you, except for the omission of the fourth paragraph thereof.

The acquisition of these aircraft would be conditional upon (1) necessary approvals of holders of our funded debt, (2) approval by the Civil Aeronautics Board, (3) our obtaining satisfactory financing therefor, and (4) approval thereof by TWA's Board of Directors.

Very truly yours,

A. V. Leslie

A. V. Leslie

EXECUTIVE OFFICES
TWENTY-SECOND FLOOR GULF BUILDING
HOUSTON 2, TEXAS

RAYMOND H. HOLLIDAY
VICE PRESIDENT

Deft EXHIBIT 10 JH 1/10/62

June 10, 1961

TO:

Trans World Airlines, Inc.
380 Madison Avenue
New York 17, N. Y.
Attention: Mr. Charles C. Tillinghast, Jr.
President

Mr. Ernest R. Breech
Mr. Irving S. Olds
Mr. Raymond M. Holliday,
Voting Trustees

Irving Trust Company as Agent for the
Holders of the Equipment Notes of
Trans World Airlines, Inc.
Attention: Mr. Robert S. Kerr,
Vice President

The Equitable Life Assurance Society
of the United States
Attention: Mr. James F. Oates, Jr.
Chairman and President

Metropolitan Life Insurance Company
Attention: Mr. Frederic W. Ecker,
Chairman

Gentlemen:

Referring to previous correspondence and conferences relating to the need of Trans World Airlines, Inc. (TWA), for additional jet aircraft, the financing thereof, the interests of Hughes Tool Company and its positions relating thereto, and in an

effort to arrive at a solution of the various questions involved, Hughes Tool Company hereby submits three separate and distinct proposals. You may accept any one or any two or all three of said proposals. This is also to advise you that Mr. Chester C. Davis is authorized to discuss with you said proposals and is fully empowered by Hughes Tool Company to commit Hughes Tool Company with respect to any or all of said proposals.

PROPOSAL NUMBER ONE

Hughes Tool Company hereby offers to guarantee subscription by the stockholders of TWA to an offering of 100 million dollars of additional common stock of TWA (or such other equity security or securities as may be mutually agreed upon), such guarantee to be comparable to the one agreed upon in the Hughes Financing and Subordination Agreement of December, 1960, in that Hughes Tool Company will agree to subscribe to a pro rata share of any such new offering and will subscribe to any portion unsubscribed by the other stockholders of TWA up to a maximum amount of 100 million dollars.

Should you question the ability of Hughes Tool Company to perform or its good faith in submitting the offer represented by this proposal, Hughes Tool Company is prepared

to place in escrow securities of a value commensurate with such undertaking which would be forfeited in the event that Hughes Tool Company fails to perform in accordance with any obligation it undertakes pursuant to this proposal.

The foregoing proposal is open for consideration by you for a period of ten days from the date hereof. If, at the end of that period, you are favorably disposed to an acceptance of this proposal, but desire additional time for a definitive acceptance thereof, and so indicate in writing, Hughes Tool Company would give careful consideration to a reasonable request for an extension of time of the offer represented by this proposal.

It is not a condition of this proposal that TWA acquire, to supplement its fleet of jet aircraft, either Boeing aircraft or Convair aircraft or any combination thereof or any other type of aircraft. The foregoing offer, however, is conditioned upon termination of the existing voting trust with respect to the shares of common stock of TWA owned by Hughes Tool Company and the transfer and return of all of said shares to Hughes Tool Company.

In connection with your consideration of this proposal, Hughes Tool Company points out the following:

(a) Hughes Tool Company would guarantee to TWA an additional 100 million dollars of equity capital which would

not only further secure the lending institutions, but would enable TWA to undertake an aggressive program for acquiring additional jet aircraft which, according to our understanding of your position, are unquestionably desired by TWA. Furthermore, with such additional equity capital, TWA should be able to obtain without difficulty adequate financing from the present lending institutions or others for expanding its present jet aircraft fleet with either Boeing aircraft or Convair aircraft or both as may be determined by the management of TWA.

(b) If this proposal is accepted, it would not be the intention of Hughes Tool Company to change the present management of TWA. The Mortgage Indenture of December 1960, securing the notes held by the lending institutions, contains provisions which, upon termination of the voting trust, adequately protect the noteholders with respect to the management of the Company. If this proposal is accepted, Hughes Tool Company will agree to the continuance of these provisions, which are sometimes called "the management clause", without change.

PROPOSAL NUMBER TWO

Hughes Tool Company, in addition to its having guaranteed the purchase from TWA of 100 million dollars of subordinated income debentures currently offered to the stockholders of TWA, hereby offers to subscribe to an additional $11,235,900 principal amount of such debentures with warrants attached at the offering price thereof, payable in cash at the closing to be held Tuesday, June 13, 1961, provided that TWA will commit itself to acquire, and to apply said sum to

amounts heretofore paid by Hughes Tool Company or now due and payable by it to General Dynamics Corporation with respect to, 13 Model 990 (formerly Model 600) jet aircraft which were heretofore ordered by Hughes Tool Company from General Dynamics Corporation for the benefit of TWA and which are available to TWA, pursuant to that commitment by Hughes Tool Company, upon terms and conditions similar to the terms and conditions under which Hughes Tool Company has heretofore made aircraft available to TWA. Said terms and conditions are more fully described under Proposal Number Three.

PROPOSAL NUMBER THREE

Hughes Tool Company hereby reaffirms that is prepared to ass gn to TWA, at Hughes Tool Company's cost in accordance with past practices of Hughes Tool Company, all rights to acquire from General Dynamics Corporation 13 Model 990 (formerly Model 600) aircraft under a purchase agreement dated November 10, 1960 as amended February 22, 1961 between Hughes Tool Company and General Dynamics Corporation. In addition, Hughes Tool Company reaffirms its willingness to make available or to cause to be made available to TWA on comparable terms four Convair Model 880's which, according to General Dynamics Corporation, will be available for delivery to TWA as follows: one in August, 1961; one in September, 1961 and two in October, 1961.

Said four Convair 880's are in the process of completion by General Dynamics Corporation with the configuration designed by TWA. Upon the acceptance of this proposal Hughes Tool Company will use its best efforts to cause General Dynamics Corporation to make available, if TWA wishes to have them, an additional four Convair 880 M's for delivery at approximately the same time as the four Convair 880's. There is attached hereto, as a separate letter dated June 9, 1961, a more complete statement of this proposal.

You will notice that favorable consideration of Proposal Number Two hereinabove set forth requires action on your part on or before June 13, 1961, because Hughes Tool Company is informed that the availability of the debentures may expire on that date. If you feel that you need additional time to consider Proposal Number Two, Hughes Tool Company is prepared to discuss with you the feasibility of extending such time and to take such action as may be appropriate toward that end.

In order to expedite favorable consideration by you of the above, copies hereof are being delivered to Francis Reed, Esq., of Messrs. Hughes, Hubbard, Blair & Reed, counsel for the voting trustees and to Messrs. Chadbourne, Parke, Whiteside & Wolff, counsel for TWA. Mr. Reed has also been requested to communicate to appropriate individuals, by telephone or otherwise, as promptly as possible the substance of

the above.

Mr. Chester C. Davis, who is empowered to discuss all or any of the above proposals and to take whatever action is necessary to commit Hughes Tool Company with respect thereto, will be continually available to you during the next ten days.

Very truly yours,

HUGHES TOOL COMPANY

By Raymond Holcombe
Vice President

EXECUTIVE OFFICES
TWENTY-SECOND FLOOR GULF BUILDING
HOUSTON 2, TEXAS

RAYMOND H. HOLLIDAY
VICE PRESIDENT

June 9, 1961

Trans World Airlines, Inc.
380 Madison Avenue
New York 17, N. Y.

Attention: Mr. Charles C. Tillinghast, Jr.
President

Dear Sirs:

Referring to the representations made by Mr. Chester C. Davis on behalf of the Hughes Tool Company at a conference held the afternoon of June 2, 1961, this will confirm that Hughes Tool Company has currently on order from General Dynamics Corporation thirteen (13) Model 990 (formerly Model 600) aircraft which are available to Trans World Airlines, Inc. (TWA). Hughes Tool Company claims that TWA is obligated to acquire said aircraft in accordance with past practices. Said 13 aircraft are being manufactured by General Dynamics Corporation under a Purchase Agreement dated November 10, 1960, as amended February 22, 1961 (said Agreement as so amended being hereafter referred to as the "Purchase Agreement"). The Purchase Agreement provides for the delivery of the first of said aircraft in December, 1961 and of the remaining aircraft at the rate of 3 per month thereafter through April, 1962. You should note, however, that such delivery schedule is contingent upon certain

customer equipment being furnished to General Dynamics Corporation by a specified date, and that in order to maintain said delivery schedule immediate action is required by TWA. Hughes Tool Company assumes that you are fully familiar with said Purchase Agreement. If you do not have a copy thereof, you may inspect same at the offices of Chester C. Davis, 120 Broadway, Room 3113, New York, New York, or upon request a duplicate copy will be furnished to you.

Hughes Tool Company hereby reaffirms that it is prepared to assign to TWA all of its rights to acquire said aircraft pursuant to the Purchase Agreement, in accordance with past practices, namely, in consideration of an agreement by TWA to pay:

(1) The balance of the purchase price of said aircraft;

(2) All amounts hereafter payable for customer-furnished equipment installed or to be installed in said aircraft; and

(3) The undepreciated cost of said aircraft to Hughes Tool Company.

As in the past, the phrase "the undepreciated cost to Hughes Tool Company" means the sum of:

(a) All amounts Hughes Tool Company shall have paid the vendors (in cash or with notes) with respect

to said aircraft including amounts paid vendors of customer-furnished equipment;

(b) All other costs, including expenses in connection with the aircraft or other related property; and

(c) An amount representing interest on items (a) and (b) at the rate of 5-1/2% per annum, computed on the average amount of the outstanding payments applicable to such aircraft and by considering the payments made as outstanding from the respective dates such payments were made and until repayment thereof to Hughes Tool Company.

With respect to the suggestion made by Mr. Tillinghast at the abovementioned conference concerning adequate assurances as to the delivery dates of such aircraft, Hughes Tool Company believes that this is a matter which should be discussed between TWA and General Dynamics Corporation. Hughes Tool Company is prepared to participate in any such discussions and to assist TWA to the extent possible in obtaining appropriate assurances from General Dynamics Corporation. In this connection TWA should recognize that, in accordance with past practices and prior to the change in management of TWA, it was customary for qualified personnel of TWA to be made available to General Dynamics Corporation as a contract representative or otherwise

for the purpose of complying with the requirements of any purchase agreement and to assist in and expedite the ultimate delivery of the aircraft covered by such purchase agreement.

As to the terms of payments or payment dates to be made or met by TWA to Hughes Tool Company upon the assumption by TWA of the Purchase Agreement, Hughes Tool Company is prepared to discuss same with TWA at any time. Hughes Tool Company is also willing to furnish to TWA any further information available to Hughes Tool Company which TWA requires with respect to said aircraft and with respect to the advantages which Hughes Tool Company believes would inure to the benefit of TWA from the acquisition of said aircraft by TWA. Hughes Tool Company understands that General Dynamics Corporation is prepared to join in or otherwise cooperate in the assignment of the Purchase Agreement to TWA.

In addition to the above, Hughes Tool Company reaffirms its willingness to make available or to cause to be made available to TWA, on comparable terms, 4 Convair 880's which, according to General Dynamics Corporation, would be available for delivery to TWA as follows:

One in August, 1961
One in September, 1961
Two in October, 1961

The said 4 Convair 880's are in the process of completion with the configuration designed by TWA.

Furthermore, upon the assumption by TWA of the Purchase Agreement Hughes Tool Company would use its best efforts to cause General Dynamics Corporation to make available to TWA an additional 4 Convair 880 M's for delivery at approximately the same time as the 4 Convair 880's hereinabove mentioned.

The availability to TWA of the above mentioned aircraft depends upon immediate action by TWA.

In order to avoid any further delay in making available to TWA the 13 Model 990 aircraft and in order to insure the availability thereof to TWA, will you please indicate your willingness to accept an assignment of the Purchase Agreement by having a duly authorized officer of TWA execute in the space hereinbelow provided a duplicate of this letter enclosed for that purpose and return same to the undersigned or to Chester C. Davis, 120 Broadway, Room 3113, New York, New York.

Very truly yours,

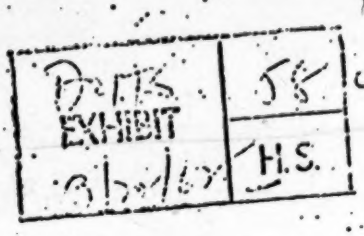
HUGHES TOOL COMPANY

By Raymond Holliday
Vice President

ACCEPTED:

TRANS WORLD AIRLINES, INC.

By _____



June 16, 1961

Mr. Raymond M. Holliday
Hughes Tool Company
Gulf Building
Houston 2, Texas

Dear Mr. Holliday:

This will acknowledge receipt of your letter of June 10, 1961, outlining several proposals. I also have your supplementary letter of June 13, 1961.

As I am sure you appreciate, these proposals are of such a nature as to require consideration by the full Board of Directors of TWA and, in view of this, it will not be possible for me to give you any definitive answers prior to the next scheduled meeting of the Board on June 21, 1961. In the interests of time, however, I would like to make a number of preliminary comments relative to various issues which appear to be presented by your proposals.

Your proposal relative to increasing the Common Stock of TWA is a new one and will have our careful consideration. TWA has suffered greatly from its under-capitalization of the past and we would wish to take every reasonable step to achieve an improvement in our debt-equity ratio.

It clearly will not be possible to dispose of the equity financing proposal within the ten day period suggested in your letter. As you undoubtedly realize, any refinancing under the conditions suggested would require not only the agreement of Hughes Tool Company, TWA and the holders of TWA's senior debt but, in addition, would require approval by the Civil Aeronautics Board. From the standpoint of TWA, it is difficult to see why an arrangement of this type would not be just as valid several months from today as now. Possibly, I misunderstand some of the factors involved but, at the moment, it would appear that the proposal should

be dealt with deliberately and carefully and not under any unnecessary pressure of time.

I have proceeded and will proceed, within the bounds that time permits, to assemble such information as I believe necessary for an intelligent consideration by the Board of Directors and others of the equity financing proposal. You can be of assistance in furnishing further details with respect to your proposals, as from time to time elaboration may seem desirable. At this time I believe further information is required in two areas of your first proposal. They are:

(a) You should advise us as to what securities Hughes Tool Company proposes to place in escrow and, in particular, whether such securities would include the recently issued subordinated debentures of TWA. Obviously, the nature of the securities in question are factors which need to be considered.

(b) Your proposal is conditioned upon termination of the existing Voting Trust. It is my understanding that the lending institutions insisted upon a Voting Trust, in addition to the "management clause", as a necessary condition to making loans to TWA at the end of 1960 and that this decision was reached only after the matter had been considered at great length. We cannot, with any realistic hope of success, ask the lending institutions to reverse an important policy decision made less than six months ago, unless you can supply us with facts not now in our possession. These facts should consist of an expression from you of the reasons which prompt Hughes Tool Company to seek at this time the termination of the Voting Trust and of the changes, internal to Hughes Tool Company or otherwise, which have occurred and will continue which would make desirable now that which was undesirable to them in December, 1960. The mere statement that Hughes Tool does not now intend to change the management is, of course, not sufficient, for otherwise you would not at this time request the termination of the Voting Trust.

Facts with respect to these changes, internal to Hughes Tool Company or otherwise, have particular significance in connection with future financing. Since the establishment of the Voting

Trust was an essential condition to our obtaining our existing loans of $165,000,000, they have been stated to us as obvious requirements of any future financing, unless the causes for the establishment of the Voting Trust have been removed. Present indications are that substantial financing will be needed in the next few years additional to the equity proposed to be added.

You are mindful, I know, that stability of management is an important element in the receipt of credit, and that this is particularly so in the instance of a company whose past history has been marked by a high degree of instability. It is also particularly true of a carrier whose only available security is a chattel having a relatively high depreciation rate and being subject to abnormal risks of obsolescence.

Further in this connection, we cannot ignore the fact that the vesting of control of TWA in Hughes Tool Company will require the approval of the Civil Aeronautics Board. In light of the clear statements of the CAB in connection with such control, it would be foolish as practical businessmen to spend time and effort in seeking to carry out your proposal without some facts that would lead us to believe that there was a reasonable chance of success in this forum. You should furnish us with the information you would propose to present to the CAB in support of your application to reassume control.

Turning to proposal number two, Mr. Rowe explained to Mr. Davis the obvious impracticability of obtaining on a day's notice an answer to this proposal. You have expressed a willingness to extend the period of time. The mechanics of achieving the desired result, should the parties reach agreement, would not seem to present any serious problems. Consequently, I shall discuss the merits of the proposal.

It would hardly seem that an offer to loan TWA an additional $11,235,900 would be sufficient at this late date to induce TWA to purchase the Convair 990s in question. We have reviewed the points raised by Mr. Davis' technical presentation and have not yet perceived any circumstances which should lead us to alter our views as to the superiority of the Boeings for our purposes. The question will again be reviewed by the directors, but I cannot be optimistic that the proferred inducement will be sufficient to cause a change in [illegible]

Addressing myself to proposal number three, we are happy at least to have a more definite proposal than has heretofore been presented to us. It should be noted, however, that you have not even yet advised us of the purchase price of the planes, an obviously essential term. You have also failed to advise us of the form in which Hughes Tool Company would want payment for the assignment of its rights under the Purchase Agreement -- whether in cash or subordinated obligations or otherwise. These are all facts that, in addition to the relative advantages to TWA of the Convair 990s and other equipment, must be taken into consideration in weighing your proposal.

I note the claim on page one of your second letter that TWA is obligated to acquire the thirteen 990 aircraft "in accordance with past practices". Now that Hughes Tool Company has come to the point of making a flat assertion in this regard, I take the occasion unequivocally to deny it and to remind you that over a period of years both Hughes Tool Company and a TWA that was under its complete control consistently maintained to their creditors and stockholders and to government regulatory agencies that even as to aircraft subsequently acquired by TWA no such obligation existed. I also remind you that at ners of the directors meetings in recent months at which the proposed Boeing purchase was discussed did you make any such claim or assertion.

I should also like to note that the assumption on page two of your second letter that we are fully familiar with the Hughes Convair purchase agreement is entirely in error.

You may consider this our final answer that we have no interest in the Convair 880Ms to which you referred. These would be four odd planes in our fleet and would, therefore, present serious operational problems. As to the regular 880s of our design, I would repeat (wi' out any commitment whatsoever) the request already made sever l times by Mr. Leslie that you present us with a

definite proposal, including price. I would also welcome your advice as to whether you would be prepared to rent these planes. If so, the terms should be clearly stated.

Please let us have answers to our various questions at an early date. The matters relating to the purchase of airplanes should have been raised and discussed months ago and the time within which further discussions could lead to any practical results is rapidly disappearing.

Very truly yours,

TRANS WORLD AIRLINES, INC.

Charles C. Tillinghast, Jr.,
President

cc: C. S. Rowe, Esq.

bc: Messrs. E. R. Breech
Irving S. Olds
F. C. Reed

Purchase Agreement

BETWEEN

BOEING AIRPLANE COMPANY

AND

PAN AMERICAN WORLD AIRWAYS, INC.

Relating to Boeing Model 707 Aircraft

Dated October 13, 1955

TABLE OF CONTENTS.

		PAGE
ARTICLE 1.	Subject Matter of Sale	1
ARTICLE 2.	Delivery of Aircraft	1
ARTICLE 3.	Price of Aircraft	3
ARTICLE 4.	Taxes	4
ARTICLE 5.	Payment	4
ARTICLE 6.	Cancellation	5
ARTICLE 7.	Warranty	6
ARTICLE 8.	Indemnity Against Patent Infringement	7
ARTICLE 9.	Warranties and Patent Indemnities from Other Manufacturers	8
ARTICLE 10.	Excusable Delay	9
ARTICLE 11.	Changes	10
ARTICLE 12.	Mandatory Modifications	10
ARTICLE 13.	Buyer-Furnished Equipment	11
ARTICLE 14.	Initial Spare Parts	11
ARTICLE 15	Stock of Spare Parts	12
ARTICLE 16.	Services, Training and Data	13
ARTICLE 17.	Demonstration and Test Flights	16
ARTICLE 18.	Title to Property and Risks	17
ARTICLE 19.	Resale or Lease	17
ARTICLE 20.	Plant Representatives of Buyer	18
ARTICLE 21.	Termination for Insolvency	18
ARTICLE 22.	Further Provisions with Respects to Engines	18
ARTICLE 23.	Assignment	20
ARTICLE 24.	Notices and Requests	20
ARTICLE 25.	Miscellaneous	20
EXHIBIT A.	Detail Specification	
EXHIBIT B.	Escalation List	
EXHIBIT C.	Master Change No. 53	

PURCHASE AGREEMENT
Relating to
BOEING MODEL 707 AIRCRAFT

THIS AGREEMENT entered into this 13th day of October, 1955, by and between BOEING AIRPLANE COMPANY, a Delaware corporation, with its principal office in the City of Seattle, State of Washington (hereinafter called Boeing) and PAN AMERICAN WORLD AIRWAYS, INC., a New York corporation, with its principal office in the City of New York, State of New York (hereinafter called Buyer);

WITNESSETH:

WHEREAS, Buyer desires to obtain by purchase aircraft of the type hereinafter described for the transportation of passengers, mail, express and cargo, and Boeing desires to manufacture and sell the same to Buyer;

Now, THEREFORE, in consideration of the mutual covenants herein contained the parties hereto agree as follows:

ARTICLE 1. *Subject Matter of Sale.*

Boeing shall manufacture, sell and deliver to Buyer, and Buyer shall purchase from Boeing, the following:

(a) Twenty (20) Boeing Model 707 aircraft (hereinafter called Aircraft) to be manufactured by Boeing in accordance with the terms of this Agreement and the detail specification (hereinafter called Detail Specification) set forth in Exhibit A attached hereto and made a part hereof; and

(b) Spare parts for the Aircraft, as more particularly set forth in Article 11 hereof.

ARTICLE 2. *Delivery of Aircraft.*

(a) Each Aircraft shall be delivered to Buyer assembled and completed ready for flight, and the Buyer shall accept delivery of such Aircraft, at a suitable airport in the State of Washington to be selected by Boeing. Upon written request of Buyer, delivery shall be made at a location in the United States other than the State of Washington to be determined by mutual agreement (except with respect to the Aircraft referred to in paragraph (d) below, at a suitable airport in the United States designated by Buyer) and set forth in a Change Order executed in accordance with Article 11 hereof, which shall also provide for the payment to Boeing by Buyer of an amount representing Boeing's increased costs occasioned thereby. The Aircraft shall be delivered during or before the months set forth in the following schedule:

Month of Delivery	Quantity of Aircraft
December 1958	2
January 1959	2
February 1959	1
March 1959	1
April 1959	2
May 1959	2
June 1959	2
July 1959	1
August 1959	2
September 1959	2
October 1959	2

Boeing agrees, however, to the extent practicable, to use its best efforts to accelerate deliveries of Aircraft under this Agreement, and particularly shall use its best efforts to deliver the first four Aircraft, and the Aircraft referred to in paragraph (d) of this Article, by two months earlier than otherwise provided for in this Agreement.

(b) In the event Boeing gives Buyer at least seven (7) days' notice that it is ready to deliver any Aircraft hereunder, and at the fault or upon the responsibility of Buyer delivery thereof is delayed, Buyer shall promptly reimburse Boeing for all cost or expense, including without limitation reasonable amounts for storage, insurance, preservation and protection, sustained by Boeing resulting from any such delay in excess of one (1) week.

(c) Boeing agrees that

(i) at least six (6) of the Aircraft, duly certificated by the Civil Aeronautics Administration, shall be delivered to Buyer prior to delivery of any Civil Aeronautics Administration certificated Model 707 type commercial aircraft to any other customer; and

(ii) the Aircraft referred to in paragraph (d) of this Article shall be delivered to Buyer prior to delivery of any Model 707 type commercial aircraft to any other customer.

(d) Boeing shall deliver, and Buyer shall accept delivery of, one of the Aircraft in October 1958, notwithstanding that a Civil Aeronautics Administration Type Certificate has not been issued for the Boeing Model 707 type aircraft, for use by Buyer for flight and maintenance training instruction and proving and test purposes. It is intended that such Aircraft shall be one of the Aircraft scheduled for delivery during the month of June 1959 as provided in paragraph (a) of this Article, but in any event the delivery schedule set forth in said paragraph (a) shall be retained with respect to the delivery of Civil Aeronautics Administration certificated Aircraft.

(e) Buyer will, not earlier than five (5) days and not later than sixty (60) days after delivery to Buyer of the second Aircraft to be certificated by the Civil Aeronautics Administration with an Airworthiness Certificate in the transport category in scheduled air carrier service, return said first delivered Aircraft referred to in paragraph (d) above to Boeing at a suitable location in the State of Washington designated by Boeing, and Boeing shall promptly incorporate in said Aircraft all of the changes or alterations referred to in Article 11(c) and in Article 12 hereof which were not incorporated in said Aircraft at the time of delivery thereof to Buyer. The cost of such changes or alterations shall be borne as provided in the article pursuant to which said change or alteration is made. Boeing shall promptly deliver such Aircraft to Buyer after incorporation therein of such changes or alterations. Notwithstanding the foregoing provisions of this paragraph, in the event Buyer does not desire to return said Aircraft to Boeing for incorporation therein of such changes or alterations and if Boeing agrees thereto, Boeing will, promptly after receipt of Buyer's purchase orders therefor, sell and deliver to Buyer, without charge to Buyer, all necessary kits of parts to accomplish such changes or alterations to such Aircraft, and, in such event, said Aircraft shall be deemed, for the purposes of this Agreement, to have been delivered, provided that the provisions of this paragraph (e) shall not relieve Boeing of its obligation to obtain an Airworthiness Certificate for said Aircraft as provided in this Agreement.

(f) In the event Boeing shall not have obtained a Type Certificate for the Model 707 aircraft on or before December 31, 1958, Buyer shall have the right to redeliver to

Boeing the Aircraft referred to in paragraph (d) above at any time after said date and prior to the issuance of the Type Certificate, and at the time of such redelivery said Aircraft shall be in as good condition as when received from Boeing, reasonable wear and tear excepted. Upon such redelivery of said Aircraft, title to and risk of loss of or damage to such Aircraft shall revert to Boeing, and Boeing shall promptly repay to Buyer the amount paid by Buyer to Boeing at the time of delivery thereof. Upon any such redelivery and repayment, it shall be deemed that no delivery of said Aircraft has theretofore been made by Boeing to Buyer hereunder, and Boeing shall thereafter deliver said Aircraft to Buyer in accordance with the delivery schedule set forth in paragraph (a) hereof and all of the other terms of this Purchase Agreement.

ARTICLE 3. *Price of Aircraft.*

(a) The basic price of each Aircraft shall be Four Million Four Hundred and Six Thousand Eight Hundred and Twenty One Dollars ($4,406,821), increased or decreased on account of price changes specified in Change Orders executed in accordance with Article 11 hereof.

(b) The purchase price of each Aircraft shall be the basic price adjusted as follows:

(i) It shall be increased or decreased by the aggregate excess over or deficiency under the prices in the Escalation List, set forth in Exhibit B attached hereto and made a part hereof, of the cost to Boeing of the items in such list included in that Aircraft. Boeing represents that the prices set forth in the Escalation List were used by Boeing as the cost of such items in arriving at the basic price of the Aircraft. Boeing shall use its best efforts to obtain such items at prices which are reasonable under the circumstances and shall notify Buyer as to the firm prices for such items as soon as possible but in any event before March 31, 1956; provided, that in the event such firm prices are not available upon the above date, Boeing shall advise Buyer as soon as such prices are available.

(ii) In the event that on April 5, 1956, Boeing shall be obligated by firm contract to sell to purchasers, including Buyer but excluding the United States Government or any agency thereof, at least sixty-five (65) Model 707 aircraft (substantially identical to the Aircraft described in Exhibit A or Exhibit C hereto except for items required for overseas flights and except for interior passenger equipment and appointments insofar as the differences do not require any structural or system changes) the basic price of each Aircraft hereunder shall be reduced by the amount of Two Hundred Thousand Dollars ($200,000).

(iii) The basic price of each Aircraft shall be decreased by the amount by which $4,300,000 (or, in the event at the time below mentioned at least sixty-five (65) Model 707 aircraft are under firm sale contracts, $4,100,000) exceeds the lowest basic price by which Boeing, at any time prior to the sale by Boeing of one hundred (100) aircraft of such type (including the Aircraft sold hereunder), may have sold or contracted to sell any complete Boeing passenger Model 707 aircraft to other purchasers, except the United States Government or any agency thereof, after appropriate adjustment for changes from the standard Model 707 aircraft of basic configuration.

(c) At least ten (10) days prior to the delivery date of each Aircraft, Boeing shall give to Buyer a written notice stating the increase or decrease in the basic price of such Aircraft by reason of the operation of the provisions contained in paragraph (b) (i) above, and a summary in such reasonable detail as the Buyer may require of the factors occasioning such

increase or decrease. At the request of Buyer, Boeing shall at reasonable intervals (but not oftener than quarterly) during the manufacture of the Aircraft advise Buyer of the estimated amount of adjustment in the basic price of each Aircraft resulting from the application of paragraph (b) (i) above.

ARTICLE 4. *Taxes.*

(a) In addition to the purchase price of the Aircraft and Spare Parts, Buyer shall pay to Boeing, upon demand, any sales, use, gross receipts or excise taxes required to be paid by Boeing as a result of any sale, use, delivery, storage (after tender of delivery in accordance with the provisions hereof) or transfer under this Agreement of any of the Aircraft, Spare Parts, services, instructions and data furnished or delivered hereunder, except any such taxes which Boeing or Buyer may be required to pay as a result of redelivery of an Aircraft by Buyer to Boeing pursuant to Article 2(f) hereof the liability for which shall be borne by Boeing.

(b) If claim is made against Boeing for any such tax, Boeing shall promptly notify Buyer. If seasonably requested by Buyer in writing, Boeing shall, at Buyer's expense, take such action as Buyer may reasonably direct with respect to such asserted liability, and shall not pay such tax except under protest, if protest is necessary. If payment be made, Boeing shall, at Buyer's expense, take such action as Buyer may reasonably direct to recover such payment and shall, if requested, permit Buyer in Boeing's name to file claim or commence an action to recover such payment.

ARTICLE 5. *Payment.*

(a) *Advance Payments for Aircraft.* Buyer shall pay to Boeing as advance payments on the Aircraft to be purchased hereunder, in accordance with the following schedule (each percentage represents an amount equal to that percentage of the aggregate basic price of the Aircraft):

Due Date of Payment	Amount
10 days after date of this Agreement	1%
January 25, 1956	4%
April 1, 1956	2%
July 1, 1956	2%
October 1, 1956	3%
January 1, 1957	3%
April 1, 1957	3%
July 1, 1957	3%
October 1, 1957	3%
January 1, 1958	3%
April 1, 1958	3%
July 1, 1958	3%

amounting to a total of 33% of the aggregate basic price of the Aircraft.

(b) *Payment for Aircraft.* Upon the delivery of each Aircraft to Buyer hereunder, Buyer shall pay the purchase price thereof as follows: There shall be credited against such purchase price an amount determined by dividing the aggregate of the amounts advanced by Buyer to Boeing under paragraph (a) above, less the aggregate amount of such advance payments previously credited against the purchase price of Aircraft delivered hereunder,

Purchase Agreement

BETWEEN

BOEING AIRPLANE COMPANY

AND

PAN AMERICAN WORLD AIRWAYS, INC.

Relating to Boeing Model 707-321 Aircraft

Dated December 19, 1955

TABLE OF CONTENTS.

		PAGE
ARTICLE 1.	Subject Matter of Sale	1
ARTICLE 2.	Delivery of Aircraft	1
ARTICLE 3.	Price of Aircraft	2
ARTICLE 4.	Taxes	2
ARTICLE 5.	Payment	3
ARTICLE 6.	Option To Purchase Additional Aircraft	4
ARTICLE 7.	Warranty	5
ARTICLE 8.	Indemnity Against Patent Infringement	7
ARTICLE 9.	Warranties and Patent Indemnities from Other Manufacturers	8
ARTICLE 10.	Excusable Delay	8
ARTICLE 11.	Changes	9
ARTICLE 12.	Mandatory Modifications	10
ARTICLE 13.	Buyer-Furnished Equipment	10
ARTICLE 14.	Initial Spare Parts	11
ARTICLE 15.	Stock of Spare Parts	11
ARTICLE 16.	Services, Training and Data	13
ARTICLE 17.	Demonstration and Test Flights	16
ARTICLE 18.	Title to Property and Risks	17
ARTICLE 19.	Resale or Lease	17
ARTICLE 20.	Plant Representatives of Buyer	18
ARTICLE 21.	Termination for Insolvency	18
ARTICLE 22.	Assignment	19
ARTICLE 23.	Notices and Requests	19
ARTICLE 24.	Miscellaneous	19
EXHIBIT A.	Detail Specification	

PURCHASE AGREEMENT

Relating to

BOEING MODEL 707-321 AIRCRAFT

THIS AGREEMENT entered into this 19 day of December, 1955, by and between BOEING AIRPLANE COMPANY, a Delaware corporation, with its principal office in the City of Seattle, State of Washington (hereinafter called Boeing) and PAN AMERICAN WORLD AIRWAYS, INC., a New York corporation, with its principal office in the City of New York, State of New York (hereinafter called Buyer);

WITNESSETH:

WHEREAS, Buyer desires to obtain by purchase aircraft of the type hereinafter described for the transportation of passengers, mail, express and cargo, and Boeing desires to manufacture and sell the same to Buyer;

NOW, THEREFORE, in consideration of the mutual covenants herein contained the parties hereto agree as follows:

ARTICLE 1. *Subject Matter of Sale.*

Boeing shall manufacture, sell and deliver to Buyer, and Buyer shall purchase from Boeing, the following:

(a) Twelve (12) Boeing Model 707-321 aircraft (hereinafter called Aircraft) to be manufactured by Boeing in accordance with the terms of this Agreement and the detail specification (hereinafter called Detail Specification) set forth in Exhibit A attached hereto and made a part hereof; and

(b) Spare parts for the Aircraft, as more particularly set forth in Article 14 hereof.

ARTICLE 2. *Delivery of Aircraft.*

(a) Each Aircraft shall be delivered to Buyer assembled and completed ready for flight, and the Buyer shall accept delivery of such Aircraft, at a suitable airport in the State of Washington to be selected by Boeing. Upon written request of Buyer, delivery shall be made at a location in the United States other than the State of Washington to be determined by mutual agreement and set forth in a Change Order executed in accordance with Article 11 hereof, which shall also provide for the payment to Boeing by Buyer of an amount representing Boeing's increased costs occasioned thereby. The Aircraft shall be delivered during or before the months set forth in the following schedule:

Month of Delivery	Quantity of Aircraft
August 1959	1
September 1959	2
October 1959	2
November 1959	2
December 1959	2
January 1960	2
February 1960	1

Boeing agrees, however, to the extent practicable, to use its best efforts to accelerate deliveries of Aircraft under this Agreement.

(b) In the event Boeing gives Buyer at least seven (7) days' notice that it is ready to deliver any Aircraft hereunder, and at the fault or upon the responsibility of Buyer delivery thereof is delayed, Buyer shall promptly reimburse Boeing for all cost or expense, including without limitation reasonable amounts for storage, insurance, preservation and protection, sustained by Boeing resulting from any such delay in excess of one (1) week.

(c) Boeing agrees that at least five (5) of the Aircraft shall be delivered to Buyer prior to delivery of any Model 707-320 (Intercontinental) series commercial aircraft to any other customer.

ARTICLE 3. *Price of Aircraft.*

(a) The basic price of each Aircraft shall be Five Million Two Hundred Thirty-five Thousand Two Hundred and Eighty-six Dollars ($5,235,286), increased or decreased on account of price changes specified in Change Orders executed in accordance with Article 11 hereof.

(b) The purchase price of each Aircraft shall be the basic price adjusted as follows:

(i) It shall be increased or decreased by the amount by which the cost to Boeing of the Automatic Pilot included in such Aircraft exceeds or is less than Twenty Seven Thousand Five Hundred Dollars ($27,500) which Boeing represents was used by Boeing as the cost of such item in arriving at the basic price of the Aircraft. Boeing shall use its best efforts to obtain such item at a price which is reasonable under the circumstances and shall notify Buyer as to the firm price for such item as soon as possible but in any event before March 31, 1956; provided, that in the event such firm price is not available upon the above date, Boeing shall advise Buyer as soon as such price is available.

(ii) The basic price of each Aircraft shall be decreased by the amount by which $5,250,000 exceeds the lowest basic price for which Boeing, at any time before Boeing shall have under order, by firm contracts of sale, one hundred (100) Model 707 aircraft (including the Aircraft sold hereunder), may have sold or contracted to sell any complete Boeing passenger Model 707-320 (Intercontinental) series aircraft (or any other aircraft of a type conforming to the basic engineering design of the Model 707-320 (Intercontinental) series except for body length) powered by Pratt & Whitney Model JT4 (J-75) type engines to any other purchaser, except the United States Government or any agency thereof, after appropriate adjustment for changes from the standard Model 707-320 (Intercontinental) series aircraft of basic configuration powered by such type engines.

(c) At least ten (10) days prior to the delivery date of each Aircraft, Boeing shall give to Buyer a written notice stating the increase or decrease in the basic price of such Aircraft by reason of the operation of the provisions contained in paragraph (b) (i) above, and a summary in such reasonable detail as the Buyer may require of the factors occasioning such increase or decrease. At the request of Buyer, Boeing shall at reasonable intervals (but not oftener than quarterly) during the manufacture of the Aircraft advise Buyer of the estimated amount of adjustment in the basic price of each Aircraft resulting from the application of paragraph (b) (i) above.

ARTICLE 4. *Taxes.*

(a) In addition to the purchase price of the Aircraft and Spare Parts, Buyer shall pay to Boeing, upon demand, any sales, use, gross receipts or excise taxes required to be paid by

Boeing as a result of any sale, use, delivery, storage (after tender of delivery in accordance with the provisions hereof) or transfer under this Agreement of any of the Aircraft, Spare Parts, services, instructions and data furnished or delivered hereunder.

(b) If claim is made against Boeing for any such tax, Boeing shall promptly notify Buyer. If seasonably requested by Buyer in writing, Boeing shall, at Buyer's expense, take such action as Buyer may reasonably direct with respect to such asserted liability, and shall not pay such tax except under protest, if protest is necessary. If payment be made, Boeing shall, at Buyer's expense, take such action as Buyer may reasonably direct to recover such payment and shall, if requested, permit Buyer in Boeing's name to file claim or commence an action to recover such payment.

ARTICLE 5. *Payment.*

(a) *Advance Payments for Aircraft.* Buyer shall pay to Boeing as advance payments on the Aircraft to be purchased hereunder, in accordance with the following schedule (each percentage represents an amount equal to that percentage of the aggregate basic price of the Aircraft):

Due Date of Payment	Amount
10 days after date of this Agreement	1%
January 25, 1956	4%
April 1, 1956	2%
July 1, 1956	2%
October 1, 1956	3%
January 1, 1957	3%
April 1, 1957	3%
July 1, 1957	3%
October 1, 1957	3%
January 1, 1958	3%
April 1, 1958	3%
July 1, 1958	3%

amounting to a total of 33% of the aggregate basic price of the Aircraft.

(b) *Payment for Aircraft.* Upon the delivery of each Aircraft to Buyer hereunder, Buyer shall pay the purchase price thereof as follows: There shall be credited against such purchase price an amount determined by dividing the aggregate of the amounts advanced by Buyer to Boeing under paragraph (a) above, less the aggregate amount of such advance payments previously credited against the purchase price of Aircraft delivered hereunder, by the number of Aircraft remaining to be delivered (including the one being delivered), and Buyer shall pay to Boeing the difference between the amount of such credit and the basic price of such Aircraft adjusted pursuant to Article 3(b) hereof to the date of delivery of such Aircraft.

(c) *Payment in U. S. Funds.* All payments hereunder shall be made in lawful money of the United States, or by a cashier's check of a member bank, located in Seattle, Washington, of the United States Federal Reserve System, payable in such money.

(d) *Repayment of Advance Payments.* In any of the following events:

(i) delivery by Boeing to Buyer in accordance with the provisions of this Agreement of all of the Aircraft to be purchased hereunder;

(ii) termination of this Agreement by Buyer under Article 10(b) hereof;

(iii) termination of this Agreement by either party under Article 10(c) hereof;

(iv) termination of this Agreement by Buyer under Article 21 hereof as to any or all Aircraft and Spare Parts then undelivered hereunder; or

(v) termination of this Agreement by Buyer by reason of a substantial default of Boeing in the performance of its obligations hereunder, if such default shall under the applicable law entitle Buyer to terminate this Agreement; provided, however, that no such default of Boeing hereunder shall entitle Buyer to terminate this Agreement or relieve Buyer of its obligations hereunder unless Boeing shall have failed to remedy such default within thirty (30) days after receiving notice thereof from Buyer;

then, in any such event, Boeing shall forthwith repay to Buyer the entire amount of the advance payments, if any, received by Boeing hereunder, less (1) the aggregate amount of such advance payments previously credited against the purchase price of Aircraft theretofore delivered to Buyer hereunder; (2) the amount determined to be due to Boeing from Buyer pursuant to the provisions of Article 10(b) hereof, if this Agreement is terminated by Buyer pursuant to said article; and (3) if this Agreement is terminated by Buyer under Article 21 hereof as to any, but not all, Aircraft and Spare Parts then undelivered hereunder, less the aggregate amount of such advance payments to be credited against the purchase price of any remaining Aircraft as to which this Agreement is not so terminated. In the event of termination of this Agreement by Buyer as provided in subparagraph (v) above, such repayment shall be without prejudice to any rights which Buyer may have under the applicable law.

ARTICLE 6. *Option to Purchase Additional Aircraft.*

In consideration of the payment by Buyer to Boeing, simultaneously with the execution of this Agreement, of the amount of Two Hundred Fifty Thousand Dollars ($250,000), receipt of which is hereby acknowledged by Boeing, Boeing hereby grants to Buyer an option to purchase up to an additional ten (10) Model 707-321 aircraft conforming to the Detail Specification, subject to all of the provisions of this Agreement except as otherwise specifically provided in this Article 6, said additional aircraft to be delivered by Boeing to Buyer during or before the months set forth in the following schedule in the event of the exercise of such option:

Month of Delivery	Quantity of Aircraft
March 1960	2
April 1960	1
May 1960	2
June 1960	1
July 1960	2
August 1960	1
September 1960	1

It is understood that Boeing has reserved for delivery to another customer or customers three (3) Model 707-320 (Intercontinental) series aircraft to be delivered at the rate of one (1) aircraft per month during the months of February, April and June, 1960, respectively, and in the event Boeing does not enter into a firm agreement or agreements with such other customer or customers with respect to any one of such aircraft, Boeing will accelerate the schedule indicated above so as to deliver one (1) additional aircraft during the month for

which delivery of such aircraft has been so reserved and one (1) aircraft shall be removed from the end of such schedule for each aircraft as to which the schedule for delivery is so accelerated. Upon request from Buyer at any time prior to January 15, 1956, Boeing shall promptly notify Buyer by telegraph as to whether it has entered into a firm agreement or agreements with such other customer or customers for the sale of any one (1) or more of such three (3) aircraft. Such option may be exercised by Buyer by giving notice to Boeing not later than January 15, 1956. If such option is exercised as to less than all of the additional ten (10) aircraft referred to above, the additional aircraft to be so purchased shall be those aircraft scheduled for earliest delivery as specified above in this Article 6. In the event of the exercise of such option by Buyer as to one or more of such additional aircraft:

(a) Paragraph (a) of Article 1 of this Agreement shall be deemed amended so as to increase the number of Aircraft to be purchased hereunder by the number of aircraft as to which the option is so exercised.

(b) The first advance payment in the amount of one percent (1%) of the aggregate basic price of such additional aircraft as to which the option is so exercised shall be paid by Buyer to Boeing ten (10) days after the date of exercise of the option, the second such payment in the amount of four per cent (4%) of such aggregate basic price shall be paid by Buyer to Boeing on or before March 1, 1956, and the remaining advance payments, commencing with the payment due on April 1, 1956, shall be made in accordance with the provisions of paragraph (a) of Article 5 of this Agreement; provided, that the amount of Two Hundred and Fifty Thousand Dollars ($250,000) paid by Buyer to Boeing in accordance with the foregoing provisions of this Article 6 shall be credited against the first advance payments to be made with respect to such aircraft until the full amount has been so credited.

ARTICLE 7. *Warranty.*

(a) Boeing agrees, represents and warrants that the Boeing Model 707-321 type aircraft will be certificated by the Civil Aeronautics Administration with a Type Certificate and that each Aircraft, prior to and at the time of delivery thereof, will be certificated by the Civil Aeronautics Administration with an appropriate Airworthiness Certificate in the transport category, in scheduled air carrier service, within the meaning of the Civil Air Regulations issued by the Civil Aeronautics Board, at takeoff and landing weights which will permit compliance with the performance guarantees set forth in the Detail Specification and under the conditions set forth therein; but said Aircraft need not meet the Civil Aeronautics Administration requirements for specific operation or operations on Buyer's routes. Boeing further agrees, represents and warrants that, prior to and at the time of delivery of each of the Aircraft, there will be in effect a release from the appropriate agency or agencies of the United States Government of the engines described in the Detail Specification, so as to permit installation of such engines in the Aircraft and delivery of the Aircraft (with such engines installed) to Buyer for use on its certificated air routes.

(b) Boeing agrees, represents and warrants that each Aircraft and Spare Part delivered under this Agreement shall, at the time of delivery thereof to Buyer, conform to the Detail Specification (excepting such portions of the Detail Specification as are stated not to be guaranteed by Boeing and subject to such changes therein as are made pursuant to Article 11 hereof entitled "Changes") and shall be free from defects in material and workmanship, and from defects or faults in design in view of the state of the art at the time of design thereof. Such warranty shall not apply to Buyer-Furnished Equipment or to accessories, equipment or parts purchased by Boeing unless they are manufactured pursuant to Boeing's detailed

DX 81, Side Letter 6, page 1
(Pan American-Boeing Purchase Agreement-B707-321s, 12/19/55)

BOEING AIRPLANE COMPANY
SEATTLE 14, WASHINGTON

TELEPHONE MADISON 2222
IN REPLY REFER TO

December 19, 1955

Pan American World Airways, Inc.
135 East 42nd Street
New York 17, New York

Attention: Mr. Franklin Gledhill,
Vice President

Subject: PAA/Boeing Purchase Agreement dated October 13, 1955 Re Model 707 Aircraft, and Purchase Agreement Re Model 707-321 Aircraft

Dear Sirs:

We are enclosing herewith four (4) execution copies of each of the following proposed agreements between Boeing Airplane Company and Pan American World Airways, Inc., which agreements have been executed on behalf of Boeing:

A. Supplemental Agreement No. 2 to the Purchase Agreement dated October 13, 1955 between our respective companies, relating to Boeing Model 707 aircraft, reducing the number of Aircraft to be purchased by Pan American thereunder from twenty (20) to ten (10) and amending the Purchase Agreement in certain other respects.

B. Purchase Agreement relating to the purchase by Pan American of twelve (12) Boeing Model 707-321 aircraft.

C. Letter Agreement relating to the Purchase Agreement referred to in B above, and entitled "PAA/Boeing Model 707-321 Purchase Agreement - Assignment to Foreign Airlines and PAA Special Features".

This letter, when accepted by you and returned to us with copies of the above mentioned agreements executed on behalf of Pan American, will evidence our further agreement with respect to the following matters:

1. The rights granted to Pan American in accordance with the provisions of Article 19(c) of the Purchase Agreement dated October 13, 1955, as amended by Supplemental Agreement No. 2,

are in addition to the rights granted to Pan American in accordance with the provisions of paragraph 2 of the Letter Agreement referred to in C above.

2. In regard to the provisions of paragraph 1 of Supplemental Agreement No. 2 to the Purchase Agreement dated October 13, 1955, reducing the number of Aircraft to be purchased thereunder from twenty (20) to ten (10), it is understood and agreed that the amount by which the first advance payment heretofore paid by Pan American to Boeing pursuant to Article 5(a) of said Purchase Agreement exceeds one percent (1%) of the aggregate basic price of the ten (10) Aircraft to be purchased under said Agreement, amended as provided in Supplemental Agreement No. 2 thereto, shall be credited against the first advance payment due from Pan American to Boeing pursuant to the provisions of Article 5(a) of the Purchase Agreement relating to the Model 707-321 aircraft.

3. Paragraph 3 of the Letter Agreement between our respective companies dated November 8, 1955, relating to the Purchase Agreement dated October 13, 1955, is revised in its entirety to read as follows:

"3. If delivery of the first certificated Aircraft shall be delayed beyond December, 1958, by reason of the failure of the appropriate agency or agencies of the United States Government to grant a security release permitting installation in the Aircraft and delivery to Buyer of the engines described in the Detail Specification for use on Buyer's certificated air routes, Boeing shall pay to Buyer $250,000 for each month of such delay after December, 1958. If the first certificated Aircraft shall be delivered prior to December, 1958, and if deliveries of the remaining certificated Aircraft shall follow, commencing with the next succeeding month, at a rate not less than specified for deliveries commencing in January, 1959, as set forth in paragraph (a) of Article 2 of the Purchase Agreement, as amended, Buyer shall pay to Boeing $250,000 for each month by which the delivery of said first certificated Aircraft shall be prior to December, 1958. For the purpose of calculating any payment to be made pursuant to this paragraph 3, the day of delivery within a calendar month shall be disregarded and each calendar month shall be treated as one full month."

4. Boeing hereby grants to Pan American the following options, in addition to the right granted to Pan American to cancel the Purchase Agreement dated October 13, 1955, as provided in Article 2(g) of said Agreement as amended by Supplemental Agreement No. 2:

(a) Upon the exercise by Pan American, not later than January 15, 1956, of the option provided for in Article 6 of the Purchase Agreement relating to the Model 707-321

Pan American World Airways, Inc. December 19, 1955

aircraft, to the extent of five (5) or more additional Model 707-321 aircraft, Pan American shall have the further right without Boeing's consent,

(i) in addition to the rights set forth in the Letter Agreement entitled "PAA/Boeing Model 707-321 Purchase Agreement - Assignment to Foreign Airlines and PAA Special Features", referred to in paragraph C above, and

(ii) notwithstanding any limitations contained in the Purchase Agreement dated October 13, 1955,

to resell, lease, transfer, or assign its rights with respe to the first six (6) Aircraft to be purchased under the Purchase Agreement dated October 13, 1955, as amended.

(b) Pan American shall have the option, exercisable by giving written notice to Boeing on or before February 4, 1956, to elect to substitute for the Detail Specification attached to the Purchase Agreement dated October 13, 1955, as Exhibit A:

(i) the American Airlines detail specification provided for in the definitive contract between Boeing and American Airlines (Boeing agreeing to use its best efforts to obtain such detail specification, and submit a copy thereof to Pan American, by January 15, 1956), except that the requirements for Pan American's overseas operations set forth in its Detail Specification shall be retained; or

(ii) the said American Airlines detail specification referred to (i) above, except that said overseas requirements and the Pan American interior configuratich and colors shall be retained; provided, that the doors, windows and systems, other than those required for Pan American's overseas operations, shall conform to the American Airlines configuration.

Boeing's prices for such substitutions shall not exceed those charged to American Airlines.

(c) Provided Pan American shall have exercised its option to cancel the Purchase Agreement dated October 13, 1955, as to one (1) or more of the last four (4) Aircraft to be delivered thereunder, as provided in Article 2(g) of said Agreement as amended by Supplemental Agreement No. 2, and provided Pan American shall have exercised the option provided for in subparagraph (b) above, upon written notice given to Boeing by Pan American at any time on or before February 4, 1956, Boeing agrees that:

(i) it will, upon written request of American Airlines, enter into an amendment to its contract with American Airlines to accelerate deliveries of Model 707 aircraft thereunder, so as to deliver one (1) additional Aircraft thereunder during each month in which an Aircraft, as to which the Purchase Agreement dated October 13, 1955 has been cancelled pursuant to the provisions of Article 2(a) thereof, was scheduled for delivery to Pan American, and terminate such contract as to one (1) of the aircraft scheduled for later delivery to American Airlines thereunder, and

(ii) it will enter into an amendment to the Purchase Agreement dated October 13, 1955, to provide for the return to Boeing of the first six (6) Aircraft to be delivered to Pan American thereunder, and the performance by Boeing of the modification work necessary to conform said Aircraft with the American Airlines configuration for its Model 707 aircraft, at Boeing's prices therefor which shall be reasonable; and

(iii) upon the written request of American Airlines, it will enter into an amendment to the contract between Boeing and American Airlines, revising the schedule for delivery of Model 707 aircraft so as to terminate such contract with respect to the last six (6) aircraft to be purchased thereunder.

The time for performance of the modification work referred to in (ii) above, and the terms and conditions thereof, shall be mutually satisfactory to Boeing and Pan American. The exercise of the option provided for in this subparagraph (c) is subject to Pan American giving written notice to Boeing at the time of or prior to the notice from Pan American referred to above, that it has entered into an agreement with American Airlines, pursuant to the rights granted to Pan American in accordance with the provisions of subparagraph (a) above, providing for the sale by Pan American to American Airlines of, or the assignment by Pan American to American Airlines of its rights with respect to, the first six (6) Aircraft to be delivered under the Purchase Agreement dated October 13, 1955, as amended.

5. The Letter Agreements entered into between our respective companies on October 13, 1955, relating to the Purchase Agreement dated October 13, 1955, shall remain in full force and effect, to the extent that the same have not heretofore been cancelled, except as follows:

(a) The Letter Agreement entitled "PAA/Boeing Model 707 Purchase Agreement - Options re Model JT4A-3 Engines", as amended, is hereby cancelled and all rights and obligations thereunder are terminated.

(b) With respect to the Letter Agreement entitled "PAA/Boeing Model 707 Purchase Agreement - Engines Prices and Availability of Model JT3D-5 Engines", paragraph 2 thereof and all references in said Letter Agreement and all

visions thereof relating to the Model JT4A-3 engines are hereby deleted.

(c) Paragraph 1 of the Letter Agreement entitled "PAA/Boeing Model 707 Purchase Agreement - Assignment to Foreign Airlines and PAA Special Features" is hereby cancelled and all rights or obligations thereunder are terminated. The provisions of paragraph 1 of said Letter Agreement are superseded by the provisions set forth in paragraphs 1 and 2 of the Letter Agreement referred to in C above.

6. The letters dated October 13, 1955 (Nos. 550-0-141 and 550-0-150) from Boeing to Pan American shall remain in full force and effect, and none of the prices set forth therein for Boeing Model 707 Master Changes or Proposed Master Changes shall be subject to any increase by reason of the execution of Supplemental Agreement No. 2 to the Purchase Agreement dated October 13, 1955.

7. All notices required or permitted to be given in accordance with the provisions set forth above shall be given in accordance with the provisions of the Article entitled "Notices and Requests" set forth in the respective Model 707 and Model 707-321 Purchase Agreements.

8. Press releases and other publicity with respect to the enclosed agreements and the matters set forth above will be prepared jointly, for publication not earlier than the afternoon of December 22, 1955.

The enclosed agreements referred to in A, B, and C above, and the matters set forth above, constitute the amendment to the Purchase Agreement dated October 13, 1955, the definitive Model 707-321 Purchase Agreement and other related agreements referred to in the Memoranda of Understanding and Letter Agreement between our respective companies dated December 14, 1955, and supersede said Memoranda and Letter Agreement.

If the enclosed forms of Supplemental Agreement No. 2, Purchase Agreement and Letter Agreement, and the matters set forth above, are acceptable to you, will you please indicate your acceptance on the enclosed copy of this letter and return the same to us with two (2) copies of the Supplemental Agreement, Purchase Agreement, and Letter Agreement, executed on behalf of Pan American.

Very truly yours,

BOEING AIRPLANE COMPANY

Accepted: December 19, 1955

PAN AMERICAN WORLD AIRWAYS, INC.

J.B. Connelly
Director of Contract Administration

Purchase Agreement

between

BOEING AIRPLANE COMPANY

and

AMERICAN AIRLINES, INC.

Relating to Boeing Model 707-123 Aircraft

Dated March 1, 1956

TABLE OF CONTENTS

	Page
ARTICLE 1. Subject Matter of Sale	1
ARTICLE 2. Delivery of Aircraft	1
ARTICLE 3. Price of Aircraft	3
ARTICLE 4. Taxes	3
ARTICLE 5. Payment	3
ARTICLE 6. Authority to Use Government-Owned Facilities	4
ARTICLE 7. Warranty	5
ARTICLE 8. Indemnity Against Patent Infringement	8
ARTICLE 9. Warranties and Patent Indemnities from Other Manufacturers	8
ARTICLE 10. Effects of Delays	9
ARTICLE 11. Changes	11
ARTICLE 12. Mandatory Modifications	11
ARTICLE 13. Buyer-Selected Equipment	12
ARTICLE 14. Spare Parts, Special Tools and Equipment	12
ARTICLE 15. Engineering Approval by Buyer	15
ARTICLE 16. Services, Training and Data	16
ARTICLE 17. Demonstration and Test Flights	19
ARTICLE 18. Title to Property and Risks	20
ARTICLE 19. Plant Representatives of Buyer	20
ARTICLE 20. Termination for Insolvency	21
ARTICLE 21. Assignment and Resale	21
ARTICLE 22. Loss, Destruction or Damage of Aircraft	22
ARTICLE 23. Notices and Requests	22
ARTICLE 24. Miscellaneous	22
EXHIBIT A. Detail Specification.	
EXHIBIT B. Buyer's Warranty Approval List.	
EXHIBIT C. Buyer's Engineering Approval List.	

PURCHASE AGREEMENT

Relating to

BOEING MODEL 707-123 AIRCRAFT

THIS AGREEMENT entered into this First day of March, 1956, by and between BOEING AIRPLANE COMPANY, a Delaware corporation, with its principal office in the City of Seattle, State of Washington (hereinafter called Boeing) and AMERICAN AIRLINES, INC., a Delaware corporation, with its principal office in the City of New York, State of New York (hereinafter called Buyer):

WITNESSETH:

WHEREAS, Buyer desires to obtain by purchase aircraft of the type hereinafter described for the transportation of passengers, mail, express and cargo and Boeing desires to manufacture and sell the same to Buyer;

Now, THEREFORE, in consideration of the mutual covenants hereinafter contained the parties hereto agree as follows:

ARTICLE 1.

Subject Matter of Sale.

Boeing shall manufacture, sell and deliver to Buyer, and Buyer shall purchase from Boeing, upon the terms and conditions hereinafter set forth, the following:

(a) Thirty (30) Boeing Model 707-123 aircraft (hereinafter called the Aircraft) to be manufactured by Boeing in accordance with the detail specification (No. D-17231, dated October 21, 1955, as revised to February 24, 1956 and identified by signature of the parties on the date hereof) set forth as Exhibit A attached hereto and hereby made a part hereof (such detail specification, as the same may be amended and modified from time to time pursuant to Article 11 hereof, being hereinafter called the Detail Specification), provided that Buyer shall at all times and from time to time by notice to Boeing prior to January 15, 1958 have the right to terminate, in reverse order of delivery and without charge, its obligation to purchase any one (1) or more of the last five (5) of such Aircraft to be delivered, as provided in paragraph (a) of Article 2 hereof; and

(b) Spare parts (as referred to in Article 14 hereof), together with the special tools and equipment therein referred to, for the Aircraft, as more particularly set forth in said Article 14.

ARTICLE 2.

Delivery of Aircraft.

(a) Each Aircraft shall be delivered to Buyer in good operating condition, and Buyer shall accept delivery of such Aircraft, at a suitable airport in the State of Washington to be selected by Boeing or at such other place as may be mutually agreed upon by a Change Order providing for delivery at such

other place and for the payment to Boeing by Buyer of Boeing's increased costs, if any, occasioned thereby. The Aircraft shall be delivered during or before the months set forth in the following schedule:

Month of Delivery	Quantity of Aircraft
February, 1959	2
March, 1959	2
April, 1959	2
May, 1959	3
June, 1959	2
July, 1959	2
August, 1959	1
September, 1959	1
October, 1959	1
November, 1959	1
December, 1959	1
January, 1960	1
February, 1960	1
March, 1960	1
April, 1960	2
May, 1960	2
June, 1960	1
July, 1960	1
August, 1960	1
September, 1960	1
October, 1960	1

(b) In the event Boeing gives Buyer at least seven (7) days' notice that it is ready to deliver any Aircraft hereunder, and at the fault or upon the responsibility of Buyer delivery thereof is delayed, Buyer shall promptly reimburse Boeing for all cost or expense, including without limitation reasonable amounts for storage, insurance, preservation and protection, sustained by Boeing resulting from any such delay in excess of one (1) week.

(c) Boeing shall deliver, and Buyer shall accept delivery of, one of the Aircraft in November, 1958, notwithstanding that an appropriate Civil Aeronautics Authority Type Certificate has not been issued for the Aircraft, for use by Buyer for flight and maintenance training instruction and proving and test purposes. It is intended that such Aircraft shall be one of the Aircraft scheduled for delivery during the month of May, 1959, as provided in paragraph (a) of this Article, but in any event the delivery schedule set forth in said paragraph (a) shall be retained with respect to the delivery of Civil Aeronautics Authority certificated Aircraft.

(d) Buyer will, not prior to, and not later than fifteen (15) days after, delivery to Buyer of the notice provided for in paragraph (b) above, in respect to the first Aircraft to be certificated by the Civil Aeronautics Authority with an Airworthiness Certificate in the transport category in scheduled air carrier service, return said first delivered Aircraft referred to in paragraph (c) above to Boeing at a suitable location in the State of Washington designated by Boeing, and Boeing shall promptly incorporate in said Aircraft all of the changes or alterations referred to in Article 12 hereof which were not incorporated in said Aircraft at the time of delivery thereof to Buyer, the cost of such changes or alterations to be borne as therein provided. Boeing shall promptly deliver such Aircraft to Buyer after incorporation therein of such changes or alterations. Notwithstanding the foregoing provisions of this paragraph (d), in the event Buyer does not desire to return said Aircraft to Boeing for incorporation therein of such changes or alterations and if Boeing agrees thereto, Boeing will, promptly after receipt of Buyer's purchase orders therefor, sell and deliver to Buyer, without charge to Buyer, all necessary kits of parts to accomplish such changes or alterations to such Aircraft and will pay to Buyer all reasonable charges for incorporation of such kits of parts in such Aircraft, and, in such event, said Aircraft shall be deemed, for the purposes of this Agreement, to have been delivered, provided that the

provisions of this paragraph (d) shall not relieve Boeing of its obligation to obtain an Airworthiness Certificate for said Aircraft as provided in this Agreement.

(e) Prior to delivery of the first Aircraft hereunder (i) Boeing shall request the manufacturer of the engines to appraise the installation thereof in such Aircraft as accomplished by Boeing, and (ii) Boeing shall request the manufacturer of the automatic pilot and integrated flight system to appraise the installation thereof in such Aircraft as accomplished by Boeing. In the event that the installation of the engines or the automatic pilot and integrated flight system is changed on any Aircraft delivered after delivery of the first Aircraft hereunder or after any prior appraisal requested hereunder, Boeing will request the manufacturer thereof to appraise the installation as so changed. Boeing will furnish to Buyer copies of each such appraisal received by Boeing. Any failure of such engines or automatic pilot and integrated flight systems to operate in accordance with the manufacturer's specification therefor caused by any item of such installation which the manufacturer has, upon any such written appraisal, found unacceptable and set forth the reasons therefor, shall as between the parties hereto be deemed to be a failure of Boeing to comply with subdivisions (i), (ii) and/or (iii) of the last sentence of paragraph (b) of Article 7 hereof.

ARTICLE 3.

Price of Aircraft.

(a) The basic price of each Aircraft shall be Four Million Six Hundred Fifty-two Thousand Four Hundred Sixty Dollars ($4,652,460), increased or decreased, as the case may be, by the net amount of all price changes specified in Change Orders applicable thereto executed in accordance with Article 11 hereof.

(b) The purchase price of each Aircraft shall be the basic price increased or decreased by the amount by which the cost to Boeing of the Automatic Pilot included in such Aircraft exceeds or is less than Twenty-seven Thousand Five Hundred Dollars ($27,500), which Boeing represents was used by Boeing as the cost of such item in arriving at the basic price of the Aircraft. Boeing will use its best efforts to obtain such item at a price which is reasonable under the circumstances and will notify Buyer as to the firm price therefor as soon as possible.

(c) Boeing shall give to Buyer a written notice stating the increase or decrease in the basic price of the Aircraft by reason of the operation of the provisions contained in paragraph (b) above promptly after the occurrence thereof but in any event not less than ten (10) days prior to the delivery date of each Aircraft.

ARTICLE 4.

Taxes.

(a) In addition to the purchase price of the Aircraft, spare parts, special tools and equipment, Buyer shall pay to Boeing, upon demand, any sales or use taxes or the amount of any new or increased gross receipts or excise taxes required to be paid by Boeing as a result of any sale, use, delivery, storage or transfer under this Agreement.

(b) If claim is made against Boeing for any such tax, Boeing shall promptly notify Buyer. If seasonably requested by Buyer in writing, Boeing shall, at Buyer's expense, take such action as Buyer may reasonably direct with respect to such asserted liability, and shall not pay such tax except under protest, if protest is necessary. If payment be made, Boeing shall, at Buyer's expense, take such action as Buyer may reasonably direct to recover such payment and shall, if requested, permit Buyer in Boeing's name to file claim or commence an action to recover such payment.

ARTICLE 5.

Payment.

(a) *Advance Payments for Aircraft.* Buyer shall pay to Boeing, as advance payments on all Aircraft to be purchased hereunder, in accordance with the following schedule (each percentage representing

amount equal to that percentage of the aggregate basic price of the maximum number of Aircraft that to be purchased hereunder at the time such payment is made):

Due date of Payment	Amount
On or before date of this Agreement	5%
August 1, 1956	2%
November 1, 1956	2%
February 1, 1957	3%
May 1, 1957	3%
August 1, 1957	3%
November 1, 1957	3%
February 1, 1958	3%
May 1, 1958	3%
August 1, 1958	3%
November 1, 1958	3%

amounting to a total of 33% of the aggregate basic price of all such Aircraft.

(b) *Payment for Aircraft.* Upon the delivery of each Aircraft to Buyer hereunder (including the Aircraft to be delivered to Buyer under Article 2(c) hereof) Buyer shall pay the purchase price thereof as follows: There shall be credited against such purchase price an amount determined by dividing the aggregate of the advance payments theretofore made by Buyer to Boeing under paragraph (a) above, less the aggregate amount of such advance payments previously credited against the purchase price of Aircraft delivered hereunder, by the number of Aircraft remaining to be delivered (including the one being delivered), and Buyer shall pay to Boeing the difference between the amount of such credit and the purchase price of such Aircraft determined in accordance with paragraph (b) of Article 3 hereof.

(c) *Payment in United States Funds.* All payments hereunder shall be made in lawful money of the United States of America, or by a cashier's check of a member bank, located in Seattle, Washington, of the United States Federal Reserve System, payable in such money, or at Buyer's election may be made by unconditional credit to Boeing's account, in Federal Reserve funds, in The First National City Bank of New York in New York City, New York, or such other bank in New York City, New York, as Boeing may designate.

(d) *Credit of Advance Payments.* In the event that Buyer notifies Boeing pursuant to paragraph (a) of Article 1 hereof that Buyer is terminating its obligation to purchase one or more of the Aircraft as provided in said paragraph (a), Boeing shall credit the aggregate amount of the previously made advance payments applicable to the Aircraft covered by such notice to the next advance payment or advance payments to be made by Buyer pursuant to paragraph (a) of this Article 5.

ARTICLE 6.

Authority to Use Government-Owned Facilities.

Boeing represents to Buyer that Boeing will have authority from the Government of the United States for the use by Boeing for the manufacture of the Aircraft of such facilities (which term as used in this Article 6 includes, without limitation, special tooling, dies and jigs) to which the Government has any title, as owner or otherwise, or in which the Government has any interest, right or privilege, as are used by Boeing in the manufacture of the Boeing Model KC-135 airplane for the U. S. Air Force and as may be necessary for the manufacture of the Aircraft in accordance with the delivery schedules herein provided.

SUPPLEMENTAL AGREEMENT NO. 5

TO

PURCHASE AGREEMENT NO. 8 DATED MARCH 1, 1956

BETWEEN

BOEING AIRPLANE COMPANY

AND

AMERICAN AIRLINES, INC.

RELATING TO BOEING MODEL 707-120 SERIES AIRCRAFT

MODEL 707-123

THIS SUPPLEMENTAL AGREEMENT entered into as of this 24th day of July, 1958, by and between BOEING AIRPLANE COMPANY, a Delaware corporation (hereinafter called Boeing) and AMERICAN AIRLINES, INC., a Delaware corporation (hereinafter called Buyer):

W I T N E S S E T H:

WHEREAS, the parties hereto entered into an agreement dated March 1, 1956, relating to Boeing Model 707-123 Aircraft, which agreement, as heretofore amended, modified and supplemented, is hereinafter called "the Purchase Agreement"; and

WHEREAS, the parties desire to further amend the Purchase Agreement as hereinafter provided,

NOW, THEREFORE, in consideration of the mutual covenants herein contained, the parties hereto agree that the Purchase Agreement is hereby amended as follows:

1. In paragraph (a) of Article 1, substitute the words and figures "Twenty-five (25)" for the words and figures "Thirty (30)".

2. In paragraph (a) of Article 2, the schedule for the delivery of the Aircraft is hereby revised in its entirety to read as follows:

MONTH OF DELIVERY	QUANTITY OF AIRCRAFT
February, 1959	2
March, 1959	2
April, 1959	2
May, 1959	3
June, 1959	2
July, 1959	2
August, 1959	1
September, 1959	1
October, 1959	1
November, 1959	1
December, 1959	1
January, 1960	1
February, 1960	1
March, 1960	1
April, 1960	2
May, 1960	2

3. Paragraph (a) of Article 3 is hereby revised in its entirety to read as follows:

"(a) The basic price of each Aircraft shall be Four Million Six Hundred Fifty-two Thousand Four Hundred Sixty and no/100 Dollars ($4,652,460.00). The purchase price of each Aircraft shall be the basic price increased or decreased, as the case may be, by the net amount of all price changes specified in Change Orders applicable thereto, executed in accordance with Article 11 or 12 hereof."

4. Paragraph (b) of Article 5 is hereby revised in its entirety to read as follows:

"(b) Payment for Aircraft. Upon the delivery of each Aircraft to Buyer hereunder (including the

AX-1584

DX 95, page 1
(Allen Letter Announcing Boeing Jet, Nov. 19, 1954)

DX 95

November 19, 1954

Dear Eddie:

In the early part of 1952 the Boeing Company commenced the design and manufacture of a prototype jet transport. This airplane made its first flight on July 15, 1954, and has now been flown more than 69 hours in 47 flights.

In January, 1954, the Boeing Company commenced work on a production model jet tanker-transport. Although this airplane will have a somewhat larger and longer fuselage than the prototype, its configuration in all other respects does not differ materially from that of the prototype. This work is now proceeding under a contract which the Company has with the Air Force.

The Company has for some time been engaged in the preparation of a specification covering a proposed commercial jet transport. It has also ascertained certain performance warranties of United Aircraft Corporation with respect to the J-57 engine. The engine specification and attendant warranties will be incorporated in the specification covering the airplane which should be in form for discussion with prospective commercial customers by November 22nd.

The Boeing Company has a sincere desire to produce a jet transport for interested air lines and believes that the time has arrived to undertake negotiations. Before actual construction of commercial transports can begin, the Company must work out with the Air Force an arrangement which would permit the use, for commercial production, of tooling designed and constructed for use on the Government contract. It must also arrange for the use of a portion of the Government owned Renton Plant for commercial production.

The Boeing Company proposes that a production notice type contract be negotiated. Under such a contract, upon notice given by Boeing within an agreed period of time, the contract would become binding upon both parties if:

1. The final price is not in excess of the price set forth in the production notice contract.
2. The delivery schedule is as favorable as that set forth in the production notice contract.
3. There is no substantial change in the aircraft specification.

This arrangement would permit Boeing to determine the position of the Air Force with respect to the use of tooling and plant area, to determine if sufficient orders could be secured to make commercial production feasible and to determine the degree of uniformity that could be achieved as between the different commercial customers.

The very rough estimates which we have made on costs indicate a sales price in the neighborhood of $4,250,000 per airplane, assuming a quantity of fifty. This price might be somewhat lower if initial production orders warranted establishing a sales price on a larger quantity. This price assumes that the configuration of all commercial airplanes would be substantially identical and is based upon (1) existing labor costs on the assumption that the contract would provide for escalation on labor, and (2) estimated costs as to major items of purchased equipment on the assumption that the contract would provide for escalation on such items.

We are acquainting the major American flag air lines as well as some of the larger foreign operators with our proposed delivery schedules. In the interest of lower prices every effort must be made to secure as large a production order as possible. This will require an equitable distribution of delivery positions. Based on a go-ahead next spring, deliveries would commence in the early part of 1958. The delivery

schedule for any customer would be based on the order in which commitments are made and will take into account the quantity purchased by each customer. The attached table sets forth proposed delivery schedules for various quantities. The second customer to make a commitment would receive airplanes at the same rate as shown in the table for the quantity ordered but would start three months later than the first customer. The third customer to make a commitment would follow the same rule.

Our experience with the prototype has been highly satisfactory. We are in a position to state that we have a design that is outstanding. By reason of the experience obtained in the design, development, production and flight testing of the B-47, B-52 and 707 prototype airplanes, we can produce a commercial jet transport that will have sound economics, great passenger appeal and outstanding performance characteristics.

If you are interested in pursuing this proposal, I trust that we will hear from you at an early date.

Very truly yours,

William M. Allen

Captain E. V. Rickenbacker
Chairman of the Board
Eastern Air Lines, Inc.
Eastern Air Lines Building
10 Rockefeller Plaza
New York 20, New York

DX 95, page 4
(Allen Letter Announcing Boeing Jet, Nov. 19, 1954)

QUANTITY OF INITIAL ORDER

Month of Delivery	25	20	15	12	10
1	1	1	1	1	1
2	1	1	1	0	0
3	1	1	1	1	1
4	2	2	1	1	1
5	1	2	2	2	2
6	2	2	1	1	2
7	1	2	2	2	2
8	2	2	1	1	1
9	1	2	2	2	
10	2	2	1	2	
11	1	2	2	2	
12	2	2	1	2	
13	1	2	2		
14	2	2	2		
15	1	2			
16	2				
17	2				

Allen
Beall
L. P. Kickelwait
J. B. Connelly
K. C. Gordon
E. C. Wells
F. P. Laudan
J. O. Yeasting
J. E. Prince
HWN-LAP-MPH
Clyde Skeen

June 23, 1955

Pan American World Airways, Inc.
135 East 42nd Street
New York 17, New York

DX 96

Attention: Mr. Franklin Gledhill
Vice President

Dear Mr. Gledhill:

At your request we are pleased to submit our firm proposal for the manufacture and sale to you of twenty-five (25) Boeing Model 707 aircraft of basic configuration as described in Boeing Detail Specification D-10707, dated April 7, 1955, as follows:

1. Contract Terms

The general terms and conditions of the sale would be as set forth in the Proof of April 29, 1955, of Purchase Agreement (Production Notice Type Contract) copies of which have been previously furnished you, subject to such changes therein as are reflected in this proposal letter or are made by mutual agreement. The contract would provide that the Production Notice must be given by September 15, 1955.

2. Price

Alternate No. 1:

The basic price per airplane is $4,500,000, subject to adjustment as follows:

(a) On account of price changes hereafter agreed upon between the parties for any special features and departures requested by you from the basic configuration as described in the Detail Specification above mentioned.

(b) On account of increase or decrease by reason of changes in Boeing's average hourly wage rate, subject to the limitation that any increase is limited to $250,000 per aircraft.

(c) On account of increase or decrease by reason of changes in prices of certain items of outside purchased equipment, such as engines, automatic pilot system, air conditioning system and reverse thrust unit.

(d) If on August 1, 1958, Boeing has firm contracts for the sale of eighty (80) or more Model 707 aircraft to commercial customers (including Pan American World Airways, Inc.), the basic price of each aircraft would be reduced as follows:

Total Quantity of Model 707 Aircraft sold by August 1, 1958	Reduction in Price: If such reduction would result in no loss or in a profit of less than 10% of cost to Boeing	Reduction in Price: If such reduction would result in a profit of at least 10% of cost to Boeing
80 - 89, inclusive	$100,000	$200,000
90 - 99, inclusive	175,000	350,000
100 and over	250,000	500,000

Alternate No. 2

The basic price per airplane is $4,500,000, subject to adjustment as follows:

(a) On account of price changes hereafter agreed upon between the parties for any special features and departures requested by you from the basic configuration as described in the Detail Specification above mentioned.

(b) No provision for labor escalation.

(c) Increase or decrease by reason of changes in prices of certain items of outside purchased equipment, such as engines, automatic pilot system, air conditioning system, and reverse thrust unit.

(d) No price reduction for additional aircraft sold.

3. Delivery

The aircraft would be delivered to you as follows:

Month of Delivery	Quantity of Aircraft
[illegible]ber, 1958	

January, 1959	2
February	2
March	2
April	2
May	2
June	2
July	2
August	2
September	2
October	2
November	2
December	1

This delivery schedule contemplates that at least eight (8) Model 707 aircraft will be delivered to you before any will be delivered to any other commercial customer.

6. Term of Offer

This offer will remain firm until July 18, 1955.

If this proposal is accepted by you, we would suggest that both parties cooperate to the end that the Purchase Agreement be finalized and executed at the earliest possible date. This would enable Boeing and Pan American to proceed promptly to obtain the Air Force approval required before the program can go forward.

Very truly yours,

BOEING AIRPLANE COMPANY

William M. Allen
President

LIMITED

June 24, 1955

L. P. Mickelwait
J. B. Connelly
K. C. Condon
E. C. Wells
F. P. Laudan
J. O. Yeasting
J. E. Prince
Clyde Skeen
H. W. Heffner - LAP - 1

PB FIL

American Airlines, Inc.
100 Park Avenue
New York 17, N. Y.

DX 97

Attention: Mr. C. R. Smith, President

Gentlemen:

Pursuant to our discussions with you, we are pleased to submit our firm proposal for the manufacture and sale to you of fifteen (15) Boeing Model 707 aircraft of basic configuration as described in Boeing Detail Specification D-16787, dated April 7, 1955, as follows:

1. Contract Terms

The general terms and conditions of the sale would be set forth in a Purchase Agreement of the production notice type. It would provide that (a) Boeing must give the production notice by September 15, 1956, or Buyer may cancel; and (b) Boeing may cancel if the required Air Force approval is not obtained prior to delivery of production notice or if within 60 days thereafter Boeing does not have firm orders for at least fifty (50) Model 707 aircraft.

2. Price

Alternate No. 1:

The basic price per airplane is $4,530,000, subject to adjustment as follows:

(a) On account of price changes hereafter agreed upon between the parties for any special features and departures requested by you from the basic configuration as described in the Detail Specification above mentioned.

(b) On account of increase or decrease by reason of changes in Boeing's average hourly wage rate, subject to the limitation that any increase is limited to $225,000 per aircraft.

(c) On account of increase or decrease by reason of changes in prices of certain items of outside purchased equipment, such

LIMITED

as engines, automatic pilot system, air conditioning system and reverse thrust unit.

(d) If on August 1, 1958, Boeing has firm contracts for the sale of eighty (80) or more Model 707 aircraft to commercial customers (including American), the basic price of each aircraft would be reduced as follows:

Total Quantity of Model 707 aircraft sold by August 1, 1958	Reduction in Price: If such reduction would result in no loss or in a profit of less than 10% of cost to Boeing	If such reduction would result in a profit of at least 10% of cost to Boeing
80-89, inclusive	$100,000	$200,000
90-99, inclusive	175,000	350,000
100 and over	250,000	500,000

Alternate No. 2:

The basic price per airplane is $4,500,000, subject to adjustments as follows:

(a) On account of price changes hereafter agreed upon between the parties for any special features and departures requested by you from the basic configuration as described in the Detail Specification above mentioned.

(b) No provision for labor escalation.

(c) Increase or decrease by reason of changes in prices of certain items of outside purchased equipment, such as engines, automatic pilot system, air conditioning system and reverse thrust unit.

(d) No price reduction for additional aircraft sold.

3. Payment

Advance payments would be made by the buyer to Boeing as follows:

(a) 1% of basic price within 30 days after execution of purchase agreement;

(b) 4% of basic price within 30 days after delivery of production

(c) 20% of basic price in ten (10) monthly installments beginning seventh month after production notice; and

(d) 33⅓% of price increases resulting from change orders.

The foregoing advance payments totaling 33⅓% of the aggregate basic price would be credited proram against the purchase price of the aircraft and the balance would be payable on delivery.

4. Delivery

The aircraft would be delivered to you as follows:

Month of Delivery	Quantity of Aircraft
April, 1959	1
May	1
June	1
July	1
August	1
September	1
October	1
November	1
December	1
January, 1960	2
February	2
March	1
April	1

Boeing would agree not to deliver Model 707 aircraft to any other customer engaged in commercial air transport service between points within the United States earlier than such aircraft will be delivered to American. Prior delivery to another customer during any one month will not be construed as earlier delivery to such other customer.

5. Term of Offer

This offer will remain open until July 15, 1955.

If this proposal appears acceptable to you, we will be glad to submit a complete form of Purchase Agreement for your consideration to the end that the Purchase Agreement be formalized and executed at the earliest possible date.

Very truly yours,
Boeing Airplane Company

By
J. D. Connelly, Director of

(UNITED)

AX-1594 DX 98, page 1
(Boeing Offer to Sell United 15 B-120s, 6/24/55)

IR File

UNITED

cc: W. M. Allen
W. E. Beall
L. P. Nickelwait
✓ J. B. Connelly
K. C. Gordon
E. C. Wells
F. P. Laudan
J. O. Yeasting
J. E. Prince
Clyde Skeen
H. W. Neffner - HPH - L

June 24, 1955

United Air Lines, Inc.
5959 South Cicero Avenue
Chicago 38, Illinois

Attention: Mr. W. A. Patterson, President

DX 98

Gentlemen:

Pursuant to our discussions with your Mr. Keilhy, we are pleased to submit our firm proposal for the manufacture and sale to you of fifteen (15) Boeing Model 707 aircraft of basic configuration as described in Boeing Detail Specification D-16737, dated April 7, 1955, as follows:

1. Contract Terms

The general terms and conditions of the sale would be set forth in a Purchase Agreement of the production noted type. It would provide that (a) Boeing must give the production notice by September 15, 1955, or buyer may cancel; and (b) Boeing may cancel if the required Air Force approval is not obtained prior to delivery of production notice or if within 60 days thereafter Boeing does not have firm orders for at least fifty (50) Model 707 aircraft.

2. Price

Alternate No. 1:

The basic price per airplane is $4,500,000, subject to adjustment as follows:

(a) On account of price changes hereafter agreed upon between the parties for any special features and departures requested by you from the basic configuration as described in the Detail Specification above mentioned.

(b) On account of increase or decrease by reason of changes in Boeing's average hourly wage rate, subject to the limitation that any increase is limited to $250,000 per aircraft.

(c) On account of increase or decrease by reason of changes in prices of certain items of outside purchased equipment, such

as engines, automatic pilot system, air conditioning system and reverse thrust unit.

(b) If on August 1, 1959, Boeing has firm contracts for the sale of eighty (80) or more Model 707 aircraft to commercial customers (including United), the basic price of each aircraft would be reduced as follows:

Total Quantity of Model 707 aircraft sold by August 1, 1958	Reduction in Price If such reduction would result in no loss or in a profit of less than 10% of cost to Boeing	Reduction in Price If such reduction would result in a profit of at least 10% of cost to Bo
80-89, inclusive	$100,000	$200,000
90-99, inclusive	175,000	350,000
100 and over	250,000	500,000

Alternate No. 2:

The basic price per airplane is $4,500,000, subject to adjustment as follows:

(a) On account of price changes hereafter agreed upon between the parties for any special features and departures requested by you from the basic configuration as described in the Detail Specification above mentioned.

(b) No provision for labor escalation.

(c) Increase or decrease by reason of changes in prices of certain items of outside purchased equipment, such as engines, automatic pilot system, air conditioning system and reverse thrust unit.

(d) No price reduction for additional aircraft sold.

3. Payment

Advance payments would be made by the buyer to Boeing as follows:

(a) 1% of basic price within 30 days after execution of purchase agreement;

(b) 4% of basic price within 30 days after delivery of production notice;

[illegible]% of basic price in ten (10) monthly installments beginning

seventh month after production notice; and

(d) 33⅓ of price increases resulting from change orders.

The foregoing advance payments totaling 33⅓ of the aggregate basic price would be credited prorata against the purchase price of the aircraft and the balance would be payable on delivery.

4. Delivery

The aircraft would be delivered to you as follows:

Month of Delivery	Quantity of Aircraft
April, 1959	1
May	1
June	1
July	1
August	1
September	1
October	1
November	1
December	1
January, 1960	2
February	2
March	1
April	1

Boeing would agree not to deliver Model 707 aircraft to any other customer engaged in commercial air transport service between points within the United States earlier than such aircraft will be delivered to United. Prior delivery to another customer during any one month will not be construed as earlier delivery to such other customer.

5. Term of Offer

This offer will remain firm until July 18, 1955.

If this proposal appears acceptable to you, we will be glad to submit a comple form of Purchase Agreement for your consideration to the end that the Purch Agreement be formalized and executed at the earliest possible date.

Very truly yours,
BOEING AIRPLANE COMPAN
ORIGINAL SIGNED BY
J. B. CONNELLY

cc: Mr. J. A. Herlihy.

J. B. Connelly, Director of
Contract Administration

(1) The information pertaining to delivery positions for Pan American is contained in DX 79. Specifically, the delivery positions in the first column are found in Article 2(a) on page 2 of Purchase Agreement No. 2, and those in the second column are found in paragraph 2 on page 2 of Supplemental Agreement No. 3 (3/13/56).

(2) The information pertaining to delivery positions for Continental is contained in DX 80. Specifically, the delivery positions in the first column are found in Article 2(a) on page 2 of Purchase Agreement No. 2; this schedule was not changed prior to 1960.

(3) The information pertaining to delivery positions for Braniff is contained in DX 82. Specifically, the delivery positions in the first column are found in Article 2(a) on page 2 of Purchase Agreement No. 4; this delivery schedule was not changed prior to 1960.

(4) The information pertaining to delivery positions for TWA (Boeing) is contained in DX 66. Specifically, the delivery positions in the first column are found in Article 2(a) on page 2 of Purchase Agreement No. 7, and those in the second column are found in paragraph 2 on page 2 of Supplemental Agreement No. 3 (1/10/57).

(5) The information pertaining to delivery positions for American is contained in DX 85. Specifically, the delivery positions in the first column are found in Article 2(a) on page 2 of Purchase Agreement No. 8, and those in the second column are found in paragraph 2 on page 2 of Supplemental Agreement No. 5 (7/28/58).

(6) The information pertaining to delivery positions for Qantas is contained in DX 68. Specifically, the delivery positions in the first column are found in Article 2(a) on page 2 of Purchase Agreement No. 14, and those in the second column are found in paragraph 2 on page 1 of Letter Agreement 14-3 (6/12/59).

(7) The information pertaining to delivery positions for Pan American is contained in DX 81. Specifically, the delivery positions in the first column are found in Article 2(a) on page 2 of Purchase Agreement No. 3, and those in the second column are found in paragraph 2 on page 2 of Supplemental Agreement No. 2 (3/13/56).

(8) The information pertaining to delivery positions for Air France is contained in DX 83. Specifically, the delivery positions in the first column are found in Article 2(a) on pages 2-3 of Purchase Agreement No. 5, and those in the second column are found in paragraph 2 on page 2 of Supplemental Agreement No. 2 (12/15/57).

(9) The information pertaining to delivery positions for Sabena is contained in DX 84. Specifically, the delivery positions in the first column are found in Article 2(a) on pages

2-3 of Purchase Agreement No. 5, and those in the second column are found in paragraph 2 on page 2 of Supplemental Agreement No. 2 (4/5/57).

(10) The information pertaining to delivery positions for TWA (Boeing, [illegible] is contained in DX 87. Specifically, the delivery positions in the first column are found in Article 2(a) on page 2 of Purchase Agreement No. [illegible]; this schedule was not changed prior to 1960.

(11) The information pertaining to delivery positions for Lufthansa is contained in DX 85. Specifically, the delivery positions in the first column are found in Article 2(a) on page 2 of Purchase Agreement No. 10; this schedule was not changed prior to 1960.

(12) The information pertaining to delivery positions for Braniff is contained in DX 87. Specifically, the delivery positions in the first column are found in Article 2(a) on pages 1-2 of Purchase Agreement No. 12; this schedule was not changed prior to 1960.

(13) The information pertaining to delivery positions for Air India is contained in DX 83. Specifically, the delivery positions in the first column are found in Article 2(a) on page 1 of Purchase Agreement No. 15, and those in the second column are found in paragraph 2 on page 2 of Supplemental Agreement No. 5 (11/13/59).

. . . . .

The general designations, "Boeing 707 (Transcontinental Version)" and "Boeing 707 (Intercontinental Version)," used to describe the aircraft considered in these cases, are determined by the types of aircraft ordered by the airlines from Boeing -- specifically whether the aircraft is of the Boeing 707-120 class (transcontinental version) or the Boeing 707-320 class (intercontinental version). Set forth below are the airlines' designations of the aircraft types ordered as set forth in the agreements with Boeing, and the class of aircraft (120 class or 320 class) to which each type belongs. The information as to aircraft [illegible] is taken from page 193 of Jane's - All The World's Aircraft, 1965-1966 Edition, published by McGraw-Hill.

Purchase Agreement Number & Airline	Airline's Designation of Aircraft Type Ordered	707-120 Class or 707-320 Class
#1 - Pan American	707 - 121	120
#2 - Continental	707 - 124	120
#3 - Pan American	707 - 321	320
#4 - Braniff	707 - 227	120
#5 - Air France	707 - 328	320
#[illegible] - Lufthansa	707 - 329	320
#[illegible] - TWA	707 - 131	120
#[illegible] - American	707 - 123	120
#[illegible] - [illegible]	707 - 331	320
#[illegible] - [illegible] Qantas	707 - 430	320
#[illegible] - [illegible]	707 - 436	320
#[illegible] - Canadian	707 - 138	120
#15 - Air India	707 - 437	320

INDEX

Volume AX-I

ITEM	PAGE
TWA Ex. 2 (Statement of Robert W. Rummel) ..	AX-1
TWA Ex. R-3 (Toolco-Convair Amended Agreement—Model 22, 6/4/56)	AX-63a
TWA Ex. R-5 (TWA-Toolco Purchase Agreement—May 9, 1960)	AX-64
TWA Ex. R-8(80) (FAA Registration Documents—B707-331, No. N771TW)	AX-73a
TWA Ex. R-8(81) (FAA Registration Documents—B707-331, No. N772TW)	AX-73k
TWA Ex. 3 (Affidavit of J. B. Connelly)	AX-74
TWA Ex. 4(b) (C. & C. Report—Comparative Profit Study)	AX-80
TWA Ex. 4(c)(1) (C. & C. Report—Financial Results from Reconstructed Jet Fleet)	AX-91
TWA Ex. 4(c)(4) (Exhibits B-J to C. & C. Report—Financial Results from Reconstructed Jet Fleet)	AX-167

Volume AX-II

TWA Ex. 5(a) (Drexel Harriman Ripley, Inc. Report—Parts I & II)	AX-336
TWA Ex. 5(b) (Exhibits to Drexel Harriman Ripley, Inc. Report)	AX-430

ITEM	PAGE
TWA Ex. 7(b)(1) (Price Waterhouse Study—Volume One)	AX-452
TWA Ex. 7(b)(2) (Price Waterhouse Study—Volume Two)	AX-480
Volume AX-III	
TWA Ex. 10 (Letter—Boeing to TWA re 707 Negotiations—12/29/54)	AX-643a
TWA Ex. 12 (Toolco-Convair CV-990 Purchase Agreement—11/10/60)	AX-644
TWA Ex. 13 (Holliday Call Sheet—Feb. 20-27, 1961)	AX-655
TWA Ex. 14 (CV-990 Purchase Agreement—Amendment of 2/22/61)	AX-660
TWA Ex. 22 (Rummel Call Sheets)	AX-665
TWA Ex. 23 (Letter Agreement—Sale of Six Boeings to Pan American)	AX-729
TWA Ex. 39 (Affidavit of Joseph P. Ripley)	AX-732
TWA Ex. 42 (C. & C. Report—Revision of Pages 63, 64, 71 & 72)	AX-735
TWA Ex. 43 (C. & C. Report—Revision of Page 51)	AX-740
TWA Ex. 46 (Jet and Turboprop Aircraft of TWA and Principal Competitors—1958-66)	AX-742
TWA Ex. 47 (Boeing Aircraft Employed on Routes Formerly Served by B-720Bs)	AX-743

ITEM	PAGE
TWA Ex. 50 (Price Waterhouse Report—Summary of Application of Assumptions)	AX-744
TWA Ex. 72 (TWA Annual Report—1939)	AX-745
TWA Ex. 73 (TWA Annual Report—1940)	AX-752
TWA Ex. 74 (TWA Annual Report—1941)	AX-758
TWA Ex. 75 (TWA Annual Report—1942)	AX-760
TWA Ex. 76 (TWA Annual Report—1943)	AX-763
TWA Ex. 77 (TWA Annual Report—1944)	AX-766
TWA Ex. 78 (TWA Annual Report—1945)	AX-769
TWA Ex. 79 (TWA Annual Report—1946)	AX-773
TWA Ex. 80 (TWA Annual Report—1947)	AX-779
TWA Ex. 81 (TWA Annual Report—1948)	AX-783
TWA Ex. 82 (TWA Annual Report—1949)	AX-788
TWA Ex. 83 (TWA Annual Report—1950)	AX-792
TWA Ex. 84 (TWA Annual Report—1951)	AX-797
TWA Ex. 86 (TWA Annual Report—1953)	AX-800
TWA Ex. 87 (TWA Annual Report—1954)	AX-805
TWA Ex. 88 (TWA Annual Report—1955)	AX-814
TWA Ex. 89 (TWA Annual Report—1956)	AX-819
TWA Ex. 90 (TWA Annual Report—1957)	AX-822
TWA Ex. 91 (TWA Annual Report—1958)	AX-842
TWA Ex. 92 (TWA Annual Report—1959)	AX-854
TWA Ex. 93 (TWA Annual Report—1960)	AX-856

ITEM	PAGE
TWA Ex. 94 (TWA Annual Report—1961)	AX-862
TWA Ex. 96 (TWA Annual Report—1963)	AX-866
TWA Ex. 128 (Pan American Annual Report—1959)	AX-868
TWA Ex. 132 (Pan American Annual Report—1963)	AX-869
TWA Ex. 155 (AAL Annual Report—1958)	AX-870
TWA Ex. 158 (AAL Annual Report—1961)	AX-871
TWA Ex. 159 (AAL Annual Report—1962)	AX-873
TWA Ex. 184 (UAL Annual Report—1959)	AX-874
TWA Ex. 186 (UAL Annual Report—1961)	AX-875
TWA Ex. 187 (UAL Annual Report—1962)	AX-876
TWA Ex. 192 (TWA Prospectus, 5/25/61 & Supplement, 6/20/61)	AX-877
TWA Ex. 194 (TWA Prospectus—6/17/57)	AX-883
TWA Ex. 223 (Pan American Prospectus—7/3/45—Supplement—7/24/45)	AX-889
TWA Ex. 249 (American Airlines Prospectus—6/11/46—Supplement—6/24/46)	AX-891
TWA Ex. 257 (TWA-Toolco Lease Agreements—Boeing Jets)	AX-893
TWA Ex. 264 (Toolco-Lockheed Purchase Agreement—L-1449A—12/23/54)	AX-901
TWA Ex. 266 (Toolco-Lockheed Purchase Agreement—L-1049G—9/26/55)	AX-908

ITEM	PAGE
TWA Ex. 267A (Letter, TWA to Toolco—1957 Common Stock Offering)	AX-919
TWA Ex. 267B (Letter, TWA to N.Y. Trust Co.—1957 Common Stock Offering)	AX-921
TWA Ex. 271 (Letter, Toolco to SEC—1957 Common Stock Offering)	AX-923
TWA Ex. 275 (TWA Board Minutes—April 26, 1945)	AX-925
TWA Ex. 276 (TWA Finance Committee Minutes—September 12, 1945)	AX-928
TWA Ex. 277 (Page from Banking Quotation Record)	AX-930
TWA Ex. 278 (TWA Board Minutes—November 8, 1946)	AX-931
TWA Ex. 279 (Special TWA Stockholders Meeting—December 23, 1946—Judges' Report)	AX-935
TWA Ex. 280A (Minutes—Adjourned Special TWA Stockholders Meeting—December 28, 1946)	AX-936
TWA Ex. 280B (Adjourned Special TWA Stockholders Meeting—December 28, 1946—Judges' Report)	AX-940
TWA Ex. 281A (Minutes—Adjourned Special TWA Stockholders Meeting—December 31, 1946)	AX-941
TWA Ex. 281B (Adjourned Special TWA Stockholders Meeting—December 31, 1946—Judges' Report)	AX-944

ITEM	PAGE
TWA Ex. 282 (Minutes & Judges' Report—Adjourned Special TWA Stockholders Meeting —January 6, 1947)	AX-945
TWA Ex. 283 (TWA Board Minutes—December 18, 1946)	AX-950
TWA Ex. 284 (TWA Board Minutes—December 27, 1946)	AX-956
TWA Ex. 285 (TWA Board Minutes—December 28, 1946)	AX-962
TWA Ex. 287 (TWA Board Minutes—January 9, 1947)	AX-966
TWA Ex. 288 (Minutes—Adjourned Special TWA Stockholders Meeting—January 13, 1947)	AX-974
TWA Ex. 290 (TWA Board Minutes—June 15, 1948)	AX-980
TWA Ex. 292 (TWA Proxy Statement—July 15, 1948)	AX-991
TWA Ex. 293 (TWA Prospectus—2/18/49 & Amendments—3/8/49)	AX-993
TWA Ex. 313 (Debt Outstanding & Available to TWA & Competitors—1961-63)	AX-1051
TWA Ex. 314 (Weighted Average Interest—TWA & Competitors—1960-63)	AX-1060
TWA Ex. 319 (Least Squares Analysis—S.H.E. Avg. Stage Length—B-331s)	AX-1065

ITEM	PAGE
TWA Ex. 320 (Least Squares Analysis—S.H.E. Avg. Stage Length—CV-880s)	AX-1066
TWA Ex. 321 (Least Squares Analysis—S.H.E. Avg. Stage Length—B-131s)	AX-1067
TWA Ex. 322 (Least Squares Analysis—S.H.E. Avg. Stage Length—B-131Bs)	AX-1068
TWA Ex. 328 (S.H.E.—Passengers Added/ Deleted—Reconstructed TWA)	AX-1069
TWA Ex. 331 (TWA Historical Load Factors—CV-880s—1962-1963)	AX-1071
TWA Ex. 336 (Comparison TWA Int'l vs. PAA-Atl.—1959)	AX-1072
TWA Ex. 345A (Price Waterhouse Comparison —C. & C. and S.H.E. (Revised))	AX-1073
TWA Ex. 351 (1965 CAB Handbook of Airline Statistics)	AX-1107
TWA Ex. 355 (Comparative Profit Study—TWA with AAL & UAL)	AX-1108
TWA Ex. 356 (Comparative Profit Study—TWA with All Other Domestic Trunks)	AX-1110
TWA Ex. 399 (Comparison, TWA Actual Jet Load Factors vs. S.H.E. Marginal Passenger Mile Factors)	AX-1112
TWA Ex. 401 (TWA B-131 Load Factors—April-July 1959)	AX-1113
TWA Ex. 420 (Price Waterhouse Comparison—C. & C. (Revised) and S.H.E.)	AX-1114

ITEM	PAGE
TWA Ex. 423 (Late Evening Flights—TWA 1961-1963)	AX-1129
TWA Ex. 424 (Cargo v. Passenger Revenue—TWA Late Evening Flights)	AX-1133
TWA Ex. 426 (Comparison of Selected A/C Numbers from S.H.E. Appendix A)	AX-1134
TWA Ex. 431 (Profitability of TWA A/C by Month—Computer Print-out)	AX-1135
TWA Ex. 432 (Profitability of TWA A/C by Month—Chart)	AX-1145
TWA Ex. 435 (Regression Analysis—Random Numbers)	AX-1146
TWA Ex. 436A (Regression Analysis—Random Numbers)	AX-1154
TWA Ex. 436B (Regression Analysis—Random Numbers)	AX-1157
TWA Ex. 436C (Regression Analysis—Random Numbers)	AX-1160
TWA Ex. 440 (Graph Illustrating Testimony of Prof. Hare)	AX-1163
TWA Ex. 441 (Regression Experiment—3/23/68)	AX-1164
TWA Ex. 444 (C. & C. Tabulation—Additional TWA Domestic Seat-Miles)	AX-1177

Volume AX-IV

ITEM	PAGE
DX4 (Toolco Order—30 P.&W. JT3C-4 Engines, 2/14/56)	AX-1178
DX5 (Letter—Toolco to P.&W. re Jet Engine Orders, 2/14/56)	AX-1181
DX6 (Toolco Order—90 Additional P.&W. JT4A-3 Engines, 2/15/56)	AX-1183
DX7 (Amendment—Toolco Order for 300 P.&W. Jet Engines, 9/7/56)	AX-1184
DX8 (Letter—P.&W. to Rummel re 300 Jet Engines, 9/7/56)	AX-1185
DX10 (Letter—Rummel to Collings re Boeing 707, 1/12/55)	AX-1186
DX11 (Notes of Convair Negotiations—March 24, 1955)	AX-1187
DX15 (Draft C.&C. Report—TWA Financial Forecast 1959-61)	AX-1192
DX19 (Page from *Aviation Week*, Jan. 10, 1955)	AX-1208
DX22 (*American Aviation*, June 20, 1955, pages 21-23)	AX-1209
DX26 (*American Aviation*, Sept. 12, 1955, pp. 84-85)	AX-1212
DX27 (*American Aviation*, Oct. 10, 1955, p. 68)	AX-1214
DX28 (Pages from *American Aviation*, Oct. 24, 1955)	AX-1215

ITEM	PAGE
DX29 (*Aviation Week*, Oct. 17, 1955, p. 7)	AX-1218
DX31 (*American Aviation*, Nov. 7, 1955, pp. 23-25, 27-28)	AX-1219
DX40 (TWA Board Minutes—June 21, 1961)	AX-1224
DX43 (Excerpts from Deposition of Robert W. Rummel)	AX-1229
DX44 (Letter of Damon, Dec. 6, 1955)	AX-1369
DX45 (Letter—Leslie to Dietrich, Dec. 19, 1955)	AX-1378
DX46 (Letter—Dietrich to Ayers, Dec. 21, 1955)	AX-1382
DX47 (Boeing-Toolco Purchase Agreement—8 B-131s, 1/10/56)	AX-1385
DX48 (Teletype—Boeing to Toolco re B707-131s, 11/11/56)	AX-1390
DX51 (Boeing Offer of B707-320s to Toolco, 1/6/56)	AX-1391
DX53 (Transcript of Telephone Conversation—Rummel & Connelly, 12/20/57)	AX-1393
DX54 (TWA Board Minutes—June 26, 1959)	AX-1402
DX57 (The Huntington Report—1960)	AX-1410
DX62 (TWA Fleet Requirements 1961-70, dated 3/1/61)	AX-1420
DX63 (TWA Financial Forecast 1959-61, dated 5/15/59)	AX-1433
DX64 (Letter to Thomas, dated 5/6/59)	AX-1438

ITEM	PAGE
DX65 (TWA Staff Engineering Report re Jets & Turboprops—4/19/56)	AX-1440
DX66 (Toolco-Boeing Contracts—B707-131s, 3/2/56)	AX-1445
DX67 (Toolco-Boeing Contracts—B707-331s, 3/19/56)	AX-1479
DX68 (Toolco-Convair Contracts—CV-880s, 9/10/56)	AX-1505
DX71 (Rummel Memo re TWA Equipment Program, 3/15/61)	AX-1536
DX72 (Telegram—Bew to Rummel—2/27/61)	AX-1538
DX73 (Letter—Leslie to Holliday—3/20/61)	AX-1539
DX74 (Letter—Leslie to Holliday—4/3/61)	AX-1540
DX77 (Letters—Toolco to TWA re Financing Additional Jets, 6/9-10/61)	AX-1541
DX78 (Letter—TWA to Holliday re Financing Proposals, 6/16/61)	AX-1553
DX79 (Pan American-Boeing Purchase Agreement—B707-120s, 10/13/55)	AX-1558
DX81 (Pan American-Boeing Purchase Agreement—B707-321s, 12/19/55)	AX-1564
DX85 (Boeing-AAL Purchase Agreement—B707-123s, 3/1/56)	AX-1576
DX95 (Allen Letter Announcing Boeing Jet, Nov. 19, 1954)	AX-1584
DX96 (Boeing Offer to Sell Pan American 25 B-120s, 6/23/55)	AX-1588

ITEM	PAGE
DX97 (Boeing Offer to Sell American 15 B-120s, 6/24/55)	AX-1591
DX98 (Boeing Offer to Sell United 15 B-120s, 6/24/55)	AX-1594
DX101 (Boeing 707 Delivery Positions)	AX-1597
Volume AX-V	
DX102 (Boeing Memorandum re 707 Over-Ocean Configuration, 11/2/55)	AX-1601
DX103 (Boeing Memorandum re TWA Delivery Positions, 12/23/55)	AX-1606
DX105 (Boeing Memorandum re Negotiations with TWA, 7/24/56)	AX-1608
DX106 (Letter—Rummel to Cook re Boeing Deliveries, 1/28/58)	AX-1611
DX107 (Letter—Rummel to Cook re Boeing Deliveries, 3/17/58)	AX-1615
DX108 (Letter—Price to Allen re Boeing Deliveries, 3/30/58)	AX-1618
DX109 (Letter—Toolco to Allen re Boeing Deliveries, 5/8/58)	AX-1621
DX116 (Rourke Memo to Rummel re CV-880 Deliveries, 1/15/60)	AX-1623
DX120 (TWA Memorandum re CV-880 Deliveries, 10/2/59)	AX-1624
DX122 (Bew Memorandum to Cannady re CV-880 Deliveries, 12/18/59)	AX-1625

ITEM	PAGE
DX124 (Parmet Memorandum to Rourke re CV-880 Deliveries, 1/13/60)	AX-1627
DX125 (TWA Memorandum re CV-880 Deliveries, 1/22/60)	AX-1629
DX127 (Rummel Memorandum to Rourke re Integration of CV-880s, 2/8/60)	AX-1630
DX128 (Letter—Rourke to Digges re Specification Modifications, 4/7/60)	AX-1638
DX130 (Bew Wire to Rourke re Convair Delays, 5/27/60)	AX-1640
DX135 (Letter—Convair to Bew re CV-880 Delivery, 1/6/61)	AX-1641
DX137 (Telegram—Bew to Rummel re Convair Delays, 2/16/61)	AX-1643
DX139 (Letter—Convair to Bew re Convair Delays, 3/16/61)	AX-1644
DX142 (Letter—Convair to Rourke re CV-880 Deliveries, 7/11/61)	AX-1647
DX143 (Letter—Rourke to Convair re CV-880 Deliveries, 8/2/61)	AX-1650
DX146 (Letter—Convair to Toolco re Model 30 Delivery Positions, 5/6/60)	AX-1652
DX148 (Toolco—General Dynamics Letter Agreement re 6 Model 30s, 7/14/60)	AX-1654
DX152 (Toolco—General Dynamics Letter Agreement re Additional Model 30s, 9/6/60)	AX-1655

ITEM	PAGE
DX156 (Telegram—Beall to Allen, et al. re PAA Negotiations, 9/28/55)	AX-1657
DX168 (Boeing Memorandum re Conversations with Howard R. Hughes, 9/23/55)	AX-1658
DX169 (Boeing Memorandum re Conversation with Howard R. Hughes, 10/31/55)	AX-1660
DX170 (Telegram—Boeing to Toolco re B707-331s, 7/21/59)	AX-1661
DX218 (C.&C. Letter to Leslie re TWA Financial Forecast, March 13, 1959)	AX-1664
DX219 (TWA Financial Forecast 1958-1962, dated 12/1/58)	AX-1666
DX237 (*Aviation Week & Space Technology*, 11/13/61, pages 42-43)	AX-1671
DX239 (*Airlift*, May 1962, p. 46)	AX-1673
DX254 (TWA Board Meeting, Aug. 16, 1961—Report of System General Manager)	AX-1674
DX255 (Statement of CAB Chairman Boyd, Jan. 29, 1960)	AX-1677
DX257 (*Aviation Week*, 1/30/61, pp. 36-37)	AX-1681
DX258 (Report to Directors of TWA—Oct. 13, 1961)	AX-1683
DX259 (CAB Order of Investigation—Dec. 28, 1961)	AX-1694
DX260 (Letter—Tillinghast to CAB, Jan. 29, 1962)	AX-1703

ITEM	PAGE
DX262 (Revised Pages 70-73 of TWA Ex. 4(c)(1))	AX-1708
DX270 (Report of Loeb, Rhoades & Co.)	AX-1712
DX271A (S.H.E. Report (Revised)—Volume One)	AX-1789
DX271B (S.H.E. Report (Revised)—Volume Two)	AX-1859
DX284 (TWA Prospectus—Nov. 20, 1952)	AX-1961
DX286 (TWA Board Minutes—Jan. 13, 1955)	AX-1967
DX287 (TWA Board Minutes—Dec. 13, 1955)	AX-1970
DX289 (TWA Board Minutes—April 26, 1956)	AX-1974
DX290 (Toolco-TWA Conditional Sale Contract—L-1049Gs, 6/6/56)	AX-1979
Volume AX-VI	
DX292 (Toolco-TWA Conditional Sale Contract—L-1649As, 4/19/57)	AX-1995
DX321 id. (CAB Orders & Documents)	AX-2012
DX322 id. (CAB Orders & Documents)	AX-2191
DX323 id. (CAB Orders & Documents)	AX-2347
Volume AX-VII	
DX334 (Correlation Coefficients—Substituted S.H.E. Table G-VII)	AX-2427
DX339 (B-120s Available to AAL, Actual vs. Reconstructed—1959)	AX-2428

ITEM	PAGE
DX341 (Domestic Carriers—Jets Assigned to Service, 1959-63)	AX-2429
DX342 (TWA's Share of Jets Assigned to Domestic Service, 1959-63)	AX-2430
DX348 (Revised Summary—Categories of Differences—Wemple vs. Simat)	AX-2431
DX358B id. (CAB Form 41 Reports—Northeast Airlines, 1957-1966)	AX-2452
DX358C id. (CAB Form 41 Reports—PAA, 1957-1966)	AX-2454
DX359A (Supplemental S.H.E. Report—Volume A)	AX-2458
DX364 id. (Excerpts from Deposition of Emmett O. Cocke)	AX-2843
DX367 (Combined Non-Stop Scheduled Frequencies Per Week—Aug. 1958-63)	AX-2851
DX368 (Combined Non-Stop Scheduled Frequencies Per Week—Aug. 1958-63)	AX-2853
DX371 (Summary—Categories of Differences—Wemple vs. Simat (Supplemental))	AX-2856
DX379 (Domestic Jet Seat Miles—Wemple vs. Historical)	AX-2867

DX 102, page 1
(Boeing Memorandum re 707 Over-Ocean Configuration, 11/2/55)

File (707)

November 2, 1955

DX 1.0

550-10-99

To: U. E. Boell

cc: W. H. Allen
B. C. Wells
J. O. Veasting
G. C. Martin
M. L. Pownall
G. S. Schairer

Subject: 707 Over-Ocean Configuration and Proposal Letters to be Prepared for Foreign Airlines

To expand upon my report during the Operations Meeting of 1 November 1955, regarding the competitive aspects of our Model 707 when applied to overseas operation, I should like to state again that while there is a large sales potential for the 707 to overseas operators, our airplane is not competitive with the DC-8 - payload-range capability.

To be competitive and to do the overseas job properly our objective should be an airplane with a still air range of 4500 nautical miles plus fuel reserves for 350 nautical miles and one hour holding. The optimum airplane should be able to fly these distances, with reserves as noted, with tourist configuration space limit payload. The take-off field length to achieve this range objective should not exceed 9500 feet, sea level, hot day.

The optimum fuselage length for this configuration cannot be fully determined until economic analyses of varying lengths versus range capability can be completed. In any event, the passenger capacity must be sufficient to insure that the 707 seat mile costs are not greater than those of the DC-8.

During the past two months we have made commitments to four of the major European airlines and one Canadian airline, to supply them with price and delivery quotations on the 707. These companies and the dates on which we promised them this information are listed below:

1. KLM - Royal Dutch Airlines

   During his visit to Seattle on September 19 and 20 Fritz Koolhoven, on behalf of General Aler, requested 707 price and delivery quotations for six aircraft. We advised that we would transmit this information to General Aler within a few weeks.

   Subsequently, in a letter from Mr. Allen to General Aler, dated September 23, 1955, the following commitment was made:

550-10-99

"We are now reviewing costs and schedules and will, at Frits Rasmcon's suggestion, present a new proposal within the next ten days."

No further communication with KLM has taken place in this regard since that date. In his letter to Mr. Allen of October 10th General Aler again indicated he desires this information and is expecting to receive a firm proposal from Boeing.

2. SAS - Scandinavian Airlines System

During the past week we have advised Per Norlin that we will forward to him a proposal letter covering delivery of five aircraft. He has requested that the delivery positions as quoted in this proposal be guaranteed to SAS for a period of ninety days.

In a letter from Mr. Tryone-Holst to Mr. Allen dated October 24, 1955, the president of SAS requests the following proposal from Boeing to be submitted to SAS at least several days prior to the SAS Board of Directors meeting scheduled to take place in Stockholm on November 14, 1955:

". . . . .contract proposal for six (6) 707's with an option for an additional four (4) to be delivered as soon as possible . . . . . should like to have alternative offers for planes with the J-57 and with the J-75 engines."

3. Air France

On October 23 and 24 the Chairman of the Board, President, two Deputy General Managers and the Manager of Air France, North American Operations, visited Boeing to study the 707. They were very favorably impressed and prior to their departure asked us to submit price and delivery quotations for quantities of six, ten and fourteen aircraft of the J-57 and J-75 configurations. They further requested this proposal be valid for a period of ninety days. We advised the Air France executives that we would submit a proposal to them at the earliest opportunity.

4. TCA

The engineer in charge of Jet Transport evaluations will be visiting Boeing on November 14th to further discuss details of the 707. Following this visit we should submit to TCA a proposal letter covering four aircraft with option for J-57, J-75 or Rolls Royce Conway engine installations.

550-10-99. Page three

5. BOAC

We have a long standing commitment to provide price and delivery data to BOAC based on a configuration of the 707 incorporating Conway engines and with no cabin interior furnishings. Before we can submit such a proposal it will be necessary to obtain current information on the price and availability dates of the Conway engines from Rolls Royce.

It is of interest to note that other airlines such as KLM and SAS have also shown interest in taking delivery of jet transports without interior furnishings and completing this work in their own shops abroad. It is recommended that a suitable interior configuration of this type be defined for the 707 and a cost reduction for same estimated.

It will be recalled that 707 proposal letters were initially sent to KLM and SAS on July 26, 1955, a few days after similar proposals were mailed out to several domestic airlines. No proposal has ever been furnished to Air France or TCA.

We must expect that the foreign airlines will request delivery position quotations valid for a period of ninety days. By virtue of their nationalized or majority state owned status it simply takes these airlines longer to convince their directors and their governing state agencies of the necessity and choice of new equipment. Even with the United States domestic airlines in the case of PAA, UAL and American it has been from three to five months time from first proposal to signed contract.

The four European airlines noted above will probably be the first in that market area to purchase jet transports. As they are the largest of the European airlines they represent the best sales potential in terms of initial and follow-on quantities of aircraft amongst the foreign operators. It is probable that they will each commit themselves with either Boeing or Douglas within the next three months time. Top technical representatives of each of these airlines will be in the States during this month studying in detail both the 707 and the DC-8. A tabulation of the anticipated sales potential of the foreign airlines is attached to this memorandum for your review.

We are prepared to submit price and delivery proposals covering the JT3-C4 configuration of the 707 to the aforementioned foreign airlines and are proceeding to prepare drafts of proposals.

550-10-99

We are not in position, unfortunately, to submit proposals to them on the aircraft they are really interested in and which is competitive with that being offered by Douglas; namely, the long range configuration of the 707 with JT4A-3 engine installation.

It is imperative that we hasten the availability of technical data, price and delivery information on this latter configuration of the 707 in order to submit the proposals the foreign airlines have requested of us and forestall their purchase of DC-8's.

We urge that plans be formulated for a series of technical team contacts to be made at the headquarters of the major foreign airlines. These contacts should be instigated just as soon as the technical data on the long range J-75 version of the 707 is available.

R. L. Bell

JET TRANSPORT MARKET - FOREIGN AIRLINES

EXPECTED PURCHASES

AIRLINE		
EUROPE	INITIAL	1965
AIR FRANCE	6 + 4 + 4	21
BOAC	10	18
LUFTHANSA	4	10
IBERIA		3
KLM	6	20
ITALAIR		7
SABENA	4	10
SAS	6 + 4	18
SWISSAIR	3	5
CANADA		
TRANS CANADA	4	10
SUB TOTAL	43 + 8 + 4	122

AIRLINE		
AFRICA	INITIAL	1965
SOUTH AFRICAN AIRWAYS	3	4
SOUTH AMERICA		
PANAIR DO BRASIL	4	5
AEROLINEAS ARGENTINAS	4	5
LAV	3	4
FAR EAST		
QANTAS	4	6
JAPAN AIRLINES	4	5
AIR INDIA	3	4
SUB TOTAL	25	33

TOTAL INITIAL - 68 to 80

TOTAL 1965 - 155

DX 102, page 5
(Boeing Memorandum re 707 Over-Ocean Configuration, 11/2/55)

AX-1606

AX-1606

DX 103, page 1
(Boeing Memorandum re TWA Delivery Positions, 12/23/55)

CONFIDENTIAL DX103

December 23, 1955

590-0-234

To: E. C. Wells

cc: W. M. Allen
W. E. Small
J. E. Connelly

Subject: Model 707 Delivery Schedules

In accordance with TWA's request, we are holding slots for TWA the following Model 707 delivery positions:

Model 707-120 Series

Month	No. of Aircraft
April 1959	1
May 1959	2
June 1959	2
July 1959	2
August 1959	1
Total	8

Model 707-320 Series

Month	No. of Aircraft
Nov. 1959	1
Dec. 1959	1
Jan. 1960	1
Feb. 1960	1
Mar. 1960	1
April 1960	1
May 1960	2
June 1960	1
July 1960	1
Aug. 1960	2
Sept. 1960	2
Oct. 1960	2
Nov. 1960	2
Dec. 1960	2
Jan. 1961	2
Total	22

The following additional Model 707-320 series positions are available and will be quoted to Delta, Northeast, Northwest and Western Airlines:

Month		No. of Aircraft
June	1959	1
July	1959	1
Aug.	1959	2
Sept.	1959	2
Oct.	1959	3
Nov.	1959	1

Additional Model 707-120 series or Model 707-220 series aircraft will become available starting March 1960, at a rate of two per month.

Additional Model 707-320 series airplanes will become available as follows:

Month		No. of Aircraft
July	1960	2
Aug.	1960	2
Sept.	1960	1
Oct.	1960	3
Nov.	1960	2
Dec.	1960	3
Jan.	1960	4
Feb.	1960	5

R. L. Bell

CONFIDENTIAL

AX-1608

DX 105, page 1
(Boeing Memorandum re Negotiations with TWA, 7/24/56)

DX 105

PB File

July 24, 1956

1-7000-7

To: W. E. Beall

cc: W. M. Allen
R. L. Bell
J. B. Connelly
A. T. Curren
D. W. Finlay
M. L. Pennell
J. O. Yeasting

Subject: Visit with R. W. Rummel and L. V. Leslie of TWA in Beverly Hills, July 19 and 20, 1956

Upon meeting Messrs. Rummel and Leslie on July 19, it became immediately apparent that their principal interest was that of discussing the procurement of additional 707-131 airplanes, but that, undoubtedly on instructions from Mr. Hughes, they were to limit the discussion to a relatively few additional early airplanes, preferably the 3 MK airplanes previously discussed.

I outlined the history of the -131 negotiations and discussions as I knew it, and told them that it was our belief, in the light of previous discussions, as well as obligations to other customers and proposals to prospective customers, that we had made an attractive and favorable offer to TWA.

They outlined their reasons for believing that the conditional aspects of our offer were not favorable, as follows:

1. They are not ready to commit to a substantially larger number of 707-131's at this time.

2. They believe that they may require additional 707-131's, and that the size of their present 707 commitment should be given full consideration as compared to other customers in allocating MK airplanes.

3. They believe that the MK airplanes can be of substantially more benefit to their early operations than to the early operations of later customers.

4. They feel that the advantage of timing on the MK airplanes is sufficient to them, even though they are not ready to commit for substantially larger purchases, to justify their immediate purchase of the 3 MK airplanes in addition to the present orders.

I told them that we would consider their points carefully, and that I would talk to Mr. Allen directly as soon as possible, and that I would appreciate their indication concerning any alternative counter proposal which we might consider. I further stated that after such consideration, I would call both Rummel and Leslie, and that possibly Mr. Allen might want to call Hughes, but I did not commit him to make such a call.

After covering this subject, I was able then to talk to Rummel and Leslie about our thoughts on economics of jet design, and developed some interest in the subject, perhaps not to the extent of jeopardizing the Convair sale immediately, but at least encouraging Rummel to take another look, and interesting Leslie in the possibilities of a truly economic design. In this discussion it was also apparent that both Rummel and Leslie take a relatively conservative view of TWA's real growth potential, and this in turn keeps them in a cautious frame of mind about thinking of any substantially larger number of 707-131's at this time. I left with them one copy each of our economic study of Boeing vs Boeing-Convair fleets, with the understanding that they would study the data presented and give me their considered opinions as to the validity of our assumptions.

On the 20th, I had an opportunity to review my understanding of the above items, and in addition during the trip to the airport with Rummel had a chance to discuss with him the subject of DC-8 vs 707 design philosophy. It is apparent that Douglas has done a tremendous job of industry-wide brainwashing on their new "more efficient" wing design, and that we must develop an effective counter program both with present and prospective customers.

With reference to TWA's interest in additional airplanes, I have studied the various possibilities since talking to Rummel and Leslie, and would like to suggest the following:

1. I believe that due to conservative thinking on the part of TWA, we are not likely to sell them a large number of additional 707-131's in the immediate future.

2. They will buy 3 additional airplanes immediately if offered (IX airplanes), since this helps them inaugurate early jet service.

3. If they buy 3 additional airplanes, they will be better equipped for 1959 jet operations, and with 12 total -131's they will be further committed and less likely to think of turning to Convair for substantial quantities or for -131 replacements. (Incidentally their total would then be 30, which would make a better announcement.)

4. Although it is desirable from our point of view to sell additional airplanes to TWA immediately, a study of our proposed schedules will show that a sale of 3 now would not hurt our prospects to other customers. In fact if TWA purchases 3 now, we might consider improving other proposals with some of the airplanes not immediately desired by TWA.

1-7000-7

5. Accordingly, I would recommend that we give serious consideration to the sale of 3 additional airplanes (at least one EM) to TWA without condition as to acceptance of additional certificated airplanes. I would recommend further, that to the extent these 3 airplanes are the same airplanes previously offered TWA as certificated airplanes (1 July, 1 August, 1 September) we make clear the dates on which additional airplanes are currently available, with an understanding that we will keep them advised as to any change in such availability by reason of modified proposals and/or sale to others.

I believe that the above procedure is in the best interest of our overall 707 program, and will possibly help our total sales by increasing the probability of added TWA sales, without adversely affecting our proposals to others. In addition, I believe that if we could firm up a program for the so-called "small" airplane in the near future, this in itself could resolve the TWA purchase of additional 707-120's.

Edward C. Wells

ECW:jcw

AX-1611

DX-106

January 23, 1958

Boeing deliveries

Mr. Raymond Cook
Andrews, Kurth, Campbell & Bradley
2200 Gulf Building
Houston 2, Texas

Dear Ray:

You will recall my recent advice that Mr. Hughes requested that I ask you and Harry West to review early Boeing jet deliveries with American Airlines re antitrust aspects.

I hope the following brief report will provide useful information.

1) Bruce Connelly and George Sandborn claim Boeing has an agreement with American Airlines which requires Boeing to deliver six Model 120 jet aircraft to American sixty days prior to delivering commercial jet aircraft to any other U. S. domestic operator. They also claim Boeing is obligated to maintain American's initial six aircraft sixty day delivery advantage throughout American's delivery period i.e., February 1959 through June 1960. Both men claim this agreement existed when the H. T. Company signed for its eight Model 131's.

2) Messrs. Connelly and Sandborn claimed to have an agreement with Pan Am which requires Boeing to deliver its first six jet transports to Pan Am sixty days prior to delivering any transports to any other commercial customer.

3) Messrs. Allen, Bell and Sandborn prior to contract signing represented that in the event Boeing could accelerate production and deliver aircraft prior to contract dates that it would maintain "relative delivery positions". This expression was taken as assurance in principle that while Boeing would not agree to specific delivery sequence that it would agree in principle to maintaining order of delivery positions then existing.

4) Sanborn claims, and Connelly reaffirms, that Boeing interpretation of "relative position" is that Boeing will alter relative deliveries when additional aircraft are ordered in order to meet its obligation to American Airlines. In other words, these gentlemen claim that each time the H. T. Company ordered additional aircraft (eight, nine, eleven, then fifteen), that Boeing was forced automatically to improve American's early delivery position and that in so doing maintained "relativity".

5) The H. T. Company contract permits Boeing to deliver twelve Model 120 aircraft (or variant thereof) prior to the month in which the H. T. Company receives its first airplane. Messrs. Sanborn and Connelly are interpreting this clause literally. Boeing is fabricating the first six aircraft to Pan Am's specifications and the next ten to American Airlines' specifications. The first airplane meeting the H. T. Company's specifications is the seventeenth of the 120 series and the eighteenth in sequence, the other airplane being a prototype 320.

6) Boeing has been extremely reluctant through the months to divulge delivery information for customers other than the H. T. Company. We have, however, obtained through undisclosed channels, Boeing's shop schedule, Exhibit A, attached. This is, however, subject to some further refinement and change.

7) We have also obtained Boeing's present target schedule for American, Pan Am and TWA:

	1958			1959											
	O	N	D	J	F	M	A	M	J	J	A	S	O	N	D
Pan Am	1	2	1	2											
AA		1	2	3	2	2	2	2	2	2	1				
TWA					2	2	2	2	2	4	1				

Remaining American Airlines target schedules are believed to be the same as contract schedule shown immediately below.

8) Boeing's contract delivery schedule provides:

	1958			1959												1960					
	O	N	D	J	F	M	A	M	J	J	A	S	O	N	D	J	F	M	A	M	J
Pan Am	1nx	O	1	2	1	2*															
AA		1nx	O	0	2	2	2	3*	2	2	1	1	1	1	1	2	2	2	2	2	2
TWA			1nx				3	4	3	4*	1										

* includes redelivery of one nx airplane.

Inspection of target and the contract schedules immediately reveal that TWA has lost position relative to American Airlines.

9) Boeing has offered six additional airplanes for early delivery. Sandborn states that if the H. T. Company buys additional airplanes for delivery during the American delivery period, American's schedule might require advancement to comply with Boeing's basic obligations as reported in items (1) and (2) of this letter.

10) Boeing has advised that it is currently manufacturing ten additional commercial jets of the 120 series on speculation with deliveries to follow within the H. T. Company delivery period. These ten are international airplanes. If the H. T. Company should purchase these airplanes, American's deliveries would be advanced "appropriately".

11) The following is Boeing's current certification schedule:

	Type of Certificate	Airworthiness
PAA	Mid-July 1958	Mid-September 1958
AA	early September 1958	Mid-November 1958
TWA	December 1958	Mid-January 1959

12) American Airlines' fare investigation data for CAB use dated November 7 included the following information:

last quarter 1958	4 aircraft
first quarter 1959	13 aircraft
second quarter 1959	6 aircraft
third quarter 1959	7 aircrart

13) Messrs. Sandborn and Connelly intimated that if the H. T. Company could agree to use its early airplanes in international operations that perhaps American Airlines would go along with earlier deliveries to TWA. I personally doubt that American would agree to this.

Our objective must be to obtain the Boeing jets at the earliest conceivable date. It appears that Boeing must be persuaded that either its moral obligation to H. T. Company and TWA overrides its written agreement with American (unlikely) or it must be demonstrated that the written agreement with American cannot be viewed as legally valid. Perhaps your and Harry West's study of the situation will reveal other plausible courses to pursue.

The very fact that we have had recent discussions with Sandborn and Connelly seems to me to be a compelling reason for early action since if nothing occurs Boeing can claim at time of delivery that we were fairly forewarned.

I, of course, would be very glad to discuss this situation with you and Harry at your convenience if you wish.

I will wait to hear from you before taking further action and in the meantime, will report any pertinent additional developments from the Boeing front.

Sincerely,

R. W. Rummel
Vice President - Engineering

cc: Mr. Harry West

AX-1615

DX-107

March 17, 1958

Mr. Raymond A. Cook
Andrews, Kurth, Campbell & Bradley
22nd Floor Gulf Building
Houston, Texas

Subject: Delivery of Model 707-131 Aircraft

Reference: 1. TWA letter dated 1/28/58, R. W. Rummel to R. A. Cook.
2. BAC letter 6-1100-41-529 dated 3/12/58, J. B. Connelly to R. W. Rummel (copy attached).

Dear Ray:

Reference (2) outlines Boeing's current target dates for the delivery of Model 707-131 aircraft.

It appears that my talks or something has done some good after all since the target dates are substantially better than outlined in Item 7 of reference (1). However, I do not know whether American's have been moved forward similarly. I am attempting to find out and will provide this information if possible.

Very truly yours,

R. W. Rummel
Vice President - Engineering

RWR:JC
Attachment
cc: Mr. C. H. Price
Mr. L. K. Schwartz

PRICE

BOEING AIRPLANE COMPANY
TRANSPORT DIVISION
RENTON, WASHINGTON

6-1100-[illegible]579

EEC
cc RWR
REC
NRP

Mr. R. W. Rummel
10 Richards Road
Kansas City, Missouri

Through: Mr. Edwin Zak
Resident Representative

Subject: Delivery of Model 707-131 Aircraft

Dear Bob:

Very early in the Model 707 program we recognized the mutual benefits to be derived by our customers and Boeing from early delivery of these aircraft, and we established target airplane delivery schedules providing for deliveries in advance of the contract requirements. During the past several months we have constantly monitored this program to determine our capability against these target schedules. We believe we are sufficiently along in our knowledge of the status of the program to provide you with the following data with respect to our target delivery schedule:

MODEL 707-131 AIRPLANE DELIVERIES PER MONTH
TARGET SCHEDULE

December, 1958	1X
January, 1959	3
February, 1959	3
March, 1959	1
April, 1959	2*
May, 1959	1
June, 1959	2
July, 1959	2

* Includes re-delivery of 1X airplane.

The foregoing target schedule is provided so you may be kept abreast of the developments in the Model 707 program. Although we cannot assure you that we shall deliver your aircraft in accordance therewith, the progress to date indicates we should be able to meet these dates barring unforeseen difficulties.

In the event we are able to meet the target schedule shown in this letter, you have our assurance that we can provide spare parts

Page Two

J. A. Rummel

support for Boeing proprietary items and the services, training and data provided by the contract.

The foregoing information is provided to enable you to plan for earliest potential deliveries of Model 707 Aircraft. The information contained in this letter of course does not change the contract delivery schedule set forth in the Purchase Agreement. Should conditions arise which alter the situation as described above we will advise you.

Very truly yours

BOEING AIRPLANE COMPANY
Transport Division

J. B. Connolly
Vice President - General Manager

COPY

DX-108

HUGHES TOOL COMPANY

EXECUTIVE OFFICES
TWENTY-SECOND FLOOR GULF BUILDING

HOUSTON 2, TEXAS

March 30th, 1958

Re: Contract No. 7

Boeing Airplane Company
P.O. Box No. 3707
Seattle, Washington

Attention: Mr. William M. Allen, President

Gentlemen:

Mr. Connelly's letter to Mr. Fennel (3-1100-41-529) reported a new target schedule of deliveries to Hughes Tool Company. The letter does not include target schedules for other customers; but on the basis of facts indirectly reported to Hughes (and partly from the Hughes schedule itself), it appears that Boeing's combined target schedule seriously discriminates against Hughes and TWA and in favor of TWA's competitors.

From the commencement of negotiations with Boeing Hughes consistently declared that protection against priority or preferential deliveries to competitive customers was an essential condition of any purchase contract, and just as consistently Boeing reaffirmed its adherence to such a policy. When Hughes requested specific contract language relating to sequence of manufacture and delivery, Boeing replied that as a matter of uniform policy Boeing had refused all of its customers any delivery priorities beyond those inherent in the contracted stipulation of delivery months. This declared policy of non-discrimination would prohibit preferential treatment either as to accelerated deliveries in advance of the stipulated delivery months or as to relative deliveries within one month. That such representations and assurances from Boeing were oral rather than written does not impair their effectiveness or importance, since Boeing realized that Hughes was executing the contract, and its several supplements, in good faith reliance upon them.

It is unthinkable that Boeing would deliberately or carelessly misrepresent facts on any matters under formal discussion. It is equally unthinkable that Boeing would cause or permit any discrimination in violation of its solemn declarations of impartiality. It is to be hoped, therefore, that the indirect report given to Hughes was erroneous or that any discriminations were unintended and will promptly be corrected.

Independently of competitive deliveries, however, the new target schedule is irreconcilable with the essence of Boeing's obligation in that it also fails to accelerate delivery of the XX airplane. It was a basic inducement that one airplane would be delivered to Hughes several months in advance of TWA's inauguration of scheduled service. Without an acceleration of the XX delivery, a timely inauguration will be seriously handicapped. Furthermore, with the capabilities demonstrated by the accelerated program Boeing's "best efforts" as required by the contract should produce a substantially earlier certificated redelivery of the airplane than is now scheduled.

Unless immediately rectified, Boeing's threatened discrimination in deliveries and its breaches of basic obligations will expose Hughes and TWA to ruinous losses. Responsibility for these losses must be borne by Boeing, both under principles of contract law and under statutory prohibitions against discrimination and restraint of trade.

Despite the seriousness of these developments and the urgency of a solution, Hughes is willing to discuss them, and for that purpose this letter is being delivered by Mr. Raymond A. Cook, attorney for the Company. Pending a satisfactory explanation and revision of these matters, the progress payments are being withheld.

Yours very truly,

HUGHES TOOL COMPANY

By: /s/ C. W. Price
Vice President

CWP/mft

3

cc: Mr. R.W. Rummel
Trans World Airlines, Inc.
10 Richards Road
Kansas City, Missouri

Mr. Harry West
Trans World Airlines, Inc.
20 West 9th Road
Kansas City, Missouri

Mr. Raymond A. Cook
Andrews, Kurth, Campbell & Bradley
2200 Gulf Building
Houston, Texas

W
PRICE

AX-1621

COPY

HUGHES TOOL COMPANY

EXECUTIVE OFFICES
TWENTY-SECOND FLOOR GULF BUILDING
HOUSTON 2, TEXAS

May 8, 1958

DX-109

C. H. PRICE
VICE PRESIDENT
AND TREASURER

Re: Your File 6-1100-2-376

Mr. William M. Allen, President
Boeing Airplane Company
Seattle, Washington

Dear Mr. Allen:

We acknowledge your letter of April 29, 1958, wherein you stated your beliefs that you had completely explained your position with respect to the delivery issue and that, to the satisfaction of the Hughes representatives, Hughes has been treated by Boeing "with complete fairness and equity under its contracts". It is true that since our letter to you dated March 30, 1958, additional facts and points of view have been developed in discussions between representatives of the two companies; but it is questionable that your position has been "completely explained" and we still can not agree that Hughes has been treated "with complete fairness and equity under its contracts". We do appreciate the cooperative manner in which you have been willing to discuss the problem.

Prior to the recent meetings in Seattle it appeared that Boeing contemplated deliveries on a basis resulting in some degree of discrimination, but Boeing's exact intentions with respect to deliveries were not then known. Boeing has now stated that its deliveries of Model 707-120 airplanes will be made to Hughes in such a sequence, relative to American Air Lines, that at the end of each month American will not have a certificated airplane advantage of more than five airplanes and that during each month this advantage to American will fluctuate, never more than eight and never less than two. That assurance, though limiting the degree of discrimination, does not restore the parity in deliveries to which Hughes is rightfully entitled.

If Boeing's originally stated policy still prevailed, (i.e., that Boeing would not for any customer make a commitment concerning relative sequence of delivery, except by specifying in the contract particular months of delivery) and if the entire Model 120 program were accelerated equally with Boeing's improved production capacity,

PRICE

Mr. William M. Allen Page 92 May 8, 1958

American's advantage would of necessity be reduced through the period of TWA's deliveries. That result is immediately apparent from comparing the two contracts (even without giving weight to the less formal assurances, which Boeing made to Mr. Hughes personally, that TWA could commence service as soon as American). Whether or not it was ever reasonable or "fair" for Boeing to have offered to the industry delivery positions contemporaneous with American's, that offer was accepted and is no longer open to review. No doubt American has contended that as an earlier customer it is entitled to preferential deliveries. Such contention is groundless on either legal or moral grounds, however, unless with American Boeing deviated from its announced policy against sequence commitments. Despite the resulting pressures and embarrassments, Boeing must now accept the responsibility of enforcing equitably the delivery provisions of all of its contracts.

Boeing's mitigating assurances, which establish a maximum disparity at the end of each month, would be more encouraging if Boeing's stop schedule were established on a basis that would at least create the maximum probability of an equitable division of deliveries within each month. As you know, an engineering conference was held in Seattle on April 17 for the purpose of clarifying this phase of the problem. Unfortunately, in the short time available and under Boeing's self-imposed security restrictions many of the material facts were not brought to light; and those that were brought to light did not adequately answer our questions.

It is to be hoped that the current conversations which Mr. Hughes is having both with you and with Mr. Small will soon produce a resolution of these issues. In the meanwhile we trust that you will agree with the propriety, if not the necessity, of our withholding the installment payments.

Yours very truly,

CHP:bpck

cc: Mr. Raymond A. Cook
Mr. R. W. Damal

CONFIDENTIAL

AX-1623

DX 116
(Rourke Memo to Rummel re CV-880 Deliveries, 1/15/60)

TO	Mr. R. W. Rummel	FROM:	R. K. Rourke	COPIES	Mr. M. B. Fennon
ADDRESS	380 Madison Avenue	ADDRESS:	10 Richards Road		
CITY	New York, N. Y.	CITY:	Kansas City, Mo.		
		DATE:	January 15, 1960		

SUBJECT: Convair 880 Delivery and Certification

Reference: TWA letter dated 1-13-60, M. R. Parmet to R. K. Rourke, attached.

DX 116

Confirming my telephone conversation the evening of January 11, I am attaching a summary of the status of completion of the first 880 aircraft that TWA will likely receive. Note that we estimate (assuming no week-end work on the part of Convair) that the first airplane will not deliver until March 2. The second airplane would be approximately ten days later. Delay of delivery until this time would make it impossible to start service by April 1 or 15, even assuming the airplanes were certificated by then. Moreover, all evidence that we can obtain without directly discussing this with Convair indicates that the airplane will not certify until May 1, and it is very possible that the certification will be after that date.

Unless something is done to cause Convair to expedite this program by overtime work, I cannot recommend that TWA continue to plan on the premise with respect to Convair operations as now included in the Jet Plans & Premises Manual.

There may be reasons why it is desirable to continue on this basis, but I think that we are doing the various departments making plans on these dates a disservice.

R. K. Rourke

RKR:JC
Attachment

AX-1624 DX 120 (TWA Memorandum re CV-880 Deliveries, 10/2/59)

TWA AND PREMISES

Chapter: 3

Title: Aircraft Availabi

Subtitle: 1.3.1 Convair 880 Delivery

Date: October 2, 1959

re the Delivery Dates of the Convair 880?

of t ed	TWA Number	On or By Mo/Day/Yr	Total Delivered For Month	Accumulated Total	Assignment: Available for Training, Pre-service Mods. or Other Use	Assignment: Available for Schedules
	8802	12/10/59	1	1	1	0
	8804	1/25/60	1	2	2	0
	8805	2/9/60	1	3	3	0
	8806	3/15/60		4		
	8807	3/24/60	2	5		
	8808	4/11/60	1	6		
	8809	5/3/60		7		
	8810	5/17/60		8		
	8811	5/30/60	3	9		
	8812	6/10/60		10		
	8813	6/16/60		11		
	8814	6/2[illegible]/60	3	12		
	8815	7/5/60		13		
	8816	7/27/60	2	14		
	8817	8/2/60		15		
	8818	8/18/60		16		
	8819	8/24/60	3	17		
	8801	9/5/60		18		
	8803	9/21/60	2	19		
	8820	10/4/60	1	20		

Origin: Planning & Research

AX-1625

TW (Bew Memorandum to Cannady re CV-880 Deliveries, 12/18/59)

DX-122

8805-514

TO: Mr. E. E. Cannady
ADDRESS: 10 Richards Road
CITY: Kansas City, Mo.

FROM: J. William Bew
ADDRESS: 3165 Pacific Highway
CITY: San Diego 12, Calif.
DATE: 18 December 1959

COPIES
Mr. R. K. Rourke
Mr. N. R. Parmet

SUBJECT: Bi-weekly Convair 880 Progress Report

The status of early deliveries has again fluctuated and I will relate an unofficial Convair estimate of delivery months:

One in January, (a remote possibility)
Two in February,
None in March,
Five in April,
Four in May,
Five in June,
Four in July,
Five in August, and
Four in September.

EEC			
JJC			
FILE			

cc: RKR
RJ, NRP

After being secured since 9 October 1959, aircraft manufacturing No. 5 was released to production on 9 December 1959. The plans appear to be to put this No. 5 aircraft into the C and N (communications and navigation) portion of the FAA Certification testing, however, no announcement regarding the aircraft has been made by H.T.Co. or Convair.

Our next two aircraft, No. 6 and No. 8, are no longer being readied for F and R (Function and Reliability) testing and TWA flight training as planned. They are now roped off and secured by H.T.Co. personnel. Production stopped on these two aircraft as of 1530, 5 December 1959.

Aircraft manufacturing No. 9, which will be our first complete aircraft for acceptance is out of the hanger and could conceivably be a late January or early February delivery.

Pari passu aircraft manufacturing No. 10 has rolled off the assembly line sporting a very bright Kelly green acrylic protective coat on all exterior surfaces. No word has been received as to how this aircraft should be marked on the exterior, however, it has the H.T.Co.—TWA interior.

The production line continues to move on schedule, however work is not being completed at proper stations due to late arrival of sub-contracted items and engineering changes. This, of course, results in incomplete aircraft rolling off the end of the line even though the airframe appears to be on schedule. I would estimate that Convair has consumed all of the two-month "fudge-factor" which they had built-in to original schedules and are now very hard pressed to meet the first quarter of even the above revised delivery sequence.

(Bew Memorandum to Cannady re CV-880 Deliveries, 12/18/59)

8808-514

TO: Mr. E. E. Cannady
ESS:
ITY:

FROM: J. William Bew
ADDRESS:
CITY:
DATE: 18 December 1959

COPIES

CT:

Attached is a production line progress chart for your information and distribution.

J. William Bew.
Mgr. Aircraft Acceptance
Convair

JWB:jo

Attachments (6)

MAY 1537

(Parmet Memorandum to Rourke re CV-880 Deliveries, 1/13/60)

DX 124

TO: R. K. Rourke
ADDRESS: 206 Airport
CITY: Kansas City

FROM: N. R. Parmet
ADDRESS: 206 Airport
CITY: Kansas City
DATE: January 13, 1960

COPIES

SUBJECT: Status of Completion of Early 880 Aircraft

As a result of our discussions, I requested Jimmy Gordon to review the delivery schedule for the first two Convair 880 aircraft and give me his estimate of when these aircraft might be delivered. Thus, we have a comparison of Convair's estimate vs. our own.

After reviewing the situation, Jimmy (with Bill Bow present) advised the following:

We estimate that the No. 9 aircraft, which Convair states is scheduled for delivery on February 12, 1960, will not be ready for delivery until approximately March 2. The No. 10 airplane for which Convair also estimates a February delivery is approximately 10 working days behind the No. 9 airplane, and consequently Jimmy estimates #10 airplane delivery for approximately March 17.

The reasons for the above estimates are as follows: The #9 airplane is outside the hangar undergoing completion and Convair final inspection. This will not be completed until approximately February 1. Following this the airplane will be weighed. This will take one day. Next comes electronics checkout for which Convair estimates ten working days. Then comes Convair pre-flight of two days followed by Convair production flying which we estimate will take five days. Finally we estimate our final inspection and packing sheets along with TWA acceptance flights will take four days. This makes a total of 22 working days from February 1 which brings the estimate to March 2 as previously indicated.

It should be pointed out that this estimate is based on a five-day work week with no overtime being expended. It is our understanding that Convair does not intend to use overtime or to work weekends to complete these aircraft.

The above estimate is based on known factors. Additional unknowns which could alter the above estimates include the following items which have not yet been fully resolved:

1. Cabin door interchangeability check.
2. Eight equipment replacement demonstrations.
3. Cabin seats.
4. Technical problems unknown at the present time.
5. Revision of electrical wiring above the cargo compartment (FAA advised they will not grant a provisional certificate for carrying cargo unless this wiring is protected).

In addition to the above we have had an incident on #12 production airplane wherein this airplane began shedding paint after a recent rainstorm in San Diego. A chunk of paint inches high and 2 feet long fell off the airplane and there are blisters the size of man's fist all over the fuselage. Of course, this airplane will require a complete repainting. Other aircraft which have been painted previously did not experience any

(Parmet Memorandum to Rourke re CV-880 Deliveries, 1/13/60)

TO: R. K. Rourke
ADDRESS:
CITY:

FROM: N. R. Parmet
ADDRESS:
CITY:
DATE: January 13, 1960

COPIES

SUBJECT:

f the symptoms. Early investigation by Convair engineers indicate the problem
n the #12 airplane is due to poor cleaning of the aircraft skin plus the possibilit
f oil or water in the air lines of the paint pressure system as a result of improp
iltering. We have established a high priority in correcting this problem and assur
hat it is not a problem basic to the Convair paint system. I will advise you furth
fter additional information becomes available.

Norman R. Parmet

EXHIBIT: DX 125 (TWA Memorandum re CV-880 Deliveries, 1/22/60) AX-1629

TO: Mr. R. W. Rummel
ADDRESS: 330 Madison Ave.
CITY: New York City

FROM: R. K. Rourke
ADDRESS: 10 Richards Road
CITY: Kansas City, Mo.
DATE: January 22, 1960

COPIES: M. B. Fannon

SUBJECT: Convair 880 Delivery and Certification

DX 125 (678) 654 6587 AX

Reference: (1) Letter, Rourke to Rummel, dated 1/15/60
(2) Letter, Rummel to Rourke, dated 1/19/60

In your letter of January 19 you requested that we advise whether or not we believe that Convair could complete 880 aircraft in accordance with TWA's planning premises if they went to work industriously, including weekends. Our review of the state of completion of the first and second aircraft indicates that neither of these aircraft could be delivered in accordance with Page 1.3.1 of the Jet Plans & Premises Manual which calls for delivery of one airplane on January 31 and the second airplane on February 19, 1960. We believe that if Convair worked seven days a week on these aircraft to their maximum capability that the earliest the first airplane could be accepted and delivered is February 22. On this basis the second airplane could possibly be delivered by the last day of February. Obviously for such aircraft to be delivered "complete" we would have to accept items like seats in less than final configuration. As you may recall, Convair presently has three airplane sets of seats on hand, none of which are considered satisfactory by our representatives. In addition to this we would expect that there would be a number of "exceptions letters" required to permit acceptance of aircraft with recognized areas of deficiencies.

Presently we have no reason to change our opinion stated in our January 15 letter with respect to the 880 certification dates.

The above appeared to us to be the most optimistic that we can be at this time with respect to the 880 situation.

R. K. Rourke

RKR:FK

AX-1630 DX 127, page 1
(Rummel Memorandum to Rourke re Intergration of CV-880s, 2/8/60)

MR. C. S. THOMAS
NEW YORK

R. W. RUMMEL
NEW YORK
FEBRUARY 8, 1960

MESSRS:
E. O. COCKE
A. V. LESLIE

CONVAIR 880 INTEGRATION INTO TWA SERVICE

IT APPEARS TO ME THAT TWA SHOULD PROCEED TO MAKE READY FOR USE OF CONVAIR 880 AIRCRAFT NOW ON ORDER FROM CONVAIR BY THE HUGHES TOOL COMPANY. HOWEVER, I FOUND NO POSITIVE CONFIRMATIVE INFORMATION DURING MY WEST COAST TRIP LAST WEEK CONCERNING TWA'S RECEIPT OF AIRCRAFT FROM THE HUGHES TOOL COMPANY. NOR DID I FIND ANY POSITIVE CONFIRMATIVE INFORMATION THAT TWA WOULD NOT RECEIVE 880 AIRCRAFT.

THE BIG QUESTION REQUIRING RESOLUTION TO PERMIT REVISING CURRENT PLANNING PREMISES IS -- HOW MANY 880'S WHEN? THIS, ALONG WITH OTHER FACETS, IS DISCUSSED IN THE ATTACHMENTS TO THIS LETTER. I RECOMMEND THAT I BE GIVEN A DIRECTIVE CONCERNING HOW MANY 880'S TWA SHOULD PLAN ON AND WHETHER WE SHOULD PLAN ON CONTINUOUS SEQUENCE OR PARI-PASSU, OR SOME OTHER DELIVERY ORDER. WITH THIS MAJOR QUESTION RESOLVED, JET PLANNING COULD ATTEMPT TO MAKE UP LOST TIME TO THE MAXIMUM EXTENT.

AS YOU KNOW, PROVISIONING, FLIGHT TRAINING, MAINTENANCE TRAINING, AND JET ENGINE OVERHAUL REMAIN CRITICAL ITEMS. IF CONTINUOUS SEQUENCE DELIVERY IS SELECTED, ALL OF THESE ITEMS BECOME MORE CRITICAL AND CONTROLLING.

I RECOMMEND THAT TWA'S JET PLANNING ACTIVITY UNDERTAKE FULL SCALE REVIEW OF 880 PLANS ON AN URGENT BASIS, BEGINNING THE MONTH THE DELIVERY PREMISES IS RESOLVED. OF COURSE, IMPLEMENTATION WILL REQUIRE RELEASE OF PROVISIONING AND OTHER APPROPRIATE ORDER AND COMMITMENT ACTIVITIES.

ATTACHED ARE NEW RECOMMENDED PLANNING AND RESEARCH PREMISES FOR MODEL 880 AND OTHER PERTINENT DATA.

R. W. RUMMEL

(Rummel Memorandum to Rourke re Intergration of CV-880s, 2/8/60)

RMR
2/8/1960

PLANNING AND RESEARCH
TRANS WORLD AIRLINES, INC.
380 MADISON AVENUE
NEW YORK 17, NEW YORK

MISSING

RECOMMENDED PLANNING PREMISES
MODEL 880

A. DELIVERY OF NC TRAINING AIRCRAFT:

1. AIRPLANE #9 — MARCH 10
2. AIRPLANE #10 — MARCH 18.

B. FAA NC CERTIFICATION — MAY 15.

C. NUMBER OF HUGHES TOOL COMPANY AIRCRAFT IN FULL NC CERTIFICATION CONFORMANCE BY MAY 15 - 6
(IN THIS CONNECTION THE NUMBER OF THESE AIRCRAFT TO BE USED BY TWA HAS NOT BEEN DEFINITELY ESTABLISHED).

D. DELIVERY SCHEDULE:

IT IS RECOMMENDED ON A PURELY SPECULATIVE BASIS THAT TWA PLAN ON THE USE OF THE FIRST 20 AIRCRAFT RATHER THAN THE PARI-PASSU DISTRIBUTION NOW CONTAINED IN THE JET PLANS AND PREMISES MANUAL, WHICH SHOULD BE REVISED. HOWEVER, SINCE FIRM KNOWLEDGE OF RECEIPT OF THE FIRST 20 AIRCRAFT IS NOT AVAILABLE, TWA SHOULD BE PREPARED TO RETURN TO THE PARI-PASSU ARRANGEMENT IF THIS SHOULD PROVE TO BE THE CASE.

ON THE OTHER HAND, CONSIDERABLE SPECULATION EXISTS CONCERNING THE POSSIBILITY THAT TWA WILL BE OFFERED MORE THAN 20 CONVAIR 880'S FOR ITS USE AND THAT TWA WOULD BE AGREEABLE TO USE MORE THAN THE 20 AIRCRAFT. IF TWA IS TO ULTIMATELY RECEIVE MORE THAN 20 CONVAIR 880'S DURING 1960, IT WILL BE FAR BETTER TO PLAN IMMEDIATELY ON THE USE OF THE ADDITIONAL AIRCRAFT RATHER THAN WAIT.

THE EXACT EFFECT ON TWA SCHEDULES, AND REVENUE AND COSTS FORECASTS OF CHANGING FROM CURRENT JET IMPLEMENTATIONS PLANS TO EITHER ACCELERATED OR MORE DELIVERIES OR DOWN CAN BEST BE DETERMINED THROUGH REVIEW BY THE JET PLANNING GROUPS AND THE JET PLANNING COMMITTEE.

E. START OF TWA SERVICE: MAY 30.
(PLAN FOR MAY 15).

RWR
2/8/1960

PLANNING AND RESEARCH
TRANS WORLD AIRLINES, INC.
380 MADISON AVENUE
NEW YORK 17, NEW YORK

A. DELIVERY AND CERTIFICATION OF NP AIRCRAFT FOR FLIGHT AND MAINTENANCE TRAINING PURPOSES.

CURRENT CONVAIR PLANNING CALLS FOR DELIVERY OF TWO NP AIRCRAFT TO HUGHES TOOL COMPANY DURING FEBRUARY. CONVAIR ESTIMATES OFFICIALLY ONE FEBRUARY 25 AND THE SECOND, UNOFFICIALLY, MARCH 2.

CONVAIR ADVISED IT HAS RECEIVED THE NP CERTIFICATE FROM THE FAA FOR THE HUGHES TOOL COMPANY CONFIGURATION AND THAT CONFORMITY ONLY IS REQUIRED TO CERTIFICATE.

PERSONAL INSPECTION OF AIRPLANES #9 AND #10, THE TWO SCHEDULED FOR FEBRUARY DELIVERY, PLUS FURTHER DETAILED REVIEW WITH MESSRS. ROURKE, BEW AND GORDON INDICATES FEBRUARY DELLIVERIES ARE HIGHLY IMPROBABLE, EVEN WITH EXTENSIVE CONVAIR OVERTIME.

IN THE LIGHT OF CURRENT KNOWLEDGE, IT APPEARS REASONABLE TO ANTICIPATE DELIVERY OF TWO NP TRAINING AIRCRAFT TO HUGHES TOOL COMPANY AS FOLLOWS:

AIRPLANE #9	MARCH 10
AIRPLANE #10	MARCH 18.

I RECOMMEND TWA USE THESE DATES AS NEW TWA PLANNING PREMISES. HOWEVER, I HAVE NOT BEEN ABLE TO VERIFY THAT THESE TWO AIRCRAFT WILL IN FACT BE DELIVERED TO EITHER HUGHES TOOL COMPANY OR TWA.

RWR
2/8/1960

PLANNING AND RESEARCH
TRANS WORLD AIRLINES, INC.
380 MADISON AVENUE
NEW YORK 17, NEW YORK

B. WHY HAS THE CONVAIR 880 AIRPLANE PROGRAM BEEN DELAYED?

THE CONVAIR 880 PROGRAM HAS BEEN DELAYED PRIMARILY BECAUSE OF:

1. VENDOR PARTS SHORTAGES,
2. CORRECTIONS DEVELOPED AND INDICATED DURING CONVAIR FLIGHT TEST PROGRAM,
3. CONVAIR'S DECISION TO MINIMIZE OVERTIME UNTIL CERTIFICATION IS AT HAND.

SETTING ASIDE THE LATTER, AND TWO, AIRCRAFT HAS NOT ADVERSELY AFFECTED THE CONVAIR PRODUCTION LINE. IN FACT, THIS MAY HAVE HELPED CONVAIR MATERIALLY BY:

1. BENEFICIAL READJUSTMENT OF PERSONNEL,
2. PERMITTING MORE TIMELY COMPLETION OF ENGINEERING,
3. PERMITTING MORE ORDERLY, I.E., LESS OUT OF STATION CONSTRUCTION.

OF COURSE, DELIVERY OF THE TWO AIRCRAFT NOW SET ASIDE IS AFFECTED. THEY HAVE BEEN RESCHEDULED FOR SUBSTANTIALLY LATER DELIVERY.

IT SHOULD PERHAPS BE NOTED, ADDITIONALLY, THAT THE CURRENT CONVAIR PRODUCTION BOTTLENECK IS NOT IN THE FACTORY BUT ON FINAL AND THE FLIGHT LINE.

CERTIFICATION HAS NOT BEEN ADVERSELY AFFECTED BY SETTING AIRCRAFT ASIDE.

T05000

PLANNING AND RESEARCH
TRANS WORLD AIRLINES, INC.
380 MADISON AVENUE
NEW YORK 17, NEW YORK

RMR
2/1960

WHEN WILL THE CONVAIR 880 RECEIVE FAA TYPE AND AIRWORTHINESS CERTIFICATION?

CONVAIR FIRMLY BELIEVES IT WILL RECEIVE THE 880 TYPE CERTIFICATE BY MAY 1. IT EXPECTS TO HAVE FIVE HUGHES TOOL COMPANY AIRPLANES IN FULL CONFORMANCE BY THEN, FULLY ELIGIBLE FOR AIRWORTHINESS CERTIFICATION ON MAY 1.

IT BELIEVES AUTO PILOT CERTIFICATION TO BE DIFFICULT BY MAY 1, BUT INCLUDES THIS IN ITS MAY 1ST ESTIMATE.

ONE TYPE CERTIFICATE IS BEING OBTAINED TO APPLY TO ALL 880'S. CUSTOMER SPECIAL ITEMS ARE TO BE HANDLED BY INCLUSION ON THE EQUIPMENT LIST, WHICH IS PART OF THE TYPE CERTIFICATE SPECIFICATION.

CONVAIR HAS NOT YET SUBMITTED PERFORMANCE DATA FOR FAA CERTIFICATION. FAA CERTIFICATION FLIGHT TESTS HAVE BEEN UNDERWAY, HOWEVER, SINCE DECEMBER 1, 1959.

CONVAIR EXPECTS TO COMPLETE ITS FAA PERFORMANCE TESTS BY MARCH 31ST.

THE FAA SENT FIVE PILOTS TO CONVAIR TO EVALUATE THE RUDDER SYSTEM. CONVAIR REPORTS THE FAA OFFICIALS HAD ADVERSE COMMENTS TO DATE. HOWEVER, THE FAA MAY REQUIRE CONVAIR TO HOLD WINGS LEVEL DURING ONE ENGINE OUT CLIMB TESTS. THIS NEEDLESSLY ADDS DELAY AND IS A MAKEOVER WHICH WOULD NOT IN FACT BE USED. FAA CLIMB TESTS BOEING CLIMB TESTS WERE RUN THIS WAY, HOWEVER THIS IS NOT TRUE. CONVAIR WILL VERY CORRECTLY FIGHT WITH THE FAA IF IT INSISTS ON NEEDLESS ERRONEOUS OR PERFORMANCE PENALTIES. TWA'S REVIEW OF THE RUDDER SYSTEM INDICATES SUBSTANTIAL IMPROVEMENT OVER BOEING AND VERY ACCEPTABLE PERFORMANCE.

ARBITRARY AND IRRATIONAL FAA ACTS (NOT SPECIFICALLY ANTICIPATED) COULD DELAY CERTIFICATION BEYOND CONVAIR'S ESTIMATE.

THE WITHDRAWING OF THE ADDITIONAL CONVAIR CERTIFICATION TEST AIRPLANE, #3, AND THE SUBSEQUENT SUBSTITUTION OF AIRPLANE #5 HAS NOT ADVERSELY AFFECTED CERTIFICATION. AIRPLANE #5 IS BEING USED TO CERTIFICATE HUGHES TOOL COMPANY SPECIAL ITEMS AND IS PRESENTLY NOT CRITICAL OF TEST TIME. THE AIRPLANE WILL FLY ON FEBRUARY 2ND.

RWR
2/8/1960

PLANNING AND RESEARCH
TRANS WORLD AIRLINES, INC.
380 MADISON AVENUE
NEW YORK 17, NEW YORK

D. WHAT IS CONVAIR'S MANPOWER SCHEDULE?

THE FACTORY IS CURRENTLY WORKING A TWO-SHIFT, FIVE-DAY WEEK.

THE FINAL ASSEMBLY FLIGHT LINE JUST OUTSIDE THE FACTORY IS NOW WORKING A TWO-SHIFT, SIX-DAY WEEK WITH SPOT SWING SHIFT APPLICATION. IT HAS BEEN ON THIS SCHEDULE FOR TWO WEEKS.

CONVAIR'S FLIGHT TEST LINE IS WORKING ON A THREE-SHIFT, SEVEN-DAY BASIS.

THE CURRENT "BOTTLENECK" IS CERTIFICATION ACTIVITIES AND FLIGHT TEST LINE ACTIVITIES. CONVAIR IS SHORT OF FLIGHT LINE SPACE AND APPARENTLY OF TRAINED PERSONNEL TO SOME EXTENT. NORMAL LEARNING CURVE TRENDS WILL AT LEAST PARTIALLY CORRECT, HOWEVER.

PLANNING AND RESEARCH
TRANS WORLD AIRLINES, INC.
380 MADISON AVENUE
NEW YORK 17, NEW YORK

RLR
2/8/1960

E. WHAT IS PRESENT SCHEDULE FOR HUGHES TOOL COMPANY DELIVERIES?

THE FOLLOWING TABLE SHOWS CURRENT ESTIMATES OF CONVAIR 880 DELIVERIES TO THE HUGHES TOOL COMPANY AND COMPARES THESE ESTIMATES WITH THE SCHEDULE CONTAINED IN TWA'S "JET PLANS AND PREMISES" MANUAL. I HAVE BEEN UNABLE TO DETERMINE WHAT AIRCRAFT TWA CAN EXPECT TO RECEIVE FROM THE HUGHES TOOL COMPANY.

CONVAIR HAS CONFIRMED IT ESTIMATES DELIVERY OF THE FIRST NP TRAINING AIRPLANE ON FEBRUARY 25TH. THIS IS BASED ON INSPECTION COMPLETION ON FEBRUARY 22ND, DELIVERY ACCEPTANCE ON FEBRUARY 24TH. IN MY OPINION DELIVERY IS MUCH MORE LIKELY ON MARCH 10TH.

CONVAIR UNOFFICIALLY ESTIMATES DELIVERY OF THE SECOND NP TRAINING AIRPLANE ON MARCH 2ND. I ESTIMATE THIS ON MARCH 18TH.

AX-1637

(Rummel Memorandum to Rourke re Intergration of CV-880s, 2/8/60)

ESTIMATED DELIVERIES

Month	TWA Jet Planes & Premises of Jan. 4, 1960		Bcu Est. of Capability	Owens 2-2-60		Dudley Diggs 2-3-1960	
January	1-31	1-1					
February	2-19	1-2		2-15	1-1	2-20	2-2
				2-28	1-2		
March			3-2	1-3			
			3-15	1-4			
April	4-4	1-3	4-1	1-3	4-1	1-3	4-30 5-7
	4-11	1-4	4-8	1-4	4-8	1-4	
	4-18	1-5	4-15	1-5	4-15	1-5	
	4-25	1-6	4-22	1-6	4-22	1-6	
			4-29	1-7	4-30	1-7	
May	5-3	1-7	5-3	1-8	4-31	4-11	5-31 4-11
	5-17	1-8	5-10	1-9			
	5-30	1-9	5-17	1-10			
			5-23	1-11			
June	6-10	1-10	6-3	1-12	6-30	5-16	6-30 5-16
	6-16	1-11	6-9	1-13			
	6-21	1-12	6-15	1-14			
			6-21	1-15			
			6-27	1-16			
July	7-5	1-13	7-1	1-17	7-31	4-20	7-31 4-20
	7-27	1-14	7-11	1-18			
			7-20	1-19			
			7-25	1-20			
August	8-2	1-15	8-1	1-21	8-31	5-25	8-31 5-25
	8-18	1-16	8-11	1-22			
	8-24	1-17	8-17	1-23			
			8-23	1-24			
			8-29	1-25			
September	9-5	1-18	9-1	1-26	9-30	5-30	9-30 5-30
			9-14	1-27			
	9-21	1-19	9-21	1-28			
			9-25	1-29			
			9-30	1-30			
October	10-5	1-20					

FROM INFORMAL DISCUSSIONS WITH JERALD OWENS AND HIS REFERENCE TO COMMENTS BY CONVAIR PERSONNEL FOLLOWING TALKS WITH MR. HUGHES, IT APPEARS POSSIBLE THAT TWA MAY RECEIVE THE FIRST TWENTY 880'S TO BE DELIVERED TO HUGHES TOOL RATHER THAN THE PARI-PASSU APPROACH. ALTHOUGH NOTHING FIRMLY RELIABLE IS AVAILABLE IN THIS CONNECTION, TWA SHOULD CONSIDER THE EFFECT OF RECEIVING THE TWENTY AIRPLANES AT THIS ACCELERATED RATE.

DX-128

April 7, 1960
Our File: 822-1295

Mr. D. A. Digges
Manager of Contracts
CONVAIR, A Division of
General Dynamics Corporation
3165 Pacific Highway
San Diego 12, California

Through: Mr. J. William Rou, Resident Representative

Dear Dudley:

Mr. Carroll has briefed me as to the outcome of his discussions with Convair regarding the take-off flap settings Convair has selected without coordination with the operators. In my conversation with you on the phone a little over a week ago I expressed extreme dissatisfaction with Convair's handling of this matter and its failure to discuss with us whether the flap settings that you have selected meet the requirements of the operators.

I am sure that you are aware of the disadvantages of having multiple flap settings in an airline operation if these are not needed to gain the optimum performance. From what we have been able to determine a 20° flap setting would be far more satisfactory in that it achieves:

a. Minimum take-off distances for most operating conditions, and

b. Adequate airworthiness climb under the environmental conditions that we will operate.

We certainly have no objection to you providing additional flap settings in the Operating Manual, and even urge you to do so, but our dissatisfaction has to do with the flap settings that you picked, namely 20 and 40°. Since we will have to operate initially with 20° flap setting, this means that we will be unnecessarily penalized at the outset. It also means that we will have to run a second set of airport data to employ the 40° flap setting. Had the flap setting selected included a 20° flap, we would have minimized the initial penalty and probably would not have had to compute newly performance for the 40° flap setting. Moreover, since you visualize flap settings of 20 and 40°, the flap warning horn now becomes practically meaningless.

Under the circumstances I cannot understand Convair's thinking in not consulting with us. As a result of this handling and since this information did not come to light until just a matter of two weeks ago, you apparently are in the position of not being able to supply us with the desired data at the time when we need it.

PLANNING AND RESEARCH
APR 8 1960

Our File 580-1295

It becomes doubly troublesome to me that Convair did not consult with us when I look at our jet operating experience and the fact that we are the most knowledgeable people with respect to our routes and, therefore, know far better what is best for us as an operator. Just in passing, as of March 30, we have flown 45,180 jet hours and have made 17,000 take-offs and are serving 15 cities with jets.

Under the circumstances I think it behooves Convair to correct a very undesirable situation by providing us with 30° flap setting data without cost and to make it available as near as possible to May 15. I believe it has been the general intent of the specification and the contract that Convair would work closely with the operator in defining the operational application of the airplane. It is unfortunate that I must say this, but we have had so many cases of Convair making decisions without consulting us. I think that one of the largest problems we have had in our mutual dealings has been in this area. It has not been our experience heretofore with other manufacturers to find things out by chance and quite often when it is too late to do anything about it. It has been difficult at times for our representatives on routine occasions to have access to your engineering personnel, although of late weeks this certainly has improved. Since Convair has repeatedly desired that our dealings be primarily through the contract group, this means, Dudley, that we must look to you and your people to be our advocate on matters such as this. It also behooves Convair personnel to become more sensitive to operating problems and to keep our people better informed of their thinking while it still is in the formative stage.

Best regards,

R. Z. Rourke
Assistant Vice President
Equipment Planning and Development

RZR:JC
cc: Mr. R. L. Bayless
Mr. R. W. Rummel

AX-1660 DX 130

(Bew Wire to Rourke re Convair Delays, 5/27/60)

DX-130

HYYXX
GA WITH AAO

27 MAY 1960

MKCGD ROURKE

3-35. FLG IS COPY OF WIRE SENT TO R W RUMMEL THIS DATE.

EARLY DELIVERIES HAVE SLIPPED SINCE THE PUSH WHICH PRODUCED AIRCRAFT NOS. 7/11/ AND 16/FOR DELTA AND AIRCRAFT NO. 10/FOR OUR TRAINING-- ATTRIBUTABLE TO INCORPORATION OF LATE CHANGES, PARTS SHORTAGES, AND IN MY ESTIMATION, INADEQUATE MAN POWER IN OFF-STATION FINAL ASSEMBLY WHERE DELIVERIES ARE NOW BUNCHING UP. DELTA'S NO. 17 AND HUGHES TOOL COMPANY NO. 20 ARE THE ONLY POSSIBLE MAY DELIVERIES, ESTIMATING OTHER NO SOONER THAN 31 MAY AND ONLY THEN IF CV WORKS MEMORIAL DAY WEEK-END.

AIRCRAFT 12 AND 23 HAVE BEEN AFFECTED BY A CONFUSED SLOW-DOWN STATUS. AIRCRAFT NO. 23 HAS BEEN MOVED TO A LESS ACCESSIBLE SPOT ON THE RAMP AND AIRCRAFT NO. 12 HAS BEEN GIVEN A COAT OF GREEN STORAGE PAINT ON LOWER FUSELAGE AND UPPER WING SURFACES. BOTH AIRCRAFT WERE WORKED HEAVILY LAST NIGHT, HOWEVER. CV ATTEMPTING TO HOLD AIRCRAFT NO. 24 ON STATION AND, BARRING THE UNFORESEEN, IT SHOULD DELIVER APPROXIMATELY 18-20 JUNE

AIRCRAFT NO. 22, WHICH WAS MOVED OUT OF HANGAR IN INCOMPLETE STATUS, HAS SUFFERED FROM BEING OFF-STATION AND HAS SLIPPED CONSIDERABLY IN LAST FEW DAYS

. ACTUALLY LOOKS LIKE A DELIVERY IN THIRD WEEK OF JUNE RATHER THAN 10 JUNE, WHICH WAS MY LAST ESTIMATE.

AIRCRAFT NOS. 25 AND 26 ARE CLOSE TO BEING ON STATION AND WITH PROPER EFFORT COULD DELIVER IN LAST WEEK OF JUNE.

AM ATTENDING MEETING THIS MORNING TO DETERMINE CV PRODUCTION PLANS AND WORK SCHEDULE FOR WEEK-END. WILL KEEP YOU ADVISED.

CONVAIR

A DIVISION OF GENERAL DYNAMICS CORPORATION

AX-1641

DX 135, page 1
(Letter - Convair to Bew re CV-880 Delivery, 1/6/61)

SAN DIEGO 12, CALIFORNIA
TELEPHONE CYPRESS 6-0111

6 January 1961
11-2-330
PSC:pj

Mr. J. W. Bew
Resident Representative
Trans World Airlines
c/o Convair, A Division of General Dynamics
San Diego

Dear Bill:

Yesterday, in a meeting with Messrs. Rourke, Cannady, West, Diggs, Chambers and yourself, we provided you with our target schedule for delivery of the Model 22 Wiz and Hughes Tool Company Aircraft including certain conditions associated therewith. As a matter of record, the information given to you yesterday is set forth below:

Aircraft No.	Date
31	Jan. 1. '61
24	Jan. (As soon as possible) Jan 5
28	Jan. (As soon as possible) Jan. 6
25	Jan. (As soon as possible) Jan. 10
29	Jan. (As soon as possible) Jan. 8
32	Jan. 27 Jan 30
14	Jan. 14 18
	Jan. 22 25
	Feb. 21
	Feb. 7
	Feb. 14
	Feb. 28
	Mar. 9
	Mar. 14
	Mar. 28
	Mar. 31
42	Apr. 30
15	Apr. 10
16	Apr. 15
	Apr. 28
	May 8
	May 20
3	May 31

Convair, A Division of General Dynamics Corporation, San Diego, California

(b) This aircraft will be offered to Hughes Tool Co. representatives on January 24, 61 in an unpainted condition. If Hughes Tool Company responds indicating its ability to process the aircraft for delivery, the aircraft will be painted and processed through final acceptance which task will be completed on or before January 27, 30, 1961. If the Hughes Tool Company does not indicate its ability to process the aircraft for delivery on January 24, 61, the aircraft will not be painted but rather placed in storage.

(c) If the specific paint job and general configuration of these two aircraft can be identified on or before January 15, 1961, the delivery dates as indicated are applicable.

(d) Provided this Ship is returned from Flight Test on 1-12-61 as scheduled.

Since our meeting with you which was held within ten minutes of the time Mr. Loomis made the schedule available to us, certain minor changes have occurred and these changes are shown above in red print.

At the conclusion of our presentation of the schedule, you asked certain questions relative to our planning. These questions which are set out below for clarification will be answered sometime today:

(a) When is Convair going to staff personnel for the above schedule?

(b) What will the Labor Force be as compared to today's Labor Force?

(c) Why did Ships No. 6 and 9 slip from their previous apparent position?

(d) Why did Ship No. 33 move from February to March?

(e) Will rescheduling of the Model 22A Hughes Tool Company program, as indicated in Convair's receipt-letter, interfere with the Model 22 schedule set out above?

Very truly yours,

C O N V A I R
A Division of General Dynamics Corporation
(San Diego)

J. W. Bew
Manager of Contracts

AX-1648

DX 137

(Telegram-Bew to Rummel re Convair Delays, 2/16/61)

TELEGRAM

W. P. MARSHALL, PRESIDENT

SF-1201 (1-60)

The time now shown in the date line on domestic telegrams is LOCAL TIME at point of origin. Time of receipt is LOCAL TIME at point of destination

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DX-137 G

0 SSB435 NLPD SAN DIEGO CALIF 16

B W RUMMEL

500 MADISON AVE NYK

16 10

TIME FOLLOWING WIRE WAS SENT N R PARMEY THIS DATE. EARLIER CONVERSATION WITH LOOMIS DELIVERY SCHEDULE WAS ON BASIS CONVAIR WOULD BE PROPERLY STAFFED BY 25 JANUARY 1961. I CAN GIVE NO LOGICAL REASON WHY THIS WAS NOT ACCOMPLISHED AS DISCUSSED IN OUR PHONE CALL OF 15 FEB, IT IS MY OPINION CONVAIR IS APPROXIMATELY 500 MEN SHORT ON THE OUT DOOR PRODUCTION LINE.

AT PRESENT RATE, CONVAIR CAN NOT MEET FOLLOW ON SCHEDULES AND FEB AND MARCH DELIVERIES ARE NOW SLIPPING DAILY DUE TO CONVAIR CONTROL VARIABLES. 1 HIRING MUST BE ACCELLERATED TO SIMULTANEOUSLY COVER FULL PRODUCTION OF AT LEAST FIVE MINORITY, RATHER THAN 2 1/2. 2 SUPERVISION MUST BE STRENGTHENED AND NEVER DILUTED BY OTHER PRODUCTION EFFORTS. 3 WORK MUST BE PROGRAMED

The time now shown in the date line on domestic telegrams is LOCAL TIME at point of origin. Time of receipt is LOCAL TIME at point of destination

0 SSB435 2=

16 PM 10 15

AROUND THE CLOCK, 7 DAYS A WEEK. 4 SOME SEMBLANCE OF AN ORGANIZED DELIVERY CENTER MUST BE CREATED. 5 CHANGE OF FACTORY PRODUCTION NUMBER.

SIGNED

HOWE, REPLIED BY JOE PARMEY, WOULD LEAD TO FURTHER REORGANIZATION RESULTING IN IMMEDIATE CONFUSION, INSECURITY, AND INEFFICIENCY

2 P DEC 8:09 LAGEPED NEBENY SAN.DIEGO 1 CALIF

AX-1644

DX 139, page 1
(Letter-Convair to Bew re Convair Delays, 3/16/61)

DX-139

A Division of General Dynamics Corporation
(San Diego)

16 March 1961

Mr. J. H. Bew
Assistant Representative
Trans World Airlines, Inc./Hughes Tool Co.
c/o Convair
San Diego 12, California

Dear Bill:

On December 30, 1960, General Dynamics Corporation and Trans World Airlines executed an agreement which initiated a program for the completion and delivery of Model 22 aircraft to TWA. Prior to this time, the only 880 production deliveries that had been or were being processed on a standard industrial basis with a definitive completion date were those two aircraft for Delta Air Lines and six aircraft for Northeast Airlines. On January 6, 1961, in response to an urgent request from TWA, we set forth a target delivery schedule for all aircraft ordered by the Hughes Tool Co. (with the exception of the aircraft delivered to Northeast), which was based upon the best analysis we could make in the short period of time between that date and the signing of the Agreement to commence factory completion and delivery. While the delivery of six aircraft for Northeast generated some expansion in our factory schedule objectives, the task in that instance was primarily one of incorporating Northeast peculiarities and otherwise delivering aircraft in an as-is condition. In summary, this afforded an opportunity to achieve full scale re-activation of the Model 22 production line coincident with the signing of the December 30, 1960, Agreement. Subsequent to the January 6 schedule advice, it became apparent that we had not had enough time to fully assess the effects of the long term program stoppage upon aircraft condition, understanding each, manpower, etc., and as a consequence, found it necessary to carry out an exhaustive analysis of the status of the overall program to more accurately define our target delivery schedule.

On November 7, 1960, which was the beginning of the processing of Northeast aircraft, there were 4,268 factory personnel on the payroll. Since that time, 1,692 factory personnel have been progressively added as rapidly as they could be employed and effectively used. Specifically, we have created a new department, 1411, to prepare your aircraft for delivery. This department is now manned with 575 workers. One Shift Operations Department, 171, has been increased from 151 to 213 workers. We plan to schedule a five-day work-week using two ten-hour shifts, two eight-hour shifts on Saturday, two Sundays as required, amounting up to 236 overtime. In addition to this employment activity, we have negotiated the temporary loan of 200 workers with required skills from our other Divisions.

As a result of the above described efforts in analyzing the program status as well as augmenting the build up in the level of factory personnel, and in consideration of Hughes experience with the 880 on the line, we have now established a thoroughly integrated program for the completion and delivery of the remaining aircraft, which provides for the first aircraft completion prior to delivery during [illegible]. The delivery or delivery rates in the Hughes

[illegible] Company's program for 880 aircraft has been [illegible]. While the efforts now [illegible] were unavoidable, it is considered reasonable that the [illegible] by approximately the completion of the [illegible] months.

[illegible], the following delivery schedule has been established for the [illegible] the remaining [illegible] Jet Delivery [illegible]:

[illegible]	Model Number Schedule	Actual or Current Projected Delivery Date
21	January 1	January 1 (Delivered)
24	As soon as possible	January 6 (Delivered)
20	January 7	January 6 (Delivered)
29	January 12	January 12 (Delivered)
27	January 26	January 6 (Delivered)
33	January 30	February 13 (Delivered)
32	January 28	January 31 (Delivered)
34	January 25	February 8 (Delivered)
2	February 24	March 31 [illegible]
25	February 7	March 31 [illegible]
30	February 14	March 14 (Delivered)
28	February 28	March 30
35	March 9	April 28 [illegible]
37	March 14	June 2
39	March 23	June 12
40	March 31	May 15
42	April 28	July 10
43	April 20	June 26
6	April 17	July 24
9A	April 26	September 6
44	May 1	August 14
20A	May 8A	September 15
3	May 24	August 4

This has unsettled circuits and has [illegible] ten January 17 delivery [illegible] anticipated to prevent the receipt by January 19, 1961. No confirmation was received all on January 20, 1961, [illegible] the Liberals in [illegible] calendar week basis.

The [illegible] dates date in the January 6 [illegible] was confirmed upon [illegible] confirmation anticipated to be given by [illegible] on or before January 19, 1961. This anticipation was received on [illegible] May 12, 1961.

[illegible] Wright Boys Airplane

[illegible] [illegible] [illegible]

Mr. J. W. Bew -3- 16 March 1961
AE-61-1235

individual breaks in an index to the items which constitute the above referenced airframe configuration, all of which will be incorporated prior to delivery as the first schedule change in the sequence of ships 2, 25, 33, 39, and 49 which aircraft have been recently committed for delivery on specific dates. In the event that it proves to have incorporation of these items in lower or an earlier delivery schedule, such a program can be established only with the specific understanding that the Air Force assumes all responsibility for incompatibility with items. Convair would, however, retain the obligation to supply the Air Force's Guidance for the installation of the items by GAC.

We regret the necessity for the schedule adjustment as shown above but assure you that everything possible is being done to maintain or improve the above schedules.

Very truly yours,

CONVAIR
A Division of General Dynamics Corporation
San Diego

E. B. Chambers
E. B. Chambers
Manager of Commercial Contracts

(Letter - Convair to Rourke re CV-880 Deliveries, 7/11/61)

July 11, 1961

DX 142

Mr. R. W. Rourke
Assistant Vice President
Equipment Planning and Development
Trans World Airlines
10 Richards Road
Kansas City 8, Mo.

Dear Russ:

Since your telephone call last week regarding the delivery schedule which Bill Bew had recently given Mr. Tillinghast on the remaining 880 aircraft assigned to TWA, I have personally conducted a very thorough analysis of the delivery situation.

At this time I think it is worthwhile to review for the record the delivery picture as of this date for the sixteen 880s delivered so far in 1961. You will recall that in the middle of March of this year I met with you, Oz Cocke, and Bob Rummel in New York and presented Mr. Chambers' March 16, 1961 letter to Mr. Bew, giving the background on the target schedule of January 6, 1961 and submitting a revised schedule. At that time I pointed out that while the first nine aircraft had been delivered approximately on schedule, with no aircraft slipping more than one week, we anticipated a delay on the remaining aircraft because of our inability to forecast on short notice the task involved in preparation of these aircraft because they had not been previously completed nor flown out.

With the exception of aircraft No. 22-00-33 which encountered excessive trim difficulties requiring in excess of one month to correct and No. 40 which was ten days late, the next seven aircraft were delivered ahead of schedule. (See Attachment). Actually, this is a remarkably good performance when you consider that most of these aircraft had been stored outside for over one year and required not only completion but extensive modification for recent engineering changes which were not anticipated at the time of the 16 March schedule. (See Attachment).

We now are required to deliver to you the last three aircraft, specifically, Serials 6, 19, and 3. You will recall, however, that the 16 March schedule suggested a delivery schedule ending July 24 for a total of twenty aircraft but including Serial Nos. 39 and 34 instead of 19 and 3. I feel that this schedule could have been met satisfactorily, since the condition of 39 and 34 was excellent at the time the schedule was proposed. You elected not to further pursue the possibility of convincing the Hughes Tool Company that these aircraft (Nos. 39 and 34) should be assigned to TWA in spite of the fact that you were successful

Mr. R. W. Rourke

July 11, 1961
Page 2

Unfortunately, the result is that the three remaining assigned aircraft for TWA include Nos. 19 and 3 instead of Nos. 39 and 34. The said remaining aircraft (i.e., Nos. 6, 19, and 13) are the ones requiring the greatest re-work of any of the other aircraft and have been in storage for the longest period of time. As we operate the systems on these aircraft we find that extensive removal and refurbishment is required and in spite of the fact that we have used parts extensively from the remaining Hughes Tool Company aircraft in order to meet the TWA schedule, we are having difficulty doing so. We are continuing to bend our best efforts in this direction however.

With regard to the schedule given to you by Mr. Bow showing July 15 for No. 6, August 15 for No. 19, and September 15 for No. 3, those dates are not familiar to me. The dates on our 16 March letter were July 24, August 21, and August respectively. At the present time, do not anticipate that those dates will be substantially slipped, except for No. 3. No. 3 has been the most difficult aircraft to complete since it was the flight test aircraft and had to be extensively stripped and re-built in order to deliver it to you as a new aircraft and fully modified to the latest engineering configuration. In other words, I feel that we will deliver within one week of the July 24 and August 21 dates but No. 3 will probably slip at least thirty days.

I recognize that Mr. Chambers' modified his letter of March 16 by his letter of March 24, but I do not believe that adequate consideration was given in the 24 March letter to the effect of your demands which created the 24 March letter. I would, therefore, prefer to stand on the delivery dates of 16 March recognizing that the schedules for Nos. 39, 34, 9, and 18 have now been violated because preference was given to the aircraft assigned to TWA.

You indicated over the telephone that Mr. Tillinghast had lost confidence in Convair's ability to schedule aircraft, however, in view of the above, I feel that we at Convair have not had a proper opportunity to inform Mr. Tillinghast regarding our performance to schedule and some of the problems which have been experienced in delivering aircraft to TWA.

In view of the fact that Mr. Tillinghast has not had the benefit of our counsel, I would appreciate it if you would at the very least show him this letter. I would appreciate, however, the opportunity to meet with Mr. Tillinghast and review with him the total history of the 880 program which, as you know, has been

Mr. R. W. Rourke

July 11, 1961
Page 3

entirely satisfactory from a delivery standpoint for our other customers.

I trust that the above information fully answers your telephone inquiry. If you desire any further information please do not hesitate to call upon me.

GENERAL DYNAMICS/CONVAIR

R. C. Loomis
President

RCL:c
Attachments

cc: R. W. Rummel
J. W. Bew

(Letter - Rourke to Convair re CV-880 Deliveries, 8/2/61)

August 2, 1961

Mr. R. C. Loomis
President
GENERAL DYNAMICS/CONVAIR
San Diego, California

Dear Bob:

In response to your letter of July 21, please be assured that your letter has been brought to Mr. Tillinghast's attention, and a copy of this reply is likewise being sent to him. I feel sure that when mutually convenient he will be glad to meet with you and hear your comments concerning the total history of the 880 program.

The really important aspect of the moment is for Convair to find ways and means for expediting delivery of the remaining aircraft, restoring delivery dates to at least those committed in Mr. Chambers' letter of March 24, 1961.

In aid of a full understanding of background, I think the following should be mentioned, some of the events, of course, anteceding your personal connection with the 880 program.

1. As executed in 1956, the 880 contract called for delivery of provisionally certificated aircraft beginning in November of 1959, with full certification to be accomplished by May 1, 1960. This appears to have been amended in March of 1960 so as to provide a revised delivery schedule for fully certified aircraft, four in May of 1960 and some four or five per month in each succeeding month until deliveries were completed in November of 1960.

2. Early in May of 1960, Hughes Tool Company assigned 20 of the 30 aircraft to TWA.

3. Convair refused to honor the assignment to TWA without confirmation from the Hughes Tool Company. During the whole of 1960, such confirmation was received only with respect to one aircraft, delivered in May of 1960. TWA's efforts to obtain further delivery pursuant to the assignment were fruitless until January 1, 1961, when a second airplane was delivered pursuant to the Letter Agreement between Convair and TWA dated December 30, 1960.

4. As time passed between May and the end of 1960, Convair repeatedly asserted its ability to deliver the 880s very promptly. For example, Convair's letter of August 2, 1960, designated 11-2-3945, set forth a delivery schedule indicating delivery of 8 aircraft in August, 5 in September, 5 in October, 3 in November and 4 in December. You and I personally discussed the delivery situation in your office just a few weeks before the close of 1960, and you asserted that with application of overtime effort a total of 10 aircraft could still be delivered before the end of 1960.

On this background, we must take issue with any implication that this story begins with the January 6, 1961 schedule, and that the January 6 schedule was done in haste. On the contrary, the January 6 schedule was a revision of the many preceding schedules, developed over a long period of time. Contrary to being conceived in haste, the January 6 schedule should have been a most deliberate and considered evaluation of all the factors in the situation. Hence our increasing shock that each succeeding delivery schedule should reflect substantial further slippage to our disadvantage.

You tend to place the blame on TWA for failure to obtain assignment from Toolco of airplanes #39 and #34. During the development of your March 16 and March 24 letters Convair had intimate knowledge of the airplanes that were assigned to TWA and the nature of the discussions which took place leading to such assignments. It is our understanding that Convair had many more discussions with the Hughes Tool Company and certainly had knowledge of the assignment schedule. The aircraft assigned to TWA came about after considerable discussions and negotiations and by the March date they represented a contractual understanding between the three parties. TWA was not in position to cause a change in these conditions. You mentioned that it was our requirement to insist on the delivery of the twenty assigned airplanes that caused work effort on the unassigned airplanes to be postponed until last. Had Convair elected, however, to maintain the staffing on the 880 program it had in April, these last airplanes could have been completed in an orderly manner for delivery to your other customer. Convair had in its hands the control of scheduling work on these airplanes concurrent with the TWA deliveries.

Related to this, you mention that delivery of TWA's 880s required robbing of parts from other airplanes. This we are sure was Convair's decision, and it was made necessary by Convair's inadequate provisioning of extra components in order to provide the normal replacements which occur during routine aircraft acceptance. It has been our experience with other manufacturers that units which experience failure during acceptance flying are procured in excess of the normal quantity in contemplation of this situation. Therefore, TWA cannot accept any responsibility or blame for this parts shortage.

We have dealt with most of the major aircraft manufacturers in the United States during our corporate history, and are aware of the problems connected with your business. In all this experience, however, we have never encountered such a disparity between delivery schedules and actual deliveries as has occurred in the 880 program with respect to the aircraft being acquired by TWA.

In conclusion I must repeat that we insist on Convair at least making good its last previous delivery commitment on 880 aircraft and hopefully to better these dates.

Very truly yours,

R. K. Rourke
Assistant Vice President
Equipment Planning and Development

RKR:JC

cc: Mr. C. C. Tillinghast, Jr.

AX-1652

DX 146, page 1
(Letter - Convair to Toolco re Model 30 Delivery Positions, 5/6/60)

CONVAIR
A DIVISION OF GENERAL DYNAMICS CORPORATION

GENERAL OFFICES
SAN DIEGO 12, CALIFORNIA
TELEPHONE: CYPRESS 6-9611

May 6, 1960

DX 146

Hughes Tool Company
Houston, Texas

Attention: Mr. C.H. Price

Gentlemen:

Pursuant to our telephone conversations with your President, Mr. Hughes, some time ago, Convair undertook to hold open for Hughes Tool Company delivery positions for six (6) Convair Model 30 aircraft in the months of July, August and September, 1961. The exact positions which we have held open to date for Hughes Tool Company are one (1) during the month of July, two (2) in August, two (2) in September and one (1) in October, and are the earliest uncommitted delivery positions available for Model 30 aircraft.

Although the holding open of the aforesaid delivery positions has to date been at Convair's risk exclusively, Convair does not feel that its commitment to Hughes for the availability of these delivery positions can be continued beyond this date, May 6, 1960, in the absence of Hughes' agreement to protect Convair against loss as hereinafter provided.

You are advised therefore that, unless you shall have executed before May 7, 1960, the enclosed copies of this letter and returned same promptly to us, thereby evidencing your agreement to the terms hereinafter set forth, the six delivery positions hereinabove prescribed will no longer be available.

In the event, on or before July 6, 1960, Hughes Tool Company shall have executed, and delivered to Convair, a definitive purchase agreement covering the manufacture and sale by Convair and purchase by Hughes of six (6) Convair Model 30 aircraft, for delivery in accordance with the schedule set forth in the first paragraph of this letter, on substantially the same terms as those prescribed by the attached Purchase Agreement, then in such event, this letter agreement shall have no further force or effect; otherwise, Convair may on July 7, 1960 or at any time thereafter cancel all or any of said six aircraft, and, in such event, Hughes agrees to pay to Convair upon Hughes' receipt of

Hughes Tool Company
Houston, Texas

May 6, 1960
Page two

an invoice therefor, all costs which on or prior to July 6, 1960, Convair shall have expended or irrevocably committed for expenditure by Convair directly attributable to the manufacture of such of said six (6) Convair Model 30 aircraft as shall be so cancelled.

Hughes is hereby advised that the six delivery dates committed to Hughes are dependent upon Hughes' acceptance of a detail specification therefor in substantial accordance with that set forth in Detail Specification Report No. ZD-30-005 (Revision of 1 May 1959) including Change Orders thereto numbered 1 through 13.

As you know, Convair is now at Convair's risk and expense holding open for Hughes two (2) delivery positions for Model 30 aircraft for each month beginning October 1961 and ending December 1962. These positions cannot be held beyond July 6, 1960, in the absence of a firm commitment from Hughes to purchase additional Model 30 aircraft.

If the foregoing is acceptable to you, kindly so indicate by executing and returning to us the enclosed two copies hereof.

Yours very truly,

GENERAL DYNAMICS CORPORATION

J.V. Naish
President - Convair Division

Accepted and agreed to
this 6th day of May 1960

HUGHES TOOL COMPANY

By K. R. Sheridan

Title Vice President

AX-1654

DX 148
(Toolco - G.D. Letter Agreement re 6 Model 30s, 7/14/60)

GENERAL DYNAMICS
CORPORATION

445 PARK AVENUE, NEW YORK 22, N.Y.

July 14, 1960

DX148

Hughes Tool Company
2200 Gulf Building
Houston 2, Texas

Attention: Mr. Raymond H. Holliday

Re: Purchase by Hughes Tool Company of Six (6) Convair Model 30 Aircraft

Gentlemen:

This will confirm our agreements reached last night.

Please refer to our Letter Agreement dated May 6, 1960 wherein Hughes Tool Company is advised that Convair is holding open for the benefit of Hughes certain delivery positions of Model 30 aircraft, and our Letter Agreement of July 7, 1960 amending same.

This letter will confirm our further agreement that wherever in said Letter Agreement of May 6, 1960 the dates "July 6, 1960" or "July 7, 1960" appear, there shall be substituted therefor the dates "August 6, 1960" and "August 7, 1960", respectively.

Our said Letter Agreement of July 7, 1960 is in all respects superseded hereby and shall be of no further force or effect.

Please indicate your agreement to the foregoing by signing in the space provided below the two (2) enclosed copies hereof and returning same to us.

Yours very truly,

GENERAL DYNAMICS CORPORATION

By _____
Earl Dallam Johnson
President

Accepted and Agreed to as
of the 14 day of July, 1960.

HUGHES TOOL COMPANY

By _____
Raymond H. Holliday

HUGHES TOOL COMPANY
Executive Offices
Twenty-second Floor Gulf Building
Houston 2, Texas

DX 152

September 6, 1960

eral Dynamics Corporation
vair Division
5 Pacific Highway
Diego 12, California

tlemen:

Please refer to letter dated May 6, 1960 from General amics Corporation, Convair Division ("Convair") to Hughes l Company ("Hughes") and to the amendment to said letter ed July 14, 1960, and to letter dated July 14, 1960, and to ter dated August 6, 1960, all regarding Convair's agreement hold open for Hughes certain delivery positions for Convair del 30 aircraft and Hughes' agreement, in certain events, to tect Convair against expenditures with respect to such ivery positions.

The next to last paragraph of the aforesaid letter of 6, 1960 refers to Convair's agreement to hold open, at vair's risk and expense, additional delivery positions for del 30 aircraft, such delivery positions consisting of one (1) the month of October 1961 (in addition to the one (1) tober 1961 delivery position referred to in the first paragraph the May 6 letter) and two (2) delivery positions for each th beginning November 1961 and ending December 1962. It is tended by this letter that Hughes agree to protect Convair as reinafter provided, from exposure to loss attributable to the (2) January 1962 positions.

In the event, on or before October 6, 1960, Hughes ll have executed and delivered to Convair a definitive rchase agreement covering the manufacture and sale by Convair l the purchase by Hughes (exclusive of the six (6) Convair del 30 aircraft referred to in the first paragraph of the oresaid May 6 letter and of the three (3) Convair Model 30 craft referred to in the third paragraph of the aforesaid y 14 letter and of the two (2) Convair Model 30 aircraft erred to in the aforesaid August 6 letter) of two (2) Convair del 30 aircraft for delivery in January, 1962 on substantially same terms as those prescribed by the draft of Purchase eement attached to the May 6 letter, then, in such event, s letter agreement shall have no further force or effect;

otherwise, Convair may, on October 7, 1960 or at any time thereafter, cancel any of the said two (2) aircraft with respect to which Hughes shall not have theretofore executed and delivered to Convair such a definitive purchase agreement, and, in such event, Hughes agrees to pay to Convair upon Hughes' receipt of an invoice therefor , all costs which on or prior to October 6, 1960 Convair shall have expended or irrevocably committed for expenditure to the extent such costs are directly attributable to the manufacture of such of said two (2) Convair Model 30 aircraft as shall be so cancelled.

Hughes understands that the two (2) delivery dates herein referred to are dependent upon Hughes' acceptance of the detailed specifications for the two (2) Model 30 aircraft in substantial accordance with that set forth in Detailed Specification Report No. ZD-30-005 (Revision of 1 May 1959) including Change Orders thereto numbered 1 through 13.

If the foregoing is acceptable to you, kindly so indicate by executing and returning to us two of the enclosed copies hereof.

Yours very truly,

HUGHES TOOL COMPANY

By Raymond M. Holliday
Raymond M. Holliday
Vice President

Accepted and agreed to as of the
6th day of September, 1960.

GENERAL DYNAMICS CORPORATION

By Earl D. Johnson
Earl D. Johnson
President

(Boeing Memorandum re Conversations with H.R. Hughes, 9/23/55)

DX 168

To: W. M. Allen, E. C. Wells, J. B. Connelly, G. C. Martin, R. L. Bell, G. S. Schairer

Subject: Contacts with Howard Hughes (TWA)

The following is a resume of the three telephone conversations I had with Howard Hughes on September 21 and 22 in Los Angeles. Mr. Hughes requ that we keep confidential any information he gave to me.

1. Mr. Hughes stated that he had information on good authority that Pan American could finance at this time only the purchase of 12 or 15 jet transports and that would be the extent of their commitment at this time.

2. Hughes feels that C. R. Smith and Juan Trippe are playing Douglas and Boeing against each other in connection with deliveries and specifications with the objectives of (1) getting the best deal possible for themselves, and (2) to retard deliveries to TWA as much as possible. He feels Douglas is much more inclined to go along with these airlines with objective number (2) than is Boeing. He bases this on a series of conversations he has had with Nat Paschall over the last two weeks and yesterday. Two weeks ago, Paschall said Douglas would offer TWA attractive delivery positions, but yesterday he said they could offer TWA nothing until 1961. Hughes said that in yesterday's conversation, Paschall indicated that "he could not care less" whether or not TWA ever got any Douglas airplanes. (Hughes reported that he talked to Mr. Paschall yesterday while Paschall was at UAL's base in San Francisco.)

3. Hughes said that about one month ago, C. R. Smith went to Donald Douglas and told him he thought Boeing's announced price of four and one-half million dollars for the 707 would be reduced and asked how much Douglas intended to reduce its price for the DC-8. Douglas replied to the effect that he didn't intend to reduce the price and, as a matter of fact, he thought his price was too low and might have to be raised irrespective of what Boeing did to their price. Hughes feels this made Mr. Smith unhappy and that it was then that Smith came to Seattle to talk to Mr. Allen and made Boeing an offer. Hughes reported that Bob Gross told him that Smith told Gross in New York last week that Boeing's acceptance of American's offer was hedged with so many provises that Smith withdrew it. I told Hughes that work on the final agreement was being held in abeyance until we negotiated the final specifications and that as far as I knew the basic deal was "on", but Hughes felt to the contrary. Hughes reported that the American Technical Team was at this time in Los Angeles negotiating diligently with Douglas on the detailed

specification for the DC-8. (The American Technical Team were, in fact, in Los Angeles in force, but from the information received by me I gathered they were working with Lockheed on the Electra.)

(4) Upon query Hughes stated that he absolutely had no deal outstanding with Convair because of Air Force pressure on Convair to do more and better on certain Air Force projects at Convair. He said that he had worked secretly for six months with Convair on the deal for 30 jet transports, the first of which is to be delivered in October 1958. He stated that the detail specifications had been completely negotiated, a formal contract had been agreed upon by both parties and the financial arrangements made when the "rug was jerked out from under the project!".

(5) When asked what TWA's interest is in the Boeing 707, Hughes replied that if Trippe, Smith and Douglas shut Boeing out he'd come up and buy 30 airplanes from us if we wanted to go ahead. If we go ahead with Pan American, American and United he said he would consider buying 15 if the deliveries weren't too bad. However, he would not take any action or send his technical men to Seattle until he saw which way the wind blew. (He declared he didn't want an airplane just like American's!)

Conclusions

My general conclusions are that Mr. Hughes is quite frustrated and undecided. He apparently dislikes Pan American, American and Douglas and does not want to see them control the market for jet transports but, on the other hand, I think he would like to see them do so if he thought Boeing would go ahead with TWA with deliveries ahead of his competitors. (He does not consider United a real competitor.) I assured him that we could not go forward with the project with a sale of only 30 airplanes. He thought perhaps we could consummate enough sales to foreign operators to make the project worthwhile, but I doubted it.

It is inconclusive to me that the Convair deal is entirely out. If it is really dead, I am sure he would be more interested in our airplane and would send his technical people to Seattle to learn more about it.

I recommend that we go forward as fast as possible with Pan American, American and United and not worry about TWA for the time being. I do recommend, however, that we hold some delivery positions open and not commit all available airplanes to the first three customers.

[illegible]

W. E. Beall

Note: Model 707 Performance Comparison Sheet (JT3C-6 and JT4A-3) dated September 19, 1955 was sent to Mr. Hughes by special messenger.

AX-1660 DX 169

(Boeing Memorandum re Conversation with H.R. Hughes, 10/31/55)

October 31, 1955

FB
FILE
707 - Tw

MEMO REPORT

DX 169

To: W. M. Allen R. L. Bell
E. C. Wells ~~J.~~ D. Connelly

Subject: Telephone Conversation between Howard Hughes in Los Angeles and W. E. Beall in Seattle at 8:00 AM, October 31, 1955.

1. Mr. Hughes inquired as to the status of the sale of the Boeing 707 to American Airlines. I told him we were in active negotiations and that we hoped we could sell them.

2. He asked why we were not able to sell United and when I replied that I didn't know, he made the categorical statement that United never had any intention of buying 707's in any event.

3. He asked that if American did not buy 707's, if there would be any chance for us to match Pan American's schedule. I explained to him that we couldn't match Pan American's schedule because it is the period of our production build-up and the first airplanes we could quote to another customer would be April or May.

4. I asked him if he wanted a delivery quotation, but he said he would wait until after our American deal was settled one way or the other. If American does not buy from us he might be tempted to talk to Trippe about matching delivery schedules.

He asked that his conversation with me be kept absolutely confidential.

ORIGINAL SIGNED BY W. E. BEALL

W. E. Beall

(Telegram - Boeing to Toolco re B707-331s, 7/21/59)

DC74

K W7A629 LONG PD AR=TDC PAS RENTON WASH 21 737PMC=
HUGHES TOOL, C H PRICE,
REPORT DELIVERY SOON AS POSSIBLE=
VICE PRESIDENT HOU=

DX 170

6-1100-60-134

SUBJ PURCHASE AGREEMENT NO 9 BETWEEN HUGHES TOOL COMPANY AND BOEING AIRPLANE COMPANY DATED MARCH 19 1956, AS AMENDED RELATED TO BOEING MODEL 707-331 AIRCRAFT
YOU HAVE REQUESTED BOEINGS CONSENT, AS REQUIRED BY ARTICLE 21 OF THE ABOVE REFERENCED PURCHASE AGREEMENT

WESTERN UNION Tlfax

NO 9 /THE/, TOGETHER WITH ALL LETTER AGREEMENTS RELATING THERETO AMENDMENTS SUPPLEMENTAL AGREEMENTS AND MODIFICATIONS THEREOF, INCLUDING CHANGE ORDERS THERETO AND CHANGE PROPOSALS HERETOFORE ACCEPTED BY HUGHES, IS HEREINAFTER CALLED THE PURCHASE AGREEMENT/, TO YOUR VOLUNTARY ASSIGNMENT TO PAN AMERICAN WORLD AIRWAYS INC OF SIX /6/ OF THE EIGHTEEN /18/ BOEING MODEL 707-331 AIRCRAFT COVERED BY THE PURCHASE AGREEMENT, IN ACCORDANCE WITH THE TERMS OF YOUR LETTER AGREEMENT WITH PAN AMERICAN UNDER DATE OF JUNE 1959,

A COPY OF WHICH YOU HAVE FURNISHED TO US.
BOEING HEREBY GRANTS SUCH CONSENT. BOEING HEREBY RELEASES THE HUGHES TOOL COMPANY FROM ALL OF ITS OBLIGATIONS UNDER THE ABOVE MENTIONED PURCHASE AGREEMENT WITH RESPECT TO THE SIX /6/ AIRCRAFT REFERRED TO IN SAID LETTER AGREEMENT, AND ALSO RELEASES THE HUGHES TOOL COMPANY FROM ALL LIABILITY WITH RESPECT TO ONE-THIRD /1/3/ OF THE AGGREGATE PRINCIPAL AMOUNT OF THE NOTES /DESIGNATED PROMISSORY NOTES C, D, AND E,

32714

1270 11-511

WESTERN UNION Telefax

DATED MARCH 6, 1959/ ISSUED BY HUGHES TOOL COMPANY TO BOEING WITH RESPECT TO INSTALLMENT PAYMENTS ON MODEL 707-331 AIRCRAFT, AND WITH RESPECT TO ONE-THIRD /1/3/ OF THE INTEREST ACCRUED ON SUCH NOTES FROM JULY 1, 1959 TO THE DATE HEREOF.

IT IS ASSUMED THAT HUGHES WILL PROMPTLY PAY TO BOEING ALL FUNDS RECEIVED FROM PAN AMERICAN AS A RESULT OF SAID ASSIGNMENT TO THE EXTENT REQUIRED TO MEET THE OUTSTANDING NOTES/INCLUDING INTEREST/ AND OBLIGATIONS OF

32715

1270 11-511

DX 170, page 3
(Telegram - Boeing to Toolco re B707-331s, 7/21/59)

WESTERN UNION

[illegible]
HOLDER TO BOEING PERTAINING TO MODEL 707-131 AND MODEL
707-331 AIRCRAFT, EXCEPT TO THE EXTENT SUCH NOTES AND
OBLIGATIONS HAVE BEEN RELEASED AS ABOVE PROVIDED YOURS
VERY TRULY=
BOEING AIRPLANE CO T L SPALDING MANAGER CONTRACT
ADMIN=

1959 JUL 21 PM 8 54

32716

(C. & C. Letter to Leslie re TWA Financial Forecast, March 13, 1959)

COVERDALE & COLPITTS

CONSULTING ENGINEERS

120 WALL STREET

NEW YORK 5, N. Y.

March 13, 1959

Mr. A. Y. Leslie, Senior Vice President
and Treasurer
Trans World Airlines, Inc.
380 Madison Avenue
New York, New York

Dear Mr. Leslie:

In accordance with your instructions, we have started work on a study of TWA's financial forecast for the period 1958-1962, which includes operation of jet aircraft. In this study, we will examine the various components of your forecast so that our independent judgment on each of these matters is satisfied and so that we will be able to support the financial information which will be used by your investment bankers in connection with the proposed financing. Our work will include a review of the method of forecasting traffic and revenue for both domestic and international air traffic, the projections of expense for the operation of piston equipment, the estimates of expense for operation of jet equipment, the estimates of general and administrative expenses and the assumptions made respecting CAB and TWA rate and route award policies.

In accordance with your instructions, we will do everything possible to complete the first phase of our study by the end of March so that the investment bankers can then hold preliminary discussions with insurance companies and others respecting the financing program. We understand that the closing of the financing is scheduled for June 1st.

We propose that our compensation for this engagement be calculated at our standard rates which are as follows:

For services of staff engineers - within the range of $125 to $175 per day

For services of partners - $300 per day

For clerical, stenographic and other work by our nonengineering employees - book payroll cost plus 50 per cent

For services of temporary employees used on this engagement, if any - payroll cost plus 50 per cent

For out-of-pocket expenses incurred directly in connection with this engagement - at cost

We propose to render monthly bills calculated as described above, and payable within 30 days.

At this early date on the study, we cannot determine the amount of our work which will be required in connection with your financing program. Using our experience with other studies of a generally comparable nature, we estimate that our total billing may be of the magnitude of $25,000.

This description of our proposed engagement is intended to be in accordance with our conversations on the subject; if it is not, please let us know.

We thank you for the engagement.

Very truly yours,

Edward L. Temple

bcc: JES
AFP

AX-1666

TRANS WORLD AIRLINES, INC.
380 Madison Avenue
New York City

DX 219

FINANCIAL FORECAST

WITH JET AIRCRAFT

1958-1962

CONFIDENTIAL

AUG 22 1962
CHESTER C. DAVIS

Prepared by:

Trans World Airlines
Finance Department

A. V. Leslie
Sr. Vice President & Treasurer

D 1660

December 1, 1958

CONTENTS

SECTION	I	Basic Forecast Assumptions
	II	Cash & Balance Sheet
	III	Operating Results System Domestic International
	IV	Property & Equipment Expenditures
	V	Revenue Forecast
	VI	Statistical Data

AX-1668

DX 219, page 3
(TWA Financial Forecast 1958-1962, 12/1/58)

6221 BY 8

FIVE YEAR FORECAST

1958 - 1962

SECTION I BASIC FORECAST ASSUMPTIONS

FINANCIAL FORECAST FOR YEARS 1958 - 1962

Basic Forecast Assumptions

I EQUIPMENT

A. Jet Aircraft - 14 B-707-131 assigned to Domestic mixed service; 18 B-707-331 of which eight are assigned to Domestic mixed service and ten to International mixed service; 30 CV-880 assigned to Domestic all first class service. Delivery schedule summarized on Schedule IV-A.

B. Present Equipment - The forecast reflects the retirement of the DC-4's, L-049's, L-1049A's, L-1049G's and Martin fleets by the end of 1960. No provision is made in the forecast for the sale or lease of these aircraft. Retirement schedule summarized on Schedule VI-C.

C. Leased Equipment - The L-1049H leased aircraft will be operated in Commercial and MATS Charter for the duration of the current lease agreement. It has been assumed the leases will not be renewed past their termination dates.

II FINANCING

A. Jet Aircraft Program - It has been assumed that TWA would purchase the jet aircraft and related spare parts and inventory from the Hughes Tool Company on conditional sales contract at 100% of the cost to TWA. Repayment would be in equal monthly installments over ten years, commencing with the first month of schedule service for each fleet, plus interest at 4% on the unpaid balance.

B. Fuel Systems & Storage - Jet fuel storage and dispensing facilities acquired in 1959 and 1960 are 100% financed. Basic terms include ten year repayment with interest at 4 to 4-1/2% on unpaid balance. Facilities at several locations are amortized without interest charges.

III INCOME STATEMENTS

A. Revenues - No change in the Domestic fare level presently in effect other than those changes effected in October 1958. It has been assumed that all fares in the current level due to expire will be extended throughout the forecast period. International first class fare levels will be maintained at present level, however, there will be no berth or sleeper seat

service on jet aircraft. After April 1, 1960 there will be one class of service replacing the present tourist/economy service at a yield of approximately the same as the weighted average of these yields experienced in 1958. All other revenues have been assumed at present rate levels.

B. Operating Expenses -

1. Direct Flying Expenses - In general, expense rates for projecting costs for piston engine aircraft now in service were based on actual experience for the year ending June 30, 1958 with the exception of those areas commented on below. Jet aircraft operating data, on which cost projections were based, was supplied by TWA's Staff Engineering and Maintenance Departments and is the result of their analysis and interpretation of manufacturers estimates for operating jet aircraft on TWA's routes and under TWA's proposed operating policies and procedures.

   a. Salaries & Wages - Flight crew salary expense was based on rates of pay stipulated in current flight crew contracts plus a percentage increase for contracts now open. (Pilots increased 6% for contract expired August 1, 1958.) A contract with the Flight Engineers was signed July 29, 1958 which extends through 1959 and covers pay rates for operating jet aircraft. It was assumed that pilots pay for operating jet aircraft will be based on current type contracts with such factors as contractual speeds and gross weights estimated. Our estimates were based on the recently signed flight engineers contract and its normal relationship to pilots pay elements and, also taking into consideration Eastern Airlines pilot contract which covers jet pay provisions.

   b. Travel Expense - Flight crew travel expense was based on actual experience rates and then adjusted to reflect a 50% increase in flight engineers travel allowance to incorporate their new contract provisions. Flight engineer and pilots travel allowance are now at the same rates and no increase is anticipated for pilots.

   c. Aircraft Fuel and Oil - Aviation gas and oil expense was based on current prices and experienced fuel consumption by type of aircraft. These prices include the recent reduction in Domestic aviation gas of approximately 1-1/2 cents per gallon. The average price per gallon for kerosene used in jet aircraft was based on bids received by TWA. The federal tax on aviation gas, which is now 2 cents per gallon for fuel used in the U.S., has been estimated to increase to 3 cents per gallon effective July 1, 1959 and to include jet fuel (Kerosene and JP-4) which is not now taxable.

AUG 31 62
CHESTER C. DAVIS
D 16(b)3

(Aviation Week & Space Technology, 11/13/61, pages 42-43)

Transatlantic Traffic Slump Continues

By Glenn Garrison

New York—North Atlantic airlines are moving into their winter off-season with little hope of a sharp increase in traffic to offset last summer's slump, which resulted in an increase of only 3% in scheduled passengers in the face of a 37% increase in capacity.

Last year at this time, when most of the carriers were operating large-scale jet fleets for the first off-season period, bookings were reported way up for the winter months, in some cases 50% and more (AW Nov. 7, 1960, p. 40). As it turned out, the North Atlantic airlines carried 35% more passengers in the final quarter of 1960 than in the previous like period. Capacity, however, rose 53% for the quarter.

An AVIATION WEEK survey of current bookings for the off season indicates a level generally only slightly higher than last year at this time. Capacity will be up again, but not as drastically as during the last off-season.

Bookings are less reliable than they used to be as an indicator of traffic because of the tendency to book later. Airlines report that the figures often change for the better a few days before a particular flight. However, little of the optimism evident last year—when the 17-day excursion fare was going in for the first time—seems reflected as this winter season goes into its second month.

The slump in traffic growth, critical when linked with the giant increase in seat capacity, began last May. For the four peak season months, June through September, the scheduled North Atlantic airlines carried 917,754 passengers, up from 884,152 in the summer of 1960. Capacity rose from 1,273,455 seats to 1,743,085, for a load factor in both directions of 53% for the 1961 period. This was a drop from a similar load factor in summer, 1960, of 68% in both directions.

First-class traffic was hardest hit, dropping 34% to a total of 95,225 passengers for the four months. Economy passengers totaled 822,529, a 9% increase.

For the nine months ending last September, scheduled traffic was up 8% to 1,484,674 passengers, and scheduled capacity was up 41% to 2,898,560 seats.

Charter Operations

Charter operations, which present some controversial aspects, zoomed during the summer period with an increase of 73% among the scheduled carriers to a total of 153,383 passengers. Some airline officials, proponents of lower scheduled fares, feel that the charter business is a way of begging the question and offering lower fares through the back door. Also, some question exists as to whether charters are accurately reported to International Air Transport Assn. In this view, an indeterminate number of charter passengers end up in the scheduled passenger totals.

Among the carriers reporting charters for June, July and August were British Overseas Airways Corp., with 202 c... bound legs: Lufthansa, with 72; KL... with 74; Pan Am, with 163; SAS, w... 32; and TWA, with 42.

Last summer's results, both in ca... city offered and traffic carried, va... considerably among the individual c... riers. Some examples:

• Pan American showed a 14% incre... in passengers for the four months t... total of 191,071. Capacity rose 4... Pan Am estimates its capacity for ... winter season will be about 29% gre... than last winter's. Bookings for the ... weeks beginning Oct. 26 are 13% ah... of bookings for the same period ... year.

• TWA traffic dropped 18% from ... previous summer to a total of 101,... passengers. Capacity was up 8.2%... 196,190 seats. Among the unfavor... factors cited by TWA are the incre... transatlantic capacity of foreign ca... and their jet fleets; entrance of new ... riers in the market, and competi... from supplemental carriers opera... charters under blanket exempti... TWA's capacity this winter will ... down slightly from last year: from a... 3,200 weekly seats in each direct... beginning Nov. 1, to 2,100 seats. A... the same date, bookings for Noven... were running about 7% higher e... bound and 5% lower westbound. TW... started promoting the off-season f... earlier this year than last.

• BOAC traffic also was down slig... from 133,475 to 127,728 passen... Capacity was up 23% for the f... months. For the entire winter sca... BOAC plans to offer about 85,061 e... bound seats, an increase of about 2... A major unfavorable factor cited ... BOAC is the fly-American directiv... U. S. government departments. A... BOAC was getting established in ... U. S. points such as Washington-B... more. The British carrier expects to ... duce its transatlantic capacity ... summer by 7%, shifting Boeing ... 420 jet equipment to other routes.

• KLM increased its capacity by 1... to 129,106 seats. Traffic rose from ... 900 to 67,678 passengers. Capacity ... the winter season will run about 2... seats a week, up from about 2,108 ... on the average last year. Bookings f... ently are about the same as last ... but KLM says it really is too early ... estimate with any exactness.

• Lufthansa increased its traffic by 1... to 57,331 passengers and increased ... capacity by 72% to 108,236 s... Lufthansa feels an improvement in ... market is absolutely dependent on ... improvement in the political situa... The airline is particularly hard hi...

North Atlantic Passenger Traffic

June Through September, 1961

	Flights	Seats	Passengers	Load Factor
Air France	1,012	143,186	71,463	50%
Air-India	169	22,256	7,780	35
Alitalia	595	78,370	42,061	54
BOAC	1,964	249,958	127,728	51
Canadian Pacific	316	37,232	17,319	47
El Al	271	32,981	21,507	65
Iberia	127	14,374	4,856	34
Irish	325	40,015	25,774	64
KLM	1,129	129,106	67,678	52
Lufthansa	764	108,236	57,331	53
Pan Am	2,748	340,030	191,071	56
Qantas	69	6,382	2,945	46
Sabena	503	70,690	30,949	42
SAS	878	113,727	63,387	56
Swissair	529	67,824	32,816	48
Trans-Canada	730	92,528	51,484	56
TWA	1,433	196,190	101,605	52
Totals:	13,562	1,743,085	917,754	53

Note: Pakistan International Airlines began transatlantic service June 16. Figures ... not available.

(Aviation Week & Space Technology, 11/13/61, pages 42-43)

...on the Berlin situation. Lufthan... ...ng with BOAC and other foreign ...arriers, cites the fly-American pro... ...as a particular source of traffic. The German airline's capacity this ...r will be up about 41% over last ...r's. Bookings are running about ...ast year's level.

...alia carried 40% more passengers ...otal of 42,016. Capacity increased ... to 78,370 seats. This winter's ...ty will be about 51% greater than ...inter's. Bookings were up about ...as of Nov. 3. Alitalia's big capacity ... of last summer coincided with the introduction of a full jet fleet; next summer's increase will be considerably less.

• SAS registered a 15% increase in traffic to 63,387 passengers. Capacity was up 9% to 113,727 seats. SAS plans to offer about the same capacity this winter as last. Bookings are reported as slightly up over this time last year.

• Air France increased its traffic from 59,272 to 71,463 passengers. Scheduled capacity rose about 49% to 143,186 seats. Bookings for the rest of 1961 and the beginning of 1962 are running about 10% ahead of last year's.

...ontrollers Question Future Value ...f Various Air Traffic Measures

By David H. Hoffman

...mi—Air traffic controllers have ... to question whether there is a ... in any future control system for ...ers that can only print flight ...s strips, devices designed to pre...nflict courses, and the present ...over airway structure.

...icism of these devices came dur...he Air Traffic Control Assn.'s ...l meeting here when controllers ...ked to discuss an ATC system ...o be reshaped by recommenda... ...f the Project Beacon task force ... [illegible] ..., then four months overdue, were ...own to most controllers at the ...30-Nov. 1 ATCA conference.

...an informal workshop on "auto... ...a evaluation," controllers made it ...that any plan to install additional ...keeping" computers similar to ...Remington-Rand Univacs now in ...at six Federal Aviation Agency ...Route Traffic Control Centers ...(CCs) would not win solid con... ...support. Their objections:

...the expense of leasing additional ...ters to print, but not update, ...progress strips would divert funds ...projects aimed at developing semi... ...atic ATC systems with greater ...lity.

...mended use of flight progress strips ...ficult to reconcile with the ex... ...l use of radar in controlling air ...

Satisfied with the results of ...to date, controllers want to focus ...attention on radar scopes rather ... strips printed by a computer. ...blem of feeding the computer ...data, stuffing the flight progress ...into holders and distributing the ...to numerous center sectors, in ...cases, requires more personnel ...would be required to print and ...ate the strips by hand.

centers, controllers at the workshop recommended that FAA re-evaluate what constitutes a legal procedure within an ATC facility. They asked, for example, if it still served a useful purpose to require a written record of the control instructions issued to every flight. Would it be necessary to take motion pictures of each radar scope if radar resulted in the elimination of flight progress strips? And would not such requirements, if imposed, lessen the efficiency of the ATC facility?

Automatic conflict prediction—a system for warning a controller well in advance of any clearance that might steer an aircraft toward a collision—also was downgraded by controllers here. According to Horace Adams of FAA's ATC operations group at the Agency's Atlantic City, N. J., test center, the need for conflict detection devices decreases as radar control is substituted for manual control of air traffic. Visual presentations offered by radar, he said, make it relatively easy for a controller to predict en route conflicts without the aid of a sophisticated computer.

Automatic conflict prediction was to be the third function entrusted to the Data Processing Central semi-automatic traffic control system, which FAA once hoped would become operational in Boston during November, 1962. But FAA officials from the National Aviation Facilities Experimental Center said here that the prototype DPC system, according to present plans, will be retained at NAFEC and used to test new traffic control techniques and some components.

It would not, they said, be installed in an operational environment as a complete system. One of the six General Precision/Librascope computers purchased by FAA for use in DPC will be shipped to the Atlanta ARTCC sometime in Fiscal 1963 (AW Aug. 28, cording to Lyle H. Ditzler, acting ... of field operations analysis in the Age...cy's Air Traffic Service.

FAA now looks upon automation ... an "assist to the controller," not as th... "salvation for all our problems," Ditz... told the forum. The concept of DPC, Ditzler added, must be "changed co...siderably" because it is based on th... "old system" of pilot position repor... and estimated times of arrival over rad... checkpoints.

Controllers and airline industry repr...sentatives here had little praise fo... FAA's three-layer airway structure, which went into operation on Apr. ... According to these users, the interme...ate altitude route system that extend... from 14,500 to 24,000 ft. is a "stum...bling block" for jets climbing to ... descending from the high-altitude net...work above 24,000 ft.

Intermediate and high altitude ai...ways often are not defined by the same VOR radials, controllers complained. Pilots added that their transition through the intermediate airway struc...ture involve cluttering the cockpit with unnecessary charts. As more high-speed jets are scheduled over short-range route segments, this problem is aggravated because pilots have only two choices: climb to altitude and then descend shortly thereafter, or remain at low alti...tude where fuel consumption is high and slower piston-powered transports present a traffic control problem.

Computer Use

According to Capt. J. D. Smith, di...rector of air traffic control for United Air Lines, United is using a computer to evaluate just how high its jets should fly on short-range route segments. In this evaluation, fuel consumption is be...ing balanced against time to climb and descend, he said.

Controllers here also expressed con...cern that the qualifications demanded of would-be controllers may be relaxed in the future to attract sufficient new personnel. On this point, Jacob Meisel, chief of personnel programs division, said that the backlog of qualified can...didates already on the civil service roll was adequate to keep controller strength at authorized levels for the next three to four years.

FAA is tackling the problem of con...troller stress, anxiety and fatigue in two ways, reported Dr. David Trites of FAA's Civil Aeromedical Research In...stitute. He said the Agency was re... doubling its testing efforts to ensure that only controllers able to withstand "stress-causing conditions" are hired in the first place. In addition, FAA is studying controller fatigue in an effo... to pinpoint and eliminate the cause. Dr. Trites made it clear, however,

DX 239
(Airlift, May 1962, p. 46)

AX-1673

Capacity Overshadowed Traffic On North Atlantic In 1961

Load factor dipped to lowest level in years as 17 carriers flew the equivalent of 14,700 flights without a passenger aboard

By ERIC BRAMLEY

THE SMALLEST passenger traffic increase on the North Atlantic in 10 years, coupled with the biggest jump in capacity, pulled 1961 load factors down to the lowest point in postwar history.

The 17 IATA passenger-carrying airlines—two U.S. and 15 foreign flag—carried 1,919,466 passengers on regular schedules, an increase of 9% over 1960. Seating capacity jumped 36.7%. Charter flights handled an additional 256,478 passengers.

Bright spots in the picture were cargo, up 36.3%, and mail, up 26.2%.

AIRLIFT's analysis of scheduled flights from the U.S. and Canada to Europe shows that 1961 was a year in which:

Load factor dropped an amazing 13 points, from 64.2% in 1960 to 51.2%. This was the first time in at least 10 years that the figure had been less than 60%. First-class was a dismal 37.5%; economy service produced 54.1%.

More than 1 million new seats were offered for sale, but the passenger increase amounted to only 158,694. Thus, for every new passenger, more than six new seats were added. The airlines flew with 1.8 million *empty* seats, which is equal to operating 14,700 flights with no passengers at all.

Six out of every seven passengers used economy service—87.2% against 12.8% first-class.

First-class traffic dropped for the first time since 1954, and the decrease was a sizeable 20.1%.

The U.S. share of the market continued to shrink. More than two out of every three passengers used foreign lines.

Pan American continued to lead in all classes of traffic. Canada-Europe operators fared somewhat better than U.S.-Europe, showing a 57.5% load factor. On U.S.-Europe routes, the traffic increase was only 7.8%. There were 1,654,306 passengers and 3,286,294 seats, for a 50.3% load factor.

68.1% fly non-U.S. airlines

Foreign lines had 68.2% of the total passenger market, up from 65.3% in 1961. Excluding Canada (where U.S. lines do not compete), the foreign carriers had 63.1% of U.S.-Europe against 36.9% for PAA and TWA. In 1960, the division was 60.2% vs 39.8%.

In 1960, when jets were replacing pistons, the airlines increased their seats by 32.3% but the number of flights decreased 3.9%. Last year, however, it was a case of adding jets to jets, and the 36.7% increase in seats was accompanied by an 11.6% increase in flights.

Pan Am increased its passenger traffic 9.7% in 1961 and had 24.4% of the U.S.-Europe market—one out of every four passengers. Its seating capacity increased 41.4%. In 1960, Pan Am had 23.9% of the market. TWA experienced a 14.7% traffic decline last year while seats increased 6.8%, and its share of the market fell from 15.9% to 12.6%.

Foreign carriers lead in cargo

Cargo totaled 69,096.2 tons; 61.4% of it was carried by foreign lines and 38.6% by PAA, TWA and Seaboard World. Excluding Canada, the division was 58.5% vs 41.5%. The three U.S. lines maintained a big lead in carrying the mail, handling 71.9% of the total and 75.6% of U.S.-Europe.

Following is each carrier's share of U.S.-Europe passenger traffic (Canada excluded) in 1961:

Pan Am	24.4%	Alitalia	5.2%
TWA	12.6	Swissair	4.4
BOAC	11.4	Sabena	3.7
Air France	9.6	Irish	2.7
Lufthansa	7.4	El Al	2.6
SAS	6.9	Air India	.9
KLM	6.8	Iberia	.6
		Qantas	.6

Many reasons have been advanced for 1961's unexpected slump. Generally listed as contributing factors were unsettled conditions in Europe, U.S. recession, and curtailing of dollar expenditures abroad. The IATA operators are now convinced that 1962 results will be much better, with estimates of passenger growth running from 12% to 15%. ■

(TWA Board Meeting, Aug. 16, 1961 - Report of System General Manager)

At the July Board of Directors meeting the question was raised as to where TWA's revenue production problems were concentrated. This report will summarize and the attached exhibits illustrate the areas of competitive revenue deficiency.

Chart No. 1 is the most recent competitive load factor comparison on selected non-stop jet segments. These are the segments upon which we have relatively accurate information through exchange of figures with AAL, UAL and CAL. This comparison indicates that our most serious problem is between New York and California where we have consistently trailed behind AAL, and either about the same or ahead of UAL. Secondarily, Chicago to Los Angeles and San Francisco are the other markets where our penetration must be improved. Note that between Baltimore and Los Angeles TWA leads in both directions and has done so consistently.

To further isolate the problem, Chart No. 2 shows a comparison of UAL, TWA and AAL historical load factors from New York to Los Angeles.

Chart No. 3 gives a direct comparison between TWA Flight 5 at 9:30 AM and AAL Flight 1 at 9:45 AM, both non-stop Boeings to Los Angeles. This AAL flight continues to surpass our parallel Flight 5. This chart illustrates one of the problems as it reveals AAL's better ability to feed their flight at Idlewild from their regional route pattern in the northeast.

I would like to enumerate some of the reasons contributing to our competitive problem with AAL, and to a lesser degree UAL, in the transcontinental non-stop markets.

1. The lack of a new modern terminal at Idlewild is becoming increasingly damaging to our business. As an example, we annually make

an on-board survey of our transatlantic passengers, and the most recent survey conducted the last week of June and first week of July this year contained write-in comments from 12% of the passengers criticizing our terminal facilities at Idlewild. These 12% constituted some 300 passengers and compare with adverse comments in last year's survey of 4%. This clearly indicates the adverse passenger reaction to our present temporary facilities, and undoubtedly places TWA at a competitive disadvantage.

2. The success of AAL's "Astrojet" advertising campaign built around their new fan engines has been most successful. Transcontinental schedules by AAL with the "Astrojet" are faster than TWA's Boeing 131 schedules. I previously referred to our problem with AAL's Flight 1 which leaves at 9:45 AM, 15 minutes later than our Flight 5, and arrives in Los Angeles at noon, 10 minutes ahead of us.

3. The ability of AAL in the east and UAL in the west, because of their route structure, to develop and concentrate on scheduling maximum internal connecting service to their long haul jets.

Aside from our position in the transcontinental jet markets, TWA's competitive position compares favorably. If we had load factors equal to our competitors on these major segments, our industry load factor would be equal to AAL and ahead of UAL.

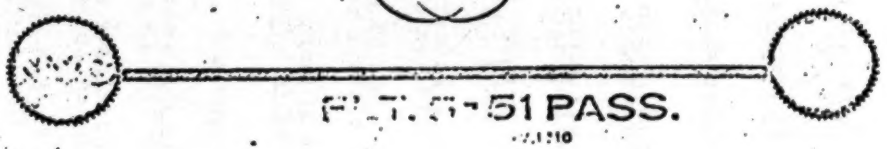
As you know, TWA missed its domestic revenue forecast for the month

"SOURCE OF PASSENGERS"

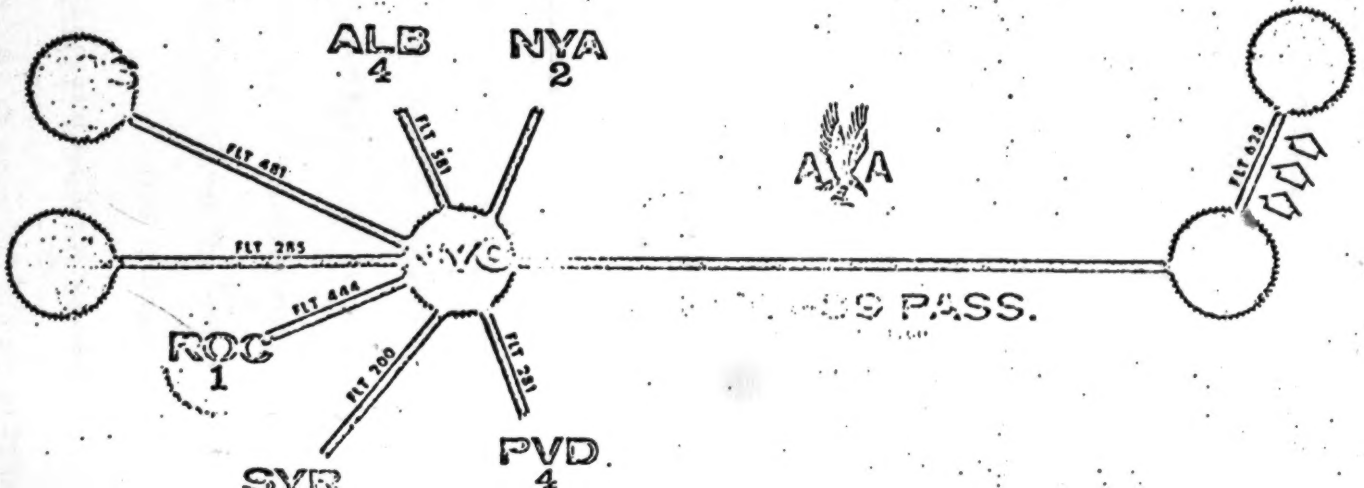
NYC-LAX

JULY 1-21 1961

TWA



VERSUS



CIVIL AERONAUTICS BOARD

1964 Budget Estimates

Chairman's Statement
Before House Subcommittee on Appropriations
January 29, 1963

Mr. Chairman and Members of the Committee, the Civil Aeronautics Board is here on its annual pilgrimage to tell you what it has done and is doing with the money Congress appropriated last year and what it needs for waging the good fight in the coming year. Before launching into the details of our accomplishments and future needs, however, I believe it would be valuable to refresh your recollection and bring you up-to-date on some salient facts and figures of the industry the Board is charged with regulating and promoting.

There are 159 direct and indirect air carriers holding economic authority from the Board. These break down into 53 certificated specific route operators, 15 supplemental air carriers, and 91 domestic and international air freight forwarders. The certificated specific route operators include:

11 trunk carriers performing mostly long-haul and medium-haul domestic services, and a majority of them also serving some foreign points;

13 local service carriers operating within the Continental United States;

2 local service carriers operating in Hawaii;

9 carriers operating in Alaska;

3 helicopter carriers;

5 all-cargo carriers;

1 carrier operating primarily between the United States and Pureto Rico;

4 U.S.-flag carriers operating internationally and flying no routes within the Continental United States;

5 other small carriers, three of which are not currently operating scheduled services.

The certificated route air carriers provide regularly scheduled service to 950 U.S. and foreign points, including 234 in Alaska. Their operating statistics for the year ended September 30, 1962, show that they:

Carried a total traffic of 6.1 billion revenue ton-miles;

Transported 62.9 million passengers for a total of 45 billion revenue passenger-miles;

Transported 1.3 billion ton-miles of cargo;

Had 2,033 aircraft which provided a capacity of 83 billion scheduled available seat-miles;

Had 2.9 billion dollars invested and employed 171 thousand persons;

Collected 3.38 billion dollars in revenue, and spent 3.25 billion dollars;

Paid 58 million dollars in various taxes;

Collected 157 million dollars in passenger transportation taxes for the Federal government.

These are impressive statistics and they also reflect a significant growth over the preceding year. We only wish that the profit picture were as rosy but it is not. The fact is that the certificated route industry earnings for the year ended September 30, 1962, provided a return of only 3.97 percent on investment. The eleven domestic

trunklines reported a composite return on investment of only 2.83 percent. Nevertheless, the picture was a bit brighter than that of the preceding 12-month period when the return on investment for the industry was 3.15 percent and for the eleven trunklines 2.16 percent. For the current year, net income was 6.6 million dollars as compared with a net loss of 4.1 million dollars in the preceding year. These are encouraging changes in the generally declining trend of earnings since 1955.

The villain in the poor profit picture continues to be excess capacity. Although the industry has experienced sizeable increases in operating costs per seat-mile flown, the break-even load factor is currently actually below the level which obtained in the good 1954-1955 period. This is so because the operating cost increases have been more than matched by the aggregate impact of several fare increases. Moreover, although traffic growth has fallen considerably below the industry's expectations, it has nevertheless continued. The inescapable conclusion appears to be that the disparity between current earnings and those of earlier good periods is essentially attributable to the substantial decline of passenger load factors as a result of excess capacity. And it should be noted that substantial numbers of jet aircraft continue to be delivered pursuant to firm commitments entered into during more optimistic times.

As we said when we were here last year, the attack on this problem must proceed on many fronts, with the Board's actively exercising its assigned regulatory and promotional roles. We have been working closely

with the airlines on such problems as no-shows, pooling of facilities and reduction of unnecessary and costly cabin frills to effect a reduction of operating costs. We also have underway a broad reassessment of the overall pattern of air carrier operation in this country. No one would dispute that the size of the jets, their operational characteristics, and the burdensome cost of their acquisition, may entail a revolution in the accepted concept of adequate and efficient service. In this connection I might note the very recent Supreme Court decision in the Pan American-Grace anti-trust case which, among other things, indicates that the Board's power to affect route realignments may be greater than heretofore thought. The Board is also pushing a program designed to streamline the provision of air service through the use of centrally located regional airports. This requires a delicate evaluation of the relative public interest in the availability of airline services at individual communities as compared with the establishment of a service framework which will permit the economical use of larger aircraft and more frequent services. On the revenue side of the ledger, we are continuing to encourage experimentation with promotional passenger fares to increase traffic and we have greatly expanded our efforts in both the costing and pricing areas of air freight movements looking toward the long awaited breakthrough that could mean so much to both the shippers and the airlines.

I should now like to turn to our appropriation request for Salaries and Expenses. We are requesting $10,800,000, which is an increase of $1,300,000 over last year. $456,000 of this increase is attributable to the 1962 Pay Act

Excess Seat Problem Will Grow This Year

Jet deliveries to expand trunks' surplus capacity, which depresses load factors, utilization rates.

By L. L. Doty

Washington—Excess capacity problems, which plagued the domestic trunkline industry during 1960 and held its annual profit to the lowest level since 1949, are now expected to continue through 1961.

As first predicted by AVIATION WEEK (Dec. 28, 1959, p. 28), a slight increase in revenue passenger miles during 1960 was rapidly outstripped by a persistent rise in available seat miles, depressing the industry's average load factor and its aircraft utilization rates. Scheduled delivery of more than 100 additional turbojet transports during 1961 will magnify the surplus seat problem and threaten continuation of the steady drop in load factors that began eight months ago.

Revenue passenger miles during 1960 fell off sharply month-by-month to culminate in a modest 4% increase for the year, compared with a 15% jump in 1959. The dwindling traffic figure was most pronounced in November and December when revenue passenger miles showed 3% and 4% decreases respectively.

Available seat miles rose steadily during the year, although the upward trend was arrested in November and December when the monthly volume was held at an almost constant level. Nevertheless, in each of the two months, the industry load factor took its worst drop of the year.

Unrealized Potential

The current situation suggests that the domestic trunkline industry is not achieving the full utilization potential of its fleets. In addition to retiring a number of piston-engine aircraft into inactive status, the industry had held utilization of its turbojet fleet to approximately 8 hr., a figure which includes such activities as flight training and charter operations. Highest rate has been attained by Continental Air Lines, which has averaged a 10.58-hr. utilization since it began service with its Boeing 707 fleet.

During 1962, when only a small number of jets are scheduled for delivery, the industry will have a short breathing spell during which the gap between traffic growth and capacity increases can be narrowed.

In 1963, however, the problem will loom again when production of medium-range jets will create a new rash of aircraft deliveries for scheduled service cession of the past six months and promote a resumption of normal traffic growth. As previously pointed out (AW Feb. 28, p. 38), airline business is extremely sensitive to the fluctuations of the Gross National Product, which, after a 15% increase in the first quarter of 1960, fell 1.5% in the third quarter and showed no change in the final quarter of the year.

In view of the GNP trend last year, coupled with a decline in personal income in the last half of 1960 and a decided drop in corporate earnings beginning early in the year, airline traffic made a remarkably strong showing during 1960. Contrasted with 1960's 4% gain, revenue passenger miles suffered a 0.3% decline during the recession year of 1958.

Industry's Future

This record suggests that should the general economy resurge early this year, airline traffic growth may be quickly restored to prevent a further depression of load factors. Thus, the immediate future of the trunkline industry depends on an early general economic recovery, plus continued attempts to generate new traffic and a reshaping of the present pattern of airline routes—a move that began last year with the proposed merger of Capital Airlines into United Air Lines.

First class revenue passenger miles were hit hardest by 1960's traffic recession. Volume for the year declined 6%, and in only two months of the year did first class revenue passenger miles register an increase. The drop in December was 19%, in November it was 16%.

As a result, the industry was forced seat miles for the industry had declined 0.7%. This reduction began in June when, for the first time, the volume of coach seats sold accounted for more than 50% of all seats sold. In October, first class traffic returned to its dominant position by a small margin.

First class load factors have declined consistently for the last 15 months. In December, the industry first class load factor dropped 4.4 points to a low 51%, compared with a 1959 average of 60%. First class load factor for 1960 was only 56%, compared with 59% for all types of traffic.

Coach Growth

On the other hand, coach traffic continued to climb spectacularly, falling by only a fraction to match first class traffic in revenue passenger miles for the year. Coach traffic showed a 17% gain for the year with a 63% load factor, despite a 19% increase in available seat miles. However, one disturbing factor appears in the coach record: load factors, while relatively high, registered an increase in only four of the last 14 months.

Generally, it is difficult to pinpoint the traffic depression to any particular market or geographical area with one exception: carriers serving the Florida market from East Coast business centers have consistently failed to generate sufficient traffic to maintain high load factors. Traffic activities of other trunklines vary widely.

An analysis of airline business during December, for example, shows that only three of the 12 trunklines were able to report an improvement in revenue passenger miles over December, 1959. United led the industry with a 30% increase in total revenue passenger miles. The airline reported a 60% increase in coach traffic and a 3% increase in first class traffic.

Braniff ended the month with a 4% traffic gain. The carrier's emphasis on coach traffic since its acquisition of turbojet equipment is illustrated by a 107% increase in coach traffic coupled with a 21% decline in first class traffic. In contrast, Delta reported a 16% rise in first class business compared with a small 4% coach increase for a total 10% gain in all categories of traffic.

Because of its current engineers' strike, Northwest Airlines' business fell off 23% and available seat miles were sliced by 20%.

25% decrease in first class traffic and a 2% increase in coach traffic. However, airline ended the year with a 12% increase in total revenue passenger miles over 1959. American says the 6.4-billion revenue passenger miles flown in 1960 is world record.

Effect of turbojet equipment on seat productivity is illustrated by American Airlines' experience during two full years of Boeing 707 operations. During that time the carrier's 707 fleet carried 4.5-million passengers a total of 4.8-billion passenger miles. By contrast, it took close to four years to accumulate the same traffic totals with the airline's fleet of 58 Douglas DC-7 transports—almost twice the size of the 707 fleet.

Big four carriers—American, Eastern, TWA and United—were generally more successful during December than the eight smaller trunk lines. Revenue passenger miles of the larger carriers declined only 2%, available seat miles are about 4% and load factor fell from 66% in December, 1959 to 57% last month.

The smaller airlines reported an 8% drop in revenue passenger miles, a drop of 6% in available seat miles and a decline in load factor from 54% to 52%. The eight airlines showed a 2% increase in coach traffic, compared with a 26% increase in coach traffic registered by the Big Four.

Big question mark in the immediate future is the value of the Florida market to the seven trunklines which now serve the area with turbojet equipment. Eastern, National and Northeast, closely competing for traffic on East Coast routes into Florida, continued to report load factors substantially below the industry average. Although Eastern experienced a 11% decrease in revenue passenger miles in December, available seat miles were sliced 14% to raise the monthly load factor from 49% to 50.3%. National's load factor dropped two points to 50.9%, since a 12% reduction in available seat miles was offset by a 16% drop in revenue passenger miles. First class traffic of both carriers declined sharply, while coach traffic remained fairly stable.

Northeast Airlines, with a 47% load factor—down one point from December, 1959—reported a 5% decrease in revenue passenger miles. The carrier's first class traffic jumped 20%, but coach traffic was down a severe 20.6%.

Although Continental's load factor fell from 53% in December, 1959 to 47% last year, the carrier's traffic dropped only 5%. Coach traffic was up 4%, but first class dipped nearly 16%.

TWA, which has had a 9.5-hr. daily utilization record with its Boeing 707-131 turbojet fleet and is now operating 34% of its schedules with jets, expe-

London—Failure of Rolls-Royce Tyne turbine disks, which was due to an obscure metallurgical problem, has forced Rolls-Royce to change the manufacturing process for the disk and to scrap 3,500 disks made prior to the change (AW June 6, p. 43).

The disks involved included not only the last two high pressure compressor stages but all the turbine disks as well. The possibility of reworking the forgings was considered but was ruled out.

In the new process, both the disk profile and the material, ferritic stainless steel, REX 535, has been retained but the ductility has been raised nearly 15% by improving the steel quality and ensuring more hot working and better grain flow during reduction of the blank. Heat treatment techniques also have been modified.

The purity of the metal has been improved by switching to vacuum melting of the stock material, and the better grain flow has been achieved by considerably increasing the length-to-diameter ratio of the billet so that the reduction of the billet during forging involves more hot working. The forging program itself has been revised.

The failure proved to be one of the most perplexing problems that Rolls has encountered, finally reducing to a statistical problem involving scatter factors of the physical properties of the material. Although the decision was finally taken to scrap all the original disks, the statistical analysis predicted that less than one in 200 of the disks would be affected.

Major Tyne setback followed bursting of a disk on a test bed last May after 2,000 hr. of engine testing, including a comprehensive program of tests at overload conditions. It coincided with the final stages of the redesigning to bring the Tyne-engined Vickers Vanguard and came within a few days of the aircraft's certification (AW Dec. 5, p. 41).

An inspection of every engine that had flown revealed one other disk with a crack radiating from the bore—with virtually the same origin as the burst disk—and all Vanguards were grounded.

Stringent investigations of the turbine disks followed, and "short life" engines were made available so that flight test programs with the aircraft could proceed.

Because the failure was difficult to reproduce, the investigations were protracted. Rolls' management decided to consult world experts and consultants from engine manufacturers, steel alloy makers and research centers before confirming the statistical nature of the problem.

Compressor and turbine disks are now in full production, using the new techniques and are being fitted to all new engines and as replacements for those engines running with short life disks. Engines with the new disks and retrofitted up to the latest standard are now being delivered for installation in Vanguard and Canadair CL-44 aircraft.

7% increase in coach traffic during the month, but a 20% dip in first-class business gave the airline a 14% loss in all types of traffic handled.

There is a tendency to consider last month's midair collision over New York (AW Dec. 26, p. 26) as the chief reason behind December's poor record. Although it has been fully demonstrated that highly-publicized accidents have a decided but short-term affect on airline business, the December record appears to most observers to be a normal sequence to the dismal showing in November when traffic fell 3% and load factors dropped 2.7%.

Net result of the current situation will be continued stress on sales, marketing techniques and new means of generating traffic, all of which will intensify competition that has already reached a heated level. Services to passengers, source of one of the most rapidly growing cost factors in 1960, will be accelerated this year and will draw heavily on the resources of individual car-

from growing competition together with equipment transitional costs which are not leveling off as anticipated when jet services were first launched, will place new fiscal demands on an industry which generally has been denied the benefits of withheld profits as a means of bolstering working capital.

As a result, 1961 will [illegible] prove to be a crucial year of this transitional phase which began in late 1958 when the first traffic gain of the year for margins started to appear. Few carriers can run the risk of low load factors for an extended period of time, and most officials of major carriers have felt for some time that mergers are an inevitable solution to the financial problems some carriers are expected to meet during the next two years.

Despite the rash of merger rumors which persist throughout the industry, there are no firm developments on mergers between any of the trunklines at this time other than the proposed consolidations of United with Capital and

REPORT TO DIRECTORS

At its last meeting, the Board of Directors requested that I prepare for its next meeting a report relative to the company's finances, the reasons for its present critical economic problems, steps being taken to solve these problems, and recommendations to the Board as to further steps which might be taken.

BACKGROUND OF THE PROBLEM

In my opinion, the present crises derives directly from (1) a general depression in the airline industry, (2) the weakness of TWA's financial and market positions relative to its two major transcontinental competitors and its principal transatlantic competitors, and (3) certain events of the recent past which have particularly affected TWA.

Dealing first with the domestic side of the picture, existence of an industry-wide depression requires no argument. Exhibit #1, from the New York Times of Sunday, September 24, 1961, shows that trunk airline profits, which aggregated $63,000,000 in 1955, all but disappeared in 1960. 1961 may see their disappearance altogether barring some startling turnabout in the last quarter. For the first seven months the industry, excluding TWA, suffered a net loss of $4,000,000. The slow months of the fall should aggravate this trend. The situation has become so grave that last month the Chairman of the Civil Aeronautics Board called all of the airline presidents to Washington to seek solutions to the problem.

In circumstances such as these, the weaker companies always are hurt the worst. Thus, TWA suffers more than American Airlines or United.

Exhibits 2 through 8, comparing TWA's domestic performance with that of American and United (Capital excluded) for the years 1951 through August 1961, reveal several significant facts:

(1) Although TWA's rate of growth has roughly matched that of American and United (Exh. 2), its revenues per ton mile have been much less than American's (Exh. 3A) and until recently its expenses considerably higher than United's (Exh. 4B). Its business has been less profitable than that of either of them (Exh. 5A, 5B).

(2) TWA's profit on domestic business has deteriorated since 1955 both absolutely and relative to that of American and (United (Exh. 6). A notable exception was in 1959, when TWA did an outstanding job of utilizing its early jets in the transcontinental market and thereby achieved unusual profitability.

HOLLIDAY

earlier than that of American and contrary to the trend of that of United (Exh. 2). Since the first of this year, TWA's domestic business has fallen less in relation to 1960 than has American's. United's has shown a diminishing gain over the prior year.

(4) TWA's percent of total trunk and big three revenue passenger miles slipped from its 1953 peak until 1959 when it reached a new peak. Thereafter it deteriorated sharply through the early months of 1961 (Exh. 7).

(5) TWA's load factors, which have been in a downward trend for most of the last 10 years, have slipped very sharply both absolutely and relative to those of the other two since 1959 (Exh. 8).

TWA's domestic pre tax profit of $25.3 million in 1959 became a loss of $1.2 million in 1960, a year in which its competitors still made substantial profits. Uncertainties regarding receipt of its 880 fleet increased expenses and interfered with orderly planning. Thus, TWA entered 1961 with a deteriorating domestic position and insufficient financial reserves to enable it without serious problems to weather an industry-wide depression while going through a major equipment program. A strike in February, the lack of a competitive terminal at Idlewild and the absence of a chief executive were complicating factors.

Some understanding of the causes of TWA's poor profit record is necessary to an intelligent consideration of possible remedies. However, a thorough discussion of such causes would unduly extend this report. Therefore, I shall limit myself to highlighting a few of such causes which bear on the course which should be taken now.

The Board is fully aware of TWA's history of absentee management which, among other things, reflected itself in a turnover of chief executives unique in the industry, thus depriving the company of consistent leadership or, at times, of any presidential leadership at all. This combined with inadequate financing and repeated periods of financial stringency have delayed and impeded orderly planning and have prevented the taking of needed action. Deteriorated interdepartmental relationships have been another result of the lack of leadership. Most importantly, the inability of the TWA management to plan and execute adequate long range equipment programs has prejudiced the company's success.

For many years, TWA's flying operations were more costly than those of its competitors (Exh. 9). One important reason was that TWA's Constellations were slower and more costly to operate than competitor's DC-6s and DC-7s. Attempts to operate at competitive speeds resulted in

substantially. With the advent of jets the costs of the Constellation have become increasingly less significant and TWA's costs have become more competitive. Despite the economic advantages of American's fan powered jets, TWA no longer operates at a substantial competitive disadvantage.

In passing, it should be noted that normal depreciation charges on the 1049Gs and 1649s (which have little earning power for TWA) exceed $21,000,000 for 1961. Special yearend writeoffs on this equipment probably will increase the figure to $36,000,000.

Until 1958, TWA had the highest rate of expenditure for advertising in the domestic industry (Exh. 10). Relative to its competitors, TWA depended for its business more on advertising than on performance. Consequently, TWA was more highly regarded by the neophyte than by the experienced traveller.

A sharp change took place in 1957 and 1958. Advertising expenditures which had been at the highest rate in the industry were cut sharply. Concurrently, vigorous efforts were made to improve performance. Outstanding improvements in performance have been made but it is doubtful that public acceptance equal to that of American or United has yet been achieved. In an airline study made early this year, the Chicago Tribune noted that "The ideal airline is visualized in terms of dependability, safety, speed, efficiency and service." It found that TWA was regarded as "a large and powerful airline that emphasized speed, style and glamour over personal attention and efficiency".

The consequence of past policy has been to weight TWA's clientel more in the direction of the tourist than of the business man, despite a route structure that passes through the commercial and industrial heartland of the country. Thus, in September, TWA's coach traffic was 71.7% of its total, as against 60.7% for American and 62.9% for United. While much business traffic now travels in coach accomodations, the percentages are significant. TWA's dependence on the tourist has meant both a lower revenue yield per passenger and a greater seasonality of traffic. TWA's load factors normally improve relative to American's and United's in vacation periods and drop in the fall.

Greater success in obtaining new routes than in acquiring the equipment needed to exploit them has also created problems for TWA. Conspicuous among major cities to which rights have been obtained without adequate means to serve them are Cleveland, Denver and Detroit. Weak efforts to exploit these markets have assured that TWA would not be the first choice of travellers. They have also made it certain that TWA's activities in these markets would not be highly profitable.

Against such a background, changes in advertising policy may

have unusual impact. It is believed that the decision in 1960 to cut advertising expenditures to the bone and eliminate magazine advertising entirely has had an appreciable effect on sagging load factors in 1961.

Delays and indecision with respect to the availability of flight equipment have been most damaging to the company, particularly in this last year. TWA's outstanding job of putting jets into domestic service in 1959 (at considerable sacrifice to its international business) bid fair greatly to improve its industry stature. Within a year, however, its competitors had introduced a greater number of jets and TWA's 880 program had bogged down. As noted by the CAB in its order of December 29, 1960, this adversely affected TWA's competitive position. By the time the 880s were received, a major opportunity for TWA to move to the front of the competitive race had been lost. From a high of 17.4% in the third quarter of 1959, TWA's share of trunk line traffic fell to 13.2% in the first quarter of 1961. In the meantime, TWA had incurred heavy internal costs and lost substantial revenues. This contributes heavily to its present financial problems.

THE INTERNATIONAL SITUATION

Turning briefly to the international front, much that has been said above is applicable. As shown by Exhibit 11, Pan American's business has both grown more vigorously and been more profitable than TWA's. Until 1958, TWA had relatively higher costs but since that time TWA's unit costs have generally been lower than Pan Am's (Exhibit 12). TWA labors under the handicap that between the United States and London both Pan Am and BOAC schedule higher frequencies while Pan Am and Air France do the same between the United States and Paris.

Exhibit 13 (as well as Exh. 11) reflects the damage suffered by TWA through the operation of Super Gs and 1649s rather than DC-6s and DC-7s and by the diversion to Pan Am in 1959 of six Boeings originally destined for TWA. Prior to 1957, TWA generally showed higher load factors than Pan Am. From 1957 on, however, this was not the case and TWA experienced an unfavorable relationship in 1959 and early 1960. The introduction of jet service by TWA overcame this in 1960. In recent months, however, TWA's load factors have been below those of Pan Am reflecting, among other things, our disadvantageous terminal situation at Idlewild and the lack of magazine advertising in 1960.

Within the last few months the economic position of all transatlantic carriers has suffered greatly from sagging load factors resulting from excessive capacity. TWA has not escaped these competitive pressures. Nevertheless, in recent months TWA's international business has earned

a steady but modest profit. At the moment this business is surprisingly strong.

MAJOR OBJECTIVES

From the foregoing, it seems apparent that to obtain future profitability TWA must achieve greater public acceptance and higher load factors. While cost reduction must be a constant challenge, there is little reason to believe that we can so improve our costs vis-a-vis other carriers that we can operate indefinitely with substantially inferior load factors. It is significant that system revenues for the twelve months ended August 31, 1961, were $362.2 million, an increase of 50.7% over those of the year 1956. During the same period the average number of employees had increased by only 8.9%. Thus, a general reduction in headcount does not appear to present a likely solution.

Perhaps as an oversimplification our major objectives for the next few years must be to:

(1) Complete a reequipment program to give us flight equipment comparable to that of our competitors.

(2) Improve our public acceptance through better schedules, better terminals and improved customer service.

(3) Discontinue activities which our resources do not permit us to carry on effectively. Local service type operations must come under particular scrutiny.

(4) Maintain a constant effort to effect savings in operating and overhead costs without impairing our ability to maintain the quality of our essential services.

(5) Improve and strengthen our internal organization with specific reference to better interdepartmental relationships, more consistent planning and more effective marketing.

Short term, our specific problem is one of maintaining solvency while making as much progress as possible toward completion of our reequipment program. Exhibit 14 shows the relative equipment disadvantage at which TWA will be, even if we succeed in completing our Caravelle program. We have an obvious obstacle to overcome.

A reequipment program must assume, of course, that the aircraft can be profitably utilized. In times such as the present, such an assumption must be challenged, and, so far as possible, proved.

The present is not the first depression which the industry has experienced. Others occurred in 1948-49 and, to a limited degree, in 1958. On each occasion the industry eventually pulled out and went on to new records. Looking at the present one, I do not think that we should assume either that the industry will not pull out or that it will pull out with quite the vigor of the past. Quite possibly, future growth will be slower. Most of the long haul business to be taken from the railroads and buses has already been garnered. The remaining market lies largely among those who can be induced to travel more and drivers of automobiles. Factors of economy and convenience make the latter a particularly difficult market to penetrate. Probably a greater potential exists in the international field where a large volume of steamer traffic still remains to be tapped.

Practically all forecasts predict an annual increase in revenue passenger miles for the next few years of more than the approximately 6% which will be roughly the average for 1958-1961. It would appear conservative, however, to use the 6% figure. This compares with an anticipated net increase in available capacity of approximately 5% a year. Thus one cannot expect sharply improved load factors for the industry as a whole. Notwithstanding this, TWA can fairly look forward to improved load factors, comparable to those of American and United, to the extent that it operates competitive schedules with comparable equipment out of comparable terminals.

TWA's jets are with few exceptions producing profits. The major problem is that they are not producing sufficient profits to overcome the loss being occasioned by piston planes. Our operating loss on our 1049G fleet alone amounted to approximately $11,500,000 for the twelve months ended July 31, 1961. In part, this problem must be solved by elimination of certain uneconomical route services. Solution of the problem will also require, however, more modern ships with which to provide the services which are retained. The Caravelle would break even with smaller loads than the 1049G. At the same time, it could be expected to attract substantially higher loads. On routes of the type in question, Caravelles would break even with about 10% fewer passengers than our 880s and, therefore, are to be preferred.

Attached as Exhibit 15 is a table showing for several alternate equipment programs the available domestic seat miles for the years 1962, 1963 and 1964. Also shown are anticipated load factors and the TWA share of total trunk passenger miles required to achieve such load factors. On the chance that the Caravelle program might abort, particular study is being given to alternatives B and C, the latter of which would involve the purchasing of 18 131Bs and 10 727s as opposed to the 20 131Bs and six 331Bs now on order. Alternative C would anticipate a more modest share of the

trunk market than any of the others, a share which approximates that actually realized in the years 1955-1958 and 1960. It suffers, however, in that it would leave us particularly short of jets vis-a-vis our competitors in the next few years.

The question of the extent to which additional jets would produce additional profits is undergoing the most careful scrutiny. It might be wise to postpone the six long-range Boeings if this could be done without severe penalties and if it would enable us to obtain short-range jets. A definite recommendation on this question will be made at the meeting on October 23. Suffice it at this point to note that while the profitability of any jet program must rest in the realm of opinion, one can be almost positive that without substantial additional jets TWA must undergo a vast contraction which would raise the most serious doubts as to the possibility of future profitable operation.

ECONOMY MEASURES

Whether or not we are able to proceed with a Caravelle program, the biggest current question is that of financing our activities for the next twelve months.

At the last meeting of the Board, the financial forecast indicated a need for $1.9 million of additional cash at the year end in order to have the $15 million of cash required for comfortable operation. Barring some further unexpected deterioration in the general level of business, we expect that this amount will be more than made up through operating economies of about $2,000,000 and curtailment in planned capital expenditures of approximately $500,000. Should we be spared another crash before the year is out, an insurance reversal of about $4 million should be available besides, but obviously this cannot be counted on. If the Caravelle program aborts, another $1,000,000 will be available.

All of the trunklines but one have reached an agreement for downgrading the level of service in the coach section. If final agreement is reached and if this is approved by the CAB, which is highly likely, this should result in additional savings in the next half year of nearly $2,000,000.

It is our expectation that at year end, even barring any improvement in business conditions, we will show cash substantially in excess of $15,000,000. The serious problem will occur in the first half of 1962.

Steps are being taken to eliminate various local service type operations. We hope to get rid of Albany, Binghamton, Scranton, Williamsport, Reading, Allentown, Fort Wayne, South Bend, Terre Haute and Fresno. Additionally, vigorous attempts are being made at less active stations to handle ground services through or in cooperation with other airlines. It is hoped that from all of these activities a saving of $2,000,000 per

year or $500,000 per quarter can be realized. It is doubtful that elimination of these services can be accomplished in time to be of material assistance, however. Steps to eliminate certain unprofitable foreign services already have been taken.

Another source of first quarter savings might be curtailed advertising. However, our need to add volume suggests that we should proceed cautiously here. It would seem prudent to reduce our expenditures somewhat in the next few months so as to be in a position to mount a major campaign to build up to the opening of our new Idlewild terminal, the receipt of our new Boeing jets and the normal spring increase in business.

Efforts are being made to cut down crew costs through use of doppler on transatlantic flights and through achievement of a three man cockpit. If successful, these efforts should prove to be of real financial significance over the long run. From a short term standpoint, however, severance pay provisions probably will prevent realization of any significant economies.

At the present time, Mr. Hall is engaged in a crash program to eliminate expense and improve operating results over the next six months. Among other things, this involves a complete review of schedules and of the level and type of service being offered in the various markets which we serve. At this writing, this effort has not been brought to a point that it is possible to include in this discussion a definitive forecast for the first quarter of 1962. Hopefully, this will be embodied in Mr. Leslie's financial report which will be presented to the October 23 meeting. Suffice it to say here that it is expected that while the forecast will represent a definite improvement over that presented to the September meeting of the Board, it will still leave us with a financial problem during the early months of 1962.

REVENUE MEASURES

Considerable thought has been given to means of effecting a rapid increase in revenues. One such possibility is that of instituting a new and cheaper high density jet coach type of travel in order to stimulate new business. This general approach has been tried by TWA in the past; at times with considerable success and on one occasion with little to show as a result. Undoubtedly a high density low fare jet coach to the Pacific Coast would attract considerable business. If successful, however, our competitors undoubtedly would follow suit and the end result probably would be a general debasement of the fare level without a sufficient increase in volume to cure the basic problem.

The best estimates seem to indicate that two-thirds of those who patronize the airlines are regular travellers who will travel via the airlines for business or other reasons without particular regard to fares. Market

elasticity must be found among the casual travellers making up the remaining third who are responsive to fare levels. A general drop of 5% in coach fare levels would require a 16% increase in these casual travellers in order to break even. Particularly at this time of year, such an increase would appear too unlikely to be a sound solution to our problem.

Thought has also been given to special discounts or promotional fares. The general industry feeling, however, is that promotional fares have done more harm than good. The current youth fare is subject to widespread abuse and even its originators now wish to get rid of it. To date, our own promotional 13-30 day fare appears to have been a limited success but its effectiveness may be diminishing with time. It is unlikely that any promotional fare in jets which we might conceive would be sufficiently beneficial to warrant interrupting an apparent industry trend to eliminate discounts in order to avoid a general debasement of the coach fare level. We believe that in the near future low cost fare activities should be limited to our piston planes.

A coach fare increase should seem preferable to a fare cut and it is quite possible that the CAB will sanction a jet coach fare increase in the near future. Just what this will yield cannot be stated with certainty at this point. However, one might fairly assume that taking into account some upgrading of traffic to first class which will result and after allowing for some possible diminution of traffic, an increase in revenues of about 5% could be expected. This would mean a net increase in income of approximately $500,000 per month.

MERGER POSSIBILITIES

Before concluding, note should be taken of merger possibilities and of the possible sale of our international business.

The management has held informal discussions with Northeast, Eastern and Pan American, the largest single stockholder in National. Northeast seems to be out of the question because its financial problems are beyond our capacity to deal with. Eastern may be interested in more serious discussions but there are obvious problems which would take time to work out. Such a merger very likely would have to be accompanied by an equity offering in order to provide needed cash because Eastern also has a difficult cash problem.

Pan American is quite worried about National which is having great difficulty in financing jets required to serve its new southern route. As National's major stockholder, it is seeking a merger for National which would improve its chances of success. From a route standpoint, this might be of interest to TWA, but as yet we have seen no evidence of interest on the part of National. Also, there would be a serious cash problem and

more equity would be required. The diversity of interests in this situation will prevent any quick consummation of merger plans, even if the long-run possibility exists.

We should, I feel, be alert to any serious merger proposals which give promise of strengthening our business. At the same time, we should recognize that any merger will take time and will be fraught with complications. Our immediate problems will not be solved in this way.

FUTURE OF INTERNATIONAL BUSINESS

So far as our foreign business is concerned, I feel that our new terminal and other factors may put us in a position to carry this on profitably for some years to come, despite increasing foreign competition. For the last few months, the international business has been carrying the domestic and at the moment is surprisingly strong. There is perhaps an even chance that our government will go to an area concept in Europe, the result of which would be to lessen the points of competition with Pan American and maximize the number of points at which we would hold a monopoly among U. S. carriers. Some program of pooling or otherwise rationalizing our service with that of Pan American appears to be a real likelihood. Should this happen, it would increase greatly the profitability of our overseas services. At the moment, it would not seem the part of wisdom to surrender any of our routes.

The question of selling our overseas routes to Pan American has been explored very cautiously. Pan American seems to have a reasonable amount of cash with which to pay at least part of the purchase price. However, there is the most serious question as to whether the CAB would approve such a sale and as to whether TWA should surrender its unique position of serving both the major cities of the United States and the major gateways of Europe. To date, this potential has not been capitalized on fully, but with the new terminal it is hoped that this can be achieved. Contacts will be maintained with Pan Am to facilitate a quick discussion of such a sale, should circumstances warrant it.

RECOMMENDED PROGRAM

It seems clear to your management that there is no spectacular feat which will reverse overnight a trend as deep-seated as that which has been affecting TWA. We feel that the problem will be solved by improved planning and by consistent and intelligent application to a variety of details. It is our recommendation that we continue on this course even though it does not promise spectacular results from a short-term standpoint.

We are optimistic that the business of TWA will experience a very substantial lift next spring. Industry forecasts indicate that business

improved over levels prevailing a year before. TWA's new Idlewild terminal and its new fan jet fleet should give it tools with which substantially to increase its market penetration. We presently are laying our plans to capitalize on this to a maximum degree.

This leaves undisposed of the question of how we manage through the lean first half of 1962. Even the substantial improvements in our operating performance over the next six months, we may come to the end of March $10 to $12 million short of our desired $15 million of cash. Conceivably, the required funds could come from (a) bank loans, (b) a deferment of payments to Boeing, or (c) an equity offering. Dealing with the latter possibility first, it seems likely that we should seek additional equity at the earliest opportunity. At the moment, so many uncertainties surround the situation that it is doubtful that an equity offering could be made under the most favorable circumstances. Also, there is doubt as to how successful such an attempt would be unless made for some positive purpose such as the acquisition of new planes. We must, however, give the most serious thought to taking such a step.

Boeing has not yet been asked for an extension of terms. Nevertheless, this should be considered a real possibility. It will depend somewhat on what our total equipment program turns out to be. So far as bank loans are concerned, we feel that a real possiblity exists here, just as soon as we are in a position to forecast our future with sufficient confidence to talk in definitive terms as to what sort of financial help will be needed. The banks undoubtedly will wish to see some evidence that we are making progress in the solution of our various problems, but we hope to be able to satisfy them in this regard in the very near future.

By way of conclusion, what TWA needs more than anything else is a period of time free of crises, during which it can engage in the orderly planning and development which, there is every reason to believe, would make it the competitive equal of American and United. Consistent application to the fundamentals of the business will be far more significant in the long run than any spectacular step which we are likely to conceive suddenly to revolutionize the situation. It is to this end that we should put our efforts.

Apologies must be made for the length of this report. It is felt, however, that any less would involve a failure adequately to discuss significant facets of TWA's problem.

Order No. E-17[illegible]

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 28th day of December, 1961

In the matter of passenger fa[illegible]s :
proposed by :
: Docket 13313
UNITED AIR LINES, INC. :

ORDER OF INVESTIGATION AND SUSPENSION

On November 1, 1961, United Air Lines, Inc. (United), filed a tariff effective January 1, 1962, proposing to increase its first-class jet fares by $1.00 and its first-class propeller fares by approximately 6 percent plus $1.00; to increase its day coach fares (jet and piston) by 5 percent plus $1.00; and to cancel its night coach fares. United states that these fare changes would increase its passenger revenues by 6.5 percent.

Six other carriers--American, Eastern, Braniff, Delta, Northeast, and TWA--have set forth their proposals for fare increases in letters to the Board and have stated their intention to file new tariffs in the future. The proposals embrace a fairly wide range of fare changes, at least in detail. These carriers appear unanimous in their proposals to decrease the spread between first-class and coach fares, generally (but not in every instance) by increasing coach fares approximately 5 percent, or to a range of 83 to 85 percent of first-class fares. Generally, the carriers propose little or no increases in first-class fares. American, however, would reduce long-haul (over 1,200 miles) first-class fares by 5 percent and increase the corresponding coach fares by 5 percent. Various carriers would cancel certain discounts or

promotional fares.[1/] In support of their fare proposals, the carriers state that for the past few years the rate of return on invested capital has been inadequate and below the return found appropriate by the Board in the General Passenger Fare Investigation. The carriers point out that in 1960 the domestic trunklines earned only 3.25 percent on their investment and that for the first nine months of 1961 there is evidence of further decline in earnings. The carriers assert that if the present low level of earnings is continued, the industry's financial structure will be threatened; and that there must be some fare increase to check and possibly reverse this unfavorable trend in earnings.

1/ American, Eastern, Northwest, and TWA propose increases in day coach fares of approximately 5 percent; Eastern and Northeast, however, would implement an increase of approximately 5 percent by raising these day coach fares to 83 1/3 percent of first-class fares; Braniff and Delta would increase such fares to 85 percent of propeller first-class fares, rounded to the next higher even dollar and then add a jet surcharge. In addition to the 5 percent fare increase, TWA would add $1.00 to each ticket sold. With regard to first-class fares, American would reduce such fares by 5 percent for trips of 1,200 miles or more but would leave the fares for distances under 1,200 miles unchanged, although it would not oppose a moderate increase in such fares if proposed by other carriers. Braniff and Delta would increase all fares to the next higher even dollar, while Eastern and Northeast would retain present jet fares and increase first-class propeller fares 5 percent. TWA would increase each passenger fare in both jet and propeller services by $1.00 and would increase by 5 percent all piston fares for flights of less than 1,200 miles.

American, Braniff, Eastern, and TWA would increase night coach fares approximately 5 percent; TWA would also apply an increase of $1.00 for each passenger ticket sold and Eastern would add jet surcharges where not presently applied.

Some carriers propose publishing a rule that no food or alcoholic beverages will be served to coach passengers. The general view is that the present promotional fares should be limited or reduced in scope, although the carriers differ in their approaches. Braniff, Continental, Eastern, Northeast, TWA, and Western would discontinue family fares, while United and Northwest would retain these fares. Eastern, Braniff, and Western oppose the continuation of the present 10 percent discount for official military traffic within the United States, which is the subject of a carrier agreement which expires December 31, 1961.

The principal problem of the industry, according to the carriers, is the continuing diversion of passenger traffic from first class to coach; that coach service, particularly on jets, has been such a tremendous bargain that first-class passengers have been diverted to this service in large numbers, thus reducing passenger mile yields and overall profits.2/

The 11 domestic trunklines reported a composite return on investment of 2.1 percent3/ for the 12-month period ended September 30, 1961. That level of earnings is inadequate by any standard. Moreover, those results mark the low point in a declining trend of earnings experienced during the last six years, notwithstanding a series of fare adjustments starting in February of 1958 which to date have increased the average first class fare by 23 percent and the average coach fare by 27 percent. The overall fare level has increased by almost 25 percent in this period.

This same six-year period has seen a substantial reduction in the year-to-year rate of passenger traffic growth from growth rates enjoyed during the first half of the 1950's. Capacity, however, during this period was increased at a faster rate than traffic with the result that industry passenger load factors have declined nearly 7 points from the favorable levels maintained during 1954 and 1955. Furthermore, aircraft now on order and scheduled for delivery during 1962 and 1963 represent very substantial potential capacity increases, even assuming that passenger traffic volume increases at a moderate pace.

The industry has also experienced sizeable increases in operating costs per seat-mile flown but those increases have been almost entirely matched by the aggregate impact of the fare increases described above. Stated differently the trunkline industry's composite break-even load factor is currently very close to the level experienced in the favorable 1954-5 period and the disparity between current earnings and those of the earlier period appears to be attributable largely to the sharp decline in passenger load factor.

With this background in mind, the Board is convinced that while limited fare changes may improve revenues moderately, no fare program alone can restore earnings to reasonable levels. On the contrary, the industry's economic problems must be attacked on a broad front of which load factor improvement is the cornerstone. We will, therefore, institute an investigation of United's proposed fare changes, except their proposed cancellation of night coach fares

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2/ American states that in the first nine months of 1960 first-class traffic was 51 percent of total passenger traffic, and that in the same period of 1961 first-class traffic declined to 43 percent of the total traffic, while coach traffic increased to 57 percent.

3/ Before interest and after income taxes. In the same period, the carriers reported a net loss of $19,390,000 after interest and taxes.

The carriers attribute much of their current financial distress to the shift of passengers from first-class to coach services and the attendant loss of revenues without commensurate cost savings. However, we are not convinced at this time that the present fare differential of approximately 25 percent is greater than the difference between the seat-mile costs of the respective services or that the coach services are inherently less profitable than first class. Moreover, the effectuation of a general revenue increase primarily by raising coach fares might tend to inhibit the growth of traffic and magnify the difficulty in improving load factors.

As an interim revenue measure, however, the Board would permit the domestic industry to effect a general fare increase of not more than three percent. Any such tariffs would have to be filed on at least 30 days' notice and provide for expiration not more than six months after effectiveness. During that period a series of steps will be undertaken in a program to resolve the underlying economic problems. In addition the Board urges the carriers to undertake the closest scrutiny of the various remaining special fares or fare discounts and to discontinue those of doubtful economic validity. On the basis of available information, the maintenance of the family fare between points where coach service is offered appears of doubtful economic value, since it results in a first-class family fare ticket being offered at a price significantly below the corresponding coach fare. As measures to enhance the relative attractiveness of first-class service without undue burden on the coach passenger or the required coach fares, the Board would not object to an increase in the first-class free baggage allowance to 66 pounds (as suggested by at least one carrier) and the establishment of a rule permitting stopovers at reasonable charge in first-class service.

In other than passenger fare areas, several programs are already underway and others will be promptly commenced. The Board has authorized inter-carrier discussions of matters relating to cabin services, the "no-show" problem,[4/] and the use of joint facilities. The Board believes that cabin services tend to be overemphasized today and there exist opportunities for significant

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4/ The trunkline carriers have reached agreement on a program to deal with the "no-show" problem and have filed that agreement with the Board. We anticipate passing on the agreement in the very near future.

operating economies without eliminating the real necessities. The elimination of service of alcoholic beverages without appropriate charge appears to present one important area for economy measures at a time when first-class fares are clearly inadequate in relation to the cost of service. Similarly, the use of common facilities by two or more carriers appears to be a useful area to explore.

The load factor improvement program will include short and long range steps. For the long range, we anticipate that programs currently being embarked upon will, directly or indirectly, result in improved load factors for the trunkline industry. However, this program, which includes an increased emphasis on consolidated services at regional airports, suspension of service to uneconomic points, substitution of local service for trunkline service where mutually beneficial, and route investigations looking toward reduction in excessive competitive carrier authorizations can be implemented only after formal proceedings.

It is evident that the time required to complete the regulatory procedures necessary to effectuate any action which the Board can take in these areas forecloses these affording any real prospect of immediate relief. The urgency of the need for capacity reduction or other economic operation action aimed at improving the imbalance between traffic and capacity, particularly on the normally profitable high density markets in which load factors are currently abnormally low makes it incumbent upon the carriers to initiate a short range interim program to provide fairly immediate relief. Therefore, each carrier will be requested to submit to the Board by January 15, 1962, its suggestions as to actions it may take to improve its load factor.

Accordingly, pursuant to the Federal Aviation Act of 1958, and particularly sections 204(a) and 1002 thereof,

IT IS ORDERED THAT:

1. An investigation is instituted to determine whether the fares, charges and provisions described in Appendix A hereto are , or will be, unjust or unreasonable, unjustly discriminatory, unduly preferential, unduly prejudicial, or otherwise unlawful, and if found to be unlawful, to determine and prescribe the lawful fares, charges and provisions.

2. Pending hearing and decision by the Board, the fares, charges and provisions described in Appendix A hereto, so far as applicable to interstate air transportation, are suspended and their use deferred to and including March 31, 1962, unless otherwise ordered by the Board and that no changes be made therein during the period of suspension except by order or special permission of the Board.

3. The proceeding ordered herein be assigned for hearing before an examiner of the Board at a time and place hereafter to be designated.

4. Copies of this order shall be filed with the tariff and shall be served upon United Air Lines, Inc., which is hereby made a party to this proceeding.

This order will be published in the Federal Register.

By the Civil Aeronautics Board:

/s/ Harold R. Sanderson

Harold R. Sanderson
Secretary

(SEAL)

Murphy, Vice Chairman, and Minetti, Member, filed the attached joint concurrence and dissent.

MURPHY, VICE CHAIRMAN, AND MINETTI, MEMBER, CONCURRING AND DISSENTING:

We concur in the suspension and investigation of United's proposed fare increase. We also agree that a multifaceted program as outlined in the majority opinion should be implemented by the carriers to improve earnings. We cannot assent, however, to a general 3% fare increase at this time. In our opinion, low trunkline load factors, due to the greatly increased capacity of the new jet aircraft, will not be improved by increasing fares. We believe that further fare increases (on top of the almost 25% increase over the past four years) may discourage the growth of traffic and compound, rather than alleviate, the carriers' financial problems.

There are a number of areas which promise fruitful reduction of unnecessary expenses and costs to which the attention of the industry has been invited and to which it is now addressing itself. This is a task which is vitally affected by the public interest and offers greater promise of producing a worthwhile solution to the financial difficulties of the industry than any further fare increase.

Since the Board agrees that declining passenger load factors are the essence of the industry's present economic problem, it is important to note that an improvement of a single percentage point in the overall load factor (presently only 56.2% for the industry) would produce an additional 30 million dollars in gross revenues. It is interesting,

also, to observe that the almost 25% in fare increases over the past four years has balanced out the rise in cost levels in this period so that the present average revenue yield per revenue passenger-mile bears the same ratio to average seat-mile costs as obtained during the financially favorable climate of 1954-5. Moreover, with many of the non-recurring jet integration costs behind us, costs give every indication of leveling out, and no dramatic changes are reasonably anticipated. These facts would seem to dictate that now is the time to hold the line. Moreover, it is reasonable to assume that an industry trend toward pure transportation service on a more economic basis (a trend which we all encourage) should eventually lead to a reduction in fares and open new and even greater markets for air transportation as we move forward in the jet age.

In short, additional trunkline passengers must be attracted to fill the present empty seats and this is unlikely to occur if fares are raised. The inevitable result of the fare increase authorized by the majority is a contribution by the traveling public of an additional 54 million dollars (on an annual basis) without any real expectation that this will solve the carriers' complex problems. We believe that such a fare increase will hamper the growth of air traffic and load factor improvement and may delay or deter a consistent and aggressive attack upon the root causes responsible for the temporary economic malady which now affects some elements of the industry.

In addition, we wish to register a dissent from any Board encouragement which would move the industry to abolish all of the special fares

or fare discounts without discrimination. We believe that certain traditional promotional fares, such as the family plan and half-fare for children should be retained as constructive merchandising programs which have developed new markets and will continue to encourage growth in air travel. Moreover, the 10% discount now afforded military personnel on first-class flights helps to fill first-class seats.

/s/ ROBERT T. MURPHY

/s/ G. JOSEPH MINETTI

DX 6

DX 260, page 1
(Letter - Tillinghast to CAB, Jan. 29, 1962)

AX-1708

(1)

TRANS WORLD AIRLINES, INC.
380 Madison Avenue
New York 17, N. Y.

RECEIVED
FEB 1 9 51 AM '62
CIVIL AERONAUTICS BOARD

January 29, 1962

The Honorable Alan S. Boyd
Chairman
Civil Aeronautics Board
Washington 25, D. C.

13313

Dear Mr. Boyd:

TWA submits this letter in response to requests contained in Order No. E-17885 and your letter of January 4, 1962. Comments were invited on programs designed to improve load factors, particularly in high-density markets.

In general, TWA agrees that the imbalance between traffic and capacity and the resulting low load factors have been a principal cause of unprofitable trunkline operations. We believe that a most important underlying cause of the imbalance is excessive competition in the high-density markets. TWA's plans include steps to improve load factors and to avoid an aggravation of the excessive capacity in these markets. Nevertheless, everyone must recognize that ultimately its actions are necessarily affected by the actions and reactions of competitors in the same markets.

TWA's scheduling policy will be to increase load factors by improving the quality of the product without significant additions to capacity. In effect, TWA plans basically to hold 1962 levels of service and frequency of schedules to 1961 standards. TWA expects to improve its load factors in June 1962 by approximately 2% over June 1961 pursuing the policy outlined above.

TWA derives 72.3% of its domestic passenger miles from service in the 100 top-ranking domestic markets. Consequently, our plans for the top 100 markets largely coincide with our plans for our entire domestic system.

In the peak month of August 1961, TWA flew an average of 247,000 plane miles per day in domestic passenger service - the same daily mileage presently planned for June 1962. Monthly seat miles available will increase 3.5%, from 709 million in August of 1961 to 734 million in June of 1962. This modest rise is attributable as much to an increase in coach seats at the expense

of first class as it is to the substitution of jet for piston mileage. Although August 1962 plans are not yet as firmly established as June's, they are expected to show only a modest increase in capacity over June.

The most significant statistic, however, relates to the number of frequencies operated in markets of major importance to TWA. These markets are obviously of paramount significance to our major competitors as well. It is in these markets that excess capacity has tended especially to depress load factors. TWA presently plans but a single frequency increase in its top 10 markets during 1962. These 10 markets account for over 40% of our domestic passenger miles.

According to present plans, TWA's peak schedules in its top 15 markets will total 43 in June 1962 compared with 45 1/2 in August 1961. In its top 25 segment, TWA will offer 60 frequencies in June 1962 compared with 62 1/2 in August 1961. August frequencies are also expected to be below August 1961. These markets account for 60% of the company's revenue passenger miles.

Perhaps it would be fair to evaluate relative carrier contribution to excess capacity on the basis of historic market participation. Using this bench mark, it can be seen that TWA's projected levels of service will tend only to regain a share-of-the-market position which has been trending slightly downward in the last two years.

Obviously, the [illegible] of the foregoing program will depend upon whether our competitors will exercise similar restraint or will try to turn our restraint to their advantage. This question arises in each individual market. One cannot fairly expect the competitor to restrict frequencies or capacity unless other competitors do likewise.

A current example highlights this problem. In December, TWA and one of its competitors each reduced a frequency in the New York - Los Angeles market to adjust their services to seasonal requirements. The other competitor, however, promptly added a flight which raised its frequency to 5 nonstop flights each way per day. It then sought to achieve an important competitive advantage by an intensive and widespread advertising and sales promotion campaign stressing the fact that its frequency was equal to the combined services of its competitors. Under such circumstances, those who restricted their capacity can only look forward to the day when they can again match frequencies with the third competitor and thus erase the competitive disadvantage under which they now labor.

Numerous other examples, with most of which the Board must be familiar, could be cited. In the light of these experiences, TWA's scheduling policy as set forth above is and will be subject to the need for response to the practices of its competitors. As the Board knows, frequency of service is a most potent competitive weapon. A carrier's participation in a market is directly related not only to its general prominence or to the tendency of the public to identify it with transportation in that particular market, but more specifically to the frequency of its operations. Capacity and frequency which are excessive at one point in time may later become naked dominance in the market if the competitors are subordinated by a substantial margin and for a sufficient time. TWA cannot remain insensitive to such threats.

Two other factors which contribute to excessive capacity should be mentioned. The first concerns the supplemental lines. While it may be true that their capacity constitutes a small percentage of industry total, such capacity is significantly concentrated in markets which vitally affect TWA.

The second difficulty stems from high-frequency schedules operated by local service lines between major terminals. These are particularly vexatious because the government is partially underwriting the capacity that contributes to our problem. In one market, for example, a local service carrier is operating nine daily non-stop schedules with on board loads averaging below 50%.

As already stated, TWA plans to hold schedule frequencies down so that anticipated traffic increases will result in higher load factors, and we have indicated some of the major assumptions and considerations involved in these plans. We have not here attempted to submit a detailed market-by-market analysis. To do so would require a most voluminous submission involving so many assumptions and variables that it would be of little value to the Board. In addition, it would require a complete statement of our marketing analyses and sales objectives on a segment by segment basis. It is questionable whether the Board desires at this time so much proprietary information.

"Plans to improve load factors" vary with flights and with segments. Such plans could include changing the type of equipment formerly employed, or changing configuration, time of departure, cabin service or routing of the schedule itself. In fact, a carrier might plan schedules which were intended to reduce load factors in a given market but produce more profit for the company. Cross-connections, interline or on-line feed, avoidance of multiple operations during congested periods and a host of other considerations might figure in any plan to improve load factors in a given market.

Honorable Alan S. Boyd
Page 4

January 29, 1962

TWA suggests that the Board might wish to make a more detailed examination of a relatively few selected markets which account for important percentages of total travel or which appear particularly suspect as examples of excess capacity. Such an investigation might bring to the Board valuable information enabling it better to come to a conclusion as to whether it wished to exercise existing powers or seek additional power to deal with the over-capacity problem. TWA would be most willing to cooperate and assist in such further studies as may be of interest to the Board. It would seem obviously desirable to select markets with respect to which the Board is in the best position to adopt effective remedies or to cause affected carriers to do so.

Specific consideration should be given to the question of whether it would be in the public interest for the Board to encourage capacity and frequency agreements among the carriers, subject to Board approval. TWA specifically suggests that an initial step in this direction could be taken if the carriers were to address themselves to the levels and frequency of services to be operated in selected markets on low traffic days (holiday weekends are one example). Substantial mileage reductions which would mean dollar savings could be effected without prejudice to public convenience. TWA is interested, and prepared to participate in such discussions.

In addition to encouraging the airlines to solve this problem in part by agreement, we believe the Board should also seriously consider preventing the operating of excess capacity, at least when this amounts to an unfair method of competition, by exercising the powers it may have under the Act. Section 411, for example, gives the Board power to order any airline to cease and desist unfair or deceptive practices or unfair methods of competition.

While the Board has indicated these comments should be addressed primarily to domestic problems, TWA believes that international operations by U. S. flag carriers are subject to the same difficulties. The Board and other segments of government are aware of allegedly excess capacity situations on international markets.

In this connection, TWA's record for a three-year period is as follows:

	Pack Frequency		
Year	Jet	Piston	Total
1960	35	8	42
1961	40	1	41
1962	46	0	46

DX 260, page 1
(Letter - Tillinghast to CAB, Jan. 29, 1962)

AX-1708

TRANS WORLD AIRLINES, INC.
380 Madison Avenue
New York 17, N. Y.

RECEIVED
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CIVIL AERONAUTICS BOARD

January 29, 1962

The Honorable Alan S. Boyd
Chairman
Civil Aeronautics Board
Washington 25, D. C.

13313

Dear Mr. Boyd:

TWA submits this letter in response to requests contained in Order No. E-17865 and your letter of January 4, 1962. Comments were invited on programs designed to improve load factors, particularly in high-density markets.

In general, TWA agrees that the imbalance between traffic and capacity and the resulting low load factors have been a principal cause of unprofitable trunkline operations. We believe that a most important underlying cause of the imbalance is excessive competition in the high-density markets. TWA's plans include steps to improve load factors and to avoid an aggravation of the excessive capacity in these markets. Nevertheless, everyone must recognize that ultimately its actions are necessarily affected by the actions and reactions of competitors in the same markets.

TWA's scheduling policy will be to increase load factors by improving the quality of the product without significant additions to capacity. In effect, TWA plans basically to hold 1962 levels of service and frequency of schedules to 1961 standards. TWA expects to improve its load factors in June 1962 by approximately 2% over June 1961 pursuing the policy outlined above.

TWA derives 72.3% of its domestic passenger miles from service in the 100 top-ranking domestic markets. Consequently, our plans for the top 100 markets largely coincide with our plans for our entire domestic system.

In the peak month of August 1961, TWA flew an average of 247,000 plane miles per day in domestic passenger service - the same daily mileage presently planned for June 1962. Monthly seat miles available will increase 3.5%, from 709 million in August of 1961 to 734 million in June of 1962. This modest rise is attributable as much to an increase in coach seats at the expense

of first class as it is to the substitution of jet for piston mileage. Although August 1962 plans are not yet as firmly established as June's, they are expected to show only a modest increase in capacity over June.

The most significant statistic, however, relates to the number of frequencies operated in markets of major importance to TWA. These markets are obviously of paramount significance to our major competitors as well. It is in these markets that excess capacity has tended especially to depress load factors. TWA presently plans but a single frequency increase in its top 10 markets during 1962. These 10 markets account for over 40% of our domestic passenger miles.

According to present plans, TWA's peak schedules in its top 15 markets will total 3 43 in June 1962 compared with 45 1/2 in August 1961. In its top 25 segments, TWA will offer 60 frequencies in June 1962 compared with 62 1/2 in August 1961. August frequencies are also expected to be below August 1961. These markets account for 60% of the company's revenue passenger miles.

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Obviously, the success of the foregoing program will depend upon whether our competitors will meet this dollar restraint or will try to turn our restraint to their advantage. This question arises in each individual market. One cannot fairly expect one competitor to restrict frequencies or capacity unless other competitors do likewise.

A current example highlights this problem. In December, TWA and one of its competitors each reduced a frequency in the New York - Los Angeles market to adjust service to seasonal requirements. The other competitor, however, promptly added a flight which raised its frequency to 5 non-stop flights each way per day. It then sought to achieve an important competitive advantage by its intensive and widespread advertising and sales promotion campaign stressing the fact that its frequency was equal to the combined services of its competitors. Under such circumstances, those who restricted their capacity can only look forward to the day when they can again match frequencies with the third competitor and thus erase the competitive disadvantage under which they now labor.

Numerous other examples, with most of which the Board must be familiar, could be cited. In the light of these experiences, TWA's scheduling policy as set forth above is and will be subject to the need for response to the practices of its competitors. As the Board knows, frequency of service is a most potent competitive weapon. A carrier's participation in a market is directly related not only to its general prominence or to the tendency of the public to identify it with transportation in that particular market, but more specifically to the frequency of its operations. Capacity and frequency which are excessive at one point in time may later become naked dominance in the market if the competitors are subordinated by a substantial margin and for a sufficient time. TWA cannot remain insensitive to such threats.

Two other factors which contribute to excessive capacity should be mentioned. The first concerns the supplemental lines. While it may be true that their capacity constitutes a small percentage of industry total, such capacity is significantly concentrated in markets which vitally affect TWA.

The second difficulty stems from high-frequency schedules operated by local service lines between major terminals. These are particularly vexatious because the government is partially underwriting the capacity that contributes to our problem. In one market, for example, a local service carrier is operating nine daily non-stop schedules with on board loads averaging below 50%.

As already stated, TWA plans to hold total schedule frequencies down so that anticipated traffic increases will result in higher load factors, and we have indicated some of the major assumptions and contingencies involved in these plans. We have not here attempted to submit a detailed market-by-market analysis. To do so would require a most voluminous submission involving so many assumptions and variables that it would be of little value to the Board. In addition, it would require a complete statement of our marketing analyses and sales objectives on a segment by segment basis. It is questionable whether the Board desires at this time so much proprietary information.

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Honorable Alan S. Boyd
Page 4

January 29, 1962

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In addition to encouraging the airlines to solve this problem in part by agreement, we believe the Board should also seriously consider preventing the operating of excess capacity, at least when this amounts to an unfair method of competition, by exercising the powers it may have under the Act. Section 411, for example, gives the Board power to order any airline to cease and desist unfair or deceptive practices or unfair methods of competition.

While the Board has indicated these comments should be addressed primarily to domestic problems, TWA believes that international operations by U. S. flag carriers are subject to the same difficulties. The Board and other segments of government are aware of allegedly excess capacity situations on international markets.

In this connection, TWA's record for a three-year period is as follows:

Year	Peck Frequency Jet	Piston	Total
1960	35	8	42
1961	40	1	41
1962	46	0	46

The record of TWA's principal transatlantic competitor, for the same period, is as follows:

Year	North Frequency Jet	Piston	Total
1960	50	8	58
1961	73	7	80
1962	92	8	100

Particularly in view of the notorious over-capacity on the North Atlantic one might well question whether such an increase in capacity was not prompted by a desire to achieve a special competitive advantage. Obviously, one faced with such an increase in capacity cannot help but give serious thought as to how it can add capacity sufficient to offset this advantage.

While the criteria for determining excess capacity in international operations are different so far as bilateral air transport agreements are concerned, excess capacity per se is a subject of legitimate interest to the Board. TWA suggests only that the area of the Board's concern should not be bound by the continental limits of the United States.

In summary, efforts to fit capacity to the demand are basic to our plans and the effectiveness of these efforts will depend in large part on what our competitors do. Consequently, we share the Board's concern and express our willingness to participate in such further studies as the Board may undertake.

Sincerely,

Charles C. Tillinghast, Jr.

cc: Members of the CAB
All trunklines Presidents

Using this pattern of changing service for the fleet of thirty CV 880 aircraft, we calculate the reduction of piston aircraft service as follows:

Year	Additional Jet Plane-Miles With 30 CV 880s (a)	Piston Plane-Miles Reduction, at 51%(b)	Seats Per Average Piston Aircraft(c)	Average Piston Aircraft Load Factor(c)	Passenger-Miles for Reduced Piston Service(b)
	(Millions)	(Millions)			(Millions)
1960	5.8	3.0	68.0	60.2%	123
1961	11.2	5.7	68.3	~~60.4~~ 59.3	~~235~~ 231
1962	11.6	5.9	67.9	61.7	247
1963	9.4	4.8	68.2	59.6	195

(a) From page 67.
(b) By calculation.
(c) Calculated from data in TWA's Schedule 3-TCM.

REVENUE INCREASE

The foregoing changes in passenger-miles, at TWA's average yields, would have produced a passenger revenue increase as follows:

Year	Passenger-Miles			Average Yield (d)	Net Increase of Passenger Revenue(c)
	Additional CV 880(a)	Deleted Piston (b)	Net Increase (c)		
	(Millions)				(Millions)
1960	351	123	228	5.645¢	$12.9
1961	648	~~235~~ 231	~~413~~ 417	5.882	~~24.3~~ 24.5
1962	599	247	352	6.104	21.5
1963	506	195	311	5.845	18.2

(a) From page 67.
(b) From table above.
(c) By calculation.
(d) From page 30.

Using the 5 percent additional revenue for various kinds of cargo including mail, express, freight and excess (weight) baggage as mentioned on pages 63 and 31, we calculated additional revenue for these types of cargo and total additional revenue with a fleet of thirty CV 880 aircraft, as fol-

Year	Additional Passenger Revenue(a)	Additional Revenue from Various Types of Cargo, at 5%(b)	Total Additional Revenue(c)
	(Millions)		
1960	$13.9	$0.6	$13.5
1961	24.3	1.2	25.5
1962	21.5	1.1	22.6
1963	18.2	0.9	19.1

(a) From previous page.
(b) By calculation.
(c) By addition.

OPERATING EXPENSES

We estimated changes in Operating Expenses that would have occurred if TWA had received a fleet of thirty CV 880 aircraft rather than twenty aircraft generally in accordance with the method and considerations used for expense estimates of previous Chapters of this report. The details of our estimates are set forth in Exhibit J. The table below summarizes these estimates.

Estimated Changes in Operating Expenses That Would Have Occurred if TWA had Received Thirty CV 880 Aircraft

Operating Expense	1960	1961	1962	1963
	(Millions)			
Flying Operations	$ +2.2	$ +4.2	$ +4.2	$ +3.1
Maintenance	+1.8	+3.6	+3.9	-
Aircraft Servicing	+0.6	+1.2	+1.3	+1.1
Passenger Service	+1.0	+1.9	+1.6	+1.4
Traffic Servicing	+0.8	+1.5	+1.5	+1.3
Servicing Administration	+0.1	+0.1	+0.1	+0.1
Promotion and Sales	+1.3	+2.6	+2.4	+2.2
General and Administrative	+0.3	+0.8	+0.6	+0.5
Depreciation and Amortization(A)	+2.7	+5.7	+5.4	+4.4
	$+10.8	$+21.6	$+21.0	$+14.1

(A) Furnished by Price Waterhouse & Co.

GAIN OR LOSS FROM OPERATIONS

We calculate the change in Gain or Loss from Operations that would have been the result of TWA receiving thirty rather than twenty CV 880 aircraft as follows:

Year	Additional Revenue(a)	Additional Expense(b)	Improvement In Gain or Loss from Operations(c)
	(Millions)		
1960	$13.5	$10.8	$2.7
1961	~~25.7~~ 25.7	21.6	~~3.9~~ 4.1
1962	22.6	21.0	1.6
1963	19.1	14.1	5.0

(a) From table at top of page 71.
(b) From table at bottom of page 71.
(c) By subtraction.

CHAPTER VI

FINANCIAL GAIN OR LOSS FROM OPERATIONS: SUMMARY

The foregoing estimates of change in TWA's Financial Gain or Loss from Operations (also called Operating Profit) are summarized in the following table for the changes in jet aircraft ownership, numbers and receipt dates.

Change in Jet Aircraft	Change in Gain or Loss from Operations				
	1959	1960	1961	1962	1963
	(Millions)				
I- Ownership rather than lease of 15 B-131 and 12 B-331 jets	$ +3.4	$ +7.9	-	-	-
II- Six additional B-331 jets	+0.3	+16.0	$ +3.7	$+2.0	$-0.2
III- Earlier receipt of 15 B-131 and 18 B-331 jets	+6.9	+3.2	-	-	-
IV- Receipt of 20 CV 880 jets on dates in purchase contract	-	+4.0	+2.4	-	-
V- Fleet of 30 rather than 20 CV 880 jets	-	+2.7	~~+3.9~~ 4.1	+1.6	+5.0
Annual Totals	$+10.6	$+33.8	~~$+10.9~~ $+10.2	$+3.6	$+4.8

In addition to the estimated changes listed above, Price Waterhouse & Co. calculated for the assumptions you gave us for Chapters I through V changes in Depreciation and Amortization Expense for other years affecting the Gain or Loss from Operations as follows:

Calculated by Price Waterhouse & Co.					
I- Ownership rather than lease of 15 B-131 and 12 B-331 jets	-	-	$ +1.0	$+0.1	$+0.3
II- Six additional B-331 jets	-	-	-	-	-
III- Earlier receipt of 15 B-131 and 18 B-331 jets	-	-	-0.1	-	-0.3
IV- Receipt of 20 CV 880 jets on dates in purchase contract	-	-	-	+0.8	-0.6
V- Fleet of 30 rather than 20 CV 880 jets	-	-	-	-	-
Annual Totals	-	-	$ +0.9	$+0.9	$-0.6
Grand Total	$+10.6	$+33.8	$+10.9	$+4.5	$+4.2

Total for All Years: $+64.0

Respectfully submitted,

Curtis & Colpitts

Consulting Engineers

AX-1712

DX270
(Report of Loeb, Rhoades & Co.)

REPORT OF

LOEB, RHOADES & CO.

re:

DREXEL HARRIMAN RIPLEY, INC.
FINANCING PLAN DATED MAY 2, 1966

PARTS I and II

PART I

QUALIFICATIONS

AX-1714

LOEB, RHOADES & CO.
FORTY TWO WALL STREET
NEW YORK, N.Y. 10005
TELEPHONE 530-4000

June 8, 1967

Donovan, Leisure, Newton & Irvine
2 Wall Street
New York, N. Y. 10005

Gentlemen:

You have requested information as to the qualifications of Loeb, Rhoades & Co., as Investment Bankers in connection with our proposed testimony in the subject case.

Loeb, Rhoades is one of the major underwriting firms in the investment banking community, having its principal offices at 42 Wall Street, New York, N.Y., with 29 Partners and approximately 1265 employees. We carry on a full service business, including not only the normal functions of broker-dealers and investment advisors but also as specialists in corporate acquisitions and mergers, private placements and the origination of, or participation in underwritings for our clients.

There are appended hereto tabulations showing (i) Offerings Managed Or Co-managed by Loeb, Rhoades & Co., (or our wholly owned subsidiary firm Loeb, Rhoades Inc.) and (ii) Dollar Totals - Underwriting Participations - by Loeb, Rhoades & Co., and Loeb, Rhoades Inc., from 1955 through 1966. We have not maintained complete records of our private placement activities for such period but there is appended hereto a partial list of such activities.

On December 12, 1956, we were the Managing Underwriter and offered to the public 784,402 shares of Northeast Airlines common stock.

TWA and Pan American Airways concluded a merger agreement in 1962. We were retained by the Voting Trustees under the Voting Trust Agreement created in connection with the December 30, 1960 financing to advise and consult with them, with respect to such merger agreement. On December 31, 1962 a petition to approve the merger was filed with the Civil Aeronautics Board. On March 4, 1963 the Board handed down an order deferring proceedings in such case indefinitely. In October, 1963 the Board of Directors of both TWA and Pan American decided to terminate the merger agreement. As a consequence of this action, while we engaged in several months' work in connection with

the merger agreement, no final action could be taken in respect thereto.

With respect to the qualifications of the individual Partners of Loeb, Rhoades who are the signatories and will appear as witnesses in this matter if requested, they are as follows:

Armand G. Erpf was born on December 8, 1897 in New York City and received his B.S. Degree at Columbia University in 1917. After overseas experience in the mining and commodity fields, and association with Cornell, Linder & Co., Management Engineers, he became Director of the Statistical and Research Departments of Carl M. Loeb, Rhoades & Co. in 1933 and a General Partner in 1936.

He is Chairman of the Executive Committee and a Director of Crowell Collier and Macmillan; Member of the Executive Committee and a Director of Seaboard Air Line Railroad Company; Member of the Finance Committee and a Director of General Instrument Corporation; a Director of Jefferson Insurance Company of New York; Jersey External Trust; Raynier Incorporated; Stein Roe & Farnham International Fund; Adela Investment Co., S.A.

He has taken an active part in numerous corporate reorganizations, mergers, and underwritings on behalf of his firm. He was instrumental in establishing the Pennsylvania-Central Air Lines which became Capital Air Lines and was subsequently merged into United Air Lines. He arranged for the financing of Northeast Air Lines in negotiation with Atlas Corporation. He has guided the building up of Crowell Collier and Macmillan through extensive acquisitions and underwritings to an eminent position in educational publications.

He is Chairman of the Council of the Graduate School of Business of Columbia University, Member of the Visiting Committee of the Graduate School of Business at the University of California (Los Angeles), Chairman of the Program for Studies of the Modern Corporation of Columbia University.

He served in the Office of the Commanding General, Headquarters Army Service Forces, Washington, D.C. during 1942-45, and was on duty with the Headquarters, U. S. Army Forces, Western Pacific and with the Commanding General, U. S. Army Forces, China Theater, in 1945-46. He was appointed to the General Staff Corps in 1944, and awarded the Legion of Merit in 1946.

Donovan, Leisure, Newton & Irvine

Kenrick S. Gillespie was born on April 13, 1907 in Morristown, New Jersey; graduated from the Taft School cum laude in 1925 and from Yale University in 1929; BA Degree, Phi Beta Kappa. Spent one year (1929-1930) at Lehman Brothers and one year at the Harvard Business School (1930-1931). Until coming to Loeb, Rhoades & Co. in 1950 he was engaged in investment research successively for an investment trust, Charles D. Barney & Co., and Barrett Associates, Inc., an investment counseling firm. Became a Partner of Loeb, Rhoades & Co., on January 1, 1955. In post World War II period his work in security analysis was fairly heavily concentrated in the air transport and aerospace industries and he assumed senior responsibility for this area at Loeb, Rhoades & Co. He is a member of the New York Society of Security Analysts, Airline Analysts Society of New York and the Aerospace Analysts of New York. He lead a panel of three speakers at the October, 1964 meeting of the National Federation of Financial Analysts covering the Air Transport Industry. He was largely responsible for a financing program for Seaboard World Airlines, Inc., which covered close to a year's work in 1959-1960 and culminated in a $6 million financing program in the fall of 1960, including Convertible Debentures and a Rights Offering. In addition to the above activities he has been Manager of the Investment Advisory Department, head of the Loeb, Rhoades Research Department and is now the Partner in charge of the Correspondent Service Department.

Gene M. Woodfin was born on February 7, 1919 in Paris, Texas; attended public schools; graduated from The University of Texas in 1940 - LLB, with highest honors; became associated with Vinson, Elkins, Weems & Francis in June, 1940; became a Partner of the firm in January, 1950 and remained with such firm (except for duty with the U.S. Navy 1942-46) until May, 1959, at which time he became a General Partner of Carl M. Loeb, Rhoades & Co. As a practicing lawyer he engaged primarily in corporate practice, particularly specializing in Oil and Gas and Gas Pipeline work. He had the primary responsibility for the development and implementation of the financing of Trunklines Gas Co., Gulf Interstate Gas Co. and Transwestern Pipe Line Co., each such financing requiring the placement of long term debt with the lending institutions and negotiations with and the completion of underwriting agreements with the several underwriters. With Loeb, Rhoades he is one of the Partners in charge of its Corporate Finance Division, and in such capacity he passes upon and assists in all underwritings and the placement of institutional loans. Mr. Woodfin is authorized to practice in the States of Texas and Illinois and is a member of the American Bar Association as well as the Bars of the States mentioned.

Very truly yours,

Gene M. Woodfin

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OFFERINGS MANAGED OR CO-MANAGED BY CARL M. LOEB, RHOADES & CO.
(OR CARL M. LOEB, RHOADES & CO. INCORPORATED) 1955 - 1966

2/23/55	$ 925,050	N. Y. Capital Fund of Canada 35,000 shs. common at 26.43 unregistered secondary
3/31/55	$1,890,000	Basic Refractories 12,000 shs. common at 15 3/4 - unregistered secondary
4/7/55	$4,651,200	Pan American Sulphur Conv. Sub. Income Debs. 5/67. Kuhn Loeb-CMLR
4/13/55	$5,074,375	General American Oil of Texas 88,250 shs. common at 57 1/2 unregistered secondary - CMLR- Sanders & Newsom
6/22/55	$2,300,000	Belock Instrument Corp. 200,000 shs. common at 11 1/2
7/5/55	$ 661,648	Three States Natural Gas 103,788 shs. common at 6 3/8, unregistered secondary.
7/18/55	$ 483,093	Sterling Drug, Inc. 74,322 shs. common at 51 1/2 - unregistered secondary
7/21/55	$2,619,367	National Biscuit Co. 63,887 shs. common at 41. Unregistered secondary - CMLR-Hallgarten
8/24/55	$3,363,750	California Electric Power Co. 230,000 shs. common at 14 5/8 (competitive bid) CMLR - Bear Stearns
9/27/55	$ 859,200	Walter Kidde & Co. 53,700 shs. commonrights offer at 16
11/2/55	$1,300,000	Plymouth Oil Co. 40,000 shs. common at 32 1/2 - unregistered secondary CMLR - Chaplin & Co.
11/23/55	$1,405,950	Harrisburg Steel Co. 36,400 shs. common at 38 5/8 - special offering
12/7/55	$ 862,500	Kawecki Chemical Co. 75,000 shs. common at 11 1/2
12/12/55	$ 446,513	Interstate Bakeries Corp. 14,175 shs. common at 31 1/2 - special offering
12/13/55	$3,500,000 $1,000,000	National Propane Corp. 140,000 shs. 5% Conv. 2nd pfd. at 25 National Propane Corp. 100,000 shs. common at 10. CMLR - Union Securities

1/12/56	$2,220,000	E. J. Korvette Co. 222,000 shs. common at 10
2/2/56	$1,256,250	Canada Dry Ginger Ale 75,000 shs. common at 16 3/4 - unregistered secondary
3/1/56	$4,480,796	U. S. Pipe & Foundry 169,888 shs. common 26 3/8 - unregistered secondary, CMLR-Farwell, Chapman
4/19/56	$13,359,616	New England Electric System 834,976 shs. common, rights offer at 16 (competitive bid) CMLR - Ladenburg-Wertheim
5/22/56	$3,316,500	American Shopping Centers 330,000 units at 10.05
6/7/56	$8,138,200	Delaware Power & Light Co. 232,520 shs. common, rights offer at 35 (competitive bid)
6/21/56	$16,901,664	U. S. Life Ins. Co. in the City of New York 650,064 shs. common at 26 (550,064 shs. registered secondary; 100,000 shs. new) Wm. Blair - First Boston-CMLR
8/13/56	$ 217,500	Koehring Co. 3,000 shs. common at 72 1/2 - unregistered secondary. CMLR - Loewi
9/10/56	$1,494,240	Harsco Corp. 34,953 shs. common at 42 3/4 - unregistered secondary
12/12/56	$7,451,819	Northeast Airlines, Inc. 784,402 shs. - common at 9 1/2
1/30/57	$ 448,356	Armstrong Cork 16,683 shs. common at 26 7/8 - unregistered secondary. CMLR - Chaplin & Co.
2/27/57	$12,936,000	West Penn Electric Co. 528,000 shs. common-rights offer at 24 1/2
5/14/57	$1,617,084	DuMont Broadcasting Corp. 231,012 shs. common-rights offer at 7 - Kuhn Loeb - CMLR
5/14/57	$ 892,500	Marchant Calculators, Inc. 30,000 shs. common at 29 3/4 - unregistered secondary. CMLR - Sutro & Co.
6/7/57	$1,257,300	Gulf Interstate Gas Co. 111,760 shs. common at 11 1/4 - unregistered secondary
6/10/57	$14,175,000	Kaiser Industries Corp. 900,000 shs. common at 15 3/4 - registered secondary. First Boston - Dean Witter - CMLR
8/26/57	$2,425,000	Jim Walter Corp. 50,000 Units at 48 1/2 CMLR - Prescott, Shepard

1/17/58	$ 811,750	Minnesota & Ontario Paper 34,000 shs. common at 23 7/8 - unregistered secondary - Goldman Sachs - CMLR
4/16/58	$14,528,235	New England Electric System 968,549 shs. common-rights offer at 15 (competitive bid) CMLR-Ladenburg-Wertheim
4/16/58	$1,200,000	Minnesota & Ontario Paper 50,000 shs. common at 24. Unregistered secondary - Goldman Sachs - CMLR
5/22/58	$1,343,750	Minnesota & Onario Paper 50,000 shs. common at 26 7/8. Unregistered secondary - Goldman Sachs - CMLR
8/14/58	$1,602,000	Kaiser Industries Corp. 133,500 shs. common at 12. Unregistered secondary. First Boston-Dean Witter-CMLR
12/11/58	$27,500,000	Arvida Corp. 2,500,000 shs. Class A common at 11. CMLR-Dominick
12/17/58	$1,000,000	Belock Instrument Corp. Conv. Sub. Debs. 5 3/4 /73
12/30/58	$14,644,253	Columbia Gas System 673,299 shs. common at 21 3/4. Registered secondary. CMLR-Merrill Lynch
1/12/59	$6,562,500	Kaiser Industries Corp. 500,000 shs. common at 13 1/8. Registered secondary. First Boston-Dean Witter-CMLR
1/16/59	$6,263,995	Hilton Credit Corp. 1,927,383 shs. common rights offer at 3 1/4
3/25/59	$80,100,000	Great Atlantic & Pacific Tea Co. 1,800,000 shs. common at 44 1/2. Registered secondary. Morgan Stanley-Smith Barney-Kuhn Loeb-CMLR
6/10/59	$2,598,750	International Harvester 30,000 shs. common at 46 5/8. Unregistered secondary
6/10/59	$1,435,000	Louisville & Nashville R. R. 17,500 shs. common at 82. Unregistered secondary. CMLR - Bache
6/15/59	$1,258,125	Mission Development Co. 55,000 shs. common at 22 7/8. Unregistered secondary. CMLR-Dean Witter-A. M. Kidder
6/15/59	$1,060,500	Tidewater Oil Co. 42,000 shs. common at 25 1/4. Unregistered secondary. CMLR-Dean Witter-A. M. Kidder
7/30/59	$2,410,000	CIT Financial Corp. 50,000 shs. common at 60 1/4. Unregistered secondary. CMLR Prescott-Shepard
8/6/59	$4,225,000	Crowell-Collier Publishing 200,000 shs. common at 21 1/8. Registered secondary.

9/3/59	$2,500,000	Gabriel Co. Sub. S. F. Debs. w/w 5 3/4 /74. CMLR-Prescott, Shepard
9/3/59	$3,591,209	New York Capital Fund of Canada 1,000,000 shs. (reduced to 284,908 shs.) common at 13 3/4
10/29/59	$30,000,000	Hilton Hotels Corp. Sub. Debs. w/w 6/84 CMLR-Merrill Lynch
12/16/59	$ 511,438	Lehman Corp. 16,700 shs. common at 30 5/8. Unregistered secondary
2/2/60	$4,625,000	Franklin Natl. Bank of Long Island 185,000 shs. common rights offer at 25. Blair & Co. - CMLR
3/31/60	$5,450,000	General Instrument Corp. 200,000 shs. common at 27 1/4
4/13/60	$11,025,000	West Penn Electric Co. 300,000 shs. common at 36 3/4 (competitive)
4/22/60	$6,000,000	Metropolitan Broadcasting Corp. Conv. Sub. Debs. 6/75. Kuhn Loeb-CMLR
5/4/60	$26,950,000	Columbia Gas System 1,400,000 shs. common at 19 1/4 (competitive) Merrill Lynch-Shields-Pressprich-CMLR
5/17/60	$4,305,741	Marquette Corp. 391,431 common at 11 (275,031 shs. new, 116,400 shs. registered secondary) CMLR-Piper Jaffray
5/23/60	$ 700,000	Itek Corp. 10,000 shs. common at 70 Unregistered secondary. Paine Webber - CMLR
8/2/60	$2,925,000	Kaiser Industries Corp. 300,000 shs. common at 9 3/4 registered secondary. First Boston -Dean Witter-CMLR
9/16/60	$ 275,000	Shoe Corp. of America 10,000 shs. common at 27 1/2. Unregistered secondary. CMLR - D. H. Blair
10/6/60	$5,408,928	Union Texas Natural Gas 150,248 shs. Class A and 75,124 shs. Class B at 24. Registered secondary. CMLR-Merrill Lynch-Smith Barney
10/25/60	$3,300,000	Scantlin Electronics Inc. 250,000 shs. common at 12 (175,000 shs. new; 75,000 shs. registered secondary) CMLR-Paine Webber
10/28/60	$1,595,000	Seaboard & Western Airlines Conv. Sub. Debs. w/w 6/70
11/1/60	$2,475,000	Mid-States Business Capital Corp. 225,000 shs. common at 11. CMLR - Scherck, Richter
11/28/60	$2,112,480	Seaboard & Western Airlines 704,160 shs. common rights offer at 3

1/25/61	$2,985,323	Emerson Electric Manufacturing Co. 54,033 shs. common at 55 1/4. Registered secondary. CMLR-Scherck, Richter
3/8/61	$15,108,450	Apco Oil Corp. 100,723 units of Sub. Debs. 5 3/4/81 and common rights offer at $150. CMLR-Smith Barney
4/25/61	$1,760,000	Adler Electronics, Inc. 160,000 shs. common at 11 (110,000 shs. new, 50,000 shs. registered secondary)
5/2/61	$1,700,000	Aqua-Chem Inc. 340,000 shs. common at 5 (227,000 shs. new, 113,000 shs. registered secondary) CMLR-Loewi
5/9/61	$11,787,700	Crowell-Collier Publishing Co. Conv. Sub. Debs. 4 1/2/81. Rights offering at $100
5/10/61	$3,392,400	Kawecki Chemical Co. Conv. Sub. Debs. 4 7/8/76. Rights offer at $100
6/21/61	$1,192,500	Crowell-Collier Publishing Co. 30,000 shs. at 39 3/4. Unregistered secondary
8/3/61	$5,000,000	Transcontinent Television Corp. 400,000 shs. Class B at 12 1/2. CMLR-Bear Stearns
8/24/61	$32,648,300	Armour & Co. Conv. Sub. Debs. 4 1/2/83. Rights offer at $100. Wertheim-Glore-CMLR
12/14/61	$2,292,500	Harsco Corp. 70,000 shs. common at 32 3/4. Unregistered secondary
12/19/61	$1,510,000	Cramer Electronics, Inc. 188,750 shs. common at 8 (87,250 shs. new, 101,500 shs. reg. secondary) (CMLR & Co., Inc.)

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2/20/62	$2,416,000	American Building Maintenance Industries 151,000 shs. common at 16 (40,000 shs. new, 111,000 shs. reg. secondary) CMLR & Co., Inc. - Sutro & Co.
3/22/62	$1,875,000	Hayden Publishing Co. 150,000 shs. common at 12 1/2 (20,000 shs. new, 130,000 shs. reg. secondary) (CMLR & Co., Inc.)
4/27/62	$437,000	Potash Co. of America 19,000 shs. common at 23. Unregistered secondary. CMLR & Co., Inc. - Boettcher

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1/8/63	$1,400,000	Belock Instrument Corp. Conv. Sub. Debs. 6/75 CMLR & Co., Inc. - Bear Stearns
4/2/63	$1,512,500	Continental Device Corp. 275,000 shs. common at 5 1/2 (CMLR & Co., Inc.)
4/19/63	$5,429,900	Crowell-Collier Publishing Co. Conv. Sub. Debs. 5/83 Rights offer at $100
4/24/63	$12,307,240	Cabot Corp. 296,560 shs. common at 41 1/2. Registered secondary. CMLR & Co. - White Weld
9/4/63	$12,113,112	Allied Chemical Corp. 237,512 shs. common at 51. Registered secondary. Smith Barney-CMLR
9/12/63	$ 559,375	Coca Cola Bottling Co. of New York 25,000 shs. common at 22 3/8. Unregistered secondary. CMLR-Elder
12/63	$5,000,000	Canon Camera Kabushiki Kaisha Conv. Unsec. Loan Stock 6 1/4/78. Sold outside U.S. M. Samuel & Co. - Vickers DaCosta-CMLR-Yamaichi Securities

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6/2/64	$200,000,000	Communications Satellite Corp. 5,000,000 shs. common at 20. Merrill Lynch-Blyth-First Boston-Kidder Peabody-Kuhn Loeb-Lazard-Lehman-CMLR-Paine Webber-White Weld-Dean Witter
6/23/64	$25,000,000	Instituto per la Ricostruzione Industriale (IRI) Bonds w/w 5 3/4/75-79. Sold outside U.S. CMLR-Banque Lambert-M. Samuel-Berliner Handels-Gesellschaft
8/11/64	$8,000,000	Hooker Chemical Corp. 200,000 shs. common at 44. Unregistered secondary. White Weld-CMLR-R.W. Pressprich
9/14/64	$2,275,727	Taft Broadcasting Co. 57,251 shs. common at 39 3/4. Unregistered secondary. Bache-CMLR
12/29/64	$5,499,762	Philippine Long Distance Telephone Co. 953,165 shs. common rights offer at 5.77

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2/12/65	$25,514,615	Armour & Co. 614,810 shs. common rights offer at 41 1/2. Wertheim-Glore-CMLR
2/26/65	$7,876,000	Taft Broadcasting Co. 176,000 shs. common at 44 3/4. Registered secondary
5/13/65	$2,317,250	Chicago Musical Instrument Co. 74,750 shs. common at 31. Unregistered secondary
5/26/65	$5,512,500	Thatcher Glass Manufacturing Co. 175,000 shs. common at 31 1/2. CMLR-Lehman
12/3/65	$12,000,000	General Instrument Corp. Conv. Sub. Debs. 4 1/4/85

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4/14/66	$150,000,000	Allied Chemical Corp. Debs. 5.20/91 Lazard-Lehman-CMLR
4/20/66	$20,000,000	Seaboard World Airlines, Inc. Conv. Sub. Debs. 5/86
6/1/66	$25,000,000	Cities Service International Capital Corp. Gtd. Notes 6 3/8/71. Offered outside U.S. First Boston-CMLR
6/14/66	$17,201,880	Allied Chemical Corp. 430,047 shs. common at 40. Registered secondary. CMLR-Smith Barney
6/17/66	$15,000,000	High Authority European Coal & Steel Community 6 1/2/86. Offered outside U.S. Banca Commerciale Italiana - S.G. Warburg-Banca Nazionale de Lavoro-Banque de Paris-Deutsche Bank-Dresdner Bank-Lazard Freres (Paris) CMLR-Banque Internationale a Luxembourg
6/20/66	$6,113,020	Allied Chemical Corp. 154,760 shs. common at 39 1/2. Unregistered secondary. CMLR-Smith Barney
9/13/66	$10,000,000	Cabot International Capital Corporation Gtd. Notes 7/71. Offered outside U.S. CMLR-White Weld
12/12/66	$15,000,000	Americas Holding S.A. Gtd. Notes 6 5/8/71. Offered outside U.S. CMLR-Banque de Paris-Banca d'America e d'Italia - Lehman

DOLLAR TOTALS - UNDERWRITING PARTICIPATIONS
CARL M. LOEB, RHOADES & CO. and CARL M. LOEB, RHOADES & CO. INCORPORATED

YEAR	BONDS	PREFERRED STOCKS	COMMON STOCKS	TOTAL
1955	$33,921,698	$3,083,785	$26,004,028	$63,009,511
1956	23,616,000	3,552,000	25,835,000	53,003,000
1957	37,491,000	4,189,000	28,110,000	69,780,000
1958	44,921,392	3,502,873	21,917,247	70,341,512
1959	28,686,158	2,104,820	36,384,021	67,174,999
1960	31,238,000	1,462,346	17,856,818	50,557,164
1961	40,244,529	1,465,084	27,845,573	69,555,186
1962	37,167,518	2,980,088	12,018,445	52,166,051
1963	38,806,642	None	19,066,609	57,873,251
1964	31,243,806	5,227,425	23,596,799	60,068,030
1965	62,669,764	5,783,236	32,780,127	101,233,127
1966	100,398,874	8,126,080	44,125,870	152,650,824

Private Placements in which CMLR acted as Agent or Participant 1955 - 1966

ADLER ELECTRONICS, INC.
May 1962 $2,000,000 Conv. Sub. Notes 1972

ANGLO-AMERICAN SHIPPING CO. LTD. (CMLR - M. SAMUEL & CO. LTD.)
1959 £ 5,000,000 7% Secured Loan Stock
£ 5,942,475 5 1/2% Secured Notes
£ 2,500,100 Ordinary Shares of £ 1

APCO OIL CORP.
June 1962 $2,500,000 Series A Notes 1965
$9,500,000 Series B Notes 1981

AUDIO DEVICES INC.
1957 100,000 shs. Common with Warrants
Dec. 1961 $1,500,000 Conv. Sub. Notes 1976

BELOCK INSTRUMENT CORP.
1960 $1,200,000 6% Notes with Warrants

CANTIERI RIUNITI DELL-ADRIATICO S.p.A.
March 1965 $13,000,000 Ship Construction Loans

CONSTRUCCIONES POPULARES, S.A. de C.V. (HONDURAS)
Dec. 1965 $6,575,000 5 1/4% 20 year notes

CONTINENTAL DEVICE CORP.
March 1965 $2,000,000 Notes due 3/1/77

CRAMER ELECTRONICS INC.
Oct. 1966 $750,000 Sub. Notes due 1980

DIXIE PIPELINE CO. (FIRST BOSTON-MORGAN STANLEY-CMLR)
Aug. 1961 $37,500,000 Secured Notes 5/86

FRONTIER REFINING CO.
1955 $1,500,000 1st 4/69
1957 $1,500,000 1st 6/72
1960 $1,500,000 1st 6 1/4/75

GULF INTERSTATE GAS CO.
Nov. 1958 $60,000,000 1st Pipe Line 5/78 (CMLR-MLPFS)

HESS OIL & CHEMICAL CORPORATION
July 1963 $30,000,000 5 1/2% Promissory Notes 1964 - 80

INMOBILIERA CALIFORNIA S. A. (Venezuela)
July 1966 $8,000,000 5 1/4% 20 Year Notes

INTERNATIONAL HOUSING CAPITAL CORP.
Nov. 1963 $9,100,000 Notes 1979 - 82

HENRY J. KAISER CO. (FIRST BOSTON: CMLR participated in placement)
1957 $25,000,000 Collateral 5 3/4/69

HENRY J. KAISER CO. - KAISER INDUSTRIES CORP. (FIRST BOSTON: CMLR participated in placement)
1960 $10,000,000 Gtd. Conv. Coll. 6/72

KAWECKI CHEMICAL CO.
July 1958 $1,500,000 Sub. Conv. Notes 5/68

KIRKEBY-NATUS CORP. (CMLR-NEW YORK SECURITIES)
June 1964 $11,000,000 Senior Notes 1974

E. J. KORVETTE INC.
July 1963 $24,000,000 5 3/8% Notes 1983
Oct. 1963 $ 6,000,000 5 3/8% Conv. Notes 1983

METROMEDIA, INC. (KUHN LOEB-CMLR)
Aug. 1961 $3,000,000 Senior Notes 6 1/4/71
$4,000,000 Junior Notes 6 1/4/75 with Warrants
30,000 Shares $3.125 Conv. Pfd.
July 1963 $7,500,000 5 3/4% Notes 1978

MIAMI COPPER CO. - TENNESSEE CORP.
June 1960 $15,000,000 Reserved-in-ore (Royalty payment)

MILGO ELECTRONIC CORP.
March 1965 $1,250,000 Notes W/W 1977

NATIONAL PROPANE CORP.
1955 $5,000,000 Notes 4 3/4/70
$2,000,000 Sub. Notes 5/75
45,000 Shares Common Stock
June 1957 $600,000 Notes 5 1/2/72
June 1958 $500,000 Senior Notes 5/73
Nov. 1960 60,000 Shares Common Stock
$2,500,000 Notes 6/75
Oct. 1962 $2,525,000 Senior Notes 5 3/4/78
June 1963 $12,750,000 Senior Notes 1972 and 1983
Nov. 1964 $1,600,000 Notes of Subsidiaries 1983

NESTOR FINANCE CORP.
July 1958 $12,730,000 Coll. Trust Bonds 5/69

NORSTAR SHIPPING CO. S.A.
Mar. 1960 $28,500,000 5 1/2/67 - 71

NORTEX OIL & GAS CORP.
1957 170,324 Shares (secondary)

PENOBSCOT COMPANY (CMLR-PUTNAM, COFFIN & BURR)
Mar. 1965 $16,000,000 Notes 1980

PRINCE ALBERT PULP COMPANY LTD.
Apr. 1966 $46,500,000 5.20% Gtd. Notes

PROYECTO VIRU. S. A. (PERU)
Dec. 1965 $4,000,000 5 1/4% 20 year notes

QUANTATRON, INC.
Dec. 1960 $1,590,000 Notes 5 3/4/64-69
5,000 Shares $100 par pfd.
10,000 Shares Common Stock

SAKURA FINANCE CORP.
July 1958 $12,000,000 Coll. Trust Bonds 5/69

SEA DRILLING CORP.
1958 $2,040,000 Notes 4 1/2/66

JOSEPH E. SEAGRAM & SONS INC. (HARRIMAN RIPLEY-CMLR)
Dec. 1963 $75,000,000 Notes due 1989

STEELMAN GAS LTD. (CMLR-ANNETT & CO. LTD)
June 1958 $4,000,000 (U.S.) 1st 6/70 with Warrants
$2,000,000 (Can.) 1st 6/70 with Warrants

JNO. H. SWISHER & SONS INC.
Oct. 1966 $20,000,000 Notes 1986

TAFT BROADCASTING CO.
Apr. 1964 $19,800,000 5 7/8% Notes 1979

TALCO ENGINEERING CORP.
1958 $200,000 Sub. Notes 5 1/4/62
40,000 Shares Common Stock

TEXAS BUTADIENE & CHEMICAL CORP.
1956 $27,500,000 1st 5/63
$1,986,766 Notes 5/70
2,484 Shares Pfd.

TEXAS NATURAL TRANSPORTATION
1955 $1,474,875 Notes - 4%

THATCHER GLASS MANUFACTURING CO. (CMLR - LEHMAN BROTHERS)
Dec. 1963 $18,450,000 Notes 1983
$3,000,000 Sub. Notes 1983

WASHINGTON POST CO.
Dec. 1963 $20,000,000 5 1/2% Notes 1979

PART II

PART II

Report of

Loeb, Rhoades & Co.

re:

Drexel Harriman Ripley, Inc.
Financing Plan Dated May 2, 1966

TABLE OF CONTENTS

		Page No.
I.	Questions Posed	1
II.	Conclusions	3
III.	Discussion	4
	A. Introduction	4
	B. The Status of the Airline Industry in Early 1955	5
	C. The Proposed Financing	12
	1. The Morehouse "Fundamental Principles"	12
	2. The Spring 1955 Equity Financing	15
	(a) The Keystone Step	15
	(b) No Need for Equity in Early 1955	15
	(c) Excessive Size of the Proposed Equity Financing	16
	(d) Premature Nature of the Proposed Equity Financing	18
	(e) Damaging Effect on TWA's Stockholders	21
	(f) Alternative Assumptions as to Toolco	25
	3. The Balance of the Financing Plan	28

Page No.

(a) The October 1, 1955 $150-170 Million Debt Financing 29

(b) The May 1959 $60 Million of Convertible Debentures .. 32

(c) The May 1959 $90-110 Million Loan Commitment 33

D. The Feasibility of TWA Independently Financing the Projected Capital Requirements of $544.8 Million 35

I. Questions Posed

Donovan Leisure Newton & Irvine has asked Loeb, Rhoades & Co., a partnership, to review a plan of financing entitled "The Financing Of Trans World Airlines, Inc. During the 1955-1960 Period," dated May 2, 1966, and presented in the form of written testimony by Edward J. Morehouse, Senior Vice President of Drexel Harriman Ripley, Inc. (DHR) and to render its opinion as investment bankers with respect to:

1. Whether the officers and directors of TWA, assuming them to have been prudent and competent in the management of its affairs, and to have had due regard for the interests of TWA and its stockholders, would have accepted and implemented the equity financing plan suggested by Mr. Morehouse to have been engaged in in late May or early June of 1955.

2. Whether Loeb, Rhoades & Co. would have recommended to TWA or to its stockholders the said equity financing plan proposed by Mr. Morehouse.

3. Whether the opinions given in response to the foregoing questions would be altered by either of the following assumptions:

(a) that TWA could not or would not have looked to Hughes Tool Company (Toolco) for assistance in the said equity financing proposed by Mr. Morehouse; or

(b) that TWA was a widely-held company with no controlling stockholder.

4. Whether TWA, without the assistance of Toolco, could have accomplished the other and later financing steps proposed by Mr. Morehouse in his testimony, to wit: (a) the obtaining of a loan commitment in the amount of $150-170 million on October 1, 1955; (b) the issuance of $60 million 5% convertible subordinated debentures on a non-pre-emptive basis in May of 1959; and (c) the obtaining of a commitment for a $90-110 million mortgage loan in May of 1959; and

5. Whether TWA, without the assistance of Toolco, could have financed the "reconstructed" capital requirements of $544.8 million during the period October 1955 through December 1960.

II. Conclusions

The following is a summary of our conclusions:

The equity financing plan suggested by DHR in the Morehouse testimony as of the Spring of 1955 would have been a plan so contrary to the best interests of TWA and its stockholders that it would not have been accepted or implemented by prudent and competent officers and directors of that company.

We would not have recommended to TWA or to its stockholders that TWA engage in Mr. Morehouse's proposed equity financing in the Spring of 1955. It could not have been accomplished without Toolco actively participating by subscribing to its proportionate share of the proposed equity offering, and it would not have been in the best interests of TWA's stockholders for Toolco to have done so at that time.

Our opinion that TWA would have rejected Mr. Morehouse's 1955 equity financing plan is the same on the assumptions that TWA could not or would not have looked to Toolco for assistance in such a financing, or that TWA was widely held with no controlling stockholder.

Lastly, TWA without the assistance of Toolco, could not have financed the so-called "reconstructed" capital requirements of $544.8 million during the period October 1955 through December 1960, on any reasonable basis.

III. Discussion

A. Introduction

Mr. Morehouse's written testimony and exhibits, despite the labor devoted to their presentation, are no more than an exercise in a hypothetical financing conducted without regard to certain important historical facts and yet with the benefit of hindsight on such things as the peaks of the stock market for airline stocks. This is no criticism of Mr. Morehouse or of DHR, who, pursuant to counsel's instructions, prepared an academic answer to an academic question. We have examined that exercise in the light of important historical facts, which cannot be ignored. Only thus can its validity be tested.

The conclusions and opinions expressed herein reflect in particular, the views of Armand G. Erpf, Kenrick S. Gillespie and Gene M. Woodfin. During the period of time in question, 1955-1960 and earlier, both Mr. Erpf and Mr. Gillespie closely followed the airlines with a view to giving investment advice to Loeb Rhoades clients. Mr. Woodfin is one of the partners in charge of the Corporate Department which has the responsibility of handling the buying functions and private placements of Loeb Rhoades, and, as such, is particularly familiar with

the various factors which must be considered in connection with advising or participating in offerings or private placements such as those suggested in the testimony of Mr. Morehouse.

In formulating the opinions expressed herein, we have utilized the Loeb Rhoades Research Department facilities, its library and its personnel to assist in our review of contemporaneous information for the 1946-1960 period. Materials reviewed include aviation and financial publications, airline annual reports, and SEC and CAB documents and exhibits. In addition, we have consulted with various of our partners and with members of our staff who are and have been knowledgeable in the area of airline finance.

B. The Status of the Airline Industry in Early 1955

It is essential to examine any proposed equity financing of TWA in early 1955 in the light of the then existing facts. Mr. Morehouse tends to take the euphoria of the investment community's attitude toward the air transport industry today, and apply it to a period when the investor's attitude toward the future of the airlines was steeped in doubt and skepticism.

The airline industry of early 1955 was very different from what it was in 1960 after a full year of jet operations and even more different from what it is today. Today's maturing adult was a baby in early 1955 and only a child in 1960. For example, total domestic trunk passenger revenues produced in scheduled service were $872,125,000 in 1954, $1,756,439,000 in 1960 and $2,908,045,000 in 1965. Overall available ton miles in scheduled service for domestic trunk airlines were 3,297,122,000 in 1954, 6,548,473,000 in 1960 and 12,593,477,000 in 1965. Total revenue passenger miles in scheduled service for the domestic trunk airlines were 16,234,638,000 in 1954, 29,233,199,000 in 1960 and 48,986,972,000 in 1965* In short, it would be fallacious to view the airline industry of early 1955 as it is viewed today.

Unquestionably the greatest uncertainty facing the airlines in early 1955 was the anticipated coming of the jet age to commercial aviation. There were no commercial jet aircraft actually available at that time and no one knew the answers to the many questions airline executives were pondering: When would commercial jet aircraft become

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* 1965 CAB Handbook of Airline Statistics, pp. 38, 47, 103; CAB Air Carrier Traffic Statistics, Vol. XII-12 for 12 months ending Dec. 31, 1966; p. 2; CAB Air Carrier Financial Statistics, Dec. 31, 1965, Vol. XIII-4, p. 2. Statistics for the year 1965 are given in lieu of 1966 statistics because of the effect of the strike on 1966 statistics.

available for ordering? Who would build them? Would they be turbo-prop or turbo-jet, or both? How large would they be? How much would they cost? When would they be delivered? To what extent and when would they replace piston operations? Would they win a high degree of public acceptance? How many would the airlines purchase? Could airport facilities be improved in time?

As Mr. Morehouse pointed out at page 6 of his report, none of the airlines, in early 1955, could have estimated with any degree of certainty how much capital would be required for the purchase of jet aircraft. At the same time it would have been obvious to anyone knowledgeable in the airline and aircraft industries that only down payments and perhaps progress payments would be required in the early years, with the heavy money requirements coming three, four or five years after orders were placed.

A further uncertainty facing the airlines at that time, especially the Big Four domestic trunk airlines (American, United, Eastern and TWA) was the prospect of a substantial increase in competition in the domestic trunk airline industry as a result of new route awards expected during 1955. Several major route cases were pending in early 1955, and with most of the major trunk airlines operating free of subsidy, the CAB was expected to make a

major reappraisal of the nation's airline routes in the course of deciding these cases.

In early 1955 the ability of the airline industry to obtain equity financing was extremely limited, as is apparent from the history of airline financing during the post-war years. Attached hereto as Exhibit A is a compilation of airline financing for the period 1946-1960, from which the paucity of equity financing during the 1950's is clearly evident.

Among Pan American,* United, American and Eastern, the first equity financing done after the sale of $40.8 million 3-1/2% cumulative convertible preferred by American on June 11,1946,** was the offering by United to its common shareholders on March 19, 1952 of 223,865 shares of 4-1/2% convertible cumulative preferred stock (convertible to common prior to 1962) at $100 per share

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* On July 3, 1945 Pan American sold $43.4 million of capital stock through an underwritten offering of capital stock with stock purchase warrants attached. 2,043,261 units were sold at $21.50 each unit consisting of one share of capital stock and a stock purchase warrant for an additional share exercisable at $18 a share. Because of the market decline beginning in 1946, very few of the warrants were exercised. (See DHR Exhibits: Pan American 1 and 2.)

** The American 3-1/2% convertible preferred stock issue (DHR Exhibit: American 3) may well have been one of the reasons why comparatively little convertible financing was undertaken by the airlines thereafter. The preferred stock dropped precipitatively in price shortly after issuance. The market price was well below par value for about 8 years. The market price of the common stock did not reach the conversion price based on redemption until December 1954. (See McClintock, Exhibit No. U-3.0, Docket No. 8008, pp. 67-8, attached as Exhibit B.)

on a basis of 1 share of preferred to every 11 shares of common (Exhibit A and DHR Exhibit: United 4.) 81,510 shares (36%) were subscribed for. The underwriters on this issue, led by Harriman Ripley, had to pick up 142,355 shares or nearly 64% of the issue. There was no other equity financing by any of these airlines until the 1958-60 period.

Attached hereto as Exhibit C is a compilation of all the common stock offerings by domestic trunk airlines during the period January 1946 to June 1957. It is readily discernible that common stock offerings were rare and in very small dollar amounts during that period. The larger offerings were those of TWA in 1952 totalling $10.7 million (DHR Exhibits: Trans World 2 and 3), that of TWA in 1957 of $43.4 million (DHR Exhibit: Trans World 7), that of Braniff in 1956 of $11.1 million (Braniff Prospectus, August 7, 1956), and that of Northeast in 1956 of $7.5 million (Northeast Prospectus, December 11, 1956). Each of these was underwritten in whole or in part by a principal shareholder. TWA offerings underwritten or guaranteed by the Hughes Tool Company accounted for over 30% of the common stock financing done by all the domestic trunk airlines through 1955 and for over 50% of such financing done through June of 1957.

The history of equity financing during the post-war piston era was summarized as follows in the initial

decision of Examiner Ralph L. Wiser in General Passenger Fare Investigation Case (Dkt. 8008) dated May 27, 1959:

> "An outstanding phenomenon of the airlines' postwar financial record has been the paucity of direct equity financing by either rights subscriptions or public offerings. A compilation presented by bureau counsel shows that between January 1, 1946, and June 30, 1956, the airlines had total financing of $604 million, of which $214 million, or 35 percent, came from long-term debt; $16 million, or 3 percent, came from preferred stock; and $374 million, or 52 percent, came from common stock ($171 million) and retained earnings ($203 million). However, most of the common-stock funds came from conversion of senior securities and only $39 million, or 6 percent of total funds, came from public sale of airline equities (i.e., subscription offering and direct offering). While there is much discussion of needs for ability to raise equity capital, the same general pattern of primary reliance upon debt and retained earnings is planned by the air carriers for the next few years." 32 CAB 291, 361-62.

This dearth of equity financing was not by design. The airlines were forced to rely on debt financing during the post-war piston era because airline equities had no investment status and most airlines were simply unable to obtain equity financing. For example, W. C. Barkes, Vice President of Finance and Property for United Airlines, explained United's 1955 debt financing program in testimony before the CAB in 1957 in the General Passenger Fare Investigation as follows (United Ex. U-2, Docket No. 8008, pp. 12-13; attached hereto as Exhibit D):

> "The 1955 financing program for United was handled entirely by arranging for issuance of debt. This was not a matter of choice, for the ability of United, as well as the industry, to sell equity has been limited. That further increase in equity is necessary and desirable is apparent, but it is equally apparent that it cannot be accomplished satisfactorily until the present period of depressed earnings is brought to an end."

In 1955 airline shares were speculative securities and they were not held in quantity by institutional investors. The CAB took note of this fact in its decision in the General Passenger Fare Investigation:

> "Airline securities represent only .58 percent of the total assets of the 43 largest investment houses, 13 of which disposed of all airline holdings by the end of 1957. Holdings of airline stock by 20 of the largest open-end investment houses declined between 1946 and 1955 from 1 percent to 0.3 percent. Holdings of 28 leading closed-end investment companies declined from 0.5 percent at the end of 1955 to 0.2 percent during the middle of 1957. Less than 0.04 percent of insurance company corporate stock investment was in airline securities." 32 CAB, 291, 303, fn. 29.

Unable to accomplish any substantial amount of equity financing, the airlines financed equipment purchases chiefly out of earnings, cash accumulations from fast depreciation and tax amortization certificates and short-term bank credits. Long-term debt was obtained only infrequently and then the maximum term was generally not

more than 20 years. As of the end of the first half of 1955 none of the airlines had obtained any financing for jet aircraft. Pan American did arrange for a long-term (25 years) $60 million loan from a group of insurance companies in May 1955, but this as well as all other airline financings done prior to the Fall of 1955 was for the purpose of financing the acquisition of piston aircraft. (Exhibit A).

C. The Proposed Financing

1. The Morehouse "Fundamental Principles"

At pages 4-5 of Mr. Morehouse's written testimony there are stated three "fundamental principles" which he says should have been followed in airline finance during the 1955-1960 period: (a) the airline should get, or endeavor to get, its equity or junior capital prior to or simultaneously with getting its senior borrowed capital; (b) the airline should own its own equipment rather than lease it from other parties; and (c) contractual commitments for capital expenditures should be prepared for reasonably in advance of the time they are to become due. Principles (a) and (c), are, of course, related.

We believe that it is unrealistic to postulate a set of principles to which diverse companies in a growth industry with varying needs and abilities should conform.

In the real world of finance an individual company's needs and abilities determine the principles by which it finances.

The relevance to his report of Mr. Morehouse's second principle, that an airline should own rather than lease its equipment, escapes us. We know of no such general principle. A decision as between ownership and leasing must depend upon the facts of each particular situation and requires not only a comparison of the relative costs, including the cost of capital, but also a determination of a company's needs and objectives. We do not attempt to set forth here the reasons why an airline might choose to lease rather than own equipment, but note that leasing of aircraft took place during the 1955-1960 period and remains a fairly common practice in the airline industry today.

With respect to Mr. Morehouse's first principle, getting equity prior to or simultaneously with senior debt, it is our experience that most companies raise funds through the sale of common equity or convertible securities only when the need therefor is clearly demonstrable. It is common practice for a lending institution to make a commitment to lend senior debt conditioned upon equity or subordinated debt financing being done prior to or contemporaneous with the later takedown of the senior funds. A well organized financin plan raises equity only when required, not in unknowing anticipation of possible future needs some years away.

As we shall show below, the fact of the matter is that historically no major airline followed Mr. Morehouse's first principle. The facts indicate that during the 1955-1960 period none of the airlines sold equity or securities convertible into equity until the latest date possible and then in amounts as minimal as possible. This is reasonable and what one would expect, rather than the converse suggested by Mr. Morehouse's first principle.

Mr. Morehouse's third principle, that contractual commitments for capital expenditures should be prepared for reasonably in advance of the time they are to become due, is difficult to quarrel with as a general proposition. The statement of the principle, however, totally fails to answer the important questions of timing and amount. No guidelines are given as to how much money should be raised, by what method or what is meant by "reasonably in advance."

In short, we do not believe that a realistic financing program can be devised or reconstructed upon any such a set of principles of airline finance. Instead, a careful analysis of the factual situation existing in the securities markets, the airline industry at large, and the individual company is required.

2. The Spring 1955 Equity Financing

(a) The Keystone Step

The financing plan for TWA as postulated by Mr. Morehouse has as its keystone a one-for-one pre-emptive equity offering proposed for the Spring of 1955.

It is apparently the opinion of Mr. Morehouse (Tr. pp. 3981, 4313-14) that the program suggested in his written testimony depends upon the success of the proposed Spring 1955 equity offering. Consequently, if this part of the program should not prove feasible the subsequent steps suggested fall of their own weight.

(b) No Need for Equity in Early 1955

We doubt that any TWA management would have been persuaded by Mr. Morehouse's "proprietary capital" argument that TWA was short of proprietary capital in comparison with the other airlines in early 1955 (pp. 8-10, Morehouse Report). We know of no airline that bases its equity or debt financing plans upon its relationship to other airlines using "yardsticks" such as those formulated by Mr. Morehouse.

Even using Mr. Morehouse's yardsticks and accepting the airlines he selected for comparison, TWA's "shortage" of proprietary capital ranges all the way from $13 million to $74 million. In addition, when TWA is compared with Eastern, the fourth member of the Big Four domestic

trunks, which Mr. Morehouse chose to ignore in this part of his discussion, it would appear by his own yardsticks that TWA was over-capitalized in early 1955 by $19 million. (p. 10, Morehouse Report and Exhibit E). A guide to the need for proprietary capital which produces results ranging all the way from $19 million over-capitalization to a "shortage" of $74 million is no guide at all.

A widely accepted measurement of the strength of a company's capital structure is its debt-equity ratio. On that basis, TWA with its ratio of 78.4% equity to 21.6% debt (p. 10, Morehouse Report) was in a better financial position than American, United and Eastern and equally as well off as Pan American.

Clearly these figures show no urgent need by TWA for equity funds. While it likely was recognized by all of the airlines and by their financial advisers in the forepart of 1955 that, at some time in the future, both additional equity and debt financing would be required by each of them to meet the oncoming jet age, no one could be sure of "when" or of "how much."

(c) Excessive Size of the Proposed Equity Financing

We have already noted in B above (pp. 5-12) that airline common stock offerings from 1946 through 1955 were not only rare, but undertaken in very small dollar amounts.

As shown in Exhibit C there were 17 common stock offerings from January 1946 through December 1955 by domestic trunk airlines for a total of $47,179,924. This was an average of $2,775,290 for each offering, even including those underwritten by majority stockholders.

The largest single offering by a domestic trunk airline during the period was by Braniff in 1955 for $5,758,050. The success of this offering and the TWA offerings in 1949 of $4,041,120 and in 1952 of $5,116,448 and $5,661,152 was guaranteed prior to each offering by a controlling stockholder (Braniff Prospectus, May 12, 1955; TWA Prospectus, February 18, 1949; DHR Exhibits: Trans World 2 and 3). Moreover, the success of the three largest common stock offerings in the year and a half subsequent to 1955 (Braniff $11,055,450 in 1956, Northeast $7,451,819 in 1956 and TWA $43,381,468 in June 1957) was similarly assured. (Braniff Prospectus, August 7, 1956; Northeast Prospectus, December 11, 1956; DHR Exhibit: Trans World 7).

It is clear that the $58.4 million common stock offering proposed by Mr. Morehouse for the Spring of 1955 would have been of astounding size, exceeding by more than $11 million the sum total of all domestic trunk common stock offerings during the 1946-1955 period. (Exhibit C). While TWA historically had raised equity during the 1946-1955 period

through the sale of common stock, the total amount aggregated not quite $15 million. It was raised in three separate offerings, the largest of which was less than one-tenth as large as that proposed by Mr. Morehouse, and was accomplished only through the very substantial and guaranteed assistance of its controlling stockholder, Toolco. To suggest, as Mr. Morehouse does, that TWA or any other domestic trunk airline, could have sold in the Spring of 1955 what was a theretofore unheard of dollar amount of stock is in our opinion utterly unrealistic, unless a financially sound majority stockholder for some reason insisted upon it and agreed in advance to assure its success.

(d) Premature Nature of the Proposed Equity Financing

To have accomplished an offering of $58.4 million of common stock in the Spring of 1955 Mr. Morehouse would have to have made his recommendations to TWA and had them accepted early in 1955.

It is common knowledge that in early 1955 there were not yet any jet aircraft available for order by TWA or any other airline and that the magnitude of the orders and investment required by the airlines was unknown. We agree with Mr. Morehouse (p. 6) that, while it was generally recognized that the amounts would be very large,

none of the airlines could estimate with any degree of certainty just how much additional capital would be required. Certainly no airline management could have foreseen in early 1955, when or in what amounts, funds would be required for the purchase of jet aircraft. No major airline saw fit, or (as we pointed out in B above at pp. 5-12) was able, to raise any equity in 1955. (Exhibit A).

Pan American was the first carrier to order jets. In October of 1955 it placed a $269 million order for 25 Douglas DC-8s and 20 Boeing 707s. Pan American had arranged for a $60 million insurance loan on May 10, 1955 to increase working capital and to acquire 7 DC-7Bs and 33 DC7-Cs, all piston aircraft. On December 19, 1956, it borrowed $30 million to provide payment for 9DC-7s and make advances on 23 707s and 21 DC-8s. It was not until July 29, 1959 that Pan American did any equity financing. In that year it had a rights offering of $46.97 million of 4-7/8% convertible subordinated debentures, convertible at $30 per share.

By the end of 1955 Eastern had ordered 19 DC-8s at a cost of $130 million, with options for 7 others. Eastern had also ordered 40 Electras costing $100 million with options on 30 more. Eastern, on October 31, 1955, entered into a credit agreement with Equitable for a total amount of $90 million which was to retire previous bank

loans and provide funds to finance aircraft purchases, including pistons. On October 21, 1958, Eastern sold to Prudential $25 million of convertible subordinated 5% notes, convertible at $41 per share.

American ordered 30 707s in November of 1955 and made arrangements on November 1, 1955 for the private placement of $75 million of 4% notes and on September 1, 1956 for the private placement of $60 million of 4-1/4% notes, the funds to be added to general funds and to be available for the purchase of jet aircraft. It was not until June 18, 1959 that American raised any equity. It then sold $40 million of 5% convertible subordinated debentures.

United ordered 30 DC-8s at a cost of $175 million in late October of 1955. It also ordered 45 four-engine piston aircraft, for a total commitment of $254.5 million. It arranged with three insurance companies on December 22, 1955 to borrow a maximum of $120 million prior to March 1, 1959. At the same time it arranged a $30 million standby revolving credit with the First National City Bank and 37 other banks. On December 20, 1957 it arranged for another $130 million of bank credit. It was not until November of 1960 that it sold $25 million of 4-7/8% convertible subordinated debentures.

The actions of these airlines clearly indicate that competent management did not raise equity in the mid-1950's as a part of long-range financing for the purchase of jet aircraft.

Finally, as is demonstrated by the "Application of Proceeds" appearing on page 22 of Mr. Morehouse's testimony, TWA had no use for equity funds in the Spring of 1955. The major dollar portion of the proceeds, $35 million, was to be used to pay off a 15-year 3-3/4% equipment mortgage loan which had just been arranged in December 1954 with Equitable. (DHR Exhibit: Trans World 4). The remainder was to liquidate other obligations so as to leave TWA debt free.

(e) Damaging Effect on TWA's Stockholders

Mr. Morehouse's proposal to raise $58.4 million in equity in the Spring of 1955 would have been a very expensive undertaking for the stockholders. In the CAB General Passenger Fare Investigation, Docket No. 8008, 32 CAB 291, 298-309, dated November 25, 1960, the CAB found that for the Big Four airlines the proper debt-equity ratio was 50%, that the cost of debt was 4-1/2%, and that the public investor required a 16% return on common equity, producing a composite return of 10.25%. Mr. Morehouse is assuming, contrary to our view, that the common stockholders would double their holdings in TWA when they could at best expect only a nominal rate of return for the foreseeable future.

A one-for-one pre-emptive offering is a drastic measure and would only be resorted to under the most unusual

circumstances such as those existing for historical TWA in 1957. As far as we have been able to determine there is no historical precedent for such an abnormally high ratio among companies of TWA's size and financial condition without the willing participation of a majority stockholder.

Some measure of the damage that might be done to all common stockholders through the proposed equity offering can be gained by a reference to figures in Mr. Morehouse's own report.

At page 22 of his report, Mr. Morehouse states that the Aggregate Indicated Market Value (AIMV) of TWA after the subscription offering would have been $116,800,000. On the 6,673,288 shares then to have been outstanding, this would indicate a post offering market price of $17.50 per share. We believe the market price would have been much lower. But even accepting the figure of $17.50, we find that the AIMV has increased only $13,400,000 after the stockholders and/or underwriters have put into the company a new amount of cash equity capital of $55,500,000. In other words, the TWA stockholders as a group having started with an aggregate market value for their shares of $103,400,000 before the offering, are being asked to put up another $58,390,000 (before underwriting fees and corporate offering expenses) to increase the AIMV not to $161,790,000 but only

to $116,800,000, a resultant self-inflicted loss of $44,990,000. A stockholder who either could not or did not choose to exercise his rights, would find his holding diluted in market value by $13.50 per share ($31 less $17.50).

Important indicia of competent management, especially as measured by the investing public, are earnings per share and yield per share. The overall money earned by a company is unimpressive to a stockholder if his earnings per share are diluted. No competent management desires to dilute the equity position of its stockholders unless required by the most pressing circumstances, and then only when the need for equity is clearly apparent.

In a regulated industry such as the airline industry, principles of reducing dilution and enhancing leverage within prudent limits are of fundamental importance to stockholders as well as to the regulatory authorities and to the public. The history of the financing of jet aircraft as arranged by the major airlines, discussed above, clearly reflects the desire of the managements of airlines to obtain the benefit of leverage afforded by debt whenever possible and to maintain the highest per share earnings possible consistent with good operating practices. Moreover, the CAB has recognized the importance of leverage by premising a rate of return for the Big Four airlines upon a capital structure containing 50 per cent debt.*

* 32 CAB 291, 307.

Since return on total investment in a regulated industry is limited on the high side, but not on the low side, the importance of leverage is magnified. The highest earnings per share will be realized by maintaining the highest level of debt the money market will accept, as long as the net interest rate is less than the return on total investment.

Quite obviously the importance of leverage is also of legitimate concern to a large majority stockholder. A competent professional management would do everything possible to maximize earnings per share, even at the expense of paying higher interest rates, approximately one half of which are paid by the government.

In our opinion a prudent and competent management would have considered both dilution and leverage in weighing Mr. Morehouse's proposal to raise equity in the Spring of 1955, and would have decided to postpone any equity financing until the need for the money could be more clearly demonstrated. In our view these considerations would have led to the same result whether the shares of the company were widely held by the public or largely held by a majority stockholder.

The fact that TWA actually did a one-for-one rights offering in 1957 does not change our view. This was not a public offering underwritten by investment bankers.

There was a definitive and immediate need for the funds* and the issue was underwritten by Toolco which had agreed to provide TWA with a minimum of $34 million of proceeds, exceeding Toolco's pro rata portion by approximately $2 million. Actually, Toolco subscribed to $35 million or 80.69% of the issue. (DHR Exhibit: Trans World 7).

(f) Alternative Assumptions as to Toolco

(i) If we assume that TWA had accepted Mr. Morehouse's recommendation with respect to the $58.4 million equity offering in the Spring of 1955 and that Toolco had agreed to take up its pro rata share of the offering in order to maintain its percentage of ownership, such a financing probably could have been done. It is our opinion, however, that such an expensive, premature and unnecessary financing would have been a bad business decisi We would not have recommended such a financing to TWA management or to the stockholders of TWA in the Spring of 1955. If such a recommendation had been made, it is our opinion that it would not have been accepted by TWA manage- ment, by its majority stockholder or by its other stockhold

(ii) If Toolco could not have been looked to for participation in the suggested equity offering, it is o

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* See Purpose of Issue Section, DHR Exhibit: Trans World

opinion that it could not have been accomplished. We would not have participated in such an underwriting and it is our opinion that a syndicate could not have been formed to have underwritten such an offering. We have already discussed the difficulties of accomplishing such a large financing under any circumstances, and we believe the impact on the financial community of a declination by Toolco to subscribe to its share of the offering would have doomed the proposal at the outset. In short, had Toolco declined to participate, Mr. Morehouse's suggested 1955 equity financing in our opinion, could not have been accomplished.

(iii) It is difficult to comment upon the purely hypothetical question presented by the assumption that there was no Toolco and that TWA was a widely-held company with no controlling stockholder. Such was not the case. Moreover, in view of the assistance TWA received as the result of Toolco's financial backing in the post-war years, it is difficult to assume that TWA, absent Toolco, could have been in as good a financial condition as it was in historically, in the Spring of 1955. Even indulging in the assumption that it was, it is our opinion that no prudent and competent management with due regard for the interests of its stockholders would have accepted the suggested equity financing plan, and if it had, we do not

believe that such an offering could have been underwritten.

The size of the offering, the lack of any precedent, the speculative nature of airline shares, the cost to the stockholders and the lack of any definitive need for the funds all argue persuasively against the doability of such a proposal. The management of TWA would have been asking its stockholders to invest their funds without any hope of a reasonable return thereon for an indefinite period of time (at least 5 years) not to finance a definitive jet aircraft program, but simply to redeem newly refinanced bonds and make the company totally debt free.

The stupendous nature of this proposed undertaking becomes fully apparent when it is realized that only $47.2 million of common stock was sold to the public by all the domestic trunk airlines during the entire 1946 to 1956 period. (Exhibit C). Moreover, if the offering had not been held precisely in the Spring of 1955, the subsequent history of TWA's earnings would have made any later offering even more difficult to consummate. Earnings for the third quarter of 1955 were $4.2 million compared to $7.1 million for that quarter in 1954 and the fourth quarter earnings dropped to $100,000 from $1.3 million the preceding year. (Exhibit F).

The years 1956, 1957 and 1958 were all loss years for TWA. (DHR Exhibit: Financials-5). Commencing in June 1955 the stocks of the airline group declined counter to the general market. (DHR Exhibits: General 5 and 7). TWA shares declined from a high of 31-5/8 in June to a low of 22-3/4 in October 1955, and, of course, went much lower thereafter. (DHR Exhibit: Trans World 9). Even accepting Mr. Morehouse's fortuitous selection of late May or early June 1955 for the proposed equity financing, we do not believe it could have been done without the assistance of Toolco. The selection of a somewhat later date would have made the success of any such a proposed financing even more improbable.

3. The Balance of the Financing Plan

As noted earlier, Mr. Morehouse testified that his financing program depends upon the success of the proposed Spring 1955 equity financing (Tr. pp. 3981, 4313-14). Therefore, if the first step had been unsuccessful, the subsequent steps in the suggested financing plan fall of their own weight. We have expressed the firm conviction that the proposed 1955 equity financing was unsound and not doable. But even assuming that such an equity financing did take place, it is our opinion that on their merits, the further financings proposed by Mr. Morehouse could not have been accomplished by TWA.

(a) The October 1, 1955 $150-170 Million Debt Financing

In assessing the likelihood of success for Mr. Morehouse's projected $150-170 million flight equipment mortgage loan of October 1, 1955, we think it relevant to consider the following:

(i) By October 1, 1955 no jets had been ordered by any airlines;

(ii) By October 1, 1955 none of the airlines had arranged any financing (debt or equity) for the purchase of jet aircraft; (Exhibit A)*

(iii) The maximum $170 million mortgage commitment which Mr. Morehouse assumes TWA could have obtained substantially exceeds the long-term commitments obtained by any other airline in 1955** The large commitments obtained by United, Eastern and American later in the Fall of 1955 were the largest in the history of the airline industry. Indeed, a $150-170 million loan to TWA on October 1, 1955, would have been almost three times as large as any long-term commitment that had been made

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* The debt financings referred to by Morehouse on page 32 of his Report (see also Financials-13) were arranged on the following dates: Pan American May 10, 1955; Northwest June 30, 1955; Eastern October 31, 1955; American, Novembe 1, 1955 and United December 21, 1955. However, the earlie Pan American and Northwest financings were for the purpos of acquiring the latest series of pistons ordered. (Exhibi

** American obtained $75 million; Eastern obtained $90 mill and United obtained $120 million of long-term debt. Financing done by other airlines during this period was for much smaller amounts. (Exhibit A).

to that date to any airline for any purpose, and would have exceeded the commitments to the other airlines by a minimum of $30-50 million. (Exhibit A).

(iv) Detailed projections with respect to the Boeing 707-331s and the Convair 880s could not have been prepared as of October 1, 1955. Lending institutions, such as life insurance companies did not make commitments of the size envisaged by Mr. Morehouse without making a comprehensive analysis of the planned use of the funds. Jet aircraft were an unknown and untested commodity in the Fall of 1955. Any insurance company asked to lend large sums of money for such a purchase during this period would have demanded detailed information as to the type and size of the fleet, cost, terms of payment, delivery dates, earning power, depreciation, planned usage, configuration and the like.

We are advised by counsel that we may assume, based upon the record in the case to date, that the intercontinental Boeing, the 707-320 series, was not ordered by any airline until December, 1955 and that detailed information on that aircraft such as described above was not available to the airlines until some time after October 1, 1955. We do not believe that funds could have been borrowed for the acquisition of this aircraft until detailed projections

containing information relating to cost, terms, delivery, earning power and the like could have been made available to prospective lenders. We note that such detailed projections, although hypothetical, were in fact included as a part of Mr. Morehouse's Report (Financials-8, 9 and 10) but that his projections were based upon information apparently not yet available to the industry. We also note the detailed projections which United in fact used in order to obtain its loan commitment in December 1955. (Defendants' Exhibit 197 in evidence.)

Moreover, Mr. Morehouse assumed that TWA's proposed borrowing on October 1, 1955 would have included a $25 million projected down payment for medium/long-range airplanes not yet selected. As to the last item, it is our opinion that a commitment of this size could not have been obtained as of October 1, 1955 to buy an unspecified number of unselected airplanes which had not yet been developed or identified.

(v) Although not disclosed by Mr. Morehouse's exhibits, TWA's earnings, as compared to 1954, began to fall in the second quarter of 1955 and dropped sharply in the third and fourth quarters. (Exhibit F).

In view of the above, and even assuming, contrary to our view, that the proposed 1955 equity financing

had been accomplished, it is our opinion that TWA would not have and could not have obtained a commitment for $150-170 million on October 1, 1955.

(b) The May 1959 $60 Million of Convertible Debentures

Notwithstanding our conviction that neither the equity nor the debt financing proposed by Mr. Morehouse for the year 1955 could have been accomplished, we will assume for the purpose of the following comments on Mr. Morehouse's 1959 proposals that both of his 1955 financings had been accomplished.

The convertible debenture financing of $60 million proposed by Mr. Morehouse for May 1959 (page 68) substantially exceeds any equity financing done by Pan American, American, Eastern or United during the 1955-1960 period. On October 21, 1958, Eastern sold $25 million of convertible subordinated notes; on June 18, 1959 American sold $40 million of convertible subordinated debentures; on July 29, 1959 Pan American sold $46.97 million of convertible subordinated debentures; on November 30, 1960, United sold $25 million of convertible subordinated debentures. Based on these facts and in light of the reconstructed earnings of TWA during the years 1956, 1957 and 1958 it seems questionable that the offering would have been doable.

We note that this proposed financing was deferred from 1956, although on page 38 of his report,

Mr. Morehouse acknowledged that a need for additional junior financing was apparent in 1956. Mr. Morehouse declined to suggest equity financing in 1956, but delayed such financing until he could take advantage of the more favorable market climate of 1959. Examination of the market price for airline stocks during the period indicates that again in May and June of 1959 the market was at its all-time high for the preceding four years and for that matter for the succeeding three and one-half years as well. (See DHR Exhibit: General 7). We find it difficult to believe that it would have been possible to have had two equity financings - one in 1955 and one in 1959 - and catch the market each time at or near its high over a thirteen-year period. One would have indeed been fortunate to have been able to do this.

(c) The May 1959 $90-110 Million Loan Commitment

With respect to the private placement of $90-110 million of 6% mortgage notes in May 1959, we doubt that an institutional investor would have been willing to enter into the commitment in light of the poor earnings and cash flow coverages and the high senior debt ratio of 60.7% shown for reconstructed TWA in Mr. Morehouse's schedule at page 70. According to the schedule, on a pro forma basis reconstructed TWA had earned an average over five years

(1954-1958) of only half of the interest that would have been payable had the total reconstructed senior debt of $280 million been outstanding. The 12 months ended March 31, 1959 were not much better than the five year average, as only 70% of the interest had been earned. None of these figures would seem to justify an institutional lender making an additional $90-110 million senior debt investment in reconstructed TWA.

Based upon our dealings with insurance companies in arranging financing for our clients, we know that all insurance companies, including the major lenders, are regulated in their investments by state laws, which prevent the lenders from acquiring obligations which are predominantly speculative in character.

We note that Mr. Morehouse speculated as to the quality of both his proposed October 1955 mortgage obligations and his $60 million May 1959 convertible subordinated debentures. In Mr. Morehouse's opinion the institutional investors would have viewed the October 1955 obligations as "not quite up to Baa quality" (page 31). As to the May, 1959 convertible subordinated debenture issue, he states that it "might have been rated no higher than B".* (page 68).

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* Although DHR Exhibit: General 1 defines Baa and Ba ratings, no definition of a B rating is given. Moody's defines a B rating as follows: "Bonds which are rated B generally lack characteristics of the desirable investment. Assurance of interest and principal payments or of maintenance of other terms of the contract over any long period of time may be small."

However, he gives no clue as to a possible rating for the $90-110 million May 1959 mortgage notes. It is our opinion that the May 1959 mortgage notes would have been considered at best of B quality, and thus might well have presented to institutional lenders a question as to whether such an investment would have complied with applicable state laws.

We are aware of so-called "basket provisions" under which insurance companies technically are permitted by state statutes to make otherwise unqualified investments up to a very small percentage of admitted assets. However, in our experience insurance companies are reluctant to make loans directly under the "basket provisions", and when they do, it is only in special situations and in small dollar amounts, certainly not in the $100 million category.

We do not attempt to pass upon the legality of the loan proposed by Mr. Morehouse, but our experience in dealing with institutional lenders leads us to the conclusion that, as a practical matter, it would have been a most difficult, if not impossible task to persuade an institutional lender to enter into the loan commitment proposed by Mr. Morehouse for May of 1959.

D. The Feasibility of TWA Independently Financing the Projected Capital Requirements of $544.8 Million

The reconstructed capital requirements of TWA from October 1, 1955 through December 31, 1960, which appear in DHR Exhibit: Financials-31, were $544.8 million. These

requirements include the cost of the 63 jet planes originally ordered by Toolco for TWA, as well as the cost of the piston acquisitions TWA historically incurred. Assuming the reconstructed funds available from operations during the period (DHR Exhibit: Financials-30) TWA would have been faced with the task of raising in excess of $300 million of new money to carry out its hypothetical program.

It is our view that in the light of the diminishing reconstructed earnings in 1955 and the loss years of 1956, 1957 and 1958 (DHR Exhibit: Financials-29), TWA could not independently have raised $300 million on reasonable terms.

TWA historically financed its requirements during the 1955-1960 period only with the substantial assistance of Toolco. In 1957 TWA had an equity financing totalling $43.4 million, of which Toolco furnished over $35 million. (DHR Exhibit: Trans World-7). TWA incurred debts at the end of December 1960 of $165 million of senior debt consisting of $92.8 million to insurance companies and $72.2 million to banks, and $100 million in the form of interim subordinated notes purchased by Toolco, to be exchanged for subordinated debentures with detachable common stock warrants (which issue was to be guaranteed by Toolco). TWA also obtained a $50 million credit from Toolco on a subordinated basis for working capital purposes. (TWA 1960 Annual Report). The total of

these 1957 and 1960 financings (not including the $50 million working capital credit) was $308.4 million, of which Toolco supplied over $135 million.

These financings assisted TWA historically in acquiring 47 jet airplanes (15 Boeing 131s, 12 Boeing 331s and 20 Convair 880s) and various piston planes, all of which are included in the larger reconstructed acquisition program Mr. Morehouse attempts to finance. In light of the substantial contributions by Toolco which made TWA's historical acquisitions possible, we do not see how TWA could have independently financed the even greater capital requirements of the hypothetical program including 63 jet planes (15 Boeing 131s, 18 Boeing 331s and 30 Convair 880s).

In his conclusion, Mr. Morehouse states (p. 75) that DHR did not wish its report to be interpreted as meaning that the financial program recommended was the only program by which TWA might have successfully financed to meet the question posed. There are no other suggestions given, so we are left with the program suggested by Mr. Morehouse which has as its cornerstone the $58.4 million equity financing in the Spring of 1955. We have stated that we do not believe that such a financing was possible without Toolco's participation, and assuming that there was no Toolco we do not believe that any prudent and competent management without the benefit of hindsight would have

adopted such a program. If there were another financial program available without Toolco's help, we believe Mr. Morehouse would have recommended it and not a program so subject to criticism because of hindsight opportunism as the program he did recommend.

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

GENE M. WOODFIN, being duly sworn, deposes and says:

I am a Partner in Loeb, Rhoades & Co., and the above report was prepared under my direct supervision. I have read the report, know the contents thereof, and all statements therein contained are true as stated to the best of my knowledge, information and belief. I hereby adopt the report as my direct testimony in the proceedings before the Honorable Herbert Brownell, Special Master, entitled Trans World Airlines, Inc. v. Howard R. Hughes, et al., 61 Civil 2324, United States District Court for the Southern District of New York.

Gene M. Woodfin

Sworn to before me this
16th day of June, 1967.

ROSE H. SUELT
Notary Public, State of New York

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ARMAND G. ERPF, being duly sworn, deposes and says:

I am a Partner in Loeb, Rhoades & Co., and I have participated in the preparation of the above report. I have read the report, know the contents thereof, and all statements therein contained are true as stated to the best of my knowledge, information and belief.

Armand G. Erpf

Sworn to before me this
16th day of June, 1967.

Notary Public.

ROSE H. SCOTT
Notary Public, State of New York
No. 41-0291580
Qualified in Queens County
Commission Expires March 30, 1969

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

KENRICK S. GILLESPIE, being duly sworn, deposes and says:

I am a Partner in Loeb, Rhoades & Co., and I have participated in the preparation of the above report. I have read the report, know the contents thereof, and all statements therein contained are true as stated to the best of my knowledge, information and belief.

Kenrick S. Gillespie

Sworn to before me this
16th day of June, 1967.

Notary Public.

ROSE H. SCOTT
Notary Public, State of New York
No. 41-0291580
Qualified in Queens County
Commission Expires March 30, 1969

EXHIBIT A - 1

DOMESTIC TRUNK AIRLINE AND PAN AMERICAN FINANCINGS 1946 - 1960*

	Airline**	Description	Amount	Purpose	Purchaser or Lender	Investment Banker
/46	TWA	2-1/4% Series B Sinking Fund Debentures due 1951	$10,000,000	Purchase of Constellations	Equitable	--
/46	AAL	3% Debentures due 1966	40,000,000	General Corporate Purposes & Purchase of Flight Equipment	Public Offering	Kidder Peabody Lehman Bros. Glore Forgan Emanuel Deetjen
/46	AAL	3-1/2% Cumulative Convertible Preferred per 100	40,800,000	General Corporate Purposes & Purchase of Flight Equipment	Public Offering	Kidder Peabody Lehman Bros. Glore Forgan Emanuel Deetjen
/46	NAL	150,000 shares common at $25.50	3,825,000	New Equipment $DC4_s$ & $DC6_s$	Public Offering	Lehman Bros.
2/46	PN	1-1/2% Credit Agreement	40,000,000	Equipment	National City and others	--
6/46	NW	Credit Agreement	10,000,000	Martin 303_s	National City and others	--
1/46	NAL	2% Credit Agreement	3,000,000	Equipment		--
8/46	NW	271,935 shares common stock at $18.50	5,030,797	Repay bank loans and purchase equipment	Offering to Shareholders 1 for 2	Auchincloss, Parker & Redpath; First Boston Hornblower & Weeks
1/46	EAL	1-1/2% Revolving Credit	20,000,000	14 Constellations and Corporate Purposes	Chase National and 26 Banks	--

Does not include Colonial Airlines (merged into Eastern Air Lines), Chicago & Southern (merged into Delta Air Lines) and Western Air Lines.
Debt financings through conditional sales contracts or by leasing are not included.

American Airlines, Inc.	AAL
Braniff Airways, Inc.	BNF
Capital Airlines	CAP
Continental Airlines	CAL
Delta Air Lines, Inc.	DAL
Eastern Air Lines	EAL
National Airlines, Inc.	NAL
Northeast Airlines	NEA
Northwest Airlines, Inc.	NW
Pan American World Airways	PN
Trans World Airlines, Inc.	TWA
United Air Lines, Inc.	UAL

DX270, Exhibit A-1
(Report of Loeb, Rhoades & Co.)

AX-1771

AX-1772

DX270, Exhibit A-2
(Report of Loeb, Rhoades & Co.)

	Airline	Description	Amount	Purpose	Purchaser or Lender	Investment Banker
946	DAL	2-1/2% Bank Credit Agreement due 1961	$ 5,000,000	To purchase Martin 202s	Citizens & Southern and 16 Banks	--
	CAP	Notes	4,000,000	Equipment	Bank	--
/47	TWA	2-3/4% Subordinated Convertible Notes due 6/2/56	10,000,000	Working Capital	Toolco (On August 24, 1948 TWA issued 1,034,423 shares of common to Toolco in exchange for the surrender and retirement of these notes and accrued interest.)	--
/47	BNF	2-1/2% Bank Credit	10,000,000	Flight Equipment DC6s and DC4s	New York Trust and others	--
7	UAL	Revolving Credit 1-1/2% - 2%	28,000,000	Expansion program including New Flight Equipment; New Ground facilities	National City and 34 Banks	--
/47	UAL	Series A Debentures 3-1/2% due 1967	12,000,000	Expansion program including New Flight Equipment; New Ground facilities	Metropolitan & MONY	Harriman Ripley
/47	UAL	4-1/2% Cum. Conv. Pfd. 94,733 shares	9,477,000	Expansion program including New Flight Equipment; New Ground facilities	Offering to Shareholders 1 for 19-1/2	Harriman Ripley
7	NEA	3% note	2,029,125	Construction of Hangar, 2 C47s, repay debt, working capital	Atlas Corp.	--
/47	NW	Revolving Credit 1-1/2% - 2%	18,000,000	To repay bank debt	14 Banks	--
/47	CAL	2-1/2% Credit Agreement	1,700,000	5 Consolidated Vultee Model 240	Chase National and others	--
/47	NW	4.6% Cum. Conv. Pfd. (390,000 shares at $25)	9,750,000	Expansion and General Corporate Purposes	Public Offering	Auchincloss, Parker & Redpath; First Boston; Hornblower & Weeks
/47	DAL	100,000 shares common at $22	2,200,000	Working Capital	Private Placement	Courts & Co.
/48	AAL	Credit Agreement	7,500,000	To provide for unforeseen contingencies	Mellon National, National City, Security First National	--
8	NEA	$1 Cum. Conv. Pfd. 83,333 shares at $20	1,667,000	To repay debt owing to Atlas Corp. & Salta Holding Corp.	Offering to Shareholders 1 for 6	None

[illegible]	CAL	37,500 shares common at $8	$ 300,000	5 CV240$_s$	Public Offering	Lehman Bros.
3/25/48	TWA	Secured Credit Agreement 3%, due 1953 (Guaranteed in part by Lockheed)	12,700,000	Purchase of 12 L 749$_s$	Bankers Trust and 13 other banks	--
			3,577,000	Purchase of 9 L 049$_s$	Bankers Trust and Mellon Bank	--
			2,500,000	Constellation engines and propellers	Wright and Curtiss-Wright	--
8/3/48	UAL	184,807 common at $10.75	1,987,000	Capital expenditures	Offering to Shareholders 1 for 10	Harriman Ripley
8/48	PN	Term Loan	40,000,000	To convert credit agreement to term loan	National City and others	--
1948	NEA	Notes	400,000	To refund other Atlas Notes	Atlas Corp.	--
2/18/49	TWA	404,112 common at $10	4,041,120	General Funds	Offering to Shareholders 1 for 5	Merrill Lynch
3/17/49	NAL	174,000 common at $5.50	957,000	--	W. R. Grace	Lehman Bros.
4/19/49	NAL	66,013 common at $6.50	429,000	--	Bessemer Securities	Lehman Bros.
4/19/49	NAL	10,000 common at $5.50	55,000	Settlement of Legal Fees	Loftin, Anderson, Scott, McCarthy & Preston	--
5/16/49	NEA	4% Notes	1,750,000	4 CV 240$_s$	Reconstruction Finance Corp.	None
8/4/49	TWA	Secured Credit Agreement, 3%, due 1955 (Guaranteed in part by Lockheed)	12,000,000	20 L 749A$_s$	Mellon and 6 other banks	--
9/1/49	NW	4% Credit Agreement Secured by Equipment and Hangars	21,000,000	10 Boeing Stratocruisers and to replace 1947 Credit Agreement	Bankers Trust and others	--
9/1/49	UAL	3% Credit Agreement	3,500,000	5 DC6$_s$	National City and other banks	--
9/20/49	PN	3% Credit Agreement	59,000,000	To repay other bank loans and acquire American Overseas Airlines	National City and 29 other banks	--
11/1/49	CAP	4% Series A Debenture due 1960	3,700,000	To refund existing long term debt	Offering to SH in exchange for 3-1/2% Notes	Lehman Bros.; White, Weld
11/1/49	CAP	4% Series B Convertible	3,700,000	To refund existing long term debt	Offering to SH in exchange for 3-1/2% Notes	Lehman Bros.; White, Weld

DX270, Exhibit A-3
(Report of Loeb, Rhoades & Co.)

AX-1773

Approx. Date	Airline	Description	Amount	Purpose	Purchaser or Lender	Investment Banker
7/1950	NAL	Secured Demand Loan 2-1/4% - 2-1/2%	$ 2,000,000	To pay for 4 DC6s	2 banks	--
8/9/50	CAP	Aircraft Purchase Notes due 1953	3,332,506	5 Constellations	Lockheed Aircraft Corp.	--
9/30/50	EAL	Credit Agreement 2-1/4%-2-1/2%	30,000,000	35 M404s, 14 L1049s and to repay $6,000,000 debt	Banks	--
1950-1951	TWA	Secured Credit Agreements, 3-3/4%, due 1956	22,850,000	40 M404s, 10 L1049As	Mellon and other banks	--
3/31/51	CAL	Secured Credit Agreement 4-1/2% due 1958	3,000,000	7 CV340s and 2 DC6Bs	Chase National and 17 other banks	--
1951	NAL	Bank loan	5,000,000	Aircraft purchases	Banks	--
2/1/52	UAL	Series B Debs. 3-1/2% due 1967	10,000,000	General	Metropolitan, MONY	Harriman Ripley
2/25/52	CAL	Supplemental Credit Agreement 4-1/2% due 1958	4,500,000	7 CV340s and 2 DC6Bs	Chase National and 17 other banks	--
2/28/52	TWA	240,774 shares at 21-1/4	5,116,448	General	Offering to Shareholders 1 for 10	None
3/5/52	CAL	89,944 shares at 8-1/2	764,524	Equipment	Public Offering	Lehman Bros.
3/19/52	UAL	223,865 shs. conv. Pfd. 4-1/2% at 100	Approx. 22,300,000	To redeem 5% Pfd.	Offering to Shareholders 1 for 11	Harriman Ripley
7/1/52	UAL	Credit Agreement 3-1/4% to 1/1/55, due 10/1/59	45,000,000	--	38 banks	--
8/12/52	DAL	100,000 shs common at $25	2,500,000	Equipment and corporate purposes	Public Offering	Courts & Co.
8/15/52	BNF	Credit Agreement	13,000,000	Flight Equipment	--	--
8/15/52	EAL	Credit Agreement Amended to 3/31/57	40,000,000	Working capital and new aircraft	--	--
8/16/52	BNF	Conv. Debs. 4-1/2% due 1963	2,000,000	Debs. assumed through merger	--	--

DX270, Exhibit A-4
(Report of Loeb, Rhoades & Co.)

	Airline	Description	Amount	Purpose	Purchaser or Lender	Investment Banker
	EAL	From. Note 4% due 12/21/61	$ 307,136	--	Phillips Petroleum	--
/52	DAL	Credit Agreement 3-1/2% to 8/1/54	20,000,000	20 CV340s, 10 DC7s	25 banks	--
/52	NAL	Loan Agreement 3-1/2% to 6/30/59	12,000,000	8 DC6Bs, 8 CV340s, 4 DC7s, and retired $5,000,000 bank loan	--	--
/52	CAP	3-7/8% Credit Agreement Secured to 6/30/54	5,000,000	5 Constellations	Chase National Bank	--
/52	TWA	353,822 shs. at $16	5,661,152	General	Offering to Share-holders 1 for 7	None
/53	NW	Credit Agreement Secured 4% due 12/31/59	21,800,000	6 1049Es	14 banks	--
/53	DAL	Conv. Debs. 5-1/2% due 5/1/73	10,942,000	Purchase of Chicago & Southern Airline	--	--
/53	PN	Credit Agreement 3-1/4%-3-3/4% due 1955-1958	59,000,000	$34,000,000 to repay debt under the 1949 agreement	National City and other banks	--
/53	CAL	Credit Agreement Amended 4-1/2% due 1959	1,000,000	DC6Bs	Chase National and 17 other banks	--
	TWA	Secured Credit Agreement, 4%, 6 years	25,000,000	20 L 1049Gs	Mellon and other banks	--
/54	UAL	Credit Agreement Amended to 1/1/56, amount reduced	30,000,000		Banks	--
/54	UAL	Series C Debs. 3-3/4% due 1974	20,000,000	General	Metropolitan MONY	Harriman Ripley
/54	CAP	Purchase Note at Bank of England rate ruling plus 1.75%; 3/1/55 became a chattel mortgage owed to Vickers-Armstrong Ltd.	67,000,000	40 to 60 Viscounts	Chase National Bank	--
/54	NW	Credit Agreement 3-3/4%	18,000,000	4 L 1049G, 6 DC6B	Bankers Trust and 14 banks	--
/54	TWA	Secured Revolving Credit, 3%, Terminating 6/30/57	10,000,000	Working Capital	Irving and 7 banks	--
/54	TWA	3-3/4% Equipment Mortgage Sinking Fund Bonds due 12/1/69	40,000,000	Refinance outstanding mort. debt, replace 1953 Bank Credit and purchase 20 L 1049Gs	Equitable	--

DX270, Exhibit A-5
(Report of Loeb, Rhoades & Co.)

AX-1775

Approx. Date	Airline	Description	Amount	Purpose	Purchaser or Lender	Investment Banker
3/1/55	UAL	Credit Agreement Amended 3-1/4%, available to 12/31/57, due 4/1/63	$30,000,000	General	Banks	--
5/10/55	PN	Notes 3-3/4% due 1980	60,000,000	7 DC7B$_s$, 33 DC7$_s$, Working Capital	Insurance Companies: Northwestern Mutual, Prudential, New England Mutual, Metropolitan and several others	Lehman Bros. Hornblower & Weeks
5/11/55	BNF	S.F. Notes 4-1/2% due 4/1/70	15,000,000	To pay for 7 DC7C$_s$ and debt retirement		F. Eberstadt
5/12/55	BNF	460,644 shs. com. stock at $12.50	Approx. 5,750,000	--	Offered to Shareholders 1 for 3	F. Eberstadt
6/30/55	NW	Credit Agreement 3-3/4% due 9/29/58	29,500,000	13 DC6$_s$, 8 DC7$_s$ and to replace 11/1/54 Agreement	Banks	--
9/30/55	NEA	Credit Agreement 4% due 12/31/62	11,000,000	10 DC6B$_s$	Banks	--
10/31/55	EAL	Notes 3-3/4% due 12/15/75	90,000,000	$36,000,000 to retire bank debt $14 MM for DC7B$_s$, Super Gs and 40 Electras, $40 MM for a future jet order	Equitable	--
11/1/55	AAL	Notes 4% due 11/1/96 (funds available until 1959)	75,000,000	20 jets	Metropolitan	Lazard Freres
11/3/55	CAL	Conv. Sub. Debs 4-3/4/70	4,125,000	To repay installment notes and general corporate purposes	Public Offering	Lehman Bros.
12/19/55	CAL	Credit Agreement	10,000,000	3 CV440$_s$, 5 DC7B$_s$	Chase Manhattan	--
12/21/55	UAL	Credit Agreement Amended 3-1/4% due 1/1/65	30,000,000	Jets	38 banks	--
12/21/55	UAL	Series D Debs 4% due 2/1/81	120,000,000	30 DC8$_s$	Metropolitan, MONY Prudential	Harriman Ripley (agent)
1955	NEA	Credit Agreement 4% due 3/63	11,000,000	DC6B	Chase Manhattan	--
3/15/56	DAL	Credit Agreement	30,000,000	Repay debt and 5 CV440$_s$, 10 DC7$_s$, 8 DC8$_s$	25 banks	--

AX-1770

DX270, Exhibit A-6
(Report of Loeb, Rhoades & Co.)

	Airline	Description	Amount	Purpose	Purchaser or Lender	Investment Banker
56	CAP	Conv. Subord. Debs. 4-1/4% due 7/1/76	$12,000,000	To refund debt and expansion	Public Offering	Lehman Bros.
56	DAL	125,000 shs common at $37	4,625,000	Corporate purposes	Public Offering	Courts & Co.
56	BNF	1,105,545 shs common stock at $10	11,000,000 (approximately)	To pay for 7 DC7s, 5 CV440s, 5 B707s, and 9 Electras	Offering to Shareholders 3 for 5	F. Eberstadt
56	AAL	Promissory Notes 4-1/4% due 11/1/96	60,000,000	Turbine powered aircraft for delivery in 1959 and 1960	Metropolitan and Prudential	Lazard Freres
56	BNF	Eq. Notes 4-3/4% due 7/1/76	40,000,000	To pay for 7 DC7s, 5 CV440s, 5 B707s, and 9 Electras	MONY, Equitable, Prudential, New England Mutual, Northwestern Mutual, Connecticut General, Connecticut Mutual	F. Eberstadt
56	NW	Credit Agreement 4-1/4% due 1959-63. To replace 6/30/55 agreement	38,500,000	Equipment	--	--
56	NEA	784,402 shs at 9-1/2	7,451,819	10 DC6Bs and corporate purposes	353,947 to holders other than Atlas Corp. on 4-5 basis; 38,254 to Atlas Corp.: Total 392,201 to public	Carl M.Loeb, Rhoades & Co.
56	CAL	Credit Agreement 4-1/2% due 1964	10,000,000	Equipment	Chase Manhattan	--
56	PH	Promissory Notes 4-3/4% due 3/1/80	30,000,000	9 DC7Cs, 23 B707s - advances, 21 DC8s - advances	Institutional Investors: Metropolitan, Prudential, Northwestern Mutual, Conn. Mutual, Mutual Benefit	Lehman Bros. Hornblower & Weeks
	NAL	Purchase Obligation	3,504,000	To purchase interchange route	--	--
	TWA	Credit, Prime, Terminating 4/30/58	10,000,000	Reserve funds	Hughes Tool Co.	--
	CAL	Mortgage 4-1/2% due 1976	130,000	Office building	--	--

DX270, Exhibit A-7
(Report of Loeb, Rhoades & Co.)

AX-1777

EXHIBIT A - 8

Approx. Date	Airline	Description	Amount	Purpose	Purchaser or Lender	Investment Banker
4/10/57	CAL	Credit Agreement (Replaces 1955 Agreement)	$26,500,000	15 Viscounts, 4 B707s, 5 DC7Bs and to refund debt	Chase Manhattan	--
5/15/57	TWA	Secured Bank Loan, 5-5-1/4%, due 12/1/60	35,000,000	Refinance debt and purchase L1049Gs and L1649As	Irving and other banks	--
5/23/57	CAL	230,000 shs at $10	2,300,000	--	Public Offering	Lehman Bros.
6/17/57	TWA	3,337,036 shs at $13	43,381,468	Refinance debt and purchase L 1049Gs and L 1649As	Offering to Shareholders 1 for 1	None
10/57	NEA	5-1/2% Subord. Note	2,000,000	--	Atlas Corp.	--
12/2/57	TWA	Subordinated Note, Prime	5,800,000	--	Hughes Tool Co.	--
12/31/57	TWA	Guaranteed (by Hughes Tool Co.) Note	12,000,000	General	Irving and Bank of America (Purchased by Hughes Tool Co. - 7/1/58)	--
12/20/57	UAL	Credit Agreement, Prime; due 12/31/61. Later extended to 6/30/62	130,000,000	11 B720s, 10 DC8s	First National City and 36 banks	--
12/31/57	PN	Short Term Loans	24,999,000	--	Banks	--
1957	PN	Installment Notes 4-1/2%, 19 monthly installments beginning 1/1/59	725,000	Purchase of aircraft	Banks	--
1957	CAL	Subordinated Notes 5% due 6/1/62	1,024,938	--	--	--
1957	CAL	Equipment Notes	4,400,000	Equipment	--	--
1957	NEA	Equip. Trust Certif. 5.737% - 7% due 1963-65	10,213,000	8 Viscounts	Vickers-Armstrong Ltd.	--
2/27/58	CAP	Notes	2,500,000	--	Chase Manhattan	--
5/31/58	NAL	Credit Agreement 4%	15,000,000	Equipment	--	--
6/19/58	CAL	Conv. Subord. Debs 5-3/4% due 6/1/73	12,500,000	To repay Vickers and flight equipment	--	Lehman Bros.

AX-1778

DX270, Exhibit A-8
(Report of Loeb, Rhoades & Co.)

	Airline	Description	Amount	Purpose	Purchaser or Lender	Investment Banker
/58	EAL	Credit Agreement Prime + due 1961	$50,000,000	40 Electras, 16 DC8s	Chase Manhattan and 17 other banks	--
/58	EAL	Conv. Sub. Notes 5% due 12/1/78	25,000,000	40 Electras, 16 DC8s, and working capital	Prudential	--
/58	PN	Credit Agreement; Prime +	130,000,000	To pay for 23 707s, 17 DC8s	New York Trust and 38 banks	--
/58	DAL	Debs. 6% due 10/1/74	25,000,000	Pay for 6 DC8s, 10 CV880s, and equipment	Prudential	--
/58	NW	4-1/4% - 4-5/8% due 1965	32,500,000	Equipment	15 banks	--
/58	NW	6% Notes due 10/1/78	40,000,000	5 DC8s, 10 Electras	Prudential, Conn. General, Conn. Mutual, Mutual Benefit, N.E. Mutual, and others	First Boston
/58	NAL	Credit Agreement	40,000,000	3 DC8s, 12 Electras, and repay debt	Chemical Corn Exchange Bank, First National City (50/50)	--
/58	NW	457,873 shs 5-1/4% Conv. Pfd. at $25	11,450,000 Approximately	Repay debt incurred for acquisition of DC7Cs and DC6Bs	Offering to Shareholders 1 for 3	First Boston
/58	DAL	Credit Agreement Amended	5,000,000 added	--	--	--
	NEA	5-1/2% Subord. Notes	3,824,000	--	Atlas Corp.	--
/59	AAL	Promissory Notes 5% due 11/1/96	30,000,000	Jets	Equitable and Metropolitan	Lazard Freres
/59	AAL	Conv. Sub. Debs 5% due 1/1/85	40,000,000	Jets	Equitable and Metropolitan	Lazard Freres
/59	PN	Conv. Sub. Debs 4-7/8% due 1979	46,971,000	Acquisition of jets and related flight and ground equipment	Offering to Shareholders - $100 for 14	Lehman Bros., Hornblower & Weeks
	CAL	Equip. Trust Certif. 6% due 6/1/62	1,545,391	--	--	--
	NEA	5-1/2% Subord. Notes	7,618,000	--	Atlas Corp.	--
/60	PN	Promissory Notes 6% due 8/1/60.	50,000,000	Jets and working capital	11 insurance companies	Lehman Bros.

DX270, Exhibit A-9
(Report of Loeb, Rhoades & Co.)

AX-179

Approx. Date	Airline	Description	Amount	Purpose	Purchaser or Lender	Investment Banker
9/1960	CAL	Secured Notes Series A 5-1/2% due 9/30/65	$25,500,000	B 707s and to retire bank debt and working capital	Chase and 21 banks	--
9/1960	CAL	Secured Notes Series B 6-1/2% due 12/31/72	12,500,000	B 707s and to retire bank debt and working capital	9 institutional lenders	--
9/1960	CAL	Subordinated Notes 6-1/2%	4,000,000	B 707s and to retire bank debt and working capital	--	--
11/30/60	UAL	Conv. Sub. Debs. 4-7/8% due 12/1/85	25,000,000	To refund debt	Public Offering	Harriman Ripley
11/30/60	UAL	Credit Agreement Amended	35,000,000	Jets	First National City and other banks	--
12/15/60	PN	Credit Agreement Supplementary to 1958 $14.8 MM borrowed 12/20/60	18,500,000	Jets and working capital	NewYork Trust and 38 banks	--
12/29/60	NAL	Demand Loan 5-1/4%	4,500,000	--	--	--
12/30/60	AAL	5-3/4% Notes	60,000,000	--	Metropolitan	--
12/30/60	TWA	Secured 6-1/2% Sinking Fund Notes, due 12/31/72	92,800,000	(Refinance existing debt, including interim loans; and purchase of jet aircraft and equipment)	Equitable and Metropolitan	Dillon Read
		Secured 6% Serial Notes	72,000,000		Irving and 7 banks	
		Subordinated 6-1/2% Interim Note	100,000,000		Hughes Tool Co.	
		Subordinated Credit	50,000,000	Working Capital	Hughes Tool Co.	
1960	NW	Credit Agreement	42,500,000	Replace 1958 Agreement	--	--
1960	NAL	Short Term Loan 5-1/4%	3,000,000	--	--	--
1960	NEA	Sub. Notes 5-1/2%	3,309,000	--	Atlas Corp.	--
1960	NEA	6-1/2% Notes due 1962-1964	6,500,000	--	Hughes Tool	--
1960	NEA	Installment Notes	880,412	--	--	--

Prepared by Loeb, Rhoades & Co.

Sources: Prospectuses, Annual Reports, SEC and CAB Documents, Moody's Industrial Manuals, Moody's Transportation Manuals, Commercial & Financial Chronicles, Investment Dealers' Digests and Standard & Poor's Corporation Records.

DX270, Exhibit A-10
(Report of Loeb, Rhoades & Co.)

consisted entirely of subordinated convertible debentures. The deductibility of interest for tax purposes accounts for this situation. It is only recently that the investment markets have been receptive to subordinated debt financing. While it has recently been a popular method of financing, we should point out that any debt security whether subordinated or not, is by its nature an obligation on which default entails consequences which do not ensue from a failure to pay preferred dividends.

b. The Market History of Airline Convertible Securities

American Airlines 3 1/2% convertible preferred stock was sold publicly in June, 1946, at $102 per share. The market for airline common stocks was then relatively high. The conversion price, based on the public offering price of the preferred stock rather than its $100 par value, amounted to $21.42 per common share. The preferred shares are convertible at any time prior to redemption. The redemption prices, and the applicable conversion prices per share of common stock have been as follows:

	Redemption Price Preferred	Equivalent Conversion Price Per Share Common
On or before June 1, 1951	$104	$21.84
Thereafter on or before June 1, 1956	103	21.63
After June 1, 1956	102	21.42

Source: Offering prospectus dated June 11, 1946.

Unless the common stock sells above the equivalent conversion price at the applicable redemption price, the company cannot force conversion through redemption.

The subsequent market range in price for both the preferred stock and the common stock has been as follows:

Year	Preferred Stock High	Preferred Stock Low	Common Stock High	Common Stock Low
1946//	102//	57 1/2	17 1/4	9
1947	80	50 3/4	11 3/8	7
1948	68	47	10	6 1/8
1949	70	51	10 3/8	6 3/4
1950	82	66	14	9 5/8
1951	93	78	17 1/8	13 1/8
1952	90	73	16 3/4	12 1/4
1953	84 1/2	70 3/4	15 3/8	11 3/8
1954	109	70 1/2	22 5/8	11 1/2
1955	139 1/2	102	29 1/8	20 1/2
1956	126	105 1/2	26 1/4	22
1957*	113	89	24 1/8	16 3/4

// From June 1.
// Approximate, the shares were not listed until November, 1946.
* Through September 10.

Source: Bank & Quotation Record

It is apparent that the preferred shares dropped precipitously in price after issuance. The market price was well below par value for about eight years. The market price of the common stock did not reach the conversion price, based on redemption, until December, 1954. Thereafter the market price of the common remained above such conversion prices, both at the highs and the lows, until January, 1957. For about eight months since that date the common shares have sold consistently below such conversion price.

None of American's 3 1/2% preferred stock had been converted prior to December 31, 1954. The amounts outstanding at various balance sheet dates on and subsequent to that date have been reported as follows:

Date	Par Value Outstanding
12-31-54	$40,000,000
6-30-55	n.a.
12-31-55	21,956,300
6-30-56	18,300,200
12-31-56	15,651,600
6-30-57	15,191,100

n.a. - not readily available.

When United Air Lines sold issues of convertible preferred stock in 1947 and again in 1952, its common stock was priced lower in relation to potentialities than the common stock of American Airlines at the time its convertible preferred stock was first offered. Both of the convertible issues of United have since been converted into common, the conversion in each instance having been forced through a call for redemption. There is no need to go into detail concerning the market action of these issues. However, we have made calculations, based on the closing market price for United common stock as of September 4, 1957, to determine how an investor, who bought 100 shares of each preferred issue at the issue price and converted his shares into common on the redemption dates, had fared through holding his investment. After giving effect to the 4% stock dividend in June, 1957, such an investor would now own 766 shares of common stock at a cost of $20,288. On the redemption date for the 1947 stock (March 18, 1952) he would have had a paper profit of about 20% on his investment in such stock, and on the redemption date of the 1952 stock (October 10, 1955) he would have had approximately a 15% profit on that portion of his investment. But on September 4, 1957, his total investment would show a loss of about $1,800.

COMMON STOCK OFFERINGS BY DOMESTIC TRUNK AIRLINES
January 1, 1946 - June, 1957

Dx. e	Airline	No. of Shares	Price Per Share	Type of Offering	Aggregate Price to Public	Investment Banker
5/46	Colonial (a)	91,400	$20	Subs. 1 for 3	$ 1,828,000	--
7/46	Chicago & Southern (b)	170,000	18	Cash	3,357,500	Kebbon, McCormick; I. M. Simon
6/46	National	150,000	25-1/2	Cash	3,825,000	Lehman Bros.
8/46	Northwest	271,935	18-1/2	Subs. 1 for 2	5,030,797	Auchincloss, Parker & Redpath, Hornblower & Weeks and First Boston
5/47	Colonial	150,000	10-1/4	Cash	1,537,500	Auchincloss, Parker & Redpath
9/47	Delta	100,000 (c)	22	Cash	2,200,000	Courts & Co.
7/48	Continental	37,500	8	Cash	300,000	Lehman Bros.
3/48	United	184,809	10-3/4	Subs. 1 for 10	1,986,697	Harriman Ripley
7/49	Trans World	404,112	10	Subs. 1 for 5	4,041,120	Merrill Lynch
7/49	National	174,000 (d)	5-1/2	Cash	957,000	Lehman Bros.
7/49	National	76,013 (e)	(e)	Cash	418,072	Lehman Bros.
7/52	Trans World	240,774	21-1/4	Subs. 1 for 10	5,116,448	None
7/52	Continental	89,944	8-1/2	Cash	764,524	Lehman Bros.
7/52	Western	165,049	11-1/2	Subs. 3 for 10	1,898,064	Blythe & Co.
7/52	Delta	100,000	25	Cash	2,500,000	Courts & Co.
7/52	Trans World	353,822	16	Subs. 1 for 7	5,661,152	None
7/55	Braniff	460,644	12-1/2	Subs. 1 for 3	5,758,050	F. Eberstadt
					$ 47,179,924	
7/56	Delta	125,000	37	Cash	4,625,000	Courts & Co.
7/56	Braniff	1,105,545	10	Subs. 3 for 5	11,055,450	F. Eberstadt
7/56	Northeast	784,402	9-1/2	Subs. 4 for 5	7,451,819	Loeb, Rhoades
7/57	Continental	230,000	10	Cash	2,300,000	Lehman Bros.
7/57	Trans World	3,337,036	13	Subs. 1 for 1	43,381,468	None
					$115,993,661	

Now part of Eastern
Now part of Delta
Sold privately
Sold privately to W. R. Grace & Co.
66,013 shares sold privately to Bessemer Securities Corp. at $6.50 per share and 10,000 shares issued at $5.50 per share to Loftin, Anderson, Scott, McCarthy & Preston in settlement of legal fees.

red by Loeb, Rhoades & Co.

es: Prospectuses, Annual Reports, SEC and CAB Documents, Moody's Industrial Manuals, Moody's Transportation Manuals, Commercial & Financial Chronicles, Investment Dealers' Digests and Standard & Poor's Corporation Records.

DX270, Exhibit C
(Report of Loeb, Rhoades & Co.)

AX-1783

As shown, during the week which immediately followed the Board's announcement of its decision denying the interim fare increase, the value of the Big Four common stocks dropped an average of 8.1% while the Dow-Jones Industrial Average declined only 1.7%. In the period from August 5 to October 25, the Big Four stocks dropped 27.1% while the Dow-Jones Industrial Average sold off by 13.1%. These declines are even more significant in that they came on top of the substantial decline already experienced from market prices at year-end 1956.

	United	American	Eastern	TWA	Dow-Jones Industrials
12/31/56	$42.75	$23.38	$49.75	$19.00	$499.47
8/5/57	29.00	19.25	38.75	14.00	500.78
% Change	-32.2%	-17.7%	-22.1%	-26.3%	+0.3%

In United's case, the decline in the market price of its equity has placed it at an obvious disadvantage in that its stock at October 25 was selling at a discount of more than 45% from its book value per share. Under these circumstances, United is effectively barred from equity financing unless existing stockholders have the value of their equity adversely affected to a serious degree.

It is apparent that the composite judgment of the market place strongly supports the view that there is a serious problem confronting the industry. The investor is indeed asking the question, "What is Wrong with the Airlines?".

United's Present and Future Financing Programs

Late in 1955 United completed a financing program designed to cover its commitments for the 30 DC-8 jet aircraft ordered late in that year, together with related ground equipment and facilities. The details of this program are covered in Exhibit U-510. As shown, the program consisted of an agreement to sell a maximum of $120,000,000 of Series D 4% Debentures to three insurance companies and an agreement providing for the borrowing of up to $30,000,000 from a group of 38 banks headed by The

All of this financing was privately arranged because United did not have a sufficiently high potential rating to go to a public offering. Prior to financing our program we explored the question of a rating with the rating agencies. It was made clear that we could not obtain a higher rating than "Ba", a rating unsatisfactory for public sale in the amounts required at satisfactory terms and conditions. The opportunity for public sale of debt by United is important, as Mr. McClintock will discuss in his testimony, but the stability of earnings of the past decade has not been sufficiently great to produce a rating which will permit such sale.

The 1955 financing program for United was handled entirely by arranging for issuance of debt. This was not a matter of choice, for the ability of United, as well as the industry, to sell equity has been limited. That further increase in equity is necessary and desirable is apparent, but it is equally apparent that it cannot be accomplished satisfactorily until the present period of depressed earnings is brought to an end.

Meanwhile, the ratio of debt in the capital structure of United will be higher than we would like to see it. Over the long term, a debt ratio of approximately 30% is a desirable goal. The Civil Aeronautics Board should permit the carriers earnings and a rate of return which will lessen the dependence on debt financing and the achievement of lower debt ratios.

The 1955 financing program did not provide for all of United's expansion needs in the 1956 - 1961 period. If we are to meet the demands of expanded air traffic volume and bring to the public the benefits of turbine powered aircraft in the intermediate haul market it is necessary that United acquire a fleet of jet aircraft designed to do that job, in addition to an expanded order for long-haul jet aircraft. Studies have been under way for many months relating to choice of aircraft type. Market projections indicate a need for a substantial number of such air-

Simat, Helliesen & Associates

342 Madison Avenue, New York, N. Y.

Telephone: 697-1595, Area Code 212

Comparative Financial Status
TWA and EAL

(Based on Yardsticks of DHR at page 9 of Part II of TWA 5(a))

Summarized Balance Sheets
December 31, 1954

	TWA(1)	EAL(2)
	----(000 omitted)----	
Net Current Assets	$ 4,089	$ 37,740
Property, Plant, Flight Equipment, etc. - Net	84,414	59,350
Other Assets, Deferred Items, etc.	1,682	2,639
Net Current & Fixed Assets	$90,185	$ 99,729
Funded Debt	$18,513	$36,000
Deferred Credits, Reserves, etc.	4,465	4,482
Total Deductions	$22,978	$40,482
Book Net Worth	$67,207	$59,247

(1) TWA 5(a), Part II, Page 9.

(2) Eastern 1954 Annual Report.

DX270, Exhibit E, page 2
(Report of Loeb, Rhoades & Co.)

	TWA	EAL
Capital Structure - Percent		
Funded Debt	21.6%	37.8%
Equity	78.4%	62.2%
Total	100.0%	100.0%

			% of TWA
Revenue Airplane Miles Flown - 1954(3)	89,087	88,502(2)	99.4%
Available Seat Miles - 1954(4)	4,768	5,287(6)	111.0%
Overall Available Ton Miles Flown - 1954(3)	581,131(5)	682,493(6)	117.0%

On the basis of Revenue Airplane Miles Flown and Available Seat Miles, respectively, TWA was approximately the same size or 11% smaller than EAL. Applying the same yardsticks as DHR on page 9 of its report, TWA compared to EAL had an excess of $8 million to $15 million of proprietary capital. Based upon Overall Available Ton Miles Flown, TWA had an excess of $19 million when compared to EAL.

---

(2) Eastern 1954 Annual Report.

(3) Thousands.

(4) Millions.

(5) TWA 5(b), Part III, Exhibit: Comparisons - 2.

(6) CAB Handbook of Statistics, 1965 Edition.

AX-1788

DX270, Exhibit F
(Report of Loeb, Rhoades & Co.)

EXHIBIT F

TWA's Quarterly Net Income (Loss)
1954-1955

	$ Million	
	1954	1955
1st Qtr	(4.0)	(3.8)
2nd Qtr	5.9	4.9
3rd Qtr	7.1	4.2
4th Qtr	1.3	0.1

Prepared by Loeb, Rhoades & Co.

Source: TWA Monthly Financial Reports 1954-1955
TWA Monthly Confidential Digests 1954-1955

"DX271A
(S.H.E. Report (Revised) - Volume One)"

REPORT OF

SIMAT, HELLIESEN & EICHNER, INC.

VOLUME I

AX-1790

"DX271A

STATE OF NEW YORK)
COUNTY OF NEW YORK) (S.H.E. Report (Revised) - Volume One)"

NATHAN S. SIMAT, being duly sworn, deposes and says:

I am President of Simat, Helliesen & Eichner, Inc., and the following report consisting of Volume I, Parts I through XI and Volume II, Parts A through G, was prepared under my direct supervision. I have read the report, know the contents thereof, and all statements therein contained are true as stated to the best of my knowledge, information and belief. I hereby adopt the report as my direct testimony in the proceedings before the Honorable Herbert Brownell, Special Master, entitled Trans World Airlines, Inc. v. Howard R. Hughes, et al., 61 Civil 2324, United States District Court for the Southern District of New York.

Nathan S. Simat

Nathan S. Simat

Sworn to before me this
29th day of June, 1967

Notary Public

ROSE H. SUELT
Notary Public, State of New York
No. 41-3891000
Qualified in Queens County
Commission Expires March 30, 1969

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

L. JOHN EICHNER, BEING DULY SWORN, DEPOSES AND SAYS:

I am a Vice President of Simat, Helliesen & Eichner, Inc., and the following report consisting of Volume I, Parts I through XI and Volume II, Parts A through G, was prepared under my direct supervision. I have read the report, know the contents thereof, and all statements therein contained are true as stated to the best of my knowledge, information and belief. I hereby adopt the report as my direct testimony in the proceedings before the Honorable Herbert Brownell, Special Master, entitled Trans World Airlines, Inc. v. Howard R. Hughes, et al., 61 Civil 2324, United States District Court for the Southern District of New York.

L. John Eichner

L. John Eichner

Sworn to before me this
29th day of June, 1967

Notary Public

ROSE H. SUELT
Notary Public, State of New York
No. 41-3891000
Qualified in Queens County
Commission Expires March 30, 1969

INDEX TO VOLUMES I AND II

VOLUME I

Qualifications	Part I
Jet Equipment Premises	Part II
Introduction and Critique	Part III
Estimates of Changes in Operating Profit From the Addition of Six B-331 Aircraft (C&C Report, Chapter II)	Part IV
Estimates of Changes in Operating Profit from the Earlier Delivery of B-131 and B-331 Aircraft (C&C Report, Chapter III)	Part V
Estimates of Changes in Operating Profit from the Earlier Delivery of Twenty CV-880 Aircraft (C&C Report, Chapter IV)	Part VI
Estimates of Changes in Operating Profit from Early Delivery of Ten Additional CV-880 Aircraft (C&C Report, Chapter V)	Part VII
Added Operating Costs of B-331 Aircraft Versus B-331B Aircraft	Part VIII
Ownership Versus Leasing: B-131 and B-331 Aircraft (C&C Report, Chapter I)	Part IX
Cost of Capital Associated With Added Investment	Part X
Comparative Profit Study	Part XI

VOLUME II

Marginal Stage Lengths (Operational Changes in Jet and Piston Services)	Part A
Displaced Piston Aircraft Service	Part B
Domestic Traffic Estimates	Part C
Domestic Revenue Yield Estimates	Part D
International Revenue Estimates	Part E
Direct Operating Expenses	Part F

I. QUALIFICATIONS

A. BACKGROUND OF SIMAT, HELLIESEN & EICHNER, INC.

The present organization was formed in February 1963 by Nathan S. Simat to engage in economic and transportation studies for government and private clients. The present officers are Nathan S. Simat, President, and Robert I. Helliesen and L. John Eichner, Vice Presidents. The current staff includes more than twenty full-time professional employees with qualifications and experience in the fields of statistical analysis, accounting and financial analysis, and transportation economics. Close working relationships are maintained with members of the faculties of nearby universities and with other research organizations to provide specialized skills and experience, as needed, to supplement and extend the capabilities of the full-time staff. Offices are maintained in Boston, New York, and Washington. A research office is also maintained in Calgary, Canada, by Simat, Helliesen & Associates, Ltd., an affiliated company. Computer facilities and services are maintained at the Boston office.

In the four years since its formation the firm has engaged in study projects for more than twenty government and commercial clients, including the U.S. Departments of Commerce and Defense, the Federal Aviation Agency, the Government of American Samoa, the Trust Territories of the Pacific, various local government bodies and individual air

carriers from every sector of the air transport industry (air taxi, local services, supplemental, domestic trunkline, and international air carriers). A brief description of the more important projects follows.

Projects for the U.S. Government

Development of airline route simulation model for estimating the costs, revenues, and rate of return on investment of operations with up to five different types of aircraft over major route segments of the Free World and use of the model to estimate the results of operations of various types of SST and subsonic jet aircraft.

Development and applications of methods of estimating the cost of developing, producing, and operating advanced types of aircraft, including the SST and jet aircraft of greatly enlarged capacity.

Analysis and development of methods of the costing of railroad operations, in order to provide management with improved cost information for investment decision-making, pricing of services, and control of operations.

Analysis of the economic feasibility of expanding

and modernizing Washington National Airport to permit operations with small, medium, and large jet aircraft.

Projects for Local Government Agencies

Analyses of the existing and future needs for commercial air services.

Analyses of the present and future adequacy of airport facilities and the needs for new and additional facilities.

Analyses to estimate the revenues and costs of specific air services under consideration.

Projects for Air Carriers

Analyses to determine the economic feasibility of air services in new markets.

Analyses to determine the profit and loss from existing services and the addition and deletion of flights.

Analyses to determine the effects of changing the prices charged for air passenger and cargo services.

Projects for Equipment Manufacturers

Analysis of peaking in the passenger demand for

transportation services and of the effect on the timing and severity of peaking of changes in the price and speed of transportation services and of changes in the national economy.

REPRESENTATIVE CLIENTS

U.S. Department of Commerce

U.S. Department of Defense

Federal Aviation Agency

City of Houston, Texas

City of Spokane, Washington

City of Calgary, Canada

Northeast Airlines, Inc.

United Air Lines, Inc.

Seaboard World Airlines, Inc.

Airlift International, Inc.

Central Airlines, Inc.

Standard Airways, Inc.

Wiggins Airways, Inc.

United Aircraft Corporation

Sabena Belgian World Airlines

Canadian Pacific Air Lines, Ltd.

B. QUALIFICATIONS OF NATHAN S. SIMAT

Nathan S. Simat, who is 47 years of age, is President of Simat, Helliesen & Eichner, Inc. and operating manager of the Boston research office. He is a resident of Brookline, Massachusetts.

He was graduated from the College of the City of New York in 1940. In the years 1940-1943 and 1946-1948 he pursued graduate studies in finance, statistics, and transportation economics at New York University, George Washington University and American University.

From 1941 through 1956, with the exception of military service and a short period of employment by the Interstate Commerce Commission, he was employed by the Civil Aeronautics Board as a transportation economist. His positions at the Civil Aeronautics Board included Head Economist of the Analysis Division of the Bureau of Economic Regulation and Chief Economist and later Chief of the Certificates Section of the Routes Division of the Bureau of Air Operations.

As Head Economist of the Analysis Division, he prepared numerous operating and financial analyses for the use of the Board and its staff, dealing with traffic, revenue, and costs of air transport operations by certificated U.S. airlines. He prepared analyses of the economic feasibility of equipment purchase programs for which appli-

cations were made to the Reconstruction Finance Corporation for financing and for which the certification of the Civil Aeronautics Board was required as to the feasibility of the programs. He also prepared analyses and appeared as a staff witness in proceedings before the Civil Aeronautics Board involving the charges for commercial services of U.S. air carriers and presented evidence concerning the reasonableness of commercial rates under consideration. In both commercial rate and mail rate proceedings before the Board, he appeared as the staff expert on matters of rate of return. He authored, in connection with the latter role, the publications entitled "Comparative Costs of Air Carrier Capital," published by the Civil Aeronautics Board in 1947 and 1948. In addition, he undertook special studies at the request of the Board to review the adequacy of the liability rules of air carriers and their insurance coverage.

As Chief Economist and, subsequently, Chief of the Certificates Section of the Routes Division of the Board, he prepared and supervised the preparation of many studies dealing with the economic consequences of adding and deleting air services. These studies were prepared for and at the request of the Board and, in many instances, were presented in formal proceedings before the Board concerned with new airline operating authority and the adequacy

and necessity of existing operating authority. During the period from 1950 through 1956, Mr. Simat appeared as a witness in over 50 economic proceedings. He also was the representative of the Civil Aeronautics Board on the joint government-industry committee to plan the role of commercial air transportation operations in time of national emergencies and to establish the Civil Reserve Air Fleet.

In November 1956, Mr. Simat joined the staff of the Aeronautical Research Foundation, a non-profit organization governed jointly by members of the faculties of Harvard University and the Massachusetts Institute of Technology. As Project Director for the Foundation, he supervised and participated in the studies of the Foundation dealing with various transportation problems. The studies included:

A study for Mr. Edward P. Curtis, Special Assistant to the President for Aviation Facilities Planning, to project the volume of aviation activities in the U.S. through 1975 and the national requirements for aviation facilities.

A study for the U.S. Air Force to establish procedures for the systematic acquisition and retirement of military support aircraft (transports, training, and special purpose air vehicles)

based on economic considerations including realizable proceeds from the disposition of such aircraft taking into account the impact of the disposition program itself on the market value of used aircraft.

A study for the Association of American Railroads to estimate the avoidable costs of passenger train services, using statistical costing procedures.

A study for the New England Conference of State Aviation Officials of the need for local air services in the New England area.

A study for the Harvard Business School analyzing and projecting the financing requirements of major U.S. airlines in the period from 1957 through 1962.

As consultant to E. R. Quesada, the President's Special Assistant for Aviation, he participated in the report on "The Status and Economic Significance of the Airline Equipment Investment Program" (known as the "Cherington Report").

In 1958, Mr. Simat and other members of the Foundation staff purchased the assets of the Foundation and established United Research Incorporated. He became

Vice President and head of the Management Sciences Division of the newly formed company. In this role, he supervised and participated in the following studies, among others:

A study for Sabena Belgian World Airlines dealing with the choice and economic feasibility of a second terminal in the U.S.

A study for the Federal Aviation Agency establishing methodology for determining the economic value of improvements in the air traffic control system and aviation facilities, and the application of this methodology to estimating the economic value of an all-weather landing system.

Studies for North American Aviation to estimate the commercial market for supersonic aircraft and small subsonic jets.

A study for the U.S. Air Force on theatre logistic support, with special attention to dispersed site operations.

A study for the Association of Local Transport Airlines and the Air Transport Association of America to develop a formula basis for subsidizing

the operations of local transport airlines.

A study for the Federal Aviation Agency to develop a mathematical model for simulating the operation of the air traffic control system, with special focus on the estimation of disruptions to flight operations from limitations of system capacity.

A forecast of the civil demand for aviation gasoline and jet fuel for the Standard Oil Co. of New Jersey.

A study for the Federal Aviation Agency of the benefits and costs of a program to improve the air traffic control system.

A study for the U.S. Department of Commerce on federal regulation of the air transport industry.

A report on the equipment and financing program of Allegheny Airlines.

A study for Lockheed Aircraft International on the market for general aviation aircraft.

A study for British West Indies Airways on the economic feasibility of jet services.

A study for the Canadian Pacific Railroad to

develop a system of capital budgeting on a company-wide basis for the uniform consideration of alternative investment possibilities.

A study for the American Express Company on the extension of credit facilities to airline passengers.

A study for Canadair Ltd. on the economic and financial outlook for Seaboard World Airlines.

A study for the Federal Aviation Agency on the feasibility of a commercial supersonic transport program.

A study for American Airlines to determine the effectiveness of and procedures for identifying frequent air travelers.

A study for the Civil Aeronautics Board of the economic feasibility of U.S. air routes and services across the Antarctic.

In addition, Mr. Simat participated in a number of economic proceedings before the Civil Aeronautics Board on behalf of various communities and air carriers, including Bonanza Airlines, the City of Toledo, the City of Houston,

Allegheny Airlines, Grand Rapids, Portland (Oregon), Seaboard World Airlines, Eagle Airways, Riddle Airlines, Northeast Airlines, and the City of Spokane. He also directed several studies of the air cargo market for Pan American World Airways, Canadair Ltd., and North American Aviation.

In 1961 Mr. Simat resigned from United Research Inc. to become President of Systems Analysis and Research Corporation, a position he held until 1963. Systems Analysis and Research Corporation was a company formed by Mr. Simat and others to engage in transportation research. While with Systems Analysis he supervised and participated in the following major studies, among others:

A study or the need and procedures for subsidizing commercial air services in the Commonwealth of Puerto Rico.

A study for Aero Commander or the market for so-called "third-level" air services.

A study for Northwest Airlines of its required rate of return in domestic operations.

A study for Canadair Ltd. on methods for estimating the indirect costs of air carrier operations.

A review of the scheduling and management practices or Canadian Pacific Airlines and Quebecair, Inc.

A review of U.S. international civil aviation policies for the Bureau of the Budget and other U.S. agencies.

Various studies of the benefits or possible mergers among local service carriers.

Studies for the U.S. Department of Commerce on the demand for intercity passenger transportation and the economic feasibility of greatly expanded air services in the Washington-Boston megalopolitan corridor.

During this period Mr. Simat appeared as an expert witness for the State of Hawaii on the matter of rate of return in a proceeding before the Maritime Commission. He also appeared in various Civil Aeronautics Board proceedings on behalf of airlines and communities, including Northeast Airlines, Allegheny Airlines, Seaboard World Airlines, the Commonwealth of Puerto Rico, and the City of Houston.

In 1963 Mr. Simat founded the organization presently known as Simat, Helliesen & Eichner, Inc. In his capacity as President, he has supervised and participated in the following studies, among others:

A review of the air service requirement of the City of Calgary, Canada.

A study of passenger service pricing policies for Canadian Pacific Airlines.

The development of an airline route simulation model for estimating the costs, revenues, and

rate of return on investment for operations with up to five different types of aircraft over major route segments of the free World and use of the model to estimate the results of operations of various types of SST and subsonic jet aircraft for the U.S. Department of Commerce.

Development and applications of methods of estimating the costs of developing, producing, and operating advanced types of aircraft, including the SST and jet aircraft of greatly enlarged capacity, for the U.S. Department of Defense.

A study to analyze the economic feasibility of expanding and modernizing Washington National Airport to permit operations with small, medium, and large jets for the Federal Aviation Agency.

In addition to the foregoing, and various appearances before the Civil Aeronautics Board, Mr. Simat has engaged in management and economic consulting to Northeast Airlines and Sabena Belgian World Airlines and has advised the Governor of American Samoa and the Trust Territories of the Pacific on aviation matters.

C. QUALIFICATIONS OF ROBERT I. HELLIESEN

Robert I. Helliesen, who is 48 years of age, is a Vice President of Simat, Helliesen & Eichner, Inc., and operating manager of the New York office. He is a

resident of Haworth, New Jersey.

In 1941 Mr. Helliesen was graduated from Colgate University where he majored in economics. In 1947 he received a masters degree in transportation economics from the New York University Graduate School of Business Administration.

From 1943 to 1956, with the exception of a two-year period of employment by The Port of New York Authority, he was employed by American Airlines, Inc. in various economics and marketing capacities. His last position prior to leaving was that of Director of Schedule Planning and Business Research. In this capacity he reported to American's Senior Vice President of Finance and Planning and was responsibile for the economic and marketing aspects of American's planning for schedules, equipment, facilities, prices, and routes, and for direction of the corporation's forecasting and market research. From an equipment standpoint, Mr. Helliesen directed and participated in economic and marketing studies resulting in the acquisition by American of piston aircraft, the turboprop Electra, and the Boeing 707 jet aircraft. He also participated in efforts to acquire piston aircraft from other airlines.

From 1956 to 1958 Mr. Helliesen was with Aviation Advisory Services, a consulting organization, as a Senior Associate. In this capacity he participated in economic, marketing and financial studies for local service, domestic

trunk and international airlines, both foreign flag and Pan American. He did economic research and studies for the Air Transport Association of America in connection with the CAB's General Passenger Fare Investigation. One study for General Dynamics entailed a market analysis relative to the advisability of acceptance by the Convair Division of General Dynamics of a large number of DC-7 aircraft as trade-ins on Convair jet aircraft.

In the latter part of 1958, Mr. Helliesen formed the Aircraft Exchange to provide the free world air transport industry with a regular market report of bids and offers for the purchase, sale and lease of used transport aircraft. A tri-lingual market report was issued on a regular basis. Regular members included most or the free world's manufacturers of transport aircraft, and most or the world's major airlines. Other members subscribed to the market report largely for information as to the status or the used aircraft market. These included many government organizations, major banks, insurance companies and miscellaneous aviation organizations. During his operation of the Aircraft Exchange, Mr. Helliesen devoted much of his time to the appraisal of present and future values of used piston aircraft and to efforts to obtain financing for aircraft transactions. Early in 1962 Mr. Helliesen sold his interest in the Aircraft Exchange,

which still exists and continues to publish its market reports.

After participating in a study for the Civil Aeronautics Board on the "Cost of Air Cargo", in July 1962 he became Senior Director or Market Development for Trans World Airlines, Inc. In 1964 Mr. Helliesen returned to American Airlines as Director of Market Development.

In 1965 Mr. Helliesen joined the firm now known as Simat, Helliesen & Eichner, Inc. In this capacity he has supervised and participated in a number of studies for government and other organizations including the following:

Analysis of peaking in the passenger demand for intercity transportation services by time of day, day of week, and season of year, and the manner and degree to which this peaking can be alleviated.

Analysis of the economic feasibility of expanding and modernizing Washington National Airport to permit jet operations.

Development and sponsoring of Northeast Airline's economic case in connection with its application to provide nonstop service between major cities in the Northeast portion of the United States and points in the Bahamas.

Development and sponsoring of Airlift International's economic case in connection with an application to provide all-cargo service between points in the United States and points in the Pacific.

D. QUALIFICATIONS OF L. JOHN EICHNER

L. John Eichner, who is 46 years of age, is a Vice President of Simat, Helliesen & Eichner, Inc. He is a resident of Greens Farms, Connecticut.

In 1942 Mr. Eichner was graduated from the Johns Hopkins University with a degree in economics.

From 1942 to 1945 he served in the U.S. Air Force as Squadron Executive Officer, attaining the rank of Major. At present, he is a Lieutenant Colonel in the U.S. Air Force Reserve with a primary specialty in administration and a secondary specialty in transportation.

In late 1945 he joined Capital Airlines as a District Cargo Manager at the beginning of its air cargo program development. He was active in the developing, marketing, and servicing of air freight during the years immediately following World War II.

He next became Assistant General Cargo Sales Manager for Capital, in which capacity he was responsible for the air mail, air express, freighter scheduling, cargo sales, service programs and the air freight programs of the airline. During this period he also served as Chairman of the Air Transport Association's Air Mail Committee and as the air postal transport expert for the Senate Postal Advisory Council. He was active in the joint program or the airlines and the U.S. Post Office Department in the development of the first experimental programs to carry regular first class mail by air on the domestic trunks and local service airlines.

In 1953 Mr. Eichner left Capital and became Vice President, Traffic & Sales, for Trans-Texas Airways, a position which he held until he left Trans-Texas in 1961. He was responsible for all marketing activities, including both passenger and cargo sales and services, for all scheduling or flight equipment, for tariffs and pricing, and for all community and public relations activities of the airline. He was active in the development of new routes for the airline and appeared in numerous CAB hearings as a witness testifying as to passenger traffic forecasts, airline schedules, comparative profitability or existing and alternate airline routes, as well as appearing in CAB and ICC hearings involving matters such as military fare policies.

During this period he served on the Board of Directors of Air Cargo, Inc., an airline industry corporation, as the representative of 13 local service airlines. He also represented the local service industry in the negotiation of new Air Express contracts for the entire domestic airline industry. He was also chairman of the Air Express Committee, an organization established jointly by the air transport industry and the Railway Express Agency to administer Air Express contracts. For eight years he was a member of the Air Transport Association's Air Traffic Conference, which is responsible for the inter-airline arrangements for all passenger and cargo service in the United States, including Alaska and Hawaii.

From 1961 until 1966 Mr. Eichner was Assistant Vice President of Corporate Planning for American Airlines, Inc. In this position he developed and presented American Airlines' initial five-year plan. This was the first known program in the airline industry to integrate the planning of scheduling, passenger and cargo marketing, finance, economic regulation, personnel, maintenance, flight operations, engineering, ground facilities, and economic research. This plan was used by American Airlines in determining existing and future aircraft needs by types of aircraft.

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"DX271A, page I-21
(S.H.E. Report (Revised) - Volume One)"

New methods or measuring, allocating, and forecasting direct and indirect costs were developed by a research team under Mr. Eichner's direction, and new techniques for projecting operating results with various aircraft types were developed. Studies were prepared for American's management covering a wide range or areas, including market research, new routes, possible airline mergers, pricing policies, airline scheduling strategies, and projections of competing airline schedules and equipment purchases.

He developed new methods of forecasting capacity and relating it to demand and devised new profitability reports by flight, by segment, and for individual aircraft on a weekly basis, taking advantage of new computer technology.

He prepared special studies and forecasts of revenues, expenses and ground facilities for future equipment types, such as B-747's, "stretched" DC-8's, "stretched" B-727's, B-737's, DC-10's, CL-1011's and various SST's. Periodic reports were also prepared on helicopter and V/STOL development and prospective uses.

Since Mr. Eichner joined Simat, Helliesen & Eichner in late 1966, he has been responsible for the preparation of airline studies and exhibits in several cases now being considered by the Civil Aeronautics Board.

II. JET EQUIPMENT PREMISES

Donovan Leisure Newton & Irvine (DLNI) has submitted to us for our review TWA Exhibit 4C, entitled "Report on Financial Results from Operations for Trans World Airlines, Inc., 1959-1963," prepared by Coverdale and Colpitts (C&C) and testified to by Mr. Wemple of that firm, and has asked us to give our estimates of the changes in TWA's operating revenues and expenses which would have occurred in the years 1959-1963 if TWA had had the additional number and types of jet aircraft available for commercial service assumed by Mr. Wemple. DLNI has also asked us to estimate the added expense which would have been incurred by TWA after 1963 in operating five B-331 aircraft instead of the five B-331B aircraft which it did operate and still operates under lease, computing such added expense for the remaining term of the B-331B leases. DLNI has further asked us to give our opinion as to the costs of capital which would have been incurred by TWA if it had owned, instead of leased, certain B-131 and B-331 aircraft, in 1959 and 1960, and to compare such capital costs with the actual costs of leasing.

With reference to the first request, DLNI has specifically instructed us to assume, as Mr. Wemple did, that TWA received the following jet aircraft in

addition to, or at an earlier date than, the jet aircraft which it in fact received in 1959-1961:

(a) Six additional B-331's on the dates shown in C&C Report,1/ page 10.

(b) Fifteen B-131's and eighteen B-331's on the earlier dates shown in C&C Report, page 40.

(c) Twenty CV-880's on the earlier dates shown in C&C Report, page 52.

(d) Ten additional CV-880's on the dates shown in C&C Report, page 65.

DLNI has also instructed us to assume, as Mr. Wemple did, that TWA would not have acquired the five B-331B's leased in 1962 and 1963 or the six CV-880's purchased in 1963 if it had acquired six additional B-331's and ten additional CV-880's.

DLNI has further instructed us to assume, as Mr. Wemple did, that TWA, even though it acquired six additional B-331's and ten additional CV-880's, would nevertheless have acquired the four B-720B's leased during 1961 and 1962 and purchased the eighteen B-131B's received in 1962.

The foregoing assumptions, which set forth a hypothetical jet fleet operated by TWA in 1959-1963, constitute

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1/ References hereinafter to "C&C Report" are to TWA 4C-1 unless otherwise noted.

the basic equipment premises for our Report. DLNI has not given us any assumptions as to the piston fleet operated by TWA during this period but has instructed us to make such adjustments in TWA's actual piston operations as, in our opinion, would have accompanied the hypothesized jet operations.

In view of the exigencies of time and in order to simplify our Report, DLNI has requested us to follow certain initial procedures used by Mr. Wemple, even though they may be arbitrary or erroneous in our opinion. In compliance with this request, after consultation with DLNI, we have accepted for purposes of this Report Mr. Wemple's tabulations, as amended during cross-examination, of actual availability of jet aircraft for commercial service (TWA Ex. 4C-4, Exhibit B) and of revised availability of jet aircraft for commercial service on the basis of receipt of a jet fleet as assumed above (TWA Ex. 4C-4, Exhibit C), although we do not agree in every instance with Mr. Wemple's computation.1/

1/ For example, in calculating the actual availability of aircraft (as reflected in TWA Ex. 4C-4, Ex. B), TWA excluded certain aircraft which had been allocated to "Central Training School" (See DX-222). In computing the constructive aircraft availability (TWA Ex. 4C-4, Ex. C), Mr. Wemple made no allowance for a similar exclusion of aircraft used for training. This results in a systematic overstatement of additional aircraft availability. We also do not agree with the start-of-service dates estimated for earlier delivery of B-131's and B-331's as shown in C&C Report, page 41, or with Mr. Wemple's computation or time to be excluded because of strikes.

DLNI has instructed us to use, for purposes of our Report, Mr. Wemple's allocations or additional availability of B-331's between TWA's Domestic and International Divisions, as set forth in the tables in the C&C Report, page 13, for the assumed six additional B-331's and in the table in the C&C Report, page 42, for the assumed earlier delivery or eighteen B-331's, again as amended during cross-examination. DLNI has further instructed us to assume, as Mr. Wemple did, that all additional available B-131 and CV-880 aircraft would be allocated exclusively to TWA domestic commercial services and none to training and other uses.

The foregoing assumptions and allocations provide the premises used in our Report for the assumed additional availability or jet aircraft in TWA's Domestic and International Divisions, as set forth below.

"DX271A, page II-5
(S.H.E. Report (Revised) - Volume One)"

Table II-A

Additional Aircraft Available for Commercial Service

Year	C&C Report,1/ Chapter II			C&C Report,2/ Chapter III				C&C Report,3/ Chapter IV	C&C Report,4/ Chapter V
	B-331			B-131	B-331			CV-880	CV-880
	Dom.	Int'l	Sys.	Dom.	Dom.	Int'l	Sys.	Dom.	Dom.
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
1959	-	0.2	0.2	1.2	0.6	0.9	1.5	-	--
1960	1.4	3.6	5.0	-	0.7	0.6	1.3	10.3	5.1
1961	2.2	3.7	5.9	-	-	-	-	5.3	9.9
1962	1.0	4.8	5.8	-	-	-	-	-	10.0
1963	0.5	0.9	1.4	-	-	-	-	-	7.9

1/ p. 13.

2/ pp. 41-42, as amended by TWA Ex. 43(a).

3/ p. 53. For 1961, the actual number of CV-880's available was amended by Mr. Wemple from 14.6 aircraft to 14.5 aircraft (TWA Ex. 4C-4-i). This, when subtracted from 19.8 aircraft assumed available in Chapter IV, produces an additional availability of 5.3 aircraft.

4/ p. 66.

DLNI has instructed us to follow Mr. Wemple's procedure for estimating the additional jet aircraft miles which would have been operated by TWA if it had had the additional jet availability set forth in Table II-A. Mr. Wemple's estimates were obtained by applying the experienced annual utilization for each type of jet, in a particular year and division, to the assumed additional availability of that type of jet in the same year and division. Application of this procedure to the assumed additional jet availability shown in Table II-A gives

the assumed additional jet plane miles set forth in Table II-B (Domestic Division) and Table II-C (International Division).[1]

Table II-B

Aircraft Type	TWA Domestic Division Additional Jet Plane Miles (millions) 1959	1960	1961	1962	1963	C&C Report
(1)	(2)	(3)	(4)	(5)	(6)	(7)
B-331	-	2.0	3.3	1.4	0.7	Chapt. II, p. 28
B-331	0.8	1.0	-	-	-	Chapt. III, pp. 43-44
B-331	1.6[1]	-	-	-	-	Chapt. III, p. 43
CV-880	-	11.7[2]	6.0[3]	-	-	Chapt. IV, p. 54
CV-880	-	5.8	11.3[4]	11.6	9.4	Chapt. V, p. 67

1/ As amended by TWA Ex. 43 (a).

2/ As amended by TWA Ex. 42 (a).

3/ Corrected: 5.3 additional CV-880 aircraft (see Table II-A) times $\frac{16.5}{14.5}$ = 6.0 million additional plane miles

4/ As amended by TWA Ex. 42(a).

Table II-C

Aircraft Type	TWA International Division Additional Jet Plane Miles (millions) 1959	1960	1961	1962	1963	C&C Report
(1)	(2)	(3)	(4)	(5)	(6)	(7)
B-331	0.1	6.3	6.6	8.4	1.5	Chapt. II. p. 15
B-331	1.6	1.1	-	-	-	Chapt. III. p. 46

1/ We do not agree, in every instance, with the way in which Mr. Wemple has applied his procedure. For example, in

[Continued on p. 7]

Tables II-B and II-C provide the additional jet aircraft miles on which the remainder of our Report is premised. We do not, however, regard them as necessarily setting forth a realistic estimate or the additional jet operations that would have been undertaken by TWA with the assumed fleet. In our opinion, as explained in the following Part III of our Report, the only reliable way to estimate the probable allocation and utilization of assumed additional equipment is through the assignment of such equipment to specific services, based upon a detailed study or existing services.

1/ [Cont'd from p. 6]

computing the additional aircraft miles resulting in 1963 from the ownership of 6 additional B-331's, Mr. Wemple used a "plane miles per aircraft" ratio based upon a combination of B-331 and B-331B experience. Since the B-331B had a higher "plane miles per aircraft" ratio than the B-331, the inclusion of B-331B aircraft results in an overstatement of aircraft miles as follows: Mr. Wemple's estimate or 1963 added international airplane miles was 1.5 million (0.9 aircraft times 1.72 million average plane miles per B-331/331B aircraft). When the aircraft types are separated, the following results:

Equipment	Average Airplane Miles per Aircraft (Million) (Calculated from Ex. C&C-4(39) and TWA 4C-4, Ex.B)	Change In Miles (Million)
(1)	(2)	(3)
5.2 B-331's added	1.695	+8.8
4.3 B-331B's deleted	1.758	-7.6
		1.2 Net Add'l. Aircraft Miles

"DX271A, page II-8
(S.H.E. Report (Revised) - Volume One)"

In addition to the procedures noted above, we have from time to time used, for the purposes of our Report, certain other assumptions of Mr. Wemple which we do not necessarily endorse. Such assumptions are noted where used.

III INTRODUCTION AND CRITIQUE

Estimation of the changes in TWA's operating revenues and expenses on the basis or the jet equipment premises in Part II requires a consideration both of the added revenues and costs that would have accompanied additional jet operations and of the decreased revenues and costs that would have resulted from eliminated piston operations. Mr. Wemple has estimated that TWA would have experienced an increase in operating profits after jet depreciation adjustments for the years 1959 through 1963 in the amount of $64 million. He did not disclose what portion of this amount was attributable to increased jet operations and what portion was attributable to decreased piston operations. Our analysis of the C&C Report shows that this $64 million breaks down as follows:

	(millions)
Operating Profit for Added and Earlier Jets, Before Depreciation	$ 87.8
Less: Jet Depreciation	-46.9
	40.9
Plus: Operating Loss Eliminated by Decreased Piston Operations 1/	+10.4
	51.3
Plus: Operating Profit from Ownership of Boeing Jets versus Leasing	+12.7
	$ 64.0

1/ The C&C Report does not eliminate any piston aircraft depreciation resulting from decreased piston operations. However, the Price Waterhouse Report, TWA Exhibit 7B, does estimate a reduction in piston aircraft depreciation expense.

In our opinion, based upon our estimating procedures described hereinafter, Mr. Wemple's estimates are wholly unreasonable and result in substantial error both as to the benefits attributed to added jet operations and those attributed to decreased piston operations.

Focus of Our Report

It is our opinion that realistic estimation of the changes in net operating profit that would result from substantial additions to available jet capacity requires an articulated operating plan in which specific consideration is given to how the added jet capacity would be integrated with existing operations, to what types of services would be added, to what existing services would be eliminated in their entirety, and to what shifts in aircraft usage would occur as added jet aircraft displace other available aircraft from their existing usage to displace, in turn, other aircraft in a chain reaction.

The scheduling and integration of new aircraft capacity is one of the most complex functions performed in the operation of an airline. It cannot be dealt with in generalities. In our view, an extensive bank of background information is needed to make appropriately informed judgments concerning the most probable and suitable use of additional aircraft on a route system as large and heterogeneous as that of TWA and the resulting effect on net operating profit.

It is necessary, for instance, to have information on past traffic behavior from which it can be determined whether and to what extent the volume of traffic would be affected by changes in the quantity and quality of air services. It is necessary to have information on historical flight performances as a guide to the estimation of the performance of new and changed air services. It is necessary to have information on cost behavior in order to arrive at reliable estimates of changes in operating expenses. And, it is necessary to have sufficient information on the structure of fares and charges and the actual revenues yielded by the established tariffs in order to satisfactorily estimate the revenue changes associated with changes in traffic.

These data were not available to us. As a result, we have not attempted the development of the comprehensive and detailed operating plan which we believe is needed for the most accurate and reliable estimation of revenues and expenses.

Instead, we have limited the focus of this statement to certain of the more significant errors of fact and judgment in the development of Mr. Wemple's estimates and to the overstatements and understatements in the estimates which flow from these errors. Even on the basis of this limited focus, we are convinced that it was not possible for TWA to have used additional jet aircraft profitably and to have realized the alleged benefits from the assumed reductions

of piston aircraft operations and fleet. We believe that this conclusion would only be reinforced by analysis of the detailed data that we lack.

Fundamental Errors in Mr. Wemple's Methodology

Mr. Wemple's estimates of the net changes in operating revenues and expenses rest primarily on a structure of arbitrary assumptions and generalizations that have no factual support and do not afford an accurate foundation for estimation.

1. Equipment usage. It is a fundamental assumption of Mr. Wemple's estimates that an added jet aircraft of a particular type would be used exactly as the average of all aircraft of the same or similar types. There is no factual support for this assumption. The fact is that added aircraft are not used as productively or as economically as available aircraft of the same or similar types. By the same token, piston services displaced by the spread of jet operations were not average piston aircraft services, but were services affording better-than-average use of piston aircraft with respect to productivity and operating economics.

2. Load factors. It is a fundamental assumption of Mr. Wemple in estimating domestic operations that added jet aircraft and displaced piston aircraft would be operated at the same average load factors (percent of available space which is occupied) as all flights operated with aircraft of the same or similar types. This assumption, too, has no

support. Experience shows that added jet operations would be operated at load factors well below the average. Displaced piston aircraft operations would be drawn from the most effective of the piston aircraft services, rather than services of average effectiveness.

3. Passenger mile yields. Mr. Wemple's domestic passenger revenue estimation assumes that passenger traffic added by added jet services would yield revenues per passenger mile equal to the average experienced yield per passenger mile for the year in which added. Here again is an unsupported assumption. Actually, the yields from added jet passenger traffic would be below average revenue yields per passenger mile from TWA's domestic passengers. Similarly, the revenue yields applicable to traffic moving on displaced piston aircraft services would not necessarily be at the average revenue yield for TWA's Domestic Division.

4. Costs. Mr. Wemple's estimates of cost changes are predicated on faulty assumptions as to cost behavior. For example, he assumed that aircraft operating costs would be increased or decreased proportionately with changes in the volume of aircraft miles operated with each type of aircraft. This does not accord with generally held concepts of aircraft operating cost behavior, unless it is further assumed that the average distance between aircraft stops is the same for added and displaced flights as it is for the average flight, an assumption which is contrary to TWA's experience. In other

cost categories, such as aircraft and traffic servicing, inappropriate factors are used by him for estimating cost changes, resulting in erroneous estimates of added and eliminated expenses.

Mr. Wemple's Failure to Test His Assumptions

Mr. Wemple's failure to test adequately his generalizations and assumptions is, in our opinion, a serious weakness. There was available to him in publicly reported information for the airline industry, as well as in information for TWA's own operations which is even more comprehensive than the data available for other airlines, a factual basis for testing whether his major generalizations and assumptions are supported by the actual experience of TWA and the airline industry. Little or no use was made of the facts available.

The Form 41 Reports of U.S. airlines to the CAB are a prime source of financial, operating, and physical data concerning airline resources and their uses. From these data it is possible to determine whether airlines were using jet and piston aircraft equipment in the same manner and whether the usage patterns changed as jet services were added from one time period to another. It is also possible, by applying available analytical methods, to identify the factors with which changes in the uses of jet and piston aircraft are associated. From comparisons of the changes in each airline's use of aircraft from one period to another,

it is possible to determine whether the number and proportion of aircraft of each type added and eliminated have a bearing on the average usage.

There were available to Mr. Wemple from TWA's source records, not publicly reported, sufficient data to make comparisons and analyses for TWA with respect to the uses of added and deleted aircraft. From aircraft routing and schedule information, it is possible to ascertain the extent of differences among individual aircraft of each type in the miles or use achieved daily and in the average stage lengths operated because the limited opportunities for use of aircraft preclude equal productivity. It is further possible to ascertain from these internal records, by examining the differences from one period to another, the extent to which the number and proportions of aircraft available of each type affected usage. Specifically, a short run increase in the number and proportions of jet aircraft decreases marginal productivity. Mr. Wemple, in failing to analyze TWA's scheduling experience, does not adequately reflect the decreased marginal productivity of added jet aircraft in his estimates.

Mr. Wemple's assumption that additions and deletions of aircraft would have been at average load factors is unsupported and unsupportable. The worksheets, exhibits and testimony made available to us disclosed no analyses by Mr. Wemple of the load factor experience of other airlines, during

the years when jet aircraft were integrated into domestic airline fleets, to determine whether the assumption is borne out by industry experience. Nor do we find analysis of the year-to-year changes in load factors for TWA operations and variations in load factors among the individual flights of TWA to determine whether short-run additions and deletions of aircraft services were made in fact without a change in the average experienced load factors. Our own analysis shows that there were substantial differences between average load factors and the load factors at which flights were added and deleted.

The estimates of operating cost changes made by Mr. Temple are premised on unsupportable generalizations and assumptions. Arbitrary judgments were made as to the proportions of expenses that would not be increased or decreased by changes in jet and piston aircraft operations, and as to the appropriate factors for estimating cost changes. These judgments were not supported by the experience of TWA and other airlines.

It is not necessary or sufficient to rely on arbitrary judgments in determining which items and proportions of operating costs are fixed and which are variable. There are commonly used methods for making this determination by means of analyses of experienced costs and cost changes. These methods enable the cost estimator to test initial judgments concerning the degree of sensitivity of costs to changes in the scale of

operations. Equally important, these methods enable the cost estimator to test assumptions with respect to the factors that are effective and valid in estimating costs. If Mr. Wemple had used these methods - testing his assumptions in the light of experienced costs of TWA and other airlines - errors in the selection of costing units and in the estimation of unit costs applicable to the changes in operations flowing from the availability or added jet aircraft would have been avoided.

The failure of Mr. Wemple to verify the validity of his costing assumptions is particularly significant because the methods of costing used by him differ in important respects from methods more usually accepted and applied by TWA and others in estimating airline operating expenses. For instance, aircraft and equipment manufacturers use substantially different methods or estimating the comparative aircrart operating costs or new and added aircraft. Similarly, costing methods used by the staff of the CAB and airlines in proceedings before the CAB dealing with the economic effects of changes in operations are substantially different from those applied by Mr. Wemple. In addition, costing methods used by airlines - including TWA - for internal planning and control purposes differ from his costing methods. While mere differences in costing methods, of course, do not signify that Mr. Wemple's methods are "wrong" and that other

methods are "right," the significant departures from more commonly accepted and used methods called for the testing and verification of the validity of the differences, which are not provided by Mr. Wemple. Our own tests show that the departures by him from more generally used methods of costing are not justified.

Mr. Wemple's Failure to Develop Articulated Plan

It was not necessary for Mr. Wemple to rely so heavily on unsupportable generalizations and assumptions. Mr. Wemple had both the time and data to develop a detailed and realistic operating plan. Available to him were the records of TWA providing information on the use and performance of each available aircraft, the on-line origin and destination of each TWA passenger and the TWA flight routings used by each passenger. Further available to him were TWA cost records, providing fuller details regarding TWA's cost experience than are publicly available. He had access to records and analyses of ticket sales and passenger revenues needed to establish more precisely the differences in revenue yields for operations in the individual markets served by TWA.[1/]

1/ We note, in this connection, that TWA recently was able to develop from its records the information supplied to the CAB with respect to passenger fares and experienced passenger yields between pairs of cities accounting for 75% of TWA's domestic air passenger traffic, both in terms of passengers and passenger miles. This information was requested by the CAB for a study of the domestic air fare structure. ("Analysis of Domestic Air Fare Structure in Effect during September 1966.")

The use of these resources would have enabled Mr. Wemple to develop an operating plan realistically integrating the use of added jet aircraft into existing schedule patterns and realistically reflecting the displacements in piston aircraft operations. Guided by information regarding the actual financial performance of scheduled flights, he would have been able to assign added jet aircraft and select the displacements of piston aircraft on an optimum and practical basis.

The use of the resources available to Mr. Wemple would have further provided the costing tools needed for accurate estimation of the specific changes in physical operations that would have occurred under the operating plan. It would have been possible for him to reflect in the cost estimates, for example, the applicable landing fees at airports where changes in operations would be contemplated. It would also have been possible for him to reflect more accurately in the cost estimates the costs of operating aircraft over the stage lengths of flights added and deleted. He thereby could have developed cost estimating relationships consistent with experienced patterns and trends in TWA's actual costs of operation.

Finally, Mr. Wemple would have avoided the risk of significant errors in the revenue estimates by using data for

experienced revenue yields available for individual markets and operations with different types of aircraft. It is inherent in the domestic fare structure that fares per mile and revenue yields per mile for transportation services decrease as the distance of travel increases. Operations conducted at longer flight stage lengths, in general, produce lower revenue yields per mile than operations on shorter stage lengths. Mr. Wemple, in estimating the net change in passenger revenues in TWA's domestic services, has assumed that the average experienced revenue yield per mile for the Domestic Division of TWA would be applicable to added and deleted operations, without reflecting differences in revenue yields applicable to added jet operations in longer than average stage lengths and deleted piston aircraft operations in shorter than average stage lengths. The most accurate method of estimating revenues is to apply the revenue yields for individual city pairs and aircraft types to the estimates of changes in traffic for the city pairs. Accuracy is somewhat impaired by the use of formulas that rely on an overall average and that do not take into account the differences in revenue yields applicable to operations over different flight segments with individual types of aircraft.1/ The

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1/ The CAB domestic air fare structure study, previously referenced, notes the following:

(Fn. cont. on p. III-13)

least accurate of the available revenue estimating procedures is the use of a broad average revenue yield without regard to the degree of comparability between the operations from which the average revenue yield is determined and the operations to which the average revenue yield is applied. Mr. Wemple used this method.

An additional factor, which could have been introduced by Mr. Wemple as a result of access to the primary source records of TWA, is the adjustment of his estimates to take account of the seasonal peaking and ebbing in both domestic and international operations. It is assumed by him that annual averages for load factors, unit operating costs, and revenue yields can be applied to added and deleted operations without recognizing that different load factors, unit costs, and revenue yields apply in estimates relating to changes in operations in the winter as opposed to the summer season. The error arising out of this assumption is most significant for changes in aircraft operations occurring only in the fall and winter

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(Fn. contd. from p. III-12)

"Inspection of fare data. . . reveals that fares generally vary with distance--the longer the distance, the higher the fare. However, the relationships of fares at various distances are not perfectly consistent in that the fares do not vary in exact proportion to distance. The use of the standard formula is merely a convenient method of expressing the average relationship between fare and distance. Fares derived from these formulas will in some instances closely approximate the actual published fares and will in other instances be substantially different since the relationship of the actual fare to distance varies from market to market."

months of a particular year, i.e., where the assumed delivery schedule calls for the delivery of jet aircraft in late summer or early fall. Since TWA operations are at seasonal ebb during the fall and winter months, load factors are at levels below the average for the year and unit operating costs are somewhat higher than the average annual levels. Revenue yields may be higher or lower than annual averages, depending on differences in the proportions of business and personal air travelers, on the availability of off-season fares, and on differences in the proportions of family groups, students, and other travel which is characterized by marked seasonality. Our analysis shows that failure to make specific allowance for seasonality biases the estimates of changes in net operating profit in the direction of overestimating the profits. We believe that it would have been feasible for Mr. Wemple to avoid this bias by taking advantage of seasonal information available from TWA records.

Our approach

Because we have not had access to the information that we believe is needed for the most accurate estimation of net operating profit changes, we have confined our analyses to those matters which present the greatest sources of errors in Mr. Wemple's estimates.

Wherever it appeared, on the basis of our initial examination, that the differences resulting from the substitution of more reasonable premises, or even from the correction of arithmetic, would not change the final estimates substantially, we have adopted Mr. Wemple's premises. We have made only the most significant corrections of the estimates.

Where Mr. Wemple has used assumptions, we have based our estimates on the experience of the airline industry and of TWA available to us. Where his approach is simplistic, we have found it necessary to use somewhat more complex methods of estimating revenue and expense changes in order to reflect more realistically the experienced behavior of revenues and costs in the airline industry.

Even on the basis of our limited departures from Mr. Wemple's assumptions and procedures, and our limited adjustments of Mr. Wemple's estimates, it is clear that added jet aircraft would not have produced added profits from operations. Our conclusions are amply supported by industry experience during this period of re-equipment with jets.

Our Conclusion

Our estimates of the increases (decreases) in TWA operating profits for added jet operations and deleted piston operations by Chapter in the C&C Report, the details of which appear hereinafter, are:

(Amounts in Millions of Dollars)

	Chapter II	Chapter III	Chapter IV	Chapter V	Total
Added Jet Operations	(37.47)	0.15	(21.63)	(26.55)	(85.50)
Deleted Piston Operations	16.40	(0.75)	4.03	7.00	26.68
Net Change in Operations	(21.07)	(0.60)	(17.60)	(19.55)	(58.82)

XI. COMPARATIVE PROFIT STUDY

DLNI has also requested us to review the Comparative Profit Study, TWA 4B, (hereinafter referred to as Comparative Profit Study) which was prepared by C & C and was testified to by Mr. Wemple. DLNI has asked us to give our opinion, based on such review, as to whether the Comparative Profit Study is a standard, recognized or reasonable method of determining the effect on the operating profits of TWA for the years 1959-1963 of its not receiving in the years 1959 and 1960 a jet aircraft fleet consisting of 18 B331 aircraft, 15 B131 aircraft and 30 CV 880 aircraft rather than the jet fleet it did receive in the years 1959-1961.

1. General Conclusion

There are standard and accepted methods used in the airline industry for measuring the effect upon an airline's operating profits of changes in operations resulting from the addition and disposition of equipment. The Comparative Profit Study is not such a method. As a quantification of what effect the availability of more or less jet equipment would have had on TWA's operating profits during the 1959-1963 period it is meaningless. Comparisons of the character presented in the Comparative Profit Study might at best be considered a very general and most imprecise index of the overall efficiency of the managements of the compared airlines,

but only after appropriate adjustments had been made to insure their comparability. Even for this limited purpose the Comparative Profit Study has no value, since, in its preparation, Mr. Wemple made no attempt to make the statistics he used comparable or to take into account all other factors affecting either the profits or the profit potentials of the airlines he compared.

2. Accepted Methods of Estimation

The most reasonable, realistic and accurate method of measuring the effect that would have been produced on TWA's operating profits as the result of the availability of additional jet equipment would be the development of an articulated operating plan for TWA that would take into account the specific markets in which such additional equipment would be used and the effect of such usage on existing operations. Although he had access to TWA's internal records, Mr. Wemple did not develop such a detailed and comprehensive operating plan, even though analyses of that character are generally required and supplied in route proceedings before the CAB.

Another and more general method of estimation that could be used is illustrated by the procedures we employed in the prior parts of our Report to measure the effect on TWA's operating profits during the 1959 to 1963 period of the additional jet fleet assumed by Mr. Wemple in TWA Ex. 4C.

While we followed generally the approach used by Mr. Wemple, we tested our assumptions in the light of TWA and industry experience and made the indicated adjustments such as, for example, the substitution of marginal load factors for average load factors and the substitution of tapered yields for average yields.

In our opinion, it would be absurd to consider the Comparative Profit Study as a measure of the operating profits TWA would have made with the additional jet equipment assumed by Mr. Wemple. We note in passing that Mr. Wemple quite properly declined to make any such claim for the Comparative Profit Study. While the amount of equipment available to an airline can affect the profitability of its operations, there are many other factors which can have an equal or greater effect on its profitability. The mere addition of seats and flights provides no assurance that the seats will be occupied or the flights patronized.

The important factors which were not considered by Mr. Wemple while preparing the Comparative Profit Study render the study valueless.

3. Factors Not Considered

a. Load factor

Perhaps the single most important factor affecting the profitability of an airline is the overall load factor it

is able to achieve on its flights. The low overall load factors at which TWA operated during the 1959-1963 period compared with the higher load factors of American (AAL) and Pan American's Atlantic Division (PAA-ATL) were the chief reason for the differences in operating profits. If TWA's passenger load factors during this five-year period had been as high as those of AAL and PAA-ATL for the Domestic and International Divisions respectively, TWA's passenger revenues would have been $107 million greater without any additions or deletions of equipment. (Exhibit XI-A)

Load factors are influenced by a wide variety of factors. Some are within the control of management, such as advertising, the quality of equipment and terminal facilities, on-time performance, passenger service features, cuisine, fare policies and scheduling. Others, not under management's control, include actions of the CAB and overall demand flowing from the level of economic activity. These are not merely theoretical considerations. Rather they have a real and measurable effect on an airline's operations. Some illustrative examples may be helpful.

Quite obviously, competition has a substantial effect on load factors. CAB decisions during 1959-1964 substantially reduced the percentage of American's monopoly markets, thereby significantly weakening the profit potential of American's

domestic route structure relative to that of TWA[1/] (Exhibit XI-B). In particular, the decision in the Southern Transcontinental Case took away American's great monopoly routes from Texas to the West Coast.

American benefited greatly during the 1961-1962 period from its conversion to "fan jets" and from its advertising program exploiting the superiority of fan jet performance. TWA suffered during this same period because of the inferior quality of its service in some respects, such as poor on-time performance and the lack of modern terminals in Los Angeles until late 1961 and at Idlewild until the spring of 1962. On the other hand, in 1964 TWA reaped considerable temporary competitive benefits from the in-flight movies and as a result of United's disastrous experiment with one-class service, a policy that caused a significant transfer of passengers from United to TWA in the lucrative transcontinental markets.

It is interesting to see that TWA had lower load factors in the earlier period in spite of the fact that TWA was operating a higher percentage of its plane miles, seat miles, and passenger miles with jets during the 1959-1962

1/ We emphatically disagree with Mr. Wemple's statement that the route structures of TWA and the compared airlines were not materially different in 1964-1965 from what they were in 1959-1963. The changes in the route structures of each were numerous and substantial.

period than American and PAA-Atlantic. (Exhibit XI-C) As a comparison of its percentage of seat miles with its percentage of passenger miles shows TWA's load factor problem lay in its jets. From 1961 thru 1963 its percentage of domestic passenger miles in jets was lower than its percentage of domestic seat miles in jets.

b. Additional business activities

The non-comparability of the three airlines may be seen by examining the non-airline activities of TWA. In its 1963 Annual Report (p. 10) published in the spring of 1964, TWA forecast revenues of $7 million "in its first year" for its new Special Services Division at Cape Kennedy. Apparently this became an even more substantial part of its operations in 1965 because in the 1964 Annual Report (p. 22), TWA forecast $15 million revenues for the Special Services Division. TWA had no substantial revenues of this nature during the 1959-1963 period and American had no such division in either period.

c. Travel habits

Changing travel habits on the part of the public can have a great impact upon the profit potential of an airline's routes. For example, TWA profited in both its Domestic and International Divisions in 1964 and later periods as the result of such changes. Internationally, TWA benefited significantly vis-a-vis PAA-ATL as the result of the greater

growth in travel between the United States and southern Europe than between the United States and northern Europe. Domestically, TWA benefited from the recent growth of travel to resort areas which TWA serves and American does not. For example, by 1965 Las Vegas had become the destination in six of TWA's top 100 markets. (Exhibit XI-D)

These limited examples are but a few of many that could be used to illustrate the myriad of factors affecting an airline's profitability from year to year.

d. Areas served

There are basic and substantial differences between the domestic operations of TWA and American and between the international operations of TWA and PAA-ATL.[1/] For example, the PAA-ATL certificate includes the entire former operation of American Overseas Airlines to the Scandinavian countries, the Low Countries, northern Germany and Berlin, which TWA is not authorized to serve. Domestically, at the end of 1965 TWA did not have competitive operating rights in 27 out of American's top 50 markets and American did not have competitive operating rights in 31 of TWA's top 50 markets. (Exhibit XI-E) The differences were even greater in 1959.

1/ We caution against the use of the route maps provided by Mr. Wemple in the Comparative Profit Study, because they are replete with errors and because they fail to take into account operating restrictions on various important route segments.

e. Accounting changes

Accounting changes also operate to render comparisons misleading, especially when made over a long period of time. With respect to the comparisons made in the Comparative Profit Study, we note the following examples:

1. During the first period flight equipment rental costs were different for the three airlines than they were in the second period in proportion to their total operating costs. Since the cost of capital of rental aircraft is included in the lease payment, it becomes a direct operating cost; but cost of capital of wholly-owned aircraft becomes a "below-the-line" expense. A simple comparison without correcting all three carriers for this single difference in both periods is misleading. (Exhibit XI-F)
2. Numerous accounting changes and changes in depreciation methods were made by the carriers during these periods. An outstanding example is the special depreciation charge for piston equipment which TWA took in 1961. This added an adjustment of $26.3 million before taxes (TWA 1961 Annual Report, p. 8) to expense in 1961 and increased TWA's 1964 and 1965 operating profits by the amounts moved forward from those later years to 1961.

3. In 1965, there was the reverse occurrence at American Airlines. The CV-990's which were originally depreciated over a 12-year life, beginning with deliveries in 1962, were changed to a 10-year life in 1965. The effect of this change was to charge a higher rate of depreciation in 1965 than in 1962 and 1963 for the CV-990's, thus reducing AA's net earnings in 1965 by $1,964,000.[1/]

Other changes in accounting methods, such as TWA's change in use of overhaul reserves at the end of 1963, also made significant differences in reported profits and in the comparability of the reported profits from period to period and from airline to airline.

f. Time periods

The selection of appropriate periods of time is also important if a comparison is to be meaningful. By selecting different time periods, a wide variety of different results can be produced from comparisons of the type made in the Comparative Profit Study. The periods selected by Mr. Wemple, 1959-1963 vs. 1964-1965, were about as different as any two periods that can be imagined. During the 1959-1963 period,

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1/ American Airlines 1965 Annual Report, p. 12, n. 2.

the introduction of jet aircraft coincided with a decline in traffic below the levels that had been forecast. The industry entered a period of excess capacity in which profits were the exception, not the rule. By 1964, this trend had been reversed, traffic boomed, load factors were greatly improved, and operating profits were restored to the levels preceding the introduction of jet aircraft.

4. Irreconcilability of the Comparative Profit Study and the C & C Report

The absurdity of the Comparative Profit Study as a measurement of "damages" is shown by a comparison of the profit estimates in the C & C Report with the Comparative Profit Study estimates allocated to individual years (Exhibit XI-G). Internationally, the Comparative Profit Study would add profits of $31.8 million in 1959 and $22.3 million in 1963 when only 1.1 and 0.9 jets, respectively, would have been added to TWA operations under the assumptions in the C & C Report. The Comparative Profit Study would add only $1.8 million in profits in 1962 when 4.8 jets would have been added. In 1963 $22.3 million in profits is added to the International Division by the Comparative Profit Study, although the C & C Report estimates a reduction of $900,000. Domestically, the Comparative Profit Study would diminish TWA's operating profit for 1959, although the C & C Report adds two additional jets and estimates additional profits of $7 million.

In sum, the Comparative Profit Study is meaningless as a measurement of damages.

TWA Passenger Load Factors Compared With American and PAA-Atlantic 1959-1963

Domestic	TWA Load Factor	AAL Load Factor	Load Factor Ratio AAL/TWA
1959	70.5%	70.4%	99.9%
1960	63.9	65.3	102.2
1961	56.7	61.4	108.3
1962	51.3	57.0	111.1
1963	52.8	58.6	111.0

International	TWA Load Factor	PAA-ATL Load Factor	Load Factor Ratio PAA-ATL/TWA
1959	59.7%	69.7%	116.8%
1960	58.9	61.3	104.1
1961	47.3	49.2	104.0
1962	48.9	48.1	98.4
1963	46.9	48.7	103.8

Source: CAB Handbook of Airline Statistics.

INCREASE IN TWA'S REVENUES BASED ON HIGHER LOAD FACTORS

($ million)

ar	TWA Actual Domestic Rev.[1]	Ratio	TWA Constructed Domestic Rev.	Gain
59	$ 251.4	.9	$ 251.2	$ (.2)
60	251.6	102	257.2	5.6
61	250.3	108	271.1	20.8
62	270.8	111	300.9	30.1
63	310.5	111	344.6	34.1
tal	$1,334.6		$1,424.9	$ 90.3[2]

ar	TWA Actual Int'l. Rev.[1]	Ratio	TWA Constructed Int'l. Rev.	Gain
59	$ 50.2	117	$ 58.6	$ 8.4
60	77.6	104	80.8	3.2
61	61.9	104	64.3	2.4
62	77.0	98	75.7	(1.3)
63	101.4	104	105.3	3.9
tal	$ 368.1		$ 384.8	$ 16.7[2]

Source: CAB Handbook of Airline Statistics, 1965 Edition.

Differences due to rounding.

"DX271A, Exhibit XI-B
(S.H.E. Report (Revised) - Volume One)"

Percentage of TWA and American Domestic Traffic from Monopoly Markets, 1964 Compared with 1959 1/

	1959	1964	Change
American Airlines	17.5%	4.2%	-13.3%
TWA-Domestic	7.8%	3.7%	- 4.1%

1/ Source: CAB Competition Study, Year 1959 and Year 1964.

TWA Percentage of Jet Plane Miles, Jet Seat Miles, and Jet Passenger Miles (Scheduled) vs. AA and PAA-ATL 1959-1963

	Percent Jet of Carrier's Total					
	Plane Miles		Seat Miles		Passenger Miles	
Domestic	TWA	AAL	TWA	AAL	TWA	AAL
1959	13%	13%	21%	21%	25%	25%
1960	35	32	49	46	49	51
1961	57	50	69	64	67	67
1962	79	62	86	74	83	74
1963	81	69	88	79	86	79
International	TWA	PAA-ATL	TWA	PAA-ATL	TWA	PAA-ATL
1959	1%	27%	3%	41%	3%	50%
1960	54	67	77	79	80	80
1961	86	81	92	88	94	87
1962	99	83	99	88	100	86
1963	99	87	99	91	100	88

Sources: For TWA, TWA Ex. C & C-4(24, 39); for PAA and UAL, CAB Form 41 Reports, Schedules T-3

Note: Figures rounded to nearest whole percent.

"DX271A, Exhibit XI-D
(S.H.E. Report (Revised) - Volume One)"

Las Vegas Markets Shown in TWA Top 100 Domestic Markets, 1965[1/]

Rank as TWA Market	City Pair	Airlines Certificated
#18	Las Vegas-Chicago	TWA and UAL
#25	Las Vegas-New York	TWA and UAL
#77	Las Vegas-San Francisco	TWA, Pacific, Delta, National
#88	Las Vegas-Albuquerque	TWA Monopoly
#90	Las Vegas-Los Angeles	TWA, Western, Bonanza
#99	Las Vegas-Kansas City	TWA, UAL

1/ Source: CAB Study, Competition Among Domestic Air Carriers, 1965, pages 638 and 639.

"DX271A, Exhibit XI-E, page
(S.H.E. Report (Revised) - Volume One)

Top 50 Markets in Which TWA and AA Were Not Competitively Certificated 1/

TWA Markets in Which AA Was Effectively Restricted or Not Certificated

Rank as TWA Market	City Pair	Volume of Passenger Miles in 1965 (million)	AA Certificate
# 7	Boston-San Francisco	181	2/
#10	San Francisco-Washington	167	2/
#12	Kansas City-New York	143	AA Not Certificated
#13	Los Angeles-Pittsburgh	143	2/
#15	Chicago-Philadelphia	131	AA Not Certificated
#17	Denver-New York	110	AA Not Certificated
#18	Chicago-Las Vegas	105	" "
#19	New York-Pittsburgh	98	2/
#20	Kansas City-Los Angeles	96	AA Not Certificated
#22	Indianapolis-New York	94	2/
#23	Chicago-Kansas City	91	AA Not Certificated
#24	Chicago-Pittsburgh	84	" "
#25	Las Vegas-New York	76	" "
#26	Dayton-New York	75	2/
#27	Dayton-Los Angeles	75	2/
#28	Philadelphia-San Francisco	68	2/
#29	Kansas City-San Francisco	67	AA Not Certificated
#30	Baltimore-San Francisco	65	2/
#31	Pittsburgh-San Francisco	63	2/
#33	Los Angeles-San Francisco	57	AA can operate cargo planes only
#36	Albuquerque-Chicago	50	AA Not Certificated
#37	Kansas City-St. Louis	48	" "
#38	Albuquerque-Los Angeles	44	" "
#39	Chicago-Columbus	43	" "
#44	Columbus-Los Angeles	39	2/
#45	Boston-Pittsburgh	34	2/
#46	Albuquerque-New York	33	AA Not Certificated
#47	Pittsburgh-Philadelphia	33	" "
#48	Baltimore-Kansas City	32	" "
#49	Albuquerque-San Francisco	31	" "
#50	Cincinnati-San Francisco	31	2/
Total TWA Passenger Miles		2,407	in 31 listed markets

1/ Source: CAB Study, Competition Among Domestic Air Carriers, 1965, pages 638 and 551.

2/ AA effectively restrained by long haul restriction or stop restriction

"DX271A, Exhibit XI-E, pa
(S.H.E. Report (Revised) - Volume On

AA Markets in Which TWA Was Effectively Restricted or Not Certificated

Rank as AA Market	City Pair	1965 Passenger miles (million)	TWA Certificate
# 6	Detroit-New York	203	TWA Not Certificated
# 7	Dallas-New York	191	" "
# 9	Dallas-Los Angeles	165	" "
#14	Chicago-Washington	132	1/
#16	Chicago-Dallas	127	TWA Not Certificated
#18	Dallas-San Francisco	111	" "
#19	Chicago-Detroit	103	1/
#22	Buffalo-New York	99	TWA Not Certificated
#23	El Paso-New York	84	" "
#25	Chicago-San Diego	77	" "
#26	Cleveland-New York	77	TWA restricted to intl. flights only
#29	Los Angeles-Memphis	69	TWA Not Certificated
#30	New York-San Diego	63	" "
#31	Memphis-New York	59	" "
#33	Boston-Detroit	54	" "
#34	Chicago-St. Louis	53	" "
#35	Dallas-Phoenix	53	" "
#36	Dallas-Washington	52	" "
#38	Dallas-Philadelphia	51	" "
#39	New York-Rochester	49	" "
#40	Nashville-New York	48	" "
#41	New York-Washington	44	TWA restricted to intl. flights only
#44	Buffalo-Chicago	41	TWA Not Certificated
#45	Buffalo-Los Angeles	41	" "
#48	Baltimore-Dallas	38	" "
#49	Chicago-Syracuse	37	" "
#50	Dallas-St. Louis	37	" "
Total AA Passenger Miles		1,955	in 27 listed mark

1/ TWA effectively restricted through long haul restrictions or stop restrictions, or both.

"DX271A, Exhibit XI-F
(S.H.E. Report (Revised) - Volume One)"

Flight Equipment Rentals as a Percent of Total (Millions of Dollars) Operating Expense 1959-1965, Selected Airlines

Year	Total Operating Expense				Total Flight Equipment Rentals			
	TWA Dom.	TWA Intl.	AA Dom.	PAA-ATL	TWA Dom.	TWA Intl.	AA Dom.	PAA-ATL
1959	247.3	82.5	346.4	144.0	8.0	2.7	1.9	--
1960	278.0	83.9	396.9	169.8	13.8	4.8	5.7	0.8
1961	289.9	84.9	395.7	203.9	1.4	0.1	7.2	1.5
1962	306.1	86.8	433.1	215.5	3.0	0.2	--	2.3
1963	325.9	109.7	440.5	224.5	0.4	4.2	--	2.5
Totals	1447.2	447.8	2012.6	957.7	26.6	12.0	14.8	7.1
Percent	100%	100%	100%	100%	1.8%	2.7%	0.7%	0.7%
1964	368.7	120.7	473.3	249.8	1.6	5.0	--	2.2
1965	430.6	143.9	530.9	266.7	0.6	3.8	--	1.1
Totals	799.3	264.6	1004.2	516.5	2.2	8.8	--	3.3
Percent	100%	100%	100%	100%	0.3%	3.3%	0.0%	0.6%

Sources: Form 41's and ATA Reports.

ADDED JETS BY YEARS

C & C Report	1959 Int	1959 Dom	1959 Sys	1960 Int.	1960 Dom	1960 Sys
Ch.II(p.13)	0.2		0.2	3.6	1.4	5.0
Ch.III(p.42)	0.9	2.0	2.9	0.6	0.7	1.3
Ch.IV(p.53)					10.3	10.3
Ch.V(p.66)					5.1	5.1
Total	1.1	2.0	3.1	4.2	17.5	21.7

	1961 Int	1961 Dom	1961 Sys	1962 Int	1962 Dom	1962 Sys
Ch.II	3.7	2.2	5.9	4.8	1.0	5.8
Ch.IV		5.2	5.2			
Ch.V		9.9	9.9		10.0	10.0
	3.7	17.3	21.0	4.8	11.0	15.8

	1963 Int	1963 Dom	1963 Sys
Ch.II	0.9	0.5	1.4
Ch.V		7.9	7.9
	0.9	8.4	9.3

"DX271B
(S.H.E. Report (Revised) - Volume Two)"

REPORT OF

SIMAT, HELLIESEN & EICHNER, INC.

VOLUME II

A. MARGINAL STAGE LENGTHS
(OPERATIONAL CHANGES IN JET AND PISTON SERVICES)

The uses of jet aircraft in domestic services changed during the 1959-1963 period. When the jets were first introduced, they were deployed by airline managements, in view of the heavy investment which they represented, in the most profitable types of operations--the long haul, high load factor flight segments. As jets continued to be added, they were used in less economic and profitable operations because the more profitable uses had been exhausted. This pattern of change in usage of resources is characteristic in industry and has been popularly described by the term "diminishing utility."

Because aircraft usage in the International Division of TWA is dominated by transatlantic operations, changes in the average stage lengths of flights as jet equipment was added were not as substantial as in the Domestic Division. But the diminishing productivity of added capacity in terms of load factors was no less severe.

In the Domestic Division, comprehensive analysis of TWA's schedules during the period of jet service buildup shows that there were parallel downward trends in the average stage

lengths of both jet and piston flights from 1959 to 1963.

Added jet flights were added at progressively decreasing stage lengths which were well below the average of existing flights with jets. The piston flights being deleted were generally those operated at significantly longer stage lengths than the average stage length for the type of piston aircraft deleted.

To perform our schedule analyses, we converted all schedule information for TWA's domestic services into a form suitable for computer processing. For each flight and each segment of a flight scheduled during each month of the five year 1959-1963 period, we recorded the flight itinerary, the departure and arrival times at each point served by the flight, the number of times monthly that the flight was scheduled to be operated (exclusive of holiday cancellations), the type of equipment, the classes of services offered, the number of available first class and coach seats, and the distances between the points served.[1/] From this basic information we were able to determine the number of flights scheduled daily between each combination of points, the average stage length of flights operated with each type of aircraft, and various other significant relationships.

We were able to determine, by appropriate sorting and tabulating of the available information, the average stage length of flights added or deleted for each type of aircraft

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1/ The complete transcription of TWA's domestic schedules for computer processing involved the creation of 46,795 individual records of flight segment data. By summarizing the data for monthly flights over the same flight segments with the same type of aircraft, the number of records was reduced to 12,047.

during each consecutive month of the period. To obtain this information, we first compared the number of daily services with each type of aircraft operated monthly over each of the flight segments (pairs of points) where non-stop services were provided with that type of aircraft. In those cases where the number of daily flight services over a particular flight segment increased from one month to another, we computed the increase in daily flight services and the increase in daily aircraft miles scheduled. By aggregating the increases in daily flight services among all flight segments and the increases in daily aircraft miles and, further, by dividing the daily aircraft mileage totals by the daily flight service totals, we were able to compute the average stage lengths of flights added each month with each type of aircraft. By determining and collecting the information for flight segments where services were reduced, we similarly were able to determine the average stage lengths of deleted flights with each type of aircraft.

When we compared the average stage length of added jet flights from one month to the next with the average stage length of all flights operated with the same type of jet aircraft in the earlier month, the comparisons showed a pronounced pattern. Average stage lengths of jet flights added were generally lower

than the average stage length of all jet flights operated in the prior month.

Comparisons between the average stage lengths of piston aircraft services deleted and the average stage length of piston services operated with the same types of aircraft in the prior month showed an opposite pattern. In the case of deleted piston aircraft services, the average stage lengths were longer than the average stage lengths of all flights scheduled in the prior month. The results of the comparisons of the added jet and deleted piston aircraft services with the average stage lengths of the services to which they were added and from which they were deleted are presented in Exhibits A-A, A-B, and A-C.

Exhibit A-A shows that the pattern of declining average distance of domestic nonstop jet flights as the number of jets increased was well established and common to the entire domestic trunk industry during the 1959-1963 period.

Exhibit A-B shows that as the B-707-131's and CV-880's were added to TWA's fleet, the jets added flew shorter distances than the jets already in service. For the 30 months from mid-1960 to the end of 1962, the stage length of the jet flights added with B-707-131's was less than the average for 26 months and above the average for

only four months. As a result, twelve-month moving averages of the stage lengths declined sharply from about 1,000 miles to below 600 miles per flight within a two-year period. In our opinion, a further addition of jets would have accelerated the decline.

Exhibit A-C shows that as the number of jets increased each year from 1959 through 1963, the average nonstop flight distances for the year declined for the L-049-749 and L-1049G aircraft. Exhibit A-C shows the annual declines in the two types of aircraft; it also shows the declines in monthly average stage lengths and compares the monthly average historical stage length of the two types of aircraft with monthly and 12 month averages of the stage length of deleted flights.

The averages, showing a sharp drop in length of piston flights as additional jets were added, signify that if even more jets had been added to TWA's domestic operations for 1959-1963, the average stage length of piston services would have dropped even more sharply.

Mr. Wemple inherently assumed that the added jet and deleted piston flights would be at the same stage lengths as the average jet or piston flights actually operated each year. We have statistically analyzed the relationship of the added jet and deleted piston flights to determine if it was possible to make a more accurate

estimate of the stage lengths of these flights. We found that the relationships set forth in Table A-I represent a statistically valid and significant improvement, in estimating the stage lengths of added jet and deleted piston flights, over the use of average stage lengths of existing jet and piston flights.

Table A-I

RELATIONSHIPS FOR ESTIMATING THE STAGE LENGTHS OF ADDED JET AND DELETED PISTON AIRCRAFT SERVICES FROM EXPERIENCED AVERAGE STAGE LENGTHS

Type of Aircraft	Statistically Determined Formula for Estimating Stage Length of Added or Deleted Flights
Added Jet Services	
B-707-131	59.8% of average stage length plus 258 miles
B-707-331	40.2% of average stage length plus 498 miles
CV-880	45.0% of average stage length plus 387 miles
B-707-131B	50.3% of average stage length plus 524 miles
Deleted Piston Services	
L-1649A	113% of average stage length plus 45 miles
L-1049G/H	141% of average stage length less 132 miles
L-049/749	158% of average stage length less 103 miles
M-404	203% of average stage length less 140 miles

Sources: TWA 4C-3 and Computer Print-outs.

The formulas set forth in Table A-I were determined by regression analysis and are as follows:

Table A-II

Type of Aircraft	Formula
B-707-131	$258 + [(.598) \quad (\overline{SL})]$
B-707-331	$498 + [(.402) \quad (\overline{SL})]$
CV-880	$387 + [(.450) \quad (\overline{SL})]$
B-707-131B	$524 + [(.503) \quad (\overline{SL})]$
L-1649A	$45 + [(1.13) \quad (\overline{SL})]$
L-1049G/H	$-132 + [(1.41) \quad (\overline{SL})]$
L-049/749	$-103 + [(1.58) \quad (\overline{SL})]$
M-404	$-140 + [(2.03) \quad (\overline{SL})]$

There were insufficient data to establish reliable relationships for estimating the stage lengths of added services with B-720B aircraft or the stage lengths of deleted services with L-1049, DC-3 and CV-240 aircraft. To the extent that operations with these aircraft would have been affected, we have used the average stage length for the added and deleted services for want of a better alternative.

The stage length relationships determined from TWA's actual experience as it added domestic jet services enabled us to make more reliable estimates, for each year, of the stage lengths of added jet flights and deleted piston flights. Because we developed the relationships from schedule information exclusively, the relationships can be properly applied only to the estimates of stage lengths in scheduled services. Our estimates for changes in aircraft miles also include changes in the miles flown in nonscheduled (charter) revenue passenger services. We have no basis for believing that the stage lengths for added and deleted nonscheduled services would have been different than they were in existing services. Consequently, for added and deleted nonscheduled services, we have used historical average stage lengths, which are determinable from data reported quarterly.[1/]

1/ TWA Ex. C & C 4(24).

We made the necessary adjustment to obtain the overall average stage length of added and deleted services by further assuming that the added scheduled and nonscheduled miles would be in the same relative proportions as the miles actually flown in scheduled and nonscheduled services in the same years. The overall average stage length of added and deleted flights was calculated for each year and aircraft type as follows:

Overall Average Stage Length of Added or Deleted Services	=	Proportion of Total Revenue Aircraft Miles in scheduled Services	x	Estimated Average Stage Length of Added or Deleted Flights in Scheduled Services
	+	Proportion of Total Revenue Aircraft Miles in Nonscheduled Services	x	Average Stage Length of Non-scheduled Revenue Flights

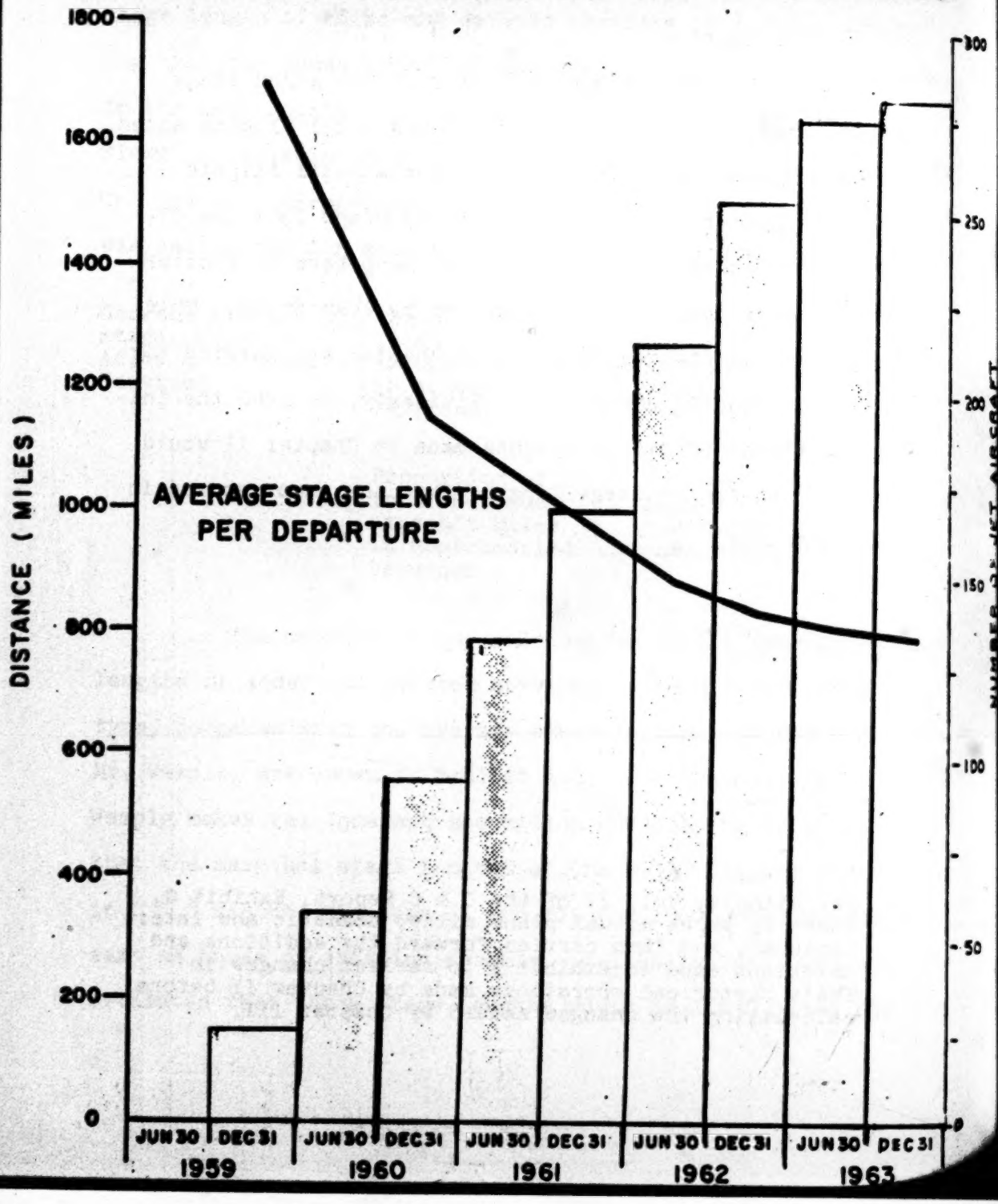
The results of our calculation of the average stage lengths of added and deleted services with each equipment type, compared with the average stage lengths assumed by Mr. Wemple, are shown in Exhibit A-D. For example, Mr. Wemple makes the inherent assumption for costing purposes that the marginal stage lengths of the B-331 flights added in C & C Report, Chapters II and III for 1960 would be the same as those of existing flights, or 1,841 miles. We have estimated that these stage lengths would be 1,250 miles for

the jets added by Chapter II and 1,140 miles for the jets added by Chapter III. This makes a difference in revenue and cost estimation.

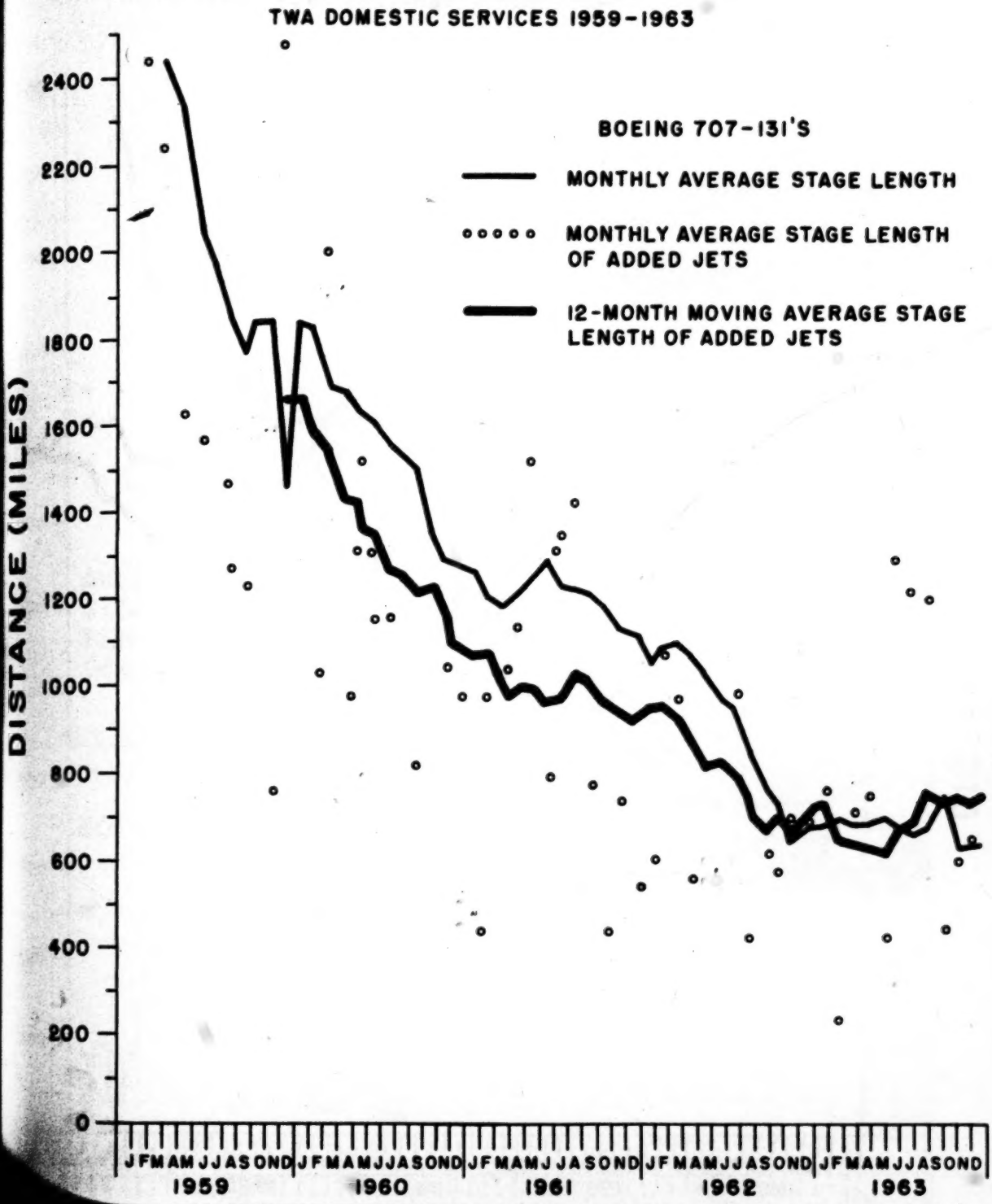
As Exhibit A-D shows, in 1960 the added stage lengths would have been shorter for the B-331 flights added by C & C Report Chapter III than for the B-331 flights added by Chapter II. Similarly, in 1960 and 1961 the CV-880 flights added by Chapter V would have been at shorter stage lengths than the flights added by Chapter IV. This is because the changes made in one chapter are carried forward to succeeding chapters.[1/] Similarly, in 1960 the initial deletions of piston flights made in Chapter II would have been at longer stage lengths than the ones removed in later chapters.

1/ For example, Vol. IV of the C & C Report, Exhibit G, Sheet 2, shows actual plane miles, domestic and international, and then carries forward the additions and deletions made in Exhibit F to reflect changes in TWA's historical operations made by Chapter II before calculating the changes caused by Chapter III.

AS THE NUMBER OF JETS INCREASED NON-STOP FLIGHT DISTANCES DECREASED DOMESTIC TRUNK LINE CARRIERS 1959-1963

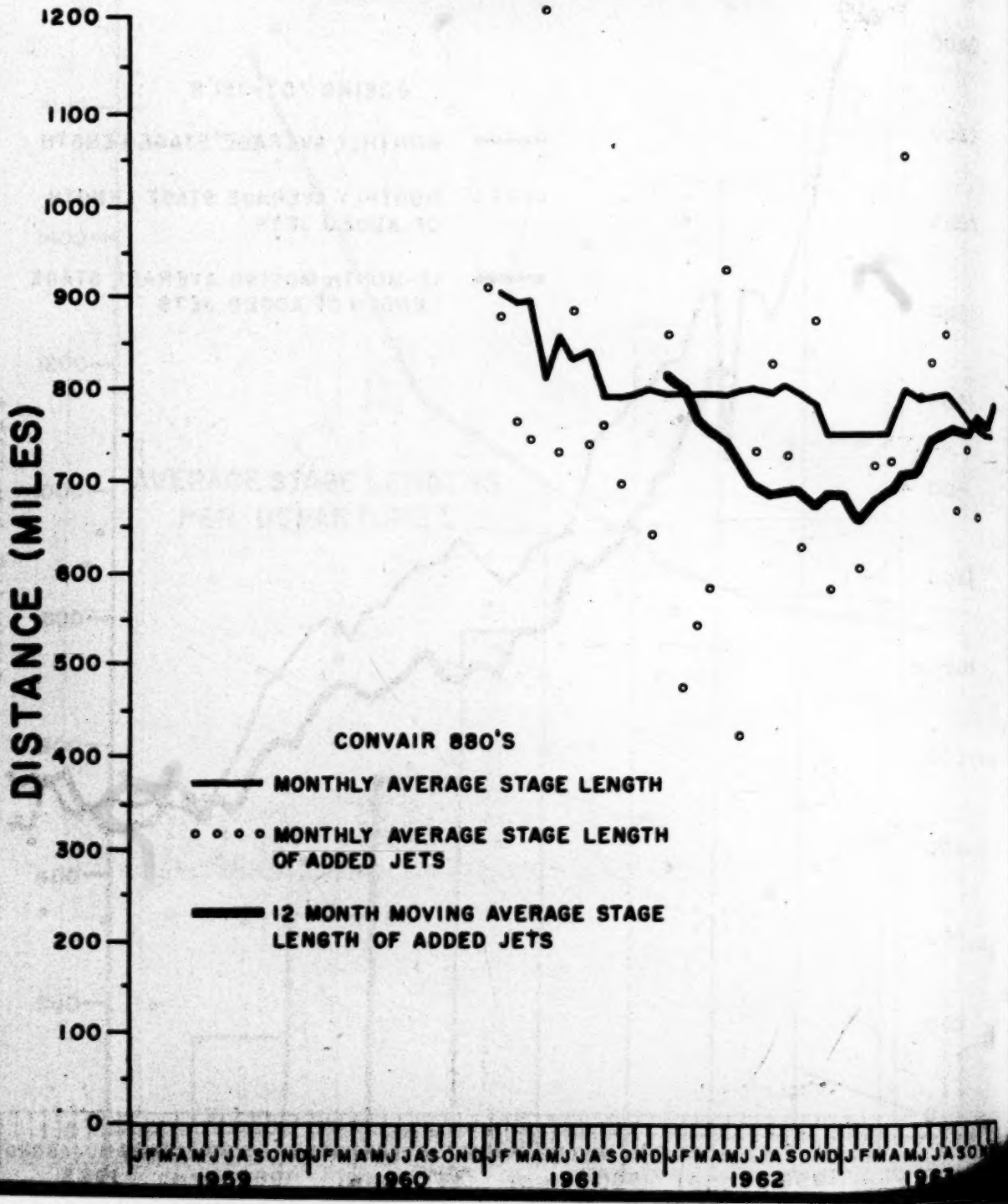


JETS ADDED TO THE FLEET FLEW SHORTER DISTANCES THAN JETS ALREADY IN THE FLEET

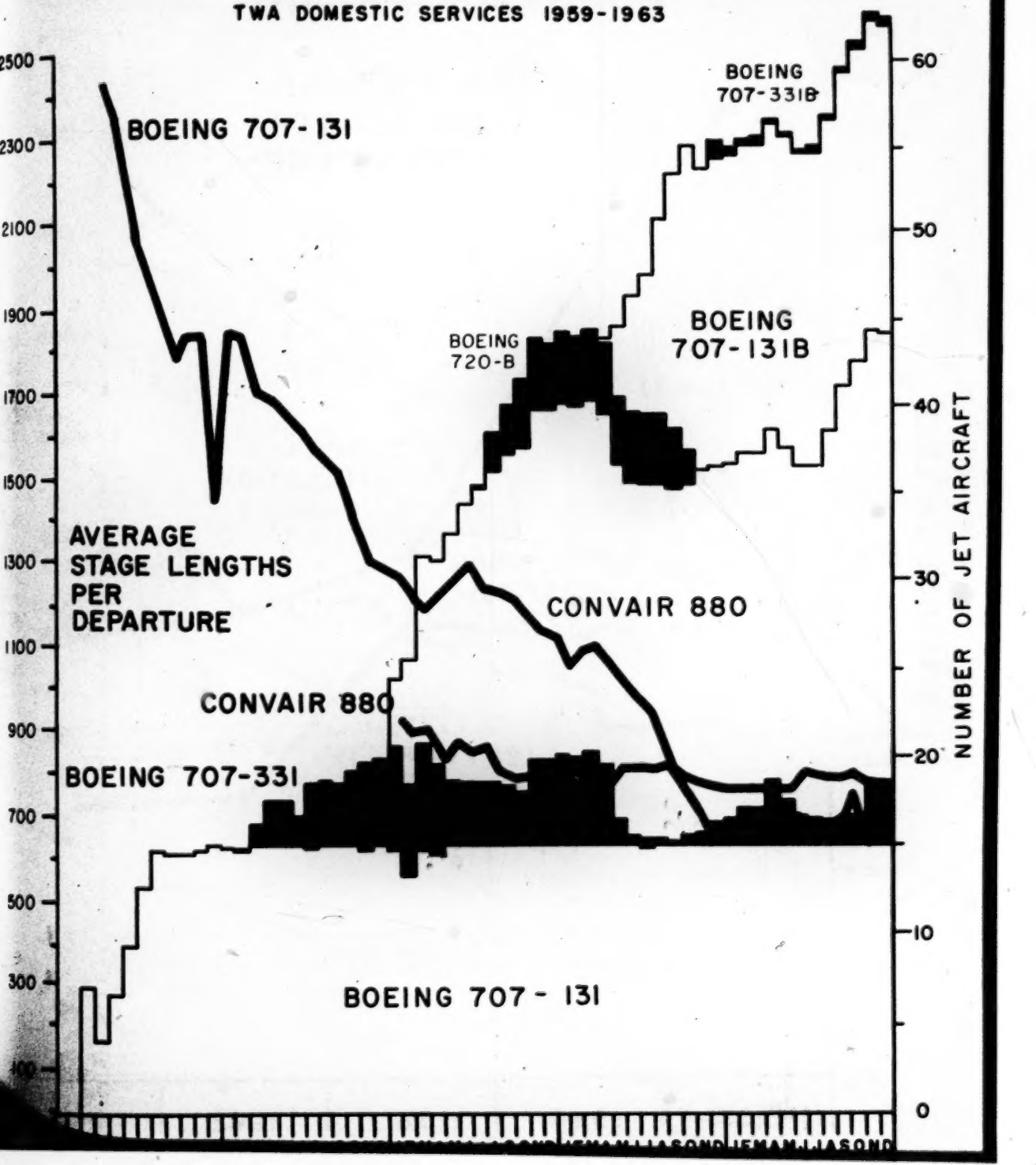


JETS ADDED TO THE FLEET FLEW SHORTER DISTANCES THAN JETS ALREADY IN THE FLEET

TWA DOMESTIC SERVICES 1959-1963

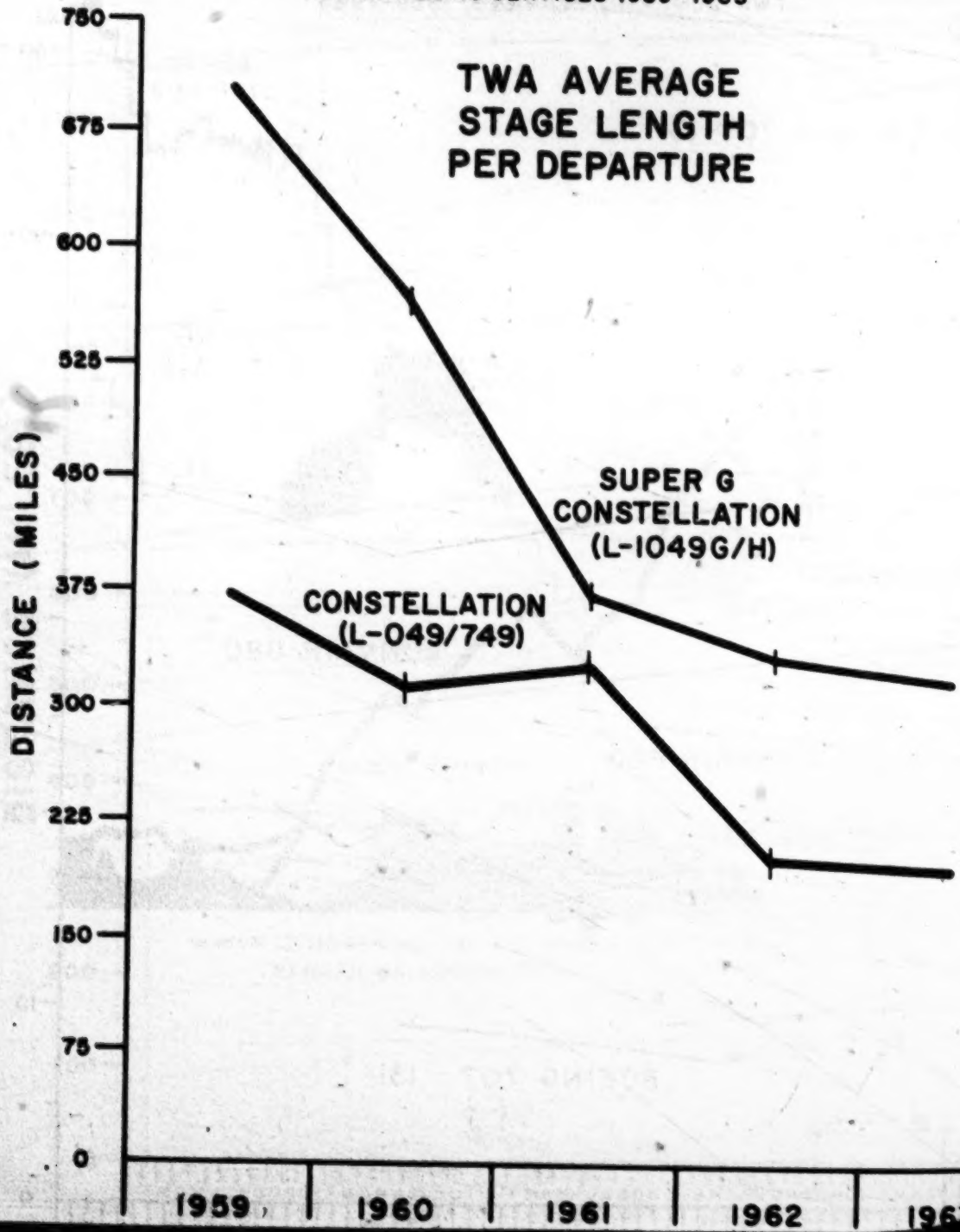


AS THE NUMBER OF JETS INCREASED NON-STOP FLIGHT DISTANCES DECREASED



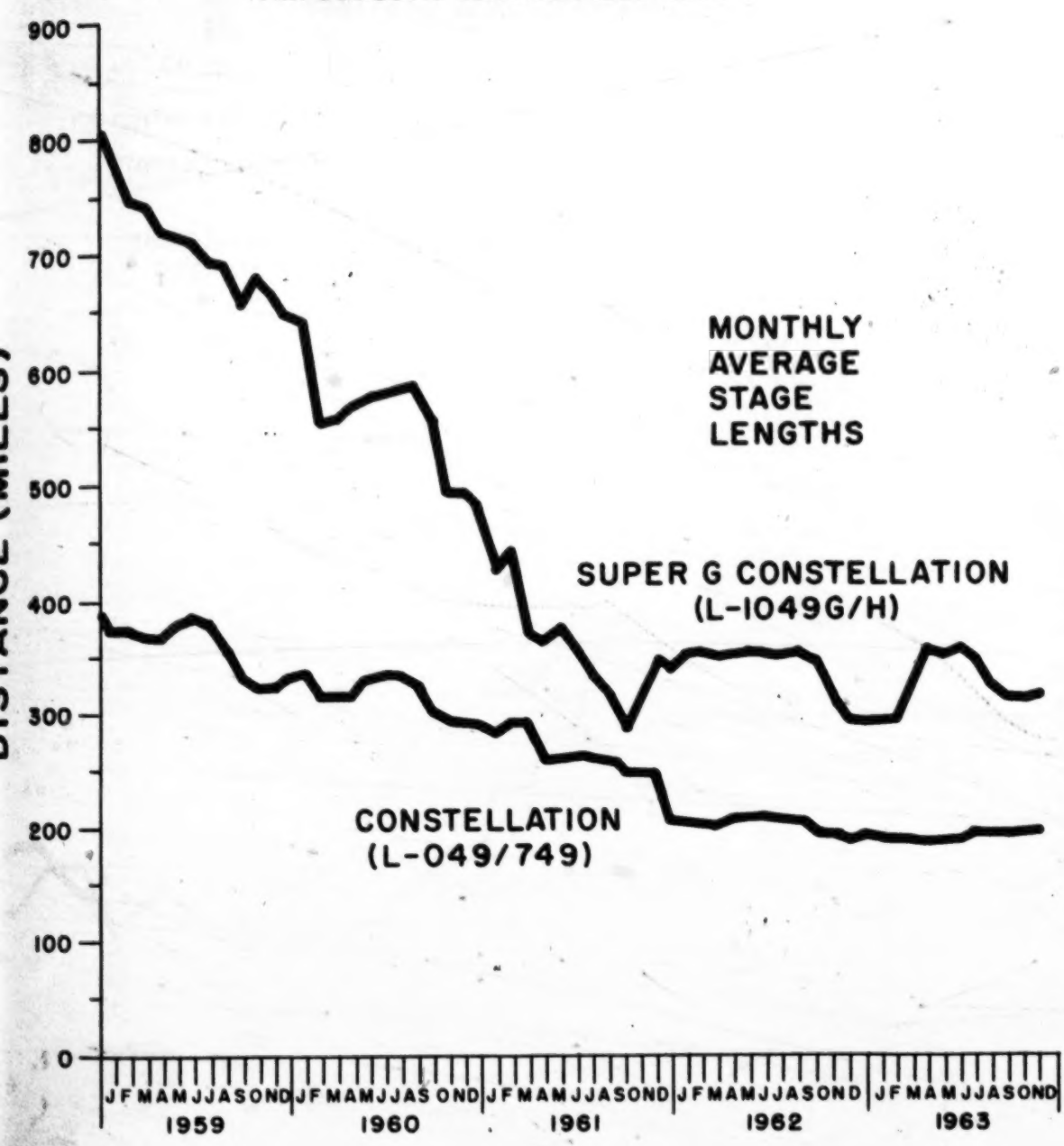
AS THE NUMBER OF JETS INCREASED NON-STOP FLIGHT DISTANCES DECREASED

TWA DOMESTIC SERVICES 1959-1963



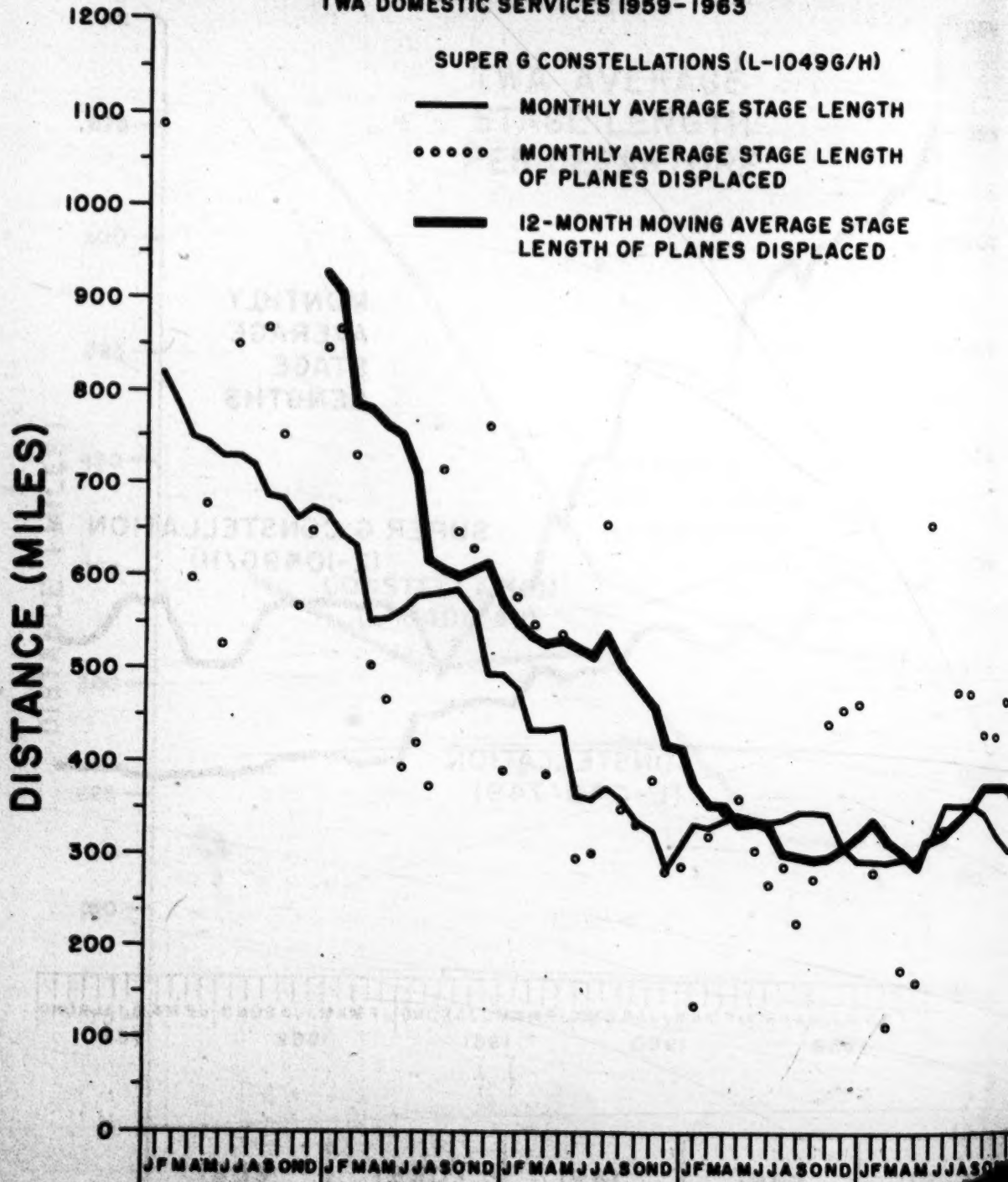
AX-1875
"DX271B, Exhibit A-C, page 2
(S.H.E. Report (Revised - Volume Two)"

AS THE NL INCREASED NON-STOP FLIGHT DISTANCES DECREASED



PISTON AIRCRAFT DISPLACED FROM SERVICE FLEW LONGER DISTANCES THAN THOSE THAT REMAIN IN SERVICE

TWA DOMESTIC SERVICES 1959-1963



Domestic Stage Lengths of Added Jet and Deleted Piston Aircraft

Year	C&C Chapter Number	Jet Aircraft Added					
		B-707-131		B-707-331		CV-880	
		S.H.E.	C&C	S.H.E.	C&C	S.H.E.	C&C
1959	III	1,360	1,844	1,140	1,844[1]	--	--
1960	II	--	--	1,250	1.871	--	--
	III	--	--	1,140	1,871	--	--
	IV	--	--	--	--	756	819[2]
	V	--	--	--	--	727	819[2]
1961	II	--	--	1,057	1,389	--	--
	IV	--	--	--	--	756	819
	V	--	--	--	--	747	819
1962	II	--	--	868	921	--	--
	V	--	--	--	--	743	791
1963	II	--	--	819	799	--	--
	V	--	--	--	--	733	769

1/ Used B-131 data for 1959.

2/ Used CV-880 data for 1961.

"DX271B, Exhibit A-D, page 1 (S.H.E. Report (Revised - Volume Two)"

AA-1877

AX-1678

Domestic Stage Lengths of Added Jet and Deleted Piston Aircraft

Year	C&C Chapter Number	Piston Aircraft Deleted					
		M-404		L-049/749		L-1049[1/]	
		S.H.E.	C&C	S.H.E.	C&C	S.H.E.	C&C
1959	III	187	*	488	*	547	*
1960	II	177	*	406	*	453	*
	III	173	*	403	*	453	*
	IV	173	*	405	*	456	*
	V	136	*	382	*	--	-
1961	II	148	*	319	*	--	-
	IV	117	*	320	*	--	-
	V	--	-	308	*	--	-
1962	II	--	-	216	*	--	-
	V	--	-	212	*	--	-
1963	II	--	-	204	*	--	-
	V	--	-	203	*	--	-

1/ Since we were unable to determine a reliable statistical relationship from the limited observations available for this aircraft, average existing stage length was used.

* These aircraft not deleted by C&C.

"DX271B, Exhibit A-D, P...
(S.H.E. Report (Revised - Volume ...

Domestic Stage Lengths of Added Jet and Deleted Piston Aircraft

Year	C&C Chapter Number	Piston Aircraft Deleted					
		L-1049G[1]		L-1049H[1]		L-1649A	
		S.H.E.	C&C	S.H.E.	C&C	S.H.E.	C&C
1959	III	--	--	598	*	1,600	1,375
1960	II	670	*	914	*	643	531
	III	663	*	--	-	640	531
	IV	660	569	793	*	640	*
	V	570	569	--	-	625	*
1961	II	394	373	--	-	411	*
	IV	390	373	--	-	208	*
	V	367	373	--	-	--	--
1962	II	339	335	--	-	--	--
	V	330	335	--	-	--	--
1963	II	316	319	--	-	488	*
	V	316	319	--	-	464	*

1/ 1049G and 1049H relationships are the same, as no distinction was made in the stage lengths of the two aircraft types.

* These aircraft not deleted by C&C.

Sources: TWA Ex. 4C-3 and C&C 4(24).

"DX271B, Exhibit A-D, page 3
(S.H.E. Report (Revised - Volume Two)"

C. DOMESTIC TRAFFIC ESTIMATES

Mr. Wemple's estimates of net changes in domestic revenues assume that added jet aircraft of each type would add to TWA's domestic traffic in the proportion that the added capacity is to the existing capacity of aircraft of the same type. Thus, if the available seat miles operated with B-331 aircraft were increased by 10%, Mr. Wemple would estimate that 10% would be added to the passenger revenue miles flown with B-331's. This assumption, which of all Mr. Wemple's assumptions has by far the greatest dollar impact on his estimates of net gain in domestic operating profits, is contradicted by the experience of TWA and of the other domestic trunk carriers.

Mr. Wemple's assumption presupposes that TWA could introduce jet capacity into the market in unlimited quantity without suffering a decrease in average jet load factors. But the history of the changes in traffic that resulted from the addition of jet services establishes that TWA and other airlines were not able to maintain average load factors. With each addition of jet capacity, the traffic increase that resulted was less than proportionate to the added capacity.

In estimating the losses in revenues from deletion of piston aircraft, Mr. Wemple similarly assumed that traffic would be reduced in proportion to the capacity deleted. This assumption is likewise contradicted by experience. With each decrease in piston aircraft capacity operated by the domestic trunklines, the loss in piston traffic was more than proportionate to the reduced capacity.

Mr. Wemple's procedures rest on the underlying assumption that in the period under consideration, TWA could use net added capacity as effectively and economically as the capacity to which it was added. Our review of the experience of TWA and the domestic airlines shows that the trunkline industry was unable to add capacity profitably during the greater part of the period. In our opinion, a further addition of capacity by TWA, or by any other air carrier, would have been even more unprofitable.

The economic climate for increased airline capacity in the early years of jet services was not favorable. In 1959, the U. S. economy had emerged from the recession in business activity that started in August, 1957 and continued through April, 1958. But, in June, 1960, the economy again started a downward drift which continued through February, 1961. The trough of the downturn in 1961 was followed by a period of gradual recovery through the third quarter of 1962 and, finally, by an accelerated period of growth which has persisted until recently.[1/] The paths of downward drift and recovery may be traced through the indexes of

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1/ See Business Cycle Developments, July, 1966, published by the Bureau of the Census, U.S. Department of Commerce.

Gross National Product (GNP) and Disposable Personal Income (DPI), both indexes adjusted for changes in price levels during the period, in Table C-I. GNP, as an index of total business activity, provides an index to the air travel activity of the business sector of the economy. DPI reflects more directly the ability of people to engage in air travel for personal reasons. The more important turning points in the trends of the indexes are evident from an examination of the table.

TABLE C-I

TRENDS IN GROSS NATIONAL PRODUCT AND DISPOSABLE PERSONAL INCOME 1959-1965

Year	Quarter	Gross National Product (Billions of 1958 Dollars)	Disposable Personal Income (Billions of 1958 Dollars)	Index (First Quarter 1959 = 100.0) Gross National Product	Index (First Quarter 1959 = 100.0) Disposable Personal Inc.
(1)	(2)	(3)	(4)	(5)	(6)
1959	I	468.6	329.3	100.0	100.0
	II	479.9	334.9	102.4	101.7
	III	475.0	332.6	101.4	101.0
	IV	480.4	335.4	102.5	101.9
1960	I	490.2	338.8	104.6	102.9
	II	489.7	341.2	104.5	103.6
	III	487.3	341.8	104.0	103.8
	IV	483.7	339.5	103.2	103.1
1961	I	482.6	341.8	103.0	103.8
	II	492.8	347.7	105.2	105.6
	III	501.5	352.8	107.0	107.1
	IV	511.7	359.6	109.2	109.2
1962	I	519.5	362.6	110.9	110.1
	II	527.7	366.8	112.6	111.4
	III	533.4	368.5	113.8	111.9
	IV	538.3	371.1	114.9	112.7
1963	I	541.2	375.7	115.5	114.1
	II	546.0	378.0	116.5	114.8
	III	554.7	383.1	118.4	116.3
	IV	562.1	388.1	120.0	117.9
1964	I	569.7	395.7	121.6	120.2
	II	578.1	405.5	123.4	123.1
	III	585.0	410.8	124.8	124.7
	IV	587.2	413.9	125.3	125.7
1965	I	600.3	418.8	128.1	127.2
	II	607.8	423.7	129.7	128.7
	III	618.2	436.8	131.9	132.6
	IV	631.2	443.9	134.7	134.8

Note: Data are seasonally adjusted quarterly totals at annual rates.

Cols. 3 and 4: The National Income and Product Accounts of the United States, 1929-1965, Office of Business Economics, U.S. Department of Commerce.

Col. 5: Col. 3 ÷ 468.6 (GNP in 1st Quarter, 1959)

6: Col. 4 ÷ 329.3 (DPI in 1st Quarter, 1959)

While the volume of domestic air travel has shown a long term trend of generally more rapid rate of growth than the economy as a whole, it mirrors the forces of growth and decline in the economy. Passenger traffic (revenue passenger miles flown in domestic trunkline scheduled services) increased from 1958 to 1959, during the period of economic recovery. From 1959 through 1961, the years during which the bulk of the additional TWA capacity would have been introduced under the jet equipment premises of Mr. Wemple, the volume of traffic stayed nearly level, gaining at the rate of 2% per year. In 1962, in the first phase of the recovery, traffic increased by 8%. Even this was below the historical rate of growth of 10% per year in the 1955-1959 period preceding the introduction of jet aircraft. It was not until 1963 that the rate of traffic increase returned to the level of the pre-jet era.[1/]

These economic factors explain, in part, why increases in air traffic during the 1959-1963 period were not proportionate to the increases in aircraft capacity operated, as Mr. Wemple assumed. Load factors declined precipitously from 1959 through 1962, as jet aircraft were added, leveling out only in 1963 when the decline was arrested by the accelerated growth of the economy, a corresponding growth in domestic trunkline air traffic, and a tapering in the number of jet aircraft added.

1/ The rates of increase in revenue passenger miles flown by domes trunklines were computed by us from information contained in th CAB Handbook of Airline Statistics, 1965 ed.

Table C-II

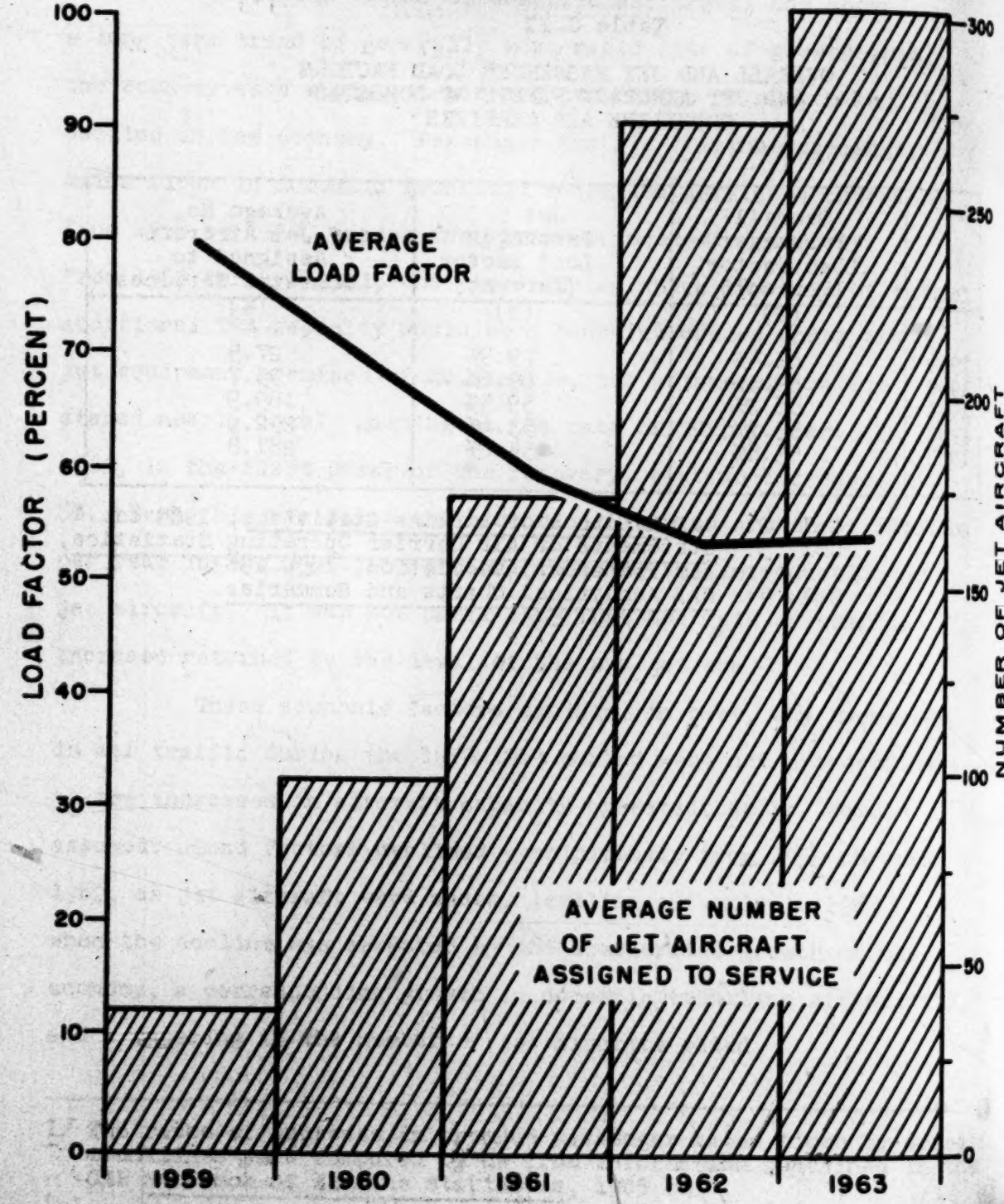
OVERALL AND JET PASSENGER LOAD FACTORS
AND JET AIRCRAFT FLEETS OF DOMESTIC
TRUNKLINE AIR CARRIERS

Year	Overall Passenger Load Factor (Percent)	Jet Passenger Load Factor (Percent)	Average No. of Jet Aircraft Assigned to Domestic Services
(1)	(2)	(3)	(4)
1959	61.4%	79.9%	27.5
1960	59.5%	69.6%	95.7
1961	56.2%	59.5%	169.9
1962	53.3%	53.6%	252.9
1963	53.8%	54.0%	281.8

Sources: Col. 2: CAB Handbook of Airline Statistics, 1965 ed.
Col. 3: Statements of Air Carrier Operating Statistics, Air Transport Association, 1959-1963.
Col. 4: CAB Analytical Charts and Summaries.

AS THE NUMBER OF JETS INCREASED LOAD FACTORS DECREASED

U.S. DOMESTIC TRUNKLINES 1959 - 1963



SOURCE: TABLE C-II

A further explanation is the condition of severe overcapacity which occurred as new jet equipment, the orders for which were placed several years earlier, was added in an air travel market whose growth was slowed by an unanticipated slowing of the pace of economic growth. The oversupply of capacity that prevailed throughout the U.S. domestic air transport industry had its roots in the general failure of air traffic forecasters, during the period when commitments for jet capacity were concluded, to foresee the taper in traffic growth that was encountered when the orders were filled. Representative forecasts of domestic passenger air traffic, made in the 1956-1958 period, show how consistently and substantially the actual traffic of the 1959-1963 period was overestimated.

Table C-III

REPRESENTATIVE FORECASTS OF U.S. DOMESTIC AIR TRAVEL MADE IN THE YEARS 1956 THROUGH 1958 COMPARED WITH ACTUAL AIR TRAVEL DURING THE YEARS 1959 THROUGH 1963

	Billions of Revenue Passenger Miles					
Year	Actual	Civil Aeronautics Administration (1956)	Canadair (1956)	Boeing (1956)	Trunkline Industry (1957)	Convair (1958)
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1959	29.3	31.8	30.9	35.1	31.0	30.0
1960	30.6	35.0	34.1	46.0	35.2	33.7
1961	31.1	37.8	37.6	58.0	39.8	38.0
1962	33.6	41.1	41.2	70.0	42.7	42.2
1963	38.5		45.0	80.0		45.7

Sources:
Col. 2: CAB Handbook of Airline Statistics, 1965 ed.
Col. 3: Civil Aviation and Federal Airways Forecasts, 1960-1965, Staff study of Civil Aeronautics Administration December, 1956; interpolated for years 1959, 1961, and 1962 by staff of Civil Aeronautics Board in General Passenger Fare Investigation, 32 CAB 291.
Col. 4: A Critical Review of Earlier Forecasts of Air Traffic and a New Approach, Report No. 93, Sales Engineering Division, Canadair, Ltd., January, 1956.
Col. 5: Traffic Forecast of Domestic U.S. Airlines to 1965, Boeing Airplane Company, December, 1965.
Col. 6: Forecasts of U.S. domestic trunkline air carriers compiled by Bureau Counsel, CAB and reproduced as Appendix 28 to the Opinion, General Passenger Fare Investigation, 32 CAB 291.
Col. 7: Post War Growth of Commercial Air Transportation in the Free World, Convair Division of General Dynamics, 1958.

"DX271B, page C-10
(S.H.E. Report (Revised) - Volume Two)"

The decline in load factors - the result of adding capacity more rapidly than traffic or, put conversely, the failure of traffic to increase in proportion to the addition of capacity - was a matter of grave industry and governmental concern during the period because the added investment in jet capacity was unprofitable. Table C-IV and Chart C-II trace the almost catastrophic decline in airline earnings suffered by the U.S. trunkline industry during the introduction and build-up of jet services in the years 1959 through 1961 when, under Mr. Wemple's assumptions, TWA would have added 16 aircraft to its jet fleets. Also shown is the increasing spread between operating profit and net income, after interest charges, caused by the failure of added jet services during the period of traffic recovery to produce operating profits more than marginally in excess of the interest charges on debt.

Table C-IV

	Earnings of U.S. Trunkline Carriers*	
Year	Operating Profit (Millions)	Net Income After Special Items (Millions)
(1)	(2)	(3)
1959	$ 124	$ 71
1960	80	16
1961	13	(36)
1962	158	40
1963	259	77

( ) Denotes loss.

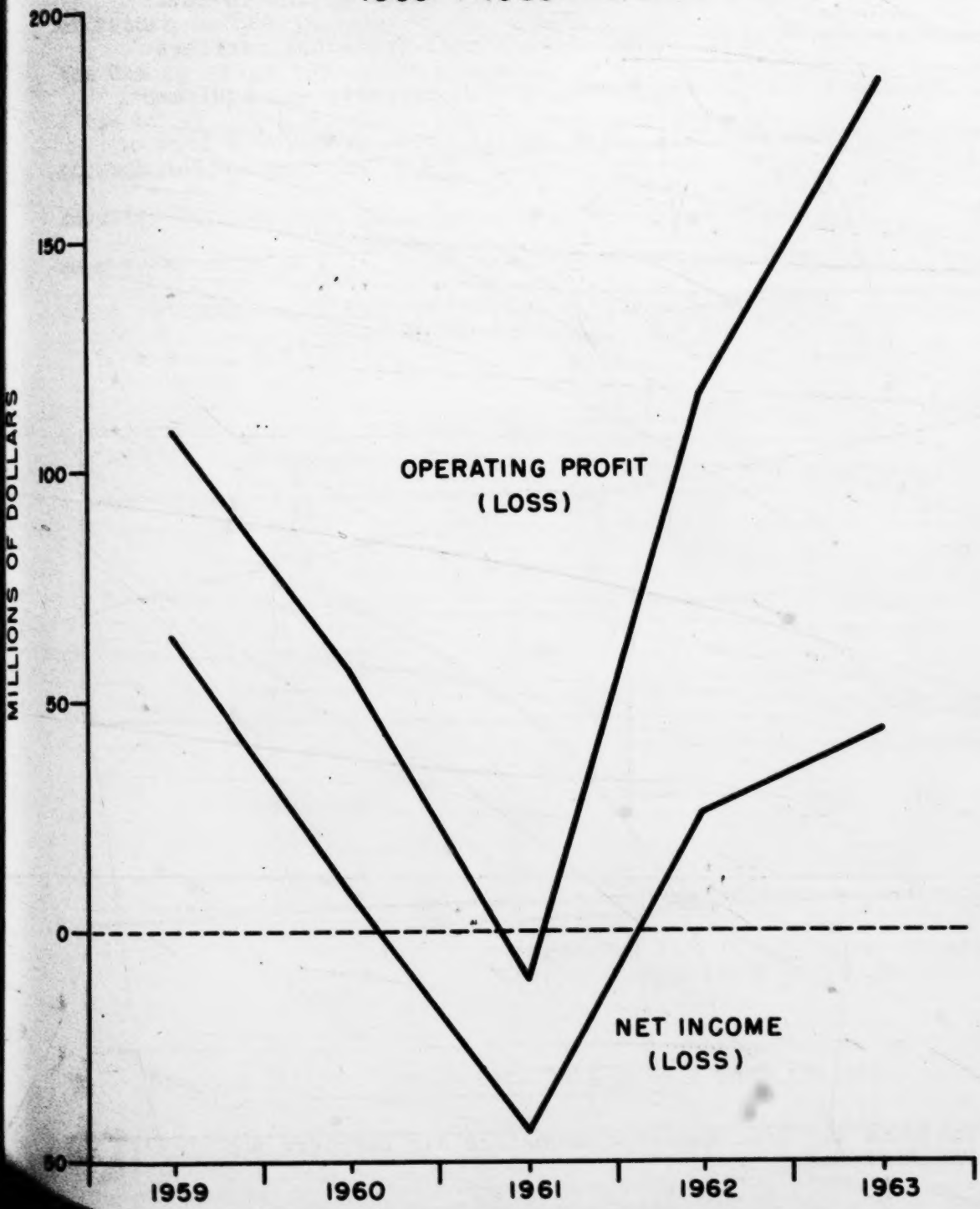
* System operations of U.S. domestic trunkline carriers and Pan American.

Source: Cols. 2 and 3: CAB Handbook of Airline Statistics, 1965 ed.

CHA

OPERATING PROFIT AND NET INCOME AFTER SPECIAL ITEMS

U. S. DOMESTIC TRUNKLINES
1959 - 1963



From the beginning of 1959 to the end of 1961 approximately one billion dollars were added to the investments of U.S. domestic and international trunkline carriers in additional flight equipment, ground property and equipment, and net working capital. Each dollar added produced a loss of 9 cents in operating profit:

Table C-V

TOTAL INVESTMENT AND OPERATING PROFIT OR LOSS OF U.S. TRUNKLINE CARRIERS 1/
1959-1961

Item	Amount (Millions)
(1)	(2)
Total Investment	
December 31, 1958	$ 1,587
December 31, 1961	2,574
Added Investment	$ 987
Operating Profit	
1958	$ 105
1961	13
Decrease	$ 92
Loss in Operating Profit for Each Dollar of Added Investment	$ 0.09

Source: Col. 2: CAB Handbook of Airline Statistics, 1965 ed.

1/ Includes all U.S. domestic trunkline air carriers and Pan American.

As a result of this decline in profitability, the rate of return before investment tax credit - a measure employed by the CAB to gauge the appropriateness of airline earnings - reached a low of 4% for U.S. certificated route air carriers from 1959 through 1963. This was the lowest average rate of return for the industry for any five consecutive postwar years. It compares with an average rate of return of 7% for the preceding 1955-1958 period and a rate of return of 11% for the following 1964-1966 period.

TABLE C-VI

AVERAGE TOTAL INVESTMENT, NET INCOME BEFORE INTEREST AND AFTER TAXES, AND RATE OF RETURN FOR U.S. TRUNKLINE AIR CARRIERS
1955-1958, 1959-1963, 1963-1966

Year	Total Investment (Millions)	Net Income Before Interest and Investment Tax Credit and After Taxes (Millions)	Rate of Return (Percent)
(1)	(2)	(3)	(4)
1955	$ 871	$ 86	9.85%
1956	1,058	93	8.78
1957	1,310	66	5.02
1958	1,531	81	5.28
1955-1958 Average	$1,192	$ 82	6.88
1959	$1,916	$ 115	6.02
1960	2,326	71	3.05
1961	2,717	43	1.59
1962	2,877	150	5.21
1963	2,825	168	5.93
1959-1963 Average	$2,532	109	4.30
1964	$3,024	$ 295	9.77
1965	3,563	429	12.03
1966*	4,038	498	12.33
1964-1966 Average	$3,542	$ 407	11.49

* Year ended June 30, 1966

Source: Cols. 2, 3 and 4: Vol. I, No. 1, Chart Book of Airline Economic Trends, Civil Aeronautics Board, November 1966

The general decline in average load factors from 1959 to 1962 signifies that each addition of capacity produced a less than proportionate increase in traffic. To put it another way, the marginal load factors - that is, the ratio of added traffic to added capacity - were below the average load factors.

It is the marginal load factor, the ratio of the net traffic added by an added flight to the capacity added by the flight, rather than the actual load factor of the added flight, which is the relevant consideration in determining whether the addition of the flight is profitable or unprofitable. The marginal load factor for added flights is generally less than the actual load factors experienced by the flights because added flights compete to some extent with existing flights of the same carrier and divert traffic from the existing flights. Thus, only part of the actual traffic carried on the added flight is new, or added, traffic; the remainder is diverted traffic which adds no new revenues.

The primary cause of the decline in overall domestic load factors during the period of jet introduction was the decline in jet aircraft load factors. A decline in the load factors of piston-engine and turbo-prop aircraft, while not so pronounced, also contributed. In Table C-VII the trends of annual average load factors in jet and non-jet aircraft services are shown for the domestic scheduled operations of trunkline air carriers. Also shown are the marginal load factors of jet and non-jet services computed by dividing the changes in seat miles flown from one year to another into the corresponding changes in passenger miles.

TABLE C-VII

TRENDS IN INDUSTRY LOAD FACTORS OF JET AND NON-JET AIRCRAFT SERVICES

Scheduled Domestic Operations of Trunkline Air Carriers 1959-1964

Year	Jet Aircraft Services: Revenue Passenger Miles (Millions)	Jet Aircraft Services: Available Seat Miles (Millions)	Jet Aircraft Services: Passenger Load Factor (Percent)	Non-Jet Aircraft Services: Revenue Passenger Miles (Millions)	Non-Jet Aircraft Services: Available Seat Miles (Millions)	Non-Jet Aircraft Services: Passenger Load Factor (Percent)
	Annual Data and Average Load Factors					
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1959	3,066	3,839	79.9%	25,061	41,954	59.7%
1960	9,995	14,357	69.6	19,238	34,797	55.3
1961	15,596	26,207	59.5	13,939	26,318	53.0
1962	20,743	38,681	53.6	11,085	21,056	52.6
1963	25,539	47,265	54.0	10,345	20,337	53.3
1964	30,842	55,803	55.3	10,815	19,439	55.6
	Change from Prior Year and Marginal Load Factors					
1960	6,929	10,518	65.9%	5,823	7,157	81.4%
1961	5,601	11,850	47.3	5,299	8,479	62.9
1962	5,147	12,474	41.2	2,854	5,262	53.7
1963	4,796	8,584	55.9	740	719	33.2
1964	5,303	8,538	62.1	(470)	898	
Change from 1959 to 1964	27,776	51,964	53.4	14,246	22,515	63.3

Sources: Cols. 2, 3, 5, & 6: Statements of Air Carrier Operating Statistics, Air Transport Association, 1959-1964.

Col. 4: Col. 2 ÷ Col. 3

Col. 7: Col. 5 ÷ Col. 6

Since the marginal load factors for added jet services shown in Table C-VII were aided by the growth in traffic produced by forces in the economy, they are higher than they would have been in the absence of such traffic growth. Similarly, the marginal load factors for deleted non-jet services are lower than they would have been in the absence of traffic growth, because traffic growth operates to increase the availability of traffic to the non-jet services remaining after the deletions and thus reduces the decrease in non-jet passenger miles associated with the decrease in non-jet seat miles flown. In Table C-VIII following, we have decreased the revenue passenger miles reported as flown by the trunkline carriers in 1959-1964 in proportion to the increase in the DPI index and have computed marginal load factors for the added jet and deleted non-jet services using these adjusted passenger miles. The adjusted marginal load factors represent the experienced marginal load factors after removing the influence of the economic growth in this period.

"DX271B, page C-19
(S.H.E. Report (Revised) - Volume Two)"

Table C-VIII

ESTIMATES OF INDUSTRY MARGINAL LOAD FACTORS OF ADDED JET AND DELETED NON-JET SERVICES AFTER ADJUSTMENT FOR TRAFFIC CHANGES RESULTING FROM ECONOMIC GROWTH

Scheduled Domestic Operations of Trunkline Air Carriers
1959-1964

	Annual Data and Average Load Factors					
	Jet			Non-Jet		
Year	Revenue Passenger Miles Adjusted for Economic Growth Since 1959 (Millions)	Available Seat Miles (Millions)	Passenger Load Factor (Percent)	Revenue Passenger Miles Adjusted for Economic Growth Since 1959 (Millions)	Available Seat Miles (Millions)	Passenger Load Factor (Percent)
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1959	3,066	3,839	79.9%	25,061	41,954	59.7%
1960	9,784	14,357	68.1	18,831	34,797	54.1
1961	14,808	26,207	56.5	13,235	26,318	50.3
1962	18,806	38,681	48.6	10,050	21,056	47.7
1963	22,305	47,265	47.2	9,472	20,337	46.6
1964	25,266	55,803	45.3	8,860	19,439	45.6
	Change from Prior Year and Marginal Load Factors					
1960	6,718	10,518	63.9%	6,230	7,157	87.0%
1961	5,024	11,850	42.4	5,596	8,479	66.0
1962	3,998	12,474	32.0	3,185	5,262	60.5
1963	3,499	8,584	40.8	578	719	80.4
1964	2,961	8,538	34.7	612	898	68.2
Change from 1959 to 1964	22,200	51,964	42.7	16,201	22,515	72.0

"DX271B, page C-20
(S.H.E. Report (Revised) - Volume Two)"

Sources: Col. 2: Col. 2 of Table C-VII, adjusted by dividing annual totals by indexes of DPI based on data from the Economic Report of the President, January 1967, p. 232 as follows:

Year	DPI (Billions of 1958 Dollars)	Indexes (1959 = 1.0000)
1959	$ 330.0	1.0000
1960	340.2	1.0216
1961	350.7	1.0532
1962	367.3	1.1030
1963	381.3	1.1450
1964	406.5	1.2207

Col. 3: Col. 3 of Table C-VII
Col. 4: Col. 2 ÷ Col. 3
Col. 5: Col. 5 of Table C-VII divided by indexes of DPI
Col. 6: Col. 6 of Table C-VII
Col. 7: Col. 5 ÷ Col. 6

TWA's domestic load factor experience paralleled the experience of the industry. From 1959 to 1963 overall average load factors in TWA's scheduled services declined from 71% to 53%. Marginal load factors for added jet services were likewise much lower than average load factors, even without adjustment for traffic changes due to changes in the economy, averaging 51.5% for the 1959-1963 period. Marginal load factors after adjustment for changes in the economy were even lower, comparing closely with the adjusted marginal load factors for added jet services throughout the industry.1/ Marginal load factors for TWA's deleted piston services were higher than average load factors for such services, both before and after traffic adjustment, also paralleling the industry experience. In Table C-IX following, we have computed marginal load factors for TWA's jet and piston aircraft operations, before and after adjustment of traffic for changes in the economy.

In adjusting traffic to eliminate from the year-to-year changes in volume the effects of year-to-year changes in the economic climate for travel, we have reduced annual traffic levels by 1% for each 1% growth in DPI, starting with the year 1959. Our adjustment is based on recent studies which have indicated that the market for air travel is, in economic terms, "income elastic,"

1/ An average of 40% for the 1959-1963 period, compared with an industry adjusted marginal load factor of 43%.

meaning that a 1% change in income produces a change of more than 1% in traffic.[1/] In using the change in DPI, rather than in GNP, as the basis for the adjustment and in decreasing annual traffic levels by only 1% for each 1% change in DPI, we have used a lower index of economic growth and attributed a lesser rate of response in traffic than indicated by the studies in the interests of assuring that the traffic adjustments are understated rather than overstated.

1/ See Forecasts of Passenger Traffic of Domestic Trunk Air Carriers, Domestic Operations, Scheduled Services, 1965-1975, Staff Report No. 5, Research and Statistics Division, Bureau of Accounts and Statistics, CAB, September 1965 and Economic Feasibility of Alternative Programs for Washington National Airport, prepared for the Federal Aviation Agency by Operations Research Incorporated, January 1966.

Table C-IX

ESTIMATES OF TWA MARGINAL LOAD FACTORS OF ADDED JET AND DELETED PISTON AIRCRAFT SERVICES BEFORE AND AFTER ADJUSTMENT OF TRAFFIC CHANGES RESULTING FROM ECONOMIC GROWTH

Scheduled Domestic Operations of TWA
1959-1964

Year	Revenue Passenger Miles (Millions) Before Adjustment for Economic Growth Since 1959	Revenue Passenger Miles (Millions) After Adjustment for Economic Growth Since 1959	Available Seat Miles (Millions)	Passenger Load Factor (Percent) Based on Unadjusted Traffic	Passenger Load Factor (Percent) Based on Adjusted Traffic
(1)	(2)	(3)	(4)	(5)	(6)
Annual Data and Average Load Factors — Jet Aircraft Services					
1959	1,146	1,146	1,379	83.1%	83.1%
1960	2,072	2,028	3,019	68.6	67.2
1961	2,861	2,716	5,148	55.6	52.8
1962	3,474	3,150	7,081	49.1	44.5
1963	4,564	3,986	8,798	51.9	45.3
1964	5,921	4,850	10,648	55.6	45.5
Change from Prior Year and Marginal Load Factors					
1960	926	882	1,640	56.5%	53.8%
1961	789	688	2,129	37.1	32.3
1962	613	434	1,933	31.7	22.5
1963	1,090	836	1,717	63.5	48.7
1964	1,357	864	1,850	73.4	46.7
Change from 1959 to 1964	4,775	3,704	9,269	51.5	40.0
Piston Aircraft Services					
1959	3,433	3,433	5,114	67.1%	67.1%
1960	2,379	2,329	3,943	60.3	59.1
1961	1,387	1,317	2,339	59.3	56.3
1962	951	862	1,542	61.7	52.9
1963	740	646	1,244	59.5	51.9
1964	610	500	933	65.4	53.6
Change from Prior Year and Marginal Load Factor					
1960	1,054	1,104	1,171	90.0%	94.3%
1961	992	1,012	1,604	61.8	63.1
1962	436	455	797	54.7	57.1
1963	211	216	298	70.8	72.5
1964	130	146	311	41.8	46.9
Change from 1959 to 1964	2,823	2,933	4,181	67.5	70

Sources:	Cols. 2 and 4:	C & C-4(24) and CAB Form 41 Report, Sched. T-3 for TWA Domestic Division, Year Ended Dec. 31, 1964.
	Col. 3:	Col. 2 divided by DPI Indexes shown in Source for Col. 2, Table C-VIII
	Col. 5:	Col. 2 ♦ Col. 4
	Col. 6:	Col. 3 ♦ Col. 4

Although the average experienced marginal load factors for TWA's added jet services for the 1959-1963 period were 51.5% based on reported traffic and 40% based on traffic adjusted for economic growth, Mr. Wemple has estimated that TWA would have been able to absorb a further volume of jet capacity at marginal load factors averaging 62%. Mr. Wemple has also estimated that the piston aircraft services deleted by TWA as a result of the added jet capacity would have had an average marginal load factor of 61%. This compares with an average marginal load factor for TWA's deleted piston services of 67.5% before adjustment and 70.2% after adjustment. Obviously, the load factors used by Mr. Wemple bear little relation to reality and result in gross overstatements of the added jet traffic and gross understatements of the deleted piston aircraft traffic which would have resulted from the assumed changes in jet and piston capacity.

In the absence of more detailed data, TWA's experienced marginal load factors by year adjusted for economic growth, as set forth in Table C-IX, provide the most reliable basis for estimating the added and deleted passenger miles that would have resulted from the assumed changes in available seat miles operated.

We have used the average marginal load factors for the combined experience of all jet and all piston aircraft operations because our analyses of schedule changes during the period of the build-up of domestic jet services show the uses of different aircraft types among the two categories of aircraft to be heavily interrelated. Analysis of TWA domestic schedules disclosed a

distinct pattern of displacement in piston aircraft services--a ripple effect wherein aircraft of each type displaced in part aircraft services with the next smaller aircraft type and were displaced, in part, by services with the next larger aircraft type (See Part B). The same type of analysis further disclosed a high degree of intercorrelation among the changes in services with the various types of jet aircraft. We found the following degrees of correlation among the additions of services of one jet type and deletions of services of another jet type on segments where aircraft of the two types were operated:

Table C-XI

	CORRELATION BETWEEN FLIGHT SEGMENT ADDITIONS AND DELETIONS OF AIRCRAFT SERVICES (1.00 is perfect correlation)				
	B-331	CV-880	B-131B	B-331B	B-720B
(1)	(2)	(3)	(4)	(5)	(6)
B-131	.84	.86	.83	.75	.56
CV-880			.72	.83	.73
B-331		.58	.49	1.00	1.00
B-131B				.68	.85

Source: Computer Analysis of TWA Domestic Schedules

TWA's traffic during the 1959-1963 period was increased from year-to-year by a decrease in the real price of its services to the traveling public and by improvements in its operating authority and non-stop services, independently of the increase stimulated by economic growth. We have not adjusted annual traffic growth to remove from the traffic totals the effects of fare and service improvements not directly flowing from the availability of additional jet aircraft. Since our calculated marginal load factors are higher than they would be if we had adjusted for these factors, our estimates tend to overstate the traffic that would have been added by further jet services and lost by further deletion of piston aircraft services.

Even on this conservative basis, we have computed that Mr. Wemple's estimates of the increase in passenger traffic from the addition of jet services are overstated by 1.7 billion passenger miles, equal to 42.6% of his total estimate of added jet traffic in TWA domestic services. His estimates of deleted piston aircraft traffic are understated by 50.8 million passenger miles, equal to 28.9% of his total estimate. The resulting overstatement of added jet revenues aggregates $97.0 million in domestic passenger revenues and $101.8 million in total transportation revenues, applying Mr. Wemple's revenue estimating factors. His estimates of piston aircraft service passenger revenues deleted are understated to the extent of $2.9 million in passenger revenues and $3.0 million in total transportation revenues.

"DX271B, page C-28
(S.H.E. Report (Revised) - Volume Two)"

The effect of using incorrect load factors on Mr. Wemple's estimates of net change in TWA's Domestic Division operating profits is to overstate the estimated benefit to profits by $104.8 million ($101.8 million plus $3.0 million). Since the total estimated benefit is only $51.3 million, including the estimated benefits from added jet services in the International Division, it is clear that application of the appropriate marginal load factors wipes out any thought of benefits and establishes a detriment to TWA's operating profit from the assumed additions to jet services in the neighborhood of $40.8 million, before any correction of Mr. Wemple's inappropriate yields and costing.

E. INTERNATIONAL REVENUE ESTIMATES

In Chapters II and III of the C&C Report, Mr. Wemple has assumed that with added and earlier B-331 jets, TWA would have provided additional seats in scheduled transatlantic service, that it would thereby have increased its percentage of the total scheduled transatlantic (IATA) seats, and that the total number of TWA scheduled transatlantic (IATA) passengers would have increased in the same proportion as TWA's share of IATA seats. Having estimated TWA's annual increase in IATA passengers on the basis of these assumptions, Mr. Wemple then concludes that TWA's total International Division passenger revenues would have increased in the same percentage as the estimated increase in TWA's IATA passengers.

Mr. Wemple committed two major errors in his estimates. First, he overestimated the percentages of IATA seats and passengers that TWA would have obtained with the assumed additional jets. Second, he erred in assuming that all of TWA's International Division revenues would have increased in proportion to increases in those percentages, ignoring the fact that much of TWA's international revenue was produced by services that, in fact, decreased as its transatlantic services increased.

In this Part of our Report we estimate the percent-

ages of IATA seats and passengers TWA realistically would have obtained with the added and earlier B-331 jets and the revenues which, in fact, would be expected to increase in relation to the estimates of the increase in TWA's IATA passengers.

1. IATA Seats and Passengers

a. The relationship between seats and passengers.

Mr. Wemple assumes that TWA's percentage of IATA passengers would have increased at the same rate as its percentage of IATA seats. We have used the same assumption for purposes of our Report although share of available IATA seats is not, in our opinion, the exclusive guide to share of available IATA traffic.

The division of traffic among competing airlines and services presents difficult estimating problems because of the number and complexity of considerations involved. Differences exist in the capacity provided by individual carriers, in the fares to passengers, in the time of flights by day of week and hour of day and in passenger preferences resulting from national ties, currency restrictions or business and government policies. All of these differences contribute to differences in market shares. It is an obvious oversimplification to assume that any single consideration can be used as the sole basis for estimating how traffic would be

divided if TWA's share of transatlantic seats were altered. The division of traffic in proportion to the division of IATA seats does not, however, afford an unreasonable approximation in the absence of a specific plan for the operation of TWA's assumed additional international jet services.

b. Increase in TWA's percentage of IATA seats.

For 1959 and 1960, Mr. Wemple used the unchanged historical total of IATA seats as the basis for computing TWA's increased percentage with its estimated additional transatlantic seats. This results from his premise that the additional TWA seats would have been seats transferred from and not replaced by Pan Am, decreasing Pan Am's IATA seats in the same number as TWA's increased. For 1961 through 1963, he used historical IATA seat totals increased by the number of additional transatlantic seats estimated for TWA.

The additional transatlantic flights and seats calculated by Mr. Wemple for TWA with the added and earlier B-331 jets are as follows:

"DX271B, page E-4
(S.H.E. Report (Revised) - Volume Two)"

Table E-I

Year	C&C Report	Additional TWA Transatlantic Flights	Additional TWA Transatlantic Seats (Thousands)
(1)	(2)	(3)	(4)
1959	Chapt. II	None	1
	Chapt. III	None	17
	Total	None	18
1960	Chapt. II	228	89
	Chapt. III	208	27
	Total	436	116
1961	Chapt. II	987	154
1962	Chapt. II	1,793	251
1963	Chapt. II	311	44

Sources: Col. 3: C&C Report, pp. 19 & 47
Col. 4: C&C Report, pp. 20 & 47

Mr. Wemple's treatment of the IATA seat totals assumes that TWA could have added jet services over and above its historical levels in the 1959-1963 period without prompting a competitive response in the jet service levels of Pan Am and the IATA foreign air carriers. The history of transatlantic services contradicts this assumption. Additions to TWA's transatlantic services have always been met with increases in the transatlantic services of other carriers. The transatlantic market is the leading international air travel market in the world. It has been the object of vigorous competition throughout its history. It is inconceivable that unilateral competitive action could occur in this market without response from competing carriers.

Pan Am, in particular, has a long history of refusing to permit TWA to gain a capacity edge in the transatlantic market. It has never permitted TWA to schedule more seats annually than it has scheduled. The allocation of transatlantic seats between TWA and Pan Am has been as follows:

Table E-II

Year	TWA Seats (Thousands)	PAA Seats (Thousands)	TWA as a percentage of PAA
(1)	(2)	(3)	(4)
1953	149	195	77%
1954	172	223	78
1955	180	279	65
1956	217	343	63
1957	228	392	58
1958	276	443	62
1959	226	427	53
1960	386	537	72
1961	412	759	54
1962	529	906	58
1963	720	1,071	67
1964	825	1,186	70
1965	1,101	1,343	82
1966	1,162	1,455	80

Sources: Cols. 2 & 3: Annual Summaries of IATA statistics
Col. 4: Col. 2 ÷ Col. 3

The historical allocation is in striking contrast with the allocation resulting from Mr. Wemple's assumption which ignores competitive response.

Table E-III

Year	Historical IATA Seats - Transatlantic			IATA Seats Estimated by Mr. Wemple		
	TWA (Thousands)	PAA (Thousands)	TWA as a percentage of PAA	TWA (Thousands)	PAA (Thousands)	TWA as a percentage of PAA
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1959	226	427	53%	244	409	60%
1960	386	537	72	502	421	119
1961	412	759	54	566	759	75
1962	529	906	58	780	906	86
1963	720	1,071	67	764	1,071	71
1964	825	1,186	70	-	-	-

Sources: Cols. 2 through 4: Table E-II
Col. 5: Col. 2 of Table E-III + Col. 4 of Table E-I
Col. 6: Col. 3 of Table E-III. For 1959 and 1960, the historical totals are reduced by the TWA additions (Col. 4 of Table E-I)
Col. 7: Col. 5 ÷ Col. 6

Under Mr. Wemple's assumption Pan Am would have behaved differently in 1960 than it ever did in fact, allowing TWA to outschedule it in seats by 19%. Furthermore, TWA would have scheduled more seats in relation to Pan Am in each of the four years 1960 through 1963 than it did in 1964, a year when transatlantic demand was heavy and TWA does not claim that it was under any equipment disadvantage.

Another strange result of Mr. Wemple's assumption is that TWA would have increased its capacity by over 100%

from 1959 to 1960, a time when the industry was facing tremendous overcapacity, and then decreased its capacity in 1963, a time when the traffic market was recovering and Pan Am was adding 18% more seats.

An examination of the peak second and third quarters of each year (omitting the first and fourth quarters when TWA, PAA and other airlines observed different policies in the seasonal reduction of weekly frequencies) establishes the typical pattern of competitive response. When TWA added, Pan Am added, and the foreign flags added more than Pan Am and TWA together.

The IATA flights added by TWA, Pan Am and foreign flag carriers during the second and third quarters of the years 1960-1963 are as follows:

Table E-IV

Carrier	Flights Added - Second Quarter			
	1960	1961	1962	1963
(1)	(2)	(3)	(4)	(5)
TWA	322	381	324	294
Pan Am	229	501	670	570
Foreign Flag	988	1,579	1,738	1,567
	Flights Added - Third Quarter			
TWA	257	232	284	182
Pan Am	439	415	720	485
Foreign Flag	1,190	1,158	1,237	1,172

Source: IATA monthly statistics

The above data demonstrate the following pattern of competitive response:

Table E-V

For each flight added by TWA:	Flights Added - Second Quarter			
	1960	1961	1962	1963
(1)	(2)	(3)	(4)	(5)
Pan Am added:	.7	1.3	2.1	1.9
Foreign flag carriers added:	3.1	4.1	5.4	5.3
	Flights Added - Third Quarter			
Pan Am added:	1.7	1.8	2.5	2.7
Foreign flag carriers added:	4.6	5.0	4.4	6.4

Source: Relationships among TWA, Pan Am and foreign flags from Table E-IV

(i) Competitive reaction: 1959

Since Mr. Wemple's addition of 18,000 transatlantic seats for TWA in 1959 does not result in the addition of any jet flights (Table E-I), we conservatively estimate that the foreign flag carriers would not have responded competitively with additional seats in 1959. We estimate that Pan Am would have operated the same total number of seats in 1959 which it historically operated.

The 18,000 seats which Mr. Wemple takes from Pan Am would in our opinion have been maintained by Pan Am through

(1) a transference to Pan Am's Atlantic Division of jet seats operated in other Pan Am divisions; (2) the retention of piston seats which were historically retired but which Pan Am would not have retired if it had not received additional B-331 seats; or (3) a combination of (1) and (2).

(1) To replace 18,000 seats with jet aircraft from its other divisions, Pan Am would have needed to transfer the equivalent of 0.4 aircraft.[1/] It is unreasonable to assume that Pan Am would not have given an equipment priority to the transatlantic market, the most important international market in the world and one where it faced intense competition. Pan Am had a reservoir of jet equipment available to it in non-transatlantic areas where it faced no jet competition. See Exhibit E-A. This reservoir was considerably greater than 0.4 aircraft.

1/ Our calculations are as follows:

$$\frac{\text{227,833,000 B-321 seat miles flown}}{\text{1,842,297 B-321 aircraft miles flown}} \quad \left(\begin{array}{l}\text{Pan Am} \\ \text{Atlantic Division} \\ \text{Sched. T-3, 1959}\end{array}\right)$$

= 123.7 seats per B-321

$$\frac{\text{18,000 seats}}{\text{123.7 seats per aircraft}} = 145.5 \text{ additional flights}$$

Assuming conservatively one flight per aircraft per day,

$$\frac{\text{145.5 flights}}{\text{365 days}} = 0.4 \text{ aircraft}$$

(2) If Pan Am had not received the B-331 jets which Mr. Wemple assumes went to TWA, it is also likely that it would have retired fewer piston seats in its Atlantic Division in 1959 than it historically did. Mr. Wemple's inherent assumption that Pan Am would have retired the same number of piston seats is completely unreasonable. Pan Am operated a considerable number of transatlantic piston flights throughout the period 1959-1963 in spite of the fact that TWA's transatlantic operation was wholly jet in and after 1961.

Table E-VI

Months/Year	Pan Am and TWA Weekly Transatlantic Round Trips			
	Pan Am		TWA	
	Piston	Jet	Piston	Jet
July, 1958	85	-	63	-
Dec., 1958	24	14	26	-
July, 1959	29	24	45	-
Dec., 1959	14	24	18	6
July, 1960	9	50	8	34
Dec., 1960	7	41	3	23
July, 1961	7	73	1	40
Dec., 1961	8	51	-	24
July, 1962	8	94	-	46
Dec., 1962	2	63	-	42
July, 1963	2	102	-	61

Source: Pan Am Ex. 188, Transatlantic Renewal Case, CAB Dkt. 13577

In July of 1958, when Pan Am operated no transatlantic jet flights, it operated 85 transatlantic piston round trips per week, or 170 weekly piston flights. In July of 1959 when it operated 48 weekly jet flights, its piston operations had declined to 58 flights per week. Thus, Pan Am deleted 2.3 piston flights for every jet flight added.[1/]

1/ $\frac{112 \text{ piston flights deleted}}{48 \text{ jet flights added}}$ = 2.3 piston flights deleted per jet flight added.

Assuming conservatively that the seating capacity of the jet aircraft was twice the seating capacity of the deleted piston aircraft, for each jet seat added, more than one piston seat was deleted. This is further borne out by the fact that Pan Am's IATA seats declined from 443,000 in 1958 to 427,000 in 1959 (Table E-II), when it was adding a substantial number of jet seats to its IATA totals. If Pan Am had not operated the 18,000 jet seats which Mr. Wemple transfers to TWA and if it had not chosen to shift at least 0.4 jet aircraft to the transatlantic from other areas, it is therefore reasonable to assume that it would have operated more transatlantic seats, not less, than it actually did.

Taking into account that Pan Am would have operated at least the number of seats it did historically, we compute TWA's percentage of IATA seats, if it had operated the additional number of transatlantic seats shown in Table E-1, as follows:

Table E-VII

1959

Actual Transatlantic Seats (Thousands)				
TWA	Pan Am	Other IATA Carriers	Total	TWA % of IATA
(1) 226	(2) 427	(3) 1,170	(4) 1,823	(5) 12.4%
Estimated Transatlantic Seats (Thousands)				
Added B-331 Aircraft (C & C Report, Chapter II)				
(6) 227	(7) 427	(8) 1,170	(9) 1,824	(10) 12.4%
Earlier Delivery of B-331 Aircraft (C & C Report, Chapter III)				
(11) 244	(12) 427	(13) 1,170	(14) 1,841	(15) 13.3%

Sources: Cols. 1 through 5: C & C Report, p. 23
Col. 6: Table E-I + Col. 1
Cols. 7 and 8: C & C Report, p. 23
Col. 9: Sum of Cols. 6, 7, and 8
Col. 10: Col. 6 ÷ Col. 9
Col. 11: Table E-I + Col. 6
Cols. 12 and 13: C & C Report, p. 23
Col. 14: Sum of Cols. 11, 12, and 13
Col. 15: Col. 11 ÷ Col. 14

(ii) Competitive reaction: 1960-1963

In 1960, Pan Am and the foreign carriers had more than sufficient jet equipment operating on non-transatlantic segments where they faced no jet competition to allow them to substitute piston aircraft services for the services operated with jets on these segments and to redistribute jet equipment into the transatlantic market to meet TWA's assumed additional flights. See Exhibits E-A and E-B.

In addition to jet equipment available in non-transatlantic service, the foreign carriers also had the option of increasing the low utilization at which they were operating their transatlantic jet equipment, producing more transatlantic flights and seats with their existing aircraft. In 1960, BOAC operated its B-707 equipment at an average utilization of four hours and 49 minutes per day and Air France operated its B-707 equipment an average four hours and 41 minutes per day.[1/] In contrast, TWA operated its B-331 aircraft in its International Division at an average utilization of nine hours and 44 minutes per day.[2/]

1/ Source: ICAO Fleet Statistics, 1960

2/ Source: TWA Ex. C & C-4(39)

For the 1961-1963 period, in addition to redistributing jet equipment available to them in their non-transatlantic services, Pan Am and the foreign carriers could have, and, in our opinion probably would have, acquired whatever new jet equipment was needed by the spring of 1961 to maintain their competitive positions in the transatlantic market. Although the history of competitive response in that market shows that the additional transatlantic flights offered by TWA were met by an addition of a greater number of flights by Pan Am and a still greater number of flights by the foreign carriers (Table E-V), we have conservatively estimated for purposes of our Report that for the years 1960-1963 Pan Am would have added only one flight over and above its historical flights for each assumed additional TWA flight. We have also estimated that the foreign carriers, taken as a group, would have responded competitively to TWA and Pan Am by adding only one additional flight for each two flights added by these carriers (one by TWA and one by Pan Am).

For the years 1960 and 1961, Mr. Wemple assumed that TWA would have added transatlantic seats through the replacement of existing piston flights with jet flights as well as seats generated by additional jet flights. We have not allowed for any competitive reaction to the assumed additional seats generated by replacement flights, although it is our opinion that any addition of transatlantic seats by TWA without a responding increase in the seats of competing carriers is unlikely.

Using the foregoing assumptions as to competitive reaction, we have estimated the number of additional transatlantic flights and seats which would have been operated by Pan American and the foreign carriers, if TWA had operated the additional transatlantic flights and seats shown in Table E-I.

Table E-VIII

Additional B-331 Aircraft
(C & C Report, Chapter II)

	Flights Added			Seats Added (Thousands)				Total Added	
				TWA					
Year	TWA	Pan Am	Other IATA Carriers	From Added Flights	From Replacement Flights	Pan Am	Other IATA Carriers	Flights	Seats (Thousands)
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
1960	228	228	228	29.8	59.3	29.8	29.8	684	148.7
1961	987	987	987	134.4	19.9	134.4	134.4	2,961	423.1
1962	1,793	1,793	1,793	251.0	-	251.0	251.0	5,379	753.0
1963	311	311	311	44.0	-	44.0	44.0	933	132.0

Earlier Delivery of B-331 Aircraft
(C & C Report, Chapter III)

	(11)	(12)	(13)	(14)	(15)	(16)	(17)	(18)	(19)
1960	208	208	208	27.0	-	27.0	27.0	624	81

Sources: Col. 2: Table E-I
Cols. 3 and 4: Estimated competitive reaction
Col. 5: C & C Report, p. 19
Col. 6: C & C Report, p. 20
Cols. 7 and 8: Estimated additional flights flown with jet aircraft of same seating configuration as TWA's additional aircraft - Col. 5
Col. 9: Sum of Cols. 2, 3, and 4
Col. 10: Sum of Cols. 5, 6, 7, and 8
Col. 11: C & C Report, p. 47
Cols. 12 and 13: Estimated competitive reaction
Cols. 14 and 15: C & C Report, p. 47
Cols. 16 and 17: Estimated additional flights flown with jet aircraft of same seating configuration as TWA's additional aircraft - Col. 14
Col. 18: Sum of Cols. 11, 12, and 13
Col. 19: Sum of Cols. 14, 16, and 17

We have computed TWA's percentage of IATA seats, based upon the additional TWA and IATA seats shown in Table E-VIII, as follows:

Table E-IX

Year	TWA	Pan Am	Other IATA Carriers	Total	TWA % of IATA
Actual Transatlantic Seats (Thousands)					
(1)	(2)	(3)	(4)	(5)	(6)
1960	386	537	1,490	2,413	16.0%
1961	412	759	2,115	3,286	12.5
1962	529	906	2,456	3,891	13.6
1963	720	1,071	2,666	4,457	16.2
Estimated Transatlantic Seats (Thousands)					
Added B-331 Aircraft (C & C Report, Chapter II)					
	(7)	(8)	(9)	(10)	(11)
1960	475	567	1,520	2,562	18.5%
1961	566	891	2,249	3,706	15.3
1962	780	1,157	2,707	4,644	16.8
1963	764	1,115	2,710	4,589	16.6
Earlier Delivery of B-331 Aircraft (C & C Report, Chapter III)					
	(12)	(13)	(14)	(15)	(16)
1960	502	594	1,547	2,643	19.0%

Sources:
Cols. 2 through 6: C & C Report, p. 23
Col. 7: Col. 2 plus Cols. 5 and 6 of Table E-VIII
Col. 8: Col. 3 plus Col. 7 of Table E-VIII
Col. 9: Col. 4 plus Col. 8 of Table E-VIII
Col. 10: Sum of Cols. 7, 8
Col. 11: Col. 7 ÷ Col. 10
Col. 12: Col. 7 plus Col. 14 of Table E-VIII
Col. 13: Col. 8 plus Col. 16 of Table E-VIII
Col. 14: Col. 9 plus Col. 17 of Table E-VIII
Col. 15: Sum of Cols. 12, 13 and 14
Col. 16: Col. 12 ÷ Col. 15

c. Increase in TWA's transatlantic passengers

Quite apart from Mr. Wemple's error in assuming that Pan Am and the foreign carriers would have allowed TWA to increase its share of transatlantic capacity without a vigorous competitive reaction, he commits the more flagrant error of assuming that all of the available transatlantic traffic would be subject to redistribution on the sole basis of TWA's added share of seats. This is not so. At least one category of traffic which moved in volume on the services of U.S. flag carriers was not susceptible to redistribution on the basis of a change in TWA's share of IATA seats. This is the A and Z traffic -- military and dependent traffic which moves under special contractual arrangements and in accordance with the policies of the U.S. Department of Defense.

Category A and Z traffic is carried on scheduled transatlantic flights of the U.S. flag carriers only. Unlike charter traffic, which flies in nonscheduled traffic, is included in the reported IATA passenger totals for TWA and Pan Am in 1961, when it was initiated, and in subsequent years.

It is extremely doubtful that TWA could have increased its A and Z passengers in 1961-1963 no matter how many assumed additional seats it had because

(1) A and Z traffic did not move on foreign carriers and TWA could not have attracted additional A and Z traffic from them, and (2) the apparent policy of the Department of Defense was to divide Category A and Z traffic equally between TWA and Pan Am[1/] without regard to the relative volume of transatlantic seats operated by each.

By assuming that TWA would have increased its historical IATA passengers in relation to its assumed additional seats without considering the special arrangements and policies with respect to the division of Category A and Z traffic, Mr. Wemple has overstated his estimate of TWA's additional IATA passengers. In using TWA's estimated percentage share of available IATA seats as the guide to its percentage share of available IATA traffic, we have likewise overstated our estimate of its share of IATA traffic.

Using our estimates of TWA's increased share of IATA seats shown in Table E-IX as a guide, without adjustment for Category A and Z traffic, we have estimated the additional number of TWA's transatlantic passengers and the resulting percentage increase over its historical passengers as follows:

1/ In this connection see Pan Am Ex. 117 and 445, Transatlantic Renewal case, CAB Dkt. No. 13577.

Table E-X

Added B-331 Aircraft (C & C Report, Chapter II)						
Year	Actual TWA Share of IATA Seats (Percent)	Estimated TWA Share of IATA Seats	Actual IATA Passengers (Thousands)		Actual TWA Share of IATA Passengers (Percent)	Estimated TWA Share of IATA Passengers (Percent)
			TWA	Total		
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1959	12.4%	12.4%	146	1,204	12.1%	12.1%
1960	16.0	18.5	243	1,534	15.8	18.3
1961	12.5	15.3	208	1,654	12.6	15.4
1962	13.6	16.8	277	1,981	14.0	17.3
1963	16.2	16.6	359	2,165	16.6	17.0

Estimated TWA Transatlantic Passengers (Thousands)	Estimated Additional TWA Transatlantic Passengers (Thousands)	Estimated TWA Percentage Increase in Transatlantic Passengers
(8)	(9)	(10)
146	---	----
280	37	15.2%
255	47	22.6
343	66	23.8
368	9	2.5

Sources: Cols. 2 and 3: Table E-VII and Table E-IX
Cols. 4, 5 and 6: C & C Report, p. 21
Col. 7: Col. 3 ÷ Col. 2 x Col. 6
Col. 8: Col. 7 x Col. 5
Col. 9: Col. 8-Col. 4
Col. 10: Col. 9 ÷ Col. 4

"DX271B, page E-22
(S.H.E. Report (Revised) - Volume Two)"

Table E-XI

Earlier Delivery of B-331 Aircraft

ear	Estimated TWA Share of IATA Seats (Chap. II)	Estimated TWA Share of IATA Seats (Chap.III)	IATA Passengers (Thousands)		Estimated TWA Share of IATA Passengers (Chap.II)	Estimated TWA Share of IATA Passengers (Chap.III)
			TWA Est. (Chap.II)	Actual Total		
1)	(2)	(3)	(4)	(5)	(6)	(7)
959	12.4%	13.3%	146	1,204	12.1%	13.0%
960	18.5	19.0	280	1,534	18.3	18.8

ear	Estimated TWA Transatlantic Passengers (Thousands)	Estimated Additional TWA Transatlantic Passengers (Thousands)	TWA Percentage Increase in IATA Passengers
	(8)	(9)	(10)
959	157	11	7.5%
960	288	8	2.9

Sources:
Col. 2: Col. 3 of Table E-X
Col. 3: Tables E-VII and E-IX
Col. 4: Col. 8 of Table E-X
Col. 5: Col. 5 of Table E-X
Col. 6: Col. 7 of Table E-X
Col. 7: Col. 3 ÷ Col. 2 x Col. 6
Col. 8: Col. 7 x Col. 5
Col. 9: Col. 8 - Col. 4
Col. 10: Col. 9 ÷ Col. 4

2. International Division Revenues.

Mr. Wemple assumed that TWA's total International Division passenger revenues would have increased in the same percentage as the percentage increase he estimated for TWA's IATA passengers. This assumption is incorrect. TWA's International Division passenger revenues have not grown in the same proportion as TWA's IATA passengers, nor could they be reasonably expected to. The historical relationship between TWA's IATA passengers and its International Division revenues is as follows:

Table E-XII

Year	TWA Transatlantic Passengers (Thousands)	TWA International Division Passenger Revenues (Millions)
(1)	(2)	(3)
1958	160	$ 61.9
1959	146	59.5
1960	243	82.0
1961	208	63.9
1962	277	77.5
1963	359	105.0
1964	488	127.2
1965	638	158.5

Sources: Col. 2: C & C Report, p. 21 for 1958-1963; IATA Reports
Col. 3: C & C Report, p. 27 for 1959-1963; CAB Handbook of Airline Statistics, 1965 ed.

Contrary to Mr. Wemple's assumption that a percentage increase in TWA transatlantic passengers would have been matched by a like percentage increase in TWA International Division passenger revenues, TWA's actual experience, whether measured over the period 1958-1965 or over the period 1959-1963, shows that its International Division passenger revenues increased at only 52%[1/] of the rate of increase of its IATA passengers.

The source of the error in Mr. Wemple's assumption is that in increasing TWA's total International Division passenger revenues, he estimated that traffic using TWA's services abroad but not across the Atlantic (beyond-the-gateway passengers) and TWA's charter passengers would increase in the same percentage as TWA's transatlantic (IATA) passengers. He obviously did not test this assumption, since it is not difficult to ascertain that the behavior of TWA's beyond-the-gateway and charter traffic was independent of its transatlantic services and traffic.

1/ 1958-1965 calculations: 638 passengers - 160 passengers ÷ 160 passengers = 298.8%
$158.5 - $61.9 ÷ $61.9 = 156.1%
156.1% ÷ 298.8% = 52%

1959-1963 calculations: 359 passengers - 146 passengers ÷ 146 passengers = 145.9%
$105.0 - $59.5 ÷ 59.5 = 76.5%
76.5% ÷ 145.9% = 52%

It is our opinion, for the reasons developed below, that TWA's beyond-the-gateway charter passengers would not have been increased in the 1959-1963 period by addition of transatlantic seats.

a. Beyond-the-gateway

(1) Beyond-the-gateway passengers

The actual annual numbers of TWA's beyond-the-gateway passengers in the period 1958-1965 were as follows:

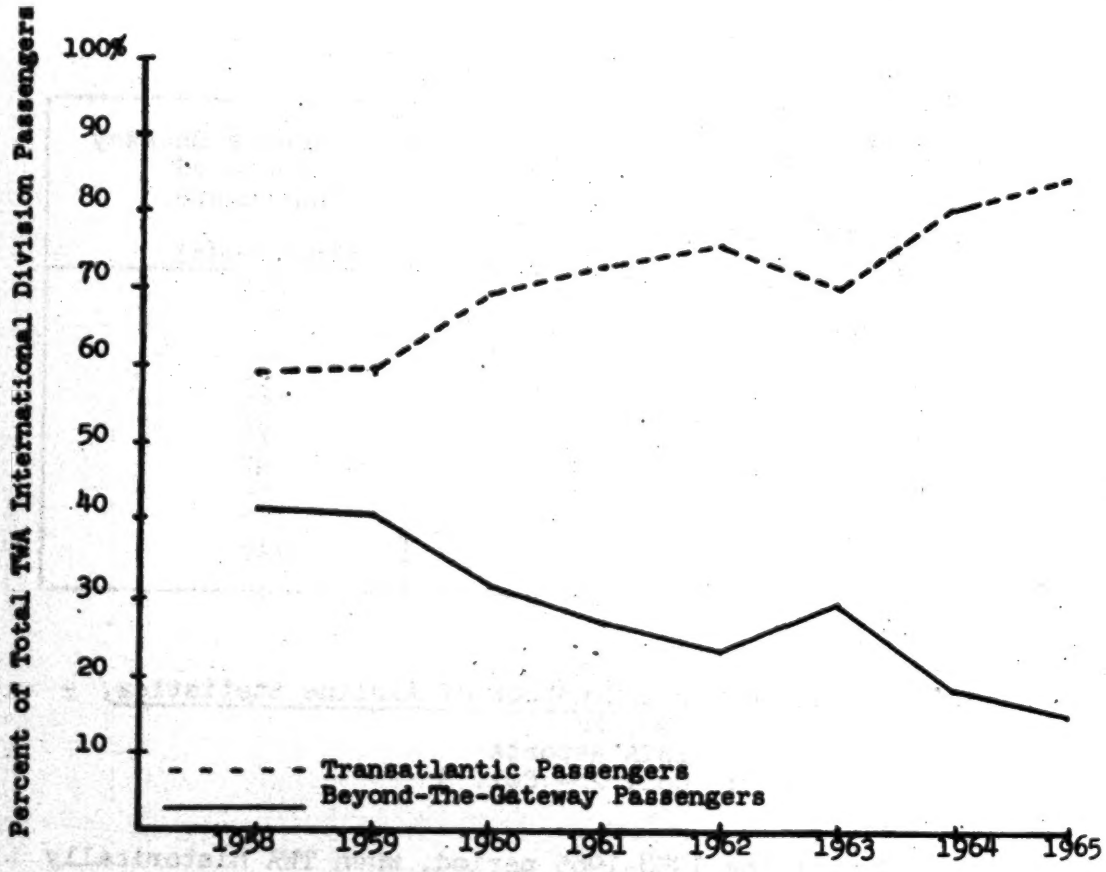
Table E-XIII

Year	Total International Division Scheduled Passenger Originations (Thousands)	Transatlantic Scheduled Passengers (Thousands)	Beyond-The-Gateway Scheduled Passengers (Thousands)
(1)	(2)	(3)	(4)
1958	274	160	114
1959	245	146	99
1960	348	243	105
1961	284	208	76
1962	365	277	88
1963	509	359	150
1964	596	488	108
1965	751	638	113

Sources: Col. 2: CAB Handbook of Airline Statistics, 1965 Ed.
Col. 3: IATA Reports
Col. 4: Col. 2 - Col. 3

During the 1958-1965 period, when TWA historically added a substantial number of jets to its international operations and its transatlantic traffic was steadily increasing, its beyond-the-gateway passengers represented a steadily declining share of its total International Division scheduled passengers.

Chart E-I

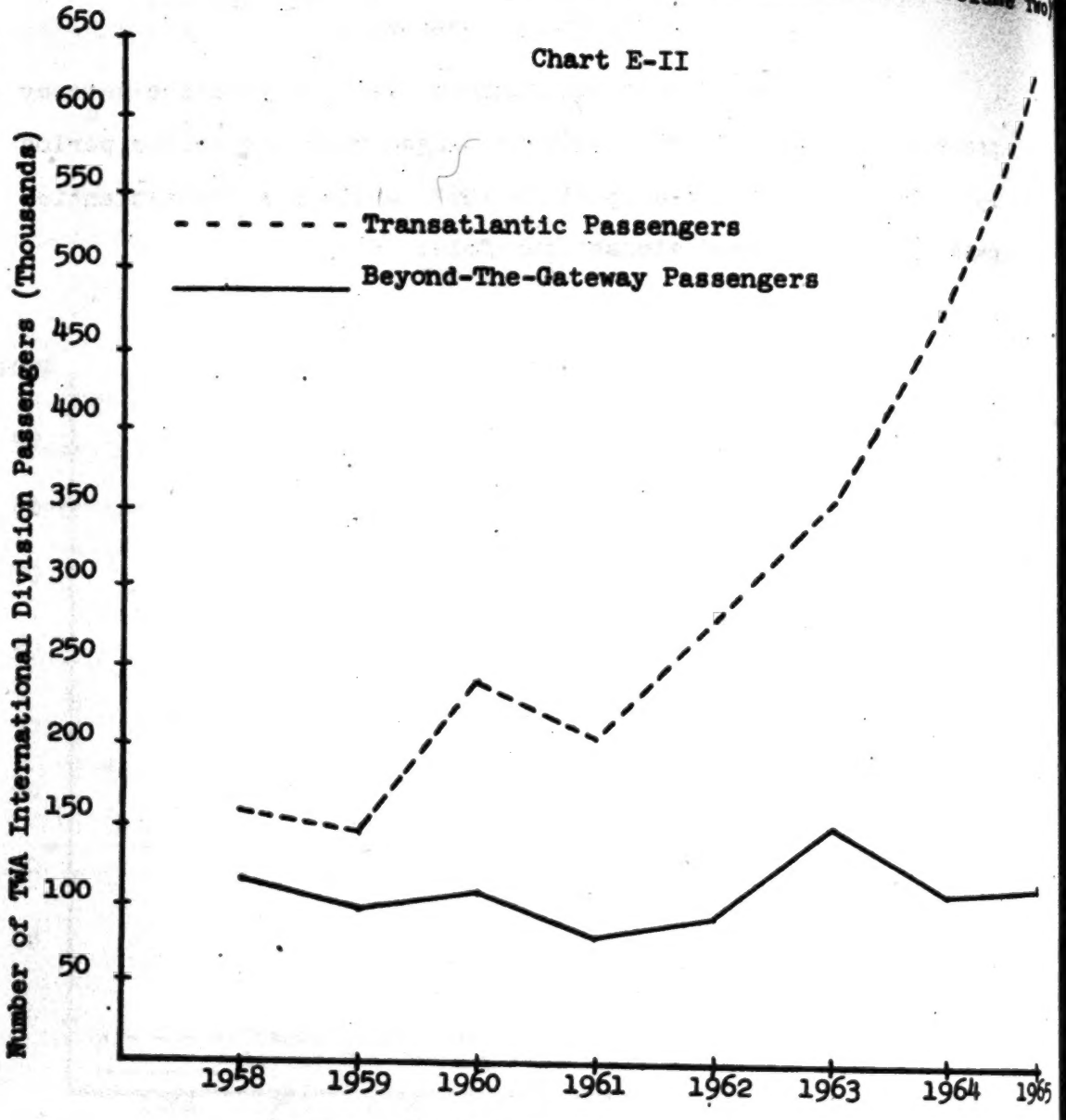


Percent of Total TWA International Division Passengers								
Category	1958	1959	1960	1961	1962	1963	1964	1965
Transatlantic Passengers	58.4%	59.6%	69.8%	73.2%	75.9%	70.5%	81.9%	85.0%
Beyond-The-Gateway Passengers	41.6	40.4	30.2	26.8	24.1	29.5	18.1	15.0
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

Source: Table E-XIII

In terms of absolute numbers, TWA's beyond-the-gateway passengers remained relatively unchanged over the entire period 1958-1965, except for a spurt in 1963, while its transatlantic passengers increased almost four-fold:

Chart E-II



Source: Table E-XIII

In order to determine the cause of the rise in beyond-the-gateway passengers in 1963, we analyzed TWA's passenger originations, as reported to the CAB,[1/] at its foreign terminals during the period 1962-1964. We found that substantially all of the 1963 increase and the subsequent 1964 decrease in beyond-the-gateway passengers resulted from increases and decreases in originations at Rome and at cities linked to Rome by TWA single-plane services. In our opinion, the rise in beyond-the-gateway traffic in 1963 is attributable to the increase in Rome traffic occasioned by the funeral of Pope John XXIII and the election and coronation of Pope Paul VI. The downward trend in 1964 and the virtual stagnation of TWA's beyond-the-gateway traffic in 1965 -- both years in which its transatlantic traffic increased substantially -- confirm the trend from 1958 to 1962, indicating that beyond-the-gateway traffic did not change and could not be expected to change in proportion to transatlantic traffic.

The long-range trend in beyond-the-gateway passengers appears to have been material to TWA in its actual jet planning. Both TWA and C&C recognized that because of the limited traffic potential, TWA could not expect growth in that market comparable

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1/ TWA Ex. C&C-4(40).

to that which would be possible in the TWA transatlantic market.[1]

(ii) Beyond-the-gateway passenger revenues

No CAB data, IATA data or TWA material available to us provides a breakdown, between transatlantic and beyond-the-gateway, of TWA's International Division scheduled passenger revenues. We therefore found it necessary to estimate the beyond-the-gateway passenger revenues by first determining the number of TWA beyond-the-gateway scheduled revenue passenger miles and then applying an appropriate beyond-the-gateway yield to these miles.

Although there are no published data available which directly shows TWA's beyond-the-gateway scheduled revenue passenger miles, we have estimated them from available data.

In the Transatlantic Renewal Case, TWA presented to the CAB a study, based on its internal records, showing that in 1962 it carried 278,436 transatlantic scheduled revenue passengers a total of 1,059,032,000 passenger miles.[2] Dividing passenger miles by passengers gives

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1/ Source: DX 15, p. 15-16;
DX 62, p. IV-14.

2/ TWA Ex. 2, 122, and 124, Transatlantic Renewal Case, CAB Dkt. 13577.

an average length of haul of 3,804 miles per transatlantic passenger. We applied this average length of haul to TWA's transatlantic passengers in 1959-1963 to determine the 1959-1963 transatlantic scheduled revenue passenger miles. By subtracting these revenue passenger miles from the total TWA International Division scheduled revenue passenger miles (as reported to the CAB), we have determined TWA's beyond-the-gateway scheduled revenue passenger miles, as follows:

Table E-XIV

Year	Int'l Division Revenue Passengers (Thousands)	Trans-atlantic Revenue Passengers (Thousands)	Beyond-the-Gateway Revenue Passengers (Thousands)	Int'l Div. Rev. Passenger Miles (Millions)	Trans-atlantic Rev. Passen-ger Miles (Millions)	Beyond-the-Gateway Rev. Passen-ger Miles (Millions)
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1959	245	146	99	672.8	555.4	117.4
1960	348	243	105	1,039.2	924.4	114.8
1961	284	208	76	904.5	791.2	113.3
1962	365	277	88	1,194.1	1,059.0	135.1
1963	509	359	150	1,564.1	1,365.6	198.5

Sources:
Col. 2: CAB Handbook of Airline Statistics, 1965 Ed.
Col. 3: C & C Report, p. 21
Col. 4: Col. 2 - Col. 3
Col. 5: CAB Handbook of Airline Statistics, 1965 Ed.
Col. 6: Col. 3 x 3,804 (average haul per passenger) (1962 figure from TWA Ex. 124, Transatlantic Renewal Case, CAB Dkt. No. 13577)
Col. 7: Col. 5 - Col. 6

We have analyzed fares for TWA's beyond-the-gateway segments and found that a substantially higher fare level per mile exists over these segments than in either TWA's transatlantic market or its domestic market. When fares in this market are averaged, a fare level of about 10¢ per passenger mile is indicated. Application of a discount of 10% to reflect experienced dilution in yields from reduced-fare passengers results in an average yield of about 9¢ per passenger mile in TWA's beyond-the-gateway services.

We have also examined the experience of European airlines during the 1959-1963 period and found that they realized an average yield of 8¢ per passenger mile of intra-European traffic.[1/] While European airlines specializing in local services would generally, in our opinion, experience lower yields than the more direct services of a trunkline carrier like TWA, we have applied the lower yield figure of 8¢ per passenger mile to estimate TWA's beyond-the-gateway passenger revenues, as follows:

1/ European Airline Research Bureau Statistics, Report RB-1, May 5, 1967; European Airline Research Bureau Report to the European Civil Aviation Conference, April 27, 1964 (kilometers converted to miles at the rate of 1.6093 kilometers per mile).

Table E-XV

Year	TWA Beyond-the-Gateway Passenger Revenues (Millions)
(1)	(2)
1959	$ 9.4
1960	9.2
1961	9.1
1962	10.8
1963	15.9

Source: Col. 7 of Table E-XIV multiplied by 8¢ average yield per revenue passenger mile

As an additional check on the appropriateness of the average yield of 8¢ applied to TWA's beyond-the-gateway traffic, we subtracted the beyond-the-gateway revenues determined on this basis from the total TWA International Division scheduled passenger revenues as reported to the CAB, giving TWA's imputed transatlantic passenger revenues. Dividing these revenues by TWA's transatlantic revenue passenger miles produced transatlantic yield ranging from 7.4¢ in 1960 down to 6.3¢ in 1962 and 1963:

Table E-XVI

Year	Total Int'l Div. Passenger Revenues (Millions)	Beyond-the-Gateway Passenger Revenues Based on 8¢ Yield (Millions)	Transatlantic Passenger Revenues (Millions)	Transatlantic Revenue Passenger Miles (Millions)	Yield Per Transatlantic Revenue Passenger Mile
(1)	(2)	(3)	(4)	(5)	(6)
1959	$ 50.2	$ 9.4	$ 40.8	$ 555.4	7.3¢
1960	77.6	9.2	68.4	924.4	7.4
1961	61.9	9.1	52.8	791.2	6.7
1962	77.0	10.8	66.2	1,059.0	6.3
1963	101.4	15.9	85.5	1,365.6	6.3

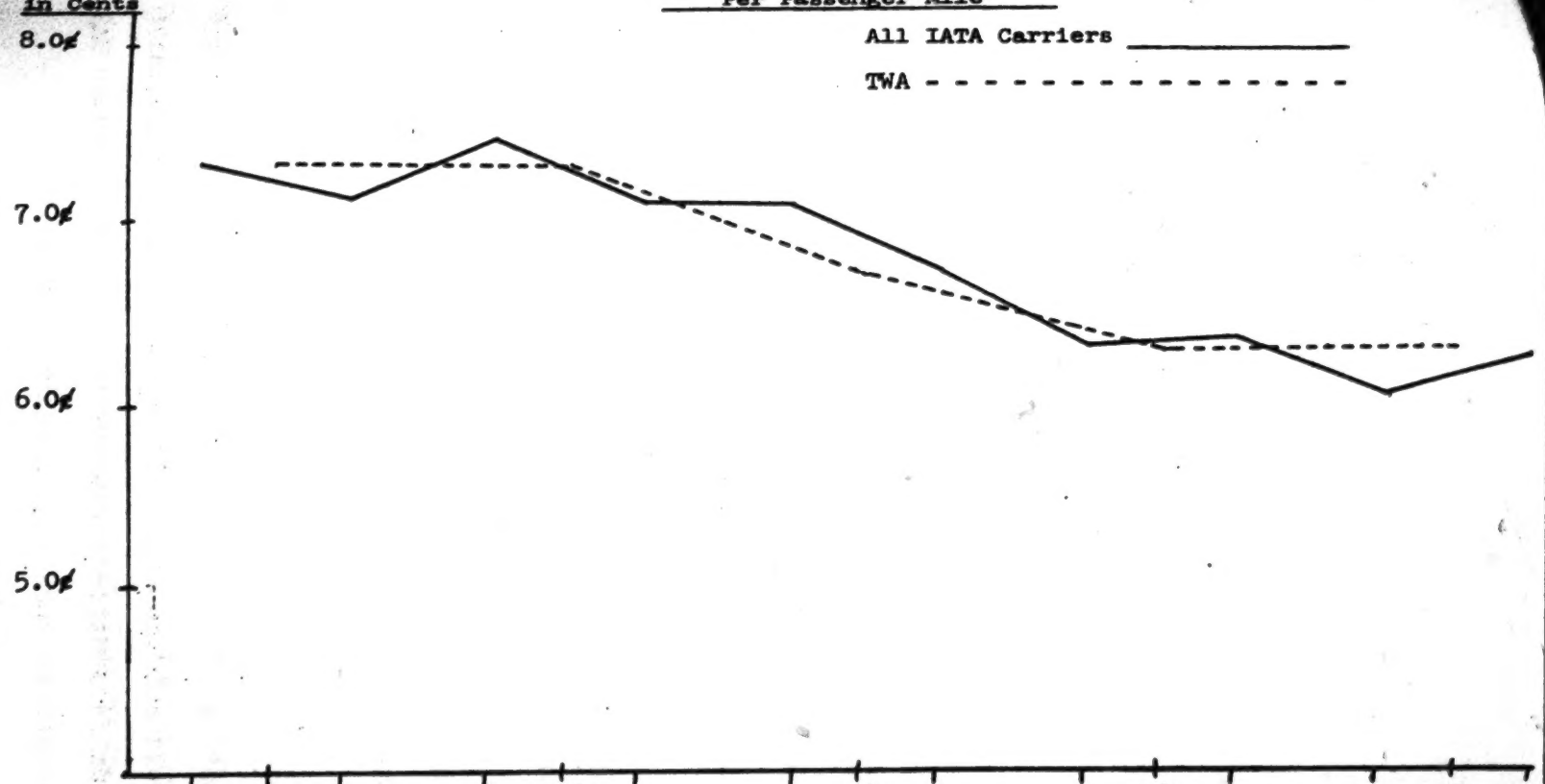
Sources: Col. 2: CAB Handbook of Airline Statistics, 1965 Ed.
Col. 3: Table E-XV
Col. 4: Col. 2 - Col. 3
Col. 5: Col. 6 of Table E-XIV
Col. 6: Col. 4 ÷ Col. 5

The transatlantic yields thus calculated for TWA compare closely with and are confirmed by the yields reported in a recent study for IATA covering transatlantic yields of all IATA carriers:

"DX271B, page E-37
(S.H.E. Report (Revised) - Volume 2)

Chart E-III

Average Transatlantic Yield
Per Passenger Mile



1/ IATA					
Winter	7.36¢	7.45¢	7.10¢	6.32¢	6.03¢
Summer	7.16¢	7.10¢	6.74¢	6.35¢	6.28¢
2/ TWA					
Year	7.3¢	7.4¢	6.7¢	6.3¢	6.3¢

1/ IATA Study: Elasticity of Demand for North Atlantic Travel, S. Wheatcroft, July 1964

2/ Table E-XVI

AX-194

"DX271B, page E-38
(S.H.E. Report (Revised) - Volume Two)"

Mr. Wemple, by erroneously increasing TWA's beyond-the-gateway passenger revenues by his estimated percentage increase in TWA transatlantic passengers, has overstated TWA's additional International Division revenues by $10.4 million in C & C Report, Chapter II and by $1.4 million in C & C Report, Chapter III. This results in a total overstatement of $11.8 million even without correction of his overestimate of TWA's added transatlantic passengers. In our opinion, no increase in beyond-the-gateway revenues would have occurred.

Table E-XVII

Year (1)	Actual Beyond-the-Gateway Revenues (Computed) (Millions) (2)	Percent of Increase Estimated by Mr. Wemple (3)	Amount of Increase Estimated by Mr. Wemple (Millions) (4)
C & C Report, Chapter II			
1959	$ 9.4	1%	$ .0
1960	9.2	23	2.1
1961	9.1	32	2.9
1962	10.8	38	4.1
1963	15.9	5	.8
		Total	$ 9.9 Million
		5% added for 1/ cargo revenue	.5
		Total Increase	$10.4 Million
C & C Report, Chapter III			
1959	9.4	7	.7
1960	9.2	6	.6
		Total	$ 1.3
		5% added for 1/ cargo revenue	.1
		Total Increase	$ 1.4 Million

Sources: Col. 2: Table E-XV
Col. 3: C & C Report, pp. 27, 47-48
Col. 4: Col. 2 x Col. 3

1/ C & C Report, pp. 31-33, 48

b. Charter

The methodology adopted by Mr. Wemple assumes that an increase in TWA's scheduled transatlantic (IATA) passengers in the period 1959-1963 would have occasioned an increase by the same percentage in TWA's international charter passenger revenues. TWA's transatlantic and charter statistics for 1959-1963 show that this assumption is erroneous because historically its international charter operations during this period were not related to its scheduled transatlantic capacity or traffic.

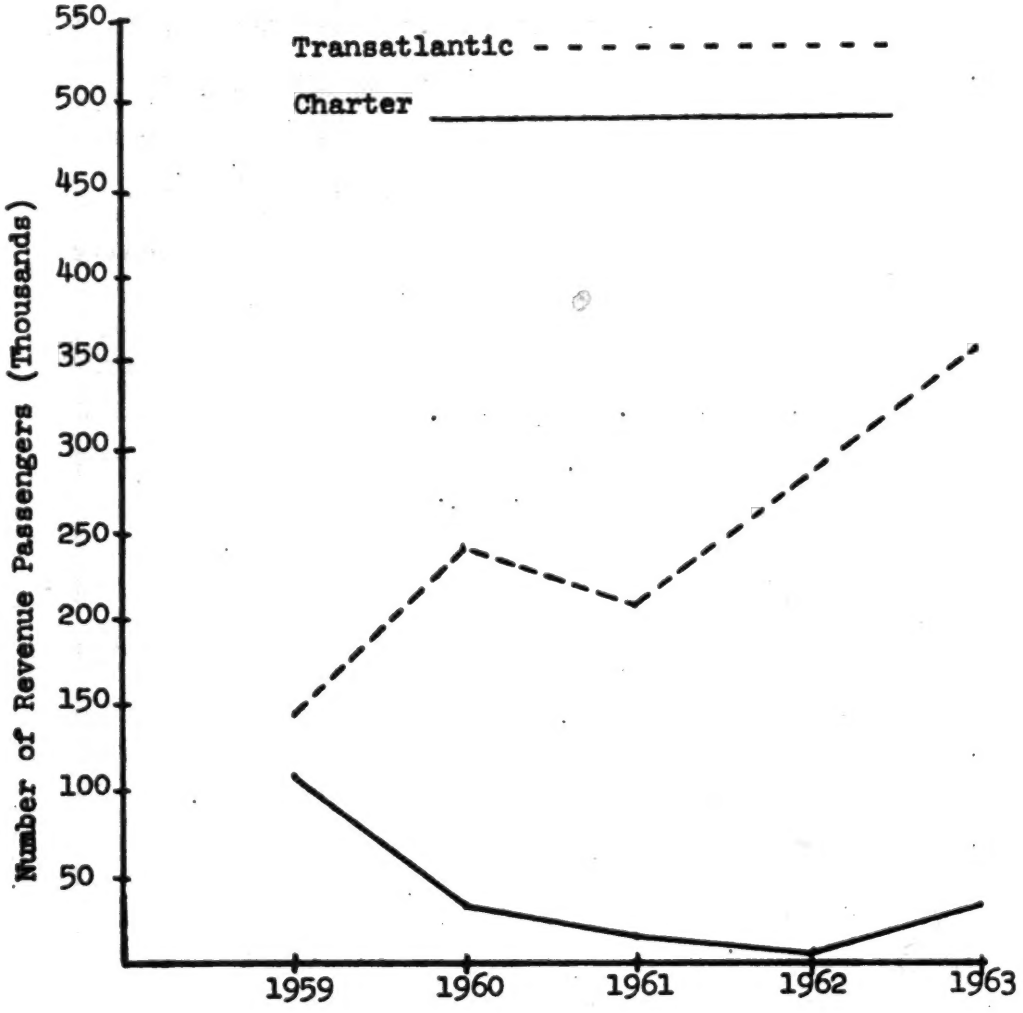
The number of IATA and charter passengers flown in its International Division in 1959-1963 were as follows:

Table E-XVIII

Year	IATA Passengers (Thousands)	Charter Passengers (Thousands)
(1)	(2)	(3)
1959	146	103
1960	243	35
1961	208	18
1962	277	4
1963	359	29

Sources: Col. 2: C & C Report, p. 21
Col. 3: CAB Handbook of Airline Statistics, 1965 Ed.

Chart E-IV


Transatlantic - - - - - - - - - - -
Charter _____
Number of Revenue Passengers (Thousands)
550
500
450
400
350
300
250
200
150
100
50
1959
1960
1961
1962
1963

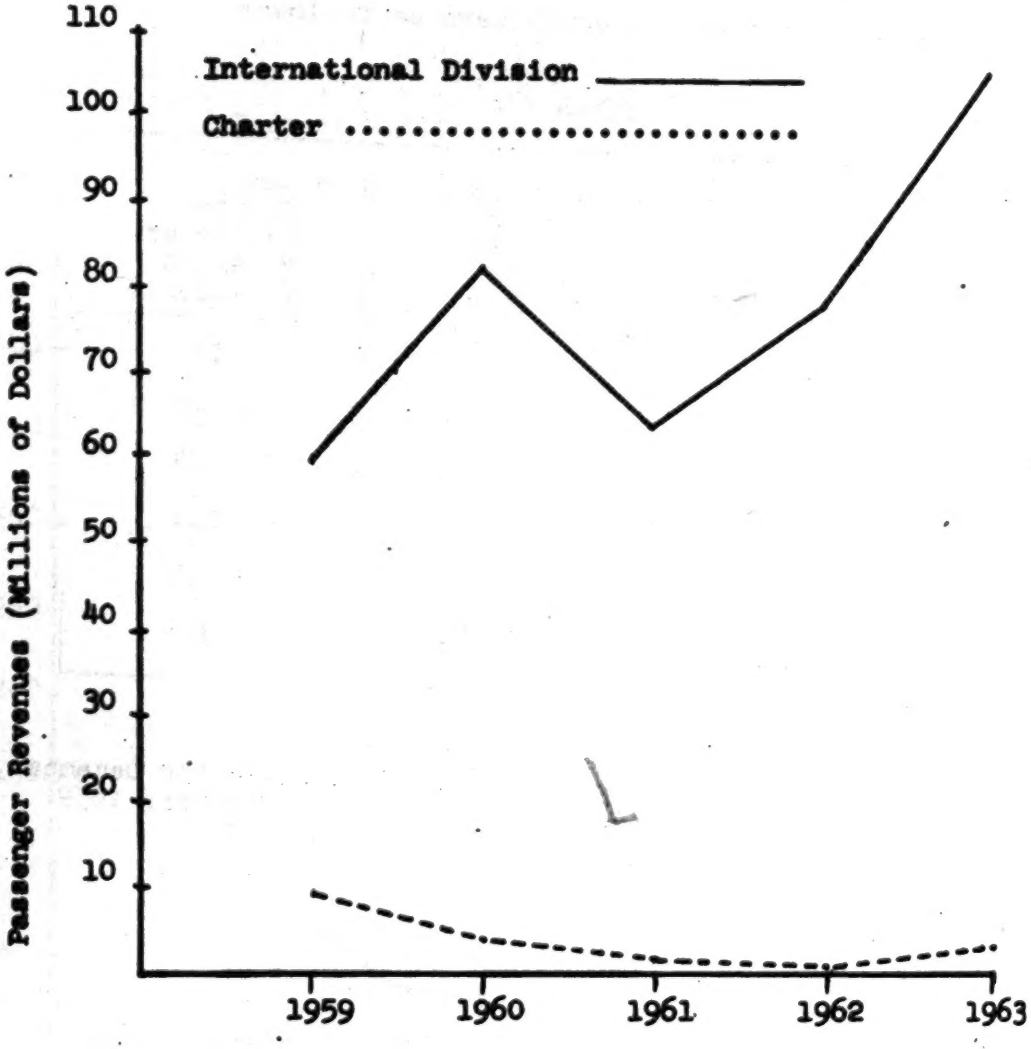
TWA's International Division passenger revenues and charter passenger revenues were as follows:

Table XIX

Year	International Division Passenger Revenues (Millions)	Charter Passenger Revenues (Millions)
(1)	(2)	(3)
1959	$ 59.5	$ 9.3
1960	82.0	4.4
1961	63.9	2.1
1962	77.5	.5
1963	105.0	3.5

Sources: Col. 2: C & C Report, p. 27
Col. 3: TWA Ex. C & C-2, Schd. 2-2M for December, 1959-1963, Schd. 2-163M for December, 1959.

Chart E-V


International Division
Charter
Passenger Revenues (Millions of Dollars)
110
100
90
80
70
60
50
40
30
20
10
1959
1960
1961
1962
1963

"DX271B, page E-44
(S.H.E. Report (Revised) - Volume Two)"

It can be seen that during the period 1959-1963 when TWA historically added a substantial number of jets to its international operations and experienced a strong growth in its scheduled transatlantic services, its international charter passengers and revenues did not increase, as Mr. Wemple assumes in his estimating, but actually suffered a decline.

Mr. Wemple, by erroneously increasing TWA charter passenger revenues by the same percent of increase he estimated for TWA's IATA passengers, has overstated TWA's additional International Division revenues by $2.3 million in Chapter II of the C & C Report and by $1.1 million in Chapter III. This results in a total overstatement of $3.4 million, apart from his overstatement of beyond-the-gateway revenues and without correction of his overestimate of TWA's added transatlantic passengers. In our opinion, no increase in charter revenues would have occurred.

C & C Report, Chapter II			
Year	Charter Passenger Revenues (Millions)	Percent of Increase Estimated by Mr. Wemple	Amount of Increase (Millions)
(1)	(2)	(3)	(4)
1959	$ 9.3	1%	$ 0.1
1960	4.4	23%	1.0
1961	2.1	32%	0.7
1962	.5	38%	0.2
1963	3.5	5%	0.2

Total - 2.2

5% added for cargo revenue .1

Total Increase $ 2.3 Million

C & C Report, Chapter III			
Year	Charter Passenger Revenues (Millions)	Percent of Increase Estimated by Mr. Wemple	Amount of Increase (Millions)
(1)	(2)	(3)	(4)
1959	$ 9.3	7%	$ 0.7
1960	4.4	6%	0.3

Total - 1.0

5% added for cargo revenue 4/ .1

Total Increase $1.1 Million

Sources: Col. 2: TWA Ex. C & C -2, Sched. 2-2M for December 1959-1963, Sched. 2-163M for December, 1959.
Col. 3: C & C Report, pp. 27, 47-48
Col. 4: Col. 2 x Col. 3

"DX271B, page E-A-1
(S.H.E. Report (Revised) - Volume Two)"

EXHIBIT E-A

PAN AMERICAN JET AIRCRAFT

Pan Am had the following jet aircraft available in its system and Atlantic Division in the 1959-1962 period:

	System			Atlantic Division		
Date	B-121	B-321	DC-8	B-121	B-321	DC-8
(1)	(2)	(3)	(4)	(5)	(6)	(7)
June 1959	6	-	-	6	-	-
Dec. 1959	6	15	-	3	10	-
June 1960	6	23	9	-	13	9
Dec. 1960	6	23	17	-	9	12
June 1961	6	26	20	-	11	14
Dec. 1961	6	26	20	-	11	12
June 1962	6	31	21	1	16	13

Source: Pan Am. Ex. 19, Transatlantic Renewal Case, Dkt. 13577

In the period 1959-1960, Pan Am operated the following non-transatlantic flight segments with jet aircraft where it faced no competitive jet aircraft:

Pan Am Division	Month/Year	Segments	Flight Number	Operations Per Week	Miles Flight
Pacific	Oct. 1959	Los Angeles-Honolulu-Tokyo	831	2	5,477
		San Francisco-Honolulu-Tokyo	851	2	5,149
		San Francisco-Honolulu	1	5	2,396
		Los Angeles-Honolulu	821	5	2,553
		Seattle-Portland-Honolulu	891	2	2,676
	Jan. 1960	San Francisco-Honolulu-Tokyo-Hong Kong	1	4	6,900
		San Francisco-Honolulu	865	2	2,396
		San Francisco-Honolulu	1	3	2,396
		Los Angeles-Honolulu	813	1	2,553
		Los Angeles-Honolulu	811	7	2,553
		Seattle-Portland-Honolulu	891	3	2,676
	April 1960	Honolulu-Tokyo-Hong Kong	1	4	5,541
		Honolulu-Tokyo	1	3	3,848
		Seattle-Portland-Honolulu	891	4	2,676
		Seattle-Fairbanks	901	4	1,530
	July 1960	Honolulu-Wake Island-Tokyo-Hong Kong	1	5	5,541
		Honolulu-Wake Island-Tokyo	1	1	3,848
		San Francisco-Tokyo	1/845	1	5,149
		Seattle-Portland-Honolulu	891	4	2,676
		Seattle-Fairbanks	901	4	1,530
	Oct. 1960	Honolulu-Guam-Manila-Saigon-Singapore-Djakarta	817	1	6,708
		Honolulu-Guam-Manila-Hong Kong	817	1	5,541
		Seattle-Portland-Honolulu	891	3	2,676
		Seattle-Honolulu	891	1	2,676
		Seattle-Fairbanks	901	4	1,530

Month/Year	Segments	Flight No.	Operations per week	Miles per flt.
Dec. 1959	Miami-San Juan	451	7	1,045
	New York-San Juan	211	7	1,605
	New York-Nassau	205	3	1,101
	New York-Ciudad Trujillo	227/428	2	1,557
	Ciudad Trujillo-Montego Bay	227/428	2	541
	Miami-Montego Bay	427	2	526
	Montego Bay-Ciudad Trujillo	427	2	541
Jan.1960	Miami-San Juan	451	7	1045
	New York-Port Au Prince	227/428	2	1557
	Port Au Prince-Montego Bay	227/428	2	366
	Miami-Montego Bay	427	2	526
	Montego Bay-Port-Au Prince	427(2), 429(2)	4	366
	New York-San Juan	211(7), 221(2), 223(2)	11	1605
	New York-Nassau	205(3), 409(2)	5	1101
	New York-Bermuda	132	2	764
Apr. 1960	Miami-San Juan	451	7	1045
	New York-Ciudad Trujillo	227	3	1557
	New York-San Juan	229(1), 211(7), 271(3)	13	1605
	San Juan-Ciudad Trujillo	229	1	255
	New York-Bermuda	132	2	764
July 1960	New York-San Juan	211(7), 251(3), 215(7)	17	1605
	Miami-San Juan	451	7	1045
	Miami-Montego Bay	427	2	526
	Montego Bay-Ciudad Trujillo	427	2	541
	New York-Ciudad Trujillo	227	2	1557
	Ciudad Trujillo-Montego Bay	227	2	541
	Philadelphia-Wash.	213	2	135
	Washington-San Juan	213	2	1568
	New York-Nassau	205	3	1101
	Boston-Baltimore	219	1	369
	Baltimore-San Juan	219	1	1571
	New York-Bermuda	132	7	764

Pan.Am. Division	Month/Year	Segments	Flight No.	Operations per Week	Miles per flt.
	Oct.1960	Miami-San Juan	451	7	1045
		Montego Bay-Ciudad Trujillo	427	2	541
		Boston-Baltimore	219	1	369
		Baltimore-San Juan	219(1),213(2)	3	1571
		Philadelphia-Baltimore	213	2	91

Month/Year	Segments	Flight No.	Operations per Week	Miles per flt
Jan. 1959	London-Amsterdam	100	3	232
	Amsterdam-Hamburg	100	2	235
	London-Brussels	100	4	218
	Brussels-Dusseldorf	100	4	116
	Amsterdam-Copenhagen	100	1	394
	Paris-Rome	114	7	678
	Rome-Istanbul	114	3	864
	Istanbul-Ankara	114	3	226
	Ankara-Baghdad	114	3	758
	Rome-Beirut	114	4	1382
	Beirut-Tehran	114	2	907
	Beirut-Damascus	114	2	50
	Damascus-Tehran	114	2	873
Apr.1959	London-Amsterdam	100	3	232
	Amsterdam-Hamburg	100	2	235
	London-Brussels	100	3	218
	Brussels-Dusseldorf	100	3	116
	Amsterdam-Copenhagen	100	1	394
July 1959	London-Amsterdam	100	3	232
	Amsterdam-Hamburg	100	3	235
	London-Brussels	100	4	218
	Brussels-Dusseldorf	100	4	116
	Ankara-Baghdad	114	1	758
Oct.1959	London-Amsterdam	100	3	232
	Amsterdam-Hamburg	100	3	235
	London-Brussels	100	4	218
	Brussels-Dusseldorf	100	4	116
	Ankara-Baghdad	114	1	758
Jan. 1960	London-Brussels	100	2	218
	Brussels-Dusseldorf	100	2	116
	London-Amsterdam	100	2	232
	Amsterdam-Dusseldorf	100	2	111
	London-Hamburg	100	3	464
	Hamburg-Copenhagen	100	3	175
	Ankara-Baghdad	114	1	758
Apr. 1960	London-Hamburg	100(3),58(1)	4	464
	Hamburg-Copenhagen	100	3	175
July 1960	London-Hamburg	100(3), 58(2)	5	464
	Hamburg-Copenhagen	100	3	175
	London-Amsterdam	58	1	232
Oct. 1960	London-Hamburg	58	1	464

Source: Official Airline Guide

EXHIBIT E-B

FOREIGN FLAG CARRIERS' JET AIRCRAFT

The foreign flag carriers which provided major jet competition in the transatlantic market during 1960 for TWA and Pan Am were BOAC and Air France. BOAC and Air France had the following jet aircraft available by the end of 1960:

BOAC		AIR FRANCE	
B-707	Comet	B-707	Caravelle
15	19	17	24

Source: ICAO Fleet Statistics, 1960.

During 1960, BOAC and Air France operated the following non-transatlantic flight segments with jet aircraft where they faced no competitive jet aircraft:

"DX271B, page E-B-2
(S.H.E. Report (Revised) - Volume Two)"

BOAC

Month	Flight Segments	Flt. Nos.	Operations per Week	Miles per Flight
March	Singapore-Sydney	714	1	3915
	Beirut-Hong Kong	932	1	4752
	Beirut-Melbourne	708	1	8516
	Calcutta-Sydney	710, 704	2	5679
	London-Santiago	661,663	2	7244
	London-Montego Bay	483/507	3	4690
	London-Johannesburg	115,121	4	5638
June	Singapore-Melbourne	714	1	3757
	Cairo-Hong Kong	932	1	5049
	Frankfurt-Sydney	708	1	10249
	Calcutta-Sydney	710	1	5679
	Frankfurt-Bombay	754	1	4081
	Calcutta-Melbourne	706	1	5551
	Montreal -London	606	2	3241
	Toronto-Prestwick, Scotland	612,616	2	3286
	London-Salisbury, Rhodesia	893	1	5152
	London-Johannesburg	115,121	6	5638
	London-Santiago	661,663	2	7244
Sept.	Singapore-Melbourne	714	1	3757
	Cairo-Hong-Kong	932	1	5049
	Frankfurt-Sydney	708	1	10249
	Calcutta-Sydney	710	1	5679
	Frankfurt-Bombay	754	1	4081
	Calcutta-Melbourne	704	1	5551
	London-Johannesburg	115,121	6	5638
	London-Santiago	661,663	2	7244
Dec.	Singapore-Melbourne	714	1	3757
	Singapore-Sydney	708	1	3915
	Calcutta-Sydney	710	1	5679
	Calcutta-Melbourne	704	1	5551
	London-Johannesburg	115	2	5638
	London-Santiago	661,663	2	7244

AIR FRANCE

Month	Flight Segments	Flight Nos.	Operations per Week	Miles per flt.
March	Los Angeles-Paris	002	2	5663
	Chicago-Paris	030	1	4146
	Paris-Tokyo (via Anchorage)	270	1	8148
June	Paris-Tokyo (via Anchorage)	270	1	8148
	Paris-Lima	109	1	6372
	Paris-Buenos Aires	081,083	2	6878
	Paris-Caracas	107	1	4731
Sept.	Paris-Tokyo (via Anchorage)	270	1	8148
	Paris-Caracas	107	1	4731
	Paris-Lima	109	1	6372
	Paris-Buenos Aires	081,083	2	6878
Dec.	Los Angeles-Paris	002	2	5663
	Paris-Abidjan, Ivory Coast	313,359	2	3027
	Paris-Tokyo (via Anchorage)	272	2	8148
	Paris-Tokyo (via Hong-Kong)	172,174,176	3	7771
	Paris-Hong Kong	262	1	5985
	Paris-Lima	109	1	6372
	Paris-Brazzaville, Rep. of Congo	401,403	2	3742
	Paris-Buenos Aires	081,083	2	6878
	Paris-Caracas	119	1	4731

CAX 1961

02/13 | 141 (d)
EXHIBIT | H.S.
9/4/6

PROSPECTUS

381,916 Shares

Trans World Airlines, Inc.

Common Stock

(par value $5 per share)

THESE SECURITIES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION NOR HAS THE COMMISSION PASSED UPON THE ACCURACY OR ADEQUACY OF THIS PROSPECTUS. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

Under the subscription offer herein described, which *expires at 3:30 P. M., Eastern Standard Time, on December 5, 1952*, TWA offers 381,916 shares of Common Stock for subscription by stockholders at $16 per share, on the basis of one-seventh share for each share held.

	Subscription Price	Underwriting Discounts and Commissions	Proceeds to TWA(1)
Per Unit	$16	None	$16
Total	$6,110,656	None	$6,110,656

(1) Assuming that all shares are sold but before deducting expenses payable by TWA estimated at $95,000.

Hughes Tool Company, the holder of 1,937,500 shares of TWA's Common Stock, has agreed to buy sufficient shares of TWA's Common Stock (to the extent sufficient shares are not otherwise sold) to provide TWA with net proceeds from the sale of Common Stock, after deducting expenses of such issuance payable by TWA, of at least $5,000,000. If less than all the 381,916 shares of Common Stock offered hereby are subscribed for, TWA intends to sell all or a part of the shares not subscribed for to Hughes Tool Company, at the subscription price above mentioned, so that the net proceeds to it from the sale of the shares offered hereby will be at least $5,000,000.

TWA's outstanding Common Stock is listed on the New York, San Francisco, Los Angeles and Midwest Stock Exchanges and applications have been made to said Exchanges for listing the shares offered hereby. During the period from October 1, 1952 through November 18, 1952, the price of the Common Stock on the New York Stock Exchange ranged from a high of 18¼ to a low of 16¾, the last sale on November 18, 1952 having been 16¾.

The date of this prospectus is November 20, 1952.

No person has been authorized to give any information or to make any representations, other than those contained in this prospectus, in connection with the offer contained in this prospectus, and, if given or made, such information or representations must not be relied upon as having been authorized by TWA. This prospectus does not constitute an offer by TWA to sell the Common Stock in any state in which such offer may not lawfully be made.

TABLE OF CONTENTS

	Page
Registration Statement	2
The Company	2
Offering to Stockholders	3
Purpose of Issue	4
Capitalization	4
Summary of Consolidated Operations	5
History and Business	7
Property	13
Relations with Hughes Tool Company	13
Long-Term Debt	14
Common Stock	15
Directors and Executive Officers	16
Litigation	18
Legal Opinion	18
Experts	18
Certificate of Independent Public Accountants	19
Financial Statements	20
Additional Information	31

REGISTRATION STATEMENT

Trans World Airlines, Inc. (herein sometimes called TWA) has filed with the Securities and Exchange Commission, Washington, D. C., a registration statement under the Securities Act of 1933, as amended, relating to the shares of Common Stock, par value $5 per share, offered hereby, and the subscription warrants evidencing the right to subscribe for such shares. For further information, reference is made to such registration statement, including the financial schedules therein and exhibits thereto.

THE COMPANY

TWA was incorporated as Transcontinental & Western Air, Inc. under the laws of the State of Delaware on December 27, 1934 by the consolidation of two Delaware corporations which had previously been engaged in air transportation. Its name was changed to Trans World Airlines, Inc. on May 17, 1950. TWA's principal business office is at 10 Richards Road, Kansas City, Missouri.

TWA has been engaged in the transportation of persons, property and mail by air since its organization. During that time it has operated a transcontinental system in the United States, and since 1946 it has operated an international system between the United States and points in Europe, Africa and Asia.

AX-1963

381,916 Shares

Trans World Airlines, Inc.

Common Stock

(par value $5 per share)

Transfer Agent
THE NEW YORK TRUST COMPANY,
New York

Registrar
BANKERS TRUST COMPANY,
New York

OFFERING TO STOCKHOLDERS

TWA is offering to holders of its outstanding Common Stock of record at the close of business on November 19, 1952, or on such later date as the above-mentioned registration statement becomes effective, the right to subscribe for an aggregate of 381,916 shares of Common Stock, at the rate of one-seventh share for each share then held, at the subscription price stated on the cover page of this prospectus. To evidence the rights to subscribe, TWA is issuing transferable subscription warrants to such stockholders. Seven rights are required to subscribe for each share of Common Stock. The rights to subscribe expire at 3:30 P. M., Eastern Standard Time, on December 5, 1952, after which unexercised subscription warrants will be void and of no value.

By Agreement dated January 16, 1951, Hughes Tool Company, the holder of 1,987,938 shares of TWA's Common Stock, agreed to buy sufficient shares of TWA's Common Stock (to the extent sufficient shares are not otherwise sold) to provide TWA with net proceeds from the sale of Common Stock, after deducting expenses of such issuance payable by TWA, of at least $5,000,000. Hughes Tool Company has the option to satisfy its obligation under the Agreement dated January 16, 1951, by lending TWA an equal amount of cash upon subordinated convertible notes, but TWA is advised that Hughes Tool Company will elect to purchase stock rather than exercise this option. If less than all the 381,916 shares of Common Stock offered hereby are subscribed for, TWA intends to sell all or a part of the shares not subscribed for to Hughes Tool Company at the subscription price above mentioned, so that the net proceeds to it from the sale of the shares offered hereby will be at least $5,000,000. Reference is hereby made to said Agreement dated January 16, 1951, which is filed as an exhibit to the registration statement, for the detailed provisions thereof and the foregoing statement is qualified in its entirety by such reference.

Exercise of Subscription Warrants. Subscription warrants may be exercised by surrender thereof, appropriately filled in and executed, to the Warrant Agent, The New York Trust Company, 100 Broadway, New York 15, N. Y., accompanied by payment for the shares subscribed. No subscription for a fraction of a share will be accepted.

Payment of the subscription price should be made in cash or by check or bank draft or postal or express money order, payable to the order of "The New York Trust Company, Agent". Certificates for shares of Common Stock will be issued as soon as practicable after subscription and payment of the subscription price.

Warrant holders unable to surrender their warrants in New York by the expiration date above mentioned may exercise their subscription rights by forwarding the subscription price by telegraph or otherwise so as to be received by the Warrant Agent at or before 3:30 P. M., Eastern Standard Time, on the expiration date, together with a guarantee in writing or by telegram from a bank, trust company or a member firm of the New York Stock Exchange that the subscription warrants with respect to the shares of Common Stock subscribed for have been transmitted by it, or are in its possession and will be transmitted immediately by it, to the Warrant Agent. Such subscriptions will be accepted subject to withholding of delivery of Common Stock subscribed for until receipt of the duly executed warrants.

Purchase and Sale of Rights to Subscribe. Rights may be bought or sold through banks or brokers. For the convenience of warrant holders TWA has made arrangements with the Warrant Agent so that a warrant holder, when forwarding his warrants to the Warrant Agent for exercise, may place an order to buy or to sell sufficient rights (not more than six) so as to enable him to subscribe for a whole number of shares. The execution of such order is subject to receipt of the order by the Warrant Agent not later than the close of business on the last full business day preceding the expiration date, and to the Warrant Agent's being able to find a seller or purchaser, as the case may be.

Foreign Stockholders. Subscription warrants will not be mailed to stockholders having registered addresses outside the United States and Canada, but are to be held for such stockholders by the Warrant

Agent, subject to satisfactory arrangements being made with the Warrant Agent for exercise or sale or other disposition thereof, until 10:00 A. M., Eastern Standard Time, on the last full business day preceding the day on which the subscription warrants will expire. The subscription warrants so held, as to which such other arrangements shall not have been made, are then to be sold, if possible, and, to the extent permitted by applicable laws and regulations, the pro rata share of the aggregate net proceeds, if any, therefrom is to be remitted to each stockholder on whose behalf such sale was made or, if such remittance is not permitted, held for the account of such stockholder subject to payment on receipt of lawful instructions.

PURPOSE OF ISSUE

The net proceeds from the sale of the Common Stock (assuming all shares are sold and after deducting expenses estimated at $95,000) will be at least $5,000,000. Such net proceeds will be added to and become part of the general funds of TWA and will be used for such corporate purposes as the management may determine.

Additional working capital is needed because of the payments made and to be made in 1952 as below stated. The need for additional working capital has increased because of the expansion of TWA's business and the introduction of new aircraft into service.

During the calendar year 1952 TWA estimates that it has made or will make expenditures from its general funds aggregating approximately $32,800,000, of which approximately $12,000,000 was paid on the purchase price of 56 aircraft and related parts and equipment, $17,300,000 is for principal, interest, regular and additional sinking fund payments and commitment fees with respect to long-term debt, and $3,500,000 is for hangar and other construction. During the same period TWA has added to its general funds approximately $5,000,000 from the sale of Common Stock in March, 1952, and estimates that depreciation will provide it with approximately $17,200,000, and that it will obtain $1,100,000 from the sale of Douglas DC-3 aircraft, leaving approximately $9,500,000 withdrawn from general funds during the year. At July 31, 1952, TWA's consolidated current assets were $40,940,561 and its consolidated current liabilities were $45,216,778. TWA's management presently has no definite plans for additional financing during 1953, but no representation is made that additional financing will not be necessary or desirable.

CAPITALIZATION

	As of November 5, 1952	
	Authorized	Outstanding
3¼% Sinking Fund Debentures (Series A) due June 1, 1956	$22,437,000.00	$22,437,000.00
3¼% Sinking Fund Debentures (Series B) due December 1, 1955	$ 6,480,000.00	$ 6,480,000.00
3% notes (secured) maturing in monthly installments from November 30, 1952 to May 31, 1953 (1948 Notes)	$ 2,087,202.69	$ 2,087,202.69
3% notes (secured) maturing in monthly installments from November 30, 1952 to April 30, 1955 (1950 Notes)	$ 7,208,571.34	$ 7,208,571.34
3% note (secured) maturing in monthly installments from November 30, 1952 to May 31, 1956 (Martin Notes)	$11,571,200.44	$11,571,200.44
3¼% notes (secured) maturing in monthly installments from November 30, 1952 to May 31, 1956 (Martin Notes)	$ 389,583.32	$ 389,583.32
3¼% note (secured) maturing in monthly installments from November 30, 1952 to July 31, 1955 (Martin Notes)	$ 2,805,000.00	$ 2,805,000.00
3¼% notes (secured) maturing in monthly installments from November 30, 1952 to July 31, 1956 (1049 Notes)	$ 8,707,235.06	$ 8,707,235.06
Common Stock, par value $5 per share	4,000,000 shs.	2,673,418 shs.

If all Common Stock being registered is sold, 3,055,334 shares will be outstanding. At November 5, 1952, TWA had outstanding other long-term debt aggregating $3,814,105.43, including $3,247,636.22 under conditional sale contracts. The interest on the Series A and Series B Debentures was increased from 3½% to 3¼% effective March 1, 1951. For additional information concerning TWA's long-term debt, see "Long Term Debt".

DX 284

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Other Recent Developments

In February, 1952, TWA offered to its stockholders 212,537 shares of its Common Stock at the price of $21.25 per share. 215,046 shares were subscribed for on this offering and an additional 25,728 shares were thereafter sold to Hughes Tool Company at the same price per share. After deducting expenses, TWA realized net proceeds from such sales of $5,000,018.64.

In connection with a program for additional financing for The Glenn L. Martin Company, TWA agreed to increase by $25,000 the price of each of the 40 Martin 404 aircraft it was purchasing, waived its rights to acquire additional Martin 404 aircraft, and purchased for $5,100,000 the twelve Martin 202A aircraft it previously leased from The Glenn L. Martin Company.

Operations at Newark Airport, which had been temporarily suspended early in 1952, were resumed in July, 1952.

In July, 1951, a flood halted all operations at TWA's main overhaul base at Kansas City, Kansas, for a considerable period. During 1951 provision for estimated uninsured flood losses was made through a charge of $2,000,000 to operating expense. As of September 30, 1952, $239,577 of this provision remained on the books to cover additional losses not processed as of that date.

The City of Kansas City, Missouri, proposes to build a new industrial airport, which, under present plans, will include a main overhaul base to be leased to TWA having substantially larger capacity than that presently available to it.

Following the outbreak of hostilities in Korea, TWA participated, by lease of aircraft to Northwest Airlines, Inc., in the Pacific airlift. Four Douglas C-54 aircraft were so leased at November 1, 1952. Such lease is subject to the Renegotiation Acts. TWA has received formal notice that renegotiation proceedings have commenced for the years 1950 and 1951, but no further steps have been taken in such proceedings. For some time, representatives of TWA and other air carriers have been engaged in studies with agencies of the United States government to determine the mobilization pattern for air transportation in the event of a greater national emergency. The subject matter of these discussions is classified information, but public statements of officers of the government indicate an understanding of the necessity for continued operation in wartime of a substantial amount of air transportation under private civilian management.

The program of production for defense being carried on by the United States government under the Defense Production Act of 1950 has not thus far interfered with TWA's operations to a material degree.

Since June 1, 1948, TWA and Delta Airlines, Inc. have interchanged aircraft at Cincinnati, Ohio, where one-plane service is provided between the TWA points Detroit, Toledo, Columbus and Dayton, and Delta points in the southeastern United States. TWA has applied to the Civil Aeronautics Board for approval of certain other similar interchange services with other air carriers.

TWA provides sky tourist service, without the deluxe accommodations of regular service and at lower rates, on heavily traveled segments of the transcontinental system by four-engine aircraft in which extra seats have been installed. In May, 1952, TWA inaugurated a similar tourist service on its international system between New York and London and Paris.

TWA sustained losses in 1946, 1947 and 1948. The factors contributing to the losses included the introduction of new and additional equipment (some of which was grounded for an extended period as a result of governmental orders), a very rapid expansion of the total air transport capacity in relation to the increase in demand for service, the cost of developing the international system, losses on other airline investments, and a pilot strike in 1946. Operations during 1949, 1950 and 1951 and the seven months ended July 31, 1952, were carried on at a profit. TWA's business has been and will continue to be affected by such matters as changes in the levels of general business activity and employment, costs and wages; competitive conditions; new developments in air and surface transportation; changes in taxation; Federal and State legislation; the national defense production program; orders of regulatory bodies; and political and economic conditions abroad.

At September 30, 1952, TWA had about 16,350 employees, nearly half of whom were represented by unions. Contracts recently negotiated with unions representing five groups of employees require approval of stabilization authorities before being put into effect.

Insurance

TWA maintains certain hull, public liability, passenger liability, property damage, baggage, air cargo, and various other types of insurance. Premiums for such insurance are in many cases on a negotiated basis. The management of TWA considers its insurance adequate as to coverage and amount.

PROPERTY

As of November 1, 1952, TWA had a fleet of 175 aircraft, of which 143 were assigned to its transcontinental system, 26 to its international system, four had been leased to Northwest Airlines, Inc. for use in the Pacific airlift and two Douglas DC-3 aircraft had been leased to another airline. All aircraft in use are maintained in airworthy condition in accordance with procedures approved by the Civil Aeronautics Administration. The aircraft above referred to are as follows:

Type	Owned	Leased	Total	Approximate Age in Years
Four Engine:				
Lockheed Constellation C-49	32	0	32	6 - 8
Lockheed Constellation 749	12	0	12	4 - 5
Lockheed Constellation 749A	24	0	24	1½- 3
Lockheed Constellation 1049	10	0	10	0 - ½
Douglas C-54	11	2	13	7 - 8
Two Engine:				
Martin 202A	12	0	12	2½
Martin 404	40	0	40	¼- 1
Douglas DC-3	32	0	32	8 -16
Total	173	2	175	

All these aircraft except Douglas C-54 and Douglas DC-3 aircraft and 16 Lockheed Constellation 049 aircraft are mortgaged or subject to conditional sale contracts referred to below under "Long-Term Debt".

For information as to the estimated service lives of aircraft, see Note 4(a) to the financial statements. Of the Douglas DC-3 aircraft above mentioned, TWA has made arrangements to sell 9 in the near future, and presently plans to withdraw most of its Douglas DC-3 aircraft from service before the end of 1953. No estimate can be given as to the date Douglas C-54 aircraft will be withdrawn from service.

TWA leases hangars, office space and similar property at various locations. For information as to obligations under leases and certain commitments for construction see Note 15 to financial statements.

RELATIONS WITH HUGHES TOOL COMPANY

Hughes Tool Company, a Delaware corporation (hereinafter sometimes called Hughes), all the outstanding stock of which is owned by Howard R. Hughes, well-known industrialist, motion picture producer, aviator and aeronautical engineer, owns 1,787,938 shares of the Common Stock of TWA which is approximately 75% of the Common Stock outstanding. In 1944 the Civil Aeronautics Board found Hughes' control of TWA consistent with the public interest and approved it on condition that commercial transactions between the two companies be limited to items not exceeding $200 in amount and totaling not more than $10,000 per year. By subsequent proceedings the condition has been modified to remove any limits on transportation purchased by Hughes from TWA at regularly published rates; to permit TWA to repair Hughes' aircraft and sell aviation fuel to Hughes at prices charged by TWA to others; and to permit TWA to purchase certain radar units from Hughes, provided the price did not exceed cost or the price of similar sales by Hughes to any other airline, whichever is lower. The Board has also permitted a number of other transactions, of which those entered into subsequent to November 1, 1949, are as follows:

(1) The sale by Hughes to TWA of six Constellation 049 aircraft at Hughes' cost, plus the cost of any modification agreed to by TWA, pursuant to a sales agreement dated February 2, 1950. The price (exclusive of modification costs) was $3,711,256.97.

(2) The financing by Hughes of $2,771,331 (approximately 75%) of the purchase price of four Constellation 749A aircraft ordered by TWA from Lockheed Aircraft Corporation pursuant to an agreement dated March 2, 1951.

(3) The sale by TWA to Hughes, at TWA's cost, of a Constellation 749A aircraft and a Martin 404 aircraft, pursuant to agreements dated, respectively, December 4, 1950 and March 2, 1951.

(4) The implementation of agreements dated April 5, 1950 and January 16, 1951 between Hughes, TWA and The Equitable Life Assurance Society of the United States. Pursuant to the agreement dated April 5, 1950, TWA realized net proceeds of approximately $5,000,000 through an offering of Common Stock to its stockholders, of which Hughes purchased 204,110 shares for $4,337,337.50. The agreement dated January 16, 1951 is described above under "Offering to Stockholders".

Transactions between TWA and Hughes and its subsidiaries (excluding purchase by Hughes of air transportation and the specific transactions referred to above) have not been substantial in amount in any year of the three year period ended November 1, 1952.

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MINUTES OF THE BOARD OF DIRECTORS MEETING
TRANS WORLD AIRLINES, INC.

January 13, 1955

A special meeting of the Board of Directors of Trans World Airlines, Inc., was held at 9:30 A.M., Thursday, January 13, 1955, in the Board Room of The National Bank of Commerce of Houston, Houston, Texas.

Directors present were: Messrs. Palmer Bradley
E. O. Cocke
Powel Crosley, Jr.
R. S. Damon
Noah Dietrich
Arthur Eisenhower
A. V. Leslie
Warren Lee Pierson
Harry Rogers
A. D. Simpson
Thomas A. Slack

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constituting a quorum.

Directors absent were: Messrs. Fred W. Ayers
John B. Blandforth
John A. Collings
Oscar F. Holcombe
Sidney Maestre
Loyd Wright

Mr. Gerald B. Brophy of Counsel and Mr. George H. Clay, Vice President and Secretary of the Corporation, were present by invitation.

Mr. Warren Lee Pierson, Chairman, called the meeting to order and thereafter presided.

The Secretary of the Corporation, Mr. George H. Clay, acted as Secretary of the meeting.

APPROVAL OF MINUTES

Minutes of the Board of Directors meeting of December 6, 1954, were approved.

PRESENTATION OF SERVICE BUTTONS TO MESSRS. POWEL CROSLEY, JR. AND GERALD B. BROPHY

The Chairman of the Board presented a 15-year service button to Mr. Powel Crosley, Jr., in recognition of his services to the Corporation since December 15, 1939.

DX 286

CONSIDERATION OF PURCHASE OF ADDITIONAL AIRCRAFT

Mr. Noah Dietrich pointed out to the Board that for many months the choice of the most modern equipment to facilitate the program of this Corporation has been a matter of which the Board has been aware and concerning which the officers of this Corporation have been in frequent discussion with the officers of Hughes Tool Company. It was made known to the Board that Hughes Tool Company after discussions with officers of this Corporation did during the month of December enter into a contract with Lockheed Aircraft Corporation for the purchase of twenty-five Model 14/94-01-120 airplanes of the Lockheed Constellation type and powered by turboprop engines of the latest type and design and that the purpose of such order by Hughes Tool Company was to assure to this Corporation the prior position in the purchase of these airplanes. Hughes Tool Company paid the sum of $16,817,603.25 to Lockheed Aircraft Corporation on account of the contract. It was explained that in order to assist this Corporation in its long range equipment program Hughes Tool Company will tender to this Corporation an option to acquire all of the aforesaid airplanes by virtue of the Hughes Tool Company contract. This Corporation in the event of the exercise of such option would be required only to make Hughes Tool Company whole and to pay interest upon funds advanced by Hughes Tool Company at a rate no greater than 3% per annum. A general discussion of the whole matter including the nature and specifications of the airplanes was held.

Upon motion duly made, seconded and unanimously carried, Mr. R. S. Damon not voting, it was resolved that since no financial risk of any kind on the part of this Corporation has been or prior to the exercise of the option (if exercised) will be involved in the negotiations, the action of the officers of the Corporation in the premises is hereby approved.

After explanation to the Board by company counsel of the nature of the contract of purchase entered into between Hughes Tool Company and Lockheed Aircraft Corporation and explanation of the fact that acceptance by this Corporation of an option to succeed to the interest of Hughes Tool Company in the purchase of such planes would create no obligation on the part of this Corporation but merely the acquisition of a valuable right, it was, upon motion duly made, seconded and unanimously carried, Mr. R. S. Damon not voting,

RESOLVED, that the executive officers of this Corporation be, and they hereby are, authorized and instructed to accept any option tendered to this Corporation by Hughes Tool Company to be subsequently exer-

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cised by this Board at its discretion which would vest in this Corporation the rights of Hughes Tool Company with respect to the acquisition of the new Lockheed equipment discussed at this meeting, provided that the acceptance of the option does not in any way bind this Corporation at this time to any financial responsibility or to take any future action of any kind in the premises.

DATES AND PLACES OF FEBRUARY, MARCH AND APRIL BOARD MEETINGS.

It was the consensus of the meeting that the regular meeting scheduled to be held Friday, February 25, 1955, should be held at 9:30 A.M., in New York City and that the regular meeting scheduled to be held Friday, March 25, 1955, should be held at 9:30 A.M., in Phoenix. The meeting was advised that the April meeting of the Board of Directors would be held on Thursday, April 28, 1955, at 20 West Ninth Street, Kansas City, Missouri, in connection with the Annual Meeting of Stockholders being held that same day.

ADJOURNMENT

There being no further business to come before the meeting, it was adjourned at 12:05 P.M.

George H. Clay
Secretary

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MINUTES OF THE BOARD OF DIRECTORS MEETING TRANS WORLD AIRLINES, INC.

December 13, 1955

A special meeting of the Board of Directors of Trans World Airlines, Inc., was held at 9:30 a.m., Tuesday, December 13, 1955, at the offices of the Corporation, 380 Madison Avenue, New York, New York.

Directors present were: Messrs. Fred W. Ayers
John E. Bierwirth
Palmer Bradley
E. O. Cocke
John A. Collings
R. S. Damon
Noah Dietrich
Arthur Eisenhower
Oscar F. Holcombe
A. V. Leslie
Warren Lee Pierson
Harry Rogers
A. D. Simpson
Thomas A. Slack
Loyd Wright

constituting a quorum.

Directors absent were: Messrs. Powel Crosley, Jr.
Sidney Maestre

Mr. George A. Spater of Counsel and Mr. George H. Clay, Vice President and Secretary of the Corporation, were present by invitation.

Mr. Warren Lee Pierson, Chairman, called the meeting to order and thereafter presided.

The Secretary of the Corporation, Mr. George H. Clay, acted as Secretary of the meeting.

APPROVAL OF MINUTES

Minutes of the Board of Directors meeting of November 14, 1955, were approved.

REPORT OF THE CHAIRMAN OF THE BOARD

The Chairman of the Board reviewed the decision of the CAB in the additional Southwest-Northeast Service Case by which this Corporation was authorized to provide service at both Tulsa and Oklahoma City and he advised of the appointment of G. Joseph Minetti as a member of the CAB replacing Josh Lee.

DX 287

After discussion, upon motion duly made, seconded and carried, it was

RESOLVED, that the proper officers of this Corporation be, and they hereby are, authorized for and on behalf of this Corporation to execute and enter into an agreement covering the leasing by this Corporation, for a ten-year period, of space in Denver, Colorado, for CTO and district offices, at a monthly rental of not in excess of $1,000, and upon such further terms and conditions as are deemed to be in the best interests of this Corporation.

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The Board of Directors authorized an appropriation in the amount of $83,000 to cover alterations, improvements and furnishings, and $10,000 to cover air conditioning for CTO and district offices at Denver.

OPTION TO PURCHASE 8 MODEL 1049G CONSTELLATION AIRCRAFT UNDER LOCKHEED CONTRACT LD-147

It was called to the attention of the Board that officers of this Corporation recently advised Hughes Tool Company that additional Model 1049G airplanes of the Lockheed Constellation type would be needed in 1956. Upon being advised of such fact, and after further discussions with officers of this Corporation, the officers of Hughes Tool Company negotiated a contract with Lockheed Aircraft Corporation covering the purchase of five (5) Model 1049G's with an option for an additional three (3) such airplanes.

This contract (known as Lockheed Contract LD-147) was finally executed by Hughes Tool Company and Lockheed Aircraft Corporation on September 24, 1955; and the option to increase the number of airplanes from five (5) to eight (8), was exercised October 15, 1955, and is evidenced by Change Order No. 1 executed as of October 17, 1955. There was presented to the Board a copy of the executed agreement, together with a copy of Change Order No. 1, showing a basic price of $1,929,000.00 per airplane, subject to the usual Lockheed escalation provision, and calling for delivery of two airplanes in June, two in July, two in August, and two in September, 1956. The contract provides that the airplanes will incorporate all of the specification changes and improvements negotiated by this company in connection with its Contract LD-111 and will incorporate also any and all additional changes necessary to meet any new CAA regulations. The purchase price of the airplanes is payable in two installments -- 25% upon execution of the contract and the balance upon delivery. The remaining terms and conditions of the contract are substantially the same as those contained in LD-111.

The Board was advised that Hughes Tool Company has tendered to this Corporation an option agreement which will permit this Corporation to acquire, at any time on or before April 30, 1956, all of Hughes Tool Company's rights under Contract LD-147 by reimbursing Hughes Tool Company for its payments made to Lockheed and its other direct costs incurred in connection with the contract, and by paying to Hughes Tool Company an additional amount equal to interest at the rate of three (3%) per cent per annum on all funds advanced by Hughes Tool Company under the contract.

The executed option agreement was exhibited to the Board and there followed a general discussion of the terms of LD-147 and the tendered option. The Board was of the unanimous opinion that the terms of the contract and of the option were satisfactory and the Board expressed its appreciation for the action of Hughes Tool Company's Board and officers in making available to this Corporation the additional 1049G airplanes.

Upon motion duly made, seconded and carried, Messrs. Fred W. Ayers, Noah Dietrich and Harry Rogers not voting, the following resolution was adopted:

RESOLVED, that receipt of the option agreement submitted by Hughes Tool Company be, and the same hereby is, acknowledged and its form approved; that the officers of this Corporation hereby are authorized to assist Hughes Tool Company in the administration of Contract LD-147 and in the negotiation of specification changes in the Model 1049G airplanes covered by such contract; and that the proper officers of this Corporation hereby are authorized to exercise the option at such time as they deem appropriate.

OPTION TO PURCHASE 25 MODEL 1649 CONSTELLATION AIRCRAFT UNDER LOCKHEED CONTRACT LD-138

Corporation's counsel called to the attention of the Board that at its meeting of January 13, 1955, a resolution was adopted authorizing the executive officers of the Corporation to accept any option tendered to this Corporation by Hughes Tool Company, for subsequent exercise by this Board at its discretion, with respect to the acquisition of the new Lockheed equipment, described as Model 1449-01-120 of the Lockheed Constellation type. Counsel further reported that the contract of Hughes Tool Company for the acquisition of such aircraft had been amended to provide for the manufacture and delivery

of 25 new Model 1649 airplanes in lieu of the earlier type, and that Hughes Tool Company has now delivered an option, relating to such new aircraft, a copy of which was exhibited to the meeting. By such instrument this Corporation was given the option to acquire all of the rights of Hughes Tool Company under the purchase agreement with Lockheed described therein (being Purchase Agreement LD-138) covering twenty-five (25) new Model 1649 airplanes, Lockheed Constellation type. There followed a general discussion of the terms of LD-138 and the tendered option.

Upon motion duly made, seconded and carried, Messrs. Fred W. Ayers, Noah Dietrich and Harry Rogers not voting, the following resolution was adopted:

RESOLVED, that receipt of the option agreement submitted by Hughes Tool Company be, and the same hereby is, acknowledged and its form approved; and that the officers of this Corporation hereby are authorized to continue assisting Hughes Tool Company in the administration of Lockheed Contract LD-138 and in negotiation of specification changes in the Model 1649 airplanes covered by such contract; provided, however, that the option not be exercised until such date as may be fixed by subsequent action of this Board.

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EXTENSION OF LEASE OF CTO SPACE IN ASTOR HOTEL - NEW YORK CITY

The meeting was advised that the Astor Estate had terminated its lease with the Hotel Astor corporation which in turn had terminated its sublease with this Corporation of CTO space in the Astor Hotel in New York City; that the 1515 Broadway, Inc., corporation had become the new lessee of the Astor Hotel with an option to purchase the hotel and that an agreement had been reached with the new lessee whereby, if the new lessee exercises its option to purchase the hotel, this Corporation's cancelled lease of CTO space in the Astor Hotel will be reinstated and extended to May 31, 1965, on substantially the same terms as contained in the original lease.

Upon motion duly made, seconded and carried, Mr. R. S. Damon not voting, it was

RESOLVED, that the proper officers of this Corporation be, and they hereby are, authorized for and on behalf of this Corporation to execute and enter into an agreement with 1515 Broadway, Inc., covering the

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MINUTES OF THE BOARD OF DIRECTORS MEETING
TRANS WORLD AIRLINES, INC.

April 26, 1956

A special meeting of the Board of Directors of Trans World Airlines, Inc. was held at 9:30 a.m., Thursday, April 26, 1956, at the offices of the Corporation, 20 West 9th Street, Kansas City, Missouri.

Directors present were: Messrs. Palmer Bradley
E. O. Cocke
John A. Collings
Noah Dietrich
Arthur Eisenhower
Oscar Holcombe
A. V. Leslie
Sidney Maestre
M. E. Montrose
Warren Lee Pierson
Harry Rogers
Ben-Fleming Sessel
A. D. Simpson

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constituting a quorum.

Directors absent were: Messrs. Fred M. ..yers
Powel Crosley, Jr.
Thomas A. Slack
Loyd Wright

Mr. George A. Spater of counsel and Mr. George H. Clay, Vice President and Secretary of the Corporation, were present by invitation.

Mr. Warren Lee Pierson, Chairman, called the meeting to order and thereafter presided.

The Secretary of the Corporation, Mr. George H. Clay, acted as Secretary of the meeting.

APPROVAL OF MINUTES

Minutes of the Board of Directors meeting of March 24, 1956, were approved.

REPORT OF THE CHAIRMAN OF THE BOARD

The Chairman of the Board reported on his recent overseas trip, on conferences held in Italy concerning summer schedules, on the Egyptian situation and the cordial relations existing between this Corporation and that government, on his visit to Beirut, on the possibility that this Corporation might be asked to assist in the development of an airline for

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Yemen, on the outstanding job being performed by this Corporation in Spain and on the signing of the new Ethiopian Agreement, under which fees have been increased. He advised that CAB examiners had recommended that this Corporation's application for an extension of its route from Colombo to Manila be approved; that its route be extended from New York to Boston via Hartford-Springfield; that it be granted additional authority to conduct service between New York and Washington, D. C., via Philadelphia and Baltimore; and that Tucson be designated as an intermediate point on its Route #2.

He reported on the present status of the Phoenix-Denver Case, the St. Louis-New York Nonstop Case, the Great Lakes-Florida Case, the St. Louis-Southeast Case, the Dallas-West Coast Case, the Polar Route cases, the International Mail Rate Case, the Frankfurt-Zurich extension and the proposed General Fare Investigation. He reported generally on recent CAB appointments and on the Celler Committee investigation.

INVESTMENT IN LINEE AEREE ITALIANE (LAI)

The Chairman advised the Board that LAI had recently decided to increase its capital from the present figure of 1.5 billion Lire to 5.5 billion Lire, a materially greater increase than contemplated at the time this subject was discussed at the Board meeting of December 13, 1955. If the Corporation should maintain its full 40% interest in LAI, the new investment required would substantially exceed the expenditure of $1,605,000 authorized by the Board at its December 13, 1955 meeting.

The Chairman stated that an individual investor in Italy has indicated that he would be willing to acquire a 10% interest in LAI, in the event the Corporation did not desire to take up its full 40%. If the Corporation should maintain its interests in LAI at 30% of the total capital, it would be required to put up an additional 1,050,000,000 Lire, which is the equivalent of $1,680,000 at 625 Lire to the dollar.

After extended discussion, upon motion duly made, seconded and carried, the following resolutions were adopted:

RESOLVED, that in connection with the proposal of Linee Aeree Italiane to increase its capitalization to 5.5 billion Lire, the Corporation shall purchase from Linee Aeree Italiane such additional shares of its capital stock as may be needed for the Corporation to maintain an interest of 30% in the total capital stock of Linee Aeree Italiane after the proposed increase, for an amount not to exceed 1,050,000,000 Lire, and the proper officers of the Corporation be, and they hereby are, authorized to take such steps as may be necessary or desirable in their discretion to consummate such purchase.

DX189

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modifications of the Agreement and Lease of premises, as amended, shall be made as the officer executing the same shall approve as being in the best interests of this Corporation, such approval to be conclusively evidenced by the signature of such officer.

RESOLVED, that the proper officers of this Corporation be, and they hereby are, authorized and empowered to do or cause to be done all such further acts and things as may be necessary or desirable and convenient and proper for the purpose of carrying out the intent of the foregoing resolution.

OPTIONS TO PURCHASE 8 MODEL 1049G CONSTELLATIONS AND 25 MODEL 1649A CONSTELLATIONS

Attention of the Board was called to the fact that Hughes Tool Company, by agreements dated November 10, 1955, had granted options to the Corporation for the purchase of (1) 8 new Model 1049G aircraft under Lockheed Contract LD-147 and (2) 25 new Model 1649A aircraft under Lockheed Contract LD-138, and that at the Directors' meeting of December 13, 1955, the Board had acknowledged receipt of such option agreements, had approved their form and had authorized the officers of the Corporation to assist Hughes Tool Company in the administration of the contracts and in the negotiation of specification changes in the airplanes covered by the contracts. In the case of the option on 1049G aircraft, the officers were authorized by the Board to exercise the option at such time as they deemed appropriate, but in the case of the option on the 1649A aircraft, the Board provided that the option should not be exercised until such date as may be fixed by subsequent action of the Board. The option for the 8 Model 1049G aircraft has not yet been exercised.

Subsequent to the Board meeting of December 13, 1955, officers of the Corporation requested Hughes Tool Company to expand the options so as to include spare engines and spare parts needed for the aircraft and also to make provision for the financing of the aircraft, engines and spare parts by Hughes Tool through conditional sale contracts. Hughes Tool Company acquiesced in those proposals and has submitted revised option agreements dated April 20, 1956, including the following terms, among others:

1. Option to purchase 8 Model 1049G Constellation aircraft under Lockheed Contract LD-147.

The revised option agreement grants the Corporation the right to acquire from Hughes Tool Company, in addition to the 8 Model 1049G airplanes covered in the original option agreement, all of the interest of Hughes Tool Company in any spare engines up to a maximum purchase price of $726,000 and all of the interest of Hughes Tool Company in any other spare parts up to a maximum purchase price of $1,524,000 which may be acquired by Hughes Tool Company for use in connection with the 1049G airplanes.

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In accordance with the terms of the revised option agreement, the Corporation will be required to make no payment at the time of exercise of the option. The aircraft, spare parts and spare engines will be sold to the Corporation by Hughes Tool Company under a conditional sale contract and payment therefor will be made in sixty equal monthly installments beginning with delivery of the first airplane. Interest on the unpaid balance will be the average interest rate payable by Hughes Tool Company on any indebtedness incurred by it for the purpose of financing the purchase of the airplanes, spare engines and spare parts, or if no such indebtedness is incurred, the prime commercial interest rate current in New York City at the time of the execution of the conditional sale contract.

The revised option provides for its exercise on or before May 31, 1956, instead of the April 30, 1956, date contained in the original option.

2. Option to purchase 25 Model 1649A Constellation aircraft under Lockheed Contract LD-138.

The revised option agreement grants to the Corporation the right to acquire from Hughes Tool Company, in addition to the 25 Model 1649A airplanes covered in the original option agreement, all the interest of Hughes Tool Company in any spare engines up to a maximum purchase price of $5,300,000 and all of the interest of Hughes Tool Company in any other spare parts up to a maximum purchase price of $5,700,000 which may be acquired by Hughes Tool Company to be used in connection with the 1649A airplanes.

The option agreement for the 1649A airplanes, like that for the 1049G airplanes, also provides for the financing of the aircraft, as well as the engines and spare parts, by Hughes Tool Company through a conditional sale contract permitting payments by the Corporation over a sixty-month period.

The date for the exercise of the option for the 1649A aircraft remains the same in the revised agreement as in the original agreement.

Copies of the revised option agreements were submitted to the Board. Thereafter there followed a general discussion of the terms of the revised options. It was unanimously agreed that the modifications of the options were in all respects favorable to the Corporation.

Upon motion duly made, seconded and carried, Messrs. Noah Dietrich, H. E. Montrose and Harry Rogers not voting, it was

RESOLVED, that receipt of the revised option agreements dated April 20, 1956, submitted by Hughes Tool Company be, and the same hereby are, acknowledged and their form approved; and that the officers of the Corporation hereby are authorized to continue assisting Hughes Tool Company in the administration of Lockheed Contracts LD-147 and 138, in the acquisition of spare engines and other spare parts and in the negotiation of specification changes

DX 289, page 11
(TWA Board Minutes-April 26, 1956)

RESOLVED, that the proper officers of the Corporation be, and they hereby are, authorized, subject to prior approval of the Civil Aeronautics Board, to exercise such options at such time as they deem appropriate, and to take such other steps, including the execution of the conditional sales contracts and such other agreements or documents as may be necessary or desirable in their discretion to consummate the acquisition and financing of the airplanes, spare engines and spare parts covered by such options.

LEASE OF HANGAR SPACE IN NATIONAL AIRLINES, INC. HANGAR - NEW YORK INTERNATIONAL AIRPORT

Upon motion duly made, seconded and carried, it was

RESOLVED, that the proper officers of this Corporation be, and they hereby are, authorized in the name and on behalf of this Corporation to execute and enter into an agreement with National Airlines, Inc., covering the leasing by this Corporation of one bay and 7,548 sq. ft. of shop space in National Airlines' hangar at New York International Airport and of related ramp space for the period May 1, 1956 to December 31, 1957, at an annual rental of $60,000 and upon such further terms and conditions as said officers may deem to be in the best interests of this Corporation.

ADJOURNMENT

There being no further business to come before the meeting, it was adjourned at 11:55 a. m.

George H. Clay
Secretary

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DX290
(Toolco-TWA Conditional Sale Contract-
L-1049Gs, 6/6/56)

CONDITIONAL SALE CONTRACT

dated as of June 1, 1956,

between

HUGHES TOOL COMPANY
as Seller

and

TRANS WORLD AIRLINES, INC.

AX-1980

DX290, page 1
(Toolco-TWA Conditional Sale Contract-
L-1049Gs, 6/6/56)

CONDITIONAL SALE CONTRACT

Contract of Conditional Sale made as of the 6th day of June, 1956, between HUGHES TOOL COMPANY, a Delaware corporation (hereinafter sometimes called the "Seller"), with its principal place of business at Houston, Texas, and TRANS WORLD AIRLINES, INC., a Delaware corporation (hereinafter sometimes called the "Buyer"), with its principal place of business at Kansas City, Missouri,

THE INTEREST OF THE SELLER IN THE AIRCRAFT AND EQUIPMENT COVERED HEREBY IS THAT OF A CONDITIONAL SELLER AND THE INTEREST OF THE BUYER THEREIN IS THAT OF A CONDITIONAL BUYER.

W I T N E S S E T H :

WHEREAS, Hughes has contracted to purchase from Lockheed Aircraft Corporation (hereinafter called "Lockheed") the eight (8) Model L-1049G Lockheed Constellation Airplanes identified as follows:

C.A.A. Registration No.	Mfr. Serial No.
N7121C	4648
N7122C	4649
N7123C	4650
N7124C	4651
N7125C	4652
N7126C	4654
N7127C	4656
N7128C	4658

together with the airplane engines (each of which is of 750 or more rated take-off horsepower and will be later identified by manufacturer's serial number in a supplement to this Conditional Sale Contract) installed in each thereof on the date of delivery of such airplanes to Hughes and together with the propeller assemblies and all other equipment and accessories attached to such airplanes and engines on

called "the Airplanes");

WHEREAS, Hughes has also contracted to purchase from various vendors extra airplane engines (each of which is of 750 or more rated take-off horsepower and will be later identified by manufacturer's serial number in a supplement to this Conditional Sale Contract) and propeller assemblies and airframe spare parts, spare parts for airplane engines and for propeller assemblies, and other accessories, flight equipment and parts, for use on or in connection with the operation or maintenance of the Airplanes at, in or near repair or overhaul bases, airports, airfields, landing strips, hangars, warehouses, storehouses and buildings owned, operated, leased or used by Buyer at any one or more of the locations shown on Exhibit I annexed hereto (all of which engines, propeller assemblies, parts, accessories and equipment are hereinafter referred to as "Spares"); and

WHEREAS, Hughes desires to sell and TWA desires to buy the Airplanes and Spares pursuant to the conditional sale arrangements set forth herein.

NOW, THEREFORE, in consideration of the mutual covenants herein contained, the parties hereto agree as follows:

1. Seller agrees to sell to Buyer and Buyer agrees to purchase the Airplanes and Spares upon the terms and conditions hereinafter set forth.

2. (a) Simultaneously upon conveyance of title to each Airplane to Seller, such Airplane shall forthwith be delivered to Buyer and Buyer shall accept such delivery at Lockheed Air Terminal, Burbank, California, or at such other place to which the Airplane has been delivered to Seller.

them to be delivered, to Buyer at Kansas City, Missouri, or such other place as may be designated by Buyer, such deliveries to be made upon delivery of the first Airplane to Buyer, or as soon thereafter as practicable, and with respect to Spares not then delivered to Seller, upon delivery of such Spares to Seller, or as soon thereafter as practicable.

3. (a) The purchase price of each Airplane for purposes of this Contract shall be the aggregate of

(1) The amounts Seller shall have paid Lockheed for such Airplane at the time of its delivery to Buyer hereunder;

(2) All additional direct costs which have been paid or incurred by Seller at the time of the delivery of such Airplane to Buyer and are attributable to such Airplane, including, but not limited to, costs of "customer furnished equipment". To the extent that any such costs are not specifically attributable to a particular Airplane they shall be allocated equally among the Airplanes at the time not delivered to Buyer;

(3) An amount equal to interest at the rate of three per cent (3%) per annum on the average amount of the outstanding advance payments made by Seller applicable to such Airplane. The average amount of the outstanding advance payments applicable to each Airplane shall be computed by considering the payments made or costs incurred as set forth in subparagraphs (1) and (2) of this paragraph 3(a) as outstanding from the respective dates such payments were made or such costs were incurred by Seller and until the delivery of such Airplane to Buyer under this Contract.

of this Contract shall be the aggregate of

(1) the total payments made therefor by Seller to the vendors of such Spares at the time of the delivery of the first Airplane to Buyer hereunder;

(2) all additional direct costs which have been paid or incurred by Seller at the time of the delivery of the first Airplane to Buyer and are attributable to such Spares or to the purchase thereof;

(3) an amount equal to interest at the rate of three per cent (3%) per annum on the average amount of the outstanding advance payments made by Seller applicable to such Spares. The average amount of the outstanding advance payments applicable to Spares shall be computed by considering the payments made or costs incurred as set forth in subparagraphs (1) and (2) of this paragraph 3(b) as outstanding from the respective dates such payments were made or such costs were incurred by Seller and until the delivery of the first Airplane to Buyer under this contract;

(4) any additional amount which, at the time of the delivery of the first Airplane to Buyer hereunder, Seller is committed to pay to suppliers of Spares.

(c) The purchase price of each Airplane and the purchase price of Spares shall each be paid by Buyer to Seller in sixty (60) equal consecutive monthly installments, together with interest on the unpaid balance at the rate of 3-3/4 per cent per annum. The first of such payments relating to each Airplane shall be made at the time of delivery of such Airplane, and the first of such payments relating to

Spares shall be made at the time Airplane. As to each Airplane, and as to Spares, the second and succeeding payments shall be made monthly on the first day of the months succeeding the month in which the first payment is required to be paid, until the whole of each such purchase price shall have been paid. All payments shall be made to the Seller at the Hughes Tool Company, Houston, Texas.

(d) In the event that the purchase price of the Airplanes differs from the amount computed at the time of the delivery thereof to Buyer hereunder or in the event that the aggregate net amount which Seller is required to pay for the Spares in a final accounting with the suppliers thereof differs from the amount used in computing the purchase price thereof pursuant to subparagraph 3(b), separate and independent adjustments will be made by payment from one party to the other of such difference. Similarly, Seller will reimburse Buyer for any interest paid by Buyer with respect to any portion of the purchase price of the Spares which is unpaid at the time of delivery of the first Airplane hereunder, to the extent and for the period that Seller has not earned such interest by having made payments to the suppliers.

4. Title to the Airplanes and Spares shall not pass to Buyer by delivery, but shall remain in Seller until such time as the purchase price shall have been paid in full and Buyer shall have paid to Seller all other sums then due and payable to Seller hereunder, whereupon absolute title to the Airplanes and Spares shall pass to Buyer.

5. Upon the happening of any one or more of the following events, namely:

(a) [illegible] manner herein specified, of any monthly installment of the purchase price of the Airplanes or Spares and such default shall continue unremedied for five (5) days after written notice thereof shall have been delivered by Seller to Buyer; or

(b) default shall be made by the Buyer in the observance or performance by the Buyer of any other covenant or agreement contained herein, and such default shall continue unremedied for thirty (30) days after written notice thereof shall have been delivered by Seller to Buyer; or

(c) the Buyer shall become insolvent, or shall file a voluntary petition in bankruptcy, or shall file a voluntary petition or answer seeking or consenting to reorganization pursuant to or purporting to be pursuant to the Acts of Congress relating to bankruptcy or any other statute, state or Federal, for the relief of debtors, or shall be adjudicated a bankrupt, or shall make an assignment for the benefit of creditors, or shall consent to the appointment of a receiver or trustee of or for it or a substantial part of its property; or

(d) an order shall be entered pursuant to or purporting to be pursuant to the Acts of Congress relating to bankruptcy or any other statute, state or Federal, for the relief of debtors approving a petition seeking a reorganization of, or if an order shall be entered appointing a receiver or trustee of, or for any substantial part of the property of, or if a warrant of attachment shall be issued against any substantial part of the property of, the Buyer, and any such order is not dismissed or stayed within sixty (60) days from its entry or such attachment is not dismissed

(e) the Bonds outstanding under that certain Indenture, dated as of December 1, 1954, between Buyer and Irving Trust Company, as Trustee, as said Indenture may have heretofore been or may hereafter be amended, shall be declared and become due and payable, prior to the date of maturity of such Bonds as set forth therein, upon the occurrence of any of the "events of default" described in said Indenture, as amended (and the Buyer hereby agrees to notify the Seller of any declaration of default forthwith upon the receipt thereof); or

(f) the Notes at the time issued and outstanding under that certain Chattel Mortgage, dated as of December 20, 1954, between Buyer and Irving Trust Company, as Trustee, as said Chattel Mortgage may have heretofore been or may hereafter be amended, shall be declared and become due and payable, prior to the date of maturity of such Notes as set forth therein, upon the occurrence of any of the "events of default" described in said Chattel Mortgage, as amended (and the Buyer hereby agrees to notify the Seller of any declaration of default forthwith upon the receipt thereof);

then Seller may at once (or at any later time) proceed to take possession of the Airplanes and Spares in any manner provided by law, or Seller may at its option, and Seller is hereby empowered to, with or without legal process, and with or without demand, enter upon the premises where the Airplanes or Spares may be and take possession thereof and remove the same. Seller may resell the Airplanes and Spares, so retaken, at public or private sale, with or without having such Airplanes and Spares at the place of sale, and upon such terms and in such manner

to so sell the Airplanes and Spares shall be given by Seller to Buyer at least ten (10) days prior to the time of such sale. Seller may bid and purchase at any such public sale. From the proceeds of any such sale, Seller shall deduct all expenses for retaking, repairing, storing and selling the Airplanes and Spares, including any reasonable attorneys' fees incurred. The balance of such proceeds shall be applied to the payment of all sums owing to Seller under this agreement and any surplus of such proceeds remaining shall be paid to Buyer or to whoever may be lawfully entitled to receive the same. Buyer shall be under no obligation to Seller for any deficiency resulting from any such sale or to make any payments on account of the purchase price of any Airplane or Spares falling due after Seller has taken possession of such Airplane or Spares pursuant to this provision.

6. From and after delivery of the Airplanes and Spares to Buyer and until absolute title thereto is vested in Buyer or its nominee, or Seller repossesses the Airplanes,

(a) Buyer shall procure and maintain at its expense public liability, passenger liability and property damage insurance in such amounts and with such companies as shall be satisfactory to Seller, covering Seller's liability as holder of legal title to the Airplanes and Spares. The policies evidencing such insurance shall contain such provisions as shall be satisfactory to Seller and shall name Seller as assured.

(b) Buyer shall at its expense maintain all risk aircraft hull insurance in respect of the Airplanes in favor of Buyer and Seller, as their interests may appear, in such amounts and with such companies as shall be satis-

[illegible] damaged to such [illegible] practical, such insurance shall be paid to the Seller to the extent of the unpaid balance of the purchase price of such Airplane together with any accrued and unpaid interest thereon, plus all other amounts then due to Seller hereunder. Upon such payment to the Seller of insurance to the extent of the unpaid balance of the purchase price of any Airplane, absolute title to the Airplane so damaged or to any parts of an Airplane so destroyed shall vest in Buyer and Seller shall deliver to Buyer such proper documents of title with respect thereto as Buyer may reasonably require. Buyer shall be under no obligation to make any payments on account of the purchase price of such Airplane falling due after such loss, destruction or damage. Any insurance proceeds in excess of the amount payable to the Seller, and any insurance proceeds payable as a result of damage not rendering repair impractical, shall be payable to Buyer or its designee.

7. Buyer may at any time pay to Seller the unpaid balance of the purchase price of the Airplanes and Spares or any part thereof, without premium or penalty.

8. Upon the payment to Seller of the balance of the purchase price of the Airplanes and Spares together with all other amounts owing to Seller hereunder, Seller shall deliver to Buyer at such place in the United States as Buyer may designate,

(a) a bill of sale duly vesting in Buyer the title to the Airplanes and Spares free and clear of all liens, claims, charges and encumbrances attaching subsequent to the delivery of the Airplanes and Spares to Seller and not arising

and Spares by Buyer, and

(b) such other appropriate documents of title with respect thereto as Buyer may reasonably require.

9. In the event any sales tax or use tax is hereafter imposed upon or paid by Seller by reason of the sale or use of the Airplanes and Spares or the purchase thereof by Seller, then in addition to the sales price provided for in paragraph 3, Buyer shall pay to Seller the amount thereof, upon demand.

10. Buyer shall furnish Seller forthwith and from time to time thereafter at reasonable intervals, all such information concerning Buyer's financial condition, including balance sheets and forecasts of earnings, as is customarily furnished to a commercial bank holding or considering the acceptance of unsecured notes of a borrower.

11. The Buyer agrees that it will pay and discharge all taxes, assessments, governmental charges and all charges for keep, repairs, storage, maintenance or accessories, which if unpaid might become a lien, charge or encumbrance upon or against any of the Airplanes or Spares; and upon the failure of the Buyer so to do the Seller may make any such payment; provided, however, that nothing herein contained shall require the Buyer to pay such tax, assessment or charge so long as the Buyer shall in good faith contest the validity thereof and shall furnish the Seller such bond or indemnity as the Seller shall require, unless, in the judgment of the Seller, forfeiture is likely to result from any such failure to pay. Any sum or sums so paid by the Seller, together with interest thereon at the highest lawful contract rate, shall be and become a part of the sum which

Buyer to the Seller.

The Buyer will, upon written request from the Seller,

(a) reimburse the Seller for all filing or recording fees incurred in connection with filing or recording or refiling or re-recording this Contract and all supplements and additions hereto, if any;

(b) execute and deliver to the Seller all such further documents and instruments and do such further acts as may be necessary to perfect the rights of the Seller herein contemplated; and

(c) furnish to the Seller at reasonable intervals reports and certificates setting forth all the information necessary to inform the Seller as to the continued existence, location and condition of the Airplanes and Spares. The Seller shall also have the right to inspect the Airplanes and Spares at all times when the same are not in use and when such inspection can be had without undue inconvenience or expense to the Buyer.

12. Buyer agrees to maintain the Airplanes and Spares in good repair and working condition at its own expense, except any airplane lost, destroyed or so damaged that insurance with respect thereto is payable to the Seller pursuant to paragraph 6 hereof. Subject to the proper performance of such covenant, the Buyer may make repairs and replacements to the Airplanes and Spares and may substitute for engines, propellers and any other equipment installed in or attached to the Airplanes or Spares, engines, propellers or other equipment of substantially the same

kind and value; provided, however, that the removal of such engines, propellers, or equipment, and no replacement thereof, shall divest Seller of its superior title thereto, or render any such removed or replaced equipment subject to the lien or claim of any person other than Seller, UNLESS and UNTIL such equipment is replaced by equipment of substantially the same kind and value, the title to which, upon such equipment being installed in or attached to the Airplanes or Spares, may validly vest in Seller free and clear of the lien or claim of any other person, subject to the provisions of paragraph 14 hereof. In the case of any such permitted substitution, title to the substituted equipment shall immediately vest in Seller and become subject to the provisions of this Conditional Sale Contract and remain so vested and so subject unless and until substituted for in the manner hereinabove permitted; and title to the equipment substituted for shall vest in Buyer.

13. Until title to the Airplanes and Spares shall have passed to the Buyer hereunder, the Buyer shall have no right, power or authority to sell, transfer, assign, mortgage or encumber or in any other manner whatsoever dispose of the Airplanes and Spares or any part thereof (except as provided in paragraph 12 hereof) or any interest therein, and the Buyer hereby agrees that, except as permitted by paragraph 12 hereof, the Buyer will not (voluntarily or involuntarily) sell, transfer, mortgage, encumber or in any other manner whatsoever dispose of the Airplanes and Spares or any part thereof or any interest therein. Buyer agrees, except as provided herein, that the Airplanes and Spares will be used exclusively for its commercial air transport operations and related activities and that it

possessed by others. Buyer may use Airplanes and Spares by other airlines with which Buyer enters into interchange agreements provided that any such use by other airlines shall for the purposes of this agreement be considered to be use by the Buyer.

14. To the extent, if any, that there is a conflict between any of the provisions of this agreement and any of the provisions of the Indenture of Mortgage dated as of December 1, 1954 between the Buyer and Irving Trust Company, as Trustee, or of the Chattel Mortgage dated as of December 20, 1954 between the Buyer and Irving Trust Company, as Trustee, the provisions of said Indenture and said Chattel Mortgage shall prevail and the provisions of this agreement shall be deemed amended to the extent necessary to avoid such conflict. Seller recognizes the liens created by (a) Granting Clause VI of said Indenture and (b) Granting Clause III of said Chattel Mortgage as prior liens on the aircraft engines and on the propellers, appliances and spare parts relating to the Airplanes or Spares when and so long as they shall be installed in, attached to or incorporated in any of the aircraft or aircraft engines at any time subject to the lien of said Indenture or of said Chattel Mortgage, as the case may be.

Seller agrees that so long as all the Bonds issued under said Indenture at the time outstanding shall be held by the original purchaser thereof, (a) Seller will not repossess the Airplanes or Spares, in the event of a default by Buyer under this agreement, without affording such original purchaser reasonable notice of such default and a reasonable opportunity to remedy the same and (b) such

purchase at any time all the by paying to Seller the then remaining balance of the purchase price hereunder plus accrued interest.

Seller also agrees that in the event of a default by Buyer hereunder, the rights and remedies of Seller shall be limited to repossession of the Airplanes and Spares.

15. Before delivery of each Airplane to Buyer hereunder, Buyer will cause to be fastened thereon in a location reasonably adjacent to, and not less prominent than that of, the airworthiness certificate for such Airplane, a name plate no larger than four inches by seven inches (4" x 7") bearing the following legend:

"Hughes Tool Company holds legal title to this Airplane as Conditional Seller."

Buyer shall maintain such name plate in such location or in one of at least equal prominence and visibility at all times. Buyer may affix to the Airplanes Buyer's name, insignia or other legends customarily displayed by Buyer on its airplanes.

16. Buyer shall indemnify and hold harmless Seller, its agents and its employees from any and all liability for losses, expenses, damages, demands and claims in connection with or arising out of any death of, or injury or alleged injury or damage to, persons or property sustained, or alleged to have been sustained, in connection with or arising or alleged to have arisen out of Buyer's possession, use or operation of the Airplanes or Spares and Buyer agrees to handle any claim and defend any suit or action brought against Seller, its agents or its employees, or any of them, based on any such death, injury or damage, or alleged injury or damage, and to pay all damages, costs and expenses,

including attorneys' fees, resulting therefrom.

Buyer's liability to Seller under this paragraph 16 is conditioned upon Seller's promptly giving notice to Buyer of institution of such suit or action or of receipt of such claim or demand. Buyer shall have the option at any time to conduct negotiations with the party or parties making any such claim or demand, and may intervene in any such suit or action. Whether or not Buyer intervenes in any such suit or action, it shall be entitled to assume, conduct or control the defense thereof, and Seller shall not settle or discharge any such claim, demand, suit, action or judgment without prior notice to and the consent of Buyer.

IN WITNESS WHEREOF, the parties hereto have executed and delivered this agreement as of the day and year first above written.

HUGHES TOOL COMPANY

By Raymond Vreeland
Vice President

Attest:

Assistant Secretary

TRANS WORLD AIRLINES, INC.

By T. L. Wilson
Vice President

Attest:

Assistant Secretary

INDEX

Volume AX-I

ITEM	PAGE
TWA Ex. 2 (Statement of Robert W. Rummel) ..	AX-1
TWA Ex. R-3 (Toolco-Convair Amended Agreement—Model 22, 6/4/56)	AX-63a
TWA Ex. R-5 (TWA-Toolco Purchase Agreement—May 9, 1960)	AX-64
TWA Ex. R-8(80) (FAA Registration Documents—B707-331, No. N771TW)	AX-73a
TWA Ex. R-8(81) (FAA Registration Documents—B707-331, No. N772TW)	AX-73k
TWA Ex. 3 (Affidavit of J. B. Connelly)	AX-74
TWA Ex. 4(b) (C. & C. Report—Comparative Profit Study)	AX-80
TWA Ex. 4(c)(1) (C. & C. Report—Financial Results from Reconstructed Jet Fleet)	AX-91
TWA Ex. 4(c)(4) (Exhibits B-J to C. & C. Report—Financial Results from Reconstructed Jet Fleet)	AX-167

Volume AX-II

TWA Ex. 5(a) (Drexel Harriman Ripley, Inc. Report—Parts I & II)	AX-336
TWA Ex. 5(b) (Exhibits to Drexel Harriman Ripley, Inc. Report)	AX-430

ITEM	PAGE
TWA Ex. 7(b)(1) (Price Waterhouse Study—Volume One)	AX-452
TWA Ex. 7(b)(2) (Price Waterhouse Study—Volume Two)	AX-480
Volume AX-III	
TWA Ex. 10 (Letter—Boeing to TWA re 707 Negotiations—12/29/54)	AX-643a
TWA Ex. 12 (Toolco-Convair CV-990 Purchase Agreement—11/10/60)	AX-644
TWA Ex. 13 (Holliday Call Sheet—Feb. 20-27, 1961)	AX-655
TWA Ex. 14 (CV-990 Purchase Agreement—Amendment of 2/22/61)	AX-660
TWA Ex. 22 (Rummel Call Sheets)	AX-665
TWA Ex. 23 (Letter Agreement—Sale of Six Boeings to Pan American)	AX-729
TWA Ex. 39 (Affidavit of Joseph P. Ripley)	AX-732
TWA Ex. 42 (C. & C. Report—Revision of Pages 63, 64, 71 & 72)	AX-735
TWA Ex. 43 (C. & C. Report—Revision of Page 51)	AX-740
TWA Ex. 46 (Jet and Turboprop Aircraft of TWA and Principal Competitors—1958-66)	AX-742
TWA Ex. 47 (Boeing Aircraft Employed on Routes Formerly Served by B-720Bs)	AX-743

ITEM	PAGE
TWA Ex. 50 (Price Waterhouse Report—Summary of Application of Assumptions)	AX-744
TWA Ex. 72 (TWA Annual Report—1939)	AX-745
TWA Ex. 73 (TWA Annual Report—1940)	AX-752
TWA Ex. 74 (TWA Annual Report—1941)	AX-758
TWA Ex. 75 (TWA Annual Report—1942)	AX-760
TWA Ex. 76 (TWA Annual Report—1943)	AX-763
TWA Ex. 77 (TWA Annual Report—1944)	AX-766
TWA Ex. 78 (TWA Annual Report—1945)	AX-769
TWA Ex. 79 (TWA Annual Report—1946)	AX-773
TWA Ex. 80 (TWA Annual Report—1947)	AX-779
TWA Ex. 81 (TWA Annual Report—1948)	AX-783
TWA Ex. 82 (TWA Annual Report—1949)	AX-788
TWA Ex. 83 (TWA Annual Report—1950)	AX-792
TWA Ex. 84 (TWA Annual Report—1951)	AX-797
TWA Ex. 86 (TWA Annual Report—1953)	AX-800
TWA Ex. 87 (TWA Annual Report—1954)	AX-805
TWA Ex. 88 (TWA Annual Report—1955)	AX-814
TWA Ex. 89 (TWA Annual Report—1956)	AX-819
TWA Ex. 90 (TWA Annual Report—1957)	AX-822
TWA Ex. 91 (TWA Annual Report—1958)	AX-842
TWA Ex. 92 (TWA Annual Report—1959)	AX-854
TWA Ex. 93 (TWA Annual Report—1960)	AX-856

ITEM	PAGE
TWA Ex. 94 (TWA Annual Report—1961)	AX-862
TWA Ex. 96 (TWA Annual Report—1963)	AX-866
TWA Ex. 128 (Pan American Annual Report—1959)	AX-868
TWA Ex. 132 (Pan American Annual Report—1963)	AX-869
TWA Ex. 155 (AAL Annual Report—1958)	AX-870
TWA Ex. 158 (AAL Annual Report—1961)	AX-871
TWA Ex. 159 (AAL Annual Report—1962)	AX-873
TWA Ex. 184 (UAL Annual Report—1959)	AX-874
TWA Ex. 186 (UAL Annual Report—1961)	AX-875
TWA Ex. 187 (UAL Annual Report—1962)	AX-876
TWA Ex. 192 (TWA Prospectus, 5/25/61 & Supplement, 6/20/61)	AX-877
TWA Ex. 194 (TWA Prospectus—6/17/57)	AX-883
TWA Ex. 223 (Pan American Prospectus—7/3/45—Supplement—7/24/45)	AX-889
TWA Ex. 249 (American Airlines Prospectus—6/11/46—Supplement—6/24/46)	AX-891
TWA Ex. 257 (TWA-Toolco Lease Agreements—Boeing Jets)	AX-893
TWA Ex. 264 (Toolco-Lockheed Purchase Agreement—L-1449A—12/23/54)	AX-901
TWA Ex. 266 (Toolco-Lockheed Purchase Agreement—L-1049G—9/26/55)	AX-908

Item	Page
TWA Ex. 267A (Letter, TWA to Toolco—1957 Common Stock Offering)	AX-919
TWA Ex. 267B (Letter, TWA to N.Y. Trust Co.—1957 Common Stock Offering)	AX-921
TWA Ex. 271 (Letter, Toolco to SEC—1957 Common Stock Offering)	AX-923
TWA Ex. 275 (TWA Board Minutes—April 26, 1945)	AX-925
TWA Ex. 276 (TWA Finance Committee Minutes—September 12, 1945)	AX-928
TWA Ex. 277 (Page from Banking Quotation Record)	AX-930
TWA Ex. 278 (TWA Board Minutes—November 8, 1946)	AX-931
TWA Ex. 279 (Special TWA Stockholders Meeting—December 23, 1946—Judges' Report)	AX-935
TWA Ex. 280A (Minutes—Adjourned Special TWA Stockholders Meeting—December 28, 1946)	AX-936
TWA Ex. 280B (Adjourned Special TWA Stockholders Meeting—December 28, 1946—Judges' Report)	AX-940
TWA Ex. 281A (Minutes—Adjourned Special TWA Stockholders Meeting—December 31, 1946)	AX-941
TWA Ex. 281B (Adjourned Special TWA Stockholders Meeting—December 31, 1946—Judges' Report)	AX-944

ITEM	PAGE
TWA Ex. 282 (Minutes & Judges' Report—Adjourned Special TWA Stockholders Meeting —January 6, 1947)	AX-945
TWA Ex. 283 (TWA Board Minutes—December 18, 1946)	AX-950
TWA Ex. 284 (TWA Board Minutes—December 27, 1946)	AX-956
TWA Ex. 285 (TWA Board Minutes—December 28, 1946)	AX-962
TWA Ex. 287 (TWA Board Minutes—January 9, 1947)	AX-966
TWA Ex. 288 (Minutes—Adjourned Special TWA Stockholders Meeting—January 13, 1947)	AX-974
TWA Ex. 290 (TWA Board Minutes—June 15, 1948)	AX-980
TWA Ex. 292 (TWA Proxy Statement—July 15, 1948)	AX-991
TWA Ex. 293 (TWA Prospectus—2/18/49 & Amendments—3/8/49)	AX-993
TWA Ex. 313 (Debt Outstanding & Available to TWA & Competitors—1961-63)	AX-1051
TWA Ex. 314 (Weighted Average Interest—TWA & Competitors—1960-63)	AX-1060
TWA Ex. 319 (Least Squares Analysis—S.H.E. Avg. Stage Length—B-331s)	AX-1065

ITEM	PAGE
TWA Ex. 320 (Least Squares Analysis—S.H.E. Avg. Stage Length—CV-880s)	AX-1066
TWA Ex. 321 (Least Squares Analysis—S.H.E. Avg. Stage Length—B-131s)	AX-1067
TWA Ex. 322 (Least Squares Analysis—S.H.E. Avg. Stage Length—B-131Bs)	AX-1068
TWA Ex. 328 (S.H.E.—Passengers Added/ Deleted—Reconstructed TWA)	AX-1069
TWA Ex. 331 (TWA Historical Load Factors— CV-880s—1962-1963)	AX-1071
TWA Ex. 336 (Comparison TWA Int'l vs. PAA-Atl.—1959)	AX-1072
TWA Ex. 345A (Price Waterhouse Comparison —C. & C. and S.H.E. (Revised))	AX-1073
TWA Ex. 351 (1965 CAB Handbook of Airline Statistics)	AX-1107
TWA Ex. 355 (Comparative Profit Study— TWA with AAL & UAL)	AX-1108
TWA Ex. 356 (Comparative Profit Study— TWA with All Other Domestic Trunks)	AX-1110
TWA Ex. 399 (Comparison, TWA Actual Jet Load Factors vs. S.H.E. Marginal Passenger Mile Factors)	AX-1112
TWA Ex. 401 (TWA B-131 Load Factors— April-July 1959)	AX-1113
TWA Ex. 420 (Price Waterhouse Comparison— C. & C. (Revised) and S.H.E.)	AX-1114

ITEM	PAGE
TWA Ex. 423 (Late Evening Flights—TWA 1961-1963)	AX-1129
TWA Ex. 424 (Cargo v. Passenger Revenue—TWA Late Evening Flights)	AX-1133
TWA Ex. 426 (Comparison of Selected A/C Numbers from S.H.E. Appendix A)	AX-1134
TWA Ex. 431 (Profitability of TWA A/C by Month—Computer Print-out)	AX-1135
TWA Ex. 432 (Profitability of TWA A/C by Month—Chart)	AX-1145
TWA Ex. 435 (Regression Analysis—Random Numbers)	AX-1146
TWA Ex. 436A (Regression Analysis—Random Numbers)	AX-1154
TWA Ex. 436B (Regression Analysis—Random Numbers)	AX-1157
TWA Ex. 436C (Regression Analysis—Random Numbers)	AX-1160
TWA Ex. 440 (Graph Illustrating Testimony of Prof. Hare)	AX-1163
TWA Ex. 441 (Regression Experiment—3/23/68)	AX-1164
TWA Ex. 444 (C. & C. Tabulation—Additional TWA Domestic Seat-Miles)	AX-1177

Volume AX-IV

ITEM	PAGE
DX4 (Toolco Order—30 P.&W. JT3C-4 Engines, 2/14/56)	AX-1178
DX5 (Letter—Toolco to P.&W. re Jet Engine Orders, 2/14/56)	AX-1181
DX6 (Toolco Order—90 Additional P.&W. JT4A-3 Engines, 2/15/56)	AX-1183
DX7 (Amendment—Toolco Order for 300 P.&W. Jet Engines, 9/7/56)	AX-1184
DX8 (Letter—P.&W. to Rummel re 300 Jet Engines, 9/7/56)	AX-1185
DX10 (Letter—Rummel to Collings re Boeing 707, 1/12/55)	AX-1186
DX11 (Notes of Convair Negotiations—March 24, 1955)	AX-1187
DX15 (Draft C.&C. Report—TWA Financial Forecast 1959-61)	AX-1192
DX19 (Page from *Aviation Week*, Jan. 10, 1955)	AX-1208
DX22 (*American Aviation*, June 20, 1955, pages 21-23)	AX-1209
DX26 (*American Aviation*, Sept. 12, 1955, pp. 84-85)	AX-1212
DX27 (*American Aviation*, Oct. 10, 1955, p. 68)	AX-1214
DX28 (Pages from *American Aviation*, Oct. 24, 1955)	AX-1215

ITEM	PAGE
DX29 (*Aviation Week*, Oct. 17, 1955, p. 7)	AX-1218
DX31 (*American Aviation*, Nov. 7, 1955, pp. 23-25, 27-28)	AX-1219
DX40 (TWA Board Minutes—June 21, 1961)	AX-1224
DX43 (Excerpts from Deposition of Robert W. Rummel)	AX-1229
DX44 (Letter of Damon, Dec. 6, 1955)	AX-1369
DX45 (Letter—Leslie to Dietrich, Dec. 19, 1955)	AX-1378
DX46 (Letter—Dietrich to Ayers, Dec. 21, 1955)	AX-1382
DX47 (Boeing-Toolco Purchase Agreement—8 B-131s, 1/10/56)	AX-1385
DX48 (Teletype—Boeing to Toolco re B707-131s, 11/11/56)	AX-1390
DX51 (Boeing Offer of B707-320s to Toolco, 1/6/56)	AX-1391
DX53 (Transcript of Telephone Conversation—Rummel & Connelly, 12/20/57)	AX-1393
DX54 (TWA Board Minutes—June 26, 1959)	AX-1402
DX57 (The Huntington Report—1960)	AX-1410
DX62 (TWA Fleet Requirements 1961-70, dated 3/1/61)	AX-1420
DX63 (TWA Financial Forecast 1959-61, dated 5/15/59)	AX-1433
DX64 (Letter to Thomas, dated 5/6/59)	AX-1438

ITEM	PAGE
DX65 (TWA Staff Engineering Report re Jets & Turboprops—4/19/56)	AX-1440
DX66 (Toolco-Boeing Contracts—B707-131s, 3/2/56)	AX-1445
DX67 (Toolco-Boeing Contracts—B707-331s, 3/19/56)	AX-1479
DX68 (Toolco-Convair Contracts—CV-880s, 9/10/56)	AX-1505
DX71 (Rummel Memo re TWA Equipment Program, 3/15/61)	AX-1536
DX72 (Telegram—Bew to Rummel—2/27/61)	AX-1538
DX73 (Letter—Leslie to Holliday—3/20/61)	AX-1539
DX74 (Letter—Leslie to Holliday—4/3/61)	AX-1540
DX77 (Letters—Toolco to TWA re Financing Additional Jets, 6/9-10/61)	AX-1541
DX78 (Letter—TWA to Holliday re Financing Proposals, 6/16/61)	AX-1553
DX79 (Pan American-Boeing Purchase Agreement—B707-120s, 10/13/55)	AX-1558
DX81 (Pan American-Boeing Purchase Agreement—B707-321s, 12/19/55)	AX-1564
DX85 (Boeing-AAL Purchase Agreement—B707-123s, 3/1/56)	AX-1576
DX95 (Allen Letter Announcing Boeing Jet, Nov. 19, 1954)	AX-1584
DX96 (Boeing Offer to Sell Pan American 25 B-120s, 6/23/55)	AX-1588

Item	Page
DX97 (Boeing Offer to Sell American 15 B-120s, 6/24/55)	AX-1591
DX98 (Boeing Offer to Sell United 15 B-120s, 6/24/55)	AX-1594
DX101 (Boeing 707 Delivery Positions)	AX-1597
Volume AX-V	
DX102 (Boeing Memorandum re 707 Over-Ocean Configuration, 11/2/55)	AX-1601
DX103 (Boeing Memorandum re TWA Delivery Positions, 12/23/55)	AX-1606
DX105 (Boeing Memorandum re Negotiations with TWA, 7/24/56)	AX-1608
DX106 (Letter—Rummel to Cook re Boeing Deliveries, 1/28/58)	AX-1611
DX107 (Letter—Rummel to Cook re Boeing Deliveries, 3/17/58)	AX-1615
DX108 (Letter—Price to Allen re Boeing Deliveries, 3/30/58)	AX-1618
DX109 (Letter—Toolco to Allen re Boeing Deliveries, 5/8/58)	AX-1621
DX116 (Rourke Memo to Rummel re CV-880 Deliveries, 1/15/60)	AX-1623
DX120 (TWA Memorandum re CV-880 Deliveries, 10/2/59)	AX-1624
DX122 (Bew Memorandum to Cannady re CV-880 Deliveries, 12/18/59)	AX-1625

ITEM	PAGE
DX124 (Parmet Memorandum to Rourke re CV-880 Deliveries, 1/13/60)	AX-1627
DX125 (TWA Memorandum re CV-880 Deliveries, 1/22/60)	AX-1629
DX127 (Rummel Memorandum to Rourke re Integration of CV-880s, 2/8/60)	AX-1630
DX128 (Letter—Rourke to Digges re Specification Modifications, 4/7/60)	AX-1638
DX130 (Bew Wire to Rourke re Convair Delays, 5/27/60)	AX-1640
DX135 (Letter—Convair to Bew re CV-880 Delivery, 1/6/61)	AX-1641
DX137 (Telegram—Bew to Rummel re Convair Delays, 2/16/61)	AX-1643
DX139 (Letter—Convair to Bew re Convair Delays, 3/16/61)	AX-1644
DX142 (Letter—Convair to Rourke re CV-880 Deliveries, 7/11/61)	AX-1647
DX143 (Letter—Rourke to Convair re CV-880 Deliveries, 8/2/61)	AX-1650
DX146 (Letter—Convair to Toolco re Model 30 Delivery Positions, 5/6/60)	AX-1652
DX148 (Toolco—General Dynamics Letter Agreement re 6 Model 30s, 7/14/60)	AX-1654
DX152 (Toolco—General Dynamics Letter Agreement re Additional Model 30s, 9/6/60)	AX-1655

ITEM		PAGE
DX156	(Telegram—Beall to Allen, et al. re PAA Negotiations, 9/28/55)	AX-1657
DX168	(Boeing Memorandum re Conversations with Howard R. Hughes, 9/23/55)	AX-1658
DX169	(Boeing Memorandum re Conversation with Howard R. Hughes, 10/31/55)	AX-1660
DX170	(Telegram—Boeing to Toolco re B707-331s, 7/21/59)	AX-1661
DX218	(C.&C. Letter to Leslie re TWA Financial Forecast, March 13, 1959)	AX-1664
DX219	(TWA Financial Forecast 1958-1962, dated 12/1/58)	AX-1666
DX237	(*Aviation Week & Space Technology*, 11/13/61, pages 42-43)	AX-1671
DX239	(*Airlift*, May 1962, p. 46)	AX-1673
DX254	(TWA Board Meeting, Aug. 16, 1961—Report of System General Manager)	AX-1674
DX255	(Statement of CAB Chairman Boyd, Jan. 29, 1960)	AX-1677
DX257	(*Aviation Week*, 1/30/61, pp. 36-37)	AX-1681
DX258	(Report to Directors of TWA—Oct. 13, 1961)	AX-1683
DX259	(CAB Order of Investigation—Dec. 28, 1961)	AX-1694
DX260	(Letter—Tillinghast to CAB, Jan. 29, 1962)	AX-1703

Item	Page
DX262 (Revised Pages 70-73 of TWA Ex. 4(c)(1))	AX-1708
DX270 (Report of Loeb, Rhoades & Co.)	AX-1712
DX271A (S.H.E. Report (Revised)—Volume One)	AX-1789
DX271B (S.H.E. Report (Revised)—Volume Two)	AX-1859
DX284 (TWA Prospectus—Nov. 20, 1952)	AX-1961
DX286 (TWA Board Minutes—Jan. 13, 1955)	AX-1967
DX287 (TWA Board Minutes—Dec. 13, 1955)	AX-1970
DX289 (TWA Board Minutes—April 26, 1956)	AX-1974
DX290 (Toolco-TWA Conditional Sale Contract—L-1049Gs, 6/6/56)	AX-1979
Volume AX-VI	
DX292 (Toolco-TWA Conditional Sale Contract—L-1649As, 4/19/57)	AX-1995
DX321 id. (CAB Orders & Documents)	AX-2012
DX322 id. (CAB Orders & Documents)	AX-2191
DX323 id. (CAB Orders & Documents)	AX-2347
Volume AX-VII	
DX334 (Correlation Coefficients—Substituted S.H.E. Table G-VII)	AX-2427
DX339 (B-120s Available to AAL, Actual vs. Reconstructed—1959)	AX-2428

ITEM	PAGE
DX341 (Domestic Carriers—Jets Assigned to Service, 1959-63)	AX-2429
DX342 (TWA's Share of Jets Assigned to Domestic Service, 1959-63)	AX-2430
DX348 (Revised Summary—Categories of Differences—Wemple vs. Simat)	AX-2431
DX358B id. (CAB Form 41 Reports—Northeast Airlines, 1957-1966)	AX-2452
DX358C id. (CAB Form 41 Reports—PAA, 1957-1966)	AX-2454
DX359A (Supplemental S.H.E. Report—Volume A)	AX-2458
DX364 id. (Excerpts from Deposition of Emmett O. Cocke)	AX-2843
DX367 (Combined Non-Stop Scheduled Frequencies Per Week—Aug. 1958-63)	AX-2851
DX368 (Combined Non-Stop Scheduled Frequencies Per Week—Aug. 1958-63)	AX-2853
DX371 (Summary—Categories of Differences—Wemple vs. Simat (Supplemental))	AX-2856
DX379 (Domestic Jet Seat Miles—Wemple vs. Historical)	AX-2867

DX292
(Toolco-TWA Conditional Sale Contract-
L-1649As, 4/19/57)

CONDITIONAL SALE CONTRACT

dated as of April 19, 1957,

between

HUGHES TOOL COMPANY
as Seller

and

TRANS WORLD AIRLINES, INC.
as Buyer

CONDITIONAL SALE CONTRACT

Contract of Conditional Sale made as of the 19th day of April, 1957, between HUGHES TOOL COMPANY, a Delaware corporation (hereinafter sometimes called the "Seller"), with its principal place of business at Houston, Texas, and TRANS WORLD AIRLINES, INC., a Delaware corporation (hereinafter sometimes called the "Buyer"), with its principal place of business at Kansas City, Missouri,

THE INTEREST OF THE SELLER IN THE AIRCRAFT AND EQUIPMENT COVERED HEREBY IS THAT OF A CONDITIONAL SELLER AND THE INTEREST OF THE BUYER THEREIN IS THAT OF A CONDITIONAL BUYER.

W I T N E S S E T H :

WHEREAS, Hughes has contracted to purchase from Lockheed Aircraft Corporation (hereinafter called "Lockheed") the twenty-five (25) Model L-1649A Lockheed Airplanes identified as follows:

C.A.A. Registration No.	Mfg. Serial No.
N7301C	1002
N7302C	1003
N7303C	1004
N7304C	1005
N7305C	1006
N7306C	1007
N7307C	1008
N7308C	1009
N7309C	1010
N7310C	1012
N7311C	1013
N7312C	1014
N7313C	1015
N7314C	1016
N7315C	1017
N7316C	1018
N7317C	1019
N7318C	1021
N7319C	1022
N7320C	1023

C.A.A. Registration No.	Mfg. Serial No.
N7321C	1024
N7322C	1025
N7323C	1029
N7324C	1030
N7325C	1035

together with the airplane engines (each of which is of 750 or more rated take-off horsepower and will be later identified by manufacturer's serial number in a supplement to this Conditional Sale Contract) installed in each thereof on the date of delivery of such airplanes to Hughes and together with the propeller assemblies and all other equipment and accessories attached to such airplanes and engines on the date of delivery of such airplanes to Hughes (hereinafter called "the Airplanes");

WHEREAS, Hughes has also contracted to purchase from various vendors extra airplane engines (each of which is of 750 or more rated take-off horsepower and will be later identified by manufacturer's serial number in a supplement to this Conditional Sale Contract) and propeller assemblies and airframe spare parts, spare parts for airplane engines and for propeller assemblies, and other accessories, flight equipment and parts, for use on or in connection with the operation or maintenance of the Airplanes at, in or near repair or overhaul bases, airports, airfields, landing strips, hangars, warehouses, storehouses and buildings owned, operated, leased or used by Buyer at any one or more of the locations shown on Exhibit 1 annexed hereto (all of which engines, propeller assemblies, parts, accessories and equipment are hereinafter referred to as "Spares"); and

WHEREAS, Hughes desires to sell and TWA desires to buy the Airplanes and Spares pursuant to the conditional sale arrangements set forth herein.

NOW, THEREFORE, in consideration of the mutual covenants herein contained, the parties hereto agree as follows:

1. Seller agrees to sell to Buyer and Buyer agrees to purchase the Airplanes and Spares upon the terms and conditions hereinafter set forth.

2. (a) Simultaneously upon conveyance of title to each Airplane to Seller, such Airplane shall forthwith be delivered to Buyer and Buyer shall accept such delivery at Lockheed Air Terminal, Burbank, California, or at such other place to which the Airplane has been delivered to Seller.

(b) Seller shall deliver the Spares, or cause them to be delivered, to Buyer at Kansas City, Missouri, or such other place as may be designated by Buyer, such deliveries to be made upon delivery of the first Airplane to Buyer, or as soon thereafter as practicable, and with respect to Spares not then delivered to Seller, upon delivery of such Spares to Seller, or as soon thereafter as practicable.

3. (a) The purchase price of each Airplane for purposes of this Contract shall be the aggregate of

(1) The amounts Seller shall have paid Lockheed for such Airplane at the time of its delivery to Buyer hereunder;

(2) All additional direct costs which have been paid or incurred by Seller at the time of the delivery of such Airplane to Buyer and are attributable to such Airplane, including, but not limited to, costs of "customer furnished equipment".

To the extent that any such costs are not specifically attributable to a particular Airplane they shall be allocated equally among the Airplanes at the time not delivered to Buyer;

(3) An amount equal to interest at the rate of three per cent (3%) per annum on the average amount of the outstanding advance payments made by Seller applicable to such Airplanes; less, however, an amount equal to the sum of all interest payments received by Seller from Lockheed for advance payments made by Seller to Lockheed in connection with the purchase agreement between them covering the Airplanes. Said sum of interest payments received by Seller from Lockheed shall be credited only against that part of the purchase price provided for by this subparagraph (3), and shall in no event reduce that part of the purchase price represented by subparagraphs (1) and (2) of this paragraph. The average amount of the outstanding advance payments applicable to each Airplane shall be computed by considering the payments made or costs incurred as set forth in subparagraphs (1) and (2) of this paragraph 3(a) as outstanding from the respective dates such payments were made or such costs were incurred by Seller and until the delivery of such Airplane to Buyer under this Contract.

(b) The purchase price of Spares for purposes of this Contract shall be the aggregate of

(1) the total payments made therefor by Seller to the vendors of such Spares at the time of the delivery of the first Airplane to Buyer hereunder;

(2) all additional direct costs which have been paid or incurred by Seller at the time of the delivery of the first Airplane to Buyer and are attributable to such Spares or to the purchase thereof;

(3) an amount equal to interest at the rate of three per cent (3%) per annum on the average amount of the outstanding advance payments made by Seller applicable to such Spares. The average amount of the outstanding advance payments applicable to Spares shall be computed by considering the payments made or costs incurred as set forth in subparagraphs (1) and (2) of this paragraph 3(b) as outstanding from the respective dates such payments were made or such costs were incurred by Seller and until the delivery of the first Airplane to Buyer under this contract;

(4) any additional amount which, at the time of the delivery of the first Airplane to Buyer hereunder, Seller is committed to pay to suppliers of Spares.

(c) The purchase price of each Airplane and the purchase price of Spares shall each be paid by Buyer to Seller in sixty (60) equal consecutive monthly installments, together with interest on the unpaid balance at the rate of 4 per cent (4%) per annum. The first of such payments relating to each Airplane shall be made at the time of delivery of such Airplane, and the first of such payments relating to Spares shall be made at the time of delivery of the first Airplane. As to each Airplane, and as to Spares, the second and succeeding payments shall be made monthly on the first day of the months succeeding the month in which the first payment is required to be paid, until the

whole of each such purchase price shall have been paid. All payments shall be made to the Seller at the Hughes Tool Company, Houston, Texas.

(d) In the event that the purchase price of the Airplanes differs from the amount computed at the time of the delivery thereof to Buyer hereunder or in the event that the aggregate net amount which Seller is required to pay for the Spares in a final accounting with the suppliers thereof differs from the amount used in computing the purchase price thereof pursuant to subparagraph 3(b), separate and independent adjustments will be made by payment from one party to the other of such difference. Similarly, Seller will reimburse Buyer for any interest paid by Buyer with respect to any portion of the purchase price of the Spares which is unpaid at the time of delivery of the first Airplane hereunder, to the extent and for the period that Seller has not earned such interest by having made payments to the suppliers.

4. Title to the Airplanes and Spares shall not pass to Buyer by delivery, but shall remain in Seller until such time as the purchase price shall have been paid in full and Buyer shall have paid to Seller all other sums then due and payable to Seller hereunder, whereupon absolute title to the Airplanes and Spares shall pass to Buyer.

5. Upon the happening of any one or more of the following events, namely:

(a) default in making any payment, in the manner herein specified, of any monthly installment of the purchase price of the Airplanes or Spares and such default shall continue unremedied for five (5) days after written notice thereof shall have been delivered by Seller to Buyer; or

(b) default shall be made by the Buyer in the observance or performance by the Buyer of any other covenant or agreement contained herein, and such default shall continue unremedied for thirty (30) days after written notice thereof shall have been delivered by Seller to Buyer; or

(c) the Buyer shall become insolvent, or shall file a voluntary petition in bankruptcy, or shall file a voluntary petition or answer seeking or consenting to reorganization pursuant to or purporting to be pursuant to the Acts of Congress relating to bankruptcy or any other statute, state or Federal, for the relief of debtors, or shall be adjudicated a bankrupt, or shall make an assignment for the benefit of creditors, or shall consent to the appointment of a receiver or trustee of or for it or a substantial part of its property; or

(d) an order shall be entered pursuant to or purporting to be pursuant to the Acts of Congress relating to bankruptcy or any other statute, state or Federal, for the relief of debtors approving a petition seeking a reorganization of, or if an order shall be entered appointing a receiver or trustee of, or for any substantial part of the property of, or if a warrant of attachment shall be issued against any substantial part of the property of, the Buyer, and any such order is not dismissed or stayed within sixty (60) days from its entry or such attachment is not dismissed or bonded within thirty (30) days from its levy; or

(e) the Bonds at the time issued and outstanding under that certain Indenture, dated as of December 1, 1954, between Buyer and Irving Trust Company, as Trustee, as said Indenture may have heretofore been or may hereafter be amended, shall be declared and become due and payable,

prior to the date of maturity of such Bonds as set forth therein, upon the occurrence of any of the "events of default" described in said Indenture, as amended (and the Buyer hereby agrees to notify the Seller of any declaration of default forthwith upon the receipt thereof); or

(f) the Notes at the time issued and outstanding under that certain Chattel Mortgage, dated as of December 20, 1954, between Buyer and Irving Trust Company, as Trustee, as said Chattel Mortgage may have heretofore been or may hereafter be amended, shall be declared and become due and payable, prior to the date of maturity of such Notes as set forth therein, upon the occurrence of any of the "events of default" described in said Chattel Mortgage, as amended (and the Buyer hereby agrees to notify the Seller of any declaration of default forthwith upon the receipt thereof);

then Seller may at once (or at any later time) proceed to take possession of the Airplanes and Spares in any manner provided by law, or Seller may at its option, and Seller is hereby empowered to, with or without legal process, and with or without demand, enter upon the premises where the Airplanes or Spares may be and take possession thereof and remove the same. Seller may resell the Airplanes and Spares, so retaken, at public or private sale, with or without having such Airplanes and Spares at the place of sale, and upon such terms and in such manner as Seller may determine. Notice of the intention of Seller to so sell the Airplanes and Spares shall be given by Seller to Buyer at least ten (10) days prior to the time of such sale. Seller may bid and purchase at any such public sale. From the proceeds of any such sale,

Seller shall deduct all expenses for retaking, repairing, storing and selling the Airplanes and Spares, including any reasonable attorneys' fees incurred. The balance of such proceeds shall be applied to the payment of all sums owing to Seller under this agreement and any surplus of such proceeds remaining shall be paid to Buyer or to whoever may be lawfully entitled to receive the same. Buyer shall be under no obligation to Seller for any deficiency resulting from any such sale or to make any payments on account of the purchase price of any Airplane or Spares falling due after Seller has taken possession of such Airplane or Spares pursuant to this provision.

6. From and after delivery of the Airplanes and Spares to Buyer and until absolute title thereto is vested in Buyer or its nominee, or Seller repossesses the Airplanes,

(a) Buyer shall procure and maintain at its expense public liability, passenger liability and property damage insurance in such amounts and with such companies as shall be satisfactory to Seller, covering Seller's liability as holder of legal title to the Airplanes and Spares. The policies evidencing such insurance shall contain such provisions as shall be satisfactory to Seller and shall name Seller as assured.

(b) Buyer shall at its expense maintain all risk aircraft hull insurance in respect of the Airplanes in favor of Buyer and Seller, as their interests may appear, in such amounts and with such companies as shall be satisfactory to Seller. If any such Airplane shall be lost, destroyed or damaged to such an extent that repair thereof is impractical, such insurance shall be paid to the Seller to the extent of the unpaid balance of the purchase price of

such Airplane together with any accrued and unpaid interest thereon, plus all other amounts then due to Seller hereunder. Upon such payment to the Seller of insurance to the extent of the unpaid balance of the purchase price of any Airplane, absolute title to the Airplane so damaged or to any parts of an Airplane so destroyed shall vest in Buyer and Seller shall deliver to Buyer such proper documents of title with respect thereto as Buyer may reasonably require. Buyer shall be under no obligation to make any payments on account of the purchase price of such Airplane falling due after such loss, destruction or damage. Any insurance proceeds in excess of the amount payable to the Seller, and any insurance proceeds payable as a result of damage not rendering repair impractical, shall be payable to Buyer or its designee.

7. Buyer may at any time pay to Seller the unpaid balance of the purchase price of the Airplanes and Spares or any part thereof, without premium or penalty.

8. Upon the payment to Seller of the balance of the purchase price of the Airplanes and Spares together with all other amounts owing to Seller hereunder, Seller shall deliver to Buyer at such place in the United States as Buyer may designate:

(a) a bill of sale duly vesting in Buyer the title to the Airplanes and Spares free and clear of all liens, claims, charges and encumbrances attaching subsequent to the delivery of the Airplanes and Spares to Seller and not arising out of the possession, use or operation of the Airplanes and Spares by Buyer, and

(b) such other appropriate documents of title with respect thereto as Buyer may reasonably require.

9. In the event any sales tax or use tax is hereafter imposed upon or paid by Seller by reason of the sale or use of the Airplanes and Spares or the purchase thereof by Seller, then in addition to the sales price provided for in paragraph 3, Buyer shall pay to Seller the amount thereof, upon demand.

10. Buyer shall furnish Seller forthwith and from time to time thereafter at reasonable intervals, all such information concerning Buyer's financial condition, including balance sheets and forecasts of earnings, as is customarily furnished to a commercial bank holding or considering the acceptance of unsecured notes of a borrower.

11. The Buyer agrees that it will pay and discharge all taxes, assessments, governmental charges and all charges for keep, repairs, storage, maintenance or accessories, which if unpaid might become a lien, charge or encumbrance upon or against any of the Airplanes or Spares; and upon the failure of the Buyer so to do the Seller may make any such payment; provided, however, that nothing herein contained shall require the Buyer to pay such tax, assessment or charge so long as the Buyer shall in good faith contest the validity thereof and shall furnish the Seller such bond or indemnity as the Seller shall require, unless, in the judgment of the Seller, forfeiture is likely to result from any such failure to pay. Any sum or sums so paid by the Seller, together with interest thereon at the highest lawful contract rate, shall be and become a part of the sum which the Buyer is required to pay under this Contract, and shall immediately, without demand, be due and be repaid by the Buyer to the Seller.

The Buyer will, upon written request from the Seller,

(a) reimburse the Seller for all filing or recording fees incurred in connection with filing or recording or refiling or re-recording this Contract and all supplements and additions hereto, if any;

(b) execute and deliver to the Seller all such further documents and instruments and do such further acts as may be necessary to perfect the rights of the Seller herein contemplated; and

(c) furnish to the Seller at reasonable intervals reports and certificates setting forth all the information necessary to inform the Seller as to the continued existence, location and condition of the Airplanes and Spares. The Seller shall also have the right to inspect the Airplanes and Spares at all times when the same are not in use and when such inspection can be had without undue inconvenience or expense to the Buyer.

12. Buyer agrees to maintain the Airplanes and Spares in good repair and working condition at its own expense, except any airplane lost, destroyed or so damaged that insurance with respect thereto is payable to the Seller pursuant to paragraph 6 hereof. Subject to the proper performance of such covenant, the Buyer may make repairs and replacements to the Airplanes and Spares and may substitute for engines, propellers and any other equipment installed in or attached to the Airplanes or Spares, engines, propellers or other equipment of substantially the same kind and value; provided, however, that no removal of any such engines, propellers, or equipment, and no replacement thereof, shall divest Seller of its superior title thereto,

or render any such removed or replaced equipment subject to the lien or claim of any person other than Seller, UNLESS and UNTIL such equipment is replaced by equipment of substantially the same kind and value, the title to which, upon such equipment being installed in or attached to the Airplanes or Spares, may validly vest in Seller free and clear of the lien or claim of any other person, subject to the provisions of paragraph 14 hereof. In the case of any such permitted substitution, title to the substituted equipment shall immediately vest in Seller and become subject to the provisions of this Conditional Sale Contract and remain so vested and so subject unless and until substituted for in the manner hereinabove permitted; and title to the equipment substituted for shall vest in Buyer.

13. Until title to the Airplanes and Spares shall have passed to the Buyer hereunder, the Buyer shall have no right, power or authority to sell, transfer, assign, mortgage or encumber or in any other manner whatsoever dispose of the Airplanes and Spares or any part thereof (except as provided in paragraph 12 hereof) or any interest therein, and the Buyer hereby agrees that, except as permitted by paragraph 12 hereof, the Buyer will not (voluntarily or involuntarily) sell, transfer, mortgage, encumber or in any other manner whatsoever dispose of the Airplanes and Spares or any part thereof or any interest therein. Buyer agrees, except as provided herein, that the Airplanes and Spares will be used exclusively for its commercial air transport operations and related activities and that it will not permit the Airplanes and Spares to be used or possessed by others. Buyer may permit the use of the Airplanes and Spares by other airlines with which Buyer enters into interchange

agreements provided that any such use by other airlines shall for the purposes of this agreement be considered to be use by the Buyer.

14. To the extent, if any, that there is a conflict between any of the provisions of this agreement and any of the provisions of the Indenture of Mortgage dated as of December 1, 1954 between the Buyer and Irving Trust Company, as Trustee, or of the Chattel Mortgage dated as of December 20, 1954 between the Buyer and Irving Trust Company, as Trustee, the provisions of said Indenture and said Chattel Mortgage shall prevail and the provisions of this agreement shall be deemed amended to the extent necessary to avoid such conflict. Seller recognizes the liens created by (a) Granting Clause VI of said Indenture and (b) Granting Clause III of said Chattel Mortgage as prior liens on the aircraft engines and on the propellers, appliances and spare parts relating to the Airplanes or Spares when and so long as they shall be installed in, attached to or incorporated in any of the aircraft or aircraft engines at any time subject to the lien of said Indenture or of said Chattel Mortgage, as the case may be.

Seller agrees that so long as all the Bonds issued under said Indenture at the time outstanding shall be held by the original purchaser thereof, (a) Seller will not repossess the Airplanes or Spares, in the event of a default by Buyer under this agreement, without affording such original purchaser reasonable notice of such default and a reasonable opportunity to remedy the same and (b) such original purchaser shall have the right, at its option, to purchase at any time all the interest of Seller hereunder by paying to Seller the then remaining balance of the purchase price hereunder plus accrued interest.

Seller also agrees that in the event of a default by Buyer hereunder, the rights and remedies of Seller shall be limited to repossession of the Airplanes and Spares.

15. Before delivery of each Airplane to Buyer hereunder, Buyer will cause to be fastened thereon in a location reasonably adjacent to, and not less prominent than that of, the airworthiness certificate for such Airplane, a name plate no larger than four inches by seven inches (4" x 7") bearing the following legend:

"Hughes Tool Company holds legal title
to this Airplane as Conditional Seller."

Buyer shall maintain such name plate in such location or in one of at least equal prominence and visibility at all times. Buyer may affix to the Airplanes Buyer's name, insignia or other legends customarily displayed by Buyer on its airplanes.

16. Buyer shall indemnify and hold harmless Seller, its agents and its employees from any and all liability for losses, expenses, damages, demands and claims in connection with or arising out of any death of, or injury or alleged injury or damage to, persons or property sustained, or alleged to have been sustained, in connection with or arising or alleged to have arisen out of Buyer's possession, use or operation of the Airplanes or Spares and Buyer agrees to handle any claim and defend any suit or action brought against Seller, its agents or its employees, or any of them, based on any such death, injury or damage, or alleged injury or damage, and to pay all damages, costs and expenses, including attorneys' fees, in connection therewith or resulting therefrom.

Buyer's liability to Seller under this paragraph 16 is conditioned upon Seller's promptly giving notice to

Buyer of institution of such suit or action or of receipt of such claim or demand. Buyer shall have the option at any time to conduct negotiations with the party or parties making any such claim or demand, and may intervene in any such suit or action. Whether or not Buyer intervenes in any such suit or action, it shall be entitled to assume, conduct or control the defense thereof, and Seller shall not settle or discharge any such claim, demand, suit, action or judgment without prior notice to and the consent of Buyer.

IN WITNESS WHEREOF, the parties hereto have executed and delivered this agreement as of the day and year first above written.

OK as to form. CAP

HUGHES TOOL COMPANY

By C A Price
Vice President

Attest:

W. E Rankin
Assistant Secretary

TRANS WORLD AIRLINES, INC.

By C V Laslie
Senior Vice President - Finance

Attest:

Assistant Secretary

AX-2012

DX321 id., Item 18
(CAB Orders & Documents)

DOCKET SECTION
PROCEEDINGS DIVISION
Nov 17 11 3 AM '49
CIVIL AERONAUTICS BOARD

CIVIL AERONAUTICS BOARD

Application

-of-

1182

HUGHES TOOL COMPANY,
a Delaware Corporation,

for approval by the Civil Aeronautics Board, if such approval is deemed necessary, of control of Transcontinental & Western Air, Inc., an air carrier, under Section 408 of the Civil Aeronautics Act of 1938.

NAME, TITLE AND ADDRESS OF PERSONS TO WHOM COMMUNICATIONS FROM THE BOARD ARE TO BE SENT:

Chadbourne, Wallace, Parke & Whiteside,
25 Broadway,
New York 4, N. Y.

and

Neil S. McCarthy, Esq.,

CIVIL AERONAUTICS BOARD

Application

of

HUGHES TOOL COMPANY

a Delaware corporation, for approval by the Civil Aeronautics Board, if such approval is deemed necessary, of control of Transcontinental & Western Air, Inc., an air carrier, under Section 408 of the Civil Aeronautics Act of 1938.

TO THE HONORABLE, THE CIVIL AERONAUTICS BOARD:

The Applicant, Hughes Tool Company, a Delaware corporation, respectfully submits to the Board the following:

1. The name and address of the Applicant is Hughes Tool Company, Gulf Building, Houston, Texas. All the stock of Hughes Tool Company is owned by Mr. Howard R. Hughes, who is a resident of Houston, Texas, and a citizen of the United States.

2. Hughes Tool Company, as of July 31, 1943, owned 440,050 shares of the capital stock of Transcontinental & Western Air, Inc., being equal to 45.6 percent of a total of 965,083 shares outstanding on that date. Transcontinental & Western Air, Inc., also a Delaware corporation, is an air carrier under the Civil Aeronautics Act of 1938 as amended, holding certificates of convenience and necessity for the transportation of persons, property and mail for routes 2, 36,

287]

3. Hughes Tool Company is principally engaged in the manufacture of oil field equipment, and is also engaged in the development and manufacture of aircraft through a department operated under the name of "Hughes Aircraft Company", with its principal place of business at Florence Avenue and Teale, Culver City, California. This department is engaged entirely

288] in the development and manufacture of aircraft for the Government or for war purposes.

4. Applicant hereby seeks the approval by the Civil Aeronautics Board, if such approval is deemed necessary, of the control by the Applicant of Transcontinental & Western Air, Inc.

WHEREFORE, the Applicant prays that the Board acting pursuant to Section 408 of the Civil Aeronautics Act of 1938, as amended, enter an order granting the approval sought herein, if such approval is deemed necessary, and, if not necessary, enter an order to that effect; and that the Board grant the Applicant such other and different relief as it may deem proper.

Dated November 15, 1943.

Respectfully submitted,

HUGHES TOOL COMPANY

By [signature]
Vice President

O. K. for release

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

DOCKET NO. 1182

Application for approval of acquisition of control under section 408 of the Civil Aeronautics Act of 1938, as amended.

HUGHES TOOL COMPANY CONTROL OF TWA

REPORT OF F. A. LEE, JR. EXAMINER

Served: JUL 12 1944

Upons

George A. Spater for Hughes Tool Company
Sadie B. Arbuthnot for the Department of Justice
Louis M. Goodkind, Public Counsel.

Exceptions, if any must be filed with the Secretary, Civil Aeronautics Board, Washington, D. C., and served upon all other parties within 10 days of the date of service shown above. Briefs may be filed and served on all other parties within 15 days after the date fixed for filing exceptions.

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

DOCKET NO. 1182

HUGHES TOOL COMPANY CONTROL OF TWA

Approval recommended of the acquisition of control by Hughes Tool Company of Transcontinental and Western Air, Inc., under section 408 of the Civil Aeronautics Act of 1938, as amended, subject to certain conditions.

Appearances:
George A. Spater for Hughes Tool Company
Sadie B. Arbuthnot for the Department of Justice
Louis A. Goeckind, Public Counsel.

REPORT OF P. A. LAW, JR., EXAMINER

Hughes Tool Company, an industrial corporation, by application duly filed, seeks approval by the Board "if such approval is deemed necessary" under section 408 of the Civil Aeronautics Act of 1938, as amended, of the acquisition by it of control through stock ownership of Transcontinental and Western Air, Inc., hereinafter called TWA, an air carrier within the meaning of section 1(2) of the Act. After notice, hearing was held and briefs have been filed. The Department of Justice was authorized to intervene.

Under section 408(a)(5) it is unlawful, unless approved by the Board, for any air carrier or person controlling an air carrier, any other common carrier or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever. By the language of section 408(b) the Board is required to grant such approval subject to such reasonable terms and conditions as are required in the circumstances unless it is found that the acquisition will not be consistent with the public interest.

Hughes Tool is a Delaware Corporation, all the stock of which is owned by Howard R. Hughes. Its principal business, located at Houston, Tex., is and has been the manufacture of rock bits, tool joints, and high pressure valves for the oil well drilling industry. The company is a family enterprise, founded by the father of the present owner, who was engaged in the oil industry. In its own field Hughes Tool has been and

is highly successful. As of November 30, 1943, its capital and earned surplus aggregated nearly $21,500,000. Its current assets aggregated more than $22,000,000 against current liabilities of approximately $10,770,000.

Howard R. Hughes is a well known aviator and aeronautical engineer who until recent years was interested in aeronautics principally, if not wholly, as a hobby. As an aviator he has been the winner of various trophies and is the holder of various speed records. As an aeronautical engineer he has designed or collaborated in the design and construction of aircraft for speed tests and more lately for air transport.

Hughes Tool first became interested in TWA at the solicitation of the president of TWA, a personal friend of Howard R. Hughes. In March 1939, the first purchase of stock, amounting to 600 shares, was made. By the end of that year, Hughes Tool was the owner of 157,700 shares of common stock of TWA. This amount had grown to more than 400,000 shares, or 42.1 percent of the then outstanding total at the end of 1940. At the end of 1942 Hughes Tool owned 440,050 shares or 45.6 percent of a total of 965,173 shares outstanding. All of this stock except 119,154 shares purchased on March 2, 1940, directly from the TWA treasury, was acquired through open market or brokerage transactions. The total investment of Hughes Tool in the stock of TWA is approximately $5,535,000.

For the purpose of this proceeding applicant has stipulated that the stock now owned constitutes control of the carrier, but for practical purposes such control has existed since the end of 1940 at least, and the Hughes influence, had it been exercised, might have been effectively felt in 1939 when the ownership as stated reached 157,700 shares. Aside from the stipulation of counsel, very little discussion is required to demonstrate that control exists and has existed since 1940. Such a proportion of the outstanding stock as that then owned, when solidly held and consistently voted, represents such a dominating influence in the affairs of a corporation that control, either affirmative or negative, must follow. Much smaller interests have been found so to do. 1/

No individual holds or has held office in both Hughes Tool and TWA except for the employment in an advisory capacity by Hughes Tool of the president of TWA, Mr. Jack Frye.

Prior to 1939 the only activity of Hughes or of Hughes Tool associated with any phase of the aircraft industry was experimental and developmental work upon the privately owned and operated equipment of Mr. Hughes or the company. No commercial activities of any character existed. The first activity of Mr. Hughes in any phase of commercial

aeronautics followed the acquisition of an interest in TWA. In the late spring and early summer of 1939, Messrs. Hughes and Frye collaborated in the design of a 4-motored airplane developed for use by TWA in commercial air transportation. They began negotiations with several aircraft manufacturing concerns regarding construction, resulting in an agreement between Hughes Tool and Lockheed Aircraft Corporation on June 30, 1939, before control of TWA by Hughes Tool was obtained for the construction and delivery of five airplanes to be known as "Ex-Calibur-4". The name later was changed to Constellation and will be referred to hereinafter as such.

This contract restricted the manufacture and sale of the Constellation type aircraft to others than Hughes Tool or TWA. It was later modified to authorize their sale to the Governments of the United States and Great Britain, to Pan American Airways, Inc., and to Koninklijke Luchtvaart Maatschappij, known as "KLM", and the number to be purchased by Hughes Tool was increased to a total of 40. In 1941 the board of directors of TWA authorized the air carrier to accept assignment of the Hughes-Lockheed agreement, and in 1942 Hughes Tool, with the approval of Lockheed assigned to TWA all of its right, title, and interest therein. Under the agreement, TWA is to purchase 15 aircraft and Hughes Tool 25, the latter being purchaseable under an option through TWA. The option to purchase the 25 is subject to cancellation upon appropriate notice. At the present time all of the Constellation type aircraft built are deliverable for military use subject to an option to reacquire a total of 40 by repurchase from the Government. Restrictions against the manufacturer which would prevent the sale of Constellation type aircraft for domestic air transport use except by TWA continues under existing contracts. When made, the Constellation agreements were for the benefit, and at the request of TWA, and to evidence TWA's interest, it was given the option to be substituted for Hughes Tool as the direct contracting party. The obvious, if not the expressed, purpose of these arrangements was to give TWA the benefit of the credit and financial standing of Hughes Tool in a transaction involving substantial financial responsibility. As to the 25 airplanes subject to the option of Hughes Tool, the record indicates that these, if the option is exercised, will be held for resale and for experimental use. Should applicant not exercise its option, it is still party to contracts restricting distribution of the aircraft even by resale, so as to prevent their use in domestic air service except by TWA.

In addition to its interest in the purchase and sale of Constellation type aircraft, Hughes Tool in 1942 began production as a subcontractor of aircraft parts for use in aircraft built as weapons for or transport by the United States military forces. Since that beginning, either directly or through subsidiary or affiliated companies, applicant has expanded and diversified its production activities in furtherance of the war effort. There is no evidence, however, of an intention to continue the manufacture of aircraft or aircraft parts or to otherwise engage in a phase of aeronautics on a commercial basis after the war. There is evidence to indicate only that Hughes Tool may continue developmental and experimental work in aviation.

Jurisdiction of the Board in the proceeding is questioned by the application when it asks approval "if such approval is deemed necessary". Under the section of the act involved, there are three elements of jurisdiction: (1) there must be an acquisition of control; (2) the party sought to be controlled must be an air carrier; and (3) the acquirer must be engaged in a phase of aeronautics. As to the first two there is no doubt. There has been an acquisition of control, and TWA is an air carrier. As to none was any serious objection to the Board's jurisdiction interposed during the course of the proceeding subsequent to the filing of the application. As the case has proceeded, it has become quite clear that neither the applicant nor TWA oppose assumption of jurisdiction by the Board and the making of statutory finding required by the act. The pertinent question is whether Hughes Tool is engaged in a phase of aeronautics as contemplated by section 408 of the act. Particularly significant in this regard is the fact that Hughes Tool is at present obligated to purchase a substantial fleet of aircraft, at least a part of which may be held for resale for commercial airline operation. It thus may under its contracts, if it has not already, become a dealer in such equipment and thus engaged in a phase of aeronautics, which renders unlawful the acquisition of control of the air carrier without the consent of the Board. While some basis for reasonable doubt in the mind of the applicant may have existed at the time control of TWA was obtained, the fact that applicant is authorized to become a dealer in second hand air transport equipment supports jurisdiction of the Board herein as urged by Public Counsel. The consummation of its plan is not essential to this conclusion. 2/

Under the present and contemplated operations of Hughes Tool no adverse effect upon the public interest can be foreseen. Applicant is not now engaged in and has no plans contemplating production of aircraft, aircraft parts, or facilities for use in commercial air transportation. So far as the possibility of TWA acquiring from the applicant aircraft which the applicant is obligated to purchase under existing agreements is concerned, the price is firmly established so as not to exceed costs, and in view of what might be referred to as the paternalistic attitude of Hughes Tool up to the present, the likelihood that TWA might be forced to purchase more than the economic operations of TWA require is remote, but such a possibility exists. That no presently existing harm or unethical purpose is apparent is not conclusive as to the future. However, the possibility of wrong doing is no basis for the interruption of a relationship which has not proven harmful, but on the contrary has been and may continue to prove helpful to the air carrier. Remembering that the interest of applicant in the air carrier had its inception in an effort to be helpful in the consummation of plans conceived and initiated by the air carrier itself, it is not inconsistent with the public interest that the relationship continue, but because of the possibilities existing therein, it is proper that the Board in observance of the obligations imposed upon it by the act insure against any temptation which may later come to the applicant to take advantage of the relationship to its own profit and to the detriment of the public interest by

granting its approval subject to such reasonable conditions as will enable it in the future to adequately protect the public interest.

The Department of Justice urges that the restraint which has been placed upon the sale of Constellation type of aircraft for use in domestic air service, together with other facts in the case, be especially considered by the Board in determining the nature and scope of any order which may be entered. It urges further that the Board's approval, if granted be bottomed upon the fact that Hughes Tool is not now engaged in the manufacture of aircraft or aircraft parts for commercial use, and suggests that the Board reserve jurisdiction in the proceeding for the purpose of reconsideration in the event that this condition change in the future. Applicant in response asserts that the restraint referred to would exist whether or not Hughes Tool has control and, contending that the Constellation type of aircraft is primarily an engineering development of and for T.W.A., believes the restraint is usual, appropriate and reasonable. As an alternative it suggests that if any condition is attached to the Board's approval, applicant be required to return for further consideration only if Hughes Tool enters commercial production of aircraft or aircraft parts and T.W.A. undertakes to purchase them.

On brief Public Counsel recommends that the Board approve the acquisition of control herein upon elaborate conditions. He would provide that the approval terminate in the event that either Hughes Tool or Howard R. Hughes engage directly or indirectly in the production or disposition of aircraft or aircraft parts for use in interstate, overseas or foreign air transportation, excepting from this condition, however, the 25 Lockheed Constellation airplanes as to which Hughes Tool now holds the right of repurchase from the United States through T.W.A. He would also provide that no compensation shall be paid to Hughes by T.W.A. for any participation by him as aeronautical engineer in the development or design of aircraft or aircraft parts; and that Hughes shall not attempt directly or indirectly to influence the air carrier in its decision to purchase aircraft or aircraft parts in the development or design of which Hughes may have participated to a substantial degree. The apparent intent of the condition is to restrain Hughes or Hughes Tool directly, or by indirection through any associate or affiliate from engaging in any manner in the manufacture, production, or disposition of any item of property which goes or might go into the creation of aircraft susceptible of use for commercial air transport. On pain of forfeiture of the Board's approval subjecting applicant to the penalties of the Act, the condition as proposed conceivably could stifle research and development work even of the character of that which Hughes Tool has heretofore performed. Considering that the applicant took immediate exception to the proposal of the Department of Justice as being too restrictive, it is reasonable

It would hardly be consistent with the public interest for TWA to be prevented from taking reasonably limited advantage of the benefits which might result from the research and development work of the controlling industry, if that corporation should at some future time undertake to manufacture articles useful in commercial air transportation. Applicant suggests that any condition attached by the Board to its approval provide that if Hughes Tool Company should commence the manufacture of aircraft or aircraft parts suitable for commercial use and that if TWA should desire to acquire such aircraft or aircraft parts, then TWA and HughesTool should be required to return to the Board for further hearing upon continuation of the relations between TWA and Hughes Tool. It insists that such a condition would permit applicant to know exactly where it stands and yet provide all the protection of the public interest contemplated by section 408 in the case of relationships between the manufacturer and an air carrier.

Mr. Hughes is an acknowledged expert in some phases of aviation. Unreasonable restrictions might, and probably would, result in depriving the air carrier of the benefit of his advice. It is possible that the experimental and development work of the applicant in its behalf or in behalf of Mr. Hughes himself, if continued, may result in the development, and possibly manufacture of one or more parts of aircraft of major benefit not only to the applicant but to the entire air transport industry. Such a possibility should not be prevented by placing in jeopardy the large investment made in the air carrier. The object of any condition to the continued control of TWA by the air carrier inserted at this time in the authority granted by the Board should be to protect the public interest from infringement by any attempt either to give TWA an unfair competitive advantage or to subject it to unreasonable demands through the influence of the controlling industry. This can be accomplished by a reasonable limit upon commercial transactions between the acquirer and the acquired which may be had without further consideration in this proceeding by the Board.

It is recommended that the Board find that control of Transcontinental & Western Air, Inc., by Hughes Tool Company is not inconsistent with the public interest so long as commercial transactions between the or between TWA and any affiliate or subsidiary of Hughes Tool is limited to aircraft parts or accessories, the complete item price of which does not exceed $25 each, with the further limitation that the total annual expenditure therefor by either party shall not exceed $10,000. It should be provided further that the Board shall retain jurisdiction in this proceeding to take appropriate action, upon breach of this condition or upon petition for waiver thereof in any manner whatsoever, and that the restriction shall not affect the existing contractual right of applicant to reacquire Constellation aircraft through TWA.

before the

CIVIL AERONAUTICS BOARD

Washington, D. C.

In the Matter of the Application of	:	
HUGHES TOOL COMPANY	:	
for approval under Section 408 of the Civil Aeronautics Act of 1938, as amended, of the acquisition of control of	:	Docket No. 1182
TRANSCONTINENTAL & WESTERN AIR, INC.	:	

MOTION FOR APPROVAL OF PURCHASE OF TWO CONSTELLATION AIRPLANES

Transcontinental & Western Air, Inc., a Delaware corporation (herein referred to as "TWA"), respectfully moves the Board to enter an order herein approving the contemplated sale by Hughes Tool Company to TWA of two Lockheed Constellation airplanes bearing Manufacturer's Serial Nos. 049-1969 and 049-1970, which Hughes Tool Company now owns, and that the Board modify its order approving the acquisition by Hughes Tool Company of control of TWA, Order Serial No. 3210, issued October 17, 1944, as amended by Order Serial No. 4437, issued January 26, 1946 and Order Serial No. E 922, issued October 29, 1947, so as to permit the sale of such aircraft.

IN SUPPORT OF SUCH MOTION, TWA shows to the Board:

1. By agreement dated as of October 1, 1948, a copy of which is attached hereto as "Exhibit 1", Hughes Tool Company has agreed to sell and TWA has agreed to purchase, subject to the approval herein requested and to the other conditions set forth in such agreement, the two Constellation airplanes above referred to at the cost of said airplanes to Hughes Tool Company, which cost is not to exceed an aggregate price of $1,090,000, all as more particularly set forth in such agreement.

2. Hughes Tool Company acquired airplane Serial No. 049-1969 from the United States Government through TWA pursuant to rights reserved by TWA and Hughes Tool Company in connection with the sale by TWA of such airplane to the Army Air Force during the War. Hughes Tool Company purchased airplane Serial No. 049-1970 from Lockheed Aircraft Corporation. Airplane No. 049-1970 has been and No. 049-1969 is in the process of being converted by Lockheed Aircraft Corporation from military to commercial versions including complete overhaul and modification to meet current CAA requirements in the air transport category.

In support of the foregoing, the affidavit of Frank H. McDonnell is attached hereto as "Exhibit 2" and by this reference made a part hereof.

3. Said airplanes are to be used by TWA on a no-charge basis pending action of the Board on this motion, in accordance with the Board's letter of October 6, 1948, a copy of which is attached hereto as "Exhibit 3".

4. As will more particularly appear from the affidavit of Warren Lee Pierson attached hereto as "Exhibit 4" and by this reference made a part hereof, said airplanes are required by TWA for use in its domestic operations; the manufacture of airplanes of this model has been discontinued; TWA has recently purchased twelve Lockheed Model 749 Constellation airplanes for a price of approximately $910,000 per airplane; and the price to be paid by TWA to Hughes Tool Company for said airplanes is substantially below the price paid by TWA for airplanes of the same model purchased by it from Lockheed Aircraft Corporation in May of 1947.

WHEREFORE, TWA respectfully moves the Board to enter an order herein approving the sale by Hughes Tool Company to TWA of two Lockheed Constellation airplanes as hereinbefore set forth,

and for such other and further relief as may be appropriate.

Respectfully submitted,

TRANSCONTINENTAL & WESTERN AIR, INC.

By W. [illegible]
Chairman of the board

Chadbourne, Wallace, Parke & Whiteside,
25 Broadway,
New York 4, N. Y.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

WARREN LEE PIERSON, being duly sworn, deposes and says that he is Chairman of the Board of TRANSCONTINENTAL & WESTERN AIR, INC.; that he has read and is familiar with the contents of the foregoing motion and the exhibits attached thereto; that he intends and desires that in granting or denying the relief requested, the Board shall place full and complete reliance upon the accuracy of each and every statement therein contained; that he is familiar with the facts therein set forth; that to the best of his information and belief every statement contained in the motion is true and no such statement is misleading.

W. Warren Lee Pierson

Subscribed and sworn to
before me this 21st day
of October, 1948.

Dorothea A. O'Brien
Notary Public

DOROTHEA A. O'BRIEN
NOTARY PUBLIC in the State of New York
Residing in Kings County
Term Ex. Cl. 1948, No. 131, Reg. No. 192-0-8
Ind. Ct. Cl. 1948, No. 41, Reg. No. 172-0-8
Commission Expires March 30, 1949

Exhibit "1"

SALES AGREEMENT

THIS AGREEMENT, made and executed in duplicate as of the first day of October, 1948, by and between HUGHES TOOL COMPANY, a Delaware corporation (hereinafter sometimes called "Seller"), with its principal place of business at Houston, Texas, and TRANS-CONTINENTAL & WESTERN AIR, INC., a Delaware corporation (hereinafter sometimes called "Buyer"), with its principal place of business at Kansas City, Missouri:

WITNESSETH:

WHEREAS, Seller desires to sell and Buyer desires to purchase two Lockheed Model 49 Constellation type airplanes which Seller now owns or has contracted to purchase;

NOW THEREFORE, in consideration of the mutual covenants hereinafter contained, the parties hereto agree as follows:

1. Seller shall sell and deliver to Buyer and Buyer shall purchase and accept delivery of two Lockheed Model 49 airplanes bearing Lockheed Serial Nos. 049-1969 and 049-1970. At the time of delivery said airplanes shall physically conform to the airplane description contained in the Lockheed Report No. E-5470-7 dated May 21, 1948, as modified by Contracts Nos. LD-45 and LD-46 dated February 3, 1948, between Seller and Lockheed Aircraft Corporation; copies of said Report and Contracts have been examined by and are in the possession of Buyer. It is understood that Seller makes no warranties whatsoever regarding said airplanes but that Buyer accepts in lieu thereof the obligations of Lockheed Aircraft Corporation as set forth in said Contracts, which obligations Lockheed Aircraft Corporation has agreed shall run in favor of Buyer as evidenced by instrument attached hereto, marked "Exhibit A", and hereby made a part hereof, and Seller hereby assigns to Buyer Seller's rights under said contracts after aircraft delivery thereunder.

2. Each of said airplanes shall be delivered to Buyer by Seller and Buyer shall accept delivery thereof at Los Angeles Municipal Airport, or such other place as may be mutually agreed upon, as soon as is practicable after the airplanes have been completed by Lockheed Aircraft Corporation and approval to this sale is granted by the Civil Aeronautics Board.

3. The sales price of each airplane shall be the cost thereof to Hughes Tool Company and for the purposes of this agreement shall be established at FIVE HUNDRED FORTY THOUSAND DOLLARS ($540,000.00), subject to the following provision: at such time as the total cost of both airplanes is finally determined, based on the books and records of the Hughes Aircraft Company Division of Hughes Tool Company, any variation from said established price shall be promptly paid by the Buyer or refunded by the Seller, as the case may be, provided that in no event shall said sales price exceed an average of FIVE HUNDRED FORTY-FIVE THOUSAND DOLLARS ($545,000.00) per airplane. Payment thereof shall be made by Buyer to Seller in consecutive monthly installments in the amount of NINE THOUSAND DOLLARS ($9,000.00) or more. The first of such payments relating to each airplane shall be made at the time of the delivery of such airplane, and one of the remaining payments shall be made each calendar month thereafter, in accordance with the promissory note hereinafter provided for, until the whole of the sales price shall have been paid. Buyer's obligation to make the payments, after the first payment, relating to each of said airplanes, shall be evidenced by a negotiable installment promissory note dated, at Los Angeles, California, as of the date of the delivery of such airplane, payable to Seller or order by Buyer and bearing interest on the principal thereof at the rate of Two Per Cent (2%) per annum, payable monthly. Such note shall provide for the payment of the principal in consecutive monthly payments of NINE THOUSAND DOLLARS ($9,000.00) or more, commencing one month after the delivery of such airplane.

Such promissory note shall be executed and delivered by Buyer to Seller at the time of the delivery of such airplane, and shall be in the form of "Exhibit B", attached hereto, and by this reference made a part hereof. The promissory note relating to each airplane shall be secured by a Chattel Mortgage, covering such airplane, which shall be a first lien on such airplane and shall be substantially in the form of the Chattel Mortgage entered into by and between Buyer and Lockheed Aircraft Corporation as of May 12, 1947, and the Supplemental Chattel Mortgage dated May 15, 1947, both relating to airplanes sold to Buyer under the terms of a certain Sales Agreement, designated as Contract No. LD-33, dated March 27, 1947, between Buyer and Lockheed Aircraft Corporation. Upon the happening of any one or more of the following events, namely:

(a) The breach on the part of the Buyer of any covenant or agreement of the Chattel Mortgage to be observed, done or performed by the Buyer;

(b) The occurrence of any event of default as provided in the Chattel Mortgage;

(c) Failure to make payment when due, and within five (5) days after demand in writing is made for payment, of the principal or of any interest of any promissory note hereinbefore referred to;

then the unpaid principal and accrued interest of both of such promissory notes shall become immediately due and payable without demand and without notice, and Buyer agrees forthwith to pay the same; or

(d) If Buyer shall divest itself, or be divested, in whatsoever manner, of title to either such airplane; or

(e) If either such airplane is lost, destroyed or damaged beyond repair;

then the unpaid principal, and accrued interest thereon, of the promissory note relating to such airplane shall become immediately due and payable without demand or notice and Buyer agrees forthwith

to pay the same. Each successive holder of each such promissory note shall have the benefit of, and may enforce the rights contained in, the foregoing provisions relating to the acceleration of maturity of such promissory note. The provisions hereof and any contained in the applicable Chattel Mortgage relating to the acceleration of the maturity of such note shall be deemed to be cumulative and not exclusive and the existence of such provisions in either instrument shall not preclude the exercise of any right set forth in the other. All payments made pursuant to this agreement shall be made in lawful money of the United States of America or by check drawn upon, and duly certified by, a member bank of the United States Federal Reserve System and payable in such money, and, unless otherwise provided, at Seller's office in Houston, Texas.

4. Buyer shall furnish Seller forthwith, and from time to time thereafter at reasonable intervals and in any event upon request at such time or times as Seller shall be engaged in offering to sell or discount either or both of said promissory notes to a bank or other prospective purchaser, all such information concerning Buyer's financial condition, including balance sheets and forecasts of earnings, as is customarily furnished to a commercial bank holding or considering the acceptance of unsecured notes of a borrower or prospective borrower therefrom. Seller shall hold such information in confidence except to the extent it reasonably deems it necessary to divulge the same to such bank or prospective purchaser in connection with the sale or discount of such note or notes.

5. In the event any sales tax or use tax is hereafter imposed upon or paid by Seller by reason of the sale or use of the airplanes or in connection with the modification thereof by Lockheed Aircraft Corporation under said Contracts LD-45 and LD-46, then in addition to the sales price provided for in section 3, Buyer shall pay to Seller the amount thereof, upon demand.

6. This agreement shall not be effective for any purpose

unless and until the Buyer has secured all consents and approvals to the extent required under or by reason of any prior commitment in order to avoid Buyer's execution of this instrument as constituting a default thereunder.

7. This agreement is entered into subject to the approval of the sale herein provided for by the Civil Aeronautics Board and in the event such approval is not granted within sixty (60) days from the date hereof, this agreement shall be deemed to be ineffective for any purpose.

8. Upon the securing of all the consents and approvals hereinbefore referred to, this agreement shall become binding and effective as of the day and year first above written.

IN WITNESS THEREOF the parties hereto have executed and delivered this Agreement as of the day and year first above written.

HUGHES TOOL COMPANY

By Noah Dietrich
Executive Vice President

TRANSCONTINENTAL & WESTERN AIR, INC.

By Warren Lee Pierson
Chairman of the Board

Orders
Serial Number E-2204

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 27th day of January, 1949.

In the matter of the application of HUGHES TOOL COMPANY for approval under section 408 of the Civil Aeronautics Act of 1938, as amended, of the acquisition of control of TRANSCONTINENTAL & WESTERN AIR INC.	Docket No. 1182

ORDER MODIFYING ORDER APPROVING ACQUISITION

A motion having been filed by Hughes Tool Company for an order modifying Order Serial No. 3210 issued October 17, 1944 in this docket, as amended by Order Serial No. 4437 issued January 26, 1946, as modified by Order Serial No. E-922 issued October 29, 1947, so as to permit the sale of two Lockheed Constellation airplanes bearing manufacturer's Serial Nos. 049-1969 and 049-1970 by Hughes Tool Company to Transcontinental and Western Air, Inc. ("TWA") pursuant to the terms and conditions of the sales agreement dated October 1, 1948, as amended by agreement of December 1, 1948, between said parties; and

The Board, acting pursuant to the powers vested in it by the Civil Aeronautics Act of 1938, as amended, particularly 205(a), 408

and 1005(d) thereof, and finding that the further modification of its order in Docket No. 1182, as amended and modified, hereinafter provided for is just and reasonable and is in the public interest;

IT IS ORDERED THAT:

Order Serial No. 3210 issued October 17, 1944, as amended by Order Serial No. 4437 issued January 26, 1946, as modified by Order Serial No. E-922 issued October 29, 1947, be and it hereby is modified by adding thereto the following:

"5. That the terms of this order shall not restrict the right of Hughes Tool Company to sell to TWA or the right of TWA to purchase from Hughes Tool Company two Lockheed Constellation airplanes bearing manufacturer's Serial Nos. C49-1969 and C49-1970, pursuant to the terms and conditions of the sales agreement dated October 1, 1948, as amended by an agreement dated December 1, 1948, between said parties, provided that the sale shall be reported to the Board in the manner provided in paragraph 2 of the order, and provided further that nothing in the Board's action herein shall be construed as a determination that the equipment here involved is required by TWA in the interest of commerce, the postal service, or the national defense or that the cost thereof to TWA is appropriate for investment and/or rate-making purposes."

By the Civil Aeronautics Board:

/s/ M. C. Mulligan

M. C. Mulligan
Secretary

(SEAL)

Before the

CIVIL AERONAUTICS BOARD

In the Matter of the Application of	:	
HUGHES TOOL COMPANY	:	
for approval under Section 408 of the Civil Aeronautics Act of 1938, as amended, of the acquisition of control of	:	Docket No. 1182
TRANSCONTINENTAL & WESTERN AIR, INC.	:	

MOTION FOR APPROVAL OF PURCHASE OF SIX CONSTELLATION AIRPLANES

Transcontinental & Western Air, Inc., a Delaware corporation (herein referred to as "TWA"), respectfully moves the Board to enter an order herein approving the contemplated sale by Hughes Tool Company to TWA of six Lockheed Constellation Model 049 airplanes bearing Manufacturer's Serial Nos. 2072, 2073, 2074, 2075, 2070 and 2084, which Hughes Tool Company now owns or has contracted to purchase and that the Board modify its order approving the acquisition by Hughes Tool Company of control of TWA, Order Serial No. 3210, issued October 17, 1944, as amended by Order Serial No. 4437, issued January 26, 1946, Order Serial No. E 922, issued October 29, 1947, and Order Serial No. E-2404, issued January 27, 1949, so as to permit the sale of such aircraft.

IN SUPPORT OF SUCH MOTION, TWA shows to the Board:

1. By agreement dated as of February 2, 1950, a copy of which is attached hereto as Exhibit 1", Hughes Tool Company has agreed to sell, on a conditional sale basis,

and TWA has agreed to purchase, subject to the approval herein requested and to the other conditions set forth in such agreement, the six Constellation airplanes above referred to at the cost of said airplanes to Hughes Tool Company less, in the case of one airplane to be used temporarily by Hughes Tool Company, depreciation at the rate of 1/84 per month, all as more particularly set forth in such agreement.

2. These airplanes are being acquired by Hughes Tool Company, four from Air France and two from Lockheed Aircraft Corporation, to assist TWA in increasing its fleet of aircraft. TWA has been endeavoring to purchase additional Constellation airplanes when the availability of these six aircraft was discovered by Hughes Tool Company while it was investigating the possibility of obtaining the use of one Constellation airplane for temporary use for test purposes. Hughes Tool Company immediately advised TWA that these six airplanes were available.

3. The contracts for the purchase of these airplanes were entered into directly by Hughes Tool Company to assist TWA in acquiring such airplanes. It is impossible for TWA to acquire aircraft without obtaining prior consents or waivers under various financial agreements it has entered into in the past. The Indenture of December 1, 1945, as amended, between TWA and The Commercial National Bank and Trust Company of New York, as Trustee, covering the Debentures held by The Equitable Life Assurance Society of the United States, prohibits, under present conditions, the acquisition by TWA of any new aircraft without the consent of the holders of the Debentures. The Chattel Mortgage of August 4, 1949 from TWA to Mellon National Bank and

Trust Company, as Trustee, prohibits borrowings, mortgaging of aircraft, or acquisition of aircraft by conditional sales agreement except after thirty days' written notice by TWA to, and negotiations with, the Lending Banks under such mortgage. Because it would be necessary for TWA to obtain additional financing to acquire these six airplanes, TWA could not have entered into arrangements for their purchase without complying with or obtaining consents or waivers under both of these agreements. By contracting to purchase these airplanes immediately Hughes Tool Company insures that they would be available to TWA upon the completion of the necessary clearances under these agreements.

4. In addition, by selling these airplanes to TWA on a conditional sale basis on the terms outlined in Exhibit 1, Hughes Tool Company is providing TWA with financial arrangements on better terms than would otherwise be available. Under the Bank Credit Agreement which TWA has arranged for the financing of the 20 Constellation Model 749A aircraft which it has contracted to purchase from Lockheed Aircraft Corporation, TWA will pay interest at the rate of 3% per annum and will pay over 35% of the purchase price of the Constellation 749A airplanes from its own funds. Interest payable to Hughes Tool Company is 2-1/2% per annum and the initial payment required is only 10% of the purchase price.

5. Five of the six airplanes are to be used by TWA on a no-charge basis after acquisition thereof by Hughes Tool Company, pending action of the Board on this motion. The sixth airplane, to be selected by TWA, is to be delivered to TWA by Hughes Tool Company on or before

August 31, 1950 after the completion of certain test flights by Hughes Tool Company.

6. The six airplanes are required by TWA for use in its domestic and international operations. The manufacture of Model 049 Airplanes has been discontinued and therefore no such airplanes are available from the manufacturer. TWA is to pay Hughes Tool Company only the price which Hughes Tool Company has paid Air France or Lockheed Aircraft Corporation, as the case may be, for such aircraft, plus such incidental expenses as Hughes Tool Company may incur in connection with purchasing these aircraft for TWA's account. With respect to the one aircraft that is to be used by Hughes Tool Company for a temporary period, the sales price to be paid by TWA is to be reduced by depreciation on the basis of a seven-year life. The purchase price of the 20 Lockheed Model 749A Constellation airplanes which TWA has recently contracted to purchase is approximately $930,000 per airplane.

7. The addition of these six airplanes to TWA's present fleet will permit increased Constellation service and increase revenue mileage and will thus improve TWA's service to the public. It will also enable TWA to increase its gross revenues, improve its cash position in the immediate future and improve TWA's earning position. Because the six airplanes being acquired are of the same model as TWA's present domestic Constellation fleet, such increased service and revenue can be achieved with relatively little increase in overhead expenses, maintenance equipment or spare parts inventories.

WHEREFORE, TWA respectfully moves the Board to

enter an order herein approving the sale by Hughes Tool Company to Pan of six Lockheed Constellation airplanes as hereinbefore set forth, and for such other and further relief as may be appropriate.

Respectfully submitted,

TRANSCONTINENTAL & WESTERN AIR, INC.

By Warren L. Amerson

Chadbourne, Wallace, Parker & Whiteside,
25 Broadway,
New York 4, N. Y.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

Warren Lee Pierson, being duly sworn, deposes and says that he is chairman of the Board of THE CONTINENTAL & WESTERN AIR, INC.; that he has read and is familiar with the contents of the foregoing motion and the exhibit attached thereto; that he intends and desires that in granting or denying the relief requested, the Board shall place full and complete reliance upon the accuracy of each and every statement therein contained; that he is familiar with the facts therein set forth; that to the best of his information and belief every statement contained in the motion is true and no such statement is misleading.

Warren L. Pierson

Subscribed and sworn to
before me this 27 day
of February, 1950.

David Schaefer
Notary Public

DAVID SCHAEFER
Notary Public, State of New York
Resident in Bronx County
Bronx County Clerk's No. 181
N. Y. Co. Clk's No. 442, Reg. No. 24-S-8
Commission Expires March 30, 1950

SALES AGREEMENT

This agreement, made and executed in duplicate as of the 2nd day of February, 1950, by and between HUGHES TOOL COMPANY, a Delaware corporation (hereinafter sometimes called "Seller"), with its principal place of business at Houston, Texas, and TRANSCONTINENTAL & WESTERN AIR, INC., a Delaware corporation (hereinafter sometimes called "Buyer"), with its principal place of business at Kansas City, Missouri.

W I T N E S S E T H :

1. Seller agrees to sell to Buyer and Buyer agrees to purchase the six Lockheed Model 049 Constellation airplanes described below (hereinafter sometimes referred to as the "Airplanes"), upon the terms and conditions hereinafter set forth:

(a) Four model 049 Lockheed Constellation airplanes, manufacturer's serial No. 2072, No. 2073, No. 2074 and No. 2075, including related conversion kits, complete and in the condition delivered to Seller pursuant to the agreement between Compagnie Nationale Air France and Seller dated January 11, 1950, a copy of which is attached hereto and by this reference made a part hereof, such airplanes being sometimes referred to as the Air France Airplanes and such agreement being referred to as the Air France Agreement.

(b) Two model 049 Lockheed Constellation airplanes, manufacturer's serial No. 2070 and No. 2084, including related conversion kits,

complete and in the condition delivered to Seller pursuant to the agreement between Lockheed Aircraft Corporation and Seller dated January 13, 1950, as amended, a copy of which agreement, as amended, is attached hereto and by this reference made a part hereof, such airplanes being sometimes referred to as the KLM Airplanes and such agreement, as so amended, being referred to as the Lockheed Agreement.

If Seller does not accept delivery from Lockheed Aircraft Corporation of the Airplane bearing Manufacturer's Serial No. 2034, this agreement shall be deemed to be cancelled with respect to such Airplane and neither party shall have any further obligation or liability to the other hereunder or otherwise with respect to such Airplane.

It is understood that Seller makes no warranties whatsoever regarding the Airplanes but will convey to Buyer all Seller's right and interest with respect to all manufacturers' warranties and guarantees acquired by Seller pursuant to the Air France Agreement.

2. Each of the Airplanes shall be delivered to Buyer by Seller and Buyer shall accept delivery thereof at Metara Airport, Newark, New Jersey, or such other airport as may be agreed upon. One of the Airplanes, to be designated by written notice from Buyer to Seller (herein sometimes referred to as the "Designated Airplane") shall be delivered by Seller to Buyer on or before August 31, 1950 upon five (5) days' prior written notice from Seller to Buyer, subject to the prior fulfillment of the conditions specified in paragraph 9 hereof. The

Airplanes, other than the Designated Airplane, shall be delivered by Seller to Buyer as soon as practicable after each such Airplane shall be delivered to Seller by Compagnie Nationale Air France or Lockheed Aircraft Corporation, as the case may be, and after all conditions specified in paragraph 9 hereof shall have been fulfilled.

3. The purchase price of each Airplane, other than the Designated Airplane, shall be the price therefor which Seller shall have paid Compagnie Nationale Air France, pursuant to the Air France Agreement, or Lockheed Aircraft Corporation, pursuant to the Lockheed Agreement, as the case may be, plus such direct out-of-pocket costs and expenses, if any, incurred by Seller in accepting delivery, storing and effecting delivery to Buyer (including insurance or ferry charges connected with any of the foregoing) and any costs incurred by Seller in modifying such Airplane pursuant to paragraph 8 hereof. The purchase price of the Designated Airplane shall be the price therefor which Seller shall have paid Compagnie Nationale Air France, pursuant to the Air France Agreement, or Lockheed Aircraft Corporation, pursuant to the Lockheed Agreement, as the case may be, plus such direct out-of-pocket costs and expenses, if any, incurred by Seller in accepting delivery and effecting delivery to Buyer (including insurance or ferry charges connected with either of the foregoing) and any costs incurred by Seller in modifying such Airplane pursuant to paragraph 8 hereof, less depreciation at the rate of one eighty-fourth of the sales price paid by Seller per month from the date of acquisition by Seller to the date of delivery by Seller to Buyer hereunder. Payment for each Airplane shall be

made in the following manner:

(a) $100,000, plus any modification costs paid by Seller pursuant to paragraph 8 hereof, in cash, upon the delivery of each Airplane to Buyer hereunder;

(b) the balance of the purchase price shall be paid by Buyer to Seller in sixty equal consecutive monthly installments, together with interest on the unpaid balance at the rate of two and one-half percent (2-1/2%) per annum. The first of such payments relating to each Airplane shall be made on the first day of the month following the delivery of said Airplane and one of the remaining payments shall be made on the first day of each month thereafter until the whole purchase price shall have been paid.

4. Title to the Airplanes shall not pass to Buyer by delivery, but shall remain in Seller until such time as the purchase price shall have been paid in full and Buyer shall have paid to Seller all other sums then due and payable to Seller hereunder, whereupon absolute title to the Airplanes shall pass to Buyer. The respective rights of Buyer and Seller to the Airplanes shall be more specifically set forth in one or more conditional sales agreements covering such Airplanes in form satisfactory to Buyer and Seller. Each such agreement shall include provisions that upon the happening of any one or more of the following events, namely:

(a) the breach on the part of the Buyer or any covenant or agreement contained herein or in such conditional sales agreement to be observed, done or performed by the Buyer;

(b) the occurrence of any event of default as provided in such conditional sales agreement;

(c) failure to make payment when due, and within five (5) days after demand in writing is made for payment, of any monthly installment of the purchase price of the Airplanes pursuant to paragraph 3;

then Seller may at once (or at any later time) proceed to take possession of the Airplanes in any manner provided by law, or Seller may at its option, and Seller is hereby empowered to, with or without legal process, and with or without demand, enter upon the premises where the Airplanes may be and take possession thereof and remove the same. Seller may resell the Airplanes, so retaken, at public or private sale, with or without having the Airplanes at the place of sale, and upon such terms and in such manner as Seller may determine. Notice of the intention of Seller to so sell the Airplanes shall be given by Seller to Buyer at least ten (10) days prior to the time of such sale. Seller may bid and purchase at any such public sale. From the proceeds of any such sale, Seller shall deduct all expenses for retaking, repairing, storing and selling the Airplanes, including any reasonable attorneys' fees incurred. The balance of such proceeds shall be applied to the payment of all sums owing to Seller under this agreement and any surplus of such proceeds remaining shall be paid to Buyer or to whoever may be lawfully entitled to receive the same. Buyer shall be under no obligation to Seller for any deficiency resulting from any such sale or to make any payments on account of the purchase price of any Airplane falling due

after Seller has taken possession of such Airplane pursuant to this provision.

From and after delivery of the Airplanes to Buyer and until absolute title thereto is vested in Buyer or its nominee, or Seller repossesses the Airplanes, Buyer shall procure and maintain at its expense public liability, passenger liability and property damage insurance in such amounts and with such companies as shall be satisfactory to Seller, covering Seller's liability as holder of legal title to the Airplanes. The policies evidencing such insurance shall contain such provisions as shall be satisfactory to Seller and shall name Seller as assured.

Buyer shall at its expense maintain all risk aircraft hull insurance in respect of the Airplanes in favor of Buyer and Seller, as their interests may appear, in an amount at least sufficient to cover the then unpaid portion of the purchase price of the Airplanes. If any such Airplane shall be lost, destroyed or damaged to such an extent that repair thereof is impractical, such insurance shall be paid to the Seller to the extent of the unpaid balance of the purchase price of such airplane together with any accrued and unpaid interest thereon, plus all other amounts then due to Seller hereunder. Buyer shall be under no obligation to make any payments on account of the purchase price of such Airplanes falling due after such loss, destruction or damage. Any insurance proceeds in excess of such amount, and any insurance proceeds payable as a result of damage not rendering repair impractical, shall be payable to Buyer or its designee.

Buyer may at any time pay to Seller the unpaid

balance of the purchase price of the Airplanes, or any part thereof, without premium or penalty.

Upon the payment to Seller of the balance of the purchase price of the Airplanes together with all other amounts owing to Seller hereunder, Seller shall deliver to Buyer at such place in the United States as Buyer may designate (1) a bill of sale duly vesting in Buyer the title to the Airplanes acquired by Seller under the Air France Agreement or the Lockheed Agreement, as the case may be, free and clear of all liens, claims, charges and encumbrances attaching subsequent to the delivery of such Airplanes to Seller and not arising out of the possession, use or operation of the Airplanes by Buyer, and (2) such other appropriate documents of title with respect thereto as Buyer may reasonably require.

5. Buyer shall furnish Seller forthwith and from time to time thereafter at reasonable intervals, all such information concerning Buyer's financial condition, including balance sheets and forecasts of earnings, as is customarily furnished to a commercial bank holding or considering the acceptance of unsecured notes of a borrower or prospective borrower therefrom.

6. In the event any sales tax or use tax is hereafter imposed upon or paid by Seller by reason of the sale or use of the Airplanes or the purchase thereof by Seller (other than the use by Seller of the Designated Airplane prior to delivery thereof to Buyer pursuant to paragraph 4 hereof), then in addition to the sales price provided for in paragraph 3, Buyer shall pay Seller the amount thereof, upon demand. Buyer agrees to indemnify

and hold harmless Seller from any liabilities, costs or expenses to which Seller may become subject because of paragraph 4 of the Air France Agreement or because of paragraph 3(b) of the Lockheed Agreement.

7. Upon the written request of Seller and the written consent of Buyer, either before or after the delivery to Seller of any of the Airplanes, pursuant to the Air France Agreement or the Lockheed Agreement, Buyer shall take physical custody thereof pending fulfillment of the conditions specified in paragraph 9 hereof and during such interim period Buyer may store, use or modify such Airplanes consistent with the terms of such request and consent, carrying such insurance coverage as may reasonably be specified in such request and consent.

8. Upon the written request of Buyer and the written consent of Seller, either before or after the delivery to Seller of any of the Airplanes, pursuant to the Air France Agreement or the Lockheed Agreement, and pending or subsequent to the fulfillment of the conditions specified in paragraph 9 hereof, modification of any of the Airplanes may be undertaken by either Buyer or Seller or through a contractor to the extent and in the manner specified in such request and consent to the end that upon completion thereof such Airplanes may be most appropriate for the use of Buyer.

9. This Agreement is subject to the fulfillment of each and all of the following conditions on or before April 1, 1950 or such extension of such date as may be agreed upon in writing:

(a) any approval, consent or clearance of the C.A.B. which may be required pursuant to the Civil Aeronautics Act of 1938, as amended;

(b) any approvals, consents, clearances or waivers which may be required under the existing agreements of Buyer with The Equitable Life Assurance Society of the United States and with various lending banks.

This Agreement shall not be effective for any purpose unless and until Buyer has secured all such approvals, consents, clearances or waivers. Buyer shall furnish evidence, satisfactory to Seller, of all approvals, consents, clearances or waivers required under subdivision (b) of this paragraph 9 within thirty (30) days from the date of the approval of the Civil Aeronautics Board pursuant to subdivision (a) of this paragraph 9.

10. Upon the securing of the approvals, consents, clearances and waivers required by paragraph 9 hereof, this Agreement shall become binding and effective as of the day and year first above written.

IN WITNESS WHEREOF, the parties hereto have executed and delivered this Agreement as of the day and year first above written.

HUGHES TOOL COMPANY

By /s/ Noah Dietrich

TRANSCONTINENTAL & WESTERN AIR, INC.

By /s/ A. V. Leslie
Vice President & Treasurer

Orders
Serial Number E-2160

(1)

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 12th day of May, 1950

In the matter of the application of HUGHES TOOL COMPANY for approval under section 408 of the Civil Aeronautics Act of 1938, as amended, of the acquisition of control of TRANSCONTINENTAL & WESTERN AIR, INC.	:	Docket No. 1182

ORDER MODIFYING ORDER APPROVING ACQUISITION

A motion having been filed by Hughes Tool Company for an order modifying Order Serial No. 3210 issued October 17, 1944 in this docket, as amended by subsequent orders, so as to permit the sale of six Lockheed Constellation airplanes bearing manufacturer's Serial Nos. 049-2072, 049-2073, 049-2074, 049-2075, 049-2070 and 049-2084 by Hughes Tool Company to Transcontinental & Western Air, Inc. ("TWA") pursuant to the terms and conditions of the sales agreement dated February 2, 1950; and

The Board, acting pursuant to the powers vested in it by the Civil Aeronautics Act of 1938, as amended, particularly sections 205(a) 408 and 1005 (d) thereof, and finding that the further modification of its order in Docket No. 1182, as amended and modified, hereinafter provided for is just and reasonable and is in the public interest;

IT IS ORDERED THAT:

Order Serial No. 3210 issued October 17, 1944, as amended by subsequent orders, be and it hereby is further amended by adding thereto the following:

"6. That the terms of this order shall not restrict the right of Hughes Tool Company to sell to TWA or the right of TWA to purchase from Hughes Tool Company six Lockheed Constellation airplanes bearing manufacturer's Serial Nos. 049-2072, 049-2073, 049-2074, 049-2075, 049-2070 and 049-2084, pursuant to the terms and conditions of the sales agreement dated February 2, 1950, between said parties, provided that the sale shall be reported to the Board in the manner provided in paragraph 2 of this order, and provided further that nothing in the Board's action herein shall be construed as a determination that the equipment here involved is required by TWA in the interest of commerce, the postal service, or the national defense or that the cost thereof to TWA is appropriate for investment and/or rate-making purposes."

By the Civil Aeronautics Board:

/s/ M. C. Mulligan

M. C. Mulligan
Secretary

(SEAL)

DX321 id., Item 5a, pag
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BEFORE THE

CIVIL AERONAUTICS BOARD

In the Matter of the Application of	:	
HUGHES TOOL COMPANY	:	
for approval under Section 408 of the Civil Aeronautics Act of 1938, as amended, of the acquisition of control of	:	Docket No. 1182
TRANS WORLD AIRLINES, INC.	:	

MOTION FOR APPROVAL OF TRANSACTIONS

TRANS WORLD AIRLINES, INC., a Delaware corporation (herein referred to as "TWA"), respectfully moves that the Board enter an order herein approving (1) the proposed sale by TWA to Hughes Tool Company (herein referred to as "Hughes"), of one Martin Model 404 Airplane pursuant to an agreement dated December 4, 1950 between TWA and Hughes, a copy of which is attached hereto as Exhibit A, (2) the proposed financing by TWA through Hughes of the final instalment of the purchase price of four Lockheed Constellation Model 749A Airplanes by means of a conditional sales contract between TWA and Hughes pursuant to an agreement dated March 2, 1951 between TWA and Hughes, a copy of which is attached hereto as Exhibit B, and an agreement dated March 2, 1951 between TWA, Hughes and Lockheed Aircraft Corporation (herein referred to as "Lockheed"), a copy of which is attached hereto as Exhibit C, (3) the proposed sale by TWA to Hughes of one Lockheed Constellation Model 749A Airplane pursuant to the agreement dated March 2, 1951 between TWA and Hughes, attached hereto as Exhibit II to

Exhibit B, and (4) the agreements between TWA, Hughes and The Equitable Life Assurance Society of the United States (herein called "Equitable"), copies of which are attached hereto as Exhibits D and E; and that the Board modify its order approving the acquisition by Hughes of control of TWA, Order Serial No. 3210, issued October 17, 1944, as amended, so as to permit the performance of such transactions and agreements.

In support of such motion, TWA shows to the Board:

A. Sale of Martin Airplane

1. By contract dated February 22, 1950, TWA contracted to purchase from The Glenn L. Martin Company 30 Martin Model 404 Airplanes. This contract, referred to as Contract No. 1116, was amended by Contract Change Order No. 4 to provide for the purchase by TWA of an additional 11 Martin Model 404 Airplanes. One of such airplanes was ordered by TWA at the request of and for the account of Hughes. TWA has agreed to sell this airplane to Hughes, subject to approval of the Board, by agreement dated December [illegible], 1950, a copy of which is attached hereto as Exhibit A.

2. Under such agreement Hughes will pay to TWA all costs incurred by TWA in connection with the purchase of this airplane from The Glenn L. Martin Company and the sale thereof to Hughes.

3. This airplane was included in Contract No. 1116 for the convenience of all the parties to the transaction and so as not to complicate the arrangements under which The Glenn L. Martin Company obtained credit to finance the manufacture of the Model 404 Airplanes and under which TWA and Eastern Air Lines at the same time obtained security for their advance payments made to The Glenn L. Martin Company.

4. The purchase by Hughes of a Martin Model 404 Aircraft is of potential benefit to TWA in that under Contract

No. 1116 the purchase price of each airplane purchased by TWA is reduced by $12,500 if The Glenn L. Martin Company manufactures more than 100 of such airplanes in continuous production.

B. Financing of Four Lockheed Constellation Model 749A Airplanes

5. By contract dated March 2, 1951 between TWA and Hughes, a copy of which is attached hereto as Exhibit B, Hughes has agreed in effect to finance the final instalment of the purchase price of four Lockheed Constellation Model 749 Airplanes which TWA has agreed to purchase from Lockheed pursuant to Contract LD-60. Hughes has agreed to pay to Lockheed the second and final instalment of the purchase price of such airplanes and to sell such airplanes to TWA on a conditional sale basis, subject to the approval herein requested and to the other conditions set forth in such agreement. Lockheed has agreed to this transaction by an agreement dated March 2, 1951 between TWA, Hughes and Lockheed, a copy of which is attached hereto as Exhibit C.

6. Hughes is taking title to these four airplanes and selling them to TWA on a conditional sale basis solely for the purpose of enabling TWA to finance the acquisition of such airplanes. The terms and conditions of sale are substantially the same as those contained in the agreement dated as of February 2, 1950 between Hughes and TWA relating to the sale from Hughes to TWA of six Constellation Model 049 Airplanes on a conditional sale basis, which was approved by Board Order No. E-4160. The details of the arrangements between the parties are more specifically set forth in the conditional sale contract, a copy of which is attached as Exhibit I to Exhibit B.

7. TWA is to pay Hughes for these airplanes only the amounts which Hughes has paid to Lockheed, with interest

on the unpaid balance as provided in the conditional sale contract. Hughes is providing TWA with financing for the acquisition of these four airplanes on better terms than would otherwise be available to TWA.

8. These four airplanes are required by TWA for use in its domestic and international operations. The addition of these planes to TWA's present fleet will permit increased Constellation service and increased revenue mileage and will thus improve TWA's service to the public.

C. Sale of One Lockheed Constellation Model 749A Airplane

9. By contract dated May 31, 1949, referred to as Contract No. LD-6C, TWA contracted to purchase from Lockheed 20 Lockheed Constellation Model 749A Airplanes. Upon the exercise of options granted to TWA to purchase additional airplanes, Contract No. LD-6C was amended by Contract Change Order No. 9 to provide for the purchase by TWA of an additional six Lockheed Constellation Model 749A Airplanes. One of such airplanes was ordered by TWA at the request of and for the account of Hughes. TWA has agreed to sell this airplane to Hughes, subject to the approval of the Board, by agreement dated March 2, 1951, a copy of which is attached hereto as Exhibit B. The details of this transaction are set forth in the letter agreement dated March 2, 1951 attached thereto as Exhibit II.

10. Under such letter agreement Hughes will pay to TWA all costs incurred by TWA in connection with the purchase of this airplane from Lockheed and the sale thereof to Hughes.

11. This airplane was included in Contract No. LD-6C for the convenience of all the parties to the transaction. The purchase by Hughes of a Lockheed Constellation Model 749A Airplane is of substantial benefit to TWA in that under Contract No. LD-6C the purchase price of each airplane purchased

by TWA is reduced as the number of planes purchased thereunder is increased through the exercise by TWA of option rights.

D. Agreements for Sale of Capital Stock of TWA.

12. By contract dated April 5, 1950 between Hughes, TWA and Equitable, TWA agreed that on or before December 31, 1951, it would sell sufficient shares of its unissued capital stock so that the net proceeds to it from such sale, after deducting underwriting commissions and other expenses of such issuance payable by it, should be at least $5,000,000 and Hughes agreed that it would cause TWA to perform such agreement and that if such shares were not otherwise sold it would itself buy sufficient shares of the capital stock of TWA to provide such net proceeds or would lend to TWA $5,000,000 evidenced by a subordinated note, all as more fully provided in such agreement (herein referred to as the "1950 Agreement"), a copy of which is attached hereto as Exhibit D.

13. By contract dated January 16, 1951 between Hughes, TWA and Equitable, TWA agreed that on or before December 31, 1952 it would sell sufficient shares of its unissued capital stock (in addition to stock to be sold pursuant to the 1950 Agreement) so that the net proceeds to it from such sale, after deducting underwriting commissions and other expenses of such issuance payable by it, should be at least $5,000,000 and Hughes agreed that it would cause TWA to perform such agreement and that if such shares were not otherwise sold it would itself buy sufficient shares of the capital stock of TWA to provide such net proceeds or would lend to TWA $5,000,000, evidenced by a subordinated note, all as more fully provided in such agreement (herein referred to as the "1951 Agreement"), a copy of which is attached hereto as Exhibit E.

14. Both agreements provide that the obligations of Hughes under such agreements are subject to the approval of

the Civil Aeronautics Board.

15. The execution of both the 1950 Agreement and the 1951 Agreement were essential parts of the transactions pursuant to which TWA arranged to purchase and finance new fleets of Martin and Constellation aircraft. The execution of the 1950 Agreement was made a condition precedent by Equitable to its consent to the purchase by TWA of 30 Martin Model 404 aircraft and to the creation of indebtedness, secured by a chattel mortgage on such aircraft, required to finance such purchase. The execution of the 1951 Agreement was made a condition precedent by Equitable to its consent to the purchase by TWA of 10 Lockheed Model 1049 Constellation Aircraft and to the creation of indebtedness, secured by a chattel mortgage on such aircraft, required to finance such purchase.

16. The 1950 Agreement and the 1951 Agreement were entered into by Hughes to enable TWA to purchase aircraft required by TWA and essential to its future operations. Their purpose is to aid TWA by providing it with additional equity capital, whether by sale of stock to others, by sale of all such stock to Hughes, by the purchase by Hughes of its pro rata share of stock offered to others or by means of a subordinated loan. The execution and performance of both these agreements will be of substantial benefit to TWA.

WHEREFORE, TWA respectfully moves the Board to enter an order herein approving (1) the sale by TWA to Hughes of one Martin Model 404 Airplane; (2) the financing by Hughes of four Lockheed Constellation Model 749A Airplanes; (3) the sale by TWA to Hughes of one Lockheed Constellation Model 749A Airplane; and (4) the agreements relating to the sale of stock of TWA attached hereto as Exhibits D and E, all as hereinabove set forth; and that the Board modify its order approving the acquisition by Hughes of control of TWA, Order Serial No. 3210, issued October 17, 1944, as amended, so as to permit the

performance of such transactions and agreements, and for such other and further relief as may be appropriate.

Respectfully submitted,

TRANS WORLD AIRLINES, INC.

By [signature]

CHADBOURNE, PARKE, WHITESIDE, WOLFF & BROPHY,
Attorneys for
Trans World Airlines, Inc.,
25 Broadway,
New York 4, N. Y.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

WARREN Lee Pierson, being duly sworn, deposes and says that he is CHAIRMAN of The Board of Directors of TRANS WORLD AIRLINES, INC.; that he has read and is familiar with the contents of the foregoing motion and the exhibits attached thereto; that he intends and desires that in granting or denying the relief requested, the Board shall place full and complete reliance upon the accuracy of each and every statement therein contained; that he is familiar with the facts therein set forth; that to the best of his information and belief every statement contained in the motion is true and no such statement is misleading.

Warren L. Pierson

Subscribed and sworn to
before me this 23rd day
of March, 1951.

Janet Stetcal
Notary Public
JANET STETCAL
Notary Public for the State of New York
Qualified in Queens County
No. 41-0267428
Certs. Filed with Co. Clerk New York
& N. Y. City Register, New York Co.
Commission Expires March 30, 1952

Exhibit A

HUGHES TOOL COMPANY
5425 Polk Avenue,
Houston, Texas.

December 4, 1950

Trans World Airlines, Inc.,
101 West 11th St.,
Kansas City 6, Missouri.

Gentlemen:

We understand that you have entered into a contract, dated February 22, 1950, with The Glenn L. Martin Company, referred to as Contract No. 1116, relating originally to the purchase by you of thirty Martin Model 4-0-4 airplanes. We also understand that by amendment to Contract No. 1116, pursuant to Contract Change Order No. 4, you have contracted to purchase from The Glenn L. Martin Company eleven additional Martin Model 4-0-4 airplanes and that under Contract No. 1116, as presently amended, similar contractual terms and conditions are applicable to the eleven additional airplanes as to the thirty original airplanes except that the price of each of the eleven additional airplanes may be increased due to escalation. This will confirm our agreement with respect to one of the eleven additional Martin Model 4-0-4 airplanes, hereinafter referred to as "the Airplane", which you have contracted to purchase pursuant to Contract Change Order No. 4.

We agree to purchase, and you agree to sell and transfer, all your right, title and interest in and to the Airplane upon the following terms and conditions:

(1) The Airplane shall be the sixth of said eleven additional airplanes and scheduled for delivery on or before March 31, 1952; provided, however, that if you should subsequently wish to designate one of the eleven additional airplanes other than the sixth in substitution for the sixth, we will not unreasonably withhold our consent and agreement to such substitution. The Airplane shall be subject to change orders heretofore and hereafter agreed upon between yourselves and The Glenn L. Martin Company, it being agreed that the Airplane is to be substantially similar to the other 10 of said 11 additional Martin Model 4-0-4 Airplanes, but you shall use your best efforts to obtain the agreement of The Glenn L. Martin Company to any special changes we may reasonably request with respect to the Airplane.

(2) During manufacture of said eleven additional airplanes, you shall perform the same functions of inspection, plant representation, and general contract administration without distinction as among said eleven additional airplanes; i.e., on the same basis and to the same standards with respect to the Airplane as apply to the other ten airplanes which are for your own account.

(3) Upon your receipt of notice from The Glenn L. Martin Company of the date they expect the Airplane to be ready for flight tests, you shall notify us thereof, and as promptly as possible thereafter you shall advise us of the amount of the balance of purchase price due to The Glenn L. Martin Company upon delivery. We shall promptly put you in funds to pay such balance of purchase price, and we hereby authorize you to pay such balance of purchase price to The Glenn L. Martin Company against delivery of the Airplane, and in our name and on our behalf to accept delivery of the Airplane and execute all instruments and take all steps appropriate to the end that delivery of the Airplane for our account be effected at the point and upon the basis set out in your contract with The Glenn L. Martin Company, with title vesting in us and with all risk and expense for our account, and following delivery to ferry the Airplane to such other point within the United States as we may request.

(4) We shall pay the same purchase price for the Airplane as you are obligated to pay The Glenn L. Martin Company, such payment to be made as follows:

(a) Forthwith upon fulfillment of the conditions set forth at paragraph 8 hereof, we shall reimburse you for all installments of the purchase price of the Airplane which you have theretofore made to The Glenn L. Martin Company.

(b) Upon notice from you, we shall forthwith put you in funds to meet when due all installments of the purchase price of the Airplane which become due subsequent to fulfillment of the conditions set forth in paragraph 8 hereof.

(5) In addition to the purchase price of the Airplane we shall pay you, following fulfillment of the conditions set forth in paragraph 8 hereof and as the sums become ascertained in normal course:

(a) Such sums, if any, as you may be required to pay to The Glenn L. Martin Company with respect to the Airplane as an adjustment of the purchase price thereof, pursuant to the contract between yourselves and The Glenn L. Martin Company, including without limitation adjustments due to change orders.

(b) Such sums, if any, as are represented by any sales or use tax imposed upon or paid by you by reason of the sale or use of the Airplane or the purchase by us hereunder.

(c) Such sums as represent, under sound accounting principles, a proper allocation to the Airplane of its proportionate share of the general expenses heretofore and hereafter incurred by you in negotiating your general contractual arrangements with The Glenn L. Martin Company, and the performance of functions of inspection, plant representation, and general

contract termination, plus the total of such sums, if any, as represent direct out-of-pocket costs and expenses to you solely on account of, and attributable to, the Airplane and acceptance of delivery and ferrying thereof, including, without limitation, the cost and expenses incidental to your providing customer furnished equipment for the Airplane.

(6) In adjustment of the sums we are obligated to pay you, you shall credit or pay to us, as appropriate, any credits allowed or payments made to you by The Glenn L. Martin Company with respect to the Airplane pursuant to your contractual arrangements with The Glenn L. Martin Company, and you shall remit to us such interest as you receive from The Glenn L. Martin Company on account of installment payments with respect to the Airplane for the period subsequent to the date we have reimbursed you for such installment payments, and you shall remit to us any repaymentsby The Glenn L. Martin Company of installment payments with respect to the Airplane for which we have reimbursed you.

(7) Following our reimbursement to you of any installment payments you have made with respect to the Airplane, you shall, subject to any consents or waivers required by the provisions of any contractual arrangements to which you are a party, execute any instruments in the nature of assignment or to evidence subrogation which we may reasonably request in view of our interest in the Airplane and our rights and obligations hereunder. It is understood that you make no warranties whatsoever regarding the Airplane but will convey to us all your assignable rights and interests in all manufacturers' warranties and guarantees acquired by you pursuant to your agreement with The Glenn L. Martin Company.

(8) This agreement is subject to any approval, consent or clearance of the Civil Aeronautics Board which may be required pursuant to the Civil Aeronautics Act of 1938, as amended.

If the foregoing correctly sets forth the agreement between us, please execute and return the enclosed copy hereof, and this shall constitute the contract between us.

Very truly yours,

HUGHES TOOL COMPANY

By /s/ Noah Dietrich
Executive Vice President

Agreed:

TRANS WORLD AIRLINES, INC.

By /s/ Warren Lee Pierson
Chairman of the Board

Dated: March 2, 1951

Exhibit B

March 2, 1951

Hughes Tool Company
7000 Romaine
Hollywood, California

Gentlemen:

This will confirm our agreement with respect to the last five (of the total twenty-six) Lockheed Model 749A airplanes which we have agreed to purchase from Lockheed Aircraft Corporation pursuant to Contract No. LD-60, as amended, such last five airplanes being hereinafter sometimes called the "Airplanes."

I. With respect to four of the Airplanes (which shall be the first four thereof delivered unless we designate an Airplane other than the fifth Airplane delivered pursuant to II below):

1. You shall pay to Lockheed Aircraft Corporation the second and final installment of purchase price with respect to each of such Airplanes upon notice from us, from time to time, stating the amount of such second and final installment and that the Airplane to whose purchase such payment is applicable is ready for delivery by Lockheed Aircraft Corporation.

2. Upon your making each such payment provided for by subparagraph 1., we shall:

a. accept delivery from Lockheed Aircraft Corporation of the Airplane to whose purchase such payment is applicable, and effect with Lockheed Aircraft Corporation the transfer of title to such Airplane to you; and

b. retain possession of such Airplane pursuant and subject to that certain "Conditional Sale Contract" of even date between us attached hereto and marked "Exhibit I".

II. With respect to one of the Airplanes (which shall be the fifth of the Airplanes delivered unless we designate a different Airplane in lieu of the fifth delivered):

1. You agree to purchase, and we agree to sell and transfer, all our right, title and interest in and to such Airplane upon your making payment therefor and upon all the other terms and conditions with respect thereto set out in that certain Letter Agreement of even date between us attached hereto and marked "Exhibit II".

III. This agreement and the "Conditional Sale Contract" and the Letter Agreement attached hereto are subject to there having been obtained, on or before March 31, 1951 or such extension of such date as may be agreed upon in writing, any approval, consent or clearance of the C.A.B. which may be required pursuant to the Civil Aeronautics Act of 1938, as amended, and neither this agreement nor such "Conditional Sale Contract"

nor such Letter Agreement shall be effective for any purpose unless and until such approval, consent or clearance shall have been obtained.

If the foregoing correctly sets forth our agreement, please execute and return the copy hereof enclosed for that purpose.

Very truly yours,

TRANS WORLD AIRLINES, INC.

By /s/ Erle M. Constable
Treasurer

Confirmed:

HUGHES TOOL COMPANY

By /s/ T. A. Slack
Vice President

Exhibit I

CONDITIONAL SALE CONTRACT

Contract of Conditional Sale made as of the 2nd day of March, 1951, between HUGHES TOOL COMPANY, a Delaware corporation (hereinafter sometimes called the "Seller"), with its principal place of business at Houston, Texas, and TRANS WORLD AIRLINES, INC. (formerly Transcontinental & Western Air, Inc.), a Delaware corporation (hereinafter sometimes called the "Buyer"), with its principal place of business at Kansas City, Missouri,

THE INTEREST OF THE SELLER IN THE AIRCRAFT AND EQUIPMENT COVERED HEREBY IS THAT OF A CONDITIONAL SELLER AND THE INTEREST OF THE BUYER THEREIN IS THAT OF A CONDITIONAL BUYER.

WITNESSETH:

WHEREAS, TWA has contracted to purchase from Lockheed Aircraft Corporation (hereinafter sometimes called "Lockheed") certain Lockheed Model 749A Constellation airplanes, and, with respect to each of four of the last five thereof to be delivered (such four being hereinafter sometimes called the "Airplanes") TWA has paid to Lockheed a first installment of purchase price in the amount of $230,625; and

WHEREAS, Hughes has agreed to pay to Lockheed the second and final installment of purchase price with respect to each of the Airplanes and in consideration thereof will obtain title to the Airplanes as delivered by Lockheed; and

WHEREAS, Hughes desires to sell and TWA desires to buy the Airplanes pursuant to the conditional sale arrangements set forth herein,

NOW, THEREFORE, in consideration of the mutual covenants herein contained, the parties hereto agree as follows:

1. Seller agrees to sell to Buyer and Buyer agrees to purchase the Airplanes upon the terms and conditions hereinafter set forth. The serial numbers applicable to the respective Airplanes, as soon as determined, shall be set out in an amendment to this Contract.

2. Simultaneously upon conveyance of title to each Airplane from Lockheed to Seller, such Airplane shall forthwith be delivered to Buyer and Buyer shall accept such delivery at Burbank, California.

3. The purchase price of each Airplane for purposes of this Contract shall be the amount which Seller shall have paid Lockheed as the second and final installment of the purchase price under Contract No. LD-60, as amended, and such purchase price shall be paid by Buyer to Seller in sixty equal consecutive monthly installments, together with interest on the unpaid balance at the rate of three percent (3%) per annum. The first of such payments relating to each Airplane

shall be made on the first day of the month next following the month in which the Airplane is delivered and one of the remaining payments shall be made on the first day of each month thereafter until the whole of such purchase price shall have been paid. All payments shall be made to the Seller at the Hughes Tool Company, Houston, Texas.

4. Title to the Airplanes shall not pass to Buyer by delivery, but shall remain in Seller until such time as the purchase price shall have been paid in full and Buyer shall have paid to Seller all other sums then due and payable to Seller hereunder, whereupon absolute title to the Airplanes shall pass to Buyer.

5. Upon the happening of any one or more of the following events, namely:

(a) default in making any payment, in the manner herein specified, of any monthly installment of the purchase price of the Airplanes and such default shall continue unremedied for five (5) days after written notice thereof shall have been delivered by Seller to Buyer; or

(b) default shall be made by the Buyer in the observance or performance by the Buyer of any other covenant or agreement contained herein, and such default shall continue unremedied for thirty (30) days after written notice thereof shall have been delivered by Seller to Buyer; or

(c) the Buyer shall become insolvent, or shall file a voluntary petition in bankruptcy, or shall file a voluntary petition or answer seeking or consenting to reorganization pursuant to or purporting to be pursuant to the Acts of Congress relating to bankruptcy or any other statute, state or Federal, for the relief of debtors, or shall be adjudicated a bankrupt, or shall make an assignment for the benefit of creditors, or shall consent to the appointment of a receiver or trustee of or for it or a substantial part of its property; or

(d) an order shall be entered pursuant to or purporting to be pursuant to the Acts of Congress relating to bankruptcy or any other statute, state or Federal, for the relief of debtors approving a petition seeking a reorganization of, or if an order shall be entered appointing a receiver or trustee of, or for any substantial part of the property of, or if a warrant of attachment shall be issued against any substantial part of the property of, the Buyer, and any such order is not dismissed or stayed within sixty (60) days from its entry or such attachment is not dismissed or bonded within thirty (30) days from its levy; or

(e) the Debentures at the time issued and outstanding under that certain Indenture, dated as of December 1, 1945, between Buyer and The Commercial National Bank and Trust Company of New York, as Trustee, as said Indenture may have heretofore been or may hereafter be amended, shall be declared and become due and payable, prior to the date of maturity of such Debentures as set forth therein, upon the occurrence of any of the "events of default" described in said Indenture, as amended (and the Buyer hereby agrees to notify the Seller of any declaration of default forthwith upon the receipt thereof); then Seller may at once (or at

any later time) proceed to take possession of the Airplanes in any manner provided by law, or Seller may at its option, and Seller is hereby empowered to, with or without legal process, and with or without demand, enter upon the premises where the Airplanes may be and take possession thereof and remove the same. Seller may resell the Airplanes, so retaken, at public or private sale, with or without having the Airplanes at the place of sale, and upon such terms and in such manner as Seller may determine. Notice of the intention of Seller to so sell the Airplanes shall be given by Seller to Buyer at least ten (10) days prior to the time of such sale. Seller may bid and purchase at any such public sale. From the proceeds of any such sale, Seller shall deduct all expenses for retaking, repairing, storing and selling the Airplanes, including any reasonable attorneys' fees incurred. The balance of such proceeds shall be applied to the payment of all sums owing to Seller under this agreement and any surplus of such proceeds remaining shall be paid to Buyer or to whoever may be lawfully entitled to receive the same. Buyer shall be under no obligation to Seller for any deficiency resulting from any such sale or to make any payments on account of the purchase price of any Airplane falling due after Seller has taken possession of such Airplane pursuant to this provision.

6. From and after delivery of the Airplanes to Buyer and until absolute title thereto is vested in Buyer or its nominee, or Seller repossesses the Airplanes,

(1) Buyer shall procure and maintain at its expense public liability, passenger liability and property damage insurance in such amounts and with such companies as shall be satisfactory to Seller, covering Seller's liability as holder of legal title to the Airplanes. The policies evidencing such insurance shall contain such provisions as shall be satisfactory to Seller and shall name Seller as assured.

(2) Buyer shall at its expense maintain all risk aircraft hull insurance in respect of the Airplanes in favor of Buyer and Seller, as their interests may appear, in an amount at least sufficient to cover the then unpaid portion of the purchase price of the Airplanes. If any such Airplane shall be lost, destroyed or damaged to such an extent that repair thereof is impractical, such insurance shall be paid to the Seller to the extent of the unpaid balance of the purchase price of such Airplane together with any accrued and unpaid interest thereon, plus all other amounts then due to Seller hereunder. Upon such payment to the Seller of insurance to the extent of the unpaid balance of the purchase price of any Airplane, absolute title to the Airplane so damaged or to any parts of an Airplane so destroyed shall vest in Buyer and Seller shall deliver to Buyer such proper documents of title with respect thereto as Buyer may reasonably require. Buyer shall be under no obligation to make any payments on account of the purchase price of such Airplane falling due after such loss, destruction or damage. Any insurance proceeds in excess of the amount payable to the Seller, and any insurance proceeds payable as a result of damage not rendering repair impractical, shall be payable to Buyer or its designee.

7. Buyer may at any time pay to Seller the unpaid balance of the purchase price of the Airplanes, or any part thereof, without premium or penalty.

8. Upon the payment to Seller of the balance of the purchase price of the Airplanes together with all other amounts owing to Seller hereunder, Seller shall deliver to Buyer at such place in the United States as Buyer may designate (1) a bill of sale duly vesting in Buyer the title to the Airplanes free and clear of all liens, claims, charges and encumbrances attaching subsequent to the delivery of the Airplanes to Seller and not arising out of the possession, use or operation of the Airplanes by Buyer, and (2) such other appropriate documents of title with respect thereto as Buyer may reasonably require.

9. In the event any sales tax or use tax is hereafter imposed upon or paid by Seller by reason of the sale or use of the Airplanes or the purchase thereof by Seller, then in addition to the sales price provided for in paragraph 3, Buyer shall pay to Seller the amount thereof, upon demand.

10. Buyer shall furnish Seller forthwith and from time to time thereafter at reasonable intervals, all such information concerning Buyer's financial condition, including balance sheets and forecasts of earnings, as is customarily furnished to a commercial bank holding or considering the acceptance of unsecured notes of a borrower.

11. The Buyer agrees that it will pay and discharge all taxes, assessments, governmental charges and all charges for keep, repairs, storage, maintenance or accessories, which if unpaid might become a lien, charge or encumbrance upon or against any of the Airplanes; and upon the failure of the Buyer so to do the Seller may make any such payment; provided, however, that nothing herein contained shall require the Buyer to pay such tax, assessment or charge so long as the Buyer shall in good faith contest the validity thereof and shall furnish the Seller such bond or indemnity as the Seller shall require, unless, in the judgment of the Seller, forfeiture is likely to result from any such failure to pay. Any sum or sums so paid by the Seller, together with interest thereon at the highest lawful contract rate, shall be and become a part of the sum which the Buyer is required to pay under this contract, and shall immediately, without demand, be due and be repaid by the Buyer to the Seller.

The Buyer will, upon written request from the Seller, (1) reimburse the Seller for all filing or recording fees incurred in connection with filing or recording or refiling or re-recording this contract and all supplements and additions hereto, if any; (2) execute and deliver to the Seller all such further documents and instruments and do such further acts as may be necessary to perfect the rights of the Seller herein contemplated; and (3) furnish to the Seller at reasonable intervals reports and certificates setting forth all the information necessary to inform the Seller as to the continued existence, location and condition of the Airplanes. The Seller shall also have the right to inspect the Airplanes at all times when the same are not in use and when such inspection can be had without undue inconvenience or expense to the Buyer.

12. Buyer agrees to maintain the Airplanes in good repair and working condition at its own expense, except any airplane lost, destroyed or so damaged that insurance with respect thereto is payable to the Seller pursuant to paragraph 6 hereof. Subject to the proper performance of such covenant, the Buyer may make repairs and replacements to the Airplanes and may substitute for engines, propellers and any other equipment installed in or attached to the Airplanes, engines, propellers or other equipment of substantially the same kind and value. In case of any such substitution title to the equipment substituted shall immediately be vested in Seller and shall become subject to the provisions of this Conditional Sale Contract while title to the equipment for which such substitution has been made will immediately vest in Buyer.

13. Until title to the Airplanes shall have passed to the Buyer hereunder, the Buyer shall have no right, power of authority to sell, transfer, assign, mortgage or encumber or in any other manner whatsoever dispose of the Airplanes or any part thereof (except as provided in paragraph 12 hereof) or any interest therein, and the Buyer hereby agrees that, except as permitted by paragraph 12 hereof, the Buyer will not (voluntarily or involuntarily), sell, transfer, mortgage, encumber or in any other manner whatsoever dispose of the Airplanes or any part thereof or any interest therein. Buyer agrees, except as provided herein, that the Airplanes will be used exclusively for its commercial air transport operations and related activities and that it will not permit the Airplanes to be used or possessed by others. Buyer may permit the use of the Airplanes by other airlines with which Buyer enters into interchange agreements provided that any such use by other airlines shall for the purposes of this agreement be considered to be use by the Buyer.

14. To the extent, if any, that there is a conflict between any of the provisions of this agreement and any of the provisions of the Chattel Mortgage dated as of March 25, 1948 between the Buyer and Bankers Trust Company, as Trustee, or of the Chattel Mortgage dated as of August 4, 1949 between the Buyer and Mellon National Bank & Trust Company, as Trustee, or of the chattel mortgages conterplated by the 1950 Credit Agreement and the 1951 Credit Agreement between the Buyer and Mellon National Bank and Trust Company, as agent, and the Lending Banks named therein, the provisions of such chattel mortgages shall prevail and the provisions of this agreement shall be deemed amended to the extent necessary to avoid such conflict.

15. Before delivery of each Airplane to Buyer hereunder, Buyer will cause to be fastened thereon in a location reasonably adjacent to, and not less prominent than that of, the airworthiness certificate for such Airplane, a name plate no larger than four inches by seven inches bearing the following legend:

"Hughes Tool Company holds legal title
to this Airplane as Conditional Seller."

Buyer shall maintain such name plate in such location or in one of at least equal prominence and visibility at all times. Buyer may affix to the Airplanes Buyer's name, insignia or other legends customarily displayed by Buyer on its airplanes.

16. Buyer shall indemnify and hold harmless Seller, its agents and its employees from any and all liability for losses, expenses, damages, demands and claims in connection with or arising out of any death of, or injury or alleged injury or damage to, persons or property sustained, or alleged to have been sustained, in connection with or arising or alleged to have arisen out of Buyer's possession, use or operation of the Airplanes and Buyer agrees to handle any claim and defend any suit or action brought against Seller, its agents or its employees, or any of them, based on any such death, injury or damage, or alleged injury or damage, and to pay all damages, costs and expenses, including attorneys' fees, in connection therewith or resulting therefrom.

Buyer's liability to Seller under this paragraph 16 is conditioned upon Seller's promptly giving notice to Buyer of institution of such suit or action or of receipt of such claim or demand. Buyer shall have the option at any time to conduct negotiations with the party or parties making any such claim or demand, and may intervene in any such suit or action. Whether or not Buyer intervenes in any such suit or action, it shall be entitled to assume, conduct or control the defense thereof, and Seller shall not settle or discharge any such claim, demand, suit, action or judgment without prior notice to and the consent of Buyer.

IN WITNESS WHEREOF the parties hereto have executed and delivered this agreement as of the day and year first above written.

HUGHES TOOL COMPANY

By /s/ T. A. Slack

Attest:

/s/ Roy H. Sherwood

(Corporate Seal)

TRANS WORLD AIRLINES, INC.

By /s/ Erle M. Constable
Treasurer

Attest:

(Corporate Seal)

/s/ J. L. Weller
Assistant Secretary

Exhibit C

SL/51624
March 2, 1951

Lockheed Aircraft Corporation
Burbank, California

Gentlemen:

The undersigned request your concurrence and agreement as hereafter set forth. For convenience, hereinafter you will sometimes be referred to as "Lockheed", Trans World Airlines, Inc. will sometimes be referred to as "TWA", and Hughes Tool Company will sometimes be referred to as "Hughes".

1. It is contemplated that TWA will finance through Hughes the final installment of the purchase price of four of the last five (of the total twenty-six) Lockheed Model 749A Airplanes which TWA has agreed to purchase from Lockheed pursuant to Contract No. LD-60, as amended. Incidental to such financing, it is contemplated that Hughes shall acquire title to four of said last five Airplanes for security purposes directly from Lockheed, and forthwith convey each of such four Airplanes to TWA subject and pursuant to conditional sale arrangements between Hughes and TWA. It is further contemplated that Hughes shall purchase full legal and beneficial ownership of the fifth of said last five airplanes, and TWA shall give Lockheed proper and timely notice designating such fifth airplane for this purpose.

2. It is therefore agreed, notwithstanding anything to the contrary in said Contract No. LD-60, as amended, but subject to the condition stated in paragraph 4 hereof, that with respect to each of said last five Airplanes:

a. Hughes shall pay Lockheed, in the form and at the place specified in said Contract No. LD-60, as amended, the final installment of purchase price applicable to each Airplane, payable upon Lockheed delivering each Airplane in accordance with said Contract No. LD-60, as amended; and payment by Hughes shall discharge the obligation of TWA to make such payment pursuant to said Contract.

b. Simultaneous with receipt of each such payment, Lockheed shall deliver to TWA, in the condition and at the place specified in said Contract (except that the fifth Airplane, referred to in paragraph 1 above, shall be delivered to Hughes, and at Las Vegas, Nevada upon proper amendment of said Contract pursuant to Article 3(b) thereof), the Airplane to whose purchase such payment is applicable, and a bill of sale duly vesting in Hughes good title to such Airplane free and clear of all encumbrances and such other appropriate documents of title as Hughes may reasonably require; and such delivery shall discharge the obligation of Lockheed to make delivery pursuant to said Contract.

c. Any representatives heretofore designated, or authorized, or who may hereafter be designated or authorized, by TWA to act or perform functions with

respect to said Airplanes, including without limitation functions of inspection, delivery of payment and receipt of delivery of Airplanes and bills of sale, execution and receipt of packing sheets, and other related matters, acts, and instruments, are hereby designated and authorized by Hughes to act and perform on its behalf similar functions with respect to said Airplanes.

3. It is further agreed, notwithstanding anything to the contrary in said Contract No. LD-60, as amended, but subject to the conditions stated in paragraph 4 hereof, that:

a. With respect to each of the four Airplanes whose title Hughes acquires for security purposes, all rights and obligations pursuant to said Contract No. LD-60, as amended, whether before or after delivery (except only those relating to payment of final installment of purchase price and delivery of Airplanes and title as in this agreement provided) shall remain rights and obligations solely between TWA and Lockheed, and shall not become rights and obligations between Hughes and Lockheed, all with the same full force and effect as would obtain but for this agreement; provided, however, that in event Hughes should repossess any or all of said four Airplanes pursuant to the conditional sale arrangements between Hughes and TWA, Hughes shall succeed to all the rights and assume all the obligations with respect to the Airplanes repossessed applicable under said Contract LD-60, as amended, and subsisting as of the date of such repossession; and all rights and obligations of Hughes in any event shall be limited and affected by all agreements, covenants, actions, consents, performances, and discharges between TWA and Lockheed with respect to said Airplanes prior to such repossession, whether before or after delivery of said Airplanes; and

b. With respect to the one of said last five Airplanes whose full legal and beneficial ownership is purchased by Hughes, all rights and obligations pursuant to said Contract No. LD-60, as amended subsisting as of the date Hughes acquires such ownership shall become rights and obligations solely between Hughes and Lockheed, and shall cease to be rights and obligations between TWA and Lockheed, provided that all rights and obligations of Hughes in any event shall be limited and affected by all agreements, covenants, actions, consents, performances, discharges between TWA and Lockheed with respect to said one Airplane prior to the date Hughes acquired such ownership.

4. TWA shall have the right to nullify the application of this agreement to any or all of said five Airplanes by written notice to that effect delivered to Lockheed and Hughes at least five days prior to delivery of the Airplane to which such notice relates.

If the foregoing correctly sets forth our understanding and agreement in the premises, kindly so indicate by dating and signing, as indicated, the two duplicates of this letter enclosed herewith and by returning one such duplicate

to each of the undersigned.

Very truly yours,

HUGHES TOOL COMPANY

By /s/ T. A. Slack
Vice President

TRANS WORLD AIRLINES, INC.

By /s/ Erle M. Constable
Treasurer

The foregoing correctly sets forth our understanding and agreement in the premises.

Dated: March 21st, 1951

LOCKHEED AIRCRAFT CORPORATION

By Carl B. Squier
Vice President

Exhibit D

AGREEMENT dated April 5, 1950 between HUGHES TOOL COMPANY, a Delaware corporation (hereinafter called "Hughes"), TRANSCONTINENTAL & WESTERN AIR, INC., a Delaware corporation (hereinafter called "TWA"), and THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, a New York corporation (hereinafter called "Equitable").

WHEREAS Hughes, as of the date hereof, is the owner of approximately 74% of the issued and outstanding capital stock of TWA; and

WHEREAS TWA proposes to borrow from banks not in excess of $10,000,000 to assist it in financing the purchase of 30 Martin 404 Airplanes (hereinafter referred to as the "Airplanes"); and

WHEREAS Equitable, as the owner of all the Debentures issued and outstanding under the Indenture dated as of December 1, 1945 entered into between TWA and The Commercial National Bank and Trust Company of New York, as Trustee, as from time to time amended (hereinafter referred to as the "Indenture"), deems it desirable that TWA acquire the Airplanes and has, co-incidentally herewith and in reliance hereon, given its consent under Section 4.26 of the Indenture to the waiver of the restrictions contained in the Indenture so as to permit TWA to purchase such Airplanes and to borrow money on the security thereof to assist it in financing such purchase;

NOW, THEREFORE, in consideration of the premises, it is hereby agreed as follows:

1. TWA agrees that on or before December 31, 1951 it will sell sufficient shares of its unissued capital stock so that the net proceeds to it from such sale, after deducting underwriting commissions and other expenses of such issuance payable by it, shall be at least $5,000,000.

2. Hughes agrees that it will cause TWA to perform the agreement contained in paragraph 1 hereof and that if other purchasers are not available, Hughes will, itself, buy on or before December 31, 1951, sufficient shares of the unissued capital stock of TWA to provide net proceeds to TWA from such sale, after deducting underwriting commissions and other expenses of such issuance payable by TWA, of at least $5,000,000, provided, however, that said purchase by Hughes shall be subject to the approval of the Civil Aeronautics Board, but Hughes agrees that it will and it will cause TWA to take such action as may be necessary to obtain such approval if such approval can be obtained.

3. Hughes agrees that if for any reason it is impossible for TWA to perform its obligation under paragraph 1 hereof, upon the request of Equitable, Hughes will lend to TWA said sum of $5,000,000 evidenced by a subordinated note or notes in substantially the same terms and subject to substantially the same conditions as were contained in the Subordinated Convertible 2-3/4% Notes issued by TWA, pursuant to the Three-Party Agreement dated January 31, 1947 between Hughes, TWA and Equitable, provided, however, that said loan

shall be subject to the approval of the Civil Aeronautics Board, but Hughes agrees that it will and it will cause TWA to take such action as may be necessary to obtain such approval if such approval can be obtained. TWA agrees that, upon the request of Equitable, it will borrow at least $5,000,000 upon such terms and conditions if such loan is made available to it. Equitable hereby agrees to waive the restrictions contained in the Indenture so as to permit such borrowing by TWA.

WITNESS the due execution hereof in several counterparts.

HUGHES TOOL COMPANY

By /s/ Noah Dietrich
V.P.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES

By /s/ Henry Greaves
Treasurer

TRANSCONTINENTAL & WESTERN AIR, INC.

By /s/ A. V. Leslie
Vice President and Treasurer

Exhibit E

AGREEMENT dated January 16, 1951 between HUGHES TOOL COMPANY, a Delaware corporation (hereinafter called "Hughes"), TRANS WORLD AIRLINES, INC., a Delaware corporation (hereinafter called "TWA") and THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, a New York corporation (hereinafter called "Equitable").

WHEREAS Hughes, as of the date hereof, is the owner of approximately 74% of the issued and outstanding capital stock of TWA; and

WHEREAS TWA proposes to borrow from banks not in excess of Ten Million Dollars ($10,000,000) to assist it in financing the purchase of 10 Lockheed Model 1049 Constellation Airplanes and spare parts for use in connection therewith (hereinafter referred to as the "Airplanes"); and

WHEREAS Equitable, as the owner of all the Debentures issued and outstanding under the Indenture dated as of Dec. 1, 1945, entered into between TWA and The Commercial National Bank and Trust Company of New York, as Trustee, as from time to time amended (hereinafter referred to as the "Indenture"), deems it desirable that TWA acquire the Airplanes and has, co-incidentally herewith and in reliance hereon, given its consent to the execution of a supplemental Indenture to the Indenture so as to permit TWA to purchase such Airplanes and to borrow money on the security thereof to assist it in financing such purchase; and

WHEREAS the parties hereto have entered into an agreement dated Apr. 5, 1950, pursuant to which TWA agreed that on or before Dec. 31, 1951 it would sell sufficient shares of its unissued capital stock so that the net proceeds to it from such sale, after deducting underwriting commissions and other expenses of such issuance payable by it, should be at least $5,000,000 (hereinafter referred to as the "1950 Agreement");

NOW, THEREFORE, in consideration of the premises, it is hereby agreed as follows:

1. Without in any way affecting the obligations of TWA and Hughes under the 1950 Agreement, TWA agrees that on or before Dec. 31, 1952, it will sell sufficient shares of its unissued capital stock so that the net proceeds to it from such sale, after deducting underwriting commissions and other expenses of such sales payable by it, shall be at least $5,000,000.

2. Hughes agrees that it will cause TWA to perform the agreement contained in paragraph 1 hereof and that if such shares are not otherwise sold, it will, itself, buy on or before Dec. 31, 1952, sufficient shares of the unissued capital stock of TWA to provide net proceeds to TWA from such sale, after deducting underwriting commissions and other expenses of such issuance payable by TWA, which together with the net proceeds from any other sales of the unissued capital stock of TWA made subsequent to the date hereof (excluding net proceeds of $5,000,000 from sales made to satisfy the requirements of the 1950 agreement), shall aggregate at least $5,000,000.

3. The parties hereto agree that Hughes may satisfy its obligation hereunder by lending to TWA on or before Dec. 31, 1952, said sum of $5,000,000 (or if the obligation of TWA under paragraph 1 hereof has been performed in part, a sum equivalent to the net proceeds of the shares of stock which Hughes would otherwise be obligated to purchase pursuant to paragraph 2 hereof), evidenced by a subordinated note or notes in substantially the same terms and subject to substantially the same conditions as were contained in the Subordinated Convertible 2-3/4% Notes issued by TWA, pursuant to the Three-Party Agreement dated Jan. 31, 1947, between Hughes, TWA, and Equitable.

4. All obligations of Hughes herein set forth are subject to any approval of the Civil Aeronautics Board which may be required by law but Hughes and TWA agree to take all reasonable steps to obtain any such required approval.

WITNESS the due execution hereof in several counterparts.

HUGHES TOOL COMPANY

By /s/ Noah Dietrich
Executive Vice President

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES

By /s/ F. A. Shailer

TRANS WORLD AIRLINES, INC.

By /s/ Erle M. Constable
Treasurer

Orders
Serial Number E-5324

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 25th day of April, 1951.

In the Matter of the Application of	
HUGHES TOOL COMPANY	
for approval under section [illegible] of the Civil Aeronautics Act of 1938, as amended, of the acquisition of control of	Docket No. 1182
TRANS WORLD AIRLINES, INC.	

ORDER MODIFYING ORDER APPROVING ACQUISITION

A motion having been filed by Hughes Tool Company for an order modifying Order Serial No. 3210 issued October 17, 1944, in this docket, as amended by subsequent orders, so as to permit the (1) sale to Hughes Tool Company by TWA of a Martin 404 aircraft ordered by TWA at the request of Hughes Tool Company pursuant to the terms and conditions of a sales contract dated December 4, 1950; (2) sale to Hughes Tool Company by TWA of a Lockheed Constellation Model 749A aircraft ordered by TWA at the request of Hughes Tool Company pursuant to a letter agreement dated March 2, 1951; (3) financing by Hughes Tool Company in favor of TWA of the final installment on four new Lockheed Constellation Model 749A aircraft on a conditional sales basis pursuant to the terms and conditions of an agreement dated March 2, 1951; and (4) implementation of certain stock agreements dated April 5, 1950, and January 16, 1951, between TWA, Hughes Tool Company, and The Equitable Life Assurance Company for the purpose of raising additional equity capital for the purchase of a fleet of aircraft deemed essential by the carrier for its future operations;

The Board, acting pursuant to the powers vested in it by the Civil Aeronautics Act of 1938, as amended, particularly sections 205(a), 408 and 1005(d) thereof, and finding that the further modification of its order in Docket No. 1182, as amended and modified, hereinafter provided for is just and reasonable and is in the public interest;

IT IS ORDERED THAT:

Order Serial No. 3210, issued October 17, 1944, as amended by subsequent orders, be and it hereby is further amended by adding thereto the following:

"7. That the terms of this order shall not restrict the right of Trans World Airlines, Inc., to sell and Hughes Tool Company to buy a Martin 404 aircraft and Lockheed Constellation Model 749A aircraft pursuant to the terms and conditions of sales contracts dated December 4, 1950, and March 2, 1951, between said parties respectively; the financing by Hughes Tool Company in favor of TWA of the final installment on four new Lockheed Constellations Model 749A aircraft under a conditional sales contract pursuant to the terms and conditions of an agreement between the parties dated March 2, 1951; the implementation of certain stock agreements dated April 5, 1950, and January 16, 1951, between Transcontinental & Western Air, Inc., Hughes Tool Company, and The Equitable Life Assurance Company for the purpose of raising additional equity capital for the purchase of a fleet of aircraft, provided that the sale shall be reported to the Board in the manner provided in paragraph 2 of this order, and provided further that nothing in the Board's action herein shall be construed as constituting an approval for rate-making purposes."

By the Civil Aeronautics Board:

/s/ M. C. Mulligan

M. C. Mulligan
Secretary

(SEAL)

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Before the

CIVIL AERONAUTICS BOARD

In the Matter of the Application of	:	
HUGHES TOOL COMPANY	:	
for approval under Section 408 of the Civil Aeronautics Act of 1938, as amended, of the acquisition of control of	:	Docket No. 1182
TRANS WORLD AIRLINES, INC.	:	

MOTION FOR APPROVAL OF PURCHASE OF THREE CONSTELLATION AIRPLANES

Communications with respect to this document should be sent to:

WARREN LEE PIERSON,
Chairman of the Board of Directors,
Trans World Airlines, Inc.,
806 Connecticut Ave., N.W.,
Washington 6, D. C.

-and-

CHADBOURNE, PARKE, WHITESIDE, WOLFF & BROPHY,
Attorneys for
Trans World Airlines, Inc.,
25 Broadway,
New York 4, N. Y.

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Before the

CIVIL AERONAUTICS BOARD

In the Matter of the Application of	
HUGHES TOOL COMPANY	
for approval under Section 408 of the Civil Aeronautics Act of 1938, as amended, of the acquisition of control of	Docket No. 1182
TRANS WORLD AIRLINES, INC.	

MOTION FOR APPROVAL OF PURCHASE OF THREE CONSTELLATION AIRPLANES

TRANS WORLD AIRLINES, INC., a Delaware corporation (herein referred to as "TWA"), respectfully moves that the Board enter an order herein approving the proposed financing by TWA through Hughes Tool Company (herein referred to as "Hughes"), of the purchase price of three Lockheed Constellation Airplanes (to be purchased from Delta Air Lines, Inc.) by means of a conditional sale contract to be dated as of April 1, 1954 between TWA and Hughes, in the form attached hereto as Exhibit A; and that the Board modify its order approving the acquisition by Hughes of control of TWA, Order Serial No. 3210, issued October 17, 1944, as amended, so as to permit the performance of such transactions and agreements.

In support of such motion, TWA shows to the Board:

1. By an agreement in the form attached hereto as Exhibit A, Hughes will agree to sell, on a conditional sale basis, and TWA will agree to purchase, subject to the

4045

approval herein requested and to the other conditions set forth in such agreement, the three Constellation airplanes above referred to at the cost of said airplanes to Hughes, all as more particularly set forth in such agreement.

2. These airplanes are to be acquired by Hughes from Delta Air Lines, Inc. (herein referred to as "Delta") pursuant to an agreement dated March 23, 1954, to be executed by Hughes and Delta, a copy of which is attached hereto as Exhibit B. Hughes will take title to these three airplanes and sell them to TWA on a conditional sale basis solely for the purpose of enabling TWA to finance the acquisition of such airplanes and thus to increase its fleet of Constellation aircraft.

3. The terms and conditions of sale by Hughes to TWA are substantially the same as those contained in the agreement dated as of February 2, 1950 between Hughes and TWA relating to the sale from Hughes to TWA of six Constellation Model 049 Airplanes on a conditional sale basis, which was approved by Board Order No. E-4160, and as those contained in the conditional sale contract dated as of March 2, 1951 between Hughes and TWA relating to the sale from Hughes to TWA of four Constellation Model 749A Airplanes on a conditional sale basis, which was approved by Board Order No. E-5324. The details of the arrangements between the parties are more specifically set forth in the form of conditional sale contract, a copy of which is attached as Exhibit A.

4. TWA is to pay Hughes for these airplanes only the amounts which Hughes pays to Delta, with interest on the unpaid balance as provided in the conditional sale contract. By selling these airplanes to TWA on a conditional sale basis on the terms outlined in Exhibit A, Hughes will provide TWA with financial arrangements on better terms than would otherwise be available. Under the bank Credit Agreement which TWA has arranged for the financing of the 20 Constellation Model 1049E aircraft and certain spare parts which it has contracted to purchase from Lockheed Aircraft Corporation, TWA will pay interest at the rate of 4% per annum and will pay at least 40% of the purchase price of the Constellation 1049E airplanes and spare parts from its own funds. Interest payable to Hughes is 3-3/4% per annum and the initial payment required is less than 2% of the purchase price.

5. These three airplanes are required by TWA for use in its domestic and international operations. The addition of these planes to TWA's present fleet will permit increased Constellation service and increased revenue mileage and will thus improve TWA's service to the public.

WHEREFORE, TWA respectfully moves the Board to enter an order herein approving the financing by Hughes of three Lockheed Constellation Airplanes, including the conditional sale of such Airplanes by Hughes to TWA, all as hereinabove set forth; and that the Board modify its order approving the acquisition by Hughes of control of TWA, Order Serial No. 3210, issued October

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17, 1944, as amended, so as to permit the performance of such transactions and agreements, and for such other and further relief as may be appropriate.

Respectfully submitted,

TRANS WORLD AIRLINES, INC.

By G. V. Leslie

Vice-President - Finance

March 24, 1954

CHADBOURNE, PARKE, WHITESIDE, WOLFF & BROPHY,
Attorneys for
Trans World Airlines, Inc.,
25 Broadway,
New York 4, N. Y.

Exhibit A

CONDITIONAL SALE CONTRACT

Contract of Conditional Sale made as of the 1st day of April, 1954, between HUGHES TOOL COMPANY, a Delaware corporation (hereinafter sometimes called the "Seller"), with its principal place of business at Houston, Texas, and TRANS WORLD AIRLINES, INC., a Delaware corporation (hereinafter sometimes called the "Buyer"), with its principal place of business at Kansas City, Missouri,

THE INTEREST OF THE SELLER IN THE AIRCRAFT AND EQUIPMENT COVERED HEREBY IS THAT OF A CONDITIONAL SELLER AND THE INTEREST OF THE BUYER THEREIN IS THAT OF A CONDITIONAL BUYER.

W I T N E S S E T H :

WHEREAS, Hughes has contracted to purchase from Delta Air Lines, Inc. (hereinafter called "Delta") the three Lockheed Constellation airplanes (hereinafter called the "Airplanes"), identified as follows:

Type	C.A.A. Registration No.	Mfg. Serial No.
L-649A	N 86521	2642
L-649A	N 86522	2653
L-749A	N 86535	2673

; and

WHEREAS, Hughes desires to sell and TWA desires to buy the Airplanes pursuant to the conditional sale arrangements set forth herein,

NOW, THEREFORE, in consideration of the mutual covenants herein contained, the parties hereto agree as follows:

1. Seller agrees to sell to Buyer and Buyer agrees to purchase the Airplanes upon the terms and conditions hereinafter set forth.

2. Simultaneously upon conveyance of title to each Airplane from Delta to Seller, such Airplane shall forthwith be delivered to Buyer and Buyer shall accept such delivery at Midway Airport, Chicago, Illinois.

3. The purchase price of each Airplane for purposes of this Contract shall be the amount which Seller shall have paid Delta for such Airplane, and such purchase price shall be paid by Buyer to Seller in sixty equal consecutive monthly installments, together with

4149

interest on the unpaid balance at the rate of three and three-quarters percent (3 3/4%) per annum. The first of such payments relating to each Airplane shall be made at the time of delivery of such Airplane, the next payment shall be made on the first day of the month next following the month in which the Airplane is delivered and one of the remaining payments shall be made on the first day of each month thereafter until the whole of such purchase price shall have been paid. All payments shall be made to the Seller at the Hughes Tool Company, Houston, Texas.

4. Title to the Airplanes shall not pass to Buyer by delivery, but shall remain in Seller until such time as the purchase price shall have been paid in full and Buyer shall have paid to Seller all other sums then due and payable to Seller hereunder, whereupon absolute title to the Airplanes shall pass to Buyer.

5. Upon the happening of any one or more of the following events, namely:

(a) default in making any payment, in the manner herein specified, of any monthly installment of the purchase price of the Airplanes and such default shall continue unremedied for five (5) days after written notice thereof shall have been delivered by Seller to Buyer; or

(b) default shall be made by the Buyer in the observance or performance by the Buyer of any other covenant or agreement contained herein, and such default shall continue unremedied for thirty (30) days after written notice thereof shall have been delivered by Seller to Buyer; or

(c) the Buyer shall become insolvent, or shall file a voluntary petition in bankruptcy, or shall file a voluntary petition or answer seeking or consenting to reorganization pursuant to or purporting to be pursuant to the Acts of Congress relating to bankruptcy or any other statute, state or Federal, for the relief of debtors, or shall be adjudicated a bankrupt, or shall make an assignment for the benefit of creditors, or shall consent to the appointment of a receiver or trustee of or for it or a substantial part of its property; or

(d) an order shall be entered pursuant to or purporting to be pursuant to the Acts of Congress relating to bankruptcy or any other statute, state or Federal, for the relief of debtors approving a petition seeking a reorganization of, or if an order shall be entered appointing a receiver or trustee of, or for any substantial part of the property of, or if a warrant of attachment shall be issued against any substantial part of the property of, the Buyer, and any such order is not dismissed or stayed within sixty (60) days from its entry or such attachment is not dismissed or bonded within thirty (30) days from its levy; or

(e) the Debentures at the time issued and outstanding under that certain Indenture, dated as of December 1, 1945, between Buyer and Bankers Trust Company, as Successor Trustee, as said Indenture may have heretofore been or may hereafter be amended, shall be declared and become due and payable, prior to the date of maturity of such Debentures as set forth therein, upon the occurrence of any of the "events of default" described in said Indenture, as amended (and the Buyer hereby agrees to notify the Seller of any declaration of default forthwith upon the receipt thereof);

then Seller may at once (or at any later time) proceed to take possession of the Airplanes in any manner provided by law, or Seller may at its option, and Seller is hereby empowered to, with or without legal process, and with or without demand, enter upon the premises where the Airplanes may be and take possession thereof and remove the same. Seller may resell the Airplanes, so retaken, at public or private sale, with or without having the Airplanes at the place of sale, and upon such terms and in such manner as Seller may determine. Notice of the intention of Seller to so sell the Airplanes shall be given by Seller to Buyer at least ten (10) days prior to the time of such sale. Seller may bid and purchase at any such public sale. From the proceeds of any such sale, Seller shall deduct all expenses for retaking, repairing, storing and selling the Airplanes, including any reasonable attorneys' fees incurred. The balance of such proceeds shall be applied to the payment of all sums owing to Seller under this agreement and any surplus of such proceeds remaining shall be paid to Buyer or to whoever may be lawfully entitled to receive the same. Buyer shall be under no obligation to Seller for any deficiency resulting from any such sale or to make any payments on account of the purchase price of any Airplane falling due after Seller has taken possession of such Airplane pursuant to this provision.

6. From and after delivery of the Airplanes to Buyer and until absolute title thereto is vested in Buyer or its nominee, or Seller repossesses the Airplanes,

(1) Buyer shall procure and maintain at its expense public liability, passenger liability and property damage insurance in such amounts and with such companies as shall be satisfactory to Seller, covering Seller's liability as holder of legal title to the Airplanes. The policies evidencing such insurance shall contain such provisions as shall be satisfactory to Seller and shall name Seller as assured.

(2) Buyer shall at its expense maintain all risk aircraft hull insurance in respect of the Airplanes in favor of Buyer and Seller, as their interests may appear, in an amount at least sufficient to cover the then unpaid portion of the purchase price of the Airplanes. If any such Airplane shall be lost, destroyed or damaged to such an extent that

repair thereof is impractical, such insurance shall be paid to the Seller to the extent of the unpaid balance of the purchase price of such Airplane together with any accrued and unpaid interest thereon, plus all other amounts then due to Seller hereunder. Upon such payment to the Seller of insurance to the extent of the unpaid balance of the purchase price of any Airplane, absolute title to the Airplane so damaged or to any parts of an Airplane so destroyed shall vest in Buyer and Seller shall deliver to Buyer such proper documents of title with respect thereto as Buyer may reasonably require. Buyer shall be under no obligation to make any payments on account of the purchase price of such Airplane falling due after such loss, destruction or damage. Any insurance proceeds in excess of the amount payable to the Seller, and any insurance proceeds payable as a result of damage not rendering repair impractical, shall be payable to Buyer or its designee.

7. Buyer may at any time pay to Seller the unpaid balance of the purchase price of the Airplanes, or any part thereof, without premium or penalty.

8. Upon the payment to Seller of the balance of the purchase price of the Airplanes together with all other amounts due to Seller hereunder, Seller shall deliver to Buyer at such place in the United States as Buyer may designate (1) a bill of sale duly vesting in Buyer the title to the Airplanes free and clear of all liens, claims, charges and encumbrances attaching subsequent to the delivery of the Airplanes to Seller and not arising out of the possession, use or operation of the Airplanes by Buyer, and (2) such other appropriate documents of title with respect thereto as Buyer may reasonably require.

9. In the event any sales tax or use tax is hereafter imposed upon or paid by Seller by reason of the sale or use of the Airplanes or the purchase thereof by Seller, then in addition to the sales price provided for in paragraph 3, Buyer shall pay to Seller the amount thereof, upon demand.

10. Buyer shall furnish Seller forthwith and from time to time thereafter at reasonable intervals, all such information concerning Buyer's financial condition, including balance sheets and forecasts of earnings, as is customarily furnished to a commercial bank holding or considering the acceptance of unsecured notes of a borrower.

11. The Buyer agrees that it will pay and discharge all taxes, assessments, governmental charges and all charges for keep, repairs, storage, maintenance or accessories, which if unpaid might become a lien, charge or encumbrance upon or against any of the Airplanes; and upon the failure of the Buyer so to do the Seller may make any such payment; provided, however, that nothing herein contained shall require the Buyer to pay such tax, assessment or charge so long as the Buyer shall in good faith

contest the validity thereof and shall furnish the Seller such bond or indemnity as the Seller shall require, unless, in the judgment of the Seller, forfeiture is likely to result from any such failure to pay. Any sum or sums so paid by the Seller, together with interest thereon at the highest lawful contract rate, shall be and become a part of the sum which the Buyer is required to pay under this contract, and shall immediately, without demand, be due and be repaid by the Buyer to the Seller.

The Buyer will, upon written request from the Seller, (1) reimburse the Seller for all filing or recording fees incurred in connection with filing or recording or refiling or re-recording this contract and all supplements and additions hereto, if any; (2) execute and deliver to the Seller all such further documents and instruments and do such further acts as may be necessary to perfect the rights of the Seller herein contemplated; and (3) furnish to the Seller at reasonable intervals reports and certificates setting forth all the information necessary to inform the Seller as to the continued existence, location and condition of the Airplanes. The Seller shall also have the right to inspect the Airplanes at all times when the same are not in use and when such inspection can be had without undue inconvenience or expense to the Buyer.

12. Buyer agrees to maintain the Airplanes in good repair and working condition at its own expense, except [illegible] airplane lost, destroyed or so damaged that insurance with respect thereto is payable to the Seller pursuant to paragraph 6 hereof. Subject to the proper performance of such covenant, the Buyer may make repairs and replacements to the Airplanes and may substitute for engines, propellers and any other equipment installed in or attached to the Airplanes, engines, propellers or other equipment of substantially the same kind and value. In case of any such substitution title to the equipment substituted shall immediately be vested in Seller and shall become subject to the provisions of this Conditional Sale Contract while title to the equipment for which such substitution has been made will immediately vest in Buyer.

13. Until title to the Airplanes shall have passed to the Buyer hereunder, the Buyer shall have no right, power or authority to sell, transfer, assign, mortgage or encumber or in any other manner whatsoever dispose of the Airplanes or any part thereof (except as provided in paragraph 12 hereof) or any interest therein, and the Buyer hereby agrees that, except as permitted by paragraph 12 hereof, the Buyer will not (voluntarily or involuntarily), sell, transfer, mortgage, encumber or in any other manner whatsoever dispose of the Airplanes or any part thereof or any interest therein. Buyer agrees, except as provided herein, that the Airplanes will be used exclusively for its commercial air transport operations and related activities and that it will not permit the Airplanes to be used or possessed by others. Buyer may permit the use of the Airplanes by other airlines with which Buyer enters into interchange agreements provided that any such use by other airlines shall for the purposes of this agreement be considered to be use by the Buyer.

14. To the extent, if any, that there is a conflict between any of the provisions of this agreement and any of the provisions of the Chattel Mortgages dated as of August 4, 1949, October 29, 1951 and May 13, 1952 between the Buyer and Mellon National Bank & Trust Company, as Trustee, or of the chattel mortgage contemplated by the Credit Agreement dated as of September 25, 1953 between the Buyer and Mellon National Bank and Trust Company, as Agent, and the Lending Banks named therein, the provisions of such chattel mortgages shall prevail and the provisions of this agreement shall be deemed amended to the extent necessary to avoid such conflict.

15. Before delivery of each Airplane to Buyer hereunder, Buyer will cause to be fastened thereon in a location reasonably adjacent to, and not less prominent than that of, the airworthiness certificate for such Airplane, a name plate no larger than four inches by seven inches bearing the following legend:

"Hughes Tool Company holds legal title
to this Airplane as Conditional Seller."

Buyer shall maintain such name plate in such location or in one of at least equal prominence and visibility at all times. Buyer may affix to the Airplanes Buyer's name, insignia or other legends customarily displayed by Buyer on its airplanes.

16. Buyer shall indemnify and hold harmless Seller, its agents and its employees from any and all liability for losses, expenses, damages, demands and claims in connection with or arising out of any death of, or injury or alleged injury or damage to, persons or property sustained, or alleged to have been sustained, in connection with or arising or alleged to have arisen out of Buyer's possession, use or operation of the Airplanes and Buyer agrees to handle any claim and defend any suit or action brought against Seller, its agents or its employees, or any of them, based on any such death, injury or damage, or alleged injury or damage, and to pay all damages, costs and expenses, including attorneys' fees, in connection therewith or resulting therefrom.

Buyer's liability to Seller under this paragraph 16 is conditioned upon Seller's promptly giving notice to Buyer of institution of such suit or action or of receipt of such claim or demand. Buyer shall have the option at any time to conduct negotiations with the party or parties making any such claim or demand, and may intervene in any such suit or action. Whether or not Buyer intervenes in any such suit or action, it shall be entitled to assume, conduct or control the defense thereof, and Seller shall not settle or discharge any such claim, demand, suit, action or judgment without prior notice to and the consent of Buyer.

17. This Contract shall, without liability of either Buyer or Seller to the other, be and become null and void and of no force or effect if on or before

April 1, 1954, or such extension of said date as Buyer and Seller may hereafter mutually agree upon in writing, the Civil Aeronautics Board (1) shall not have authorized the transactions contemplated hereby and (2) shall not have granted any approval that may be required for the purchase of the Airplanes by Hughes from Delta.

IN WITNESS WHEREOF, the parties hereto have executed and delivered this agreement as of the day and year first above written.

HUGHES TOOL COMPANY

By _____

Attest:

_____

(Corporate Seal)

TRANS WORLD AIRLINES, INC.

By _____

Attest:

_____

(Corporate Seal)

Exhibit B

March 23, 1954

Hughes Tool Company,
Houston,
Texas.

Dear Sirs:

The following is in confirmation of our agreement with respect to the purchase by you (Hughes) from us (Delta) of three Lockheed Constellation airplanes powered with four Wright Model 749 CD-BD-1 type engines:

1. We agree to sell to you and you agree to purchase from us the following Lockheed Constellation airplanes:

Type	Delta Co. No.	C.A.A. Registration No.	Mfg. Serial No.
L-649A	521	N 86521	2642
L-649A	522	N 86522	2653
L-749A	535	N 86535	2673

All such airplanes shall be delivered to you, at Midway Airport, Chicago, Illinois. Delta will assume all risk of damage to or destruction of such aircraft prior to delivery to Hughes. Delivery of such airplanes shall be made in accordance with the following schedule:

Mfg. Serial No.	Date
2642	April 1, 1954
2673	April 25, 1954
2653	June 1, 1954

2. It is understood and agreed that each of said airplanes shall be delivered to Hughes in an "as is" condition, it being understood that each airplane when delivered shall be clean and in good operating condition, all in accordance with airline operating standards, but this shall not require any periodic overhaul work prior to the delivery of the airplane. Each airplane shall be licensed for commercial operations with the necessary Civil Aeronautics Authority certificate of airworthiness under transport category of the Civil Air Regulations immediately prior to the delivery of such airplane by Delta to Hughes. Each airplane shall have all necessary equipment (including auto-pilot, radio and galley but excluding emergency equipment for overseas operation) as shall have been standard on said airplane when operated by Delta in regularly scheduled passenger operations. Except as

specifically set forth in this paragraph, nothing herein contained shall be construed to warrant, impliedly or otherwise, any of the aircraft, engines or component parts thereof against any structural defects or mechanical malfunctioning. Should any of the airplanes to be sold hereunder have suffered any material damage since March 1, 1954 and prior to delivery thereof hereunder, then Delta will promptly advise Hughes whether it will repair such aircraft and tender it for delivery or whether it will cancel the agreement to deliver such aircraft pursuant to the provisions of paragraph 6 hereof. If delivery of such airplane shall, as a result of any such repair by Delta, be delayed more than 60 days beyond the scheduled delivery date set forth in paragraph 1 hereof, Hughes may cancel this agreement with respect to such airplane.

3. The purchase price of each airplane as above described shall be one million, fifty thousand dollars ($1,050,000.00), or a total price for the three (3) airplanes of three million one hundred fifty thousand dollars ($3,150,000.00). The purchase price of each airplane shall be paid in cash or by certified or cashier's check on delivery of each individual airplane to Hughes.

4. At the time of delivery of each of the said airplanes to Hughes, Delta agrees to turn over to Hughes all of the maintenance and overhaul logs and records in its possession with respect to each such airplane and the engines attached. Delta also agrees that at the time of delivery of each airplane Delta will execute and deliver to Hughes appropriate instruments of sale and assignment transferring good title to the airplane to Hughes free and clear of any mortgage or other encumbrance, in form sufficient to permit recordation of clear title thereto with the Civil Aeronautics Authority, together with all manufacturer's warranties and guarantees, expressed or implied, held by Delta in connection therewith and all rights based thereon or enuring to Delta as original purchaser of said airplanes.

5. Any sales, use, gross receipts or excise tax legally assessed against Delta, by reason of the transactions provided for under this agreement shall be paid by Hughes in addition to the purchase price specified herein. If claim is made against Delta for any such tax, Delta shall immediately notify Hughes.

If seasonably requested by Hughes, Delta shall not pay any such tax except under protest, and if payment be made, shall use all reasonable efforts to obtain a refund thereof. If all or any part of such tax be refunded, Delta shall repay to Hughes so much thereof as Hughes shall have paid. Hughes shall pay to Delta, upon demand, all expenses incurred by Delta in protesting payment of such tax and in endeavoring to obtain such refund.

6. Delta reserves the right to cancel this agreement with respect to any one or more of the aforesaid airplanes in the event that any governmental action, accident or force majeure occurrence or other cause beyond its reasonable control renders such airplane unavailable to Delta for delivery hereunder. In the event of a partial cancellation pursuant to the provisions of this paragraph, such partial cancellation will in no wise effect the obligation of Delta to sell and deliver and the obligation of Hughes to purchase the remaining airplanes covered by this agreement. In the event that Delta should exercise its right to a partial cancellation under this paragraph, Delta shall immediately notify Hughes of such cancellation and of the reasons therefor.

7. It is understood and agreed that wherever the word "Hughes" is used herein, that phrase shall be deemed to include the assigns of Hughes, if, but only if, such assignment shall have been consented to in writing by Delta in advance, and if, but only if, Hughes shall remain primarily liable and obligated for the prompt payment of monies due and performance of the covenants herein provided to be performed by it or its assigns. Other than as hereinbefore provided, this agreement and all of its provisions shall inure to and become binding upon the executors, administrators, successors and assigns of the parties hereto.

8. This agreement supersedes and replaces in its entirety any and all prior agreements, either written or verbal, between the parties hereto or their agents or representatives.

9. This agreement shall be construed in accordance with the laws of the State of New York.

10. This agreement is expressly conditioned upon the approval by the Civil Aeronautics Board of the sale by Delta to Hughes

of the three airplanes enumerated above, if such approval shall be required, and of the sale by Hughes to Trans World Airlines, Inc. of said airplanes.

If the foregoing conforms with our understanding, will you execute the original and duplicate original of this letter in the place indicated below and the same will constitute a contract between us.

Very truly yours,

DELTA AIR LINES, INC.

By _____

Attest:

_____

Accepted:

March , 1954

HUGHES TOOL COMPANY

By _____

Attest:

_____

Order No. E-8214

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 1st day of April, 1954.

In the matter of the proposed sale by

DELTA AIR LINES, INC.

Docket No. 6607

of certain Constellation aircraft to
Hughes Tool Company.

In the matter of the application of

HUGHES TOOL COMPANY

for approval under section 408 of the
Civil Aeronautics Act of 1938, as
amended, of the acquisition and control
of

Docket No. 1132

TRANS WORLD AIRLINES, INC.

ORDER MODIFYING ORDER APPROVING ACQUISITION

A motion having been filed by Delta Air Lines, Inc. praying for (1) a finding that (a) the proposed sale of three Constellation aircraft by Delta to Hughes Tool Company, and (b) the acquisition by Trans World Airlines, Inc. (TWA) from Hughes Tool of the same aircraft are transactions which do not come within the provisions of section 408 of the Civil Aeronautics Act of 1938, as amended; (2) or, if section 408 is applicable, for an exemption from the provisions of said section 408 insofar as such provisions would otherwise prevent these transactions without Board approval; and

A separate application having been filed simultaneously by TWA for an order modifying Order Serial No. 3210 issued October 17, 1944 in Docket No. 1132, as amended by subsequent orders, so as to permit the acquisition by TWA of the three Constellations sold to Hughes Tool by Delta as described above in Docket No. 6607;

The Board, acting pursuant to the powers vested in it by the Civil Aeronautics Act of 1938, as amended, particularly sections 205(a), 408, and 1005(d) thereof, and finding that:

1. The proposed sale of three Constellation aircraft by Delta to Hughes Tool does not constitute purchase of a substantial part of Delta's properties within the meaning of section 408; and

2. The further modification of its order in Docket No. 1182, as amended and modified, hereinafter provided for is just and reasonable and is in the public interest;

IT IS [illegible]

1. Order Serial No. 3210 issued October 17, 1944, as amended by subsequent orders, be and it hereby is further amended by adding thereto the following:

> "7. That the terms of this order shall not restrict the rights of Trans World Airlines, Inc. to purchase, and Hughes Tool Company to sell, three Constellation aircraft pursuant to the terms and conditions of a sales agreement dated April 1, 1954 between said parties; Provided, That nothing in the Board's action herein shall be construed as constituting an approval for rate-making purposes."

2. The requests of Delta in Docket No. 6607 to the extent not granted herein be and they hereby are dismissed.

By the Civil Aeronautics Board:

/s/ M. C. Mulligan

M. C. Mulligan
Secretary

(SEAL)

(CAB Orders

original

(1)

BEFORE THE

CIVIL AERONAUTICS BOARD

- x

In the Matter of the Application of :

HUGHES TOOL COMPANY :

for approval under Section 408 of the Civil Aeronautics Act of 1938, as amended, of the acquisition of control of : Docket No. 1182

TRANS WORLD AIRLINES, INC. :

- x

MOTION OF TRANS WORLD AIRLINES, INC.
FOR APPROVAL OF TRANSACTIONS WITH
HUGHES TOOL COMPANY

Communications with respect to this document should be sent to:

WARREN LEE PIERSON,
Chairman of the Board of Directors,
Trans World Airlines, Inc.
806 Connecticut Avenue, N.W.
Washington 6, D. C.

and

CHADBOURNE, PARKE, WHITESIDE & WOLFF,
Attorneys for Trans World Airlines, Inc.
25 Broadway
New York 4, New York

4

BEFORE THE

CIVIL AERONAUTICS BOARD

In the Matter of the Application of	
HUGHES TOOL COMPANY	
for approval under Section 408 of the Civil Aeronautics Act of 1938, as amended, of the acquisition of control of	Docket No. 1182
TRANS WORLD AIRLINES, INC.	

MOTION OF TRANS WORLD AIRLINES, INC. FOR APPROVAL OF TRANSACTIONS WITH HUGHES TOOL COMPANY

TRANS WORLD AIRLINES, INC. (hereinafter referred to as "TWA") respectfully moves that the Board enter an order herein modifying its Order Serial No. 3210, issued October 17, 1944, as amended, approving the acquisition of control of TWA by Hughes Tool Company (hereinafter referred to as "Hughes"), so that the terms of such order will not restrict the right of TWA to exercise the following options for the purchase of aircraft, together with related engines and spare parts, and to engage in other transactions relating to the aircraft, engines and spare parts which are the subject matter of such options:

(1) An option from Hughes to TWA dated April 20, 1956, for the purchase of Lockheed 1049G aircraft, together with related engines and spare parts, a copy of which is attached hereto as Exhibit I, and which is hereinafter referred to as the "1049G option";

(2) A second option from Hughes to TWA dated April 20, 1956, for the purchase of Lockheed 1649A aircraft, together with related engines and spare parts, a copy of which is attached hereto as Exhibit II, and which is hereinafter referred to as the "1649A option".

In support of its motion, TWA shows to the Board the following:

1. The 10490 option offers TWA the right to acquire all of the interest of Hughes in eight new Model 10490 Constellation aircraft acquired by Hughes under a Purchase Agreement between it and Lockheed Aircraft Corporation (hereinafter referred to as "Lockheed") and in spare engines and spare parts acquired by Hughes therefor. The option may be exercised by TWA at any time on or before May 31, 1956 (subject to extension under certain stated conditions).

2. If the 10490 option is exercised, the aircraft, spare engines and spare parts will be purchased by TWA pursuant to a conditional sale contract. TWA will pay Hughes as the purchase price for such aircraft, spare engines and spare parts an amount equivalent to the payments made by Hughes to Lockheed and Hughes' other direct costs incurred in connection with the acquisition of such aircraft, spare engines and spare parts, plus interest at the rate of 3% per annum on advance payments made by Hughes thereon. Such purchase price would be paid by TWA in sixty equal monthly installments with interest on the unpaid balance.

3. The 1649A option offers TWA the right to acquire all of the interest of Hughes in twenty-five Model 1649A Constellation aircraft acquired by Hughes under a Purchase Agreement between it and Lockheed and in spare engines and spare parts acquired by Hughes therefor. The option may be exercised by TWA at any time on or before October 31, 1955 (subject to extension under certain stated conditions).

4. If the 1649A option is exercised, the aircraft, spare engines and spare parts will be purchased by TWA pursuant to a conditional sale contract. TWA will pay Hughes as the purchase price for such aircraft, spare engines and spare parts an amount equivalent to the payments made by Hughes to Lockheed and Hughes' other direct costs incurred in connection with the acquisition of such aircraft, spare engines and spare parts, plus interest at the rate of 3% per annum on advance payments made by Hughes thereon, except that these interest payments shall be reduced by an amount equal to all interest payments received by Hughes from Lockheed under the Purchase Agreement.* Such purchase price would be paid by TWA in sixty equal monthly installments with interest on the unpaid balance.

5. By the terms of both options their exercise is made subject to the approval of the Civil Aeronautics Board. Neither option has been exercised.

* No interest is payable to Hughes by Lockheed under the Purchase Agreement for 1049G aircraft.

6. Prior to the exercise of the options, TWA will undertake inspection functions and will participate in the negotiation of any change orders and the purchase of any customer-furnished equipment or spares to be paid for in the first instance by Hughes, as it would if it had contracted directly with the manufacturer for the purchase of the aircraft, engines and spare parts under option.

7. The eight 1049G aircraft and the twenty-five 1649A aircraft, together with related engines and spare parts, are required for use in TWA's domestic and international operations, and TWA requests modification of the Board's order herein so that it can take advantage of the options.

WHEREFORE, Trans World Airlines, Inc. respectfully prays that the Board enter an order herein modifying the Board's Order Serial No. 3210, as amended, so that the terms of such order will not restrict the right of TWA to exercise the options referred to above and to engage in other transactions relating to the aircraft, engines and spare parts which are the subject matter of such options, and providing such other and further relief as may be appropriate.

Respectfully submitted,
TRANS WORLD AIRLINES, INC.
By [signature]

Dated: May 1, 1956.

EXHIBIT I

THE STATE OF TEXAS :
COUNTY OF HARRIS :

OPTION

KNOW ALL MEN BY THESE PRESENTS:

1. That for and in consideration of the sum of Ten Dollars ($10.00) cash and other good and valuable considerations paid by Trans World Airlines, Inc., a Delaware corporation with a principal office and place of business in Kansas City, Missouri (hereinafter called "TWA"), to Hughes Tool Company, a Delaware corporation with its principal office and place of business in Houston, Texas (hereinafter called "Tool Company"), the receipt and sufficiency of all of which consideration is hereby acknowledged by Tool Company, Tool Company has this day given and granted, and does by these presents hereby give and grant, unto TWA the exclusive right and privilege (hereinafter referred to as the "Option") to acquire from Tool Company, at the price and on the terms and conditions hereinafter set out, (1) all the interest of Tool Company in eight (8) new Model 1049G Airplanes, Lockheed Constellation type, (hereinafter called "1049G Airplanes") which may be acquired by Tool Company pursuant to that certain Purchase Agreement dated September 28, 1955 (and Change Order No. 1 thereto, executed as of October 17, 1955) between Lockheed Aircraft Corporation (hereinafter called "Lockheed"), as Seller, and Tool Company, as Buyer, including all of the rights of Tool Company under such Purchase Agreement, as amended, and under all change orders and letter agreements incident

thereto (which with said Purchase Agreement, as amended, are hereinafter collectively referred to as "The Purchase Agreement"), a copy of The Purchase Agreement having been heretofore furnished to counsel for TWA; (2) all the interest of Tool Company in any spare engines (having a maximum purchase price as defined in paragraph 5 of up to $726,000) that may have been or may be acquired by Tool Company for use in the 10490 Airplanes, including Tool Company's interest in any purchase agreement relating thereto; and (3) all the interest of Tool Company in any other spare parts (having a maximum purchase price as defined in paragraph 5 of up to $1,524,000) which may have been or may be acquired by Tool Company for use in connection with the 10490 Airplanes, including Tool Company's interest in any purchase agreement relating thereto. For the purposes of this Option the term "spare parts" shall include extra propeller assemblies and airframe spare parts, spare parts for airplane engines and for propeller assemblies and other accessories, flight equipment and parts for use on or in connection with the operation or maintenance of aircraft.

2. If the Option is exercised, the 10490 Airplanes, the spare engines and spare parts purchased by Tool Company will be sold by Tool Company to TWA pursuant to a conditional sale contract in substantially the form attached hereto as Exhibit A. The interest rate on the unpaid balances payable by TWA under such conditional

sale contract shall be the average interest rate payable by Tool Company on any indebtedness incurred by it for the purpose of purchasing the 1049G Airplanes, the spare engines and spare parts therefor (including any indebtedness proposed to be secured by the assignment of Tool Company's interest in such conditional sale contract), or if no such indebtedness is incurred the prime commercial interest rate current in New York City at the time of the execution of such conditional sale contract.

3. TWA may exercise said Option by sending, by registered mail, a notice in writing to that effect to Tool Company addressed as follows:

Hughes Tool Company
2200 Gulf Building
Houston 2, Texas

Attention: Mr. C. H. Price

The Option may be exercised only as to all the 1049G Airplanes, spare engines and spare parts referred to in paragraph 1. Said Option may be exercised by TWA at any time on or before May 31, 1956; provided, however, that if prior to May 31, 1956, (or prior to such later option exercise date as may be authorized by this paragraph) the scheduled delivery date for the first airplane under The Purchase Agreement has been deferred for a period beyond June 30, 1956, by reason of a good faith written agreement between Tool Company and Lockheed or by reason of a claim of such deferment asserted in writing by Lockheed and not contested in good faith

by Tool Company, then in such event the option exercise date shall be deferred for an identical period of time. In the event this Option shall not have been exercised on or before the option exercise date as above determined, then this Option shall thereupon terminate, and subsequent deferments of the aforesaid delivery date shall not effect a revival of the lapsed Option.

4. The purchase price of each 1049G Airplane purchased by TWA pursuant to the option herein granted shall be the sum of the following:

(1) The amounts Tool Company shall have paid Lockheed for such airplane.

(2) All additional direct costs which are paid or incurred by Tool Company and are attributable to such airplane, including, but not limited to, costs of "customer furnished equipment" provided for in Article 18 of The Purchase Agreement. To the extent that any such costs are not specifically attributable to a particular airplane they shall be allocated equally among the airplanes at the time not delivered to TWA.

(3) An amount equal to interest at the rate of three per cent (3%) per annum on the average amount of the outstanding advance payments made by Tool Company applicable to such airplane. The average amount of the outstanding advance payments applicable to each airplane shall be computed by considering the payments made or costs incurred as set forth in subparagraphs (1) and (2) of this paragraph 4 as outstanding from the

respective dates such payments were made or such costs were incurred by Tool Company and until the delivery of such airplane to TWA under the conditional sale contract;

(4) The assumption by TWA of all liabilities and obligations of Tool Company to Lockheed arising out of The Purchase Agreement.

5. The purchase price of the spare engines and spare parts purchased by TWA pursuant to the Option herein granted shall be the sum of the following:

(1) the total payments made therefor by Tool Company to the vendors of such spare engines or spare parts;

(2) all additional direct costs which are paid or incurred by Tool Company and are attributable to such spare engines and spare parts or to the purchase thereof;

(3) an amount equal to interest at the rate of three per cent (3%) per annum on the average amount of the outstanding advance payments made by Tool Company applicable to such spare engines and spare parts. The average amount of the outstanding advance payments applicable to spare engines and spare parts shall be computed by considering the payments made or costs incurred as set forth in subparagraphs (1) and (2) of this paragraph 5 as outstanding from the respective dates such payments were made or such costs were incurred and until the delivery of the first 1049G Airplane to TWA under the conditional sale contract;

(4) any additional amount which, at the time of the delivery of the first 1049D Airplane to TWA, Tool Company is committed to pay to suppliers of spare engines and spare parts;

(5) the assumption by TWA of all other liabilities and obligations of Tool Company to the vendors of such spare engines and spare parts arising out of the purchase thereof.

6. In the event that the purchase price of the 1049D Airplanes differs from the amount computed at the time of the delivery thereof to TWA or in the event that the aggregate net amount which Tool Company is required to pay for the spare engines and spare parts in a final accounting with the suppliers thereof differs from the amount used in computing the purchase price thereof pursuant to paragraph 5, separate and independent adjustments will be made by payment from one party to the other of such difference. Similarly, Tool Company will reimburse TWA for any interest paid by TWA with respect to any portion of the purchase price of the spare engines and spare parts which is unpaid at the time of delivery of the first 1049D Airplane, to the extent and for the period that Tool Company has not earned such interest by having made payments to the suppliers.

7. The exercise of this Option by TWA shall be subject to the approval of the Civil Aeronautics Board or the receipt by Tool Company of an opinion of

counsel for TWA that such approval is not necessary.

8. The foregoing Option is subject to the right of Tool Company, at any time prior to the exercise by TWA of this Option, to exercise any and all of Tool Company's rights and privileges under The Purchase Agreement; and nothing herein shall be construed as in any wise limiting, restricting, prohibiting, or otherwise affecting the exercise by Tool Company of its rights under The Purchase Agreement.

9. This Option shall be binding upon and inure to the benefit of Tool Company and TWA and their respective successors and assigns; provided, however, that TWA may not assign this Option without the prior written consent of Tool Company, and any attempted assignment without such consent shall, at the option of Tool Company, effect a termination of this Option.

10. This Option shall supersede the option granted by Tool Company to TWA dated November 10, 1955 relating to the 1049G Airplanes, which option is hereby revoked.

EXECUTED this 20th day of April, A.D. 1956.

HUGHES TOOL COMPANY

By /s/ Raymond M. Holliday
Vice President

[Corporate Seal]

ATTESTED:

/s/ C. H. PRICE
Assistant Secretary

Exhibit A

CONDITIONAL SALE CONTRACT

Contract of Conditional Sale made as of the day of , 1956, between HUGHES TOOL COMPANY, a Delaware corporation (hereinafter sometimes called the "Seller"), with its principal place of business at Houston, Texas, and TRANS WORLD AIRLINES, INC., a Delaware corporation (hereinafter sometimes called the "Buyer"), with its principal place of business at Kansas City, Missouri,

THE INTEREST OF THE SELLER IN THE AIRCRAFT AND EQUIPMENT COVERED HEREBY IS THAT OF A CONDITIONAL SELLER AND THE INTEREST OF THE BUYER THEREIN IS THAT OF A CONDITIONAL BUYER.

W I T N E S S E T H :

WHEREAS, Hughes has contracted to purchase from Lockheed Aircraft Corporation (hereinafter called "Lockheed") the eight (8) Model L-1049G Lockheed Constellation Airplanes identified as follows:

C.A.A. Registration No.	Mfg. Serial No.

together with the airplane engines (each of which is of 7[illegible] or more rated take-off horsepower and will be later identified by manufacturer's serial number in a supplement to this Conditional Sale Contract) installed in each thereof on the date of delivery of such airplanes to Hughes and together with the propeller assemblies and all other equipment

and accessories attached to such airplanes and engines on the date of delivery of such airplanes to Hughes (hereinafter called "the Airplanes");

WHEREAS, Hughes has also contracted to purchase from various vendors extra airplane engines (each of which is of 750 or more rated take-off horsepower and will be later identified by manufacturer's serial number in a supplement to this Conditional Sale Contract) and propeller assemblies and airframe spare parts, spare parts for airplane engines and for propeller assemblies, and other accessories, flight equipment and parts, for use on or in connection with the operation or maintenance of the Airplanes at, in or near repair or overhaul bases, airports, airfields, landing strips, hangars, warehouses, storehouses and buildings owned, operated, leased or used by Buyer at any one or more of the locations shown on Exhibit 1 annexed hereto (all of which engines, propeller assemblies, parts, accessories and equipment are hereinafter referred to as "Spares"); and

WHEREAS, Hughes desires to sell and TWA desires to buy the Airplanes and Spares pursuant to the conditional sale arrangements set forth herein.

NOW, THEREFORE, in consideration of the mutual covenants herein contained, the parties hereto agree as follows:

1. Seller agrees to sell to Buyer and Buyer agrees to purchase the Airplanes and Spares upon the terms and conditions hereinafter set forth.

2. (a) Simultaneously upon conveyance of title to each Airplane from Lockheed to Seller, such Airplane shall forthwith be delivered to Buyer and Buyer shall accept such delivery at Lockheed Air Terminal, Burbank, California, or at such other place to which the Airplane has been delivered to Seller by Lockheed.

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(CAB Orders & Doc

(b) Seller shall deliver the Spares, or cause them to be delivered, to Buyer at Kansas City, Missouri, or such other place as may be designated by Buyer, such deliveries to be made upon delivery of the first Airplane to Buyer, or as soon thereafter as practicable, and with respect to Spares not then delivered to Seller, upon delivery of such Spares to Seller, or as soon thereafter as practicable.

3. (a) The purchase price of each Airplane for purposes of this Contract shall be the aggregate of

(1) The amounts Seller shall have paid Lockheed for such Airplane at the time of its delivery to Buyer hereunder;

(2) All additional direct costs which have been paid or incurred by Seller at the time of the delivery of such Airplane to Buyer and are attributable to such Airplane, including, but not limited to, costs of "customer furnished equipment". To the extent that any such costs are not specifically attributable to a particular Airplane they shall be allocated equally among the Airplanes at the time not delivered to Buyer;

(3) An amount equal to interest at the rate of three per cent (3%) per annum on the average amount of the outstanding advance payments made by Seller applicable to such Airplane. The average amount of the outstanding advance payments applicable to each Airplane shall be computed by considering the payments made or costs incurred as set forth in subparagraphs (1) and (2) of this paragraph 3(a) as outstanding from the respective dates such payments were made or such costs were incurred by Seller and until the delivery of such Airplane to Buyer under this Contract.

(b) The purchase price of Spares for purposes of this Contract shall be the aggregate of

(1) the total payments made therefor by Seller to the vendors of such Spares at the time of the delivery of the first Airplane to Buyer hereunder;

(2) all additional direct costs which have been paid or incurred by Seller at the time of the delivery of the first Airplane to Buyer and are attributable to such Spares or to the purchase thereof;

(3) an amount equal to interest at the rate of three per cent (3%) per annum on the average amount of the outstanding advance payments made by Seller applicable to such Spares. The average amount of the outstanding advance payments applicable to Spares shall be computed by considering the payments made or costs incurred as set forth in subparagraphs (1) and (2) of this paragraph 3(b) as outstanding from the respective dates such payments were made or such costs were incurred by Seller and until the delivery of the first Airplane to Buyer under this contract;

(4) any additional amount which, at the time of the delivery of the first Airplane to Buyer hereunder, Seller is committed to pay to suppliers of Spares.

(c) The purchase price of each Airplane and the purchase price of Spares shall each be paid by Buyer to Seller in sixty (60) equal consecutive monthly installments, together with interest on the unpaid balance at the rate of per cent (%) per annum. The first of such payments relating to each Airplane shall be made at the time of delivery of such Airplane, and the first of such payments relating to

Spares shall be made at the time of delivery of the first Airplane. As to each Airplane, and as to Spares, the second and succeeding payments shall be made monthly on the first day of the months succeeding the month in which the first payment is required to be paid, until the whole of each such purchase price shall have been paid. All payments shall be made to the Seller at the Hughes Tool Company, Houston, Texas.

(d) In the event that the purchase price of the Airplanes differs from the amount computed at the time of the delivery thereof to Buyer hereunder or in the event that the aggregate net amount which Seller is required to pay for the Spares in a final accounting with the suppliers thereof differs from the amount used in computing the purchase price thereof pursuant to subparagraph 3(b), separate and independent adjustments will be made by payment from one party to the other of such difference. Similarly, Seller will reimburse Buyer for any interest paid by Buyer with respect to any portion of the purchase price of the Spares which is unpaid at the time of delivery of the first Airplane hereunder, to the extent and for the period that Seller has not earned such interest by having made payments to the suppliers.

4. Title to the Airplanes and Spares shall not pass to Buyer by delivery, but shall remain in Seller until such time as the purchase price shall have been paid in full and Buyer shall have paid to Seller all other sums then due and payable to Seller hereunder, whereupon absolute title to the Airplanes and Spares shall pass to Buyer.

5. Upon the happening of any one or more of the following events, namely:

(a) default in making any payment, in the manner herein specified, of any monthly installment of the purchase price of the Airplanes or Spares and such default shall continue unremedied for five (5) days after written notice thereof shall have been delivered by Seller to Buyer; or

(b) default shall be made by the Buyer in the observance or performance by the Buyer of any other covenant or agreement contained herein, and such default shall continue unremedied for thirty (30) days after written notice thereof shall have been delivered by Seller to Buyer; or

(c) the Buyer shall become insolvent, or shall file a voluntary petition in bankruptcy, or shall file a voluntary petition or answer seeking or consenting to reorganization pursuant to or purporting to be pursuant to the Acts of Congress relating to bankruptcy or any other statute, state or Federal, for the relief of debtors, or shall be adjudicated a bankrupt, or shall make an assignment for the benefit of creditors, or shall consent to the appointment of a receiver or trustee of or for it or a substantial part of its property; or

(d) an order shall be entered pursuant to or purporting to be pursuant to the Acts of Congress relating to bankruptcy or any other statute, state or Federal, for the relief of debtors approving a petition seeking a reorganization of, or if an order shall be entered appointing a receiver or trustee of, or for any substantial part of the property of, or if a warrant of attachment shall be issued against any substantial part of the property of, the Buyer, and any such order is not dismissed or stayed within sixty (60) days from its entry or such attachment is not dismissed

or bonded within thirty (30) days from its levy; or

(e) the Bonds at the time issued and outstanding under that certain Indenture, dated as of December 1, 1954, between Buyer and Irving Trust Company, as Trustee, as said Indenture may have heretofore been or may hereafter be amended, shall be declared and become due and payable, prior to the date of maturity of such Bonds as set forth therein, upon the occurrence of any of the "events of default" described in said Indenture, as amended (and the Buyer hereby agrees to notify the Seller of any declaration of default forthwith upon the receipt thereof); or

(f) the Notes at the time issued and outstanding under that certain Chattel Mortgage, dated as of December 20, 1954, between Buyer and Irving Trust Company, as Trustee, as said Chattel Mortgage may have heretofore been or may hereafter be amended, shall be declared and become due and payable, prior to the date of maturity of such Notes as set forth therein, upon the occurrence of any of the "events of default" described in said Chattel Mortgage, as amended (and the Buyer hereby agrees to notify the Seller of any declaration of default forthwith upon the receipt thereof);

then Seller may at once (or at any later time) proceed to take possession of the Airplanes and Spares in any manner provided by law, or Seller may at its option, and Seller is hereby empowered to, with or without legal process, and with or without demand, enter upon the premises where the Airplanes or Spares may be and take possession thereof and remove the same. Seller may resell the Airplanes and Spares, so retaken, at public or private sale, with or without having such Airplanes and Spares at the place of sale, and upon such terms and in such manner

as Seller may determine. Notice of the intention of Seller to so sell the Airplanes and Spares shall be given by Seller to Buyer at least ten (10) days prior to the time of such sale. Seller may bid and purchase at any such public sale. From the proceeds of any such sale, Seller shall deduct all expenses for retaking, repairing, storing and selling the Airplanes and Spares, including any reasonable attorneys' fees incurred. The balance of such proceeds shall be applied to the payment of all sums owing to Seller under this agreement and any surplus of such proceeds remaining shall be paid to Buyer or to whoever may be lawfully entitled to receive the same. Buyer shall be under no obligation to Seller for any deficiency resulting from any such sale or to make any payments on account of the purchase price of any Airplane or Spares falling due after Seller has taken possession of such Airplane or Spares pursuant to this provision.

6. From and after delivery of the Airplanes and Spares to Buyer and until absolute title thereto is vested in Buyer or its nominee, or Seller repossesses the Airplanes,

(a) Buyer shall procure and maintain at its expense public liability, passenger liability and property damage insurance in such amounts and with such companies as shall be satisfactory to Seller, covering Seller's liability as holder of legal title to the Airplanes and Spares. The policies evidencing such insurance shall contain such provisions as shall be satisfactory to Seller and shall name Seller as assured.

(b) Buyer shall at its expense maintain all risk aircraft hull insurance in respect of the Airplanes in favor of Buyer and Seller, as their interests may appear, in such amounts and with such companies as shall be satis-

factory to Seller. If any such Airplane shall be lost, destroyed or damaged to such an extent that repair thereof is impractical, such insurance shall be paid to the Seller to the extent of the unpaid balance of the purchase price of such Airplane together with any accrued and unpaid interest thereon, plus all other amounts then due to Seller hereunder. Upon such payment to the Seller of insurance to the extent of the unpaid balance of the purchase price of any Airplane, absolute title to the Airplane so damaged or to any parts of an Airplane so destroyed shall vest in Buyer and Seller shall deliver to Buyer such proper documents of title with respect thereto as Buyer may reasonably require. Buyer shall be under no obligation to make any payments on account of the purchase price of such Airplane falling due after such loss, destruction or damage. Any insurance proceeds in excess of the amount payable to the Seller, and any insurance proceeds payable as a result of damage not rendering repair impractical, shall be payable to Buyer or its designee.

7. Buyer may at any time pay to Seller the unpaid balance of the purchase price of the Airplanes and Spares or any part thereof, without premium or penalty.

8. Upon the payment to Seller of the balance of the purchase price of the Airplanes and Spares together with all other amounts owing to Seller hereunder, Seller shall deliver to Buyer at such place in the United States as Buyer may designate,

(a) a bill of sale duly vesting in Buyer the title to the Airplanes and Spares free and clear of all liens, claims, charges and encumbrances attaching subsequent to the delivery of the Airplanes and Spares to Seller and not arising

out of the possession, use or operation of the Airplanes and Spares by Buyer, and

(b) such other appropriate documents of title with respect thereto as Buyer may reasonably require.

9. In the event any sales tax or use tax is hereafter imposed upon or paid by Seller by reason of the sale or use of the Airplanes and Spares or the purchase thereof by Seller, then in addition to the sales price provided for in paragraph 3, Buyer shall pay to Seller the amount thereof, upon demand.

10. Buyer shall furnish Seller forthwith and from time to time thereafter at reasonable intervals, all such information concerning Buyer's financial condition, including balance sheets and statements of earnings, as is customarily furnished to a commercial bank holding or considering the acceptance of unsecured notes of a borrower.

11. The Buyer agrees that it will pay and discharge all taxes, assessments, governmental charges and all charges for keep, repairs, storage, maintenance or accessories, which if unpaid might become a lien, charge or encumbrance upon or against any of the Airplanes or Spares; and upon the failure of the Buyer so to do the Seller may make any such payment; provided, however, that nothing herein contained shall require the Buyer to pay such tax, assessment or charge so long as the Buyer shall in good faith contest the validity thereof and shall furnish the Seller such bond or indemnity as the Seller shall require, unless, in the judgment of the Seller, forfeiture is likely to result from any such failure to pay. Any sum or sums so paid by the Seller, together with interest thereon at the highest lawful contract rate, shall be and become a part of the sum which

the Buyer is required to pay under this Contract, and shall immediately, without demand, be due and be repaid by the Buyer to the Seller.

The Buyer will, upon written request from the Seller,

(a) reimburse the Seller for all filing or recording fees incurred in connection with filing or recording or refiling or re-recording this Contract and all supplements and additions hereto, if any;

(b) execute and deliver to the Seller all such further documents and instruments and do such further acts as may be necessary to perfect the rights of the Seller herein contemplated; and

(c) furnish to the Seller at reasonable intervals reports and certificates setting forth all the information necessary to inform the Seller as to the continued existence, location and condition of the Airplanes and Spares. The Seller shall also have the right to inspect the Airplanes and Spares at all times when the same are not in use and when such inspection can be had without undue inconvenience or expense to the Buyer.

12. Buyer agrees to maintain the Airplanes and Spares in good repair and working condition at its own expense, except any airplane lost, destroyed or so damaged that insurance with respect thereto is payable to the Seller pursuant to paragraph 6 hereof. Subject to the proper performance of such covenant, the Buyer may make repairs and replacements to the Airplanes and Spares and may substitute for engines, propellers and any other equipment installed in or attached to the Airplanes or Spares, engines, propellers or other equipment of substantially the same

kind and value; provided, however, that no removal of any such engines, propellers, or equipment, and no replacement thereof, shall divest Seller of its superior title thereto, or render any such removed or replaced equipment subject to the lien or claim of any person other than Seller, UNLESS and UNTIL such equipment is replaced by equipment of substantially the same kind and value, the title to which, upon such equipment being installed in or attached to the Airplanes or Spares, may validly vest in Seller free and clear of the lien or claim of any other person, subject to the provisions of paragraph 14 hereof. In the case of any such permitted substitution, title to the substituted equipment shall immediately vest in Seller and become subject to the provisions of this Conditional Sale Contract and remain so vested and so subject unless and until substituted for in the manner hereinabove permitted; and title to the equipment substituted for shall vest in Buyer.

13. Until title to the Airplanes and Spares shall have passed to the Buyer hereunder, the Buyer shall have no right, power or authority to sell, transfer, assign, mortgage or encumber or in any other manner whatsoever dispose of the Airplanes and Spares or any part thereof (except as provided in paragraph 12 hereof) or any interest therein, and the Buyer hereby agrees that, except as permitted by paragraph 12 hereof, the Buyer will not (voluntarily or involuntarily) sell, transfer, mortgage, encumber or in any other manner whatsoever dispose of the Airplanes and Spares or any part thereof or any interest therein. Buyer agrees, except as provided herein, that the Airplanes and Spares will be used exclusively for its commercial air transport operations and related activities and that it

will not permit the Airplanes and Spares to be used or possessed by others. Buyer may permit the use of the Airplanes and Spares by other airlines with which Buyer enters into interchange agreements provided that any such use by other airlines shall for the purposes of this agreement be considered to be use by the Buyer.

14. To the extent, if any, that there is a conflict between any of the provisions of this agreement and any of the provisions of the Indenture of Mortgage dated as of December 1, 1954 between the Buyer and Irving Trust Company, as Trustee, or of the Chattel Mortgage dated as of December 20, 1954 between the Buyer and Irving Trust Company, as Trustee, the provisions of said Indenture and said Chattel Mortgage shall prevail and the provisions of this agreement shall be deemed amended to the extent necessary to avoid such conflict. Seller recognizes the liens created by (a) Granting Clause VI of said Indenture and (b) Granting Clause III of said Chattel Mortgage as prior liens on the aircraft engines and on the propellers, appliances and spare parts relating to the Airplanes or Spares when and so long as they shall be installed in, attached to or incorporated in any of the aircraft or aircraft engines at any time subject to the lien of said Indenture or of said Chattel Mortgage, as the case may be.

Seller agrees that so long as all the Bonds issued under said Indenture at the time outstanding shall be held by the original purchaser thereof, (a) Seller will not repossess the Airplanes or Spares, in the event of a default by Buyer under this agreement, without affording such original purchaser reasonable notice of such default and a reasonable opportunity to remedy the same and (b) such

original purchaser shall have the right, at its option, to purchase at any time all the interest of Seller hereunder by paying to Seller the then remaining balance of the purchase price hereunder plus accrued interest.

Seller also agrees that in the event of a default by Buyer hereunder, the rights and remedies of Seller shall be limited to repossession of the Airplanes and Spares.

15. Before delivery of each Airplane to Buyer hereunder, Buyer will cause to be fastened thereon in a location reasonably adjacent to, and not less prominent than that of, the airworthiness certificate for such Airplane, a plate no larger than four inches by seven inches (4" x 7") bearing the following legend:

"Hughes Tool Company holds legal title to this Airplane as Conditional Seller."

Buyer shall maintain such name plate in such location or in one of at least equal prominence and visibility at all times. Buyer may affix to the Airplanes Buyer's name, insignia or other legends customarily displayed by Buyer on its airplanes.

16. Buyer shall indemnify and hold harmless Seller, its agents and its employees from any and all liability for losses, expenses, damages, demands and claims in connection with or arising out of any death of, or injury or alleged injury or damage to, persons or property sustained, or alleged to have been sustained, in connection with or arising or alleged to have arisen out of Buyer's possession, use or operation of the Airplanes or Spares and Buyer agrees to handle any claim and defend any suit or action brought against Seller, its agents or its employees, or any of them, based on any such death, injury or damage, or alleged injury or damage, and to pay all damages, costs and expenses,

including attorneys' fees, in connection therewith or resulting therefrom.

Buyer's liability to Seller under this paragraph 16 is conditioned upon Seller's promptly giving notice to Buyer of institution of such suit or action or of receipt of such claim or demand. Buyer shall have the option at any time to conduct negotiations with the party or parties making any such claim or demand, and may intervene in any such suit or action. Whether or not Buyer intervenes in any such suit or action, it shall be entitled to assume, conduct or control the defense thereof, and Seller shall not settle or discharge any such claim, demand, suit, action or judgment without prior notice to and the consent of Buyer.

IN WITNESS WHEREOF, the parties hereto have executed and delivered this agreement as of the day and year first above written.

HUGHES TOOL COMPANY

By _____
Vice President

Attest:

_____
Assistant Secretary

TRANS WORLD AIRLINES, INC.

By _____
Vice President - Finance

Attest:

_____
Assistant Secretary

EXHIBIT II

THE STATE OF TEXAS :
COUNTY OF HARRIS :

OPTION

KNOW ALL MEN BY THESE PRESENTS:

1. That for and in consideration of the sum of Ten Dollars ($10.00) cash and other good and valuable considerations paid by Trans World Airlines, Inc., a Delaware corporation with a principal office and place of business in Kansas City, Missouri (hereinafter called "TWA"), to Hughes Tool Company, a Delaware corporation with its principal office and place of business in Houston, Texas (hereinafter called "Tool Company"), the receipt and sufficiency of all of which consideration is hereby acknowledged by Tool Company, Tool Company has this day given and granted, and does by these presents hereby give and grant, unto TWA the exclusive right and privilege (hereinafter referred to as the "Option") to acquire from Tool Company, at the price and on the terms and conditions hereinafter set out, (1) all the interest of Tool Company in twenty-five (25) new Model 1649A Airplanes, Lockheed Constellation type, (hereinafter called "1649A Airplanes") which may be acquired by Tool Company pursuant to that certain Purchase Agreement dated December 23, 1954 between Lockheed Aircraft Corporation (hereinafter called "Lockheed"), as Seller, and Tool Company, as Buyer, including all of the rights of Tool Company under such Purchase Agreement, as amended, and under all change orders and letter agreements incident thereto (which with said Purchase Agreement, as amended,

are hereinafter collectively referred to as "The Purchase Agreement"), a copy of The Purchase Agreement having been heretofore furnished to counsel for TWA; (2) all the interest of Tool Company in any spare engines (having a maximum purchase price as defined in paragraph 5 of up to $5,300,000) that may have been or may be acquired by Tool Company for use in the 1649A Airplanes, including Tool Company's interest in any purchase agreement relating thereto; and (3) all the interest of Tool Company in any other spare parts (having a maximum purchase price as defined in paragraph 5 of up to $5,700,000) which may have been or may be acquired by Tool Company for use in connection with the 1649A Airplanes, including Tool Company's interest in any purchase agreement relating thereto. For the purposes of this Option the term "spare parts" shall include extra propeller assemblies and airframe spare parts, spare parts for airplane engines and for propeller assemblies and other accessories, flight equipment and parts for use on or in connection with the operation or maintenance of aircraft.

2. If the Option is exercised, the 1649A Airplanes, the spare engines and spare parts purchased by Tool Company will be sold by Tool Company to TWA pursuant to a conditional sale contract in substantially the form attached hereto as Exhibit A. The interest rate on the unpaid balances payable by TWA under such conditional sale contract shall be the average interest rate payable by Tool Company on any indebtedness incurred

by it for the purpose of purchasing 1649A Airplanes, the spare engines and spare parts therefor (including any indebtedness proposed to be secured by the assignment of Tool Company's interest in such conditional sale contract), or if no such indebtedness is incurred, the prime commercial interest rate current in New York City at the time of the execution of such conditional sale contract.

3. TWA may exercise said Option by sending, by registered mail, a notice in writing to that effect to Tool Company addressed as follows:

Hughes Tool Company
2200 Gulf Building
Houston 2, Texas

Attention: Mr. C. H. Price

The Option may be exercised only as to all the 1649A Airplanes, spare engines and spare parts referred to in paragraph 1. Said Option may be exercised by TWA at any time on or before October 31, 1956; provided, however, that if prior to October 31, 1956, (or prior to such later option exercise date as may be authorized by this paragraph) the scheduled delivery date for the first airplane under The Purchase Agreement has been deferred for a period beyond April 30, 1957, by reason of a good faith written agreement between Tool Company and Lockheed or by reason of a claim of such deferment asserted in writing by Lockheed and not contested in good faith by Tool Company, then in such event the option exercise date shall be deferred for an identical period of time. In the event this

Option shall not have been exercised on or before the option exercise date as above determined, then this Option shall thereupon terminate, and subsequent deferments of the aforesaid delivery date shall not effect a revival of the lapsed Option.

4. The purchase price of each 1649A Airplane purchased by TWA pursuant to the option herein granted shall be the sum of the following:

(1) The amounts Tool Company shall have paid Lockheed for such airplane.

(2) All additional direct costs which are paid or incurred by Tool Company and are attributable to such airplane, including, but not limited to, costs of "customer supplied equipment" provided for in Article 18 of The Purchase Agreement. To the extent that any such costs are not specifically attributable to a particular airplane they shall be allocated equally among the airplanes at the time not delivered to TWA.

(3) An amount equal to interest at the rate of three per cent (3%) per annum on the average amount of the outstanding advance payments made by Tool Company applicable to such airplane; less, however, an amount equal to the sum of all interest payments received by Tool Company from Lockheed under Letter Agreement No. 3 (SL/98053) of The Purchase Agreement. Said sum of interest payments received by Tool Company from Lockheed, shall be credited only against that part of the purchase price provided for by this subparagraph (3), and shall in no event reduce that part of the purchase price represented by subparagraphs (1), (2) or (4) of this

paragraph. The average amount of the outstanding advance payments applicable to each airplane shall be computed by considering the payments made or costs incurred as set forth in subparagraphs (1) and (2) of this paragraph 4 as outstanding from the respective dates such payments were made or such costs were incurred by Tool Company and until the delivery of such airplane to TWA under the conditional sale contract;

(4) The assumption by TWA of all liabilities and obligations of Tool Company to Lockheed arising out of The Purchase Agreement.

5. The purchase price of the spare engines and spare parts purchased by TWA pursuant to the Option herein granted shall be the sum of the following:

(1) the total payments made therefor by Tool Company to the vendors of such spare engines or spare parts;

(2) all additional direct costs which are paid or incurred by Tool Company and are attributable to such spare engines and spare parts or to the purchase thereof;

(3) an amount equal to interest at the rate of three per cent (3%) per annum on the average amount of the outstanding advance payments made by Tool Company applicable to such spare engines and spare parts. The average amount of the outstanding advance payments applicable to spare engines and spare parts shall be computed by considering the payments made or costs incurred as set forth in subparagraphs (1) and (2) of this paragraph 5 as outstanding from the respective dates such

payments were made or such costs were incurred and until the delivery of the first 1649A Airplane to TWA under the conditional sale contract;

(4) any additional amount which, at the time of the delivery of the first 1649A Airplane to TWA, Tool Company is committed to pay to suppliers of spare engines and spare parts;

(5) the assumption by TWA of all other liabilities and obligations of Tool Company to the vendors of such spare engines and spare parts arising out of the purchase thereof.

6. In the event that the purchase price of the 1649A Airplanes differs from the amount computed at the time of the delivery thereof to TWA or in the event that the aggregate net amount which Tool Company is required to pay for the spare engines and spare parts in a final accounting with the suppliers thereof differs from the amount used in computing the purchase price thereof pursuant to paragraph 5, separate and independent adjustments will be made by payment from one party to the other of such difference. Similarly, Tool Company will reimburse TWA for any interest paid by TWA with respect to any portion of the purchase price of the spare engines and spare parts which is unpaid at the time of delivery of the first 1649A Airplane, to the extent and for the period that Tool Company has not earned such interest by having made payments to the suppliers.

7. The exercise of this Option by TWA shall be subject to the approval of the Civil Aeronautics Board

or the receipt by Tool Company of an opinion of counsel for TWA that such approval is not necessary.

8. The foregoing Option is subject to the right of Tool Company, at any time prior to the exercise by TWA of this Option, to exercise any and all of Tool Company's rights and privileges under The Purchase Agreement; and nothing herein shall be construed as in any wise limiting, restricting, prohibiting, or otherwise affecting the exercise by Tool Company of its rights under The Purchase Agreement.

9. This Option shall be binding upon and inure to the benefit of Tool Company and TWA and their respective successors and assigns; provided, however, that TWA may not assign this Option without the prior written consent of Tool Company, and any attempted assignment without such consent shall, at the option of Tool Company, effect a termination of this Option.

10. This Option shall supersede the option granted by Tool Company to TWA dated November 10, 1955 relating to the 1649A Airplanes, which option is hereby revoked.

EXECUTED this 20th day of April, A.D. 1956.

HUGHES TOOL COMPANY

By /s/ Raymond H. Holliday
Vice President

[Corporate Seal]

ATTESTED:

/s/ C. H. PRICE
Assistant Secretary

Exhibit A

CONDITIONAL SALE CONTRACT

Contract of Conditional Sale made as of the day of , 195 , between HUGHES TOOL COMPANY, a Delaware corporation (hereinafter sometimes called the "Seller"), with its principal place of business at Houston, Texas, and TRANS WORLD AIRLINES, INC., a Delaware corporation (hereinafter sometimes called the "Buyer"), with its principal place of business at Kansas City, Missouri,

THE INTEREST OF THE SELLER IN THE AIRCRAFT AND EQUIPMENT COVERED HEREBY IS THAT OF A CONDITIONAL SELLER AND THE INTEREST OF THE BUYER THEREIN IS THAT OF A CONDITIONAL BUYER.

W I T N E S S E T H :

WHEREAS, Hughes has contracted to purchase from Lockheed Aircraft Corporation (hereinafter called "Lockheed") the twenty-five (25) Model L-1649A Lockheed Constellation Airplanes identified as follows:

C.A.A. Registration No.	Mfg. Serial No.

together with the airplane engines (each of which is of 750 or more rated take-off horsepower and will be later identified by manufacturer's serial number in a supplement to this Conditional Sale Contract) installed in each thereof on the date of delivery of such airplanes to Hughes and together with the propeller assemblies and all other equipment

and accessories attached to such airplanes and engines on the date of delivery of such airplanes to Hughes (hereinafter called "the Airplanes");

WHEREAS, Hughes has also contracted to purchase from various vendors extra airplane engines (each of which is of 750 or more rated take-off horsepower and will be later identified by manufacturer's serial number in a supplement to this Conditional Sale Contract) and propeller assemblies and airframe spare parts, spare parts for airplane engines and for propeller assemblies, and other accessories, flight equipment and parts, for use on or in connection with the operation or maintenance of the Airplanes at, in or near repair or overhaul bases, airports, airfields, landing strips, hangars, warehouses, storehouses and buildings owned, operated, leased or used by Buyer at any one or more of the locations shown on Exhibit 1 annexed hereto (all of which engines, propeller assemblies, parts, accessories and equipment are hereinafter referred to as "Spares"); and

WHEREAS, Hughes desires to sell and TWA desires to buy the Airplanes and Spares pursuant to the conditional sale arrangements set forth herein.

NOW, THEREFORE, in consideration of the mutual covenants herein contained, the parties hereto agree as follows:

1. Seller agrees to sell to Buyer and Buyer agrees to purchase the Airplanes and Spares upon the terms and conditions hereinafter set forth.

2. (a) Simultaneously upon conveyance of title to each Airplane from Lockheed to Seller, such Airplane shall forthwith be delivered to Buyer and Buyer shall accept such delivery at Lockheed Air Terminal, Burbank, California, or at such other place to which the Airplane has been delivered [illegible] by Lockheed.

(b) Seller shall deliver the Spares, or cause them to be delivered, to Buyer at Kansas City, Missouri, or such other place as may be designated by Buyer, such deliveries to be made upon delivery of the first Airplane to Buyer, or as soon thereafter as practicable, and with respect to Spares not then delivered to Seller, upon delivery of such Spares to Seller, or as soon thereafter as practicable.

3. (a) The purchase price of each Airplane for purposes of this Contract shall be the aggregate of

(1) The amounts Seller shall have paid Lockheed for such Airplane at the time of its delivery to Buyer hereunder;

(2) All additional direct costs which have been paid or incurred by Seller at the time of the delivery of such Airplane to Buyer and are attributable to such Airplane, including, but not limited to, costs of "customer furnished equipment". To the extent that any such costs are not specifically attributable to a particular Airplane they shall be allocated equally among the Airplanes at the time not delivered to Buyer;

(3) An amount equal to interest at the rate of three per cent (3%) per annum on the average amount of the outstanding advance payments made by Seller applicable to such Airplanes; less, however, an amount equal to the sum of all interest payments received by Seller from Lockheed for advance payments made by Seller to Lockheed in connection with the purchase agreement between them covering the Airplanes. Said sum of interest payments received by Seller from Lockheed shall be credited only against that part of the purchase price provided for by this subparagraph (3), and shall in no event reduce that part of the purchase price represented by subparagraphs (1) and (2) of this paragraph.

applicable to each Airplane shall be computed by considering the payments made or costs incurred as set forth in subparagraphs (1) and (2) of this paragraph 3(a) as outstanding from the respective dates such payments were made or such costs were incurred by Seller and until the delivery of such Airplane to Buyer under this Contract.

(b) The purchase price of Spares for purposes of this Contract shall be the aggregate of

(1) the total payments made therefor by Seller to the vendors of such Spares at the time of the delivery of the first Airplane to Buyer hereunder;

(2) all additional direct costs which have been paid or incurred by Seller at the time of the delivery of the first Airplane to Buyer and are attributable to such Spares or to the purchase thereof;

(3) an amount equal to interest at the rate of three per cent (3%) per annum on the average amount of the outstanding advance payments made by Seller applicable to such Spares. The average amount of the outstanding advance payments applicable to Spares shall be computed by considering the payments made or costs incurred as set forth in subparagraphs (1) and (2) of this paragraph 3(b) as outstanding from the respective dates such payments were made or such costs were incurred by Seller and until the delivery of the first Airplane to Buyer under this contract;

(4) any additional amount which, at the time of the delivery of the first Airplane to Buyer hereunder, Seller is committed to pay to suppliers of Spares.

(c) The purchase price of each Airplane and the purchase price of Spares shall each be paid by Buyer to Seller in sixty (60) equal consecutive monthly installments, together with interest on the unpaid balance at the rate of per cent (%) per annum. The first of such payments

relating to each Airplane shall be made at the time of delivery of such Airplane, and the first of such payments relating to Spares shall be made at the time of delivery of the first Airplane. As to each Airplane, and as to Spares, the second and succeeding payments shall be made monthly on the first day of the months succeeding the month in which the first payment is required to be paid, until the whole of each such purchase price shall have been paid. All payments shall be made to the Seller at the Hughes Tool Company, Houston, Texas.

(d) In the event that the purchase price of the Airplanes differs from the amount computed at the time of the delivery thereof to Buyer hereunder or in the event that the aggregate net amount which Seller is required to pay for the Spares in a final accounting with the suppliers thereof differs from the amount used in computing the purchase price thereof pursuant to subparagraph 3(b), separate and independent adjustments will be made by payment from one party to the other of such difference. Similarly, Seller will reimburse Buyer for any interest paid by Buyer with respect to any portion of the purchase price of the Spares which is unpaid at the time of delivery of the first Airplane hereunder, to the extent and for the period that Seller has not earned such interest by having made payments to the suppliers.

4. Title to the Airplanes and Spares shall not pass to Buyer by delivery, but shall remain in Seller until such time as the purchase price shall have been paid in full and Buyer shall have paid to Seller all other sums then due and payable to Seller hereunder, whereupon absolute title to the Airplanes and Spares shall pass to Buyer.

5. Upon the happening of any one or more of the following events, namely:

(a) default in making any payment, in the manner herein specified, of any monthly installment of the purchase price of the Airplanes or Spares and such default shall continue unremedied for five (5) days after written notice thereof shall have been delivered by Seller to Buyer; or

(b) default shall be made by the Buyer in the observance or performance by the Buyer of any other covenant or agreement contained herein, and such default shall continue unremedied for thirty (30) days after written notice thereof shall have been delivered by Seller to Buyer; or

(c) the Buyer shall become insolvent, or shall file a voluntary petition in bankruptcy, or shall file a voluntary petition or answer seeking or consenting to reorganization pursuant to or purporting to be pursuant to the Acts of Congress relating to bankruptcy or any other statute, state or Federal, for the relief of debtors, or shall be adjudicated a bankrupt, or shall make an assignment for the benefit of creditors, or shall consent to the appointment of a receiver or trustee of or for it or a substantial part of its property; or

(d) an order shall be entered pursuant to or purporting to be pursuant to the Acts of Congress relating to bankruptcy or any other statute, state or Federal, for the relief of debtors approving a petition seeking a reorganization of, or if an order shall be entered appointing a receiver or trustee of, or for any substantial part of the property of, or if a warrant of attachment shall be issued against any substantial part of the property of, the Buyer, and any such order is not dismissed or stayed within sixty (60) days from its entry or such attachment is not dismissed

or bonded within thirty (30) days from its levy; or

(e) the Bonds at the time issued and outstanding under that certain Indenture, dated as of December 1, 1954, between Buyer and Irving Trust Company, as Trustee, as said Indenture may have heretofore been or may hereafter be amended, shall be declared and become due and payable, prior to the date of maturity of such Bonds as set forth therein, upon the occurrence of any of the "events of default" described in said Indenture, as amended (and the Buyer hereby agrees to notify the Seller of any declaration of default forthwith upon the receipt thereof); or

(f) the Notes at the time issued and outstanding under that certain Chattel Mortgage, dated as of December 20, 1954, between Buyer and Irving Trust Company, as Trustee, as said Chattel Mortgage may have heretofore been or may hereafter be amended, shall be declared and become due and payable, prior to the date of maturity of such Notes as set forth therein, upon the occurrence of any of the "events of default" described in said Chattel Mortgage, as amended (and the Buyer hereby agrees to notify the Seller of any declaration of default forthwith upon the receipt thereof);

then Seller may at once (or at any later time) proceed to take possession of the Airplanes and Spares in any manner provided by law, or Seller may at its option, and Seller is hereby empowered to, with or without legal process, and with or without demand, enter upon the premises where the Airplanes or Spares may be and take possession thereof and remove the same. Seller may resell the Airplanes and Spares, so retaken, at public or private sale, with or without having such Airplanes and Spares at the place of sale, and upon such terms and in such manner

as Seller may determine. Notice of the intention of Seller to so sell the Airplanes and Spares shall be given by Seller to Buyer at least ten (10) days prior to the time of such sale. Seller may bid and purchase at any such public sale. From the proceeds of any such sale, Seller shall deduct all expenses for retaking, repairing, storing and selling the Airplanes and Spares, including any reasonable attorneys' fees incurred. The balance of such proceeds shall be applied to the payment of all sums owing to Seller under this agreement and any surplus of such proceeds remaining shall be paid to Buyer or to whoever may be lawfully entitled to receive the same. Buyer shall be under no obligation to Seller for any deficiency resulting from any such sale or to make any payments on account of the purchase price of any Airplane or Spares falling due after Seller has taken possession of such Airplane or Spares pursuant to this provision.

6. From and after delivery of the Airplanes and Spares to Buyer and until absolute title thereto is vested in Buyer or its nominee, or Seller repossesses the Airplanes,

(a) Buyer shall procure and maintain at its expense public liability, passenger liability and property damage insurance in such amounts and with such companies as shall be satisfactory to Seller, covering Seller's liability as holder of legal title to the Airplanes and Spares. The policies evidencing such insurance shall contain such provisions as shall be satisfactory to Seller and shall name Seller as assured.

(b) Buyer shall at its expense maintain all risk aircraft hull insurance in respect of the Airplanes in favor of Buyer and Seller, as their interests may appear, in such amounts and with such companies as shall be satis-

factory to Seller. If any such Airplane shall be lost, destroyed or damaged to such an extent that repair thereof is impractical, such insurance shall be paid to the Seller to the extent of the unpaid balance of the purchase price of such Airplane together with any accrued and unpaid interest thereon, plus all other amounts then due to Seller hereunder. Upon such payment to the Seller of insurance to the extent of the unpaid balance of the purchase price of any Airplane, absolute title to the Airplane so damaged or to any parts of an Airplane so destroyed shall vest in Buyer and Seller shall deliver to Buyer such proper documents of title with respect thereto as Buyer may reasonably require. Buyer shall be under no obligation to make any payments on account of the purchase price of such Airplane falling due after such loss, destruction or damage. Any insurance proceeds in excess of the amount payable to the Seller, and any insurance proceeds payable as a result of damage not rendering repair impractical, shall be payable to Buyer or its designee.

7. Buyer may at any time pay to Seller the unpaid balance of the purchase price of the Airplanes and Spares or any part thereof, without premium or penalty.

8. Upon the payment to Seller of the balance of the purchase price of the Airplanes and Spares together with all other amounts owing to Seller hereunder, Seller shall deliver to Buyer at such place in the United States as Buyer may designate.

(a) a bill of sale duly vesting in Buyer the title to the Airplanes and Spares free and clear of all liens, claims, charges and encumbrances attaching subsequent to the delivery of the Airplanes and Spares to Seller and not arising

out of the possession, use or operation of the Airplanes and Spares by Buyer, and

(b) such other appropriate documents of title with respect thereto as Buyer may reasonably require.

9. In the event any sales tax or use tax is hereafter imposed upon or paid by Seller by reason of the sale or use of the Airplanes and Spares or the purchase thereof by Seller, then in addition to the sales price provided for in paragraph 3, Buyer shall pay to Seller the amount thereof, upon demand.

10. Buyer shall furnish Seller forthwith and from time to time thereafter at reasonable intervals, all such information concerning Buyer's financial condition, including balance sheets and forecasts of earnings, as is customarily furnished to a commercial bank holding or considering the acceptance of unsecured notes of a borrower.

11. The Buyer agrees that it will pay and discharge all taxes, assessments, governmental charges and all charges for keep, repairs, storage, maintenance or accessories, which if unpaid might become a lien, charge or encumbrance upon or against any of the Airplanes or Spares; and upon the failure of the Buyer so to do the Seller may make any such payment; provided, however, that nothing herein contained shall require the Buyer to pay such tax, assessment or charge so long as the Buyer shall in good faith contest the validity thereof and shall furnish the Seller such bond or indemnity as the Seller shall require, unless, in the Judgment of the Seller, forfeiture is likely to result from any such failure to pay. Any sum or sums so paid by the Seller, together with interest thereon at the highest lawful contract rate, shall be and become a part of the sum which

the Buyer is required to pay under this Contract, and shall immediately, without demand, be due and be repaid by the Buyer to the Seller.

The Buyer will, upon written request from the Seller,

(a) reimburse the Seller for all filing or recording fees incurred in connection with filing or recording or refiling or re-recording this Contract and all supplements and additions hereto, if any;

(b) execute and deliver to the Seller all such further documents and instruments and do such further acts as may be necessary to perfect the rights of the Seller herein contemplated; and

(c) furnish to the Seller at reasonable intervals reports and certificates setting forth all the information necessary to inform the Seller as to the continued existence, location and condition of the Airplanes and Spares. The Seller shall also have the right to inspect the Airplanes and Spares at all times when the same are not in use and when such inspection can be had without undue inconvenience or expense to the Buyer.

12. Buyer agrees to maintain the Airplanes and Spares in good repair and working condition at its own expense, except any airplane lost, destroyed or so damaged that insurance with respect thereto is payable to the Seller pursuant to paragraph 6 hereof. Subject to the proper performance of such covenant, the Buyer may make repairs and replacements to the Airplanes and Spares and may substitute for engines, propellers and any other equipment installed in or attached to the Airplanes or Spares, engines, propellers or other equipment of substantially the same

kind and value; provided, however, that no removal of any such engines, propellers, or equipment, and no replacement thereof, shall divest Seller of its superior title thereto, or render any such removed or replaced equipment subject to the lien or claim of any person other than Seller, UNLESS and UNTIL such equipment is replaced by equipment of substantially the same kind and value, the title to which, upon such equipment being installed in or attached to the Airplanes or Spares, may validly vest in Seller free and clear of the lien or claim of any other person, subject to the provisions of paragraph 14 hereof. In the case of any such permitted substitution, title to the substituted equipment shall immediately vest in Seller and become subject to the provisions of this Conditional Sale Contract and remain so vested and so subject unless and until substituted for in the manner hereinabove permitted; and title to the equipment substituted for shall vest in Buyer.

13. Until title to the Airplanes and Spares shall have passed to the Buyer hereunder, the Buyer shall have no right, power or authority to sell, transfer, assign, mortgage or encumber or in any other manner whatsoever dispose of the Airplanes and Spares or any part thereof (except as provided in paragraph 12 hereof) or any interest therein, and the Buyer hereby agrees that, except as permitted by paragraph 12 hereof, the Buyer will not (voluntarily or involuntarily) sell, transfer, mortgage, encumber or in any other manner whatsoever dispose of the Airplanes and Spares or any part thereof or any interest therein. Buyer agrees, except as provided herein, that the Airplanes and Spares will be used exclusively for its commercial air transport operations and related activities and that it

will not permit the Airplanes and Spares to be used or possessed by others. Buyer may permit the use of the Airplanes and Spares by other airlines with which Buyer enters into interchange agreements provided that any such use by other airlines shall for the purposes of this agreement be considered to be use by the Buyer.

14. To the extent, if any, that there is a conflict between any of the provisions of this agreement and any of the provisions of the Indenture of Mortgage dated as of December 1, 1954 between the Buyer and Irving Trust Company, as Trustee, or of the Chattel Mortgage dated as of December 20, 1954 between the Buyer and Irving Trust Company, as Trustee, the provisions of said Indenture and said Chattel Mortgage shall prevail and the provisions of this agreement shall be deemed amended to the extent necessary to avoid such conflict. Seller recognizes the liens created by (a) Granting Clause VI of said Indenture and (b) Granting Clause III of said Chattel Mortgage as prior liens on the aircraft engines and on the propellers, appliances and spare parts relating to the Airplanes or Spares when and so long as they shall be installed in, attached to or incorporated in any of the aircraft or aircraft engines at any time subject to the lien of said Indenture or of said Chattel Mortgage, as the case may be.

Seller agrees that so long as all the Bonds issued under said Indenture at the time outstanding shall be held by the original purchaser thereof, (a) Seller will not repossess the Airplanes or Spares, in the event of a default by Buyer under this agreement, without affording such original purchaser reasonable notice of such default and a reasonable opportunity to remedy the same and (b) such

original purchaser shall have the right, at its option, to purchase at any time all the interest of Seller hereunder by paying to Seller the then remaining balance of the purchase price hereunder plus accrued interest.

Seller also agrees that in the event of a default by Buyer hereunder, the rights and remedies of Seller shall be limited to repossession of the Airplanes and Spares.

15. Before delivery of each Airplane to Buyer hereunder, Buyer will cause to be fastened thereon in a location reasonably adjacent to, and not less prominent than that of, the airworthiness certificate for such Airplane, a name plate no larger than four inches by seven inches (4" x 7") bearing the following legend:

"Hughes Tool Company holds legal title to this Airplane as Conditional Seller."

Buyer shall maintain such name plate in such location or in one of at least equal prominence and visibility at all times. Buyer may affix to the Airplanes Buyer's name, insignia or other legends customarily displayed by Buyer on its airplanes.

16. Buyer shall indemnify and hold harmless Seller, its agents and its employees from any and all liability for losses, expenses, damages, demands and claims in connection with or arising out of any death of, or injury or alleged injury or damage to, persons or property sustained, or alleged to have been sustained, in connection with or arising or alleged to have arisen out of Buyer's possession, use or operation of the Airplanes or Spares and Buyer agrees to handle any claim and defend any suit or action brought against Seller, its agents or its employees, or any of them, based on any such death, injury or damage, or alleged injury or damage, and to pay all damages, costs and expenses,

including attorneys' fees, in connection therewith or resulting therefrom.

Buyer's liability to Seller under this paragraph 16 is conditioned upon Seller's promptly giving notice to Buyer of institution of such suit or action or of receipt of such claim or demand. Buyer shall have the option at any time to conduct negotiations with the party or parties making any such claim or demand, and may intervene in any such suit or action. Whether or not Buyer intervenes in any such suit or action, it shall be entitled to assume, conduct or control the defense thereof, and Seller shall not settle or discharge any such claim, demand, suit, action or judgment without prior notice to and the consent of Buyer.

IN WITNESS WHEREOF, the parties hereto have executed and delivered this agreement as of the day and year first above written.

HUGHES TOOL COMPANY

Attest:

By _____
Vice President

_____
Assistant Secretary

TRANS WORLD AIRLINES, INC.

Attest:

By _____
Vice President - Finance

_____
Assistant Secretary

DX321 id., Item 7b, page 1
(CAB Orders & Documents)

BEFORE THE

CIVIL AERONAUTICS BOARD

In the Matter of the Application of	:
HUGHES TOOL COMPANY	:
for approval under Section 408 of the Civil Aeronautics Act of 1938, as amended, of the acquisition of control of	: Docket No. 1182
TRANS WORLD AIRLINES, INC.	:

MOTION OF TRANS WORLD AIRLINES, INC.
FOR APPROVAL OF TRANSACTIONS WITH
HUGHES TOOL COMPANY

TRANS WORLD AIRLINES, INC. (hereinafter referred to as "TWA") respectfully moves that the Board enter an order herein modifying its Order Serial No. 3210, issued October 17, 1944, as amended, approving the acquisition of control of TWA by Hughes Tool Company (hereinafter referred to as "Hughes"), so that the terms of such order will not restrict the right of TWA to purchase from Hughes Tool Company up to 25 jet powered aircraft suitable for operation by TWA on both its domestic and international routes.

1. Thorough studies have been made by TWA of the characteristics of all jet aircraft available in this country and abroad. None of these aircraft has the range desirable for all-year around operations across the Atlantic so as to permit non-stop services in both directions under the extreme conditions frequently encountered on that route.

2. During the past few years important new

developments have occurred affecting jet aircraft which make it possible to design aircraft at this time that are superior in performance, safety and economy to the commercial aircraft now being constructed, the designs for which were initially laid down four or five years ago.

3. Hughes Tool Company has indicated to TWA that, subject to approval of the Board, it is willing to construct jet transport aircraft for TWA's use, taking into account the most recent design developments, on terms that are at least as favorable in every respect as those that can be secured from any manufacturer for a similar aircraft. Deliveries of such aircraft will commence in 1961. The aircraft will be used interchangeably on TWA's international and domestic routes.

4. Hughes Tool Company has advised TWA that it is willing to sell such aircraft to any other airline at the same price as sold to TWA.

5. Hughes Tool Company has also advised TWA that the aircraft would be constructed by the Aircraft Division of Hughes Tool Company in a new factory to be located in accordance with the recently announced policy of the Air Force to insure the widest possible dispersal of aircraft production facilities.

WHEREFORE, Trans World Airlines, Inc. respectfully prays that the Board enter an order herein modifying the Board's Order Serial No. 3210, as amended, so that the terms of such order will not restrict the right of TWA to acquire from Hughes Tool Company the aircraft as referred to above, and providing such other and further relief as may be appropriate.

Respectfully submitted,

TRANS WORLD AIRLINES, INC.

By Warren Lee Pierson
Chairman of the Board

May 10, 1966

Order No. E-10300

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 17th day of May, 1956

In the matter of the application of	
HUGHES TOOL COMPANY	
for approval under section 408 of the Civil Aeronautics Act of 1938, as amended, of the acquisition and control of	Docket No. 1182
TRANS WORLD AIRLINES, INC.	

ORDER MODIFYING ORDER APPROVING ACQUISITION

By motion filed May 2, 1956, Trans World Airlines, Inc. (TWA) requests an order modifying Order No. E-3210, Docket No. 1182, issued October 17, 1955, as amended by subsequent orders, so that the terms of such order will not restrict the right of TWA to exercise certain options dated April 20, 1956 for the purchase of eight Lockheed 1049G and twenty-five Lockheed 1049A aircraft, and spare engines and parts from the Hughes Tool Company pursuant to conditional sale contracts.

We have considered all of the circumstances surrounding the proposal and find it in the public interest to relax the restrictions in the aforementioned Order No. E-3210. The Board has recently awarded TWA several new route segments and it appears that additional aircraft are required to implement such services. Furthermore, it appears that the new equipment is being made available to TWA at cost with the advantage of earlier delivery than would be possible if purchases of like equipment had to be made in the open market. In any event, it should be made clear that in determining that the proposed transaction is in the public interest we are not making any finding as to the reasonableness of the cost of the aircraft and related components for rate making purposes.

The Board, acting pursuant to the powers vested in it by the Civil Aeronautics Act of 1938, as amended, particularly sections 205(a), 408, and 1005(d) thereof, and finding that the further modification of Order No. E-3210 as hereinafter provided is just and reasonable and is in the public interest;

IT IS ORDERED, THAT Order No. 3210 issued October 17, 1944, as amended by subsequent orders, be and it hereby is further amended by adding thereto the following:

"8. That the terms of this order shall not restrict the right of Trans World Airlines, Inc. to purchase, and Hughes Tool Company to sell, eight Lockheed 1049 and twenty-five Lockheed 1649A aircraft and related spare parts and engines pursuant to the terms and conditions of certain options dated April 20, 1956 and conditional sales contracts between said parties; Provided, That nothing in the Board's action herein shall be construed as constituting an approval for rate-making purposes."

By the Civil Aeronautics Board:

/s/ M. C. Mulligan

M. C. Mulligan
Secretary

(SEAL)

Order No. E-10360

(1)

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 8th day of June, 1956

In the matter of an investigation of proposed transactions between	:	
HUGHES TOOL COMPANY	:	Docket No. 8061, et al. 1182
and	:	
TRANS WORLD AIRLINES, INC.	:	

ORDER INSTITUTING INVESTIGATION

In Trans World Airlines, Control by Hughes Tool, Docket No. 1182, 6 CAB 153 (1944), we approved the acquisition of control of Trans World Airlines, Inc. (then known as Transcontinental and Western Air, Inc., hereinafter TWA) by Hughes Tool Company (hereinafter Toolco) under section 408 of the Act subject to the condition, inter alia, that approval should be effective so long as commercial transactions between the two companies were limited to items the price of which did not exceed $200.00 each with a total aggregate annual limitation of $10,000.00. We found (p. 156) that "Applicant (Toolco) is not now engaged in, and has no plans contemplating, production of aircraft, aircraft parts, or facilities for use in commercial air transportation." We also found that there was no evidence in the record of an intention on the part of Toolco to engage in any phase of supply for commercial aviation (p. 155). In further proceedings in 9 CAB 381 (1948) we held that a certain letter agreement between Toolco and TWA resulted in further control of TWA for which Board approval was required pursuant to section 408 of the Act. One of the questions in the case was whether any change in the activities of Toolco in the field of aeronautics since the date of the Board's approval in 6 CAB 153 had affected or altered the character of the control approved therein. We stated that (p. 382) "It is clear that a substantial change in the activities of Toolco in the field of aeronautics would result in a transaction subject to the Board's jurisdiction under section 408 by reason of the fact that the character and priority of control originally approved might be altered or changed as a result thereof." We then found that the principal activity of Toolco at that time consisted of experimental work on aircraft accessories and armament for the Army and Navy. We concluded, therefore, that there had been no substantial change in Toolco's operations in the field of aeronautics since the original order of approval which required further Board consideration, under section 408, of Toolco's control of TWA. In 12 CAB 192 (1950) we approved, on the merits, the further acquisition of control of TWA by Toolco subject to the terms and conditions attached to the Board's approval in 6 CAB 153.

3114

On May 10, 1956, TWA filed a motion in Docket No. 1182 that the Board modify its Order in 6 CAB 153 so as not to restrict the right of TWA to purchase from Toolco up to 25 jet-powered aircraft suitable for operation by TWA on both its domestic and international routes.

As noted above, the aeronautical activities of Toolco considered heretofore in 6 CAB 153 and 9 CAB 381 did not involve manufacture or sale of aircraft for commercial use. It appears, therefore, that the manufacture of jet aircraft for use of TWA and other airlines by Toolco may result in a substantial change in the activities of Toolco in the field of aeronautics which would require our further consideration, under section 408, of Toolco's control of TWA. However, Toolco has not filed an application for such approval under section 408. Accordingly, we will institute an investigation to determine whether the proposed change in Toolco's activities in the field of aeronautics will result in a transaction subject to the Board's jurisdiction under section 408 and if so, whether we should approve such transaction. We will consolidate therewith TWA's motion in Docket No. 1182 for amendment of the Board's order in 6 CAB 153 since we find that such consolidation will be conducive to the proper dispatch of the Board's business and to the ends of justice and will not unduly delay the proceeding.

ACCORDINGLY, IT IS ORDERED THAT:

1. An investigation, assigned Docket No. 2061, be and it hereby is instituted to determine (a) whether the proposal of Hughes Tool Company to manufacture and sell up to 25 jet-powered aircraft for TWA and other air lines will result in a transaction requiring further Board consideration, under section 408, of the control of TWA by Hughes Tool Company; (b) if so, whether the Board should approve or disapprove such transaction under section 408(b) of the Act;

2. TWA's motion in Docket No. 1182 for an amendment of the Board's order in 6 CAB 153, as amended, be consolidated with the investigation instituted by ordering paragraph No. 1;

3. Said consolidated proceeding be set down for expeditious hearing before an examiner of the Board at a time and place hereafter to be designated.

By the Civil Aeronautics Board:

/s/ M. C. Mulligan

M. C. Mulligan
Secretary

(SEAL)

BEFORE THE

CIVIL AERONAUTICS BOARD

In the Matter of the Application of :	
HUGHES TOOL COMPANY :	
for approval under Section 408 of the Civil Aeronautics Act of 1938, as amended, of the acquisition of control of :	Docket No. 1182
TRANS WORLD AIRLINES, INC. :	

MOTION OF TRANS WORLD AIRLINES, INC.
FOR APPROVAL OF TRANSACTIONS WITH
HUGHES TOOL COMPANY

TRANS WORLD AIRLINES, INC. (hereinafter referred to as "TWA") respectfully moves that the Board enter an order herein modifying its Order Serial No. 3210, issued October 17, 1944, as amended, approving the acquisition of control of TWA by Hughes Tool Company (hereinafter referred to as "Hughes"), so that the terms of such order will not restrict the right of TWA to borrow from Hughes up to $10,000,000 under the terms and conditions hereinafter described.

1. The terms and conditions upon which TWA proposes to borrow up to $10,000,000 from Hughes and upon which Hughes will extend credit in such amount to TWA are as follows:

(a) All loans will be upon unsecured notes of TWA in substantially the form attached as Exhibit A.

(b) The initial amount of the credit will not exceed $10,000,000. On August 1, 1957, the maximum

amount of the credit shall be reduced to $7,500,000; on November 1, 1957, to $5,000.000; on February 1, 1958, to $2,500,000;

(c) The credit shall terminate on April 30, 1958, or at such earlier time as the Treasurer of Hughes deems necessary because of other cash requirements or contractual limitations;

(d) Borrowings and repayments shall be in multiples of $100,000 and upon reasonable notice to Hughes;

(e) All loans shall bear interest for each day at a rate equivalent to the then prevailing prime rate for commercial loans in New York, New York, computed on the basis of 365 days;

(f) No commitment fee shall be required;

(g) Before each borrowing Hughes shall have received a signed opinion from TWA's counsel that the promissory note, when executed and delivered, will be a valid and binding obligation of TWA according to its tenor and effect and that its issuance will not violate any obligation or restriction imposed upon TWA by any law or governmental regulation or by any contract, indenture or other document to which TWA is a party.

2. The arrangement described above will operate as a standby credit to be utilized as and when required by TWA, thus providing TWA with reserve funds in the event additional cash is needed during the period of the credit.

WHEREFORE, Trans World Airlines, Inc. respectfully prays that the Board enter an order herein modifying the Board's Order Serial No. 3210, as amended, so that the terms of such order will not restrict the right

of TWA to borrow up to $10,000,000 from Hughes Tool Company on the above terms and conditions, and providing such other and further relief as may be appropriate.

Respectfully submitted,

TRANS WORLD AIRLINES, INC.

By T. F. Wells
Vice President

September 11, 1956

EXHIBIT A

New York, New York
, 195_

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FOR VALUE RECEIVED, the undersigned TRANS WORLD AIRLINES, INC., a Delaware corporation (hereinafter sometimes called "TWA"), promises to pay fifteen (15) days after demand the sum of

Dollars ($) to the order of HUGHES TOOL COMPANY at the office of Irving Trust Company, One Wall Street, New York 15, New York, together with interest from date on the unpaid principal hereof at a rate for each day equivalent to the then prevailing prime rate for commercial loans in New York, New York, computed on the basis of 365 days.

Demand for payment, protest and notice of dishonor are hereby waived by the undersigned.

The indebtedness represented by this promissory note, including both principal and interest, is subordinated and subject in right of payment to the prior payment in full of all the principal of, premium, if any, and interest on the 3-3/4% Equipment Mortgage Sinking Fund Bonds due December 1, 1969 of TWA now or hereafter issued under the Indenture of Mortgage dated as of December 1, 1954, between TWA and Irving Trust Company, as Trustee, as said Indenture has heretofore been or from time to time hereafter may be amended, modified or supplemented, and any renewal, extension, refunding, amendment and modification of any such Bonds (all of such principal of, premium, if any, and interest on all of such Bonds together with any such renewal, extension, refunding, amendment and modification of any thereof being hereinafter called "Bond

Indebtedness"). Upon any distribution of all or substantially all of the assets of TWA or upon any dissolution, winding up or liquidation of TWA, whether voluntary or involuntary, or upon any reorganization, readjustment, arrangement or similar proceeding relating to TWA or any of its creditors as such property, whether in bankruptcy, insolvency, receivership proceedings or otherwise, or upon any assignment by TWA for the benefit of creditors or upon any other marshalling of the assets or liabilities of TWA,

(a) all the Bond Indebtedness shall first be paid in full in cash or provision made for such payment by deposit of the requisite cash in trust with a bank or banks (either theretofore acting as Trustee under the aforementioned Indenture, or duly appointed paying agents for the purpose) before any payment or distribution is made on account of the principal or interest on the indebtedness under this promissory note;

(b) any payment or distribution (whether in cash, property or securities) to which the holder of this promissory note would be entitled except for the provisions of this subordination clause shall be paid or delivered by the trustee, receiver, assignee for the benefit of creditors, or other liquidating agents making such payment or distribution, directly and ratably to the holders of the Bond Indebtedness (or to their representatives or to the Trustee under the aforementioned Indenture) to the extent necessary to pay off the Bond Indebtedness in full after giving effect to any concurrent payment or distribution or provision therefor as aforesaid to the holders of the Bond Indebtedness; and

(c) in the event that notwithstanding the foregoing, any payment or distribution (whether in cash, property or securities) shall be received by the holder of this promissory note before all such Bond Indebtedness is paid in full, or provision is made as aforesaid for its payment, such payment or distribution shall be ratably held in trust for the benefit of, and shall be ratably paid over or delivered to the holders of, the Bond Indebtedness or their representatives (or to the Trustee under the aforementioned Indenture), for application to or payment of all the Bond Indebtedness remaining unpaid to the extent necessary to pay the Bond Indebtness in full after giving effect to any concurrent payment or distribution or provision therefor as aforesaid to the holders of such Bond Indebtedness.

In the event and during the continuation of any default under any instrument constituting Bond Indebtedness or pursuant to which any Bond Indebtedness shall have been issued, continuing during the period of grace, if any, specified in such instru-

ment, no payment of principal or interest shall be made on this promissory note and no holder of this promissory note shall be entitled to receive any such payment. Nothing contained in this promissory note shall affect the obligation of TWA to make, or prevent TWA from making, at any time, except during the pendency of any of the proceedings or upon the happening of any of the events referred to in the foregoing provisions of this promissory note or during the continuation of any such default, payments of principal of, or interest on, this promissory note.

The above subordination clause defines solely the relative rights as between the holder of this promissory note and the holders of the Bond Indebtedness; and nothing in such clause shall be deemed to impair the obligations under this promissory note as between the holder of this promissory note and TWA.

TRANS WORLD AIRLINES, INC.

By_____

Order No. E-10971

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 13th day of December, 1956

In the matter of the application of	:	
	:	
HUGHES TOOL COMPANY	:	
	:	
for approval under section 408 of the Civil Aeronautics Act of 1938, as amended, of the acquisition of control of	:	Docket No. 1182
	:	
TRANS WORLD AIRLINES, INC.	:	

ORDER

By motion filed with the Board on September 13, 1956 Trans World Airlines, Inc. (TWA) requests modification of the Board's order in Docket No. 1182, Order No. 3210 1/, as amended and modified, which restricts commercial transactions between TWA and Hughes Tool Company (Toolco) and between TWA and any affiliate or subsidiary of Toolco to a maximum of $200 each with the further limitation that the total annual expenditure involved in such commercial transactions by either party shall not exceed $10,000.

The modification is desired to permit TWA to borrow from Toolco up to $10,000,000. Briefly, the transaction is subject to the following terms and conditions: (1) all loans will be made upon unsecured notes of TWA; (2) the initial amount of the credit will not exceed $10,000,000 and will be reduced by $2,500,000 August 11, 1957, November 1, 1957 and February 1, 1958; (3) the credit shall terminate April 30, 1958, or at such earlier time as the treasurer of Toolco deems necessary because of other cash requirements or contractual limitations; (4) borrowings and repayments shall be in multiples of $100,000 and upon reasonable notice to Toolco; (5) all loans shall bear interest for each day at a rate equivalent to the then prevailing rate for commercial loans in New York; (6) no commitment fee shall be required; and (7) before each borrowing TWA's counsel shall give Toolco a signed opinion that the promissory note when executed and delivered will be a valid and binding obligation upon TWA. The carrier states that the loan arrangement will operate as a standby credit to be utilized as and when required by TWA, thus providing it with reserve funds in the event additional cash is needed during the

1/ 6 CAB 191.

period of credit.

The Board has previously approved the control of TWA by Toolco 2/ under section 408 of the Act, and the proposed transaction raises no new question under section 408 of control by Toolco. The Board finds that the proposed transaction does not violate the original intent of the restriction imposed upon transactions between TWA and Toolco; and further modification as ordered herein of the Board's order in Docket No. 1182, as amended and modified, is just and reasonable and is in the public interest.

IT IS ORDERED THAT:

1. Order Serial No. 3210, issued October 17, 1944, as amended by subsequent orders, be and it hereby is further amended to the extent necessary to permit TWA to borrow from Toolco up to $10,000,000 to be utilized as and when required by TWA as reserve funds in the event additional cash is needed during the period commencing with the date of this order and terminating April 30, 1958, or at such earlier time as the Treasurer of Toolco deems necessary because of other cash requirements or contractual limitations;

2. Such action shall not be a determination for rate-making purposes of the reasonableness of the financial provisions of the transaction;

3. The motion, except to the extent granted herein, be and it hereby is denied; and

4. This order may be amended or revoked at any time in the discretion of the Board without hearing.

By the Civil Aeronautics Board:

/s/ M. C. Mulligan

M. C. Mulligan
Secretary

(SEAL)

2/ 6 CAB 153 and 12 CAB 192.

BEFORE THE

CIVIL AERONAUTICS BOARD

In the Matter of the Application of	
HUGHES TOOL COMPANY	
for approval under Section 408 of the Civil Aeronautics Act of 1938, as amended, of the acquisition of control of	Docket No. 1182
TRANS WORLD AIRLINES, INC.	

AMENDED MOTION OF TRANS WORLD AIRLINES, INC.
FOR APPROVAL OF TRANSACTIONS WITH
HUGHES TOOL COMPANY

TRANS WORLD AIRLINES, INC. (hereinafter called TWA) filed with the Board on or about April 1, 1957 its motion requesting the issuance of an order which would permit TWA to sell convertible debentures to Hughes Tool Company (hereinafter called Hughes) as a part of a general offering to all stockholders of TWA, and to enter into a commitment with Hughes insuring the purchase of at least $34,000,000 of such debentures pursuant to a refinancing program described in said motion.

Since the filing of the motion, the Board of Directors of TWA has determined that the refinancing program could not be carried out satisfactorily by the issuance of convertible debentures and that it would be advisable to make an offering to its stockholders of additional shares of common stock, in lieu of debentures, at the rate of one new share for each share now held.

The proposal to offer common stock instead of debentures was announced at the annual meeting of stockholders held in Kansas City on April 25, 1957, at which the stockholders voted to increase the number of authorized shares of common stock from 4,000,000 to 10,000,000.

TWA accordingly files this amended motion for an order by the Board modifying its Order Serial No.3210, issued October 17, 1944, as amended (which approved the acquisition of control of TWA by Hughes) so as to permit TWA to sell to Hughes, and Hughes to buy from TWA (1) Hughes' pro rata share of an issue of common stock of TWA to be offered to TWA's stockholders as hereinafter described, and (2) any of such stock offered to TWA stockholders and not subscribed for upon such offering and so as to permit TWA and Hughes to enter into and perform a commitment agreement relating to such offering as hereinafter described.

1. As explained in its original motion, TWA wishes to refinance its obligations under existing and contemplated conditional sale contracts with Hughes covering the 8 Lockheed 1049G and 25 Lockheed 1649A aircraft, spare parts and engines, referred to in paragraph 8 of Order Serial No. 3210, as amended by Order Serial No. E-10300, issued May 17, 1956.

Present plans contemplate that such refinancing would be accomplished in part by loans from the banks and/or insurance companies and in part by the sale of additional shares of common stock of TWA. The proceeds of the loans and stock sales will be applied toward the payment of TWA's obligations to Hughes with respect to the above-mentioned aircraft, spare parts and engines.

As a result of the sale of common stock instead of debentures, the refinancing would effect the

reduction of TWA's debt by at least $34,000,000, with a corresponding reduction in interest payments.

2. The offering of additional shares of common stock to TWA's stockholders would be made by means of transferable subscription warrants permitting the purchase of one new share for each share now held. At the present time there are 3,337,036 shares outstanding, so that this would result in an offering of 3,337,036 additional shares. The price at which such shares are to be offered depends on the market at the time the offering is made, which is expected to be in June, and will be determined at that time.

TWA and Hughes propose to enter into an agreement providing, among other things, that Hughes would have the right to acquire any shares offered to stockholders not subscribed for upon the offering, and that if Hughes took less than all such unsubscribed shares, they would be obligated to take enough shares to provide TWA with net proceeds of $34,000,000 from the shares acquired by Hughes from TWA. A copy of the proposed form of commitment agreement is attached as Annex A.

Discussions have been initiated with insurance companies for long-term debt financing of the 1049G and 1649A aircraft, but it does not appear possible that such loans can be consummated before September or October of this year. In the meantime, TWA has completed arrangements by which it will borrow $35,000,000 from banks secured by chattel mortgages on the 1049G and 1649A aircraft and engines. This bank loan will provide for repayment as follows: $10,000,000 on December 1, 1957 with interest at

5% and the balance payable in 36 equal monthly instalments beginning January 1, 1958 with interest at 5-1/4%.

The commitment agreement attached as Annex A provides that if TWA does not secure an additional $15,000,000 from common stock and debt on or before December 1, 1957, Hughes will establish a revolving credit in favor of TWA for the amount by which the additional proceeds from stock and loans fall short of $15,000,000. This revolving credit, which terminates December 1, 1960, provides for interest at the prime commercial rate.

3. The proposed refinancing on the terms hereinabove described is of substantial advantage to TWA for the following reasons, among others:

(a) The transaction will enable TWA to reduce its indebtedness by at least $34,000,000, and possibly more than this amount, depending on the market price of the shares at the time of the offering, the subscription price and the interest of the other stockholders in the offering.

This will improve the financial strength of TWA, decreasing the ratio of debt to equity. It would also reduce the amount of debt on which interest would be payable.

(b) As a consequence of the financing, as above described, the requirements for cash to meet interest payments and debt reduction on the new 1049G and 1649A aircraft will be reduced by approximately 40 per cent, leaving TWA in a much more flexible position for future financing of jet equipment and facilities.

4. On or about May 28, 1957 TWA will file with

the Securities and Exchange Commission a Registration Statement under the Securities Act of 1933, covering the proposed offering of additional shares of common stock to TWA stockholders. In accordance with normal SEC practice the Registration Statement will become effective at 5:30 P.M. on the 19th day after the date of filing. On the day following the date it becomes effective, TWA will mail to stockholders subscription warrants permitting the purchase of new shares, accompanied by a copy of the prospectus which is a part of the SEC Registration Statement. In order to make the offering to stockholders attractive, it is essential that the prospectus state that Hughes has agreed to purchase at least $34,000,000 of the stock as above referred to.

For this reason, action by the Civil Aeronautics Board on the transaction between TWA and Hughes, as above described, is urgently needed on or before June 11, 1957, to meet the requirement of the New York Stock Exchange that conditions precedent to the offering be removed at least four trading days before the Registration Statement becomes effective.

WHEREFORE, TRANS WORLD AIRLINES, INC. respectfully prays that the Board enter an order herein modifying the Board's Order Serial No. 3210, as amended, so that its order will permit TWA to sell to Hughes, and Hughes to buy from TWA, (1) Hughes' pro rata share of an issue of common stock to be offered to TWA's stockholders as above described and (2) any of such stock offered to TWA's stockholders and not subscribed for upon such offering; and will also permit TWA and Hughes to enter into and perform an agreement relating to such offering substantially in the form attached hereto

as Annex A, and providing for such other and further relief as may be appropriate.

Respectfully submitted,

TRANS WORLD AIRLINES, INC.

By A. V. Lewis
Senior Vice President-Finance

ANNEX A

May , 1957

Trans World Airlines, Inc.
380 Madison Avenue
New York 17, N. Y.

Dear Sirs:

Referring to the registration statement, which you have filed under the Securities Act of 1933, covering an offering of Common Stock to stockholders at the rate of one share for each share of Common Stock held, we confirm the following agreement between us which shall become effective when said registration statement shall have become effective and the Civil Aeronautics Board shall have entered an order approving in substance the transactions contemplated hereby:

1. You shall make the offering of the Common Stock described in said registration statement.

2. If you make such offering, we shall acquire from you, and you shall issue and sell to us, all or any part of the shares of Common Stock so offered to stockholders and not subscribed for upon such offering, the number of shares of Common Stock to be so acquired by us to be determined by us; provided, however, that if we purchase less than all said unsubscribed shares, we shall be obligated to purchase such number thereof as will, with the shares acquired by us on the exercise of subscription warrants, provide you with aggregate net proceeds of at least $34,000,000 from the shares acquired by us.

3. All acquisitions of Common Stock by us pursuant to paragraph 2 above shall be at the price at which the Common Stock is offered to your stockholders, pursuant to the above mentioned registration statement, and we shall notify you, not later than three business days after the expiration of the subscription period, of the number of shares to be acquired by us in the event we desire to acquire more than the shares which we are obligated to purchase pursuant to paragraph 2. Payment to you for shares acquired by us pursuant to paragraph 2 shall be at such times and in such amounts as you may request.

4. Nothing in this agreement shall impair our rights as one of your stockholders to receive subscription warrants for Common Stock in connection with such offering to stockholders, to purchase subscription warrants on the

open market, and to purchase Common Stock upon the exercise of subscription warrants received from you or purchased from others. We will not sell any subscription warrants acquired by us.

5. You shall apply the net proceeds from the sale of Common Stock and from any loans hereafter made by you from banks or other institutional investors, to the payment or prepayment of amounts owed by you to us in connection with the purchase of the eight Lockheed Constellation 1049C aircraft and the twenty-five Lockheed 1649A aircraft and related spare parts and engines.

6. In the event that, as a result of our purchase of Common Stock, we become the owner of 80% or more of your outstanding Common Stock, you will permit us to file consolidated income tax returns for you and ourselves, upon the condition that we agree to indemnify you, in a manner satisfactory to you and your counsel, against all loss or liability arising out of your having paid greater taxes on income in the aggregate than you would have been required to pay if your income tax returns had not been consolidated with ours and to secure our indemnity by bond or otherwise, in a manner satisfactory to you.

7. If on or before December 1, 1957 you have not received an aggregate of $15,000,000 or more in net proceeds from the sale of (a) Common Stock in excess of $34,000,000 and (b) bonds, notes or other indebtedness in addition to the contemplated bank loans of $35,000,000 referred to in your registration statement above mentioned, then, in such event, we will enter into a revolving credit agreement in the form attached hereto as APPENDIX I for the amount by which such net proceeds aggregate less than $15,000,000. You shall apply the proceeds of any loans from us under such revolving credit, up to a maximum of $10,000,000, to the payment of the $10,000,000 of such contemplated bank loans maturing December 1, 1957.

If the foregoing correctly states the agreement between us, kindly so confirm by signing in the place indicated and returning the copy of this letter enclosed for the purpose, whereupon this letter and said copy will constitute the agreement between us, to become effective as

above provided.

Very truly yours,

HUGHES TOOL COMPANY

By_____

Confirmed, May - , 1957

TRANS WORLD AIRLINES, INC.

By_____

APPENDIX I

REVOLVING CREDIT AGREEMENT

THIS AGREEMENT, dated as of December 1, 1957, between TRANS WORLD AIRLINES, INC., a Delaware corporation (herein called TWA) and HUGHES TOOL COMPANY, a Delaware corporation (herein called Hughes).

W I T N E S S E T H :

WHEREAS, Hughes is willing to establish a revolving credit on the terms hereinafter set forth,

NOW, THEREFORE, in consideration of the premises and the mutual agreements herein contained, the parties hereto agree as follows:

1. Hughes hereby establishes a revolving credit in favor of TWA in the amount of $, for the period from December 1, 1957 to December 1, 1960, when the credit shall expire and terminate.

2. Whenever TWA desires to obtain a loan hereunder, TWA shall give Hughes written notice at least five business days prior to the expected borrowing, and to deliver to Hughes on or before the borrowing date, a note, in substantially the form of EXHIBIT A attached hereto, bearing the date on which such loan is to be made, payable to Hughes in the amount of the borrowing and executed by a duly authorized officer of TWA.

3. TWA may at any time prepay any loan or portion thereof with accrued interest to the date of prepayment, provided that any partial prepayment of principal shall be in the amount of $100,000 or any multiple thereof.

IN WITNESS WHEREOF, this agreement has been executed by the parties hereto as of the day and year first above

written.

TRANS WORLD AIRLINES, INC.

By_____
Vice President

[Corporate Seal]

Attest:

_____
Secretary

HUGHES TOOL COMPANY

By_____
Vice President

[Corporate Seal]

Attest:

_____
Secretary

AX-2170

DX321 id., Item 8b, [illegible]
(CAB Orders & Documents)

EXHIBIT A

New York, New York
, 195_

$

FOR VALUE RECEIVED, the undersigned TRANS WORLD AIRLINES, INC., a Delaware corporation (hereinafter sometimes called "TWA"), promises to pay on December 1, 1960 the sum of Dollars ($) to the order of HUGHES TOOL COMPANY at the office of Irving Trust Company, One Wall Street, New York 15, New York, together with interest from date on the unpaid principal hereof at a rate for each day equivalent to the then prevailing prime rate for commercial loans in New York, New York, computed on the basis of 365 days.

Demand for payment, protest and notice of dishonor are hereby waived by the undersigned.

The indebtedness represented by this promissory note, including both principal and interest, is subordinated and subject in right of payment to the prior payment in full of (a) all the principal of, premium, if any, and interest on the 3-3/4% Equipment Mortgage Sinking Fund Bonds due December 1, 1969 of TWA (hereinafter sometimes called the "Bonds") now or hereafter issued under the Indenture of Mortgage dated as of December 1, 1954, between TWA and Irving Trust Company, as Trustee, as said Indenture has heretofore been or from time to time hereafter may be amended, modified or supplemented, (b) all the principal of, premium, if any, and interest on indebtedness of TWA not in excess of $50,000,000 (hereinafter sometimes called the "Indebtedness") now or hereafter issued under an Indenture of Mortgage, dated as of , 1957, between TWA and as Trustee, providing a lien upon 8 Lockheed Constellation 1049G aircraft, up to 25 Lockheed 1649A aircraft, and related engines, as said Indenture may hereafter be amended, modified or supplemented, and (c) any renewal, extension, refunding, amendment and modification of any Bonds or Indebtedness (all of such principal of, premium, if any, and interest on all Bonds and Indebtedness together with any such renewal, extension, refunding, amendment and modification of any thereof being hereinafter called "Senior Indebtedness"); provided, however, that neither this note nor any note of TWA of similar tenor shall be deemed to be a refunding of any Senior Indebtedness. Upon any distribution of all or substantially all of the assets of TWA or upon any dissolution, winding up or liquidation of TWA, whether voluntary or involuntary, or upon any reorganization, readjustment, arrangement

or similar proceeding relating to TWA or any of its creditors as such or property, whether in bankruptcy, insolvency, receivership proceedings or otherwise, or upon any assignment by TWA for the benefit of creditors or upon any other marshalling of the assets or liabilities of TWA,

(a) all the Senior Indebtedness shall first be paid in full in cash or provision made for such payment by deposit of the requisite cash in trust with a bank or banks (either theretofore acting as the respective Trustees under the respective Indentures above mentioned, or duly appointed paying agents for the purpose) before any payment or distribution is made on account of the principal or interest on the indebtedness under this promissory note;

(b) any payment or distribution (whether in cash, property or securities) to which the holder of this promissory note would be entitled except for the provisions of this subordination clause shall be paid or delivered by the trustee, receiver, assignee for the benefit of creditors, or other liquidating agents making such payment or distribution, directly and ratably to the holders of the Senior Indebtedness (or to their representatives or to the respective Trustees under the respective Indentures above mentioned,) to the extent necessary to pay off the Senior Indebtedness in full after giving effect to any concurrent payment or distribution or provision therefor as aforesaid to the holders of the Senior Indebtedness; and

(c) in the event that notwithstanding the foregoing, any payment or distribution (whether in cash, property or securities) shall be received by the holder of this promissory note before all such Senior Indebtedness is paid in full, or provision is made as aforesaid for its payment, such payment or distribution shall be ratably held in trust for the benefit of, and shall be ratably paid over or delivered to the holders of, the Senior Indebtedness or their representatives (or to the respective Trustees under the respective Indentures above mentioned,) for application to or payment of all the Senior Indebtedness remaining unpaid to the extent necessary to pay the Senior Indebtedness in full after giving effect to any concurrent payment or distribution or provision therefor as aforesaid to the holders of such Senior Indebtedness.

In the event and during the continuation of any default under any instrument constituting Senior Indebtedness or pursuant to which any Senior Indebtedness shall have been issued, continuing during the period of grace, if any, specified in

such instrument, no payment of principal or interest shall be made on this promissory note and no holder of this promissory note shall be entitled to receive any such payment. Nothing contained in this promissory note shall affect the obligation of TWA to make, or prevent TWA from making, at any time, except during the pendency of any of the proceedings or upon the happening of any of the events referred to in the foregoing provisions of this promissory note or during the continuation of any such default, payments of principal of, or interest on, this promissory note.

The above subordination clause defines solely the relative rights as between the holder of this promissory note and the holders of the Senior Indebtedness; and nothing in such clause shall be deemed to impair the obligations under this promissory note as between the holder of this promissory note and TWA.

TRANS WORLD AIRLINES, INC.

By_____

Order No. E-11432

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 11th day of June, 1957

In the matter of the application of HUGHES TOOL COMPANY for approval under section 408 of the Civil Aeronautics Act of 1938, as amended, of the acquisition of control of TRANS WORLD AIRLINES, INC.	Docket No. 7282

ORDER

By motion amended May 28, 1957, Trans World Airlines, Inc. (TWA) requests modification of Order No. 3210,1/ as amended and modified by subsequent orders, which restricts commercial transactions between TWA and Hughes Tool Company (Toolco) and between TWA and any affiliate or subsidiary of Toolco to a maximum of $200 each, with the further limitation that the total annual expenditure involved in such commercial transactions by either party shall not exceed $10,000.

The further modification is desired to permit TWA to refinance its obligations under existing and contemplated conditional sales contracts with respect to the acquisition 2/ of 8 Lockheed 1049G's and 25 Lockheed 1649A's and related spare parts and engines. Briefly, the refinancing program would be accomplished in four segments: (1) the issuance by TWA to stockholders and pro rata acquisition by Toolco of new common stock which would net TWA at least $34,000,000; (2) equipment loans from banks and/or insurance companies in the amount of at least $35,000,000; (3) a revolving credit arrangement established by Toolco in favor of TWA up to an amount of $15,000,000, and (4) the balance, if any, from TWA's general funds.

The carrier alleges that the proposed financial program will (1) enable it to reduce its indebtedness by at least $34,000,000 with a corresponding reduction in interest payments; (2) improve its financial structure by decreasing the ratio of debt to equity; (3) ease TWA's monthly debt burden by

1/ 8 CAB 153 (Docket No. 1102).
2/ Previously approved by Order No. E-10300, dated May 17, 1956.

extending equipment payments over a longer period; and (4) leave TWA in a much more flexible financial position for future financing of jet equipment and facilities.

The Board has previously approved the control of TWA by Toolco [1] under section 408 of the Act and the proposed refinancing program, including the possible increased percentage of stock held by Toolco in TWA, raises no new questions under section 408 in respect thereto. The Board finds that the proposed transaction does not violate the original intent of the restriction imposed upon transactions between TWA and Toolco; and further modification as ordered herein of Order No. 3210 as amended and modified, is just and reasonable and is in the public interest.

IT IS ORDERED THAT:

1. Any additional acquisition of control of TWA by Toolco as may result from the agreement presented herein, be and is hereby approved, provided that such additional control, if any, shall be exercised in accordance with the terms and conditions of the Board's order in 6 CAB 153, as amended, approving the original acquisition of control of TWA by Toolco.

2. Order No. 3210, issued October 17, 1944, as amended by subsequent orders, be and it hereby is further amended so as to permit TWA to sell to Toolco and the latter to buy its pro rata share of an issue of common stock to be offered to TWA's stockholders, as well as related transactions as set forth in the motion as amended;

3. Such action shall not be a determination for rate-making purposes of the reasonableness of the financial provisions of the transactions;

4. The motion, as amended, except to the extent granted herein be and it hereby is denied; and

5. The order may be amended or revoked at any time in the discretion of the Board without hearing.

By the Civil Aeronautics Board:

/s/ M. C. Mulligan

M. C. Mulligan
Secretary

(SEAL)

1/ 6 CAB 153 and 12 CAB 192.

BEFORE THE

CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

In the Matter of the Application of	:	
HUGHES TOOL COMPANY	:	
for approval under Section 408 of the Civil Aeronautics Act of 1938, as amended, of the acquisition of control of	:	Docket No. 1182
TRANS WORLD AIRLINES, INC.	:	

MOTION OF TRANS WORLD AIRLINES, INC.
FOR APPROVAL OF TRANSACTIONS WITH
HUGHES TOOL COMPANY

TRANS WORLD AIRLINES, INC. (herein referred to as "TWA") respectfully requests the Board to enter an order herein modifying its Order Serial No. 3210, issued October 17, 1944, as amended, approving the acquisition and control of TWA by Hughes Tool Company (herein referred to as "Hughes") so that the terms of said order will not restrict the right of TWA to enter into the transactions with Hughes more fully described below.

These transactions arise out of commitments made by Hughes to third parties in order to assist TWA in connection with the procurement of aircraft, the purchase of spare parts and the raising of funds.

1. In order to provide TWA with the aircraft needed by it to operate transatlantic economy schedules and to meet the demand for charter and cargo services as well as for high density flights on domestic routes,

Hughes has made arrangements by which TWA can lease and purchase a total of nine Lockheed 1049H aircraft on terms favorable to TWA.

Hughes has leased from third parties for the purpose of making them available to TWA, the following five aircrafts.

(a) By an agreement dated July 26, 1957 Hughes leased two Lockheed 1049H Constellation aircraft and related spare parts from Resort Airlines, Inc., (herein referred to as "Resort") for a term ending April 30, 1958, a transaction approved by the Board on August 15, 1957 in Order E-11698. TWA has used these airplanes and spares but has paid no rent for them.

(These aircraft and spares leased from Resort have recently been sold to California-Eastern Aviation, Inc. and are the subject of the contract described in subparagraph (b) below).

(b) By an agreement between Hughes and California-Eastern Aviation, Inc. (herein referred to as "Cal-Eastern"), dated April 2, 1958, filed with the Civil Aeronautics Board in Docket No. 9407, Hughes has agreed to lease from Cal-Eastern two Lockheed 1049H Constellation aircraft and related spare parts beginning May 1, 1958, if approval of the Civil Aeronautics Board has been obtained by that date. The lease is for thirty-six months subject to termination by Cal-Eastern at any time on or after February 1, 1959 on 90 days' notice.

(c) By an agreement between Hughes and Cal-

Eastern dated December 18, 1957, Hughes has also leased from Cal-Eastern three additional Lockheed 1049H Constellation aircraft and related spare parts for thirty-six months. This lease was approved by the Civil Aeronautics Board on January 15, 1958, Order No. E-12111.

The three aircraft and parts were delivered by Cal-Eastern directly to TWA following the commencement of the term of the lease and have been in TWA's sole possession and control since then, but it has paid no rent for them.

2. Hughes proposes to sublet the five aircraft and parts referred to in paragraph 1 hereof to TWA at the same rental price as provided in Hughes' agreements with Resort and Cal-Eastern, subject to the following conditions:

(a) TWA agrees to sublease these five aircraft during at least a portion of each calendar year 1958, 1959 and 1960. TWA also agrees to lease the aircraft during 1961 until the expiration of the leases from Cal-Eastern to Hughes. TWA may terminate the sublease in respect of the year 1958, 1959 or 1960 by giving written notice to Hughes, in which event the termination shall become effective after the expiration of a period following such notice during which the net rental obligations of TWA with respect to such aircraft shall aggregate $1,000,000 in such calendar year (the maximum rental obligations allowable under TWA's existing indentures).

(b) If TWA exercises its right to terminate the sublease in any calendar year, Hughes shall have the right to terminate the sublease as to all future calendar years by giving TWA written notice to that effect 90 days prior to the beginning of the next

Dec. 1182

calendar year. A copy of the form of sublease is attached as Exhibit A.

3. TWA has contracted to purchase from Lockheed four 1049H aircraft which were originally ordered by Hughes from Lockheed. Hughes cancelled its agreement with Lockheed simultaneously with the execution of the purchase agreement between TWA and Lockheed. In connection therewith, TWA and Hughes agreed, subject to the approval of the Civil Aeronautics Board, that if by June 1, 1958 the sublease of the five 1049H aircraft has not been consummated, Hughes would at TWA's request acquire the four 1049H aircraft or TWA would at Hughes' request sell such aircraft to Hughes. On any such transfer of the aircraft, TWA would receive from Hughes an amount equal to TWA's book value at that time and Hughes would assume any remaining liabilities of TWA to Lockheed in respect thereof.

A copy of the above agreement is attached as Exhibit B.

4. In December 1957 Hughes bought $1,155,143 of the spare parts originally ordered by Linee Aeree Italiane in connection with the four Lockheed 1649A aircraft LAI had contracted to purchase from the manufacturer. TWA agreed to buy the remainder of the spare parts, and on December 31, 1957 entered into a contract for the purchase of the four aircraft from Lockheed. TWA now proposes to purchase the $1,155,143 of spare parts for these aircraft from Hughes at Hughes' cost.

5. Hughes has guaranteed obligations of TWA to third parties in the following instances:

(a) Pursuant to loan agreement dated December 27, 1957 TWA has borrowed $12,000,000 from Irving Trust Company and Bank of America repayable in 90 days with a 90-day extension period. Hughes guaranteed the loan without any consideration from TWA.

(b) As mentioned in paragraph 4, TWA has contracted to buy from Lockheed the four 1649A aircraft originally ordered by Linee Aeree Italiane. These aircraft are to be sold under conditional sales agreements which provide that when payments required thereunder cannot be made because of the cash requirements of TWA's indentures, such payments shall be deferred to the end of the contract. Hughes has agreed with Lockheed that if TWA is required to defer any payment, Hughes will itself make the payment at the time it becomes due, and will be reimbursed by Lockheed only when the final deferred payments are collected by Lockheed from TWA. Thus, in a sense, Hughes may receive payments from TWA if TWA finds it necessary to defer any of the instalments under its conditional sales agreements with Lockheed.

(In the event of a default by TWA under the conditional sales contract, Hughes has agreed with Lockheed to buy the airplanes from Lockheed at an amount equal to the unpaid purchase price, but neither Lockheed nor Hughes has any recourse against TWA).

(c) As set forth in paragraph 3 TWA has also contracted to buy from Lockheed four 1049H aircraft. The contractual arrangements are in substance the same as those outlined in (b) above.

6. TWA respectfully requests the Board to modify its Order Serial No. 3210 so as to allow TWA

(a) to pay Hughes for the rent incurred by Hughes (plus payments or minus credits made or received by Hughes on account of differences in airframe or engine overhaul hours) to Resort and Cal-Eastern for the Lockheed 1049H aircraft referred to in paragraph 1, in accordance with the terms of the sublease set forth in Exhibit A; and to enter into a sublease of the five Lockheed 1049H aircraft and related parts in substantially the form set forth in Exhibit A;

(b) to sell to Hughes the four Lockheed 1049H aircraft under the conditions outlined in paragraph 3; and

(c) to buy at Hughes' cost, new spare parts for Lockheed 1649A aircraft in an aggregate amount not to exceed $1,155,143, referred to in paragraph 4.

The commitments made by Hughes to third parties on TWA's behalf, referred to in paragraph 5, would make Hughes a creditor of TWA if TWA defaults on its bank loans or would make Hughes the indirect recipient of equipment purchase payments made by TWA if TWA is required to defer instalments on its conditional sales contracts with Lockheed. In either of these events TWA would pay Hughes directly or indirectly the amount due on obligations contracted by TWA with a third party. While TWA believes that payments of this nature are not restricted by the CAB order approving Hughes' control of TWA, TWA nevertheless respectfully prays that the

Board either (i) clarify the order by excluding from its terms any payments by TWA to Hughes of obligations incurred by TWA to third parties which have been assumed by Hughes as guarantor, or (ii) approve, to the extent such approval is required, payment by TWA to Hughes of the $12,000,000 TWA borrowed from banks under its loan agreement of December 27, 1957, in the event Hughes should be required to pay such loans as guarantor and payment by TWA of instalments on its conditional sales contracts with Lockheed which would indirectly go to Hughes, in the event Hughes has been required to take up instalments deferred by TWA.

7. The aircraft and spare parts involved in the transactions described above are all needed in the performance of TWA's certificated services, and the terms and conditions on which TWA is receiving them from Hughes involve the payment of no consideration to Hughes other than the rent incurred by Hughes in the case of the leased airplanes and reimbursement of Hughes' actual cost of the 1649A spares. The guarantees by Hughes of the TWA bank loan and of TWA's instalment obligations under conditional sales contracts, were of substantial advantage to TWA, were purely for TWA's convenience and entailed no cost whatever to TWA.

WHEREFORE, TRANS WORLD AIRLINES, INC. respectfully prays that the Board enter an order herein modifying its Order Serial No. 3210, as amended, so that its order will permit TWA to enter into the transactions with Hughes Tool Company described above to the extent such modification may be deemed necessary.

Respectfully submitted

Warren Lee Pierson
Chairman of the Board

April 18, 1958

Exhibit A

AIRPLANE SUBLEASE AGREEMENT

1. Hughes Tool Company (hereinafter called "Hughes") hereby agrees to sublet and grant to Trans World Airlines, Inc. (hereinafter called "TWA") and TWA agrees to hire and take, during the term of this agreement, those certain five (5) Lockheed L-1049H Constellation airplanes bearing CAA numbers N 101R, N 102R, N 6931C, N 6932C and N 6933C (Manufacturer's Serial Nos. 4818, 4824, 4813, 4823 and 4826, respectively) and related spare parts, leased to Hughes by California Eastern Aviation, Inc. (hereinafter called "Cal-Eastern") except that the two airplanes bearing [illegible] numbers N 101R and N 102R were leased to Hughes by Resort Airlines, Inc. (hereinafter called "Resort") for a term ending April 30, 1958 and thereafter by Cal-Eastern.

2. Hughes shall remain obligated to Resort and Cal-Eastern for rental payments and other obligations under the leases from Resort and Cal-Eastern to Hughes. TWA will be responsible to Hughes for performance of the obligations of Hughes under the leases of the airplanes and spare parts from Resort and Cal-Eastern to Hughes except for the rental payments, and except for the payments measured by the differences in hours since last overhaul on the engines and airframes.

3. TWA shall pay Hughes for the rent incurred by Hughes to Resort and Cal-Eastern for the airplanes and spare parts referred to in paragraph 1

hereof, except for any period during which the airplanes and spare parts were not available to TWA. The amounts so to be paid by TWA shall be payable monthly in advance on the first day of each month, except that rental for periods prior to the date of approval of the Civil Aeronautics Board, as provided in paragraph 5 below, shall be due and payable on the first of the month next succeeding such approval. The rent for any fraction of a month for which TWA is obligated to make payments herein shall be pro-rated according to the number of calendar days in such month.

4. TWA shall also reimburse Hughes for payments made by Hughes on account of differences in airframe and engine overhaul hours for the periods of TWA's use of the airplanes. In the event that the differences in airframe or engine overhaul hours results in a credit to Hughes for the periods of TWA's use of the airplanes, then Hughes shall pay to TWA an amount equal to that credit.

5. This agreement is subject to approval by the Civil Aeronautics Board. The sublease of airplanes shall become effective upon entry of an order of the Board permitting TWA to perform this agreement and it shall remain in effect as to the respective airplanes for the period of the present leases from Cal-Eastern to Hughes or until terminated as to all or a part of the remaining term of said leases in accordance with the following provisions:

(a) Upon termination of Hughes' lease of any of the airplanes, TWA's sublease shall terminate as to those airplanes and continue as to the remainder. Hughes shall notify TWA of receipt of any notice of termination under Hughes' lease of the airplanes.

(b) TWA may terminate the sublease in respect of the calendar year 1958 by giving written notice to Hughes, in which event the termination shall become effective as to the remainder of the calendar year 1958 only, but not as to calendar years 1959, 1960 or 1961, upon the expiration of a period following the giving of such notice during which the net rental obligations of TWA with respect to such aircraft shall aggregate $1,000,000 in 1958. TWA shall have the same right of termination in respect of each of the years 1959 and 1960.

(c) If TWA exercises its right to terminate the sublease as to any calendar year pursuant to subparagraph (b), Hughes shall have the right to terminate the sublease in respect of all future calendar years by giving TWA written notice to that effect 90 days prior to the beginning of the next calendar year.

HUGHES TOOL COMPANY

By_____
Vice President

AGREED:

TRANS WORLD AIRLINES, INC.

By_____
Vice President

Exhibit B

Trans World Airlines, Inc.
380 Madison Avenue
New York 17, N.Y.

Dear Sirs:

This is to evidence our understanding concerning the four Lockheed 1049H aircraft which Hughes Tool Company had contracted to purchase from Lockheed Aircraft Corporation and which we have today released so the aircraft would be available for acquisition directly by TWA.

These four aircraft, together with five aircraft of the same type leased by Hughes Tool Company from California Eastern Aviation, Inc., and proposed to be sublet by TWA, represent all the aircraft of this type being acquired by TWA. The sublease of the five aircraft is subject to the approval of the Civil Aeronautics Board and in the event such sublease is not approved, the use by TWA of only four airplanes of the 1049H type may not be desirable. Accordingly, it is agreed that in the event such sublease of the five aircraft is not consummated on or before June 1, 1958, then (1) Hughes Tool Company, at TWA's request, will acquire the four 1049H aircraft purchased by TWA from Lockheed or (2) TWA, at Hughes Tool Company's request, will sell such aircraft to Hughes Tool Company. Any such request must be made in writing and delivered to the other party on or before June 10, 1958. On transfer of the aircraft, TWA would receive from Hughes Tool Company an amount equal to TWA's book value at that time, and Hughes will assume any remaining liabilities of TWA to Lockheed in respect thereof.

This agreement is subject to the approval of the Civil Aeronautics Board.

Your signature at the place indicated below shall constitute an acceptance of the terms above set forth.

Yours truly,

HUGHES TOOL COMPANY

By_____

ACCEPTED:

TRANS WORLD AIRLINES, INC.

By_____

AX-2187
DX321 id., Item 9b
(CAB Orders & Documents)

TRANS WORLD AIRLINES, INC.

806 CONNECTICUT AVENUE,
WASHINGTON 6, D. C., U. S. A.

DX321
9b

May 27, 1958

DL 1182

Civil Aeronautics Board
Washington 25, D. C.

Re: Dockets 1182 and 8061

Gentlemen:

On May 10, 1956, Trans World Airlines, Inc. filed a motion in Docket 1182 for approval of certain transactions with Hughes Tool Company; specifically, the purchase by TWA from Hughes Tool of up to 25 jet-powered aircraft. Subsequently the Board instituted an investigation of the proposed transaction in Docket 8061, consolidating therein TWA's motion referred to above.

Pursuant to a request by counsel for Hughes Tool and TWA, all procedural steps in this proceeding were indefinitely postponed on July 31, 1956, and the matter has remained dormant since that date.

We hereby formally withdraw our motion of May 10, 1956, in Docket 1182 and respectfully request that the proceedings thereon and in Docket 8061 be dismissed without prejudice.

Yours very truly,

TRANS WORLD AIRLINES, INC.

by Thomas K. Taylor
Thomas K. Taylor
Vice President

(1)

Order No. E-13334

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 30th day of December, 1958

In the matter of the application of	:	
	:	
HUGHES TOOL COMPANY	:	
	:	Docket No. 1182
for approval under section 408 of	:	
the Civil Aeronautics Act of 1938,	:	
as amended, of the acquisition of	:	
control of Trans World Airlines, Inc.	:	

ORDER

By motion filed with the Board on April 18, 1958, Trans World Airlines, Inc. (TWA) requests modification of Order No. 3210 1/, as amended and modified by subsequent orders, which restricts commercial transactions between TWA and Hughes Tool Company (Hughes) and between TWA and any affiliate or subsidiary of Hughes to "transactions involving complete items of property, the price of which does not exceed $200 each, with the further limitation that the total annual expenditure involved in such commercial transactions by either party shall not exceed $10,000."

The modification is desired to permit the following transactions between the two companies: (1) sublease by TWA of five L-1049H aircraft from Hughes; (2) sale by TWA to Hughes, upon the happening of certain contingencies, of four L-1649H aircraft which TWA has contracted to purchase from Lockheed; (3) purchase by TWA of $1,155,143 worth of spare parts for L-1649A aircraft from Hughes; (4) guarantee by Hughes of certain TWA obligations under a bank loan and under conditional sales contracts.

In support of its motion TWA alleges, inter alia, that the aircraft and spare parts involved in these transactions are needed in the performance of its certificated services; that the terms under which TWA is receiving them involve the payment of no consideration to Hughes other than the rent incurred by Hughes in the case of the leased aircraft and reimbursement of Hughes' actual cost in the case of the L-1649A spare parts; and that the

1/ 6 C.A.B. 153 (1944)

guarantees by Hughes of TWA's obligations were of substantial advantage to the carrier, were purely for TWA's convenience and entailed no cost whatever to TWA. The carrier states further that, while it believes that payments by TWA to Hughes of the amounts due on TWA's obligations to third parties which may be assumed by Hughes as guarantor are not restricted by Order No. 3210, it would like the Board to clarify the order by eliminating any restrictions on such payments or modify the order to the extent necessary to allow the payments to be made in this instance.

The Board has previously approved the control of TWA by Hughes under section 408 of the Act 2/ and the proposed transactions raise no new issues with respect thereto. All of the transactions, including those involving guarantees by Hughes of TWA's obligations to third parties with the resultant possibility that TWA may, directly or indirectly, make payments to Hughes as guarantor of these obligations, are outside of the scope of the permissible class of transactions stated in Order No. 3210. Accordingly, modification of this order so as to permit such transactions is required. The Board finds that the proposed transactions as set forth in the motion, do not violate the original intent of the restriction imposed upon transactions between TWA and Hughes, and further modification as ordered herein of Order No. 3210, as amended and modified, is just and reasonable and is in the public interest. However, such action shall not be deemed to be a determination for rate-making purposes of the reasonableness of the transactions.

ACCORDINGLY, IT IS ORDERED:

1. That any additional control of TWA by Hughes as may result from the transactions presented herein, be and it hereby is approved, provided that such additional control, if any, shall be exercised in accordance with the terms and conditions of Order No. 3210, issued October 17, 1944, as amended, approving the original acquisition of control of TWA by Hughes;

2. That Order No. 3210, issued October 17, 1944, as amended by subsequent orders, be and it hereby is further amended so as to permit the transactions between TWA and Hughes, as set forth in the motion, to take place;

3. That such action shall not be a determination for rate-making purposes of the reasonableness of the transactions;

2/ 6 C.A.B. 153 (1944) and 12 C.A.B. 192 (1950).

4. That the motion, except to the extent granted herein, be and it hereby is denied;

5. That this order may be amended or revoked at any time in the discretion of the Board without hearing.

By the Civil Aeronautics Board:

/s/ Mabel McCart

Mabel McCart
Acting Secretary

(SEAL)

DX322
10a

BEFORE THE

CIVIL AERONAUTICS BOARD

In the Matter of the Application of :

HUGHES TOOL COMPANY :

for approval under Section 408 of the Civil Aeronautics Act of 1938, as amended, of the acquisition of control of : Docket No. 1182

TRANS WORLD AIRLINES, INC.

MOTION OF TRANS WORLD AIRLINES, INC. FOR APPROVAL OF TRANSACTIONS WITH HUGHES TOOL COMPANY

Communications with respect to this document should be sent to:

WARREN LEE PIERSON
Chairman of the Board of Directors
Trans World Airlines, Inc.
1000 - 16th Street, N. W.
Washington 6, D. C.

and

CHADBOURNE, PARKE, WHITESIDE & WOLFF
Attorneys for Trans World Airlines, Inc.
25 Broadway
New York 4, N. Y.

January 29, 1959

BEFORE THE

CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

In the Matter of the Application of	:	
HUGHES TOOL COMPANY	:	
for approval under Section 408 of the Civil Aeronautics Act of 1938, as amended, of the acquisition of control of	:	Docket No. 1182
TRANS WORLD AIRLINES, INC.	:	

MOTION OF TRANS WORLD AIRLINES, INC.
FOR APPROVAL OF TRANSACTIONS WITH
HUGHES TOOL COMPANY

TRANS WORLD AIRLINES, INC. (herein referred to as "TWA") respectfully requests the Board to enter an order herein modifying its Order Serial No. 3210, issued October 17, 1944, as amended, approving the acquisition and control of TWA by Hughes Tool Company (herein referred to as "Hughes") so that the terms of said order will not restrict the right of TWA to enter into the transactions with Hughes more fully described below.

1. Hughes has on order from Boeing Airplane Company, 15 Boeing Model 707-131 jet aircraft at a purchase price of approximately $4,700,000 per aircraft. Although TWA has entered into no specific commitment to acquire such aircraft, it nevertheless contemplates that certain of these aircraft will be made available to it, on terms not yet determined, for use in TWA's certificated operations. The first of these aircraft (herein referred to as the "Leased Aircraft") has been delivered to Hughes by Boeing Airplane Company and TWA desires to make use of such aircraft in its jet training program.

2. Promptly after the filing of this application Hughes proposes to deliver the Leased Aircraft to TWA under a lease agreement, providing for its lease by TWA on a day-to-day basis, subject to the right of either party to terminate the lease on 24 hours written notice and subject to the approval of the Civil Aeronautics Board. A copy of the proposed form of lease is attached as Exhibit A.

3. Hughes has also acquired a stock of spare parts and provisioning for such Boeing Model 707-131 jet aircraft and proposes to make these available to TWA to the extent needed by TWA in the operation of the Leased Aircraft. Hughes will sell to TWA such of these spare parts and provisioning as TWA will request for use on the Leased Aircraft during the term of the lease, at Hughes' cost but not in excess of a total of $100,000. A copy of the proposed form of letter agreement relative to this transaction is attached as Exhibit B.

4. TWA believes that use by it of the Leased Aircraft, and the spare parts therefor as set forth in paragraph 3 hereof, is necessary to enable TWA to carry forward its jet training program so that it will be in a position to conduct certificated service with jet equipment when such equipment is delivered to it.

WHEREFORE, TRANS WORLD AIRLINES, INC. respectfully prays that the Board enter an order herein modifying its Order Serial No. 3210, as amended, so that its order will permit TWA to enter into the transactions with Hughes Tool Company described above.

Respectfully submitted,

Thomas K. Taylor
Vice President

January 29, 1959

Exhibit A

THIS AGREEMENT entered into as of the 27th day of January 1959 by and between Hughes Tool Company, a Delaware corporation ("Lessor") and Trans World Airlines, Inc., a Delaware corporation ("Lessee"):

W I T N E S S E T H :

1.

Lessor hereby agrees to lease to Lessee and Lessee hereby agrees to hire and take from Lessor, subject to the terms and conditions herein provided, one Boeing Model 707-131 aircraft bearing FAA No. N731-TW (Manufacturer's Serial No. 17658), including four Pratt and Whitney JT3C-6 Engines (Serial Nos. SNP 629419B, SNP 629201B, SNP 629202B, and SNP 629203B), herein sometimes referred to as "the Aircraft."

2.

The lease of the Aircraft shall commence on delivery of the Aircraft to Lessee and shall continue from day-to-day until terminated by either of the parties. The lease shall terminate upon twenty-four hours written notice to such effect from one party to the other. The Aircraft shall be delivered to Lessee hereunder at Kansas City, Missouri, on January 29, 1959 or on the delivery of the Aircraft to Lessor by Boeing Airplane Company, whichever is later.

3.

(a) At the time of commencement of this lease the Aircraft shall have a current provisional Certificate of Airworthiness issued under Special Civil Air Regulation No. 425, adopted by the Civil Aeronautics Board on June 20, 1958, permitting crew training, service testing and simulated carrier operations but not permitting carriage of passengers for hire. Lessee agrees to accept the Aircraft in its present

condition and Lessor makes no warranties or representations whatsoever as to condition of the Aircraft, and none shall be implied in law.

Such warranties and guarantees from manufacturers and suppliers of the Aircraft and its equipment as can be effectively assigned for the term of this lease are hereby assigned by Lessor to Lessee for the term of this lease to the extent of Lessee's interest accruing during the term of such lease.

(b) Upon the termination of this lease, Lessee agrees to return the Aircraft to Lessor (at Mid-Continent International Airport, Kansas City, Missouri, or such other place as may be mutually agreed) in the same condition and equipped with the same equipment as it was at the commencement of the lease, except for reasonable wear and tear from ordinary use.

During the term of the lease Lessee may at its own expense remove from the Aircraft such items of equipment, and may install on the Aircraft such additional items of equipment, as Lessee may consider reasonably necessary to fit such Aircraft for use by Lessee; provided, however, that no such removal or installation which shall cause permanent change in the structure of the Aircraft shall be made without the prior written consent of Lessor unless such removal or installation is made pursuant to a mandatory FAA requirement. Such items as shall be so removed may be either retained in the custody of Lessee, or returned to Lessor, but in either event they shall be reinstalled on the Aircraft prior to the return of the Aircraft to Lessor. Items of non-mandatory nature that shall have been installed in the Aircraft shall be removed prior to the return of the Aircraft to Lessor.

3.

5.

Lessee shall perform all necessary maintenance, overhaul and servicing on the Aircraft during the term of the lease in accordance with the requirements of the Federal Aviation Agency.

6.

If, during the term of the lease of Aircraft pursuant to this agreement, the Federal Aviation Agency or any other governmental agency having jurisdiction shall make mandatory the installation, removal or modification (other than mere inspection) of items on the Aircraft, then compliance shall be effected promptly at Lessor's expense.

7.

Lessee shall be liable for any loss of, or damage to, any Aircraft while leased from Lessor hereunder. During all times that the Aircraft is leased hereunder, Lessee shall, at its own cost and expense, keep the Aircraft, insured against loss or damage from crash, fire, wind storm, collision, strike, riots, insurrection, civil commotion or other accident or casualty (except war risk) with Lessor named as a co-insured and shall furnish Lessor with a certificate of insurance therefor. The amount of such insurance shall not be less than $4,700,000 per Aircraft, with flight deductible and ground deductible clauses substantially equivalent to those currently in force in Lessee's other insurance policies. In the event of damage to the Aircraft, during the term of the lease, from a risk required to be covered by such insurance, Lessee will repair the damage at its own expense. Upon complying with the foregoing provision, Lessee shall be entitled to retain (or, in the case of receipt by Lessor, to receive from Lessor) all proceeds of insurance with respect to such damage. In the

4.

repair, Lessee will pay to Lessor, as their interests may appear, for such Aircraft the sum of $4,700,000 (U.S. currency), less any amounts that might have been paid to and retained by Lessor as proceeds from the insurance, which shall constitute payment for all right, title and interest of Lessor in the Aircraft which shall thereupon pass to Lessee. The policies providing the insurance required by this agreement shall include customary provisions that Lessor shall not be responsible for the representations and warranties of Lessee and that Lessor shall receive notice prior to cancellation or expiration (unless the policy is being renewed) of any policy.

8.

Lessee agrees to defend, indemnify and hold harmless Lessor from and against all losses, including cost and expenses by reason of claims for injury or death of persons and loss or damage to property arising out of or in any manner connected with possession, use or operation by Lessee of the Aircraft leased hereunder during the term of such lease. During such term the Lessee shall keep in force and effect liability insurance in the amounts recommended by Lessee's Senior Vice-President-Finance.

9.

Lessee agrees that no Aircraft leased pursuant hereto will be used during the term of the lease in any manner which shall violate any law or regulation of any government or governmental agency having jurisdiction and that any fine, penalty or forfeiture resulting from any such violation shall be the sole responsibility of Lessee.

5.

10.

(a) As rent for the Aircraft leased hereunder Lessee shall pay to Lessor the sum of $2500.00 for each full day during the term of the lease. The rental shall be paid on the last day of each month.

(b) Lessee shall also pay to Lessor in respect of each of the engines on the Aircraft $31.00 per hour for each hour since the last overhaul on such engine at the time returned to Lessor on the termination of the lease less the number of hours since manufacture or overhaul on such engine on the delivery of the Aircraft to Lessee.

If the hours since last overhaul on any engine at the time it is returned to Lessor on termination of the lease are less than the number of hours since manufacture or overhaul on such engine on delivery of the Aircraft to Lessee, Lessor shall pay to Lessee $31.00 for each hour of difference between the two figures.

Settlement under this subparagraph (b) shall be made within 15 days after the end of the term of the lease.

11.

Lessee shall have no right to consent to any lien or liens on the Aircraft. Any liens incurred by Lessee shall be discharged at the cost and expense of Lessee, who shall indemnify and save Lessor harmless against any such lien or liens. Lessee shall pay all operating taxes and licenses applicable to the Aircraft or the operation thereof, and also shall pay all property taxes assessed against Lessee or Lessor with respect to the Aircraft by any state, county, or other political subdivision to which Lessor would not ordinarily pay property taxes, except for the use of the Aircraft by

6.

Lessee hereunder. Lessee also shall pay any and all state, federal, county and local sales and use taxes assessed against either Lessee or Lessor resulting from the lease or use hereunder of the Aircraft.

12.

Notwithstanding any of the above provisions it is further agreed that

(a) This lease agreement is entered into subject to approval of the Civil Aeronautics Board and until an order has been entered by the Civil Aeronautics Board permitting the transaction covered by this agreement no rental shall be paid hereunder;

(b) This lease is subject to the necessary consents of the holders of obligations issued by Trans World Airlines, Inc. under its outstanding indentures, chattel mortgages and loan agreements. In the absence of such consents no rental shall be paid hereunder.

IN WITNESS WHEREOF, each of the parties hereto has caused this agreement to be executed in its name and in its behalf by its officer or agent thereunto duly authorized.

TRANS WORLD AIRLINES, INC.

By _____

HUGHES TOOL COMPANY

By _____

Raymond Cook as Agent.

EXHIBIT B

HUGHES TOOL COMPANY
2200 GULF BUILDING
HOUSTON 2, TEXAS

Trans World Airlines, Inc.
380 Madison Avenue
New York 17, New York

Attention: Mr. A. V. Leslie

Re: Purchase of Spare Parts

Dear Sirs:

This letter will set forth our agreement and understanding concerning the purchase by TWA from Hughes Tool Company of spare parts and provisioning (herein called "Spares") for use in connection with the operation by TWA of the Boeing Model 707-131 Aircraft being leased to TWA from Hughes Tool Company under a lease agreement entered into simultaneously herewith.

From the stock of Spares owned by Hughes Tool Company and stored at Kansas City, Kansas and at other places known to TWA, TWA is hereby authorized to withdraw a supply of Spares and to store such Spares in TWA's custody at such places as it may select. From time to time TWA may purchase any of such spares as TWA may consider to be required in the operation of the aforementioned leased Aircraft, payment to be in cash and at Hughes Tool Company's actual cost. Upon the termination of the aforementioned lease agreement any Spares which are then in the custody of TWA and have not been purchased by it will promptly be returned to Hughes Tool Company at the place or places where originally withdrawn.

In no event shall the aggregate dollar amount of Spares purchased by TWA under this agreement exceed the sum of $100,000.

Appropriate accounting procedures should be established for the accurate and prompt recordation of all transactions involving the withdrawing and purchase of Spares.

This agreement and arrangement are subject to approval of the Civil Aeronautics Board, and until an order has been entered by the Civil Aeronautics Board permitting the transactions covered by this agreement no payments shall be made hereunder.

If the foregoing is acceptable to TWA please so acknowledge by executing and returning the enclosed copy of this letter.

Very truly yours,

Accepted this
day of _____, 1959

Trans World Airlines, Inc.
by

Vice President

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10b

(1)

Order No. E-13542

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 24th day of February, 1959

In the matter of the application of	:	
	:	
HUGHES TOOL COMPANY	:	Docket No. 1182
	:	
for approval of the acquisition of control of Trans World Airlines, Inc.	:	

ORDER

By motion filed with the Board on January 30, 1959, Trans World Airlines, Inc. (TWA) requests modification of Order No. 3210, 1/ as amended and modified by subsequent orders, which restricts commercial transactions between TWA and Hughes Tool Company (Hughes) to those involving items of property the price of which does not exceed $200 and which restricts the total annual expenditure involved in such transactions by either party to a sum not to exceed $10,000. The modification is desired to permit TWA to lease one Boeing 707-131 aircraft from Hughes as well as to acquire from Hughes a supply of spare parts, not to exceed $100,000 in value, which are needed for the operation of this aircraft.

In support of its motion, TWA states that the aircraft and the spare parts therefor are necessary to enable it to carry forward its jet training program so that it will be in a position to conduct certificated jet service as soon as sufficient jet equipment is delivered.

The Board has previously approved the control of TWA by Hughes under section 408 of the Act, 2/ and the proposed transactions raise no new issues with respect thereto. However, the transactions are outside of the scope of the permissible class of transactions stated in Order No. 3210 and modification of that order to permit such transactions is therefore required. The Board finds that the proposed transactions, as set forth in the motion, do not violate the original purpose of the Board in imposing the restrictions contained in Order No. 3210, and further finds that modification as ordered herein is just

1/ 6 C.A.B. 153, 158 (1945)

2/ 6 C.A.B. 153 (1945) and 12 C.A.B. 192 (1950)

and reasonable and in the public interest. However, such action shall not be deemed to be a determination for rate-making purposes of the reasonableness of the transactions.

ACCORDINGLY, IT IS ORDERED:

1. That, subject to the conditions hereinafter set forth, Order No. 3210, issued October 17, 1944, as amended by subsequent orders, be and it hereby is further amended to permit the transactions between TWA and Hughes, as set forth in the motion, to take place;

2. That such action shall not be a determination for rate-making purposes of the reasonableness of the transactions;

3. That this order may be amended or revoked at any time in the discretion of the Board without hearing.

By the Civil Aeronautics Board:

/s/ Mabel McCart

(SEAL)

Mabel McCart
Acting Secretary

original

322
10c

BEFORE THE

CIVIL AERONAUTICS BOARD

In the Matter of the Application of	
HUGHES TOOL COMPANY	
for approval under Section 408 of the Civil Aeronautics Act of 1938, as amended, of the acquisition of control of	Docket No. 1182
TRANS WORLD AIRLINES, INC.	

MOTION OF TRANS WORLD AIRLINES, INC.
FOR APPROVAL OF TRANSACTIONS WITH
HUGHES TOOL COMPANY

Communications with respect to this document should be sent to:

WARREN LEE PIERSON
Chairman of the Board of Directors
Trans World Airlines, Inc.
1000 - 16th Street, N. W.
Washington 6, D. C.

and

CHADBOURNE, PARKE, WHITESIDE & WOLFF
Attorneys for Trans World Airlines, Inc.
25 Broadway
New York 4, N. Y.

March 13, 1959

BEFORE THE

CIVIL AERONAUTICS BOARD

In the Matter of the Application of	:	
HUGHES TOOL COMPANY	:	
for approval under Section 408 of the Civil Aeronautics Act of 1938, as amended, of the acquisition of control of	:	Docket No. 1182
TRANS WORLD AIRLINES, INC.	:	

MOTION OF TRANS WORLD AIRLINES, INC. FOR APPROVAL OF TRANSACTIONS WITH HUGHES TOOL COMPANY

TRANS WORLD AIRLINES, INC. (herein referred to as "TWA") respectfully requests the Board to enter an order herein modifying its Order Serial No. 3210, issued October 17, 1944, as amended, approving the acquisition and control of TWA by Hughes Tool Company (herein referred to as "Hughes") so that the terms of said order will not restrict the right of TWA to enter into the transactions with Hughes more fully described below.

1. Hughes has on order from Boeing Airplane Company, 14 Boeing Model 707-131 jet aircraft at a purchase price of approximately $4,700,000 per aircraft. Although, save as hereinafter set forth, TWA has entered into no specific commitment to acquire such aircraft, it nevertheless contemplates that certain of these aircraft will be made available to it, on terms

not yet determined, for use in TWA's certificated operations. The first Boeing 707-131 jet aircraft has already been delivered to Hughes by Boeing Airplane Company. Hughes has delivered said aircraft to TWA under a day-to-day lease subject to the approval of the Civil Aeronautics Board, all as more fully set forth in TWA's motion dated January 29, 1959 requesting that the Board enter an order herein modifying its Order Serial No. 3210, as amended, so that its order will permit TWA to enter into such transaction. By its Order Serial No. 13542 adopted February 26, 1959 the Board has permitted this transaction between TWA and Hughes.

2. In order to make additional such aircraft available to TWA, Hughes proposes to deliver up to eleven additional Boeing Model 707-131 jet aircraft (herein referred to as the "Leased Aircraft") to TWA under a lease agreement or agreements, providing for the lease of each such aircraft by TWA on a day-to-day basis at a rate not to exceed $2,500 per day, subject to the right of either party to terminate the lease on 24 hours written notice and subject to the approval of the Civil Aeronautics Board. Such leases would in any event terminate no later than June 30, 1959. The proposed lease or leases will be in form substantially similar to the form attached as Exhibit A to TWA's motion herein dated January 29, 1959.

3. Hughes has also acquired a stock of spare parts and provisioning for such Boeing Model 707-131 jet aircraft and proposes to make these available to TWA to the extent needed by TWA in the operation of the Leased Aircraft. Hughes will sell to TWA such of these spare

parts and provisioning as TWA will request for use on the Leased Aircraft during the term of the lease or leases thereof, at Hughes' cost, provided that the total amount of spare parts and provisioning so acquired by TWA for the Leased Aircraft and for the airplane leased pursuant to Board Order No. 13542 shall not be in excess of $3,500,000. A copy of the proposed form of letter agreement relative to this transaction is attached as Exhibit A.

4. Hughes will also deliver to TWA up to 30 spare aircraft engines for the Leased Aircraft under a lease agreement or agreements to be negotiated on terms comparable to those applicable to the Leased Aircraft. A copy of such lease agreement, when negotiated, will be filed with the Board as a supplement to this motion.

5. Use by TWA of the Leased Aircraft, and the spare engines, spare parts and provisioning therefor referred to in paragraphs 3 and 4 hereof, is necessary to enable TWA to carry forward its jet training program and to permit TWA to commence the operation of jet service on its certificated routes.

WHEREFORE, TRANS WORLD AIRLINES, INC. respectfully prays that the Board enter an order herein modifying its Order Serial No. 3210, as amended, so that its order will permit TWA to enter into the transactions with Hughes Tool Company described above.

Respectfully submitted,

A. V. Leslie

A. V. Leslie
Senior Vice President-Finance
and Treasurer

March 13, 1959

AX-2208

DX322 id., Item 10d(1), page 1
(CAB Orders & Documents)

CHADBOURNE, PARKE, WHITESIDE & WOLFF
25 BROADWAY, NEW YORK 4, N.Y.
Digby 4-8000

WILLIAM H. PARKE
GEORGE W. WHITESIDE
HENRY J. WOLFF
ALEXANDER B. ROYCE
LEE B. MORLEY
HORACE B. HITCHCOCK
STANHARD DUNN
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CARL S. ROWE
DEE W. STONE
CYRIL F. METZAD
HARRY L. WEST
RICHARD H. HOBBINS
JOHN F. COSTELLOE
FRANK P. STONE
WILLIAM DUVERNOY
JOHN DONCHIAN

WASHINGTON, D. C. OFFICE
SHOREHAM BUILDING
REPUBLIC 7-8010

WARREN E. BAKER
WASHINGTON PARTNER

RECEIVED
Mar 23 8 00 AM '59
BUR. OF AIR OPERATIONS

March 19, 1959

1182

CIVIL AERONAUTICS BOARD
RECEIVED
MAR 23 1959
CARRIER RELATIONS DIV.

Mr. J. W. Rosenthal
Bureau of Air Operations
Civil Aeronautics Board
Washington 25, D. C.

Dear Mr. Rosenthal:

Enclosed for your information is a copy of an Agreement of Lease entered into on March 17, 1959 by Hughes Tool Company and TWA, covering the lease by TWA from Hughes Tool Company on a day-to-day basis of Boeing Model 707-131 aircraft, FAA No. N732TW. This covers the second Boeing 707-131 leased by Hughes to TWA and the first such aircraft covered by TWA's Motion of March 13, 1959 in Docket No. 1182. As indicated in the Motion, this lease was entered into subject to the approval of the Civil Aeronautics Board.

Except for changes in the plane and engine numbers, the addition of a clause at the end of the second sentence of paragraph 2 and the addition of a sentence at the end of paragraph 11, the enclosed lease is in the same form as the lease executed in connection with TWA's Motion of January 29, 1959, in Docket No. 1182, which was approved by the Board's Order Serial No. 13542 of February 26, 1959.

Very truly yours,

Carl S. Rowe

Enclosure

THIS AGREEMENT entered into as of the 17th day of March 1959 by and between Hughes Tool Company, a Delaware corporation ("Lessor") and Trans World Airlines, Inc., a Delaware corporation ("Lessee"):

W I T N E S S E T H :

1.

Lessor hereby agrees to lease to Lessee and Lessee hereby agrees to hire and take from Lessor, subject to the terms and conditions herein provided, one Boeing Model 707-131 aircraft bearing FAA No. N732TW (Manufacturer's serial No. 17659), including four Pratt and Whitney JT3C-6 Engines (Serial Nos. SNP629074B , SNP628855B , SNP628852B , and SNP628844B), herein sometimes referred to as "the Aircraft."

2.

The lease of the Aircraft shall commence on delivery of the Aircraft to Lessee and shall continue from day-to-day until terminated by either of the parties. The lease shall terminate upon twenty-four hour written notice to such effect from one party to the other and shall in any event terminate no later than June 30, 1959. The Aircraft shall be delivered to Lessee hereunder at Kansas City, Missouri, or such other place as may be mutually agreed.

3.

(a) Lessee agrees to accept the Aircraft in its present condition and Lessor makes no warranties or representations whatsoever as to condition of the Aircraft, and none shall be implied in law.

Such warranties and guarantees from manufacturers and suppliers of the Aircraft and its equipment as can be effectively assigned for the term of this lease are hereby assigned by Lessor to Lessee for the term of this lease to the extent of Lessee's interest accruing during the term of such lease.

(b) Upon the termination of this lease, Lessee agrees to return the Aircraft to Lessor (at Mid-Continent International Airport, Kansas City, Missouri, or such other place as may be mutually agreed) in the same condition and equipped with the same equipment as it was at the commencement of the lease, except for reasonable wear and tear from ordinary use.

4.

During the term of the lease Lessee may at its own expense remove from the Aircraft such items of equipment, and may install on the Aircraft such additional items of equipment, as Lessee may consider reasonably necessary to fit such Aircraft for use by Lessee; provided, however, that no such removal or installation which shall cause permanent change in the structure of the Aircraft shall be made without the prior written consent of Lessor unless such removal or installation is made pursuant to a mandatory FAA requirement. Such items as shall be so removed may be either retained in the custody of Lessee, or returned to Lessor, but in either event they shall be reinstalled on the Aircraft prior to the return of the Aircraft to Lessor. Items of non-mandatory nature that shall have been installed in the Aircraft shall be removed prior to the return of the Aircraft to Lessor.

5.

Lessee shall perform all necessary maintenance, overhaul and servicing on the Aircraft during the term of the lease in accordance with the requirements of the Federal Aviation Agency.

6.

If, during the term of the lease of Aircraft pursuant to this agreement, the Federal Aviation Agency or any other governmental agency having jurisdiction shall make mandatory the installation, removal or modification (other than mere inspection) of items on the Aircraft, then compliance shall be effected promptly at Lessor's expense.

7.

Lessee shall be liable for any loss of, or damage to, any Aircraft while leased from Lessor hereunder. During all times that the Aircraft is leased hereunder, Lessee shall, at its own cost and expense, keep the Aircraft, insured against loss or damage from crash, fire, wind storm, collision, strike, riots, insurrection, civil commotion or other accident or casualty (except war risk and engine ingestion) with Lessor named as a co-insured and shall furnish Lessor with a certificate of insurance therefor. The amount of such insurance shall not be less than $4,700,000 per Aircraft, with flight deductible and ground deductible clauses substantially equivalent to those currently in force in Lessee's other insurance policies. In the event of damage to the Aircraft, during the term of the lease, from a risk required to be covered

by such insurance, Lessee will repair the damage at its own expense. Upon complying with the foregoing provision, Lessee shall be entitled to retain (or, in the case of receipt by Lessor, to receive from Lessor) all proceeds of insurance with respect to such damage. In the event the Aircraft is lost, destroyed or damaged beyond repair, Lessee will pay to Lessor, as their interests may appear, for such Aircraft the sum of $4,700,000 (U.S. currency), less any amounts that might have been paid to and retained by Lessor as proceeds from the insurance, which shall constitute payment for all right, title and interest of Lessor in the Aircraft which shall thereupon pass to Lessee. The policies providing the insurance required by this agreement shall include customary provisions that Lessor shall not be responsible for the representations and warranties of Lessee and that Lessor shall receive notice prior to cancellation or expiration (unless the policy is being renewed) of any policy.

8.

Lessee agrees to defend, indemnify and hold harmless Lessor from and against all losses, including cost and expenses by reason of claims for injury or death of persons and loss or damage to property arising out of or in any manner connected with possession, use or operation by Lessee of the Aircraft leased hereunder during the term of such lease. During such term the Lessee shall keep in force and effect liability insurance in the amounts recommended by Lessee's Senior Vice-President-Finance.

9.

Lessee agrees that no Aircraft leased pursuant hereto will be used during the term of the lease in any manner which shall violate any law or regulation of any government or governmental agency having jurisdiction and that any fine, penalty or forfeiture resulting from any such violation shall be the sole responsibility of Lessee.

10.

(a) As rent for the Aircraft leased hereunder Lessee shall pay to Lessor the sum of $ 2,500.00 for each full day during the term of the lease. The rental shall be paid on the last day of each month.

(b) Lessee shall also pay to Lessor in respect of each of the engines on the Aircraft $31.00 per hour for each hour since the last overhaul on such engine at the time returned to Lessor on the termination of the lease less the number of hours since manufacture or overhaul on such engine on the delivery of the Aircraft to Lessee.

If the hours since last overhaul on any engine at the time it is returned to Lessor on termination of the lease are less than the number of hours since manufacture or overhaul on such engine on delivery of the Aircraft to Lessee, Lessor shall pay to Lessee $31.00 for each hour of difference between the two figures.

Settlement under this subparagraph (b) shall be made within 15 days after the end of the term of the lease.

11.

Lessee shall have no right to consent to any

lien or liens on the Aircraft. Any liens incurred by Lessee shall be discharged at the cost and expense of Lessee, who shall indemnify and save Lessor harmless against any such lien or liens. Lessee shall pay all operating taxes and licenses applicable to the Aircraft or the operation thereof, and also shall pay all property taxes assessed against Lessee or Lessor with respect to the Aircraft by any state, county, or other political subdivision to which Lessor would not ordinarily pay property taxes, except for the use of the Aircraft by Lessee hereunder. Lessee also shall pay any and all state federal, county and local sales and use taxes assessed against either Lessee or Lessor resulting from the lease or use hereunder of the Aircraft.

The title of Lessor (whether as trustee or otherwise), to the Aircraft and any right of Lessor (whether as trustee or otherwise) to take possession of the Aircraft in compliance with the provisions of this lease shall not be affected by the provisions of Chapter X of the Federal Bankruptcy Act as amended from time to time.

12.

Notwithstanding any of the above provisions it is further agreed that

(a) This lease agreement is entered into subject to approval of the Civil Aeronautics Board and until an order has been entered by the Civil Aeronautics Board permitting the transaction covered by this agreement no rental shall be paid hereunder;

(b) This lease is subject to the necessary consents of the holders of obligations issued by Trans World Airlines, Inc. under its outstanding

indentures, chattel mortgages and loan agreements. In the absence of such consents no rental shall be paid hereunder.

IN WITNESS WHEREOF, each of the parties hereto has caused this agreement to be executed in its name and in its behalf by its officer or agent thereunto duly authorized.

TRANS WORLD AIRLINES, INC.

By /s/ A. V. Leslie
Senior Vice President-Finance

HUGHES TOOL COMPANY

By /s/ Raymond M. Holliday
Vice President

AX-2216

DX322 id., Item 10(d)(2)
(CAB Orders & Documents)

CHADBOURNE, PARKE, WHITESIDE & WOLFF
25 BROADWAY, NEW YORK 4, N.Y.
DIGBY 4-8000

WASHINGTON, D.C. OFFICE
SHOREHAM BUILDING
REPUBLIC 7-8050

March 30, 1959

CIVIL AERONAUTICS BOARD
RECEIVED
APR 2 1959
CARRIER REGULATIONS

Mr. J. W. Rosenthal
Bureau of Air Operations
Civil Aeronautics Board
Washington 25, D. C.

Dear Mr. Rosenthal:

Enclosed for your information is a copy of an Agreement of Lease entered into on March 30, 1959 by Hughes Tool Company and TWA, covering the lease by TWA from Hughes Tool Company on a day-to-day basis of Boeing Model 707-131 aircraft, FAA No. N733TW.

This lease covers the third Boeing 707-131 leased by Hughes to TWA and the second such aircraft covered by TWA's Motion of March 13, 1959 in Docket No. 1182. As indicated in the Motion this lease was entered into subject to the approval of the Civil Aeronautics Board.

The enclosed lease is in form identical to the lease covering aircraft FAA No. N732TW, a copy of which was forwarded to you by Mr. Rowe on March 19, 1959.

Very truly yours,

Harold L. Warner Jr.

Enclosure

RECEIVED
APR 2 8 39 AM '59
OFFICE OF DIRECTOR
BUR. OF AIR OPERATIONS

AX-2217

DX322 id., Item 10(d)(3)
(CAB Orders & Documents)

CHADBOURNE, PARKE, WHITESIDE & WOLFF
25 BROADWAY, NEW YORK 4, N.Y.
DIGBY 4-8900

WASHINGTON, D.C. OFFICE
SHOREHAM BUILDING
REPUBLIC 7-6060

WARREN E. BAKER
WASHINGTON PARTNER

April 22, 1959

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APR 23 1 59 PM 59
CIVIL AERONAUTICS BOARD
OFFICE OF DIRECTOR
BUREAU OF AIR OPERATIONS
RECEIVED
APR 23 1959
FAIRCHILD PUBLICATIONS LIT.

Mr. J. W. Rosenthal
Bureau of Air Operations
Civil Aeronautics Board
Washington 25, D. C.

Dear Mr. Rosenthal:

Enclosed for your information is a copy of an Agreement of Lease entered into on April 18, 1959 by Hughes Tool Company and TWA covering the lease by TWA from Hughes Tool Company on a day-to-day basis of Boeing Model 707-131 aircraft, FAA No. N735TW.

This lease covers the fifth Boeing 707-131 leased by Hughes to TWA and the fourth such aircraft covered by TWA's Motion of March 13, 1959 in Docket No. 1182. As indicated in the Motion this lease was entered into subject to the approval of the Civil Aeronautics Board. The lease of this aircraft commenced on April 18, 1959, when the aircraft was delivered to TWA.

The enclosed lease is in form identical to the lease covering aircraft FAA No. N732TW, a copy of which was forwarded to you on March 19, 1959.

Very truly yours,

Carl S. Rowe

Enclosure

DX322 id., Item 10(d)(4)
(CAB Orders & Documents)

CHADBOURNE, PARKE, WHITESIDE & WOLFF
25 BROADWAY, NEW YORK 4, N.Y.
DIGBY 4-8000

WILLIAM M. PARKE
GEORGE W. WHITESIDE
HENRY J. WOLFF
ALEXANDER B. ROYCE
LEE S. HOREY
HORACE G. HITCHCOCK
STANNARD DUNN
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CHARLES PICKETT
CARL S. ROWE
DYE W. STONE
CYRIL F. METZAD
HARRY L. WEST
RICHARD H. HOBBINS
JOHN F. CASTELLOE
FRANK B. STONE
NORMAN SOMERVILLE
DAVID SOMERVILLE

WASHINGTON, D.C. OFFICE
SHERMAN BALDWIN
REPUBLIC 7-5880

WARREN E. BAKER
WASHINGTON OFFICE

CIVIL AERONAUTICS BOARD
RECEIVED
MAY 6 1959
CARRIER RELATIONS DIV.

May 4, 1959

Mr. J. W. Rosenthal
Bureau of Air Operations
Civil Aeronautics Board
Washington 25, D. C.

Dear Mr. Rosenthal:

Enclosed for your information is a copy of an Agreement of Lease entered into on April 29, 1959 by Hughes Tool Company and TWA covering the lease by TWA from Hughes Tool Company on a day-to-day basis of Boeing Model 707-131 aircraft, FAA No. N736TW.

This lease covers the sixth Boeing 707-131 leased by Hughes to TWA and the fifth such aircraft covered by TWA's Motion of March 13, 1959 in Docket No. 1182. As indicated in the Motion this lease was entered into subject to the approval of the Civil Aeronautics Board. The lease of this aircraft commenced on April 29, 1959, when the aircraft was delivered to TWA.

The enclosed lease is in form identical to the lease covering aircraft FAA No. N732TW, a copy of which was forwarded to you on March 19, 1959.

Very truly yours,

Carl S. Rowe

Enclosure

RECEIVED
MAY 5 11 41 AM '59
OFFICE OF DIRECTOR
BUR. OF AIR OPERATIONS

AX-2219

DX322 id., Item 10(d)(5)
(CAB Orders & Documents)

DOCKET SECTION
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MAY 20 9 54 AM '59
CIVIL AERONAUTICS BOARD

CHADBOURNE, PARKE, WHITESIDE & WOLFF
30 BROADWAY, NEW YORK 4, N.Y.
DIGBY 4-8900

WASHINGTON, D.C. OFFICE
SHOREHAM BUILDING
REPUBLIC 7-8090

(1)

May 18, 1959

Civil Aeronautics Board
Washington 25, D. C.

Re: Motion dated March 13, 1959 of Trans World Airlines, Inc. for approval of Transactions with Hughes Tool Company, Docket No. 1182

Gentlemen:

Pursuant to Order Serial No. E 13873 issued May 15, 1959, enclosed for filing on behalf of TWA in the above matter are a copy of agreement of lease entered into as of May 10, 1959 and copy of agreement of lease entered into as of May 13, 1959 by Hughes Tool Company and TWA covering the lease by TWA from Hughes Tool Company on a day-to-day basis of Boeing Model 707-131 aircraft, FAA No. N737TW and N738TW respectively.

These leases cover the seventh and eighth Boeing 707-131 leased by Hughes to TWA and the sixth and seventh such aircraft covered by TWA's Motion of March 13, 1959 in the above docket. As indicated in the Motion these leases were entered into subject to the approval of the Civil Aeronautics Board. The lease of aircraft FAA No. N737TW commenced on May 10, 1959 and the lease of aircraft FAA No. N738TW commenced on May 13, 1959, the respective dates the aircraft were delivered to TWA.

The enclosed leases are in form identical to the five preceding leases filed by TWA in connection with its Motion of March 13, 1959 in the above matter.

Very truly yours,

AX-2220

DX322 id., Item 10(d)(6)
(CAB Orders & Documents)

(1)

(1 Docket 1182) (2)-B-110

CHADBOURNE, PARKE, WHITESIDE & WOLFF
25 BROADWAY, NEW YORK 4, N.Y.
DIGBY 4-8000

MAY 27 12 12 PM '59

WASHINGTON, D.C. OFFICE
SHOREHAM BUILDING
REPUBLIC 7-8080

May 26, 1959

Civil Aeronautics Board
Washington 25, D. C.

Re: Motion dated March 13, 1959 of Trans World Airlines, Inc. for approval of Transactions with Hughes Tool Company, Docket No. 1182

Gentlemen:

Pursuant to Order Serial No. E 13873 issued May 15, 1959, enclosed for filing on behalf of TWA in the above matter is a copy of agreement of lease entered into as of May 24, 1959 by Hughes Tool Company and TWA covering the lease by TWA from Hughes Tool Company on a day-to-day basis of Boeing Model 707-131 aircraft, FAA No. N740TW.

This lease covers the ninth Boeing 707-131 leased by Hughes to TWA and the eighth such aircraft covered by TWA's Motion of March 13, 1959 in the above docket. The lease commenced on May 24, 1959, the date the aircraft was delivered to TWA.

The enclosed lease is in form identical to the preceding leases filed by TWA in connection with its Motion of March 13, 1959 in the above matter.

Very truly yours,

Harold L. Warnick

Enclosures

AX-2221

DX322 id., Item 10(d)(7)
(CAB Orders & Documents)

(1)

CHADBOURNE, PARKE, WHITESIDE & WOLFF
25 BROADWAY, NEW YORK 4, N.Y.
DIGBY 4-8900

~~(1) A-75~~
(2) A-110

JUN 4 11 26 AM '59

WASHINGTON, D.C. OFFICE
SHOREHAM BUILDING
REPUBLIC 7-8080

June 3, 1959

Civil Aeronautics Board
Washington 25, D. C.

Re: Motion dated March 13, 1959 of Trans World Airlines, Inc. for approval of Transactions with Hughes Tool Company, Docket No. 1182

Gentlemen:

Pursuant to Order Serial No. E 13873 issued May 15, 1959, enclosed for filing on behalf of TWA in the above matter is a copy of agreement of lease entered into as of May 28, 1959 by Hughes Tool Company and TWA covering the lease by TWA from Hughes Tool Company on a day-to-day basis of Boeing Model 707-131 aircraft, FAA No. N739TW.

This lease covers the tenth Boeing 707-131 leased by Hughes to TWA and the ninth such aircraft covered by TWA's Motion of March 13, 1959 in the above docket. The lease commenced on May 28, 1959, the date the aircraft was delivered to TWA.

The enclosed lease is in form identical to the preceding leases filed by TWA in connection with its Motion of March 13, 1959 in the above matter.

Very truly yours,

Harold L. Warner Jr.

Enclosures

AX-2222

DX322 id., Item 10(d)(8)
(CAB Orders & Documents)

orig. only

CHADBOURNE, PARKE, WHITESIDE & WOLFF
25 BROADWAY, NEW YORK 4, N.Y.
Direct 4-8000

JUN 19 1 5 PM '59

WASHINGTON, D.C. OFFICE
SHOREHAM BUILDING
REPUBLIC 7-8050

(1)

1182

June 18, 1959

Civil Aeronautics Board
Washington 25, D. C.

Re: Motion dated March 13, 1959 of Trans World Airlines, Inc. for approval of Transactions with Hughes Tool Company, Docket No. 1182

Gentlemen:

Pursuant to Order Serial No. E 13873 issued May 15, 1959, enclosed for filing on behalf of TWA in the above matter is a copy of agreement of lease entered into as of June 13, 1959 by Hughes Tool Company and TWA covering the lease by TWA from Hughes Tool Company on a day-to-day basis of Boeing Model 707-131 aircraft, FAA No. N741TW.

This lease covers the eleventh Boeing 707-131 leased by Hughes to TWA and the tenth such aircraft covered by TWA's Motion of March 13, 1959 in the above docket. The lease commenced on June 13, 1959, the date the aircraft was delivered to TWA.

The enclosed lease is in form identical to the preceding leases filed by TWA in connection with its Motion of March 13, 1959 in the above matter.

Very truly yours,

Harold L. Warner Jr.

Enclosure

AX-2223

DX322 id., Item 10(d)(9)
(CAB Orders & Documents)

CHADBOURNE, PARKE, WHITESIDE & WOLFF
30 BROADWAY, NEW YORK 4, N.Y.
DIGBY 4-8000

WASHINGTON, D.C. OFFICE
SHOREHAM BUILDING
REPUBLIC 7-8030

July 6, 1959

Civil Aeronautics Board
Washington 25, D. C.

Re: Motions dated March 13 and June 26, 1959 of Trans World Airlines, Inc. for approval of Transactions with Hughes Tool Company, Docket No. 1182

Gentlemen:

Pursuant to Order Serial No. E 13873 issued May 15, 1959 and Order Serial No. E 14169 issued July 1, 1959, enclosed for filing on behalf of TWA in the above matter is a copy of agreement of lease entered into as of July 1, 1959 by Hughes Tool Company and TWA covering the lease by TWA from Hughes Tool Company on a day-to-day basis of Boeing Model 707-131 aircraft, FAA No. N742TW.

This lease covers the twelfth Boeing 707-131 leased by Hughes to TWA and the eleventh such aircraft covered by TWA's Motion of March 13, 1959 in the above docket. The lease commenced on July 1, 1959, the date the aircraft was delivered to TWA.

The enclosed lease is in form identical to the preceding leases filed by TWA in connection with its Motion of March 13, 1959 in the above matter.

Very truly yours,

Harold L. Warner Jr.

Enclosure

AX-2224

DX322 id., Item 10(d)(10)
(CAB Orders & Documents)

(1)

CHADBOURNE, PARKE, WHITESIDE & WOLFF

30 BROADWAY, NEW YORK 4, N.Y.

DIGBY 4-8000

WASHINGTON, D.C. OFFICE
SHOREHAM BUILDING
REPUBLIC 7-4030

CIVIL AERONAUTICS BOARD
RECEIVED

JUL 21 1959

CASHIER RELATIONS DIV.

July 17, 1959

Civil Aeronautics Board
Washington 25, D. C.

Re: Motions dated March 13 and June 26, 1959 of Trans World Airlines, Inc. for approval of Transactions with Hughes Tool Company, Docket No. 1182

Gentlemen:

Pursuant to Order Serial No. E 13873 issued May 15, 1959 and Order Serial No. E 14169 issued July 1, 1959, enclosed for filing on behalf of TWA in the above matter is a copy of agreement of lease entered into as of July 10, 1959 by Hughes Tool Company and TWA covering the lease by TWA from Hughes Tool Company on a day-to-day basis of Boeing Model 707-131 aircraft, FAA No. N743TW.

This lease covers the thirteenth Boeing 707-131 leased by Hughes to TWA and the first such aircraft covered by TWA's Motion of June 26, 1959 in the above docket. The lease commenced on July 10, 1959, the date the aircraft was delivered to TWA.

The enclosed lease is in form identical to the preceding leases filed by TWA in connection with its Motion of March 13, 1959 in the above matter.

Very truly yours,

Harold L. Warner Jr.

Enclosure

AX-2225

DX322 id., Item 10(d)(11)
(CAB Orders & Documents)

CHADBOURNE, PARKE, WHITESIDE & WOLFF
25 BROADWAY, NEW YORK 4, N.Y.
DIGBY 4-8800

WASHINGTON, D.C. OFFICE
SHOREHAM BUILDING
REPUBLIC 7-8050

WARREN E. BAKER
WASHINGTON PARTNER

August 7, 1959

Civil Aeronautics Board
Washington 25,
D. C.

Re: Motions dated March 13 and June 26, 1959 of Trans World Airlines, Inc. for approval of Transactions with Hughes Tool Company, Docket No. 1182

Gentlemen:

Pursuant to Order Serial No. E 13873 issued May 15, 1959 and Order Serial No. E 14169 issued July 1, 1959, enclosed for filing on behalf of TWA in the above matter is a copy of agreement of lease entered into as of August 1, 1959 by Hughes Tool Company on a day-to-day basis of Boeing Model 707-131 aircraft, FAA No. N745TW.

This lease covers the 15th Boeing 707-131 leased by Hughes to TWA and the third such aircraft covered by TWA's motion of June 26, 1959 in the above Docket. The lease commenced on August 1, 1959, the date the aircraft was delivered to TWA.

The enclosed lease is in form identical to the preceding leases filed by TWA in connection with its Motion of March 13, 1959 in the above matter.

Very truly yours,

CIVIL AERONAUTICS BOARD
RECEIVED
AUG 10 1959
CARRIER RELATIONS DIV.

Enclosure

321
10

(1)

Order No. E-13873

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 15th day of May, 1959

In the matter of the application of	:	
HUGHES TOOL COMPANY	:	Docket No. 1182
for approval of the acquisition of control of Trans World Airlines, Inc.	:	

ORDER

By notice filed with the Board on March 16, 1959, Trans World Airlines, Inc. (TWA) requests modification of Order No. 3210 1/, as amended and modified by subsequent orders, which restricts commercial transactions between TWA and Hughes Tool Company (Hughes) to those involving items of property the price of which does not exceed $200 and which restricts the total annual expenditure involved in such transactions by either party to a sum not to exceed $10,000. The modification is desired to permit TWA to lease on an individual basis up to eleven Boeing 707-131 aircraft from Hughes as they become available, as well as to acquire from Hughes at Hughes' actual cost a supply of spare parts, not to exceed $3,500,000 in value, which are needed for the operation of these aircraft. In addition, modification is requested to permit the lease by Hughes of up to thirty spare jet engines to TWA. The rental charges and other terms of the spare engine leases have not as yet been negotiated.

In support of its notion, TWA states that the aircraft and the spare parts and engines therefor are necessary to enable it to carry forward its jet training program and to commence jet service on its certificated routes. The Board recently authorized a similar transaction between TWA and Hughes involving a single Boeing 707-131 aircraft. 2/ The additional aircraft involved in the present transaction will be leased under substantially the same terms as those approved in the prior transaction.

The Board has previously approved the control of TWA by Hughes under section 408 of the Act. 3/ However, the transactions are outside the scope of the permissible class of transactions stated in Order No. 3210 and modification of that order to permit such transactions is therefore required. Upon review of the application and all subsequent filings the Board finds that the proposed aircraft lease transactions, and the agreement for the purchase of spare parts

1/ 6 C.A.B. 153, 158 (1946).
2/ Order No. E-13542, February 26, 1959
3/ 6 C.A.B. 153 (1944) and 12 C.A.B. 192 (1950).

do not violate the original purpose of the Board in imposing the restrictions contained in Order No. 3210 and further finds that modification as ordered herein is just and reasonable and in the public interest. However, inasmuch as the terms of the spare engine leases have not been filed, the Board cannot at this time determine whether modification of Order No. 3210 is justified with regard to the spare engine lease transactions. Therefore, the Board will defer action on TWA's motion insofar as it requests authorization for the lease of thirty spare jet engines to TWA.

Under the agreement, a separate lease will be executed for each aircraft. However, since only four of these leases have been filed, the Board will condition its approval of the instant aircraft lease transactions upon the filing, within ten days of the execution thereof, of each aircraft lease. The Board's action herein shall not be deemed a determination for rate-making purposes of the reasonableness of the transactions.

ACCORDINGLY, IT IS ORDERED:

1. That, subject to the conditions hereinafter set forth, Order No. 3210, issued October 17, 1944, as amended by subsequent orders, be and it hereby is further amended to permit the aircraft lease transactions between TWA and Hughes, and the agreement for the acquisition of up to $3,500,000 worth of spare parts as set forth in the motion to take place;

2. That TWA shall file within ten days of the execution thereof a copy of each aircraft lease;

3. That action on TWA's motion insofar as it requests authorization for the lease of thirty spare jet engines by Hughes to TWA be and it hereby is deferred;

4. That such action shall not be a determination for rate-making purposes of the reasonableness of the transactions;

5. That this order may be amended or revoked at any time in the discretion of the Board without hearings;

6. That the motion, except to the extent granted or deferred herein, be and it hereby is denied.

By the Civil Aeronautics Board:

/s/ Mabel McCart

Mabel McCart
Acting Secretary

(SEAL)

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BEFORE THE

CIVIL AERONAUTICS BOARD

In the matter of the application of	
HUGHES TOOL COMPANY	
for approval of the acquisition of control of Trans World Airlines, Inc.	Docket No. 1182

MOTION OF TRANS WORLD AIRLINES, INC.
FOR APPROVAL OF TRANSACTIONS WITH
HUGHES TOOL COMPANY

Communications with respect to this document should be sent to:

WARREN LEE PIERSON
Chairman of the Board of Directors
Trans World Airlines, Inc.
1000 - 16th Street, N. W.
Washington 6, D. C.

and

CHADBOURNE, PARKE, WHITESIDE & WOLFF
Attorneys for Trans World Airlines, Inc.
25 Broadway
New York 4, N. Y.

June 26, 1959

BEFORE THE

CIVIL AERONAUTICS BOARD

In the matter of the application of	:	
HUGHES TOOL COMPANY	:	Docket No. 1182
for approval of the acquisition of control of Trans World Airlines, Inc.	:	

MOTION OF TRANS WORLD AIRLINES, INC. FOR APPROVAL OF TRANSACTIONS WITH HUGHES TOOL COMPANY

TRANS WORLD AIRLINES, INC. (herein referred to as "TWA") respectfully requests the Board to enter an order herein modifying its Order Serial No. 3210, issued October 17, 1944, as amended, approving the acquisition of control of TWA by Hughes Tool Company (herein referred to as "Hughes") so that the terms of said order will not restrict the right of TWA to enter into the transactions with Hughes more fully described below.

1. By motion filed with the Board on January 30, 1959 TWA requested a modification of Order No. 3210 issued October 17, 1944, as amended, so as to permit TWA to lease one Boeing 707-131 jet aircraft from Hughes as well as to acquire from Hughes a supply of spare parts, not to exceed $100,000 in value, which were needed for the operation of said aircraft.

On February 26, 1959 the Board by its Order No. 13542 amended Order No. 3210 so as to permit the transactions between TWA and Hughes, as set forth in said motion, to take place.

2. Thereafter, as set forth in TWA's motion filed with the Board on March 16, 1959, subject to the approval of the Board Hughes proposed to lease to TWA up to eleven additional Boeing Model 707-131 jet aircraft (herein referred to as the "Leased Aircraft") on a day-to-day basis at a rate of $2,500 per day, subject to the right of either party to terminate the lease agreement on twenty-four hour written notice, such leases in any event to terminate no later than June 30, 1959. As a part of this transaction Hughes also agreed to sell to TWA at Hughes' actual cost certain spare parts and provisioning, not to exceed $3,500,000 in value, needed for the operation of the Leased Aircraft.

On May 15, 1959 the Board by its Order No. 13873 amended Order No. 3210, issued October 17, 1944, as amended by subsequent orders, so as to permit the aforesaid aircraft lease transactions between TWA and Hughes and the agreement for the acquisition of up to $3,500,000 worth of spare parts to take place.

3. TWA and Hughes had anticipated that definitive financing arrangements permitting TWA to operate the Leased Aircraft on a permanent basis would be finalized on or about June 30, 1959. However, arrangements for such financing have not as yet been completed and accordingly the parties desire to extend the date of latest termination provided for in the leases of the Leased Aircraft (including the proposed lease of the aircraft not yet delivered to TWA referred to in paragraph 4) from June 30, 1959 to September 30, 1959. A proposed form of amendment so extending said leases already executed is attached hereto as Exhibit A.

4. Aircraft FAA No. N731TW, covered by Board Order No. 13542, was leased to TWA under date of January 29, 1959. Ten of the eleven Leased Aircraft covered by the Board's Order No. 13873 have been delivered to TWA and the one remaining Leased Aircraft is scheduled for delivery in the near future.

Hughes has remaining on order from Boeing Airplane Company three additional Boeing Model 707-131 jet aircraft at a purchase price of approximately $4,700,000 per aircraft. In order to make additional such aircraft available to TWA, Hughes proposes to deliver up to three Boeing Model 707-131 jet aircraft in addition to the "Leased Aircraft" and aircraft FAA No. N731TW. The three additional Boeing Model 707-131 jet aircraft would be delivered to TWA under a lease agreement or agreements, providing for the lease of each such aircraft by TWA on a day-to-day basis at a rate not to exceed $2500 per day, subject to the right of either party to terminate the lease on twenty-four hours written notice and subject to the approval of the Civil Aeronautics Board. Such leases would in any event terminate no later than September 30, 1959. The proposed lease or leases will be in form substantially similar to the form attached as Exhibit A to TWA's motion herein dated January 29, 1959.

5. Hughes has further agreed to sell to TWA at Hughes' cost when and if requested by TWA such spare parts and provisioning as are owned by Hughes or are on order and are available for use in the operation of the Leased

Aircraft and the four other Boeing Model 707-131 jet aircraft referred to in paragraph 4. A copy of the proposed form of letter agreement relative to this transaction is attached as Exhibit B.

6. In its motion dated March 13, 1959 in the above matter, TWA requested that the Board's Order permit TWA to lease from Hughes Tool Company "up to 30 spare aircraft engines for the Leased Aircraft under a lease agreement or agreements to be negotiated on terms comparable to those applicable to the Leased Aircraft." The motion further stated "A copy of such lease agreement, when negotiated, will be filed with the Board as a supplement to this motion."

In its Order No. E-13873 the Board deferred action on TWA's motion insofar as it requests authorization for the lease of 30 spare jet engines by Hughes Tool Company to TWA.

Since the filing of the motion, TWA has tentatively decided to defer the question of how TWA should handle the acquisition of its total spare aircraft engine requirements until definitive financing has been worked out for jet equipment and as a result TWA has purchased directly from the manufacturer certain additional spare engines in order to satisfy interim requirements. Consequently, no further action is requested of the Board at this time on TWA's motion of March 13, 1959.

7. Use by TWA of the Leased Aircraft, the four additional Boeing Model 707-131 jet aircraft and

the spare parts and provisioning is necessary to enable TWA to continue the operation of jet service on its certificated routes.

WHEREFORE, TRANS WORLD AIRLINES, INC. respectfully prays that the Board enter an order herein modifying its Order Serial No. 3210, as amended, so that its order will permit TWA to enter into the transactions with Hughes Tool Company described above.

Respectfully submitted,

Senior Vice President-
Finance and Treasurer

June 26, 1959

EXHIBIT A

THIS AGREEMENT entered into as of the day of , 1959 by and between Hughes Tool Company, a Delaware corporation ("Lessor") and Trans World Airlines, Inc., a Delaware corporation ("Lessee"):

WITNESSETH:

WHEREAS, Lessor and Lessee have heretofore entered into lease agreements covering the day-to-day leasing by Lessor to Lessee of Boeing Model 707-131 aircraft as follows:

Aircraft FAA No.	Date of Lease
N732TW	March 17, 1959
N733TW	March 30, 1959
N734TW	April 3, 1959
N735TW	April 18, 1959
N736TW	April 29, 1959
N737TW	May 10, 1959
N738TW	May 13, 1959
N740TW	May 26, 1959
N739TW	May 28, 1959
N741TW	June 13, 1959

and

WHEREAS, said leases contemplate that they shall in any event terminate no later than June 30, 1959, and

WHEREAS, the parties desire to amend said leases so as to extend the date of latest termination from June 30, 1959 to September 30, 1959.

NOW, THEREFORE, the parties hereto agree as follows:

1. Effective June 30, 1959, the second sentence of paragraph 2 of each of the leases above

specified is hereby amended to read as follows:

"The lease shall terminate upon twenty-four hour written notice to such effect from one party to the other and shall in any event terminate no later than September 30, 1959."

2. (a) This lease amendment is entered into subject to approval of the Civil Aeronautics Board and until an order has been entered by the Civil Aeronautics Board permitting the transaction covered by this agreement no rental shall be paid hereunder;

(b) This lease amendment is subject to the necessary consents of the holders of obligations issued by Trans World Airlines, Inc. under its outstanding indentures, chattel mortgages and loan agreements. In the absence of such consents no rental shall be paid hereunder.

IN WITNESS WHEREOF, each of the parties hereto has caused this agreement to be executed in its name and in its behalf by its officer or agent thereunto duly authorized.

TRANS WORLD AIRLINES, INC.

By_____
Senior Vice President-Finance

HUGHES TOOL COMPANY

By_____
Vice President

EXHIBIT B

HUGHES TOOL COMPANY
2200 GULF BUILDING
HOUSTON 2, TEXAS

Trans World Airlines, Inc.
380 Madison Avenue
New York 17, New York

Attention: Mr. A. V. Leslie

Re: Purchase of Spare Parts

Dear Sirs:

The letter agreement between us dated March 25, 1959 provides that TWA may purchase at Hughes Tool Company's actual cost such Boeing 707-131 aircraft spare parts and provisioning owned by Hughes Tool Company as TWA may request, not to exceed however in aggregate dollar amount the sum of $3,500,000.

To permit the continued operation of the Boeing 707 aircraft by TWA Hughes Tool Company hereby agrees, when and if requested by TWA, to sell to TWA on the same terms and conditions as outlined in our letter of March 25, 1959, such additional 707-131 spare parts and provisioning as are owned by Hughes or are on order and are available for use in connection with the operation of said aircraft.

This amendment to our agreement is subject to the approval of the Civil Aeronautics Board and until an order has been entered by the Civil Aeronautics Board permitting the additional transactions covered by this amendment no payments shall be made under said amendment.

If the foregoing is acceptable to TWA please so acknowledge by executing and returning the enclosed copy of this letter.

Very truly yours,

Accepted this
day of , 1959

Trans World Airlines, Inc.
by

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Order No. E-14169

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 1st day of July, 1959

In the matter of the application of	:	
HUGHES TOOL COMPANY	:	Docket No. 1182
for approval of the acquisition of control of Trans World Airlines, Inc.	:	

ORDER

On May 15, 1959, by Order No. E-13873, the Board modified its order approving the acquisition of control of Trans World Airlines, Inc. (TWA) by Hughes Tool Company (Hughes) 1/ so as to permit TWA to lease on an individual basis, as they became available, up to eleven Boeing 707-131 aircraft from Hughes and to acquire, when and as needed in the operation of these aircraft, a stock of not to exceed $3,500,000 worth of spare parts from Hughes at Hughes' actual cost. These leases were to be on a day-to-day basis and were to expire no later than June 30, 1959. Ten of these leases have been executed. By motion filed June 29, 1959, TWA requests modification of Order No. 3210 so as to permit the extension of these ten leases under the same rental and other terms until no later than September 30, 1959, as well as to permit the lease, under identical terms, of four additional Boeing 707-131 aircraft, and the purchase from Hughes at Hughes' actual cost of additional spare parts necessary for the operation of the leased jet aircraft.

TWA states that it had anticipated that definitive financing arrangements permitting it to operate these jet aircraft on a permanent basis would have been finalized by June 30, 1959, but that since arrangements for such financing have not as yet been completed the parties to the leases now desire to extend them until September 30, 1959, and to lease additional aircraft during this same period.

1/ Order No. 3210, issued October 17, 1944. This order, as amended by subsequent orders, restricts commercial transactions between TWA and Hughes to items not exceeding $200 each and totaling not more than $10,000 per year.

The Board has previously approved the control of TWA by Hughes under section 408 of the Act. 2/. However, the proposed transactions are outside the scope of the permissible class of transactions stated in Order No. 3210, and modification of that order to permit such transactions is therefore required. Upon review of the motion, the Board finds that the extension of the aircraft leases, the leasing of four additional aircraft, and the agreement for the purchase of additional spare parts at Hughes' actual cost do not violate the original purpose of the Board in imposing the restrictions contained in Order No. 3210, and further finds that modification as ordered herein is just and reasonable and in the public interest. The Board will condition its approval of the four additional aircraft lease transactions upon the filing, within ten days of the execution thereof, of each of those aircraft leases. The Board's action herein shall not be deemed a determination for rate-making purposes of the reasonableness of the transactions.

ACCORDINGLY, IT IS ORDERED:

1. That, subject to the conditions hereinafter set forth, Order No. 3210, issued October 17, 1944, as amended by subsequent orders, be and it hereby is further amended to permit the extension of the currently existing aircraft leases which were approved by Order No. E-13873 and the leasing of additional aircraft by TWA from Hughes and the agreement for the acquisition of additional spare parts as set forth in the motion, to take place;

2. That TWA shall file within ten days of the execution thereof a copy of the heretofore unexecuted aircraft leases;

3. That such action shall not be a determination for rate-making purposes of the reasonableness of the transactions;

4. That this order may be amended or revoked at any time in the discretion of the Board without hearing;

By the Civil Aeronautics Board.

/s/ Mabel McCart

Mabel McCart
Acting Secretary

(SEAL)

2/ 6 C.A.B. 153 (1944) and 12 C.A.B. 192 (1950).

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BEFORE THE

CIVIL AERONAUTICS BOARD

In the matter of the application of

HUGHES TOOL COMPANY

for approval of the acquisition of control of Trans World Airlines, Inc.

Docket No. 1182

MOTION OF TRANS WORLD AIRLINES, INC. FOR APPROVAL OF TRANSACTIONS WITH HUGHES TOOL COMPANY

Communications with respect to this document should be sent to:

WARREN LEE PIERSON
Chairman of the Board of Directors
Trans World Airlines, Inc.
1000 - 16th Street, N. W.
Washington 6, D. C.

and

CHADBOURNE, PARKE, WHITESIDE & WOLFF
Attorneys for Trans World Airlines, Inc.
25 Broadway
New York 4, N. Y.

September 22, 1959

BEFORE THE

CIVIL AERONAUTICS BOARD

In the matter of the application of	:	
HUGHES TOOL COMPANY	:	Docket No. 1182
for approval of the acquisition of control of Trans World Airlines, Inc.	:	
	:	

MOTION OF TRANS WORLD AIRLINES, INC. FOR APPROVAL OF TRANSACTIONS WITH HUGHES TOOL COMPANY

TRANS WORLD AIRLINES, INC. (herein referred to as "TWA") respectfully requests the Board to enter an order herein modifying its Order Serial No. 3210, issued October 17, 1944, as amended, approving the acquisition of control of TWA by Hughes Tool Company (herein referred to as "Hughes") so that the terms of said order will not restrict the right of TWA to enter into the transactions with Hughes more fully described below.

1. By motion filed with the Board on January 30, 1959, TWA requested a modification of Order No. 3210 issued October 17, 1944, as amended, so as to permit TWA to lease one Boeing 707-131 jet aircraft from Hughes.

On February 26, 1959 the Board by its Order No. 13542 amended Order No. 3210 so as to permit the aforesaid transaction between TWA and Hughes to take place.

2. Thereafter on May 15, 1959 the Board by its Order No. 13873 approved the leasing by Hughes to

TWA of up to 11 additional Boeing Model 707-131 jet aircraft as set forth in TWA's motion filed with the Board on March 16, 1959. Said leases were on a day-to-day basis and were to expire no later than June 30, 1959. Ten such leases were executed.

3. By motion filed June 29, 1959 TWA requested modification of Order No. 3210 so as to permit the extension of the ten leases referred to in paragraph 2 under the same rental and other terms until no later than September 30, 1959, as well as to permit the lease, under identical terms, of four additional Boeing Model 707-131 aircraft.

On July 1, 1959, the Board by its Order No. 14169 amended Order No. 3210, issued October 17, 1944, as amended by subsequent orders, so as to permit the aforesaid aircraft lease transactions between TWA and Hughes to take place. The ten Boeing Model 707-131 jet aircraft leased by Hughes to TWA as set forth in paragraph 2, together with the four additional Boeing Model 707-131 jet aircraft leased to TWA as authorized by Order No. 14169, are herein referred to as the "Leased Aircraft".

4. TWA and Hughes had anticipated that definitive financing arrangements permitting TWA to operate the Leased Aircraft on a permanent basis would have heretofore been finalized. However, since arrangements for such financing have not as yet been completed the parties accordingly desire to extend the date of termination provided for in the leases of the Leased Aircraft beyond September 30, 1959 and until terminated by either party upon twenty-four hours written notice by one party to the other. A proposed form of amendment so extending said

leases is attached hereto as Exhibit A.

5. Use by TWA of the Leased Aircraft is necessary to enable TWA to continue the operation of jet service on its certificated routes.

WHEREFORE, TRANS WORLD AIRLINES, INC. respectfully prays that the Board enter an order herein modifying its Order Serial No. 3210, as amended, so that its order will permit TWA to enter into the transactions with Hughes Tool Company described above.

Respectfully submitted,

Senior Vice President -
Finance and Treasurer

September 22, 1959

EXHIBIT A

THIS AGREEMENT entered into as of the day of , 1959 by and between Hughes Tool Company, a Delaware corporation ("Lessor") and Trans World Airlines, Inc., a Delaware corporation ("Lessee"):

W I T N E S S E T H :

WHEREAS, Lessor and Lessee have heretofore entered into lease agreements covering the day-to-day leasing by Lessor to Lessee of Boeing Model 707-131 aircraft as follows:

AIRCRAFT FAA NO.	DATE OF LEASE
N732TW	March 17, 1959
N733TW	March 30, 1959
N734TW	April 3, 1959
N735TW	April 18, 1959
N736TW	April 29, 1959
N737TW	May 10, 1959
N738TW	May 13, 1959
N740TW	May 24, 1959
N739TW	May 28, 1959
N741TW	June 13, 1959
N742TW	July 1, 1959
N743TW	July 10, 1959
N744TW	July 14, 1959
N745TW	August 1, 1959

and

WHEREAS, said leases, as amended, contemplate that they shall in any event terminate no later than September 30, 1959, and

WHEREAS, the parties desire to amend said leases so as to extend the date of termination beyond September 30, 1959 and until terminated by either party upon twenty-four hours written notice by one party to the other.

NOW, THEREFORE, the parties hereto agree as follows:

1. Effective September 30, 1959, the second sentence of paragraph 2 of each of the leases above specified is hereby amended to read as follows:

"The lease shall terminate upon twenty-four hour written notice to such effect from one party to the other".

2. (a) This lease amendment is entered into subject to approval of the Civil Aeronautics Board and until an order has been entered by the Civil Aeronautics Board permitting the transaction covered by this agreement no rental shall be paid hereunder;

(b) This lease amendment is subject to the necessary consents of the holders of obligations issued by Trans World Airlines, Inc. under its outstanding indentures, chattel mortgages and loan agreements. In the absence of such consents no rental shall be paid hereunder.

IN WITNESS WHEREOF, each of the parties hereto has caused this agreement to be executed in its name and in its behalf by its officer or agent thereunto duly authorized.

TRANS WORLD AIRLINES, INC.

By_____
Senior Vice President - Finance

HUGHES TOOL COMPANY

By_____
Vice President

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Order No. E-14504

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 30th day of September, 1959

In the matter of the application of	:	
	:	
HUGHES TOOL COMPANY	:	Docket No. 1182
	:	
for approval of the acquisition of control of Trans World Airlines, Inc.	:	

ORDER

On July 1, 1959, by Order No. E-14169, the Board modified its order approving the acquisition of control of Trans World Airlines, Inc. (TWA) by Hughes Tool Company (Hughes) 1/ so as to permit, among other things, the extension of ten leases of Boeing 707-131 aircraft by TWA from Hughes 2/ until September 30, 1959, and to permit the lease of four additional Boeing 707-131 aircraft. By motion filed September 23, 1959, TWA requests modification of Order No. 3210 so as to permit the extension of these leases, under identical terms, until such time as they are terminated by either party upon 24 hours' written notice.

TWA states that it had anticipated that definitive financing arrangements permitting it to operate these jet aircraft on a permanent basis would have been finalized by September 30, 1959, but that since arrangements for such financing have not as yet been completed, the parties to the leases now desire to extend them until such time as these arrangements are completed.

The Board has previously approved the control of TWA by Hughes under section 408 of the Act. 3/ However, the proposed lease extensions are outside the scope of the permissible class of transactions stated in Order No. 3210,

1/ Order No. 3210, issued October 17, 1944. This order, as amended by subsequent orders, restricts commercial transactions between TWA and Hughes to items not exceeding $200 each and totaling not more than $10,000 per year.

2/ By Order No. E-13973, May 15, 1959, the Board modified Order No. 3210 so as to permit the original lease of these aircraft.

3/ 6 CAB 153 (1944) and 12 CAB 192 (1950).

and modification of that order to permit such transactions is therefore required. Upon review of the motion, the Board finds that the extension of these aircraft leases does not violate the original purpose of the Board in imposing the restrictions contained in Order No. 3210, and further finds that, under the circumstances described above, modification as ordered herein is just and reasonable and in the public interest. The Board's action herein shall not be deemed a determination for rate-making purposes of the reasonableness of the transactions.

ACCORDINGLY, IT IS ORDERED:

1. That, subject to the conditions hereinafter set forth, Order No. 3210, issued October 17, 1944, as amended by subsequent orders, be and it hereby is further amended to permit the extension of the aircraft leases as set forth in TWA's motion;

2. That such action shall not be a determination for rate-making purposes of the reasonableness of the transactions;

3. That this order may be amended or revoked at any time in the discretion of the Board without hearing.

By the Civil Aeronautics Board.

/s/ Mabel McCart

(SEAL)

Mabel McCart
Acting Secretary

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BEFORE THE

CIVIL AERONAUTICS BOARD

In the matter of the application of	
HUGHES TOOL COMPANY	
for approval of the acquisition of control of Trans World Airlines, Inc.	Docket No. 1182

NOTICE OF TRANS WORLD AIRLINES, INC.
FOR APPROVAL OF TRANSACTIONS WITH
HUGHES TOOL COMPANY

Communications with respect to this document should be sent to:

THOMAS K. TAYLOR
Vice President
Trans World Airlines, Inc.
1000 - 16th Street, N. W.
Washington 6, D. C.

and

CHADBOURNE, PARKE, WHITESIDE & WOLFF
Attorneys for Trans World Airlines, Inc.
25 Broadway
New York 4, N. Y.

November 6, 1959

BEFORE THE

CIVIL AERONAUTICS BOARD

In the matter of the application of	
HUGHES TOOL COMPANY	
for approval of the acquisition of control of Trans World Airlines, Inc.	Docket No. 1182

MOTION OF TRANS WORLD AIRLINES, INC.
FOR APPROVAL OF TRANSACTIONS WITH
HUGHES TOOL COMPANY

TRANS WORLD AIRLINES, INC. (herein referred to as "TWA") respectfully requests the Board to enter an order herein modifying its Order Serial No. 3210, issued October 17, 1944, as amended, approving the acquisition of control of TWA by Hughes Tool Company (herein referred to as "Hughes") so that the terms of said order will not restrict the right of TWA to enter into the transactions with Hughes more fully described below.

1. Hughes has on order from Boeing Airplane Company 12 Boeing Model 707-331 jet aircraft at a purchase price of approximately $5,600,000 per aircraft. In addition Hughes has on order 30 Convair Model 880 jet aircraft at a purchase price of approximately $3,930,000 per aircraft.

2. Although TWA has entered into no specific commitment to acquire such aircraft, it nevertheless contemplates that certain of these aircraft will be made available to it, on terms not yet determined, for use in

TWA's certificated operations. Current estimates indicate that the first Boeing Model 707-331 aircraft will be ready for delivery in November, 1959 and that the first Convair 880 aircraft will be ready for delivery approximately one month thereafter. TWA desires to make use of the first aircraft to be delivered in its jet training program and subsequently to make use of these and other such aircraft in the operation of jet service on its certificated routes.

3. As TWA has advised the Board in connection with the temporary extension of its leases from Hughes Tool Company of Boeing Model 707-131 aircraft, approved by CAB Order No. 14504, definitive financing plans for TWA's jet aircraft program have not yet been completed. Pending the completion of these definitive plans, it is desirable that interim arrangements be made covering TWA's use of the jet aircraft in its operation.

4. In order to make certain of such aircraft available to TWA, Hughes proposes to deliver Boeing Model 707-331 jet aircraft and Convair Model 880 jet aircraft (said Boeing and Convair jet aircraft being hereinafter referred to as the "Leased Aircraft") to TWA under a lease agreement or agreements, providing for the lease of each such aircraft by TWA on a day-to-day basis at a rate not to exceed $2,940 per day with respect to the Boeing Model 707-331 jet aircraft and $2,070 per day with respect to the Convair Model 880 jet aircraft, subject to the right of either party to terminate the lease on twenty-four hours written notice and subject to the approval of the Civil Aeronautics Board. Such lease will be in substantially the same form as the present leases by

TWA from Hughes of Boeing Model 707-131 aircraft, the subject of CAB Orders Nos. 13542, 13873 and 14169. A copy of the proposed form of lease is attached as Exhibit A. No more than eight of each type of aircraft would be leased by TWA without the submission to the Board of a supplemental motion requesting approval of such additional leases.

5. Hughes has also acquired or has on order certain spare parts and provisioning for the Boeing Model 707-331 aircraft and for the Convair Model 880 aircraft. Hughes will sell to TWA at Hughes' cost when and if requested by TWA such spare parts and provisioning as are owned by Hughes or are on order. A copy of the proposed form of letter agreement relative to this transaction is attached as Exhibit B.

6. TWA believes that use by it of the Leased Aircraft, and the spare parts and provisioning therefor, as set forth in paragraph 5, is necessary to enable TWA to carry forward its jet training program and to enable TWA to conduct certificated service with Boeing Model 707-331 and Convair Model 880 jet aircraft when such aircraft are delivered to it.

WHEREFORE, TRANS WORLD AIRLINES, INC. respectfully prays that the Board enter an order herein modifying its Order Serial No. 3210, as amended, so that its order will permit TWA to enter into transactions with Hughes Tool Company described above.

Respectfully submitted,

Charles S. Thomas

C. S. Thomas
President

November 6, 1959

EXHIBIT A

THIS AGREEMENT entered into as of the day of , 1959 by and between Hughes Tool Company, a Delaware corporation ("Lessor") and Trans World Airlines, Inc., a Delaware corporation ("Lessee"):

WITNESSETH:

1.

Lessor hereby agrees to lease to Lessee and Lessee hereby agrees to hire and take from Lessor, subject to the terms and conditions herein provided, one Model aircraft bearing FAA No. (Manufacturer's Serial No.), including four Engines (Serial Nos. , , , and), herein sometimes referred to as "the Aircraft."

2.

The lease of the Aircraft shall commence on delivery of the Aircraft to Lessee and shall continue from day-to-day until terminated by either of the parties. The lease shall terminate upon twenty-four hour written notice to such effect from one party to the other. The Aircraft shall be delivered to Lessee hereunder at , or such other place as may be mutually agreed.

3.

(a) Lessee agrees to accept the Aircraft in its present condition and Lessor makes no warranties or representations whatsoever as to condition of the Aircraft, [illegible] shall be implied in law

Such warranties and guarantees from manufacturers and suppliers of the Aircraft and its equipment as can be effectively assigned for the term of this lease are hereby assigned by Lessor to Lessee for the term of this lease to the extent of Lessee's interest accruing during the term of such lease.

(b) Upon the termination of this lease, Lessee agrees to return the Aircraft to Lessor (at Mid-Continent International Airport, Kansas City, Missouri, or such other place as may be mutually agreed) in the same condition and equipped with the same equipment as it was at the commencement of the lease, except for reasonable wear and tear from ordinary use.

During the term of the lease Lessee may at its own expense remove from the Aircraft such items of equipment, and may install on the Aircraft such additional items of equipment, as Lessee may consider reasonably necessary to fit such Aircraft for use by Lessee; provided, however, that no such removal or installation which shall cause permanent change in the structure of the Aircraft shall be made without the prior written consent of Lessor unless such removal or installation is made pursuant to a mandatory FAA requirement. Such items as shall be so removed may be either retained in the custody of Lessee, or returned to Lessor, but in either event they shall be reinstalled on the Aircraft prior to the return of the Aircraft to Lessor. Items of non-mandatory nature that shall have been installed in the Aircraft shall be removed prior to the return of the Aircraft to Lessor.

5.

Lessee shall perform all necessary maintenance, overhaul and servicing on the Aircraft during the term of the lease in accordance with the requirements of the Federal Aviation Agency.

6.

If, during the term of the lease of Aircraft pursuant to this agreement, the Federal Aviation Agency or any other governmental agency having jurisdiction shall make mandatory the installation, removal or modification (other than mere inspection) of items on the Aircraft, then compliance shall be effected promptly at Lessor's expense.

7.

Lessee shall be liable for any loss of, or damage to, any Aircraft while leased from Lessor hereunder. During all times that the Aircraft is leased hereunder, Lessee shall, at its own cost and expense, keep the Aircraft, insured against loss or damage from crash, fire, wind storm, collision, strike, riots, insurrection, civil commotion or other accident or casualty (except war risk and engine ingestion) with Lessor named as a co-insured and shall furnish Lessor with a certificate of insurance therefor. The amount of such insurance shall not be less than $ per Aircraft, with flight deductible and ground deductible clauses substantially equivalent to those currently in force in Lessee's other insurance policies. In the event of damage to the Aircraft, during the term of the lease, from a risk required to be covered

by such insurance, Lessee will repair the damage at its own expense. Upon complying with the foregoing provision, Lessee shall be entitled to retain (or, in the case of receipt by Lessor, to receive from Lessor) all proceeds of insurance with respect to such damage. In the event the Aircraft is lost, destroyed or damaged beyond repair, Lessee will pay to Lessor, as their interests may appear, for such Aircraft the sum of $ (U. S. currency), less any amounts that might have been paid to and retained by Lessor as proceeds from the insurance, which shall constitute payment for all right, title and interest of Lessor in the Aircraft which shall thereupon pass to Lessee. The policies providing the insurance required by this agreement shall include customary provisions that Lessor shall not be responsible for the representations and warranties of Lessee and that Lessor shall receive notice prior to cancellation or expiration (unless the policy is being renewed) of any policy.

8.

Lessee agrees to defend, indemnify and hold harmless Lessor from and against all losses, including cost and expenses by reason of claims for injury or death of persons and loss or damage to property arising out of or in any manner connected with possession, use or operation by Lessee of the Aircraft leased hereunder during the term of such lease. During such term the Lessee shall keep in force and effect liability insurance in the amounts recommended by Lessee's Senior Vice-President-Finance.

9.

Lessee agrees that no Aircraft leased pursuant hereto will be used during the term of the lease in any manner which shall violate any law or regulation of any government or governmental agency having jurisdiction and that any fine, penalty or forfeiture resulting from any such violation shall be the sole responsibility of Lessee.

10.

(a) As rent for the Aircraft leased hereunder Lessee shall pay to Lessor the sum of $ for each full day during the term of the lease. The rental shall be paid on the last day of each month.

(b) Lessee shall also pay to Lessor in respect of each of the engines on the Aircraft $ per hour for each hour since the last overhaul on such engine at the time returned to Lessor on the termination of the lease less the number of hours since manufacture or overhaul on such engine on the delivery of the Aircraft to Lessee.

If the hours since last overhaul on any engine at the time it is returned to Lessor on termination of the lease are less than the number of hours since manufacture or overhaul on such engine on delivery of the Aircraft to Lessee, Lessor shall pay to Lessee $ for each hour of difference between the two figures.

Settlement under this subparagraph (b) shall be made within 15 days after the end of the term of the lease.

11.

Lessee shall have no right to consent to any

lien or liens on the Aircraft. Any liens incurred by Lessee shall be discharged at the cost and expense of Lessee, who shall indemnify and save Lessor harmless against any such lien or liens. Lessee may sublease the Aircraft to any scheduled airline operating in the United States, provided such sublease is made expressly subject to the terms and conditions hereof. Lessee shall pay all operating taxes and licenses applicable to the Aircraft or the operation thereof, and also shall pay all property taxes assessed against Lessee or Lessor with respect to the Aircraft by any state, county, or other political subdivision to which Lessor would not ordinarily pay property taxes, except for the use of the Aircraft by Lessee hereunder. Lessee also shall pay any and all state, federal, county and local sales and use taxes assessed against either Lessee or Lessor resulting from the lease or use hereunder of the Aircraft.

The title of Lessor (whether as trustee or otherwise), to the Aircraft and any right of Lessor (whether as trustee or otherwise) to take possession of the Aircraft in compliance with the provisions of this lease shall not be affected by the provisions of Chapter X of the Federal Bankruptcy Act as amended from time to time.

12.

Notwithstanding any of the above provisions it is further agreed that

(a) This lease agreement is entered into subject to approval of the Civil Aeronautics Board and until an order has been entered by the Civil Aeronautics Board permitting the transaction covered by this agreement no rental shall be paid hereunder;

(b) This lease is subject to the necessary consents of the holders of obligations issued by

indentures, chattel mortgages and loan agreements. In the absence of such consents no rental shall be paid hereunder.

IN WITNESS WHEREOF, each of the parties hereto has caused this agreement to be executed in its name and in its behalf by its officer or agent thereunto duly authorized.

TRANS WORLD AIRLINES, INC.

By_____

HUGHES TOOL COMPANY

By_____

EXHIBIT B

HUGHES TOOL COMPANY
2200 GULF BUILDING
HOUSTON 2, TEXAS

Trans World Airlines, Inc.
380 Madison Avenue
New York 17, New York

Attention: Mr. A. V. Leslie

Re: Purchase of Spare Parts.

Dear Sirs:

This letter will set forth our agreement and understanding concerning the purchase by TWA from Hughes Tool Company of spare parts and provisioning (herein called "Spares") for use in connection with the operation by TWA of the Boeing Model 707-331 jet aircraft and Convair Model 880 jet aircraft leased by TWA from Hughes Tool Company.

Hughes Tool Company hereby agrees to sell to TWA at Hughes Tool Company's actual cost such Spares as are owned by Hughes Tool Company or are on order by it as TWA may from time to time elect to purchase.

Appropriate accounting procedures should be established for the accurate and prompt recordation of all transactions involving the withdrawing and purchase of Spares.

This agreement and arrangement are subject to approval of the Civil Aeronautics Board, and until an order has been entered by the Civil Aeronautics Board permitting the transactions covered by this agreement no payments shall be made hereunder.

If the foregoing is acceptable to TWA please so acknowledge by executing and returning the enclosed copy of this letter.

Very truly yours,

Accepted this
day of , 1959

Trans World Airlines, Inc.

by
Vice President

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Order No. E-11877

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 29th day of January, 1960

In the matter of the application of

HUGHES TOOL COMPANY

for approval of the acquisition of control of Trans World Airlines, Inc.

Docket 1182

ORDER

By motion filed with the Board on November 6, 1959, Trans World Airlines, Inc. (TWA) requests modification of Order 3210, 1/ as amended and modified by subsequent orders, which restricts commercial transactions between TWA and Hughes Tool Company (Hughes) and between TWA and any affiliate or subsidiary of Hughes to "transactions involving complete items of property, the price of which does not exceed $200 each, with the further limitation that the total annual expenditure involved in such commercial transactions by either party shall not exceed $10,000." The modification is desired to permit TWA to lease from Hughes on an individual, day-to-day basis up to eight Boeing 707-331 aircraft and up to eight Convair 880 aircraft, and to purchase from Hughes at Hughes' actual cost such spare parts and provisioning for these aircraft as TWA may require.

In support of its motion, TWA states that the aircraft and the spare parts therefor are necessary to enable it to carry forward its jet training program and to provide additional jet service over its certificated routes pending completion of definitive financing arrangements permitting it to operate these aircraft on a permanent basis.

The Board has previously approved the control of TWA by Hughes under section 408 of the Act, 2/ and the proposed transactions raise no new issues with respect thereto. However, the transactions are outside of the scope of the permissible class of transactions stated in Order 3210, and modification of that order to permit such transactions is therefore required.

1/ 6 C.A.B. 153, 158 (1944).

2/ 6 C.A.B. 153 (1944) and 12 C.A.B. 192 (1950).

The Board finds that the proposed transactions, as set forth in the motion, do not violate the original purpose of the Board in imposing the restrictions contained in Order 3210, and further finds that modification as ordered herein is just and reasonable and in the public interest. However, such action shall not be deemed to be a determination for rate-making purposes of the reasonableness of the transactions. The Board will condition its authorization herein upon the filing of each of the aircraft leases within ten days after the execution thereof.

ACCORDINGLY, IT IS ORDERED:

1. That, subject to the conditions hereinafter set forth, Order 3210, issued October 17, 1944, as amended by subsequent orders, be and it hereby is further amended to permit the transactions between TWA and Hughes, as set forth in the motion, to take place;

2. That TWA shall file a copy of each aircraft lease within ten days after the execution thereof;

3. That this action shall not be deemed a determination for rate-making purposes of the reasonableness of the transactions;

4. That this order may be amended or revoked at any time in the discretion of the Board without hearing.

By the Civil Aeronautics Board:

/s/ Mabel McCart

Mabel McCart
Acting Secretary

(SEAL)

(1)

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BEFORE THE

CIVIL AERONAUTICS BOARD

In the matter of the application of	:	
HUGHES TOOL COMPANY	:	
for approval of the acquisition of control of Trans World Airlines, Inc.	:	Docket No. 1182

MOTION OF TRANS WORLD AIRLINES, INC.
FOR APPROVAL OF TRANSACTIONS WITH
HUGHES TOOL COMPANY

Communications with respect to this document should be sent to:

THOMAS K. TAYLOR
Vice President
Trans World Airlines, Inc.
1000 - 16th Street, N. W.
Washington 6, D. C.

and

CHADBOURNE, PARKE, WHITESIDE & WOLFF
Attorneys for Trans World Airlines, Inc.
25 Broadway
New York 4, N. Y.

March 30, 1960

BEFORE THE

CIVIL AERONAUTICS BOARD

In the matter of the application of	
HUGHES TOOL COMPANY	
for approval of the acquisition of control of Trans World Airlines, Inc.	Docket No. 1182

MOTION OF TRANS WORLD AIRLINES, INC. FOR APPROVAL OF TRANSACTIONS WITH HUGHES TOOL COMPANY

TRANS WORLD AIRLINES, INC. (herein referred to as "TWA") respectfully requests the Board to enter an order herein modifying its Order Serial No. 3210, issued October 17, 1944, as amended, approving the acquisition of control of TWA by Hughes Tool Company (herein referred to as "Hughes") so that the terms of said order will not restrict the right of TWA to enter into the transactions with Hughes more fully described below.

1. Hughes has on order from Boeing Airplane Company seven Boeing Model 707-331 jet aircraft at a purchase price of approximately $5,600,000 per aircraft. In addition Hughes has on order thirty Convair Model 880 jet aircraft at a purchase price of approximately $3,930,000 per aircraft.

2. As TWA has previously advised the Board in connection with the leases from Hughes Tool Company

of Boeing Model 707-131 aircraft, approved by CAB Order No. 14504, and in connection with the leasing from Hughes Tool Company of Boeing Model 707-331 jet aircraft and Convair Model 880 jet aircraft, approved by CAB Order No. 14877, definitive financing plans for TWA's jet aircraft program are being completed.

3. The definitive financing plans contemplate that TWA will acquire title to the jet aircraft heretofore leased by Hughes to TWA as well as to additional Boeing Model 707-331 jet aircraft and Convair Model 880 jet aircraft.

4. The Board in its Order E-14877 approved the leasing by Hughes to TWA of up to eight Boeing Model 707-331 jet aircraft. Five such aircraft have been leased pursuant to Order E-14877. In lieu of leasing additional Boeing Model 707-331 jet aircraft and in order to make such aircraft immediately available to TWA on a permanent basis, Hughes proposes to assign to TWA Hughes' right to acquire two Boeing Model 707-331 jet aircraft and the customer-furnished equipment thereon from the vendor. TWA would acquire such right at Hughes' cost, including advance payments made by Hughes with respect to such aircraft and customer-furnished equipment and interest on advance payments made by Hughes to the vendor with respect thereto. Following such assignment and subject to TWA's acceptance of the aircraft on delivery, TWA proposes to purchase the aircraft from the vendor by payment to the vendor of the balance of the purchase price applicable to such aircraft. Payment to Hughes of its down payments made thereon and

interest applicable thereto will be made only following approval thereof by the Board.

5. TWA believes that the acquisition of the two Boeing Model 707-331 jet aircraft referred to herein is necessary and desirable for use in TWA's domestic and international operations and that such acquisition is reasonable and in the best interest of TWA.

WHEREFORE, Trans World Airlines, Inc. respectfully prays that the Board enter an order herein modifying its Order Serial No. 3210, as amended, so that its order will permit TWA to enter into transactions with Hughes Tool Company described above.

Respectfully submitted,

C. S. Thomas

C. S. Thomas
President

March 30, 1960

DX322 id., Item 11b, page 1
(CAB Orders & Documents)

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BEFORE THE

CIVIL AERONAUTICS BOARD

In the matter of the application of	
HUGHES TOOL COMPANY	
for approval of the acquisition of control of Trans World Airlines, Inc.	Docket No. 1182

MOTION OF TRANS WORLD AIRLINES, INC.
FOR APPROVAL OF TRANSACTIONS WITH
HUGHES TOOL COMPANY

Communications with respect to this document should be sent to:

THOMAS K. TAYLOR
Vice President
Trans World Airlines, Inc.
1000 16th Street, N. W.
Washington 6, D. C.

and

CHADBOURNE, PARKE, WHITESIDE & WOLFF
Attorneys for Trans World Airlines, Inc.
25 Broadway
New York 4, N. Y.

April 14, 1960

BEFORE THE

CIVIL AERONAUTICS BOARD

In the matter of the application of	:	
HUGHES TOOL COMPANY	:	Docket No. 1182
for approval of the acquisition of control of Trans World Airlines, Inc.	:	

MOTION OF TRANS WORLD AIRLINES, INC.
FOR APPROVAL OF TRANSACTIONS WITH
HUGHES TOOL COMPANY

TRANS WORLD AIRLINES, INC. (herein referred to as "TWA") respectfully requests the Board to enter an order herein modifying its Order Serial No. 3210, issued October 17, 1944, as amended, approving the acquisition of control of TWA by Hughes Tool Company (herein referred to as "Hughes") so that the terms of said order will not restrict the right of TWA to enter into the transactions with Hughes more fully described below.

1. As TWA has previously advised the Board definitive financing plans for the TWA jet aircraft program are now being completed. It is anticipated that full details of this program will be worked out shortly. Pending the completion of the details of such program and in order to make an additional Boeing Model 707-331 jet aircraft immediately available to TWA on a permanent basis, Hughes proposes to assign to TWA Hughes' right to acquire a third Boeing Model 707-331 jet aircraft and the

customer-furnished equipment thereon from the vendor.

As in the case of the two Boeing Model 707-331 jet aircraft covered by TWA's motion to the Board of March 30, 1960, TWA would acquire such right with respect to the third aircraft at Hughes' cost, including advance payments made by Hughes with respect to such aircraft and customer-furnished equipment and interest on advance payments made by Hughes to the vendor with respect thereto. Following such assignment and subject to TWA's acceptance of the aircraft on delivery, TWA proposes to purchase the aircraft from the vendor by payment to the vendor of the balance of the purchase price applicable to such aircraft. Payment to Hughes of its down payments made thereon and interest applicable thereto will be made only following approval thereof by the Board.

2. Pending completion of the definitive financing program TWA may arrange temporary financing for the third Boeing Model 707-331 jet aircraft on a letter of credit basis, TWA's obligations thereunder to be guaranteed by Hughes.

3. The definitive financing plans for TWA's jet aircraft program contemplate that TWA will acquire title to certain of the Convair Model 880 jet aircraft on order by Hughes. In order to use the Convair Model 880 jet aircraft in its jet training program and subsequently to make use of these aircraft on its certificated routes, it is desirable that TWA have the use of a flight simulator to train its flight crews in the

operation of the Convair Model 880 jet aircraft.

4. Hughes has on order from Link Aviation, Inc. a flight simulator for the Convair Model 880 jet aircraft at a purchase price of approximately $1,018,550.

5. So that this simulator may be made immediately available to TWA Hughes proposes to assign to TWA Hughes' interest therein upon TWA's agreement to pay Hughes' cost and to assume all liabilities and obligations of Hughes to the vendor, including the payment of the balance of the purchase price.

Following such assignment and subject to TWA's acceptance of the simulator on delivery, TWA proposes to purchase the simulator from the vendor by payment to the vendor of the balance of the purchase price applicable to such simulator. Payment to Hughes of its costs, including down payments made thereon and interest applicable thereto, will be made only following approval thereof by the Board.

6. Hughes is willing to make said Boeing Model 707-331 jet aircraft and said flight simulator available to TWA on the above basis.

7. The foregoing program is subject to the necessary approvals of the holders of obligations issued by TWA under its outstanding indentures, chattel mortgages and loan agreements.

8. TWA believes that the acquisition of the Boeing Model 707-331 jet aircraft and the flight simulator for the Convair Model 880 jet aircraft is necessary

and desirable for use in TWA's operations and that such acquisition is reasonable and in the best interests of TWA.

WHEREFORE, Trans World Airlines, Inc. respectfully prays that the Board enter an order herein modifying its Order Serial No. 3210, as amended, so that its order will permit TWA to enter into transactions with Hughes Tool Company described above.

Respectfully submitted,

Thomas K. Taylor

Thomas K. Taylor
Vice President

Original

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BEFORE THE

CIVIL AERONAUTICS BOARD

In the matter of the application of

HUGHES TOOL COMPANY

for approval of the acquisition of control of Trans World Airlines, Inc.

Docket No. 1182

MOTION OF TRANS WORLD AIRLINES, INC.
FOR APPROVAL OF TRANSACTIONS WITH
HUGHES TOOL COMPANY

Communications with respect to this document should be sent to:

THOMAS K. TAYLOR
Vice President
Trans World Airlines, Inc.
1000 - 16th Street, N.W.
Washington 6, D. C.

and

CHADBOURNE, PARKE, WHITESIDE & WOLFF
Attorneys for Trans World Airlines, Inc.
25 Broadway
New York 4, N. Y.

May 6, 1960

BEFORE THE

CIVIL AERONAUTICS BOARD

In the matter of the application of HUGHES TOOL COMPANY for approval of the acquisition of control of Trans World Airlines, Inc.	Docket No. 1182

MOTION OF TRANS WORLD AIRLINES, INC.
FOR APPROVAL OF TRANSACTIONS WITH
HUGHES TOOL COMPANY

TRANS WORLD AIRLINES, INC. (herein referred to as "TWA") respectfully requests the Board to enter an order herein modifying its Order Serial No. 3210, issued October 17, 1944, as amended, approving the acquisition of control of TWA by Hughes Tool Company (herein referred to as "Hughes") so that the terms of said order will not restrict the right of TWA to enter into the transactions with Hughes more fully described below.

1. Hughes now has on order from Boeing Airplane Company four Boeing Model 707-331 jet aircraft at a purchase price of approximately $5,600,000 per aircraft. In addition Hughes has on order thirty Convair Model 880 jet aircraft at a purchase price of approximately $3,930,000 per aircraft.

2. TWA has previously leased from Hughes, on a day-to-day basis, fifteen Boeing Model 707-131 aircraft and five Boeing Model 707-331 aircraft and such leases have been approved by orders of the Board. TWA has also acquired from Hughes three additional Boeing Model 707-331 aircraft, as set forth in the motions dated March 30, 1960 and April 14, 1960 in this proceeding. TWA, by motions

also requested approval of leasing from Hughes additional Boeing Model 707-331 aircraft and certain Convair Model 880 jet aircraft.

As TWA has advised the Board in such motions, definitive financing plans for the TWA jet aircraft program are now being completed. As a part of these plans it is proposed that TWA acquire title to the fifteen Boeing Model 707-131 aircraft and the five Boeing Model 707-331 aircraft now leased by TWA from Hughes. It is also proposed that as a part of such plans Hughes will assign to TWA Hughes' rights in the contracts covering two additional Boeing Model 707-331 jet aircraft and 20 Convair Model 880 jet aircraft and customer-furnished equipment therefor. TWA would also acquire Hughes' interest in, or contract rights covering, the spare parts, equipment and provisioning for such aircraft owned or on order by Hughes.

3. TWA would purchase from Hughes the nineteen jet aircraft under lease to TWA on December 31, 1959 at Hughes' net book value, including interest on Hughes' payments and other costs applicable to such nineteen aircraft. TWA would purchase the jet aircraft leased to TWA after December 31, 1959, Hughes' contract rights in the additional twenty-two jet aircraft and Hughes' interest or contract rights in the spare parts, provisioning and equipment therefor at Hughes' cost, including interest thereon. The existing leases of jet aircraft from Hughes to TWA would be cancelled as of the acquisition of title by TWA, with rental on the jet aircraft leased after December 31, 1959, cancelled from the beginning.

4. The proposed transactions described in paragraphs 2 and 3 hereof are more fully set forth in the form of

agreement between TWA and Hughes attached hereto as Exhibit A. Such transactions would be in addition to the purchase by TWA from Hughes of the three additional Model 707-331 jet aircraft and the flight simulator for the Convair Model 880 aircraft referred to in TWA's motions dated March 30, 1960 and April 14, 1960 and the purchase by TWA from Hughes of spare parts and provisioning for jet aircraft previously approved by order of the Board.

5. Following assignment of Hughes' contract rights referred to in paragraph 2, and subject to completion of financing arrangements satisfactory to TWA and to TWA's acceptance on delivery, TWA proposes to purchase such aircraft, spare parts, equipment and provisioning from the vendors by payment to the vendors of the balance of the purchase price applicable thereto. Payment to Hughes of its costs therefor, including interest applicable thereto, will be made only following the approval thereof by the Board. It is presently contemplated that one additional Boeing Model 707-331 aircraft, five Convair 880 aircraft, twenty-six spare jet engines and a substantial part of the other spare parts, equipment and provisioning would be thus acquired before June 30, 1960, and that the balance of such purchases would, in large part, be completed prior to November 30, 1960.

6. It is proposed that TWA's acquisition of the jet aircraft, spare parts, provisioning and equipment would be financed by the sale by TWA of $260,000,000 of its securities. Of this $160,000,000 would be senior debt sold to banks and institutional investors and approximately $100,000,000 would be junior securities sold through a rights offering to TWA's stockholders, of which Hughes would agree to purchase a sufficient amount (to the extent such securities are not otherwise sold) to provide TWA with net proceeds of $100,000,000. The junior securities would be either in the form of subordinated debentures convertible

into common stock, subordinated debentures with detachable common stock purchase warrants, or common stock, or a combination thereof. Any debentures would be subordinated to the senior debt and all other borrowings of TWA, with interest payable only if earned, but cumulative. TWA's note in the principal amount of $5,811,000, due on December 1, 1960, plus interest, held by Hughes, will be applied by Hughes as part payment on its share of the junior securities, as will a portion of the payments that will be payable by TWA to Hughes for jet aircraft, spare parts, equipment and provisioning, as set forth in paragraph 3 hereof. In addition, Hughes will, if needed, advance to TWA on a subordinated basis not to exceed $50,000,000 to enable TWA to carry out the permanent financing plan and to maintain TWA's net working capital at not less than $10,000,000 until completion of TWA's acquisition of the jet equipment referred to in paragraph 2 hereof.

7. Pending completion of the definitive financing program, referred to in paragraph 6, which is proposed to be accomplished by June 1, 1960, TWA would borrow approximately $50,000,000 from banks on a short term basis payable upon completion of the permanent financing, secured by mortgages on certain of the jet aircraft which TWA would acquire from Hughes and the manufacturers. These temporary loans would be guaranteed by Hughes. They would be paid out of the proceeds of the long term financing. In connection with the temporary financing TWA would acquire from Hughes three of the twenty jet aircraft now leased by TWA from Hughes. During this interim period payments to Hughes with respect to jet aircraft, spare parts, equipment and provisioning

would be made by means of subordinated obligations of TWA, payable upon completion of the permanent financing. As a part of this program Hughes will guarantee TWA's 3-3/4% Equipment Mortgage Sinking Fund Bonds, due December 1, 1969, as they may be amended in connection with this temporary financing.

8. This program is subject to any necessary approvals of the holders of obligations issued by TWA under its outstanding indentures, chattel mortgages and loan agreements.

9. TWA believes that the acquisition of the aircraft, spare parts, provisioning and equipment referred to herein are necessary and desirable for use in TWA's domestic and international operations, and that their acquisition on the terms here set forth, the financing program therefor and the proposed transactions with Hughes to carry out these programs are reasonable and in the best interest of TWA.

WHEREFORE, Trans World Airlines, Inc. respectfully prays that the Board enter an order herein modifying its Order Serial No. 3210, as amended, so that its order will permit TWA to enter into transactions with Hughes Tool Company described above.

Respectfully submitted,

Thomas K Taylor

C. S. Thomas
Vice - President

May 6, 1960

DX322 id., Item 11c, page 7
(CAB Orders & Documents)

Exhibit A

HUGHES TOOL COMPANY
Gulf Building
Houston 2, Texas

May 9, 1960

Trans World Airlines, Inc.
380 Madison Avenue,
New York 17, N. Y.

Attention: Mr. A. V. Leslie

Re: Purchase of Boeing Model 707-131 and 707-331 Jet Aircraft and Convair Model 880 Jet Aircraft

Dear Sirs:

If accepted by you this proposal will state our agreement and understanding concerning the conditions under which Trans World Airlines, Inc. (hereinafter called "TWA") may acquire from Hughes Tool Company (hereinafter called "Hughes") Hughes' interest in Boeing Model 707-131 and Boeing Model 707-331 jet aircraft, Convair Model 880 jet aircraft and spare parts, equipment and provisioning therefor.

1. Hughes hereby agrees to sell to TWA and, subject to the provisions of paragraph 9(c) hereof, TWA agrees to purchase from Hughes two Boeing Model 707-131 jet aircraft, Manufacturer's Serial Nos. 17671 and 17672, FAA Nos. N744TW and N745TW respectively, manufactured by Boeing Airplane Company and one Boeing Model 707-331 jet aircraft, Manufacturer's Serial No. 17679, FAA No. N765TW, manufactured by Boeing Airplane Company under Purchase Agreement No. 9 dated March 19, 1956, as amended, between Boeing Airplane Company and Hughes (hereinafter called the "331 Purchase Agreement").

Upon notice from TWA prior to June 30, 1960, Hughes shall transfer good title to such three aircraft to TWA free

and clear of all liens and encumbrances. TWA shall pay to Hughes Hughes' net book value of aircraft FAA Nos. N744TW and N745TW on the date title thereto is transferred from Hughes to TWA. As to aircraft FAA No. N765TW, TWA shall pay Hughes Hughes' undepreciated cost with respect to such aircraft.

As used herein and elsewhere in this agreement Hughes' net book value with respect to any aircraft shall mean the sum of

(i) The amounts Hughes shall have paid Boeing Airplane Company for such aircraft;

(ii) The amounts Hughes shall have paid vendors of customer-furnished equipment thereon;

(iii) All other costs of Hughes, including expenses, in connection with such aircraft, and

(iv) An amount representing interest on items (i), (ii) and (iii), at a rate per annum to be negotiated between the parties prior to the closing of TWA's long-term financing plan (computed on the average amount of the outstanding payments applicable to such aircraft by considering the payments made as outstanding from the respective dates such payments were made and until delivery of such aircraft to TWA under the respective day-to-day leases of such aircraft from Hughes to TWA);

such cost to Hughes to be depreciated (a) as to airframes, over a 10-year life with a 10% residual value, (b) as to JT-3 engines, over a 5-year life with a 10% residual value and (c) as to JT-4 engines, over a 7-year life with a 10% residual value.

As used herein and elsewhere in this agreement Hughes' undepreciated cost with respect to any aircraft, equipment, spare parts or provisioning shall mean the sum of

(i) The amounts Hughes shall have paid the vendors with respect thereto (including the amounts paid the vendors of customer-furnished equipment with respect to an aircraft);

(ii) All other costs, including expenses, in connection with the aircraft or other property, and

(iii) An amount representing interest on items (i) and (ii) at a rate per annum to be negotiated between the parties prior to the closing of TWA's long-term financing plan (computed on the average amount of the outstanding payments applicable to such aircraft or other property by considering the payments made as outstanding from the respective dates such payments were made and until the acquisition of such aircraft or property by TWA under this agreement).

2. Hughes hereby assigns to TWA the rights of Hughes to acquire from Boeing Airplane Company 2 Boeing Model 707-331 jet aircraft (Manufacturer's Serial Numbers 17685 and 17690) currently being manufactured by Boeing Airplane Company under the 331 Purchase Agreement. Subject to the provisions of paragraph 9(c) hereof, TWA agrees to purchase from the manufacturer pursuant to the 331 Purchase Agreement each such aircraft when manufactured in accordance with the terms of the 331 Purchase Agreement and tendered for delivery pursuant thereto. In exercising such rights to acquire each aircraft TWA shall pay Boeing Airplane Company the balance of the purchase price of said aircraft and shall agree to pay to the

vendors involved the balance due for customer-furnished equipment installed on such aircraft. In addition, TWA shall pay Hughes Hughes' undepreciated cost with respect to such aircraft.

3. Hughes hereby assigns to TWA the rights of Hughes to acquire from General Dynamics Corporation 20 Convair Model 880 jet aircraft currently being manufactured by General Dynamics Corporation under Purchase Agreement, dated as of September 10, 1956, as amended, between General Dynamics Corporation and Hughes (hereinafter called the "880 Purchase Agreement"). The 20 Convair Model 880 jet aircraft covered by such assignment are more specifically described in Exhibit 1 hereto.

Subject to the provisions of paragraph 9(c) hereof, TWA agrees to purchase from the manufacturer pursuant to the 880 Purchase Agreement each such aircraft when manufactured in accordance with the terms of the 880 Purchase Agreement and tendered for delivery pursuant thereto. In exercising such rights to acquire each aircraft TWA shall pay General Dynamics Corporation the balance of the purchase price of said aircraft and shall agree to pay to the vendors involved the balance due for customer-furnished equipment installed on such aircraft. In addition, TWA shall pay Hughes Hughes' undepreciated cost with respect to such aircraft.

4. Hughes hereby confirms that TWA has the exclusive right and privilege to acquire from Hughes the 13 Boeing Model 707-131 jet aircraft and 4 Boeing Model 707-331 jet aircraft heretofore leased to TWA on a day-to-day basis and not covered by paragraph 1 hereof, said aircraft being more specifically described in Exhibit 2 attached hereto. Subject to the provisions of paragraph 9(c) hereof, Hughes will sell

conditions outlined in paragraph 5 hereof.

5. TWA may purchase the aircraft referred to in paragraph 4 hereof by at least two days' notice to Hughes given on or prior to June 30, 1960 and upon payment to Hughes of Hughes' net book value thereof. Hughes agrees that upon such payment by TWA it will transfer to TWA good title to such aircraft, free and clear of all liens and encumbrances.

6. Hughes hereby confirms that TWA has the exclusive right and privilege to acquire from Hughes Hughes' right to acquire from the manufacturers, or Hughes' interest in, as the case may be, the spare engines for the Boeing 331 and Convair 880 jet aircraft, more specifically described in Exhibit 3, and all other spare parts, equipment and provisioning owned or on order by Hughes for the Boeing or Convair jet aircraft (such engines, spare parts, equipment and provisioning hereinafter referred to as the "Spares").

7. Subject to the provisions of paragraph 9(c) hereof, TWA agrees to purchase the Spares from time to time, from the vendors or Hughes, as the case may be, (a) as to Spares of which title has vested in Hughes upon payment to Hughes of Hughes' undepreciated cost and (b) as to the remainder, upon payment of Hughes' undepreciated cost and TWA's agreement to assume all liabilities and obligations of Hughes to the manufacturers applicable to the Spares acquired by TWA, including the payment of any balance of the purchase price. Upon notice from TWA to Hughes, specifying such Spares, Hughes will transfer to TWA good title, free and clear of all liens and encumbrances, to such Spares that are owned by Hughes and all Hughes' rights as to other Spares specified in such notice.

8. Payments from TWA to Hughes pursuant to this agreement up to a total of $100,000,000 (less the principal amount of $5,811,000 on TWA's note, due December 1, 1960,

held by Hughes, plus interest thereon) may be made by means of subordinated debentures of TWA in the form that such subordinated debentures may be offered to all stockholders of TWA in connection with the proposed financing plan of TWA. Pending the issuance of subordinated debentures in connection with such financing plan, payments from TWA to Hughes pursuant to this agreement shall be made by delivery to Hughes of subordinated notes, on which interest is payable only if earned and on which no principal payment will be made so long as any senior debt is outstanding except out of the proceeds of the sale of subordinated obligations issued under the definitive financing program or of the sale of capital stock. The interest rate on such subordinated notes, and on the subordinated obligations issuable by TWA to Hughes pursuant to agreements between TWA and Hughes dated April 1, 1960 and April 14, 1960, respectively, shall be the same as that agreed upon by TWA and the lending banks for the temporary loans to TWA pending completion of the proposed definitive financing program for TWA.

9. Notwithstanding any of the above provisions it is further agreed that:

(a) This agreement is entered into subject to approval of the Civil Aeronautics Board and until an order has been entered by the Civil Aeronautics Board permitting the transaction covered by this agreement no sums shall be payable by TWA to Hughes hereunder.

(b) This agreement is subject to the necessary consents of the holders of obligations issued by TWA under its outstanding indentures, chattel mortgages and loan agreements. TWA will diligently endeavor to secure such consents, but in the absence of such consents no sums shall be payable by TWA to Hughes hereunder.

(c) TWA's obligation to make any payment, deliver any subordinated obligations or assume any liabilities or other obligations with respect to the purchase of any aircraft or other property hereunder is in each case subject to completion of financing arrangements (either temporary or definitive) relating thereto completely satisfactory to TWA.

If the foregoing is acceptable to TWA please so acknowledge by executing and returning the enclosed copy of this letter.

Very truly yours,
HUGHES TOOL COMPANY

By

Accepted this day
of May, 1960

TRANS WORLD AIRLINES, INC.

By

Exhibit 1

Description of Convair 880 Jet Aircraft Assigned to TWA

Model 880 Manufacturing Number Assigned by Convair	Month in which Delivery Is Presently Scheduled
10	May
20	"
22	"
24	June
25	"
27	July
28	"
31	"
2	"
32	Aug.
33	"
35	"
3	Sept.
40	"
42	"
14	Oct.
15	"
19	"
6	Nov.
8	"

Exhibit 2

DESCRIPTION OF AIRCRAFT

Boeing Model 707-131 Jet Aircraft, FAA No.	Date of Lease
N731TW	January 30, 1959
N732TW	March 17, 1959
N733TW	March 30, 1959
N734TW	April 3, 1959
N735TW	April 18, 1959
N736TW	April 29, 1959
N737TW	May 10, 1959
N738TW	May 13, 1959
N740TW	May 24, 1959
N739TW	May 28, 1959
N741TW	June 13, 1959
N742TW	July 1, 1959
N743TW	July 10, 1959

Boeing Model 707-331 Jet Aircraft, FAA No.	Date of Lease
N762TW	November 6, 1959
N761TW	November 8, 1959
N763TW	November 17, 1959
N764TW	December 27, 1959

Exhibit 3.

Description of Spare Engines
to be Assigned to TWA

General Electric Aircraft Engines
Model CJ805 for the Convair 880 Aircraft(1)

30 Model CJ805 aircraft engines being manufactured by General Electric Company under contract with Hughes Tool Company, dated October 1, 1956, said engines to be assigned to TWA in accordance with TWA's needs currently estimated as follows:

May	1
June	8
July 1 to 15	5
July 16 thru 31	2
August	5
September	5
October	4
November	1
	30

Pratt & Whitney Aircraft Engines
Model JT4A(2)

10 Pratt & Whitney aircraft engines Model JT4A on order by Hughes Tool Company from United Aircraft Corporation under contract dated February 14, 1956 and from Boeing Airplane Company under contract dated January 14, 1959, such engines to be assigned to TWA in accordance with its needs currently estimated to be at the rate of one engine per week commencing May 2, 1960.

(1) TWA has heretofore succeeded to the interest of Hughes Tool Company in 8 CJ805 engines per telegram agreements dated April 25, 1960. The engines herein described are in addition to the first 8 of such engines covered by the April 25 order.

(2) TWA has heretofore succeeded to the interest of Hughes Tool Company in 25 JT4A engines manufactured by United Aircraft Corporation under contract dated February 14, 1956. The engines herein described are in addition to said 25 engines.

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11d

(1)

Order No. E-15430

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 23rd day of June, 1960

In the matter of the application of HUGHES TOOL CO. for approval under section 408 of the Federal Aviation Act of 1958, as amended, of the acquisition of control of TRANS WORLD AIRLINES, INC.	Docket 11882

ORDER

By notions filed April 1, 1960, April 14, 1960, and May 6, 1960, Trans World Airlines, Inc. (TWA) requests modification of Order 3219, 1/ as amended and modified by subsequent orders, which restricts commercial transactions between TWA and Hughes Tool Co. (Toolco) and between TWA and any subsidiary or affiliate of Toolco to a maximum of $200 each and an aggregate annual expenditure in such transactions of $10,000.

The further modifications are desired to permit TWA to finance its obligations with respect to the acquisition of 25 Boeing 707 and 20 Convair 880 jet aircraft, together with the necessary engines, spares and equipment required to operate these aircraft on TWA's certificated routes. 2/ In addition, TWA desires to acquire Toolco's interests in a flight simulator manufactured by Link Aviation, Inc. for the purpose of training flight crews in the operation of 880 aircraft.

The total cost of these aircraft, engines, spares and equipment is approximately $260,000,000, which would be raised by (1) the sale of $160,000,000 of senior securities (bonds), at 5-1/2% interest, to banks and institutional investors, and (2) the sale of $100,000,000 of junior securities

1/ 6 CAB 153 (Docket 1182).

2/ Twenty of the Boeing aircraft are already on lease to TWA from the owner, Toolco. These leases were approved by Orders E-13542; E-13873; E-14169; E-14504; and E-14877. Under the terms of the instant arrangements, TWA will purchase these aircraft from Toolco. Toolco will assign to TWA its interest and contract rights to the remaining five Boeing aircraft. In addition, Toolco will assign its interest and contract rights to TWA in certain aircraft currently on order from the manufacturer.

3043

sold through a rights offering to TWA common stockholders. 1/ In the event that such stockholders do not subscribe to their pro rata share of the offering, Toolco will guarantee a net of $100,000,000 to TWA. 2/ In addition, Toolco has agreed to lend TWA an additional $50,000,000 to enable TWA to complete the financing plan and maintain its net working capital at not less than $10,000,000. Pending completion of these arrangements, TWA will borrow $50,000,000 from banks on a short term basis, such loan to be guaranteed by Toolco, and repaid from the proceeds of the permanent financing.

TWA believes that the acquisition of the aircraft engines, spares and equipment described above is necessary and desirable to the conduct of its domestic and international operations and that the terms of the financing program and the transactions with Toolco necessary to carry out these programs are reasonable and in TWA's best interest.

The Board has previously approved the control of TWA by Toolco 3/ under section 408 of the Act. It is true that, should the rights offered to TWA stockholders be in the form of common stock and Toolco purchased all the new stock pursuant to its guarantee, Toolco's interest in TWA would increase from the present 78 percent to approximately 90 percent. Although, normally, an increase of 12 percent in stock ownership would be considered substantial and would give rise to a new control relationship under section 408, in view of the overwhelming control of TWA by Toolco by virtue of Toolco's ownership of 78 percent of the stock, the Board concludes that any increase of control is insignificant and does not call for a reexamination of the relationship under section 408.

Upon the basis of the application and the representations contained therein, the Board finds that the acquisition of the 45 aircraft and the proposed financing program, including the possible increased percentage of common stock held by Toolco in TWA, do not appear to violate the intent of the original restrictions imposed on transactions between TWA and Toolco. Accordingly, further modification of Order 3210 is just and reasonable and is in the public interest. It appears, however, that the transactions may otherwise be subject to section 408 in that they may involve TWA's purchase of a substantial part of the properties of Toolco. However, upon the basis of the above circumstances, the Board finds that the enforcement of section 408 would be an undue burden on TWA by reason of unusual circumstances affecting its operations and would not be in the public interest. Therefore, for the reasons expressed above, the Board will exempt TWA from section 408 to the extent that such section might prohibit the transactions without prior Board approval.

1/ The rights offering may be in the form of (1) subordinated debentures convertible into common stock; (2) subordinated debentures with detachable common stock purchase warrants; (3) common stock; or (4) a combination thereof.

2/ This guarantee might require Toolco to subscribe to 120% of the offering.

3/ 6 CAB 153, 12 CAB 192, Order E-11432 dated June 11, 1957.

ACCORDINGLY, IT IS ORDERED:

1. That the restrictions imposed on transactions between Toolco and TWA by Order 3219, as modified, are further modified to permit TWA to consummate the transactions described in the aforesaid motions;

2. That TWA be and it hereby is exempted pursuant to section 416 from the requirements of section 408 to the extent necessary to enable it to purchase the instant aircraft and equipment from Toolco, a person engaged in a phase of aeronautics;

3. That the decisions of the Board, as expressed in ordering paragraphs 1 and 2, shall not be deemed a determination for rate-making purposes of the reasonableness of any of the transactions specified herein;

4. That the motions, except to the extent granted herein, are denied; and

5. That this order may be amended or revoked at any time in the discretion of the Board without hearing.

By the Civil Aeronautics Board:

/s/ Robert C. Lester

(SEAL)

Robert C. Lester
Secretary

(1)

BEFORE THE

CIVIL AERONAUTICS BOARD

Jul 1 4 05 PM '60

In the matter of the application of

HUGHES TOOL COMPANY

for approval of the acquisition of control of Trans World Airlines, Inc.

Docket No. 1182

MOTION OF TRANS WORLD AIRLINES, INC.
FOR APPROVAL OF TRANSACTIONS WITH
HUGHES TOOL COMPANY

Communications with respect to this document should be sent to:

THOMAS K. TAYLOR
Vice President
Trans World Airlines, Inc.
1000 - 16th Street, N.W.
Washington 6, D. C.

and

CHADBOURNE, PARKE, WHITESIDE & WOLFF
Attorneys for Trans World Airlines, Inc.
25 Broadway
New York 4, N. Y.

July 1, 1960

BEFORE THE

CIVIL AERONAUTICS BOARD

In the matter of the application of	:	
HUGHES TOOL COMPANY	:	
for approval of the acquisition of control of Trans World Airlines, Inc.	:	Docket No. 1182

MOTION OF TRANS WORLD AIRLINES, INC.
FOR APPROVAL OF TRANSACTIONS WITH
HUGHES TOOL COMPANY

1. By motion in this proceeding dated May 6, 1960 TRANS WORLD AIRLINES, INC. (herein referred to as "TWA") advised the Board with respect to definitive financing plans for the TWA jet aircraft program under which it was proposed that TWA would acquire title to 15 Boeing Model 707-131 jet aircraft, 10 Boeing Model 707-331 jet aircraft, 20 Convair Model 880 jet aircraft and the spare parts, equipment and provisioning therefor previously acquired or ordered by Hughes Tool Company (herein referred to as "Hughes"). The proposed transactions between TWA and Hughes relating to such financing program, outlined in such motion of May 6, 1960 and in TWA's motions in this proceeding of March 30, 1960 and April 14, 1960, were approved by Board Order No. E-15430, dated June 23, 1960.

2. It is now proposed that the foregoing program be supplemented so that TWA will acquire title to 2 additional Boeing Model 707-331 aircraft,

making a total of 12 such aircraft that TWA will receive, and so that TWA will also acquire title to 5 additional spare engines for Boeing Model 707-331 aircraft. Such acquisition by TWA would be covered by the amendment to the agreement of May 9, 1960 effected by the agreement attached hereto as Exhibit A. The acquisition of the additional aircraft and engines would be on the same terms and conditions as the transactions set forth in TWA's motions in this proceeding referred to in paragraph 1 hereof and approved by Board Order No. E-15430, dated June 23, 1960. To finance the acquisition of these additional aircraft and engines the senior debt to be sold to banks and institutional investors, referred to in paragraph 6 of TWA's motion of May 6, 1960, would be increased from $160,000,000 to $168,800,000.

3. In implementation of the prior agreements between TWA and Hughes referred to in the motion of May 6, 1960 and approved by Order No. E-15430, and as a part of the long-term financing program outlined in such motion, TWA proposes to enter into various agreements with lending banks, insurance companies, indenture trustees and others, including Hughes. Among these agreements are the following:

(a) A proposed agreement (in substantially the form attached hereto as Exhibit B) between TWA, Hughes and the holders of the senior debt referred to in paragraph 6 of TWA's motion dated May 6, 1960, defining in more detail the terms of the subordinated obligations to be issued by TWA to Hughes and Hughes' obligation to advance TWA up to $50,000,000 on a subordinated basis, if needed, providing for the issuance by TWA of interim subordinated notes in payment of amounts due by TWA to Hughes pending the completion of the public offering of TWA's subordinated

debentures and outlining some of the terms of the public offering.

(b) A proposed Final Accounting and Debenture Purchase Agreement between TWA and Hughes (in substantially the form attached hereto as Exhibit C), which implements the transactions between the two companies outlined in the motion of May 6, 1960, as supplemented by the agreement referred to in paragraph 2 hereof, sets forth the method by which TWA's obligations to Hughes will be settled, and establishes certain of the terms of, and a procedure for determining other terms of, the public offering of TWA's subordinated debentures within the conditions specified in the agreement referred to in paragraph 3(a) hereof.

(c) A proposed Three Party Agreement between Hughes, TWA and Irving Trust Company, as Notes Agent, representing the holders of TWA's senior debt (substantially in the form attached hereto as Exhibit D), providing that in the event of default by TWA under certain covenants in the indenture securing such borrowing, Hughes would subject to a voting trust agreement all shares of the common stock of TWA held by Hughes.

4. Save for the desirable supplementing of TWA's Boeing Model 707-331 jet aircraft fleet by the addition of 2 more aircraft and spare engines described in paragraph 2 hereof, the proposed agreements referred to above do not change the substance of the transactions between TWA and Hughes outlined in TWA's motions of March 30, 1960, April 14, 1960

and May 6, 1960, approved by Order No. E-15430. To the extent that the consummation of the transactions outlined herein requires further approval from the Board in this proceeding, the issuance by the Board of an appropriate order, to enable TWA to conclude its long-term financing program, would be in the public interest.

WHEREFORE, Trans World Airlines, Inc. respectfully prays that the Board enter an order herein modifying its Order Serial No. 3210, as amended, so that its order will permit TWA to enter into such additional transactions with Hughes Tool Company as are described above and to consummate its proposed long-term financing program.

Respectfully submitted,

Senior Vice President-Finance
and Treasurer

July 1, 1960

Exhibit A

HUGHES TOOL COMPANY
GULF BUILDING
HOUSTON 2, TEXAS

June 30, 1960

Trans World Airlines, Inc.
380 Madison Avenue
New York 17, N. Y.

Attention: Mr. A. V. Leslie

Re: Purchase of Boeing Model 707-131 and 707-331 Jet Aircraft and Convair Model 880 Jet Aircraft

Dear Sirs:

This will confirm our understanding that the agreement between us, dated May 9, 1960, on this same subject, is amended in the following respects:

1. The date "June 30, 1960" in paragraph 5 thereof is changed to "July 31, 1960".

2. The first sentence of paragraph 2 thereof is changed to read as follows:

"Hughes hereby assigns to TWA the rights of Hughes to acquire from Boeing Airplane Company four Boeing Model 707-331 jet aircraft (Manufacturer's Serial Nos. 17685, 17687, 17688 and 17690) manufactured by Boeing Airplane Company under the 331 Purchase Agreement."

3. Exhibit 3 thereof is amended by changing the reference to "10 Pratt & Whitney aircraft engines Model JT4A" to "15 Pratt & Whitney aircraft engines Model JT4A".

Pending the issuance of any order by the Civil Aeronautics Board that may be required with respect to the transactions contemplated hereby no sums shall be payable by TWA to Hughes with respect to the 2 additional Boeing Model 707-331 jet aircraft and the spare engines therefor added to the agreement of May 9, 1960 by this amendment thereof. This amendment will not become effective until any necessary consents have been obtained from the holders of obligations issued by TWA under its outstanding indentures, chattel mortgages and loan agreements.

If the foregoing is acceptable to TWA please so acknowledge by executing and returning the enclosed copy of this letter.

Very truly yours,
HUGHES TOOL COMPANY

By

Accepted as of the 30th day
of June 1960
TRANS WORLD AIRLINES, INC.

DX322 id., Item 11(e), page 35
(CAB Orders & Documents)

Exhibit D

6718—June 30, 1960—N—12-14-30 Ad Press

Agreement

AMONG

HUGHES TOOL COMPANY

AND

TRANS WORLD AIRLINES, INC.

AND

IRVING TRUST COMPANY, as Notes Agent

1960 THREE-PARTY AGREEMENT

Dated July , 1960

AGREEMENT dated July , 1960, among HUGHES TOOL COMPANY, a Delaware corporation (hereinafter called "*Hughes*"), party of the first part, TRANS WORLD AIRLINES, INC., a Delaware corporation (hereinafter called "*TWA*"), party of the second part, and IRVING TRUST COMPANY, a New York trust company (hereinafter called the "*Notes Agent*"), party of the third part.

WITNESSETH:

WHEREAS Hughes is the owner of not less than 5,221,301 shares of Common Stock, par value $5 per share, of TWA, comprising approximately 78% of the outstanding 6,674,155 shares of Common Stock of TWA; and

WHEREAS TWA has executed and delivered to Chemical Bank New York Trust Company, as Trustee (hereinafter called the "*Trustee*"), an Indenture of Mortgage dated as of July 1, 1960 (hereinafter called the "*Note Indenture*"), which provides for (a) the delivery thereunder of $74,000,000 principal amount of 6% Equipment Mortgage Serial Notes of TWA, maturing serially on June 30, 1961, and quarterly thereafter through June 30, 1968 (hereinafter called "*Serial Notes*"), and (b) the issuance thereunder of $91,800,000 principal amount of 6½% Equipment Mortgage Sinking Fund Notes of TWA, due June 30, 1972 (hereinafter called "*Sinking Fund Notes*"), all said Serial Notes and Sinking Fund Notes being hereinafter collectively called the "*Notes*" (which term, as used herein, shall also mean the Serial Notes or the Sinking Fund Notes, as the context or circumstances may require); and

WHEREAS TWA has entered into an agreement dated as of July , 1960 (hereinafter called the "*July 1960 Loan Agreement*"), with Irving Trust Company and the other Banks named therein (hereinafter collectively called the "*Banks*"), pursuant to which the Banks have agreed to lend an aggregate of $74,000,000 to TWA, such loans to be evidenced by an equal aggregate principal amount of Serial Notes; and

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WHEREAS TWA has entered into agreements dated July , 1960 (hereinafter called the *"Note Purchase Agreements"*), with The Equitable Life Assurance Society of the United States and Metropolitan Life Insurance Company (hereinafter together called the *"Insurance Companies"*), pursuant to which the Insurance Companies have agreed to purchase from TWA an aggregate of $94,800,000 principal amount of Sinking Fund Notes; and

WHEREAS it is a condition precedent to the obligation of the Banks to advance any monies to TWA pursuant to the July 1960 Loan Agreement, and it is a condition precedent to the obligations of the Insurance Companies to purchase any Sinking Fund Notes from TWA pursuant to the Note Purchase Agreements, that this Agreement shall have been duly executed and delivered by the parties hereto; and

WHEREAS the Notes Agent has been duly authorized by the Banks and the Insurance Companies to enter into this Agreement; and

WHEREAS, for the purposes of this Agreement, (a) the term *"a majority of the Noteholders"* shall mean the holders of more than 50% in principal amount of all the Notes at the time outstanding (excluding any Notes held by Hughes or by any Hughes Affiliate), (b) the term *"TWA Stock"* shall mean the Common Stock of TWA, as the same shall be constituted from time to time, and shall also mean and include, in the event TWA shall merge into or be consolidated with another corporation, or shall sell all or any substantial portion of its assets to another corporation in exchange for voting securities of such other corporation, all voting securities of such other corporation which shall be issued or become issuable in respect of the Common Stock of TWA in connection with or as a result of any such merger, consolidation or sale of assets, and (c) the term *"Hughes Affiliate"* shall mean any person, firm or corporation (except TWA and its subsidiaries) controlling, controlled by or under common control with Hughes Tool Company.

NOW, THEREFORE, in consideration of the premises, the parties hereto agree with each other as hereinbelow set forth:

§ 1. In the event that

(a) default shall be made in the performance or observance of any covenant, agreement or condition contained in § 4.16, § 4.18, § 4.21, § 4.22, § 4.24, § 4.26, § 4.30, § 4.31, § 4.32, § 9.1 or § 10.1 of the Note Indenture; or default shall be made in the performance or observance of any covenant, agreement or condition contained in § 4.15 of the Note Indenture and such default shall not be remedied within a period of 30 days after the happening of such default; or any of the Events of Default described in § 11.1H or § 11.1I of the Note Indenture shall have happened; or

(b) TWA shall at any time be in default in the payment of interest on any of the Notes and such default shall not be remedied within a period of 10 days, or TWA shall at any time be in default in the payment of the principal of or premium on any of the Notes when and as the same shall become due and payable, whether at maturity, by declaration, by call for redemption or otherwise;

then, and in any such event, Hughes hereby agrees that it will, within 10 days after the service on it of a request therefor by the Notes Agent, cause to be subjected to a Voting Trust Agreement in the form attached hereto as Schedule A (hereinafter called the *"Voting Trust Agreement"*), all shares of TWA Stock owned by Hughes at the date hereof and all shares of TWA Stock hereafter acquired by Hughes or by any Hughes Affiliate in any manner (including, without limitation, any acquisition through the exercise of conversion rights contained in any convertible securities of TWA or through the exercise of Warrants or rights to subscribe to TWA Stock or otherwise) prior to the execution and delivery of the Voting Trust Agreement (except any such shares theretofore sold by Hughes or by any Hughes Affiliate on any national securities exchange or in connection with a bona fide public offering with respect to which a registration statement became effective under the Securities Act of 1933, as amended, and not thereafter acquired or reacquired by Hughes or by any Hughes Affiliate). TWA and Hughes hereby agree that they will take all action requisite on their part to cause the Voting Trust Agreement to be executed and delivered by TWA and Hughes, respectively, and by the Voting

Trustee to be nominated by Hughes as hereinafter provided. The Voting Trustees under the Voting Trust Agreement shall consist of three persons, two to be nominated by the Notes Agent and one to be nominated by Hughes, *provided, however*, that in the event that Hughes shall fail to designate such nominee within the aforesaid period of 10 days after the service on it of such request by the Notes Agent, or in the event such nominee shall fail to execute the Voting Trust Agreement within said 10 day period, the third Voting Trustee shall be a person designated by the two Voting Trustees nominated by the Notes Agent. Any such request by the Notes Agent shall be in writing, shall specify the names of the two Voting Trustees nominated by the Notes Agent, and shall contain a certification that the Notes Agent has been authorized to serve such request and to designate such two Voting Trustees by a majority of the Noteholders, and, concurrently with the service of such request upon Hughes, a copy thereof shall be served upon TWA. In order to subject said shares of TWA Stock to the Voting Trust Agreement, Hughes will transfer and assign or cause to be transferred and assigned said shares to said Voting Trustees and will deposit or cause to be deposited with the Agent of the Voting Trustees named in the Voting Trust Agreement the certificates for said shares, all of which certificates, if not registered in the names of the Voting Trustees, shall be duly endorsed in blank for transfer or accompanied by proper instruments of assignment and transfer thereof duly executed in blank, in either case with signatures guaranteed and with all requisite stock transfer tax stamps thereto affixed. Hughes further agrees that if, at any time or from time to time after the execution and delivery of the Voting Trust Agreement, Hughes or any Hughes Affiliate shall acquire additional shares of TWA Stock in any manner (including, without limitation, any acquisition through the exercise of the conversion rights contained in any convertible securities of TWA or through the exercise of warrants or rights to subscribe to TWA Stock or otherwise), it will forthwith upon the acquisition of any such additional shares cause the same to be subjected to the Voting Trust Agreement in the same manner as hereinabove set forth with respect to the shares of TWA Stock owned

by Hughes at the time of the execution and delivery of the Voting Trust Agreement. The Voting Trust Agreement shall be dated on or as of such date, not earlier than the date of the aforesaid request therefor by the Notes Agent and not later than the date of execution thereof, as the Notes Agent shall determine, and shall be expressed to terminate on June 30, 1980, or ten years after the date of the Voting Trust Agreement, whichever shall be earlier. TWA and Hughes agree that, in the event that the Voting Trust Agreement would terminate ten years after the date thereof, as contemplated by the foregoing sentence and by clause (a) of Article Thirteen of the form of Voting Trust Agreement attached hereto as Schedule A, they will, at the written request of the Notes Agent, take all action requisite on their part to extend the duration of the Voting Trust Agreement for such additional period (not exceeding, however, the maximum period then permitted by the laws of the State of Delaware) as shall be specified in such request of the Notes Agent.

§ 2. Hughes agrees that as regards such shares of TWA Stock owned by it at the date hereof as are presently pledged, it will concurrently with the execution hereof obtain (a) the consent of such pledgee to the execution and delivery of this Agreement by Hughes and to the performance by Hughes of its undertakings and agreements hereunder, and (b) the agreement of such pledgee to conform to the requirements of the next succeeding sentence of this § 2, with respect to the TWA Stock pledged with such pledgee, subject, however, to the proviso contained in the second next succeeding sentence of this § 2. Hughes further agrees that in the event that it or any Hughes Affiliate shall, subsequent to the date hereof and prior to the execution and delivery of the Voting Trust Agreement, pledge or otherwise transfer, by sale or in any other manner, any shares of TWA Stock at any time owned by Hughes or by such Hughes Affiliate (except any shares sold by Hughes or by such Hughes Affiliate on any national securities exchange or in connection with a bona fide public offering with respect to which a registration statement became effective under the Securities Act of 1933, as amended, and not thereafter acquired or reacquired by

(1)

Order No. E-15561

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 21st day of July, 1960

In the matter of application of	:
HUGHES TOOL COMPANY	:
for approval under section 408 of the Federal Aviation Act of 1958, as amended, of the acquisition of control of TRANS WORLD AIRLINES, INC.	: Docket 11189

ORDER

By Order E-15430, issued June 23, 1960, the Board authorized Trans World Airlines, Inc. (TWA) to consummate certain transactions with Hughes Tool Company (Toolco) providing for the acquisition of 45 jet aircraft (25 Boeing 707's and 20 Convair 880's) and related equipment. 1/ TWA's long term financing program for the acquisition of the aircraft was also before the Board for consideration.

By motion filed with the Board July 1, 1960, TWA requests approval of the acquisition of title to two more Boeing 707 aircraft and five additional jet engines from Toolco. To finance this acquisition, TWA's senior debt will be increased from $160,000,000 to $168,800,000 by the sale of an additional $8,800,000 of its securities to banks and institutional investors.

The motion also presents proposed agreements between TWA and Toolco and between TWA, Toolco and the lending institutions which are intended to implement the transactions approved by the Board in the aforementioned Order E-15430. In addition to the terms and conditions previously reported to the Board, the agreements provide for an increase in TWA's senior debt from $150,000,000 to $168,800,000 of which $74,200,000 will be obtained from banks at 6% interest and $94,600,000 will be obtained from the insurance companies at 6½% interest. 2/ The subordinate or junior debt remains at $100,000,000 which will be obtained by an offering of debentures bearing common stock purchase warrants to the holders of TWA's common stock. Toolco will make up the difference between the amount subscribed by the other

1/ The authorization granted was in the nature of (1) modification of Order E-9210 of October 17, 1958, which limited the amount of transactions between TWA and Toolco and (2) an exemption from section 408.

2/ The interest rate of 5½% noted in Order E-15430 applies only to payment

DX322 id., Item 11(...
(CAB Orders & Documents)

stockholders and $100,000,000. These debentures will bear an interest rate of 6¼%. The revolving credit arrangement with Toolco, the purpose of which is to maintain TWA's net working capital at a minimum of $10,000,000 remains at $50,000,000 which, as of the date of purchase of the last jet aircraft in the program, will be converted into a note for the balance then due. Such note shall likewise bear interest at the rate of 6¼%.

A voting trust agreement between TWA, Toolco and Irving Trust Company as Notes Agent, for the holders of TWA's senior debt provides that, in the event of default by TWA, Toolco's holdings of TWA's common stock shall be placed in a voting trust which shall be administered by a committee composed of two representatives of the holders of the senior debt and one representative of Toolco.

TWA submits that, except for the addition of the two jet aircraft and five engines, the agreements leading to the conclusion of its long term financing program do not change the substance of transactions approved by the Board in Order E-15430.

The Board finds that the acquisition of two additional jet aircraft and necessary engines and the implementation agreements covering the overall financing of TWA's jet aircraft program do not violate the intent of the original restrictions imposed on transactions between TWA and Toolco in Order 3210, as modified by Order E-15430 issued June 23, 1960. Accordingly, a further modification of that Order is just and reasonable and in the public interest. While the transaction may be subject to section 408 in that it may represent the acquisition by TWA of an additional substantial part of the properties of Toolco, it does not change the substance of the transactions approved by the Board in Order E-15430 which granted an exemption under section 416 from the requirement of section 408 to enable TWA to purchase aircraft and equipment from Toolco, a person engaged in a phase of aeronautics. Under these circumstances, the Board finds that enforcement of section 408 would be an undue burden on TWA by virtue of unusual circumstances affecting its operations and would not be in the public interest. Therefore, the Board exempts TWA from the provisions of section 408 insofar as that section might prohibit the transactions without prior Board approval.

ACCORDINGLY, IT IS ORDERED:

1. That the restrictions imposed on transactions between Toolco and TWA by Order 3210, as modified by Order E-15430 issued June 23, 1960, are further modified herein to permit TWA to consummate the transactions described in the aforesaid motions;

2. That TWA be, and it hereby is exempted pursuant to section 416 from the requirement of section 408 to the extent necessary to enable it to purchase two additional jet aircraft and five engines from Toolco, a person engaged in a phase of aeronautics;

3. That this order shall not be deemed a determination for rate-making purposes of the reasonableness of any of the transactions specified herein; and

4. That this order may be amended or revoked at any time in the discretion of the Board without hearing.

By the Civil Aeronautics Board:

/s/ Robert C. Lester

Robert C. Lester
Secretary

(SEAL)

DX322 id., Item 11g, p.
(CAB Orders & Documents)

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(1)

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11g

BEFORE THE

CIVIL AERONAUTICS BOARD

In the matter of the application of	
HUGHES TOOL COMPANY	
for approval of the acquisition of control of Trans World Airlines, Inc.	Docket No. 1182

MOTION OF TRANS WORLD AIRLINES, INC.
FOR APPROVAL OF TRANSACTIONS
IF SUCH APPROVAL IS NECESSARY

Communications with respect to this document should be sent to:

THOMAS K. TAYLOR
Vice President
Trans World Airlines, Inc.
1000 - 16th Street, N.W.
Washington 6, D. C.

and

CHADBOURNE, PARKE, WHITESIDE & WOLFF
Attorneys for Trans World Airlines, Inc.
25 Broadway
New York 4, N. Y.

December 22, 1960

BEFORE THE

CIVIL AERONAUTICS BOARD

In the matter of the application of	:	
HUGHES TOOL COMPANY	:	
for approval of the acquisition of control of Trans World Airlines, Inc.	:	Docket No. 1182
	:	

MOTION OF TRANS WORLD AIRLINES, INC.
FOR APPROVAL OF TRANSACTIONS
IF SUCH APPROVAL IS NECESSARY

TRANS WORLD AIRLINES, INC. (herein referred to as "TWA") respectfully requests the Board to enter an order herein amending its Order No. E-15561, issued July 21, 1960, modifying the restrictions imposed on transactions between TWA and HUGHES TOOL COMPANY (herein referred to as "Hughes") if any such amendment is necessary in order to permit the consummation of the proposed financing for TWA, and to grant such other approvals under Sections 408 and 409 of the Act (or exemptions therefrom) as the Board may consider necessary in connection therewith.

1. TWA's motions dated May 6, 1960 and July 1, 1960 outlined proposed temporary and definitive financing arrangements to be entered into by TWA, including the sale of secured obligations to banks and institutional investors, the sale of junior securities to stockholders, the issuance of subordinated obligations to Hughes and other proposed transactions between TWA and Hughes connected with TWA's acquisition of jet equipment.

2. The proposed transactions between TWA and Hughes relating to TWA's acquisition of jet equipment and the financing thereof were approved by Orders of the Board

DX322 id., Item 11g, p
(CAB Orders & Documents)

dated June 23, 1960 and July 21, 1960 (Nos. 15430 and 15561).

3. Pursuant to the agreement dated May 9, 1960 between TWA and Hughes, the form of which was attached as Exhibit A to TWA's motion dated May 6, 1960, providing for the acquisition by TWA from Hughes and from the manufacturers of a fleet of Boeing Model 707-131, Boeing Model 707-331 and Convair Model 880 jet aircraft, spare engines, spare parts, equipment and provisioning therefor (subject to the completion of either temporary or definitive financing arrangements completely satisfactory to TWA), and pursuant to agreements between TWA and Hughes dated April 1, 1960 and April 14, 1960 (covering transactions approved by Order No. E-15430), TWA has acquired 2 Boeing Model 707-131 aircraft, 8 Boeing Model 707-331 aircraft, 1 Convair Model 880 aircraft and spare engines, spare parts, equipment and provisioning for Boeing Model 707-131, Boeing Model 707-331 and Convair Model 880 aircraft. Such acquisitions have been facilitated through temporary debt financing of TWA, guaranteed by Hughes, and the issuance of subordinated obligations by TWA to Hughes, in the manner outlined in TWA's motion of May 6, 1960.

4. The definitive financing outlined in TWA's motions of May 6, 1960 and July 1, 1960 has not yet been accomplished. It is now proposed that such financing be accomplished and that the first closing under this financing be held on December 29, 1960. The terms of this financing and of the transactions between TWA and Hughes relating thereto are to be substantially the same as those set forth in TWA's motions of May 6, 1960 and July 1, 1960, approved by orders of the Board dated June 23, 1960 and July 21, 1960. Among the changes, which it is believed do not affect the substance of the transaction, are the deposit by Hughes

at the time of the first closing under the definitive financing arrangements, of Hughes' TWA stock, in the voting trust (which was previously to be established only under certain conditions) and the granting to Hughes by the purchasers of TWA's secured obligations of options to acquire such obligations from the holders thereof under certain conditions.

Attached hereto are copies of the following proposed agreements reflecting changes in the drafts of documents relating to TWA's long-term financing program submitted to the Board with TWA's motion of July 1, 1960:

(a) An agreement (in substantially the form attached hereto as Exhibit A) between TWA, Hughes and the prospective holders of the senior debt of TWA. This agreement, among other things, reflects a reduction in the total amount of senior debt (Notes) to be issued by TWA from $168,800,000 to $165,000,000, and changes in the maturity dates of the Notes, caused by the postponement of the financing and the resulting increased depreciation on the flight equipment to be mortgaged to secure the Notes. This proposed agreement is a revision of the agreement attached as Exhibit B to TWA's motion of July 1, 1960.

(b) A Final Accounting and Debenture Purchase Agreement between TWA and Hughes (in substantially the form attached hereto as Exhibit B). This agreement, among other things, redesignates the particular 20 Convair 880 airplanes to be acquired by TWA, without changing the total number of aircraft to be so acquired. This proposed agreement is a revision of the agreement attached as Exhibit C to TWA's motion of July 1, 1960.

(c) An agreement between TWA, Hughes and the Voting Trustees described therein (substantially in the form attached hereto as Exhibit C), providing for the deposit by Hughes in a voting trust of all shares of common stock of TWA held by Hughes. This agreement is a revision of the Voting Trust Agreement attached as Schedule A to the proposed Three Party Agreement which was Exhibit D to TWA's motion of July 1, 1960, and reflects the present proposal that such a voting trust be created prior to the consummation of the long-term financing.

(d) An Option Agreement between Irving Trust Company, as Bank Agent, The Equitable Life Assurance Society of the United States, Metropolitan Life Insurance Company and Hughes (in substantially the form attached hereto as Exhibit D), pursuant to which Hughes would be given options, under certain conditions, to purchase the Notes to be issued under the financing program from the holders thereof (herein called the "Option Agreement").

5. The proposed agreements referred to above do not change the substance of the transactions between TWA and Hughes outlined in TWA's motions of May 6, 1960 and July 1, 1960, approved by Order No. E-15430. The consummation of this long-term financing program is in the best interests of TWA and the public.

6. While TWA believes no further approval by the Board is necessary to enable it to consummate its proposed financing, it respectfully requests any such approval as the Board deems required.

7. Of the three Voting Trustees under the Voting Trust Agreement referred to in paragraph 4(c) hereof, Raymond M. Holliday has been appointed a Voting Trustee by Hughes. Mr. Holliday is a director of TWA and a director and officer of Hughes. Such relationships and the interlocking relationships resulting from the holding by Mr. Holliday of any other directorships and offices within the system of affiliated and subsidiary companies composed of Hughes and TWA were approved by the Board under Section 409 of the Act by Order No. E-14251, dated July 22, 1959. TWA believes no further approval by the Board is necessary under Section 409 to permit Mr. Holliday to hold the position of one of such Voting Trustees.

The other two Voting Trustees are to be designated by the Notes Agent, as agent for the holders of the Notes to be issued by TWA in connection with the proposed financing.

TWA believes that no Section 409 approval is necessary with respect to the Voting Trustees, since a Voting Trustee is not an officer or director and Section 409 applies only to officers and directors of air carriers.

WHEREFORE, TRANS WORLD AIRLINES, INC. respectfully prays that the Board either (a) enter an order herein amending its Order No. E-15561 and modifying its Order Serial No. 3210, as amended, so that such order will permit the consummation of the proposed financing for TWA, if the Board finds that any such further order is required, and enter an order granting such other approvals under Sections 408 and 409 of the Act (or exemptions therefrom) as the Board considers necessary, or (b) enter an order herein determining that no such further orders are required; and grant it such other and further relief as may be appropriate.

Respectfully submitted,

Thomas K. Taylor

Thomas K. Taylor
Vice President

December 22, 1960

119

Exhibit C

Agreement

AMONG

TRANS WORLD AIRLINES, INC.

AND

RAYMOND M. HOLLIDAY, and , as VOTING TRUSTEES

AND

HUGHES TOOL COMPANY

Voting Trust Agreement

Relating to Common Stock of
Trans World Airlines, Inc.

FARMERS BANK OF THE STATE OF DELAWARE
AGENT FOR THE VOTING TRUSTEES

Dated as of December 15, 1960

AGREEMENT dated as of December 15, 1960, among TRANS WORLD AIRLINES, INC., a Delaware corporation (hereinafter called the *"Corporation"*), party of the first part, and RAYMOND M. HOLLIDAY, and , the survivors or survivor of them and their respective successors appointed as in this Agreement provided, as Voting Trustees (hereinafter called the *"Voting Trustees"*), parties of the second part, and HUGHES TOOL COMPANY, a Delaware corporation (hereinafter called *"Hughes Tool"*), party of the third part.

WITNESSETH:

WHEREAS, the Corporation is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware with an authorized capital stock consisting of 15,000,000 shares of Common Stock, par value $5 per share (hereinafter called *"TWA Stock"*), of which 6,674,155 shares are presently issued and outstanding; and

WHEREAS, at the date of this Agreement, Hughes Tool is the owner of 5,221,301 shares of TWA Stock, comprising approximately 78% of the outstanding shares of TWA Stock, and no Hughes Affiliate (which term, as used herein, shall mean any person, firm or corporation, except the Corporation and its subsidiaries, controlling, controlled by or under common control with Hughes Tool) owns any TWA Stock; and

WHEREAS, the Corporation has executed and delivered to Chemical Bank New York Trust Company, as Trustee (hereinafter called the *"Trustee"*) an Indenture of Mortgage dated as of December 1, 1960 (hereinafter called the *"Note Indenture"*), which provides for (a) the delivery thereunder of $72,200,000 principal amount of 6% Equipment Mortgage Serial Notes of the Corporation, maturing serially on December 31, 1961, and quarterly thereafter through December 31, 1964 (hereinafter called *"Serial Notes"*), and (b) the issuance thereunder of $92,800,000 principal amount of 6½% Equipment Mortgage

AGREEMENT dated as of December 15, 1960, among TRANS WORLD AIRLINES, INC., a Delaware corporation (hereinafter called the "*Corporation*"), party of the first part, and RAYMOND M. HOLLIDAY, and , the survivors or survivor of them and their respective successors appointed as in this Agreement provided, as Voting Trustees (hereinafter called the "*Voting Trustees*"), parties of the second part, and HUGHES TOOL COMPANY, a Delaware corporation (hereinafter called "*Hughes Tool*"), party of the third part.

WITNESSETH:

WHEREAS, the Corporation is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware with an authorized capital stock consisting of 15,000,000 shares of Common Stock, par value $5 per share (hereinafter called "*TWA Stock*"), of which 6,674,155 shares are presently issued and outstanding; and

WHEREAS, at the date of this Agreement, Hughes Tool is the owner of 5,221,301 shares of TWA Stock, comprising approximately 78% of the outstanding shares of TWA Stock, and no Hughes Affiliate (which term, as used herein, shall mean any person, firm or corporation, except the Corporation and its subsidiaries, controlling, controlled by or under common control with Hughes Tool) owns any TWA Stock; and

WHEREAS, the Corporation has executed and delivered to Chemical Bank New York Trust Company, as Trustee (hereinafter called the "*Trustee*") an Indenture of Mortgage dated as of December 1, 1960 (hereinafter called the "*Note Indenture*"), which provides for (a) the delivery thereunder of $72,200,000 principal amount of 6% Equipment Mortgage Serial Notes of the Corporation, maturing serially on December 31, 1961, and quarterly thereafter through December 31, 1964 (hereinafter called "*Serial Notes*"), and (b) the issuance thereunder of $92,800,000 principal amount of 6½% Equipment Mortgage

Sinking Fund Notes of the Corporation, due December 31, 1972 (hereinafter called *"Sinking Fund Notes"*), all said Serial Notes and Sinking Fund Notes being hereinafter collectively called the *"Notes"*; and

WHEREAS, the Corporation has entered into an agreement dated as of December 1, 1960 (hereinafter called the *"December 1960 Loan Agreement"*), with Irving Trust Company and the other Banks named therein (hereinafter collectively called the *"Banks"*), pursuant to which the Banks have agreed to lend an aggregate of $72,200,000 to the Corporation, such loans to be evidenced by an equal aggregate principal amount of Serial Notes; and

WHEREAS, the Corporation has entered into agreements dated as of December 1, 1960 (hereinafter called the *"Note Purchase Agreements"*), with The Equitable Life Assurance Society of the United States and Metropolitan Life Insurance Company (hereinafter together called the *"Insurance Companies"*), pursuant to which the Insurance Companies have agreed to purchase from the Corporation an aggregate of $92,800,000 principal amount of Sinking Fund Notes; and

WHEREAS, it is a condition precedent to the obligation of the Banks to advance any moneys to the Corporation pursuant to the December 1960 Loan Agreement, and it is a condition precedent to the obligations of the Insurance Companies to purchase any Sinking Fund Notes from the Corporation pursuant to the Note Purchase Agreements, that this Agreement shall have been duly executed and delivered by the parties hereto; and

WHEREAS, under and by virtue of the provisions of an agreement dated as of December 1, 1960 (hereinafter called the *"Noteholders' Agreement"*), between Irving Trust Company, as agent for the Banks, the Insurance Companies, and Irving Trust Company, as agent for the holders of Notes (hereinafter called the *"Notes Agent"*, which term, as used herein, shall include any successor to such Notes Agent),

the Notes Agent has designated and appointed and as Voting Trustees under this Agreement; and

WHEREAS Hughes Tool has designated and appointed Raymond M. Holliday as a Voting Trustee under this Agreement; and

WHEREAS, each of the Voting Trustees under this Agreement is a citizen of the United States;

NOW, THEREFORE, a voting trust in respect of the TWA Stock is hereby created and established subject to the following terms and conditions, to all and every one of which the parties hereto expressly assent and agree:

FIRST: Hughes Tool agrees that concurrently with the execution and delivery of this Agreement it will transfer and assign, or cause to be transferred and assigned, to the Voting Trustees 5,221,301 shares of TWA Stock and will deposit or cause to be deposited hereunder with the hereinbelow mentioned Agent (hereinafter called the "*Agent*") of the Voting Trustees the certificates for such shares, all of which certificates, if not registered in the name of the Voting Trustees, shall be duly endorsed in blank for transfer or accompanied by proper instruments of assignment and transfer thereof duly executed in blank, in either case with signatures guaranteed and with all requisite stock transfer tax stamps thereto affixed.

SECOND: Hughes Tool agrees that if it or any Hughes Affiliate shall hereafter acquire in any manner (including, without limitation, any acquisition through the exercise of the conversion rights contained in any convertible securities of the Corporation or through the exercise of warrants or rights to subscribe to TWA Stock or in connection with any merger, consolidation or sale of assets of the Corporation or otherwise) any shares of TWA Stock, in addition to those hereinabove mentioned, it will transfer and assign, or cause to be transferred and assigned, to the Voting Trustees such additional shares and will deposit or cause to be deposited hereunder with the Agent the certificates for such additional shares, which certificates, if not registered in the name of the Voting Trustees, shall be duly endorsed in blank for transfer or

accompanied by proper instruments of assignment and transfer thereof duly executed in blank, in either case with signatures guaranteed and with all requisite stock transfer tax stamps thereto affixed. The term *"TWA Stock"*, as used in this Article Second, shall mean the Common Stock of the Corporation, as the same shall be constituted from time to time, and shall also mean and include, in the event the Corporation shall merge into or be consolidated with another corporation, or shall sell all or any substantial portion of its assets to another corporation, all voting securities of such other corporation.

THIRD: The Voting Trustees shall from time to time issue in respect to the TWA Stock so deposited hereunder with the Agent a Voting Trust Certificate or Voting Trust Certificates for a like number of shares of such TWA Stock, in substantially the following form and registered in the name of Hughes Tool or in such name as shall be specified in writing by Hughes Tool:

No. .....

..... Shares

TRANS WORLD AIRLINES, INC.

Voting Trust Certificate For Common Stock

THIS IS TO CERTIFY THAT

will, upon the termination of the Voting Trust Agreement hereinafter mentioned and subject to the provisions thereof, upon surrender hereof and upon payment of any stamp tax or other charge in connection with the delivery, be entitled to receive a certificate or certificates, expressed to be fully paid, for shares of Common Stock, par value $5 per share, of Trans World Airlines, Inc., a Delaware corporation (hereinafter called "the Corporation"), heretofore deposited under said Agreement, and is in the meantime entitled to receive payments equal to the cash dividends, if any, collected by or for the account of the Voting Trustees hereinafter named, or their successors, upon a like number of shares, and to receive Voting Trust Certificates (or scrip therefor) in respect of any dividends payable in Common Stock of the Corporation so collected.

This certificate is issued under and the rights represented hereby are subject to, and each successive holder hereof by ac-

cepting the same consents and agrees to be bound by, all the terms and conditions of a certain Voting Trust Agreement dated as of December 15, 1960 (hereinafter called the "Voting Trust Agreement"), by and between the Corporation, party of the first part, Raymond M. Holliday, and , the survivors or survivor of them and their respective successors appointed as in the Voting Trust Agreement provided, as Voting Trustees, parties of the second part, and Hughes Tool Company, a Delaware corporation, holder of certain shares of Common Stock of the Corporation, party of the third part. An original counterpart of the Voting Trust Agreement is on file at the principal office of the Corporation in the State of Delaware, and is open to the inspection of any holder of stock of the Corporation or of any Voting Trust Certificate daily during business hours.

No voting right passes by or under this certificate or by or under any agreement expressed or implied, it being expressly understood and agreed that, until the actual delivery of a stock certificate or certificates to the registered owner hereof or his assigns, the Voting Trustees at any time acting under the Voting Trust Agreement shall possess and be entitled in their discretion to exercise in respect of any and all shares of stock called for by this certificate, all rights and powers of every name and nature, including the right to vote thereon and to take or omit to take any other action in respect thereof.

The Voting Trust Agreement will remain in effect until December 15, 1970, unless previously terminated or unless the duration of the Voting Trust Agreement is extended as provided therein.

No stock certificate shall be deliverable in respect hereof until December 15, 1970, or until such earlier or later termination of the Voting Trust Agreement, except as otherwise provided in the Voting Trust Agreement in certain specific cases. Any such delivery shall in any event be subject to the provisions of the Voting Trust Agreement.

This certificate is transferable only on the books of the Voting Trustees at the office of their Agent in the City of Wilmington, Delaware, by the registered owner in person or by attorney duly authorized and upon surrender hereof properly endorsed and payment of any taxes imposed by law on such transfer, and otherwise as provided in the Voting Trust Agreement.

Title to this certificate, when duly endorsed, shall to the extent permitted by law be transferable with the same effect as in the case of a negotiable instrument. The Voting Trustees and their Agent may nevertheless deem and treat the registered holder hereof (or, when presented duly endorsed in blank, the bearer hereof) as the absolute owner hereof for all purposes whatsoever, and neither the Voting Trustees nor their Agent shall be affected by any notice to the contrary.

This certificate is not valid for any purpose until signed by the Agent of the Voting Trustees.

IN WITNESS WHEREOF, the Voting Trustees have caused this certificate to be signed by their duly authorized Agent.

Dated

RAYMOND M. HOLLIDAY

.....

.....

Voting Trustees.

By FARMERS BANK OF THE STATE OF DELAWARE,

Agent

By .....

Such certificates shall have a form of assignment on the back thereof in substantially the following form:

FOR VALUE RECEIVED the undersigned hereby sells, assigns and transfers unto the within certificate and all right, title and interest represented thereby, and irrevocably constitutes and appoints attorney to transfer the same on the books of the Voting Trustees with full power of substitution in the premises.

The Voting Trustees may make such changes in the form of such certificates and may add or append such legends or endorsements thereon as may be required by the rules of any stock exchange on which application may be made to list such certificates or to conform to any usage.

FOURTH: As hereinafter in Article Eighth contemplated, the Voting Trustees may also issue scrip representing fractional interests in respect of Voting Trust Certificates, which scrip shall be in bearer form and transferable by delivery and unless otherwise expressly stated shall have only the rights (1) of exchange for full Voting Trust Certificates and (2) to participate, upon the termination of this Agreement, proportionately in the stock or avails thereof held for the benefit of such scrip. Such scrip shall be of such tenor and form, not inconsistent with the provisions hereof, as the Voting Trustees may approve.

FIFTH: The Voting Trust Certificates shall be printed and shall be signed in the name of the Voting Trustees by their Agent appointed for the purpose, and shall be transferable only on the books of the Voting Trustees at the Office of their Agent in the City of Wilmington, Delaware, as provided in the Voting Trust Certificates and in accordance with the rules from time to time established for that purpose by the Voting Trustees.

The transfer books may be closed by the Voting Trustees for a reasonable time prior to the payment or distribution of any dividend, as well as at any other time or for any other purpose when deemed by the Voting Trustees to be desirable. In lieu of the closing of the books against transfers of Voting Trust Certificates as aforesaid, the Voting Trustees may, if they deem it advisable, fix a date as a record date for the determination of the Voting Trust Certificate holders entitled to receive such dividends; and the owners of Voting Trust Certificates of record on such date shall exclusively be entitled to participate in the distribution of such dividends.

SIXTH: In case any Voting Trust Certificate shall become mutilated or become lost, destroyed or stolen, the Voting Trustees may, in their

uncontrolled discretion, issue and deliver in exchange therefor and upon cancellation of the mutilated Voting Trust Certificate, or in lieu of the lost, destroyed or stolen Voting Trust Certificate, a new Voting Trust Certificate representing the same number of shares of stock, upon the production of evidence of such loss, destruction or theft, satisfactory to the Voting Trustees, and upon receipt of indemnity satisfactory to them, and upon compliance also with such other reasonable regulations as they may prescribe.

SEVENTH: The certificates for TWA Stock deposited with the Agent of the Voting Trustees shall, if not registered in the name of the Voting Trustees, be surrendered and cancelled and new certificates therefor issued to the Voting Trustees. In all certificates issued in the name of the Voting Trustees it shall appear that they are issued pursuant to this Agreement, and in the entry of such ownership in the books of the Corporation that fact shall also be noted.

Such TWA Stock shall be held, used and applied by the Voting Trustees and their successors in office for the purposes of and in accordance with this Agreement.

The Voting Trustees may cause any TWA Stock at any time held by them under this Agreement to be transferred to any name or names other than the name of the Voting Trustees herein named, if such transfer becomes necessary by reason of any change in the persons holding the office of Voting Trustees as hereinafter provided or by reason of any statutory requirement relative to directors' qualifying shares.

EIGHTH: Until the delivery as hereinafter provided of stock certificates or the avails thereof in exchange for Voting Trust Certificates, either upon the termination of this Agreement or pursuant to Article Seventeenth or Article Eighteenth, each registered owner of a Voting Trust Certificate shall be entitled from time to time to receive payments equal to cash dividends, if any, collected by or for the account of the Voting Trustees upon the number of shares of TWA Stock called for by such Voting Trust Certificate, and to receive Voting Trust Certificates (or scrip therefor) in respect of any dividends payable in TWA Stock so collected.

Any dividends received by the Voting Trustees other than cash dividends or dividends payable in TWA Stock shall as soon as conveniently possible be transferred to and distributed among the registered owners of Voting Trust Certificates in accordance with their respective interests therein, all at such time and in such manner as the Voting Trustees shall determine is appropriate.

In case the holders of TWA Stock shall be offered the right to subscribe for or purchase any shares of capital stock of the Corporation, the Voting Trustees shall promptly notify the registered owners of Voting Trust Certificates of the terms of such offer. Upon receipt from a registered owner of any Voting Trust Certificate, within the period fixed by the Voting Trustees for such purpose, of a request to subscribe for or purchase shares of such capital stock pursuant to such offer (in an amount not in excess of the ratable amount which might be subscribed for or purchased by a holder of the number of shares of TWA Stock represented by such Voting Trust Certificate), accompanied by funds sufficient to pay the subscription or purchase price thereof, the Voting Trustees will make such subscription or purchase and will pay the subscription or purchase price to the Corporation or other person making such offer for the account of the registered owner of such Voting Trust Certificate, and (a) in the event TWA Stock has been subscribed for or purchased, will issue an additional Voting Trust Certificate (or scrip therefor) in respect of such TWA Stock to the registered owner of such Voting Trust Certificate, upon receipt by the Voting Trustees of such TWA Stock from the Corporation or other person making such offer, or (b) in the event capital stock of the Corporation (other than TWA Stock) has been subscribed for or purchased, will deliver the certificate or certificates for such capital stock to the registered owner of such Voting Trust Certificate, upon receipt by the Voting Trustees of such certificate or certificates from the Corporation or other person making such offer.

In case the holders of TWA Stock shall be offered the right to subscribe for or purchase any other securities of the Corporation (other than shares of capital stock of the Corporation), the Voting Trustees, in their discretion, may either (a) follow the procedure set forth in the

immediately preceding paragraph with respect to rights to subscribe for or purchase shares of capital stock of the Corporation (other than TWA Stock) with respect to the rights to subscribe for or purchase such other securities of the Corporation, or (b) by agreement with the Corporation or other person making such offer, waive their right to receive such subscription or purchase rights in respect of the shares of TWA Stock held by the Voting Trustees, on condition that the Corporation or other person making such offer make such offer directly to the registered owners of the Voting Trust Certificates, at the same time and on the same terms that such offer is made to holders of TWA Stock.

The Voting Trustees shall not be required to make any such subscriptions or purchases on behalf of registered owners of Voting Trust Certificates (or to issue any Voting Trust Certificates in respect of the TWA Stock which shall be the subject of any such subscription or purchase offer) unless provided by such owners with funds sufficient to pay (in addition to the subscription or purchase price thereof, as aforesaid) any taxes or other expenses which may be incurred by the Voting Trustees in connection therewith. The Voting Trustees shall not be required in any event to make any such subscription or purchase in respect of deposited shares of TWA Stock represented by scrip. The Voting Trustees shall have full power and discretion to prescribe and regulate any and all details in connection with any such subscription or purchase rights and the exercise thereof including, without limitation, the power to issue subscription warrants covering such subscription or purchase rights to the registered owners of Voting Trust Certificates and to determine the terms and conditions under which such warrants may be assigned and transferred.

NINTH: The Voting Trustees may adopt their own rules of procedure. The action of a majority of the Voting Trustees for the time being in office taken at a meeting, or taken without a meeting by a writing signed by such a majority, shall, except as otherwise herein specifically provided, constitute the action of the Voting Trustees and have the same effect as though taken by all the Voting Trustees. Any

Voting Trustee may vote or may act in person or by his proxy given to any other Voting Trustee or Voting Trustees or to any other person or persons. Any Voting Trustee may act as a director or officer of the Corporation and may vote for himself as such, and he or any firm of which he is a member or any corporation of which he may be a stockholder, director, officer, agent or employee may purchase, sell, own, hold or deal in Voting Trust Certificates, and may contract with the Corporation or be or become pecuniarily interested in any manner or transaction to which the Corporation or any affiliated company may be a party or in which the Corporation may in any way be concerned, as fully and freely as though he were not a Voting Trustee.

TENTH: The Voting Trustees assume no liability as stockholders, their interest hereunder being that of trustees merely. In voting the TWA Stock represented by the stock certificates held by them hereunder (which they may do either in person or by proxy to any one or more of them or to any other person or persons or to his or their substitute or substitutes), the Voting Trustees will exercise their best judgment to secure the election of suitable directors of the Corporation, to the end that its business and affairs shall be properly managed, and the Voting Trustees will likewise vote and act in other matters in accordance with their best judgment; but they assume no responsibility in respect of such management or in respect of any action taken by them or taken in pursuance of their vote so cast, and no Voting Trustee shall incur any responsibility as trustee or otherwise by reason of any error in law, mistake of judgment, or of any matter or thing done or suffered or omitted to be done under this Agreement except for his own individual malfeasance.

The Voting Trustees assume no responsibility with respect to the validity or genuineness of any of the stock certificates (or other securities received in lieu thereof) deposited with them hereunder or of any notice, request, assignment, power of attorney, acknowledgment or other paper or document, and they shall be entitled to assume that any such stock certificates (or other securities) so deposited with them and any such other paper or document are genuine

and valid and what they purport to be and have been signed by the proper parties or party and that any endorsements and assignments thereof are genuine and legal; and in making delivery of stock certificates (or other securities or cash received in lieu thereof), upon the surrender of Voting Trust Certificates representing the same, the Voting Trustees shall be entitled to deliver any stock certificates (or other securities received in lieu thereof) purporting and believed by the Voting Trustees to be genuine and legal.

The Voting Trustees may retain counsel to advise and represent them in any and all matters arising under this Agreement and may employ and fix the compensation of accountants and other agents who may do or perform any acts in behalf of the Voting Trustees within the scope of their respective agencies which the Voting Trustees are authorized hereunder to do or perform, and the reasonable charges of such counsel and other disbursements and expenses made or incurred by the Voting Trustees in the administration of their trust hereunder, including all taxes or other governmental charges imposed upon the Voting Trustees in connection with the transfer or issuance of any stock or Voting Trust Certificates or subscription warrants or in respect of the ownership of the TWA Stock (or other securities received in lieu thereof) held by them as trustees or in respect of any dividends, distributions or other rights in respect of such TWA Stock (or other securities) and the expenses of printing the Voting Trust Certificates (and scrip therefor) shall be borne and promptly paid by the Corporation, and the Corporation hereby agrees to pay or advance the same forthwith from time to time upon the demand of the Voting Trustees. The Voting Trustees may pay any taxes which they shall lawfully be required to pay out of any funds in their hands or of any dividends or distributions and shall have a lien with interest for any sums so paid upon the respective shares of TWA Stock (or other securities) or dividends or distributions held by the Voting Trustees upon which any such tax may be applicable.

The Voting Trustees shall be entitled to receive and Hughes Tool will pay reasonable compensation for their services hereunder, in such amount as may be agreed upon from time to time between the Voting

Trustees and Hughes Tool. In the event that the Voting Trustees or any of them and Hughes Tool are unable to agree upon the compensation to be paid by Hughes Tool for such services, the controversy shall be settled by arbitration in accordance with the Rules of the American Arbitration Association. All expenses of such arbitration, including, without limitation, the fees and expenses of counsel for the Voting Trustees and all other expenses incurred by the Voting Trustees in connection with such arbitration, shall be borne and promptly paid by Hughes Tool.

Without in any wise limiting the generality of the foregoing, the Corporation and Hughes Tool agree, jointly and severally, to indemnify each of the Voting Trustees against, and hold each of them harmless from, any and all claims, damages or liabilities, joint or several, to which he may become subject, and to reimburse each of the Voting Trustees for any legal or other expenses incurred by him in connection with any actions, suits or proceedings to which he may be made a party or in which he may be otherwise involved (including, without limitation, any proceeding instituted by or before any Federal or State governmental or regulatory authority), in so far as such claims, damages or liabilities or such actions, suits or proceedings arise out of or are based upon the administration by the Voting Trustees of their trust under this Agreement or the exercise of any powers or the performance of any duties by the Voting Trustees as herein provided or contemplated, or otherwise arise by reason of his being or having been a Voting Trustee hereunder, except that no Voting Trustee shall be entitled to any such indemnification or reimbursement in relation to matters as to which he shall be finally adjudged in any such action, suit or proceeding to be liable by reason of his own individual malfeasance.

ELEVENTH: Until the delivery as hereinafter provided of stock certificates or the avails thereof in exchange for Voting Trust Certificates, either upon the termination of this Agreement or pursuant to Article Seventeenth or Article Eighteenth, the Voting Trustees shall possess and shall be entitled in their discretion, not subject to any review, to exercise in person or by their proxy, in respect of any and all shares of TWA Stock at the time on deposit under this Agreement all rights

and powers of every name and nature, including the right to vote thereon or to consent to any and every act of the Corporation.

Without in anywise limiting the generality of the foregoing, the Voting Trustees are specifically authorized in the exercise of their sole and absolute discretion in respect of any and all TWA Stock at any time deposited under this Agreement to vote for or consent to: the election of directors of the Corporation, the removal of directors of the Corporation, any increase, reduction or reclassification of the capital stock of, or any reduction of the capital of, the Corporation, any changes or amendments in or to the Agreement and Act of Consolidation of the Corporation constituting its Certificate of Incorporation, the sale or disposal in any manner of all or any part or parts of the property, assets or business of the Corporation, any consolidation or merger of the Corporation with or into any other corporation, any merger of any other corporation into the Corporation, and any reorganization of the Corporation, and any action with respect to any of the foregoing which any stockholder might lawfully take, and upon any such increase, reduction or reclassification of stock, reduction of capital or merger, consolidation or reorganization becoming effective, to make such surrender of TWA Stock deposited under this Agreement as may be proper or expedient and to receive and hold under this Agreement in lieu thereof any and all stock issued in exchange for such surrendered TWA Stock, and thereafter, in the discretion of the Voting Trustees, they may receive and appropriately issue Voting Trust Certificates against other stock issued pursuant to any such corporate change. For all purposes of this Agreement any such stock so received by the Voting Trustees in exchange for TWA Stock so surrendered shall take the place of the TWA Stock so surrendered by them.

TWELFTH: Any Voting Trustee may at any time resign by filing at the principal office of the Corporation in the State of Delaware his resignation in writing and concurrently notifying the Corporation, the Agent, the other Voting Trustees and the Notes Agent in writing of such filing of such resignation, and such resignation shall be effective 10 days after the date of such filing of such resignation without any acceptance thereof.

Raymond M. Holliday or any successor to Raymond M. Holliday (and such successor's successor and so on in line of succession) may be removed by the registered owners of a majority in interest of the Voting Trust Certificates at the time outstanding by an instrument or concurrent instruments signed by such owners or their duly authorized attorneys-in-fact and filed at said principal office of the Corporation. or or any successor to or (and such successor's successor and so on in line of succession) may be removed by the Notes Agent by an instrument signed by or on behalf of the Notes Agent and filed at said principal office of the Corporation.

In the event of the resignation, removal, death, loss of United States citizenship or other inability to act of any Voting Trustee a vacancy shall be deemed to exist in his office and such vacancy may be filled at any time by the appointment of a successor in the manner hereinafter provided. Any such successor to any Voting Trustee shall, at the time of his appointment, be a citizen of the United States.

Any successor to Raymond M. Holliday (and such successor's successor and so on in line of succession) as Voting Trustee shall be appointed by the registered owners of a majority in interest of the Voting Trust Certificates at the time outstanding by an instrument or concurrent instruments signed by such owners or their duly authorized attorneys-in-fact and filed at said principal office of the Corporation.

Any successor to or (and such successor's successor and so on in line of succession) as Voting Trustees shall be appointed by the Notes Agent by an instrument signed by or on behalf of the Notes Agent and filed at said principal office of the Corporation, *provided, however*, that if any vacancy in the office of either of such Voting Trustees shall have continued for more than 10 days, then or , or any successor to or theretofore appointed by the Notes Agent (and such successor's successor and so on in line of succession) may appoint a successor Voting Trustee to fill such vacancy.

Concurrently with the filing at said principal office of the Corporation of any such instrument of removal of any Voting Trustee or any such instrument appointing a Voting Trustee, the person filing the same shall notify the Corporation, the Agent, the Voting Trustees (or the other Voting Trustees, as the case may be) and the Notes Agent in writing of such fact and, as promptly as possible after such filing, the Corporation shall mail written notice thereof to the Agent, to the Voting Trustees (or the other Voting Trustees, as the case may be) and to the Notes Agent.

If any vacancy in the office of a Voting Trustee shall have continued for more than 10 days the remaining Voting Trustee or Voting Trustees may exercise all the rights, powers and privileges of the Voting Trustees hereunder until such vacancy or vacancies shall have been filled by the appointment of a successor Voting Trustee or successor Voting Trustees in the manner hereinabove provided.

Any successor Voting Trustee appointed as herein provided shall indicate his acceptance of such appointment by signing a counterpart of this Agreement on file at said principal office of the Corporation and thereupon such successor shall be vested with all the rights, powers, duties and immunities herein conferred upon the Voting Trustees as though such successor had been originally a party to this Agreement as a Voting Trustee. The term "Voting Trustees" as used in this Agreement and in the Voting Trust Certificates issued hereunder shall apply to and mean the parties of the second part hereto, the survivors or survivor of them and their respective successors.

THIRTEENTH: This Agreement shall terminate on the earliest of the following dates, namely: (a) December 15, 1970 (being less than ten years from the date of execution and delivery of this Agreement), unless the duration of this Agreement shall be extended as provided in Article Eighteenth hereof, or (b) the date on which the Trustee under the Note Indenture shall execute an instrument acknowledging satisfaction of and discharging the same, or (c) the date on which there shall be delivered to the Corporation an instrument signed by or on behalf of the Notes Agent terminating this Agreement.

FOURTEENTH: Upon the termination of this Agreement the Voting Trustees in exchange for and upon surrender of any Voting Trust Certificate then outstanding shall, in accordance with the terms hereof and upon payment, if the Voting Trustees shall so require, of a sum sufficient to reimburse them for any tax or other governmental charge in connection with such delivery, deliver certificates for TWA Stock in the amount called for by such Voting Trust Certificate, and the Voting Trustees may require the holder of such Voting Trust Certificate to surrender the same for such exchange. Nothing in this Article Fourteenth or elsewhere in this Agreement contained shall, however, be construed to deprive the Voting Trustees, or their nominee or nominees, of the right as record holder or holders of the deposited shares to vote the same and to execute consents with respect thereto, notwithstanding the termination of this Agreement, so long as they shall continue to be the record holders thereof.

After any termination of this Agreement as above provided, the Voting Trustees may in their discretion deposit any stock or other property then held hereunder with the Agent with authority and instructions to make delivery thereof in exchange for outstanding Voting Trust Certificates as provided in this Article Fourteenth, and thereupon all further obligations or duties of the Voting Trustees under this Agreement or any provision thereof shall cease.

The Voting Trustees shall give the owners of the Voting Trust Certificates notice of any termination of this Agreement prior to the date stated in clause (a) of Article Thirteenth hereof.

FIFTEENTH: All notices to be given to the owners of Voting Trust Certificates shall be given by mailing the same to the registered owners of Voting Trust Certificates addressed to their respective addresses as shown on the books of the Voting Trustees, and any notice whatsoever when mailed by or on behalf of the Voting Trustees to such registered owners of Voting Trust Certificates as herein provided shall have the same effect as though personally served on all holders of Voting Trust Certificates.

SIXTEENTH: Farmers Bank of the State of Delaware is hereby appointed the Agent of the Voting Trustees to receive certificates repre-

senting shares of TWA Stock and to sign and issue Voting Trust Certificates in the name and as Agent of the Voting Trustees and to transfer Voting Trust Certificates. The Agent now or hereafter appointed by the Voting Trustees may resign upon 30 days' written notice to the Voting Trustees or on such shorter notice as the Voting Trustees may accept. The Voting Trustees shall have the power to remove any Agent and in case of the resignation or removal of any Agent or in case any Agent shall in any way become disqualified from acting, a successor Agent having an office in the City of Wilmington, Delaware, may be appointed by the Voting Trustees and they shall cause notice of such appointment to be given to the Corporation and to the registered owners of Voting Trust Certificates. Upon the resignation, removal or disqualification of any Agent, the Agent shall, upon payment of its proper charges, deliver the custody of the stock certificates held hereunder as well as all other property held hereunder to the successor Agent or otherwise as the Voting Trustees shall direct and the successor Agent shall have and possess all the rights and immunities of the Agent originally named herein.

The Voting Trustees and the Agent shall be fully protected in acting in the discharge of any of their or its duties hereunder upon any instrument, document or paper believed by them or it to be genuine and to have been executed by the proper parties and the Agent shall be fully protected in issuing any Voting Trust Certificates hereunder, or in taking or in refraining from taking any action hereunder in reliance upon any direction or statement, purporting to be signed by the Voting Trustees or their authorized proxies, as to the existence or nonexistence of any fact or the performance or nonperformance of any act and may accept as conclusive any such statement.

The Agent shall not incur any liability to anyone by reason of anything done or permitted or omitted to be done by it at the request or direction of the Voting Trustees, or because of any disposition which it shall make at the request or direction of the Voting Trustees of any stock certificate or other document or paper or funds or property deposited with it pursuant to any of the provisions hereof, or for any

action which it may take or refrain from taking in respect thereof upon like request or direction, it being the intent and purpose of this Agreement that such stock certificates, documents, papers, funds and property shall be wholly at the order of and under the control of the Voting Trustees; and no Agent of the Voting Trustees shall incur any liability whatsoever except for its own individual malfeasance in the discharge of its duties as specified in this Article Sixteenth, nor shall it be liable for negligence of its agents, officers or employees, if chosen and retained with due care. The Agent shall be entitled to reasonable compensation for its services hereunder and to be reimbursed for all expenses incurred by it hereunder, and all such reasonable compensation and expenses shall be deemed to be expenses of the Voting Trustees required to be borne and promptly paid by the Corporation as provided in Article Tenth hereof.

SEVENTEENTH: On the terms and subject to the conditions specified in this Article Seventeenth, holders of Voting Trust Certificates complying therewith shall be entitled, prior to the termination of this Agreement, to surrender such Voting Trust Certificates to the Voting Trustees and to obtain in exchange therefor certificates for the shares of TWA Stock represented by the Voting Trust Certificates so surrendered.

The limited right created by this Article Seventeenth to withdraw TWA Stock from deposit under this Agreement shall be subject to the conditions precedent that each holder of a Voting Trust Certificate desiring to avail himself of such right shall establish by evidence satisfactory to the Voting Trustees that

(A) such holder (1) is Hughes Tool or a Hughes Affiliate, and (2) has sold or has entered into a firm contract to sell the shares of TWA Stock represented by such Voting Trust Certificate in a bona fide public offering (as that term is hereinafter defined), or

(B) such holder (1) is a pledgee, who holds such Voting Trust Certificate under a bona fide pledge thereof to secure a loan

or other obligation incurred by Hughes Tool or a Hughes Affiliate as to which such pledgor is presently in default, (2) has elected to foreclose such pledge in accordance with its terms, and (3) pursuant to such foreclosure has sold or has entered into a firm contract to sell the shares of TWA Stock represented by such Voting Trust Certificate in a bona fide public offering (as that term is hereinafter defined).

Upon compliance to the satisfaction of the Voting Trustees with the conditions specified in the preceding paragraph with respect to any Voting Trust Certificate, the Voting Trustees shall deliver a certificate or certificates for the shares of TWA Stock represented by such Voting Trust Certificate in exchange for and upon surrender of such Voting Trust Certificate, provided, however, that if the TWA Stock represented by such Voting Trust Certificate shall have been the subject of a firm contract of sale, the Voting Trustees shall not be required to deliver a certificate or certificates for such shares of TWA Stock until the Voting Trustees receive satisfactory evidence that such contract of sale has been or is to be consummated in accordance with its terms. Any such exchange shall be effected in the manner provided in Article Fourteenth as if this Agreement had been terminated.

Whenever reference is made in this Article Seventeenth to TWA Stock "represented by" a Voting Trust Certificate, such reference shall mean the number of shares of TWA Stock expressed in such Voting Trust Certificate to be deliverable in respect of such Voting Trust Certificate upon the termination of this Agreement.

The term "bona fide public offering", as used in this Article Seventeenth with respect to any sale of shares of TWA Stock, shall mean (a) a bona fide sale of such shares "regular way" (but not pursuant to crossed orders or pursuant to any special offering) on any national securities exchange, whether or not pursuant to a registration statement which shall have become effective under the Securities Act of 1933, as amended, or (b) a bona fide public offering of such shares by or through securities dealers made pursuant to a registration state-

ment which shall have become effective under the Securities Act of 1933, as amended, unless (in the case of any sale otherwise than by or on behalf of Hughes Tool or any Hughes Affiliate) the Voting Trustees shall have received an opinion of counsel satisfactory to the Voting Trustees that such public offering does not require the registration of such shares under the Securities Act of 1933, as amended. The term "public offering" shall not include any sale by auction or at broker's board, or any other sale at which the shares being offered might be purchased by a single purchaser or by a group of purchasers acting in concert.

EIGHTEENTH: This Agreement shall not be terminated except as provided in Article Thirteenth hereof, nor shall the duration of this Agreement be extended or this Agreement amended or modified in any other respect except by an instrument or concurrent instruments in writing signed by or on behalf of the Notes Agent, by the Corporation, by all the Voting Trustees and by the registered owners of a majority in interest of the Voting Trust Certificates at the time outstanding or their duly authorized attorneys-in-fact and filed at the principal office of the Corporation in the State of Delaware, provided, however, that in the case of any extension of the duration of this Agreement, (1) the instruments effecting such extension shall be signed and filed as aforesaid only during the 12-month period immediately preceding the termination date specified in clause (a) of Article Thirteenth, (2) no such extension shall extend the duration of this Agreement beyond the maximum period then permitted by the laws of the State of Delaware, and (3) no such extension shall affect the rights or obligations of any holder of Voting Trust Certificates who shall not consent to such extension.

In the event that the duration of this Agreement shall be extended pursuant to this Article, the Voting Trustees shall forthwith give notice of such extension in the manner provided in Article Fifteenth to all registered owners of Voting Trust Certificates. Each holder of any Voting Trust Certificate who shall not have signed a written

instrument consenting to such extension, in person or by duly authorized attorney-in-fact, shall be entitled to receive from the Voting Trustees, from and after the termination date specified in clause (a) of Article Thirteenth, a certificate or certificates for TWA Stock in the amount called for by the Voting Trust Certificate held by such holder, in exchange for and upon surrender of such Voting Trust Certificate, and the Voting Trustees shall effect such exchange. Any such exchange shall be effected in the manner provided in Article Fourteenth as if this Agreement had been terminated.

NINETEENTH: Hughes Tool agrees to pay the reasonable compensation of the Notes Agent for its services under this Agreement and the Noteholders' Agreement, including any services rendered by the Notes Agent to the Noteholders, or any of them, in connection with the transactions contemplated by this Agreement and the Noteholders' Agreement and to reimburse the Notes Agent for any out-of-pocket expenses incurred in connection therewith, including the fees and disbursements of any counsel which the Notes Agent may retain in connection with or incident to any of such transactions.

Hughes Tool further agrees that, so long as it or any Hughes Affiliate shall be the beneficial owner of any Voting Trust Certificates, it will not consolidate with, merge into, or convey or transfer all or substantially all of its property as an entirety to, any person unless the successor formed by or resulting from such consolidation or merger or to which such conveyance or transfer is made shall execute and deliver to the Corporation and the Voting Trustees and the Notes Agent, simultaneously with such consolidation, merger, conveyance or transfer, a supplemental agreement to this Agreement wherein the due and punctual performance of the covenants and agreements herein which are to be performed or observed by Hughes Tool shall be assumed by such successor corporation.

TWENTIETH: All notices and other communications hereunder shall be in writing and shall be addressed to each of the respective parties named below at its address set forth below, unless such address

shall have been changed by written notice to the other parties of such change, in which event it shall be addressed to such changed address:

(a) If to the Corporation:

Trans World Airlines, Inc.,
c/o The Corporation Trust Company,
100 West Tenth Street,
Wilmington 99, Delaware

with a copy to:

Trans World Airlines, Inc.,
380 Madison Avenue
New York 17, N. Y.

Attention: *Senior Vice President—Finance and Treasurer*

(b) If to the Voting Trustees:

Raymond M. Holliday
c/o Hughes Tool Company,
2200 Gulf Building,
Houston 2, Texas.

.....

.....

(c) If to Hughes Tool:

Hughes Tool Company,
2200 Gulf Building,
Houston 2, Texas.

Attention: *Mr. Raymond M. Holliday, Vice-President—Finance*

(d) If to the Agent:

Farmers Bank of the State of Delaware,
Wilmington, Delaware

Attention: *Mr. O. H. P. Baldwin, President.*

(c) If to the Notes Agent:

Irving Trust Company,
One Wall Street,
New York 15, N. Y.

Attention: *Mr. Robert A. Kerr,*
Vice President

Any such request, notice or other communication shall be deemed sufficiently served if mailed by registered or certified mail, postage prepaid, addressed as hereinabove in this Article Twentieth provided.

TWENTY-FIRST: All the covenants, conditions and provisions of this Agreement shall enure to the benefit of and shall be binding upon the parties hereto and the Agent and the Notes Agent and their respective successors and assigns.

TWENTY-SECOND: In the event that any provision of this Agreement shall be held to be invalid or unenforceable in whole or in part under the laws of the State of Delaware, such invalidity or unenforceability shall not in any wise affect the validity of the other provisions of this Agreement. For the purposes of this Article Twenty-second, each and every provision of each Article of this Agreement shall be deemed to constitute a distinct and separable provision from the other provisions of this Agreement.

TWENTY-THIRD: This Agreement may be executed in several counterparts, each of which so executed shall be deemed to be an original, and all of such counterparts shall together constitute but one and the same instrument.

TWENTY-FOURTH: Until the termination of this Agreement one original counterpart hereof and of any amendment or modification hereof shall be filed at the principal office of the Corporation in the State of Delaware and open to the inspection of any holder of stock of the Corporation or of any Voting Trust Certificate daily during business hours.

TWENTY-FIFTH: This Agreement has been made in the City of Wilmington, Delaware, and this Agreement and the trust hereby created shall be construed and governed by the laws of said State and the validity and effect of said trust and of this Agreement shall be determined in accordance with the laws of said State.

IN WITNESS WHEREOF, the parties hereto have duly executed this Agreement as of the day and year first above written.

TRANS WORLD AIRLINES, INC.

By .....
Vice-President.

Attest:

.....
Secretary.

.....(L. S.)

.....(L. S.)

.....(L. S.)
Voting Trustees

HUGHES TOOL COMPANY

By .....
Vice-President.

Attest:

.....
Secretary.

DX 322 id., Item 11g, Ex.D, page 1
(CAB Orders & Documents)

Exhibit D

Agreement

AMONG

IRVING TRUST COMPANY, as Bank Agent

AND

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES and METROPOLITAN LIFE INSURANCE COMPANY

AND

HUGHES TOOL COMPANY

OPTION AGREEMENT

Dated as of December 1, 1960

AGREEMENT dated as of December 1, 1960, among IRVING TRUST COMPANY, a New York trust company, as agent for the hereinbelow-mentioned Banks (hereinafter called the *"Bank Agent"*), party of the first part, THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, a New York corporation (hereinafter called *"Equitable"*), party of the second part, METROPOLITAN LIFE INSURANCE COMPANY, a New York corporation (hereinafter called *"Metropolitan"*), party of the third part, and HUGHES TOOL COMPANY, a Delaware corporation (hereinafter called *"Hughes"*), party of the fourth part.

WITNESSETH:

WHEREAS Trans World Airlines, Inc., a Delaware corporation (hereinafter called *"TWA"*), has executed and delivered to Chemical Bank New York Trust Company, as Trustee (hereinafter called the *"Trustee"*), an Indenture of Mortgage dated as of December 1, 1960 (hereinafter called the *"Note Indenture"*), which provides for (a) the delivery of $72,200,000 principal amount of 6% Equipment Mortgage Serial Notes of TWA, maturing serially on December 31, 1961, and quarterly thereafter through December 31, 1964 (hereinafter called *"Serial Notes"*), and (b) the issuance thereunder of $92,800,000 principal amount of 6½% Equipment Mortgage Sinking Fund Notes of TWA, due December 31, 1972 (hereinafter called *"Sinking Fund Notes"*), all said Serial Notes and Sinking Fund Notes being hereinafter collectively called the *"Notes"* (which term, as used herein, shall also mean the Serial Notes or the Sinking Fund Notes, as the context or circumstances may require); and

WHEREAS Hughes is the owner of not less than 5,221,301 shares of Common Stock, par value $5 per share, of TWA, comprising approximately 78% of the outstanding 6,674,155 shares of Common Stock of TWA (hereinafter called *"TWA Stock"*); and

WHEREAS TWA has entered into an agreement dated as of December 1, 1960 (hereinafter called the *"December 1960 Loan Agreement"*),

DX 322 id., Item 11g, Ex. D, page 3
(CAB Orders & Documents)

with Irving Trust Company and the other Banks named therein (hereinafter collectively called the "*Banks*") and the Bank Agent, pursuant to which the Banks have agreed to lend an aggregate of $72,200,000 to TWA, such loans to be evidenced by an equal aggregate principal amount of Serial Notes; and

WHEREAS TWA has entered into agreements dated as of December 1, 1960 (hereinafter called the "*Note Purchase Agreements*"), with Equitable and Metropolitan (hereinafter together called the "*Insurance Companies*"), pursuant to which the Insurance Companies have agreed to purchase from TWA an aggregate of $27,800,000 principal amount of Sinking Fund Notes; and

WHEREAS it is a condition precedent to the obligation of the Banks to advance any moneys to TWA pursuant to the December 1960 Loan Agreement, and it is a condition precedent to the obligations of the Insurance Companies to purchase any Sinking Fund Notes from TWA pursuant to the Note Purchase Agreements, that an Agreement dated as of December 15, 1960 (hereinafter called the "*Voting Trust Agreement*"), among TWA, the Voting Trustees described therein and Hughes, in the form annexed to the Note Purchase Agreements as Exhibit C, shall have been duly executed and delivered by the parties thereto and all shares of TWA Stock owned by Hughes at the date of the Note Purchase Agreements and all shares of TWA Stock subsequently acquired by Hughes or any Hughes Affiliate (as hereinafter defined) shall have been validly subjected to the Voting Trust Agreement; and

WHEREAS the parties hereto are entering into this Agreement in order to afford Hughes the right, at its option, to purchase all the Notes and thereupon to terminate the Voting Trust Agreement; and

WHEREAS the Bank Agent has been duly authorized by the Banks to enter into this Agreement; and

WHEREAS, for the purposes of this Agreement, (a) the terms *"Hughes Affiliate"* and *"Notes Agent"* shall have the respective meanings specified in the Voting Trust Agreement, and (b) the term *"assignee"* shall mean any person acquiring any of the Notes from any of the Banks pursuant to § 1.4 hereof or from any of the Insurance Companies pursuant to § 2.5 hereof and each successor assignee of any such assignee;

NOW, THEREFORE, in consideration of the premises, the parties hereto agree with each other as hereinbelow set forth:

ARTICLE ONE

Bank Option

§ 1.1. On the terms and subject to the conditions hereinafter set forth, the Bank Agent hereby irrevocably grants to Hughes the non-transferable right and option (hereinafter called the *"Bank Option"*) to purchase from the Banks and their respective assignees, if any, at any time after December 31, 1961, at the principal amount thereof plus accrued interest thereon to the Bank Closing Date hereinafter specified, all (but not less than all) the Serial Notes then held by the Banks and such assignees, *provided, however*, that the Bank Option may be exercised only as provided in § 1.2 hereof and the right of Hughes to exercise the Bank Option shall be subject to the conditions that (a) Hughes shall, concurrently with its exercise of the Bank Option, exercise the Insurance Company Options granted to Hughes by the Insurance Companies pursuant to Article Two hereof in accordance with their terms, and (b) the purchase by Hughes of the Serial Notes pursuant to the Bank Option shall not require any consent or approval of any Federal or State governmental or regulatory authority or, if such consent or approval is required, the same shall have been validly granted, shall be in full force and effect, and shall be valid and sufficient therefor on the date when Hughes shall give notice of its election to exercise the Bank Option as provided in § 1.2 hereof.

DX 322 id., Item 11g, Ex. D, page 5
(CAB Orders & Documents)

§ 1.2. The Bank Option may be exercised by Hughes by giving written notice to the Bank Agent, which notice shall state the election of Hughes to exercise the Bank Option, shall fix a date, not less than 60 days nor more than 90 days after the date upon which such notice shall be given by Hughes, for the delivery of the Serial Notes and the payment of the purchase price thereof (the date of such delivery and payment being herein called the "*Bank Closing Date*") and shall contain (a) a representation and warranty by Hughes that, concurrently with such exercise of the Bank Option, Hughes has exercised the Insurance Company Options and has designated as the Insurance Company Closing Date in its notice of exercise of the Insurance Company Options the same date as it has designated as the Bank Closing Date in its notice of exercise of the Bank Option, and (b) a representation and warranty by Hughes that it is purchasing all the Serial Notes for its own account, for investment, and not with a view to the distribution thereof. Such notice of exercise of the Bank Option shall be accompanied by an opinion of counsel for Hughes, satisfactory in scope and substance to the Bank Agent, to the effect that the exercise of the Bank Option by Hughes has been duly authorized by all requisite corporate action of Hughes and that the purchase by Hughes of the Serial Notes pursuant to the Bank Option does not require any consent or approval of any Federal or State governmental or regulatory authority or, if such consent or approval is required, that the same has been validly granted, is in full force and effect, and is valid and sufficient therefor.

§ 1.3. On the Bank Closing Date the Bank Agent shall deliver or cause to be delivered to Hughes, at the office of Irving Trust Company, One Wall Street, New York, N. Y., the Serial Notes to be sold to Hughes by the Banks and their respective assignees, if any, pursuant to the Bank Option, duly endorsed in blank or accompanied by duly executed assignments in blank (without recourse) and in proper form for transfer, against payment in full of the purchase price by certified or official bank check payable in Federal Reserve funds to the order of the Bank Agent or otherwise as directed in writing by the Bank

DX 322 id., Item 11g, Ex. D, page 6
(CAB Orders & Documents)

Agent. Hughes shall be liable for, and hereby agrees to pay, any and all transfer taxes which may be imposed upon the sale of the Serial Notes to Hughes pursuant to the Bank Option.

§ 1.4. The Bank Agent agrees that the option granted by it to Hughes pursuant to § 1.1 hereof shall apply to and cover all the Serial Notes at any time held by the Bank Agent and any of the Banks and that neither it nor any of the Banks will sell, assign, transfer or otherwise dispose of any of the Serial Notes at any time held by it except to another of the Banks unless (a) such disposition is made pursuant to an instrument of assignment duly executed by the assignor and assignee of such Serial Note or Notes, by which the assignee shall agree to assume and to be bound by all the obligations of the assignor under this Agreement in respect of the Serial Note or Notes which are the subject of such assignment, and (b) there shall be endorsed upon the Serial Note or Notes which are the subject of such assignment, prior to the delivery thereof to the assignee, the following legend:

> "This Note is subject to the provisions of an Agreement dated as of December 1, 1960, pursuant to which Hughes Tool Company has the right at its option to purchase this Note on the terms and subject to the conditions set forth in said Agreement, a copy of which is on file with the Trustee under the within mentioned Indenture."

The Bank Agent further agrees that it will promptly deliver to Hughes an executed counterpart of each instrument of assignment executed by any holder of Serial Notes pursuant to the provisions of this Section.

§ 1.5. In the event that Hughes shall exercise the Bank Option and the Insurance Company Options in accordance with their respective terms, and thereafter shall fail to pay in full on the Bank Closing Date the purchase price of all the Serial Notes then subject to the Bank Option and all the Sinking Fund Notes then subject to the Insurance Company Options, upon tender thereof to Hughes as provided in this Agreement, the Bank Option shall become void and shall terminate at the close of business on the Bank Closing Date.

DX 322 id., Item 11g, Ex. D, page 7
(CAB Orders & Documents)

§1.6. The Bank Option shall be non-transferable and any assignment by Hughes of the Bank Option, or of any interest therein or any right created by the terms thereof, without the written consent of the Bank Agent, shall be void.

ARTICLE TWO

Insurance Company Options

§2.1. On the terms and subject to the conditions hereinafter set forth, each of the Insurance Companies hereby irrevocably grants to Hughes the non-transferable right and option (hereinafter collectively called the "*Insurance Company Options*") to purchase from it and its assignees, if any, at any time after December 31, 1961, at the purchase price specified and computed as provided in § 2.2 hereof, all (but not less than all) the Sinking Fund Notes then held by it and such assignees, *provided, however*, that the Insurance Company Options may be exercised only as provided in § 2.3 hereof and the right of Hughes to exercise the Insurance Company Options shall be subject to the conditions that (a) Hughes shall concurrently exercise its option thereunder to purchase all (but not less than all) the Sinking Fund Notes then subject to the Insurance Company Options, and (b) the purchase by Hughes of the Sinking Fund Notes pursuant to the Insurance Company Options shall not require any consent or approval of any Federal or State governmental or regulatory authority or, if such consent or approval is required, the same shall have been validly granted, shall be in full force and effect, and shall be valid and sufficient therefor on the date when Hughes shall give notice of its election to exercise the Insurance Company Options as provided in § 2.3 hereof.

§2.2. The purchase price to be paid by Hughes for the Sinking Fund Notes upon the exercise of the Insurance Company Options shall be an amount equal to the sum of (a) the principal amount thereof plus accrued interest thereon to the Insurance Company Closing Date hereinafter specified, plus (b) a premium which shall be 22% of the prin-

DX 322 id., Item 11g, Ex. D, page 8
(CAB Orders & Documents)

cipal amount of such Sinking Fund Notes, if the Insurance Company Closing Date shall be on or before March 31, 1962, and which shall thereafter be reduced by ½ of 1% for each quarterly period of three calendar months which shall elapse from January 1, 1962 to the Insurance Company Closing Date.

§ 2.3. The Insurance Company Options may be exercised by Hughes (a) by giving written notice to the Insurance Companies and to each assignee of any of the Sinking Fund Notes named in an instrument of assignment delivered to Hughes pursuant to § 2.5 hereof, and (b) if the Supplemental Indenture referred to in § 3.1 hereof shall have been executed and delivered, by giving written notice also to the Trustee, as provided in § 3.1(b) hereof, which notice shall state the election of Hughes to exercise the Insurance Company Options, shall fix a date, not less than 60 days nor more than 90 days after the date upon which such notice shall be given by Hughes, for the delivery of the Sinking Fund Notes and the payment of the purchase price thereof (the date of such delivery and payment being herein called the "*Insurance Company Closing Date*"), shall state the purchase price (computed as provided in § 2.2 hereof) to be paid by Hughes for the Sinking Fund Notes, shall state whether or not Hughes has concurrently exercised the Bank Option, and shall contain a representation and warranty by Hughes that it is purchasing all the Sinking Fund Notes for its own account, for investment, and not with a view to the distribution thereof. Such notice of exercise of the Insurance Company Options shall be accompanied by an opinion of counsel for Hughes, satisfactory in scope and substance to the Insurance Companies and their respective assignees, if any (and to the Trustee, if the Supplemental Indenture referred to in § 3.1 hereof shall have been executed and delivered), to the effect that the exercise of the Insurance Company Options by Hughes has been duly authorized by all requisite corporate action of Hughes and that the purchase by Hughes of the Sinking Fund Notes pursuant to the Insurance Company Options does not require any consent or approval of any Federal or State governmental or regulatory authority or, if such consent or approval is required, that the same has been

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HUGHES TOOL COMPANY

Executive Offices
Twenty-Second Floor Gulf Building
Houston 2, Texas

NOAH DIETRICH
Executive Vice President

January 8, 1947.

To the Board of Directors of Transcontinental & Western Air, Inc.:

Hughes Tool Company, as the owner of approximately 46% of the capital stock of Transcontinental & Western Air, Inc., makes the following proposal to the Board of Directors of the latter company, contingent upon a final consummation of the present refinancing deal with Equitable Life Assurance Society, and subject to necessary approval by governmental authority:

(1) The present refinancing deal with Equitable Life Assurance Society contemplates that the present $40,000,000 loan will be revised so as to rearrange sinking fund requirements, but that interest shall be paid as and when due. Upon final consummation of this financial arrangement, Hughes Tool Company will thereupon immediately lend Transcontinental & Western Air, Inc. the sum of $5,000,000 in cash, and on or before June 1, 1947, upon the request of Transcontinental & Western Air, Inc., when the need therefor has been determined by the Board of Directors of said company, will lend said company an additional sum of $5,000,000 in cash. These loans shall be in the form of notes maturing on the day following the maturity of the outstanding Equitable debentures but shall be subordinate as to principal and interest to said debentures, as well as to any loans which may be extended to Transcontinental & Western Air, Inc. by the Reconstruction Finance Corporation as a result of the establishment of a $40,000,000 line of credit hereinafter referred to. The notes to be issued to Hughes Tool Company shall bear interest at the rate of 2-3/4% per annum, payable only out of earnings of the company, but interest shall be cumulative and payable in full at maturity.

(2) During the life of the notes to be issued to Hughes Tool Company, and at any time after the necessary additional shares of common stock of Transcontinental & Western Air, Inc. is legally authorized to be issued, Hughes Tool Company shall have the option of converting said notes, principal and

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accumulated unpaid interest, into Transcontinental & Western Air, Inc. common stock on the following basis:

At a price to be determined by the average of the closing market prices of the stock on the New York Stock Exchange for the ten days preceding the date upon which Hughes Tool Company exercises its option to so convert by written notice to Transcontinental & Western Air, Inc.; provided, however, that on January 1, 1950, Transcontinental & Western Air, Inc. shall have the right to require Hughes Tool Company to convert said notes into the common stock of Transcontinental & Western Air, Inc. by notice in writing to Hughes Tool Company. In such event, the conversion price per share shall be determined by the average of the closing market prices of such stock on the New York Stock Exchange for the ten days preceding the date of the written notice from Transcontinental & Western Air, Inc. to Hughes Tool Company. However, in case Transcontinental & Western Air, Inc. does not require Hughes Tool Company to convert said notes into common stock on said date, as above set out, then Hughes Tool Company's option to convert said indebtedness into common stock shall continue until maturity of the indebtedness.

(3) Hughes Tool Company will diligently endeavor to arrange a $40,000,000 line of credit with Reconstruction Finance Corporation, and in order to procure said line of credit will agree with Reconstruction Finance Corporation to enter into a voting trust agreement covering all of its stock in Transcontinental & Western Air, Inc., the members of said voting trust to be selected as follows:

One by Reconstruction Finance Corporation or Equitable Life Assurance Society (as agreed upon between them), one by Hughes Tool Company, and the third by agreement between Hughes Tool Company and Reconstruction Finance Corporation.

Such voting trust shall only become effective if, as and when the first monies may be actually advanced by Reconstruction Finance Corporation to Transcontinental & Western Air, Inc. under the aforesaid $40,000,000 line of credit, and said voting trust shall continue in effect

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until all monies borrowed by Transcontinental & Western Air, Inc. from Reconstruction Finance Corporation have been repaid in full, principal and interest. In the event, however, of any default in payment of principal or interest by Transcontinental & Western Air, Inc. in the Reconstruction Finance Corporation loan, if made, the mutually selected member on the aforesaid voting trust shall, upon demand in writing of Reconstruction Finance Corporation, resign and Reconstruction Finance Corporation shall be entitled to nominate the third member of said voting trust.

N.D.

(4) In the event no money is actually borrowed from Reconstruction Finance Corporation under aforesaid $40,000,000 line of credit, and only in that event, and any default in principal or interest payments occurs on the Equitable Life Assurance Society's loan, then in that event Hughes Tool Company agrees that it will enter into a voting trust agreement with said Equitable Life Assurance Society covering all of its stock in Transcontinental & Western Air, Inc., and the members of this voting trust shall be elected as follows:

Two by Equitable Life Assurance Society and one by Hughes Tool Company.

In case the aforesaid voting trust agreement with Reconstruction Finance Corporation (paragraph (3)) becomes effective, then Equitable Life Assurance Society shall have no right to require the establishment of the voting trust contemplated by this paragraph.

Upon final consummation of the revised refinancing deal with Equitable Life Assurance Society mentioned above in paragraph (1), and approval by governmental authority, and delivery to Transcontinental & Western Air, Inc. by Hughes Tool Company of the first $5,000,000 in cash referred to in paragraph (1) above, the Board of Directors will be reconstituted so that a majority of directors will be nominees of the Hughes Tool Company.

Until all of the changes contemplated above have been made, no changes in the by-laws of Transcontinental & Western Air, Inc. will be made without written consent of Hughes Tool Company.

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Board of Directors of
Transcontinental & Western Air, Inc.
page 4

The proposals contained in this letter are necessarily dependent upon various contingencies, and upon final consummation it will be necessary for Hughes Tool Company and Transcontinental & Western Air, Inc. to execute various legal documents. The form of these various documents must, of course, be acceptable to Hughes Tool Company.

HUGHES TOOL COMPANY

By

NOAH DIETRICH

Executive Vice President.

Accepted by the Board of Directors of
Transcontinental & Western Air, Inc.,
January 9, 1947
TRANSCONTINENTAL & WESTERN AIR, INC.,

By

JACK FRYE

President

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TRANSCONTINENTAL & WESTERN AIR, INC.

January 10, 1947

Docket No. 1182

Honorable James M. Landis, Chairman
Civil Aeronautics Board
Department of Commerce Building
Washington 25, D. C.

Dear Sir:

Reference is made to the application of Hughes Tool Company contained in the letter, dated January 10, 1947, from Mr. Palmer Bradley, attorney for Hughes Tool Company, to the Honorable James M. Landis, Chairman, Civil Aeronautics Board, for approval by the Civil Aeronautics Board of the loan by Hughes Tool Company to Transcontinental & Western Air, Inc. of the sum of $10,000,000, as set forth in the agreement between Hughes Tool Company and Transcontinental & Western Air, Inc.

On January 9, 1947 the Board of Directors of Transcontinental & Western Air, Inc. accepted by unanimous action the proposal of the Hughes Tool Company to the Board of Directors contained in the written communication to the Board of Directors dated January 8, 1947.

As attorney for Transcontinental & Western Air, Inc., I have been instructed by the Board of Directors of that company to inform you that they and the officers of the company join in the application of Hughes Tool Company for the approval of the loan contained in the agreement referred to above and urge that such approval be granted as soon as is conveniently possible.

Respectfully yours,

/s/ Gerald B. Brophy

GERALD B. BROPHY,
Attorney for Transcontinental
& Western Air, Inc.

AX-2852

DX323, Item 13a, Page 3
(CAB Orders & Dockets)

COPY

HUGHES TOOL COMPANY

Executive Offices
Twenty-second Floor Gulf Building
Houston 2, Texas

January 10, 1947

Docket No. 1182

Honorable James M. Landis, Chairman
Civil Aeronautics Board
Department of Commerce Building
Washington 25, D. C.

Dear Sir:

Reference is made to the Order of the Civil Aeronautics Board issued on the 17th day of October 1944, in the above Docket and the amendment thereto, dated the 26th day of January 1946, approving, under the conditions stated therein, control of Transcontinental & Western Air, Inc. by Hughes Tool Company under Section 408 of the Civil Aeronautics Act of 1938, as amended.

Transmitted to you herewith is a copy of an agreement between Hughes Tool Company and Transcontinental & Western Air, Inc. in the form of a letter, dated January 8, 1947, and accepted by the Board of Directors of Transcontinental & Western Air, Inc. on January 9, 1947, providing, among other things, for the loan by Hughes Tool Company to Transcontinental & Western Air, Inc. of the sum of $10,000,000 upon the terms and conditions stated therein.

On behalf of Hughes Tool Company, application is hereby made to the Civil Aeronautics Board for approval of said loan by Hughes Tool Company to Transcontinental & Western Air, Inc., if such approval is deemed necessary under the terms of the Order dated the 17th day of October, 1944, as amended, and referred to above, and for the approval of any other provision of the agreement between Hughes Tool Company and Transcontinental & Western Air, Inc. submitted herewith under said Order of the Civil Aeronautics Board, if such approval is deemed necessary.

It is believed that the Civil Aeronautics Board is fully aware of the serious financial condition of Transcontinental & Western Air, Inc. It is in an immediate need of substantial working capital

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in order to carry on its current operations. The loan to the company in the sum of $5,000,000 by Hughes Tool Company, upon approval by the Civil Aeronautics Board, is designed to alleviate the pressing needs of the company for working capital at the present time. The commitment of the Hughes Tool Company to provide up to an additional sum of $5,000,000 on or before June 1, 1947 assures further working capital to Transcontinental & Western Air, Inc. to carry on its operations.

In addition to working capital, it is believed that the company may require further funds in order to keep abreast of aircraft development and the service afforded by its competitors and for the purpose of serving adequately the routes for which it has been certificated. Accordingly, you will note that the agreement between Hughes Tool Company and Transcontinental & Western Air, Inc. provides that efforts will be made to obtain a credit of $40,000,000 from the Reconstruction Finance Corporation or other sources.

In addition, the agreement contemplates a revision of the present indenture securing the debentures of Transcontinental & Western Air, Inc. held by The Equitable Life Assurance Society of the United States so as to eliminate defaults under the present indenture which might occur during the coming year.

In effect, the agreement between the Hughes Tool Company and Transcontinental & Western Air, Inc. contemplates a complete financing program for Transcontinental & Western Air, Inc. to enable it to perform its obligations under the certificates of convenience and necessity issued to it by the United States.

It is requested that the application contained herein be approved in order that the financing contemplated by the enclosed agreement may be completed without delay.

Enclosed also is a letter from the attorney for Transcontinental & Western Air, Inc. in which that company joins in the application contained herein.

Respectfully Submitted,

/s/ Palmer Bradley
PALMER BRADLEY
Attorney for Hughes Tool Company

Enclosures

AX-2854

DX323, Item 13a, Page 1
(CAB Orders & Documents)

Preliminary Correspondence

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D-c 1/62

January 22, 1947

2796

Palmer Bradley, Esquire
Attorney for Hughes Tool Company
Twenty-second Floor, Gulf Bldg.
Houston 2, Texas

Re: TWA-Hughes Tool Company Agreement

Dear Sir:

In reply to your letter of January 12, 1947, to which there was attached a certain agreement between TWA and the Hughes Tool Company, you are hereby advised that the Board is of the opinion that neither the loan from Hughes Tool Company to TWA provided for in such agreement nor any other provision of such agreement constitutes the kind of commercial transaction intended to be governed by the conditions imposed by the Board's Order, Serial No. 3210, dated October 17, 1944, as amended by Order, Serial No. 4437, dated January 20, 1946, and, accordingly, no approval by the Board of said loan or other provisions of the Agreement is deemed necessary under such orders.

Nothing in this letter is to be construed as a determination that approval by the Board of this agreement pursuant to the provisions of Section 408 of the Civil Aeronautics Act is not required.

Sincerely yours,

(Original file copy approved by all members of the Board loaned to Minutes Section.)

J. M. Landis
Chairman

DX 323
13-b

Orders
Serial Number E-579

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

At a session of the Civil Aeronautics Board
held at its office in Washington, D. C.
on the 7th day of February, 1947.

In the Matter of transactions between	:	
HUGHES TOOL COMPANY	:	Docket No. 2796
and	:	
TRANSCONTINENTAL & WESTERN AIR, INC.	:	
and related matters	:	

ORDER OF INVESTIGATION

IT APPEARING TO THE BOARD:

1. That the Board by Order Serial No. 3210, dated October 17, 1946, Docket No. 1182, approved the acquisition by Hughes Tool Company (hereinafter called Hughes Tool) of control through stock ownership of Transcontinental and Western Air, Inc. (hereinafter called TWA) subject to certain conditions as set forth in said order, as amended by Order Serial No. 4437, dated January 26, 1946; and

2. That Hughes Tool has transmitted to the Board a copy of a letter agreement between that company and TWA, dated January 8, 1947, and accepted by the Board of Directors of TWA on January 9, 1947, providing among other things (1) for a loan by Hughes Tool

-2-

(2).for the reconstitution, upon the occurrence of certain events, of the Board of Directors of TWA, so that a majority of directors will be nominees of Hughes Tool; and

3. That as a consequence of, or in connection with, the foregoing, there may have been or may be such a change in the character or extent of the control of Hughes Tool over TWA as to constitute an acquisition of control requiring approval under section 408 of the Civil Aeronautics Act of 1938, as amended; and

The Board acting on its own initiative and pursuant to the powers vested in it by the Civil Aeronautics Act of 1938, as amended, particularly sections 205(a), 408, and 1002(b) thereof, and finding that an investigation of the foregoing matters is necessary in order to carry out the provisions of said Act and to exercise and perform its powers and duties thereunder;

IT IS ORDERED:

1. That an investigation be, and it hereby is, instituted for the purpose of:

(1) Determining whether the letter-agreement of January 8, 1947, between Hughes Tool and TWA, accepted by the Board of Directors of TWA on January 9, 1947, or any arrangement or action related thereto, or any change in the activities of Hughes Tool in the field of aeronautics since October 17, 1946, has resulted or will result in an acquisition of control of TWA for which Board approval is required pursuant to section 408 of the Civil Aeronautics Act of 1938, as amended;

(2) Determining whether such acquisition of control, if any, is consistent with the public interest and fulfills the conditions of said

(3) Entering any such order or taking any such further action herein as may be appropriate pursuant to the provisions of the Civil Aeronautics Act of 1938, as amended.

2. That the proceeding ordered herein be assigned for hearing before an Examiner of the Board at a time and place hereafter to be designated.

3. That Hughes Tool and Fox be made parties to the proceeding herein and that a copy of this order be served upon such parties.

By the Civil Aeronautics Board:

/s/ M. C. Mulligan
M. C. Mulligan
Secretary

(SEAL)

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

At a session of the Civil Aeronautics Board held at its office in Washington D.C. on the 27th day of February, 1947

In the matter of transactions between

HUGHES TOOL COMPANY
and
TRANSCONTINENTAL & WESTERN AIR, INC.

DOCKET NO. 2796

and related matters.

ORDER OF INSPECTION AND EXAMINATION

It Appearing to the Board:

1. That the Board by order Serial No. E-289, dated February 7, 1947, instituted an investigation into certain transactions between Hughes Tool Company (Hughes Tool) and Transcontinental & Western Air, Inc. (TWA), evidenced by letter agreement of January 8, 1947, between Hughes Tool and TWA, and

2. That said investigation was ordered to determine whether said letter agreement of January 8, 1947, accepted by the Board of Directors of TWA on January 9, 1947, or any arrangement or action related thereto, or any change in the activities of Hughes Tool in the field of aeronautics since its acquisition of control of TWA by stock ownership was approved by the Board on October 17, 1944, has resulted or will result in an

acquisition of control of TWA, for which Board approval is required pursuant to section 408 of the Civil Aeronautics Act of 1938, as amended, to determine whether such acquisition of control, if any, is consistent with the public interest and fulfills the conditions of said section 408, and to determine what order or what further action may be appropriate pursuant to the provisions of the Civil Aeronautics Act of 1938, as amended; and

The Board, acting pursuant to the powers vested in it by the Civil Aeronautics Act of 1938, as amended, particularly section 407(c) thereof, and finding that an inspection and examination by its representatives of the accounts, records, and memoranda, including all documents, papers and correspondence, now or hereafter existing, and kept or required to be kept by TWA, is necessary for the administration of the Act, and particularly in connection with its Order of Investigation dated February 7, 1947, referred to in paragraph I, hereof;

IT IS ORDERED:

That any employee or employees of the Board designated by the Secretary of the Board in writing shall at all times during the pendency of the proceeding instituted by Order Serial No. E-289, dated February 7, 1947, Docket No. 2796, have access to and authority to inspect and examine all accounts, records, and memoranda, including all documents, papers, and correspondence, now or hereafter existing, and kept or required to be kept by TWA.

By the Civil Aeronautics Board:

/s/ M. C. Mulligan

M. C. Mulligan
Secretary

(SEAL)

DX323
13d

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

At a session of the Civil Aeronautics Board held at its office in Washington, D. C., on the 27th day of February, 1947

In the matter of transactions between

HUGHES TOOL COMPANY

and

TRANSCONTINENTAL & WESTERN AIR, INC.

and related matters

DOCKET NO. 2796

ORDER OF INSPECTION AND EXAMINATION

It appearing to the Board:

1. That the Board by Order Serial No. E-289, dated February 7, 1947, [illegible], ordered an investigation into certain transactions between Hughes Tool Company (Hughes Tool) and Transcontinental & Western Air, Inc. (TWA), evidenced by letter agreement of January 8, 1947, between Hughes Tool and TWA; and

2. That said investigation was ordered to determine whether said letter agreement of January 8, 1947, accepted by the Board of Directors of TWA on January 9, 1947, or any arrangement or action related thereto, or any change in the activities of Hughes Tool in the field of aeronautics since its acquisition of control of TWA by stock ownership was approved by the Board on October 17, 1944, has resulted or will result in an acquisition

f control of TWA, for which Board approval is re

ection 408 of the Civil Aeronautics Act of 1938, as amended, to determine whether such acquisition of control, if any, is consistent with the public interest and fulfills the conditions of said section 408, and to determine what order or what further action may be appropriate pursuant to the provisions of the Civil Aeronautics Act of 1938, as amended; and

The Board, acting pursuant to the powers vested in it by the Civil Aeronautics Act of 1938, as amended, particularly sections 407(c) and 408(d) thereof, and finding that Hughes Tool is a person heretofore authorized to acquire control and having control of TWA, and finding further that an inspection and examination by representatives of the Board of accounts, records, memoranda, documents, papers, and correspondence hereinafter described in paragraph 1 below, is reasonably necessary for the administration of said Act, particularly in connection with its order of investigation dated February 7, 1947, referred to above;

IT IS ORDERED:

1. That the provisions of sections 407(c) and 408(d) of the Civil Aeronautics Act are made applicable to Hughes Tool to the extent necessary to afford the Board and its representatives access to and authority to inspect and examine, with respect to the period from and after October 17, 1946, (1) all correspondence between Hughes Tool, or any director, officer, stockholder, or employee thereof, and TWA, or any director, officer, employee thereof, (2) all correspondence between Hughes Tool, or any director, officer, employee, or stockholder thereof, and Reconstruction Finance Corporation, or any banking, financial, [illegible] institution or

any director, officer, or employee thereof, re to TWA or the financing of TWA in any manner, (3) all accounts, records, and memoranda, including all documents, papers, and correspondence, relating to the purchase or sale by Hughes Tool or any director, officer, employee, or stockholder thereof of stock of TWA, (4) all accounts, records, and memoranda, including all documents, papers and correspondence, relating to the sale or purchase of aircraft by Hughes Tool, and (5) all other accounts, records, and memoranda, including all documents, papers, and correspondence, which relate to activities of Hughes Tool as a person engaged in a phase of aeronautics or in connection with its stock interest in TWA, now or hereafter existing, and kept or required to be kept by Hughes Tool.

2. That any employee, or employees, of the Board designated by the Secretary of the Board in writing shall at all times during the pendency of the proceeding instituted by Order Serial No. E-289, dated February 7, 1947, have access to and authority to inspect the accounts, records, and memoranda, including documents, papers, and correspondence, now or hereafter existing, and kept or required to be kept by Hughes Tool, set forth in ordering paragraph 1 hereof.

By the Civil Aeronautics Board:

/s/ M. O. Mulligan

M. O. Mulligan
Secretary

(SEAL)

STATE OF TEXAS }
COUNTY OF HARRIS }

WHEREAS Transcontinental & Western Air, Inc., a Delaware corporation, (hereinafter called "TWA") is in process of certain negotiations with Lockheed Aircraft Corporation of Burbank, California, looking to the acquisition of certain airplanes and equipment; and

WHEREAS Hughes Tool Company, a Delaware corporation, (hereinafter called "COMPANY") is the holder of certain obligations of TWA in the form of debentures issued pursuant to a three-party agreement dated January 31, 1947, between TWA, COMPANY, and the Equitable Life Assurance Society of the United States; and

WHEREAS in the event of the purchase of the airplanes and equipment from Lockheed Aircraft Corporation referred to above, it will be necessary for COMPANY to subordinate the obligations of the debentures to the obligation of TWA in favor of Lockheed Aircraft Corporation; and

WHEREAS TWA has requested COMPANY to facilitate these negotiations in the respect just mentioned; and

WHEREAS COMPANY is willing at this time to agree and make it certain that at no time in the future will a demand for money be made upon TWA based upon the debentures, provided that COMPANY shall be given the right to approve any contract between TWA and Lockheed Aircraft Corporation arising out of or resulting from the present negotiations above referred to, as it would otherwise have had the power to require as a condition to its subordination of the obligations contained in the debentures;

NOW, THEREFORE, in consideration of th

I.

COMPANY hereby agrees that it shall at all times hereafter forever be foreclosed from asserting that it has any right to a payment on account of any of the above mentioned debentures, in money or in any form other than stock in TWA in accordance with the provisions of the debentures. It is the purpose hereof to assure TWA, and all persons, with whom it might deal, of the fact, and to bind COMPANY to the fact that the above referred to debentures shall at all times hereafter remain only a measure of the right of COMPANY to acquire stock in TWA in satisfaction thereof. This act of COMPANY in no sense constitutes an election to convert the debentures into stock as of this date, or of any other date, and it shall be construed only as a waiver of, and agreement by COMPANY that it shall not hereafter have, any rights under the debentures not relating to stock acquisition. Insofar as they relate to stock acquisition, the debentures and the agreement shall remain in all respects in full force and effect and shall constitute the measure of, as well as the basis for, the right of COMPANY to acquire additional stock in TWA in satisfaction of such debentures, all as therein provided and as if this agreement had not been executed.

II.

TWA agrees that it will enter into no final contract with Lockheed Aircraft Corporation pursuant to the negotiations now being carried on and which were the subject of letter of November 19, 1947 from COMPANY to Lockheed Aircraft Corporation, unless COMPANY shall have approved such contract

IN WITNESS WHEREOF the parties have executed this instrument IN DUPLICATE ORIGINALS as of the 26th day of December, 1947.

HUGHES TOOL COMPANY

By /s/ Noah Dietrich
Executive Vice President

Attest:

/s/ C.S. Johnson
Secretary

TRANSCONTINENTAL & WESTERN AIR, INC.

By /s/ LaMotte T. Cohu
President

Attest:

/s/ Albert V. Leslie
Vice-President-Treasurer

DX323, Item 13g, page 1
(CAB Orders & Documents)

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139

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Release authorized
Edward T. Stodola
Examiner
Jan. 30, 1948.

DOCKET NO. 2796

TRANS-HUGHES TOOL COMPANY INVESTIGATION

In the matter of transactions between the Hughes Tool Company and Transcontinental & Western Air, Inc., and related matters.

REPORT OF EDWARD T. STODOLA, EXAMINER

Served: 1-30-48

Opens:
Thomas A. Slack for Hughes Tool Company.
Gerald B. Prorby for Transcontinental & Western Air, Inc.
Gabriel J. Paterno, Public Counsel.

Exceptions, if any, must be filed with the Secretary, Civil Aeronautics Board, Washington, D. C., and served upon all parties within 10 days from the date of service shown above. Briefs to the Board, if any, may be filed with the Secretary of the Board and served on all other parties within 10 days after date fixed for filing exceptions.

DOCKET NO. 2796

TWA-HUGHES TOOL COMPANY INVESTIGATION

Recommended, that the Board find that the transaction evidenced by the letter agreement between the Hughes Tool Company and Transcontinental & Western Air, Inc., dated January 8, 1947, and accepted by the Board of directors of TWA on January 9, 1947, have resulted in a further acquisition of control by Hughes Tool Company over TWA within the meaning of section 408 of the Act.

Recommended, that a subsequent hearing be held to determine whether such further or additional acquisition of control by the Hughes Tool Company is consistent with the public interest and fulfills the conditions of said section 408.

Appearances:

Thomas A. Slack (Andrews, Kurth, Campbell & Bradley) for Hughes Tool Company.
Gerald P. Brophy (Chadbourne, Wallace, Parke & Whiteside) for Transcontinental & Western Air, Inc.
Gabriel J. Patavia and James L. Highsaw, Jr., Public Counsel.

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REPORT OF EDWARD T. STODOLA, EXAMINER

PRELIMINARY STATEMENT

This proceeding arises out of an order of the Board instituting an investigation into a letter agreement between the Hughes Tool Company (Toolco) and Transcontinental and Western Air, Inc. (TWA), dated January 8, 1947, and accepted by the board of directors of TWA on January 9, 1947. Among other things, this agreement provided for a substantial money loan by Toolco to TWA in exchange for shares of the corporation into shares of common stock of the carrier, and for the reconstitution, upon the occurrence of certain events, of the board of directors of TWA. The Board instituted this proceeding to determine whether said letter agreement or any arrangement or action related thereto, or any change in the activities by Toolco in the field of aeronautics since October 17, 1944, has resulted or will result in an acquisition of control of TWA for which its approval is required pursuant to section 408 of the Civil Aeronautics Act of 1938, as amended; to determine whether such acquisition of control, if any, is consistent with the public interest and fulfills the conditions of said section 408; and for the purpose of entering any such order or taking any such further action as may be appropriate pursuant to the provisions of the Act.

On May 15, 1947, after a prehearing conference had been held on the issues raised by the Board's order instituting this proceeding, respondents Toolco and TWA filed a joint motion requesting an order of the Board to hear and determine

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1/ Order Serial No. E-289, dated February 7, 1947.

2/ This is the date of the Board's approval of the original acquisition of control by Hughes Tool Company of TWA under section 408 of the Act, Docket No. 1182, Transcontinental & W.A., Control by Hughes Tool Co., 6 C.A.B. 153;

separately "the preliminary questions" raised by said order of investigation, and to limit the evidence in the proposed preliminary proceeding accordingly. Upon consideration of the motion, the Board on June 18, 1947, ordered that a preliminary hearing be held to determine the question of whether the said letter agreement of January 8, 1947, or any arrangement or action related thereto, or any change in the activities of Toolco in the field of aeronautics since October 29, 1946, has resulted or will result in an acquisition of control of TWA pursuant to section 408 of the Act, and ordered further that the hearing on the other issues raised by the Board's order of February 7, 1947, be deferred pending decision on the aforesaid issue. The Board, however, denied the motion of the parties with respect to any limitation of the evidence in this initial or preliminary proceeding. Hearings were held pursuant to this latter order of the Board in Los Angeles, Calif., on September 10 and 11, 1947.

STATEMENT OF ISSUES

Section 408(a)(5) of the Act, makes unlawful, without Board approval, an acquisition of control of an air carrier by a person engaged in a phase of aeronautics. In November 1943, Toolco applied to the Board under section 408 of the Act for "approval * * * of the control by the applicant of Transcontinental & Western Air, Inc." Toolco was then and thereafter, by reason of several activities, a "person engaged in a phase of aeronautics."

As of December 31, 1943, Toolco owned 440,050 shares of the capital stock of TWA, or approximately 45.6 percent of the total 965,173 TWA shares outstanding on that date. Hearing on the Toolco application for approval of

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1/ Order Serial No. E-857, granting in part and denying in part the [illegible] of Hughes Tool Company and Transcontinental and Western Air, Inc.

control was held on March 17, 1944. Upon a record in which it was stipulated that the stock then owned by Toolco constituted control of the carrier, the Board approved the acquisition of control of TWA by Toolco. 1/

The order of approval contains no specific reference either to the extent of stock ownership which might be enjoyed by Toolco or to the nature of the aeronautical activities in which Toolco might engage. The Board, however, placed certain conditions in its order of approval which in effect limits the right of Toolco to engage in commercial transactions involving aeronautical property with TWA. 2/

1/ Transcontinental & W.A., Control by Hughes Tool Co., supra.

2/ The following is the text of order of approval issued October 17, 1944:

"Hughes Tool Company, an industrial corporation, having filed an application requesting that the Board approve the acquisition of control, by the purchase of common stock, of Transcontinental & Western Air, Inc., under section 408 of the Civil Aeronautics Act of 1938, as amended, and a full public hearing having been held thereon, and the Board, upon consideration of the record in this proceeding, having issued its opinion containing its findings, conclusions, and decision, which is attached hereto and made a part hereof,

IT IS ORDERED, That the application of Hughes Tool Company be and it is hereby approved, subject to the following conditions:

1. That said approval shall be effective so long as commercial transactions between TWA and Hughes Tool Company and between TWA and any affiliate or subsidiary of Hughes Tool Company are limited to transactions involving complete items of property, the price of which does not exceed $[illegible] each, with the further limitation that the total annual expenditure involved in such commercial transactions by either party shall not exceed $10,000;

2. That TWA shall furnish with its annual report to the Board a supplement thereto showing the total of all cash transactions between TWA and Hughes Tool Company and/or any affiliate or subsidiary thereof, the number of such transactions, the maximum and minimum price of items of property, and the general nature of the commodities involved; and

3. That nothing herein shall restrict or affect the right of purchase by Hughes Tool Company through TWA of aircraft, the purchase of which is provided for in existing agreements between them." (P, 158)

The basic question to be resolved herein is whether under the facts of record in this proceeding there has been any additional acquisition of control of TWA by Toolco requiring approval by the Board under section 408 of the Act. This question in turn raises two problems: First, whether there can be any acquisition of control of TWA by Toolco which requires Board approval in view of the fact that the Board has previously approved acquisition of control of the air carrier by Toolco; secondly, if, as a matter of law, there can be an additional acquisition of control, notwithstanding the Board's prior approval of control pursuant to section 408 of the Act, whether the instant record shows an acquisition of control of such character as must be approved by the Board. Further, as a part of the general problem of the Board's jurisdiction in this type of case but separate from the question whether or not the transaction represented by the letter agreement has resulted in a further acquisition of control, it appears appropriate to inquire whether or not the Board has continuing jurisdiction over a control relationship previously approved by it under said section 408.

STATEMENT OF FACTS

Both TWA and Toolco are Delaware corporations. TWA is holder of certificates of public convenience and necessity issued by the Board authorizing it to engage in air transportation both in the United States and in the international field. All of the capital stock of Toolco is owned by Howard R. Hughes; its principal business is located in Houston, Tex., and consists of the manufacture of oil well drilling tools and equipment. Through an unincorporated division of its business, operated under the name of "Hughes Aircraft Company," with its principal place of business at Culver City, Calif., Toolco has been and is at present engaged in certain activities in the field of aeronautics.

Toolco's control over TWA was acquired through gradual purchases of shares of stock, beginning with an initial purchase of only 600 shares in March 1939. By the end of 1939 Toolco held 157,700 shares. The Board in the original acquisition case, decided in October 1944, found that Toolco's first participation in any phase of civil aeronautics followed the acquisition of its interest in TWA in 1939. 6/ Prior to 1939, the only activities of Mr. Hughes, the sole stockholder of Toolco, or Toolco itself, associated with any phase of aviation were in experimental and developmental work upon the privately owned and operated equipment of Mr. Hughes or his company. Since 1939, and between that time and 1944, the Board found that Toolco's engagement in a phase of aeronautics consisted in the collaboration between Messrs. Jack Frye, then president of TWA, and Hughes, in the preparation and development, primarily for use by TWA, of the transport plane now known as the Constellation, and in Toolco's development and manufacture of aircraft and aircraft accessories in furtherance of the war effort.

In brief, the aeronautical activities of Toolco represented by the Constellation program involved arrangements between Toolco and the Lockheed Aircraft Corporation for the construction and purchase of this four-engine passenger transport plane. After various changes and modifications as to priorities, deliveries, and the number of aircraft to be purchased, Toolco's agreements with Lockheed were assigned to TWA, with Toolco reserving an option to purchase through TWA 25 of the 40 aircraft to be built under the Constellation specifications. The Board, in holding that Toolco was a person engaged

6/ Transcontinental & W.A., Control by Hughes Tool Co., supra, p. 1.

in a phase of aeronautics, paid particular attention to the fact that it retained rights under the Lockheed contracts to 25 Constellations which might have been resold for commercial airline operations. Toolco's option under the contracts has since completely expired and this phase of aeronautical activities on the part of Toolco must be considered ended.

About the time of the contracts for the construction of the Constellations, Toolco acquired 40,000 shares of stock in the Lockheed Aircraft Corporation and was at one time Lockheed's largest stockholder. Toolco's executive vice president described this purchase of stock as a necessary expedient so that there would be a closer contact with Lockheed's operations. When the Army took over the Constellation program during the war, Toolco decided to dispose of its stock in Lockheed. However, through inadvertence, the brokers making the sale failed to dispose of 400 shares of the stock. To the extent that these remaining shares represent an interest in a manufacturer of aircraft, Toolco is engaged, at least indirectly, in that phase of aeronautics. However, this interest in Lockheed perhaps no longer represents a relationship of any real significance, particularly since Toolco's connections with the production and sale of the Constellation aircraft has been terminated. 7/

Aside from the termination of Toolco's relationship with Lockheed in the development of the Constellation transport, the record shows that there has been no substantial change in the aeronautical activities of Toolco since the Board's order of 1944 approving control of TWA. At the time of the hearing in the original control proceeding, Toolco's aeronautical activities were, as

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7/ As far as shown by this record, TWA has no equipment on order from Lockheed. But, even assuming there have been purchases by TWA of equipment from Lockheed since the date of the hearing or that there may be such purchases in the future, it is difficult to see how any unlawful influence could result

already indicated, closely associated with the war effort.

Located at Houston were the Aircraft Strut Plant, manufacturing aircraft landing gear and struts for the Army, and the Dickson Gun Plant, which manufactured gun barrels and was operated for the Army by Tenico under a management contract. Operations in both of these plants terminated following the close of the war. The major wartime aeronautical enterprise of Tenico consisted of the development of the planned flying boat, HK-1, and a photo reconnaissance plane, known as the XF-11, both on Government contracts. Only one of the former and three of the latter type planes have been produced.

The XF-11 is a plane developed for use in combat and is not adaptable to commercial air transport service. The original contract for the production of the XF-11 contemplated the manufacture of 101 units of this type ship. At the end of the war that contract was cut back to three planes: one static test model and two flying models. The static test model has been delivered to the Army and the first flying model crashed in a test flight and was completely destroyed. The third ship is now in the process of being tested by the U. S. Army, under its responsibility.

HK-1, commonly called the cargo ship, is the only one of its type in existence. This ship, an eight-engine craft alleged to be the largest airplane in the world, was built under a contract let by the Defense Plant Corporation to the Kaiser-Hughes Company. [1/] This contract was later canceled and a new contract was set up between the Defense Plant Corporation (succeeded in interest

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1/ Kaiser-Hughes Company, which was organized in connection with the cargo ship contract, is legally still alive, though it no longer functions. The charter of this company permits it to engage in the manufacture and opera[illegible] [illegible] there is no indication in the record that this company

by the Reconstruction Finance Corporation) and the Hughes Aircraft Company. Under this contract an arrangement is provided whereby Toolco may be permitted to retain the ship for further experimental purposes of its own at prescribed rental rates. This arrangement permits Toolco to get a credit not to exceed $3,000,000 if it expends more than that sum beyond the $18,000,000 fixed price under the contract for the plane. According to Mr. Deitrich, executive vice president of Toolco, this latter clause was included in the contract to enable Toolco to get whatever experimental and developmental experience from the work that possibly existed in it. As of July 31, 1947, Toolco had expended over $7,000,000 of its own funds in the construction of the cargo plane. While it is clear that the cargo ship itself cannot be used for commercial aviation and that it was not intended to be so used, there is no reason to assume that the experience obtained by Toolco from its construction cannot be used to develop a plane along the lines of this ship, either for the carrying of cargo over long distances or long-range passenger operations.

In addition to the activity involved in the production of the four planes referred to above, which were considered by the Board in the original control proceeding, Toolco has developed and sold, or has contracted to sell, the Hughes Airline Radar Device and certain items of airplane armament, all developed by the aircraft division of the company at Culver City. Furthermore, aside from said purchase contracts, the company has contracts with the United States Government for the following work in the aeronautical field: (1) experimental evaluation of three remote control devices for throttles on airplane engines; (2) experiments on a parevane antenna for Army and Navy aircraft; (3) experiments on controlling aerodynamic devices by fixes on celestial [illegible] (4) experiments involving the design and control of pilotless aircraft;

(5) experiments on radio devices in the VHF (very high frequency) field; (6) the manufacture of ammunition hoists and machine gun feed mechanisms for Army and Navy aircraft; and (7) the production of ammunition feed chutes and booster for machine guns for the United States Navy. From the foregoing, it is evident that the plant at Culver City is primarily a large scale development laboratory for aeronautics.

A further aeronautical activity of Toolco consists of conversion work on 14 C-47 aircraft, which represent Army surplus equipment acquired by Toolco since January 1947 for conversion and resale. The record shows that this activity did not commence with orders for said planes before their purchase, but that Toolco went out and purchased these planes in the hope that they would be readily resalable after conversion. Certain of these planes are currently being sold.

The only equipment directly usable by commercial aviation now being manufactured by Toolco is the Hughes Airline Radar.[2/] This device is an instrument which works on the radar principle and is capable of warning the pilot of his proximity to any obstruction. These devices are now being sold by Toolco to all commercial airlines that wish them, on a nonprofit basis. The sale of the radar device will also be made to TWA at cost. Purchase orders from that carrier have been received by Toolco which recite that the purchases would be made subject to the terms and conditions of the Board's order approving control by Toolco, as amended,[1c/] in Docket No. 1182. Apart from the prospective

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2/ The other devices manufactured by Toolco and developed by it consist of the ammunition hoists, machine gun feed mechanism and boosters and are purely military equipment.

1c/ On October 29, 1947, the Board, by Order Serial Number E-922, modified the original order approving the acquisition in Docket No. 1182 so as to permit Toolco to sell the radar units to TWA.

sales to TWA, the effect and extent of which is controlled by the Board, Teolco has marketed, and apparently will continue to market, these devices to other purchasers. However, there has been no attempt to market the device formally, the orders received having been more or less spontaneous, flowing from the advertisements which have appeared in connection therewith.

With respect to the contracts upon which Teolco is now engaged for experimental work, the paravane antenna and the very high frequency devices are most likely to be effectively adapted to commercial aviation use. The record shows that title to all the devices now being developed on an experimental basis, save the ammunition hoists and the machine gun feed chute, is in the United States Government and their manufacture for commercial use would require governmental approval. However, there is no reason to believe that the knowledge obtained by Teolco in the manufacture of the paravane antenna or any of the other devices hereinabove referred to, could not readily be applied to the manufacture of similar equipment useful in commercial aviation. The record, however, indicates that Teolco has no present plans for engagement in the commercial production and sale of such aircraft equipment.

There have been but small additions to the stock held by Teolco in TWA since the date of the Board's approval of control. Whereas on October 17, 1944, Teolco owned a total of 440,050 shares, or about 45.1 percent of TWA's outstanding stock, it held but 14,600 more shares, or approximately 46.1 percent of TWA's total outstanding shares, on January 1, 1947. The remaining share holdings are widely dispersed.

The present and contemplated aeronautical activities of Teolco clearly establish its engagement in a phase of aeronautics under section 408 of the Act. We now turn to an examination of the letter agreement of January 8, 1947.

To understand the reason for the letter agreement of January 8, 1947, it is necessary to examine Teolco's relationship to TWA during the period between the end of the recent war and the date of the agreement. The history of this

effect upon Toolco's control of the carrier.

Prior to the end of the war TWA was described by Mr. Deitrich as having "plenty of capital". Like other carriers, TWA was then operating under war-engendered restrictions in equipment. With the war's end, however, came the necessity for expansion, both in equipment and personnel, to operate a network of newly authorized routes. To this end it became imperative to raise additional capital. Efforts at additional financing, however, disclosed a gradual but ever widening rift between the TWA management and Toolco with respect to [illegible] ting plans and policies for the carrier. No attempt will be made here to recount or outline all of the differences between the TWA management and its principal stockholder. Nor are the merits of such differences of concern here. They are relevant here only as they reflect the background of the events which led to the letter agreement.

As early as January 1945 there were some preliminary discussions between Mr. E. Lee Talman, then senior vice president of TWA, and Mr. Deitrich, with respect to financing for the carrier. Mr. Deitrich then recognized that TWA's capital needs could not be financed without increasing the carrier's common stock base. Mr. Deitrich further informed Mr. Talman that final decision in the matter was up to Mr. Hughes, but indicated that he would do all he could to assist in obtaining Mr. Hughes' approval. Thereafter, Mr. Fryo, then president of TWA, and Mr. Hughes had a number of discussions with respect to further financing for TWA. Nothing, however, came of these efforts.

There is evidence to indicate that the management of TWA had been considering plans for capital expansion long before the financial condition of TWA became critical. The officials of TWA and Mr. Deitrich were in agreement that the company needed a broader stock base and that any plan for raising capital required the sale of additional [illegible] stock. Yet, no definite program for

arriving at a financing program acceptable to Toolco were impeded by the lack of faith on the part of Mr. Deitrich and the board of directors of Toolco in the TWA management. In fact, Mr. Deitrich testified that he had lacked confidence in the TWA management for several years.

Following the failure of the TWA management and Toolco to agree on a method to finance TWA's postwar needs, a number of other proposals to raise the required capital came into being. During the latter part of 1945, Mr. Frye approached the Export-Import Bank to establish a line of credit in the amount of 15[illegible] million dollars. This loan was to be reduced by the amount of funds and credit secured from private sources. Efforts were also made about this time to secure a loan from the Reconstruction Finance Corporation in the amount of 10[illegible] million dollars. On the assumption that one or the other of the foregoing loans might materialize, the management of the carrier felt that perhaps some interim financing might suffice. This led to a proposed bank loan in the amount of 17 million dollars for the purchase of equipment in which the Commercial National Bank and Trust Company of New York and other banks were to participate. Mr. Frye, however, considered this loan inadequate. Meanwhile, during November 1945 a program of debt financing was entered into with the Equitable Life Assurance Society of the United States whereby Equitable purchased an issue of 3 percent sinking fund debentures from the carrier in the principal amount of 3[illegible] million dollars. 11/ Then in the early months of 1946 Equitable purchased an issue of 2½ percent sinking fund debentures in the amount of 10 million dollars from TWA. Sinking fund payments of 4 million dollars annually were required under the two series of debenture loans. These payments were to be used forthwith for the retirement of outstanding debentures.

11/ The debentures were issued pursuant to a purchase agreement dated [illegible]ecember 3[illegible], 1945, and in accordance with the provisions of an indenture dated [illegible] 1, 1946. The Equitable loan was an equipment loan [illegible] that 60 percent

There is nothing in the record to indicate that a successful flotation of stock in a large volume could not have been accomplished at any time during 1945 and during the greater part of 1946. But even as late as 1946 no plans for equity financing had been agreed upon since Mr. Hughes had not consented to such financing. It appears that TWA officials were apparently unable to obtain a firm commitment from Mr. Hughes for equity financing, although the record shows that there probably would have been no objection to such financing on the part of Mr. Hughes "under proper conditions." One of such conditions, as far as both Mr. Deitrich and Mr. Hughes were concerned, was a change in the management of the carrier. Accordingly, it definitely can be concluded that the lack of financing at least up to this date, resulted from the differences of opinion between the TWA management and its principal stockholder and from the lack of faith expressed by Mr. Deitrich and the board of directors of Trafco in such management.

It further appears from the record that the TWA board of directors were divided over plans to finance the carrier and with regard to policies regarding its operation. Prior to January 9, 1947 all the directors of TWA were persons acceptable to Mr. Frye. Of the 11 directors who were members of the TWA board prior to its reconstitution on January 9, five were employees of the company and opposed a managerial reorganization of the carrier. The six other nonemployee directors -- the so-called "outside" directors -- sided with Trafco on the necessity for reorganization of the carrier's administrative or managerial set-up. In Mr. Deitrich's opinion, the division in the board of directors was a very strong one, although the minutes of the directors' meetings during this period do not reveal such dissension.

When the anticipated loans from the Export-Import Bank and the RFC did not materialize, presumably because the carrier failed to establish that pri-

led to negotiations for large-scale financing through a group of bankers headed by the Bankers Trust Company of Pittsburgh, now the Mellon National Bank and Trust Company. In August 1946 a concrete plan was evolved which would have raised considerable capital. The plan proposed equity financing for TWA to the extent of 25 to 35 million dollars, direct credit from the banks to the extent of 25 million dollars, and an additional 10 million dollars to be furnished by Toolco. The amount to be furnished by Toolco was also to be raised through a stock issue. This plan thus contemplated equity financing to the total extent of 35 or 45 million dollars. It did not involve prepayment or retirement of the Equitable loan. The banks attached two conditions to the proposed financing: (1) a change of management for TWA, and (2) the security market maintaining its relatively favorable mid-1946 level.

The TWA management was favorable to the so-called Bankers Trust plan except that it did not want itself replaced. Again, differences of opinion between the management of the carrier and the principal stockholder apparently delayed the acceptance of the Bankers Trust plan, even though Mr. Hughes had agreed to the substantial equity financing involved in that proposal. In the end nothing was done until an unfavorable turn in the security market about September 1946 resulted in a withdrawal of the Bankers Trust plan.

Toward the end of 1946 TWA's financial condition had become critical. All efforts at refinancing had failed. The record shows that in the closing months of 1946 TWA could not attract any capital and was facing bankruptcy. The record further shows that Toolco was willing to be of further financial assistance but was unwilling to advance additional money to save the carrier without taking precautions to assure itself that the money would be wisely spent. It was Mr. Deitrich's definite opinion that certain economies were necessary [illegible] life and welfare of TWA and he believed that the TWA management prior

to January 9, 1947 was not disposed to effectuate them. Because it was felt that the viewpoint of the majority of stockholders was not adequately represented on the TVA board of directors, plans were made to increase their number or to shorten their term of office. This, however, was not effected because the carrier's bylaws at that time prevented the proposed changes and because of Mr. Deitrich's fear of possible unfavorable publicity which might result. Thus one of the purposes of the letter agreement was the selection of a new or more sympathetic board to run the carrier.

All these factors contributed to the crisis confronting TVA in the late months of 1946. The letter agreement of January 8 became the means chosen to reorganize the carrier and to save it from bankruptcy.

The letter agreement of January 8, 1947, between Toolco and TVA was accepted by the board of directors of TVA on January 9, 1947. This agreement provides, among other things, for: (1) a loan by Toolco to TVA in the amount of 10 million dollars and the issuance to Toolco of 2 3/4 percent notes due June 2, 1956, for such loan with an option to convert said notes into common stock of TVA; (2) diligent endeavor on the part of Toolco to arrange a 40-million dollar loan of credit with the RFC; [12/] (3) a rearrangement of the Equitable financing under the 40-million dollar debenture loan; (4) a reconstitution of the board of directors of TVA so that the majority thereof will be nominees of Toolco; and (5) a requirement that no change be made in the bylaws of the carrier without the written consent of Toolco until all the foregoing changes and conditions had been made.

12/ The loan contemplated was also to be an equipment loan and is no longer being pressed because it was Mr. Deitrich's opinion that no additional equipment is required by the carrier. However, attempts were being made along the line of the hearing herein to secure a general credit from the RFC in the [illegible] amount of 10 million dollars.

The notes issued to Toolco under the agreement may be converted at any time prior to their maturity, on 10 days notice, into TVA common stock at the option of Toolco and there appears no possible way for the carrier to avoid the conversion whenever Toolco elects, save bankruptcy. The notes themselves are convertible at a price equal to the average price of the TVA stock for the last 10 days prior to the notice date on the New York Stock Exchange, but in no event for a price less than $5 per share. To provide for the possible conversion, 2,000,000 shares of TVA common stock at $5 par value have been authorized. Thus, if Toolco were to acquire the entire 2,000,000 shares authorized at the minimum conversion price, it would then be the owner of about 80 percent of the common stock of TVA issued and outstanding.[13/] It should be noted that stock in TVA carries with it no preemptive rights, so that upon the issuance of additional shares present stockholders, other than Toolco, may not require that they be permitted to subscribe to shares proportionate to their present holdings in the carrier. Accordingly, the letter agreement gives Toolco an inalienable right to acquire up to a possible 80-percent stock interest in TVA. It should also be noted that the letter agreement further provides that TVA may not make payments on Toolco's loan before payment in full is made in the 6-million dollar debenture loan held by Equitable, and any advances made to the carrier by the RFC. Under the circumstances, it is not likely that conversion, if Toolco should so elect, could be avoided except by an act of bankruptcy by the carrier.

13/ There is a possibility, however, that TVA may accelerate the conversion since the agreement provides that on January 1, 1950, TVA may require Toolco to exercise its option to convert. The record is not clear as to why such condition was inserted into the letter agreement.

If Toolco should convert at $15, the closing market price of TVA stock on [illegible], 1947, it would obtain approximately 67 percent of all TVA stock

The loan by Toolco, as just noted, is junior to the 40-million dollar indebtedness to Equitable. TWA was technically in default on this loan at the time the letter agreement was accepted. As a partial consideration for Toolco's loan, Equitable agreed to a rearrangement of the sinking fund requirements under the indenture by making the terms of payment more lenient. The 16-million dollar Toolco loan was advanced to TWA in staggered sums, with an initial advance of 5 million dollars on January 31, 1947. Under a so-called three-party agreement, Equitable agreed to amend the indenture to permit the Toolco loan when the full 16 million dollars became available to the carrier. This was handled in such a manner as to automatically place TWA in default of the indenture if Toolco failed to loan the second 5 million dollars. In the event of default after the full loan had been made, Toolco and Equitable agree to execute a voting trust agreement to which will be pledged all Toolco's shares in TWA either presently owned or subsequently acquired. Toolco will appoint one and Equitable two of the three voting trustees.

Immediately upon the consummation of the letter agreement, the board of directors of TWA was reconstituted and 13 additional directors were added to the original 11 then upon the board. The directors added were all nominees of Toolco.[16/] In addition to the reconstitution of the board of directors, certain

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15/ Agreement between Toolco, TWA, and Equitable.

16/ These were Palmer Bradley, Thomas A. Slack, William Streetman, and Richard F. Burns, all members of the law firm representing Toolco; A. V. Leslie, a former banker and now a Toolco employee; Harry Rogers, a production man brought to Kansas City to study maintenance problems of the carrier; W. H. Seiler, another employee of Toolco; A. D. Simpson, president of the National Bank of Commerce of Houston; Oscar Holcomb, Mayor of Houston; and C. E. Millikan, F. J. O'Hara, George C. Summers, and Lloyd Wright, all attorneys. Mr. Deitrich testified that all 13 of these men were well known to the principal stockholder and that he knew that they could be relied upon to exercise that degree of judgment and discretion so that the money loaned to TWA by Toolco would be properly dedi-

other changes were made in the operation and management of the air carrier after January 9. These changes mainly were in the nature of the replacement of the top management of the carrier, the institution of a rigid program of economy, and the importation of Toolco personnel to analyze TWA problems. The top management of TWA was vested in a temporary executive committee which, at all times had as two of its members either Mr. Bradley and Mr. Leslie, or Mr. Deitrich and Mr. Leslie. Messrs. John Collings and Paul Richter, representing the management of the carrier, also served on this Committee.

As a result of these changes the record shows that certain suggestions by Mr. Deitrich were almost immediately thereafter carried into effect. These changes related to the top level management of the company and indicate at least the degree to which the new, and then temporary, management of the carrier on and after January 9, 1947, found itself in agreement with the wishes of the principal common stockholder. Further changes consisted of simplification of the corporate structure of TWA and the cancelation of the Lockheed equipment program.

The regular annual stockholders' meeting of the carrier was held on April 24, 1947. The TWA board was then reduced in number from 24 to 14. Of the 14 individuals who are now members of the TWA board, 6 of the 13 nominated by Toolco on January 9 remained. They are Messrs. Bradley, Leslie, Simpson, Wright, Holcomb, and Streetman. To their number were added Mr. A. B. Eisenhower, a Kansas City banker, and Mr. Deitrich. The remaining 6 members of the present board are carry-overs from the board of TWA that existed prior to January 9. With this board there exists little probability of conflict over Toolco's policy for TWA.

At this annual stockholders' meeting the TWA bylaws were amended to permit the removal of any director without cause by the vote of the majority of the stock present and entitled to vote at any special meeting of the stock-

holders. After the annual stockholders' meeting, the newly elected board of directors further amended the bylaws of the carrier to provide, among other things, that special meetings of the stockholders, for any purpose other than that regulated by statute, could be called at the request of holders of 20 percent or more of the capital stock. At such a meeting the stockholders can increase or decrease the number of directors for the purpose of obtaining control. These amendments were obviously designed to make the new board more responsive to the stockholders' wishes.[17/]

It would appear that all of the management powers acquired by Toolco as a result of the letter agreement could have been assumed in any event through the voting of its stock at the annual stockholders' meeting held on April 24, 1947. However, it is doubtful whether in the absence of the letter agreement Toolco could have brought about these changes prior to that stockholders' meeting.

SUMMARY OF THE LAW

As already indicated, both Toolco and TWA are Delaware corporations. Section 26 of the Delaware Corporation Law[18/] provides that a corporation may amend its certificate of incorporation by adding to or decreasing its corporate powers, or by substituting certain powers and purposes in place of those already present therein, or by increasing or decreasing its authorized capital stock or reclassifying it, or by making any other change or alteration in its certificate that may be desired. Every such amendment, however, requires the affirmative vote of a majority of the stock of that corporation

17/ The bylaws of TWA may be altered or amended by either the stockholders or the board of directors.

18/ Revised Code of Delaware 1935, Chap. 65, Art. 1, Par. 2058, Sec. 26.

entitled to vote on such amendment. Under section 39 of the Delaware Corporation Law[19] proceedings for dissolution must be approved by two-thirds of the voting stock of said corporation, and under section 59 of that law[20] an agreement of merger between a Delaware corporation and another such corporation, or a corporation of any State must, at least insofar as the Delaware Corporation is concerned, have the approval of two-thirds of the total number of shares of its capital stock.

The provisions of the Civil Aeronautics Act which are principally involved herein are as follows:

> "Sec. 408 (a) It shall be unlawful, unless approved by order of the Authority as provided in this section -
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> • • •
>
> (5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;
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> • • •
>
> (7) For any person to continue to maintain any relationship established in violation of any of the foregoing subdivisions of this subsection."
>
> • • •

Subsection (b) of section 408, which requires an application to the Board and a hearing, provides in part:

> " • • • Unless, after such hearing, the Authority finds that the • • • acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order, approve such • • • acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe • • •"

19/ Revised Code of Delaware 1935, Chap. 65, Art. 1, Par. 2071, Sec. 39, as amended by 45 Laws of Delaware (1945) Chap. 157, Sec. 3 pp. 596-598.

20/ Revised Code of Delaware 1935, Chap. 65, Art. 1, Par. 2091, Sec. 59, as amended by 43 Laws of Delaware (1941) Chap. 132, Sec. 12, pp. 458-461.

The Board has not heretofore had occasion to render decision upon the question whether, once an acquisition of control of an air carrier has been approved pursuant to section 408, any subsequent transaction can result in an acquisition of control which must also be approved under that section. However, in Railroad Control of Northeast Airlines, 4 C.A.B. 379 (1943) the Board in a dictum laid down an interpretation of section 408 which may be applicable to such situation. In that case, the Board found that the Boston & Maine and Maine Central Railroads jointly exercised complete control of Northeast from the date of its organization until 1938, and enjoyed full and positive control from said date until October 1940. The question presented was whether said railroads acquired control of Northeast Airlines within the meaning of section 408(a)(5) of the Act since the effective date of the Act. The Board found that control had been gradually relinquished so that on the date of the hearing the parties retained only about 4% percent of the stock of Northeast, and concluded that section 408 (a)(5) did not apply to continuance or maintenance of control by said railroads where control had been acquired by them before the effective date of the Act and had since been diminished. The Board recognized:

> ". . . that 'control' as used in section 408 does not necessarily depend upon the ownership of any specific minimum percentage of stock or other ownership rights but rather depends, in the light of all the facts and circumstances in a particular case, upon whether there exists as a matter of fact a power to dominate or an actual domination of one legal personality by another." (p. 381)

After concluding that it had no jurisdiction in that case because control had been acquired prior to the effective date of the Act and not subsequently increased thereafter, the Board said:

"While we do not believe that Congress intended us to exercise jurisdiction over a control relationship created prior to the effective date of the Civil Aeronautics Act and existing unchanged from that date forward, we do believe that we possess jurisdiction in a case where the extent of effectiveness of control has increased. The term 'control' does not connote an absolute concept, but represents the amount of power and influence over the controlled corporation. The number of powers and the degree of influence which the controller held on the effective date of the Act must be deemed approved by Congress, but a subsequent increase in the number of powers, or a strengthening of influence, does not in our opinion share this immunity. This is particularly true in a situation where the control at the time Congress acted was only partial, but becomes complete after that time. [illegible] in the event of a change in control whereby different or other common carriers acquired controlling interests in an airline, this change would, of course, be subject to our approval under all of the provisions of section 408." (p. 366)

Factually, the situation under consideration in the present proceeding differs somewhat from that involved in the Northeast case. Since the railroads had acquired control of Northeast prior to the effective date of the Act, such control was recognized as lawful by the Board on the ground that it must be deemed approved by Congress. This control was not required to meet the statutory test of public interest; no pre-existing approval of control by the Board was involved. Control on the part of the railroads had not increased since the effective date of the Act. Accordingly, the Board found it unnecessary to pass upon the applications for approval of control. However, the Board insisted that it would pass upon any increase in "the extent of effectiveness of control."

Though the circumstances giving rise to the obiter in the Northeast case differ from the facts herein, the present proceeding likewise raises the issue of the application of the words "increase in the extent of effectiveness of control," if the acquisition of additional shares of stock by Toolco would thereby enable it to exercise greater power or effectiveness of control than that contemplated under the Board's original order of approval of October 27, 1944.

Provisions of the Civil Aeronautics Act relating to consolidation, merger, and acquisition of control were modeled after similar provisions of the Interstate Commerce Act and amendments thereto. Section 408 of the Civil Aeronautics Act was borrowed almost word for word from section 213 of the Motor Carrier Act of 1935.[21] Section 213, on the other hand, was patterned on section 5 of the Transportation Act of 1920.[22] Accordingly, persuasive weight may be given herein to decisions of the Interstate Commerce Commission construing the word "control" and dealing with the concept of acquisition of control or changes in the extent of effectiveness thereof in relationships comparable to that before us in the instant proceeding.[23]

The Commission has rendered decisions in varying situations involving changes in the character, extent or effectiveness of control on the part of an acquirer of a carrier subject to the unification and control provisions of the Interstate Commerce Act. In brief, public counsel have submitted a survey of I.C.C. cases bearing on the general issue of the Commission's jurisdiction as affected by existing conditions of control and the scope or extent of further control sought to be established.

21/ 49 Stat. 868.

22/ 41 Stat. 481. The Motor Carrier Act became Part II of the Interstate Commerce Act. The unification and acquisition of control provisions of the Interstate Commerce Act were further revised by the Transportation Act of 1940 (54 Stat. 905). This latter Act in its Part III extended Commission jurisdiction to water carriers, while Parts I and II govern as theretofore rail and motor carriers, respectively. Section 213 of the Motor Carrier Act was repealed; its provisions were removed to Section 5, Part I. Section 5(2) to (13) now deals with unification and acquisition of control for all three types of carriers.

23/ Acquisition of Marquette by T/A-Intercontinental Division 2 C.A.B. 479 (1940); American President Lines, et al., Petition, 7 C.A.B. 799 (1947); Cf. United States Navigation Co. v. Cunard S.S. Co., 284 U.S. 474, 480-481 (1932).

A number of the decisions involve somewhat different ownership and control relationships than under consideration herein. To the extent, however, that the various decisions hold that further control of a carrier may be acquired through stock purchases where the pre-existing control does not cover all of the corporate activities of the controlled company they constitute a rather consistent policy on the part of the Commission in requiring approval of stock-purchase transactions vesting substantive rights in an acquirer of stock it did not theretofore have. In fact, several of these decisions involve situations which bear strong analogy to the circumstances present in the instant proceeding.

The Commission's holdings as to its jurisdiction with respect to applications proposing acquisitions in situations involving pre-existing control of one type or another may be summarized as follows:

(1). Where the applicant already owns a majority of the stock more of which is sought to be acquired, Commission approval is not required where such acquisition will not result in any other or further control on the part of the acquirer.

It was so held in Control of Peoria & Eastern by Big Four, 71 I.C.C. 767 (1922) where an application was filed with the Commission by the Cleveland, Cincinnati, Chicago & St. Louis Railway Company to purchase all the outstanding stock of Peoria not already owned by the applicant. At the time of filing of said application, applicant owned $5,000,100 par value of Peoria's capital stock of which there was outstanding $9,994,000 out of total authorized capital of $10,000,000. Based upon these facts the Commission stated:

"By paragraph (2) of section 5 of the Interstate Commerce Act, we are authorized to approve the acquisition, to the extent indicated by us, by one carrier engaged in interstate commerce of the control of any other such carrier by the purchase of stock or in any other manner specified. In this case, however, so far as appears, the purchase of the remaining stock of the carrier will not give the applicant any other or further control over such carrier than that which it had acquired prior to the enactment of the paragraph. It can only be said that the applicant, in this proceeding, is seeking to acquire that which it admittedly has heretofore acquired. We are, therefore, of the opinion that the application is not within the scope of the paragraph above referred to." (pp. 747-748).

A similar conclusion was reached in Kittrell-Central-Dixie Motor Coach Corp., 35 M.C.C. 25 (1939) where the Commission stated that a majority stockholder need not obtain approval of the purchase of additional shares of stock. The Commission in passing upon an application filed under section 213 of the Motor Carrier Act said:

> "* * * as previously indicated, applicant already controls Sunshine through ownership of a majority of its capital stock. The proposed purchase by applicant of 611 additional shares of stock in Sunshine accordingly does not involve an acquisition of control of that carrier within the meaning of section 213 * * *" (p. 28).

Other decisions have followed the same rule.[24/] However, the Commission has assumed jurisdiction to approve control by lease where control by stock ownership, even if legally complete, already existed.[25/]

2. Where an acquisition by one who is already a majority stockholder of a carrier results in the domination of more activities of the controlled company than permitted a majority stockholder or in the creation of a substantive measure of additional control, the Commission has taken the position that such an acquisition is subject to its jurisdiction.

24/ See, in accord, Securities of Colorado & Southern, 86 I.C.C. 213, 218 (1924); Securities of Chesapeake & N. Ry. Co., 156 I.C.C. 248, 249 (1929).

25/ Acquisition of Control of C.V. & N.W.R. by P.R.R., 70 I.C.C. 201

Perhaps the leading case on this proposition is Control of Pig Four by New York Central, 72 I.C.C. 98 (1922). This case involved prior control on the part of the New York Central through ownership of 52.9 percent of the common stock of the Pig Four, but none of the latter's preferred stock, which had the power to reject any increase in bonded indebtedness or any lease resulting in increased fixed charges. The Commission, in assuming jurisdiction and granting New York Central authority to acquire a majority of the preferred stock, said: 28/

"* * * Such ownership (of 52.9 percent), however, does not constitute complete control, since it appears that the consent of a majority of the preferred stock is required for the issuance of the Pig Four of any evidences of funded debt or the making by it of any lease of railway property which may entail increased fixed charges. This application is made, therefore, for authority to acquire that further and more complete measure of control which will result from the ownership by the applicant of at least a majority of the preferred stock." (pp. 96-97, emphasis added).

Similarly, in Control of C. St. P., M. & O. Ry. Company, 105 I.C.C. 543 (1926) application was filed under section 5(2) of the Interstate Commerce Act by the Chicago & Northwestern Railway, which then owned 50.04 percent of the stock in Omaha Railway, for authority to acquire further control of the latter road. The Commission adopted the view that further control of the Omaha Rail-

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28/ Respondents argue that this and the two cases that follow are distinguishable from subject proceeding on the grounds that (a) no order of prior approval authorizing the pre-existing control had been issued by the Commission in those cases, and (b) that acquirers voluntarily applied for approval. The absence of a prior ratification by the Commission of the status of control existing at the time of the applications for approval of further control in these cases does not make irrelevant the doctrine established by this group of decisions. The Commission took the position that "control" within the meaning of the statute meant complete legal control. The existence of a prior order of approval would have been significant only to the extent that it may or could have by its terms granted the acquirer the full and complete control contemplated by the statute. Moreover, even if there had been prior orders of approval, they may not have approved degrees or elements of control not then in existence. Furthermore, the fact that the applications for approval were voluntarily made does not make those decisions less useful as authority. Obviously, jurisdiction under the statute could not have been conferred upon the Commission by the parties, assuming the parties are correct, whether it acts pursuant to voluntary applications or on its own motion.

way by applicant would enable applicant to take steps toward complete unification of operations through lease or merger or consolidation, as permitted by law, and exercised jurisdiction to approve the acquisition. In Peoria & E. Ry. Co. Control, 236 I.C.C. 749 (1940) the Commission approved acquisition by applicant Cleveland, Cincinnati, Chicago & St. Louis Railway of further control of the Peoria & Eastern by purchase of additional shares of stock where the applicant already owned a numerical majority (50.02 percent) of the shares outstanding. The Commission found that while a bare majority gave the applicant a measure of control over the Peoria & Eastern, under the laws of Illinois various corporate actions, including the renewal of a charter by railroad corporations, must be approved by a vote of more than such a majority. The applicant sought approval of the purchase of additional shares of stock in order to accomplish renewal of the Peoria & Eastern charter in accordance with Illinois law. 27/ The purchase of additional shares was found to represent a further acquisition of control.

A case recently decided by the Commission has likewise recognized that control through stock ownership of most but not all corporate activities does not prevent the Commission from authorizing further or additional control. In Wheeling and Lake Erie Railway Company Control, Finance Docket 15685, decided June 25, 1947, an application by the Nickel Plate, the Chesapeake and Ohio Railway Company and the Allegheny Corporation was filed under section 5(2) of the Interstate Commerce Act, seeking approval of the acquisition by Nickel Plate of certain shares of stock in the Wheeling Railway Company. C. & O. and Allegheny

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27/ The charter of a railroad corporation can be renewed, under the laws of Illinois, by stockholder's action if three-fourths of the votes cast at any regular election for that purpose favor such renewal, provided, however, that those voting for renewal agree to purchase the stock of those opposed. Applicant sought approval of its plan to purchase additional shares in order to be able to vote for renewal and to be in the position to make the required agreement, if necessary.

joined in this application because of C. & O.'s direct control of Nickel Plate and Alleghany's indirect control of Nickel Plate through the C. & O. Nickel Plate is controlled by C. & O. through ownership of 77 percent of its outstanding common stock and C. & O. is in turn controlled by Alleghany through the ownership of 6.74 percent of C. & O.'s common stock. Nickel Plate's interest in Wheeling amounts to nearly 47 percent. C. & O.'s interest in it is 21 percent, and Alleghany's interest in that company is 0.01 percent. Collectively these interests aggregated approximately 68 percent.[28] It was proposed that Nickel Plate purchase C. & O.'s and Alleghany's stock interests in Wheeling, which would have the effect of giving it, Nickel Plate, the approximate 68 percent ownership of that company. The Interstate Commerce Commission held, on these facts, that Nickel Plate's acquisition "of further control of the Wheeling and Lake Erie Railway Company through stock ownership • • • is a transaction within the scope of section 5(2) of the Interstate Commerce Act • • •"

The Commission thus found that the conversion of a 47-percent interest into a 68-percent legal ownership of the company was a transaction subject to its jurisdiction, and in so finding stated as follows:

> "Protection of the Nickel Plate's interest in Wheeling might be affected through acquisition of enough of the latter's stock, 3 or 4 percent, to give the Nickel Plate a majority, or numerical control; but the applicants urge that merger or consolidation of the companies is necessary to accomplish benefits of unified operation, and for that purpose a 2/3 assenting vote is required by Ohio law." (p. 12).

28/ This control relationship was previously approved in Finance Docket No. 15161 et al, Wheeling & Lake Erie Railroad Co. Control, 267 I.C.C. 163 decided December 10, 1946, wherein the Commission approved the sale to Nickel Plate of 78,145 Wheeling shares beneficially owned by the C. & O. Nickel Plate thereby acquired a near 47-percent interest in Wheeling. Prior thereto the C. & O. and Nickel Plate owned 35.1 and 32.9 percent, respectively, of the voting stock of the Wheeling and all of these shares of stock were deposited in trust. Before December 1946, there therefore existed, as far as C. & O. and Nickel Plate were concerned, a separation of ownership from control. The events leading to the trusteeing of the Wheeling stock are set forth in 156 I.C.C. 667. However, by supplemental report and order in Finance Docket No. 15161, dated March 10, 1947, the Commission approved and authorized, among other things, a termination of the trust of all of the Wheeling stock acquired by Nickel Plate.

It thus appears that the Commission recognized in this case that a change from actual to legal ownership of Wheeling, where the change referred to carried with it the power to satisfy the provisions of Ohio law with respect to a possible prospective merger or consolidation of Nickel Plate and Wheeling, that did not theretofore exist in the acquirer, was a transaction subject to its jurisdiction and for which its approval was required under section 5 of the Act.

It is true, as respondents point out, that the Commission has exercised almost continuous jurisdiction over the stock of the Wheeling railroad and, further, that the Commission, in the same proceeding in which it approved the acquisition of a 47-percent interest in Wheeling on the part of Nickel Plate, ordered the shares still owned by the C. & O. and Allegheny, representing 21 percent of the voting stock of Wheeling, placed in another trust. But it is obviously absurd to contend, as respondents do, that the terminology of the Commission in approving the acquisition by the Nickel Plate of "further control" of the Wheeling in Finance Docket No. 15665 was a mere characterization of the change from pre-existing shared control by the three carriers to individual control by Nickel Plate. On the contrary, the Commission clearly approved the "further control" on the part of Nickel Plate as a jurisdictional acquisition within the meaning of section 5(2) of the Interstate Commerce Act. 29/

3. An increase in the ownership of the number of shares which transforms what constitutes de facto or actual control into legal control represents an acquisition subject to the jurisdiction of the Commission.

29/ The application in Docket No. 15665 was made under section 5(2) of the Act. If no element of increased or additional control were involved the Commission should have dismissed the application for the want of jurisdiction and perhaps merely entertained an application to terminate the second trust to permit Nickel Plate to buy the remaining voting stock in Wheeling.

Jurisdiction in this type of situation was first upheld by the Commission in Control of Columbia, Newberry & Laurens R. R., 117 I.C.C. 219 (1926). There the applicant, Atlantic Coast Line Railroad, already owned 45.8 percent of the stock of the Columbia, and enjoyed virtual control through the cooperation of interests friendly to the applicant, who held 7.5 percent of the stock. In spite of finding that applicant enjoyed de facto control the Commission assumed jurisdiction and approved applicant's request for further control.

In Dollar Lines - Purchase - United States Steamship Co., 30 M.C.C. 69 (1941), Pacific Greyhound Lines, owner of 60 percent of Dollar Lines outstanding stock, sought authority under section 5 of the Interstate Commerce Act to acquire control of Dollar Lines through the purchase of the remaining 60 percent of its outstanding stock. 30/ It was contended by Greyhound that it exercised exclusive actual control and management of Dollar Lines with the oral consent of the single 60 percent stockholder and that no acquisition of control was involved because the proposed purchase of 60 percent of the stock would give it no further control than that which it was already exercising.

The Commission found that Pacific Greyhound was in actual control of the company at the time of the application but rejected its argument, stating:

> "Apart from the question of whether or not Pacific Greyhound acquired actual control of Dollar prior to the effective date of the Act, and which question we are not now determining, these applications * * * seek our authority for acquisition of control of Dollar by Pacific Greyhound through ownership of its capital stock. Such acquisition of control clearly requires our prior authorization under section 5. In considering this proposal, we cannot overlook the fact that Pacific Greyhound at present holds actual control of Dollar * * *" (p. 74).

30/ This case also involved a joint application by Dollar Lines and the United States for the purchase by Dollar of the operating rights of United States.

While the Commission disapproved the proposed acquisition on the part of Greyhound, principally because the 49-percent control was effectuated without prior Commission approval, the rule established by the decision on the jurisdictional issue involved appears sound. Greyhound was attempting to transform a working practical control into an assured legal domination of the controlled carrier. The Commission recognized that a change from actual to legal control was a substantive acquisition requiring its approval.

The Commission has required approval of increase in control in other cases involving transfer of actual control to legal control. In Hegshire-Control - M.E. & C. Motor Lines, Inc., 35 M.C.C. 33 (1939), the Commission approved an application under section 213 of the Motor Carrier Act whereby Hegshire, a 33 - 1/3-percent stockholder became a 50-percent stockholder through the retirement of 2C shares of the company's stock, leaving 4C shares outstanding equally owned. Subsequently, Hegshire sought the Commission's authority under the same section to acquire the remaining shares of stock of M. E. & C. Motor Lines. This application was likewise approved by the Commission, as consistent with the public interest, under that section. Hegshire - Control M. E. & C. Motor Lines, Inc., 35 M. C.C. 487 (1940). Similarly, in Black Hills Stages Inc. - Purchase - Black Hills Transp., 25 M.C.C. 529 (1939), the Burlington Transportation Company, a 50-percent stockholder in Black Hill Stages was permitted to acquire complete control of Black Hills Stages, through the purchase of the remaining 50 percent of its outstanding stock. 31/

Respondents argue that the Hegshire and Black Hills decisions are irrelevant to the problem before us because they involve changes from shared control to individual control. It is much the same claim of inapplicability that

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31/ Prior to the approval, the Commission had permitted Burlington Transportation to acquire control jointly with Black Hills Transportation Co. of Black Hills Stages (25 M.C.C. 171).

respondents attempted to apply to the Wheeling case, supra. The argument proceeds on the premise that where several parties each own a control of a carrier, the purchase by one of the interest of another is, both practically and legally, the acquisition of "a control" by the purchaser. In other words, it is contended that the acquisition of "complete" or further" control referred to by the Commission in these cases simply represents the acquisition by the purchaser of the remaining interests in the controlled carrier.

This is by no means so. As already noted in the comments on the Wheeling case, the Commission specifically treated the transfer of interests involved in this type of situation as jurisdictional acquisitions within the meaning of the statute. True, the Commission did not elaborate on its reasons for so doing. But there would appear to be no reason why an acquiring stockholder could not secure an additional quantum of control through an acquisition of stock from one or more stockholders of a controlled carrier rather than from the corporation itself.

4. A change from indirect to direct control through the elimination of an intermediate controlled subsidiary or through a change in the form of ownership may constitute an acquisition subject to the jurisdiction of the Commission.

Subject proceeding, of course, does involve any change in the corporate person of either the acquirer or the controlled carrier. But this line of decisions reveals how far the Commission had gone in refusing to restrict its authority on the issue of jurisdiction under section 5 of the Interstate Commerce Act. It in effect placed changes in the form or character of control on par with transactions increasing the power of control on the part of an acquirer.

The leading case on the foregoing type of control situation is Atchison, T. & S.F. Ry. Co. - Control - Santa Fe Trail Transp., 15 M.C.C. 469 (1938). In that case an application under section 213 of the Motor Carrier Act for approval and acquisition of stock of the Santa Fe Trail Transportation Company was made

indirectly controlled the rater carrier through a zeene holding company, and it was desired to change the form of control from indirect to direct. The projected change was to be accomplished by the railroad's purchase of approximately 55 percent of the Transportation Company's stock from the General Improvement Company, a wholly-owned subsidiary of the railroad. The contention was made at the hearing by certain intervenors that where a railroad controls a rater carrier indirectly through a subsidiary company it is not necessary that approval be given by the Commission for the acquisition of control, the argument being that once a railroad has acquired control, of whatever character, of a rater carrier, it may modify or shift the form of control without Commission approval or authorization under section 213, because it was not thereby acquiring anything within the meaning of that section. In assuming jurisdiction and approving the acquisition, the Commission took the position that section 213(a)(1) must be read as a whole. It wrote as follows:

> "It is clear that one of the purposes of the section is to make sure, if an acquisition of control is approved, that its terms and conditions shall be just and reasonable. However, if a railroad could secure approval of an acquisition of indirect control upon terms which we find to be just and reasonable, and could then, without our supervision, shift such indirect control to direct control, it could at the same time also, by means of such transaction, in effect modify the terms and conditions upon which control is held. For this reason we believe that to give effect to the obvious intent of the section a change in character of control must be regarded as a transaction requiring our approval and authorization under section 213(a)(1). It is evident that otherwise a control consistent with the public interest might be so changed as to become inconsistent therewith. As a further illustration of what might happen, a desirable direct control might be shifted to an undesirable indirect control." (pp. 471-472)

As the foregoing language indicates, the Commission has taken the position that a conversion of indirect control over a carrier to direct control may in effect modify the terms and conditions imposed in an order of approval and therefore represents a change in control subject to the Commission's authorization.

Other decisions of the Commission followed the Allegheny case. In Chesapeake & Ohio Railway Company - Purchase, 261 I.C.C. 239 (1945) the Allegheny Cor-

acquire control through the Chesapeake and Ohio of the properties of the Norfolk Terminal and Transportation Co. In holding the application of Allegheny subject to approval under section 5 of the Interstate Commerce Act, the Commission said at page 260:

> "The two applications contemplate a change of existing control in that the Chesapeake & Ohio would control, through purchase, the properties of Terminal, instead of control through stock ownership and by lease, and Allegheny's control of the two companies would likewise be changed. Such 'internal re-arrangement of corporate structure' must have our approval under section 5(2) of the Act or be unlawful."

Thus, the Commission in this case recognized that while Allegheny [illegible] indirectly controlled both companies, as a result of the proposed transaction its control was to be changed, through purchase, and that an acquisition of control would take place under section 5 of the Interstate Commerce Act.

An indication of the extent to which the Atchison doctrine has been applied is shown in Standard Freight Lines, Inc. - Merger, 46 M.C.C. 41 (1945).[32] In that case Standard Freight Lines and Bates' Motor Transport sought authority under section 5 of the Interstate Commerce Act to merge the operating rights and properties of Bates into Standard. One Chaddick, who controls Standard through ownership of all its stock and who controlled Bates through ownership of 65.3 percent of its stock, filed application to acquire control of the operating rights and properties of Bates through the merger. The Commission in that case held, citing the Atchison case, that although Chaddick already controlled both of the carriers involved, such control is at present exercised over separate entities and the proposed merger would result in the change in the form of that control through unification of the properties in Standard. It stated at page 421:

32/ For other I.C.C. cases following the theory of the Atchison case see: Southern Pacific Co. - Control - Pacific Motor Trucking Co., 25 M.C.C. 121, 122; Greyhound Corporation - Control - Toronto Greyhound Lines, 36 M.C.C. 599; [illegible] Universal Carloading Co. - Control - [illegible]

"The fact that the instant merger would result only in a formal change in the manner in which Chaddick exercises his control over the properties of Yates does not negative the fact that such change in the form of this control is a transaction subject to section 5, just as the merger itself is such a transaction."

Commissioner Miller dissented, pointing out that Chaddick's acquisition of control of operation rights and properties of Yates through the merger added nothing to the control which he already had over that company. The majority, however, held Chaddick a necessary party applicant in the proceeding requiring the Commission's authorization for the change in the form of his control.

The foregoing class of cases establishes that where the form of control has been altered through change from indirect to direct control or through a change in the character of the person or corporation holding control, the transactions are subject to Commission approval. In other words, the Commission has gone as far as to hold that certain changes in the form of control as well as increases thereof are subject to its approval.

There is perhaps another aspect of the problem here presented which bears upon a determination of whether or not the Board has jurisdiction. It concerns the power of the Board to maintain continuing authority over control relationships previously approved by it under section 408 of the Act. It is evident from the language of the Atchison opinion that the Interstate Commerce Commission feels it needs to maintain continuing jurisdiction over control relationships approved by it. The Commission acknowledged the necessity of a continuing power to enforce such terms and conditions as it might prescribe in approving an acquisition of control.

It is true that the Board advised Pooles that the transaction embodied in the latter agreement was not the kind of commercial transaction intended to be governed by the terms and conditions of the original order of approval and, accordingly, no approval by the Board of the loan or other provisions of the agreement

was deemed necessary under the order. 23/ But the Board further advised respondents that its advice was not to be construed as a determination that approval by the Board under section 408 of the Act was not required. 24/

The fact that the letter agreement fails directly to affect the terms and conditions of the original order of approval does not dispose of the question of the extent to which we can rely on the doctrine of continuing jurisdiction in the present proceeding. One approach to this problem rests on the proposition that the power to impose reasonable terms and conditions under section 408 impliedly gives the Board continuing authority to prescribe new terms and conditions in the event of any material change in relationship previously approved, as well as power to see to it that the terms and conditions originally imposed are followed. There, however, may be another basis in the Act for asserting the doctrine of continuing jurisdiction.

Without exploring the several situations where an administrative order has or should have the effect of finality, it may be safely stated that the judicial concepts of res judicata and equitable estoppel do not ordinarily apply to administrative determinations. In the present situation, resort can be had to the statute under which the Board operates to determine the effects of decisions thereunder. Section 1005 of the Act provides grounds for vesting a continuing

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23/ By letter, dated January 22, 1947, after both Toolco and TWA had requested approval of the transaction under the terms of the order of approval entered in Docket No. 1182.

24/ Assuming the transaction entered into under the letter agreement represents an additional acquisition of control pursuant to section 408, query, whether failure of respondents to make application for approval under that section does not constitute a violation of the Act.

power upon the Board to take account of events following approval of control relationships under section 408. [35] Courts, of course, have always enjoyed the power to modify or even revoke their judgment or decree during the term of court when the judgment or decree was entered. [36] If it can be concluded that section 1005 grants the Board substantive rather than procedural powers, then there is a considerable analogy between the control of orders by a court during the term in which they were rendered and the control by the Board of its orders at all times. [37]

It is next necessary to examine the present Toolco-TVA relationship to determine whether Toolco has acquired any greater control over the carrier than that contemplated by the Board's order of October 17, 1944. Obviously, if neither the letter agreement of January 8, 1947, nor any change in the aeronautical activities of Toolco since October 17, 1944, has resulted in any further acquisition of control of TVA within the meaning of section 408 of the Civil Aeronautics Act there is nothing in this proceeding for which Board approval is required under that section. However, the word "control" as used in the Act may embrace every form

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35/ Section 1005(a) provides, in part, that orders of the Board "shall continue in force until further order . . ." Section 1005(d) empowers the Board "to suspend or modify its orders upon such notice and in such manner as it shall deem proper." It will be argued no doubt that the provisions of section 1005 are intended to be merely procedural. But its language may reasonably be construed as a grant of authority to change not only orders having a procedural effect but also those effecting substantive interests. Significant in this connection is the fact that the section contemplates that some changes may be made upon notice. Moreover, it seems that if section 1005 were intended only to provide a procedural mechanism for the exercise of substantive powers granted elsewhere in the Act, it would have been couched in language similar to that of section 205. There the Board is empowered, among other things, to amend orders where the amendment is deemed "necessary to carry out such provisions [of the Act] and to exercise and perform its powers and duties under this Act." No such language will be found in section 1005.

36/ Zimmern v. United States, 298 U.S. 167, 169 (1936).

37/ Malcierz v. Chicago, St. P., M. & O. R. Co., 115 Neb. 727, 214 N.W. 748, 748 (1927); Cf. Brenner v. Hall, 122 F. 2d, 128 (C.C.A. 7th 1941), cert. denied 314 U.S. 669 (1941); Federal Trade Commission v. Kay, 35 F. 2d 167 (C.C.A. 7th 1929) cert. denied 281 U.S. 764 (1930); National Labor Relations Board v. Baltimore L. Co., 140 F. 2d 51 (C.C.A. 4th 1944), cert. denied, 321 U.S. 795 (1944).

of control, actual or legal, direct or indirect, negative or affirmative. It also includes the power to control whether that power is currently used or can be exercised in the future.[38] Finally, irrespective of whether subject transaction has resulted in further acquisition of control under section 408, it appears appropriate to inquire whether the applicable law confers upon the Board continuing jurisdiction over control relationships already approved by it under said section.

CONCLUSIONS

The record made in this proceeding indicates that there has been no significant change in the activities of Toolco in the field of aeronautics since the Board's original order of approval of October 17, 1944. While it is clear that Toolco continues as a person engaged in a phase of aeronautics under section 408 of the Act, there has been no change in its aeronautical activities since said date for which Board approval is required.

The record shows, however, that the letter agreement clearly resulted in an immediate increase in the effectiveness of Toolco's control over TWA. Following the acceptance of the letter agreement by TWA and pursuant thereto, the TWA board of directors was reconstituted. The directors who were added were all nominees of Toolco. Through the reconstituted board Toolco achieved, for the first time since its control of the carrier was approved by the Board, unquestioned dominance of the management of the carrier. There then followed significant changes in the management of the affairs of the carrier, including, among other things, a replacement of the top management of TWA, a modification of its internal organizational framework, and certain changes in the day-to-day operation of company.

38/ Pan Am. Airways, Inc., Acquisition of Panagra, 4 C.A.B. 803 (1943); and cases there cited; Re the Detroit Edison Company, 7 S.E.C. 908 (1940).

There is no doubt of Toolco's desire of certain changes in TWA before injecting additional money into the carrier, and that, in the absence of the letter agreement Toolco or its representatives could not have brought about changes made prior to the date of the annual stockholders' meeting on April 24, 1947. On April 24, Toolco took steps that promised to assure it of authority to enforce its policy decisions respecting the operations [illegible] changes were chosen, the majority of whom were well known to the principal stockholder. The by-laws of the carrier were amended. These amendments were definitely designed to prevent any future impasse between the principal stockholder and the TWA board.

It appears certain that on April 24, 1947, Toolco could have accomplished as effective a reconstitution of the TWA board as was achieved pursuant to the letter agreement. As a matter of fact, at the April 24 annual meeting of the stockholders, called under the pre-existing by-laws, Toolco accomplished a change in the board of directors under which there exists very little probability of conflict with Toolco policy for TWA. Nevertheless, during the interim period, January 9 - April 24, 1947, the letter agreement made possible the unity of management control which Toolco was able to exercise over the carrier after the acceptance of the agreement. However, since all the management powers assumed by Toolco as a result of the January 9 agreement could have been exercised in any event not later than April 24, such increased or additional control as took place during this short period would hardly require approval under the Act. It would be straining the language of section 408(a) to say that this

is the "control" intended to be covered by the Act. Insofar, therefore, as the letter agreement of January 9 may be considered as affecting matters of management control of TWA by Toolco during the period from January 9 through April 24 of 1947, it probably did not more than to accomplish on and after January 9 what Toolco could and would have done without the agreement on April 24.

However, the $40,000,000 loan made to TWA under the agreement carried the right on the part of Toolco to have the debt retired by converting it to common stock. We have noted that this letter agreement thus gives Toolco a right to acquire up to a possible 80 percent of the common stock of TWA. This right rests solely at Toolco's option unless bankruptcy ensues. Accordingly, it becomes necessary to determine whether the acquisition or potential acquisition, wholely on Toolco's option, of the substantially greater stock interest in TWA represented by shares acquirable through conversion of the debt has resulted in any change in the extent or effectiveness of control of Toolco of TWA.

Reference to the I.C.C. cases hereinbefore summarized reveals that where there had been a substantial increase in the extent, effectiveness or power of control through stock purchases, the additional control which resulted therefrom required approval by the Commission. This doctrine is supported by a number of the I.C.C. cases reviewed. These cases all discount the argument that where control in one form exists, a change in that control or an increase thereof need not be approved. The decisions rendered in four of the cases in particular — the Big Four, Control of [illegible], the second Peoria & Eastern, and the Wheeling cases —

have definitely established the proposition that the creation of a substantial measure of additional control in an acquiring stockholder, whose pre-existing control was for one reason or another legally incomplete, represents an acquisition subject to the approval of the Commission under the Interstate Commerce Act. Factually, as already pointed out, these cases are not "on all fours" with the instant proceeding. But the facts which grounded the decisions on the jurisdictional issue before the Commission in each of them are strikingly similar to the situation before us and the cases are therefore authority for the doctrine that pre-existing control, unless legally complete, does not preclude an additional acquisition for which further approval is required. Moreover, the scope of the Board's dictum in the Northeast case plainly indicates that there can be a transaction amounting to an acquisition of control of an air carrier which must be approved by the Board under section 408 of the Act, even though the Board has approved a prior acquisition of control of such air carrier by the same person.

There can be little dispute with the proposition that "control" of a corporation means power to dictate the complete action of the corporation. Under Delaware law, Toolco, with a majority stock ownership in TWA can, alone and on its own initiative, perform such important corporate acts as amending TWA's certificate of incorporation by adding to or decreasing its corporate powers, or by substituting certain powers and purposes in place of those already present therein, or by increasing or decreasing its authorized capital stock or reclassifying it, or by making other changes or alterations in said certificate. Further, a two-thirds common stock interest in TWA would enable Toolco, for the first time, and using only its

voting power, to satisfy the provisions of Delaware law with respect to such vital matters as merger, consolidation or dissolution of the carrier. Accordingly, the acquisition or potential acquisition, wholly at Toolco's option, of a majority or two-thirds stock ownership in TWA creates in Toolco, alone, the power of change and of life and death over TWA.

We thus come to the crux of this case. It is clear that the letter agreement of January 9, insofar as it gives Toolco the option to acquire a substantially greater stock interest in TWA, thereby enabling it to exercise any of the corporate activities or powers conferred by Delaware law upon a majority or two-third owner of a Delaware Corporation, represents in fact a change in the extent of effectiveness of control and constitutes in law an acquisition of control, unless it can be shown that the control approved by the Board in Docket No. 1182 was, for all purposes, complete or absolute control.

Respondents rest their case principally upon the proposition that the Board in Docket No. 1182 approved the highest possible degree of control. They contend that the effect of the Board's order was to permit Toolco to acquire TWA common stock without any limitations as to the amount of stock, time of purchase or any other factor. In other words, it is argued that the Board's order in Docket No. 1182 approving control contemplates and covers the very type of transaction represented by the letter agreement of January 9. Respondents further contend that even if this were not true, Toolco has, after the date of the original approval of control, at all times exercised complete legal control since the [illegible] shares voted by Toolco "plus the management proxies" at each [illegible] have consistently constituted more than two thirds of the out-

standing stock of TWA.

To determine whether the Board intended to approve blanket, unlimited control in future by Toolco over TWA, it is necessary to examine the Board's concept of the "control" it ratified in other acquisition proceedings before it under section 408 and to analyze the language of the Board's opinion and order in Docket No. 1182.

The Board has in various acquisition cases set forth its interpretation of the word "control" as used in section 408 of the Act. [39/] It has recognized that control does not connote an absolute concept; that it may apply to and cover a great variety of situations; and that it represents the amount of power and influence necessary to give its possessor substantial influence over the controlled corporation. The Board has also recognized that the quantum or degree of control may change. For example, in the Northeast case, the Board noted that the measure of control may increase. In another proceeding it recognized that changed circumstances following a period of effective control resulted in a reduction in the quantum of control. Thus, in the Aerovias de Guatemala case, the Board considered an application of Pan American Airways relating to its ownership of 40 percent of stock in Aerovias, a Guatemalan carrier. The Board found that Pan American in fact did control the carrier for a period of time. Subsequently, Pan American's holdings in Aerovias were materially reduced. This reduction in Pan American's holdings, plus other changes in the relationship between the parties, represented so substantial a change in

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39/ Railroad Control of Northeast Airlines, supra; Pan American Airways, Inc., Aerovias de Guatemala, supra; Pan American Airways, Inc., Aeroneves de Mexico, 4 C.A.B. 494 (1943); Pan American Airways, Acquisition of China National, 6 C.A.B. 143 (1944).

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Pan American's influence over the carrier that the Board concluded that Pan American no longer controls Aerovias. The Board clearly recognized that "control" is not a static concept. It said:

> "... it is apparent that where the word "control" is used in a public utility statute without any qualification or limitation, the legislature did not intend any artificial restrictions should be placed on its meaning. Thus, the existence of "control" is a factual matter to be ascertained by a weighing of all of the evidence in each particular case and the drawing of reasonable inferences and conclusions therefrom, in the light of the objectives and purposes of the statute. It is therefore important in this case, among other things, to scrutinize all of the facts and circumstances which resulted in Pan American's acquisition of 40 per cent of Aerovias' stock, and to ascertain what rights, if any, such stock interest gives to Pan American in the conduct of the affairs of Aerovias. This necessarily requires a careful examination into the past and present relationship between Aerovias and Pan American, including a full inquiry into all transactions between the two companies." (page 405).

It is obvious that the Board, in passing upon an application for approval of an acquisition of control under section 408, does not concern itself with more than the specific degree of control involved in the situation before it. Ordinarily, the Board would not and could not grant approval of an acquisition in future unless the issue was raised during the adjudication of the proceeding or at best recognized by the Board in its opinion or order. Whether the scope of approval granted in Docket No. 1182 has had the effect of approving all future acquisitions must be resolved from the action of the Board in that case.

After reciting the number and per centum of its capital stock interest in TAI, Toledo's application in Docket No. 1182 for approval of control of the carrier, requested "approval by the Civil Aeronautics

Board, if such approval is deemed necessary, of the control by the applicant[40] of Transcontinental & Western Air. Presumably the control referred to was the measure of control existing at the time of the application.

Examination of the briefs of Public Counsel and of Toolco, the report of the examiner, and the Board's opinion and order in Docket No. 1182 reveals that all parties to the proceeding concerned themselves with the control relationship then present. Throughout the entire proceeding, an acquisition as of that time was in contemplation of the parties. Thus, Public Counsel urged that "the acquisition of control"[41] of TWA by Toolco be approved, subject to such terms as he proposed. Counsel for Toolco spoke of the "control here involved"[42] in urging approval. The examiner likewise viewed the control relationship in terms of the stock interest that Toolco then owned in TWA. However, for the most authoritative evidence of the precise relationship approved in that proceeding resort must be had to the final action of the Board.

It is elementary that in interpreting an administrative order it is necessary to construe the order and the accompanying opinion or report as a whole. Therefore, the Board's order in Docket No. 1182 must be read in the light of the opinion upon which it was based.

In arguing that Board approval in this proceeding is not required respondents rely heavily upon the specific language used by the Board in

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40/ Paragraph 4 of application filed November 19, 1943; emphasis supplied.

41/ Brief of Public Counsel, Pages 12 and 27; emphasis added.

42/ Brief on behalf of Toolco, page 3; emphasis added.

its order of approval. Pointing ~~presumably~~ to words set forth in the introductory paragraph of the order (see footnote 5, supra) respondents insist the Board approved "the acquisition of control, by the purchase of common stock" of TWA. And it is this language, the contention continues, which indicates an intention on the part of the Board to grant approval of unlimited control in future through the acquisition of stock.

The words of the introductory paragraph referred to are merely descriptive of the application of Toolco in that case. It is true that the Board ordered the application so described be approved. However, the terms of the order, must, as already noted, be read in the light of the Board's opinion.

The Board's opinion in Docket No. 1182 recites that "control" for the purpose of that proceeding was stipulated, and the principal issue facing the Board for decision was whether Toolco, the acquirer, was a person engaged in a phase of aeronautics, within the meaning of section 408(a)(5) of the Act. Finding that to be the fact, and together with the fact that the controlled corporation was an air carrier, and that "control" was stipulated, the Board approved the relationship subject to certain limitations relating to commercial transactions between Toolco and TWA.

The Board's opinion carefully described Toolco's history of stock ownership in TWA from 1939 to the date of the opinion, when Toolco, the Board recognized, owned 45.6 percent of the shares then outstanding. The Board's findings with respect to the control relationship involved were ~~s~~ in terms of the amount of stock interest then owned by Toolco. The

Board said:

> "For the purpose of this proceeding applicant (Toolco) concedes that the stock now owned constituted control of the carrier. There is very little room to doubt that for all practical purposes such control has existed since the end of 1940 at least when 42.1 percent was owned. Ownership of so great a proportion of outstanding stock, the remainder of which is dispersed among many owners, represents such a dominating influence in the affairs of the corporation that, in the absence of circumstances indicating the contrary, control either affirmative or negative, must follow. Much smaller interest have been found so to result." (Supra. p. 154 emphasis supplied)

After making other findings on various aspects of relationship before it, the Board concluded:

> "Soo we find that acquisitions of control of TWA by Hughes Tool through the purchase and ownership of a stock interest therein will not be inconsistent with the public interest." (Supra. p. 157, emphasis supplied).

It is clear from the foregoing that the board did not and could not have intended complete, in future approval of the relationship between Toolco and TWA. The decision clearly relates to the quantum of control represented by the then ownership of common stock in the controlled company. Doubtless it will be argued that the Board would have used the phrase "the stock interest" had only the then existing stock ownership been covered by its approval. Contrariwise, it can be contended that had the Board intended approving such control as would have been covered by an unlimited acquisition of stock in the future it would have used the words "any stock interest". It would be possible to further play upon the words used in the order and opinion originally granted approval. Suffice it to say that the words "a stock interest" when read in the context of the entire opinion, clearly connote the specific ownership

relationship existing at the time of Toolco's original application.

It must also be recognized that merely because the Board approved Toolco's control flowing from the ownership of 45.6 percent of TWA's common stock; Toolco need not come before the Board with the purchase of each successive share of stock. As a matter of fact, the record shows that between October 17, 1944 and June 30, 1947, Toolco made small acquisitions (and sales) of TWA stock. 23/ Obviously, minor acquisitions not substantially affecting the measure of control need not have successive approvals. However, conversely, the Board's approval of a specific control relationship, upon certain facts and conditions, does not obviate the necessity of approving a further acquisition resulting from a significant increase in the extent or effectiveness of control. This position is given point by the fact that the Board has no jurisdiction over the issuance of airline securities. If the law in this regard were otherwise securities which Toolco could acquire pursuant to the letter agreement would be controlled. But the potential stock interest represented in the 10 million dollar loan to TWA is not controlled. Through this transaction Toolco has attained new and highly important substantative rights over the carrier. The transaction, therefore, has created another acquisition of control, subject to the Board's jurisdiction. 24/

23/ The percentage of outstanding TWA stock held by Toolco between said dates never varied more (or less) than by 1 percent from the amount held on October 17, 1944.

24/ The very fact that the Board issued its order of investigation in this proceeding negates the argument of respondents that the Board consulted its order of October 17, 1944, to constitute an unlimited, [illegible] of Toolco's acquisition of control of the carrier.

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Let us restate the foregoing in another way. Perhaps it can be more simply expressed. To begin with, it is obvious that factually there can be more than one acquisition of control. The I.C.C. cases reviewed make that clear. The Toolco-TWA situation itself demonstrates that proposition nicely. In 1944 a 45 percent stock interest gave Toolco a certain degree of power or control over the corporate activities of the carrier. In 1947 an indefeasible option to acquire up to a possible 78 percent stock interest gave Toolco a substantially greater degree of power or control over the corporate activities of the carrier. It follows then that factually there was another, further or second acquisition of control. This is true regardless of the interpretation placed upon the original order of approval; factually, the situation before us involves a further or second acquisition regardless whether or not there legally has been such another acquisition. In other words, there has been a further or second acquisition as a matter of fact, even if it could be successfully established that there has not been such an acquisition as a matter of law.

Now, we have seen that it is also possible to have a further or second acquisition of control as a matter of law. The Interstate Commerce Commission has so held in numerous cases. The Board said so in the Northeast case. To determine whether there has been another acquisition as a matter of law on the part of Toolco under the transaction of January 9, 1947, we must look to see what the Board originally approved in 1944. It is clear that it approved the acquisition that was then before it; it could not at that time have approved or reasonably anticipated an acquisition which took place some three years later. The Board's original order of approval, when read in light of the report of the case and the record upon which it was based, cannot be interpreted to have contemplated a blanket approval of any and all subsequent acquisitions. The record in Docket No. 1182 is clear to the effect that the issue of approving complete, blanket, control in

settle an issue which was never raised or recognized, the argument that the Board approved the highest degree of control must fail.

The further basis for respondent's argument that Tcolco's control over TUA has not increased and cannot increase may be very briefly set at rest. It turns upon the claim that Tcolco, by controlling management proxies since October 17, 1944, has, together with such proxies, had the power to take any corporate action necessary with respect to the carrier in compliance with Delaware law. An answer to this claim requires the distinction between having the required voting power under Delaware law upon the vote of Tcolco alone as against having such power dependent upon the use of proxies to vote stock owned by others, who may not always acquiesce. Further, while Tcolco has been able to secure proxies sufficient to enable it to control the day-to-day affairs of the carrier, it may not be able to obtain that acquiescence in matters such as a merger, consolidation or dissolution of the carrier. But even if it be assumed that Tcolco could at all times obtain sufficient votes to put in effect any desired corporate action, the fact remains that the letter agreement, through the retirement of the indebtedness therein created by conversion to stock, makes unnecessary any dependence upon other stock interests in TUA. Certainly, therefore, a control relationship has been established where the controlled company, which formerly responded to orders from one person with assistance from others by proxies, or otherwise, now responds or may respond to one person at its sole instance.

There is no doubt that an assertion of jurisdiction in this case clearly can stand on the proposition that the transaction embodied in the letter agreement of January 9 has resulted in "an acquisition" of control within the meaning of section 5. The fact that an increase in the extent or effectiveness of control over TUA is present by virtue of the terms of the letter agreement and that that increase [illegible] further acquisition as a matter of law are sufficient to require the

with the vindication of the public interest in so important and dynamic a field as civil aviation has the responsibility of asserting all such powers as the law gives it to effectuate the policy committed to its care. Accordingly, the examiner urges that the Board consider whether under the provisions of the Act it may also assert authority over the matter in issue in this proceeding on the ground that it has continuing jurisdiction over control relationships previously approved by it under section 408.[45]

It can be plausibly argued that the continuance in the public interest of a previously ratified control relationship is a condition precedent to any approval of an acquisition which the Board may grant under section 408 of the Act. There is of course an overriding public concern in seeing to it that control of an airline is not exercised in a manner inconsistent with the objectives set forth in section 2 of the Act. A person acquiring control, it may be argued, should not be allowed to frustrate the purpose of the statute by acting, subsequent to the acquisition, in a manner which would have prevented approval of the acquisition in the first instance.

45/ Strong support for continuing jurisdiction on the part of the Board can be found in the following statement made at the hearing by Thomas A. Black, counsel for Tecolco in this proceeding: "Of course the Board has jurisdiction. It knows it has jurisdiction. I will concede the Board has jurisdiction. The question is not whether it has jurisdiction, but whether in this case it should do anything about its jurisdiction. The Board could unquestionably enter an order and say, 'Here, we want to reopen this thing and look at the whole picture, bring that in and let us have a look at it,' but that is not the question here, whether the Board has jurisdiction. It is a question of whether it is called upon in view of the letter of January 8th to call its jurisdiction into force and to do something about it, and the two thoughts and concepts are as far apart as day and night." A similar position was taken by George A. Spater, counsel for Tecolco in the proceeding under Docket No. 1182. In a letter addressed to the Board under the date of August 14, 1944, protesting a condition proposed by Public Counsel for incorporation into the order of approval, Mr. Spater argued that Public Counsel failed "to appreciate (1) the practical considerations involved in [that] case and (2) the significance of the continuing jurisdiction of the Board with its power to prevent any over-reaching." As to the second point, Mr. Spater said: " . . . the attention of the Board is directed to its ability to retain continuing jurisdiction over the relationship between Eastern Air Lines, Inc. and Tecolco. The Board could at any time re-

The foregoing is not to imply in the least that the further acquisition of control of TWA by Toolco may not be consistent with the public interest. That issue is not before us here. It is merely intended to explore the possible existence of a continuing power on the part of the Board to review a prior approval of an acquisition under section 408 in the absence of a specification in the order of approval reserving such authority.

As already noted, section 408(b) provides that the Board may impose in an order approving an acquisition such terms and conditions as it shall find just and reasonable. Section 1005(a) provides, in part, that the orders of the Board shall continue until its further order; section 1005(d) authorizes the Board to modify its orders. It may therefore be argued that sections 408 and 1005 read together, plus the implied power of the Board to require that an approved acquisition is exercised in a manner consistent with the high purposes of the Act, confers upon the Board continuing control of the relationships previously ratified by it and authorizes it to amend prior orders of approval to impose such new terms and conditions as it may deem necessary. Perhaps the foregoing is the rationale which prompted Toolco's counsel in the present proceeding to concede that the Board has continuing jurisdiction and which moved counsel in the original case to urge that the Board had and would retain continuing control over the Toolco-TWA relationship.

No doubt the contention will be made that the Board is foreclosed here from relying on section 1005 since the order instituting this proceeding fails specifically to state that this section of the Act is involved. But in addition to specifying the issues involved under section 408 of the Act, the Board's order of investigation of February 7, 1947, also has as one of its recited purposes the entry of "any such order or taking of any such further action as may be appropriate pursuant to the provisions" of the Act. This proceeding can there-

rely on section 1005 to assert continuing jurisdiction.

The examiner suggests that the Board has continuing jurisdiction irrespective of the existence of a further acquisition. However, since the facts and the law so clearly establish an additional acquisition as a result of the transactions embodied in the letter agreement, it is urged that jurisdiction herein be asserted on the ground that Tcolco has acquired further or additional control of the carrier.

Accordingly, it is concluded that the letter agreement of January 9, 1947, insofar as it gives Tcolco the right to acquire additional stock interest in TWA, thereby vesting Tcolco with certain substantive rights over the carrier it did not theretofore possess, represents such an increase in the extent or effectiveness of control over TWA that it must be considered "an acquisition of control" within the meaning of section 408 of the Act.

RECOMMENDATIONS

It is recommended that the Board find that the transactions evidenced by the letter agreement of January 9, 1947, have resulted in a further acquisition of control over TWA on the part of Tcolco under section 408 of the Act. It is further recommended that a subsequent hearing be held to determine whether such a further or additional acquisition of control is consistent with the public interest and fulfills the conditions of said section 408.

AGREEMENT made this 25th day of March, 1948, by and between HUGHES TOOL COMPANY, a Delaware corporation (hereinafter called "Hughes"), of the first part, BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, BANK OF THE MANHATTAN COMPANY, BANKERS TRUST COMPANY, CALIFORNIA BANK, CENTRAL HANOVER BANK AND TRUST COMPANY, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, THE FIRST NATIONAL BANK OF BOSTON, GIRARD TRUST COMPANY, MELLON NATIONAL BANK AND TRUST COMPANY, J. P. MORGAN & CO. INCORPORATED, THE NEW YORK TRUST COMPANY, THE PHILADELPHIA NATIONAL BANK and SECURITY-FIRST NATIONAL BANK OF LOS ANGELES (hereinafter called the "Lending Banks"), WRIGHT AERONAUTICAL CORPORATION, a New York corporation (hereinafter called "Wright") and CURTISS-WRIGHT CORPORATION, a Delaware corporation (hereinafter called "Curtiss"), all of the second part, LOCKHEED AIRCRAFT CORPORATION, a California corporation (hereinafter called "Lockheed"), of the third part, TRANS-CONTINENTAL & WESTERN AIR, INC., a Delaware corporation (hereinafter called "TWA"), of the fourth part, and BANKERS TRUST COMPANY, a New York trust company, as agent under a certain Credit Agreement between the Lending Banks, Wright, Curtiss, Lockheed and TWA (said Credit Agreement being hereinafter called the "Credit Agreement" and said agent being hereinafter called the "Agent"), of the fifth part,

WITNESSETH:

WHEREAS Hughes is the owner of $10,000,000 principal amount of Subordinated Convertible 2¾% Notes (hereinafter called the "Convertible Notes") of TWA, issued and outstanding pursuant to an agreement dated January 31, 1947 between Hughes, TWA and The Equitable Life Assurance Society of the United States (hereinafter called the "Three-Party Agreement"); and

WHEREAS TWA owns nine (9) Lockheed Constellation Model 049 aircraft (hereinafter called the "049 Aircraft") in respect of which TWA is indebted for the unpaid balance of the purchase price upon its promissory notes payable to Lockheed now held by Bankers Trust Company and Mellon National Bank and Trust Company, two of the Lending Banks; and

WHEREAS TWA deems it desirable to purchase from Lockheed twelve (12) Constellation Model 749 aircraft (hereinafter called the "749 Aircraft") and spare parts therefor (hereinafter called the "Lockheed Spare Parts") and from Wright, forty-eight (48) Wright 749C18BD1 engines (hereinafter called the "Engines") and spare parts, tools and equipment therefor (hereinafter called the "Wright Spare Parts") and from Curtiss seventeen (17) Curtiss 632S-A14 propeller assemblies (hereinafter called "Propellers") and spinners, spare parts, tools and equipment therefor (hereinafter called "Curtiss Spare Parts"); and

WHEREAS TWA has arranged, for the purpose of assisting it in refinancing the debt held by Bankers Trust Company and Mellon National Bank and Trust Company above referred to and for the purpose of assisting it in financing the purchase of the 749 Aircraft and Lockheed Spare Parts, to borrow under the Credit Agreement sums up to $16,276,942.50 from the Lending Banks acting through the Agent upon its promissory notes (hereinafter called the "Bank Notes") payable to the Agent and, for the purpose of assisting it in financing the purchase of the Engines, Wright Spare Parts, Propellers and Curtiss Spare Parts, the extension of credit by Wright and Curtiss up to $2,300,000 and $200,000, respectively, upon its promissory notes (hereinafter called, respectively, the "Wright Notes" and the "Curtiss Notes") likewise payable to the Agent (the Bank Notes, Wright Notes and Curtiss Notes all hereinafter collectively called the "Notes"), all to be secured by an Indenture of Chattel Mortgage between TWA and Bankers Trust Company as Trustee (said Indenture and all indentures and chattel mortgages supplemental thereto executed and delivered to confirm the lien of the original Chattel Mortgage on the property of TWA now owned and therein specifically described and on the property of TWA to be hereafter acquired as contemplated by the Chattel Mortgage as originally executed being hereinafter called the "Chattel Mortgage" and said Trustee being herein called the "Mortgage Trustee"); and

WHEREAS TWA proposes and intends fully and effectively to transfer, grant, bargain, sell, mortgage, assign and pledge to the Mortgage Trustee for the security of the Notes, the 049 Aircraft, the 749 Air-

craft, the Lockheed Spare Parts, the Engines, the Wright Spare Parts, the Propellers and the Curtiss Spare Parts *inter alia*; and

WHEREAS Hughes, as owner of all the Convertible Notes, is desirous that TWA refinance the debt held by Bankers Trust Company and Mellon National Bank and Trust Company, and that TWA acquire the 749 Aircraft, the Lockheed Spare Parts, the Engines, the Wright Spare Parts, the Propellers and the Curtiss Spare Parts, and to enable TWA so to do, Hughes is willing to consent to all necessary action by TWA in connection therewith,

NOW, THEREFORE, in consideration of the premises and of the mutual covenants and promises herein contained, the parties hereto agree with each other as hereinbelow set forth:

1. Hughes expressly consents to and approves the following:

(a) The prepayment in full with interest by TWA of the indebtedness incurred by it in the purchase of the nine (9) 049 Aircraft evidenced by its promissory notes payable to Lockheed, held, as of March 11, 1948, by the following Lending Banks and in the following unpaid principal amounts: Bankers Trust Company, $1,238,662.50; and Mellon National Bank and Trust Company, $2,386,000.00;

(b) The execution and delivery by TWA with Lockheed of Contract LD-42 and the agreement covering the purchase of the Lockheed Spare Parts, both dated as of November 18, 1947, and all amendments thereto, with respect to the purchase by TWA of the 749 Aircraft and Lockheed Spare Parts; and the execution and delivery of Purchase Agreements with Wright and Curtiss with respect to the purchase, respectively, of the Engines and Wright Spare Parts and the Propellers and Curtiss Spare Parts;

(c) The incurring or creation by TWA, for the purpose of refinancing the promissory notes referred to in subparagraph (a) above and of financing the purchase from Lockheed of the 749 Aircraft and the Lockheed Spare Parts, of indebtedness to the Lending Banks under the Credit Agreement up to an aggregate principal amount of $16,276,942.50 upon Bank Notes payable to the Agent upon the terms and conditions provided in the Credit Agreement;

(d) The incurring or creation by TWA with respect to the purchase from Wright of Engines and Wright Spare Parts and with respect to the purchase from Curtiss of Propellers and Curtiss Spare Parts, of indebtedness to Wright up to an aggregate principal amount of $2,300,000 and to Curtiss up to an aggregate principal amount of $200,000, evidenced by Wright Notes and Curtiss Notes, respectively, payable to the Agent upon the terms and conditions provided in the Credit Agreement;

(e) The transferring, granting, bargaining, selling, mortgaging, hypothecating and pledging by TWA to the Mortgage Trustee under the Chattel Mortgage, for the security of the Notes, of (i) the nine (9) 049 Aircraft and each of them; (ii) the twelve (12) 749 Aircraft and each of them; (iii) the Lockheed Spare Parts and each and every item thereof; (iv) the Engines and each thereof and the Wright Spare Parts and each and every item thereof; (v) the Propellers and each thereof and the Curtiss Spare Parts and each and every item thereof; and (vi) all items of property covered by the Chattel Mortgage and all items of property substituted for or in replacement of any thereof in accordance with the terms of the Chattel Mortgage; and

(f) The execution and delivery by TWA of the Chattel Mortgage.

2. Hughes hereby confirms with TWA its agreement expressed in paragraph 1 of a certain agreement between Hughes and TWA dated December 26, 1947 and agrees with each other party hereto that it shall at all times hereafter forever be foreclosed from asserting that it has any right to any payment on account of the Convertible Notes or any of them in money or in any form other than shares of stock in TWA in accordance with the provisions of the Convertible Notes; that it shall at no time hereafter have any right as a creditor of TWA to receive or claim in respect of the Convertible Notes any payment in money or any property of TWA; and that the Convertible Notes shall at all times hereafter remain only a measure of and

basis for the right of Hughes or the holders thereof to acquire shares of stock in TWA in satisfaction thereof. Hughes further agrees, forthwith upon the execution of this Agreement, to cause each of the Convertible Notes to be stamped on its face with a legend indicating the same is in all respects subject to the provisions of this Agreement and setting forth the substance of this paragraph.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed by their respective officers thereunto duly authorized the day and year first above written.

HUGHES TOOL COMPANY

By F. W. AYERS
Vice President.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION

By T. C. DEANE
Vice President.

BANK OF THE MANHATTAN COMPANY

By J. N. HASLETT
Vice President.

BANKERS TRUST COMPANY

By D. C. HICKSON
Vice President.

CALIFORNIA BANK

By C. C. DEPLEDGE
Vice President.

CENTRAL HANOVER BANK AND TRUST COMPANY

By ALFRED ELLINGER
Vice President.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK

By G. D. SMITH
Vice President.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO

By R. A. AISHTON
Vice President.

THE FIRST NATIONAL BANK OF BOSTON

By ORSON ADAMS, JR.
Vice President.

GIRARD TRUST COMPANY

By H. W. HOCELAND
Vice President.

MELLON NATIONAL BANK AND TRUST COMPANY

By FREDERICK GWINNER
Vice President.

J. P. MORGAN & CO. INCORPORATED

By I. C. R. ATKIN
Vice President.

THE NEW YORK TRUST COMPANY

By H. S. ALDRICH
Vice President.

THE PHILADELPHIA NATIONAL BANK

By JOHN McDOWELL
Vice President.

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES

By C. A. RUDE
Vice President.

By E. J. CALLISTER
Asst. Sec.

WRIGHT AERONAUTICAL CORPORATION

By H. P. DOLAN
~~*Vice President.*~~
Treasurer.

CURTISS-WRIGHT CORPORATION

By ROBERT L. EARLE
Vice President.

LOCKHEED AIRCRAFT CORPORATION

By C. A. BARKER, JR.
Vice President.

TRANSCONTINENTAL & WESTERN AIR, INC.

By ALBERT V. LESLIE
Vice President.

BANKERS TRUST COMPANY, AGENT

By D. C. HICKSON
Vice President.

AX-2425
DX323 id., Item 15b, pa
(CAB Orders & Document

DX323
15b

Order No. E-12604

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 4th day of June, 1958

In the matter of an investigation of proposed transactions between HUGHES TOOL COMPANY and TRANS WORLD AIRLINES, INC.	Docket No. 8061, et al.

ORDER [illegible] INVESTIGATION

On May 10, 1956, Trans World Airlines, Inc. (TWA) filed a motion in Docket No. 1182 that the Board modify its order therein so as not to restrict the right of TWA to purchase from the Hughes Tool Company (Toolco) up to 25 jet-powered aircraft suitable for operation by TWA on both its domestic and international routes.

By Order No. E-10360, adopted June 8, 1956, the Board instituted the instant investigation to determine whether Toolco's proposal to manufacture and sell up to 25 jet-powered aircraft for TWA and other airlines would result in a transaction requiring further Board consideration, under section 408, of Toolco's control of TWA, and if so, whether the Board should approve or disapprove such transaction under section 408(b). The Board also consolidated therein the aforementioned TWA's motion.

Pursuant to a request by counsel for Toolco and TWA, all procedural steps in this proceeding were indefinitely postponed on July 31, 1956. By letter of May 27, 1958, TWA has formally withdrawn its motion of May 10, 1956 in Docket No. 1182, and has requested that the proceedings thereon and in Docket No. 8061 be dismissed without prejudice.

Inasmuch as the proceeding in Docket No. 8061 was instituted to investigate the effect of Toolco's proposal as set forth in its motion of May 10, 1956 in Docket No. 1182, the Board finds that the withdrawal of said motion by TWA

renders the instant investigation moot, and requires dismissal of said motion;

ACCORDINGLY, IT IS ORDERED THAT:

1. The investigation instituted in Docket No. 8061 be and it hereby is terminated; and

2. TWA's motion of May 10, 1956 in Docket No. 1182 be and it hereby is dismissed without prejudice.

By the Civil Aeronautics Board:

/s/ Marvin Bergsman

Marvin Bergsman
Acting Secretary

(SEAL)

INDEX

Volume AX-I

ITEM	PAGE
TWA Ex. 2 (Statement of Robert W. Rummel) ..	AX-1
TWA Ex. R-3 (Toolco-Convair Amended Agreement—Model 22, 6/4/56)	AX-63a
TWA Ex. R-5 (TWA-Toolco Purchase Agreement—May 9, 1960)	AX-64
TWA Ex. R-8(80) (FAA Registration Documents—B707-331, No. N771TW)	AX-73a
TWA Ex. R-8(81) (FAA Registration Documents—B707-331, No. N772TW)	AX-73k
TWA Ex. 3 (Affidavit of J. B. Connelly)	AX-74
TWA Ex. 4(b) (C. & C. Report—Comparative Profit Study)	AX-80
TWA Ex. 4(c)(1) (C. & C. Report—Financial Results from Reconstructed Jet Fleet)	AX-91
TWA Ex. 4(c)(4) (Exhibits B-J to C. & C. Report—Financial Results from Reconstructed Jet Fleet)	AX-167

Volume AX-II

TWA Ex. 5(a) (Drexel Harriman Ripley, Inc. Report—Parts I & II)	AX-336
TWA Ex. 5(b) (Exhibits to Drexel Harriman Ripley, Inc. Report)	AX-430

ITEM	PAGE
TWA Ex. 7(b)(1) (Price Waterhouse Study—Volume One)	AX-452
TWA Ex. 7(b)(2) (Price Waterhouse Study—Volume Two)	AX-480
Volume AX-III	
TWA Ex. 10 (Letter—Boeing to TWA re 707 Negotiations—12/29/54)	AX-643a
TWA Ex. 12 (Toolco-Convair CV-990 Purchase Agreement—11/10/60)	AX-644
TWA Ex. 13 (Holliday Call Sheet—Feb. 20-27, 1961)	AX-655
TWA Ex. 14 (CV-990 Purchase Agreement—Amendment of 2/22/61)	AX-660
TWA Ex. 22 (Rummel Call Sheets)	AX-665
TWA Ex. 23 (Letter Agreement—Sale of Six Boeings to Pan American)	AX-729
TWA Ex. 39 (Affidavit of Joseph P. Ripley)	AX-732
TWA Ex. 42 (C. & C. Report—Revision of Pages 63, 64, 71 & 72)	AX-735
TWA Ex. 43 (C. & C. Report—Revision of Page 51)	AX-740
TWA Ex. 46 (Jet and Turboprop Aircraft of TWA and Principal Competitors—1958-66)	AX-742
TWA Ex. 47 (Boeing Aircraft Employed on Routes Formerly Served by B-720Bs)	AX-743

ITEM	PAGE
TWA Ex. 50 (Price Waterhouse Report—Summary of Application of Assumptions)	AX-744
TWA Ex. 72 (TWA Annual Report—1939)	AX-745
TWA Ex. 73 (TWA Annual Report—1940)	AX-752
TWA Ex. 74 (TWA Annual Report—1941)	AX-758
TWA Ex. 75 (TWA Annual Report—1942)	AX-760
TWA Ex. 76 (TWA Annual Report—1943)	AX-763
TWA Ex. 77 (TWA Annual Report—1944)	AX-766
TWA Ex. 78 (TWA Annual Report—1945)	AX-769
TWA Ex. 79 (TWA Annual Report—1946)	AX-773
TWA Ex. 80 (TWA Annual Report—1947)	AX-779
TWA Ex. 81 (TWA Annual Report—1948)	AX-783
TWA Ex. 82 (TWA Annual Report—1949)	AX-788
TWA Ex. 83 (TWA Annual Report—1950)	AX-792
TWA Ex. 84 (TWA Annual Report—1951)	AX-797
TWA Ex. 86 (TWA Annual Report—1953)	AX-800
TWA Ex. 87 (TWA Annual Report—1954)	AX-805
TWA Ex. 88 (TWA Annual Report—1955)	AX-814
TWA Ex. 89 (TWA Annual Report—1956)	AX-819
TWA Ex. 90 (TWA Annual Report—1957)	AX-822
TWA Ex. 91 (TWA Annual Report—1958)	AX-842
TWA Ex. 92 (TWA Annual Report—1959)	AX-854
TWA Ex. 93 (TWA Annual Report—1960)	AX-856

ITEM	PAGE
TWA Ex. 94 (TWA Annual Report—1961)	AX-862
TWA Ex. 96 (TWA Annual Report—1963)	AX-866
TWA Ex. 128 (Pan American Annual Report—1959)	AX-868
TWA Ex. 132 (Pan American Annual Report—1963)	AX-869
TWA Ex. 155 (AAL Annual Report—1958)	AX-870
TWA Ex. 158 (AAL Annual Report—1961)	AX-871
TWA Ex. 159 (AAL Annual Report—1962)	AX-873
TWA Ex. 184 (UAL Annual Report—1959)	AX-874
TWA Ex. 186 (UAL Annual Report—1961)	AX-875
TWA Ex. 187 (UAL Annual Report—1962)	AX-876
TWA Ex. 192 (TWA Prospectus, 5/25/61 & Supplement, 6/20/61)	AX-877
TWA Ex. 194 (TWA Prospectus—6/17/57)	AX-883
TWA Ex. 223 (Pan American Prospectus—7/3/45—Supplement—7/24/45)	AX-889
TWA Ex. 249 (American Airlines Prospectus—6/11/46—Supplement—6/24/46)	AX-891
TWA Ex. 257 (TWA-Toolco Lease Agreements—Boeing Jets)	AX-893
TWA Ex. 264 (Toolco-Lockheed Purchase Agreement—L-1449A—12/23/54)	AX-901
TWA Ex. 266 (Toolco-Lockheed Purchase Agreement—L-1049G—9/26/55)	AX-908

Item	Page
TWA Ex. 267A (Letter, TWA to Toolco—1957 Common Stock Offering)	AX-919
TWA Ex. 267B (Letter, TWA to N.Y. Trust Co.—1957 Common Stock Offering)	AX-921
TWA Ex. 271 (Letter, Toolco to SEC—1957 Common Stock Offering)	AX-923
TWA Ex. 275 (TWA Board Minutes—April 26, 1945)	AX-925
TWA Ex. 276 (TWA Finance Committee Minutes—September 12, 1945)	AX-928
TWA Ex. 277 (Page from Banking Quotation Record)	AX-930
TWA Ex. 278 (TWA Board Minutes—November 8, 1946)	AX-931
TWA Ex. 279 (Special TWA Stockholders Meeting—December 23, 1946—Judges' Report)	AX-935
TWA Ex. 280A (Minutes—Adjourned Special TWA Stockholders Meeting—December 28, 1946)	AX-936
TWA Ex. 280B (Adjourned Special TWA Stockholders Meeting—December 28, 1946—Judges' Report)	AX-940
TWA Ex. 281A (Minutes—Adjourned Special TWA Stockholders Meeting—December 31, 1946)	AX-941
TWA Ex. 281B (Adjourned Special TWA Stockholders Meeting—December 31, 1946—Judges' Report)	AX-944

ITEM	PAGE
TWA Ex. 282 (Minutes & Judges' Report—Adjourned Special TWA Stockholders Meeting —January 6, 1947)	AX-945
TWA Ex. 283 (TWA Board Minutes—December 18, 1946)	AX-950
TWA Ex. 284 (TWA Board Minutes—December 27, 1946)	AX-956
TWA Ex. 285 (TWA Board Minutes—December 28, 1946)	AX-962
TWA Ex. 287 (TWA Board Minutes—January 9, 1947)	AX-966
TWA Ex. 288 (Minutes—Adjourned Special TWA Stockholders Meeting—January 13, 1947)	AX-974
TWA Ex. 290 (TWA Board Minutes—June 15, 1948)	AX-980
TWA Ex. 292 (TWA Proxy Statement—July 15, 1948)	AX-991
TWA Ex. 293 (TWA Prospectus—2/18/49 & Amendments—3/8/49)	AX-993
TWA Ex. 313 (Debt Outstanding & Available to TWA & Competitors—1961-63)	AX-1051
TWA Ex. 314 (Weighted Average Interest—TWA & Competitors—1960-63)	AX-1060
TWA Ex. 319 (Least Squares Analysis—S.H.E. Avg. Stage Length—B-331s)	AX-1065

ITEM	PAGE
TWA Ex. 320 (Least Squares Analysis—S.H.E. Avg. Stage Length—CV-880s)	AX-1066
TWA Ex. 321 (Least Squares Analysis—S.H.E. Avg. Stage Length—B-131s)	AX-1067
TWA Ex. 322 (Least Squares Analysis—S.H.E. Avg. Stage Length—B-131Bs)	AX-1068
TWA Ex. 328 (S.H.E.—Passengers Added/ Deleted—Reconstructed TWA)	AX-1069
TWA Ex. 331 (TWA Historical Load Factors—CV-880s—1962-1963)	AX-1071
TWA Ex. 336 (Comparison TWA Int'l vs. PAA-Atl.—1959)	AX-1072
TWA Ex. 345A (Price Waterhouse Comparison —C. & C. and S.H.E. (Revised))	AX-1073
TWA Ex. 351 (1965 CAB Handbook of Airline Statistics)	AX-1107
TWA Ex. 355 (Comparative Profit Study—TWA with AAL & UAL)	AX-1108
TWA Ex. 356 (Comparative Profit Study—TWA with All Other Domestic Trunks)	AX-1110
TWA Ex. 399 (Comparison, TWA Actual Jet Load Factors vs. S.H.E. Marginal Passenger Mile Factors)	AX-1112
TWA Ex. 401 (TWA B-131 Load Factors—April-July 1959)	AX-1113
TWA Ex. 420 (Price Waterhouse Comparison—C. & C. (Revised) and S.H.E.)	AX-1114

ITEM	PAGE
TWA Ex. 423 (Late Evening Flights—TWA 1961-1963)	AX-1129
TWA Ex. 424 (Cargo v. Passenger Revenue—TWA Late Evening Flights)	AX-1133
TWA Ex. 426 (Comparison of Selected A/C Numbers from S.H.E. Appendix A)	AX-1134
TWA Ex. 431 (Profitability of TWA A/C by Month—Computer Print-out)	AX-1135
TWA Ex. 432 (Profitability of TWA A/C by Month—Chart)	AX-1145
TWA Ex. 435 (Regression Analysis—Random Numbers)	AX-1146
TWA Ex. 436A (Regression Analysis—Random Numbers)	AX-1154
TWA Ex. 436B (Regression Analysis—Random Numbers)	AX-1157
TWA Ex. 436C (Regression Analysis—Random Numbers)	AX-1160
TWA Ex. 440 (Graph Illustrating Testimony of Prof. Hare)	AX-1163
TWA Ex. 441 (Regression Experiment—3/23/68)	AX-1164
TWA Ex. 444 (C. & C. Tabulation—Additional TWA Domestic Seat-Miles)	AX-1177

Volume AX-IV

Item	Page
DX4 (Toolco Order—30 P.&W. JT3C-4 Engines, 2/14/56)	AX-1178
DX5 (Letter—Toolco to P.&W. re Jet Engine Orders, 2/14/56)	AX-1181
DX6 (Toolco Order—90 Additional P.&W. JT4A-3 Engines, 2/15/56)	AX-1183
DX7 (Amendment—Toolco Order for 300 P.&W. Jet Engines, 9/7/56)	AX-1184
DX8 (Letter—P.&W. to Rummel re 300 Jet Engines, 9/7/56)	AX-1185
DX10 (Letter—Rummel to Collings re Boeing 707, 1/12/55)	AX-1186
DX11 (Notes of Convair Negotiations—March 24, 1955)	AX-1187
DX15 (Draft C.&C. Report—TWA Financial Forecast 1959-61)	AX-1192
DX19 (Page from *Aviation Week*, Jan. 10, 1955)	AX-1208
DX22 (*American Aviation*, June 20, 1955, pages 21-23)	AX-1209
DX26 (*American Aviation*, Sept. 12, 1955, pp. 84-85)	AX-1212
DX27 (*American Aviation*, Oct. 10, 1955, p. 68)	AX-1214
DX28 (Pages from *American Aviation*, Oct. 24, 1955)	AX-1215

ITEM	PAGE
DX29 (*Aviation Week*, Oct. 17, 1955, p. 7)	AX-1218
DX31 (*American Aviation*, Nov. 7, 1955, pp. 23-25, 27-28)	AX-1219
DX40 (TWA Board Minutes—June 21, 1961)	AX-1224
DX43 (Excerpts from Deposition of Robert W. Rummel)	AX-1229
DX44 (Letter of Damon, Dec. 6, 1955)	AX-1369
DX45 (Letter—Leslie to Dietrich, Dec. 19, 1955)	AX-1378
DX46 (Letter—Dietrich to Ayers, Dec. 21, 1955)	AX-1382
DX47 (Boeing-Toolco Purchase Agreement—8 B-131s, 1/10/56)	AX-1385
DX48 (Teletype—Boeing to Toolco re B707-131s, 11/11/56)	AX-1390
DX51 (Boeing Offer of B707-320s to Toolco, 1/6/56)	AX-1391
DX53 (Transcript of Telephone Conversation—Rummel & Connelly, 12/20/57)	AX-1393
DX54 (TWA Board Minutes—June 26, 1959)	AX-1402
DX57 (The Huntington Report—1960)	AX-1410
DX62 (TWA Fleet Requirements 1961-70, dated 3/1/61)	AX-1420
DX63 (TWA Financial Forecast 1959-61, dated 5/15/59)	AX-1433
DX64 (Letter to Thomas, dated 5/6/59)	AX-1438

ITEM	PAGE
DX65 (TWA Staff Engineering Report re Jets & Turboprops—4/19/56)	AX-1440
DX66 (Toolco-Boeing Contracts—B707-131s, 3/2/56)	AX-1445
DX67 (Toolco-Boeing Contracts—B707-331s, 3/19/56)	AX-1479
DX68 (Toolco-Convair Contracts—CV-880s, 9/10/56)	AX-1505
DX71 (Rummel Memo re TWA Equipment Program, 3/15/61)	AX-1536
DX72 (Telegram—Bew to Rummel—2/27/61)	AX-1538
DX73 (Letter—Leslie to Holliday—3/20/61)	AX-1539
DX74 (Letter—Leslie to Holliday—4/3/61)	AX-1540
DX77 (Letters—Toolco to TWA re Financing Additional Jets, 6/9-10/61)	AX-1541
DX78 (Letter—TWA to Holliday re Financing Proposals, 6/16/61)	AX-1553
DX79 (Pan American-Boeing Purchase Agreement—B707-120s, 10/13/55)	AX-1558
DX81 (Pan American-Boeing Purchase Agreement—B707-321s, 12/19/55)	AX-1564
DX85 (Boeing-AAL Purchase Agreement—B707-123s, 3/1/56)	AX-1576
DX95 (Allen Letter Announcing Boeing Jet, Nov. 19, 1954)	AX-1584
DX96 (Boeing Offer to Sell Pan American 25 B-120s, 6/23/55)	AX-1588

ITEM	PAGE
DX97 (Boeing Offer to Sell American 15 B-120s, 6/24/55)	AX-1591
DX98 (Boeing Offer to Sell United 15 B-120s, 6/24/55)	AX-1594
DX101 (Boeing 707 Delivery Positions)	AX-1597
Volume AX-V	
DX102 (Boeing Memorandum re 707 Over-Ocean Configuration, 11/2/55)	AX-1601
DX103 (Boeing Memorandum re TWA Delivery Positions, 12/23/55)	AX-1606
DX105 (Boeing Memorandum re Negotiations with TWA, 7/24/56)	AX-1608
DX106 (Letter—Rummel to Cook re Boeing Deliveries, 1/28/58)	AX-1611
DX107 (Letter—Rummel to Cook re Boeing Deliveries, 3/17/58)	AX-1615
DX108 (Letter—Price to Allen re Boeing Deliveries, 3/30/58)	AX-1618
DX109 (Letter—Toolco to Allen re Boeing Deliveries, 5/8/58)	AX-1621
DX116 (Rourke Memo to Rummel re CV-880 Deliveries, 1/15/60)	AX-1623
DX120 (TWA Memorandum re CV-880 Deliveries, 10/2/59)	AX-1624
DX122 (Bew Memorandum to Cannady re CV-880 Deliveries, 12/18/59)	AX-1625

ITEM	PAGE
DX124 (Parmet Memorandum to Rourke re CV-880 Deliveries, 1/13/60)	AX-1627
DX125 (TWA Memorandum re CV-880 Deliveries, 1/22/60)	AX-1629
DX127 (Rummel Memorandum to Rourke re Integration of CV-880s, 2/8/60)	AX-1630
DX128 (Letter—Rourke to Digges re Specification Modifications, 4/7/60)	AX-1638
DX130 (Bew Wire to Rourke re Convair Delays, 5/27/60)	AX-1640
DX135 (Letter—Convair to Bew re CV-880 Delivery, 1/6/61)	AX-1641
DX137 (Telegram—Bew to Rummel re Convair Delays, 2/16/61)	AX-1643
DX139 (Letter—Convair to Bew re Convair Delays, 3/16/61)	AX-1644
DX142 (Letter—Convair to Rourke re CV-880 Deliveries, 7/11/61)	AX-1647
DX143 (Letter—Rourke to Convair re CV-880 Deliveries, 8/2/61)	AX-1650
DX146 (Letter—Convair to Toolco re Model 30 Delivery Positions, 5/6/60)	AX-1652
DX148 (Toolco—General Dynamics Letter Agreement re 6 Model 30s, 7/14/60)	AX-1654
DX152 (Toolco—General Dynamics Letter Agreement re Additional Model 30s, 9/6/60)	AX-1655

ITEM		PAGE
DX156	(Telegram—Beall to Allen, et al. re PAA Negotiations, 9/28/55)	AX-1657
DX168	(Boeing Memorandum re Conversations with Howard R. Hughes, 9/23/55)	AX-1658
DX169	(Boeing Memorandum re Conversation with Howard R. Hughes, 10/31/55)	AX-1660
DX170	(Telegram—Boeing to Toolco re B707-331s, 7/21/59)	AX-1661
DX218	(C.&C. Letter to Leslie re TWA Financial Forecast, March 13, 1959)	AX-1664
DX219	(TWA Financial Forecast 1958-1962, dated 12/1/58)	AX-1666
DX237	(*Aviation Week & Space Technology*, 11/13/61, pages 42-43)	AX-1671
DX239	(*Airlift*, May 1962, p. 46)	AX-1673
DX254	(TWA Board Meeting, Aug. 16, 1961—Report of System General Manager)	AX-1674
DX255	(Statement of CAB Chairman Boyd, Jan. 29, 1960)	AX-1677
DX257	(*Aviation Week*, 1/30/61, pp. 36-37)	AX-1681
DX258	(Report to Directors of TWA—Oct. 13, 1961)	AX-1683
DX259	(CAB Order of Investigation—Dec. 28, 1961)	AX-1694
DX260	(Letter—Tillinghast to CAB, Jan. 29, 1962)	AX-1703

Item	Page
DX262 (Revised Pages 70-73 of TWA Ex. 4(c)(1))	AX-1708
DX270 (Report of Loeb, Rhoades & Co.)	AX-1712
DX271A (S.H.E. Report (Revised)—Volume One)	AX-1789
DX271B (S.H.E. Report (Revised)—Volume Two)	AX-1859
DX284 (TWA Prospectus—Nov. 20, 1952)	AX-1961
DX286 (TWA Board Minutes—Jan. 13, 1955)	AX-1967
DX287 (TWA Board Minutes—Dec. 13, 1955)	AX-1970
DX289 (TWA Board Minutes—April 26, 1956)	AX-1974
DX290 (Toolco-TWA Conditional Sale Contract—L-1049Gs, 6/6/56)	AX-1979
Volume AX-VI	
DX292 (Toolco-TWA Conditional Sale Contract—L-1649As, 4/19/57)	AX-1995
DX321 id. (CAB Orders & Documents)	AX-2012
DX322 id. (CAB Orders & Documents)	AX-2191
DX323 id. (CAB Orders & Documents)	AX-2347
Volume AX-VII	
DX334 (Correlation Coefficients—Substituted S.H.E. Table G-VII)	AX-2427
DX339 (B-120s Available to AAL, Actual vs. Reconstructed—1959)	AX-2428

ITEM	PAGE
DX341 (Domestic Carriers—Jets Assigned to Service, 1959-63)	AX-2429
DX342 (TWA's Share of Jets Assigned to Domestic Service, 1959-63)	AX-2430
DX348 (Revised Summary—Categories of Differences—Wemple vs. Simat)	AX-2431
DX358B id. (CAB Form 41 Reports—Northeast Airlines, 1957-1966)	AX-2452
DX358C id. (CAB Form 41 Reports—PAA, 1957-1966)	AX-2454
DX359A (Supplemental S.H.E. Report—Volume A)	AX-2458
DX364 id. (Excerpts from Deposition of Emmett O. Cocke)	AX-2843
DX367 (Combined Non-Stop Scheduled Frequencies Per Week—Aug. 1958-63)	AX-2851
DX368 (Combined Non-Stop Scheduled Frequencies Per Week—Aug. 1958-63)	AX-2853
DX371 (Summary—Categories of Differences—Wemple vs. Simat (Supplemental))	AX-2856
DX379 (Domestic Jet Seat Miles—Wemple vs. Historical)	AX-2867

DX 334 AX-2427

(Correlation Coefficients-Substituted S.H.E. Table G-VII) 1

Table G-VII

CORRELATION COEFFICIENTS PRODUCED BY TESTS
TO DETERMINE THE PROPER COSTING UNIT
FOR THE AIRCRAFT SERVICING EXPENSE

Source of Information	Weighted Aircraft Departures	Available Ton Miles Flown	Both Costing Units
(1)	(2)	(3)	(4)
Domestic Cross-Section Experience - All Carriers			
1959	.8455	.9553	.9587
1960	.8894	.9792	.9808
1961	.9261	.9906	.9924
1962	.9544	.9853	.9919
1963	.9219	.9763	.9843
Domestic Time Series Experience - All Carriers	.9692	.9968	.9992
International Cross-Section Experience - All Carriers			
1959	.9952	.9978	.9980
1960	.9984	.9986	.9986
1961	.9986	.9987	.9994
1962	.9995	.9988	.9998
1963	.9994	.9975	.9994
International Time Series Experience - All Carriers	.9748	.9862	.9862
TWA Domestic Time Series Experience	.9835	.9873	.9873
TWA International Time Series Experience	.9173	.9256	.9276

Source: Computer Print Outs

AX-2428

DX 339

(B-120s Available to AAL, Actual vs. Reconstructed-1959)

Tabulation: American Airlines Boeing 707-120 aircraft available, actual versus reconstructed delivery - 1959

B 707-120 Aircraft (1)	Actual Receipt Dates (2)	Aircraft Days Available - 1959 (Actual) (3)	Rummel's Reconstructed Receipt Dates (4)	Aircraft Days Avail able - 195 (reconstruc (5)
# 1	10-23-58	365	10-23-58	365
2	12-31-58	365	10-30-58	365
3	1-23-59	343	1-29-59	337
4	1-31-59	335	2-13-59	322
5	2-13-59	322	3-27-59	280
6	2-27-59	308	4-9-59	267
7	3-27-59	280	4-23-59	253
8	4-9-59	267	4-29-59	247
9	4-23-59	253	5-4-59	242
10	5-4-59	242	5-12-59	234
11	5-12-59	234	5-21-59	225
12	5-21-59	225	5-28-59	218
13	5-28-59	218	6-5-59	210
14	6-5-59	210	6-24-58	191
15	6-24-59	191	7-1-59	184
16	6-29-59	186	7-14-59	171
17	7-27-59	158	7-31-59	154
18	7-31-59	154	8-1-59	153
19	8-12-59	142	8-12-59	142
20	8-24-59	130	8-24-59	130
21	9-15-59	108	9-15-59	108
22	10-5-59	88	10-5-59	88
23	10-14-59	79	10-14-59	79
24	10-28-59	65	10-28-59	65
25	11-20-59	42	11-20-59	42
	Total Aircraft Days Available	5310	Total Aircraft Days Available	5072

5310 days ÷ 365 days = 14.55 aircraft available (actual - 1959)

5072 days ÷ 365 days = 13.90 aircraft available (reconstructed - 1959)

Difference between B 707-120 availability to American (actual versus reconstructed, 1959) = 14.55 A/C - 13.90 A/C = .65 A/C

Sources: Cols. 2 and 4, TWA Ex. 2, Annex D.
Cols. 3 and 5, by computation.

DX 341
AX-249
(Domestic Carriers-Jets Assigned to Service, 1959-63)

PERCENT OF DOMESTIC SCHEDULED REVENUE PASSENGER MILES AND AVAILABLE SEAT MILES ACCOMPLISHED WITH JET AIRCRAFT AND AVERAGE NUMBER OF JET AIRCRAFT ASSIGNED TO SERVICE

1959 - 1963

	Carrier										
	American	Eastern	TWA	United 1/	Braniff	Continental	Delta	National	Northeast	Northwest	Western
Revenue Passenger Miles											
1959	25.0%	- %	25.0%	2.5%	0.2%	32.7%	4.8%	9.3%	0.5%	- %	- %
1960	50.7	11.2	46.6	46.1	22.0	58.1	33.4	28.3	13.8	0.8	10.3
1961	66.6	23.3	67.4	65.3	28.3	61.1	49.3	40.5	49.4	31.7	34.9
1962	73.5	43.7	78.5	73.9	37.0	67.2	65.1	49.5	55.1	52.4	45.4
1963	78.5	46.6	86.0	77.0	45.0	75.8	70.8	64.7	59.6	57.6	49.9
Available Seat Miles											
1959	21.2%	- %	21.2%	2.2%	0.2%	29.6%	4.2%	6.3%	0.4%	- %	- %
1960	46.2	8.7	43.4	40.7	17.8	56.3	29.1	19.8	11.0	0.7	8.5
1961	64.3	20.9	68.8	61.4	26.5	63.0	45.2	35.2	48.1	32.0	33.0
1962	73.8	41.8	82.1	72.4	37.5	70.9	61.9	50.4	53.7	51.6	43.1
1963	79.2	46.0	87.6	76.7	46.6	77.2	68.1	63.9	57.5	58.9	49.4
Average Number of Jet Aircraft Assigned to Service											
1959	13.7%	- %	9.0%	1.8%	- %	2.0%	1.0%	- %	- %	- %	- %
1960	26.6	5.7	17.6	26.0	2.7	4.8	8.4	2.3	0.2	0.3	1.2
1961	39.1	12.3	34.7	52.7	4.5	5.0	15.2	3.4	5.8	4.5	3.9
1962	56.8	24.9	48.3	80.3	6.2	6.6	21.1	6.7	6.1	9.7	6.0
1963	62.3	24.0	57.4	82.1	6.7	8.6	24.8	10.2	6.2	11.0	8.5

1/ 1959 and 1960 figures exclude Capital Airlines

Sources: ATA - Comparative Statement of Air Carriers' Aircraft Operating Statistics; C.A.B. - Air Carrier Analytical Charts and Summaries

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AX-2430 DX 342

(TWA's Share of Jets Assigned to Domestic Service, 1959-63)

TWA's SHARE OF BIG THREE JET AIRCRAFT ASSIGNED TO SERVICE

Domestic Division - Carrier's Equipment

Years 1959 - 1963

	Number of Jet Aircraft Assigned to Service				
Carrier	1959	1960	1961	1962	1963
TWA	9.0	17.6	34.7	48.3	57.4
American	13.7	26.6	39.1	56.8	62.3
United	1.8	26.0	52.7	80.3	82.1
Total Big Three	24.5	70.2	126.5	185.4	201.8

	Percent of Big Three Jet Aircraft Assigned to Service				
	1959	1960	1961	1962	1963
TWA	36.7%	25.1%	27.4%	26.1%	28.4%
American	55.9	37.9	30.9	30.6	30.9
United	7.4	37.0	41.7	43.3	40.7
	100.0%	100.0%	100.0%	100.0%	100.0%

Source: Air Carrier Analytical Charts and Summaries, C.A.B.

REVISED SUMMARY OF CATEGORIES OF DIFFERENCE BETWEEN ESTIMATES OF MR. WEMPLE AND MR. SIMAT

This revised memorandum is submitted by defendants in response to the wish expressed by the Special Master (Tr. 7898) for a summary of the "categories of difference" between the estimates made by plaintiff's expert, Mr. Wemple, and defendants' expert, Mr. Simat, of the changes in plaintiff's operating profits that would have resulted from certain assumed changes in plaintiff's jet aircraft fleet during the period 1959-1963. It is intended as an objective comparison.

Mr. Simat's estimates in this memorandum have been revised to reflect (1) the deletion of B-331B costs and (2) the application of revised marginal load factors based upon Mr. Simat's corrected method of adjusting for economic growth.

1. Overall Comparisons

The overall difference in the estimate of changes in operating profits (excluding changes related to the issue of leasing versus ownership of B-131s and B-331s in 1959 and 1960) is approximately $91.8 million. Mr. Wemple has estimated that operating profits would have been improved by $51.5 million, while Mr. Simat has estimated that they would have deteriorated by $40.3 million.

These figures are not entirely comparable, however. Although Mr. Wemple's figures provide for an increase in depreciation costs of jet aircraft of $44.1 million, a figure supplied to him by Price Waterhouse, and an increase in insurance costs of $5.5 million, both of which figures are adopted by Mr. Simat,[1] they make no provision for reduction in the costs of depreciation and insurance attributable to piston aircraft removed from operations. The latter are estimated by Mr. Simat at $14.6 million.[2] If the savings in piston aircraft depreciation and insurance expense are not considered, the difference between the two estimates would be increased by $14.6 million to $106.4 million.

Each of these estimates represents a combination of estimates, by year and by Division, for increased jet operations and for decreased piston operations. The yearly estimates for the entire period, arranged in these categories, are as follows:

1/ TWA 4-C(4), Items A. of Ex. F, pp. 12, 20, 27, 35, 42, 56, 64; Ex. G, pp. 11, 19, 27, 35; Ex. H, pp. 10, 19; Ex. J, pp. 10, 19, 27, 36. DX 331, as amended by Mr. Simat letter of November 16, 1967, to Mr. Hayes, enclosed in Mr. Perkins' letter to Mr. Tenney of November 16, 1967, to reflect the correction of the 1963 marginal load factor in DX 330. All further references to DX 331 are intended to incorporate this amendment.

2/ DX 331.

(Revised Summary-Categories of Differences-Wemple vs. Simat)

Comparison of Changes in Jet and Piston Operating Results by Division and Year (millions of dollars).

	1959		1960		1961		1962		1963		1959-1963	
	W 1/	S 2/	W	S	W	S	W	S	W	S	W	S
estic												
et	-	+0.5	-	-24.7	-	-34.8	-	-4.1	-	+3.8	-	-59.3 3/
ton	-	-2.3	-	+6.9	-	+14.5	-	+6.9	-	+1.6	-	+27.6
et	+3.6	-1.8	+10.8	-17.8	+8.6	-20.3	+1.1	+ 2.8	+5.1	+5.4	+29.2	-31.7
erna-nal												
et	-	-0.6 4/	-	-2.3	-	-9.2	-	-10.2	-	-3.1	-	-25.4
ton	-	+2.6	-	+9.9	-	+4.5	-	NC	-	NC	-	+17.0
et	+3.1	+2.0	+15.2	+7.6	+1.8	-4.7	+2.5	-10.2	-.3	-3.1	+22.3	-8.4
tem												
t	-	-0.1	-	-27.0	-	-44.0	-	-14.3	-	-0.7	-	-84.7
ton	-	+0.3	-	+16.8	-	+19.0	-	+6.9	-	+1.6	-	+44.6
et	+6.7	+0.2	+26.0	-10.2	+10.4	-25.0	+3.6	-7.4	+4.8	+2.3	+51.5	-40.1 5/

1/ Source: TWA Ex. 4C-1, pp. 27, 30, 37-38, 48, 49, 50, 64, 72, as amended TWA Exs. 42, 42(a), 43, 43(a). For Chapters II and III of C & C Report, cargo revenues allocated between Domestic and International Divisions in proportion to passenger revenues. Incidental revenues of $.2 million for 1959, Chapter III (p. 49), allocated entirely to Domestic Division.

2/ DX 331.

3/ Mr. Wemple computes only the net changes in jet and piston operations.

4/ The difference between this and the prior estimated change in DX 327 ("no change" to $0.6 million) results from accumulated differences in rounding in the calculation of international revenues. For example, the initial percentage of TWA's reconstructed share of IATA seats was rounded to three digits (12.43) in DX 271A, but carried out to eleven digits by the computer, printing out seven (12,44998). This difference in rounding practice carried from percentage of IATA seats through percentage of IATA passenger absolute number of IATA passengers, percentage increase in IATA passengers to increased International Division revenues, leads to the ultimate difference of $0.6 million here noted.

5/ Difference of $0.2 million between amount shown here and on DX 331 due to rounding.

Comparison of the estimates could also be made in terms of each of the four Chapters in the C & C Report (Chapters II-V) which deal with different equipment premises, but we do not believe this would serve the Master's present purpose.[1/] What we propose here is a comparison of the basic equipment and operational assumptions, followed by a comparison of the procedures used in estimating the revenue and cost changes resulting therefrom, together with an assessment of the separate significance of the different procedures for the overall estimates in so far as it is possible to do so.

2. Equipment and Operating Assumptions

Mr.Simat accepts Mr. Wemple's assumptions as to the number of jets to be added and as to the dates at which they would be added. Overall Mr. Wemple assumed that the additional jets and the earlier deliveries of such jets, when placed in operation, would displace then existing piston services. Mr. Simat accepts and follows this assumption. They differ in their assumptions as to what pistons

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1/ The detailed results of Mr. Simat's estimates corresponding to each of the four C & C Chapters are set forth in DX 331.

would be deleted in the Domestic Division, although Mr. Simat accepts Mr. Wemple's assumption that the pistons deleted in the International Division would be 1649As.

a. Jet

For the purposes of this report, Mr. Simat has used the assumptions made by Mr. Wemple as to the additional annual availabilities of jet aircraft and their allocation between the Domestic and International Divisions (SHE Report, Vol. I, Table II-A at II-5). He has also used Mr. Wemple's estimate, based on these additional availabilities, of the number of additional jet plane miles which would have been flown each year in each Division (Tables II-B and II-C at II-6).

In addition, Mr. Simat has estimated, with respect to domestic operations only, the average length of hop at which services with each type of jet would have been added in each year (marginal stage length of added jet services). Mr. Wemple does not discuss length of hop as a factor in his estimates. It is Mr. Simat's opinion, however, that Mr. Wemple's methods of estimating domestic yields on the basis of annual averages and direct operating costs on the basis of plane miles flown inherently assume that jet services would have been added at the average existing stage lengths for the year in question.

Mr. Simat's method of estimating marginal stage lengths is treated in Vol. II (DX 271B), Part A of his report. The formulas for deriving marginal stage lengths of added jet services are stated at A-7. Their principal significance is in the estimation of yields and direct operating costs for added domestic jet operations.

b. Piston

For the International Division, Mr. Simat has assumed, as Mr. Wemple did, that all of the piston aircraft miles deleted would have been those flown with L-1649As and that such plane miles would have been deleted in the same annual amounts as those estimated by Mr. Wemple. (C&C Report, Vol. II, Table B-XII, at p. B-18.) For the Domestic Division, the estimates differ. Both Mr. Wemple and Mr. Simat estimate additional deletions of piston plane-miles by the use of experienced ratios of piston-miles deleted to jet-miles added.[1/] Mr. Wemple confines his deleted miles to those flown with the longest-range planes, the L-1049Gs and L-1649As. Mr. Simat allocates the deleted plane miles among all the various types of piston aircraft

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1/ Mr. Simat uses the ratios of total plane-miles added and deleted in each year. Mr. Wemple uses these ratios in connection with added B-131 and B-331 plane-miles (C&C Report, pp. 29, 44) but uses ratios derived from certain pairs of cities and in different time periods in connection with added CV-880 plane-miles (Id. pp. 61-62, 69-70).

being operated in proportion to the experienced deletion of plane miles by each such type during the year in question. Mr. Simat's discussion of his method is contained in Volume II, Part B of his report. His estimates of the additional piston-miles deleted each year by type of plane are set forth in Table B-XI at B-12.

The differences in estimation of the number of additional piston-plane miles deleted (with respect to added CV-880 plane-miles) and in the allocation of the deleted miles to the various types of pistons affect a number of aspects of the estimates, both of piston revenues lost and piston expenses saved, particularly under Mr. Simat's procedures. It would be a very difficult task to assign a figure to their net impact on the overall estimates.

Mr. Simat has derived formulas for estimating the stage-length of deleted piston services (Vol. II, Table A-I at A-7), and these affect his estimates of the yields and direct operating costs applicable to the deletion of domestic piston operations.

Applying rates of utilization for 1958 to his estimates of piston-plane miles deleted, Mr. Simat has estimated the number of additional piston aircraft retired each year (Vol. II, Tables B-XIII and B-XIV at B-22, 23,

24, 25). This is for the purpose of estimating the depreciation costs ($14 million) and insurance costs ($.6 million) saved. Mr. Wemple has not estimated the number of L-1049Gs and L-1649As which would have been retired under his procedures, nor the associated savings in depreciation and insurance.

3. Revenue Estimates - Domestic Division

The estimates of gain or loss in domestic passenger revenues associated with the estimated addition or deletion of jet and piston plane miles are based upon the estimation of changes in traffic (added or deleted revenue passenger-miles), to which estimated yields (cents per revenue passenger-mile) are then applied. Mr. Simat has followed Mr. Wemple in adding 5% to estimated changes in passenger revenues in order to arrive at estimated changes in total transportation revenues.

a. Traffic Estimates

Mr. Wemple has applied the average load factor experience by plaintiff in a particular year with a particular type of jet (B-131, B-331, CV-880) or piston (L-1049G, L-1049 to his estimate of the added or deleted seat-miles flown with that type of plane in that year. Mr. Simat has applied the experienced average load factor at which all types of jets

were added by plaintiff in the subsequent year (marginal load factor) to his estimate of added jet seat-miles for a particular year. He has likewise applied marginal load factors for all types of pistons to his estimates of deleted piston seat-miles. The marginal load factors are adjusted to remove the influence of economic growth.

Marginal load factors are treated by Mr. Simat in Vol. II, Part C. The adjusted marginal load factors are set forth in Table C-IX at C-23.

Mr. Wemple's use of average load factors results in the addition of 3,940 million jet revenue passenger miles and the deletion of 1,760 million piston revenue passenger miles, or a net increase of 2,180 million revenue passenger miles (TWA 4C-1, pp. 30, 45, 63, 70, as amended by TWA Ex. 42, 42(a), 43, 43(a)). Mr. Simat's use of adjusted marginal load factors results in the addition of 2,366.0 million jet revenue passenger miles and the deletion of 2,847.3 million piston revenue passenger miles, or a net decrease of 481.3 million revenue passenger miles.

Application to these figures of the average yields used by Mr. Wemple results in a difference of $98.3 million in the estimates of added passenger revenues from additional jet operations and a difference of $63.7 million in the estimates of deleted passenger revenues from displaced piston

operations (Vol. II, C-27). This makes a total difference of $162.0 million in the estimates of changes in domestic passenger revenues, reflecting principally the difference in the estimates of load factors applicable to added and deleted domestic operations. 1/

1/ In the case of deleted piston services, it also reflects the difference in the estimates of plane miles deleted for added CV-880 plane miles and the difference in the estimates of seat-miles deleted flowing from Mr. Simat's allocation of deleted plane miles among all types of pistons.

b. Yield Estimates

Mr. Wemple computes added passenger revenues by applying to his estimates of added revenue passenger miles flown the average yield per passenger mile experienced by TWA for all revenue passenger miles flown in its Domestic Division for the year in question (e.g., C & C Report, p. 30). Since passenger yields per mile diminish as length of trip increases, Mr. Simat estimates yields appropriate to the average trip length at which, in his opinion, jet passengers would be added (longer than the average) and piston passengers deleted (shorter than the average) in each year.

Mr. Simat's procedures for obtaining his yield estimates are treated in Vol. II, Part D. The formulas for relating passenger revenue to trip length are set forth in Tables D-III and D-V at D-8 and D-10. The relationships between the estimated ratios of trip length of passenger to stage length of aircraft are stated separately for jets and pistons at D-18. Mr. Simat applies these ratios to the marginal stage lengths for added jet services and deleted piston services as estimated by him in accordance with the formulas in Part A.

An indication of the relative significance of the difference in estimation of yields is provided by Table D-IX at D-21, in which Mr. Simat has applied to Mr. Wemple's estimates of net added passenger miles the annual yields

determined by his formula as those realized by the plaintiff for a trip length of 1,453 miles (the actual average trip length of all passengers added by plaintiff during the period 1959-1963). The application of these yields[1/] reduces Mr. Wemple's estimates of net added passenger revenues from $127.0 million to $122.6 million, or $4.4 million.

The combined effect of the differences in the estimation of added and deleted traffic and in the yields applied thereto result in an overall difference of $164.5 million in the estimates of added passenger revenues as follows:

	Mr. Wemple	Mr. Simat	Difference
Added Jet	$229 Million	$136.5 Million	$92.5 Million
Deleted Piston	(102) "	(174) "	72.0 "
Net Change	$127 Million	($37.5) Million	$164.5 Million

(TWA 4C-1, pp. 30, 45, 63, 70, as amended by TWA Exs. 42, 42(a), 43, 43(a); DX 331.)

1/ These are, of course, only an approximation of the yields actually applied by Mr. Simat which vary with his estimates of the marginal stage lengths at which different types of equipment were added and deleted.

Comparison of this $164.5 million difference with the difference of $162.0 million obtained by application of Mr. Wemple's yields to Mr. Simat's estimates of added traffic gives another indication of the relative significance of the varying yield estimates.

4. Revenue Estimates - International Division

Plaintiff's passenger revenues in its International Division are derived in part from scheduled transatlantic services (IATA traffic) and in part from scheduled services beyond the European gateway cities (beyond-the-gateway traffic) and from non-scheduled (charter) services. The estimation of changes in international passenger revenues requires, under Mr. Simat's procedures but not under Mr. Wemple's, separate consideration of IATA traffic and non-IATA traffic. As in the case of domestic revenue estimates, Mr. Simat has again followed Mr. Wemple in adding 5% to estimated changes in passenger revenues in order to arrive at estimated changes in total transportation revenues.

a. Non-IATA Traffic

Mr. Wemple has applied his estimated percentage increases each year in the amount of plaintiff's IATA traffic to the passenger revenues for the entire International Division in order to obtain his estimates of

added international passenger revenues (e.g., C & C Report, pp. 26-27). This assumes that plaintiff's beyond-the-gateway and charter traffic would have increased in the same proportion each year as that estimated by Mr. Wemple for its IATA traffic.

In Mr. Simat's opinion, the assumed additions of plane-miles in the International Division would not have been accompanied by any increase in beyond-the-gateway or charter traffic, for the reasons stated in Vol. II, Part E at E-23 through E-45. He estimates that the resulting overstatement of International Division passenger revenues by Mr. Wemple is $11.2 million in respect of beyond-the-gateway revenues (Table E-XVII at E-39) and $3.2 million in respect of charter revenues (Table XX at E-45), or a total of $14.4 million.

b. IATA Traffic

Both Mr. Wemple and Mr. Simat estimate that plaintiff's scheduled transatlantic passenger traffic would have increased each year by the same percentage as that by which its share of total transatlantic capacity (IATA seats) would have increased as a result of the assumed additional jet availabilities.

Mr. Wemple has assumed that the other IATA carriers would not have offered additional seats in the 1959-1963 period and, further, that in 1959 and 1960 the

added seats would have been "transferred" from Pan Am. He therefore measures plaintiff's increased share of IATA seats against a base (total IATA seats) which is unchanged from the historical in 1959 and 1960 and which thereafter is increased only by the amount of the assumed addition to plaintiff's seats.

In Mr. Simat's opinion, Pan Am and the other IATA competitors of plaintiff would have reacted to the assumed increase in plaintiff's capacity by offering additional capacity of their own. He has, therefore, measured plaintiff's percentage gain against a larger base which reflects his estimate of the greater number of seats which would have been offered by plaintiff's competitors. This results in a smaller estimate than Mr. Wemple's of the increase in plaintiff's scheduled transatlantic passengers.

Mr. Simat's discussion of competitive reaction by other carriers appears in Vol. II, Part E at E-3 through E-18. His estimates of the percentage increases in plaintiff's share of IATA passengers are set forth in Tables E-X and E-XI at E-21 and E-22. These are to be compared with the estimates in the C & C Report at pages 26, 47 and 48 respectively.

Mr. Simat obtains his estimates of the resulting

increase in passenger revenues by applying his estimated percentage increases in the number of plaintiff's passengers to the dollar amount of International Division passenger revenues realized in the corresponding year, after subtracting those revenues which he estimates to be derived from beyond-the-gateway and charter operations. Mr. Wemple uses total passenger revenues of the International Division without segregating the non-IATA portion thereof.

Mr. Wemple's estimate of net additional passenger revenues for the International Division is $85 million (C & C Report, pp. 27, 48), of which Mr. Simat has estimated that $14.4 is attributable to non-IATA traffic, leaving $70.4 as the portion attributable to IATA traffic. This is to be compared with Mr. Simat's estimate of $45.1 million (SHE Report, Vol. I, pp. IV-113, 114 and V-80, 81). The difference is therefore about $25 million in the estimates of added revenues from additional scheduled transatlantic passenger traffic. The difference in the estimates of total International Division passenger revenues is about $39.5 million.

5. Cost Estimates - Direct Operating Expenses

Mr. Wemple estimates that direct operating expenses

(except insurance and depreciation) would have changed in proportion to aircraft miles flown. In Mr. Simat's opinion, block hours rather than aircraft miles provide the appropriate costing unit for estimating changes in such expenses where aircraft are operated over varying stage lengths. He has accordingly estimated changes in these expenses for domestic operations in proportion to his estimated changes in the block hours flown with the various types of aircraft added and deleted. For international operations, where there would have been no significant change in stage lengths, he has used Mr. Wemple's method of estimating in proportion to changes in plane miles flown.

Mr. Simat's procedures for estimating changes in direct operating expenses in domestic operations are treated in Vol. II, Part F. His estimates of added and deleted block hours depend upon his estimates of the marginal stage lengths of added and deleted flights. With respect to displaced piston operations, they also depend upon his estimates of the allocation of deleted piston miles among the various types of pistons.

The corresponding estimates may be tabulated as follows:

(Revised Summary-Categories of Differences-Wemple vs. Simat)

Estimates of Changes in Direct Operating-Expense
(Less Depreciation and Insurance)
(Millions of Dollars)

	Mr. Wemple[1]	Mr. Simat[2]	Difference (Mr. Wemple's Estimate Less Mr. Simat's)
Domestic			
Jets	98.8	+ 99.88	- 1.08
Pistons	-71.5	-103.98	+32.48
Net	+27.3	- 4.10	+31.40
International			
Jets	+35.7	+ 35.30	+ .40
Pistons	-16.4	- 16.40	0
Net	+19.3	+ 18.90	+ .40
System			
Jets	134.5	$135.18	- .68
Pistons	87.9	-(120.38)	+32.48
Net	46.6	$ 14.80	+31.80

As stated previously, there is no difference in the estimates of increases in costs of insurance ($5.5 million) and depreciation (44.1 million) attributable to added jet availability, but Mr. Simat has included, as Mr. Wemple did not, estimated savings of $14.6 million in such costs as a result of piston retirements.

1/ TWA Ex. 4-C(4), Ex. F, pp. 3-4, 6-8, 13-15, 21-23, 28-30, 36-38, 43-45, 51-52, 57-59; Ex. G, pp. 3-6, 12-15, 20-22, 28-30; Ex. H, pp. 2-5, 11-13; Ex. J, pp. 3-5, 11-14, 20-22, 28-30, as amended by TWA Exs. 42, 42(a), 43, 43(a).

2/ DX 331.

6. Cost Estimates - Ground and Indirect Expenses

Mr. Wemple divides indirect costs into two components: (1) fixed components in which he estimates no change for changes in the level of operations and (2) variable components in which he estimates that changes would occur in direct proportion to changes in a costing unit selected by him as appropriate to the particular component under consideration.

Mr. Simat has selected costing units through analysis of the historical cost experience, domestic and international, of plaintiff and of the industry in the period 1959-1963. Through the use of regression analysis, he has obtained formulas for estimating the amount of change in the various categories of indirect expense that would accompany a unit change in the costing unit found by him to be appropriate to the particular category under consideration.

Mr. Simat's procedures for estimating changes in ground and indirect expenses are treated in Vol. II, Part G. Table G-VIII at G-42 compares the costing units used by Mr. Simat with those used by Mr. Wemple. Exhibit G-H displays the variable unit costs derived by the regression analysis which are to be applied to the appropriate costing units to obtain the estimated change in each category of indirect expense. The same variable unit costs are applied each year to changes in jet and piston operations, but different

unit costs are applied to changes in domestic and international operations.

The differences in the estimates of indirect and ground expenses may be tabulated as follows:

Difference in Estimates of Ground and Indirect Expense
(Millions of Dollars)

	Mr. Wemple[1]	Mr. Simat[2]	Difference (Mr. Wemple's Estimate Less Mr. Simat's)
Domestic			
Jet	-[3]	+ 67.48	-
Piston	-	- 95.45	-
Net	+40.9	- 27.97	+68.87
International			
Jet	-	+ 35.93	-
Piston	-	- 9.52	-
Net	+31.5	+ 26.41	+ 5.09
System			
Jet	-	+103.41	-
Piston	-	-104.97	-
Net	+72.4	- 1.56	+73.96

A summary of the overall estimates of changes in revenues and costs is attached.

1/ TWA Ex. 4-C(1), pp. 37-38, 50, 64, 71, as amended by TWA Ex. 42, 43(a).

2/ DX 331.

3/ Mr. Wemple estimates only the net changes in ground and indirect expenses.

(Revised Summary-Categories of Differences-Wemple vs. Simat)

Summary of the Dollar Differences Between Mr. Wemple and Mr. Simat

		Mr. Wemple	Mr. Simat
		(Millions)	
Revenues			
Passenger Revenues - Domestic			
	Jet	$229	$136.5
	Piston	-102	-174.0
	Net	$127	- 37.5
Passenger Revenues - International			
	Net	$ 85	$ 45.1
Net Passenger Revenues - System		$212	$ 7.6
Net Transportation Revenues - System (at 105% of Passenger Revenues)		$222.6	$ 8.0
Costs (System)			
Direct Costs (other than Insurance and Depreciation)			
	Jet	$134.5	$135.2
	Piston	- 87.9	-120.4
		$ 46.6	$ 14.8
Insurance	Jet	$ 5.5	$ 5.5
	Piston	---	- .6
	Net	$ 5.5	$ 4.9
Depreciation	Jet	$ 44.1	$ 44.1
	Piston	---	- 14.0
	Net	$ 44.1	$ 30.1
Net Indirect Costs		$ 72.4	$ -1.6
Net Total Costs		$168.6	$ 48.3
Net Change in Operating Profit		$ 54.0	$-40.3
Adjustments to Operating Profit			
Depreciation & Amortization - (Ground Equipment, Item B; Developmental and Preoperating Expense, Item C)1/		$ -2.6	--
Insurance2/		$ .1	--
Net Change in Operating Profit After Adjustments		$ 51.5	$-40.3

1/ Tr. Ex. 4-C(4), Ex. F, pp. 12, 20, 27, 35, 42, 50, 64; Ex. G, pp. 19, 27, 35.
2/ Tr. Ex. 43(a), Ex. G, p. 3.

AX-2452

DX 358 B id., page 1
(CAB Form 41 Reports - Northeast Airlines, 1957-1966)

UNITED STATES OF AMERICA
WASHINGTON, D.C.

CIVIL AERONAUTICS BOARD

CERTIFICATION

BY CERTIFY that the annexed ~~item~~ are true ~~copy~~ copies of the

B-7 schedules for the quarters ended March 31, June 30, September 30 and December 31 for each of the years 1957 through 1965 and for the quarter ended March 31, 1966 of the CAB Form 41 reports of Northeast Airlines, Inc.

on file in this Board.

IN WITNESS WHEREOF, I have hereunto subscribed my name, and caused the seal of the Civil Aeronautics Board to be affixed this 29th day of July one thousand nine hundred and sixty-six

Harold R. Sanborn
Secretary
CIVIL AERONAUTICS BOARD

the Federal Aviation Act (49 U.S.C. 1324(d)) provides in pertinent part that "[a]ll decisions purporting to be shall be competent evidence of the orders, decisions, rules, regulations, and reports of the Board--in all and federal--without further proof or authentication thereof"; Section 701(c) (49 U.S.C. 1461(c)) provides or reports of the Board relating to any accident or the investigation thereof, shall be admitted in evidence ion for damages growing out of any matter mentioned in such report or reports"; and Section 1103 (49 U.S.C reports and reports filed with the Board shall be preserved as public records in the custody of the Secretary received as prima facie evidence of what they purport to be--in all judicial proceedings"; and that "copies ch records certified by the secretary of the Board, under the seal of the Board, shall be received in ce of the originals."

DX 358 B id., page 2
(CAB Form 41 Reports - Northeast Airlines, 1957-1966)

AX-2453

UNITED STATES OF AMERICA
WASHINGTON, D.C.

CIVIL AERONAUTICS BOARD

CERTIFICATION

~~are~~ copies

EBY CERTIFY *that the annexed ~~are~~ true ~~copy~~ of the*

T-7 schedules for the quarters ended March 31, June 30, September 30 and December 31 for each of the years 1957 through 1965 and for the quarter ended March 31, 1966 of the CAB Form 41 reports of Pan American World Airways, Inc.

in this Board.

IN WITNESS WHEREOF, *I have hereunto subscribed my name, and caused the seal of the Civil Aeronautics Board to be affixed this* 29th *day of* July *one thousand nine hundred and* sixty-six.

Donald R Jamison
Secretary
CIVIL AERONAUTICS BOARD

The Federal Aviation Act (49 U.S.C. 1324(d)) provides in pertinent part that "[c]ollections purporting to be [such] by competent evidence of the orders, decisions, rules, regulations, and reports of the Board—in all [and federal] without further proof or authentication thereof"; Section 301(c) (49 U.S.C. 1441(c)) provides [or member of the Board relating to any accident or the investigation thereof, shall be admissible evidence] [such reports shall not be admitted as evidence or used for any purpose in any suit or action for damages] [the reports shall not be published or open to public inspection in the discretion of the Secretary] [of the Board, whether or not such person is then employed by the Board] and that [no part of any report] [or any other controversy or suit growing out of such accident, shall be construed in

AX-2454

DX 358 C id., page 1
(CAB Form 41 Reports - PAA, 1957-1966)

AIRFRAME AND AIRCRAFT ENGINES ACQUIRED

Date Acquired (1)	Date Placed in Service (Delivery) (2)	Airline Serial No. (3)	Type Code (4)	Status (5)	No. (6)	Type and Model (7)	Series (8)	Passenger Capacity (9)	Cargo (10)	Cost (11)	Years for Depreciation (12)	Years for Maintenance (13)	Estimated Residual Value (14)	Life (15)	Remarks (16)
						Airframe Additions									
12-10-58	12-24-58	M 707	Used		1401	Boeing B707-121- Addl Cost				447			45	120	Addl Engineering Costs
11-10-58	12-02-58	708	"		"	" "				447			45	"	"
11-26-58	11-26-58	709	"		"	" "				447			45	"	"
10-29-58	10-27-58	710	"		"	" "				447			45	"	"
10-16-58	10-26-58	711	"		"	" "				447			45	"	"
10-30-58	11-03-58	712	"		"	" "				447			45	"	"
04-13-54	04-30-54	M 5118	"		"	Douglas DC-6B "				4,339			451	84	Modif. Dual Config.
12-01-53	12-03-53	A 5118	"		"	" "				3,444			547	"	"
01-12-53	01-21-53	A 5120	"		"	" "				3,444			547	"	"
04-08-52	04-11-52	A 522	"		"	" "				1,534			210	"	"
02-06-52	11-02-53	M 7522	"		"	Douglas DC-6A "				2,474			371	84	Interior Accommodations
06-27-52	07-15-52	85188	"		"	" "				2,474			371	"	"
						Total Airframe Additions				28,801					
						Airframes Transferred from Other Property Account									
11-05-60	12-06-60	M 781	New		1401	Boeing B707-131		4	133	4,525,216			452,522	120	Boeing Airplane Co.
"	"	"	"		"	"				59,160			-0-	"	Capitalized Interest
"	"	"	"		"	"				45,413			4,541	"	B707 Project Costs
"	"	"	"		"	"				163,683			16,368	"	Hughes Tool - Acq. Costs
12-15-59	01-27-60	782	"		"	"		4	133	4,525,216			452,522	"	Boeing Airplane Co.
12-15-59	"	"	"		"	"				59,160			-0-	"	Capitalized Interest
"	"	"	"		"	"				45,413			4,541	"	B707 Project Costs
"	"	"	"		"	"				163,683			16,368	"	Hughes Tool - Acq. Costs
12-10-59	02-05-60	783	"		"	"		4	133	4,525,216			452,522	"	Boeing Airplane Co.
"	"	"	"		"	"				59,160			-0-	"	Capitalized Interest
"	"	"	"		"	"				45,413			4,541	"	B707 Project Costs
"	"	"	"		"	"				163,684			16,382	"	Hughes Tool - Acq. Costs
08-28-59	09-02-59	714	Used		1401	Boeing B707-321- Addl Cost				116,000			13,600	"	Advance Delivery Costs
07-19-57	03-26-59	715	"		"	" "				116,000			13,600	"	"
08-22-59	09-03-59	716	"		"	" "				116,000			13,600	"	"
09-01-59	09-11-59	717	"		"	" "				116,000			13,600	"	"
09-22-59	10-04-59	718	"		"	" "				116,000			13,600	"	"
10-02-59	10-10-59	719	New		"	"		4	133	4,427,264			442,726	"	Boeing Airplane Co.
"	"	"	"		"	"				212,500			-0-	"	Capitalized Interest
"	"	"	"		"	"				17,450			1,745	"	Engineering Costs
"	"	"	"		"	"				35,536			3,554	"	B707 Project Costs
"	"	"	"		"	"				1,466			1478	"	Modif. Refund
10-06-59	10-14-59	720	"		"	"		4	133	4,427,264			442,726	"	Boeing Airplane Co.
"	"	"	"		"	"				212,500			-0-	"	Capitalized Interest
"	"	"	"		"	"				17,450			1,745	"	Engineering Costs
"	"	"	"		"	"				35,536			3,554	"	B707 Project Costs
"	"	"	"		"	"				1,466			1478	"	Modif. Refund
10-19-59	10-29-59	721	"		"	"		4	133	4,427,264			442,726	"	Boeing Airplane Co.
"	"	"	"		"	"				212,500			-0-	"	Capitalized Interest
"	"	"	"		"	"				17,450			1,745	"	Engineering Costs
"	"	"	"		"	"				35,536			3,554	"	B707 Project Costs
"	"	"	"		"	"				1,466			1479	"	Modif. Refund
10-29-59	11-08-59	722	"		"	"		4	133	4,427,264			442,726	"	Boeing Airplane Co.
"	"	"	"		"	"				212,500			-0-	"	Capitalized Interest
"	"	"	"		"	"				17,450			1,745	"	Engineering Costs
"	"	"	"		"	"				35,536			3,554	"	B707 Project Costs
"	"	"	"		"	"				1,466			1479	"	Modif. Refund
10-27-59	11-04-59	723	"		"	"		4	133	4,427,264			442,726	"	Boeing Airplane Co.
"	"	"	"		"	"				212,500			-0-	"	Capitalized Interest
"	"	"	"		"	"				17,450			1,745	"	Engineering Costs
"	"	"	"		"	"				35,536			3,554	"	B707 Project Costs
"	"	"	"		"	"				1,466			1479	"	Modif. Refund
11-30-59	12-12-59	724	"		"	"		4	133	4,427,264			442,726	"	Boeing Airplane Co.
						Carried Forward				47,524,307					

Boeing 8-7

CAB Form 41

Page 3 of 3

AIRFRAMES AND AIRCRAFT ENGINES ACQUIRED

An Annual Base Are Combined

Quarter Ended March 31, 19 49

Date Acquired (1)	Date Placed in Service or Withdrawn from Storage (2)	Airframe Serial No. (3)	New or Used (4)	Number of Engines Acquired (5)	Aircraft No. (6)	Type and Model (7)	Flight Time (8)	Aircraft Time Since Overhaul (9)	Aircraft Time Since Last Major Check (10)
						Airframe Additions			
12-27-48	01-27-49	10103	New		1401	Douglas DC-6			
01-17-49	01-18-49	104	"		"	"			
01-20-49	01-21-49	105	"		"	"			
01-28-49	12-28-49	10701	Used		"	Boeing B-707-121 Addl Cost			
						Total Additions			
						Airframes Transferred from Other Property Accounts			
12-27-48	01-27-49	10103	New		1401	Douglas DC-6		4	111
"	"	"	"		"	"			
"	"	"	"		"	"			
"	"	"	"		"	"			
"	"	"	"		"	"			
12-29-48	01-18-49	10104	New		"	"		4	114
"	"	"	"		"	"			
"	"	"	"		"	"			
"	"	"	"		"	"			
"	"	"	"		"	"			
12-28-48	01-21-49	10105	New		"	"		4	11
"	"	"	"		"	"			
"	"	"	"		"	"			
"	"	"	"		"	"			
"	"	"	"		"	"			
12-23-48	01-14-49	10106	New		"	Boeing B-707-121		4	13
"	"	"	"		"	"			
"	"	"	"		"	"			
"	"	"	"		"	"			
"	"	"	"		"	"			
12-23-48	01-14-49	10726	New		"	Boeing B-707-121		4	13
"	"	"	"		"	"			
"	"	"	"		"	"			
"	"	"	"		"	"			
"	"	"	"		"	"			
12-29-48	01-31-49	10727	New		"	Boeing B-707-121		4	13
"	"	"	"		"	"			
"	"	"	"		"	"			
"	"	"	"		"	"			
"	"	"	"		"	"			
12-23-48	01-11-49	10728	New		"	Boeing B-707-121		4	13
"	"	"	"		"	"			
"	"	"	"		"	"			
"	"	"	"		"	"			
"	"	"	"		"	"			
11-01-36	11-11-36	10731	Used		"	Douglas DC-7C -1441 Cost			
04-20-36	04-21-36	733	"		"	"			
04-22-36	04-24-36	734	"		"	"			
02-07-36	04-02-36	735	"		"	"			
12-13-36	04-01-36	736	"		"	"			
12-18-36	12-28-36	744	"		"	"			
01-26-36	01-01-36	742	"		"	"			
01-30-36	01-31-36	743	"		"	"			
12-30-36	12-31-36	10707	"		"	Boeing B-707-121 Addl Cost			
12-31-36	12-31-36	708	"		"	"			
01-01-36	01-01-36	709	"		"	"			
01-01-36	01-01-36	710	"		"	"			
01-01-36	01-01-36	711	"		"	"			
		Total Airframes Transferred from Other Property Accounts							

Cost (14)	Reserve for Depreciation (15)	Reserve for Maintenance (16)	Estimated Scrap Value (17)	Trade-in (18)	Acquired From (19)
28 664			2 806	120	Douglas Aircraft Co.
28 664			2 806	"	"
28 664			2 806	"	"
84 459			8 447	"	Standard-action Modif
1 161 441					
4 415 827			441 585	120	Douglas Aircraft Co.
91 288			-0-	"	Capitalized Interest
15 808			1 580	"	Engineering Costs
5 423			541	"	DC-6 Project Costs
3 5849			3524	"	Modif. Refund
4 415 827			441 585	"	Douglas Aircraft Co.
91 288			-0-	"	Capitalized Interest
15 808			1 580	"	Engineering Costs
5 423			541	"	DC-6 Project Costs
3 5849			3524	"	Modif Refund
4 416 832			441 684	"	Douglas Aircraft Co.
91 288			-0-	"	Capitalized Interest
15 808			1 580	"	Engineering Costs
5 423			541	"	DC-6 Project Costs
3 5849			3524	"	Modif Refund
4 424 164			442 416	120	Boeing Airplane Co.
141 894			16 163	"	Hughes Tool Co.
98 168			-0-	"	Capitalized Interest
49 413			4 941	"	B-707 Project Costs
4 427 264			442 726	120	Boeing Airplane Co.
212 580			-0-	"	Capitalized Interest
17 450			1 745	"	Engineering Costs
15 536			3 554	"	B-707 Project Costs
3 6669			1670	"	Modif. Refund
4 417 264			442 726	"	Boeing Airplane Co.
213 580			-0-	"	Capitalized Interest
17 450			1 745	"	Engineering Costs
15 536			3 554	"	B-707 Project Costs
3 6669			1670	"	Modif. Refund
4 417 264			442 726	"	Boeing Airplane Co.
213 580			-0-	"	Capitalized Interest
17 450			1 745	"	Engineering Costs
15 536			3 554	"	B-707 Project Costs
3 6669			1670	"	Modif. Refund
122 796			48 416	84	Cargo Configure Modifs
122 796			43 416	"	
122 796			48 419	"	
122 796			48 419	"	
122 796			48 419	"	
122 796			48 419	"	
122 796			43 419	"	
122 796			42 419	"	
695			70	120	Radio Install Modif.
695			70	"	"
695			70	"	"
695			70	"	"
695			70	"	"
4 608 393					

Page 3 of 8

Air Carrier - Flight Equipment Accounted

Quarter Ended June 30, 19 60

Date Acquired	Date Placed in Passenger Service (Effective)	Airframe Serial No.	Use of Unit	Number of Aircraft Engines Acquired	Amount	Type and Model	Net Book Value Added	Aircraft Engines Ref. No. Series	Net Book Value Carried to
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
						Airframe Additions			
03-07-60	06-01-60 N	806	New		1601	Douglas DC-8 Add'l Cost			
04-03-60	06-10-60	807	"		"	" "			
04-11-60	06-15-60	808	"		"	" "			
04-22-60	07-20-60	809	"		"	" "			
12-15-59	01-27-60 N	702	Used		"	Boeing B707-331 Add'l Cost			
						Total Additions			
						Airframes Transferred from Other Property Accounts			
02-07-60	03-27-60 N	803	Used		1601	Douglas DC-8 Adj. Cost			
03-17-60	06-10-60 N	804	"		"	" "			
03-20-60	04-01-60	805	"		"	" "			
03-07-60	06-01-60	806	New		"	" "		4	116
"	"	"	"		"	" "			
"	"	"	"		"	" "			
"	"	"	"		"	" "			
04-03-60	06-10-60 N	807	New		"	" "		4	116
"	"	"	"		"	" "			
"	"	"	"		"	" "			
"	"	"	"		"	" "			
04-11-60	06-15-60	808	New		"	" "		4	116
"	"	"	"		"	" "			
"	"	"	"		"	" "			
"	"	"	"		"	" "			
04-22-60	07-20-60	809	New		"	" "		4	116
"	"	"	"		"	" "			
"	"	"	"		"	" "			
"	"	"	"		"	" "			
11-05-59	12-05-59 N	701	Used		"	Boeing B-707-331 Adj. Cost			
12-15-59	01-27-60 N	702	"		"	" "			
12-30-59	02-05-60	703	"		"	" "			
03-23-60	04-16-60	704	"		"	" "			
04-21-60	05-30-60	705	New		"	" "		4	133
"	"	"	"		"	" "			
"	"	"	"		"	" "			
"	"	"	"		"	" "			
04-28-60	07-05-60	706	New		"	" "		4	133
"	"	"	"		"	" "			
"	"	"	"		"	" "			
"	"	"	"		"	" "			
04-28-59	09-02-59 N	714	Used		"	Boeing B-707-321 Adj. Cost			
"	"	"	"		"	" "			
07-15-59	08-26-59	715	"		"	" "			
08-22-59	09-09-59	716	"		"	" "			
09-01-59	09-11-59	717	"		"	" "			
09-22-59	10-04-59	718	"		"	" "			
10-02-59	10-10-59	719	"		"	" "			
10-16-59	10-16-59	720	"		"	" "			
						Carried Forward			

* Denotes Invoice Amount

Schedule B-7

U. S. Government Printing Office: 1960 - 0-60207

Cost	Reserve for Depreciation	Estimated Residual Value	Estimated Remaining Useful Life (Months)	Flight Equipment Adjustments to Reserves	Acquired From	Line No.
(11)	(12)	(13)	(14)	(15)	(16)	
25,759		2,576	120		Douglas Aircraft Co.	1
25,759		2,576	"		"	2
25,759		2,576	"		"	3
25,759		2,576	"		"	4
52,887		5,289	120		Standardization Modif.	5
155,923						6
						7
						8
2,305*		231*	120		Reclass. to A/C 1604	9
2,305*		231*	"		"	10
2,305*		231*	"		"	11
4,416,837	486,784	"			Douglas Aircraft Co.	12
51,288	-0-	"			Capitalized Interest	13
15,000	1,500	"			Engineering Costs	14
5,613	561	"			DC-8 Project Costs	15
3,384*	338*	"			Modif. Refund	16
4,417,274	486,827	"			Douglas Aircraft Co.	17
51,288	-0-	"			Capitalized Interest	18
15,000	1,500	"			Engineering Costs	19
5,613	561	"			DC-8 Project Costs	20
3,384*	338*	"			Modif. Refund	21
4,417,274	486,827	"			Douglas Aircraft Co.	22
51,288	-0-	"			Capitalized Interest	23
15,000	1,500	"			Engineering Costs	24
5,613	561	"			DC-8 Project Costs	25
3,384*	338*	"			Modif. Refund	26
4,417,274	486,827	"			Douglas Aircraft Co.	27
51,288	-0-	"			Capitalized Interest	28
15,000	1,500	"			Engineering Costs	29
5,613	561	"			DC-8 Project Costs	30
3,384*	338*	"			Modif. Refund	31
2,295*	230*	"			Reclass. to A/C 1604	32
2,295*	230*	"			"	33
2,295*	230*	"			"	34
2,295*	230*	"			"	35
4,526,164	497,716	"			Boeing Airplane Co.	36
163,624	16,368	"			Hughes Tool Co.	37
59,160	-0-	"			Capitalized Interest	38
43,118	4,312	"			B-707 Project Costs	39
4,526,165	497,717	"			Boeing Airplane Co.	40
163,624	16,368	"			Hughes Tool Co.	41
59,160	-0-	"			Capitalized Interest	42
43,118	4,312	"			B-707 Project Costs	43
2,305*	231*	"			Reclass. to A/C 1604	44
10,854*	-0-	"			Adj. Capitalized Interest	45
2,305*	231*	"			Reclass. to A/C 1604	46
10,854*	-0-	"			Adj. Capitalized Interest	47
2,305*	231*	"			Reclass. to A/C 1604	48
10,854*	-0-	"			Adj. Capitalized Interest	49
2,305*	231*	"			Reclass. to A/C 1604	50
10,854*	-0-	"			Adj. Capitalized Interest	51
2,305*	231*	"			Reclass. to A/C 1604	52
10,854*	-0-	"			Adj. Capitalized Interest	53
2,305*	231*	"			Reclass to A/C 1604	54
10,854*	-0-	"			Adj. Capitalized Interest	55
2,305*	231*	"			Reclass to A/C 1604	56
10,854*	-0-	"			Adj. Capitalized Interest	57
21,418,772						58
						59

CAB Form 41

AX-2458

"DX359A
(Supplemental S.H.E. Report - Volume A)"

SUPPLEMENTAL REPORT OF

SIMAT, HELLIESEN & EICHNER, INC.

VOLUME A

PARTS I & II

AX-2459

"DX359A

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.: (Supplemental S.H.E. Report - Volume A)"

NATHAN S. SIMAT, being duly sworn, deposes and says:

I am President of Simat, Helliesen & Eichner, Inc., and the following report, consisting of Volume A, Part I and Part II with its appendices was prepared under my direct supervision. I have read the report, know the contents thereof, and all statements therein contained are true as stated to the best of my knowledge, information, and belief. I hereby adopt the report as my direct testimony in the proceeding before the Honorable Herbert Brownell, Special Master, entitled Trans World Airlines, Inc., v. Howard R. Hughes, et al., 61 Civil 2324, United States District Court for the Southern District of New York.

Nathan S. Simat

Sworn to before me this
29th day of December 1967

Notary Public
MARGOT A. WARD
Notary Public, State of New York
No. 24-4154775 Qual. in Kings Co.
Certificate filed in New York County
Commission Expires March 30, 1969

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

L. JOHN EICHNER, being duly sworn, deposes and says:

I am a Vice President of Simat, Helliesen & Eichner, Inc., and the following report, consisting of Volume A, Part I and Part II with its appendices was prepared under my direct supervision. I have read the report, know the contents thereof, and all statements therein contained are true as stated to the best of my knowledge, information, and belief. I hereby adopt the report as my direct testimony in the proceeding before the Honorable Herbert Brownell, Special Master, entitled Trans World Airlines, Inc. v. Howard R. Hughes, et al., 61 Civil 2324, United States District Court for the Southern District of New York.

L. John Eichner

Sworn to before me this
29th day of December 1967

Notary Public
MARGOT A. WARD
Notary Public, State of New York
No. 24-4154775 Qual. in Kings Co.
Certificate filed in New York County
Commission Expires March 30, 1969

INDEX

	Page
PART I: INTRODUCTION	I-1
A. Our Request for Internal TWA Records	I-1
B. Limitations on Our Use of the Materials Furnished by TWA	I-2
C. Projects Undertaken in This Report	I-6
1. Aircraft Scheduling	I-7
2. Traffic Estimating	I-7
3. Passenger Trip Lengths	I-8
PART II: HISTORICAL PERFORMANCE OF TWA'S JET AIRCRAFT 1959-1963	II-1
A. Analysis of Individual Jet Aircraft Performance	II-3
1. Aircraft Routing Charts	II-3
2. On-Board Reports	II-8
B. Stage Lengths Operated by TWA's Jets	II-11
C. Load Factors Experienced by TWA's Jets	II-20
D. Profitability of TWA's Individual Jet Aircraft	II-33
1. Profit or Loss Under S.H.E. Procedures	II-33
a. The B-131's	II-37
b. The CV-880's	II-40
c. The B-131B's	II-43
d. The Minor Domestic Jet Fleets: B-331's, 720B's, B-331B's	II-45
2. Profit or Loss Under Mr. Wemple's Procedures	II-49
a. The B-131's	II-51
b. The CV-880's	II-52
c. The B-131B's	II-53
d. The Minor Domestic Jet Fleets: B-331's, B-720B's, B-331B's	II-53
3. General Conclusions as to the Historical Profitability of TWA's Jet Aircraft	II-60
APPENDIX A	
APPENDIX B	

PART I

INTRODUCTION

A. Our Request for Internal TWA Records

In our earlier report, DX 271, we noted that we were handicapped, in estimating the consequences of adding jet aircraft to TWA's available fleet, by a lack of detailed information concerning TWA operations and operating results at levels less aggregated than the operating division. We pointed out that, lacking finer grained information, we had to forego the use of estimating methods which we would have preferred to use. Instead, we used an estimating approach that was fashioned to the limitations of the available data. While this approach led to estimates that we believe are reasonable and in accord with historical experience, we maintained that improved and more realistic estimates could and would be made, if we had access to certain detailed information concerning the actual usage of aircraft during the period of jet inventory build-up and the traffic and revenues resulting from actual aircraft usage. This was the reason for the request that TWA produce specified categories of internal records from its files.

In describing our needs for additional and more detailed information, we specified data on the traffic and financial performance of scheduled flight services, by individual flight segments. We also specified routing chart information which, together with the flight performance data, would enable us on the basis of TWA's own experience to make more accurate judgments regarding how additional aircraft would have been used and how this usage would have affected the operations of existing aircraft and the volume of traffic carried. In addition we specified on-line, on-flight, and passenger revenue yield information in order to improve and add realism to our estimates of passenger revenues.[1/]

B. Limitations on Our Use of the Material Furnished by TWA

In our report of progress, dated October 25, 1967 (DX 325)[2/] we reviewed the principal objectives of our supplemental report, described the status of the material furnished to us by TWA and outlined the analysis program then underway or contemplated. We noted that the scope of

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1/ See affidavit of Nathan S. Simat, dated June 29, 1967, annexed to defendants' motion filed June 30, 1967.

2/ Status of Supplemental Report by Simat, Helliesen & Eichner, delivered to the Special Master and counsel for plaintiff on October 25, 1967 and received in evidence on October 26, 1967 (Tr. 8391-92).

that program was contingent upon a clarification of the data made available to us and confirmed our previous estimate that the analytical work would be completed by the end of the year and that a written report would be ready for submission by the end of January or early in February.

Since the submission of DX 325, we have been compelled to carry out some portions of our projected program on a more limited basis than originally planned and to shelve other parts entirely. This resulted, in part, from difficulties in processing the materials received and, in part, from inherent deficiencies in the information recorded. The decision of the Special Master to require submission of our supplemental report by January 1, 1968, even though its scope was at the same time confined to TWA's Domestic Division (Tr. 8606), was another factor that obliged us to be selective in our analysis.

Unforeseen difficulties in processing materials were especially pronounced in the case of flight traffic performance data. In checks of the information keypunched from the basic source records supplied to us, we found that there were duplications in the data that required extensive tracing and corrections of the keypunched data before the accuracy could be established. Routing chart information, though

no less complete than was noted in our progress report, was not entirely legible in some instances and required time-consuming cross-checking with flight performance data to assure that flight information contained in the routing charts was properly recorded.

The principal deficiencies in the information were found in the passenger revenue yield data. We noted in our progress report that the information supplied was for a period subsequent to 1959-1963 and, furthermore, that we were not certain that the information afforded an improvement over the relationships we had developed from industry data and adjusted to TWA's average passenger revenue yield levels. As a result of further examination of the information, it appears it was not developed from analysis of tickets covering the transportation provided by TWA over individual flight segments, but was estimated from quoted fares between the terminals of flight segments by applying average divisional percentage differences between fares and revenue yields. Since there is much evidence that the percentage differences between fares and revenue yields vary from segment to segment, generally in relation to segment distances, the yield information supplied by TWA was not even as accurate or as realistic as the relationships that we obtained from industry data.

Accordingly, we lacked the basis for undertaking a further analysis of revenue yields, as contemplated. Since no more accurate basis for estimating passenger revenue yields was derivable from the information at hand, we have relied on the method of estimating passenger revenue yields developed in our earlier report as the best available. We have, however, been able to improve our estimates of the relationship between length of hop and passenger trip length.

Finally, because of the other difficulties encountered, we had to delay the recording and processing of information on the competitive services operated by other airlines in markets where TWA historically operated nonstop flights with piston and jet aircraft. As a result, our analyses of the influence of flight schedules of competing airlines on TWA's aircraft usage and share of available traffic are not as extensive as we had planned.

Notwithstanding our inability to undertake in full the analyses originally contemplated, we have been able for the first time to ascertain the detailed usage and operational results of the aircraft which TWA did have available and, in consequence, to effect significant improvements in our estimates of the usage, traffic and revenues which would most probably have ensued from assumed additional jet capacity.

C. Projects Undertaken in This Report

This report has two major parts. Part II contains our analysis of the domestic jet operations historically conducted by TWA in 1959-1963. Part III contains our estimates of the traffic and revenues which TWA would have obtained in 1959-1963 if it had operated the additional capacity assumed by Mr. Wemple for the Domestic Division.

In Part II, using information from TWA's routing charts and on-board reports, we have determined the average stage lengths and load factors in each month of the 1959-1963 period for every one of the active jet aircraft in TWA's domestic fleet. The results confirm the conclusions as to the trends in stage lengths and load factors expressed in our earlier report. Furthermore, we have determined for each such aircraft, using both our own estimating procedures and those of Mr. Wemple, the operating profit or loss obtained in each month of the period. This analysis of profitability by individual jet aircraft reinforces our previous opinion that throughout the greater part of this period TWA could not have added jet capacity at a profit.

In Part III, we present our improved estimates of the effect on operating profits of the assumed operation by TWA of additional jet capacity in its Domestic Division.

The additional data have provided a firmer foundation for estimating in three significant areas:

1. Aircraft scheduling. We have now been able to make detailed estimates of the changes in aircraft usage associated with the availability of additional jet aircraft by flight segments, grounded on the scheduling policies of TWA disclosed by actual aircraft usage. Rather than estimating the average stage length of added and deleted flight operations by the use of divisional average relationships between the stage lengths of existing and added and deleted services, we were able to estimate directly the changes in flight operations for each flight segment affected and to derive the stage lengths of added and deleted flights from the individual flight segment data.

2. Traffic estimating. The additional data enabled us to effect major improvements in the traffic estimates. We have now been able to estimate the added and deleted traffic resulting from changes in flight operations on an individual segment basis, rather than on the basis of average marginal load factors. We took into consideration the characteristics of the flight segment (its length in miles and whether it was competitive or noncompetitive) and also the experienced relationships, among flight segments of like characteristics, between traffic volumes added and deleted and changes in flight operations.

3. Passenger trip lengths. As a result of a comprehensive analysis of TWA's on-line traffic for individual flights, we were able to improve the estimates of the trip lengths of passengers added and deleted as a result of the contemplated additions and deletions of jet and piston aircraft services.

In addition to the foregoing improvements in the estimates of changes in aircraft operations and traffic which were anticipated to flow from the supplementary data and studies, we further found that the analyses of historical aircraft usage and operating results, made possible by the availability of routing chart and flight information, disclosed characteristic patterns of differences among aircraft of the same type, not only as to how individual aircraft were used but also as to the profit or loss contribution of the individual aircraft. We found that the differences were so uniform among the individual aircraft and varied so consistently among fleets of different numbers of aircraft that it was possible from the data to independently estimate the amount of operating profits and losses that would be added and deleted by changes in the number of aircraft available and used. This afforded an alternative basis for estimating the financial effects of

fleet additions and deletions that was not not anticipated.

The estimates detailed in Part III provide a further substantiation for our opinion that operation of the additional jet capacity assumed by Mr. Wemple would have contributed significant operating losses to TWA's Domestic Division.

PART II

PART II

HISTORICAL PERFORMANCE OF TWA'S JET AIRCRAFT 1959 - 1963

Our analysis of TWA's domestic operations with jet aircraft owned or leased in 1959-1963 confirms three of the major conclusions stated in our prior report (DX 271):

1. As jets were added, they were flown on increasingly shorter stage lengths with the result that the average stage length over which each jet fleet was operated suffered a progressive decline;
2. As jets were added, they were operated at increasingly lower load factors with the result that the average load factor achieved by each jet fleet suffered a progressive decline;
3. As jets were added, the lower stage lengths and load factors at which they were operated produced lower operating profits for the added jets. Operations conducted at a marginal profit or at a loss, even before deduction of interest and other costs of capital, occurred at an early stage in the introduction of each of the jet fleets.

The historical performance provides a backdrop for projecting the results that TWA would have obtained if it had operated the additional capacity postulated by Mr. Wemple.

Analysis of TWA's records establishes definite trends to lower stage lengths, lower load factors and consequently lower operating profits (or higher operating losses) as jets were added. In our opinion, the operation of still more jets in any year of the 1959-1963 period would necessarily have accelerated these historical trends.

Airline managements attempt to employ their invested capital and physical resources as profitably as possible. An airline does not use a multi-million dollar jet unprofitably if it has an opportunity to fly it profitably. If at any point in time opportunities do not exist for profitable employment of all the aircraft in a particular fleet, an airline may nevertheless choose to operate them all even though some must be flown on unprofitable routes. Various considerations may underlie such a choice. The management may hope to cover some of the operating costs which are incurred whether or not a plane is put in the air - principally, depreciation and hull insurance, while avoiding the expenses associated with any extended grounding. Or management may misjudge the profit opportunities, hoping for greater traffic and revenue production than proves, in actuality, to be attainable. Managements are especially vulnerable to this kind of overoptimism in periods of stagnant traffic growth, such as that from 1959 to mid-1963.

When management becomes aware of loss operations it attempts

to solve the problem by rescheduling its equipment. This is one of the reasons why changes in aircraft schedules and routings occurred so frequently during the 1959-1963 period.

The fact that TWA operated many of its jet aircraft at a marginal profit level or at a loss throughout most of this period, despite efforts to find profit opportunities through equipment shifts and rerouting, does not suggest that TWA stood in need of still more jet equipment. On the contrary, it is proof that, with more jets on its hands, TWA management would have faced an even more difficult problem of profitable deployment.

A. Analysis of Individual Jet Aircraft Performance

The new information upon which this part of our report is based was obtained primarily from TWA aircraft routing charts and TWA monthly on-board reports.[1/] We have now been able to ascertain the historical usage, the passenger load and the profitability of each jet aircraft scheduled in the 1959-1963 routing charts furnished to us by TWA.[2/]

1. Aircraft Routing Charts

TWA, like other airlines, assigned operating routes to the active aircraft in each of its fleets through the

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1/ Furnished by plaintiff upon defendants' motion filed June 30, 1967 and granted by the Special Master July 13,1967 (Tr. 7021).

2/ It has proved impossible for us to make a similar anaylsis of piston aircraft performance within the time limitation fixed by the Special Master.

medium of routing charts. A routing chart displays the flight patterns over a 24-hour period for each of the active aircraft of a particular type, such as the B-131 or the CV-880. For one B-331, the daily pattern might be from Los Angeles to Idlewild to Los Angeles. For another, it might be from Idlewild to Indianapolis to Idlewild to Chicago. The sum of the daily flight patterns for each of the aircraft in a particular fleet constitutes the overall scheduling of the fleet.

The routing chart does not purport to identify by license frame numbers or otherwise the physical piece of equipment which performs each daily pattern. What it does tell us is that, during each day it is in effect, one of the active aircraft in the fleet will perform one of the daily flight patterns. A flight pattern may or may not be performed day after day with the identical piece of equipment. Typically it will not be the identical piece of equipment. The usual procedure is to rotate all of the aircraft in a fleet in sequence through each daily flight pattern so that each piece of equipment may undergo the periodic maintenance checks built into the scheduling. (Some routing charts assign an aircraft to maintenance for an entire aircraft day.) But if there are, say, 15 B-131s being operated, then the number of daily flight patterns flown by B-131s will be exactly 15, no more - no less. Fifteen "actives" produce 15 "aircraft days."

Chart II-A on page II-6 reproduces a sample TWA routing chart, issued October 18, 1963 and assigning the daily routing of 23 of TWA's 26 CV-880s effective October 27, 1963. Of the other three 880s, one was assigned as a spare, one was assigned to pilot training and one remained unassigned.[1/]

The chart schedules 23 aircraft days, one day for each of the 23 active CV-880s. The day for the aircraft performing Flight 138 (upper left corner) begins at 12:30 A.M. with a departure from San Francisco to Pittsburgh. It continues with departures from Pittsburgh at 11:35 A.M. on Flight 142 for Boston, from Boston at 2:20 P.M. on Flight 193 for St. Louis, and from St. Louis at 6:45 P.M. on Flight 194 to Boston, where it terminates upon a scheduled arrival at 11:19 P.M. Clearly, the same piece of equipment could not repeat this schedule on the succeeding day, but would perform Flight 91, as indicated (lower left corner), departing from Boston at 8:15 A.M. for Chicago. Flight 138 would be performed on the succeeding day with the equipment which had completed Flight 161 from Cincinnati to San Francisco (upper right corner) as the last lap of its aircraft day. Thus the chart moves each of the 23 active aircraft through each of the 23 aircraft days.

1/ An indication that management did not envisage any possibility of profitable employment for this aircraft.

"DX359A, page II-6
(Supplemental S.H.E. Report - Volume A)"

The flight number attached to each pair of origin and destination points on the routing chart is the same number by which the flight is designated in the TWA timetable effective during the same period of time and in the TWA on-board reports which record data on the flights as actually performed. The flight numbers in the routing charts do not necessarily designate non-stop flights. The number of scheduled segments making up a given flight can be determined from the appropriate timetable. The number of segments actually flown with that type of equipment each month for a given flight is recorded in the TWA on-board reports.

In analyzing the performance of individual jet aircraft, we have used the aircraft routing charts as the basis for individualizing aircraft performance. Each daily flight pattern for each of the active aircraft is considered to be the daily performance of one aircraft, - i.e., one "aircraft day." An aircraft day performed throughout a month is considered to be the performance of one aircraft for that month. It is, of course, immaterial to our analysis that in the course of the month each piece of equipment in the fleet may have been rotated through each of the daily flight patterns. The sum of the aircraft days is always equal to the number of active aircraft in the fleet. If there had been three fewer active jet aircraft in any fleet at any time, there would

have to have been three fewer aircraft days scheduled in the routing chart for that fleet at that time. If there had been five more active jets, there would have to have been five more aircraft days scheduled.

Since the TWA on-board reports provide flight performance data on a monthly basis, it was necessary to combine routing charts where two or more were effective during the same month. Daily flight patterns assigned in the first routing chart in a month were matched with those assigned in the succeeding chart or charts in that month. In most instances the great majority of flight patterns were preserved intact throughout the month. Where a flight pattern was discontinued, an effort was made to match it to a pattern with like characteristics.

2. On-Board Reports

The TWA on-board reports provide monthly summaries of data by flight number, segment and type of equipment for all revenue flights performed by TWA. From these reports we obtained the number of departures and the number of revenue passengers carried each month by each type of jet over each segment constituting part of a scheduled flight indentified by a flight number. By combining these data for all segments comprising a flight and for all flights comprising an aircraft day, as assigned in the routing chart, we obtained the total number of flights performed and passengers carried in

each month by each aircraft in each of TWA's jet fleets for which we were furnished routing charts.

From the origin and destination points of these flights we obtained aircraft miles, block hours, and departures. Multiplying the aircraft miles by the seating configurations gave us the seat miles flown by each aircraft on each segment for each month.[1] From these statistics we computed, for each aircraft in TWA's jet fleet, the average monthly stage length (aircraft miles flown during the month divided by monthly departures) and the average monthly load-factor (revenue passenger miles operated during the month divided by available seat miles offered). We also computed, for each such aircraft, the monthly operating profit or loss, according to the methods described in Section D of this part of our report.

The number of flights actually performed and recorded in the on-board reports is not in every instance the same number of flights scheduled for a particular type of equipment in the aircraft routing charts. Weather conditions or equipment failures sometimes caused flights to be cancelled or operated with substitute equipment.[2] In other instances,

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[1] Aircraft miles were computed by multiplying the segment distance (airport-to-airport) by the number of departures. Seat miles were computed by multiplying the aircraft miles by the average number of seats for the month and aircraft type in question as set forth in the TWA monthly report on operating statistics (TWA C&C-3).

[2] The strike in February, 1961 also caused a number of cancellations.

flights departed as scheduled but landed at non-scheduled destinations, usually because of weather. Our analysis pertains, of course, only to flights actually operated. Cancelled flights were not counted. Flights performed with substitute equipment of another aircraft type, whether jet or piston, were not counted. We did count scheduled flights performed with the scheduled type of equipment where for one reason or another a non-scheduled departure or landing was made. For example, Flight 87, scheduled in November 1961 to be operated with a B-131 from Albuquerque to Los Angeles, flew 25 departures as scheduled and one departure from Albuquerque to Ontario, an airport some 50 miles east of Los Angeles, also with a B-131. We included the statistics for the Albuquerque-Ontario flight with the statistics for the 25 Albuquerque-Los Angeles flights in determining the performance of the B-131 aircraft performing Flight 87 in November 1961.[1]

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[1] We did not add in any additional expense of ferrying the flight from Ontario to Los Angeles as a non-scheduled trip.

B. Stage Lengths Operated by TWA's Jets

The historical deterioration of the stage lengths scheduled for TWA's jets commenced as early as the second month of service with its first jet fleet. When the B-131s were scheduled in April 1959, the first full month of operation, they were used upon transcontinental nonstops averaging 2404 miles per trip.1/ As departures doubled in May from 143 to 286, the average scheduled stage length dropped by 96 miles from 2404 to 2308. This drop in the average indicates that the added jets were scheduled at an average stage length shorter than the pre-existing average. This distance, the marginal stage length of the added operations was, in fact only 2,211 miles.2/ In June, with a 48% increase in scheduled departures, the marginal stage length fell to 1,570 miles.3/

This was the start of a continuing process which applied with equal force to every single one of TWA's jet fleets during the whole of the 1959-1963 period, as shown in Table II-A.

1/ Computer printout entitled "Domestic Schedule Average Stage Length," table for "Aircraft Type B70," the code designation for B-131 (workpaper).

2/ Ibid. TWA scheduled 316,236 additional aircraft miles in May. Dividing this figure by 143, the number of added departures, gives 2,211 miles per added departure.

3/ Ibid. Departures increased from 286 to 424, and 216,594 additional aircraft miles were flown, an average of 1,570 miles per added departure.

TABLE II-A

ANNUAL AVERAGE STAGE LENGTHS (SCHEDULED) BY JET AND PISTON AIRCRAFT TYPE

(1)	1959 (2)	1960 (3)	1961 (4)	1962 (5)	1963 (6)
All fleets	440	445	489	552	591
Piston Aircraft					
M-404	161	155	141	---	---
049/749	366	318	265	199	191
L-1049	532	445	426	---	---
L-1049G/H	722	567	375	336	322
L-1649A	1,414	534	311	299	---
Jet Aircraft					
CV-880	---	---	821	790	767
B-131	1,888	1,533	1,207	892	648
B-131B	---	---	---	1,509	1,303
B-331	---	2,027	1,572	1,007	827
B-331B	---	---	---	479	340
B-720B	---	---	1,010	967	---

Source: To obtain averages for all fleets combined, scheduled aircraft miles, C&C-4(24), were divided by scheduled departures, C&C-4(25). The separate averages for the various aircraft types were obtained from the printout Domestic Schedule Average Stage Length, supra at II-11, fn. 1., and are the figures shown for December in each year in the column headed "Running Average Stage Length."

The average scheduled stage length of B-131 flights dropped from 1,888 miles in 1959 to 648 miles in 1963, and that of B-331 flights from 2,027 miles in 1960 to 827 in 1963. The decline in average stage lengths of the later-introduced jet types,

though not so dramatic, was equally definite. The progressive decline in average stage lengths reflected, of course, a progressive decline in marginal stage lengths, as added jets were scheduled on segments which were generally shorter than the pre-existing average.

This deterioration in average jet stage lengths occurred even though the average stage length for all TWA flights increased each year from 1959 to 1963. The overall increase was not occasioned by an increase in average piston stage lengths since these too fell continuously every year for every type. The reason is that TWA eliminated a large number of trips from its schedules, most of them short haul, and downgraded the stage lengths of the individual aircraft types operated on the remaining frequencies.

Within any one year the downward trend of stage lengths is partially obscured by seasonal fluctuations, caused principally by the demand patterns of the California markets. The influence of these seasonal patterns can be removed through the use of a 12-month moving average, which combines the average stage length for a given month with the averages for the 11 preceding months.[1] Twelve-month moving averages of the stage lengths scheduled each month by each of the jet types in TWA's fleet during the 1959-1963 period (beginning in each case with the twelfth full month of operation) are displayed in Table II-B on page II-14.

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[1] Where the general trend is downward, as here, the moving average for a given month is necessarily higher than the actual average for that month, since it is influenced by the generally higher averages of the preceding 11 months.

TABLE II-2

12-MONTH MOVING AVERAGE STAGE LENGTHS AND AVERAGE NUMBER OF JET AIRCRAFT AVAILABLE

YEAR (1)	MONTH (2)	Average Stage Lengths						AVERAGE NO. OF JET AIRCRAFT AVAILABLE (9)
		B 707-131 (3)	B 707-331 (4)	CV-880 (5)	B 720 B (6)	B 707-131 B (7)	B 707-331 B (8)	
1960	March	1843.61						12.7
	April	1817.85						13.8
	May	1784.05						14.7
	June	1755.22						15.3
	July	1720.68						15.8
	August	1691.87						16.1
	Sept.	1665.18						16.4
	Oct.	1620.75						16.8
	Nov.	1576.30						17.2
	Dec.	1532.65						17.6
1961	Jan.	1490.43						18.4
	Feb.	1453.34	1915.73					19.3
	Mar.	1414.13	1848.07					20.6
	April	1378.90	1814.76					21.7
	May	1348.27	1814.95					23.0
	June	1321.56	1815.12					24.4
	July	1295.75	1796.82					25.8
	Aug.	1272.61	1772.14					27.5
	Sept.	1250.46	1749.01					29.3
	Oct.	1236.87	1720.41					31.2
	Nov.	1222.32	1646.52					33.2
	Dec.	1206.74	1572.08	820.74				35.2
1962	Jan.	1190.99	1521.28	816.62				36.8
	Feb.	1183.68	1489.04	813.00				38.3
	Mar.	1175.18	1456.66	808.66				39.4
	April	1162.25	1426.12	805.03				40.5
	May	1139.32	1384.92	803.76				41.5
	June	1113.12	1342.15	800.27				42.5
	July	1087.27	1293.20	797.95	986.34			43.5
	Aug.	1050.77	1242.15	796.05	981.21			44.6
	Sept.	1008.99	1202.36	795.36	983.64			45.7
	Oct.	968.14	1135.10	795.49	975.50			46.8
	Nov.	929.58	1083.58	793.65				47.6
	Dec.	891.66	1007.22	789.65				48.6
1963	Jan.	856.04	911.69	786.08				49.5
	Feb.	824.45	807.42	782.62				50.5
	Mar.	790.45	666.40	778.73		1455.76		51.4
	Apr.	757.08	581.47	775.09		1444.44		52.5
	May	730.78	491.49	771.71		1419.03		53.4
	June	702.25	430.09	771.76		1399.29		54.1
	July	678.01	669.28	770.79		1376.64	384.80	54.7
	Aug.	664.36	703.64	770.60		1352.42	367.65	55.2
	Sept.	660.01	738.91	772.04		1336.74	340.00	55.7
	Oct.	653.31	764.10	769.96		1319.76	340.00	56.2
	Nov.	650.86	789.86	768.82		1309.77	340.00	57.0
	Dec.	648.30	886.73	767.32		1302.78	340.00	

Sources: Cols. 3-8: Computer printout, supra at II-11, fn. 1.
Col. 9: TWA 4c-4, Ex. B., Col. 11, 12-month moving average.

It is evident from Table II-B that month by month as jets were being added to TWA's fleets, each fleet was being operated at progressively lower average stage lengths. The downward trend was unremitting for the B-131s throughout the entire period, as it also was, with minor exceptions, for the CV-880s. Even the later-introduced B-131Bs show a constantly declining trend. The trend is equally marked for the B-331s until May 1963, when an upturn occurs.

The decline in average stage lengths was produced by the operational requirements of scheduling the individual aircraft within each fleet. The routing charts and the on-board reports furnished by TWA permit an understanding of the scheduling patterns which underly the averages. In Table II-C, on page II-16, we have analyzed the stage lengths operated by each active jet in TWA's fleet[1/] during the month of December in each year of the 1959-1963 period.

Table II-C shows, for each type of jet and for the fleet as a whole, the number of aircraft operating in four distance categories - over 2,000 miles, 1,000 to 1,999 miles, 700 to 999 miles and under 700 miles. The pattern of scheduling may be illustrated by tracing what happened to the B-131s.

1/ With the exception of the B-331Bs, for which no domestic routing charts were furnished us.

TABLE II-C

NUMBER OF INDIVIDUAL AIRCRAFT WITHIN EACH JET TYPE OPERATED AT DIFFERENT STAGE LENGTHS FOR DECEMBER 1959-1963

Stage Lengths	Year	B-131	B-331	CV-880	B-720B	B-131B	Total
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Over 2,000 miles	1959	4	---	---	---	---	4
	1960	1	3	---	---	---	4
	1961	1	2	0	0	---	3
	1962	0	---[1/]	0	---	2	2
	1963	0	1 [1/]	0	---	4	5
1,000-1,999 miles	1959	10	---	---	---	---	10
	1960	10	0	---	---	---	10
	1961	5	2	3	2	---	12
	1962	0	---	0	---	10	10
	1963	0	---	4	---	9	13
700-999 miles	1959	0	---	---	---	---	0
	1960	4	0	---	---	---	4
	1961	6	0	12	2	---	20
	1962	5	---	12	---	4	21
	1963	5	---	9	---	4	18
Under 700 miles	1959	0	---	---	---	---	0
	1960	0	0	---	---	---	0
	1961	0	0	3	0	---	3
	1962	9	---	5	---	1	15
	1963	9	---	11	---	0	20

Source: Appendix B.

1/ Although TWA did not furnish 1963 routing charts for the B-331, TWA 40-3 indicates that a B-331 was operating nonstop between New York and Los Angeles in December 1963.

In May 1959, with six active jets, TWA operated three B-131s at average stage lengths over 2,000 miles and three at average stage lengths between 1,000 and 1,999 miles.[1/] In the following December, when TWA had received its full fleet of 15 B-131s, four B-131s were now being operated at average stage lengths over 2,000 miles, while the remaining ten active 131s were operated at average stage lengths between 1,000 and 1,999 miles (Table II-C). Clearly, opportunities did not exist to schedule the additional B-131s on the longer hops.

By December 1960, only one B-131 was operating at an average stage length over 2,000 miles. The first three B-331s added to the domestic fleet had now taken over the longer hops with the result that B-131 operations were downgraded. Ten B-131s still flew hops averaging between 1,000 and 1,999 miles, and four were now flying average hops of 700 to 999 miles. As more jets were added to TWA's other fleets, B-131 operations underwent a progressive further downgrading. In December 1963, none of the 14 active B-131s was operated at an average stage length as long as 1,000 miles, and nine were flying average hops under 700 miles, less than the distance from New York to Chicago.

1/ Computer printout showing monthly average stage length, average load factor and operating profit or loss by Mr. Wemple's method for each scheduled jet aircraft operated by TWA in 1959-1963. A copy of this printout is annexed to this report as Appendix B.

Looking at TWA's jet fleet as a whole, one can see that, as additional jets came in, they were either assigned to shorter stage lengths than the existing average for the particular jet type or they compelled the downgrading of aircraft of other jet types. 1/ While the total number of aircraft of all types operating at an average stage length of 2,000 miles or more remained fairly constant (4, 4, 3, 2, 5) the number operating at stage lengths in each of the lower categories increased from year to year. No jets are shown as operating at average hops below 700 miles until December 1961, when there were three.2/ In December 1963, the number below 700 miles had grown to 20.

In Chart II-B on Page II-19 we present a graphic comparison of the average stage lengths operated by the four B-131s having the highest average with those of the four having the lowest average within each month of the 1959-1963 period beginning in July 1959. If TWA had operated additional jets in any year of the 1959-1963 period,there can be no doubt, in our opinion, that the trends shown in Chart II-B for the B-131s, as well as the similar trends obtaining for the other jet types, would have been accentuated.

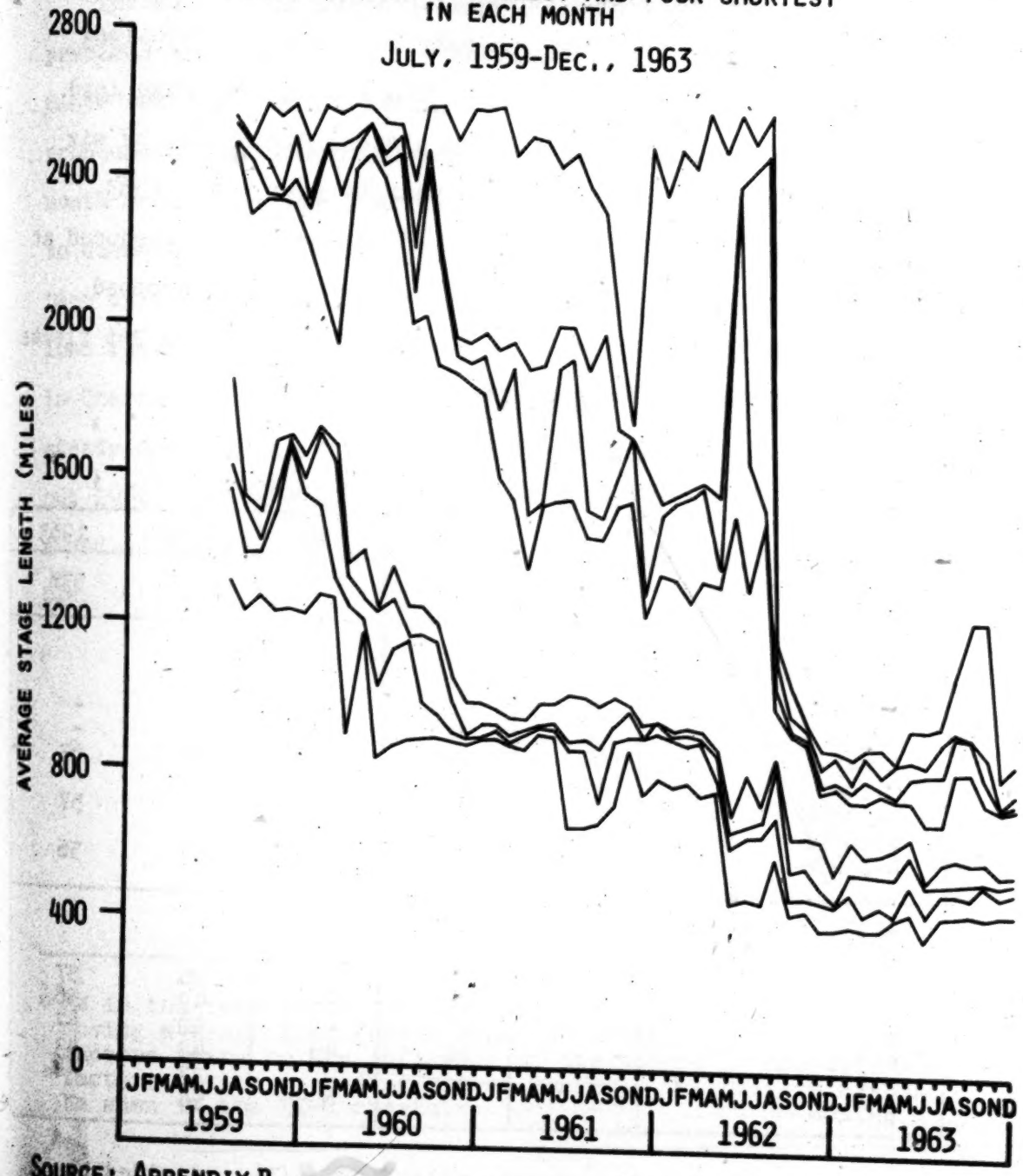
1/ Piston aircraft schedules were also downgraded as they were rippled down to shorter and shorter segments.

2/ The first jet to be operated at an average stage length below 700 miles was a B-331 in January 1961 (Appendix B).

MONTHLY AVERAGE STAGE LENGTHS OPERATED BY INDIVIDUAL B-131 AIRCRAFT

SHOWING THE FOUR LONGEST AND FOUR SHORTEST IN EACH MONTH

JULY, 1959-DEC., 1963



SOURCE: APPENDIX B

C. Load Factors Experienced by TWA's Jets

TWA suffered constantly declining load factors during the first four and one-half years of the 1959-1963 period. As shown in Table II-D, TWA's annual average load factor for all aircraft, jet and piston, diminished by six or seven percentage points from year to year until 1963. The B-131s, the B-331s and the CV-880s were all introduced at relatively high average load factors, which then dropped sharply in the second year of operation. All three jet fleets struck bottom in 1962 and rose moderately in 1963.

TABLE II-D

TWA DOMESTIC LOAD FACTORS 1959-1963

	1959	1960	1961	1962	1963
All Fleets	71%	64%	57%	51%	53%
Piston Aircraft					
M-404	64	61	59	-	-
L-049	66	59	58	-	-
L-749	64	63	61	64	63
L-1049	64	59			
L-1049G	70	60	60	61	57
L-1049H	73	56			
L-1649A	70	59	54	59	56
Jet Aircraft					
CV-880	-	-	66	56	57
B-131	83	69	53	49	56
B-131B	-	-	-	42	47
B-331	-	64	49	42	43
B-331B	-	-	-	37	44
B-720B	-	-	48	50	-

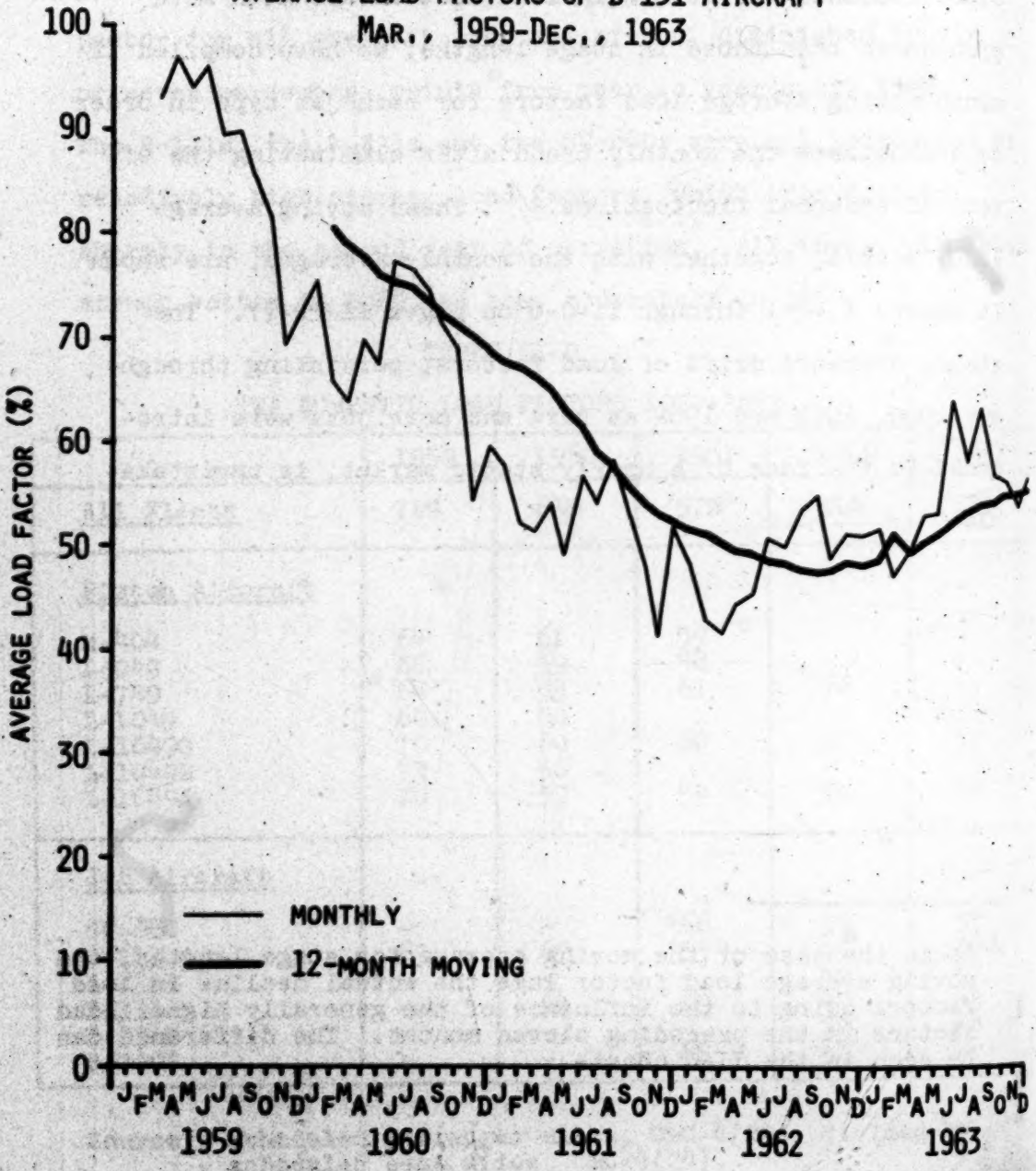
Source: Scheduled passenger miles, C&C-4(24), divided by scheduled seat miles, C&C-4(24).

The decline in TWA's average monthly load factors preceded the decline in its average annual load factors. Since seasonal variations in load factors are even more pronounced than those in stage lengths, we have compiled 12-month moving average load factors for each jet type in order to demonstrate the monthly trend after eliminating the effect of seasonal fluctuations.[1/] These moving average load factors, together with the monthly averages, are shown in Charts II-C-1 through II-C-6 on pages II-22-27. The steady downward drift of load factors, persisting throughout 1960, 1961 and 1962 as more and more jets were introduced in the face of a nearly static market, is unmistakable.

1/ As in the case of the moving average for stage lengths, the moving average load factor lags the actual decline in load factors owing to the influence of the generally higher load factors in the preceding eleven months. The difference can be seen in the II-C charts.

CHART IIC-1

AVERAGE LOAD FACTORS OF B-131 AIRCRAFT
MAR., 1959-DEC., 1963

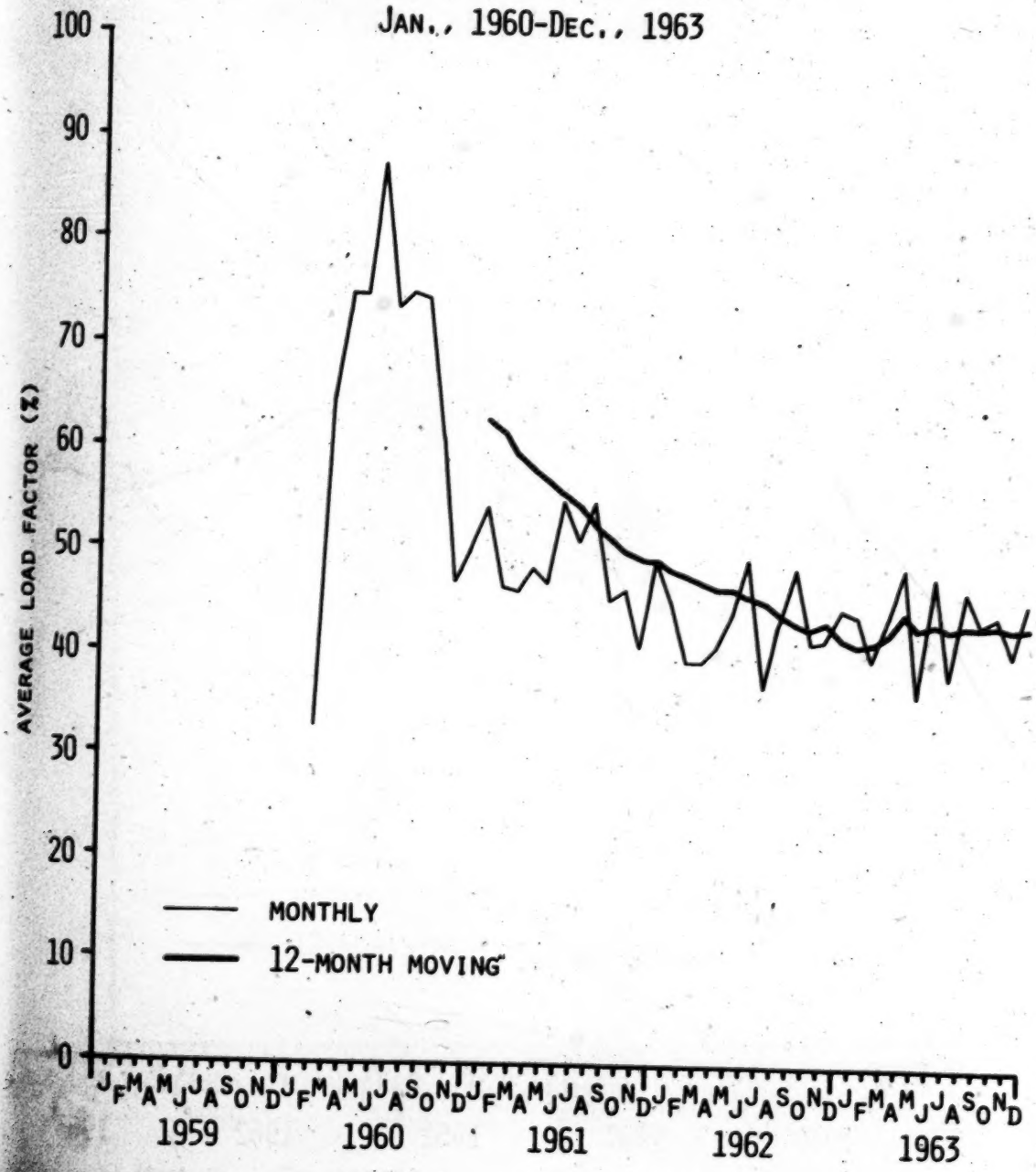


SOURCE: TWA EXHIBIT C&C-3

CHART IIC-2

AVERAGE LOAD FACTORS OF B-331 AIRCRAFT

JAN., 1960-DEC., 1963

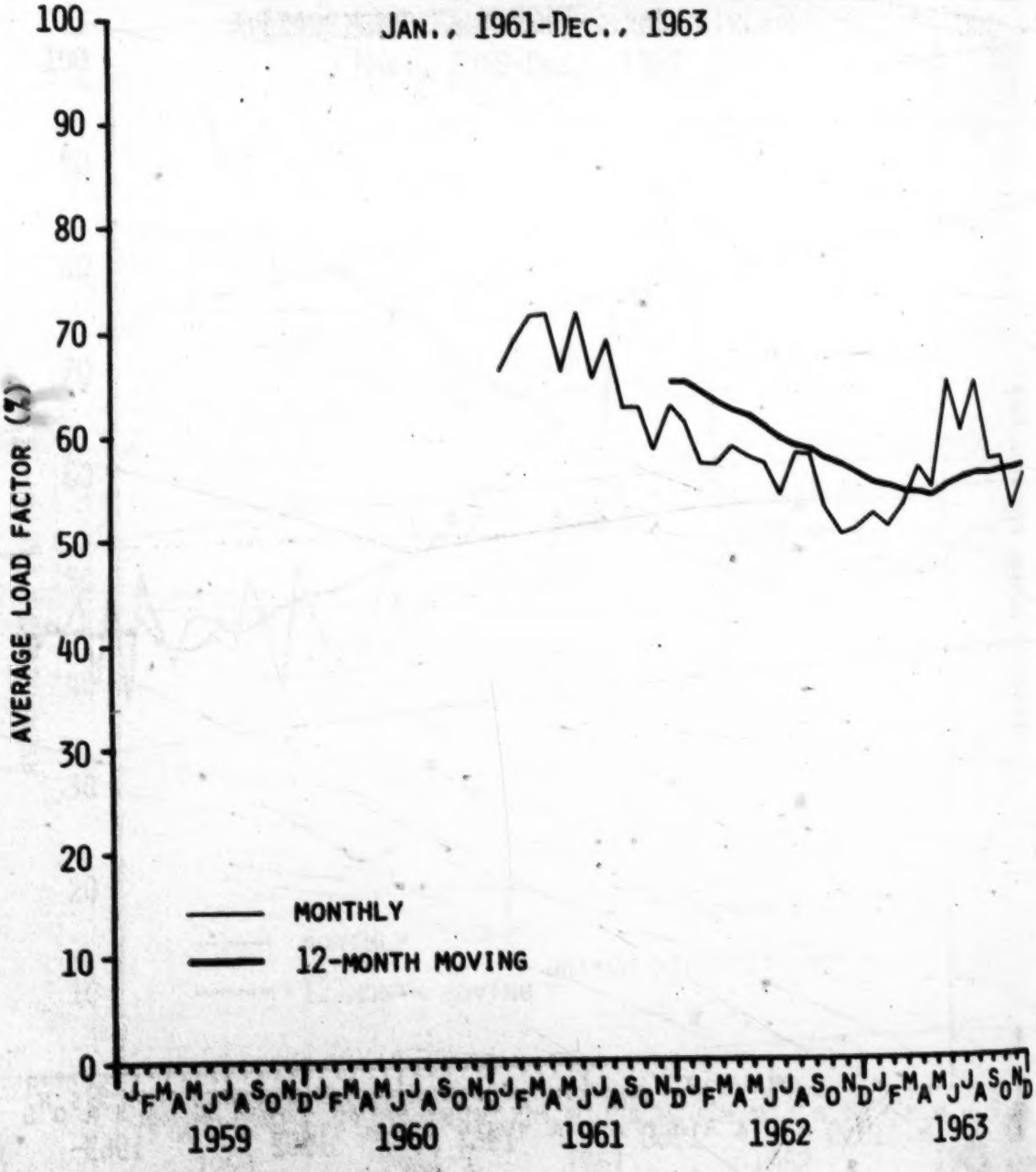


SOURCE: TWA EXHIBIT C&C-3

CHART II[illegible]

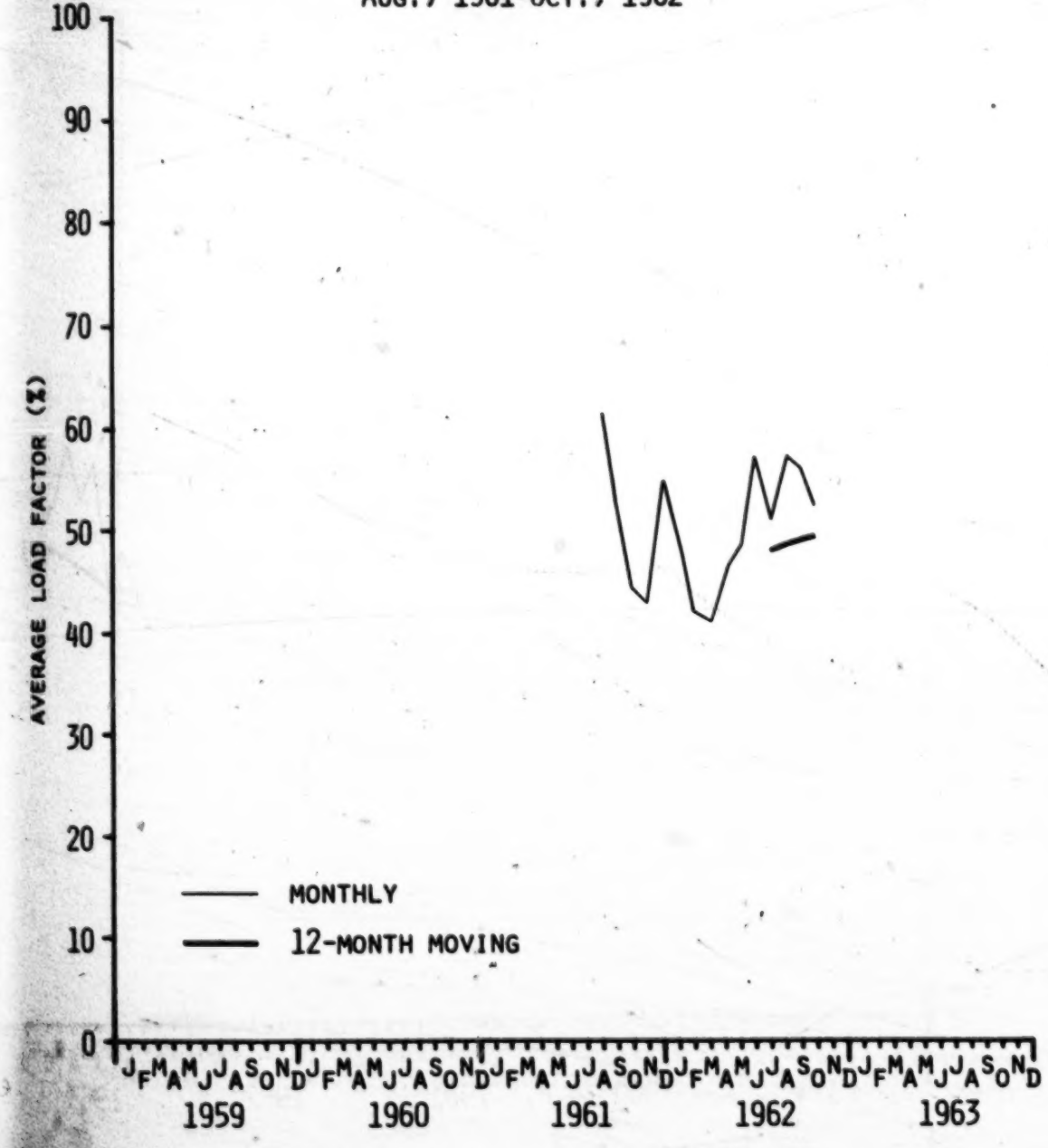
AVERAGE LOAD FACTORS OF CV-880 AIRCRAFT

JAN., 1961-DEC., 1963



SOURCE: TWA EXHIBIT C&C-3

AVERAGE LOAD FACTORS OF B-720B AIRCRAFT
AUG., 1961-OCT., 1962



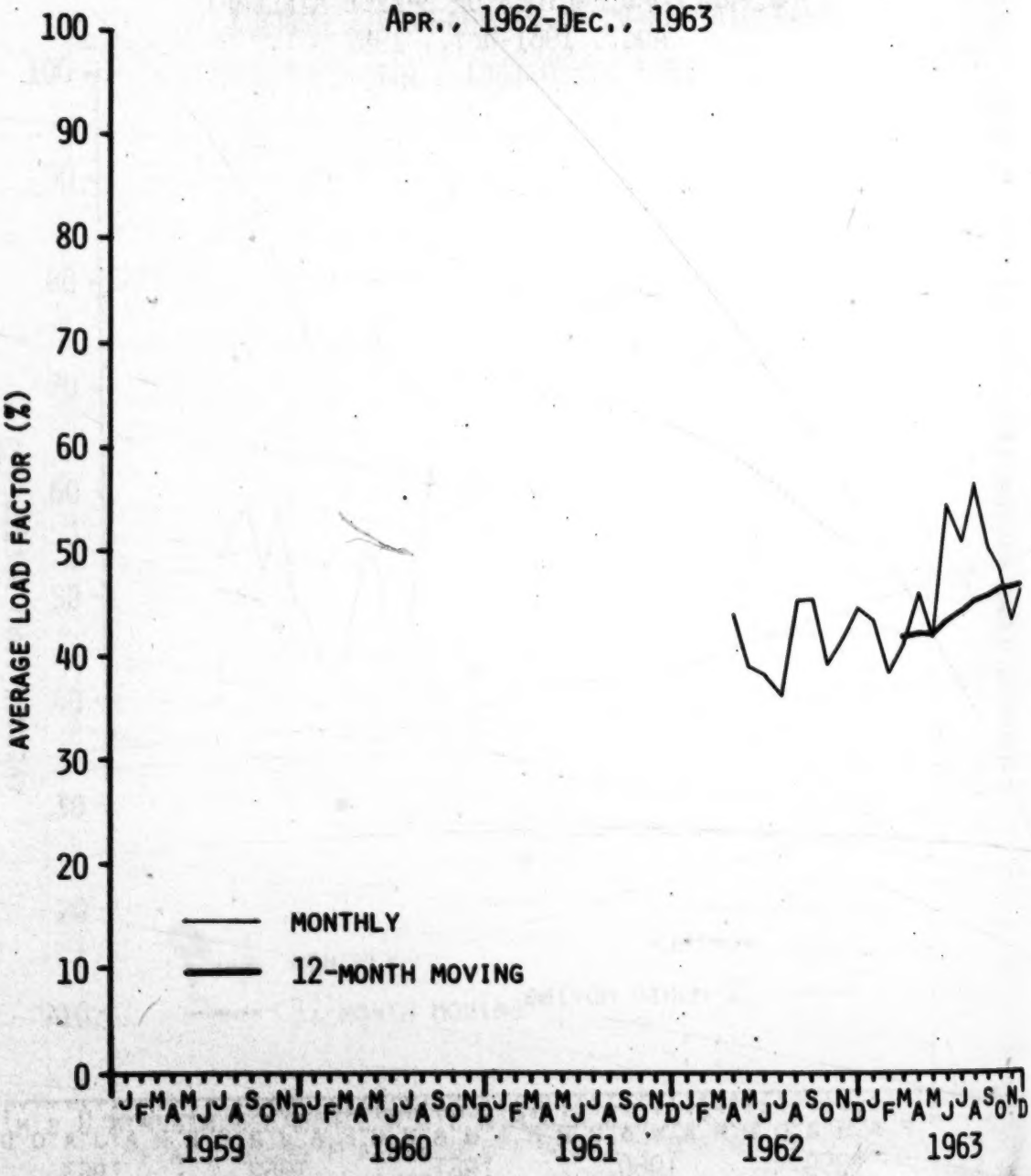
SOURCE: TWA EXHIBIT C&C-3

"DX359A, page II-26
(Supplemental S.H.E. Report - Volume A)"

CHART IIC-5

AVERAGE LOAD FACTORS OF B-131B AIRCRAFT

APR., 1962-DEC., 1963

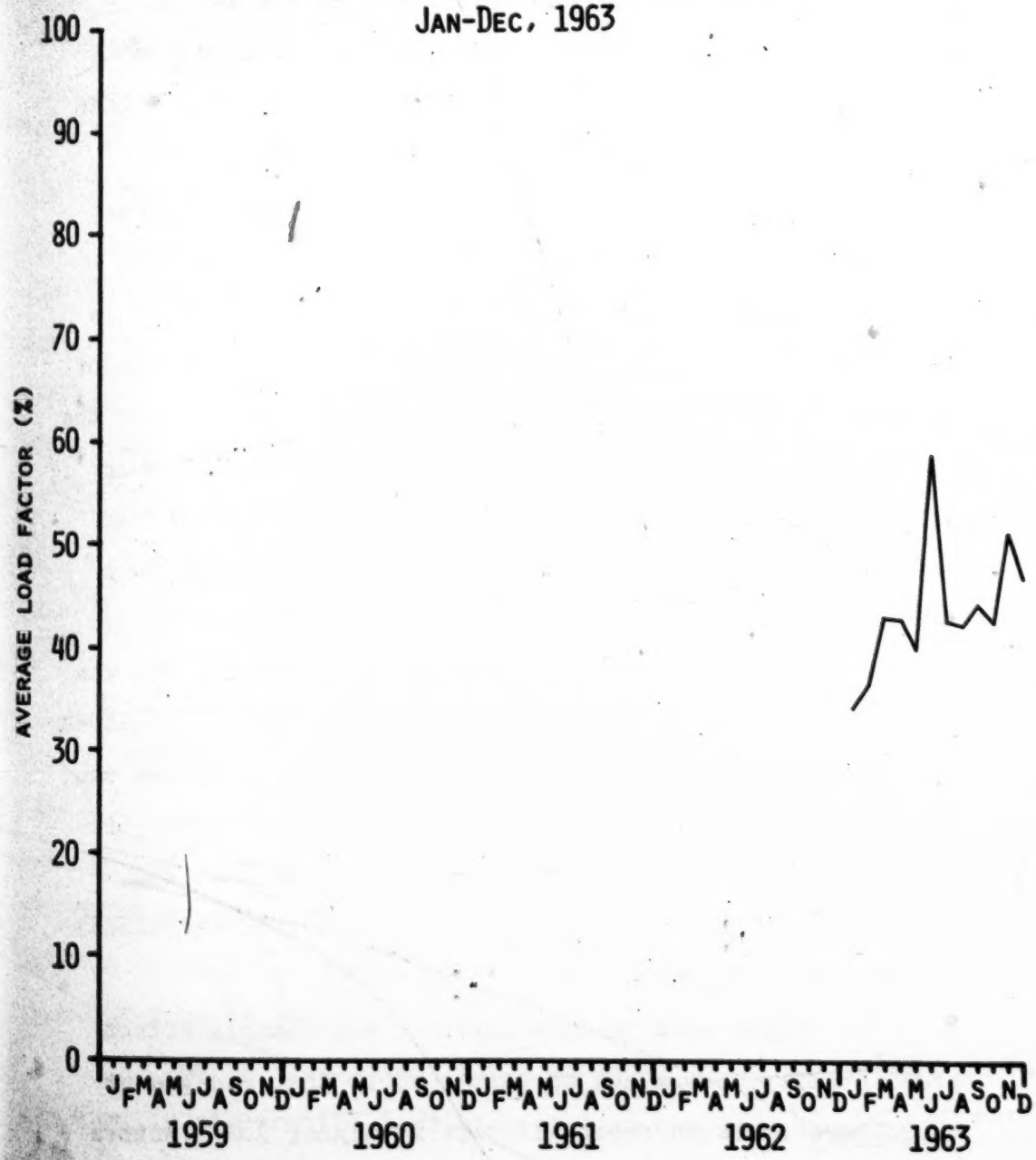


SOURCE: TWA EXHIBIT C&C-3

CHART IIC-6

AVERAGE LOAD FACTORS OF B-331B AIRCRAFT

JAN-DEC, 1963



SOURCE: TWA EXHIBIT C&C-3

Even during periods of relatively high load factors, such as the introductory years of the B-131, B-331 and CV-880 jet fleets, there was great variation in the load factors achieved by individual aircraft within each jet fleet. We have computed the individual load factors from the data recorded in TWA's on-board reports.

The CV-880 average load factor of 66% in 1961 was much higher than the 56% average in 1962, but even in 1961 TWA was unable to achieve a 66% load factor in all of its 880 operations. In April, for example, four out of the 12 active CV-880s were already operating at load factors below 66% (Appendix B). One of these operated at a load factor of only 51%. Four months later, in August, a much stronger month for air passenger travel, seven out of 17 active CV-880s were operating below 66%, and again one was operating as low as 51%. By October, when TWA had received all 20 CV-880s and was scheduling 18 of them in active use, ten were operating at load factors below 66%. Four of these were now at 51% or below, with the lowest at 43%. It is apparent that TWA could not have operated additional CV-880s at a load factor as high as 66%.

Since load factors directly and sharply affect profitability, there can be little doubt that management would have operated these aircraft at higher load factors

if it had been able to do so. There can be no doubt that it could not have operated any additional 880s, let alone ten more at load factors close to the 66% average.

In 1962, the situation grew far worse for the CV-880s, as TWA's average annual load factor dropped ten points to 56%. In November, when the full fleet of 20 had been available for a year, eleven of the 18 active 880s experienced load factors below 50%, three of them below 40%. The operations by these jets were contributing substantially to the losses which TWA sustained in 1962. If there had been ten additional CV-880s in November 1962, it is our opinion that they could have achieved load factors no better, and would almost certainly have experienced load factors worse than those of the three 880s actually operated at load factors below 40%.

In spite of the upturn in traffic that occurred in the last half of 1963, in November of that year TWA was unable to operate the six additional CV-880s with which by then it had augmented its fleet, at load factors above 50%. Of the 24 CV-880s active in November, eight experienced load factors below 50%. Six of these had load factors ranging from 45% down to 39%.

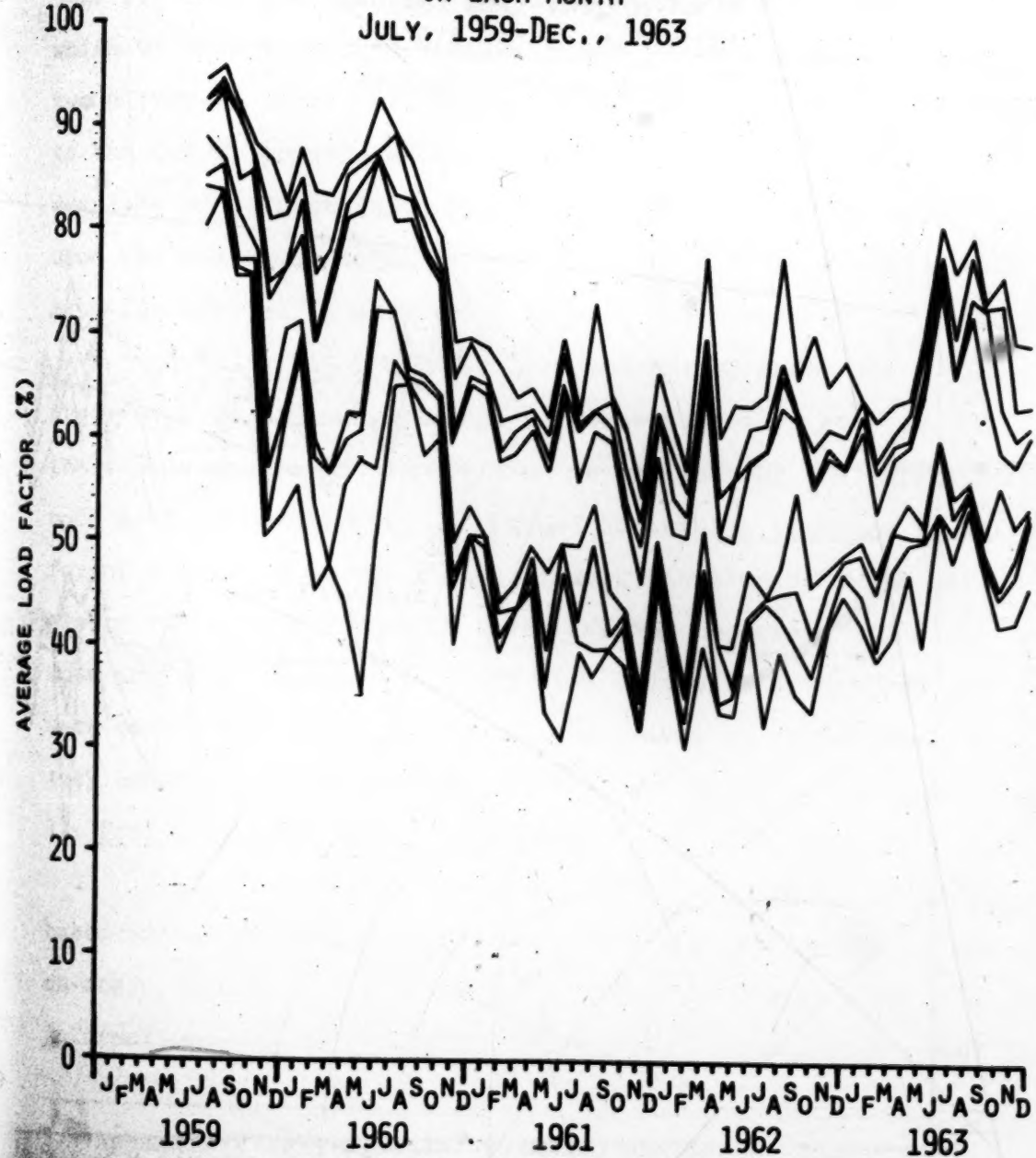
Charts II-D-1 and II-D-2 on pages II-31 and II-32 graphically compare the four highest with the four lowest average monthly load factors obtained by individual aircraft

of the B-131 and CV-880 fleets in each month during the 1959-1963 period. In our opinion, if TWA had operated additional B-131s or CV-880s, they would have experienced load factors not greater, and in most cases less, than the lowest load factors historically experienced in the corresponding month and fleet, as shown in Charts II-D-1 and II-D-2.

MONTHLY AVERAGE LOAD FACTORS OF INDIVIDUAL B-131 AIRCRAFT

SHOWING THE FOUR HIGHEST AND FOUR LOWEST IN EACH MONTH

JULY, 1959-DEC., 1963

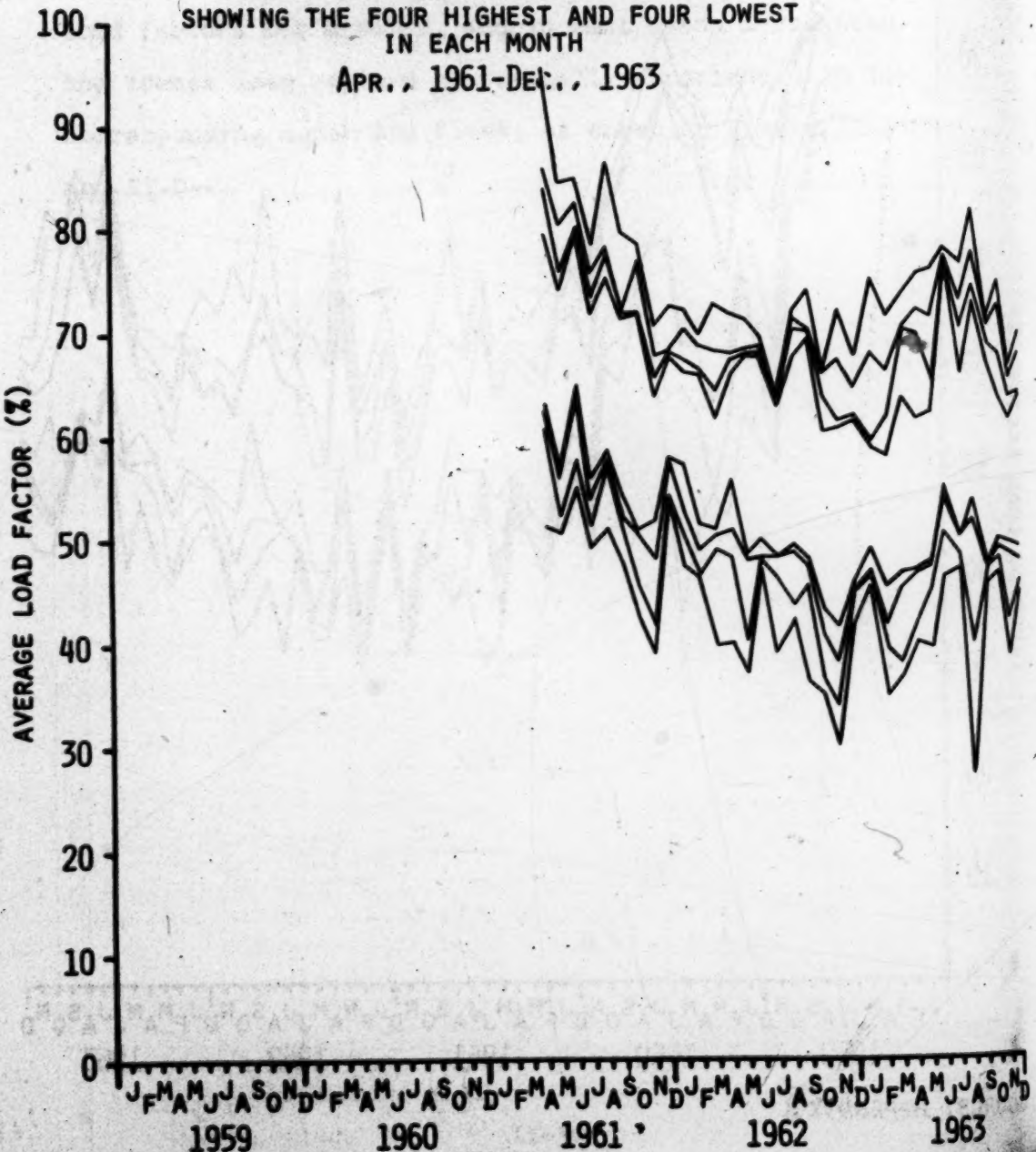


SOURCE: APPENDIX B

MONTHLY AVERAGE LOAD FACTORS OF INDIVIDUAL CV-880 AIRCRAFT

SHOWING THE FOUR HIGHEST AND FOUR LOWEST IN EACH MONTH

APR., 1961-DEC., 1963



SOURCE: APPENDIX B

D. Profitability of TWA's Individual Jet Aircraft

We have determined the monthly operating profit or loss for each jet aircraft operated by TWA in 1959-1963 for which we were furnished routing charts. We have done this on two different bases, estimating revenues and costs (1) according to the S.H.E. procedures (Appendix A)[1/] and (2) according to Mr. Wemple's procedures (Appendix B). Both estimates are based upon the distances actually flown and the number or passengers actually carried in each month by each jet aircraft.

While the profit or loss determined under the S.H.E. procedures is, in our opinion, substantially more accurate, the difference is not significant to the present analysis. For both methods demonstrate with equal certainty, although in different degree, that individual aircraft in each of TWA's jet fleets varied strikingly in their earning capacity, depending upon their scheduling, and they also demonstrate that, as jets were added, the additional jets were placed on routes where they began to contribute not profits, but losses.

1. Profit or Loss Under S.H.E. Procedures

The monthly profit or loss for each jet aircraft is based upon information appearing in the TWA routing charts and on-board reports. The following illustrates how we used such information.

1/ Appendix A is a computer printout similar to Appendix B but with operating profit or loss computed by S.H.E. methods.

TWA routing charts for June 1962 show a B-131 as operating flight number 42 from San Francisco to Idlewild. This was the entire daily scheduled activity for one aircraft.[1/] The on-board report for June 1962 shows that flight 42 operated from San Francisco to Idlewild 29 times nonstop as scheduled and once with a stop at Baltimore. The number of passengers carried on flight 42 with a B-131 aircraft over each of the three segments San Francisco-Idlewild, San Francisco-Baltimore and Baltimore-Idlewild is recorded in the on-board report for June. The number of aircraft miles flown over each of the three segments was obtained by multiplying the airport-to-airport mileage for the segment by the number of departures flown over the segment as shown in the on-board report. The number of passengers multiplied by the number of aircraft miles gave the passenger revenue miles for each segment. The appropriate yield was then applied (see, e.g., DX 271B, Part D and DX 271A, pp. IV-27, 28) to arrive at the passenger revenues realized on each segment. The total of the passenger revenues for the three segments, multiplied by 105% to obtain transportation revenues, appears in Appendix A as the total revenues earned in June 1962 by A/C 040, the B-131 performing flight 42.

1/ This was A/C 040 in Appendix A, June 1962 table for B-70s (B-131s).

In instances of irregular operations (operations performed with scheduled equipment under a scheduled flight number but on a non-scheduled segment), where two or more routing charts were effective in the same month and where the same flight was scheduled for different aircraft in the second or subsequent routing charts, we allocated the departures, aircraft miles and block hours flown and passengers carried over a segment among such different aircraft. Allocation was necessary because the on-board reports do not show the day of the month on which a flight was performed. We made such allocations in proportion to the number of days the pertinent flight patterns were effective during the month. In a very few instances, where such allocation resulted in apportioning less than one-half of a departure to an aircraft, the printout (Appendix A) shows departures as zero, but the computer in determining average stage lengths for the purpose of yield and cost estimation used the appropriate fraction less than 0.5.

Flying operations costs, maintenance and maintenance burdan, all of which vary with the amount of operations performed, were based upon block hours flown as recorded in the on-board reports and upon block hour-cost

ratios derived from total annual block hours flown and total annual direct operating costs experienced for the aircraft type and year in question (see DX 271B, Part F). To determine the direct costs which vary with fleet size (depreciation, hull insurance and leased aircraft rentals), we computed the historical costs per aircraft day and applied these units to the number of days in each month that each aircraft was scheduled as active. These costs are understated because the aircraft days reported by TWA and used by us to derive our unit costs included all aircraft in a fleet, active and inactive, but we did not apply the unit costs to aircraft which were unassigned, assigned as spares, assigned to pilot training or in maintenance for whole aircraft days.1/

We have not attempted to determine profit or loss for scheduled trips performed with substituted equipment of another jet aircraft type: for example, a scheduled CV-880 run performed with a B-131. In many instances, no doubt, the substituted aircraft was one assigned as a spare or unassigned. Lack of time prevented the extension of our

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1/ There was considerable variation from year to year and fleet to fleet in the percentage of active aircraft. In 1961, for example, 97 percent of the reported available B-131 aircraft days were scheduled in the routing charts compared with 82% in 1959.

program to this kind of irregular operation.1/ We estimate that the operations for which we have determined profit or loss account for 90 percent or better of all jet operations conducted by TWA. The inclusion of these irregular operations would not, in our opinion, significantly affect our results.

Ground and indirect expenses were determined in accordance with the procedures set forth in DX 271B, Part G. Data set forth in or compiled from TWA routing charts and on-board reports furnished us with the basis for estimating our various indirect costing units as outlined on page G-42 of DX 271B.

a. The B-131s

In 1959, the B-131s all operated at high load factors and showed substantial operating profits, except for the aircraft which operated in November at a load factor of 51%.

In January 1960, the least profitable B-131s began operating at a loss. One or two B-131s incurred losses each month thereafter through May. During the peak summer season the B-131s were operated profitably in June and September, but the respite was brief. In every month from October 1960 through December 1963, one to eight B-131s sustained operating losses.2/

1/ We did, as stated above, p. II-10, include irregular operations performed with aircraft of the type scheduled by TWA.

2/ After December 1960, TWA owned all its B-131s, so that aircraft of this type which returned a small operating profit were no longer returning a net profit after cost of capital.

Thus, during 47 months out of 57 in the April 1959-1963 period, never less than one, and often as many as six, seven or eight B-131s failed to return an operating profit. Chart II-E-1 on page II-39 compares the monthly operating profits earned by the four most profitable B-131s in each month from July 1959 through December 1963 with the operating profit or loss experienced by the four least profitable B-131s in each month.

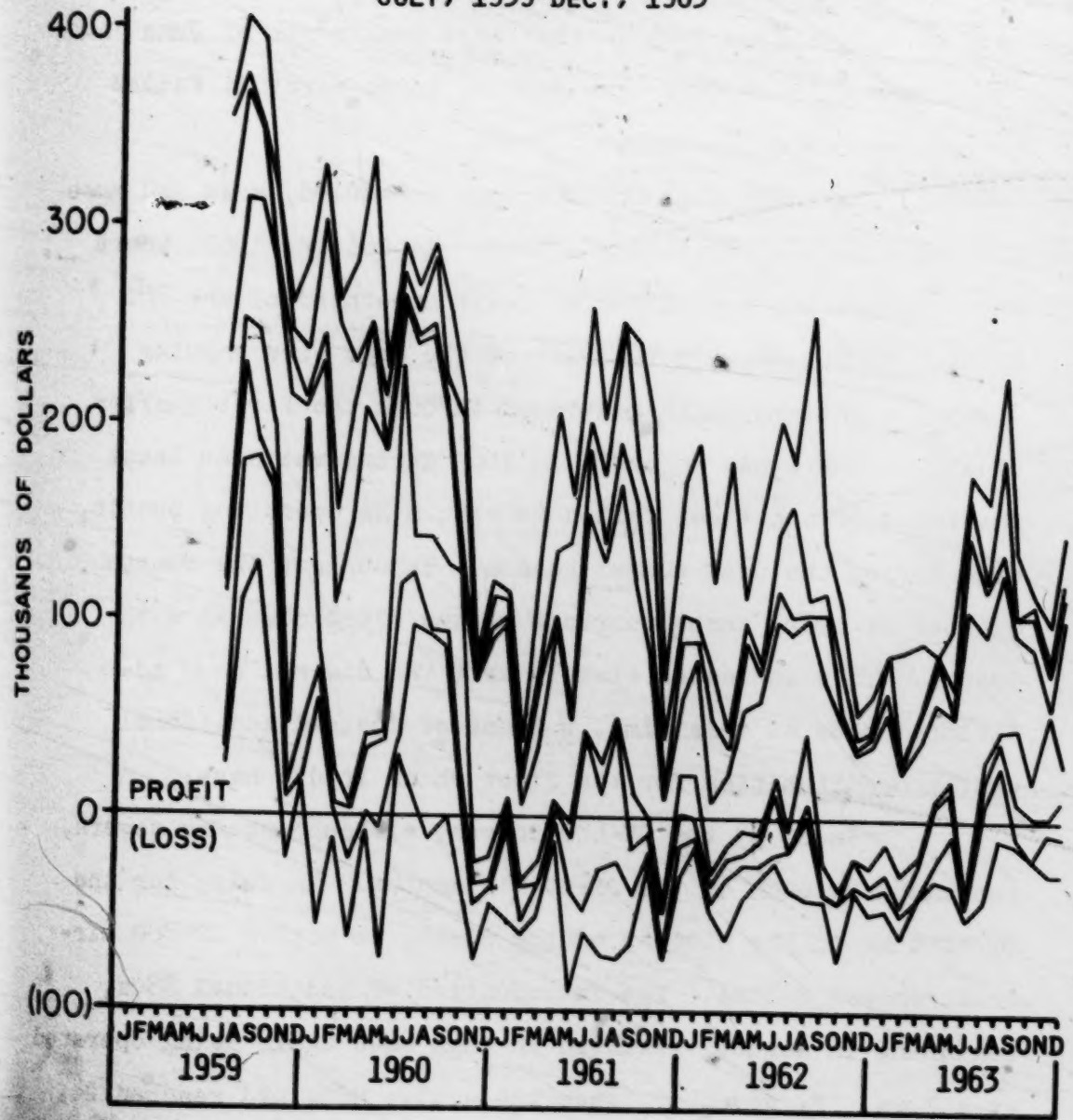
AX-2509

CHART IIE-1

MONTHLY OPERATING PROFIT OR LOSS FOR INDIVIDUAL B-131 AIRCRAFT

SHOWING THE FOUR MOST PROFITABLE AND FOUR LEAST PROFITABLE IN EACH MONTH

JULY, 1959-DEC., 1963



SOURCE: APPENDIX A

b. The CV-880s

Beginning in February 1961, the first full month of operation, at least one CV-880 experienced an operating loss every month through December 1963, with the one exception of July 1963. Even in the first peak month of June 1961, when only 14 880s were active, three aircraft failed to earn an operating profit.

As additional CV-880s were scheduled, more and more of them sustained operating losses. In October 1961, there were substantial losses for at least one-third of the 880 fleet. In November, a majority of the 880s were showing losses, a pattern which continued through the first quarter of 1962. There was no month in 1962 during which at least one-third of the fleet failed to return an operating profit, even during the peak summer season. Throughout the fourth quarter of 1962, three quarters of the fleet came in with losses. This indicates clearly that TWA did not need additional 880s at this time, but needed instead additional profit opportunities for the fleet which it did have.

In 1963, the CV-880 losses, although not as severe, continued in each of the first six months. In July, for the first time in the history of the fleet, no active CV-880 aircraft showed a loss. The introduction of additional 880s, beginning in August, resulted in some 880s again being operated at a loss. By November, when the active 880s had reached 24, seven were showing losses.

"DX359A, page II-41
(Supplemental S.H.E. Report - Volume A)"

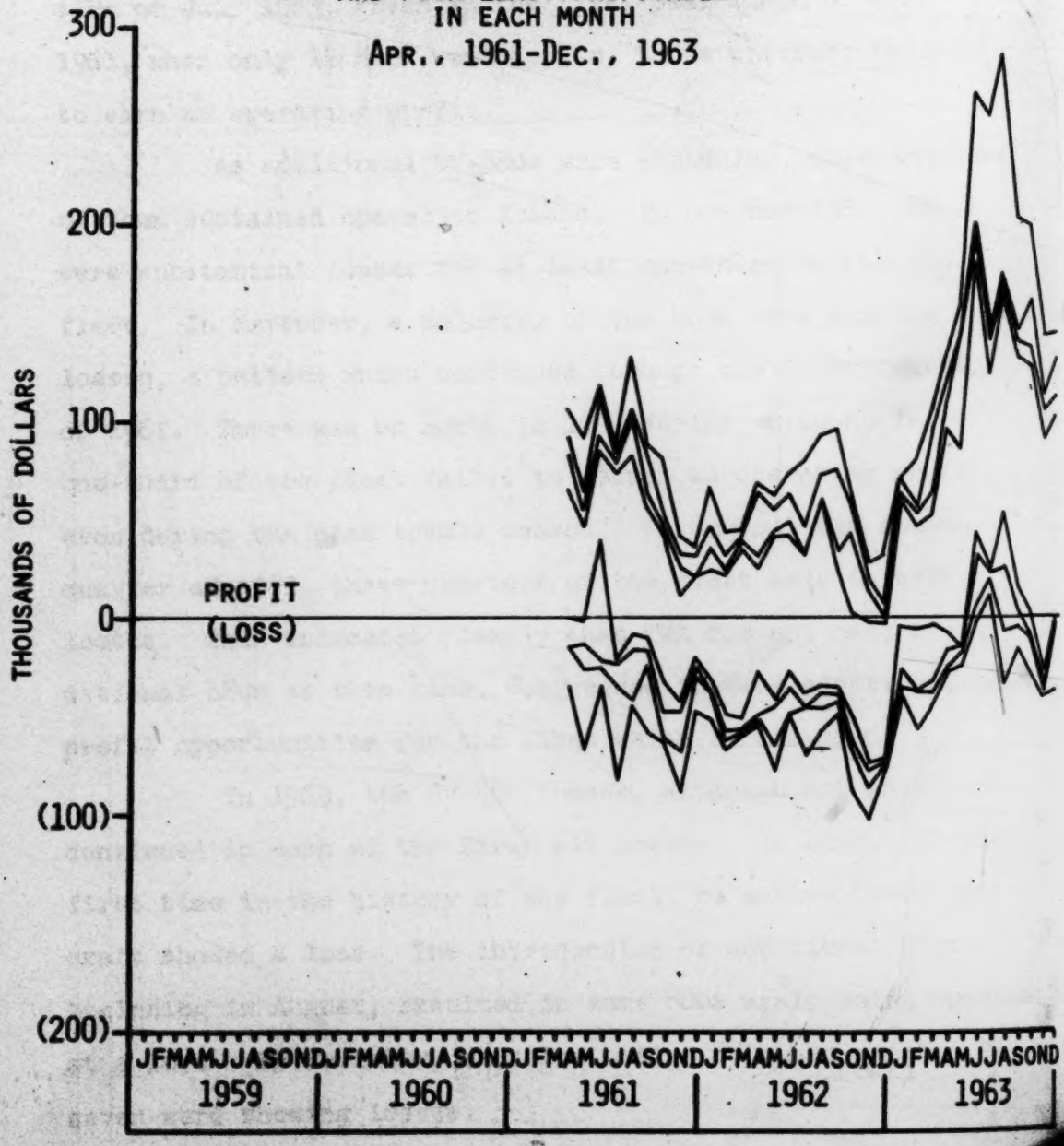
Chart II-E-2 on page II-42 compares the operating profits and losses of the top four and bottom four CV-880s in each month from April 1961 through December 1963.

CHART IIE-2

MONTHLY OPERATING PROFIT OR LOSS FOR INDIVIDUAL CV-880 AIRCRAFT

SHOWING THE FOUR MOST PROFITABLE AND FOUR LEAST PROFITABLE IN EACH MONTH

APR., 1961-DEC., 1963



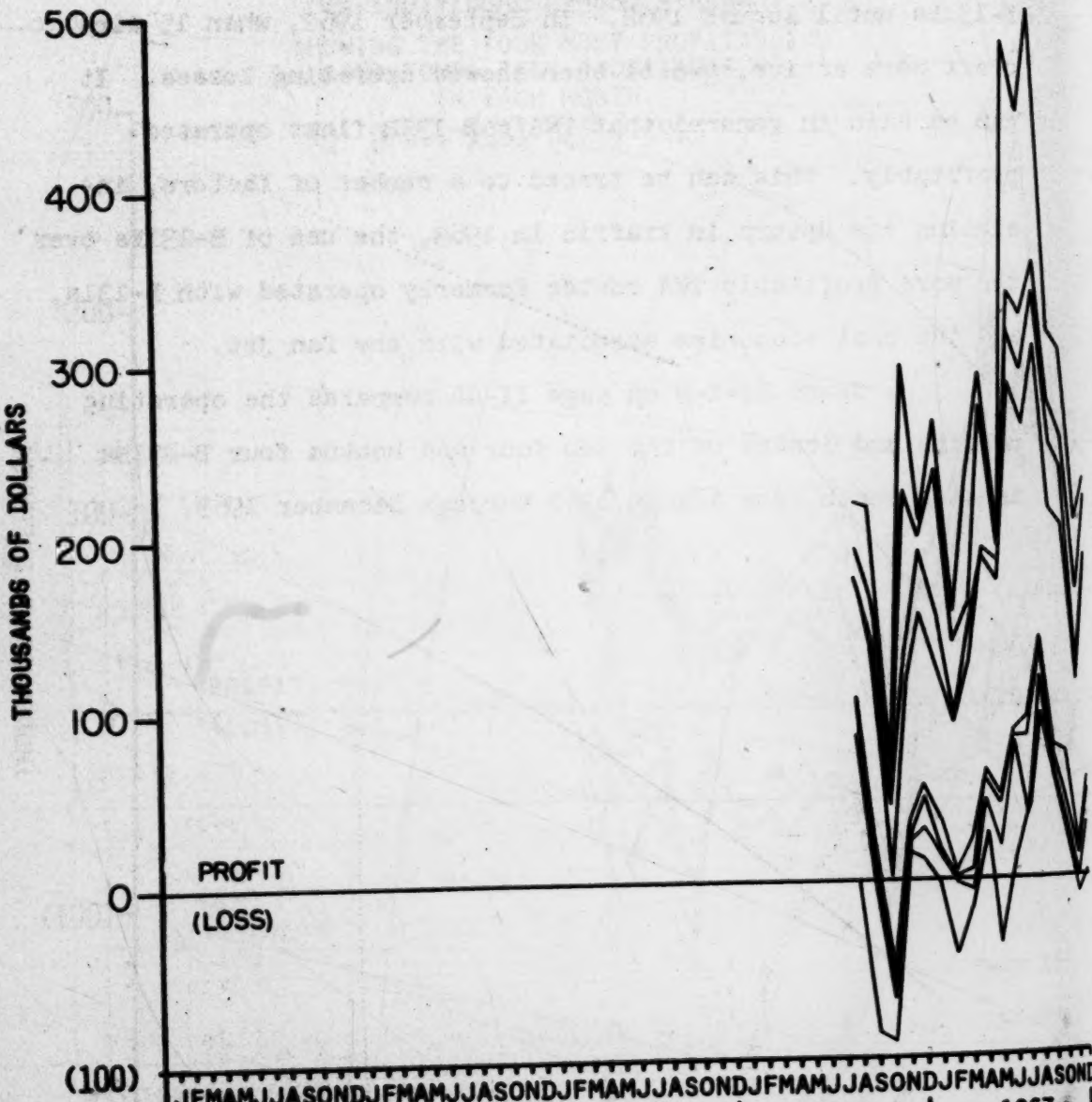
SOURCE: APPENDIX A

c. The B-131Bs

This fleet first appears in the routing charts in April 1962, but TWA did not have a substantial number of active B-131Bs until August 1962. In September 1962, when 15 aircraft were active, two of them showed operating losses. It can be said in general that TWA's B-131B fleet operated profitably. This can be traced to a number of factors, including the upturn in traffic in 1963, the use of B-131Bs over the more profitable TWA routes formerly operated with B-131s, and the cost economies associated with the fan jet.

Chart II-E-3 on page II-44 compares the operating profits and losses of the top four and bottom four B-131Bs in each month from August 1962 through December 1963.

MONTHLY [illegible]
FOR INDIVIDUAL B-131B AIRCRAFT
SHOWING THE FOUR MOST PROFITABLE
AND FOUR LEAST PROFITABLE
IN EACH MONTH
AUG., 1962-DEC., 1963



SOURCE: APPENDIX A

d. The Minor Domestic Jet Fleets: B-331s, 720Bs, B-331Bs

Only a few aircraft in these fleets were operated domestically by TWA during the 1959-1963 period.[1/] TWA furnished no B-331 routing charts for the period May 1962 through December 1963, and, consequently, we did not compute individual B-331 profit or loss after April 1962. TWA furnished routing charts for its four 720Bs only for the first few months of operation. Since the 720B schedules remained fairly static, we were able in this case to determine profits and losses for individual aircraft throughout most of the period of 720B operation. Since no B-331B routing charts were furnished for domestic operations, we did not compute profit or loss for individual B-331Bs.

The few B-331s used domestically were scheduled on long haul high load factor flights in the highly seasonal California market and were profitable in 1960 and 1961 during peak months. In off-peak months, some of the domestic B-331s realized operating losses. In 1962, the off-season losses continued. Chart II-E-4 on page II-47 presents the individual operating profits and losses of all B-331s flown domestically in each month from March 1960 through April 1962.

TWA never operated all of its 720Bs at a profit. In eight of the 13 months for which we were able to determine the profitability of individual aircraft, at least three, and sometimes all four, of the 720Bs showed substantial operating

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1/ See TWA 4C-4, Ex. B.

losses.[1/] The profit picture improved in the peak summer season of 1962, but the fleet as a whole operated in the red during the lease period.

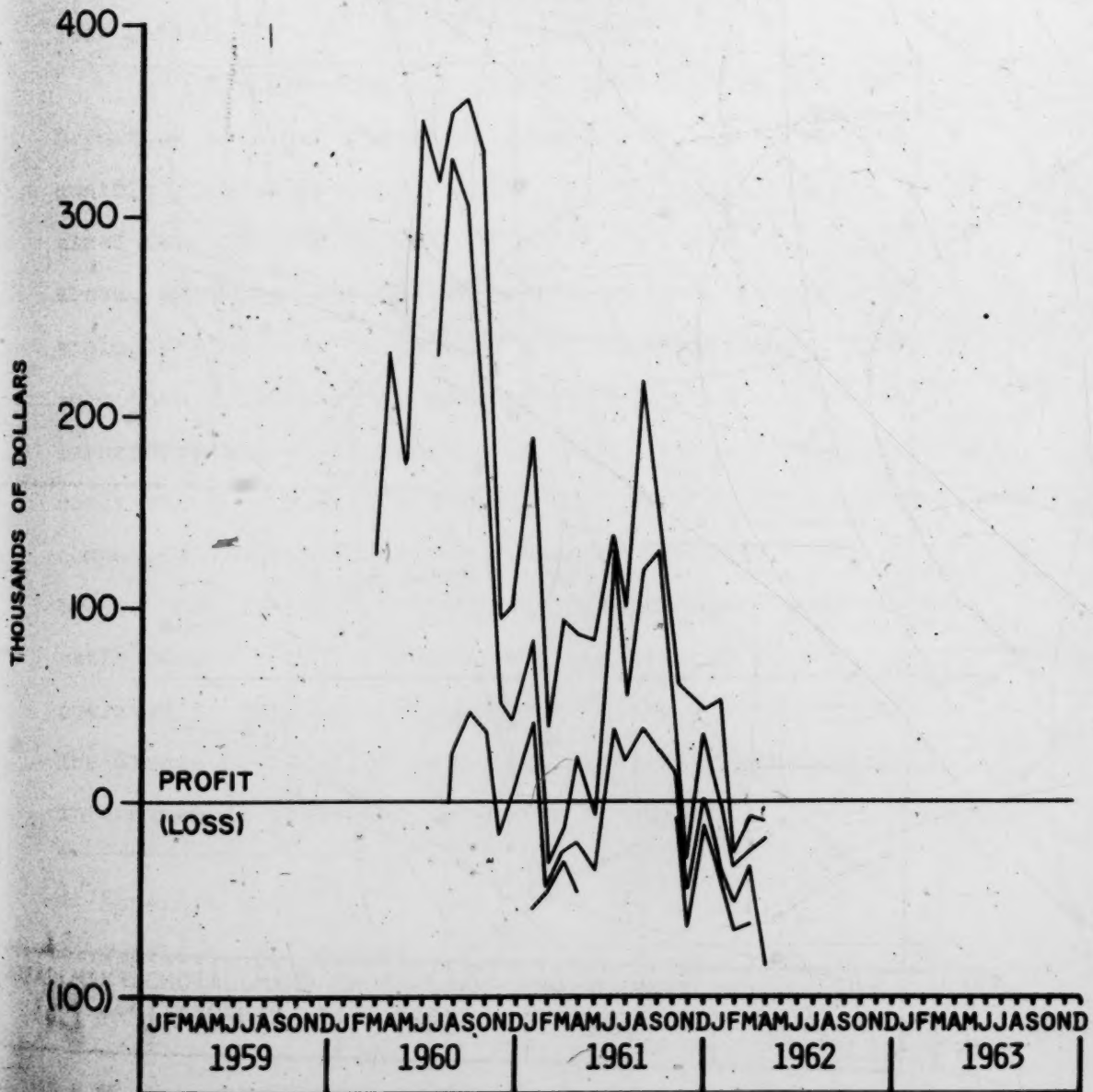
This conclusion is confirmed by an estimate of the profitability of the 720B fleet based on aircraft miles operated and revenue passenger miles achieved by the fleet as reported to the CAB. We found that the fleet lost $895,449 in 1961 and earned $9,307 in 1962 for a net operating loss of $886,142 over the period of the lease.[2/]

Chart II-E-5 on page II-48 presents the individual operating profits and losses of all 720Bs in each month from September 1961 through September 1962.

1/ Since the 720Bs were leased aircraft, rentals are included in direct operating costs.

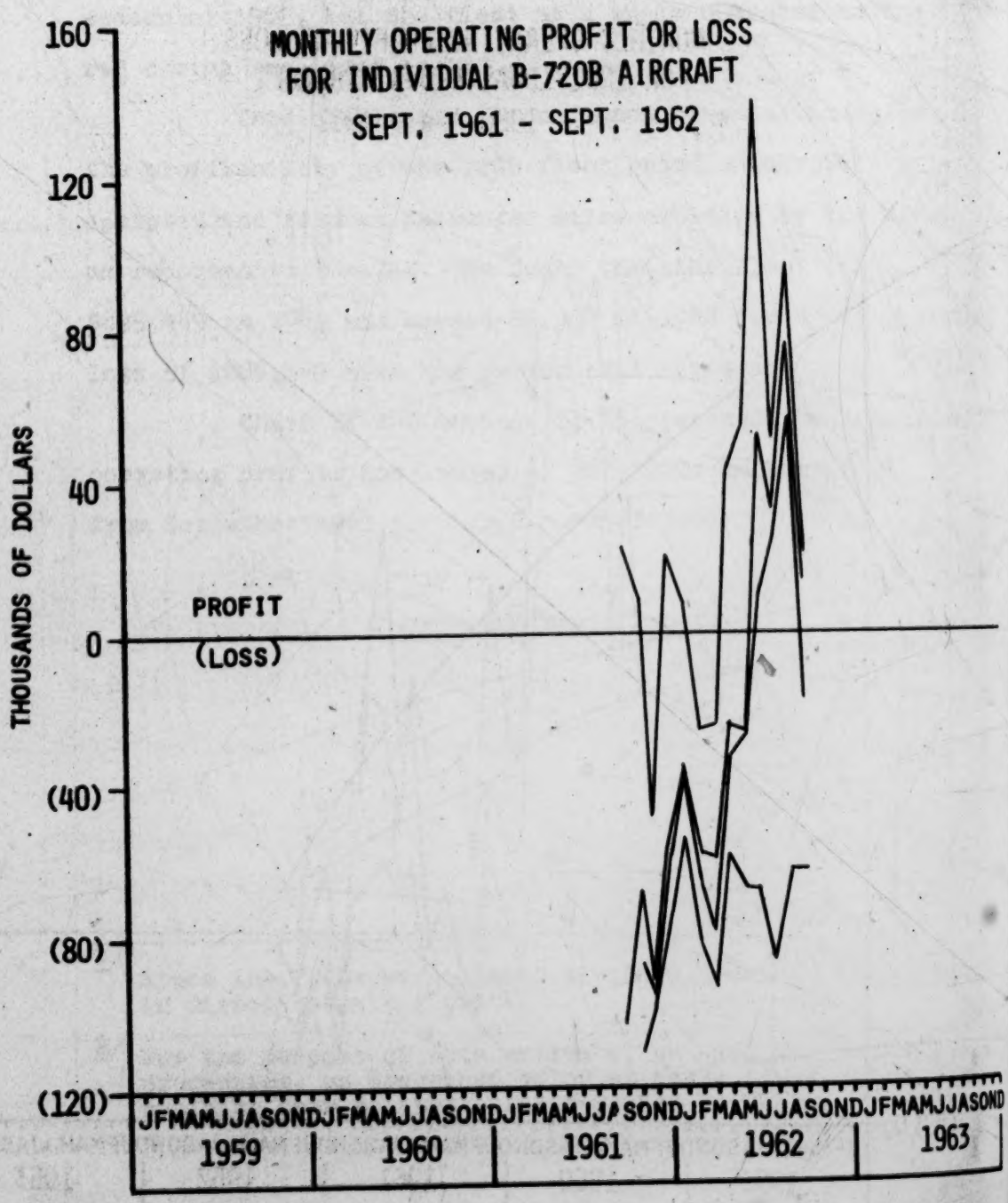
2/ For the purpose of this estimate, we used Mr. Wemple's procedures, as described below at pages II-49, 50, applying them to statistics reported by TWA in Form 41s.

MONTHLY OPERATING PROFIT OR LOSS FOR INDIVIDUAL B-331 AIRCRAFT MAR., 1960-APR., 1962



SOURCE: APPENDIX A

CHART IIE-5



SOURCE: APPENDIX A

2. Profit or Loss Under Mr. Wemple's Procedures

The conclusion that TWA operated many of its jets at a loss during the 1959-1963 period does not depend upon using the S.H.E. revenue and costing procedures. The use of Mr. Wemple's procedures results in a similar profit and loss pattern.[1/]

Applying the procedures set forth in the C&C Report we obtained passenger revenues by multiplying the monthly revenue passenger miles for each jet aircraft, determined from the TWA on-board reports in the manner described above, pp. II-34, 35, by TWA's average passenger mile yield for the year in question.[2/] These passenger revenues were then multiplied by 105 percent to obtain the monthly transportation revenues per aircraft. Those direct operating costs which vary with the amount of operations performed were computed by multiplying the number of aircraft miles flown by each jet during a month by a cost-per-mile based on the ratio of the total of such costs experienced to total miles operated by jets of the same type in the year in question.[3/] The direct costs which vary with fleet size were determined in the manner described above, p. II-36.

1/ Appendix B.

2/ TWA 4C-1, pp. 30, 45.

3/ See TWA 4C-4, Exs. F-J.

In computing ground and indirect expenses, we first ascertained what portions of these expenses Mr. Wemple considered variable.[1] We then multiplied the corresponding portions of the pertinent monthly statistics for each jet aircraft by the appropriate ratios, as determined from the cost experience in the year in question.[2]

The table in Appendix B (Mr. Wemple's method) for the B-131s in July 1963, when compared with the corresponding table in Appendix A (the S.H.E. method), illustrates the similarities and differences between the two methods. The transportation revenues are slightly higher in Appendix B. The aircraft operating expenses are higher in Appendix B on longer haul flights and lower on shorter haul trips because Mr. Wemple used a flat rate per aircraft mile whereas the S.H.E. method reflects the higher costs of shorter hauls with slower block speeds. The ground and indirect expenses in Appendix B are less for aircraft with high load factors and greater for aircraft with low load factors, reflecting less sensitivity to the effect of traffic on such costs.

Under both methods the most profitable B-131 in July 1963 shows a profit that is very close: $167,000 in Appendix B compared with $164,000 in Appendix A. The least profitable B-331, however, shows a profit of $21,000 in Appendix B compared with a loss of $42,000 in Appendix A. The loss estimate is

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1/ See DX 271B, Part G; TWA 4C-4, Exs. F-J; DX 244.

2/ See DX 271B, p. G-42; TWA 4C-4, Exs. F-J.

occasioned primarily by the higher costs incurred in short haul operations and attributed to them under the S.H.E. method in contrast to Mr. Wemple's method.

While Mr. Wemple's method, in our opinion, tends to minimize the disparity in operating results attained by different aircraft within the fleet, it does not necessarily result in a showing of fewer loss aircraft. In the case of the B-131s for example, Appendix B, compared with Appendix A, shows fewer 131s returning operating losses in 23 months, the same number in 30 months and a greater number in 4 months. The number of months in which one or more B-131s lost money is 39 in Appendix B compared with 47 in Appendix A.

The results of using Mr. Wemple's procedures to determine the profitability of individual jet aircraft lead to the same conclusions as those obtained by the S.H.E. procedures.

a. The B-131s

Again, the first and only B-131 to show an operating loss in 1959 appears in November. Again, beginning in January 1960, one or more B-131s each month failed to earn an operating profit until the peak month of June. Profitable operations for all B-131s continued through September.

Thereafter, the pattern of loss operations persisted without a break, except for the months of November 1962 and April 1963, until the traffic upswing in mid-1963. In a number of months, the losses extended to as many as five, six or seven aircraft. In February 1961 nine B-131s registered losses under Mr. Wemple's methods.

b. The CV-880s

The CV-880s strikingly demonstrate the similarity of the profit and loss pattern obtained by the two methods. Again, it appears that beginning in February 1961, the first full month of operation, TWA was unable to operate all of its CV-880s at a profit in any month until July 1963. With the addition of six more 880s beginning in August 1963, unprofitable operations were resumed, and by November 1963 as many as seven CV-880s were again losing money.

Under both methods there appears a trough from November 1961 which continues throughout 1962. In this 14-month period there was no month without at least seven loss 880s, and there were six months with as many as eleven or twelve.

Under Appendix B, compared with Appendix A, fewer CV-880s returned operating losses in 14 months, the same number in 13 months and a greater number in 9 months. Both methods show only one month, July 1963, in which no CV-880 operated at a loss.

c. The B-131Bs

Appendix B is not as favorable to B-131B operations as Appendix A. Notably in 1963, many more 131Bs appear in Appendix B as experiencing losses, and there are only four months, as compared with seven months in Appendix A, in which no loss operations were sustained. The reason is that the flat rates per aircraft mile used in Mr. Wemple's costing do not reflect the cost savings produced by the long hauls on which the B-131s were routed. Especially noticeable are the relatively sharp differences in the ground and indirect expenses.

The pattern that emerges is basically the same, however, even though somewhat obscured by inexact costing. The B-131Bs, which appeared late on the scene and displaced the B-131s from the more profitable routes because of their greater speed and economy, turned in the best profit performance of any of TWA's jet fleets in the 1959-1963 period. There were still some months, however, in which some of the aircraft in this fleet failed to find profitable employment.

d. The Minor Domestic Jet Fleets: B-331s, B-720Bs, B-331Bs

The pattern for B-331s is almost identical under both methods, with profitable operations in peak months and some loss aircraft in the off seasons. Again, Mr. Wemple's methods disfavor

the relatively long-haul B-331s. Again, the B-720B fleet experiences no month in which all four aircraft return a profit.

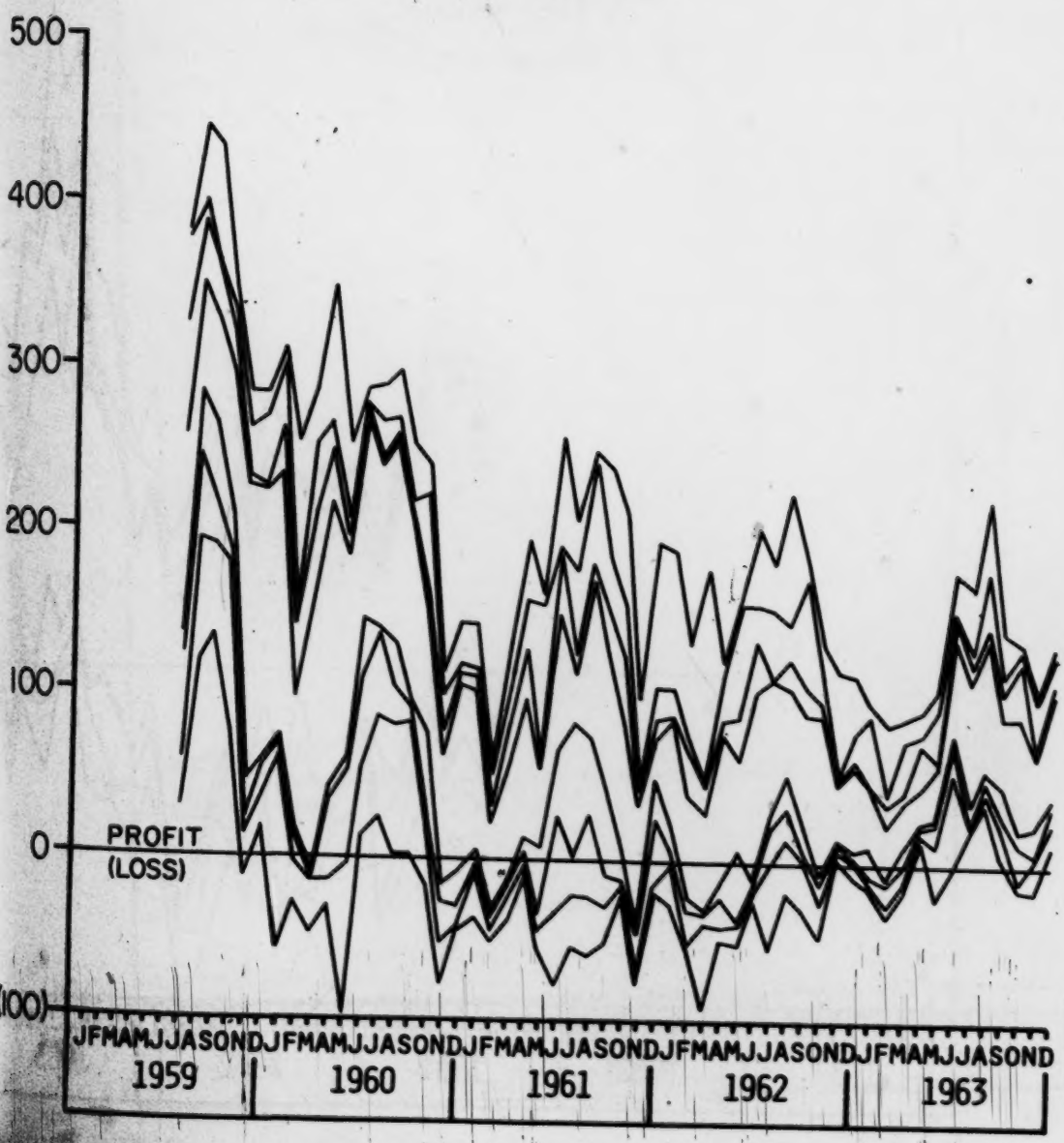
Chart II-F-1 on page II-55 compares the monthly operating profits, as computed in Appendix B, earned by the four most profitable B-131s in each month from July 1959 through December 1963 with the operating profit or loss experienced by the four least profitable B-131s in each month. Charts II-F-2 and II-F-3 on pages II-56, 57 present similar comparisons for the CV-880s and B-131Bs. Charts II-F-4 and II-F-5 on pages II-58, 59 present the individual operating profits and losses of all the B-331s (March 1960-April 1962) and all the B-720Bs (September 1961 - September 1962), as computed in Appendix B.

CHART IIF-1

MONTHLY OPERATING PROFIT OR LOSS FOR INDIVIDUAL B-131 AIRCRAFT

SHOWING THE FOUR MOST PROFITABLE AND FOUR LEAST PROFITABLE IN EACH MONTH

JULY, 1959-DEC., 1963



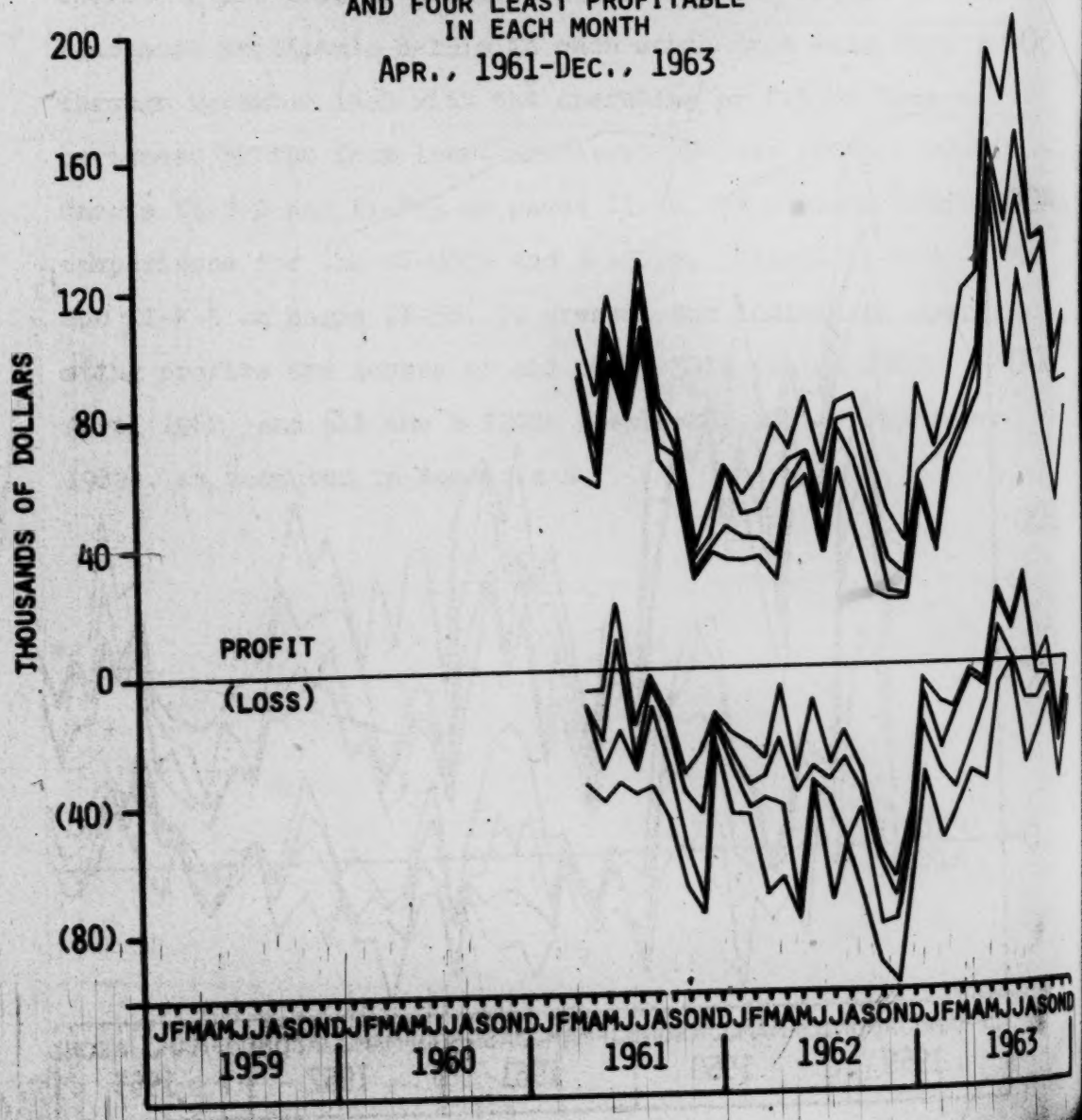
SOURCE: APPENDIX B

CHART IIF-2

MONTHLY OPERATING PROFIT OR LOSS FOR INDIVIDUAL CV-880 AIRCRAFT

SHOWING THE FOUR MOST PROFITABLE AND FOUR LEAST PROFITABLE IN EACH MONTH

APR., 1961-DEC., 1963



SOURCE: APPENDIX B

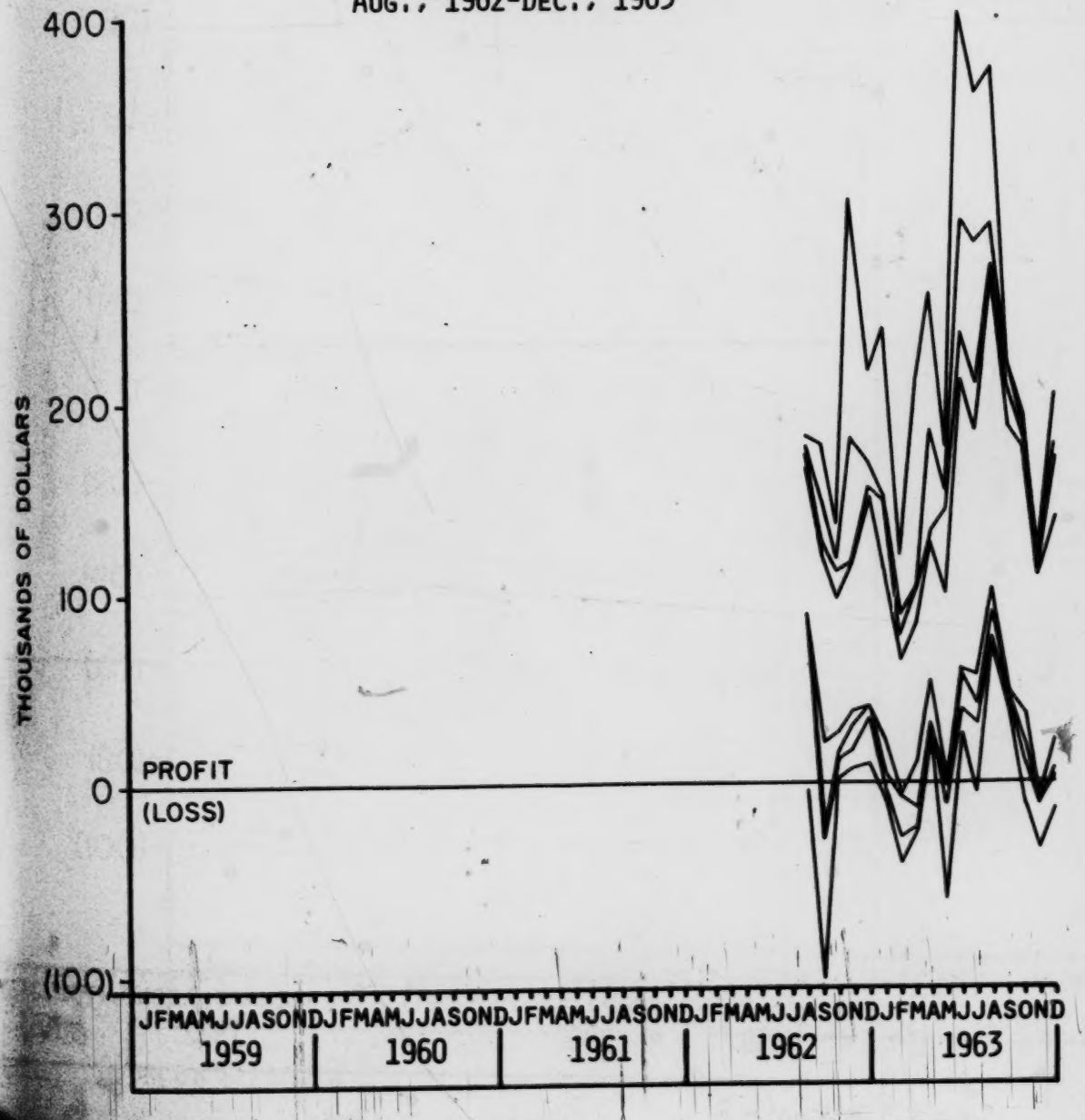
"DX359A, page II-57
(Supplemental S.H.E. Report - Volume A)"

CHART IIF-3

MONTHLY OPERATING PROFIT OR LOSS FOR INDIVIDUAL B-131B AIRCRAFT

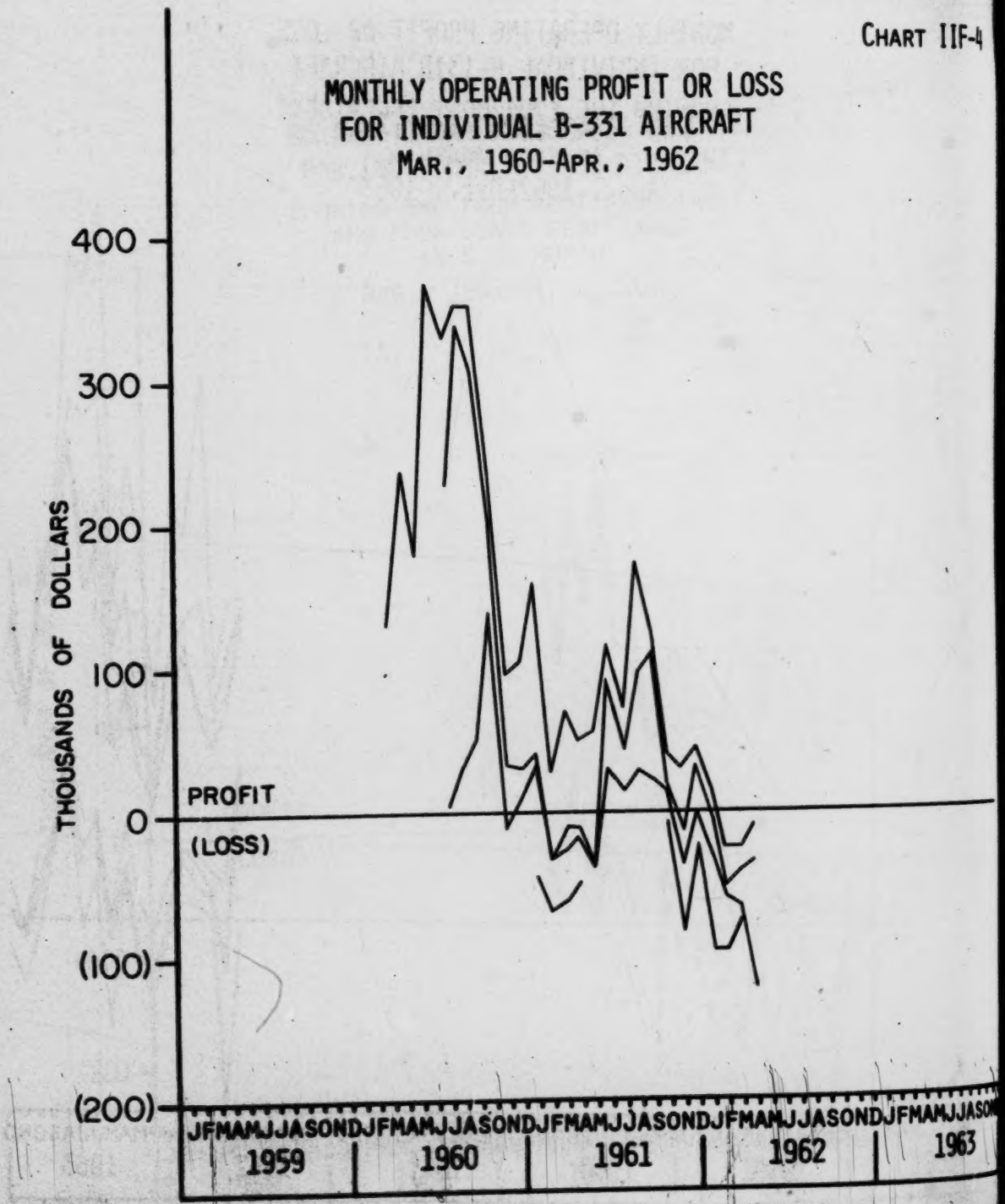
SHOWING THE FOUR MOST PROFITABLE AND FOUR LEAST PROFITABLE IN EACH MONTH

AUG., 1962-DEC., 1963



SOURCE: APPENDIX B

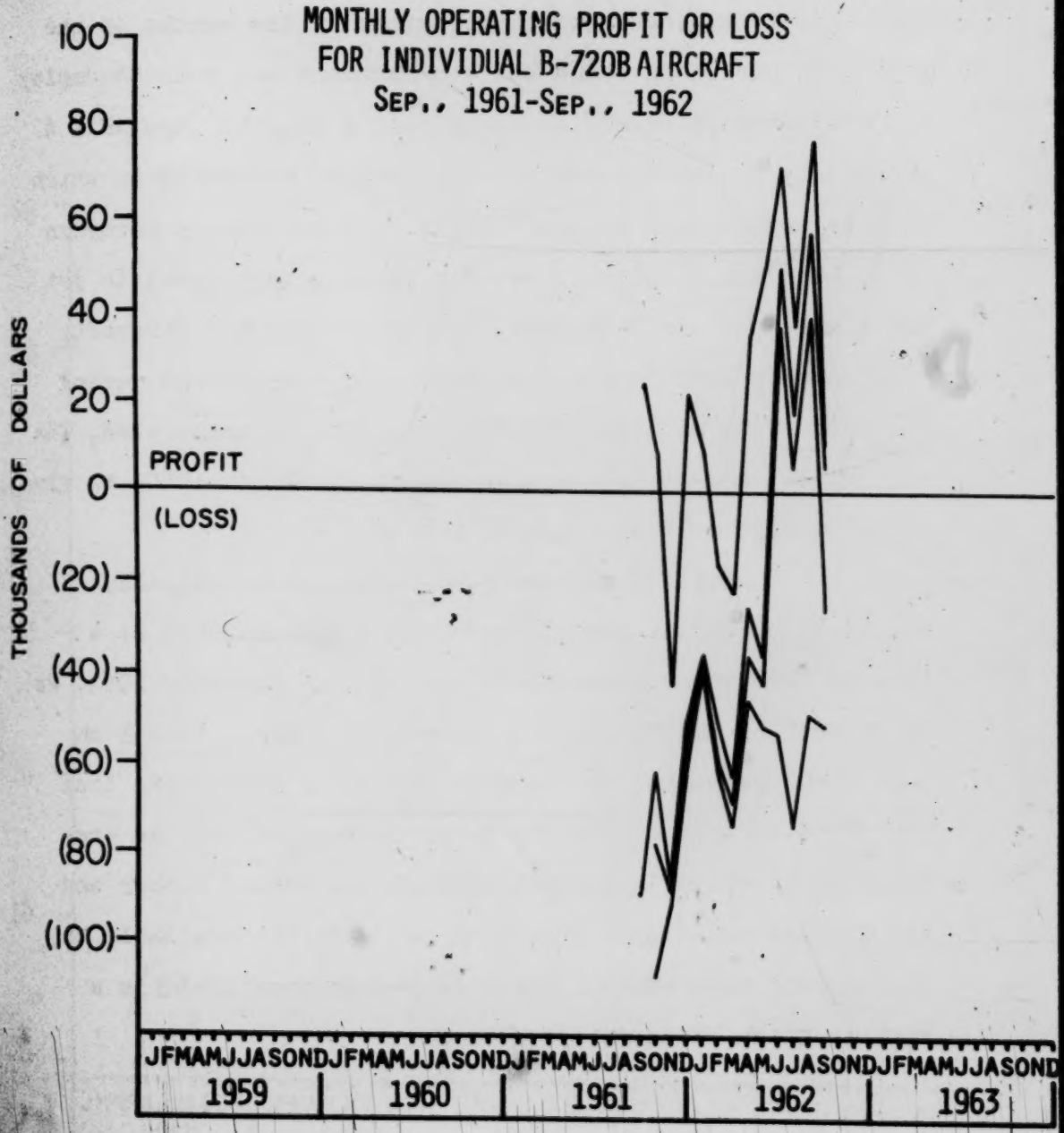
CHART IIF-4



SOURCE: APPENDIX B

"DX359A, page II-59
(Supplemental S.H.E. Report - Volume A)"

CHART IIF-5



SOURCE: APPENDIX B

3. General Conclusions as to the Historical Profitability of TWA's Jet Aircraft

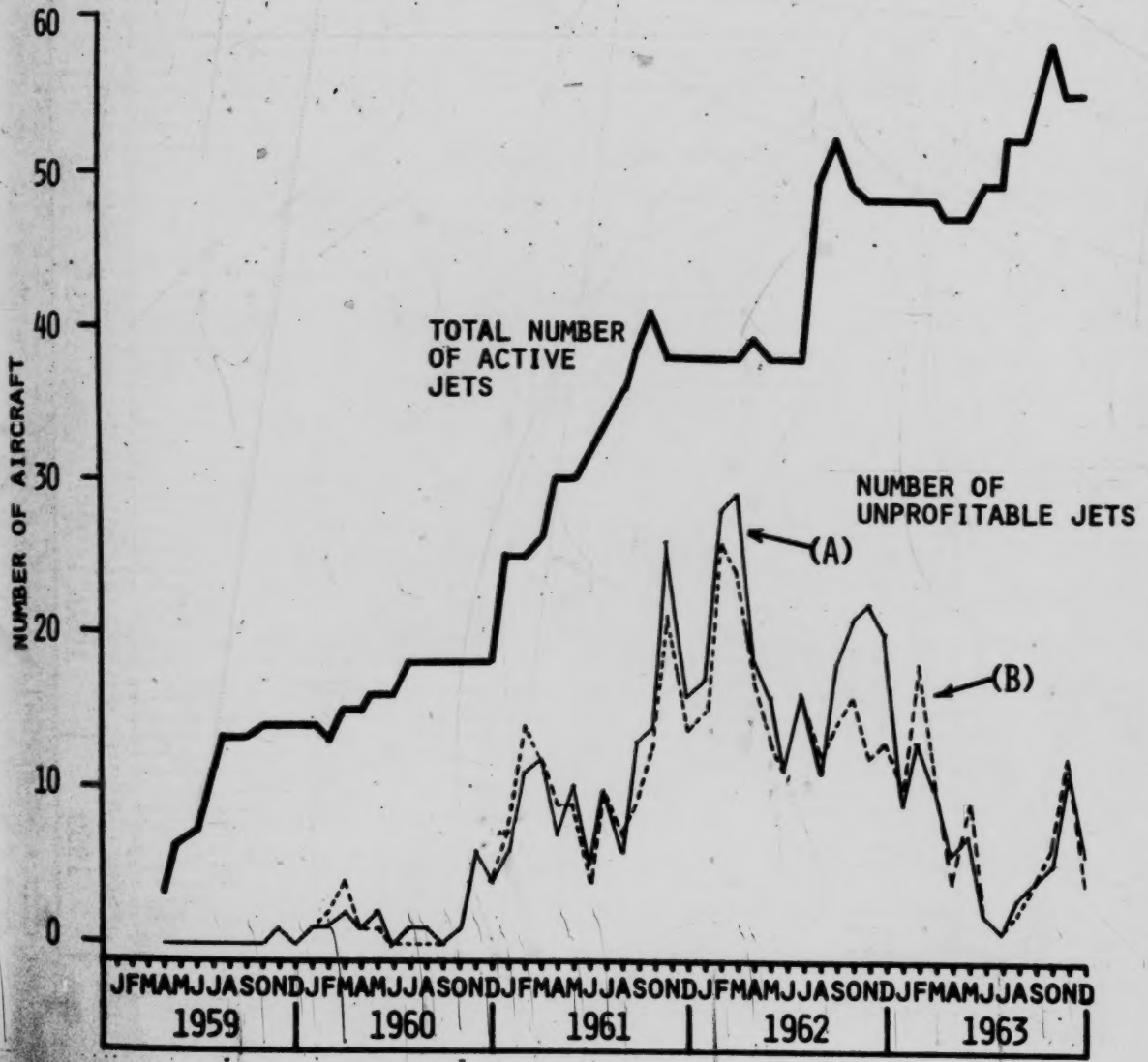
Whichever method of estimating profit and loss is followed, it appears that there were very few months of the 1959-1963 period in which TWA's management was able to employ all of its jet aircraft at an operating profit. Appendix A shows only ten months and Appendix B only 12 months in which no jets experienced a loss. Eight of these months occur in 1959, when the difference between TWA's actual domestic jet fleet and that assumed by Mr. Wemple is only 1.4 aircraft. From January 1960 through December 1963, the period during which the bulk of additional jet capacity is postulated, TWA was unable, except in the peak summer season of 1960, to fly all of the jets it did have at a profit.

Chart II-G on page II-61 presents graphically the total number of jet aircraft which TWA operated at a loss in each month from April 1959 through December 1963, as shown both by Appendix A and Appendix B. Chart II-H-1 on page II-62 presents the range of operating profit and loss per jet aircraft in each month of the same period, as computed in Appendix A, graphed against the actual number and the assumed additional number of jet aircraft available to TWA in each such month. Chart II-H-2 on page II-63 is a similar graph based on Appendix B.

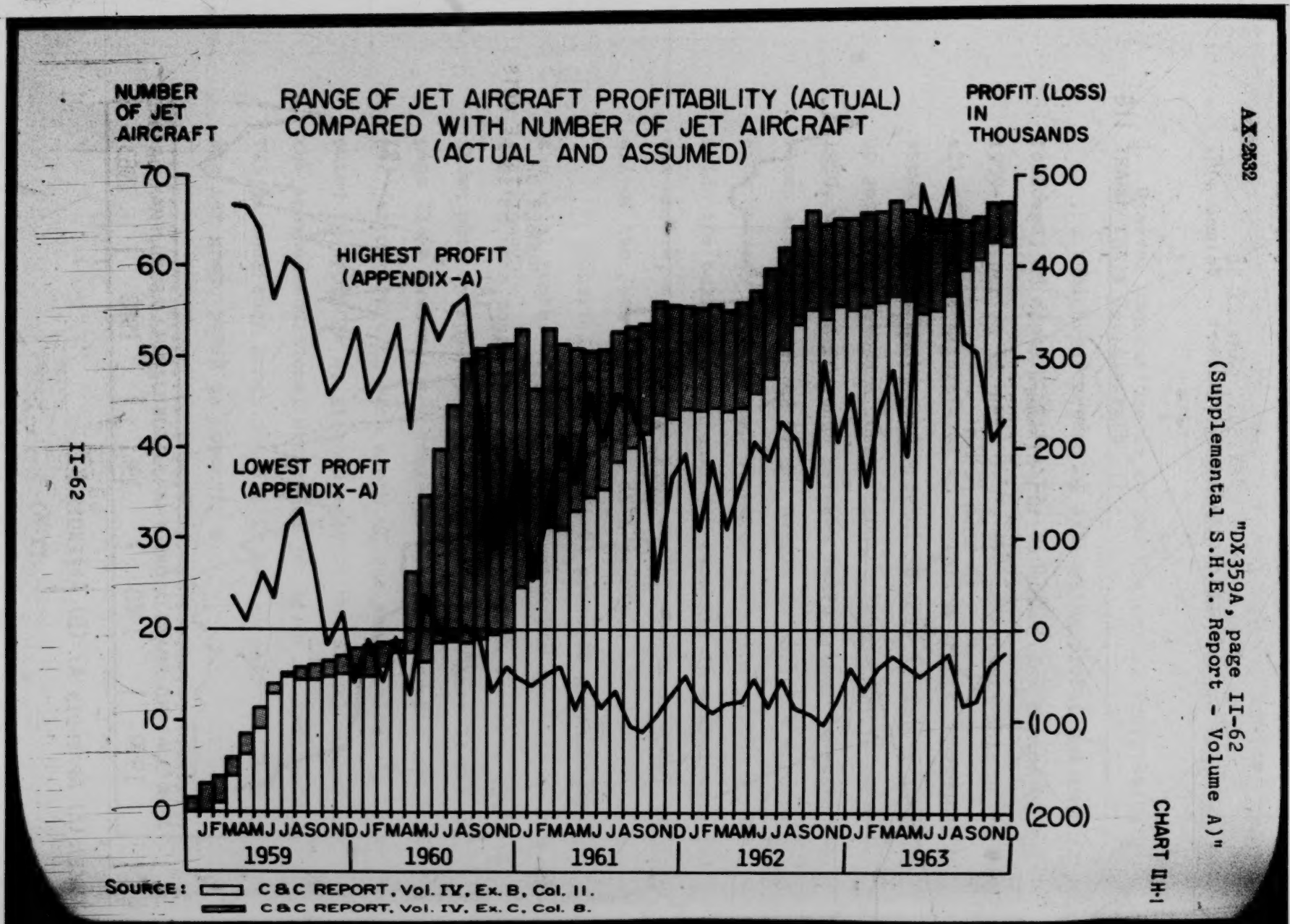
AX-2531

CHART IIG

NUMBER OF JET AIRCRAFT OPERATED AT A LOSS IN EACH MONTH



SOURCE: (A) APPENDIX A; (B) APPENDIX B

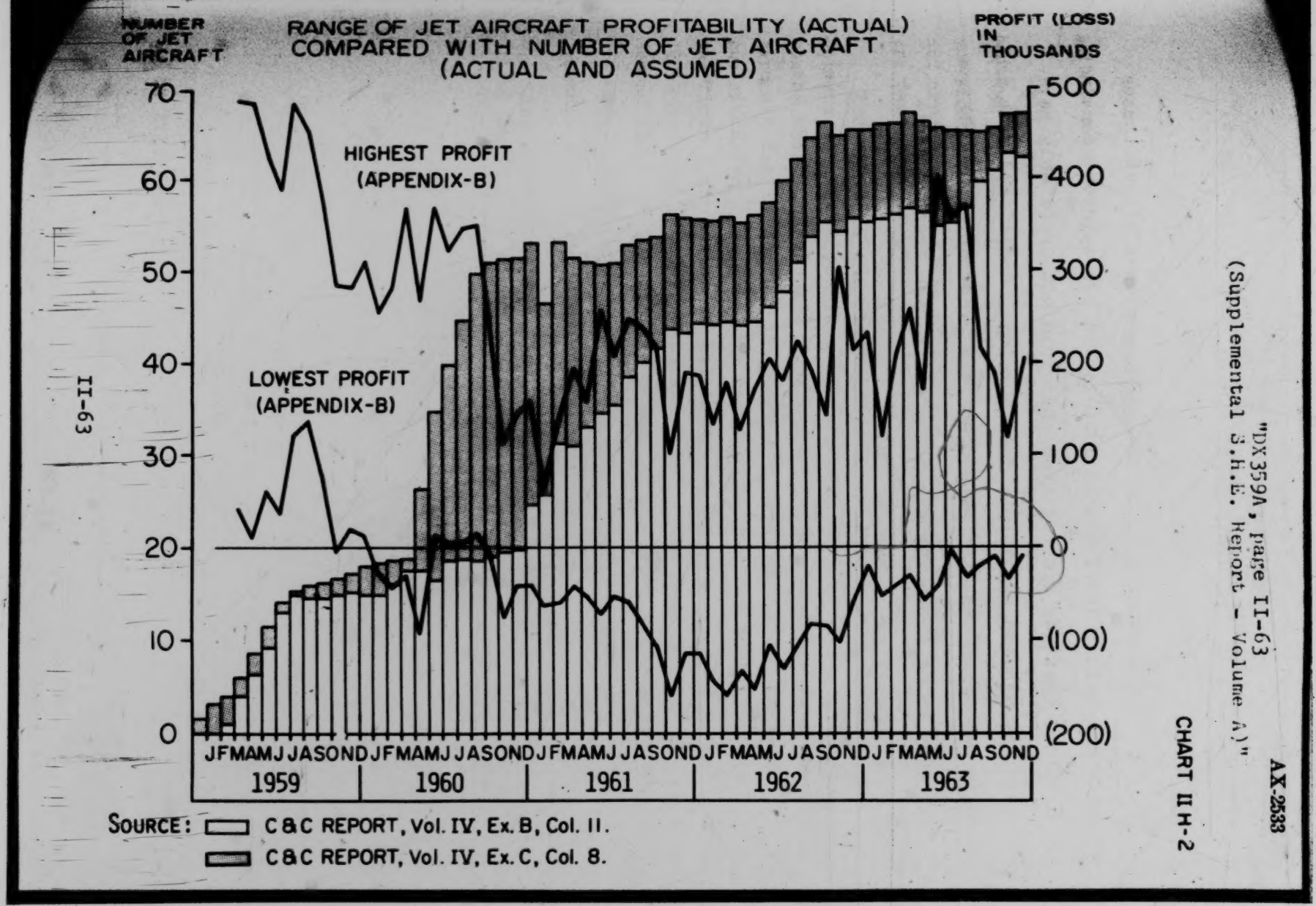


II-62

AX-2532

"DX 359A, page II-62
(Supplemental S.H.E. Report - Volume A)"

CHART II H-1



II-63

"DX 359A, page II-63
(Supplemental S.H.E. Report - Volume A)"

CHART II H-2

AX-2533

The comparison of the growing extent of jet losses with the actual jet fleet buildup is, in our opinion, convincing evidence that TWA did not need and could not profitably have used the assumed additional jet capacity. Additional jets could only have been added on schedules less profitable than those already being flown and would therefore have created additional operating losses for TWA.

"DX359A, Appendix A
(Supplemental S.H.E. Report - Volume A)"

APPENDIX A

This table is a profit and loss tabulation by month for TWA jet aircraft shown upon TWA routing charts for the years 1959-1963. The methods used to determine revenues and expenses are those of the previous S.H.&E. report[1/] and are described in Part II, pp. II-33-37, of the present report.

The manual changes recorded in the profit and loss columns were reallocations of revenues and expenses in those months where TWA changed routings of certain flights from one aircraft day to another or had a single trip divided between two aircraft: e.g., where a routing chart shows that Flight 85 was flown from Boston to Baltimore to Kansas City with one 720-B and continued from Kansas City to Los Angeles with a second 720-B. Lack of time prevented new runs being prepared.

The load factor columns and stage length columns in Appendix A were not used.

The aircraft codes used in Appendix A are as follows:

B-70	-	B707-131
B7F	-	B707-131B
B30	-	B707-331
B2F	-	B720B
880	-	CV-880

1/ DX 271, A & B.

AX 2586

"DX 359A, Appendix A, page 1
(Supplemental S.H.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1959 APR

BTG	A/C NUM	RANK	AV. PASS LF	AV. STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	020	1	97.95	2455.81	887486	215563	198569	414132	473354
	010	2	95.15	1860.20	542634	139339	127121	266460	276174
	030	3	90.46	2474.00	106520	44632	24671	69302	37218

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1959 MAY

870 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
010	1	94.31	1988.45	1048513	333137	243087	576224	472289
030	2	99.70	2509.70	954901	307285	212583	519868	435033
020	3	89.38	2474.00	817872	299359	186757	486116	331756
040	4	94.93	2396.78	434755	208879	100106	308985	125770
050	5	83.52	1450.73	81178	30773	20554	51327	29851
060	6	90.56	1743.33	29581	10224	6868	17092	11489

"DX359A, Appendix A, page 2
(Supplemental S.H.E. Report - Volume A)"

AX-2537

AX-2538

"DX359A, Appendix A, page 3
(Supplemental S.H.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1959 JUN

BTG	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	010	1	93.22	1924.65	101045[illegible]	331498	237048	568547	441904
	030	2	99.34	2538.26	912807	297222	203336	500558	412249
	020	3	95.53	1678.85	908210	304912	217252	522164	386055
	050	4	95.27	2469.20	838384	291419	189398	480818	357567
	040	5	95.27	1752.06	841932	296594	200318	496911	345021
	060	6	99.79	2474.00	439901	197739	99330	297070	142832
	070	7	89.97	1550.38	13[illegible]434	47045	34121	81166	57268

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1959 JUL

BTO	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	040	1	93.00	2544.38	875245	312158	198573	510731	364514
	010	2	89.24	1603.68	906135	327821	222935	550755	355380
	050	3	88.39	2133.43	800310	307352	187985	495337	304973
	070	4	92.92	1824.08	658269	265222	157599	422821	235449
	020	5	84.90	1869.36	658994	272217	159496	431713	227281
	080	6	91.57	2070.12	459237	180131	108006	288137	171180
	030	7	90.04	1295.57	493870	222881	127351	350232	143638
	060	8	94.40	2474.00	425429	205827	97610	303437	121992
	100	9	90.10	2530.50	294542	110979	67564	178544	115998
	110	10	83.69	1544.48	162289	66432	40907	107339	54950
	090	11	80.39	2474.00	128554	71782	30451	102233	26321

4

"DX359A, Appendix A, page 4
(Supplemental S.H.E. Report - Volume A)"

AX-2539

AX-2540

S/M/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1959 AUG

B70	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS	]
	070	1	90.71	1515.74	1027012	363929	255247	619175	407836	]
	030	2	94.50	1665.44	918515	320122	222055	542177	376338	]
	040	3	94.59	2483.19	881621	313695	200454	514148	367471	]
	080	8	93.97	1854.28	773406	287290	183388	470678	302728	] 277144
	100	4	91.20	2103.70	780296	295518	182879	478397	301899	] 326682
	090	5	88.23	2474.33	781131	300564	180114	480678	300453	]
	060	6	88.44	2292.57	774557	300202	180483	480684	293875	]
	050	7	85.38	2428.68	775974	303829	180248	484077	291901	]
	120	9	89.40	1492.14	732066	282568	181985	464553	267513	]
	110	10	83.70	1221.94	767604	310708	204117	514825	252784	]
	010	11	93.31	1847.00	633415	250357	150596	400953	232461	]
	020	12	86.04	1730.19	566317	245923	136812	384735	181582	]
	130	13	83.51	1372.13	310049	119386	80178	199564	110485	]

"DX359A, Appendix A, page 5
(Supplemental S.H.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1959 SEP

STG	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	070	1	89.93	1472.15	1002031	353670	251021	604691	397340
	040	2	92.35	2587.00	840444	300109	190301	490410	350033
	030	3	91.45	1695.34	858661	304011	207670	511680	346981
	080	4	89.41	2344.89	814265	299887	188026	487913	326352
	090	5	88.18	2433.15	768846	292094	177429	469524	299322
	060	6	88.64	2291.34	765017	290853	177910	468763	296255
	100	7	86.73	1413.43	778008	303304	197313	500617	277391
	050	8	81.36	2331.64	713899	292268	168550	460818	253081
	120	9	85.03	1529.22	706614	281636	176924	458560	248085
	130	10	76.75	1379.38	764493	316609	201355	517965	246528
	110	11	75.88	1257.18	669888	297287	181801	479087	190800
	010	12	84.69	1847.00	556882	238934	134931	373865	183017
	020	13	76.08	1746.00	481924	234383	121269	355652	126272

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"DX 359A, Appendix A, page 6
(Supplemental S.H.E. Report - Volume A)"

AX-2541

6

AX-2542

"DX 359A, Appendix A, page 7
(Supplemental S.I.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1959 OCT

STG	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	070	1	84.78	1479.53	876103	335465	222427	557893	318210
	030	2	86.06	1715.56	836779	313556	205237	518794	317986
	130	3	88.12	1218.65	804614	308291	209654	517946	286668
	040	4	81.97	2546.40	771621	307921	179269	487190	284431
	120	5	79.34	1673.23	746376	312263	187617	499880	246496
	050	6	75.62	1748.59	718507	316876	182304	499180	219327
	060	7	82.34	2356.82	651065	278330	153592	431922	219143
	090	8	75.45	2324.80	681354	300582	163816	464398	216955
	100	9	78.00	2332.56	66611[illegible]	291336	159416	450752	215358
	110	10	76.85	1544.45	661232	289946	170245	460191	201040
	010	11	86.87	1820.02	591687	249535	143083	392618	199069
	020	12	78.40	1804.90	582968	261464	144571	406035	176930
	080	13	87.58	1844.45	527907	233213	127536	360749	167158
	140	14	86.76	1569.71	191759	72937	48010	120947	70811

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1959 NOV

870 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
130	1	86.66	1224.71	742556	287868	194029	481897	260659
120	2	90.98	1695.45	718764	292946	179349	472295	246469
020	3	70.29	1878.83	719044	306380	180130	486510	232534
140	4	74.64	1767.01	697581	306136	176966	483101	214480
030	5	73.42	1751.36	688926	302015	175646	477661	211265
090	6	67.68	2391.46	579147	281252	142009	423261	155886
110	7	68.05	1573.91	564243	275460	149924	425384	138859
050	8	65.27	1729.19	590064	303816	156336	460152	129915
100	9	70.49	1671.46	428236	231154	111651	342805	85430
010	10	67.24	1821.54	428045	233474	110230	343704	84341
040	11	51.50	2587.00	460045	291831	121013	412844	47201
080	12	61.99	2501.73	272266	186849	67632	254481	17784
060	13	65.16	2317.44	283789	200909	72457	273366	10423
070	14	50.52	1640.00	289566	227201	84906	312107	-22541

"DX359A, Appendix A, page 9
(Supplemental S.H.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1959 DEC

B78 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
020	1	76.17	1828.51	800477	322607	198035	520642	279834
130	2	82.62	1215.87	739975	304544	196628	501172	238803
030	3	73.72	1684.26	703013	310357	180083	490440	212574
140	4	73.40	1721.83	699506	311689	178699	490388	209119
050	5	72.82	1696.57	698387	318812	179765	498577	199810
090	6	73.98	2311.35	632882	287207	152698	439905	192977
110	7	73.80	1642.44	606173	282000	158141	440140	166032
120	8	81.79	1720.52	526924	244799	131091	375890	151034
010	9	70.90	1826.70	460683	239163	116806	355969	104714
100	10	72.78	1642.92	421117	231580	109732	341312	79805
040	11	52.72	2492.42	477590	296551	125216	421767	55824
060	12	76.19	2213.55	326989	200865	79976	280840	46149
070	13	62.75	1581.88	339168	224759	93713	318472	20696
080	14	61.97	2336.88	289613	198067	73253	271320	18293

"DX359A, Appendix A, page 10
(Supplemental S.H.E. Report - Volume A)"

AX-2545

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1960 JAN

STG	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	020	1	82.72	1968.51	879891	311695	235200	546895	332996
	120	2	87.77	1766.09	832210	303661	226309	529970	302240
	130	3	84.73	1269.02	780237	305488	230557	536045	244192
	140	4	77.00	1744.14	762462	314960	215188	530148	232314
	090	5	76.95	2474.00	710759	291619	187376	478995	231764
	110	6	73.78	1589.84	640744	283917	186236	470153	170591
	050	7	68.79	1717.49	627472	304227	184165	488392	139080
	030	8	79.18	1508.46	529052	248446	153725	402171	126880
	010	9	77.03	1841.04	492224	233043	136894	369937	122287
	100	10	76.53	2054.83	394623	203235	107381	310616	84006
	080	11	72.53	1867.42	428900	224172	121248	345420	83480
	040	12	55.52	2587.00	535496	305694	154176	459870	75626
	070	13	69.29	1703.47	433199	244040	128315	372354	60845
	060	14	71.15	2477.20	106123	132728	29588	162316	-56193

"DX359A, Appendix A, page 11
(Supplemental S.H.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1960 FEB

B70 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
110	1	83.88	1727.82	742682	285274	205791	491065	251816
020	2	69.93	1943.66	584607	258787	163191	421977	162629
130	3	69.20	1693.14	629124	288627	183714	472342	156782
080	4	63.25	2347.93	527778	270632	148574	419206	108571
100	5	61.26	1628.13	464365	251936	141798	393734	70631
070	6	69.21	1820.56	399334	214217	115193	329409	69927
050	7	59.31	1669.87	507490	286683	157130	443814	63677
030	8	75.27	1315.34	355354	202957	108977	311934	43422
090	9	64.48	2478.53	288179	177915	78733	256648	31531
120	10	64.33	1260.57	325991	200005	103935	303940	22051
060	11	58.04	1674.50	333294	223336	104847	328183	5112
010	12	54.30	1847.00	316987	214442	97694	312136	4851
040	13	45.29	2572.49	356651	260478	109986	370464	-13813

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1960 MAR

B70 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
050	1	75.35	1319.30	918025	360340	277382	637723	280303
070	2	83.32	1240.34	768069	308360	229312	537673	230397
100	3	76.24	1708.82	716465	300845	203867	504713	211753
060	4	64.59	1504.25	709165	340880	217381	558261	150904
020	5	56.92	1991.49	583536	308938	173138	482076	101460
030	6	70.74	2497.00	318419	188208	85336	273544	44875
090	7	59.79	1432.50	390583	242230	124811	367041	23543
110	8	59.04	1557.83	388728	244302	122127	366429	22299
040	9	56.75	1717.05	350630	231459	108746	340205	10425
130	10	65.90	2474.00	284170	197816	79768	277585	6585
120	11	47.97	2586.63	417053	284533	125955	410488	6565
010	12	47.72	2417.35	395496	269734	120219	389953	5543
080	13	56.44	1351.97	287489	215586	95835	311421	-23932
140	14	78.49	895.42	116189	138428	40233	178662	-62473

"DX 359A, Appendix A, page 12
(Supplemental S.H.E. Report - Volume A)"

AX-2548

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING]

1960 MAR]

830 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS	]
010	1	64.76	2432.62	523722	251031	143580	394611	129110	]

"DX359A, Appendix A, page 13
(Supplemental S.H.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1960 APR

870 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
050	1	85.64	1173.14	955930	333830	286076	619906	336024
100	2	81.52	1688.67	756814	293589	211481	505070	251744
070	3	86.11	1205.83	773509	292571	229560	522132	251377
060	~~4~~ 5	74.57	1394.52	808467	337096	242713	579810	~~298686~~
020	~~5~~ 4	68.34	1928.98	737985	316330	208698	525027	212958
090	6	72.36	1527.60	617011	278428	181811	460239	156771
030	7	82.46	2587.00	384133	187577	98521	286099	98034
110	8	59.61	1736.01	548714	298875	167619	466495	82219
120	9	55.48	2540.46	474029	275926	136570	412496	61533
040	10	62.24	1771.81	396078	229528	117927	347455	48623
080	11	67.23	1264.30	390213	225648	124160	349808	40405
130	12	64.57	2478.00	355417	219187	100008	319196	36222
010	~~13~~ 14	44.52	2458.00	375017	267207	116084	383291	-8274
140	~~14~~ 13	71.65	1485.87	205171	161896	62423	224319	~~-19148~~

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SAGE METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1960 APR

B30 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
010	1	74.81	2474.00	674252	265918	177299	443217	231034

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1960 MAY

870 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
100	~~1~~ 2	76.73	1734.72	779801	316602	220396	536998	~~243803~~
050	~~2~~ 1	87.74	883.41	757351	291765	242785	534550	222801
020	3	67.13	1558.40	737652	327387	218791	546178	191474
070	4	81.85	1231.58	655175	272784	196081	468865	186310
040	5	68.37	1898.61	690286	308195	196067	504262	186023
140	6	69.52	1719.01	696332	317354	202117	519471	176861
130	7	66.54	2397.06	618441	297043	170583	467626	150816
090	8	68.92	1560.42	612270	289107	182756	471863	140407
120	9	60.91	2545.51	590989	305009	165592	470601	120388
030	10	81.33	2432.12	395347	199116	103228	302345	93002
110	11	57.89	1736.67	573786	310903	175722	486625	87161
080	~~12~~ 13	64.20	1237.98	417400	241053	134627	375680	41720
060	~~13~~ 12	79.95	1020.94	338678	196202	109021	305223	~~33455~~
150	14	56.50	1298.51	209730	164538	71188	235726	~~26996~~
010	15	34.76	2458.00	320798	285334	108862	394196	-73398

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1960 MAY

B30 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
010	1	74.79	2473.57	549228	231921	143832	375752	173476

"DX359A, Appendix A, page 17
(Supplemental S.H.E. Report - Volume A)"

"DX 359A, Appendix A, page 18
(Supplemental S.H.E. Report - Volume A)"

AX-2553

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1960 JUN

STG	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	040	1	78.13	1907.28	829341	313664	226613	540277	289064
	130	2	84.78	2249.80	773474	293138	203034	496172	277302
	100	3	81.36	1716.03	790117	304204	219925	524129	265988
	090	4	86.48	1539.63	748546	280217	209274	489491	259055
	020	5	78.01	1398.78	805744	314925	234594	549519	256225
	140	6	78.57	1406.25	827643	330778	241007	571786	255857
	050	7	92.64	867.04	789945	287264	250417	537681	252264
	080	8	74.54	1350.64	776854	318882	231473	550356	226499
	110	9	74.35	1695.66	720533	307349	205762	513112	207421
	060	10	87.19	1259.73	617299	246857	180131	426988	190310
	120	11	66.94	2544.03	635666	296198	172996	469194	166472
	070	12	71.80	1530.25	587209	282064	176476	458540	128669
	030	13	87.14	2504.48	414166	191448	105570	297018	117148
	150	14	78.70	1125.64	333597	190735	104500	295235	38362
	010	15	49.98	2458.00	428971	269680	127200	396880	32091

18

AX-2554

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1960 JUN

830 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
010	1	87.34	2474.00	844484	275970	213159	489129	355357

Pan American, Appendix A, Page 47
(Supplemental S.H.E. Report - Volume A)

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1960 JUL

870 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
140	1	79.84	1392.68	853514	334888	247270	582159	271355
040	2	74.92	1982.13	779555	308313	213273	521586	257968
010	3	77.38	2198.20	731580	290857	194857	485714	245866
020	4	71.78	1683.46	795732	326456	227411	553868	241864
090	5	82.95	1534.57	733283	284709	207808	492517	240766
050	6	88.37	877.43	776132	291726	247440	539167	236966
100	7	77.43	1728.63	740548	303275	208367	511642	~~228906~~
080	8	77.93	1137.56	774693	313383	237523	550906	223787
130	9	76.71	2005.42	683181	286149	186414	472563	210617
060	10	88.89	1237.13	653443	253646	190197	443843	209599
110	11	72.72	2091.85	637115	285935	175508	461443	175673
120	12	64.91	1659.03	634963	305136	187732	492868	142094
070	13	71.65	1487.63	576485	276381	173195	449577	126909
030	14	80.69	2587.00	395723	196859	102021	298879	96843
150	15	67.46	1154.59	287432	192621	93312	285934	~~1498~~

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING]

1960 JUL]

B30 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS	]
010	1	81.74	2434.29	803336	277206	205651	482857	320479	]
030	2	67.88	2545.15	606623	215335	160018	375353	231275	]
020	3	59.80	2293.79	125203	88879	35375	124254	949	]

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING]

1960 AUG]

870 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS	]
010	1	83.02	2458.00	774354	285969	199276	485245	289108	]
140	2	80.97	1396.65	867392	333207	249958	583166	284226	]
040	3	72.61	1923.23	793494	321606	220367	541974	251520	]
090	4	83.88	1516.09	740991	286164	209973	496137	244854	]
080	5	81.20	981.22	798531	312506	251574	564080	234450	]
050	6	86.93	877.60	764225	291883	245434	537317	226908	]
020	7	65.92	2025.33	757563	329542	213620	543161	214402	]
060	8	87.37	1237.82	642833	253373	188292	441665	201168	]
120	9	72.50	1262.50	714133	310415	218221	528636	185498	]
100	10	70.10	1785.94	668463	299932	191940	491873	176590	]
130	11	68.10	1766.67	641364	298969	185707	484676	156688	]
110	12	65.26	2474.00	602574	294443	166011	460454	142120	]
030	13	81.24	2587.00	385250	191991	98952	290943	94307	]
070	14	66.47	1517.67	532195	276215	163051	439265	92930	]
150	15	59.84	1159.30	234214	184812	79377	264189	-29975	]

"DX359A, Appendix A, page 22
(Supplemental S.H.E. Report - Volume A)"

AX-257

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING]

1960 AUG]

830 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS	]
030	1	70.52	2524.93	943386	342375	247834	590209	353177	]
810	2	84.35	2433.46	809472	274034	205857	479891	329581	]
020	3	74.75	2474.00	239104	150103	63147	213250	25854	]

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1960 SEP

B70	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	140	1	77.53	1491.77	806890	317011	231320	548332	258559
	010	2	78.04	2186.18	639919	261028	170247	431275	208644
	120	3	75.71	1262.85	713840	295709	216681	512390	201450
	050	4	82.34	884.86	699164	281682	228510	510192	188974
	090	5	76.07	1534.00	650874	273337	188660	461997	188877
	020	6	62.84	1806.70	703016	319775	205299	525074	177942
	080	7	75.04	944.23	707652	301445	231089	532534	175119
	040	8	66.84	1894.73	642339	288862	182605	471467	170872
	110	9	66.22	2172.48	577007	275979	161016	436995	140012
	060	10	76.67	1199.25	559268	249096	170785	419882	139386
	130	11	66.12	1728.49	595286	284746	173888	458634	136654
	100	12	65.63	1748.51	580381	279629	170564	450193	130188
	030	13	80.67	2587.00	382874	189034	98492	287526	95351
	070	14	66.18	1470.93	501985	260610	154279	414889	87096
	150	15	58.42	1141.14	238529	184049	81734	265784	-27254

"DX 359A, Appendix A, page 24
(Supplemental S.H.E. Report - Volume A)"

AX-2559

AX-2560

"DX359A, Appendix A, page 25
(Supplemental S.H.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1960 SEP

830 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
030	1	70.91	2522.72	935435	330457	244710	575168	360268
010	2	80.57	2474.00	772541	268320	197778	466098	306443
020	3	77.14	2474.00	271199	152412	70799	223211	47988

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1960 OCT

B70 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
010	1	70.65	1263.49	790922	330736	241243	571979	218943
150	2	75.18	900.07	805093	335144	265356	600500	204593
080	3	67.30	1531.64	608761	282773	182836	465609	143153
110	4	73.30	1050.23	603784	273830	192917	466747	137037
030	5	75.52	877.60	625579	280975	211530	492505	133075
050	6	79.20	1224.33	535996	243664	162027	405691	130305
100	7	66.81	1967.43	512099	255777	145545	401321	110778
120	8	68.97	1921.00	491019	245211	138536	383747	107272
060	9	60.14	1867.59	549634	285892	162405	448297	101337
130	10	61.74	1549.27	539581	279363	165812	445175	94406
090	11	65.69	1370.94	461326	240255	141629	381884	79442
070	12	68.46	1311.00	455969	241518	142372	383890	72079
020	13	63.90	2503.81	303672	192264	83296	275560	28112
140	14	76.42	983.00	290265	181122	94647	275770	14495
040	15	64.06	1746.00	215261	166783	63563	230346	-15085

S/M/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1960 OCT

830 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
010	1	70.97	2474.00	691235	272383	182095	454477	236757
030	2	54.93	2421.09	781497	356115	220666	576780	204717
020	3	68.74	2474.00	274402	163975	73561	237536	36872

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1960 NOV

870 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
140	1	59.61	889.41	620830	316741	220875	537616	83223
070	2	69.24	1092.86	483342	249575	156266	405841	77502
010	3	50.02	1340.92	610009	333448	203584	537032	72977
080	4	46.82	1440.90	673726	377469	226833	604302	69424
150	5	60.87	1056.27	499435	268899	168131	437029	62406
090	6	55.33	1464.88	448945	258655	144292	402947	45998
030	7	59.90	895.37	435789	247278	156225	403503	32286
100	8	51.35	1956.47	385375	245011	117901	362911	22464
050	9	53.33	1842.32	371802	239996	114803	354799	17003
120	10	53.87	1900.52	352851	228961	106911	335873	16978
110	11	58.74	1203.23	263968	194019	88162	282180	-18212
130	12	65.86	986.75	207370	162008	70234	232243	-24873
020	13	45.46	2584.54	192930	170854	57071	227925	-34995
060	14	52.41	867.78	240674	193637	91614	285251	-44577
040	15	40.29	1697.52	127503	156369	43975	200284	-72781

"DX359A, Appendix A, page 28 (Supplemental S.S.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1960 NOV

830 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
010	1	52.21	2433.39	501233	264388	142987	407374	93859
030	2	40.07	2519.84	553457	332392	169420	501812	51645
020	3	55.59	2471.05	183705	148987	52330	201317	-17612

AX-2564

"DX359A, Appendix A, page 29
(Supplemental S.H.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1960 DEC

870 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
010	1	54.66	1337.00	705912	357183	228760	585944	119968
140	2	64.51	920.81	648559	314812	221652	536464	112095
080	3	51.36	1450.27	665251	353216	216008	569224	96027
150	4	65.18	1058.44	544305	273615	178446	452060	92245
070	5	68.41	1099.79	529531	268034	171086	439121	90410
120	6	64.98	1921.00	445998	237334	127165	364498	81500
050	7	63.29	1814.93	434322	240754	127193	367947	66375
030	8	65.92	885.32	495921	259677	172195	431872	64049
090	9	54.95	1515.52	471279	267388	150018	417406	53872
100	10	57.47	1982.52	421753	245162	124019	369181	52572
110	11	69.81	1227.21	340947	206172	106608	312780	28166
130	12	64.78	986.21	237689	177574	81007	258581	-20891
020	13	51.17	2587.00	192276	169510	55499	225010	-32734
040	14	51.32	1706.94	202305	176166	63673	239839	-37534
060	15	53.64	893.00	240444	193662	89955	283617	-43173

"DX 359A, Appendix A, page 30
(Supplemental S.H.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING]

1960 DEC]

B30 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS	]
010	1	52.11	2429.54	535784	278189	152665	430854	104934	]
030	2	41.12	2475.01	522857	318551	159755	478306	44551	]
020	3	57.98	2379.23	241667	168059	68151	236210	5458	]

S/H/F METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1961 JAN

880 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
030	1	73.66	810.15	239169	126082	89244	215326	23844
050	2	69.90	788.46	199714	102224	77421	179645	20071
020	3	74.84	837.53	192562	111873	71630	183503	9058
060	4	50.86	1846.14	65180	45426	22520	67946	-2767
010	5	61.29	825.08	152514	97865	59275	157141	-4626
040	6	57.62	823.34	147929	112188	61066	173254	-25325

"DX359A, Appendix A, page 32
(Supplemental S.H.E. Report - Volume A)"
AX-2567

AX-2568

"DX359A, Appendix A, page 33
(Supplemental S.H.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1961 JAN

570 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
140	1	62.09	919.25	648003	292941	239387	532328	115675
090	2	59.09	1500.51	542902	251341	181127	432468	110434
010	3	52.80	1338.10	627063	302764	219713	522477	[illegible]
150	4	65.36	1096.34	515800	233179	178743	411922	103878
070	5	68.89	1107.66	503324	228735	173508	402243	101078
120	6	64.28	1937.29	438972	206825	134170	340995	97977
050	7	57.66	1580.28	496456	245229	164254	409483	86967
080	8	50.80	1346.21	640220	325703	230265	555969	84252
030	9	66.01	908.70	484493	224851	178586	403436	81056
100	10	57.15	1778.71	450427	225610	145628	371238	79189
110	11	63.94	1063.58	314263	177748	112495	290243	24020
020	12	50.40	2591.18	246014	158921	76122	235044	10973
040	13	49.39	1426.70	297791	188202	106273	294475	[illegible]
130	14	62.63	965.92	220469	142856	81921	224778	-4308
060	15	44.96	884.06	173564	150033	75652	225684	-52120

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1961 JAN

B38 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
010	1	60.57	2406.16	667919	283243	195950	479193	188726
030	2	43.86	2481.38	634315	345626	204750	550375	83940
020	3	64.30	2216.18	289361	161168	85519	246687	42674
040	4	47.75	665.55	69527	91137	32565	123702	-54175

AX-2570

"DX359A, Appendix A, page 35
(Supplemental S.H.E. Report - Volume A)"

S/A/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1961 FEB

866 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
050	1	72.58	503.36	361261	188929	136777	325706	35554
030	2	62.30	749.48	299624	154273	110890	265163	34463
010	3	78.53	837.56	205397	116917	73626	190543	14854
020	4	74.62	870.69	203185	126905	75063	201968	1217
060	5	61.26	1946.67	164972	130047	58566	188613	-19635
040	6	57.13	754.29	200921	153405	84804	238209	-37288

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1961 FEB

B70 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
150	1	67.14	1180.26	310441	155919	103706	259625	50816
140	2	58.59	897.47	398629	208475	151695	360169	38460
100	3	53.03	1541.98	319539	183801	109954	293755	25784
070	4	57.81	1117.45	318399	182700	116665	299365	19034
110	5	61.96	943.41	256495	153645	95566	249211	7284
120	6	58.23	1887.04	193891	128307	61730	190037	3853
050	7	52.55	1959.97	230324	152025	75461	227486	2840
090	8	47.60	1497.75	294692	185628	106732	292359	2332
030	9	51.69	1054.25	292450	179273	112732	292005	445
010	10	44.52	1315.38	266782	183459	102260	285719	-18936
020	11	43.47	2463.38	151495	125587	49929	175415	-23920
080	12	41.13	1262.78	258340	190167	103460	293626	-35286
130	13	50.67	1003.64	128085	114808	51178	165986	-37901
060	14	44.29	880.89	101825	110758	45182	155940	-54115
040	15	39.48	867.45	114960	121869	54318	176187	-61227

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1961 FEB

B30 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
010	1	50.27	2367.12	364222	209049	114696	323745	40478
020	2	47.56	2474.00	125479	117453	40580	158033	-32554
040	3	55.82	475.82	96609	98834	41770	140604	-43996
030	4	32.68	2541.41	271439	219307	97536	316842	-45404

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1961 MAR

880 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
050	1	75.36	781.17	562590	262054	211558	473612	88986
070	2	73.95	934.28	546395	265896	195782	461678	84717
010	3	90.36	830.26	360224	159448	124833	284281	75945
030	4	80.33	752.21	442564	213608	165341	378949	63615
020	5	71.11	853.97	281684	170064	106715	276779	4911
060	6	50.71	1617.69	265692	186482	92805	279287	-13595
040	7	60.39	857.99	301114	199485	120460	319945	-18831

AX-2574

"DX359A, Appendix A, page 39
(Supplemental S.H.E. Report - Volume A)"

S/H/C METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1961 MAR

870 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
040	1	54.50	1344.69	744939	345798	259630	605428	139510
060	2	51.56	1215.08	472466	226004	161179	387183	85283
050	3	55.17	911.41	637500	315352	247286	562638	74863
130	4	64.01	941.33	378909	201986	140431	342417	36492
100	5	62.37	1122.53	340501	191486	122100	313586	26915
120	6	46.53	1494.27	454969	267895	166457	434351	20618
140	7	50.43	1883.71	329247	201352	110137	311489	17758
010	8	48.19	2513.32	252788	163584	79365	242949	9839
020	9	52.09	1927.90	315402	194644	123196	317840	-2438
080	10	43.65	1286.84	443183	275226	172380	447606	-4423
090	11	43.54	1269.75	427251	271156	166481	437637	-10387
030	12	51.49	853.42	263651	175703	111089	286791	-23142
150	13	58.44	983.00	137751	119202	52691	171893	-34142
070	14	49.14	893.00	231577	170397	96930	267327	-35750
110	15	43.75	1079.62	192808	162400	81098	243498	-50690

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1961 MAR

830 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
010	1	50.64	2474.00	547351	281663	169183	450846	96505
030	2	34.29	2519.62	538097	364032	188926	552958	-14861
020	3	45.93	2471.54	195140	156942	63430	220372	-25232
040	4	57.68	667.31	181931	136439	77855	214294	-32463

S/A/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1961 APR

000 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
070	1	77.04	928.57	559135	254487	195696	450183	108952
050	2	74.74	783.73	558777	257826	209688	467514	91263
030	3	83.85	757.26	452140	203634	164797	368431	83718
010	4	85.86	830.09	337457	152655	117042	269697	67760
060	5	60.88	1382.98	234143	144870	79896	224766	9378
120	6 7	73.20	707.67	16637	8027	6486	14514	2123
110	7 8	79.73	837.33	10570	5012	3750	8762	1809
020	8 9	67.60	841.49	268410	166078	102138	268217	193
100	9 6	~~86.49~~ 95.8	611.00	3688	2750	1367	4117	~~-430~~
090	10 11	~~63.17~~ 52.3	726.35	240211	157627	98735	256362	~~-16152~~
040	11 10	62.60 NC	1035.81	217200	151968	81798	233766	~~-16566~~
080	12	~~51.14~~ 51.1	1258.78	181959	150354	70514	220868	~~-38908~~

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1961 APR

STG	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	040	1	59.43	1357.15	812322	334398	270925	605323	206999
	050	2	60.79	914.36	687715	300545	254136	554680	133035
	100	3	64.86	1096.63	548442	249434	192299	441732	106710
	060	4	62.93	1215.08	474478	216829	159367	376196	98281
	070	5	62.34	920.47	453102	223598	168278	391876	61226
	110	6	49.25	1526.88	471937	251760	165113	416873	55064
	010	7	56.96	2503.30	295486	157938	87215	245154	50332
	090	8	48.50	1251.72	486815	266964	180575	447539	39278
	020	9	53.85	1019.09	406326	217721	156545	372266	34060
	080	10	47.33	1243.34	478246	264822	180107	444929	-33317
	120	11	43.69	1513.54	420473	257015	155395	412411	8062
	140	12	61.10	983.00	233175	145041	86158	231199	1976
	130	13	46.49	1893.86	270460	180823	92202	273025	-2565
	030	14	49.97	898.14	274224	173910	113729	287639	-13411

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1961 APR

B30 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
010	1	49.95	2474.00	512454	267375	158950	426325	86131
030	2	38.60	2516.22	478857	296744	160105	456849	22038
040	3	46.27	442.00	45482	43647	21300	64947	-19465
020	4	41.20	2474.00	123917	129449	42170	171619	-47707

"DX 359A, Appendix A, page 43
(Supplemental S.H.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1961 MAY

880 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
070	1	68.49	819.03	639224	303137	243830	546967	92258
010	2	84.48	830.63	338133	156171	117424	273595	64538
040	3	80.69	708.51	380163	180147	142134	322281	57882
100	4	74.71	766.06	455858	234340	172772	407112	48746
060	5	66.07	839.21	445766	237648	170021	407670	38097
030	6	76.09	665.68	260331	143910	101519	245430	14901
110	7	64.93	704.06	452467	252757	186141	438898	13569
120	8	55.30	748.10	346782	202260	138386	340646	6136
050	9	52.34	1847.00	298883	193277	101522	294799	4084
130	10	65.34	815.67	92843	59551	36496	96048	-3207
080	11	56.86	837.97	381320	240265	155320	395585	-14265
020	12	57.13	951.20	235614	168588	96059	264647	-29031
090	13	50.26	665.25	241943	197370	113815	311185	-69241

"DX359A, Appendix A, page 44
(Supplemental S.H.E. Report - Volume A)"

S/O/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1961 MAY

870 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
070	1	56.22	1367.94	743715	327314	251726	579040	164675
080	2	60.62	911.33	704881	305175	258824	563999	140882
130	3	51.29	2008.42	398407	214976	127991	342967	55440
060	4	48.71	1262.50	538401	287905	198784	486689	51711
030	5	54.25	2429.30	303484	166066	90878	256943	46541
120	6	47.47	1530.35	47267[illegible]	260107	168282	428389	44281
110	7	47.79	1495.03	459915	253761	164116	417877	42041
090	8	62.32	929.63	381091	199806	140275	340081	41010
020	9	57.22	849.79	409471	220178	159267	379445	30026
040	10	49.77	1003.77	439633	245973	172937	418910	20722
140	11	58.16	983.00	249782	152961	90190	243151	-2368
050	12	36.37	1892.72	430834	284832	157202	442034	-11201
100	13	39.89	1542.58	286461	213003	110608	323611	-37150
010	14	35.32	891.67	427792	310107	206104	516211	-88418

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1961 MAY

830 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
010	1	49.31	2437.81	511742	269085	159166	428250	83492
030	2	36.54	2422.61	485614	322623	168104	490728	-5113
020	3	44.61	2474.00	151259	136921	49397	186319	-35060

S/H/F METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1961 JUN

880 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
070	1	73.41	810.72	662295	296356	247046	543402	118893
060	2	73.71	883.41	611297	274412	220625	495037	116260
140	3	74.71	935.42	553726	262905	199728	462634	91093
090	4	79.88	897.22	539442	246269	206226	452494	86947
030	5	84.71	722.18	388115	177930	143134	321064	67051
020	6	64.84	1847.00	352504	183752	111070	294822	57682
120	7	79.28	775.70	418938	206408	154941	361350	57580
050	8	70.65	827.29	467536	235305	175055	410361	57175
010	9	82.48	716.13	374375	178506	139556	318062	56313
080	10	69.87	837.96	452773	232426	169938	402365	50408
100	11	65.20	1020.24	388854	207299	141266	348565	40290
040	12	54.92	1591.00	120367	101594	41376	142970	-22603
130	13	57.56	840.77	232536	162425	94531	256956	-24420
110	14	63.90	583.56	325199	214020	146517	360537	-35338

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1961 JUN

878 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
070	1	65.23	1289.94	883042	334305	289424	623730	259312
130	2	68.64	1540.79	664228	254606	207711	462317	201903
050	3	64.22	1262.65	706429	284678	235212	519890	186540
030	4	54.41	1921.87	633687	279497	198717	478213	155473
020	5	69.92	1284.57	544071	220493	173733	394226	149845
140	6	59.22	1340.42	642229	279861	215065	494925	147304
110	7	64.31	1012.00	574736	245645	204261	449906	124831
100	8	49.42	1418.93	747164	367380	265982	633362	113804
040	9	56.16	1042.36	611879	288001	224279	512281	99598
080	10	50.64	1100.48	670554	330992	253454	584446	86107
010	11	53.77	883.52	614497	301563	244035	545598	68899
120	12	47.43	2003.37	398833	224336	130562	354898	43935
090	13	60.03	859.32	403840	206662	153854	360516	43325
060	14	49.42	651.00	131898	119506	60614	180120	-48223
150	15	31.12	2474.00	212645	193806	79041	272847	-60202

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1961 JUN

B30 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
010	1	64.07	2474.00	505050	223265	146013	369278	135772
030	2	49.24	2482.01	657579	324332	204179	528511	129068
020	3	64.76	2474.00	260924	147351	75609	222961	37967

"DX 359A, Appendix A, page 50
(Supplemental S.H.E. Report - Volume A)"

AX-2880

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1961 JUL

SEQ	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	120	1	71.94	901.31	540927	257615	197492	455107	85820
	060	2	75.74	814.13	486999	226476	178539	405016	81983
	080	3	73.60	940.48	539161	263467	194779	458247	80914
	100	4	70.50	764.80	586951	286250	227358	513608	73343
	130	5	70.22	716.33	551234	283507	217130	500637	50598
	110	6	67.61	818.51	472026	244541	179726	424267	47760
	030	7	78.47	727.74	367115	183225	138618	321843	45273
	020	8	~~58.60~~ 58.5	1531.68	313096	180408	105628	286035	~~27060~~
	160	9	~~65.68~~ 70.8	1154.65	78810	45244	27797	73041	5769
	010	10	64.67	710.18	286223	176200	116943	293143	-6921
	050	11	57.78	833.07	394200	242297	159047	401344	-7144
	040	12	55.91	828.14	381489	244276	156456	400732	-19243
	150	13	49.03	1305.50	99998	82886	37814	120699	-21701
	090	14	51.19	1443.77	230143	169018	83888	252906	-22758
	070	15	54.02	850.00	216952	164379	90086	254465	-37513
	140	16	56.44	477.86	293050	224480	151071	375551	-82501

50

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1961 JUL

BTO	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	070	1	61.11	1248.90	806252	331717	271489	603206	203046
	050	2	62.57	1262.50	698774	290554	234041	524595	174178
	030	3	53.83	1887.47	623449	284209	197683	481892	141557
	140	4	55.95	1363.58	639637	287625	216925	504550	135087
	100	5	49.64	1433.92	731544	360440	258564	619004	112540
	150	6	55.64	1505.40	523447	250237	177005	427243	96205
	130	7	61.06	1274.31	478628	227081	161427	388509	90119
	040	8	54.20	1001.97	619081	300502	231615	532118	86963
	020	9	41.88	1239.70	437404	207884	146281	354164	83239
	090	10	52.42	859.48	635327	315084	251128	566211	69115
	110	11	56.88	1012.00	489471	243346	180743	424089	65382
	010	12	51.89	897.22	592617	301031	235795	536826	55791
	120	13	42.37	2379.84	414755	250813	136741	387554	27201
	080	14	40.86	1436.63	323323	225550	123871	349422	-26099
	060	15	39.44	651.00	101517	119139	51844	170983	-69465

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1961 JUL

830 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
030	1	49.47	2468.05	532886	268188	163347	431535	101351
010	2	55.37	2405.61	355084	190101	106329	296430	58654
020	3	67.38	2474.00	209654	128435	59550	187985	21669

"DX359A, Appendix A, page 52
(Supplemental S.H.E. Report - Volume A)"

AX-2587

"DX359A, Appendix A, page 53
(Supplemental S.H.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1961 AUG

000 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
150	1	77.36	897.71	614537	263435	216865	480300	134237
060	2	78.30	813.75	527652	228896	189858	418753	108899
100	3	74.90	759.90	629168	287139	238105	525244	103924
130	4	73.98	721.05	593841	282963	227447	510411	83430
110	5	71.30	968.03	512060	247583	184021	431605	80455
140	6	75.17	1068.29	410167	190802	139044	329846	80321
020	7	86.15	719.00	416784	185496	152183	337680	79104
120	8	74.56	957.79	369076	186924	130931	317855	51221
070	9	68.30	718.51	414364	218384	162722	381106	33258
090	10	58.46	1406.69	382085	218572	132034	350606	31479
050	11	63.89	836.49	446272	246118	171957	418075	28197
010	12	68.95	713.00	320807	179759	126891	306650	14157
030	13	59.83	1316.38	239767	150905	83568	234473	5294
040	14	56.55	816.08	379338	235177	154372	389549	-10211
170	15	57.45	603.11	159254	105778	71609	177387	-18132
160	16	63.00	499.92	264756	182649	125539	308189	-43432
080	17	50.89	850.00	215416	168693	90944	259637	-44221

S/M/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1961 AUG

870 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
060	1	62.85	1302.91	900310	350086	297321	647407	252903
040	2	61.11	1376.26	905844	356472	298356	654828	251018
070	3	62.80	1332.52	707654	282786	231624	514410	193246
110	4	53.94	1431.29	830612	371219	283400	654619	175993
020	5	72.69	1324.63	554061	217583	172866	390449	163612
030	6	54.25	1985.25	652112	289993	203700	493693	158420
130	7	61.06	982.93	645574	282713	232589	515302	130272
150	8	66.01	1321.63	476081	208891	156676	365567	110514
100	9	54.75	863.77	702769	328924	273244	602168	100601
120	10	58.96	1003.15	543563	256421	199471	455892	87670
080	11	59.51	1305.50	426952	211799	144289	356088	70862
010	12	59.88	719.86	505249	247749	206180	453929	51320
140	13	49.58	2318.35	374987	209784	117831	327615	47372
090	14	39.93	1490.59	339319	234094	128932	363026	-23707
050	15	37.01	658.96	99197	120697	52441	173138	-73941

"DX359A, Appendix A, page 54
(Supplemental S.M.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1961 AUG

B30 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
030	1	55.07	2522.63	769787	325751	226957	552708	217072
010	2	62.58	2474.00	446364	199876	127684	327560	118809
020	3	63.05	2474.00	265201	148490	76345	224835	40366

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1961 SEP

880 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
020	1	72.13	984.92	538223	256245	192037	448282	89941
060	2	~~69.44~~ 69.3	948.14	556736	262805	207587	470392	~~86345~~
100	3	71.30	815.93	457757	223150	170169	393319	64438
010	4	79.72	722.10	373323	174581	138953	313534	59789
090	5	71.66	711.78	479824	244006	189118	433123	46701
140	6	70.09	765.54	423662	226218	163476	389694	33968
180	7	65.58	656.64	347924	188505	141384	329888	18036
150	8	65.71	723.84	356400	199593	141804	341396	15004
170	9	~~46.67~~ 63.4	718.02	339537	198056	136984	335040	~~4497~~
040	10	56.91	1299.03	226276	147306	80494	227800	-1524
130	11	57.14	593.28	327155	191886	138766	330652	-3497
030	~~12~~ 13	41.55	710.45	288752	175365	118547	293912	-5160
050	~~13~~ 12	~~50.58~~ 62.9	666.75	505889	293593	218347	511940	~~-6051~~
160	14	50.89	1293.48	305552	203164	113965	317128	-11575
110	15	55.24	811.03	481801	294880	200568	495448	-13647
070	16	54.32	853.81	350126	225841	142884	368725	-18599
080	17	52.22	876.96	423341	274024	176021	450045	-26704
120	18	47.06	855.81	179719	159859	79254	239112	-59393

"DX359A, Appendix A, page 56 (Supplemental S.H.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1961 SEP

STG	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	080	1	64.08	1278.31	847050	327990	279052	607042	240008
	150	2	61.78	1387.25	724956	302061	239265	541326	183630
	060	3	58.76	1301.51	670910	285982	225498	511481	159429
	020	4	64.06	1105.44	533103	229853	181499	411352	121751
	140	5	57.69	1727.32	286085	99244	90895	190139	95945
	120	6	49.91	999.93	779429	381878	302276	684154	95275
	130	7	53.44	1605.63	507399	249813	170040	419853	87545
	100	8	53.32	1519.23	472863	235654	159371	395025	77838
	030	9	46.22	1983.09	522242	272882	171870	444752	77490
	070	10	59.79	1260.35	435936	213276	148154	361430	74506
	090	11	46.43	888.10	522073	290671	215370	506041	16033
	010	12	45.94	925.17	536593	299761	223145	522906	13687
	080	13	41.75	1336.33	363520	245352	140791	386144	-22623
	110	14	40.06	1205.05	284161	210436	114988	325424	-41264
	040	15	39.97	702.08	108995	120821	53765	174586	-65591

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1961 SEP

830 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
030	1	56.00	2548.25	559146	234167	163412	397579	161567
010	2	61.44	2474.00	483543	214139	139395	353534	130009
020	3	68.83	2355.44	216002	127554	61478	189033	26969

"DX 359A, Appendix A, page 58
(Supplemental S.H.E. Report - Volume A)"

AX-2593

AX-2594

"DX359A, Appendix A, page 59
(Supplemental S.H.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1961 SEP

REF	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	020	1	62.80	1089.62	405964	243417	139696	383113	22853
	010	2	39.48	834.91	198446	213197	88768	301965	-103519

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1961 OCT

000 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND.	TOTAL OPER	PROFIT/LOSS
140	1	76.99	903.85	441506	203401	156126	359527	81978
150	2	71.49	813.69	467005	229102	173328	402430	64575
040	3	71.76	686.31	475619	231524	183695	415218	60401
010	4	78.51	718.63	360598	172985	135159	308145	52453
180	5	~~66.11~~ 66.3	987.53	412068	216403	151330	367733	~~44395~~
160	6	~~63.46~~ 63.3	849.41	567865	304019	221190	525208	~~42654~~
130	7	60.32	649.15	417143	224917	169338	394255	22888
060	8	66.25	713.62	435208	237312	175847	413159	22049
170	9	70.55	734.45	296411	165901	114923	280824	15587
070	10	64.58	719.39	457764	262357	187920	450277	7486
020	11	65.87	713.54	298517	173425	119913	293338	5178
080	12	65.62	592.67	326312	202992	140833	343825	-17513
110	13	~~53.76~~ 53.8	956.82	352162	231739	144460	376200	~~-24038~~
120	14	50.37	1220.30	187172	143860	71087	214947	-27775
050	15	50.80	954.20	299656	210855	122652	333507	-33851
030	16	54.61	602.19	337528	228927	157915	386842	-49314
090	17	42.61	1044.83	254123	206733	109602	316335	-62212
100	18	45.30	857.80	181118	163853	80779	244631	-63514

"DX359A, Appendix A, page 60
(Supplemental S.H.E. Report - Volume A)"

AX-2595

"DX359A, Appendix A, page 61
(Supplemental S.H.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1961 OCT

STG	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	060	1	61.45	1090.45	814184	327958	282177	610136	204048
	050	2	57.40	1272.29	705414	309513	240771	550284	155130
	130	3	54.12	1704.00	497073	235411	162584	397995	99079
	020	4	53.66	850.56	689875	332399	272401	604800	85074
	150	5	45.84	1704.00	454612	251237	157733	408970	45642
	080	6	53.46	1275.33	400387	216565	141443	358008	42379
	100	7	44.37	1481.35	394674	230840	143670	374511	20164
	070	8	43.35	1135.63	555853	316597	223635	540232	15621
	110	9	42.58	1326.46	433980	262651	162378	425029	8951
	120	10	43.09	1495.20	422954	257022	157009	414030	8925
	040	11	38.64	1736.24	429511	272714	156551	429265	246
	010	12	43.52	961.56	521316	304061	217163	521224	92
	090	13	48.73	896.49	415013	253262	170336	423599	-8588
	030	14	43.14	1113.20	314831	208736	124604	333340	-18509
	140	15	51.40	983.00	201069	146772	78615	225386	-24317

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1961 OCT

830 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
010	1	53.39	2472.60	392624	213506	119666	333172	59455
040	2	40.99	2406.68	174714	85851	57552	143403	31312
030	3	60.05	1262.50	77180	34040	26670	60710	16470
020	4	58.68	1762.33	155022	115656	46968	162623	-7601

AX-2598

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1961 OCT

SEF	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	020	1	55.44	1112.77	457369	285681	163459	449140	8229
	040	2	40.92	891.85	234495	203221	100411	303632	-69136
	030	3	41.40	900.54	263639	239831	112994	352825	-89186
	010	4	35.28	957.63	224167	235503	100826	336329	-112162

63

"DX359A, Appendix A, page 63
(Supplemental S.H.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1961 NOV

880 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
140	1	63.47	937.41	454671	243043	169586	412629	42041
020	2	67.70	904.29	355297	189950	131496	321446	33851
010	3	70.35	740.42	320462	169187	123404	292591	27871
100	4	65.42	712.91	414369	232552	169440	401993	12376
120	5	59.53	831.95	390950	225621	155284	380905	10044
110	6	63.86	652.78	399873	231181	167845	399025	848
090	7	59.79	812.12	363678	224156	147777	371933	-8255
160	8	61.24	776.29	340908	212093	139115	351208	-10301
040	9	59.55	1067.43	180682	124680	67282	191963	-11281
130	10	60.98	731.15	417594	253617	175302	428918	-11324
030	11	60.53	734.12	264859	169053	109528	278581	-13723
070	12	61.29	602.58	301165	190599	130314	320913	-19748
150	13	51.61	1016.63	321146	216627	127081	343708	-22561
170	14	61.92	591.44	294479	190850	129689	320540	-26061
060	15	57.94	538.63	352832	229286	167748	397034	-44202
080	16	47.81	947.17	269452	205017	113556	318573	-49121
180	17	38.43	1283.72	147647	153996	63005	217001	-69355
050	18	41.56	982.79	299930	246173	132998	379171	-79241

"DX359A, Appendix A, page 64
(Supplemental S.H.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1961 NOV

STG	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	090	1	54.84	900.11	566178	280047	216378	496425	69753
	080	2	45.41	1224.69	550642	303577	206428	510005	40637
	050	3	46.89	936.91	536450	297751	219907	517658	18792
	060	4	52.21	930.39	371187	215062	145509	360571	10616
	110	5	49.49	1209.78	321843	199558	119472	319031	2812
	020	6	35.85	1285.15	474281	313163	195669	508831	-34551
	100	7	45.30	745.02	307440	206267	137995	344261	-36821
	120	8	46.24	982.73	150555	131448	61501	192949	-42394
	040	9	32.88	2491.19	156620	147512	55774	203286	-46666
	010	10	35.16	1201.05	522193	346507	223804	570312	-48119
	030	11	32.43	1622.92	455453	340089	183088	523177	-67724
	070	12	39.38	899.92	313078	240182	141440	381622	-68544

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1961 NOV

A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
010	1	45.28	2472.95	460970	260380	146425	406805	54164
020	2	50.16	1222.80	188444	140831	69252	218083	-29639
030	3	39.81	1243.60	214097	172450	85947	258397	-44299
040	4	29.54	2505.09	250247	220809	92760	313570	-63322

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1961 DEC

880 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
020	1	68.23	933.84	381400	206301	138936	345237	36163
010	2	72.73	715.66	335063	173581	129002	302584	32479
070	3 4	66.86	696.16	423640	232602	169078	401680	21960
140	4 5	62.23	941.36	429049	245228	162637	407864	21185
160	5 3	~~67.38~~ 62.9	736.75	450493	252080	179869	431949	~~18544~~
090	6	66.32	820.27	388712	223357	151611	374968	13744
100	7	68.01	710.90	394285	225230	159751	384981	9303
110	8	60.55	858.18	367370	217315	144447	361762	5608
130	9	65.83	737.43	415551	247332	169422	416753	-1202
150	10	57.26	1004.87	336918	216540	129552	346092	-9174
120	~~11~~ 12	~~66.32~~ 67.5	726.04	297294	186990	120280	307270	~~-9975~~
060	~~12~~ 11	61.85	1048.20	188052	128477	69859	198336	-10284
180	13	58.40	1312.88	237496	167604	85632	253236	-15740
030	14	59.75	753.05	243290	164221	100843	265064	-21774
040	15	54.20	990.47	335342	224854	132686	357540	-22198
080	16	54.15	954.62	279812	194438	111989	306427	-26615
170	17	63.01	605.37	258378	175530	112714	288243	-29865
050	18	57.55	559.59	324236	219869	152831	372700	-48464

67

AA-2002

"DX 359A, Appendix A, page 67
(Supplemental S.H.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1961 DEC

B70 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
070	1	66.17	938.97	704195	286191	245896	532087	172109
040	2	50.69	1531.68	667409	335185	228126	563311	104098
020	3	52.30	1499.34	559371	277748	190813	468561	90810
030	4	48.87	1298.40	510339	266878	183826	450704	59634
060	5	51.95	1341.57	441225	238682	154107	392789	48436
100	6	62.49	938.24	378656	197103	138677	335780	42876
090	7	58.57	1052.30	399099	215308	147332	362640	36459
080	8	51.47	785.63	544641	286212	224747	510958	33683
010	9	50.38	958.61	470213	261185	186255	447440	22772
050	10	46.42	2357.14	225316	150156	71269	221425	3891
110	11	48.38	909.13	401982	251424	165646	417069	-15087
120	12	52.57	965.53	183090	140219	71575	211794	-28705

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1961 DEC

838 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
010	1	49.73	2454.10	379651	214471	117209	331680	47971
030	2	55.02	1223.66	374253	207880	132755	340635	33619
040	3	38.87	2402.22	352473	232752	117308	350061	2412
020	4	58.83	1341.97	202654	143995	69074	213069	-10415

"DX 359A, Appendix A, page 6
(Supplemental S.H.E. Report - Volu

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 JAN

880 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
140	1	67.11	939.49	512927	258115	187146	445261	67666
070	2	70.06	690.43	469421	236514	184570	421084	48338
110	3	63.74	851.10	418479	219724	161091	380815	37664
010	4	72.14	623.19	364256	180368	148367	336735	27521
150	5	62.30	998.16	401170	225708	148485	374193	26977
020	6	60.94	927.13	411409	233916	155039	388955	22455
100	7	63.60	731.45	436141	246080	179729	425809	10331
160	8	61.52	738.64	486250	277885	201004	478889	7361
090	9	61.42	840.63	389967	229258	155543	384801	5165
130	10	63.46	728.48	446641	263863	186576	450439	-3798
060	11	56.85	1061.47	199055	135892	75501	211393	-12338
120	12	66.03	770.21	162987	118482	64441	182923	-19936
030	13	56.89	761.46	245458	167730	103730	271460	-26002
040	14	50.16	995.38	395576	262186	160030	422216	-26639
080	15	52.28	944.56	289887	203971	118136	322107	-32220
180	16	47.09	1305.50	182264	152639	69864	222505	-40241
050	17	60.36	552.50	358138	229909	168812	398720	-40582
170	18	59.94	536.57	297640	208952	140654	349606	-51966

"DX359A, Appendix A, page 70
(Supplemental S.H.E. Report - Volume A)"

"DX359A, Appendix A, page 71
(Supplemental S.H.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 JAN

BTG	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
100	1	61.53	958.56	698954	266281	241852	508133	190821	
050	2	51.76	1321.09	504821	234439	170437	404875	99946	
030	3	44.73	1309.45	574085	276209	207200	483409	90676	
040	4	58.51	1068.22	433273	196760	156566	353327	79946	
110	5	51.35	763.92	599611	276190	247253	523444	76167	
020	6	42.43	1547.57	552122	281942	195818	477761	74361	
060	7	54.49	914.97	432130	210136	163716	373852	58278	
080	8	39.51	1530.31	577236	321327	208066	529392	47843	
070	9	50.21	902.60	386286	210594	152873	363467	22819	
090	10	38.67	2485.72	178949	122515	56849	179365	-415	
120	11	49.51	955.04	185451	123633	72805	196438	-10987	
010	12	40.18	897.23	412039	246370	181361	427731	-15692	

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 JAN

830 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
010	1	49.32	2407.89	352669	194794	106115	300909	51760
030	2	45.27	1242.84	328466	205617	122748	328365	101
040	3	30.98	2500.40	344881	259211	120646	379857	-34976
020	4	47.09	1180.06	145935	128077	54831	182908	-36973

"DX359A, Appendix A, page 73
(Supplemental S.H.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 FEB

000 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
130	1	65.66	943.35	441158	233360	163017	396377	44781
100	2	66.14	822.27	404024	214325	156592	370917	33107
060	3	68.43	683.70	432783	233070	174353	407423	25361
010	4	69.80	650.72	327789	171542	132666	304207	23582
040	5	62.00	1097.40	200855	125383	73048	198431	2424
140	6	55.43	1018.30	347762	220726	134559	355286	-7524
020	7	54.74	944.02	381859	241621	150895	392515	-10656
110	8	54.08	913.63	475789	293829	193478	487307	-11519
080	9	57.33	834.75	338168	225023	142298	367321	-29153
090	10	57.95	715.00	366034	238276	160741	399017	-32984
030	11	53.60	739.57	213672	153566	93491	247057	-33385
120	12	53.96	813.69	260375	189872	112426	302298	-41923
050	13	57.64	574.25	305990	208212	145225	353437	-47447
180	14	45.77	1312.04	167926	150776	66468	217244	-49318
070	15	48.41	969.69	261744	202109	110368	312477	-50733
150	16	51.22	715.64	459530	310436	208503	518939	-59410
170	17	57.78	534.24	285829	209622	138814	348437	-62607
160	18	46.16	855.94	169916	159198	76886	236085	-66169

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 FEB

870 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
100	1	57.36	958.85	595105	259455	215809	475264	119841
050	2	50.93	1264.80	490171	242685	172852	415537	74635
040	3	55.53	1024.97	391973	192466	148805	341271	50702
070	4	52.87	879.17	324908	185605	129768	315373	9535
060	5	48.80	926.13	349302	201328	140983	342311	6990
020	6	36.74	1545.56	420771	265613	161815	427428	-6657
110	7	42.17	776.76	492101	282210	225514	507724	-15623
030	8	35.64	1222.84	438569	281915	183190	465105	-26536
120	9	47.57	952.58	128205	103687	52603	156290	-28085
090	10	30.59	2435.10	107556	103188	38479	141667	-34111
010	11	38.22	905.65	420402	271214	193583	464797	-44395
080	12	32.99	1573.10	373527	270685	147868	418553	-45026

74

"DX 359A, Appendix A, page 74
(Supplemental S.H.E. Report - Volume A)"

AX-2609

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 FEB

B30 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
030	1	45.47	1461.39	193991	150360	70399	220760	-26768
010	2	36.78	2382.44	179684	149658	61284	210941	-31255
020	3	35.10	1553.67	201942	173649	80036	253685	-51743
040	4	31.07	1814.84	324649	262361	128353	390714	-66065

"DX359A, Appendix A, page 75
(Supplemental S.H.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 MAR

880 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
100	1	64.17	850.21	460339	238534	176753	415287	45052
130	2	61.30	924.94	492814	265693	185742	451435	41380
060	3	68.36	685.24	488318	253433	194170	447603	40715
010	4	72.82	626.68	379834	189286	153039	342325	37508
040	5	59.68	1132.67	218635	137901	79706	217607	1028
140	6	53.76	1036.16	376992	234730	144615	379345	-2352
020	7	53.68	948.21	429910	265104	168838	433942	-4032
090	8	61.33	706.38	417621	244562	177227	421789	-4168
080	9	58.04	839.88	423789	255442	173098	428541	-4751
110	10	52.34	925.18	501847	305000	203272	508272	-6426
030	11	58.78	726.52	266355	173095	112110	285205	-18851
050	12	61.35	548.54	365397	225496	168796	394292	-28895
150	13	53.52	721.19	534009	330329	234006	564336	-30328
070	14	50.92	945.09	311588	217491	127317	344807	-33220
120	15	50.15	832.07	275937	206589	120790	327379	-51442
170	16	56.94	536.60	311208	219329	149643	368972	-57764
160	17	49.02	850.00	203179	173073	89030	262104	-58925
180	18	39.77	1303.65	176365	164812	72172	236984	-60619

"DX359A, Appendix A, page 77
(Supplemental S.H.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 MAR

STG	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	100	1	77.37	963.61	748713	299414	266909	566322	182390
	040	2	68.28	1029.50	414980	209577	161299	370876	44104
	050	3	59.64	1250.46	437757	240292	161220	401511	36246
	070	4	67.77	891.54	390834	211813	155836	367649	23187
	030	5	48.05	1324.97	446037	270509	176903	447412	-1375
	090	6	51.51	2587.00	180013	125575	57473	183048	-3035
	110	7	57.25	747.61	535558	295166	244915	540081	-4523
	120	8	69.89	983.00	191266	122800	73550	196350	-5084
	020	9	46.79	1583.24	403476	263414	156269	419683	-16207
	060	10	58.12	917.84	320820	204577	135116	339693	-18873
	010	11	51.50	899.11	435004	269858	198067	467925	-32921
	080	12	40.16	1575.97	427444	316112	173525	489637	-62193

77

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 MAR

B38 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
010	1	40.79	2474.00	245269	172774	78706	251479	-6211
040	2	35.56	1804.64	345450	243693	127493	371186	-25736
030	3	46.27	1162.33	213089	163408	82321	245729	-32640
020	4	32.83	1592.29	193589	178080	77669	255749	-62159

78

AX-2614

"DX359A, Appendix A, page 79
(Supplemental S.H.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 APR

000	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	100	1	67.77	850.11	478850	230703	179537	410240	68610
	060	2	71.62	688.79	500650	241325	194125	435451	65199
	120	3	61.42	939.50	418030	228426	157318	385743	32286
	020	4	58.60	960.25	432724	240011	163715	403725	28999
	040	5	65.34	1046.13	236657	136430	85370	221800	14857
	010	6	~~66.98~~ 66.9	620.86	351619	190183	147812	337994	~~13634~~
	090	7	61.87	711.10	433132	243539	181560	425099	8033
	130	8	55.32	993.08	372774	224654	143539	368192	4582
	080	9	~~55.80~~ 55.7	434.15	362460	218970	142593	361563	~~897~~
	070	10	56.79	949.33	357391	222035	139504	361539	-4149
	030	11	62.62	708.71	289668	174426	120478	294904	-5236
	050	12	65.91	542.89	406373	234080	183168	417248	-10875
	110	13	~~57.18~~ 60.5	737.56	405696	253101	176224	429326	~~-23630~~
	140	14	50.63	906.07	511027	325415	214750	540165	-29138
	170	15	47.88	826.47	202796	163319	89540	252858	-50063
	150	16	58.18	533.73	300774	209359	143659	353019	-52243
	160	17	40.02	1283.46	166311	152224	67671	219896	-53584

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 APR

B70 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
100	1	54.73	849.44	617742	271102	234285	505388	112355
040	2	46.95	1301.70	621008	298832	221593	520425	100584
030	3	51.36	914.01	664185	309925	263954	573879	90306
050	4	60.44	778.03	422269	200605	165761	366366	55903
110	5	50.96	1025.50	436293	214864	167034	381897	54396
020	6	40.46	1357.15	474182	261194	179360	440555	33627
080	7	43.56	1262.50	373844	211347	141900	353246	20597
060	8	47.85	865.97	426822	239430	177012	416442	10380
140	9	40.69	2584.54	197038	129154	62066	191219	5818
070	10	45.07	758.75	488033	265368	217472	482840	5193
120	11	47.28	902.42	275931	169909	112711	282620	-6689
090	12	34.77	1548.65	445856	294585	170893	465478	-19621
130	13	46.41	892.21	174796	125860	73559	199418	-24622
010	14	33.97	1094.39	567652	357993	253081	611074	-43421

"DX359A, Appendix A, page 80
(Supplemental S.H.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 APR

TF A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
010	1	45.91	2302.78	69944	23151	20766	43917	26027

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 APR

830 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
020	1	49.81	1174.62	239499	162415	87558	249974	-10475
010	2	44.35	2463.44	150918	121909	47238	169147	-18228
030	3	24.16	2540.72	183604	193959	72238	266197	-82593

"DX359A, Appendix A, page 82
(Supplemental S.H.E. Report - Volume A)"

S/M/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 MAY

880 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
010	1	68.30	907.66	432831	210917	158450	369367	63464
060	2	67.88	690.54	500895	248548	196300	444848	56047
130	3	61.44	944.69	459484	242499	171461	413961	45524
100	4	67.34	707.21	503565	258829	203711	462540	41025
110	5	59.50	845.29	444851	239176	174326	413502	31349
020	6	70.96	614.51	367743	191765	152526	344292	23457
160	7	67.32	656.25	470797	254480	195837	450316	20480
090	8	65.16	647.89	435109	238364	180262	418626	16483
030	9	64.41	1074.17	236191	135903	83962	219865	16326
050	10	48.19	1048.42	529361	317867	209304	527171	2191
040	11	58.79	542.25	381174	233255	179051	412306	-31132
120	12	53.24	765.79	284816	197270	122600	319870	-35053
150	13	55.74	733.57	187921	144891	82264	227155	-39234
070	14	47.87	953.53	316924	227687	131365	359052	-42126
140	15	50.43	706.29	374278	251156	168618	419774	-45499
170	16	37.13	1318.10	164512	161392	68733	230124	-65612
080	17	40.23	1029.25	293649	241731	130226	371956	-78307

"DX359A, Appendix A, page 83
(Supplemental S.M.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 MAY

870 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
090	1	56.84	947.94	713757	297586	258122	555707	158050
070	2	56.85	609.87	727900	326539	321026	647565	80335
060	3	50.39	951.80	588599	280265	232454	512718	75880
030	4	46.08	1262.50	533804	272856	199258	472114	61690
150	5	48.26	2366.42	272075	127921	83129	211050	61025
080	6	48.28	1063.04	519277	264097	200692	464789	54488
130	7	45.81	1462.12	416263	221773	146300	368073	48190
110	8	49.44	687.75	364494	199586	161318	360903	3590
120	9	35.52	2390.18	343199	224366	117114	341480	1710
050	10	36.61	2587.00	204745	141552	66671	208224	-3479
020	11	34.00	1490.85	571605	351564	224637	576201	-4596
100	12	49.53	647.83	415251	235678	187980	423658	-8406
010	13	40.60	896.46	505027	295693	222534	518227	-13200
140	14	63.67	451.67	179642	117881	86302	204183	-24540
040	15	39.96	812.79	523644	315309	241747	557056	-33413

"DX 359A, Appendix A, page 84
(Supplemental S.H.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING]

1962 MAY]

BTF	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND&IND	TOTAL OPER	PROFIT/LOSS	]
	020	1	48.14	2474.00	453838	165354	129792	295146	158683	]
	010	2	30.79	2587.00	361591	198135	118404	316539	45051	]

AX-2620

"DX 359A, Appendix A, page 85
(Supplemental S.H.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 JUN

880 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
010	1	69.33	896.83	440035	206443	159138	365581	74455
100	2	68.59	704.55	517742	249171	205100	454271	63470
060	3	64.93	686.55	478065	239274	188595	427869	50196
130	4	58.08	937.69	476884	254056	180348	434403	42481
170	5	67.79	641.97	468373	245869	194006	439875	28498
040	6	49.71	1062.09	566479	324966	219331	544297	22182
020	7	67.09	725.25	319258	171708	125667	297375	21883
110	8	54.83	846.78	404411	227732	161591	389323	15088
050	9	59.97	1091.78	229855	136739	82273	219012	10843
080	10	53.73	1013.11	389229	237360	150081	387441	1787
150	11	56.42	761.69	365786	221373	151873	373245	-7466
090	12	56.92	646.74	387131	232414	167351	399765	-12635
180	13	47.48	1305.50	214882	157911	79549	237459	-22577
120	14	53.89	758.00	291641	192304	123461	315765	-24124
160	15	58.26	729.93	206365	147896	88020	235916	-29551
070	16	46.77	955.75	314841	221833	129947	351780	-36940
030	17	53.82	542.53	348371	229324	169130	398454	-50083
140	18	47.44	701.09	358491	244885	163763	408648	-50157

"DX 359A, Appendix A, page 86
(Supplemental S.H.E. Report - Volume A)"

AX-2621

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 JUN

STG	A/C NUM RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
090	1	61.67	942.05	760743	291173	267004	558177	202566
110	2	57.96	1040.49	603554	242862	215235	458097	145457
030	3	51.72	1300.42	595577	268798	210136	478934	116643
070	4	58.03	663.45	689145	299456	289629	589085	100060
060	5	58.29	994.00	502663	219458	186683	406141	96822
020	6	43.16	1645.96	600843	300476	207575	508051	92792
120	7	42.42	2436.17	440003	233839	139394	373233	66770
080	8	47.46	913.29	572096	284515	232513	517028	55068
010	9	48.04	902.44	552596	275652	223124	498776	53820
050	10	47.16	808.51	557294	291589	240315	531903	25391
040	11	42.54	2505.32	238183	143322	74410	217731	20452
130	12	48.50	804.36	327431	183896	137854	321750	5682
140	13	63.40	463.83	190184	118431	90126	208557	-18373
100	14	47.17	637.38	384099	226389	179851	406240	-22141

87

"DX359A, Appendix A, page 87
(Supplemental S.H.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 JUN

BTF	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	020	1	45.43	2474.00	469412	182410	136652	319061	150350
	010	2	29.92	2584.78	328355	188274	108986	297260	31096

"DX 359A, Appendix A, page 88
(Supplemental S.H.E. Report - Volume A)"
AX-2623

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 JUL

A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
130	1	63.58	926.78	521491	251059	190356	441415	80076
010	2	62.94	914.57	395826	202240	146315	348556	47270
060	3	60.81	687.81	461960	243622	185886	429508	32453
100	4	62.79	712.26	480206	252610	195356	447965	32240
020	5	63.14	722.42	309562	172453	123959	296412	13150
110	6	51.87	858.79	401695	232657	161458	394115	7581
050	7	55.20	1102.20	212727	135166	77348	212514	213
170	8	61.24	653.74	439324	255461	188384	443846	-4522
040	9	46.29	1150.25	297581	196382	114461	310842	-13262
150	10	52.27	777.56	364823	226992	154281	381273	-16450
180	11	47.91	1305.50	223528	163860	82590	246451	-22923
080	12	48.54	1035.29	343180	230326	136001	366328	-23147
090	13	53.11	652.30	373397	236856	164825	401681	-28284
120	14	50.19	755.72	271300	194288	117440	311728	-40428
160	15	52.23	731.72	180411	142518	79631	222149	-41738
030	16	52.66	539.97	352412	228050	171389	399439	-47027
140	17	47.90	701.71	371288	250183	168437	418620	-47332
070	18	39.16	949.05	246062	206674	109447	316121	-70059

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 JUL

B70 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
110	1	58.90	944.48	748977	299627	267776	567403	181574
070	2	47.94	1486.48	765137	343168	263166	606333	158803
040	3	61.78	993.44	494166	207483	178662	386145	108021
090	4	58.92	674.13	670015	288834	277351	566184	103831
120	5	53.51	1470.27	465184	215229	154225	369454	95730
060	6	64.49	791.12	420525	178121	159072	337192	83333
080	7	44.35	2437.37	444184	225179	137946	363125	81059
020	8	56.25	722.08	377901	180204	156706	336910	40991
100	9	44.92	910.47	544148	291629	227761	519390	24758
010	10	44.98	897.07	492973	264948	204964	469912	23062
130	11	48.65	719.00	327028	189016	144447	333463	-6434
050	12	47.88	634.84	379133	221103	174511	395614	-16481
030	13	32.72	2587.00	188935	142162	63883	206045	-17110
140	14	56.21	451.67	164165	118227	82875	201101	-36936

S/H/F METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING]

1962 JUL]

BTF	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS	]
	020	1	40.99	2474.00	415474	178349	124376	302725	112749	]
	010	2	30.73	2587.00	348594	190139	113754	303893	44706	]

S/M/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 AUG

880 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
010	1	71.89	901.75	472364	209774	167890	377664	94700
110	2	70.16	664.90	484437	222342	188608	410951	73486
060	~~3~~ 4	64.89	690.33	491731	238941	192272	431213	60518
100	~~4~~ 3	~~67.34~~ 67.3	695.03	522883	253773	209360	463133	~~59750~~ 61
180	5	62.12	857.27	476207	239481	180154	419636	56571
020	6	71.06	723.07	342152	169889	131331	301220	40932
150	7	61.26	764.23	433320	229365	172602	401967	31354
120	8	65.92	771.55	366661	196486	143894	340380	26281
130	9	54.35	1266.35	251356	151719	87817	239536	11819
050	10	53.48	1183.89	228698	144344	83222	227567	1131
040	11	49.34	969.64	418487	257536	165037	422574	-4086
080	12	51.32	1005.50	383229	238051	149935	387986	-4757
170	13	54.72	636.13	386133	245814	172421	418234	-32102
160	14	55.39	693.86	193604	144302	85291	229593	-35989
090	15	48.63	770.82	342386	229301	149193	378494	-36108
030	16	~~54.95~~ 54.6	548.74	360362	225797	171715	397512	~~-37150~~
070	17	43.52	955.11	296815	219178	125522	344700	-47884
140	18	42.27	831.76	190009	162485	85600	248085	-58075

92

"DX359A, Appendix A, page 92
(Supplemental S.H.E. Report - Volume A)"

AX-2627

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 AUG

B70 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
110	1	63.63	950.37	807880	298438	281461	579900	227980
010	2	54.22	913.36	634548	279707	242281	521988	112560
120	3	66.24	1152.73	397519	161138	130822	291960	105558
090	4	77.12	573.94	491117	189687	198305	387993	103125
100	5	52.41	882.28	623042	288877	248940	537817	85224
020	6	61.65	718.92	401102	178517	161527	340044	61058
070	7	50.25	1044.73	462201	226561	175571	402132	60069
060	8	67.67	846.90	311327	138299	113082	251380	59947
080	9	45.60	1101.74	564638	291014	220267	511281	53357
040	10	58.56	826.26	353777	167297	137826	305123	48655
140	11	47.95	941.24	523122	270082	210841	480923	42199
030	12	43.28	992.72	407301	231656	166722	398378	8924
130	13	52.34	689.07	326997	179265	143395	322660	4337
050	14	39.74	829.84	277914	191267	126473	317740	-39824

"DX359A, Appendix A, page 93
(Supplemental S.H.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 AUG

B7F A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
090	1	48.02	1706.72	516341	139936	160623	300559	215782
050	2	44.73	1517.29	526734	164137	171903	336040	190694
060	3	42.19	2458.00	440831	135992	129723	265715	175116
100	4	56.46	1377.06	411912	106281	130807	237087	174825
120	5	46.74	2264.56	404012	116264	117610	233875	170137
010	6	39.86	1911.74	614062	246420	199240	445660	168403
080	7	44.97	946.30	542244	174169	205594	379763	162485
040	8	44.94	1176.48	501946	160530	178982	339512	162433
020	9	43.20	2443.13	417708	172206	123195	295401	122307
030	10	42.81	1495.76	312254	106193	103473	209666	102589
110	11	50.76	1778.78	254505	74895	77626	152522	101983
070	12	40.93	1061.54	327518	117376	126663	244038	83480
130	13	34.38	2587.00	32559	22812	10140	32953	-394

94

"DX 359A, Appendix A, page 94
(Supplemental S.I.E. Report - Volume A)"

AX-2629

"DX359A, Appendix A, page 95
(Supplemental S.H.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TARLE AA COMPOSITE ROUTING

1962 SEP

000	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	010	1	73.69	895.64	457275	198897	162018	360915	96360
	070	2	69.92	689.49	485676	223490	185588	409078	76598
	110	3	64.50	670.25	511364	257462	210516	467978	43386
	100	4	65.42	659.91	394655	196492	158117	354609	40046
	020	5	69.96	726.82	308113	156927	119100	276027	32086
	140	6	62.64	769.20	412528	220369	162737	383106	29422
	160	7	67.26	797.72	337530	183314	131607	314921	22609
	050	8	59.84	1212.00	244402	137070	84889	221960	22442
	180	9	53.76	850.71	395500	229281	158910	388192	7308
	040	10	59.03	657.17	324327	190722	140601	331323	-6995
	170	11	60.18	640.87	397652	234262	170854	405117	-7465
	120	12	48.45	963.57	404442	253158	163301	416459	-12017
	190	13	60.46	756.00	154739	105104	63813	168917	-14178
	090	14	52.86	787.71	362486	224463	152487	376950	-14464
	080	15	47.81	1031.54	323034	219363	130379	349742	-26709
	150	16	69.03	389.50	195866	133073	100039	233111	-37245
	060	17	45.18	955.28	295291	212288	123516	335804	-40513
	130	18	46.94	850.00	196611	156104	84326	240430	-43819
	030	19	35.93	1304.02	151373	138481	62049	200530	-49157

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 SEP

B70 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
070	1	65.79	674.88	670880	258271	270041	528313	142567
100	2	60.25	881.10	712234	296965	297991	594955	117278
090	3	62.36	965.16	460102	194781	160145	354926	105176
050	4	62.27	737.14	430159	188539	171157	359696	70463
020	5	62.14	722.68	350112	160071	140261	300331	49781
060	6	59.14	629.21	422678	203246	178071	381317	41361
130	7	62.50	910.50	243894	118523	86298	204821	39075
080	8	58.77	910.50	230754	122760	85450	208210	22544
040	9	46.00	1023.58	351842	194028	140685	334713	17129
030	10	40.50	889.06	415206	251636	183164	434800	-19595
140	11	56.94	544.36	180250	117455	85731	203186	-22936
110	12	56.71	426.15	316214	189180	165828	355008	-38793
120	13	55.20	465.18	258172	166017	131920	297938	-39765
010	14	36.21	921.18	398901	258517	183716	442232	-43332

"DX359A, Appendix A, page 97
(Supplemental S.H.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 SEP

STF	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	150	1	50.10	1798.22	579949	194033	173555	367588	212360
	040	2	49.56	1329.94	514457	184857	170804	355661	158796
	020	3 4	44.46	1871.47	489394	192606	151601	344207	145188
	070	4 3	50.02	1427.96	455075	168361	149649	318010	137065
	060	5	47.67	1099.53	460574	180467	164477	344944	115630
	090	6	49.48	1177.56	362019	150699	127685	278383	83636
	100	7	32.94	1783.71	472021	224502	168324	392826	79195
	110	8	41.03	1198.10	400066	179529	145862	325391	74675
	030	9	38.73	2497.09	325979	154809	99178	253987	71992
	120	10	30.98	1809.94	452723	228282	163049	391330	61393
	140	11	46.17	1044.30	119934	48108	44543	92651	27283
	130	12	49.10	710.48	73608	34734	31710	66444	7164
	050	13	26.17	1721.88	408834	244863	160942	405805	3029
	080	14	27.14	2586.41	226086	151713	77497	229210	-3123
	010	15	14.83	1923.33	112253	143090	57690	200781	-88527

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 OCT

880 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
040	1	65.93	903.57	431337	210287	159157	369444	61892
050	2	66.24	685.37	495424	240906	193980	434885	60541
110	3	63.52	698.25	446596	224736	177681	402417	44179
020	4	54.10	1212.00	236854	148566	86117	234683	2171
070	5	57.22	664.02	468973	265883	203200	469083	-111
140	6	~~58.55~~ 55.1	796.38	347651	208989	141852	350841	~~-3188~~
010	7	60.31	633.75	308787	184166	134466	318633	-9846
180	8	~~51.49~~ 52.0	835.99	357584	220358	147938	368296	~~-10712~~
030	9	58.06	653.86	325303	195377	142759	338136	-12833
160	10	56.13	860.87	262141	172228	108203	280431	-18292
150	11	56.13	577.71	285885	191953	130811	322764	-36879
060	12	43.91	995.02	45854	306732	194269	501000	-42460
120	13	57.12	528.21	173055	134954	83769	218723	-45668
090	14	43.01	969.49	278032	210310	117973	328283	-50251
170	15	51.99	644.40	353461	242866	162666	405532	-51671
080	16	34.91	1201.51	162873	155246	70098	225344	-62471
130	17	40.70	835.44	179864	164456	82808	247264	-67400
100	18	36.21	1001.21	263206	232011	121666	353677	-90472

"DX359A, Appendix A, page 98
(Supplemental S.H.E. Report - Volume A)"

AX-2634

"DX359A, Appendix A, page 99
(Supplemental S.H.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 OCT

B70 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
090	1	53.42	932.21	613546	276221	229619	505840	107707
100	2	56.53	672.68	646029	290673	278430	569104	76926
080	3	70.48	554.95	401666	175864	170495	346359	55307
050	4	58.97	856.88	346059	161411	133418	294829	51230
060	5	56.58	637.04	481143	235199	204421	439621	41522
020	6	55.91	723.99	358895	175509	149567	325076	33819
140	7	51.82	899.16	220501	127485	84186	211672	8829
010	8	41.67	893.10	445899	256325	194018	450343	-4443
070	9	46.10	842.59	185938	124762	78001	202763	-16824
130	10	51.02	672.35	172768	124925	79049	203974	-31206
040	11	37.45	944.67	331633	218673	148687	367361	-35728
120	12	54.21	467.53	262827	169909	135013	304921	-42094
110	13	54.59	436.94	318946	193732	167803	361534	-42588
030	14	34.42	867.39	431518	297645	206665	504309	-72792

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 OCT

BTF	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	030	1	39.17	1824.61	584077	237034	192630	429664	154413
	020	2	43.53	2418.53	478635	183903	140383	324286	154350
	080	3	47.93	1156.62	507297	189985	176428	366413	140884
	070	4	35.74	1798.98	600383	258134	205175	463309	137074
	140	5	33.28	2272.65	527839	244298	172534	416832	111007
	130	6	41.57	1194.57	466209	201334	169294	370629	95581
	050	7	37.86	2476.07	384645	180444	118471	298916	85729
	090	8	35.20	1286.93	559063	264230	215365	479596	79467
	160	9	36.78	1702.49	422988	198231	146361	344593	78395
	060	10	40.89	996.61	434485	189303	171529	360832	73652
	120	11	44.96	1169.69	351501	160745	128881	289626	61875
	040	12	39.71	2093.07	263629	133156	83412	216568	47061
	010	13	35.53	944.54	470865	223007	206252	429259	41606
	100	14	30.37	2284.86	329375	187301	112393	299694	29681
	110	15	38.91	1010.64	326663	165392	131665	297056	29607
	150	16	43.21	2560.55	178246	101076	52672	153748	24498
	170	17	39.58	937.33	76466	32269	31907	64177	12290

"DX359A, Appendix A, page 100
(Supplemental S.H.E. Report - Volume A)"

AX-2635

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 NOV

SEQ	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	020	1	59.85	914.19	373700	200137	142657	342794	30906
	070	2	60.54	690.33	428412	234111	173888	407999	20414
	140	3	71.85	553.20	362032	190860	156425	347286	14747
	160	4	61.25	857.25	282797	174134	112275	286409	-3612
	040	5	60.13	658.17	336611	195754	146143	341897	-5286
	030	6	59.21	730.94	252767	157344	105059	262403	-9636
	050	7	67.02	467.42	300169	171002	140497	311499	-11330
	010	8	47.63	913.36	436103	275794	182564	458358	-22255
	060	9	47.34	1212.00	173731	131641	66785	198426	-24695
	080	10	48.04	1091.00	164550	127879	64113	191992	-27442
	130	11	47.38	951.51	213093	162561	87656	250217	-37123
	120	12	47.63	667.71	385260	266196	181459	447656	-62396
	170	13	43.17	845.55	238197	193863	108906	302769	-64572
	110	14	41.41	977.07	413497	297563	182126	479689	-66191
	180	15	44.00	681.28	231559	194686	111771	306457	-74898
	150	16	34.12	806.25	98998	125271	51321	176592	-77994
	100	17	37.94	843.67	251987	220047	119184	339231	-87244
	090	18	29.70	790.79	149208	170628	81827	252455	-103247

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 NOV

870 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
120	1	54.75	656.88	615121	288375	271986	560361	54759
010	2	59.42	709.39	348643	165438	143559	308997	39645
110	3	65.54	826.76	321134	151787	132432	284219	36915
040	4	51.93	691.10	444041	218197	191163	409361	34681
020	5	56.09	824.41	307257	155407	123135	278542	28715
030	6	53.10	636.78	415543	215758	183048	398806	16737
050	7	46.65	699.24	355271	195522	159925	355447	-177
070	8	42.62	874.20	415285	239379	176571	415950	-665
090	9	47.70	772.77	255889	161118	112235	273353	-17465
080	10	38.90	500.07	221952	137253	105907	243160	-21208
130	11	42.19	759.69	425756	253242	194180	447422	-21666
060	12	54.92	458.08	318209	138205	164093	352298	-34089
100	13	61.40	385.73	195357	126235	106342	232577	-37220

"DX359A, Appendix A, page 103
(Supplemental S.H.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 NOV

STF	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	070	1	61.58	951.04	785055	223304	264307	487611	297444
	110	2	45.22	1810.96	648365	225085	199276	424361	224004
	090	3	42.07	1517.53	517984	207533	175625	383158	134826
	120	4	38.46	1243.04	589499	254538	219753	474291	115208
	060	5	45.59	1255.33	446503	175853	156693	332546	113957
	140	6	45.73	1168.38	443665	181600	157822	339422	104243
	040	7	47.09	1815.88	354818	145762	110568	256329	98489
	130	8	38.15	2530.46	403453	182506	123090	305596	97858
	020	9	36.32	2442.45	377388	175771	117206	292978	84411
	030	10	29.45	2587.18	474661	243253	156847	400100	74562
	160	11	36.81	1678.33	385569	181600	133479	315079	70489
	080	12	45.62	962.46	348646	154114	133807	287921	60725
	150	13	60.77	657.06	309663	130022	126973	256995	52668
	100	14	43.62	1404.17	241329	125285	83940	209225	32103
	170	15	30.99	1704.00	341804	188683	126631	315315	26489
	050	16	38.86	889.08	323003	162170	139001	301171	21832
	010	17	33.96	937.55	410058	208542	183733	392275	17783

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 DEC

880 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
020	1	61.16	898.25	389735	208652	147676	356328	33406
070	2	57.91	893.06	423883	239473	174571	414044	9838
140	3	60.36	556.25	350485	195879	153606	349485	1000
010	4	61.35	891.16	468491	280590	190143	470733	-2243
150	5	61.83	836.60	286039	175360	111216	286577	-6545
130	6	54.69	967.90	260439	172314	100145	272459	-12020
050	7	64.48	474.45	320543	187010	150764	337773	-17230
110	8	53.68	727.95	338359	220388	145749	366137	-27778
060	9	45.34	888.01	207003	155022	87192	242214	-35214
080	10	46.43	955.58	312226	222428	128508	350937	-38711
090	11	45.30	780.29	259259	189969	114616	304586	-45333
030	12	47.46	719.02	200013	158109	90750	248859	-48850
120	13	46.01	673.24	356263	256467	168840	425307	-69045
100	14	41.39	842.33	291954	232240	131564	363804	-71850
160	15	45.63	794.77	311591	240458	143925	384384	-72792
040	16	44.32	676.44	268543	213750	131186	344936	-76388
170	17	44.38	744.94	455104	324418	207862	532280	-77176

AX-2640

"DX359A, Appendix A, page 105
(Supplemental S.H.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 DEC

070 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
130	1	56.22	685.19	580341	267948	249035	516982	63359
020	2	60.92	856.32	308664	147996	116647	264643	44022
060	3	56.72	688.50	391697	185469	162624	348092	43604
120	4	67.57	572.88	360869	168902	153633	322535	38335
010	5	57.74	738.14	318587	155730	129224	284954	33633
080	6	48.57	871.61	440339	233289	178019	411308	29030
040	7	52.70	681.89	424259	212250	183941	396191	28068
140	8	47.25	787.47	446489	241643	191463	433107	13381
030	9	48.61	630.95	375559	213561	173139	386700	-11141
090	10	52.37	462.09	61845	44515	32614	77129	-15284
050	11	50.48	539.00	244161	149073	120726	269800	-25638
100	12	45.54	768.29	206059	147153	92933	240086	-34028
070	13	55.17	450.54	288538	176840	149909	326749	-38210
110	14	57.98	389.67	181252	128441	101472	229913	-48661

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 DEC

BTF	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	070	1	54.96	987.78	641219	211758	221608	433366	207853
	110	2	42.95	1826.26	606292	226326	189548	415874	190417
	090	3	47.51	1466.79	594873	212909	193275	406183	188690
	060	4	54.24	1210.91	503214	172772	168704	341476	161740
	130	5	40.31	1575.73	635393	261080	215646	476726	158672
	150	6	49.91	1174.69	507507	191386	173877	365263	142244
	120	7	47.10	1521.06	458603	176448	149627	326075	132528
	050	8	49.60	1778.29	385358	152466	118711	271177	114181
	170	9	42.64	1725.97	431792	183278	141706	324984	106808
	040	10	32.97	2593.56	469823	225175	148997	374173	95651
	030	11	36.74	2412.44	351200	168867	109245	278112	73088
	080	12	44.86	997.05	384306	168489	145993	314482	69825
	020	13	46.90	902.21	353627	154627	138126	292753	60873
	160	14	61.24	681.87	300065	127914	120421	248335	51731
	140	15	36.57	1657.45	333799	171281	117519	288799	45000
	010	16	36.63	976.24	366932	184712	154679	339391	27541
	100	17	40.96	1543.19	202751	119390	70487	189877	12874

"DX 359A, Appendix A, page 107
(Supplemental S.H.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1963 JAN

888 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
070	1	58.41	691.74	426832	202400	153600	356000	70832
140	2	74.85	553.18	379717	166324	142687	309010	70707
020	3	57.76	906.19	351526	168081	117596	285676	65850
010	4	49.05	906.82	471610	241147	168873	410021	61589
060	5	57.65	867.32	269411	130800	90018	220818	48592
050	6	67.49	469.50	326710	154664	134984	289648	37062
150	7	59.33	879.92	265692	148098	92616	240714	24978
120	8	54.98	645.53	479391	268444	188143	456587	22804
130	9	51.79	937.67	236574	142373	82130	224504	12071
030	10	54.40	721.48	227856	131184	85459	216643	11214
080	11	46.29	960.42	286252	173880	101838	275717	10535
090	12	48.81	769.83	251089	147322	94384	241705	9384
180	13	53.34	689.65	349235	205593	135051	340644	8591
110	14	49.60	701.28	327716	192308	131365	323674	4042
040	15	49.16	673.27	242696	149038	99720	248757	-6062
170	16	44.92	766.58	291095	196413	121899	318311	-27216
100	17	50.57	759.65	266040	196217	105084	301301	-35261
160	18	46.58	731.89	35181	58192	14925	73117	-37936

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1963 JAN

870 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
110	1	55.69	695.44	596209	280237	232168	512405	83803
040	2	52.60	733.64	462659	212834	167228	380063	82590
020	3	64.28	847.00	306907	138882	102703	241585	65322
010	4	59.14	718.91	333729	157055	122549	279604	54125
080	5	49.06	991.58	428704	227876	155231	383107	45597
060	6	58.69	668.32	353383	184132	136081	320214	33170
050	7	64.35	542.58	274277	141177	113111	254288	19989
130	8	60.97	637.52	269395	147540	104655	252195	17200
030	9	50.21	629.84	350627	203211	146148	349359	1268
120	10	42.51	783.51	372663	230446	154289	384734	-12071
090	11	45.17	760.91	232015	163438	97169	260607	-28591
070	12	50.39	488.12	299722	192474	144308	336782	-37060
100	13	56.47	395.14	161348	122236	84967	207203	-45855

AX-2644

"DX359A, Appendix A, page 109
(Supplemental S.H.E. Report - Volume A)".

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1963 JAN

STF	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	070	1	60.25	940.73	712652	232641	216135	448776	263876
	110	2	44.15	1844.17	688340	262087	188459	450546	237795
	120	3	65.14	1453.06	462990	189942	127996	317938	145051
	060	4	51.81	1352.29	465595	184408	137008	321416	144179
	100	5	38.45	2044.00	532903	244106	152937	397042	135861
	050	6	54.24	1772.38	378752	153062	100416	253478	125274
	030	7	38.87	1819.22	494840	232439	145445	377884	116956
	040	8	36.30	1838.07	544480	260972	167295	428267	116213
	150	9	45.52	1164.10	424408	195832	136508	332340	92068
	170	10	37.42	1717.40	410257	210772	126855	337627	72631
	160	11	51.72	1000.22	345274	159994	114139	274133	71140
	080	12	45.87	1007.98	349175	169026	118588	287614	61561
	130	13	37.28	1606.61	367324	195534	115485	311020	56304
	140	14	32.37	1675.87	366805	213230	122481	335711	31093
	020	15	42.86	877.94	275582	152691	103390	256081	19501
	010	16	34.66	984.75	353900	199182	138477	337659	16241
	090	17	38.59	1568.55	191372	132446	61488	193934	-2562

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1963 FEB

880 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
070	1	61.88	688.28	399190	177585	140462	318047	81143
010	2	49.51	901.73	425288	214559	152045	366603	58682
140	3	71.50	555.60	320437	143452	121908	265360	55077
120	4	49.84	731.50	474599	245697	179891	425589	49011
020	5	54.76	903.84	301569	151103	103136	254239	47330
050	6	58.02	872.58	242275	117841	80862	198703	43572
060	7	66.05	665.09	247944	125107	103666	228773	19171
160	8	55.74	856.22	224467	129917	80843	210760	13707
130	9	51.52	960.36	216169	128016	74863	202879	13290
110	10	48.25	710.21	322397	184545	129389	313934	8464
080	11	45.10	954.67	243212	152834	87698	240532	2680
180	12	50.25	688.02	277253	167188	109353	276541	712
090	13	46.22	778.76	226382	138719	87291	226011	371
040	14	50.27	663.31	207183	126557	84528	211085	-3902
030	15	47.72	731.11	184742	118036	72974	191010	-6268
170	16	41.37	747.23	238976	172851	105281	278131	-39155
150	17	39.61	740.00	35283	58318	16136	74454	-39171
100	18	34.85	857.60	209613	168833	89404	258238	-49625

AX-2646

"DX 359A, Appendix A, page 111
(Supplemental S.H.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1963 FEB

870 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
040	1	58.38	691.60	479357	213359	178333	391691	87666
020	2	57.32	856.61	227215	120810	79852	200662	26553
110	3	49.61	679.79	460954	242563	191898	434461	26493
080	4	47.02	873.58	347204	193728	129238	322966	24237
050	5	62.08	536.21	274252	139269	115537	254805	19447
060	6	50.22	686.64	320997	173152	129582	302734	18263
010	7	49.41	723.11	226039	131891	89937	221828	4211
130	8	52.25	586.51	312751	179741	135884	315625	-2874
030	9	45.72	632.47	299465	185512	129970	315482	-16017
120	10	39.98	797.35	304115	202258	129840	332099	-27984
100	11	53.69	389.27	136949	107070	74043	181113	-44165
090	12	39.27	734.48	218220	167568	99556	267123	-48904
070	13	47.03	423.34	216957	160495	117315	277810	-60852

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1963 FEB

BTH	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	050	1	40.14	1760.77	544578	231147	156951	388098	156480
	080	2	51.19	952.53	476052	187896	154016	341912	134140
	160	3	45.78	1169.08	409437	184727	131285	316012	93425
	130	4	46.62	1433.66	356495	159499	107021	266520	89975
	120	5	31.31	2443.16	446107	239172	132254	371426	74681
	090	6	36.22	1296.22	503692	255311	176388	431699	71993
	060	7	45.67	1757.91	270569	133829	76949	210778	59791
	140	8	33.53	1516.98	444589	239330	148014	387345	57244
	180	9	35.53	1710.73	353281	187793	111442	299236	54045
	170	10	43.00	1259.18	304615	154965	98165	253130	51486
	070	11	43.28	1196.04	270657	136147	89186	225333	45324
	030	12	36.86	1668.98	204187	124431	64921	189352	14835
	020	13	37.15	876.44	299105	169937	120784	290721	8384
	100	14	35.81	996.73	246794	149053	94350	243403	3393
	110	15	39.37	1453.71	169078	113134	54711	167845	1233
	150	16	29.24	1663.55	290777	189008	102560	291567	-790
	010	17	27.29	952.91	259864	185594	118545	304139	-44275

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1963 MAR

A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
050	1	73.64	896.36	340722	129325	101901	231226	109496
070	2	63.65	685.98	454183	199185	158632	357817	96366
080	3	56.35	964.45	368139	182264	120021	302285	65855
010	4	48.66	902.25	456025	236099	164861	401780	54245
060	5	70.34	485.86	337253	152864	134687	287551	49702
020	6	53.69	908.69	341059	175279	117060	292339	48720
140	7	70.49	556.43	323009	155184	124253	279437	43572
040	8	61.40	685.25	283809	140080	103189	243269	40538
120	9	49.61	725.76	499844	260261	191646	459906	39938
100	10	54.59	877.51	264131	153447	95203	248651	15480
090	11	48.81	767.82	256649	150783	96440	247224	9425
180	12	51.44	693.64	320925	189786	125290	315075	5850
030	13	49.49	732.79	218985	133718	84863	218581	405
110	14	47.61	707.41	356059	21624	144179	355803	255
130	15	46.48	971.82	215014	142101	77531	219633	-4619
170	16	44.85	737.70	290350	198494	124381	322875	-32525
160	17	38.18	870.04	273331	200985	111649	312633	-39302
150	18	36.27	726.54	39368	66826	18987	85813	-46445

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1963 MAR

A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
040	1	61.60	683.60	469290	206659	171120	377778	91512
010	2	57.08	707.70	35877[illegible]	169357	134940	304297	54478
110	3	51.71	674.44	599344	299109	245882	544991	54354
080	4	51.48	880.21	359563	191274	127455	318729	40834
020	5	58.48	807.68	249799	133987	89319	223306	26493
060	6	52.68	683.60	315965	169455	124637	294092	21874
030	7	52.47	640.70	398949	217818	161328	379146	19803
050	8	63.64	535.80	244761	130962	101256	232218	12543
130	9	54.98	595.06	362113	201517	152834	354351	7763
120	10	41.56	768.75	381671	238532	161964	400496	-18825
090	11	47.61	755.38	204899	146141	85528	231669	-22771
100	12	59.87	390.37	177589	127997	91466	219464	-41874
070	13	51.42	455.13	286834	186595	142181	328775	-41941

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1963 MAR

BTF	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	080	1	55.53	941.42	692053	238167	216131	454298	237755
	050	2	39.24	1804.25	566076	244506	163224	407731	158345
	060	3	56.33	1802.22	399994	153212	103812	257024	142970
	160	4	47.67	1167.03	478059	205679	150405	356084	121975
	130	5	45.63	1463.78	423136	186765	126225	312990	110146
	090	6	37.04	1498.23	544859	265556	178138	443695	101165
	120	7	32.03	2458.04	504452	260179	147116	407295	97156
	140	8	35.42	1571.58	542190	273132	173469	446600	95590
	070	9	45.09	1288.91	374880	172535	118554	291089	83791
	030	10	47.40	1613.44	286843	136955	82872	219828	67015
	180	11	35.52	1789.08	383314	203889	119565	323453	59861
	170	12	43.25	1242.11	287601	154638	93720	248358	39243
	100	13	39.86	989.67	330321	179432	120920	300352	29969
	020	14	42.68	886.23	286078	155719	107581	263300	22779
	150	15	30.30	1654.47	306774	196075	106007	302082	4691
	110	16	39.58	1362.19	167671	117940	55632	173572	-5901
	010	17	31.55	955.75	262624	173378	109596	282974	-20351

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1963 APR

880 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
060	1	69.94	690.33	496431	193056	165865	358921	137510
040	2	75.45	867.06	356309	128254	106418	234672	121638
010	3	~~56.54~~ 56.6	882.11	523279	232360	177974	410334	~~112945~~
020	4	61.46	915.05	390120	166208	125594	291801	98319
150	5	56.40	837.36	452715	213031	157315	370346	82369
070	6	57.09	955.58	369808	177842	120151	297993	71814
050	7	72.16	474.08	362398	154097	144364	298461	63937
030	8	65.35	671.41	301359	135257	107180	242437	58922
080	9	54.55	786.50	284599	142532	100921	243452	41147
100	10	57.33	719.20	334204	172316	123164	295480	38726
110	11	52.42	673.68	434038	226806	170550	397355	36683
140	12	~~51.67~~ 51.7	882.63	249758	147060	89180	236240	~~13518~~
120	13	50.69	684.87	311981	183015	123992	307007	4973
170	14	41.68	482.30	24085	19963	13164	33126	-9041
130	15	46.81	738.17	301207	193281	125345	318626	-17419
090	16	40.03	843.78	282425	192703	113642	306346	-23921
160	17	46.26	909.46	88252	82318	33073	115391	-27140

S/M/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1963 APR

B70 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
010	1	62.97	703.88	397090	167896	143303	311200	85891
120	2	57.97	690.82	482746	217077	181123	398200	84546
050	3	55.32	672.00	588506	272226	234523	506749	81756
020	~~4~~ 5	64.21	829.89	293025	132527	98865	231392	61633
110	~~5~~ 4	50.84	832.50	414405	211357	151191	362549	~~51857~~
080	6	55.12	683.74	387279	185764	150040	335804	51475
070	7	47.37	751.56	426198	232105	171034	403140	~~23058~~
130	8	59.86	527.65	287938	149892	122874	272766	15172
040	9	54.98	748.37	271954	155269	103800	259070	12885
060	~~10~~ 11	54.21	608.11	358461	196363	151123	347486	~~10975~~
030	~~11~~ 10	50.02	631.02	387209	216772	161607	378379	8830
100	12	60.37	421.75	219336	135058	106581	241639	-22303
090	13	54.94	424.31	308091	186878	152788	339666	-31576

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1963 APR

BTF A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
080	1	60.68	946.33	748209	236203	226212	462415	285794
050	2	47.95	1716.77	709759	248525	191593	440117	269641
120	3	38.55	2473.50	612056	259193	164927	424120	187936
090	4	42.16	1454.92	673576	279264	210033	489297	184279
060	5	50.30	1803.55	428409	149859	108291	258151	170258
130	6	51.53	1516.68	489121	184872	137257	322129	166992
140	7	38.72	1544.04	628739	285840	193551	479391	149348
070	8	46.48	1305.09	472273	190019	143225	333244	139034
180	9	43.60	1733.51	466716	198321	134266	332586	134130
160	10	47.60	1165.93	473541	200529	149570	350099	123442
030	11	50.73	1483.55	327114	139910	93961	233870	93246
170	12	46.62	1234.13	379409	176814	120915	297729	81671
150	13	36.70	1648.45	404986	203423	127510	330933	74053
100	14	45.46	986.96	353419	168362	122412	290774	62645
020	15	48.23	869.82	323185	150135	114784	264918	58267
110	16	45.87	1358.12	266179	142622	82393	225016	41163
010	17	37.34	930.73	360731	189932	140638	330570	30159

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1963 MAY

A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
150	1	60.16	1254.63	529927	214827	154714	369540	160387
060	2	71.48	691.10	501969	190008	165423	355431	146537
020	3	62.10	999.71	520846	211714	162882	374596	146250
170	4	65.08	647.54	442219	194443	160067	354510	87708
030	5	54.77	788.41	512454	239987	184769	424756	87699
040	6	75.87	516.69	351139	143816	132139	275955	75184
070	7	57.22	963.73	358745	172029	116448	288477	70267
010	8	56.59	720.40	451859	215782	165926	381708	70151
100	9	50.76	711.72	367763	188796	140677	329473	38290
130	10	60.02	676.43	355994	184123	133794	317916	38077
050	11	51.59	1018.15	235471	131398	79129	210527	24944
140	12	49.91	673.06	393451	211747	156836	368583	24867
080	13	47.71	779.52	261091	150085	100301	250386	10705
120	14	47.56	655.30	314907	198383	132063	330446	-15539
090	15	39.66	1032.79	275687	185505	105954	291459	-15772
110	16	44.95	646.54	298939	190793	128078	318870	-19931
160	17	47.17	546.10	291264	180934	135687	316621	-25356

S/M/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1963 MAY

B70 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
120	1	57.40	679.54	595910	266309	231497	497806	98104
020	2	66.49	734.66	332737	149569	115700	265269	67468
110	3	69.50	505.58	432492	197784	178442	376226	56266
010	4	58.48	662.92	395152	189126	151533	340659	54493
060	5	53.70	668.81	445126	220024	177238	397262	47864
080	6	64.69	720.98	321346	160679	115883	276562	44784
100	7	59.07	592.18	404124	199369	162692	362061	42063
040	8	60.05	847.00	265693	131849	92467	224317	41376
130	9	70.50	663.00	180970	86645	65938	152583	28387
030	10	51.03	804.28	318004	174094	123820	297914	20090
050	11	50.31	642.44	410542	223049	169512	392561	17980
090	12	40.86	929.14	361799	226535	144655	371190	-9392
070	13	52.31	433.06	369997	218547	185472	404019	-34022

120

"DX359A, Appendix A, page 120
(Supplemental S.H.E. Report - Volume A)"

AX-2655

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1963 MAY

DTF	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	030	1	39.40	2001.60	645032	269467	180737	450204	194828
	090	2	49.65	1356.32	574618	216085	166945	383031	191588
	080	3	49.45	841.03	686687	271957	237767	509724	176963
	110	4	55.51	932.24	549863	200813	179250	380064	169800
	020	5	40.46	2417.00	413139	187617	110254	297871	115268
	130	6	47.17	945.83	463842	200987	160643	361630	102212
	100	7	45.80	1256.88	398849	176051	124015	300066	98774
	120	8	40.96	1249.00	435100	208170	138928	347098	88002
	050	9	43.15	1310.61	357821	176382	112101	288483	69338
	040	10	44.91	992.18	367819	174592	129453	304045	63773
	160	11	37.11	1681.92	365474	191961	110799	302760	62715
	070	12	52.21	779.64	335100	152636	121266	273902	61198
	010	13	42.35	925.29	381440	184723	144662	329385	52055
	170	14	31.26	1586.20	502774	286275	171683	457957	44817
	140	15	32.06	2390.10	339790	198520	100743	299263	40527
	150	16	34.29	1315.94	350606	203509	126514	330023	20583
	060	17	25.76	1394.18	257306	196059	100492	296552	-39246

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1963 JUN

888 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
130	1	76.39	1262.50	649674	206890	174417	381307	268367
040	2	70.22	787.43	638316	231282	206756	438038	200278
020	3	69.99	987.39	575463	206720	172359	379079	196384
080	4	77.15	690.33	547109	190319	175272	365591	181518
170	5	78.05	641.15	512575	189185	172826	362011	150564
010	6	68.29	703.66	568832	224000	195615	419614	149218
070	7	67.66	949.98	436666	176544	134099	310643	126023
140	8	59.00	1122.25	447188	192920	135762	328683	118505
030	9	77.15	718.97	387794	144707	125091	269798	117996
120	10	61.69	685.47	476485	205389	170777	376166	100319
160	11	69.39	707.63	423950	180135	146765	326901	97049
110	12	58.50	777.23	383386	172435	134349	306784	76602
060	13	71.20	690.38	286970	122506	95538	218044	68925
180	14	64.19	645.09	408367	191829	150437	342265	66101
100	15	54.05	1022.05	363977	180179	121181	301360	62617
090	16	54.94	786.50	297811	147573	107016	254589	43222
050	17	57.91	734.81	264496	133159	95680	228839	35657
190	18	50.36	638.98	321088	181245	131870	313115	7973
150	19	46.24	766.11	285755	174080	114063	288143	-2388

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1963 JUN

870 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
130	1	66.66	673.84	704117	268414	257738	526152	177965
080	2	80.70	837.16	512054	187577	159863	347440	164616
060	3	73.44	571.59	558811	211611	208858	420469	138342
120	4	76.61	510.92	502799	199938	197753	397691	105108
040	5	65.48	810.36	444494	190256	154554	344810	99686
020	6	67.10	627.01	462688	193851	169613	363464	99224
100	7	53.53	930.78	456000	219442	159551	378993	77007
050	8	60.02	631.67	474447	219008	182154	401162	73285
090	9	77.79	653.87	346328	152010	122628	274638	71682
030	10	75.33	517.23	361701	151930	141774	293704	67997
010	11	63.70	574.47	394453	177894	154438	332332	62121
070	12	60.30	435.06	456738	230710	213316	444027	12711
110	13	53.29	370.40	198667	136063	111609	247672	-49005

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1963 JUN

A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
030	1	66.91	1270.82	1036159	271507	277045	548552	487607
100	2	66.13	951.37	797134	229526	233279	462805	334331
110	3	50.96	2597.00	750681	252562	183464	436026	314653
130	4	66.73	1164.50	658373	194269	181530	375799	282574
160	5	48.19	1341.40	753758	282876	223474	506350	247408
150	6	61.81	1523.55	584765	188553	157183	345737	239028
040	7	61.31	1030.38	499915	172360	152160	324520	175395
140	8	46.70	1394.29	542901	218409	159122	377532	165370
170	9	46.00	2377.54	464873	186054	119356	305410	159468
020	10	68.33	1095.01	414353	144917	118684	263601	150753
010	11	54.15	882.43	478287	179140	163386	342526	135761
070	12	38.86	1463.84	485291	231907	151159	383065	102226
120	13	37.43	2245.83	439174	221413	125364	346778	92400
080	14	45.23	1127.47	419393	193039	138651	331690	87703
060	15	51.71	1299.36	316013	142030	91653	233684	82334
090	16	57.96	757.82	355917	155245	120504	275748	80169
050	17	64.12	492.98	192107	100885	80008	180893	11214

S/M/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1963 JUL

880 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
140	1	72.84	1262.50	640064	209855	173618	383473	256593
060	2	70.44	687.03	516746	196746	171618	368364	148382
160	3	77.04	640.80	504452	188388	169226	357614	146838
050	4	65.09	872.96	437931	174596	137420	312016	125915
120	5	65.95	773.54	455662	179620	151483	331102	124560
020	6	65.96	901.75	419265	166980	131696	298676	120589
110	7	63.29	707.67	478879	202111	168531	370641	108237
010	8	61.20	712.97	510868	222937	181528	404466	106402
070	9	56.92	957.97	376661	180634	123268	303902	72759
030	10	65.84	719.11	331163	146017	113325	259342	71821
180	11	62.45	707.07	393267	184396	140764	325161	68106
130	12	56.04	690.23	433442	204856	160674	365530	67912
150	13	46.87	1116.48	359424	193583	119572	313155	46269
190	14	53.87	793.71	289539	146452	104145	250597	38942
170	15	56.25	637.28	363140	192046	140355	332401	30739
040	16	54.96	728.50	250751	131986	91906	223892	26859
080	17	48.34	1001.68	291469	164506	101635	266141	25328
090	18	50.33	766.33	324071	181675	121665	303340	20731
100	19	50.27	644.05	323748	180642	130919	311561	12186

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1963 JUL

B70 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
130	1	63.20	674.10	717464	287604	265379	552983	164481
080	2	60.73	899.61	557980	245822	188153	433975	124005
030	3	60.92	646.64	600675	250372	229033	479406	121270
050	4	64.35	812.16	440787	191637	153491	345128	95658
120	5	76.33	488.53	486628	198011	193822	391833	94795
020	6	66.50	592.47	435792	189954	163212	353166	82625
110	7	66.51	593.62	418038	185323	158413	343736	74302
040	8	70.25	515.85	387639	170214	157011	327225	60413
100	9	48.49	945.68	404924	214991	145543	360533	44390
060	10	54.35	608.12	393054	202718	159116	361834	31220
090	11	61.74	663.00	293293	157419	112929	270348	22945
010	12	52.76	572.30	314161	171042	133694	304736	9426
070	13	51.11	432.02	364694	220773	185684	406457	-41763

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1963 JUL

BTF	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	030	1	62.03	1255.82	994217	282136	273976	556112	438105
	100	2	63.54	946.33	796321	233816	235535	469351	326970
	110	3	45.81	2559.34	755039	271769	190400	462169	292869
	130	4	63.00	1164.50	625423	195327	175610	370937	254486
	160	5	49.66	1309.96	774653	295105	233904	529009	245645
	150	6	60.51	1523.55	575702	187845	154899	342745	232958
	080	7	54.06	1122.35	540260	203250	164819	368069	172191
	050	8	65.78	770.67	447244	153810	146206	300016	147228
	060	9	55.42	1218.73	439914	170114	126961	297075	142839
	040	10	56.90	1026.82	438139	165975	134604	300579	137560
	140	11	43.37	1374.42	500820	212750	151603	364352	136467
	010	12	46.86	893.42	462790	195405	165454	360860	101930
	170	13	37.86	2417.00	397512	190707	108801	299508	98003
	070	14	36.56	1443.65	486175	240210	154881	395090	91084
	020	15	51.05	1122.00	344121	152944	108845	261789	82331
	120	16	32.03	2012.59	407067	234100	127090	361189	45877
	090	17	49.18	696.11	336304	169405	126955	296360	39944

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1963 AUG

880 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
140	1	77.27	1262.50	678934	210528	180886	391414	287520
160	2	82.04	646.83	548658	193241	180610	373851	175007
060	3	74.72	689.57	543798	195270	175955	371226	172572
050	4	72.77	878.84	485034	173377	145357	318734	166300
120	5	70.33	812.24	498314	177828	156953	334781	163533
020	6	72.97	901.72	448304	162050	135245	297296	151010
010	7	65.62	709.96	562072	226400	194909	421309	140763
110	8	68.74	703.68	506561	199876	173973	373849	132711
070	9	63.20	949.84	425266	182920	134258	317178	108088
130	10	61.73	705.22	492631	210059	174522	384580	108050
180	11	69.40	718.52	429407	183654	146972	330625	98782
030	12	69.78	718.08	347592	143287	116142	259429	88163
150	13	52.11	1124.34	405407	195347	128429	323776	81631
090	14	58.42	761.71	442753	210238	156904	367142	75611
170	15	64.13	642.77	410164	191586	149639	341224	68944
190	16	59.35	808.14	324397	148302	111427	259729	64668
080	17	53.69	1015.93	343513	169564	113946	283509	60304
040	18	61.55	737.28	248092	134477	100610	235087	54003
100	19	53.77	644.98	361468	189889	143053	332942	28526
210	20	39.97	931.30	77223	56889	29372	86261	-9039
200	21	27.00	893.00	39718	53718	19795	73513	-33795

"DX35/A, Appendix A, Page 123
(Supplemental Source Report - Volume A)"

AX-2063

"DX35A, Appendix A, page 129
(Supplemental S.H.E. Report - Volume A)"

S/M/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1963 AUG

A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
130	1	69.36	677.63	809747	293682	288373	582056	227692
030	2	65.02	662.20	732874	277932	269184	547116	185759
080	3	65.37	925.36	526183	218527	170265	388792	137391
020	4	73.30	612.13	493168	190761	174996	365757	127411
050	5	71.50	811.02	463427	183926	154316	338242	125186
110	6	72.49	584.86	534824	211367	198684	410051	124773
120	7	79.26	493.66	511471	200700	200686	401385	110086
100	8	53.78	919.79	476720	229835	166107	395942	80778
040	9	77.94	517.28	359294	150131	139141	289272	70021
140	10	57.93	1070.91	202716	79408	62579	141987	60729
090	11	71.17	658.00	301646	145708	109909	255617	46030
060	12	55.74	613.09	407982	203488	162959	366447	41535
010	13	55.97	579.13	342582	173120	141318	314438	28144
070	14	56.45	430.90	432193	234376	208637	443013	-10820

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1963 AUG

TF	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	040	1	61.73	2021.65	1016565	273644	243942	517586	498979
	110	2	62.81	1220.10	876771	274717	253340	528057	348713
	090	3	66.31	1335.64	739263	207886	193375	401261	337999
	070	4	78.00	995.25	667906	176453	187141	363594	304312
	080	5	60.32	805.01	743294	246548	239844	486392	256904
	130	6	63.81	836.54	684897	216858	217812	434669	252228
	170	7	67.67	1293.04	610381	204772	167445	372217	238164
	140	8	49.68	2545.65	531601	198891	131186	330076	201525
	050	9	60.83	965.43	505200	175239	155302	330541	174659
	010	10	49.21	2538.19	463691	184755	115428	300183	163508
	060	11	41.82	1443.49	586874	251184	176799	427982	158891
	120	12	43.24	2417.00	454340	191291	118327	309617	144722
	020	13	51.24	876.91	533822	203889	186070	389959	143862
	160	14	54.15	1128.00	452589	177218	137188	314406	138184
	100	15	54.75	1194.62	426084	168372	129393	297765	128321
	180	16	57.55	1299.20	364915	147307	101848	249155	115760
	150	17	43.79	1208.44	446032	204867	146486	351352	94679

"DX 359A, Appendix A, page 131
(Supplemental 3.M.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1963 SEP

SHE	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS	
	140	1	67.08	1267.41	568152	204426	158945	363371	204781	
	070	2	70.82	690.33	502280	188025	165700	353725	148555	
	150	3	71.27	669.51	534146	207987	182543	390530	143616	
	050	4	64.44	879.43	472069	185160	148307	333466	138603	
	020	5	68.61	905.93	421197	162609	131469	294078	127119	
	010	6	57.56	705.16	481346	218439	176839	395278	86068	
	080	7	58.79	955.75	382265	175172	123835	299007	83258	
	120	8	~~51.26~~ 57.4	792.84	384511	172181	133596	305777	~~78734~~	78
	110	9	58.58	703.92	430002	195487	157223	352711	77291	
	170	10	62.06	710.83	381595	177790	138001	315792	65804	
	030	11	65.16	706.81	298665	134881	103312	238193	60472	
	190	12	59.07	646.74	373592	185398	140283	325680	47912	
	130	13	52.50	705.74	386482	195172	147786	342957	43524	
	090	14	54.69	778.44	291016	145193	104978	250172	40844	
	160	15	47.26	1126.58	317713	172583	105035	277618	40095	
	040	16	55.25	735.00	280591	141304	103066	244369	36220	
	210	17	48.61	912.00	299954	175138	105376	280514	19440	
	220	18	~~31.40~~ 50.8	1222.64	91345	44412	28431	72843	~~-18501~~	-18
	100	19	45.34	1006.06	280116	163786	100248	264034	16082	
	060	20	47.04	766.09	289705	172664	113446	286110	3595	
	200	21	47.21	641.43	305834	181943	129112	311055	-5221	
	180	22	46.79	893.00	135289	102966	50245	153211	-17923	

S/M/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1963 SEP

A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
130	1	59.30	676.26	698747	293699	268403	562102	136645
030	2	57.19	651.56	594914	255699	233327	489026	105892
140	3	49.79	1226.71	496497	236234	155359	391593	104904
080	4	58.86	918.25	466747	210822	158067	368890	97858
120	5	73.91	477.62	464450	192462	190331	382793	81657
110	6	65.62	587.35	431988	189143	166413	355556	76432
040	7	72.99	517.40	391933	164361	155073	319434	72499
020	8	63.81	594.03	403804	180091	154499	334590	69216
090	9	72.79	663.00	317572	143421	113722	257143	60429
050	10	59.29	817.80	350197	168133	126864	294997	55200
100	11	49.29	917.03	413684	215364	150829	366193	47493
060	12	51.14	621.68	344814	189822	143294	333116	11698
010	13	48.86	571.77	280997	164804	124697	289501	-8504
070	14	54.94	434.92	399614	217629	194027	411656	-12042

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1963 SEP

BTF	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	040	1	49.85	1972.76	792926	268164	205521	473685	319241
	110	2	57.66	1241.69	747404	254643	221401	476044	271364
	090	3	57.73	1379.72	595984	193308	161782	355089	240895
	080	4	56.05	804.03	682481	240941	227236	468177	214304
	130	5	58.63	833.17	609462	209209	199261	408470	200992
	170	6	52.25	1275.69	525699	198377	150423	348800	176899
	120	7	47.16	2417.00	478776	184549	120891	305439	173337
	070	8	63.31	994.82	464709	157806	140172	297979	166730
	010	9	48.78	2172.78	446389	177995	115860	293854	152535
	050	10	56.76	971.87	438462	163428	138225	301653	136810
	140	11	41.51	2587.00	450529	199299	118187	317486	133043
	160	12	41.05	1280.94	396071	191541	129590	321131	74940
	060	13	37.06	1335.86	442154	223549	144118	367668	74487
	150	14	41.29	1337.26	380872	186916	123687	310603	70269
	020	15	42.81	897.61	409952	189562	154832	344394	65558
	100	16	46.41	1107.76	312896	150885	103806	254691	58206

S/M/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1963 OCT

A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
160	1	~~67.91~~ 67.2	1253.56	540529	199689	151971	351660	~~188869~~ 5001
060	2	72.64	690.33	532490	195482	174317	369799	162691
200	3	74.91	633.28	503929	192891	171964	364854	139075
170	4	58.39	1485.81	440323	188600	122804	311404	128920
050	5	59.93	880.53	446874	190202	145890	336092	110782
110	6	62.71	670.06	418609	177232	149464	326696	91912
020	7	57.49	928.90	396124	177581	131944	309525	86599
070	8	56.59	953.53	373515	179015	123301	302315	71199
100	9	55.82	743.39	419991	198938	153552	352490	67501
150	10	57.46	680.12	432029	202566	162114	364680	67349
180	11	62.25	718.91	389582	182366	140430	322796	66785
030	12	63.80	727.97	320387	144131	111361	255493	64894
010	13	53.81	705.02	463164	225606	175296	400902	62262
230	14	60.97	646.32	413103	200754	154296	355049	58053
190	15	48.03	1125.36	374191	198238	123197	321435	52755
080	16	53.56	741.68	346041	172619	128470	301089	44952
220	17	52.33	904.89	333815	178972	113413	292385	41429
210	18	~~53.78~~ 51.9	661.86	341241	181847	133287	315134	~~26107~~ 2255
040	19	49.10	737.78	241020	139816	94423	234239	6782
090	~~20~~ 21	~~51.16~~ 49.8	648.56	256353	149661	104336	253996	~~2387~~ -8314
130	~~21~~ 20	~~54.25~~ 57.3	669.68	209645	127359	81672	209031	~~614~~ +1416
120	22	49.85	558.16	327812	194895	143493	338388	-10576
140	23	46.52	561.31	253288	166843	114828	281671	-28383

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1963 OCT

STG	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	080	1	59.35	603.09	677077	291110	269302	560412	116665
	100	2	56.74	674.23	659694	289811	259056	548866	110828
	090	3	75.89	516.62	494538	196464	193563	390027	104511
	070	4	59.32	861.99	453925	208146	156804	364950	88975
	040	5	73.57	524.26	394835	164205	154809	319015	75821
	110	6	58.75	610.21	398233	186655	159774	346429	51804
	020	7	59.45	626.36	359644	173652	140304	313956	45688
	150	8	45.31	1224.78	247516	122966	81017	203983	43533
	130	9	57.63	799.30	306326	156187	113009	269196	37130
	050	10	53.77	633.99	401547	205880	160841	366721	34826
	140	11	63.52	634.29	256689	136104	98200	234304	22385
	120	12	54.43	735.42	288101	158817	109997	268815	19287
	060	13	58.22	430.18	445977	230072	212492	442564	3413
	030	14	42.46	640.14	348769	210170	157392	367562	-18793
	010	15	46.01	574.22	255997	160119	116222	276340	-20343

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1963 OCT

BTF	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	040	1	46.07	2082.11	800114	285936	210646	496582	303532
	140	2	49.06	1581.51	735761	273707	210797	484504	251256
	110	3	55.32	1352.51	613782	207665	171661	379325	234457
	150	4	61.04	940.02	587965	199222	188522	387744	200222
	170	5	53.44	1285.23	566479	207570	161153	368723	197755
	090	6	65.10	993.03	505236	165289	151507	316796	188440
	100	7	53.29	798.59	651887	245136	223987	469124	182763
	130	8	52.48	1511.48	472653	178747	133637	312384	160269
	080	9	53.51	986.50	469558	180497	151864	332361	137197
	010	10	54.81	1151.36	352203	147220	108129	255349	96854
	120	11	38.19	2227.43	411240	200940	115440	316381	94859
	070	12	39.18	2530.50	388415	190503	105120	295623	92792
	180	13	48.80	1457.09	330758	152596	94995	247590	83165
	160	14	46.49	1160.55	351096	163980	114485	278465	72633
	060	15	34.73	1363.25	376325	209706	126037	335743	40582
	050	16	32.72	2286.00	314453	180861	93078	273939	40514
	020	17	36.79	892.10	385126	201391	157636	359027	26099

"DX359A, Appendix A, page 13C
(Supplemental S.H.E. Report - Volume A)"

"DX359A, Appendix A, page 137
(Supplemental S.H.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1963 NOV

888 A/C NUM	RANK		AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
090	1	2	65.69	690.33	466339	192204	159508	351713	114626
170	2	3	55.91	1468.21	407744	184528	116456	300984	106760
140	3	1	~~61.50~~ 62.9	1222.85	384913	166606	113419	280025	~~104887~~
180	4		66.46	654.62	427461	184920	151429	336349	91113
030	5		52.25	928.90	381890	187761	132173	319934	61956
020	6		51.33	1022.00	306985	154736	99296	254032	52953
010	7		53.59	709.30	426730	213210	161970	375180	51550
190	8		48.65	1114.41	366259	194507	120844	315350	50909
080	9		53.56	965.30	331434	171555	112044	283599	47835
100	10		61.09	633.87	305324	149492	113003	262496	42829
200	11		59.09	658.01	362394	185253	136316	321569	40824
110	~~12~~	17	54.43 50.9	733.75	330360	168345	122351	290696	~~39664~~
230	~~13~~	16	63.88 63.0	524.54	154568	74578	61835	136413	~~18155~~
060	~~14~~	12	~~55.64~~ 57.2	562.19	260779	143164	105426	248590	~~12188~~
050	~~15~~	13	46.39	880.05	260898	152869	96314	249183	11715
240	~~16~~	14	50.94	724.11	247007	146318	96628	242946	4061
150	~~17~~	15	51.15	711.73	308199	182046	123929	305975	2223
160	18		59.71	514.50	230179	134259	97012	231271	-1092
220	19		42.43	930.55	261013	170916	97306	268222	-7208
040	20		42.66	729.52	191338	132596	81109	213705	-22366
070	21		42.85	602.60	243196	160954	110979	271933	-28737
130	22		45.14	537.48	225595	154131	105126	259257	-33662
210	23		39.21	815.87	263315	191539	110381	301920	-38605
120	24		44.37	537.95	285614	189858	136812	326670	-41056

137

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1963 NOV

B70 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
120	1	58.04	682.21	587832	259973	226884	486857	100974
100	~~2~~ 4	60.54	726.98	447513	202679	163586	366265	~~81253~~
090	~~3~~ 2	56.70	606.62	590710	271113	241117	512230	78481
080	~~4~~ 5	57.91	714.57	384456	184723	143307	328030	~~56419~~
030	5	53.43	718.27	431376	207541	168044	375585	55791
060	6	55.84	623.14	401399	201120	158691	359812	41587
110	7	69.86	483.26	346378	161278	144390	305668	40710
050	8	46.82	802.11	389769	202717	150677	353394	36375
040	9	63.51	513.17	292847	147577	123756	271332	21515
020	10	54.94	622.39	307270	165523	124706	290228	17042
140	11	47.34	698.66	338539	195447	142046	337494	1046
130	12	53.04	543.81	237171	139697	105397	245094	-7924
070	13	52.20	432.36	360831	208735	180703	389438	-28607
010	14	42.66	612.79	292729	190543	135385	325927	-33198

"DX 359A, Appendix A, page 138
(Supplemental S.H.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1963 NOV

BTF	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	080	1	42.42	2024.69	632444	252831	173231	426062	206382
	120	2	50.88	1393.49	495777	187797	141460	329257	166521
	160	3	53.93	830.77	453865	181394	155107	336501	117364
	110	4	47.56	805.30	513081	217542	185003	402545	110536
	100	5	57.12	994.63	375117	150246	119016	269262	105855
	150	6	39.35	1535.01	527407	257054	168460	425515	101892
	140	7	48.09	1536.99	371761	162348	108124	270472	101289
	180	8	46.72	1286.16	397770	178202	119452	297654	100116
	090	9	48.43	1002.01	351543	158382	118201	276583	74959
	070	10	42.68	1184.40	360891	177137	116638	293775	67116
	030	11	37.29	2530.50	343251	181986	95281	277267	65984
	010	12	44.54	1192.76	280993	143545	92423	235968	45024
	130	13	32.72	2315.64	339531	193985	100713	294699	44832
	170	14	39.00	1183.92	264434	152303	93095	245398	19036
	050	15	32.59	1348.03	312256	190398	108586	298984	13272
	040	16	30.24	2284.68	213029	147053	65725	212778	252
	020	17	34.18	896.52	264878	163309	111480	274789	-9911

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1963 DEC

A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
090	1 2	67.92	691.84	488879	192115	164748	356864	132016
180	2 3	70.02	640.50	479358	198554	167758	366312	113046
140	3 1	~~61.32~~ 62.5	1224.49	405141	177543	119542	297085	~~108056~~
030	4	54.91	994.12	476652	217743	156513	374256	102396
190	5	57.08	1129.66	438627	201521	135036	336558	102070
010	6	58.64	703.51	510604	229488	186683	416171	94434
020	7	55.49	1018.47	372343	171040	117193	288233	84110
080	8	57.75	958.52	385622	183671	125882	309554	76069
060	9	64.04	539.37	344531	155569	132277	287845	56685
200	10	61.90	646.15	391267	194852	145745	340597	50670
170	11	44.91	1472.01	350791	194732	109406	304138	46654
150	12	58.80	725.69	366285	187909	135553	323462	42823
110	13 20	~~54.62~~ 51.4	730.18	336524	172955	124512	297467	~~39867~~
240	14 13	58.73	741.13	297629	151969	107491	259460	38169
210	15 14	52.14	822.97	366647	200652	132985	333637	33010
050	16 15	54.02	828.60	226454	124993	78619	203612	22842
220	17 16	47.71	916.65	299083	178213	106664	284876	14207
230	18 17	64.35	461.14	256679	136490	108785	245275	11404
040	19 18	50.34	743.43	252427	144626	97097	241724	10704
100	20 19	49.30	634.88	273120	157888	111313	269201	3919
070	21	53.01	538.03	242708	140216	102998	243215	-507
160	22	60.32	513.77	248758	145735	105265	251000	-2242
120	23	52.39	526.98	369394	209181	163484	372665	-3271
130	24	45.65	519.66	267413	180268	125516	305784	-38371

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1963 DEC

B78 A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
030	1	60.84	703.57	646127	260577	237979	498556	147571
120	~~2~~ 3	60.76	689.16	598469	253494	223542	477036	121432
090	~~3~~ 4	60.47	607.90	640336	274977	251734	526711	113625
100	~~4~~ 5	61.34	753.75	529686	234953	190585	425538	~~104149~~
080	~~5~~ 2	63.56	728.57	455604	198548	160916	359464	~~96140~~
050	6	54.22	838.76	431684	200896	155755	356651	75033
110	7	69.35	490.54	397296	180084	165526	345610	51686
140	8	54.03	717.92	408925	205703	157750	363453	45472
020	9	60.62	598.49	339260	164531	132756	297287	41973
060	10	53.46	623.52	400312	206787	162497	369283	31029
040	11	61.32	521.09	329429	161654	139503	301157	28271
130	12	59.02	539.00	273126	146102	115939	262041	11085
010	13	46.69	610.11	350349	204639	154855	359494	-9145
070	14	52.66	428.29	402049	228900	202415	431315	-29267

"DX 359A, Appendix A, page 141
(Supplemental S.S.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1963 DEC

B7F A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
100	1	68.02	1000.79	584900	182414	172426	354839	230060
120	2	55.28	1366.16	591914	204551	164566	369117	222797
080	3	40.18	2022.11	615264	260392	172182	432574	182690
160	4	58.69	825.11	587279	210795	193966	404762	182517
140	5	52.56	1512.86	507207	188767	142953	331720	175487
180	6	52.20	1301.03	521033	201302	148633	349936	171097
150	7	42.08	1580.72	595005	269135	182476	451611	143394
110	8	49.74	811.13	577574	233051	203345	436396	141181
090	9	52.38	992.66	414284	170257	135666	305923	108363
030	10	36.74	2484.25	383140	199671	107149	306820	76320
070	11	44.51	1218.00	367801	176429	115858	292287	75514
170	12	47.59	1166.80	356859	167820	115306	283126	73733
050	13	38.63	1312.34	378656	197479	123015	320494	58162
130	14	35.13	2204.85	352781	193450	103173	296624	56158
010	15	46.08	1207.01	277464	140653	88705	229358	48106
040	16	33.16	2284.88	276079	165471	81587	247058	29020
020	17	35.20	863.70	337921	193159	142078	335238	2684

AX-2678

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1961 NOV

REF	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	020	1	54.02	1049.38	277338	216106	102342	318448	-41110 -
	030	2	39.83	887.48	192737	201751	84442	286194	-93456 -
	040	3	39.56	948.22	162697	187928	70479	258407	-95709
	010	4	36.67	985.47	241644	240549	106698	347246	-105603 -

"DX359A, Appendix A, page 143
(Supplemental S.H.E. Report - Volume A)"

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1961 DEC

BZF	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	020	1	63.73	1045.89	335068	224186	117219	341405	-6338 - 1
	010	2 3	51.50	997.56	296658	225493	112206	337699	-41041 - 5
	040	3 2	50.26	1001.29	254158	214930	97544	312474	-58316
	030	4	56.33	726.35	162424	168066	66416	234482	-72067 - 7

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 JAN

REF	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	020	1	56.25	1029.94	323796	211529	114564	326093	-2297
	010	2	43.61	1071.56	329822	231536	126016	357553	-27730
	040	3	44.23	1079.86	281036	211909	105662	317571	-36535
	030	4	50.01	725.84	233098	188788	96767	285555	-52457

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 FEB

SEF	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	020	1	52.22	1065.49	283100	197829	102449	300278	[illegible]
	040	2	42.05	967.64	204128	181080	82234	263314	-59186
	010	3	35.36	1064.97	258277	219683	110684	330367	[illegible]
	030	4	40.59	660.63	161466	169393	76786	246180	[illegible]

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 MAR

B2F	A/C NUM	RANK	Av PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	020	1	54.42	1074.97	302456	209651	107953	317603	-15147 -1
	010	2	42.93	1034.88	308103	249550	131898	381447	-73344 -4
	040	3	37.27	929.71	218661	203510	93712	297222	-78561
	030	4	43.12	715.21	184903	189030	85764	274794	-89891 -4

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 APR

B2F	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	020	1	60.97	1054.00	388990	217911	132575	350486	38503
	010	2	40.68	1081.13	387022	255656	152670	408326	-21304
	040	3	43.46	991.32	295972	212131	116693	328824	-32852
	030	4	44.18	780.33	234547	193387	99999	293386	-58839

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 MAY

REF A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
020	1	60.01	947.03	326272	186443	109650	296093	30179 +
010	2.3	40.52	1163.57	423466	270706	162223	432929	-9463 -
040	2.2	43.64	1104.00	323669	227093	122715	349808	-26139
030	4	40.31	741.60	194977	175745	81579	257324	-62347 -

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 JUN

BEF	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
	010	3	54.65	1136.42	546164	262346	186491	448837	97327 +
	040	2	55.21	1082.00	421421	225437	145065	370502	50918
	020	1	69.88	975.29	340704	184909	112935	297844	42860 +
	030	4	48.98	726.55	187202	168359	78418	246776	-59575 -

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 JUL

DEP	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
040		1	56.48	1074.59	418215	225487	141704	367191	51024
010		[illegible]	48.00	1147.35	487424	266012	172956	438967	48457 [illegible]
020		[illegible]	57.76	1016.96	280658	182912	96798	279711	947 [illegible]
030		4	41.78	742.30	167019	173261	74053	247315	-80296-[illegible]

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 AUG

B2F A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
040	1	61.98	1075.67	485642	231287	158151	389438	96204
010	2 3	52.90	1157.18	559257	273241	192551	465793	93464 5
020	3 2	67.73	1021.09	311226	178290	102128	280418	30808 7
030	4	49.53	732.49	213077	179154	88332	267486	-54409-.

S/H/E METHOD PROFIT AND LOSS TABLE AA COMPOSITE ROUTING

1962 SEP

DEP	A/C NUM	RANK	AV PASS LF	AV STG LEN	TOTAL REV	A/C OPER	GRND+IND	TOTAL OPER	PROFIT/LOSS
040	22		59.15	1062.04	294782	182472	99348	281820	12962
020	21		68.48	1031.00	252058	160807	82443	243250	8809
010	3		47.62	1102.56	300176	199416	109372	308988	-8812
030	4		51.76	748.45	155813	152863	62903	215766	-59953

APPENDIX B

This table is a profit and loss tabulation by month for TWA jet aircraft shown upon TWA routing charts furnished for the years 1959-1963. The methods used to determine revenues and expenses are those of the C & C report [1/] and are described in Part II, pp. II-49, 50, of the present report.

The manual changes recorded in the profit and loss columns were reallocations of revenues and expenses in those months where TWA changed routings of certain flights from one aircraft day to another or had a single trip divided between two different aircraft; e.g., where a routing chart shows that Flight 85 was flown from Boston to Baltimore to Kansas City with one 720-B and continued from Kansas City to Los Angeles with a second 720-B. The manual changes recorded in the load factor and stage length columns were necessary for the same reason. The load factors and stage lengths shown in Appendix B, as manually corrected, were the ones used in this report.

1/ TWA 4C-1 and 4.

AX-2680

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

JANUARY 1961

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
CV880	38	1	810.2	0.737	245,013.62	127,305.12	91,844.63	219,149.75	25,363.87
	30	2	788.5	0.698	203,184.18	102,679.10	77,004.87	179,679.97	23,504.21
	28	3	837.5	0.748	198,354.23	107,613.37	73,927.03	181,540.40	16,813.83
	18	4	825.1	0.613	157,355.29	105,221.12	61,677.27	166,898.39	9,543.10CR
	60	5	1646.1	0.809	69,330.18	51,788.40	28,686.78	80,475.18	11,145.00CR
	40	6	823.3	0.576	152,636.86	107,570.70	60,860.54	168,431.24	15,794.38CR

"DX 359A, Appendix B, page 1 (Supplemental S.I.E. Report - Volume A)"

1

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

FEBRUARY 1961

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
CV880	30	1	749.5	0.823	305,823.14	150,808.88	111,564.69	262,372.77	43,450.37
	50	2	883.4	0.726	369,049.71	190,301.88	138,544.74	328,846.62	40,203.09
	10	3	837.6	0.785	211,622.03	121,346.11	78,004.76	199,350.87	12,271.16
	28	4	870.7	0.746	209,020.86	124,421.68	77,959.27	202,380.95	6,648.91
	40	5	754.3	0.571	206,814.86	148,852.09	82,865.36	230,717.45	23,902.59CR
	60	6	1846.7	0.513	179,739.61	144,765.19	74,190.11	218,955.30	39,215.69CR

AX-2691

"UX359A, Appendix B, page 2
(Supplemental S.I.E. Report - Volume A)"

AX-2692

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

MARCH 1961

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
CV880	80	1	761.2	0.754	572,690.67	267,803.66	212,978.14	479,982.82	92,708.85
	70	2	934.3	0.748	566,167.67	268,643.15	211,485.39	480,128.54	86,039.13
	30	3	782.2	0.803	450,406.19	209,671.69	165,100.96	374,772.65	75,633.54
	10	4	830.3	0.904	368,847.95	165,770.86	131,889.74	297,660.62	71,187.33
	20	5	854.0	0.711	288,948.76	165,227.63	108,947.83	274,175.46	14,773.30
	40	6	858.0	0.804	389,859.85	195,809.52	121,743.57	317,553.09	7,993.24CR
	60	7	1817.7	0.807	282,635.08	208,704.05	116,966.95	325,671.00	43,035.92CR

"DX359A, Appendix B, page 3 (Supplemental S.H.E. Report - Volume A)"

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

APRIL 1961

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
CV880	70	1	926.6	0.770	579,916.36	258,674.99	213,511.77	472,186.76	107,729.60
	50	2	785.9	0.747	568,166.89	260,792.56	210,634.73	471,427.31	96,739.58
	30	3	756.1	0.839	480,337.17	201,307.52	166,399.40	367,706.92	92,630.25
	10	4	630.1	0.859	346,648.51	160,400.35	124,688.02	285,088.37	61,560.14
	20	5	641.5	0.676	276,682.32	161,961.77	105,058.45	267,020.22	9,662.10
	120	7	707.7	0.732	16,795.60	8,018.54	6,256.64	14,275.18	2,520.42
	110	8	837.3	0.797	10,822.76	5,379.73	3,954.63	9,334.36	1,488.40
	100	6	706.3 ~~786.0~~	0.958 ~~0.885~~	3,721.05	2,768.31	1,330.40	4,104.71	2,564.81 ~~382.660H~~
	90	9	669.1 ~~787.3~~	0.523 ~~0.632~~	243,344.37	153,626.31	94,005.85	247,632.16	7,098.02 CR ~~4,385.79CR~~
	40	10	1039.8 ~~1039.4~~	N.C. 0.626	225,037.10	147,940.91	87,141.03	235,081.99	10,042.40 CR ~~10,044.89CR~~
	60	11	1387.4	0.609	246,463.44	160,718.25	96,147.06	256,865.31	10,401.87CR
	80	12	1269.4 ~~1252.6~~	N.C. 0.511	190,351.49	149,972.64	78,045.59	228,018.23	37,807.98 CR ~~37,666.74CR~~

AX-2694

"DX 359A, Appendix B, page (Supplemental S.H.E. Report - Vol

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

MAY 1961

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
CV880	78	1	819.0	0.685	650,303.30	316,241.83	246,266.15	562,518.08	87,793.22
	108	2	766.1	0.747	465,929.62	224,301.87	172,636.52	397,140.59	68,789.03
	48	3	788.5	0.807	385,315.72	183,043.36	140,495.18	323,538.54	61,777.18
	18	4	838.6	0.845	348,063.88	164,559.72	125,685.87	290,245.59	57,838.29
	68	5	839.2	0.661	457,420.61	243,664.44	174,783.97	418,448.41	38,972.28
	118	6	784.1	0.649	455,999.75	246,484.24	175,015.25	421,499.49	34,500.26
	38	7	666.7	0.761	262,161.72	145,517.43	96,844.43	242,361.86	19,799.86
	128	8	748.1	0.653	352,921.67	200,821.18	135,259.85	336,081.03	16,840.64
	138	9	815.7	0.653	94,827.29	58,089.23	36,336.97	94,426.20	401.09
	88	10	838.8	0.569	390,482.82	242,099.95	155,313.13	397,413.88	6,930.26CR
	28	11	851.2	0.571	241,207.84	167,439.01	95,812.61	263,251.62	22,043.78CR
	58	12	1847.8	0.523	317,920.24	219,723.57	129,533.91	349,257.48	31,337.24CR
	98	13	665.3	0.503	243,392.06	184,937.93	100,389.69	285,327.62	41,935.76CR

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

JUNE 1961

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
CV880	70	1	810.7	0.734	674,644.91	305,799.16	251,212.60	557,011.76	117,633.15
	60	2	883.4	0.737	628,626.51	287,353.44	233,902.46	521,255.90	107,370.61
	90	3	697.2	0.799	544,146.20	238,756.07	198,795.69	437,551.76	106,594.44
	140	4	935.4	0.747	569,069.83	261,660.97	211,068.85	472,749.82	96,320.31
	30	5	722.2	0.847	392,964.38	177,493.40	141,777.48	319,270.88	73,693.50
	120	6	775.7	0.793	428,198.09	198,988.69	156,696.53	355,685.22	72,512.87
	10	7	716.1	0.825	379,396.09	176,397.71	137,654.82	314,052.53	65,343.56
	50	8	827.3	0.707	479,576.44	238,072.93	180,200.24	418,273.17	61,303.27
	80	9	838.0	0.699	464,574.27	234,165.14	175,032.70	409,197.84	55,376.43
	100	10	1020.2	0.652	402,150.26	220,601.27	154,140.06	374,741.33	27,408.93
	20	11	1847.0	0.648	374,956.52	209,734.34	143,918.39	353,652.73	21,303.79
	110	12	583.6	0.639	322,053.64	188,798.41	124,079.63	312,878.04	9,175.60
	130	13	840.8	0.576	237,730.56	163,142.78	94,200.65	257,343.43	19,612.85CR
	40	14	1591.0	0.549	127,347.23	112,081.96	51,139.35	163,221.31	35,874.08CR

AX-2696

"DX359A, Appendix B, page 1
(Supplemental S.H.E. Report - Volume

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

JULY 1961

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
CV880	80	1	940.5	0.736	555,410.71	261,518.10	206,803.49	468,321.59	87,089.12
	100	2	764.8	0.705	595,240.79	286,860.56	223,904.40	510,764.96	84,475.83
	120	3	901.3	0.719	555,204.63	266,354.37	207,837.24	474,191.61	81,013.02
	60	4	814.1	0.757	498,130.52	234,108.88	184,251.94	418,360.82	79,769.70
	130	5	716.3	0.702	560,789.66	273,918.97	211,141.43	485,060.40	75,729.26
	30	6	727.7	0.785	372,138.79	182,271.94	136,557.55	318,829.49	53,309.30
	110	7	825.1	0.676	483,650.40	250,419.50	183,801.36	434,220.86	49,429.54
	10	8	710.2	0.647	289,407.49	174,714.65	111,222.17	285,936.82	3,470.67
	140	9	~~1189.7~~ 596.7	~~0.807~~ 0.703	82,049.99	47,750.95	31,407.42	79,158.37	~~2,891.62~~ 143.00CR
	50	10	833.1	0.578	484,412.95	246,038.30	160,181.36	406,219.66	1,806.71CR
	20	11	~~1630.7~~ 1773.5	~~0.866~~ 0.585	330,203.95	207,492.48	130,278.94	337,771.42	~~7,567.47CR~~ 4,533.85 CR
	40	12	828.1	0.559	391,462.71	246,127.99	156,363.05	402,631.04	11,168.33CR
	140	13	477.9	0.564	283,223.48	199,071.00	112,925.39	302,996.39	19,772.91CR
	150	14	1305.5	0.490	103,411.01	89,184.25	42,999.45	132,183.70	28,772.69CR
	70	15	850.0	0.540	222,572.20	164,684.61	89,867.98	254,552.59	31,980.39CR
	90	16	1443.8	0.512	242,818.67	182,291.81	99,628.30	281,920.11	39,101.24CR

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

AUGUST 1961

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
CV880	150	1	897.7	0.776	631,497.46	273,678.67	231,281.21	504,959.88	126,537.58
	100	2	759.9	0.749	637,680.78	284,174.57	235,418.42	519,592.99	118,087.79
	130	3	721.1	0.740	604,022.65	274,310.26	223,577.09	497,887.35	106,135.30
	60	4	818.7	0.783	539,361.86	238,974.14	197,126.74	436,100.88	103,260.98
	20	5	719.0	0.862	422,199.68	183,944.42	151,232.76	335,177.18	87,022.50
	110	6	968.0	0.713	526,941.22	253,034.06	196,755.86	449,789.94	77,151.28
	140	7	1074.5	0.752	425,609.79	205,238.90	157,074.72	362,313.62	63,496.17
	120	8	957.6	0.746	380,239.50	189,651.13	140,538.24	330,189.37	50,050.13
	70	9	718.5	0.683	420,781.53	218,842.14	158,711.97	377,554.11	43,227.42
	50	10	636.5	0.639	458,285.72	246,849.48	175,750.65	422,600.13	35,685.59
	10	11	713.0	0.690	324,291.69	178,472.08	122,033.94	300,506.02	23,785.67
	90	12	1406.7	0.585	402,293.79	238,788.65	157,938.21	396,726.86	5,566.93
	170	13	603.1	0.575	159,981.40	98,893.74	63,108.39	162,002.13	2,020.73CR
	160	14	499.9	0.630	257,964.65	161,622.55	99,284.31	260,906.86	2,942.21CR
	40	15	816.1	0.566	388,119.28	238,278.54	153,774.80	392,053.34	3,934.06CR
	30	16	1316.4	0.598	251,100.71	164,456.35	97,964.14	262,420.49	11,319.78CR
	80	17	850.0	0.509	221,138.98	168,565.19	90,335.37	258,900.56	37,761.58CR

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

SEPTEMBER 1961

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
CV880	60	1	~~647.0~~ 647.0	~~0.693~~ 0.693	568,455.04	272,582.76	213,380.50	485,963.26	~~84,491.78~~ 84,839.90
	20	2	984.9	0.721	555,810.52	265,541.33	208,178.40	473,719.73	82,090.79
	90	3	711.8	0.717	483,878.56	233,017.32	180,286.76	413,304.08	70,574.48
	100	4	815.9	0.713	468,474.35	227,995.62	174,752.78	402,748.40	65,725.95
	10	5	722.1	0.797	377,851.46	177,477.98	137,452.08	314,930.06	62,901.40
	140	6	765.5	0.701	432,065.58	216,799.84	161,825.03	378,624.87	53,440.71
	180	7	656.6	0.656	353,863.30	184,701.99	134,701.22	319,403.21	34,460.09
	150	~~9~~	723.8	0.657	362,013.36	198,722.30	137,734.03	336,456.33	25,557.03
	50	~~8~~ 8	~~643.6~~ 643.6	~~0.629~~ 0.629	506,956.39	263,383.97	198,257.44	461,641.41	~~45,315.98~~ 27,705.99
	170	~~10~~ 11	~~741.4~~ 741.4	~~0.634~~ 0.634	343,210.09	188,757.03	130,112.54	318,869.57	~~24,340.52~~ 18,605.49
	130	~~11~~ 10	593.3	0.671	327,308.84	181,233.86	123,871.36	305,105.22	22,203.62
	110	12	816.5	0.552	490,049.52	291,485.65	195,258.74	486,744.39	3,304.93
	30	13	710.4	0.616	291,839.77	177,529.82	112,904.58	290,434.40	1,405.37
	70	14	656.2	0.543	359,133.62	229,129.17	143,781.23	372,910.40	13,776.78C
	80	15	888.0	0.522	432,241.73	275,082.43	175,042.90	450,125.33	17,883.60C
	40	16	1299.0	0.569	236,474.90	161,366.32	93,441.13	254,809.47	18,334.57C
	160	17	1293.5	0.509	319,446.06	219,930.21	130,368.17	350,298.36	30,852.32C
	120	18	855.6	0.471	184,362.65	154,808.25	77,075.40	231,881.65	47,519.00C

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

OCTOBER 1961

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
CV880	140	1	903.8	0.770	453,332.29	210,572.70	166,140.20	376,712.90	76,619.39
	40	2	686.3	0.718	484,049.70	234,175.57	180,245.61	414,421.18	69,628.52
	150	3	813.7	0.715	478,569.08	232,769.19	178,362.60	411,131.79	67,437.29
	160	4	~~822.7~~ 866.1	~~0.633~~ 0.639	579,551.83	299,995.24	222,391.43	522,386.67	~~56,725.66~~ 57,165.16
	10	5	718.6	0.785	364,490.77	176,219.29	133,005.94	309,225.23	55,265.54
	130	6	849.1	0.683	421,112.44	218,179.85	158,656.94	376,836.79	44,275.65
	60	7	713.6	0.663	438,562.51	230,711.45	166,471.96	397,183.41	41,379.10
	70	8	719.4	0.646	461,753.81	245,324.06	176,396.61	421,720.67	40,033.14
	180	9	~~1002.0~~ 998.9	~~0.663~~ 0.661	422,968.74	224,605.80	160,639.03	385,244.83	~~38,182.28~~ 37,723.91
	170	10	734.4	0.706	300,415.00	165,623.07	112,311.98	277,935.05	22,479.95
	80	11	892.7	0.656	326,417.37	185,359.22	124,197.10	309,556.32	16,861.05
	20	12	713.5	0.659	301,036.93	174,227.51	114,433.50	288,661.01	12,375.92
	30	13	682.2	0.546	332,266.12	215,970.20	132,783.27	348,753.47	16,487.35CR
	110	14	~~875.7~~ 884.6	NC 0.538	361,166.82	233,413.51	144,978.39	378,391.90	~~17,343.94CR~~ 17,225.08CR
	50	15	954.2	0.508	307,612.61	215,258.17	125,638.50	340,896.67	33,083.86CR
	120	16	1230.2	0.504	195,016.83	154,977.91	79,805.36	234,783.27	39,766.44CR
	100	17	863.0	0.453	185,645.29	161,208.34	78,536.42	239,744.76	54,099.47CR
	90	18	1044.6	0.426	260,571.01	216,808.77	112,496.60	329,305.37	68,734.36CR

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

NOVEMBER 1961

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES ORNS & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
CV880	140	1	937.4	0.635	469,263.76	250,705.57	180,108.90	430,814.47	38,449.31
	100	2	712.9	0.654	416,703.06	222,463.57	158,717.15	381,180.72	35,522.34
	20	3	904.3	0.677	364,466.76	195,333.26	137,726.75	333,060.01	31,406.75
	10	4	740.4	0.704	324,631.52	174,033.92	121,480.16	295,514.08	29,117.44
	110	5	652.8	0.639	402,327.16	220,565.30	154,160.28	374,725.78	27,591.38
	130	6	731.2	0.610	420,470.61	236,975.68	163,071.75	400,047.43	20,423.18
	120	7	831.9	0.595	398,795.53	231,583.69	155,656.36	387,210.05	11,585.48
	160	8	776.3	0.612	346,109.21	202,648.49	134,078.85	336,727.34	9,381.87
	90	9	812.1	0.598	369,567.64	217,260.58	144,085.58	361,346.16	8,241.68
	70	10	602.6	0.613	303,473.00	183,343.10	117,540.36	300,883.46	2,589.52
	170	11	591.4	0.618	294,426.61	176,117.22	113,776.10	291,893.32	2,533.29
	60	12	536.6	0.579	344,259.16	210,645.64	135,357.19	346,002.83	1,743.67CR
	30	13	734.1	0.605	267,128.54	168,482.73	103,803.12	272,285.85	5,157.31CR
	40	14	1067.4	0.596	185,816.98	132,804.23	72,519.95	205,324.18	19,507.20CR
	150	15	1016.6	0.616	332,780.67	224,628.01	135,237.93	359,865.94	27,085.27CR
	80	16	947.2	0.478	277,247.90	206,705.78	115,328.68	322,034.46	44,786.56CR
	180	17	1283.7	0.364	155,101.08	158,062.99	69,454.06	227,517.05	72,415.97CR
	50	18	982.8	0.416	306,612.15	251,607.66	134,430.74	386,038.40	77,426.25CR

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

DECEMBER 1961

A/C TYPE	A/C NO.	PROFIT BANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
CV880	160	1	~~736.7~~ 735.1	~~0.674~~ 0.674	457,205.26	235,504.01	172,878.97	408,382.98	~~52,822.28~~ 48,822.28
	70	2	696.2	0.669	431,246.75	226,248.31	163,374.17	389,622.48	41,624.27
	20	3	936.6	0.682	394,754.31	207,902.98	148,807.33	356,710.31	38,044.00
	100	4	710.9	0.660	397,283.62	209,460.75	149,881.73	359,342.48	37,941.14
	10	5	715.7	0.727	338,719.67	176,779.09	125,772.31	302,551.40	36,168.47
	130	6	737.4	0.658	420,325.04	224,453.85	159,849.59	384,303.44	36,021.60
	90	7	826.3	0.663	395,936.02	212,987.52	150,294.05	363,281.57	32,656.45
	140	8	941.4	0.622	442,611.92	244,626.67	170,749.55	415,376.42	27,335.50
	120	~~10~~ 10	735.7 ~~746.2~~	0.675 ~~0.665~~	381,450.17	173,307.96	114,343.84	287,651.80	~~10,798.37~~ 9,737.15
	110	~~10~~ 9	856.2	0.605	375,430.69	219,350.27	145,874.63	365,224.90	10,205.79
	170	11	605.4	0.630	256,744.25	161,581.27	99,497.67	261,078.94	2,334.69CR
	150	12	1004.9	0.573	349,102.74	216,480.27	137,706.98	354,187.25	5,084.51CR
	50	13	859.6	0.576	317,954.00	208,700.34	125,245.91	333,946.25	7,992.25CR
	30	14	783.1	0.598	245,676.66	161,719.64	95,796.86	257,513.50	11,836.84CR
	180	15	1312.9	0.584	249,490.87	166,145.37	97,886.00	264,031.37	14,540.50CR
	60	16	1048.2	0.618	193,078.85	134,405.16	74,603.92	209,009.10	15,930.25CR
	40	17	990.5	0.542	348,443.09	224,619.90	138,786.43	363,406.33	14,963.28CR
	80	18	954.6	0.641	287,938.61	194,993.84	115,384.25	310,378.09	22,439.48CR

AX-2702

"DX359A, Appendix B, page 13
(Supplemental S.I.E. Report - Volume I)"

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

JANUARY 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
CV880	148	1	939.5	0.671	526,667.78	262,160.41	201,918.34	463,198.75	63,469.03
	78	2	690.4	0.701	476,185.84	232,646.49	179,842.16	412,488.67	63,496.87
	18	3	623.2	0.721	365,356.47	184,634.78	137,863.22	321,498.00	43,857.47
	138	4	728.5	0.638	449,793.65	240,952.58	173,976.69	414,929.27	34,864.38
	168	5	736.6	0.615	491,565.52	266,663.11	191,636.86	457,699.97	33,865.55
	108	6	731.5	0.636	439,388.24	235,938.92	169,827.80	405,766.72	33,849.52
	118	7	651.1	0.637	425,383.86	229,416.25	164,382.26	393,798.53	31,615.35
	158	8	998.2	0.623	412,633.11	228,116.80	168,425.92	396,543.92	24,289.19
	28	9	927.1	0.669	423,634.46	237,148.11	165,550.77	402,698.88	20,935.58
	98	10	840.6	0.614	395,988.50	223,113.65	154,434.38	377,548.03	18,438.47
	58	11	852.5	0.604	353,129.34	206,493.32	138,340.14	344,833.46	8,295.88
	179	12	836.6	0.599	296,361.58	181,261.15	116,314.22	297,595.37	1,233.79CR
	128	13	770.2	0.660	165,902.26	113,692.46	63,545.42	177,137.88	11,235.64CR
	38	14	761.5	0.569	247,928.24	164,963.61	98,665.53	263,629.14	15,700.90CR
	68	15	1061.5	0.568	203,757.01	143,425.14	81,105.67	224,530.81	20,773.80CR
	88	16	944.6	0.523	296,760.72	201,659.78	120,931.65	322,591.63	25,810.91CR
	48	17	995.4	0.502	405,775.46	268,836.73	167,362.82	436,199.55	30,424.09CR
	188	18	1305.5	0.471	199,801.17	155,963.75	79,882.63	235,846.38	45,845.21CR

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

FEBRUARY 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
CV880	60	1	683.7	0.684	438,654.62	218,062.82	166,627.96	384,690.78	53,963.84
	130	2	943.4	0.657	453,236.72	231,801.08	173,687.98	405,489.06	47,547.66
	100	3	822.3	0.661	410,410.11	212,347.99	157,175.86	369,523.85	40,886.26
	10	4	650.7	0.698	329,773.57	171,087.26	124,687.07	295,774.33	33,999.34
	90	5	715.0	0.579	367,150.92	215,990.06	145,433.71	361,423.77	5,727.15
	80	6	634.8	0.573	342,019.76	205,664.57	135,867.26	341,531.83	487.93
	110	7	913.6	0.541	485,632.03	289,785.23	196,133.99	485,919.22	87.19CR
	50	8	574.3	0.576	302,756.91	185,806.72	120,099.41	305,906.13	3,149.22CR
	20	9	944.0	0.547	392,922.68	239,456.36	158,085.11	397,541.47	4,618.79CR
	140	10	1018.3	0.554	358,178.78	219,504.71	143,607.09	363,111.80	4,933.02CR
	170	11	534.2	0.578	284,119.21	176,459.66	112,631.97	289,091.63	4,972.42CR
	40	12	1097.4	0.620	206,161.67	132,087.56	80,233.59	212,321.15	6,159.48CR
	150	13	715.6	0.512	463,136.34	291,399.13	189,908.61	481,307.74	18,169.40CR
	120	14	813.7	0.540	263,577.12	175,541.67	106,472.04	282,013.91	18,436.79CR
	30	15	739.6	0.536	215,295.28	151,360.25	87,134.56	238,494.83	23,199.55CR
	70	16	969.7	0.484	268,394.16	193,914.77	111,922.56	305,837.33	37,443.17CR
	160	17	855.9	0.462	173,935.31	144,426.86	73,609.93	218,036.79	44,101.48CR
	180	18	1312.0	0.458	175,088.27	146,031.27	74,296.28	220,329.55	45,241.28CR

AX-2704

"DX359A, Appendix B, page 15
(Supplemental S.H.E. Report - Volume A)"

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

MARCH 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
CV880	60	1	685.2	0.684	495,963.70	245,617.52	188,395.74	434,013.26	61,950.44
	10	2	626.7	0.728	381,312.27	180,417.59	142,746.11	332,163.70	49,148.57
	100	3	550.2	0.642	466,421.42	246,630.11	180,675.63	427,305.74	40,915.68
	130	4	924.9	0.613	506,222.20	273,530.46	197,529.16	471,059.62	35,162.58
	90	5	786.4	0.613	419,003.61	233,640.72	163,478.89	397,516.61	21,685.88
	50	6	548.5	0.614	362,120.18	207,946.30	141,268.16	349,214.46	12,905.72
	80	7	639.9	0.580	429,681.56	249,715.32	170,077.16	419,792.48	9,889.08
	150	8	721.2	0.535	539,015.46	324,804.78	218,175.58	542,180.28	3,164.82CR
	30	9	726.5	0.588	268,867.09	170,971.63	106,068.91	277,037.54	8,170.45CR
	170	10	536.6	0.569	309,526.61	194,966.82	123,151.66	318,118.48	8,591.87CR
	20	11	946.2	0.537	442,787.67	273,272.34	179,075.40	452,347.74	9,560.07CR
	40	12	1132.7	0.597	224,482.32	148,313.16	88,171.48	236,484.64	12,002.32CR
	110	13	925.2	0.523	512,762.80	316,338.10	200,870.57	528,208.67	12,445.87CR
	140	14	1036.2	0.538	388,926.53	245,047.49	157,227.78	402,275.27	13,348.74CR
	70	15	945.1	0.569	319,529.38	218,310.39	131,282.82	349,613.21	29,983.83CR
	120	16	832.1	0.502	279,447.86	198,749.08	115,262.91	314,011.99	34,564.13CR
	160	17	850.0	0.490	207,469.13	161,465.07	86,168.10	247,633.17	40,164.04CR
	180	18	1383.6	0.398	183,956.92	172,419.86	81,760.41	254,180.27	70,223.35CR

"DX359A, Appendix B, page 16
(Supplemental S.H.E. Report - Volume A)"

AX-2705

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

APRIL 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
CV880	60	1	690.3	0.716	508,796.90	240,210.52	191,235.27	431,445.79	77,351.11
	100	2	850.1	0.678	487,487.67	242,689.66	185,602.26	428,291.92	59,195.75
	50	3	542.9	0.659	403,026.19	212,632.15	154,475.91	367,108.06	35,918.13
	10	4	~~634.8~~ 613.5	~~0.678~~ 0.669	381,703.63	188,574.86	134,284.02	322,858.88	~~30,044.79~~ 28,943.01
	90	5	711.1	0.619	435,112.06	238,236.34	169,430.23	407,666.57	27,445.49
	120	6	939.5	0.614	428,834.49	236,824.65	167,298.21	404,123.06	24,711.43
	20	7	961.8	0.586	444,646.14	253,703.37	175,607.63	429,311.00	15,335.14
	30	8	709.1	0.625	291,483.13	172,168.13	113,199.55	285,367.68	6,115.45
	110	9	~~740.6~~ 742.2	~~0.572~~ 0.605	486,596.56	240,414.06	161,640.91	402,054.97	~~7,901.09~~ 4,109.21
	40	10	1046.1	0.653	242,269.17	145,574.56	93,065.39	238,639.95	3,649.22
	70	11	949.3	0.568	366,779.61	222,223.43	146,079.99	368,303.42	1,523.81CR
	150	12	535.3	0.582	299,108.06	185,515.84	118,355.77	303,871.61	4,763.55CR
	130	~~13~~ 14	993.1	0.553	383,207.31	235,265.49	153,721.65	388,987.14	5,779.83CR
	80	~~14~~ 13	~~940.6~~ 952.6	~~0.550~~ 0.557	370,729.68	228,055.95	148,512.42	376,568.37	~~7,838.69CR~~ 5,838.69CR
	140	15	906.1	0.506	519,305.21	328,060.91	213,665.05	541,725.96	22,420.75CR
	170	16	826.5	0.479	205,882.34	162,062.62	86,144.66	248,207.28	42,324.94CR
	160	17	1283.5	0.400	173,238.49	162,883.29	76,858.57	239,741.86	66,503.37CR

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

MAY 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
CV880	60	1	690.5	0.679	509,667.51	248,279.99	192,783.37	441,063.36	68,884.15
	100	2	707.2	0.673	506,110.62	248,713.12	192,021.46	440,734.58	65,376.04
	160	3	656.3	0.673	472,079.90	234,961.51	179,122.50	414,104.01	57,975.89
	10	4	907.7	0.683	441,574.46	220,070.63	166,989.82	387,060.65	54,517.83
	20	5	614.5	0.710	366,641.51	184,629.76	137,435.16	322,064.92	44,576.59
	90	6	647.9	0.652	438,752.09	227,382.03	167,780.35	395,162.38	43,589.71
	130	7	944.7	0.614	471,029.59	252,854.09	182,761.06	435,615.15	35,414.44
	110	8	645.3	0.595	452,220.00	251,041.64	176,906.83	427,947.07	24,272.93
	40	9	542.3	0.588	375,985.97	218,158.62	147,542.54	365,701.36	10,284.61
	30	10	1074.2	0.644	242,366.60	146,329.57	92,943.73	239,273.30	3,093.30
	120	11	765.8	0.532	288,057.77	191,273.77	116,110.65	307,384.42	19,326.65CR
	150	12	733.6	0.557	188,595.46	135,976.92	76,065.36	211,042.28	22,446.82CR
	140	13	786.3	0.584	376,488.53	247,320.65	164,098.99	401,419.64	25,011.31CR
	50	14	1086.4	0.482	542,048.23	350,579.36	224,918.19	575,497.55	33,449.32CR
	70	15	963.5	0.479	325,160.57	228,966.36	135,197.14	364,163.52	39,002.95CR
	170	16	1316.1	0.371	171,449.63	169,647.64	77,521.52	247,169.16	75,719.53CR
	80	17	1029.3	0.402	299,790.06	246,963.22	131,804.16	378,767.38	78,997.32CR

"DX359A, Appendix B, page 17 (Supplemental S.H.E. Report - Volume

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

JUNE 1962

TABLE A

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
CV880	100	1	704.5	0.686	520,586.69	243,164.60	195,306.14	438,470.74	82,115.95
	10	2	696.6	0.693	449,041.32	213,708.02	168,056.36	381,756.40	67,284.92
	170	3	642.0	0.678	468,814.38	225,319.18	176,354.33	401,673.51	67,140.87
	60	4	686.5	0.649	485,565.36	240,218.61	184,505.37	424,723.98	60,841.38
	130	5	937.7	0.581	488,360.15	264,635.26	190,741.18	455,376.44	32,783.71
	20	6	725.3	0.671	322,112.29	169,342.00	121,456.81	290,800.81	31,311.48
	90	7	646.7	0.569	389,897.74	223,587.35	153,085.43	376,672.78	13,224.96
	150	8	761.7	0.564	369,836.86	215,772.53	145,543.39	361,315.92	8,520.94
	110	9	846.8	0.548	410,759.22	240,556.51	162,879.37	403,435.88	7,323.34
	80	10	1013.1	0.537	399,634.33	239,157.47	159,344.40	398,501.87	1,132.46
	50	11	1091.8	0.500	236,426.67	146,605.63	91,592.61	238,198.24	1,771.57CR
	30	12	542.5	0.536	342,640.96	210,790.66	136,557.09	347,347.77	4,706.81CR
	40	13	1062.1	0.497	581,516.45	351,896.75	236,966.27	588,863.02	7,346.57CR
	120	14	758.0	0.539	294,992.54	187,157.33	117,524.26	304,681.59	9,689.05CR
	160	15	729.9	0.583	207,284.37	136,436.07	80,897.34	217,333.41	10,049.04CR
	140	16	701.1	0.474	360,291.46	243,296.81	148,847.67	392,144.48	31,853.02CR
	180	17	1305.5	0.475	223,839.64	167,035.28	92,449.53	259,484.81	35,645.17CR
	70	18	955.8	0.468	322,797.13	224,963.86	133,929.10	358,892.96	36,095.83CR

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

JULY 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
CV880	130	1	926.8	0.636	534,388.82	268,686.24	204,146.77	472,783.01	61,605.81
	100	2	712.3	0.628	483,478.73	247,988.89	185,279.20	433,185.89	50,289.84
	60	3	687.8	0.668	469,673.22	248,564.90	181,421.43	429,986.33	39,686.89
	170	4	653.7	0.612	439,967.61	234,248.43	169,847.91	403,696.34	36,271.47
	10	5	914.6	0.629	484,474.93	214,127.96	184,915.41	399,043.37	35,431.56
	20	6	722.4	0.631	312,278.45	174,667.05	119,512.20	294,369.25	17,906.20
	90	7	652.3	0.631	376,606.63	231,751.65	150,721.63	382,473.28	5,866.45CR
	110	8	886.8	0.619	409,256.02	252,986.67	164,675.76	417,661.77	8,603.75CR
	150	9	777.6	0.623	368,569.57	230,788.24	148,180.47	378,968.71	10,299.14CR
	30	10	840.8	0.627	346,641.96	218,284.41	139,060.18	357,344.59	10,702.63CR
	80	11	1102.2	0.662	219,215.41	149,069.35	86,580.81	235,650.16	16,614.75CR
	120	12	786.7	0.592	275,612.26	189,332.94	112,073.16	301,406.10	25,793.82CR
	160	13	731.7	0.522	181,330.68	135,744.26	72,987.19	208,681.45	27,328.65CR
	60	14	1035.3	0.486	353,114.63	236,630.36	144,984.91	381,615.27	28,868.64CR
	140	15	781.7	0.479	373,454.55	250,478.51	153,937.24	404,407.75	30,953.20CR
	180	16	1305.5	0.479	232,899.81	172,603.06	95,994.86	268,597.86	35,698.18CR
	40	17	1150.3	0.463	307,088.62	219,579.03	127,848.44	347,423.47	40,422.65CR
	70	18	949.1	0.392	252,215.80	214,507.12	110,841.99	325,349.11	73,133.31CR

"DX359A, Appendix B, page 20
(Supplemental S.H.E. Report - Volume A)"

AX-2709

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

AUGUST 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
CV880	10	1	901.8	0.719	482,242.12	221,794.46	179,160.30	400,954.76	81,287.36
	110	2	671.7	0.702	489,093.91	228,773.77	182,687.32	411,461.09	77,632.82
	100	3	~~698.9~~ 700.3	~~0.673~~ N/C	525,187.75	250,764.59	198,006.79	448,771.38	~~75,598.37~~ 76,416.37
	60	4	690.3	0.649	499,868.01	248,217.69	190,101.70	438,319.39	61,548.62
	180	5	887.3	0.621	485,598.58	251,249.49	186,632.28	437,881.77	47,716.81
	20	6	723.1	0.711	345,210.02	172,671.19	128,581.36	301,252.55	43,957.47
	120	7	779.7	0.659	370,018.97	192,714.83	140,198.56	332,913.39	37,105.58
	150	8	764.2	0.613	438,147.54	233,588.78	168,974.47	402,563.25	35,584.29
	170	9	641.5	0.547	387,512.31	231,716.24	153,876.64	385,592.88	1,919.43
	30	10	~~546.7~~ 546.4	~~0.546~~ 0.546	384,587.46	215,000.55	140,631.34	355,631.89	~~1,054,043CR~~ 256.99CR
	80	11	1005.5	0.513	393,104.40	247,095.53	158,891.44	405,986.97	12,882.57CR
	130	12	1291.2	0.543	261,016.16	171,194.14	103,838.25	275,032.39	14,016.23CR
	50	13	1183.9	0.535	236,489.26	160,590.17	94,095.52	254,685.69	19,196.43CR
	160	14	693.9	0.554	193,663.65	136,505.50	76,651.95	213,157.45	19,493.80CR
	40	15	969.6	0.493	430,475.32	275,372.62	175,967.97	451,339.99	20,864.67CR
	90	16	770.6	0.486	346,320.41	232,769.69	142,162.79	374,932.48	28,612.07CR
	70	17	955.1	0.435	384,180.86	229,291.93	129,174.20	358,466.13	54,286.07CR
	140	18	838.7	0.423	193,518.12	165,242.03	82,949.75	248,191.78	54,673.66CR

02:20

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

SEPTEMBR 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
CV880	10	1	895.6	0.737	466,231.40	210,616.89	172,361.57	382,978.46	83,252.94
	78	2	889.5	0.699	493,464.63	230,088.86	184,553.84	414,634.70	78,829.93
	118	3	870.3	0.645	512,499.37	253,672.50	196,253.14	448,925.64	63,483.73
	108	4	859.9	0.654	398,882.43	204,149.68	151,147.55	355,297.43	42,785.00
	148	5	769.2	0.626	418,286.84	219,935.91	168,489.77	388,425.28	37,761.56
	168	6	797.7	0.673	340,441.87	176,967.40	128,454.58	305,411.98	35,029.89
	28	7	726.8	0.788	310,457.56	160,353.16	116,095.61	276,448.77	34,008.79
	178	8	640.9	0.602	399,417.31	218,677.54	154,807.17	373,484.71	25,732.60
	48	9	657.2	0.598	322,788.65	187,773.62	125,721.49	313,495.11	9,293.54
	158	10	389.5	0.696	186,711.51	114,223.55	70,030.38	184,253.85	2,457.66
	188	11	858.7	0.538	402,440.48	241,477.84	160,669.99	402,147.83	293.45
	58	12	1212.8	0.598	251,818.87	154,235.35	97,739.88	251,975.23	156.36CR
	198	13	756.8	0.685	188,978.92	99,630.83	68,368.50	168,818.83	4,030.61CR
	98	14	787.7	0.529	366,483.33	226,720.90	146,963.15	373,684.85	7,288.72CR
	128	15	963.6	0.485	413,611.66	269,444.13	170,079.98	439,524.83	25,913.95CR
	68	16	1031.5	0.478	330,681.44	226,306.71	136,512.80	362,818.71	32,137.27CR
	138	17	650.8	0.469	200,614.80	155,994.26	83,277.90	239,272.16	38,658.16CR
	60	18	955.3	0.452	302,389.59	220,388.43	126,960.38	347,268.81	44,959.22CR
	30	19	1304.0	0.359	157,049.44	150,563.24	71,214.81	229,798.05	72,748.61CR

"DX359A, Appendix B, page 21
(Supplemental S.H.E. Report - Volume)

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

OCTOBER 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES BRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
CV880	50	1	688.4	0.662	502,778.74	245,441.93	190,333.54	435,775.47	67,003.27
	40	2	903.6	0.659	439,092.76	220,714.12	166,408.10	387,122.22	51,970.54
	110	3	698.2	0.635	451,847.13	232,762.94	172,765.47	405,528.41	46,318.72
	70	4	664.0	0.572	469,035.38	261,577.72	184,107.56	445,685.28	23,350.10
	10	5	633.7	0.603	306,931.07	178,945.00	118,864.20	297,809.20	9,121.87
	30	6	653.9	0.581	323,047.58	191,572.89	126,324.19	317,897.08	5,150.50
	140	7	~~666.4~~ 666.5	~~0.553~~ 0.551	352,561.76	212,397.46	139,478.19	351,875.65	~~6,000.11~~ 4,522.41 C
	150	8	585.4	0.561	285,502.70	178,887.35	112,637.08	291,524.43	6,021.73CR
	160	9	860.9	0.561	263,499.57	168,457.31	103,954.59	272,411.90	8,912.33CR
	170	~~10~~ 11	645.9	0.520	354,207.46	224,766.75	142,864.56	367,631.31	13,243.85CR
	180	~~11~~ 10	~~845.6~~ 787.3	~~0.519~~ 0.520	362,700.85	230,903.96	146,501.72	377,405.68	~~14,704.83CR~~ 11,486.31 C
	20	12	1212.0	0.541	243,622.16	163,367.14	97,066.82	260,433.96	16,811.80CR
	120	13	543.9	0.571	169,422.99	122,509.81	66,533.86	189,042.67	19,619.68CR
	90	14	969.5	0.430	284,677.92	219,731.03	121,466.98	341,198.01	56,520.09CR
	60	15	995.0	0.439	466,034.53	325,823.66	197,411.63	523,235.29	57,200.76CR
	130	16	844.9	0.407	183,409.14	163,456.18	79,624.01	243,080.19	59,671.05CR
	80	17	1201.5	0.349	168,393.68	171,901.84	77,132.69	249,034.53	80,640.85CR
	100	18	1021.4	0.362	268,167.92	240,545.97	121,213.30	361,759.27	93,591.35CR

AX-2712

"DX359A, Appendix B, page 23
(Supplemental S.H.E. Report - Volume A)"

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

NOVEMBER 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
CV880	148	1	553.2	0.718	356,895.54	174,443.39	132,671.98	307,115.29	49,780.25
	78	2	690.3	0.685	435,299.79	233,611.14	168,464.23	402,075.37	33,224.42
	58	3	467.4	0.679	292,535.90	180,412.39	110,469.99	290,882.38	23,653.52
	28	4	914.2	0.598	379,913.42	211,192.14	147,455.16	358,647.30	21,266.12
	48	5	656.2	0.681	334,050.67	190,091.77	129,499.06	319,590.83	14,459.74
	168	6	657.3	0.613	266,040.74	166,825.28	110,376.15	276,901.43	9,139.31
	38	7	730.9	0.592	253,693.94	156,363.55	98,811.30	255,174.85	1,280.91CR
	18	8	913.4	0.476	442,717.04	289,616.69	182,971.71	472,588.40	29,871.36CR
	128	9	667.7	0.476	384,588.39	257,124.63	158,935.59	416,060.22	31,504.83CR
	88	10	1091.8	0.460	169,414.37	136,101.49	69,840.75	205,942.24	36,527.87CR
	138	11	961.8	0.474	218,576.53	185,038.68	98,480.97	283,511.65	36,935.12CR
	68	12	1212.8	0.473	178,562.67	142,649.58	73,944.40	216,593.98	38,011.11CR
	188	13	681.3	0.440	233,264.24	183,344.21	98,781.13	282,125.34	48,861.10CR
	178	14	845.8	0.432	240,333.86	198,422.89	102,392.92	292,815.81	52,482.73CR
	158	15	806.2	0.341	180,482.34	120,596.81	46,419.71	167,014.72	66,562.38CR
	118	16	977.1	0.414	418,984.28	311,542.46	180,926.34	492,468.82	73,484.54CR
	108	17	843.7	0.379	256,760.21	222,353.67	114,201.81	336,555.68	79,795.47CR
	98	18	798.8	0.297	150,439.31	177,848.82	73,371.72	258,419.74	99,948.43CR

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

DECEMBER 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES BRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
CV880	140	1	556.3	0.684	345,949.45	177,466.33	129,853.83	307,320.16	38,629.29
	20	2	898.3	0.612	397,155.89	215,378.68	153,068.71	368,447.39	28,708.50
	70	3	693.1	0.579	430,396.66	240,190.92	168,183.25	408,374.17	22,022.49
	50	4	474.4	0.645	313,332.52	172,148.51	119,221.23	291,369.74	21,962.78
	150	5	836.6	0.618	283,576.10	164,939.59	109,000.90	273,940.49	9,635.61
	10	6	891.2	0.514	477,189.96	289,272.70	192,582.66	481,855.36	4,665.40CR
	110	7	728.0	0.537	341,348.89	211,814.48	136,097.65	347,912.13	6,563.24CR
	130	8	967.9	0.547	267,867.90	173,181.25	106,269.45	279,450.70	11,582.80CR
	30	9	719.0	0.475	201,463.40	155,910.22	83,195.23	239,105.45	37,642.05CR
	80	10	955.6	0.464	320,787.26	226,338.41	133,338.84	359,677.25	38,889.99CR
	120	11	673.2	0.460	356,408.89	248,513.57	148,562.14	397,075.71	40,666.82CR
	90	12	780.3	0.458	262,696.27	195,312.23	109,646.55	304,958.78	42,262.51CR
	160	13	794.8	0.486	312,467.16	224,717.93	130,568.44	355,286.37	42,819.21CR
	60	14	888.0	0.453	211,048.03	166,733.51	88,362.64	255,096.15	44,048.12CR
	40	15	676.4	0.443	267,297.16	203,147.44	112,709.57	315,857.01	48,559.85CR
	170	16	744.9	0.444	462,036.85	318,991.84	194,745.01	513,736.85	51,700.00CR
	100	17	842.3	0.414	298,297.53	234,211.47	128,553.69	362,765.16	64,467.63CR

"DX359A, Appendix B, page 24
(Supplemental S.H.E. Report - Volume A)"

AX-2713

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

JANUARY 1963

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES BRNCH & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
CV880	148	1	883.2	0.748	375,016.63	146,892.54	140,268.81	287,161.35	87,855.28
	78	2	691.7	0.584	431,285.42	196,977.89	171,529.52	378,498.11	66,787.31
	128	3	655.6	0.588	482,388.51	229,523.88	195,136.22	424,653.22	57,735.89
	88	4	469.5	0.575	319,986.51	140,987.89	122,596.71	263,583.88	56,382.71
	28	5	986.2	0.578	356,318.26	172,328.43	142,161.72	314,490.12	41,828.14
	18	6	986.8	0.491	477,316.98	250,324.41	199,696.61	450,223.92	27,093.88
	168	7	689.7	0.533	382,296.29	181,692.44	143,748.89	325,641.33	26,656.96
	158	8	879.9	0.593	268,029.26	136,861.02	105,165.59	242,246.61	25,782.65
	68	9	862.8	0.576	272,932.47	140,836.42	108,953.37	249,789.79	23,142.68
	118	10	720.1	0.49[illegible]	327,681.68	181,913.28	136,680.31	318,613.81	9,066.89
	38	11	721.8	0.544	228,672.41	129,186.39	92,781.35	221,966.74	6,705.67
	188	12	789.6	0.586	278,359.43	154,274.27	112,070.90	266,345.17	4,014.26
	138	13	937.7	0.518	240,918.29	139,826.85	99,136.66	238,186.73	2,731.56
	98	14	769.8	0.488	283,616.29	158,972.35	106,271.02	267,243.37	3,627.08CR
	48	15	674.6	0.492	241,085.66	144,949.30	100,794.37	245,343.67	4,257.99CR
	88	16	960.4	0.463	292,389.94	178,567.16	124,565.86	303,133.04	7,773.10CR
	178	17	766.6	0.449	290,023.54	178,648.65	124,774.98	303,423.65	13,490.01CR
	168	18	731.9	0.466	35,397.75	83,576.14	15,051.94	68,628.08	33,230.33CR

PROFIT OR LOSS FROM SCHEDULE. PSGR OPERATIONS - C & C METHOD

TABLE A

FEBRUARY 1963

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
CV880	70	1	686.3	0.619	402,951.33	176,291.05	157,839.40	334,130.45	68,820.88
	140	2	555.6	0.715	316,253.21	130,433.74	119,539.26	249,973.00	66,280.21
	120	3	731.5	0.498	479,576.55	244,564.34	199,665.59	444,229.93	35,346.62
	60	4	468.1	0.661	242,609.98	114,024.94	93,545.03	207,569.97	35,240.01
	10	5	901.7	0.495	430,092.67	224,055.67	179,433.86	403,489.53	26,603.14
	20	6	903.8	0.548	305,902.58	155,813.63	123,721.03	279,534.66	25,967.72
	50	7	872.6	0.560	245,329.63	126,157.61	97,762.93	223,920.71	21,408.92
	160	8	856.2	0.557	225,784.94	122,247.78	90,976.61	213,224.39	12,560.55
	180	9	686.0	0.503	279,238.15	155,322.53	115,970.71	271,293.24	7,944.91
	110	10	710.2	0.483	322,270.23	179,947.57	135,516.71	315,464.28	6,805.95
	130	11	960.4	0.515	219,797.75	126,982.41	90,603.17	217,585.58	2,212.17
	40	12	663.3	0.503	206,827.74	123,215.46	85,473.05	208,688.51	2,860.77CR
	90	13	776.8	0.462	228,420.02	141,821.79	97,367.16	239,188.95	10,768.93CR
	30	14	731.1	0.477	185,189.17	118,513.63	78,142.26	196,655.89	11,466.72CR
	80	15	954.7	0.451	248,396.30	154,238.13	106,723.92	260,962.05	12,565.75CR
	170	16	747.2	0.414	237,161.46	159,195.52	104,894.27	264,089.79	26,928.31CR
	150	17	740.0	0.396	35,515.04	53,002.86	15,947.43	68,950.31	33,435.27CR
	100	18	857.6	0.349	212,103.43	166,926.78	99,857.38	266,784.16	54,680.73CR

"DX359A, Appendix B, page 26
(Supplemental S.H.E. Report - Volume A)"

AX-2715

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

MARCH 1963

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
CV880	70	1	686.0	0.636	456,437.05	198,023.49	176,272.93	373,296.42	83,140.63
	80	2	896.4	0.736	346,540.88	149,295.12	130,896.57	276,381.69	70,239.16
	60	3	485.9	0.763	331,228.28	140,274.50	125,686.44	265,954.94	65,273.34
	140	4	556.4	0.705	319,037.76	136,262.86	120,996.22	257,257.38	61,780.48
	80	5	964.5	0.564	376,264.80	183,478.81	151,148.05	334,626.86	41,638.24
	40	6	669.2	0.514	284,066.79	138,436.86	111,472.83	249,910.69	34,896.78
	120	7	726.9	0.496	684,670.73	260,323.65	218,497.79	478,821.44	34,849.29
	30	8	988.7	0.537	346,215.73	178,456.46	140,998.86	319,455.32	26,760.41
	10	9	982.3	0.487	469,957.55	244,878.65	193,335.35	438,213.40	22,744.15
	100	10	693.6	0.514	323,179.31	174,824.74	133,281.12	308,105.86	15,073.45
	100	11	679.6	0.546	265,977.86	143,865.36	107,809.19	251,674.55	14,303.33
	110	12	769.3	0.476	356,525.94	201,286.31	150,549.08	351,835.39	4,690.55
	90	13	767.6	0.488	289,463.63	153,591.76	108,718.11	262,309.81	2,846.98CR
	30	14	732.6	0.495	219,684.90	134,345.76	91,661.02	226,006.78	6,321.88CR
	170	15	737.7	0.446	288,289.63	177,975.77	124,856.76	302,832.53	13,825.92CR
	130	16	971.8	0.465	218,886.25	140,266.20	93,137.37	233,423.57	14,537.32CR
	150	17	726.8	0.363	39,521.66	60,815.93	18,327.99	79,143.92	39,622.24CR
	160	18	878.8	0.382	277,683.30	196,670.91	126,441.89	323,120.80	45,236.61CR

"DX359A, Appendix B, page 27 (Supplemental S.H.E. Report - Volume A)"

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

APRIL 1963

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER.	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
CV880	60	1	690.3	0.696	501,340.92	193,087.42	190,488.06	383,575.48	117,765.44
	40	2	875.5	0.754	362,022.21	141,047.72	135,166.08	276,213.80	85,808.41
	50	3	474.1	0.722	355,226.46	143,784.82	133,984.17	277,768.99	77,457.47
	10	4	~~682.1~~ 537.1	~~0.665~~ 0.566	529,432.22	241,280.04	212,480.80	453,760.84	~~78,671.38~~ 75,074.52
	20	5	915.0	0.615	395,829.37	177,097.86	155,323.88	332,421.74	63,407.63
	150	6	837.4	0.564	457,754.67	213,679.88	183,838.22	397,718.10	60,036.57
	30	7	671.4	0.654	301,241.64	136,898.18	116,364.60	253,262.78	47,978.86
	70	8	955.6	0.571	377,655.87	180,939.49	151,163.27	332,102.76	45,553.11
	110	9	673.7	0.624	433,983.42	217,449.06	177,977.59	395,426.65	38,556.77
	100	10	724.9	0.573	336,700.30	164,249.32	134,210.41	298,459.73	37,240.57
	80	11	786.8	0.546	267,135.05	151,256.71	116,405.50	267,662.21	19,472.84
	120	12	685.6	0.607	312,775.63	171,161.19	129,555.94	300,717.13	12,058.50
28	140	13	~~894.2~~ 850.4	A/C 0.517	253,211.35	143,293.37	104,288.33	247,581.70	~~9,629.65~~ 6,226.51
	170	14	482.3	0.417	23,193.54	15,787.50	10,231.67	26,019.17	2,825.63CR
	130	15	749.2	0.468	299,439.07	176,148.97	127,126.16	303,275.13	3,836.06CR
	180	16	989.5	0.463	89,812.26	78,320.93	38,272.00	116,592.93	26,780.67CR
	90	17	648.9	0.400	286,211.16	192,675.58	128,045.00	320,720.58	34,509.42CR

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

MAY 1964

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
CV880	60	1	691.1	0.715	587,311.16	192,781.92	191,764.70	384,466.62	122,844.56
	20	2	999.7	0.621	530,076.62	224,291.99	207,441.58	431,733.57	98,343.05
	150	3	1254.6	0.602	544,268.62	235,529.46	214,783.43	450,312.91	93,955.11
	170	4	647.5	0.651	442,499.64	166,161.89	171,107.62	337,268.91	85,230.13
	40	5	516.7	0.759	346,030.88	137,016.42	129,032.68	266,051.10	79,979.78
	30	6	788.4	0.545	515,670.30	243,660.81	208,810.74	452,418.75	63,251.75
	10	7	720.4	0.566	483,079.32	212,995.27	182,119.07	395,114.34	88,764.98
	130	8	676.4	0.666	386,034.50	167,117.61	140,583.81	307,701.42	48,333.08
	70	9	963.7	0.572	388,844.65	177,265.80	146,343.24	323,609.04	42,235.61
	140	10	673.1	0.499	393,383.57	209,947.93	163,716.90	373,664.83	19,718.74
	100	11	711.7	0.568	388,673.81	196,449.66	152,735.80	349,185.46	19,488.33
	50	12	1018.2	0.516	239,389.62	138,767.80	98,640.83	237,408.33	1,981.49
	120	13	686.3	0.476	314,628.81	182,148.77	132,987.12	315,847.89	419.08CR
	160	14	846.1	0.472	283,816.71	169,882.42	120,283.57	289,285.99	5,369.28CR
	80	15	779.5	0.477	261,784.53	157,346.87	110,469.66	267,816.75	6,031.22CR
	110	16	646.5	0.449	296,415.07	182,688.15	129,387.72	311,912.87	12,507.80CR
	90	17	1832.6	0.397	278,667.93	191,249.17	125,168.33	316,414.50	37,546.57CR

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

JUNE 1963

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
CV880	130	1	1262.5	0.764	667,674.58	227,589.74	248,594.64	476,184.62	191,489.96
	40	2	787.4	0.702	644,324.82	237,166.34	244,583.37	481,749.71	162,575.11
	80	3	690.3	0.771	553,049.76	193,087.58	205,468.48	398,556.06	154,493.70
	20	4	987.4	0.708	586,056.06	219,541.75	222,635.73	442,177.48	143,878.58
	170	5	641.2	0.760	513,867.76	180,250.51	190,426.81	370,677.32	143,190.44
	10	6	703.7	0.683	571,042.69	219,297.24	218,215.97	437,513.21	133,529.48
	30	7	719.0	0.772	390,413.62	146,798.34	145,044.37	291,842.71	98,570.91
	70	8	950.0	0.677	444,963.70	180,089.69	170,413.52	350,503.21	94,455.49
	160	9	707.6	0.694	424,894.44	170,141.68	161,744.49	331,886.17	93,008.27
	120	10	665.5	0.617	478,110.86	205,870.10	187,432.85	393,302.95	84,807.91
	180	11	645.1	0.642	408,490.85	175,416.41	158,509.20	333,927.61	74,563.24
	140	12	1122.3	0.590	458,362.17	206,272.91	181,827.28	388,100.19	70,261.98
	60	13	690.4	0.712	289,244.90	124,892.61	109,437.55	234,330.16	54,914.74
	110	14	777.2	0.585	385,575.25	160,412.45	153,306.09	333,718.54	51,856.71
	100	15	1022.1	0.540	369,666.96	165,865.50	150,265.46	336,130.96	33,536.00
	50	16	734.8	0.579	265,186.74	136,217.22	105,700.15	241,917.37	23,189.37
	90	17	786.5	0.549	299,113.36	155,241.60	121,021.23	276,262.83	22,850.53
	190	18	639.0	0.504	319,311.49	174,904.20	132,525.40	307,429.60	11,881.89
	150	19	766.1	0.462	286,103.94	171,548.92	121,940.38	293,489.30	7,388.36CR

AX-2720

"DX359A, Appendix B, page 31
(Supplemental S.H.E. Report - Volume A)"

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

JULY 1963

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
8880	140	1	1262.5	0.726	657,878.78	235,176.12	247,595.74	482,771.86	175,106.92
	160	2	640.6	0.778	506,929.30	181,361.92	188,394.10	369,756.02	137,173.28
	60	3	687.0	0.704	522,669.94	199,614.92	198,027.81	397,642.73	124,427.21
	120	4	773.5	0.660	459,133.51	189,732.70	176,953.76	366,686.46	92,447.03
	10	5	713.0	0.612	513,514.80	221,111.62	201,729.22	422,840.84	90,673.96
	110	6	707.7	0.633	488,565.50	203,607.36	187,151.38	390,758.74	89,806.76
	50	7	673.0	0.651	448,680.26	187,284.41	172,381.35	359,665.76	88,154.50
	20	8	961.8	0.660	425,488.67	178,817.25	163,982.31	342,499.56	82,989.11
	180	9	707.1	0.624	394,816.61	176,703.93	154,287.74	329,991.67	64,825.14
	30	10	719.1	0.656	333,228.86	148,811.24	128,484.06	276,495.30	56,733.56
	130	11	696.2	0.568	435,172.51	287,367.76	175,081.75	382,449.51	52,723.00
	70	12	956.0	0.569	383,786.17	184,919.68	153,732.43	338,652.31	45,102.86
	170	13	637.3	0.563	363,997.61	178,953.94	146,293.56	325,247.50	38,750.31
	190	14	793.7	0.539	291,954.41	155,817.11	118,423.61	273,940.72	17,113.69
	40	15	728.5	0.559	251,786.09	137,465.47	101,857.81	239,323.28	12,462.81
	90	16	766.3	0.563	327,186.66	179,572.07	135,783.68	315,355.75	11,791.11
	100	17	644.6	0.563	323,118.15	178,014.35	134,180.24	312,194.59	10,923.56
	150	18	1116.5	0.469	368,290.91	209,414.61	156,294.07	365,708.68	2,582.23
	80	19	1001.7	0.483	296,088.43	171,374.93	124,440.79	295,815.72	272.71

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

AUGUST 1963

TABLE A

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
CV880	140	1	1262.5	0.773	697,892.80	235,176.12	259,188.13	494,364.25	203,528.64
	160	2	646.8	0.820	651,047.14	184,360.04	202,037.25	386,397.29	164,649.85
	60	3	689.6	0.747	549,914.64	198,471.20	205,765.83	404,237.03	145,677.61
	50	4	878.8	0.728	494,394.09	186,049.70	186,110.16	372,159.86	122,234.23
	10	5	710.0	0.656	564,447.24	225,729.74	217,812.30	443,542.04	120,905.20
	120	6	812.2	0.703	504,240.70	194,292.56	191,332.51	385,625.07	118,615.63
	110	7	703.7	0.667	507,840.33	199,103.17	193,758.29	392,861.46	114,978.87
	20	8	901.7	0.730	455,508.67	173,943.56	171,364.48	345,308.04	110,200.63
	180	9	718.5	0.694	431,497.30	173,401.34	164,252.36	337,653.70	93,843.60
	130	10	705.2	0.617	494,764.80	212,855.95	193,923.84	406,779.79	87,985.01
	70	11	949.8	0.632	432,925.56	187,273.23	168,654.01	355,927.24	76,998.32
	170	12	642.8	0.641	411,369.00	177,734.36	159,666.69	337,401.05	73,967.95
	30	13	718.1	0.698	349,760.65	146,942.16	132,966.13	279,908.29	69,852.36
	90	14	761.7	0.584	446,712.01	204,762.26	177,675.85	382,438.11	64,273.90
	190	15	808.1	0.593	326,499.98	157,672.73	129,312.19	286,984.92	39,515.06
	40	16	737.3	0.615	290,584.60	140,545.63	113,983.63	254,529.46	36,055.14
	150	17	1124.3	0.521	415,712.69	212,053.02	170,790.96	382,844.00	32,868.69
	100	18	645.0	0.536	360,156.17	183,938.27	146,613.44	330,551.71	29,604.46
	80	19	1015.9	0.537	349,303.73	179,721.82	142,257.23	321,979.05	27,324.68
	210	20	931.3	0.400	79,461.45	55,544.40	35,567.50	91,111.90	11,650.45CR
	200	21	893.0	0.270	40,336.95	51,841.11	21,115.59	72,956.70	32,619.75CR

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

SEPTEMBER 1963

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
CV880	140	1	1267.4	0.671	583,628.60	226,731.80	223,999.22	450,730.22	132,898.38
	160	2	669.5	0.713	536,749.47	281,059.50	203,037.95	484,097.45	132,652.02
	70	3	690.3	0.708	307,643.80	193,087.58	192,314.05	385,401.63	122,242.17
	50	4	879.4	0.644	488,598.97	199,440.05	186,385.37	385,746.22	94,852.75
	20	5	985.9	0.686	426,712.37	172,246.95	162,876.33	335,123.28	91,589.09
	10	6	788.2	0.576	482,352.92	219,688.59	192,634.36	412,322.95	70,029.97
	110	7	783.9	0.586	430,564.80	197,076.88	171,130.28	368,206.28	62,358.52
	170	8	718.8	0.621	381,743.69	178,749.73	149,418.17	328,167.90	61,575.79
	60	9	985.6	0.586	388,971.59	186,966.24	184,449.16	335,415.40	53,556.19
	190	10	646.7	0.591	374,688.06	174,987.40	148,874.16	323,531.56	51,123.50
	120	11	~~782.5~~ 779.5	~~0.573~~ 0.574	387,628.76	184,323.74	155,025.44	339,349.18	~~40,279.58~~ 41,600.74
	30	12	786.8	0.582	380,213.41	130,661.90	116,086.15	282,918.05	47,295.36
	130	13	788.7	0.525	386,676.15	197,493.93	158,593.53	356,087.46	30,788.69
	90	14	778.4	0.547	298,259.66	153,038.85	118,389.91	271,428.99	26,829.67
	40	15	735.8	0.552	281,119.21	147,414.88	113,557.92	260,971.92	20,147.29
	220	16	1453.3	0.508	93,854.36	48,413.97	38,713.69	87,127.66	~~0,286.92~~ 5,405.58
	210	17	912.8	0.486	306,915.77	174,316.58	128,765.32	303,081.90	3,833.87
	100	18	1126.6	0.473	325,582.41	186,953.44	137,886.04	324,759.48	822.93
	200	19	641.4	0.472	303,979.46	177,063.69	128,784.44	305,788.13	1,788.67CR
	80	20	766.1	0.470	291,053.93	171,548.10	123,373.33	294,918.43	3,864.50CR
	100	21	1086.1	0.453	284,205.74	173,321.05	121,899.86	295,220.91	11,015.17CR
	180	22	893.0	0.466	137,307.74	100,171.11	58,339.34	158,510.45	21,112.71CR

"DX359A, Appendix B, page 33
(Supplemental S.H.E. Report - Volume A)"

AX-2122

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

OCTOBER 1963

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
CV880	60	1	690.3	0.726	536,101.52	199,523.66	202,646.07	402,169.73	135,931.79
	200	~~2~~ 3	633.6	0.748	506,852.88	185,350.93	189,228.88	374,578.91	131,273.97
	160	~~3~~ 2	~~1265.6~~ 1265.6	~~0.672~~ 0.672	654,940.14	216,306.02	212,346.96	428,654.98	~~133,946.70~~ 126,285.16
	110	4	670.1	0.627	419,397.08	183,715.01	163,711.90	347,426.91	71,970.17
	50	5	680.9	0.599	453,759.68	203,133.26	179,249.35	382,382.61	71,377.07
	170	6	1485.8	0.584	455,482.73	208,145.49	181,189.36	389,334.85	66,147.88
	230	7	646.3	0.610	413,766.74	185,879.71	162,703.02	348,582.73	65,184.01
	180	8	716.9	0.622	389,834.61	174,366.79	152,465.67	326,852.46	62,982.15
	150	9	681.4	0.575	431,444.70	201,738.71	172,383.66	374,122.37	57,322.33
	20	10	928.9	0.575	400,470.60	189,840.47	159,989.64	349,830.11	50,640.49
	30	11	726.0	0.636	321,540.62	147,536.08	124,961.35	272,497.43	49,043.19
	100	12	743.4	0.658	421,295.04	202,606.55	169,692.62	372,299.17	48,995.87
	10	13	765.0	0.538	463,970.24	226,200.66	188,838.82	415,039.48	48,930.76
	70	14	983.5	0.566	379,789.27	184,234.56	152,386.50	336,621.06	43,168.21
	80	15	743.3	0.536	346,634.90	179,050.11	141,349.02	320,399.13	26,435.77
	210	16	~~675.6~~ 661.0	~~0.519~~ 0.536	340,903.20	176,049.81	138,767.96	314,817.47	~~22,129.53~~ 26,085.73
	220	17	804.9	0.523	341,468.96	180,156.19	140,112.35	320,268.54	21,200.42
	190	18	1125.4	0.480	383,578.67	212,211.28	161,527.10	373,738.38	9,840.49
	120	19	558.2	0.499	324,267.99	179,696.12	134,996.91	314,693.03	9,574.96
	90	~~20~~ 21	~~647.7~~ 648.6	~~0.499~~ 0.512	254,581.55	146,145.27	105,163.00	251,308.27	~~4,588.26 CR~~ 3,273.28
	130	~~21~~ 20	~~645.6~~ 669.7	~~0.513~~ 0.542	209,575.31	121,711.30	85,100.09	206,811.39	~~6,720.12~~ 3,263.88
	40	22	737.8	0.491	240,336.68	144,354.40	100,521.29	244,875.69	4,539.01CR
	140	23	561.3	0.465	250,053.51	154,908.65	106,370.85	261,279.20	11,225.69CR

"DX359A, Appendix B, page 34
(Supplemental S.H.E. Report - Volume A)"

AX-2723

AX-2724

"DX359A, Appendix B, page 35 (Supplemental S.H.E. Report - Volume A)"

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

NOVEMBER 1963

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
CV880	90	1	690.3	0.657	470,964.64	193,867.56	181,670.43	374,786.81	96,146.63
	100	2	654.6	0.665	429,196.94	177,482.83	165,181.12	342,583.95	86,611.99
	140	3	1412.3	0.625	384,799.48	176,645.85	154,996.83	331,641.68	26,496.13
	170	4	1468.2	0.589	421,582.82	201,287.64	169,892.49	370,980.13	50,601.89
	200	5	656.0	0.591	363,489.66	170,715.23	144,996.86	314,812.89	48,597.89
	10	6	709.3	0.536	427,877.79	210,887.98	174,236.70	385,123.68	42,454.11
	160	7	633.9	0.611	386,829.37	145,691.26	120,279.38	265,970.64	48,858.73
	30	9	926.9	0.522	386,476.60	198,862.56	158,812.28	356,674.84	29,781.76
	110	16	612.0	0.509	331,752.36	169,528.67	134,584.28	304,112.95	4,401.67
	60	18	968.3	0.536	337,016.22	173,859.69	137,364.21	311,213.30	25,802.92
	230	15	460.5	0.430	182,712.63	69,146.48	59,330.93	128,477.33	10,987.69
	180	11	514.5	0.597	226,849.32	119,112.98	89,699.56	208,812.46	18,036.86
	60	8	584.4	0.572	289,849.66	138,237.98	104,758.27	242,996.25	30,101.24
	20	12	1022.0	0.513	314,716.70	170,324.07	129,677.59	300,201.66	14,515.04
	190	13	1114.4	0.486	375,303.28	206,880.96	157,421.84	364,302.80	12,800.48
	150	14	711.7	0.512	386,636.67	167,314.64	126,672.18	293,986.82	12,651.85
	240	17	724.1	0.509	246,857.95	142,098.16	102,181.76	244,191.92	2,666.03
	50	10	660.1	0.464	263,798.79	160,543.37	112,314.54	272,857.91	9,059.126
	120	19	536.0	0.444	279,550.91	174,017.27	120,781.89	294,799.86	15,217.986
	130	20	537.5	0.451	222,531.96	143,943.30	95,587.05	239,530.35	16,998.396
	70	21	602.6	0.426	239,623.52	156,582.62	104,885.07	261,387.69	23,864.171
	220	22	930.5	0.424	266,492.66	173,599.62	116,848.35	290,447.97	23,968.31
	40	23	729.5	0.427	190,305.49	133,644.51	83,290.14	216,934.65	26,629.184
	210	24	619.9	0.392	265,703.92	184,506.07	119,772.70	304,278.77	38,814.85

PROFIT OR LOSS FROM SCHEDULED PSSR OPERATIONS - C & C METHOD

DECEMBER 1953

TABLE A

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSSR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
CV880	180	1	640.5	0.700	481,245.65	187,783.66	182,799.44	370,583.10	110,662.55
	~~90~~	2	691.8	0.679	493,356.03	196,372.46	188,777.02	385,149.48	108,206.55
	10	~~3~~ 4	703.5	0.586	511,677.89	228,469.33	203,312.22	431,781.55	79,896.34
	140	~~4~~ 3	~~1284.5~~ 1422	~~0.613~~ 0.625	418,857.42	185,779.77	183,279.95	349,059.72	~~89,667.53~~ 69,797.70
	200	5	646.1	0.619	392,252.16	176,018.93	153,635.39	329,654.32	62,597.84
	190	6	1129.7	0.571	450,085.76	210,019.96	180,164.70	390,184.66	59,901.10
	30	7	994.1	0.549	484,950.46	230,799.85	196,239.06	427,038.91	57,911.55
	60	8	539.4	0.640	342,756.59	154,394.79	133,080.09	287,474.88	55,283.71
	80	9	958.8	0.577	392,789.03	186,219.31	156,723.19	342,942.50	49,846.53
	150	10	725.7	0.588	366,815.78	173,644.63	145,641.09	319,485.72	47,330.06
	20	11	1018.5	0.555	381,431.74	187,819.01	153,892.80	341,711.81	39,719.93
	240	12	741.1	0.587	299,825.89	148,597.62	118,685.86	267,283.48	32,542.41
	230	13	461.1	0.643	251,645.67	122,748.72	97,586.38	220,336.10	31,310.57
	110	~~14~~ 19	~~730.2~~ 6633	~~0.540~~ 0.514	336,227.00	172,842.81	137,070.68	309,913.49	~~26,313.51~~ 5,443.68
	210	~~18~~ 14	823.0	0.521	371,299.83	193,245.22	182,517.40	345,762.62	25,537.21
	120	~~16~~ 15	527.0	0.524	363,164.12	189,072.37	148,961.02	338,033.39	25,130.73
	160	~~17~~ 16	513.8	0.603	244,937.39	126,040.56	96,589.36	222,629.92	22,307.67
	50	~~19~~ 17	828.6	0.540	229,807.17	130,295.12	93,429.05	223,724.17	6,083.00
	70	~~19~~ 18	538.0	0.530	240,244.55	136,385.06	98,203.54	234,588.60	5,655.95
	40	20	743.4	0.503	252,612.64	147,059.93	104,855.47	251,915.40	697.24
	100	21	634.9	0.493	272,658.20	158,314.88	113,898.42	272,213.30	444.90
	220	22	916.7	0.477	385,278.92	177,374.69	128,828.19	306,202.88	923.96CR
	170	23	1472.0	0.449	362,327.90	214,012.31	185,888.31	369,900.62	7,572.72CR
	130	24	819.7	0.457	264,155.23	163,921.70	113,047.04	276,968.74	12,813.51CR

"DX359A, Appendix B, page 36
(Supplemental S.H.E. Report - Volume A)"

AX-2725

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

APRIL 1959

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
8707-131	28	1	2465.6	0.979	970,042.47	219,648.85	264,327.11	483,967.16	486,075.31
	18	2	1869.2	0.981	587,144.94	142,617.87	160,728.52	303,338.39	283,686.55
	38	3	2474.8	0.985	116,451.75	42,318.86	32,139.16	74,457.72	41,994.03

AX-2726

"DX359A, Appendix B, page 37
(Supplemental S.H.E. Report - Volume A)"

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

MAY 1959

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
8707-131	10	1	1988.5	0.943	1137,494.31	345,656.79	311,673.29	657,330.08	480,164.23
	30	2	2509.7	0.997	1044,402.41	313,122.02	283,598.75	596,820.77	447,581.64
	20	3	2474.0	0.894	894,127.07	303,440.06	247,150.34	550,590.40	343,536.67
	40	4	2396.8	0.849	474,631.57	200,781.47	129,969.84	330,751.31	144,080.26
	50	5	1450.7	0.835	86,930.35	30,856.30	24,310.04	55,166.34	31,764.01
	60	6	1743.3	0.906	30,686.54	10,165.85	8,519.06	18,684.91	12,201.63

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

JUNE 1959

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES ORHD & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-131	18	1	1924.5	0.932	1096,611.99	337,125.28	300,812.71	637,937.91	457,674.08
	38	2	2538.3	0.993	996,692.06	302,219.42	271,616.66	573,827.18	424,864.78
	28	3	1678.9	0.965	978,847.97	306,196.57	267,846.41	574,044.98	404,802.99
	88	4	2469.2	0.953	918,498.29	293,265.94	258,892.80	544,158.74	374,339.55
	48	5	1782.1	0.953	910,418.79	291,965.22	249,226.16	541,193.38	369,229.41
	68	6	2474.8	0.998	488,918.78	194,388.89	130,784.36	325,985.25	188,918.53
	78	7	1898.4	0.988	148,663.58	46,723.22	41,877.73	87,888.95	60,862.63

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

JULY 1959

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES BRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-131	40	1	2544.4	0.930	957,646.36	312,686.76	263,634.86	576,321.62	381,324.74
	10	2	1603.7	0.892	974,524.32	325,663.00	270,129.34	595,792.34	378,731.98
	50	3	2133.4	0.884	872,225.75	303,732.84	242,166.28	545,899.12	326,326.63
	70	4	1837.0	0.929	712,751.15	257,951.31	196,243.95	454,195.26	258,555.89
	20	5	1869.4	0.849	713,632.21	273,277.13	199,527.17	472,804.30	240,827.91
	60	6	2870.1	0.916	499,259.75	176,913.50	137,794.94	314,708.44	184,551.31
	30	7	1298.6	0.900	524,556.40	219,512.25	145,184.73	364,696.98	159,881.42
	80	8	2474.0	0.944	465,094.31	200,777.59	127,726.93	328,504.52	136,589.79
	100	9	2530.8	0.901	322,234.09	109,336.14	89,175.76	198,511.90	123,722.19
	110	10	1544.7	0.837	174,390.11	65,577.73	48,882.71	114,460.44	59,929.67
	90	11	2474.0	0.804	140,540.30	71,243.66	39,682.67	110,926.33	29,613.97

"DX359A, Appendix B, page 40
(Supplemental S.H.E. Report - Volume A)"

AX-2729

80

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

AUGUST 1959

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES BRNB & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-131	70	1	1528.8	0.907	1102,533.09	351,832.39	304,864.72	656,697.11	445,836.98
	30	2	1665.4	0.945	988,984.21	316,891.19	271,536.53	588,226.72	400,757.49
	40	3	2483.2	0.946	983,910.16	310,880.36	264,706.05	575,586.35	388,391.81
	80	~~45~~	~~2033.3~~ 2033.3	~~0.959~~ 0.959	837,973.32	284,275.86	230,366.43	514,643.49	~~294,047.32~~ 294,047.32
	100	~~51~~	~~1913.9~~ 1913.9	~~0.899~~ 0.899	848,916.35	292,418.90	234,525.05	526,943.95	~~321,972.40~~ 321,254.91
	90	6	2474.3	0.862	883,963.69	300,156.12	237,242.13	537,397.25	316,566.64
	60	7	2292.6	0.864	845,130.06	297,588.77	234,692.30	532,281.07	312,848.99
	50	8	2429.9	0.864	847,897.66	303,832.89	236,423.77	539,456.66	308,441.00
	120	9	1492.1	0.894	786,924.62	278,788.53	218,131.15	496,939.68	290,984.34
	110	10	1221.9	0.837	813,264.91	300,939.07	228,028.45	528,967.52	284,297.39
	10	11	1847.8	0.933	688,187.73	251,483.44	188,581.01	439,964.45	248,203.28
	20	12	1738.2	0.868	610,928.83	246,340.48	170,462.73	416,803.21	194,117.32
	130	13	1372.1	0.838	330,662.77	117,467.97	92,751.83	210,219.80	120,443.77

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

SEPTEMBR 1959

TABLE A

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-131	70	1	1487.4	0.899	1073,118.72	343,619.49	297,117.35	640,936.84	432,181.88
	30	2	1695.3	0.915	926,452.85	306,002.15	255,514.66	561,516.81	363,936.04
	40	3	2587.0	0.924	920,061.72	302,727.24	253,614.95	556,342.19	363,719.53
	80	4	~~2847.2~~	~~0.894~~	888,958.94	302,314.51	246,370.36	548,684.87	~~328,219.88~~ 340,274.07
	90	6	2433.1	0.882	840,018.91	293,627.34	233,355.32	526,982.66	313,036.25
	60	7	2291.3	0.886	834,305.68	291,249.78	231,562.00	522,811.78	311,494.10
	100	5	~~1413.4~~	~~0.867~~	834,017.35	295,503.88	232,350.61	527,854.49	~~318,217.05~~ 306,162.86
	130	8	1379.4	0.767	815,333.07	316,521.17	232,272.70	548,793.87	266,539.20
	120	9	1529.2	0.850	759,453.73	281,227.84	212,312.21	493,539.85	265,913.88
	50	10	2331.6	0.814	779,225.94	294,702.25	219,573.17	514,275.42	264,950.52
	110	11	1257.2	0.759	710,202.59	290,161.61	202,767.28	492,928.89	217,273.70
	10	12	1847.0	0.847	602,399.09	243,293.42	168,524.26	411,817.68	190,581.41
	20	13	1746.0	0.761	520,066.70	237,518.63	148,405.74	385,924.37	134,142.33

(Supplemental S.H.E. Report - Volume A)" Appendix B, page 42

AX-2731

AX-2732

"DX359A, Appendix B, page 43
(Supplemental S.H.E. Report - Volume A)"

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

OCTOBER 1959

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRNDS & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
8707-131	70	1	1484.6	0.848	937,989.31	328,635.26	262,295.92	590,931.18	346,978.13
	30	2	1715.6	0.861	981,861.50	316,276.76	251,327.23	567,603.99	333,457.51
	130	3	1218.6	0.881	855,486.54	300,392.65	237,622.20	538,015.85	317,391.49
	40	4	2646.4	0.828	844,669.63	312,856.78	237,659.51	550,516.29	294,172.74
	120	5	1679.5	0.793	804,627.79	309,442.99	227,748.94	537,191.93	267,436.86
	50	6	1752.5	0.756	774,780.37	311,596.60	221,290.78	532,887.38	241,812.79
	60	7	2356.8	0.823	710,544.59	277,948.80	199,753.59	477,694.39	232,850.20
	100	8	2338.2	0.788	726,381.99	292,172.59	206,260.81	498,433.40	227,948.59
	90	9	2324.8	0.754	743,663.66	303,585.15	212,817.84	516,023.02	227,640.63
	110	10	1544.5	0.768	709,884.37	298,383.69	201,918.16	492,301.25	216,783.12
	10	11	1828.8	0.869	639,636.56	251,599.96	178,178.03	429,777.99	210,858.57
	20	12	1812.8	0.784	629,965.36	265,547.63	178,713.16	444,260.99	185,784.31
	80	13	1644.5	0.676	579,751.66	233,905.93	158,714.85	392,623.78	176,128.18
	140	14	1757.9	0.868	265,747.21	71,969.16	57,387.25	129,876.35	76,870.86

18

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

NOVEMBER 1959

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-131	130	1	1224.7	0.867	786,723.70	285,118.97	219,834.01	504,952.98	283,770.72
	120	2	1695.5	0.810	774,074.54	294,668.55	218,380.30	513,048.85	261,025.69
	140	3	1767.0	0.746	752,047.54	306,463.23	215,477.98	520,941.21	231,106.33
	20	4	1878.8	0.703	778,398.38	326,329.04	225,739.46	552,068.50	226,329.88
	30	5	1751.4	0.734	741,362.75	305,942.23	213,114.01	519,056.24	222,306.51
	90	6	2391.5	0.677	632,535.91	290,223.08	184,896.13	475,119.21	157,416.70
	50	7	1729.2	0.653	636,285.91	298,643.14	187,451.91	486,095.05	150,190.86
	110	8	1573.9	0.681	603,850.72	280,350.98	176,306.85	456,657.83	147,192.89
	100	9	1671.5	0.705	460,423.75	231,431.75	133,449.00	364,880.75	95,543.00
	10	10	1821.5	0.672	462,964.11	238,810.31	135,516.95	374,327.26	88,636.85
	40	11	2587.0	0.515	503,626.67	299,264.40	157,030.72	456,295.12	47,331.75
	60	12	2317.4	0.652	309,587.86	194,217.63	91,237.75	285,455.38	24,132.48
	80	13	2501.7	0.620	298,047.42	195,414.37	88,820.98	284,235.35	13,812.07
	70	14	1680.0	0.505	309,933.26	223,134.01	97,129.27	320,263.28	10,330.02CR

94

"DX359A, Appendix B, page 44
(Supplemental S.H.E. Report - Volume A)"

AX-2783

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

DECEMBER 1959

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
8707-131	20	1	1828.5	0.762	866,306.94	335,535.06	247,195.46	582,730.52	283,576.42
	130	2	1215.9	0.826	785,861.11	296,676.77	220,861.83	517,538.60	268,322.51
	30	3	1684.3	0.737	736,395.09	312,296.85	217,216.53	529,513.38	226,881.71
	140	4	1721.8	0.734	753,672.11	312,464.43	216,623.14	529,087.57	224,584.54
	50	5	1696.6	0.728	752,630.22	313,861.93	216,664.13	530,526.06	222,104.16
	90	6	2311.3	0.740	690,786.25	293,034.66	198,240.92	491,265.58	199,490.67
	110	7	1842.4	0.738	649,646.53	281,673.31	186,521.66	468,394.97	181,251.56
	120	8	1720.5	0.818	568,493.38	243,269.64	160,064.15	403,273.79	165,219.59
	10	9	1826.7	0.709	498,305.68	244,828.01	144,228.02	389,056.03	109,249.65
	100	10	1642.9	0.728	452,483.97	227,867.60	130,249.86	358,117.66	94,286.31
	60	11	2213.5	0.762	356,988.02	195,895.37	101,832.93	297,728.30	59,171.72
	40	12	2492.4	0.527	522,363.23	304,966.49	161,866.34	466,823.83	55,539.40
	70	13	1581.9	0.628	362,821.02	218,811.89	107,802.41	326,614.30	36,206.72
	80	14	2336.9	0.628	315,727.34	204,471.85	94,076.38	298,548.15	17,179.19

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

JANUARY 1960

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
8707-131	20	1	1968.5	0.827	956,934.65	345,674.65	300,994.70	646,669.35	310,265.30
	120	2	1766.1	0.878	900,668.48	317,611.32	280,335.40	597,946.72	302,721.76
	130	3	1269.0	0.847	830,647.07	307,763.34	260,147.22	567,910.56	262,736.51
	140	4	1744.1	0.770	824,652.13	327,242.75	262,893.47	590,136.22	234,515.91
	90	5	2474.0	0.770	779,392.48	314,734.56	248,491.65	563,226.21	216,166.27
	110	6	1589.8	0.738	689,282.74	297,862.92	221,587.15	519,450.07	169,832.67
	50	7	1717.5	0.688	678,516.55	309,107.44	221,292.44	530,399.88	148,116.67
	30	8	1508.5	0.792	567,802.34	251,206.37	180,050.95	431,257.32	136,545.02
	10	9	1841.0	0.770	533,729.66	245,999.74	170,135.93	416,135.67	117,593.99
	80	10	1867.4	0.725	485,075.50	234,886.91	150,020.98	384,907.89	80,167.61
	100	11	2075.2	0.765	429,957.21	217,831.19	137,227.85	355,059.04	74,898.17
	70	12	1703.5	0.693	467,598.79	242,125.34	152,264.10	394,389.44	73,209.35
	40	13	2987.0	0.585	588,051.06	324,673.96	201,438.72	526,112.68	61,938.38
	60	14	2477.2	0.711	116,375.27	132,267.04	37,667.41	169,954.45	53,579.18CR

"DX359A, Appendix B, page 46
(Supplemental S.H.E. Report - Volume A)"

AX-2735

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

FEBRUARY 1960

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
8707-131	110	1	1727.8	0.639	802,418.18	296,762.62	251,837.75	548,600.37	253,809.81
	130	2	1693.1	0.692	679,860.70	302,237.04	221,428.08	523,665.12	155,695.58
	20	3	1943.7	0.699	636,032.68	286,637.28	206,791.21	493,428.49	142,604.19
	60	4	2347.9	0.632	577,502.53	287,386.21	191,893.50	479,279.71	98,222.82
	50	5	1669.9	0.593	548,190.20	289,855.95	184,893.85	474,749.80	73,440.40
	100	6	1628.1	0.613	499,814.90	266,403.78	167,280.52	433,684.30	66,130.60
	70	7	1620.6	0.692	431,854.40	225,163.78	140,710.26	365,874.04	65,980.34
	30	8	1315.3	0.753	378,486.97	199,089.29	121,234.93	320,324.22	58,162.75
	120	9	1260.6	0.643	347,394.05	287,108.71	114,997.23	322,097.94	25,296.11
	90	10	2478.5	0.645	316,021.04	196,345.63	104,555.26	300,900.89	15,120.15
	80	11	1674.5	0.580	358,699.89	223,890.81	121,603.65	345,494.46	13,204.63
	10	12	1847.0	0.543	343,755.60	227,114.62	116,467.68	345,582.30	1,826.70CR
	40	13	2572.5	0.483	391,624.68	276,985.97	141,767.80	418,753.77	27,129.69CR

"DX359A, Appendix B, page 47
(Supplemental S.H.E. Report - Volume A)"

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

MARCH 1960

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
8707-131	50	1	1319.3	0.754	976,318.08	376,004.40	312,661.47	688,565.87	287,652.21
	70	2	1240.3	0.833	817,374.99	308,283.05	256,846.01	565,129.06	252,245.93
	100	3	1708.8	0.762	772,791.48	315,310.05	246,919.73	562,229.78	210,561.70
	60	4	1504.3	0.646	762,108.15	351,078.02	252,045.21	603,124.23	158,983.92
	20	5	1991.5	0.569	635,096.65	337,275.84	216,320.76	553,596.60	81,500.05
	30	6	2497.0	0.707	349,286.85	203,397.59	113,269.23	316,666.82	32,620.03
	90	7	1432.5	0.598	417,777.41	247,511.72	140,626.77	388,140.49	29,636.92
	110	8	1557.8	0.590	418,293.40	249,618.63	141,225.44	390,844.07	27,449.33
	130	9	2474.0	0.659	311,610.35	198,909.05	102,604.84	301,513.89	10,096.46
	40	10	1717.1	0.568	378,948.13	240,845.60	129,168.21	370,013.81	8,934.32
	120	11	2586.6	0.480	457,981.90	302,622.89	163,110.20	465,733.09	7,751.19CR
	80	12	1352.0	0.564	306,774.67	214,122.95	104,710.38	318,833.33	12,058.66CR
	10	13	2417.4	0.477	433,339.83	292,603.91	154,562.54	447,166.45	13,826.62CR
	140	14	895.4	0.785	120,445.63	130,151.64	38,269.15	168,420.79	47,975.16CR

"DX359A, Appendix B, page 48
(Supplemental S.H.E. Report - Volume A)"

AX-2737

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

APRIL 1960

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES BRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
8707-131	58	1	1178.0	0.886	1010,715.78	348,007.15	316,038.83	664,045.98	346,669.80
	78	2	1295.8	0.861	821,246.63	299,275.42	256,548.79	555,824.21	265,422.42
	108	3	1688.7	0.815	816,611.69	309,683.68	257,630.13	567,233.81	249,377.88
	68	4	~~1439.5 1004.0~~	~~0.631 0.740~~	863,563.99	343,267.75	277,125.82	620,393.57	217,548.31 ~~240,170.42~~
	28	5	1935.1	0.883	881,936.08	346,565.78	261,990.06	608,545.84	193,390.24
	98	6	1527.6	0.724	662,970.88	291,205.84	214,039.86	505,245.70	157,725.18
	118	7	1736.8	0.596	593,156.52	308,260.16	199,828.37	508,088.53	85,067.99
	38	8	2587.8	0.825	421,632.72	204,095.20	132,802.25	336,897.45	84,935.27
	88	9	1264.3	0.672	414,592.55	226,729.38	135,910.61	362,638.91	51,921.64
	128	10	2540.5	0.585	529,235.98	295,822.33	178,323.70	474,146.03	46,689.95
	48	11	1771.8	0.622	426,838.61	242,296.30	143,816.76	386,313.86	43,888.88
	138	12	2842.2	0.646	389,466.37	223,826.18	128,817.44	352,643.54	36,822.83
49	148	13	~~1319.5 1001.8~~	~~0.793 0.710~~	219,764.72	168,812.81	71,893.91	231,106.72	14,289.11 ~~11,948.88CR~~
	18	14	2458.8	0.445	411,142.29	292,758.24	149,573.81	442,332.85	31,189.76CR

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

MAY 1960

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES BRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
8707-131	50	1	883.4	0.877	787,303.83	288,876.90	244,834.12	533,711.02	253,592.81
	100	2	~~1740.2~~ 1329.4	~~0.767~~ 0.730	842,155.73	331,665.94	268,372.01	600,037.95	~~342,117.78~~ 206,581.20
	70	3	1231.6	0.819	695,974.16	278,835.32	219,119.50	497,954.82	198,019.34
	20	4	1565.9	0.671	795,485.92	350,377.48	260,481.61	610,859.09	184,626.83
	140	5	1719.0	0.695	753,660.63	328,804.76	244,967.80	573,772.56	179,888.07
	40	6	1898.6	0.684	749,697.31	331,461.90	244,532.99	575,994.89	173,702.42
	90	7	1560.4	0.669	656,857.38	300,789.71	213,886.97	514,676.68	142,180.70
	130	8	2397.1	0.665	677,694.15	314,768.34	222,327.20	537,095.54	140,598.61
	120	9	2545.5	0.609	648,488.45	324,635.32	216,983.77	541,619.09	106,869.36
	30	10	2432.1	0.813	433,335.32	210,987.54	136,590.26	347,577.80	85,757.52
	110	11	1736.7	0.579	620,272.96	326,257.03	210,079.60	536,336.63	83,936.33
	80	~~12~~ 13	1238.0	0.642	443,229.91	244,653.28	146,549.48	391,202.76	52,027.15
	60	~~13~~ 12	~~1028.4~~ 1037.5	~~0.799~~ 0.666	353,737.53	191,676.89	111,854.30	303,532.89	~~50,204.64~~ 61,863.71
	150	14	~~1310.2~~ 1155.2	~~0.865~~ 0.623	221,129.69	165,101.37	75,324.99	240,426.36	~~19,296.67CR~~ + 4,580.59
	10	15	2488.0	0.348	351,700.02	313,327.20	138,115.61	451,442.81	99,742.79CR

AX-2740

"DX359A, Appendix B, page 51
(Supplemental S.H.E. Report - Volume A)"

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

JUNE 1960

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
8707-231	58	1	867.0	0.926	819,999.55	288,968.03	252,171.81	533,131.84	286,777.71
	48	2	1907.3	0.761	900,614.62	337,516.50	285,394.40	622,910.90	277,703.92
	138	3	2249.8	0.848	845,368.96	304,647.84	263,939.65	568,587.49	276,781.47
	148	4	1486.3	0.786	890,384.14	333,396.50	281,854.87	615,249.57	275,134.57
	160	5	~~1710.0~~ 1761.3	~~0.844~~ 0.775	853,211.66	315,532.53	266,354.54	583,887.07	~~269,324.59~~ 269,324.59
	98	6	1539.6	0.865	884,749.98	298,574.77	250,387.53	548,962.30	283,787.68
	28	7	1396.8	0.788	864,729.90	328,154.84	274,098.83	602,252.87	262,477.03
	88	8	1358.6	0.745	831,643.32	329,676.66	265,918.42	595,595.08	236,048.24
	118	9	1698.7	0.744	778,926.87	315,368.17	249,187.89	564,496.86	214,430.01
	68	10	1259.7	0.872	656,478.97	253,648.76	203,967.30	457,816.86	199,462.91
	128	11	2544.8	0.669	697,663.87	314,152.84	228,020.56	542,172.68	155,491.27
	78	12	1538.2	0.716	627,192.39	278,521.58	202,039.29	480,560.79	146,631.60
	38	13	2584.8	0.871	454,324.42	284,136.23	141,173.82	345,309.25	109,015.17
	188	14	~~1180.0~~ 917.5	~~0.707~~ 0.891	350,991.61	188,289.68	111,073.61	299,283.41	~~51,708.20~~ 51,364.75
	18	15	2458.8	0.588	476,293.14	292,758.27	164,796.22	457,554.49	12,738.65

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

JULY 1960

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
8707-131	140	1	1392.7	0.798	918,426.30	340,145.59	289,867.26	630,012.85	288,413.45
	50	2	877.4	0.864	807,122.57	290,066.66	250,196.85	540,265.51	266,857.06
	90	3	1534.6	0.829	786,415.79	297,414.85	246,485.51	543,900.36	242,515.43
	80	4	1146.2	0.779	821,796.14	319,896.17	260,541.27	580,437.44	241,358.70
	40	5	1982.1	0.749	847,696.36	336,146.76	270,784.39	606,931.15	240,765.23
	20	6	1663.5	0.718	860,196.32	350,285.32	277,114.47	627,399.79	232,796.53
	100	~~78~~	~~1834.4~~ 1720.6	~~0.747~~ 0.774	799,966.02	315,386.90	253,929.93	569,316.83	~~228,979.04~~ 230,649.19
	10	~~87~~	2198.2	0.774	799,587.39	315,423.69	253,640.61	569,264.30	230,323.09
	60	9	1237.1	0.889	694,179.20	262,103.27	214,973.32	477,076.59	217,102.61
	130	10	2005.4	0.767	743,861.57	301,966.63	236,536.99	538,505.62	205,358.95
	110	11	2091.9	0.727	694,629.25	298,926.93	223,197.35	522,124.28	172,504.97
	120	12	1659.0	0.649	687,004.72	320,721.00	226,034.04	546,755.04	140,249.68
	70	13	1487.6	0.717	615,617.58	278,625.66	198,393.59	477,019.25	138,598.33
	30	14	2587.0	0.807	434,559.77	210,898.48	136,885.68	347,784.16	86,775.61
	150	15	~~936.1~~ 1184.6	~~0.737~~ 0.675	303,387.63	192,127.43	98,995.59	291,123.02	~~14,034.96~~ 12,264.61

"DX359A, Appendix B, page 53
(Supplemental S.H.E. Report L Volume A)"

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

AUGUST 1960

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES ORMS & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
8707-131	148	1	1396.7	0.810	933,296.90	340,838.29	293,847.15	634,685.44	298,613.46
	18	2	2458.8	0.630	848,946.16	313,327.20	266,881.33	579,488.53	269,537.63
	88	3	961.2	0.812	839,331.92	315,674.69	264,124.11	579,798.80	259,533.12
	58	4	877.6	0.869	793,416.91	298,185.68	248,676.29	536,781.97	256,628.94
	98	5	1518.1	0.639	794,576.38	297,417.56	248,586.25	546,003.81	248,572.57
	48	6	1923.2	0.726	862,824.48	348,143.07	277,113.21	625,256.28	236,768.12
	68	7	1237.8	0.674	682,869.80	262,195.49	211,877.06	474,072.55	207,996.45
	128	8	1262.8	0.725	761,518.14	319,228.26	244,879.47	564,099.73	197,418.41
	28	9	2025.3	0.659	824,148.56	361,469.00	278,388.13	631,769.13	192,379.43
	188	~~10~~ 11	~~1770.0~~ 1708.9	~~0.633~~ 0.701	722,454.55	315,822.31	233,982.16	548,924.47	~~151,077.70~~ 173,530.08
	138	~~11~~ 10	1766.7	0.661	694,878.62	312,671.53	226,981.87	538,753.40	156,324.62
	118	12	2474.8	0.653	668,766.56	311,224.57	217,189.04	528,413.61	132,346.97
	78	13	1517.7	0.665	588,561.50	277,984.32	186,142.56	464,126.88	104,434.62
	38	14	2567.8	0.812	423,859.43	287,228.31	133,117.95	348,346.26	82,713.17
	158	15	~~990.0~~ 1199.8	~~0.735~~ 0.898	246,781.46	184,291.95	82,682.12	266,974.07	4/77.77 ~~20,192.61~~

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

SEPTEMBR 1960

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES BRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-131	140	1	1505.6	0.775	670,227.91	331,111.56	276,164.28	607,275.84	262,952.07
	50	2	884.9	0.823	724,138.32	279,781.83	227,265.91	507,047.74	217,090.58
	120	3	1262.8	0.757	757,656.95	305,398.50	241,532.30	546,930.80	210,726.15
	80	4-5	949.4	0.750	741,568.93	302,749.66	236,809.16	539,558.86	202,010.07
	10	~~4~~	~~2107.3~~ 2102.2	~~0.788~~ 0.784	699,157.45	283,279.69	221,607.16	504,886.85	~~194,270.60~~ 208,059.91
	90	6	1534.0	0.761	697,415.77	287,679.08	222,127.63	509,806.71	187,609.06
	20	7	1822.9	0.628	761,609.69	350,017.17	252,374.33	602,391.50	159,218.19
	40	8	1894.7	0.668	697,436.17	314,410.18	228,018.82	542,429.00	155,007.17
	60	9	1199.3	0.767	592,760.80	257,321.32	188,510.40	445,831.72	146,929.08
	130	~~10~~ 11	~~1728.8~~ 1770.5	~~0.661~~ 0.653	644,404.70	299,974.72	211,192.73	511,167.45	~~130,237.25~~ 119,947.94
	110	~~11~~ 10	2180.4	0.662	630,277.04	295,054.66	206,473.64	501,528.30	128,748.74
	100	~~12~~ 13	~~1763.4~~ 1824.9	~~0.686~~ 0.596	625,983.24	295,480.17	205,462.35	500,942.52	~~125,040.72~~ 92,541.75
	70	~~13~~ 12	1470.9	0.662	536,096.37	265,107.69	175,642.75	440,750.44	95,347.93
	30	14	2587.0	0.807	420,452.68	204,095.31	132,447.10	336,542.41	83,910.27
	150	15	~~1141.1~~ 981.4	~~0.584~~ 0.734	258,707.09	184,650.86	84,481.75	269,131.81	~~10,423.72~~ 14,074.27

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

OCTOBER 1960

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-131	188	1	903.0	0.752	643,394.00	334,119.90	269,231.10	603,351.00	240,043.00
	10	2	1263.5	0.706	645,228.94	349,666.20	273,170.47	623,036.67	222,192.27
	38	3	877.6	0.785	645,358.59	277,654.83	205,833.23	483,488.06	161,866.53
	118	4	1850.2	0.733	635,845.57	280,387.23	203,987.22	484,374.45	151,471.12
	58	5	1228.2	0.792	568,291.21	248,714.88	179,628.22	428,643.10	139,648.11
	88	6	1531.6	0.673	650,677.51	301,378.32	212,426.22	513,804.54	136,872.97
	188	7	1967.4	0.668	556,081.62	272,967.67	181,826.29	454,793.96	101,287.66
	128	8	1921.0	0.690	533,616.32	260,642.12	173,362.34	434,024.46	99,791.86
	138	9	1549.3	0.617	578,693.61	294,937.86	192,328.61	487,266.67	90,827.94
	68	10	1867.6	0.681	595,907.96	306,437.43	199,445.31	505,882.74	90,025.22
	78	11	1315.8	0.685	483,650.58	246,372.38	157,330.31	403,702.69	79,947.89
	98	12	1388.6	0.657	493,302.97	255,771.11	161,883.88	417,654.99	75,647.98
	148	13	983.0	0.764	302,668.17	188,797.79	96,316.78	277,116.57	25,563.60
	28	14	2503.8	0.639	333,070.25	207,239.43	109,961.83	317,201.26	15,868.99
	48	15	1746.0	0.641	232,652.02	173,911.31	76,632.28	250,743.59	17,891.57CR

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

NOVEMBER 1960

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
8707-131	140	1	889.4	0.596	647,126.97	316,066.68	215,437.18	531,503.86	115,625.11
	70	2	1092.9	0.592	509,005.80	244,381.69	164,106.91	408,488.60	100,517.20
	150	3	1056.3	0.609	526,099.98	270,816.31	174,326.71	445,143.02	80,956.96
	10	4	1340.9	0.566	651,193.37	360,320.57	226,227.33	586,547.90	64,645.47
	80	5	1440.9	0.466	720,491.93	408,797.45	254,735.38	663,532.83	56,959.10
	30	6	895.4	0.599	450,079.63	247,691.17	149,671.14	397,362.31	52,717.32
	90	7	1464.9	0.583	477,779.20	270,639.29	161,852.38	432,491.67	45,287.53
	50	8	1842.3	0.533	401,966.42	248,198.20	137,400.76	385,598.96	16,367.46
	100	9	1956.5	0.514	418,041.00	260,528.13	144,252.46	404,780.59	13,260.41
	120	10	1900.5	0.539	383,412.82	239,568.22	130,730.15	370,318.37	13,094.45
	110	11	1203.2	0.587	279,366.12	191,289.67	93,319.07	284,608.74	5,242.62CR
	130	12	986.8	0.659	216,342.55	161,184.88	70,471.24	231,656.12	15,313.57CR
	60	13	867.8	0.524	249,164.96	191,248.48	85,537.78	276,786.26	27,621.30CR
	20	14	2584.8	0.455	211,857.75	189,323.69	75,512.90	264,836.59	52,978.84CR
	40	15	1697.8	0.403	137,546.57	163,829.42	50,775.47	214,604.89	77,058.32CR

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

DECEMBER 1960

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-131	140	1	920.8	0.645	679,793.26	312,669.47	222,382.24	535,051.71	144,651.55
	16	2	1337.0	0.547	755,145.46	379,745.63	256,566.70	636,312.33	118,833.13
	76	3	1099.6	0.584	558,303.86	264,672.19	180,439.53	444,511.72	113,792.14
	150	4	1056.4	0.652	574,128.21	277,315.74	187,428.02	464,743.76	109,384.45
	30	5	885.3	0.659	514,035.39	256,635.15	167,409.57	424,044.72	89,990.67
	60	6	1450.3	0.514	712,868.22	381,056.51	245,975.35	627,031.86	85,836.36
	120	7	1921.0	0.550	484,603.76	249,740.95	158,368.66	408,109.61	76,694.15
	56	8	1814.9	0.633	469,967.44	249,038.49	154,395.92	403,434.41	66,533.03
	90	9	1515.5	0.550	502,458.42	284,178.34	170,494.88	454,673.22	47,785.20
	100	10	1962.5	0.575	458,256.20	288,263.53	163,851.45	414,104.98	44,151.22
	110	11	1227.2	0.698	362,408.33	203,328.52	116,650.41	319,976.93	42,431.40
	130	12	986.2	0.648	248,111.38	178,474.62	81,183.58	256,578.32	8,466.97CR
	66	13	893.0	0.536	249,143.11	192,148.19	85,038.59	277,178.76	28,035.67CR
	40	14	1706.9	0.513	218,695.12	184,301.85	75,476.91	259,778.76	41,083.64CR
	20	15	2567.0	0.512	211,146.37	181,537.07	72,925.41	254,462.48	43,316.11CR

"DX359A, Appendix B, page 57
(Supplemental S.H.E. Report - Volume A)"

57

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

JANUARY 1961

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
8707-131	140	1	926.2	0.621	673,191.74	286,167.10	243,650.55	539,017.65	143,174.09
	70	2	1107.7	0.689	523,849.14	220,181.95	185,789.50	405,971.45	117,877.69
	150	3	1096.3	0.654	538,485.15	233,124.91	192,991.97	426,116.88	112,368.27
	30	4	968.7	0.660	498,467.85	219,111.29	178,290.68	397,401.97	101,065.88
	90	5	1569.5	0.591	570,193.61	261,672.87	208,761.15	470,434.02	99,559.59
	10	6	~~1388.8~~ 1375.1	~~0.528~~ 0.528	660,529.65	320,132.68	248,166.03	568,298.71	~~88,231.06~~ 93,250.51
	120	7	1937.3	0.643	467,924.63	213,572.87	168,274.12	381,846.99	86,077.64
	80	8	1346.2	0.508	671,999.84	334,866.90	254,866.93	589,677.83	82,322.01
	50	9	1595.7	0.577	525,277.77	250,854.04	193,360.10	444,214.14	81,063.63
	100	10	1776.7	0.572	477,480.35	235,476.19	176,118.11	411,594.30	65,886.05
	110	11	1072.9	0.639	327,163.96	169,513.79	117,784.44	287,298.23	39,865.73
	130	12	965.9	0.626	227,312.54	139,205.81	82,189.25	221,394.76	5,917.78
	40	13	~~1448.1~~ 1516.4	~~0.494~~ 0.493	313,959.56	194,772.26	119,911.70	314,683.96	~~724.39CR~~ 2,243.75CR
	20	14	2891.2	0.584	264,224.05	172,074.69	100,406.71	272,481.40	8,257.35CR
	60	15	884.1	0.450	178,082.73	145,954.46	69,705.25	215,659.71	37,576.98CR

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

FEBRUARY 1961

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-131	148	1	897.8	0.586	414,125.79	202,965.84	151,906.99	354,872.87	59,252.92
	158	2	1180.3	0.671	326,486.77	157,988.73	116,351.43	274,340.16	52,066.61
	78	3	1117.5	0.578	331,469.03	175,750.37	121,927.81	297,678.18	33,730.85
	118	4	943.4	0.628	266,111.46	146,445.92	96,435.66	242,881.58	23,229.88
	108	5	1542.0	0.530	336,790.77	188,344.70	126,405.78	314,750.46	22,040.29
	38	6	1054.2	0.517	303,218.65	178,456.66	114,508.56	292,965.22	10,253.43
	128	7	1867.0	0.582	286,430.16	131,175.30	75,824.70	207,000.00	569.84CR
	58	8	1960.0	0.525	245,612.14	154,166.81	92,384.00	246,550.81	938.67CR
	98	9	1497.8	0.476	389,073.88	191,247.96	119,167.82	310,415.78	1,341.98CR
	18	10	1315.4	0.445	279,278.81	186,757.41	109,589.78	296,367.19	17,088.38CR
	138	11	1803.6	0.587	132,299.36	112,135.51	50,206.83	162,342.34	30,042.98CR
	88	12	1262.6	0.411	270,240.66	192,801.84	108,439.50	301,240.84	31,000.16CR
	28	13	2463.4	0.435	162,496.26	135,103.36	64,194.21	199,297.59	36,802.31CR
	68	14	886.9	0.443	104,312.17	106,926.47	40,997.31	147,923.78	43,611.61CR
	48	15	867.4	0.395	116,389.19	118,965.80	47,234.99	166,200.49	49,891.30CR

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

MARCH 1961

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
8707-131	40	1	1344.7	0.545	783,722.88	358,262.81	292,253.90	650,516.71	133,206.17
	50	2	911.4	0.552	661,314.81	309,473.90	245,901.02	555,374.92	105,939.89
	60	3	1215.1	0.616	497,256.91	229,638.85	180,449.83	410,288.68	86,968.23
	130	4	941.3	0.640	391,849.02	189,988.17	141,039.48	331,027.65	60,821.37
	100	5	1122.5	0.624	354,164.33	180,943.51	128,164.73	309,108.24	45,056.09
	120	6	1494.3	0.465	477,288.69	274,256.65	185,119.32	459,375.97	17,912.72
	140	7	1883.7	0.504	350,071.64	206,697.29	133,009.84	339,707.13	10,364.71
	20	8	1027.9	0.521	325,024.60	192,379.01	122,512.64	314,891.65	10,132.35
	80	9	1286.8	0.436	462,697.29	281,241.10	182,583.07	463,824.17	1,126.88CR
	90	10	1269.8	0.435	447,434.79	274,633.46	176,681.08	451,314.54	3,879.75CR
	30	11	853.4	0.515	266,711.66	170,799.45	100,819.45	271,618.90	4,907.22CR
	10	12	2513.3	0.482	271,316.57	179,966.21	104,275.15	284,241.36	12,924.79CR
	70	13	893.0	0.491	237,817.69	163,862.21	90,947.35	254,809.56	16,991.87CR
	150	14	963.0	0.588	142,103.34	114,462.12	52,075.47	166,537.59	24,434.25CR
	110	15	1079.6	0.438	197,968.71	157,447.26	78,068.46	235,515.71	37,547.00CR

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

APRIL 1961

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-131	40	1	1357.1	0.594	885,482.68	348,881.81	311,049.34	659,931.15	195,551.53
	50	2	914.4	0.588	713,388.39	296,045.35	258,185.85	554,150.96	159,155.49
	100	3	1097.1	0.649	570,076.84	237,596.35	203,580.35	441,146.70	128,930.14
	60	4	1215.1	0.629	499,110.66	220,578.29	179,308.34	399,886.63	99,224.03
	70	5	920.5	0.623	466,213.72	212,222.95	166,533.08	380,756.03	87,457.69
	20	6	1019.1	0.538	419,244.06	217,691.17	155,824.27	373,515.44	45,728.62
	110	7	1526.9	0.492	496,413.94	263,223.39	188,496.63	451,720.02	44,693.92
	90	8	1251.7	0.485	508,632.21	271,397.39	193,952.10	465,349.49	43,482.72
	80	9	~~1243.3~~ 1240.1	~~0.479~~ 0.474	497,643.04	271,634.56	190,858.58	462,693.14	~~54,949.90~~ 34,950.07
	10	10	2583.3	0.570	317,312.16	173,718.88	116,443.98	298,162.86	27,150.10
	140	11	983.0	0.611	240,572.68	141,302.54	86,967.57	228,268.11	12,312.57
	120	12	1513.5	0.437	441,474.29	263,704.61	172,918.31	436,623.12	4,851.17
	30	13	~~905.6~~	~~0.498~~	277,124.14	173,227.43	104,851.84	278,079.27	~~954.13~~ 954.13CR
	130	14	1695.1	0.468	287,555.83	185,914.53	110,793.73	296,708.26	9,152.43CR

"DX359A, Appendix B, page 61
(Supplemental S.H.E. Report - Volume A)"

"DX359A, Appendix B, page 62
(Supplemental S.H.E. Report - Volume A)"

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

MAY 1961

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-131	80	1	911.3	0.606	732,522.52	302,744.06	264,666.35	567,410.41	165,112.11
	70	2	1367.9	0.562	783,609.96	339,161.17	287,761.06	626,922.23	156,687.73
	90	3	929.6	0.623	394,969.74	189,805.43	141,888.11	331,693.54	63,276.20
	20	4	849.8	0.572	422,559.06	210,388.26	154,574.08	364,962.34	57,596.72
	60	5	1262.5	0.487	862,053.75	292,025.83	213,477.62	505,503.45	86,550.30
	40	6	1083.8	0.498	452,648.39	244,074.41	171,091.07	415,165.48	37,482.91
	130	7	2088.4	0.513	424,447.11	227,889.60	159,200.17	387,089.77	37,357.34
	120	8	1530.4	0.475	498,290.73	270,290.36	189,334.46	459,624.82	38,665.91
	110	9	1495.8	0.478	481,774.79	263,356.92	183,855.33	447,212.25	34,562.54
	30	10	2429.3	0.543	325,841.46	183,284.54	120,622.38	303,906.92	21,934.54
	140	11	983.0	0.582	248,419.35	149,196.62	90,550.43	239,747.05	8,672.30
	100	12	1542.6	0.399	299,639.73	212,879.33	120,050.11	332,929.44	33,289.71CR
	50	13	1892.7	0.364	459,043.41	313,266.61	189,018.07	502,284.68	43,241.27CR
	10	14	891.7	0.383	431,788.73	305,497.20	179,419.84	484,917.04	53,128.31CR

AX-2751

"DX359A, Appendix B, page 63
(Supplemental S.H.E. Report - Volume A)"

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

JUNE 1961

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES BRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
8707-131	70	1	1289.9	0.652	926,799.53	338,531.46	329,000.43	667,531.89	259,267.64
	130	2	1540.8	0.686	698,932.12	260,510.16	245,702.08	506,212.24	192,719.88
	50	3	1262.7	0.642	739,151.67	286,220.76	263,194.77	549,424.53	189,727.14
	20	4	1284.6	0.699	573,140.36	222,010.69	200,787.10	422,803.99	150,336.37
	140	5	1340.4	0.592	675,322.62	284,181.67	244,487.05	528,668.72	146,654.10
	110	6	1012.0	0.643	593,235.65	241,945.98	211,180.11	453,126.09	140,109.56
	30	7	1921.9	0.544	675,242.22	303,663.10	249,013.33	552,676.43	122,565.79
	40	8	1042.4	0.582	635,943.68	282,606.28	232,872.56	515,478.84	120,465.84
	100	9	1418.9	0.494	783,023.93	370,246.40	295,344.18	665,590.58	117,433.35
	10	10	883.5	0.538	627,989.37	289,490.74	232,288.41	521,899.15	106,290.22
	80	11	1100.5	0.506	694,384.08	328,867.20	260,343.87	589,210.27	105,093.81
	90	12	889.3	0.688	415,485.78	197,258.71	149,956.65	347,215.36	68,190.42
	120	13	2003.4	0.474	425,892.68	237,174.30	162,272.74	399,447.04	26,445.64
	60	14	651.0	0.494	131,977.26	114,907.15	49,778.94	164,686.09	32,708.83CR
	150	15	2474.0	0.311	228,125.50	205,206.24	98,325.39	303,531.63	75,406.13CR

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

JULY 1961

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-131	70	1	1248.9	0.611	846,481.55	333,713.81	304,445.04	638,158.85	208,322.70
	50	2	1262.5	0.626	732,153.12	292,025.83	262,057.92	554,083.75	178,069.37
	140	3	1363.6	0.559	672,252.24	298,135.71	246,377.07	544,512.78	127,739.46
	30	4	1887.5	0.538	663,773.38	304,241.01	245,381.27	549,622.28	114,151.10
	100	5	1433.9	0.496	767,854.63	368,038.58	289,304.13	654,342.71	113,511.92
	40	6	1882.0	0.542	643,845.49	295,386.23	237,536.55	532,922.78	110,622.71
	90	7	859.5	0.524	687,105.06	308,213.47	244,404.43	552,617.90	104,487.16
	130	8	1274.7	0.611	502,589.95	224,774.02	180,790.24	405,564.26	97,025.69
	150	9	1507.2	0.556	547,854.91	256,094.22	201,031.75	457,125.97	90,728.94
	10	10	897.2	0.619	608,309.72	292,462.82	226,790.42	519,253.24	89,056.48
	20	11	1239.7	0.619	460,400.11	209,445.84	165,161.42	374,607.26	85,792.85
	110	12	1012.0	0.569	507,207.51	238,091.08	185,218.77	423,309.85	83,897.66
	120	13	2380.7	0.424	444,477.99	268,552.87	174,416.67	442,969.54	1,508.45
	80	14	1437.3	0.409	339,098.11	226,081.18	134,402.34	360,483.52	21,388.41CR
	60	15	651.0	0.394	101,427.68	115,895.21	40,606.35	155,701.56	54,273.88CR

AX-2754

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

AUGUST 1961

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-131	68	1	1362.9	0.629	945,602.24	356,833.18	338,152.74	694,985.92	250,616.32
	48	2	1376.3	0.611	951,979.49	367,169.86	342,367.60	709,586.66	242,422.83
	78	3	1332.5	0.628	743,727.62	294,793.66	266,009.95	560,803.61	182,924.01
	118	4	1431.3	0.539	873,852.81	379,248.47	322,893.54	702,134.01	171,718.80
	28	5	1324.6	0.727	585,139.65	221,274.37	203,549.16	424,823.53	160,316.12
	138	6	982.9	0.611	670,166.13	277,967.12	241,982.51	519,949.63	151,118.50
	108	7	863.8	0.547	725,655.70	322,144.35	267,235.59	589,379.94	136,275.76
	38	8	1965.2	0.543	695,461.22	313,699.88	286,639.96	570,339.84	125,121.68
	158	9	1321.6	0.668	497,032.76	211,192.15	176,031.46	387,223.61	109,809.15
	128	10	1883.2	0.598	561,676.72	249,672.32	203,526.90	453,399.22	108,279.50
	18	11	719.9	0.599	510,815.53	230,591.62	184,497.85	415,089.47	95,726.66
	88	12	1368.5	0.595	448,567.42	211,333.36	162,222.79	373,556.15	75,011.27
	148	13	2318.3	0.496	491,760.89	222,266.64	151,390.61	373,657.25	28,843.64
	98	14	1490.6	0.399	357,172.18	238,628.85	142,494.24	381,122.79	23,950.61CR
	50	15	659.8	0.378	98,202.41	116,674.98	40,054.12	156,729.10	58,526.69CR

"DX359A, Appendix B, page 65
(Supplemental S.H.E. Report - Volume A

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

SEPTEMBR 1961

TABLE A

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-131	50	1	1278.3	0.641	889,880.49	332,282.83	316,997.22	649,280.05	240,600.44
	150	2	1387.2	0.618	761,740.06	302,115.61	273,355.73	575,471.34	186,268.72
	60	3	1305.9	0.588	705,334.03	295,786.00	285,768.15	581,554.15	153,779.88
	20	4	~~1119.6~~ 1022.7	~~0.541~~ 0.635	557,822.28	231,927.52	198,726.78	430,654.30	~~127,167.98~~ 128,041.48
	120	5	999.9	0.499	807,510.27	376,726.67	303,850.91	680,577.58	126,932.69
	140	6	1726.7	0.577	383,038.93	106,013.50	110,320.87	216,334.37	86,704.56
	70	7	1260.4	0.598	457,954.46	211,598.81	165,457.24	377,056.05	80,898.41
	130	8	1605.6	0.534	534,468.80	256,995.47	197,910.75	454,906.22	79,562.58
	100	9	1519.2	0.533	498,476.37	244,328.02	184,573.18	429,001.20	69,475.17
	30	10	1983.1	0.462	557,050.14	296,725.78	213,637.69	510,363.47	46,686.67
	90	11	888.1	0.464	538,803.11	288,048.92	206,400.28	494,449.20	44,353.91
	10	12	925.2	0.459	548,906.24	294,711.25	210,841.46	505,552.71	43,353.53
	80	13	1336.3	0.417	381,419.89	240,223.21	150,283.37	390,506.58	9,086.69CR
	110	14	1209.0	0.481	297,040.35	206,858.87	118,393.55	325,252.42	28,212.07CR
	40	15	~~707.1~~ 741.4	~~0.498~~ 0.397	189,508.50	116,246.62	43,674.75	159,921.37	~~80,412.87CR~~ 51,286.37CR

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

OCTOBER 1961

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-131	60	1	1184.2	0.614	550,471.29	333,506.22	305,536.38	639,042.60	211,428.69
	~~80~~	2	~~1276.8~~ 1309.5	~~0.574~~ 0.585	741,462.41	315,597.83	270,221.42	585,819.25	~~156,643.16~~ 154,740.22
	28	3	~~843.3~~ 849.7	~~0.537~~ 0.536	710,869.13	322,016.30	262,983.00	584,999.30	~~125,869.83~~ 124,772.77
	130	4	1704.8	0.541	525,409.34	247,699.54	193,995.57	441,695.11	84,314.23
	80	5	1275.3	0.535	419,554.33	217,346.25	155,340.79	372,687.04	46,867.29
	150	6	1704.0	0.458	486,623.48	262,152.42	184,719.87	446,872.29	33,751.19
	90	7	896.5	0.487	428,886.37	235,521.54	162,021.85	397,543.39	30,542.98
	70	8	1139.9	0.434	570,645.38	320,362.16	222,548.71	542,910.87	27,734.51
	10	9	971.4	0.435	536,268.73	304,087.19	208,930.26	513,017.45	23,251.28
	100	10	1481.3	0.444	414,404.71	239,961.62	160,625.93	400,587.55	13,817.16
	120	11	1538.6	0.431	442,289.34	264,218.01	172,777.74	436,987.75	5,301.59
	110	12	1338.9	0.426	458,076.20	273,744.74	179,512.95	453,257.69	4,818.51
	30	13	1113.2	0.431	328,324.75	212,761.09	126,215.05	340,976.14	12,651.39CR
	140	14	983.0	0.514	207,278.06	143,407.50	77,448.64	220,856.14	13,578.08CR
	40	15	1743.7	0.386	455,506.34	293,743.13	183,448.95	477,192.08	21,685.74CR

"DX359A, Appendix B, page 67 (Supplemental S.H.E. Report - Volume A)"

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

NOVEMBER 1961

TABLE A

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
8707-131	90	1	980.1	0.548	588,730.60	271,210.23	216,727.38	487,937.61	100,792.99
	50	2	936.9	0.469	550,692.92	290,752.22	210,427.23	501,179.45	49,513.47
	80	3	1224.7	0.464	578,795.12	310,176.42	222,989.10	533,165.52	45,629.60
	60	4	930.4	0.522	383,789.96	205,610.89	142,877.62	348,488.51	35,301.45
	110	5	1209.8	0.495	336,575.10	194,958.08	126,904.93	321,861.01	14,714.09
	100	6	745.0	0.453	312,775.18	196,969.96	120,578.03	317,547.99	4,772.81CR
	70	7	899.9	0.394	323,063.34	222,143.36	129,394.78	351,538.14	28,474.80CR
	120	8	982.7	0.462	155,337.31	128,259.32	59,568.58	187,827.90	32,490.59CR
	20	9	1265.1	0.359	493,545.83	329,939.17	203,256.89	533,196.06	39,650.23CR
	10	10	1201.1	0.352	538,863.87	360,225.87	223,272.23	583,498.10	44,634.23CR
	40	11	2491.2	0.329	168,012.71	162,179.68	71,109.71	233,289.39	65,276.68CR
	30	12	1622.9	0.324	483,723.51	352,269.51	205,666.20	557,935.71	74,212.20CR

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

DECEMBER 1961

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES BRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-131	70	1	939.8	0.662	736,325.21	280,916.25	260,685.45	541,571.70	194,753.51
	40	2	1831.7	0.587	787,766.89	335,865.58	265,330.63	601,196.21	186,569.68
	20	3	1499.3	0.523	589,761.61	283,795.17	219,469.09	503,264.26	86,497.35
	60	4	786.6	0.515	559,059.24	275,769.29	208,826.38	484,595.67	74,463.57
	100	5	936.2	0.625	391,946.40	186,814.81	140,326.41	327,141.22	64,805.18
	90	6	1052.3	0.586	412,049.86	201,592.43	149,518.51	351,110.94	60,938.12
	30	7	1296.4	0.469	535,054.61	277,445.10	202,361.92	479,807.02	55,247.59
	50	8	1341.6	0.520	465,925.56	239,070.57	173,657.67	412,728.24	53,197.32
	10	9	956.6	0.504	484,230.22	251,552.70	181,800.29	433,352.99	50,877.23
	110	10	989.1	0.484	414,389.54	231,229.32	157,084.99	388,314.31	25,995.23
	120	11	965.5	0.526	188,921.61	134,910.65	70,221.91	205,132.56	16,210.95CR
	80	12	2357.1	0.464	241,058.88	165,896.81	92,348.13	258,244.94	17,186.06CR

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

JANUARY 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
8707-131	100	1	988.6	0.615	725,328.92	271,852.19	262,916.50	534,768.69	190,560.23
	110	2	763.9	0.514	609,211.82	273,295.23	229,577.82	502,873.05	106,338.77
	40	3	1068.2	0.585	443,411.60	191,417.99	162,388.41	353,806.40	89,605.20
	50	4	1321.1	0.518	528,328.17	241,621.80	198,729.84	440,351.64	87,976.53
	60	5	915.0	0.545	444,145.02	202,342.29	165,150.23	367,492.52	76,652.50
	30	6	1309.4	0.447	595,619.59	301,852.05	232,112.71	533,164.76	62,454.83
	70	7	902.6	0.502	396,580.62	197,517.47	150,230.10	347,747.57	48,833.05
	20	8	1547.6	0.424	574,588.11	305,362.16	227,018.97	532,381.13	42,206.98
	80	9	1530.3	0.395	605,416.21	339,361.28	243,892.90	583,254.18	22,162.03
	10	10	897.2	0.402	417,815.93	245,276.25	167,532.64	412,808.89	5,007.04
	120	11	955.0	0.495	190,109.88	119,964.99	72,254.90	192,419.89	2,110.01CR
	90	12	2485.7	0.387	189,456.20	140,205.09	78,786.12	218,993.21	27,537.01CR

"DX359A, Appendix B, page 70
(Supplemental S.H.E. Report - Volume A)"

AX-2750

AX-2760

"DX359A, Appendix B, page 71
(Supplemental S.H.E. Report - Volume A)"

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

FEBRUARY 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
8707-131	100	1	958.9	0.574	617,107.13	254,412.16	228,513.51	482,925.67	134,181.46
	50	2	1264.8	0.589	511,409.20	240,233.98	194,551.44	434,785.42	76,623.78
	40	3	1025.0	0.585	399,701.91	184,132.75	149,064.25	333,197.00	66,504.91
	70	4	879.2	0.529	333,514.14	166,575.57	125,772.19	292,347.76	41,166.38
	60	5	926.1	0.488	358,794.07	187,177.20	137,910.87	325,088.07	33,706.00
	110	6	776.8	0.422	497,600.31	274,935.39	198,643.91	473,579.30	24,021.01
	10	7	985.6	0.382	425,352.52	261,730.22	174,609.86	436,340.08	10,987.56CR
	120	8	952.6	0.476	131,431.10	96,612.42	50,840.39	147,452.81	16,021.71CR
	20	9	1545.6	0.367	437,738.52	277,235.58	181,819.99	459,055.57	21,317.05CR
	30	10	1222.6	0.386	452,487.05	292,606.69	189,583.99	482,290.68	29,803.63CR
	90	11	2435.1	0.306	113,731.12	115,448.82	50,102.35	165,551.87	51,819.75CR
	80	12	1573.1	0.338	392,199.87	276,685.72	168,484.93	445,170.65	52,970.78CR

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

MARCH 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
8707-131	100	1	963.6	0.774	776,639.18	310,780.59	286,880.66	597,661.25	178,977.93
	40	2	1029.5	0.663	422,415.56	209,430.65	160,502.25	369,932.30	52,483.26
	70	3	891.5	0.678	401,121.14	202,363.22	152,682.27	355,045.49	46,055.65
	110	4	747.6	0.572	541,337.01	295,481.50	215,070.19	510,551.69	30,785.32
	50	5	1260.5	0.596	486,711.64	248,147.56	179,482.87	427,630.45	29,081.19
	60	6	917.8	0.561	329,761.48	195,917.62	130,478.41	326,396.03	3,365.45
	120	7	983.0	0.699	196,252.84	120,632.43	74,192.16	194,824.59	1,428.25
	10	8	899.1	0.515	439,920.64	271,425.86	180,045.05	451,470.91	11,550.27CR
	30	9	1325.0	0.480	462,742.14	300,876.16	193,348.80	493,424.96	30,682.82CR
	90	10	2567.0	0.515	190,676.90	144,019.42	78,032.15	222,051.57	31,374.67CR
	20	11	1583.2	0.468	419,749.27	282,707.40	176,827.49	459,534.89	39,785.62CR
	80	12	1576.0	0.402	449,125.66	340,973.34	198,942.79	539,916.13	90,790.47CR

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

APRIL 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-131	108	1	~~882.6~~ 1221.1	~~0.547~~ 0.545	638,885.70	275,447.78	239,013.54	514,461.32	~~124,344.38~~ 123,960.97
	38	2	914.0	0.514	677,385.23	305,318.48	257,148.12	562,463.60	114,841.63
	58	3	790.5	0.504	430,349.36	185,598.57	157,593.19	343,191.76	87,157.62
	48	4	~~1309.6~~ 1249.6	~~0.470~~ 0.469	647,552.12	317,250.44	251,304.33	568,554.77	~~78,997.35~~ 80,998.36
	110	5	1025.5	0.510	446,824.93	218,108.87	169,957.07	388,065.94	58,758.99
	68	6	867.3	0.479	437,161.21	225,384.36	168,852.26	394,236.62	42,924.59
	78	7	760.0	0.461	494,201.68	261,480.72	193,817.39	455,298.11	38,903.57
	88	8	1262.5	0.436	386,248.00	220,058.03	152,843.84	372,901.87	13,346.13
	128	9	914.0	0.473	283,655.19	163,493.67	109,892.08	273,385.75	10,269.44
	20	10	1360.1	0.495	491,450.56	284,807.42	198,462.56	483,269.98	8,180.58
	130	11	899.2	0.464	178,316.32	120,945.74	69,414.25	190,359.99	12,043.67CR
	140	12	2584.5	0.467	288,786.37	146,316.95	84,147.77	230,464.72	21,758.35CR
	98	13	1548.6	0.348	488,566.62	311,038.31	197,946.66	508,984.97	40,418.35CR
	18	14	1094.4	0.340	578,908.30	381,488.89	246,364.62	627,768.51	48,860.21CR

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

MAY 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-131	90	1	947.9	0.568	740,383.55	303,629.77	274,697.49	578,327.26	162,056.29
	70	2	609.9	0.569	730,495.95	300,153.52	271,019.05	571,172.57	159,323.38
	60	3	951.6	0.584	600,457.51	281,734.29	229,008.08	510,742.37	89,715.14
	88	4	1060.8	0.483	533,779.83	264,753.30	205,708.58	470,461.88	63,317.95
	30	5	1262.5	0.461	550,677.95	282,419.74	214,731.32	497,151.06	53,526.89
	100	6	647.8	0.495	421,266.63	214,444.86	161,339.25	375,784.11	45,482.72
	150	7	2366.4	0.483	287,673.74	141,685.71	110,878.57	252,564.28	35,109.46
	110	8	687.7	0.494	368,575.39	193,707.82	141,219.27	334,927.09	33,648.30
	130	9	1462.1	0.458	434,597.40	233,808.19	169,723.50	403,531.69	31,065.71
	140	10	451.7	0.637	177,799.68	101,704.51	64,423.88	166,128.39	11,671.29
	10	11	896.5	0.406	513,978.09	296,421.74	207,355.12	503,776.86	10,201.23
	40	12	812.8	0.488	530,579.20	308,609.91	215,013.67	523,623.58	6,955.62
	50	13	2587.0	0.366	216,674.26	163,564.70	90,176.41	253,681.11	36,806.85CR
	120	14	2390.2	0.355	362,871.98	248,224.51	152,286.11	400,510.62	37,638.64CR
	20	15	1499.0	0.340	595,218.06	392,873.37	253,232.81	645,306.18	50,088.16CR

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

JUNE 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT.	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-131	90	1	942.1	0.617	789,358.63	307,690.48	287,865.71	595,556.19	293,802.44
	70	2	663.4	0.568	696,463.74	281,951.43	257,258.30	539,209.73	157,274.01
	110	3	1648.5	0.588	621,482.62	256,687.85	229,611.99	486,299.84	135,182.78
	60	4	994.8	0.583	513,088.78	216,783.80	189,306.34	406,090.14	104,918.56
	30	5	1388.4	0.617	616,063.98	280,163.55	233,518.34	513,681.89	102,382.09
	80	6	913.3	0.479	583,923.87	285,650.22	225,524.23	511,374.45	72,549.42
	10	7	982.4	0.488	565,948.13	277,652.96	218,374.95	496,927.91	70,020.22
	50	8	888.5	0.472	564,683.85	281,366.86	218,878.46	500,244.02	64,389.83
	20	9	~~1040.8~~ 1679.2	~~0.488~~ 0.433	629,136.68	332,775.79	249,586.18	582,361.97	~~46,774.72~~ 46,905.73
	100	10	637.4	0.472	387,874.48	207,384.68	150,351.38	357,736.96	30,168.42
	130	11	~~884.4~~ 794.0	~~0.488~~ 0.433	333,586.58	180,798.17	128,387.29	309,185.46	~~24,401.12~~ 24,151.11
	120	12	2436.2	0.424	466,474.55	261,618.77	185,516.48	447,127.17	18,347.38
	140	13	463.8	0.634	188,849.56	103,782.28	68,377.88	172,159.28	16,390.28
	40	14	2808.3	0.425	282,178.67	162,884.48	108,432.28	262,316.68	19,348.81CR

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

JULY 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-131	110	1	944.5	0.589	776,461.83	306,958.84	285,937.46	592,896.30	183,565.53
	90	2	674.1	0.589	678,539.56	274,066.27	249,863.70	523,929.97	154,609.59
	78	3	1486.5	0.478	797,360.48	375,759.29	308,052.18	683,811.47	113,549.01
	48	4	993.4	0.618	506,563.78	208,217.31	184,333.30	392,550.61	113,013.17
	66	5	791.1	0.645	428,611.78	177,684.21	184,717.60	332,401.81	96,609.89
	126	6	1470.3	0.536	486,076.10	225,992.99	182,829.37	408,822.36	77,253.74
	20	7	722.1	0.562	381,028.67	180,385.27	141,722.20	322,107.47	58,921.20
	100	8	910.5	0.449	568,261.63	290,725.70	217,998.89	508,724.59	46,537.24
	10	9	897.1	0.488	504,659.46	268,214.24	198,070.72	466,284.96	38,374.50
	50	10	634.8	0.479	384,668.67	205,341.63	148,666.47	353,997.12	30,658.75
	80	11	2437.4	0.443	468,988.38	288,877.80	155,113.06	448,990.86	20,016.32
	130	12	719.8	0.486	330,791.60	180,897.44	127,272.38	308,169.79	22,621.90
	140	13	451.7	0.562	168,664.21	103,748.69	60,810.69	164,286.38	1,592.17CR
	30	14	2867.8	0.327	266,127.60	167,481.76	98,229.08	263,630.84	53,502.99CR

AX-2766

"DX359A, Appendix B, page 77 (Supplemental S.H.E. Report - Volume A)"

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

AUGUST 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
8707-131	110	1	980.4	0.636	836,630.88	307,151.34	383,432.23	610,583.57	226,047.31
	90	2	573.9	0.771	491,195.56	172,621.28	171,907.08	344,728.36	146,467.20
	10	3	913.4	0.542	651,268.16	284,620.41	244,417.28	529,037.69	122,230.47
	100	4	~~884.3~~ 884.0	~~0.525~~ 0.524	633,991.16	286,307.15	239,600.45	526,107.88	107,883.28 ~~107,883.28~~
	120	5	1152.7	0.662	412,117.96	169,682.64	148,287.80	318,170.44	93,947.52
	20	6	718.9	0.617	404,294.08	176,549.83	147,574.54	324,124.37	80,169.71
	60	7	846.9	0.677	318,025.78	139,724.41	113,962.79	253,687.20	64,338.58
	140	8	941.3	0.479	535,215.95	267,803.99	206,836.86	474,640.85	60,575.10
	70	9	1044.7	0.592	474,831.55	233,672.73	181,407.01	415,279.74	59,551.81
	40	10	~~844.6~~ 840.9	~~0.587~~ 0.586	389,366.02	168,281.86	132,597.21	308,799.07	57,572.22 ~~57,572.22~~
	80	11	1119.6 ~~1109.8~~	0.459 ~~0.450~~	580,571.44	298,906.36	227,248.05	526,154.41	54,472.79 ~~54,472.79~~
	130	12	689.1	0.523	328,986.55	171,153.75	124,475.31	295,629.06	33,357.49
	30	13	992.7	0.433	418,028.81	238,007.83	165,898.39	403,906.22	14,122.59
	50	14	838.4	0.397	283,697.86	188,052.39	115,284.19	303,336.58	19,638.72CR

45

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

SEPTEMBR 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-131	70	1	674.9	0.658	674,460.77	247,401.76	242,809.64	490,211.40	184,249.37
	100	2	681.1	0.602	714,181.61	279,019.45	261,706.91	540,726.36	173,455.25
	90	3	965.2	0.624	477,829.25	196,297.71	173,859.30	370,157.01	107,672.24
	50	4	737.1	0.623	434,475.77	182,781.94	158,132.55	340,914.49	93,561.28
	60	5	629.2	0.591	428,905.19	188,214.21	157,784.54	345,998.75	82,906.44
	20	6	722.7	0.621	353,076.04	157,220.67	128,560.98	285,781.05	67,294.99
	110	7	426.2	0.567	309,924.67	152,938.73	115,047.55	267,986.28	41,938.39
	130	8	910.5	0.625	251,932.50	124,641.35	91,626.11	216,267.46	35,665.04
	80	9	910.5	0.588	236,921.27	124,641.35	87,272.66	211,914.01	25,007.26
	120	10	465.2	0.552	254,821.26	136,187.81	95,156.16	231,345.97	23,475.29
	40	11	1023.6	0.460	359,409.69	199,281.79	140,212.46	339,494.25	19,915.44
	140	12	544.4	0.569	177,461.27	106,591.19	65,816.81	172,408.00	5,053.27
	30	13	889.1	0.405	423,254.27	251,340.88	170,875.44	422,215.44	1,038.83
	10	14	921.2	0.362	404,846.96	265,728.99	168,894.39	434,623.38	29,777.32CR

"DX359A, Appendix B, page 78
(Supplemental S.H.E. Report - Volume A)"

AX-2767

AX-2768

"DX359A, Appendix B, page 79
(Supplemental S.H.E. Report - Volume A)"

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

OCTOBER 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-131	100	1	672.7	0.565	647,310.46	272,564.18	240,456.44	513,020.64	134,289.92
	90	2	932.2	0.534	634,869.59	281,107.35	238,841.80	519,949.15	114,920.44
	80	3	884.9	0.705	488,057.71	158,613.65	142,160.59	300,773.64	99,284.07
	60	4	837.8	0.566	489,774.28	217,407.76	181,898.68	399,306.44	90,467.84
	50	5	856.9	0.598	381,663.68	164,655.69	129,204.34	293,260.23	57,743.65
	20	6	724.0	0.559	361,632.27	174,196.37	134,623.66	308,819.85	52,713.22
	110	7	436.9	0.546	313,145.04	159,804.47	117,232.85	277,037.32	36,107.72
	120	8	467.8	0.542	259,258.43	140,967.16	97,289.51	238,176.67	21,081.76
	10	9	803.1	0.417	454,514.77	295,639.20	162,043.36	437,682.56	16,632.21
	140	10	899.2	0.518	227,622.67	133,288.82	86,241.08	219,521.10	8,101.77
	130	11	672.3	0.518	172,828.23	113,439.16	65,719.44	179,158.62	6,333.39CR
	70	12	842.6	0.461	189,778.33	127,826.90	73,993.25	201,820.15	12,041.82CR
	40	13	944.7	0.374	337,526.37	224,474.34	139,393.79	363,868.13	26,341.76CR
	30	14	867.4	0.344	439,836.69	298,774.19	186,402.31	485,176.50	45,339.81CR

"DX359A, Appendix B, page 80
(Supplemental S.H.E. Report - Volume A)"

AX-2769

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

NOVEMBER 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-131	120	1	656.9	0.547	614,923.24	266,743.14	230,056.33	496,799.47	118,123.77
	110	2	626.8	0.555	322,965.63	142,336.73	116,395.77	258,692.50	64,273.33
	48	3	691.1	0.519	449,324.41	215,826.58	170,149.44	385,976.02	63,348.39
	38	4	636.8	0.531	420,737.65	201,446.40	156,503.53	359,949.93	60,787.92
	18	5	709.4	0.594	358,693.24	161,570.41	126,685.08	288,485.49	68,237.75
	28	6	624.4	0.561	310,632.76	154,375.87	115,588.23	269,964.10	40,668.68
	68	7	486.1	0.548	312,450.16	157,568.00	116,860.14	274,428.14	38,022.02
	58	8	699.2	0.466	358,529.82	196,769.05	139,371.01	336,140.06	22,389.76
	88	9	580.1	0.589	220,350.48	116,913.63	81,130.54	208,044.37	20,306.11
	78	10	674.2	0.426	426,612.12	242,624.05	169,815.47	412,439.52	14,172.60
	108	11	385.7	0.614	186,224.20	104,938.91	67,972.88	172,911.49	13,312.71
	138	12	759.7	0.422	433,882.82	247,647.54	172,840.87	420,488.41	12,513.81
	98	13	772.8	0.477	258,655.42	152,187.31	100,861.44	252,248.75	6,606.67

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

DECEMBER 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-131	130	1	665.2	0.562	582,266.96	258,961.17	216,534.68	467,495.85	114,711.11
	120	2	572.9	0.676	360,468.27	181,876.26	129,113.03	280,989.31	79,498.96
	60	3	668.5	0.567	396,479.26	184,535.35	147,171.45	331,706.80	64,772.46
	40	4	681.9	0.527	427,886.14	206,635.92	161,463.49	368,319.41	59,566.73
	20	5	656.3	0.669	314,581.10	148,499.31	115,011.29	263,510.60	51,070.50
	60	6	671.6	0.486	452,430.16	230,411.20	174,102.59	404,513.79	47,916.37
	10	7	738.1	0.577	322,066.77	156,674.55	119,095.65	275,770.20	46,316.57
	140	8	787.5	0.473	454,441.52	236,391.35	176,081.37	412,472.72	41,968.80
	30	9	631.0	0.486	379,266.52	200,567.76	148,928.59	346,486.37	32,779.15
	70	10	456.5	0.562	282,692.63	147,718.86	105,581.17	253,300.03	29,392.60
	50	11	539.0	0.565	248,924.51	140,779.62	91,848.51	232,627.53	8,296.98
	110	12	389.7	0.566	172,462.61	105,292.61	63,713.35	169,005.96	3,456.65
	90	13	462.1	0.524	60,955.53	36,497.69	23,037.95	59,535.64	1,419.89
	100	14	766.3	0.455	208,338.30	136,866.73	81,485.25	218,351.98	10,013.68CR

"DX359A, Appendix B, page 82
(Supplemental S.H.E. Report - Volume A)"

AX-2771

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

JANUARY 1963

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	V A R I A B L E E X P E N S E S A/C OPER	GRND & INDIRECT	TOTAL	PROFIT/ LOSS
B707-131	110	1	696.4	0.587	598,124.24	274,488.05	226,788.48	501,276.53	96,847.71
	40	2	733.6	0.626	466,645.88	204,523.71	172,322.54	376,846.25	89,799.63
	20	3	847.0	0.643	310,392.71	148,658.72	113,979.19	262,637.91	47,754.80
	60	4	668.3	0.587	355,484.66	174,803.79	133,162.10	307,965.89	47,518.77
	10	5	716.9	0.591	335,651.98	166,667.42	125,512.08	292,179.50	43,472.48
	50	6	542.6	0.544	270,530.66	135,354.28	99,316.95	234,671.23	35,859.63
	80	7	691.6	0.491	437,965.40	235,902.37	171,363.72	407,266.09	30,719.31
	130	8	637.5	0.618	269,887.72	140,899.22	100,241.20	240,340.42	29,547.30
	30	9	629.8	0.582	353,692.61	195,794.61	137,556.04	333,350.65	20,341.76
	70	10	486.1	0.504	296,558.31	171,174.11	115,241.21	286,415.32	10,142.99
	100	11	395.1	0.565	154,953.54	104,277.73	58,559.61	162,837.34	7,883.80CR
	120	12	783.6	0.425	377,373.91	234,809.84	153,548.51	388,358.35	10,984.44CR
	90	13	768.9	0.452	233,657.19	156,968.86	93,459.35	249,428.21	15,771.02CR

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

FEBRUARY 1963

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-131	40	1	691.6	0.584	483,989.44	217,691.98	181,515.21	399,407.19	84,582.25
	110	2	679.8	0.496	460,923.58	239,201.36	179,820.89	419,021.95	41,901.63
	80	3	536.2	0.621	270,070.29	134,033.84	99,913.58	233,947.12	36,123.17
	130	4	686.5	0.522	311,337.11	166,268.03	119,881.77	286,149.80	25,187.31
	60	5	696.6	0.582	388,668.86	178,170.30	129,462.89	303,632.89	18,967.97
	20	6	596.6	0.573	229,706.53	126,728.60	86,569.98	213,297.98	16,468.55
	60	7	673.6	0.470	354,260.62	201,806.02	140,166.77	341,972.79	12,287.83
	30	8	632.8	0.467	302,231.69	182,141.67	120,491.16	302,633.83	401.14CR
	10	9	723.1	0.494	227,207.99	139,310.48	88,731.15	228,041.63	833.64CR
	70	10	423.3	0.470	212,456.37	137,594.28	84,985.86	221,580.14	9,193.77CR
	100	11	389.3	0.537	131,369.79	93,519.92	50,248.54	143,768.46	12,398.67CR
	120	12	797.3	0.488	307,542.69	208,177.10	127,421.29	335,598.39	25,055.70CR
	90	13	734.9	0.393	219,291.32	166,275.36	91,341.89	257,617.67	32,333.35CR

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

MARCH 1963

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-131	40	1	683.6	0.616	474,030.08	209,654.51	175,662.67	385,317.18	88,712.90
	110	2	674.4	0.617	599,104.86	292,447.18	231,275.98	523,723.16	75,381.70
	10	3	707.7	0.571	360,207.35	180,198.92	135,793.10	315,992.02	44,215.33
	30	4	640.7	0.525	403,025.07	209,344.98	155,019.52	364,364.50	38,660.57
	130	5	595.1	0.550	361,103.90	185,665.67	137,332.36	322,998.03	38,105.87
	80	6	880.2	0.515	367,644.44	197,876.35	142,085.18	339,961.53	27,682.91
	50	7	535.8	0.636	241,761.52	126,734.23	88,964.65	215,698.88	26,062.64
	60	8	683.6	0.526	317,878.15	174,559.59	122,210.06	296,769.65	21,108.50
	20	9	807.7	0.585	252,051.01	137,605.04	94,490.10	232,095.14	19,955.87
	70	10	455.1	0.514	282,266.46	162,708.01	109,119.79	271,827.80	10,448.66
	100	11	390.4	0.599	170,835.08	106,609.60	63,706.45	170,316.05	519.03
	90	12	755.4	0.476	210,304.20	139,690.59	82,930.62	222,821.21	12,517.01CR
	120	13	768.7	0.416	385,308.92	243,289.30	157,818.98	401,828.28	15,719.28CR

AX-2774

"DX359A, Appendix B, page 85
(Supplemental S.H.E. Report - Volume A)

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

APRIL 1963

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-131	56	1	672.0	0.583	587,413.37	270,212.32	223,031.13	493,243.45	94,169.92
	120	2	690.6	0.580	486,321.53	222,801.02	182,647.07	405,448.09	80,873.44
	10	3	783.9	0.638	388,822.92	179,087.41	147,066.60	326,154.01	72,668.91
	80	4	686.3	0.581	388,570.85	194,316.04	147,660.98	341,976.94	46,593.91
	20	5	840.1	0.642	296,972.99	142,422.57	108,688.59	251,111.16	44,861.83
	116	6	~~766.6~~ 840.6	~~0.507~~ 0.560	422,881.49	220,915.83	163,571.76	384,487.29	~~37,692.53~~ 37,894.20
	60	7	587.7 ~~660.1~~	0.550 ~~0.648~~	356,946.59	184,412.41	136,181.11	320,593.52	33,925.74 ~~36,353.07~~
	130	8	527.7	0.599	284,212.26	145,366.04	105,970.33	251,336.37	32,875.89
	30	9	631.0	0.588	390,214.83	210,304.03	151,879.25	362,183.28	28,031.55
	90	10	424.3	0.549	381,838.42	161,237.23	114,791.51	276,028.74	25,889.68
	70	11	741.3 ~~761.0~~	0.484 ~~0.474~~	429,726.76	237,318.80	169,649.12	406,967.92	25,007.80 ~~22,758.84~~
	40	12	748.4	0.550	273,927.74	150,345.97	104,156.36	254,502.35	19,425.39
	100	13	421.8	0.604	212,330.67	119,197.38	79,020.87	198,218.25	14,112.42

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

MAY 1963

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-131	120	1	679.5	0.574	595,882.24	266,824.92	224,345.29	491,170.21	104,712.03
	110	2	585.6	0.695	426,368.20	176,443.41	154,081.38	330,524.79	95,843.41
	100	3	592.2	0.591	493,996.93	191,438.86	151,110.03	342,548.89	51,448.04
	20	4	734.7	0.665	335,631.47	153,316.38	122,381.25	275,697.63	59,933.84
	10	5	662.9	0.585	396,718.03	190,262.72	148,726.00	338,988.72	57,729.31
	60	6	668.8	0.537	446,305.31	222,759.72	170,697.96	393,457.68	52,847.63
	80	7	721.0	0.647	323,662.09	152,434.24	118,765.11	271,199.35	52,662.74
	130	8	663.0	0.765	181,070.36	81,306.67	65,252.33	146,558.00	34,512.35
	50	9	642.4	0.583	413,422.97	220,782.44	160,708.90	381,491.34	31,931.63
	70	10	433.1	0.523	362,608.20	193,423.88	139,584.03	333,007.91	29,600.29
	40	11	847.0	0.601	267,692.78	140,752.73	99,756.24	240,510.97	27,181.81
	30	12	884.3	0.518	318,013.47	178,509.34	123,173.76	301,683.10	16,330.37
	90	13	929.1	0.469	366,328.66	236,668.16	150,786.28	387,466.44	21,137.78CR

AX-2776

"DX359A, Appendix B, page 87
(Supplemental S.H.E. Report - Volume A)"

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

JUNE 1965

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
8707-131	130	1	673.8	0.667	703,648.63	268,734.79	256,415.06	525,149.85	178,498.78
	88	2	837.2	0.887	519,356.27	181,148.83	182,468.21	363,617.04	155,738.23
	60	3	671.6	0.734	586,321.83	285,340.46	198,841.98	484,191.44	102,130.39
	120	4	510.9	0.766	495,761.00	181,906.55	175,810.09	357,716.64	138,044.36
	20	5	627.8	0.671	488,157.46	191,498.32	169,233.99	360,924.31	104,233.15
	40	6	810.4	0.885	446,810.84	189,377.14	163,377.38	352,754.52	94,056.32
	58	7	631.7	0.500	477,411.77	213,421.99	177,870.56	391,292.55	86,119.22
	98	8	653.9	0.778	346,336.39	139,881.87	122,479.11	261,488.98	84,857.41
	30	9	517.2	0.783	356,597.96	144,982.84	126,851.09	271,833.13	84,764.83
	70	10	435.1	0.883	447,838.77	202,697.66	166,565.68	368,663.54	78,875.23
	10	11	574.5	0.637	393,039.66	176,773.92	144,847.34	320,621.26	73,218.40
	100	12	938.8	0.835	463,284.01	228,297.50	177,289.38	405,586.88	57,727.13
	110	13	378.4	0.833	187,869.95	119,389.93	71,960.55	191,270.48	3,488.53CR

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

JULY 1963

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
8707-131	130	1	674.1	0.632	719,935.59	288,127.06	265,270.40	553,397.46	166,538.13
	120	2	488.5	0.763	488,130.76	179,640.29	170,485.09	350,045.38	138,085.38
	36	3	646.6	0.698	601,250.92	256,127.78	223,396.91	479,524.69	121,726.23
	80	4	899.6	0.687	567,387.78	244,612.47	210,891.30	455,503.77	111,884.01
	28	5	892.5	0.665	438,133.38	185,979.97	159,721.92	345,701.89	92,431.49
	58	6	812.2	0.644	443,538.34	192,442.36	162,798.03	355,240.39	88,289.95
	110	7	593.6	0.665	418,777.89	179,786.67	152,664.93	332,451.60	86,326.29
	40	8	515.9	0.702	381,732.77	161,441.92	137,638.95	299,080.87	82,651.90
	68	9	688.1	0.548	395,270.19	199,140.77	150,364.62	349,525.39	45,744.80
	90	10	663.0	0.617	293,456.06	146,959.90	108,674.91	255,634.81	37,821.25
	70	11	432.0	0.511	356,978.62	194,413.19	138,184.66	332,597.85	24,380.77
	100	12	945.7	0.485	412,653.92	226,837.12	161,903.26	388,740.38	23,913.54
	10	13	572.3	0.528	313,658.71	172,306.87	120,460.40	292,767.27	20,891.44

"DX359A, Appendix B, page 88
(Supplemental S.H.E. Report - Volume A)"

AX-2111

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

AUGUST 1963

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES BRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-131	138	1	677.6	0.694	812,114.37	294,667.17	293,586.86	588,173.23	223,941.14
	36	2	662.2	0.659	734,133.38	285,913.21	268,865.47	554,778.68	179,354.70
	128	3	493.7	0.793	584,227.57	181,046.76	177,715.28	358,762.04	145,465.53
	118	4	584.9	0.725	533,988.22	282,376.96	191,385.59	393,682.55	140,222.67
	20	5	612.1	0.733	496,680.24	189,674.74	177,374.35	367,849.89	129,831.15
	80	6	925.4	0.654	535,548.72	220,068.18	195,922.54	415,990.64	119,558.88
	58	7	811.8	0.715	467,024.35	184,667.01	167,784.53	352,451.54	114,572.81
	48	8	517.3	0.779	354,243.95	142,448.31	125,229.65	267,677.96	86,565.99
	108	9	919.8	0.538	485,322.32	237,622.98	185,480.29	423,103.19	62,219.13
	78	10	438.9	0.565	423,989.19	285,424.39	160,152.25	365,576.64	58,332.55
	98	11	656.8	0.712	301,718.71	135,968.96	108,492.01	244,462.97	57,257.74
	68	12	613.1	0.557	410,336.18	282,299.12	185,488.50	367,787.62	52,548.56
	148	13	1078.9	0.579	288,943.26	86,996.77	78,469.84	165,466.61	43,476.64
	18	14	579.1	0.560	341,746.87	176,615.60	129,372.23	304,988.03	36,758.84

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

SEPTEMBR 1963

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-131	130	1	676.3	0.593	698,164.56	294,787.81	260,868.61	555,656.42	142,508.14
	120	2	477.6	0.738	486,485.04	175,915.63	163,029.30	338,944.63	117,540.21
	30	3	651.6	0.572	594,092.11	265,371.35	223,832.86	489,204.21	104,887.90
	40	4	517.4	0.736	386,786.00	157,088.80	138,430.37	295,518.87	91,267.13
	110	5	587.4	0.656	431,390.68	184,202.76	157,698.95	341,901.71	89,488.89
	60	6	918.3	0.569	474,266.74	215,822.22	177,521.26	393,343.48	80,923.26
	20	7	594.0	0.638	484,880.45	179,324.12	148,676.87	328,200.99	76,679.46
	90	8	663.0	0.728	317,747.96	137,228.62	113,781.15	251,009.77	66,738.19
	140	9	1226.7	0.498	513,884.60	263,868.27	200,243.67	464,108.94	49,775.66
	50	10	817.6	0.593	351,176.33	170,352.38	131,218.50	301,570.88	49,605.45
	70	11	434.9	0.550	391,850.28	195,987.41	148,995.11	344,982.52	46,897.76
	100	12	917.6	0.493	419,910.90	225,581.25	164,058.10	389,639.35	30,271.55
	80	13	621.7	0.511	346,519.60	188,585.89	134,118.16	322,624.05	23,894.95
	10	14	571.6	0.489	279,993.63	166,261.01	109,638.66	275,899.67	4,093.96

"DX359A, Appendix B, page 91
(Supplemental S.H.E. Report - Volume A)"

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

OCTOBER 1963

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
8707-131	80	1	683.1	0.593	676,111.01	287,939.93	252,530.38	540,470.31	135,640.70
	90	2	516.6	0.759	488,011.27	182,518.49	173,359.95	355,878.44	132,140.83
	100	3	674.2	0.567	658,248.87	292,372.31	248,392.75	540,765.06	117,483.81
	40	4	524.3	0.736	389,718.91	158,431.29	139,247.89	297,679.18	92,039.33
	70	5	~~550.5~~ 550.7 ~~662.8~~	~~0.596~~ 0.596 ~~0.893~~	488,318.17	218,822.61	171,963.65	390,786.26	~~97,531.91~~ 74,269.51
	60	6	430.2	0.582	436,427.62	205,155.16	163,715.93	368,871.11	67,556.51
	110	7	~~538.7~~ 538.7 ~~813.6~~	~~0.592~~ 0.592 ~~0.888~~	399,936.92	189,068.77	148,221.80	337,289.77	~~88,648.16~~ 58,995.05
	20	8	626.4	0.594	359,682.81	174,563.30	134,366.98	308,869.30	51,013.51
	50	9	634.8	0.538	484,326.06	205,659.34	154,533.84	360,193.18	44,132.88
	130	10	799.3	0.576	386,984.24	159,634.85	115,397.26	274,432.11	32,472.13
	140	11	634.3	0.638	256,622.98	131,727.72	94,438.98	226,166.70	30,456.28
	120	12	~~750.7~~ 750.7 ~~738.4~~	~~0.542~~ 0.542 ~~0.844~~	298,145.19	159,148.41	110,567.98	269,713.31	~~20,431.88~~ 31,694.28
	150	13	1224.8	0.453	288,978.77	137,799.86	102,288.98	240,084.86	15,924.71
	10	14	574.2	0.468	288,339.67	163,797.80	101,573.19	265,370.19	10,030.52CR 14,001.97 CR
	30	15	~~707.2~~ 707.2 ~~686.4~~	~~0.723~~ 0.723 ~~0.425~~	348,758.86	220,504.51	141,910.46	362,414.97	~~13,656.80CR~~

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

NOVEMBER 1963

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-131	120	1	682.2	0.660	587,976.07	259,845.04	220,767.61	480,612.65	107,363.42
	90	2	606.6	0.567	588,815.85	265,228.06	222,270.80	487,498.86	101,316.99
	100	3 5	~~719.8~~ 769.8 ~~787.0~~	~~0.606~~ 0.616 ~~0.666~~	450,773.52	202,734.06	167,651.74	370,385.80	~~66,611.51~~ ~~88,387.72~~
	110	4 3	483.3	0.699	340,843.28	148,149.41	123,028.17	271,177.58	69,665.70
	80	5 4	763.8 ~~714.6~~	0.574 ~~0.574~~	387,482.29	186,691.56	145,560.97	332,252.53	~~69,005.97~~ ~~66,229.76~~
	60	6	623.1	0.658	484,706.63	198,536.94	153,323.46	351,860.40	52,846.43
	30	7	718.3	0.634	432,172.69	216,480.21	165,480.31	381,960.52	50,212.17
	40	8	513.2	0.635	288,480.82	140,999.39	106,184.88	247,184.27	41,296.55
	70	9	432.4	0.622	353,296.97	188,338.82	136,042.84	324,381.66	28,915.31
	20	10	622.4	0.649	387,703.17	163,494.84	117,018.92	280,513.76	27,189.41
	50	11	802.1	0.488	392,463.21	215,353.99	153,712.56	369,066.55	23,396.66
	140	12	698.7	0.473	338,778.60	196,567.29	133,762.60	330,329.89	8,448.71
	130	13	543.8	0.530	234,237.04	138,388.51	89,839.74	228,146.25	6,090.79
	10	14	612.8	0.427	292,604.22	190,257.30	118,908.63	309,165.93	16,561.71CR

"DX359A, Appendix B, page 92
(Supplemental S.H.E. Report - Volume A)"

AX-2781

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

DECEMBER 1963

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES BRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-131	30	1	703.6	0.666	648,524.19	272,450.30	240,912.73	513,363.03	135,161.16
	90	2	667.9	0.666	639,993.36	270,968.22	238,092.10	509,060.32	130,943.04
	120	3	669.2	0.668	600,429.64	256,815.72	223,132.81	479,148.53	121,281.11
	160	5	219.8	0.594	534,376.34	231,150.80	198,176.61	429,327.41	80,596.46
	80	4	763.8	0.636	460,723.96	200,826.80	169,554.25	369,380.25	111,595.18
	110	6	490.8	0.693	390,712.79	165,690.49	141,234.94	306,925.43	83,787.36
	50	7	636.8	0.542	438,852.09	216,816.93	166,278.65	383,095.58	52,756.51
	20	8	596.5	0.666	339,735.14	165,856.91	126,318.14	291,375.05	48,360.09
	140	9	717.9	0.548	411,438.64	207,826.48	157,101.68	364,928.88	46,510.76
	40	10	521.1	0.613	324,913.68	156,560.73	120,583.67	279,864.40	45,849.28
	60	11	623.9	0.535	402,374.62	205,931.70	154,932.26	359,963.96	42,410.66
	70	12	428.3	0.527	302,664.89	204,456.66	150,871.14	355,327.80	37,327.09
	130	13	539.0	0.590	269,964.36	143,148.46	100,977.88	244,126.34	25,838.04
	10	14	610.1	0.467	350,102.88	205,337.45	138,749.34	344,086.79	6,015.21

"DX359A, Appendix B, page 93
(Supplemental S.H.E. Report - Volume A)"

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

APRIL 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
87071318	10	1	2302.8	0.459	73,788.47	23,292.80	28,684.48	51,977.28	21,811.19

AX-2784

"DX359A, Appendix B, page 95
(Supplemental S.H.E. Report - Volume A)"

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

MAY 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
87871318	20	1	2474.0	0.481	480,269.14	169,178.40	184,518.05	353,696.45	126,572.73
	18	2	2587.0	0.388	383,011.06	206,436.61	167,457.23	373,893.84	9,116.92

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

JUNE 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES BRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
7071318	20	1	2474.0	0.454	496,779.76	186,126.44	193,640.62	379,767.06	117,012.72
	10	2	2564.8	0.299	347,603.57	194,660.15	153,583.66	348,243.83	440.26CR

AX-2786

"DX359A, Appendix B, page 97
(Supplemental S.H.E. Report - Volume A)"

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

JULY 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
87871818	28	1	2474.0	0.410	439,696.89	185,434.41	176,216.25	361,650.66	78,046.23
	18	2	2587.0	0.387	369,249.97	201,463.39	161,647.44	363,110.83	6,139.14

87

"DX359A, Appendix B, page 98
(Supplemental S.H.E. Report - Volume A)"

AX-2787

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

AUGUST 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B7071318	90	1	1706.7	0.460	540,243.91	151,244.11	207,670.40	358,914.51	181,329.40
	80	2	946.3	0.450	561,070.56	166,430.95	219,264.16	385,695.11	175,375.45
	50	3	1817.3	0.447	552,600.70	164,935.40	216,260.85	381,196.25	171,404.45
	100	4	1377.1	0.565	428,058.47	105,779.36	158,509.14	264,288.50	163,769.97
	40	5	1176.5	0.449	526,740.79	155,417.53	203,540.48	358,958.01	161,782.78
	120	6	2264.6	0.467	426,820.95	124,989.83	165,175.39	290,165.22	136,655.73
	60	7	2458.0	0.422	466,470.43	148,834.49	185,393.95	334,228.44	132,241.99
	10	8	1911.7	0.399	644,155.49	282,560.64	260,059.39	512,620.03	131,535.46
	30	9	1496.9	0.428	326,008.30	106,765.59	129,853.96	236,619.55	91,388.75
	110	10	1682.3	0.508	266,779.43	76,936.53	101,188.63	178,125.16	88,654.27
	20	11	2443.1	0.432	441,998.25	179,076.07	174,556.48	353,634.55	88,363.70
	70	12	1861.5	0.409	336,910.44	113,837.05	135,021.72	248,858.77	88,051.67
	130	13	2587.0	0.344	34,467.65	24,235.12	14,548.54	38,783.66	4,296.01CR

AX-2788

"DX359A, Appendix B, page 99 (Supplemental S.H.E. Report - Volume A)"

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

SEPTEMBER 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
87071318	150	1	1826.7	0.591	611,662.00	201,747.29	232,496.54	434,243.83	176,618.17
	40	2	1339.1	0.496	535,288.57	184,441.07	204,192.49	388,633.56	146,655.01
	78	3	1480.2	0.588	472,853.98	167,667.68	179,864.57	347,531.65	125,322.30
	20	#5 ~~1871.6~~ (1267.7)	~~0.446~~ (0.448)	516,162.72	194,488.55	202,320.01	396,808.56	~~119,354.16~~ (111,854.58)
	60	#4	1102.6	0.477	476,949.66	174,576.99	183,667.06	358,246.05	118,703.61
	90	6	1188.6	0.495	373,854.41	144,824.79	142,362.53	286,387.32	86,667.09
	110	7	1211.1	0.410	416,252.61	176,306.16	166,698.78	343,661.96	73,258.65
	100	8	1703.7	0.329	492,068.57	235,746.26	210,419.95	446,166.23	45,902.34
	30	9	2497.1	0.387	345,989.35	169,989.12	149,432.76	301,421.90	43,567.45
	140	10	1044.3	0.462	123,483.43	46,612.75	47,982.84	94,514.77	28,968.66
	120	11	1869.9	0.310	473,921.51	240,209.61	206,789.12	446,998.13	26,923.38
	130	12	~~904.3~~ (910.1)	~~0.458~~ (0.491)	73,630.48	32,123.53	25,226.72	58,350.25	~~15,488.38~~ (24,354.76)
	50	13	1727.5	0.262	427,739.51	283,161.93	196,132.68	481,294.83	23,855.92CR
	80	14	2886.4	0.271	239,480.73	159,966.34	109,484.17	269,420.51	29,939.78CR
	10	15	1986.8	0.148	117,665.53	148,386.88	69,717.66	218,104.26	101,838.73CR

"DX359A, Appendix B, page 100
(Supplemental S.H.E. Report - Volume A)"

AX-2789

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

OCTOBER 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
87071318	80	1	1162.1	0.479	527,007.76	188,536.51	202,672.15	391,208.66	135,799.10
	30	2	1630.8	0.392	611,885.12	245,848.40	248,220.03	494,068.43	117,746.69
	20	3	2418.5	0.435	586,257.14	196,396.77	199,528.44	395,925.21	110,331.93
	70	4	1814.2	0.357	628,474.72	270,236.47	261,975.92	532,212.39	96,262.33
	130	5	1194.6	0.416	488,215.70	196,940.96	193,625.48	390,566.44	94,649.26
	90	6	1286.9	0.352	579,671.62	256,370.19	242,751.61	499,121.80	80,549.82
	60	7	1883.8	0.409	445,576.66	167,338.96	178,918.18	365,957.14	79,619.54
	120	8	1169.7	0.449	382,138.97	152,328.50	141,617.02	293,948.52	68,193.45
	140	9	2272.7	0.333	557,163.77	259,798.32	237,474.71	497,265.03	59,898.74
	10	10	944.5	0.385	476,309.51	218,409.84	198,893.39	417,303.23	59,006.28
	100	11	1782.5	0.368	441,898.49	201,181.52	182,611.10	383,792.62	58,097.87
	50	12	2476.1	0.379	407,068.41	185,545.78	166,794.36	352,340.14	54,728.27
	110	13	1016.9	0.389	335,552.08	159,154.61	136,402.86	295,557.47	39,994.41
	40	14	2093.1	0.397	277,161.44	138,778.78	112,016.27	250,792.05	26,369.39
	170	15	937.3	0.396	77,676.56	31,069.93	31,423.02	62,492.95	15,183.61
	150	16	2560.5	0.432	188,783.07	101,354.19	74,541.63	175,895.82	12,887.25
	160	17	2306.1	0.304	347,576.11	194,127.10	152,679.08	346,806.18	769.93

AX-2790

"DX359A, Appendix B, page 101
(Supplemental S.H.E. Report - Volume A)"

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

NOVEMBER 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
87071318	70	1	951.0	0.516	813,626.93	214,211.40	295,600.85	510,012.25	303,614.68
	110	2	1619.7	0.452	683,419.53	237,734.67	266,641.39	504,376.06	179,043.47
	90	3	1517.5	0.421	540,152.56	209,572.47	214,793.51	424,365.98	115,786.58
	120	4	1243.0	0.385	612,283.86	247,723.49	249,663.75	497,387.24	114,896.62
	140	5	1168.4	0.457	460,360.32	175,237.75	179,096.70	354,334.45	106,025.87
	60	6	1255.3	0.456	461,879.09	176,068.02	179,840.85	355,908.87	105,970.22
	150	7	667.1	0.608	309,694.61	113,736.86	112,969.21	226,706.27	83,189.34
	40	8	1615.9	0.471	371,791.19	148,323.26	143,542.00	291,865.26	79,925.93
	80	9	962.5	0.456	357,865.67	147,716.58	139,307.77	287,024.35	70,841.32
	130	10	2530.5	0.382	427,136.15	189,219.57	174,574.24	363,793.81	63,342.34
	160	11	1670.3	0.368	402,731.31	186,869.76	166,352.04	352,441.80	50,289.51
	20	12	2442.4	0.363	399,291.66	186,748.04	165,594.21	352,339.25	46,952.41
	90	13	889.1	0.389	327,196.60	154,839.00	133,017.69	287,856.69	39,338.91
	10	14	937.5	0.340	415,052.67	201,975.93	176,735.02	377,710.95	37,341.72
	100	15	1422.6	0.436	250,476.36	121,692.15	98,646.26	220,338.41	30,136.97
	30	16	2567.2	0.294	502,641.20	261,957.16	223,071.27	485,028.43	17,612.77
	170	17	1764.0	0.310	356,536.99	193,075.82	155,510.40	348,586.22	7,950.77

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

DECEMBER 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B7071318	70	1	987.8	0.550	668,794.41	202,278.91	247,947.46	450,226.37	218,568.04
	90	2	1466.8	0.475	622,057.02	214,401.67	239,696.24	454,097.91	167,959.11
	60	3	1210.9	0.842	528,007.24	170,986.29	194,223.82	365,210.11	154,797.13
	110	4	1826.3	0.429	639,224.13	236,582.24	252,786.21	489,368.45	149,855.68
	150	5	1174.7	0.499	527,656.07	183,242.67	200,982.10	384,224.77	143,631.30
	130	6	1575.7	0.403	665,504.79	256,734.74	267,777.53	524,512.27	140,992.52
	120	7	1521.1	0.471	478,228.32	176,001.39	186,672.67	362,674.06	115,554.26
	50	8	1778.3	0.496	403,922.74	153,113.77	154,022.01	307,135.78	96,786.96
	170	9	1726.0	0.426	451,247.48	183,327.27	178,795.58	362,122.85	89,124.63
	80	10	997.1	0.449	395,736.62	161,519.57	154,721.82	316,241.39	79,495.23
	160	11	681.9	0.612	381,425.46	113,219.31	109,707.39	222,926.70	78,498.76
	20	12	902.2	0.469	361,264.93	147,658.02	139,655.58	287,313.60	73,951.33
	40	13	2593.6	0.330	497,786.29	239,235.39	212,737.59	451,972.98	45,813.31
	10	14	976.2	0.366	374,675.64	178,945.05	154,986.27	333,931.32	40,744.32
	30	15	2412.4	0.367	371,462.69	177,463.16	153,519.83	331,002.99	40,459.70
	140	16	1657.4	0.366	348,118.85	170,157.93	144,071.04	314,228.97	33,889.88
	100	17	1543.2	0.418	210,932.43	116,647.96	84,497.75	200,545.71	10,386.72

AX-2792

"DX359A, Appendix B, page 103
(Supplemental S.H.E. Report - Volume A)"

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

JANUARY 1963

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
07071318	70	1	948.7	0.602	732,320.76	222,590.54	271,762.64	494,353.18	237,973.58
	110	2	1853.4	0.442	717,183.98	279,396.14	287,383.83	566,779.97	150,324.23
	120	3	1483.1	0.651	477,996.03	155,596.74	174,457.23	330,053.97	147,942.06
	60	4	1352.3	0.518	478,724.45	152,634.34	153,990.68	306,625.22	112,699.23
	80	5	1772.4	0.542	302,668.37	154,226.64	149,253.09	303,479.73	89,188.64
	150	6	1104.1	0.485	436,780.26	186,995.62	173,588.66	360,583.62	76,196.66
	100	7	2044.0	0.384	554,485.34	254,077.83	231,320.63	485,398.46	69,086.88
	160	8	1018.3	0.517	352,023.86	148,265.18	135,355.76	283,560.94	68,462.92
	30	9	1019.2	0.389	514,668.81	237,663.54	214,019.71	451,683.25	62,982.56
	40	10	1849.3	0.363	563,366.84	269,353.78	239,303.65	508,657.43	54,709.41
	50	11	1006.0	0.459	357,122.84	161,815.86	141,632.10	303,447.16	53,675.68
	170	12	1717.4	0.374	424,791.18	211,399.49	178,728.98	390,128.39	34,670.79
	130	13	1616.4	0.373	380,372.95	195,443.85	160,226.10	355,670.84	24,702.91
	20	14	877.9	0.429	279,411.76	144,223.46	112,915.43	257,138.89	22,272.86
	10	15	984.8	0.347	360,006.81	197,961.97	155,213.68	353,174.75	6,832.06
	140	16	1675.9	0.324	378,679.64	210,235.13	167,067.20	383,302.33	4,622.69CR
	90	17	1568.5	0.386	197,793.88	124,833.68	82,432.62	207,266.30	9,472.42CR

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

FEBRUARY 1963

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES BRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
07071318	80	1	952.5	0.512	488,790.72	181,167.61	188,429.54	369,597.15	119,193.57
	50	2	1760.6	0.401	566,887.05	244,746.08	233,473.98	478,220.06	88,666.99
	100	3	1169.1	0.458	421,299.03	176,345.59	167,176.25	343,521.84	77,777.19
	130	4	1433.7	0.466	367,283.56	157,933.30	145,034.90	302,968.20	64,315.36
	90	5	1296.2	0.362	516,017.87	246,477.50	219,347.43	465,824.93	50,192.94
	170	6	1259.2	0.430	313,628.46	149,801.51	126,623.16	276,424.67	37,203.79
	60	7	1767.9	0.457	280,235.79	133,699.28	111,270.92	244,970.20	35,265.59
	70	8	1196.0	0.433	276,752.79	137,306.14	111,533.74	248,839.88	27,912.91
	140	9	1517.0	0.335	460,825.30	239,488.04	200,892.98	440,381.02	20,444.28
	160	10	1710.7	0.355	365,643.37	191,470.10	156,385.66	347,855.76	17,787.61
	20	11	876.4	0.371	302,224.27	161,510.25	127,448.05	288,958.30	13,265.97
	120	12	2443.2	0.313	465,772.66	255,253.66	207,885.68	463,139.34	2,633.32
	180	13	996.7	0.358	251,809.47	146,159.65	107,429.45	253,589.10	1,779.63CR
	30	14	1669.0	0.369	210,167.37	127,659.61	88,841.81	216,501.42	6,334.05CR
	110	15	1483.7	0.394	174,245.97	109,928.80	72,182.76	182,111.56	7,865.59CR
	150	16	1663.6	0.292	299,636.28	190,959.99	137,140.98	328,100.97	28,264.69CR
	10	17	952.9	0.273	262,670.92	182,204.26	123,286.50	305,490.76	42,819.84CR

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

MARCH 1963

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
87071318	88	1	941.4	0.555	711,003.32	231,463.82	268,713.97	500,177.79	210,825.53
	68	2	1882.2	0.563	414,966.20	155,921.14	156,311.92	312,233.06	102,735.14
	168	3	1167.0	0.477	492,075.14	196,971.18	193,125.70	390,096.88	101,978.26
	58	4	1884.3	0.392	589,292.35	262,231.49	244,302.77	506,534.26	82,758.09
	138	5	1463.8	0.456	436,799.80	186,579.84	173,447.85	360,027.69	76,772.11
	98	6	1498.2	0.378	568,984.00	263,969.18	236,714.42	500,683.60	68,300.40
	78	7	1288.9	0.451	384,350.94	172,020.41	153,118.89	325,139.30	59,211.64
	148	8	1571.6	0.384	552,699.29	274,270.46	240,843.84	515,114.30	47,584.99
	38	9	1613.4	0.474	295,543.62	140,281.94	116,170.75	256,372.69	39,171.13
	178	10	1242.1	0.432	299,456.28	148,488.18	119,064.25	267,544.43	27,918.77
	188	11	989.7	0.399	337,142.79	171,089.99	139,114.27	310,204.26	26,938.53
	28	12	886.2	0.427	289,539.74	147,825.60	117,119.63	264,945.23	24,594.51
	188	13	1789.1	0.388	396,762.22	208,758.07	169,566.35	378,416.42	18,348.80
	128	14	2458.8	0.320	526,695.10	282,883.52	233,140.07	515,143.59	11,551.51
	118	15	1362.2	0.396	172,290.65	114,051.42	71,241.98	185,293.40	13,002.75CR
	10	16	985.7	0.315	266,628.33	171,009.36	118,657.30	289,666.66	23,038.33CR
	158	17	1654.5	0.303	316,666.61	198,782.16	142,947.18	341,729.34	25,062.73CR

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

APRIL 1963

TABLE A

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
87071318	80	1	946.3	0.607	768,253.71	227,732.78	284,593.44	512,326.22	255,927.49
	50	2	1726.9	0.480	738,556.58	265,826.04	289,422.78	555,248.82	183,307.76
	90	3	1454.9	0.422	692,872.34	280,197.08	281,255.21	561,452.29	131,420.05
	60	4	1803.5	0.603	444,584.05	154,268.54	164,918.44	319,186.98	125,397.07
	130	5	1516.7	0.515	505,351.54	188,092.28	194,450.42	382,542.70	122,808.84
	70	6	1320.6	0.485	485,219.72	190,933.71	189,620.16	380,553.87	104,665.85
	160	7	1165.9	0.476	486,689.96	193,904.82	191,093.66	384,998.48	101,691.48
	140	8	1544.0	0.387	653,119.27	286,212.98	271,859.81	558,072.79	95,046.48
	120	9	2479.4	0.385	639,269.69	282,255.87	266,457.97	548,713.84	90,875.85
	180	10	1733.5	0.436	483,058.72	205,781.84	194,229.78	400,011.62	83,047.10
	170	11	1234.1	0.466	389,097.44	167,806.72	153,617.57	321,424.29	67,673.15
	30	12	1488.7	0.507	336,792.29	144,073.33	130,095.38	274,168.71	62,623.58
	100	13	987.0	0.455	360,131.57	161,906.62	143,145.33	305,051.95	55,079.62
	20	14	869.8	0.462	327,352.81	146,147.80	128,092.23	274,240.03	53,112.78
	150	15	1648.8	0.367	418,194.67	210,143.46	176,976.23	387,119.71	31,074.96
	110	16	1368.1	0.459	274,596.23	138,004.07	105,878.62	243,882.69	30,713.54
	10	17	933.6	0.373	365,198.02	187,764.61	153,731.46	341,496.07	23,701.95

AX-2796

"DX359A, Appendix B, page 107
(Supplemental S.H.E. Report - Volume A)"

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

MAY 1963

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-131B	88	1	841.8	0.494	783,256.63	283,389.28	274,173.86	527,482.34	175,774.29
	116	2	932.2	0.566	889,346.89	195,674.86	211,945.93	407,619.99	182,326.90
	98	3	1356.3	0.497	804,193.64	221,632.57	231,406.82	453,039.89	141,154.55
	36	4	2661.6	0.394	672,663.85	293,322.94	279,425.62	572,748.56	99,935.29
	138	5	945.8	0.472	472,381.89	194,207.75	186,437.25	380,645.00	91,736.89
	188	6	1256.9	0.456	416,560.73	179,459.20	163,341.00	342,800.20	67,760.53
	76	7	779.6	0.522	338,180.33	144,638.53	130,052.18	274,690.71	63,889.62
	128	8	1249.0	0.418	461,337.15	208,333.78	185,330.40	393,664.18	67,672.97
	48	9	992.2	0.449	373,489.42	178,363.94	149,388.16	319,752.10	53,737.32
	28	10	2417.0	0.488	431,364.96	283,315.52	177,774.66	381,090.18	50,274.78
	18	11	989.3	0.423	383,232.04	188,643.24	186,835.53	336,478.77	46,753.27
	88	12	1319.6	0.431	378,820.96	174,814.86	149,670.58	323,684.58	46,336.38
	168	13	1681.9	0.371	386,886.22	197,717.62	161,176.66	358,894.38	21,991.92
	188	14	1315.9	0.343	356,289.06	200,322.88	155,548.88	355,871.66	2,417.38
	178	15	1586.2	0.313	521,257.81	287,788.15	233,684.64	521,392.79	134.98CR
	148	16	2390.1	0.321	354,913.42	209,852.48	157,649.12	366,781.52	11,788.18CR
	68	17	1394.2	0.256	266,666.36	198,969.71	128,528.00	327,497.71	60,831.35CR

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

JUNE 1963

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
87071318	36	1	1270.8	0.569	1069,787.90	278,857.94	389,978.22	668,836.16	400,951.74
	100	2	951.4	0.661	818,991.28	227,686.45	299,276.12	526,962.57	292,028.71
	130	3	1164.5	0.667	678,197.42	196,136.39	247,361.32	443,496.71	234,700.71
	110	4	2567.0	0.589	784,644.59	270,689.48	304,560.12	575,449.60	209,194.99
	160	5	1341.4	0.482	780,337.72	281,771.83	307,149.85	588,921.68	191,416.04
	190	6	1523.5	0.618	602,691.57	190,282.40	223,422.87	413,705.27	188,986.30
	40	7	1030.4	0.613	509,965.72	169,940.33	189,386.28	359,326.61	150,639.11
	20	8	1095.0	0.583	424,411.28	140,035.28	154,055.18	294,090.46	130,320.82
	10	9	882.4	0.542	483,069.22	176,496.38	184,611.28	363,107.66	119,961.56
	140	10	1394.3	0.467	563,484.38	223,168.85	223,660.80	446,829.65	116,654.73
	170	11	2377.5	0.460	485,217.74	201,597.84	193,379.85	394,977.68	90,240.06
	90	12	757.8	0.588	364,175.27	141,048.09	136,961.55	278,009.64	86,165.63
	80	13	1127.5	0.452	430,172.99	186,889.48	172,246.42	359,135.90	71,037.09
	60	14	1299.4	0.517	327,368.48	141,734.74	126,540.48	268,275.22	59,093.26
	70	15	1463.8	0.389	504,695.95	236,258.63	211,242.40	447,493.03	57,202.92
	120	16	2245.8	0.374	458,485.60	225,767.75	194,158.35	419,926.10	38,559.50
	50	17	493.8	0.641	188,493.31	93,581.60	69,327.21	162,908.81	25,584.50

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

JULY 1963

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
87071318	30	1	1255.6	0.620	1025,808.87	286,983.65	379,493.27	666,475.92	359,331.95
	100	2	946.3	0.635	818,254.38	235,324.02	301,146.50	536,470.52	281,783.86
	130	3	1164.5	0.630	644,074.20	197,863.22	237,475.57	435,338.79	208,735.41
	160	4	1310.0	0.497	801,618.85	298,400.84	318,569.45	616,969.49	184,649.36
	150	5	1523.5	0.605	593,520.45	192,010.62	220,765.93	412,776.85	180,743.90
	110	6	2559.3	0.456	789,070.61	296,702.74	314,335.51	611,038.25	178,032.36
	80	7	1122.4	0.541	554,790.95	198,435.30	211,811.26	410,246.56	144,544.39
	50	8	770.7	0.658	452,460.60	150,654.93	165,316.73	315,971.66	136,488.94
	40	9	1026.8	0.569	448,790.39	164,898.54	169,276.14	334,174.68	114,615.71
	60	10	1218.7	0.554	454,547.84	169,345.97	172,512.17	341,858.14	112,688.90
	10	11	893.4	0.469	468,573.45	194,717.77	185,522.56	380,240.33	88,333.12
	140	12	1374.4	0.434	518,935.05	222,455.62	209,693.73	432,349.35	86,585.70
	20	13	1122.0	0.510	351,962.67	150,888.39	136,284.07	287,172.46	64,790.41
	90	14	696.1	0.492	343,136.42	152,043.42	134,134.43	286,177.85	56,958.57
	70	15	1443.6	0.366	505,827.86	248,850.96	215,404.17	464,255.13	41,572.73
	170	16	2417.0	0.379	415,047.67	208,307.24	174,807.64	383,114.88	31,932.99
	120	17	2012.6	0.328	424,419.39	240,605.73	188,912.00	429,517.73	5,098.34CR

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

AUGUST 1963

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B7071318	40	1	2021.6	0.617	1059,910.17	295,723.66	392,454.58	688,178.24	371,731.93
	110	2	1220.1	0.628	901,384.79	271,526.82	337,996.13	609,522.95	291,861.84
	90	3	1338.6	0.663	765,150.41	216,311.80	279,057.66	495,369.46	269,780.95
	70	4	995.3	0.780	682,102.43	176,891.26	241,097.31	417,988.57	264,113.86
	80	5	805.0	0.603	760,812.60	231,456.72	283,141.55	514,598.27	246,214.33
	130	6	836.5	0.636	699,563.10	208,189.32	257,192.34	465,381.66	234,181.44
	170	7	1293.0	0.577	633,350.14	208,450.63	238,102.07	446,552.70	186,797.44
	50	8	965.4	0.606	515,975.62	173,196.43	191,666.30	364,862.73	151,112.89
	20	9	876.9	0.512	539,435.54	202,069.79	208,644.39	410,714.18	128,721.36
	140	10	2845.7	0.497	555,623.10	211,286.10	216,583.84	427,869.94	127,753.16
	160	11	1128.0	0.541	465,096.27	174,704.20	177,457.77	352,161.97	112,934.30
	100	12	1194.6	0.548	435,799.19	165,821.73	165,836.03	331,659.76	104,139.43
	10	13	2536.2	0.492	484,657.79	192,477.28	189,392.16	381,869.44	102,788.35
	60	14	1443.5	0.418	609,990.79	259,263.67	249,252.78	508,516.45	101,474.34
	180	15	1299.2	0.575	377,728.29	146,136.10	142,072.46	288,207.86	89,520.73
	120	16	2417.0	0.432	474,382.79	208,307.24	191,997.41	400,304.65	74,078.14
	150	17	1208.4	0.438	457,154.67	200,812.31	184,363.50	385,175.81	71,978.86

"DX359A, Appendix B, page 111
(Supplemental S.H.E. Report - Volume

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

SEPTEMBR 1963

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
87071318	110	1	1241.7	0.577	768,818.90	255,703.77	294,620.51	550,324.28	218,494.62
	40	2	1972.8	0.499	826,705.25	286,102.44	322,110.02	608,212.46	218,492.79
	80	3	804.8	0.560	698,315.19	227,851.60	264,373.62	492,224.92	206,090.27
	130	4	833.2	0.586	621,280.28	201,536.85	232,776.72	434,313.57	186,966.71
	90	5	1379.7	0.577	617,175.55	202,857.60	232,053.26	434,910.86	182,264.69
	70	6	994.8	0.633	474,185.13	157,646.07	174,685.14	332,331.21	141,853.92
	170	7	1275.7	0.523	548,711.20	199,374.58	210,121.31	409,495.89	139,215.31
	50	8	971.9	0.568	447,553.12	163,234.63	168,940.28	332,174.91	115,378.21
	120	9	2417.0	0.472	499,896.81	201,587.66	197,628.85	399,216.51	100,680.30
	10	10	2172.8	0.488	464,869.81	186,456.73	182,145.78	368,602.51	96,267.30
	140	11	2567.0	0.415	470,913.76	212,120.18	192,946.28	405,066.46	65,847.30
	20	12	897.6	0.428	412,879.09	188,088.93	167,659.38	355,748.31	57,130.78
	160	13	1280.9	0.411	407,417.78	192,046.16	167,472.51	359,518.67	47,899.11
	150	14	1337.3	0.413	391,469.78	185,782.38	160,643.46	346,425.84	45,043.94
	100	15	1107.8	0.464	319,433.59	149,069.32	126,828.05	275,897.37	43,536.22
	60	16	1335.9	0.371	459,565.86	227,024.27	194,914.45	421,938.72	37,627.14

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

OCTOBER 1963

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
87071318	40	1	2082.1	0.461	834,268.71	309,415.97	331,918.61	641,334.58	192,954.13
	150	2	840.0	0.610	599,621.93	192,352.08	222,654.08	415,006.16	184,615.77
	100	3	796.6	0.533	665,734.90	230,636.53	255,096.16	485,132.69	180,602.21
	110	4	1352.5	0.553	634,362.45	215,573.22	240,907.06	456,480.28	177,882.17
	140	5	1561.5	0.491	762,333.79	287,096.16	303,202.24	590,298.40	172,035.39
	90	6	993.0	0.651	515,034.23	165,336.27	188,621.87	353,958.14	161,076.09
	170	7	1285.2	0.534	587,352.21	208,841.77	224,914.12	433,755.89	153,596.32
	80	8	986.5	0.535	476,471.65	179,881.59	183,158.51	363,040.10	115,431.75
	130	9	1511.5	0.525	487,043.09	184,670.87	187,330.45	372,001.32	115,041.77
	10	10	1151.4	0.548	359,811.53	146,301.44	136,940.47	283,241.91	76,569.62
	180	11	1457.1	0.488	343,063.13	152,870.35	134,404.85	287,275.20	55,787.93
	160	12	1160.5	0.465	356,676.25	162,620.37	142,424.09	305,044.46	53,631.79
	70	13	2530.5	0.392	485,842.98	199,695.89	169,174.77	369,070.36	36,772.60
	120	14	2227.4	0.382	428,991.27	212,271.12	180,245.00	392,516.12	36,475.15
	20	15	892.1	0.368	386,162.16	201,877.71	164,172.22	366,049.93	20,112.23
	60	16	1363.2	0.347	391,059.65	212,636.56	169,384.83	382,021.39	9,038.26
	50	17	2286.0	0.327	328,015.63	195,199.30	144,971.57	340,170.87	12,155.24CR

"DX359A, Appendix B, page 113
(Supplemental S.H.E. Report - Volume A)"

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

NOVEMBER 1963

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR. LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
87071318	120	1	1393.5	0.569	513,083.43	194,293.07	198,876.95	393,170.02	119,913.41
	88	2	2024.7	0.424	659,152.42	271,362.15	268,370.87	539,733.02	119,419.40
	168	3	830.8	0.539	461,791.97	172,796.22	176,437.16	349,233.38	112,558.59
	118	4	885.3	0.476	523,588.01	207,339.77	206,511.35	413,851.12	109,736.89
	108	5	994.6	0.571	382,023.68	146,328.91	143,994.49	290,323.40	91,700.28
	180	6	1266.2	0.467	412,840.40	176,679.89	163,624.98	340,304.87	72,535.53
	148	7	1537.0	0.481	383,589.04	164,523.30	150,863.80	315,387.10	68,201.94
	98	8	1092.8	0.484	358,223.87	156,342.01	140,630.40	296,972.41	61,251.46
	158	9	1535.0	0.393	546,554.26	262,650.65	232,674.56	495,329.41	51,224.85
	78	10	1194.4	0.427	373,186.23	175,363.33	151,672.61	327,035.94	46,150.29
	18	11	1192.8	0.445	287,369.62	142,981.20	115,392.01	258,373.21	28,996.41
	38	12	2530.5	0.373	358,681.62	187,718.63	151,817.43	339,533.06	19,118.56
	178	13	1183.9	0.398	270,004.81	149,641.51	112,789.89	262,351.40	7,653.41
	138	14	2315.6	0.327	354,461.74	204,872.15	156,653.48	361,525.63	7,063.89CR
	28	15	896.5	0.342	266,559.67	162,003.54	116,071.06	278,074.60	11,514.93CR
	58	16	1348.8	0.326	324,293.75	192,429.28	143,525.93	338,955.21	14,661.46CR
	48	17	2284.7	0.302	222,214.97	155,643.07	100,981.08	256,624.15	34,409.18CR

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

DECEMBER 1963

TABLE A

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
87871318	100	1	1000.8	0.680	597,056.97	177,577.93	216,701.14	394,279.07	202,777.90
	160	2	625.1	0.587	598,217.32	197,557.64	224,082.70	421,640.34	176,576.98
	120	3	1366.2	0.553	612,693.94	210,155.29	232,718.98	442,874.27	169,819.67
	110	4	811.1	0.497	589,798.82	221,880.97	229,938.66	451,819.63	138,778.99
	180	5	1301.0	0.522	541,122.80	208,002.73	208,404.24	408,406.97	132,715.83
	140	6	1512.9	0.526	523,090.53	194,163.58	201,121.04	395,284.62	127,805.91
	80	7	2022.1	0.402	641,318.80	279,075.07	265,314.75	544,389.82	96,928.98
	90	8	992.7	0.524	421,875.18	167,344.80	162,341.21	329,686.01	92,189.17
	150	9	1560.7	0.421	616,831.50	273,921.09	256,403.27	530,324.36	86,507.14
	170	10	1166.8	0.476	385,309.99	182,003.20	144,070.26	306,073.46	59,236.53
	70	11	1218.0	0.445	380,422.30	174,307.57	152,787.28	327,094.85	53,327.45
	50	12	1312.3	0.386	392,826.95	197,210.75	164,457.21	361,667.96	31,158.99
	10	13	1287.0	0.461	284,689.50	148,813.12	113,218.55	254,031.67	30,577.83
	30	14	2484.3	0.367	400,255.50	287,482.83	170,231.23	377,713.26	22,542.24
	130	15	2204.6	0.381	368,087.05	201,554.74	158,798.57	360,353.31	7,653.74
	20	16	863.7	0.352	340,035.69	190,021.54	146,628.16	336,649.70	3,385.99
	40	17	2284.9	0.332	287,980.36	176,255.07	126,692.87	302,947.94	14,967.58CR

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

MARCH 1960

TABLE A

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-331	10	1	2432.6	0.648	574,051.20	253,362.39	188,006.72	441,369.11	132,682.09

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

APRIL 1960

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	V A R I A B L E E X P E N S E S A/C OPER	ORND & INDIRECT	TOTAL	PROFIT/ LOSS
B707-331	10	1	2474.0	0.748	739,339.72	269,844.40	235,097.91	504,942.31	234,417.41

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

MAY 1960

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES BRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
8707-331	10	1	2473.6	0.748	602,259.10	233,417.04	190,534.04	423,952.08	178,306.22

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

JUNE 1960

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
8707-331	10	1	2474.0	0.873	920,032.64	276,360.64	284,683.65	561,044.29	364,988.35

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

JULY 1960

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-331	10	1	2434.3	0.617	880,461.99	282,330.34	273,700.96	956,037.29	324,324.70
	30	2	2848.1	0.670	668,776.70	220,823.85	214,270.26	441,094.11	224,682.59
	20	3	2293.6	0.598	137,050.16	88,121.40	48,301.27	133,422.67	3,627.49

"DX359A, Appendix B, page 120
(Supplemental S.H.E. Report - Volume A)"

AX-2809

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

AUGUST 1960

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES BRNO & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-331	30	1	2524.9	0.705	1030,064.94	356,232.11	331,049.90	687,282.01	347,782.93
	10	2	2433.5	0.844	887,633.90	279,057.75	274,802.09	553,859.84	333,774.06
	20	3	2474.0	0.747	262,192.63	148,736.21	82,931.72	231,667.93	30,524.70

120

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

SEPTEMBR 1960

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-331	38	1	2522.7	0.709	1026,254.04	349,974.89	327,937.76	677,912.65	348,341.39
	18	2	2474.8	0.886	647,148.23	276,369.62	264,388.78	540,741.40	386,398.83
	28	3	2474.8	0.771	297,386.27	152,586.83	93,534.42	246,098.45	51,298.82

"DX359A, Appendix B, page 121
(Supplemental S.H.E. Report - Volume A)"

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

OCTOBER 1960

TABLE A

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES			PROFIT/ LOSS
						A/C OPER	GRND & INDIRECT	TOTAL	
B707-331	10	1	2474.0	0.710	757,983.01	282,314.29	242,209.12	524,523.41	233,459.60
	30	2	2421.1	0.549	856,556.98	373,713.43	289,257.99	662,971.42	193,585.56
	26	3	2474.0	0.667	389,985.62	165,026.26	96,758.64	261,784.90	39,128.72

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

NOVEMBER 1960

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-331	18	1	2433.4	0.522	549,554.97	269,947.89	186,276.25	456,223.34	93,331.63
	38	2	2519.8	0.481	687,069.66	352,986.49	226,776.56	579,763.07	33,307.59
	88	3	2471.1	0.556	201,437.86	146,962.31	67,278.12	213,240.43	11,802.56CR

"DX359A, Appendix B, page 123
(Supplemental S.H.E. Report - Volume A)"

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

DECEMBER 1960

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-331	10	1	2429.5	0.521	587,303.77	285,141.73	198,955.70	484,097.43	103,206.34
	30	2	2475.0	0.411	573,190.44	334,544.74	207,042.74	541,587.48	31,602.96
	20	3	2379.2	0.588	284,530.16	165,039.21	87,400.58	252,439.79	12,090.37

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

JANUARY 1961

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-331	18	1	2486.2	0.686	718,991.83	299,664.26	257,431.60	557,095.86	158,895.98
	38	2	2481.4	0.439	688,194.84	374,224.66	264,219.39	638,443.39	41,751.45
	28	3	2216.2	0.643	309,780.63	161,118.39	109,807.64	270,926.63	38,854.68
	48	4	665.6	0.478	70,245.16	87,971.50	26,697.86	114,669.36	44,424.20CR

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

FEBRUARY 1961

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
8707-331	10	1	2307.1	0.503	390,250.52	214,449.15	146,452.12	360,901.27	29,358.28
	20	2	2474.0	0.476	134,613.91	116,989.06	51,204.46	168,193.52	33,579.61
	40	3	675.8	0.588	97,031.16	95,693.37	35,840.60	131,533.97	33,702.81
	30	4	2841.4	0.327	291,364.80	237,231.94	123,406.75	360,638.69	69,273.88

AX-2816

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

MARCH 1961

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-331	18	1	2474.0	0.586	587,197.76	295,023.14	219,589.14	514,612.28	72,585.48
	48	2	667.3	0.577	183,350.87	129,955.68	66,589.15	196,544.83	13,194.76CR
	28	3	2471.5	0.459	289,342.19	156,995.69	80,181.81	237,177.50	27,835.31CR
	38	4	2519.6	0.343	577,584.19	397,933.78	240,300.49	638,234.27	60,730.08CR

"DX359A, Appendix B, page 127
(Supplemental S.H.E. Report - Volume A)"

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

APRIL 1961

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-331	10	1	2474.0	0.499	549,762.57	281,657.94	206,345.92	488,003.86	61,758.71
	40	2	682.0	0.463	45,995.78	41,336.29	17,591.47	58,927.76	12,931.98CR
	30	3	2516.2	0.386	514,027.91	327,056.13	206,498.09	533,554.22	19,526.31CR
	20	4	2474.0	0.412	132,933.14	128,807.20	52,425.60	181,232.80	48,299.66CR

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

MAY 1961

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
8707-331	10	1	2437.8	0.493	548,650.24	284,349.78	206,201.98	490,551.68	58,298.56
	30	2	2482.6	0.365	520,585.64	345,057.72	211,980.64	557,038.36	36,452.72CR
	20	3	2474.8	0.446	162,270.11	138,444.34	62,585.40	200,949.74	38,679.63CR

"DX359A, Appendix B, page 129
(Supplemental S.H.E. Report - Volume A)"

"DX359A, Appendix B, page 130
(Supplemental S.H.E. Report - Volume A)"

AX-2819

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

JUNE 1961

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-331	10	1	2474.0	0.641	541,817.15	233,193.09	193,019.89	426,212.18	115,604.97
	30	2	2482.0	0.492	705,663.90	349,680.79	266,391.18	616,071.97	89,591.93
	20	3	2474.0	0.648	279,923.58	151,175.62	99,509.52	250,685.14	29,238.44

AX-2820

"DX359A, Appendix B, page 131
(Supplemental S.H.E. Report - Volume A)"

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

JULY 1961

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-331	30	1	2468.1	0.498	571,653.95	287,037.83	213,328.00	500,365.83	71,288.12
	10	2	2466.6	0.584	380,574.36	196,111.34	138,466.49	336,577.83	43,996.53
	20	3	2474.8	0.674	224,916.76	130,988.20	78,696.88	209,684.28	15,232.48

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

AUGUST 1961

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-331	30	1	2522.6	0.551	826,304.76	352,711.63	301,040.06	653,751.69	172,553.07
	10	2	2474.0	0.626	478,864.90	213,005.66	169,936.44	382,942.10	95,922.80
	20	3	2474.0	0.631	284,507.49	153,356.62	100,818.68	254,175.30	30,332.19

"DX359A, Appendix B, page 132
(Supplemental S.H.E. Report - Volume A)"
AX-2821

AX-2822

"DX359A, Appendix B, page 133
(Supplemental S.H.E. Report - Volume A)"

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

SEPTEMBR 1961

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
0707-321	30	1	2648.2	0.560	600,289.56	255,861.16	217,870.36	473,737.52	126,552.04
	10	2	2474.0	0.614	518,744.64	225,736.86	184,728.47	410,465.33	108,279.31
	20	3	2356.4	0.688	231,618.88	129,319.38	80,724.80	210,044.18	21,566.62

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

OCTOBER 1961

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
8707-331	10	1	2472.6	0.834	421,285.66	224,100.76	156,000.46	388,101.22	41,184.44
	30	2	1262.5	0.688	80,628.63	33,177.35	29,104.36	62,281.71	18,346.92
	40	3	2486.7	0.410	187,354.52	97,208.49	74,194.37	171,402.86	15,951.66
	20	4	1762.3	0.667	165,503.31	115,412.66	58,174.00	173,586.66	8,083.35CR

AX-2824

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

NOVEMBER 1961

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
8707-331	10	1	2472.9	0.453	494,526.44	274,112.61	188,849.85	462,961.86	31,564.58
	20	2	1222.8	0.502	198,344.59	140,978.10	73,884.63	214,862.13	16,517.54CR
	30	3	1243.6	0.398	222,857.05	172,246.12	87,933.17	260,179.29	37,322.24CR
	40	4	2009.1	0.298	288,512.76	239,075.01	116,305.73	355,381.84	66,868.78CR

"DX359A, Appendix B, page 135
(Supplemental S.H.E. Report - Volume A)"

135

"DX359A, Appendix B, page 136
(Supplemental S.H.E. Report - Volume A)"

AX-2825

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

DECEMBER 1961

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER:	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-331	30	1	1223.7	0.550	390,366.25	202,217.17	142,199.93	344,417.10	45,949.15
	10	2	2454.1	0.497	407,149.33	222,929.95	151,719.84	374,648.79	32,500.54
	25	3	1342.6	0.588	213,205.17	136,366.05	76,578.31	212,944.36	260.81
	45	4	2402.2	0.389	376,182.67	252,225.29	150,130.06	402,355.35	24,172.48CR

136

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

JANUARY 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-331	10	1	2407.9	0.493	373,688.06	218,599.86	148,362.75	366,962.63	14,125.43
	30	2	1242.6	0.463	339,672.37	217,233.99	130,371.98	347,605.97	8,032.78CR
	20	3	1180.1	0.471	151,621.28	125,748.65	57,660.38	183,409.95	31,784.67CR
	40	4	2566.4	0.310	365,073.23	300,742.14	155,973.68	464,715.22	99,641.99CR

"DX359A, Appendix B, page 137
(Supplemental S.H.E. Report - Volume A)"

"DX359A, Appendix B, page 138
(Supplemental S.H.E. Report - Volume A)"

AX-2827

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

FEBRUARY 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
8707-331	30	1	1461.4	0.455	202,639.79	149,546.60	78,288.11	227,834.11	25,194.32CR
	10	2	2362.4	0.368	189,834.91	165,088.65	77,665.30	242,745.95	52,911.04CR
	20	3	1853.7	0.351	210,922.88	183,189.22	87,122.98	270,312.20	59,389.32CR
	40	4	1814.8	0.311	339,328.89	291,906.48	146,253.77	438,160.25	98,831.36CR

AX-2828

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

MARCH 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B707-331	38	1	1162.3	0.463	220,430.60	161,675.12	84,764.39	246,439.51	26,008.91CR
	18	2	2474.8	0.496	289,568.62	196,813.10	103,185.95	299,919.05	49,350.43CR
	48	3	1884.6	0.386	361,030.52	280,125.21	149,109.61	429,234.82	68,195.30CR
	28	4	1892.3	0.328	201,689.64	191,978.74	85,387.90	277,433.64	75,644.00CR

"DX359A, Appendix B, page 139
(Supplemental S.H.E. Report - Volume A)"

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

APRIL 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
8707-331	20	1	1163.9	0.496	249,031.71	163,672.82	93,861.91	257,734.73	8,703.02CR
	10	2	2463.4	0.444	159,704.90	133,448.80	61,982.79	195,351.59	35,646.69CR
	30	3	2540.7	0.242	194,418.15	228,331.61	91,213.43	319,545.04	125,126.89CR

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

SEPTEMBR 1961

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRNS & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B-720B	20	1	1089.6	0.628	422,195.80	242,983.69	154,294.98	397,278.67	24,917.13
	10	2	634.9	0.395	283,362.11	208,548.48	83,911.83	292,462.23	89,100.12CR

"DX359A, Appendix B, page 141
(Supplemental S.H.E. Report - Volume A)"

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

OCTOBER 1981

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B-720B	20	1	1149.5 ~~1117.2~~	0.555 ~~0.554~~	475,578.15	286,825.00	178,843.79	465,668.79	90,904.9 ~~87,909.36~~
	40	2	891.9	0.409	240,192.18	205,152.02	98,035.09	303,187.11	62,994.9
	30	3	~~774.6~~ ~~826.3~~	0.414 ~~0.414~~	270,455.41	238,833.90	110,009.14	348,843.04	78,059.3 ~~70,387.37~~
	10	4	972.9 ~~946.3~~	0.355 ~~0.363~~	228,796.25	240,962.83	97,868.57	338,831.40	105,935.4 ~~110,036.11~~

AX-282

"DX359A, Appendix B, page 143
(Supplemental S.H.E. Report - Volume A)"

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

NOVEMBER 1961

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B-720B	20	1	1134.3	0.499	287,784.02	212,395.14	108,907.76	321,302.90	[illegible]
	30	2	990.0	0.405	196,674.48	203,661.75	80,934.43	284,796.18	[illegible]
	40	3	942.2	0.396	166,190.02	187,658.00	68,520.12	256,178.12	89,988.18CR
	10	4	933.1	0.391	246,551.66	242,979.65	104,130.44	347,110.09	[illegible]

"DX359A, Appendix B, page 144
(Supplemental S.H.E. Report - Volume A)"

AX-2833

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

DECEMBER 1961

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B-720B	20	1	~~1074.0~~ 1162.0	~~0.637~~ 0.639	347,301.58	218,257.01	126,517.99	344,775.00	~~21,526.68~~ 22,044.94
	10	~~2~~ 3	~~1018.3~~ 972.1	~~0.615~~ 0.494	305,582.48	228,873.28	117,032.42	345,905.70	~~40,323.22CR~~ 40,323.22CR
	40	~~3~~ 2	1001.3	0.503	262,196.14	213,163.94	101,046.35	314,210.29	52,014.15CR
	30	4	~~772.8~~ 766.6	~~0.562~~ 0.537	154,152.54	152,690.61	61,495.92	224,186.53	~~69,033.99CR~~ 69,033.99CR

AAS-2884

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

JANUARY 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B-720B	20	1	~~1139.7~~ ~~1040.8~~	~~0.537~~ ~~0.505~~	332,988.57	201,675.71	125,821.25	327,496.96	~~0,933.55~~ ~~0,491.61~~
	10	2	~~1016.1~~ ~~1077.0~~	~~0.431~~ ~~0.488~~	337,510.27	233,140.64	136,146.49	369,287.15	~~36,124.76 CR~~ ~~31,776.88CR~~
	30	3	~~695.3~~ ~~788.8~~	~~0.501~~ ~~0.588~~	234,740.20	180,547.34	91,275.42	271,822.78	~~35,181.54 CR~~ ~~37,082.58CR~~
	40	4	1879.9	0.442	288,808.50	212,195.48	116,021.85	328,217.33	39,408.83CR

"DX 359A, Appendix B, page 145 (Supplemental S.H.E. Report - Volume A)"

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

FEBRUARY 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B-720B	20	1	1152.0 ~~1089.3~~	0.455 ~~0.522~~	291,388.48	136,167.95	112,074.71	298,242.67	17,713.28 ~~61,982.184~~
	40	2	967.6	0.421	208,433.32	175,420.63	84,937.42	260,358.05	51,925.03(
	30	~~4~~	650.3 ~~671.6~~	0.422 ~~0.406~~	160,984.64	158,329.45	66,281.09	224,610.55	61,460.64 ~~49,086.941~~
	10	~~3~~	1004.1 ~~1083.9~~	0.352 ~~0.384~~	261,473.64	217,485.47	112,370.78	329,856.25	68,482.34 ~~80,186.611~~

"Supplemental S.H.E. Report - Volume A)"

AAX-2855

AX-2836

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

MARCH 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B-720B	20	1	~~1001.0~~ 1165.5	~~0.644~~ 0.622	311,486.34	201,723.03	119,598.79	321,321.82	~~23,282.33 CR~~
	30	~~2~~ 3	~~717.0~~ 703.3	~~0.401~~ 0.411	185,249.28	180,539.44	76,919.97	257,459.41	~~72,210.13 CR~~ 69,543.03 CR
	40	3 4	929.7	0.373	221,634.44	202,239.62	93,746.44	295,986.06	74,151.62 CR
	10	~~2~~ 2	~~1007.0~~ 947.9	~~0.429~~ 0.371	311,682.22	252,255.47	134,131.73	386,387.20	~~74,704.98 CR~~ 63,975.74 CR

"DX359A, Appendix B, page 147 (Supplemental S.H.E. Report - Volume A)"

"DX359A, Appendix B, page 148
(Supplemental S.H.E. Report - Volume A)"

AX-2837

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

APRIL 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B-720B	20	1	~~1061.0~~ 1167.0	~~0.610~~ 0.520	400,396.29	209,621.92	148,566.84	358,188.76	~~43,207.83~~ 35,669.23
	10	2	~~1087.6~~ 1018.5	~~0.407~~ 0.440	393,456.54	264,168.44	161,894.41	425,062.85	~~31,604.21CR~~ 36,348.95 CR
	40	3	991.3	0.435	300,386.52	215,561.12	121,264.63	336,825.75	36,437.13CR
	30	4	~~709.0~~ 751.1	~~0.442~~ 0.458	236,084.35	158,517.54	94,868.49	283,386.03	~~47,301.68CR~~ 46,010.21 CR

AX-2838

"DX359A, Appendix B, page 149 (Supplemental S.H.E. Report - Volume A)"

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

MAY 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B-720B	20	1	1133.3 ~~847.8~~	0.601 ~~0.698~~	334,247.67	152,143.39	120,590.79	302,734.18	49,446.91 ~~31,513.49~~
	10	2/3	1070.4 ~~1143.8~~	0.703 ~~0.708~~	432,644.59	283,744.23	178,232.95	461,977.18	53,667.62CR ~~29,332.59CR~~
	40	2/3	1104.0	0.426	331,529.91	233,678.05	134,565.70	368,243.75	36,713.84CR ~~53,785.76CR~~
	30	4	626.1 ~~741.6~~	0.403 ~~0.488~~	196,245.23	169,637.14	76,985.46	246,622.60	~~50,377.37~~

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

JUNE 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B-720B	10	1	~~1067.1~~ ~~1137.0~~	~~0.544~~ ~~0.847~~	561,885.45	273,672.05	213,749.18	487,421.23	~~51,263.23~~ ~~74,464.22~~
	20	~~3~~	1140.0 ~~876.0~~	0.642 ~~0.699~~	349,708.46	182,666.61	126,144.58	308,811.19	72,430.26 ~~40,897.27~~
	40	~~2~~	1082.0	0.552	433,517.33	231,776.40	164,518.81	396,295.21	37,222.32
	30	4	~~663.4~~ ~~789.8~~	0.487 ~~0.498~~	188,199.50	162,622.23	73,562.78	236,185.01	~~-24,317.51~~ ~~47,985.51~~

AX-2840

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

JULY 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES BRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B-720B	40	1	1874 6	0.565	431,787.67	231,423.95	162,996.02	394,419.97	37,367.70
	10	~~2~~ 3	~~1059.3~~	~~0.484~~	501,540.33	279,769.42	197,075.10	476,844.52	~~5,772.36~~
	20	~~3~~ 2	~~1124.3~~	~~0.542~~	288,459.98	185,711.85	108,333.90	294,045.75	~~12,087.25~~
	30	4	~~687.7~~	~~0.412~~	187,893.55	168,874.63	68,544.83	237,419.46	~~74,271.51~~

"DX 359A, Appendix B, page 151 (Supplemental S.H.E. Report - Volume A)"

"DX359A, Appendix B, page 152
(Supplemental S.H.E. Report - Volume A)"

AX-2841

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD

TABLE A

AUGUST 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B-720B	40	1	1075.9	0.620	502,842.25	239,501.29	185,916.68	425,417.97	77,424.28
	10	~~2~~ 3	~~1067.9~~ ~~1167.2~~	~~0.533~~ ~~0.529~~	574,823.52	286,992.86	220,397.44	507,390.30	~~37,453.70~~ ~~67,433.22~~
	20	~~3~~ 2	~~1204.6~~ ~~1081.6~~	~~0.611~~ ~~0.677~~	319,970.41	181,050.22	116,137.00	297,187.22	~~22,641.77~~ ~~66,783.19~~
	30	4	~~682.2~~ ~~735.8~~	~~0.493~~ ~~0.498~~	214,449.09	174,251.26	83,586.80	257,838.06	~~50,368.04~~ ~~43,388.97~~

AA-2842

PROFIT OR LOSS FROM SCHEDULED PSGR OPERATIONS - C & C METHOD — TABLE A

SEPTEMBR 1962

A/C TYPE	A/C NO.	PROFIT RANK	AVG STAGE LENGTH	AVG PSGR LOAD FACT	TOTAL REVENUE	VARIABLE EXPENSES A/C OPER	VARIABLE EXPENSES GRND & INDIRECT	VARIABLE EXPENSES TOTAL	PROFIT/ LOSS
B-720B	40	1 2	1062.0	0.592	303,904.79	184,972.24	113,521.40	298,493.64	5,411.14
	20	~~2~~ 1	~~1304.6~~	~~0.607~~	259,285.40	161,660.07	93,903.04	255,563.11	~~1,135.10~~
	10	3	~~1032.3~~	~~0.434~~	307,117.96	207,603.79	120,936.69	328,540.48	~~27,341.19~~
	30	4	~~207.1~~	~~0.580~~	157,285.51	146,767.48	60,628.84	209,396.32	~~53,603.95~~

"DX359A, Appendix B, page 153
(Supplemental S.H.E. Report - Volume A)"

DX 364

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PRESENT:

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GORDON M. LUCEY, ESQ.,

SILAS M. R. GIDDINGS, ESQ.,

RICHARD S. HARRELL, ESQ.,

DONALD I. STRAUBER, ESQ.

oOo

E M M E T T O S B O R N C O C K E, having previously been sworn, resumed the stand and testified further as follows:

EXAMINATION (Cont'd) BY MR. DAVIS:

Q Mr. Cocke, have you reviewed your testimony to date?

A Yes, I have.

Q Is there anything that you would like to add, change, modify, alter, to what you have already testified to?

A No.

Q I believe the last time you were here to testify, we had just marked the minutes of the Board of Directors meeting held on February 24, 1950.

Do you have what has been marked as Defendants' Exhibit 163 before you?

A No, I do not.

Q You will recall that is an exhibit which we prepared relating to aircraft acquisition by TWA?

A Yes.

Q It is not necessarily complete. It is accurate so far as we are concerned, to the extent to which we know the facts, and it is to be used by you only to guide you in orienting you in your recollection. Do you understand that?

A Yes.

Q The minutes of the meeting of the board of February 24, 1950, refer to an agreement with the Glenn L. Martin Company for the purchase of 30 Martin 404 aircraft, with a right at the option of TWA to purchase up to 30 additional airplanes of the same model. It also refers

DX 364 id., page 603
(Excerpts from Deposition of Emmett O. Cocke)

DX364

Q Did you find some entries there which helped you remember what was happening at the time?

A I don't recall any entries that brought back more than what the notes in my diary would indicate.

Q Are you currently reading your testimony as it goes along? Have you been reading your own testimony?

A I have.

Q Are you more or less up to date?

A Yes.

Q Is there anything that you can add to what you have already testified to?

A No.

Q You understand if at any time something occurs to you when you review your testimony, that it will be helpful if you would let me know that there is something which has occurred to you, or some change or modification you would like to make. I am not referring now to possible changes in particular words that do not change the meaning of what you say.

Take your time with respect to those. With respect to anything of substance which occurs to you, or what you think ought to be added in order to complete your testimony, I would appreciate it if you would let us know.

Would you do that?

(Excerpts from Deposition of Emmett O. Cocke)

DX 364

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E M M E T T O S B O R N C O C K E, called as a witness, having previously been sworn, resumed the stand and testified further as follows:

EXAMINATION (Cont'd) BY MR. DAVIS:

Q Mr. Cocke, have you reviewed your testimony to date now?

A Yes.

Q Do you have anything that you would like to add

or alter or modify, of substance--I am not talking of typographical errors?

A No.

Q Have you discussed the period which we have covered with any fellow officers or employees of TWA?

A No, I have not.

Q As I recall, the last time we had completed going over your 1953 diary. I believe we had also gone over a letter from Mr. Bradley to Mr. Dietrich, had we not, relating to the decisions of TWA with respect to the acquisition of additional Lockheed equipment over Douglas equipment?

A There was a letter, yes, from Mr. Bradley to Mr. Dietrich.

Q Do you recall going over that letter with me?

A Yes, I do.

Q You have no further recollection of the subject matter covered by that letter?

A No, I do not.

MR. DAVIS: May I at this time have marked for identification the diary for the year 1954.

(Mr. Cocke's diary for the year 1954 marked Defendants Exhibit 303 for identification, as of this date.)

BY MR. DAVIS:

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DX364

Q I understand that, but I would like to know what discussion took place relative to these suggestions, recommendations, alternatives that were being presented by Mr. Rourke?

A I don't recall the discussions.

Q Do you recall what views Mr. Thomas expressed as to the desirability of cutting back on the 880 program so as to take advantage of what appeared at the time, at least, as a possibility of improved aircraft?

A At some later period I recall that he felt that we should cut back the Convair order from thirty to twenty.

Q Now I am interested in what was being said with respect to the desirability of ordering, or having the Hughes Tool Company order some 990s?

A I don't recall any discussions on that. Mr. Thomas at a later date, I believe, discussed the cutback of the 880s from thirty to twenty. I did not agree with him.

After discussions with him he pointed out that by reducing the order from thirty to twenty, that our financing problems would be eased, that it would leave room for later financing for more aevanced models of the aircraft that were being considered.

I think I finally agreed that in view of those factors maybe we should cut back from thirty to twenty.

Q It is a fact, is it not, that there came a point when the Hughes Tool Company did place an order with Convair for some thirteen 990s?

A Yes, I am aware of that.

Q Do you recall the discussion which took place at these meetings of the Jet Planning Committee with respect to the suggestion made by Mr. Rourke, that in order to maintain TWA in a competitive position with American, it might be desirable to plan for ten to fifteen 990s in lieu of a similar number of 880s?

A I don't recall the discussions. Certainly these alternatives were discussed with the Jet Planning Committee.

I have no recollection of what went on in the discussions beyond what I have testified to and I don't know what these minutes reflect.

Q Mr. Tillinghast testified at some point that he or someone at TWA inquired into the circumstances relating to the order placed by the Hughes Tool Company for 990s, which took place some time in 1961.

Do you recall in that connection the suggestion being made by Mr. McCone as a director? Do you recall that taking place?

DX364

EXAMINATION (Cont'd) BY MR. DAVIS:

Q Mr. Cocke, before we resume with your diary, have you thought of anything which you can add to your prior testimony?

A I have not.

Q Have you been reading your testimony?

A Yes, I have.

Q Up to what point have you read it?

A I scanned several pages this morning.

Q Of yesterday's testimony?

A Yes, on the answer that seemed to be confusing yesterday with regard to my comments on Mr. Class, to be certain that it reflected what I intended it to reflect.

Q Does that mean you are current in going over the transcript?

A Except for yesterday.

Q You just had a chance to scan it briefly?

A Yes.

Q Then let us resume with your diary.

A Yes.

Q I believe that we were up to March 20 of 1961.

A That is my recollection.

Q Will you proceed from that point on, please? Where are you up to now?

(Combined Non-Stop Scheduled Frequencies Per Week-Aug. 1958-63)

Annual On-Line Passengers Between New York and Los Angeles Carried by American, TWA and United

1959-1963

Year and Item	American	TWA	United	Total
1959				
Passengers	269,360	187,560	69,070	525,990
Share of Big Three	51%	36%	13%	100%
1960				
Passengers	234,420	188,860	96,980	520,260
Share of Big Three	45%	36%	19%	100%
1961				
Passengers	226,990	162,130	70,190	459,310
Share of Big Three	50%	35%	15%	100%
1962				
Passengers	225,960	144,710	92,480	463,150
Share of Big Three	49%	31%	20%	100%
1963				
Passengers	229,910	167,470	118,070	515,450
Share of Big Three	45%	32%	23%	100%

Source: Competition Among Domestic Airlines, C.A.B. Yearly Issues - Table I.

DX 367, page 2
(Combined Non-Stop Scheduled Frequencies Per Week-Aug. 1958-63)

Annual On-Line Passengers Between
New York and San Francisco Carried
by American, TWA and United
1959 - 1963

Year and Item	American	TWA	United	Total
1959				
Passengers	38,390	164,190	104,350	306,930
Share of Big Three	13%	53%	34%	100%
1960				
Passengers	104,590	123,410	100,250	328,250
Share of Big Three	32%	38%	30%	100%
1961				
Passengers	103,450	100,740	93,060	297,250
Share of Big Three	35%	34%	31%	100%
1962				
Passengers	99,120	83,160	108,920	291,200
Share of Big Three	34%	29%	37%	100%
1963				
Passengers	101,210	105,420	129,010	335,640
Share of Big Three	30%	31%	39%	100%

Source: Competition Among Domestic Airlines, C.A.B. Yearly Issues - Table I

Dx 368, page 1

(Combined Non-Stop Scheduled Frequencies Per Week-Aug. 1958-63)

Year	Direction	Market & Equipment Type					
		New York - Los Angeles			New York - San Francisc		
		Jet	Piston	Total	Jet	Piston	Tota
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
1958	E/B	-	76	76	-	56	56
	W/B	-	76	76	-	49	49
	Total	-	152	152	-	105	105
1959	E/B	49	14	63	21	14	35
	W/B	49	14	63	21	14	35
	Total	98	28	126	42	28	70
1960	E/B	70	-	70	~~35~~ 56	-	~~35~~
	W/B	77	-	77	49	-	49
	Total	~~147~~ 147	-	147	~~84~~ 105	-	~~84~~ 10
1961	E/B	77	-	77	63	-	63
	W/B	84	-	84	56	-	56
	Total	161	-	161	119	-	119
1962	E/B	95	-	95	74	-	74
	W/B	96	-	96	74	-	74
	Total	191	-	191	148	-	148
1963	E/B	108	-	108	75	-	75
	W/B	108	-	108	74	-	74
	Total	216	-	216	149	-	149

Source: Official Airline Guides

AX-2854

DX 368, page 2

(Combined Non-Stop Scheduled Frequencies Per Week-Aug. 1958-63)

Year	Carrier	Direction	Market & Equipment Type					
			New York - Los Angeles			New York - San Francisco		
			Jet	Piston	Total	Jet	Piston	Total
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
1958	TWA	E/B	-	21	21	-	28	28
		W/B	-	21	21	-	21	21
		Total	-	42	42	-	49	49
	AAL	E/B	-	35	35	-	-	-
		W/B	-	35	35	-	-	-
		Total		70	70			
	UAL	E/B	-	20	20	-	28	28
		W/B	-	20	20	-	28	28
		Total		40	40		56	56
1959	TWA	E/B	21	-	21	21	-	21
		W/B	21	-	21	21	-	21
		Total	42		42	42		42
	AAL	E/B	28	7	35	-	-	-
		W/B	28	7	35	-	-	-
		Total	56	14	70	-	-	-
	UAL	E/B	-	7	7	-	14	14
		W/B	-	7	7	-	14	14
		Total		14	14		28	28
1960	TWA	E/B	28	-	28	21	-	21
		W/B	28	-	28	21	-	21
			56	-	56	42	-	42
	AAL	E/B	28	-	28	21	-	21
		W/B	35	-	35	14	-	14
		Total	63	-	63	35	-	35
	UAL	E/B	14	-	14	14	-	14
		W/B	14	-	14	14	-	14
		Total	28	-	28	28	-	28
1961	TWA	E/B	28	-	28	21	-	21
		W/B	28	-	28	21	-	21
		Total	56	-	56	42	-	42
	AAL	E/B	28	-	28	21	-	21
		W/B	35	-	35	14	-	14
		Total	63	-	63	35	-	35
	UAL	E/B	21	-	21	21	-	21
		W/B	21	-	21	21	-	21
		Total	42	-	42	42	-	42
1962	TWA	E/B	28	-	28	21	-	21
		W/B	28	-	28	21	-	21
		Total	56	-	56	42	-	42
	AAL	E/B	39	-	39	25	-	25
		W/B	40	-	40	25	-	25
		Total	79	-	79	50	-	50
	UAL	E/B	28	-	28	28	-	28
		W/B	28	-	28	28	-	28
		Total	56	-	56	56	-	56

DX 368, page 3

(Combined Non-Stop Scheduled Frequencies Per Week-Aug. 1958-63)

Year	Carrier	Direction	Market & Equipment Type					
			New York - Los Angeles			New York - San Francisco		
(1)	(2)	(3)	Jet (4)	Piston (5)	Total (6)	Jet (7)	Piston (8)	Total (9)
1963	TWA	E/B	34	-	34	21	-	21
		W/B	28	-	28	21	-	21
		Total	62	-	62	42	-	42
	AAL	E/B	41	-	41	26	-	26
		W/B	47	-	47	25	-	25
		Total	88	-	88	51	-	51
	UAL	E/B	33	-	33	28	-	28
		W/B	33	-	33	28	-	28
		Total	66	-	66	56	-	56

Source: Official Airline Guides

DX 371

Summary of Categories of Difference Between Estimates of Mr. Wemple and Mr. Simat (Supplemental Report, Vol. B, Part III)

This memorandum is submitted by defendants, in response to the Special Master's invitation (tr. 10,155), as a summary of the differences between the estimates made by Mr. Wemple, plaintiff's expert, in his report (TWA-4C) and those by Mr. Simat, defendants' expert, in Part III of the Simat, Helliesen and Eichner Supplemental Report (DX 359B). Since the Supplemental Report adopts many of the procedures of the prior Simat, Helliesen and Eichner Report (DX 271A and B), notably in the area of costs, and since it deals only with TWA's Domestic Division, many of the comparisons made in DX 348, the summary of differences based upon the prior report as revised, apply also to the present summary. When this is the case, reference will be made to the appropriate pages in Defendants' Exhibit 348. For completeness, however, this memorandum does show the unchanged International Division estimates.

Mr. Simat's alternative estimate, contained in Chapter E of Part III, is not discussed herein because it does not purport to be a complete estimate of changes in operating profit, but a test of the reasonableness of his conclusions.

1. Overall Comparisons

The overall difference between the estimates of changes in operating profits are (in millions):[1]

	Mr. Wemple[2]	Mr. Simat[3]	Difference (Mr. Wemple's estimate less Mr. Simat's)
Domestic	$29.1	$-87.3	$116.4
International	22.4	- 8.6	31.0
Net	$51.5	$-95.9	$147.4

1/ Mr. Simat did not submit a detailed estimate reflecting the effect of the revised traffic estimating formula shown in TWA 417. He estimated that the gain in domestic transportation revenues from added jet service would change from about $80 million to about $95 million and that the net loss in domestic transportation revenues from added jet and deleted piston services would be within a million dollars of the originally estimated loss of about $100 million (tr. 10,079-80).

2/ Source: TWA 345A.

3/ Source: DX 359B, p. III-27 for Domestic;
DX 331 for International.

These figures are not entirely comparable, for although Mr. Wemple's figures provide for an increase in depreciation costs of jet aircraft of $44.1 million, a figure supplied to him by Price, Waterhouse, and an increase in insurance costs of $5.5 million, both of which figures are adopted by Mr. Simat, they make no provision for reduction in the costs of depreciation and insurance attributable to piston aircraft removed from operations. The latter are estimated by Mr. Simat at $14.6 million. If the savings in piston aircraft depreciation and insurance expense are not considered, the difference between the two estimates would be increased by $14.6 million to $162.0 million. 1/

Each of these estimates represents a combination of estimates, by year and by Division, for increased jet operations and for decreased piston operations. The yearly estimates for the entire period, arranged in these categories, are as follows:

1/ DX 348.

DX 371, page 4
(Summary-Categories of Differences-Wemple vs. Simat (Suppl.))

Comparison of Changes in Jet and Piston Operating Results by Division and Year
(millions of dollars)

	1959		1960		1961		1962		1963		1959-1963	
	1/ W	2/ S	W	S	W	S	W	S	W	S	W	S
Domestic												
3/												
Jet	-	-2.3	-	-34.8	-	-37.0	-	-24.5	-	-13.4	-	-111.9
Piston	-	-0.8	-	+9.5	-	+4.2	-	+9.5	-	+2.3	-	+24.6
Net	+3.6	-3.1	+10.8	-25.3	+8.6	-32.9	+1.1	-15.0	+5.1	-11.1	+29.2	-87.3
4/ International												
Jet	-	-0.6	-	-2.3	-	-9.2	-	-10.2	-	-3.1	-	-25.4
Piston	-	+2.6	-	+9.9	-	+4.5	-	NC	-	NC	-	+17.0
Net	+3.1	+2.0	+15.2	+7.6	+1.8	-4.7	+2.5	-10.2	-.3	-3.1	+22.3	-8.4
System												
Jet	-	-2.9	-	-37.1	-	-46.2	-	-34.7	-	-16.5	-	-137.3
Piston	-	+1.8	-	+19.4	-	+8.7	-	+9.5	-	+2.3	-	+41.6
Net	+6.7	-1.1	+26.0	-17.7	+10.4	-37.6	+3.6	-25.2	+4.8	-14.2	+51.5	-95.7

1/ Source: DX 348, p. 3.

2/ Source: DX 359B, pp. III-25 - 27.

3/ Mr. Wemple computes only the net changes in jet and piston operations.

4/ Since the Supplemental Report does not deal with the International Division, there is no change from DX 348.

No comparison can be made in terms of the four Chapters of Mr. Wemple's Report (II-V) which deal individually with the equipment premises, for Mr. Simat's supplemental estimates are in terms of TWA's entire fleet. What follows is a comparison of the assumptions and methods adopted by Mr. Wemple and Mr. Simat to estimate changes in Domestic Division profits. Since those adopted by Mr. Wemple have not since been changed, only brief treatment to facilitate comparison is given them here, and reference is made to the fuller exposition contained in Defendants' Exhibit 348.

2. Equipment and Operating Assumptions

The Supplemental Report is premised upon the same jet equipment assumptions as those used by Mr. Wemple[1/] (Supplemental Report, Vol. B, pp. III-1 - III-3). Mr. Simat assumed the same total number of added jet and deleted piston plane miles and the same distribution thereof among the various plane types as in the prior report (Vol. B, Tables III-A, III-B). The assumptions as to added jet plane miles are also the same as those used by Mr. Wemple. Mr. Simat then estimated the number of departures and average stage length in each month for each type of aircraft in the resulting constructive fleet

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1/ See DX 348, pp. 4-5, 6-7.

on the basis of TWA's schedule pattern and preferences in the month in which its actual fleet was closest in number to the constructive fleet (Vol. B, pp. III-8 - III-13).

3. Revenue Estimates

The estimates of gain or loss in domestic passenger revenues associated with the addition of jet or deletion of piston plane miles were based upon estimates of changes in traffic (added or deleted revenue passenger miles) to which yields (cents per revenue passenger mile) were applied. As in all previous estimates, both Mr. Wemple's and Mr. Simat's, 5% was added to passenger revenue changes to obtain changes in total transportation revenue.1/

a. Traffic estimates

By relating the year-to-year changes in TWA's historical on-line passenger traffic (traffic carried between a point of origin and a point of final destination) between pairs of points served by TWA non-stop flights during 1959-63 to the year-to-year changes in jet and piston aircraft services historically provided, segment-by-segment, Mr. Simat determined relationships for

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1/ See DX 348, p. 8.

both jet and piston services between a unit change in seat miles and the accompanying change in revenue passenger miles. He applied these relationships to the assumed added jet and deleted piston seat miles to arrive at his estimates of the number of added and deleted revenue passenger miles (Vol. B, pp. III-14 - III-18).[1/]

b. Yield estimates

Mr. Simat used the availability of TWA data to obtain a new relationship between stage length and passenger trip length (Vol. B, pp. III-19 - III-23). Apart from this change, added and deleted revenues were calculated from added and deleted revenue passenger miles as in the prior report.[2/] The following is a summary of the estimated changes in passenger revenues for the Domestic Division.

	Mr. Wemple[3/] (Millions)	Mr. Simat[4/] (Millions)	Difference (Mr. Wemple's estimate less Mr. Simat's) (Millions)
Jet	$ + 229	$ + 76	$ 153
Piston	- 102	- 171	69
Net Change	$ + 127	$ - 95	$ 222

1/ See DX 348, pp. 8-10.

2/ See DX 348, pp. 11-13.

3/ DX 348, p. 21.

4/ DX 359B, pp. III-25, III-26.

This compares with Mr. Simat's previous estimate of $136.5 million added jet and $174 million deleted piston passenger revenues, or a net of $-37.5 million which differed from Mr. Wemple's net by $164.5 million.[1/]

c. Cost estimates.

Mr. Simat calculated added and deleted direct and indirect costs by the same methods that he used in the prior report,[2/] although, since some of the costing units depend on variables such as stage lengths and block hours, the estimates themselves are different. In addition, because the constructive scheduling of added aircraft involved changes in the scheduled usage of existing aircraft, Mr. Simat applied his costing procedures not, as in the prior report, only to the added operations, but rather to the entire constructive operation in each year. The changes due to added and deleted services were then determined by subtracting historical from constructive costs.

1/ DX 348, p. 12.

2/ DX 348, pp. 16-20.

Estimates of Changes in Direct Operating Expense (Less Depreciation and Insurance) (Millions of Dollars)

	Mr. Wemple[1]	Mr. Simat[2]	Difference (Mr. Wemple's estimate less Mr. Simat's)
Domestic			
Jets	+ 98.8	+ 100.7	- 1.9
Pistons	- 71.5	- 101.0	+ 29.5
Net	+ 27.3	- 0.3	+ 27.6
International			
Jets	+ 35.7	+ 35.3	+ 0.4
Pistons	- 16.4	- 16.4	0.0
Net	+ 19.3	+ 18.9	+ 0.4
System			
Jets	+ 134.5	+ 136.0	- 1.5
Pistons	- 87.9	- 117.4	+ 29.5
Net	+ 46.6	+ 18.6	+ 28.0

There is no difference in the estimates of costs of insurance ($5.5 million) and depreciation, including rentals, ($44.1 million) attributable to added jet availability, but Mr. Simat included, as Mr. Wemple did not, estimated savings of $14.6 million in such costs as a result of piston retirements.[3]

1/ DX 348, p. 18.

2/ DX 359B, pp. III-25 - III-27 for Domestic and DX 331 for International.

3/ See DX 348, pp. 7-8.

DX 371, page 10
(Summary-Categories of Differences-Wemple vs. Simat (Suppl.))

Estimates of Changes in Ground and Indirect Expense
(Millions of Dollars)

	Mr. Wemple[1]	Mr. Simat[2]	Difference (Mr. Wemple's Estimate Less Mr. Simat's)
Domestic			
Jet	-[3]	+ 56.08	-
Piston	-	- 92.42	-
Net	+ 40.9	- 36.34	+ 77.24
International			
Jet	-	+ 35.93	-
Piston	-	- 9.52	-
Net	+ 31.5	+ 26.41	+ 5.09
System			
Jet	-	+ 92.01	-
Piston	-	- 101.94	-
Net	+ 72.4	- 9.93	+ 82.33

A summary of the overall estimates of changes in revenues and costs is attached.

1/ DX 348, p. 20.

2/ DX 359B, pp. III - 25, III - 27.

3/ Mr. Wemple estimates only the net changes in ground and indirect expenses.

DX 371, page 11
(Summary-Categories of Differences-Wemple vs. Simat (Suppl.))

Summary of the Dollar Difference Between Mr. Wemple and Mr. Simat

	Mr. Wemple (Millions)	Mr. Simat (Millions)
Revenues		
Passenger Revenues - Domestic		
Jet	$ 229	$ 76.0
Piston	-102	-171.2
Net	$ 127	$ -95.2
Passenger Revenues - International[1]		
Net	$ 85	$ 45.1
Net Passenger Revenues - System	$ 212	$ -50.1
Net Transportation Revenues - System (at 105% of Passenger Revenues)	$ 222.6	$ -52.6
Costs (System)		
Direct Costs (other than Insurance and Depreciation)		
Jet	$ 134.5	$ 136.0
Piston	-87.9	-117.4
Net	$ 46.6	$ 18.6
Insurance and Depreciation		
Jet	$ 49.6	$ 49.3
Piston	--	-14.6
Net	$ 49.6	$ 34.7
Net Indirect Costs	$ 72.4	$ - 9.9
Net Total Costs	$ 168.6	$ 43.4
Net Change in Operating Profit	$ 54.0	$ -96.0
Adjustments to Operating Profit Depreciation & Amortization - (Ground Equipment, Item B; Developmental and Preoperating Expense, Item C)[2]	$ -2.6	--
Insurance[3]	$ .1	--
Net Change in Operating Profit After Adjustments	$ 51.5	$ -96.0

1/ International estimates; which are unchanged, are included here for completeness.
2/ TWA Ex. 4-C(4), Ex. F, pp. 12, 20, 27, 35, 42, 50, 64; Ex. G, pp. 19, 27, 35.
3/ TWA Ex. 43(a), Ex. G, p. 3.

(Domestic Jet Seat Miles-Wemple vs. Historical)

Various Comparisons of Wemple's Jet Seat Miles Added (Domestic) With Historical Jet Seat Miles Flown (Domestic)

Year	Jet Type	TWA Assumed Jet Seat Miles Added (000,000)	Col. 3 as a Percentage of Historical Jet Seat Miles Flown by:					
			TWA (Total)	TWA (same plane type)	AAL	UAL	AAL & UAL	AAL TWA & UAL
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
1959	B-131	178.6	13.0%	13.0%	-	-	-	-
	B-331	89.3	6.5	-	-	-	-	-
	Total	267.9	19.4%	-	15.9%	167.3%	14.48%	8.3%
1960	B-331	362.4	12.0	79.2	-	-	-	-
	CV-880	1,545.1	51.2	-	-	-	-	-
	Total	1,907.5	63.2	-	43.1	56.6	24.5	17.6
1961	B-331	418.1	8.1	50.7	-	-	-	-
	CV-880	1,518.8	29.3	104.5	-	-	-	-
	Total	1,936.9	37.3	-	31.3	27.0	14.5	10.4
1962	B-331	180.9	2.6	46.6*	-	-	-	-
	CV-880	1,066.0	15.1	50.1	-	-	-	-
	Total	1,246.9	17.6	-	14.8	12.6	6.8	4.9
1963	B-331	97.7	1.1	22.4*	-	-	-	-
	CV-880	882.7	10.0	35.5	-	-	-	-
	Total	980.4	11.1	-	10.3	8.7	4.7	3.3

Sources: Col. 3: C & C Report, Vol. I, Chapters II-V, as amended.

Cols. 4-9: By computation. Historical jet seat miles flown from ATA statistics.

*Includes B-331B

DX 379, page 2
(Domestic Jet Seat Miles-Wemple vs. Historical)

Available Seat-Miles Operated
Domestic Scheduled Service Only
TWA, UAL and AAL
Jet Aircraft Types, 1959-1963

Year	Airline	Jet Type	Historical Jet Seat Miles (000)
1959	AAL	B-707-123	1,689,836
	TWA	B-707-131	1,378,725
	UAL	DC-8	160,160
	Total		3,228,721
1960	AAL	B-707-123	4,005,714
		B-720	334,511
		DC-8	85,873
		Total	4,426,098
	TWA	B-707-131	2,561,178
		B-707-331	457,454
		Total	3,018,632
	UAL	B-720	391,332
		DC-8	2,976,062
		Total	3,367,394
	Total		10,812,124

Source: ATA Statistics

DX 379, page 3
(Domestic Jet Seat Miles-Wemple vs. Historical)

Year	Airline	Jet Type	Historical Jet Seat Miles (000)
1961	AAL	DC-8	42,153
		B-707-100	1,975,607
		B-707-120B	1,694,525
		B-720	898,225
		B-720B	1,584,963
		Total	6,195,473
	TWA	CV-880	1,453,538
		B-707-131	2,769,404
		B-707-331	824,663
		B-720	139,912
		Total	5,187,517
	UAL	DC-8-50	201,359
		DC-8-20	2,231,283
		DC-8-10	2,712,838
		B-720	2,019,438
		Total	7,164,918
	Total		18,547,908
1962	AAL	B-707-100/123	4,104,789
		B-707-120B	3,568,910
		CV-990	756,072
		Total	8,429,771
	TWA	B-707-131	2,474,637
		B-707-131B	1,645,675
		B-707-331	382,330
		B-707-331B	5,836
		B-720	446,271
		CV-880	2,128,226
		Total	7,082,975
	UAL	DC-8-50	482,082
		DC-8-20	2,241,723
		DC-8-10	3,394,492
		DC-720	3,758,889
		Total	9,877,186
	Total		25,389,932

DX 379, page 4
(Domestic Jet Seat Miles-Wemple vs. Historical)

Year	Airline	Jet Type	Historical Jet Seat Miles (000)
1963	AAL	B-707-120/123B	4,411,702
		CV-990	1,900,601
		B-720	3,195,195
		Total	9,507,498
	TWA	B-707-331	387,736
		B-707-331B	48,752
		B-707-131	2,178,182
		B-707-131B	3,698,501
		CV-880	2,484,529
		Total	8,797,700
	UAL	DC-8-50	1,331,703
		DC-8-20	2,288,255
		DC-8-10	2,839,286
		B-720	4,800,900
		Total	11,260,144
	Total		29,565,342

INDEX

	Page
Opinions Below	1
Jurisdiction	3
Questions Presented	3
Constitutional and Statutory Provisions Involved	4
Statement of the Case	4
The Judgment	4
The Toolco-TWA Control Relationship	5
The Complaint	6
Toolco Seeks To Discover TWA's Factual Contentions	7
The Order for the Entry of a Default Judgment	8
The Interlocutory Appeal	10
The Damage Award	10
The Decision of the Court of Appeals	12
Reasons for Granting the Writ	13
A. Due Process—the right to know the charges prior to lengthy, burdensome, and costly discovery	13
B. Due Process—the use of a default to establish conclusions of law	19
C. Conflict Between Circuits—increase in the ad damnum after default	25
D. The Federal Aviation Act—immunity for antitrust violations	26
E. The Sherman Act—a parent's decisions in regard to its subsidiary	33
F. Potential Competition—a Clayton Act test for a Sherman Act violation	36

Page

G. Proximate Cause—assumption of facts without proof to support them 39

H. Summary of Reasons 42

Conclusion 42

Appendix:

A. Opinion and Order of the District Court, dated February 7, 1963, Denying Defendants' Motion To Dismiss (214 F. Supp. 106) 1a

B. Opinion and Order of the District Court, dated May 3, 1963, Entering Default Judgment (32 F.R.D. 604) 13a

C. Opinion of the Court of Appeals, dated June 2, 1964, Dismissing Defendants' Counterclaims and Rejecting Primary Jurisdiction of the Civil Aeronautics Board (332 F.2d 602) 19a

D. Order of the Supreme Court, dated November 16, 1964, Granting Writs of Certiorari (379 U.S. 912) 44a

E. Order of the Supreme Court, dated March 8, 1965, Dismissing the Writ of Certiorari as Improvidently Granted in Hughes Tool Company *et al.* v. Trans World Airlines, Inc., No. 443 ... 45a

F. Order of the Supreme Court, dated March 8, 1965, Dismissing the Writ of Certiorari as Improvidently Granted in Hughes Tool Company v. Trans World Airlines, Inc., *et al.*, No. 501 .. 46a

G. Opinion and Order of the District Court, dated November 16, 1965, Affirming Refusal of the Special Master To Adopt Petitioner's Interim Findings (38 F.R.D. 499) 47a

H. Opinion and Order of the District Court, dated December 23, 1969, Upholding the Final Report of the Special Master (308 F. Supp. 679) 50a

I. Opinion and Order of the District Court, dated April 13, 1970, Awarding Costs and Attorney's Fees (312 F. Supp. 478) 81a

J. Order of the District Court, dated April 14, 1970, Entering Judgment 93a

Page

K. Opinion of the District Court, dated June 10, 1970, Granting Stay of Execution and Establishing Security Pending Appeal (314 F. Supp. 94) 94a

L. Order of the District Court, dated June 16, 1970, Establishing Security Pending Appeal 102a

M. Opinion of the Court of Appeals, dated September 1, 1971, Affirming With Modification the Judgment of the District Court 108a

N. Orders of the Court of Appeals, dated September 28, 1971, Denying Petitions for Rehearing and Rehearing In Banc 163a

O. Order of the Court of Appeals, dated October 7, 1971, Granting Stay of Execution Pending the Filing of a Petition for Certiorari and Increasing the Security Required 165a

P. Order of the Court of Appeals, dated October 18, 1971, Denying Defendants' Motion for Reconsideration of the Order Requiring Additional Security 166a

Q. Statutes Involved 167a

TABLE OF AUTHORITIES

CASES:

Allied Air Freight, Inc. v. *Pan American World Airways*, 393 F.2d 441 (2d Cir. 1968), *cert. denied*, 393 U.S. 846 (1968) 14n, 24n

American Crystal Sugar Co. v. *Cuban-American Sugar Co.*, 259 F.2d 524 (2d Cir. 1958) 38n

Bailey v. *Drexel Furniture Co.*, 259 U.S. 20 (1922) 36

Brown Shoe Co. v. *United States*, 370 U.S. 294 (1962) 37n, 38

Butler Aviation Co. v. *CAB*, 389 F.2d 517 (2d Cir. 1968) 32

Central Savings & Loan Assn. of Charlton, Iowa v. *Federal Home Loan Bank Board*, 422 F.2d 504 (8th Cir. 1970) 21

Conley v. *Gibson*, 355 U.S. 41 (1957) 16

Cragin v. *Lovell*, 109 U.S. 194 (1883) 20, 21

E. V. Prentice Mach. Co. v. *Associated Plywood Mills, Inc.*, 252 F. 2d 473 (9th Cir. 1958), *cert. denied*, 356 U.S. 951 (1958) 40

Page

Ex parte Fisk, 113 U.S. 713 (1885) 20
Feingold v. *Walworth Bros., Inc.*, 238 N.Y. 446, 144 N.E. 675 (1924) 22n
Fong v. *United States*, 300 F. 2d 400 (9th Cir. 1962), *cert. denied*, 370 U.S. 938 (1962) 25, 26
Hammond Packing Co. v. *Arkansas*, 212 U.S. 322 (1909) 22
Haynes v. *United States*, 390 U.S. 85 (1968) 22n
Hickman v. *Taylor*, 329 U.S. 495 (1947) 16
Hiland Dairy, Inc. v. *Kroger Co.*, 402 F. 2d 968 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969) 37
Hovey v. *Elliott*, 167 U.S. 409 (1897) 22
Hughes Tool Co. v. *Trans World Airlines, Inc.*, 379 U.S. 912 (1964) 2
Hughes Tool Co. v. *Trans World Airlines. Inc.*, 380 U.S. 248 (1965) 2, 10, 27, 28, 39
Hughes Tool Co. v. *Trans World Airlines, Inc.*, 380 U.S. 249 (1965) 2, 10
Klinger v. *Baltimore & O. R. Co.*, 432 F. 2d 506 (2d Cir. 1970) 41
Kolaski v. *United States*, 362 F. 2d 847 (5th Cir. 1966) 22n
La Buy v. *Howes Leather Co.*, 352 U.S. 249 (1957) .. 18n
McAllister v. *Kuhn*, 96 U.S. 87 (1877) 21
Milwaukee Towne Corp. v. *Loew's, Inc.*, 190 F. 2d 561 (7th Cir. 1951) 41
Mitchell v. *Watson*, 58 Wash. 2d 206, 361 P. 2d 744 (1961) 22n
Nagler v. *Admiral Corp.*, 248 F. 2d 319 (2d Cir. 1957) .. 16
National Aviation Trades Assn. v. *CAB*, 420 F. 2d 209 (D.C. Cir. 1969) 33
Ohio Cent. R. Co. v. *Central Trust Co.*, 133 U.S. 83 (1890) 21
Pan American World Airways, Inc. v. *United States*, 371 U.S. 296 (1963) 31, 32, 33
People v. *George Henriques & Co.*, 267 N.Y. 398, 196 N.E. 304 (1935) 22n
Pope v. *United States*, 323 U.S. 1 (1944) 21
Schlagenhauf v. *Holder*, 379 U.S. 104 (1964) 18n
SCM Corp. v. *Radio Corp. of America*, 407 F. 2d 166 (2d Cir. 1969), *cert. denied*, 395 U.S. 943 (1969) .. 21
Shemtob v. *Shearson, Hammill & Co.*, 448 F. 2d 442 (2d Cir. 1971) 35n
Thomson v. *Wooster*, 114 U.S. 104 (1885) 19, 20, 24

Page

Trans World Airlines, Inc. v. *Hughes, et al.*, 214 F. Supp. 106 (S.D.N.Y. 1963) 2, 9, 28
Trans World Airlines, Inc. v. *Hughes, et al.*, 32 F.R.D. 604 (S.D.N.Y. 1963) 2
Trans World Airlines, Inc. v. *Hughes, et al.*, 332 F. 2d 602 (2d Cir. 1964) 2, 10, 28, 29, 30, 32
Trans World Airlines, Inc. v. *Hughes, et al.*, 38 F.R.D. 499 (S.D.N.Y. 1965) 2, 20
Trans World Airlines, Inc. v. *Hughes, et al.*, 308 F. Supp. 679 (S.D.N.Y. 1969) 2, 12, 20, 41
Trans World Airlines, Inc. v. *Hughes, et al.*, 312 F. Supp. 478 (S.D.N.Y. 1970) 3, 18n
Trans World Airlines, Inc. v. *Hughes, et al.*, 314 F. Supp. 94 (S.D.N.Y. 1970) 3
Trans World Airlines, Inc. v. *Hughes, et al.*, 449 F. 2d 51 (2d Cir. 1971) 1, 13, 20, 21, 34, 37, 37n, 40, 42
United States v. *Columbia Steel Co.*, 334 U.S. 495 (1948) 34
United States v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957) 38
United States v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964) 38n
United States v. *Procter & Gamble Co.*, 356 U.S. 677 (1958) 14
United States v. *Rumely*, 345 U.S. 41 (1953) 36
United States v. *Ryan*, 402 U.S. 530 (1971) 14
United States v. *United Mine Workers of America*, 70 F. Supp. 42 (D.D.C. 1946) 23n
United States v. *United Mineworkers of America*, 330 U.S. 258 (1947) 23
United States ex rel. Harshman v. *County Court of Knox County*, 122 U.S. 306 (1887) 20

STATUTES:

United States Constitution, Amendment V 3, 4
Clayton Act 37
Section 3 (15 U.S.C. § 14) 4, 6
Section 7 (15 U.S.C. § 18) 4, 6, 15, 28, 36, 37, 38, 39

Federal Aviation Act
Section 102 (49 U.S.C. § 1302) 32, 33
Section 408 (49 U.S.C. § 1378) 4, 5, 12n, 26, 27, 31, 32n, 33

Page

Section 409 (49 U.S.C. § 1379) 27

Section 414 (49 U.S.C. § 1384) 3, 4, 7, 27, 29, 30, 31, 32, 33

Federal Rules of Civil Procedure 3, 13, 16, 18n, 19

Rule 16 .....4, 8, 16, 17

Rule 37 .....4, 22, 24

Rule 37(b)(2)(iii) 24, 25n

Rule 37(d) 24, 25n

Rule 54 4

Rule 54(c) 3, 25, 26

Rule 55 4

Rule 55(b)(2) 21n

Rule 55(d) 25

Judicial Code

28 U.S.C. § 1254(1) 3

28 U.S.C. § 1292 .....4, 9, 10, 14, 23n

Sherman Act 3, 37, 38, 38n

Section 1 (15 U.S.C. § 1) 4, 6, 28, 36, 37, 38

Section 2 (15 U.S.C. § 2) 4, 6, 28, 36, 37, 38

MISCELLANEOUS AUTHORITIES:

1971 Annual Report of the Director of the Administrative Office II-108 ..... 35n

Davis, Administrative Law Treatise § 19.06 (1970 Supp.) 32n

3 Freeman, Law of Judgments (5th ed., Tuttle 1925) 21

Handbook of Recommended Procedures for the Trial of Protracted Cases, 25 F.R.D. 351 (1960) 17

Manual for Complex and Multidistrict Litigation (1970) 16, 17

4 Moore, Federal Practice (2d ed. 1970) 22n, 25

Page

Note, Sanctions for Enforcement of Discovery—Constitutionality of Rule 37, 37 Wash. L. Rev. 175 (1962) 22n

Note, The Constitutional Limits of Discovery, 35 Ind. L. J. 337 (1960) 22n

Pomeroy, Remedies and Remedial Rights (2d ed. 1883) 20

Report of the Attorney General's National Committee To Study the Antitrust Laws 35 (1955) 34

Report on Procedure in Anti-Trust and Other Protracted Cases, 13 F.R.D. 62 (1951) 17

Rosenberg, Sanctions To Effectuate Pretrial Discovery, 58 Col. L. Rev. 480 (1958) 25n

Transcontinental & Western Air., Inc., Control by Hughes Tool Co., 6 C.A.B. 153 (1944) 5, 30, 33, 34

Transcontinental & Western Air., Inc., Further Control by Hughes Tool Co., 9 C.A.B. 381 (1948) ..30, 33

Transcontinental & Western Air., Inc., Further Control by Hughes Tool Co., 12 C.A.B. 192 (1950) 5, 30, 33, 34

8 Wright & Miller, Federal Practice and Procedure (1970) 22n, 25

Civil Aeronautics Board Orders:

E-10360, June 8, 1956 29

E-12604, June 6, 1958 29

E-13542, February 26, 1959 30

E-13873, May 15, 1959 30

E-14169, July 1, 1959 30

E-14504, September 30, 1959 30

E-14877, January 29, 1960 30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,
Petitioners,

v.

TRANS WORLD AIRLINES, INC., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Hughes Tool Company and Raymond M. Holliday pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Second Circuit entered on September 1, 1971, which affirmed a judgment in favor of respondent Trans World Airlines, Inc., of $145,448,141.07 and increased the rate of interest on that judgment from 6% to 7½%.

OPINIONS BELOW

The opinion of the Court of Appeals review of which is sought is reported at 449 F.2d 51 and is set forth at page

108a of the separately-bound Appendix.[1] Earlier opinions in this litigation, also set forth in the separately-bound Appendix, are reported as follows:

(1) The opinion and order of the District Court for the Southern District of New York, dated February 7, 1963, denying petitioners' motion to dismiss the complaint, is reported at 214 F. Supp. 106. (App. 1a)

(2) The opinion and order of the District Court, dated May 3, 1963, ordering the entry of a judgment by default against petitioners and certifying the presence of a controlling question of law, is reported at 32 F.R.D. 604. (App. 13a)

(3) The opinion of the Court of Appeals for the Second Circuit, dated June 2, 1964, affirming the District Court on the question on which interlocutory appeal was allowed, is reported at 332 F.2d 602. (App. 19a)

(4) The orders of this Court granting and then dismissing writs of certiorari as improvidently granted, dated November 16, 1964, and March 8, 1965, are reported at 379 U.S. 912, 380 U.S. 248, and 380 U.S. 249. (App. 44a, 45a, 46a)

(5) The opinion and order of the District Court, dated November 16, 1964, affirming the Special Master's refusal to adopt respondents' proposed interim findings, is reported at 38 F.R.D. 499. (App. 47a)

(6) The opinion and order of the District Court, dated December 23, 1969, confirming the Special Master's damage award in the sum of $137,611,435.95, is reported at 308 F. Supp. 679. (App. 50a)

(7) The opinion, order, and judgment of the District Court, dated April 13 and 14, 1970, including counsel fees of $7,500,000 and costs, is reported at 312 F. Supp. 478. (App. 81a, 93a)

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[1] Citations to the separately-bound Appendix to this petition are in the form "App. —a." A certified copy of the Joint Appendix printed for the use of the court below has been furnished to the Clerk of this Court, and references to it are in the form, "2d Cir. App. A—." References to portions of the record that were not printed in the Joint Appendix are in the form, "Doc. —."

(8) The opinion and order of the District Court, dated June 10, 1970, granting stay of execution and establishing security pending appeal, is reported at 314 F. Supp. 94. (App. 94a)

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on September 1, 1971. A timely petition for rehearing was filed on September 15, 1971, and denied on September 28, 1971 (App. 163a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does a defendant have a right under the Due Process Clause of the Fifth Amendment and as a part of notice pleading under the Civil Rules to require plaintiff to identify with reasonable specificity the conduct that it claims is illegal before defendant is required to participate in lengthy and expensive deposition proceedings in which plaintiff seeks evidence from the defendant to support the charges of illegality?

2. Is a defendant deprived of property without due process of law in violation of the Fifth Amendment if a court enters a default judgment, as a sanction for refusal to make further discovery, under circumstances that do not permit a presumption that the defendant has no defense to the action, and then treats the default as a conclusive admission of liability and that damage proximately resulted therefrom?

3. After a defendant is in default may a federal court, despite the clear prohibition of Civil Rule 54(c), permit a plaintiff to amend its complaint so that it may be awarded damages substantially greater than those prayed for in the complaint at the time of the default?

4. When the Civil Aeronautics Board has approved an acquisition of control over an air carrier by a person engaged in a phase of aeronautics and has further approved all relevant transactions between them, is the exercise of that control to determine how the air carrier acquires aircraft and the necessary financing therefor immunized

from the operation of the antitrust laws under Section 414 of the Federal Aviation Act?

5. May a subsidiary recover against its parent for violation of the Sherman Act because the parent determines the manner and method by which the subsidiary acquires capital equipment, when the parent is not a competitor of those who manufacture and supply such equipment?

6. Is a corporation that has in no way restrained or monopolized a particular area of commerce subject to damages under the Sherman Act because it has "independent economic significance" and is a "potential competitor" of those engaged in that area of commerce?

7. May a plaintiff recover antitrust damages without introducing any evidence that relates the injuries claimed to the restraint or monopolization of trade alleged and without showing that the plaintiff had the financial ability to do what it claims defendants prevented it from doing?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth in the separately-bound Appendix beginning at page 176a. They include the following:

1. United States Constitution, Amendment V.
2. United States Code, Title 15, Sections 1 and 2 (Sherman Act §§ 1, 2) and Sections 14 and 18 (Clayton Act §§ 3, 7).
3. United States Code, Title 49, Sections 1378 and 1384 (Federal Aviation Act §§ 408, 414).
4. United States Code, Title 28, Section 1292.
5. Federal Rules of Civil Procedure, Rules 16, 37, 54, and 55.

STATEMENT OF THE CASE

The Judgment

The judgment below for $145,448,141.07, with interest at 7½%, was entered as a sanction under Civil Rule 37. The District Court ordered that a default judgment be entered against petitioners after Hughes Tool Company ("Toolco") had elected to rest on the merits of its legal positions in order to obtain appellate review of interlocu-

tory orders of the District Court. Following the default order, a hearing was held before a Special Master. It was limited to the amount of damages to be awarded Trans World Airlines, Inc. ("TWA").

The judgment awards $137,611,435.95 as treble damages under the antitrust laws, plus $7,500,000 in attorneys' fees and $336,705.12 as costs.

The Toolco-TWA Control Relationship

Petitioner Toolco was formerly the owner of 78% of the stock of TWA. Petitioner Raymond M. Holliday ("Holliday") is a Toolco executive and was for a time a director of TWA.

The Civil Aeronautics Board ("CAB"), pursuant to Section 408 of the Federal Aviation Act (49 U.S.C. § 1378), twice approved after public hearings the acquisition by Toolco of control over TWA. *Transcontinental & Western Air., Inc., Control by Hughes Tool Co.*, 6 C.A.B. 153 (1944); *Transcontinental & Western Air., Further Control by Hughes Tool Co.*, 12 C.A.B. 192 (1950). The CAB found in 1944 that it had jurisdiction over Toolco's acquisition of control because Toolco had ordered aircraft for TWA, some of which might be sold to airlines other than TWA, and thus was engaged in a phase of aeronautics within the meaning of Section 408. The CAB retained jurisdiction over the Toolco-TWA relationship by approving the acquisition of control only on the condition that individual transactions between Toolco and TWA be limited to less than $200 and total annual transactions between Toolco and TWA to less than $10,000. As a result, every material transaction between Toolco and TWA was submitted to the CAB and approved by it under Section 408 through modification of the original orders approving acquisition of control. The CAB issued nineteen such modification orders, including orders approving the specific transactions that are the subject of this litigation.

In 1960, several large banks and insurance companies demanded, as a condition to their supplying senior financing for TWA's initial jet fleet, that Toolco place its TWA stock in a voting trust controlled by them. Toolco yielded

to this demand on December 31, 1960. The new TWA management, which the lenders installed, filed an antitrust complaint against Toolco, Holliday and Howard R. Hughes ("Hughes"), Toolco's sole stockholder, six months thereafter. Hughes was never served.

The Complaint

The complaint charged in conclusory terms violations of Sections 1 and 2 of the Sherman Act and Sections 3 and 7 of the Clayton Act. Toolco was alleged to be a manufacturer and supplier of aircraft to air carriers and the offenses charged all relate to the alleged exclusion of competitors of Toolco from the TWA market for aircraft. This alleged exclusion of Toolco's competitors was variously denominated an acquisition of stock in violation of Section 7 of the Clayton Act, a boycott, a tie-in, monopolization or an attempt to monopolize, and sales and leases on the condition that TWA not acquire aircraft from any competitor of Toolco.

The complaint alleged a number of acts by Toolco, some during the period of Toolco control and some after the voting trust had taken control, in furtherance of the offenses charged. At the damage hearing, however, TWA limited its claims to the manner in which, under Toolco control, Toolco acquired its initial jet fleet from Boeing and Convair.[2]

The complaint prayed for treble damages of $105 million, divestiture, and other injunctive relief.[3] Since both TWA and Toolco are Delaware corporations, federal jurisdiction was solely dependent on alleged antitrust violations.[4]

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[2] In the damage hearing, TWA did not seek any damages for conduct of the defendants after the voting trust took control in December, 1960 or because of an alleged conspiracy between the defendants and Atlas Corporation to bring about a merger of Northeast Airlines and TWA or for alleged malicious and wilful interference with TWA's business subsequent to December, 1960.

[3] Toolco sold its interest in TWA in a public offering in 1966.

[4] The answers of Toolco and Holliday denied the alleged violations of law and asserted as an affirmative defense that the District Court had no jurisdiction because of exclusive primary jurisdiction in the CAB.

Toolco Seeks To Discover TWA's Factual Contentions

From the filing of the complaint, TWA sought to take the deposition of Hughes before Toolco obtained a reasonable identification of TWA's factual claims. Toolco urged that the charges of antitrust violations in the complaint were unintelligible because: (1) Toolco had never manufactured airplanes for airlines and was a supplier only to the extent that it had helped its subsidiary acquire aircraft; and (2) such acts as were alleged in the complaint appeared to be immunized from the antitrust laws, under Section 414 of the Federal Aviation Act, by the orders of the CAB approving Toolco's control of TWA and all transactions in which TWA acquired equipment from Toolco. The District Court awarded Toolco priority of discovery.

The deposition of TWA failed to reveal the ultimate facts on which TWA relied to support its claimed antitrust violations.[5] Accordingly, Special Master J. Lee Rankin, who had been appointed to preside over discovery, recommended that a pretrial conference be held under Rule 16, at which TWA would be required to delineate the facts on which it based its complaint and at which the issues could be defined. He announced that he considered the holding of a pretrial

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[5] The Special Master, J. Lee Rankin, stated:

> I had thought that before we completed the testimony of Mr. Tillinghast [the Chief Executive Officer of TWA], I would be informed about the ultimate facts that the plaintiff was relying upon to support the various allegations of its complaint, which are largely conclusions of law, but do conform to the requirements of the federal rules concerning such complaints.
>
> I did not think that with the chief executive officer of the plaintiff being deposed, we would reach a point at the conclusion where I would not know the ultimate facts upon which the plaintiff was relying to establish those various allegations insofar as they had a bearing upon a violation of the antitrust laws.
>
> But I did find I was in that position. I think that has an important bearing upon what is equitable in asking testimony of principal witnesses of the defendant in this case [*i.e.*, Howard Hughes], and when that should be required. [Doc. 236, Tr. 101.]

conference to be so important to the progress of the litigation that if the parties did not apply to the District Court for a Rule 16 proceeding, which he offered to conduct, he would do so himself.

Toolco promptly applied for a pretrial conference. TWA opposed the application. Toolco also served interrogatories designed to elicit TWA's factual contentions. The Special Master ruled that the interrogatories were proper and that TWA could be of great assistance to the progress of the litigation by answering them promptly. TWA appealed this ruling.

On October 25, 1962, the Special Master set February 11, 1963, as the date for the deposition of Hughes in California pursuant to a witness subpoena. He fixed this date in order to give Toolco an opportunity to bring on a dispositive motion addressed to the complaint after Toolco had obtained a definition of the issues, either through answers to interrogatories and further discovery of TWA, or through a Rule 16 proceeding (Doc. 236, Tr. 59-63, 116-117).

The District Court deprived Toolco of this opportunity. On January 10, 1963, it denied Toolco's application for a Rule 16 proceeding, ordered that TWA need not answer interrogatories until 60 days after completion of the Hughes deposition, and confirmed the February 11th date for that deposition (2d Cir. App. A.-122-126).

The Order for the Entry of a Default Judgment

Shortly after the action was begun Toolco had moved to dismiss the complaint or for summary judgment. This motion was held in abeyance pending a delineation of TWA's factual contentions. Toolco advised the District Court on several occasions that once TWA's factual claims were defined Toolco would be in a position to admit the facts (in contrast to legal conclusions) and obtain a determination whether they gave rise to liability and, if so, to what extent.[6] Deprived of this opportunity by the District

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[6] For example, as early as October 2, 1961, counsel for Toolco advised the District Court: "We believe this case can be decided, in so far as the complaint is concerned on admitted facts" (Doc.

Court's rulings, and faced with the prospect of a deposition expected to take at least "a good two or three months" (2d Cir. App. A-1908) and to cost Toolco $5 million (2d Cir. App. A-280), Toolco abandoned the motion for summary judgment and brought on for hearing the motion to dismiss.

The District Court denied the motion from the bench (2d Cir. App. A-xix-xx) and refused to certify its denial of Toolco's motion so as to permit an interlocutory appeal under 28 U.S.C. § 1292(b) (App. 12a).[7]

In order to secure appellate review, Toolco on February 8, 1963, filed a Notice of Position, stating that, subject only to whatever judicial relief it might thereafter obtain, it elected to rest on the merits of its position so that it might avoid the burden and the enormous expenses of further pretrial and trial proceedings prior to the time that an appellate court had the opportunity to rule upon the decisions and orders of the trial court (2d Cir. App. A-268).[8] In a hearing the same day, Toolco advised the District Court that by reason of the election it had made, Hughes would not appear for deposition on February 11, 1963 (2d Cir. App. A-281) and that Toolco's position would be the same, and it would not further defend on the merits, even if Hughes should appear (2d Cir. App. A-298-299). Pursuant to its election, Toolco declined to produce documents in addition to some 125,000 documents that it had already

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48, p. 23). In a memorandum filed on July 12, 1962, counsel for Toolco stated:

> Once the present management of TWA has been compelled to disclose the factual basis for its claims, Toolco will be in a position to admit such facts and seek a determination as to whether they give rise to liability and, if so, as to the extent thereof. It has been the position of Toolco since the commencement of this action that once TWA's management is compelled to disclose what it claims, a determination on the merits as to such claims will be appropriate. [Doc. 100, pp. 24-25.]

[7] The District Court gave no reason at the time for this refusal, although later the court suggested that Toolco could have had review by writ of mandamus (2d Cir. App. A-277).

[8] Toolco, as 78% stockholder of TWA, was bearing 78% of TWA's expenses, in addition to its own.

furnished to TWA (2d Cir. App. A-305). The District Court then indicated it would entertain a motion by TWA for a default judgment (2d Cir. App. A-307).

On February 15, 1963, TWA moved for the entry of a default judgment and also to increase the *ad damnum* from $105 million to $135 million. On May 3, 1963, the District Court granted these motions and referred the matter to the Special Master to determine "the amount of damages to be paid * * *." It also granted the certification under 28 U.S.C. § 1292(b) that it had declined to grant at the time it denied the motion to dismiss the complaint (App. 13a).

The Interlocutory Appeal

Toolco petitioned the Court of Appeals for leave to appeal under 28 U.S.C. § 1292(b). The Court of Appeals limited its review to whether the District Court had jurisdiction of the action and whether the CAB orders were a complete defense to the action. It affirmed the District Court on those issues (App. 19a). This Court granted certiorari but, at this interlocutory stage of the case, dismissed the writ after argument as improvidently granted (380 U.S. 248, 249; App. 45a, 46a).

The Damage Award

At the damage hearing before newly-appointed Special Master Herbert Brownell, TWA for the first time specified the conduct of the defendants that it claimed had injured it and for which it sought damages. On a complaint that alleged a boycott, tie-in, and attempt to monopolize based upon the exclusion of manufacturers and suppliers of aircraft other than Toolco from the TWA market, TWA sought damages because Toolco, not TWA, ordered aircraft from Boeing and Convair for the TWA market.

According to TWA, TWA should have ordered for its initial jet fleet 33 planes from Boeing and 30 planes from Convair——exactly the planes that Toolco ordered for its subsidiary. If TWA, not Toolco, had ordered the planes, TWA contended it would have (1) ordered the planes from Boeing sooner, (2) received all the planes instead of cutting back on the size of the fleet, and (3) purchased all the

planes instead of leasing some of the Boeing jets for a time and purchasing them later.[9]

Special Master Brownell held that the order for the entry of a default judgment established both liability and proximate cause. His Report did not explain how Toolco's ordering planes for TWA instead of TWA's ordering the

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[9] Petitioners introduced no evidence at the damage hearing other than certain industry statistics and expert testimony as to the amount of damages, if any. The following facts, none of which had ever been in dispute and all of which were well-known to TWA at the time it filed its complaint, were confirmed in the course of the cross-examination of TWA witnesses:

(a) Toolco did not manufacture airplanes for air carriers and did not compete with manufacturers and suppliers of aircraft for air carriers.

(b) Toolco ordered Boeing aircraft promptly after Convair had decided not to manufacture a long-range jet that would have met the unique requirements of TWA.

(c) Toolco ordered jets for TWA only after TWA advised Toolco that it lacked the financial resources to order jets itself.

(d) To the manufacturers whether TWA or Toolco ordered the aircraft made no difference. Toolco's contracts with the manufacturers prohibited the assignment of the right to receive the aircraft to anybody other than TWA without the consent of the manufacturer. A vice president of Boeing testified that Boeing at no time considered Toolco or TWA as separate customers, stating: "We considered that they were and are the same" (2d Cir. App. A-1101).

(e) In March, 1959, after the announcement of improved fanjets, Toolco determined that eight of the Boeing jets and ten of the Convair jets were not needed by TWA for its initial jet fleet and so advised TWA. Pursuant to this decision, in the fall of 1959 Toolco released to Boeing its contractual rights to six long-range Boeing jets then under construction. Boeing sold these planes to Pan American.

(f) Late in 1960 Toolco released its contractual rights to six of the ten Convair planes that had been determined to be surplus to TWA's needs. The six planes were then leased by Convair to Northeast. The remaining four were ultimately delivered to Toolco. Toolco offered these four aircraft to TWA in 1961, but TWA did not accept the offer, and the planes were not used until 1963.

(g) Toolco's financial resources and credit made possible payment for and the delivery of 19 of the Boeing jets. Pend-

planes itself, or the other decisions thereafter made, could conceivably be a violation of the antitrust laws.

The Special Master, on the basis of expert testimony that estimated increased revenues by mechanically applying TWA's load factors to a larger number of aircraft, awarded TWA $27,600,000 for late delivery of jets and delivery of a smaller number of jets than originally ordered. He awarded TWA $5,300,000 because some of the jets were temporarily leased by TWA. He awarded TWA $570,748.65 for disruption of TWA's business because the Convair jets were delivered late. The remaining $12,400,000 of the damage award represents the effect of retroactive application of changes in accounting practices made by TWA two-and-a-half years after this action was instituted. The total award of damages after trebling came to $137,611,435.95.[10]

The District Court confirmed the Report of the Special Master in all respects (App. 50a). Judgment was entered for $145,448,141.07, including attorneys' fees and costs, with interest at the rate of 6%.

The Decision of the Court of Appeals

TWA, Toolco, and Holliday filed cross-appeals from the District Court's judgment. TWA claimed that the amount awarded was inadequate. Toolco and Holliday maintained that the judgment entered was without foundation, in fact or law, and that the order for the entry of the default judgment under the circumstances of this case and the

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ing the arrangement of permanent financing, Toolco leased the planes to TWA on a day-to-day basis. The leases were approved by the CAB under Section 408 of the Federal Aviation Act.

(h) Of the 20 Convair planes received by TWA, 19 were delivered after permanent financing was arranged in December 1960.

[10] The Special Master rejected the hypothetical testimony of TWA's financial expert as to about how TWA could have raised on its own the large amounts of financing required for the 63-plane fleet. Despite his rejection of the only testimony as to how TWA could have financed the 63-plane fleet, the Special Master assumed, without explanation, that TWA could have obtained financing for the jet fleet hypothesized by TWA.

effect given to that order by the District Court deprived them of their property without due process of law. The Court of Appeals affirmed the judgment in all respects but one. It increased the interest rate from 6% to 7½% (App. 108a). The total amount of the judgment with interest now stands at over $163 million. Interest alone is running at almost $11 million a year.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals does tremendous violence to due process of law, subjecting petitioners to the largest judgment ever awarded as a sanction for steps that, rightly or wrongly, they fully believed they were entitled to take in order to permit an orderly test of their legal position. The decision distorts the proper application of the Federal Rules of Civil Procedure. It introduces startling innovations into the antitrust laws that, if left intact, will plague and clog the federal courts for years to come. The decision provides the lure of treble damages to bring to the exclusive jurisdiction of the federal courts suits that until now have been regarded as simple state law claims. Finally, the decision virtually emasculates an important section of the Federal Aviation Act and in doing so discourages others in the aeronautics industry from coming to the assistance of struggling carriers and invites collision between the CAB and the courts.

A. Due Process—the right to know the charges prior to lengthy, burdensome and costly discovery

The plainest principles of fairness and due process, as well as orderly procedure, require that a defendant be apprised of the charges against him before he may be compelled to subject himself to discovery, at an immense expenditure of time and funds. This is particularly true in a treble damage action under the antitrust laws, where the conduct charged is a crime and two-thirds of the relief requested is punitive. Those principles were ignored in the decision of the Court of Appeals.

This case has been colored in the popular mind by the image of a man of great wealth so insistent on maintaining

his privacy that he flouts the lawful processes of the United States courts. The image bears no resemblance to the reality of what in fact happened. It was Toolco that made a responsible decision to decline to proceed further in order to test its legal rights. Toolco specifically advised the court that its decision not to proceed would be the same even if Hughes, who had been subpoenaed as a witness, were to appear on the day set for his deposition (2d Cir. App. A-299, A-303-304).

Toolco made its decision only after the District Court: (1) refused to require TWA to disclose its factual contentions prior to Toolco's being subjected to a deposition that would have taken months and cost it more than $5 million (2d Cir. App. A-280); (2) determined that the antitrust claims asserted were not within the primary jurisdiction of the CAB and had not been immunized from the operation of the antitrust laws by orders of the CAB approving Toolco's control of and transactions with TWA; and (3) declined to certify its rulings for an appeal under 28 U.S.C. § 1292(b).

Toolco took the position it did because it seemed the only way to obtain appellate review of these interlocutory orders that it believed erroneous without being put to the expense of useless litigation. Its course was suggested by that successfully followed by the United States in *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 680-681 (1958), where the United States solicited dismissal of its complaint as a means of obtaining appellate review of an order requiring it to produce a grand jury transcript. See also *United States* v. *Ryan*, 402 U.S. 530, 533 (1971), holding that a person who believes that a District Court has erred in refusing to quash a grand jury subpoena "is free to refuse compliance and * * * in such event he may obtain full review of his claims before undertaking any burden of compliance with the subpoena."[11]

In this case the need for a meaningful identification of TWA's factual contentions was peculiarly great because

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[11] See also *Allied Air Freight, Inc.* v. *Pan American World Airways*, 393 F.2d 441 (2d Cir.), *cert. denied*, 393 U.S. 846 (1968), described in note 22, *infra*, p. 24.

defendants saw no facts alleged in the complaint that would constitute a violation of the antitrust laws. On the surface, the complaint would appear to be detailed. It is long. It has many paragraphs. It seems to state numerous facts. But on closer examination by petitioners, the allegations appeared meaningless for they all seemed to center on acts and judgments normally and naturally engaged in by a parent in relation to its subsidiary. The complaint uses in abundance the special jargon of antitrust—"boycott," "tying arrangement," "attempt to monopolize"—to describe a normal and legal relationship between a parent and a subsidiary. In addition the complaint simply ignored the orders of the CAB approving Toolco's control of TWA and all transactions between Toolco and TWA. In fact, the complaint makes no reference whatever to the CAB. Yet the complaint alleged that the acquisition of Toolco's stock interest in TWA violated Section 7 of the Clayton Act, a conclusory allegation that made no sense in light of the CAB's approval of that acquisition by Toolco.

Petitioners' reaction to the complaint was that this case was a classic one for summary judgment because the key facts apparently relied upon gave rise to no antitrust claim, and petitioners were ready to stipulate them. Moreover, Toolco knew, and the damage hearing confirmed, that these were the only facts upon which TWA could be relying—for both TWA and Toolco, after 21 years, were aware of all of the facts concerning their relationship. There were, in truth, no facts to be discovered, and it was wholly unlikely that there would be any "genuine issue as to any material fact" between them as to what had happened in the past, however much they might differ about the legal consequences of those events.

For these reasons Toolco sought to ascertain on which of the facts, known to both parties, TWA was relying to support the conclusory allegations of antitrust violations. Special Master Rankin felt the same way. He tried to elicit from TWA and its executives the facts upon which they were relying to establish antitrust violations, but he was unsuccessful.[12]

[12] See his statement quoted at note 5, *supra*, p. 7.

Despite this, the District Court and the Court of Appeals held that the defendants were entitled to a specification of TWA's factual contentions and a delineation of the issues only *after* they had been subjected to an enormously burdensome and expensive deposition for the purpose of permitting plaintiff to seek evidence or leads to evidence to support its ill-defined charges. In so holding the courts below overlooked the function of a complaint under modern pleading as well as the nature of discovery under the Federal Rules of Civil Procedure.

At one time the pleadings were expected to inform a defendant of the facts underlying the plaintiff's claim and to define the issues between the parties. They were not a suitable device for this task. Accordingly, under the Federal Rules of Civil Procedure, the complaint is now expected only to give defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley* v. *Gibson*, 355 U.S. 41, 48 (1957). The defendant's right to know with reasonable specificity the factual nature of that claim is to be vindicated through the various discovery devices provided by the Rules together with pretrial conferences under Rule 16. *Hickman* v. *Taylor*, 329 U.S. 495, 501 (1947). The same principles of simplified pleading that govern a routine personal injury case are applicable also to the most complex antitrust case. However, as the draftsman of the Civil Rules was at pains to explain in the leading case so holding, in complicated cases in which fuller disclosure of the basis of the claim is needed, simplified pleading is workable only because such disclosure can be had by these other devices in the rules, including Rule 16 and the discovery rules. *Nagler* v. *Admiral Corp.*, 248 F.2d 319, 322-323 (2d Cir. 1957).

The most recent and authoritative guidelines for the conduct of the large antitrust case, found in *Manual for Complex and Multidistrict Litigation* (1970), take into account the necessity for a defendant in a "big" case to be informed in the first instance of the basic facts underlying the complaint. Thus the *Manual* recommends a "first wave of discovery" designed to obtain information concerning the transactions upon which the claims for relief are based.

Only after this is completed is discovery on the merits to be allowed in a "second wave of discovery." *Manual* § 1.5.[13]

Yet in this case, when Toolco turned to the various procedures provided by the Rules in an effort to require TWA to disclose the factual basis of the wrongdoing being charged and to identify the issues between the parties, the District Court denied Toolco's motion for Rule 16 procedures, despite the specific recommendation of the Special Master, and refused to require answers to defendant Toolco's interrogatories until after the deposition of the witness Hughes, even though both the Special Master and the District Court found these interrogatories to be proper. Thus the court ordered that Hughes first appear for a deposition on the merits that would be both extensive and expensive, and for which he could not properly be prepared. The estimate that the deposition would cost Toolco in excess of $5 million (2d Cir. App. A-280) was never challenged.[14] Only after the expenditure of that astronomical amount was Toolco to be permitted to have any meaningful description of the nature of the claims against it.

Ordinarily the order of discovery is and must be for the discretion of the trial court. The grant of this broad discretion assumes that it will be exercised to illuminate, rather than to conceal, the issues. In this case, however, the discovery orders of the District Court, taken together,

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[13] This is not a new perception. Before the present action was commenced, a predecessor of the present *Manual*, approved by the Judicial Conference of the United States, had said that in protracted cases discovery must be confined to the genuine issues necessary for decision and that the court must take affirmative steps to define the issues before discovery on the merits begins. *Handbook of Recommended Procedures for the Trial of Protracted Cases*, 25 F.R.D. 351, 386-390 (1960). An even earlier report, also approved by the Judicial Conference, had been to the same effect. *Report on Procedure in Anti-Trust and Other Protracted Cases*, 13 F.R.D. 62, 66-68 (1951).

[14] It is of interest that the District Court, which was not disturbed at the prospect of a deposition that would cost defendants more than $5 million, later felt it proper to observe that prior to this case the highest recoveries on record in cases that had gone to judgment had been $4.4 million and $4.2 million (App. 82a).

denied to petitioners the fundamental right to know the charges against them before being subjected to examination in search of evidence or leads to evidence. The rulings of the District Court deprived Toolco of the opportunity properly to prepare Hughes for the deposition, with intelligent advice of counsel. They deprived it also of the opportunity to obtain a determination, based on the facts claimed by TWA, whether TWA had any bona fide antitrust claims against petitioners. To put a defendant to an expense of $5 million in trial preparation before it is known if there is anything to be tried is so grave an abuse of judicial process as to amount to a denial of due process.

The matter has importance far beyond the confines of this case.[15] The possibilities for harassment of defendants, either for the purpose of inducing a settlement or for other ulterior motives unrelated to the merits of the litigation, are enormous. Particularly in the large antitrust case, where vague allegations of a conspiracy in restraint of trade may result in enormous expenditures on discovery, equal in themselves to a sizable judgment, the rights of a defendant under the discovery rules require protection. The ruling of the Court of Appeals will constitute a particularly enticing temptation to competitors to bring treble damage suits for reasons other than legitimate ones, since the expense of discovery and the knowledge gained therefrom can themselves be competitive weapons of no mean worth.

On the other hand, prompt identification of the issues and the stipulation of undisputed facts will greatly reduce the burden that the "big" case imposes on the federal courts. Here, if the facts relied on by TWA had been specified prior to the default, this case would have been disposed of expeditiously by summary judgment.[16]

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[15] Certiorari is appropriate "to review undecided questions concerning the validity and construction of" the discovery rules (*Schlagenhauf* v. *Holder*, 379 U.S. 104, 109 (1964)), and to pass on questions of importance in the administration of the Federal Rules of Civil Procedures (*La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 251 (1957)).

[16] The presentation of an intelligent motion for summary judgment requires that a defendant know with some certainty the plain-

Conclusory allegations of a complaint permit the artful pleader to bring his case in the federal courts even though ultimately it turns out that the conduct of the defendant does not support a federal claim or is one for an administrative agency. Only through requiring a prompt identification of the factual claims of a plaintiff and an early determination based on such facts as to whether the claim asserted is one over which the federal court has jurisdiction will the federal courts be relieved of the burden of cases that belong in the state courts or before an administrative agency.

The decision of the Second Circuit approving the actions of the District Court with regard to discovery may be expected to have great influence on courts around the country precisely because appellate decisions on the conduct of discovery are, quite properly, few and far between. Thus, there is an urgent need that this Court clarify for the lower courts the proper management of discovery in complex litigation.

B. Due Process—the use of a default to establish conclusions of law

The need for this Court to speak authoritatively on the effect of a default for noncompliance with the discovery provisions of the Federal Rules of Civil Procedure is highlighted by the fact that both Special Masters, the District Court, and the Court of Appeals all considered that the controlling decision was what the Second Circuit referred to as "the venerable but still definitive case" (App. 126a) of *Thomson* v. *Wooster*, 114 U.S. 104 (1885). This 86-year old case was decided in a procedural system that has long since been put in a museum and it cannot be correctly understood apart from its context.

Thomson involved a default for failure to answer. It did not and could not speak to the use of default as a sanction

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tiff's factual claims. In this case, for example, though the complaint alleged a boycott (¶ 9(c)), it was not revealed until the damage hearing that the supposed boycott consisted of no more than Toolco's ordering planes for TWA from Boeing and Convair instead of TWA's ordering the same planes from Boeing and Convair.

for enforcement of the discovery rules. Indeed in the same month *Thomson* was decided this Court held that, despite the Conformity Act, a federal court lacked power to order a defendant in an action to appear for the taking of his deposition as authorized by a state statute. *Ex parte Fisk*, 113 U.S. 713 (1885). The even more sweeping discovery now permitted was everywhere unknown in that period.

The courts below read *Thomson* as teaching that a party in default "has admitted the truth of the well-pleaded allegations of the complaint" (App. 48a, 52a-53a, 126a). The view of the first Special Master that even a default judgment "must be just" (2d Cir. App. A-371) and that it was "his duty on behalf of the court to be satisfied of the liability of the defendants * * * " (2d Cir. App. A-372) was rejected (App. 48a). Accordingly the Second Circuit took the position "that the default had the effect of admitting or establishing that the acts pleaded in the complaint violated the antitrust laws and that those acts caused injury to TWA in the respects there alleged" (App. 139a). In accord with this view of the effect of a default, the Second Circuit ruled that "there was no burden on TWA to show that any of Toolco's acts pleaded in the complaint violated the antitrust laws nor to show that those acts caused the well-pleaded injuries" (App. 139a), and that the illegality of Toolco's acts was conclusively established by the default (App. 142a). In these rulings the courts below misread the *Thomson* decision.

What *Thomson* held is that a default admits "facts properly pleaded." 114 U.S. at 110. Evidence will not be heard to dispute those facts. *Ibid.* See also *United States* ex rel. *Harshman* v. *County Court of Knox County*, 122 U.S. 306, 316-317 (1887). Nothing in *Thomson* or in any other case supports the proposition that a default admits legal conclusions. To have included conclusions in a complaint would itself have been improper at a time when there was a rigorous rule that pleadings must be limited to the "dry, naked, actual facts." Pomeroy, *Remedies and Remedial Rights* 576 (2d ed. 1883). Thus it was held that a default did not admit "a mere conclusion of law." *Cragin*

v. *Lovell*, 109 U.S. 194, 199 (1883). Nor did a default admit that the facts alleged constituted a cause of action or authorized a recovery. *McAllister* v. *Kuhn*, 96 U.S. 87 (1877); *Cragin* v. *Lovell*, 109 U.S. 194 (1883); *Ohio Cent. R. Co.* v. *Central Trust Co.*, 133 U.S. 83 (1890); 3 Freeman, *Law of Judgments* 2664-2665 (5th ed., Tuttle 1925).

Today's more relaxed notions of pleading allow the use of conclusions in a complaint, but it is still true that conclusory allegations of an attempt to monopolize do not necessarily constitute a valid antitrust claim. *Central Savings & Loan Assn. of Charlton, Iowa* v. *Federal Home Loan Bank Board*, 422 F. 2d 504, 509 (8th Cir. 1970); *SCM Corp.* v. *Radio Corp. of America*, 407 F. 2d 166, 170 (2d Cir. 1968), *cert. denied*, 395 U.S. 943 (1969). Even after default, it remains for the court to consider whether "the unchallenged facts shown of record establish a legally binding obligation; it adjudicates the plaintiff's right of recovery and the extent of it, both of which are essential elements of the judgment." *Pope* v. *United States*, 323 U.S. 1, 12 (1944).[17]

This view of the effect of a default will not burden the courts. If, for example, a complaint alleges that on a specified date defendant executed and delivered to plaintiff a promissory note in which he promised to pay a specified sum by a certain date and that the money has not been paid (*cf.* Official Form 2), or if it alleges that on a particular day at a particular place defendant negligently drove a motor vehicle against plaintiff as a result of which plaintiff was thrown down and had his leg broken and other injuries (*cf.* Official Form 9), a first-year law student can tell at a glance that the facts admitted by the default give rise to liability. Those usual and routine cases are quite unlike

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[17] See Civil Rule 55(b)(2), providing that after default the court may hold hearings, if necessary, "• • • to determine the amount of damages or *to establish the truth of any averment by evidence* or to make an investigation of any other matter • • • " (emphasis supplied).

an antitrust case in which there may be hard questions in determining liability even on an admitted state of facts.[18]

The holding of the courts below that a party in default has admitted legal conclusions of the complaint and the illegality of his conduct conflicts with applicable decisions of this Court, is contrary to Rule 37 of the Civil Rules, and is a denial of due process of law. It is settled here that the Constitution bars a court from denying a party all right to defend an action as a punishment for failure to obey a court order (*Hovey* v. *Elliott*, 167 U.S. 409 (1897)), though if a party has failed to produce evidence material to an issue it may be presumed that the party's position on that issue is lacking in merit. *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322 (1909). The presumption can constitutionally go no farther than the production order. Failure to produce evidence going only to one issue justifies resolving that issue against the defaulting party but does not permit the court to deny him a right to defend on other issues.[19]

As a result of Toolco's refusing to proceed further in order that it might obtain appellate review of the legal issues that it deemed controlling, petitioners were held to have admitted the illegality of their conduct, and ultimately were penalized by the entry against them of a default judgment that the courts below said was 30 times the largest judgment ever awarded in an American court, whether with

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[18] In this respect a default is similar to a plea of guilty in a criminal case. Defendant admits his conduct by a guilty plea but may continue to challenge the illegality of the conduct. *Haynes* v. *United States*, 390 U.S. 85, 87 n. 2 (1968;) *Kolaski* v. *United States*, 362 F.2d 847 (5th Cir. 1966). Challenges of this kind rarely occur and do not burden the courts.

[19] *Mitchell* v. *Watson*, 58 Wash.2d 206, 361 P.2d 744 (1961); *People* v. *George Henriques & Co.*, 267 N.Y. 398, 196 N.E. 304 (1935); *Feingold* v. *Walworth Bros., Inc.*, 238 N.Y. 446, 144 N.E. 675 (1924); 4 Moore, *Federal Practice* ¶ 37.03[2.-1] at pp. 37-56 (2d ed. 1970); 8 Wright & Miller, *Federal Practice and Procedure* 763-764 (1970); Note, *Sanctions for Enforcement of Discovery—Constitutionality of Rule 37*, 37 Wash.L.Rev. 175, 181-182 (1962); Note, *The Constitutional Limits of Discovery*, 35 Ind.L.J. 337, 349-350 (1960).

or without a trial.[20] This severe sanction was imposed even though petitioners stood ready to stipulate to the basic facts, once they ascertained with a fair degree of specificity what it was TWA was claiming, so that they might obtain on the stipulated facts an adjudication of whether those facts gave rise to liability and, if so, the extent thereof. The sanction was imposed even though the District Court, which had earlier refused to permit an interlocutory appeal, certified when it entered the order of default that a substantial question existed on which there was ground for difference of opinion about the court's jurisdiction and the immunizing effect of the CAB orders.

When petitioners filed their Notice of Position they took their chances on whether they were right or wrong about the applicable law. They gave up their right to challenge the factual allegations of the complaint. But they cannot be held to have admitted the legal conclusions of the complaint that their acts were illegal and that any damage suffered by TWA was the proximate result of the facts alleged. There can be no presumption of want of merit in their legal position when their refusal to proceed further was because they wished to stand on that legal position.[21] The holding below that because of the default ever the most

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[20] The very size of the judgment in this case points up its punitive nature and raises serious due process questions. In *United States v. United Mine Workers of America*, 70 F.Supp. 42 (D.D.C. 1946), the District Court, after detailed findings, concluded that an individual and a union had willfully violated a court order in regard to a matter of great public importance and were guilty of criminal and civil contempt. A judgment of $3.5 million was entered against the union. This Court thought that "excessive" and reduced it to $700,000 unless the union failed to comply in the future with the District Court's orders. 330 U.S. 258, 305 (1947). In the instant case the dispute is solely between private parties, the person whose deposition was sought was never served and was not a party to the case, and the judgment was 42 times larger than the one deemed "excessive" in the *United Mine Workers case*.

[21] It is apparently costlier for some litigants to persist in a position in order to obtain appellate review than it is for others. In one case the District Court stayed an antitrust action pending consideration by the CAB. It would not allow a § 1292(b) appeal.

conclusory allegations of the complaint are admitted, and that the illegality and its causal relation to the damages are established, is unsupported by precedent and is a constitutionally impermissible punishment of petitioners for the position they took. It was and is the view of the petitioners that the conduct relied on by TWA had no relationship to a violation of the antitrust laws and that the admissions of TWA at the damage hearing established that fact.[22] The default did not, and constitutionally could not, establish the contrary.

But if a default has the novel effect that the lower courts, by their misreading of *Thomson* v. *Wooster*, have given it, it was contrary to Rule 37 to grant a default judgment. The District Court purported to rely on what were then Rules 37(b)(2)(iii) and 37(d). But Rule 37(b)(2) provided that "the court may make such orders in regard to the refusal as are just, and among others" might render

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Plaintiff refused to present its claim to the CAB and simply did nothing for two years. The action was then dismissed without prejudice for want of prosecution. On appeal from that dismissal it was held, as plaintiff had contended all along, that the action should not have been stayed. The action was reinstated and plaintiff was allowed to proceed. *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 393 F.2d 441 (2d Cir.), *cert. denied*, 393 U.S. 846 (1968).

[22] An example will illustrate the point. TWA was awarded more than $50 million in damages because of the "diversion" of six Boeing aircraft from TWA to Pan American. The so-called "diversion," according to the testimony of TWA's sole factual witness, consisted of a decision, announced in the spring of 1958, to cut back the number of long-range Boeing jets that TWA would receive, followed some months later by a release to Boeing of Toolco's contract rights to the planes, which rights could not be assigned to anybody other than TWA without Boeing's consent, and the sale of the planes by Boeing to Pan American. By no stretch of the imagination does this "diversion" have anything to do with a boycott of anybody or with a tie-in of anything or an attempt to monopolize the supplying of aircraft to TWA or anyone else. Indeed if, as alleged, Toolco was using or intended to use TWA as a captive market, the "diversion" is plainly inconsistent with the allegation. Thus solely because of the default judgment TWA was awarded over $50 million for the alleged "diversion."

a judgment by default.[23] If a default judgment establishes the illegality of the conduct with which a defendant is charged, it would not be "just" to enter a default judgment, the severest of all possible sanctions, when it is well understood that defendant's refusal to make further discovery is to test the illegality of the charged conduct. Although the limitation to "just" sanctions is addressed in the first instance to the trial courts, it is vigorously policed by the appellate courts, first, because of the constitutional issues lurking so closely in the background if overly drastic sanctions are imposed and, second, because of the general purpose of the Civil Rules to encourage dispositions on the merits. 4 Moore, *Federal Practice* 37.08 (2d ed. 1970); 8 Wright & Miller, *Federal Practice and Procedure,* § 2284 (1970).

The lower courts need direction, written in today's procedural idiom, on the effect of a default—and particularly of a default for failure to make discovery—rather than being required to look to an 1885 decision that is, as the decisions below indicate, readily misunderstood.

C. Conflict Between Circuits—increase in the ad damnum after default

The Second Circuit has taken a position directly contrary to that reached by the Ninth Circuit, as to whether a plaintiff can amend its complaint to increase the damages sought from the defendant *after* defendant has incurred a default for failure to make discovery. Such an increase violates Rule 54(c), which states: "A judgment by default shall not * * * exceed in amount that prayed for in the demand for judgment." See also Rule 55(d), which states: "In all cases a judgment by default is subject to the limitations of Rule 54(c)."

In *Fong* v. *United States,* 300 F.2d 400 (9th Cir.), *cert. denied,* 370 U.S. 938 (1962), default was entered against

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[23] As a part of the 1970 amendments of the discovery rules, language limiting the court to such sanctions "as are just" was added to Rule 37(d). The courts, however, had always held that the express limitation stated in Rule 37(b)(2) applied also to Rule 37(d). Rosenberg, *Sanctions to Effectuate Pretrial Discovery,* 58 Col.L.Rev. 480, 494 (1958).

a defendant who failed to appear for the taking of his deposition. At the hearing on damages plaintiff was allowed to amend one count of its complaint to state a claim for actual damages in addition to the liquidated damages that it had originally claimed. The Ninth Circuit held that this could not be done. It pointed out that the limitation of Rule 54(c) was "very simple, clear and decisive" and that the court was thus "unable to escape the explicit and emphatic mandate of Rule 54(c) which unmistakably commands that upon the facts and circumstances of this case the judgment 'shall not be different in kind from or exceed in amount that prayed for in the demand for judgment' at the time of the entry of the default." 300 F.2d at 413.

In the face of this ruling, the Second Circuit quite candidly and explicitly recognized that "the authorities do not appear to be in agreement" on this issue and that it had not previously expressed itself on the question (App. 156a). Nevertheless it held that the District Court properly allowed an increase from $105 million to $135 million by amendment after petitioners defaulted and properly awarded the full sum asked in the amended prayer.[24]

Permitting an increase of almost 30 per cent in the amount claimed presents more than an important question of federal procedure. It also poses a due process question. A defendant who elects to refuse to continue discovery in order to test the merits of his legal position runs the risk that this may be costly if he is wrong about the law, but surely, as a matter of basic justice, he is entitled to know what the maximum cost may be.

The conflict between the Second Circuit and the Ninth Circuit on this point can only be resolved by this Court.

D. The Federal Aviation Act—immunity for antitrust violations

Acts authorized by the CAB under Section 408 of the Federal Aviation Act are exempt from the antitrust laws.

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[24] In fact, before attorneys' fees and costs were added, the judgment was for $137,611,435.95, or more than $2.6 million in excess of even the amended prayer. The original prayer for $105 million is comfortably close to the $100.4 million actually awarded because of the transactions concerning the jet fleet. The increase to $135

So also are whatever other acts are necessary to carry out acts that the Board has authorized and approved. Section 414 of the Act is quite clear on this point. It provides that any person affected by any order made under Sections 408, 409, or 412 of the Act

> shall be, and is hereby relieved from the operations of the "antitrust laws", as designated in section 12 of Title 15, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order. [App. 171a-172a.]

Despite this provision, the Court of Appeals on the interlocutory appeal refused to recognize any antitrust immunity for transactions between Toolco and TWA after Toolco's CAB-approved acquisition of control. And it did so even though it recognized that the Board had made orders, subsequent to its approval of control, "approving the specific transactions involving the acquisition of jet aircraft which are the subject matter of this litigation" (App. 31a).

The Court of Appeals did not address itself at all to this issue when the case came back to it, although, as pointed out by petitioners in their brief below, the case was then in a far different posture than it had been in 1964. In the earlier opinion the Second Circuit had only the complaint before it. When the case returned there was also the record of the damage hearing. This made a difference in two important respects.

First, a major portion of the complaint sets out claims for purported violations of the antitrust laws after the voting trust took control of TWA in 1960. Both the Second Circuit on the interlocutory appeal, and the CAB in its memorandum filed with this Court, relied in part on an argument that the Board no longer had jurisdiction over Hughes and Toolco, after Toolco relinquished control in 1960, and that there could be no immunity for

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million may have been thought necessary to accommodate the change in accounting practices by TWA in 1963, on the basis of which the Special Master and the courts below allowed an additional $37.2 million in damages. See p. 12, *supra*.

post-1960 conduct (App. 29a; Memorandum for the Civil Aeronautics Board as Amicus Curiae at 18, *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 380 U.S. 248 (1965)). That argument for rejecting the claim of antitrust immunity is no longer available. At the damage hearing TWA abandoned its claims concerning the post-1960 events, as well as its claims of conspiracy with Atlas Corporation to merge TWA with Northeast Airlines. It sought and was awarded damages solely for events that occurred in the exercise of Toolco's control of TWA, a control that the CAB had approved.

Second, because it had only the complaint before it when it ruled in 1964, the Second Circuit inevitably was influenced, in passing on the immunity issue, by the allegations of boycotts and tying arrangements with which the complaint is replete. The damage hearing has established that, regardless of the label an artful pleader might put upon them, the acts complained of were decisions about when and how TWA would acquire its initial jet fleet, acts that are the normal incidents of the control that had been approved.

It is understandable that the Second Circuit should not speak again to an issue on which it had once ruled. But this Court has an opportunity to pass on this issue of the effect of CAB approval on the record as it stands today. That full record makes it even more anomalous than it was in 1964 that the courts below should fail to give full effect to the antitrust immunity conferred by Congress in Section 414.

The fact is that immunity was found to exist on one phase of the case but not on others. Immunity was recognized for violations allegedly present in the acquisition of control itself. The District Court said, and the Court of Appeals did not dispute, that:

> The antitrust violations that could possibly be present in such acquisition—that it was a contract in restraint of trade prohibited by section 1 of the Sherman Act, or was an attempt to monopolize prohibited by section 2 of the Sherman Act, or was an acquisition of stock prohibited by section 7 of the Clayton Act—were within the contemplation of the approval orders and pro-

tected by the exemption provided by section 414. [App. 7a.]

Yet the Second Circuit refused to find antitrust immunity for the other transactions that are the subject of this litigation. It ruled this way on the ground that the Board's approval extended to the individual transactions themselves, "not to the whole range of activities which over a period of years constituted the backdrop against which these transactions were effected" (App. 32a). It was never explained why immunity extends to the antitrust violations that could *possibly* be present when control was acquired but not to transactions carried out in the exercise of that control. Even if the views of the Second Circuit about the liability of a parent for "arrogating" the making of decisions in regard to its subsidiary had some validity, there is very little point in immunizing against antitrust attack only those acts that are not antitrust violations in the first place.

Moreover, if antitrust liability in this case, absent CAB approval, could properly have been based upon the novel doctrine of "potential competition" or "independent economic significance," as the Court of Appeals said in its latest decision, the immunity provided by Section 414 must have applied. It was because Toolco's aeronautical activities made it a potential supplier of aircraft to air carriers that Toolco's acquisition of control of TWA required CAB approval in the first place. Whatever "independent economic significance" Toolco can be said to have had, or whatever "potential competition" it may have represented, was well known to and examined in great length by the CAB prior to its approvals. See 6 C.A.B. 153, 155-156 (1944); 9 C.A.B. 381, 382 (1948); 12 C.A.B. 192, 216 (1950).[25]

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[25] When Toolco in 1956 briefly contemplated manufacturing airplanes itself for TWA, the Board, on its own initiative, ordered an investigation to determine whether the proposed change in Toolco's activities in the field of aeronautics would be a transaction subject to Board approval under Section 408 and, if so, whether it should approve or disapprove. Order E-10360, June 8, 1956 (2d Cir. App. AX-2149). The investigation was terminated when the Board was advised that Toolco had abandoned the proposed manufacturing project. Order E-12604, June 6, 1958.

The Second Circuit took as restrictive a view of the subsequent CAB orders approving individual transactions between Toolco and TWA as it did of the original orders allowing control to be acquired. It was unwilling to hold that "* * * these individual and narrow Board orders immunized the defendants from the operation of the antitrust laws with respect to activities not specifically ruled upon by the Board" (App. 32a). Yet it also refused to recognize immunity as to matters that *had* been specifically ruled on by the CAB. In the judgment below $15.9 million was awarded TWA because in 1959 and 1960 Toolco leased 19 jets to TWA rather than selling them to TWA outright. Whatever may be said about the other elements of damage awarded, it is clear that the Board understood that the jets were being leased to TWA and that this was being done as an interim measure pending arrangements for permanent financing. The leasing of the jets was approved by the Board in five separate orders,[28] in each of which it found that these transactions were "just and reasonable and in the public interest."

The decision of the Court of Appeals will result in confusion about the proper role of the courts in relation to the Board and about the extent to which one who acquires control of an air carrier with CAB approval can rely on an order of the CAB approving a transaction as a grant of antitrust immunity. The decision leaves it to the courts to determine when an approved transaction is immunized and when it is not, depending on such subjective criteria as the court's view of what was the "backdrop" and whether the CAB was or was not aware of all of the facts. The decision reflects a lack of confidence in the agency's ability to make knowledgeable decisions.

The reason for the immunity conferred by Section 414 when applied to an acquisition of control is to permit a person engaged in a phase of aeronautics to assist the con-

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[28] Orders E-13542, Feb. 26, 1959 (2d Cir. App. AX-2202); E-13873, May 15, 1959 (2d Cir. App. AX-2226); E-14169, July 1, 1959 (2d Cir. App. AX-2237); E-14504, Sept. 30, 1959 (2d Cir. App. AX-2245); E-14877, Jan. 29, 1960 (2d Cir. App. AX-2260).

trolled carrier without running afoul of the antitrust laws. The purpose of retaining jurisdiction over transactions between the two is to insure that the controller does not overreach in dealings with the air carrier by forcing the carrier to take unneeded equipment or the like. For a court to make a *de novo* determination of when or whether immunity is conferred would thwart the purposes of both Congress and the agency. And, at a time when many carriers are in difficult financial circumstances, the decision below would effectively deter anyone else in any phase of aeronautics from coming to a carrier's assistance, because he would not be able to rely on the antitrust immunity that CAB approval and Section 414 seem to confer.

The result reached below is contrary to this Court's holding in *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963), the so-called *Panagra* case. In *Panagra*, the Court examined the extent of the jurisdiction of the CAB over a complaint that charged violations of the antitrust laws in the exercise of control over air carriers by another air carrier and a common carrier. The Court recognized that if the control relationship met the standards of Section 408 as determined by the CAB, it could not violate the antitrust laws.

> It would also be odd to conclude that an affiliation between a common carrier and an air carrier that passed muster under § 408 should run afoul of the antitrust laws. Whether or not transactions of that character meet the standards of competition and monopoly provided by the Act is peculiarly a question for the Board, subject of course to judicial review as provided in 49 U.S.C. § 1486. [371 U.S. at 309.]

The Court observed that the CAB "* * * has its special standard of the 'public interest' as defined by Congress" and pointed out: "If the courts were to intrude independently with their construction of the antitrust laws, two regimes might collide." *Id.* at 310. The Court concluded that for this reason the CAB, and not the federal courts, had exclusive jurisdiction over the control relationship.

It misses the mark to say that the Board is not "any more qualified to consider such charges than the federal

courts, which daily encounter and resolve antitrust problems" (App. 30a). Congress has directed the Board to make a broader inquiry than is open in an antitrust action. Under the first proviso of Section 408 the Board is prohibited from approving any transaction that "* * * would result in creating a monopoly or monopolies and thereby restrain competition * * *." At the same time the Board itself "* * * has properly concluded, in light of the immunity from the antitrust laws conferred by § 414, that it must consider anti-competitive effects less extreme than those limned in the proviso in determining whether the transaction will 'be consistent with the public interest,' as defined in § 102 * * *." *Butler Aviation Co.* v. *CAB*, 389 F. 2d 517, 519 (2d Cir. 1968). But if there is an anti-competitive effect short of a monopoly, the Board may still approve if it finds that, in the light of all the factors listed in Section 102, the overall effect is in the public interest. Sections 408 and 414 become meaningless if a court, taking a monocular view of only the effect on competition, can award huge damages for a transaction that the Board, after the broad inquiry it is required to make, has found to be in the public interest.[27]

The Board, in its orders in 1944 and 1950, did not merely approve the acquisition by Toolco of a financial interest in TWA. It approved, as its orders show on their face and as Section 408(a)(5) of the Act requires, acquisition of "control." Nor did the Board approve control in the abstract without considering the incidents that go with control. When it first approved control it conditioned its approval in a fashion intended "to protect the public interest from any improper coercion of the air carrier by a controlling company on account of any further interest which

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[27] Thus Professor Davis notes that "* * * the congressional policy expressed in the Federal Aviation Act includes both something more and something less than the antitrust policy." He suggests that a proper accommodation of CAB regulation with the antitrust laws would be to limit judicial action applying antitrust policies to proceedings on judicial review of Board orders. Davis, *Administrative Law Treatise* § 19.06 at 634 (1970 Supp.).

the controlling company may have in some other phase of aeronautics." 6 C.A.B. 153, 157 (1944). It was pursuant to that condition that it approved the specific transactions covering the jet aircraft that are the subject of this litigation. In this case, as is customary, the Board "* * * retained jurisdiction over the agreement to assure that no anticompetitive practices occur and to impose additional conditions if unforeseen contingencies arise." *National Aviation Trades Ass'n* v. *CAB*, 420 F. 2d 209, 221 (D.C. Cir. 1969). It was with regard to these particular parties that the CAB defined "control" as used in Section 408 of the Act as meaning "the existence of a right or power to direct or dominate, whether actually exercised or existing in potential use." 9 C.A.B. 381, 386 (1948). It specifically recognized that Toolco "has sufficient power and influence to control the board of directors of TWA and thereby to manage and direct the usual day-to-day business and financial affairs of the airline." *Id.* at 387. Its approval of Toolco's increased control of TWA was on the basis of a finding that both the public interest and TWA had benefited from Toolco's contributions to TWA, particularly "in the selection and purchase of its equipment * * *." 12 C.A.B. 192, 216 (1950).

The holding in this case that the antitrust laws were violated by Toolco's making decisions as to the manner in which TWA should acquire its jet aircraft, even though the CAB had authorized Toolco to make these decisions and had approved the specific transactions that resulted from the decisions, is plainly inconsistent with Sections 408 and 414 of the Act and with this Court's holding in *Panagra*.

E. The Sherman Act—a parent's decisions in regard to its subsidiary

The opinion of the Court of Appeals approves the award of more than $145 million in antitrust damages because of "[t]he illegality of Toolco's arrogation of all authority for buying aircraft * * *" (App. 142a). This ruling extends to a startling degree the liability of a parent corporation

for determining the manner in which its subsidiary does business.

The supposed "arrogation of all authority" consisted of Toolco's deciding that it would order jet aircraft for TWA instead of TWA's ordering precisely the same aircraft from the same manufacturers, the decision as to when these aircraft should be ordered, the later determination that it would be unwise to acquire too many first-generation jets and that TWA should take only 47 of the 63 jets initially ordered, and the decision that TWA should lease aircraft for a time until financing could be obtained to purchase them.

Decisions about when, from whom, and in what quantity a subsidiary should acquire capital equipment are customarily made by the parent. To the extent that these decisions have been too much influenced by the self-interest of the parent or have gone beyond the bounds of business judgment, the traditional remedy has been a claim under state law for breach of fiduciary duty or mismanagement. Note, *The Fiduciary Duty of Parent to Subsidiary Corporation*, 57 Va. L. Rev. 1223 (1971). It has never been supposed that the parent is subject to damages under the antitrust laws for dictating the manner and method by which its subsidiary acquired capital equipment when the parent was not a competitor of other suppliers. Even if the parent is a supplier "[a] subsidiary will in all probability deal only with its parent for goods the parent can furnish." *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 523 (1948).

The report to Attorney General Brownell of an eminent committee was quite emphatic on this point.

> It seems indeed inconceivable to hold *per se* illegal the mere fixing by a parent of a subsidiary's price or production, or the selection by the parent of those persons with whom its subsidiary may or may not deal. [*Report of the Attorney General's National Committee To Study the Antitrust Laws* 35 (1955).]

No case since 1955—except for the present case—has cast any doubt on that conclusion. But under the ruling below, a parent that decides that its subsidiary should buy from

X rather than Y may be held liable for antitrust damages if, with the wisdom of hindsight, the subsidiary can show that the decision was unwise.[28]

This result has the widest possible ramifications. The test of antitrust liability becomes whether the subsidiary has been injured by the decisions of its parent rather than whether these decisions restrain or monopolize trade. This is a distortion of antitrust law that will have a calamitous effect on the federal courts. All a plaintiff in these circumstances need do is invoke the language of antitrust for what is essentially a "mismanagement" case and there will be exclusive federal jurisdiction over what until now would have been a state law claim that in many instances could only be brought in the state courts.[29] With the tantalizing prospect of treble damages as a lure, few plaintiffs are likely to resist the invitation to make a federal case out of it.[30]

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[28] The holding that the subsidiary may recover from the parent would seem to have the corollary that those who are excluded from the market represented by the subsidiary's needs because of the parent's decision also have a right of action under the antitrust laws. Yet in this case TWA did not want Douglas jets. Certainly neither Boeing nor Convair was excluded from supplying aircraft to the market represented by TWA's needs.

[29] TWA and Toolco are each Delaware corporations. It is only because the claims were under the antitrust laws that the federal courts have been burdened for more than a decade with this massive case. A different panel of the Second Circuit had a wiser perception when, one day before the decision in this case came down, it held that conclusory allegations in a complaint are not enough to "bootstrap" a "garden-variety customer's suit against a broker for breach of contract" into a violation of the Securities Exchange Act. *Shemtob* v. *Shearson, Hammill & Co.*, 448 F.2d 442, 445 (2d Cir. 1971).

[30] That this is the wrong moment in history to invite more antitrust cases is evident from the fact that the number of private antitrust actions commenced has increased from 228 in 1960 to 1445 in 1971. *1971 Annual Report of the Director of the Administrative Office* II-108.

F. Potential Competition—a Clayton Act test for a Sherman Act violation

The Court of Appeals has departed from decisions of this Court, and its own prior decisions, by improperly holding that the standards used to determine the existence of violations of Section 7 of the Clayton Act may be used to find violations of Section 1 and 2 of the Sherman Act. This unprecedented theory of antitrust liability will generate great confusion unless overturned by this Court.

In its complaint, TWA alleged that Toolco was a manufacturer and supplier of aircraft to air carriers, an allegation absolutely essential to its claims that Toolco restrained or monopolized the business of supplying aircraft. The evidence at the damage hearing, however, established that Toolco has never manufactured aircraft for sale to air carriers and has never been a competitor of those who do manufacture and supply aircraft to air carriers.[31] Only that "blind" court, against which Chief Justice Taft admonished in a famous passage, that does not see what "[a]ll others can see and understand * * *"—*Bailey* v. *Drexel Furniture Co.*, 259 U.S. 20, 37, (1922); *cf. United States* v. *Rumely*, 345 U.S. 41, 44 (1953)—could have any doubt on this point. Thus, though the Court of Appeals paid lip service in a paragraph to the notion that judicial notice cannot be taken of indisputable facts in CAB records (App. 133a), it recognized the weakness of that position and developed a new theory on which Toolco would be liable though, as is the fact, it has never manufactured aircraft for air carriers nor has it been a supplier of aircraft to air carriers other than its subsidiary, TWA.

The Second Circuit said that even if it is a fact that Toolco is not a major force as a supplier, this does not "negative the possibility that Toolco possessed independent

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[31] In its brief in the court below TWA conceded that "* * * defendants did not manufacture and sell a 'Hughes jet' during the damage period * * *." Brief for Plaintiff-Appellant Trans World Airlines, Inc., p. 94.

economic significance" sufficient to support antitrust liability (App. 134a).[32]

The Court of Appeals cited no cases to support its theory that "independent economic significance" or a potential ability to compete are enough for Sherman Act liability. Nor could it. Indeed only recently the Eighth Circuit has affirmed dismissal of a complaint charging a Sherman Act violation where the most that could be said was that the defendant "would have the power potentially to engage in some unfair and predatory practices in this field, but there is no showing of unfair or predatory practices." *Hiland Dairy, Inc.* v. *Kroger Co.*, 402 F. 2d 968, 975 (8th Cir. 1968), *cert. denied*, 394 U.S. 903 (1969).

The Court of Appeals has taken an antitrust theory heretofore carefully limited to merger cases under Section 7 of the Clayton Act and converted it into an entirely new theory of Sherman Act violation. Indeed the standard it applied is not even the appropriate standard for Clayton Act liability, for there must be proof that a merger will *probably* injure potential competition and not merely *possibly* do so.[33] The Court of Appeals based liability on a

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[32] The Court continued:

> There is evidence in the record of activities by Toolco or Hughes that suggest significant movement by Toolco and Hughes toward actual or potential commercial manufacturer or dealership in airplanes, especially jets, and their parts. * * *
>
> The evidence that Toolco's interests and ambitions in commercial air flights may have extended beyond mere management of TWA begins with Toolco's admitted role, initiated in World War II and continuing to the present day, as a substantial manufacturer of helicopters and aircraft parts for military purposes (and now of aerospace materials as well). Although Toolco stresses the non-commercial nature of this activity, it is clear that Toolco throughout the relevant period had the technical capability and sophisticated "know-how," to enter the commercial market without untoward delay if it had so chosen. [App. 136a.]

[33] The correct standard has been summarized by this Court as follows: " * * * Congress used the words '*may* be substantially to lessen competition' (emphasis supplied), to indicate that its concern was with probabilities, not certainties. Statutes existed for

mere possibility. But even if the standard used by the Second Circuit were the correct one in Clayton Act cases, it has no application in determining violations of Sections 1 and 2 of the Sherman Act.

This Court has consistently distinguished the differing purposes of these statutes. For example, in *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 597 (1957), the Court said:

> The Clayton Act was intended to supplement the Sherman Act. Its aim was primarily to arrest apprehended consequences of inter corporate relationships before those relationships could work their evil, which may be at or any time after the acquisition, depending upon the circumstances of the particular case.

And the Court has quoted from the legislative history of the 1950 amendments of the Clayton Act to show that that statute is based on "the concept of reasonable probability" since it "seeks to arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act." *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 323 n. 39 (1962).

These clearly delineated distinctions between the two statutes had previously been understood by the lower courts, including the Second Circuit.[34] With the stroke of a pen, and with no citation of cases, this decision has now undone this understanding of the law. To import the

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dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities. Mergers with a probable anticompetitive effect were to be proscribed by this Act." *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 323 (1962). See also *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 658 (1964).

[34] As a different panel of the same court said in another case:

> The legislative history of the amendment makes it plain that Congress intended by § 7 to forbid mergers which were beyond the reach of the Sherman Act as judicially interpreted. • • • Thus under § 7 as amended the Sherman Act test is no longer appropriate, • • • and conduct may fall under the ban of amended § 7 before it has attained the statute of an unreasonable restraint of trade. [*American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 259 F. 2d 524, 527 (2d Cir. 1958).]

Clayton Act test into a Sherman Act case has no basis in precedent or logic.

Here, for example, the trade and commerce of supplying aircraft was not in any way restrained or monopolized because Toolco might have contemplated becoming at some time in the future a manufacturer of jet aircraft in competition with Boeing and Convair, particularly since any concrete steps in this direction by Toolco would have invited instant scrutiny by the CAB.[25] Nor did this potential competition or any "independent economic significance" Toolco may have possessed in any way injure TWA. TWA cannot have been damaged in the past because "the technical capability and sophisticated 'know-how' " of Toolco were such that it might possibly have played a different role in the future had it chosen to do so. In upholding recovery on these grounds, the Court of Appeals again has flung open the doors of the federal courts to a host of plaintiffs who will seek to test this novel theory for imposing treble damages in Sherman Act cases.

G. Proximate Cause—assumption of facts without proof to support them

When this case was before this Court in 1965, Justice White put the following question to counsel for TWA: "How can you prove how much you have been damaged without showing what you have been damaged from?" Transcript of Argument at 28, *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 380 U.S. 248 (1965). Seven years of further litigation have failed to provide an answer to that question.

Even if it be assumed, either because of the default or on some novel theory of "independent economic significance," that liability for some violation of the antitrust laws properly could have been found in Toolco's control of TWA, that liability does not mean—at least under traditional doctrines of antitrust law—that TWA could recover

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[25] See note 25 *supra*, p. 29.

damages unless the injuries for which it claimed damages were "proximately caused" by the violations of law. Even where liability is admitted the burden is on plaintiff to establish a causal relation between the illegal acts and the injury. *E. V. Prentice Mach. Co.* v. *Associated Plywood Mills, Inc.*, 252 F. 2d 473 (9th Cir. 1958), *cert. denied*, 356 U.S. 951 (1958).

The Court of Appeals recognized that there was a "sense" in which it was "TWA's burden to show 'proximate cause,'" but immediately said that "[o]n the other hand, there was no burden on TWA to show that any of Toolco's acts * * * caused the well-pleaded injuries, except as we have indicated that it had to for the purpose of establishing the extent of the injury caused TWA, in dollars and cents" (App. 139a).

The damages awarded TWA were not because of any restraint on the trade of supplying aircraft to air carriers or because of any monopolization of that trade. Rather they were for conduct in the exercise of control that allegedly injured TWA, whether or not that conduct restrained or monopolized trade. Thus a substantial portion of the damages for which recovery was allowed were because, in the opinion of TWA's witness, Toolco was tardy in ordering from Boeing the Boeing planes that TWA wanted. Perhaps—though Toolco vigorously denies this—TWA was damaged by the delay in placing the orders, but it would be absurd to suggest that by that delay Boeing's trade or the trade of any other "potential competitor" of Toolco was restrained or monopolized.

Similarly TWA was awarded damages because it leased planes for a time from Toolco instead of buying exactly the same planes. It is true that TWA alleges that the leases, which were approved by the CAB, contained a condition that TWA would not purchase or lease planes from a competitor of Toolco. But the damages that TWA claimed, as Special Master Brownell recognized (2d Cir. App. following A-1966), were because of the greater cost of leasing than buying and had nothing to do with any alleged condition in the leases.

To its theory that a plaintiff may recover antitrust damages for conduct that did not restrain or monopolize trade, the Second Circuit has added the doctrine that proximate cause can be supplied by assumption, not proof. Prior to this case the lower courts had refused to approve a rule that would impose liability without any proof that the violation caused the injury. *Klinger* v. *Baltimore & O. R. Co.*, 432 F. 2d 506, 516 (2nd Cir. 1970). They had insisted that a plaintiff has the burden of establishing that he would and could have achieved the results he claimed that he was prevented from achieving by the alleged violation. *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F. 2d 561 (7th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952).

Yet in this case TWA has been allowed to recover because it did not acquire 63 jet aircraft without any proof that it could have raised the $350 million required for the purchase. TWA apparently recognized that it had this burden, for it introduced expert testimony to show how it could have financed this fleet. *Both the Special Master and the District Court rejected this evidence* (2d Cir. App. following A-1966; App. 77a-79a). But the District Court held that because of the default TWA was not required to show that it could have financed the fleet (App. 64a-65a), while the Second Circuit proceeded to *assume* that TWA could have financed the purchase of 63 jets, citing the fact that other airlines had financed their jet fleets and ignoring the fact that those airlines were experiencing substantial profits while TWA was suffering losses (App. 147a).

Any loosening of the requirements of proof in antitrust litigation is an invitation for more suits of that kind and encourages attempts to convert routine state law claims into antitrust claims, with the genuine state law claim often joined as "pendent" to the antitrust claim. This Court should finally determine the nature and extent of a plaintiff's burden, before he may recover antitrust damages, to establish a causal relation between the antitrust violation and the damages and to show his ability to do what he claims he was prevented from doing by the violation.

H. Summary of Reasons

Seven detailed reasons why this Court should grant certiorari have been presented above. It would be unfortunate, however, if the details of particular reasons should cause sight to be lost of the overall effect of the proceedings below. What has happened in this case is an outrage. The lower courts, mistakenly thinking that their authority had been flouted to protect the privacy of a wealthy man, have responded in a fashion that not only departs alarmingly from the usual course of judicial process but also represents a denial of due process. The precedents they have created, if allowed to stand, will inflict serious wounds on sound principles of procedure and antitrust law and will impose heavy burdens on the federal courts.

CONCLUSION

For the reasons stated, this writ should be granted and the judgment of the Court of Appeals for the Second Circuit reversed.

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G. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-827

HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,
Petitioners,

v.

TRANS WORLD AIRLINES, INC., *Respondents.*

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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INDEX

Page

A. Opinion and Order of the District Court, dated February 7, 1963, Denying Defendants' Motion To Dismiss (214 F. Supp. 106) 1a

B. Opinion and Order of the District Court, dated May 3, 1963, Entering Default Judgment (32 F.R.D. 604) 13a

C. Opinion of the Court of Appeals, dated June 2, 1964, Dismissing Defendants' Counterclaims and Rejecting Primary Jurisdiction of the Civil Aeronautics Board (332 F.2d 602) 19a

D. Order of the Supreme Court, dated November 16, 1964, Granting Writs of Certiorari (379 U.S. 912) 44a

E. Order of the Supreme Court, dated March 8, 1965, Dismissing the Writ of Certiorari as Improvidently Granted in Hughes Tool Company *et al.* v. Trans World Airlines, Inc., No. 443 ..... 45a

F. Order of the Supreme Court, dated March 8, 1965, Dismissing the Writ of Certiorari as Improvidently Granted in Hughes Tool Company v. Trans World Airlines, Inc., *et al.*, No. 501 ..... 46a

G. Opinion and Order of the District Court, dated November 16, 1965, Affirming Refusal of the Special Master To Adopt Petitioner's Interim Findings (38 F.R.D. 499) 47a

H. Opinion and Order of the District Court, dated December 23, 1969, Upholding the Final Report of the Special Master (308 F. Supp. 679) 50a

I. Opinion and Order of the District Court, dated April 13, 1970, Awarding Costs and Attorney's Fees (312 F. Supp. 478) 81a

J. Order of the District Court, dated April 14, 1970, Entering Judgment 93a

Page

K. Opinion of the District Court, dated June 10, 1970, Granting Stay of Execution and Establishing Security Pending Appeal (314 F. Supp. 94) 94a

L. Order of the District Court, dated June 16, 1970, Establishing Security Pending Appeal 102a

M. Opinion of the Court of Appeals, dated September 1, 1971, Affirming With Modification the Judgment of the District Court 108a

N. Orders of the Court of Appeals, dated September 28, 1971, Denying Petitions for Rehearing and Rehearing In Banc 163a

O. Order of the Court of Appeals, dated October 7, 1971, Granting Stay of Execution Pending the Filing of a Petition for Certiorari and Increasing the Security Required 165a

P. Order of the Court of Appeals, dated October 18, 1971, Denying Defendants' Motion for Reconsideration of the Order Requiring Additional Security 166a

Q. Statutes Involved 167a

APPENDIX

A.

214 Federal Supplement 106

UNITED STATES DISTRICT COURT
S. D. NEW YORK.

Feb. 7, 1963.

TRANS WORLD AIRLINES, INC., *Plaintiff*,

v.

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY, *Defendants*,

and

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES ET AL., *Additional Defendants on Counterclaims.*

METZNER, District Judge.

Defendant Hughes Tool Company (Toolco) moves to dismiss the complaint pursuant to rules 12(b) (1) and 12(b) (6) of the Federal Rules of Civil Procedure on the grounds that the court lacks jurisdiction over the subject matter and that the complaint fails to state any claim upon which relief can be granted. The original notice of motion was filed on August 9th, 1961 and in addition to the grounds now urged requested summary judgment pursuant to rule 56 of the Federal Rules of Civil Procedure. In effect, the present notice of motion brings on for hearing the original motion.

In its brief Toolco has stated,

"At the suggestion of the Court (Transcript of pre-trial conference of September 6, 1961, pp. 50, 52)

Toolco agreed to postpone the motions and thereafter commenced its pre-trial examination of TWA."

The opinion of this court of January 19th, 1963 sets forth the numerous occasions on which counsel for Toolco agreed that the motion as originally filed was not ripe for determination. Consequently, it was not a suggestion of the court, to which Toolco courteously agreed, that the matter be postponed. Rather it was an understanding by counsel that under the decisions of this circuit summary judgment in this type of case should not be considered until the deposition proceedings are completed. (See also Poller v. Columbia Broadcasting System, 368 U.S. 464, 473, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962)). The grounds now urged under rule 12(b) existed and were adverted to in the original notice of motion. Since counsel for Toolco has indicated he was prepared at that time to argue the matter, he could just as well have submitted it then, instead of requesting on January 14th, 1963 that the motion now be heard, when the taking of the deposition of Howard R. Hughes is imminent. Furthermore, the Special Master on October 25th, 1962 granted the second adjournment of this deposition, from October 29th to February 11th, 1963, and stated that the long adjournment of more than three months was in order to allow Toolco's counsel sufficient time to make whatever motions he thought were necessary.

On January 14th, 1963, when Toolco moved that its motion to dismiss be set down for hearing, it also requested that TWA first proceed by written interrogatories directed to Hughes, instead of by oral deposition. This request was formally denied on January 19th, 1963, after a pretrial conference held on January 17th.

Counsel for Toolco continually relates the taking of the deposition to a determination of the motion to dismiss. As I have indicated before, this deposition depends not

only on the existence of alleged valid claims against Toolco, but on Toolco's counterclaims for $385,000,000 against plaintiff and the additional defendants.[1]

So much for the underbrush. Now as to the merits of the motion, there is no doubt that the complaint on its face sets forth a claim against the defendant and is not subject to dismissal under rule 12(b) (6).

Briefly, the plaintiff, TWA, charges that Toolco, Hughes, and Holliday, named defendants, and Atlas Corporation have combined and conspired to restrain, and have attempted to monopolize, interstate and foreign commerce of the United States in the furnishing of jet aircraft and/or nonjet aircraft by sale, lease or other means, to TWA, and to TWA and other air carriers, in violation of sections 1 and 2 of the Sherman Act and sections 3 and 7 of the Clayton Act. It more specifically alleges that the defendants and Atlas combined to restrain commerce

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[1] On the morning of the argument of this motion (February 6th, 1963) Toolco filed another notice of motion returnable February 8th, 1963 requesting that all further proceedings with respect to the counterclaims be stayed pending a disposition by the Civil Aeronautics Board of a "Complaint of Hughes Tool Company and Request for Investigation" which had been filed that day with the CAB. The only document attached to the notice of motion is a copy of the complaint filed with the CAB, seeking relief under sections 408, 409, 411 and 1002 of the Federal Aviation Act. That complaint names all of the additional defendants in the action pending in this court and also Pan American World Airways, Inc. and Juan T. Trippe. It sets forth some of the allegations contained in the counterclaims and also makes reference to the proposed merger of TWA and Pan Am. It further alleges that Trippe, the dominant force in Pan Am, also has been in the position to influence the policies of Metropolitan Life Insurance Company, a large lender to TWA and one of the additional defendants in this action. Thus, the conspiracy alleged in the counterclaims has been enlarged by including Pan Am and Trippe. Jurisdiction of the CAB is predicated upon a claim that the decision in Pan American World Airways, Inc. v. United States, 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963), grants the CAB primary jurisdiction.

by providing financing of the acquisition by TWA of aircraft only upon the condition that TWA acquire all such aircraft from Toolco, and that they required TWA to boycott all suppliers of aircraft except Toolco, in violation of section 1 of the Sherman Act; and that sales and leases of jet-powered aircraft were made on the condition that the purchaser or lessee would not buy or lease the goods of a competitor of the vendor or lessor, in violation of section 3 of the Clayton Act. The complaint also charges that acquisitions of the stock of a corporation were made in violation of section 7 of the Clayton Act.

The first claim is concerned with acts allegedly committed during and prior to December 1960 which, it is claimed, violate all of the above mentioned statutes. The second claim deals with events occurring subsequent to December 1960 which are alleged to violate sections 1 and 2 of the Sherman Act and section 7 of the Clayton Act. For these claims, plaintiff seeks treble damages, divestiture, and an injunction. The third claim charges that the defendants have wilfully and maliciously damaged the business of TWA by the acts alleged in the prior claims, and seeks damages and an injunction under the common law.

Defendant Toolco urges that the complaint be dismissed because the control by Toolco over the plaintiff was authorized by the CAB and was thereby exempted from the antitrust laws. The other ground urged is that the subject matter of the complaint is within the exclusive primary jurisdiction of the CAB.

Toolco indicates that it has withdrawn its motion for summary judgment. However, its brief relies on matter outside the complaint to justify dismissal on the ground that the acts done by Toolco were pursuant to the exercise of control over TWA authorized by the CAB and therefore exempt from the antitrust laws. Dismissal under rule 12(b) (6) is not warranted, though summary judg-

ment might be available. Putnam v. Air Transport Ass'n of America, 112 F.Supp. 885 (S.D.N.Y. 1953). The defendant appears to be in a procedural dilemma. Since defendant has raised the issue of exemption in its third affirmative defense, the court will consider this branch of the motion as one for judgment on the pleadings pursuant to rule 12(c). Matters dehors the complaint may be considered on the branch of the motion seeking dismissal for lack of subject matter jurisdiction. Cohen v. American Window Glass Co., 126 F.2d 111, 114 (2d Cir., 1942); Central Mexico Light & Power Co. v. Munch, 116 F.2d 85 (2d Cir., 1940); Moore v. Gorman, 75 F.Supp. 453 (S.D.N.Y. 1948).

Toolco relies on the 1944 and 1950 orders of the CAB permitting Toolco to acquire control of TWA. 6 CAB 153; 12 CAB 192. These orders were issued pursuant to section 408(5) of the Civil Aeronautics Act of 1938,[2] which makes it unlawful without CAB approval for "any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever". Toolco was considered as one engaged in a phase of aeronautics because of its activities in the development of aircraft and accessories.

Section 414 of the Federal Aviation Act, 49 U.S.C. § 1384, provides that

> "Any person affected by any order made under sections 408 [49 U.S.C. § 1378] * * * shall be, and is hereby, relieved from the operations of the 'antitrust laws' * * * and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do any-

[2] This section is now 49 U.S.C. § 1378(5). The Federal Aviation Act of 1958, 72 Stat. 737, 49 U.S.C. § 1301 et seq., superseded the Civil Aeronautics Act of 1938, 52 Stat. 973, making no changes relevant to the problem before the court.

thing authorized, approved, or required by such order."

It is Toolco's contention that all the acts complained of by TWA are immunized from claims of violations of the antitrust laws because of section 414. This leads to an examination of what action was approved by the orders issued pursuant to section 408(5) and what is the scope of the exemption provided by the words "insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order", in section 414.

Statutory authority granted regulatory agencies to give exemption from the application of the antitrust laws is not unusual.[8] But the Supreme Court has clearly stated that immunity from the antitrust laws is not to be lightly implied. California v. Federal Power Comm'n, 369 U.S. 482, 485, 82 S.Ct. 901, 8 L.Ed.2d 54 (1962). Regulated industries are not per se exempt from the antitrust laws. United States v. Borden Co., 308 U.S. 188, 198-199, 60 S.Ct. 182, 84 L.Ed. 181. And it is elementary that repeals by implication are not favored. Georgia v. Pennsylvania R. R., 324 U.S. 439, 456, 65 S.Ct. 716, 89 L.Ed. 1051 (1945). In the latest decision by the Supreme Court, Pan American World Airways, Inc. v. United States, supra note 1, which will be discussed in detail below, the Court stated that

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[8] See, e. g., 47 U.S.C. § 222(b)(1) (telegraph mergers approved by the Federal Communications Commission); 47 U.S.C. § 221(a) (telephone mergers approved by FCC); 46 U.S.C. § 814 (rate fixing and other agreements between water carriers approved by the Federal Maritime Board); 49 U.S.C. § 5 (railroad mergers approved by the Interstate Commerce Commission); 49 U.S.C. §§ 5a-b (agreements between carriers involving rates approved by ICC); 15 U.S.C. § 18 (exempting from the operation of section 7 of the Clayton Act transactions approved within their statutory authority by the CAB, FCC, Federal Power Commission, ICC, FMB, Secretary of Agriculture, and, in some cases, the Securities and Exchange Commission).

the regulatory scheme here in question would not be read as designed completely to displace the antitrust laws "absent an unequivocally declared congressional purpose so to do." 371 U.S. at 305, 83 S.Ct. at 482. It went on to say that the antitrust problems "expressly entrusted to [the CAB] encompass only a fraction of the total." Ibid.

The orders of 1944 and 1950 relied on by Toolco merely approved the acquisition of control of TWA by Toolco. The antitrust violations that could possibly be present in such acquisition—that it was a contract in restraint of trade prohibited by section 1 of the Sherman Act, or was an attempt to monopolize prohibited by section 2 of the Sherman Act, or was an acquisition of stock prohibited by section 7 of the Clayton Act—were within the contemplation of the approval orders and protected by the exemption provided by section 414. Cf. United States v. Southern Pac. Co., 290 Fed. 443 (D.Utah 1923). These orders did not give Toolco a license to engage in other acts that normally may be forbidden by the antitrust laws. What has been approved and exempted is the fact of "acquisition of control", not activities engaged in by the controlling party subsequent to acquisition, which may be illegal.

I have found no case and none has been cited to me which interprets the words "necessary to enable such person to do anything authorized, approved, or required by such order", or similar exemptive language in other statutes, in a way that will sustain Toolco's position. In Putnam v. Air Transport Ass'n of America, supra, the plaintiff was attacking a claimed boycott by the defendants. The court in applying section 414 stated that the boycott was "the inevitable result" of the agreement sanctioned by the CAB which by its terms permitted the defendants to choose with whom they would deal. This is far different from the immunization claimed by Toolco. Congress could not have intended that restraints or at-

tempts to monopolize, subsequent to an order allowing acquisition of control, were necessary to enable Toolco to do anything authorized or approved by the order.

One more point merits discussion under this branch of the motion. The second claim for relief is based on acts alleged to have been committed by the defendants and Atlas subsequent to December 1960. In December 1960 TWA moved before the CAB for modification of the original order of 1944 as amended. Approval was also sought

> "under section 408 * * * for the transactions contemplated under the financing plan. Similarly sought is approval * * * under section 409 of the Act, of the interlocking relationships arising out of the designation of Raymond M. Holliday, as a representative of Toolco, and of Ernest R. Breech and Irving S. Olds as representatives of the banks and institutional investors, to serve as Voting Trustees under a Voting Trust set up for the Toolco-TWA stock."

This relief was requested in connection with the jet aircraft financing transactions which resulted in Toolco's putting its 78% stock interest in TWA under a voting trust, which in effect gave control of TWA to the lenders who are named as additional defendants in this action.

On December 29th, 1960 the CAB entered its order on this motion (Order No. E-16195). In the course of the opinion, the CAB said at page 6:

> "Under these circumstances, we think it clear that Board action to facilitate TWA's acquisition of jet equipment is in the public interest. At the same time, however, it is evident that Toolco's control of TWA, as exercised through Hughes, has presented substantial problems requiring the Board's attention.
>
> "In short, and without further description of these problems, the Board wishes to make clear the fact

that it would anticipate the proper filing of an application under section 408 of the Act and the obtaining of the approval of the Board before Toolco would attempt to reassume control over TWA.[19] It is clear that such approval would not be forthcoming without a searching inquiry into the public interest factors affecting this control.[20] ''

Footnote 19 in the above quotation reads as follows:

''The Option Agreement requires Toolco, in exercising the option, to provide a satisfactory opinion of counsel that the exercise of the option, by purchase of the notes, does not require governmental or regulatory approval or that such approval has been granted and is in force. No such provision could, of course, preclude dissolution of the voting trust after the ten-year term has expired. Nonetheless, it is clear that Toolco should not resume direct control at that time unless prior approval of the Board is sought and obtained.''

It is clear from this opinion that the CAB does not look upon Toolco as controlling TWA after December 1960. Thus, anything done by Toolco subsequent to that date has not been approved by orders of the CAB and certainly no exemption exists as to the second claim.

We come now to the question of ''primary jurisdiction'' which is defendant's second ground for dismissal of these claims. In discussing the primary jurisdiction of the CAB in relation to this complaint, there is some overlap with the discussion as to the effect of an order issued under section 408(5) and the extent of the exemption granted by section 414. In this case we are concerned primarily with whether there exists exclusive primary jurisdiction in the CAB without regard to whether or not it has taken any action in relation to a particular transaction. Cf. Far East Conference v. United States, 342 U.S. 570, 72 S.Ct. 492, 96 L.Ed. 576 (1952).

Defendant places great reliance upon the recent decision of the Supreme Court in Pan American World Airways, Inc. v. United States, supra, popularly known as the Panagra case. In determining the scope of this decision we must first go to the next to the last sentence of the majority opinion, which reads:

> "We think the narrow questions presented by this complaint have been entrusted to the Board and that the complaint should have been dismissed." 371 U.S. at 313, 83 S.Ct. at 486.

The Court was dealing with section 411 of the act, 49 U.S.C. § 1381, which gives the CAB jurisdiction over "unfair or deceptive practices" and "unfair methods of competition" by air carriers. The acts charged to be antitrust violations were limitations of routes, divisions of territories, and the relation of a common carrier to air carriers, which the Court stated were "precise ingredients of the Board's authority in granting, qualifying, or denying certificates to air carriers, in modifying, suspending, or revoking them, and in allowing or disallowing affiliations between common carriers and air carriers." 371 U.S. at 305, 83 S.Ct. at 482. The Court went on to say:

> "It would be strange, indeed, if a division of territories or an allocation of routes which met the requirements of the 'public interest' as defined in § 2 were held to be antitrust violations. It would also be odd to conclude that an affiliation between a common carrier and an air carrier that passed muster under § 408 should run afoul of the antitrust laws. Whether or not transactions of that character meet the standards of competition and monopoly provided by the Act is peculiarly a question for the Board, subject of course to judicial review * * *." 371 U.S. at 309, 83 S.Ct. at 484.

If we substitute in this quotation the words "acquisition of control of any air carrier by any person engaged in any other phase of aeronautics" in place of "an affiliation between a common carrier and an air carrier", we have presented the fact situation upon which Toolco relies. However, the acts complained of by TWA are acts allegedly done by the controlling party after the acquisition had been approved, not only to the detriment of the carrier in question, but to other carriers and to competitors of the controlling party. This in my view is the distinguishing factor between this case and the Panagra case. While the acts charged here could be proper subjects for consideration by the Board in determining whether control of TWA by Toolco was in the public interest,[4] they are not the type of acts over which the Board has exclusive primary jurisdiction. They are not within the contemplation of the regulatory powers granted the CAB. Cf. Georgia v. Pennsylvania R. R., supra.

Furthermore, the Board has no power to award damages, and we do not reach the statement of the Court in the Panagra case to the effect that since the Board's essential regulatory powers deal with the division of territories, etc., then Congress must have intended to give it authority that was ample to deal with the evil at hand. Rather, the statement by the Court that a court has jurisdiction under the antitrust laws if the agency has no power to grant relief is controlling here. 371 U.S. at 313 n. 19, 83 S.Ct. at 486 n. 19.

It is also clear that once a regulatory agency has acted the court is competent to consider and determine the scope of the exemption claimed. River Plate & Brazil Conferences v. Pressed Steel Car Co., 227 F.2d 60 (2d Cir., 1955); Putnam v. Air Transport Ass'n of America, supra. The cases of American Airlines v. Standard Air Lines, 80

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[4] See CAB Order No. E-16195 quoted at page 13, supra.

F.Supp. 135 (S.D.N.Y. 1948) and United States v. Railway Express Agency, 89 F.Supp. 981 (D.Del. 1950), relied on by Toolco, are not in point.

In addition to the determination that as a matter of law the Board does not have exclusive primary jurisdiction over the acts alleged in the complaint, the practical aspects of this case make especially apposite the statement in the River Plate case, supra, to the effect that a reference to the agency would be "useless and time-consuming" (227 F.2d at 63). Over 10,000 pages of testimony have already been taken by Toolco in deposition proceedings and over one and a quarter million documents have been produced in these proceedings by all parties. If there is any policy that would favor referral, it is not present in this case. See Atlantic Coast Line R. R. v. Riss & Co., 105 U.S.App.D.C. 380, 267 F.2d 657, 658 (1958).

Consequently, the motion to dismiss is denied. The application made upon oral argument for a certificate pursuant to 28 U.S.C. § 1292(b) was denied at that time. Toolco's application for a stay of all deposition-discovery proceedings pending an application for a stay to the Court of Appeals was granted on the oral argument to the extent that all deposition-discovery proceedings are stayed until 5 p.m. February 8th, 1963 to allow Toolco time to request a stay from the Court of Appeals beyond that time.

So ordered.

B.

32 Federal Rules Decisions 604

UNITED STATES DISTRICT COURT
S. D. NEW YORK.

May 3, 1963.

TRANS WORLD AIRLINES, INC., *Plaintiff*,

v.

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY, *Defendants*,

and

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES ET AL., *Additional Defendants on Counterclaims.*

METZNER, District Judge.

The plaintiff Trans World Airlines, Inc. (TWA) has moved for an order pursuant to rules 37(b) (2) (iii), 37 (d) and 55(b) (2) of the Federal Rules of Civil Procedure directing the entry of a judgment by default against the defendant Hughes Tool Company (Toolco). It requests that a hearing be held to determine the amount of damages to be paid by Toolco for the injuries alleged in the complaint, and that Toolco divest itself of all of its right, title and interest in the stock of TWA. The motion also seeks leave to increase the *ad damnum* clause following paragraph 70 of the complaint, from $105,000,000 to $135,000,000. It further seeks a dismissal of the counterclaims with prejudice. The motion further requests that Toolco, its officers and employees, or anyone acting in concert with them, be enjoined from instituting any action based upon the counterclaims set forth in the answer of Toolco and from instituting any proceeding before an administrative agency of the United States in which TWA is a party and which is based upon the allegations of the counterclaims. Finally,

it is requested that the claims asserted by TWA against the defendant Holliday be severed from these proceedings.

Toolco owns 78% of the stock of TWA and Howard R. Hughes owns all of the stock of Toolco. It is clear that during all of the times covered by the complaint the management of TWA was controlled by Hughes personally.

Pursuant to an authorization from Hughes, the attorney for Toolco accepted service of a witness subpoena directed to Hughes by TWA. The deposition of Hughes was originally scheduled for September 24th, 1962 and was adjourned by the court to October 29th, 1962. On October 25th the Special Master adjourned the deposition of Hughes to February 11th, 1963. On December 28th, 1962 the Special Master stated that when this adjournment was granted there was no doubt that it was the intention and expectation that the deposition would start on the adjourned date and proceed until it was concluded according to law.

In the pretrial order of January 10th, 1963 the court affirmed this ruling of the Special Master, and stated that the date of February 11th, 1963 would be adhered to in the absence of extraordinary circumstances. The order of January 10th also directed Toolco to produce certain documents as to which it claimed an attorney-client privilege. The order pointed out that Toolco's opposition to producing such documents was in fact a reargument of the order of this court dated July 24th, 1962 which denied the claim of privilege.

The order of January 10th also denied Toolco's application to proceed at that time with the examination of two witnesses on the ground that such deposition would interfere with the taking of the Hughes deposition scheduled for February 11th.

On January 15th counsel for Toolco moved for an order that the Hughes deposition be taken on written interroga-

tories, or, in the alternative, that the motion to dismiss the complaint, pending since August 9th, 1961, be brought on for hearing. On January 16th Toolco's counsel was informed that he would be given until February 1st to submit all papers in support of his motion to dismiss. On January 19th Toolco's motion to take Hughes' deposition in writing was denied. The court, however, allowed counsel for Toolco time to indicate whether he desired the place of deposition to be changed for the convenience of Hughes. No such request was ever made.

On January 23rd the Court of Appeals denied Toolco's application for a stay of the orders of January 10th and 19th.

On February 1st, on Toolco's appeal from an order of the Special Master, the court affirmed that order, and directed that Toolco produce certain tax documents to TWA on a daily basis up to February 11th.

On February 6th a hearing was held on Toolco's motion to dismiss the complaint. The motion was denied from the bench with an indication that the formal opinion would be filed the following day. The denial of the motion embraced a finding that the court had jurisdiction of the claims. Toolco was granted a stay of deposition-discovery proceedings until 5 p.m. on February 8th, to afford it an opportunity to apply to the Court of Appeals for a further stay pending an application for a writ of mandamus.

The formal opinion of February 7th, 214 F.Supp. 106, denying Toolco's motion to dismiss the complaint, pointed out that the grounds urged for a dismissal existed and were adverted to in the original notice of motion filed on August 9th, 1961, and served several weeks prior to the assignment of this case for all purposes, pursuant to rule 2 of the general rules of this court. The court indicated that counsel for Toolco could just as well have argued the motion at the inception of the litigation, instead of waiting until the taking of the deposition of Hughes was imminent.

A pretrial conference was held on Friday, February 8th, at 5 p.m., on information that counsel for Toolco was not going to proceed with the deposition proceedings of Hughes on the following Monday. Toolco did not apply to the Court of Appeals for a stay pending an application for a writ of mandamus, but, rather, submitted a "Notice of Position" to the court at the time of the hearing. In essence, this document stated that because of the enormous expenses that would be incurred in further pretrial and trial proceedings, which in Toolco's belief would exceed the amount of damages provable by TWA under the complaint, Toolco decided to rest on the merits of its position, so that the Court of Appeals would have an opportunity to rule upon the propriety of the denial of the motion to dismiss the complaint.

At the hearing counsel for Toolco stated that he had advised his client of the sanctions available to TWA under rule 37, and that by insisting upon a right to obtain a review of the legal questions involved in the proceedings to date Toolco understood that it might be deprived of further defending on the merits. Counsel referred to this as a "business decision."

Counsel for Toolco specifically stated that Hughes would not appear for deposition on February 11th and that if it were necessary to clarify the record everyone could gather on the following Monday (February 11th) to

> "note the fact that the Tool Company is failing in [sic—and?] refusing to produce Mr. Hughes, and then you can have your record and you can take your remedy on it."

Counsel also stated that he did not intend to further litigate the counterclaims until after a determination of a complaint filed by Toolco with the Civil Aeronautics Board on February 6th which includes some of the allegations of the counterclaims.

Embraced within the refusal to proceed with the deposition of Hughes is the refusal to obey the orders of the court directing Toolco to produce the documents referred to above.

On the basis of this record TWA made the motion now before the court. It is clear that the deposition of Hughes is essential for the proper presentation of TWA's case. It is also clear that the failure of Hughes to appear on February 11th for his deposition was the result of a clear and studied determination by Toolco after all efforts to postpone the appearance of Hughes had failed. The default was deliberate and willful and justifies the court in entering a default judgment as provided in rule 37(b) (2) (iii) and 37(d). A judgment by default shall be entered in favor of TWA against Toolco, and the counterclaims asserted by Toolco against TWA shall be dismissed with prejudice.

That branch of the motion seeking to increase the *ad damnum* clause from $105,000,000 to $135,000,000 is granted. This is not a case where a party has defaulted in appearance. Here issue was joined and adversary proceedings continued in the pretrial stages of this litigation. The damages originally asserted were unliquidated and TWA is entitled to recover for whatever damage it can show it suffered. Furthermore, Toolco will be represented at the hearings necessary to assess damages under rule 55(b)(2). Rule 54(c); Peitzman v. City of Illmo, 141 F.2d 956 (8th Cir.), cert. denied, 323 U.S. 718, 65 S.Ct. 47, 89 L.Ed. 577 (1944); cf. Riggs, Ferris & Geer v. Lillibridge, 316 F.2d 60 (2d Cir. 1963).

Before entering the final judgment a hearing must be held to determine the amount of damages to be awarded TWA since the damages are unliquidated. Therefore, pursuant to rule 55(b) (2), the question of the amount of the damages to be paid by Toolco to TWA is referred to J. Lee Rankin, the Special Master heretofore designated by the

court, who has presided over the deposition-discovery p
ceedings for the past year.

TWA has also requested that Toolco divest itself
its 78% stock interest in TWA. The propriety of granti
this prayer for relief will be determined by the court

The determination of the application by TWA for
injunction will be held in abeyance pending the entry
the final judgment.

The application to sever the action against Holliday
been withdrawn on his election to be individually bou
by the defaults of Toolco. Consequently, the applicati
for a default judgment is deemed to include a requ
for similar relief against this defendant, and the dis
sition of this motion as to Toolco is also dispositive
to Holliday.

I am of the opinion that this order involves a controlli
question of law (see Pan American World Airways, I
v. United States, 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed
325 (1963)) as to which there is a substantial ground
difference of opinion. Enormous expense has already b
incurred in this litigation, and the hearings before
Special Master on the question of damages, with a potent
recovery of $135,000,000 on the first two claims and $1
000,000 on the third claim, may well be prolonged. An i
mediate appeal from this order is justified, since it m
materially advance the ultimate termination of this l
gation.

So ordered.

C.

332 Federal Reporter, 2d Series 602

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT.

Nos. 150, 151, Dockets 28405, 28406.

TRANS WORLD AIRLINES, INC., *Plaintiff-Appellee,*

v.

HOWARD R. HUGHES, *Defendant,*

and

HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY, *Defendants-Appellants.*

TRANS WORLD AIRLINES, INC., *Plaintiff-Appellee,*

v.

HOWARD R. HUGHES and RAYMOND M. HOLLIDAY, *Defendants,*

and

HUGHES TOOL COMPANY, *Defendant-Appellant,*

and

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, ET AL., *Additional Defendants-Appellees,*

and

ERNEST R. BREECH, *Additional Defendant.*

Argued Nov. 13, 1963.
Decided June 2, 1964.

Before LUMBARD, Chief Judge, and KAUFMAN and HAYS, Circuit Judges.

LUMBARD, Chief Judge:

These separate appeals, heard together, are from two orders of the United States District Court for the Southern District of New York in the same case. In the first appeal, No. 28405, the defendants, Hughes Tool Company (Toolco) and Raymond M. Holliday, Toolco's chief financial officer,

attack the validity of an order which granted default jud ment in favor of the plaintiff, Trans World Airlines, In because of the defendants' failure to produce Toolco managing agent, Howard R. Hughes, for examination a their failure to produce certain papers and documents, F.R.D. 604 (S.D.N.Y. 1963). In the second appeal, N 28406, Toolco attacks an order which dismissed with pre udice its first five counterclaims against TWA and a grou of additional defendants and an order of the same da which granted summary judgment in favor of TWA on t sixth counterclaim.

TWA's complaint charged the defendants with a varie of violations of the antitrust laws as well as with havi committed willful and malicious injury to TWA's busine and sought divestiture of Toolco's interest in TWA, injun tive relief, and money damages, trebled with respect to t antitrust violations. On May 3, 1963, Judge Metzner o dered the entering of a default judgment in favor of TW against Toolco[1] but referred to a special master the iss of damages, on TWA's claim of $35,000,000 which the an trust statute would treble, and retained for further consi eration the question of divestiture. Judge Metzner d certify under 28 U.S.C. § 1292(b) that immediate appeal w justified inasmuch as a controlling question of law was i volved and hearings on the question of damages might prolonged. We granted leave to appeal limited to two que tions: first, whether the district court lacked jurisdiction the treble damage action by reason of primary jurisdictio over these matters residing in the Civil Aeronautics Boar and second, whether the issuance of certain orders by t CAB permitting the defendant to take certain actions co stitutes a good defense to the antitrust action. Thus t

[1] Due to the relationship of the parties, the district court accept the election of defendant Holliday, an officer and director of Tool to be bound by Toolco's decision to forego further discove proceedings.

propriety of the court's entering a default judgment against the defendants with respect to the complaint is not before us and we consider it only in connection with the court's dismissal of the five counterclaims asserted by the defendants. The second appeal is taken as of right from a final judgment which dismissed Toolco's first five counterclaims and granted summary judgment to TWA on the sixth counterclaim.

Background of the Litigation

An understanding of the issues requires a preliminary statement of certain background facts set forth in the pleadings and which on this record and in view of the default of the defendants we must take as established.

Commencing about five years after TWA was organized in 1934, Toolco, which at all times has been 100 percent owned and controlled by Howard Hughes, began to purchase TWA common stock, and by 1944 it held 45 percent of this stock. By 1958 Toolco had increased to 78 percent its interest in TWA's common stock; from 1944 until December 1960 it nominated a majority of TWA's directors.

Since 1955 the commercial air industry has largely converted to the use of jet aircraft. TWA's competitors began in that year to aid in the development of and to purchase jet planes. Prior to 1955 Toolco had entered into an arrangement with the General Dynamics Corporation (Convair) for the joint development of jet aircraft, but in that year the two companies terminated the arrangement. Toolco had also entered into a plan whereby it would develop and manufacture its own jet aircraft for sale or lease to TWA and its competitors. That plan was abandoned during 1956. During this period, Toolco arranged for the purchase on its own account of jet aircraft from Convair and the Boeing Company, these arrangements providing that Toolco could assign to TWA its rights to such aircraft.

Despite repeated requests by TWA, Toolco refused to assign any planes to TWA during the period 1956 to 1960. The only jet-powered aircraft which the defendants permitted TWA to use during this period were leased on a day-to-day basis by Toolco to TWA during 1959 and 1960 on the condition that TWA would not purchase or lease aircraft from any other potential supplier.

At some time prior to May 1960 Toolco and Atlas Corporation, which owns a controlling stock interest in Northeast Airlines, entered upon a plan to have Northeast propose to TWA a merger of the two air carriers. In November 1960, while the proposed merger plan was pending, Toolco diverted to Northeast six of the Convair jet aircraft which by previous agreement it had assigned to TWA.

The defendants pursued a continuous policy of refusing to permit TWA to undertake equity financing except on the condition that Toolco increase its equity position in TWA; as a result TWA was limited to obtaining funds through debt financing. When in 1960 Toolco and Hughes finally agreed to outside financing for TWA, the cost of such financing had risen greatly and the financing could be arranged only on less favorable terms than had theretofore been available, terms which had been secured by TWA's competitors. Under the 1960 financing arrangement Toolco's stock in TWA was placed in a voting trust.[1a] The CAB approved this financing arrangement and the voting trust on December 29, 1960, finding that these arrangements

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[1a] The commitments of the various lending institutions had been conditioned upon the continuation of satisfactory TWA management. The lenders reserved the right to insist upon a voting trust during the term of the loan in the event of a change in TWA management which they deemed to be adverse to TWA's credit position. When Charles Thomas abruptly resigned as president of TWA in July 1960 the lenders offered to effect the transaction if Toolco agreed to place its stock in TWA in a voting trust. In December 1960 Toolco executed the voting trust agreement.

were in the public interest. Thereupon, the Metropolitan Life Insurance Company and the Equitable Life Assurance Society loaned TWA $92,800,000 and a group of banks for which the Irving Trust Company acted as agent loaned TWA $72,000,000. In March 1961 TWA's Board of Directors authorized the purchase of 26 Boeing jet aircraft. Thereafter the defendants continued their attempts to have TWA purchase from Toolco jet aircraft which Toolco had previously agreed to purchase from Convair. The defendants have also continued to press their demand for a merger of TWA and Northeast and have otherwise, despite the existence of the voting trust, attempted to prevent TWA from acquiring jet aircraft other than from Toolco.

THE FIRST APPEAL—Docket No. 28405

TWA's complaint alleges that the facts heretofore stated constitute violations of the Sherman and Clayton antitrust acts, insofar as the defendants have attempted to monopolize a substantial segment of interstate and foreign commerce and trade, have required that TWA boycott all suppliers of aircraft other than Toolco, and have agreed to provide financing and to sell aircraft to TWA on the condition that TWA not purchase or lease the goods of a competitor. The defendants assert that the Civil Aeronautics Board possesses primary jurisdiction over these matters and in the exercise of its powers has approved all of the transactions alleged in the complaint and thereby immunized the defendants from the operation of the antitrust laws. Judge Metzner held that nothing in the Federal Aviation Act precludes the district court from asserting jurisdiction in this case and that the CAB's approval of various transactions between TWA and Toolco did not confer immunity upon the defendants from the operation of the antitrust laws. We agree.

The proposition has so often been stated that it has become hornbook law that immunity from the operation of the

antitrust laws is not lightly to be inferred from the enactment of a regulatory statute. See Georgia v. Pennsylvania R. Co., 324 U.S. 439, 65 S.Ct. 716, 89 L.Ed. 1051 (1945). Yet Congress may effect such a design through explicit enactment of an immunizing provision, and Congress has done so on occasion.[2] Under § 408(a) (6) of the Federal Aviation Act, 49 U.S.C. § 1378(a) (6), no person engaged in any phase of aeronautics[3] may lawfully acquire control of any air carrier without the prior approval of the CAB. Section 411 empowers the Board to order any air carrier to cease and desist from "unfair or deceptive practices or unfair methods of competition." Section 414 of the Act provides that any person affected by any order made under § 408[4] "shall be, and is hereby, relieved from the operation of the 'antitrust laws' * * * and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order."

In attempting to ascertain the extent of the antitrust immunity conferred by the Aviation Act we do not explore wholly uncharted territory. In Pan American World Airways, Inc. v. United States, 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963) (Panagra) a case upon which all parties in this litigation principally rely, the Supreme Court considered the extent to which the Aviation Act has granted

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[2] See, e. g., Clayton Act § 16, 38 Stat. 737 (1914), 15 U.S.C. § 26 (1958); Shipping Act § 15, 39 Stat. 734 (1916), 46 U.S.C. § 814 (1958); Interstate Commerce Act § 5a(9), 62 Stat. 473 (1948), 49 U.S.C. § 5b(9) (1958).

[3] In Transcontinental & Western Air, Inc., Control by Hughes Tool Company, 6 C.A.B. 153 (1944), the Board determined that Toolco was engaged in a phase of aeronautics and thus subject to Board action under § 408.

[4] Section 414 applies to 49 U.S.C. § 1379 (interlocking relationships) and 49 U.S.C. § 1382 (pooling and other agreements) as well as to § 408.

the CAB jurisdiction over matters involving the commercial aviation industry which might otherwise constitute antitrust violations.

Pan American, a major airline in interstate and foreign commerce, and W.R. Grace & Co., a common carrier, were charged in a civil action brought by the United States with violations of the antitrust laws arising from their relations with Panagra, an airline which had been formed by Pan American and Grace, each of which owned 50 percent of its stock. The government's complaint alleged restraints of trade in that Pan American and Grace had agreed that Panagra would have the exclusive right to traffic along the west coast of South America free of Pan American competition and that Pan American would enjoy the exclusive right to traffic in other areas in South America and between the Canal Zone and the United States; that Pan American and Grace had conspired to monopolize and did monopolize air commerce between the eastern coastal areas of the United States and western coastal areas of South America and Buenos Aires; and that Pan American had exercised its 50 percent control over Panagra to prevent it from securing authority from the CAB to extend its service from the Canal Zone to the United States.

The district court found a single violation in Pan American's activities with regard to the extension of Panagra's routes and ordered divestiture of Pan American's stock interest in Panagra. On direct appeal from the district court, the Supreme Court reversed the lower court judgment on the ground that the questions presented by the government's complaint had been entrusted to the CAB and the district court therefore lacked jurisdiction in the premises.

Noting that those aspects of antitrust problems entrusted to the Board are "but a fraction of the total," the Court emphasized that the limitation of routes, the division of territories, and the relation of common carriers to air car-

riers are "basic to [the] * * * regulatory scheme" of the Federal Aviation Act and that the acts charged in the government's complaint are "precise ingredients of the Board's authority." The term "unfair methods of competition" in § 411, the Court noted, must gather meaning from the context of the regulatory scheme envisioned in the Act, and it would be strange if the "public interest" standard incorporated into § 411[5] was deemed satisfied by the Board as to a particular transaction and yet that transaction was violative of the antitrust laws; it would be equally strange for a transaction approved under § 408 by the Board to be adjudged subsequently to be in violation of the antitrust laws.

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[5] Title 49 U.S.C. § 1302 provides:

"In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

"(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(b) The regulation of air transportation in such manner as to recognise and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

"(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

"(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(e) The promotion of safety in air commerce; and

"(f) The promotion, encouragement, and development of civil aeronautics."

The striking dissimilarities between the operative facts in Panagra and those in the instant case as well as the whole tenor of the Supreme Court's opinion compel us to the conclusion that the district court properly asserted jurisdiction in this cause. The relationship between the allegedly unlawful activities in Panagra and the scope of the Board's powers to deal with such activities was direct. Under 49 U.S.C. § 1371, it is the specific function of the CAB to certify airlines to operate on a particular route between terminal points directed by the Board. The unlawful division of territories and allocation of routes with which Pan American, Grace and Panagra were accused were therefore directly within the ambit of powers explicitly granted the Board by the Congress. To permit the courts to intrude into this area would have been, as the Court noted, to permit the erection of an independent yet parallel body of law in direct contravention of the regulatory scheme embodied in the Aviation Act.

By contrast, in the instant case TWA's complaint alleges transactions which are unrelated to any specific function of the CAB. The Board is explicitly entrusted with the duty of considering for approval any potential acquisition of control over an air carrier by a person engaged in any phase of aeronautics; and to the extent of such approval—but only to that extent—the Act grants immunity from the operation of the antitrust laws. Surely Congress did not contemplate that CAB approval of an acquisition would be tantamount to approval of every transaction which might be entered into by the controlling party. The focus of the Board's powers in this sphere is the acquisition itself rather than the broad range of activities into which the controller may enter thereafter. Thus the plaintiff's complaint enumerates a variety of transactions over which the Board is given no explicit jurisdiction by the Act: an attempt to monopolize a substantial segment of interstate and foreign air commerce, imposition by the defendants on TWA of the condition that

the airline not purchase or lease aircraft from any supplier other than Toolco, and the tying of financing of aircraft acquisitions with the purchase of such aircraft from Toolco.

Nowhere in the Act is the Board specifically charged with the duty of monitoring each transaction which is ultimately effected between the carrier and its controller once an acquisition is approved. The Board concededly may condition its approval of a control acquisition upon such terms as it may find to be just and reasonable, and thereby retain a continuing jurisdiction over the activities of the controlling party.[6] In the exercise of this supplementary power the Board may investigate and regulate certain aspects of transactions effected between an air carrier and the controlling party. But the existence of this power—which was employed in approving Toolco's acquisition of control over TWA—hardly supports the defendants' claim that Congress placed the regulation of everything which might flow from such transactions within the exclusive jurisdiction of the CAB. The issue here is not whether the CAB may consider such matters but rather whether the federal courts have been excluded from their consideration by Congress. There is virtually no limit to the nature and variety of the transactions which fall within this category. In the absence of an explicit congressional mandate entrusting such transactions exclusively to the Board we can find no basis for declaring the federal courts to be without jurisdiction in such matters.

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[6] Section 408, provides, in pertinent part:

"Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order, approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe * * *."

In Panagra the Civil Aeronautics Board could have considered the activities of Pan American under its broad power set out in § 411 of the Act to "investigate and determine whether any air carrier * * * has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation * * *," a provision to which the Supreme Court explicitly adverted in holding that the matters there in dispute had been specifically entrusted by Congress to the Board. By contrast, the Board enjoys no such power to deal with the allegedly unlawful activities of Hughes and Toolco, inasmuch as § 411 is applicable solely to "any air carrier, foreign air carrier, or ticket agent." The limited applicability of § 411 merely underscores the limited jurisdiction conferred by Congress upon the Board to deal with the multifarious antitrust problems which may arise in the management and operation of the commercial air industry. Moreover, it is not even clear that the Board any longer possesses any jurisdiction over the activities of Hughes and Toolco, even under § 408 of the Act, inasmuch as the voting trust arrangement adopted in 1960 appears to have ousted Hughes and Toolco from control over the operations of TWA, such control being a prerequisite to the Board's acting under § 408.

We are reinforced in our conclusion by the Supreme Court's recognition of the limitations of its holding in Panagra. Characterizing the questions presented in the government's complaint as "narrow" ones, the Court, as we have noted, emphasized that the antitrust problems entrusted by the Act to the Board "encompass only a fraction of the total." The activities here drawn into issue by TWA's complaint fall without the ambit of that small fraction of antitrust problems placed within the Board's exclusive jurisdiction.

The Aviation Act itself bears testimony that matters such as those with which we are here concerned were not intended to be placed without the competence of the federal judiciary.

Title 49 U.S.C. § 1506 declares that "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." Moreover, the Act fails to empower the Board to grant the very relief principally sought by the plaintiff in this action —the award of money damages, trebled under the mandate of the antitrust laws.

Even if we were to view as the subject of judicial discretion the question whether the CAB is to be given primary jurisdiction in the consideration of activities such as those here alleged, we could find no compelling reason to adopt such a course on the facts presented. While the entire regulatory scheme of the Federal Aviation Act demands that the Board be given great latitude in fashioning public policy with regard to the development of the commercial air industry through the acquisition of control over air carriers—and the Board possesses a substantial expertise in these matters—there is no such necessity for a uniformity of policy with regard to the consideration of the validity of individual transactions effected between an air carrier and its controller which are alleged to be unlawful under the antitrust laws. Nor is the Board any more qualified to consider such charges than the federal courts, which daily encounter and resolve antitrust problems. The disposition of such matters by the courts would not intrude upon the Board's function of fashioning the broad framework of control for the commercial air industry. We can thus find no warrant for adopting the position that the subject matter of this litigation was entrusted by Congress to the exclusive jurisdiction of the Civil Aeronautics Board.

Nor do we find any merit in the defendants' alternative contention that the Civil Aeronautics Board, in approving Toolco's acquisition of control over TWA and certain specific transactions thereafter, immunized the defendants from the operation of the antitrust laws as to all the

ramifications of these transactions. Title 49 U.S.C. § 1384 extends such immunity only "insofar as may be necessary to enable such person to do anything authorized, approved or required by such order." As Judge Metzner noted, the Board's approval of acquisition of control by Toolco over TWA did not carry with it approval of every transaction which Toolco might choose to effect in the exercise of its control. To give § 408 such a carte blanche effect would be to pervert the entire regulatory structure of the Aviation Act. Nor can any of the activities with which Toolco stands charged be deemed to have been necessary to the exercise of its control relationship.

In its original grant of approval of the acquisition of control over TWA by Toolco,[7] the Board restricted commercial transactions between the two companies to "transactions involving complete items of property, the price of which does not exceed $200 each, with the further limitation that the total annual expenditure involved in such commercial transactions by either party shall not exceed $10,000." Over the years the Board has occasionally modified this order to permit specific intercompany transactions. In 1959 and 1960 the Board issued five such modification orders approving the specific transactions involving the acquisition of jet aircraft which are the subject matter of this litigation. In each case, however, the Board's order states merely the specific terms of the transaction and none of the accompanying conditions which allegedly were foisted upon TWA.[8] Order No. E-13873, issued on May 15, 1959, for example, states that the modification "is desired to permit TWA to lease on an individual basis up to eleven Boeing 707-131 aircraft from Hughes as they become available, as well as to acquire from Hughes at

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[7] Transcontinental & Western Air, Inc., Control by Hughes Tool Company, 6 C.A.B. 153 (1944).

[8] See Order No. E-13542, February 26, 1959; Order No. E-13873, May 15, 1959; Order No. E-14169, July 1, 1959; Order No. E-14504, September 30, 1959; Order No. E-14877, January 29, 1960.

Hughes' actual cost a supply of spare parts, not to exceed $3,500,000 in value, which are needed for the operation of these aircraft. In addition, modification is requested to permit the lease by Hughes of up to thirty spare jet engines to TWA." The Board stated in its order that the proposed arrangements did not violate the purpose of the original restriction in the control approval and that the modification ordered was just and reasonable and in the public interest; but the Board was careful to emphasize that its action should not be deemed a determination for rate-making purposes of the reasonableness of the transactions. There is no indication whatsoever—or any reason to believe—that the Board had been given any indication of the conditions which had been attached to Toolco's agreements with TWA. The Board's approval extended only to the individual transactions involved in these orders, not to the whole range of activities which over a period of years constituted the backdrop against which these transactions were effected. There is thus no cause to hold that these individual and narrow Board orders immunized the defendants from the operation of the antitrust laws with respect to activities not specifically ruled upon by the Board.

The defendants maintain that in any event the complaint fails to state facts sufficient to establish the jurisdiction of the district court. They claim that the allegations of antitrust violations in the complaint are wholly conclusory and that the specific transactions alleged to have been effected by the defendants do not state a cause of action under the antitrust laws. We do not agree. We cannot say that the specific transactions alleged in TWA's complaint—that Toolco refused to finance aircraft acquisitions by TWA unless TWA agreed to purchase planes from no supplier other than Toolco; that Toolco required TWA generally to boycott all other suppliers of aircraft; that the defendants have attempted through various means to monopolize a substantial segment of interstate and for-

eign air commerce—are on their face insufficient to support a claim of antitrust violations, a claim which surely falls within the jurisdiction of the district court. The allegations state the outlines of a tying arrangement, an economic boycott of the defendants' competitors, and an attempt to monopolize commerce, all unlawful under the antitrust statutes. It would be particularly inappropriate to find these allegations insufficient to establish the district court's jurisdiction inasmuch as the defendants denied the plaintiff the right through pre-trial discovery to add more detail and substance to the allegations set forth in the complaint. "[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47, 78 S.Ct. 99, 103, 2 L.Ed. 2d 80 (1957). See Dioguardi v. Durning, 139 F.2d 774 (2 Cir. 1944); Knudsen v. Torrington Co., 254 F.2d 283 (2 Cir. 1958). Of course the Federal Rules apply with equal force to suits under the antitrust laws. Nagler v. Admiral Corp., 248 F.2d 319, 322-23 (2 Cir. 1957). We are satisfied that the complaint sufficiently states a cause of action and establishes the district court's jurisdiction.

THE SECOND APPEAL—Docket No. 28406

The defendants also appeal, as of right, from orders of the district court which dismissed with prejudice their first five counterclaims asserted against TWA and a group of additional defendants and which granted summary judgment in favor of TWA on a sixth counterclaim, because of the defendants' failure to produce Hughes for examination and their failure to produce certain papers and documents. The additional defendants are the three major lending institutions which participated in the 1960 financing and voting trust agreements, certain of their officers, the

incumbent president and chairman of the board of directors of TWA, and an investment banking concern which since early in 1959 has served as TWA's principal financial adviser.

The proper consideration of this appeal requires a chronological exposition of the lengthy and complicated pretrial proceedings engaged in by the parties. Late in 1961 Judge Metzner was assigned to serve as a judge for all purposes in this litigation under General Rule 2, General Rules of the United States District Courts for the Southern and Eastern Districts of New York. By order of February 7, 1962, Judge Metzner confirmed a series of prior orders which had awarded Toolco priority in the conduct of pretrial discovery, and he then appointed J. Lee Rankin, Esq. as Special Master to supervise the conduct of the discovery proceedings.

Shortly after the filing of the answer and counterclaims on February 12, the Special Master granted Toolco's motions to have the additional defendants produce a multitude of documents. On March 5, Judge Metzner modified the February 7 order so as to limit Toolco's priority in discovery to evidence which bore on the plaintiff's claims against Toolco. The March 5 order stated that "The additional defendants may participate in such depositions conducted by plaintiff, in furtherance of their own deposition proceedings, or may separately schedule such depositions to follow upon the completion of plaintiff's depositions." The court further ordered that upon the completion of the additional defendants' deposition proceedings Toolco could complete its own deposition proceedings.

On February 16, the Special Master had granted the motion of the additional defendants for the production of certain documents by Toolco. Toolco withheld certain of these documents on a claim of attorney-client privilege. After full consideration, the Special Master ordered the production of these documents on April 17. After affirm

ance by the district court of this order and of a second order to produce issued by the Special Master, and denial of review by this court, counsel for Toolco, in a letter to Judge Metzner on January 23, 1963, declared that Toolco would refuse to comply with any of these orders.

Meanwhile, on September 6, 1962, counsel for Toolco had accepted a subpoena calling for Hughes' personal appearance as a witness returnable on September 24, 1962. The district court later set October 29 as the date for the Hughes deposition. The court went on to adopt as its own a prior decision of the Master that in view of the close connection between Hughes and Toolco, Toolco would be responsible for Hughes' actions with respect to the subpoena, and that if Hughes failed to communicate with the Special Master he would be deemed to have acquiesced in this interpretation. No communication from Hughes was received by the Master.

On October 25, 1962, the Master granted Toolco's motion to adjourn the Hughes deposition, but set February 11, 1963, as a firm date therefor. By order of January 10, 1963, the district court affirmed the setting of this date, stating that "this date will be adhered to in the absence of extraordinary circumstances." Shortly thereafter, Toolco moved to hold the Hughes deposition on written interrogatories and to bring on for hearing its motion, pending since August 8, 1961, to dismiss the complaint for failure to state a claim upon which relief may be granted. On January 19, 1963, the district court denied the first motion.

In preparation for the Hughes deposition, the additional defendants had moved on January 9, 1963, for the production by Toolco of certain income tax returns, revenue agents' reports, accountants' work sheets and other documents which would allegedly substantiate a claim that Toolco and Hughes had been motivated by a desire to reap tax benefits at TWA's expense in their dealings with TWA concerning the acquisition of a jet-powered fleet of aircraft.

On January 22, 1963, the Master ruled that the documents were relevant to the issues in the case and that their production would not place an unreasonable burden upon Toolco. On February 1, the district court affirmed the order to produce, but Toolco failed to produce the documents, despite repeated demands by TWA and the additional defendants.

On February 6, 1963, five days before the scheduled Hughes deposition, Toolco filed a complaint with the Civil Aeronautics Board charging the additional defendants with violations of the Federal Aviation Act. On the same day Toolco moved the district court for a stay of all proceedings on the counterclaims pending disposition by the CAB of the Toolco complaint, on the ground that under the Supreme Court's decision in Panagra, filed on January 14, 1963, the Board possessed exclusive jurisdiction over the subject matter of the counterclaims. On February 6 the district court denied Toolco's motion to dismiss the complaint, 214 F. Supp. 106 (S.D. N.Y. 1963), and on February 8 it denied Toolco's motion for a stay of all proceedings on the counterclaims.

On February 8 counsel for Toolco informed the district court that Toolco had made a "business decision" not to proceed further with discovery proceedings, but rather to rest on the merits of the positions theretofore taken and seek judicial review thereof. Consequently, counsel for Toolco stated, Hughes would fail to appear for the deposition ordered for February 11. He further stated that Toolco was aware of the sanctions which could be imposed by the district court for such a willful and deliberate failure to proceed with the scheduled discovery proceedings.

The inevitable consequence of Toolco's default in producing Hughes as a witness and in producing the documents as the court had directed was that on May 3 the district court granted the motions of TWA and the additional defendants for dismissal of the counterclaims with prejudice, under Rule 37(b) (2) (iii) and Rule 37(d) of the

Federal Rules of Civil Procedure. From the final judgments entered pursuant to that decision, and from a final judgment entered the same day granting TWA's motion for summary judgment on the sixth counterclaim, Toolco appeals.

Inasmuch as the sixth counterclaim raises issues unrelated to the first five counterclaims, we shall treat the sixth counterclaim separately.

The First Five Counterclaims

The appellants raise several contentions: first, that the district court should have granted their motion for a stay of all proceedings on the counterclaims pending disposition of the complaint which the defendants had filed with the CAB; second, that the district court should have granted the defendants a voluntary dismissal of the counterclaims without prejudice; and third, that the district court orders which directed Hughes to appear for deposition as noticed by the additional defendants, and which directed Toolco to produce the tax documents and the documents involving the attorney-client privilege, were improper.

That there was no cause for granting a stay of all proceedings on the counterclaims appears clear from the nature of these counterclaims. The first counterclaim alleges that the additional defendants and the present management of TWA improperly sought to perpetuate their control over TWA by preventing termination of the voting trust according to its terms. The second charges that Metropolitan and Equitable had acquired control over TWA in violation of § 408 of the Aviation Act. The third counterclaim is brought derivatively on behalf of TWA and asserts that the additional defendants and the present TWA management have conspired in violation of the antitrust laws to monopolize the supplying of financing to air carriers. The fourth restates the allegations of the third counterclaim and alleges that Toolco has suffered damages in excess of $77,000,000. Finally, the fifth counterclaim charges a com-

mon law conspiracy to interfere with Toolco's rights as the owner of 78 percent of the stock of TWA and to extend the duration of the voting trust beyond the period permitted by the applicable Delaware statute.

In the light of the views we have above expressed regarding the first appeal, it is plain that all of these counterclaims save the second fall beyond the scope of the CAB's exclusive jurisdiction. They deal with alleged misconduct on the part of the lending institutions in their dealings with TWA and Toolco and in no respect with matters specifically entrusted to the Board in the Act. Acts such as those alleged in all but the second counterclaim may properly be made the subject of an action in a federal district court. Inasmuch as the Board possessed no exclusive jurisdiction as to these claims, the defendants presented no adequate basis for a stay of proceedings.

As for the second counterclaim—which alleges a violation by the additional defendants of § 408 of the Aviation Act—the Board clearly possesses exclusive jurisdiction. Under that section, the Board is empowered to investigate alleged violations, and the district court was without power to adjudicate this issue. The court should have dismissed this counterclaim for lack of jurisdiction, and we direct the modification of the judgment below accordingly.

The defendants maintain that the district court should have granted a voluntary dismissal without prejudice of the counterclaims. It suffices merely to note that at no juncture in the proceedings below did the defendants request that the court grant such relief. Indeed, the very purpose for the defendants' "business decision" to terminate all pretrial discovery was to gain judicial review of the positions which the defendants had taken below.

Finally, the defendants contend that the district court's dismissal with prejudice of the counterclaims was invalid because the discovery orders upon which the district court

based its order under Rules 37(b) (2) (iii) [9] and 37 (d) [10] were improper.

We think it clear beyond any question, in light of all the circumstances here presented, that the deposition of Hughes was necessary to all aspects of this litigation, and his willful and deliberate default constituted a sufficient basis under Rule 37 for the dismissal of the counterclaims with prejudice. Hughes has at all times been the sole owner of Toolco and the guiding light behind all the transactions between Toolco and TWA. Both TWA and the additional defendants had the right to depose Hughes. Although the

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[9] Rule 37 provides:

"(b) Failure to Comply With Order.

"(2) *Other Consequences.* If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

"(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party • • • "

[10] Rule 37 provides:

"(d) Failure of Party to Attend or Serve Answers. If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party."

defendants contend that the February 11, 1963 deposition was to be held solely for the benefit of TWA, Judge Metzner's order of February 7, 1962 made clear that the additional defendants could schedule separate deposition proceedings of their own, or in the alternative participate in TWA's deposition proceedings. On February 14, 1962, the additional defendants served notices to examine Toolco by Hughes, its managing agent. The additional defendants had the right under Judge Metzner's order to treat as their own the Hughes deposition scheduled for February 11, and it is abundantly clear from the record that they did so.

When Hughes chose not to appear for this deposition—which action was taken deliberately and with full knowledge of the sanctions available to the additional defendants under Rule 37—Judge Metzner was fully justified in entering judgments dismissing the counterclaims against TWA and the additional defendants. The sanction of judgment by default for failure to comply with discovery orders is the most severe sanction which the court may apply, and its use must be tempered by the careful exercise of judicial discretion to assure that its imposition is merited. However, where one party has acted in willful and deliberate disregard of reasonable and necessary court orders and the efficient administration of justice, the application of even so stringent a sanction is fully justified and should not be disturbed. See Nasser v. Isthmian Lines, 2d Cir., 1964, 331 F. 2d 124; Link v. Wabash Railroad Co., 370 U.S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962); Gill v. Stolow, 240 F. 2d 669 (2 Cir. 1957).

Hughes' deposition was absolutely essential to the proper conduct of the litigation. Yet he and Toolco seized upon every opportunity to forestall this event. To this end they demanded the production of a multitude of documents by TWA and the additional defendants and secured successive adjournments of the deposition. Indeed, Hughes and Toolco seemed to look upon the entire discovery proceedings as some sort of a game, rather than as a means of securing the just and expeditious settlement of the important matters in dispute. It was only at the very eve of the Hughes deposition—after the other litigants had been put

to much delay and expense—that the defendants made a "business decision" to terminate discovery.

Hughes' conduct is particularly intolerable in a large and complex litigation such as this one. The protracted antitrust suit taxes the energies and resourcefulness of each party to the litigation; and it consumes much time of the court and the special masters it appoints. Tactics such as Hughes' serve only to frustrate the implementation of the discovery machinery devised by the federal judiciary to expedite the handling of such complex litigation. See Handbook of Recommended Procedure for the Trial of Protracted Cases, Report of the Judicial Conference Study Group on Procedure in Protracted Litigation, 25 F.R.D. 351 et seq. (1960).

In the light of all these circumstances, the district court was not obliged to employ sanctions less severe than the dismissal of the counterclaims with prejudice. Whatever lesser sanctions might have sufficed with regard to the documents withheld by the defendants, it seems to us that a dismissal of the counterclaims was appropriate, in view of Hughes' intransigence after intensive and expensive discovery proceedings already protracted for more than one year.

We are also of the view that the other two discovery orders were properly issued. After careful examination of the documents, both the Special Master and the district court determined that the attorney-client privilege claimed by the defendants as to the first group of documents had been waived as the result of the defendants' pleading advice of counsel as a defense and as the result of two affidavits, one of which was submitted to the CAB by Raymond A. Cook, one of Toolco's attorneys. As the Master noted, the Cook affidavit purports to be based upon information received by Cook as Attorney for Toolco and in many respects parallels the allegations made in the answer and counterclaims. The district court properly held that under these circumstances the affidavit constituted a waiver by Toolco of the attorney-client privilege. As for the documents concerning income tax information, there can be

little question of the relevance of this material to the litigation. The additional defendants might well have based a defense to the counterclaims upon a showing that Toolco's and Hughes' activities with regard to the financing of aircraft acquisitions by TWA were motivated by a desire to reap income tax benefits for Hughes at the expense of TWA. Of course, the test of relevance for discovery purposes is less stringent than that applied to the admissibility of evidence at trial. Moore, Federal Practice ¶ 34.10. The district court properly ordered the production of the tax documents.

The Sixth Counterclaim

The December 1, 1960 financing agreement required the subordination of prior indebtedness of TWA to Toolco, to be achieved through the issuance by TWA of interim subordinated notes in payment *pro tanto* of the prior indebtedness. TWA was then obliged to offer to its stockholders the right to purchase, at least at par, $100 million worth of subordinated debentures. The interest on both the interim notes and the debentures was set at 6½ percent. Toolco agreed to purchase the "principal amount" of the unsubscribed debentures within three business days of the close of the subscription offering. The agreement further provided that "TWA shall * * * refund the Interim Subordinated Notes * * * upon the purchase by Hughes [Toolco] of [the] Subordinated Debentures * * * and Hughes shall accept such Subordinated Debentures in any such refunding of the Interim Subordinated Notes up to the aggregate principal amount of Subordinated Debentures which Hughes is so obligated to purchase." The transaction was to be completed by TWA's turning over to Toolco the cash received from the subscription offering in addition to accrued and unpaid interest on the interim notes to the date of refunding.

The subscription offering expired on June 8, 1961. On June 13, three business days thereafter, TWA delivered to Toolco some $19 million in cash received in the offering

and nearly $81 million in unsubscribed debentures, totalling $100 million, the amount of the interim notes. TWA also paid Toolco interest on the $100 million to June 8 and interest on the $19 million through June 12. TWA paid no interest on the $81 million from June 8 through June 12 on the ground that it was substituting interest-bearing debentures for the interim notes.

In its sixth counterclaim, Toolco contends that under the terms of the financing agreement, TWA was obliged to pay interest on the interim notes to the date of refunding, June 13, and that TWA's failure to pay such interest resulted in Toolco's paying more than par value for the subordinated debentures, in violation of the terms of the agreement. We agree with Judge Metzner who found that "based on the overall arrangements between the parties, * * * it was their intention to substitute the debentures for the interim notes and that payment of double interest for the five days was not the intendment of the parties." The fact that the subordinated debentures were issued as of June 8 and bore interest from that date, in the same amount as the interim notes, indicates that the exchange for the notes was to be effective as of that date. The provision for having the closing three business days thereafter was merely to afford time for the preparation for that transaction. The most plausible reading of the financing agreement would seem to be one which eliminates the double interest for the period between June 8 and June 13 which Toolco now seeks. Judge Metzner properly granted summary judgment to TWA on this counterclaim.

Conclusion

As to the first appeal, we find that the district court had jurisdiction of the action and that the Civil Aeronautics Board orders do not constitute a good defense to the antitrust claim of the plaintiff.

The orders of the district court in the second appeal are affirmed with the exception of the order dealing with the second counterclaim. The second counterclaim is dismissed for lack of jurisdiction.

D.

379 U.S. 912

OCTOBER TERM, 1964.

November 16, 1964.

No. 443. HUGHES TOOL CO. ET AL. v. TRANS WORLD AIRLINES, INC.; and

No. 501. HUGHES TOOL CO. v. TRANS WORLD AIRLINES, INC., ET AL. C.A. 2d Cir. Certiorari granted. *Paul A. Porter, Victor H. Kramer* and *Werner J. Kronstein* for petitioners in both cases. *John F. Sonnett, Dudley B. Tenney* and *Raymond L. Falls, Jr.*, for respondent in No. 443. *John F. Sonnett* for Trans World Airlines, Inc., and *Bruce Bromley, William C. Chanler, William M. Bradner, Jr., Edward R. Neaher, John R. Hupper* and *Charles L. Stewart* for Equitable Life Assurance Society of the United States et al., respondents in No. 501. Reported below: 332 F.2d 602.

E.

380 U.S. 248

OCTOBER TERM, 1964.

Per Curiam.

HUGHES TOOL CO. ET AL. v. TRANS WORLD AIRLINES, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 443. Argued March 3, 1965.—Decided March 8, 1965.

Certiorari dismissed as improvidently granted.

Reported below: 332 F.2d 602.

Chester C. Davis argued the cause for petitioners. With him on the briefs were *Paul A. Porter, Victor H. Kramer, Abe Krash, Dennis G. Lyons, Werner J. Kronstein* and *Daniel A. Rezneck.*

John F. Sonnett argued the cause for respondent. With him on the briefs were *Dudley B. Tenney, Raymond L. Falls, Jr., Marshall H. Cox, Jr.,* and *Abraham P. Ordover.*

Acting Solicitor General Spritzer, Assistant Attorney General Orrick, Lionel Kestenbaum, O. D. Ozment and *Robert L. Toomey* filed a memorandum for the Civil Aeronautics Board, as *amicus curiae.*

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

F.

380 U.S. 249

HUGHES TOOL CO. v. TWA.

Per Curiam.

HUGHES TOOL CO. v. TRANS WORLD AIRLINES, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 501. Argued March 4, 1965.—Decided March 8, 1965.

Certiorari dismissed as improvidently granted.

Reported below: 332 F.2d 602.

Chester C. Davis argued the cause for petitioners. With him on the briefs were *Paul A. Porter, Victor H. Kramer, Abe Krash, Dennis G. Lyons, Werner J. Kronstein* and *Daniel A. Rezneck.*

Bruce Bromley argued the cause for respondents. With him on the brief for the Equitable Life Assurance Society of the United States et al. were *William C. Chanler, William M. Bradner, Jr.,* and *Edward R. Neaher.* On the brief for Trans World Airlines, Inc., was *John F. Sonnett.*

Acting Solicitor General Spritzer, Assistant Attorney General Orrick, Lionel Kestenbaum, O. D. Ozment and *Robert L. Toomey* filed a memorandum for the Civil Aeronautics Board, as *amicus curiae.*

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

G.

38 Federal Rules Decisions 499

UNITED STATES DISTRICT COURT
S. D. NEW YORK.

TRANS WORLD AIRLINES, INC., *Plaintiff*,

v.

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY, *Defendants*.

Nov. 16, 1965.

METZNER, District Judge.

Plaintiff seeks review of so much of an opinion and order of the Special Master as fails to adopt some of the proposed interim findings of fact requested by the plaintiff.

It is unnecessary to detail the long, drawn-out history of this complicated antitrust litigation. The present problem arose after the court directed the entry of a judgment by default pursuant to Fed. R. Civ. P. 37(b)(2)(iii) and 37 (d), and appointed a Special Master pursuant to rule 55(b)(2) to determine the amount of damages.

The plaintiff, in an attempt to facilitate the hearings before the Special Master, submitted proposed interim findings of fact to formalize the basic findings which it considered flowed from the default. The plaintiff disagrees with some of the views expressed by the Special Master in his opinion and with so much of his order striking portions of the proposed findings.

In the main I agree with the exposition by the Special Master of the law and procedures to be followed by him in assessing the damages in this case. There appears to be some ambiguity in one portion of his opinion which may need clarification.

He states that:

"For the reasons indicated the defendants, at this point, do not have the right to produce evidence to try

to establish in any manner that the allegations of the complaint other than as to damages cannot be maintained."

The opinion goes on to state:

"Recognizing that it is his duty on behalf of the court to be satisfied of the liability of the defendants, as well as of the proof, according to law, of the amount of damages claimed, he must also be satisfied by a preponderance of the evidence that any damages were proximately caused". * * *

The reference to a duty "to be satisfied of the liability of the defendants" may, in light of the first quotation above, indicate a conflict in approach, although a reading of the entire opinion does not warrant such a conclusion.

The order referring this matter to the Special Master pursuant to the authority of Fed. R. Civ. P. 55(b)(2) was intended to embrace this portion of the rule:

"If, in order to enable the court to enter judgment * * * it is necessary to * * * determine the amount of damages * * * the court may * * * order such references as it deems necessary and proper".

Liability is not an issue for the Special Master except in a very limited sense. The sufficiency of the complaint has already been established by the denial of defendant's motion to dismiss. 214 F. Supp. 106 (S.D. N.Y. 1963), aff'd, 332 F. 2d 602 (2d Cir. 1964), writ of cert. dismissed, 380 U.S. 248, 85 S. Ct. 934, 13 L. Ed. 2d 817 (1965). By virtue of the default the defendant has admitted the truth of the well-pleaded allegations of the complaint. Thomas v. Wooster, 114 U.S. 104, 5 S. Ct. 788, 29 L. Ed. 105 (1885).

Allegations are not well pleaded if they are shown to be indefinite or erroneous by other statements in the complaint (Thomson v. Wooster, supra); or where they are contrary to facts of which the court will take judicial notice (Glenn Coal Co. v. Dickinson Fuel Co., 72 F. 2d 885, 889 (4th Cir. 1934)); or where they are not susceptible of proof by legiti-

mate evidence (Cohen v. United States, 129 F. 2d 733 (8th Cir. 1942), Greeson v. Imperial Irr. Dist., 59 F. 2d 529 (9th Cir. 1932)); or where they are contrary to uncontroverted material in the file of the case (Interstate Nat. Gas Co. v. Southern Calif. Gas Co., 209 F. 2d 380, 384 (9th Cir. 1953), In re Woodmar Realty Co., 294 F. 2d 785 (7th Cir. 1961), cert. denied 369 U.S. 803, 82 S. Ct. 643, 7 L. Ed. 2d 550 (1962)). However, it may be shown by plaintiff, in the context of this case, that some matters of which the court may take judicial notice should not be so noticed. See McCormick, Evidence § 330 (1954). Where file material is involved, if the plaintiff did not have full opportunity to meet or controvert such material, then it should not be used to nullify the allegation. If evidence merely tends to show that an allegation is not true, the allegation must be taken as true in this default. Finally, the plaintiff is entitled to the benefit of all reasonable inferences from the evidence tendered.

Attempts by defendant to escape the effects of its default should be strictly circumscribed. It should not be afforded an opportunity to litigate what has already been deemed admitted in law. In the absence of an exceedingly strong showing that an allegation is untrue under the rules set forth above, the allegation stands as admitted.

The Special Master stated that the failure to adopt any proposed finding is not a determination that such finding

> "is false, or disproved, or that it will not be fully established by the close of the hearings on damages."

Such proposed findings are not at issue except to the limited extent noted above. The Special Master specifically stated that

> "the defendants are not allowed by the present refusal to adopt such tendered findings to contest them on the merits as they could do if there had been no default."

The matter is returned to the Special Master to proceed in accordance with these views. So ordered.

H.

308 Federal Supplement 679

UNITED STATES DISTRICT COURT
S. D. NEW YORK.

TRANS WORLD AIRLINES, INC., *Plaintiff*,

v.

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY, *Defendants*.

No. 61 CIV. 2324

Dec. 23, 1969.

METZNER, District Judge.

The special master, Herbert Brownell, Esq.. has submitted his report awarding plaintiff $137,611,435.95 as damages after trebling as provided in § 4 of the Clayton Act, 15 U.S.C. § 15. The matter had been referred to him for assessment of damages following the entry of a default judgment imposed as a sanction for failure of Howard R. Hughes to appear for deposition. Trans World Airlines, Inc. v. Hughes, 32 F.R.D. 604 (S.D. N.Y. 1963). In the ensuing discussion, plaintiff will be referred to as TWA and defendants Howard R. Hughes and Hughes Tool Company as Hughes and Toolco, respectively.

Both parties have filed objections to the report. The defendants move to confirm those portions of the report which are favorable to them and move to reject those portions which are adverse to their position. If their contentions are correct, TWA is not entitled to any damages. TWA objects to the report on the ground that the amount awarded is inadequate. The maximum figure for which it contends is $510 million plus prejudgment or moratory interest of over $175 million. The respective contentions of the parties will be discussed below.

The history of this litigation, in which TWA sought damages for claimed antitrust violations, shows that it has been long and complex. It was originally instituted on June 30, 1961. On August 31, 1961, the case was assigned to me for

all purposes pursuant to Rule 2 of the General Rules of this court. Since then it has been the subject of many pretrial rulings, opinions and appeals. The sufficiency of the complaint was upheld in an opinion reported in 214 F. Supp. 106 (S.D. N.Y. 1963). In that opinion this court also ruled adversely to defendants' contention that the acts complained of were exempt from the antitrust laws by virtue of certain orders of the Civil Aeronautics Board. After the court was informed that Hughes would refuse to appear for examination, it granted TWA's application for a default judgment. 32 F.R.D., *supra*. The Court of Appeals affirmed the rulings found in 214 F. Supp., *supra*, but refused to pass upon the propriety of the entry of the default judgment. 332 F. 2d 602 (2d Cir. 1964). On March 8, 1965, the Supreme Court dismissed writs of certiorari as improvidently granted. 380 U.S. 248, 249, 85 S. Ct. 934, 13 L. Ed. 2d 817, 818. The special master and the court then made preliminary rulings as to the effect of the default judgment on the damage hearings. 38 F.R.D. 499 (S.D. N.Y. 1965).[1]

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[1] Despite these rulings defendants moved to compel TWA to come forward with evidence to preclude the finding of a fact which in effect would remove the basis of TWA's claim. In a memorandum opinion dated January 4, 1966, denying the motion, the court said:

> "A 7-inch stack of affidavits, briefs and supporting documents has been submitted in connection with this motion. After reading them and listening to defendant's extensive argument, one wonders why the case was never defended on the merits, if all that defendant contends for is true. At this late date, after the complaint has been sustained and a default judgment entered, with appeals to the Court of Appeals and a writ of certiorari dismissed by the Supreme Court, defendant now, in effect, seeks summary judgment in its favor. It asks that plaintiff come forward to negative a fact which defendant asserts as true. The shoe is on the other foot. The plaintiff has a judgment in its favor and the only limitation thereon has been spelled out in the order of the Special Master dated July 30, 1965 and the order of this court dated November 16, 1965. Together they outline the procedures to be followed before the Special Master, where the matter is properly pending. The court cannot conceive of any further reason for delay in proceeding before the Special Master until the hearings are completed."

The hearings before the special master commenced on May 2, 1966. Some 11,000 pages of testimony were taken from expert witnesses in the field of economics, engineering, finance and accounting. Over 800 exhibits containing 60,000 pages were admitted in evidence. The special master thereafter rendered a 323-page report. A hearing was held on the objections of the parties to the report. They submitted over 1,300 pages of briefs and memoranda, including a 62-page listing by defendants of 216 specific objections to the report.

At page 12 of his report, the special master states, "Despite prior rulings in the case, this [effect of the default] has been the subject of continuing disagreement between the parties in the damage hearings." I thought that this issue had been clearly disposed of in the preliminary report of the original special master, dated July 30, 1965, and in this court's opinion in 38 F.R.D. 499.

As stated in that opinion at page 501:

> "Liability is not an issue for the Special Master except in a very limited sense. The sufficiency of the complaint has already been established by the denial of defendant's motion to dismiss. 214 F. Supp. 106 (S.D. N.Y. 1963), aff'd, 332 F. 2d 602 (2d Cir. 1964), writ of cert. dismissed, 380 U.S. 248, 85 S. Ct. 934, 13 L. Ed. 2d 817 (1965). By virtue of the default the defendant has admitted the truth of the well-pleaded allegations of the complaint. Thomson v. Wooster, 114 U.S. 104, 5 S. Ct. 788, 29 L. Ed. 105 (1885)."

In the present report, the special master has referred to another case, Harshman v. Knox County, 122 U.S. 306, 7 S. Ct. 1171, 30 L. Ed. 1152 (1887), which on its facts is even stronger than Thomson v. Wooster, *supra*. Without going into the details of that case, it is sufficient to quote the Court's language at page 317, 7 S. Ct. at pages 1175-1176:

> "In the absence of a denial, the fact as stated in the petition of the plaintiff is confessed by the default, and

stands as an admission on the record, of its truth by the defendant."

In the hearings before the special master, TWA did not have to present any evidence to support the well-pleaded allegations of the complaint, and defendants may not offer evidence to controvert such allegations. To the extent that they did, it will be disregarded. That opportunity was forfeited by defendants as a result of the default.

Defendants may show, however, that an allegation is not well pleaded, but only in very narrow, exceptional circumstances. The *Thomson* and *Harshman* cases clearly support this rule. For example, an allegation made indefinite or erroneous by other allegations in the same complaint is not a well-pleaded allegation. Other examples, as detailed in 38 F.R.D. at 501, are allegations which are contrary to facts of which the court will take judicial notice, or which are not susceptible of proof by legitimate evidence, or which are contrary to uncontroverted material in the file of the case. That opinion went on to say:

"However, it may be shown by plaintiff, in the context of this case, that some matters of which the court may take judicial notice should not be so noticed. See McCormick, Evidence § 330 (1954). Where file material is involved, if the plaintiff did not have full opportunity to meet or controvert such material, then it should not be used to nullify the allegation. If evidence merely tends to show that an allegation is not true, the allegation must be taken as true in this default. Finally, the plaintiff is entitled to the benefit of all reasonable inferences from the evidence tendered.

"Attempts by defendant to escape the effects of its default *should be strictly circumscribed.* It should not be afforded an opportunity to litigate what has already been deemed admitted in law. *In the absence of an exceedingly strong showing* that an allegation is untrue

under the rules set forth above, the allegation stands as admitted." 38 F.R.D. at 501 (emphasis added).

This quoted language had in mind the impact of the failure of Hughes to appear for deposition. His default stymied TWA in the acquisition and presentation of evidence in support of its claim. As the Court of Appeals said (332 F. 2d at 614):

> "We think it clear beyond any question, in light of all the circumstances here presented, that the deposition of Hughes was necessary to all aspects of this litigation * * *."

And again at page 615:

> "Hughes' deposition was absolutely essential to the proper conduct of the litigation."

Defendants claim that there are allegations in the complaint which are contrary to facts of which the court will take judicial notice. They particularly refer to that portion of the third paragraph of the complaint which alleges that Toolco was engaged

> "since in or about 1939 in the development, manufacture and acquisition of aircraft and related equipment from the manufacturers thereof in various states and in the sale and lease of such aircraft to air carriers in various other states for use in interstate and foreign commerce."

They request that judicial notice be taken of the fact that Toolco never "manufactured" or engaged "in the sale and lease" of aircraft. I cannot take judicial notice of these matters because they are not indisputably true.

The question whether judicial notice can be taken of facts which are not indisputable has been the subject of disagreement among scholars. Wigmore thought that notice should not be limited to indisputable facts. He took the position that the taking of judicial notice of a fact merely

relieved the offeror of more formal proof. However, this did not prevent his opponent from disputing the fact by offering contrary evidence. 9 Wigmore, Evidence § 2567 (3d ed. 1940). See also Thayer, Preliminary Treatise on Evidence 308-309 (1898); Ohio Bell Telephone Co. v. Public Utilities Comm'n of Ohio, 301 U.S. 292, 301-302, 57 S. Ct. 724, 81 L. Ed. 1093 (1937); United States v. Aluminum Co. of America, 148 F. 2d 416, 445-446 (2d Cir. 1945). The more recent thinking is that only indisputable facts such as matters of common knowledge and matters capable of certain verification will be judicially noticed. When noticed such facts are binding on the trier of the facts. Morgan, The Law of Evidence, 1941-1945, 59 Harv. L. Rev. 481, 482-87 (1946); McCormick, Evidence § 330 (1954); McNaughton, Judicial Notice, 14 Vand. L. Rev. 779 (1961); Alvary v. United States, 302 F. 2d 790, 794 (2d Cir. 1962).

I do not have to resolve the debate among scholars concerning the taking of judicial notice during trial. It is clear to me that after a default only indisputable facts should be noticed to contradict allegations of the complaint. Otherwise a preliminary hearing would be necessary to afford plaintiff a chance to rebut factual material which a defendant claims should be judicially noticed. See the *Ohio Bell* and *Alcoa* cases, *supra*. In effect it would permit a defendant to litigate facts which are foreclosed by a default under the *Thomson* and *Harshman* cases, *supra*.

In determining indisputability, the courts will consider "the nature of the subject, the issue involved, and the apparent justice of the case." McCormick, Evidence § 330, at 709 (1954). Each of these factors counts against noticing the proposition offered by defendants. First, the subject of the proposition is not scientific, historical, geographic or statistical matter of the kind courts are most willing to notice. Instead it is a garden variety proposition about who did what, when and where. Second, the facts which defendants wish judicially noticed in this litigation would be relevant to the central issue of liability under the

antitrust laws. The more critical an issue is to a case, the more reluctant courts should be to determine it by taking judicial notice. Third, the apparent justice of the case in the posture of a default based upon wilful refusal to appear for deposition requires me to resolve all doubts against defendants.

The defendants are urging that certain facts are indisputable because they appear in orders of the CAB and material in the CAB files. While judicial notice may be taken of the existence and contents of such material, it does not follow that the court will take judicial notice of the truth or accuracy of the contents. Stasiukevich v. Nicolls, 168 F. 2d 474, 479 (1st Cir. 1948). In that case the court found that "the findings are merely evidence of the facts asserted," and went on to state that "of course, the other party may introduce evidence tending to prove the contrary of the facts asserted in the official report." Since a finding is merely evidence and is rebuttable, it cannot be considered indisputable. As to material in the CAB files, it stands on even weaker footing, since it has not been subject to any sort of examination of an adversary nature.

Defendants argue that TWA has failed to establish that it received late or inadequate deliveries of jet aircraft as a proximate result of the conduct of the defendants in violation of the antitrust laws. They assert that the claim "is defective for the further reason that the plaintiff has failed to establish by a preponderance of the evidence that, but for defendants' conduct, it would and could have accomplished the results now asserted."

It has been said of "proximate cause" that:

> "There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion * * * Much of this confusion is due to the fact that no one problem is involved, but a number of different problems, which are not distinguished clearly * * *." Prosser, Law of Torts 240 (3d ed. 1964).

The question of proximate cause involved in this case arises out of a distinction between the *fact* of damage and the *amount* of damage. The Supreme Court explained this distinction recently in Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n. 9, 89 S.Ct. 1562, 1571, 23 L.Ed.2d 129 (1969):

> "Zenith's burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by its proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage."

Basically defendants seek to deny that they caused *any* injury to TWA, i.e., to deny the *fact* of damages. The fact of damages, however, is an element of liability. The complaint alleges that the defendants committed certain acts which caused injury to TWA. The allegations are admitted by the default and the fact of injury is thereby established. The only question remaining is the amount of damages defendants should pay TWA.

When we come to the computation of the amount of damages in an antitrust case, we look to the rules enunciated in Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652 (1946). Those rules are that the trier of the facts must use the most precise proof available, that even where a defendant by his own wrong has prevented a more precise computation, the award may not be based on speculation or guesswork, and that the award must be predicated on a just and reasonable estimate of the damage, based on relevant data.

Finally, the report must be reviewed in the light of the strong presumption in favor of the findings of fact made by the special master. They are to be accepted unless clearly erroneous. Fed.R.Civ.P. 53(e)(2); Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 689, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946); United States v. S. Volpe & Co., 359 F.2d 132, 134 (1st Cir. 1966); E. I. du Pont de Nemours &

Co. v. Purofied Down Prods. Corp., 176 F.Supp. 688, 691 (S.D.N.Y. 1959). This rule is the same as Rule 52(a), which is applicable to findings of fact made by the trial court in a nonjury case. Such a finding is clearly erroneous only where "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948).

The complexity of the proof in this case is attested to by the nature of the testimony proffered by the parties. Intricate questions of engineering, finance and economics were involved.[2] They were reviewed and resolved with

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[2] An example of the complexities of the proof may be found in the following quotation from the report (page 94) which relates to testimony affecting only one aspect of an item of damage:

"The above formula for the B-331s was determined by a method commonly recognized by statistical experts for determining relationships between two variables, and known as regression analysis or as the method of least squares (Tr. 7805-6). As an example, by plotting on graph paper aircraft hours operated (independent variable) and amount of operating expenses (dependent variable) for several airlines, one can connect the dots on the graph with a straight line which represents an average relationship between the points. There are various standards for placing the straight lines, but the method of least squares fits the line to the various observations (dots) so as to reduce the squares of the deviations (differences) to a minimum. It produces a line showing the average of the various lines that might be fitted to the observations. If one squares the deviations and divides by the number of observations, one gets the standard error of estimate; and, given a normal distribution of errors, 68% of the observations should fall within one standard of error and 95% of the observations should fall within two standard errors. Relationships based on fewer observations tend to be more untrustworthy, and results showing a large proportion of observations outside the standard error of estimate likewise tend to be untrustworthy unless validated by independent means.

"No claim was made by Simat that regression analysis was anything more than a statistical method useful in testing the

painstaking care by a special master of extremely high competence. Especially apt here is the language of the court in Badenhausen v. Guaranty Trust Co., 145 F.2d 40, 53 (4th Cir. 1944), cert. denied, 323 U.S. 797, 65 S.Ct. 440, 89 L.Ed. 636 (1945), referring to the effect to be given to the findings of a special master who prepared a plan of railroad reorganization:

> "Especially imperative is the rule when, as here, the master has lived with the case for four years, has patiently studied the complex questions involved and has listened with painstaking care in extended hearings to the arguments and proposals of all the parties who desired to be heard."

To the same effect, see Santa Cruz Oil Corp. v. Allbright-Nell Co., 115 F.2d 604 (7th Cir. 1940).

Bearing these considerations in mind, I will first pass upon the specific objections by the defendants to the report of the special master.

Defendants' Objections to the Report of the Special Master

I. Determinations Relating to Defendants' Alleged Antitrust Violations.

A. Facts which defendants claim should have been found.

Objections 1-3 and 13. The suggested findings as to CAB approval are irrelevant to the proceedings and were so adjudged by this court on defendants' motion to dismiss (214

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validity of assumptions made by non-mathematical observations and raw data and conclusions based thereupon. Nevertheless Simat was of the opinion that the statistics produced by regression analysis under the assumptions made in his report confirmed his expert opinion as to the financial results that would have been obtained under the relevant equipment assumptions."

F.Supp. 106), which determination was affirmed by the Court of Appeals (332 F.2d 602) when it said at page 610:

> "Nor do we find any merit in the defendants' alternative contention that the Civil Aeronautics Board, in approving Toolco's acquisition of control over TWA and certain specific transactions thereafter, immunized the defendants from the operation of the antitrust laws as to all the ramifications of these transactions."

Objection 4 with 11 subdivisions. These are suggested findings based on a suggested finding that Toolco never manufactured or supplied commercial transport aircraft to United States air carriers in competition with manufacturers and suppliers of such aircraft. First, the defendants by their default admit that they did engage in such activity. Second, the suggested findings do not necessarily clearly negative liability when all the allegations of the complaint are read together. Third, there is sufficient in the record on this default to justify the refusal of the special master to so find. In this regard, reference is made to the placing of orders by Toolco for Convair 880s built to the specifications of Capital Airlines, the placing of orders for Convair 990s built to the specifications of American Airlines, the sale of Boeing 331s to Pan American and the leasing of Convair 880s to Northeast Airlines.

Objections 5-8. The suggested findings that during the period covered by the complaint Hughes did everything to explore the source of supply of jets in the best interests of TWA fly directly in the face of the alleged wrongdoing by the defendants which is admitted by the default. Additionally the record contains evidence to the effect that Hughes was not acting solely in the best interests of TWA in the development of the Model 18 by Convair.

Objections 9, 9a, 9b and 10. These are suggested findings that defendants did not engage in financing the acquisition of aircraft in competition with insurance companies, commercial banks or other lending institutions and that TWA

obtained such financing from various airplane manufacturers and banks. I fail to see their relevancy in view of the charges contained in the complaint which are, in effect, that defendants dictated to TWA the methods and means of financing the acquisition of aircraft. See paragraphs 10(g), 23, 24, 26, 27 and 28 of the complaint.

Objections 11 and 12. These are suggested findings that Atlas never manufactured or developed aircraft and submitted a proposal pursuant to an agreement with Toolco for merger of Northeast Airlines and TWA which was reported as being fair. The default admits the allegations of the complaint regarding the conspiracy and that the proposed merger was advantageous to the defendants and disadvantageous to TWA. Further, as regards TWA reports favorable to the merger, the domination and control of TWA by Hughes must be taken into consideration in evaluating such reports.

B. Findings claimed to be clearly erroneous.

Objections 14, 15 and 17 to the findings that the activity by Toolco constituted "engaging in" the development and manufacture of aircraft by Toolco. The record is sufficient to sustain these findings.

Objection 16 to the finding that Toolco was engaging in this activity when TWA should have been arranging for purchases from other suppliers. This finding is sustained by paragraphs 16, 17, 24, 25 and 26 of the complaint.

Objections 18, 19 and 20 to the findings regarding the purchase of Pratt & Whitney engines, Toolco's trading on its delivery positions as to jets and Toolco's refusal to assign to TWA its rights to acquire jets. These objections are predicated on an assumption that the findings were made after a contested trial following full pretrial discovery procedures. Obviously it is not open to defendant to claim, as it does in objection 20, that it disproved the allegations in paragraph 18 of the complaint, or that the engines were

purchased for TWA's best interests and were not resold at a profit.

Objection 21 to the finding that TWA's management was dominated by Hughes is clearly frivolous. The finding is not only admitted by the default, but was so found in 32 F.R.D. at 606 and 332 F.2d at 614.

Objection 22 to the finding that the factory representatives were Toolco employees reporting to Rummel as the representative of Toolco is captious. The record shows that Rummel was Toolco's special representative even though he received compensation from TWA. The factory representatives reported to a TWA employee, Rourke, who reported to Rummel. If Rourke had been paid by Toolco, reimbursement would have been made to Toolco by TWA as part of the cost of the aircraft.

C. Conclusions of law claimed to be erroneous.

Objections 1-12 are directed to conclusions of law made by the special master. His findings of fact have been sustained by the rulings on the objections made above. Paragraphs 9 and 10 of the complaint have been admitted by the default and defendants' judicial notice argument has been rejected. The conclusions of law are further buttressed by the opinion of the Court of Appeals that the specific transactions alleged to have been effected by the defendants state a cause of action under the anti-trust laws. 332 F.2d 602, 611. These objections are overruled.

II. Determinations Relating to TWA's Claim That It Received an Inadequate and Late Jet Fleet.

A. Facts which defendants claim should have been found.

Objections 1, 2, 3 and 4 are suggested findings similar to those in objections 6 and 7 in I A, *supra*, and are similarly disposed of. It is frivolous to claim that this record could

possibly sustain a finding that TWA was an independent negotiator.

Objection 5. The suggested finding that defendants' negotiations with Convair in 1955 did not restrain trade takes a mediate fact, meaningless without other mediate facts, and draws a negative conclusion of law out of context.

Objections 6, 7, 8, 9, 11, 12, 13, 14 and 16. These suggested findings are misleading. They state facts which assume that the conditions were not of defendants' doing. The assumption is wrong, since the state of the record on liability shows that defendants' conduct brought about the fact situation, and it is this very conduct which is the basis of TWA's complaint. Furthermore, reliance on achieving better delivery dates with an increase in orders only buttresses TWA's position that prompt action with its welfare in mind would have achieved even better results.

Objections 10 and 15. These are suggested findings that TWA equalled its domestic competitors in jet service in 1959, and in 1960 flew more transatlantic seats relative to Pan American and earned a higher operating revenue than Pan American. Assuming the suggested findings to be true, they miss the point in issue that defendants' actions prevented even better results from being achieved.

Objection 17. This is a suggested finding that TWA has failed to show that it would have ordered jet aircraft in 1955 from Boeing rather than from Douglas absent the exercise of any control by defendants. The default precludes the necessity of making any such showing.

Objections 18, 19 and 20. The suggested findings that Toolco in 1959 determined that it was advisable to reduce the planned jet fleet and that Thomas and the firm of Coverdale & Colpitts agreed are negatived by the default and are not borne out by the record.

Objection 21. The suggested finding that in the spring of 1959 TWA was in poor financial condition ignores the

allegations of paragraphs 4, 10(b), 10(g), 23, 24 and 26 of the complaint regarding Toolco's domination and control of TWA.

Objection 22. The suggested finding that it was not unusual for an airline to cut back initial jet orders covers only part of the relevant fact. The remainder is that such an airline would, and did, at the same time increase orders for other models.

Objection 23. The suggested finding that TWA has failed to show domination by defendants preventing the exercise of independent judgment by the executives of TWA completely ignores the default.

Objection 24. The suggested finding that Rummel was a middle echelon executive with no power of decision as to what equipment could be purchased by TWA ignores the record, unless it be defendants' contention that the decision as to what equipment could be purchased was lodged in Hughes.

Objections 25 and 33. The suggested findings that the decision to reduce the size of the initial jet fleet and that the administration of the Convair contract by defendants were not in restraint of trade are contrary to the admissions made by the default.

Objection 26. The suggested finding that Thomas and the board of directors of TWA ratified the transfer by Toolco of six of the Boeing 331s to TWA's competitor Pan American overlooks the admitted exercise of control and domination of TWA by Hughes.

Objection 27. The suggested finding that the transfer was not in restraint of trade is contrary to the admissions made by the default.

Objections 28, 29 and 29A. These are suggested findings that TWA has failed to show that absent control by defendants it would have ordered 63 jets, that it could have financed such fleet and obtained earlier delivery dates.

The default precludes the necessity of making any such showing.

Objections 30, 31 and 32. These are suggested findings that failure to meet the delivery schedule of the Convair 880s was not defendants' responsibility, that such delay was attributable to Convair, even after January 1961. The suggested findings are contrary to the admissions inherent in the default and to the testimony in the record.

Objection 33. The suggested finding that TWA has failed to show that defendants' administration of the Convair contract unreasonably restrained trade ignores the effect of the default.

B. Findings claimed to be clearly erroneous.

The objections under this subdivision are numbered 34 through 74. In the main, the findings attacked are just the opposite of what defendants claim the special master should have found as set forth in objections 1 through 33 in II A above.

The findings made by the special master which are referred to in this subdivision are not clearly erroneous. As to objection 56 to the finding that the hypothetical jet fleet and reconstructed delivery dates constitute a proper basis for computing damages, I refer to the discussion of the *Bigelow* case, *supra*. Many of the findings are clearly established by the admissions inherent in the default. Others rely on disputed evidence in the record, but obviously this does not require their rejection under the "clearly erroneous" rule. In addition to these comments for overruling the objections, I refer to specific comments made in ruling on objections 1 through 33 in II A above.

C. Conclusions of law claimed to be erroneous.

Objections 1, 2 and 3 have been disposed of in the discussion of proximate cause and the *Bigelow* case, *supra*. The remaining objections 4 through 14 are directed toward

conclusions of law which are amply supported by the findings of fact sustained by the above rulings.

III. Determinations Relating to TWA's Claim That It Was Injured by Leasing Jet Aircraft from Toolco.

A. Facts which defendants claim should have been found.

Objection 1. The suggested finding that the leases of jets in 1959 and 1960 were made pending consummation of permanent financing disregards the admissions of the allegations in paragraph 20 of the complaint.

Objections 2 and 3. The suggested findings that the leases were approved by the CAB and did not disclose any restrictions in acquisitions by TWA are subject to the same rulings made on objections 1-3 and 13 in I A above. The leases were between Toolco and its controlled TWA.

Objections 4 and 5. The suggested findings that there is no evidence that the rentals were unreasonably high and that Toolco received no rental until December 30, 1960 are immaterial.

Objection 6. The suggested finding that there is no testimony that TWA would have purchased rather than leased the jets absent the alleged conduct of defendants in violation of the antitrust laws is subject to the same ruling made with regard to objection 17 in II A above.

B. Findings claimed to be clearly erroneous.

Objection 7 to the finding that the leased jets were the first made available to TWA by defendants during the years 1955 to 1960 is overruled because there is no such finding.

Objection 8 to the finding that the leases were made with the understanding that TWA would not lease or purchase jets from other potential suppliers is overruled because of

the admission of the factual allegations of paragraph 20 of the complaint.

Objections 9, 10 and 11 refer to statements of contentions by the special master and are not findings.

C. Conclusions of law claimed to be erroneous.

Objections 1 through 5. In view of the rulings and comments on the objections referred to in A and B of this part, the conclusions of law made by the special master, referred to in objections 1 through 4, are correct. Objection 5 to the use of interest cost of capital is more an objection to a finding of fact and is overruled because the finding is not clearly erroneous.

IV. Determinations Relating to TWA's Claim for Lost Operating Profits.

A. Facts which defendants claim should have been found with reference to the International Division.

Objections 1, 2, 3 and 4. These are suggested findings that TWA has failed to prove damage in this category based on assumptions of TWA's expert. They are predicated on finding that the figures of defendants' experts are correct. The refusal to make such findings was not clearly erroneous.

Objection 5 is a suggested finding that there is no evidence in the record to justify an assumption that TWA would have leased Boeing 331s to Northeast in October and November 1959. The assumption made by TWA's expert was justified on the facts as to the time of year and passenger demand.

B. Findings claimed to be clearly erroneous with reference to the International Division.

Objection 6 is to the finding that there would be an $89.3 million increase in operating revenue. This finding is not clearly erroneous.

Objections 7 through 7j. These objections except 7i are directed to findings as to the "competitive response" which defendants' expert relied on in his computations. The findings are supported by the record and are not clearly erroneous. Objection 7i is to the finding that TWA's comparative shortage of jet equipment caused it to lose its market position. The finding is supported by the record.

Objection 8 is to the finding relating to "beyond-the-gateway and charter service passengers." This finding is supported by the record.

Objections 9, 9a and 9b. These objections disagree with the special master's findings as to operating costs. The findings are supported by the record.

C. Facts which defendants claim should have been found with reference to the Domestic Division.

Objection 1. The suggested finding that there is no evidence that TWA would have leased four Boeing 720Bs or bought 18 Boeing 131Bs would not be a correct finding. The record justifies the opposite finding made by the special master.

Objection 2. The suggested finding that TWA has failed to prove that its net operating profits would have increased is predicated on accepting defendants' evidence. The conflict in the evidence was for the special master to resolve and his contrary finding is supported by the evidence.

Objection 3 is a suggested finding that TWA has failed to prove that its average rate of capacity could have been maintained with an added jet capacity. The suggested finding relies on the testimony of defendants' expert which the special master was entitled to reject.

Objection 4 is a suggested finding that in the 1959-1963 period there was an acute overcapacity which alarmed the CAB as well as the airline industry. The suggested finding

does not affect the fact that under proper conditions TWA would have been able at least to maintain its competitive position in relation to other carriers. See chart at page 138 of the report.

Objection 5 is a suggested finding that as airlines added jet capacity in 1959-1963 the load factors steadily declined. The implication of this suggested finding disregards the fact that with an adequate jet fleet TWA's position would have been different. See page 133 of the report.

D. Findings claimed to be clearly erroneous with reference to the Domestic Division.

Objections 6 and 13 to the findings as to increased transportation revenues and increased operating costs are overruled. The findings are supported by the record.

Objections 7 and 8 are to the findings as to TWA's shortage of jet equipment. The findings are supported by the record.

Objections 9, 9a and 9b to the findings using the average annual load factor in estimating added traffic are overruled. See comments on the immediately preceding objections 3-5.

Objection 9c. The objection does not encompass the complete finding of the special master.

Objection 9d. The finding objected to is correct in the context used by the special master.

Objections 10, 10a, 10b, 10c, 10d, 10e and 10f. These objections go to findings by the special master in which he refused to accept defendants' testimony as to "marginal load" factor as opposed to accepting TWA's testimony as to "annual average load factor." Here again there is present a conflict of testimony which the special master was justified in resolving as he did. See the findings to which objections 9, 9a and 9b immediately above are directed.

Objection 11 is to the finding that TWA testimony adequately takes into account changes in stage lengths accompanying the introduction of jets. The special master simply resolved the conflicting testimony on this subject and his finding is supported by the record.

Objections 12 and 12a. Here again the objections are predicated on the refusal of the special master to accept the testimony of defendants' expert as opposed to that of TWA's expert. The objections are overruled.

E. Fact which defendants claim should have been found with regard to the added cost of operating the Boeing 331s.

Objection 1. The suggested finding that there would have been increased costs in operating five 331s over the actual cost of operating five 331Bs which were leased is predicated on accepting defendants' testimony. The special master was justified in refusing to do so for the reasons stated in the report.

F. Facts which defendants claim should have been found with regard to mitigation of damages.

Objections 1 and 2. These are suggested findings that Toolco offered TWA four Convair 880s in 1961 which TWA refused and that TWA could have acquired additional jets in 1961-1963, which it failed to do. The suggested findings completely ignore the existence of the new management of TWA, its problems with defendants at the time, and its business judgment to concentrate on Boeing planes for the best interests of TWA.

G. Finding claimed to be clearly erroneous with reference to mitigation of damages.

Objection 3 to the finding that the purchase of four Convair 880s was not feasible as a business matter is overruled. See comment on the immediately preceding objections 1 and 2.

H. Conclusions of law claimed to be erroneous.

Objection 1. The import of the conclusion as set forth in this objection does not appear in the report.

Objection 2. The application of the standards of proof set forth in the *Bigelow* case, *supra*, is proper.

Objection 3. The special master was justified in accepting the testimony of TWA's expert.

Objections 4, 5 and 6. The special master acted properly with regard to the matters to which these objections are made.

Objection 7. This objection ties in with objection 1 in E immediately above and is similarly disposed of.

Objection 8. This objection does not correctly reflect the cited page of the report. The conclusion reached by the master there was proper.

V. Determinations Relating to TWA's Claim for Disruption of Its Business.

A. Facts which defendants claim should have been found.

Objection 1. The suggested finding that the defendants were not responsible for late deliveries of the 880s has been rejected above (II A, objections 30-33).

Objection 2. The suggested finding that TWA was not subject to expenses it would not otherwise have incurred is not sustained by the record.

Objections 3, 4, 5 and 6. These are suggested findings that TWA was not damaged by reason of certain payments made to maintenance instructors and crew members, or costs allocated for use of a simulator and transition training plane. The suggested findings overlook the fact that TWA was paying for enforced idleness and refresher training made necessary by the delays. These are proper items of damage.

VI. Determinations Relating to the Computation of the Amount of the Damage Award.

A. Facts which defendants claim should have been found.

Objections 1 and 2. The suggested findings relate to a $12.3 million increased cost of capital on advance deposits and progress payments for the reconstructed fleet. The special master explained that to make such findings would "involve elaborate calculations and several speculative assumptions." The suggested findings are not supported by the record.

Objection 3. The suggested finding regarding the cost of purchasing the theretofore leased jets is incomplete and misleading standing alone.

B. Findings claimed to be clearly erroneous.

Objection 4 is to the finding refusing to make provision for increased cost of capital on advanced deposits and progress payments. The finding is merely the opposite of what defendants claim should have been found as detailed in objections 1 and 2 in IV A above. The objection is overruled.

Objection 5 is to the finding which added interest cost on advance deposits for twenty 880s to TWA's capital base. The finding is not clearly erroneous.

Objections 6 and 7 are to the findings excluding capital expenditures for ratable parts, expendable parts and construction work. The findings are not clearly erroneous.

Objection 8 is to the finding limiting to the years 1959 and 1960 the increased interest cost of owning instead of leasing the jets. The special master was justified in making the finding.

C. Finding claimed to be erroneous regarding the use of TWA Exhibit 50.

Objection 1 is to the finding that the principles of combination and adjustment used by TWA's expert were proper. The special master was justified in making this finding.

D. Conclusions of law claimed to be erroneous.

Objection 1 is to the use of the external borrowing rate and is overruled.

Objection 2 relates to objection 4 in VI B above and is overruled.

Objection 3 to the adjustments of TWA's historical financial statements is overruled.

TWA's Objections to the Report of the Special Master

TWA has filed objections to the report on the following grounds:

1. The award as a whole is inadequate.

2. The special master erred in rejecting TWA's comparative profit measure of damages.

3. The award on TWA's claim for losses in operating profits is inadequate.

4. The award on TWA's claim for losses due to leasing jets from Toolco is inadequate.

5. The special master erred in denying damages for losses connected with financing the jet fleet.

6. The special master erred in denying damages for losses due to delay in disposing of the displaced piston aircraft.

7. The special master erred in finding that TWA is not entitled to an award of prejudgment or moratory interest.

I. Inadequacy of Total Award.

The contention that the award as a whole is inadequate is predicated on a claim that it permits the defendants to retain the fruits of their wrongdoing.

Toolco is alleged to have acquired its stock interest in TWA at a cost of $94 million. On May 3, 1966 it sold this stock for a net price of $545.8 million, with a resulting profit of $452 million. After payment of the 25% capital gains tax, the net profit after taxes is calculated at $339 million. I am advised that any judgment for damages in this case is fully deductible from current income for tax purposes. Therefore, on the award recommended by the special master, the ultimate cost to Toolco of paying such award would only be $75 million, leaving Toolco with a net profit of $265 million. TWA claims that Toolco should not be permitted to retain this amount since it violates the theory of unjust enrichment.

The fallacy in the application of this theory to this case is that the profit on the sale of the stock is not attributable to the illegal acts of the defendants. Defendants' control and domination of TWA ended on December 30, 1960. TWA does not seek damages for the period subsequent to 1963 because it claims that by the end of 1963 the ill effects of defendants' control had been eliminated. At that time the stock was selling at about $32 a share compared with $86 a share at the date of sale. Therefore, the high value that the TWA stock reached in 1966 had nothing to do with the acts of the defendants. There is no dispute that Toolco's acquisition of the controlling interest in TWA was legal. It was the improper exercise of control that is attacked by the complaint. 214 F.Supp. at 109-110. What TWA seeks under this objection is not damages based on unjust enrichment flowing from the acts of the defendants, but rather punishment not within the contemplation of any accepted measure of damages. The cases relied on by TWA (*Bigelow, supra;* Southern Pacific Co.

v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 38 S.Ct. 186, 62 L.Ed. 451 (1918); Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968)) are not in point, since they speak of the unfairness of permitting a defendant to retain the profits flowing from his illegal acts.

This objection is overruled.

II. The Comparative Profit Measure of Damages.

TWA claims that the special master erred in not using its comparative profit studies as the measure of damages. One such study showed losses to TWA of approximately $170 million. Another showed losses of $121 million. TWA advanced a second measure of damages based on specifically computed losses claimed to flow from the defendants' conduct. The special master proceeded on this theory, but only awarded $45 million of TWA's claim of $105 million.

The first argument to support the comparative profit measure of damages is related to TWA's claim of unjust enrichment. Since the unjust enrichment theory has been rejected, this argument for the use of comparative profit studies fails.

TWA then argues that the comparative profit study is a proper and standard method of measuring damages without regard to the amount that it would produce. The special master rejected the comparative profit studies because there was a more precise method of ascertaining damages, which was the method he used. Further, he found that the comparative profit study was based on indefinite allegations of the complaint. The method he used was predicated on more specific allegations of the complaint. TWA's reliance on *Bigelow, supra,* for the use of the comparative profit measure of damages is misplaced. In that case the Court found at page 266 of 327 U.S. at page 580 of 66 S.Ct. that it was proper to use comparative receipts to measure damages because the defend-

ants' "wrongful action had prevented petitioners from making any more precise proof of the amount of the damage."

This objection is overruled.

III. Inadequacy of Award for Losses in Operating Profit.

TWA complains that in determining the "cost of capital" factor in computing operating profit the special master erred in using 6% for 1959 and 6.3% for 1960. If the jet fleet had been available for use by TWA at the times it should have been, TWA would have needed capital at those times to finance the purchase of the jets. The interest paid for borrowing the money would be a cost factor to be added to other operating expenses each year, and would be offset against the expected receipts to determine the operating profits that would be realized if there had been an adequate jet fleet.

The special master first determined the amount of money that had to be available beginning in 1959 to finance the purchases based on the "reconstructed" delivery dates of the aircraft. He then applied TWA's historical external borrowing rate at those times to arrive at the yearly cost of capital.

TWA contends that it was error to use this rate because its financial condition and the program of financing it followed were the result of the illegal acts of the defendants. It claims that if it had been free of restraint it could have undertaken financing in 1955, and that the maximum cost of borrowing would have been only the 4¾% paid by its competitors in 1955 and 1956 rather than the 6 to 6½% it paid in 1960.

The use of the lower rate for "cost of capital" would increase the operating profits found by the special master for the years in question, and would result in an increase

of $4.9 million (before trebling) in the award for this item of damage.

The special master rejected TWA's theory of damage on losses connected with financing the jets (see V below). Included in that loss was a projected cost of capital predicated on what TWA might have done in the area of financing in 1955. In view of this ruling, the rate of interest paid by competitors in 1955-1956 is not the true measuring rod. Rather, the rate paid by competitors in 1959 and 1960 is the more accurate figure. The record shows that it ranged from 5 to 6½%, not significantly different from the 6 and 6.3% rate used by the special master.

This objection is overruled.

IV. Inadequacy of Award for Losses Due to Leasing Jets from Toolco.

TWA seeks an increase of $1.6 million (before trebling) in the award for this item of damage. What has been said in III above applies equally as well to this objection. This objection is overruled.

V. Refusal to Award Damages for Injuries Alleged to Have Been Suffered in Financing the Jets.

It is the claim of TWA that the illegal acts of defendants with respect to financing the acquisition of jets by TWA caused it damage in the amount of $30 million. The claimed damage is based on the difference in its cost under the program which it was forced to adopt and a plan which it claims an independent TWA would have adopted. TWA offered expert testimony by Drexel Harriman Ripley, Inc., a firm of investment bankers, as to what an independent TWA would have done to provide adequate financing for the jet age. Defendants countered with their expert, Loeb, Rhoades & Co., a firm of investment bankers.

The special master reviewed the conflicting testimony in detail in pages 186 through 264 of his report. TWA claimed it would have undertaken financing operations in May 1955, October 1955 and May 1959. It appears that the latter two financings depended on "the prudence and doability of the May 1955 equity financing."

The special master referred to the standards of the *Bigelow* case (see page 12 of this opinion) and also noted that he was aware that TWA's financial condition in 1955 reflected the influences of Toolco. He then stated (page 258 of the report):

> "However, after careful deliberation, I have determined that TWA has not established that a prudent and competent management of TWA acting independently and free of any control or interference on the part of Toolco would and should have calculated in the spring of 1955 the amount of the financial requirements of TWA for the jet aircraft age. It is also my determination that an independent and prudent TWA management would not have accepted the recommendation of Drexel Harriman Ripley that TWA sell in May 1955 $55.5 million (net proceeds) in common stock of TWA.
>
> "For me to find to the contrary would in my opinion endow Drexel Harriman Ripley and an independent prudent Board of TWA in 1955 with a prescience, wisdom and perfection of timing that exceeds the natural capacity of the most experienced men acting without the benefit of hindsight."

The special master pointed out that no alternative theory of damages was presented by either TWA or the defendants. After discussing in detail the basis for his findings, the special master concluded that TWA had failed to sustain its burden of proof as to damages claimed to have been suffered as the result of the financing program that it was forced to adopt.

As already indicated, proof as to the amount of damages is unfettered by the effect of the default. The resolution of conflicting testimony is a question for the special master and the clearly erroneous rule is applicable.

This objection is overruled.

VI. Losses on Sales of Used Piston Aircraft.

TWA complains that the special master erred in refusing to award any damages for claimed losses on the sale of piston aircraft. It admits that no other area of damages presented quite such complex questions of computation. The amount of damages it seeks under this item is $2.7 million.

TWA takes the position that when jets were introduced into service pistons were made obsolete. Therefore, any delay in delivery of jets must have caused delay in the disposal of pistons. Since the market price of pistons steadily declined during this period, it is claimed that a loss to TWA resulted.

Here again the difference must be recognized between the fact of injury which is admitted and the amount of damages which TWA must show flowed from that injury. The special master found that TWA had failed to sustain its burden of proof on this item of damage and detailed his reasons on pages 272 through 295 of his report. I have reviewed those findings and find that they are supported by the record.

This objection is overruled.

VII. Moratory Interest.

TWA has asked to be awarded moratory, or prejudgment, interest on its recovery. This raises the question whether moratory interest is within my power to grant in an antitrust action for treble damages.

The right to interest on a sum recoverable under a federal statute is determined by federal, not local, law. Rodgers v. United States, 332 U.S. 371, 373, 68 S.Ct. 5, 92 L.Ed. 3 (1947); Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 715, 65 S.Ct. 895, 89 L.Ed. 1296 (1945). Under federal law interest is not available on sums recovered as penalties. Rodgers v. United States, *supra;* United States v. United Drill & Tool Corp., 87 U.S.App.D.C. 236, 183 F.2d 998, 1000 (1950) (dictum). Some cases have ruled that interest is also unavailable on double or treble damage recoveries in certain circumstances. Brooklyn Sav. Bank v. O'Neil, *supra* (Fair Labor Standards Act); United States v. Globe Remodeling Co., 196 F.Supp. 652, 658 (D.Vt. 1961) (False Claims Act).

Relying on *Brooklyn Bank,* Judge Wyzanski denied moratory interest in a treble damage antitrust case. Cape Cod Food Prods., Inc. v. National Cranberry Ass'n, 119 F.Supp. 900, 911 (D.Mass. 1954). He cites an unpublished decision by Judge Caffey in this district which reaches the same result. A different result is suggested by the rationale of United Mine Workers v. Coronado Coal Co., 258 F. 829, 846-847 (8th Cir. 1919), rev'd on other grounds, 259 U.S. 344, 42 S.Ct. 570, 66 L.Ed. 975, 27 A.L.R. 762 (1922), but that decision came before *Brooklyn Bank* or *Rodgers.*

Interest should not be allowed in antitrust actions where the statute provides for punitive damages. Treble damages compensate a plaintiff handsomely for all his losses, including loss of the use of money rightfully his.

This objection is overruled.

Conclusion

The report of the special master awarding damages in the sum of $137,611,435.95 pursuant to 15 U.S.C. § 15 is confirmed.

So ordered.

I.

312 Federal Supplement 478

UNITED STATES DISTRICT COURT,
S.D. NEW YORK.

TRANS WORLD AIRLINES, INC., *Plaintiff*,

v.

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY, *Defendants*.

No. 61 Civ. 2324.

APRIL 13, 1970.

METZNER, District Judge.

Plaintiff, Trans World Airlines, Inc., moves for the award of reasonable attorney's fees and costs of suit as the successful party in this antitrust litigation. Clayton Act § 4, 15 U.S.C. § 15. Plaintiff requests counsel fees in the sum of $10,500,000 and costs of suit in the sum of $2,230,602.

This court has already awarded damages in the sum of $137,611,435.95. 308 F. Supp. 679 (S.D.N.Y. Dec. 23, 1969).

The general rule is that the fixing of counsel fees in an antitrust action is within the discretion of the trial court, "reasonably exercised." Montague & Co. v. Lowry, 193 U.S. 38, 48, 24 S.Ct. 307, 48 L.Ed. 608 (1904). The problem of how to exercise this discretion reasonably has been the subject of much discussion. Farmington Dowel Prods. Co. v. Forster Mfg. Co., 297 F. Supp. 924 (D. Me. 1969), modified on appeal, 421 F.2d 61 (1st Cir. 1969); Hanover Shoe, Inc. v. United Shoe Mach. Corp., 245 F. Supp. 258, 302 (M.D. Pa. 1965), vacated on other grounds, 377 F. 2d 776 (3d Cir. 1967), aff'd in part on other grounds, rev'd in part on other grounds, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968); Noerr Motor Freight, Inc. v. Eastern R.R. Pres. Conf., 166 F. Supp. 163, 168 (E.D.Pa. 1958), aff'd 273 F.2d 218 (3d Cir. 1959), rev'd on other grounds,

365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961). In *Hanover Shoe, supra,* the court detailed what appear to be the generally accepted factors to be weighed in determining a reasonable attorney's fee. They are:

"(1) whether plaintiff's counsel had the benefit of a prior judgment or decree in a case brought by the Government,

(2) the standing of counsel at the bar—both counsel receiving the award and opposing counsel,

(3) time and labor spent,

(4) magnitude and complexity of the litigation,

(5) responsibility undertaken,

(6) the amount recovered,

(7) the knowledge the court has of the conferences, arguments that were presented and of work shown by the record to have been done by attorneys for the plaintiff prior to trial,

(8) what it would be reasonable for counsel to charge a victorious plaintiff."

However, these factors are only general guidelines and in the final analysis, "The reasonableness of an attorney's fee can only be determined with reference to a particular case." *Noerr, supra,* at 168.

We have here an unprecedented recovery—some 30 times greater than the next highest recoveries on record. In Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 587 (10th Cir. 1961), petition for cert. dismissed per stipulation, Wade v. Union Carbide & Carbon Corp., 371 U.S. 801, 83 S.Ct. 13, 9 L.Ed. 2d 46 (1962), the treble damages were $4,400,000 and in *Hanover Shoe, supra,* at 302, they were $4,239,000. Obviously the fee to be awarded will be unprecedented, but the court will attempt to insulate itself

against the impact of the amount requested in determining what a reasonable attorney's fee should be in this case.

The action was instituted on June 30, 1961. On August 31, 1961 it was assigned to me for all purposes pursuant to rule 2 of the General Rules of this court. The suit was of great magnitude and complexity, and was bitterly contested from its inception. The first phase of the litigation started with defendant Hughes Tool Company conducting deposition proceedings and discovery being made by both parties. Massive sets of interrogatories were served by both parties. The deposition proceedings covered some 80 days of testimony embodied in 13,000 pages of transcript. During this period attempts were made by TWA to serve Howard Hughes so that his deposition might be taken. Toolco engaged in extensive legal maneuverings to forestall the taking of the deposition. Some of those activities are recited in 332 F.2d 602, 611-613 (2d Cir. 1964). Defendant finally moved to dismiss the complaint, which motion was denied, 214 F. Supp. 106 (S.D.N.Y. 1963). The culmination of the maneuvering occurred on February 8, 1963 when counsel for Toolco stated that Hughes would not appear for deposition. He referred to "a business decision" not to proceed further with discovery proceedings, but rather to rest on the merits of the positions theretofore taken and seek judicial review thereof. The Court of Appeals said:

> "Hughes' deposition was absolutely essential to the proper conduct of the litigation. Yet he and Toolco seized upon every opportunity to forestall this event. To this end they demanded the production of a multitude of documents by TWA and the additional defendants and secured successive adjournments of the deposition. Indeed, Hughes and Toolco seemed to look upon the entire discovery proceedings as some sort of a game, rather than as a means of securing the just and expeditious settlement of the important matters

in dispute. It was only at the very eve of the Hughes deposition—after the other litigants had been put to much delay and expense—that the defendants made a 'business decision' to terminate discovery." 332 F.2d at 615.

Twenty-one pretrial hearings were held by this court during this phase of the litigation, resulting in the entry of many orders and opinions after hearing argument and reading papers submitted on contested matters.

The first phase ended, as far as this court was concerned, with the striking of Toolco's answer for failure of Hughes to appear for deposition. A judgment by default was directed to be entered in favor of TWA against Toolco and the counterclaims asserted by Toolco against TWA were dismissed with prejudice. 32 F.R.D. 604 (S.D.N.Y. 1963). Separate appeals were taken by Toolco from these two determinations (214 F. Supp. 106 and 32 F.R.D. 604), and the hearing on the amount of damages to be awarded TWA was stayed pending these appeals. The Court of Appeals did not pass upon the propriety of the entry of the default judgment against Toolco with respect to the complaint. It limited its review and affirmance to the holding that the district court had jurisdiction of the treble damage action and that issuance of certain orders by the CAB did not constitute a defense to the action. 332 F.2d 602. At the same time it sustained the dismissal of the counterclaims with prejudice because of Toolco's failure to produce Hughes for examination and its failure to produce certain papers and documents. Id. at 615. It also affirmed the granting of summary judgment to the plaintiff on the sixth counterclaim. Id. at 616. The Supreme Court granted certiorari in both appeals, 379 U.S. 912, 85 S.Ct. 261, 13 L.Ed.2d 184 (1964), and after hearing oral argument on March 3 and 4, 1965, dismissed the writs of certiorari as improvidently granted, 380 U.S. 248, 249, 85 S.Ct. 934, 13 L.Ed.2d 817 (1965).

The second phase of the litigation commenced with the hearings on the damage claims before a special master. Preliminarily, some matters of procedure were disposed of, including an appeal to this court from a ruling of the special master (38 F.R.D. 499 (S.D.N.Y. 1965)), and a motion by the defendant which in effect asked for summary judgment in its favor. This latter motion was denied on January 4, 1966. The special master thereafter directed that on May 2, 1966 plaintiff submit in written form all of the testimony it proposed to offer as its affirmative case. Plaintiff offered eight witnesses who were cross-examined by the defendant for a period of 50 days. The defendant followed the same procedure of submitting the testimony of its witnesses in written narrative form and offered four witnesses who were cross-examined by plaintiff for a total of 35 days. The testimony covered some 11,000 pages of transcript with over 800 exhibits containing 60,000 pages admitted in evidence. Experts of recognized standing in the fields of economics, engineering, finance and accounting were called by both sides. At the conclusion of the hearings before the special master, some 745 pages of briefs were submitted by the parties. The special master then rendered a 323-page report. Cross-motions addressed to the report were submitted to the court with an additional 600 pages of briefs by the parties in support of their respective positions. The court's opinion on these motions was rendered on December 23, 1969. 308 F. Supp. 679.

In this application, counsel of record have stated that they have spent 64,000 hours on this case since they were retained by plaintiff. I have excluded some 4,000 hours that are credited to persons who worked on the case but who were not members of the bar in the year that the services were rendered. One of these persons is credited with 3300 hours over a three-year period. An additional 1400 hours have been excluded, since they are not within the period for which compensation should be considered. I have also made an adjustment of hours depending on whether, at the

time the services were rendered, the person involved was a partner or associate. The result is that the firm is credited with 58,600 hours, of which 20,000 hours are allocable to partners' time and 38,600 hours allocable to associates' time. These hours were all attributable to the problems of this litigation.

One of the factors to be considered in determining a reasonable fee is whether the plaintiff had the benefit of a prior government judgment or decree. Defendant contends that the default judgment in this case gave plaintiff even greater assistance than a prior government judgment would have offered. This is an oversimplification of the problem. The default occurred only after several years of intensive litigation with appeals by defendant all the way up to the Supreme Court. If there had been a prior judgment which would have the prima facie effect afforded by § 5(a) of the Clayton Act, 15 U.S.C. § 16(a), this effort might well have been unnecessary.

Despite the default the issue as to the amount of damages was severely contested. There still remained for disposition intricate and complex issues and proof on the question of damages, which are amply reflected in the report of the special master. In addition defendant relitigated the effect of the default and the scope of judicial notice, which had previously been disposed of (38 F.R.D. 499). The length and scope of the damage hearings belie defendant's argument that "So far as that was concerned [absence of a prior judgment] their job was a cinch. The default * * * left only arithmetic to be done by plaintiff's counsel." For example, an expert offered by defendant was cross-examined for 22 days on the basis of a 656-page report which he had used in putting together his direct written testimony. Subsequently this witness made corrections in his direct testimony which produced 13 volumes of computer printouts. A supplemental report was then filed by defendant for this witness which contained 230 additional

pages with more computer printouts and work papers. All of this had to be analyzed and met by plaintiff's expert witness in this one field of inquiry.

We come now to the question whether compensation may be granted for time spent in this lawsuit on matters unconnected with the award of damages. § 4 of the Clayton Act provides that:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15.

Defendant contends that time spent by plaintiff's counsel in seeking to obtain equitable relief may not be considered in determining the amount to be awarded as counsel fee. This is true since the allowance of attorney's fees is incidental to the statutory right to damages. Decorative Stone Co. v. Building Trades Council, 23 F.2d 426 (2d Cir.), cert. denied, 277 U.S. 594, 48 S.Ct. 530, 72 L.Ed. 1005 (1928) (request for an award of counsel fee rejected where only injunctive relief was sought); Ring v. Spina, 84 F. Supp. 403, 408 (S.D.N.Y. 1949), modified sub nom. Ring v. Authors' League of America, Inc., 186 F.2d 637 (2d Cir.), cert. denied, 341 U.S. 935, 71 S.Ct. 854, 95 L.Ed. 1363 (1951), and Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 888, 899 (S.D.N.Y. 1948) (request rejected where damages and injunction were sought, but plaintiff successful in obtaining only an injunction). In this case, however, the development of the facts was the same for both grounds of claimed relief, and the hours eliminated would merely be those devoted to spelling out the claim for an injunction and applying therefor to the court. Such time would be minimal in the overall picture, but will be taken into account in fixing the fee.

Defendant also contends that the time spent in defending against the counterclaims may not be considered on this application. Bergjans Farm Dairy Co. v. Sanitary Milk Producers, 241 F. Supp. 476, 489 (E.D. Mo. 1965), aff'd, 368 F.2d 679 (8th Cir. 1966). This is certainly true as to the sixth counterclaim on which summary judgment was awarded plaintiff. But here again the amount of time involved on this issue is minimal. As to the other five counterclaims, they were inextricably bound up with the claims of plaintiff. Defendant itself stated that "In effect the facts asserted in the counterclaims constitute affirmative defenses to the allegations of the complaint." These affirmative defenses had to be overcome for plaintiff to succeed on its claim for damages and thus should be considered in making the fee award.

Defendant argues that the award of counsel fee should be limited to the time and effort necessary to prove items of damage sustained and may not include an award for time spent on claimed items of damage which were rejected by the trier of the facts. Union Leader Corp. v. Newspapers of New England, Inc., 218 F. Supp. 490 (D. Mass. 1963), vacated on other grounds sub nom. Haverhill Gazette Co. v. Union Leader Corp., 333 F.2d 798, 801 n. 2, motion to recall mandate denied, 333 F.2d 808 (1st Cir.), cert. denied, 379 U.S. 931, 85 S.Ct. 329, 13 L.Ed.2d 343 (1964); *Bergjans Farm Dairy Co., supra;* Osborn v. Sinclair Ref. Co., 207 F. Supp. 856, 864 (D. Md. 1962), rev'd on other grounds, 324 F.2d 566 (4th Cir. 1963). These decisions are refinements of the rule set forth in the *Decorative Stone, Ring* and *Alden-Rochelle* cases, *supra.* However, the courts in applying this limitation pointed out that they were concerned with cases where the recovery was small in relation to an asserted large claim. It is interesting to note that in *Union Leader* single damages were $29,442 with an award of counsel fee of $60,000 and in *Osborn* single damages were $325 with an award of $14,000. See also Darden v. Besser, 257 F.2d 285 (6th Cir.

1958), where single damages were $15,000 with an award of $30,000.

In the instant case the award, to say the least, is substantial. The failure of the plaintiff to achieve a recovery of $510,000,000 was not due so much to the failure to prove items of damage as it was to the rejection of its theory of measuring damages. There was a reasonable basis for urging the comparative profits theory (Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969); Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264, 66 S.Ct. 574, 90 L.Ed. 652 (1946)) even though the court ultimately ruled against plaintiff on this theory.

Consequently, while reassessment must be made of the time and labor spent by plaintiff in these areas of work, this does not require extensive adjustments in the time factor. The court has been closely involved with this case since August 31, 1961 and is in a position to make a proper evaluation without further proof being called for. This is all the more true since, as indicated below, the time factor is not that crucial in a case such as this.

The firms of Cahill, Gordon, Sonnett, Reindel & Ohl, representing the plaintiff, and Donovan, Leisure, Newton & Irvine and Chester C. Davis, representing the defendants, are recognized as able and experienced counsel. In fact, the Donovan, Leisure firm was counsel for the successful plaintiff in the *Hanover Shoe* case, *supra*. The history of the proceedings attests to the great responsibility undertaken by counsel.

Defendant points out that plaintiff's application claiming 64,000 hours of time spent on this litigation amounts to a request for $164 an hour for all of the services rendered, whether by senior partners, junior partners, senior associates or junior associates. It then refers to computations made by it of awards in other cases, translated into

terms of hourly rates. The requested fee, if it is to be based on a "mix" rate of $164 an hour, could be excessive even in the City of New York. I would estimate that a "mix" rate of $75 an hour would be charged by outstanding, experienced law firms in this city. However, attributing substantial weight to an hourly rate is unfair in a case such as this where success and complexity of issues are such important factors. In *Hanover Shoe, supra,* where the treble damages of $4,239,000 were about the highest heretofore obtained, the court pointed out that it arrived at the fee award of $650,000 on bases other than hours spent by counsel. Consequently, the computation of hourly rates in that case had little meaning.

Similarly, a fee based on a percentage of recovery is not a satisfactory test for this case, although it appears to have been the sole one used in the *Union Carbide* case, *supra,* where the court held that "an allowance of 15 percent of the amount recovered * * * would be reasonable." 300 F.2d at 587. A percentage fee gives undue weight to the size of the recovery. In cases with small recoveries, it completely ignores professional skill and the complexity of the work involved, and could result in an insufficient award for services rendered. See *Union Leader, supra,* 218 F. Supp. at 493; *Noerr, supra,* 166 F. Supp. at 170. Conversely, where the recovery is extraordinarily high, it could result in an excessive award.

Finally, we come to the eighth factor, which has been framed by two judges as the ultimate test to be applied: that is, a fee which in the judgment of the trial court "would be reasonable for counsel to charge a victorious plaintiff. The rate is the free market price, the figure which a willing, successful client would pay a willing, successful lawyer." Cape Cod Food Prods., Inc. v. National Cranberry Ass'n, 119 F. Supp. 242, 244 (D. Mass. 1954); *Farmington Dowel, supra,* 297 F. Supp. at 926. On the other hand, this test has been characterized as the outer limits of recovery. *Noerr, supra,* 166 F. Supp. at 170.

It seems to me that the major factors bearing on the fixing of attorneys' fees in antitrust cases are the complexity of the problems presented, the skill of counsel, and the measure of success achieved by counsel. The other factors are subsidiary to these and may be helpful in evaluating them, but neither separately nor collectively do these other factors constitute the basis for fixing the fee.

In measuring the success of counsel, only single damages should be considered, since that is the amount produced through the efforts of counsel. Trebling is a penalty imposed by law and automatically attaches to the damages found. Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp., 194 F.2d 846, 859 (8th Cir.), cert. denied, 343 U.S. 942, 72 S.Ct. 1035, 96 L.Ed. 1348 (1952); Milwaukee Towne Corp. v. Loew's, Inc., 190 F.2d 561, 571 (7th Cir. 1951), cert. denied, 342 U.S. 909, 72 S.Ct. 303, 96 L.Ed. 680 (1952). Consequently, the referable recovery here is $45,870,478.

As stated at the outset, the problem of how to reasonably exercise the court's discretion is a difficult one and in the final analysis it can only be resolved with reference to a particular case. A point is reached where the amount of plaintiff's recovery is unrelated to services of counsel. The large amounts involved do not add to the complexity of the problems, increase the responsibilities of counsel or require greater capabilities of counsel.

After carefully reviewing the entire matter and giving effect to the adjustments discussed above, it is my considered judgment that a reasonable attorney's fee in this case is $7,500,000.

Plaintiff requests $2,230,602 as "the cost of suit" allowable by § 4 of the Clayton Act. It concedes that, aside from attorney's fees, no case has ever gone beyond "taxable costs" which are awarded in any case to a successful party. 28 U.S.C. § 1920; Fed.R.Civ.P. 54(d). Similar requests by successful plaintiffs in private antitrust suits to be awarded their "reasonably incurred expenses of liti-

gation" have been uniformly rejected. *Farmington Dowel, supra,* 297 F. Supp. at 930. This request is accordingly denied.

Alternatively, plaintiff requests $396,596.43 as taxable costs. Included in this sum is $28,342.63 claimed for services in connection with attempts to serve Hughes. These charges are based on payments to lawyers and private investigators in several parts of this country and Mexico City. To the extent that these payments are allocable to attempts to serve a summons on Hughes as a defendant in this action, they clearly are not taxable costs against Toolco. They also are not taxable for that portion of the services involved in attempting to serve a witness subpoena on Hughes. § 1920 provides for taxation of fees of witnesses, not the expense of searching out the witness. On the record it is clear that Hughes and Toolco were one and the same, and therefore service of notice to take deposition would have sufficed for plaintiff's purposes. Consequently, this item is disallowed.

The sum of $19,145.20 for printing costs in the Court of Appeals and the Supreme Court is not taxable, nor are the costs applicable to printing more than 50 copies of the other documents.

As to the transcript of damage hearings, plaintiff may only tax its share of the cost of transcript furnished to the special master plus three additional copies.

Finally, plaintiff has again requested moratory interest to run from the date of the report of the special master. I rejected this plea in my opinion disposing of the motions addressed to the report of the special master. I see no reason to change that disposition in which I said:

> "Interest should not be allowed in antitrust actions where the statute provides for punitive damages. Treble damages compensate a plaintiff handsomely for all his losses, including loss of the use of money rightfully his." 308 F. Supp. at 696.

Judgment shall be entered accordingly. So ordered.

J.

Judgment Entered April 14, 1970

[Doc. 531]

61 Civ. 2324

[CAPTION]

This action came on for hearing before the Court, the Honorable Charles M. Metzner, District Judge, presiding, and the issues having been duly heard, and the Court having rendered its decisions of December 23, 1969 and April 13, 1970, and having directed the entry of judgment thereon,

It is hereby Ordered and Adjudged

That the plaintiff Trans World Airlines, Inc. recover of the defendants Hughes Tool Company and Raymond M. Holliday, jointly and severally, the sums of $137,611,435.95 as damages, $7,500,000.00 as a reasonable attorneys' fee, and $336,705.12 as costs, for a total amount of $145,448,141.07, together with interest thereon at the rate of 6% as provided by law.

Dated at New York, New York, this 14th day of April, 1970.

CHARLES M. METZNER
U.S.D.J.
JOHN LIVINGSTON
Clerk of the Court

Judgment Entered 4/14/70

K.

314 Federal Supplement 94

UNITED STATES DISTRICT COURT,
S.D. NEW YORK.

TRANS WORLD AIRLINES, INC., *Plaintiff*,

v.

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY, *Defendants*.

No. 61 Civ. 2324.

June 10, 1970.

METZNER, District Judge.

Defendants move for a stay of execution, pending appeal, of the judgment entered in favor of the plaintiff without posting the usual supersedeas bond. Practically speaking, defendant Hughes Tool Company (hereinafter called Toolco) is the party involved in this motion.

F.R.C.P. 62(d) provides that "When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule.* * *" Rule 33 of the General Rules of this court provides that such bond shall be in the amount of the judgment plus 11% and an additional $250 to cover costs. Plaintiff in this antitrust action was awarded single damages of $45,870,478.65, which after trebling and adding costs and a reasonable attorney's fee amounts to $145,448,141.07. The bond would have to be in the amount of $161,447,686.59.

Rule 31(b) of the General Rules of this court provides that every bond or undertaking must either:

"(1) be secured by the deposit of cash or government bonds in the amount of the bond, undertaking or

stipulation, or be secured by (2) the undertaking or guaranty of a corporate surety holding a certificate of authority from the Secretary of the Treasury * * *."

The third alternative provided by the rule is not applicable to this case.

It is Toolco's contention that either of the alternatives contained in Rule 31(b) "could not be effected without imposing an added penalty on [Toolco] by requiring it to engage in disruptive and time-consuming liquidation of assets or a costly and time-consuming financing program." It proposes that it either not be required to post any bond or undertaking, or that whenever the net worth of Toolco goes below three times the judgment the stay pending appeal shall be lifted.

Although the final judgment in this matter was not entered until April 14, 1970, the report of the special master recommending damages in the amount of $137,611,-436.95 was confirmed by this court on December 23, 1969. Defendants apparently did nothing from that time until May 5, 1970 (the date of the order to show cause bringing on this motion) to arrange for the posting of the required bond except to make inquiry of surety companies. Appended to the order to show cause are two letters from surety companies indicating that a bond of this size could be arranged only if secured with a deposit of collateral in the form of cash or government bonds or documents of similar liquidity in the full amount of the bond. The inability of surety companies to undertake such an obligation is fully understood and appreciated by the court.

Because of the unprecedented size of the judgment against what is in essence a single defendant, the court signed the order to show cause in an attempt to see if some satisfactory arrangement could be worked out whereby the interests of the successful plaintiff could be reconciled with

the understandable, practical problems facing Toolco. Hearings were held on May 11, May 20 and June 3 which were unproductive in bringing the parties close to a solution of the problem.

At the outset the brief submitted by Toolco took the position that the law was clear to the effect that the court has the power "in extraordinary circumstances such as those presented by this case, to grant a stay of execution without requiring the filing of a supersedeas bond in the ordinary form or the posting of any security." It argued that its net worth was in excess of $500,000,000 and that this was ample assurance that the plaintiff would be able, in the event of affirmance, to obtain satisfaction of its judgment without the posting of any security at the present time. In addition, it offered that a lien could be created on specific property having a value in excess of $45,000,000, the amount of the compensatory portion of the judgment. The plaintiff took the position that Rule 33, requiring a bond in the amount of 111% of the judgment, indicates that any lower figure is most unlikely to be sufficient security for the payment of a judgment.

With the adoption of the Federal Rules of Appellate Procedure, effective July 1, 1968, Rule 73(d) of the Federal Rules of Civil Procedure, which referred to supersedeas bonds on appeals to the Court of Appeals, was repealed. It had provided, among other things, that:

> "the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on appeal, interest, and damages for delay, unless the court, after notice and hearing and for good cause shown, fixes a different amount • • • ."

These words had been inserted in the original rule in 1938 to cover situations where money judgments of enormous

sums had been entered and defendants were unable to give a supersedeas bond to stay the execution of a judgment. The language allowed the court, in a case of hardship of that kind, to issue a stay of execution so that, in effect, the defendant's right of appeal would not be destroyed. The language was not transferred to any other section of the rules by the amendment of 1968, and consequently the court is faced with F.R.C.P. 62(d) and our local district Rule 33. Despite the repeal of Rule 73(d), I am of the opinion that the court has the inherent power in extraordinary circumstances to provide for the form and amount of security for a stay pending appeal, based on the conditions it finds to exist in a particular case. See 9 Moore, Federal Practice ¶ 208.06[1] at 1416 (2d ed. 1969).

At the first hearing on May 11, the parties adhered to their diametrically opposed positions. The plaintiff pointed out that there was no assurance that Toolco's present net worth would continue to exist. It further took the position that during the period from December to May Toolco, with its asserted net worth, could have arranged for a loan to be used as an undertaking. Plaintiff suggested that Howard Hughes, the sole owner of the stock of Toolco, should guarantee the payment of the judgment and place his stock with the court as collateral for such guaranty.

If consideration was to be given to Toolco's proposal, plaintiff asserted that it should receive the same treatment as would be afforded any lending institution approached for a loan by Toolco. This would include certified, detailed financial statements, regular certificates by responsible officers of defendants as to the maintenance of net worth and limitations on transactions between Toolco and its 100% stockholder. However, plaintiff adhered to its view that Toolco should arrange for financing in order to secure the judgment in full.

The hearing was adjourned to May 20 with a direction to the defendants to conduct negotiations with lending in-

stitutions. Counsel were admonished to have continuing discussions so that on the adjourned date the plaintiff would not be faced with a new proposal for the first time.

The fear of the court was well founded since it appears that Toolco's new proposal was sent to plaintiff's counsel the day before the adjourned hearing. That proposal contained four provisos:

> "1. HTCo [Toolco] will furnish TWA with a Certificate by its Treasurer certifying that the present net worth of the Company, determined in accordance with generally accepted accounting principles applied on a basis consistent with prior accounting periods, without provison for the judgment, is in excess of $500 million, namely, substantially in excess of three times the amount of the judgment.
>
> "2. Thereafter, HTCo will provide TWA quarterly, or more frequently if desired, with a Certificate of its Treasurer certifying that the net worth of HTCo remains substantially in excess of three times the amount of the judgment.
>
> "3. Haskins & Sells advises that they will have completed their audit for the year ended December 31, 1969 by the end of the month. HTCo will immediately engage Haskins & Sells to make quarterly audits. Shortly after such engagement Haskins & Sells will be able to complete interim audit procedures for the first quarter of 1970.
>
> "4. HTCo will provide TWA with an appropriate Certificate of Haskins & Sells based upon such audits which will support the Treasurer's Certificate and, in addition, based upon interim auditing procedures Haskins & Sells will provide TWA from time to time with a confirmation in the form of a 'comfort letter', customarily furnished to underwriters, to the effect that

nothing has come to their attention subsequent to their last audit to indicate that the net worth of the Company has been reduced to an amount which is not in excess of three times the amount of the judgment."

The letter ended with the following statement: "Based on our telephone conversation, I expect to hear from you to arrange a meeting for this afternoon to discuss the matter further." On the same date plaintiff submitted a nine-page proposal as to what it was willing to accept.

The hearing proceeded on May 20, in which counsel for Toolco outlined the discussions had with the banks. The following statement by counsel appears on page 16 of the transcript:

"So you reduce all that and you say: What does that mean in terms of how much you can do?

"And they say: Well, we don't know exactly yet but we would be happy to do it.

"What will it cost?

"Well, we cannot exactly tell you what terms and conditions.

"But you put all those together and the only conclusion you come to is that it is not realistic * * *."

The interesting point about all this is that Toolco never requested the banks to follow through and come up with definitive answers. It took the position that whatever the cost, it would be unduly burdensome. If Toolco had wanted financing to conclude a business transaction, I am sure that there would have been no hesitancy on its part to get the concrete answers, but somehow it did not take that tack to solve this problem. The hearing was adjourned to June 3 with a direction to Toolco to furnish the plaintiff with the audited financial statements of its operations for

the year 1969 and a list of its assets worth $10,000,000 or more. This was done for the purpose of giving the plaintiff an opportunity to know what was being offered and to be in a position to evaluate whether it would be sufficient to secure its judgment.

Aside from charges and countercharges of bad faith, a large portion of the hearing on June 3 was devoted to a statement by defense counsel as to the huge capital demands being made on Toolco by its subsidiaries and affiliates. The sum total of all this was that there could be nothing available for the plaintiff by way of cash security. Business was to continue as usual with Toolco being the sole arbiter of what it wanted to do. Cash could be converted to fixed assets which would not affect the net worth of the company as reflected on a balance sheet. However, it could certainly affect what I would call the quality of that net worth insofar as the collection of the judgment is concerned. We read every day about the liquidity squeeze.

The figures which were furnished the plaintiff indicate that in the three-month period ending March 31, 1970 the quick current assets have been reduced by a third. In addition, the court received a letter from Toolco's counsel dated May 22, 1970 stating that the court should not be surprised to read an announcement in the press, either late that day or the next day, that Toolco had acquired the Dunes Hotel for a cash consideration of $35,000,000 and that there was a contemplated transaction in which Toolco would be called upon to lay out another $11,000,000 within the next six or eight months. There are additional examples of cash commitments in the financial notes to which I need not specifically refer.

Part of business as usual must include some recognition of the rights of this plaintiff that has acquired a judgment against Toolco for violation of the antitrust laws of the United States. Toolco requests plaintiff to forgo both

immediate collection of its judgment and full security for that judgment pending appeal. It must be prepared to assume some financial burden to achieve "business as usual." At the same time, I fully appreciate that under present conditions a supersedeas bond in the amount contemplated by Rule 33 is not practicable under the circumstances. I have come to the conclusion that Toolco can arrange to post security in the form required by Rule 31(b) in the amount of $75,000,000. This shall be done on or before June 22, 1970. The balance of $86,447,686.59 shall be secured along the lines suggested by the defendants as to the maintenance of Toolco's net worth at three times the amount of such balance. The details of this arrangement shall be worked out between counsel. Each knows what the other has proposed. The court cannot be expected, on the papers before it, to come up with a satisfactory resolution embodying such detailed and intricate financial considerations. It should not be required to devote the time necessary to preside over such a conference between counsel. Obviously, there has to be flexibility on both sides for this endeavor to be successful.

Counsel are directed to meet in continuous session and appear before the court on June 16 in Room 1106 at 10:30 A.M. with a proposal in such form that any needed resolution of disputes can easily be disposed of.

So ordered.

L.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324

TRANS WORLD AIRLINES, INC., *Plaintiff*,

—against—

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY, *Defendants*.

Order

Defendants Hughes Tool Company ("HTCo") and Raymond M. Holliday having moved by order to show cause dated May 5, 1970 for an order granting a stay, pending appeal, of execution of the judgment in favor of the plaintiff Trans World Airlines, Inc. ("TWA") entered herein on April 14, 1970, and that motion having come on for hearing before the Court on May 11, May 20 and June 3 and the Court having rendered an opinion on June 10, 1970, it is

ORDERED that the execution of, and any proceedings to enforce, the judgment in favor of TWA entered herein on April 14, 1970, be stayed pending the determination by the United States Court of Appeals for the Second Circuit of defendants' appeal from such judgment, provided, however,

(1) That HTCo on or before June 22, 1970 file with the Court a supersedeas bond in an amount not less than $75,000,000 to be secured in the aggregate in the manner provided by Rule 31(b) of the General Rules of this Court; it being understood that in lieu of depositing cash or government bonds (including obligations guaranteed by the government) pursuant to the provision of Rule 31(b)(1) HTCo may deposit certifi-

cates of deposit and short-term commercial paper, with the right from time to time to substitute for such securities other similar securities so long as the total principal amount of securities is no less than $75,000,000 or to substitute in whole or in part for such deposit of securities an undertaking or guaranty under Rule 31(b)(2), it being further understood that the surety or sureties on such undertaking or guaranty shall remain liable in the amount of the undertaking or guaranty until all amounts finally determined to be due following appeal or expiration of time for appeal have been paid, and it being further understood that TWA shall take no steps to recover any such security or to enforce any such undertaking or guaranty until the expiration of a period of not in excess of 90 days following the final disposition of the appeal; and

(2) That HTCo maintains a net worth (stockholder's equity) in excess of $335,000,000.

It Is Further Ordered that the stay of execution herein provided shall terminate if at any time the net worth of HTCo should fall below $335,000,000.

It Is Further Ordered that so long as the stay of execution provided herein remains in effect HTCo shall furnish to TWA

(1) An audited balance sheet, on a quarterly basis, of HTCo and its subsidiaries, commencing with the balance sheet for quarter ending June 30, 1970, consolidated on an equity basis, in the form previously furnished to TWA for the year ended December 31, 1969, together with a certification by Haskins & Sells that such quarterly balance sheets were prepared in conformity with generally accepted accounting principles on a basis consistent with prior years and that such balance sheets reflect that the net worth (stock-

holder's equity) of HTCo, without provision for the judgment herein, is in an amount in excess of $335,000,000. HTCo will also furnish TWA with a schedule of the principal assets reflected on the balance sheet identifying each of the fixed assets of HTCo, including the location thereof, having a book value in excess of $5,000,000 and setting forth with respect to each such asset its book value and the nature and amount of any material existing liens or encumbrances thereon, and setting forth such additional information, if any, as shall be required to permit reconciliation thereof with the last preceding, similar schedule of principal assets filed pursuant to this order. The quarterly audited balance sheets and certifications thereof by Haskins & Sells and schedules of assets shall be furnished to TWA no later than 120 days following the close of each quarter.

(2) A certificate by the Treasurer of HTCo, on a quarterly basis, commencing with the quarter ending June 30, 1970, certifying that the net worth (stockholder's equity) of HTCo as of the date of the certificate, determined in accordance with generally accepted accounting principles applied on a basis consistent with prior accounting periods, without provision for the judgment herein, is an amount in excess of $335,000,000. At the same time that HTCo furnishes TWA with its Treasurer's certificate, HTCo will also furnish TWA with a letter from Haskins & Sells to the effect that since the last audit by Haskins & Sells and to the date of such letter nothing has come to their attention to indicate that the net worth (stockholder's equity) of HTCo is in an amount which does not exceed $335,000,000. Said certificates by the Treasurer of HTCo and said letters by Haskins & Sells will be furnished to TWA no later than 30 days following the close of each quarter.

IT IS FURTHER ORDERED that so long as the stay of execution herein provided remains in effect HTCo shall not make any distribution or transfer of its assets which would reduce its net worth below $335,000,000.

IT IS FURTHER ORDERED that the HTCo balance sheets and the schedule of assets heretofore supplied to plaintiff and all documents which HTCo may hereafter furnish to TWA pursuant to this order (the "HTCo Documents") shall be given confidential treatment in strict accordance with the conditions stated below provided that defendants shall have stamped thereon at the time of delivery to TWA a legend reading substantially as follows: "CONFIDENTIAL This document may be examined only by authorized persons and in accordance with the order of the U. S. District Court, S.D. N.Y., dated June 16, 1970."

(1) No HTCo Document may be used by or on behalf of TWA except to determine compliance by HTCo with the terms of this order or in connection with further proceedings related to such compliance and the continuance or termination of the stay of execution herein granted, provided that TWA shall not be barred from using information relating to the existence and location of HTCo assets contained in any HTCo Document in aid of proceedings to enforce the judgment herein should the stay of execution be terminated.

(2) No HTCo Document shall be reproduced or copied by TWA or its attorneys or anyone acting on their behalf. If the attorneys for TWA require additional copies, such copies shall be obtained from counsel for HTCo.

(3) No HTCo Document shall be voluntarily disclosed by attorneys for TWA to any person other than (a) members of the firm of Cahill, Gordon, Sonnett, Reindel & Ohl and its employees; (b) the following named members of Price, Waterhouse & Co., inde-

pendent public accountants: John C. Biegler, Donald H. Trautlein, Dean H. Secord and Robert E. Roth, or such member of Price, Waterhouse as counsel for TWA may hereafter designate in their stead by letter to the Court and to HTCo; (c) the following named officers or directors of TWA: Charles C. Tillinghast, Jr., Chairman of the Board of Directors, Barry T. Leithead, Chairman of the Litigation Committee of the Board of Directors, L. Edwin Smart, Senior Vice President-External Affairs and Raymond R. Fletcher, Jr., Esq., Vice President and General Counsel, or such director or officer as may succeed to their positions, and be designated in their stead by counsel for TWA by letter to the Court and to HTCo, provided, however, that any such disclosures shall be made only to persons actively concerned with or engaged in the handling of proceedings relating to the stay of execution on a "need-to-know" basis, and shall be as limited as reasonably may be possible, and except that disclosures may be made to a court having jurisdiction of this action in connection with proceedings relating to the stay of execution of the judgment herein.

(4) When not in such use as is permitted by the provisions of this order, attorneys for TWA shall keep the HTCo Documents in a locked filing cabinet and shall give access thereto only in conformity with the provisions of this order.

(5) All HTCo Documents which are delivered to this Court shall be maintained in a sealed file in the custody of this Court or its Clerk, and no such HTCo Document shall be made available to any person other than counsel of record in this action.

(6) Upon the termination of the stay of execution granted by this order, all HTCo Documents shall be promptly returned to HTCo.

(7) This order shall be binding upon each and every person who at any time has possession of or access to any HTCo Document, and no such person shall disclose any of the contents of any such document to any person not covered by the terms and intent of this order. The attorneys for TWA shall cause a copy of this order to be shown to each person to whom any HTCo Document is disclosed by them, and shall maintain a list of the names and addresses of all such persons, which list shall be made available to HTCo for inspection by it upon request.

Dated: New York, New York
June 16, 1970

/s/ CHARLES METZNER
U.S.D.J.

The entry of the above order is consented to:

/s/ DUDLEY B. TENNEY
Counsel for Plaintiff TWA

/s/ JAMES V. HAYES
Counsel for Defendants
Hughes Tool Co. &
Raymond M. Holliday

M.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 883, 834—September Term, 1970.

(Argued May 7, 1971 Decided September 1, 1971.)

Docket Nos. 34902, 35114

TRANS WORLD AIRLINES, INC.,
Plaintiff-Appellant,

v.

HOWARD R. HUGHES,
Defendant,

and

HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,
Defendants-Appellants.

Before:

SMITH, KAUFMAN, and HAYS,
Circuit Judges.

Cross-appeals from a final judgment for plaintiff in the amount of $145,448,141.07, upon a previous default judgment entered on a complaint alleging violations of the antitrust laws, by the United States District Court for the Southern District of New York, Charles M. Metzner, *Judge*, following a hearing on damages before Special Master Herbert Brownell.

Modified with respect to interest on the judgment and as modified, affirmed.

JAMES V. HAYES (Ralstone R. Irvine, Mahlon F. Perkins, Jr., David A. Wier, *of counsel*; Donovan, Leisure, Newton & Irvine, New York, N. Y.; Davis & Cox, New York, N. Y., *on the brief*), *for defendants-appellants.*

DUDLEY B. TENNEY (Paul W. Williams, Immanuel Kohn, Marshall H. Cox, Jr., Abraham P. Ordover, Lawrence C. Browne, Michael P. Tierney, *of counsel;* Cahill, Gordon, Sonnett, Reindel & Ohl, New York, N. Y., *on the brief*), *for plaintiff-appellant.*

KAUFMAN, *Circuit Judge:*

We are presented in this case with cross-appeals from a final judgment entered April 14, 1970, premised upon a previous default judgment, in favor of plaintiff Trans World Airlines. Inc. (TWA) against defendants-appellants Hughes Tool Company and its chief financial officer, Raymond M. Holliday (Toolco), which, the district court tells us, 312 F. Supp. at 480, is some thirty times greater than the next highest monetary award ever entered.

The extraordinary aspect of this complex litigation is in large measure attributable to the elusiveness of Howard R. Hughes, progenitor and sole owner of Toolco, protagonist in its operations, in a sense the central character of this litigation as well, and yet not a party to this appeal because Hughes himself, although named as a defendant in TWA's complaint, could not be located for service of process.

I.

Since the facts in this litigation have been set forth in detail in many prior reported decisions, *see* 214 F. Supp. 106 (S.D.N.Y. 1963), 32 F.R.D. 604 (S.D.N.Y. 1963); 332 F.2d 602 (2d Cir. 1964); 38 F.R.D. 499 (S.D.N.Y. 1965); 308 F. Supp. 679 (S.D.N.Y. 1969); 312 F. Supp. 478 (S.D.N.Y. 1970), in the interest of avoiding unconscionable length of this opinion, we will limit our own initial statement to a brief resumé of the tortuous history of the case, sufficient to permit a meaningful statement of the issues raised.

More than a decade ago, by a complaint dated June 30, 1961, TWA filed its complaint in this action charging Toolco and Hughes with violations of the Clayton and Sherman Acts, 15 U.S.C. §§ 1, 2, 11, and 18, as well as with a claim, for which pendent jurisdiction was asserted, alleging malicious and willful injury to the business of TWA.

Convoluted and protracted pre-trial maneuvers culminated in the failure of Toolco to produce Hughes for a deposition scheduled by court order to be taken on February 11, 1963. As a result of Hughes' confessed unwillingness to appear, as well as the nonproduction by Toolco of certain papers and documents whose disclosure to plaintiff had also been required by court order, the Rule 2 judge assigned to the action (Rule 2, *General Rules for the Southern and Eastern Districts of New York*), Judge Metzner, on May 3, 1963 filed two orders. One entered the default against Toolco and granted TWA's motion to increase the *ad damnum* clause of its complaint from $105,000,000 to $135,000,000, after trebling. In the second order Judge Metzner also found Toolco in default with respect to five counterclaims that Toolco had asserted against TWA and several additional defendants. Judge Metzner dismissed these counterclaims and also granted TWA's motion for summary judgment on a sixth counterclaim.

We granted leave to take an interlocutory appeal from the former order, after Judge Metzner had certified that an appeal was appropriate under 28 U.S.C. § 1292(b). But we limited our review to considering whether the district court's jurisdiction over the antitrust action was ousted because primary jurisdiction lay with the Civil Aeronautics Board, which had approved various steps by which Toolco gradually assumed virtually complete control of TWA, holding about 78% of its stock at the time the complaint was filed, and whether certain of the CAB orders associated with those grants of approval constituted a good

defense to TWA's action. The interlocutory appeal was consolidated with defendants' parallel appeal as of right from Judge Metzner's dismissal of the counterclaims. A panel of this court ultimately ruled that the district court did properly assert its jurisdiction and that the CAB orders did not constitute blanket approval of the claims in the complaint and hence were not a defense to TWA's action. In the appeal on the counterclaims, the orders of the district court were affirmed with one exception, not relevant here (determining that the CAB had exclusive jurisdiction over one of the dismissed counterclaims). 332 F. 2d 602, *cert. granted,* 379 U.S. 92 (1964), *cert. dismissed as improvidently granted,* 380 U.S. 248, 249 (1965).

Judge Metzner's ruling adjudging Toolco in default necessitated an extensive hearing to determine damages. Herbert Brownell, Esq.,[1] appointed Special Master for this purpose, conducted hearings between May 2, 1966 and April 9, 1968. On September 1, 1968, in a thorough report, the Master awarded TWA trebled damages of $137,611,435.95. Both sides filed objections. On December 23, 1969, Judge Metzner adopted Brownell's report in all respects, 308 F. Supp. 679, and then in a subsequent opinion awarded attorneys fees of $7.5 million and assessed costs in the amount of $336,705.12. 312 F. Supp. 478. On April 14, 1970, the district court entered its final judgment, with 6% interest to run from that date, in the sum—impressive even by space age and inflationary standards—of $145,448,141.07.[2]

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[1] Hon. J. Lee Rankin, appointed Special Master during pre-trial proceedings, was replaced when he resigned in December 1965 to become Corporation Counsel for New York City.

[2] A prayer for equitable relief included in the original complaint was mooted when Toolco sold all its TWA stock in May, 1966.

II.

A. *Toolco Appeal*

The first thrust of the Toolco appeal is directed at the default judgment itself and primarily concerns issues that were not the focus of the damage hearing before Special Master Brownell. The broad question pressed by Toolco is whether TWA is entitled to recover any amount whatever on the record before us, regardless of the adequacy of its proof of damages. Toolco contends (discussed in part III below) that the default judgment was improperly entered against it, in violation of its due process rights, and should be vacated; that (part IV) even if the default judgment is valid, the judgment does not justify assessing damages against Toolco for any antitrust violations, since in Toolco's view the evidence in the record conclusively refutes the possibility that any such violations could have occurred; and that (part V) even if the default judgment establishes antitrust infractions, TWA has not proved that any damages it might have suffered as a result of acts of mismanagement alleged in the complaint arose from antitrust violations. On each of these questions, we affirm the judgment below in all respects.

Toolco also contests Special Master Brownell's calculations of the damages. It argues that (part VI), even if proximate causation was shown, the damages were in several respects wrongly computed. In each of these respects we also affirm the reasoning and conclusions of the Master and of Judge Metzner.

Additionally, Toolco challenges under F.R. Civ. P. 54(c) Judge Metzner's grant of TWA's motion to increase the *ad damnum* at the same time he entered the default judgment (part VIII). It also argues that the award of attorney's fees is excessive and unreasonable (part IX). We believe Judge Metzner properly permitted TWA to raise the *ad damnum* and that the payment allowed for legal services was within the bounds of his discretion.

B. *TWA Appeal*

TWA takes issue with only one item of Brownell's report, *viz.* certain interest charges credited in mitigation of damages (part X). We affirm the Master's disposition of this issue. TWA also appeals from the denial by Judge Metzner of moratory interest as an element of the damages to be trebled under Section 4 of the Clayton Act, 15 U.S.C. § 15. It also questions Judge Metzner's holding that interest on the judgment should run from the date of the district court's judgment, rather than the date the Special Master filed his report, and contests the award of only 6% interest pursuant to New York judgments law, intead of the 7½% currently set by the state Banking Board as the maximum allowable commercial rate. We discuss these issues in part XI and affirm the district court on the first two points but hold that proper interest under current New York decisional authority is 7½%. TWA's last assertion (part XII) is that it may recover $1.6 million compensation for fees paid to experts as a component of its "cost of suit," 15 U.S.C. § 15. With this assertion we disagree.

III.

Toolco argues forcefully that Judge Metzner's entry of a default judgment having such drastic consequences resulted in a denial of due process and was otherwise an abuse of discretion under F. R. Civ. P. 37(b)(2)(iii) and 37(d). We are reminded not only of the severe nature of this particular default but of the fundamental importance of the right to an adversary hearing prior to judicial determination of rights and liabilities. We are in full accord with the general proposition, for which Toolco cites the three leading cases of *Hovey* v. *Elliott,* 167 U.S. 409 (1897), *Hammond Packing Co.* v. *Arkansas,* 212 U.S. 322 (1909), and *Societe Internationale* v. *Rogers,* 357 U.S. 197 (1958), that the totality of circumstances surrounding the

failure to make discovery must be considered in determining what sanctions to apply under Rule 37. As we understand Toolco's argument, those portions of the "totality of circumstances" it considers to control the invalidity of the default here are these: that TWA did not itself comply with Toolco's efforts to pursue pre-trial discovery sufficiently to lay an adequate foundation for the attempt to depose Howard Hughes; that, to similar legal effect, Judge Metzner on January 10, 1963, improperly denied Toolco's request for a Rule 16 hearing and permitted TWA to delay answering interrogatories served on it by Toolco in the fall of 1962 until after the Hughes deposition scheduled for February 11, 1963; that its own compliance with TWA's requests for discovery was substantial and in good faith; and that TWA did not and indeed could never have shown a need to depose Hughes. In sum it argues that in the face of all this, the district court grossly abused its discretion in not resorting to a less drastic alternative remedy before putting an end to litigation on the merits with a default judgment.

Although we agree with TWA that these arguments are unpersuasive, for the sake of clarity we pause to reject TWA's alternative theory that we may not consider the merits of the default judgment because we are required by either res judicata or collateral estoppel to follow the affirmance by the earlier panel of this court of the default judgment entered against Toolco on its counterclaims. Res judicata is singularly inappropriate in this context. As we have noted, leave to Toolco to appeal from the default judgment entered on TWA's antitrust complaint was narrowly confined and the panel expressly reserved the very question at issue here, "[t]he propriety of the court's entering a default judgment against the defendants with respect to the complaint . . . ." Prior to the judgment now appealed from, there had simply been no "final judgment" entered with respect to the merits of TWA's cause of

action against Toolco, and thus we lack the fundamental prerequisite for applying res judicata. See *Moore, Federal Practice* ¶ 0.405[1].

Nor will collateral estoppel avail TWA. The relevant issue "actually litigated and determined in the prior" appeal, *Lawler* v. *National Screen Service Corp.*, 349 U.S. 322, 326 (1955), was only that Judge Metzner properly entered the default on Toolco's counterclaims. This is a sharply distinguishable issue from the propriety of a different default judgment in favor of Toolco's adversary (this does not follow, as Toolco suggests, because the latter default is more drastic, but simply because the two questions are not the same). The issue of the propriety of the default here is not a right, question, or fact determined on the previous appeal. We believe we can fairly assume that TWA would not attempt to invoke collateral estoppel if the counterclaim had been asserted in a separate action. Combining two claims for trial as permitted for convenience under the Federal Rules does not dissolve the separate identities of the two claims or the two default judgments. Collateral estoppel and res judicata take aim at redundant litigation of identical issues or causes of action; they are not intended to foreclose consideration of the legal merits by analogy—however persuasive the analogies may be.

This is not to say that we will entirely disregard the obvious force of the prior determination on so closely related a question. This is foremost a matter of *stare decisis* and, of course, we *are* bound by collateral estoppel not to reopen subsidiary issues actually determined in the earlier appeal. We are persuaded that the most important considerations that prompted the earlier affirmance of the default on Toolco's counterclaims compel the same result here.

The essential details of the pre-trial proceedings that climaxed in the default are succinctly set out in Chief Judge Lumbard's earlier opinion, 332 F.2d 602, and we will en-

deavor to avoid unnecessary repetition. Because the factors bearing on the two default judgments are not identical, however, and in view of Toolco's attack on the district court's conduct of the pretrial proceedings, we cannot entirely avoid a brief sketch of the history of the litigation prior to the default.

One relatively minor justification put forward by the earlier panel in affirming the default judgment on the counterclaims related to Toolco's noncompliance with two discovery orders entered upon motions made by certain defendants who had been joined in the litigation by Toolco's counterclaim. Toolco now asserts that these production orders concerned matters irrelevant or at least of marginal importance to TWA's complaint. However this may be—and it is virtually impossible, because of the default and the nonproduction of the documents to evaluate this claim—we agree that the failure to comply with orders granted in favor of the other litigants would most likely not in itself have warranted the severe remedy of a default judgment in favor of TWA on the principal action.

But it is also apparent that these production orders are of trivial importance to the propriety of the default judgment in question here, in light of Howard Hughes' deliberate, knowing, willful, and plainly announced refusal to comply with an order requiring his appearance for the taking of his deposition on February 11, 1963, and which had been served long in advance of the return day. The reason that entry of the default was inevitable after Hughes' nonappearance can only be understood against the background of TWA's intensive efforts, first undertaken on the very day that it filed its complaint, to compel Hughes' personal testimony, as a witness and "managing agent" of defendant Hughes Tool Co. under F.R. Civ. P. 37(b)(2). TWA has consistently maintained, and continues to do so, that quite aside from the fact that he was Toolco's alter ego, Hughes' pretrial testimony was absolutely essential

for it adequately to frame the issues and prepare for trial because of Hughes' extraordinary secretive methods of doing business. It was the indispensable nature of Hughes' personal testimony, according to TWA, that prompted its diligent pursuit of Hughes from the inception of the litigation. TWA's campaign to depose Hughes, which opened with a motion for leave to do so on the date it filed its complaint, was temporarily frustrated when the motion was denied and Toolco was granted priority in the taking of depositions. But TWA renewed its efforts with a further unsuccessful motion and proposals to depose Hughes prior to Toolco's depositions. In early January, 1962, TWA adopted a new tactic and repeatedly sought with equal lack of success, to discover Hughes' whereabouts from Toolco. After further futile notices to depose Hughes served in January and February, 1962, TWA achieved a breakthrough when on June 4, the then Special Master rejected Toolco's objections to interrogatories directed to both Hughes and Toolco to locate Hughes so that he might be deposed. Toolco was ordered to answer the interrogatories unless Hughes should authorize counsel to accept service of a subpoena on his behalf for his appearance at the deposition.

On appeal the district court ordered that the interrogatories be answered as modified by it in an immaterial respect. Counsel for Toolco on July 27 informed the Master that Hughes had authorized counsel to accept service of a subpoena for Hughes to appear as a witness. An extended period of wrangling followed. Among other highlights of this period, Toolco refused a proposed stipulation and order to serve Hughes through Toolco's counsel, on the ground that agreeing to the stipulation might prejudice its right to object to the propriety of the deposition. Finally, on September 6, 1962, the same day that TWA charged that a purported authorization for counsel to accept service for Hughes was apparently a forgery, counsel for

Toolco informed Judge Metzner that another lawyer, Chester Davis, had in fact been served that day in California, pursuant to Hughes' personal authorization. On September 13, as part of its indignant response to the forgery allegation, Toolco submitted to the court the notice of deposition, a subpoena to Hughes, an affidavit of Davis stating his authority to accept service for Hughes, and a second affidavit from a Los Angeles notary stating that Hughes had indeed appeared in person before him and had acknowledged Davis' authority.

Subsequently, the district court adopted a decision of Special Master Rankin that Toolco would bear responsibility for Hughes' response to the subpoena, and stated that Hughes would be considered bound by this declaration unless he objected. No objections were ever made and there is, of course, no question that Toolco was responsible for the actions of the owner of all its stock. At Toolco's instance, the deposition date was twice postponed until by order of January 10, 1963, the court affirmed a final date set by Master Rankin requiring Hughes' appearance on February 11, a schedule "to be adhered to in the absence of extraordinary circumstances." Also on January 10, 1963, Judge Metzner denied an application for a Rule 16 pre-trial hearing that had been presented to it by Toolco on September 25, 1962, at the initial suggestion not of Toolco but of the Master. The motion was denied "without prejudice to renew on papers before the Court 30 days after the completion of the deposition of Howard R. Hughes." Judge Metzner also affirmed the denial by the Special Master of Toolco's motion to depose two financial institutions concerned primarily with issues raised by Toolco's counterclaim, the Irving Trust Co. and Dillon, Reed, & Co., on the ground that to grant the motion would interfere with the scheduled deposition of Howard Hughes.

Thus by mid-January Toolco had explored and exhausted myriad possible avenues for further delaying the day of

reckoning. On February 8, 1963, the Friday prior to Hughes' scheduled appearance the following Monday, Toolco announced a strategy decision. That day Toolco's counsel served on TWA and filed with the court a "notice of position" stating that in view of the court's denial of its motion two days earlier to dismiss the complaint, the denial of a certification permitting review of that order under 28 U.S.C. § 1292(b), and because of "the enormous expenses which would be incurred by Toolco . . . in further pre-trial *and trial* proceedings and the belief of Toolco *that such expenses would exceed the amount of damages provable by plaintiff under the complaint*" (emphasis added). Toolco "elects, subject only to whatever judicial relief it may hereafter obtain, to rest on the merits of its positions as heretofore taken so that it may avoid the burdens and expenses involved in further pre-trial *and trial* proceedings prior to the time that an appellate court has the opportunity to rule upon the decisions and orders heretofore made herein" (emphasis added).

At a hearing conducted February 8, 1963, Toolco's counsel, Davis, whose signature appeared on the "notice of position," admitted that "the subpoena on behalf of Mr. Hughes was valid, never was questioned." He also read from the record that portion of a ruling by the Special Master on September 15, 1962, imposing responsibility for Hughes' actions on Toolco, including the Master's comment that "I am piercing the corporate veil as to the Hughes Tool Company, and I am bringing what I hope is clear notice of very substantial sanctions" against Toolco "in case there should be at some later date a . . . failure to respond to the subpoena . . . ." Davis commented that Toolco was "aware of these rulings" and had accepted the responsibility imposed on it by the Master. Davis further explained that he had described to Toolco the sanctions available in the event Hughes should not appear, with particular regard to F. R. Civ. P. 37(d). Davis further

explained that the basis of Toolco's strategic judgment was that which had been expressed in the "notice" a calculation that TWA could not prove damages equal to the expenses of further litigation. Finally, Davis candidly and clearly recognized, and attributed the same awareness to Toolco, "that by insisting on a right to obtain a review on the legal questions which have been decided to date, and should it develop that they are in error . . . as a consequence *they may be deprived of further defending on the merits, other than on the question of damages*" (emphasis added). Davis described Toolco's decision to stand on Hughes' nonappearance as a "business decision" —the wisdom of which Davis himself pointedly would not vouch for—and responded affirmatively to the court's query whether Toolco's position was that "the plaintiff may take whatever proceedings it is advised to take by way of sanctions under Rule 37."

Short of express consent to the entry of a default judgment, a clearer case for the necessity and propriety of such a judgment could hardly be imagined. On appeal, as we have said, the complaint was held sufficient to state an antitrust claim under several theories and after all that was said at the February 8 hearing Toolco could hardly have been shocked that it then found itself left with nothing to litigate but damages.

The language of the panel on the previous appeal with respect to the Hughes non-appearance is as relevant in this context as it was to the issue presented by the default with respect to the counterclaims:

> "When Hughes chose not to appear for this deposition—which action was taken deliberately and with full knowledge of the sanctions available to the additional defendants under Rule 37—Judge Metzner was fully justified in entering judgments dismissing the counterclaims against TWA and the additional de-

fendants. The sanction of judgment by default for failure to comply with discovery orders is the most severe sanction which the court may apply, and its use must be tempered by the careful exercise of judicial discretion, to assure that its imposition is merited. However, where one party has acted in willful and deliberate disregard of reasonable and necessary court orders and the efficient administration of justice, the application of even so stringent a sanction is fully justified and should not be disturbed."

Chief Judge Lumbard further elucidated in words pertinent on this appeal:

"beyond any question . . . the deposition of Hughes was necessary to all aspects of this litigation. Hughes has at all times been sole owner of Toolco and the guiding light behind all the transactions between Toolco and TWA. Both TWA and the additional defendants had the right to depose Hughes.

. . . .

Hughes' deposition was absolutely essential to the proper conduct of the litigation. Yet he and Toolco seized upon every opportunity to forestall this event. . . . Indeed, Hughes and Toolco seemed to look upon the entire discovery proceedings as some sort of a game, rather than as a means of securing the just and expeditious settlement of the important matters in dispute. It was only at the very eve of the Hughes deposition—after the other litigants had been put to much delay and expense—that the defendants made a 'business decision' to terminate discovery.

Hughes' conduct is particularly intolerable in a large and complex litigation such as this one. The protracted antitrust suit taxes the energies and resourcefulness of each party to the litigation; and

it consumes much time of the court and the special masters it appoints. Tactics such as Hughes' serve only to frustrate the implementation of the discovery machinery devised by the federal judiciary to expedite the handling of such complex litigation." 330 F.2d at 614-15.

Nor was that panel's references to the necessity of Hughes' deposition to "all aspects of this litigation" gratuitous. It was prompted by Toolco's position on the earlier appeal that Hughes' deposition was relevant *only* to the TWA action and not to the counterclaims. Even if we are not bound in a strict legal sense by the previous ruling that Hughes' deposition was essential to TWA's claim, that holding was manifestly correct. As will be seen, many of TWA's asserted charges relied on interpretations of intent and of the significance of ambiguous projects quickly aborted, and of possible exploratory actions taken by Toolco that may or may not have been relevant to TWA's several antitrust theories. The reality behind the charges could hardly be tested without the testimony of the one man who personally directed Toolco's activities throughout the relevant period and whose singular penchant for secrecy was, after two years of frustrating delay in the conduct of the litigation, well known to the Master and the trial court. Clearly the court was entirely correct in concluding that the litigation would only continue its desultory course without the appearance on stage at the earliest possible moment of the hitherto unseen Prince of the drama. Thus, the court's decisions to postpone all further discovery by Toolco—discovery of the sort which had not substantially advanced the litigation in the past—were not only within its discretion but quite obviously correct. Indeed, in light of TWA's express reliance on Hughes himself to establish as much as 75% of its own case against Toolco, one would have expected that Toolco might have welcomed the opportunity to force

TWA to play the card that it had proclaimed was so important to its case, in the expectation that a disappointing deposition would open the way for an early termination of the case favorable to Toolco. Toolco's argument that TWA had not by February 8 laid a sufficient foundation for its case thus falls as well, because by failing to produce Hughes, Toolco deprived both TWA and itself of the opportunity to establish their respective positions. Finally, the suggestion that the court might have resorted to some sanction short of a default judgment after Toolco had announced a policy decision to take an action that would give it the right to take an immediate appeal—which only a final judgment on the merits would accomplish—and following the willful refusal to produce a witness whom the court had rightly found central to the expeditious progress of the lawsuit, has such an air of unreality about it as to bear its own refutation. Contrast *Rosenberg, Sanctions to Effectuate Pretrial Discovery, Colum. L. Rev.* 480, 495 (1958) (giving party "second chance" desirable in appropriate case).

Toolco intimates that throughout the litigation TWA sought in bad faith to win a fabricated case by exploiting Hughes' known craving for solitude. Nothing in the record would justify any such finding, and in any event the district court did offer to permit the deposition to be taken in as much privacy and under any other conditions that might suit Hughes' aversion to public appearance.

The cases relied on by Toolco are far afield and demonstrate by negative implication the inevitability of the default in this case. For example, in *Gill* v. *Stolow*, 240 F.2d 669 (2d Cir. 1957), the court reversed the entry of a default only upon a showing of a "real attempt to comply" with an order requiring the witness to travel from England to New York for the deposition, a trip the court found actually barred by his ill-health. There, the witness defied doctor's orders to appear for the deposition within

two months of the time scheduled for taking it. As far as we know, defendants have never in the eight years since the default judgment represented that Hughes was willing to be deposed were the default vacated. *Von Der Heydt* v. *Rogers*, 251 F.2d 17 (D.C. Cir. 1958) (per curiam) reversed a default judgment only upon a conclusion that the district court had not adequately set forth its findings. Concurring separately, then Circuit Judge Burger commented that "if the information sought is material to the case and not privileged, and if appellant was able to produce it, failure to produce warrants dismissal." *Id.* at 19. That is precisely the case here, except that the information sought was more than merely "material." It was essential. It could prove to be the life or death of the action. In *Independent Productions Corp.* v. *Loew's, Inc.*, 283 F.2d 730 (2d Cir. 1960), we simply found full compliance with the only court order outstanding at the time of the default judgment and concluded that the default judgment was improperly entered merely because when the witness appeared for the deposition he raised a Fifth Amendment privilege. See also *Bon Air Hotel, Inc.* v. *Time, Inc.*, 376 F.2d 118 (5th Cir. 1967), *cert. denied*, 393 U.S. 815 (1968) (Petitioner's failure to comply due to inability brought about neither by its own conduct nor by circumstances within its control did not warrant default judgment). Finally, *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1957), as in *Gill*, reversed a default judgment only on the strength of findings by the Special Master, adopted by the district court, and approved by the court of appeals, that the party had made good faith and diligent efforts to execute a production order where compliance would have violated Swiss law.

Indeed, the circumstances mandating entry of a default judgment here are stronger than in *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322 (1909), where the party against whom a default judgment was entered claimed a privilege that it urged justified its noncompliance. Despite this,

the Court ruled that because the Hammond Co. "absolutely declined to obey the order," which required production of evidence that the court could only "assume was material," in view of the non-compliance, the default judgment was proper. As in this case, Hammond too relied on the denial of pretrial motions by the defaulting party that would have postponed compliance with or modified the order. The Court found no abuse of the district court's broad discretion to control pretrial procedures.

In light of the foregoing, it would appear that were less at stake in this litigation, the propriety of the default judgment would not have deserved the full discussion we have afforded it. The entry of the default judgment was inescapable and virtually invited by Toolco.

IV.

Toolco, assuming arguendo that we would hold that the default judgment was properly entered against it on TWA's complaint, seeks nevertheless to avoid any liability for the antitrust violations alleged by TWA on the ground that we are required to find as a matter of law that facts essential to establish any such violations, although alleged in the complaint, are in fact untrue and could not have been proved by TWA at a trial. To the extent that the allegations of antitrust infringements are not conclusively disproved, so Toolco asserts, the allegations themselves are either too vague or conclusory or otherwise insufficient to support any recovery whatever. We disagree.

Despite inevitable sharp contrasts of tone and emphasis in the voluminous briefs, the parties do not seem to disagree that Judge Metzner, in preliminary rulings prior to the damage hearing and again in his decision adopting the report of the Master, applied an entirely correct standard in defining the legal effect of a default judgment. We too find Judge Metzner's discussions of the law in this complicated area unexceptionable. Extracting justiciable

standards from the venerable but still definitive case, *Thomas* v. *Wooster,* 114 U.S. 104 (1885), Judge Metzner ruled that by its default Toolco admitted every "well pleaded allegation" of the complaint, a term of art which Judge Metzner interpreted to permit finding an allegation not to be "well pleaded" only "in very narrow, exceptional circumstances:"

> "For example, an allegation made indefinite or erroneous by other allegations in the same complaint is not a well-pleaded allegation. Other examples . . . are allegations which are contrary to facts of which the court will take judicial notice or which are not susceptible of proof by legitimate evidence, or which are contrary to uncontroverted material in the file of the case." 308 F. Supp. at 683.

Judge Metzner then discussed the meaning that the much-mooted phrase "judicial notice" should take in the present context, as distinguished from the much different circumstance of a full trial, and summarized his previous discussion as implying that "only indisputable facts"—facts which could not possibly be rebutted if the non-defaulting party were permitted a trial—may be judicially "noticed" to rebut factual material otherwise admitted by a default. Toolco now attempts to hoist Judge Metzner by his own petard in directing our attention away from the "judicial notice" standard to certain "material in the file of the case" introduced by Toolco during the hearing on damages which according to Toolco has not been "controverted" by TWA. But this argument stands the matter on its head and implies that it was TWA's responsibility to defend the allegations of its complaint by rebutting adverse matter introduced by Toolco in the damage hearing. TWA had no obligation to introduce any evidence whatever in support of the allegations of its complaint. Matter introduced by Toolco to disprove or mitigate damages which only *tends* to contradict the allegations of the complaint has no

legal effect except as it bears on the question of damages unless it could not conceivably have been refuted and disproved by TWA had there been a trial and thus is "indisputable." It would usher in a new era in the dynamics of litigation if a party could suffer a default judgment to be entered against it and then go about its business as if the judgment did not exist and as though, despite the opportunities to comply with the court's orders and to defend on the merits which had been ignored, the slate was wiped clean and a new day had dawned. To state the proposition is to expose the folly of it.

The applicable principles are clearly implied from *Thomas* v. *Wooster, supra,* where the court held that defendants who had defaulted in a patent infringement suit would not be permitted to show that the patent sued upon was invalid. Defendants had sought to introduce the original patent to show it differed from a reissued patent, which was the patent the plaintiffs sought to enforce. The court ruled that neither this proof nor evidence that defendants had delayed 14 years in seeking reissue were sufficient to defeat the contrary allegation of the validity of the patent contained in the complaint because, *inter alia,* the delay "might possibly have been explained, and the court could not say as a matter of law, it was insusceptible of explanation. . . ." We are instructed by *Wooster* that so long as the facts as painted by the complaint "*might* . . . have been the case" they may not now be successfully controverted by Toolco. There was a time for that and Toolco cannot elect to default and then defend on the merits. It cannot have its cake and eat it too.

Toolco's adversion to TWA's alleged failure to buttress its allegations in effect seeks to have us review the evidence presently in the record as though we were passing on a motion by Toolco for summary judgment supported by appropriate affidavits following normal discovery proceedings and prior to entry of any final judgment. In such

a case, we would grant the motion unless TWA "set forth specific facts showing that there is a genuine issue for trial." F.R. Civ. P. 56(e). But TWA need not introduce any facts whatever in support of its complaint. Judgment has already been entered in its favor on a complaint held on the earlier appeal to this court to state a sufficient claim. Only damages remained to be determined. As Judge Metzner ruled "[w]here file material is involved, if the plaintiff did not have full opportunity to meet or controvert such material, then it should not be used to nullify the allegation." This conclusion is the clear implication of the Court's refusal to permit the admission of the prior patent in *Thomas*.

We have, nevertheless, reviewed all the evidence introduced and relied on by Toolco in its attempt to negative its liability and conclude that Toolco has shown nothing that renders inconceivable the likelihood that TWA could have proved at trial that actions by Toolco which formed the basis for the award of damages were in fact, as alleged in the complaint, violations of the antitrust laws. Although we have found it desirable to set forth and affirm the propositions of law relied upon by the district court and by both Masters involved, it would serve no useful purpose to rehash in detail the arguments which defendants have repeatedly urged to show that the exacting test of *Thomas* v. *Wooster* has been met and which incidentally have been rejected both by Judge Metzner and Special Master Brownell in thorough and well-reasoned opinions.[3]

Briefly, as we said on the earlier appeal, the allegations of the complaint "state the outlines of a tying arrangement, an economic boycott of the defendants' competitors,

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[3] We also are in agreement with the similar statements of the applicable principles of law contained in Brownell's report, as well as those in a preliminary opinion of Special Master Rankin dated July 30, 1965, and in an earlier opinion of Judge Metzner, reported at 38 F.R.D. 499 (S.D.N.Y. 1965).

and an attempt to monopolize commerce, all unlawful under the antitrust statutes." 332 F.2d 602, 611. Specifically, in the first of three claims set forth in the complaint—the only claim upon which TWA introduced evidence of damages—TWA contended that Toolco, 100% owned by Hughes throughout the relevant period, acquired control of TWA and made it a "captive market" for Toolco "with the primary purpose of restraining and monopolizing the trade and commerce" of TWA, which was alleged to constitute a substantial proportion of various defined markets for airplanes, including jets, and related equipment. TWA further alleged that defendants intended that Toolco would become the sole source of supply of jet-powered aircraft to TWA (thus by implication intending to monopolize a substantial portion of a defined market) and a dominant source of supply of jets to air carriers generally; that suppliers to TWA other than Toolco would be boycotted; and that defendants would cause Toolco to supply TWA with aircraft only upon condition that TWA would accept financing dictated by Toolco.

Quite apart from proof of intent, paragraph 9 of the complaint alleged that defendants conspired to restrain trade in violation of Section 1 of the Sherman Act; provided financing to TWA only on the condition that plaintiff buy all aircraft needed for its operations from Toolco; required TWA to boycott all suppliers of aircraft except Toolco; conspired to monopolize the TWA market in violation of Section 2 of the Sherman Act; attempted to monopolize the TWA market, also in violation of Section 2 of the Sherman Act; and sold and leased jets to TWA on the condition that TWA not buy or lease the goods of a competitor of Toolco, in violation of Section 3 of the Clayton Act.

Paragraphs 11 through 29 of the complaint set forth in detail specific acts performed in furtherance of the offenses charged and for the improper purposes alleged, as

outlined above. Thus, according to the complaint, Toolco first acquired TWA with the intent to make it its own market for supplying aircraft, an intention which was carried through into the advent of the commercial jet age during the years 1955-56. In 1956, according to these allegations, Toolco ordered a total of 33 Boeing jets and 30 additional Model 880 jets manufactured by General Dynamics Corporation ("Convair"). At the same time, defendants prohibited TWA from "making any arrangements for the acquisition, by sale, lease, or otherwise, of any jet-powered aircraft." The complaint goes on to say that throughout 1956-60, Toolco refused to assign to TWA the rights to acquire the jets on order from Convair and Boeing, despite TWA's requests that it do so and despite provisions in Toolco's contracts with Boeing and Convair that permitted it to do so. Jets leased to TWA by Toolco on a day-to-day basis in 1959-60 were the only jets made available to TWA during the years 1955 to 1960 and were inadequate to TWA's needs, it was charged. Each lease was conditioned on TWA's agreement and understanding that it would not purchase or lease aircraft from any other supplier. In 1960 six of the Convair 880's Toolco had ordered in 1956 were leased to Northeast Airlines, including three previously assigned to TWA. Similarly, in June, 1959, six of the Boeing jets ordered in 1956 were "diverted to the principal transatlantic competitor of TWA" (Pan Am). While thus restricting TWA's purchases of jets, the complaint alleged that Toolco also inhibited TWA's ability to obtain equity financing and caused TWA to rely chiefly on debt financing, thus rendering TWA unable to finance needed aircraft acquisitions except upon Toolco's approval. Toolco intended by this restriction to increase TWA's dependence on Toolco in furtherance of its unlawful purposes. From 1955-60 defendants prohibited TWA from obtaining financing for the acquisition of jets required for TWA's needs.

The damages which Brownell ultimately awarded to TWA consisted primarily of profits lost as a result of (1) diversion of the six Convair's to Northeast; (2) temporary retention by Toolco of four additional of the ordered Convair's and the ultimate lease of those jets to Northeast; (3) diversion of the six Boeings to Pan Am; (4) the lease, instead of outright sale, of jets in 1959-60; and (5) late delivery of 47 of the 63 jets ordered in 1956, which would have been avoided if, by allegations of the complaint, Toolco had not unlawfully constricted TWA's financing and acquisition of its own jet fleet. Although TWA also attempted to prove other damages resulting from Toolco's manipulation of its financing, and further damage arising from delayed sales of obsolete prop aircraft, Brownell found TWA's proof in these respects insufficient and TWA does not appeal from either determination. No damages were sought to be proved for alleged continuing antitrust violations by Toolco subsequent to December 15, 1960, when Toolco put all its TWA stock in a voting trust controlled by three voting trustees (including Holliday), thus relinquishing control of TWA, an action required as a condition of loans to TWA advanced by various banks and insurance companies to permit the purchase of new jets.

As it did before Brownell and Judge Metzner, Toolco now seeks to discredit primarily one part of paragraph three of TWA's complaint, in which TWA alleged that Toolco had been engaged since 1939 "in the development, manufacture and acquisition of aircraft and related equipment" and its "sale and lease" to air carriers, and to demonstrate the inadequacy of one antitrust theory that, according to Toolco, collapses if the allegations of paragraph three are untenable. Toolco thus would have us find *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947), to be the linchpin of TWA's complaint, without which the remainder cannot hold together. In *Yellow Cab*, the Court reversed the grant of a motion to dismiss a com-

plaint which had alleged that a company engaged in the business of manufacturing taxis had established control of a substantial segment of cab operations in four cities and had exploited its control by extracting exclusive purchasing agreements from its owned cabs and taxi companies, thus excluding other manufacturers from the affected market with the ultimate effect, as the Court said, that "the appellees effectively limited the outlets through which cabs may be sold in interstate commerce." *Id.* at 226. This argument fails at each of three points. Toolco has not established to our satisfaction that TWA could not possibly have proven violations analogous to those alleged in *Yellow Cab*. Even if it had, additional specific allegations of antitrust violations in the complaint other than the one which rests on the holding in *Yellow Cab* are not conclusively disproved by Toolco's evidence. Nor has Toolco demonstrated that TWA's postulates for recovery are in any other manner not "well pleaded."

To disprove the allegation of paragraph 3 that Toolco was a "manufacturer" of commercial airplanes, Toolco relies primarily on (1) CAB opinions and orders dating from 1944-50 that concluded Toolco was not then engaged in or planning the manufacture of airplanes for commercial use, (2) schedules to CAB Form 41 Reports filed by domestic trunk airlines pursuant to 49 U.S.C. § 1377 indicating that between 1950 and 1966 none of these airlines purchased or leased a Toolco-made airplane, and (3) the fact that no TWA annual report ever mentioned the manufacture of a "Hughes plane." These documents, Toolco asserts, conclusively establish that Toolco was never a manufacturer of commercial aircraft and certainly not a competitor with the giant manufacturers—Boeing, Douglas, and Convair—and thus the exclusive dealing arrangements alleged in the complaint are entirely innocuous and incapable of producing the kind of market foreclosure alleged in *Yellow Cab*. Toolco similarly sets out to undermine the allegation that it was a "dealer" in aircraft, again directing attention to

CAB opinions and orders dated no later than 1950 finding no sales or leases of planes by Toolco to any airline but TWA; and again introducing the Form 41 Reports to the same effect but extending to 1961. The thrust of its argument is that under no view of the complaint, given the facts established by these documents, could TWA conceivably have proved more than that Toolco as a parent of TWA engaged in good-faith efforts to rescue it from financial crisis and to operate it as a successful business enterprise. Even if TWA could prove mismanagement by Toolco, that is insufficient, in Toolco's view, to intimate any possible foreclosure of competition—since Toolco was a mere manager or conduit and had no independent competitive significance—and accordingly TWA's theories must be found barren, since danger to free competition is the *raison d'etre* of the antitrust laws and some showing of such a danger in every case is a *sine qua non* of proving their infringement.

Both Judge Metzner and Master Brownell met Toolco's argument in this respect head-on, holding that courts could not consider as conclusively proven, facts merely recited in CAB orders and opinions and in airline reports that are the product of no adversary proceedings, distinguishing between the *existence* of such documents, of which courts might in an appropriate case take judicial notice, and the truthfulness of their contents, which would be subject to contrary proof had the trial precluded by Toolco's default actually been conducted. We agree with the reasoning of both opinions and find the authorities there relied on to be in point and sound. See *Stasiukevich* v. *Nicolls*, 168 F.2d 474, 479 (1st Cir. 1958); *McCormick on Evidence* § 328 at 704, § 330 at 709 (1954); *Morgan, The Law of Evidence*, 1941-45, 59 *Harv. L. Rev.* 481, 482-87 (1946); *McNaughton, Judicial Notice*, 14 *Vand. L. Rev.* 779 (1961).

Moreover the documents described above, while (if their contents were accepted as true) showing that Toolco was

not a major force as a supplier of aircraft other than to TWA, hardly negative the possibility that Toolco possessed independent economic significance, apart from its role as supplier to TWA, sufficient to support proof of any or all the antitrust theories limned by TWA's complaint. There is evidence in the record of activities by Toolco or Hughes that suggest significant movement by Toolco and Hughes toward actual or potential commercial manufacturer or dealership in airplanes, especially jets, and their parts. We cannot say that proof at a trial—prevented by Toolco's conduct—that Toolco was more than a conduit for TWA but rather possessed independent competitive significance with respect to the commercial aircraft market, would be insufficient, if combined with appropriate related proof of the intent, attempt, collusion, tying arrangements, boycotts, and monopolization alleged in the complaint, to support an antitrust judgment for TWA.

The evidence that Toolco's interests and ambitions in commercial air flights may have extended beyond mere management of TWA begins with Toolco's admitted role, initiated in World War II and continuing to the present day, as a substantial manufacturer of helicopters and aircraft parts for military purposes (and now of aerospace materials as well). Although Toolco stresses the non-commercial nature of this activity, it is clear that Toolco throughout the relevant period had the technical capability and sophisticated "know-how," to enter the commercial market without untoward delay if it had so chosen. Early in its history, Toolco acquired the rights to the first forty Constellation aircraft developed in cooperation with Lockheed in the early 1940's. Twenty-five of these were intended by Toolco for sale to airlines other than TWA. 6 CAB 153, 155 (1944). During and after the war, Hughes actively engaged in the development (ultimately unsuccessful) of a plan worthy of Jules Verne, for a 700-passenger plywood flying boat for commercial development. Manufacture by Toolco of aircraft in association with AVRO of

Canada, and of Caravelles as a licensee of Sud Aviacion of France, were considered during the middle 1950's. In 1956, Toolco ordered at least 300 Pratt & Whitney jet engines, later sold primarily to Boeing and Pan Am at a substantial profit. The engines could well have been intended for installation in the planned Toolco jets and in any event constituted Toolco as a competitor with other sellers of jet engines.

Also in 1956, secret discussions were commenced within the inner circles of Toolco and TWA for Toolco to manufacture commercial jets, a plan scuttled before the end of that year by the initiation of a CAB investigation into the matter which followed a TWA motion to the Board for approval to purchase up to 25 Toolco-manufactured commercial jets. Through most of 1955, Toolco was engaged with Convair in the development of a jet which again proved unfeasible. Evidence of these last mentioned aborted forays is consistent with allegations in paragraphs 14 and 15 of the complaint that defendants arranged with Convair to develop "a jet-powered aircraft to be manufactured by Convair and to be supplied by the defendants to air carriers" and that "defendants also entered into a plan under which Toolco would itself" manufacture jets to be furnished "both to TWA and to other air carriers."

Additionally, there was testimony that Toolco ordered seven Convair 880s manufactured to the specifications of Capital Airlines and thirteen Convair 990s built for American Airlines' requirements.

Finally, Toolco's activities with respect to the 63-plane fleet ordered in 1956, only part of which was ever delivered to TWA, further support an inference that Toolco contemplated that it was or might become more than a manager for TWA. Thus, Toolco conditioned its order for the Convair 880's on a stipulation that the price to it would be reduced progressively as Convair was successful in selling more of the planes beyond the initial orders by Toolco

and by Delta Airlines, Inc., a condition consistent with possible Toolco participation in marketing the 880. Non-assignment provisions in the purchase agreements do not conclusively negate the capacity of Toolco to have dealt in its Boeing and Convair contracts and priority rights with airlines other than TWA—and of course Toolco did not in fact exercise its right to assign the contracts to TWA. Ultimately, of course, as alleged in the complaint and demonstrated at the damages hearing, defendants did sell or lease 16 planes of the ordered 63-plane fleet to Pan Am and Northeast. As Master Brownell observed, the ability of Toolco to deliver these jets immediately may have given Toolco a significant competitive advantage over their own manufacturers. Late in 1959, Hughes negotiated with Lockheed for purchase of Electras at a time when Toolco's own actions indicated TWA was fully stocked with jets.

Toolco's response to most of these considerations is that each is consistent with a sole intent on its part to deal in aircraft and aircraft parts solely for the benefit of TWA. However, the allegation in the complaint that Toolco refused to assign the rights to the ordered fleet to TWA, although it was empowered to do so under the contracts of sale, is consistent with a contrary inference.

In any event, the question is not whether one inference or another is the stronger but whether Toolco's evidence—in light of its default and thus the absence of a trial—absolutely forecloses the possibility that Toolco enjoyed actual or potential independent competitive significance in the commercial aircraft market sufficient to support a finding of an antitrust violation under any of the several hypotheses put forward in the complaint, including, in addition to the *Yellow Cab* theory, (1) unlawful *intent* to monopolize a substantial portion of the commercial aircraft market in restraint of trade; (2) unlawful conspiracy to do so, see *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products*

Co., 284 F.2d 1 (9th Cir. 1960), *rev'd on other grounds*, 370 U.S. 19 (1962); *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968); *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968); *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964); (3) enforcement of an illegal boycott, see *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457 (1941); *United States* v. *New York Great Atlantic & Pacific Tea Co.*, 173 F.2d 79 (7th Cir. 1949); *Klor's Inc.* v. *Broadway-Hale Stores*, 359 U.S. 207 (1959); (4) tying adequate financing of TWA to its purchase or lease of jets from Toolco, and vice-versa, see *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 502-03 (1969); and (5) the lease of Aircraft to TWA on the condition that TWA not purchase or lease aircraft from other suppliers, see *International Salt Co.* v. *United States*, 332 U.S. 392 (1947); *Standard Oil Co. of California* v. *United States*, 337 U.S. 293 (1949).

Toolco's reply brief argues that the allegations of unlawful intent are unduly vague but this is unsupported by the cases it relies on, *Glenn Coal Co.* v. *Dickinson Fuel Co.*, 72 F.2d 885, 888 (4th Cir. 1934); *SCM Corp.* v. *Radio Corp. of America*, 407 F.2d 166 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969) (mere conclusory and vague allegations and nothing more, of unlawful attempt or conspiracy to monopolize or to restrain trade, or, simply, to violate the antitrust laws, were held insufficient). By contrast, TWA's complaint alleges specific acts by defendants allegedly pursuant to an intent to monopolize specified markets by means which are described in detail in the complaint. These allegations are both adequate as a matter of proper pleading and sufficiently definite to support an award of damages entered on the default judgment.

Toolco's argument that a conspiracy among Holliday and Hughes, as officers and shareholders of Toolco, with Toolco itself, is as a matter of antitrust law unprovable, is an

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illustration of the thrust of Toolco's approach to the question whether the decisive allegations in the complaint are "well-pleaded." Whether TWA might have proven such a conspiracy would have turned on the nature and weight of technical and secretive evidence bearing on the independent economic significance of each of the parties and also on subjective questions of intent and attempt. Toolco's conduct barred even initial exploration of these crucial factual issues. We are reminded that even summary judgment "should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Poller* v. *Columbia Broadcasting System, Inc., supra* at 473. See also *White Motor Co.* v. *United States,* 372 U.S. 253, 259-60 (1963). We should be far more reluctant to grant summary judgment for Toolco following entry of judgment for TWA, as it now in effect requests us to do, when its own default barred even initial exploration of the crucial factual issues.

V.

The opinions below and the briefs submitted to us on this appeal reveal some confusion as to the proper scope of the hearing on damages. As the authorities cited above illustrate, a default judgment entered on well-pleaded allegations in a complaint establishes a defendant's liability. Also, at the hearing before Special Master Brownell it was incumbent upon TWA to introduce evidence showing the extent of the damages which resulted from the antitrust violations established by the default judgment. The difficulty arises as to a question that Toolco refers to in part II of its main brief as one of "proximate cause." To what extent did the default judgment dispense with a plaintiff's normal obligation to show that damages alleged were proximately caused by Toolco's illegal actions? The answer seems to us inherent in the question.

The default had the effect of admitting or establishing that the acts pleaded in the complaint violated the antitrust laws and that those acts caused injury to TWA in the respects there alleged. Because, however, the damages were unliquidated and uncertain, F.R.Civ.P. 55(b), it was necessary for TWA at the hearing to establish the *extent* of the injuries established by the default. The outer bounds of the recovery allowable are of course measured by the principle of proximate cause. The default judgment did not give TWA a blank check to recover from Toolco any losses it had ever suffered from whatever source. It could only recover those damages arising from the acts and injuries pleaded and in this sense it was TWA's burden to show "proximate cause." On the other hand, there was no burden on TWA to show that any of Toolco's acts pleaded in the complaint violated the antitrust laws nor to show that those acts caused the well-pleaded injuries, except as we have indicated that it had to for the purpose of establishing the extent of the injury caused TWA, in dollars and cents.

Thus, in *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 284 F.2d 1 (9th Cir. 1960), *rev'd on other grounds*, 370 U.S. 19 (1962), cited by Toolco, the court held that an antitrust plaintiff could not recover for losses attributable to a watered-down product rather than to defendant's acts. To the same effect are the other cases relied on by Toolco, e.g., *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F.2d 561 (7th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952) (plaintiff could not recover for losses based on defendant's illegal restriction on its distribution of first-run movies during a period when plaintiff's theatre was not equipped to show first-run movies). TWA purports to dispute Toolco's abstract statement of the appropriate scope of the damage hearing, relying on an unreported district court opinion whose reasoning on the issue of proximate causation we adopted in *Jones* v. *Uris Sales Corp.*, 373 F.2d 644 (2d Cir. 1967). While TWA cites *Jones* for the proposi-

tion that at the damage hearing it had no obligation to show proximate cause in any sense, the central language of the district court opinion in *Jones* which TWA relies upon belies its own assertion: "[t]he causal relationship is stated distinctly in the complaint by the allegation that Penn diverted profits belonging to the defendant Uris. All that remained to be supplied were the identities of the accounts and the enterprise *to which they were diverted*, and the amount of *the profits diverted* . . . ." (Emphasis added.) Implicit in the limiting words we have emphasized is the proposition that it was plaintiff's obligation following the default to establish that any lost profits for which it sought recovery were in fact those whose unlawful diversion was established by the default judgment. The default judgment proved the fact of the diversion (the injury) and its illegality. But to recover damages, plaintiff was necessarily required to establish that those damages were attributable to the diversion. Thus, however well-pleaded the allegation that profits were diverted, plaintiffs in *Jones* could not avoid, to the extent necessary to establish the causal nexus for the recovery of damages, introducing evidence relating to the diversion alleged.

Nor do we believe, contrary to Toolco's assertion, that Special Master Brownell misunderstood this issue. His formulation that the "burden of establishing proximate cause is satisfied *as to liability* if proximate cause is adequately alleged in the complaint" (emphasis added) is consistent with our own understanding of the law and, as we will elucidate shortly, we find his application of the proper principles to have been unexceptionable. In fact, Toolco helpfully reminds us that Special Master Brownell disallowed two major elements of damage alleged by TWA. We have reference to those supposedly arising from the assertions in TWA's complaint that it was chronically underfinanced by Toolco and from TWA's claimed tardy sale of its prop fleet. His conclusions on this score were based on his determination that TWA's proof that those damages

arose from the illegal acts and injuries established by the default judgment was inadequate.

Despite its present broad assertion (perhaps in an excess of caution), that "proximate cause" was in no sense an element essential to establishing recoverable losses, TWA's strategy at the hearing, with respect to the damages actually awarded, was in fact designed to prove causation. To illustrate, and to lay the foundation for our discussion of Toolco's various claims that in several respects TWA's proof of causation was inadequate, we conclude this portion of our opinion by sketching the contours of the evidentiary foundation of TWA's damage award.

TWA's most important witness was Robert W. Rummel, at the time of the hearing TWA Vice President for Planning and Research. Rummel testified to the effect that had Hughes and Toolco not interfered with TWA's operations in the manner alleged in TWA's complaint, TWA would have attempted to acquire in the commercial market a jet fleet of its own consisting of the same 63 airplanes we have made reference to—33 Boeing 707's and 30 Convair 880's—which Toolco did in fact order for TWA and which were ultimately delivered to Toolco in 1959-60. As we have noted, major elements in the damages awarded were losses incurred by TWA and caused by Toolco's diversion of 16 of these jets, 6 Boeings and 10 Convairs, to Pan Am and Northeast and delays in the delivery of the Boeings and Convairs that were not diverted. Brownell accepted only in part Rummel's testimony that the delays in the Convair deliveries were solely attributable to Hughes's misconduct, but he fully accepted Rummel's testimony as to the makeup of the "reconstructed" 63-jet fleet. His report concluded that only the Convair delays beyond those provided in a March 2, 1960, amendment to the original delivery schedule were chargeable to defendants, since delays reflected in that amendment were caused by Convair's own mismanagement.

John B. Connelly, Vice President and Assistant General Manager of Boeing Aircraft Division corroborated TWA's

claim that delays in Boeing deliveries were caused by defendants' failure to negotiate with reasonable diligence for priorities in delivery dates in 1955 when jets were first offered commercially. The thrust of the Connelly-Rummel testimony was that if defendants had not, as alleged in the complaint, prevented TWA from negotiating for itself, it would have ordered and received a full 63-jet fleet sooner than it in fact received the abbreviated 47-jet fleet from Toolco. Apart from a portion of the Convair delays, Brownell credited this evidence in its entirety. The illegality of Toolco's arrogation of all authority for buying aircraft was, as we have said, conclusively established by the default judgment.

Two other fact witnesses for TWA testified as to losses caused by disruptions in the transition from prop to jet operations attributable to defendants' interference with the Convair 880 deliveries. The Special Master adopted their computations without reservation and, except for Toolco's attack on the underlying finding of disruption already referred to, Toolco does not seem to press its argument that the proof with respect to these items was inadequate.

The testimony of TWA's four expert witnesses fared somewhat worse with the Special Master than did that of its so-called "fact witnesses." Brownell rejected a "Comparative Profit Study" report comparing TWA's actual profits with two of its competitors during two separate periods offered in an effort to prove TWA's losses. The report was prepared by Coverdale & Colpits, a consulting engineering firm, and testimony concerning it was given by a partner in the firm, Edward L. Wemple. The Special Master did, however, accept the computations contained in a second Coverdale report tracing in detail the operating losses attributable to Toolco's disruption of the jet fleet for the years 1959-63. These computations included an estimate of increased profits that would have accrued had

TWA owned outright certain Boeing 707's which Toolco only leased to it in 1959-60, as well as of profits that would have been realized otherwise from timely delivery of the reconstructed fleet.

TWA also attempted to prove damages resulting from Toolco's inadequate financing of TWA by introducing a study prepared by Drexel Harriman Ripley, Inc. (the DHR study) testimony concerning which was given by its Senior Vice-President, Edward J. Morehouse. Morehouse testified that if TWA had been independently and competently managed during 1955-60, it could have financed the purchase of the reconstructed fleet at much lower costs than those actually incurred through Toolco's management. The program of independent financing described by the DHR study was rejected by Brownell, as was a report prepared by R. Dixon Speas Associates estimating TWA losses from belated sales of piston airplanes.

Finally, John C. Biegler, a partner of Price Waterhouse & Co., testified with respect to a report in evidence and prepared by his firm under his supervision which reconstructed TWA's historical financial posture on the basis of TWA's evidence of disruptions and their supposed effects which were caused by Toolco. The Price Waterhouse study, as supplemented at times during the hearing, was the vehicle through which evidence of both sides bearing on the effect on TWA operations of supposed Toolco disruptions was translated into differences between actual and hypothetical TWA profits.

Toolco's direct case consisted of testimony of four expert witnesses, Gene M. Woodfin, partner in Loeb, Rhoades & Co., investment brokers, and Nathan S. Simat, Robert I. Helliesen and L. John Eichner, principals in the aviation consulting firm of Simat, Helliesen & Eichner, Inc. Each of defendants' experts sought to discredit the evidence of Wemple, Morehouse, and Speas.

Thus, as is apparent from the above summary, TWA did not rely only on its default judgment but introduced evidence linking each component of the damages claimed to the pleaded illegal acts of Toolco and injuries to TWA. Toolco contends, however, that TWA's proof should have been rejected by the Special Master and that TWA has not established that the delays in delivery, the diversions, or the Boeing leases caused any damage to TWA attributable to those acts and injuries.

VI.

Both sides agree that Special Master Brownell's findings, adopted by Judge Metzner, may not be disturbed at this juncture unless we agree with Toolco that they are "clearly erroneous," F.R.Civ.P. 52(a), the standard also properly applied by Judge Metzner himself in reviewing the Master's Report, F.R.Civ.P. 53(e)(2). Our function would seem to be in a sense redundant, since it appears that each of the substantial objections to the Master's conclusions raised by Toolco before us has already been considered and rejected by the district court. But because of the huge sums involved in this litigation, we have not been content to rest on Judge Metzner's appraisal of the Master's findings and have made our own independent review of those findings. We agree with Judge Metzner's assertion that it is relevant that Special Master Brownell's report is a product of "painstaking" analysis of highly complex questions following hearings on damages which extended over a period of two years, consisting of hundreds of hours of testimony and producing a transcript of 11,000 pages. See *Badenhausen* v. *Guaranty Trust Co.*, 145 F.2d 40, 53 (4th Cir. 1944), *cert. denied*, 323 U.S. 797 (1945); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 274-75 (1949). We might add that his report reflects an extraordinary awareness of the issues raised and the applicable principles of law.

In this connection we observe that the Master, in considering the proof of both parties, did so with explicit reference to the classic statement of the applicable guidelines expressed in *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946), permitting an award in cases such as this to be based "upon probable and inferential, as well as direct and positive proof," and imposing on the wrongdoer any "risk of uncertainty which his own wrong has created," *id.* at 264. Indeed, the Supreme Court recently observed:

> "Trial and appellate courts alike must also observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts."

Zenith Radio Corp. v. *Hazeltine Research Inc.*, 395 U.S. 100, 123 (1969). In this case the reference to risk in *Bigelow* would seem to have even greater application. Toolco must bear the responsibility for any lack of preciseness of proof, and there is good reason that this should be so. The default itself by Toolco rendered precise proof of damages even more difficult than in the usual antitrust case, where the plaintiff may avail itself of the full battery of discovery procedures to prove damages as well as to prove liability. Toolco cannot be permitted to block the discovery of precise, clear and direct evidence and then be heard to complain that the evidence should have been more convincing.

In any event, our answer to each of the many objections that Toolco raises to the specific findings of the Special Master as to the "proximate cause" of the damages awarded TWA, is that each of the challenged findings is amply supported by evidence introduced during the hearing and that none is "clearly erroneous." Toolco's argu-

ments on this score are principally five, each of which we shall discuss sufficiently to demonstrate the basis for the Master's conclusions.

1. Toolco attacks first the validity of the entire basis of the damage award, the reconstructed 63-jet fleet which Brownell found constituted "a proper basis for computing damages." That he was justified in doing so is established first by Rummel's testimony that TWA *should* in fact have ordered the fleet that Toolco ordered for it, although with more dispatch. Rummel was TWA's senior engineer in 1943, chief engineer in 1949, elevated to Vice President in charge of Engineering in 1956, was throughout this period closely associated with Hughes himself in his early exploration of the commercial jet market and indeed may have been the only individual with whom Hughes entrusted a share of responsibility for aircraft procurement. Rummel testified that he reported directly to Hughes, had authority to commit funds under Toolco's contracts, and "the Toolco factory representatives at Boeing and Convair reported to me as special representative of Toolco responsible for the technical administration of the Toolco contracts . . . ." His primary responsibility throughout most of his employment with TWA "has been to recommend what size and what type fleets to procure . . . ." In addition to the historical fact that Rummel, chief procurement officer for TWA at the time and Hughes' confidant, participated in and concurred in the decision to acquire the 63-jet fleet, the assumption that TWA would have acted approximately as did Toolco in the interest of exploiting to maximum financial benefit the enormous potential of the jet age is entirely reasonable. Indeed, in view of the well-pleaded allegations of the complaint, asserting that defendants did not always act in the best interest of TWA, and defendants' contrary assertion that it did always so act, it ill-behooves defendants now to suggest that a well-managed TWA would have acted differently in evaluating its jet fleet requirement than did Toolco.

Assuming then that an independent TWA would have attempted to acquire the same 63-jet fleet ordered by Toolco, defendants contend that TWA would not have been able to finance such an undertaking, which would have cost about $353 million or $93 million more than TWA actually spent for its 47-jet fleet. Toolco notes that $100 million of the financing for the 47-jet fleet was supplied by Toolco itself through its purchase of TWA subordinated debentures. We find untenable Toolco's characterization as insufficient to support the Special Master's contrary assumption that an independent TWA would and could have financed the full 63-jet fleet, the evidence that United, American, and Pan American Airlines each were in fact able to finance comparable ventures during the same period. Toolco directs our attention to financial reversals experienced by TWA during the period preceding the time Brownell assumed TWA would have financed the fleet (1958-59). But the well-pleaded allegations of the complaint demonstrate conclusively that crippling TWA's financial posture and reducing it to a state of vassalage, dependent on Toolco's support, was part of defendants' overall antitrust violation. See Complaint ¶¶ 17, 18, 19, 22, 23, 24, 26, 50, 51, and 52(a). To the extent of negating Toolco's attempted reliance on TWA's asserted financial weakness, these allegations must be given effect. Any inferences other than that an independent TWA would have fared neither better nor worse than competing airlines in financing its jet fleet would have been unwarranted.

3. Assuming then that the 63-jet reconstructed fleet was a reasonable basis for assessing damages, Toolco nonetheless insists that Special Master Brownell erred in his findings that in several respects (concerning the delays in Boeing and Convair deliveries; the leasing of Boeings to TWA; and the diversion of 16 jets to TWA's competitors) an independent TWA would have been managed to better financial advantage. It first attacks the assumption, fully supported by testimony of Rummel and Boeing Vice-Presi-

dent Connelly, that more diligent bargaining for Boeing jets would have resulted in TWA enjoying approximately the same rights to priority in deliveries as did Pan Am, American and United. Rummel's testimony adequately supports the conclusion that TWA would and could have engaged in negotiations reasonably "calculated to preserve TWA's competitive position in the industry for early deliveries," to quote Brownell's words. Connelly, who was in a position to be entirely familiar with Boeing's policies with respect to delivery dates,[4] testified, contrary to Toolco's present contentions, that more diligent efforts by TWA would in fact have resulted in substantial parity of priorities.

Because of Master Brownell's and Judge Metzner's thorough discussions of these questions, and in the interest of curtailing this necessarily protracted opinion, we will not continue to discuss each of the other fine-drawn points raised by Toolco in an attempt to discredit this testimony. It is sufficient that we note we have thoroughly considered each of them and found them insufficient to support a holding of clear error.

4. Special Master Brownell concluded that defendants' dalliance in securing Convair deliveries and its active interference with Convair's production schedule was responsible for delays beyond the amended delivery schedule. This finding is amply supported by evidence of (1) Hughes's refusal to accept delivery of the Convair 880's when Convair was ready to deliver them; (2) his assumption of personal control of all matters concerning the deliveries and his direction that TWA was not to proceed with any acceptance procedures without personal clearance from Hughes; and

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[4] Connelly testified that as Director of Contract Administration he was a member of a "headquarters group" at Boeing in 1955 and in 1956 became Vice President and General Manager in charge of the department at Boeing in which responsibility for commercial airline programs was centralized.

(3) Hughes's personal instructions to Toolco armed guards at one point to forcefully seize four CV-880's from the Convair production lines, thereby aggravating Convair's production difficulties. Moreover, it was uncontested that TWA received its planes on an average approximately 9.9 months later than provided in the original schedule, while deliveries to Delta were delayed by only 1.4 months.

5. Finally, the Master's assumption that TWA as a non-handcuffed independent operator would have purchased outright nineteen Boeings leased to it by Toolco in 1959-60 is supported by evidence in the DHR study establishing that as a general rule outright ownership was more desirable than leasing under the conditions existing at that time, subject to certain exceptions not applicable. Also, in cross-examination, defendant's expert Woodfin, admitted that the 1959-60 leases were an interim and unsatisfactory arrangement. The Master's observation that, of 2,036 aircraft operated by certified route carriers on December 31, 1960, only 117 were leased, is also relevant.

VII.

Our response to Toolco's objections to certain calculations by Special Master Brownell of damages, given that the elements of injury to TWA—from late deliveries, non-deliveries, leases instead of sales, and resultant disruption—were properly established, as we believe, is based on the same rationale that underlies our conclusions in the preceding portion of this opinion. Once again, we find none of Brownell's findings to be clearly erroneous.

There are essentially two issues raised with respect to the calculation of damages, which seem to be subdivided for purposes of analysis and emphasis many times in the briefs. The first concerns the degree of injury due to Toolco's failure to deliver the 10 diverted Convairs and 6 diverted Boeings in light of the size of TWA's jet fleet over the period of five years, 1959-63, for which dam-

ages were assessed. Toolco claims alternatively that certain aircraft purchased by TWA during that period made up for at least part of the lost profits that would otherwise have been incurred as a result of the lost 16 planes. Moreover, to the extent the losses were not thus compensated for, Toolco would attribute the fault not to the diversions but to the failure of TWA's new management to "mitigate" damages by purchasing other jets to replace the diverted ones (as we have noted, three voting trustees, two of whom were not controlled by defendants, assumed control of Toolco's voting stock on December 15, 1960). We do not believe that these claims are inconsistent, as TWA asserts. Rather they amount in the aggregate to a single contention that TWA did in fact partly mitigate damages but could and should have done so entirely, or at least to a greater extent.

The second issue raised is based on the argument that even if TWA's fleet size was decreased as a result of Toolco disruptions to the extent found by Brownell, one cannot calculate the extent to which the larger fleet would have increased TWA's profits.

A. *Fleet Size.*

All the issues raised with respect to the decrease in the size of TWA's fleet attributable to Toolco's mismanagement turn on the conflict between the testimony of Toolco's experts and that of TWA's expert, Wemple, of Coverdale & Colpits, who prepared and gave testimony concerning two reports estimating damages, assuming TWA had received the full reconstructed 63-jet fleet on schedule, rather than 47 jets late. As we have said, Brownell rejected one report, the Comparative Profits Study, but accepted entirely the calculations of the other, which we will refer to as the Wemple study. To rebut the Wemple study, Toolco introduced a report by Simat of Simat, Hellieson & Eichner, Inc., which Brownell rejected in its entirety.

According to the evidence accepted by Brownell, the six Boeings were diverted to Pan Am between November 5, 1959 and June 8, 1960 (they would otherwise have been received by TWA between July 19, 1959 and May 9, 1960). The ten Convairs were to be received between December 1959 and September 1960. On March 5, 1959, Toolco told TWA that it would not receive the Convairs. Six were then diverted to Northeast (and in 1963 repurchased by TWA). The other four were retained for a time by Toolco, then sold to Northeast (and never bought by TWA).

Brownell accepted Wemple's estimates that the Convair diversions resulted in the loss to TWA of the use of 5.1 planes in 1960, 9.9 planes in 1961, the 10 planes in 1962, and 7.9 planes in 1963. The six Boeings, unlike the Convairs, were suitable for international as well as domestic use. Brownell accepted Wemple's conclusion that their diversion resulted in a loss to TWA of use of the following quantities of planes in the stated years, for international and domestic use:

	International	*Domestic*	*Total*
1959	0.2	none	0.2
1960	3.6	1.4	5.0
1961	3.7	2.2	5.9
1962	4.8	1.0	5.8
1963	0.9	0.5	1.4

The markedly lower figures in each category for 1963 reflect the purchase by TWA in that year of the six diverted Convairs and the lease for use in 1962 and 1963 of five Boeing B-331B's (as substitutes for the diverted B-331's).

Brownell also accepted Wemple's testimony that even if it had received its full 63-jet fleet on schedule, TWA would still have leased, as it in fact did, four B-720B

aircraft (a medium range late model Boeing) during 1961-62 and would also have purchased 18 additional B-131B fan jets in 1962. Thus, these purchases were not considered as mitigating the damage caused by Toolco's diversions.

Toolco argues that there is no justification for Brownell's refusal to consider the purchase and lease of these B-720B's and B-131B's as at least partially mitigating damages. Alternatively, it contends that there is no support for the conclusion that any deficiency in TWA's fleet existing in 1959-60 as a result of Toolco's diversions, could have had effects that lingered for four years, into 1963, three years after Toolco relinquished control of TWA. Rather, Toolco insists, at least by 1962 and 1963 any deficiencies in the TWA jet fleet must be attributed either to TWA's business judgment that investment in replacements was not economically justified (thus there could have been no damage resulting from the earlier diversions) or to TWA's unjustified refusal to mitigate damages. The cumulative thrust of this pincer argument is that if TWA would have profited, as Brownell found, from the lost jets, why did not TWA replace them? If it would not have profited, there can be no damages.

We find Wemple's testimony that the B-131B purchases and the B-720B leases did not represent "substitutes" for the lost jets justified by several considerations. First, these assumptions were based on Wemple's background of expertise, and there is no basis in the record for finding they were dictated by TWA's counsel, as Toolco maintains. Second, no airline which commenced using commercial jets in the period during which damages were assessed stood pat and remained contented with its originally acquired fleet during that time. Thus, between 1960 and 1963, Pan Am increased its jet fleet from 38 to 64; United from 34 to 91; and American from 25 to 73 jets. It is entirely reasonable and appropriate to assume TWA

would also have expanded its fleet. Thus, it was not for the Master to conclude that the damages caused by the diversions had been entirely mitigated as soon as TWA acquired a fleet of 63 jets, as it did during 1962. It was not until 1963, the last year for which damages were assessed, that TWA obtained a fleet comparable to the 63 jets it should have had in 1959-60, plus those that it acquired in the meantime. Moreover, the transcontinental but not international-range B-131s may not have been an effective substitute for either the lost intercontinental-range B-331's or the diverted intermediate range Convairs. Finally, we note that Toolco failed to present a single expert witness to challenge the claim that the interim acquisitions did not mitigate damages, or to present an alternative assumption; indeed, Simat, Toolco's own expert, relied on Wemple's contention in this respect.

In support of its claim that TWA failed to mitigate damages, Toolco specifically cites (1) TWA's termination of the B-720B leases in 1962; (2) the decision of a Flight Equipment Committee appointed by TWA in 1961 to lease *only* four B-720B's, instead of six, as recommended by Rummel; (3) a reduction in its order of the B-131B's from an original 20 to only 18 actually purchased in 1962; and (4) its refusal in 1961 to buy the four CV-880's retained by Toolco which were ultimately sold to Northeast.

It is sufficient response to the latter contention to note that the complaint alleges that Toolco offered the CV-880's only on the illegal condition that TWA would not buy jets from Boeing, and Toolco has not shown that this contention was not well-pleaded. This adequately explains TWA's refusal to purchase the CV-880's offered by Toolco. Moreover, there is evidence that neither the B-720B's nor the B-131B's were adequate substitutes for the diverted jets, and thus TWA's actions with respect to those planes are not necessarily indicative of its ability and thus of a deliberate refusal to compensate for the diverted air-

craft. In any event, the burden of proof to establish failure to mitigate damages was on Toolco, see *Ellerman Lines Ltd.* v. *The President Harding*, 288 F.2d 288, 291 (2d Cir. 1961); *United States* v. *Warsaw Elevator Co.*, 213 F.2d 517, 518-19 (2d Cir. 1954); *United States* v. *Russel Electric*, 250 F. Supp. 2, 20 (S.D.N.Y. 1965), and Toolco failed to demonstrate TWA's financial capability to purchase substitute jets deliverable before 1963, or that any such jets were on the market. There is evidence in the record indicating that the lead time in the purchase of jet-powered aircraft, each of which is tailor-made in many respects for the specific customer, is several years. Finally, a holding, in the face of no evidence to the contrary offered by Toolco, that TWA was financially able in the time immediately after the transfer of control to restock its depleted fleet, would not be consonant with the allegation of ¶ 53(a) that Hughes's mainipulations of TWA had left it financially debilitated.

B. *Lost Profits From Decreased Fleet Size*

Toolco also attacks Wemple's testimony credited by the Special Master, that even if TWA had received all 63 jets, the additional 16 jets would have enjoyed a "load factor" (measure of the number of passengers carried on an average trip) equal to the average load factor for all jets of the same types during the years for which damages were assessed. Toolco's principal argument is that its own expert was correct in (1) considering the probable depressing effect on demand of introducing new jets into the commercial air flight market and (2) basing his estimates on TWA's specific records of profits for each of its separate jet routes.

But adding 16 planes to the market would have increased overall capacity of domestic American air carriers by only 3.7% at most. It is entirely reasonable to believe that TWA's new, modern jets would have attracted at

least as many extra passengers to TWA as might have been lost because of the added capacity. Thus one does not have to strain to recognize that TWA's competitors would have borne a loss of passengers. In any event, the effect hypothesized by Toolco is highly speculative and Toolco has not carried its burden of proof on this score.

Moreover, Toolco's approach of calculating the potential market for the lost planes only by looking at the capacity of each existing TWA route to absorb the new capacity is too rigid and the Master was not clearly in error to reject it. There is no reason to believe TWA could not have arranged its schedules to maximize its profits.

Finally, there is simply no sound reason to accept Simat's assumption that international competitors of TWA would have increased their transatlantic jet flights by four for each flight added by TWA. The Master was justified in rejecting this guesswork.

C. *Accounting Adjustments in the Price Waterhouse Study*

Toolco seeks to challenge certain adjustments made in the Price Waterhouse financial analysis, upon which both parties relied throughout the hearing to show the financial impact on TWA of various competing or alternative assumptions, some of which were ultimately resolved in favor of TWA, and some in favor of Toolco. Contrary to the claim in Toolco's reply brief, these adjustments were made by Price Waterhouse, not Biegler, who directed the study and testified concerning it. In Plaintiff's Exhibit 50, Biegler merely summarized the adjustments already made by Price Waterhouse and which were previously incorporated in its study. The exhibit included an index of references to the Price Waterhouse study that explained and justified each conclusion. Toolco raised no objections to any of these adjustments before the Special

Master, although it had ample time to study the Price Waterhouse report prior to Brownell's decision and in the face of Judge Metzner's clearly expressed and entirely appropriate suggestion that any technical problems that might arise after Toolco had thoroughly scrutinized the report should first be referred to Brownell so that rebuttal evidence could be put in the record. Toolco's failure to do so is inexcusable, particularly in litigation as complex and difficult as this is. It is precluded from raising these issues now since its conduct has denied TWA an opportunity to submit its own evidence on these intricate accounting matters to the Special Master.

In any event, Brownell's acceptance of the adjustments relied on by both parties and to which no objections were made can hardly be assigned as plain error unless the defect is patent and obvious on the face of the report. We find none of the adjustments complained of clearly erroneous, and indeed most, if not all, seem clearly justified as reflecting reasonable accounting procedures.

VIII.

In its May 3, 1963 order entering the default judgment on TWA's complaint, as we have already noted, the district court also granted TWA's motion to increase the trebled ad damnum from $105,000,000 to $135,000,000. Toolco assigns this as error under F.R.Civ.P. 54(c), which provides that "a judgment by default shall not . . . exceed in amount that prayed for in the demand for judgment." Although the authorities do not appear to be in agreement and this Circuit has not expressed itself on the question, we are of the view that there is no sound basis for restricting TWA to the precise damages originally sought in a case where damages alleged were unliquidated, and where defendant did not default by non-appearance, but rather because of non-compliance with discovery procedures, and indeed was granted a full trial on the question of dam-

ages actually caused by the allegations established by its default. See *Riggs, Ferris & Geer* v. *Lillibridge*, 316 F.2d 60, 62-63 (2d Cir. 1963); *Sarlie* v. *E. L. Bruce Co.*, 265 F. Supp. 371 (S.D.N.Y. 1967); 6 Moore, Federal Practice ¶¶ 54.61, 55.08 at 1206. Toolco cannot in good conscience complain of any unfairness or surprise, for, as we said in discussing the propriety of the default judgment, at no time has it sought to rectify its refusal to cooperate with the legitimate discovery orders, an act it easily could have performed after Judge Metzner granted the motion to increase the ad damnum. Moreover, at the February 8 hearing, prior to Hughes' non-appearance, TWA clearly announced its intention to apply for an increase in the prayer for damages to the trebled $135 million.

IX.

Judge Metzner awarded attorneys fees to TWA of $7.5 million based on the time expenditure of 56,000 hours and taking into consideration many relevant factors which are each thoroughly discussed in his opinion, 312 F. Supp. 478. Toolco assigns the award as error largely on the basis that the hourly rate (about $128) is excessive, thus ignoring the unprecedented size of the judgment (the allowance for attorneys fees is less than 6% of the award of damages), the complexity of the proceedings, and the fact that the default judgment was the product of intensive pre-trial activity for two years and was followed by exhaustive appeals and intricate damages proceedings during which Toolco persistently attempted to undo the effects of its own default. In extraordinary litigation such as this, it would be artificial to fix an arbitrary hourly rate without regard to other relevant factors, for example, quality of the representation, the success achieved, and the size of the award. There are no exact formulations of which we are aware, that would require a precise maximum hourly fee to be fixed in a vacuum. Under all the circumstances, especially in view of Judge Metzner's meticulous discussion

of the problem, we are unable to say that he exercised his broad discretion in this respect unreasonably. *W. Montague & Co.* v. *Lory*, 193 U.S. 39, 48 (1904); *Hanover Shoe, Inc.* v. *United Shoe Mach. Corp.*, 245 F. Supp. 258, 302 (M.D. Pa. 1965), *vacated on other grounds*, 377 F.2d 776 (3d Cir. 1967), *reversed in part on other grounds*, 392 U.S. 481 (1968).

TWA's Cross-Appeal

The five points raised by TWA on its appeal do not call for more than summary discussion.

X.

Its only objection to Brownell's computation of damages is that he sensibly permitted a deduction from TWA's damages for the cost of capital that TWA would have incurred if it had independently purchased its 63-jet reconstructed fleet because of interest charges that TWA would have incurred if the necessary capital had been borrowed in 1958-59. The Special Master calculated a somewhat higher interest rate (6.3%) for the Convairs than for the Boeings (6%) because the Convairs under the reconstructed plan would have been delivered later than the Boeings. In arriving at a rate of 6.3%, the Master relied on average interest rates charged to other airlines for similar loans during this period, and indeed paid by TWA itself on its own comparable indebtedness during that period. The 6-6.3% rate is identical to that which TWA's expert Morehouse had computed in a portion of his rejected financing plan which contemplated some additional borrowing, in 1959, supplementing earlier financing in 1955 at lower rates.

In seeking a smaller deduction for interest costs, TWA relies on (1) its Exhibit No. 314, showing interest rates on debts outstanding to various airlines in 1960, but without regard to the times that the debts were incurred or

the purposes for which they were incurred; (2) the rejected Comparative Profits Study; and (3) a Price-Waterhouse estimated financing charge premised on the rejected Morehouse report. For the reasons just indicated, each ground asserted is insufficient to establish that Special Master Brownell's adoption of the higher rate was clearly erroneous. In the absence of a viable alternative offered by TWA (and TWA does not contest the rejection of the Morehouse and Comparative Profits studies) the Master properly based his deduction for interest charges on the price of money at the time when financing would normally have been arranged for the 63-jet fleet.

XI.

TWA also argues that the interest allowances on the damage award and the judgment itself were incorrect.

TWA contends that it was improperly denied moratory interest as an element of "the damages sustained" by it under Clayton Act § 4, 15 U.S.C. § 15, to be computed from the time the damages were sustained and trebled to the date of judgment. We agree with the Seventh Circuit's contrary resolution of this issue in *Locklin* v. *Day-Glo Color Corp.*, 429 F.2d 873, 877 (7th Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971). It is reasonable to interpret Congress' silence on the matter as indicating that trebled damages are sufficient penalty and that interest need not be included. See *Rodgers* v. *United States*, 332 U.S. 371 (1947). Moreover, trebled damages will more than adequately compensate TWA for its injuries. *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697 (1945). Thus, there is no inherent policy reason to award moratory interest here and not doing so avoids difficult questions of proof—including highly abstruse inquiries as to proper rates and the time from which interest should run. Since the trebled damage device in any event adequately serves the penal and remedial purposes of the antitrust laws, we believe that it

is sounder, absent contrary express Congressional intent, to consider that these difficult and time-consuming inquiries are intended to be avoided.

TWA also urges that interest on the judgment should run from the time the Master filed his report, rather than from the date of the district court's judgment, contrary to the apparently clear language of 28 U.S.C. § 1961, which speaks of an award of interest "from the date of the entry of the judgment" and applies by its terms to "any money judgment . . . recovered in a district court." TWA is not, as it attempts to show, "penalized" in any sense by any delay in judgment occasioned by the court's discretionary referral of the case to a Master. To the contrary, the salutary device of having the highly complex questions in this case heard and analyzed by a Master served to expedite this litigation. TWA cites no authority in point for its position [6] and we perceive no good reason to adopt its novel argument in the face of the plain words of Section 1961.

We do, however, agree with TWA that under New York law, applicable here pursuant to 28 U.S.C. § 1961 (interest on the judgment is calculated "at the rate allowed [on such judgments] by State law"), interest on the judgment should be at the rate of 7½% rather than the 6% allowed by Judge Metzner. Under N.Y.C.P.L.R. § 5004, interest on

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[6] *Tilgham* v. *Proctor*, 125 U.S. 136 (1888), and other patent cases relied on by TWA do not involve the question of when interest begins to run on a judgment, but rather from when interest as an *element of damages* should be measured. The holding of the cases cited is that interest should run from the date that the fact and amount of damages cease to be "in earnest controversy and of uncertain issue," *id.* at 161, an event marked by the filing of the Master's report. Since we determine that moratory interest is inappropriate here, these cases are inapplicable. In *L. P. Larson, Jr., Co.* v. *Wm. Wrogley, Jr., Co.*, 20 F.2d 830 (7th Cir. 1927), a trademark and unfair competition case, the question at issue was also the time from which interest would be assessed "as an element of damages." *Id.* at 836. See also *Carter Products, Inc.* v. *Colgate-Palmolive Co.*, 214 F. Supp. 383, 417-18 (D. Md. 1963).

money judgments in New York "shall be at the legal rate." When this section was first adopted in 1963, it clearly referred to the rate then set as the maximum allowable interest rate prescribed by Gen. Bus. Law § 340 (6%). Section 340 was subsequently superseded by an identical provision codified as § 5-501(1) of the N.Y. Gen. Obl. Law. In 1968, that provision was amended to give the State Banking Board discretion to set the maximum rate of interest allowable on loans or their equivalent. The 6% rate was thereafter to prevail only if the Board prescribed no other maximum lending rate. In February, 1969 (the Court's judgment was filed in 1970), the Board prescribed a rate of 7½%.

Ever since the amendment to Section 5-501(1), there has been a lively controversy among New York courts and commentators as to which rate governs money judgments —6% or the rate set by the Board. The commentator to the C.P.L.R. argued persuasively in 1969 (see N.Y.C.P.L.R. 1970 Supp. at 146-49) that the sounder view was that the Board's rate should prevail, since the purpose of C.P.L.R. § 5004 was to set interest on money judgments at the going rate at the time in New York State, and the purpose of amending Section 5-501(1) was to permit that rate to be responsive to changing economic conditions. The commenator saw no need for leaving the rate of interest on judgments rigid after the state had determined that for commercial purposes the rate should be more flexible.

We agree with this reasoning. Toolco relies on our contrary decision in *Caldecott* v. *L. I. Lighting Co.*, 417 F.2d 994 (2d Cir. 1969), where we followed the tentative view of the then highest state court ruling on this question, *Belcher* v. *Kesten*, N.Y.L.J. July 29, 1969, p. 11, col. 7 (Sup. Ct. Queens County). Since *Caldecott* was decided by us, the Appellate Division, First Department, has unanimously held in *Rachlin & Co.* v. *Tra-Max, Inc.*, 308 N.Y.S. 2d 153 (March 5, 1970), that the 7½% rate should apply to a money judgment on a claim founded in contract. We see no

sound basis for distinguishing contract from tort actions in fixing the appropriate rate of interest on a judgment and since *Rachlin* is presently the most authoritative declaration of New York law interpreting C.P.L.R. § 5004, we will modify the judgment of the district court and direct that interest run from the date of the judgment at the rate of 7½%.

XII.

TWA's last contention is that it should be compensated for fees paid to its experts as part of its "cost of suit," 15 U.S.C. § 15. This precise issue has long since been decided contrary to TWA's position in this Circuit, *Straus* v. *Victor Talking Machine Co.*, 297 F. Supp. 791 (1924) and TWA has not persuaded us that that decision, or the unanimous host of cases relying on *Straus* in this and other jurisdictions should be overruled. See e.g., *Twentieth Century Fox Film Corp.* v. *Goldwyn*, 328 F.2d 190, 224 (9th Cir. 1964); *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F.2d 561 (10th Cir. 1961), cert. dismissed sub nom. *Wade* v. *Union Carbide & Carbon Corp.*, 371 U.S. 801 (1962); *Farmington Dowel Prods. Co.* v. *Forester Mfg. Co.*, 297 F. Supp. 924 (D. Me.), aff'd and remanded, 421 F.2d 61 (1st Cir. 1969).

The judgment is modified to allow 7½% interest on the judgment. In all other respects, the judgment of the district court is affirmed.

N.

Orders of September 28, 1971

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

34902 & 35114

TRANS WORLD AIRLINES, INC., *Plaintiff-Appellant*,

v.

HOWARD R. HUGHES, ET AL., *Defendants*

HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,
Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellants Hughes Tool Company and Raymond M. Holliday,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Dated: September 28th, 1971

J. JOSEPH SMITH
J. Joseph Smith

IRVING R. KAUFMAN
Irving R. Kaufman

PAUL R. HAYS, SR.
Paul R. Hays

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

34902 & 35114

TRANS WORLD AIRLINES, INC., *Plaintiff-Appellant*,

v.

HOWARD R. HUGHES, ET AL., *Defendants*
HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,
Defendants-Appellants.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellants Hughes Tool Company and Raymond M. Holliday, and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Chief Judge Friendly and Judge Mansfield took no part in the consideration of this petition.

HENRY J. FRIENDLY
Henry J. Friendly
Chief Judge

September 28, 1971.

O.

Order of October 7, 1971

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

34902

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 7th day of October, one thousand nine hundred and seventy-one.

TRANS WORLD AIRLINES, INC., *Plaintiff-Appellant,*

v.

HOWARD R. HUGHES, ET AL., *Defendants.*

HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY, *Defendants-Appellants.*

It is herely ordered that the motion by appellants Hughes Tool Company and Raymond M. Holliday to Stay issuance of the mandate pending application to the Supreme Court of the United States for a writ of certiorari within the tine provided for such application by Section 2101(c) of the Judicial Code (28 U.S.C. § 2101(c)) and the Rules of the Supreme Court be and hereby is granted, provided, however, that appellants Hughes Tool Company and Raymond M. Holliday on or before October 15, 1971, file, in addition to the security ordered by the District Court, a supersedeas bond in the amount of $85 million or, if agreeable to Trans World Airlines, Inc., other security in an equivalent amount.

J. JOSEPH SMITH
J. Joseph Smith

IRVING R. KAUFMAN
Irving R. Kaufman

PAUL R. HAYS
Paul R. Hays

Circuit Judges

P.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket Nos. 34902, 35114

TRANS WORLD AIRLINES, INC., *Plaintiff-Appellant,*

v.

HOWARD R. HUGHES, ET AL., *Defendants,*

HUGHES TOOL COMPANY AND RAYMOND M. HOLLIDAY,
Defendants-Appellants.

It is ORDERED that the motion of October 13, 1971, by appellants Hughes Tool Company and Raymond M. Holliday, to vacate so much of our order of October 7, 1971, which required said appellants to post "a supersedeas bond in the amount of $85 million, or if agreeable to Trans World Airlines, Inc., other security in an equivalent amount", be and hereby is denied;

IT IS FURTHER ORDERED that the time for said appellants to post the supersedeas bond or other security directed by our order of October 7, 1971, and required to be filed on or before October 15, 1971, be and the same hereby is extended to November 1, 1971.

/s/ J. JOSEPH SMITH

/s/ IRVING R. KAUFMAN

/s/ PAUL R. HAYS

Dated:

October 18, 1971

Q.

Statutory Provisions Involved

UNITED STATES CONSTITUTION AMENDMENT V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

UNITED STATES CODE, Title 15:

§1. *Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty.* Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal; PROVIDED, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: PROVIDED FURTHER, That the pre-

ceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

§ 2. *Monopolizing trade a misdemeanor; penalty.* Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

§ 14. *Sale, etc., on agreement not to use goods of competitor.* It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other

commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

§ 18. *Acquisition by one corporation of stock of another.* No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations,

when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: PROVIDED, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

UNITED STATES CODE, Title 49:

§ 1378. (Section 408, Federal Aviation Act) *Consolidation, merger, and acquisition of control.*

(a) *Prohibited acts.* It shall be unlawful unless approved by order of the Board as provided in this section—

• • •

(5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;

• • •

(b) *Application to Board; hearing; approval; disposal without hearing.* Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe:

• • •

§ 1384. (Section 414, Federal Aviation Act) *Legal restraints.* Any person affected by any order made under sections 1378, 1379, or 1382 of this title shall be, and is hereby, relieved from the operations of the "antitrust laws", as designated in section 12 of Title 15, and of all

other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order.

UNITED STATES CODE, Title 28:

§ 1292. *Interlocutory decisions.*

• • •

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

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RULES OF CIVIL PROCEDURE

Rule 16. *Pre-Trial Procedure: Formulating Issues.* In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

Rule 37. Refusal To Make Discovery: Consequences.

* * *

(d) *Failure of Party To Attend or Serve Answers.* If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party. [1]

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[1] Rule 37 was amended March 30, 1970, effective July 1, 1970. The rule now provides, in pertinent part:

(d) *Failure of Party To Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b) (6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard

Rule 54. *Judgment; Costs.*

• • •

(c) *Demand for judgment.* A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

Rule 55. *Default.*

(a) *Entry.* When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made

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to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c). [(A), (B), and (C) of subdivision (b)(2), referred to above, are:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;]

to appear by affidavit or otherwise, the clerk shall enter his default.

(b) *Judgment.* Judgment by default may be entered as follows:

(1) *By the Clerk.*

• • •

(2) *By the Court.* In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

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DEC 28 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-830

TRANS WORLD AIRLINES, INC.,
Cross-Petitioner,

v.

HUGHES TOOL COMPANY and
RAYMOND M. HOLLIDAY,
Respondents.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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December 23, 1971

INDEX

	PAGE
Opinions Below	2
Jurisdiction	3
Questions Presented	3
Statutory Provision Involved	4
Statement of the Case	4
Reasons for Granting this Writ in Event Court Grants Defendants' Petition, in Whole or in Part	
1. The decision below erroneously excluded pre-judgment interest from consideration as an element of actual damages under Section 4 of the Clayton Act	14
2. The decision below erroneously excluded, in this private antitrust suit, the allowance of interest on the Special Master's award for the period between filing his Report and entry of judgment upon it	18
3. The decision below improperly interprets the provision for recovery of "cost of suit" in Section 4 of the Clayton Act to exclude the cost of TWA's experts	20
4. The decision below has misapplied a principle approved by this Court in the *Hanover Shoe* litigation by determining TWA's damages on the basis of a "cost of capital" computed in disregard of allegations of the complaint that defendants had precluded borrowings at lower interest rates	22
Conclusion	24

TABLE OF AUTHORITIES

Cases

PAGE

Brent v. *Thornton*, 106 Fed. 35 (5th Cir. 1901) 16

Brooklyn Savings Bank v. *O'Neil*, 324 U.S. 697 (1945) 15

Carter Products, Inc. v. *Colgate-Palmolive Co.*, 214 F. Supp. 383 (D. Md. 1963) 19

Eddy v. *Lafayette*, 163 U.S. 456 (1896) 16

Hanover Shoe, Inc. v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968) 22

Illinois Central R.R. v. *Turrill*, 110 U.S. 301 (1884) .. 19

LaBuy v. *Howes Leather Co.*, 352 U.S. 249 (1957) 19

L. P. Larson, Jr., Co. v. *William Wrigley, Jr., Co.*, 20 F. 2d 830 (7th Cir. 1927), *rev'd in part on other grounds*, 277 U.S. 97 (1928) 19

Lincoln v. *Claflin*, 74 U.S. (7 Wall.) 132 (1868) 15, 16

Locklin v. *Day-Glo Color Corp.*, 429 F.2d 873 (7th Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971) 15, 20n

Los Angeles Brush Mfg. Corp. v. *James*, 272 U.S. 701 (1927) 19

Miller v. *Robertson*, 266 U.S. 243 (1924) 17

Minnesota Mining & Mfg. Co. v. *New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965) 21

Moore-McCormack Lines, Inc. v. *Richardson*, 295 F.2d 583 (2d Cir. 1961), *cert. denied*, 368 U.S. 989 (1962) 20n

New Dunderberg Mining Co. v. *Old*, 97 Fed. 150 (8th Cir. 1899) 16

Perma Life Mufflers, Inc. v. *International Parts Corp.*, 392 U.S. 134 (1968) 21

Radovich v. *National Football League*, 352 U.S. 445 (1957) 21

Rodgers v. *United States*, 332 U.S. 371 (1947) 15

PAGE

Straus v. *Victor Talking Machine Co.*, 297 Fed. 791 (2d Cir. 1924) 20, 22

Thomsen v. *Cayser*, 243 U.S. 66 (1917) 16

Thomson v. *Wooster*, 114 U.S. 104 (1885) 12

Tilghman v. *Proctor*, 125 U.S. 136 (1888) 19

United Mine Workers v. *Coronado Coal Co.*, 258 Fed. 829 (8th Cir. 1919), *rev'd on other grounds*, 259 U.S. 344 (1922) 16

Statutes

Clayton Act § 4, 15 U.S.C. § 15 (1970) 3, 4, 6, 14, 15, 19, 20, 21, 22

Clayton Act § 16, 15 U.S.C. § 26 (1970) 6

Judicial Code
28 U.S.C. § 1254(1) (1970) 3

Judicial Code
28 U.S.C. § 1292(b) (1970) 9

Judicial Code
28 U.S.C. § 1920 (1970) 21

Judicial Code
28 U.S.C. § 1961 (1970) 19, 20n

Sherman Act § 7
Act of July 2, 1890, ch. 647, § 7, 26 Stat. 210 *repealed*, Act of July 7, 1955, ch. 283, 69 Stat. 283 21

IN THE

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No.

TRANS WORLD AIRLINES, INC.,
Cross-Petitioner,

v.

HUGHES TOOL COMPANY and
RAYMOND M. HOLLIDAY,
Respondents.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Cross-Petitioner Trans World Airlines, Inc. ("TWA") respectfully prays that a writ of certiorari issue to review that portion of the decision of the United States Court of Appeals for the Second Circuit, entered in this proceeding on September 1, 1971, which denied certain parts of TWA's appeal to that Court in modifying and affirming a judgment in TWA's favor in the amount of $145,448,141.07, the writ to issue only in the event this Court should grant, in whole or in part, the petition for a writ of certiorari filed by Hughes Tool Company ("Toolco") and Raymond M. Holliday (together "defendants"), which has been assigned No. 71-827 (hereinafter, "defendants' petition").

TWA does not believe the decision of the Court of Appeals against the defendants involves any issue warranting consideration by this Court, which has already had before it upon prior writs of certiorari (Nos. 443 and 501, October 1964 Term) all significant aspects of this controversy except the amount of the damage award. TWA does not believe that the "Questions Presented" listed in defendants' petition are in truth presented on the record, since they assume facts not found to exist. Accordingly, TWA is opposing defendants' petition, and a brief in opposition will be filed. If, however, defendants' petition is granted in whole or in part, so that this litigation of ten and a half years is not now terminated, then TWA asks that its conditional cross-petition also be granted, so that this Court may consider also certain questions which were decided against TWA below.

OPINIONS BELOW

The decision of the Court of Appeals of which review is sought was set out in an opinion by Kaufman, C.J., writing for a unanimous court, reported at 449 F.2d 51 [108a *et seq.**]. It affirmed decisions of the District Court for the Southern District of New York, Metzner, D.J., reported at 308 F. Supp. 679 [50a *et seq.*] and 312 F. Supp. 478 [81a *et seq.*], which in turn confirmed and entered judgment upon a Report and Award by the Special Master, Hon. Herbert Brownell (the "Brownell Report"). The Brownell Report is reproduced with its original pagination in the Appendix to this cross-petition.

Earlier decisions in the litigation include an unreported decision by the Court of Appeals on January 23, 1963, which after briefing and argument denied defendants review by mandamus or interlocutory appeal of a series of discovery orders (including the orders which defendants ultimately refused to obey); and a unanimous decision the following year

* Citations with the suffix "a" are to pages of the appendix to defendants' petition.

per Chief Judge Lumbard, reported at 332 F.2d 602 (1964) [19a *et seq.*]. Two writs of certiorari to the latter Court of Appeals decision were dismissed by this Court at the October 1964 Term, after full briefing and argument, as having been improvidently granted, 380 U. S. 248 and 249 (1965).

Other orders and decisions herein by the District Court for the Southern District of New York are reported at 29 F.R.D. 523 (December 5, 1961); 214 F. Supp. 106 (February 7, 1963) [1a *et seq.*]; 32 F.R.D. 604 (May 3, 1963) [13a *et seq.*]; 38 F.R.D. 499 (November 16, 1965) [47a *et seq.*]; CCH 1966 Trade Cas. ¶ 71,653 (January 4, 1966); and 314 F. Supp. 94 (June 10, 1970) [94a *et seq.*].

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on September 1, 1971. Defendants' petition for rehearing was denied on September 28, 1971. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether under Section 4 of the Clayton Act, 15 U.S.C. §15 (1970), a plaintiff can recover, as an element of his actual damages, interest computed on the loss sustained for the period preceding the judicial determination of the amount of the loss?

2. Whether, in a suit in which the determination of the amount of damages was referred to a special master whose award was thereafter confirmed in all respects, a plaintiff is entitled to recover interest on the amount thus determined from the date the master's report was filed to the date judgment was entered?

3. Whether under Section 4 of the Clayton Act, a successful plaintiff is entitled to recover, as an item of its actual cost of suit, payments for the services of firms and individuals retained as experts to establish the amount of damages?

4. Whether, in determining the amount of interest to be deducted from plaintiff's damages to reflect the "cost of capital" which plaintiff would have incurred had it been operating free from the unlawful restraints imposed by defendants, the fact that defendants had prevented plaintiff from borrowing money earlier at lower interest rates requires as a matter of law the cost of capital to be computed at such lower rates?

STATUTORY PROVISION INVOLVED

United States Code, Title 15:

"§ 15. *Suits by persons injured; amount of recovery*

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

STATEMENT OF THE CASE

This antitrust case is unique on its facts, and in its procedural history.

It is believed to be one of the oldest private lawsuits still in active litigation in the Federal courts, having been commenced June 30, 1961 in the Southern District of New York.

The plaintiff, TWA, is a major airline, the only United States flag airline authorized to conduct regularly scheduled operations on both transatlantic and transcontinental routes. Its stock has at all relevant times been listed and traded on the New York Stock Exchange.

Defendant Toolco is a corporation wholly owned by Howard R. Hughes, who has directed, controlled and dominated its activities. It has been engaged in the manufacture of oil drilling equipment and has also served as a vehicle for Hughes in a number of other enterprises, including the supply and leasing of aircraft. In 1939 Toolco purchased a minority stock interest in TWA. As a result of that purchase and a number of subsequent acquisitions over the years, Toolco at the time the complaint was filed had a beneficial interest in 78% of TWA's outstanding stock and—until six months previously—had acted as supplier and lessor of equipment to TWA; Hughes and Toolco had dominated all of TWA's activities in connection with the acquisition of aircraft and their financing. At the time this litigation was commenced, Toolco's TWA stock was held in a voting trust established in December 1960, with a majority of the voting trustees being designated by owners of senior debt securities of TWA. In 1966 Toolco sold its TWA stock for net proceeds of more than $546 million, realizing a gain of $452 million over its $94 million cost of acquiring such stock.

Hughes, whom Judge Kaufman termed the "unseen Prince of the drama" (449 F.2d at 61) [122a], was named in the complaint as a defendant, but TWA was never able to serve him as a party; the only valid and effective service ever obtained upon Hughes was as a witness, and it was arranged and vouched for by Toolco.

The third defendant named in the complaint, Holliday, was and is a vice president and director of Toolco, and at the time the complaint was filed was also a director of TWA.*

The complaint charged, in brief, that defendants had violated the antitrust laws by restraining trade in and monopolizing and conspiring to monopolize the supply of

* The complaint was served upon Holliday in January 1962 and his answer was filed in March 1962. In 1963, after Toolco had announced its program of wilful refusal to obey any discovery order of the district court, Holliday expressly elected to be bound for all purposes by Toolco's default, and has presented no separate defense.

aircraft to TWA, thus creating a captive market which they utilized in an attempt to establish themselves in a dominant position as suppliers of aircraft to the American airline industry. They are specifically alleged, *inter alia*, to have, for these purposes, tied the provision of financing for TWA to its purchasing or leasing jets from Toolco, and vice versa; to have enforced an illegal boycott; and to have leased aircraft to TWA on condition that TWA not purchase or lease aircraft from other suppliers. As a direct result of defendants' conduct, TWA was prevented from acquiring an adequate fleet of jet aircraft in a timely manner, and from arranging appropriate financing for such a fleet, to its great damage, originally estimated as being in excess of $35 million (subsequently enlarged to $45 million on notice to defendants, *infra*, p. 7n). Treble damages and an injunction were asked, pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26 (1970).

At the damage hearing, TWA eventually presented expert testimony estimating its lost profits, before trebling, as in excess of $105 million on one theory and in excess of $169 million on another theory; the actual damages awarded below amounted to $45,870,487.65. The various items making up the claimed damages and their relationships with the specific restraints alleged in the complaint are reviewed at 449 F.2d at 64-65 [128a-130a]. Judge Kaufman summarized the elements reflected in the final award as follows:

> "The damages which Brownell ultimately awarded to TWA consisted primarily of profits lost as a result of (1) diversion of the six Convairs to Northeast; (2) temporary retention by Toolco of four additional of the ordered Convairs and the ultimate lease of those jets to Northeast; (3) diversion of the six Boeings to Pan Am; (4) the lease, instead of outright sale, of jets in 1959-60; and (5) late delivery of 47 of the 63 jets ordered in 1956, which would have been avoided if, by the allegations of the complaint, Toolco had not unlawfully constricted TWA's financing and acquisition of its own jet fleet." (449 F. 2d 65-66) [131a].

In August 1961 Judge Charles M. Metzner was appointed to preside over the case for all purposes. Initial priority of discovery went to defendants. TWA was required to begin production of documents in August 1961, and Toolco commenced taking the deposition of TWA's new President, Charles C. Tillinghast, Jr., on January 5, 1962.

In February 1962 Toolco served its answer, which included extensive counterclaims both against TWA and against its new management and a number of financial institutions and their officers (referred to collectively throughout the litigation as the "additional defendants"). The counterclaims charged, in effect, that the disasters which had overtaken TWA during the preceding years had resulted not from the unlawful conduct of defendants, but from a supposed conspiracy by the additional defendants and TWA to force Toolco to give up control of TWA and to monopolize aircraft financing in the hands of the additional defendant financial institutions. Toolco's counterclaims alleged that both itself and TWA had suffered as a result (TWA to the extent of at least $45 million), and treble damages were asked.*

Thus TWA's complaint and Toolco's counterclaims were in essential agreement that TWA had suffered serious injuries and that those injuries were the result of violations of the antitrust laws although expressing opposed positions as to the identity of the wrongdoers responsible for those injuries.

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* Toolco's higher evaluation of the damages suffered by TWA was one factor that led TWA's counsel to put defendants on notice (at the outset of the February 8, 1963 hearing at which Toolco announced its intention to default) that TWA had an application for leave to amend its *ad damnum* clause to ask damages of not less than $45 million.

Discovery was coordinated. Documents produced upon the request of any party were made available to all other parties. All were represented at and entitled to participate in the depositions and pre-trial conferences. It was recognized that the entire controversy would be the subject of a single trial, once discovery had been completed. A single final judgment encompassing all issues and binding upon all parties was to be expected, and that judgment would normally have been subjected to a single review by the Court of Appeals and (should certiorari be granted) by this Court.

As matters developed, however, early in 1963, after defendants had spent a year in deposition discovery of TWA (with two depositions completed, two others in progress and a long list still to come), and had, in the words of Judge Kaufman, "* * * explored and exhausted myriad possible avenues for further delaying the day of reckoning" (449 F.2d at 60) [118a-119a], the district court ruled that TWA and the additional defendants should be permitted to commence the depositions originally noticed by them a year previously. The first of these was to be the deposition of Hughes, the principal actor in all the events described in TWA's complaint, and the dominant figure behind Toolco's counterclaims. TWA's notice of this deposition was pursuant to a witness subpoena, while the additional defendants' notice was directed to Toolco, of which Hughes was the managing agent. Toolco conceded that the witness subpoena was valid and enforceable (it had itself arranged to accept service of the subpoena in lieu of answering interrogatories about Hughes's whereabouts). Toolco expressly stipulated that it was responsible for Hughes's compliance with that subpoena. Whatever significance the difference in the two notices might originally have had had evaporated by 1963.

Defendants at this point, first by written notice and then at a hearing in open court, formally refused to participate in any further discovery proceedings whatever, whether through oral depositions or the production of documents,* and stated that they would as a "business decision" default rather than defend upon the merits. This flat refusal to proceed with the litigation on the merits resulted in a final judgment dismissing Toolco's own counterclaims and in an interlocutory judgment in TWA's favor upon its complaint. No final judgment could be entered upon TWA's complaint until after an evidentiary hearing to establish the amount of its damages.

TWA asked that the damage hearing be held immediately, so that appellate review would follow entry of a final judgment on the complaint. However, the district court considered it appropriate to permit the jurisdictional issues raised by the complaint and counterclaims to be reviewed together, stating that an "immediate appeal from this order is justified" (32 F. R. D. at 608) [18a]. The Court of Appeals agreed, granting defendants an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (1970).

Both in the Court of Appeals and in this Court the procedurally separate appeals were heard together. Thus there were presented to both Courts at that time, on one or both appeals, the jurisdictional and procedural questions which the district court had passed upon in the

* While emphasis has been placed in the subsequent proceedings upon defendants' having blocked the oral deposition of Hughes, they also at the same time finally and flatly refused to produce a large number of documents, the production of which pursuant to two separate orders they had been contesting during the earlier discovery proceedings. Both TWA and the additional defendants considered these documents to be of great importance to the development of their respective cases on the merits. The maneuverings of defendants during this period are described in greater detail in Judge Lumbard's opinion, 332 F.2d at 612-13 [34a-37a] and in Judge Kaufman's opinion, 449 F.2d at 58-62 [115a-123a].

course of 19 pre-trial hearings, including all aspects of the conduct of pre-trial discovery and excluding only the amount of TWA's damages.

In connection with their default, defendants in 1963 made a number of concessions in open court, including an express acknowledgment of their liability in damages if the several jurisdictional grounds on which they were seeking appellate review were determined against them. As counsel for Toolco stated at the pre-trial hearing before Judge Metzner on February 8, 1963:

> "• • • we are fully aware—my client is fully aware—that by insisting on a right to obtain a review on the legal questions which have been decided to date • • • they may be deprived of further defending on the merits, other than on the question of damages." [2d Cir. App. A-276*]

As he explained at a later point in the same hearing:

> "My purpose of course is to obtain something which will enable me to get a review on the law as to whether or not you are entitled to be here in the first place. And then I am prepared, if I am wrong in that regard, to pay the consequences to the extent to which you are able to prove damages." [2d Cir. App. A-297]

TWA's counsel pointed out that the deposition of Hughes was pursuant to a valid witness subpoena, and that the witness himself had neither objected to it nor made any representation or suggestion to the court that he would be unavailable or would refuse to testify. It was TWA's

* Citations to "2d Cir. App. A- " are to the Joint Appendix filed in the Court of Appeals, a certified copy of which has been furnished to this Court by defendants.

position that, regardless of Toolco's "business decision", TWA was entitled to proceed with this vital discovery to establish the nature and extent of its damages, as well as defendants' responsibility for them. However, at Toolco's express request and in reliance upon its stated willingness to respond in damages, Judge Metzner stayed TWA from proceeding and directed that the deposition (then scheduled to commence in Los Angeles on the next business day) not be held.

The 1963-65 appeals resulted in affirmance by the Court of Appeals of the pertinent lower court decisions on all matters presented for review. As to defendants' procedural arguments, Chief Judge Lumbard stated:

> "Hughes' deposition was absolutely essential to the proper conduct of the litigation. Yet he and Toolco seized upon every opportunity to forestall this event. To this end they demanded the production of a multitude of documents by TWA and the additional defendants and secured successive adjournments of the deposition. Indeed, Hughes and Toolco seemed to look upon the entire discovery proceedings as some sort of a game, rather than as a means of securing the just and expeditious settlement of the important matters in dispute. It was only at the very eve of the Hughes deposition—after the other litigants had been put to much delay and expense—that the defendants made a 'business decision' to terminate discovery." (332 F. 2d at 615) [40a-41a]

Certiorari having been dismissed after full briefing and oral argument in this Court, the Court of Appeals affirmance then became final as to the counterclaims and constituted a binding adjudication against Toolco of the issues presented thereby (including, significantly, the contentions

made in the counterclaims as to where responsibility rested for TWA's losses).*

Following this Court's dismissal of certiorari in March 1965, defendants urged to the lower court, in spite of their prior concessions, that TWA should be required to prove the truth of the allegations of its complaint (default or no default, and without benefit of discovery) before a judgment in damages could be entered against them. Judge Metzner held, however, that defendants, having defaulted, were precluded except within the narrow limits established by *Thomson* v. *Wooster,* 114 U. S. 104 (1885), from contesting the truth of the allegations of the complaint, and that TWA was not required to introduce evidence to establish the truth of those allegations (38 F.R.D. at 501) [48a-49a]. With these principles finally laid down, the damage hearings themselves began in April 1966 before the Special Master, Hon. Herbert Brownell.

The hearings lasted altogether two and a half years, with Mr. Brownell's Report and Award being handed down on September 21, 1968. In addition to witnesses from TWA and the Boeing Company, TWA presented the expert testimony of a firm of consulting engineers, Coverdale & Colpitts, a firm of aviation consultants, R. Dixon Speas Associates, Inc., an investment banking firm, Drexel Harriman Ripley, Inc. and a firm of independent public accountants, Price Waterhouse & Co. Through these witnesses, as Judge Kaufman commented, "TWA * * * introduced evidence linking each component of the damages claimed to the pleaded illegal acts of Toolco and injuries to TWA." (449 F. 2d at 72) [144a] The direct testimony of all of TWA's

* TWA was a party defendant (in substance as well as in form) to the counterclaims. It joined in every motion and brief filed by the additional defendants. It is entitled to all benefits of the decisions rendered thereon, as fully as any other counterclaim defendant.

witnesses was submitted in written form on May 2, 1966, but defendants' study of this evidence and their cross-examination of TWA's witnesses continued through March 2, 1967.

Defendants' own case was presented thereafter entirely through expert witnesses, with several reports being presented by the aircraft consulting firm of Simat, Helliesen & Eichner, Inc. and a report by the investment banking firm of Loeb, Rhoades & Co. The material on which these reports were supposedly based included voluminous computer printouts, which required sophisticated analysis by TWA's experts in order that cross-examination could be carried on effectively. Indeed, after the testimony of defendants' witnesses came to a conclusion on March 27, 1968, TWA's short rebuttal case also included the testimony of a statistical expert on certain matters which had arisen in the course of cross-examination of defendants' witnesses. Recross was completed on April 9, 1968.

Briefing and the preparation by Mr. Brownell of his Report occupied the next six months. A year and a half was then occupied with the district court's review and confirmation of the damage award and the entry of judgment thereon on April 14, 1970, and another year and a half was devoted to the process of briefing and arguing the appeals to the Court of Appeals for the Second Circuit. That Court's unanimous opinion was handed down on September 1, 1971.

Assuming, hypothetically, that TWA is finally permitted on June 30, 1972, the eleventh anniversary of the filing of its suit, to enforce payment by defendants of the damages that the Special Master and the two lower courts have adjudicated in its favor, the eleven years between filing its

complaint and recovering its damages would have been spent as follows:

Period from filing of complaint (6/30/61) to defendants' admission of liability (subject to jurisdictional defenses and asessment of damages) (2/8/63)	1 yr. 7 mos.
Period from defendants' admission of liability (2/8/63) to disposition of appeals on jurisdictional and procedural matters (interlocutory as to complaint and answer, final as to counterclaims and replies) (3/8/65)	2 yrs. 1 mo.
Period from disposition of interlocutory appeals (3/8/65) to the filing of the Brownell Report (liquidating TWA's previously unliquidated damage claim) (9/21/68)	3 yrs. 6 mos.
Period from filing of Brownell Report (9/21/68) to entry of judgment (4/14/70)	1 yr. 7 mos.
Period from entry of judgment (4/14/70) to assumed completion of final appellate review, etc.	2 yrs. 3 mos.
	11 years

REASONS FOR GRANTING THIS WRIT IN EVENT COURT GRANTS DEFENDANTS' PETITION, IN WHOLE OR IN PART

1. The decision below erroneously excluded prejudgment interest from consideration as an element of actual damages under Section 4 of the Clayton Act.

A. Section 4 of the Clayton Act, 15 U.S.C. § 15 (1970), provides that a person injured by a violation of the antitrust laws "shall recover threefold the damages by him sustained."

The Second Circuit Court of Appeals, relying principally upon the reasoning of the Seventh Circuit in *Locklin* v. *Day-Glo Color Corp.*, 429 F.2d 873, 877 (1970), *cert. denied*, 400 U.S. 1020 (1971), held that TWA was not entitled to recover interest, as an element of the damages actually sustained, from the end of the period when the damages were inflicted upon it to the date of judicial determination of the amount of those damages. The Court of Appeals below stated that it was reasonable to interpret Congressional silence on the matter "as indicating that trebled damages are sufficient penalty and that interest need not be included" (449 F.2d at 80) [159a]. The Court further reasoned that treble damages "will more than adequately compensate TWA for its injuries" and noted the belief that "absent contrary express Congressional intent, [it is sounder] to consider that these difficult and time-consuming inquiries are intended to be avoided" [*ibid.*]. The two cases cited by the Court other than the *Locklin* case—*i.e.*, *Rodgers* v. *United States*, 332 U.S. 371 (1947), and *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697 (1945)—dealt with statutes each of which is not only different in purpose but quite different in language from Section 4 of the Clayton Act; neither purports to announce a general principle for interpreting other statutes providing for the recovery of multiple damages. There is nothing in the legislative history of Section 4 to indicate that Congress intended to exclude any element of actual damages customarily recognized by the courts.

At the time the Clayton Act was passed, it was already well established that, in a proper case, interest on a sum found to be due (even though unliquidated) from the time a plaintiff should have had that sum should be regarded as an element of his actual damages, quite separate from the interest which a court allows as a matter of law on judgments. *Lincoln* v. *Claflin*, 74 U.S. (7 Wall.) 132, 139

(1868); *Eddy* v. *Lafayette*, 163 U.S. 456, 467 (1896); *New Dunderberg Mining Co.* v. *Old*, 97 Fed. 150, 153-55 (8th Cir. 1899); *Brent* v. *Thornton*, 106 Fed. 35, 38 (5th Cir. 1901).

The only early reported antitrust cases on this point are entirely consistent with this analysis and are in conflict with the decision of the Court of Appeals below. In *Thomsen* v. *Cayser*, 243 U.S. 66, 74, 88-89 (1917), this Court cited with approval the fact that the jury had added interest to the damages found, thus confirming, in the Court's view, that the verdict was not based on "supposititious profits" but on an actual calculation of damages. Subsequently in *United Mine Workers* v. *Coronado Coal Co.*, 258 Fed. 829, 846-47 (8th Cir. 1919), *rev'd on other grounds*, 259 U.S. 344 (1922), the Eighth Circuit explained *Thomsen* v. *Cayser* as being a particular application of the rule of *Lincoln* v. *Claflin*, *supra*, and held that the prejudgment interest (awarded by the district court in that case as a matter of law) should have been left to the jury as a matter of damages. Both cases involved private antitrust plaintiffs and are predicated on the assumption that Congress intended that such plaintiffs—like other plaintiffs—could recover prejudgment interest as an element of damages.

TWA respectfully submits that the proper interpretation of "damages * * * sustained" in Section 4 is of importance to all private antitrust plaintiffs. This case is not unique in the fact that a substantial period of time has elapsed between the time when plaintiff's damages were actually sustained and the time when a judicial determination of the amount of those damages was made. Since two Circuits now hold that a private antitrust plaintiff cannot recover this actual element of damages sustained, unless certiorari is granted the view embodied in *Thomsen* v. *Cayser* and *UMW* v. *Coronado Coal* will have been, in effect, overruled,

without adequate consideration of the policies embodied in the Clayton Act.

B. It is particularly inappropriate in this case for defendants to escape the payment of compensatory interest for the extended period following their deliberate default. In a non-jury case, the award of such interest is a matter within the discretion of the court, *Miller* v. *Robertson*, 266 U. S. 243, 258 (1924), and the facts here establish a compelling case for the exercise of that discretion.

The adoption by this Court of the Federal Rules of Civil Procedure in 1937 was a historic landmark in the administration of civil justice under common law principles. It gave notice that the natural desire of parties for the courtroom advantage often available, if opponents can be forced to trial unaided by compulsory revelation in advance of potentially damaging evidence, would thereafter be subordinated to the public interest that all parties to a civil action must have a full and fair opportunity to discover and present the evidence relevant to their claims. The discovery rules, which enable parties to develop their evidence to the extent necessary by compulsory process against their opponents, are the basic procedural foundation on which the federal civil system has rested for the past thirty years.

Defendants' deliberate and wilful decision—so announced, with the explanation that it was a matter of business judgment—was to defy this discovery process, to compel, if at all possible, TWA to proceed without benefit of the evidence of intent and motive and of detailed transactions among co-conspirators which would have come out if TWA had been permitted to take the depositions and examine the secret documents to which the district court had found it entitled. Defendants' conduct has been twice reviewed in detail by the Court of Appeals for the Second Circuit, and vigorously condemned. Chief Judge Lumbard, speaking for a unanimous Court, characterized it in 1964 as "wilful and deliberate disregard of reasonable and

necessary court orders and the efficient administration of justice * * *" (332 F. 2d at 614) [40a]. After pointing out that "Hughes' deposition was absolutely essential to the proper conduct of the litigation" (332 F.2d at 615) [40a], he went on to say:

> "Hughes' conduct is particularly intolerable in a large and complex litigation such as this one. The protracted antitrust suit taxes the energies and resourcefulness of each party to the litigation; and it consumes much time of the court and the special masters it appoints. Tactics such as Hughes' serve only to frustrate the implementation of the discovery machinery devised by the federal judiciary to expedite the handling of such complex litigation." (332 F.2d at 615) [41a]

Judge Kaufman in 1971, also speaking for a unanimous court, reviewed the entire proceedings once again and in detail, and summarized its conclusions on this second review in this sentence:

> "The entry of the default judgment was inescapable and virtually invited by Toolco." (449 F.2d at 63) [125a]

Yet the ultimate and inevitable effect of the failure below to allow TWA compensatory interest for the post-1963 period is to reward the very disruptive tactics which the Second Circuit has twice with unanimity found intolerable.

2. The decision below erroneously excluded, in this private antitrust suit, the allowance of interest on the Special Master's award for the period between filing his Report and entry of judgment upon it.

Judge Metzner (312 F.Supp. at 485) [92a] and the Court of Appeals (449 F.2d at 80) [160a] held that TWA was not entitled to interest on the award from September 21, 1968 when the Brownell Report was filed to the entry of judgment thereon on April 14, 1970, although the award was confirmed in all respects.

Some delay is virtually inevitable whenever the question of damages is referred to a special master since—whatever the gain in judicial efficiency—an additional layer of judicial review is involved, and that takes time. The policy underlying Section 4 of the Clayton Act would appear to call for minimizing the adverse impact of such a delay upon a plaintiff whose injuries are the subject of the reference. However necessary the reference to a master may be to determine the damages in a complex antitrust case (and TWA concedes that this case is a classic example of one requiring such a reference), this necessity arises not from anything done by the plaintiff, but from defendants' wrongdoing for which Section 4 is intended to provide a remedy.

This Court has previously expressed its concern that parties not be unnecessarily penalized by references to masters. *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 256 (1957); *Los Angeles Brush Mfg. Corp.* v *James*, 272 U.S. 701, 707 (1927). There surely is no practical reason why such a delay should operate to the monetary prejudice of the plaintiff, when there is available the simple solution of allowing interest on any sum found properly awarded from the date of the special master's award. This is exactly what courts have done for very many years in judgments entered on special masters' awards in other situations. *Illinois Central R.R.* v. *Turrill*, 110 U.S. 301, 303 (1884); *Tilghman* v. *Proctor*, 125 U.S. 136, 160-61 (1888); *L. P. Larson, Jr., Co.* v. *William Wrigley, Jr., Co.*, 20 F.2d 830, 836 (7th Cir. 1927), *rev'd in part on other grounds*, 277 U. S. 97 (1928); *Carter Products, Inc.* v. *Colgate-Palmolive Co.*, 214 F.Supp. 383, 417-18 (D. Md. 1963).

The Court of Appeals erred in considering this question to be governed by 28 U.S.C. § 1961 (1970), which provides that in a federal district court interest *must* be awarded on a money judgment from the date of entry thereof at

the rate prescribed by state law.* The omission from that section of the statute of any reference to prejudgment interest had not previously been construed to preclude the award of interest from an earlier date when sound reasons for such an award exist.**

3. The decision below improperly interprets the provision for recovery of "cost of suit" in Section 4 of the Clayton Act to exclude the cost of TWA's experts.

Should a successful plaintiff in a private antitrust suit bear his entire cost of presenting expert testimony on the complex issues relating to the proof of the amount of damages sustained without reimbursement by the defendant? While admittedly a long and uniform line of circuit and district court decisions, stemming from the Second Circuit's decision nearly half a century ago in *Straus* v. *Victor Talking Machine Co.*, 297 Fed. 791, 806-07 (1924), have answered in the affirmative, this Court has not passed upon the question, which is essentially one of interpreting the phrase "cost of suit" in Section 4 of the Clayton Act.

The legislative history with respect to the adoption of Section 4 is extremely sparse, there being, to our knowl-

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* "Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law." (28 U.S.C. § 1961)

** The Seventh Circuit, in *Locklin* v. *Day-Glo Color Corp.*, *supra*, further confused this question with the availability of interest as damages discussed in Point 1 above, and announced the patently erroneous rule that recovery of interest is precluded whenever interest "is not enumerated as a recoverable item in the statute" (429 F.2d at 877). There is no authority whatever for such a rule, which in many situations would result in manifest injustice. *See, e.g., Moore-McCormack Lines, Inc.* v. *Richardson*, 295 F.2d 583, 592-95 (2d Cir. 1961), *cert. denied*, 368 U. S. 989 (1962).

edge, nothing in either the congressional debates or the relevant committee reports that seeks to define the phrase "cost of suit, including a reasonable attorney's fee." The most that can be concluded from the legislative history of Section 4, and from that of Section 7 of the Sherman Act (now repealed) from which Section 4 was derived, is that Congress intended to provide a genuine remedy that would encourage victims of violations of the antitrust laws to seek relief in the courts. *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 139 (1968); *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965); *Radovich* v. *National Football League*, 352 U.S. 445, 454 (1957).

Since the potentially enormous expense involved in bringing suit and prosecuting it to a conclusion is one of the major negative considerations which a prospective antitrust plaintiff must have in mind, it is far more consistent with the basic policy underlying Section 4 that major necessary expenses of suit should be reimbursed than that they should be excluded by interpreting "cost of suit" so narrowly as to include only costs ordinarily taxable by any successful litigant, without benefit of any special statutory provision. Moreover, a broader interpretation finds strong inferential support in the phrasing of the statute. The use of the word "including" is definitional: the "cost of suit" described is one which "includes" attorney's fees. Ordinary taxable costs never *include* such fees, 28 U.S.C. § 1920 (1970), and if such costs were all that was intended, the correct and natural phrase would have been "costs, *and* a reasonable attorney's fee."

TWA's total claim for its cost of this suit, exclusive of attorney's fee, was $2,230,602.83. Again, as it did in the Court of Appeals in order to simplify presentation of the issue, TWA here confines its claim to the fees which it had to pay for the services of firms and individuals retained

as experts in connection with the damage hearing—a total of $1,642,677.71. It is respectfully submitted that the suggested interpretation of Section 4 of the Clayton Act to permit reimbursement of this sum not only is more grammatically and logically justifiable than that of the Second Circuit in the *Straus* case, *supra*, which renders the phrase "cost of suit" mere surplusage, but also more reasonably effectuates the congressional policy behind the statute.

4. The decision below has misapplied a principle approved by this Court in the *Hanover Shoe* litigation by determining TWA's damages on the basis of a "cost of capital" computed in disregard of allegations of the complaint that defendants had precluded borrowings at lower interest rates.

In *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 504 (1968), this Court approved the principle that, in determining the amount of the loss suffered by a plaintiff from a defendant's actions in violation of the antitrust laws, there should be subtracted from the amount by which the plaintiff shows his earnings were decreased an appropriate sum reflecting the probable interest cost, if any, which the plaintiff would have had to incur to acquire income producing equipment not in fact acquired. This deducted amount is described as the "cost of capital". In the *Hanover Shoe* case, in which the damages found stemmed from plaintiff's having been unlawfully required to lease machinery which would have been cheaper for it to buy, an interest charge calculated at 2.5% on the assumed purchase price of such machinery was deducted from the amount of the award.

The same principle was applied in this case by the Special Master, Mr. Brownell, and approved by the courts below. In this case the damages which TWA was awarded were based on loss of earnings resulting from its having

been unlawfully precluded from obtaining a sufficiently large fleet of jets in a sufficiently timely manner. The Brownell Report deducted from the award as "cost of capital" interest computed at the rates of 6.0% and 6.3% on the net assumed investment in the additional and earlier jet aircraft [Brownell Report, pp. 147-67, 173-85]. These interest rates were determined on the basis of interest rates being charged to TWA and others in the 1959-60 period on substantial borrowings for similar purposes. The amount deducted in this computation was very large—a total of $29.0 million was subtracted from the base damage figure, reducing the award, after trebling, by $87.0 million.

TWA does not now dispute the logic and general propriety of a "cost of capital" deduction from a damage award in a proper case. TWA does contend, however, that the courts below should not have charged TWA in this computation at the 6.0-6.3% rate based on interest rates prevailing around 1959-60, when the complaint (*admitted by defendants' default*) expressly alleges that in 1955 and 1956, at a time when funds were available at interest rates of 4% to 4¾%, defendants prevented TWA from making arrangements for financing. To charge TWA in the damage computation with a "cost of capital" based on any interest rate higher than 4¾% is to permit defendants to profit by their own wrongdoing.

The amounts involved, although much less than the $29.0 million actually deducted in the damage computation as "cost of capital", are still substantial. The computation can readily be made from the data presented in the Brownell Report, and would produce a "cost of capital" of $22.5 million—$6.5 million less than produced by Mr. Brownell's calculation. After trebling, the result would be to increase TWA's judgment by $19.5 million.

CONCLUSION

The issues raised by this cross-petition are peripheral to the basic controversy. Although involving very substantial sums, to TWA they are less important than bringing this ten-and-one-half years of litigation to a conclusion. The Brownell Report has been confirmed in its entirety by the district court and unanimously upheld by the Court of Appeals, which has twice reviewed in detail and approved the conduct of the pre-trial proceedings. TWA believes that there is nothing in defendants' petition for certiorari to warrant a further review at this time of what are essentially factual determinations.

Nonetheless, if the Court determines to grant defendants' petition, in whole or in part, TWA believes that the Court should take that opportunity to correct the erroneous results reached below on the questions presented in this conditional cross-petition.

Respectfully submitted,

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December 23, 1971

DEC 23 197
E. ROBERT SEAVER, C
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IN THE

Supreme Court of the United States

October Term, 1971

Nos. 71-827 and

HUGHES TOOL COMPANY and
RAYMOND M. HOLLIDAY,
Petitioners,

v.

TRANS WORLD AIRLINES, INC.,
Respondent.

TRANS WORLD AIRLINES, INC.,
Cross-Petitioner,

v.

HUGHES TOOL COMPANY and
RAYMOND M. HOLLIDAY,
Respondents.

APPENDIX TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AND

SUPPLEMENTAL APPENDIX TO ACCOMPANY BRIEF IN OPPOSITION

Explanatory Note

The Report and Award of Hon. Herbert Brownell, Special Master (the "Brownell Report"), was filed herein with the United States District Court for the Southern District of New York in printed form on September 21, 1968. A copy of the original 323-page Brownell Report was bound into the Joint Appendix filed with the United States Court of Appeals for the Second Circuit on the appeals to that Court, and in both courts below references were made to the original pagination of the printed Brownell Report. Cross-Petitioner and Respondent Trans World Airlines, Inc. ("TWA") is filing the Brownell Report in this Court, in the form in which it was originally submitted to the District Court in 1968, as an Appendix to TWA's own Conditional Cross-Petition for a Writ of Certiorari in No. and to supplement the Appendix filed by Petitioners and Respondents Hughes Tool Company and Raymond M. Holliday with their Petition in No. 71-827.

United States District Court

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324

TRANS WORLD AIRLINES, INC.,

Plaintiff,

—against—

HOWARD R. HUGHES, HUGHES TOOL COMPANY, and RAYMOND M. HOLLIDAY,

Defendants.

REPORT OF HERBERT BROWNELL, SPECIAL MASTER

Dated: September 21, 1968

United States District Court

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324

TRANS WORLD AIRLINES, INC.,

Plaintiff,

—against—

HOWARD R. HUGHES, HUGHES TOOL COMPANY, and RAYMOND M. HOLLIDAY,

Defendants.

REPORT OF HERBERT BROWNELL, SPECIAL MASTER

Introduction—Prior History of the Case

This is an action by plaintiff Trans World Airlines ("TWA") against Howard R. Hughes ("Hughes"), Hughes Tool Company ("Toolco"), and Raymond M. Holliday ("Holliday"), an officer of Toolco and a director of TWA at the time of the filing of the complaint. The complaint was filed on June 30, 1961. Service was made on Toolco at that time, but service of process on Holliday was not made until January, 1962. Both Toolco and Holliday appeared and answered the complaint. Hughes was never served, and he has not appeared in the action.

The complaint sets forth three claims. The first claim alleges violations of Sections 1 and 2 of the Sherman Act

and Sections 3 and 7 of the Clayton Act. The second claim, based on certain of the acts alleged in support of the first claim but only those acts committed since December 31, 1960, also alleges violations of Sections 1 and 2 of the Sherman Act and Section 7 (but not Section 3) of the Clayton Act. These two claims allege that TWA is a major U. S. air carrier with both domestic and international routes, that Toolco "was and is engaged . . . since in or about 1939 in the development, manufacture and acquisition of aircraft and related equipment from the manufacturers thereof . . . and in the sale or lease of such aircraft to air carriers", and that Toolco has acquired 78% of the common stock of TWA. The first two claims further allege that through various acts the defendants and Atlas Corporation (named as a co-conspirator but not as a defendant) required TWA to acquire all of its jet aircraft from Toolco and to boycott all other suppliers, provided financing for the acquisition of jet aircraft only on the condition that TWA purchase all its jet aircraft from Toolco, and sold and leased jet aircraft on the condition that the purchaser would not buy or lease from any competitor. The third claim, based on pendent jurisdiction, alleges malicious and wilful interference with the business of TWA through the same acts pleaded in support of the first two claims. The complaint seeks treble damages and also injunctive relief requiring defendants to divest themselves of all stock in TWA and to refrain from acquiring any interest in TWA or seeking to exercise control or domination over TWA. In its answer to the complaint, Toolco asserted various counterclaims against TWA and also against others.

In August 1961, the case was assigned to Judge Charles M. Metzner for all purposes, pursuant to Rule 2 of the

General Rules of the District Court. On February 7, 1962 Judge Metzner appointed J. Lee Rankin as Special Master to supervise the discovery proceedings.

Simultaneously with filing the complaint, TWA moved by order to show cause on June 30, 1961 to take the deposition of Hughes. This motion was denied, however, and Toolco was allowed priority in the taking of depositions. On February 7, 1962, in the same order appointing the Special Master, Judge Metzner established a schedule of depositions, which was subject to change by the Special Master upon application of either party. This schedule called for Toolco to continue with the depositions of some twenty-four witnesses which had then been noticed, with the plaintiff to commence depositions immediately upon completion of Toolco's schedule. The last deposition by Toolco was set for April 19, 1962, and the depositions noticed by TWA were to commence with the deposition of Hughes on April 23, 1962.

This schedule was subsequently amended by the Special Master. The deposition of Hughes was set for September 24, 1962, then adjourned to October 29, 1962, and finally set for February 11, 1963. Although Hughes himself was never served with process as a party, the Special Master ruled that Toolco would be responsible for his appearance at the deposition, and Toolco did not contest this ruling.

On January 10, 1963, Judge Metzner denied an application by Toolco to further postpone the deposition of Hughes, so that Toolco might continue with its own depositions. On January 14, Toolco moved to have the deposition of Hughes taken only on written interrogatories, and in the event that this was denied, further moved to have set down for hearing a motion which it had originally made in August, 1961 to dismiss the complaint. Characterizing

this motion as appearing to be "another attempt to put off the deposition of Hughes", Judge Metzner denied the request to have the deposition taken by interrogatories. As to the second branch of the motion, Judge Metzner observed that the case "is not in a posture for a meaningful disposition of the motions to dismiss the complaint or for summary judgment" and noted the agreement of Toolco on several occasions that such a motion was premature. However, the Court further stated that it "cannot prevent defendant Toolco from pressing these motions at this time" and set the motions down for argument.

After oral argument on February 6, 1963, Judge Metzner denied Toolco's motion from the bench and entered a formal opinion and order the following day. (Reported at 214 F. Supp. 106). In that opinion, Judge Metzner stated that "as to the merits of the motion, there is no doubt that the complaint on its face sets forth a claim against the defendants and is not subject to dismissal under rule 12(b)(6)". Judge Metzner further ruled that the acts of the defendants alleged in the complaint were not exempted from the antitrust laws by virtue of certain orders of the Civil Aeronautics Board, and that the C.A.B. did not have exclusive primary jurisdiction over the subject matter of the complaint.

Almost immediately thereafter, at a pre-trial conference before Judge Metzner on Friday, February 8, 1963, counsel for Toolco announced that Hughes would not appear for the deposition scheduled for the following Monday, February 11. Toolco also declared its unwillingness to produce as previously ordered certain income tax returns, as well as certain other documents for which a claim of attorney-client privilege had been made but rejected by the court. Toolco also filed a written "Notice of Position" dated February 8, which recited in part that:

"Toolco hereby elects, subject only to whatever relief it may hereafter obtain, to rest on the merits of its positions as heretofore taken so that it may avoid the burdens and expenses involved in further pre-trial and trial proceedings prior to the time that an appellate court has had the opportunity to rule upon the decisions and orders heretofore made herein."

Counsel for Toolco elaborated on this position at the pre-trial conference on February 8. Adverting to the earlier ruling of the Special Master that Toolco would be responsible for Hughes' compliance with the deposition subpoena, with the possible sanction of a default if the subpoena were not complied with, counsel stated that "the Tool Company did not seek a review of those rulings of the Special Master by the Court and accepted in effect the responsibility placed on it by that ruling." (Tr. of Feb. 8, p. 9). He also stated Toolco's awareness of the possible consequences of a failure to comply with the discovery procedures:

"I have also had occasion to describe to my client, the Hughes Tool Company, the sanctions available under the Rules by reason of a respectful declination or election to stand on the questions of law which have been decided to date and not to proceed any further with respect to discovery proceedings. I have particularly called to their attention the provisions of 37(d) —Rule 37(d)—of the Federal Rules, with respect to the sanctions which could be applied by the Court on the Tool Company. [Tr. of Feb. 8, p. 9]

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"The Tool Company does want to rest on the merits of its position, and it does so fully aware of the sanctions which the Court, in its discretion, may impose upon the Tool Company. . . . [*Ibid.*, p. 11]

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"We are fully aware—my client is fully aware—that by insisting on a right to obtain a review on the legal questions which have been decided to date, and should it develop that they are in error, as indicated by your Honor's decisions and rulings, as a consequence they may be deprived of further defending on the merits, other than on the question of damages." [*Ibid.*, p. 12]

In response to questions from the Court, counsel advised that embraced within the contemplation of the "notice of position" was an advice to the Court that Hughes would not appear for the deposition on February 11, and that plaintiff could take any proceedings it is advised to take by way of sanctions under Rule 37. [Tr. of Feb. 8, p. 20] When counsel for TWA questioned whether Hughes would be bound by the anticipatory default, Toolco further waived the right to any defense against sanctions should Hughes in fact appear for the deposition:

"The Court: • • • Now, Mr. Davis says that as far as the defendant Hughes Tool Company is concerned, they will admit today that Mr. Hughes will not appear on Monday and that as a result you may then take whatever steps you wish to pursuant to Rule 37 [sic].

"I would also like Mr. Davis to state for the record that if by chance Mr. Hughes should appear at the courthouse on Monday, despite what has transpired here this afternoon, that will be no defense to any proceeding taken by T.W.A.

"Mr. Davis: I will so state, your Honor." [Tr. of Feb. 8, pp. 48-49]

Toolco also re-iterated its intention not to produce the documents which it had been ordered to produce, and the Court summarized the state of the proceedings to counsel for the plaintiff and the defendants on the counterclaims as follows:

"The record is now set for you to take whatever action you wish to take on the counterclaims and for Mr. Sonnett to take whatever action he wishes to take on the claims based on the default of Mr. Hughes on Monday.

"Secondly, you have the failure to produce the tax documents, which is an individual and separatr [sic] ground for proceeding; and you have the failure to produce the attorney-client documents, which are a separate and individual ground for proceeding." [Tr. of Feb. 8, pp. 59-60.]

After counsel for Toolco again stipulated as to the binding nature of these acts, the hearing was adjourned.

Thereafter, on February 15, 1963 TWA moved to amend the ad damnum portion of the complaint and formally moved for default judgment pursuant to Rule 37. At the hearing on February 8, counsel for TWA had intimated an intention to increase the amount of damages which TWA was seeking. On May 3, 1963 Judge Metzner granted the motion to amend the complaint and directed that default judgment should be entered for TWA, with a hearing to be held to determine the amount of damages. The question of "the amount of the damages to be paid" was referred to the Special Master previously designated to preside over the discovery proceedings. The counterclaims were also dismissed with prejudice. The opinion is reported at 32 F.R.D. 604. As will appear hereafter, the commencement of the damage hearings was long delayed.

In granting this relief to plaintiff, Judge Metzner reviewed the history of the proceedings to date, and stated:

"It is clear that the deposition of Hughes is essential for the proper presentation of TWA's case. It is also clear that the failure of Hughes to appear on February

> 11th for his deposition was the result of a clear and studied determination by Toolco after all efforts to postpone the appearance of Hughes had failed. The default was deliberate and willful and justifies the court in entering a default judgment. . . . " 32 F.R.D. at 607.

The order was certified by Judge Metzner for immediate appeal.

On June 2, 1964, the Court of Appeals, Second Circuit, affirmed the propriety of the entry of the default and also the earlier decision of Judge Metzner relating to the Court's jurisdiction. The decision of the Court of Appeals is reported at 332 F. 2d 602. After ruling that the Civil Aeronautics Board did not have primary jurisdiction over the anti-trust activities alleged and that prior orders of the C.A.B. did not immunize the acts alleged in the complaint from the operation of the anti-trust laws, the Court went on to uphold the complaint as stating a cause of action under the anti-trust laws:

> "The defendants maintain that in any event the complaint fails to state facts sufficient to establish the jurisdiction of the district court. They claim that the allegations of antitrust violations in the complaint are wholly conclusory and that the specific transactions alleged to have been effected by the defendants do not state a cause of action under the antitrust laws. We do not agree. We cannot say that the specific transactions alleged in TWA's complaint—that Toolco refused to finance aircraft acquisitions by TWA unless TWA agreed to purchase planes from no supplier other than Toolco; that Toolco required TWA generally to boycott all other suppliers of aircraft; that the defendants have attempted through various means to monopolize a substantial segment of interstate and foreign air commerce—are on their face insufficient to

support a claim of antitrust violations, a claim which surely falls within the jurisdiction of the district court. The allegations state the outlines of a tying arrangement, an economic boycott of the defendants' competitors, and an attempt to monopolize commerce, all unlawful under the antitrust statutes. It would be particularly inappropriate to find these allegations insufficient to establish the district court's jurisdiction inasmuch as the defendants denied the plaintiff the right through pre-trial discovery to add more detail and substance to the allegations set forth in the complaint.

* * * * *

"We are satisfied that the complaint sufficiently states a cause of action and establishes the district court's jurisdiction." 332 F. 2d at 610-11.

With respect to the dismissal of the counterclaims with prejudice, the Court held that one such counterclaim against additional defendants should have been dismissed for lack of jurisdiction, but otherwise affirmed the dismissal of the counterclaims with prejudice as a consequence of the default. In doing so, the Court affirmed the rulings of the District Court that required production of the tax documents and those documents as to which the claim of attorney-client privilege had been claimed, and affirmed the propriety of granting a judgment by default in view of the non-compliance with these orders and the failure of Hughes to appear as ordered.

"The sanction of judgment by default for failure to comply with discovery orders is the most severe sanction which the court may apply, and its use must be tempered by the careful exercise of judicial discretion to assure that its imposition is merited. However, where one party has acted in willful and deliberate disregard of reasonable and necessary court orders

and the efficient administration of justice, the application of even so stringent a sanction is fully justified and should not be disturbed. [citations omitted]

"Hughes' deposition was absolutely essential to the proper conduct of the litigation. Yet he and Toolco seized upon every opportunity to forestall this event. To this end they demanded the production of a multitude of documents by TWA and the additional defendants and secured successive adjournments of the deposition. Indeed, Hughes and Toolco seemed to look upon the entire discovery proceedings as some sort of a game, rather than as a means of securing the just and expeditious settlement of the important matters in dispute. It was only at the very eve of the Hughes deposition—after the other litigants had been put to much delay and expense—that the defendants made a 'business decision' to terminate discovery.

"Hughes' conduct is particularly intolerable in a large and complex litigation such as this one. The protracted antitrust suit taxes the energies and resourcefulness of each party to the litigation; and it consumes much time of the court and the special masters it appoints. Tactics such as Hughes' serve only to frustrate the implementation of the discovery machinery devised by the federal judiciary to expedite the handling of such complex litigation. See Handbook of Recommended Procedure for the Trial of Protracted Cases, Report of the Judicial Conference Study Group on Procedure in Protracted Litigation, 25 F.R.D. 351 et seq. (1960).

"In the light of all these circumstances, the district court was not obliged to employ sanctions less severe than the dismissal of the counterclaims with prejudice. Whatever lesser sanctions might have sufficed with regard to the documents withheld by the defendants, it seems to us that a dismissal of the counterclaims was appropriate, in view of Hughes' intransigence after intensive and expensive discovery proceedings already protracted for more than one year." 332 F. 2d at 614-15.

The Supreme Court granted certiorari as to the decision of the Court of Appeals, but the writ of certiorari was subsequently dismissed as improvidently granted. 380 U. S. 248-9 (March 8, 1965).

On May 10, 1965, TWA moved before J. Lee Rankin, the Special Master, for an order adopting certain interim findings of fact, based on the allegations of the complaint. The interim findings were sought by TWA "as a basis for the submission of its further evidence as to the amount of its damages." On July 30, the Special Master entered an order which outlined the effect of the default and which tentatively adopted some of the proposed interim findings while tentatively refusing to adopt others.

The failure of the Special Master to adopt the omitted findings was appealed by TWA to the district court. On November 16, 1965, Judge Metzner entered an opinion and order which did not deal with specific findings but which further stated the law pertaining to the effect of the default and returned the matter to the Special Master. 38 F.R.D. 499 (1965). These two decisions by the Special Master and Judge Metzner, as well as a subsequent decision by Judge Metzner noted below, are described more fully elsewhere in this opinion.

Shortly thereafter, Toolco moved before Judge Metzner for an order calling on TWA to set forth the facts which would preclude a finding that Toolco had never been engaged in the manufacture or supply of aircraft in competition with any other manufacturer or supplier. This motion was denied by Judge Metzner on January 4, 1966.

J. Lee Rankin, who had been appointed Special Master to determine the amount of damages, resigned this position upon being appointed Corporation Counsel of the City of

New York. The undersigned was appointed as Special Master under the same terms as the original reference.

On May 2, 1966, the hearing on damages formally commenced with the submission of the plaintiff's direct testimony on damages in written narrative form. Defendants' direct testimony was also thereafter submitted in written narrative form. All witnesses were subjected to thorough cross-examination, which (together with the oral testimony of one rebuttal witness for plaintiff) covers nearly 11,000 pages. More than 800 exhibits were also introduced by both parties. The hearings closed on April 9, 1968, and printed briefs have been submitted by both parties.

Effect of the Default

The first question which must be considered is the effect of the default on plaintiff's case and the extent of the burden which plaintiff must still meet in order to justify recovery. Despite prior rulings in the case, this has been the subject of continuing disagreement between the parties in the damage hearings.

Prior to the commencement of the hearings on damages, plaintiff moved before Special Master Rankin, as noted above, for certain findings of fact based on the allegations of the complaint, which were requested on an interim basis as a foundation for the submission of its evidence on damages. Plaintiff took the position that the default justified the entry of such findings without further offer of proof by plaintiff. After full written and oral argument, Special Master Rankin entered on July 30, 1965 an opinion and order which discussed in detail the effect of the default and which adopted certain of the proposed findings on an interim basis. However, Special Master Rankin declined,

also on an interim basis, to adopt the balance of the proposed findings. A full statement of his opinion is required to properly evaluate the positions of the parties in the damage hearings. The Special Master described the effect of the default as follows:

"The default having been entered for the reasons indicated above, the question remains as to its effect. The default is an admission implied by law as a result of the default, which thereupon dispenses with any proof of the facts alleged in the complaint, except as to unliquidated damages. The default not only has the legal effect of an admission of the allegations, but precludes any showing of defensive matters in regard thereto except as to damages. When the damages are not liquidated, there is no admission as to the damages by reason of the default, and proof thereof is required. (See 3 Freeman, Law of Judgments, Secs. 1281-1282, pp. 2662-2664 (Tuttle's Ed. 1925).

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"All parties agree that *Thomson* v. *Wooster,* 114 U. S. 104 (1885) is the leading case by the Supreme Court of the United States on the effect of a default. It is recognized in that decision that upon the entry of a decree *pro confesso* all matters alleged with sufficient certainty are admitted. However, it is as to those matters not adequately alleged with regard to certainty, or subjects which from their nature and the course of the court proceedings require an examination of details imposing an obligation on the complainant to furnish proof, that differences arise.

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"While conclusions of law are for the court in the determination of any judgment to be awarded and it thus decides whether the damages proved did in fact flow from the violations of law alleged, the defendants after their default no longer have the right to contest

whether the asserted violations did in fact occur. They are limited to pointing out such information or evidence as may be in the record where the court should take judicial notice of records or facts which show that the allegations could not be true.

"When the plaintiff has pleaded a 'statement of claim' showing that he is entitled to relief (F.R.C. P. Rule VIII (a)), he may yet be unable to prove the case alleged. But that is not a problem in a default where the allegations are, in legal effect, admitted. Defaulting defendants are allowed to raise questions as to allegations contrary to judicially known facts because when a pleader states matter as facts which is not out of harmony with that which the court judicially knows, such averments in the pleading are disregarded. *Greeson* v. *Imperial Irrigation District,* 59 F. 2d 529 (9th Cir. 1932); *Interstate Natural Gas Company* v. *Southern California Gas Company,* 209 F. 2d 380 (9th Cir. 1953). See also In Re: *Woodmar Realty Company,* 294 F. 2d 785 (7th Cir. 1961); *Cert. Denied,* 369 U. S. 803 (1962) and *Glen Coal Company* v. *Dickenson Fuel Company,* 72 F. 2d 885 (4th Cir. 1934).

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"Thus, at this stage of the case, the court is obligated to arrive at a judgment and that judgment must be just. Therefore, whenever a court would take judicial notice of the proceedings of public bodies such as the Civil Aeronautics Board or other Federal commissions or the files of the court or any similar matters and such records and information would satisfy the court that any allegation of the complaint or any part of an allegation could not be true, the court is not required by reason of the default to accept such allegation, or such part of it.

"The effect of information appearing in the record up to this date, or as hereafter developed, bearing upon the truth of the allegations of the complaint, is somewhat different. Where such evidence clearly shows

that the allegation or part of an allegation could not possibly be true, the court will not stultify itself by accepting such allegation or part of it in the face of such evidence. Where, however, the evidence merely may tend to show that the allegation may not be maintained and the defendants by reason of the nature of their default have materially interfered with the plaintiff's ability to produce evidence which might support the allegation or disprove such record evidence, the court is not required to reject the allegations. Such a result would reward the defendants for their interference with the processes of the court.

"For the reasons indicated the defendants, at this point, do not have the right to produce evidence to try to establish in any manner that the allegations of the complaint other than as to damages cannot be maintained. That opportunity was given up by their decision to default. The rights of plaintiff resulting from the default should not be taken away by any refinements and legalistic reasoning of any considerations that do not reach to the level of necessary and proper requirements for a fair and just hearing on the question of damages.

"On the other hand, it should not be forgotten that the court in entering a judgment of default is performing 'a judicial act'. *Pope* v. *United States*, 323 U. S. 1. Furthermore, Rule 55(b)(2), under which the court directed that this hearing be held recognizes that such is the nature of the responsibility, at this point in the default proceeding, by stating:

> 'If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as to it seems necessary and proper . . .'

"It is within the framework described that the Special Master must proceed. Recognizing that it is his duty on behalf of the court to be satisfied of the liability of the defendants, as well as of the proof, according to law, of the amount of damages claimed, he must also be satisfied by a preponderance of the evidence that any damages were proximately caused by the violations of law alleged in the complaint. Therefore, in the belief that the damage portion of the trial will be advanced by his doing so, the Special Master has sustained a considerable portion of the plaintiff's motion and has adopted certain findings requested, but only on an interim basis, for the purposes of the hearings on damages. He is reserving the right, however, before such hearings are closed to modify any or all of said interim findings if he finds it desirable or necessary in order that justice may be promoted in this case. The Special Master has also declined to adopt certain interim findings proposed in the motion. The findings adopted are set forth in Exhibit AA attached to this opinion and order and made a part hereof as fully as if set out herein. [Exhibit AA is not reproduced herein.]

"The failure to adopt, at this time, any proposed finding is not a determination by the Special Master that such finding is false, or disproved, or that it will not be fully established by the close of the hearings on damages. Such proposed findings have not been adopted at this time because in each instance they appear directly or indirectly to have a bearing upon the question of damages, and may be affected either partially or wholly by the evidence which is adduced in proof of damages herein.

"The failure to now adopt such proposed interim findings, is not to be construed as placing such findings at issue, except to the limited extent that there is any information of which a court would take judicial notice, or there is evidence in the record which would prove such findings to be false or there may be evidence prop-

erly adduced as a part of these hearings on damages which would establish such findings to be false and is brought to the attention of the Special Master before the hearings close. The defendants are not allowed by the present refusal to adopt such tendered findings to contest them on the merits as they could do if there had been no default."

On appeal by plaintiff to Judge Metzner from portions of the Special Master's opinion and order, the legal effects of the default were again thoroughly briefed and argued orally. On November 16, 1965, Judge Metzner entered an opinion and order disposing of the appeal (reported at 38 F.R.D. 499). This opinion and order made no reference to any specific proposed findings which the Special Master had agreed or declined to adopt. It did, however, summarize generally the legal effect of the default, clarified a seeming ambiguity in the opinion of the Special Master relating to liability and proximate cause, and returned the case to the Special Master for proceedings in accordance with the Court's opinion. That opinion is, of course, controlling here.

Pointing out that the reference to the Special Master was made "to determine the amount of damages", Judge Metzner described the effect of the default as follows:

"Liability is not an issue for the Special Master except in a very limited sense. The sufficiency of the complaint has already been established by the denial of defendant's motion to dismiss. 214 F. Supp. 106 (S. D. N. Y. 1963), *aff'd*, 332 F. 2d 602 (2d Cir. 1964), *writ of cert. dismissed*, 380 U. S. 248, 85 S. Ct. 934, 13 L. Ed. 2d 817 (1965). By virtue of the default the defendant has admitted the truth of the well-pleaded allegations of the complaint. *Thomson* v. *Wooster*, 114 U. S. 104, 5 S. Ct. 788, 29 L. Ed. 105 (1885).

"Allegations are not well pleaded if they are shown to be indefinite or erroneous by other statements in

the complaint (*Thomson* v. *Wooster, supra*); or where they are contrary to facts of which the court will take judicial notice (*Glenn Coal Co.* v. *Dickinson Fuel Co.*, 72 F. 2d 885, 889 (4th Cir. 1934)); or where they are not susceptible of proof by legitimate evidence (*Cohen* v. *United States*, 129 F. 2d 733 (8th Cir. 1942); *Greeson* v. *Imperial Irr. Dist.*, 59 F. 2d 529 (9th Cir. 1932)); or where they are contrary to uncontroverted material in the file of the case (*Interstate Nat. Gas Co.* v. *Southern Calif. Gas Co.*, 209 F. 2d 380, 384 (9th Cir. 1953); *In re Woodmar Realty Co.*, 294 F. 2d 785 (7th Cir. 1961), *cert. denied*, 369 U. S. 803, 82 S. Ct. 643, 72 L. Ed. 550 (1962)). However, it may be shown by plaintiff, in the context of this case, that some matters of which the court may take judicial notice should not be so noticed. See McCormick, Evidence § 330 (1954). Where file material is involved, if the plaintiff did not have full opportunity to meet or controvert such material, then it should not be used to nullify the allegation. If evidence merely tends to show that an allegation is not true, the allegation must be taken as true in this default. Finally, the plaintiff is entitled to the benefit of all reasonable inferences from the evidence tendered."

Judge Metzner's opinion makes clear that the failure of the Special Master to adopt certain of the findings did not constitute a determination that the allegations on which they are based are not well-pleaded:

> "The Special Master stated that the failure to adopt any proposed finding is not a determination that such finding
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> 'is false, or disproved, or that it will not be fully established by the close of the hearings on damages.'
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> Such proposed findings are not at issue except to the limited extent noted above. The Special Master specifically stated that

> 'the defendants are not allowed by the present refusal to adopt such tendered findings to contest them on the merits as they could do if there had been no default.'"

It is thus clear from the Court's opinion that even those findings not adopted by the Special Master are admitted by the default except to the extent that they can be disproved within the framework of the well-pleaded allegations rule as set forth by the Court. Furthermore, the Court's opinion also establishes that the allegations are presumed to be well-pleaded, and that the burden is on the defendants to show that they are not:

> "Attempts by defendant to escape the effects of its default should be strictly circumscribed. It should not be afforded an opportunity to litigate what has already been deemed admitted in law. In the absence of an exceedingly strong showing that an allegation is untrue under the rules set forth above, the allegation stands as admitted."

A subsequent opinion and order by Judge Metzner on January 4, 1966 also shows that the defendants carry the burden of disproving each allegation of the complaint, despite the Special Master's failure tentatively to adopt a finding based on a particular allegation.

One of the findings which the plaintiff had requested but which the Special Master failed to make at that point in the proceedings was to the effect that Toolco was engaged in the development and manufacture of aircraft, as alleged in the complaint. The Special Master did adopt a portion of the same finding which stated that Toolco was engaged in the acquisition of aircraft from manufacturers in various states and in the sale and lease of such aircraft in interstate commerce, but failed to adopt a further position to

the effect that such sales and leases were "to air carriers in various other states". The defendants, as above mentioned, moved before Judge Metzner in December, 1965 for an order requiring TWA to set forth the facts on which TWA would rely in order to preclude the entry of a finding of fact as follows:

> "The facts before this Court establish that at no time during the period covered by the complaint herein were the defendants, or any of them, engaged in the manufacture or supply of commercial transport aircraft in competition with any manufacturer or supplier of such aircraft."

Despite the failure of the Special Master to adopt the findings noted above, Judge Metzner ruled that the burden with respect to these facts still rested on the defendants rather than the plaintiff, and denied the motion:

> "It asks that plaintiff come forward to negative a fact which defendant asserts as true. The shoe is on the other foot."

Finally, it may be noted that there is no procedural requirement for making such interim findings before taking evidence in the hearing on damages, and the Special Master's disposition of the request for findings appears to have been simply an exercise of the Master's power to regulate the proceedings before him, which is generally subject to review only for abuse of discretion. See 5 Moore's Federal Practice, ¶ 53.06. In fact, during oral argument before Judge Metzner on the motion to review the Special Master's failure to adopt certain of the proposed findings, both counsel for Toolco and the Court treated the Special Master's order as an exercise of discretion in the conduct of the proceedings. Counsel for Toolco asserted that the Mas-

ter could have denied all of the proposed findings without committing reversible error, and the Court agreed, stating that the Master "wanted to lay down some ground rules which could perhaps shorten the hearing." (Tr. of Sept. 28, 1965, pp. 15-16)

It is, therefore, clear that the burden of disproving *all* the allegations of the complaint still rests on the defendants, and the failure of the Special Master to adopt certain findings of fact has not created in the plaintiff a burden of proving those facts. Although the defendants have asserted that the findings which were not adopted represent "gaps" in plaintiff's case which plaintiff is required to fill in through proof, this contention cannot be and is not sustained.

The burden assumed by a defaulting party is a heavy one. Its weight is illustrated by *Thomson* v. *Wooster*, 114 U. S. 104 (1885), which was cited by Judge Metzner, and by other early Supreme Court decisions. In *Thomson*, the plaintiff sued for infringement of a re-issued patent on a folding guide for sewing machines. The original patent was dated October 5, 1858, had been extended for seven years in 1872, and had been re-issued in December 1872. The complaint alleged that numerous suits had been brought and sustained against other infringers, and sought an accounting of profits and damages. The defendants appeared but failed to file an answer to the complaint, and a decree *pro confesso* was entered. The case was referred to a master to determine the profits and damages. After an award by the master, the defendants appealed, asserting among other arguments that the re-issued patent was invalid because it was for an invention other than the one covered by the original patent, and also because an excessive amount of time elapsed between the original issue

and the re-issue, and as a further reason because the complaint alleged that successful suits had been brought on the original patent, whereas invalidity or inoperativeness were conditions precedent of a re-issue. These arguments were rejected by the Supreme Court.

"A confession of facts properly pleaded dispenses with proof of those facts, and is as effective for the purposes of the suit as if the facts were proved; and a decree *pro confesso* regards the statements of the bill as confessed.

* * * * *

"... it seems clear that the defendants, after the entry of the decree *pro confesso*, and whilst it stood unrevoked, were absolutely barred and precluded from alleging anything in derogation of, or in opposition to, the said decree. . . . The attempt, on the hearing before the master, to show that the reissued patent was for a different invention from that described in the original patent, or to show that there was such unreasonable delay in applying for it as to render it void under the recent decisions of this court, was entirely inadmissible because repugnant to the decree. The defendants could not be allowed to question the validity of the patent which the decree had declared valid. The fact that the reissue was applied for and granted fourteen years after the date of the original patent would, undoubtedly, had the cause been defended and the validity of the reissued patent been controverted, been strongly presumptive of unreasonable delay; but it might possibly have been explained, and the court could not say as a matter of law, and certainly, under the decree of the court, the master could not say, that it was insusceptible of explanation. And on this appeal it is surely irregular to question the allegations of the bill. If anything appears in those allegations themselves going to show that the decree was erroneous, of course it is assignable for error; but any attempt

to introduce facts not embraced in those allegations, for the purpose of countervailing the decree, is manifestly improper. The introduction of the original patent, pending the appeal, was clearly irregular." (114 U. S. at 110 and 114)

The Supreme Court then noted the argument of defendants that as a matter of law the re-issued patent must be void, since (quoting the defendants' assignment of errors),

"'... the bill avers that during the fourteen years of the original term of patent the validity of said letters patent was established in numerous suits in the Circuit Courts of the United States, and that all persons sued took licenses and paid therefor, as well as many others not sued, thereby averring, in substance, that the original letters patent were *valid* and *operative*:

"'Wherefore, appellants ask this court to hold that the original letters patent having been *valid* and *operative,* as averred by complainant, for over fourteen years, no reissue thereafter could be legally obtained, because *invalidity* or *inoperativeness* are conditions precedent to the grant of a reissue.'

"The answer to this assignment is obvious. The suits brought on the original patent may have been for infringements committed against particular parts of the invention, or modes of using it and putting it into operation, as to which the specification was clear, full and sufficient; whilst, at the same time, there may have been certain other parts of the invention, or modes of using it and putting it into operation, as to which the specification was defective or insufficient, and which were not noticed until the application for reissue was made; or, in the original patent the patentee may have claimed as his own invention more than he had a right to claim as new—a mistake which might be corrected at any time. At all events, the court cannot

say, as mere matter of law, that this might not have been the case." (114 U. S. at 115)

The Supreme Court's disposition in *Thomson* of the defendants' attacks on the validity of the allegations in the plaintiff's bill shows the exceedingly heavy burden assumed by a defaulting party who attempts to disprove the allegations of the complaint. Even when relying on matters appearing of record, the defendant must show that such matters conclusively, and beyond all doubt, prove that the allegations could not be true.

Another case illustrating this heavy burden is *Harshman* v. *Knox County,* 122 U. S. 306 (1887). Plaintiff had sued the county on certain bonds which the county had issued, and when the county defaulted, obtained a judgment of $77,374.46. He then brought a proceeding by mandamus against the Justices of the county court to compel them to levy a tax sufficient to pay the judgment. The county defended on the ground that the bonds were issued pursuant to a special statute (incorporating a railroad) which authorized a certain rate of tax to support the bonds, that the county had levied such tax and still had insufficient money to pay, and that there was no authority to levy additional taxes. Although the bonds, which were attached to the original complaint, recited that they were issued pursuant to that special statute, the plaintiff in his complaint alleged that the bonds were issued pursuant to a different and more general statute which granted unlimited taxing power. As recited in the Supreme Court's opinion,

". . . the contention of the respondents in the Circuit Court was, that they were entitled to show by the recitals in the bonds themselves, in contradiction to those contained in the judgment founded upon them,

that they were in fact issued under the charter of the corporation, and not under the general law. On this point, the judgment of the Circuit Court was in their favor, denying to the relator the peremptory writ of mandamus, and this decision is now alleged as error, for which the judgment should be reversed." (122 U. S. at 316)

Noting that the question was whether the county was estopped to deny that the bonds were issued under the general statute, the Supreme Court opinion stated:

"The averment to that effect in the petition in the action, if material and traversable, was confessed by the default. * * * The averment as to the character of the bonds, and the grounds and authority upon which they were founded, so as to constitute them legal obligations of the county of Knox, contained in the petition, was clearly material to the plaintiff's cause of action. If the defendant had denied it by a proper pleading, the fact would have been put in issue, and the plaintiff would have been bound to prove it. * * * In the absence of a denial, the fact as stated in the petition of the plaintiff is confessed by the default, and stands as an admission on the record, of its truth by the defendant." (122 U. S. at 316-317)

The judgment of the Circuit Court was reversed, with directions to award a peremptory mandamus.

Proof of Basic Anti-Trust Allegations

Against the background of decisions such as these, and having established that defendants bear the burden of disproving the allegations in the complaint, regardless of the Special Master's interim findings, it must now be determined whether any of the allegations have been shown

to be disproved within the narrow confines of the "well-pleaded allegations" rule. The chief allegation which defendants claim to be disproved is the allegation that Toolco was engaged in the development and manufacture of aircraft and the supply of aircraft to air carriers. The defendants claim that this allegation is disproved by various C.A.B. opinions, orders and records which are said to be appropriate for judicial notice, and by certain exhibits introduced during the hearings on damages as well as by the testimony of certain of plaintiff's witnesses during the hearings.

The question of judicial notice is an important one, for it underlies a major portion of Toolco's defense on liability. However, Toolco's reliance upon judicial notice of official documents and records is misplaced. Although judicial notice may indeed be taken of official reports such as reports of administrative agencies, the notice extends only to the existence of the report and its contents, and not to the accuracy of facts recited in the report. For example, in *Stasiukevich* v. *Nicolls*, 168 F. 2d 474, 479 (1st Cir. 1948), Judge Magruder denied judicial notice as to facts recited in an official Congressional committee report:

> "The official report of a legislative or congressional committee is admissible in evidence in a judicial proceeding, as an exception to the hearsay rule, where the report, within the scope of the subject matter delegated to the committee for investigation, contains findings of fact on a matter which is at issue in the judicial proceeding. See Wigmore on Evidence, §§ 1662, 1670. Indeed, the court could properly take judicial notice of the report, without its formal introduction into evidence. But though the court may receive the report in evidence, or may take judicial notice of its existence and contents, this does not mean that the court must

accept the findings in the report as indisputable truth; the findings are merely evidence of the facts asserted. See Unitd [sic] States v. Aluminum Co. of America, 2 Cir., 1945, 148 F. 2d 416, 445, 446; Morgan, The Law of Evidence, 1941-1945, 59 Harv. L. Rev. 481, 485-86 (1946)."

McCormick on Evidence, §328 at p. 704, also notes that while courts will take judicial notice of official documents, this merely "dispenses with formal authenticating proof of the genuineness of the documents" and "does not mean that if the document is a statement of facts, such facts are themselves judicially noticed."

No authority has been cited to support taking judicial notice of facts merely because they are contained in the findings of an administrative agency, and indeed, such treatment would accord the findings of an administrative agency greater weight than is accorded the findings of a court of law. Determinations of fact by a court of law may be used in a separate proceeding only within the narrow confines of the doctrines of res judicata and collateral estoppel, and are not binding on other parties. A Court's reliance on findings of fact in another case may constitute reversible error. Cf. *Radovich* v. *Cunard,* 364 F. 2d 149 (2nd Cir. 1966). If judicial notice cannot be taken of facts contained in findings of a court of law, it would seem that *a fortiori* judicial notice may not be taken of facts simply because they are contained in findings of an administrative agency. Such findings may be of some probative value under the authorities cited above, and in the absence of a default the C.A.B. materials might be quite persuasive. However, they do not permit judicial notice to be taken of the assertion that Toolco was never a manufacturer or supplier of aircraft.

The existence and contents of an administrative order or a document filed with an administrative agency may under certain circumstances be of relevance to a judicial proceeding apart from the facts recited therein. This is true, for example, with regard to the question of whether an administrative agency has primary jurisdiction over the subject matter being litigated. *Interstate Nat. Gas. Co.* v. *Southern Calif. Gas. Co.*, 209 F. 2d 380 (9th Cir. 1953). However, the relevance of C.A.B. orders and filings to primary jurisdiction in this case has already been considered and disposed of by Judge Metzner and by the Court of Appeals.

Even if judicial notice were taken of the fact that no U. S. air carrier ever purchased a commercial transport aircraft manufactured by Toolco, this would not of itself be sufficient to disprove the allegation that Toolco was "engaged in" the development and manufacture of aircraft. In addition to the general allegation of "engaging" in paragraph 3 of the complaint, there is also an allegation that "defendants and General Dynamics Corporation (hereinafter called 'Convair') entered into an arrangement for the joint development of a jet-powered aircraft to be manufactured by Convair and to be supplied by the defendants to air carriers, including TWA" (Paragraph 14) as well as an allegation that "the defendants also entered into a plan under which Toolco would itself commence the manufacture of a jet-powered aircraft" with the intent that "Toolco would furnish this aircraft . . . both to TWA and to other air carriers." (Paragraph 15). While these efforts were eventually abandoned, they would appear to constitute "engaging in" the development and manufacture of aircraft. Also, they occurred at the period of time when TWA alleges that it should have been arranging for purchases from

other suppliers such as Boeing Aircraft Corporation (Boeing). Furthermore, there is evidence which would suggest that the development and manufacture of the Convair 880 aircraft, which did in fact take place, had elements of a joint venture between Toolco and Convair, with Toolco to benefit financially from the sale of such aircraft over and above the initial order for 40 placed by Toolco and Delta Airlines Inc. (Delta). There is also evidence that Hughes took steps to find buyers, including Delta, for the Convair 880. Defendants do not seriously contest these facts, and in many cases admit them. In view of the specific allegations of paragraphs 14 and 15 of the complaint, which are admitted by the default and which have not been disproved by the defendants under the "well-pleaded" rule, and in view of the additional evidence suggesting what might have been shown to be a joint venture between Convair and Toolco, it is not possible to find that the allegation of "engaging in" the development and manufacture of aircraft could not be true. The testimony of Robert W. Rummel cited at p. 55 of defendants' brief likewise does not show that the allegation could not be true, but at best tends to show that it may not be true. This is not a sufficient showing under the rules laid down in Judge Metzner's opinion:

> "If evidence merely tends to show that an allegation is not true, the allegation must be taken as true in this default."

The same holds true with respect to the allegations of the complaint that Toolco was a supplier of aircraft purchased from other manufacturers. The general allegation that Toolco was engaged in the supply of such aircraft to airlines (Paragraph 3) is supplemented by allegations

that Toolco purchased aircraft from Boeing and Convair (Paragraph 17), that defendants caused six of the Boeing aircraft to be "diverted" to the principal transatlantic competitor of TWA (Paragraph 18), that defendants caused six of the Convair 880 aircraft to be leased to Northeast Airlines Inc. (Northeast), of which three had previously been assigned to TWA (Paragraph 22), and that Toolco also agreed to purchase Convair 990 aircraft from Convair and sought to have TWA purchase these aircraft from Toolco, rather than purchasing additional aircraft from Boeing as TWA proposed to do (Paragraphs 37 and 38). There was also evidence that Toolco purchased a large supply of jet engines from Pratt & Whitney Aircraft Corporation, which it subsequently sold at a profit.

Toolco does not deny that it purchased aircraft, or that it sold aircraft to TWA. In fact, it asserts that all of the aircraft which it purchased were purchased for TWA and as a convenience to TWA, and that TWA would have been unable to purchase such aircraft itself because of financial considerations. It does not deny that six Boeing aircraft purchased by Toolco from Boeing were assigned to Pan American Airways Inc. (Pan Am), or that six of the thirty Convair 880 aircraft originally purchased by Toolco from Convair were leased by Convair to Northeast, but it does contend that these were merely the disposition of aircraft which had been determined to be excess to TWA's needs by TWA's own management. Furthermore, it contends that since all aircraft sold by Toolco were manufactured by Boeing or Convair, there can be no question of restraining competition by Boeing or Convair, while Douglas Aircraft Corporation (Douglas), the third major manufacturer, was not in the running for TWA's orders in any case.

Here again, it is difficult to say how the issues would have been resolved had this case gone to trial. However,

in the context of the default, it cannot be said that defendants have met the difficult burden of showing that the supplier allegations are not well-pleaded. While a prospective purchaser could purchase Boeing or Convair jets from Boeing or Convair rather than Toolco, the element of delivery time was a factor which might cause such a purchaser to turn to Toolco rather than to the manufacturer directly. Jet aircraft, being an enormously expensive commodity, are not manufactured and sold from open stock. A purchaser from a manufacturer at a particular point in time would be offered certain dates for future delivery, depending on the manufacturer's backlog and production facilities at the time of order. On the other hand, Toolco might be able to offer the assignment of aircraft which had been ordered previously and which were scheduled for delivery at dates earlier than those which the manufacturer could offer. To the extent that only one manufacturer is involved, then it is true that the total number of aircraft sold by that manufacturer remains the same. However, it cannot be said as a matter of law that Toolco's ability to offer certain delivery dates to Pan American for Boeing aircraft might not have influenced Pan American to forego purchasing from Douglas, or that Northeast might not have purchased or leased from some manufacturer other than Convair if the Toolco 880's had not been available. Furthermore, price increases over a period of time by a manufacturer might mean that the manufacturer's price at the time of negotiation with a new customer was higher than that paid by Toolco. In fact, this appears to have been the case with the Pratt & Whitney engines. The fact that Toolco in this litigation refused to make available certain documents and information which might have had a bearing on its sales of aircraft and engines and the

profits or tax savings which it may have derived therefrom, makes it particularly difficult to sustain Toolco's contention that it purchased only for the benefit of TWA. There is, moreover, an allegation in the complaint that "Despite repeated requests by TWA, Toolco refused throughout the period 1956 to 1960 to assign to TWA the rights to acquire" the jets which Toolco had ordered from Convair and Boeing (Paragraph 18). This allegation has not been disproved under the "well-pleaded allegations" rule and therefore stands as admitted. It tends to rebut the argument that the aircraft were ordered solely for TWA.

Much of defendants' argument that Toolco was not a supplier of aircraft centers around evidence that Hughes and Toolco were acting in an effort to secure "the newest and finest equipment" for TWA. (Defendants' brief, p. 74, and generally pp. 73-94). However, the fact that Hughes and Toolco were interested in securing good aircraft for TWA is not inconsistent with an intention to act as a supplier of aircraft to TWA and to other airlines as well. Nor is the fact that aircraft were ordered to TWA specifications of itself conclusive that such aircraft were intended solely for TWA, since certain of these aircraft were in fact sold or leased to other airlines, namely Pan American and Northeast. Furthermore, there is evidence that Toolco ordered Convair 990 aircraft which were to be built to the specifications of American Airlines.

Although there is evidence to suggest that Toolco may have been purchasing solely for TWA, this does not constitute a sufficient showing on the part of defendants. Furthermore, the intention of Toolco in ordering the aircraft is a subject which undoubtedly would have been developed more fully had the deposition of Hughes been taken. The default foreclosed fuller examination of this question.

Under all of the circumstances, it cannot be said that defendants have disproved the "supplier" allegations within the limits of the "well-pleaded allegations" rule.

In short, the evidence relied on by Toolco merely tends to support its position and does not conclusively establish that the allegations could not be true. Moreover, in addition to the allegations of the complaint cited above, it is also alleged that Hughes was the sole stockholder of Toolco and controlled its activities (paragraph 4) and that Toolco in turn had acquired more than 78% of TWA's common stock (paragraph 11), which is far more than a controlling interest. Judge Metzner in his opinion of May 3, 1963 stated that:

> "It is clear that during all of the times covered by the complaint the management of TWA was controlled by Hughes personally." 32 F.R.D. at 606

Therefore, even a conclusive showing that the six Boeing jets and ten Convair jets were declared excess to TWA's needs with concurrence of the Hughes-dominated TWA management would not necessarily establish as a matter of law that Toolco had no responsibility for the decision to cut back, which Toolco asserts was the sole reason for the sale of aircraft to carriers other than TWA.

One other allegation in the complaint which may require special comment is the allegation that Atlas, though not named as a defendant, was a co-conspirator with defendants in seeking to restrain competition. Since Atlas was not named as a defendant, it has not been represented by counsel at any stage of this case. Furthermore, the occurrence of the default has precluded any examination of whether there is any evidence to support the charge of conspiracy.

The law of the default appears to require that Atlas be deemed to have conspired with Toolco for purposes of this litigation. The complaint alleges generally that Atlas, together with the defendants, engaged in a conspiracy and attempt to restrain trade in violation of various provisions of the antitrust laws (paragraph 9), that the acts of Atlas were done in furtherance of the offenses charged and with anti-competitive intent, for the profit of Atlas (paragraph 10), and that more specifically, Atlas joined with Toolco in attempting to force upon TWA a merger with Northeast, which would have enlarged the defendants' captive market for aircraft and would have furthered the anti-competitive scheme (paragraphs 21 and 47). Since the allegations of conspiracy have not been disproved within the limits of Judge Metzner's order, they must be taken as admitted as far as the defendants in this case are concerned. The fact that Atlas was not named as a defendant does not prevent a charge that Toolco conspired with Atlas. *U. S.* v. *Griffith*, 334 U. S. 100, 103 (1948). However, the "fact" of the conspiracy is taken to be true only for purposes of this litigation and between the parties to this litigation. There is no intent to bind Atlas or to suggest what outcome would have resulted as to it had the allegations of the complaint been litigated.

Proximate Cause

Apart from the "well-pleaded allegations" rule, however, the defendants argue that under the opinion of Special Master Rankin, proximate cause is not admitted for any purpose by the default. They assert that plaintiff has the burden of proving that any injuries which it suffered were proximately caused by antitrust violations of the defen-

dants. Although admitting that the default may have established the existence of antitrust violations for purposes of this proceeding, they assert that the default did not relieve the plaintiff of establishing this causal connection by means of proof submitted in the hearing on damages. In support of this position, they point to the statement in the Special Master's opinion that he "must also be satisfied by a preponderance of the evidence that any damages were proximately caused by the violations of law alleged in the complaint", a requirement flowing from the Special Master's duty "on behalf of the court to be satisfied of the liability of the defendants, as well as the proof, according to law, of the amount of damages claimed . . . ."

However, defendants' position cannot be sustained. Judge Metzner in his opinion noted that the Special Master's mention of a duty "to be satisfied of the liability of the defendants" might appear to be inconsistent with an earlier statement by the Special Master that "the defendants, at this point, do not have the right to produce evidence to try to establish in any manner that the allegations of the complaint other than as to damages cannot be maintained." Referring to this as an "ambiguity . . . which may need clarification", Judge Metzner stated that the conflict in approach was only an apparent one in light of the Special Master's entire opinion, that the matter was referred to the Special Master to "determine the amount of damages", and that "[l]iability is not an issue for the Special Master except in a very limited sense." The sufficiency of the complaint had already been upheld, and the default admitted all well-pleaded allegations of the complaint. Therefore, liability was an issue only to the extent that the defendants could show, within the rules laid out in Judge Metzner's opinion, that particular allegations in the

complaint were not well-pleaded. Thus under Judge Metzner's opinion (which is binding here), the reference to proximate cause in the Special Master's opinion is interpreted to mean that the plaintiff (as is customary) has the burden of establishing proximate cause, but that this burden is satisfied as to liability if proximate cause is adequately alleged in the complaint, unless the defendants are able to show that such allegations are not well-pleaded. It does not mean that the plaintiff must always prove proximate cause with evidence, regardless of a default.

This conclusion is fortified by the few authorities which bear upon the subject. In the recent case of *Jones* v. *Uris Sales Corp.*, 63 Civ. 2018 (S. D. N. Y. June 27, 1966), *affirmed* 373 F. 2d 644 on the basis of the District Court's opinion on this issue, Judge MacMahon rejected a similar argument by a defaulting defendant that the plaintiff had the burden of proving proximate cause in a hearing before a special master on the question of damages:

> "Defendants' second contention, that even if the allegations are 'distinct and positive,' plaintiff must still prove 'a causal relationship between the allegation deemed admitted and the damage resulting therefrom,' is an obvious attempt to cripple the rule of *Thomson* v. *Wooster* by qualifying it. Defendants have cited no authority in support of their contention, and we seriously doubt that any exists. In any event, the causal relationship is stated distinctly in the complaint...."

The implication of Rule 55, Federal Rules of Civil Procedure, also suggests that proximate cause can be admitted by a default. Under Rule 55, judgment can be entered without any hearing whatsoever if the amount of damages is fixed. Cf. *Ferraro* v. *Arthur M. Rosenberg Co.*, 156 F. 2d

212 (2nd Cir. 1946). If a plaintiff alleges that a defendant has proximately caused damages in a fixed amount, then clearly he is not required to submit further proof of proximate cause, since no hearing is required. It is only when the amount of damages is uncertain and unliquidated that a hearing must be held to fix the amount of damages. Furthermore, a plaintiff's proof of proximate cause may well require evidence in the possession of the defendant. To hold that a plaintiff must always prove proximate cause regardless of a default might allow a defendant to avoid a judgment by withholding such evidence, regardless of the sanctions of Rule 37.

Authorities applying state law, while also relatively scarce, also support this position. In *Putney* v. *DuBois Co.*, 226 S. W. 2d 737 (Mo. Ct. of App. 1950), proximate cause was deemed admitted by the default, and in other cases, a plaintiff was allowed to recover, apparently without offering proof of proximate cause. *State of Maryland* v. *Travelers Indemnity Co.*, 197 A. 2d 265 (Dist. of Col. Ct. of App. 1964); *Anderson* v. *Gallman*, 99 A. 2d 560 (Dist. of Col. Ct. of App. 1953); *Baltimore Transit Co.* v. *Mezzanotti*, 174 A. 2d 768 (Md. Ct. of App. 1961); *Osborn* v. *Gibson*, 309 S. W. 2d 15 (Mo. Ct. of App. 1958).

On the other hand, defendants (as in *Jones* v. *Uris*, *supra*) have been unable to cite any authority for the proposition that proximate cause, even if alleged, is not admitted by a default. The case of *E. V. Prentice Mach. Co.* v. *Associated Plywood Mills, Inc.*, 252 F. 2d 473 (9th Cir.), *cert. denied*, 356 U. S. 951 (1958), cited by defendants at p. 112 of their brief for the proposition that plaintiff must show proximate cause despite an admission of liability, is not in point. This was not a default case, and the defendant, while admitting a violation of the anti-

trust laws, specifically excluded the question of whether the plaintiff had suffered harm therefrom. Defendants' contention cannot be sustained, and plaintiff may rely on well-pleaded allegations in the complaint to establish proximate cause.

Insofar as required to explain the basis for award of damages in this Report, reference will be made in later sections hereof to other specific allegations of the complaint which are deemed to be well-pleaded. Unless a contrary conclusion is specified herein, all allegations of the complaint on which damages are awarded are taken by me to be well-pleaded.

Evidentiary Rulings

At the time that defendants tendered certain documents as their Exhibits 321, 322 and 323, judicial notice was taken of some portions (representing C.A.B. opinions and orders which were also contained in plaintiff's Exhibit 315), while decision was reserved as to the balance. Judicial notice will not be taken of these remaining documents.

For the most part, these remaining documents are motions, contracts and similar papers submitted to the C.A.B. in connection with the proceedings which resulted in the orders which have been noticed. Defendants have offered them either for admission into evidence or for judicial notice. Special memoranda of law have been submitted by both parties, and it is clear that defendants intend to use these documents to contest the allegations of the complaint, including paragraph 20 concerning conditions on the aircraft leases from Toolco to TWA. As indicated earlier, defendants do not have the right to introduce evidence to contest the allegations of the complaint as to liability, and

therefore the only question is whether these documents should be judicially noticed.

There is some question as to whether these documents are a proper subject for judicial notice. However, they will not be judicially noticed on grounds of relevance, even if they are viewed as otherwise fit for such notice. It is clear, as shown above, that judicial notice of these documents would at best be judicial notice of their existence and contents. It would not constitute judicial notice of the truth of what they contain. They would at best be mere evidence to be weighed with other evidence relating to such truth.

For judicial notice to be taken of a fact, the better view, in my opinion, is that such fact must be indisputable. While Wigmore in Volume 9 of Wigmore on Evidence, 3rd Ed., does take the position that a fact judicially noticed may be contested through the introduction of evidence and need not be indisputable, Morgan (in "The Law of Evidence, 1941-1945", 59 Harv. L. Rev. 481, 1946) takes the opposite view and holds that facts must be indisputable to be noticed. If indisputable, rebuttal evidence would be improper. McNaughton, in a preliminary draft of his proposed revision of Wigmore's chapter on judicial notice, accepts the Morgan view and holds that judicial notice should be limited to indisputable facts. McNaughton, "Judicial Notice—Excerpts Relating to the Morgan-Wigmore Controversy", 14 Vanderbilt L. Rev. 779 (1961). The distinction may not be of overriding importance in the normal case, since as a practical matter it may not make much difference whether the propriety of notice is argued before notice is taken or after. However, in a default case, the spirit of the Supreme Court cases dealing with the effect of a default and the rationale of Rule 37 require

that judicial notice not be used broadly to permit a contest on the merits of the complaint, and that judicial notice be limited to those facts which are indeed indisputable. It cannot be said that the facts recited in the documents submitted are indisputable, and that as a matter of law, plaintiff would not have been able to produce contradicting evidence. It must be remembered that in *Thomson* v. *Wooster*, the defendant was not permitted to introduce a government document (a patent) in his effort to dispute the allegations of the complaint. Even though that patent would have been strongly presumptive of the invalidity of a reissued patent, the court went to great lengths to point out hypothetical means by which the two might be reconciled.

Defendants also argue that the documents as to which decision was reserved should be noticed on the ground that they are necessary for a full understanding of those opinions of the C.A.B. which have been noticed. However, the meaning of these noticed opinions is clear on their face, and in any event, since they would not be sufficient to disprove the allegations of the complaint, there is no reason for further detailed elucidation.

Other C.A.B. documents which have been considered are those offered as Defendants' Exhibit 358A, B, C and D. These are reports filed by various airlines with the C.A.B. showing acquisition of aircraft, and are cited by defendants in an effort to disprove the allegations of the complaint concerning Toolco's engagement in the manufacture of aircraft (Defendants' brief, p. 56). Defendants' brief suggests at pp. 46-47 that plaintiff has objected to this exhibit. However, plaintiff did agree that the reports were appropriate for judicial notice (Tr. 9590), and although intimating that an objection might be made on other

grounds, no such objection was raised. This exhibit has been considered, but it is insufficient to disprove the allegations of the complaint, for the reasons set forth above.

Certain other C.A.B. documents were introduced which bore not on the issue of liability but rather on the amount of damages. Decision was reserved at the time as to these exhibits, Defendants' Exhibits Nos. 255, 259 and 261, which bear on the issue of overcapacity in the airline industry during the early 1960's when TWA claims that it should have had more jets. Exhibit 255 is a statement before the House Subcommittee on Appropriations on January 29, 1963 by the Chairman of the Civil Aeronautics Board. Exhibit 259 is a C.A.B. order relating to a United Air Lines fare proposal, and Exhibit 261 is a letter from the President of United Air Lines to the Chairman of the C.A.B. in response to that C.A.B. order. Judicial notice will be taken that Exhibits 255 and 259 were issued, and Exhibit 261 (which is of questionable standing for judicial notice) will be deemed admitted into evidence. Neither the Chairman of the C.A.B. nor the President of United were available for cross-examination, but their statements have been considered for their appropriate evidentiary worth.

One other ruling on an evidentiary matter was handled separately, at request of defendants' counsel. They requested a ruling prior to filing of briefs on the introduction into evidence of DX 364 for identification. On June 13, 1968, I sustained the plaintiff's objection to such introduction. Defendants' counsel in their brief have requested reconsideration of my ruling. I have reconsidered it in the light of said request, and adhere to my former ruling which is set forth below in full:

"During the hearing on damages (transcript page 10,698) defendants offered in evidence certain portions

of the deposition of Emmet Osborn Cocke, a director and officer of plaintiff Trans World Airlines, which were marked for identification as Defendants' Exhibit 364. This deposition had been taken in the course of the discovery proceedings prior to the entry of the default against defendants. Plaintiff objected to the receipt of Exhibit 364 into evidence, and a ruling on the objection was reserved by the Special Master. That objection is now sustained for the reasons set forth below.

"Although Rule 26(d)(2), F.R.C.P. permits the deposition of an officer or director of a party to be used by an adverse party 'for any purpose', Rule 26(d) nevertheless makes clear that a deposition may be used only 'so far as admissible under the rules of evidence.' To the extent that proffered evidence bears on the amount of damages, it is within the scope of the hearings on damages in this case and the normal rules of evidence apply. On issues of liability, however, the rules of evidence have been substantially modified by virtue of the default. As to liability, the default has admitted the well-pleaded allegations of the complaint, and allegations bearing on liability may be contested only within the limits set forth in Judge Metzner's opinion of November 16, 1965 (38 F.R.D. 499).

"An examination of the proffered pages of the Cocke deposition shows that they are concerned with issues of liability rather than the amount of damages. For the most part, they deal with the proposed merger between TWA and Northeast Airlines, certain aspects of TWA's jet acquisition program, and the circumstances surrounding the institution of the present antitrust action. These proffered pages do not qualify for consideration on such issues of liability under the rules laid down in Judge Metzner's opinion.

"The only portion of Judge Metzner's opinion which might justify admission of Exhibit 364 is the reference in that opinion to 'uncontroverted material in the file

of the case.' There is substantial question whether this deposition represents 'uncontroverted' material and whether plaintiff had 'full opportunity to meet or controvert such material.' However, aside from this question, the deposition would not appear to be entitled to consideration. Mr. Cocke's deposition was not admitted into evidence prior to the default and does not constitute a part of the formal record in this case. If Mr. Cocke were called as a witness at this time, his testimony would be inadmissible because it would constitute a presentation of evidence on liability which is prohibited by the default. It is hard to see how Mr. Cocke's deposition can be admitted into evidence if his live testimony could not.

"There is also some question as to whether the deposition is admissible in light of the contention that plaintiff has had no adequate opportunity for cross examination, and a further question as to the relevance of many of the pages offered. However, there is no need to reach these questions in light of the considerations set forth above.

"The objection is sustained."

Other evidentiary rulings more appropriately appear hereafter in the discussion of the damage claims.

Damage Claims

The plaintiff's damage claims will now be discussed in the following Sections:

I. Losses in operating profits due to inadequacy of jet fleet caused by delays in delivery and failure to deliver jets.

(A) International division losses.

(B) Domestic division losses.

(C) B-331B's.

(D) Mitigation claim.

(E) Adjustment in interest cost.

(F) Damages under Section I.

II. Losses due to being required to lease jets from Toolco instead of buying jets from the manufacturers.

III. Losses connected with financing the jets.

IV. Losses due to delay in disposal of displaced piston aircraft.

V. Losses due to disruption of business.

VI. Alternative over-all claim for damages based upon comparative profitability study.

VII. Interest on damage claim.

VIII. Recapitulation and final award.

I. *Losses in Operating Profits Due to Inadequacy of Jet Fleet*

The plaintiff has elected, in its damage claims, to present specific evidence of damages with respect to only a

portion of the allegations of the complaint. The damages claimed are confined to those said to stem from actions of the defendants in the period from early 1955 to the end of 1960 when the Hughes-dominated board of directors of TWA was replaced, for management purposes, by independent voting trustees. In its claim for damages due to the inadequacy of its jet fleet (Section I) the plaintiff takes the position that the main effect of these 1955-60 actions of the defendants was felt by TWA in a period beginning in 1959 (when the planes TWA "should have" ordered in 1955 would have begun being delivered in substantial numbers) through the end of 1963 (when TWA's independent management achieved "a more nearly adequate fleet"). While actions of the defendants at earlier periods are alleged in the complaint, they are referred to by the plaintiff in the damage proceedings primarily for background purposes.

The complaint states:

> "During this period [in or about October 1955] when other United States-flag air carriers were placing orders for jet powered aircraft, and thereafter, the defendants caused and directed TWA to forego making any arrangements for the acquisition, by sale, lease or otherwise of any jet powered aircraft (par. 17) • • • TWA has further been injured in the following manner:
>
> (a) TWA was prevented from obtaining jet powered aircraft and was deprived of opportunity for adequate use of jet powered aircraft during the years 1958, 1959, 1960 and to date with a resultant loss in profits." (par. 52)

The complaint (pars. 9 and 10) also alleges that these actions of the defendants resulted from and were in furtherance of defendants' antitrust offenses.

It is undisputed that by 1955 aircraft manufacturers including Boeing and Douglas had prepared plans and drawings for the manufacture by themselves of jet powered aircraft intended for commercial use. At the same time the major U.S. air carriers were devoting substantial efforts to determine whether and how the jet powered aircraft then being developed by Boeing, Douglas or others could be best utilized by them.

Commercial jet aircraft concededly have a very great competitive advantage over piston aircraft or turbo-prop aircraft both in speed, comfort, efficiency and operating costs. From the first introduction of the jets into commercial service, passengers having the choice have chosen to travel by jet rather than by piston aircraft.

The principal witness of the plaintiff in support of its damage claim for loss in operating profits due to inadequacy of its jet fleet was Mr. Robert W. Rummel, Vice President, Planning and Research, of TWA. He joined TWA as a senior engineer in charge of new aircraft studies and future fleet planning in 1943. He became Chief Engineer of TWA in 1949 and held that position until 1956, when he was elected Vice President, Engineering. In 1959 he was appointed to his present position of Vice President, Planning and Research. From 1956 through 1960 he was also employed by Toolco as a consultant and special representative in connection with the acquisition of jet aircraft from Boeing and Convair, and the acquisition of jet engines. As Toolco's special representative during that period he reported directly to Hughes. He had authority to commit funds under Toolco contracts, and the Toolco factory representatives at Boeing and Convair reported to him as special representative of Toolco responsible for the technical administration of the Toolco contracts with such manufacturers (TWA Ex. 2).

Rummel testified that since 1943 he had been actively engaged in all of TWA's major aircraft procurement programs and had been intimately concerned both with the aircraft actually acquired through Toolco and also with aircraft which TWA considered for procurement. He stated that his activities included negotiations with aircraft manufacturers with respect to technical specifications, performance characteristics, provisioning and spare parts, delivery schedules and acceptance tests. He was cross-examined extensively as to his qualifications as an expert. I find him qualified as an expert in these fields. I reserved decision on the admissibility of his prepared testimony (TWA Ex. 2) until I had an opportunity again to review it in the light of the case as a whole.

In accordance with the foregoing discussion of the effect of the default, defendants' general objections (Nos. 1 and 2) to the testimony of Rummel, which were also reasserted as to plaintiff's other witnesses, are overruled. The first objection was founded on the argument that plaintiff had the burden of proving all allegations which were omitted by Special Master Rankin in his Interim Findings, and the second objection was based on the argument that plaintiff bore the burden of introducing evidence to prove proximate cause, regardless of the default. Neither of these positions can be sustained, for the reasons set forth above. Decision had also been reserved as to certain of the specific objections in part 3 of the objections to the testimony of Rummel (specific objections 4, 5(a), 10, 11, 12, 13, 14, 15, 18, 19 and 21), and these objections are also hereby overruled.

Similarly, I reserved decision on the admissibility of the prepared testimony of the witnesses for the defendants. I now rule that such testimony is likewise admitted into evidence. I likewise decide that the experts called by

the plaintiff and defendants as witnesses in these proceedings were qualified for the purposes for which they appeared.

Rummel testified that although TWA's principal competitors, both on domestic routes and on international routes, were engaged in serious negotiations for acquisition of jet aircraft either with Boeing or Douglas during the last six months of 1955, TWA and Toolco, which were during this period in all respects closely controlled in aircraft procurement matters by Hughes personally, did not engage in negotiations reasonably calculated to preserve TWA's competitive position in the industry for early deliveries of jet aircraft. Rummel also testified that he had recommended negotiations with Boeing before and during this period for acquisition of a jet fleet for TWA, but that Hughes did not authorize negotiations with Douglas and informed Boeing that Toolco and TWA were interested in ordering the Boeing jets only if Toolco could obtain a large priority in delivery positions (vis-a-vis its competitors). He also testified that Boeing refused this demand on the ground that it would wreck its commercial program.

Rummel testified that in general the major air carriers which placed orders first obtained the most advantageous delivery positions. He stated that in order for TWA to obtain competitive equality in early jet deliveries, TWA, Pan-Am and American Airlines, Inc. (American) would have had to commence and continue serious negotiations looking toward a commitment with Boeing for long range jets at about the same time; also, all three carriers would have had to have placed orders for these Boeing aircraft at about the same time. He stated that "at about the same time" does not mean that the actual signing of contracts or letters of intent must be simultaneous, since execution

of such formal documents is not the significant factor; and that minor differences in final contract dates are not significant so long as the negotiations have been substantially contemporaneous. He also testified that the size of the order would play a role in priority of delivery positions; that in fact the major carriers did place large orders and got priority of deliveries; and that a carrier's potential total order was more important than the size of the first order. He testified in detail, as hereinafter set forth, as to his estimate of the delivery dates that the plaintiff could have achieved and would have achieved if it had not been prevented by the defendants from ordering jets during the period under consideration.

The defendants have failed to disprove, in any manner open to them in the light of their default, that they prevented TWA from entering into negotiations with Boeing as alleged in the complaint or that Toolco failed seriously to negotiate with manufacturers during the latter half of 1955, all contrary to Rummel's advice and to TWA's demonstrable competitive needs, with the result of keeping TWA from ever getting as favorable delivery positions for long-range jets as those obtained by TWA's principal competitors in the years in question.

Mr. Ralph Damon, the then President of TWA, advised the Board of Directors of TWA on December 9, 1955 of the substantial orders for jets by TWA's principal competitors and pointed out that these jets would be coming into competition with TWA possibly in 1959 and surely in 1960 and 1961, at which time "Every airplane which TWA now owns or has on order or option will be either totally obsolete or heavily outclassed in speed, comfort, passenger acceptability and economics on competitive routes." (DX 44).

In his report to the Board he also predicted that any airline which did not have comparable equipment by that time would be practically out of business soon thereafter. Rummel testified that Damon had been kept out of any participation in the consideration of jet equipment by Hughes.

Hughes finally authorized negotiations with Boeing for acquisition of jets, presumably for TWA, in late December 1955. A protective order for eight delivery positions for Toolco for B-131s was secured from Boeing on January 6, 1956 (D Ex. 47). A contract for eighteen B-331s was entered into on March 19, 1956. Additional B-131 jets were ordered in a series of contracts entered into between March 2, 1956 and January 10, 1957, with an ultimate total of fifteen (TWA Ex. 2, p. 8; Ex. R-1; Ex. R-2; D Ex. 66, 67). The numbers of B-331s and B-131s finally fixed upon were based upon discussions between Rummel and Hughes as to the proper number of Boeing aircraft for TWA's foreseeable needs for long range jets as of that date.

The delivery dates for these Boeing jets were later than those obtained by the plaintiff's chief competitors. These aircraft moreover were not to be purchased by TWA but were to be purchased by Toolco, with Toolco retaining the power to make a later decision as to their ultimate use and destination.

Later, in April 1956, Hughes caused Toolco to enter into a contract with Convair for thirty CV-880 medium range jet aircraft which had been recommended to him by Rummel for inclusion in TWA's projected jet fleet. (See complaint par. 17.) Here again Toolco retained the power to make a later decision as to whether the planes would go to TWA (TWA Ex. R-3, R-4.) The plaintiff does not complain that the medium range jets should have been ordered earlier but

does allege that the defendants interfered with the production of the planes and caused late deliveries of some of the jets and diverted others of them to Northeast and prevented delivery to TWA of still others.

Experts for both plaintiff and the defendants submitted estimates of the changes in TWA's operating revenues and expenses which would have occurred if the additional aircraft had been secured and the existing aircraft had been delivered earlier. Their estimates were made on the basis of the following premises:

(a) TWA would have received six additional Boeing B-331 aircraft (long range jet aircraft suitable for non-stop trans-Atlantic operations) which were diverted to Pan-Am.

(b) Fifteen Boeing B-131 aircraft (a slightly shorter range jet suitable for trans-continental operations but not well suited for trans-Atlantic operations) and twelve B-331 aircraft, which were actually received by TWA, would have been received on earlier delivery dates.

(c) Twenty CV-880 aircraft, which TWA actually received, would have been received on earlier delivery dates.

(d) Ten additional CV-880's would have been received.

Estimates of the delivery dates for the additional Boeing and Convair aircraft in categories (a) and (d) and of the earlier "reconstructed" delivery dates for the aircraft in categories (b) and (c) were prepared by Rummel. The B-131 and CV-880 aircraft were all used in TWA's domestic operations, and the delivery dates are discussed in the section of this opinion dealing with domestic operations. The B-331 aircraft were used in both international and domestic operations. As to these, Rummel prepared a table

showing the improvement in delivery position he estimated that TWA would have achieved, taking into account both the six additional planes (which had been diverted to Pan-Am) and the delays in delivery of the twelve other Boeing B-331 jets. The table, shown below, lists in the first column the actual receipt date for the twelve B-331's by TWA and the actual receipt dates for the six additional B-331's by Pan-Am. Since all eighteen were part of the original Toolco contracts with Boeing, the delivery dates for all eighteen would have been advanced by making timely orders. The actual delivery dates were earlier than the contract delivery dates, so are used by the plaintiff in computing its damage estimates. Opposite each "actual receipt date" is the "reconstructed earlier receipt date" fixed by Mr. Rummel on the assumptions hereinafter described.

Actual Receipt Date	Reconstructed Earlier Receipt Date
*November 5, 1959	*July 19, 1959
November 10, 1959	August 22, 1959
November 10, 1959	August 28, 1959
November 25, 1959	September 22, 1959
*December 15, 1959	*October 6, 1959
December 23, 1959	October 27, 1959
*December 30, 1959	*November 5, 1959
January 18, 1960	November 10, 1959
*March 23, 1960	*December 15, 1959
April 1, 1960	December 30, 1959
April 5, 1960	January 18, 1960
April 14, 1960	February 29, 1960
*April 29, 1960	*March 23, 1960
May 9, 1960	April 26, 1960
May 25, 1960	April 29, 1960
*June 8, 1960	*May 9, 1960
July 1, 1960	June 8, 1960
July 1, 1960	July 1, 1960

* Diverted to Pan-Am

(In the case of two of the planes, Toolco failed to make payment when they were ready for delivery so the "ready for delivery" date is used in the above table rather than the "actual receipt" date.)

Since the B-331 aircraft were used by TWA in both international and domestic operations, the added availability of these planes was allocated between the international and domestic operations of TWA in the same proportion as the allocation actually made by TWA of its B-331 aircraft during this period. The details of this allocation of the additional B-331 availability are shown in the sections of this report dealing with TWA's international and domestic operations. As to responsibility for diversion of the six B-331 aircraft to Pan American, I have already rejected defendants' argument that ratification of the assignment by the Hughes-dominated TWA Board of Directors is sufficient, under the rules of the default, to relieve defendants of responsibility for this portion of plaintiff's claim.

The Rummel testimony was corroborated in many significant aspects by the testimony of Mr. J. B. Connelly, Vice President and Assistant General Manager of Boeing's Aircraft Division. (TWA Ex. 3) Connelly testified that he was familiar with the development, production, sales and deliveries of commercial jet aircraft by Boeing during the period 1954 to 1961 and in particular the jet aircraft known as the Boeing 707-120 and the Boeing 707-320 series.

The policies followed by Boeing concerning the sale of commercial jet aircraft to commercial air carriers throughout the period 1955 to 1961 were testified to by Connelly. He testified that he participated in and was generally familiar with the negotiations between Boeing and Pan-Am, between Boeing and American and between Boeing and Toolco as well as other air carriers. He stated that in 1955

Boeing wished to sell substantial numbers of 707 jet aircraft to TWA. This included the 707-330 Series, long-range jets suitable for TWA international service. (The configuration later chosen from this Series for TWA's use was designated as B-331.) It also included the 707-120 Series, suitable for transcontinental service. (The configuration in this Series chosen for TWA was B-131.)

Connelly testified that Boeing would have afforded TWA substantially as early delivery positions as those afforded to other customers of comparable interest to Boeing. He stated specifically that had TWA commenced negotiations and ordered jet aircraft comparable in number to those ordered by Pan-Am and American, respectively, at about the same time as such other customers ordered jet aircraft from Boeing, Boeing would have afforded TWA substantial equality in early delivery positions with Pan-Am and American. He stated that Boeing would have sought to provide substantial equality of early delivery positions as between Pan-Am and TWA for planes used primarily on international routes and substantial equality of early delivery positions as between American and TWA as to aircraft used primarily on domestic routes. He stated that Boeing would have agreed, assuming that TWA had placed such orders, to deliver and would have delivered to TWA jets of the B-120 and B-320 Series earlier than such aircraft were in fact delivered under the Boeing agreements with Toolco. He further testified that he had examined the "Statement of Improvement of Delivery Positions", prepared by Rummel and hereinafter discussed, and expressed the opinion that it constituted a reasonable estimate of the improvement in delivery positions which TWA would have obtained. With reference to the six B-331 jets which were originally ordered by Toolco and were later

delivered by action of Toolco to Pan-Am instead of TWA, Connelly corroborated the testimony of Rummel as to the earliest delivery positions Pan-Am could have obtained from Boeing for six such jets if they had been ordered from Boeing in July 1959. The Connelly testimony was not seriously controverted.

The Rummel and Connelly testimony reinforce the above-quoted allegations of the complaint in respect of the inadequacy of the plaintiff's long range jet fleet caused by action of the defendants.

In view of the fact that the "reconstructed" TWA possessed six additional Boeing B-331 jets and ten additional CV-880 jets, it was assumed that this larger fleet would have rendered unnecessary certain additions to the TWA fleet which were made when the management of TWA was turned over from the Hughes interests to independent voting trustees in December 1960. It was assumed that TWA would not have acquired five B-331B (fan jet) aircraft which it leased in 1962 and 1963, and that it would not have acquired six CV-880 aircraft which it purchased in 1963. However, it was assumed that even with the larger "reconstructed" fleet, TWA would nevertheless have acquired the four B-720B aircraft (a later model Boeing medium range jet) which were leased during 1961 and 1962, and would also have purchased the eighteen additional B-131B aircraft (fan jets) which it received in 1962.

The foregoing assumptions, which set forth a hypothetical jet fleet for TWA in 1959-1963, constitute the basic equipment premises for the estimates of the expert witnesses for both plaintiff and defendants. As to the piston fleet which would have been operated by TWA during this period, each expert made such adjustments in TWA's actual piston operations as, in his opinion, would have accompanied the hypothesized jet operations.

Defendants argue that there is no certainty that the hypothetical jet fleet recommended by Rummel, which forms the basis for that part of the plaintiff's damage claims due to inadequacy of its jet fleet, would in fact have been implemented by the plaintiff under an independent management. They stress that Rummel was not chief executive officer of TWA nor in any position to impose his equipment views on the Board of Directors. They cite various inter-office memoranda, introduced into evidence, indicating that there was a running exchange of comments, and differing opinions, among TWA officers and staff members from time to time over the types and amounts of jet equipment to be purchased. Defendants also introduced in evidence various opinions expressed by CAB officials, trade magazine editors and airline executives, including some TWA officials, to the effect that airlines may have overbought jet equipment capacity and would suffer adverse financial consequences if they did not cut back their jet programs. They conclude that the plaintiff's expert testimony is too speculative to be accepted as a basis for damages.

Given the well-pleaded allegations of the complaint, however, the testimony of Rummel, who was chief procurement officer for the plaintiff at the time and an equipment procurement representative of Hughes, as well as the Connolly testimony, and the evidence that the assumed additional fleets of B-331s, B-131s and CV-880s were in fact ordered in the same type and quantity by a Hughes-dominated TWA, although at later dates, I am of the opinion that the hypothetical jet fleet and reconstructed delivery dates constitute a proper basis for computing damages under this Section I. The evidence of the plaintiff's experts as to the reconstructed jet fleet is well within the standards of distinctness and positiveness of proof allowable in default sit-

nations under the doctrine of *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946).

By way of orientation for the detailed discussion which follows showing the methodology used by the various experts in making up their estimates of damages due to the inadequacy of TWA's jet fleet, it should be stated at this point that estimation of the changes in TWA's operating revenues requires a consideration both of the added revenues and costs that would have accompanied additional jet operations and of the decreased revenues and costs that would have resulted from eliminated piston operations. The estimates of revenues and costs produced by the plaintiff's experts and the defendants' experts were dramatically different (see Tables pp. 59 and 83). The plaintiff's experts estimated that TWA would have experienced an increase in net operating profits after appropriate adjustment for depreciation for the years 1959 through 1963 in the amount of 51.7 million dollars, whereas the defendants' experts estimated that if TWA had acquired and operated the hypothetical jet fleet as assumed by the plaintiff, it would have experienced a decrease in net operating profits after depreciation adjustments for these same years, of 95.91 million dollars. The defendants' brief states at page 220:

> "It was not, of course, Simat's [expert witness of defendants'] opinion that the management of reconstructed TWA would have permitted such staggering losses to accumulate. Management could have drastically cut schedules • • • but while such measures might have avoided the dire consequences of operating Wemple's [expert witness of plaintiff] added plane miles, they would not have sufficed to put the added fleet in the black."

At this point I shall separate the claims of the plaintiff with respect to the adequacy of its jet fleet into divisions

A and B, i.e., between claims for loss of operating profits of its International Division and claims for loss of operating profits of its Domestic Division.

(A) *International Division*

It will be useful, I believe, from time to time while reading the ensuing discussion as to the International Division to refer to the table which follows, comparing the amounts of the estimates of experts retained by the plaintiff and defendants. The table is a portion of plaintiff's Ex. 420 (Sch. C).

(Table reproduced on following page)

As to the International Division, the plaintiff's claim as shown on foregoing Table is for $22.4 million damages. It may usefully be divided into two parts. First, the reduction of the plaintiff's projected Boeing jet fleet by the conceded diversion of six of the eighteen B-331 jets by action of Toolco to Pan-Am, TWA's principal transatlantic competitor, at a time when fierce competition existed for the lead in the jet service on international routes (cf. complaint, pars. 9, 10). The amount of damages claimed by reason of this diversion is $17.6 million. Second, the delays in the delivery of that fraction of the B-331 jets assigned to the International Division which resulted from the original equipment orders being delayed by Toolco until after the earliest delivery positions for the long range jets had been preempted by Pan-Am. This second claim is for $4.8 million.

SCHEDULE C

INTERNATIONAL
C&C AND SHE

T R A N S W O R L D A I R L I N E S, I N C.

COMPARISON OF CHANGE IN INTERNATIONAL OPERATING PROFITS IN REPORTS OF COVERDALE & COLPITTS AND SIMAT, HELLIESEN & EICHNER, INC. (REVISED)

(Amounts in millions)

	6 additional B331's II-6 (1959-1963)			Earlier receipt of B131's and B331's III-4 (1959-1960)			T o t a l		
	C&C	SHE	*	C&C	SHE	*	C&C	SHE	*
Transportation revenues:									
Passenger revenues	$74.70	$40.51	$34.19	$10.30	$4.59	$5.71	$85.00	$45.10	$39.90
Other	3.70	2.02	1.68	.60	.23	.37	4.30	2.25	2.05
Rounding									
Total transportation revenues	78.40	42.53	35.87	10.90	4.82	6.08	89.30	47.35	41.95
Operating expenses:									
Flying operations	9.90	)		.60	)		10.50	)	
Direct maintenance	4.80	17.80)	.40	.40	1.10)		5.20	18.90)	.40
Applied maintenance burden	3.50	)		.10	)		3.60	)	
Insurance	1.70	1.59	.11	.20	.14	.06	1.90	1.73	.17
Depreciation - jet aircraft	11.10	11.10		1.30	1.30		12.40	12.40	
Rounding									
	31.00	30.49	.51	2.60	2.54	.06	33.60	33.03	.57
Aircraft servicing	3.50	5.34	(1.84)	.20	.36	(.16)	3.70	5.70	(2.00)
Stewardess and related costs	6.10	2.35)	1.58	.60	.13)	.22	6.70	2.48)	1.80
Other passenger servicing		2.17)			.25)			2.42)	
Traffic servicing	2.40	1.53	.87	.30	.18	.12	2.70	1.71	.99
Servicing administration	.50	.60	(.10)		.05	(.05)	.50	.65	(.15)
Reservation and sales	9.00	6.75	2.25	1.20	.76	.44	10.20	7.51	2.69
Advertising and publicity	4.40	2.46	1.94	.50	.21	.29	4.90	2.67	2.23
General and administrative	2.50	2.26	.24	.30	.15	.15	2.80	2.41	.39
Ground equipment maintenance and depreciation		.82	(.82)	.20	.03	.17	.20	.85	(.65)
Rounding					.01	(.01)		.01	(.01)
	28.40	24.28	4.12	3.30	2.13	1.17	31.70	26.41	5.29
Expenses covered in both reports	59.40	54.77	4.63	5.90	4.67	1.23	65.30	59.44	5.86
Depreciation - piston aircraft		(2.87)	2.87		(.63)	.63		(3.50)	3.50
Amortization	1.40		1.40	.20		.20	1.60		1.60
Total operating expenses	60.80	51.90	8.90	6.10	4.04	2.06	66.90	55.94	10.96
Change in operating profits	$17.60	($ 9.37)	$26.97	$ 4.80	$ .78	$4.02	$22.40	($ 8.59)	$30.99

*C&C over (under) SHE.

Source: Comparison of change in operating profits in reports of Coverdale & Colpitts and Simat, Helliesen & Eichner, Inc. (Revised), TWA Exhibit 345A, pages as indicated above.

Revenues—First Part

The plaintiff retained the firms of Coverdale & Colpitts (sometimes referred to as "Coverdale") and Price Waterhouse & Co. to calculate the change in operating profits based upon the foregoing assumptions.

Coverdale, with its predecessor firm, is a nationally known firm providing consulting engineering and financial services to industry and government. It conducts industrial studies involving mergers and reorganizations, management appraisals, transportation and product pricing analyses, plant location and operations studies. These studies have included all forms of transportation including air transportation. The Coverdale study in this case was presented through the direct testimony of Edward L. Wemple who has been a partner in the Coverdale firm since 1956. Studies in the airline field which have been made under his supervision have included analyses of operations programs for TWA, Flying Tiger Line and British Overseas Airways, as well as traffic and revenue studies for various airports, including O'Hare International Airport. He is a member of the American Institute of Consulting Engineers.

Before discussing the Coverdale report on the additional B-331 planes, it should be remembered that these planes were assumed to have obviated the leasing of five B-331B aircraft in 1962-1963. The international service actually operated with the B-331B aircraft were assumed to be performed by the additional B-331's. Revenue and cost figures were adjusted accordingly by all expert witnesses.

The Coverdale estimate of changes in operating profits relating to the six diverted B-331s will now be summarized. It starts with a computation from TWA equipment records of the annual average number of additional B-331 Boeing

jets that would have been available for commercial service for the International Division if there had been no transfer of the six B-331s to Pan-Am by action of Toolco and these planes had been in TWA's service (a jet in service for one-tenth of a year would show as one-tenth of a jet in the annualized figures):

The computation of such annual average number of additional jets is as follows:

1959	0.2 B-331s
1960	3.6 "
1961	3.7 "
1962	4.8 "
1963	0.9 "

Coverdale relied on actual TWA experience as to the time ordinarily elapsing between the date of receipt of a plane and the date of commencing service in fixing the date when an aircraft was "available for commercial service." Aircraft "available for commercial service" is a term which is defined to include not only aircraft actually employed in revenue-producing activities, but all other owned or leased aircraft on hand, once commercial service has been inaugurated with aircraft of the same type. (See TWA Ex. 4(c)(4), Ex. B, C; Tr. 4653-62, 4695-4703.) Thus the term includes aircraft not overhauled, aircraft being used for pilot training activity and other similar non-productive aircraft.

Coverdale assumed that an increase in the number of aircraft available for commercial service would produce a proportionate increase in plane miles flown, thus allowing for maintenance, training and other non-productive employment of the additional aircraft on a basis exactly proportionate to TWA's historical experience in the same year with aircraft of the same type. The Coverdale computa-

tions also implicitly assume that in any given year additional aircraft of any type would be employed in operations substantially similar in kind to those in which aircraft of the same type were employed by TWA in the same year.

The assumed additional aircraft available for commercial service in the International Division would have produced additional passenger revenue jet plane miles, as follows:

1959	0.1	million	miles
1960	6.3	"	"
1961	6.6	"	"
1962	8.4	"	"
1963	1.5	"	"

The estimates of these additional jet plane miles were obtained by applying the experienced annual utilization for the B-331s in a particular year to the assumed additional availability of that type of jet in the same year.

Coverdale then estimated the corresponding reduction of the number of piston aircraft miles. This estimate was based on determining the ratio between the increase in all jet plane miles flown historically in the International Division in a given year over those flown in the preceding year, and the decrease in all piston plane miles flown in this Division between the same two years, and estimating that a further increase in jet plane miles would have produced a further and proportionate decrease in piston plane miles for that year.

The corresponding reduction of piston passenger revenue plane miles was as follows:

1959	0.1	million	miles
1960	5.1	"	"
1961	1.6	"	"

These reductions would have been piston plane miles flown by Lockheed L-1649As and are obtained by applying

to the experienced annual utilization for the L-1649As in a particular year in the International Division their assumed lesser availability in that year.

The ratio of the number of transatlantic flights to millions of plane miles being fairly uniform, the number of assumed increased transatlantic flights was then computed on a basis directly proportionate to the net increase in plane miles; and on the basis of seating capacity of the B-331 aircraft, the number of increased available seats was computed, with the following results:

	Additional Flights	Additional Available Seats
1959	—	1.1 thousands
1960	228	89.1 "
1961	987	154.3 "
1962	1,793	251.0 "
1963	311	44.0 "

The additional seats in 1959 resulted from using aircraft of greater seating capacity, even though the number of flights remained the same.

The international operations of TWA consisted of transatlantic flights and continuation of certain of these flights "beyond the gateway" (the gateway being the point at which the eastward transatlantic flight made its first European stop). It was conceded there is no source to obtain the industry figures for the number of "beyond the gateway" scheduled passengers (Tr. 8498). It was accordingly assumed by Coverdale that increased TWA service for the International Division would have been divided between scheduled transatlantic operations and other international operations as historically divided.

During the years in question, the figures submitted by the plaintiff's experts showed a very close correlation between TWA's percentage of the total available transatlantic seats

and its percentage of total transatlantic passengers on all airlines constituting the members of the International Air-line Transportation Association (IATA). Their estimate of additional TWA transatlantic passengers which would have been obtained is therefore obtained by taking the increased percentage of seats and proportionately increasing the number of passengers.

Here it should be noted that in estimates for 1959-60, the additional seats offered by TWA would have been, in effect, a transfer of seats from Pan-Am to TWA, because TWA's additional aircraft would have been transfers of the six diverted B-331s from Pan-Am and there would have been no increase in the total U. S.-airline available transatlantic seats; but since Pan-Am could have obtained delivery of other similar jets from manufacturers in the spring of 1961, the annual total numbers of transatlantic seats available for the years 1961, 1962 and 1963 were assumed by the plaintiff to have been increased by the number of additional seats that would have been offered by TWA.

The industry competitive factors in 1959-60 were markedly different in international travel from the 1961-63 period. Notice of these differences is taken in discussing damage theories hereinafter.

The calculation of TWA's additional transatlantic passengers in accordance with the above premises produced the following results:

	Actual Passengers	Revised Number of Passengers
1959	146 thousand	147 thousand
1960	243 "	298 "
1961	208 "	275 "
1962	277 "	382 "
1963	359 "	377 "

There were then computed the additional revenues which would have been received by TWA in respect of these additional passengers. This was done by taking the actual International Division passenger revenues for each of the five years in question and increasing them by the same percentage as the increase in the number of TWA transatlantic passengers for each year in question.

The additional passenger revenues, so calculated, are as follows:

1959	$ 0.6	million
1960	18.9	"
1961	20.4	"
1962	29.5	"
1963	5.3	"

There was additional assumed revenue from mail, express, freight and excess baggage which all experts estimated at 5% of the assumed additional passenger revenue. The total estimated additional revenue from the assumed six additional B-331s was therefore $78.4 million for the International Division.

Hereafter we will discuss the estimates of the plaintiff's experts as to the amount of attendant increased operating expenses which amounted to $60.8 million leaving the net additional revenue of $17.6 million as the amount of the plaintiff's damage claim for the International Division with respect to the six additional B-331s transferred by reason of the action of Toolco to Pan-Am. Before reviewing the estimates for operating expenses, however, we will first discuss the computations of the defendants' experts with respect to the change in operating revenues related to the International Division from these six assumed additional B-331s.

The defendants retained as their experts to analyze the Coverdale estimates, and to prepare their own estimates

of changes in operating profits, the firm of Simat, Helliesen & Eichner, Inc. (sometimes referred to as "Simat").

The report of Simat was presented through direct testimony of Messrs. Nathan S. Simat, Robert I. Helliesen and L. John Eichner, officers of that organization. The Simat organization was formed in 1963 and engages in economic and transportation studies for government and private clients. It has conducted studies for various air carriers from every sector of the air transport industry. Simat was for many years employed by the Civil Aeronautics Board as a transportation economist. As Head Economist of the Analysis Division of the CAB, he prepared numerous operating and financial analyses dealing with air traffic, revenues and costs, feasibility of equipment purchase programs and he appeared in numerous commercial rate and mail proceedings. As Chief of the Certificates Section of the Routes Division of the CAB he prepared or supervised the preparation of studies dealing with the economic consequences of adding and deleting air services. He has acted in management and economic consulting capacities for Northeast Airlines and Sabena Belgian World Airlines.

Helliesen was for some years employed by American Airlines, Inc. in various economics and marketing capacities and held the office of Director of Schedule Planning and Business Research in that company. He has done economic research for the Air Transport Association of America in connection with the CAB general passenger fare investigation and has also been retained by the Convair Division of General Dynamics. He formed the Aircraft Exchange, which provided regular market reports of bids and offers for the purchase, sale and lease of used transport aircraft, and served as its head in 1958-1962. He joined the Simat organization in 1965.

Eichner served in responsible positions with Capital Airlines, Trans-Texas Airlines and from 1961 to 1966 was Assistant Vice President of Corporate Planning for American Airlines, Inc., where his duties included the preparation of special studies and forecast of revenues, expenses and ground facilities for various types of air equipment. He joined the Simat organization in 1966.

The Simat report assumed the same reconstructed earlier delivery dates for the jet equipment as the Coverdale report, and assumed all the other equipment assumptions of the Coverdale report, so that the size of the hypothetical jet fleet in both reports for the five year period 1959-1963 is identical. The defendants' experts used the Coverdale estimates for the number of added and deleted aircraft and aircraft miles and further used the assumption that all deleted piston aircraft services in TWA International Division had been operated with L-1649A aircraft. They also testified that it was not unreasonable to use the percentage share of available IATA transatlantic seats as a guide for estimating TWA's percentage share of transatlantic passengers and accordingly used the same number of TWA transatlantic seats assumed to be added.

It was their opinion, however, that Coverdale's estimate that TWA could increase its share of available transatlantic seats was erroneous. Simat's opinion was that the transatlantic market is the leading international air travel market in the world and the object of vigorous competition by nearly 20 air carriers exclusive of supplemental and charter carriers and that it was difficult, if not impossible, to conceive of a market where a likelihood of unilateral competitive action without response from other carriers in the market, is more remote.

Under this theory of "competitive response" developed by defendants' experts, and more fully stated hereafter, the reconstructed estimates for additional transatlantic passengers by Simat were:

1959	146 thousand
1960	281 "
1961	255 "
1962	343 "
1963	368 "

The opinion of Simat on this theory of competitive response was that Pan-Am, as TWA's principal transatlantic competitor, would have taken some of its long range jets off of its other international flights to maintain its "historic ratio" of available transatlantic seats vis-a-vis TWA, or else it would have retained some of the piston seats which were historically retired, or both. Simat was also of the opinion that foreign airlines would have likewise responded competitively. He selected the second and third quarters of the years 1960-63 (omitting the first and fourth quarters when various airlines observed different policies in the seasonal reduction of weekly frequencies) and noted that in these selected quarterly periods, for each flight (including pistons as well as jets) added by TWA, the following "pattern of competitive response" in annualized average additional planes was shown in 1960, 1961, 1962 and 1963: In the second quarter of said years Pan-Am added .07, 1.3, 2.1 and 1.9; foreign flag carriers added 3.3, 4.2, 5.4 and 5.3; and in the third quarter of said years Pan-Am added 1.7, 1.8, 2.5 and 2.7; foreign flag carriers added 4.4, 5.0, 4.4 and 6.4.

It will be illuminating to discuss the defendants' arguments separately for the 1959-60 period and for the 1961-63 period.

Simat estimated that in 1959 Pan-Am would have transferred .04 jet aircraft (on an annualized basis) to the transatlantic service from its other international routes but that the foreign competitors, since it was assumed that no increase in the total transatlantic service of U.S. airlines would be involved, would not have responded competitively. For 1960 Simat first estimated that for each flight added by TWA, Pan-Am would have responded competitively by adding one flight and other foreign competitors taken as a group would have responded by adding one flight; but since he did not assume that the additional seats generated by TWA through the replacement of piston flights by jet flights would have engendered a competitive response, he adjusted his estimates of competitive responses to the net addition of .85 transatlantic seats by Pan-Am and the same by the other IATA carriers for each seat that would have been added by TWA.

Conclusions as to Revenue Estimates

The severe worldwide shortage of jet equipment through 1960 was such in my opinion, as to make the assumed transatlantic competitive response unrealistic for the 1959-60 period. It is reasonable to assume that TWA's usage of the six diverted B-331s would have been proportionately the same as its usage of the curtailed fleet it did acquire, and thus that approximately one-third of the diverted six B-331s would have been used domestically by TWA. The total U.S. airline competition on the transatlantic route would thus have involved the use of two fewer jets during these years, thus appearing to rule out any probability of "competitive response" from foreign lines. As to Pan-American, piston aircraft with their higher cost and lower attractiveness were in no position to compete effectively

against jets. On cross-examination of Simat, it was brought out that essentially there was no "historical pattern" of response by competitors to additional TWA transatlantic service. The ratio of such TWA to Pan-American service, for example, varied from 53% to 82% in the years leading up to introduction of the jets (Tr. 8378).

Also it was shown that in 1960 TWA historically increased its percentage of transatlantic seats vis-a-vis Pan-Am, without competitive response, indicating that Pan-Am made a management decision that it preferred to use many of its jets on other international services to maintain or improve its position there. If Pan-Am had not received the diverted planes, it presumably would have been in an even less favorable position to exert a "competitive response" on the transatlantic service during the years in question. Pan-Am faced jet competition, for example, on the Pacific routes where Quantas and BOAC were operating jets. When Pan-American did receive B-331s in quantity, it transferred the B-131s theretofore used on the transatlantic service to the Caribbean service, thus further indicating the need on its part to distribute its jet equipment on a worldwide basis. All airlines dropped piston service on transatlantic routes as jets became available, because of customer preference for jets.

Finally, no testimony was introduced as to the effect financially on the other worldwide operations of TWA's transatlantic competitors of transfer of jet service from these other international operations to the transatlantic route. In the absence of such figures, and considering the facts summarized above, it appears to be sheer speculation to conclude that the managements of the competing airlines would have automatically made a competitive response in any given ratio to the changed conditions on the transatlantic route.

Support for this conclusion also may be found in an examination of Pan Am's Pacific operations and a comparison of the profitability of these operations with Pan Am's Atlantic operations. The table below, comparing Pan Am's Pacific and Atlantic divisions for both seat miles and operating profit, is taken from statistics in the C.A.B. *Handbook of Airline Statistics* 1965 Edition, which has been frequently relied on by both sides. This comparison shows that in the years in question, except for transition year 1959, Pan Am's Pacific operations were far more productive on a revenue per seat mile basis than were its Atlantic operations. It cannot be lightly assumed that Pan Am would have sacrificed its earnings on the Pacific in order to match T.W.A. flight increases on the less profitable Atlantic route.

COMPARISON OF PAN AM PACIFIC AND ATLANTIC OPERATIONS

(000's omitted)

	Pacific Division		Atlantic Division	
	Seat Miles (000)	Operating Profit ($000)	Seat Miles (000)	Operating Profit ($000)
1959	1,397,428	5,557	2,447,837	17,469
1960	2,108,703	18,672	3,220,514	16,593
1961	2,525,397	21,689	4,361,135	4,468
1962	2,915,237	30,965	5,123,207	12,489
1963	3,267,904	38,814	6,007,142	33,273

Source: C.A.B. Handbook of Airline Statistics, 1965 Ed., Part III Tables 83 and 85, Part IV Tables 83 and 85.

As to the availability of jet aircraft for foreign flag carriers from non-competitive sectors, it is not known whether or not the profitability of these non-competitive sectors would or would not inhibit the shifting of jet aircraft to the Atlantic. Also, it is not clear whether the individual non-

competitive sectors recorded by Simat were not merely intermediate portions of a longer flight, which could not be deleted if the longer flight was to be retained, or that these sectors were operated with jet aircraft suitable for transatlantic operations.

Finally, there is no evidence that scheduling considerations would have permitted the shifting of aircraft from their actual routes to the Atlantic. For example, elimination of a short non-competitive flight by Pan Am or some other carrier might not free enough jet hours for an additional transatlantic flight, and even if sufficient hours were available, there is no evidence that they would have been available at times which were commercially attractive for transatlantic operations.

The defendants' experts stated a further objection to the plaintiff's method of calculating changes in operating revenues in that the plaintiff's experts assume that the categories of passengers other than scheduled transatlantic passengers included in the International Division ("beyond the gateway" and charter service passengers) would increase in the same percentage as for IATA scheduled transatlantic passengers. Defendants' experts produced statistics designed to show that TWA's actual experience demonstrated that "beyond the gateway" International Division passenger revenues, as defined by them, increased during the years in question at only 52% of the rate of increase for transatlantic IATA passengers; that the percentage of "beyond the gateway" passengers, as defined by them, to the total TWA International Division passengers dropped from 40.4% in 1959 to 29.5% in 1963; and that in terms of absolute numbers such TWA "beyond the gateway" passengers remained relatively unchanged over this period except for a "spurt" in 1963, while its IATA transatlantic passengers increased almost fourfold.

The evidence was conflicting as to the proper basis for measuring the volume of "beyond the gateway" passengers (Tr. 8506; TWA Ex. 340).

The plaintiff's claim for the 1959-60 period, however, does not rest upon any increase in traffic from year to year. It assumes only that whatever traffic moved in the International Division area would have been proportionately redistributed in its favor, if it had the assumed increase in number and betterment in quality of equipment. Transatlantic passenger figures of the industry are used as a basis for computations because they are admittedly accurate and constitute the bulk of revenues for the International Division, whereas no one was able to produce satisfactory International Division territory figures for the industry for estimation purposes (Tr. 8498). As to overall charter service in the area served by the International Division, it seems reasonable to assume, as the plaintiff did, that it is obtained for the transatlantic service generally in proportion to capacity offered, assuming the same type of equipment is used.

The plaintiff points out, finally, that the defendants' experts assume that if TWA had failed to obtain a favorable customer response to a larger jet capacity offered to charter customers and to "beyond the gateway" customers, TWA nevertheless would have continued the same proportionate distribution of its International Division jet aircraft between transatlantic service and these other services as it did historically. They stated that any rational management, during this period of jet shortage, would have promply redistributed its aircraft assigned to the International Division so as to take advantage of the demand on the more profitable segments. If the more profitable segments consisted of transatlantic service, then service would have been transferred by management from the "be-

yond the gateway" service and the charter service to scheduled transatlantic flights.

As to the 1961-63 period, competitive conditions changed materially from the 1959-60 period. Jets had become available in greater quantity and the industry load factor dropped. Economic conditions were less favorable for international travel during most of the period. Piston service on the transatlantic route ceased, and TWA's comparative shortage of jet equipment in 1961 caused it rapidly to lose its market position. The plaintiff has assumed that in this period the total number of seats offered by the industry in general transatlantic competition would have increased because Pan-Am could have received delivery from Boeing directly of six B-331s which it decided to buy in 1959. Accordingly the plaintiff has estimated that TWA would have obtained its historical share of passengers based on the increased industry capacity. The net increase in operating profits estimated by the plaintiff for these years (on the basis outlined above) is substantially lower than for the 1959-60 period. The figures are as follows:

	Gross Estimated Additional Revenue	Estimated Increased Costs	Net Estimated Additional Revenues
1961	$21.4 million	$19.6 million	$1.8 million
1962	31.0 "	28.5 "	2.5 "
1963	5.6 "	5.9 "	(.3) "

For background purposes, it is noted at this point that during the 1961-63 period, Pan-Am's Atlantic Division historically made an operating profit of $50.3 million; and TWA's historic operating profit for this period in its International Division was $25.1 million.

The defendants make the same two points in respect of the 1961-63 period as discussed above to dispute the validity of the plaintiff's estimates—i.e.—"competitive response"

and disproportionate increase assumed for "beyond the gateway" and charter service. In reply the plaintiff makes several additional points in respect of the years 1961-63: (a) It is unrealistic and speculative to assume TWA's foreign competitors would have weakened their competitive position on other routes to meet such increased transatlantic competition as would have been produced by Pan-Am's assumed acquisition of six additional jets early in 1961. Pan-Am would have had during this period, under the posited assumptions, exactly the same number of jets that it historically had, and presumably would have distributed them worldwide as it historically did. (b) It is reasonable to assume that an increase in jet service by TWA with resultant increase in its proportion of total service offered by the industry, would have correspondingly increased its proportion of total traffic carried in its International Division.

The reasoning of the plaintiff appears to me to be valid and accordingly I accept the added revenue estimates in respect of the six diverted B-331s as computed by the plaintiff's experts for the International Division.

Estimates of Operating Costs

The added costs of operating the six additional jets in the International Division were computed in detail by the experts for the plaintiff and defendants. (See summary thereof in table on p. 83.)

A brief description of the methodology used by the plaintiff's expert in estimating changes in operating expenses attendant upon the assumed additional TWA operations in respect of the six diverted B-331s is set forth below. Changes in operating expenses are separately computed for the increases in jet operations and the decreases in piston operations. As to each category, hereafter described,

a determination was made of the extent to which it varied historically in the years in question as the scale of operations changed, and an estimate was made based on the assumption that further changes in the scale of operations would produce further changes in expenses on a proportionate basis. Following are the categories and the method used for each in computing the changes in expenses for the assumed changes in operations.

Flying operations and maintenance expense incurred for operating and maintaining aircraft were changed in proportion to the assumed changes in plane miles or number of aircraft available.

Aircraft servicing expenses which have to do generally with ground activities for aircraft were computed on the basis that the estimated net increase of plane miles operated would have been proportional to the increase in number of flights processed on the ground and accordingly plane miles were used as the index for calculation of changes in this class of expense.

Passenger service expense which has to do with passengers while in flight was computed insofar as cabin personnel is concerned in proportion to plane miles operated; and expenses for food supplies and liability insurance were varied in accordance with passenger revenues.

Traffic servicing expense which has to do with handling passenger and cargo traffic on the ground were varied in proportion to transportation revenues.

Service and administration expense which has to do with supervisory and administrative activities for servicing of aircraft and traffic was varied in accordance with changes in plane miles.

Promotion and sales expenses were varied in accordance with changes in transportation revenues.

General and administrative expense which has to do with corporation matters in certain activities such as financial, accounting, legal and general administration were varied in accordance with changes in transportation revenues.

Depreciation and amortization were computed by Price Waterhouse & Co. and certified by it as being appropriate under the assumed changes in equipment.

The detailed changes in operating expenses are set forth in the Coverdale Report, Volume I and summarized at pages 37 and 38 thereof by years.

The total increased costs found by the defendants' experts for this facet of the case were less than those found by the plaintiff's experts by reason of the fact that the defendants' experts had calculated costs on the basis of a smaller increase in traffic. The total added costs under this facet of the case found by the plaintiff's experts was $60.8 million; the corresponding total found by the defendants' experts was $51.9 million. If the estimates of the plaintiff's experts as to increased traffic and revenues for the International Division are accepted, and the cost estimates of the defendants' experts are recomputed on that basis but using their own costing methods, the recomputed cost estimates of the defendants' experts would be at least as low as those of the plaintiff's experts. Since the estimates of the plaintiff's experts are accepted by me as to traffic and revenues, their estimates as to operating cost should be accepted. Accordingly, at this point no detailed discussion of the different costing methodologies used by the experts for the International Division is called for.

Revenues and Operating Costs—Second Part of Claim

The second part of the plaintiff's claim as to the International Division, as stated above, is a claim for $4.8 million damages caused by delays in delivery of the 18 Boeing B-331 jets (insofar as a fraction thereof is assumed to be used in the International Division service) which resulted from orders therefor being delayed by Toolco until after the earliest delivery positions had been preempted by Pan-Am. The assumed earlier delivery dates would have affected operations only in 1959 and 1960 since the last of the B-331s was historically delivered in 1960.

There is agreement between the experts that the annual average added B-331 aircraft for the International Division under assumption of the earlier deliveries of the twelve B-331 jets for 1959 would be .9 aircraft and for 1960 would be .6 aircraft; that the added jet aircraft miles would be 1.6 million miles for 1959 and 1.1 million miles for 1960; that there would be a reduction of 1.6 million piston aircraft plane miles in 1959 leaving the International Division total plane miles unchanged; that there would be no reduction of piston plane miles in 1960 and accordingly the net increased plane miles for the International Division in 1960 would have been the same as the gross increase, i.e., 1.1 million plane miles; that the additional transatlantic seats for 1959 would have been only from the difference in size between the jets and the replaced pistons and would have amounted to 17 thousand additional transatlantic seats; and finally that the additional transatlantic seats for 1960 would be 27 thousand. Translating these figures into increased revenue, on the same basis as was used in the case of the six additional (Pan-Am) planes,

and adding thereto the 5% for additional revenues from cargo, the plaintiff's experts estimate that the total additional International Division operating revenues from assumed earlier delivery of twelve B-331s would have been $4.5 million in 1959 and $6.4 million in 1960. The defendants' experts would reduce these figures, as in the case of the six additional (Pan-Am) planes for the factors of (a) competitive response and (b) failure of "beyond the gateway" and charter traffic to increase proportionately to the increase in transatlantic service. The defendants' experts' figures, with these reductions, show assumed additional operating revenues of only $2.79 million in 1959 and $2.03 million in 1960. For the reasons above stated, the plaintiff's estimates of additional revenues are accepted.

As to operating costs, here again if the plaintiff's estimates on increased traffic and revenues are accepted, and the defendants' cost figures are recomputed under its own methods of costing but on the basis of the plaintiff's increased traffic and revenue figures, the result would be a total of operating costs at least as low as the plaintiff's cost figures. The plaintiff's operating cost estimates are accordingly accepted.

A recapitulation of the damages awarded in respect of the International Division is set forth at the end of Section I of this discussion of plaintiff's damage claims.

(B) *Domestic Division*

The next division of plaintiff's claims for damages with respect to inadequacy of its jet fleet is for loss of operating profits in its Domestic Division. Here because of the greater variety of aircraft types compared to the International Division, the opportunity for changing segment

(stage) lengths of flights, the more complicated fare structure, and the difficulty of computing applicable load factors, the estimation of changes in operating results is more difficult.

As a beginning to a review of this aspect of the case, it will be instructive to examine the following table showing the historical jet competitive picture between the plaintiff and its chief domestic competitors, the quantitative extent to which TWA historically lagged behind its chief domestic competitors in acquiring jets in the years 1959-63, and comparative operating profits:

Domestic Operating Profit (Loss)

vs.

Percent of 1964 Jet Fleet[1]

	American			United[3]			T.W.A.		
	Operating Profit (000)	*No. of Jets*	*% of 1964 Fleet*	*Operating Profit (000)*	*No. of Jets*	*% of 1964 Fleet*	*Operating Profit (Loss) (000)*	*No. of Jets*	*% of 1964 Fleet*
1959	$24,517	24	30.0%	$18,802	15	13.4%	$ 26,308	18	22.7%
1960	24,720	34	42.5	9,429	44	39.3	(883)	21	25.3
1961	19,089	49	61.3	3,100	76	67.9	(10,226)[2]	42	50.6
1962	19,335	63	78.8	14,845	87	77.7	(7,391)	56	67.5
1963	39,004[2]	64	80.0	26,635	91	81.3	17,552	61	73.5
1964	61,245	80	100.0	49,865	112	100.0	50,892	83	100.0

Sources: TWA Exhibit 46A and CAB Air Carrier Financial Statistics.

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[1] Domestic year end inventories as a percent of 1964 year end inventories

[2] Excludes special adjustments. If these are included, the tendencies ar more accentuated. Thus, for American in 1963 inclusion of the adjustment result in operating profit of $43,900,000 and in 1961 for TWA results in operating losses of $24,200,000.

[3] Excludes Capital 1959-1960. If Capital is included, the United operating profit is $19,100,000 in 1959, and $3,100,000 in 1960. United's 1961 and (to some extent) 1962 operating results were affected by its acquisition on June 1, 196 of Capital Airlines which had already incurred operating losses in 1961 o $3,400,000.

The subdivisions of the plaintiff's Domestic Division claims are:

(a) failure to receive certain B-331s which were diverted by action of Toolco to Pan-Am and delay in delivery of other B-331s; and delay in delivery of fifteen B-131s;

(b) delay in delivery of twenty Convair 880s;

(c) failure to receive an additional ten Convair 880s of which six were diverted by action of Toolco to Northeast Airlines.

It will also be useful I believe, from time to time, while reading the ensuing discussion relating to the Domestic Division, to refer to the tables which follow comparing the amounts of the estimates of the plaintiff's experts and the final (or Supplemental) Estimates of the defendants' experts relating to the Domestic Division. The first table is plaintiff's Exhibit 420, Schedule B, showing the comparisons of the two sets of experts for each of the years 1959-63, as well as the comparisons of the totals for five years.

The second table is Schedule B1 of plaintiff's Exhibit 420. It sets forth the plaintiff's (Coverdale) estimates of each of said years by categories. Category II-1 relates to chapter II of the Coverdale Report dealing with the six additional B-331s. Category III-1 relates to chapter III of the Coverdale Report dealing with earlier receipt of B-131 and B-331 aircraft. Category IV relates to chapter IV of the Coverdale Report dealing with the delay in receipt of twenty CV-880 aircraft. Category V relates to chapter V of the Coverdale Report dealing with the failure to receive ten CV-880 aircraft.

The third table is Schedule B2 of plaintiff's Exhibit 420. It sets forth the final (or Supplemental) estimates of the

defendants' expert (Simat) for each of the five years—1959-1963. Simat, in its Supplemental Report referred to hereinafter, did not break down its estimates by categories (although it did so in its Original Report referred to hereinafter). The Final (or Supplemental) Simat Report gives, as will be noted, separate estimates for added jet revenues and costs, and for revenues and costs of deleted pistons, in lieu of breaking down the figures by the above mentioned categories.

(Tables reproduced on following pages.)

T R A N S W O R L D A I R L I N E S, I

COMPARISON OF CHANGE IN DOMESTIC OPERATING PROFITS IN REPORT OF COVERDALE & COLPITTS (REV
AND SUPPLEMENTAL REPORT OF SIMAT, HELLIESEN & EICHNER, INC.

(Amounts in millions)

	1959			1960			1961			1962		
	C&C	SHE	*	C&C	SHE	*	C&C	SHE	*	C&C	SHE	*
Transportation revenues:												
Passenger revenues	$5.90	($1.21)	$7.11	$39.50	($40.42)	$79.92	$38.20	($55.22)	$93.42	$23.50	($ .19)	$23
Other	.40	(.06)	.46	2.00	(2.02)	4.02	1.90	(2.77)	4.67	1.20	(.01)	1
Rounding											.02	(
Total transportation revenues	6.30	(1.27)	7.57	41.50	(42.44)	83.94	40.10	(57.99)	98.09	24.70	(.18)	24
Operating expenses:												
Flying operations		)		4.50	)		4.50	)		4.30	)	
Direct maintenance	.20	.27)	(.27)	3.70	(7.51))	15.21	4.40	(7.77))	15.87	3.10	7.64)	
Applied maintenance burden	(.20)	)		(.50)	)		(.80)	)		1.10	)	
Insurance	.30	1.60)	(.10)	1.20	10.80)	-	1.00	10.90)	-	.60	6.70)	-
Depreciation - jet aircraft	1.20	)		9.60	)		9.90	)		6.10	)	
Rounding												
	1.50	1.87	(.37)	18.50	3.29	15.21	19.00	3.13	15.87	15.20	14.34	
Aircraft servicing	.10	.45	(.35)	1.40	(1.08)	2.48	1.60	(3.44)	5.04	1.40	.39	1
Stewardess and related costs	.20	.05)	.22	2.90	(.29))	5.84	2.80	(.40))	6.88	1.80	.34)	1
Other passenger servicing		(.07))			(2.65))			(3.68))			(.01))	
Traffic servicing	.30	(.19)	.49	2.40	(4.60)	7.00	2.30	(7.05)	9.35	1.60	(.63)	2
Servicing administration		.01	(.01)	.20	(.28)	.48	.20	(.59)	.79	.10	(.01)	
Reservation and sales	.50	(.12)	.62	3.40	(3.91)	7.31	3.10	(5.52)	8.62	2.00	(.02)	2
Advertising and publicity	.10	(.03)	.13	.60	(.72)	1.32	.90	(1.15)	2.05	.70	-	
General and administrative	.10	.01	.09	.90	(1.03)	1.93	1.20	(1.78)	2.98	.70	.36	
Ground equipment maintenance and depreciation		.01	(.01)	.10	(.34)	.44		(.28)	.28		.56	(
Rounding		.04	(.04)		.03	(.03)		(.02)	.02		.01	(
	1.30	.16	1.14	11.90	(14.87)	26.77	12.10	(23.91)	36.01	8.30	.99	7
Expenses covered in both reports	2.80	2.03	.77	30.40	(11.58)	41.98	31.10	(20.78)	51.88	23.50	15.33	8
Depreciation - piston aircraft		(.19)	.19		(5.58)	5.58		(4.36)	4.36		(.51)	
Amortization				.30		.30	.20		.20	.10		
Total operating expenses	2.80	1.84	.96	30.70	(17.16)	47.86	31.30	(25.14)	56.44	23.60	14.82	8
Change in operating profits	$3.50	($3.11)	$6.61	$10.80	($25.28)	$36.08	$ 8.80	($32.85)	$41.65	$ 1.10	($15.00)	$1

*C&C over (under) SHE.

Source:
C&C - Schedule B-1
SHE - Schedule B-2

OVERSIZE PAGE
SEE NEXT FRAME
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SCHEDULE B

DOMESTIC
C&C AND SHE

T R A N S W O R L D A I R L I N E S, I N C.

COMPARISON OF CHANGE IN DOMESTIC OPERATING PROFITS IN REPORT OF COVERDALE & COLPITTS (REVISED) AND SUPPLEMENTAL REPORT OF SIMAT, HELLIESEN & EICHNER, INC.

(Amounts in millions)

5 9		1 9 6 0			1 9 6 1			1 9 6 2			1 9 6 3			T o t a l		
SHE	*	C&C	SHE	*	C&C	SHE	*	C&C	SHE	*	C&C	SHE	*	C&C	SHE	*
.21)	$7.11	$39.50	($40.42)	$79.92	$38.20	($55.22)	$93.42	$23.50	($ .19)	$23.69	$20.10	$ 1.87	$18.23	$127.20	($95.17)	$222.37
.06)	.46	2.00	(2.02)	4.02	1.90	(2.77)	4 67	1.20	(.01)	1.21	1.00	.09	.91	6.50	(4.77)	11.27
									.02	(.02)					.02	(.02)
.27)	7.57	41.50	(42.44)	83.94	40.10	(57.99)	98.09	24.70	(.18)	24.88	21.10	1.96	1$.14	133 70	(99.92)	233.62
)		4.50	)		4.50	)		4.30	)		3.10	)		16.40	)	
.27)	(.27)	3.70	(7.51))	15.21	4.40	(7.77))	15.87	3.10	7.64)	.86	.40	7.01)	(3.71)	11.80	(.36))	27.96
)		(.50)	)		(.80)	)		1.10	)		(.20)	)		(.60)	)	
.60)	(.10)	1.20	10.80)	-	1.00	10.90)	-	.60	6.70)	-	.40	5.00)	.30	3.50	35.00)	.20
)		9.60	)		9.90	)		6.10	)		4.90	)		31.70	)	
.87	(.37)	18.50	3.29	15.21	19.00	3.13	15.87	15.20	14.34	.86	8.60	12.01	(3.41)	62.80	34.64	28.16
.45	(.35)	1.40	(1.08)	2.48	1.60	(3.44)	5.04	1.40	.39	1.01	1.20	.12	1.08	5.70	(3.56)	9.26
.05)			(.29))			(.40))			.34)			.55)			.25)	
(.07))	.22	2.90	(2.65))	5.84	2.80	(3.68))	6.88	1.80	(.01))	1.47	1.60	.08)	.97	9.30	(6.33))	15.38
(.19)	.49	2.40	(4.60)	7.00	2.30	(7.05)	9.35	1.60	(.63)	2.23	1.40	(.32)	1.72	8.00	(12.79)	20.79
.01	(.01)	.20	(.28)	.48	.20	(.59)	.79	.10	(.01)	.11	.10	(.01)	.11	.60	(.88)	1.48
(.12)	.62	3.40	(3.91)	7.31	3.10	(5.52)	8.62	2.00	(.02)	2.02	1.80	.13	1.67	10.80	(9.44)	20.24
.03)	.13	.60	(.72)	1.32	.90	(1.15)	2.05	.70	-	.70	.70	.06	.64	3.00	(1.84)	4.84
.01	.09	.90	(1.03)	1.93	1.20	(1.78)	2.98	.70	.36	.34	.50	.39	.11	3.40	(2.05)	5.45
.01	(.01)	.10	(.34)	.44		(.28)	.28		.56	(.56)		.28	(.28)	.10	.23	(.13)
.04	(.04)		.03	(.03)		(.02)	.02		.01	(.01)		.01	(.01)		.07	(.07)
.16	1.14	11.90	(14.87)	26.77	12.10	(23.91)	36.01	8.30	.99	7.31	7.30	1.29	6.01	40.90	(36.34)	77.24
.03	.77	30.40	(11.58)	41.98	31.10	(20.78)	51.88	23.50	15.33	8.17	15.90	13.30	2.60	103.70	(1.70)	105.40
.19)	.19		(5.58)	5.58		(4.36)	4.36		(.51)	.51		(.26)	.26		(10.90)	10.90
		.30		.30	.20		.20	.10		.10	.10		.10	.70		.70
.04	.96	30.70	(17.16)	47.86	31.30	(25.14)	56.44	23.60	14.82	8 78	16.00	13.04	2.96	104.40	(12.60)	117.00
.31)	$6.61	$10.80	($25.28)	$36.08	$ 8.80	($32.85)	$41 65	$ 1.10	($15.00)	$16.10	$ 5.10	($11.08)	$16.18	$ 29.30	($87.32)	$116.62

T R A N S W O R L D A I R L I N E S, I N C.

CHANGE IN DOMESTIC OPERATING PROFITS IN REPORT OF COVERDALE & COLPITTS (REVISED)

(Amounts in millions)

	1959	1960					1961				1962		
	III-1	II-1	III-1	IV	V	Total	II-1	IV	V	Total	II-1	V	Total
Transportation revenues:													
Passenger revenues	$5.90	$1.90	$1.10	$23.60	$12.90	$39.50	$1.40	$12.20	$24.60	$38.20	$2.00	$21.50	$23.50
Other	.40	.10	.10	1.20	.60	2.00	.10	.60	1.20	1.90	.10	1.10	1.20
Rounding													
Total transportation revenues	6.30	2.00	1.20	24.80	13.50	41.50	1.50	12.80	25.80	40.10	2.10	22.60	24.70
Operating expenses:													
Flying operations		(.80)	(.40)	3.80	1.90	4.50	(1.00)	1.90	3.60	4.50	.60	3.70	4.30
Direct maintenance	.20	(.70)	(.40)	3.20	1.60	3.70	(.60)	1.70	3.30	4.40	.10	3.00	3.10
Applied maintenance burden	(.20)	(.60)	(.40)	.30	.20	(.50)	(.80)	(.10)	.10	(.80)	.20	.90	1.10
Insurance	.30	.20	.10	.60	.30	1.20	.20	.30	.50	1.00	.10	.50	.60
Depreciation - jet aircraft	1.20	.90	.60	5.40	2.70	9.60	1.60	2.60	5.70	9.90	.70	5.40	6.10
Rounding													
	1.50	(1.00)	(.50)	13.30	6.70	18.50	(.60)	6.40	13.20	19.00	1.70	13.50	15.20
Aircraft servicing	.10	(.20)	(.10)	1.10	.60	1.40	(.20)	.60	1.20	1.60	.10	1.30	1.40
Stewardess and related costs)	.20		.10	1.80	1.00	2.90		.90	1.90	2.80	.20	1.60	1.80
Other passenger servicing)													
Traffic servicing	.30	.10	.10	1.40	.80	2.40	.10	.70	1.50	2.30	.10	1.50	1.60
Servicing administration				.10	.10	.20		.10	.10	.20		.10	.10
Reservation and sales	.50	.20	.10	2.00	1.10	3.40	.10	1.00	2.00	3.10	.20	1.80	2.00
Advertising and publicity	.10			.40	.20	.60		.30	.60	.90	.10	.60	.70
General and administrative	.10			.60	.30	.90		.40	.80	1.20	.10	.60	.70
Ground equipment maintenance and depreciation			.10			.10							
Rounding													
	1.30	.10	.30	7.40	4.10	11.90	-	4.00	8.10	12.10	.80	7.50	8.30
Expenses covered in both reports	2.80	(.90)	(.20)	20.70	10.80	30.40	(.60)	10.40	21.30	31.10	2.50	21.00	23.50
Depreciation - piston aircraft													
Amortization		.20	.10			.30	.20			.20	.10		.10
Total operating expenses	2.80	(.70)	(.10)	20.70	10.80	30.70	(.40)	10.40	21.30	31.30	2.60	21.00	23.60
Change in operating profits	$3.50	$2.70	$1.30	$ 4.10	$ 2.70	$10.80	$1.90	$ 2.40	$ 4.50	$ 8.80	($ .50)	$ 1.60	$ 1.10

Source. Comparison of change in operating profits in reports of Coverdale & Colpitts and Simat, Helliesen & Eichner, Inc. (Revised), TWA Exhibit 345A, pages as indicated above.

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SCHEDULE W-1

DOMESTIC
C&C

T R A N S W O R L D A I R L I N E S, I N C.

CHANGE IN DOMESTIC OPERATING PROFITS IN REPORT OF COVERDALE & COLPITTS (REVISED)

(Amounts in millions)

1959	1960					1961				1962			1963		
III-1	II-1	III-1	IV	V	Total	II-1	IV	V	Total	II-1	V	Total	II-1	V	Total
$5.90	$1.90	$1.10	$23.60	$12.90	$39.50	$1.40	$12.20	$24.60	$38.20	$2.00	$21.50	$23.50	$1.90	$18.20	$20.10
.40	.10	.10	1.20	.60	2.00	.10	.60	1.20	1.90	.10	1.10	1.20	.10	.90	1.00
6.30	2.00	1.20	24.80	13.50	41.50	1.50	12.80	25.80	40.10	2.10	22.60	24.70	2.00	19.10	21.10
nues															
	(.80)	(.40)	3.80	1.90	4.50	(1.00)	1.90	3.60	4.50	.60	3.70	4.30	.40	2.70	3.10
.20	(.70)	(.40)	3.20	1.60	3.70	(.60)	1.70	3.30	4.40	.10	3.00	3.10	.10	.30	.40
(.20)	(.60)	(.40)	.30	.20	(.50)	(.80)	(.10)	.10	(.80)	.20	.90	1.10	.10	(.30)	(.20)
.30	.20	.10	.60	.30	1.20	.20	.30	.50	1.00	.10	.50	.60		.40	.40
1.20	.90	.60	5.40	2.70	9.60	1.60	2.60	5.70	9.90	.70	5.40	6.10	.50	4.40	4.90
1.50	(1.00)	(.50)	13.30	6.70	18.50	(.60)	6.40	13.20	19.00	1.70	13.50	15.20	1.10	7.50	8.60
.10	(.20)	(.10)	1.10	.60	1.40	(.20)	.60	1.20	1.60	.10	1.30	1.40	.10	1.10	1.20
.20		.10	1.80	1.00	2.90		.90	1.90	2.80	.20	1.60	1.80	.20	1.40	1.60
.30	.10	.10	1.40	.80	2.40	.10	.70	1.50	2.30	.10	1.50	1.60	.10	1.30	1.40
			.10	.10	.20		.10	.10	.20		.10	.10		.10	.10
.50	.20	.10	2.00	1.10	3.40	.10	1.00	2.00	3.10	.20	1.80	2.00	.20	1.60	1.80
.10			.40	.20	.60		.30	.60	.90	.10	.60	.70	.10	.60	.70
.10			.60	.30	.90		.40	.80	1.20	.10	.60	.70		.50	.50
		.10			.10										
1.30	.10	.30	7.40	4.10	11.90	-	4.00	8.10	12.10	.80	7.50	8.30	.70	6.60	7.30
2.80	(.90)	(.20)	20.70	10.80	30.40	(.60)	10.40	21.30	31.10	2.50	21.00	23.50	1.80	14.10	15.90
reports															
	.20	.10			.30	.20			.20	.10		.10	.10		.10
2.80	(.70)	(.10)	20.70	10.80	30.70	(.40)	10.40	21.30	31.30	2.60	21.00	23.60	1.90	14.10	16.00
ts															
$3.50	$2.70	$1.30	$ 4.10	$ 2.70	$10.80	$1.90	$ 2.40	$ 4.50	$ 8.80	($ .50)	$ 1.60	$ 1.10	$ .10	$ 5.00	$ 5.10

erating profits in reports of
Simat, Helliesen & Eichner, Inc. (Revised),
as indicated above.

SCHEDULE

DOMESTIC
SHE

T R A N S W O R L D A I R L I N E S, I N C.

CHANGE IN DOMESTIC OPERATING PROFITS IN SUPPLEMENTAL REPORT OF SIMAT, HELLIESEN & EICHNER, INC.

(Amounts in millions)

	1959			1960			1961			1962			1963		
	AJ	Less DP	Total	AJ	Less DP	Total	AJ	Less DP	Total	AJ	Less DP	Total	AJ	Less DP	T
Transportation revenues:															
Passenger revenues	$2.44	$3.65	($1.21)	$21.44	$61.86	($40.42)	$23.29	$78.51	($55.22)	$16.80	$16.99	($ .19)	$12.02	$10.15	$
Other	.12	.18	(.06)	1.07	3.09	(2.02)	1.16	3.93	(2.77)	.84	.85	(.01)	.60	.51	
Rounding										.01	(.01)	.02			
Total transportation revenues	2.56	3.83	(1.27)	22.51	64.95	(42.44)	24.45	82.44	(57.99)	17.65	17.83	(.18)	12.62	10.66	
Operating expenses:															
Flying operations	2.15	1.88	.27	31.14	38.65	(7.51)	32.15	39.92	(7.77)	21.94	14.30	7.64	13.28	6.27	
Direct maintenance															
Applied maintenance burden															
Insurance	1.60		1.60	10.80		10.80	10.90		10.90	6.70		6.70	5.00		
Depreciation - jet aircraft															
Rounding															
	3.75	1.88	1.87	41.94	38.65	3.29	43.05	39.92	3.13	28.64	14.30	14.34	18.28	6.27	
Aircraft servicing	.24	(.21)	.45	4.90	5.98	(1.08)	5.97	9.41	(3.44)	4.63	4.24	.39	2.41	2.29	
Stewardess and related costs	.15	.10	.05	1.62	1.91	(.29)	1.67	2.07	(.40)	1.19	.85	.34	.91	.36	
Other passenger servicing	.13	.20	(.07)	1.40	4.05	(2.65)	1.56	5.24	(3.68)	.98	.99	(.01)	.52	.44	
Traffic servicing	.08	.27	(.19)	1.25	5.85	(4.60)	1.38	8.43	(7.05)	1.31	1.94	(.63)	.83	1.15	
Servicing administration	.01		.01	.30	.58	(.28)	.42	1.01	(.59)	.31	.32	(.01)	.19	.20	
Reservation and sales	.22	.34	(.12)	2.07	5.98	(3.91)	2.33	7.85	(5.52)	1.64	1.66	(.02)	.85	.72	
Advertising and publicity	.04	.07	(.03)	.38	1.10	(.72)	.48	1.63	(1.15)	.43	.43		.36	.30	
General and administrative	.12	.11	.01	2.11	3.14	(1.03)	2.77	4.55	(1.78)	1.53	1.17	.36	.98	.59	
Ground equipment maintenance and depreciation	.08	.07	.01	1.30	1.64	(.34)	1.84	2.12	(.28)	1.44	.88	.56	.70	.42	
Rounding	.02	(.02)	.04	.02	(.01)	.03	(.01)	.01	(.02)	.01		.01	.01		
	1.09	.93	.16	15.35	30.22	(14.87)	18.41	42.32	(23.91)	13.47	12.48	.99	7.76	6.47	
Expenses covered in both reports	4.84	2.81	2.03	57.29	68.87	(11.58)	61.46	82.24	(20.78)	42.11	26.78	15.33	26.04	12.74	
Depreciation and insurance - piston aircraft (1)		.19	(.19)		5.58	(5.58)		4.36	(4.36)		.51	(.51)		.26	
Amortization															
Total operating expenses	4.84	3.00	1.84	57.29	74.45	(17.16)	61.46	86.60	(25.14)	42.11	27.29	14.82	26.04	13.00	
Change in operating profits	($2.28)	($ .83)	($3.11)	($34.78)	$ 9.50	($25.28)	($37.01)	$ 4.16	($32.85)	($24.46)	$ 9.46	($15.00)	($13.42)	$ 2.34	$

AJ = Added jet
DP = Deleted piston
(1) These amounts are shown together in the supplemental report.
Source Supplemental report of Simat, Helliesen & Eichner, Inc., Volume B, Part III, pages III - 25, 26 and 27.

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SCHEDULE B-2

DOMESTIC
SHE

T R A N S W O R L D A I R L I N E S, I N C.

CHANGE IN DOMESTIC OPERATING PROFITS IN SUPPLEMENTAL REPORT OF SIMAT, HELLIESEN & EICHNER, INC.

(Amounts in millions)

	1959			1960			1961			1962			1963		
	AJ	Less DP	Total	AJ	Less DP	Total	AJ	Less DP	Total	AJ	Less DP	Total	AJ	Less DP	Total
evenues:	$2.44	$3.65	($1.21)	$21.44	$61.86	($40.42)	$23.29	$78.51	($55.22)	$16.80	$16.99	($ .19)	$12.02	$10.15	$ 1 87
nues	.12	.18	(.06)	1.07	3.09	(2.02)	1.16	3.93	(2.77)	.84	.85	(.01)	.60	.51	.09
										.01	(.01)	.02			
ransportation revenues	2.56	3.83	(1.27)	22.51	64.95	(42.44)	24.45	82.44	(57.99)	17.65	17.83	(.18)	12.62	10.66	1.96
es:															
ons)	2.15	1.88	.27	31.14	38.65	(7.51)	32.15	39.92	(7.77)	21.94	14.30	7.64	13.28	6.27	7.01
ance)															
nance burden)	1.60		1.60	10.80		10.80	10.90		10.90	6.70		6.70	5.00		5.00
)															
jet aircraft)															
	3.75	1.88	1.87	41.94	38.65	3.29	43.05	39.92	3.13	28.64	14.30	14.34	18.28	6.27	12.01
	.24	(.21)	.45	4.90	5.98	(1.08)	5.97	9.41	(3.44)	4.63	4.24	.39	2.41	2.29	.12
ting	.15	.10	.05	1.62	1.91	(.29)	1.67	2.07	(.40)	1.19	.85	.34	.91	.36	.55
related costs	.13	.20	(.07)	1.40	4.05	(2.65)	1.56	5.24	(3.68)	.98	.99	(.01)	.52	.44	.08
servicing	.08	.27	(.19)	1.25	5.85	(4.60)	1.38	8.43	(7.05)	1.31	1.94	(.63)	.83	1.15	(32)
ing	.01		.01	.30	.58	(.28)	.42	1.01	(.59)	.31	.32	(.01)	.19	.20	(.01)
nistration	.22	.34	(.12)	2.07	5.98	(3.91)	2.33	7.85	(5.52)	1.64	1.66	(.02)	.85	.72	.13
d sales	.04	.07	(.03)	.38	1.10	(.72)	.48	1.63	(1.15)	.43	.43		.36	.30	06
d publicity	.12	.11	.01	2.11	3.14	(1.03)	2.77	4.55	(1.78)	1.53	1.17	.36	.98	.59	.39
inistrative															
nt maintenance and	.08	.07	.01	1.30	1.64	(.34)	1.84	2.12	(.28)	1.44	.88	.56	.70	.42	.28
	.02	(.02)	.04	.02	(.01)	.03	(.01)	.01	(.02)	.01		.01	.01		01
	1.09	.93	.16	15.35	30.22	(14.87)	18.41	42.32	(23.91)	13.47	12.48	.99	7.76	6.47	1.29
s covered in both reports	4.84	2.81	2.03	57.29	68.87	(11.58)	61.46	82.24	(20.78)	42.11	26.78	15.33	26.04	12.74	13 30
d insurance -		.19	(.19)		5.58	(5.58)		4.36	(4.36)		.51	(.51)		.26	(.26)
ft (1)															
perating expenses	4.84	3.00	1.84	57.29	74.45	(17.16)	61.46	86.60	(25.1)	42.11	27.29	14.82	26.04	13.00	13.04
in operating profits	($2.28)	($ .83)	($3.11)	($34.78)	$ 9.50	($25.28)	($37.01)	$ 4.16	($32.85)	($24.46)	$ 9.46	($15.00)	($13.42)	$ 2.34	($11.08)

on
are shown together in the supplemental report.
ntal report of Simat, Helliesen & Eichner, Inc., Volume B, Part III, pages III - 25, 26 and 27.

B331's and B131's—Plaintiffs' Position

(a) We will first discuss the plaintiff's revenue estimates (Coverdale) for the B-331s allocated to the Domestic Division. The facts with respect to failure to deliver and delay in delivery of the Boeing B-331s have been set forth above. We have also previously listed (p. 52) the reconstructed earlier receipt dates for the B-331s as computed by Rummel and have set forth the underlying assumptions by which they were fixed.

The Coverdale report computed the change in operating profits for the Domestic Division by a different methodology than used by it for the International Division claims in certain particulars. These are set forth in the discussion, which follows, to the extent the methodology is different. The annual average number of B-331s which would have been available for commercial service (after the above-described adjustment for the B-331Bs and for a non-controverted short-term lease of aircraft time to Northeast) was computed for the Domestic Division under the same method heretofore set forth. They were as follows (TWA Ex. 4(c)(1), pp. 13, 27, 42):

	Planes Allocated from the 6 Diverted B-331s	Planes Allocated from Late Delivery of the 12 B-331s
1959	none	0.6
1960	1.4	0.7
1961	2.2	
1962	1.0	
1963	0.5	

These assumed additional jet aircraft would have produced (under the method heretofore described) additional

passenger revenue plane miles as follows (*id.*, pp. 28, 43, 44):

For the Diverted Planes	For the Late Deliveries
1960 — 2.0 million miles	1959 — 0.8 million miles
1961 — 3.3 " "	1960 — 1.0 " "
1962 — 1.4 " "	
1963 — 0.7 " "	

Using actual seats per aircraft and actual TWA average load factors for B-331s in Domestic Division service for each year (except the B-131 load factor was used for B-331 computation for 1959 when no B-331s were in domestic service) the resulting passenger miles for the additional jet aircraft would have been as follows (*id.*, pp. 28, 43, 44):

For the Diverted Planes	For the Late Deliveries
1960 — 156 million miles	1959 — 74 million miles
1961 — 206 " "	1960 — 78 " "
1962 — 76 " "	
1963 — 42 " "	

The reduction of piston passenger revenue plane miles, based upon the actual annual TWA experienced ratios in domestic service of all piston plane mile decrease to all jet plane mile increase, was as follows (*id.*, pp. 29, 43, 44):

For the Diverted Planes	For the Late Deliveries
1960 — 2.9 million miles	1959 — 0.8 million miles
1961 — 4.2 " "	1960 — 1.4 " "
1962 — 0.9 " "	
1963 — 0.2 " "	

The reduced piston passenger miles were then computed by using the average number of seats based on the average for all TWA piston aircraft for the year and actual annual average load factors of TWA's piston aircraft used

in the Domestic Division during the years in question. The resulting figures were (*id.*, pp. 30, 44, 45 and by calculation):

For the Diverted Planes	For the Late Deliveries
1960 — 123 million miles	1959 — 38.4 million miles
1961 — 182 " "	1960 — 59 " "
1962 — 44 " "	
1963 — 9 " "	

The net increase in passenger miles was then computed. Using TWA's annual average yield (Domestic Division actual passenger revenue, combined jet and piston, per passenger mile) the increase in Domestic Division revenues for the B-331 aircraft operations was estimated at (*id.*, pp. 30, 44, 45 and by calculation):

For the Diverted Planes	For the Late Deliveries
1960 — $1.9 million	1959 — $1.9 million
1961 — $1.4 "	1960 — $1.1 "
1962 — $2.0 "	
1963 — $1.9 "	

The additional revenue for non-passenger traffic (mail, express, freight, excess baggage) was calculated at 5% of the estimated additional passenger revenue. The resulting total additional revenue estimate was:

For the Diverted Planes	For the Late Deliveries of B-331s
1960 — $2.0 million	1959 — $2.0 million
1961 — $1.5 "	1960 — $1.2 "
1962 — $2.1 "	
1963 — $2.0 "	

The total of additional revenues thus claimed in respect of the B-331s under subdivision (a) is $10.8 million.

Next we summarize the plaintiff's revenue estimates in respect of the late deliveries of B-131s.

Rummel prepared a table showing the effect on delivery positions by reason of the delays in delivery of the B-131s. His underlying assumptions in computing the reconstructed earlier receipt dates therefor were the same as those discussed above (pp. 48-56) in respect of the B-331 earlier delivery dates, and are accepted for the reasons stated above.

The list below shows the actual receipt dates for the B-131s and opposite each such date is the corresponding reconstructed earlier receipt date. (TWA Ex. 4(c)(1), p. 40.) Each plane, as in the case of the B-331s, was fully identified, and actual receipt date verified for the record, from official CAB records.

Actual Receipt	Reconstructed Earlier Receipt
1/29/59	11/30/58
3/17/59	12/31/58
3/30/59	1/31/59
4/ 3/59	2/27/59
4/18/59	3/30/59
4/29/59	4/ 3/59
5/10/59	4/18/59
5/13/59	5/10/59
5/24/59	5/13/59
5/28/59	5/24/59
6/13/59	5/28/59
7/ 1/59	6/13/59
7/10/59	6/29/59
7/14/59	7/10/59
8/ 1/59	7/27/59

On the basis of TWA's experience as to time between receipt dates and commencing service, Coverdale computed that revenue service for the B-131s would have commenced

January 6, 1959. Only the year 1959 is involved in the B-131 computations.

Coverdale, using the same methodology as described above for B-331s assigned to domestic service, computed the additional annual average number of B-131s available for 1959 in the Domestic Division at 1.4 aircraft. The additional jet plane miles were 1.9 million miles. The additional passenger miles were 176 million miles. The corresponding reduction of piston plane miles was 1.9 million miles. The deleted piston passenger miles (using the number of seats in the L-1649A times the actual load factor) were 89.6 million miles. The increased passenger revenue estimate resulting from these computations is $4.1 million. To this figure 5% is added for non-passenger revenues. The plaintiff therefore estimates additional revenue from the assumed earlier delivery of the B-131s for the Domestic Division of $4.3 million.

The total estimated increased revenues under subdivision (a) of the Domestic Division claim is thus $15.1 million. We note in passing that Coverdale estimated combined increased expenses for subdivision (a) at $6.1 million leaving estimated additional net operating revenue of $9.0 million as the amount of plaintiff's damage claim for subdivision (a) of the Domestic Division claims. Discussion of costs will, however, be deferred until later.

B331's and B131's—Defendants' Position

We will next review the revenue computations of the Simat Report for subdivision (a). The Simat estimates use a different method of computation of the average stage length over which the added flights would be operated, a different method of computing load factors and a different method of computing passenger yields. Coverdale

assumed that the added jet services would be operated at the same average stage lengths as existing domestic jet services for planes of the same or similar types in the year that the added services would be operated; that added jet aircraft and displaced piston aircraft would be operated at the same average load factor (per cent of available seats which are occupied) as all flights operated in that year by TWA with aircraft of the same or similar types; and that added jet services and displaced piston services would yield revenues per passenger mile equal to the average yield experienced by TWA per passenger for the year in which added for the same or similar type plane.

The basic differences between the two reports, according to the Simat, arise from certain erroneous assumptions from the Coverdale report. Simat testified that jet aircraft, as they were received by the various carriers including TWA, were assigned to the most lucrative long-haul routes, where their attractiveness to passengers and operating economies could be most fully exploited. As additional jets would be received, they would be added to the best of the remaining routes, which were less advantageous than the original assignments, and according to Simat, the history of jet deliveries showed a pattern of assignment to routes of decreasing advantage. Simat asserted that the Coverdale study failed to take this pattern into consideration, and that as a result, the Coverdale report contained certain "fundamental errors" as follows (italics mine):

(1) The assumption that added jet aircraft and displaced piston aircraft would be operated at the same average *load factors* as the average of all aircraft of the same or similar types for the year is unrealistic. Added jet operations, Simat estimated, in fact would produce addi-

tional traffic at levels well below the average for existing jets, and displaced piston aircraft would be drawn from the most effective of the piston aircraft services, rather than services of average effectiveness.

(2) The assumption that added jet aircraft of a particular type would be used in *stage lengths* exactly as the average of all aircraft of the same or similar types for the year is not realistic because the added aircraft are not used as productively or as economically as available aircraft of the same or similar types. Additional aircraft would be operated at stage lengths shorter than average. By the same token displaced piston services were not average piston aircraft services but were long-haul services affording better-than-average use of piston aircraft with respect to productivity and operating economies.

(3) The assumption that passenger traffic added by added jet services or deleted by displaced piston services would have *revenue yields per passenger mile* equal to the average experienced yield per passenger mile for the year in which added, is unrealistic. Simat estimated that the yields from this added jet passenger traffic would be below average revenue yields per passenger mile and yields of traffic from displaced piston services would not necessarily be at the average revenue yield for the Domestic Division.

We will defer until later discussion of a Supplemental Simat Report, and now discuss the three factors which, in the original Simat Report, differentiate it from the Coverdale Report as to the Domestic Division.

The original Simat Report states his opinion that the assumed additional jet operations would not have produced additional net revenues for the plaintiff in the 1959-63 period. In support of this conclusion, Simat makes the following points:

1. The economic climate for increased airline capacity was not favorable during the years in question. In June 1960 the economy started a downward drift which continued through February, 1961. This was followed by a gradual recovery through the third quarter of 1962 and finally through the balance of 1962 and in 1963 by a period of accelerated growth.

2. While volume of domestic air travel has shown a long term trend of generally more rapid rate of growth than the economy as a whole, it mirrors the forces of decline and growth in the economy.

3. Actual load factors for the industry declined precipitously in 1959 through 1962, leveling out only in 1963. TWA's load factor in all its scheduled services declined from 71% in 1959 to 53% in 1963.

4. The U. S. air trunkline industry suffered a decline in earnings shown by the CAB Handbook of Airline Statistics, 1965 edition, as follows:

	Operating Profit	Adjusted Net Income
1959	$124 million	$71 million
1960	$ 80 "	$16 "
1961	$ 13 "	($36) "
1962	$158 "	$40 "
1963	$259 "	$77 "

5. From the same source, it was shown that from the beginning of 1959 to the end of 1961 approximately one billion dollars were added to the investment of U.S. domestic and international trunk line carriers in additional flight equipment, ground property and equipment and net working capital. For each dollar added there was a loss of 9 cents in operating profit.

6. The rate of return before investment tax credit—a measure employed by the CAB to gauge the appropriateness of airline earnings for regulatory purposes—reached a low of 4% for U.S. certificated route air carriers from 1959 through 1963. This was the lowest average rate of return for the industry for any five consecutive post-war years. It compares with an average rate of return of 7% for the preceding 1955-58 period and a rate of return of 11% for the 1964-68 period.

Simat next presented a mathematical study based upon computer calculations to support his conclusions. He expressed his opinion that *marginal load factor*, i.e., the ratio of the net passengers added by an additional flight to the seat capacity added by the flight, rather than annual average load factor for the type of plane for the year involved, should be the factor used in considering whether the addition of an assumed flight would be profitable in calculating damage estimates. He states that the marginal load factor for added flights is generally less than the actual load factor of existing flights because added flights compete to some extent with existing flights of the same carrier and divert traffic from other existing flights.

Simat then made an adjustment in his marginal load factor percentages, before applying it to his damage estimates, to compensate for traffic produced solely by "forces in the economy." The adjustment was intended to result in isolating the additional traffic that he estimated would have been due solely to the introduction of additional jets. This adjustment was in proportion to the increase in Disposable Personal Income, which is an index used by the Office of Business Economics of the U.S. Department of Commerce and which, in Simat's opinion, would have reflected the ability of people to engage in air travel for personal reasons.

The adjusted marginal load factors, by years, were applied by Simat to the agreed upon added plane miles for estimating added and deleted passenger miles. The average marginal load factors for the combined experience of all types of jets were used by Simat to obtain the marginal load factor for jet operations since, he stated, his studies showed a high degree of interrelation among the various categories of jets. The same method was used for non-jets to obtain the average marginal load factor for non-jets.

Simat found, as a result, that the Coverdale estimates of increase in passenger traffic from the addition of domestic jet services were "overstated" by 1.65 billion passenger miles, equal to 41.9% of the total estimate of added jet traffic. He also found that Coverdale "understated" the estimates of deleted piston aircraft traffic by 1.1115 billion passenger miles, equal to 63.3% of the total estimate. We reserve until later our opinion of the validity of the use of average load factor (Coverdale) or adjusted marginal load factor (Simat) in computation of damages.

The procedure followed by Simat to obtain domestic passenger revenue yields was to apply to his estimates of added jet and deleted piston passenger miles in each year, not the historical average yield for all passengers (as did Coverdale) but the particular yield which was found by him to be applicable in that year to trips of the average length that would have been taken by passengers who would have been added and deleted. This required three steps: (1) estimation of average stage lengths for the assumed added and deleted traffic; (2) estimation of average passenger trip lengths for the assumed added and deleted traffic; and (3) estimation of the average yield which would have been realized by TWA for different passenger trip lengths.

Simat reviewed TWA's domestic jet schedules and derived mathematical relationships between existing stage lengths of jet flights and the stage lengths of jet flights actually added in the years in question. Based upon these relationships, he estimated the stage lengths of the flights that would have been added with the assumed additional jet aircraft.

His relationships for estimating the stage lengths of added scheduled jet services for each type of jet aircraft are expressed in the formula (DX 271A, p. IV-3):

$$\textit{Average Stage Length of Added Jet Services (Miles)} = C1 \times \textit{Average Stage Length of Existing Jet Services (Miles)} + C2$$

Where C1 is an amount less than 1.0 applied to determine that part of the stage length of added jet services that varies in proportion to the actual length of existing jet services and

C2 is an additional number of miles that does not vary with the stage length of existing jet services.

For the B-331 aircraft, the specific relationship was:

$$\textit{Average Stage of Added Flights (Miles)} = 0.271 \times \textit{Average Stage of Existing Flights (Miles)} + 631.544$$

Adjustment was made for non-scheduled flights by assuming they would have had the same lengths as scheduled flights and would be flown in the same relative proportions as the miles actually flown in all service in the same years.

The above formula for the B-331s was determined by a method commonly recognized by statistical experts for determining relationships between two variables, and known as regression analysis or as the method of least squares (Tr. 7805-6). As an example, by plotting on graph paper aircraft hours operated (independent variable) and

amount of operating expenses (dependent variable) for several airlines, one can connect the dots on the graph with a straight line which represents an average relationship between the points. There are various standards for placing the straight lines, but the method of least squares fits the line to the various observations (dots) so as to reduce the squares of the deviations (differences) to a minimum. It produces a line showing the average of the various lines that might be fitted to the observations. If one squares the deviations and divides by the number of observations, one gets the standard error of estimate; and, given a normal distribution of errors, 68% of the observations should fall within one standard of error and 95% of the observations should fall within two standard errors. Relationships based on fewer observations tend to be more untrustworthy, and results showing a large proportion of observations outside the standard error of estimate likewise tend to be untrustworthy unless validated by independent means.

No claim was made by Simat that regression analysis was anything more than a statistical method useful in testing the validity of assumptions made by non-mathematical observations and raw data and conclusions based thereupon. Nevertheless Simat was of the opinion that the statistics produced by regression analysis under the assumptions made in his report confirmed his expert opinion as to the financial results that would have been obtained under the relevant equipment assumptions.

The average stage length estimated by Simat for the added B-331 domestic flights are set forth below, and are compared with the stage lengths used by Coverdale, which were based on the average stage lengths which TWA actually experienced with B-331 jets for that year (DX 271B, Ex. A-D):

	Coverdale	Simat
1959	1869 miles	1047 miles
1960	1869 "	1047 "
1961	1389 "	1009 "
1962	920 "	881 "
1963	799 "	848 "

The number of flights that would be performed with the added aircraft miles was obtained by dividing the added plane miles by Simat's estimated average stage length of the added services:

	Net Added B-331 Flights
1960	1600
1961	3122
1962	1613
1963	855

In obtaining his trip length data for added and deleted traffic, Simat noted that TWA's average passenger trip length historically trended steadily upward during 1959-1963—from 892.6 miles per passenger to 942.3 miles per passenger. TWA would have added 499,000 passengers and 725 million passenger miles during this period, giving an average trip length per added passenger of 1,453 miles. This is 1.6 times the 914 mile average stage length of TWA's domestic traffic in this period. Simat then derived a relationship between the stage lengths of added and deleted flights and the trip lengths of passengers added and deleted as a consequence of the flight changes. Separate ratios were established for jet and piston services, using various assumptions that Simat considered reasonable on the basis of his experience. Using these ratios, he estimates the average trip length of added jet passengers by increasing the estimated stage lengths of the added flight

by 144% and of deleted piston passengers by applying 168% to the stage lengths of the deleted piston flights.

He stated that the reason why revenue passenger yield realized by domestic air carriers varies with distance traveled is because the fares contain a fixed component in the form of a charge per ticket, which is intended to cover such costs as ticketing and handling of the passenger and baggage at airports (not dependent on length of trip) and a variable component in the form of a charge per mile. As the length of trip increases, there results a "fare taper." Adding to the effect of taper are such factors as that passengers on longer than average trips get a disproportionate part of fare discounts. By use of regression analysis Simat obtained a relationship between yields and trip distances on an industry basis for the years 1959-63. These figures were adjusted to TWA yields by comparing the actual passenger yield for TWA at an average trip length in each year with the yield estimated for the same trip length using the industry relationship.

The estimated revenue yields were applied to the estimated adjusted marginal load factors, computed as above described, and transportation revenues were obtained.

We now show the results of the methodology in the original Simat Report under subdivision (a):

The seat miles for the added B-331 planes are the same as under Coverdale assumptions. The adjusted marginal load factors and added passenger miles are (DX 271B, p. IV-25):

	Added Seat Miles (Millions)	Marginal Load Factor	Added Revenue Passenger Miles
1960	241.6	32.4%	78.3 million
1961	418.1	22.7	94.9 "
1962	180.9	49.2	89.0 "
1963	97.7	49.5	48.4 "

The average stage lengths, passenger trip length, and added passengers are (*id.*, p. IV-27):

	Average Added Stage Length (Miles)	Average Added Trip Length (Miles)	Added Passengers
1960	1,138	1,633	47,449
1961	1,009	1,447.9	65,543
1962	881	1,264.2	70,400
1963	848	1,216.9	39,773

Applying the yields for passenger revenues, computed as set forth above, the following estimated added revenues are obtained (*id.*, p. IV-29):

	Passenger Revenue Yield Per Mile	Total Added Revenues
1960	5.342¢	$4.39 million
1961	5.685¢	$5.67 million
1962	5.979¢	$5.59 million
1963	5.768¢	$2.93 million

As to displaced piston aircraft service, Simat noted that Coverdale had based its estimate on the experienced ratio of total such miles deleted to total jet miles added in each year, and had assumed that all the additional plane miles deleted in domestic service were flown with L-1649As or L-1049Gs. Simat disagreed with this latter assumption, and stated that by eliminating the piston aircraft with the largest number of seats, Coverdale had overstated the number of piston seat miles to be eliminated. Simat accordingly computed the additional piston miles deleted according to the type of piston plane proportional to the plane miles of each type actually deleted in the year in question. The results, applying marginal load factors, gave the estimated deleted passenger miles as follows (*id.*, p. IV-31):

		Deleted Available Seat Miles (Millions)	Marginal Load Factor	Deleted Passenger Miles (Millions)
M-404—	1960	22.	63.2	13.90
	1961	38.	57.3	21.77
L-049/749				
	1960	52.88	63.8	33.74
	1961	63.39	58.	36.75
	1962	50.78	72.6	36.87
	1963	5.51	69.4	3.82
L-1049	1960	33.51	64.4	21.58
L-1049G	1960	61.16	63.1	38.59
	1961	43.66	57.1	53.15
	1962	1.60	72.7	1.16
	1963	2.39	69.4	1.66
L-1049H	1960	.97	66.	.64
L-1649A	1960	10.09	63.5	6.41
	1961	80.24	63.4	50.87
	1963	9.10	84.8	7.72

The average stage lengths and average trip length of deleted passenger traffic having next been obtained, the numbers of deleted passengers were computed. The revenue yields were computed for each type of deleted piston and the resulting deleted revenues, were as follows (*id.*, p. IV-35):

		Deleted Revenues (Millions)
M-404	1960	$1.02
	1961	$1.67
L-049/749	1960	$2.08
	1961	$2.42
	1962	$2.64
	1963	$ .26
L-1049	1960	$1.30
L-1049G	1960	$2.23
	1961	$3.39

		Deleted Revenue (Millions)
L-1049G (cont.)		
	1962	$ .07
	1963	$ .11
L-1049H	1960	$ .03
L-1649A	1960	$ .37
	1961	$3.21
	1963	$ .47

The methods used in the original Simat Report for estimating changes in operations from the earlier delivery of certain B-131 and B-331 aircraft follow the procedures described above in respect of the changes from failure to receive certain B-331s, and the detailed figures appear in DX271A, Chapter V.

The original Simat estimate for subdivision (a) is that the total revenues would have been strikingly less than the Coverdale estimate if the Boeing jets had been introduced and operated under the posited equipment assumptions.

Discussion of costs relating to this subdivision (a) and my decision as between the methodologies of the plaintiff and defendants are deferred until later.

Twenty Convair 880's—Plaintiff's Position

Subdivision (b) of the plaintiff's claim for loss of profits in the Domestic Division is based upon the delayed delivery of twenty of the thirty CV-880 aircraft originally ordered by Toolco from Convair. On this subject paragraph 19 of the complaint states:

> "During the period 1956 to 1960, the defendants required Convair to make certain changes in the design of Model 880 aircraft on order by Toolco, but the defendants prevented TWA from arranging with Convair for certain design modifications which were de-

sired by TWA and which would not have interfered with the scheduled dates of delivery. During the year 1960 the defendants also prevented and restricted TWA from making acceptance and test flights from time to time of various specific Convair model 880 aircraft then on order with Convair by Toolco."

Paragraph 18 of the complaint provides, in part, with respect to the Convair 880's:

"Despite repeated requests by TWA Toolco refused throughout the period 1956 to 1960 to assign to TWA the rights to acquire such aircraft."

The background facts are that Toolco, in April 1956, contracted with Convair for thirty medium range CV-880 jets, a newly developed model. At or about the same time Delta contracted with Convair for ten of the CV-880 jets. These contracts provided for a subsequent allocation of delivery dates for the 40 planes between Toolco and Delta, which was to be worked out between the parties at a later date. The selection of CV-880 jets by Toolco for medium range operations was on Rummel's recommendation. He favored concentrating on pure jets in preference to buying turbo-prop aircraft for medium range operations. The number ordered by Toolco—i.e.—thirty aircraft, was also based upon Rummel's recommendation.

The plaintiff does not contend that a medium range jet could or should have been ordered at an earlier date. After a succession of modifications in the original Toolco and Delta contracts, Convair agreed in the final contract to the first delivery to be made in November 1959 and the fortieth in September 1960, with the allocation of specific dates still to be made by mutual agreement.

In the fall of 1958 when the production of the CV-880s had reached a point where it became essential to allocate particular aircraft between Toolco and Delta, so that the configurations would meet the respective requirements of the two airlines, Toolco refused to agree to any proposed allocation of delivery dates and Convair finally made a specific allocation on its own initiative (Rummel, TWA Ex. 2, p. 15; Tr. 1094-1095, 1108, 1552-1553). Delta executed a contract amendment incorporating the delivery schedule provided for it (TWA Ex. R10). Toolco never executed such an agreement, but the evidence shows that Toolco could have contracted for the contract delivery dates assigned to it by Convair. The plaintiff has accordingly assumed delivery dates so assigned by Convair (original contract delivery dates) in measuring the delays in delivery of twenty of the CV-880's.

Rummel testified (Tr. 307, 321, 444, 1538) that defendant Hughes assumed personal control of all matters connected with Convair deliveries; that no one else in TWA was permitted to become involved on matters of delivery; that in the fall of 1959 defendant Hughes instructed him that he was not to proceed with any acceptance procedures or even to continue acceptance flights without receiving personal clearance from defendant Hughes (Tr. 2949-50, 2987). The evidence as a whole bears out this Rummel testimony.

Rummel also testified that in December 1959 Toolco sent armed guards to the Convair plant who actually took control over the first four CV-880's coming off the production line and scheduled for delivery to TWA or Toolco; that these planes were subsequently bailed to Toolco and remained in that condition for many months, unavailable for final inspection test flight or acceptance procedures (Tr.

2788-90, 2810-17, 2839-40). The effect of this incident is discussed later.

Rummel also testified that removal of other CV-880's from the production line came as a direct result of the actions of defendant Hughes (Tr. 2836-37). Rummel also testified that when Convair subsequently tendered approximately seven or eight completed aircraft, they were refused because "we had not been cleared by Hughes to do so" (Tr. 2763-66).

Rummel also testified that Convair claimed damages from Toolco for delay in delivery and storage costs on nineteen of the twenty planes which eventually went to TWA and that in 1963 (when TWA purchased six additional CV-880s from Convair after repossession from Northeast Airlines) that Toolco agreed to credit Convair with a substantial sum in recognition of these claims (Tr. 2757-65; DX 145; TWA Ex. 21).

Delta during this period was accepting deliveries of aircraft under the contract with an average delay of 1.4 months per plane subsequent to the various contract delivery dates. Rummel testified that if TWA had been the purchaser, independent of defendants Hughes and Toolco, it was his opinion that Convair would have delivered the aircraft to TWA on a schedule at least closely approximating that of Delta (Tr. 1129-1139).

TWA's claim for damages under this facet of the case is based on the original Toolco-Convair contract delivery dates, as stated above. Its theory of damages is that by reason of the actions of Toolco, it is entitled to rely upon the schedule of deliveries which Convair was willing (prior to these events) to contract to meet.

Following is a table showing the original contract delivery dates, the actual receipt dates and the months difference (TWA Ex. 4(c)(1), p. 52):

Actual Receipt Date	Contract Delivery Date	Months Difference
5/18/60	11/59	6
1/ 1/61	1/60	12
1/ 5/61	2/60	11
1/ 6/61	3/60	10
1/ 8/61	3/60	10
1/12/61	4/60	9
1/21/61	4/60	9
2/ 2/61	5/60	9
2/15/61	5/60	9
3/15/61	6/60	9
3/18/61	6/60	9
3/20/61	7/60	8
4/26/61	7/60	9
5/ 6/61	7/60	10
5/25/61	7/60	10
6/ 9/61	8/60	10
7/ 9/61	8/60	11
8/10/61	8/60	12
9/ 2/61	9/60	12
10/13/61	9/60	13

The Coverdale Report computed the increase in annual average CV-880s which would have been available for commercial service if the original contract delivery dates had been met under this portion of the case, as follows (*id.*, p. 53):

1960—10.3 planes
1961— 5.2 planes

assuming the aircraft would have been received on the 15th of whatever month was specified in the contract for each aircraft.

Using TWA historical data for 1961 operation of CV-880s, Coverdale calculated the additional plane miles would have been 5.9 million for 1961; and again using 1961 data (since TWA was not operating CV-880s in 1960), it calculated the additional plane miles for 1960 as 11.6 million.

Using TWA's average of 88.3 seats offered for sale per CV-880 in 1961, it then calculated the additional seat miles as (*id.*, p. 54):

1960—1,024 million additional seat miles
1961— 521 million additional seat miles

Using TWA's 1961 average CV-880 passenger load factor, the resulting number of additional jet passenger miles for 1961 is 341 million miles. Since TWA did not have CV-880s to operate in commercial service in 1960, Coverdale took average load factor for 1960 for TWA's Boeing 331s and 131s used in the Domestic Division and thus computed additional jet passenger miles for 1960 for the CV-880s as 702 million miles. (*Id.*, p. 55.)

To obtain the corresponding reduction in piston plane passenger miles a complicated formula was used: An examination was made of the historical service patterns for the thirty specific pairs of cities in which TWA historically employed its twenty CV-880s when they were put into service in 1961 and for the six additional pairs of cities served by the six additional CV-880s when they were put into service in 1963. The historical decrease in piston service on those particular segments was totaled and was related to the amount of jet service introduced on such segments. It was found that the average decrease in piston plane miles was 52% of the increase in jet plane miles between the same cities. It was assumed that this percentage would be applicable to any earlier service and to any further increase in CV-880 service in similar operations; and

that in any given year the kinds of operations in which TWA would have used additional jets of a given type would have been essentially similar to the operations in which aircraft of the same type were used by TWA historically in the same year. Applying the 52% reduction factor to the additional CV-880 jet plane miles the additional reduction of piston plane miles becomes (*id.*, p. 62):

1961—3.1 million
1960—6.0 million

More than half of the reduction shown above was in flights of L-1049G aircraft, and the Coverdale Report used the average number of seats offered for sale in L-1049Gs for each of the two years in question, and the average load factor for such piston plane for each year, and thereby arrived at the following figures for reduced piston passenger miles (*ibid.*):

1960—286 passenger miles
1961—134 passenger miles

The above changes in jet and piston passenger miles and TWA's actual yields (computed as set forth above, at pp. 84-86) gives estimated net increase of passenger revenues as follows (*id.*, p. 63):

1960—$23.5 million
1961— 12.2 million

Adding the 5% estimate for non-passenger revenues these figures become (*ibid.*):

1960—$24.8 million
1961— 12.8 million

for the net estimated additional revenues under subdivision (b).

Twenty Convair 880's—Defendants' Position

The defendants take the position that there is no positive and distinct allegation in the complaint that the delays in delivery of the CV-880s were caused by the defendants; and that the plaintiff has failed during the damage hearings to introduce evidence to link the delays sufficiently with actions of the defendants. The defendants claim that the proof indicates that the delays were due primarily, if not exclusively, to Convair—i.e.—the manufacturer. The defendants cite at pages 142-150 of their brief the references to various contemporaneous documents which were introduced as exhibits in which TWA's representatives described actions or failures to act, on the part of Convair, which might have contributed to delays.

There is an allegation in the complaint that "during the period 1956 to 1960, the defendants required Convair to make certain changes in the design of Model 880 aircraft on order by Toolco. . . ." (Paragraph 19). However, this paragraph in the complaint does not allege that these changes in design resulted in any delays in the delivery of any aircraft, and no evidence of any such delay was introduced. The only specific action of the defendants prior to May 1960 (when the first 880s were delivered to plaintiff) cited by the plaintiff as being active interference by Toolco and defendant Hughes with the deliveries of the planes was the setting aside of three of the 880s from the production line in December 1959 and the stationing by Toolco of armed custodians to guard the planes. But it is clear from a contemporaneous document (Deft. Ex. 127) that Rummel did not consider this action by Toolco in itself to have delayed Convair's production schedule, although it was probable by this time that Convair was not going to be able to deliver on the original schedule.

In an inter-office memorandum written by Rummel to Mr. Charles Thomas, then President of TWA, under date of February 8, 1960, he stated:

> "Setting aside the three, now two, aircraft has not adversely affected the Convair production line. In fact this may have helped Convair materially by (1) beneficial reassignment of personnel, (2) permitting more timely completion of engineering, and (3) permitting more orderly, i.e., less out of station construction. Of course, delivery of the two aircraft now set aside is affected. They have been rescheduled for substantially later delivery * * *. Certification has not been adversely affected by setting aircraft aside."

I conclude that the defendants are not chargeable with responsibility for delays in delivery by reason of the December 1959 incident.

On March 2, 1960, the purchase agreement between Convair and Toolco covering all thirty of the CV-880s was changed by amendment No. 4 which established a new schedule for delivery of the planes as follows:

May	1960—4	planes
June	4	"
July	5	"
August	5	"
September	4	"
October	5	"
November	3	"

In my opinion the plaintiff's position that it was entitled to take the original contract delivery dates in measuring the amount of damages is not valid. Rather it should be bound by the revised delivery dates established in Amendment No. 4.

The evidence clearly shows, however, that commencing about May 1960 when Convair was able to offer deliveries, the defendants, as alleged in the complaint, prevented deliveries from being made and caused substantial delays in deliveries.

I have heretofore set forth the references to the testimony of Rummel showing that Hughes assumed personal control of all matters connected with Convair deliveries and that no one else at TWA was permitted to become involved on matters of delivery or acceptance procedures or even to continue acceptance flights. Rummel also testified that after TWA was rendered unable by Hughes to carry out final inspection procedures, numbers of additional aircraft were removed by Convair from the production line in a semi-complete state (Tr. 2807-8). This occurred progressively as TWA could not proceed with acceptance procedures (Tr. 2808). In "the summer" of 1960 Convair tendered seven or eight completed aircraft and Rummel testified that, "We didn't proceed with the flight testing because we hadn't been cleared by Hughes to do so." (Tr. 2766). Also, it is uncontroverted in the evidence that Convair claimed damages from Toolco for delay in delivery and storage costs on nineteen of the twenty planes which eventually went to TWA (Tr. 2757-58, 2764-65); and in 1963 Toolco settled Convair's damage claims for disruption of its business and delays in deliveries by crediting Convair with $3,750,000.

We turn now to the defendants' computations set forth in the Simat Original Report. Using his methodology described above for Boeing planes in domestic service, Simat reached the following results in respect of the assumed earlier delivery of 20 CV-880s:

Simat assumed the Coverdale estimates of 10.3 added planes for 1960 and 5.3 added planes for 1961; and the estimate of 11.7 million added jet plane miles for 1960 and 6.0 million jet added plane miles for 1961. By analysis of TWA domestic schedules for CV-880s over the period 1961-1963, Simat established by regression analysis the estimated stage lengths of added CV-880 jet service to be 752 miles, although the historical average stage length of existing CV-880 flights was 819 miles. The number of added flights becomes 15,558 for 1960 and 7,978 for 1961.

To the net assumed added seat miles, Simat then applied the "estimated adjusted marginal load factors" (32.3% for 1960 and 22.5% for 1961) and obtained added revenue passenger miles of 333.7 million miles for 1960 and 119.2 million miles for 1961. Since the average stage length of added service was estimated at 752 miles for both years, the number of added passengers becomes 309,239 for 1960 and 110,462 for 1961. TWA's actual average passenger revenue yield per mile was then adjusted proportionately in the same proportion as the actual average trip length bears to the adjusted trip length, and the total added revenues were (DX. 271A, p. VI-16):

1960—$19.5
1961—$ 7.3

As for piston aircraft operations, by regression analysis the estimated stage lengths of each type of displaced piston plane was calculated, and the number of deleted piston flights and miles was also estimated for each type of piston plane. The total deleted revenues from piston operations,

similarly computed for each type of piston, and then combined, were (*id.*, p. 20):

1960—$41.3
1961—$20.0

Simat, it will thus be seen, estimated very substantial losses in revenues for both years from the assumed additional operations of the twenty 880s.

Discussion of estimated changes in expenses under subdivision (b) is deferred until later. However, the figures for loss of revenue, apart from costs, are significant. In view of the clear preference by airline passengers for jets over pistons, it is almost impossible to accept the conclusion that replacements of piston flights by jet flights would have caused net revenues to decline from $41.1 million to $19.5 million in 1960 (more than 50%) and from $20.0 million to $7.3 million (more than 65%) in 1961. These figures should be contrasted with the views of the Civil Aeronautics Board as expressed in Order No. E-16195 (December 29, 1960, TWA Ex. 315.4, also reported at 32 C.A.B. 1363). That Order approved the loan agreement which substituted control by independent voting trustees for control by Hughes. Noting that the loan would enable TWA to take delivery of the 20 Convair 880's, the C.A.B. stated:

> It appears that the failure to receive this equipment as planned may have played a substantial part in TWA's recent inability to maintain its traffic position relative to its principal competitors. Thus, we note, for example, that the carrier's preliminary traffic reports for the month of November 1960 show that TWA's share of the Big Four domestic passenger market has declined from 23 to 20.2 percent. By way of contrast, United, which was behind TWA, has

> caught and passed it, increasing its share from 21.3 percent to 29 percent. It appears to be significant that TWA's major competitors have already taken delivery of much larger jet fleets than TWA is operating and have firm orders for delivery of more. [Footnotes omitted.]

Thus, the C.A.B., an impartial body which is certainly experienced in matters such as these, was of the opinion that the delay in delivery of the Convair 880's had probably resulted in a heavy loss of traffic to TWA, rather than a preservation of traffic as Simat asserts. Simat's conclusion that replacing piston flights with jet flights would result in a heavy loss of traffic can only be viewed with disbelief and reflects on the credibility of his entire approach.

Ten Convair 880's—Plaintiff's Position

Subdivision (c) of the plaintiff's claim for loss of profits in the Domestic Division is based upon the failure to receive ten of the thirty CV-880s originally ordered by Toolco from Convair.

In addition to the more general allegations of the complaint (see Par. 52) the following statements appeared therein:

> "In or about April 1956 the defendants arranged for Toolco to place orders for at least 30 Model 880 jet powered aircraft to be manufactured by Convair (par. 17)."

> "In November 1960 while the proposal for merger was pending, the defendants arranged for the lease by Convair to Northeast of six of the Convair model 880 aircraft which Toolco had ordered from Convair.

Among the aircraft so leased to Northeast were three aircraft which Toolco previously by an agreement with TWA of May 9, 1960 had assigned to TWA (par. 22)."

There is no disagreement over the fact that the remaining four 880s out of the ten involved in the claim under subdivision (c) were retained by Toolco for some time and later leased by it to Northeast (TWA Ex. 2, p. 10), and were never released by Toolco to the plaintiff.

Earlier we described the main major provisions of the contemporaneous contracts between Toolco and Convair, and Delta and Convair, for a total of forty CV-880s (pp. 101-03). Rummel testified that as a result of this and other reductions in the jets available to the plaintiff, caused by actions of Toolco, TWA was unable "to provide the schedule coverage that was advisable because of lack of equipment for a number of years" (Tr. 1085-86).

Rummel was informed on March 5, 1959 by Toolco representatives that TWA was not to receive ten of the Convair 880s which had been previously ordered (TWA Ex. 2, p. 9; R. Tr. 147). It appears that Toolco had had negotiations with Capital Airlines about selling six to ten of those CV-880s in January 1959. Rummel protested about the cutback in the Convair fleet (Tr. 762-65) as did other TWA officials (Tr. 1165-74, 1193-94). The opposition to the reduction was communicated to the executives of Toolco and to Hughes personally, but Hughes dismissed TWA's objections "summarily" (Tr. 1178-81).

The original contract delivery dates for the ten planes which the plaintiff takes as being the dates when it would have received the ten planes but for the aforementioned actions of Toolco, are as follows (TWA Ex. 2, p. 18; TWA Ex. 4(c)(1), p. 65):

December	1959
February	1960
April	1960
May	1960
June	1960
June	1960
July	1960
August	1960
August	1960
September	1960

and in each case it is assumed by Coverdale for damage computation purposes that the aircraft would have been received on the 15th day of the applicable month.

The additional annual average number of CV-880s available for commercial service was computed on this basis as (TWA Ex. 4(c)(1), p. 66):

1960	5.1
1961	9.9
1962	10.
1963	7.9

(The reduced figure for 1963 results from the fact that, as noted above, TWA actually purchased six of the ten planes in question from Northeast Airlines in the last quarter of 1963, and it was assumed that these six CV-880s would have been among the thirty aircraft in the original Toolco order for such planes).

The Coverdale calculation of additional passenger miles TWA would have recorded each year is similar to the calculations described above (pp. 104-06) for the twenty CV-880s involved in the delayed deliveries. It results as follows (*id.*, p. 67):

1960—351 million additional jet passenger miles
1961—648 " " " " "
1962—599 " " " " "
1963—506 " " " " "

It was assumed that service by TWA for the additional ten CV-880s would have been similar to that which it actually operated with a fleet of twenty CV-880s in 1960 and with a fleet of twenty-six commencing in 1963.

The Coverdale Report then took thirty-six pairs of cities where most of the CV-880 service was concentrated and found that the reduction of piston aircraft service for such pairs of cities was 51% of the jet aircraft service added. Using this ratio, the report then calculated reduction of piston aircraft service as follows (*id.*, p. 70):

1960 — 123 million miles
1961 — 235 " "
1962 — 247 " "
1963 — 195 " "

At TWA's average annual yields, computed on the basis above described, the following are the Coverdale calculations for net increase of passenger revenues (*ibid.*):

1960 — $12.9 million
1961 — $24.3 "
1962 — $21.5 "
1963 — $18.2 "

Using 5% additional revenue for non-passenger revenues the total additional revenue figures become:

1960 — $13.5 million
1961 — $25.5 "
1962 — $22.6 "
1963 — $19.1 "

In considering whether to allow the full amount of the plaintiff's claim under this subdivision (c) relating to the failure to receive ten CV-880s, the question arises as to whether the plaintiff is justified in using the original contract delivery dates or whether (as in the case of the calculation of damages in respect of the delays in delivery of the twenty CV-880s considered under subdivision (b)), the plaintiff should be required to use the amended delivery dates set forth in Amendment No. 4 of the contract between Toolco and Convair.

For the reasons stated above, it is my opinion that it is reasonable to use the contract delivery dates in Amendment No. 4 in computing its damages under this subdivision (c).

Ten Convair 880's—Defendant's Position

The original Simat estimates in respect of the failure to deliver the ten additional CV-880s are now considered.

Simat assumed the estimates of added planes and added plane miles as computed in the Coverdale Report. By regression analysis the stage lengths for the assumed added service were obtained, as were the stage lengths of the assumed deleted piston service, by types of planes. To the added seat miles assumed, Simat then applied the "estimated adjusted marginal load factors" (32.3 for 1960, 22.5 for 1961, 48.7 for 1962 and 49.4 for 1963) and obtained added revenue passenger miles of (DX 271A, p. VII-15):

1960	—	165.4	million miles
1961	—	224.5	" "
1962	—	519.1	" "
1963	—	435.2	" "

The assumed added passengers were (*ibid.*):

1960 — 163,487
1961 — 211,693
1962 — 494,193
1963 — 422,976

The average passenger revenue yield per mile (adjusted as described above) then produced total added revenues of (*id.*, p. VII-17):

1960 — $ 9.7 million
1961 — $13.7 "
1962 — $33. "
1963 — $26.6 "

The total deleted revenues from piston operations, similarly computed for each type of plane, and then combined, were (*id.*, p. VII-21):

1960 — $21.0
1961 — $37.8
1962 — $22.3
1963 — $10.2

Discussion of changes in costs under subdivision (c) is deferred until later.

I now take up the Simat Supplemental Report.

During the Simat cross-examination on the original Simat Report, plaintiff's attack was directed primarily to the validity of the concept of a marginal load factor—both before and after adjustment for economic growth. The use of this factor, more than any other, accounted for the wide variation in the estimate of the experts covering domestic operations.

The defendants countered with the statement that with the data then available to them they were confined to

pointing out the "fundamental errors" of the Coverdale Report—that they needed additional data from TWA records if they were expected to produce the best judgment of their expert (Simat) as to changes that would have occurred in operating profits.

The testimony of the defendants' experts was that any realistic estimation of the change in net operating profit requires the construction of an articulated TWA operating plan in which specific consideration is given to how the added jet capacity would be integrated with existing operations, to what types of service would be added, to what existing services would be eliminated in their entirety, and of what shifts in aircraft usage would occur as added jet aircraft displaced other aircraft from their existing usage to displace, in turn, other aircraft in a chain reaction. Since the scheduling and integration of new aircraft capacity is one of the most complex functions performed in the operation of an airline, Simat stated, it cannot be dealt with in generalities but an extensive bank of background information is needed to make appropriately informed judgments concerning the most probable and suitable use of additional aircraft on a route system as heterogeneous as that of TWA, and the resulting effect on operating profit.

The defendants accordingly made a demand for massive additional production of TWA's operating records to enable their experts to construct an operating plan for TWA for the years in question and thus test the validity of their underlying damage theories. This demand was vigorously contested by the plaintiff as unnecessary and too late. It was my opinion that because of the incredibly large spread between the estimates of the experts as to operating results to be expected from the assumed added jet fleet, the Special

Master and any court reviewing the matter were entitled to the best judgment of all the experts, based on every available TWA record, as to the factors involved in their judgment. The defendants' admission that the original Simat Report did not reflect the best judgment of their expert because of the limited source material available, also influenced me. Accordingly, the defendants' belated request was granted as to the production of all available records sought by it affecting the Domestic Division operations of TWA.

I decided that corresponding figures for the International Division operations need not be produced because of lesser complexity of the factors involved in the operations of that Division. For example, the computations of transatlantic load factors were basically undisputed, and the stage lengths of the flights of course did not vary to any considerable degree in the International operations.

This demand for production entailed a substantial delay in the completion of the damage hearings but resulted in a Supplemental Simat Report reflecting, in conjunction with its original report, its final revised estimate of changes in plaintiff's domestic operating revenues. The Supplemental Report did not change estimates of costs, so the Simat cost estimates for the Domestic Division are found in the original Simat Report.

The mass of material furnished by the plaintiff as a basis for the Simat Supplemental Report consisted mainly of TWA's routing charts and on-board reports and on-line passenger revenue yield information for the five-year period 1959-1963. Traffic and financial data for all scheduled flight services were made available by individual flight segments. For each segment of each flight, the information was converted into a form considered suitable by Simat

for computor processing. This information included flight itinerary, departure and arrival time, number of flights per month, type of equipment, classes of service and numbers of seats in each class, and distances between points served.

Basically the differences in method from the Original Report may be summarized as follows:

1. Rather than estimating the average stage length of added and deleted operations by the use of Domestic Division average relationships between stage lengths of existing added and deleted services, the report estimated directly the changes in flight operations by segments and derived the stage lengths from individual flight segment data.

2. Rather than estimating passenger miles on the basis of average divisional marginal load factors, the Report estimated them on the basis of individual segments.

3. Rather than estimating passenger trip lengths on the basis of divisional averages, the Report estimated them likewise on data from the individual flights.

Following is a more detailed description of the methodology used in the Simat Supplemental Report:

The routing charts show the flight patterns over a twenty-four hour period for each aircraft. The on-board reports provide monthly summaries of data by flight number, segment and type of equipment for all revenue flights. They show number of departures and number of revenue passengers. From the origin and destination points, data were obtained for computing aircraft miles and block hours. Block hours are defined as the elapsed time between departure from the gate position before take-off to arrival

at the gate position after landing. From these figures, seat miles were obtained for each aircraft in each segment for each month. Simat then computed the average monthly stage length (aircraft miles divided by departures) and the average monthly load factor (revenue passenger miles divided by seat miles).

The annual average stage lengths resulting were (DX 271A, p. II-12):

Pistons	1959	1960	1961	1962	1963
M-404	161	155	141	—	—
049/749	366	318	265	199	191
L-1049	532	445	426	—	—
L-1049 G/H	722	567	375	336	322
L-1649A	1,414	534	311	299	—
Jets					
CV-880	—	—	821	790	767
B-131	1,888	1,533	1,207	892	648
B-131 B	—	—	—	1,509	1,303
B-331	—	2,027	1,572	1,007	827
B-331 B	—	—	—	479	340
B-720 B	—	—	1,010	967	—
For All Fleets	440	445	489	552	591

The load factors shown were (*id.*, p. II-20):

Pistons					
M-404	64	61	59	—	—
L-049	66	59	58	—	—
L-749	64	63	61	64	63
L-1049	64	59	—	—	—
L-1049 G	70	60	60	61	57
L-1049 H	73	56	—	—	—
L-1649 A	70	59	54	59	56

Jets	1959	1960	1961	1962	1963
CV-880	—	—	66	56	57
B-131	83	69	53	49	56
B-131 B	—	—	—	42	47
B-331	—	64	49	42	43
B-331 B	—	—	—	37	44
B-720 B	—	—	48	50	—
For All Fleets	71	64	57	51	53

Simat next determined his estimate of the monthly operating profit or loss, based on distances actually flown and number of passengers actually carried. He did this first computing revenues and costs under the methodology used in his Original Report and second by computing them under the Coverdale methodology. He summarized his results in the following language:

> "While the profit or loss determined under the Simat procedures is, in our opinion, substantially more accurate, the difference is not significant to the present analysis. For both methods demonstrate, with equal certainty, although in different degree, that individual aircraft in each of TWA's jet fleets varied strikingly in their earning capacity, depending upon their scheduling, and they also demonstrate that, as jets were added, the additional jets were placed on routes where they began to contribute not profits, but losses."

The Supplemental Report does not make separate estimates according to categories of assumptions, as did the Simat Original Report and the Coverdale Report.

In deploying the assumed additional jet fleet, Simat built a constructive schedule just as TWA historically scheduled such equipment when it in fact received the additional equipment (with certain adjustments not material for understanding the methodology). It selected as

a basis for the schedule of the constructive fleet in each month ("constructive fleet month") the schedule pattern adopted by TWA in the "guide" month, i.e., a subsequent month when the actual jet fleet was closest in number to the constructive fleet. The average jet stage length was computed for each guide month and applied to the total jet miles in the constructive fleet month, to obtain total constructive jet departures. Piston fleet miles and departures were similarly constructed. To determine the traffic carried by the "constructive" fleet, Simat did not use the on-board data furnished by TWA but chose instead an intricate method of computing passengers from data from a competition study of the CAB made in 1966, which tabulates from samples the number of passengers who purchased tickets for travel on TWA, or other airlines, between each combination of cities served by TWA and other airlines. By regression analysis Simat then related the change in the volume of passenger miles between each two successive years, for each flight segment, with the corresponding changes in the volume of seat miles scheduled with jet and piston aircraft. Further regression analysis was used to convert the relationship between changes in non-stop on-line passenger traffic service (traffic carried between a point of origin and a point of final destination) as reported in the CAB Competition Survey, and changes in aircraft services to a relationship between changes in on-board traffic and changes in aircraft services.

Passenger yields were then applied (varying with the estimated length of passenger trip to show "taper" as described in the original Report). The ratio of length of passenger trip to stage length was also computed as in the original Report, with some refinements statistically.

Operating revenues resulted from this application of

yield figures to the passenger miles. The results showed an even greater net loss of revenue for the Domestic Division than shown in the original Report. Total revenues were estimated at $79.79 million and total costs at $191.74 million, or a net loss estimated for operating with the assumed additional Domestic fleet of $111.95 million. Some "alternative" computations are also set forth in the Supplemental Report to "validate" the findings of the Report, but are not otherwise relied upon (DX 371) and accordingly are not discussed in this Opinion.

Conclusions

I have described above the claims of the plaintiff for Domestic Division losses resulting from inadequacy of its jet fleet. I have also examined the methodology used in the reports of the plaintiff's expert witness (Wemple of Coverdale) and the defendants' expert witness (Simat) and their estimates of the financial results to TWA if the hypothesized jet fleet had been received and operated in the years 1959-63. Since the conflicting results as to the amount of damages are based largely upon three assumed factors, the reasonableness of those factors will now be discussed as a preliminary to award of damages under this part of the case (Section IB-Domestic).

The greatest portion of differing results stems from the use by Coverdale of the historical annual average load factor (percentage of available seats which are occupied) for each type of plane to compute the number of net additional passenger miles that would have been flown if the additional planes had been available; and from the use by Simat of the marginal load factor (ratio of the net traffic added by an added flight to the seat capacity added by the

flight) in his computation of the number of net additional passenger miles. (In his Supplemental Report Simat did not denominate this factor as marginal load factor, but for purposes of this discussion the term is applicable to both of his Reports.) In my opinion the historical average annual load factor of the same or similar type of plane involved in the computation is the proper measure to be used. Since it is computed separately for each year it adequately takes into account the steadily decreasing load factors experienced by TWA and by the industry during most of the period covered by the damage claims.

The defendants quite properly state that use of the annual average load factor would not be valid if applied to unlimited assumed additions to traffic. However, the Coverdale report was based upon a limited assumed increase in traffic—limited by the amount of increased traffic assumed by the equipment assumptions of the posited hypothetical TWA jet fleet.

The percentages of seat miles of all types of aircraft assumed to be added by TWA domestically in 1959-63 measured against the total of TWA, American and United; and the percentage of seat miles so added by TWA measured against TWA's historical jet domestic seat miles is shown in the following table (TWA Ex. 444):

TOTAL AVAILABLE SEAT-MILES OPERATED
DOMESTIC SCHEDULED SERVICE ONLY
TWA, UAL AND AAL
ALL AIRCRAFT TYPES, 1959-1963

Year	TWA, UAL and AAL Historical Seat-Miles (A)	TWA Estimated Additional Seat-Miles (B)	Percent Additions by TWA
	(Millions)		
1959	21,738	105	0.5%
1960	24,827	910	3.7
1961	29,020	1,018	3.5
1962	34,613	774	2.2
1963	37,969	638	1.7

Year	TWA Only Historical Seat-Miles (A)	TWA Estimated Additional Seat-Miles (B)	Additions Percent
	(Millions)		
1959	6,492	105	1.6%
1960	6,962	910	13.1
1961	7,487	1,018	13.6
1962	8,623	774	9.0
1963	10,042	638	6.4

(A) Source: CAB Handbook of Airline Statistics (1965 Edition).

(B) Source: C&C Report (May 2, 1966) Volume I, Chapters II-V; Exhibits TWA 42, 42A, 43A and DX 262.

As applied to this posited increase in traffic, I am of the opinion that use of the annual average load factor in the Coverdale Report is reasonable.

A comparison of industry average load factors (scheduled operations of the trunk line air carriers) for the years in question with the TWA average load factors used by

Coverdale also tends to confirm the reasonableness of the Coverdale computations. The industry figures are as follows (DX 271B):

	Jets	Non Jets
1959	79.9	59.7
1960	69.6	55.3
1961	59.5	53.
1962	53.6	52.6
1963	54.	53.3

The use of the marginal load factor by Simat to measure increase or decrease in number of passenger miles is, in my judgment, inappropriate. I note that Simat throughout his testimony refers to the marginal load factor as being appropriate to determine whether an assumed added flight would be profitable. That may well be so for an individual flight under normal industry conditions which do not involve a transition period in which there is introduced into the market a highly preferred new type of equipment. But it seems to me to erroneously exclude from consideration the probability that passengers would be diverted from competitors, who would not have had, under the assumptions here applicable, as great a quantity of jets as they had historically, to TWA which, under said assumptions, would have had more of the jet equipment so highly preferred by the traveling public. Indeed Simat stated (Simat Tr. 9123) "A truly accurate measure of marginal load factor should consider not only the competitive factors but also the other factors I mentioned of increased public acceptance, changes in quality and quantity of air services, and independent of the change in capacity alone." As applied in the Simat Report, these factors have not been sufficiently recognized. I am strengthened in my opinion by the follow-

ing statement of defendants in their brief (p. 220) that even though Simat's methodology led to the mathematical conclusion that TWA would have lost $95.91 million, if it had operated the assumed additional jet equipment as hereinbefore described: "It was not, of course Simat's opinion that the management of reconstructed TWA would have permitted such staggering losses to accumulate. Management could have drastically cut schedules * * * but while such measures might have avoided the dire consequences of operating * * * [the jet] added plane miles they would not have sufficed to put the added fleet in the black." A mathematical result which varies so widely from the estimate of what would in fact have occurred, must be regarded with great caution.

In terms of passengers carried, the Simat calculations (with marginal load factor being the greatest factor) also result in an unrealistic assumed loss to TWA over the five year period of over 3 million passengers, as follows (TWA Ex. 328):

	Jet Added	Piston Deleted
1959	79,768	138,635
1960	546,707	1,729,434
1961	387,698	1,915,988
1962	564,593	967,280
1963	462,749	350,869
Total	2,041,515	5,102,206

A factor which leads to such unrealistic mathematical results as does the marginal load factor as used herein, should be rejected.

Examples of the unreliability of the results reached by use of the marginal load factor are cited in the Plaintiff's brief (pp. 191-4) as follows:

"In 1959, for example, a period when TWA's actual jet load factor of 83.1% was such as to demonstrate that jet capacity of all airlines was far less than sufficient to fly the passengers who wished to fly in jets, the defendants employ a 'marginal load factor' in computing what would have occurred with more jets of 56.5%. In 1960, the actual figure is 68.6% but defendants use 37.1%. In the year 1961 the actual figure was 55.6%, while the marginal figure used is 31.7%.*

"The fallacies of this approach would be more apparent if quarter-to-quarter figures were employed. For example, in the fourth quarter of 1960, TWA was able to offer 829,780 jet available seat miles. In the first quarter of 1961, it was able to offer 873,704 jet available seat miles—the increase resulting primarily from the deliveries of the first few Convair 880 jet aircraft. Revenue passenger miles for the two periods were respectively 490,699 and 482,514. [TWA Ex. C & C 4 (24)] A simple computation following the principles that Simat espouses indicates a marginal load factor of zero—according to Simat the sole cause of TWA's falling load factors has to be its improvement in equipment, limited as that improvement was.

* * * * *

"From 1959 to 1960 TWA decreased the piston service which it offered by 1,171 million seat miles; the piston passenger traffic which it carried was decreased by 1,054 million revenue passenger miles. The simple-minded computation to which the defendants' cause and effect assumptions lead them is that TWA's piston miles were operated at a marginal load factor of 90%;** that is, that for every 100 piston seat miles subtracted

* After the adjustment against economic growth, discussed below, the figures are 53.7% for 1959, 31.5% for 1960 and 21.0% for 1961. The defendants' figures were changed several times, and DX 330 is believed to reflect the final estimates.

** The adjustment against economic growth is applied in reverse to make this figure, for computational purposes, an historic 94.5%.

or added by TWA in 1959, 90 revenue passenger miles were subtracted or added as a direct result [DX271B, p. C-23, as modified by DX330]. This being, according to defendants, the sole explanation of the historical trends, they conclude that further decreases of piston mileage offered would have had similar effects, so that any time TWA was led to cancel a piston flight in 1959 it would have cost itself the passengers which would have filled 90% of that piston's seats, while added jets would (according to defendants' jet analysis), have filled only 56.5% of their seats. Any such piston cancellation, whether or not involving a jet replacement, would obviously be a scheduling decision costing TWA a great deal of money.

"Indeed, if there were operative in actual fact something properly describable as a 90% marginal load factor for pistons in 1959, TWA and all other airlines should as a matter of sound business management have made every effort to increase piston mileage so as to take advantage of this extremely favorable market situation. The proper management decision would have been to reverse the developing situation and replace all of the limited existing jet mileage with piston mileage."

The reason for Simat's extraordinarily high estimates of the load factors on displaced piston flights seems to be a fundamentally unsound approach. Simat's marginal load factors for the deleted piston services were calculated by matching decreases in piston passenger traffic with decreases in piston flights. However, it is apparent that some of the decreases in piston passenger traffic were the result of passenger preference for jets, which caused fewer persons to use those piston flights which continued to be operated. Simat paired the deleted piston flights with the total decline in piston passenger traffic from all sources.

To take a hypothetical example, it may be assumed that an airline operated four flights from Point A to Point B with 50 seat piston aircraft, averaging 40 passengers per flight. If it is further assumed that jet competition would cause a loss of five passengers per flight, then each flight would be carrying only 35 passengers. If the airline then withdrew one of these flights, the load factor of the deleted flight should properly be 70% (35 passengers as against 50 seats). However, there has been a total loss of 55 passengers, if the first loss of five passengers per plane is added to the loss attributable to the deleted flight. Using Simat's method of matching deleted flights with the total decline in passenger traffic, the deletion of one 50 seat flight would be deemed to have resulted in the loss of all 55 passengers, rather than the loss of 35 passengers. It is this basic error of methodology which apparently has resulted in estimates of marginal load factors for deleted piston flights which exceed 100% (i.e. exceed the maximum capacity of the deleted aircraft). It is, moreover, apparent that passenger traffic was declining on all major piston flights which were feeling the effect of competition from jets, both on flights which were subsequently deleted and also on those flights which were continued in operation. Matching this total passenger decline with the deleted flights alone has resulted in a completely invalid marginal load factor for deleted piston services, and the result has been to vastly overstate the amount of revenues that TWA would have lost by deleting piston flights.

The defendants counter by giving examples of "absurd results" reached by the Coverdale method, as set forth below, but it is my opinion that the questions they raise in that connection can be rationally answered. At page 245 of the defendants' brief, they point out that Coverdale

would add nearly two billion revenue passenger miles to TWA's domestic traffic from 1959 through 1962, a period in which that traffic declined by 154 million passenger miles; that in 1961 Coverdale bestows on TWA 644 million additional passenger miles heedless of the fact that in that year the entire domestic trunk industry could add only 300 million; and that American Airlines suffered a decline of 500,000 passengers and 339 million passenger miles in 1961 in spite of having added fifteen jets. Where, the defendants ask, were the additional TWA passengers to come from? It appears to me they would probably have come from passengers that were attracted from competitors who would not have had as attractive equipment in type or quantity, vis-a-vis TWA, as they did historically during the years of jet shortage; and that new passengers would also have been attracted by the new and preferred assumed TWA jet equipment. The new jets did not *cause* the historical decreases in traffic admittedly experienced by the industry and by TWA, as the methodology used by Simat seems to dictate.

It should be emphasized that plaintiff has not sought to recoup from defendants its entire operating losses incurred historically during some of the years in question. For example, as pointed out at page 32 of plaintiff's reply brief, in 1961, a year in which Pan-Am and American operated at a profit, TWA's operating losses were $12 million and its net loss $15 million before special adjustments (TWA Ex. 94). Its damage evidence claimed that operating results were adversely affected by $10.6 million by its failure to receive the jets diverted to others and delays in receipt of the jets it did receive. It is that adverse effect upon its operating results alone, for which plaintiff seeks recovery

in its claims based on inadequacy of its jet fleets. Plaintiff has not sought to blame defendants here for the results of a general economic turndown. Rather, since jets were admittedly more attractive to the traveling public than pistons, it is the reflection of customer dissatisfaction with inadequate equipment attributable to defendants' conduct that is here the key element.

The adjustment made by the original Simat Report in the marginal load factor was intended to eliminate such part of the assumed added traffic as was attributable to economic changes. It is true that the economic changes for this period had already occurred and had been fully absorbed by the flight schedules which had historically been operated during those years. Thus, deletion of economic growth factors might be valid in determining the extent to which assumed additional flights might have produced additional passengers for the domestic airline industry as a whole. However, what is at issue here is not how many passengers would have been added to the entire airline industry, but how many passengers would have been added to TWA. While some might have been totally new passengers, others would represent a diversion of existing passengers from other airlines to TWA. In short, the addition of more jet flights might have resulted in a considerable redistribution of airline passengers with great increases for TWA, even though relatively few new passengers are produced for the airline industry as a whole. Therefore, the economic growth factor, while it may be applicable in other contexts, is not properly applicable here.

A second instance of different factors used by the experts was historical "average annual stage length" used

by Coverdale in estimating stage lengths of assumed added flights, as opposed to "marginal stage lengths" used for this purpose by Simat. The factor of annual average stage length of TWA, as used by Coverdale separately for jets and pistons, in my opinion, adequately takes into consideration the various changes in stage lengths accompanying the introduction of jets. The mathematical basis for confirming Simat's estimates of marginal stage lengths of added flights developed, on cross examination, to be unreliable (Tr. 7918-34; TWA Ex. 320; Tr. 7955). No reasonable alternative to use of the annual average stage length by type of plane, as used in the Coverdale Report, was presented to me and I accept the validity of its use as a proper factor to be employed in the calculations of damages. (See TWA Ex. 396). The acceptance of the use of the annual average stage length, as a proper factor, eliminates the need for any discussion at this point of the validity of the factor of average trip length of passengers as computed by Simat.

Also in my opinion the Coverdale Report is reasonable in using actual annual average yield per passenger in computing the dollar yield estimates for assumed added passengers. In my opinion the Simat estimates, using the so-called "fare taper" are less reliable because they fail to take into consideration adequately the jet fare surcharges in existence during much of the period involved, and the varying fare structures in operation for various periods and various classes of travel.

In adopting the Coverdale figures based on TWA's average performance rather than the Simat figures based on declining marginal productivity, I have been influenced by the overall picture of TWA's performance in relation to the performance of all of the other domestic trunk carriers

during the period 1959-1963. In 1959, TWA had the highest operating profit for its domestic operations of any U. S. trunk line. It also operated over many of the most densely traveled long haul routes in the country. Given the strength of its route structure and its 1959 operations, it is reasonable to assume that with adequate equipment TWA would have fared approximately as well in the ensuing years as the trunkline industry as a whole. If a condition of overcapacity had set in, it would be reasonable to assume that TWA would not have fared significantly worse than the other trunks, since it is not asserted that historical TWA was operating too many aircraft during this period. The statistics, however, show that TWA fared far worse during this period than the other trunks. It is clear that during 1960, 1961 and 1962, when plaintiff claims it was short of jets, TWA fell significantly behind the other carriers, and that beginning in 1962 and in 1963 and 1964, when TWA was catching up in terms of jet equipment, it also significantly improved its performance in relation to the other trunk carriers.

These statistics, which are set forth below, are taken from the CAB's 1965 Handbook of Airline Statistics. In Part III, Table 4, figures are given for the entire domestic operations of the domestic trunk carriers for revenue passenger miles, passenger originations and passenger emplanements. Individual figures for TWA are given in Part III Table 18. If the TWA figures are subtracted from the totals for all trunk lines, the TWA figures can then be compared with the totals for all trunk lines other than TWA. In all cases, figures are given as shown in the Handbook, with the final 000's omitted. The comparisons are shown in Chart 1. To compare TWA's post 1959 performance with that of the other carriers, the figures in Chart

1 can be expressed year by year in terms of the percentage increase or decrease in relation to 1959. This comparison is set forth in Chart 2. The divergence between TWA's performance after 1959 in comparison with that of the other trunk lines can be seen even more clearly when the percentage figures in Chart 2 are shown in the graphs which follow that chart.

CHART 1

REVENUE PASSENGER MILES

	1959	1960	1961	1962	1963	1964
All Trunks Other Than TWA	23,547,987	24,782,266	25,286,494	27,402,634	31,079,743	35,127,863
TWA	4,579,229	4,450,933	4,248,298	4,425,206	5,304,013	6,530,505

PASSENGER ORIGINATIONS

	1959	1960	1961	1962	1963	1964
All Trunks Other Than TWA	39,358	40,252	40,018	41,932	47,751	53,828
TWA	5,130	4,932	4,651	4,827	5,629	6,704

PASSENGER ENPLANEMENTS

	1959	1960	1961	1962	1963	1964
All Trunks Other Than TWA	42,526	43,308	43,213	45,639	52,001	58,551
TWA	5,487	5,370	5,139	5,393	6,221	7,412

CHART 2

MEASUREMENT OF PERFORMANCE BY YEAR IN RELATION TO 1959

REVENUE PASSENGER MILES

	1959	1960	1961	1962	1963	1964
All Trunks Other Than TWA	23,547,987	+5.2%	+7.4%	+16.4%	+32.0%	+49.2%
TWA	4,579,229	−2.8%	−7.2%	−3.4%	+15.8%	+42.6%

PASSENGER ORIGINATIONS

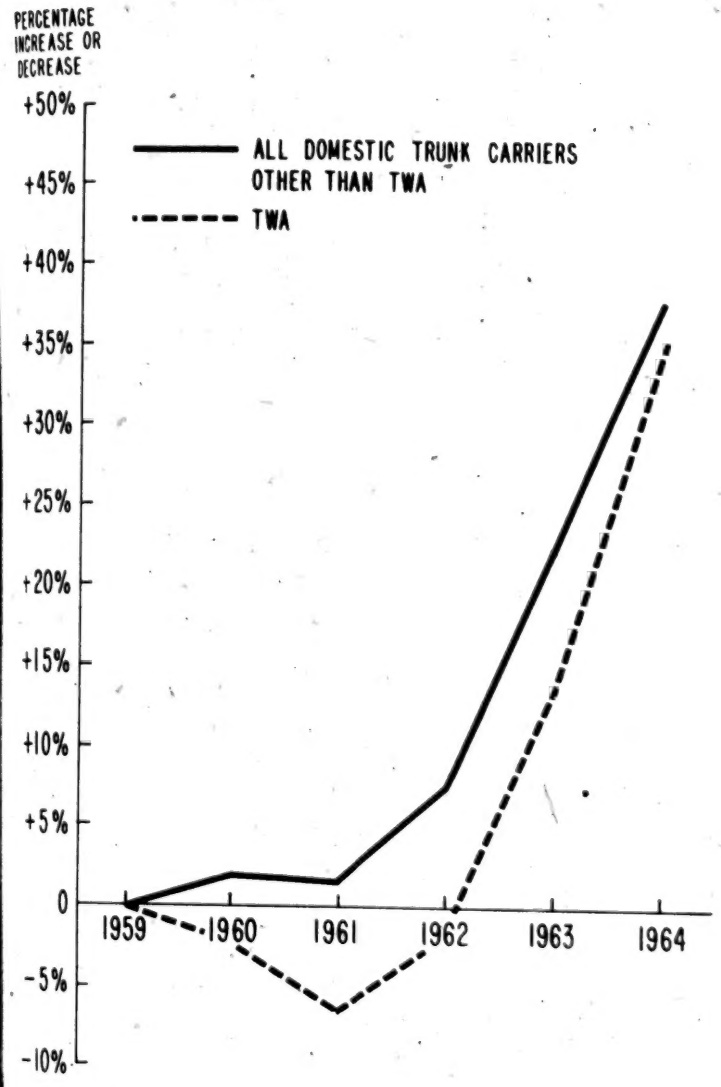
	1959	1960	1961	1962	1963	1964
All Trunks Other Than TWA	39,358	+2.3%	+1.7%	+6.5%	+21.3%	+36.8%
TWA	5,130	−3.9%	−9.3%	−5.9%	+9.7%	+30.7%

PASSENGER ENPLANEMENTS

	1959	1960	1961	1962	1963	1964
All Trunks Other Than TWA	42,526	+1.8%	+1.6%	+7.3%	+22.3%	+37.7%
TWA	5,487	−2.1%	−6.3%	−1.7%	+13.4%	+35.1%

PASSENGER ENPLANEMENTS

PERCENTAGE INCREASE OR DECREASE COMPARED TO 1959



From this it can be seen that TWA's performance in 1960 and 1961 was significantly worse, when compared to its 1959 performance, than that of the other trunk carriers. In 1962, it turned the corner of recovery, and by 1964 had nearly reached the same level of performance, vis-a-vis 1959, as the other trunks. This strongly suggests that TWA's shortage of jets in these years had a significantly adverse effect on its competitive position. Had TWA's performance been maintained at the same level as the other trunks, its passenger traffic would have been far greater than the levels which it actually experienced. In view of TWA's excellent route structure and its strong performance in 1959, the inference is strong that its failure to maintain its position in 1960 and the subsequent years was due to its shortage of jet equipment, which affected its ability to compete for the available passenger traffic. These statistics make it almost impossible to accept the Simat thesis that TWA would have suffered further drastic declines in passenger traffic if it had replaced piston flights with jets. Rather, the inference is that TWA would have obtained far higher levels of passenger traffic. Therefore, the Coverdale use of TWA's historical average figures to project the additional traffic from the jets would appear to be a conservative estimate.

As to the Domestic Division claims, the plaintiff's proof is sufficiently certain and direct to meet the standards in default situations (*Bigelow* v. *RKO Radio Pictures Inc.*, 327 U. S. 251 (1946)). The defendants, while raising doubts as to certain aspects of the claims which could undoubtedly have been cleared up if Hughes had been willing to testify, have failed to disprove these claims by any method open to them in the light of their default. Accordingly, I find as follows:

Subdivision (a). The plaintiff's estimates of revenues are reasonable and are adopted by me.

Subdivision (b). The plaintiff's use of original contract delivery dates in the Convair contract is not reasonable. Its estimates of revenues if computed instead on the basis of using the delivery dates provided for in Amendment No. 4 to said contract are reasonable and as so changed (as hereinafter set forth) are adopted by me. After appropriate adjustment of assumed changes in expenses, the net dollar reduction from plaintiff's claim is hereafter shown.

Subdivision (c). The plaintiff's estimates of revenues, modified similarly to use the delivery dates provided for in said Amendment No. 4, are reasonable and as so changed (as hereinafter set forth) are adopted by me. The appropriate related adjustment in expenses is hereafter shown.

As to costs of operation of the assumed added plane miles under subdivisions (a), (b) and (c), I find that if the methods of computation thereof, used by Simat, were applied to the increased traffic and revenue estimates by Coverdale, and which I have adopted as reasonable, they would produce at least as low expense estimates as those of Coverdale, and accordingly I adopt the Coverdale estimates of expenses applicable to subdivision (a), (TWA Ex. 449; Tr. 10,679-82) and the estimates of expenses under subdivisions (b) and (c) modified as above stated; provided, however, that a change in the applicable amount of net interest costs (hereafter discussed), is to be given effect.

After the record in the case was closed I requested counsel for the plaintiff to recompute the damage claim in respect of failure to receive and delay in delivery of the Convair 880s on the basis of using the delivery dates set forth in Amendment No. 4 to the Convair-Toolco con-

tract instead of the original contract delivery dates. The recomputation, with copy to counsel for defendants, has now been submitted to me. Since I have now decided (*supra,* p. 141) that the Amendment No. 4 dates are properly used for computation of damages, I set forth below the amount as computed by the plaintiff to be deducted from the plaintiff's claim in respect of the Convair 880s; and I have arranged to have the recomputation (Letter of Dudley B. Tenney to the Special Master dated August 30, 1968, with enclosures) filed with the Exhibits:

SUMMARY OF EFFECT OF APPLICATION OF REVISED ASSUMPTION THAT DELIVERY DATES FOR THIRTY CV880 AIRCRAFT WERE THOSE SET FORTH IN AMENDMENT NO. 4 IN LIEU OF THOSE SET FORTH IN ORIGINAL TOOLCO-CONVAIR CONTRACT

FOR THE PERIOD SEPTEMBER 30, 1955—DECEMBER 31, 1963

	(Amounts in millions)
Increase in income and special items before provisions for income taxes (Price Waterhouse & Co. report, Vol. I p. 5, as revised by $.2 million in TWA Exs. 42 and 43 and DX262)	$71.9
Adjustments—Add (deduct) (Note 1):—	
Decrease in gain from operations before provisions for depreciation, obsolescence and amortization, per Coverdale & Colpitts	($3.6)
Reduction in provisions for depreciation of airframes, engines and rotable parts due to later timing of the fleet, $1.9 million in 1960 and ($.1) million in 1962 (Note 2)	1.8

Decrease in proceeds relating to earlier sale of 103 piston aircraft: Per R. Dixon Speas Associates	(.8)	
Less—Reduction in "bad debts" (Note 3)	.2	
Decrease in reserve for overhaul of jet aircraft, eliminated at December 31, 1963, resulting from reduced maintenance expense (Note 4)	(.7)	
Total adjustments		(3.1)
Increase in income and special items before provisions for income taxes, as adjusted to reflect delivery of thirty CV880 aircraft on dates set forth in Amendment No. 4 of Toolco-Convair contract		$68.8

Since, however, I have elsewhere rejected the plaintiff's claim in respect of the earlier sale of piston aircraft, I eliminate from the foregoing recomputation the items

Decrease in proceeds, etc.	$(.8) million
Less reduction in "bad debts"	.2 "

Accordingly the recomputation, as so changed, results in a reduction of the plaintiff's claim in respect of the Convair 880s of $2.5 million.

(C) ***B-331B's***

An additional point is raised by the defendants in connection with the plaintiff's claim under this Section I. It asserts that the cost of operation of the five fan-jet B-331Bs

which were leased by the plaintiff from Boeing was less than the cost of operations of the additional B-331s it would have had in the assumed additional fleet underlying the plaintiff's damage claim. The defendants claim that the savings in operating the B-331Bs in the post-1963 period until the end of the leases in 1971 and 1972 should accordingly be deducted from any damages awarded under this Section I. They estimate such lease period for the five planes at 40.33 aircraft years. On the basis of a historically determined production rate of 4,000 block hours per aircraft, and applying a "conservative" cost advantage of $100 per block hour, the savings would aggregate $16.1 million (DX 271A, pp. VIII—10-12; Tr. 8818-19). The defendants state that it is the rule in both tort and contract cases that a plaintiff may recover only for the net effect of defendants' acts after deducting the value of any benefit caused by such acts.

The plaintiff points out that insofar as savings from the operation of the B-331Bs (as against the assumed additional B-331s) for the 1959-1963 period is concerned these estimated savings were deducted fully in the Coverdale computations. And the plaintiff makes no claim for damages based upon operations of its jet fleet in the post-1963 period.

The plaintiff further points out that the defendants had nothing to do with the decision to lease the B-331Bs; it was the Voting Trustees, after the defendants' control of the operations of TWA had ceased, who ordered them; and accordingly the rule of law cited by the defendants has no application to the facts in this case.

The plaintiff finally points out that if one were to attempt to calculate the relative benefit of operating the B-331Bs and the assumed jet fleet in the post-1963 period, it would

be necessary to take into consideration many additional factors ignored in the defendants' calculation. Four such items are listed in the plaintiff's reply brief at p. 130, as follows:

> "(i) During the period within which the six owned B-331s would have been fully depreciated, the rental expense for the five leased B-331Bs would have exceeded total depreciation upon the six B-331s by some $9.5 million [TWA Ex. 353; Simat Tr. 8805-06].
>
> "(ii) If TWA wished to continue operating the five B-331Bs at the end of the lease period, when reconstructed TWA would have owned six fully depreciated B-331s, historical TWA would either have to exercise its option to buy the planes at a substantial figure or have to enter into a new lease [Tr. 8813-15].
>
> "(iii) Six B-331s would have earned more revenue than five B-331Bs, but Simat made no allowance at all for such additional revenue although he thought it 'appropriate to consider the earnings power of the additional B-331, that is, the sixth aircraft' [Simat Tr. 8806, 8810].*
>
> "(iv) No account was taken of the resale value of the six owned B-331Bs [Simat Tr. 8814-16] despite the defendants' statement that airplanes 'cannot be thrown away' [Def. Br., p. 275].*

"*Defendants also take no account of either the ultimate resale value or the post-1963 earning power of the four additional CV-880s which reconstructed TWA would have had in its jet fleet if it had received all 30 CV-880s."

I am of the opinion that the defendants have failed to state any claim for a benefit due to their actions; that their computation of the value of the alleged benefit is fatally deficient; and accordingly no deduction should be made from damages awarded to the plaintiff by reason of the

alleged savings in operations of the B-331Bs in the post-1963 period.

(D) *Mitigation Claim*

Defendants also claim that the plaintiff should have mitigated its damages by "picking up the four unassigned 880s in 1961"; by accepting the opportunity, which it allegedly rejected, to acquire seven 880Ms available for delivery from Convair from June through December 1961 in Capital Airlines' configuration (or from October 1961 through April 1962 in plaintiff's configuration), and thirteen fan-jet 990s available from Convair for delivery from December 1961 through April 1962 in American Airlines' configuration. The citations in support of the mitigation claim (DX 56; DX 62 pp. V-4, V-9-10; DX 72; DX 74; Tr. 2332-33, 2351-52, 2364-67; DX 78, p. 4; Tr. 2405-08) are generally too indefinite or too incomplete to form a basis for a specific mitigation claim. Evidence from the defendants to complete the picture as to the underlying facts was not available to the plaintiff due to the defendants' default. Indeed, defendants do not even compute the dollar value of their mitigation claim.

The plaintiff correctly points out that Toolco owned the four unassigned 880s and had the rights to the seven 880Ms and the thirteen fan-jet 990s (Rummel Tr. 1534-37) so that Toolco's agreement would have been required to consummate any of the transactions. The independent Trustees of TWA were engaged in a series of bitter controversies, including threats of litigation, with Toolco in 1961-1962 (complaint, paragraphs 35, 37, 38, 39, 40-46), so that no transactions of the kind which the defendants envisage in their mitigation claim would have been feasible as a business matter, especially since the policy of the Voting Trus-

tees favored buying Boeing planes rather than additional Convairs. The defendants' mitigation claim is accordingly rejected.

(E) Adjustment to Reconstructed Interest Cost

The interest cost of the funds that would have been applied to the timely acquisition of a sufficient number of aircraft must next be determined.

TWA introduced the testimony of John C. Biegler, a partner of Price Waterhouse, who used the Drexel Harriman Ripley financial plan (TWA Ex. 5, Part II) and a reconstructed flight equipment fund take down schedule (TWA Ex. 7(b) 2, VI, B, Schedule B-3) to compute the total interest cost that would have been incurred by Reconstructed TWA during the period October 1, 1955-December 31, 1963 (TWA Ex. 7(b) 2, VI, B, Schedule B-1). This figure was compared with the actual interest cost incurred by Historical TWA (TWA Ex. 7(b) 2, VI, C, Schedule C). After appropriate adjustments Price Waterhouse found that there would be an increase in gross interest cost for Reconstructed TWA over Historical TWA in the amount of $9.9 million. In addition to this increased cost, Reconstructed TWA would also have incurred added expense to the extent of $1.0 million, a premium for its early payment of the $35 million 3¾ percent Equipment Mortgage Sinking Fund Bonds in July, 1955 (TWA Ex. 7(b) 2, VI, A, Schedule A). These costs appear in the plaintiff's "Condensed Summary of Effect of Application of Assumptions" as deductions from the alleged overall reconstructed gain in operating profits (TWA Ex. 50).

The defendants have not attempted to fix the appropriate interest cost. Since I have not accepted the Drexel Harriman Ripley financial plan (see pages 257-264) on which the Price Waterhouse computation relied, I have independently calculated the appropriate cost of interest. The testimony of Biegler indicated that a separate calculation of reconstructed interest expense would be feasible, granting certain additional assumptions. (Tr. 6361). I believe the record is sufficiently complete to allow these assumptions to be taken. However, in my opinion it is not necessary or feasible for me to construct a complex financial plan on the order of that presented by Drexel Harriman Ripley. Also, I do not find it necessary or feasible to extend my determinations by making detailed calculations reflecting complex and minor accounting adjustments.

In reconstructing the interest expense associated with the additional and earlier purchase of jet flight equipment I have assumed that funds were available at the time of the delivery of each aircraft. Except with respect to an item representing accrued interest on deposits for the purchase of twenty CV 880's, which is a matter of historical record and which is discussed hereafter at page 155, I have not made provision for funds for advance deposits and progress payments on aircraft purchases. For me to do so on a reconstructed basis would involve elaborate calculations and several speculative assumptions not required in recognizing the historical item of accrued interest on deposits for the twenty CV 880 aircraft. For similar reasons I have not considered any commitment fees and short-term investment returns that might be experienced with certain types of financing. The proceeds from the sale of piston aircraft were determined to have no material impact on the calculation of interest. In my opinion, these procedures and assumptions are fair and reasonable, and they avoid the

substantial amount of speculation or guesswork that would be involved with a more complex calculation.

In arriving at an appropriate deduction for cost of capital, I find that two components must be determined: (1) the amount of funds needed and the timing of the take-downs; and (2) the rate at which the funds are obtained.

(1) ***The amount of funds needed and the timing of the take-downs.***

(a) *six additional B-331 aircraft*—The six B-331 aircraft that were diverted became historically available to Pan American on the following delivery dates.*

Aircraft No.	*Date Received*
N701	November 5, 1959
N702	December 15, 1959
N703	December 30, 1959
N704	March 23, 1960
N705	April 29, 1960
N706	June 8, 1960

To avoid undue complexity I assume that one-third of the funds required for the purchase of these aircraft and related spare parts and equipment would be needed by TWA as of October 1, 1959, one-third as of January 1, 1960 and the balance as of April 1, 1960. As stated in the Price Waterhouse Report, the full purchase price of these aircraft and related spare parts and equipment would amount to a capital expenditure of $43.1 million (TWA Ex. 7(b) 2, VI, p. 35). I accept this figure.** Accordingly, I assume

* Source: Coverdale Report, TWA Ex. 4-c(1), p. 10. The impact of delivery to TWA at dates earlier than the above dates which Coverdale in its report described as "assumed receipt dates" is considered hereafter at pp. 150-155.

** Defendants' expert, Simat, relied on the Price Waterhouse Report for basic data in computing the cost of capital to effect purchase of the leased aircraft (Simat Report, DX 277A, IX-B-3).

that $14.4 million would be required as of the beginning of the fourth quarter of 1959, $14.4 million as of the beginning of 1960 and $14.3 million as of the beginning of the second quarter of 1960.

(b) *ten additional CV880 aircraft*—It was my determination above at page 141 that TWA would have acquired ten additional CV880 aircraft during 1960 and that delivery would have occurred from May through November of that year. As stated by Price Waterhouse, the full purchase price for these aircraft and related spare parts and equipment would have amounted to $48.1 million (TWA Ex. 7(b) 2, VI, p. 43). I accept this determination. Accordingly, I assume that one-third of this total amount, $16.1 million, would be needed as of April 1, 1960, one-third of $16.0 million as of July 1, 1960, and the balance of $16.0 million at October 1, 1960.

(c) *earlier delivery of jet aircraft*—I determined above at pages 52, 87 and 141 of this Report that TWA would have acquired its jet fleet prior to the historical delivery dates. With respect to the Boeing fleet, eleven B-131 aircraft and seventeen B-331 aircraft would have been acquired an average of 1.63 months earlier, and nineteen CV880 aircraft an average of 7.74 months earlier as shown in the calculations below.

Average Delay in Purchase of Fifteen B-131 and Eighteen B-331 Aircraft

Actual and Assumed Receipt	*Reconstructed Delivery Date*[1]	*Months Difference*
B-131 Aircraft		
1-29-59	11-30-58	2.0
3-17-59	12-31-58	2.5
3-30-59	1-31-59	2.0
4- 3-59	2-27-59	1.0
4-18-59	3-30-59	0.5
4-29-59	4- 3-59	1.0
5-10-59	4-18-59	1.0
5-13-59	5-10-59	0.0
5-24-59	5-13-59	0.5
5-28-59	5-24-59	0.0
6-13-59	5-28-59	0.5
7- 1-59	6-13-59	0.5
7-10-59	6-29-59	0.5
7-14-59	7-10-59	0.0
8- 1-59	7-27-59	0.0
B-331 Aircraft		
11- 5-59	7-19-59	3.5
11-10-59	8-22-59	2.5
11-10-59	8-28-59	2.5
11-25-59	9-22-59	2.0
12-15-59	10- 6-59	2.5
12-23-59	10-27-59	2.0
12-30-59	11- 5-59	2.0
1-18-60	11-10-59	2.0
3-23-60	12-15-59	3.0
4- 1-60	12-30-59	3.0
4- 5-60	1-18-60	2.5
4-14-60	2-29-60	1.5

[1] See determination pp. 52 and 87 this report.

Actual and Assumed Receipt	*Reconstructed Delivery Date*	*Months Difference*
4-29-60	3-23-60	1.0
5- 9-60	4-26-60	0.5
5-25-60	4-29-60	1.0
6- 8-60	5- 9-60	1.0
7- 1-60	6- 8-60	1.0
7- 1-60	7- 1-60	0.0
	Total	45.5

Average Delay:

$$\frac{\text{Total Months Delay}}{\text{\# of Aircraft Delayed}} = \frac{45.5}{28} = 1.63 \text{ Months}$$

$$= \frac{1.63}{12} = .1354 \text{ Year}$$

Average Delay in Purchase of Twenty CV880 Aircraft

Actual Receipt	*Delivery Date[1] Reconstructed*	*Months Difference*
5-18-60	5-15-60	0.0
1- 1-61	5-15-60	7.5
1- 5-61	5-15-60	7.5
1- 6-61	6-15-60	6.5
1- 8-61	6-15-60	7.0
1-12-61	6-15-60	7.0
1-21-61	7-15-60	6.0
2- 2-61	7-15-60	6.5
2-15-61	7-15-60	7.0
3-15-61	8-15-60	7.0
3-18-61	8-15-60	7.0
3-20-61	8-15-60	7.0
4-26-61	9-15-60	7.5
5- 6-61	9-15-60	7.5
5-25-61	9-15-60	8.5
6- 9-61	10-15-60	8.0
7- 9-61	10-15-60	9.0
8-10-61	10-15-60	10.0
9- 2-61	11-15-60	9.5
10-13-61	11-15-60	11.0
	Total	147.0

Average Delay:

$$\frac{\text{Total Months Delay}}{\text{\# of Aircraft Delayed}} = \frac{147.0}{19} = 7.74 \text{ months}$$

$$= \frac{7.74}{12} = .6450 \text{ year}$$

[1] See determination page 141 this report.

For the purpose of calculating the effect on cost of capital with respect to the delayed Boeing aircraft I find that a determination that the aircraft would have been delivered earlier requires a matching determination that funds would be needed earlier to effect purchase. As above, in determining the capital amount needed I rely on those figures provided in the Price Waterhouse Report.

As stated by Price Waterhouse the initial cost of fifteen B-131 aircraft would have been $71.6 million and the cost of related spare engines $5.9 million or a total of $77.5 million (TWA Ex. 7(b) 2, VI, pp. 30 and 32). The schedule of reconstructed deliveries above indicates that only eleven of the B-131 aircraft were delayed. On a prorated basis the cost of these eleven aircraft would amount to $56.8 million.* Price Waterhouse also indicated that the total reconstructed cost for eighteen B-331 aircraft and related spare parts and equipment would have been $129.3 million (TWA Ex. 7(b) 2, VI, p. 35). Seventeen of the eighteen B-331 aircraft were delayed and the prorated cost of these aircraft is $122.1 million.** On a fleet basis, the total cost of delayed Boeing aircraft and related spare parts and equipment thus amounts to $178.9 million. Accordingly, I determine that TWA would have to have had this amount available an average of 1.63 months earlier in order to take delivery at the reconstructed earlier dates.

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* 15 aircraft = $77.5 million = $5.16 million per aircraft
× 11 delayed aircraft
15 = $56.76 million for 11 aircraft

** 18 aircraft = $129.3 million = $7.18 million per aircraft
× 17 delayed aircraft
18 = $122.06 million for 17 aircraft

Similarly, on a reconstructed basis the funds necessary to effect the purchase of the delayed CV880 aircraft would have had to be available to pay for the aircraft on the earlier reconstructed delivery dates. I have determined, as set forth above that these aircraft would have been delivered an average of 7.74 months earlier than the historical delivery dates, and accordingly, actual funds would have had to be available more than seven months earlier.

As stated by Price Waterhouse, the initial cost of the nineteen CV 880 aircraft that would have been acquired earlier would be the historical capital outlay of $83.0 million, plus a reconstructed amount of $.5 million for the earlier purchase of spare parts (TWA Ex. 7(b) 2, VI, pp. 43 and 46). This total figure of $83.5 million includes a $4.1 million historical payment for interest on an advance deposit. Since I have determined that the funds to pay for the earlier purchase of these aircraft would have been available 7.74 months earlier it is reasonable to assume that the accrued interest on the advance deposit would be reduced. Therefore I determine that instead of the $4.1 million interest payment, TWA would have paid $3.5 million, a difference of $.6 million.* Such an adjustment reduces the total sum needed to purchase the nineteen delayed CV 880 aircraft from $83.5 million to $82.9 million.

(2) *The rate at which the funds are obtained.*

In Section II pp. 183-84 I have determined that the *Hanover Shoe* case is controlling on the question of the

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* 1. Interest Payment of $4.1 million at 5.5% (TWA Ex. 7(b)2, VI, p. 44) indicates time period of 51 months.

2. Adjusted period:
$51 - 7.74 = 43.26$ months

3. Adjusted interest payment on advance deposit:
$4.1 million $\times$ 43.26 = $3.5 million

proper cost of capital to employ in measuring damages in antitrust cases. According to *Hanover,* the proper rate to employ is the company's external borrowing rate.

In examining the record I find that there is enough evidence of borrowing rates for the period in question to fix an approximate constructive rate for TWA which is both fair and reasonable under the facts and circumstances developed at the hearing. The record discloses that TWA historically negotiated major debt financings on several occasions during the general period in question, 1955-1963. The significant independent borrowings involved the following debt.*

1957	Chattel Mortgage Notes, 5¼% due December 1, 1960	$ 20.7 million
1957	Bank Loan, 5¼%	$ 12.0 million
1960	Equipment Mortgage Notes, 6½%, due December 31, 1972	$114.8 million
1960	Equipment Mortgage Serial Notes, 6%	$ 85.4 million
1961	Equipment Mortgage Notes, Series B, 6% due December 31, 1977	$ 57.0 million
1961	Equipment Mortgage Serial Notes, Series B, 5½%	$ 21.9 million
1961	Subordinated Income Debentures, 6½% due June 1, 1978	$111.9 million
1963	Convertible Subordinated Debentures, 5¾% due October 1, 1983	$ 38.5 million

Interest rates for these actual borrowings range from 5¼-6½ percent. Reference to long-term borrowings by

* Source: Price Waterhouse Report, TWA Ex. 7(b)2, VI, Schedule C4.

other airlines at or about this time (1957-1960) indicates that rates on debt financings generally ranged from 5-6½ percent.* Those straight financings (no convertible feature) of more than $25 million with indicated borrowing rates are listed below:

1958	*Delta* —Debentures due Oct. 1, 1974, 6%	$25.0 million
	Northwest —Credit 4¼-4⅝% due 1965	$32.5 million
	Northwest —Notes due October 1, 1978, 6%	$40.0 million
1959	*American* —Promissory Notes due Nov. 1, 1996, 5%	$30.0 million
1960	*Pan American* —Promissory Notes 1st installment due 1967, 6%	$50.0 million
	Capital —Secured Notes Series A due September 30, 1965, 5½%	$25.5 million
	American —Notes, 5¾%	$60.0 million

I also take note that one aspect of the Drexel Harriman Ripley financial reconstruction was a $90-100 million debt financing scheduled for May 1959 (TWA Ex. 5, Part II, p. 70). Drexel Harriman Ripley made the following appraisal as to the interest rate on this proposal:

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*Source: Loeb, Rhoades Report DX270, Part II, Exhibit A.

"We believe that institutional investors, in the second quarter of 1959, would have charged TWA an interest rate of 6% on the used portion of the Series B Flight Equipment Notes, and a commitment fee of ½% per annum on the unused portion." (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 70)

The Rate Applicable to the Reconstructed Purchase of the Boeing Fleet—On a reconstructed basis TWA would have purchased its entire Boeing fleet between November 30, 1958 and July 1, 1960.

The record discloses no large-scale financing by TWA at or about the time when arrangements for funds certainly would have been made to effect purchase during the above period, i.e., 1958-1959. Therefore I have looked to those points in the record that suggest a rate that might have been obtained at this time by an independent management seeking funds to purchase a substantial jet fleet. Considering the evidence on airline borrowings recited above on pages 155 through 157, I believe that it is fair and reasonable to fix TWA's borrowing rate for funds needed to purchase the Boeing aircraft on the reconstructed delivery dates at 6%.

The Rate Applicable to the Reconstructed Purchase of the Convair Fleet—However, I find a different interest rate should be used in respect of the thirty CV 880 aircraft. I have previously determined that the reconstructed and timely delivery of a fleet of thirty CV 880 aircraft would have occurred between May 15, 1960 and November 15, 1960. These deliveries would have occurred subsequent, in point of time, to the deliveries of the Boeing fleet. Of the total reconstructed Boeing fleet of thirty-three aircraft only two were delivered after delivery of the first Convair aircraft.

Unlike the case with the acquisition of the Boeing fleet, where there is no evidence in the record of financings directly related, in point of time, to the acquisition of the fleet, TWA did undertake large scale financing approximately seven months subsequent to the first delivery, on a reconstructed basis, of the Convair fleet. From the financial statements submitted in evidence it is reasonable to conclude that the historical purchase of twenty CV 880 aircraft was largely financed by the historical borrowings arranged in December, 1960, referred to above on page 156. Aside from the training aircraft which was delivered in May 1960 the first deliveries of the CV 880 fleet historically commenced immediately after the December 1960 financings.

Under the December, 1960 financing agreements provision was made to sell Equipment Mortgage Notes (of which $114.5 million were sold) at 6½%, and Equipment Mortgage Serial Notes (of which $85.4 million were sold) at 6%. The weighted average interest rate for these external borrowings is 6.3%.* There is no significant evidence that TWA could have borrowed at a lower or higher rate at or about the time of the reconstructed delivery dates. Accordingly, I determine that 6.3% should be the rate applicable in computing the additional interest cost that would be connected with the additional and earlier need of funds for the reconstructed acquisition of the CV 880 aircraft.

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* Weighted Average interest rate (x)

$114.5 million	× 6.5%	=	7.443
$ 85.4 million	× 6.0%	=	5.124
199.9 x		=	12.567
		x =	.063

Reconstruction of Interest Cost

The basic components determined above, i.e., the amount needed, the timing of the take downs, and the rate, allow a computation of an interest cost that is an appropriate deduction from the overall increase in operating profits resulting from the reconstruction of TWA to include the additional and earlier use of jet aircraft. In computing interest charges, an adjustment should be made, however, to the gross capital investment required to give effect to the cash throw-off in the form of depreciation and amortization from the added capital investment. I note that such an adjustment was an integral part of the calculation introduced by Simat with respect to the constructive purchase of the leased aircraft (DX 271A, IX-B), and that plaintiff's counsel in their brief adopted this calculation (Plaintiff's Brief, p. 227). The depreciation and amortization figures associated with the reconstructed additional and earlier use of jet flight equipment have been calculated by Price Waterhouse. They were not materially challenged by the defendants and I accept them as stated. I have used them below in column 2 of Calculations A and B and also in Calculations C and D. Finally, it is assumed that the reconstructed borrowings necessary to finance the purchase of the additional jet equipment will not be paid off prior to December 31, 1963.

Proceeding on the foregoing assumptions and evidence, I have determined that Reconstructed TWA would have incurred additional interest cost over the period 1959-1963 in the amount of $8.3 million for adding six B331 aircraft, and $8.7 million for adding ten CV 880 aircraft, or a total of $17.0 million. The details of these determinations appear in Calculations A and B below.

Interest Cost 1959-1963

Adding Six B-331 Aircraft

($ millions)

	(1) Adjusted Capital Investment Beginning of Period	(2) Less Depreciation and Amortization for the Period[2]	(3) Adjusted Capital Investment End of Period	(4) Average Investment for the Period (1) + (3) ÷ 2	(5) Interest at 6 per cent	(6) Interest Cost for the Period (4) × (5)
Fourth qtr. 1959	14.4[1]	—	14.4	14.4	1½%[3]	.216
First qtr. 1960	28.8[1]	0.4*	28.4	28.6	"	.429
Second qtr. 1960	42.7[1]	1.1*	41.6	42.1	"	.632
Second half 1960	41.6	2.3*	39.3	40.5	3%[4]	1.215
1961	39.3	5.1	34.2	36.7	6%	2.202
1962	34.2	4.3	29.9	32.0	"	1.920
1963	29.9	3.6	26.3	28.1	"	1.686
Total increase in interest cost for period 1959-1963						$8.300

* Proration of annual depreciation of $3.8 million.

[1] See (1)(a) above on page 150.

[2] Source: TWA Ex. 7(d).

[3] One-quarter of annual rate of 6 per cent.

[4] One-half of annual rate of 6 per cent.

CALCULATION B

Interest Cost 1960-1963

Adding Ten CV-880 Aircraft

($ millions)

	(1) Adjusted Capital Investment Beginning of Period	(2) Less Depreciation and Amortization for the Period[2]	(3) Adjusted Capital Investment End of Period	(4) Average Investment for the Period (1) + (3) ÷ 2	(5) Interest at 6.3 per cent	(6) Interest Cost for the Period (4) × (5)
Second qtr. 1960	16.1[1]	.1*	16.0	16.1	1.58%[3]	.254
Third qtr. 1960	32.0[1]	.6*	31.4	31.7	"	.501
Fourth qtr. 1960	47.4[1]	1.3*	46.1	46.8	"	.739
1961	46.1	5.7	40.4	43.3	6.3%	2.728
1962	40.4	5.4	35.0	37.7	"	2.375
1963	35.0	4.4	30.6	32.8	"	2.066
				Total increase in interest cost for period 1960-1963		$8.663

* Proration of annual depreciation of $2.0 million.

[1] See (1)(b) above on page 150.

[2] Source: TWA Ex. 7(d) as amended by letter of Price Waterhouse to Cahill, Gordon of August 30, 1968, Note 2.

[3] One-quarter of annual rate of 6.3 per cent.

Since historically TWA had the benefits of the earnings generated by the twenty-eight delayed Boeing aircraft and the nineteen delayed CV 880 aircraft after their historical acquisition, in determining damages for delay in receipt of these aircraft, I am concerned only with the loss of profits in the period between constructive deliveries and actual deliveries. I have determined, as stated above, that the average delay in acquisition of the Boeing aircraft was 1.63 months and that the average delay of the CV 880 aircraft was 7.74 months. I find that these are fair and reasonable periods to use in determining the additional interest cost to TWA which would be incurred in financing the earlier acquisitions. Accordingly, I determine that the additional interest cost related to the earlier ownership of the delayed Boeing aircraft would be $1.4 million, as shown in Calculation C below. The additional interest cost related to the earlier purchase of the delayed CV 880 aircraft amounts to $3.2 million as shown in Calculation D below.

CALCULATION C

Interest Cost 1958-1960

Earlier Purchase of Twenty-Eight Boeing Aircraft
($ millions)

Cost of 11 B-131 Aircraft delayed[1]	56.8	
Cost of 17 B-331 Aircraft delayed[1]	122.1	
a. Total cost of earlier Boeing Aircraft		178.
Less increase in depreciation as a result of the earlier purchase[2]		3.
b. Net value of earlier investment		175.
c. Average earlier investment (a + b ÷ 2)		177.
× annual interest rate[3]		.0
Increased interest cost for one year		10.62
× average delay		.135
		$1.43

[1] See determination page 154 above.
Source: TWA Ex. 7(b)2, VI, pp. 30, 32 and 35.

[2] Source: TWA Ex. 7(d).

[3] See page 158 above.

CALCULATION D

Interest Cost 1960-1961

Earlier Purchase of Nineteen CV-880 Aircraft
($ millions)

Cost of 19 Aircraft delayed[1]		$ 82.9
Less increase in depreciation as a result of the earlier purchase[2]		$ 6.8
Net value of earlier investment		$ 76.1
Average earlier investment (a + b ÷ 2)		$ 79.5
× Average annual interest rate[3]		$ .063
Increased interest cost for one year		$5.0085
× Average delay		.6450
		$3.2305

[1] See determination page 155 of this report.
Source: TWA Ex. 7(b) 2, VI, p. 46.

[2] Source: TWA Ex. 7 (d) as amended by letter of Price Waterhouse to Cahill, Gordon of August 30, 1968, Note 2.

[3] See page 159 above.

The total increase in interest cost caused by the additional and earlier purchase of jet flight equipment aggregates $21.6 million as shown in Calculation E below.

CALCULATION E

Summary of Adjustments to Interest Cost
1958-1963

	($ millio
I. *Additional Purchase*	
Six B-331 Aircraft	$ 8.
Ten CV-880 Aircraft	8.
	$16.
II. *Earlier Purchase*	
Eleven B-131 Aircraft and Seventeen B-331 Aircraft	$ 1.
Nineteen CV-880 Aircraft	3.
	4.
Total	$21

As shown by the above table the proper amount to be deducted from the damages under Section I in respect of interest cost is $21.6 million. This represents an increase of $10.7 million over the deduction made by Price Waterhouse (TWA Ex. 50).

(F) *Damages under Section I*

For the reasons above stated, the amount of the damages under Section I is as follows:

A. International Division		$22,400,000.
B. Domestic Division	$29,300,000.	
Less adjustment as to Convair 880s:	($ 2,500,000.)	$26,800,000.
Total Net Revenues		$49,200,000.
Less adjustment relating to interest rate:		($21,600,000.)
Damages under Section I		$27,600,000.

An accounting adjustment related to the above damages is made in the final award in Section VIII.

II.

Losses due to being required to lease jets.

The following allegations in the complaint underlie the claim considered in this Section II:

"9. Beginning in or about the year 1939 and continuing up to and including the date of the filing of this complaint, the defendants, Atlas and other persons acting for each of them have been and are now engaged in:

• • •

"(f) Sales and leases of jet-powered aircraft on the condition, agreement and understanding that the purchaser or lessee shall not buy or lease the goods of a competitor or competitors of the vendor or lessor, in violation of Section 3 of the Clayton Act; and

• • •

"10. Each act of the defendants and Atlas hereinafter alleged was done in furtherance of the offenses charged in the preceding paragraph and was a part thereof and was done with the primary purpose of restraining and monopolizing the trade and commerce described above. It was the intent of the defendants and Atlas, *inter alia*:

• • •

"(h) That the defendants and Atlas would obtain substantial profits for themselves, at the expense of TWA and other air carriers, as the result of restrictions upon competition in the trade and commerce hereinbefore alleged.

• • •

"20. During the period 1959 to 1960, defendants arranged for the lease to TWA by Toolco of certain jet-powered aircraft on a day-to-day basis. Such aircraft were the first and only jet-powered aircraft made available to TWA by the defendants during the years 1955 to 1960 and the number of aircraft so leased by Toolco to TWA was inadequate for the needs of TWA. Such leases were given on a continuing condition, agreement and understanding that TWA would not purchase or lease aircraft from any other potential supplier thereof. The effect of such continuing condition, agreement and understanding was to foreclose, to all potential suppliers of jet-powered aircraft to TWA other than defendants, the opportunity for selling or leasing jet-powered aircraft to TWA."

The specific allegations set forth in Paragraph 20 above concern a fleet of fifteen B-121 jet aircraft and four B-331 jet aircraft that were historically leased by TWA from Toolco according to a schedule of delivery dates commencing in January, 1959 and ending in December, 1959. These nineteen leased aircraft are among the fleet of sixty-three jets considered in Section I. Except for two B-131 aircraft which were purchased in May, 1960, they were historically purchased by TWA on December 30, 1960.

The plaintiff and its experts contend that the defendants forced TWA to lease these jet aircraft from Toolco instead of permitting it to own them, with the result that TWA had to pay far more to have the use of these aircraft than it would have paid if it had originally bought the aircraft itself. TWA further contends that

"Toolco, on the other hand, not only profited through the receipt of rental payments but also, by taking depreciation on an accelerated basis, created a tax gain for which it claimed capital gains treatment upon ultimate sale." (Plaintiff's Brief, p. 220.)

Proof of Damages

TWA through its financial expert, Morehouse of Drexel Harriman Ripley, included among the "Fundamental Principles of Airline Finance" that an airline should own its flight equipment rather than lease it from other parties. Two minor exceptions to this general principle, the "seasonal interchange" type of lease and the "through run interchange" type of lease were stated. (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 4)

The cross-examination of Morehouse developed the following points:

¶ The equipment represented by the two exceptions, *i.e.*, the "seasonal interchange" and the "through run interchange" type of lease, is a comparatively small part of the total fleet of any airline. (Tr. 3991-3992).

¶ In the opinion of Drexel Harriman Ripley an airline is not soundly financed if its major income producing facilities, as contrasted with what might be described as servicing equipment such as hangars and airport facilities, are not owned. (Tr. 3995).

¶ The principal distinction between the popularity of railroad car leasing and the unpopularity of airplane leasing is the much more rapid development of the state of the art in the aircraft field, but it might be appropriate for an airline to lease rather than buy if it thought that the particular aircraft which it needed presently might be outdated quite shortly. (Tr. 3996).

¶ There has been interest in the use of equipment trust financing for airlines. Equipment trust financing is not particularly germane to the leasing problem, but it is somewhat "in the same ball park." (Tr. 4000).

¶ There are under certain conditions tax advantages such as the investment credit which make it a good business decision to enter into leasing arrangements. The investment credit was not a factor, however, during 1955-1960. (Tr. 3997, 4020-1).

¶ After the investment credit became effective United Air Lines leased a sizeable number of airplanes through a third party group of commercial banks to whom the credit was more valuable than if United had owned or leased directly. (Tr. 4029).

¶ Among the factors to consider in a comparison of the cost of ownership with the cost of leasing would be an estimate of the cost of the capital involved in the purchase of an airplane, and the depreciation on the airplane, when owned, compared with the gross rentals involved in the lease alternative. (Tr. 4013-4014).

¶ Drexel Harriman Ripley believe that it is in the best interests of an airline to retain the greatest degree of control of its income-producing property. Ownership gives that greatest degree of control. A very long lease with reasonably flexible provisions probably involves the giving up of less of the control factor than the opposite extreme, a day-to-day lease which has no assurance of any reinstatement of the lease. (Tr. 4020, 4019).

Operating Profit Lost—TWA has claimed that had it owned the aircraft leased from Toolco in 1959 and 1960 from the date Toolco received them, it would not have incurred actual rental expense aggregating $7.8 million in 1959 and $16.4 million in 1960. These rental charges were historically incurred by TWA and were taken from Form 41 reports filed with the Civil Aeronautics Board (CAB) (TWA Ex. 4(c)(1), p. 9). Assuming ownership, TWA's

accounting expert, Biegler of Price Waterhouse, estimated that depreciation on these nineteen aircraft during the actual lease period would be $4.4 million in 1959 and $8.5 million in 1960. (TWA Ex. 7(d)). By subtracting these depreciation estimates from actual rentals Wemple of Coverdale computed a "Total Improvement in Gain From Operations" amounting to $3.4 million in 1959 and $7.9 million in 1960. In addition, Price Waterhouse estimated a further improvement in gain from operations in the amount of $1.4 million, representing a reduction in depreciation and amortization expense for TWA on a reconstructed basis during 1961-1963 if the aircraft were owned rather than leased ($1.0 million in 1961, $0.1 million in 1962 and $0.3 million in 1963 (TWA Ex. 7(d)). The total improvement in operating profits over the period 1959-1963 before provision for the cost of funds necessary to achieve earlier ownership would then aggregate $12.7 million. (Plaintiff's Brief, pp. 221-222).

The cross-examination of Wemple of Coverdale presented the following points:

¶ The leases from Toolco to TWA were approved by the CAB. (Tr. 5040).

¶ Coverdale did not inquire into the question whether TWA should have owned rather than leased aircraft in 1959 and 1960. (Tr. 5047).

¶ No inquiry was made as to whether TWA was in the financial condition to buy the airplanes in 1959 and 1960. (Tr. 5048).

¶ In measuring the difference between owning and leasing insofar as it affects operating expenses cost of capital would not be considered but it would normally be considered in a feasibility analysis of the entire project. (Tr. 5053).

The Cost of Capital—The cost of funds that would be necessary to pay for the ownership of the aircraft which historically were leased is reflected in the Price Waterhouse Report (TWA Ex. 7(b) 2, VI, B) in the form of interest cost. Plaintiff's Brief states the following position:

> "This cost of the borrowed money which reconstructed TWA needed to buy the Boeing jets instead of leasing them appears in the reconstructed financial statements prepared by Price Waterhouse & Co., as part of a total provision for all of TWA's financial needs, including, for example, CV-880s as well as Boeings. It is possible, if desired, to allocate a portion of TWA's cost of borrowed money to the acquisition of these jets so as to derive a separate net damage figure for the effects of the wrongful acts alleged in paragraph 20 of the complaint. As indicated in TWA Ex. 314, as of December 31, 1960, reconstructed TWA's weighted average interest rate on outstanding debt was 4.75%, and that is plainly the cost of money properly applicable to buying the leased jets. Applying this interest rate to Simat's average net book value figures for the leased jets for 1959 and 1960 [DX 271A, pp. IX-B-3-4], TWA's 1959 cost of money to buy the leased jets would have been $2.4 million in 1959 ($51.3 million x 4.75%) and $3.4 million in 1960 ($72.1 million x 4.75%). Reconstructed TWA's cost of capital to own the leased jets during 1959 and 1960 would thus have been $5.8 million,* not the $12.6 million calculated by Simat, and on this basis, TWA's net losses from not being allowed to buy the leased jets, stated separately, would aggregate $6.9 million (before trebling)." (Plaintiff's Brief, pp. 226-227)

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*"It must be emphasized that this interest expense is already reflected in the Price Waterhouse & Co. Report as part of the interest which would have been paid by reconstructed TWA. It is not an additional deduction from TWA's claim of $104.5 million, before trebling."

TWA's basic contention is that the only cost of capital which can be considered in antitrust cases is interest on borrowed money. They cite *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 377 F. 2d 776 (3rd Cir. 1967), *rev'd on other grounds*, 88 S. Ct. 2224 (1968), as authority for this position.

Defendants' Answer

The Defendants' Brief asserts that TWA has not presented any evidence in support of its leasing claim other than the computation of Coverdale. Defendants further state that the plaintiff:

> " . . . relies solely on paragraph 20 of the complaint, the allegations of which purport to set forth a violation of section 3 of the Clayton Act. (Pl. Memo., p. 220) Apart from the legal and factual defects of the section 3 charge, nothing in paragraph 20 provides a foundation for the claim that plaintiff was injured by being required to lease aircraft rather than own them. (See pp. 17-18, 103-04 *supra*) There is no claim and no evidence that the rentals were excessive.* Indeed, all of the leases received CAB approval. (CAB Orders E-13542, E-13873, E-14169, E-14504, E-14877)." (Defendants' Brief, pp. 292-293)

* "The rentals were no higher in relation to the value of the aircraft than those paid by plaintiff's post-1960 management to Boeing for the four 720Bs, also a short-term lease which included installed engines. The rental rate for the 720Bs of $80,000 a month per plane is equivalent to a daily rate of $2,630, compared with the daily rates of $2,500 for the B-131s and $2,940 for the B-331s. (TWA C & C-4(2) for qtrs. ended March 31, 1960 and December 31, 1961) In each case the daily rate amounts to 0.05% of the value placed by plaintiff on the leased aircraft ($5.1 million each for the 720Bs, $4.6 million each for the B-131s and $5.8 million each for the B-331s)." (*Ibid.*)

In an effort to support the propriety of the lease arrangements, the defendants introduced the report of Simat.

Simat testified that the leasing of flight equipment is a common practice among U. S. airlines and that during the period 1955-1963 eleven different trunklines and Pan American leased flight equipment for their scheduled operations at rentals in excess of $100,000 per year in at least one year, and in some cases in each year, of the period. Simat stressed that the leasing of equipment can, in many instances, reduce the overall costs of the airlines, including the cost of capital, by substituting the credit of the lessor for the credit of the lessee. (Simat Report, DX 271A, Vol. 1, IX and Exhibit IX-A).

Woodfin of Loeb, Rhoades, defendants' financial expert, disputed Drexel Harriman Ripley's contention that an airline should own rather than lease its equipment.

> "The relevance to his report of Mr. Morehouse's second principle, that an airline should own rather than lease its equipment, escapes us. We know of no such general principle. A decision as between ownership and leasing must depend upon the facts of each particular situation and requires not only a comparison of the relative costs, including the cost of capital, but also a determination of a company's needs and objectives. We do not attempt to set forth here the reasons why an airline might choose to lease rather than own equipment, but note that leasing of aircraft took place during the 1955-1960 period and remains a fairly common practice in the airline industry today." (Loeb, Rhoades Report, DX 270, Part II, p. 13).

Loeb, Rhoades' representative, Woodfin, was cross-examined on the firm's opinion of this matter and the following points were developed:

¶ Generally, the airlines own their airplanes. Tax considerations dominate the decision to lease. Today, there are a great number of airlines that don't own their airplanes because of tax benefits derived from leasing. (Tr. 7100)

¶ There would not be much concern if a lessor who owned 75 per cent of an airline was leasing planes to the airline on a day-to-day basis because the lessor would be principally interested in keeping the planes in use producing income. (Tr. 7104A-7106)

¶ It would not be of material concern that every jet aircraft that TWA had in 1959 was leased, and that they were all subject to mortgages taken out by Toolco. (Tr. 7106)

¶ Woodfin would not dispute the following view of his partner, Kenrick Gillespie, which was expressed in an advisory letter dated June 8, 1959. (TWA Ex. 258, p. 2):

> "The cost of the overall jet program will run well in excess of $300 million, and permanent financing has not yet been crystallized. The commitment for purchase of the jets was made by the parent, Hughes Tool, and to date the planes are being leased to TWA on a month-to-month basis. This is an interim and unsatisfactory arrangement. We believe that a solution to this problem is imminent and will involve ownership of the aircraft by TWA and permanent financing of a satisfactory nature." (Tr. 7111-7112)

Cost of Capital Defense—The defendants persistently challenged TWA's proof of damages on the leasing claim on the basis that an improper provision was made for the cost of funds necessary to purchase the aircraft. In their

brief defendants argue that TWA's imputation of a debt expense of owning these aircraft as reflected in the overall cost of the financial program designed by Drexel Harriman Ripley is not a sufficient showing of cost.

Instead of using merely debt expense as a cost of capital for the leased aircraft the defendants assert that an overall cost of capital including the cost of equity as well as debt expense should be employed.* Evidence on this point was presented by defendants' witness, Simat, who adopted the cost of capital applicable to TWA which had been established at 10.25% by the CAB for rate-making purposes (Simat Report, DX 271A, IX-6).

Simat computed the average additional investment in the nineteen leased aircraft after depreciation and multiplied this figure by 10.25%. His findings were as follows:

> " • • • if they had been owned during 1959 instead of leased [the average additional investment], would have been $51.3 million greater than historical TWA. With a cost of capital at 10.25%, this would have cost $5.2 million for 1959. Similarly, the average additional investment in the B-131 and B-331 aircraft after depreciation, if they had been owned during 1960 instead of leased, would have been $72.1 million greater than historical TWA. Applying the 10.25% cost of capital, this would have cost $7.4 million for 1960 (Simat Report, DX 271A, IX-7).

Simat concluded that if TWA had owned the fifteen B-131s and the four B-331s instead of leasing them in 1959 and 1960, the costs of ownership (depreciation, amor-

* The concept of "cost of capital" as used by defendants was defined by the District Court in the *Hanover Shoe* case as:

"the rate of return expected by investors on capital funds they place at • • • [a concern's] disposal." (245 F. Supp. at 289-290)

tization and capital) would have exceeded the costs of leasing (rentals paid) by $1.3 million. (Simat Report, DX 271A, IX-8).

The defendants also contend that *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.* should not be interpreted to exclude the cost of equity capital from the computation of antitrust damages in all cases. Defendants' Brief cites several alleged grounds of distinction that exist in this case. Defendants argue that while the Circuit Court characterized the concept of cost of capital as a novel one which had not yet reached the point of general acceptance among economists, and the measurement of which was vague and not susceptible of general agreement, that there are no such questions about the concept in the regulated airline industry.

> "[cost of capital] has long been a topic for concern and investigation by the CAB, which must ensure that subsidies and passenger fare levels are adequate to cover all the capital costs of an airline, both debt and equity (DX 271A, pp. IX-5-6) . . . Nor is the measurement vague. After extensive hearings in the General Passenger Fare Investigation, Dkt. 8008 32 C.A.B. 291 (1960), the CAB found the cost of capital for the 'Big Four' domestic trunks, which includes TWA, to be 10.25%. (Id. at IX-6). The figure is susceptible of general agreement. Plaintiff's financial expert, Morehouse, testified that he would accept the cost of capital established by the CAB in determining the costs of ownership" (Tr. 4015-17) (Defendants' Brief, p. 277).

Defendants' counsel raise a further alleged distinction.

> "The most important distinction from *Hanover* is the finding in that case by the District Court that Han-

over at all times had sufficient capital to purchase the machinery in question and that, if additional capital had been needed, it would not have raised equity capital but borrowed the necessary funds at an interest rate of 2.5%. 245 F. Supp. 258, 289-92, 299. This finding, affirmed by the Circuit Court, was the sole ground upon which the Supreme Court decided this issue in favor of Hanover. (36 U.S.L. Week at 4649) It did not decide or intimate that the overall cost of capital should under no circumstances be deductible in antitrust cases. The circumstances here are the opposite of those in Hanover. Plaintiff charges that it did not have enough equity, and Morehouse's reconstructed financing provides for the issuance of common stock and convertible debentures. A composite cost of equity and debt is therefore apt for TWA." (Defendants' Brief, p. 278).

The cross-examination of Simat yielded the following pertinent points:

¶ The 10.25 per cent figure is a figure which the CAB concluded was a reasonable figure for the cost of capital of a major airline such as TWA. It includes not only the cost of debt securities but also the cost of equity securities which are no less a cost to the company than the cost of debt. (Tr. 8820).

¶ The Price Waterhouse Report does not cover the full cost of capital, i.e., it covers only that portion of the cost of capital which is represented by the cost of debt financing. (Tr. 8825).

¶ If a business achieves a return in the course of its operations sufficient to meet its cost of capital that portion of the return which relates to the return on equity would appear in the income statement as net earnings or profits. (Tr. 8827).

¶ The cost of equity is actually an estimate of the return on investment which investors must be able to expect from a company's future operations but it is no more an estimate than depreciation expense, and the expired costs of any other assets of the company which are only partially consumed during the period. (Tr. 8832).

Determination of Damages

The allegations of the complaint set forth above (pages 168 and 169) are taken to be "well pleaded." As a result of their default, defendants are found to have admitted each of the allegations included in the paragraphs of the complaint dealing with aircraft leases during the period 1959 through 1960.

The defendants have argued that the principal paragraph in the complaint relative to the leasing claim (par. 20) does not specify any injury as a result of Toolco leasing aircraft to TWA rather than TWA owning these same aircraft. Indeed, the defendants stress that there is no claim that the rents were excessive and that all of the leases received CAB approval. (Defendants' Brief p. 292-293) A reading of paragraph 20 without the other related allegations of the complaint would support this contention. It appears that the singular thrust of the paragraph goes toward the claim that the 1959-1960 leases did not provide a sufficient number of aircraft for TWA's needs and that the provisions of the lease agreements prohibited TWA from buying *or leasing* other jet aircraft from another potential supplier. This aspect of TWA's overall claim is the subject of Section I above, and has been decided in favor of TWA. I am not, however, persuaded that the inquiry under this Section II into the question of damages as a result of these leases should be arrested on the basis of the silence within paragraph 20. I find that

other general allegations in the complaint specify enough grounds of injury to base my findings in this portion of the claim on an evaluation of all the evidence presented rather than on an omission in a specific allegation. For instance, it would appear that the above quoted paragraph 10 subsection (h) would be sufficient to cover damages resulting from leasing rather than owning the aircraft.

TWA's financial expert, Morehouse of Drexel Harriman Ripley, believed that it was a "fundamental principle" for airlines to own rather than lease their flight equipment. The ability to control primary income producing property was cited as of paramount importance. The defendants' expert, Woodfin of Loeb, Rhoades, disputed the Drexel Harriman Ripley proposition as a general principle and cited that leasing of aircraft was a fairly common practice in the airline industry from 1955 onward. (Loeb, Rhoades Report DX 270, Part II, p. 13). However, in cross-examination on the question of the Toolco-TWA leases, Woodfin stated that he would not dispute the view of his partner, Gillespie, that the 1959-1960 leases were an interim and unsatisfactory arrangement. (Tr. 7111-7112)

The defendants' expert, Simat, gave additional testimony that the leasing of aircraft was common among airlines from 1955-1963; however, no evidence was presented that other airlines leased all their jets during 1959-1960 or that flight equipment rentals of any one airline approximated the $24.2 million spent by TWA during those years for jets.

There was indication that United Air Lines took some advantage of the investment credit by leasing aircraft through commercial banks but this tax advantage was unavailable in 1959 and 1960. (Tr. 3997, 4020-1). There was no evidence presented that aircraft manufacturers had sufficient financial resources and were willing to lease, or as to the existence of a third party financier who was

ready, willing and able to act as lessor to TWA during the period. I have also noticed that as of December 31, 1960 that of 2,036 aircraft operated by certificated route air carriers in system operations, 1,919 were owned and 117 were leased (Civil Aeronautics Board, Handbook of Airline Statistics, 1961 edition, PI-1).

In view of the paucity of evidence showing that the lease arrangements were superior to ownership, or that TWA was unwilling or incapable of purchasing jets during 1959-1960, I am persuaded, that absent Toolco's control, that TWA would have purchased the 15 B-131 and 4 B-331 aircraft directly from Boeing.

Given this determination, the question of damages from leasing rather than owning centers on the calculation of damages presented in evidence by TWA's expert, Wemple of Coverdale.

As indicated above the calculation was based on two factors: (1) the historical rental payments on the jet aircraft from TWA to Toolco; and (2) a computation of the appropriate depreciation and amortization applicable to the leased jets. Defendants have not disputed the accuracy of the rental payments used in the calculation and no material challenge was made to the determination of depreciation and amortization constructed by Price Waterhouse and testified to by their representative, Biegler (Tr. 6327-6343). I therefore accept the figure of $12.7 million as the extra costs incurred by TWA by reason of its being forced to lease rather than own the nineteen jet aircraft, but this amount is before the necessary deduction of the cost of funds required for their purchase.

The defendants have urged that the computation of the difference between leasing and owning flight equipment must include an additional deduction of the cost of ownership or "cost of capital." The foundation of this "cost of

capital defense" rests on including as part of the cost of capital an appropriate cost attributable to the cost of equity. Using as their overall cost of capital the rate of 10.25% which had been established by the CAB for rate-making purposes the defendants claim that it would be more expensive to own than lease.

TWA and its counsel have not objected to Simat's formula for computing financial differences between leasing and owning. In fact TWA's counsel adopts Simat's figures for "average additional investment" in computing their own leasing claim separately from their general operating claim. (Plaintiff's Brief, p. 227). However, TWA has vigorously disputed Simat's use of a cost of capital which includes a cost of equity rather than its own estimate of cost of capital which is solely limited to its reconstructed borrowing rate, i.e., 4.75%. TWA's counsel also argues that the recent case of *Hanover Shoe Inc.* v. *United Shoe Machinery Corp.*, 377 F. 2d 776 (3rd Cir. 1967) *rev'd on other grounds* 88 S. Ct. 2224 (1968) is dispositive on the question of excluding a cost of equity in the computation of damages in antitrust cases. Despite defendants, attempt to distinguish *Hanover* from the facts of this case I find the following language to be a clear statement favoring TWA's position:

> "United contends that Hanover's so-called cost of capital should have been treated as an element of the cost of acquiring the machinery. The court below disallowed this item, which was defined as 'the rate of return expected by investors on capital funds they place at * * * [a concern's] disposal,' after hearing the conflicting testimony of expert economists called by each party. It found that 'cost of capital' is an economic concept which allows a company to decide if a certain investment is sound by computing the rate of return which will be required on that investment to jus-

tify expending funds on it rather than in an alternative investment, and that it is measured in terms of percentage of earnings per share of common stock to price per share, and of percentage of net profits after taxes to stockholders' equity. It also found that the measurement of cost of capital was vague and not susceptible of general agreement in its application and that in any event it was not a proper element in the calculation of damages but was only a guide to investment.

"The novel concept which United sought to have approved has not yet reached the point of general acceptance even among economists. We agree with the court below that cost of capital is not sufficiently related to actual costs to be included in an antitrust damage calculation." (377 F. 2d at 791-92)

The U. S. Supreme Court has expressed agreement with this finding. 88 S. Ct. 2224, 2237 (1968).

Accordingly, I do not accept the defendants' figure for the cost of capital as computed by Simat since it is an inappropriate measure of the cost of ownership. I am persuaded that the correct external cost of capital is the appropriate borrowing rate for TWA during the period in question. However, since I have not accepted TWA's reconstructed financial plan which is considered in Section III hereof, the rate which TWA asserts (4.75 per cent) must also be rejected. In Section I pages 147 to 167 of this report I have discussed the problem of adjusting the overall interest cost that must be deducted from the total "loss" in operating profits that I have awarded as a fair measure of damages. There it was determined that an appropriate rate to apply to the purchase of Boeing aircraft would be 6 per cent. Adopting the figures of average additional investment for the nineteen jet aircraft during 1959 and 1960 upon which both parties agree, I have determined

that on a separate basis TWA's damages would amount to $5.3 million as set forth below:

Determination of Separate Net Damage Resulting From Leasing Rather Than Owning Jet Aircraft

Year	(1) Average Additional Investment in Jets (Net Book Value)	(2) Assumed Interest Rate on Borrowed Funds	(3) Cost of Capital to Own Jets (1) x (2)
1959	$51.3 million[1]	6%	$3.1 million
1960	$72.1 million[1]	6%	4.3 million
Total			7.4 million

	($ millions)	
TOTAL RENTALS JET AIRCRAFT 1959-1960	24.2	
Add		
HISTORICAL INCREASE IN DEPRECIATION AND AMORTIZATION COSTS IN 1961-1963 OVER RECONSTRUCTED COSTS[2]	1.4	
		25.6
Less		
DEPRECIATION AND AMORTIZATION 1959-1960	(12.9)	
COST OF CAPITAL—(3) above	(7.4)	
		(20.3)
TOTAL NET LOSS BY REASON OF LEASING RATHER THAN OWNING		$5.3

[1] Simat Report, Dx 271A IX-B-3-4.
[2] Price Waterhouse Report, TWA Ex. 7(d).

III.

Losses connected with financing the jets.

The following allegations of the complaint underlie the claims considered in this Section III.

> "7. The trade and commerce involved in this action concerns:
>
> * * * * *
>
> "(f) The financing in interstate commerce of the United States of the acquisition by sale, lease or other means of aircraft for use by TWA in air transportation in interstate and foreign commerce of the United States."

Paragraph 9 of the complaint alleges that defendants and others engaged in a combination and conspiracy to restrain interstate and foreign commerce in violation of Sections 1 and 2 of the Sherman Act and Sections 3 and 7 of the Clayton Act.

Paragraph 10 of the complaint alleges, in part, as follows:

> "10. Each act of the defendants and Atlas hereinafter alleged was done in furtherance of the offenses charged in the preceding paragraph and was a part thereof and was done with the primary purpose of restraining and monopolizing the trade and commerce described above. It was the intent of the defendants and Atlas, inter alia:
>
> * * * * *
>
> "(g) That defendants would supply TWA with the aircraft essential to its business only on the condition that TWA would accept such financing arrangements relating to the aircraft as the defendants dictated, and in turn that defendants would allow

TWA to procure financing essential for the acquisition of the aircraft it needed only on the condition that TWA would accept such aircraft as the defendants dictated; and"

• • • • •

The allegations with respect to equity financing are set forth in paragraph 23 of the complaint. The allegations with respect to debt financing are set forth in paragraphs 24 through 28, inclusive, and paragraph 52(c) and (d) of the complaint and are more fully discussed hereafter.

The Proof of Damages

In proof of damages, TWA offered as direct expert testimony the report of Drexel Harriman Ripley, a firm of investment bankers with experience during the 1955-1960 period under consideration, in the financing of airlines and manufacturers of aircraft and jet equipment. Drexel Harriman Ripley "reconstructed" on the basis of certain assumptions given them by TWA's counsel, the TWA financial structure so as to provide what, in their opinion, would be adequate financing for a 63-plane jet fleet and in doing so made the central assumption that beginning in 1955, TWA's management was free to do what was best for TWA. Drexel Harriman Ripley assumed "neither that there was nor that there wasn't" a majority stockholder of TWA such as Toolco. (Tr. 3933)

In their report, Drexel Harriman Ripley stated:

"This report is written in response to the request of Cahill, Gordon, Reindel & Ohl that we give our opinion as to whether Trans World Airlines, Inc., if it had been under an independent and competent management not influenced by any consideration other than the prudent conduct of its operating and financial affairs, during the 1955-1960 period, could have fi-

nanced its projected capital requirements for those years, including specifically the purchase of 15 Boeing 707-131s, 18 Boeing 707-331s, 30 Convair 880s, and all the piston aircraft which were purchased by it and delivered during the foregoing period; and, if so, that we describe the methods by which, in our opinion, such capital requirements should have been financed.

"We have been advised, and assume for purposes of this report, that if Trans World Airlines had been adequately financed the 33 Boeing aircraft could and would have been ordered by an independent and competent management in the fall of 1955 for delivery in 1959 and 1960, and that the 30 Convair aircraft could and would have been ordered by such management in 1956 for delivery in 1960." (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 1)

• • • • •

"We are assuming for the purposes of this report that we were engaged by Trans World Airlines as its investment bankers throughout the 1955-1960 period, and that we were thus in intimate and frequent contact with the management and had access to all current information and data having a bearing on finance." (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 3)

• • • • •

"We have designed the foregoing financing program* on the basis of projected and reconstructed capital expenditures prepared by Price Waterhouse & Co.; on the basis of reconstructed financial statements prepared by Price Waterhouse & Co.; and on the basis of forecasts of funds generated prepared by Coverdale & Colpitts. And we have used various statements of figures furnished to us by Trans World Airlines pertaining to historical balance sheets, income

* Described below on page 190 of this report.

accounts, and certain other historical financial data." (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 2)

Drexel Harriman Ripley also considered such other historical data as general financial information about the economy, the airline industry and the stock market.

The Drexel Harriman Ripley Report asserted that there are certain fundamental principles which should govern prudent management of a major airline in arranging its corporate financing, as follows:

"We have consistently maintained that the fundamental principles which should be followed in airline finance, throughout the 1955-1960 period under review, are as follows:

The airline should get, or endeavor to get, its equity or junior capital prior to or simultaneously with getting its senior borrowed capital.

The airline should own its own equipment rather than lease it from other parties.

* * * * *

Contractual commitments for capital expenditures should be prepared for reasonably in advance of the time they are to become due. By this we mean that the airline should plan and arrange its financing program so as to have sufficient liquid capital and/or credit standing to afford reasonable expectation of obtaining the funds required to meet its forward commitments." (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, pp. 4-5)

In determining TWA's financial requirements and whether it had sufficient equity capital and credit standing to fulfill these financial requirements, Drexel Harriman Ripley accepted the assumptions given it by TWA's counsel, as described above, and proceeded to reconstruct the

financial condition and results of operations of TWA for the 1955-1960 period. In effecting the reconstruction, Drexel Harriman Ripley made adjustments in the historical figures principally to reflect the acquisition and financing of jet aircraft and their operation subsequent to 1958. Timely delivery of jet aircraft was assumed. Drexel Harriman Ripley relied upon a reconstruction of income (loss) and a projected capital expenditure program for 1955-1960 which had been prepared by Price Waterhouse and also gave consideration to projections of cash flow made by Coverdale. (See IV. "Premises and Assumptions," Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 5.)

Based on the foregoing considerations, Drexel Harriman Ripley summarized their opinion as follows:

> "In our opinion Trans World Airlines could have financed, and if we had been advising it during the 1955-1960 period we would have advised it to finance, the acquisition of the foregoing aircraft and its other capital expenditures by means of the following program, which will be more fully described hereinafter, in addition to the estimated internally generated funds." (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 1)

The financing program recommended was composed of four separate elements, summarized in Plaintiff's Brief as follows:

> "(i) An underwritten common stock issue in May 1955 offered preemptively on a share-for-share basis at $17.50 per share to provide net proceeds of $55.5 million.
>
> "(ii) A private placement long-term loan commitment with institutional investors in October 1955 for

$150 million minimum—$170 million maximum at 4% interest.

"(iii) An underwritten non-preemptive offering in May 1959 of $60 million of 5% subordinated debentures, convertible into common stock.

"(iv) A private placement long-term loan commitment with institutional investors in May 1959 for $90 million minimum—$110 million maximum at 6% interest." (Plaintiff's Brief, pp. 60-61)

TWA claims that by reason of Toolco's preventing TWA management from adopting and following the above financing program, that TWA has been damaged to the extent of $97.8 million, of which $36.9 million ($12.3 million before trebling) is attributable to Toolco's interference with TWA's equity financing, and $60.9 million ($20.3 million before trebling) is attributable to defendants' refusal to permit TWA to arrange debt financing as TWA claims was done by other airlines when the prevailing cost of money was lower.

Plaintiff's Brief states in respect of its claim of $12.3 million in damages (before trebling) attributable to Toolco's interference with the equity financing:

"TWA is claiming $12.3 million in damages (before trebling) for the wrongful acts of defendants set forth in paragraph 23.

"This damage is measured by the difference between:

"(i) the net proceeds from a 1-for-1 common stock offering which TWA was forced to make in 1957, when the market price for TWA stock was at one of its lowest points historically and TWA's financial condition was very shaky, so as to enable Toolco to increase its equity interest in TWA, and

"(ii) the net proceeds of a 1-for-1 common stock financing which Drexel Harriman Ripley would have recommended be made by TWA in the spring of 1955 (assuming they were advising TWA in 1955), when the market for stock was far more favorable for a successful equity financing, when TWA's prospects even in the opinion of Toolco's expert witness were rosy, when TWA should have been preparing for the needs of the jet age, and when TWA had already for many years (as set forth in the complaint) been starved of equity." (Plaintiff's Brief, p. 69)

Plaintiff's Brief states in respect of a claim of $20.3 million in damages (before trebling), attributable to defendants' refusal to permit TWA to arrange debt financing:

"TWA is making a separate claim of $20.3 million (before trebling) for the wrongful acts of defendants set forth in the foregoing paragraphs.

"This separate claim is based upon the difference between:

"(i) The present value (*i.e.*, the present equivalent of the future burden) of future payments for debt service on TWA's long-term debt historically outstanding on December 31, 1963, and

"(ii) The present value (i.e., the present equivalent of the future burden) of future payments for debt service on long-term debt for reconstructed TWA as of December 31, 1963 with a debt structure of the kind and in the amounts recommended by Drexel Harriman Ripley." (Plaintiff's Brief, p. 120)

In answer to TWA's claim for damages, defendants introduced as direct testimony the Report of Loeb, Rhoades (DX 270) in which its conclusions are stated, as follows:

"The equity financing plan suggested by DHR in the Morehouse testimony as of the Spring of 1955 would have been a plan so contrary to the best interests of TWA and its stockholders that it would not have been accepted or implemented by prudent and competent officers and directors of that company.

"We would not have recommended to TWA or to its stockholders that TWA engage in Mr. Morehouse's proposed equity financing in the Spring of 1955. It could not have been accomplished without Toolco actively participating by subscribing to its proportionate share of the proposed equity offering, and it would not have been in the best interests of TWA's stockholders for Toolco to have done so at that time.

"Our opinion that TWA would have rejected Mr. Morehouse's 1955 equity financing plan is the same on the assumptions that TWA could not or would not have looked to Toolco for assistance in such a financing, or that TWA was widely held with no controlling stockholder.

"Lastly, TWA without the assistance of Toolco, could not have financed the so-called 'reconstructed' capital requirements of $544.8 million during the period October 1955 through December 1960, on any reasonable basis." (Loeb, Rhoades Report, DX 270, Part II, p. 3)

I have concluded that the investment banking firms of Drexel Harriman Ripley, and Loeb, Rhoades and the witnesses who participated in the preparation of their direct testimony and who submitted to cross-examination with respect thereto are well qualified as experts competent to give testimony as to TWA's financial affairs in the 1955-1960 period. The direct testimony of each discloses a thoroughness of preparation and a familiarity with the subject. The cross-examination of the witnesses was extensive

and searching and most helpful in considering the issue of damages.

The Equity Financing

This Report will consider first the evidence with respect to damages introduced in connection with equity financing.

Paragraph 23 of the complaint alleges as follows:

> "23. Subsequent to the acquisition of stock by Toolco in TWA, defendants for reasons of self-interest continuously refused to allow equity financing by TWA except on condition that, as a result of any such financing, Toolco would be enabled to increase its equity position in TWA and instead caused TWA to obtain funds chiefly by means of debt financing. TWA was thus rendered unable to seek the financing it needed for the acquisition of aircraft except upon the approval of defendants. The purpose of the defendants in rendering TWA dependent upon them for such assistance in financing as defendants might choose to provide, and the effects thereof, were, among other things,
>
> "(a) to create and maintain control in the defendants of the business of financing the purchase of aircraft for use by TWA, and
>
> "(b) to strengthen defendants' control over the acquisition of aircraft by TWA."

The Drexel Harriman Ripley Report and Morehouse Testimony Relating to Equity Financing

Drexel Harriman Ripley states that TWA should have known early in 1955 that the jet age was imminent and that provisions must be made for funding substantial capi-

tal expenditures (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, pp. 6 and 10).

The circumstances of the airline industry in early 1955, as seen by Drexel Harriman Ripley, is stated in their report as follows:

> "Prior to 1955, the major airlines had experienced five years of good earnings with the trend generally upward. In early 1955 it was generally recognized that the jet age was coming and that large amounts of additional capital from outside sources would be required to acquire jet aircraft and other facilities. However, there were wide differences of opinion as to the type of jet aircraft which would be preponderant. One school of thought favored the 'straight jet'; another favored the gas turbine driven propeller type, generally referred to as the 'prop-jet' or 'turbo-prop'. None of the airlines, so far as we know, could at that time estimate with any degree of certainty just how much additional capital would be required. But it was generally recognized that the amounts would be very large." (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 6)

The Drexel Harriman Ripley Report cites the annual reports of commercial aircraft manufacturers as evidence of the awareness of the airline industry in early 1955 that the advent of the jet age was imminent, but, only the Annual Report of the Boeing Company for the calendar year 1954 (DX 187), which was issued on March 7, 1955, can be helpful in understanding the airline industry's thinking in early 1955. Referring to the Boeing 1954 Annual Report, the Drexel Harriman Ripley Report states:

> "*Boeing*: In its 1954 annual report, published in the early part of 1955, Boeing refers to its B-47 (a jet bomber) as being 'well established' in the military

> service, and states that considerable active interest had developed among airline operators in a commercial application of its jet prototype tanker-transport." (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 7)

Drexel Harriman Ripley also cited the Annual Reports for 1953 and 1954 of National Aviation Corporation, a closed-end investment trust which concentrates its investments in the airline and aircraft manufacturing industries, as follows:

> "*National Aviation 1953 Report*: This report states categorically that it was all but a certainty that the (then) piston-engined newcomers (presumably the DC-7 and the Lockheed Super Constellation) were the last of their kind for mass travel by air, the reason being that the few companies concerned with commercial transport were all working on jets.
>
> "*National Aviation 1954 Report*: This report refers to the British invasion of the U. S. domestic airline market with the Vickers Viscount turbo-prop. And it states that the new 'shape of things to come in 1955-58 is in ferment * * * *.'" (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 8)

Capital Expenditure Requirements in the Jet Age

The Drexel Harriman Ripley Report asserts that in early 1955 TWA could have formed an opinion as to its capital expenditure requirements in the jet age. It stated:

> "We doubt that in early 1955 the TWA management could make an accurate estimate of its forward capital expenditure program. But it seems reasonable to presume that the management would have at that

time estimated the six-year total at over $300 million, and probably nearer to $400 million." (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 10).

Shortage of Equity Capital

Drexel Harriman Ripley compiled certain statistics which it employed as "yardsticks" for measuring the TWA equity capital in comparison with that of its major competitors (Pan American Airways, American Airlines and United Air Lines). These statistics consisted of (i) Total Operating Revenue; (ii) Net Operating Income; (iii) Net Income Including Capital Gains; (iv) Revenue Airplane Miles Flown; and (v) Available Seat Miles. In addition, Net Operating Income per Revenue Airplane Mile and per Million Available Seat Miles for five years, 1950-1954, and for one year, 1954, were set forth in comparative form (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 11).

Drexel Harriman Ripley applied these "yardsticks" and determined that TWA had a shortage of equity capital. Plaintiff's Brief summarized and stated this matter as follows:

"* * * On the basis of 1954 revenue miles flown and available seat miles, respectively, TWA was 33% to 28% larger than Pan American, 10% to 7% smaller than American, and 9% to 5% smaller than United; using these figures as yardsticks, TWA was short of proprietary capital by from $69 million to $74 million in comparison with Pan American, by from $27 million to $30 million in comparison with American, and by $17 million to $21 million in comparison with United. Using available ton miles as a yardstick, TWA was 12.7% larger than Pan American, 15.6% smaller than American and 13.6% smaller than United, indicating a proprietary capital shortage of $53 mil-

lion when compared to Pan American, $21 million when compared to American and $13 million when compared to United. [Drexel Harriman Ripley Report, Part II, pp. 9-10]" (Plaintiff's Brief, pp. 82-83)

The Drexel Harriman Ripley Report then proceeds to conclude with respect to additional equity required, as follows:

> "In the light of the foregoing, and recognizing that TWA was the only company conducting both U. S. transcontinental and transatlantic operations, we believe that TWA would have been well advised in early 1955 to obtain not less than $50 million of additional proprietary capital. TWA's book net worth at December 31, 1954 was only $67.2 million, a very low amount in relation to the capital expenditure program which it faced in the (then) next few years.
>
> "It is our opinion that we would have advised TWA in early 1955 to raise not less than $50 million of additional equity capital. And that it be raised by an underwritten preemptive offering of common stock." (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 10)

Drexel Harriman Ripley supports its opinion that TWA should and could have raised at least $50 million additional equity capital in 1955 by citing, in addition to TWA's operating results in the 1950-1954 period which compared favorably with its principal competitors, the announcement in March 1955 that TWA's earnings per share in 1954 were double earnings per share for the preceding year 1953, the fact that the general stock market was strong and advancing and that the market for TWA common stock from January 1, 1954 to June 30, 1955 showed a greater percentage advance than the Standard & Poor's Index of Air

Transport Stocks or the Dow Jones Industrial Index, and performed better than its three major competitors.

Drexel Harriman Ripley then concluded:

> "Thus, the market for TWA stock in the first six months of 1955 showed no sign that investors were worried about the TWA losses reported for the first quarter. The seasonal character of TWA's operations and those of other airlines was generally recognized." (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 17)
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> "From the foregoing it will be noted that the market for TWA stock was strong in terms of price and trading volume in early 1955, and that market prices were much above book values." (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 17)

The TWA loss for the first quarter referred to above was a loss of $3,898,000, announced on May 5, 1955 (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 13).

The Drexel Harriman Ripley Report compares the price earnings ratios of TWA with its three major competitors during the period 1950-1955 and notes that TWA was selling at about the same price earnings ratio as United Air Lines, although United Air Lines had a better long-term historical earnings record than TWA and was paying cash dividends whereas TWA was not. During the same period Pan American and American Airlines sold at higher price-earnings ratios. Drexel Harriman Ripley also indicated that in early 1955 the major financial advisory services regarded TWA as an appropriate "hold." (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, pp. 19-20).

The recommendation of the Drexel Harriman Ripley Report with respect to an equity issue by TWA is set forth as follows:

"We would have advised and urged TWA, in the spring of 1955, to put out a major equity issue in the first half of that year. The stock market was strong and its trend was upward. The first half of 1955 was the time for TWA to correct its obviously short proprietary capital position and prepare for the jet age.* We would have recommended that the equity financing be effected in April or May. The regular 1954 year end audit would comply with the SEC rule for listed companies. (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 21)

* In February 1955 General Motors issued and sold $328 million of common stock. Goodyear Tire & Rubber sold $45 million in July.

Cross Examination of Morehouse

There is set forth below certain supplemental information developed in the defendants' extensive cross-examination of Edward J. Morehouse of Drexel Harriman Ripley and certain exhibits admitted in evidence. The information set forth is selected to illuminate the Drexel Harriman Ripley Report. However, I did not confine my consideration solely to the information listed below.

¶ Any change in the timing of the financing (including the equity financing) would affect the amount of damages computed under the Drexel Harriman Ripley approach (Tr. 3892).

¶ If, hypothetically, common stock were offered in October 1955 when the market price of TWA stock was $22 as compared to $31 in May 1955, there could have been an effect on the amount raised and, therefore, an effect on damages (Tr. 3884-3885).

¶ The Boeing Annual Report dated March 7, 1955 (DX 187) contains the following sentence which had been omitted from the Drexel Harriman Ripley Report:

"Our entry into the commercial field is as yet undetermined. We desire such a commercial development, if it can be accomplished on a sound financial basis and without interfering with our military commitments." (Tr. 4109)

¶ The Boeing 707 prototype was flown in July 1954 (Tr. 4120).

¶ On November 19, 1954, William H. Allen, President of Boeing, quoted a price of $4.25 million for the commercial version of the jet tanker (DX 95). On December 21, 1955, Noah Dietrich, then Vice President of Toolco and a director of TWA, wrote to Fred Ayers, Senior Vice President of Toolco and also a director of TWA:

"For several years it has been assumed in the air transport industry that jet aircraft would play a prominent role when their design reached the stage of development as to be commercially feasible. Early this year [1955] TWA engineers and representatives of the Tool Company concluded that the time was ripe to commence negotiations for the design and manufacture of jet airplanes which would suit the peculiar requirements of TWA. Because of the tremendous cost of newly designed jet aircraft it was a foregone conclusion that the Tool Company would have to lend substantial financial assistance to TWA. The exact form and extent of such support being left open, pending final determination as to the requirements and the existing financial capabilities of TWA itself." [DX 46]

¶ The article by Selig Altschul, entitled "Financing Patterns to Change for Jet Transport Acquisitions" appearing in the November 7, 1955 issue of AMERICAN AVIATION (DX 31, p. 27) "is probably a reasonably good

description of the picture as it then existed * * *" (Tr. 3985), but Morehouse disagreed with the following statement as being "too general":

> "'It is important to note that the bulk of financial requirements for the airlines for ordering jets will not come until four years or so from now. This gives them time to work out financing programs.'" (Tr. 3987-3988)

¶ A memorandum from J. P. Ripley of Drexel Harriman Ripley to Berry and Morehouse of the same firm, dated September 23, 1955 (DX 182), summarizing a conference with Curtis Barkes, Financial Vice President of United Air Lines, states:

> "'Barkes said that just off the top of his head he is thinking along the following lines. He is wondering if we could work out a transaction with Metropolitan by the terms of whch [sic] UAL would borrow from the Metropolitan $30,000,000 within the next two or three months and make a commitment to borrow the balance (presumably about $90,000,000) on the condition that UAL sell $30,000,000 of preferred stock. Then UAL could sit down and consider the risks involved in selling the preferred stock right now or waiting until later to sell it. He appreciates the risks involved, but he thinks the market might be better next summer.'" (Tr. 3965)

There is no indication that Ripley asserted the foregoing violated a fundamental principle of Drexel Harriman Ripley or that he was offended by the suggestion of Barkes, contained in DX 182 (Tr. 3967-3968).

¶ The timetable for the hypothetical sale of equity in the spring of 1955, assuming a June 1, 1955 closing and

the retention of Drexel Harriman Ripley by TWA in January 1955 would be (i) two or three weeks to conduct the survey to conclude that TWA required equity financing and to formulate a plan (Tr. 4104); (ii) receipt of approval of recommendations and commencement of work approximately in the middle of March 1955 at the latest (Tr. 4099); and (iii) the filing of a registration statement with the SEC on April 19, 1955, the preparation of which would have commenced as late as a month prior thereto (Tr. 4097), but might take longer so that it might have commenced somewhere between February 19 and the middle of March 1955 (Tr. 4098).

¶ Morehouse expressed doubt that in January 1955 Drexel Harriman Ripley would have known that the Government would on August 1, 1955 give the required consent to Boeing to use Government facilities to manufacture commercial jet aircraft (Tr. 4127).

¶ Drexel Harriman Ripley were instructed to assume that orders for jet aircraft would have been placed in the fall of 1955 and Morehouse stated that:

> "... it is not unreasonable to assume that only a few months earlier than that time they would have had enough information about probable costs and probable needs to have estimated that their capital expenditure program would have been in the order of the numbers we have set down here" (Tr. 4169).

¶ In the spring of 1955, the airline would probably have had enough information to know that its needs were going to be in the order of $300 million to $400 million (Tr. 4171).

¶ Sometime in the second half of 1955, United Air Lines (for whom Drexel Harriman Ripley was then acting as

investment bankers) first came to some conclusion with respect to what its anticipated expenditures might be for jet aircraft (Tr. 4172).

¶ In concluding that TWA was short of equity, Drexel Harriman Ripley compared TWA revenue per seat miles and available ton miles with its competitors, but did not consider that TWA, during 1954 at the time the comparisons were made, had taken the lead in promoting coach travel (Tr. 4157-4158), and that the statistics for one of the competitors, American Airlines, reflected a 24-day pilot strike in 1954 (Tr. 4157). Thus the TWA revenue per seat mile, "a yardstick" used by Drexel Harriman Ripley in developing the shortage in TWA equity, appears higher in relation to its competitors and according to the Drexel Harriman Ripley approach, resulted in a greater shortage of equity (Tr. 4157-4166).

¶ Airline stocks during May and June 1955 "were volatile and investments in them were speculative in nature." (Tr. 4196).

¶ During the period from January 1, 1946 to May 12, 1955 the equity financing of all airlines aggregated $47,272,425 (Tr. 4256), the largest of which was an offer by Braniff of $5,700,000 (Tr. 4257), and TWA accounted for the other three large equity financings, one in 1949 and two in 1952 (Tr. 4256). On July 3, 1945, there was an equity issue of $42,398,000 by Pan American Airways, coupled with stock purchase warrants to purchase an additional $36,800,000 (Tr. 4258) (very few of the stock purchase warrants were exercised because of the sharp drop in the Pan American Airways' stock (Loeb, Rhoades Report, DX 270, Part II, p. 8).

¶ The Drexel Harriman Ripley Report recommended a 1-for-1 rights offering of TWA stock in May 1955, yet Ripley in a letter dated August 25, 1955 (DX 193) in speaking of a prospective rights offer of common stock of United Air Lines admitted that a 1-for-3 rights offering would be very high and that "even one to five is pretty high" (Tr. 4262).

¶ Application of the "yardsticks" to TWA produced a TWA equity shortage ranging from $13 million to $74 million, the upper end of the range being produced by comparison with Pan American Airways, the only one of the comparable competitors flying the transatlantic run. The absolute dollar comparison of capital indicates that the amount of equity shortage would have been fixed in the upper range. (Tr. 4166)

¶ TWA's need for additional equity was "so bad" that in the opinion of Drexel Harriman Ripley TWA should have rushed to the market and raised the equity in May of 1955 rather than at some later date in the summer. (Tr. 4167)

¶ It is not clear from Drexel Harriman Ripley's records that they actually recommended equity financing to United Air Lines in the fall of 1955. The next equity financing of United Air Lines subsequent to the fall of 1955 was in 1960. (Tr. 4307)

The Loeb, Rhodes Report and Woodfin Testimony Relating to Equity Financing

The Loeb, Rhoades Report (DX 270) constitutes the direct testimony of Gene M. Woodfin, a general partner of Loeb, Rhoades, an investment banking firm of New York City.

value which continued below par value for about eight years. The market price of the common stock did not reach the conversion price based on redemption until December 1954. Also cited was the $43.4 million sale of capital stock of Pan American on July 3, 1945 through an underwritten offering of capital stock with stock purchase warrants attached, exercisable at $18 a share. Because of the market decline in 1946 very few of the warrants were exercised (Loeb, Rhoades Report, DX 270, Part II, p. 8 and footnotes). Common stock offerings of domestic trunk airlines during the period from January 1946 to June 1957 were rare and in very small dollar amounts. Of the four major offerings, two were by TWA, one in 1952 for $10.7 million and the other in 1957 for $43.4 million, and each of the four larger offerings were underwritten in whole or in part by a principal shareholder (Loeb, Rhoades Report, DX 270, Part II, p. 9).

"This dearth of equity financing was not by design. The airlines were forced to rely on debt financing during the post-war piston era because airline equities had no investment status and most airlines were simply unable to obtain equity financing. For example, W. C. Barkes, Vice President of Finance and Property for United Airlines, explained United's 1955 debt financing program in testimony before the CAB in 1957 in the General Passenger Fare Investigation as follows (United Ex. U-2, Docket No. 8008, pp. 12-13; attached hereto as Exhibit D):

"'The 1955 financing program for United was handled entirely by arranging for issuance of debt. This was not a matter of choice, for the ability of United, as well as the industry, to sell equity has been limited. That further increase in equity is necessary and desirable is apparent, but it is equally

apparent that it cannot be accomplished satisfactorily until the present period of depressed earnings is brought to an end.'

"In 1955 airline shares were speculative securities and they were not held in quantity by institutional investors." (Loeb, Rhoades Report, DX 270, Part II, pp. 10-11)

As of June 30, 1955, none of the airlines had obtained any financing for jet aircraft and prior thereto had financed their equipment purchases chiefly out of earnings, cash accumulations from fast depreciation and tax amortization certificates and short-term bank credits. Long-term debt was obtained infrequently. The Pan American 25-year $60 million loan from a group of insurance companies in May 1955 was for the purpose of financing the acquisition of piston aircraft. (Loeb, Rhoades Report, DX 270, Part II, pp. 11-12)

The fundamental principles of Drexel Harriman Ripley, summarized on page 189 of this report, were challenged by Loeb, Rhoades, which stated:

"We believe that it is unrealistic to postulate a set of principles to which diverse companies in a growth industry with varying needs and abilities should conform."

• • • • •

"With respect to Mr. Morehouse's first principle, getting equity prior to or simultaneously with senior debt, it is our experience that most companies raise funds through the sale of common equity or convertible securities only when the need therefor is clearly demonstrable. It is common practice for a lending institution to make a commitment to lend senior debt conditioned upon equity or subordinated debt financ-

ing being done prior to or contemporaneous with the later takedown of the senior funds. A well organized financing plan raises equity only when required, not in unknowing anticipation of possible future needs some years away. As we shall show below, the fact of the matter is that historically no major airline followed Mr. Morehouse's first principle. The facts indicate that during the 1955-1960 period none of the airlines sold equity or securities convertible into equity until the latest date possible and then in amounts as minimal as possible. This is reasonable and what one would expect, rather than the converse suggested by Mr. Morehouse's first principle.

"Mr. Morehouse's third principle, that contractual commitments for capital expenditures should be prepared for reasonably in advance of the time they are to become due, is difficult to quarrel with as a general proposition. The statement of the principle, however, totally fails to answer the important questions of timing and amount. No guidelines are given as to how much money should be raised, by what method or what is meant by 'reasonably in advance.'

"In short, we do not believe that a realistic financing program can be devised or reconstructed upon any such a set of principles of airline finance. Instead, a careful analysis of the factual situation existing in the securities markets, the airline industry at large, and the individual company is required." (Loeb, Rhoades Report, DX 270, Part II, pp. 12-14)

Loeb, Rhoades stated that TWA had no need for equity in early 1955 and that it was doubtful that any TWA management would have been persuaded that TWA, in 1955, was short of equity in comparison with the other airlines. Loeb, Rhoades knows of no airline that bases its equity or debt financing upon its relationship to other airlines using

"yardsticks" such as formulated by Morehouse. (Loeb, Rhoades Report, DX 270, Part II, p. 15)

According to Loeb, Rhoades, the results obtained using the "yardsticks" show a variance in the indicated equity shortage from $13 million to $74 million.

> "A widely accepted measurement of the strength of a company's capital structure is its debt-equity ratio. On that basis, TWA with its ratio of 78.4% equity to 21.6% debt (p. 10 Morehouse Report) was in a better financial position than American, United and Eastern and equally as well off as Pan American.
>
> "• • • While it likely was recognized by all of the airlines and by their financial advisers in the forepart of 1955 that, at some time in the future, both additional equity and debt financing would be required by each of them to meet the oncoming jet age, no one could be sure of 'when' or of 'how much.'" (Loeb, Rhoades Report, DX 270, Part II, p. 16)

It was Loeb, Rhoades' opinion that the equity issue proposed by Drexel Harriman Ripley was excessive in amount and that it is unrealistic to state that it could have been sold in the spring of 1955.

> "It is clear that the $58.4 million common stock offering proposed by Mr. Morehouse for the Spring of 1955 would have been of astounding size, exceeding by more than $11 million the sum total of all domestic trunk common stock offerings during the 1946-1955 period.
>
> "• • • To suggest, as Mr. Morehouse does, that TWA or any other domestic trunk airline, could have sold in the Spring of 1955 what was a theretofore unheard of dollar amount of stock is in our opinion utterly unrealistic, unless a financially sound majority stockholder for some reason insisted upon it and

agreed in advance to assure its success." (Loeb, Rhoades Report, DX 270, Part II, pp. 17 and 18)

Loeb, Rhoades thought that the proposed equity financing in May 1955 was premature:

"To have accomplished an offering of $58.4 million of common stock in the Spring of 1955 Mr. Morehouse would have to have made his recommendations to TWA and had them accepted early in 1955.

"It is common knowledge that in early 1955 there were not yet any jet aircraft available for order by TWA or any other airline and that the magnitude of the orders and investment required by the airlines was unknown. We agree with Mr. Morehouse (p. 6) that, while it was generally recognized that the amounts would be very large, none of the airlines could estimate with any degree of certainty just how much additional capital would be required. Certainly no airline management could have foreseen in early 1955, when or in what amounts, funds would be required for the purchase of jet aircraft." (Loeb, Rhoades Report, DX 270, Part II, pp. 18-19)

The first carrier to order jets was Pan American which placed an order in October 1955 for 25 Douglas DC-8s and 20 Boeing 707s, at a cost of $269 million. The $60 million loan arranged May 10, 1955 by Pan American was to finance the acquisition of piston aircraft and to increase working capital. A $30 million loan on December 19, 1956 was to finance the purchase of 9 DC-7s and make advance payments on 23 707s and 21 DC-8s. Pan American had no equity financing until July 29, 1959. American Airlines ordered 30 707s in November 1955 and in the same month placed privately $75 million of 4% notes. The following year on September 1, 1956, American placed privately an

additional $60 million at 4¼% the proceeds of which were added to general funds and were available for the purchase of jet aircraft. American raised no equity until June 15, 1959. United ordered 30 DC-8s at a cost of $175 million in late October 1955 and also ordered 45 piston aircraft. On December 22, 1955, United arranged with three insurance companies to borrow, prior to March 1, 1959, up to $120 million and at the same time arranged a $30 million standby revolving credit with a group of bankers. Two years later, in December 1957, United arranged for another $130 million bank credit. It was not until November 1960 that it sold equity in the form of convertible debentures (Loeb, Rhoades Report, DX 270, Part II, pp. 19 and 20).

Loeb, Rhoades in their Report concluded that:

> "The actions of these airlines clearly indicate that competent management did not raise equity in the mid-1950's as a part of long-range financing for the purchase of jet aircraft." (Loeb, Rhoades Report, DX 270, Part II, p. 20)

Finally Loeb, Rhoades stated that TWA had no use for equity funds in the spring of 1955 since $35 million of the proceeds of the equity issue was to be used to pay off a 15-year 3¾% equipment mortgage which had been arranged with Equitable in December 1954. (Loeb, Rhoades Report, DX 270, Part II, p. 21)

In the opinion of Loeb, Rhoades, the 1-for-1 preemptive offering recommended by Drexel Harriman Ripley is a drastic measure without historical precedent, unless a major stockholder willingly participates. On such an offering, the market price for TWA would drop lower than $17.50 as stated by Drexel Harriman Ripley and even at

$17.50, TWA stockholders would suffer a self-inflicted loss in the aggregate indicated market value of $44,990,000, and a stockholder who did not purchase additional stock would find his holdings diluted in market value by $13.50 per share (Loeb, Rhoades Report, DX 270, Part II, pp. 22-23).

No competent management would approve the dilution of the equity position of its stockholders and reduce stock leverage unless the need is clearly apparent and the circumstances pressing:

> "In our opinion a prudent and competent management would have considered both dilution and leverage in weighing Mr. Morehouse's proposal to raise equity in the Spring of 1955, and would have decided to postpone any equity financing until the need for the money could be more clearly demonstrated. In our view these considerations would have led to the same result whether the shares of the company were widely held by the public or largely held by a majority stockholder.
>
> "The fact that TWA actually did a one-for-one rights offering in 1957 does not change our view. This was not a public offering underwritten by investment bankers. There was a definitive and immediate need for the funds* and the issue was underwritten by Toolco which had agreed to provide TWA with a minimum of $34 million of proceeds, exceeding Toolco's pro rata portion by approximately $2 million. Actually, Toolco subscribed to $35 million or 80.69% of the issue. (DHR Exhibit: Trans World 7)." (Loeb, Rhoades Report, DX 270, Part II, pp. 24-25)

* See Purposes of Issue Section, DHR Exhibit: Trans World 7.

The Report then took up alternative assumptions as to Toolco:

"(i) If we assume that TWA had accepted Mr. Morehouse's recommendation with respect to the $58.4 million equity offering in the Spring of 1955 and that Toolco had agreed to take up its pro rata share of the offering in order to maintain its percentage of ownership, such a financing probably could have been done. It is our opinion, however, that such an expensive, premature and unnecessary financing would have been a bad business decision. We would not have recommended such a financing to TWA management or to the stockholders of TWA in the Spring of 1955. If such a recommendation had been made, it is our opinion that it would not have been accepted by TWA management, by its majority stockholder or by its other stockholders.

"(ii) If Toolco could not have been looked to for participation in the suggested equity offering, it is our opinion that it could not have been accomplished. We would not have participated in such an underwriting and it is our opinion that a syndicate could not have been formed to have underwritten such an offering. We have already discussed the difficulties of accomplishing such a large financing under any circumstances, and we believe the impact on the financial community of a declination by Toolco to subscribe to its share of the offering would have doomed the proposal at the outset. In short, had Toolco declined to participate, Mr. Morehouse's suggested 1955 equity financing in our opinion, could not have been accomplished.

"(iii) It is difficult to comment upon the purely hypothetical question presented by the assumption that there was no Toolco and that TWA was a widely-held company with no controlling stockholder. Such was not the case. Moreover, in view of the assistance TWA received as the result of Toolco's financial backing in the post-war years, it is difficult to assume that TWA, absent Toolco, could have been in as good a financial

condition as it was in historically, in the Spring of 1955. Even indulging in the assumption that it was, it is our opinion that no prudent and competent management with due regard for the interests of its stockholders would have accepted the suggested equity financing plan, and if it had, we do not believe that such an offering could have been underwritten." (Loeb, Rhoades Report, DX 270, Part II, pp. 25-27)

Loeb, Rhoades concluded that Drexel Harriman Ripley's proposal was not "doable" and in relation to the amount of common stock sold by the domestic trunk airlines during the entire 1946-1956 period it was "stupendous."

"• • • if the offering had not been held precisely in the Spring of 1955, the subsequent history of TWA's earnings would have made any later offering even more difficult to consummate. Earnings for the third quarter of 1955 were $4.2 million compared to $7.1 million for that quarter in 1954 and the fourth quarter earnings dropped to $100,000 from $1.3 million the preceding year. (Exhibit F). The years 1956, 1957 and 1958 were all loss years for TWA. (DHR Exhibit: Financials—5). Commencing in June 1955 the stocks of the airline group declined counter to the general market. (DHR Exhibits: General 5 and 7). TWA shares declined from a high of 31⅝ in June to a low of 22¾ in October 1955, and, of course, went much lower thereafter. (DHR Exhibit: Trans World 9). Even accepting Mr. Morehouse's fortuitous selection of late May or early June 1955 for the proposed equity financing, we do not believe it could have been done without the assistance of Toolco. The selection of a somewhat later date would have made the success of any such a proposed financing even more improbable." (Loeb, Rhoades Report, DX 270, Part II, pp. 27-28)

Cross-examination of Woodfin

There is set forth below certain supplementary information developed in the plaintiff's cross-examination during 5½ days of Woodfin, a general partner of Loeb, Rhoades and certain exhibits admitted in evidence. The information set forth below is selected to illuminate the Loeb, Rhoades Report. However, I did not confine my consideration solely to the information listed below.

¶ Woodfin had experience in negotiating the financing of pipelines (Tr. 6762) but prior to 1959, claimed no expertise in airline financing (Tr. 6763).

¶ Woodfin was associated with Loeb, Rhoades when two Seaboard World Airlines' financings were done in 1960 and 1966. Seaboard was exclusively a cargo carrier with a record of operating losses and the financings were effected in part to adjust creditors' claims (Tr. 6767-6771).

¶ Loeb, Rhoades also acted as investment bankers for Northeast Airlines in 1956 and had connections with Capital Airlines (Tr. 6772-6773).

¶ It was not "in the cards" for any independent competent management (forgetting Toolco) to have jumped in and have had a rights offering when they did not need the money in May 1955. (Tr. 6808)

¶ Historically it took a lot of help from Toolco to finance a program substantially less than the $550 million capital program recommended by Drexel Harriman Ripley. Woodfin does not see how TWA could have financed such a substantial program without the help of Toolco. (Tr. 6813)

¶ The fact that in May 1957 TWA sold 3,337,036 shares of common stock for $43,381,486 means that with Toolco cooperation TWA could have sold the common stock in May 1955. (Tr. 6822-6823)

¶ It is significant that at the time of the May 1957 equity issue TWA had a real present need for the funds and sold stock despite the downtrend in earnings commencing in June 1955, which was not arrested until the year 1959. (Tr. 6828)

¶ Loeb, Rhoades would not have advised any financing in 1957 if Toolco was content to make the down payments on equipment acquisitions. As pressure to pay installments mounted, a better case was made for financing. Neither Drexel Harriman Ripley nor Loeb, Rhoades would have done the equity financing in 1957. (Tr. 6840)

¶ The 1957 financing was not intended to cover the jets but to pay for the Lockheed 1649 A and 1049 G aircraft and spare parts. (Tr. 7217-7218)

¶ While American Airlines in May 1955 had a ratio of 78% equity to total capitalization and was in a strong balance sheet position to borrow for the jet program, this in the opinion of Woodfin does not mean that an airline should be so operated. With a high equity ratio earnings available for stockholders are going to be reduced. The CAB encourages a 50% debt ratio which provides leverage beneficial to stockholders. (Tr. 6871-6875)

¶ The growth of the domestic passenger airlines particularly in 1953, 1954 and 1955 was not reflected by enthusiasm on the part of stockholders. Airline stocks were speculative without a broad investment appeal (Tr. 6863) but as of October 27, 1954 Loeb, Rhoades stated in an

investment "informatory" (TWA Ex. 207): "The strength in airlines reflects a widening interest in this group which we have been recommending for some time, believing that finally some of the basic problems are being overcome." (Tr. 6887A)

¶ A Loeb, Rhoades informatory on American Airlines commented that its 80% ratio of equity to total capital puts it in the strongest position of any airline to meet the financial demands of the jet program (Tr. 6875).

¶ In 1954-early 1955 the outlook for commercial jets continued uncertain. Boeing had not received permission from the U. S. Air Force to use the tanker-jet tooling and the Renton, Washington plant to build a commercial version of the tanker-jet, there remained questions about the functioning of jet aircraft in hot weather, noise, and whether the airline industry would decide upon turboprops such as the Electra (Tr. 6889-6892).

¶ Several issues of aviation trade journals in the late summer and early fall of 1954 carried accounts of Boeing's prospects for the manufacture of a commercial jet, its ability to satisfy U. S. Air Force obligations and also meet commercial requirements and the estimate that the capital requirements of the commercial airline industry would range between $1.5 billion to $3 billion over the next 10 years. (Tr. 6900-6907).

¶ On November 19, 1954 Allen, President of Boeing, wrote Damon, President of TWA, with a carbon copy to Hughes (DX 95A), stating that the time had arrived to negotiate with the airlines for a commercial ship but pointing out that before actual construction can begin, Boeing must obtain from the Air Force permission to use the tool-

ing designed and constructed for the Air Force contract and also permission to use a portion of the Government-owned plant at Renton, Washington. To assist in negotiating with the Government, Boeing suggested a "production type contract", which would become binding upon both parties on receipt of notice given by Boeing if the final price is within the maximum price and the delivery schedule is as favorable and the aircraft specifications are substantially the same as set forth in the production notice contract. The indicated sales price was in the neighborhood of $4,250,000 per aircraft assuming a quantity of 50 (Tr. 6908-6912).

¶ American Aviation Daily of December 3, 1954 (TWA Ex. 216) observed that the prototype aircraft for the Boeing 707 jet had 40 hours flight time with the original set of jet engines which was a remarkable record for prototype aircraft according to Boeing (Tr. 6914-6915).

¶ Woodfin was aware in December 1954 that Pan American was negotiating for Boeing commercial jets (Tr. 6937, TWA Ex. 219).

¶ Loeb, Rhoades was aware that there was active interest in commercial jets in the fall of 1954 and considered this in preparing their direct testimony. But at that time no one could ascertain who would order what and when, and what the delivery timetable would be. Loeb, Rhoades' opinion would not be affected by knowledge that Pan American Airways was seriously negotiating, for that was a fact. (Tr. 6920-6923)

¶ Woodfin was aware in January 1955 that United was negotiating for DC-8 jets for delivery starting in 1960 and

possibly 1959 and United actually ordered jet aircraft in the fall of 1955 (Tr. 6943-6944).

¶ In January 1955 Boeing was interested in commencing active negotiations with TWA on specifications for its jet aircraft (Tr. 6947, DX 10).

¶ The payment of $10,000,000 for an option to purchase 15 jet aircraft to be delivered four years later at a total cost of $75,000,000 would not, in Woodfin's opinion, require raising money to finance the option in January 1955. (Tr. 6950-6951).

¶ When asked was it not obvious in early 1955 to everyone in the airline business that millions and millions of dollars would be required for financing jet aircraft? Woodfin replied:

> "A. As to exactly when the sums of money would have to be produced and how much outside money would have to be produced was all a function of how the airlines operated, what cash flow off they had from depreciation and earnings, what cash they had available, from tax acceleration certificates, and the rest of it, how much outside money was going to be needed and how many airplanes were actually going to be ordered. I don't think anybody knew. There was a lot of speculation, of course." (Tr. 6957)

¶ Woodfin did not consider the equity financings by other airlines in the years covered by the complaint prior to 1955. TWA Ex. 224 sets forth a record of equity financings, including convertible preferred stock, for the period from 1939-1945, inclusive (Tr. 6980-6983).

¶ The price of an airline's common stock is a highly material consideration to an airline company and its investment bankers contemplating an issue. (Tr. 7046).

¶ In determining whether a common stock issue is doable an underwriter would look at the common equity financing of other companies in the same period. It would do no good to examine issues of convertible preferred, convertible debentures or any other different securities (Tr. 7073-7074).

¶ In December 1955 United Air Lines completed the "largest single financing program in the history of the airline industry * * * as part of its long range preparation for jet airliner operations." This aggregated $150 million. (TWA Ex. 180, p. 6, Tr. 7084).

¶ In May 1955 TWA did not know what aircraft was to be ordered. When the equipment program had been determined they would have discussed their money needs with Equitable who held their equipment mortgages. However, contrary to United which had its best year in 1956, TWA earnings started downhill in the second half of 1955 and operations continued to show a loss in 1956, 1957 and 1958. This barred TWA from approaching Equitable (Tr. 7114-7116).

¶ Loeb, Rhoades would not determine TWA's financial requirements by employing the "yardsticks" used by Drexel Harriman Ripley. These yardsticks are used to measure efficiency of airline operations and the efficient use of capital and the statistics are more meaningful for flight engineers and operating people (Tr. 7122-7123).

¶ In May 1955 there had not been a sizeable common equity offering by airline companies for several years and Loeb, Rhoades had serious doubts that the stock market would absorb a $50,000,000 issue. (Tr. 7130).

¶ Woodfin agrees "as a generalization" that stock should be sold first before selling debt, a general principle set

forth by John F. Childs, Vice President, Irving Trust Company, in an article entitled "Long Term Financing" appearing in the Corporate Treasurer's and Controller's Encyclopedia, Volume 2, page 435 (Tr. 7133), but none of the airlines sold equity before selling debt and the most natural and normal practice is to couple the sale of debt with equity (Tr. 7136).

¶ On May 3, 1955 Loeb, Rhoades stated in a Research Department informatory (TWA Ex. 201) that American Airlines with a ratio of 78% of equity to total capitalization was in need of no financing until the jet program and then probably would be in the strongest position of any of the airlines to finance the program (Tr. 7189).

¶ Woodfin is in fundamental disagreement with the Drexel Harriman Ripley proposal that capital be doubled and stock be sold below book in May 1955 when TWA had no precise information with respect to its aircraft requirements (Tr. 7249).

¶ Woodfin objects to paying off in June 1955 an equipment mortgage loan obtained from Equitable Insurance Company in December 1954 believing it would put TWA in a very strange position in the fall of 1955 when it returned to the insurance companies to get a loan commitment (Tr. 7250-7251).

¶ In 1957 when historically TWA sold common stock to its stockholders the jet age was much closer and there was a very definite use for the money. 75% of the 25% minority stockholders subscribed for the stock (Tr. 7261-7262).

¶ TWA was the only one of the big four airlines which did not pay a dividend. If funds were sought from stockholders in May, 1955 before the details of the jet acqui-

sition program were known and when there was no immediate need for the funds it would be taxing the stockholders (Tr. 7285).

¶ Offering additional stock substantially below the market involves the risk of depressing the after-market to the detriment of all stockholders (Tr. 7307-7308).

¶ In January or February of 1955, none of the airlines were able to determine the amount of money required and when it would be needed (Tr. 7197).

¶ Late in 1955 United completed a $150 million financing program designed to cover its commitments for the 30 DC-8 jetcraft ordered late in 1955 together with related ground equipment and facilities. This financing was privately arranged because United did not have a sufficiently high potential rating to go to a public offering and was entirely a debt issue because in the words of United Air Lines: "This was not a matter of choice, for the ability of United, as well as the industry, to sell equity has been limited. That further increase in equity is necessary and desirable is apparent, but it is equally apparent that it cannot be accomplished satisfactorily until the present period of depressed earnings is brought to an end." (Loeb, Rhoades Report DX 270, Exhibit D, pp. 12-13, Exhibit U-2 in CAB Docket No. 8008).

The Debt Financing

TWA's claim for damages in respect of the defendants' interference with TWA's debt financing is founded upon paragraphs 24 through 28 inclusive and paragraph 52(c) and (d) of the complaint which are set forth below.

Paragraphs 24 through 28 of the complaint provide:

"24. From 1955 until December, 1960, the defendants used their power over the financing of aircraft thus obtained to compel TWA to acquire aircraft of the type and in the manner dictated by the defendants and used their power over TWA's acquisition of aircraft, obtained as hereinbefore alleged, to compel TWA to obtain financing for the acquisition of such aircraft of the type and in the manner dictated by the defendants.

"25. At least as early as 1955, the needs of United States air carriers for the extensive financing required for acquisition of jet-powered aircraft were recognized throughout the air carrier industry and by others, including the defendants.

"26. In 1955 and continuously thereafter until December, 1960, the defendants, pursuant to and in furtherance of their plan to control TWA in a manner advantageous to themselves, directed TWA to make no efforts itself to obtain financing necessary for the acquisition of jet-powered aircraft required for the needs of TWA.

"27. Commencing in the year 1955 and continuing thereafter, various other air carriers, including competitors of TWA, made appropriate arrangements for the financing of jet-powered aircraft. In 1955 and 1956 various United States air carriers were able to obtain funds at a cost (or interest rate per annum) in 1955 of 4%, and in 1956 at costs ranging from 4¼% to 4¾%.

"28. In 1955 and thereafter for a period of several years, the defendants discussed with others various proposals for the financing of jet-powered aircraft, but the defendants did not make arrangements for such financing nor allow TWA to make such arrangements until December 1960, at which time the prevailing cost of funds (or interest rates) for debt financing was approximately 6-6½%."

Paragraph 52 of the complaint provides, *inter alia*:

> "52. TWA has further been injured in the following manner:
>
> * * * * *
>
> "(c) TWA was foreclosed from obtaining financing on more advantageous terms than those available to it in December 1960 and thereby suffered a loss by virtue of the greater cost of borrowing it ultimately experienced.
>
> "(d) TWA's ability to obtain financing for its needs was substantially impaired."

It is helpful to note particularly that the foregoing allegations, all of which are admitted by defendants' default, assert that (i) defendants dictated the type and manner of acquiring aircraft and manner of financing the acquisition (par. 24); (ii) United States air carriers recognized in early 1955 the need for extensive financing in order to acquire jet aircraft (par. 25); (iii) defendants directed TWA to make no efforts itself to obtain financing for the acquisition of jet aircraft (par. 26); (iv) various other air carriers, including TWA competitors, made arrangements for financing commencing in 1955, and in that year and in 1956, obtained commitments at interest rates ranging from 4% in 1955 to 4¼-4¾% in 1956 (par. 27); (v) defendants discussed various proposals for financing TWA jet requirements in 1955 and for several years thereafter made no arrangements for financing nor was TWA allowed to arrange financing until December 1960, when interest rates were approximately 6-6½% (par. 28); and (vi) TWA was foreclosed from obtaining advantageous interest rates and thereby suffered a loss (par. 52(c)).

The debt financing recommended by Drexel Harriman Ripley in their Report was summarized at pages 190-91 of this Report and is repeated herewith:

> "(ii) A private placement long-term loan commitment with institutional investors in October 1955 for $150 million minimum—$170 million maximum at 4% interest.
>
> "(iii) An underwritten non-preemptive offering in May 1959 of $60 million of 5% subordinated debentures, convertible into common stock.
>
> "(iv) A private placement long-term loan commitment with institutional investors in May 1959 for $90 million minimum—$110 million maximum at 6% interest." (Plaintiff's Brief, pp. 60-61)

On the basis of the allegations of the paragraphs of the complaint set forth above, TWA purported to establish damages before trebling in the amount of $20.3 million, which was determined as follows:

> "This separate claim is based upon the difference between:
>
> "(i) The present value (*i.e.*, the present equivalent of the future burden) of future payments for debt service on TWA's long-term debt historically outstanding on December 31, 1963, and
>
> "(ii) The present value (*i.e.*, the present equivalent of the future burden) of future payments for debt service on long-term debt for reconstructed TWA as of December 31, 1963 with a debt structure of the kind and in the amounts recommended by Drexel Harriman Ripley." (Plaintiff's Brief, p. 120)

The date of December 31, 1963 was selected for the purpose of calculating damages because according to TWA's

counsel that date permitted the simplest and most logical assumptions. As of December 31, 1963, the debt structures of Historical TWA and of Reconstructed TWA were comparable because (i) the jet fleet had been delivered and financing arranged, (ii) both Historical and Reconstructed TWA had outstanding long-term non-convertible and convertible debentures and the total amount of debt outstanding was comparable, and (iii) the shares outstanding of Historical and Reconstructed TWA as of December 31, 1963 were practically identical. If calculations had been made at a later date, additional assumptions would have been required to make adjustments for conversions of convertible debentures which occurred in respect of Historical TWA. (Plaintiff's Reply Brief, pp. 73-74)

October 1955 Debt Financing

Drexel Harriman Ripley Report and Morehouse Testimony

In forming their opinion with respect to debt financing in October 1955and their recommendation that TWA should have and could have arranged mortgage loan commitments from institutional investors which would have provided over the next three years a minimum of $150 million and a maximum of $170 million, Drexel Harriman Ripley took the following approach:

(i) A pro forma balance sheet as of September 30, 1955 was prepared for Reconstructed TWA in which effect was given to the May 1955 sale of common stock providing net proceeds to TWA of $55.5 million. (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, pp. 23-25 and Exhibit thereto "Financials—7")

(ii) A capital expenditure program for Reconstructed TWA was projected by Price Waterhouse as of September 30, 1955, which indicated that Reconstructed TWA would require capital expenditures from the fourth quarter of 1955 through December 1960, aggregating $375.3 million (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, pp. 26-27 and Exhibit thereto "Financials—8")

(iii) A source of funds forecast from October 1955 to December 1960 for Reconstructed TWA as of September 1955 was prepared by Coverdale (Drexel Harriman Ripley Report, TWA Ex. 5, Part III, Volume 2 "Financials—9")

(iv) The balance sheets of Historical TWA and Reconstructed TWA as of September 30, 1955 were then compared with those of their three principal competitors, the balance sheets of American Airlines and United Air Lines as of September 30, 1955, and the balance sheet of Pan American Airways as of December 31, 1955.

In this comparison Historical TWA had a book net worth less than its three principal competitors by the following amounts: Pan American Airways $40 million, American Airlines $42 million, and United Air Lines $29 million; whereas Reconstructed TWA would have shown a greater book net worth than its competitors by the following amounts: Pan American Airways $15 million, American Airlines $13 million, and United Air Lines $26 million. Reconstructed TWA would have had no funded debt, showing 100% equity in its capital structure compared to 67.9% for Pan American Airways, 79.2% for American Airlines and 73.3% for United Air Lines; whereas Historical TWA would have had a ratio of 67.4% of equity to total capitalization. (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 25)

Drexel Harriman Ripley stated in their report that they would not have recommended short-term financing because funds required by TWA were very large and the returns on their investment in form of earnings were several years off. They would, therefore, have recommended that between July 1 and September 30, 1955, that TWA take corporate proceedings to authorize a flight equipment mortgage and in the fourth quarter of 1955 to arrange with institutional investors for a commitment to purchase flight equipment mortgage notes in the principal amount ranging between a minimum of $150 million and a maximum of $170 million, with an interest rate of 4% and a commitment fee of ½% on the unused portion. (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 31) A summary of the principal provisions of the equipment mortgage and the October 1955 loan agreement are set forth in the Drexel Harriman Ripley Report, TWA Ex. 5, Part II, pp. 29-30, 32, 33.

Lastly, Drexel Harriman Ripley in their Report set forth a five year projection as it would have appeared in September 1955, showing as of December 31 for each of the years 1956-1960, inclusive, the outstanding equipment mortgage notes, their percentage of net tangible assets and the "Leeway" for the issuance of additional funded debt within the 60% voluntary action limit of funded debt to consolidated net tangible assets required by the mortgage. Drexel Harriman Ripley concluded that Reconstructed TWA could expect to be able to take down by 1959 the maximum of $170 million available from the equipment mortgage financing while remaining comfortably within the 60% limitation.

Cross-examination of Morehouse

There is set forth below certain supplemental information developed in the defendants' extensive cross-examination of Morehouse of Drexel Harriman Ripley and certain exhibits admitted in evidence. As was the case earlier in this Report, the information set forth below is selected to illuminate the Drexel Harriman Ripley Report. However, I did not confine my consideration solely to the information listed below.

¶ In formulating the $170 million debt financing in October 1955, Drexel Harriman Ripley made no assumption as to whether interest rates were going up or going down and took no advantage of hindsight in knowing that interest rates substantially increased over the five year period from the fall of 1955 to the end of 1960. (Tr. 3888-3889)

¶ The proposed debt financing of October 1955 assumed and was dependent upon the successful consummation of the May 1955 equity financing. Since in ordering aircraft equipment the lead time is in many cases so long, an airline need not necessarily arrange financing prior to entering into a contractual commitment for the equipment if it is satisfied that its credit standing and liquid capital give it a reasonable expectation that total financing is available. (Tr. 4038)

¶ It would not be proper for an airline to rely upon the credit standing of a parent holding 75% of its stock. (Tr. 4039)

¶ In planning the TWA May 1955 financing, Drexel Harriman Ripley would not have necessarily discussed with Equitable Life "rolling over" $35 million of the equipment mortgage placed in December 1954 and would have men-

tioned possible additional financing in the fall of 1955 in general terms rather than specific terms. (Tr. 4250)

¶ In formulating its recommendations for October 1955 Drexel Harriman Ripley would have believed in the summer of 1955 that TWA in the fall of 1955 would have been negotiating with Boeing for 33 jet transports, of which 15 would be Boeing 707-131s and 18 Boeing 707-331s. (Tr. 4299-4300)

¶ Drexel Harriman Ripley assumed that TWA entered into the long-term financing arrangements on October 1, 1955 and that there would have been some negotiations with Boeing prior thereto. (Tr. 4300)

¶ Drexel Harriman Ripley's recommendations for October 1955 were not based on 20/20 hindsight even though the Capital Expenditure Projections prepared by Price Waterhouse admittedly used 20/20 hindsight. (Tr. 4335)

¶ While the general operating characteristics of jet aircraft were not known in September 1955, Drexel Harriman Ripley were of the opinion that a potential lender could have been satisfied with reasonable forecasts based on the known general operating characteristics. (Tr. 4338)

¶ Coverdale projected TWA revenue income to be greater than the actual results of operations of Historical TWA which showed a loss. On the basis of historical results TWA would not have been able to take down the amounts of money projected by Drexel Harriman Ripley under the 1955 mortgage equipment loan because of the provision of the mortgage limiting funded debt to 60%. (The limitation of debt to 60% of consolidated net tangible assets.) (Tr. 4351)

The Loeb, Rhoades Report and Woodfin Testimony Relating to the October 1955 Debt Financing

The Loeb, Rhoades Report disagreed with the Drexel Harriman Ripley opinion that TWA could and should have made arrangements in October 1955 to borrow between $150 million and $170 million from institutional lenders. Loeb, Rhoades stressed that the Drexel Harriman Ripley Report and testimony of Morehouse recommending the October 1955 debt financing assumed and was dependent upon the successful consummation of the equity financing in May 1955 producing net proceeds of $55.5 million. (Loeb, Rhoades Report, DX 270, Part II, p. 28)

Loeb, Rhoades proceeds to state that in its opinion even if the October 1955 financing was not dependent upon the May 1955 equity financing, it could not have been successfully arranged. The Loeb, Rhoades Report states their opinion as follows:

"In assessing the likelihood of success for Mr. Morehouse's projected $150-170 million flight equipment mortgage loan of October 1, 1955, we think it relevant to consider the following:

(i) By October 1, 1955 no jets had been ordered by any airlines;

(ii) By October 1, 1955 none of the airlines had arranged any financing (debt or equity) for the purchase of jet aircraft; (Exhibit A)*

* The debt financings referred to by Morehouse on page 32 of his Report (see also Financials—13) were arranged on the following dates: Pan American May 10, 1955; Northwest June 30, 1955; Eastern October 31, 1955; American, November 1, 1955 and United December 21, 1955. However, the earlier Pan American and Northwest financings were for the purpose of acquiring the latest series of pistons ordered. (Exhibit A).

(iii) The maximum $170 million mortgage commitment which Mr. Morehouse assumes TWA could have obtained substantially exceeds the long-term commitments obtained by any other airline in 1955.** The large commitments obtained by United, Eastern and American later in the Fall of 1955 were the largest in the history of the airline industry. Indeed, a $150-170 million loan to TWA on October 1, 1955, would have been almost three times as large as any long-term commitment that had been made to that date to any airline for any purpose, and would have exceeded the commitments to the other airlines by a minimum of $30-50 million. (Exhibit A).

(iv) Detailed projections with respect to the Boeing 707-331s and the Convair 880s could not have been prepared as of October 1, 1955. Lending institutions, such as life insurance companies did not make commitments of the size envisaged by Mr. Morehouse without making a comprehensive analysis of the planned use of the funds. Jet aircraft were an unknown and untested commodity in the Fall of 1955. Any insurance company asked to lend large sums of money for such a purchase during this period would have demanded detailed information as to the type and size of the fleet, cost, terms of payment, delivery dates, earning power, depreciation, planned usage, configuration and the like.

We are advised by counsel that we may assume, based upon the record in the case to date, that the intercontinental Boeing, the 707-320 series, was not ordered by any airline until December, 1955 and that detailed information on that aircraft such as described

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** American obtained $75 million; Eastern obtained $90 million; and United obtained $120 million of long-term debt. Financing done by other airlines during this period was for much smaller amounts. (Exhibit A).

above was not available to the airlines until some time after October 1, 1955. We do not believe that funds could have been borrowed for the acquisition of this aircraft until detailed projections containing information relating to cost, terms, delivery, earning power and the like could have been made available to prospective lenders. We note that such detailed projections, although hypothetical, were in fact included as a part of Mr. Morehouse's Report (Financials—8, 9 and 10) but that his projections were based upon information apparently not yet available to the industry. We also note that detailed projections which United in fact used in order to obtain its loan commitment in December 1955. (Defendants' Exhibit 197 in evidence.)

Moreover, Mr. Morehouse assumed that TWA's proposed borrowing on October 1, 1955 would have included a $25 million projected down payment for medium/long-range airplanes not yet selected. As to the last item, it is our opinion that a commitment of this size could not have been obtained as of October 1, 1955 to buy an unspecified number of unselected airplanes which had not yet been developed or identified.

(v) Although not disclosed by Mr. Morehouse's exhibits, TWA's earnings, as compared to 1954, began to fall in the second quarter of 1955 and dropped sharply in the third and fourth quarters. (Exhibit F)." (Loeb, Rhoades Report, DX 270, Part II, pp. 29-31)

In conclusion the Loeb, Rhoades Report stated an opinion with respect to the October 1955 debt financing as follows:

"In view of the above, and even assuming, contrary to our view, that the proposed 1955 equity financing had been accomplished, it is our opinion that TWA would not have and could not have obtained a commitment for $150-170 million on October 1, 1955." (Loeb, Rhoades Report, DX 270, Part II, pp. 31-32)

It is noted that Loeb, Rhoades emphasizes that prior to October 1, 1955 none of the airlines had arranged any financings (Debt or Equity) for the purchase of jet aircraft and that the $60 million financing of Pan American and the $29.5 million financing of Northwest arranged on May 10, 1955 and June 30, 1955, respectively, were in each case to finance the acquisition of piston planes, not jets, and in the case of Pan American also for working capital. The first financing specifically concerned with the acquisition of jets was the Eastern Air Lines financing arranged on October 31, 1955 amounting to $90 million of which $40 million was earmarked for future jet orders. The first financing earmarked solely for acquisition of jets was the American Airlines financing of $75 million effected November 1, 1955 and the United Air Lines financing of $150 million effected December 21, 1955, of which $30 million was arranged with thirty-eight banks and $120 million with insurance companies.

Cross-examination of Woodfin

There is set forth below certain supplemental information developed in TWA's extensive cross-examination of Woodfin and certain exhibits admitted in evidence. As was the case earlier in this Report, the information set forth below is selected to illuminate the Loeb, Rhoades Report. However, I did not confine my consideration solely to the information listed below.

¶ The United Air Lines Annual Report for the calendar year 1955 stated in referring to a financing program arranged in December 1955:

> "The largest single financing program in the history of the airline industry was completed by United in December as part of its long-range preparation for

jetliner operations. Included were arrangements for a maximum of $150,000,000 in new capital, to be available over the next five years. Of that amount, $120,000,000 may be realized from the sale of new debentures and up to $30,000,000 may be borrowed under a new bank credit agreement. No equity financing is involved.

"Series D, 4 per cent sinking fund debentures will be sold as funds required from February 1, 1956 through March 1, 1959, to the Metropolitan Life Insurance Company, The Prudential Insurance Company of America and The Mutual Life Insurance Company of New York. . . .

"The new credit agreement is with a group of 38 banks headed by The First National City Bank of New York. Replacing an earlier agreement dated March 1, 1955, it makes loans available through December 31, 1960, with repayment over a five-year term thereafter." (TWA Ex. 180, p. 6, Tr. 7084)

¶ Most of the airline financing from 1946 to the 1955 period was with banks, mostly five year money. (Pan American in October 1946 had a $40 million credit agreement with the National City Bank.) Only Pan American, United and TWA had placed any long-term money with institutions. (Tr. 7182-7183)

¶ Prior to October 31, 1955, when Eastern Air Lines arranged a $90 million financing with Equitable Life Assurance Company, of which $40 million was to finance jet acquisitions, there had been only the following long-term financings arranged with insurance companies: (i) a $60 million financing of Pan American Airways arranged on May 10, 1955 with a group of several insurance companies, (ii) the $40 million financing arranged by TWA with Equitable Life Assurance Company to replace a 1953 bank

credit and to purchase 20 Lockheed 1049-Gs, and (iii) three financings of United Air Lines arranged with Metropolitan Life and MONY, a $12 million financing in 1947, a $10 million financing in March 1952, and a $20 million financing in July 1954, the last two of which were stated to be for general purposes. (DX 270—Exhibit A—pp. 2, 4, 5 and 6, Tr. 7250-7251)

¶ On October 25, 1955, the Board of United approved the purchase of 30 Douglas DC-8's at a total cost of $175,000,000; on October 14, 1955, Pan American Airways ordered 25 Boeing jets and 20 Douglas jets; and in November, 1955 American Airlines ordered 30 jets (Tr. 7382-7383).

¶ An agreement in principle is reached between the lender and the borrower some time before the execution of the formal written documents evidencing the loan commitment. (Tr. 7388)

¶ In October 1955, after giving effect to the $55.5 million May 1955 equity financing and the $170 million October 1955 debt financing, TWA on a pro-forma basis had a more favorable ratio of debt to total capitalization (57%) than did United Air Lines which had a ratio of 61%. But it is doubtful that TWA could have raised more long-term money than United Air Lines. Long-term lenders would be interested in earnings as well as amount of equity and TWA was not doing well in the latter part of 1955. (Tr. 7409-7410)

¶ In Woodfin's opinion it would have been a mistake to terminate in May 1955 the $40 million financing arranged by TWA with Equitable Life in December 1954. Institutional lenders do not like to have recently completed financings terminated even if Equitable Life had been will-

ing to "roll over" the $40 million financing. Woodfin doubts that Equitable together with other insurance companies would have been willing to participate in an additional $150-170 million financing in October 1955 as recommended by Drexel Harriman Ripley. Such a financing involved a larger commitment than a group of large insurance companies gave subsequently to TWA's three principal competitors. Woodfin would hold this opinion whether or not TWA had effected the $55.5 million equity financing in May 1955. Only a relatively few number of large life insurance companies were participating in airline financing in 1955. (Tr. 7250-7255)

The May 1959 Debt Financings

Drexel Harriman Ripley recommended that Reconstructed TWA in May 1959 make (i) an underwritten non-preemptive offering of $60 million 5% Convertible Subordinated Debentures and (ii) a private placement with institutional investors of a long-term loan commitment ranging from $90 million to $110 million and bearing interest at 6%.

In formulating their recommendation, Drexel Harriman Ripley first considered the reconstructed situation of TWA in September 1956, again for the period from 1957 through mid-1958 and lastly in 1959.

As of September 30, 1956

It was assumed that TWA had placed orders in September 1956 for 30 Convair 880 jet aircraft for delivery in 1960 at a total price of $157,900,000 and that a down payment of $26,300,000 was made at the time the orders were placed with substantially no further payments required until the third quarter of 1959, the funds for the down

payment being obtained from a takedown on July 1, 1956 of $50 million of the Series A Mortgage Notes arranged for by Reconstructed TWA in October 1955.

The report proceeded to examine the financial posture of TWA as of September 1956 in the light of its then projected capital expenditure program and considered what, if any, financing arrangements might have been indicated in September 1956.

Drexel Harriman Ripley considered TWA's reconstructed operating results during the first nine months of 1956, which showed a loss of $500,000 and internal cash generation of $17.5 million and noted that by September 1956 Reconstructed TWA was running well behind the Coverdale forecast of funds generated prepared as of September 1955. They also considered (i) a reconstructed balance sheet as of September 30, 1956, which gave effect to the receipt of $55.5 million net proceeds of sale of common stock in May 1955 and the takedown of $100 million under the October 1955 debt financing, (ii) TWA's capital expenditure program projected by Price Waterhouse as of September 30, 1956, and (iii) the projection of TWA money requirements as of September 30, 1956, which indicated a peak requirement by the 1960 third quarter of $233.5 million, which was $163.5 million in excess of the $70 million remaining available out of the $170 million 1955 mortgage commitment.

Drexel Harriman Ripley concluded as follows:

> "In summary, then, TWA's financial posture at September 30, 1956 was about as follows: It had experienced sizable operating losses during the nine-month period then ended, and C&C was forecasting further losses in 1957. TWA had a projected peak requirement for $163.5 million in new outside funds (over and above what had been provided for in the 1955 mortgage financing) and it appeared that some form of junior

security would have to be included in the financing of this requirement. But the new money did not appear to be needed before the first quarter of 1959, almost 2½ years hence.

We conclude that under the circumstances prevailing in September 1956 we would have recommended to TWA that it not attempt, at that time, to formalize further financing arrangements even though all indications were that it would have to do so later. We believe that TWA would have held conversations with its major institutional lenders to advise them of the enlargement of its projected money requirements, indicating (a) that it would be approaching them at a later date to discuss further borrowing arrangements, and (b) that it recognized the indicated need for junior financing prior to or in conjunction therewith.

It would not have been practical, in September 1956, to attempt to pinpoint a target date for a financing two years or so away. We believe that it would have been logical to plan in terms of a financing sometime in the latter part of 1958 or early in 1959. However, since the junior financing would doubtless involve the sale of common stock, either directly or through the use of a convertible security or warrants, we believe that TWA and we, as their investment bankers, would have been keeping a weather eye on the market for airline securities with a view toward a possible earlier financing should stock market conditions permit." (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 38)

1957 Through Mid-1958

Drexel Harriman Ripley then proceeded to consider the reconstructed TWA situation in 1957 through mid-1958. They assumed that the $70 million remaining balance of the $170 million financing arranged in October 1955 had been taken down, $50 million on April 1, 1957 and $20 million on January 1, 1958, and that Reconstructed TWA had the same aircraft leases as Historical TWA. They noted

that reconstructed generation of funds from internal sources for the twelve months ended September 30, 1957 exceeded by $13.9 million the forecast made by Coverdale in September 1956, but that in the last quarter of 1957 internal cash flow on a reconstructed basis was $4.8 million lower than the forecast for that quarter and that cash flow continued to lag behind the forecast for the next two quarters so that the accumulated lag in cash flow for the period from September 30, 1956 to June 30, 1958 was $3.5 million. On instructions from TWA's counsel, Drexel Harriman Ripley assumed that in the fourth quarter of 1957 TWA made a commitment to acquire four L1649A piston aircraft and four L1049H piston aircraft, although the expenditures for these eight piston aircraft were not included in the Price Waterhouse Projection of Capital Expenditures made as of September 1955 and September 1956. The net cash expenditures by TWA for these eight aircraft totalled $17.3 million and were to be made in the last quarter of 1957 and the first three quarters of 1958, and Drexel Harriman Ripley assumed that these acquisitions would be financed by the takedown on January 1, 1958 of the last $20 million available under the October 1955 financing. (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, pp. 39-40)

On the basis of the foregoing considerations, Drexel Harriman Ripley in their report made the following comments with respect to the situation in mid-1958:

> "As a result of the foregoing factors, TWA would have been aware, by mid-1958, that funds required from outside sources to meet projected capital expenditures would be larger than indicated by the September 1956 projection. Timing of the money requirement had not changed, however. It appeared that the airline should be able to meet its scheduled progress

payments on the jets, and its other capital requirements, without obtaining new funds from outside sources until the spring or summer of 1959.

TWA, however, was on 'thin ice' with respect to the funded debt restrictions of the Flight Equipment Mortgage. Exhibit: Financials—27 indicates that throughout the first half of 1958 TWA's reconstructed funded debt as a percentage of net tangible assets would have hovered right around the 60% figure set forth in the voluntary action covenant of the funded debt limitation. It did not appear that there was any immediate danger of reaching the 65% default level." (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 41)

Operating under these considerations Drexel Harriman Ripley stated that TWA probably would have given thought to doing some junior financing in 1958 in order to provide some additional "cushion" beneath its outstanding funded debt and thereby avoid the possibility of default under the 65% provision of the outstanding Flight Equipment Mortgage. (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 43)

After comparing the market prices of TWA stock with Standard & Poor's Index of Air Transport Stocks as well as the AIMV (Aggregate Indicated Market Value) and the book value of TWA shares and noting the decline of TWA common from a mid-1955 high of 31⅝ to 12¾ in March 1958, when the historical book value per share was $15.09, and after also considering published comments on airline stocks of Moody's Stock Survey, Drexel Harriman Ripley commented as follows:

"So, throughout the first half of 1958 TWA's shares, and the shares of its principal competitors, were selling at prices only slightly recovered from their then recent lows. But the market generally seemed to be expecting an improved performance from airline shares

during the forthcoming months. Since TWA's period of outside money need still appeared to be at least twelve months away, we believe that we would have recommended that TWA adhere to its plans for a financing in 1959 rather than attempt to accelerate part of the program. It appeared to be a good business risk that market conditions for an equity offering by TWA (which would clearly be the cornerstone of the financing) would be better by mid-1959 than they were in mid-1958.

Thus, commencing in the summer of 1958, we believe that TWA, in consultation with its lawyers, accountants, investment bankers, institutional lenders, etc., would have been engaged in the task of designing and preparing for a major financing, in the spring or summer of 1959, involving the sale of both senior and junior securities." (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 43)

Early 1959

In preparing for the major financing in the spring or summer of 1959, Drexel Harriman Ripley considered various earnings and other data relating to TWA and its principal competitors including a tabulation of TWA operations, both historically and reconstructed, year by year, 1954-1958, compared with its three main competitors. Drexel Harriman Ripley observed that the operating results of all four airlines during the five year period showed the effects of the high cost of preparation for the introduction of jet equipment, but noted that TWA, with losses from operations in three out of the five years, turned in by far the poorest performance of the four airlines. The report then turned to consideration of a more detailed income account for Reconstructed TWA for the five years 1954-1958, inclusive, and set forth brief summaries of TWA news releases commenting on revenues and operat-

ing results put out on April 1, 1959 and April 23, 1959. Consideration was also given to a summary of items appearing in the current section of Moody's Transportation Manual from January 1, 1959 to June 30, 1959, relating to the CAB monthly earnings reports of TWA and its competitors and also the earnings reports of TWA and its competitors for the year ended December 31, 1958 and interim reports, which in each case were compared with the similar period a year earlier. (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, pp. 47-52)

Having considered operating figures of TWA and its three principal competitors as summarized above, the report then turned to a consideration of the general stock market situation and the market quotations for the common stocks of TWA and its three principal competitors. It noted that the stock market in general was strong and advancing through 1958 and the first half of 1959, referring to the Dow Jones Industrial Average during that period, which indicated a percent advance over the 18 month period ranging from a high of 43% to a low of 41% and for the six month period ended June 30, 1959 ranging from a high of 8% to a low of 6%. (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 53)

In commenting upon the market quotations for the common stock of TWA's competitors, the Report noted that over the 18 months ended June 1959, the stocks of TWA's main competitors advanced in greater amounts percentagewise than the Dow Jones Industrials. With respect to the market for the TWA common stock, the Report commented:

> "TWA, although operating at a loss in the first quarter of 1959, was sharply reducing its loss in that quarter as compared with the corresponding quarter of 1958. TWA stock advanced strongly in price during the first half of 1959, in fact, more than double that of the Standard & Poor's Index of Air Transport

Stocks. And it was selling well over its book value." (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 54)

A comparative tabulation showing volume, price per share and approximate dollar volume of trading in TWA common stock for the entire year 1958 and the first six months of 1959 was then set forth, and also a tabulation giving a comparison of the market prices of TWA stock with its historical book value at year-end over the five year period preceding 1959 and at the middle of 1959.

The Report commented upon the price-earnings ratios of TWA and its three principal competitors as follows:

"Translating the foregoing figures into price/earnings ratios (P/E), and using the Standard & Poor's figures of earnings per share, brings the following results:

	Price/Earnings Ratios-Times			
	TWA	PAA	AAL	UAL
Five-Year Average 1954-1958	30.8	19.6	15.8	10.9
Three-Year Average 1956-1958	—	20.7	15.9	10.7

Note: Prices taken at average market price—April, May, June 1959. Using the AAL figures including the 'special credit' for 1954, the ratio for the five-year average 1954-1958 becomes 15.1 times (instead of 15.8 times).

It will be noted that TWA shows no figure for the P/E ratio for the three-year period 1956-1958, the reason being that TWA operated at a loss in each of the three years. Its three main competitors operated profitably in each of the five years 1954-1958. Nevertheless, as stated hereinbefore, TWA stock was strong in the market in early 1959, doubtless because of anticipated future operating profits." (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 56)

The Report then noted that Standard & Poor's was advising investors to hold TWA, buy Pan American and American Airlines, and hold United Air Lines. It then noted that Moody's Stock Survey published a relatively bullish article on the subject of airline stocks in the spring of 1959 and that both Moody's and Standard & Poor's were emphasizing the importance of the coming jet airplanes.

Again the report reconstructed the TWA situation in March 1959 resorting to a reconstructed balance sheet, a capital expenditure program as projected by Price Waterhouse as of March 1959, and a projection of money requirements as of March 1959, noting that the latter projection indicated a peak money requirement by the 1960 third quarter of $160.7 million.

Lastly the Report, in coming to its recommendations as to the 1959 debt financing, noted that (i) as of March 31, 1959, reconstructed funded debt as a percentage of net tangible assets was 59.1%, (ii) as of that date not more than $100 million could have been raised by the issuance of additional equipment mortgage notes, assuming a total financing of $160 million, and (iii) all of the new money would not be required by TWA until the third quarter of 1960, by which time TWA's net tangible asset position should improve through retention of forecast earnings. The Report stated its recommendation as follows:

> "Under the above circumstances, we believe that we would have recommended junior financing in the amount of $60 million. Subject to the sale of $60 million of junior securities, we believe that TWA could have obtained commitments from institutional investors for the private purchase of Series B Flight Equipment Mortgage Notes to provide, over the next two years, a minimum of $90 million and a maximum of $110 million." (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 61)

The Report then turned to specific consideration of the essential terms for the junior financing and the senior debt financing.

Junior Debt of $60 Million

Drexel Harriman Ripley ruled out issuing common stock because of the poor earnings record of TWA and also excluded the issuance of a straight or convertible preferred because the dividends would not be deductible for tax purposes by TWA. The Report concluded that convertible subordinated debentures should be publicly offered in May 1959 and that the offering should be underwritten rather than making a preemptive offering to stockholders.

It was Drexel Harriman Ripley's opinion that the conversion rate should be "right on" or very close to the market at the time of offering. As the announcement of a proposed offering of convertible subordinated debentures of the magnitude contemplated frequently has a depressing effect on the market, Drexel Harriman Ripley in arriving at the conversion price of $18.50 per share discounted by 15% the mid-May 1959 market price of $21.75 per share (first concluding, based on a consideration of the historical and reconstructed earnings of TWA that a reconstructed market value would have been approximately the same as the historical value). (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 66)

An interest rate of 5% was recommended, which was the same rate being paid on similar issues by American Airlines and Eastern Air Lines and slightly above a 4⅞% rate being paid by Pan American Airways and a 4¾% rate being paid by KLM.

An outline of the specific terms of the proposed subordinated debentures is set forth on pages 68 and 69 of the Drexel Harriman Ripley Report.

Senior Debt Financing

Drexel Harriman Ripley were of the opinion that TWA could and should have obtained in May 1959 from institutional investors commitments to purchase from $90 million to $110 million Flight Equipment Mortgage Notes subject to the prior sale of $60 million convertible subordinated debentures, the funds to be taken down over a period ending December 31, 1960.

The recommended interest rate was 6%, which was admittedly higher than the interest rate on current unsecured borrowings of its principal competitors, Pan American Airways, American Airlines and United Air Lines. Only Delta and Northwest Airlines were paying a 6% rate on their senior debt. (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 70)

It is important to note, and the Drexel Harriman Ripley Report acknowledges, that Reconstructed TWA, giving effect to the May 1959 financings, would have had a higher debt ratio and lower earnings and cash flow coverages than the other six trunk airlines, except that TWA's cash flow would have exceeded that of Pan American Airways and Delta. However, as a counter-consideration, Drexel Harriman Ripley in their Report cited as favorable factors for TWA (i) a "strong forecast of earning power" arising from ownership by December 1960 of a jet fleet which would have equalled or surpassed the fleets of each of its three main competitors, (ii) a strong mortgage security for its senior debt as compared with the other airlines whose debts were unsecured, and (iii) a higher interest rate except for Delta and Northwest. (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, pp. 70-71)

The terms of the loan agreement pursuant to which the mortgage equipment notes would be issued are set forth on page 71 of the Drexel Harriman Ripley Report.

Lastly, the Report compared the balance sheets of Historical and Reconstructed TWA with those of Pan American Airways, American Airlines and United Air Lines, and also compared the historical and reconstructed capital structure of TWA as of December 31, 1960, which indicated that Reconstructed TWA would have had a total funded debt of $320,180,000, of which $260,180,000 was senior, compared to the historical total funded debt of $223,242,000, of which $123,242,000 was senior. (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 74)

The Loeb, Rhoades Report Relating to the May 1959 Debt Financing

Loeb, Rhoades in their Report stated that notwithstanding their conviction that neither the May 1955 equity nor the October 1955 debt financing recommended by Drexel Harriman Ripley could have been accomplished, they would assume that for the purpose of commenting on the proposed 1959 financing, the 1955 financings as recommended by Drexel Harriman Ripley had been accomplished. Their Report noted that the proposed convertible debentures financing of $60 million substantially exceeded any equity financing done by Pan American, American, Eastern or United during the 1955-1960 period, mentioning that Eastern sold $25 million of convertible subordinated notes on October 21, 1958, American sold $40 million of convertible subordinated debentures on June 18, 1959, Pan American sold $46.97 million of convertible subordinated debentures on July 29, 1959 and United sold $25 million of convertible subordinated debentures on November 30, 1960. In view of these circumstances and the fact that the reconstructed earnings of TWA during the years 1956, 1957 and 1958 were disappointing, Loeb, Rhoades questioned that the

offering would have been doable. Further, Loeb, Rhoades found it difficult to believe that it would have been possible to have had two equity financings—one in 1955 and one in 1959—and catch the market each time at or near its high over a thirteen-year period. (Loeb, Rhoades Report, DX 270, Part II, p. 33).

Turning to the proposed private placement of $90 million to $110 million of 6% mortgage notes in May 1959, Loeb, Rhoades expressed doubt that an institutional investor would have been willing to enter into the commitment again in light of the poor earnings and cash flow coverages as well as the high senior debt ratio of 60.7% indicated for the first quarter of 1960 on page 70 of the Drexel Harriman Ripley Report. In commenting on the schedule, Loeb, Rhoades stated:

> "(c) The May 1959 $90-110 Million Loan Commitment
>
> With respect to the private placement of $90-110 million of 6% mortgage notes in May 1959, we doubt that an institutional investor would have been willing to enter into the commitment in light of the poor earnings and cash flow coverages and the high senior debt ratio of 60.7% shown for reconstructed TWA in Mr. Morehouse's schedule at page 70. According to the schedule, on a pro forma basis reconstructed TWA had earned an average over five years (1954-1958) of only half of the interest that would have been payable had the total reconstructed senior debt of $280 million been outstanding. The 12 months ended March 31, 1959 were not much better than the five year average, as only 70% of the interest had been earned. None of these figures would seem to justify an institutional lender making an additional $90-110 million senior debt investment in reconstructed TWA.
>
> Based upon our dealings with insurance companies in arranging financing for our clients, we know that all

insurance companies, including the major lenders, are regulated in their investments by state laws, which prevent the lenders from acquiring obligations which are predominantly speculative in character.

We note that Mr. Morehouse speculated as to the quality of both his proposed October 1955 mortgage obligations and his $60 million May 1959 convertible subordinated debentures. In Mr. Morehouse's opinion the institutional investors would have viewed the October 1955 obligations as 'not quite up to Baa quality' (page 31). As to the May, 1959 convertible subordinated debenture issue, he states that it 'might have been rated no higher than B'.* (page 68). However, he gives no clue as to a possible rating for the $90-110 million May 1959 mortgage notes. It is our opinion that the May 1959 mortgage notes would have been considered at best of B quality, and thus might well have presented to institutional lenders a question as to whether such an investment would have complied with applicable state laws. (Loeb, Rhoades Report, DX 270, Part II, pp. 33-35)

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* Although DHR Exhibit: General 1 defines Baa and Ba ratings, no definition of a B rating is given. Moody's defines a B rating as follows: 'Bonds which are rated B generally lack characteristics of the desirable investment. Assurance of interest and principal payments or of maintenance of other terms of the contract over any long period of time may be small.'"

The Loeb, Rhoades Report then turns to a consideration of the reconstructed capital requirements of TWA from October 1, 1955 through December 31, 1960 appearing in the Drexel Harriman Ripley Report as Exhibit: Financials—31, which showed a total requirement of $544.8 million to cover the cost of the 63 jet planes originally ordered by Toolco for TWA, as well as the cost of the piston acquisitions TWA historically incurred. Apart from funds generated from operations assumed on a reconstructed basis, TWA would have been faced with raising in excess of

$300 million of new money to carry out the hypothetically reconstructed capital requirement program in the period from October 1, 1955 through December 31, 1960. Loeb, Rhoades concludes that in view of the diminishing reconstructed earnings in 1955 and the losses incurred in 1956, 1957 and 1958, TWA could not independently have raised $300 million on reasonable terms.

After listing on page 36 of their Report the financial aid given TWA historically by Toolco in the 1955-1960 period which assisted TWA historically in acquiring 47 jet planes and various piston planes, Loeb, Rhoades states as its opinion that TWA could not have independently financed the capital requirements of the hypothetical program which were even greater than that met historically by TWA with Toolco's assistance. In conclusion, Loeb, Rhoades reverts to the May 1955 equity financing of $58.4 million recommended by Drexel Harriman Ripley as the cornerstone of its program and repeats its opinion that the equity financing could not have been completed without Toolco's participation and that without Toolco, no prudent and competent management without the benefit of hindsight would have adopted such a program.

Cross-examination of Witnesses on 1959 Debt Financing

The cross-examination of the expert witnesses as to that portion of their respective reports relating to the 1959 debt financing was not as extensive as the cross-examination devoted to the May 1955 equity financing and the October 1955 debt financing, possibly because their direct testimony as embodied in their respective reports was especially detailed and explicit. No supplemental information developed on cross-examination addressed to the May 1959 debt financings needs to be noted herein.

Determination of Damages Related to Financing

I find that those paragraphs of the complaint that form the basis of TWA's claim for damages related to financing, specifically paragraphs 7(f), 10(g), paragraphs 23 through 28 inclusive and paragraph 52(c) and (d) are "well pleaded" and in considering and determining the damages claimed by TWA, I accept these allegations as proved.

It may be helpful once again to restate below in summary form the essence of these allegations as follows:

1. For the purpose of creating and maintaining control of the business of financing the purchase of aircraft for use by TWA and strengthening control over the acquisition of aircraft by TWA, the defendants rendered TWA dependent upon them for such assistance in financing as defendants might choose to provide, refusing to allow equity financing by TWA except on condition that as a result Toolco would increase its equity position in TWA and causing TWA instead to obtain funds chiefly by means of debt financing, thus rendering TWA unable to seek financing needed for the acquisition of aircraft except upon the approval of defendants. The actions complained of commenced subsequent to the acquisition by Toolco of a stock interest in TWA and the action continued throughout the period covered by the complaint. (Par. 23).*

2. From 1955 until December 1960 defendants dictated the type and manner of acquiring aircraft and the manner of financing the acquisition of aircraft. (Par. 24).

3. At least as early as 1955 United States air carriers recognized the needs for the extensive financing required for the acquisition of jet powered aircraft. (Par. 25).

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* Toolco first acquired stock of TWA in 1939 (6 CAB 153, 154) and continued its actions until December 31, 1960.

4. In 1955 and continuously thereafter until December 1960 defendants directed TWA to make no efforts itself to obtain financing necessary for the acquisition of jets required for TWA needs. (Par. 26).

5. Commencing in 1955 and continuing thereafter various other air carriers, including TWA competitors, made appropriate arrangements for the financing of jet aircraft, and in 1955 and in 1956 obtained commitments for funds at interest rates ranging from 4% in 1955 to 4¼%-4¾% in 1956. (Par. 27).

6. In 1955, and for several years thereafter defendants discussed various proposals for financing TWA jet aircraft, but made no arrangements for such financing, nor was TWA allowed to make any such arrangements until December 1960, when interest rates for long-term debt were approximately 6-6½% (Par. 28); and

7. TWA was foreclosed from obtaining financing on more advantageous terms than those available to it in December 1960 and thereby suffered a loss because of the greater cost of borrowing and TWA's ability to obtain financing for its needs was substantially impaired. (Par. 52(c) and (d)).

The well pleaded allegations restated above, which are accepted as facts, lead to the determination that with one important exception noted below, the existence of Toolco, its ownership of stock and the role played by it historically in making or guaranteeing loans to TWA or in buying TWA equity all must be ignored in considering and determining damages to TWA attributable to the foregoing allegations of the complaint. To give weight to the existence of Toolco, its TWA stock ownership and the role played by it in TWA financial affairs would be in deroga-

tion of the allegations and not permissible as I interpret the doctrine of *Thomas* v. *Wooster* (114 U. S. 104) discussed on pages 21 through 24 of this Report. Notwithstanding this exclusion, I must consider the actual Balance Sheet as of December 31, 1954 and the actual operating results for the year 1954 and the first two calendar quarters of 1955, as did TWA and its experts Drexel Harriman Ripley, and as must have an independent Board.

Proof of Damages. TWA in submitting its proof of damages has endeavored to establish through the expert testimony of Drexel Harriman Ripley what it would have recommended to TWA in the early part of 1955, in October 1955 and in May 1959. Further through the expert testimony of Drexel Harriman Ripley and through cross-examination of Woodfin, a general partner of Loeb, Rhoades, the expert retained by the defendants, TWA has endeavored to establish that if the Board of TWA in early 1955 and continuously thereafter had been composed of directors acting prudently, independently and free from any control or dominance by Toolco or any other major stockholder, it would have approved and could have carried out the recommendations of Drexel Harriman Ripley.

TWA and its expert, Drexel Harriman Ripley, state quite clearly and repeatedly that the debt financings recommended in October 1955 and May 1959 assumed and were conditioned upon the sale in May 1955 of common stock bringing net proceeds to TWA of $55.5 million (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, pp. 23-25; Tr. 3981, 4313-4314). The recommendations with respect to the May 1959 sale of $60 million convertible debentures and the placing of $90-$110 million equipment mortgage notes assumed and were additionally conditioned upon the successful placing in October 1955 of a $150-$170 mil-

lion equipment mortgage (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 58).

It is, therefore, understandable why TWA, its expert and counsel devoted a substantial amount of attention to the prudence and doability of the May 1955 equity financing and why the defendants, their expert and counsel similarly addressed an equivalent amount of attention to proving that the May equity financing was imprudent, premature and not doable.

No alternative theory of damage was presented by TWA or the defendants and I must, therefore, address myself to TWA's contention that an independent and prudent Board of TWA could and should have sold in May 1955, $58.5 million of common stock of TWA which would bring net proceeds to TWA of $55.5 million.

In the receiving and hearing of evidence on damages I have been guided by the principle of *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251 (1946). The Supreme Court in *Bigelow* stated that "the most elementary conceptions of justice and public policy require that the wrongdoers shall bear the risk of the uncertainty which his own wrong has created." (327 U. S. 251, 265). However, the Court defined the responsibilities of the trier of fact in the following language at page 264:

> "In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly."

I recognize that with respect to participation in the financing of commercial airline companies and aircraft manufacturing companies, Drexel Harriman Ripley, and

its senior officers who participated in the preparation of their Report are eminently qualified. As a product of careful and sophisticated statistical research and presentation their Report is commendable. However, after careful deliberation, I have determined that TWA has not established that a prudent and competent management of TWA acting independently and free of any control or interference on the part of Toolco would and should have calculated in the spring of 1955 the amount of the financial requirements of TWA for the jet aircraft age. It is also my determination that an independent and prudent TWA management would not have accepted the recommendation of Drexel Harriman Ripley that TWA sell in May 1955 $55.5 million (net proceeds) in common stock of TWA.

For me to find to the contrary would in my opinion endow Drexel Harriman Ripley and an independent prudent Board of TWA in 1955 with a prescience, wisdom and perfection of timing that exceeds the natural capacity of the most experienced men acting without the benefit of hindsight. I am aware that in the spring of 1955 the equity capital of historical TWA reflected the influences of the major stockholder, Toolco, over several years prior thereto, but I am not persuaded that it has been convincingly established that TWA was "obviously short of proprietary capital" in the early part of 1955 (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 21).

TWA and Drexel Harriman Ripley compared the net worth in absolute dollars of TWA with the net worth of its principal competitors and showed that at best TWA was short by $25.7 million (United Air Lines) and at worst short by $39.1 million (Pan American) (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 9). In addition, TWA and Drexel Harriman Ripley resorted to

a comparison of certain "yardsticks" applied to TWA and to its principal competitors. Several "yardsticks" were employed: (i) Total Operating Revenue; (ii) Net Operating Income; (iii) Net Income Including Capital Gains; (iv) Revenue Airplane Miles Flown; (v) Available Seat Miles; and (vi) Net Operating Income Per Revenue Airplane Miles and Per Million Available Seat Miles for 5 years 1950-1954 and for one year 1954. Defendants' expert, Loeb, Rhoades, stated that these "yardsticks" are tools normally used for measuring operating performance. On that basis TWA, which as the record discloses had revenue and earnings up to December 31, 1954 that compared favorably with those of its principal competitors, might be said to have made the most efficient use of its equity capital (Tr. 7122-7123). It is deemed significant that a comparison of debt-equity ratios as of December 31, 1954, indicated that TWA with a ratio of 78.4% equity to 21.6% debt was in a better financial position than American and United and about equal to Pan American. (Drexel Harriman Ripley Report, TWA Ex. 5, Part II, p. 9).

Loeb, Rhoades was of the opinion that TWA having placed with Equitable Life a $40 million Equipment Mortgage Loan in December 1954, was adequately financed. I accept this opinion of Loeb, Rhoades. In January and February 1955 the performance characteristics of commercial jet aircraft and the dates on which they were to be delivered were still far from being settled. It was acknowledged that the delivery dates for jet aircraft were three or more years away. While there was discussion in the trade press and periodicals that commercial airlines were almost certain to be using commercial jets in the future, it was still an open question whether they were to be pure jets or turbo-prop jets (Loeb, Rhoades Report, DX 270, Part II, pp. 6-7). While the Annual Report in 1953

of the National Aviation Corporation, a closed-end investment trust, concentrating on airline and aircraft manufacturing industries regarded the DC7 and the Super Constellation as the last of their kind for mass air travel. Its Report for 1954 referring to the advent of the Vickers Viscount turbo-prop stated that the new "shape of things to come in 1955-58 is in ferment * * *" (See page 196 this Report). In the early months of 1955 Boeing could not say when it would commence the manufacture of commercial jets. Its Annual Report for the calendar year 1954 which bears the date March 7, 1955, was far from definite. The manufacturing facilities, tools and equipment used by Boeing for the manufacture of the U. S. Air Force jet tankers were owned by the U. S. In early 1955 Boeing was seeking, but had not obtained, the consent of the U. S. Air Force to use these facilities for the manufacture of commercial jets (this consent was not obtained until August 1955) (Tr. 6889).

During the spring and summer of 1955 the specifications and performance characteristics of the commercial jet continued to be the subject of speculation and discussion. The functioning of jet aircraft in hot weather, noise at airports and the choice between pure jets and turbo-props, such as the Electra and Vickers Viscount was still unresolved (Tr. 6889-6893). It was not until October, November and December of 1955 that delivery schedules were arranged and firm contracts were signed. It was in those months that the airlines made arrangements to finance the acquisition of jets. The first financing arranged was by Eastern Air Lines on October 31, 1955 for $90 million, of which $40 million was earmarked for the purchase of jets. This was followed by the American Airlines financing of $75 million

arranged on November 1, 1955 and the United Air Lines financing of $150 million arranged on December 21, 1955, these being solely to finance the acquisition of jets.

I find it unlikely for an independent Board of TWA to have acted upon the Drexel Harriman Ripley recommendation with respect to initiating a plan to secure $300-400 million over six years in the first quarter of 1955 when there was no proven need for equity capital and when specific information with respect to the performance characteristics and delivery dates of jet aircraft was still unavailable and uncertain. That is to say, I am not persuaded that this information was available in sufficiently definite form to permit the formulation of the financial program of the magnitude which Drexel Harriman Ripley states it would have recommended, and I conclude that an independent prudent Board of TWA would not have accepted and acted upon the Drexel Harriman Ripley recommendations and that the sale in May 1955 of common stock of TWA for $58.5 million netting TWA $55.5 million would not have occurred.

But even if an independent prudent Board of Directors of TWA would have concluded in the early months of 1955 that a program should be formulated and acted upon to provide funds with which to finance the long-term acquisition of jet aircraft, I am persuaded by and accept the expert testimony of Loeb, Rhoades to the effect that such a Board would not have implemented the plan advocated in the Drexel Harriman Ripley Report. Loeb, Rhoades in their direct testimony and their cross-examination established the following points: (i) TWA was not clearly in immediate need of equity capital as asserted by Drexel Harriman Ripley; (ii) the $58.5 million common stock offering exceeded by more than $11 million the sum total

of all domestic trunk common stock offerings during the 1946-1955 period; (iii) the terms of the one-for-one offering involved an extreme dilution of stockholders' interest; and (iv) the $58.5 million offering exceeded by $23 million the sum total of common stock offerings of all other airlines between May 1955 and 1960 (Loeb, Rhoades Report, DX 270, Part II, Exhibit A). It is also significant to note that United Air Lines which was being advised during the period in question by Drexel Harriman Ripley sold no equity to finance jets until 1960, when it issued convertible debentures in the amount of $25 million.

The recommended October 1, 1955 mortgage debt financing amounting to $150-170 million was stated by TWA's expert, to be largely dependent on the successful completion of the May 1955 common stock offering. Testimony of both plaintiff and defendants indicated that an improved balance sheet based on a reconstruction of TWA as of September 30, 1955 incorporating the added equity would be a crucial step in securing the large amount of debt conceived by Drexel Harriman Ripley for the fall of 1955.

TWA's expert was faced with a difficult task in offering to prove that large scale financing would have been obtained in 1955 in an amount and on the terms estimated. Relative to the previous year, TWA's quarterly earnings were dropping rapidly after the first quarter of 1955. (Loeb, Rhoades Report, DX 270, Part II, Exhibit F.) It appears that in order to secure the amount indicated at favorable terms that TWA would have had to complete jet financing commitments before lending institutions became cognizant that TWA's earnings deterioration was more serious than a mere seasonal variation. Against this history TWA and Drexel Harriman Ripley endeavored to show that an independent TWA Board would have had

the singular foresight to plan both the common stock offering of $55.5 million and the October 1, 1955 debt financing of $150-$170 million well ahead of its competitors. As indicated above, the advent of commercial jet aircraft was the subject of discussion in the trade press in November and December of 1954 and January of 1955 and was commented upon in the Boeing Annual Report of 1954 which was dated March 7, 1955, and the cost of a commercial jet aircraft was generally accepted to be in the neighborhood of $4,250,000. Nevertheless, I am satisfied from the record that there remained to be determined as of August-September 1955 (the time which the debt financing would have had to be negotiated) much vital information regarding specific aircraft orders, performance and delivery schedules before realistic bargaining for such large scale funds could take place. Indeed, a $150-$170 million loan to TWA on October 1, 1955, would have been almost three times as large as any long-term commitment that had been made to that date to any airline for any purpose. (See page 234 this Report). I conclude that TWA has not proved that either of the 1955 financings could have been reasonably negotiated at the time, in the amount and according to the terms suggested, by an independent and prudent management.

Since the May 1959 equity financing of $60 million and debt financing of $90-110 million assumed and were dependent upon the 1955 common stock and mortgage debt financings and since I have determined that the latter on their face as proposed by TWA's expert could not have taken place under the historical circumstances established in the record, I thus find a failure of proof with regard to these subsequent financings. Although the complaint alleges damages attributable to defendants' interference with the proper and timely financing of TWA, I do not feel that I, as Special Master, can independently, with the

record available, make an ultimate determination of any specific amount of damages with respect to financing. Therefore I determine on the whole that no damages be awarded to TWA in respect of the allegations of the complaint set forth above.

In view of my determinations above it is not necessary for me to consider the calculation of the debt burden as of December 31, 1963. However, I do think it might be proper for me to observe that an independent prudent management might have subsequent to December 31, 1963 found opportunities to refinance all or part of the funded debt at more favorable terms and thus nullify the significance of a present value comparison as far as damages are concerned.

IV.

Loss Due to Delay in Disposal of Displaced Piston Aircraft

Plaintiff alleges in paragraph 52 of its complaint that it "was foreclosed from the opportunity for early sales of its obsolescent piston-engine aircraft, causing loss to TWA". It claims that the earlier delivery of the jet aircraft would have allowed it to retire many of its piston aircraft earlier and at least as early as its competitors did (TWA Ex. 2, pp. 22-23) and that a decline in the market prices obtainable for these aircraft during that period caused TWA damages of $6,880,600, before trebling (TWA Ex. 6B, pp. 9, 24-26). TWA has lowered this claim to $5,700,000 before trebling by taking into consideration possible losses due to uncollectible items receivable (Plaintiff's Brief 231).

TWA does not contend that the acquisition of any particular jet airplane would have caused the retirement of any particular piston plane or planes (Tr. 1649), and it states that as the jet aircraft were delivered over a period of time, they displaced piston aircraft from certain routes which in turn displaced other piston aircraft from other routes, and so on, in a chain reaction which made piston aircraft available for sale which were not necessarily the particular planes which had been serving the routes to which the jet aircraft were assigned (Tr. 1649-50, 1799-1800). Nor does TWA contend that there is a specific relation in terms of seating capacity between the jet aircraft and the piston planes retired in connection with their acquisition (Tr. 1683, 1799). Its claim rests on the broader assertion that until it received jet aircraft it was re-

quired to keep sufficient piston aircraft to carry on its business (Tr. 1596, 1600, 1798). The proof it offers as to the loss it sustained is put forward as a reasonable estimate of the number of sales of piston aircraft which were delayed, the extent of the delays, and the cost to TWA of the delays (Plaintiff's Brief 230).

It will be recalled from the discussion under Section I of this Report that the hypothetical jet fleet of reconstructed TWA used in computing lost operating profits consisted of 63 jet aircraft. As a basis for computing damages under this Section IV, Rummel constructed Annex F to TWA Exhibit 2 (hereinafter "Annex F") in which he first listed the delivery dates of the first 63 jets historically received by TWA and the delivery dates of the first 63 jets assumed to have been received by reconstructed TWA. Rummel next determined how many days earlier reconstructed TWA would have received each of its first 63 jets than it historically received each of its first 63 jets ("jet gain days"). Rummel also listed chronologically the sales dates for 103 piston aircraft which TWA historically sold between December 31, 1958, and July 20, 1962 (the latter date being the date on which TWA sold the last piston aircraft it sold before receiving its 63rd jet) (Tr. 1593, 1630). Rummel then determined reconstructed piston sale dates by moving forward the sale date of each of the 103 pistons a number of days ("piston gain days") equal to the jet gain days of the reconstructed jet with which it was linked (Tr. 1607, 1690). The pistons were linked to the jet by the following method:

Rummel linked the first jet received to those (four) of the 103 piston aircraft which TWA sold prior to the receipt of that jet airplane (Tr. 1647). He then took the period the delivery of the jet was delayed, jet gain days,

which is 60 days, and advanced the date these four piston aircraft were actually sold by 60 days to arrive at a "reconstructed piston retirement" date. The actual retirement date listed for each piston aircraft is the date the airplane was historically sold and the reconstructed retirement date is the date on which TWA claims for damages purposes the plane would have been sold if the delivery of the "linked" jet aircraft had not been delayed (Tr. 1631-32, 1653, 1689-90, 1724). The second jet received by TWA was delivered on March 17, 1959.* In Annex F, TWA has linked to the second jet the piston aircraft actually sold prior to the delivery date of that jet airplane and subsequent to the delivery date of the jet airplane previously received (Tr. 1700-01). As the second jet is claimed to have been delivered 76 days late, TWA asserts in Annex F that the piston aircraft linked to it would have been retired 76 days earlier.

This system is used throughout Annex F to attribute to each of the 103 piston aircraft a reconstructed retirement date. The number of days by which the reconstructed dates are advanced vary from 11 to 707. As each piston aircraft is linked to the first jet airplane which was delivered after the piston plane was sold, jet airplanes which were delivered after the delivery of other jet airplanes by an interval in which no piston aircraft sales took place are not linked to any piston aircraft and therefore play no part in TWA's computation of days by which piston retirement dates are reconstructed. For example, no piston aircraft were actually sold between March 25, 1959, when the airplane listed on Annex F as Piston No. 7 was sold, and June 26, 1959, when the airplane listed

*The date March 17, 1958, appearing in Annex F is a typographical error; the plane was delivered on March 17, 1959 (Tr. 1696).

on Annex F as Piston No. 8 was sold. Between these two dates, nine jet aircraft were delivered at various times from March 30, 1959, to June 13, 1959, but eight of these nine jet airplanes are not linked to any piston aircraft. Although TWA does not contend that any particular piston airplane would in fact have been sold on its reconstructed retirement date, it offers Annex F as "a reasonable construction of events that could have been expected" to occur (Plaintiff's Brief 234, Tr. 1632).

Plaintiff based its estimates as to the price which it would have obtained for the displaced piston aircraft upon a study made by R. Dixon Speas Associates, aviation consultants with extensive experience in evaluating aircraft. The study was presented through the prepared testimony of Mr. R. Dixon Speas (TWA Ex. 6B). The report reflected a study made by Speas Associates of the market for used piston aircraft offered for sale by the various United States trunk line air carriers for the years in question and concluded with the opinion that if the 103 piston aircraft had been sold earlier at the reconstructed retirement dates, TWA would have received 6.9 million dollars greater proceeds than it did historically for those aircraft.

To determine the price which TWA would have obtained on the reconstructed retirement date for each of the piston aircraft, Speas has constructed by statistical analysis sales price trends, by types of aircraft, of all the aircraft sold by United States trunk line air carriers from January 1, 1958, to June 30, 1964. These sales price trends are depicted in the figures set forth at pages 33-43 of TWA Exhibit 6B, where in every class of aircraft the trend line so constructed by TWA declines throughout the period. To determine the damages claimed for each piston air-

craft, Speas, at pages 24-26 of TWA Exhibit 6B, applies the rate of market price decline for aircraft of that type to the period of delay equal to "piston gain days" arrived at in formulating reconstructed retirement dates in Annex F.

For purposes of reference it is noted that the prices actually received by TWA for the piston aircraft it sold in the period from January 1, 1958, to June 30, 1964, including the 103 aircraft it links to the delivery of jet aircraft, are set forth at pages 80-85 of TWA Exhibit 6B, and the prices received by other United States trunk line air carriers in the sales of piston aircraft in the same period are set forth at pages 122-154 of the same exhibit.

Defendants attack the validity of TWA's proof. They contend that the reconstructed retirement dates for piston aircraft are meaningless without proof that the earlier delivery of particular jet airplanes would have advanced the sale of particular piston airplanes, and advanced them an equal number of days (DX 324, p. 5). Defendants also attack TWA's price trend lines. Although they do not dispute the validity of the mathematical basis for the trend lines given all the assumptions used by Speas, they contend that the lines are constructed with reference to inappropriate data (Defendants' Brief 281). They point out that the condition of the aircraft and the nature of the sales transactions were not considered and that the trend lines are based in part on data for periods not relevant to the aircraft in question (DX 324, pp. 5-6). Defendants also point out that TWA's computations give no consideration to benefits which TWA could offset against losses in sales prices, such as depreciation and the use of the aircraft while allowing the usable flight time after overhaul of air frames, engines, and propellers to expire

(DX 324, p. 6), and that the average cost of a full overhaul on the two-engine planes, which are the M-202 and M-404 aircraft, exceeds $100,000 and the cost of overhaul of larger piston aircraft is greater (DX 324, pp. 32-34). Defendants also contend that there was not a steady market for each of the types of piston aircraft retirement by TWA (Defendants' Brief 284-86). They further contend that any comparison of the sales by TWA to the sales by other airlines should entail an examination of the percentage of each airline's piston aircraft sold during the initial period of jet aircraft acquisition. (DX 324, p. 7).

In supporting their contention that the sales transactions were not sufficiently homogeneous to warrant their use in the construction of price trend lines, defendants maintain that sales which were actually trade-ins on jet acquisitions or sales to buyers which entailed a high risk of default were made at prices far higher than could be obtained from arm's length, financially responsible buyers (DX 324, pp. 14-17). Defendants also contend the sales of any aircraft for less than $100,000 were not sales for use as airplanes but as scrap (DX 324, p. 17), implying that either these aircraft were not usable for flying or there were no buyers. In addition, defendants contend that TWA did not require the 103 piston aircraft during the period in question, and to illustrate this they set forth tables comparing the normal utilization of certain aircraft types with TWA's utilization during that time (DX 324, pp. 21-26).

TWA attempts to meet defendants' contention that the reconstructed retirement dates cannot be taken as dates when the aircraft would have been sold by arguing that it cannot be said that the absence of sales at any time within the period means there were no buyers, for sales took place throughout the period and to say that an absence of sales indicates an absence of buyers is "improb-

ably deterministic" (Plaintiff's Brief 235). As TWA asserts, its claim is based on the proposition that market prices declined steadily and continuously during a six-year period beginning in mid-1958 (Plaintiff's Reply Brief 119). TWA attempts to meet defendants' contentions that the trend lines are based on sales which are too disparate to be compared by arguing that the factors which distinguish particular sales average out in the formulation of the trend lines (Plaintiff's Brief 239-44). In particular, TWA contends that any differences in sales prices accounted for by differences in flying time since overhaul are random and that airlines provide "progressive maintenance" and do not allow aircraft to be flown without maintenance until they require a complete overhaul (Plaintiff's Brief 239). TWA also contends that each piston aircraft it sold was, on an average basis, approximately 50 per cent "run out of time" (Plaintiff's Brief 244).

Proof of any actual relation between the acquisition of jet aircraft and the retirement of the piston aircraft, other than the chronology set forth in Annex F, was not introduced. It was apparently available to TWA, for Rummel testified that TWA had charts showing probable piston aircraft retirements as a function of the acquisition of jet aircraft (Tr. 1801) and made several references in his testimony to a specific piston retirement plan.* He also

*"Forward planning regarding fleet composition" (Tr. 556), "the removal of a fleet or fleets would be on a plan known basis" (Tr. 562), the disposition "did reflect planning" (Tr. 1611), "the development of plans" (Tr. 1619), "the specific plan for retirement" (Tr. 1638), "the plan" (Tr. 1641), "the plan to retire pistons" (Tr. 1653), "in the overall piston retirement plan we spoke of release of airplanes in terms of what they would do" (Tr. 1722), a "disposal plan" (Tr. 1745), and an "overall plan" (Tr. 1755). TWA personnel were assigned the formulation of a plan to retire piston aircraft (Tr. 1616, 1628-29). There was a broad plan in writing contained in the Jet Plans and Premises Manual which did not link the retirement of particular piston planes to specific jet deliveries (Tr. 1624), and certain exhibits introduced by defendants are taken from this source (Tr. 1666, 1670).

testified that he chose the dates of actual sales "rather than a plan" as the basis of TWA's proof on this issue (Tr. 1641).

I accept as "well-pleaded" the allegation of paragraph 52 of the complaint that plaintiff was foreclosed from the opportunity for early sales of piston aircraft, but I determine for the reasons set forth below that TWA is not entitled to the damages it claims in its proof with respect to losses due to delay in having piston aircraft available for sale. Defendants have proved conclusively that TWA's decisions to retire or retain many of the 103 aircraft were based on considerations having no connection with the acquisition of jet aircraft or defendants' acts and that the losses claimed in the proof offered by TWA with respect to the remainder of these aircraft cannot be said to be the result of defendants' acts. Instances of these failures in proof are set forth in the detailed review which follows. Moreover, the statistical analysis used by the plaintiff is deficient for the reasons advanced by the defendants and summarized above. The detailed application of the analysis of each type of piston plane sold by TWA, as set forth below, indicates clearly the unreasonableness of the results obtained under the methodology used, and plaintiff's claim under this Section IV is rejected in its entirety.

M-202A Aircraft

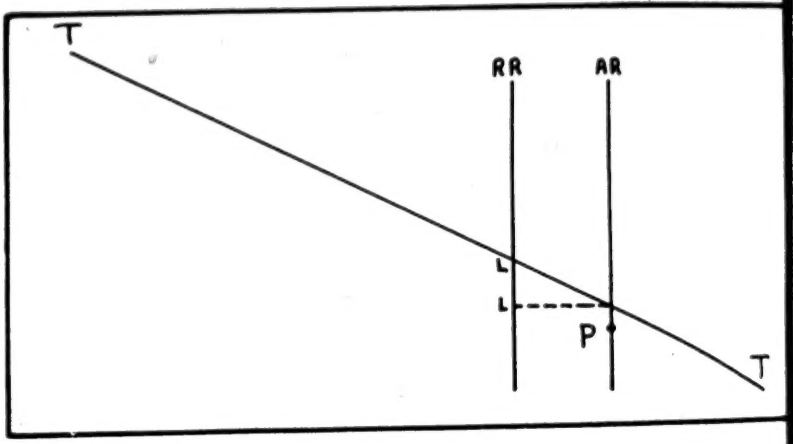
TWA claims damages of $75,800, before trebling, for delay in having eleven M-202A aircraft available for sale (TWA Ex. 6B, p. 9). These are short-range, two-engine airplanes. According to TWA's proof, the earliest date at which any of these aircraft would have been sold had there been no delay in the receipt of jet aircraft is No-

rember 1, 1958, which is the "reconstructed retirement date" set forth in Annex F for Piston Aircraft No. 1. The proof shows, however, that TWA historically made these aircraft available for sale in December 1957 and that on February 15, 1958, TWA announced that they were retired from service (Tr. 1656, 1661, DX 35). As these aircraft were put up for sale and retired from service prior to their reconstructed retirement dates, TWA's claim that a delay in the availability of these aircraft for sale due to a delay in receiving jet aircraft caused the loss to TWA claimed in its proof cannot be sustained. My reasoning in support of this conclusion follows:

TWA's claim is for losses due to a delay in having certain aircraft available for sale. It has computed its damages for that delay in a series of steps, the first of which, as described above, are (1) the computation of piston gain days, (2) the formulation by statistical analysis of trend lines which show the market price for each type of aircraft declining throughout the period at a steady rate, and (3) the determination of the decline in market price during the period between the reconstructed retirement date and the actual retirement date by translating the piston gain days for each aircraft into quarters of delay and multiplying the quarterly rate of market decline for the particular type of aircraft by the number of quarters of delay. The next step is to put forward the resulting amount not only as the decline in market price between the reconstructed retirement date and the actual retirement date but also as the amount of damages claimed for delay in having the aircraft available for sale. The claim that the delay in acquiring jet aircraft caused a loss in this amount is apparently based on the contention that TWA's failure to sell the aircraft between the recon-

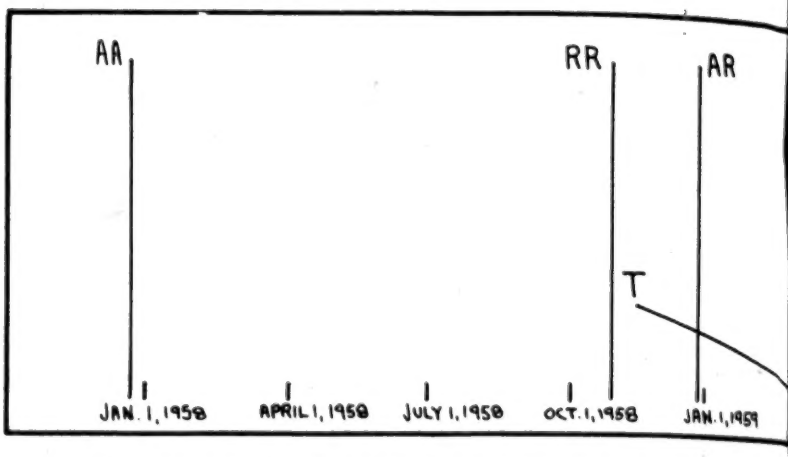
structed retirement date and the actual retirement date was caused by delay in receiving jet aircraft. An alternative possible basis would be the contention that this amount equals the decline in market price during earlier, but equal, periods of the delay in having aircraft available for sale.

At first Rummel testified that the theory of TWA's proof was that the piston aircraft were not available for sale prior to the date of actual retirement (Tr. 1612, 1613-14) and he also testified that the piston aircraft were needed at the reconstructed retirement dates because of the lack of having jet aircraft (Tr. 1633). This testimony indicates that it is TWA's contention that because of the jet delivery delays the aircraft could not be given up prior to their actual retirement dates and therefore that the fall in market price between the reconstructed retirement date and the actual retirement date is TWA's actual loss. TWA's proof in this respect may be set forth in graph form as follows:



The line TT represents a TWA trend line of market prices for a particular type of aircraft over a period of time, where time is measured horizontally and price is measured vertically. The time and price at which a particular airplane is sold is represented by the point P. Thus a vertical line AR passing through P represents the actual retirement date, and a vertical line RR placed to the left of AR by the amount of piston gain days for the aircraft represents its reconstructed retirement date. The decline in market price during the period of piston gain days is therefore represented by a segment the length of LL.

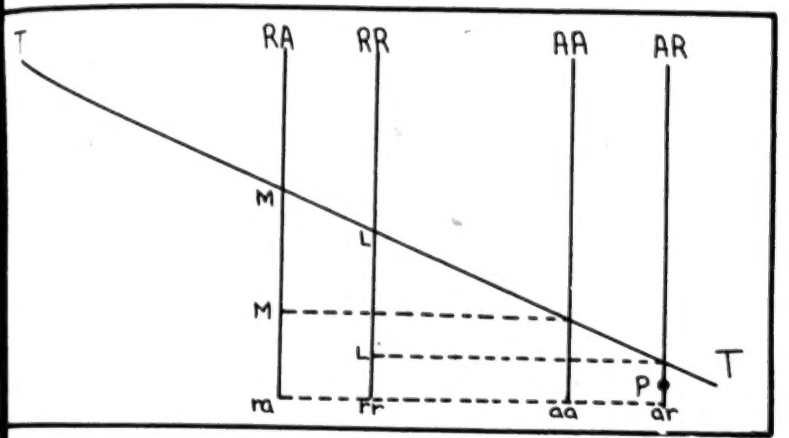
It was established, however, that TWA actually made many piston aircraft available for sale not only in advance of their actual retirement dates but in advance of their reconstructed retirement dates. In some instances piston aircraft were actually made available for sale approximately two years prior to the earliest reconstructed retirement date for any aircraft of that type (DC-4 aircraft; DX 324, p. 67; Annex F). In the case of M-202A aircraft, the planes were available for sale at least as early as December 1957 while the earliest reconstructed retirement date set forth in Annex F for any aircraft of this type is November 1, 1958, and the earliest actual retirement date for these aircraft is December 31, 1958. A graph showing these dates with respect to the first M-202A airplane sold would appear as follows, with the line AA representing a date as of which the proof has established the aircraft was actually available for sale:



Rummel also testified that piston aircraft were available for sale earlier than the dates listed in Annex F and that the reconstructed retirement date is not the date an airplane would have been available for sale but the date it is assumed it would have been sold (Tr. 1631-32, 1633, 1692, 1751, 1754, 1756). He testified that in Annex F TWA assumed that if the jet aircraft had not been delayed, the piston aircraft would have been available for sale in advance of the reconstructed retirement dates "exactly to the same degree" that the dates they were actually made available for sale preceded the actual retirement dates (Tr. 1751) and that the time it would have taken to make the reconstructed sale may be assumed to be the same as the time it took to make the actual sale (Tr. 1753). This testimony indicates that TWA seeks as damages the difference in market prices on the reconstructed retirement date and the actual retirement date on the theory that, although aircraft were available for sale prior to the reconstructed retirement dates, it takes a certain amount of time to sell any particular airplane even when a market exists. Possibly TWA contends alternatively that that amount is equal to the decline

in market value during the period it actually complains of, that is, the period of delay in having the aircraft available for sale, which decline would be equal to the decline in market price in the later period between the reconstructed retirement date and the actual retirement date because (1) the lead times between having aircraft available for sale and selling them would be the same in both cases and (2) the trend line shows a market price decline at a steady rate.

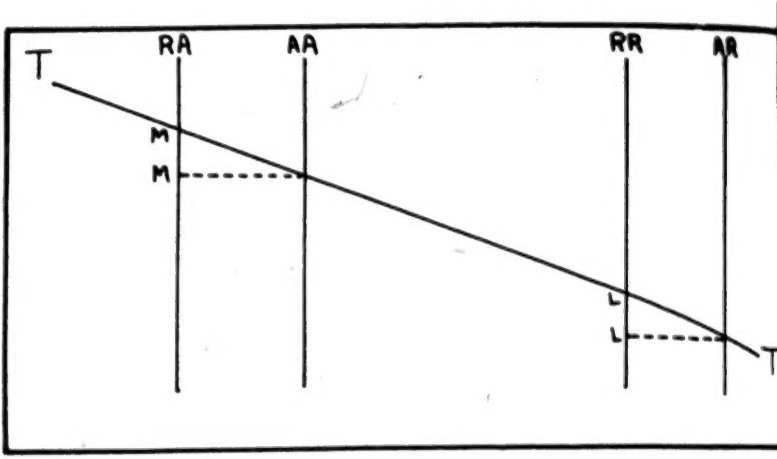
Rummel's introduction of the factor of equivalent lead times may be set forth in graph form as follows:



The vertical line AA plotted to the left of AR represents the date the aircraft was actually available for sale, and on TWA's assumption that the time it took to effect the sale would have been the same at any earlier time, a vertical line RA representing the reconstructed availability date would lie as far to the left of RR as AA is from AR. The segments shown on the graph as ra-rr and aa-ar are equal, and therefore adding the segment rr-aa to each of them results in the segment ra-aa being equal to rr-ar.

The segment MM therefore equals the segment LL, which expresses the conclusion that the decline in market price in the period of delay in having aircraft available for sale equals the decline in market price between the reconstructed retirement date and the actual retirement date.

Where the proof shows that an aircraft was actually available for sale prior to its reconstructed retirement date, a graph would show the lines AA and RA to the left of line RR:



In this situation the particular proof of loss attributable to defendants' acts put forward by TWA cannot be sustained. No matter which of the theories described above underlies TWA's claim, the damages claimed are based upon the assertion that the aircraft would have been sold on certain dates, the earliest of which, in the case of M-202A aircraft, is November 1, 1958, while defendants have shown that the aircraft were available for sale prior to that time, at least as early as December 1957 for M-202A

planes. If there was a market throughout the period, as TWA asserts (Plaintiff's Brief 235, Tr. 3688, Plaintiff's Reply Brief 119, 122)) and must assert to support its contention that planes could have been sold throughout the period earlier than they were, the delay in selling these planes after they were no longer needed cannot be said to be caused by defendants' acts. The proof does not show that there is any particular number of months or years required to effect the sale of an airplane once it is placed on the market. On the contrary, the evidence shows that planes of the same type, even when made available for sale at the same time, were sold at widely varying times after becoming available for sale. The contention of TWA that it may be assumed that the period between availability and sale would be the same whenever a plane is made available for sale, thereby requiring an earlier, reconstructed availability date to enable a sale to take place on the reconstructed retirement date, is conclusively disproved. As defendants were not responsible for TWA's failure to sell these aircraft from December 1957 on, I am unable to find that the loss it claims in its proof to have sustained upon the sale of the M-202A aircraft, which sales occurred over the period December 31, 1958, to October 1, 1959 (Annex F), is due in any part to a delay prior to December 1957 in having the aircraft available for sale or that the damages claimed may be a measure of a loss attributable to the period of delay in availability. Moreover, the proof conclusively shows that these aircraft were made available for sale prior to "mid-1958" which TWA asserts was the commencement of a six-year price decline (Plaintiff's Reply Brief 119). In addition, in view of TWA's assertion that there was a market for the sale of the aircraft, I conclude that TWA has failed in its proof

based on the assertion that, as a reasonable reconstruction of events that would have occurred, an airplane would have been sold on a certain day if the acquisition of jet aircraft had not been delayed, where defendants have shown that the aircraft was actually made available for sale by TWA prior to that time.*

In considering TWA's proof above, I have treated as valid its basic assumption that there was a market throughout the period, the existence of which would have enabled airplanes to be sold on their reconstructed retirement dates at market prices which declined at a steady rate. Rummel testified, however, that the market was glutted by the time TWA's planes were available for sale (Tr. 1636),** and if that is the fact TWA's methodology is further invalidated.

Moreover, TWA's proof shows that from 1959 to 1963 there was an elimination of 15,000 short-segment departures resulting from a TWA decision "to eliminate the short stage length departures operated with piston aircraft, because they were not profitable and had nothing whatsoever to do with the advent of the long-range aircraft, which is the

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* Rummel conceded that a document showing M-202A aircraft to be available for sale in February 1958 indicated that he could not say that the first four of these aircraft sold were timed to the first jet as is shown in Annex F (Tr. 1668). Rummel also testified that he could not say the M-202A listed in Annex F as Piston No. 21 and linked to Jet No. 16 was needed by TWA until the delivery of that jet in view of proof that TWA leased the piston plane on January 14, 1959 (Tr. 1679) and again on June 13, 1959 (Tr. 1681-82). The reconstructed retirement date for that plane in Annex F is June 17, 1959. Similarly, the M-202A airplane listed in Annex F as Piston No. 22 was leased twice prior to its reconstructed retirement date of June 17, 1959, the second leasing taking place on June 6, 1959 (Tr. 1685-86). Piston No. 13 was leased on June 27, 1959, and has a reconstructed retirement date of June 29, 1959 (Tr. 1690-91).

** Defendants showed that TWA did not lag behind its competitors in 1958-1959 in selling piston aircraft (Tr. 3692-93) and takes the position that the market decline took place at that time (Defendants' Brief 285).

subject of our analysis and estimates." (Tr. 10642-43 and TWA Ex. 443). That the M-202A aircraft were all operating on average stage lengths of less than 300 miles and were the subject of this managerial decision (Defendants' Brief 290) is undisputed. The elimination on this scale of the short stage length departures operated with piston aircraft having no connection with the introduction of the jet aircraft into service makes it impossible to conclude that the short-range M-202A aircraft were retained because the delivery of long-range aircraft was delayed. The claim for damages with respect to these aircraft is disallowed in its entirety. It is noted that the first four aircraft of this type which were sold form the starting point of the trend line set forth at page 33 of TWA Ex. 6B. There is no evidence to support the conclusion that higher prices were obtainable for aircraft of this type between November 1, 1958, and the date on which they were sold, December 31, 1958, and the trend lines of market prices constructed by TWA do not purport to show that higher prices were available prior to the initial sales which constitute the starting points of the trends (Tr. 3610-11, 3612). For that reason also, TWA's proof does not support the damages it claims with respect to these aircraft.

L-1049, L-1049G and L-1049H Aircraft

TWA claims damages of $808,100, before trebling, for delay in having eleven aircraft of the types L-1049, L-1049G, and L-1049H available for sale (TWA Ex. 6B, p. 9). Speas testified that he considered the L-1049, L-1049G, and L-1049H aircraft to be enough alike to use the same market decline in computing damages for aircraft of all these types (Tr. 3644). The trend line constructed for the market price of these aircraft is apparently based

solely on data of L-1049 sales, and the data for L-1049G and L-1049H aircraft were not used in determining the trend line (TWA Ex. 6B, pp. 24, 26, 38, 85, Tr. 3643), although the quarterly market declination rate constructed with reference to L-1049 aircraft is used as the basis for computing the claimed loss attributable to L-1049G and L-1049H aircraft (TWA Ex. 6B, pp. 24-26). TWA contends that using the sales data for the L-1049H aircraft would result in a trend line which would not be reliable because it would have a low coefficient of correlation (Tr. 3789). All nine of TWA's L-1049 aircraft were listed for sale on February 6, 1959 (Ex. G annexed to DX 324), while according to TWA's proof the earliest date on which any of the planes would have been sold if the jet aircraft had not been delayed was July 18, 1959, which is set forth in Annex F as the reconstructed retirement date for Piston No. 16, the damaged L-1049G for which TWA claims no damages on the ground that it was damaged prior to its reconstructed retirement date. (TWA Ex. 6B, p. 24; Tr. 1707, 1737). The next earliest reconstructed retirement date was September 24, 1959, which is set forth in Annex F as the reconstructed retirement date for the L-1049 airplane listed as Piston No. 26. Only five of the nine L-1049 aircraft were sold by June 30, 1964 (TWA Ex. 6B, pp. 80-85).

As these aircraft were listed for sale prior to the earliest reconstructed retirement date for aircraft of any of these types and are enough alike for TWA to value them on the same trend line, for the reasons set forth above with respect to M-202A aircraft, TWA's claim that a delay in the availability of these aircraft for sale due to a delay in receiving jet aircraft caused the loss to TWA claimed in its proof cannot be sustained. Moreover, if only the data of

L-1049 sales will serve as the basis of a trend line having a reliable coefficient of correlation, TWA's claim that losses with respect to the other types may be measured by the trend line, with which their own data is incompatible, is not accepted. The claim with respect to these aircraft is therefore disallowed in its entirety. It is noted that the aircraft which is plotted on page 38 of TWA Ex. 6B as sold in the second quarter of 1963 is the same plane that is also plotted as having been sold in the fourth quarter of 1960, having been repossessed in the interim (Tr. 3643). It was therefore available for sale at least as early as the time of its first sale. It is also noted that if the sale of this aircraft, which occurred after the period of the sale of the 103 aircraft, had not been considered, TWA's claim would concededly be reduced by $120,250 (Tr. 3779).

DC-4 Aircraft

TWA claims damages totalling $91,800, before trebling, with respect to delay in having available for sale six DC-4 aircraft (TWA Ex. 6B, p. 9). On July 27, 1957, TWA authorized the sale of all these aircraft (DX 324, p. 67, Tr. 1729-30, 1739) and offered aircraft of this type for sale through an aircraft broker on January 2, 1959 (DX 324, p. 67 and Ex. G annexed thereto where this type is referred to as C-54). The earliest of the dates to which TWA's proof shows the sale of any of these planes would have been advanced if the delivery of jet aircraft had not been delayed is June 8, 1959, which is the reconstructed retirement date set forth in Annex F for Piston Aircraft No. 8. As these aircraft were for sale prior to any period of delay in their sale claimed to be caused by the delay in receipt of jet airplanes, for the reasons set forth above with respect to M-202A aircraft, TWA's claim that a delay

in the availability of these aircraft for sale due to a delay in receiving jet aircraft caused the loss to TWA claimed in its proof cannot be sustained. Moreover, minutes of TWA's Board of Directors show that TWA made these planes available for sale because they were being operated at a loss, not because they were no longer needed by reason of the acquisition of jet aircraft (Tr. 1729-30, DX 37). The date they were made available for sale was prior to "mid-1958" which is the time TWA asserts the six-year price decline commenced (Plaintiff's Reply Brief 119). In addition, these aircraft were all configured for cargo or engine carrying service rather than passenger service (DX 324, p. 67, Tr. 1716). The claim for damages with respect to these aircraft is disallowed in its entirety.

It is noted that in a sale of a group of four of these planes by TWA in 1959 the price paid by the buyer and plotted by TWA at page 35 of its Exhibit 6B, purchased not only four aircraft but also 29 extra engines (Tr. 3657). One of the other of these four-engine aircraft which is plotted on the same chart was apparently sold with only one of its engines (Tr. 3658-59). TWA's proof indicates that the factor of extra engines would reduce the quarterly market price decline from $12,400 to $12,000 (Tr. 3784). It is also noted that if sales in the first three quarters of 1958 and the fourth quarter of 1962 had been eliminated in determining the rate of market price decline for this type of aircraft, TWA's claim would concededly be $37,740 less (Tr. 3772).

L-1649A Aircraft

TWA claims damages of $1,461,900, before trebling, with respect to delay in having available for sale four L-1649A aircraft (TWA Ex. 6B, p. 9). These are long-range air-

craft which were directly replaced in function by the jet aircraft. In view of Rummel's testimony that TWA would have liked to sell these aircraft earlier because they were uneconomical but delayed their retirement because they were substantially undepreciated (Tr. 1800), any loss resulting from a decline in the market price obtainable for these aircraft cannot be attributed to the acts of defendants.[1] The claim for damages with respect to the delay in the availability of L-1649A aircraft for sale is therefore disallowed in its entirety.

The damages claimed with respect to the first two aircraft sold of these four would have to be disallowed in any event, for they were the first aircraft of that class to be sold by any airline in the period from January 1, 1958, to June 30, 1964, and each brought the highest price obtained to the date of its sale. There is no evidence to support the conclusion that a higher price was obtainable for aircraft of this type between January 1, 1958, and the dates on which they were sold in the fall of 1960, and the trend lines of market prices constructed by TWA do not purport to show that higher prices were available prior to the initial sales which constitute the starting point of the trend (TWA Ex. 6B, p. 39, Tr. 3610-11, 3612). Similarly, the damages claimed for the last two aircraft sold of this type would have to be reduced, for their reconstructed retirement dates are dates prior to the initial sales, and plaintiff's computations in effect extend the price trend lines to times prior to the commencement of the trend. All the sales of aircraft of this type were sold by TWA, and the

[1] There is other TWA proof that aircraft of this type were ordered with full knowledge of the coming of jet aircraft because of their "cash generating power" and that even with the advent of jet planes there would be a need for aircraft of this type for several years (Tr. 3795).

first four of these sales were to a buyer outside the country and without a credit rating, factors which TWA admits would affect the sales prices (Tr. 3621). These planes were later repossessed by TWA (Tr. 3628).

L-749A Aircraft

TWA claims damages of $346,000, before trebling, for delay in having three L-749A aircraft available for sale (TWA Ex. 6B, p. 9). The proof shows that TWA sold two L-749 and three L-749A aircraft during this period (TWA Ex. 6B, pp. 81-85) and that it offered "several Lockheed model 749 and 749A Constellation airplanes for sale" as early as July 25, 1958 (Exhibit F Annexed to DX 324). As TWA's L-749A aircraft were listed for sale prior to the earliest reconstructed retirement date for aircraft of this type, which is set forth in Annex F as July 13, 1959, (Piston No. 23) for the reasons set forth above with respect to M-202A aircraft, TWA's claim that a delay in the availability of these aircraft for sale due to a delay in receiving jet aircraft caused the loss to TWA claimed in its proof cannot be sustained. TWA's claim for damages with respect to L-749A aircraft is therefore disallowed in its entirety.

Even apart from the proof that TWA made these aircraft available for sale in July, 1958, its claim for damages could not be granted in the amount requested. The first L-749A airplane sold by any airline in the period between January 1, 1958, and June 30, 1964, was the plane listed in Annex F as Piston Aircraft No. 23 (TWA Ex. 6B, p. 37). This airplane was sold at a substantially higher price than any other aircraft of its type. There is no evidence to show that a higher price would have been obtainable had the plane been sold at an earlier date, and, as shown above with

respect to M-202A and L-1649A aircraft, the trend line constructed by plaintiff does not purport to show higher prices prior to the initial sale. TWA's claim for damages with respect to this airplane would therefore be disallowed in any event.

The second aircraft of this type sold by TWA is the plane listed in Annex F as Piston Aircraft No. 58. This plane was actually sold on November 24, 1961, and according to Annex F, it would have been retired by March 12, 1960, except for the defendants' delay in furnishing jet aircraft. The proof shows, however, that at least as early as August 17, 1960, TWA considered that this aircraft was not needed, for at that time it leased it to another company (Tr. 1771), and therefore the fact that TWA did not sell this plane in the period from August 17, 1960, to November 1961 cannot be attributed to its claimed need to retain aircraft because of delay in receiving jet aircraft. The period from March 12 to August 17, 1960, is one of 1.7 quarters rather than the 6.8 quarters which was used to compute the damages attributed to this plane at page 25 of TWA Exhibit 6B, where the aircraft is listed as No. 44 under its registration number N-6017C. Using TWA's method of computing damages, the maximum decline in market price which could have been related to delay in receiving the jet aircraft referred to in Annex F as Jet No. 52 is $37,230, which is the rate of quarterly market decline for this aircraft type computed by TWA of $21,900 (TWA Ex. 6B, p. 25) for a period of 1.7 quarters.

Not all of this loss could be attributable to the acts of defendants, however. As has been determined above, defendants are not responsible for part of the delay in the delivery of the 30 Convair 880 jet aircraft. In Annex F, the last 48 of the 103 piston aircraft, Piston Nos. 56-103,

are related to timely deliveries of Convair 880 jet aircraft with respect to which defendants are not responsible for 60 days of the delivery delay, and this particular piston airplane, Piston No. 58, is linked to the nineteenth Convair 880. Therefore, even if damages could be awarded with respect to any aircraft of this type, defendants could not have been responsible for damages for delay with respect to this airplane for a period greater than one quarter.

The third aircraft of this type with respect to which TWA claims damages is the plane listed in Annex F as Piston Aircraft No. 103. This plane has registration number N-6012C and appears also as No. 103 at page 26 of TWA Exhibit 6B. The plane was actually sold on July 20, 1962, and TWA has assigned it a reconstructed retirement date of August 12, 1960. At approximately that time an aircraft of the same type was sold for $164,000 (TWA Ex. 6B, p. 78). The aircraft actually sold in the third quarter of 1960 is the only airplane of this type sold by an airline other than TWA in the period January 1, 1958, to December 31, 1964, and there were only five sold by TWA. The actual sale of an airplane of this type at the time of the reconstructed sale date raises the question whether the better evidence of the price TWA would have obtained for this plane is the price actually obtained by its competitor at that time or the higher price claimed by TWA, which is the price actually received for the airplane later plus the amount the market price declined from the reconstructed retirement date to the actual sale date as shown by the trend line TWA has set forth at page 37 of its Exhibit 6B.

TWA attributes the fact that particular sales prices fall above or below its trend lines to random differences in the condition of the aircraft of any particular type (Plain-

tiff's Brief 239-40, 242). The only two aircraft of this type for which the engine and airframe condition are in evidence are the TWA aircraft bearing registration numbers N-6012C and N-6017C (TWA Ex. 421, p. 3). These planes brought approximately the same price although N-6017C was sold on November 24, 1961, and N-6012C was sold on July 20, 1962. The trend line set forth at page 37 of TWA Ex. 6B represents a decline in market price of approximately $58,400 in that time, and as there are so few aircraft on which this trend line is based, if the condition of the plane which was sold later was equivalent to or better than that of the plane which was sold earlier, there would be reason to refer to the actual sales price at the reconstructed retirement date, rather than to apply the trend-line market price decline to the price later received. According to TWA, reference to actual sales at the reconstructed sale dates would be a valid method of determining loss (Tr. 3685). TWA's Exhibit 241 shows, however, that the later-sold airplane had more hours of flying time before an airframe overhaul was required and before an overhaul was required of any of its four engines. This difference in the condition of the two airplanes is consistent with TWA's explanation of deviation of particular prices from the trend lines and supports the validity of the trend line constructed for this type of aircraft. In the absence of similar information with respect to the aircraft actually sold in the quarter of the reconstructed retirement date, TWA's reliance on the trend line is accepted for this purpose with respect to aircraft of this type.

Even if damages could be awarded with respect to aircraft of this type, the damages of $170,830 claimed by TWA with respect to this airplane would have to be diminished in view of the determination made above that

defendants were not responsible for part of the delay in the delivery of the 30 Convair 880 aircraft. Annex F shows that the last 48 of the 103 aircraft are related to deliveries of jet aircraft of this type and that this particular piston airplane, which is the last of the 103 piston aircraft to be sold, is linked to the twenty-seventh Convair 880 airplane. Any period of the delay in retiring piston aircraft No. 103 attributable to the acts of defendants would therefore have been diminished by 60 days with the result that damages with respect to this aircraft would necessarily have been diminished by at least $14,600 to $156,220.

M-404 Aircraft

TWA claims damages of $1,009,300, before trebling, for the delay in having 37 M-404 aircraft available for sale (TWA Ex. 6B, p. 9). These are short-range, two-engine aircraft, and, as shown above with respect to M-202A aircraft, TWA's proof shows that from 1959 to 1963 there was an elimination of 15,000 short-segment departures resulting from a TWA decision "to eliminate the short stage length departures operated with piston aircraft, because they were not profitable. It had nothing whatsoever to do with the advent of the long-range jet aircraft, which is the subject of our analysis and estimates." (Tr. 10,642-43 and TWA Ex. 396, 443). For this reason, as in the case of the M-202A aircraft, TWA's claim with respect to M-404 aircraft is disallowed in its entirety. Although it is therefore unnecessary to examine in detail the computation of damages with respect to M-404 aircraft, it should be noted that TWA had aircraft of this type available for sale from a time not shown by the proof until March 11,

1959 (Ex. E annexed to DX 324) and that 18 aircraft of this type were gradually sold by March 20, 1961,[1] when TWA declared the remaining 19 aircraft surplus (Tr. 1747-48, DX 39). In addition, no damages could be granted with respect to the first three aircraft of this type sold by TWA, listed in Annex F as Piston Nos. 5, 6 and 7, as, for the reasons set forth above with respect to M-202A and L-1649A aircraft, these aircraft form the starting point of TWA's trend line (TWA Ex. 6B, p. 34), and there is no reason to believe that the market price was higher at an earlier time than the prices obtained for these aircraft. Moreover, as the last 19 of these aircraft were actually available for sale from March 20, 1961, prior to both the reconstructed and actual retirement dates, the delay in effecting sales of these aircraft after that date, which amounted to more than nine months in the case of the planes listed in Annex F as Piston Nos. 59-75, cannot be attributed to defendants' acts. These limitations alone would reduce the damages claimed by TWA for these aircraft by $361,641, as damages for the aircraft listed in Annex F as Piston Nos. 5-7 would be disallowed in their entirety, and the quarters of delay would be limited to 3.3 for Piston No. 48, 3.2 for Piston No. 49, and 3.67 for Piston Nos. 59-75.

L-049 Aircraft

TWA claims damages of $3,087,000, before trebling, for delay in having 31 L-049 aircraft available for sale (TWA

[1] Sales of these aircraft occurred in February, March, August, and November 1959, January, February, March, June, and September 1960, and February 1961. Two of these aircraft, numbers N-40432 and N-40441, were leased to another company in November 1959 (Tr. 1749), more than six months prior to their actual retirement date in June 1960 (Annex F, p. 3).

Ex. 6B, p. 9). These are intermediate-range, four-engine airplanes. TWA's L-049 fleet, or at least "several" airplanes of it, was for sale as early as July 15, 1958 (DX 349), but none was sold before the sale of one on August 26, 1959 (TWA Ex. 6B, p. 81), and a second one was not sold until April 30, 1961 (TWA Ex. 6B, p. 83). The aircraft of this type are listed in Annex F as Piston Nos. 20, 43-47 and 76-100, where the earliest reconstructed retirement date for any of them is May 12, 1959, and the next earliest is May 5, 1960. As TWA considered these aircraft available for sale as early as July, 1958, for the reasons set forth above with respect to M-202A aircraft, TWA's claim that a delay in the availability of these aircraft for sale due to a delay in receiving jet aircraft caused the loss to TWA claimed in its proof cannot be sustained. The claim for damages with respect to having aircraft of this type available for sale is therefore disallowed.

Although TWA's offering of its aircraft of this type for sale in 1958 shows that defendants are not responsible for the delays claimed in TWA's proof with respect to L-049 aircraft, there are other reasons which would require the disallowance of TWA's claim with respect to all of these aircraft. It is undisputed that the 30 of the 31 aircraft TWA still had in 1961 were operating at stage lengths of less than 300 miles (Defendants' Brief 290, Annex F, TWA Ex. 396) and the proof shows that elimination on a large scale of such piston flights was the result of a decision having nothing to do with the acquisition of jet aircraft (Tr. 10642-43, Defendants' Brief 290). There are separate reasons why the claim with respect to a different 30 of these aircraft must be disallowed, and these 30 aircraft are the first five and the last 25 which were sold.

TWA made particular efforts to sell four aircraft of this type in March, 1959 (Ex. E Annexed to DX 324), but four aircraft of this type were not disposed of until May, 1961 (Annex F, TWA Ex. 6B, pp. 80-83). The fifth aircraft of this type to be sold, listed as Piston No. 46 and assigned a reconstructed retirement date of May 14, 1960, in Annex F, was removed from service on November 24, 1959 (Tr. 1761). As these five aircraft were available for sale prior to their reconstructed retirement dates, for the reasons set forth above with respect to M-202A aircraft, TWA's claim that a delay in the availability of these aircraft for sale due to a delay in receiving jet aircraft caused the loss to TWA claimed in its proof cannot be sustained.

The sixth aircraft of this type which was sold by TWA is listed in Annex F as Piston No. 47 where it is linked to a Convair 880 airplane with respect to which it has been determined defendants are not responsible for 60 days of the delay in acquisition.*

The proof shows that TWA would not be entitled to any damages for the remaining 25 aircraft in any event. When they were sold, the flying time after overhaul of the airframes and engines was substantially used up (TWA Ex. 421). TWA had been granted a time extension to operate the engines for 2,000 hours between overhauls (DX 354, p. 2) and for all practical purposes had used up even the additional times granted prior to selling the aircraft. Three of the aircraft were "incomplete, uncertified and non-flyable" and parts had been removed which would not be replaced (DX 354, p. 2). Three other aircraft were

*The number of quarters set forth at page 26 of TWA Ex. 6B for this aircraft, which is listed there as No. 66, is apparently incorrect, for the entire period of delay claimed of 13 months and 10 days equals 4.4 quarters rather than 4.6.

in "minimum ferry condition" and were not in "airworthy condition" (DX 354, p. 2). The remaining 19 aircraft complied with federal airworthiness directives only up to December 31, 1961 (DX 354, p. 2). Sales of "non-operating" aircraft of this type by another airline were omitted by TWA in computing the market price decline (Tr. 3773-74).

As noted above, these airplanes were made available for sale on June 21, 1961. Piston No. 47, which was sold on June 23, 1961, had over seven-eighths of its flying time after overhaul remaining for its airframes and approximately three-fourths of its flying time after overhaul remaining for its engines (Aircraft N90830 in TWA Ex. 421). In view of the proof that a complete overhaul of a four-engine aircraft costs more than $100,000 and in view of TWA's argument that its trend lines are valid despite differences in overhaul times because airlines provide progressive maintenance and do not allow aircraft to be flown until they require a complete overhaul (Plaintiff's Brief 239) and the significance which TWA attaches to the time since overhaul in determining the value of aircraft (Tr. 1723, 3633), TWA's claim with respect to these 25 aircraft would be disallowed.

Even if all 25 airplanes had been airworthy, the difference in value between these airplanes in a completely used up condition and Piston No. 47 which was sold shortly after these planes were made available for sale is at least three-fourths of the cost of overhaul or at least $75,000 per airplane. TWA received an average of approximately $16,000 for each of these 25 aircraft, and the price received for Piston No. 47 (TWA Ex. 6B, p. 83) was not more than $75,000 higher.

It should be noted that even if damages could be awarded with respect to these 25 aircraft, defendants would not be responsible for 60 days of the delay in making them available for sale because these 25 aircraft are Piston Nos. 76-100 in Annex F, the retirement of which is linked to the Convair 880 aircraft. This limitation alone would result in a diminution of TWA's damages by $810,000 before trebling.

V.

Losses due to disruption of business.

Plaintiff makes a separate claim for damages for disruption of its business at the time of transition to jets. It bases this claim primarily upon the following allegations of the complaint:

> "53. As additional results of the offenses hereinabove alleged, TWA further has been immediately and irreparably injured in that: * * * (f) the period of disruption caused by the transition from non-jet to jet operations has been extended * * * (g) the co-ordination of the change from non-jet to jet operations has been disrupted over an extended period of time; * * * (h) the management and business of TWA has been disrupted over an extended period of time."

Plaintiff presented its detailed evidence to support this claim through the prepared testimony of Raymond F. Rowe, Staff Vice President—Transportation Training (TWA Ex. 8) and Virgil L. Walstrom, Director—Maintenance and Overhaul Planning (TWA Ex. 9). The damages are stated by these witnesses to be the direct result of defendants' activities which delayed the deliveries to the plaintiff of Convair 880s. The amount of the claim under this Section V is as follows:

(1) $350,246 in monthly guaranteed salaries which TWA paid to 24 captains and 14 flight engineers who had to be held off schedules because the Convair 880 aircraft, for which they had been trained, had not arrived; and since there were no other aircraft available on which they were qualified to operate, TWA paid the above sum to these employees while they remained idle and "substantially unproductive" to the Airline. (TWA Ex. 8, p. 3).

(2) $177,260 as the cost of refresher training for 62 captains, 40 first officers and 45 flight engineers. (TWA Ex. 8, p. 4).

(3) $42,972.65 as the cost of subsequent retraining of the ground crew. (TWA Ex. 9, pp. 3-5).

These three claims total $570,478.65, and they appear not to overlap in any way the claims reflected in the computations of Price, Waterhouse (TWA Ex. 7) or Coverdale (TWA Ex. 4).

Rowe testified that TWA's training plans at first were based on the original contract dates for delivery of the CV-880s, i.e., that deliveries were to commence in November 1959, with scheduled service to commence in March 1960. Delays in delivery ensued, however, and full scale training of flight crews did not commence until February 1960. As noted elsewhere in this opinion it was clear to the plaintiff at or about this time that deliveries would not begin until May 1960. It appears to me that the plaintiff was justified in commencing the flight training courses in February 1960, as Rowe testified, in preparation for deliveries in May.

The first CV-880 was in fact delivered in May 1960 and used for training purposes. Rowe stated (TWA Ex. 8) that "by summer of 1960, adequate flight-crews had been trained." Elsewhere in this opinion, I have concluded that commencing in May 1960 the further delays in deliveries of 880s were caused by defendants. Rowe testified, without contradiction that in the summer of 1960 flight crew training was drastically reduced because the 880s had not been delivered; co-pilots were returned to service on piston equipment; but captains and flight engineers could not be returned for such service without additional retraining;

that TWA was obligated to pay their salaries even though no 880s were available. (TWA Ex. 8, pp. 2 & 3).

Deliveries of the 880s were resumed in January 1961, by which time the flight crews required refresher training in order to be qualified under TWA standards and FAA regulations (id. p. 4). Walstrom testified that similar refresher training in December 1960 was required for ground crews. (TWA Ex. 9).

I am of the opinion that the plaintiff took reasonable steps to mitigate its losses caused by the delays in deliveries that were due to the defendants' actions.

There is set forth below certain supplementary information developed in the cross-examination of Rowe:

¶ Annex A to TWA Ex. 8 does not list all captains and flight engineers who had completed Convair training prior to the commencement of 880 revenue service in January 1961, but only those who were held off regular service flights so that they would be available to fly Convair 880s when delivered (Tr. 6594).

¶ A TWA pilot normally would fly about 750 to 800 hours a year (Tr. 6597).

¶ While a pilot is in training, the pilot does not perform regular service flight on other types of aircraft (Tr. 6599-6600). In order to qualify for scheduled flight operation, FAA regulations require that a pilot complete a proficiency check every six months on the type of equipment he is going to perform on, and also complete at least three take-offs and landings to a full stop within the last 90 days (Tr. 6601).

¶ TWA regulations for safety reasons prohibit a pilot from flying piston equipment after he has completed tran-

sition on jet equipment without transition back to the piston equipment (Tr. 6602).

¶ Training for a captain or first officer consists of three weeks of ground school, 12 to 18 hours of simulator training, 8 to 20 hours transition training on the aircraft, and then 20 hours of line time (regular commercial service with passengers) under supervision. Training for a flight engineer is the same except that he requires four weeks of ground school (Tr. 6602-6603).

¶ Because of TWA safety regulations, when a captain or flight engineer begins training on a new type of aircraft, he devotes his full time to that training and does not fly other craft even though he is otherwise qualified to fly them (Tr. 6607).

¶ The above-stated TWA regulation does not apply to first officers [co-pilots] (Tr. 6609, [6613]).

¶ TWA regulations are approved by the FAA and consequently must be complied with like any other FAA regulation (Tr. 6610-6611).

¶ In order to return to piston equipment, a captain is required to complete one hour of transition on piston aircraft and at least one ILS approach and three take-offs and landings. Then in order to return to jet aircraft again, he is required to complete two hours of transition training and three take-offs and landings with jet equipment (Tr. 6611-6612).

¶ The guaranteed salary of captains, co-pilots and flight engineers was computed on the basis of an 85 hour month even though the union contract only guaranteed salary for a 60-hour month (Tr. 6615-6616).

¶ Mr. Rowe felt that the real reason for not returning the captains and flight engineers to piston aircraft was the belief that the Convair 880s were expected momentarily and crews would be needed to serve on them. (Tr. 6626).

There is set forth below certain supplementary information developed in the cross-examination of Walstrom:

¶ About 80 hours of classroom training was necessary to qualify a ground crew mechanic for service on a Convair 880 aircraft (Tr. 6550-6551).

¶ The minimum of 80 hours training was a TWA requirement and not specifically required by the FAA (Tr. 6555-6556).

¶ The ground crew were trained mainly where they were domiciled although there was a "minor amount of travel involved" (Tr. 6556-6557).

¶ Refresher training of the ground crew would be necessary whenever the "considerable time" of three months or more had elapsed since initial training and actual contact with the airplane (Tr. 6570).

¶ TWA did not hire any additional instructors to conduct the refresher training on Convair 880s (Tr. 6573).

¶ All the refresher training listed in Annex A consisted of classroom training (Tr. 6573).

¶ Refresher training took place in lieu of regular productive work (Tr. 6574).

¶ While taking refresher training, the ground crew was not on overtime pay (Tr. 6574).

¶ Walstrom was "sure" that maintenance suffered during the period that refresher courses were given, and that "it resulted in some degree of overtime over what we would

normally have had." Walstrom guessed that "it is just axiomatic that it has to be handled in some way, the work that has to be done. And one way it can come out is overtime." (Tr. 6574-6575).

The supplementary information thus developed in cross-examination of Rowe and Walstrom supports the plaintiff's entire claim under this Section V, and accordingly said claim is allowed for the full amount of $570,478.65.

VI.

Alternative over-all claim for damages based upon comparative profitability study.

Up to this point we have considered the plaintiff's claims for damages suffered by it as a result of specified allegations of the complaint. The plaintiff also claims under this Section VI damages "for the totality of its injuries set forth in the complaint." It claims certain additional injuries not covered by the preceding portions of this opinion as follows:

1) Injuries to TWA piston fleet, being included in the term "aircraft" in the following portion of paragraph 10 of the complaint:

"It was the intent of plaintiff and Atlas, inter alia • • •

(d) that defendants would have TWA as a captive market and would supply the requirement of TWA for aircraft, including jet-powered aircraft, upon terms advantageous to themselves;

(e) that the requirements of TWA for aircraft, including jet-powered aircraft, would be enlarged for the benefit of defendants and Atlas by various means."

Other paragraphs of the complaint cited under this heading are as follows:

"TWA has been denied the right freely to acquire aircraft necessary to its operations and has received such aircraft as were made available to it in an untimely manner (par. 50)."

"TWA has been further and immediately injured in its business • • • in that defendants have allowed TWA to procure financing essential for the acquisition of

aircraft only upon the condition that TWA would accept such aircraft as the defendants dictated, * * * ." (par. 51)

2) Injuries relating to the disruption of the management and business of TWA. Under this heading plaintiff cites paragraph 53(h) of the complaint reading as follows:

"As additional results of the offenses hereinabove alleged TWA further has been immediately and irreparably injured in that * * *

(h) The management and business of TWA has been disrupted over an extended period of time."

3) Injuries relating to the disruption of the transition from non-jet to jet operations (over and above the disruption claims previously discussed above under Section V of this opinion). Under this heading the plaintiff cites paragraphs 53(f) and (g) of the complaint which were quoted above in discussion of the disruption claimed under Section V.

4) Injuries to TWA's good will (and consequent ability to attract passengers in competition with other airlines) due to the many years of victimizing of TWA by the defendants. Under this heading plaintiff cites paragraph 52(e) of the complaint which reads:

"TWA had been further injured in the following manner * * *

(e) TWA's good will in its business in serving passengers throughout the world was diminished."

This Section VI claim is presented by plaintiff as an over-all alternative claim, i.e., it includes damages incident to all of the claims discussed above in Sections I-V and

damages for the above listed four categories of additional injuries not covered by Sections I-V.

The testimony in support of this alternative over-all claim for damages was presented in the form of a very brief comparative profit study prepared by Coverdale & Colpitts. It attempted to measure the extent to which the operating profits (not net profits) earned by the plaintiff during the years 1959-1963, inclusive, fell short of such profits that plaintiff would have attained had its profits for those years been on the same level vis-a-vis certain other air carriers, as the profits earned by it during the years 1964 and 1965. The comparison used for TWA's International Division was with the Atlantic Division of Pan-Am. The comparison for TWA's Domestic Division was based upon a comparison with American Airlines, Inc. These airlines were the ones most nearly comparable in the opinion of Coverdale & Colpitts with TWA. The basis upon which the study was made was that during the years 1959-1963 the plaintiff's business was handicapped by unlawful restraints or monopolization of the defendants, whereas during the so-called base years of 1964 and 1965 the effects of the defendants' alleged illegal actions had been substantially dissipated and accordingly the profit figures for those two years represented operations when the plaintiff's business was not handicapped by unlawful restraints or monopolization. The comparative profitability study is plaintiff's Exhibit 4(b) and was prepared under the direction of Wemple and submitted as a portion of his sworn direct testimony. No study of comparative operations policies or physical facilities or service policies was made by Coverdale.

The Coverdale Report found that TWA's 1959-1963 route structure was not materially different from what it was in

1964 and 1965. It also concluded that the route structures of the Atlantic Division of Pan-Am and of American were not materially different in 1959-1963 from what they were in 1964 and 1965.

The operating profits during the base years 1964 and 1965 of TWA's Domestic and International Divisions and of the air carriers for purposes of comparison were as follows:

	1964	1965	Average
	(Millions)		
TWA International	$34.6	$47.6	$41.1
TWA Domestic	50.9	49.8	50.3
PAA-Atlantic	26.1	33.7	29.9
American (Domestic)	61.2	70.9	66.1

The ratios of TWA's operating profits to those of the air carriers selected for comparison in 1964 and 1965 were as follows:

	1964-1965 Average Operating Profit (Millions)	Ratio, TWA to Other
TWA International	$41.1	
		1.37
PAA-Atlantic	29.9	
TWA Domestic	$50.3	
		.76
American (Domestic)	66.1	

The operating profits (losses) in each of the years 1959 through 1963 of TWA and the selected air carriers were as follows:

	1959	1960	1961	1962	1963	Total
	(Millions)					
AA-Atlantic	$17.5	$16.6	$ 4.5	$12.5	$33.3	$ 84.4
merican Domestic)	24.5	24.7	19.1	19.3	43.9	131.5
WA International	(—7.8)	17.1	(—13.5)	15.3	23.3	34.4
WA Domestic	26.3	(—0.9)	(—24.2)	(—7.4)	17.5	11.3

Application of the TWA profit ratios determined for the base years 1964 and 1965 to the total 1959-1963 profits of the selected air carriers, establishes that TWA's profits would have been as set out below if TWA had attained a profit level comparable to that reached by TWA in 1964 and 1965:

1959-1963 Profits	(Millions)	1964-1965 Profit Ratio, TWA to Other	Calculated 1959-1963 TWA Profits (Millions)
PAA-Atlantic	$ 84.4	1.37	$115.6
American (Domestic)	131.5	.76	99.9

The difference between the profits calculated by this method and TWA's actual profits are as follows:

Comparison Airline	Calculated 1959-1963 TWA Profits (Millions)	Actual TWA Profits		Difference (Millions)
PAA-Atlantic	$115.6	TWA International	$34.4	$ 81.2
American (Domestic)	99.9	TWA Domestic	11.3	88.6
				$169.8

The operating profits earned by TWA's International Division in the period 1959 through 1963 were about $81 million less than they would have been if that Division's profit, as compared with PAA-Atl., had been as high as in the years 1964 and 1965. The operating profits earned by TWA's Domestic Division in the period 1959 through 1963 were about $89 million less than they would have been if that Division's profit, as compared with American, had been as high as in the years 1964 and 1965.

In my opinion the Coverdale comparative profit study does not provide an acceptable measure of damages in this proceeding, and I disallow the over-all claim based upon it. The allegations in the complaint relating to it are very much less definite and certain than the specific allegations with which the claims under Sections I-V of the opinion have dealt and to a considerable extent are overlapping therewith. Under Sections I-V of this opinion, the plaintiff claims a total of approximately $104 million and accordingly the claim for additional damages under this alternative claim amounts to an additional $65 million of general damages based solely upon the comparative profit study.

The objections of the defendants to the basis of the study, and the validity of the comparisons made therein for the purpose for which it is sought to be used are, in the main, valid.

The fact that many of the routes of the airlines used for comparative purposes parallel those of TWA (see maps attached to the study) is in itself not a sufficient basis for indicating that comparable earnings should follow therefrom. Some additional factors required to make the comparison valid in such a complex business, all of which are missing from the study, are comparative equipment and physical facilities and a myriad of management accounting and service factors. The variance in historical load factors in earlier years between TWA and the other airlines is one reflection of the importance of these missing factors. See *Wolfe* v. *Nat'l Lead Co.*, 225 F. 2d 427 (9th Cir.) 1955.

Furthermore, it seems inherently invalid to raise T.W.A.'s 1959-1963 results by using the 1959-1963 levels of operating profit of American and Pan-Am. Both of these carriers actively compete with TWA on its major routes. If TWA were to have significantly increased its revenues by introducing additional jet service in 1959-1963, it is

obvious that much of the increased revenue would have represented a diversion from its major competitors, including American and Pan-Am. Since the improvement in TWA would have lowered the operating profit of its two major competitors, it would not seem proper to estimate the operating profit of reconstructed TWA on the basis of the unreduced levels of operating profit of American and Pan-Am.

It also seems to me that the two alternative methods used by Coverdale in computing damages contain significant inconsistencies (TWA Ex. 4(b) and 4(c)). In my opinion the methodology used by Coverdale in plaintiff's Exhibit 4(c) is more precise and realistic than that shown in its comparative profitability study (TWA Ex. 4(b)). At one point the following colloquy occurred during the cross-examination of Wemple (Coverdale):

> "Q. Have you any opinion, Mr. Wemple, as to which between 4B and 4C represents the proper approach or the better approach to the determination of net operating profits? A. I have no opinion on that matter.
>
> Q. In 4(c) you come out with * * * $64 million and here you come out with $170 million, and still you have no opinion. A. Correct." (Tr. 6139-40) (See also Tr. 6134 and Simat Def. X 271A. p. XI-1).

The plaintiff did not call any other witness to support the Comparative Profit Study.

In my opinion the evidence to support the study is conjectural. The damages awarded in respect of Section I-V of this opinion adequately reflect the totality of the plaintiff's damages. When applied to the underlying facts the Comparative Profit Study produces results which are unrealistic (Def. Brief, p. 305).

VII.

Interest on damage claim.

The plaintiff in its brief takes the position that any award should carry interest, as an exercise of the discretionary authority of the trier of the facts to include in the award a sum constituting prejudgment (or moratory) interest, which would itself be subject to trebling (Plaintiff's Brief, p. 284). It alleges that the defendants, "through skillful exercise of their rights of appeal and through vigorous and lengthy contests of TWA's damage case," have succeeded in postponing for over five years a determination of the sum that should be awarded to TWA. Furthermore, TWA asserts that failure to record the operating profits which should have been recorded in each year, 1959 through 1963, and other elements of damage, have deprived plaintiff not only of the absolute amounts, but also of the normal increment on these sums.

The defendants in their brief state that the matter of award of interest should not be covered in the Special Master's opinion on damages but should be reserved for the trial judge who passes upon the Special Master's report.

I have interpreted the order of reference to the Special Master as requiring me to express my opinion on this subject.

The first line of cases to be considered establishes the Federal rule that interest may be allowed upon unliquidated claims.

In *Miller* v. *Robertson,* 266 U. S. 243, 258 (1924), the court allowed interest upon unliquidated claims:

> "Generally interest is not allowed upon unliquidated damages. *Mowry* v. *Whitney,* 14 Wall. 620, 653, 20 L. Ed. 860 (1871). But when necessary in order to arrive at fair compensation, the court in the exercise of a fair discretion may include interest or its equivalent as an element of damages."

In *Miller* the claim was capable of reduction to a specific monetary amount with a minimum degree of difficulty. There the buyer refused to accept ore and the seller sued for the difference between the contract price and the lesser price obtained when the seller resold ore after the buyer's refusal. The Supreme Court said the lower court properly allowed interest since the claim was a "debt" but suggested that such an award was within its discretion.

In *Concordia Insurance Co.* v. *School District No. 98,* 282 U. S. 545 (1931), the following statement appears:

> "In the absence of an authoritative state decision to the contrary, there was nothing in either [statute] which required the trial court in rendering its judgment to depart from the rule in respect of the allowance of interest which this court has recognized, namely, that, even in the case of unliquidated damages, 'when necessary in order to arrive at fair compensation, the court in the exercise of its sound discretion may include interest or its equivalent as an element of damages.' (citing *Miller, supra*)" 282 U. S. at 544-545.

In *National Airlines, Inc.* v. *Stiles,* 268 F. 2d 400 (5th Cir. 1959) the court concluded that interest was clearly in order. The case appears to be an expansion of the doctrine insofar as it allows interest in a situation where the damage is pecuniary but not subject to close valuation. An action had been brought under the Death on the High Seas Act by the widow of a passenger who was killed when the

defendant's airplane crashed. In awarding interest, the court pointed out that a party suffering a financial loss from the death of a "breadwinner", just as from the destruction of a ship, could be adequately compensated for the loss only "if the award is made at the time of the loss or if interest for the time between loss and payment is allowed." 268 F. 2d at 405. In so holding, the court stated:

> "It is quite clear that with as many uncertain factors as there are for consideration by the court in arriving at the fair value of plaintiff's pecuniary loss the length of time to the date of judgment may sometimes be taken into consideration by the court in determining the amount of its award." 268 F. 2d at 405.

After reviewing the congressional intent, the court affirmed the lower court's award stating:

> "... Congress clearly did intend to provide full compensation for the loss; and . . . the courts cannot carry out this clear mandate without taking into account the inadequacy of delayed compensation." 268 F. 2d at 406.

The court pointed out that admiralty stands on a different footing from the common law regarding damages, "for the general rule in common law had traditionally been that prejudgment interest could not be allowed on an unliquidated tort claim."

Shortly after the *National Airlines* decision, a Federal case was decided which laid to rest the question of power of the Federal courts to award prejudgment interest on unliquidated claims under Federal statutes. This case, which involved the High Seas Act, was *Moore-McCormack Lines, Inc.* v. *Richardson,* 295 F. 2d 583 (2d Cir. 1961), *cert. denied,* 368 U. S. 989 (1962). In the *Moore-McCormack* decision, the court stated:

> "Interest was never refused on unliquidated claims from any doubt that some financial loss is actually suffered from delay in receiving money. Theoretically, refusal was based on the concept that interest was payable only on a 'debt' and that no debt could be due until the liability had been fixed. (citation omitted) McCormack traces the distinction to a survival of the medieval distaste for interest as 'usurious.' (citation omitted) A further explanation sometimes advanced is that a debtor should not be burdened with prejudgment interest upon an obligation so nebulous that he must necessarily look to the courts to fix its scope. Similar considerations would, however, seem to support the disallowance of prejudgment interest where liability is in doubt as to a 'liquidated' claim. But since the courts have not seen fit to deny prejudgment interest in the latter case, we see no reason why they should not grant it in the former." 295 F. 2d at 594.

It thus appears that the Federal courts have discretionary authority to allow interest on unliquidated claims, as well as liquidated claims, in proper cases where the statute is silent as to award of interest.

Next to be considered is a series of Federal cases standing for the proposition that when a penalty is authorized by the statute, it may be improper to award interest in addition. These cases first arose under the Fair Labor Standards Act but their rule of law regarding interest was made applicable to the private antitrust field by Judge Wyzanski in *Cape Cod Food Products, Inc.* v. *National Cranberry Association,* 119 F. Supp. 900 (D. Mass. 1954).

Cape Cod was an action by a food products company against individuals and corporations for damages claimed to have been sustained by the plaintiff by reason of an alleged conspiracy on the part of the defendants to violate

the antitrust laws. Judge Wyzanski charged the jury as follows:

"Finally, I instruct you . . . that you are not to allow any interest of any kind. The problem of interest is one which has not yet been authoritatively settled by the Supreme Court of the United States. The ruling that I make is in accordance with the ruling of Judge Caffey in the Southern District of New York, and contrary to an earlier ruling of my own. But I am now bearing in mind a decision in the Supreme Court of the United States in connection with the Fair Labor Standards Act, 29 U. S. C. A. §201 *et seq.*, and double damages, and I have concluded that in a statute where treble damages are available, interest is not appropriately allowed. So you will please not take into account the problems of interest of any kind." 119 F. Supp. at 911.

Judge Wyzanski cites in support of his conclusion *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697 (1945).

Brooklyn Bank was an action for back wages and liquidated damages under Section 16(b) of the Fair Labor Standards Act. That aspect of *Brooklyn Bank* relevant to the situation presently under consideration centers around the court's consideration of whether an employee recovering minimum wages and liquidated damages under Section 16(b) is also entitled to interest on the sums so recovered. Mr. Justice Reed, speaking for the Court, first stated that the question of the right to interest on sums recoverable under a federal statute is a question of federal, not local, law. He then went on to disallow the interest requested and, in so doing, made the following statements at pp. 715-16:

"Interest is not recoverable in judgments obtained under §16(b). As was indicated in our decision in *Overnight*

Motor Co. v. *Missel,* 316 U. S. 572 (1942), §16(b) authorizes the recovery of liquidated damages as compensation for delay in payment of sums due under the Act. Since Congress has seen fit to fix the sums recoverable for delay, it is inconsistent with Congressional intent to grant recovery of interest on such sum in view of the fact that interest is customarily allowed as compensation for delay in payment. To allow an employee to recover the basic statutory wage and liquidated damages, with interest, would have the effect of giving an employee double compensation for damages arising from delay in the payment of the basic minimum wages. See *Royal Indemnity Co.* v. *United States,* 313 U. S. 289, 296. Allowance of interest on minimum wages and liquidated damages recoverable under §16 (b) tends to produce the undesirable result of allowing interest on interest. See *Cherokee Nation* v. *United States,* 270 U. S. 476, 490. Congress by enumerating the sums recoverable in an action under Section 16(b) meant to preclude recovery of interest on minimum wages and liquidated damages."

Shortly after the *Brooklyn Bank* decision, the Supreme Court applied the rule in that case to penalties incurred under the Agricultural Adjustment Act of 1938. In *Rodgers* v. *United States,* 332 U. S. 371 (1947), the District Court rendered judgment in favor of the Government for penalties incurred under the Act for marketing cotton in excess of farm quotas plus interest from the date the penalties became due to the date of judgment. The Circuit Court of Appeals affirmed this decision and the Supreme Court granted *certiorari.* In an opinion by Mr. Justice Black, the Supreme Court reversed the lower court's decision and denied the propriety of awarding interest.

In *Rodgers,* the petitioner produced and sold more cotton than allotted him under Part IV of the Agricultural

Adjustment Act of 1938 as amended. Stat. 31, 55-60; 55 Stat. 203; 7 U. S. C. A. §§ 1281 *et seq.* The United States instituted suit to recover money "penalties" to which non-cooperating farmers are "subject" for quota violations. Mr. Justice Black, after stating that federal law controls since the penalties are imposed under an act of Congress, said:

"Since penalties under the Agricultural Adjustment Act are imposed under an Act of Congress, they bear interest only if and to the extent such interest is required by Federal law (citations omitted). There is no language in the Agricultural Adjustment Act or in any other act of Congress which specifically allows or forbids interest on penalties such as these prior to judgment. But the failure to mention interest in statutes which create obligations has not been interpreted by this Court as manifesting an unequivocal congressional purpose that the obligation shall not bear interest. (citation omitted) For in the absence of an unequivocal prohibition of interest on such obligations, this Court has fashioned rules which granted or denied interest on particular statutory obligations by an appraisal of the congressional purpose in imposing them and in the light of general principles deemed relevant by the Court. (citation omitted)" 332 U. S. at 373.

The opinion next contains the following statements cited in the Plaintiff's brief in support of the proposition that interest should be awarded in a private antitrust action:

"As our prior cases show, a persuasive consideration in determining whether such obligations shall bear interest is the relative equities between the beneficiaries of the obligation and those upon whom it has been imposed. And this court has generally weighed these relative equities in accordance with the historic judi-

cial principle that one for whose financial advantage an obligation was assumed or imposed, and who has suffered actual money damages by another's breach of that obligation, should be fairly compensated for the loss thereby sustained." 332 U. S. at 373.

However, the actual holding of *Rodgers* undercuts the relevance of this statement to the present situation. *Rodgers,* as mentioned above, appears to be the application by the Supreme Court of the rule it established in *Brooklyn Bank.* In disallowing prejudgment interest, the Court made the following observations:

". . . [W]e think that the question of interest on the penalties provided in the Agricultural Adjustment Act on non-cooperators should be governed by the rule previously applied by this Court to criminal fines. Although Congress neither wholly prohibited nor made it a crime for a farmer to market cotton in excess of his quota, still it imposed sanctions upon non-cooperators analogous to those of the criminal law. The purpose of Congress in requiring payment of penalties into the Federal Treasury for marketing above the allotted amount was not to raise revenue for the Government's financial advantage but to deter farmers from planting and marketing more than their quotas. In fact, the whole philosophy of the Agricultural Adjustment Act is based on the theory that the public will be benefited, not damaged, if farmers produce and market within these quotas, thereby avoiding the payment of penalties." 332 U. S. 374-375.

The penalties imposed by the Fair Labor Standards Act and the Agricultural Adjustment Act are analogous for the question here under consideration to those imposed by the trebling of damages in a private antitrust action. The situation in which TWA finds itself is not unlike the situa-

tion of the government in the *Rodgers* case insofar as the penalties are concerned and *Rodgers* leaves no doubt but that interest cannot run on that part of the treble damages which is the "penalty" or "deterrent factor." But, as *Rodgers* was speaking only to penalties in and of themselves, the case does not necessarily mean that interest could not run on the primary damage claim. That interest can run on this primary amount is, in fact, the contention of TWA.

In *Brooklyn Bank, supra,* the court merely stated, without severing withheld wages from liquidated damages, that "[t]o allow an employee to recover the basic statutory wage and liquidated damages, with interest, would have the effect of giving an employee double compensation for damages arising from delay in the payment of the basic minimum wages." 324 U. S. at 715. It would seem, then, that *Rodgers* did in no way qualify the *Brooklyn Bank* holding. *Rodgers* was discussing only penalties so the Court talked in terms of penalties. *Brooklyn Bank* was discussing actual damages plus liquidated damages, and the Court spoke in terms of disallowing interest on both with the suggestion that the liquidated damages had the same effect as interest insofar as the claimant was concerned. Therefore, the *Rodgers* decision seems in no way to support TWA's contention that interest should be allowed on the primary amount in the situation presently being considered.

This interpretation of *Brooklyn Bank* is borne out in *Asselta* v. *149 Madison Ave. Corp.*, 95 F. Supp. 856 (S. D. N. Y. 1951). There the problem and its solution depended upon an interpretation of the effect of § 11 of the Portal-to-Portal Act of 1947, 294 U. S. C. A. § 260, on § 16(b) of the Fair Labor Standards Act, 29 U. S. C. A. § 216(b).

Under the Portal-to-Portal Act, the awarding of liquidated damages as provided in the Fair Labor Standards Act was no longer mandatory, but, by § 11, was placed within the sound discretion of the court. Judge Kaufman, in distinguishing the *Brooklyn Bank* decision, made the following observations:

> "Clearly, interest on an award in which no liquidated damages were granted, such as in the present case, would not be barred by the holding in Brooklyn Savings Bank v. O'Neil. An analysis of the opinion in the O'Neil case indicates that the Court regarded the provision for liquidated damages as a substitute for interest, which, the Court said, 'is customarily allowed as compensation for delay in payment.'" 95 F. Supp. at 858.

The stage was then set for Judge Wyzanski's adoption of the Federal Rule concerning interest on penalties to private antitrust litigation where treble damages are available.

Although interest is traditionally considered compensation for delay in the payment of money rightfully due the claimant, it appears that where penalties are involved, as in the trebling of the principal amount in a private antitrust action, such penalty is conceptually in lieu of interest. TWA, in the situation presently under consideration, is not entitled to moratory interest.

VIII

Recapitulation and Final Award

The schedule below compiles the separate determinations (prior to adjustments as set forth below) made in the foregoing sections of this Report.

SUMMARY OF SEPARATE DETERMINATIONS

		($ millions)		
SECTION I	*Losses in operating profits due to inadequacy of jet fleet*			
	(1) International Division		22.4	
	(2) Domestic Division	29.3		
	less: adjustment with respect to earlier delivery of Convair aircraft	2.5		
			26.8	
			49.2	
	less: cost of capital to effect earlier and additional purchase of jets (increase in gross interest cost)		21.6	
				$27,600,000

SECTION II	*Losses due to being required to lease jets*		
		12.7	
	less: cost of capital to effect purchase of jets	7.4	
			5,300,000
SECTION III	*Losses connected with financing the jets*		
	(1) Damages with respect to equity financing	-0-	
	(2) Damage with respect to debt financing	-0-	
			-0-
SECTION IV	*Loss due to delay in disposal of displaced piston aircraft*		-0-
SECTION V	*Loss due to disruption of business*		570,478.63
	TOTAL		$33,470,478.63

The determination of the amount of damages in the previous sections of this Report has generally followed the separate statement of the several aspects of the over-all claim as set forth by TWA. However, these various interrelated aspects of the over-all claim were consolidated by Price Waterhouse and adjusted in connection with TWA's historical financial statements. The result of the Price Waterhouse analysis, which was put forward by plaintiff as its final claim, developed the total sum of $104.5 million before trebling (TVA Exs. 7 and 50).

The defendants have not raised any serious question as to the Price Waterhouse analysis. Although I have not accepted some of the underlying calculations by other experts which were incorporated into the Price Waterhouse report, I do accept the basic principles of combination and adjustment. The Price Waterhouse results have been modified to incorporatethe specific determinations in the foregoing sections of this Report.

In Section III of this Report I have set forth my determination that thereshould be no damage award with respect to financing. Thisdetermination reduces the Price Waterhouse total sum by $32.6 million, leaving $71.9 million. In Sections I and IV I have made specific determinations which accept in part and reject in part the underlying data upon which this figure of $71.9 million is based. These adjustments include a reduction with respect to the Domestic Division operating claim, of $2.5 million; an increase in gross interest cost of $29.0 million; and making no provision for any increase in proceeds with respect to the sale of piston aircraft and other property retirements.

These adjustmets appear in tabular form below in the "Consolidated Statement of Award". Adopting the adjusted Price Waterhouse formulation together with the separate award for losses due to disruption of business

stated in Section V, I determine that the over-all award for damages should be $45,870,478.65 (before trebling).

CONSOLIDATED STATEMENT OF AWARD

	($ millions)	
A. *Increase in gain from operations with respect to earlier delivery, additional purchase, and owning rather than leasing jet aircraft*	76.8*	
less: adjustment with respect to earlier delivery of Convair aircraft	2.5	
	74.3	
less: increase in proceeds relating to earlier sale of piston aircraft	-0-	
less: increase in gross interest cost	29.0	
		$45,300,000
B. *Losses connected with financing the jets*		
(1) Damages with respect to equity financing	-0-	
(2) Damages with respect to debt financing	-0-	
		-0-
C. *Loss due to disruption of business*		570,478
		$45,870,478

* Source: TWA Ex. 50 as amended by TWA Exs. 42 and 43 and DX 262.

On April 9, 1968, TWA moved on the record to amend its complaint to ask damages in such amount as the Special Master should find to have been established by the evidence. TWA gave written notice on May 2, 1966, of intent to make such motion at the close of the hearing, and there is no suggestion of surprise. I have determined that no amendment of the complaint is required in order to award the plaintiffs the damages hereby awarded because the previous motion of the plaintiffs to amend their complaint to increase the amount of damages sought to be recovered, as granted by Judge Metzner, was sufficiently broad to authorize the award hereby made.

Pursuant to 15 U. S. C. § 15, the damages of $45,870,478.65 determined above are trebled to $137,611,435.95.

The plaintiffs' request for award of counsel fees and costs is referred to the District Court for decision.

The foregoing Report shall constitute my findings of fact and conclusions of law.

/s/ HERBERT BROWNELL
Special Master

Dated: September 21, 1968

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-827

HUGHES TOOL COMPANY

and

RAYMOND M. HOLLIDAY,

Petitioners,

v.

TRANS WORLD AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT TRANS WORLD AIRLINES, INC. IN OPPOSITION

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January 21, 1972

INDEX

	PAGE
Orders and Opinions Below	2
Questions Presented	3
Counter-Statement of the Case	4
The complaint	6
The answers and counterclaims: issues presented	9
Discovery	11
The default: amendment of *ad damnum clause*	15
The 1963-1965 appeals	18
The damage hearings	19
Summary of Argument	21
Argument	
A. Defendants were not denied due process of law by the district court's pretrial discovery orders. (Petition, Section A)	25
B. It is not a violation of due process to enter and enforce a default judgment under Rule 37 against defendants who wilfully and with full knowledge refuse to permit discovery of evidence of vital importance on all contested issues. (Petition, Section B)	32
C. There is no basis in law or in conscience for defendants to pay less than the amount of damages for which they were found liable after a contested evidentiary damage hearing. (Petition, Section C)	38
D. The default judgment was not precluded by the Federal Aviation Act or any action of the Civil Aeronautics Board. (Petition, Section D)	41

PAGE

E. That Toolco "mismanaged" TWA's affairs is no defense to liability under the antitrust laws. (Petition, Section E) 47

F. Defendants cannot refuse discovery and defend on the merits on the basis that there is no proof they were more than "potential" competitors. (Petition, Section F) 49

G. The Special Master and the courts below correctly found that TWA, in proving the amount of its damages, had demonstrated that each item recovered flowed from the allegations of unlawful conduct and resultant injuries admitted by defendants' default. (Petition, Section G) 51

H. The precedential impact of the decisions below. (Petition, Section H) 56

Conclusion 57

Annex

Pretrial Order, September 7, 1961 ..... 1t

Pretrial Order, February 7, 1962 ..... 3t

Pretrial Order, July 12, 1962 ..... 8t

Opinion and Order, July 24, 1962 ..... 11t

Pretrial Order, September 21, 1962 ..... 13t

Pretrial Order, January 10, 1963 ..... 18t

Pretrial Order, January 19, 1963 ..... 24t

Pretrial Order, February 1, 1963 ..... 30t

Opinion and Order, January 4, 1966 ..... 32t

TABLE OF AUTHORITIES

Cases

	PAGE
Allied Air Freight, Inc. v. *Pan American World Airways*, 393 F.2d 441 (2d Cir.), *cert. denied*, 393 U.S. 846 (1968)	41
Bell v. *Hood*, 327 U.S. 678 (1946)	42
Bigelow v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946)	55
Blonder-Tongue Laboratories, Inc. v. *University of Illinois Foundation*, 402 U.S. 313 (1971)	4
California v. *Federal Power Commission*, 369 U.S. 482 (1962)	45
Carnation Co. v. *Pacific Westbound Conference*, 383 U.S. 213 (1966)	41,46
Continental Ore Co. v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962)	45
Cromwell v. *County of Sac*, 94 U.S. 351 (1876)	4
Eastman Kodak Co. v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927)	55
Fong v. *United States*, 300 F.2d 400 (9th Cir.), *cert. denied*, 370 U.S. 938 (1962)	34, 37n, 39
Fortner Enterprises, Inc. v. *United States Steel Corp.*, 394 U.S. 495 (1969)	34n, 48
Georgia v. *Pennsylvania R.R.*, 324 U.S. 439 (1945)	45
Hammond Packing Co. v. *Arkansas*, 212 U. S. 322 (1909)	34
Harshman v. *Knox County*, 122 U. S. 306 (1887)	36
Jones v. *Uris Sales Corp.*, 373 F.2d 644 (2d Cir. 1967)	34
LaBuy v. *Howes Leather Co.*, 352 U. S. 249 (1957)	50n
McAllister v. *Kuhn*, 96 U. S. 87 (1877)	36
Michigan Window Cleaning Co. v. *Martino*, 173 F.2d 466 (6th Cir. 1949)	34

PAGE

Norfolk Monument Co. v. *Woodlawn Memorial Gardens, Inc.*, 394 U. S. 700 (1969) 34n

Norman v. *Young*, 422 F.2d 470 (10th Cir. 1970) 34

Pan American World Airways v. *United States*, 371 U. S. 296 (1963) 46

Partmar Corp. v. *Paramount Pictures Theatres Corp.*, 347 U. S. 89 (1954) 4

Peitzman v. *City of Illmo*, 141 F.2d 956 (8th Cir.), *cert. denied*, 323 U. S. 718 (1944) 39

Perma Life Mufflers, Inc. v. *International Parts Corp.*, 392 U. S. 134 (1968) 37

Pioche Mines Consolidated, Inc. v. *Dolman*, 333 F.2d 257 (9th Cir. 1964), *cert. denied*, 380 U. S. 956 (1965) 34

Poller v. *Columbia Broadcasting System, Inc.*, 368 U. S. 464 (1962) 27, 34n

Radovich v. *National Football League*, 352 U. S. 445 (1957) 37

Riggs, Ferris & Geer v. *Lillibridge*, 316 F.2d 60 (2d Cir. 1963) 39

Sarlie v. *E. L. Bruce Co.*, 265 F.Supp. 371 (S.D.N.Y. 1967) 39

Silver v. *New York Stock Exchange*, 373 U. S. 341 (1963) 45

Story Parchment Co. v. *Paterson Co.*, 282 U. S. 555 (1931) 55

Superintendent of Insurance v. ***Bankers Life & Casualty Co.***, 40 U.S.L.W. 4001 (U. S. November 8, 1971) 47

Thomson v. *Wooster*, 114 U.S. 104 (1885) 32, 35, 37

Trans World Airlines, Inc. v. *Civil Aeronautics Board (Hughes Tool Company, Intervenor)*, 339 F.2d 56 (2d Cir. 1964), *cert. denied*, 382 U.S. 842 (1965) 19n

United States v. ***Borden Co.***, 308 U. S. 188 (1939) 45

United States v. *Philadelphia National Bank*, 374 U. S. 321 (1963) 46

PAGE

United States v. *Procter & Gamble Co.*, 356 U. S. 677 (1958) 28n

United States v. *Ryan*, 402 U. S. 530 (1971) 28n

Zdanok v. *Glidden Co.*, 327 F.2d 944 (2d Cir.), *cert. denied*, 377 U. S. 934 (1964) 4

Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 395 U. S. 100 (1969) 55

Statutes and Rules

Clayton Act, Section 3, 15 U.S.C. § 14 (1970) 7n

Clayton Act, Section 7, 15 U.S.C. § 18 (1970) 7n

Federal Aviation Act, Section 408, 49 U.S.C. § 1378 (1970) 42

Federal Aviation Act, Section 414, 49 U.S.C. § 1384 42

Federal Rules of Civil Procedure

Rule 8(c) 42

Rule 15(a) 40

Rule 16 ..... 16, 25, 29, 31

Rule 26(c)-(d) 31

Rule 37 ..... 3, 32, 35

Rule 54(b) 18

Rule 54(c) 40

General Rules for the United States District Court, Southern District of New York

Rule 2(b) 11

Judicial Code
28 U.S.C. § 1292(b) (1970) 18

Sherman Act, Section 1, 15 U.S.C. § 1 (1970) 6

Sherman Act, Section 2, 15 U.S.C. § 2 (1970) 6

Miscellaneous Authorities

	PAGE
W. BRENNAN, *Pretrial Procedure in New Jersey—A Demonstration,* 28 N.Y.S. BAR BULL. 442 (1956)	30
F. JAMES, CIVIL PROCEDURE (1965)	31
MANUAL FOR COMPLEX AND MULTI-DISTRICT LITIGATION (1970)	29
6 J. MOORE, FEDERAL PRACTICE ¶¶54.61, 55.08 (2d ed. 1971)	39
J. MOORE, FEDERAL PRACTICE RULES PAMPHLET (1971)	30
Order No. E-16195, 32 C.A.B. 1363 (Dec. 29, 1960)	5, 9
Original Advisory Committee Note of 1937 to Fed. R. Civ. P. 37	35
Symposium, *The Practical Operation of Federal Discovery,* 12 F.R.D. 131 (1952)	30
C. A. WRIGHT, FEDERAL COURTS (2d ed. 1970)	31
J. WRIGHT, *Pre-Trial on Trial,* 14 LA. L. REV. 391 (1954)	30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-827

HUGHES TOOL COMPANY
and
RAYMOND M. HOLLIDAY,
Petitioners,

v.

TRANS WORLD AIRLINES, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT TRANS WORLD AIRLINES, INC. IN OPPOSITION

The petition herein seeks review of a decision by the United States Court of Appeals for the Second Circuit entered September 1, 1971 [108a *et seq.**] on which rehearing was denied on September 28, 1971 [163a-164a] and which is reported at 449 F.2d 51. The decision of the court of appeals modified as to the rate of interest applicable and otherwise affirmed the opinions and judgment of the United States District Court for the Southern District of New York reported at 308 F. Supp. 679 [50a *et seq.*] and 312 F. Supp. 478 [81a *et seq.*]. These decisions of the district court and of the court of appeals confirmed in its entirety

* Citations with the suffix "a" are to pages of the appendix to the petition.

the Report and Award of the Special Master in this case, Hon. Herbert Brownell, filed September 21, 1968 (the "Brownell Report").

By their petition, Hughes Tool Company ("Toolco") and Raymond M. Holliday (collectively, "defendants") are also seeking reconsideration of matters previously decided by the United States Court of Appeals for the Second Circuit in a decision entered on June 2, 1964 and reported at 332 F. 2d 602 [19a *et seq.*]. Writs of certiorari with respect to this earlier decision were granted on November 16, 1964 and, after full briefing and argument, were dismissed on March 8, 1965 as having been improvidently granted, as had been suggested during oral argument by counsel for TWA. 379 U. S. 92 [44a], 380 U. S. 248, 249 [45a, 46a].

ORDERS AND OPINIONS BELOW

The "Opinions Below" listed in defendants' petition at pp. 1-3, and the separately bound appendix accompanying defendants' petition, omit (a) the opinions and orders of the district court in the course of supervising pretrial discovery, which the first two of defendants' "Questions Presented" ask this Court to review, (b) the opinion and order of the district court dated January 4, 1966, refusing to make the finding of fact on which the fifth of defendants' "Questions Presented" is logically dependent, and (c) the Brownell Report, which sets forth the Special Master's findings that plaintiff Trans World Airlines, Inc. ("TWA") had established that it was damaged in the amount of $45,870,478.65 by defendants' conduct in violation of the antitrust laws, as alleged in the complaint.

The Brownell Report, with its original pagination, has been filed herein and in No. 71-830 as a separately bound

Appendix to TWA's Conditional Cross-Petition for a Writ of Certiorari and Supplemental Appendix to Accompany Brief in Opposition. Certain of the relevant pretrial orders and opinions of the district court, not otherwise available to this Court, are also reprinted as an annex at the end of this brief.*

QUESTIONS PRESENTED

The seven "Questions Presented" listed in the petition are dealt with, in the same order, in the Argument (p. 25 *et seq., infra*). That Argument and the Counter-Statement of the Case (p. 4 *et seq.*) demonstrate that none of these questions is actually presented on the record in this case.

A threshold question is presented, however, as to the extent to which principal issues defendants seek to reargue are judicially foreclosed. The propriety of the very same discovery orders, the claimed right of defendants to make a "business decision" not to obey them, and the correctness of the district court's conclusion that this refusal of discovery compelled the entry of an order against defendants under the default provisions of Fed. R. Civ. P. 37—these precise issues were adjudicated in the court of appeals' final (not interlocutory) judgment in 1964. This was the judgment which affirmed the dismissal with prejudice of Toolco's counterclaims against TWA and others, never alluded to in the petition, and a writ of certiorari with respect to it (No. 501) was dismissed by this Court as

* Citations with the suffix "t" are to the annex to this brief; citations with the suffix "a" are to the appendix to defendants' petition; citations to "Brownell Report" are to TWA's appendix to conditional cross-petition and supplemental appendix to this brief in opposition; citations to "2d Cir. App. A- " are to the Joint Appendix in the court of appeals, a certified copy of which has been furnished to this Court by defendants; citations to "AX- " are to the Joint Appendix of Exhibits in the court of appeals, a certified copy of which has been furnished to this Court by TWA; and citations to "Doc. " are to documents in the record before the court of appeals not otherwise reproduced.

having been improvidently granted. 380 U. S. 249 [46a]. In its 1971 decision the court of appeals held that its prior decision was not binding on the present appeal, and therefore found it necessary to re-examine these questions and the record of pretrial proceedings, reaching the same conclusions as the 1964 panel. TWA suggests, however, that all of the elements calling for application of established doctrines of judicial finality are here met and that this alone is a sufficient reason for not granting the writ with respect to issues adjudicated in dismissing Toolco's counterclaims. *Cromwell* v. *County of Sac*, 94 U. S. 351, 353 (1876); *Partmar Corp.* v. *Paramount Pictures Theatres Corp.*, 347 U. S. 89, 100-01 (1954); *Zdanok* v. *Glidden Co.*, 327 F. 2d 944, 954-55 (2d Cir.), *cert. denied*, 377 U. S. 934 (1964); *cf. Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U. S. 313, 328-29 (1971).

COUNTER-STATEMENT OF THE CASE

This lawsuit was commenced on June 30, 1961. Plaintiff TWA was a corporation with more than 13,000 public stockholders (now 38,000), the stock of which has at all relevant times been traded on the New York Stock Exchange. It was and is the only United States-flag airline authorized to conduct regularly scheduled operations on both transatlantic and transcontinental routes. The named defendants were Howard R. Hughes, Toolco, a diversified corporation wholly owned by Hughes, and Raymond M. Holliday, an officer and director of Toolco and a director of TWA.

Until the end of 1960, six months before the complaint was filed, TWA had been for many years dominated by Hughes and Toolco. At that time, TWA had available for service only 27 jet aircraft, of which 17 were on day-to-day leases from Toolco [AX-101].* On December 30, 1960, at

* Hughes, indeed, appears to have been personally negotiating at around this time for the sale to American Airlines of 15 of the 27 jets operated by TWA [2d Cir. App. A-203].

the insistence of TWA's senior creditors, Toolco's holdings of TWA stock (amounting at the time to 78% of the outstanding shares) were placed in a voting trust. In an opinion and order dealing with this and certain related transactions, the Civil Aeronautics Board (the "CAB") stated:

> "We have not been told officially of the reasons which motivated the decision of the insurance companies and banks to seek this protection. However, we have not been unaware of TWA's problems.
>
> "For example, it is a matter of public record that TWA's major competitors arranged the financing of their jet fleets at a significantly earlier date than did TWA. The impact of this fact may be indeed far-reaching.
>
> • • • • •
>
> "Moreover, it is probable that the delay in arranging financing has also prevented TWA from securing delivery of a substantially large portion of the jet fleet which was ordered on its behalf. • • • It appears that the failure to receive this equipment as planned may have played a substantial part in TWA's recent inability to maintain its traffic position relative to its principal competitors. • • • It appears to be significant that TWA's major competitors have already taken delivery of much larger jet fleets than TWA is operating and have firm orders for delivery of more.
>
> "Under these circumstances, we think it clear that Board action to facilitate TWA's acquisition of jet equipment is in the public interest." (32 C.A.B. 1363, 1364-65, Order No. E-16195 (Dec. 29, 1960))

Of the three voting trustees, two were prominent independent businessmen appointed by the creditors: Irving S. Olds, former Chairman of the Board of Directors of United States Steel Corporation, and Ernest R. Breech, former Chairman of the Board of Directors of Ford Motor Company. The third was the defendant Holliday, representing

Toolco and Hughes; Holliday, however, opposed all of the steps thereafter taken by the trustees.

At a special stockholders' meeting early in 1961 the trustees caused a sufficient number of directors to be replaced to establish a new, independent majority of the board, which elected Charles C. Tillinghast, Jr. (formerly Vice President—International Operations of The Bendix Corporation) as president.* The new board also retained independent counsel with no prior connections with either TWA or Toolco "* * * to determine whether [TWA] has a cause of action to recover damages from any party or parties in connection with the procurement of aircraft, ground equipment, training aids, financing thereof, or any other matter" (Minutes of TWA's Board of Directors Meeting, March 20, 1961, p. 12). On the recommendation of such counsel, made after an investigation of such sources as were available to TWA, this lawsuit was brought against Hughes, Toolco and Holliday.

The complaint

The complaint charged defendants with a combination and conspiracy to restrain and monopolize and an attempt to monopolize a substantial segment of trade, beginning in 1939, the objects of which were to monopolize the supply of aircraft to TWA and to use TWA as a captive market in making Toolco a dominant source of supply of aircraft to air carriers generally—all in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 2 of the Sherman Act, 15 U.S.C. § 2 [complaint, pars. 9, 10, 11].**

* In addition to Tillinghast and Breech, who became chairman of the board, the new directors were Clifford F. Hood, former President of United States Steel Corporation; Barry T. Leithead, President of Cluett, Peabody & Co. Inc.; Houston M. McBain, former Chairman of Marshall Field & Co.; and John A. McCone, former Chairman of the Atomic Energy Commission.

** TWA's complaint is at 2d Cir. App. A-1 *et seq.*

The complaint charged that, for the purpose of establishing complete domination and control over TWA's acquisition of aircraft, Toolco conditioned the supply of aircraft to TWA upon TWA's confining itself to such financing as Toolco provided for it, and conditioned the provision of financing to TWA upon TWA's accepting such aircraft on such terms as Toolco dictated [complaint, pars. 9, 10, 23, 24]. It charged that Toolco imposed upon TWA a boycott of manufacturers that could have supplied aircraft to TWA directly [complaint, pars. 9, 10, 17, 20] and that, during the years 1959 and 1960, pursuant to the conspiracy, day-to-day leases of aircraft by Toolco to TWA were conditioned on an understanding that TWA would not acquire aircraft except from Toolco [complaint, pars. 9, 20].*

It charged that there were other conspirators besides defendants, one being Atlas Corporation, in which Hughes was individually an 11% stockholder, and which in turn controlled Northeast Airlines [complaint, par. 6]. Atlas was alleged to have joined the conspiracy at an unknown date prior to May 1960. An attempt, participated in by Atlas, to impose upon TWA a merger with Northeast on terms disadvantageous to TWA was alleged, as was a transfer to Northeast of six Convair 880 jet aircraft ordered by Toolco, three of which had previously been contractually assigned to TWA [complaint, pars. 21, 22].**

The mechanics of the attempt during 1955 and 1956 to use the TWA captive market for aircraft to secure a dominant position in the supply of jet aircraft were

* The leasing of jets on the illegal condition was alleged, in addition, to violate Section 3 of the Clayton Act, 15 U.S.C. § 14. A violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, was also alleged, and divestiture and other equitable relief were asked, in addition to damages. These claims for equitable relief were mooted, however, on Toolco's voluntary sale of all of its TWA stock in 1966, for $546 million in cash, at a profit to Toolco of over $450 million.

** Subsequent to the filing of the complaint, Toolco acquired control of Northeast from Atlas, and leased four other Convair 880s to Northeast.

alleged in considerable detail [complaint, pars. 14-17]. Defendants engaged in a joint venture with the Convair Division of General Dynamics Corporation to develop a jet aircraft which TWA would be required to buy as an initial captive customer [complaint, par. 14]. To preserve this captive market during this period, when TWA's principal competitors were placing direct orders with Boeing and Douglas, Toolco prevented TWA from arranging either for direct acquisition of jet aircraft or for the financing of such aircraft. When the initial joint venture effort with Convair failed, defendants were alleged to have thereafter planned the direct manufacture by Toolco of jet aircraft—also to be marketed to airlines generally, with the TWA market as a captive marketing base [complaint, pars. 15, 16, 17, 26]. In 1956, jet aircraft were ordered by Toolco from other manufacturers (Boeing and Convair), but it was alleged that Toolco repeatedly refused to assign rights to such aircraft to TWA [complaint, par. 18].

It was alleged that defendants' attempts to prevent TWA from acquiring aircraft directly from manufacturers instead of through defendants had continued subsequent to 1960, and examples were given [complaint, pars. 36-48].

The injuries caused TWA by this course of conduct were spelled out [complaint, pars. 50-53]. They consisted principally in its having been prevented from obtaining jet aircraft and deprived of opportunity for adequate use of jet aircraft from 1958 on, with a resultant loss of profits [complaint, par. 52(a)], and in its having been prevented from obtaining financing in 1955 and 1956, when interest rates were low and when its competitors obtained such financing. Among the specific examples of injuries alleged, in addition to such matters referred to above as the assignment of Convair 880s to Northeast and the day-to-day leases of jets in 1959 and 1960 on unlawful conditions, was the diversion by defendants

of six long-range Boeing jet aircraft to Pan American World Airways, TWA's principal transatlantic competitor [complaint, par 18]. Other injuries were alleged to include TWA's inability to dispose of its used piston aircraft (because of the insufficiency of its jet equipment) until the market for such aircraft had dropped considerably, impairment of TWA's ability to secure financing, loss of goodwill, and general disruption of TWA's management and business [complaint, pars. 52, 53]. Damages were estimated as in excess of $35,000,000 [complaint, par. 54].

Thus, TWA's complaint charged that its late financing, the delay in delivery and inadequacy of its jet fleet, and its loss of competitive position, to which the CAB had referred in Order No. E-16195 (*supra,* p. 5), and the disastrous losses which had resulted, *were caused by defendants' wrongful conduct and were the result of a conspiracy and attempt to monopolize in violation of the antitrust laws.*

The answers and counterclaims: issues presented

It proved impossible for TWA to serve process on Hughes. Toolco's answer (adopted in substance by Holliday) put in issue substantially all of the averments of TWA's complaint, and also included extensive counterclaims against TWA and nine additional defendants.* The counterclaims charged that TWA and its new management, a number of financial institutions and their officers (referred to collectively throughout the litigation and here as "additional defendants") had been engaged in a conspiracy in violation of the antitrust laws to force Toolco to give up control of TWA and to monopolize aircraft financing in the hands of the financial institutions.

*Toolco's Answer and Counterclaims is at 2d Cir. App. A-41 *et seq.* and Holliday's Answer is at 2d Cir. App. A-99 *et seq.*

TWA's losses (stated to have exceeded $45 million [Toolco answer, par. 99], the amount to which TWA subsequently amended its own *ad damnum* clause) were charged to have been the result of this conspiracy, and Toolco was stated to have suffered damages amounting to $77 million.*

By its answer, Toolco identified the critical issues as to which evidence would be needed, in addition to evidence of the extent of TWA's losses. For example, Toolco denied that Hughes had directed, controlled and dominated it [Toolco answer, par. 4], and denied that it had engaged in the combination, conspiracy and attempt charged or that any of the specific acts which it had admittedly done were done pursuant to such a combination, conspiracy and attempt, or pursuant to an intent on the part of the defendants to utilize TWA as a captive market for aircraft and to become a dominant source of supply of aircraft to air carriers [Toolco answer, par. 1]. It denied that it had engaged in a joint venture with Convair to develop a jet aircraft to be supplied by defendants to air carriers including TWA, for which aircraft TWA would serve as a captive market [Toolco answer, par. 10]. It denied that defendants had caused and directed TWA to forego making any arrangements for the acquisition of jet aircraft [Toolco answer, par. 13]. It denied that it had refused to assign rights to acquire jet aircraft to TWA, denied that the transfer of long-range Boeing jets to Pan American was caused by defendants, and affirmatively alleged that this transfer had been recommended and approved by TWA's management [Toolco answer, par. 14]. It denied that it

* Defendants' omission of any mention of these counterclaims is not an oversight. There has been an adjudication against Toolco which is final and binding on every issue involved. Factually, that final judgment constitutes a rejection of defendants' version of what really happened. Defendants are very anxious to avoid any consideration of the implications of the dismissal with prejudice, factual as well as legal.

had prevented TWA from making test and acceptance flights of specific Convair 880 aircraft [Toolco answer, par. 15]. It denied that its day-to-day leases of aircraft to TWA were conditioned on the understanding that TWA would not acquire aircraft from any other potential supplier [Toolco answer, par. 16]. It denied that it did not allow TWA to make its own arrangements for financing aircraft [Toolco answer, par. 1].

This partial list sufficiently indicates the scope of the issues on the merits of TWA's claims to which discovery—by TWA as well as by defendants—was necessarily directed. Central to the establishment by TWA of its right to recover under the antitrust laws were the issues as to defendants' intent and purposes in establishing control over TWA, its financing and its aircraft acquisitions, and whether—and why—Toolco prevented TWA from ordering its own aircraft and arranging its own financing, and diverted jet aircraft needed by TWA to TWA's competitors. The nature and purpose of the arrangements which defendants made with Convair, and the nature and purpose of defendants' equipment transactions and negotiations with airlines other than TWA, were identified by the pleadings as issues of critical importance. Toolco's denial of control by Hughes (accompanied by a denial of each allegation of the complaint connecting Hughes with the specific actions and events charged) also placed in issue the details of Hughes's operating relationships with both Toolco and TWA.

Discovery

Initial priority of discovery went to defendants, and TWA was required to begin production of documents in August 1961 [1t]. On August 31, 1961 the case was assigned by the Chief Judge to Judge Charles M. Metzner for all purposes, pursuant to Rule 2 of the General Rules for the United States District Court for the Southern District of

New York [2d Cir. App. A-33]. Pursuant to a schedule fixed by Judge Metzner [6t-7t], Toolco began its deposition of Tillinghast, TWA's president, on January 5, 1962 [Doc. 53].

Although Tillinghast had come from outside TWA, had been president for less than three months when the complaint was filed, and had no personal knowledge of events before he joined TWA, defendants were still taking his deposition in July 1962, with no signs of bringing it to a conclusion. On July 12, 1962 Judge Metzner ordered the deposition to be completed by July 25, 1962 [9t]. The deposition transcript was 6,729 pages long at the conclusion of Tillinghast's testimony [Doc. 222]. Thereafter, a deposition of Robert W. Rummel, TWA's principal procurement officer, was taken and concluded on October 16, 1962 [Doc. 227, p. 1928]. Two other depositions were commenced by defendants but still had not been completed on February 8, 1963, when defendants informed the district court and the parties that they would refuse to participate in any further discovery proceedings.

Before February 8, 1963, TWA and the additional defendants were prevented from engaging in deposition discovery, but Toolco, the additional defendants and some non-parties were required to produce documents in response to various demands. It became apparent that critical documents were to be found in three areas: (a) such records of Hughes's conversations and directives as had been preserved, partly in Toolco's telephone and message center at 7000 Romaine Street, Los Angeles, and partly in the form of notes preserved by third parties of telephone conversations with Hughes;* (b) documents involving the lawyers through whom many of Hughes's and Toolco's busi-

* Apparently as a matter of practice, Hughes never corresponded. Communication with him was solely by telephone, and the Los Angeles message center operated 24 hours a day, 365 days a year, to facilitate this unique operating method.

ness negotiations had been conducted, as to which defendants claimed attorney-client privilege; and (c) documents which would reveal the financial aspects of defendants' dealings in aircraft, not only with TWA, but with others.

In the first area, the available records were fragmentary in the extreme; occasional verbatim messages were kept for later delivery, when the two parties could not be put in direct contact, but the message center record of any actual conversation was limited to such comments as "They talked" or "Omit. They talked" [AX-665-728 *passim: e.g.*, AX-669, AX-673, AX-691, AX-694]. Subjects of particular interest were from time to time summarized in "memoranda", and the raw telephone records destroyed. Unfortunately no memoranda were produced, defendants explaining that they, too, had been destroyed [Doc. 215, pp. 3412-13; Doc. 306, pp. 2-3; Doc. 307, pp. 5-7]. It was thus plain that oral discovery of Hughes was necessary to develop the relevant, material facts.

In the second area, defendants claimed attorney-client privilege. Special Master J. Lee Rankin, who had been appointed to supervise discovery proceedings [3t-4t], twice held and the district court twice agreed that the privilege—if any—had been waived, that the documents were material and relevant, and that they should be produced [11t-12t, 21t-22t]. Defendants disregarded these orders, and as of February 8, 1963 were in open and admitted defiance of still a third order to produce this material [2d Cir. App. 305-06].

In the third area, tax returns and audited financial statements of Toolco through 1960 were produced (with such extraordinary precautions as to secrecy that the documents are still sealed and appear nowhere in the printed record). No work papers or detailed audit reports were produced, and the extreme brevity of the returns and balance sheets and income statements made it impossible to determine with any precision the specific transactions reflected by any

particular entry. A motion was made for the production of work papers and other material which would clarify these and related matters, specifying 23 categories of documents in all, and including a demand for material subsequent to 1960 [2d Cir. App. A-133-36]. The documents were held relevant and material; Toolco advised the parties that at least nine cartons of such documents existed. Ordered to turn them over to TWA and the additional defendants, counsel for defendants, in open court, flatly refused [2d Cir. App. A-133-36, A-304-05].

TWA informed the court that its principal evidence on the critical issues of the litigation would come from Hughes. It exhibited documents which demonstrated that Hughes had been the prime mover in every matter described in the complaint [*e.g.*, Docs. 165, 166, 167]. The district court (which conducted in this period over 19 pre-trial hearings) found: "It is clear that during all of the times covered by the complaint the management of TWA was controlled by Hughes personally" (32 F.R.D. at 606) [14a]. It further found: "It is clear that the deposition of Hughes is essential for the proper presentation of TWA's case" (32 F.R.D. at 607) [17a].

Defendants' conduct during this period has been extensively reviewed, not only by the district court but by two panels of the Court of Appeals for the Second Circuit. Defendants' motives were transparent—to conduct their own discovery interminably while resisting at all cost any meaningful discovery by TWA and the additional defendants.* Chief Judge Lumbard summarized the unanimous view of the court of appeals in these words:

> "Hughes' deposition was absolutely essential to the proper conduct of the litigation. Yet he and

* It was, of course, TWA and not Toolco that was ultimately vulnerable to the financial burdens of interminable litigation. As pointed out below, Toolco was worth "several" hundreds of millions of dollars by its own assertion, while TWA was in desperate financial straits during the first two years after it was freed from Hughes's control. The repeated assertions in defendants' petition that TWA's lawsuit constituted financial oppression of Toolco (*see* Petition, pp. 14, 16, 17, 18) are utter nonsense.

> Toolco seized upon every opportunity to forestall this event. To this end they demanded the production of a multitude of documents by TWA and the additional defendants and secured successive adjournments of the deposition. Indeed, Hughes and Toolco seemed to look upon the entire discovery proceedings as some sort of a game, rather than as a means of securing the just and expeditious settlement of the important matters in dispute." (332 F.2d at 615) [40a-41a]

Judge Kaufman, also speaking for a unanimous court, stated:

> "Clearly the court was entirely correct in concluding that the litigation would only continue its desultory course without the appearance on stage at the earliest possible moment of the hitherto unseen Prince of the drama." (449 F.2d at 61) [122a]

The default; amendment of *ad damnum* clause

The default was eventually established in open court at a hearing held at the close of business on Friday, February 8, 1963, the last business day before the deposition of Hughes was to begin in Los Angeles at 10 a.m. on Monday, February 11.* Demands by Toolco that extensive interrogatories be answered by TWA and that issues be

* The deposition had been originally scheduled for April 23, 1962, on the assumption that Toolco would have concluded its depositions by that time [7t]. TWA's attempts to serve a witness subpoena on Hughes having been unsuccessful, Toolco was twice ordered in July to answer interrogatories as to Hughes's whereabouts [8t; Doc. 103]. In lieu thereof, Toolco arranged to accept service of a witness subpoena on Hughes's behalf, and it expressly vouched for the validity of this service [2d Cir. App. A-272]; elaborate precautions were taken by the court to assure that Hughes was personally advised of what had been done in his name and its potential consequences [15t-17t]. That subpoena provided for the deposition to commence on September 24, 1962. This was postponed by court order to October 29, 1962 to permit Toolco to carry its own discovery further [*ibid.*] and then further postponed to February 11, 1963, which date, however, was expressly stated to be subject to no further adjournments "in the absence of extraordinary circumstances" [19t].

limited in a so-called "Rule 16" conference prior to commencement of the Hughes deposition had been denied, the court providing that TWA would be permitted to examine Hughes before it was required to answer the interrogatories, and stating that, since Hughes's deposition would "facilitate an intelligent ruling upon Toolco's application pursuant to Rule 16", the denial of the application was without prejudice to a renewal after Hughes's examination had been completed [20t]. No suggestion was ever made that there was any medical or other obstacle to Hughes's appearing, and as the court of appeals pointed out, Judge Metzner had offered to have the deposition taken "in as much privacy and under any other conditions that might suit Hughes's aversion to public appearance" (449 F.2d at 62) [122a].

On February 8, 1963 Toolco served upon the Special Master, TWA and the additional defendants a document entitled "Notice of Position" stating that Toolco "hereby elects * * * to rest on the merits of its positions as heretofore taken so that it may avoid the burdens and expenses involved in further pre-trial and trial proceedings * * *" [2d Cir. App. A-268-69]. At TWA's request the district court scheduled a further pretrial hearing at 5 p.m. that day to establish the meaning and implications of this communication.

At the outset of the February 8 hearing, TWA's counsel gave formal notice that TWA claimed and now expected to prove damages of at least $45 million before trebling, and that TWA intended to move to amend its complaint in that respect [2d Cir. App. A-271].

After this notice had been given, counsel for defendants formally stated that it was his clients' "business decision" that the deposition would not be held, and to proceed no further with any pretrial discovery, in defiance of all court

orders [2d Cir. App. A-280]*. The meaning and effect of this decision was explored at length, and it was made quite clear that defendants accepted that they would be liable in damages if the several grounds on which they were seeking review were determined against them. Counsel for Toolco stated:

> "• • • we are fully aware—my client is fully aware—that by insisting on a right to obtain a review on the legal questions which have been decided to date • • • they may be deprived of further defending on the merits, other than on the question of damages." [2d Cir. App. A-276]

At a later point in the same hearing he explained:

> "My purpose of course is to obtain something which will enable me to get a review on the law as to whether or not you are entitled to be here in the first place. And then I am prepared, if I am wrong in that regard, to pay the consequences to the extent to which you are able to prove damages." [2d Cir. App. A-297]

Since Hughes's deposition was to be taken pursuant to a valid witness subpoena, and Hughes had neither objected to it nor made any representation that he would be unavailable or would refuse to testify, TWA took the position that, regardless of Toolco's "business decision", TWA was entitled to proceed with this vital discovery [2d Cir. App. A-292-98]. However, at Toolco's express request and in reliance upon its stated willingness to respond in damages, Judge Metzner stayed TWA from proceeding and directed that the deposition not be taken [2d Cir. App. A-307].

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* It was at this February 8 hearing that counsel for defendants gave as a reason for the "business decision" the cost of proceeding with the Hughes deposition, of which so much is made in defendants' petition [2d Cir. App. A-280]. He estimated it at $5 million (explaining that the figure was supplied by his clients and declining to vouch for its accuracy)—a ridiculous estimate that TWA at the time called "obviously absurd" [2d Cir. App. A-293].

There followed inevitably the entry by the district court on May 3, 1963 of a final judgment dismissing Toolco's own counterclaims with prejudice and an interlocutory judgment in TWA's favor upon its complaint (32 F.R.D. at 607) [17a; 2d Cir. App. A-323]. No final judgment could be entered upon TWA's complaint until after an evidentiary hearing to establish the amount of its damages. It was ruled, however, that since Toolco would be represented at the damage hearing and in a position to contest TWA's damage proof, TWA was entitled to recover such actual damages as it could establish, and its motion to amend its complaint was accordingly granted (32 F.R.D. at 607-08) [17a].

The 1963-1965 appeals

Following entry of the default judgment on TWA's complaint and dismissal of Toolco's counterclaims with prejudice, defendants were granted immediate review of the decisions below. Toolco appealed as of right from the dismissal of its counterclaims (an order pursuant to Fed.R.Civ. P. 54(b) having been entered), and after appropriate certification by the district court, the court of appeals allowed defendants an interlocutory appeal, pursuant to 28 U.S.C. §1292(b), with respect to the complaint (32 F.R.D. at 608) [18a] (332 F. 2d at 605) [20a]. Both in the court of appeals and later in this Court these separate appeals were heard together. Thus, there were presented to both appellate courts at that time, on one or both appeals, not only the jurisdictional but also the procedural questions which the district court had passed upon in the course of the various pretrial hearings, including all aspects of the conduct of pretrial discovery.

The 1963-1965 appeals resulted in affirmance by the court of appeals of the district court's decisions on all matters presently relevant. Certiorari was granted as to both appeals, and there was full briefing and argument, including acceptance by this Court of a brief *amicus* filed on behalf of

the CAB, which supported the correctness of the decisions below insofar as they dealt with matters of primary jurisdiction and the asserted exemptive effect of the CAB's prior orders.

As his first point on oral argument, counsel for TWA urged that certiorari be dismissed because the decisions below were plainly correct (Transcript of Argument in No. 443, p. 18). On the next decision day both writs were dismissed as improvidently granted.

Defendants' petition attributes this dismissal to the fact that the appeal from the judgment in TWA's favor, No. 443, was interlocutory, not final (Petition, p. 10); but the appeal from the dismissal with prejudice of Toolco's counterclaims, No. 501, was from a final judgment, plainly binding unless reversed. This Court's order left standing in its entirety the court of appeals' affirmance of the district court's decision, as a final adjudication of every issue involved in the dismissal with prejudice of the counterclaims.*

The damage hearings

The damage hearings followed next, before Special Master Brownell. They extended over a period of 2½ years —3½ years if time spent in determining various preliminary matters relating to the scope of the default is

* An attempt by Toolco, initiated after the default, to reacquire control of TWA through acquisition of the power to replace the independent voting trustees was rejected by the court of appeals late in 1964, on an appeal from a CAB order disclaiming jurisdiction. The court of appeals held that no such reacquisition of control was permissible without a public hearing. A petition for certiorari filed by Toolco as intervenor, in which the CAB did not join, was denied by this Court. *Trans World Airlines, Inc.* v. *Civil Aeronautics Board, (Hughes Tool Company, Intervenor)*, 339 F.2d 56 (2d Cir. 1964), *cert. denied*, 382 U. S. 842 (1965).

included.* The transcript of testimony taken at the damage hearings totalled almost 11,000 pages, substantially all of it cross-examination, since the direct testimony of witnesses was presented in written form. Over 60,000 pages of documents were admitted in the record as exhibits. The scope and thoroughness of these hearings and the intensity with which each issue was contested are reflected in the Brownell Report. Every point which defendants' petition attempts to make to this Court was raised in the damage hearing and is considered and rejected in the Report, except solely their arguments with respect to the conduct of the discovery proceedings and that the CAB had exempted their unlawful conduct from the antitrust laws (Sections A and D of the Petition), both of which had been expressly raised and rejected on the previous appeals.

Defendants' objections to the damage award were voluminous. In all, more than 1,300 pages of briefs and memoranda were submitted to the district court. Consideration of the objections and review of the record occupied the district court for over a year, after which the Brownell

* One of these preliminary matters was an express refusal by the district court to find that the allegations of paragraph 3 of TWA's complaint were untrue [32t-33t]. Such a finding was again requested of the Special Master at the close of the damage hearing, and was again expressly refused [Brownell Report, pp. 26, 28-33]. This factual determination, confirmed yet again by the district court in 1969 after a review of the entire record (308 F.Supp. at 686) [60a] and affirmed unanimously by the court of appeals (449 F.2d at 67-68) [133a-136a], is still disputed in defendants' present petition on the basis of entirely unsupported assertions of facts not found below. Defendants' contention, now four times rejected, heads the list of items in the footnote at pp. 11-12 of defendants' petition which are described as "facts, none of which had ever been in dispute" and which were, it is claimed, "confirmed in the course of the cross-examination of TWA's witnesses". That entire list, indeed, consists of restatements of factual contentions and related claims of innocent motivation which defendants attempted to prove at the damage hearing, which they asked the Special Master to find, and which he refused to find.

Report was confirmed by Judge Metzner in its entirety, each of the objections filed (those of TWA as well as those of defendants) being expressly overruled.

The appeal which followed was given correspondingly careful attention. The parties were permitted to file briefs without regard to the ordinary length limitations. Counting the various annexes bound in with the briefs, the appellate briefs totaled 719 pages, and the printed Joint Appendix and Joint Appendix of Exhibits consisted of 12 bound volumes. A full day was set aside for oral argument. The meticulous attention given by the court of appeals to all of defendants' arguments—including those which had been previously made, unsuccessfully, in the course of the 1963-1965 appeals—is fully apparent from Judge Kaufman's opinion. Except for a modification of the rate of interest on the judgment, the decisions below were unanimously affirmed in every respect.

Summary of Argument

While this lawsuit is unusual and perhaps unique, both with respect to the factual issues involved in the basic controversy and the unprecedented use by defendants of default as a tactic in a continuing litigation, there are no special and important reasons for further review by this Court. Such a lawsuit as this is not likely to recur, and as a defaulted case it lacks the factual record necessary for adequate consideration of the substantive antitrust questions tendered by defendants.

Nothing that has happened since this Court's dismissal of certiorari in 1965, after briefing and oral argument, has made the case more worthy of consideration by this Court. The questions of law involved in the post-1965 proceedings for the most part consist of long-established principles applicable to wilful defaults. These principles are seldom invoked because of the relative infrequency of such defaults by parties wishing to continue in active litigation. Defend-

ants' strategy of discover, default and defend on the damages has not been widely imitated.

Only two of the seven legal questions now tendered by defendants for decision by this Court were not presented in 1965* and none can be fairly described as of general significance. The decision below is not in conflict with the decision of another circuit on the same matter**; it is not a decision of an important question of federal law which requires settlement by this Court or which is in conflict with applicable decisions of this Court. Nor is the exercise of this Court's power of supervision called for by any departure by the courts below from the accepted and usual course of judicial proceedings.

Indeed, the action taken by the lower courts, once defendants had taken the highly unusual step of electing to disregard the district court's discovery orders and thus deprive TWA of access to critical evidence, was the minimum that was fair to a plaintiff so disadvantaged. TWA could not thereafter be required to prove the facts alleged in the complaint, as defendants obviously understood when they first announced and explained their "business decision", but the lower courts did require TWA to prove its damages in exhaustive detail. In the course of the damage hearing and subsequent judicial review—the only aspect of this proceeding taking place subsequent to this Court's 1965 dismissal of certiorari—defendants were accorded full opportunity for cross-examination, submission of rebuttal evidence and oral and written argument, and they exercised these rights abundantly.

The questions now advanced by defendants as a basis for review by this Court are merely artfully phrased efforts to extract from this controversy over defaults and damages

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* No. 7 and the last clause of No. 2.

** The conflict between circuits alleged at p. 25 of the petition is not a real one; confronted with the same facts there is no reason to believe the circuits would have ruled differently. See pp. 39-40, *infra*.

some legal issues of general significance. They simply are not there. All of the questions posed are based on assertions or assumptions of fact which are refuted by the record or which the courts below declined to find because of defendants' election not to submit their contentions to the scrutiny of discovery.

A. Defendants' first proposed question hinges on their factual assertion that the complaint and pretrial proceedings prior to the scheduled deposition of Hughes did not identify the allegedly illegal conduct "with reasonable specificity." The complaint here is in fact a very specific one, upheld as sufficient by the lower courts, and there is no merit to the charge of failure of specificity. The illegal transactions were clearly identified. Defendants had no constitutionally protected right to refuse to comply with lawful discovery orders in order to force TWA to establish its case on the merits without benefit of discovery. Their contrary argument is frivolous. (pp. 25-31, *infra*)

B. Defendants' second question relies on assertion of the fact, not found by the Special Master or either court below, that the circumstances of the default did "not permit a presumption that the defendant has no defense to the action." If any presumption is to be made with respect to the real reasons for the default, the normal presumption that defendants realized that they could be shown to have acted unlawfully cannot be excluded. Having deliberately chosen as a "business decision" to refuse to comply with lawful discovery orders with respect to evidence of vital importance on all contested issues, and with the express expectation that a default judgment might be entered, defendants were not denied due process by the entry of a default judgment which ruled that the well-pleaded, material and traversable allegations of the complaint were admitted. Any other result would constitute a serious deprivation of substantial justice and due process to the plaintiff TWA to which discovery was denied. (pp. 32-38, *infra*)

C. The implicit premise of the third question posed by defendants is that the defaulting defendant had no notice of the proposed amendment of the *ad damnum* clause at the time of its decision to default and had no opportunity thereafter to change its decision. In this case, that premise is plainly false. Defendants had notice of the proposed amendment at the time they elected to default and despite such notice stood by that election. Moreover, the default judgment was not entered until three months later, but defendants never offered to comply with the district court's discovery orders. (pp. 38-40, *infra*)

D. Defendants' fourth question, which probably did not survive the default in any case (see pp. 41-42, *infra*), is based on the unstated premise that there was no unlawful and undisclosed motive underlying the acts performed by defendants in the exercise of their control over TWA. The question of motivation would have been explored, if defendants had been willing to permit discovery, and the present record is therefore incomplete as to the critical facts needed to resolve the question now posed by defendants. The CAB's brief *amicus* filed when this case was here in 1965 confirms that the Board's past orders, approving solely defendants' acquisition of control over TWA, were not intended to and did not immunize them from liability in damages to TWA for conduct admitted by their default to be pursuant to a conspiracy to restrain and monopolize and in furtherance of their attempt to monopolize a substantial segment of trade. (pp. 41-46, *infra*)

E. Similarly, the fifth question raised by defendants embodies the assumptions that the parent corporation (here Toolco) is not a competitor of equipment suppliers and is not acting for unlawful purposes. These assumptions do not and could not rest on any factual finding below, and are at variance both with the allegations of TWA's complaint

and with evidence available to TWA concerning Toolco's dealings in aircraft. In any event defendants' failure to make discovery precluded building a record and making a finding on this issue. (pp. 47-48, *infra*)

F. Defendants' sixth question assumes that they "in no way restrained or monopolized a particular area of commerce." This assumption is flatly contrary to the basic allegations of the complaint admitted by the default. The Special Master and both courts below found that the evidence supported the inference that Toolco's extensive activities had important competitive impact in the relevant market and "combined with appropriate related proof of the intent, attempt, collusion, tying arrangements, boycotts and monopolization alleged in the complaint" would have supported an antitrust judgment for TWA in a trial on the merits, had there been one. (pp. 49-51, *infra*)

G. Defendants' final question assumes that plaintiff's evidence of damage was not related to the alleged restraint or monopolization and that plaintiff did not show that without defendants' interference it could have financed the purchase of aircraft. These assumptions are obviously not justified on the record as made in the damage hearing, and the findings of the Special Master and the courts below that TWA in fact made a sufficient showing were clearly warranted. (pp. 51-56, *infra*)

ARGUMENT

A. Defendants were not denied due process of law by the district court's pretrial discovery orders. (Petition, Section A)

Defendants' constitutional argument depends upon the proposition that their right to due process of law was violated when the deposition of Hughes was ordered before the procedures of Fed. R. Civ. P. 16 had been used to

limit and narrow the issues, and before TWA answered interrogatories propounded by defendants. This argument is frivolous on its face.

Nothing can be plainer than that the discovery which TWA sought and which the district court held TWA was entitled to, was reasonably calculated to develop or discover the existence of relevant evidence—evidence relevant, for example, to a determination

> (i) that defendants had in fact engaged in the conspiracy to restrain and monopolize trade and the attempt to monopolize charged in the complaint (*cf.* Petition, Section B),
>
> (ii) that defendants' activities of which TWA complained were such that they had not been and indeed could not be exempted from operation of the antitrust laws by orders of the CAB (*cf.* Petition, Section D),
>
> (iii) that such activities did not constitute "normal and natural" conduct of a majority stockholder in relation to its subsidiary but instead represented steps in a larger scheme, one part of which was a deliberate attempt to establish and exploit a captive market for anticompetitive purposes (*cf.* Petition, Section E),
>
> (iv) that that scheme had been translated into action with others than TWA (*cf.* Petition, Section F), and
>
> (v) that all of the foregoing was the cause of TWA's admitted losses—losses which defendants themselves had alleged in their counterclaims to be in excess of $45 million (*cf.* Petition, Section G).

Defendants could not construct in their petition a challenge to the materiality, relevance and probable availability of such evidence. They are therefore reduced to claiming—as a constitutional right—that a private antitrust plaintiff

must first go through various preliminary tests as to the sufficiency of the evidence already available to it before being allowed the benefit of the discovery provided by the Federal Rules. Before TWA was permitted to take a single deposition, the petition urges, the district court was required by the Constitution to compel TWA to answer all defendants' interrogatories and to hold a conference under Rule 16 for the limitation and definition of the issues even though the district court did not believe the case was ripe for such action.

The petition makes no attempt to hide the fact that what defendants really wanted was summary judgment, prior to discovery by plaintiff. Summary judgment under such circumstances being forbidden by the decisions of this Court, *e.g.*, *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962), they sought, and now claim as a constitutional right, the same thing under a different name.

At p. 15 of the petition defendants say:

> "Petitioners' reaction to the complaint was that this case was a classic one for summary judgment because the key facts apparently relied upon gave rise to no antitrust claim, and petitioners were ready to stipulate them."

Yet nothing could be plainer than that they were never prepared to stipulate the basic, critical facts which the complaint alleges. Indeed, each of those facts was then, has been since, and is still contested—defendants are still asking for summary judgment in their favor based on their contrary assertions, without allowing TWA its rights of discovery.

It is revealing to examine the nature of the interest for the protection of which defendants are invoking this claimed constitutional right to freedom from discovery. The only interest now claimed is defendants' financial inter-

est in not being subjected to the expense of litigation. The deposition was "expected to take at least 'a good two or three months'," it would have been "enormously burdensome", it would have required expenditure of "an astronomical amount" by Toolco (Petition, pp. 9, 16, 17).

Toolco had already taken depositions of its own for much longer than "a good two or three months." The "enormous" burdens of the litigation to Toolco were no less burdensome to TWA. As to the "astronomical cost", whatever the true cost might have been of a single deposition to Toolco, it could not have been significantly different for TWA.

Toolco's own answer alleges that it had assets in 1961 and 1962 of "several hundred million dollars" (Toolco answer, par. 3). TWA on the other hand was near bankruptcy. In 1961 and 1962 it recorded losses totalling over $44 million [AX-478]. At the end of 1962 its remaining tangible assets, less liabilities and deferred credits, were only $62.5 million [AX-476]. It was TWA, not Toolco, that was under a near-breaking financial strain. It was TWA, not Toolco, which might be ruined if the cost and delays of this litigation were unnecessarily multiplied.

Why, then, the flat refusal to permit further discovery? Plainly because this particular discovery might bring out the truth. That was why defendants made a "business decision" to prevent further discovery at all cost. They gambled that they could minimize their risks by depriving TWA of the access to evidence which the Federal Rules normally guarantee to a plaintiff as to any other party, and to which the court had held TWA entitled.*

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* Defendants pretend to find a precedent for their "election" in the position taken by the government in *United States* v. *Procter & Gamble Co.*, 356 U.S. 677 (1958) (Petition, p. 14). The crucial difference, however, is that in both *Procter & Gamble* and *United States* v. *Ryan*, 402 U.S. 530 (1971), which defendants also cite, refusal to comply with the discovery orders was directed at testing the validity of the discovery orders themselves. Both cases make plain that if the discovery orders were lawful, the disobedient litigant would suffer the appropriate sanction for his refusal.

By the various references to Manuals and Handbooks (Petition, pp. 15-18), defendants seek to suggest the existence of a body of authority that mandates the precise order of depositions and timing of pretrial conferences, depriving the trial court of all discretion. In fact, of course, the situation is quite otherwise.

> "The suggestions made herein are subject always to the discretion of each judge to adapt the procedures to the particular case or to deviate and innovate where necessary or desirable." MANUAL FOR COMPLEX AND MULTI-DISTRICT LITIGATION, at 0.4 (1970).

In this case, from the time the complaint was filed, the case was given the most careful attention in the district court; a single judge presided over it for all purposes; a special master was appointed to supervise discovery and close control over all discovery was maintained by the district judge; and defendants' contentions were carefully considered—not just once, but many, many times. It is this close attention and continuous supervision that the Manuals and Handbooks are concerned with, not any mechanical series of orders—and particularly not any automatic grant of indefinite absolute priority of discovery to a filibustering defendant.

By their interrogatories and their motion for a Rule 16 proceeding, defendants were seeking not just a definition of issues—the pleadings had accomplished this—but a limitation of issues, a binding order as to what TWA would have the right to prove at trial. Judge Metzner held that TWA should have access to the key witness before answering interrogatories of this character, and stated that the deposition of that key witness would "facilitate an intelligent ruling" upon the Rule 16 application by the court [20t]. Many experienced commentators have agreed that adequate prior discovery is essential to proper use of these

procedures. Discussing the New Jersey state practice, Mr. Justice Brennan said in 1956:

> "It is our conviction, justified by experience, that the full benefit of pretrial conference procedure will not be realized unless each litigant is afforded in advance of the conference the fullest possible opportunity to find out all he can as to his own and his adversary's case." W. BRENNAN, *Pretrial Procedure in New Jersey—A Demonstration,* 28 N.Y.S. BAR BULL. 442, 445 (1956).

This relationship between adequate discovery and issue-limiting pretrial procedures is equally apparent in federal practice. A symposium held in 1951 on "The Practical Operation of Federal Discovery" produced this comment by United States District Court Judge Bard of the Eastern District of Pennsylvania:

> "Pre-trials are valueless unless there has been liberal use of discovery, or unless there has been a free voluntary exchange of information which is frequently given now because of the discovery provisions in the federal rules. In other words, the discovery procedure has induced pre-trials and made pre-trials effective." (12 F.R.D. 131, 153)

Professor Moore's FEDERAL PRACTICE RULES PAMPHLET (1971) says at p. 641:

> "The deposition and discovery rules are particularly helpful in obtaining factual data as a basis in moving for and opposing motions for summary judgment. * * * And in affording the parties and the court with a knowledge of the case *so that pretrial Rule 16 may function properly.*" (emphasis added)

See also J. WRIGHT, *Pre-Trial on Trial,* 14 LA. L. REV. 391, 399-400 (1954) ("Much of the benefit from pre-trial is impossible without discovery").

Defendants are not simply arguing that it would be better practice for this Court to require trial courts to engage in

preliminary issue-limiting procedures before permitting a plaintiff to engage in pretrial discovery. They are arguing that this is not a matter for the exercise of judgment at all. They assert they were entitled to limit the issues before the deposition as a matter of due process—a constitutional right of defendants.

If that is true, the present Federal Rules could hardly withstand constitutional attack. Rule 26(d), for example, now expressly contemplates as the *normal* procedure that there should be no such thing as absolute priority of discovery, even on a temporary basis, and a defendant who has a legitimate interest in avoiding or narrowing discovery must seek his remedy under Rule 26(c) or not at all. Professor Fleming James points out as to the specific contention that a Rule 16 proceeding should have preceded the Hughes deposition:

> "Rule 16 does not compel the federal district courts to hold pretrial conferences and it leaves the court which does use it the greatest latitude in prescribing the time and manner of holding it." F. JAMES, CIVIL PROCEDURE 223 (1965).

For, as has been generally agreed by all commentators:

> "• • • one of the principal ideas embodied in the rules is that it is wise to leave many details of procedure to the informed discretion of the judge, acting in the circumstances of the particular case, rather than regulating such details by rigid provisions." C. A. WRIGHT, FEDERAL COURTS 433 (2d ed. 1970).

It is frivolous for defendants to contend, as they do, that the district court abused its discretion in 1963 in deciding when to hold a hearing to narrow the issues. It is presumptuous to present that contention to this Court as an important question of law, and it is nothing short of absurd to denominate it as a question of constitutional law, involving deprivation of due process rights.

B. It is not a violation of due process to enter and enforce a default judgment under Rule 37 against defendants who wilfully and with full knowledge refuse to permit discovery of evidence of vital importance on all contested issues. (Petition, Section B)

Defendants themselves admit that:

> "When [defendants] filed their Notice of Position they took their chances on whether they were right or wrong about the applicable law. They gave up their right to challenge the factual allegations of the complaint." (Petition, p. 23)

These two sentences, although obscured by defendants' assault upon this Court's holding in *Thomson* v. *Wooster*, 114 U. S. 104 (1885), still amount to a concession that the rulings below as to the effect to be accorded the default judgment in this case were correct.

As the Brownell Report and the opinions of the district court and the court of appeals make clear, the judgment in this case is grounded upon specific well-pleaded allegations of TWA's complaint, allegations originally placed in issue when defendants appeared and answered, but which they could no longer challenge because of their default. Since defendants' decision to bar discovery into the critical issues effectively blocked all access to evidence of the motives and intent that led defendants to act as they did, no other result from that "business decision" was ever conceivable, and it is apparent on the record that no other result was expected by defendants at the time. As Chester C. Davis, Toolco's counsel, stated to the court:

> "I have also had occasion to describe to my client, the Hughes Tool Company, the sanctions available under the Rules by reason of a respectful declination or election to stand on the questions of law which have been decided to date and not to proceed any further with respect to discovery proceedings." [2d Cir. App. A-274]

And again:

> "The Tool Company does want to rest on the merits of its position, and it does so fully aware of the sanctions which the Court, in its discretion, may impose * * *." [2d Cir. App. A-275]*

Summarizing, in response to TWA's statement that the Hughes deposition should proceed, "business decision" or no "business decision", Mr. Davis also said:

> "* * * if it will help your record, Mr. Sonnett, on Monday * * * you can note the fact that the Tool Company is failing in [*sic*—and?] refusing to produce Mr. Hughes, and then you can have your record and you can take your remedy on it." [2d Cir. App. A-297]

As Judge Kaufman stated for the court of appeals:

> "It would usher in a new era in the dynamics of litigation if a party could suffer a default judgment to be entered against it and then go about its business as if the judgment did not exist and as though, despite the opportunities to comply with the court's orders and to defend on the merits which had been ignored, the slate was wiped clean and a new day had dawned. To state the proposition is to expose the folly of it." (449 F.2d at 63-64) [127a]

If defendants were right, the correct litigation tactic for any defendant charged with an antitrust violation, proof of which lies largely in his own hands, would be (a) to attempt to wear down the plaintiff by extended discovery, (b) to refuse any significant discovery himself and instead default, (c) to continue to assert his innocence, and (d) to count on exoneration because the plaintiff would be left

* See, also, statements quoted at p. 17, *supra*.

without the means of proving liability.* The result would be a true denial of due process: the plaintiff would be denied not just the rights accorded to him under the Federal Rules, but effective access to the courts upon his claims. *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322, 351 (1909).

Under present law, a refusal to make discovery in a civil case is, as it should be, rare indeed. Defendants refer to no other case where such a refusal was described as an "election" and justified as a "business decision". But in those rare cases in which, for whatever reasons, defendants have wilfully refused to permit lawful discovery of important evidence, the courts have consistently found that entry of a default judgment "was compelled * * * in order to protect the statutorily-created right of discovery and the constitutionally-guarded due process rights of plaintiff." *Norman* v. *Young*, 422 F.2d 470, 474 (10th Cir. 1970); see also *Jones* v. *Uris Sales Corp.*, 373 F.2d 644, 647-48 (2d Cir. 1967); *Pioche Mines Consolidated, Inc.* v. *Dolman*, 333 F.2d 257, 269 (9th Cir. 1964), *cert. denied*, 380 U.S. 956 (1965); *Fong* v. *United States*, 300 F.2d 400, 408-09 (9th Cir.), *cert. denied*, 370 U.S. 938 (1962); *Michigan Window Cleaning Co.* v. *Martino*, 173 F.2d 466, 468 (6th Cir. 1949). These cases confirm the basic wisdom of the presumption announced in *Hammond* v. *Arkansas*, that the refusal to produce material evidence is an admission of want of merit in the asserted defense. That is the analysis, of

* These tactics would open a novel means of evading this Court's repeated admonition against deciding complex antitrust litigation on motions to dismiss or for summary judgment while issues of anti-competitive motive and intent remain unresolved by trial. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U. S. 464, 473 (1962) ("* * * summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot."). *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U. S. 495, 499-500 (1969); *Norfolk Monument Co.* v. *Woodlawn Memorial Gardens, Inc.*, 394 U. S. 700, 704 (1969).

course, which was expressly relied upon by the Advisors (see Original Committee Note of 1937 to Fed. R. Civ. P. 37) when they developed the system of pretrial discovery, enforceable by all of the sanctions provided for in Rule 37, which today forms the basic framework for the administration of civil justice in the federal courts.*

Defendants' present criticism of *Thomson* v. *Wooster* as a museum piece and their rejection of the standards fixed by it reflect a remarkable change in the move to Washington from New York. Typical of their previous view is their description of *Thomson* v. *Wooster* in 1965 as "the fountainhead of judicial wisdom on the effect of a default" (Memorandum in Opposition to Plaintiff's Motion for Interim Findings of Fact, June 2, 1965, p. 15). Rationally, a default judgment grounded upon a refusal to permit discovery essential to plaintiff's case could have no other effect than that given it by the courts below, grounded on the principles laid down by this Court in *Thomson* v. *Wooster* and *Hammond* v. *Arkansas*.

Charges that the allegations of TWA's complaint are "conclusory" or mere "legal conclusions" cannot assist defendants. The distinctions which they are trying to make are at best a throwback to 19th century pleading and are as semantically incorrect in those terms as they are under the present Rules. Nothing makes this clearer than defendants' own example to illustrate the kind of complaint in which "the facts admitted by the default give rise to

* Defendants throughout the petition refer to the final judgment below as if it were a money fine imposed by the district court as a punishment for Toolco's contemptuous conduct [*e.g.*, "The judgment below for $145 million * * * was entered as a sanction under Civil Rule 37" (p. 4); defendants "were penalized by entry * * * of a default judgment * * * 30 times the largest judgment ever awarded * * *" (p. 22); and see n. 20 at p. 23]. Of course, the default judgment carried no money amount whatever; $137 million (and cost of suit) was awarded, after hearing, because Toolco had admitted, by its default, that it violated the antitrust laws and injured TWA thereby and because TWA proved the actual amount of its damages to be over $45 million.

liability" (Petition, p. 21). According to defendants, one such complaint is that which "• • • alleges that on a particular day at a particular place defendant negligently drove a motor vehicle against plaintiff as a result of which plaintiff was thrown down and had his leg broken and other injuries• • • " (*ibid.*). The allegation that defendant "negligently drove a motor vehicle against plaintiff" is, of course, admitted by a default. But whether that admission of *negligence* is an admission of fact or of mixed fact and law, or of a conclusory allegation, is immaterial to the effect to be accorded the admission by default. The allegation is proper, material and traversable and by defaulting a defendant admits it, and all the legal consequences that flow from it. *Harshman* v. *Knox County,* 122 U. S. 306, 316-17 (1887).

As early as *McAllister* v. *Kuhn,* 96 U. S. 87 (1877), a case cited by defendants (Petition, p. 21), this Court held that where a complaint states a cause of action, a defendant's default in failing to answer admits the allegation that defendant *converted* stock belonging to plaintiff:

> "If the statements contained in the petition are true, and McAllister had actually converted the stock to his own use, Kuhn was entitled to his damages. By his default, whatever had been properly pleaded was confessed. Had issue been joined upon the averment of conversion, it would have been necessary to show the existence of facts which in law constituted a conversion; but, for the purposes of pleading, the ultimate fact to be proven need only be stated. The circumstances which tend to prove the ultimate fact can be used for the purposes of evidence, but they have no place in the pleadings. We think the complaint does state all the facts necessary to constitute a cause of action." (96 U. S. at 89)

So *negligence* and *conversion* are typical conclusory allegations of "ultimate fact", the type of fact to which

Pomeroy is referring in the quotation on p. 20 of defendants' petition, the type of fact which is admitted by a default under the rule of *Thomson* v. *Wooster,* which held *validity* of a patent to be admitted. In precisely the same way defendants admitted here, by the default, TWA's allegations of *conspiracy to restrain and monopolize and attempt to monopolize* a particular segment of trade or commerce, set out in paragraphs 9 and 10 of the complaint [2d Cir. App. A-8-10]. These allegations as to the overall scheme in which defendants were engaged, and of the relation to that scheme of the specific acts that injured TWA and are the basis for TWA's recovery, must be taken as admitted by the default, no less than the allegation of negligence in defendants' example, the allegation of conversion in *McAllister* v. *Kuhn,* or the allegation of the validity of the reissued patent in *Thomson* v. *Wooster.**

Defendants' suggestion (Petition, pp. 21-22) that antitrust cases should be treated differently because they present difficult and complex questions is wrong in present law and unsound as a suggestion for future policy. Private antitrust plaintiffs are not a disfavored class of litigants upon whom specially onerous burdens of pleading and proof are to be placed. *Perma Life Mufflers, Inc.* v. *International Parts Corp.,* 392 U. S. 134, 139 (1968); *Radovich* v. *National Football League,* 352 U. S. 445, 454 (1957) ("* * * this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in [the antitrust] laws").

* In *Fong* v. *United States,* 300 F.2d 400 (9th Cir.), *cert. denied,* 370 U.S. 938 (1962), the defendant's refusal to return from South America to complete a deposition in progress resulted in entry of a default judgment against him. That default judgment was accorded the same effect as the default judgment here. When defendant sought at the damage hearing to require the government to prove the allegation in its complaint that he was the *alter ego* of certain corporations and hence responsible for their acts, the court ruled that this critical allegation (of "ultimate fact", in the old terminology) was admitted by his default and not subject to challenge (300 F.2d at 409).

In the unique circumstances here, the courts below could have done nothing other than what they did.

C. There is no basis in law or in conscience for defendants to pay less than the full amount of damages for which they were found liable after a contested evidentiary damage hearing. (Petition, Section C)

1. The supposed conflict of authority as to the propriety of permitting an *ad damnum* clause to be amended in a case like this is wholly imaginary, and the petition is able to construct that imaginary conflict only upon a misstatement of the order of events surrounding defendants' default.

However early defendants may have reached their decision to refuse discovery, it was not until the hearing before Judge Metzner on February 8, 1963 that their studied noncompliance with the court's discovery orders was formalized as a default. The transcript is clear that, as the court of appeals states,

> "* * * at the February 8 hearing, prior to Hughes's non-appearance, TWA clearly announced its intention to apply for an increase in the prayer for damages to the trebled $135 million." (449 F.2d at 79) [157a]

Although on notice of TWA's intention to amend, defendants nonetheless went forward with their default. Three months ensued before the default judgment was actually entered against them on May 3, 1963 during which not the slightest suggestion was heard from defendants that they would be willing to remedy their default. The petition's argument of the supposed question in terms of "due process" and "basic justice" is simply not justified by the facts of this case, as those facts have been found by the courts below.

2. In any event, TWA was entitled to recover the full amount of the damages which it was able to prove. The

courts below agreed that this was the only just interpretation of the Rules where a claim for damages in an unliquidated amount is involved, the default followed appearance and answer, and plaintiff at the damage hearing would be required to prove, and defendants in a position to contest, every dollar of the claimed damages.

There is no contrary authority to the position taken by the courts below. In his opinion permitting the amendment Judge Metzner cites *Peitzman* v. *City of Illmo,* 141 F. 2d 956, 962 (8th Cir.), *cert. denied,* 323 U.S. 718 (1944), which —although the facts of the case are somewhat confused— plainly stands for the proposition that if the defendant is in a position to contest the plaintiff's proof of damage, he is liable for the entire amount found to be proven. Both Judge Metzner and the court of appeals refer to *Riggs, Ferris & Geer* v. *Lillibridge,* 316 F.2d 60, 62-63 (2d Cir. 1963), which deals with the basic principle that damages if unliquidated must be proven in their entirety, and that a plaintiff under the modern procedure can obtain such damages (or other relief) as he can prove he is entitled to. In *Sarlie* v. *E. L. Bruce Co.,* 265 F. Supp. 371, 377-78 (S.D.N.Y. 1967), the district court in a default case reached the same conclusion as was reached in the instant case. Professor Moore is in accord. See 6 J. MOORE, FEDERAL PRACTICE ¶54.61, at p. 1206, ¶55.08, at p. 1823 (2d ed. 1971).

Fong v. *United States,* 300 F.2d 400 (9th Cir.), *cert. denied,* 370 U. S. 938 (1962), does not take a contrary view. In the *Fong* case there were originally several claims for relief, some of which claimed actual damages for such matters as conversion and wrongful sale of the vessels which were the subject matter of the action. A contract claim for liquidated damages per ship of $100 per day for each day up to 180 days during which the vessels were not scrapped and $25,000 for any period thereafter was upheld; the other claims were held insufficient as

a matter of law. After appearing, the defendant defaulted and was forbidden to contest the factual allegations of the complaint. Judgment by default was entered against him after a damage hearing at which the government sought to recover actual damages in addition to liquidated damages. On defendant's motion, the court amended its judgment to limit the award to the liquidated damages, rejecting the government's argument that the demands made in the insufficient claims could be used to support the higher recovery. The Court of Appeals for the Ninth Circuit held that, since each claim seeking actual damages had been found not to state a claim, it would be unjust to import into the single sufficient claim the entirely different theories of damage computation embodied in the insufficient claims.* There is no conflict between that decision and the decision reached below.

Any other result than that reached below would be contrary to the principles which the Federal Rules were intended to embody. Certainly, Fed. R. Civ. P. 54(c) is to be read in conjunction with the provision of Fed. R. Civ. P. 15(a) that leave to amend a pleading "shall be freely given when justice so requires." Since defendants were on notice, before their default, of TWA's intention to amend its *ad damnum* clause and in fact exercised their right to defend as to the amount of damages, permitting the amendment was plainly just.

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* The United States did not petition for certiorari; the petition which was filed and denied was by the defendant and based on an asserted right to dispute well-pleaded allegations of the complaint despite his default. See footnote, *supra*, p. 37.

D. The default judgment was not precluded by the Federal Aviation Act or any action of the Civil Aeronautics Board. (Petition, Section D)

Defendants' arguments, now as in 1965, are directed to the interpretation and application of particular orders of the CAB issued many years ago and without any continuing effect whatever today. After full briefing and argument, this Court declined to consider these issues of antitrust exemption when the case was last here seven years ago. There is no reason why certiorari should be granted to consider them now. Recent decisions of this Court and of the courts of appeals in cases like *Carnation Co.* v. *Pacific Westbound Conference*, 383 U. S. 213, 220-23 (1966), have adequately charted the law. Compare, for example, *Allied Air Freight, Inc.* v. *Pan American World Airways*, 393 F.2d 441, 445-48 (2d Cir.), *cert. denied*, 393 U. S. 846 (1968).

None of defendants' activities which have been held to have violated the antitrust laws, and none of the specific actions resulting in injury to TWA, for which TWA has been awarded damages, has ever been approved by the CAB, formally or informally, by order or otherwise. The orders on their face plainly include no such approval. The CAB expressly stated in its brief *amicus* on the prior review in Nos. 443 and 501, October Term 1964, that no such approval was ever intended, and that it lays no claim to the power to immunize such activities from the reach of the antitrust laws even if it had the desire to do so.

It is by no means clear that defendants are entitled to raise these matters following a default for refusal to permit relevant discovery. Neither the defense that their conduct was exempted from the antitrust laws by order of the CAB nor the related defense urged on the prior appeals that the subject matter of the claims was within the "primary jurisdiction" of the CAB is jurisdictional, in the

sense of going to the power of the district court to hear and determine the questions presented to it. *Cf. Bell* v. *Hood,* 327 U. S. 678 (1946). Indeed, they are plainly affirmative defenses which under Fed. R. Civ. P. 8(c) are to be pleaded as such. Defendants' refusal to allow discovery to proceed prejudiced the consideration of the defenses of primary jurisdiction and antitrust exemption, just as it did of the other issues raised by the pleadings.

In any event, the district court and the court of appeals correctly concluded that the conduct alleged in the complaint and which formed the basis for the default judgment was not exempted or insulated from antitrust prosecution. To establish an exemption defendants must bring their conduct within the scope of the Board's authority, and point to orders of the Board conferring the exemption. They can do neither.

The only relevant authority of the Board to exempt conduct from the antitrust laws derives from Sections 408 and 414 of the Federal Aviation Act, 49 U.S.C. §§ 1378, 1384. Section 414 provides, in pertinent part, that any person affected by any order made under Section 408 "shall be, and hereby is, relieved from the operation of the 'antitrust laws' * * * insofar as may be *necessary* to enable such person to do anything *authorized, approved* or *required* by such order" (emphasis supplied).* Section 408(b) provides, with respect to an acquisition of an air carrier by a person engaged in any other phase of aeronautics that:

> "Unless, after such hearing, the Board finds that the * * * acquisition of control will not be consistent

* The language of Section 414 is perfectly clear that the exemption, if it applies at all, is not only from the "antitrust laws" but from "all other restraints or prohibitions made by, or imposed under, authority of law * * *." Literally, this would include the restraints of the common law applicable, *e.g.*, to frauds, deceits, and breaches of fiduciary duty. Such broad language emphasizes the importance of Congress's further direction that the exemption should only be available "insofar as necessary" to enable the doing of something "authorized, approved or required."

with the public interest or that the conditions of this section will not be fulfilled, it shall by order *approve such * * * acquisition of control,* upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe * * *." (emphasis supplied)

It is evident from the language of these provisions that the Board's only power is to approve the acquisition and the only thing exempted is the acquisition itself. The default judgment here, however, is not based upon an allegedly unlawful acquisition.

Judge Lumbard put the matter succinctly in his opinion for the Second Circuit in its first review of this case:

> "Surely Congress did not contemplate that CAB approval of an acquisition would be tantamount to approval of every transaction which might be entered into by the controlling party. The focus of the Board's powers in this sphere is the acquisition itself rather than the broad range of activities into which the controller may enter thereafter." (332 F.2d at 608) [27a]*

The original orders authorizing the acquisition of first 45% and then 73% of TWA's stock were intended, as the court of appeals found, only to approve the acquisitions, nothing more (332 F.2d at 610) [30a-31a]. This was all the Board could approve and all it did approve. The subse-

* In its brief *amicus* when the case was previously before this Court, the CAB strongly supported this interpretation:

> "But orders authorizing control do not approve prospectively all things that may be done in the exercise of control; and the Board's orders did not permit Toolco to utilize its power as a means of violating the antitrust laws. As the court below summarized TWA's complaint, it charges 'the outlines of a tying arrangement, an economic boycott of the defendants' competitors, and an attempt to monopolize commerce' (332 F.2d at 611). Such conduct plainly did not constitute acts 'necessary to enable' Toolco to do 'anything authorized [or] approved' by the Board's order." (p. 15)

quent orders amending the original orders to permit particular transactions in no way broadened, nor could they have broadened, the scope of the exemption which flowed from the original orders.

The Board, in its *amicus* brief, confirmed the accuracy of this construction of its orders and pointed out that its concern was only to prevent Toolco from pressing unneeded equipment on TWA, not to police possible antitrust violations:

> "• • • no immunity was conferred by the various orders modifying the basic orders of approval.• • • The orders were entered solely on the basis of motions filed by TWA, and without hearings or adversary pleadings. The Board stressed the limited nature of its approvals by pointing out that it was appraising the transactions in the light of the original intent of the restriction in the control order, thus focusing upon whether Toolco was using its control relationship to sell to TWA aircraft not economically justified by its operation. It also stated that it was not passing upon the reasonableness of the transactions for ratemaking purposes. *In short, the Board did not purport to approve anything but the specific transactions involved, and the misconduct alleged in the complaint was no more necessary to the consummation of those transactions than it was to the original acquisition of control.* (Amicus brief, pp. 15-16) (emphasis added)

The CAB is without jurisdiction under the Federal Aviation Act over either the acquisition of equipment by air carriers or their financing. Moreover, no CAB order ever dealt at all with the particular transactions which caused injury to TWA. TWA was awarded damages for the following actions of defendants, each taken pursuant to the conspiracy and attempt to monopolize alleged in the complaint:

> (1) Precluding TWA from ordering Boeings in 1955:—no CAB order approved such preclusion;

(2) Diverting 6 Boeings to Pan American:—no CAB order approved such diversion;*

(3) Denying 10 Convairs to TWA:—no CAB order approved such denial;

(4) Preventing timely delivery of 20 Convairs to TWA:—no CAB order approved such prevention;

(5) Conditioning the leasing of planes to TWA upon TWA's acquiring planes from no one else:—no CAB order approved such condition; and

(6) Disrupting the training of TWA's flight crews and ground personnel:—no CAB order approved such disruption.

The real thrust of defendants' argument, as the courts below and the CAB have recognized, is that when Toolco was authorized to acquire control, they secured blanket immunity from the antitrust laws. The ruling of the court of appeals that they did not, that the legality of the acquisition of control does not carry with it the legality of each exercise of that control, is a simple application of principles which this Court has consistently taught. See *Silver* v. *New York Stock Exchange*, 373 U. S. 341, 357 (1963); *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 707 (1962). It has long been emphasized that statutory provisions granting or authorizing exemptions from the antitrust laws are to be kept within the narrowest of limitations. *E.g., United States* v. *Borden Co.*, 308 U.S. 188, 206 (1939); *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 456-57 (1945); *California* v. *Federal Power Commission*, 369 U.S. 482, 485 (1962); *United*

* Toolco seeks to present these diversions and those of the Convair 880s to Northeast as if they did not involve dealings in aircraft —profitable dealings—by Toolco (Petition, pp. 11n, 24n). They were assignments of contracts for planes, at a profit. The diversion of the Boeings is described in Pan American's Annual Report for 1959 as follows:

> "Six long-range Intercontinentals were *purchased from Hughes Tool Company* during the year at a cost of $40,000,000." [AX-868; emphasis added]

With the working papers withheld, the details are not available, but Toolco's secret tax returns leave no doubt that its profit in deals like this in 1959 and 1960 amounted to many millions of dollars.

States v. *Philadelphia National Bank*, 374 U.S. 321, 350-51 (1963). Even without that cautionary rule, however, it would be plain that nothing the Board has done had the effect of immunizing from liability the conduct which formed the basis of the present judgment.

Once it is concluded that the Board has not expressly exempted Toolco's conduct from antitrust liability, no viable argument of primary or exclusive agency jurisdiction remains. The court of appeals in 1964 carefully and accurately distinguished *Pan American World Airways* v. *United States*, 371 U. S. 296 (1963), pointing out, *inter alia*, that in that case the conduct complained of was at the heart of the Board's jurisdiction whereas here the conduct was beyond the Board's reach, and that there injunctive relief was sought, of a kind which could be provided by the Board whereas here TWA seeks treble damages for past conduct, which the Board has no power to award. In *Carnation Co.* v. *Pacific Westbound Conference*, 383 U. S. 213 (1966), this Court emphasized the difference:

> "The award of treble damages for past and completed conduct which clearly violated the Shipping Act would certainly not interfere with any future action of the Commission." (383 U. S. at 222)

This observation is particularly pertinent here since the CAB has not only no remedy available to give TWA redress, but no continuing jurisdiction at all over Toolco's conduct.*

* The court of appeals pointed out (332 F.2d at 609) [29a] that the Board's jurisdiction to deal at all with Toolco's conduct vis-a-vis TWA probably expired in 1960 when Toolco ceased to control TWA. Toolco misses the principal point of the court of appeals comment when it suggests (Petition, pp. 27-28) that the situation is somehow altered by TWA's decision not to attempt to prove damages attributable to Toolco's post-1960 conduct. The point is that after 1960 the Board lacked power to reach any of Toolco's conduct, whether it antedated or post-dated 1960. The Board simply lost jurisdiction over Toolco—and could only regain it in connection with a new acquisition of control.

E. That Toolco "mismanaged" TWA's affairs is no defense to charges under the antitrust laws. (Petition, Section E)

It is obviously no defense to antitrust charges that a parent's conduct also amounted to "breach of fiduciary duty" and "mismanagement" (Petition, p. 34). *Cf. Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 40 U.S.L.W. 4001, 4003 (U.S. November 8, 1971), rejecting a similar argument that mismanagement that also amounts to illegal conduct in connection with the purchase or sale of a security is not cognizable under the Securities Exchange Act. Such an argument, indeed, comes with singular ill grace from a "fiduciary" which, having chosen concealment over disclosure, has defaulted to antitrust charges instead of complying with discovery orders.

Before their wilful default, it was open to defendants to prove, if they could, that nothing which they had done amounted to anything more than normal oversight by Toolco of the aircraft acquisitions of its 78%* subsidiary. That argument, however, is no longer open. The basic charge of the complaint was that Toolco's arrogation of all authority for buying aircraft was illegal and violated the antitrust laws because it was pursuant to, and a principal part of, defendants' unlawful scheme to make TWA a "captive market" upon which defendants could build in fulfilling their purpose to secure a dominant position in the supply of aircraft to air carriers. Judge Kaufman's summary of TWA's complaint (449 F.2d at 64-65) [128a-130a] emphasizes that the specific acts alleged, upon which the damages ultimately awarded were based, all were "performed in furtherance of the offenses charged and for the improper purposes alleged" (449 F.2d at 65) [129a].

* During the critical 1955-56 period, Toolco owned 74% of TWA's stock. It had started buying stock in 1939 and by 1945 had accumulated 45%, which increased to 73% in 1948. The 78% was not reached until 1958.

It is mere sophistry, under these circumstances, to assert that the court of appeals' decision "extends to a startling degree the liability of a parent corporation for determining the manner in which its subsidiary does business" (Petition, pp. 33-34) or amounts to a ruling that "a parent that decides that its subsidiary should buy from X rather than Y may be held liable for antitrust damages if, with the wisdom of hindsight, the subsidiary can show that the decision was unwise" (Petition, pp. 34-35).* Such statements, like the assertion that "the *mere* fixing by a parent of a subsidiary's price of production or the selection by the parent of those persons with whom its subsidiary may or may not deal" is not, without more, *per se* illegal (Petition, p. 34, emphasis added) have no relevance to the present case.

TWA's success in a trial on the merits was in no way dependent on a showing of *per se* violations, as this Court reaffirmed recently in *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 499-500 (1969). All that was required of TWA was to plead allegations which, taken as a whole, spelled out violations whether *per se* or not. It did so.

The fundamental issue of defendants' motivation and intent in limiting to Toolco the acquisition of all aircraft for TWA was raised by the allegations of the complaint and the denials in defendants' answers. It was a proper subject for discovery and a matter to be determined at trial (*supra*, pp. 10-11). But defendants chose not to defend on the merits, and they cannot now pose as an issue for this Court one that presupposes their motives to have been only the innocent anxiety of a parent for its subsidiary's welfare.

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* Whether defendants' decisions were wise or unwise is irrelevant here, but TWA's damages show how costly they proved for TWA, while Toolco's secret tax returns show how profitable they were for Toolco.

F. **Defendants cannot refuse discovery and defend on the merits on the basis that there is no proof they were more than "potential" competitors. (Petition, Section F)**

> "We cannot say that proof at a trial—prevented by Toolco's conduct—that Toolco was more than a conduit for TWA but rather possessed independent competitive significance with respect to the commercial aircraft market, would be insufficient, *if combined with appropriate related proof of the intent, attempt, collusion, tying arrangements, boycotts, and monopolization alleged in the complaint,* to support an antitrust judgment for TWA." (449 F.2d at 67) [134a] (emphasis added)

These words have been omitted from the quotation in which defendants discern the "potential competition" theory that they then go on to belabor (Petition, p. 37n). The omission demonstrates that this attack is directed against a straw man.

The court of appeals did not formulate any new substantive rules, let alone devise "a Clayton Act test for a Sherman Act violation" (Petition, p. 36). In the usual case the trier of fact would decide what role the alleged antitrust violator had played and what effect his alleged antitrust violations had had within the relevant field of commerce. Here, however, defendants barred TWA from access to evidence about this subject and attempted instead, on the basis of the limited evidence offered at the damage hearing, to convince the Special Master and the courts below that Toolco had nothing at all to do with the business of supplying aircraft to air carriers. The question which those courts had therefore to consider was whether the evidence to which Toolco pointed was such as to foreclose the possibility that TWA with benefit of discovery would have been able to show that Toolco played a role sufficient to support a finding of an antitrust violation

"under any of the several hypotheses put forward in the complaint * * *." (449 F.2d at 68) [136a]*

Both the Special Master [Brownell Report, pp. 38-42] and the court of appeals (449 F.2d at 67-68) [134a-136a] have reviewed at some length the evidence showing how actively Toolco and Hughes participated in the commercial aircraft market *outside* of the TWA market which they completely monopolized. The district court also referred to certain of the relevant evidence in confirming the Special Master's *refusal* to find that Toolco never engaged in the manufacture or supply of commercial transport aircraft to United States air carriers in competition with manufacturers and suppliers of such aircraft (308 F. Supp. at 686)

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* The court of appeals catalogued these "several hypotheses" as including

> "* * * in addition to the *Yellow Cab* theory [*United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947)], (1) unlawful intent to monopolize a substantial portion of the commercial aircraft market in restraint of trade; (2) unlawful conspiracy to do so, see *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 284 F.2d 1 (9th Cir. 1960), *rev'd on other grounds*, 370 U.S. 19 (1962); *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968); *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968); *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964); (3) enforcement of an illegal boycott, see *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457 (1941); *United States* v. *New York Great Atlantic & Pacific Tea Co.*, 173 F.2d 79 (7th Cir. 1949); *Klor's Inc.* v. *Broadway-Hale Stores*, 359 U.S. 207 (1959); (4) tying adequate financing of TWA to its purchase or lease of jets from Toolco, and vice-versa, see *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 502-503 (1969); and (5) the lease of aircraft to TWA on the condition that TWA not purchase or lease aircraft from other suppliers, see *International Salt Co.* v. *United States*, 332 U.S. 392 (1947); *Standard Oil Co. of California* v. *United States*, 337 U.S. 293 (1949)." (449 F.2d at 68-69) [136a-137a]

Defendants refer to none of the cases cited in the above quotation. Indeed, the only decision by this Court in a private antitrust case mentioned by defendants is *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249 (1957), cited for a non-antitrust proposition (Petition, p. 18n).

[60a]. Defendants continue to ignore such matters as Toolco's sale of Boeings to Pan American, leases of Convairs to Northeast, and temporary corner on jet engines in 1956—marketed "in competition to Pratt & Whitney", as that manufacturer complained [2d Cir. App. A-178-79].

The express assumption of this particular argument as stated by defendants in their summary formulation in "Questions Presented" No. 6 (Petition, p. 4) is that Toolco "has in no way restrained or monopolized a particular area of commerce."

That assumption is contrary to the findings by the Special Master and the courts below. It is negatived even by the limited evidence that defendants permitted to be developed before their default. It contradicts essential allegations of TWA's complaint. The argument based on it is simply not available on the record.

G. The Special Master and the courts below correctly found that TWA, in proving the amount of its damages, had demonstrated that each item recovered flowed from the allegations of unlawful conduct and resultant injuries admitted by defendants' default. (Petition, Section G)

Defendants again ignore the state of the record in making their "proximate cause" argument.

The answer to Mr. Justice White's question—"How can you prove how much you have been damaged without showing what you have been damaged from?" (see Petition, p. 39) is that TWA did in fact show what it was damaged from. Despite what would appear from defendants' selective quotations from the court's opinion (*cf.* Petition, p. 40), the court of appeals so found:

> "The default had the effect of admitting or establishing that the acts pleaded in the complaint violated the antitrust laws and that those acts caused injury to TWA in the respects there alleged. Because,

> however, the damages were unliquidated and uncertain, F.R. Civ. P. 55(b), it was necessary for TWA at the hearing to establish the *extent* of the injuries established by the default. The outer bounds of the recovery allowable are of course measured by the principle of proximate cause. The default judgment did not give TWA a blank check to recover from Toolco any losses it had ever suffered from whatever source. It could only recover those damages arising from the acts and injuries pleaded and in this sense it was TWA's burden to show 'proximate cause'. On the other hand, there was no burden on TWA to show that any of Toolco's acts pleaded in the complaint violated the antitrust laws nor to show that those acts caused the well-pleaded injuries, except as we have indicated that it had to for the purpose of establishing the extent of the injury caused TWA, in dollars and cents." (449 F.2d at 70) [144a]

TWA was damaged by the specifically pleaded deprivations it suffered in its jet fleet—inadequate in number, received too late, initially available only through day-to-day leases from Toolco—as a result of the defendants' primary concern with establishing themselves as suppliers of aircraft to air carriers generally [see complaint, pars. 9, 10, 14, 17-20, 22-24, 26, 28, 49-53]. As to the effect to be given to these allegations see pp. 35-37, *supra*. The amount of the losses which TWA suffered from these fleet deprivations was proven in the course of a bitterly contested two-year hearing before the Special Master, whose 323-page Report is itself a complete refutation of defendants' pretense that proof of damage was lacking. The Special Master's findings with respect to each of TWA's damage claims were expressly related to the allegations of its complaint [Brownell Report, pp. 45, 100-01, 112-13, 168-69, 186-87, 194, 224-26, 265, 296, 302-03]. Judge Kaufman found that TWA "did not

rely only on its default judgment but introduced evidence linking each component of the damages claimed to the pleaded illegal acts of Toolco and injuries to TWA" (449 F.2d at 72) [144a].

Apart from disagreeing (Petition p. 40) with this express finding, defendants utilize their "proximate cause" argument chiefly to argue that TWA failed to prove that it could have financed the acquisition of additional jets.

TWA historically received and paid for 47 jets. TWA presented evidence that, except for defendants' activities, it would have received 6 additional Boeing B-331 jets and 10 additional Convair 880 jets. This evidence was accepted by the Special Master, who expressly found that the resulting "hypothetical jet fleet and reconstructed delivery dates constitute a proper basis for computing damages * * *" [Brownell Report, p. 56]. As to the financing of this additional equipment, the Special Master found that (a) "the full purchase price of [the 6 additional Boeings] and related spare parts and equipment [would have amounted] to a capital expenditure of $43.1 million" [Brownell Report, p. 149], and (b) "the full purchase price for [the 10 additional Convairs] and related spare parts and equipment would have amounted to $48.1 million" [Brownell Report, p. 150]. Thus, a total of $91.2 million of additional funds would have been needed to acquire the 16 jets that defendants' unlawful conduct kept TWA from acquiring. The Special Master, for purposes of his "cost of capital" computations, treated all of these funds as borrowed. In light of the default and his rulings on the evidence, he made what he described as the "fair and reasonable assumption" that "funds were available at the time of the delivery of each aircraft" that TWA did not receive because of defendants' unlawful conduct,

stating that the record was "sufficiently complete to allow these assumptions to be taken" [Brownell Report, p. 148].*

After weighing the very same argument that defendants now put to this Court, the court of appeals held:

> "Assuming then that an independent TWA would have attempted to acquire the same 63-jet fleet ordered by Toolco, defendants contend that TWA would not have been able to finance such an undertaking, which would have cost about $353 million or $93 million more than TWA actually spent for its 47-jet fleet. Toolco notes that $100 million of the financing for the 47-jet fleet was supplied by Toolco itself through its purchase of TWA subordinated debentures. We find untenable Toolco's characterization as insufficient to support the Special Master's contrary assumption that an independent TWA would and could have financed the full 63-jet fleet, the evidence that United, American, and Pan American Airlines each were in fact able to finance comparable ventures during the same period. Toolco directs our attention to financial reversals experienced by TWA during the period preceding the time

* The Special Master had before him an extensive body of information relevant to TWA's capability to have arranged for the additional funds if it had not been the victim of defendants' unlawful combination and conspiracy to restrain and monopolize and attempt to monopolize in violation of the antitrust laws. Among other things, the record includes (a) the well-pleaded allegations of TWA's complaint—accepted by the Special Master and entitled to controlling weight in any consideration of what TWA could have done if defendants had not violated the law and injured it [see Brownell Report, p. 254]; (b) expert testimony that an independent TWA could have financed the acquisition of an adequate jet fleet, including the 16 additional jets [AX-353, AX-429]; (c) evidence that each of TWA's principal competitors—United, American and Pan American—successfully financed a fleet larger than the 63-jet fleet (449 F.2d at 74) [147a]; and (d) evidence of TWA's actual financing and the various possibilities available to it to have raised any additional money needed [AX-861, AX-865]. Traffic and accounting studies demonstrated that availability of the earlier and larger jet fleet would have produced a large increase in funds internally generated from operations. The increase in 1959 and 1960 alone would have provided the major part of the necessary funds [AX-479].

> Brownell assumed TWA would have financed the fleet (1958-59). But the well-pleaded allegations of the complaint demonstrate conclusively that crippling TWA's financial posture and reducing it to a state of vassalage, dependent on Toolco's support, was part of defendants' overall antitrust violation. See Complaint ¶¶ 17, 18, 19, 22, 23, 24, 26, 50, 51 and 52(a). To the extent of negating Toolco's attempted reliance on TWA's asserted financial weakness, these allegations must be given effect. Any inferences other than that an independent TWA would have fared neither better nor worse than competing airlines in financing its jet fleet would have been unwarranted." (449 F.2d at 74) [147a].

Thus, defendants' "proximate cause" argument simply ignores both their default and what was decided below.

As for their concern for "loosening of the requirements of proof in antitrust litigation" (Petition, p. 41), this Court's views need no reaffirmation. The basic guidelines for determining the amount of damages to be awarded a plaintiff injured by violations of the antitrust laws were laid down in *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927); *Story Parchment Co.* v. *Paterson Co.*, 282 U.S. 555 (1931); and *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946). The Court has never departed from the rules set forth in those three cases, but has reaffirmed them again and again—most recently in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123-24 (1969).

As this Court noted in *Bigelow*, "The most elementary concepts of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created" (327 U.S. at 265). By defaulting, defendants admitted the antitrust violations alleged in the complaint, and the fact that injuries resulted from those violations. All that was left was to calculate the amount of damages necessary to compensate TWA for those in-

juries. That amount was determined in the Brownell Report, which the court of appeals characterized as reflecting "an extraordinary awareness of the issues raised and the applicable principles of law" (449 F.2d at 73) [144a]. Twice that Report has been painstakingly reviewed and confirmed in all respects, first by the district court and then by the court of appeals. As the court of appeals observed:

> "Toolco must bear the responsibility for any lack of preciseness of proof, and there is good reason that this should be so. The default itself by Toolco rendered precise proof of damages even more difficult than in the usual antitrust case, where the plaintiff may avail itself of the full battery of discovery procedures to prove damages as well as to prove liability. Toolco cannot be permitted to block the discovery of precise, clear and direct evidence and then be heard to complain that the evidence should have been more convincing." (449 F.2d at 73) [145a]

H. The precedential impact of the decisions below. (Petition, Section H)

Defendants pretend that the decision below "is an outrage" which will "inflict serious wounds on sound principles of procedure and antitrust law" and "impose heavy burdens on the Federal Courts." In every respect except the factual determination of the amount of TWA's damages, the decision below is nearly eight years old, and this Court's dismissal of certiorari occurred seven years ago. No such impact has been visible. No court has suggested disagreement with the earlier decision, nor, indeed, has any court suggested that that decision broke any new ground. No great number of defendants has "elected" to defy discovery orders, but instances of such defiance were equally rare before.

The one real possibility that the course of this litigation would result in drastic changes either in procedure or in substantive law would arise if the litigation were to culminate in defendants' arguments being upheld.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be in all respects denied.

Respectfully submitted,

DUDLEY B. TENNEY
80 Pine Street
New York, New York 10005
Counsel for Respondent
Trans World Airlines, Inc.

Of Counsel:

PAUL W. WILLIAMS
IMMANUEL KOHN
RAYMOND L. FALLS, JR.
WILLIAM T. LIFLAND
MARSHALL H. COX, JR.

CAHILL, GORDON, SONNETT,
REINDEL & OHL
80 Pine Street
New York, New York 10005

January 21, 1972

Pretrial Order, September 7, 1961

[Doc. 44]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324

TRANS WORLD AIRLINES, INC.,

Plaintiff,

against

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,

Defendants.

A pretrial conference was held in this cause on September 6, 1961, wherein the following proceedings were had.

I.

• • •

II.

Plaintiff TWA has already gathered some of the documents called for by the subpoena duces tecum served on TWA on August 16, 1961 by defendant Hughes Tool Co. TWA shall continue gathering the material called for by this subpoena duces tecum and shall complete compliance with the subpoena by Friday, October 13, 1961. Defendant Hughes Tool Co. may commence the inspection and copying of said documents on September 7, 1961.

III.

Plaintiff's motion pursuant to F.R.C.P. 34 shall be argued on September 21, 1961 at 10:30 a.m. in chambers.

Defendant Hughes Tool Co. shall serve and file its papers in opposition prior to 10 a.m. on September 18, 1961.

IV.

The question as to when defendant Hughes Tool Co. shall commence taking depositions and when it shall comply with any order entered on plaintiff's motion pursuant to F.R.C.P. 34 will be argued in conjunction with said motion.

V.

The motion by defendant Hughes Tool Co. to dismiss the complaint pursuant to F.R.C.P. 12 and for summary judgment pursuant to F.R.C.P. 56 shall be held in abeyance. Said defendant shall notify the Court when it desires the motions to be heard. A date will then be fixed for the serving and filing of papers in opposition and argument on the motions.

VI.

The service of subpoenas by defendant Hughes Tool Co. may continue.

SO ORDERED.

Dated: New York, N. Y.
September 7, 1961.

/s/ CHARLES M. METZNER
U.S.D.J.

Pretrial Order, February 7, 1962

[Doc. 59]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324

TRANS WORLD AIRLINES, INC.,

Plaintiff,

against

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,

Defendants.

Pretrial conferences were held in this cause on January 10, 1962 and January 23, 1962, wherein the following proceedings were had.

• • •

II.

The deposition of the plaintiff by Charles C. Tillinghast, Jr., shall be continued and the depositions of the other witnesses shall be commenced in accordance with the schedule annexed hereto. The Special Master hereinafter appointed may vary this schedule upon application of either party if in his opinion the circumstances require such variance.

III.

Upon the consent of counsel for the plaintiff and the defendant Hughes Tool Company, the Court was empowered to appoint a Special Master. J. LEE RANKIN, ESQ., of 36 West 44th Street, New York 36, New York is hereby appointed Special Master to act in connection with the depositions and other discovery proceedings undertaken by any person now a party or any person who may hereinafter

become a party, with the following powers: to preside over and supervise the conduct of depositions and in connection therewith to rule on such objections to questions, whether heretofore made or to be made, as have not been reserved by stipulation of the parties to the time of trial; to rule on objections, whether heretofore made or to be made, with respect to the production of documents; to make any and all other rulings which may be required pursuant to the provisions of Rules 26 to 37, and 45, of the Federal Rules of Civil Procedure and such other rules as may from time to time become applicable.

IV.

Any action taken or ruling made by said Special Master shall be subject to review by the Honorable Charles M. Metzner, United States District Judge for the Southern District of New York, upon timely application with reasonable notice.

V.

The Special Master shall be reimbursed for such expenses as are reasonably and necessarily incurred by him and the compensation of the Special Master is to be fixed at $60.00 per hour. Such reimbursement and compensation are to be taxed as costs at the conclusion of this action; provided, however, that until the taxation of costs the compensation of the Special Master is to be paid at monthly intervals, fifty per cent (50%) by plaintiff Trans World Airlines, Inc., and fifty per cent (50%) by defendant Hughes Tool Company, and provided, further, that such payments shall be subject to reallocation among any additional parties who may hereafter be joined and who may participate in the depositions.

VI.

Defendant Hughes Tool Company shall file its answer to the complaint herein upon the day following the completion, in accordance with the annexed schedule, of the deposition of plaintiff by Charles C. Tillinghast, Jr., Robert W. Rummel and E. O. Cocke.

VII.

The deposition of plaintiff by A. V. Leslie, in view of his present illness, is adjourned without date and shall be re-scheduled by the Special Master upon reasonable notice by the defendant at an appropriate time in light of the health of the witness and at a date not in conflict with the annexed schedule.

VIII.

Any request for a change in the date fixed for the production of writings and other material by the defendant Hughes Tool Company, presently set for March 15, 1962 by order of this Court dated December 18, 1961, shall be made to the Special Master.

So Ordered.

Dated: New York, N. Y.
February 7, 1962

/s/ Charles M. Metzner
Charles M. Metzner
U. S. D. J.

SCHEDULE OF DEPOSITIONS

I.

Depositions Noticed by Defendant Hughes Tool Company

Date	Deponent	Time and Location of Deposition
Feb. 13, 1962	Trans World Airlines, Inc. By: Charles C. Tillinghast, Jr. R. W. Rummel E. O. Cocke	10 a.m. 80 Pine St. New York, N.
Feb. 20, 1962	Charles Thomas	10 a.m. The Irvine Ra 13042 Myford Tustin, Calif.
Feb. 21, 1962	Bank of America By: Keith Carver Robert Gordon	10 a.m. Clerk's Office U. S. Court H Los Angeles, C
Feb. 27, 1962	Bankers Trust Company By: E. F. Ebert	10 a.m., Room 120 Broadway New York, N.
Feb. 27, 1962	Morgan Guaranty Trust Co. of New York By: John Schroeder	2 p.m., Room 120 Broadway New York, N.
Feb. 28, 1962	The Mellon Bank By: Frederick Gwinner Ralph Ehler	10 a.m. Clerk's Office U.S. District C Pittsburgh, Pa
Mar. 1, 1962	Ben-Fleming Sessel Robert A. Kerr Irving Trust Company By: Ben-Fleming Sessel Robert A. Kerr	10 a.m., Room 120 Broadway New York, N.
Mar. 8, 1962	Frederic H. Brandi Arthur L. Wadsworth Dillon, Read & Co., Inc. By: Frederic H. Brandi Arthur L. Wadsworth	10 a.m., Room 120 Broadway New York, N.
Mar. 15, 1962	James F. Oates, Jr. Grant Keehn Equitable Life Assurance Society of the United States By: James F. Oates, Jr. Grant Keehn	10 a.m., Room 120 Broadway New York, N.
Mar. 15, 1962	Warner Mendel	10 a.m., Room 120 Broadway New York

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Date	Deponent	Time and Location of Depositions
23, 1962	Harry C. Hagerty Gordon P. Jenkins Metropolitan Life Insurance Company By: Harry C. Hagerty Gordon P. Jenkins	10 a.m., Room 3113 120 Broadway New York, N. Y.
29, 1962	Irving S. Olds	10 a.m., Room 3113 120 Broadway New York, N. Y.
5, 1962	Ernest R. Breech	10 a.m., Room 3113 120 Broadway New York, N. Y.
2, 1962	Boeing Company By: William M. Allen J. O. Yeasting	10 a.m. Clerk's Office U.S. District Court Seattle, Wash.
9, 1962	Prudential Insurance Company of America By: Monroe Chappelear	10 a.m., Room 3113 120 Broadway New York, N. Y.

II.

Depositions Noticed by Plaintiff Trans World Airlines, Inc.

3, 1962	Howard R. Hughes	10 a.m. Beverly Hills Hotel Beverly Hills, Cal.
1962	Hughes Tool Company By: Raymond Holliday	10 a.m., 18th Floor 80 Pine Street New York, N. Y.
5, 1962	Hughes Tool Company By: M. E. Montrose	10 a.m., 18th Floor 80 Pine Street New York, N. Y.
, 1962	Hughes Tool Company By: C. H. Price	10 a.m., 18th Floor 80 Pine Street New York, N. Y.
, 1962	Hughes Tool Company By: C. S. Johnson	10 a.m., 18th Floor 80 Pine Street New York, N. Y.
1962	Hughes Tool Company By: H. E. Rogers	10 a.m., 18th Floor 80 Pine Street New York, N. Y.
1962	Hughes Tool Company By: C. Collier	10 a.m., 18th Floor 80 Pine Street New York, N. Y.

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Pretrial Order, July 12, 1962

[Doc. 101]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324

TRANS WORLD AIRLINES, INC.,

Plaintiff,

against

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,

Defendants.

A pretrial conference was held today on the respective appeals by the plaintiff and defendant Hughes Tool Company from rulings of the Special Master.

1. Defendant Hughes Tool Company appeals from a ruling of the Special Master overruling Toolco's objections to interrogatories propounded to it by plaintiff. After hearing counsel and reading the papers submitted in support of and in opposition to the appeal, the ruling of the Special Master is modified as indicated below and as modified is sustained.

Interrogatory No. 1 is modified by striking the words "or attorney". It is further modified by limiting any knowledge, information or belief of a director to such knowledge, information or belief which said director has acquired as a director of the defendant Toolco.

As to Interrogatory No. 4, the defendant need not make any answer thereto insofar as any of the named persons in this interrogatory are former employees or consultants.

However, the defendant in its answer to this Interrogatory No. 4 shall indicate which of said persons are former employees or consultants. Insofar as consultants are concerned, the term shall embrace those persons who are in normal usage considered as independent contractors.

Interrogatory No. 7 refers to employees, agents and/or representatives of Toolco. The information requested by this interrogatory shall be furnished as to such persons only if those persons performed services of a personal nature or otherwise for Hughes individually and if such services were compensated for by the defendant and not by Hughes personally.

The dates referred to in the interrogatories shall be computed from the date of this order.

2. Plaintiff has appealed from a ruling of the Special Master denying the motion of the plaintiff for an order determining that rule 4 of the Civil Rules of the United States District Court of the Southern District of New York is applicable in the instant case. After hearing argument of counsel and reading the papers in support of and in opposition to this motion, the appeal is disposed of as follows:

Irrespective of rule 4, the court has the power to vary any order heretofore entered fixing priority of deposition-discovery proceedings. In view of the number of days which the defendant Toolco has devoted to the deposition of Tillinghast, the president of the plaintiff, defendant is directed to complete that deposition on or before July 25th, 1962. It shall commence taking the depositions of the other noticed individuals immediately thereafter. Plaintiff may renew its motion before the Special Master on September

20th, 1962 if at that time it is advised that the depositions scheduled upon the completion of the Tillinghast deposition are not moving as expeditiously as possible, and that any further delay in the taking of the depositions of the defendant would be prejudicial to the plaintiff.

So Ordered.

Dated: New York, N. Y.
July 12, 1962

/s/ Charles M. Metzner
U.S.D.J.

Opinion and Order, July 24, 1962 (Memorandum Endorsed on Motion Papers Dated May 11, 1962)

[Doc. 93]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324

TRANS WORLD AIRLINES, INC.,

Plaintiff,

against

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,

Defendants.

Defendant Hughes Tool Company has applied to the court to review the opinion of the Special Master rendered on April 17, 1962 and the order of the Special Master contained in his letter of May 2d, 1962, as modified by his letter of May 3d, 1962, to the extent that the defendant is required to produce for inspection and copying by adverse parties any privileged communications between attorney and client.

The court has reviewed the opinion of the Special Master which appears in the transcript at pp. 4361-4369 and the letters referred to above. The Special Master has made an exhaustive study of the law applicable to the attorney-client privilege. The court agrees that the law is as stated by the Special Master both as to the privilege and the waiver thereof. The court sustains the ruling of the Special Master as he has applied the law to questions presented to him. If there are any specific documents concerning which the defendant desires specific rulings as to their ad-

missibility, they may be submitted to the Special Master pursuant to the directions appearing at p. 4391 of the transcript and in the letter of May 2d, 1962, as modified by the letter of May 3d, 1962.

So ORDERED.

Dated: New York, N. Y.
July 24, 1962

/s/ CHARLES M. METZNER
U.S.D.J.

Pretrial Order, September 21, 1962

[Doc. 122]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324

TRANS WORLD AIRLINES, INC.,

Plaintiff,

against

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,

Defendants.

A pretrial conference was held on September 19th, 1962 upon a notice from the attorneys for the plaintiff that it was appealing from so much of the Special Master's ruling of September 15th, 1962 as denied the plaintiff the right to proceed with the deposition of Howard R. Hughes on September 24th, 1962. After hearing counsel for the plaintiff, the defendant Hughes Tool Company and the additional defendants, and after reading the transcript of the hearing before the Special Master on September 15th, 1962, the appeal is disposed of as follows.

Sometime prior to July 12th, 1962 the Special Master evidenced his serious concern about whether or not Howard R. Hughes would be available as a witness in this proceeding if and when his deposition was properly reached under the orders of the court. This concern of the Special Master was not aroused in connection with any application by the plaintiff to interfere with the priority of deposition previously determined by order of the court dated February 7th, 1962 as amended by the order of March 5th, 1962. In order to resolve that problem prior to the time of request-

ing Howard R. Hughes to appear as a witness, the Special Master afforded the Tool Company alternative procedures. Either it was to answer certain interrogatories as to the whereabouts of Howard R. Hughes, in order to facilitate the service of a witness subpoena, or counsel for the Tool Company was to provide satisfactory proof that he was authorized to accept service of the subpoena on behalf of Howard R. Hughes.

Interrogatories were framed by the plaintiff and served upon the Tool Company which thereafter were amended by order of the court dated July 12th, 1962. Subsequently, by order dated July 26th, 1962, the time for the Tool Company to answer the interrogatories was fixed for August 27th, 1962. Counsel for the Tool Company then served and filed with the court a document which he asserted gave him the authority to accept service of the witness subpoena on behalf of Howard R. Hughes. At this time the court reserves for future determination any question raised by the plaintiff regarding the authenticity of that document.

Pursuant to the document filed with the court, Chester C. Davis, counsel for the Tool Company, accepted service of a witness subpoena on behalf of Howard R. Hughes on September 6th, 1962. That subpoena was issued out of the United States District Court for the Southern District of California upon the notice by the attorneys for the plaintiff served upon Chester C. Davis, which stated that the deposition of Howard R. Hughes as a witness would be taken at the United States District Courthouse for the Southern District of California in Los Angeles on September 24th, 1962. The return of the marshal, indicating service upon Chester C. Davis in Los Angeles, was accompanied by an affidavit by Mr. Davis stating that he had

been authorized in writing by Howard R. Hughes to accept such service.

Pursuant to the order of the court dated July 12th, 1962 and the suggestion made by the court at a hearing held on September 6th, 1962, the plaintiff moved before the Special Master on September 15th, 1962 for permission to suspend the taking of the depositions by the Tool Company in order to permit plaintiff to commence taking the deposition of Howard R. Hughes on September 24th, 1962, and that the suspension of the taking of depositions by the Tool Company be continued until the deposition of Howard R. Hughes was completed. The Special Master denied the application of the plaintiff.

However, in connection with this denial the Special Master directed Chester C. Davis to write to Howard R. Hughes and inform him that the Special Master considered that the subpoena is binding upon Mr. Hughes and that he is subject to appear pursuant to that subpoena on September 24th, 1962 or at any other date fixed by the court. The Special Master stated for reasons set forth in the record that unless Howard R. Hughes communicated with him by today, Friday, September 21st, 1962 he would consider that Mr. Hughes has acquiesced in this interpretation and that if Mr. Hughes subsequently either attacked the validity of the subpoena or failed to appear pursuant to that subpoena on September 24th, 1962, or at any future time that the court might direct for the taking of the deposition of Mr. Hughes pursuant to that subpoena, he, the Special Master, would consider the imposition of sanctions upon the Tool Company, and that he would entertain a motion to strike the answer of the Tool Company and enter judgment against it.

Without passing upon the power of the Special Master

to grant the entry of such judgment, the court adopts the interpretation and conditions expressed by the Special Master. Any determination by the Special Master on an application for a default judgment would, of course, be reviewable upon appeal to the court.

On the hearing of this appeal the court inquired of Chester C. Davis as to whether he had followed the directions of the Special Master. Mr. Davis advised the court that he had written to Howard R. Hughes on Monday, September 17, 1962, and enclosed the pages of the transcript of the hearing before the Special Master on September 15th, 1962 which contained the views of the Special Master. Howard R. Hughes has neither communicated with the Special Master nor the court as of 5:30 p.m. today, which is the end of the business day. Therefore, I find that Mr. Hughes has acquiesced in the interpretation and conditions expressed by the Special Master.

The Special Master has presided over the deposition proceedings practically since their inception. The propriety of plaintiff's application is peculiarly within his competence. He is aware of the court's views contained in the last paragraph of the order of July 12, 1962. Plaintiff has not made an adequate showing at ths time that the ruling of the Special Master within this framework is in error. I approve and affirm the ruling of the Special Master denying the application of the plaintiff to proceed with the deposition of Howard R. Hughes on September 24th, 1962 to the extent that the return date of September 24th, 1962 contained in the subpoena served upon Howard R. Hughes is adjourned by order of this court to October 29th, 1962 at the same time and place. The Tool Company may apply to the Special Master on October 22nd, 1962 for a further adjournment of the date now fixed for the deposition of Howard R. Hughes.

Pretrial Order, September 21, 1962

Chester C. Davis is directed to notify Howard R. Hughes of this determination before 9 p.m. tonight, Eastern Daylight Time, both by telephone communication and by mailing a copy of this order air mail special delivery to Howard R. Hughes.

So Ordered.

Dated: New York, N. Y.
September 21, 1962

/s/ Charles M. Metzner
U. S. D. J.

Pretrial Order, January 10, 1963

[Doc. 144]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324

TRANS WORLD AIRLINES, INC.,

Plaintiff,

against

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,

Defendants.

A pretrial conference was held on January 9th, 1963 to consider various matters brought to the court's attention by notices of appeals from rulings of the Special Master. These matters are disposed of as follows:

1. The appeal by TWA, pursuant to a telephone request, to review an order of the Special Master adjourning the deposition of Howard R. Hughes to February 11th, 1963 is withdrawn by counsel for TWA pursuant to an application filed January 8th, 1963.

2. The appeal by Hughes Tool Company dated January 3rd, 1963 seeking to review an order of the Special Master dated December 28th, 1962 denying Toolco's application to examine Ben-Fleming Sessel and the Irving Trust Company by Sessel and Arthur L. Wadsworth and Dillon, Read & Co. by Wadsworth is denied and the ruling of the Special Master is affirmed. The court adopts the statement of the Special Master appearing on page 11 of the transcript of

proceedings before the Special Master dated December 28th, 1962, which states:

> "I do not think it [the depositions of Sessel and Wadsworth] would advance the proper administration of this case since it would in my judgment inevitably branch out into the issues of the counterclaims, or result in such continuous controversy as to the exact limits of such issues that it might interfere with the taking of Mr. Hughes' deposition at the time and place fixed."

The court has previously indicated that priority of deposition is not sacrosanct, and even without the adoption as of July 1st, 1962 of rule 4 of the Civil Rules of this district the court has the power to alternate the taking of depositions by the parties.

During a ten-month period the defendant has conducted over 80 days of depositions of the plaintiff, which have consumed over 10,000 pages of testimony. It will have substantially completed the deposition of the plaintiff this month with the testimony of Cocke and Leslie. It has then scheduled the depositions of other witnesses, including Sessel and Wadsworth, which can consume a very long period of time. The deposition of Howard R. Hughes by the plaintiff and the additional defendants should now go forward. This deposition was originally scheduled for September 24th, 1962 and then adjourned to October 29th, 1962. It has now been adjourned to February 11th, 1963 and this date will be adhered to in the absence of extraordinary circumstances. The complicated nature of this action necessitates long and involved deposition-discovery proceedings and it is only fair that plaintiff be allowed to proceed without waiting for the defendant to complete its deposition proceedings. This is especially true where the

plaintiff claims that 75% of the proof necessary to sustain its claim is obtainable from Hughes personally.

Furthermore, the completion of such deposition will advance materially the date when the court could meaningfully entertain the various motions which Mr. Davis has indicated he would like to press for a dismissal of the complaint and for summary judgment. It will also facilitate an intelligent ruling upon Toolco's application pursuant to rule 16 of the Federal Rules of Civil Procedure and the sufficiency of TWA's compliance with interrogatories served on October 11th, 1962 and the further interrogatories served on November 13th, 1962.

The court concurs in the ruling of the Special Master contained in his order of December 28th, 1962 clarifying his order of October 25th, 1962, directing that Howard R. Hughes appear on February 11th, 1963 for deposition in Los Angeles. The return date of the subpoena served on September 6th, 1962 as adjourned by order of this court dated September 21st, 1962 and the notice to take deposition are adjourned to February 11th, 1963 at the same time and place. The provisions of the order of this court dated September 21st, 1962 are reaffirmed and reiterated, and Mr. Davis is directed to notify Howard R. Hughes of the directions of the court contained in this order by telephonic communication and by written communication to be made and sent by 5 p.m. on January 11th, 1963.

3. The motion by Hughes Tool Company, pursuant to rule 16 of the Federal Rules of Civil Procedure, to authorize the Special Master to conduct pretrial conferences, with recommendations to the court for the form and terms of a pretrial order defining and limiting the legal and factual issues in this case, is denied without prejudice to a renewal

30 days after the completion of the deposition of Howard R. Hughes.

4. The appeal by Hughes Tool Company dated September 19th, 1962 from an order of the Special Master made on September 15th, 1962 which requires Hughes Tool Company to produce for inspection and copying by opposing counsel, prior to a further definition of the issues, the documents with respect to which Hughes Tool Company claims attorney-client privilege is denied and the order of the Special Master is affirmed.

A reading of the briefs and the oral argument would indicate that the application under advisement is in fact a reargument of the order of this court dated July 24th, 1962. At that time the court indicated that it had reviewed the opinion of the Special Master which appeared in the transcript at pages 4361-4391 and the letters of the Special Master dated May 2nd, 1962 and May 3rd, 1962. The court concurred with the opinion of the Special Master and directed that if there were any specific documents concerning which Hughes Tool Company desired specific rulings they should be submitted to the Special Master.

At pages 122 et seq. of the transcript of September 15th, counsel for the Hughes Tool Company stated that he had made available to the Special Master the documents concerning which the defendant was asserting the attorney-client privilege. Counsel went on to state that the documents were made available for a ruling by the Special Master not as to whether they would be normally covered by the attorney-client privilege, but "whether or not the attorney-client privilege had been waived." He then went on to say at page 124 that:

> "What is developing is simply the question of the procedure to be followed in obtaining rulings of the

> Special Master with respect to individual documents, applying the principles of law announced by the Special Master and affirmed by Judge Metzner, and the only area which I am aware constitutes a difference of opinion, perhaps, is whether those documents are to be produced at this time on the ground that prior to this time there had been a waiver of the privilege."

Documents heretofore submitted to the Special Master shall be made available to all parties by noon on January 14th, 1963. If there are any additional documents to which the defendent Hughes Tool Company asserts a non-waived attorney-client privilege, such documents shall be submitted for a ruling to the Special Master by noon of January 14th, 1963 and a list thereof furnished at the same time to counsel for all parties.

5. The appeal by TWA, pursuant to a telephonic request, to review an order of the Special Master denying its motion to quash or strike interrogatories served by Toolco on October 11th, 1962 is denied except that the order of the Special Master is modified to the extent that TWA shall answer the interrogatories within 60 days after the completion by TWA of its deposition of Howard R. Hughes. Objection to specific interrogatories shall be made to the Special Master within 55 days after the completion of the deposition of Howard R. Hughes.

6. The appeal by TWA dated December 20th, 1962 from an order of the Special Master appearing in the transcript of the proceedings before the Special Master on December 3rd, 1962 is denied except that the order of the Special Master is modified to the extent that TWA shall answer the interrogatories within 60 days after the completion by TWA of its deposition of Howard R. Hughes. Objection

specific interrogatories shall be made to the Special Master within 55 days after the completion of the deposition of Howard R. Hughes.

So Ordered.

Dated: New York, N. Y.
January 10, 1963

/s/ Charles M. Metzner
U. S. D. J.

Pretrial Order, January 19, 1963

[Doc. 146]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324

TRANS WORLD AIRLINES, INC.,

Plaintiff,

against

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,

Defendants.

Defendant Hughes Tool Company (referred to as Toolco) has moved for an order pursuant to rule 30(b) of the Federal Rules of Civil Procedure that the deposition of Howard R. Hughes be taken on written interrogatories or, in the alternative, that if such relief pursuant to rule 30(b) is denied that the motions of Toolco to dismiss the complaint or for summary judgment pursuant to rules 12(b) and 56(b) be brought on for hearing and determination. The motion further requests that the order of this court dated January 10th, 1963 be stayed until the determination of the motions to dismiss or for summary judgment.

This case was assigned to me for all purposes by the Chief Judge on August 31, 1961 pursuant to rule 2 of the General Rules of this court. After the disposition of several preliminary matters concerning production of documents and scheduling, Toolco commenced taking depositions of the plaintiff in February 1962. The parties requested that a Special Master be appointed to supervise the deposition proceedings and the court designated J. Lee Rankin for this purpose. Since that time over 80 sessions

have been held and over 10,000 pages of testimony have been taken.

Sometime prior to July 12th, 1962 the Special Master indicated his serious concern about whether or not Howard R. Hughes would be available as a witness in this proceeding if and when his deposition was reached. Without detailing the subsequent events, all of which are set forth in the order of this court dated September 21, 1962, the problem seemed to have been resolved when counsel for Toolco filed with the court a document purportedly signed by Howard R. Hughes authorizing said counsel to accept service of a witness subpoena on behalf of Howard R. Hughes. Plaintiff attacked the authenticity of this authorization. Counsel for Toolco flew to Los Angeles and accepted service of a witness subpoena from a Deputy United States Marshal for the Southern District of California at 7 a.m. (10 a.m. New York time) on September 6th, 1962, the morning of the hearing before this court on plaintiff's claim of forgery. The disposition of that matter has been held in abeyance. The subpoena provided for the appearance of Howard R. Hughes at the United States District Courthouse in Los Angeles on September 24th, 1962.

Subsequently, plaintiff moved before the Special Master to suspend the taking of depositions by Toolco in order to permit plaintiff to commence taking the deposition of Hughes pursuant to the subpoena. The Special Master denied this application and this court affirmed that ruling by its decision and order of September 21st to the extent that the deposition was adjourned to October 29th, 1962. Leave was given Toolco to make application to the Special Master for a further adjournment if in its opinion this was necessary. Such application was made on October 22nd, 1962 and the Special Master adjourned the return

date of the subpoena to February 11th, 1963. The court has affirmed that ruling. During the months of September, October, November and December, Toolco has proceeded with its deposition of the plaintiff.

On December 28th, 1962 defendant Toolco made application to the Special Master to take the deposition of two additional witnesses which if granted would have necessitated a further adjournment of the Hughes deposition. The Special Master denied this application and the ruling of the Special Master was affirmed by the court in its decision and order of January 10th, 1963.

Counsel for Toolco has repeatedly indicated since the assignment of this case to me that motions theretofore made to dismiss the complaint and for summary judgment would be noticed for argument, but agreed that they were premature.[1]

The present motion appears to be another attempt to put off the deposition of Hughes. As I stated in my order of January 10th,

> "The complicated nature of this action necessitates long and involved deposition-discovery proceedings and it is only fair that plaintiff be allowed to proceed without waiting for the defendant to complete its deposition proceedings. This is especially true where the plaintiff claims that 75% of the proof necessary to sustain its claim is obtainable from Hughes personally.
>
> "Furthermore, the completion of such deposition will advance materially the date when the court could

[1] Transcript of pretrial conference September 6, 1961, pp. 25-28, 40-41.

Transcript of pretrial conference October 2, 1961, pp. 10, 23.

Transcript of pretrial conference February 23, 1962, pp. 58-59.

Transcript of pretrial conference September 19, 1962, p. 39.

Transcript of pretrial conference January 9, 1963, p. 17.

> meaningfully entertain the various motions which Mr. Davis has indicated he would like to press, for a dismissal of the complaint and for summary judgment. It will also facilitate an intelligent ruling upon Toolco's application pursuant to rule 16 of the Federal Rules of Civil Procedure and the sufficiency of TWA's compliance with interrogatories served on October 11th, 1962 and the further interrogatories served on November 13th, 1962."

Because of the issues involved in this litigation and the nature of the proof sought from Hughes, the use of written interrogatories would be a wholly unsatisfactory procedure. Contemplated answers to specific interrogatories may not be forthcoming, which would render meaningless subsequent questions. Answers given might suggest further questions to sufficiently probe for the facts, but such questions would not appear in the interrogatories. None of the grounds asserted or implied are sufficient in this case to justify proceeding initially by written interrogatories. Consequently, the first branch of the motion, seeking relief pursuant to rule 30(b), is denied.

As I have indicated above in the quotation from the January 10th order, it would appear to the court that the case is not in a posture for a meaningful disposition of the motions to dismiss the complaint or for summary judgment. The motion papers filed before the assignment of the case pursuant to rule 2, which I assume are the motions Toolco is now bringing on for hearing, were predicated upon the grounds that the complaint fails to state a claim upon which relief can be granted, that this court lacks jurisdiction of the subject matter of the action, and that there is no genuine issue as to any material fact. More specifically, it is stated that the transactions complained of were subject to and approved by orders of the CAB under section

408 of the Federal Aviation Act of 1958 and therefore pursuant to section 414 of that act there is an exemption from the operations of the antitrust laws, that if there is any question as to the scope or the enforcement of the above orders, they are matters within the exclusive jurisdiction of the CAB, and finally that the activities of Toolco subsequent to 1960 which are alleged to have constituted a malicious and willful interference with TWA's business were taken on advice of counsel.

The court, of course, cannot prevent defendant Toolco from pressing these motions at this time. However, since counsel for the defendant has been contemplating the motions for more than a year and a half, he obviously does not need the six weeks which he requests for the preparation of his papers. Counsel for plaintiff has indicated that he will cooperate in relieving defendant of a schedule with regard to motions pending in a companion action in Delaware, so as to free counsel for the defendant to devote his efforts entirely to these motions. As I indicated to counsel in an informal conference on January 16th, I will fix the date of February 1st, 1963 at noon for defendant to file all additional papers in support of its motions, and plaintiff shall be given until noon of February 8th, 1963 for answer. If upon reading defendant's papers the court is of the opinion that there is doubt as to its preliminary observations that these motions are premature, it will advise counsel of a short adjournment of the deposition of Hughes. In the meantime, this deposition shall go forward as ordered, on February 11th, 1963.

The order of January 10th will not be stayed pending a determination of the motions to dismiss and for summary judgment. The documents which the court has directed be turned over to the plaintiff shall be furnished as provided

in the order of January 10th, 1963 except that the date of January 14th, 1963 as fixed in paragraph 4 of that order is amended to read "January 22nd, 1963".

At the hearing before the Special Master on January 17th, counsel for defendant was reluctant to indicate whether he desired to hold the deposition at some place other than the United States Courthouse in Los Angeles. As counsel for the plaintiff and the additional defendants have indicated, they are amenable to cooperate in any reasonable request of counsel for the defendant, but it is necessary that advice of a change be given so that necessary arrangements can be made. Consequently, unless counsel for the defendant indicates by noon on January 22nd, 1963 a desire to change the designated place, the deposition shall proceed in the United States Courthouse in Los Angeles.

So ORDERED.

Dated: New York, New York
January 19, 1963

/s/ CHARLES M. METZNER
U. S. D. J.

Pretrial Order, February 1, 1963

[Doc. 168]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324

TRANS WORLD AIRLINES, INC.,

Plaintiff,

against

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,

Defendants.

A pretrial conference was held in the above action on January 28th, 1963 at 5 p.m.

Four matters were presented to the court for consideration:

1. A motion by the defendant Hughes Tool Company, returnable February 8th, 1963 at 4 o'clock, to adjourn the deposition of Howard R. Hughes presently scheduled for February 11th, 1963 until after a final adjudication of said defendants' motion to dismiss the complaint. This motion was advanced for argument to January 28th, and on the record of the pretrial conference, the attorney for Hughes Tool Company withdrew the motion.

2. A motion by the plaintiff Trans World Airlines to withdraw its motion to dismiss the counterclaims, except that portion of said motion which attacks the second counterclaim for failure to state a claim and the motion for summary judgment with respect to the sixth counterclaim. This motion is granted and plaintiff is directed to file its reply to the counterclaims of defendant Hughes Tool Com-

pany within ten days after the conclusion of the deposition of Howard R. Hughes.

3. A motion by the additional defendant Charles C. Tillinghast, Jr. for leave to answer the counterclaims of the defendant Hughes Tool Company ten days after the conclusion of the deposition of Howard R. Hughes. This motion is granted.

4. A motion by the defendant Hughes Tool Company to review an order of the Special Master dated January 22nd, 1963 requiring the defendant Hughes Tool Company to produce for inspection and copying the so-called tax documents. As to the nine boxes of papers which the court is informed may contain pertinent documents in relation to the request to produce, the defendant Hughes Tool Company is directed to send them today to counsel for the plaintiff, who shall make arrangements for producing copies thereof for the plaintiff and the additional defendants. If the defendant Hughes Tool Company contends for some reason or other that said documents are not subject to production, then the nine boxes shall be sent today to the Special Master, who shall rule upon any objections that the defendant shall make to the production of specific documents. Any other documents subject to the notice and affidavit of January 9, 1963 shall be produced on a daily basis on or before February 11th, 1963.

So Ordered.

Dated: New York, N. Y.
February 1st, 1963

/s/ Charles M. Metzner
U.S.D.J.

Opinion and Order, January 4, 1966

[Doc. 496]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324

TRANS WORLD AIRLINES, INC.,

Plaintiff,

against

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,

Defendants.

METZNER, D. J.

Defendant has moved for a pre-hearing order calling upon the plaintiff to set forth the facts supported by the record or by matters judicially noticeable or by evidence which the plaintiff is prepared to offer, upon which plaintiff would rely to preclude the entry of the following finding of fact:

> The facts before this Court establish that at no time during the period covered by the complaint herein were the defendants, or any of them, engaged in the manufacture or supply of commercial transport aircraft in competition with any manufacturer or supplier of such aircraft.

The defendant then requests that if this proposed finding of fact is supported notwithstanding the material set forth in the plaintiff's offer of proof, the finding of fact shall be made and the case dismissed as a matter of law.

A 7-inch stack of affidavits, briefs and supporting documents has been submitted in connection with this motion.

After reading them and listening to defendant's extensive argument, one wonders why the case was never defended on the merits, if all that defendant contends for is true. At this late date, after the complaint has been sustained and a default judgment entered, with appeals to the Court of Appeals and a writ of certiorari dismissed by the Supreme Court, defendant now, in effect, seeks summary judgment in its favor. It asks that plaintiff come forward to negative a fact which defendant asserts as true. The shoe is on the other foot. The plaintiff has a judgment in its favor and the only limitation thereon has been spelled out in the order of the Special Master dated July 30, 1965 and the order of this court dated November 16, 1965. Together they outline the procedures to be followed before the Special Master, where the matter is properly pending. The court cannot conceive of any further reason for delay in proceeding before the Special Master until the hearings are completed.

MOTION DENIED. SO ORDERED.

Dated: New York, N. Y.
January 4, 1966

/s/ CHARLES M. METZNER
U. S. D. J.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-880

TRANS WORLD AIRLINES, INC.,
Cross-Petitioner,

v.

HUGHES TOOL COMPANY and
RAYMOND M. HOLLIDAY,
Respondents.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-830

TRANS WORLD AIRLINES, INC.,

Cross-Petitioner,

v.

HUGHES TOOL COMPANY and
RAYMOND M. HOLLIDAY,

Respondents.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Trans World Airlines, Inc. ("TWA") has filed a cross-petition, asking that if this Court grants the petition for certiorari, No. 71-827, filed by Hughes Tool Company ("Toolco") and Raymond M. Holliday (together "defendants") that it also consider certain additional issues tendered by TWA.

Defendants' petition presents issues of recurring importance in the conduct of civil litigation in the federal courts. TWA's cross-petition raises issues that it correctly describes as "peripheral to the basic controversy" (Cross Petition 24) and that are either of no general significance or controlled by long-established precedents. Basically

TWA's complaint is that the judgment for $145,448,141.07 that it has received is inadequate and that it should have received more—more interest, more costs, and more treble damages.

A.

The essential facts about the proceedings below are set out in defendants' petition. The Statement of the Case in the cross-petition is misleading in several respects that deserve comment.

1. TWA states (Cross Petition 7) that the fact that Toolco included in its answer a derivative counterclaim on behalf of TWA establishes that TWA was seriously injured and that these injuries resulted from violations of the antitrust laws. The statement will not withstand analysis.

The counterclaim alleged a violation of the antitrust laws based on a conspiracy among lending institutions and others to seize control of TWA for their own purposes. Among the acts alleged in furtherance of this conspiracy was the ordering of more jet aircraft than TWA needed or could afford. Clearly a claim that TWA has been injured by ordering too many jets is not an admission that it was injured by having too few jets. Equally clearly, a claim that the antitrust laws were violated by the conspiracy of the lenders and others to seize control has no relevance to whether defendants violated the antitrust laws in the decisions they made in the exercise of their CAB-approved control of Toolco's subsidiary.

2. TWA erroneously characterizes statements made by counsel for defendants at the time they gave their Notice of Position as "an express acknowledgment of [defend-

ants'] liability in damages if the several jurisdictional grounds on which they were seeking appellate review were determined against them'' (Cross Petition 10). The statements quoted by TWA in no way support the conclusion TWA seeks to draw from them because ''liability in damages'' cannot be separated from ''damages for what?'' Defendants do not question that, if they were wrong in their view of the applicable law, they would be liable in damages for injuries proximately caused by conduct constituting a tie-in, boycott, or attempt to monopolize. They have never agreed that they would be liable for conduct that did not violate the antitrust laws nor for injuries that did not result from any violation of the antitrust laws.

3. TWA ends its Statement of the Case with a table showing the length of time that various phases of this litigation have taken (Cross Petition 14). Defendants agree that a tragic amount of time has been spent on this case by the courts as well as the litigants. This waste of time has been quite unnecessary. This case would have ended years ago had TWA been willing to define the issues and to reveal the factual basis of its claim in a Rule 16 proceeding as urged by Special Master Rankin. It is hardly Toolco's fault that TWA successfully resisted the efforts of the Special Master to speed progress in this case or that TWA was able to conceal until the damage hearing the fact that the injury for which it claimed damages had no conceivable connection with the violations of the antitrust laws it had alleged.

B.

TWA is not satisfied with interest at the rate of 7½% from the date of the judgment. It claims that interest should have started to run before the judgment was entered.

The Second and Seventh Circuits are clearly right in saying that where treble damages are awarded, moratory interest has no place in the computation of damages. One may admire the ingenuity with which TWA seized one sentence in the opinion of this Court in *Thomsen* v. *Cayser*, 243 U.S. 66 (1917), describing the award below as including interest, and a holding in *United Mine Workers* v. *Coronado Coal Co.*, 258 Fed. 829 (8th Cir. 1919), *reversed on other grounds*, 259 U.S. 344 (1922), that a judge may not award interest if the jury has not done so, as a basis for claiming that a conflict exists. The fact that TWA can find no better authority for its position than two cases more than 50 years old, in one of which moratory interest was not awarded and in the other of which the propriety of awarding such interest was not discussed, is a clear indication that for more than a half century courts have not included moratory interest in treble damage awards.

This would be an inappropriate case in which to reexamine this longstanding practice. As the Court of Appeals recognized, the award of moratory interest would give rise to difficult questions of proof, "including highly obstruse inquiries as to proper rates and the time from which interest should run" (App. 159a). The peculiar facts, or lack of facts, in this case would compound the problem. The holding below was that there was no need to show "that any of Toolco's acts pleaded in the complaint violated the antitrust laws nor to show that those acts caused the well-pleaded injuries" (App. 139a). To try to determine when moratory interest might properly be awarded would be impossible in a miasma where both cause and effect are lacking.

TWA claims in the alternative that it should have received interest from the date of the report of the Special Master, rather than from the date of the judgment. Its

novel claim ignores "the plain words of Section 1961" (App. 160a), it ignores the view of the Court of Appeals that the reference served to expedite the litigation, and it ignores the fact that defendants did not request the reference and should not be penalized because of it.

C.

TWA argues that in addition to costs and attorneys' fees of $7,836,705.12 awarded it by the District Court, it should receive an additional $1,642,677.71 to reimburse it for payments made to experts who testified for it at the damage hearing. It contends that Section 4 of the Clayton Act, which allows recovery of "cost of suit, including a reasonable attorney's fee," really means "cost of suit, including not only a reasonable attorney's fee but also any other expenses incurred that would not otherwise be taxable as costs." The simple answer to this contention is that the statute does not say what TWA would have it say. If Congress had meant to include payments to expert witnesses and the like as part of the cost of suit, it would have said so. What TWA concedes to be "a long and uniform line of decisions" (Cross Petition 20) have read the statute naturally and rejected the claim now made. Nor is this case, in which the Special Master rejected in whole or in part the testimony of all of the major expert witnesses that TWA produced, an apt vehicle for reconsidering what has come to be accepted law.

D.

TWA's final claim is that it should have been awarded an additional $19.5 million because the courts below should have assumed that TWA would have financed the hypotheti-

cal fleet of jets, on which it based its damage claims, at the interest rates prevailing in 1955 and 1956 instead of at the rates prevailing in 1958-1960 when the hypothetical fleet, according to TWA, would have been delivered. Even TWA is unable to explain what question of wide application is presented by whether the Special Master should have used one interest rate or another as the "cost of capital." The question may be novel but it depends solely on the particular facts of this case. Moreover, the assumption that long before the planes were to be delivered TWA would have raised the vast sums required to pay for them is quite remarkable. That TWA can advance such an assumption only emphasizes that damages were awarded without any showing that TWA could at any time have financed the hypothetical jet fleet.

CONCLUSION

The cross-petition should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-827

HUGHES TOOL COMPANY

and

RAYMOND M. HOLLIDAY,

Petitioners,

v.

TRANS WORLD AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

Respondent's 57-page discussion[1] of the merits of the questions presented in the petition shows how far apart

1 Petitioners plainly cannot answer all of the factual assertions made by respondent, particularly in the light of the voluminous papers already filed. One of respondent's assertions, however, may illustrate the caution with which the Court should address itself to respondent's brief. Respondent states that its attorney called the $5,000,000 estimate for taking Hughes' deposition "obviously absurd" at the time the estimate was made (Brief in Opposition 17 n). Actually, what TWA's counsel called "obviously absurd" was petitioners' claim that they were resisting discovery in order to avoid the great expense involved (2d Cir. App. A-293). He did not contest the figure itself.

the parties are on these questions of law and only emphasizes the importance of authoritative resolution of the questions by this Court. To take but one example, those engaged in any phase of aeronautics who are considering coming to the assistance of an air carrier need to know whether CAB approval of their acquisition of control, coupled with continuing CAB surveillance of all transactions between the parent and the carrier, provides antitrust immunity for those transactions that take place as a normal incident of control or whether it immunizes only the acquisition itself. That TWA thinks the latter view is correct (Brief in Opposition 45) does not make the question any less significant or less worthy of the attention of this Court.

TWA's position throughout is colored by its reluctance to have this Court speak to the effect to be given a default. *Thomson* v. *Wooster*, 114 U.S. 104 (1885), the case on which both parties necessarily rely in the absence of more recent guidance from this Court,[2] teaches that a default admits "facts properly pleaded." *Id.* at 110. No matter how broadly "facts" may be read, it is a concept that does not include conclusions of law. When TWA asserts, as it has throughout this litigation, that "by defaulting, defendants admitted the antitrust violations alleged in the complaint"

---

2 TWA's repeated suggestion that defendants are making an "assault" on or a "criticism of" the *Thomson* case (Brief in Opposition 32, 35) is wrong. Defendants expressly rely on the *Thomson* case and object to the misreading of it by the lower court (Petition, 20, 22).

(Brief in Opposition 55), TWA ignores that distinction. Defendants, in announcing their business decision to proceed no further, said that they did so in order that they might "stand on the questions of law which have been decided to date" (2d Cir. App. A-274, quoted at Brief in Opposition 32). Within the *Hovey-Hammond* rule (Petition 22), they cannot be held to have admitted the legal propositions that they expressly sought to test. Yet TWA finds support for its opposition to review of Questions 4 to 7 in the petition by attributing to the default a broader effect than it properly has, while at the same time arguing that this Court need not speak on the effect of a default.

At the same time—and quite inconsistently—TWA ignores the benefits that did come to it from defendants' business decision. Repeatedly it asserts that the novel and unsound rulings of the courts below were made necessary because the defendants' course had barred it from proving its case in accordance with familiar legal standards (*e.g.*, Brief in Opposition 42, 48, 49). Because of the default, however, the facts must be taken as TWA alleged them, read in the light of what the damage hearing showed about the meaning of particular allegations. If, with the advantage accruing to it from the default, all that TWA can show is that Toolco was at most a potential competitor of aircraft manufacturers, that the supposed violations of the antitrust laws were nothing more than a parent making decisions for its subsidiary, and that this control of the subsidiary was approved by the CAB, TWA must face squarely whether all of this is a violation of the antitrust

laws, rather than contend that different antitrust principles apply to those who are in default than to those whose conduct has been proven at a trial.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-830

TRANS WORLD AIRLINES, INC.,
Cross-Petitioner,

—v.—

HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR CROSS-PETITIONER TRANS WORLD AIRLINES, INC.

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June 6, 1972

INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Statutory Provision Involved 3

Questions Presented 3

Statement of the Case
(Limited to Issues of TWA's Cross-Petition) 4

Summary of Argument 10

ARGUMENT

I. The decisions below erroneously excluded prejudgment interest from consideration as an element of damages under Section 4 of the Clayton Act 13

II. Alternatively, the decisions below erroneously failed to allow interest on the Special Master's award for the period between the filing of his Report and the entry of judgment 23

III. The decisions below should have determined TWA's net damages on the basis of a "cost of capital" established by the allegations of the complaint that defendants wrongfully precluded borrowings at lower interest rates 29

PAGE

IV. The decisions below improperly interpreted the provision for recovery of "cost of suit" in Section 4 of the Clayton Act to exclude the expense necessarily incurred by TWA when it retained expert witnesses to assist in proving the amount of its damages 35

CONCLUSION 43

ANNEX A 1a

ANNEX B 1b

TABLE OF AUTHORITIES

Cases

Aronson v. *Orlov*, 228 Mass. 1, 116 N.E. 951, *cert. denied*, 245 U.S. 662 (1917) 26

***Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251** (1946) 34
Brent v. *Thornton*, 106 F. 35 (5th Cir. 1901) 17
***Bridenstine* v. *Iowa City Elec. Ry.*, 181 Iowa 1124, 165** N.W. 435 (1917) 16n, 17n
Brooklyn Savings Bank v. *O'Neil*, 324 U.S. 697 (1945) 19, 20, 21

Carter Products, Inc. v. *Colgate-Palmolive Co.*, 214 F.Supp. 383 (D. Md. 1963) 24-25
Collier v. *Granger*, 258 F.Supp. 717 (S.D.N.Y. 1966) 28
Colonial Refrigerated Transp., Inc. v. *Mitchell*, 403 F.2d 541 (5th Cir. 1968) 17n, 21

PAGE

Crosby v. *Kroeger*, 138 Colo. 55, 330 P.2d 958 (1958) 16n
Crosby Steam Gage & Valve Co. v. *Consolidated Safety Valve Co.*, 141 U.S. 441 (1891) .....11, 24, 25 & n, 26n

Day v. *Woodworth*, 13 How. 362 (1851) 42
DeLaughter v. *Borden*, 431 F.2d 1354 (5th Cir. 1970) .. 18n
DeLong Corp. v. *Morrison-Knudsen Co.*, 20 App. Div. 2d 104, 244 N.Y.S.2d 859 (1st Dep't 1963), *aff'd*, 14 N.Y.2d 346, 200 N.E.2d 557 (1964) 17n

Eddy v. *Lafayette*, 163 U.S. 456 (1896) 17
Emery v. *Tilo Roofing Co.*, 89 N.H. 165, 195 A. 409 (1937) 17n

Farmers Ins. Exchange v. *Henderson*, 82 Ariz. 335, 313 P.2d 404 (1957) 15n-16n
Fell v. *Union Pac. Ry.*, 32 Utah 101, 88 P. 1003 (1907) .. 16n
First Nat'l Bank of Hollywood v. *American Foam Rubber Corp.*, 309 F.Supp. 545 (S.D.N.Y. 1969) 15n
Flanders v. *Tweed*, 15 Wall. 450 (1872) 42
E. M. Fleischmann Lumber Corp. v. *Resources Corp. Int'l*, 114 F.Supp. 843 (D. Del. 1953), *aff'd*, 211 F.2d 204 (3d Cir. 1954) 15n, 16n

Hanover Shoe, Inc. v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968) 30
Hawaii v. *Standard Oil Co. of California*, 405 U.S. 251 (1972) 13, 39
Robert C. Herd & Co. v. *Krawill Mach. Corp.*, 256 F.2d 946 (4th Cir. 1958), *aff'd*, 359 U.S. 297 (1959) 16n
Hobart v. *O'Brien*, 243 F.2d 735 (1st Cir.), *cert. denied*, 355 U.S. 830 (1957) 15n
Hunt v. *Ward*, 262 Ala. 379, 79 So.2d 20 (1955) 15n

PAGE

Hutchinson v. *Hutchinson,* 223 Cal. App.2d 494, 36 Cal. Rptr. 63 (1st Dist. 1963) 41n

Hygienic Chemical Co. v. *Provident Chemical Works,* 176 F. 525 (2d Cir. 1910) 40-41

Illinois Central R.R. v. *Turrill,* 110 U.S. 301 (1884) ..11, 24, 25n

International Boxing Club v. *United States,* 358 U.S. 242 (1959) 28

In re Kavares (Motor Vehicle Accident Indemnification Corp.), 29 App. Div.2d 68, 285 N.Y.S.2d 983 (1st Dep't 1967) 26

Kennedy v. *Clayton,* 216 Ark. 851, 227 S.W.2d 934 (1950) 16n

LaBuy v. *Howes Leather Co.,* 352 U.S. 249 (1957) 24

L. P. Larson, Jr., Co. v. *William Wrigley, Jr., Co.,* 20 F.2d 830 (7th Cir. 1927), *rev'd in part on other grounds,* 277 U.S. 97 (1928) 24

Lincoln v. *Claflin,* 7 Wall. 132 (1868) 17, 18, 19, 27n

Locklin v. *Day-Glo Color Corp.,* 429 F.2d 873 (7th Cir. 1970), *cert. denied,* 400 U.S. 1020 (1971) 11, 19, 21, 27

Los Angeles Brush Mfg. Corp. v. *James,* 272 U.S. 701 (1927) 24

Louisiana & Arkansas Ry. v. *Export Drum Co.,* 359 F.2d 311 (5th Cir. 1966) 14

Marrazzo v. *Scranton Nehi Bottling Co.,* 438 Pa. 72, 263 A.2d 336 (1970) 16n

Marshfield Steel Co. v. *NLRB,* 324 F.2d 333 (8th Cir. 1963) 14

PAGE

Miller v. *Robertson*, 266 U.S. 243 (1924) 14, 27n
Moore-McCormack Lines, Inc. v. *Richardson*, 295 F.2d 583 (2d Cir. 1961), *cert. denied*, 368 U.S. 989 (1962) 14
Munro v. *Maryland Casualty Co.*, 48 Misc. 183, 96 N.Y.S. 705 (Sup. Ct. N.Y. Co. 1905) 41n

New Dunderberg Mining Co. v. *Old*, 97 F. 150 (8th Cir. 1899) 17
Newman v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) 39

Petition of City of New York, 332 F.2d 1006 (2d Cir.), *cert. denied*, 379 U.S. 922 (1964) 14
Norte & Co. v. *Huffines*, 416 F.2d 1189 (2d Cir. 1969), *cert. denied*, 397 U.S. 989 (1970) 14

Overnight Motor Transp. Co. v. *Missel*, 316 U.S. 572 (1942) 20

Pepin v. *Beaulieu*, 102 N.H. 84, 151 A.2d 230 (1959) 16n
Ex parte Peterson, 253 U.S. 300 (1920) 42
Pettingill v. *Kelton*, 124 Vt. 472, 207 A.2d 245 (1965) 16n

Rachlin & Co. v. *Tra-Mar, Inc.*, 33 App. Div.2d 370, 308 N.Y.S.2d 153 (1st Dep't 1970) 28n
Rayonier, Inc. v. *Polson*, 400 F.2d 909 (9th Cir. 1968) .. 18n
Riss & Co. v. *Feldman*, 79 A.2d 566 (D.C. Mun. Ct. App. 1951) 18n
Rodgers v. *United States*, 332 U.S. 371 (1947) 14, 19-20, 21, 27
Royal Indemnity Co. v. *United States*, 313 U.S. 289 (1941) 28

PAGE

Schine Chain Theatres, Inc. v. *United States*, 334 U.S. 110 (1948) 28
Schulte v. *Louisville & N. R.R.*, 128 Ky. 627, 108 S.W. 941 (1908) 18n
Speed v. *Transamerica Corp.*, 135 F.Supp. 176 (D. Del. 1955), *modified & aff'd*, 235 F.2d 369 (3d Cir. 1956) .. 16n
Straus v. *Victor Talking Machine Co.*, 297 F. 791 (2d Cir. 1924) 12, 38, 40, 41, 42

Texas Co. v. *State*, 154 Tex. 494, 281 S.W.2d 83 (1955) 16n, 19
Thomsen v. *Cayser*, 243 U.S. 66 (1917) 18
Tilghman v. *Proctor*, 125 U.S. 136 (1888) ....11, 23 & n, 24, 25n, 26n, 27
Trinidad Asphalt Paving Co. v. *Robinson*, 52 F. 347 (E.D. Mich. 1892) 42

United Mine Workers v. *Coronado Coal Co.*, 258 F. 829 (8th Cir. 1919), *rev'd on other grounds*, 259 U.S. 344 (1922) 18-19
United States v. *Schurz*, 102 U.S. 378 (1880) 42

Wells Laundry & Linen Supply Co. v. *Acme Fast Freight, Inc.*, 138 Conn. 458, 85 A.2d 907 (1952) 16n

Statutes and Rules

Act of August 23, 1842, ch. 118, § 8, 5 STAT. 518 ..... 27n
Agricultural Adjustment Act of 1938, 52 STAT. 31 (1938), 7 U.S.C. § 1281 (1970) 20

CAL. CIV. CODE
§ 3288 (West 1970) 16n
§ 4370(a) (West Supp. 1971) 41n

PAGE

CLAYTON ACT
Section 4, 38 STAT. 731 (1914), 15 U.S.C. § 15 (1970) 3, 4, 11, 12, 13, 20, 24, 27, 35, 38, 39, 40, 42
Section 16, 38 STAT. 737 (1914), 15 U.S.C. § 26 (1970) .. 4n
COLO. REV. STAT. ANN.
§ 41-2-1 (1963) 15n

Death on the High Seas Act, 41 STAT. 537-38 (1920), 46 U.S.C. §§ 761-68 (1970) 14
DEL. CODE ANN.
Tit. 10, § 8906 (1953) 38n

Fair Labor Standards Act of 1938
Section 16(b), 52 STAT. 1069 (1938), 29 U.S.C. § 216(b) (1970) 20
Federal Rules of Civil Procedure
Rule 26(b)(4)(C) 39n
Rule 37 5
FLA. STAT. ANN.
§ 90.231 (West 1960) 38n

GENERAL RULES FOR THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK
Rule 2(b) 4-5

ILL. ANN. STAT.
ch. 74, § 3 (Smith-Hurd Supp. 1972) 26
IOWA CODE ANN.
§ 625.21 (1950) 26

JUDICIAL CODE
28 U.S.C. § 1254(1) (1970) 2
§ 1292(b) (1970) 5
§ 1920 (1970) 42
§ 1961 (1970) ..... 9, 26 & n, 27

PAGE

LA. REV. STAT. ANN.
§ 13:3666 (West 1968) 38n
§ 13:4203 (West 1968) 15n

MASS. GEN. LAWS ANN.
ch. 231, § 6(B) (1956) 15n
ch. 235, § 8 (1956) 26
ME. REV. STAT. ANN.
Tit. 14, § 1602 (Supp. 1972) 15n
Tit. 16, § 251 (Supp. 1972) 38n
MICH. COMP. LAWS ANN.
§ 600.6013 (1968) 15n
MINN. STAT. ANN.
§ 549.09 (1947) 26
Mo. ANN. STAT.
§ 537.520 (1953) 16n
Motor Vehicle Accident Indemnification Corporation Law, N.Y. INS. LAW §§ 600-26 (McKinney 1966) 26

N.H. REV. STAT. ANN.
§ 524:1-b (Supp. 1971) 16n
§ 525:14-a (Supp. 1971) 38n
N.Y. CPLR
§ 5002 (McKinney 1963) ..... 26, 28 & n
§ 5004 (McKinney 1963) ..... 28 & n
N.Y. GEN. OBLIG. LAW
§ 5-501(1) (McKinney 1964), *as amended* L. 1968, ch. 349 § 1, eff. May 15, 1968 (McKinney Supp. 1971) 22n, 28n
N.Y. State Banking Board Regulations
No. 37, 3 N.Y.C.R.R. § 34.1 (1968) 28n
General Reg. Part 4, 3 N.Y.C.R.R. § 4.1 (1969) 28n

PAGE

N.C. GEN. STAT.
§ 7A-314 (Supp. 1971) 38n
N.D. CENT. CODE
§ 28-26-06(5) (Supp. 1971) 38n

Revised Statutes of 1874
Section 966 ..... 27n
Section 4919 ..... 25n
Section 4921 ..... 25n
Act of August 1, 1946, ch. 726, § 1, 60 STAT. 778 ..... 25n
R.I. GEN. LAWS ANN.
§ 9-21-10 (Supp. 1971) 15n

SHERMAN ACT, Section 7, Act of July 2, 1890, ch. 647, Sec. 7, 26 STAT. 210, *repealed*, Act of July 7, 1955, ch. 283, 69 STAT. 283, eff. January 7, 1956 ..... 40 & n
S.C. CODE ANN.
§ 10-1605 (1962) 26
S.D. COMPILED LAWS ANN.
§ 21-1-13 (1967) 16n

VA. CODE ANN. § 8-223 (1950) 16n

WIS. STAT. ANN.
§ 271.04(4) (Supp. 1972-73) 26
WYO. STAT. ANN.
§ 1-195 (Supp. 1971) 38n

Miscellaneous Authorities

PAGE

56 FEDERAL RESERVE BULLETIN, No. 12 (December 1970) 22n

J. D. Guilfoil,
Damage Determination in Private Antitrust Suits, 42 NOTRE DAME LAW. 647 (1967) 14-15

H.R. REP. No. 1587, 79th Cong., 2d Sess., 1946 U.S. CODE CONG. & ADMIN. NEWS, p. 1387 ..... 25n

N. Leonard,
The Measurement of Damages: An Economist's View, 31 OHIO ST. L.J. 687 (1970) 36

McCORMICK ON DAMAGES
§ 56 (1935) 15

6 J. MOORE, FEDERAL PRACTICE
¶ 54.70[1] (2d ed. 1971) 42

New York Law Journal, May 26, 1972 ..... 28n

NEW YORK LEGISLATIVE RECORD & INDEX, vol. I (1972) .. 28n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-830

TRANS WORLD AIRLINES, INC.,

Cross-Petitioner,

—v.—

HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR CROSS-PETITIONER TRANS WORLD AIRLINES, INC.

Opinions Below

The decision of the United States Court of Appeals for the Second Circuit under review is reported at 449 F.2d 51 (A-2739 *et seq.*).* It affirmed decisions in favor of plain-

* Citations with the prefix "A-" are to volumes A-I through A-VII of the printed Appendix and those with the prefix "AX-" are to volumes AX-I through AX-VII of the printed Appendix of Exhibits, filed with this Court in Nos. 71-827 and 71-830; citations to "Doc." are to documents in the original record certified to this Court in Nos. 71-827 and 71-830 and not otherwise reproduced; those with the prefix "Tr." refer to pages of the stenographic transcript of the damage hearing before Special Master Herbert Brownell (Doc. 554); citations to "TWA Ex." are to the exhibits offered by TWA in the damage hearing. Citations to "Brownell Report" are to the Report of the Special Master (Doc. 508), a copy of which is bound into volume A-V of the printed Appendix following p. A-1966.

tiff Trans World Airlines, Inc. ("TWA") and against defendants Hughes Tool Company ("Toolco") and Raymond M. Holliday by the United States District Court for the Southern District of New York, reported at 308 F.Supp. 679 (A-2027 *et seq.*) and 312 F.Supp. 478 (A-2060 *et seq.*), which in turn had confirmed in its entirety and entered judgment upon a Report and Award by the Special Master, Hon. Herbert Brownell ("the Brownell Report") (A-1966).

Earlier decisions in the litigation include an opinion and order of the district court on May 3, 1963, directing entry of an interlocutory default judgment for TWA against the defendants, and a final judgment dismissing Toolco's counterclaims, reported at 32 F.R.D. 604 (A-317 *et seq.*); and a unanimous decision in TWA's favor in 1964, written by Chief Judge Lumbard, affirming the district court's May 3 decision in all pertinent respects, reported at 332 F.2d 602 (A-328 *et seq.*). Writs of certiorari to the court of appeals with respect to its 1964 judgments (A-324-27) were dismissed by this Court at the October 1964 Term, after full briefing and argument, as having been improvidently granted, 380 U.S. 248, 249 (1965) (A-2737-38).

Jurisdiction

The judgment of the court of appeals was entered on September 1, 1971. Defendants' petition for rehearing was denied on September 28, 1971 (A-2799). TWA's cross-petition was filed December 23, 1971, and was granted and consolidated for argument with defendants' petition in No. 71-827 on February 22, 1972, 405 U.S. 915. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statutory Provision Involved

Clayton Act, Section 4,
United States Code, Title 15:

"§ 15. *Suits by persons injured; amount of recovery.*

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (38 STAT. 731 (1914))

Questions Presented

1. Whether under Section 4 of the Clayton Act a plaintiff can recover, as an element of actual damages, interest on losses of revenue for the period commencing after those losses were experienced to the entry of final judgment (here the period between December 31, 1963 and April 14, 1970)?

2. Alternatively, whether in a suit in which the determination of the amount of damages was referred to a special master, whose award of damages was thereafter confirmed in all respects by the district court, a plaintiff is entitled to recover interest on the amount thus determined for the period from the date the master's report was filed to the date final judgment was entered (here the period from September 21, 1968 to April 14, 1970)?

3. Whether, in determining TWA's actual net loss attributable to defendants' unlawful activities, the Special

Master should have deducted from TWA's proven lost revenues a "cost of capital" based on the lower interest rates which defendants prevented TWA from securing rather than the higher rates which TWA incurred later?

4. Whether under Section 4 of the Clayton Act a successful plaintiff is entitled to recover, as a part of his "cost of suit," the expense of retaining experts to establish the amount of damages?

Statement of the Case

(Limited to Issues of TWA's Cross-Petition)

In this statement we will not attempt to set out fully the facts of the case as we view them; such a statement will be reserved for our brief on the issues raised by defendants' petition in No. 71-827. We set out here only the facts pertinent to a consideration of the narrow legal issues as to computation of damages, interest and cost of suit, which are raised by TWA's cross-petition in No. 71-830.

On June 30, 1961 TWA filed its complaint against defendants Howard R. Hughes, Hughes Tool Company ("Toolco") and Raymond M. Holliday (A-1 *et seq.*) in the Southern District of New York seeking treble damages pursuant to Section 4 of the Clayton Act.[1]

On August 31, 1961 the case was assigned for all purposes to District Judge Charles M. Metzner pursuant to Rule 2

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[1] TWA also sought equitable relief under Section 16 of the Clayton Act, 38 STAT. 737 (1914), 15 U.S.C. § 26, but this request became moot in 1966 when Toolco disposed of its interest in TWA at a profit of $452 million.

of the General Rules for the Southern District of New York (A-33), and from then on Judge Metzner continued in charge of the case.

Defendants obtained priority under the then practice in the Southern District of New York (A-2077) and conducted discovery of TWA for one and a half years. Then, on February 8, 1963, in defiance of the district court's order that Toolco produce Hughes for his deposition, pursuant to Toolco's undertaking to do so and following acceptance by Hughes of a witness subpoena (A-123-24), and also in defiance of several outstanding orders for the production of certain vital documents (A-133-36, A-304-05; A-2268-69, A-124-26, A-305-06), defendants formally and expressly refused, as the result of what they called a "business decision", to continue with pretrial or trial of the case (A-268-69).

On February 16, 1963 TWA filed its formal motion for a default judgment (Doc. 180). On May 3, 1963 the district court, pursuant to Fed.R.Civ.P. 37, entered a default judgment against defendants on TWA's complaint, directing that the amount of TWA's damages be determined by a special master (A-321). On the basis of Toolco's default, the district court also entered a judgment dismissing Toolco's counterclaims against TWA and certain other parties (A-323). Defendants were granted a permissive appeal under 28 U.S.C. § 1292(b) with respect to the interlocutory judgment of default upon TWA's complaint (A-2736), and Toolco appealed as of right from the final judgment dismissing its counterclaims. The court of appeals on June 2, 1964 unanimously affirmed the decisions of the district court in all respects presently material (332 F.2d 602, A-328 *et seq.*).

Petitions for certiorari were granted as to both appeals (379 U.S. 92, A-2737); after full briefing and oral argument, this Court on March 8, 1965 dismissed the writs as improvidently granted (380 U.S. 248, 249, A-2738). This Court thereby left standing both the final judgment dismissing Toolco's counterclaims against TWA and certain other parties, and TWA's interlocutory default judgment against defendants for an amount of damages which had yet to be determined.

After remand, and following the appointment of Hon. Herbert Brownell as Special Master, the damage hearing commenced. At the Special Master's direction TWA submitted all of its direct testimony in written form on May 2, 1966, and tendered its witnesses for cross-examination. This was one day short of three years after entry of the default judgment against defendants. The cross-examination of TWA's witnesses consumed nearly 9 months, and was followed by TWA's cross-examination of defendants' witnesses on the basis of their written reports, which consumed eight and one-half months. On March 27, 1968 TWA put in a short rebuttal case, and defendants' cross-examination on the redirect testimony took place on April 9, 1968. The damage hearing was then closed.

The Special Master's Report, totalling 323 printed pages, was filed on September 21, 1968. Mr. Brownell found that TWA had proved it suffered a loss in its 1959-1963 operating profits totalling $74.3 million as a consequence of defendants' conspiracy to restrain and monopolize and their attempt to monopolize. He found that these losses resulted from TWA's receiving too few jets too late and from the fact that it could not buy jets in 1959-1960 but was forced to lease them from Toolco. From that amount the Special

Master then deducted a "cost of capital" of $29 million (Brownell Report, pp. 158-67, 184-85, 322; A-1966). This sum was the amount of the interest which he determined that TWA would have had to pay on the additional capital investment necessary to purchase a 63-plane jet fleet on the schedule established by the testimony of its witnesses, including jets that defendants had denied TWA and jets which TWA had been required to lease from Toolco. In calculating this "cost of capital", the Special Master used interest rates of 6 per cent and 6.3 per cent (the rates he concluded TWA would have had to pay to borrow money in 1959 and 1960) and not the lower rates of 4 per cent to 4¾ per cent at which borrowings could have been arranged in 1955 and 1956 as alleged in the complaint (Complaint, pars. 23, 26-28, A-15-16).

By deducting the $29 million "cost of capital" from TWA's proven $74.3 million loss in operating profits, the Special Master derived a net operating loss of $45.3 million, to which he added the sum of $570,478.65, representing additional proven losses sustained by TWA through disruption of certain training operations. The Special Master thus found that, as a result of defendants' antitrust violations, as of December 31, 1963 TWA had been damaged in the total amount of $45,870,478.65 before trebling (Brownell Report, p. 322; A-1966). However, the Special Master declined to make a further award of interest as damages ("prejudgment interest"), concluding that such an award is not legally available in treble damage antitrust suits (Brownell Report, pp. 309-18; A-1966).

While defendants below challenged the amount of damages found by the Special Master, they have not, in their petition in No. 71-827, sought further review of that determination by this Court. It is now undisputed that TWA

suffered losses of at least $45,870,478.65 from the specific injuries alleged in the complaint.[2]

Approximately a year and a half was then occupied with the district court's review and confirmation of the damage award. In an opinion on December 23, 1969 Judge Metzner considered and overruled all of the objections to the Special Master's Report filed by defendants and by TWA, and confirmed the Report in its entirety (308 F.Supp. 679, A-2027 *et seq.*); in an opinion on April 13, 1970 he ruled upon TWA's application for its cost of suit including a reasonable attorney's fee (312 F.Supp. 478, A-2060 *et seq.*). In those opinions, he rejected TWA's contention that the Special Master had deducted too large a "cost of capital" in fixing TWA's net operating losses (308 F. Supp. at 694, A-2054-55), affirmed the Special Master's ruling disallowing prejudgment interest (308 F.Supp. at 696, A-2058-59), and rejected TWA's alternative claim for interest from the filing of the Brownell Report to entry of judgment (312 F.Supp. at 485, A-2072). Upon TWA's application for its cost of suit, Judge Metzner awarded TWA $7,500,000 as a reasonable attorney's fee and $336,705.12 as taxable costs. He held as a matter of law, however, that TWA was entitled to recover as its cost of suit only such of its reasonable and necessary out-of-pocket expenses in prosecuting the action (other than attorney's fees) as are normally recovered as taxable costs; he therefore denied the rest of TWA's claim for its actual expenditures, principally consisting of the fees and expenses TWA paid to its expert witnesses at the damage hearing (312 F.Supp. at

[2] Indeed, Toolco itself had asserted in its counterclaims filed early in 1962 that TWA had suffered losses of this magnitude as a result, *inter alia*, of late deliveries of jets and borrowings at too high interest rates (Toolco Answer, pars. 98-99, A-89-90).

485, A-2071-72). On April 14, 1970 Judge Metzner entered final judgment for TWA in the amount of $147,448,141.07 (A-2073).

Another year and a half was spent in briefing, argument and determination of appeals to the court of appeals. That court on September 1, 1971 handed down a unanimous opinion affirming the judgment of the district court in all respects (except for increasing the rate of interest on the judgment to 7½ per cent per annum from entry of judgment, in accordance with applicable New York law and 28 U.S.C. § 1961 (449 F.2d at 80-81, A-2796-97)).

Review in this Court will extend this case well into its twelfth year, with the first eleven years having been spent as follows:

Period from filing of complaint (6/30/61) to defendants' formal announcement of a "business decision" that they would not continue with pretrial or trial of the case (2/8/63)	1 yr. 7 mos.
Period from defendants' refusal to proceed (2/8/63) to entry of final judgment dismissing Toolco's counterclaims and entry of interlocutory judgment in favor of TWA for damages yet to be assessed (5/3/63)	3 mos.
Period from entry of judgments (5/3/63) to disposition of appeals in this Court (3/8/65)	1 yr. 10 mos.
Period from disposition of appeals (3/8/65) to the filing of the Brownell Report (liquidating TWA's damage claim) (9/21/68)	3 yrs. 6 mos.

Period from filing of Brownell Report (9/21/68) to entry of final judgment for TWA (4/14/70) ..... 1 yr. 7 mos.

Period of appellate review from entry of judgment (4/14/70) to June 30, 1972 .... 2 yrs. 3 mos.

At the damage hearing it was established that defendants' conduct resulted in losses of operating revenues to TWA which continued through the year 1963. As of December 31, 1963 the amount of these losses (after deduction of the cost of capital applied by the Special Master) aggregated $45,870,478.65. Defendants' responsibility to pay whatever damages might be determined to exist was settled on February 8, 1963 when Toolco announced its business decision to default—or, at the latest, on May 3, 1963, with the entry of a default judgment in TWA's favor. The more than six years to the entry of final judgment for TWA on April 14, 1970 is a period during which TWA was deprived through no fault of its own of the use of moneys which it would have had in hand, absent defendants' wrongdoing.

Summary of Argument

The care with which the Special Master weighed the evidence presented at the damage hearing is apparent in his 323-page Report. Both courts below in their opinions analyzed the record and the applicable law and concluded that the Special Master's determinations were in every instance sound and well supported. TWA is not challenging in this Court any of the findings of fact made below. The questions presented in TWA's cross-petition are specific, narrow questions of law and policy.

I. It is the general rule in federal cases that, where necessary to compensate the plaintiff fully for his injuries, interest may be awarded as an element of plaintiff's actual damages from the date when the damages were sustained to the entry of judgment. There is nothing in the language or legislative history of Section 4 of the Clayton Act to support the ruling of the court of appeals below that this general federal rule is inapplicable to private antitrust cases. The early federal cases support the discretionary award of such prejudgment interest. By denying the recovery of prejudgment interest as a matter of law, the Second Circuit below and the Seventh Circuit in *Locklin* v. *Day-Glo Color Corp.*, 429 F.2d 873, 877 (7th Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971), have failed to give effect to the mandate of Section 4 of the Clayton Act that a private antitrust plaintiff recover threefold "the damages by him sustained."

II. If TWA is not entitled to prejudgment interest from the close of the period during which its operating losses were sustained to the entry of judgment, TWA is at least entitled to compensation for the delay between the initial determination of the amount of its damages by the court's Special Master and the entry of judgment thereon by the district court. That interest on a master's award subsequently confirmed should run from the date of the award has been firmly established by decisions of this Court for nearly a hundred years. *Illinois Central R.R.* v. *Turrill*, 110 U.S. 301, 303 (1884); *Tilghman* v. *Proctor*, 125 U.S. 136, 160-61 (1888); *Crosby Steam Gage & Valve Co.* v. *Consolidated Safety Valve Co.*, 141 U.S. 441, 458 (1891). Those decisions involved patent cases, but no statutory reason or policy ground exists for restricting the principle to such cases. As announced, the rule was one of general

applicability, and to deprive a successful antitrust plaintiff of its benefit violates the congressional policy expressed in Section 4 of the Clayton Act.

III. TWA's complaint includes specific well-pleaded allegations that defendants, in furtherance of their antitrust violations, prevented TWA from arranging financing for jet aircraft in 1955 and 1956, when its competitors were arranging financing at rates of 4 per cent to 4¾ per cent per annum. These allegations were admitted by defendants' default. In calculating the "cost of capital" to TWA of financing a full 63-plane jet fleet, the Special Master did not give effect to these allegations and instead charged TWA with interest at the rates of 6 per cent to 6.3 per cent which TWA paid when it borrowed money at a later date. The Special Master's failure to utilize the lower rates available in 1955 and 1956 permits defendants to profit by their own wrongdoing.

IV. By adhering to the analysis of Section 4 of the Clayton Act in *Straus* v. *Victor Talking Machine Co.*, 297 F. 791, 806-07 (2d Cir. 1924), the court of appeals has failed to recognize the mounting cost to private antitrust plaintiffs of expert witnesses essential to the successful proof of damages resulting from violations of the antitrust laws. The strained and illogical construction of Section 4 adopted by the court in *Straus* limits the recovery of "cost of suit" to that small portion of the antitrust plaintiff's actual and necessary out-of-pocket expenditures which are ordinarily awarded to any successful plaintiff as taxable costs without special statutory provisions. Such a construction makes the statutory phrase mere surplusage and does violence to the purpose and plain meaning of Section 4. The logical interpretation of the language which Congress chose is

that a successful antitrust plaintiff was intended to be specially favored by recovering the actual "costs of the litigation." *Cf. Hawaii* v. *Standard Oil Company of California,* 405 U.S. 251, 266 (1972).

ARGUMENT

I.

The decisions below erroneously excluded prejudgment interest from consideration as an element of damages under Section 4 of the Clayton Act.

Section 4 of the Clayton Act provides that a person injured by a violation of the antitrust laws "shall recover threefold the damages by him sustained." The court of appeals, affirming the decisions of the district court and the Special Master, held that, as a matter of law, the trier of fact in a private treble damage antitrust case does not have discretion to award interest upon the damages established from the last date when the harmful effects of the defendants' illegal activities were sustained (here December 31, 1963) to entry of judgment (here April 14, 1970) (449 F.2d at 80, A-2795).

This ruling misinterprets the plain words of Section 4 of the Clayton Act.

In this case, the period of time from December 31, 1963 to the entry of judgment was six years, three months and 14 days (or 6.28 years). During that period TWA was deprived of the money which it would have had but for defendants' wrongdoing and which, as part of TWA's earning base, would have strengthened the airline's weakened financial structure—the legacy of its captivity by defendants (Complaint, pars. 52(d) and 53(a), A-26). At the same time, defendants, who on February 8, 1963 had an-

nounced their readiness to pay such damages as TWA could prove (A-297), retained under their control, and invested as they saw fit, the funds necessary for such payment.

The general federal rule is that interest may be awarded as an element of damages, whether the claim is liquidated or unliquidated and whether it sounds in contract or in tort, where necessary to make the plaintiff whole for the injuries sustained because of the defendant's wrongdoing. *Miller* v. *Robertson,* 266 U.S. 243, 258 (1924) ("• • • when necessary in order to arrive at fair compensation, the court in the exercise of a sound discretion may include interest or its equivalent as an element of damages"); *Marshfield Steel Co.* v. *NLRB,* 324 F.2d 333, 338 (8th Cir. 1963) (award of back pay by N.L.R.B.); *Moore-McCormack Lines, Inc.* v. *Richardson,* 295 F.2d 583, 592-95 (2d Cir. 1961), *cert. denied,* 368 U.S. 989 (1962) (recovery of pecuniary loss under Death on the High Seas Act); *Norte & Co.* v. *Huffines,* 416 F.2d 1189, 1191-92 (2d Cir. 1969), *cert. denied,* 397 U.S. 989 (1970) (judgment in derivative suit for securities fraud).

The prime consideration in determining whether to include interest as damages is whether such interest would in fact be "compensatory." *Rodgers* v. *United States,* 332 U.S. 371, 373 (1947); *Norte & Co.* v. *Huffines, supra* at 1191. Where the plaintiff has been deprived of the use of a sum of money by the defendant's wrongdoing, the inability to use the money is a real injury resulting from the wrong, for which he is entitled to be compensated. *Louisiana & Arkansas Ry.* v. *Export Drum Co.,* 359 F.2d 311, 317 (5th Cir. 1966); *Petition of City of New York,* 332 F.2d 1006 (2d Cir.), *cert. denied,* 379 U.S. 922 (1964). *See also* J. D. Guilfoil, *Damage Determina-*

tion in Private Antitrust Suits, 42 NOTRE DAME LAW. 647, 655 (1967).

In state courts, too, on the basis of either case law or legislative enactment, the recovery of interest as damages in noncontract cases is commonly permitted, either as a matter of right or in the discretion of the trier of fact.[3] Writing in 1935, Professor McCormick said of the class of cases "where the sum claimed is neither 'liquidated' nor based on standardized valuation, but yet is pecuniary in its nature":

> "The earlier judges, with their distaste for interest upon unliquidated claims where the debtor cannot know the precise sum which the law will exact, frowned upon interest in this class of claims, but the marked tendency to-day is toward the allowance of interest in such cases." MCCORMICK ON DAMAGES, § 56, p. 222.

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[3] *See, e.g., as of right:* COLO. REV. STAT. ANN. § 41-2-1 (1963) (actions for personal injuries from date suit is filed); LA. REV. STAT. ANN. § 13:4203 (West 1968) (legal interest from date of judicial demand on damages "ex delicto"); Title 14, ME. REV. STAT. ANN. § 1602 (Supp. 1972) (all civil actions from date complaint filed); MICH. COMP. LAWS ANN. § 600.6013 (1968) (any money judgment in a civil action from date complaint filed); R. I. GEN. LAWS ANN. § 9-21-10 (Supp. 1971) (actions for damages in which there is a verdict or a decision for pecuniary damages from date of commencement of action); *Hobart* v. *O'Brien,* 243 F.2d 735, 745 (1st Cir.), *cert. denied,* 355 U.S. 830 (1957) (applying MASS. GEN. LAWS ANN. ch. 231, § 6(B) (1956), subsequently amended in respect not here pertinent (Supp. 1971), to negligence action for personal injury and property damage); *First Nat'l Bank of Hollywood* v. *American Foam Rubber Corp.,* 309 F. Supp. 545, 546 (S.D. N.Y. 1969) (applying New York law to counterclaim charging conspiracy to injure or destroy bankrupt's business—interest on lost profits from "outside date" of loss); *E. M. Fleischmann Lumber Corp.* v. *Resources Corp. Int'l,* 114 F. Supp. 843, 844-46 (D. Del. 1953), *aff'd,* 211 F.2d 204 (3d Cir. 1954) (applying Del. law—all tort cases generally, except for personal injury, defamation, etc.); *Hunt* v. *Ward,* 262 Ala. 379, 79 So.2d 20, 25-26 (1955) (property damage tort cases if standard by which to measure damages is fixed by law); *Farmers Ins. Exchange* v. *Henderson,* 82

The primary consideration should be fair compensation of the plaintiff for the full extent of his injury.[4]

Ariz. 335, 313 P.2d 404 (1957) (action for loss or destruction of going business—likened to conversion of property); *Crosby* v. *Kroeger,* 138 Colo. 55, 330 P.2d 958, 963 (1958) (personal injuries); *Bridenstine* v. *Iowa City Elec. Ry.,* 181 Iowa 1124, 165 N.W. 435, 439-40 (1917) (suit to recover damages for death due to defendant's negligence); *Pepin* v. *Beaulieu,* 102 N. H. 84, 151 A.2d 230, 235 (1959) (negligence action for personal injury and property damage—applying N. H. REV. STAT. ANN. § 524:1-b (Supp. 1971)); *Texas Co.* v. *State,* 154 Tex. 494, 281 S.W.2d 83, 89 (1955) (in recovery for torts against property, even though damages unliquidated, if they have become fixed at a definite time); *Fell* v. *Union Pac. Ry.,* 32 Utah 101, 88 P. 1003, 1005-06 (1907) (tort actions for injury to or destruction of property).

Discretionary: CAL. CIV. CODE § 3288 (West 1970) (in cases of oppression, fraud, or malice); MO. ANN. STAT. § 537.520 (1953) (in jury's discretion in actions for wrongful detention or conversion of property); S.D. COMPILED LAWS ANN. § 21-1-13 (1967) ("In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given in the discretion of the jury"); VA. CODE ANN. § 8-223 (1950) (in action on contract or tort, from date fixed by jury); *Robert C. Herd & Co.* v. *Krawill Mach. Corp.,* 256 F.2d 946, 952-53 (4th Cir. 1958), *aff'd,* 359 U.S. 297 (1959) (applying Md. law—negligence action for damage to property); *Speed* v. *Transamerica Corp.,* 135 F. Supp. 176 (D. Del. 1955), *modified & aff'd,* 235 F.2d 369 (3d Cir. 1956) (action for fraud—Kentucky law applied to common law count and federal law applied to counts alleging SEC violations); *Kennedy* v. *Clayton,* 216 Ark. 851, 227 S.W.2d 934, 939 (1950) (damage to property); *Wells Laundry & Linen Supply Co.* v. *Acme Fast Freight, Inc.,* 138 Conn. 458, 85 A.2d 907, 909-10 (1952) (injury to property—damages unliquidated); *Marrazzo* v. *Scranton Nehi Bottling Co.,* 438 Pa. 72, 263 A.2d 336, 337 (1970) (negligent damage to property); *Pettingill* v. *Kelton,* 124 Vt. 472, 207 A.2d 245, 248 (1965) (negligently inflicted injury).

[4] *See, e.g., Robert C. Herd & Co.* v. *Krawill Mach. Corp., supra* at 953 (plaintiff compelled to expend large sums of money over a period of years as a result of defendants' wrongs would be denied full compensation if prejudgment interest was not recoverable); *E. M. Fleischmann Lumber Corp.* v. *Resources Corp. Int'l, supra* at 844 ("Adequate compensation is the fundamental principle of damages and the additional compensation for the detention of the damages, measured by the allowance as interest, is permitted in

At the time the Clayton Act was passed, the general federal rule, permitting the award of interest on a sum found due (even though unliquidated) from the time a plaintiff should have had the sum as an element of his actual damages, was already well established. *Eddy* v. *Lafayette,* 163 U.S. 456, 467 (1896) (negligent damage to property); *New Dunderberg Mining Co.* v. *Old,* 97 F. 150, 153-55 (8th Cir. 1899) (wrongful conversion of property); *Brent* v. *Thornton,* 106 F. 35, 38 (5th Cir. 1901) (illegal seizure and detention of property). The practice of awarding interest as damages in such a case long predated the adoption even of the Sherman Act. *Lincoln* v. *Claflin,* 7 Wall. 132, 139 (1868) (fraudulent obtaining of property).

It may be argued that the antitrust plaintiff's right to treble damages justifies restricting the computation of his actual damages more narrowly than might otherwise be

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order to make the awarded damages adequate in amount."); *Bridenstine* v. *Iowa City Elec. Ry., supra* 165 N.W. at 440 ("* * * where payment is resisted and the obligation is denied until the case has been prosecuted to final judgment after the lapse of months or perhaps years, an allowance of interest is quite essential to the accomplishment of full justice."); *DeLong Corp.* v. *Morrison-Knudson Co.,* 20 App. Div.2d 104, 105-06, 244 N.Y.S.2d 859, 861 (1st Dep't 1963), *aff'd,* 14 N.Y.2d 346, 200 N.E.2d 557 (1964) ("* * * in the case of intentional tort resulting in pecuniary injury measurable by economic standards and not involving personal injuries, interest must be added if the victim of the tort is to be made whole."); *Emery* v. *Tilo Roofing Co.,* 89 N.H. 165, 195 A. 409, 412-13 (1937) (liquidated-unliquidated distinction must give way to "* * * fundamental principle that damages in a given case should give full compensation for the loss sustained. * * * Where property has been wrongfully taken, detained, destroyed, or damaged and the owner thereby deprived of its use, full compensation may often require that judgment be given for an amount sufficient to put the owner in as good a position as he would occupy if payment had been made contemporaneously with the loss."); *Colonial Refrigerated Transp., Inc.* v. *Mitchell,* 403 F.2d 541, 555 (5th Cir. 1968) (applying Texas law: "The damages suffered by the loss of use of money are real damages").

appropriate, perhaps by analogy to decisions under state law which have denied interest where "exemplary" or "punitive" damages are awarded.[5] But the express statutory mandate of the Clayton Act requires trebling the "damages by him sustained", and nothing in the statute suggests that those damages should be subject to any special limitations or exclusions. Indeed, not a shred of legislative history that we are aware of even hints at an intention to change the general rules as to how the amount of actual damages should be determined.

In the only early reported cases on the point, the possibility of interpreting the treble damage provisions of the antitrust laws as precluding application of the principles of *Lincoln* v. *Claflin, supra,* does not appear to have occurred to the courts. It was assumed instead that a private antitrust plaintiff—like any other plaintiff—could recover prejudgment interest as damages. *See Thomsen* v. *Cayser,* 243 U.S. 66, 74, 88-89 (1917), in which this Court cited the fact that the jury had added interest to the damages as confirming that the verdict was not based on "supposititious profits" but on actual calculation. *See also United Mine Workers* v. *Coronado Coal Co.,* 258 F. 829, 846-47 (8th Cir. 1919), *rev'd on other grounds,*

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[5] *Riss & Co.* v. *Feldman,* 79 A.2d 566 (D.C.Mun.Ct.App. 1951) (interest not allowable on punitive damages except as additional punishment); *Schulte* v. *Louisville & N.R.R.,* 128 Ky. 627, 108 S.W. 941, 942-43 (1908) (dictum—no interest recoverable where exemplary damages allowed); *Rayonier, Inc.* v. *Polson,* 400 F.2d 909, 922 (9th Cir. 1968) (Washington treble damage statute for wrongful removal of timber is penal in character and must be strictly construed—no interest on award). A somewhat different approach is taken in *DeLaughter* v. *Borden,* 431 F.2d 1354, 1359 (5th Cir. 1970), which approves the allowance of prejudgment interest by the district court, limited to the single damage portion of a treble damage award for violation of a Louisiana milk marketing statute.

259 U.S. 344 (1922), which notes that *Thomsen* v. *Cayser* is a particular application of the rule of *Lincoln* v. *Claflin*, and holds that prejudgment interest (awarded by the district court in that case as a matter of law) should have been left to the jury as a matter of damages.

To support its contrary holding, the Second Circuit below relied principally on *Locklin* v. *Day-Glo Color Corp.*, 429 F.2d 873, 877 (7th Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971), which held that a private antitrust plaintiff is not entitled to recover interest as an element of his damages because the damages are trebled. The Seventh Circuit in *Locklin* cited no authority for this proposition and gave no explanation for rejecting the plaintiff's argument there that the general tort rule permitting interest as damages should apply.

The Second Circuit, on the other hand, did discuss briefly the reasons for reaching the same conclusion as the court in *Locklin*. In addition to asserting that trebling of the damages "will more than adequately compensate TWA for its injuries," the court below stated that it is reasonable to interpret congressional silence on the matter "as indicating that trebled damages are sufficient penalty and that interest need not be included" (449 F.2d at 80, A-2795). Like the court in *Locklin*, the court below did not explain what basis there is for rejecting the much more logical assumption that Congress intended by its silence to adopt the prevailing practice concerning the measure of damages available in tort actions.

In addition to the *Locklin* case, the court of appeals cited two decisions of this Court in other fields as authority for its holding: *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697 (1945), and *Rodgers* v. *United States*, 332 U.S. 371

(1947). These cases deal with two quite different statutory schemes, and in neither did this Court suggest that there was any overriding general principle to be applied.

The *Brooklyn Savings Bank* case involved a suit for back wages plus interest from the date when the wages were due under the Fair Labor Standards Act of 1938, which expressly provides in Section 16(b), 52 STAT. 1069 (1938), 29 U.S.C. § 216(b) (1970), for recovery of any unpaid wages plus "an additional equal amount as liquidated damages." Citing its earlier decision in *Overnight Motor Transp. Co.* v. *Missel*, 316 U.S. 572 (1942), that such "liquidated damages," which are geared to unpaid back wages, are intended to compensate for delay in payment for sums due under the Act—the delay which is compensated for in tort cases by prejudgment interest—this Court held that prejudgment interest should not be awarded in addition to such "liquidated damages." However, there is nothing in the language or history of Section 4 of the Clayton Act to indicate that the trebling of damages thereunder is intended to compensate for delay in payment or that it is intended to constitute "liquidated damages" in lieu of actual damages.

In the *Rodgers* case, this Court held that penalties payable to the United States under the Agricultural Adjustment Act of 1938, 52 STAT. 31 (1938), 7 U.S.C. § 1281 (1970), by a farmer who had exceeded his agricultural quota for cotton were most closely analogous to criminal fines, as to which it is well established that no interest is payable. Fines, of course, do not reflect a measurable loss suffered by the Government, and cannot reasonably be considered to be compensatory in the sense that the actual damages recovered by a private antitrust plaintiff, *i.e.*, "the damages by him sustained," are compensatory. 332

U.S. at 374. Therefore, since the language and purpose of Section 4 is so completely different from the statutes in *Brooklyn Savings Bank* and *Rodgers*, the interpretation given to those statutes by this Court is inapplicable to the Clayton Act, and neither case lends support to the decision of the Second Circuit below or that of the Seventh Circuit in *Locklin*.

The court below also indicated some reluctance to become involved in what it considered to be the "difficult and time-consuming inquiries" required to determine the amount of prejudgment interest to which TWA is entitled (449 F.2d at 80, A-2795). Without agreeing with the court's characterization, TWA is prepared, in order to avoid any possibility that such a problem might arise, to accept the following basis of computation, which is the most favorable to which the defendants might be entitled:

(1) The date from which the prejudgment interest is to run can be fixed at the latest possible date—that is, the last day when TWA has proved it was still suffering direct injuries from defendants' conduct, thus disregarding the fact that some of the proven losses were experienced as early as the first quarter of 1959. *Cf. Colonial Refrigerated Transp., Inc.* v. *Mitchell*, 403 F.2d 541, 554-55 (5th Cir. 1968). This latest possible date for the commencement of interest charges would be December 31, 1963.[6]

[6] TWA's expert Wemple testified that, since by the end of 1963 TWA had historically come within five aircraft of the full 63-plane fleet which it would have had but for defendants' wrongdoing, he had recommended that the computation of estimated changes in TWA's operating results not be continued beyond that point (AX-99-100; Wemple Tr. 4902). The period covered by the damage studies of TWA's experts was accepted by the Special Master as the proper period within which to examine the effects on TWA of the defendants' unlawful conduct (Brownell Report, pp. 79, 141-43; A-1966).

(2) The rate of interest can be fixed at the lowest arguably compensatory figure—that is, the lowest point reached by the prime rate during the entire period from the end of 1963 to 1970. This lowest possible rate would be 4½ per cent,[7] a rate which throughout the period was well below both the legal rate established in New York[8] and the actual cost to TWA of any of its borrowings.[9] The amount of prejudgment interest to which TWA is entitled can thus be computed as follows:[10]

TWA's proven losses:	$45,870,478.65
rate of interest:	.045
number of years (12/31/63 to 4/14/70):	6.28
$45,870,478.65 × .045 × 6.28 =	$12,962,997.26
	× 3 (trebling)
	$38,888,991.78

[7] The prime rate increased steadily during this period of time: 4½% in 1963, 4½-5% in 1964-65, 5-6% in 1966-67, 6-6¾% in 1968, and 7-8½% in 1969-70. 56 FED. RESERVE BULL., No. 12, p. A33 (December 1970).

[8] Under N.Y. GEN. OBLIG. LAW § 5-501 (McKinney 1964), the legal rate of interest was 6% per annum until July 1, 1968 when it was increased to 7¼%; it was then raised to 7½% effective February 16, 1969 (see note 14, p. 28 *infra*).

[9] TWA actually paid well above the prime rate on borrowings of over $160 million in 1963-66 (TWA Exs. 96-99). TWA continued to pay for its money at or above the prime rate throughout the rest of the period through 1970, as its annual reports, available to the public, demonstrate.

[10] An alternative calculation to reflect the fact that TWA is entitled to have its damage award increased as set forth in Point III *infra* is set out as Annex A at the end of this brief.

II.

Alternatively, the decisions below erroneously failed to allow interest on the Special Master's award for the period between the filing of his Report and the entry of judgment.

If this Court should hold that TWA is not entitled to prejudgment interest from the last date when it directly sustained damages as a result of defendants' wrongdoing until the entry of judgment, as set forth in Point I above, then TWA is still entitled to the compensation for delay which is customary in cases where the determination of damages is referred to a master and the master's award is subsequently confirmed by the district court—*i.e.*, TWA should receive interest from the filing of the Brownell Report to the entry of judgment confirming that Report. By denying TWA this compensation for delay, the district court (312 F.Supp. at 485, A-2072) and the court of appeals (449 F.2d at 80, A-2795-96) accorded to defendants for that 19-month period the interest-free use of money to which TWA had been judicially determined to be entitled. *Tilghman* v. *Proctor*, 125 U.S. 136 (1888).[11] This de-

[11] In *Tilghman* v. *Proctor*, a patent infringement case, the Court first noted that, under existing prior decisions, the plaintiff's claim was one for "unliquidated damages, which, as a general rule, and in the absence of special circumstances, do not bear interest until after their amount has been *judicially ascertained* • • •" (125 U.S. at 160; emphasis added). It went on to say:

"Nothing is shown to take this case out of the general rule. At the time of the infringement, the fundamental questions of the validity and extent of Tilghman's patent were in earnest controversy and of uncertain issue. *Interest should therefore be allowed, as in Illinois Central Railroad* v. *Turrell, just cited, only from the day when the master's report was submitted to the court* • • • upon the amount shown to be due by that report and the accompanying evidence." (125 U.S. at 161; emphasis added.)

nial placed upon TWA the entire cost of the delay from referring the question of damages to a special master.

Some delay is virtually inevitable whenever the question of damages is referred to a special master, particularly in a complex private antitrust action, since—whatever the gain in judicial efficiency—an additional layer of judicial review is involved, and that takes time. In this case it took one year and seven months. The policy underlying Section 4 of the Clayton Act can be completely effectuated only by minimizing the adverse impact of such a delay upon the plaintiff. However necessary the reference may be in such a case, this necessity arises not from anything done by the plaintiff, but from defendants' wrongdoing for which Section 4 is intended to provide a remedy.

This Court has previously expressed its concern that parties not be unnecessarily penalized by references to masters. *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 256 (1957); *Los Angeles Brush Mfg. Corp.* v. *James*, 272 U.S. 701, 707 (1927). There is no logical reason why such a delay should operate to the monetary prejudice of the plaintiff when there is available the simple solution of allowing interest on any sum found properly awarded from the date of filing of the master's report. This is exactly what federal courts have done for very many years in judgments entered on special masters' awards, where interest has not been awarded from an earlier date as an element of damages. *See, e.g., Illinois Central R.R.* v. *Turrill*, 110 U.S. 301, 303 (1884); *Tilghman* v. *Proctor, supra; Crosby Steam Gage & Valve Co.* v. *Consolidated Safety Valve Co.*, 141 U.S. 441, 458 (1891); *L. P. Larson, Jr., Co.* v. *William Wrigley, Jr., Co.*, 20 F.2d 830, 836 (7th Cir. 1927), *rev'd in part on other grounds*, 277 U.S. 97 (1928); *Carter Products, Inc.*

v. *Colgate-Palmolive Co.*, 214 F.Supp. 383, 417-18 (D.Md. 1963). The fact that most of these were patent cases is reflective only of the long-standing utilization of references to special masters in patent cases. There is nothing peculiar to patent infringement suits nor any basis in the historical development of the applicable statutes that would justify confining the rule to patent cases.[12] It was originally announced as a rule of general applicability, and it should apply whenever the assessment of damages is referred to a special master and the master's award is subsequently confirmed by the district court. This Court said as much in discussing the rationale for the rule in the *Crosby Steam Gage & Valve Co.* case, *supra*:

> "Delay caused by the court, or not attributable to the plaintiff, in coming to a conclusion on the master's report, where the amount found by that report is confirmed, ought not to deprive the plaintiff of interest on the amount found by the master. Under such circumstances, the account ought to be considered as liquidated on the day when the master's report is filed." (141 U.S. at 458).

We know of no reason for refusing to apply a similar rule to the master's award in a private treble damage case.

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[12] At the time of this Court's decisions in the *Illinois Central R.R.*, *Tilghman* and *Crosby* cases, the pertinent statutory provisions spoke only of "actual damages sustained" and "the damages the complainant has sustained." Revised Statutes of 1874, Section 4919 and Section 4921. No mention was made therein of interest from the filing of the master's report. The first reference to interest of any kind was inserted in Section 4921 by Act of August 1, 1946, ch. 726, § 1, 60 STAT. 778, which provided for "general damages * * *, not less than a reasonable royalty therefor, together with such costs, and interest, as may be fixed by the court." The House Committee Report indicates that the reference to interest in the 1946 amendment was intended to require the award of interest "from the time infringement occurred." H.R. REP. No. 1587, 79th Cong., 2d Sess., 1946 U.S. CODE CONG. & ADMIN. NEWS, p. 1387.

A similar practice is established in New York, where N.Y. CPLR § 5002 (McKinney 1963) mandates the recovery of interest "in any action, from the date * * * the report * * * was made to the date of entry of final judgment." In *In re Kavares (Motor Vehicle Accident Indemnification Corp.)*, 29 App.Div.2d 68, 70-71, 285 N.Y.S.2d 983, 987 (1st Dep't 1967), "report" in § 5002 was held to include the final award of an arbitrator determining the amount of compensation under the Motor Vehicle Accident Indemnification Corporation Law, N.Y. INS. LAW §§ 600-26 (McKinney 1966). *See also* ILL. ANN. STAT. ch. 74, § 3 (Smith-Hurd Supp. 1972); IOWA CODE ANN. § 625.21 (1950); *Aronson* v. *Orlov*, 228 Mass. 1, 116 N.E. 951, 955, *cert. denied*, 245 U.S. 662 (1917) (applying predecessor of MASS. GEN. LAWS ANN. ch. 235, § 8 (1956)); MINN. STAT. ANN. § 549.09 (1947); S. C. CODE ANN. § 10-1605 (1962); WIS. STAT. ANN. §271.04 (4) (Supp. 1972-73).

The court of appeals did not find it necessary to give any reason for departing from this established practice because it considered the question to be one of interest on a federal money judgment (449 F.2d at 80, A-2795), which under 28 U.S.C. § 1961 *must* run from the date of entry of the judgment at the rate prescribed by state law.[13]

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[13] The court of appeals distinguished the cases cited by TWA on the ground that they were concerned with the award of interest *as damages*, which it held unavailable as a matter of law in antitrust cases (449 F.2d at 80n.5, A-2796); *see* discussion in Point I *supra*, especially pp. 19-21. This distinction, however, is unavailable in light of the discussion in *Crosby Steam Gage & Valve Co.*, *supra*, which rests the practice of awarding interest on a master's report, subsequently confirmed, squarely on the policy of avoiding prejudice to a plaintiff from the delay involved in a reference.

The suggestion that 28 U.S.C. § 1961 affirmatively *precludes* interest prior to the entry of judgment by the court is of course untenable in light not only of *Tilghman* v. *Proctor* and *Crosby*

The court of appeals appears again to be following the Seventh Circuit's decision in *Locklin* v. *Day-Glo Color Corp.*, discussed in Point I, p. 19 *supra*. On the basis of an erroneous ruling that interest "not enumerated as a recoverable item in the statute * * * is therefore precluded" (429 F.2d at 877), the Seventh Circuit held that interest cannot be recovered from the date of the master's award since Section 4 of the Clayton Act makes no provision for interest and 28 U.S.C. § 1961 applies only to interest from the entry of a final judgment. This Court's decision in *Rodgers* v. *United States*, 332 U.S. 371, 373 (1947), directly refutes this proposition:

> "* * * the failure to mention interest in statutes which create obligations has *not* been interpreted by this Court as manifesting an unequivocal congressional purpose that the obligation shall not bear interest." (Emphasis added.)

Both the Second Circuit below and the Seventh Circuit in *Locklin* fail to deal with the equitable principle embodied in *Tilghman* v. *Proctor, supra,* and the cases following it, that a successful plaintiff should, as a matter of course, be compensated for the delay between the determination of the amount of his damages by the special master whom the court has appointed and the entry by the court of judgment thereupon.

A private antitrust plaintiff is as entitled to the benefit of this equitable principle as are patent, trademark and

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Steam Gage & Valve Co. but also of *Miller* v. *Robertson, supra*, *Lincoln* v. *Claflin, supra,* and innumerable other cases which have allowed such interest in a broad variety of situations ever since the substance of 28 U.S.C. § 1961 was enacted in the Act of August 23, 1842, ch. 118, § 8, 5 STAT. 518, subsequently codified in Revised Statutes of 1874, Section 966.

copyright plaintiffs, who are accorded it as a matter of course. The congressional policy expressed in the Clayton Act requires, indeed, that defendants found to have violated the antitrust laws should not be permitted to retain the fruits of their wrongdoing. *International Boxing Club* v. *United States,* 358 U.S. 242, 253 (1959); *Schine Chain Theatres, Inc.* v. *United States,* 334 U.S. 110 (1948). To leave a plaintiff uncompensated for such additional delay in his recovery would appear inconsistent with that policy.

The amount of interest to which TWA is entitled may be calculated, in the absence of a federal statute, with reference to the law of the state in which the district court sits. *See Royal Indemnity Co.* v. *United States,* 313 U.S. 289, 297 (1941); *Collier* v. *Granger,* 258 F.Supp. 717, 719 (S.D.N.Y. 1966). Under N.Y. CPLR §§ 5002, 5004 (McKinney 1963), interest from master's report to judgment would be calculated at the legal rate, which during the 19-month period in question rose from 7¼ per cent to 7½ per cent.[14] Therefore, the interest may be determined according to the following computation:

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[14] Under N.Y. GEN. OBLIG. LAW § 5-501(1) (McKinney Supp. 1971), as amended in 1968, the legal rate of interest in New York is that set by the State Banking Board. *Rachlin & Co.* v. *Tra-Mar, Inc.,* 33 App.Div.2d 370, 308 N.Y.S.2d 153 (1st Dep't 1970). Effective July 1, 1968, the Board set the rate at 7¼%, Regulation No. 37, 3 N.Y.C.R.R. § 34.1 (1968). Subsequently the rate was increased to 7½% effective February 16, 1969, General Regulation, Part 4, 3 N.Y.C.R.R. § 4.1 (1969). During its 1972 session the New York State Legislature enacted Assembly Bill No. A10477 (1972 NEW YORK LEGISLATIVE RECORD & INDEX, vol. I, p. A669) which amends N.Y. CPLR § 5004 to change the rate of interest on verdicts, reports and decisions (as provided for in N.Y. CPLR § 5002) from "the legal rate" to "six per centum per annum." The amendment was signed into law by the Governor as Chapter 358 of the Laws of 1972, and will go into effect on September 1, 1972. N.Y.L.J., May 26, 1972, p. 1, col. 6.

Total award of Special Master:	$137,611,435.95
Number of years at rate of 7¼% (9/21/68 to 2/15/69):	.40
Number of years at rate of 7½% (2/16/69 to 4/14/70):	1.16
$137,611,435.95 × .0725 × .40 =	$ 3,990,731.64
$137,611,435.95 × .075 × 1.16 =	$ 11,972,194.93
	$ 15,962,926.57

III.

The decisions below should have determined TWA's net damages on the basis of a "cost of capital" established by the allegations of the complaint that defendants wrongfully precluded borrowings at lower interest rates.

The Special Master found that, when TWA received too few jets too late (47 instead of 63, with delays of up to 11 months) (Brownell Report, pp. 51-57, 151-53; A-1966) and was compelled to lease jets from Toolco in 1959-1960 instead of purchasing them directly (Brownell Report, p. 182; A-1966), TWA suffered losses in operating profits totalling $74.3 million (Brownell Report, p. 322; A-1966). The complaint establishes that defendants' actions in limiting and delaying TWA's jet fleet and in leasing jets to TWA on unlawful conditions were in furtherance of their conspiracy to restrain and monopolize and their attempt to monopolize the supply of aircraft to commercial air carriers in violation of the antitrust laws (Complaint, pars. 7, 9, 10, 14-20, 22, 24, 49-51, 52(a), A-3-4, A-8-10, A-15, A-23-25).

In computing TWA's damages for its injuries from these antitrust violations, the Special Master deducted from this $74.3 million of proven losses in operating profits a total of $29 million to reflect the cost which TWA would have incurred in raising sufficient capital funds to purchase the additional 16 jets, to acquire the full 63-plane fleet earlier, and to purchase rather than lease from Toolco the planes received in 1959-1960 (Brownell Report, pp. 147-67, 183-85, 319-20; A-1966). Since the deduction was made from the earnings which the Special Master had determined TWA lost (*i.e.*, before trebling), the effect of this deduction was to reduce TWA's overall recovery by $87 million.

TWA accepts the logic and propriety of making a "cost of capital" deduction from the gross damage award pursuant to the principle approved by this Court in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 504 (1968), but believes the principle was misapplied in this case. In *Hanover Shoe,* where the damages stemmed from the plaintiff's having been unlawfully required to lease machinery which would have been cheaper to buy, an interest charge of 2.5 per cent on the assumed purchase price of the machinery was deducted from the amount of the award. In this case, where the damages stemmed from being denied capital equipment as well as being required to lease rather than own such equipment, the same principle was applied by the Special Master and approved by the courts below (308 F.Supp. at 694, A-2054-55; 449 F.2d at 79-80, A-2793-94).

The specific cost of capital which the Special Master fixed, however, was based on assumed interest rates of 6 per cent and 6.3 per cent. He derived these rates from the interest rates incurred by airlines generally for borrow-

ings negotiated in the 1958-1960 period, with particular reference to the rates available to TWA in 1959-1960 (Brownell Report, pp. 158-59; A-1966). Yet the complaint specifically alleges that, in furtherance of and as a part of their conspiracy to restrain and monopolize and their attempt to monopolize aircraft supply, defendants prevented TWA from arranging financing in 1955 and 1956 when interest rates were very substantially lower, ranging from 4 per cent to 4¾ per cent (Complaint, pars. 7, 9, 10(g), 23, 26, 27, 28, 52(c), A-3-4, A-8-10, A-15-16, A-25). The Special Master expressly found these allegations to be well-pleaded, and summarized what he considered to be their essential elements in his own language:

> "It may be helpful once again to restate below in summary form the essence of these allegations as follows:
>
> "1. For the purpose of creating and maintaining control of the business of financing the purchase of aircraft for use by TWA and strengthening control over the acquisition of aircraft by TWA, the defendants rendered TWA dependent upon them for such assistance in financing as defendants might choose to provide, refusing to allow equity financing by TWA except on condition that as a result Toolco would increase its equity position in TWA and causing TWA instead to obtain funds chiefly by means of debt financing, thus rendering TWA unable to seek financing needed for the acquisition of aircraft except upon the approval of defendants. The actions complained of commenced subsequent to the acquisition by Toolco of a stock interest in TWA and the action continued throughout the period covered by the complaint. (Par. 23).*

"* Toolco first acquired stock of TWA in 1939 (6 CAB 153, 154) and continued its actions until December 31, 1960.

"2. From 1955 until December 1960 defendants dictated the type and manner of acquiring aircraft and the manner of financing the acquisition of aircraft. (Par. 24).

"3. At least as early as 1955 United States air carriers recognized the needs for the extensive financing required for the acquisition of jet powered aircraft. (Par. 25).

"4. In 1955 and continuously thereafter until December 1960 defendants directed TWA to make no efforts itself to obtain financing necessary for the acquisition of jets required for TWA needs. (Par. 26).

"5. Commencing in 1955 and continuing thereafter various other air carriers, including TWA competitors, made appropriate arrangements for the financing of jet aircraft, and in 1955 and in 1956 obtained commitments for funds at interest rates ranging from 4% in 1955 to 4¼%-4¾% in 1956. (Par. 27).

"6. In 1955, and for several years thereafter defendants discussed various proposals for financing TWA jet aircraft, but made no arrangements for such financing, nor was TWA allowed to make any such arrangements until December 1960, when interest rates for long-term debt were approximately 6-6½% (Par. 28); and

"7. TWA was foreclosed from obtaining financing on more advantageous terms than those available to it in December 1960 and thereby suffered a loss because of the greater cost of borrowing and TWA's ability to obtain financing for its needs was substantially impaired. (Par. 52(c) and (d)).

"The well pleaded allegations restated above * * * are accepted as facts * * * ." (Brownell Report, pp. 254-55; A-1966)

The Special Master held, however, that TWA had not met its burden of showing that it had suffered losses in any specific amount in connection with the financing of its jet fleet (Brownell Report, pp. 258 *et seq.*, 322; A-1966).

TWA does not contest the fact that—as the Special Master determined—in 1958-1960 TWA would have had to pay 6 to 6.3 per cent interest. This is approximately what it did pay at about that time.

In 1955 and 1956, however, TWA would have paid 4 to 4¾ per cent. Those figures are established by the complaint and fairly reflect the rates paid by other airlines which, unlike TWA, arranged financing in those years (AX-1776-77). TWA believes that the Special Master (who accepted these figures) should have given recognition to them in his selection of a "cost of capital" factor to apply in determining the net amount of the losses in operating profits which resulted from defendants' misconduct.

Charging TWA with 6 per cent and 6.3 per cent interest in a "cost of capital" deduction produces an inequitable result as can be seen in the extraordinary difference between TWA's historical interest costs and the interest costs which other airlines, which had arranged for their borrowings earlier, were in fact paying during the 1960-1963 period for their overall debt. TWA Ex. 314 (AX-1060 *et seq.*) sets out the weighted average interest rates on all outstanding external debt, as of December 31 of each of the years 1960-1963, for TWA and each of its three principal competitors—Pan American World Airways, Inc. ("PAA"), American Airlines, Inc. ("AAL"), and United Air Lines, Inc. ("UAL"):

Weighted Average Interest Rates on Debt Outstanding at December 31, 1960-1963

	TWA	*PAA*	*AAL*	*UAL*
1960	6.27%	4.67%	4.32%	4.27%
1961	6.27	4.88	4.67	4.38
1962	6.21	4.87	4.65	4.25
1963	6.27	4.74	4.68	4.41

Of the four largest American-flag airlines, *only* TWA found itself, at the close of the Hughes-Toolco regime, with an operative interest rate in excess of 6 per cent. The amounts to which the low interest rates of its competitors were applicable were in all respects comparable to the amounts on which TWA was compelled to pay interest rates so strikingly higher (*see, e.g.*, TWA Ex. 313, AX-1051 *et seq.*). This is the very "loss by virtue of the greater cost of borrowing" pleaded in paragraph 52(c) of the complaint (A-25). For that to become the basis for a deduction from the damage award to TWA is to allow defendants to profit by their own wrongdoing. *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946).

If the Special Master had used 4¾ per cent (no higher rate is justifiable in light of the express allegations of the complaint admitted by the default and the demonstrated interest costs of TWA's competitors during the same period of time) instead of 6 per cent and 6.3 per cent, the cost of capital which he computed would have been $22.5 million instead of $29.0 million, and the damages found would have been increased by $6.5 million. Since the Special Master set out his actual computations in his Report, where they appear at pp. 161-62, 164-66 and 185 (A-1966), the results of such a change in the assumed interest rate are simple to determine: in Annex B to this brief we have set out the required changes

in the Special Master's computations, showing the $6.5 million difference. After trebling the result would be to increase TWA's judgment by $19.5 million.

IV.

The decisions below improperly interpreted the provision for recovery of "cost of suit" in Section 4 of the Clayton Act to exclude the expense necessarily incurred by TWA when it retained expert witnesses to assist in proving the amount of its damages.

Section 4 of the Clayton Act provides that a successful private antitrust plaintiff

> "* * * shall recover threefold the damages by him sustained, *and the cost of suit, including a reasonable attorney's fee.*" (Emphasis added.)

Like the permissible composition of the damage award discussed in Point I above, the meaning of the phrase "cost of suit" presents a question of statutory interpretation—one upon which this Court has not had occasion to pass. In the absence of a definitive construction by this Court, the lower federal courts have interpreted "cost of suit" as meaning only "taxable costs."

As the instant case strikingly demonstrates, proving damages in a major private antitrust case has become not just time-consuming, but complex, sophisticated and correspondingly very costly. When the damages suffered by a plaintiff are required to be measured in terms of profits lost over a period of many years (the Special Master and the district court rejected any simpler approach to fixing TWA's damages[15]), the measurement of those profits as a practical matter can only be made with

[15] Brownell Report, pp. 302-08 (A-1966); 308 F.Supp. at 694 (A-2053-54). The district court did, however, state that TWA's Comparative Profit Study (AX-80 *et seq.*) had a "reasonable basis" (312 F.Supp. at 483, A-2068).

the participation of experts. *See* N. Leonard, *The Measurement of Damages: An Economist's View*, 31 OHIO ST. L.J. 687, 698-99 (1970). Even in a less complex case, a plaintiff who did not present accounting testimony, for example, would run an obvious risk of having failed to establish the amount of his loss.

TWA's total claim for its cost of this suit, exclusive of attorney's fee, was $2,230,602.83. The district court limited its recovery to an award of "taxable costs" in the amount of $336,705.12 (312 F.Supp. at 485, A-2071-72, A-2073). Again, as it did in the court of appeals in order to simplify presentation of the issue, TWA here confines its claim in excess of the amount recovered as taxable costs to the fees and disbursements which it had to pay for the services of firms and individuals retained as experts in connection with the damage hearing—a total of $1,642,677.71.[16] The

[16] The breakdown of the fees as to each firm of experts is as follows:

Coverdale & Colpitts consulting engineers		
Fees	$569,810.23	
Disbursements	41,023.13	610,833.36
Drexel Harriman Ripley, Inc. investment bankers		
Fees	$257,250.00	
Disbursements	784.33	258,034.33
Price Waterhouse & Co. independent public accountants		
Fees	$464,600.00	
Disbursements	32,267.76	$ 496,867.76
R. Dixon Speas Associates aviation consultants		
Fees	$234,206.00	
Disbursements	42,736.26	276,942.26
		$1,642,677.71

The disbursements of R. Dixon Speas Associates included fees paid to expert consultants on statistics (including Professor Van Court M. Hare, Jr.) totalling $17,793.08.

affidavits submitted by TWA to demonstrate that it had actually made these expenditures and that they were reasonably necessary to the prosecution of TWA's claims (Docs. 520, 524) were not contested by the defendants in the district court.[17]

The sole reason for the denial by the courts below of reimbursement to TWA for these expenditures was that,

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[17] The role played by each expert may be briefly described. *Edward L. Wemple,* a partner in the consulting engineering firm, Coverdale & Colpitts, presented reports by his firm to demonstrate the amount by which TWA's operating revenues and profits had been decreased through failure to receive all of its 63-plane jet fleet in the manner and on the time schedule it would have followed had it not been for defendants' unlawful intervention (AX-80 *et seq.*, AX-91 *et seq.*, AX-167 *et seq.*). *Edward J. Morehouse,* Senior Vice President of the investment banking firm, Drexel Harriman Ripley, Inc., presented a report stating his opinion and that of his firm that a non-captive TWA could have financed the purchase of its full 63-plane jet fleet at very much lower costs than those in fact incurred in the later financial arrangements eventually dictated by defendants for the cut-back fleet, and describing in detail a particular program which he and his firm would have recommended as "do-able" at the time (AX-336 *et seq.*, AX-430 *et seq.*). *R. Dixon Speas,* President of R. Dixon Speas Associates, submitted a report estimating the financial loss suffered by TWA as a result of delays in the sale of its piston engine aircraft (TWA Ex. 6(b)). *John C. Biegler,* a partner in Price Waterhouse & Co., independent public accountants, presented a report which restated and compared TWA's historical financial statements during the damage period with those which it would have reported except for the various matters complained of, adjusting and combining all of the other expert studies on the basis of a consistent set of assumptions and following in all material respects the accounting methods which were historically employed by TWA and its independent accountants during the years in question (AX-452 *et seq.*, AX-480 *et seq.*). Price Waterhouse also prepared supplementary accounting studies that were admitted into evidence and relied upon by the parties and the Special Master as accurately reflecting the financial effects of the conflicting assumptions of the experts for each side (Brownell Report, pp. 58-59, 81-83, 142-43; A-1966). Statistical experts, including *Van Court M. Hare, Jr.,* assisted in the analysis of defendants' expert testimony, and Professor Hare testified in rebuttal on certain statistical matters (A-1773 *et seq.*).

under a line of circuit and district court cases stemming from the Second Circuit's decision in *Straus* v. *Victor Talking Machine Co.*, 297 F. 791, 806-07 (1924), such reimbursement has been denied. The district court felt bound by these precedents (312 F.Supp. at 485, A-2071), and the court of appeals declined to overrule the *Straus* case (449 F.2d at 81, A-2798). Therefore, it remains for this Court, which has never passed upon the question, to give a definitive interpretation of the phrase "cost of suit" in Section 4 of the Clayton Act in order to effectuate fully the congressional policy embodied in it in light of the realities of today's private antitrust suit.

Although federal courts do not tax as court costs even a part of the actual out-of-pocket expenses for necessary expert witnesses, a number of state statutes recognize their importance by including all or part of the expenses of hiring experts within taxable costs.[18] However, in a private antitrust case it is not necessary to expand the type of litigation expenses now comprehended by ordinary taxable costs. Congress has expressly provided for the recovery of the "cost of suit," and all that is necessary is to give that provision its natural meaning.

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[18] *See, e.g.*, Title 16, ME. REV. STAT. ANN. § 251 (Supp. 1972) (amended in 1971, eliminated $50 per diem limit to permit "a reasonable sum for each day's attendance of any expert witness"); N.H. REV. STAT. ANN. § 525:14-a (Supp. 1971) (amended in 1971 to allow "actual costs" for expert witness fees); FLA. STAT. ANN. § 90.231 (West 1960) (expert witness fee, "including the cost of any exhibits used by such witness in the amount of ten dollars per hour or *such amount as the trial judge may deem reasonable* • • • shall be taxed as costs.") (emphasis added); Title 10, DEL. CODE ANN. § 8906 (1953) ("[F]ees for witnesses testifying as experts • • • shall be fixed by the court in its discretion, and • • • taxed as part of the costs"). *See also* LA. REV. STAT. ANN. § 13:3666 (West 1968); N.C. GEN. STAT. § 7A-314 (Supp. 1971); N.D. CENT. CODE § 28-26-06(5) (Supp. 1971); WYO. STAT. ANN. § 1-195 (Supp. 1971).

By doing so in the present case, this Court will not only give recognition to the present-day importance of such expert witnesses in private antitrust suits,[19] but will also effectuate the congressional purpose underlying Section 4 of the Clayton Act in a most practical way. Where Congress has intended that a policy of national importance is to be enforced by those who have been directly injured by the proscribed conduct, this Court has recognized that it should liberally construe provisions allowing recovery of the expense of suit in order that such persons will be encouraged to seek judicial relief. *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). Such an approach is equally applicable to a private antitrust action, for as this Court has very recently made clear, the purpose of allowing the recovery of cost of suit in Section 4 is not only to encourage but to make economically feasible the bringing of private antitrust actions. In *Hawaii* v. *Standard Oil Co. of California*, 405 U.S. 251, 266 (1972), this Court responded as follows to the State of Hawaii's argument that it should be permitted to bring an antitrust suit *parens patriae* on behalf of all of its citizens because individual citizens were not financially able to bring such a suit on their own behalf:

"Congress has given private citizens rights of action for injunctive relief and damages for antitrust viola-

[19] Recognition of the importance of expert witnesses generally is already expressed by this Court in the adoption of the 1970 amendments to the Federal Rules of Civil Procedure. Thus Rule 26(b)(4)(C), as amended, not only provides that a party seeking discovery from another party's expert witness must pay a reasonable fee for the expert's time in responding to discovery, but also that if such discovery extends to the facts known or opinions reached by the expert, the party seeking discovery must pay a fair portion of the other party's reasonable fees and expenses in obtaining such facts or opinions from the expert.

> tions without regard to the amount in controversy. 28 U.S.C. § 1337; 15 U.S.C. § 15. Rule 23 of the Federal Rules of Civil Procedure provides for class actions which may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture. • • • The fact that a successful antitrust suit for damages recovers not only the costs of the litigation, but also attorney's fees, should provide no scarcity of members of the Bar to aid prospective plaintiffs in bringing these suits."

The fees paid to experts for which the lower courts have refused TWA recovery were plainly part of the "costs of the litigation" to TWA.

That TWA should recover its cost of expert witnesses is, we believe, firmly within the equity and policy of the statute. Furthermore, we believe the language of the statute is entirely consistent with the equity and policy we urge, while the contrary analysis of Section 4 in *Straus* v. *Victor Talking Machine Co., supra,* is strained and unpersuasive.

The language of Section 4 of the Clayton Act derives from Section 7 of the Sherman Act (now repealed)[20] from which it differs solely in the substitution of the singular "cost of suit" for the plural "costs of suit". In *Straus* the court commented that this difference was probably accidental (297 F. at 806-07). Yet in a different context, but roughly contemporary with passage of the Clayton Act, legal significance was ascribed to the use of "cost" instead of "costs." In *Hygienic Chemical Co.* v. *Provident Chem-*

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[20] Act of July 2, 1890, ch. 647, Sec. 7, 26 STAT. 210. *repealed,* Act of July 7, 1955, ch. 283, 69 STAT. 283, eff. January 7, 1956.

ical Works, 176 F. 525, 527-28 (2d Cir. 1910), the court in construing an agreement to share the cost and expense of defending a patent suit, stated:

> "The words 'cost' and 'costs' do not always mean the same thing. The word 'cost' and the phrase 'taxable costs' generally have quite different meanings. 'Cost' may be considered as synonymous with 'expense'. 'Taxable costs' are allowances made to the successful party to reimburse him for his disbursements made in prosecuting or defending a suit." [21]

The court in *Straus* placed its principal reliance on the argument that, because the language of both statutes was followed by the phrase "including a reasonable attorney's fee", Congress could not have intended to mean the *expenses* of suit, since such expenses would automatically include the attorney's fee (297 F. at 807). This, however, is a misreading of the words that Congress used.

The important word in this analysis is "including." It evidences the fact that Congress regarded the phrase "cost

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[21] *Accord: Munro* v. *Maryland Casualty Co.*, 48 Misc. 183, 187, 96 N.Y.S. 705, 707 (Sup. Ct. N.Y. Co. 1905) ("To defend at its cost means to bear the burden of the litigation, to defray the expense of carrying it on. 'Cost' and 'costs' are not synonymous."). *See also Hutchinson* v. *Hutchinson,* 223 Cal.App.2d 494, 36 Cal. Rptr. 63 (1st Dist. 1963), where the court construed CAL. CIV. CODE § 4370(a) (West Supp. 1971), which provides that in a matrimonial proceeding a party may be ordered to pay "such amount as may be reasonably necessary for the cost of maintaining or defending the proceeding * * * ." The court, affirming an award of a reasonable fee for the services of a private investigator whom the wife had employed, analyzed the pertinent statutory language as follows:

> "Quite obviously, the reference to 'the cost of maintaining or defending the action' means something other than and in addition to attorney's fees. Also, such a cost means something other than and in addition to what are referred to as 'costs and necessary disbursements in the action.'" (36 Cal. Rptr. at 71)

of suit" as *including* within its meaning "a reasonable attorney's fee." The rule that ordinary taxable costs *never* include an attorney's fee was well-settled long before the enactment of either the Sherman Act or the Clayton Act. *Flanders* v. *Tweed,* 15 Wall. 450, 452-53 (1872); *Day* v. *Woodworth,* 13 How. 362, 372-73 (1851). *See* 28 U.S.C. § 1920 (1970); 6 J. MOORE, FEDERAL PRACTICE ¶ 54.70[1], at 1301 (2d ed. 1971). Since Congress may be presumed to have been aware that "taxable costs" do not include an attorney's fee, it must have intended the phrase "cost of suit" chosen in Section 4 to mean something more than the ordinary "taxable costs" recoverable by the successful party in any lawsuit. Otherwise the phrase used would have been "costs *and* a reasonable attorney's fee."

The practical effect of the construction in *Straus* is to treat the entire reference to "cost of suit" in Section 4 as mere surplusage. The principle that taxable costs follow the result as of course in actions at law in federal courts was well settled at the time the Sherman Act was enacted. *Ex parte Peterson,* 253 U.S. 300, 317-18 (1920) (reviewing the early practice); *United States* v. *Schurz,* 102 U.S. 378, 408 (1880) (Supplemental Opinion); *Trinidad Asphalt Paving Co.* v. *Robinson,* 52 F. 347, 349-50 (E.D. Mich. 1892). There was no need for Congress to provide that a successful treble damage plaintiff should recover taxable costs. He would get those under the prevailing practice in any event.

Therefore, grammatically and logically the language chosen points to a conclusion opposite to the one reached in *Straus*—that Congress intended the entire expense of suit, including specifically an attorney's fee, to be recoverable.

Conclusion

It is respectfully submitted that the judgment below should be modified to increase the amount to be recovered by cross-petitioner TWA as follows:

A. Interest as damages from December 31, 1963 to entry of judgment (Point I) [see also Annex A]	$38,888,991.78
(or, alternatively)	
Interest from filing of Brownell Report to entry of judgment (Point II)	15,962,926.57
B. Increase to reflect lower "cost of capital" (Point III)	19,500,000.00
C. Including TWA's expenses for experts in "cost of suit" (Point IV)	1,642,677.71

and as modified should be affirmed.

Respectfully submitted,

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ANNEX A

If this Court finds that TWA is entitled to have its damages increased by $6.5 million before trebling to give effect, in deducting its "cost of capital", to the lower interest rates, as alleged in the complaint, at which TWA would have financed its full 63-plane jet fleet but for defendants' wrongdoing (Point III *supra*), then TWA's total damages before trebling will be increased to $52,370,478.65. This will result in an increase in the total amount of prejudgment interest to which TWA would be entitled under the computation set forth on p. 22 of Point I *supra*, which can be shown as follows:

TWA's proven losses:	$52,370,478.65
rate of interest:	.045
number of years (12/31/63 to 4/14/70):	6.28
$52,370,478.65 × .045 × 6.28 =	$14,799,897.26
	× 3 (trebling)
	$44,399,691.78

ANNEX B

COST OF CAPITAL

In his Report the Special Master describes in detail the procedures which he followed in determining the "cost of capital," commencing at p. 148 and continuing through the detailed calculations in the tables appearing at pp. 161-62 and 164-66 that are labeled as Calculations A through E (A-1966). With respect to the jets which TWA was required to lease through 1960, instead of being able to buy them for itself, a brief additional computation is contained in the Brownell Report at p. 185 (A-1966). This Annex will describe the principal elements of those computations, and how the Special Master made them.

His method is simple and appropriate. TWA's objection is that "cost of capital" should not employ an interest rate in excess of 4¾ per cent. The effect on the award of a change in the interest rates is shown in the revised computations appearing hereafter.

The 63-plane jet fleet, which TWA would have had but for defendants' wrongdoing, can be divided for this purpose, as it was for the purpose of the basic operating studies on which the award of damages was based, into four classifications, which for this purpose the Special Master labeled (A), (B), (C) and (D).

(A) Six B-331 aircraft were diverted to Pan American by defendants so that TWA never did receive them.

(B) Ten CV-880 aircraft were diverted by defendants, who assigned six to Northeast and, initially, retained the other four. (These four were later leased to Northeast for a number of years but then reverted to Toolco's possession.)

(C) Of the 33 Boeing aircraft involved, 28 (11 B-131s and 17 B-331s) were delayed in delivery for an aver-

age of 1.63 months, or .1354 of a year, as the result of defendants delaying the placement of jet orders in 1955. (This includes the six diverted B-331s covered by (A) above, since under (A) there is considered only the period of operation following delivery to Pan American, and not the pre-delivery delays.)

(D) Of the 20 CV-880 aircraft received by TWA, 19 were delayed in delivery for an average of 7.74 months or .6450 of a year as a result of defendants' conduct.

The Special Master's computations are perhaps most easily understood if (C) and (D) are considered first.

The extent of the delays in delivery for the Boeing and Convair fleets in fact received by TWA had been determined by the Special Master at an earlier point in his Report, based on the testimony of Robert W. Rummel, TWA's Vice President, Planning and Research, and the principal expert on equipment matters for both TWA and Toolco throughout the relevant period, and John B. Connelly, Vice President and Assistant General Manager of the Boeng Company —Aircraft Division and a member of Boeing's "headquarters group" during the negotiations with airlines for the sale of early jet aircraft, and a review of the other evidence (Brownell Report, pp. 52, 87, 141, 151-53; A-1966). For "cost of capital" purposes any assumed interest rate was therefore applicable only for these specific periods of delay (Brownell Report, pp. 154-55; A-1966). The amount on which interest should be computed was considered to be the *total* cost of the planes in question, together with all related spare parts and equipment. This cost had been computed and furnished to the Special Master by Price Waterhouse & Co. and had been accepted by defendants' expert (Brownell Report, pp. 149-50, 154-55; A-1966). The calculations with respect to sections (C) and (D) were thus simple.

With respect to those aircraft that TWA did not in fact receive, covered under (A) and (B), interest was imposed for a much longer period—the entire portion of the 1959-1963 damage period during which TWA was deprived of the aircraft. The *amounts* to which the interest rate was applied were available to the Special Master through the computations of Price Waterhouse & Co., which had computed the depreciation charge for each year in order to deduct it from the claims for lost operating profit. Price Waterhouse & Co. thus developed and presented as part of its reports the necessary information on "adjusted capital investment" for each segment of the fleet as of the end of each calendar year throughout the period. The Special Master determined that funds would be needed in advance of the actual delivery dates, and consequently he charged TWA with interest on one-third of the total investment in each fleet commencing a little over one month prior to the first delivery of an airplane in that fleet, with interest on the second third commencing to accrue three months later, and interest on the final third commencing to accrue after an additional three months. Thus assumed interest was charged to TWA on the entire assumed investment for "cost of capital" purposes well in advance of the time when TWA was assumed to have received its final deliveries (Brownell Report, pp. 149-50; A-1966).

The computations required to implement this direct and straightforward approach are quite easy to follow. Reproduced below are the tables that appear at pp. 161 through 166 of the Brownell Report (A-1966), exactly as such tables appear in the Report except that each figure which would be different if the calculation had been made using a 4¾ per cent interest rate has been *italicized,* and next to it is printed **[in bold-face type and in brackets]** the different figure that would result from using the 4¾ per cent rate to make the same calculation.

CALCULATION A

Interest Cost 1959-1963

Adding Six B-331 Aircraft
($ millions)

	(1) Adjusted Capital Investment Beginning of Period	(2) Less Depreciation and Amortization for the Period[2]	(3) Adjusted Capital Investment End of Period	(4) Average Investment for the Period (1) + (3) ÷ 2	(5) Interest at 6.3 per cent [4¾]	(6) Interest Cost for the Period (4) × (5)
Fourth qtr. 1959	14.1[1]	—	14.4	14.4	*1½%*[3] [1 3/16%[3]]	*.216* [.171]
First qtr. 1960	28.8[1]	0.4*	28.4	28.6	*1½%*[3] [1 3/16%[3]]	*.429* [.340]
Second qtr. 1960	42.7[1]	1.1*	41.6	42.1	*1½%*[3] [1 3/16%[3]]	*.632* [.501]
Second half 1960	41.6	2.3*	39.3	40.5	*3%*[4] [2⅜%[4]]	*1.215* [.962]
1961	39.3	5.1	34.2	36.7	*6%* [4¾%]	*2.202* [1.743]
1962	34.2	4.3	29.9	32.0	*6%* [4¾%]	*1.920* [1.520]
1963	29.9	3.6	26.3	28.1	*6%* [4¾%]	*1.686* [1.335]
				Total increase in interest cost for period 1959-1963		*$8.300* [6.572]

* Proration of annual depreciation of $3.8 million.

[1] See (1)(a) above on page 150.

[2] Source: TWA Ex. 7(d).

[3] One-quarter of annual rate of *6 per cent.* [4¾ per cent.]

[4] One-half of annual rate of *6 per cent.* [4¾ per cent.]

CALCULATION B

Interest Cost 1960-1963

Adding Ten CV-880 Aircraft

($ millions)

	(1) Adjusted Capital Investment Beginning of Period	(2) Less Depreciation and Amortization for the Period[2]	(3) Adjusted Capital Investment End of Period	(4) Average Investment for the Period (1) + (3) ÷ 2	(5) Interest at 6.3 per cent [4¾]	(6) Interest Cost for the Period (4) × (5)
Second qtr. 1960	16.1[1]	.1*	16.0	16.1	*1.58%*[3] [1 3/16%[3]]	*.254* [.192]
Third qtr. 1960	32.0[1]	.6*	31.4	31.7	*1.58%*[3] [1 3/16%[3]]	*.501* [.377]
Fourth qtr. 1960	47.4[1]	1.3*	46.1	46.8	*1.58%*[3] [1 3/16%[3]]	*.739* [.557]
1961	46.1	5.7	40.4	43.3	*6.3%* [4¾%]	*2.728* [2.057]
1962	40.4	5.4	35.0	37.7	*6.3%* [4¾%]	*2.375* [1.791]
1963	35.0	4.4	30.6	32.8	*6.3%* [4¾%]	*2.066* [1.558]
Total increase in interest cost for period 1960-1963						*$8.663* [6.532]

* Proration of annual depreciation of $2.0 million.

[1] See (1)(b) above on page 150.

[2] Source: TWA Ex. 7(d) as amended by letter of Price Waterhouse to Cahill, Gordon of August 30, 1968, Note 2.

[3] One-quarter of annual rate of *6.3 per cent.* [4¾ per cent.]

CALCULATION C

Interest Cost 1958-1960

Earlier Purchase of Twenty-Eight Boeing Aircraft
($ millions)

	Cost of 11 B-131 Aircraft delayed[1]	56.8		
	Cost of 17 B-331 Aircraft delayed[1]	122.1		
a.	Total cost of earlier Boeing Aircraft		178.9	
	Less increase in depreciation as a result of the earlier purchase[2]		3.7	
b.	Net value of earlier investment		175.2	
c.	Average earlier investment		177.1	
	(a + b ÷ 2) × annual interest rate[3]		.06	[.0475]
	Increased interest cost for one year		*10.626*	[8.412]
	× average delay		.1354	
			$1.4388	[$1.1390]

[1] See determination page 154 above.
Source: TWA Ex. 7(b)2, VI, pp. 30, 32 and 35.

[2] Source: TWA Ex. 7(d).

[3] See page 158 above.

CALCULATION D

Interest Cost 1960-1961

Earlier Purchase of Nineteen CV-880 Aircraft
($ millions)

Cost of 19 Aircraft delayed[1]	$ 82.9	
Less increase in depreciation as a result of the earlier purchase[2]	$ 6.8	
Net value of earlier investment	$ 76.1	
Average earlier investment (a + b ÷ 2)	$ 79.5	
X Average annual interest rate[3]	*$ .063*	[.0475]
Increased interest cost for one year	*$5.0085*	[$3.7763]
X Average delay	.6450	
	$3.2305	[$2.4357]

[1] See determination page 155 of this report.
Source: TWA Ex. 7(b)2, VI, p. 46.

[2] Source: TWA Ex. 7(d) as amended by letter of Price Waterhouse to Cahill, Gordon of August 30, 1968, Note 2.

[3] See page 159 above.

CALCULATION E

Summary of Adjustments to Interest Cost
1958-1963
($ millions)

I. *Additional Purchase*		
Six B-331 Aircraft	*$ 8.300*	[$ 6.572]
Ten CV-880 Aircraft	*8.663*	[6.532]
	$16.963	[$13.104]
II. *Earlier Purchase*		
Eleven B-131 Aircraft and Seventeen B-331 Aircraft	*$ 1.439*	[$ 1.139]
Nineteen CV-880 Aircraft	*3.231*	[2.436]
	4.670	[3.575]
Total	*$21.633*	[$16.679]

The total effect of the foregoing changes would be to decrease the sum subtracted from the award—*i.e.*, to increase the award—by $4.9 million (before trebling).

Leasing

The Special Master's application of the "cost of capital" approach to the jets which were required to be leased by TWA in 1959 and 1960, instead of owned, is described in the Brownell Report at pp. 184-85 (A-1966). Since the same method is employed it requires no additional explanation. The calculation below is reproduced from p. 185 of the Report, with those figures *italicized* which are affected by a change to 4¾ per cent in assumed interest rates; next to each italicized figure is printed **[in bold-face type and in brackets]** the different figure that would result from using the 4¾ per cent rate in the calculation.

Determination of Separate Net Damage Resulting From Leasing Rather Than Owning Jet Aircraft

Year	(1) Average Additional Investment in Jets (Net Book Value)	(2) Assumed Interest Rate on Borrowed Funds	(3) Cost of Capital to Own Jets (1) × (2)	
1959	$51.3 million[1]	6% [4¾%]	*$3.1* million	[$ 2.4]
1960	$72.1 million[1]	6% [4¾%]	*4.3* million	[3.4]
	Total		*7.4* million	[5.8]

	($ millions)	
TOTAL RENTALS JET AIRCRAFT 1959-1960	24.2	
Add		
HISTORICAL INCREASE IN DEPRECIATION AND AMORTIZATION COSTS IN 1961-1963 OVER RECONSTRUCTED COSTS[2]	1.4	
	25.6	
Less		
DEPRECIATION AND AMORTIZATION 1959-1960	(12.9)	
COST OF CAPITAL—(3) above	(*7.4*)	[(5.8)]
	(*20.3*)	[(18.7)]
TOTAL NET LOSS BY REASON OF LEASING RATHER THAN OWNING	*$5.3*	[$6.9]

[1] Simat Report, Dx 271A IX-B-3-4.

[2] Price Waterhouse Report, TWA Ex. 7(d).

The effect of this change would be to decrease the sum subtracted from the award—*i.e.*, to increase the award—by $1.6 million (before trebling).

Effect on award

The "cost of capital" deductions from TWA's damage award made by the Special Master totalled $29.0 million ($21.6 million as shown in Calculation E at p. 8b *supra*, plus $7.4 million as shown in the calculation at p. 10b *supra*). If the interest rate used in making the calculations had been 4¾ per cent, the "cost of capital" deductions from TWA's damage award would have totalled $22.5 million ($16.7 million as shown in Calculation E at p. 8b *supra*, and $5.8 million as shown in the calculation at p. 10b *supra*).

The result of using a 4¾ per cent rate to calculate "cost of capital" would thus be to increase the damage award to TWA by $6 5 million (before trebling), and by $19.5 million after trebling.

TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	3
Questions Presented	3
Constitutional and Statutory Provisions Involved	5
Statement of the Case	5
The Toolco-TWA Control Relationship	6
The Pleadings	9
The Discovery Orders of the District Court	11
The Order for the Entry of A Default Judgment	14
The Interlocutory Appeal	16
The Damage Award	17
The Decision of the Court of Appeals	22
Summary of Argument	22

ARGUMENT

I. The District Court Erred in Ordering Defendants to Submit to Burdensome and Expensive Discovery Before the Charges against Them Had Been Reasonably Specified	28
II. The Courts Below Erred in Holding That the Default Established the Truth of Conclusions of Law	42
III. The Courts Below Erred in Allowing Recovery in Excess of The *Ad Damnum*	52
IV. CAB Orders Approving Acquisition of Control of a Carrier Create Antitrust Immunity for the Exercise of That Control	65

PAGE

A. The Statutes 70

B. The CAB Orders 74

C. The Damage Award 79

D. The Decisions Below 82

V. The Acts of Defendants Were Not In Violation of the Antitrust Laws 88

A. The Parent-Subsidiary Relationship 89

B. Lack of Competition with Manufacturers and Suppliers 100

VI. Damages Have Been Awarded Without Requisite Proof That They Were The Result of Antitrust Violations 117

A. The General Standard of Causation 118

B. The Effect of the Default 121

C. Application to the Present Case 128

CONCLUSION 146

TABLE OF AUTHORITIES

CASES:

Alamo Theatre Co. v. *Loew's Inc.*, 22 F.R.D. 42 (N.D. Ill. 1958) 32

Albrecht v. *Herald Co.*, 390 U.S. 145 (1968) 106

Allied Air Freight, Inc. v. *Pan American World Airways*, 393 F.2d 441 (2d Cir.), *cert. denied*, 393 U.S. 846 (1968) 30, 31

Allis-Chalmers Mfg. Co. v. *White Consolidated Indus., Inc.*, 414 F.2d 506 (3rd Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970) 93, 113n

Alpha Distributing Co. of California v. *Jack Daniel's Distillery, Inc.*, 207 F.Supp. 136 (N.D. Cal. 1961), *affirmed per curiam*, 304 F.2d 451 (9th Cir. 1962) 95

PAGE

American Tobacco Co. v. *United States*, 328 U.S. 781 (1946) 103, 108
Associated Press v. *United States*, 326 U.S. 1 (1945) 108n
Bailey v. *Drexel Furniture Co.*, 259 U.S. 20 (1922) 106
Barclay v. *Pickles*, 38 Mo. 143 (1866) 125n
Batchelder v. *Bartholomew*, 44 Conn. 494 (1877) ... 125n
Beall v. *Munson*, 204 Cal.App.2d 396, 22 Cal. Rptr. 333 (1962) 125n
Beckman v. *Walter Kidde & Co.*, 316 F.Supp. 1321 (E.D.N.Y. 1970), *affirmed*, 451 F.2d 593 (2d Cir. 1971) 32, 38n
Bigelow v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946) 133n, 140-141
Billy Baxter, Inc. v. *Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971) 38n, 118, 120
Blow v. *Joyner*, 156 N.C. 140, 72 S.E. 319 (1911) .. 125n
Bond Distributing Co. v. *Carling Brewing Co.*, 325 F.2d 158 (4th Cir. 1963) 38n
Brown Shoe Co. v. *United States*, 370 U.S. 294 (1962) 27, 107, 112
Bushie v. *Stenocord Corp.*, 1972 Trade Cases ¶ 73,896 (9th Cir., March 15, 1972) 104
Butler Aviation Co. v. *CAB*, 389 F.2d 517 (2d Cir. 1968) 83
Calderone Enterprises Corp. v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 40 U.S.L.Wk. 3543 (May 15, 1972) .. 120
California Shipping Co., Inc. v. *Pacific Far East Line, Inc.*, 453 F.2d 381 (9th Cir. 1971), *cert. denied*, 40 U.S.L.Wk. (April 17, 1972) 38n
Central Foundry Co. v. *Benderson*, 284 Ala. 144, 223 So.2d 266 (1969) 45
Central Savings & Loan Assn. of Charlton, Iowa v. *Federal Home Loan Bank Board*, 422 F.2d 504 (8th Cir. 1970) 45

PAGE

Champlin v. *Tilley*, 5 Fed. Cas. 436 (No. 2586) (C.C.D. Conn. 1809) 47
Chapman v. *Rudd Paint & Varnish Co.*, 409 F.2d 635 (9th Cir. 1969) 38n, 105
Chicago Board of Trade v. *United States*, 246 U.S. 231 (1918) 95
Cohen v. *Newsweek, Inc.*, 374 F.2d 470 (8th Cir.), *cert. denied*, 389 U.S. 878 (1967) 38n
Commonwealth Edison Co. v. *Allis-Chalmers Mfg. Co.*, 315 F.2d 564 (7th Cir.), *cert. denied*, 375 U.S. 834 (1963) 120
Conference of Studio Unions v. *Loew's, Inc.*, 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952) 120
Conley v. *Gibson*, 355 U.S. 41 (1957) 32
Continental Ore Co. v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962) 141
Control Data Corp. v. *International Business Machines Corp.*, 421 F.2d 323 (8th Cir. 1970) 32
Cowen v. *New York Stock Exchange*, 371 F.2d 661 (2d Cir. 1967) 38n
Cragin v. *Lovell*, 109 U.S. 194 (1883) 44, 45
Crest Auto Supplies, Inc. v. *Ero Mfg. Co.*, 360 F.2d 896 (7th Cir. 1966) 38n

Dahl, Inc. v. *Roy Cooper Co.*, 448 F.2d 17 (9th Cir. 1971) 38n
Dehoff v. *Black*, 206 N.C. 687, 175 S.E. 179 (1934) 125-126
Douglas v. *Harris*, 35 N.J. 270, 173 A.2d 1 (1961) 47, 48

Edwards v. *California*, 314 U.S. 160 (1941) 88
Electrolytic Chlorine Co. v. *Wallace & Tiernan Co.*, 328 Mo. 782, 41 S.W.2d 1049 (1931) 123
E. V. Prentice Machinery Co. v. *Associated Plywood Mills, Inc.*, 252 F.2d 473 (9th Cir.), *cert. denied*, 356 U.S. 951 (1958) 118-119, 123
Ex parte Fisk, 113 U.S. 713 (1885) 48

PAGE

Fashion Originators' Guild v. *Federal Trade Commission*, 312 U.S. 457 (1941) 95n
Federal Trade Commission v. *Consolidated Foods Corp.*, 380 U.S. 592 (1965) 110
Federal Trade Commission v. *Procter & Gamble Co.*, 386 U.S. 568 (1967) 113, 114
Feingold v. *Walworth Bros., Inc.*, 238 N.Y. 446, 144 N.E. 675 (1924) 49
Fields Productions, Inc. v. *United Artists Corp.*, 318 F.Supp. 87 (S.D.N.Y. 1969), *affirmed per curiam*, 432 F.2d 1010 (2d Cir. 1970), *cert. denied*, 401 U.S. 949 (1971) 121
First National Bank of Arizona v. *Cities Service Co.*, 391 U.S. 253 (1968) 32, 38, 105
Flintkote Co. v. *Lysfjord*, 246 F.2d 368 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957) 136-137
Fong v. *United States*, 300 F.2d 400 (9th Cir.), *cert. denied*, 370 U.S. 938 (1962) 60-61, 62-63, 64
Ford Motor Co. v. *United States*, 92 S.Ct. 1142 (1972) 107, 112
Fortner Enterprises, Inc. v. *United States Steel Corp.*, 394 U.S. 495 (1969) 96, 110
Frow v. *De La Vega*, 15 Wall. (82 U.S.) 552 (1872) 47

GAF Corp. v. *Circle Floor Co.*, 329 F.Supp. 823 (S.D.N.Y. 1971) 109
Getty Oil Co. v. *Skelly Oil Co.*, 267 A.2d 883 (Del. 1970) 90n
Goldlawr, Inc. v. *Shubert*, 276 F.2d 614 (3d Cir. 1960) 105
Gottesman v. *General Motors Corp.*, 414 F.2d 956 (2d Cir. 1969), *cert. denied*, 403 U.S. 911 (1971) 93
Graves v. *Cameron*, 161 N.C. 549, 77 S.E. 841 (1913) 125n
Greeson v. *Imperial Irrigation District*, 59 F.2d 529 (9th Cir. 1932) 48

PAGE

Hallett Construction Co. v. *Iowa State Highway Commission*, 261 Iowa 290, 154 N.W.2d 71 (1967) 123
Hammond Packing Co. v. *Arkansas*, 212 U.S. 322 (1909) 48
Havens v. *Hartford & New Haven R.R. Co.*, 28 Conn. 69 (1859) 123-125
Haynes v. *United States*, 390 U.S. 85 (1968) 46-47
Hawaii v. *Standard Oil Co.*, 92 S.Ct. 885 (1972) ... 119
Hawkins v. *Crook*, 2 P. Wms. 556, 24 Eng. Repts. 860 (1729) 123
Hickman v. *Taylor*, 329 U.S. 495 (1947) 32
Hiland Dairy, Inc. v. *Kroger Co.*, 402 F.2d 968 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969) 45, 104, 108, 110
Hovey v. *Elliott*, 167 U.S. 409 (1897) 48
Hudson Sales Corp. v. *Waldrip*, 211 F.2d 268 (5th Cir.), *cert. denied*, 348 U.S. 821 (1954) 95
Hughes Tool Co. v. *Trans World Airlines, Inc.*, 379 U.S. 912 (1964) 2
Hughes Tool Co. v. *Trans World Airlines, Inc.*, 380 U.S. 248 (1965) 2, 16, 68, 117
Hughes Tool Co. v. *Trans World Airlines, Inc.*, 380 U.S. 249 (1965) 2

In re Woodmar Realty Corp., 294 F.2d 785 (7th Cir. 1961), *cert. denied*, 369 U.S. 803 (1962) 47
International Salt Co. v. *United States*, 332 U.S. 392 (1947) 98n
Interstate Natural Gas Co. v. *Southern California Gas Co.*, 209 F.2d 380 (9th Cir. 1953) 47-48

Jackson v. *Heiser*, 111 F.2d 310 (9th Cir. 1940) 45
Jackson v. *Kotzebue Oil Sales*, 17 F.R.D. 204 (D. Alaska 1955) 47
Johnny Maddox Motor Co. v. *Ford Motor Co.*, 202 F. Supp. 103 (W.D. Tex. 1960) 105
Johnson v. *Johnson*, 92 N.J. Super. 457, 224 A.2d 23 (1966) 45
Johnson v. *Ready Mix Concrete Co.*, 318 F.Supp. 930 (D. Neb. 1970) 120

PAGE

Keco Industries, Inc. v. *Borg Warner Corp.*, 334 F. Supp. 1240 (M.D. Pa. 1971) 104
Klor's Inc. v. *Broadway-Hale Stores*, 359 U.S. 207 (1959) 95n
Kolaski v. *United States*, 362 F.2d 847 (5th Cir. 1966) 47

Lamphear v. *Buckingham*, 33 Conn. 237 (1866) ... 122
LaBarre v. *City of Waterbury*, 69 Conn. 554, 37 Atl. 1068 (1897) 56
Lindsey v. *Drs. Keenan, Andrews & Allred*, 118 Mont. 312, 165 P.2d 804 (1946) 45

Massa v. *Jiffy Products Co., Inc.*, 240 F.2d 702 (9th Cir. 1957) 47
Maywald Trailer Co. v. *Perry*, 238 S.W.2d 826 (Tex. Civ. App. 1951) 123
Meyerson v. *El Paso Natural Gas Co.*, 246 A.2d 789 (Del.Ch. 1967) 90n
Milwaukee Towne Corp. v. *Loew's, Inc.*, 190 F.2d 561 (7th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952) 119
Mitchell v. *Watson*, 58 Wash.2d 206, 361 P.2d 744 (1961) 49
McAllister v. *Kuhn*, 96 U.S. 87 (1877) 44, 45
McClelland v. *Climax Hosiery Mills*, 252 N.Y. 347, 169 N.E. 605 (1930) 124n, 126-127
McGuire v. *Columbia Broadcasting System, Inc.*, 399 F.2d 902 (9th Cir. 1968) 38n, 39
McLean Trucking Co. v. *United States*, 321 U.S. 67 (1944) 82

Nagler v. *Admiral Corp.*, 248 F.2d 319 (2d Cir. 1957) 33
National Aviation Trades Assn. v. *CAB*, 420 F.2d 209 (D.C. Cir. 1969) 71, 83
Nationwide Auto Appraiser Service v. *Association of Casualty & Surety Companies*, 382 F.2d 925 (10th Cir. 1967) 120

PAGE

Nelson Radio and Supply Co., Inc. v. *Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953) 105
New Home Appliance Center, Inc. v. *Thompson*, 250 F.2d 881 (10th Cir. 1957) 32
New York Central R. Co. v. *Grimstad*, 264 F. 334 (2d Cir. 1920) 134n
Norman v. *Young*, 422 F.2d 470 (10th Cir. 1970) .. 47

Ohio Central R. Co. v. *Central Trust Co.*, 133 U.S. 83 (1890) 44
O. Hodgkins Sales Corp. v. *Chrysler Corp.*, 327 F.Supp. 1020 (D. Mass. 1971) 45

Pan American World Airways, Inc. v. *United States*, 371 U.S. 296 (1963) 26, 68-69, 70, 73, 83, 85-86, 87
Peitzman v. *City of Illmo*, 141 F.2d 956 (8th Cir.), *cert. denied*, 323 U.S. 718 (1944) 54-55, 56, 57, 58, 62-63
People v. *George Henriques & Co.*, 267 N.Y. 398, 196 N.E. 304 (1935) 49
Poller v. *Columbia Broadcasting System, Inc.* 368 U.S. 464 (1962) 37, 38, 94n
Pope v. *United States*, 323 U.S. 1 (1944) 46
Potts v. *Howser*, 267 N.C. 484, 148 S.E. 2d 836 (1966) 122
Pueblo Trading Co. v. *El Camino Irrigation Dist.*, 169 F.2d 312 (9th Cir. 1948), *cert. denied*, 335 U.S. 911 (1949) 65
Putnam v. *Air Transport Ass'n of America*, 112 F.Supp. 885 (S.D.N.Y. 1953) 32

Radiant Burners, Inc. v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961) 145
Rayco Mfg. Co. v. *Dunn*, 234 F.Supp. 593 (N.D. Ill. 1964) 120
Riggs, Ferris & Geer v. *Lillibridge*, 316 F.2d 60 (2d Cir. 1963) 53, 57

PAGE

Sagebiel's Inc. v. *Sumrall*, 358 S.W.2d 251 (Tex. Civ. App. 1962) 125n
Sam S. Goldstein Industries v. *Botany Industries, Inc.*, 301 F.Supp. 728 (S.D.N.Y. 1969) 145
Sarlie v. *E. L. Bruce Co.*, 265 F.Supp. 371 (S.D.N.Y. 1967) 57-58
SCM Corp. v. *Radio Corp. of America*, 407 F.2d 166 (2d Cir. 1969), *cert. denied*, 395 U.S. 943 (1969) 45
Shemtob v. *Shearson, Hammill & Co.*, 448 F.2d 442 (2d Cir. 1971) 94n
Sinclair Oil Corp. v. *Levien*, 280 A.2d 717 (Del. 1971) 90n
Snow Crest Beverages, Inc. v. *Recipe Foods, Inc.*, 147 F.Supp. 907 (D. Mass. 1956) 120
Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. *Rogers*, 357 U.S. 197 (1958) 48
Standard Fashion Co. v. *Magrane-Houston Co.*, 258 U.S. 346 (1922) 107, 112
Standard Oil Company of California v. *United States*, 337 U.S. 293 (1949) 91, 98
Standard Oil Company of New Jersey v. *United States*, 221 U.S. 1 (1911) 104, 108n
Story Parchment Co. v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931) 132
Sunkist Growers, Inc. v. *Winckler & Smith Citrus Products Co.*, 284 F.2d 1 (9th Cir. 1960), *reversed on other grounds*, 370 U.S. 19 (1962) 119
Superintendent of Insurance v. *Bankers Life & Casualty Co.*, 404 U.S. 6 (1971) 94
Swift & Co. v. *United States*, 196 U.S. 375 (1905) .. 103

Tallman v. *Ladd*, 5 F.2d 582 (4th Cir. 1925) 45
Tampa Electric Co. v. *Nashville Coal Co.*, 365 U.S. 320 (1961) 98

PAGE

Thomson v. *Wooster*, 114 U.S. 104 (1885) 24, 42, 43, 44, 46, 48, 50, 122, 123

Thorpe v. *National City Bank of Tampa*, 274 F. 200 (5th Cir. 1921) 122

Times-Picayune Publishing Co. v. *United States*, 345 U.S. 594 (1953) 97, 111

Trans World Airlines, Inc. v. *Hughes, et al.*, 214 F. Supp. 106 (S.D.N.Y. 1963) 2, 93

Trans World Airlines, Inc. v. *Hughes, et al.*, 32 F.R.D. 604 (S.D.N.Y. 1963) 2, 52, 53, 60n

Trans World Airlines, Inc. v. *Hughes, et al.*, 332 F.2d 602 (2d Cir. 1964) 2, 32, 46, 67, 68, 82, 93

Trans World Airlines, Inc. v. *Hughes, et al.*, 38 F.R.D. 499 (S.D.N.Y. 1965) 2, 43, 47

Trans World Airlines, Inc. v. *Hughes, et al.*, 308 F. Supp. 679 (S.D.N.Y. 1969) 3, 128

Trans World Airlines, Inc. v. *Hughes, et al.*, 312 F.Supp. 478 (S.D.N.Y. 1970) 3

Trans World Airlines, Inc. v. *Hughes, et al.*, 314 F.Supp. 94 (S.D.N.Y. 1970) 3

Trans World Airlines, Inc. v. *Hughes, et al.*, 449 F.2d 51 (2d Cir. 1971) 2, 42, 43, 47, 57, 59, 60n, 66, 89-90, 94, 96, 97, 100, 101, 105, 106n, 111n, 112, 113, 114, 114n, 115, 128, 129, 131, 133, 134, 138, 142n

United States v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) 103

United States v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) 91

United States v. *Columbia Steel Co.*, 334 U.S. 495 (1948) 91, 98, 99, 104, 108

United States v. *Continental Can Co.*, 378 U.S. 441 (1964) 113n

PAGE

United States v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957) 107, 112
United States v. *Fong*, 182 F.Supp. 446 (N.D. Cal. 1959), *aff'd*, 300 F.2d 400 (9th Cir.), *cert. denied*, 370 U.S. 938 (1962) 45, 61-62
United States v. *General Dynamics Corp.*, 258 F. Supp. 36 (S.D.N.Y. 1966) 107
United States ex rel. *Harshman* v. *County Court of Knox County*, 122 U.S. 306 (1887) 43
United States v. *Knox*, 79 F.Supp. 714 (E.D. Tenn. 1948) 47
United States v. *National Retail Lumber Dealers Assn.*, 40 F.Supp. 448 (D. Colo. 1941) 104
United States v. *New York Great Atlantic & Pacific Tea Co.*, 173 F.2d 79 (7th Cir. 1949) 95n
United States v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964) 27, 112
United States v. *Procter & Gamble Co.*, 356 U.S. 677 (1958) 30
United States v. *Rumely*, 345 U.S. 41 (1953) 106
United States v. *Ryan*, 402 U.S. 530 (1971) 30
United States v. *Singer Mfg. Co.*, 374 U.S. 174 (1963) 129
United States v. *Topco Associates, Inc.* 92 S.Ct. 1126 (1972) 92, 110
United States v. *United States Steel Corp.*, 251 U.S. 417 (1920) 103
United States v. *Yellow Cab Co.*, 332 U.S. 218 (1947) 98-99, 99n, 100
United States v. *Yellow Cab Co.*, 80 F.Supp. 936 (N.D. Ill. 1948) *affirmed*, 338 U.S. 338 (1949) .. 99n
Vevelstad v. *Flynn*, 230 F.2d 695 (9th Cir.), *cert. denied*, 352 U.S. 827 (1956) 124n
Volasco Products Co. v. *Lloyd A. Fray Roofing Co.*, 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963) 120

PAGE

Went v. *Schmidt*, 117 Conn. 257, 167 A. 721 (1933) 125n
White Motor Co. v. *United States*, 372 U.S. 253 (1963) 38
Wolfe v. *National Lead Co.*, 225 F.2d 427 (9th Cir.), *cert. denied*, 350 U.S. 915 (1955) 137-138

STATUTES AND RULES:

United States Constitution, Amendment V 3, 4, 5
Air Mail Act of 1934, 48 Stat. 936 73
Civil Aeronautics Act of 1938, 52 Stat. 973, now 49 U.S.C. § 1377 .....73, 101n
Clayton Act 26, 27, 65, 68, 107, 111, 116

Section 3 (15 U.S.C. § 14) 5, 10, 91, 144
Section 4 (15 U.S.C. § 15) 5, 27, 118
Section 7 (15 U.S.C. § 18) 5, 10, 26, 88, 107, 110

Federal Aviation Act 11, 69, 73

Section 102 (49 U.S.C. § 1302) 5, 71, 82, 83
Section 408 (49 U.S.C. § 1378) 5, 7, 9, 25, 66, 67, 68, 69, 70, 71, 72n, 74, 75, 77, 78, 79, 81, 83, 87, 109n
Section 409 (49 U.S.C. § 1379) 5, 70
Section 411 (49 U.S.C. § 1381) 5, 85
Section 414 (49 U.S.C. § 1384) ...4, 5, 12, 25, 66, 67, 68, 72, 74, 79, 82, 83,85, 87-88
Section 1002 (49 U.S.C. § 1482) 5, 72
Section 1005 (49 U.S.C. § 1485) 5, 72

Federal Communications Act, 47 U.S.C. §§ 221, 222 74n
Federal Power Act, 16 U.S.C. § 824b 74n
Federal Rules of Civil Procedure 28, 31

Rule 5 58
Rule 8 ..... 124n
Rule 15 ..... 5, 63

PAGE

Rule 16 ..... 5, 14, 32, 37, 39
Rule 37 ..... 5, 48, 50, 51n
Rule 54 ..... 4, 5, 25, 52, 53, 57, 58, 59, 60, 61, 62, 63, 64, 65
Rule 55 ..... 5, 47, 48, 52, 58, 126n

Interstate Commerce Act, 49 U.S.C. §5(2) 74n
Judicial Code

28 U.S.C. § 1254 3
28 U.S.C. § 1292 ..... 5, 15, 16, 29, 30, 31

New York Civil Practice Act, § 490 ..... 126, 126n
Sherman Act 4, 26, 27, 65, 68, 106, 107, 108, 108n, 109, 110, 111, 116
Section 1 (15 U.S.C. § 1) 5, 10
Section 2 (15 U.S.C. § 2) 5, 10

Shipping Act, 46 U.S.C. § 814 ..... 74n

CIVIL AERONAUTICS BOARD OPINIONS AND ORDERS:

Application of Trans World Airlines, Inc., et al., Order 71-8-91 (August 19, 1971) 84

California Eastern Aviation, Inc., Control, 26 C.A.B. 272 (1958) 71n
Central Airlines, Inc., Control, 10 C.A.B. 538 (1949) 71n

Davis-Cutler, Acquisition of Control, 23 C.A.B. 766 (1956) 71n

The Florida Case, 6 C.A.B. 961 (1946) 71n
Trans World Airlines, Inc., Acquisition of Sun Line Companies, Order No. 71-1-4, January 4, 1971 .. 71n
Transcontinental & Western Air., Inc., Control by Hughes Tool Co., 6 C.A.B. 153 (1944) 6, 75, 76, 85, 86, 95, 101n, 114, 115

PAGE

Transcontinental & Western Air., Inc., Further Control by Hughes Tool Co., 9 C.A.B. 381 (1948) 7, 77, 78, 85, 101n

Trans World Air., Control by Hughes, 31 C.A.B. 982 (1960) 80n

Trans World Air., Control by Hughes, 32 C.A.B. 1363 (1960) 80

Trans World Airlines, Inc., Further Control by Hughes Tool Co., 12 C.A.B. 192 (1950) ... 8, 9, 75, 77, 78, 79-80, 85, 101n, 114n

E-10360, June 8, 1956 ..... 109n
E-12604, June 6, 1958 ..... 109n
E-13542, February 26, 1959 ..... 81n
E-13873, May 15, 1959 ..... 81n
E-14169, July 1, 1959 ..... 81n
E-14504, September 30, 1959 ..... 81n
E-14877, January 29, 1960 ..... 81n

MISCELLANEOUS AUTHORITIES:

Anno., 163 A.L.R. 496 (1946) 45

1971 *Annual Report of the Director of the Administrative Office* II-108 ..... 94n

3 Barron & Holtzoff, *Federal Practice and Procedure* § 1216 (Wright ed. 1958) 57n
3 Blackstone, *Commentaries* *398 123
14 CFR §§ 200 *et seq.* 72n
Clark & Moore, *A New Federal Civil Procedure—II. Pleadings and Parties*, 44 Yale L.J. 1291 (1935) 59
Clark, *Code Pleading* 267 (2d ed. 1947) 59
Clark, *Code Pleading* 270 (2d ed. 1947) 65
83 Cong. Rec. 6728-6729 (1938) 74
98 Cong. Rec. 16453 (1950) (remarks of Senator Kefauver) 107-108
92 Cong. Rec. 16499 (1950) (remarks of Senator Donnell) 112n

PAGE

Davis, *Administrative Law Treatise* § 19.06 (1970 Supp.) 83n

3 Freeman, *Law of Judgments* 2664-2665 (5th ed., Tuttle 1925) 45

Handbook of Recommended Procedures for the Trial of Protracted Cases, 25 F.R.D. 351 (1960) 34, 40

Hart & Honoré, *Causation in the Law* 371 (1959) .. 134n

Hearings Before the Special Senate Committee on Investigation of Air Mail and Ocean Rail Rates, 73rd Cong., 2d Sess. (1934) 73n

Intra-Enterprise Conspiracy Under Section 1 of The Sherman Act, 35 Miss.L.J. 5 (1963) 92

Krause, *The Multi-Corporate International Business Under Section 1 of the Sherman Act—Intra-Enterprise Conspiracy Revisited*, 17 Bus.Law. 912 (1962) 92n

Manual for Complex and Multidistrict Litigation (1970) 33, 34

McQuade, *Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act*, 41 Va.L.Rev. 183 (1955) 92n

2A Moore, *Federal Practice* (2d ed. 1962) 32, 45

2A Moore, *Federal Practice* (2d ed. 1968) 45

4A Moore, *Federal Practice* (2d ed. 1970) 49, 51

6 Moore, *Federal Practice* (2d ed. 1953) ...47, 57, 59, 126n

Note, *Sanctions for Enforcement of Discovery—Constitutionality of Rule 37*, 37 Wash. L. Rev. 175 (1962) 49–50

Note, *The Constitutional Limits of Discovery*, 35 Ind. L.J. 337 (1960) 50

Note, *The Fiduciary Duty of Parent to Subsidiary Corporation*, 57 Va.L.Rev. 1223 (1971) 90n

PAGE

O'Brien, *Potential Competition Under the Sherman Act Cases*, 12 Proceedings of ABA Section of Antitrust Law 105 (1958) 108n

41 Op. Atty. Gen. 333 (1957) 84

Pomeroy, *Remedies and Remedial Rights* 576 (2d ed. 1883) 44

Rahl, *Applicability of the Clayton Act to Potential Competition*, 12 Proceedings of ABA Section of Antitrust Law 128 (1958) 107n

Report on Procedure in Anti-Trust and Other Protracted Cases, 13 F.R.D. 62 (1951) 34

Report of the Attorney General's National Committee To Study The Antitrust Laws 35 (1955) 92

Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 Col.L.Rev. 480 (1958) 51

S. Doc. No. 15, 74th Cong., 1st Sess. 69 (1935) 73

Sutherland, *Damages* § 429 (4th ed. 1916) 122

Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U.L.Rev. 20 (1968) 92n, 96, 97, 99, 105

Wright, *Federal Courts* 437 (2d ed. 1970) 53

4 Wright & Miller, *Federal Practice and Procedure: Civil* 170 (1969) 33

5 Wright & Miller, *Federal Practice and Procedure: Civil* (1969) 45, 48

8 Wright & Miller, *Federal Practice and Procedure:* Civil (1970) 49, 51

9 Wright & Miller, *Federal Practice and Procedure: Civil* 734 (1971) 129

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-827

HUGHES TOOL COMPANY and
RAYMOND M. HOLLIDAY,

Petitioners,

v.

TRANS WORLD AIRLINES, INC.

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

Petitioners Hughes Tool Company ("Toolco") and Raymond M. Holliday ("Holliday") submit this brief on writ of certiorari to review the opinion and judgment of the Court of Appeals for the Second Circuit that affirmed a judgment in favor of respondent Trans World Airlines, Inc. ("TWA") of $145,448,141.07 and increased the rate of interest on that judgment from 6% to 7½%. TWA's cross-petition to review the judgment (No. 71-830) on the ground that it is inadequate was also granted by the Court. Separate briefs are being submitted in No. 71-830.

Opinions Below

The opinion of the Court of Appeals is reported at 449 F.2d 51 (App. A-2739).[1] Earlier opinions in this litigation are reported as follows:

(1) The opinion and order of the District Court for the Southern District of New York, dated February 7, 1963, denying petitioners' motion to dismiss the complaint, is reported at 214 F.Supp. 106 (App. A-255).

(2) The opinion and order of the District Court, dated May 3, 1963, ordering the entry of a judgment by default against petitioners and certifying the presence of a controlling question of law, is reported at 32 F.R.D. 604 (App. A-317).

(3) The opinion of the Court of Appeals for the Second Circuit, dated June 2, 1964, affirming the District Court on the question on which interlocutory appeal was allowed, is reported at 332 F.2d 602 (App. A-328).

(4) The orders of this Court granting and then dismissing writs of certiorari as improvidently granted, dated November 16, 1964, and March 8, 1965, are reported at 379 U.S. 912, 380 U.S. 248, and 380 U.S. 249 (App. A-2738, A-2739).

(5) The opinion and order of the District Court, dated November 16, 1965 affirming the Special Master's refusal to adopt respondent's proposed interim finding, is reported at 38 F.R.D. 499 (App. A-396).

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[1] Citations to the Appendix filed in this Court in Docket Nos. 71-827, 71-830 are in the form "App. A " or "App. AX ." References to portions of the record that were not printed in the Appendix are in the form "Doc. , p. ."

(6) The opinion and order of the District Court, dated December 23, 1969, confirming the Special Master's damage award in the sum of $137,611,435.95, is reported at 308 F.Supp. 679 (App. A-2027).

(7) The opinion, order, and judgment of the District Court, dated April 13 and 14, 1970, including counsel fees of $7,500,000 and costs, is reported at 312 F.Supp. 478 (App. A-2060).

(8) The opinion and order of the District Court, dated June 10, 1970, granting stay of execution and establishing security pending appeal, is reported at 314 F.Supp. 94.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on September 1, 1971. A timely petition for rehearing was filed on September 15, 1971, and denied on September 28, 1971. The petition for a writ of certiorari was filed on December 23, 1971, and was granted on February 22, 1972. The jurisdiction of the Court rests upon 28 U.S.C. § 1254(1).

Questions Presented

1. Does a defendant have a right under the Due Process Clause of the Fifth Amendment and as a part of notice pleading under the Civil Rules to require plaintiff to identify with reasonable specificity the conduct that it claims is illegal before defendant is required to participate in lengthy and expensive deposition proceedings in which plaintiff seeks evidence from the defendant to support the charges of illegality?

2. Is a defendant deprived of property without due process of law in violation of the Fifth Amendment if a court enters a default judgment, as a sanction for refusal to make further discovery, under circumstances that do not permit a presumption that the defendant has no defense to the action, and then treats the default as a conclusive admission of liability and that damage proximately resulted therefrom?

3. After a defendant is in default may a federal court, despite the clear prohibition of Civil Rule 54(c), permit a plaintiff to amend its complaint so that it may be awarded damages substantially greater than those prayed for in the complaint at the time of the default?

4. When the Civil Aeronautics Board has approved an acquisition of control over an air carrier by a person engaged in a phase of aeronautics and has further approved all relevant transactions between them, is the exercise of that control to determine how the air carrier acquires aircraft and the necessary financing therefor immunized from the operation of the antitrust laws under Section 414 of the Federal Aviation Act?

5. May a subsidiary recover against its parent for violation of the Sherman Act because the parent determines the manner and method by which the subsidiary acquires capital equipment, when the parent is not a competitor of those who manufacture and supply such equipment?

6. Is a corporation that has in no way restrained or monopolized a particular area of commerce subject to damages under the Sherman Act because it has "independent economic significance" and is a "potential competitor" of those engaged in that area of commerce?

7. May a plaintiff recover antitrust damages without introducing any evidence that relates the injuries claimed to the restraint or monopolization of trade alleged and without showing that the plaintiff had the financial ability to do what it claims defendants prevented it from doing?

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions involved are set forth in the Annex hereto. They include the following:

1. United States Constitution, Amendment V.

2. United States Code, Title 15, Sections 1 and 2 (Sherman Act §§ 1, 2) and Sections 14, 15 and 18 (Clayton Act §§ 3, 4, and 7).

3. United States Code, Title 49, Sections 1302, 1378, 1379, 1381, 1384, 1482(b) and (c) and 1485(d) (Federal Aviation Act §§ 102, 408, 409, 411, 414, 1002(b) and (c) and 1005(d)).

4. United States Code, Title 28, Section 1292.

5. Federal Rules of Civil Procedure, Rules 15, 16, 37, 54, and 55.

Statement of the Case

The judgment below for $145,448,141.07, with interest at 7½%, was entered as a sanction under Civil Rule 37 against Toolco, formerly the controlling stockholder of TWA, and Holliday, a Toolco executive and for a time a director of TWA. The District Court ordered that a default judgment be entered after Toolco had elected to rest on the merits of its legal positions in order to obtain appellate review of interlocutory orders of the District Court that

(1) had denied Toolco the right to a reasonable specification of TWA's factual contentions prior to being subjected to burdensome deposition discovery estimated to cost Toolco over $5,000,000, and (2) had held that TWA could maintain an antitrust action notwithstanding that the Civil Aeronautics Board (the "CAB") had authorized and approved Toolco's acquisition of control of TWA and all significant transactions between Toolco and TWA.

Following the default order, a hearing was held before a Special Master. It was limited to the amount of damages to be awarded TWA, without regard to whether the conduct that TWA claimed injured it was illegal under the antitrust laws or to whether that conduct was the proximate cause of the injuries for which TWA claimed damage.

The judgment awards $137,611,435.95 as treble damages under the antitrust laws, plus $7,500,000 in attorneys' fees and $336,705.12 as costs.

The Toolco-TWA Control Relationship

The antitrust damages purportedly relate to the acquisition of TWA's initial jet fleet while under Toolco control. Toolco first acquired a stock interest in TWA in 1938 at the suggestion of TWA's then president to Howard R. Hughes ("Hughes"), the sole stockholder of Toolco and one of the country's leading aviators. By 1944 Toolco had acquired approximately 44% of the stock of TWA. It applied to the CAB for approval, if necessary, of this acquisition. The CAB approved after public hearings the acquisition by Toolco of control over TWA. *Transcontinental & Western Air., Inc., Control by Hughes Tool Co.*, 6 C.A.B. 153 (1944) (App. A-3297).

The CAB found in 1944 that it had jurisdiction over Toolco's acquisition of 44% of the stock of TWA because Toolco had ordered aircraft for TWA, some of which might be sold to airlines other than TWA, and thus was engaged in a phase of aeronautics within the meaning of § 408. The CAB retained jurisdiction over the Toolco-TWA relationship by approving the acquisition of control only on the condition that individual transactions between Toolco and TWA be limited to less than $200 and total annual transactions to less than $10,000.

The CAB reexamined the Toolco-TWA control relationship when Toolco, shortly after the Second World War, supplied desperately needed financing to TWA pursuant to a letter agreement that permitted Toolco to acquire over 70% of the stock of TWA. The CAB ordered an investigation to determine whether the increase in control required further approval under § 408. The CAB concluded that its approval was required because, under the agreement, "a control relationship has been established where the controlled company, which formerly responded to orders from one person with assistance from others by proxies, or otherwise, now responds or may respond to one person at its sole instance." *Transcontinental & Western Air., Inc., Further Control by Hughes Tool Co.*, 9 C.A.B. 381, 391 (1948) (App. A-3311, A-3330). The CAB further held that a requirement that TWA obtain the consent of Toolco before purchasing additional equipment "represents an element of new and increased control arising out of the letter agreement" (9 C.A.B. at 391 n. 18, App. A-3330).

At the public hearing to determine whether this increased control was in the public interest, the Examiner conducted a broad inquiry into "the activities of Toolco with respect to TWA for the period during which the prior

approved control existed." *Trans World Airlines, Inc., Further Control by Hughes Tool Co.*, 12 C.A.B. 192, 194 (1950) (App. A-3333, 3343). He held this inquiry proper "to test what this same controller may do with complete, unqualified control with what it did under a 45-percent ownership of the carrier" (12 C.A.B. at 197, App. A-3342). The purpose of such an examination was solely

> to indicate the kind and character of control which for the past years has been, and which may in the future continue to be, exercised by the same controller exercising the additional degree of control arising from the transactions evidenced by the letter agreement of January 8, 1947. [12 C.A.B. at 197, App. A-3343.]

The inquiry centered on TWA's acquisition of equipment and financing under Toolco control. The Examiner stressed "the contributions of Toolco and Mr. Hughes in the way of financial support to the carrier, [and] in the selection and purchase of its equipment" (12 C.A.B. at 216, App. A-3382). He found that the acquisition of "practically every Constellation aircraft in the TWA fleet now and those on order has been accomplished directly or indirectly with the financial and technical assistance of Mr. Hughes and his company" (12 C.A.B. at 217, App. A-3382-3383). Although critical of the extent to which TWA under Hughes control had relied on debt financing, he concluded:

> The continued interest of Toolco in TWA appears essential to the best interests of the carrier and the public. [12 C.A.B. at 224, App. A-3396.]

The Board adopted the findings, conclusions and recommended opinion of the Examiner. It held:

> The record in this proceeding does not permit us to reach any other conclusion than that reached by the

> Examiner, viz, that the further acquisition of control should be approved as being consistent with the public interest and the requirements of the Act. [12 C.A.B. at 193, App. A-3334.]

The 1950 order approving the acquisition of further control continued in force the provisions of the 1944 control order under which the Board retained jurisdiction over all significant transactions between Toolco and TWA. As a result, every material transaction between Toolco and TWA was submitted to the CAB and approved by it under § 408 through modification of the original orders approving acquisition of control. The CAB issued nineteen modification orders, including orders approving the specific transactions that are the subject of this litigation (pp. 75-81, *infra*).

The Pleadings

In 1960, several large banks and insurance companies demanded, as a condition to their supplying senior financing for TWA's initial jet fleet, that Toolco place its TWA stock in a voting trust controlled by them. Toolco yielded to this demand on December 31, 1960. Six months later, under a new management installed by the lenders, TWA filed an antitrust complaint against Toolco, Holliday and Hughes. The primary object of the new management in bringing an antitrust action was to obtain divestiture of Toolco's stock interest in TWA and thus to solve what it viewed as a problem created by Hughes' interest in TWA (App. A-1886).[2] Hughes was never served.

[2] On April 18, 1962, TWA filed an action against Toolco and Hughes in the Delaware Court of Chancery alleging mismanagement and violations of fiduciary duties. This action has not yet been dismissed.

The complaint (App. A-1) charged in conclusory terms violations of §§ 1 and 2 of the Sherman Act and §§ 3 and 7 of the Clayton Act. Toolco was alleged to be a manufacturer and supplier of aircraft to air carriers and the offenses charged all related to the alleged exclusion of Toolco's competitors from the TWA market for aircraft. The alleged use of Toolco's control of TWA to exclude competitors of Toolco from the TWA market was variously denominated an acquisition of stock in violation of § 7 of the Clayton Act, a boycott, a tie-in, monopolization or an attempt to monopolize, and sales and leases on the condition that TWA not acquire aircraft from any competitor of Toolco.

The complaint alleged a number of acts by Toolco, some during the period of Toolco control and some after the voting trust, in furtherance of the offenses charged. At the damage hearing, however, TWA limited its claims to the manner in which, under Toolco control, TWA acquired its initial jet fleet from Boeing and Convair.[3]

The complaint prayed for treble damages of $105 million, divestiture, and other injunctive relief.[4] Since both TWA and Toolco are Delaware corporations, federal jurisdiction was solely dependent on alleged antitrust violations.

The answers of Toolco and Holliday (App. A-41, A-99) denied the alleged violations of law and asserted as affirmative defenses that the District Court had no jurisdiction

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[3] In the damage hearing, TWA did not seek any damages for conduct of the defendants after the voting trust took control in December, 1960 or because of an alleged conspiracy between the defendants and Atlas Corporation to bring about a merger of Northeast Airlines and TWA or for alleged malicious and wilful interference with TWA's business after December, 1960.

[4] Toolco sold its interest in TWA in a public offering in 1966.

over the subject matter and that the complaint failed to state a claim on which relief could be granted because: (1) the CAB had authorized and approved Toolco's control over TWA and specifically approved every transaction between Toolco and TWA involving the acquisition of flight equipment or financing, thereby exempting the conduct complained of from the antitrust laws; and (2) the CAB had exclusive primary jurisdiction over the subject matter of the action.

Toolco also filed counterclaims against TWA, the lending institutions, and individuals representing the interests of the lending institutions. The counterclaims alleged violations of the Federal Aviation Act, the antitrust laws and common law.[5]

The Discovery Orders of the District Court

Prior to filing the complaint, the new management of TWA discussed the tactical advantages of seeking the deposition of Hughes at the outset of the litigation. Directors of TWA who knew Hughes stated that he would settle the lawsuit rather than submit to a deposition (App. A-1930-1931). When TWA filed its complaint, it obtained an order sealing the complaint and an order to show cause why the deposition of Hughes should not be taken at once (App. A-x).

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[5] One counterclaim was asserted derivatively on behalf of TWA. It alleged that the additional defendants had conspired to restrain and monopolize the supplying of senior financing to airlines, had seized control of TWA pursuant to that conspiracy, and, by reason of that conspiracy and acts in furtherance thereof, both before and after the wrongful seizure of control, had injured TWA. Among the acts of which Toolco complained was the ordering of an excessive number of aircraft for TWA and the financing of those aircraft on terms designed to perpetuate the voting trust and to prevent its termination in accordance with its terms.

Toolco urged that it was entitled to a reasonable identification of TWA's factual claims before TWA commenced deposition discovery and that the charges of antitrust violations in the complaint were unintelligible because: (1) Toolco had never manufactured airplanes for airlines and was a supplier only to the extent that it had helped its subsidiary acquire aircraft; and (2) such acts as were alleged in the complaint appeared to be immunized from the antitrust laws, under § 414 of the Federal Aviation Act, by the orders of the CAB approving Toolco's control of TWA and all transactions in which TWA acquired equipment or financial assistance from Toolco. The District Court awarded Toolco priority of discovery (App. A-2077).

The deposition of TWA failed to provide any definition of the ultimate facts on which TWA relied to support its antitrust claims.[6] TWA's President, Charles C. Tillinghast, Jr., who made the decision to file the complaint, was uninformed as to the factual basis for the antitrust charges. He revealed that an antitrust action had been brought on the advice of special counsel for TWA after an incomplete investigation of the facts in order to obtain permanent insulation of TWA from Hughes (App. A-1898, A-1911-1912). He gave as a reason for bringing an antitrust action that it "didn't have the social approbriums [*sic*] attached to it that some other types of action did"—"the best people were defendants in antitrust actions"—and that for this reason settlement might be facilitated (App. A-1912).

Mr. Tillinghast indicated that Mr. Rummel, TWA's Vice President-Planning and Research, and Mr. Leslie, TWA's chief financial officer for seventeen years, might be in pos-

[6] See the statement in this regard of Special Master Rankin, quoted pp. 36-37, *infra*.

session of relevant facts. But to Mr. Leslie's knowledge Toolco never attempted to force TWA to boycott any supplier of aircraft or to force TWA to acquire aircraft from one aircraft supplier rather than another (Doc. 223, pp. 12338-12339). And Mr. Rummel testified that far from restraining competition among manufacturers of aircraft, Toolco and TWA created competition among manufacturers where none previously existed (Doc. 234, pp. 64-65).

While the TWA deposition was in progress, TWA continued to attempt to obtain an order for the deposition of Hughes. TWA procured a subpoena from the District Court in California for the deposition of Hughes as a witness, and counsel for Toolco accepted service of this subpoena on behalf of Hughes. On September 15, 1962, Special Master J. Lee Rankin, who had been appointed to preside over discovery, adjourned indefinitely the return day for the deposition of Hughes. He recommended that a pretrial conference be held at which TWA would be required to delineate the facts on which it based its complaint and at which the issues could be defined (App. A-2383-2389).

Special Master Rankin stressed the inequity of requiring the testimony of Hughes while TWA's factual claims remained undefined. He announced that he considered the holding of a pretrial conference to be so important to the progress of the litigation that in the event counsel did not apply to the court for such a conference, as he had suggested, he would "approach Judge Metzner [to whom the case had been assigned for all purposes] and request that he take such proposed action in order that this case be properly expedited" (App. A-2388).

Toolco applied for a pretrial conference. TWA opposed the application. While awaiting a decision on the application, Toolco served interrogatories designed to elicit TWA's factual contentions. The Special Master ruled that the interrogatories were proper and that TWA could be of great assistance to the progress of the litigation by answering them promptly (App. A-2436). TWA appealed this ruling.

While TWA resisted revealing its factual contentions, it continued to press for the deposition of Hughes. TWA claimed that it would prove 75% of its case through Hughes but refused to reveal what that case might be. On October 25, 1962, the Special Master set February 11, 1963, as the date for the deposition of Hughes in California pursuant to the witness subpoena. He fixed this date in order to give Toolco an opportunity to bring on a dispositive motion addressed to the complaint after Toolco had obtained a definition of the issues, either through answers to interrogatories and further discovery of TWA, or a Rule 16 proceeding (App. A-2431-2437).

The District Court deprived Toolco of this opportunity. On January 10, 1963, it denied Toolco's application for a Rule 16 proceeding, ordered that TWA need not answer interrogatories until 60 days after completion of the Hughes deposition, and confirmed the February 11th date for that deposition (App. A-122-126).

The Order for the Entry of A Default Judgment

Shortly after the action was commenced, Toolco had moved to dismiss the complaint or for summary judgment. Since the District Court advised Toolco that it considered the motion premature, the motion was held in abeyance

pending a delineation of TWA's factual contentions. Toolco told the District Court that once TWA defined its factual claims, Toolco would be in a position to admit the facts (in contrast to legal conclusions) and obtain a determination whether they gave rise to liability and, if so, to what extent (App. A-2129-2130).

Deprived by the District Court's rulings of a definition of TWA's factual claims and faced with the prospect of a deposition expected to take at least "a good two or three months" (App. A-1908) and to cost Toolco $5 million (App. A-280), Toolco abandoned its motion for summary judgment and brought on for hearing the motion to dismiss, based upon the control orders of the CAB and the Commission's jurisdiction over the Toolco-TWA relationship. The District Court denied the motion from the bench (App. A-2653-2654). It refused to certify its denial so as to permit an interlocutory appeal under 28 U.S.C. § 1292(b).[7]

In order to secure appellate review, Toolco on February 8, 1963, filed a Notice of Position, stating that subject only to whatever judicial relief it might thereafter obtain, it elected to rest on the merits of its positions so that it might avoid the burden and enormous expenses of further pretrial and trial proceedings prior to the time that an appellate court had the opportunity to rule upon the decisions and orders of the trial court (App. A-268).

In a hearing the same day, Toolco advised the District Court that by reason of the election it had made, Hughes would not appear for deposition on February 11, 1963 (App.

[7] The District Court gave no reason at the time for this refusal, although later the Court suggested that Toolco could have had review by writ of mandamus (App. A-277). Toolco had sought review by writ of mandamus of the discovery orders of the District Court but the Court of Appeals denied it review.

A-281) and that Toolco's position would be the same, and it would not further defend on the merits, even if Hughes should appear (App. A-298-299). Consistent with this position, Toolco declined to produce documents in addition to some 125,000 that it had already furnished to TWA (App. A-305). The District Court then indicated that it would entertain a motion by TWA for a default judgment (App. A-307).

On February 15, 1963, TWA moved for the entry of a default judgment and also to increase the *ad damnum* from $105 million to $135 million. On May 3, 1963, the District Court granted these motions and referred the matter to the Special Master to determine "the amount of damages to be paid * * *" (App. A-321). Having done so, it also granted the certification under 28 U.S.C. § 1292(b) that it had declined to grant at the time it denied the motion to dismiss the complaint (App. A-322).

The Interlocutory Appeal

Toolco petitioned the Court of Appeals for leave to appeal under 28 U.S.C. § 1292(b). The Court of Appeals limited its review to whether the District Court had jurisdiction of the action and whether the CAB orders were a complete defense to the action (App. A-2736). It affirmed the District Court on those issues. This Court granted certiorari but, at this interlocutory stage of the case, dismissed the writ after argument as improvidently granted (380 U.S. 248, 249, App. A-2738).[8]

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[8] In its order of May 3, 1963, the District Court dismissed with prejudice Toolco's counterclaims, save one as to which it granted TWA summary judgment. The Court of Appeals affirmed the District Court, with the exception of one counterclaim that it held was within the exclusive jurisdiction of the CAB. This Court also granted certiorari as to the dismissal of the counterclaims but dismissed the writ as improvidently granted.

The Damage Award

At the damage hearing before newly-appointed Special Master Herbert Brownell,[9] TWA predicated its entire case on the fact that Toolco had controlled the acquisition and financing of TWA's initial jet fleet. According to TWA, Toolco did not do as good a job of it as, in hindsight, should have been done and presumably would have been done by TWA, absent that control. On a complaint that alleged the outlines of a boycott, tie-in and attempt to monopolize based upon the exclusion of manufacturers and suppliers of aircraft other than Toolco from the TWA market, TWA sought damages because Toolco, not TWA, ordered aircraft from Boeing and Convair for the TWA market.

According to TWA, TWA should have ordered for its initial jet fleet 33 planes from Boeing and 30 planes from Convair—exactly the planes that Toolco ordered for its subsidiary (App. AX-10-11, AX-15). TWA contended that if it, not Toolco, had ordered the planes, it would have ordered the planes from Boeing sooner, received all the planes instead of cutting back on the size of the fleet, and purchased all the planes instead of leasing some of the Boeing jets for a time and purchasing them later (App. AX-13-14, AX-23). Moreover, since Toolco as purchaser of the Convair aircraft assumed responsibility for all matters pertaining to deliveries of the aircraft, Toolco, so TWA's damage case ran, was responsible for any delay in the delivery of the Convair aircraft beyond the original contract dates even though TWA recognized that there would have been some delay beyond the contract dates whoever had ordered the planes (App. AX-23, Doc. 556-14, 16).

[9] Brownell was appointed to succeed Special Master Rankin after the latter was named Corporation Counsel of the City of New York (App. A-424).

Based on these assumptions, TWA constructed a hypothetical delivery schedule for the 33 Boeing planes and the 30 Convairs (App. AX-43-55). This delivery schedule in turn became the basis for the opinion of an expert witness as to how much more money TWA would have made with the hypothetical fleet than with the fleet it in fact operated during the period for which damages were claimed. This testimony in principal part was based upon the assumption that additional jet capacity would be filled in any given year at the same rate as the capacity actually operated (App. AX-121, AX-136-137, AX-147, AX-160), even though during much of the damage period the airline industry was plagued by too much jet capacity, not too little (App. AX-1604, AX-1703).

TWA also claimed damages based upon testimony of a financial expert as to how TWA, if not under the control of Toolco, could have and, had his firm been retained to advise TWA, would have financed the 63-plane fleet (App. AX-353).

Petitioners introduced no evidence at the damage hearing other than certain industry statistics and expert testimony, including testimony showing that TWA was losing money on many of the jets it in fact operated during the damage period, thereby indicating that TWA was operating too much rather than too little jet capacity (App. AX-2503-2516). Toolco relied on the testimony of TWA's witnesses on direct and cross-examination, and documents introduced during the course thereof, to establish the essential facts as to the procurement of TWA's initial jet fleet. These facts, which were never in dispute, included the following:

(a) Toolco did not manufacture airplanes for air carriers and did not compete with manufacturers and suppliers of aircraft for air carriers. See pp. 100-103, *infra*.

(b) In order to obtain the best jet plane for TWA, Toolco and TWA entered into timely negotiations with Convair for the manufacture of a long-range jet to meet the unique requirements of TWA. Promptly after Convair decided not to manufacture a long-range jet, Toolco ordered Boeing aircraft for TWA (App. A-511-513, A-889-890). At the time Toolco ordered jet planes for TWA, TWA lacked the financial resources to make the requisite down payments and progress payments (App. AX-1378).

(c) To the manufacturers, whether TWA or Toolco ordered the aircraft made no difference. As a Boeing vice president testified: "We considered that they were and are the same" (App. A-1101). Toolco's contracts with the manufacturers prohibited the assignment of the right to receive the aircraft to anybody other than TWA without the consent of the manufacturer (App. AX-1461-1462, AX-1496-1497, AX-1517).

(d) In March, 1959, after the announcement of improved fanjets (App. AX-870), Toolco determined that eight of the Boeing jets and ten of the Convair jets were not needed by TWA for its initial jet fleet and so advised TWA (App. A-560-564). Pursuant to this decision, in the summer of 1959 Toolco assigned to Pan American, with the consent of Boeing, Toolco's contractual rights to six long-range Boeing jets then under construction and Boeing released Toolco from its obligations as to these aircraft (App. AX-1498). Boeing then sold these planes to Pan American (App. AX-1498).

(e) Late in 1960 Toolco released its contractual rights to six of the ten Convair planes that had been determined to be surplus to TWA's needs. Convair then leased these planes to Northeast (App. A-949-950, AX-1525). The remaining four Convairs ultimately were delivered to Toolco, after Toolco in 1961 had offered the planes to TWA and TWA had turned

down the offer (App. AX-1538, AX-1539, AX-1540). The four Convairs sat on the ground until 1963 (App. A-861-863).

(f) Toolco's financial resources and credit made possible payment for and the delivery of 19 of the Boeing jets. Pending the arrangement of permanent financing, Toolco leased these planes on a day-to-day basis. The CAB approved the leases under Section 408 of the Federal Aviation Act (App. AX-2202, AX-2226, AX-2237, AX-2245, AX-2260).

(g) Of the 20 Convair planes TWA received, 19 were delivered after permanent financing was arranged in December 1960.

Special Master Brownell held that the order for the entry of default judgment established both liability and proximate cause. For this reason he found it unnecessary to consider whether the conduct that TWA claimed injured it was conduct that violated the antitrust laws, or how, in light of CAB approval of Toolco control, antitrust damages could properly be awarded based on what TWA contended should or would have happened, absent that control. For this reason, he nowhere in his Report explained how a parent, by ordering planes for its subsidiary instead of having the subsidiary order the same planes from the same supplier, violates the antitrust laws. Nor did he explain what decisions made by the parent as to how many planes the subsidiary needs or whether they should be bought or leased have to do with a boycott, tie-in, or attempt to monopolize.

Special Master Brownell held that "in considering and determining damages," he was required to ignore historical facts. To take into account what actually took place "would be in derogation of the allegations [of the Complaint] and not permissible", because of the order for a default judg-

ment (App. A-1966 Brownell Report 255-256). Special Master Brownell found sufficient basis in the allegations of the complaint to award TWA antitrust damages because it did not purchase 33 Boeing jets and 30 Convair jets on the delivery dates hypothesized by TWA, modified, as to the Convairs, to those set forth in a contract amendment. He did so even though he rejected the testimony of TWA's financial expert as to how a TWA independent of Toolco could have raised the vast amounts of financing required for the 63-plane fleet. He assumed, without explanation, that TWA could have financed the fleet and he awarded damages based on this assumption.

Accepting the approach of TWA's expert that in a given year additional jet capacity would be filled at the same rate as existing capacity, the Special Master awarded TWA $27,600,000 for late delivery of jets and delivery of a smaller number of jets than originally ordered. He awarded TWA $5,300,000 because some of the jets were temporarily leased by TWA pending permanent financing. He awarded TWA $570,748.65 for disruption of TWA's business because the Convair jets were delivered late. The remaining $12,400,000 of the damage award represents the effect of retroactive application of changes in accounting practices made by TWA two-and-a-half years after this action was instituted. The total damage award after trebling came to $137,611,435.95.

The District Court confirmed the Report of the Special Master in all respects (App. A-2027). Judgment was entered for $145,448,141.07, including attorneys' fees and costs, with interest from the date of judgment at the rate of 6%.

The Decision of the Court of Appeals

TWA, Toolco, and Holliday filed cross-appeals from the District Court's judgment. TWA claimed that the judgment was inadequate because the Special Master had used the wrong cost of capital, because TWA should have received moratory interest and interest at a higher rate and because TWA should have recovered as costs the amount it paid for expert testimony. Toolco and Holliday maintained that the judgment entered was without foundation in fact or law, and that the order for the entry of the default judgment under the circumstances of this case and the effect given to that order by the District Court deprived them of their property without due process of law. The Court of Appeals affirmed the judgment in all respects but one. It increased the interest rate from 6% to 7½% (App. A-2796-2798). The total amount of the judgment with interest now stands at over $169 million. Interest alone is running at almost $11 million a year.

Summary of Argument

This case has occupied the attention of the federal courts, at every level, on repeated occasions since 1961 when it was commenced. It involves a huge amount of money. The issues it presents are extremely important—but not, in truth, either complicated or difficult. Once the procedural underbrush is cleared away, as we undertake to do in the first three sections of the Argument, the substantive issue, discussed in the final three sections, appears in stark simplicity: is it a violation of the federal antitrust laws for a parent corporation, whose control of an air carrier subsidiary has been approved by the Civil Aeronautics Board, to

make normal business decisions about the acquisition and financing of capital equipment for the subsidiary? TWA claims that hindsight shows that some of Toolco's decisions as its parent were erroneous, that it was damaged by them, and that it is entitled to recover that damage three times over in a federal antitrust suit. Toolco maintains that even if the decisions were unwise (which it denies), this attempt by TWA to insulate itself from Hughes (App. A-1898, A-1911-1912) amounts to at most a mismanagement claim, cognizable only in state court, rather than a violation of the federal antitrust laws.

I. Toolco has supposed from the outset that the only possible issue in the case is the simple one just described. That issue could have been resolved one way or the other, expeditiously and inexpensively, many years ago. But TWA's complaint was so commodious and so conclusory that it was difficult to be sure that no more than this was involved. Both Toolco and Special Master Rankin pressed from the beginning to find out from TWA just what it really was claiming and what the issues in the case were. These efforts were resisted by TWA and rebuffed by the District Court. Although the Judicial Conference of the United States has insisted over and over again, for many years, that it is imperative in the "big" case that the issues be adequately specified before discovery on the merits is permitted, the District Court ordered that TWA must be allowed extremely expensive and time-consuming discovery on the merits before identifying the issues. The District Court also refused to allow interlocutory review in which Toolco could test its legal position. Because the District Court strayed so far from the permissible course of pre-trial proceedings in cases of this kind, and abused the discretion it must ordinarily have on those rulings, Toolco was left

with no viable option save to refuse to proceed further on the merits of the case and to stand on its legal position. It was only at the damage hearing, after Toolco had been held to be in default, that TWA revealed what it should have been required to disclose at the outset, that despite all the antitrust jargon adeptly used in the complaint, TWA's whole case was that its parent should have provided it with more jets, should have ordered them earlier, and should have financed them differently. See pp. 28-42, *infra*.

II. All agree that the controlling case on the effect of a default is *Thomson* v. *Wooster*, 114 U.S. 104 (1885), but there is great divergence on what that case means. The District Court and Court of Appeals read *Thomson* as saying that a default admits all "well-pleaded allegations of the complaint" and thus reasoned that Toolco had admitted that "the acts pleaded in the complaint violated the antitrust laws." In fact *Thomson* held that a default admits "facts properly pleaded." It is settled that a default does not admit conclusions of law nor does it admit that on the facts pleaded the plaintiff is entitled to relief. Even if the general rule on this were otherwise—and it is not—it would be a constitutionally impermissible denial of due process under the *Hovey-Hammond* rule to hold that, as a sanction for a refusal to permit further discovery, a defendant can be foreclosed from litigating purely legal issues when it is clear that defendant took the act that led to the default so that it could stand or fall on those legal issues. See pp. 42-51, *infra*.

III. When Toolco gave notice to the court and to TWA that it would not proceed further on the merits, the complaint sought a judgment against it for $105 million. Subsequently TWA was allowed to amend its complaint to increase its demand to $135 million and ultimately was

awarded $137.6 million, plus attorneys' fees and costs. No amount of rationalization can escape the fact that in permitting recovery in excess of the amount demanded at the time of default, the courts below have ignored the explicit command of Civil Rule 54 (c) : "A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment." See pp. 52-65, *infra*.

IV. TWA says that the "crux" of its case is Toolco's acts "to control and dictate" the acquisition and financing of aircraft by TWA; the Second Circuit regarded the judgment as based on "the illegality of Toolco's arrogation of all authority for buying aircraft * * *." But the CAB had twice approved, under § 408 of the Federal Aviation Act, Toolco's acquisition of control of TWA and, under § 414 of the FAA, all acts necessary to the exercise of that control are made immune from the antitrust laws. The CAB approved Toolco control even though it was fully aware that Toolco would make exactly the kinds of decisions for TWA of which complaint is now made. The CAB imposed conditions on its approval to prevent abuse by Toolco of its control and scrutinized all subsequent transactions between TWA and Toolco, including those involving the jet aircraft here in issue, for that same purpose. The congressional scheme adopted in the Federal Aviation Act leaves the Board free to balance the anticompetitive effects of an acquisition of control against other factors relevant to the public interest and gives antitrust immunity to control relationships that the Board has approved on the conditions that the Board has required. The court below thought that the Board is not "any more qualified to consider such charges than the federal courts, which daily encounter and resolve antitrust problems," but this fails to recognize that Con-

gress has directed the Board to consider a broader spectrum of considerations than merely the antitrust laws and that the Board "has its special standard of the 'public interest' as defined by Congress. * * * If the courts were to intrude independently with their construction of the antitrust laws, two regimes might collide." *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 308, 310 (1963). See pp. 65-88, *infra*.

V. Even aside from the fact of CAB approval, the acts of Toolco for which TWA was awarded damages were not antitrust violations and were at most state law claims for mismanagement. Toolco was lawfully the parent of TWA. It was not in competition with manufacturers or suppliers of commercial aircraft. For Toolco to make decisions about the acquisition of jets for TWA and to act as a conduit by which the planes went from the manufacturers to TWA is to do what a parent normally and naturally does for its subsidiary and has never been held heretofore to violate the antitrust laws. It was absolutely essential to TWA's antitrust claims that Toolco be a competitor of manufacturers and suppliers of commercial aircraft, though even if this had been the case that would not in itself have been sufficient to establish liability. But Toolco was not a competitor of manufacturers and suppliers. The complaint did not allege that it was; the court below quite properly refused to find that it was. The court sought to cure this defect by finding a "possibility" that Toolco was a "potential commercial manufacturer or dealership in airplanes * * *." Factually this was unsound. Legally it was irrelevant. The "potential competitor" doctrine has considerable significance in cases under § 7 of the Clayton Act. To import a Clayton Act test into a Sherman Act charge overlooks

the fact that the Clayton Act seeks to arrest restraints of trade "in their incipiency" while the Sherman Act is directed to "full-fledged restraints." *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 323 n. 39 (1962). The Second Circuit compounded its error by speculating about mere possibilities when even the Clayton Act cases require a showing of "reasonable probability." *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 175 (1964). The effect of the decision below in this regard is to encourage litigants with what heretofore have been state law claims to seek treble damages in federal antitrust actions, if they can find a mere "possibility" of "potential competition." See pp. 88-117, *infra*.

VI. Section 4 of the Clayton Act allows recovery of treble damages only to a plaintiff who can show that he has been injured "by reason of" an antitrust violation. This requirement of causation is the same in a default case as in any other. Though there is much confusion in the decisions of Special Master Brownell, the District Court, and the Court of Appeals about the burden, if any, on TWA to show that its damages were by reason of any antitrust violation, the end result is that TWA was awarded damages without establishing causation. TWA did not seek damages because of a restraint on competition among suppliers of aircraft to air carriers. It did not allege, nor did it prove at the damage hearing, that an independent TWA would or could have acquired the number of jets that it now says it should have or that it would have ordered them at the time it now says they should have been ordered. For all that this vast record shows, TWA would have suffered the same losses for which it has now recovered damages even though it had been controlled by an independent board of directors and no so-called "antitrust violation" had ever taken place. See pp. 117-145, *infra*.

ARGUMENT

I. The District Court Erred in Ordering Defendants to Submit to Burdensome and Expensive Discovery Before the Charges against Them Had Been Reasonably Specified.

The plainest principles of fairness and due process, as well as orderly procedure, require that a defendant be apprised of the charges against him before he may be compelled to submit himself to discovery, at an immense expenditure of time and funds. This is particularly true in a treble damage action under the antitrust laws, where the conduct charged is a crime and two-thirds of the relief requested is punitive. Those principles were ignored in the pretrial orders of the District Court and in the affirmance of the judgment by the Court of Appeals.

Two points should be stated at the outset in order that it may be clear that there is no dispute among the parties about them: (1) the effective administration of the Federal Rules of Civil Procedure, and particularly of the discovery rules, requires that wide scope be given to the discretion of the district judge; (2) the rules of procedure and orders of the courts made pursuant to them should be obeyed. Defendants fully accept these two points. But the points are properly understood only when it is remembered that wide discretion is not unlimited discretion and that there are occasions in litigation when the only way for a party to test its position in an appellate court is to respectfully refuse to comply with a court order under the rules.

This case has been colored in the popular mind by the image of a man of great wealth so insistent on maintaining his privacy that he flouts the lawful processes of the United

States courts. The image bears no resemblance to the reality of what in fact happened. It was Toolco that made a responsible decision to decline to proceed further in order to test its legal rights. Toolco specifically advised the court that its decision not to proceed would be the same even if Hughes, who had been subpoenaed as a witness, were to appear on the day set for his deposition (App. A-299, A-303-304).

From the outset of this case Toolco believed its conduct could not, as a matter of law, constitute a violation of the antitrust laws. The defendants and Special Master Rankin pressed for procedures that would require TWA to specify in some meaningful way how it contended that the antitrust laws had been violated, so that defendants might test the legal soundness of these contentions. TWA resisted and the District Court rebuffed all such efforts.

From the outset of this case Toolco believed that the antitrust claims asserted were within the primary jurisdiction of the CAB and had been immunized from the operation of the antitrust laws by orders of the CAB approving Toolco's control of and transactions with TWA. The District Court ruled to the contrary but refused to certify its ruling for an appeal under 28 U.S.C. § 1292(b).

The District Court, instead, ordered that TWA need not disclose its factual contentions until Toolco had been subjected to a deposition that would have taken months and cost it more than $5 million. The Court of Appeals, on application for writ of mandamus, refused to interfere.

It was with the case in this posture, with every other opportunity to secure an orderly determination of its legal position foreclosed, that Toolco made the business decision

not to proceed further in what seemed to it useless litigation on the facts but to stand instead on its legal position. A decision of this kind carries risks for a litigant but is not uncommon when it appears to be the only way to obtain appellate review of interlocutory orders. Thus in *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 680-681 (1958), the United States solicited dismissal of its complaint as a means of obtaining appellate review of an order requiring it to produce a grand jury transcript. See also *United States* v. *Ryan*, 402 U.S. 530, 533 (1971), holding that a person who believes that a District Court has erred in refusing to quash a grand jury subpoena "is free to refuse compliance and * * * in such event he may obtain full review of his claims before undertaking any burden of compliance with the subpoena."

The case of *Allied Air Freight, Inc.* v. *Pan American World Airways*, 393 F.2d 441 (2d Cir.), *cert. denied*, 393 U.S. 846 (1968), is particularly instructive in this connection because it involved issues so similar to those in the present case. That was an antitrust action by an air freight forwarder against an airline. The airline contended that the CAB had primary jurisdiction. The District Court agreed and ordered the action stayed until the forwarder had exhausted its remedies before the CAB. The court refused to certify its order for appeal under 28 U.S.C. § 1292(b) and the Second Circuit refused to review the order on application for mandamus. The forwarder did not go to the CAB. More than two years later its suit was dismissed without prejudice for want of prosecution. That dismissal, even though without prejudice, was appealable as a final order. On review of it the appellate court held that the primary

jurisdiction doctrine was not applicable, that the stay should not have been ordered, and that the forwarder could now go forward in the District Court.

Thus, in the present case, if the District Court had agreed with the legal defenses the defendants put forward, TWA could have had immediate review if its suit had been dismissed or it could have had review, following the *Allied Air Freight* tactic, if the action had been stayed. In fact the District Court rejected defendants' legal contentions. There still could have been review if the court had allowed a § 1292(b) appeal, as it did three months later on the same issues. Because it refused the § 1292(b) certificate, the decision by defendants not to proceed further was the only way to obtain appellate review without enormous effort, loss of time and expense.

There would have been other devices by which defendants could have tested TWA's antitrust theories if the District Court had required TWA to make clear what its contentions were. In holding that the defendants were entitled to a specification of TWA's factual contentions and a delineation of the issues only *after* they had been subjected to an expensive and burdensome deposition for the purpose of permitting TWA to hunt for evidence to support its ill-defined charges, the District Court overlooked the function of a complaint under modern pleading as well as the nature of discovery under the Federal Rules of Civil Procedure.

At one time the pleadings were expected to inform a defendant of the facts underlying the plaintiff's claim and to define the issues between the parties. They were not a suitable device for this task. Accordingly, under the Federal Rules of Civil Procedure, the complaint is now expected only to give defendant "fair notice of what the plaintiff's claim

is and the grounds upon which it rests." *Conley* v. *Gibson*, 355 U.S. 41, 47 (1957). The defendant's right to know with reasonable specificity the factual nature of that claim is to be vindicated through the various discovery devices provided by the Rules together with pretrial conferences under Rule 16. *Hickman* v. *Taylor*, 329 U.S. 495, 501 (1947). On the 1964 appeal in the present case the Second Circuit upheld the sufficiency of the complaint in the present action (332 F.2d at 610-611, App. A-343-344). With that determination we do not disagree. But that does not mean that the complaint necessarily presented a claim that must be tried. Intelligent use of the rules governing discovery and pretrial conferences may disclose that a complaint, though legally sufficient, is vulnerable to a motion for summary judgment—*e.g.*, *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 290 (1968); *Beckman* v. *Walter Kidde & Co.*, 316 F.Supp. 1321, 1325 (E.D.N.Y. 1970), *affirmed*, 451 F.2d 593 (2d Cir. 1971); *Putnam* v. *Air Transport Ass'n of America*, 112 F.Supp. 885, 886-887 (S.D.N.Y. 1953)—or a motion to strike a particular allegation for which plaintiff has no factual support, *e.g.*, *Alamo Theatre Co.* v. *Loew's Inc.*, 22 F.R.D. 42, 45 (N.D. Ill. 1958).

The same principles of simplified pleading that govern a routine personal injury case are applicable also to the most complex antitrust case. *E.g.*, *Control Data Corp.* v. *International Business Machines Corp.*, 421 F.2d 323 (8th Cir. 1970); *New Home Appliance Center, Inc.* v. *Thompson*, 250 F.2d 881 (10th Cir. 1957); 2A Moore, *Federal Practice* ¶ 8.17[3] (2d ed. 1962). But, as the draftsman of the Civil Rules was at pains to explain in the leading case so holding, simplified pleading is workable for these complicated cases in which fuller disclosure of the basis of

the claim is needed only because disclosure can be had by the other devices in the rules, including Rule 16 and the discovery provisions. *Nagler* v. *Admiral Corp.*, 248 F.2d 319, 322-323 (2d Cir. 1957). See also 4 Wright & Miller, *Federal Practice and Procedure: Civil* 170 (1969).

Simplified pleading works in the "big" case only because of the availability of discovery and similar devices. By the same token the discovery rules are suitable for the "big" case only if their use is controlled much more carefully by the court than in routine litigation, where the parties can be left to use the rules when and how they will. This has been a source of concern throughout the history of the Civil Rules, the problems have been repeatedly studied by knowledgeable and authoritative groups, and widely accepted answers have been found.

The most recent guidelines for the conduct of a large antitrust case are found in *Manual for Complex and Multidistrict Litigation* (1970), developed by a distinguished group of experienced judges under the auspices of the Federal Judicial Center. These guidelines recognize the importance of prompt definition of the issues in the case and the necessity that the defendant be informed in the first instance of the basic facts underlying the complaint. Thus they recommend that the court promptly hold a first pretrial conference in order to "ascertain counsels' current views of the issues involved in the case." *Manual* § 1.2. There is then to be a "first wave of discovery" designed to obtain information concerning the transactions upon which the claims for relief are based. *Manual* § 1.5. The possibility of the disposition of the case by early resolution of some legal question is recognized and procedures

suggested for use if this is the case. *Manual* § 1.8. Only after these preliminary steps have been taken is discovery on the merits to be allowed in a "second wave of discovery." *Manual* § 1.5. Provision is made for earlier carefully-controlled discovery on the merits to provide for emergencies and to permit narrowing of the issues, but the judges are warned that "experience has demonstrated that in a complex case orderly discovery requires that this first wave of discovery be accompanied by plans for full discovery in two successive waves as recommended herein." *Manual* § 1.7.

The teachings of the *Manual* are not a new perception, unavailable for the guidance of the District Court in the years 1961-1963, when this case was in a pretrial stage. Before the present action was commenced a predecessor of the present *Manual*, approved by the Judicial Conference of the United States in March, 1960, had said that in protracted cases discovery must be confined to the genuine issues necessary for decision and that the court must take affirmative steps to define the issues before discovery on the merits begins. *Handbook of Recommended Procedures for the Trial of Protracted Cases*, 25 F.R.D. 351, 386-390 (1960). A still earlier report, approved by the Judicial Conference in September, 1951, was to the same effect in insisting that adequate specification of the issues in complex cases is so important "as to require that it be done no matter what the objection or difficulty" and that the issues as particularized "should serve as the basis for the bounds of permissible discovery." *Report on Procedure in Anti-Trust and Other Protracted Cases*, 13 F.R.D. 62, 66-68 (1951).

In this case the need for a meaningful identification of TWA's factual contentions and of the issues, if any, that they raised was peculiarly great because defendants saw no facts alleged in the complaint that would constitute a violation of the antitrust laws. On the surface, the complaint would appear to be detailed. It is long. It has many paragraphs. It seems to state numerous facts. But on closer examination by defendants, the allegations appeared meaningless for they all seemed to center on acts and judgments normally and naturally engaged in by a parent in relation to its subsidiary. The complaint uses in abundance the special jargon of antitrust—"boycott," "tying arrangement," "attempt to monopolize"—to describe a normal and legal relationship between a parent and a subsidiary.

The complaint was even more puzzling because it simply ignored the orders of the CAB approving Toolco's control of TWA and all transactions between Toolco and TWA. Indeed the complaint made no reference whatever to the CAB. Yet the complaint alleged that the acquisition of Toolco's stock interest in TWA violated § 7 of the Clayton Act, a conclusory allegation that made no sense in light of the CAB's approval of that acquisition.

Defendants' reaction to the complaint was that this case was a classic one for summary judgment because none of the facts known to defendants gave rise to an antitrust claim, and defendants were ready to stipulate to those facts. Moreover, Toolco knew, and the damage hearing confirmed, that the key facts relied upon by TWA had to be among the facts known to defendants—for both TWA and Toolco, after 21 years, were aware of all of the facts concerning their relationship. There were, in

truth, no facts to be discovered, and it was wholly unlikely that there would be any "genuine issue as to any material fact" between them as to what had happened in the past, however much they might differ about the legal consequences of those events.

For these reasons Toolco sought to ascertain on which of the facts, known to both parties, TWA was relying to support the conclusory allegations of antitrust violations. Toolco repeatedly made it clear that once TWA's factual claims were defined Toolco would be in a position to admit the facts (in contrast to legal conclusions) and obtain a determination whether they gave rise to liability and, if so, to what extent.[10]

Special Master Rankin had the same difficulty with the complaint. He tried to elicit from TWA and its executives the facts upon which they were relying to establish antitrust violations, but he was unsuccessful. In a hearing on September 15, 1962, he said:

> I had thought that before we completed the testimony of Mr. Tillinghast [the Chief Executive Officer of TWA], I would be informed about the ultimate facts that the plaintiff was relying upon to support

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[10] For example, as early as October 2, 1961, counsel for Toolco advised the District Court: "We believe that this case can be decided, in so far as the complaint is concerned, on admitted facts." (App. A-2129). In a memorandum filed on July 12, 1962, counsel for Toolco stated:

> Once the present management of TWA has been compelled to disclose the factual basis for its claims, Toolco will be in a position to admit such facts and seek a determination as to whether they give rise to liability and, if so, as to the extent thereof. It has been the position of Toolco since the commencement of this action that once TWA's management is compelled to disclose what it claims, a determination on the merits as to such claims will be appropriate. [Doc. 100, pp. 24-25].

> the various allegations of its complaint, which are largely conclusions of law, but do conform to the requirements of the federal rules concerning such complaints.
>
> I did not think that with the chief executive officer of the plaintiff being deposed, we would reach a point at the conclusion where I would not know the ultimate facts upon which the plaintiff was relying to establish those various allegations insofar as they had a bearing upon a violation of the antitrust laws.
>
> But I did find that I was in that position. I think that has an important bearing upon what is equitable in asking testimony of principal witnesses of the defendant in this case [*i.e.*, Howard Hughes], and when that should be required [App. A-2385-2386].

Accordingly, Mr. Rankin recommended that a Rule 16 proceeding be held, at which TWA would be required to delineate the facts on which it based its complaint and at which the issues could be defined. He announced that he considered the holding of a pretrial conference to be so important to the progress of the litigation that if the parties did not apply to the District Court for a Rule 16 proceeding, which he offered to conduct, he would do so himself (App. A-2386-2388).

This would have been an appropriate case for summary judgment if the issues and the facts on which TWA was relying could have been identified. It is true that in several cases this Court has quoted the statement first made in *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962), that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken

the plot." But to say that summary procedures are to be used "sparingly" is to recognize that there are some cases of this kind in which they are proper and useful. The Court emphasized this point in the term following *Poller*, when it said: "Summary judgments have a place in the antitrust field, as elsewhere * * *. Some of the law in this area is so well developed that where, as here, the gist of the case turns on documentary evidence, the rule at times can be divined without a trial." *White Motor Co.* v. *United States*, 372 U.S. 253, 259 (1963). More recently, in *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 (1968), the Court affirmed a grant of summary judgment for defendant in a private antitrust case, and said, at 290:

> While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint.

Courts of appeals, fully sensitive to what was said in *Poller*, have affirmed summary judgments for antitrust defendants in a variety of cases.[11] The matter was well put, in terms

[11] *E.g.*, *California Shipping Co., Inc.* v. *Pacific Far East Line, Inc.*, 453 F.2d 381 (9th Cir. 1971), *cert. denied*, 40 U.S.L.Wk. 3503 (April 17, 1972); *Beckman* v. *Walter Kidde & Co., Inc.* 451 F.2d 593 (2d Cir. 1971); *Dahl, Inc.* v. *Roy Cooper Co.*, 448 F.2d 17 (9th Cir. 1971); *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); *Chapman* v. *Rudd Paint & Varnish Co.*, 409 F.2d 635 (9th Cir. 1969); *McGuire* v. *Columbia Broadcasting System, Inc.*, 399 F.2d 902 (9th Cir. 1968); *Cohen* v. *Newsweek, Inc.*, 374 F.2d 470 (8th Cir.), *cert. denied*, 389 U.S. 878 (1967); *Cowen* v. *New York Stock Exchange*, 371 F.2d 661 (2d Cir. 1967); *Crest Auto Supplies, Inc.* v. *Ero Mfg. Co.*, 360 F.2d 896 (7th Cir. 1966); *Bond Distributing Co.* v. *Carling Brewing Co.*, 325 F.2d 158 (4th Cir. 1963).

that could have been applicable to this case, in *McGuire* v. *Columbia Broadcasting System, Inc.*, 399 F.2d 902, 905 (9th Cir. 1968):

> However, the showing of a "genuine issue for trial" is predicated upon the existence of a legal theory which remains viable under the asserted version of the facts, and which would entitle the party opposing the motion (assuming his version to be true) to a judgment as a matter of law.

As defendants have always viewed this case, it was not one in which it would have been necessary to probe motive or intent. It is their position that there is no viable legal theory on which the dissatisfaction of TWA's new management with decisions that Toolco had made about the acquisition and financing of jet aircraft for TWA could be made into a valid claim under the antitrust laws.

It was this opportunity to test TWA's legal theory and to obtain a prompt disposition of the case that was foreclosed by the pretrial orders of the District Court. The court denied Toolco's motion for a Rule 16 proceeding, despite the specific recommendation of the Special Master, and refused to require answers to defendant Toolco's interrogatories until after the deposition of the witness Hughes, even though both the Special Master and the District Court found these interrogatories to be proper. Thus the court ordered that Hughes first appear for a deposition on the merits that would be both extensive and expensive, and for which he could not properly be prepared. Toolco would have had to bear all of its own expense at that deposition and, as 78% owner of TWA, would have borne 78% of TWA's expense. The estimate that the deposition would cost Toolco

in excess of $5 million (App. A-280) was never challenged.[12] Only after the expenditure of that huge amount was Toolco to be permitted to have any meaningful description of the nature of the claims against it or any opportunity to demonstrate to the court that the case could be disposed of as a matter of law.

Ordinarily the order of discovery is and must be for the discretion of the trial court. The grant of this broad discretion assumes that it will be exercised to illuminate, rather than to conceal, the issues. This is particularly important in large and complex cases such as this one, for it is a commonplace in cases of this kind that "plaintiffs hesitate to commit themselves to a statement of the issues in the case until they have had substantial discovery from defendants." *Handbook of Recommended Procedures for the Trial of Protracted Cases*, 25 F.R.D. 351, 388 (1960). That is why every set of recommendations for handling these "big" cases has insisted on the vital importance of identifying the issues before discovery on the merits is begun. In this case, however, the discovery orders of the District Court, taken together, denied to defendants the fundamental right to know the charges against them before being subjected to examination in search of evidence or leads to evidence.

The possibilities for harassment of defendants, either for the purpose of inducing a settlement or for other ulterior motives unrelated to the merits of the litigation, are enormous under the procedure permitted by the District

[12] It is of interest that the District Court, which was not disturbed at the prospect of a deposition that would cost defendants more than $5 million, later felt it proper to observe that prior to this case the highest *recoveries* on record in cases that had gone to judgment had been $4.4 million and $4.2 million (App. A-2061).

Court. Particularly in the large antitrust case, where vague allegations of a conspiracy in restraint of trade may result in enormous expenditures on discovery, equal in themselves to a sizable judgment, the rights of a defendant under the discovery rules require protection. To put a defendant to an expense of $5 million in trial preparation before it is known if there is anything to be tried is so grave an abuse of judicial process as to amount to a denial of due process.

But it is not only defendants who have a stake in the matter. It is also in the interest of the courts themselves that the procedures experience has shown to be best for litigation of this kind be followed. Prompt identification of the issues and the stipulation of undisputed facts will greatly reduce the burden that the "big" case imposes on the federal courts. Some cases can be disposed of altogether when, through these procedures, it is seen that, despite the conclusory allegations of an artful pleader, the case is not within the jurisdiction of the federal courts at all but belongs in a state court or before an administrative agency. Other cases, when the issues are identified and the undisputed facts stipulated, can be disposed of expeditiously by summary judgment.[13] Even in those cases that must ultimately be tried on the merits, adherence to the recommended procedures for protracted cases

[13] The presentation of an intelligent motion for summary judgment requires that a defendant know with some certainty the plaintiff's factual claims. In this case, for example, though the complaint alleged a boycott (¶9(c), App. A-9), it was not revealed until the damage hearing that the supposed boycott consisted of nothing more than Toolco's ordering planes for TWA from Boeing and Convair instead of TWA's ordering the same planes from Boeing and Convair.

will keep discovery within reasonable bounds and confine the trial to those genuine issues on which there is a real dispute.

This case has occupied an immense amount of time in the federal courts for 11 years. It has done so because of the failure of the District Court to follow sound principles on the proper management of discovery and pretrial proceedings in complex litigation.

II. The Courts Below Erred in Holding That the Default Established the Truth of Conclusions of Law.

At the damage hearing and in subsequent court proceedings, the major issue between the parties has been the effect to be given to the default. The parties, both Special Masters, the District Court, and the Court of Appeals all considered that the controlling decision was what the Second Circuit referred to as "the venerable but still definitive case" (449 F.2d at 63, App. A-2758) of *Thomson* v. *Wooster*, 114 U.S. 104 (1885). *Thomson* is the authoritative precedent, but the courts below misread the decision and gave the default a broader effect than it properly or constitutionally can have.

In an opinion at the outset of the damage hearing, Special Master Rankin recognized that the default "dispenses with any proof of the facts alleged in the complaint, except as to unliquidated damages" (App. A-365). He stated, however, that even a default judgment "must be just" (App. A-371) and that it was "his duty on behalf of the court to be satisfied of the liability of the defendants * * *" (App. A-372). The District Court, in reviewing the opinion by the Special Master, questioned the state-

ment that the Master had to be satisfied about liability, saying that "liability is not an issue for the Special Master except in a very limited sense" and citing *Thomson* for the proposition that by virtue of the default defendants had admitted the truth of "the well-pleaded allegations of the complaint" (38 F.R.D. at 501, App. A-2030). All subsequent actions in the case were colored by this misreading of *Thomson*. The second Special Master in making his report, the District Court in passing on exceptions to the report, and the Court of Appeals in affirming the judgment all erred by giving too broad an effect to the default. The Second Circuit took the position that "the default had the effect of admitting or establishing that the acts pleaded in the complaint violated the antitrust laws and that those acts caused injury to TWA in the respects there alleged" (449 F.2d at 70, App. A-2772). In accord with this view of the effect of a default, the Second Circuit ruled that "there was no burden on TWA to show that any of Toolco's acts pleaded in the complaint violated the antitrust laws nor to show that those acts caused the well-pleaded injuries" (449 F.2d at 70, App. A-2773). The illegality of Toolco's acts, it said, was "conclusively established by the default judgment" (449 F.2d at 71, App. A-2776).

Neither *Thomson*, nor any other authoritative case, supports such a doctrine. What *Thomson* held is that a default admits "facts properly pleaded." 114 U.S. at 110. Similarly, *United States* ex rel. *Harshman* v. *County Court of Knox County*, 122 U.S. 306, 317 (1887), says that a default admits "material and traversable" allegations of "fact." Nothing in *Thomson* or in any other case supports the proposition that a default admits legal conclusions.

To have included conclusions in a complaint would itself have been improper at a time when there was a rigorous rule that pleadings must be limited to the "dry, naked, actual facts." Pomeroy, *Remedies and Remedial Rights* 576 (2d ed. 1883). A default admitted only those things that would then have been admitted by a general demurrer. *McAllister* v. *Kuhn*, 96 U.S. 87, 89 (1877). Thus it was held that a default did not admit "a mere conclusion of law." *Cragin* v. *Lovell*, 109 U.S. 194, 199 (1883).

There is difficulty in distinguishing between allegations of "fact," which are admitted by a default, and "conclusions of law," which are not, but it has always been clear that the illegality of the conduct charged in the complaint is the ultimate conclusion of law. For this reason, a default has never admitted that the conduct charged by the complaint is sufficient as a matter of law to establish a right of recovery. This is open to challenge even by a party in default. This was indicated in *Thomson* itself when the Court insisted that a decree does not follow as of course after a default but is to be made "according to what is proper to be decreed upon the statements of the bill assumed to be true." 114 U.S. at 113. This was spelled out by the Court in more detail a few years later in *Ohio Central R. Co.* v. *Central Trust Co.*, 133 U.S. 83, 91 (1890):

> If the allegations are distinct and positive, they may be taken as true without proof; but if they are indefinite, or the demand of the complainant is in its nature uncertain, the requisite certainty must be afforded by proof. But in either event, although the defendant may not be allowed, on appeal, to question the want of testimony or the insufficiency or amount of the evidence, he is not precluded from

> contesting the sufficiency of the bill, or from insisting that the averments contained in it do not justify the decree.

To the same effect are *Cragin* v. *Lovell*, 109 U.S. 194 (1883); *McAllister* v. *Kuhn*, 96 U.S. 87 (1877); *Tallman* v. *Ladd*, 5 F.2d 582 (4th Cir. 1925); *United States* v. *Fong*, 182 F. Supp. 446, 451 (N.D. Cal.), *aff'd*, 300 F.2d 400 (9th Cir.), *cert. denied*, 370 U.S. 938 (1962); see *Jackson* v. *Heiser*, 111 F.2d 310, 313 (9th Cir. 1940); 3 Freeman, *Law of Judgments* 2664-2665 (5th ed., Tuttle 1925). State decisions are said to be "almost unanimous" in support of a similar view. Anno., 163 A.L.R. 496 (1946). See, *e.g.*, *Central Foundry Co.* v. *Benderson*, 284 Ala. 144, 223 So. 2d 266 (1969); *Lindsey* v. *Drs. Keenan, Andrews & Allred*, 118 Mont. 312, 165 P. 2d 804 (1946); *Johnson* v. *Johnson*, 92 N.J. Super. 457, 224 A. 2d 23 (1966).

Today's more relaxed notions of pleading allow the use of conclusions in a complaint—2A Moore, *Federal Practice* ¶ 8.12 (2d ed. 1962); 5 Wright & Miller, *Federal Practice and Procedure: Civil* § 1218 (1969)—but it is still true that conclusory allegations of an attempt to monopolize do not necessarily constitute a valid antitrust claim. *Central Savings & Loan Assn. of Charlton, Iowa* v. *Federal Home Loan Bank Board*, 422 F.2d 504, 509 (8th Cir. 1970); *SCM Corp.* v. *Radio Corp. of America*, 407 F.2d 166, 170 (2d Cir. 1969), *cert. denied*, 395 U.S. 943 (1969); *Hiland Dairy, Inc.* v. *Kroger Co.*, 402 F.2d 968, 973 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969); *O. Hodgkins Sales Corp.* v. *Chrysler Corp.*, 327 F. Supp. 1020, 1021 (D. Mass. 1971); 2A Moore, *Federal Practice* ¶ 12.08, at 2269 (2d ed. 1968); 5 Wright & Miller, *Federal Practice and Procedure: Civil* § 1357, at 595-596, § 1363, at 658 (1969).

On the first appeal the Second Circuit found that the complaint in this case was not vulnerable to a motion to dismiss (332 F.2d at 610-611, App. A-343-344). As Special Master Rankin had noted, the allegations of the complaint "are largely conclusions of law, but do conform to the requirements of the federal rules concerning such complaints" (App. A-2385).[14] This does not mean that every allegation in it must now stand as admitted. The default admitted only the "facts properly pleaded," as the *Thomson* case said, and did not admit all of the "well-pleaded allegations," as the courts below thought. It is for the court, not for the pleader, to decide whether the facts alleged constitute a violation of law for which the plaintiff can have recovery. Even after a default, it remains for the court to consider whether "the unchallenged facts shown of record establish a legally binding obligation; it adjudicates the plaintiff's right of recovery and the extent of it, both of which are essential elements of the judgment." *Pope* v. *United States*, 323 U.S. 1, 12 (1944).

This view of the effect of a default has not been and will not be a burden on the courts. Most complaints follow well-tested patterns and a first-year law student can tell at a glance that the facts admitted by the default give rise to liability. These usual and routine cases are a far cry from an antitrust case, in which there may be hard questions of liability even on an admitted state of facts. There is an analogy between the effect of a default and the effect of a plea of guilty in a criminal case. A criminal defendant admits his conduct by a guilty plea but may continue to challenge the illegality of that conduct. *Haynes* v. *United*

[14] His statement is quoted in context *supra*, pp. 36-37.

States, 390 U.S. 85, 87 n. 2 (1968); *Kolaski* v. *United States*, 362 F.2d 847 (5th Cir. 1966). Challenges of this kind are rare and not burdensome.

It is because the court performs a judicial function, even on a default judgment, and must be satisfied that the judgment is just, that the court has discretion, if it sees fit, to require proof of some or all of the facts going to liability, even after default. Civil Rule 55(b)(2); *Jackson* v. *Kotzebue Oil Sales*, 17 F.R.D. 204 (D.Alaska 1955); *United States* v. *Knox*, 79 F.Supp. 714 (E.D.Tenn. 1948); *Douglas* v. *Harris*, 35 N.J. 270, 173 A.2d 1 (1961); see *Norman* v. *Young*, 422 F.2d 470, 474 (10th Cir. 1970); *Massa* v. *Jiffy Products Co., Inc.*, 240 F.2d 702, 706 (9th Cir. 1957). Even if the court does not choose to call for proof of liability, it must take into account, in entering judgment, facts that have become a part of the record. Thus, for example, if one of several defendants charged jointly defaults but there is a trial on the merits at which the other defendants are successful, judgment must be given against the plaintiff even as to the defaulting defendant. *Frow* v. *De La Vega*, 15 Wall. (82 U.S.) 552 (1872); *Champlin* v. *Tilley*, 5 Fed. Cas. 436 (No. 2586) (C.C.D.Conn. 1809); 6 Moore, *Federal Practice* ¶ 55.06 (2d ed. 1953). Because the rule about the effect of a default was formulated by analogy to what is admitted by a general demurrer (or, as it is called today, a motion to dismiss), a default, as the courts below acknowledged (38 F.R.D. at 501, App. A-396-397; 449 F.2d at 63, App. A-2758), does not admit even allegations of fact if it may be judicially noticed that they are not true. *E.g.*, *In re Woodmar Realty Corp.*, 294 F.2d 785 (7th Cir. 1961), *cert. denied*, 369 U.S. 803 (1962); *Interstate Natural Gas Co.* v. *Southern California Gas Co.*,

209 F.2d 380 (9th Cir. 1953); *Greeson* v. *Imperial Irrigation District*, 59 F.2d 529 (9th Cir. 1932); 5 Wright & Miller, *Federal Practice and Procedure: Civil* § 1363, at 659 (1969).

The decisions on the effect of a default have been written in the context of a default by want of appearance or by failure to answer, rather than of a default imposed as a sanction for enforcement of the discovery rules. Discovery, as it now exists, was unknown at the time that the governing principles on the effect of a default were formulated. Indeed, in the very month that this Court decided the *Thomson* case, it also held that a federal court lacked jurisdiction to order a defendant to give a deposition even in a diversity action in which the state law, applicable under the Conformity Act, authorized depositions. *Ex parte Fisk*, 113 U.S. 713 (1885). There is no reason, however, to suppose that the effect of a default under Civil Rule 37 is, or constitutionally can be, any broader than under Civil Rule 55. A state court, applying rules based on the Federal Rules, has specifically held that it is not. *Douglas* v. *Harris*, 35 N.J. 270, 173 A.2d 1 (1961). The Due Process Clause stands squarely in the path of any argument that it is.

It is settled here that the Constitution bars a court from denying a party all right to defend an action as a punishment for failure to obey a court order, *Hovey* v. *Elliott*, 167 U.S. 409 (1897), though if a party has failed to produce evidence material to an issue it may be presumed that the party's position on that issue is lacking in merit. *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322 (1909). These cases, as the Court said in *Societe Internationale Pour Participations Industrielles et Commerciales, S. A.* v. *Rogers*, 357 U.S. 197, 209 (1958), "establish that there are constitutional limitations upon the power of courts,

even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause."

Because of these constitutional limitations, a presumption of lack of merit can go no farther than the production order. Failure to produce evidence going only to one issue justifies resolving that issue against the defaulting party but does not permit the court to deny him a right to defend on other issues. The case of *Feingold* v. *Walworth Bros., Inc.*, 238 N.Y. 446, 144 N.E. 675 (1924), decided by one of the strongest state court benches ever assembled, is instructive. Defendants had refused to disclose information that would show the value of stock about which they were claimed to have made false representations. It was held that entry of a default judgment against them for this refusal to produce went beyond the constitutional limits marked out by the *Hovey* and *Hammond* cases. The refusal, the court held, would permit an order precluding defendants from claiming that the value of the stock was less than the plaintiff alleged but they were still free to contest whether they had made any false representations. In another case it was held that the refusal of defendant to disclose the alleged source of information on which a libelous article was based was enough to justify a presumption that no such person existed but it would not support a default money judgment against the defendant. *Mitchell* v. *Watson*, 58 Wash. 2d 206, 361 P. 2d 744 (1961). See also *People* v. *George Henriques & Co.*, 267 N.Y. 398, 196 N.E. 304 (1935); 4A Moore, *Federal Practice* ¶ 37.03 [2.-1], at 37-56 (2d ed. 1970); 8 Wright & Miller, *Federal Practice and Procedure: Civil* 763-764 (1970); Note, *Sanctions for Enforcement of*

Discovery—Constitutionality of Rule 37, 37 Wash. L. Rev. 175, 181-182 (1962); Note, *The Constitutional Limits of Discovery*, 35 Ind. L. J. 337, 349-350 (1960).

When defendants filed their Notice of Position they took their chances on whether they were right or wrong about the applicable law. They gave up their right to challenge the factual allegations of the complaint. They cannot be held, however, to have admitted the legal conclusions of the complaint that their acts were illegal and that any damage suffered by TWA was the proximate result of the facts alleged. There can be no presumption of want of merit in their legal position when their refusal to proceed further was because they wished to stand on that legal position. The holding below that because of the default even the most conclusory allegations of the complaint are admitted, and that the illegality and its causal relation to the damages are established, is unsupported by precedent and is a constitutionally impermissible punishment of defendants for the position they took. It was and is the view of the defendants that the conduct relied on by TWA had no relationship to a violation of the antitrust laws and that the admissions of TWA at the damage hearing established that fact. The default did not, and constitutionally could not, establish the contrary.

If a default has the novel effect that the courts below, by their misreading of *Thomson* v. *Wooster*, have given it, Rule 37 was violated by the grant of a default judgment. The District Court purported to rely on what were then Rules 37(b)(2)(iii) and 37(d). But Rule 37(b)(2) provided that "the court may make such orders in regard to the refusal as are just, and among others" might render

a judgment by default.[15] If a default judgment establishes the illegality of the conduct with which a defendant is charged, it would not be "just" to enter a default judgment, the severest of all possible sanctions, when it is well understood that defendant's refusal to make further discovery is to test the illegality of the charged conduct. Although the limitation to "just" sanctions is addressed in the first instance to the trial courts, it is vigorously policed by the appellate courts. The appellate courts do this because they are aware of the constitutional issues that lurk so closely in the background if overly drastic sanctions are imposed and because they recognize the general purpose of the Civil Rules to encourage dispositions on the merits. 4 Moore, *Federal Practice* ¶ 37.08 (2d ed. 1970); 8 Wright & Miller, *Federal Practice and Procedure: Civil* § 2284 (1970).

Thus what happened below would be wrong even if a default admits ultimate legal conclusions. But the courts below erred in thinking that legal conclusions, as distinguished from facts, are admitted by a default. Defendants were entitled to an independent judicial determination of whether their acts as alleged in the complaint, supplemented by TWA's admissions at the damage hearing and by facts that may be judicially noticed, were in violation of the antitrust laws. The courts below erred in denying them this determination and in relying instead on the conclusions of the pleader.

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[15] As a part of the 1970 amendments of the discovery rules, language limiting the court to such sanctions "as are just" was added to Rule 37(d). The courts, however, had always held that the express limitation stated in Rule 37(b)(2) applied also to Rule 37(d). Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 Col.L.Rev. 480, 494 (1958).

III. The Courts Below Erred in Allowing Recovery in Excess of The *Ad Damnum*.

Civil Rule 54(c) is brief and explicit. It provides:

> A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

Thus the rule draws a sharp distinction between default judgments and all other judgments and lays down separate rules for each. A default judgment cannot go beyond the *ad damnum*. Other judgments are not so limited and, as against a party not in default, the claimant is to be given whatever relief he is entitled to, whether he has demanded it or not. The command of the rule is emphasized by Civil Rule 55(d), which states: "In all cases a judgment by default is subject to the limitations of Rule 54(c)."

In the present case paragraph (3) of the prayer for relief in the complaint prayed for "$105,000,000, threefold the damages sustained by plaintiff, together with costs and attorneys' fees" (App. A-31). After defendants had advised the District Court that they were not going to proceed further, that court granted TWA's motion to increase the *ad damnum* from $105 million to $135 million (32 F.R.D. at 607, App. A-321). The judgment actually entered, exclusive of attorneys' fees and costs, was for $137,611,435.95 (App. A-2073), and here, as in the courts below, TWA is claiming that it is entitled to even more. The process by which the courts below found

that they were not bound by the clear limitation of the first sentence of Rule 54(c) deserves examination.

The discussion of this issue by the District Court is, in its entirety, as follows:

> That branch of the motion seeking to increase the *ad damnum* clause from $105,000,000 to $135,000,000 is granted. This is not a case where a party has defaulted in appearance. Here issue was joined and adversary proceedings continued in the pretrial stages of this litigation. The damages originally asserted were unliquidated and TWA is entitled to recover for whatever damage it can show it suffered. Furthermore, Toolco will be represented at the hearings necessary to assess damages under rule 55(b)(2). Rule 54(c); Peitzman v. City of Illmo, 141 F.2d 956 (8th Cir.), cert. denied, 323 U.S. 718, 65 S. Ct. 47, 89 L. Ed. 577 (1944); cf. Riggs, Ferris & Geer v. Lillibridge, 316 F.2d 60 (2d Cir. 1963). [32 F.R.D. at 607-608, App. A-321.]

The reference by the District Court to Rule 54(c) is mystifying, unless the court noticed only the final language of the rule and failed to note the first sentence or the introductory clause of the second sentence. Nor is the court's position strengthened by its reference—with a "cf." signal—to *Riggs, Ferris & Geer* v. *Lillibridge*, 316 F.2d 60 (2d Cir. 1963). That was not a default case. In holding that after a full contested trial the court can award judgment in excess of the amount demanded, the court in *Riggs* was making a routine application of the second sentence of Rule 54(c). Wright, *Federal Courts* 437 (2d ed. 1970). The case says nothing whatever about the first sentence of the rule.

Thus the only authority cited by the District Court that even arguably supports it on this point is *Peitzman* v. *City of Illmo*, 141 F.2d 956 (8th Cir.), *cert. denied*, 323 U.S. 718 (1944). The shaky quality of that decision as precedent is best indicated by quoting the entire relevant portion of the Eighth Circuit's decision. Defendant in that case was claiming error in allowing an amendment, after his default, raising the prayer for punitive damages from $10,000 to $20,000.

> The other amendment concerns the amount of damages prayed for. In this connection it should be observed that the record is in a confused condition; it in fact presents a paradox. The petition as served in the state court asked for $5,000 compensatory damages. The first amended petition, filed August 2, 1941, while the case was still in the state court, shows that the prayer for compensatory damages was in the sum of $5,000 and for punitive damages in the sum of $20,000. On October 7, 1942, the record indicates, plaintiff gave notice of motion to amend the prayer of the petition by interlineation, by increasing the amount of punitive damages from $1,000 to $10,000, which motion was granted October 12, 1942. In fact, instead of increasing the amount of the claim for punitive damages from $1,000 to $10,000, by this amendment the amount of the claim for punitive damages was decreased from $20,000 to $10,000. At the time of the trial plaintiff moved to amend the complaint "in the actual damages up to $5,000.00 and to amend the amount of punitive damages to $20,000.00." In this state of the record it is doubtful whether the prayer for punitive damages was in fact increased in amount. Rule 54(c) provides in part as follows: "A judgment by default shall not be different in

kind from or exceed in amount that prayed for in the demand for judgment." Rule 55(b) makes provision for a hearing on the question of the amount of damages where defendant has appeared in the action. Rule 54(c) apparently is a general rule applicable in case of a non-appearing defendant in complete default. On a hearing on the question of damages, under Rule 55(b) a defendant, though in default, is in court on a hearing limited to the question of the amount of damages, to the same extent that he is in court in a trial on the merits, and we think amendments at the trial are as appropriate in the one case as in the other. Amendments to a pleading may be allowed at the hearing on damages as to the relief prayed, subject to the right of the defendant, if taken by surprise or put to a disadvantage, to ask for a continuance or for time in which to prepare to meet the enlarged claim. See Rule 5(a); La Barre v. City of Waterbury, 69 Conn. 554, 37 A. 1068. In general, it may be said that a change in the amount prayed for is not of vital importance, as the prayer for relief is in fact no part of the claim or cause of action stated. [141 F.2d at 962.]

A number of things may be said about this confused case. First, since, as the court said, "it is doubtful whether the prayer for punitive damages was in fact increased in amount," the necessity for deciding whether an increase after default is permissible is also doubtful. Second, the default was entered because of defendant's failure to appear for depositions in April and May of 1942, at which time the punitive damages sought were clearly $20,000. The confusing developments all occurred subsequent to that failure. Third, the jury awarded $10,000 as punitive dam-

ages. 141 F.2d at 956. There was no need to rely on either the original demand for $20,000 or the later reinstated demand for that amount in order to affirm the award. Fourth, the only authority cited by the Eighth Circuit for its discussion of the right to amend after default had nothing to do with the limiting effect of the *ad damnum*. Plaintiff in *LaBarre* v. *City of Waterbury*, 69 Conn. 554, 37 Atl. 1068 (1897), had given notice of his claim to the defendant municipality before bringing suit, as he was required to do, but had neglected to allege in his complaint that he had given notice. The court allowed plaintiff to amend to state the fact of notice but also offered to allow defendant to plead anew and to present its witnesses if it wished to do so. The *LaBarre* case, to the extent that it is relevant under very different procedural rules, merely supports a discretionary power in the court to reopen a default for the plaintiff's benefit, so that no injustice will be done because of an inadvertent procedural omission.

We return from the dubious and confused authority of *Peitzman* to the proceedings in the present case. The Second Circuit affirmed the holding of the District Court that an increase in the *ad damnum* is permissible. It said:

> Although the authorities do not appear to be in agreement and this Circuit has not expressed itself on the question, we are of the view that there is no sound basis for restricting TWA to the precise damages originally sought in a case where damages alleged were unliquidated, and where defendant did not default by non-appearance, but rather because of non-compliance with discovery procedures, and indeed was granted a full trial on the question of damages actually caused by the allegations established by its default. See *Riggs, Ferris & Geer* v. *Lillibridge*, 316 F.2d 60, 62-63 (2d Cir. 1963);

Sarlie v. *E. L. Bruce Co.*, 265 F. Supp. 371 (S.D. N.Y. 1967); 6 Moore, Federal Practice ¶¶ 54.61, 55.08 at 1206. Toolco cannot in good conscience complain of any unfairness or surprise, for, as we said in discussing the propriety of the default judgment, at no time has it sought to rectify its refusal to cooperate with the legitimate discovery orders, an act it easily could have performed after Judge Metzner granted the motion to increase the ad damnum. Moreover, at the February 8 hearing, prior to Hughes's non-appearance, TWA clearly announced its intention to apply for an increase in the prayer for damages to the trebled $135 million. [449 F.2d at 78-79, A-2792.]

It is of interest that the Second Circuit did not rely on the *Peitzman* case, though this is not surprising in view of the shakiness of that case as authority, the fact that the Ninth Circuit, as will be seen, had refused to accept the dicta in *Peitzman*, and the obvious embarrassment with which TWA made even passing reference to *Peitzman* in its brief in the Second Circuit.

The authorities on which the Second Circuit did rely are of interest. The *Riggs, Ferris* case, as pointed out in the discussion of the District Court's opinion, was not a default case and goes only to the second sentence of Rule 54(c). Professor Moore does indeed twice repeat a sentence consistent with the ruling of the Second Circuit but he cites no authority except the *Peitzman* case. 6 Moore, *Federal Practice* ¶ 54.61, at 1206, ¶ 55.08, at 1823 (2d ed. 1953).[16] The decision in *Sarlie* v. *E. L. Bruce Co.*, 265

[16] Another treatise, more cautiously, states what was said in *Peitzman* but prefaces the statement with a noncommittal "it has been held that * * *." 3 Barron & Holtzoff, *Federal Practice and Procedure* § 1216, at 87 (Wright ed. 1958).

F. Supp. 371, 377-378 (S.D.N.Y. 1967), is a square holding in support of the ruling below. In *Sarlie* the court said that "it is arguable * * * as a matter of policy" that the limitations of Rule 54(c) should not apply to a default judgment where the defendant has appeared and thought it found "support in case law" for this position in *Peitzman* and in the decision of the District Court in the present case. Thus if *Peitzman* is put to one side, as the Second Circuit recognized sound analysis requires and as the Ninth Circuit has held must be done, there is literally no support for the view of Professor Moore, no support for the decision of the District Court in the present case, no support for the decision in the *Sarlie* case, and thus no support for the ruling of the Second Circuit in the present case except for Judge Cannella's suggestion in *Sarlie* about what might arguably be "sound policy."

The principal theme of the decisions below—as well as of the *Peitzman* and *Sarlie* decisions—is that the limitation of Rule 54(c) applies only to a default for total failure of a defendant to appear and that it does not apply to a defendant who has appeared and later defaulted or later been defaulted because of his failure to make discovery. The simple answer to this is that Rule 54(c) makes no distinction of this kind. The draftsmen of the Civil Rules would not have been at a loss for words if they had wished to make that distinction. Indeed they made just such a distinction in several places in the rules. The notice provisions of Rule 55(b)(2) apply only "if the party against whom judgment by default is sought has appeared in the action" while Rule 5(a) requires service of all papers subsequent to the complaint except on

"parties in default for failure to appear." Their failure to use any words of qualification when they spoke of "judgment by default" in Rule 54(c) shows beyond question that they meant to speak to all judgments by default, whether against a party who "has appeared" or against one "in default for failure to appear."

Nor was this inadvertence on the part of the draftsmen. In an article that had great influence on the drafting of the Civil Rules, Judge Clark and Professor Moore had argued that the prayer for relief should limit the judgment only in cases of default for nonappearance. Clark & Moore, *A New Federal Civil Procedure—II. Pleadings and Parties*, 44 Yale L.J. 1291, 1303 (1935). Both of those distinguished men have recognized that their suggestion on this point was not adopted. Judge Clark later noted that "the federal rule might well have gone further and restricted the judgment to the demand only when the defendant had not appeared * * *." Clark, *Code Pleading* 267 n. 168 (2d ed. 1947). Professor Moore notes policy arguments in favor of not limiting the plaintiff by his demand in a case in which the default is by a party who has appeared, and then says: "But Rule 54(c) does not go that far; it makes no distinction in the type of judgment by default; and hence all judgments by default are subject to its limitations." 6 Moore, *Federal Practice* ¶ 54.61, at 1206 (2d ed. 1953).

The suggestion of the Second Circuit that Rule 54(c) is not limiting because "at the February 8 hearing, prior to Hughes's non-appearance, TWA clearly announced its intention to apply for an increase in the prayer * * *" (449 F.2d at 79, App. A-2792), is also unsound. It is

true that Hughes was scheduled to appear for his deposition on February 11th and that TWA gave notice at the hearing on February 8th that it would seek to amend the prayer (App. A-271). But that hearing was held only because earlier on February 8th Toolco had filed with the court its Notice of Position, announcing that it would not proceed further and would rest on the merits of the positions it had taken (App. A-268). It was by the filing of the Notice of Position that Toolco crossed the Rubicon.[17] At that time it had no notice that TWA was making or would make any claim in excess of $105 million.

The result would hardly be different even if the chronology had been otherwise. If amendment of the *ad damnum* clause was precluded by Rule 54(c), mere notice of the precluded amendment could not cure the preclusion.

A better understanding of Rule 54(c) than that applied by the courts below in this case is evidenced in *Fong* v. *United States*, 300 F.2d 400 (9th Cir.), *cert. denied*, 370 U.S. 938 (1962), a case that was not noted by either the District Court or the Court of Appeals, though it was cited to both of them. The United States had sold a number of surplus ships to Fong for scrapping by him and later brought an action asserting various claims against him arising out of that transaction. The government contended that Fong had not scrapped some of the

[17] The Second Circuit's opinion reflects a consistent misunderstanding of this point. It says, at a number of places and in a variety of ways, that "entry of the default was inevitable after Hughes's nonappearance * * *" (449 F.2d at 58, App. A-2748). The fact, as the District Court correctly noted (32 F.R.D. at 607, App. A-320-321), is that it was Toolco that made a responsible decision not to appear and that it specifically advised the court that its decision to proceed would be the same even if Hughes were to appear for his deposition (App. A-299, A-303-304).

ships within the time permitted under the conditions of sale and that he had resold other ships without scrapping them, contrary to the conditions of the sale. In one count the United States sought double damages under the False Claims Act, in another it sought double damages under the Surplus Property Act of 1944, in another it sought damages for conversion of personal property, and in Count Four it sought damages for breach of contract. A default was ordered because of the failure of Fong to appear for his deposition. Both parties participated in the damage hearing.

The District Court in that case thought there was grave doubt whether the first three counts stated a claim but held that the United States was entitled to contract damages under Count Four. *United States* v. *Fong*, 182 F. Supp. 446, 451 (N.D. Cal. 1959). At the time of the default Count Four alleged facts showing that Fong had breached his contract both by his delay in scrapping some ships and by selling others while they were still unscrapped. The prayer for relief on that count, however, asked only for the liquidated damages provided for in the contract for delay in scrapping.

Initially the court ordered judgment for $516,000 in liquidated damages for the delay in scrapping and an additional $511,000 in actual damages for selling unscrapped ships. 182 F. Supp. at 452-454. On a motion for amendment of the judgment Fong argued that the award of actual damages violated Rule 54(c). The court agreed, holding that Rule 54(c) precluded the recovery by default of anything in excess of liquidated damages. 182 F. Supp. at 454-455. It rejected the government's argument that

Rule 54(c) did not apply because the judgment was entered only after a trial on damages in which Fong participated through counsel. 182 F. Supp. at 455.

On a cross-appeal on this point by the United States, the Ninth Circuit affirmed the holding below that the actual damages for selling unscrapped ships could not be recovered. The appellate court was impressed neither by the *Peitzman* case nor by the sentence from Professor Moore's treatise based on *Peitzman*. It said:

> It must be borne in mind that the mandate of the Rule is very simple, clear and decisive that a judgment "shall not be different in kind from or exceed in amount that prayed for in the demand for judgment" in default cases. Peitzman, supra, was not based upon facts like those in this case, in that, the record was in a "confused condition", and was such that "In this state of the record it is doubtful whether the prayer for punitive damages was in fact increased in amount". Very likely the court in that case in accepting the so-called trial amendment ostensibly increasing the amount of demanded damages, thought that all the court did was to put the statement of the damages demand as to amount back in the very same condition of that statement in the pleading before any changes ever were made, as the parties intended, thus correcting an obvious mistake.
>
> In view of the foregoing, we conclude that for the reasons stated Peitzman, supra, is distinguishable from this case, and should not control or influence our decision here. Moreover, we are unable to escape the explicit and emphatic mandate of Rule 54(c) which unmistakably commands that upon the facts and circumstances of this case the judgment

"shall not be different in kind from or exceed in amount that prayed for in the demand for judgment" at the time of the entry of default. [300 F.2d at 413.]

The *Fong* case is decisively against any right of TWA in this case to recover more than $105 million, exclusive of attorneys' fees and costs. When this case was before the Second Circuit, TWA sought to distinguish *Fong* on two different grounds. It first argued that in *Fong* the government never moved at any time to amend the *ad damnum* clause, while it had made such a motion here after Toolco gave its Notice of Position. This will not do. Either Rule 54(c) states a limitation on default judgments or it does not. If it does, that limitation can hardly be so readily avoided by the formality of offering an amendment. If it does not, an amendment is unnecessary. Rule 15(b), on amendments to conform to the evidence, is no less effective than is Rule 15(a), on formal amendments.

As a second purported distinction offered to the Second Circuit, TWA noted that the complaint in *Fong* asked for liquidated damages while after default the United States also sought actual damages. TWA discerned a difference between an attempt, as in *Fong*, to recover damages "qualitatively different" and an attempt, as it was making, to permit "a purely quantitative difference" in the size of the award. Thus, while its earlier arguments, both in the District Court and in the Court of Appeals, had asked those courts to disregard the first sentence of Rule 54(c) entirely, this second distinction would have had the court rewrite the first sentence to read: "A judgment by default shall not be different in kind but may exceed in amount that prayed for in the demand for judgment." One need

only look at what the first sentence says, as promulgated by this Court, to realize why that purported distinction of *Fong* is untenable.

In opposing certiorari here, TWA abandoned its earlier distinctions and offered still a third reason why *Fong* has no bearing on this case. It described *Fong* as rejecting the government's argument "that the demands made in the insufficient claims could be used to support the higher recovery" and said that the Ninth Circuit had held only that "since each claim seeking actual damages had been found not to state a claim, it would be unjust to import into the single sufficient claim the entirely different theories of damage computation embodied in the insufficient claims." Brief in Opposition at 40. There is discussion in the *Fong* opinion that bears some resemblance to this description by TWA, but the argument is likely to be persuasive only to one who has not read *Fong*. In the opinion at headnote 10, 300 F.2d at 412-413, the Ninth Circuit considered, and rejected for reasons we have quoted, the argument that Rule 54(c) was inapplicable and that the judgment on Count Four was not limited by the demand on that count. After it had concluded that discussion it turned to the alternative argument that the allegations or demands in the first three counts might somehow allow greater relief on Count Four. It considered this, under headnotes 11 and 12, 300 F.2d at 413-414, and rejected this argument also. But the fact that the Ninth Circuit in *Fong* also rejected an alternative argument for greater recovery, not available in this case, does not detract from the force of its rejection of the first argument, the argument that TWA necessarily is making here.

The reason for the limitation imposed by Rule 54(c) is readily apparent. Before a defendant chooses a course that may result in a default judgment against him, he is entitled to know what the consequences to him will be. This is essential as a matter of fairness, if not indeed as a matter of due process. This much is due to every defendant, whether he has appeared or not appeared. A defendant who elects to refuse to continue discovery in order to test the merits of his legal position runs the risk that this may be costly if he is wrong about the law, but he is entitled to know what the maximum cost may be.

Rule 54(c) is, as the Ninth Circuit said, "very simple, clear and decisive." If, as a matter of policy, any change in the rule is indicated, it should be by the usual process of rule amendment, rather than by a vaguely-defined judicial gloss that would make the rule on the books a trap for unwary litigants. This Court should give effect to "the explicit and emphatic mandate" of the rule by holding that the judgment below is a nullity to the extent that it awards TWA, exclusive of attorneys' fees and costs, in excess of $105 million. *Pueblo Trading Co.* v. *El Camino Irrigation Dist.*, 169 F.2d 312, 313 (9th Cir. 1948), *cert. denied*, 335 U.S. 911 (1949); Clark, *Code Pleading* 270 (2d ed. 1947).

IV. CAB Orders Approving Acquisition of Control of a Carrier Create Antitrust Immunity for the Exercise of That Control.

The decision of the Court of Appeals must be reversed because the court below awarded treble damages for conduct immunized from Sherman and Clayton Act penalties.

TWA recognized that the "crux" of its complaint is "Toolco's acts and efforts, through the exercise of its stock control over TWA, to control and dictate the manner and method by which TWA acquired aircraft and the necessary financing therefor" (Doc. 18, p. 5). The Second Circuit agreed that the judgment was based on "the illegality of Toolco's arrogation of all authority for buying aircraft * * *" (449 F.2d at 71, App. A-2776). The "control and dictat[ion]," the "arrogation of all authority," consisted of decisions by Toolco as to when jets should be ordered, whether they should be ordered by Toolco or TWA, how many of the jets ordered were needed by TWA, and whether TWA should lease aircraft for a time until financing could be arranged to purchase them.

As will be demonstrated in Point V, such conduct is completely outside the scope of the antitrust laws. Nevertheless, for present purposes it may be assumed that somehow or other—and the courts below never defined how—the "arrogation of all authority" in some way could have something to do with a violation of the antitrust laws, if only because the complaint so alleges. Whatever antitrust violations may be alleged in the complaint, the fact remains that the damages awarded are solely because Toolco controlled TWA and made decisions that TWA at the damage hearing claimed were wrong.

The CAB twice approved the acquisition of control of TWA, under § 408 of the Federal Aviation Act, and it subsequently approved all transactions between Toolco and TWA, including the temporary leases. Section 414 immunizes any person affected by an order under § 408 from antitrust or other legal restraints to the extent "necessary

to enable such person to do anything authorized, approved or required by such order." It was necessary to Toolco's CAB-approved control of TWA that it make decisions of the kind now complained of for TWA. The CAB, in approving the control, was fully aware that Toolco, if permitted to control, would make these decisions. The power to decide is the power to decide unwisely as well as to make decisions that appear wise in retrospect. If Toolco had not exercised its control over TWA it would have failed to do precisely what the Board by its § 408 order authorized Toolco to do. Yet TWA is now awarded an astronomical sum because Toolco did exercise control. That exercise is now found to be an illegal arrogation of authority.

When this case was first presented to the Court of Appeals in 1964 for interlocutory review of jurisdictional questions, that court ruled that while immunity under § 414 covered the acquisition of control, it could not be said to embrace every conceivable act in the exercise of that control that might possibly constitute a boycott, a tying arrangement, or an attempt to monopolize (332 F.2d at 608, 610, App. A-337-338, A-344). Arguably that was a reasonable decision at that time, when there was nothing before the Court of Appeals but the complaint. But the record of the damage hearing has narrowed the terms of reference from the limitless realm of the possible to a contained set of facts. The damage hearing revealed that the Toolco actions relied upon by TWA were the normal and natural incidents of parental control of a subsidiary. As we shall show later in this section of the argument, it is possible to hypothesize things that Toolco might have done, because

of its relation to TWA, that would not have been within the scope of the approval and the resulting antitrust immunity. The damage hearing has established that these kinds of things are not what this case is about.[18] It is about exactly the kinds of things that the CAB authorized Toolco to do.

Even if the actions of Toolco specified at the damage hearing might, absent CAB approval, have raised questions under the Sherman and Clayton Acts—and we undertake to show in the next section of the brief that they would not —Congress in § 408 specifically reserved for the CAB the task of applying antitrust considerations, along with other public interest factors, in determining whether control relationships like that between Toolco and TWA should be established and maintained, and in § 414 it immunized those relations, when approved by the CAB, from the antitrust laws. This Court has recognized that a meaningful exemption from the antitrust laws is necessary for the Board to effectuate the "regulatory scheme" that Congress intended to create. The key case is *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963), the so-called *Panagra* case. Pan American and W. R. Grace

[18] A further reason why the case is in a different posture now than it was in 1964 is that a major portion of the complaint sets out claims for purported violations of the antitrust laws after the voting trust took control of TWA in 1960. Both the Second Circuit on the interlocutory appeal and the CAB in its memorandum filed with this Court when the case was here before relied in part on an argument that the Board no longer had jurisdiction over Hughes and Toolco after Toolco relinquished control in 1960 and that there could be no immunity for post-1960 conduct (332 F.2d at 609, App. A-339); Memorandum of the Civil Aeronautics Board as Amicus Curiae at 18, *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 380 U.S. 248 (1965)). At the damage hearing TWA abandoned its claims concerning the post-1960 events, as well as its claim of conspiracy with Atlas Corporation to merge TWA with Northeast Airlines, and was awarded damages solely for events that occurred in the exercise of Toolco's control of TWA.

& Co. had jointly established a South American airline, Panagra. A government antitrust action charged that the two owners had unlawfully agreed upon a division of South American routes between Panagra and Pan American and that Pan American had used its 50% control of Panagra to prevent the latter from securing CAB authority to operate from the Canal Zone to the United States. This Court held that the complaint should have been dismissed because the Board had exclusive jurisdiction of the matters alleged in the government's complaint. The Court made particular mention of affiliations approved by the Board under § 408:

> It would also be odd to conclude that an affiliation between a common carrier and an air carrier that passed muster under § 408 should run afoul of the antitrust laws. Whether or not transactions of that character meet the standards of competition and monopoly provided by the Act is peculiarly a question for the Board, subject of course to judicial review as provided in 49 U.S.C. § 1486. [371 U.S. at 309.]

We first discuss the pertinent provisions of the Federal Aviation Act, as well as its legislative history, to show the extensive mandate Congress gave to the Board over antitrust questions. We then examine the various orders of the Board with regard to Toolco's control of TWA. Finally, we examine the facts relied upon for the award of damages to show that they were within the CAB's approval of control and were thus immunized from the effects of laws other than the Federal Aviation Act.

A. The Statutes

When the CAB involved itself in the relationship between Toolco and TWA, it was not performing merely a ministerial function. It was discharging a broad and meaningful responsibility arising from a number of provisions of federal law that were the outgrowth of very serious congressional consideration. The statutes themselves leave little doubt of the mandate Congress gave to the Board.

Most important in the context of this case is § 408(a)(5) of the Federal Aviation Act, which provides that an order of approval by the Board is required where control of an air carrier is to be acquired by another air carrier, by a common carrier, or by a person "engaged in any other phase of aeronautics." Section 408 (b) charges the Board to hold public hearings into proposed acquisitions of this kind and not to approve any that "would result in creating a monopoly or monopolies and thereby restrain competition * * *."

Section 409(a) of the Act sets forth a related requirement for Board approval before persons described above can establish interlocking directorships or interlocking officer relationships. Section 411 of the Act gives the Board power to enjoin after notice and hearing "unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof." In terms that section is limited to air carriers, but in *Panagra* the Court implied that the Board was free to utilize a broad definition of the term, "air carriers," in order to exercise authority over anticompetitive practices by persons exercising control over an air carrier. 371 U.S. at 311.

In performing its duties under these and other sections of the FAA, the Board is required to measure the public interest in terms of six factors specified in § 102 of the Act, and is charged with "the encouragement and development of an air transportation system * * *," "foster[ing] sound economic conditions" in that transportation, and "the promotion * * * of civil aeronautics."

The responsibility lodged with the Board to prevent anticompetitive abuses of a control relationship continues undiminished after initial approval. Section 408(b) states that Board approval of acquisition of control is to be "upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe * * *." It is quite common for the Board to insure continuing supervision by incorporating in approval orders a prohibition against transactions that exceed a specified dollar amount between the controlling party and the carrier and a requirement of special reports detailing dealings between a controlling party and a carrier.[19]

In these cases the Board retains "jurisdiction over the agreement to assure that no anticompetitive practices occur and to impose additional conditions if unforeseen contingencies arise." *National Aviation Trades Assn.* v. *CAB*, 420 F.2d 209, 221 (D.C.Cir. 1969). The Board has statutory authority under § 408(e) to investigate, either on complaint or on its own initiative, to determine whether the restrictions on control are being violated and may require an offender "to take such action, consistent with the provisions

[19] *E.g., Trans World Airlines, Inc., Acquisition of Sun Line Companies*, Order No. 71-1-4, January 4, 1971; *California Eastern Aviation, Inc., Control*, 26 C.A.B. 272, 287 (1958); *Davis-Cutler, Acquisition of Control*, 23 C.A.B. 766, 770 (1956); *Central Airlines, Inc., Control*, 10 C.A.B. 538, 545 (1949); *The Florida Case*, 6 C.A.B. 961, 1001 (1946).

of this chapter, as may be necessary, in the opinion of the Board, to prevent further violation of such provision." Thus the Board can investigate and remedy any change in the activities of either of the parties that it fears may have undue anticompetitive effects. Still another provision, § 1002 (b), (c), gives general authority to the Board to investigate whether any person has failed to comply with any provision of the FAA or any requirements established by the Board thereunder and to compel compliance with the Act if it finds a violation. Finally, § 1005(d) empowers the Board "to suspend or modify" any order "upon such notice and in such manner as [it] shall deem proper." If a control relationship should develop along undesirable lines, or in an unexpected manner, the Board has ample power under the provisions just cited to withdraw its approval or otherwise to remedy the matter.[20]

The foregoing review of the Board's statutory authority demonstrates the seriousness of purpose with which Congress acted in turning over to the Board the responsibility for controlling anticompetitive abuses in the business of air transportation. If there were any doubt that Congress wished the CAB to be the principal moving force in this area, it would be removed by § 414. That section relieves any person affected by an order under §§ 408, 409, or 412 of the Act from antitrust or other legal restraints to the extent "necessary to enable such person to do anything authorized, approved or required by such order."

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[20] The Board also has power to keep itself informed about the relationships of parties after it has approved control. Under § 408(d) the Board can subject the controlling party to the same requirements relating to accounts, records, and reports as an air carrier. Section 415 allows the Board to require from the controlling party "full and complete reports and other information." The Board has in fact promulgated elaborate reporting regulations. 14 CFR §§ 200 *et seq.*

The broad power vested in the CAB on the face of the statutes is confirmed also by the legislative history of the relevant provisions. Section 7 of the Air Mail Act of 1934, 48 Stat. 936, had prohibited control of an air carrier by a company engaged in any phase of the aviation industry.[21] In 1935 a Federal Aviation Commission, appointed by President Roosevelt to recommend a comprehensive policy for protecting the public interest in light of the rapid growth of the aviation industry, urged that that blanket prohibition should be relaxed and that responsibility for protecting the public interest against anticompetitive practices in the industry should be turned over to a new regulatory agency. The agency would be in a position to preserve competition while balancing this against other public interest considerations, since "the door should be left open as far as possible for a free flow of investment capital into air transportation in the interest of a strengthening of its structure and the improvement of its facilities." *S. Doc. No. 15*, 74th Cong., 1st Sess. 69 (1935). Congress responded to this recommendation in the Civil Aeronautics Act of 1938, 52 Stat. 973, reenacted without substantive change, so far as the presently relevant provisions are concerned, in the Federal Aviation Act of 1958, 72 Stat. 731. As the Court said in *Panagra*, "since 1938, the industry has been regulated under a regime designed to change the prior competitive system." 371 U.S. at 301.

In the Senate debates on the 1938 statute, Senator McKellar questioned the wisdom of giving a commission the

[21] Prior to the 1934 Act, the control of air carriers by airplane manufacturers and holding companies had led to abuses. *Hearings Before the Special Senate Committee on Investigation of Air Mail and Ocean Rail Rates*, 73rd Cong., 2d Sess. (1934).

power to permit combinations in restraint of trade. Senators Truman and McCarran responded by emphasizing the fullness and completeness of antitrust authority intended to be exercised by the new agency under the Act. 83 Cong. Rec. 6728-6729 (1938). The statute delineated the authority of the CAB to enforce antitrust policies more explicitly than in any similar regulatory legislation.[22] Both the statutes and the legislative history teach that the Board was and is intended to control the relation of antitrust policies to other considerations of the public interest in a broad and meaningful way, without any fear of intrusion from any other governmental body.

B. The CAB Orders

As we noted at the outset of this section, TWA says that the "crux" of its complaint involves Toolco's use of its control over TWA "to control and dictate the manner and method by which TWA acquired aircraft and the necessary financing therefor" (Doc. 18, p. 5). The courts below held that these activities were not necessarily within the scope of the various orders entered by the CAB pursuant to § 408. Yet an examination of the orders reveals that their subject matter consists precisely of what TWA calls the "crux" of its complaint. Further, the records pertaining to the orders indicate the Board's active and continuing concern with the very factual "backdrop" that TWA brought forward at the damage hearing. If the result below is sustained, the purported exemption from the antitrust laws expressed in § 414 is a dead letter and the CAB can exercise no meaningful function under § 408.

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[22] See, *e.g.*, the comparable provisions of the Shipping Act, 46 U.S.C. § 814, the Interstate Commerce Act, 49 U.S.C. §5(2), the Federal Communications Act, 47 U.S.C. §§ 221, 222, and the Federal Power Act, 16 U.S.C. § 824b.

The orders of the Board approving Toolco's control of TWA are described in the Statement of Facts.[23] The basic order, issued in 1944, approved the acquisition by Toolco of approximately 45% of the common stock of TWA (6 C.A.B. 153, App. A-3297). A modifying order in 1950 permitted TWA to increase its stock ownership to more than 70% and to seat a majority of Toolco nominees on the TWA board (12 C.A.B. 912, App. A-3333).

Conditions imposed by the Board in its 1944 order, reaffirmed in 1950, limited transactions between the companies to those "involving complete items of property, the price of which does not exceed $200 each, with the further limitation that the total annual expenditure involved in such commercial transactions by either party shall not exceed $10,000" (6 C.A.B. at 158, App. A-3306). Thus from 1944 to 1960 every acquisition or lease of aircraft by TWA from Toolco and each financing of TWA by Toolco required specific Board approval. The various applications filed by TWA with the Board requesting this approval described in detail the nature of the transactions, the reasons for them, and their benefit to TWA. Extensive exhibits containing the terms and conditions of the transactions accompanied each application. The orders issued by the Board approving the transactions were based on § 408 and were in the form of modifications to the original control order (App. AX-2202, AX-2226, AX-2237, AX-2245, AX-2260). Thus the Board regarded its transactional orders as continuations of the original proceeding approving Toolco's acquisition of control. Each of the modification orders rested on a stated finding by the Board that the transactions were "just and reasonable and in the public interest" (*e.g.*, App. AX-2261).

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[23] Pp. 6-9, *supra*.

The orders reflect on their face a process of continuous and comprehensive supervision by the Board, in precisely the manner that Congress intended. This is confirmed by the hearings that preceded the basic control orders in 1944 and 1950.

In its opinion accompanying the 1944 order (6 C.A.B. 153, App. A-3297) the Board examined in great detail the specific effects upon competition of the foreseeable actions that Toolco might take with respect to TWA once control was approved. It was precisely because Toolco had the rights to purchase planes, some of which might be held for resale to commercial airlines, that the Board found that Toolco was potentially a dealer and thus was engaged in a phase of aeronautics, so that Board approval of Toolco's control was required (6 C.A.B. at 156, App. A-3302). The Board was aware that it was Toolco that had contracted with Lockheed for the purchase of Constellations, intended for TWA, and that that arrangement had been made "to give TWA the benefit of the credit and financial standing of Hughes Tool in a transaction involving substantial financial responsibility" (6 C.A.B. at 155, App. A-3300-3301). The Board noted the possibility that TWA might be "forced," through Toolco's control, to purchase more planes than TWA's needs required and said that it was imposing conditions to "insure against any temptation which may later come to [Toolco] to take advantage of the relationship to its own profit and to the detriment of the public interest" (6 C.A.B. at 156, App. A-3302-3303). It found that the limit it put on transactions between Toolco and TWA would "protect the public interest from any improper coercion of the air carrier by a controlling company on account of any interest which that controlling company may have in some other phase of aeronautics" (6 C.A.B. at 157, App. A-3304).

When Toolco proposed to increase its stock interest in TWA from 45% to more than 70%, as a part of a financing scheme to rescue TWA from impending bankruptcy shortly after the war, the CAB found that this would be a further acquisition of control, for which its approval was required (9 C.A.B. at 381, App. A-3320). It ordered a hearing to determine if this further acquisition would be consistent with the public interest. That hearing ranged over the entire 14-year history of the Toolco relationship to TWA and the full spectrum of activities involved. Toolco's management policies were subjected to close analysis in the very areas for which TWA has now been awarded damages. Careful scrutiny was given to Toolco's participation in the acquisition of equipment by TWA (12 C.A.B. at 207, 210, 217, App. A-3363-3364, A-3368-3369, A-3383) and to the role of Toolco in obtaining financing for TWA (12 C.A.B. at 208, 216-217, App. A-3365-3366, A-3382-3383). The Board knew that "TWA was required to come to Toolco to obtain consent of the latter before purchasing additional equipment" (9 C.A.B. at 391 n. 18, App. A-3330) and that in practice it was Toolco that contracted with manufacturers for planes intended for TWA (12 C.A.B. at 208, App. A-3365).

The Board, in its 1944 and 1950 orders, did not merely approve the acquisition by Toolco of a financial interest in TWA. It approved, as § 408(a)(5) requires and as its orders show on their face, acquisition of "control." The Board's public counsel was unhappy with the further acquisition in 1950, and noted the possibility that the Board might require that the additional stock to be acquired by Toolco not be voted, but even he thought that such a limitation would be impractical and undesirable (12 C.A.B. at 215, App. A-3380). It was with regard to these particular

parties that the Board defined "control" as used in § 408 as meaning "the existence of a right or power to direct or dominate, whether actually exercised or existing in potential use" (9 C.A.B. at 386, App. A-3321). It was aware that the further acquisition would give Toolco "complete actual and legal control" (12 C.A.B. at 197, App. A-3342), that Toolco would "manage and direct the usual day-to-day business and financial affairs of the airline" (9 C.A.B. at 387, App. A-3323), and that Toolco had not been willing to give further financial assistance to save TWA from bankruptcy "without assurance that the management of the carrier would be replaced and the carrier reorganized and run in agreement with the wishes of the principal stockholder and/or its representatives" (12 C.A.B. at 206, App. A-3360).

With all of this knowledge before it, and with full understanding of exactly what control by Toolco would mean, the Board approved the further acquisition of control. The record showed that benefits to TWA from having Toolco as its principal owner had been "real and substantial" (12 C.A.B. at 216, App. A-3381). Toolco's continued engagement in certain phases of aeronautics was in the public interest and did not conflict with its control of an air carrier (12 C.A.B. at 216, App. A-3381). The record did not permit "any other conclusion than that * * * the further acquisition of control should be approved as being consistent with the public interest and the requirements of the Act" (12 C.A.B. at 193, App. A-3334).

In the light of all that the Board knew and of all that it said, the conclusion is inescapable that the Board, with its eyes wide open, approved giving Toolco the power "to control and dictate the manner and method by which TWA

acquired aircraft and the necessary financing therefor." Far from being an illegal "arrogation of all authority," this was a legitimate exercise of power approved by the Board under § 408 and thus immunized by § 414.

C. The Damage Award

Whatever may have seemed to be the case in 1964 when the Second Circuit considered the immunity issue on the basis of the complaint alone, it is now clear that the damages awarded to TWA are based on decisions that Toolco made for its subsidiary about acquisition and financing of aircraft and are, therefore, for exercising precisely that control that the Board authorized Toolco to have.

(1) The largest item in the award, $27.6 million before trebling, was for late delivery of jet aircraft and because the jet fleet was cut back to 47 planes rather than the 63 planes originally ordered. The initial order for Boeing jets was given promptly after negotiations with Convair about manufacture by that company of a long-range jet suited to the unique requirements of TWA had fallen through. The jet orders were reduced in 1959 when Toolco, in consultation with TWA, determined that the larger fleet of first-generation jets was not needed. Whatever may be said in hindsight about the sagacity of these management determinations, it is difficult to think of decisions that are more traditionally the type of business judgment that a parent would make concerning the policies of its subsidiary. "'* * * [I]nevitably the controlling company, by virtue of its investment in the acquired carrier, will endeavor to make itself accountable—as indeed the acquirer here under scrutiny had—for the managerial efficiency, the operating economy, and the financial integrity of the controlled car-

rier" (12 C.A.B. at 196, App. A-3341). The discussion earlier of the CAB control orders shows that the Board was fully aware, when it approved the acquisition of control, that Toolco would make decisions of this kind for TWA. As late as December, 1960, the Board said that "we have not been unaware of TWA's problems" and pointed to the fact that TWA had not arranged financing for its jet fleet as early as had its major competitors and that it had ordered fewer planes than they had. *Trans World Air., Control by Hughes*, 32 C.A.B. 1363, 1364-1365 (1960) (App. A-3403, A-3408-3409). Yet with that awareness the Board took no action to revoke its approval of control[24] and instead approved, as modifications of the original control orders, each of the transactions by which TWA acquired jets.

(2) The award of $5.3 million before trebling because some of the jet aircraft were temporarily leased by TWA from Toolco is an even more obvious example. The decision that the planes should be leased to the airline until permanent financing could be arranged was well within the general control approved by the CAB in 1944 and 1950 and, in this instance, it was the subject of specific Board approval. In five separate orders the Board approved the lease of planes from Toolco to TWA, finding that these transactions "do not violate the original purpose of the Board in impos-

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[24] The Board on its own motion did order an investigation in 1956 when thought was briefly given to Toolco's manufacturing jets for TWA. See note 51, p. 109, *infra*.

On June 23, 1960, the Board approved a proposed plan for permanent financing that could have increased Toolco's ownership of TWA stock from 78% to 90%. The Board found that "in view of the overwhelming control" already exercised by Toolco, "any increase of control is insignificant and does not call for a reexamination of the relationship under section 408". *Trans World Air., Control by Hughes*, 31 C.A.B. 982, 983 (1960) (App. AX-2287, 2288).

ing the restrictions contained in Order 3210, and * * * [are] just and reasonable and in the public interest."[25] Even if, as TWA claims, the Board was unaware of, and did not approve, a supposed condition accompanying the leases that TWA would thereafter purchase aircraft only from Toolco, this does not alter the situation. The Board had been fully aware, from at least 1950, that Toolco would decide what planes TWA would acquire and that Toolco would be the nominal purchaser of planes for TWA's use.[26] Furthermore, the acquisition thereafter of any aircraft by TWA from or through Toolco would be subject to CAB approval under § 408.

(3) Somewhat more than half a million dollars, before trebling, was based on added personnel costs to TWA because certain Convairs were not delivered on the schedule that had been agreed to. TWA's case is that these delays would not have occurred had not Toolco controlled TWA, but again the point is that this control was approved by the CAB and thus immunized from the antitrust laws.

(4) The $12.4 million before trebling awarded because of retroactive application of changes made in TWA's accounting practices 2½ years after this suit was instituted are dependent on the validity of the other three awards of damages. They have no independent significance for purposes of the control relationship and its status under § 408.

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[25] Orders E-13542, Feb. 26, 1959 (App. AX-2202); E-13873, May 15, 1959 (App. AX-2226); E-14169, July 1, 1959 (App. AX-2237); E-14504, Sept. 30, 1959 (App. AX-2245); E-14877, Jan. 29, 1960 (App. AX-2260).

[26] Further, as discussed at pp. 142-145, *infra*, the damages were awarded because leasing is costlier than purchase, not because of the supposed condition.

D. The Decisions Below

The decision by the Court of Appeals that §414 is no bar to the recovery here will result in confusion about the proper role of the courts in relation to the Board and about the extent to which one who acquires control of an air carrier with CAB approval can rely on an order by the CAB approving a transaction as a grant of antitrust immunity in conducting the normal business affairs of a company with such a control relationship. The decision leaves it to the courts to determine when an approved transaction is immunized and when it is not, depending on such subjective criteria as the "backdrop" and the court's perception of the extent to which the CAB was aware of all the facts. But the scope of the Board's power to confer immunity does not turn, as the Court of Appeals mistakenly thought, on whether the courts or the Board are more competent to pass on antitrust matters. Congress has given an express power to confer immunity in § 414. It did so for a purpose —to enable the Board to fashion and apply a competitive standard in the light of public interest factors detailed in § 102 of the Act. "It is not for this Court, or any other, to override a policy, or an exemption from one, so clearly and specifically declared by Congress, whatever may be our views of the wisdom of its action." *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 79 (1944).

Thus it misses the mark to say that the Board is not "any more qualified to consider such charges than the federal courts, which daily encounter and resolve antitrust problems" (332 F.2d at 609, App. A-341). The whole point is that Congress has determined that the extent of permissible competition in the aviation industry is too complex to

be resolved only in antitrust terms. As the Court noted in *Panagra*, the Board "has its special standard of the 'public interest' as defined by Congress. * * * If the courts were to intrude independently with their construction of the antitrust laws, two regimes might collide." 371 U.S. at 308, 310.

Congress has directed the Board to make a broader inquiry than is open in an antitrust action. Under the first proviso of § 408 the Board is prohibited from approving any transaction that "would result in creating a monopoly or monopolies and thereby restrain competition * * *." At the same time, the Board itself "has properly concluded, in light of the immunity from the antitrust laws conferred by § 414, that it must consider anti-competitive effects less extreme than those limned in the proviso in determining whether the transaction will 'be consistent with the public interest,' as defined in § 102 * * *." *Butler Aviation Co.* v. *CAB*, 389 F.2d 517, 519 (2d Cir. 1968). See also *National Aviation Trades Assn.* v. *CAB*, 420 F.2d 209, 213 (D.C.Cir. 1969). But if there is an anticompetitive effect short of a monopoly, the Board may still approve if it finds that, in the light of all the factors listed in § 102, the overall effect is in the public interest. Sections 408 and 414 become meaningless if a court, taking a monocular view of only the effect on competition, can award huge damages for a transaction that the Board, after carefully weighing any injury to competition against the benefits that the transaction will provide, has found to be in the public interest.[27]

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[27] Thus Professor Davis notes that "* * * the congressional policy expressed in the Federal Aviation Act includes both something more and something less than the antitrust policy." He suggests that a proper accommodation of CAB regulation with the antitrust laws is to limit judicial action applying antitrust policies to proceedings on judicial review of Board orders. Davis, *Administrative Law Treatise* § 19.06, at 634 (1970 Supp.).

Suppose, for example, that when TWA was on the verge of bankruptcy in 1946, the only company with sufficient resources and interest to enable TWA to survive had been Lockheed. Suppose further that the CAB approved acquisition of control by Lockheed, recognizing the obvious restriction on competition from such a vertical integration but finding that that was outweighed by the public interest in having a strong and solvent TWA. On the theory of the court below, Lockheed would have been vulnerable to an antitrust action if, while it exercised control, TWA, with CAB approval, had purchased Lockheed planes.

The Board understands its powers in this regard. See, for example, its recent order authorizing joint action by TWA, American, and United to reduce scheduled capacity in certain markets. *Application of Trans World Airlines, Inc., et al.*, Order 71-8-91 (August 19, 1971). The Board expressly noted that this joint action was inconsistent with the antitrust laws but approved it—and thereby gave antitrust immunity, 41 Op. Atty. Gen. 333 (1957)—because of the financial distress the industry is suffering. The Board said, at 5, that

> in the present unusual circumstances, approval of the three-carrier agreement notwithstanding its inconsistency with the antitrust principles is required to meet serious transportation needs and secure important public benefits.

In the present case antitrust liability was found on the novel theory of what was termed "potential competition." Yet it was precisely because such "potential competition" existed, that is, because Toolco's aeronautics activities made it conceivably a potential supplier to air carriers, that Toolco's acquisition of TWA required CAB approval. Whatever "independent economic significance" Toolco can be said to

have had, or whatever "potential competition" it may have represented, was the basis of the CAB's original interest in the relationship and was examined at great length by the Board prior to each of its approvals (6 C.A.B. at 155-156, App. A-3299-3301; 9 C.A.B. at 382, App. A-3314; 12 C.A.B. at 216, App. 3381).

It is true, as noted in *Panagra*, that the Federal Aviation Act has not completely displaced the antitrust laws, and that "on the civil side violations of antitrust laws other than those enumerated in the act might be imagined." 371 U.S. at 305. This was said in discussing the Board's authority under § 411 and that section is not among the sections specified in § 414 in defining immunity. The Court's remark just quoted was in a context "apart from orders which give immunity from the antitrust laws by reason of § 414 * * *." *Ibid.* Nevertheless it is possible to imagine acts that a controlling company might do, by virtue of its control of an air carrier, that would not be within the immunity conferred by a § 408 order. Suppose, for example, that Toolco refused to sell drill bits except to companies that agreed to patronize TWA whenever possible. Or that Toolco agreed to buy only Boeings for TWA in exchange for Boeing's agreement to buy all its drill bits from Toolco. Arrangements of this kind with third parties might well be outside the scope of the immunity. But that is not our case. We have here only the normal exercise of the controlling party's right to make important decisions for its subsidiary. This is at the heart of the Board-approved control and thus of the § 414 immunity.

In *Panagra*, the Court went on to say:

> Limitation of routes and divisions of territories and *the relation of common carriers to air carriers* are basic in this regulatory scheme. The acts charged in

> this civil suit as antitrust violations are precise ingredients of the Board's authority in granting, qualifying, or denying certificates to air carriers, in modifying, suspending, or revoking them, *and in allowing or disallowing affiliations between common carriers and air carriers.* [371 U.S. at 305; emphasis added.]

Equally the relation between air carriers and persons engaged in aeronautics is "basic in this regulatory scheme" and is a "precise ingredient" in "allowing or disallowing affiliations." Congress has said that what the Board has joined together it is not for the antitrust court to rend asunder.

TWA has suggested that the Board "is without jurisdiction under the Federal Aviation Act over either the acquisition of equipment by air carriers or their financing." Brief in Opposition to Certiorari at 44. It is difficult at this late date to suggest that the restrictions the Board imposed in its original orders on acquisition of equipment and the series of subsequent orders approving particular equipment acquisitions and financing arrangements were all *ultra vires* and that the Board for nearly 30 years has been arrogating an authority it does not have. The unsoundness of this suggestion can be easily illustrated. Suppose that Toolco had obtained and resold to TWA the full 63-jet fleet originally ordered. Suppose that the Board, conscious of the possibility "that TWA might be forced, through the control exercised by Hughes Tool, to purchase more than the economic operations of TWA require * * *" (6 C.A.B. at 156, App. A-3302), had carefully examined the transaction and approved TWA's acquisition of that many jets from Toolco. On TWA's narrow view of the Board's jurisdiction, TWA could now claim substantial antitrust dam-

ages for the money it lost if, with hindsight, 63 jets turned out to be more than it needed, and it could do this despite CAB approval of acquisition of that large a fleet.

The decision below reflects a lack of confidence in the administrative process that Congress saw fit to establish and in the ability of the Board to make knowledgeable decisions. Since 1938 Congress has carefully evolved a system considered by it to be most appropriate for promoting the orderly development and functioning of the commercial aviation industry in this country. Congress intended that the Board should have the responsibility, within a broad regulatory scheme, for adjusting competitive practices within the aviation industry to make possible the provision of assistance to carriers from various segments of the industry and the economy when that is found to be in the best interests of the public.

The case history of the relation between Toolco and TWA reflects that through the use of control of the carrier by Toolco, as approved by the Board, Toolco rescued TWA from financial disaster after World War II, developed TWA's air fleet, aided it in becoming one of the most important air carriers in the country, and assisted it in entering the jet age. Perhaps, as the new management of TWA contends, Toolco made some mistakes in the course of its exercise of control, but in human affairs it would be unusual if this were not the case. The courts below have, in effect, found Toolco's stewardship to have been unlawful by measuring it against the rigid principles of the antitrust laws rather than by the more supple test of the public interest that Congress has provided for this industry.

The decision below is plainly inconsistent with §§ 408 and 414 of the Act and with this Court's holding in *Panagra*. At a time when many air carriers are in difficult finan-

cial circumstances, the decision below, if affirmed, would effectively deter anyone else in any phase of aeronautics from coming to a carrier's assistance, because the antitrust immunity that CAB approval and § 414 seem to confer would have become "only a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." *Edwards* v. *California*, 314 U.S. 160, 186 (1941) (Jackson, J., concurring).

V. The Acts of Defendants Were Not In Violation of the Antitrust Laws.

In the preceding point of the Argument we have discussed the effect on antitrust liability of CAB approval of acquisition of TWA by Toolco and of the transactions between them. For purposes of the present point we assume that the effect of CAB approval is narrower than we have there contended and that the antitrust immunity, granted by § 414 of the Federal Aviation Act and by the last sentence of § 7 of the Clayton Act, extends to the acquisition of control itself but not to the exercise of control. Even on that assumption, the acts of defendants alleged in the complaint are not violations of the antitrust laws.

The complaint alleged that Toolco had restrained and monopolized the trade and commerce of supplying aircraft to air carriers in general and to TWA in particular. Basically it asserted that the defendants foreclosed suppliers of aircraft other than Toolco from supplying the TWA market. So long as TWA could rely on the conclusory allegations of the complaint it could perpetuate the myth that TWA was forced to buy Toolco planes instead of planes of other manufacturers and suppliers. The damage hearing exposed this for the myth it was. TWA was not awarded damages because any other supplier was excluded from the TWA mar-

ket nor because of any restraint on trade of suppliers; the award is based entirely on harm TWA claims to have suffered because Toolco decided for TWA when and how TWA would acquire planes from Boeing and Convair.

Though this case has gone on for many years and produced many decisions from the courts below, at no point has any court specified how defendants' acts violated the statutes plaintiff relies on. The Court of Appeals thought that "the default had the effect of admitting or establishing that the acts pleaded in the complaint violated the antitrust laws * * *" (449 F.2d at 70, App. A-2772). Apparently it lacked full confidence in that position—and wisely so, as we have shown in Point II of the Argument. Accordingly it outlined six different theories on which it thought that an antitrust violation could be found (449 F.2d at 68-69, App. A-2770-71). All six of those theories are fatally undercut by one or both of the following two facts: (1) Toolco was lawfully the parent of TWA; and (2) Toolco was not in competition with manufacturers or suppliers of commercial aircraft.

A. The Parent-Subsidiary Relationship

Because the Court of Appeals ignored the significance of the fact that Toolco and TWA were not independent entities, and that Toolco was lawfully in control of TWA by its 78% stock ownership, approved by the CAB, the court below has awarded $145 million in damages under the antitrust laws for what is at most a mismanagement claim. The court below thought that the judgment was based on "the illegality of Toolco's arrogation of all authority for buying aircraft

* * * " (449 F.2d at 71, App. A-2776), when in substance TWA's claims amounted to nothing more than that normal management decisions made by Toolco for its subsidiary were detrimental to TWA.

A controversy between these two Delaware corporations about mismanagement would have been litigated in a state court and TWA's recovery of *single* damages would have been conditioned on a showing that Toolco had breached its fiduciary duties and had been guilty of "gross and palpable overreaching."[28] The Court of Appeals, by ignoring the critical importance of the parent-subsidiary relationship, has allowed a *three-fold* recovery of damages without even a threshold showing of the elements of a mismanagement claim.[29]

The supposed "arrogation of all authority" consisted of Toolco's deciding that it would order jet aircraft for TWA instead of TWA's ordering precisely the same aircraft from the same manufacturers, the decision as to when these aircraft should be ordered, the later determination that it

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[28] *E.g., Sinclair Oil Corp.* v. *Levien*, 280 A.2d 717, 722 (Del. 1971); *Getty Oil Co.* v. *Skelly Oil Co.*, 267 A.2d 883, 888 (Del. 1970); *Meyerson* v. *El Paso Natural Gas Co.*, 246 A.2d 789, 794 (Del. Ch. 1967). See generally Note, *The Fiduciary Duty of Parent to Subsidiary Corporation*, 57 Va.L.Rev. 1223 (1971).

[29] TWA can hardly assert that the facts are unrelated to a mismanagement claim. After instituting the instant action in federal court, TWA filed a mismanagement suit in the Delaware Court of Chancery alleging substantially the same facts it had set forth in its antitrust complaint. As a matter of fact, the federal complaint, stripped of its antitrust verbiage and with the added claims of mismanagement and violation of fiduciary duties, is identical for all practical purposes with the state complaint. That state action has not yet been dismissed.

would be unwise to acquire too many first-generation jets and that TWA should take only 47 of the 63 jets initially ordered, and the decision that TWA should lease aircraft for a time until financing could be obtained to purchase them.

If Toolco, by virtue of monoply power or huge resources or predatory tactics, had been able to force decisions of this kind on an independent TWA, the case might arguably fit within antitrust concepts. But for Toolco to make these decisions for a subsidiary it has lawfully acquired was merely to do what a parent normally does. This Court has recognized repeatedly that dealings that would be antitrust violations if engaged in by independent entities can be lawful if the parties are parent and subsidiary. In *United States* v. *Columbia Steel Co.*, 334 U.S. 495 (1948), for example, the Court established that exclusive dealing between parent and subsidiary is a lawful and normal business practice, even though it might well violate the antitrust laws if the companies were unrelated.

> A subsidiary will in all probability deal only with its parent for goods the parent can furnish. That fact, however, does not make the acquisition invalid. [334 U.S. at 523.]

A fortiori the dealings themselves are not illegal. See also *Standard Oil Company of California* v. *United States*, 337 U.S. 293 (1949), where the Court held that an exclusive dealing arrangement imposed on independent dealers violated § 3 of the Clayton Act though recognizing that the same arrangement could have been imposed on company agents, and *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), explicitly distinguishing between inde-

pendent distributors and those whose function was essentially that of agents or salesmen in determining the propriety of restrictions on resale.

Commentators are agreed that parent-subsidiary relations are not subject to the same standards that govern independent enterprises.[30] The report to Attorney General Brownell by an eminent committee was quite emphatic on this point:

> It seems indeed inconceivable to hold *per se* illegal the mere fixing by a parent of a subsidiary's price or production, or the selection by the parent of those persons with whom its subsidiary may or may not deal. [*Report of the Attorney General's National Committee To Study The Antitrust Laws* 35 (1955).]

The fact of the matter, in view of the parent's responsibilities to its own shareholders, is that "the parent not only has a right to control its subsidiaries, but a duty to do so." Stengel, *Intra-Enterprise Conspiracy Under Section 1 of The Sherman Act*, 35 Miss. L.J. 5, 21 (1963).

At the heart of any antitrust claim is the concept that the offending party has wrongfully exercised, or sought to exercise, control over the economic and competitive decisions of an independent business entity. See *United States* v. *Topco Associates, Inc.*, 92 S.Ct. 1126, 1135-1136 (1972). Virtually every antitrust violation—price-fixing, tying, exclusive

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[30] See generally Krause, *The Multi-Corporate International Business Under Section 1 of the Sherman Act — Intra-Enterprise Conspiracy Revisited*, 17 Bus. Law. 912 (1962); McQuade, *Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act*, 41 Va.L.Rev. 183 (1955); Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U.L.Rev. 20 (1968).

dealing, territorial allocations, exclusion of competitors—is based upon a defendant's attempt to control what he has no right to control—the prices of his competitors, his customer's choice of suppliers, a competitor's entry into a market. TWA, however, had no claim to economic independence, since it was lawfully acquired by Toolco as the courts below recognized (214 F. Supp. at 109, App. A-261; 332 F.2d at 608, App. A-336). TWA cannot complain that Toolco controlled what it had no right to control, but only that it did not exercise that control in a manner consistent with what TWA now claims were its best interests. That is a mismanagement claim rather than an antitrust claim.

A subsidiary does have standing under the antitrust laws to challenge the legality of its acquisition by its parent. *E.g., Gottesman* v. *General Motors Corp.*, 414 F.2d 956 (2d Cir. 1969), *cert. denied*, 403 U.S. 911 (1971); *Allis-Chalmers Mfg. Co.* v. *White Consolidated Indus., Inc.*, 414 F.2d 506 (3d Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970). Once that legality has been established, however, as it has here by virtue of CAB approval, the subsidiary should not—and until this case, did not—have capacity to make antitrust claims concerning the mere exercise of parental control. The decision of the Court of Appeals creates a hitherto unimagined[31] potential for actions by subsidiary corporations and minority stockholders. If the arrogation of all authority for management decisions of a subsidiary is a violation of the antitrust laws, then any decision a parent makes for its subsidiary that appears wrong by the wisdom of hindsight will give rise to a claim for treble damages. No

[31] None of the commentators who have studied the question of intra-enterprise conspiracy—see note 30, *supra*—has considered the possibility of a subsidiary suing its parent for restraining the subsidiary's trade. Until now the question has been whether and when a third party or the government could successfully claim that corporate affiliates had conspired with one another.

need will remain to prove breach of duty or "palpable overreaching," and damages caused by a parent's misjudgment will be recoverable thrice over. All the subsidiary need do is invoke the language of antitrust to create exclusive federal jurisdiction over what until now has been a state law claim that in many instances could only be brought in the state courts.[32] With the tantalizing prospect of treble damages as a lure, few plaintiffs are likely to resist the invitation to make a federal case out of it.[33]

In the antitrust laws, as in the securities statutes, Congress "did not seek to regulate transactions which constitute no more than internal corporate mismanagement." *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, 12 (1971). The antitrust theories the Court of Appeals thought possibly applicable break down when applied in a parent-subsidiary context.

One theory mentioned by the Court of Appeals was "enforcement of an illegal boycott" (449 F.2d at 69, App. A-2770). The hypothesis fails for the simple reason that there was no "boycott." Each of the cases cited by the Court

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[32] A different panel of the Second Circuit refused to convert a state claim into a more complex federal action when, one day before the decision in this case came down, it held that conclusory allegations in a complaint are not enough to "bootstrap" a "garden-variety customer's suit against a broker for breach of contract" into a violation of the Securities Exchange Act. *Shemtob* v. *Shearson, Hammill & Co.*, 448 F.2d 442, 445 (2d Cir. 1971).

[33] [T]his is one of those cases, not unfamiliar in treble-damage litigation, where injury resulting from normal business hazards is sought to be made redressable by casting the affair in antitrust terms." *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 474 (1962) (Harlan, J., dissenting). That this is the wrong moment in history to invite more antitrust suits is evident from the fact that the number of private antitrust actions commenced has increased from 228 in 1960 to 1445 in 1971. *1971 Annual Report of the Director of the Administrative Office* II-108.

of Appeals for this theory[34] involved an agreement by one group of enterprises not to deal with other businesses, with the objective of destroying the other businesses or coercing them into certain desired conduct.

In this case there is no credible suggestion, nor could there be, that Toolco's decision to purchase planes for TWA was designed to coerce or destroy Boeing, Convair, Douglas, or any other aircraft manufacturer. They could hardly have been coerced or destroyed since any loss of sales to TWA was replaced by sales to Toolco. From the viewpoint of these supposedly "boycotted" manufacturers, the "restraint" was no different from what occurs whenever any purchasing decision is made. A decision to buy from one firm is necessarily a decision not to buy from another, but that does not make the decision an unlawful restraint of trade or boycott. See *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918). That the decision is made by a parent for its subsidiary does not make unlawful a decision that the subsidiary could lawfully have made for itself. *Hudson Sales Corp.* v. *Waldrip*, 211 F.2d 268 (5th Cir.), *cert. denied*, 348 U.S. 821 (1954); *Alpha Distributing Co. of California* v. *Jack Daniel's Distillery, Inc.*, 207 F. Supp. 136 (N.D.Cal. 1961), *affirmed per curiam*, 304 F.2d 451 (9th Cir. 1962). If Toolco's decision that it, rather than TWA, would purchase aircraft—a decision that did not impinge in any way on the economic freedom of an independent party and that was made "to give TWA the benefit of the credit and financial standing of Hughes Tool * * *" (6 C.A.B. at 155, App. A-3300-3301)—was a boycott, then every parent's selection of suppliers for its

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[34] *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457 (1941); *Klor's Inc.* v. *Broadway-Hale Stores*, 359 U.S. 207 (1959); and *United States* v. *New York Great Atlantic & Pacific Tea Co.*, 173 F.2d 79 (7th Cir. 1949).

subsidiary can be converted into a boycott by denominating it as such in a complaint. See Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U.L. Rev. 20, 49 (1968).

TWA acquired Boeing jets and Convair jets, not Toolco jets, and it wanted Boeing jets and Convair jets. To Boeing and Convair, whether TWA or Toolco ordered the jets was immaterial. Boeing viewed TWA and Toolco as one and the same customer, and the right to receive the planes could not be assigned without the consent of the manufacturers. Moreover, Boeing and Convair produced exactly the same number of jets and sold them at the same price, whoever placed the order. The decision to cut back on the orders permitted the sale or lease of certain of these jets to others but the trade of Boeing was in no way restrained or monopolized because with Boeing's consent Toolco assigned its orders for six aircraft and Boeing then sold the aircraft to Pan American. The same is true of the lease of the Convairs to Northeast. The leasing of jets to TWA pending permanent financing affected the manufacturers not at all (and even if it had, of course, the damage would have been to them rather than to TWA).

A second hypothesis on which the Court of Appeals thought an antitrust violation might be found was "tying adequate financing of TWA to its purchase or lease of jets from Toolco, and vice-versa" (449 F.2d at 69, App. A-2770). This hypothesis also fails when it is remembered that Toolco owned TWA. A tie-in between goods and financing can violate the antitrust laws, as *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495 (1969), cited by the Court of Appeals, shows, but this cannot be the case when the "sale" is from a parent to a subsidiary it lawfully controls. The *Fortner* case and the other tie-in cases all involve sales to independent entities. This is no mere happen-

stance. "[T]he essence of illegality in tying agreements is the wielding of monopolistic leverage; a seller exploits his dominant position in one market to expand his empire into the next." *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 611 (1953). Here Toolco used no market power in either jets or financing to compel TWA to take the other "tied" product. Instead, Toolco exercised its "power" as a parent corporation to control the decisions of its subsidiary with regard to both jets and financing.[35] As two commentators correctly assert, "the whole theory of antitrust limitations on [tie-in sales] appears to break down when applied to transactions within a multi-corporate enterprise.*** [W]ithin a corporate system, it is of course always open to a parent company to 'force' a wholly-owned subsidiary to accept particular products by the exercise of central corporate control." Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U.L. Rev. 20, 51 (1968). The only difference with a subsidiary that is less than wholly-owned is the fiduciary duty the parent owes to the minority stockholders of the subsidiary, but that does not alter the antitrust consequences.

The suggestion by the Court of Appeals that antitrust liability might be found on an "exclusive dealing" theory (449 F.2d at 69, App. A-2770), in addition to overlooking that here there was no exclusive dealing, also ignores the fact that TWA was Toolco's lawful subsidiary. The "exclusive dealing" label has no place in parent-subsidiary dealings, because, as the Court recognized in *United States* v.

[35] The weakness of the tying allegation is shown by the statement below that adequate financing was tied to the sale of jets "and vice versa." In a tying arrangement, the purchaser is forced to buy an unwanted product (the "tied" product) in order to obtain the desired "tying" product. An allegation that "A was tied to B and vice versa" makes no antitrust sense, for the same product cannot be both the desired tying product and the unwanted tied product to a single buyer.

Columbia Steel Co., 334 U.S. 495, 523 (1948), a parent may compel its subsidiary to deal only with the parent. In *Standard Oil Company of California* v. *United States*, 337 U.S. 293 (1949), cited by the Court of Appeals,[36] the antitrust illegality consisted of a compulsion upon independent dealers to deal exclusively in defendant's products. All members of the Court agreed that there would be no antitrust violation if the defendant had sold its products through subsidiary stations rather than independent dealers. Indeed Justice Douglas dissented in the *Standard Oil* case because he thought that the effect of the decision would be to encourage oil companies to buy out independent gas stations. 337 U.S. at 315-321.

The vice of an exclusive dealing contract is that it binds an independent businessman to the will of another, thus eliminating competition for the patronage of the former. *Standard Oil Company of California* v. *United States*, *supra*, at 313-314; *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 327 (1961). Exclusive dealing between parent and subsidiary is not anticompetitive; it is the normal way of doing business. The Second Circuit's "exclusive dealing" hypothesis, like its theories of "boycott" and "tying," provides no support whatever for characterizing losses allegedly suffered by TWA as the result of Sherman or Clayton Act violations. In each instance, the Court of Appeals failed to perceive the significance of Toolco's lawful ownership of TWA.

United States v. *Yellow Cab Co.*, 332 U.S. 218 (1947), teaches nothing to the contrary. That case upheld the suffi-

[36] The other case cited by the Court of Appeals for this point, *International Salt Co.* v. *United States*, 332 U.S. 392 (1947), was a tying case in which the sale was to independent enterprises.

ciency of a complaint charging that subsidiary cab operating companies were required to buy cabs from their manufacturer parent.[37] The complaint alleged that restraint of interstate trade "was the primary object of the combination" by which the parent acquired the operating companies, 332 U.S. at 227, and this Court ruled that "any affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress has imposed." *Ibid.*[38] At the next term the Court read *Yellow Cab* to hold that parent-subsidiary dealings can be unlawful if the acquisition of the subsidiary was unlawful but not if the acquisition was lawful. *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 520-522 (1948). It emphasized that *Yellow Cab* did not mean that all exclusive dealing arrangements are illegal nor does the fact that a subsidiary deals only with its parent for goods make the acquisition of the subsidiary invalid. 334 U.S. at 523. See Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U.L. Rev. 20, 38-41 (1968). In the present case the acquisition of control over TWA was not unlawful, having been approved by the CAB and immunized from antitrust attack. Thus the essential premise of *Yellow Cab* is not present here.

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[37] *Yellow Cab* is also not in point here because Toolco was not a manufacturer or supplier of commercial aircraft. See pp. 100-103, *infra*. *Yellow Cab* would have been differently decided if the parent had been supplying its operating subsidiaries with Fords or Chevrolets that the subsidiary wanted rather than with cabs manufactured by the parent.

[38] Subsequently this Court affirmed a judgment for defendants based on findings that the acquisition of the operating companies had not been illegal. *United States* v. *Yellow Cab Co.*, 80 F.Supp. 936 (N.D.Ill. 1948), *affirmed*, 338 U.S. 338 (1949).

The Court of Appeals erred in holding that it is a violation of the antitrust laws for a parent to make decisions for or provide goods and services to its lawfully-acquired subsidiary.

B. Lack of Competition with Manufacturers and Suppliers

In the preceding portion of the Argument we have examined the "boycott," "tie-in," and "exclusive dealing" theories adverted to by the Court of Appeals. That court also suggested that liability might have been found on theories of "unlawful *intent* to monopolize a substantial portion of the commercial aircraft market in restraint of trade," or "unlawful conspiracy to do so," or on "the *Yellow Cab* theory" (449 F.2d at 68, App. A-2770), though how the *Yellow Cab* theory differs from the "exclusive dealing" theory already discussed is not made clear. It is essential to each of these theories that Toolco was in competition with other manufacturers and suppliers for the commercial aircraft market. The record shows conclusively that it was not.[39]

It is true that in the notorious paragraph 3 of the complaint (App. A-2), which is in the section of that document describing the parties, Toolco is described as being engaged, among other things, "in the development, manufacture and acquisition of aircraft and related equipment from the manufacturers thereof in various states and in the sale and lease of such aircraft to air carriers in various other states * * *." This is an allegation of fact, admitted by the default, but it should be noted that it does *not* allege, nor has Toolco admitted, that Toolco has ever been in competition with manufacturers or suppliers of commercial aircraft

[39] The *Yellow Cab* theory also fails because Toolco's acquisition of TWA was lawful. See p. 99, *supra*.

for any portion of that market. To the extent that the allegation is indefinite it must be read in the light of what the record shows (449 F.2d at 63, App. A-2758). The record shows beyond doubt that Toolco was not a manufacturer of commercial aircraft. The record shows beyond doubt that Toolco was not a supplier of aircraft, except in the case of aircraft ordered for its own subsidiary. Paragraph 3 is consistent with both of these facts.

TWA admitted in its brief below that defendants did not manufacture commercial jets during the damage period.[40] This admission was inevitable given the undisputed evidence put forth at the damage hearing.[41] The most that the Court of Appeals could find was "significant movement" toward "actual or potential commercial manufacturer or dealership in airplanes * * *" (449 F.2d at 67, App. A-2767).

Toolco was not a manufacturer of commercial airplanes and it was not an independent supplier. CAB opinions and orders covering Toolco's aeronautical activities prior to

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[40] Brief for Plaintiff-Appellant Trans World Airlines, Inc. at 94: "[D]efendants did not manufacture and sell a 'Hughes jet' during the damage period * * *." Also see *id.* at 70 (emphasis added): *"If* Toolco had *actually* established itself as an aircraft manufacturer * * *."

[41] In opinions and orders from 1944 through 1950, the impartial Civil Aeronautics Board concluded that Toolco was neither engaged in nor planning the manufacture of airplanes for commercial use (6 C.A.B. at 156, App. A-3302; 9 C.A.B. at 383, App. A-3314; 12 C.A.B. at 198, App. A-3345-3346). Schedules to CAB Form 41 Reports, filed by domestic trunk airlines pursuant to § 407 of the Civil Aeronautics Act of 1938, 52 Stat. 973, now 49 U.S.C. § 1377, show that between 1950 and 1966 none of those airlines purchased or leased a Toolco-made airplane. Finally, Robert W. Rummel, who had been employed by TWA since 1943 in the evaluation of aircraft and in discussions with all major United States and foreign aircraft manufacturers, and who was TWA's chief witness at the damage hearing, did not "recall" Toolco manufacturing airplanes for airlines (App. A-475-476, A-971-972).

1950 reveal not a single sale or lease of an airplane from Toolco to carriers other than TWA.[42] Federally required reports filed by Pan American and all of the domestic trunk airlines show that none of the airlines, other than TWA, acquired a single jet or piston plane from Toolco or Hughes between January 1, 1950, and the filing of the complaint on June 30, 1961.[43] In its post-hearing brief to the Special Master TWA admitted that the 63 jets originally ordered by Toolco in the 1950s "were intended for TWA's use."[44] They were not ordered for resale by Toolco as a supplier to air carriers generally.[45] Subsequent reduction in TWA's anticipated needs forced Toolco to re-

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[42] See note 41, p. 101, *supra*.

[43] *Ibid.* TWA conceded that the summaries of Form 41 reports "were appropriate for judicial notice" and the Special Master admitted them (App. A-1966 Brownell Report 40-41). There is no reason to doubt the veracity and completeness of these summaries or the reports they reflect.

[44] See Memorandum in Support of TWA's Claims for Damages, May 31, 1968, at 4 (Doc. 556-14).

[45] The planes were to be built to satisfy TWA's special requirements, including its unique cockpit configuration (App. A-508-509). Had Toolco intended to sell those jets to other airlines it would have used the specifications of those airlines. No true independent supplier would intentionally deflate the resale value of his product by making further costs, *e.g.*, for modification and pilot retraining, inevitable.

The purchase agreements between Toolco and the manufacturers specifically barred Toolco from assigning its contract rights to any air carrier other than TWA without the written consent of the particular manufacturer (App. AX-63m; AX-1461). Had Toolco intended to supply the 63 planes to carriers other than TWA, it would not have bargained away its freedom to assign, sell, and lease at will.

Toolco delivered all jets immediately or almost immediately to TWA. Every jet delivered in 1959 was delivered immediately to TWA under interim lease (App. AX-893). Every jet delivered in 1960, save for two 331s on which there was a short delay pending completion of financing, was delivered immediately to TWA either under interim lease or by assignment (TWA Schedule B-7 to CAB Form 41, 6/30/60, TWA Ex. 58, DX 358D). On May 9, 1960, Toolco assigned to TWA all the jets still undelivered (except the 16

lease its rights to some of the jets then on order.[46] The manufacturers, not Toolco, later sold or leased those jets to other airlines.[47]

Since Toolco was not a manufacturer or independent supplier, but only a manager and supply conduit for its subsidiary, the Sherman Act charges must fail. A firm that does not even participate in a market can hardly be said to monopolize that market. This principle follows *a fortiori* from *United States* v. *United States Steel Corp.*, 251 U.S. 417 (1920) (40% of an industry not a monopoly), and *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (33% not a monopoly). Neither can a nonparticipant be said to have achieved a "dangerous probability" of successfully monopolizing a market when it has not even entered the market. Yet "dangerous probability" is an essential element of every unlawful "attempt to monopolize." *Swift & Co.* v. *United States*, 196 U.S. 375, 396 (1905); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 785 (1946); *Hiland Dairy, Inc.* v. *Kroger Co.*,

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by which TWA's proposed fleet had been cut back) and confirmed TWA's exclusive right to acquire the jets remaining under lease, contingent on the consummation of financing by June 30 (App. AX-64).

The above facts reveal what was meant by the allegation that Toolco was engaged "in the sale or lease of such aircraft to air carriers" and how improper it would be to read that allegation as stating that Toolco was functioning as an independent supplier to airlines generally.

[46] With the assent of TWA's president, ratification by TWA's Board of Directors, and agreement by Boeing, Toolco offered its rights to six Boeing 331s to Pan American (App. AX-1408; AX-1661-1663).

[47] Boeing, not Toolco, sold the 331s to Pan American (AX-1661-1663). Toolco *released* its rights to six unneeded Convairs, and *Convair itself* leased the planes to Northeast (A-949). Ultimately four other Convairs were delivered to Toolco and duly offered to TWA, but refused by the new management (App. AX-1538-1540). Those four remained unused by any airline for several years (App. A-861-863; AX-10-11).

402 F.2d 968, 974 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969); *Bushie* v. *Stenocord Corp.*, 1972 Trade Cases ¶ 73,896 at p. 91,720 (9th Cir., March 15, 1972); *Keco Industries, Inc.* v. *Borg Warner Corp.*, 334 F. Supp. 1240, 1245 (M.D. Pa. 1971).

The only "market" in which Toolco was a supplier was the TWA market and Toolco could sell or lease planes to TWA only with the approval of the CAB. Toolco's purchase of planes for TWA had no adverse effect on any manufacturer or independent supplier and was lawful, as we have developed above, because of Toolco's control of TWA. This was not a restraint of trade at all, much less an unreasonable restraint as the Sherman Act requires. *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 522 n. 19 (1948); *Standard Oil Company of New Jersey* v. *United States*, 221 U.S. 1, 63-64 (1911).

The fact that the defendants were not in the market of manufacturing or supplying aircraft also undercuts the theory of a conspiracy to monopolize. "A conspiracy to monopolize is a conspiracy to get control of the industry in which the defendant is engaged * * *." *United States* v. *National Retail Lumber Dealers Assn.*, 40 F. Supp. 448, 456 (D. Colo. 1941). This Court has never sustained such a far-fetched proposition as liability for "conspiracy to monopolize" an unentered business. The purported monopolization conspirators with which this Court has dealt have been present participants in the targeted market.

The conspiracy charge also fails for want of the needed kinds of conspirators. The complaint alleges that Toolco conspired with Hughes, said to be "an officer and the sole stockholder of Toolco," Holliday, said to be "the chief

operating officer of Toolco in charge of TWA affairs," and Atlas. A corporation can act only through its officers and agents and, as a matter of law, cannot be held to have conspired with them. *Chapman* v. *Rudd Paint & Varnish Co.*, 409 F.2d 635, 643 n. 9 (9th Cir. 1969); *Nelson Radio and Supply Co., Inc.* v. *Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953); *Johnny Maddox Motor Co.* v. *Ford Motor Co.*, 202 F. Supp. 103, 105 (W.D. Tex. 1960). This is one of those rare propositions in antitrust law of which it can be said that "the law appears clear * * *." Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U.L. Rev. 20, 24 n. 15 (1968). The rule is not changed by the fact that Hughes was the sole stockholder of Toolco as well as an officer. *Goldlawr, Inc.* v. *Shubert*, 276 F.2d 614, 617 (3d Cir. 1960). This proposition disposes of the claim of a conspiracy with Hughes and Holliday.

The Court of Appeals properly saw fit to ignore the claim in the complaint that Atlas, not named as a defendant, was a coconspirator (449 F.2d at 69, App. A-2771). Atlas was neither a manufacturer nor a supplier of commercial aircraft. Its only alleged act was its decision in 1960, 21 years after Toolco, Hughes, and Holliday are said to have begun their conspiracy, to cause Northeast Airlines, which Atlas controlled, to submit a merger proposal to TWA (App. A-14). The merger was not consummated, nor could it have been without CAB approval, upon which the merger was expressly conditioned and through which antitrust immunity would have resulted. This assertion of a conspiratorial involvement by Atlas has such little relation to TWA's damages that had Atlas been named as a defendant it would have been entitled to dismissal. *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 (1968). Nor

did the Court of Appeals rely on TWA's suggestion in its brief below that TWA might itself have been found to be a reluctant conspirator. It is a sufficient answer to that suggestion that no claim of this kind was ever made in the complaint. *Albrecht* v. *Herald Co.*, 390 U.S. 145, 150 n. 6 (1968).

It was absolutely essential to TWA's Sherman Act charges that Toolco be a competitor of manufacturers and suppliers of commercial aircraft. It could have been found to be such only by that "blind" court, against which Chief Justice Taft admonished in a famous passage, that does not see what "all others can see and understand * * *." *Bailey* v. *Drexel Furniture Co.*, 259 U.S. 20, 37 (1922); *cf. United States* v. *Rumely*, 345 U.S. 41, 44 (1953). The Court of Appeals was not blind, and refused to rely upon any actual competition. But the Court of Appeals undertook to cure this fatal flaw in TWA's case by inventing a new concept of *possible* "independent competitive significance" based on a theory of *potential* entry into the market.[48] In doing so the court below read into the Sherman Act a test appro-

[48] This novel concept is discussed at a number of places in the Second Circuit's opinion. The following passage is illustrative:

> Moreover the documents * * * while * * * showing that Toolco was not a major force as a supplier of aircraft other than to TWA, hardly negative the *possibility that Toolco possessed independent economic significance*, apart from its role as supplier to TWA * * *. There is evidence * * * that suggest[s] *significant movement* by Toolco and Hughes *toward* actual or *potential commercial manufacturer or dealership* in airplanes * * *. We cannot say that proof at a trial * * * that Toolco was more than a conduit for TWA but rather possessed *independent competitive significance* with respect to the commercial aircraft market, would be insufficient, if combined with appropriate related proof of the intent, attempt, collusion, tying arrangements, boycotts, and monopolization alleged in the complaint, to support an antitrust judgment for TWA. [449 F.2d at 67, App. A-2767; emphasis added.]

priate under § 7 of the Clayton Act and, in the process, misapplied the test. The decision below well illustrates "the pitfalls which always lurk in so ambiguous a phrase" as "potential competition"[49] and, if affirmed, would cause great confusion in antitrust litigation.

The distinction between the Sherman Act and the Clayton Act in this regard has long been recognized here and by the lower courts. As was said in *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 597 (1957):

> The Clayton Act was intended to supplement the Sherman Act. Its aim was primarily to arrest apprehended consequences of intercorporate relationships before those relationships could work their evil, which may be at or any time after the acquisition, depending upon the circumstances of the particular case.

See also *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346, 355 (1922); *Ford Motor Co.* v. *United States*, 92 S.Ct. 1142, 1146 n. 4 (1972). The Court has quoted from the legislative history of the 1950 amendments of the Clayton Act to show that that statute is based on "the concept of reasonable probability" since it "seeks to arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act." *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 323 n. 39 (1962).

"The Sherman Act operates 'after the fact,' that is, once monopolistic proportions have been obtained." *United States* v. *General Dynamics Corp.*, 258 F. Supp. 36, 60 (S.D.N.Y. 1966). It deals, as Senator Kefauver told the Senate in 1950, with "accomplished monopoly." 98 Cong. Rec. 16453

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[49] Rahl, *Applicability of the Clayton Act to Potential Competition*, 12 Proceedings of ABA Section of Antitrust Law 128, 143 (1958).

(1950). Potential competition is a relevant consideration in § 7 cases. It is not, in the sense that it was used below, in Sherman Act cases.[50]

In *Hiland Dairy, Inc.* v. *Kroger Co.*, 402 F.2d 968 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969), the plaintiff attempted to make an antitrust case out of a food retailer's construction of a dairy facility. The Eighth Circuit approved a dismissal on the pleadings. Allegations of an intent to monopolize plus an initial step supposedly in that direction—building a dairy plant—were insufficient to state a claim. The alleged development toward monopolization was in too infant a stage for a Sherman Act attack.

> [A]bout all anyone could say is that Kroger would have the power potentially to engage in some unfair and predatory practices in this field, but there is no showing of unfair or predatory practices. And any future operations are subject to the proscription of federal and state laws that condemn monopolies and unfair and predatory trade practices that unduly restrict competition. [402 F.2d at 975.]

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[50] A few Sherman Act decisions have mentioned "potential competition" or similar phrases. *E.g.*, *Standard Oil Company of New Jersey* v. *United States*, 221 U.S. 1, 73-74 (1911); *Associated Press* v. *United States*, 326 U.S. 1, 14 (1945); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 785 (1946); *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 528-529 (1948). But "no [Sherman Act] case seems yet to have turned solely on considerations affecting potential competition * * *." O'Brien, *Potential Competition Under the Sherman Act Cases*, 12 Proceedings of ABA Section of Antitrust Law 105, 107 (1958). The cases that note the concept are inapposite here. They refer to the power of one who has a monopoly to exclude potential entrants, or to the elimination of competition *inter se* among the members of an enterprise. Toolco was not a monopolist since it had not entered the market and it certainly excluded no one. There is no suggestion that Toolco and TWA were potential competitors with each other. If the Sherman Act cases say anything on this point, they state a policy *encouraging* potential entry. The approach of the Court of Appeals is at odds with that policy.

See also *GAF Corp.* v. *Circle Floor Co.*, 329 F. Supp. 823, 828 (S.D.N.Y. 1971), where defendants in a Sherman Act case were granted summary judgment because any steps the defendant had taken toward monopoly "were too remote from achievement to be actionable * * *." These two cases are illustrative of many soundly reasoned Sherman Act cases in which a different result would be required on the approach taken by the Second Circuit in the present case.

In essence, the Court of Appeals thought that Toolco's purchasing decisions for TWA violated the Sherman Act because those decisions were accompanied by a sequence of incipient possibilities: (1) Toolco eventually would become a general manufacturer and supplier of commercial aircraft; (2) despite CAB supervision,[51] Toolco would make TWA into a captive customer bound by exclusive dealing arrangements; (3) despite CAB supervision, risks of Justice Department antitrust suits, and inherent limitations on its ability to shoulder losses, Toolco would use its captive TWA market to subsidize predatory competition aimed at obtaining non-TWA customers; and (4) Toolco would drive others from the non-TWA market and raise permanent barriers to reentry.

If such a pyramid of hypothetical events can form the basis for Sherman Act liability, litigation possibilities for

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[51] When Toolco in 1956 briefly contemplated manufacturing airplanes itself for TWA, the Board, on its own initiative, ordered an investigation to determine whether the proposed change in Toolco's activities in the field of aeronautics would be a transaction subject to Board approval under § 408 of the Federal Aviation Act and, if so, whether it should approve or disapprove. Order E-10360, June 8, 1956 (App. AX-2149). The investigation was terminated when the Board was advised that Toolco had abandoned the proposed manufacturing project. Order E-12604, June 6, 1958.

imaginative, incipiency-minded plaintiffs would seem enormous. "Theoretically, all manufacturers, distributors, merchants, sellers, and buyers could be considered as potential competitors of each other." *United States* v. *Topco Associates, Inc.*, 92 S. Ct. 1126, 1133 (1972). Persons disappointed in their efforts to sell goods to corporate subsidiaries could readily blame their misfortune on alleged parental schemes to restrain trade. A parent arguably possessing the potential to manufacture goods needed by its subsidiaries would run a grave risk of Sherman Act litigation if it attempted to purchase rather than manufacture the goods. Economically beneficial uses of the parent-subsidiary relationship would be deterred.

It has been said that the antitrust laws were "not passed to outlaw diversification," *Federal Trade Commission* v. *Consolidated Foods Corp.*, 380 U.S. 592, 603 (1965) (Stewart, J., concurring), but on the approach taken below they may well have that result. Section 7 of the Clayton Act has an incipiency standard, but it only applies to the acquisition by one corporation of the stock or assets of another. In contrast, the Sherman Act, as viewed below, has an incipiency standard that applies to *all* transactions, including routine internal expansion or diversification of the sort held not actionable in the *Hiland Dairy* case discussed above.[52]

Arrangements having any potential to lead to illegal tying arrangements would become subject to Sherman Act attack. Until now the *actual* use of *existing* leverage power has been a prerequisite to antitrust condemnation. *E.g.*, *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394

[52] See p. 108, *supra*.

U.S. 495, 502-503 (1969); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 611 (1953). Under the ruling below alleged *intended* use of *potential* leverage power would be sufficient.

Congress should preside over any such drastic changes in antitrust doctrine. For one thing, the Clayton Act already adequately guards against incipient anticompetitive tendencies in acquisitions. Other acts preliminary to the creation of a dangerous probability of monopoly are not proper subjects for immediate antitrust condemnation. If and when the dangerous probability occurs or the restraint is effected, the Sherman Act can intervene to rescue competition before any damage is done. On the doctrine announced below the federal courts will be clogged for years with premature, time-consuming, purely speculative, and totally unnecessary Sherman Act litigation.

The Court of Appeals committed dangerous error when it set out on its own[53] to import a Clayton Act test into a Sherman Act context. It compounded the error when it misapplied the Clayton Act test by speculating about mere possibilities rather than calculating reasonable probabilities.[54]

The concept of reasonable probability is at the heart of the Clayton Act decisions from which the Second Circuit

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[53] TWA's complaint makes no reference to potential competition nor was the concept ever mentioned by the Special Master or the District Court. Hence, the Court of Appeals' solo excursion was not anticipated by the parties nor discussed in the briefs below.

[54] The court speaks twice of "the possibility" that Toolco possessed independent economic significance (449 F.2d at 67, 68, App. A-2767, A-2770) and once of "movement by Toolco and Hughes toward * * * potential commercial manufacture or dealership" (449 F.2d at 67, App. A-2767).

apparently borrowed its ideas of potential entry and independent competitive significance. Congress made explicit its intent that courts be concerned with probabilities and not possibilities[55] and this Court has repeatedly acknowledged that "proof of a mere *possibility* of a prohibited restraint or tendency to monopoly will not establish the statutory requirement * * *." *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 598 (1957). See also *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346, 356-357 (1922). The Court enforces the "statutory requirement of reasonable probability." *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 175 (1964). See also *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 323 (1962); *Ford Motor Co.* v. *United States*, 92 S.Ct. 1142, 1146 n. 4 (1972).

The Court of Appeals mentions a number of factors to establish the possibility of eventual entry by Toolco into the business of manufacturing airplanes or supplying airplanes for customers other than its subsidiary, TWA. These factors are clearly insufficient to support a finding of reasonable probability.

1. *Potential Manufacturer.* The Court of Appeals noted that Toolco has manufactured helicopters and aircraft parts for military use since World War II (449 F.2d at 67, App. A-2767). This Court can take judicial notice that helicopters and commercial jets are complex and vastly

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[55] The use of the words ["may be"] means that the bill, if enacted, would not apply to the mere possibility but only to the reasonable probability of the prescribed [*sic*] effect * * * . [S. Rep. No. 1775, 81st Cong., 2d Sess. 6 (1950).]

See also 92 Cong. Rec. 16499-16501 (1950) (remarks of Sen. Donnell).

different products.[56] An enormous array of technological concepts, both theoretical and applied, relate to commercial jetliners but not to helicopters and military aircraft parts.[57] The Court of Appeals did not even mention such obstacles as manpower, basic equipment, and administrative problems inherent in a changeover from defense-related production to commercial operations.[58]

The Court of Appeals also pointed to Toolco's participation with Lockheed in the early 1940's in developing the first Constellations (449 F.2d at 67, App. A-2768). Toolco's role was that of planner, not manufacturer, and its involvement did not indicate a likely entrance into the manufacture of commercial aircraft. As TWA acknowledged in paragraph 13 of the complaint (App. A-11), major airlines frequently joined manufacturers in development of aircraft to fit their special needs. Toolco, as TWA's parent, was doing just that for its subsidiary[59]

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[56] This is quite unlike cases in which the products were simple in design, closely related in production technique, and nearly identical in end-use. Compare *United States* v. *Continental Can Co.*, 378 U.S. 441, 464-465 (1964) (glass and metal containers); *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568, 580 (1967) (detergents and abrasive cleaners).

[57] The production of some component parts hardly implies an ability to produce the total product. *Cf. Allis-Chalmers Mfg. Co.* v. *White Consolidated Industries, Inc.*, 414 F.2d 506, 534 (3d Cir. 1969) (Aldisert, J., dissenting).

[58] Although Boeing had developed and manufactured jet bombers and tankers for the Air Force and Douglas had manufactured hundreds of commercial air transports, it took them years to develop the specifications for a commercial jet and three or four more years to effect delivery.

[59] In 1955 Toolco engaged in similar cooperation with Convair just as Pan American worked with Boeing to develop the 707 (App. A-1201).

(6 C.A.B. at 155, App. A-3300).[60] Other factors were cited by the Court of Appeals,[61] but these too establish, if anything, only an ephemeral possibility of entry into the manufacturing market. As the late Justice Harlan stated, "assumption is no substitute for reasonable probability * * *" *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568, 584 (1967) (concurring opinion).

2. *Potential Non-TWA Supplier.* The record shows scarcely even a possibility that Toolco would have become an independent supplier of aircraft. The Court of Appeals cited the 1944 CAB decision for the proposition that 25 Lockheed Constellations "were intended by Toolco for sale to airlines other than TWA" (449 F.2d at 67, App. A-

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[60] The Court of Appeals also cited the "plywood flying boat" to illustrate Toolco's commercial airplane manufacturing proclivities. The HK-1 plane was built under government contract for military purposes and, as the CAB found, the plane "was not intended to be used for anything but military purposes, and Toolco has no plans to build others like it" (12 C.A.B. at 198 n. 13, App. A-3346 n. 13).

[61] The AVRO and Caravelle episodes (449 F.2d at 67, App. A-2768-69) support no finding of reasonably probable entry, for in each case steps *toward* manufacture were briefly explored and then abandoned (App. AX-1297; A-1807-1808). Another in the court's list of "aborted forays" (449 F.2d at 68, App. A-2768)—and the phrase accurately describes their inconsequential nature—was TWA's 1956 CAB motion for permission to purchase up to 25 Toolco-made jets, if such were ever manufactured. See note 51, p. 109, *supra*. As paragraph 15 of the complaint recites (App. A-12), that "project" died aborning the middle of that same year, without ever reaching even the blueprint stage. The court below further assumed that certain Pratt & Whitney jet engines ordered by Toolco "could well have been intended for installation in the planned Toolco jets * * *" (449 F.2d at 67, App. A-2768). This pyramiding of assumptions is clear error under the reasonable probability standard.

2768), but the CAB reached the opposite conclusion: "There is no evidence of an intention * * * to engage in any phase of supply for commercial aviation" (6 C.A.B. at 155, App. A-3301).

The Court of Appeals also relied upon "testimony that Toolco ordered seven Convair 880s manufactured to the specifications of Capital Airlines and thirteen Convair 990s built for American Airlines' requirements" (449 F.2d at 68, App. A-2769). As the record makes clear, however, the 880s conformed to Capital's specifications simply because Capital itself had originally ordered them (App. AX-1319-1320; AX-1556). After studying the merits of using the 880s as designed or converting them, TWA ultimately decided not to purchase the planes and none was ever completed. The 990s had been independently ordered by American and it was not planning to buy more from Toolco (App. A-832).[62]

The Court of Appeals also mentioned a section of the Toolco-Convair contract for thirty 880s (449 F.2d at 68, App. A-2769). That section provided for a retroactive reduction in Toolco's unit base price for each of Convair's commercial sales over the initial 40 being purchased by Toolco and Delta Airlines (App. AX-63q). The cited section

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[62] Moreover, the Convair-Toolco 990 agreement—a TWA exhibit (App. AX-652)—expressly barred Toolco from assigning the contract to anyone other than TWA without Convair's prior written consent. Nor, for a two-year period following commencement of deliveries, could the 990s be resold or leased. TWA ultimately selected Boeing 131 Bs and 331 Bs over Convair's 990s (App. A-861). The 990 program was discontinued and none of the 990s scheduled for TWA was ever completed (App. A-841).

is evidence of Toolco's hard bargaining for TWA's ultimate benefit. When other airlines climbed on the 880 bandwagon, they would have to pay their share of development costs reflected in the initial prices agreed to by Toolco and Delta. Another section of the contract leaves no doubt but that Convair, not Toolco, would be making those over-forty sales to new customers (App. AX-63p).[63]

* * * * *

The record thus shows clearly that Toolco was not a reasonably probable entrant into the business of manufacturing or supplying planes to non-TWA carriers. Nor, absent probable entry, is it reasonably probable that Toolco possessed competitive significance in the commercial aircraft manufacture and supply markets except to the extent that it was a buyer for its subsidiary. In its opinion, the Court of Appeals never mentioned "reasonable probabilities." The reason is clear—the most that could be shown was "possibilities." And possibilities have never before this case been held sufficient to create liability under the Clayton Act, much less the Sherman Act.

We emphasize, however, that even if the Court of Appeals had found a reasonable probability of entry—and it did not—this would have been a test wholly foreign to the Sherman Act under the circumstances of this case. It is not enough under the Sherman Act that the party charged

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[63] The memo regarding Lockheed Electras (App. A-198) does not show Toolco to be a reasonably probable *non-TWA* supplier of Electras. It merely reflects that a TWA director advised TWA's president to discourage Mr. Hughes from buying Electras for *TWA*. The memo is no support for an inference that Toolco intended to offer Electras to anyone *other than TWA*.

with monopolizing or attempting to monopolize may someday enter the relevant market, whether that entry is termed possible, probable, or virtually a certainty. We see, therefore, just how far afield the Court of Appeals has gone and what a disruptive, confusing, and dangerous element has been introduced into the law of antitrust.

VI. Damages Have Been Awarded Without Requisite Proof That They Were The Result of Antitrust Violations.

When this case was before this Court in 1965, Justice White asked counsel for TWA: "How can you prove how much you have been damaged without showing what you have been damaged from?" Transcript of Argument at 28, *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 380 U.S. 248 (1965). Seven years of further litigation have failed to provide an answer to that question.

Damages cannot be awarded in an antitrust case merely because plaintiff establishes that the antitrust laws have been violated and shows that he has been injured. He must also establish the requisite causal relation between the violation and the injury. This is as true after a default as it is in a contested case.[64] The Special Master and the District Court erroneously thought that there was no requirement of establishing causation. The Court of Appeals recognized that this was wrong, and that causation must be shown, but was willing to rely on assumptions to substitute for the proof that TWA was unable to present. Thus

[64] If, for example, liability is established for a conspiracy to fix the price of watches, a dealer in watches would not be entitled to damages because the watches did not work.

the findings as to damages are fatally tainted by application of erroneous legal standards.

A. The General Standard of Causation

For purposes of this portion of the Argument, we assume —contrary to what we believe to be true—that liability for some violation of the antitrust laws properly could have been found in Toolco's control of TWA, either because of the default or on some novel antitrust theory. Even on that assumption, TWA was not entitled to a judgment for damages unless the injuries for which it claimed damages were "proximately caused" by the antitrust violations.

Section 4 of the Clayton Act allows recovery of treble damages by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws * * *." For present purposes we assume that TWA has been injured in its business or property. We assume that Toolco and Holliday did something forbidden in the antitrust laws. It is still essential to recovery that the injury be "by reason of" the law violation.

> The statutory requirement that treble damage suits be based on injuries which occur "by reason of" antitrust violations expressly restricts the right to sue under this section. There must be a causal connection between an antitrust violation and an injury sufficient for the trier of fact to establish that the violation was a "material cause" of or a "substantial factor" in the occurrence of damage. [*Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F.2d 183, 187 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971).]

Thus in *E. V. Prentice Machinery Co.* v. *Associated Plywood Mills, Inc.*, 252 F.2d 473 (9th Cir.), *cert. denied*, 356

U.S. 951 (1958), defendant admitted that it was liable under the antitrust laws in sending threatening letters to plaintiff's customers. At the trial on the issue of damages plaintiff showed that it had suffered a substantial decline in business immediately after defendant did its wrongful acts. The court found, however, that the decline in business began before the threatening letters were sent out, and that it was caused by customer dissatisfaction with the way plaintiff ran its business. It was held that plaintiff had failed to carry its burden of establishing a causal connection between the wrongful acts and its losses and that plaintiff could not recover any damages.

In *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 284 F.2d 1 (9th Cir. 1960), *reversed on other grounds*, 370 U.S. 19 (1962), the court sustained a jury's determination of antitrust liability but held that plaintiff could not recover for its business losses if they resulted from a watered-down product rather than from the antitrust violation. And in *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F.2d 561 (7th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952), the court sustained a finding of conspiracy to exclude the plaintiff from access to first-run movies but reversed an award of damages for a period during which plaintiff's theater, prior to remodeling, was not suitable for playing first-run pictures.

Even a showing of cause-in-fact is not, without more, enough to justify an award of damages. As this Court said very recently in *Hawaii* v. *Standard Oil Co.*, 92 S.Ct. 885, 891 n. 14 (1972):

> The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all

> injuries that might conceivably be traced to an antitrust violation.

Thus a plaintiff must show far more than that its injury was an incidental byproduct of an antitrust violation; it must show that it was a target of the unlawful acts. *E.g.*, *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295-1297 (2d Cir. 1971), *cert. denied*, 40 U.S.L.Wk. 3543 (May 15, 1972); *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F.2d 183, 187 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); *Nationwide Auto Appraiser Service* v. *Association of Casualty & Surety Companies*, 382 F.2d 925, 928-929 (10th Cir. 1967); *Conference of Studio Unions* v. *Loew's, Inc.*, 193 F.2d 51, 55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952); *Johnson* v. *Ready Mix Concrete Co.*, 318 F.Supp. 930, 932 (D. Neb. 1970); *Rayco Mfg. Co.* v. *Dunn*, 234 F.Supp. 593, 597 (N.D. Ill. 1964).

On this principle a supplier cannot recover though he has been harmed by a conspiracy directed at his customer. *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 395 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963); *Snow Crest Beverages, Inc.* v. *Recipe Foods, Inc.*, 147 F. Supp. 907 (D. Mass. 1956). Consumers cannot recover though a conspiracy raised the price of equipment purchased by utilities with which they deal and led to increased rates. *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 315 F.2d 564, 566-567 (7th Cir.), *cert. denied*, 375 U.S. 834 (1963). In one interesting case a movie producer had contracted for distribution of his picture and made it a condition of the contract that the distributor would not "block book" the picture. Despite the contract, and in the face of

the antitrust laws, the distributor did block book a group of pictures to television and plaintiff contended that as a result he received $400,000 less than the fair value of the television rights for his picture. The defendant's action was clearly unlawful but plaintiff's antitrust complaint was dismissed on the pleadings. The court held that block booking injures television stations that are compelled to accept motion pictures that they do not want and that it injures other distributors who are deprived of an opportunity to license their pictures to stations that have been forced to take defendant's pictures. The television stations and the other distributors were in the "target area" but any injury to the producer was only incidental and not actionable under the antitrust laws. *Fields Productions, Inc.* v. *United Artists Corp.*, 318 F. Supp. 87 (S.D.N.Y. 1969), *affirmed per curiam*, 432 F.2d 1010 (2d Cir. 1970), *cert. denied*, 401 U.S. 949 (1971).

Thus in the present case the burden was on TWA to establish that any injury it suffered was caused by the antitrust violations it claimed and that the injury was the direct result of the violation rather than merely incidental to the alleged efforts of Toolco to suppress "competition among aircraft manufacturers and others in the furnishing of aircraft by sale, lease or other means" (Complaint, ¶49, App. A-23).

B. The Effect of the Default

The general principles applicable to proof of unliquidated damages are equally applicable after a default.

> The admission arising from a demurrer or a default is not an acknowledgment, or to be considered as evidence, of liability for substantial damages; nor

> that any such damages were suffered, or if so that the defendant was responsible for them. [Sutherland, *Damages* § 429 (4th ed. 1916).]

It is still incumbent on plaintiff, even after default, to show that he has suffered more than nominal damages and that his damage was caused by the legal wrong charged in the complaint.

In a default case in which well-pleaded facts in the complaint are sufficient for liability, defendant, by defaulting, admits that plaintiff is entitled to recover "some" damages. *Thorpe* v. *National City Bank of Tampa*, 274 F. 200, 202 (5th Cir. 1921). But an admission that the plaintiff is entitled to "some" damages does not prevent the defendant from showing that the plaintiff is entitled only to nominal damages. In *Potts* v. *Howser*, 267 N.C. 484, 148 S.E.2d 836 (1966), the court summarized the rule:

> It is true that defendant's answer has been stricken, and that plaintiff's cause of action and right to recover at least nominal damages have been established. However, defendant is entitled to a trial on inquiry before a jury on the issue of damages. * * * In the trial of the question of damages, the defaulting defendant has the right to be heard and participate. He may, if he can, reduce the amount of damages to nominal damages. [267 N.C. at 494, 148 S.E.2d at 844.]

The effect of a default is the same that the common law gave following judgment for plaintiff on demurrer to the defendant's plea. *Thomson* v. *Wooster*, 114 U.S. 104, 107 (1885); *Lamphear* v. *Buckingham*, 33 Conn. 237, 250 (1866). It remains open for defendant, even after default, to show that "no damages were caused to the plaintiff by the

matters alleged" and thus that only nominal damages can be recovered. *E.g., Electrolytic Chlorine Co.* v. *Wallace & Tiernan Co.*, 328 Mo. 782, 790, 41 S.W.2d 1049, 1052 (1931); *Hallett Construction Co.* v. *Iowa State Highway Commission*, 261 Iowa 290, 295, 154 N.W.2d 71, 74 (1967); *Maywald Trailer Co.* v. *Perry*, 238 S.W.2d 826, 827 (Tex. Civ. App. 1951).

Even after a defendant in an antitrust case has admitted liability "the plaintiff is required to establish with reasonable probability the existence of some causal connection between the defendant's wrongful act and some loss of anticipated revenue." *E. V. Prentice Machinery Co.* v. *Associated Plywood Mills, Inc.*, 252 F.2d 473, 477 (9th Cir.), *cert. denied*, 356 U.S. 951 (1958). The same rule applies after default.

Modern provisions for the assessment of damages after default are traceable directly to the writ of inquiry at common law. See *Thomson* v. *Wooster*, 114 U.S. 104, 111 (1885), quoting from *Hawkins* v. *Crook*, 2 P. Wms. 556, 24 Eng. Repts. 860 (1729); 3 Blackstone, *Commentaries* *398. A leading early American case on the scope of the hearing on damages at common law is *Havens* v. *Hartford & New Haven R.R. Co.*, 28 Conn. 69 (1859). That was an action for injuries sustained by a railroad passenger, in which a hearing on damages was had after defendant's demurrer was overruled. On appeal counsel for defendant argued that "the case stands on a demurrer just as it would have stood on a default," and counsel for plaintiff did not dispute that proposition. Instead he argued that at the inquest on damages defendant must be deemed to have admitted that his acts caused the plaintiff's injuries. His

argument, which the court rejected, is strikingly similar to that advanced by TWA in the present case.

> It is laid down by all the authorities that a demurrer admits all the allegations of the declaration that are well pleaded. * * * We do not claim that immaterial allegations are admitted. But when we allege that our injury was caused by the defendant's negligent act, the allegation is a material one, and if he demurs he admits its truth. * * * Now we claim that the whole inquiry must be as to *how much* we were injured, and that it is too late to inquire whether the plaintiff [*sic;* defendant?] has done us any injury at all. [28 Conn. at 83-85.]

The court specifically rejected that argument. It held that although a demurrer or default may admit all material, well-pleaded allegations, "material" in this sense means "material to the question to be tried by the court; and that is, whether the plaintiff can sustain his action." 28 Conn. at 80. A default or demurrer, the court held, admits nothing with respect to what damages plaintiff ought to recover.[65] That is the issue for the inquest on damages. Accordingly, at that inquest plaintiff must show, among other things, that any substantial damages he seeks to recover were caused by the acts of the defendant. The court said that "a demurrer or default proves nothing more than" that the

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[65] "An allegation of damage is not, however, a traversable allegation. * * * It is not admitted by a defendant's failure to answer." *McClelland* v. *Climax Hosiery Mills*, 252 N.Y. 347, 351, 169 N.E. 605, 606-607 (1930). That rule survives today in Civil Rule 8(d). See *Vevelstad* v. *Flynn*, 230 F.2d 695, 703 (9th Cir.), *cert. denied*, 352 U.S. 827 (1956).

act charged was done "and nothing but nominal damages will be given unless there be further proof." 28 Conn. at 94.

> May not the defendants show, on the hearing in damages, notwithstanding the demurrer, that the plaintiff's knee was not hurt at all? or if so, that it was caused by his attempt to assail the conductor, or in his twisting his limb under the seat in order to keep from being ejected from the car, or in springing over the seat to avoid the conductor? If so, and the injury to the knee may be denied and disproved, the manner and degree in which it is claimed to have been done by the defendants may be disproved; for the greater includes the less, and the proof of the manner may well show, as it did in this case, that the plaintiff himself was the author of this particular injury. [28 Conn. at 96.]

A multitude of cases support the same proposition.[66] Two are worthy of particular comment. *Dehoff* v. *Black*, 206 N.C. 687, 175 S.E. 179 (1934), was a suit to recover the value of plaintiff's truck, which, plaintiff alleged, was demolished in a collision caused by defendant's negligence. A default judgment was entered after defendant failed to answer. At the inquiry on damages substantial damages were awarded to plaintiff. The Supreme Court of North Carolina held that at the inquiry evidence to show that the driver of the defendant's truck was not the defendant's servant was properly excluded because it "goes only to the

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[66] *E.g. Went* v. *Schmidt*, 117 Conn. 257, 167 A. 721 (1933); *Graves* v. *Cameron*, 161 N.C. 549, 77 S.E. 841 (1913); *Blow* v. *Joyner*, 156 N.C. 140, 72 S.E. 319 (1911); *Batchelder* v. *Bartholomew*, 44 Conn. 494 (1877); *Barclay* v. *Pickles*, 38 Mo. 143 (1866); *cf. Beall* v. *Munson*, 204 Cal.App.2d 396, 22 Cal. Rptr. 333 (1962); *Sagebiel's, Inc.* v. *Sumrall*, 358 S.W.2d 251 (Tex.Civ.App. 1962).

question of liability." 206 N.C. at 690, 175 S.E. at 181. It reversed, however, because it held that it was error to exclude evidence to show that the collision was caused by the driver of plaintiff's truck.

> A simple illustration may serve to make clear its competency: A and B, each driving a truck or automobile, approach from opposite directions upon the highway. B is slightly over the center of the road. A decides to teach him a lesson by taking his front wheel off. This he does with consequent injury to himself. A sues B and obtains a judgment by default and inquiry for want of an answer. Upon the execution of the inquiry, B offers to show how the collision occurred, not to escape his liability of a penny and the costs established by the judgment, but to show that A's damage, over and above the amount fixed by the default judgment, was the result of a self-inflicted injury (not contributory negligence) and the proper measure of damages. * * * In a tort action for unliquidated damages, the amount recoverable is the sum necessary to compensate the plaintiff for the injury sustained as a proximate result of defendant's negligence or wrong. [206 N.C. at 690, 175 S.E. at 181.]

The other case worthy of note is *McClelland* v. *Climax Hosiery Mills*, 252 N.Y. 347, 169 N.E. 605 (1930), which involved a default judgment in a suit for breach of an employment contract. At a proceeding for an assessment of damages under what was then § 490 of the New York Civil Practice Act,[67] defendant introduced testimony to show that

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[67] Civil Rule 55(b)(2) was modeled in part on § 490 of the New York Civil Practice Act. 6 Moore, *Federal Practice* ¶55.01[4], at 1804 (2d ed. 1953).

plaintiff had been offered a similar position at the same salary by another employer. On the basis of this testimony the trial court refused to award damages for the remaining period of the contract. The Court of Appeals found that the testimony in the case before it was too uncertain to establish that plaintiff could have had similar employment for any definite time at any definite salary, but it held that testimony of this kind is competent, not to defeat plaintiff's cause of action but "for the purpose of assisting the court in fixing the real damages suffered by the plaintiff." 252 N.Y. at 351, 169 N.E. at 607. In a concurring opinion, joined in by all of the members of the court save one, Chief Judge Cardozo explained that if the employee refuses suitable substitute employment, "he has broken the chain of causation, and loss resulting to him thereafter is suffered through his own act. It is not damage that has been caused by the wrongful act of the employer." 252 N.Y. at 359, 169 N.E. at 609-610.

The *McClelland* case supports the others discussed in this section for the proposition that the defaulted defendant is entitled at the hearing on damages to attempt to show that plaintiff's damage was not caused by the acts alleged. No matter how "well-pleaded" plaintiff's allegations, causation is an issue at the hearing on damages and is not established by the default. The Special Master and the courts below strayed from these simple, sensible, and time-honored principles. In so doing, they plunged the damage hearing into a never-never land where outlandish assumptions substituted for proof of actual facts.

C. Application to the Present Case

Special Master Rankin ruled that in a suit for unliquidated damages, "there is no admission as to the damages by reason of the default, and proof thereof is required" (App. A-366). It was his view that he would have to be "satisfied by a preponderance of the evidence that any damages were proximately caused by the violations of law alleged in the complaint" (App. A-372). He was right, as the discussion in the preceding section has shown.

Unfortunately Special Master Brownell took a different view. He ruled that proximate cause is admitted by the default (App. A-1966 Brownell Report 36) and that after default plaintiff did not have any burden of introducing evidence to prove proximate cause (App. A-1966 Brownell Report 47). The District Court took a similar view (308 F. Supp. at 684-685, 689, App. A-2033-34, A-2042). The Court of Appeals recognized that the opinions below and the briefs of the parties "reveal some confusion as to the proper scope of the hearing on damages" (449 F.2d at 69, App. A-2772), but it did very little in its own opinion to dispel that confusion.

On the one hand, the Court of Appeals stated that "the outer bounds of the recovery allowable are of course measured by the principle of proximate cause" and that "in this sense it was TWA's burden to show 'proximate cause'" (449 F.2d at 70, App. A-2773). Again it said that it is "necessary to establish the causal nexus for the recovery of damages * * *" (449 F.2d at 70, App. A-2774). And it noted that TWA's strategy at the damage hearing "was in fact designed to prove causation" (449 F.2d at 71, App. A-2775).

On the other hand, the Court of Appeals ruled that the default had the effect of admitting that the acts pleaded "caused injury to TWA in the respects there alleged" and that "there was no burden on TWA * * * to show that those acts caused the well-pleaded injuries * * *" (449 F.2d at 70, App. A-2772-2773). It praised Special Master Brownell for his understanding of the law on this point and his application of proper principles (449 F.2d at 70, App. A-2774). On critical issues related to causation, it was willing to rely on what it recognized to be "assumption" only (449 F.2d at 73, 74, App. A-2781).

Neither Special Master Brownell nor the Court of Appeals attempted to explain the connection between the restraints of competition alleged and the managerial decisions that TWA claimed injured it. There was no connection. This is not a situation where unwanted goods were foisted on a captive market or where a manufacturer of aircraft was precluded from supplying the TWA market. The target of the antitrust violations alleged was the suppliers of commercial aircraft and not TWA. Toolco owned 78% of TWA and bore 78% of the alleged losses from its exercise of managerial control.

Because the findings below about damages derived from the application of an improper legal standard to the facts, they cannot stand. *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 194 n. 9 (1963); 9 Wright & Miller, *Federal Practice and Procedure: Civil* 734 n. 7 (1971). In order to demonstrate the seriousness of the errors in this regard, we will examine in some detail how the causation issue was treated in connection with the largest elements of damage—the

loss of profits from an inadequate jet fleet and the use of leases rather than outright sales.

1. *Loss of Profits.* The largest item of damages included in the judgment was $27.6 million ($82.8 when trebled), representing losses in operating profits due to an inadequate jet fleet caused by delays in deliveries of some jets and failure to deliver 16 other jets. These are discussed in Part I of the Special Master's Report (App. A-1966 Brownell Report 44-167) and are referred to as "Part I damages." Our submission here is that if the proper standard had been applied, the amount allowed on this claim would have been zero, since (1) if there had been a loss of profits it would have been wholly unrelated to the alleged suppression of competition among aircraft manufacturers, (2) Toolco did not in fact cause TWA any loss in operating profits, and (3) the finding to the contrary was based on sheer speculation and guesswork.

TWA's financial expert, Edward J. Morehouse of Drexel Harriman Ripley, testified that a May 1955 public offering of TWA common stock was a prerequisite to all of TWA's subsequent debt financings to pay for the earlier deliveries of the larger reconstructed jet fleet that the damage award assumes an independent TWA would have had. Yet the Special Master found that an independent and prudent TWA, operating free of any restraints or controls by Toolco, would not have made this public offering and that none of the subsequent TWA financings, which would have been necessary to pay for the reconstructed jet fleet, would have taken place (App. A-1966 Brownell Report 256-264).

The testimony of TWA's engineering expert, Rummel, who purported to show that TWA's jet fleet was inadequate,

referred only to what "TWA *should* in fact have ordered" (449 F.2d at 73, App. A-2780; emphasis by the Court of Appeals). Rummel expressly disclaimed any knowledge of TWA's financial capabilities. Nor did he say what an independent and prudent TWA board *would* have ordered.

That is all that TWA proved. TWA did not show that Toolco's acts caused TWA's inadequate jet fleet. As the Special Master found, TWA's own independent and prudent Board of Directors—uninfluenced by Toolco—would not have taken the action necessary to finance the larger jet fleet. Thus TWA's failure to have that fleet was not the result of the assumed violations of the antitrust laws by Toolco.

The Special Master unequivocally rejected TWA's proof that it would have obtained the necessary financing. Unfortunately he did not relate his finding on that point to his analysis of Part I damages. The sum total of his explanation why the causation issue had been satisfied is as follows:

> Given the well-pleaded allegations of the complaint, however, the testimony of Rummel, * * * as well as the Connolly testimony, and the evidence that the assumed additional fleets of B-331s, B-131s and CV-880s were in fact ordered in the same type and quantity by a Hughes-dominated TWA, although at later dates, I am of the opinion that the hypothetical jet fleet and reconstructed delivery dates constitute a proper basis for computing damages under this Section I. [App. A-1966 Brownell Report 56.]

The Special Master thus relied in part on "the well-pleaded allegations of the complaint." The allegations to which he referred were set forth in his report as follows:

> "During this period [in or about October 1955] when other United States-flag air carriers were placing orders for jet powered aircraft, and thereafter, the defendants caused and directed TWA to forego making any arrangements for the acquisition, by sale, lease or otherwise of any jet powered aircraft (par. 17) * * * TWA has further been injured in the following manner:
>
> (a) TWA was prevented from obtaining jet powered aircraft and was deprived of opportunity for adequate use of jet powered aircraft during the years 1958, 1959, 1960 and to date with a resultant loss in profits." (par. 52) [App. A-1966 Brownell Report 45; brackets and asterisks in original.]

These "well-pleaded allegations" are barren of any facts showing that the damages are "the certain result of the wrong." *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931). There is only a five-word conclusory statement that there was "a resultant loss of profits." Nowhere in the complaint is it alleged that an independent TWA wanted or would or could have acquired 33 Boeings and 30 Convairs. Nowhere is it alleged that an independent TWA would or could have financed a 63-jet fleet at earlier dates, rather than the historical 47-jet fleet. Nowhere is it alleged that, but for Toolco's oppression, TWA would have obtained equity financing at a much earlier time than actually happened. No facts were alleged to show that plaintiff's harm necessarily was caused by defendant's assumed unlawful conduct. While we can assume that a conclusory allegation that a defendant's con-

duct "result[ed] [in] loss of profits" was sufficient to sustain the complaint against a motion to dismiss filed shortly after the commencement of the action, it does not follow that the same conclusory allegations can be given controlling weight after a two-year hearing on damages.

The Court of Appeals recognized this when it noted that TWA was required to introduce evidence "to establish a causal nexus for the recovery of damages" (449 F.2d at 70, App. A-2774). Since TWA did not allege that it would have ordered and financed a larger jet fleet in time to take earlier deliveries thereof, TWA should have shown that fact in the damage hearing. The "well-pleaded allegations of the complaint" did not establish causation for the specific grounds of damages for which evidence was offered.[68]

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[68] The following hypothetical cases illustrate the point:

Hypothetical Case #1: X sues Y for the wrongful death of X's deceased. X alleges in his complaint that (a) deceased fell overboard from Y's boat; (b) Y failed to have lifebuoys on board, and (c) as a result, deceased drowned. The trier of facts finds Y was negligent in failing to have lifebuoys on board. What is the judgment? Before answering, consider:

Hypothetical Case #2: X sues Y for the wrongful death of X's deceased. X alleges in his complaint that (a) deceased fell overboard from Y's boat; (b) Y failed to have lifebuoys on board; (c) deceased floundered alongside the boat for five minutes while the deceased's wife looked on in horror; (d) as a result, deceased drowned. The trier of facts finds Y was negligent in failing to have lifebuoys on board. What is the judgment? Is it the same as in Case #1?

It should be obvious that in Case #2 deceased's death is probably caused by Y's failure to have lifebuoys on board. But for the absence of lifebuoys, the deceased would probably have been saved. Judgment for X in Case #2. But can the same be said in Case #1? It is a matter of "speculation or guesswork," *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946), whether the deceased's death was caused by Y's negligence in failing to have lifebuoys on board. Suppose, for example, the deceased did not know how to swim and

Indeed, the Special Master appeared to acknowledge this when he explicitly relied upon the testimony of Rummel and Connelly in concluding that damages were shown.

The Special Master cited "the testimony of Rummel" as one of the main reasons why the causation requirement had been satisfied. Estimates for the "reconstructed" delivery dates for all 63 aircraft were prepared by this TWA Vice President, "TWA's most important witness" (449 F.2d at 71, App. A-2775). The Special Master found him qualified as an expert in "negotiations with aircraft manufacturers with respect to technical specifications, performance characteristics, provisioning and spare parts, delivery schedules and acceptance tests" (App. A-1966 Brownell Report 47). Whatever Rummel's qualifications as an engineer, he was totally ignorant of TWA's financial capabilities. Indeed at the hearing he repeatedly disclaimed knowledge of TWA's

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sank without a trace within seconds after hitting the water? In an earlier Second Circuit case the ruling was for Y:

> [T]here is nothing whatever to show that the decedent was not drowned because he did not know how to swim, nor anything to show that, if there had been a life buoy on board, the decedent's wife would have got it in time, * * * or, if she had, that she would have thrown it so that her husband could have seized it, or * * * that, if he did, it would have prevented him from drowning. [*New York Central R. Co.* v. *Grimstad*, 264 F. 334, 335 (2d Cir. 1920).]

The point of these hypotheticals is that while a complaint may be sufficient to state a cause of action, that fact alone does not necessarily establish cause-in-fact. The leading students of causation accept the result in the *Grimstad* case, just described, and use it to illustrate the proposition that "if the greatest efforts on the part of all concerned would probably not have averted the harm causal connexion is not made out." Hart & Honoré, *Causation in the Law* 371 (1959). It is submitted that TWA's complaint is analogous to Case #1 and, as a consequence, it was necessary for it to prove at the damage hearing that it would not have drowned anyhow.

financial situation during the period when financing would have been needed to support his reconstructed jet fleet. By way of example:

> The Special Master: Do you have an opinion as to whether or not TWA was in a position to finance the acquisition of these planes? Do you have an opinion?
> The Witness [Rummel]: I don't think I have an opinion that's sufficiently valid to present, no. [App. A-503.]

* * * * *

Q. [Toolco counsel]: Did you give financial ability of TWA any weight at all in the preparation of this sentence?
A. [Rummel]: This is an area in which I personally am not especially proficient. It was not my intention to get into that.
Q. Does that mean that you did not give weight to financial ability of TWA?
A. Not particularly. [App. A-547.]

* * * * *

Q. [Toolco counsel]: So does your opinion as expressed in this sentence contain an assumption by you that TWA could have placed the orders for the Convairs in 1956?
A. [Rummel]: Well, I'm simply stating that if TWA had done that what the effect would have been. * * *

> The Special Master: Have you anything to add to it to your knowledge as to whether or not TWA could have placed the order at the same date that Toolco placed it?
> [Toolco counsel]: That's right.
> The Witness: Well, you see that gets over into the area of financing ability and all that sort of thing and I don't feel too competent to testify on it. That was not my area of responsibility. [App. A-626.]

* * * * *

Q. [Toolco counsel]: Is it correct or not, Mr. Rummel, that so far as this particular sentence is concerned, you are indulging the assumption that TWA would have been financially able to place the orders at the time Toolco placed them? * * *

A. [Rummel]: Well, in the reconstruction that's contained in the testimony, it is assumed that TWA would have ordered and then we derived the result that would have been achieved. [App. A-626-627.]

Other examples abound.[69]

The testimony of Rummel makes it very clear that he was not competent to testify on what TWA *could* have done and that he merely assumed what TWA *would* have done. His testimony was an academic answer to an academic question: what *should* TWA have done? The Special Master assumed that TWA could and would have done what Rummel testified it should have done. This assumption follows from the erroneous view that a causal nexus need not be shown, even when it had not been specifically alleged, in the damage hearing.

The erroneous reliance upon the Rummel testimony is analogous to the situation in *Flintkote Co.* v. *Lysfjord*, 246 F.2d 368 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957). Plaintiffs there sought damages for loss of profits that they would have realized if an antitrust violation had not prevented them from acquiring acoustical tile from defendant Flintkote on a direct basis. To prove damages plaintiffs testified that, while they knew nothing of the finances of the business and had never managed such a business

[69] *E.g.*, App. A-492, A-548, A-563, A-664, A-746, A-811, A-813, and A-917.

before, they fully anticipated annual profit increases based on the assumption of " 'just normal expected increase in good will and sales, [and] promotional work.' " 246 F.2d at 390. Neither the plantiffs in *Flintkote* nor Rummel in our case could give even an educated guess as to what *would* have happened absent defendants' unlawful conduct. The Ninth Circuit's answer in *Flintkote*, made with a full appreciation of the relaxed standard of proof of damages in antitrust cases, is equally applicable here:

> What, then, were plaintiffs' estimates and upon what factual basis were they grounded? In essence, the computation of lost profits was based on the *assumption* that the plaintiffs would make as much working for themselves in their first year of operation as they and their employer, R. W. Downer Co., made together from their sales in their best year working for that going concern; that thereafter, profits would increase as much as 50% annually. * * *
>
> The foregoing represents the sum and substance of plaintiffs' evidence on this issue. The omissions are manifold and significant. Nowhere in the record is there any substantial evidence of the state of the industry during this three year period. There is no evidence that plaintiffs would probably have obtained more business if they could have purchased Flintkote tile on a direct basis * * *. [246 F.2d at 391; emphasis added.]

This, the court held, was not enough. Proof of damages, even in an antitrust case, requires "something better * * * than a mere interested guess." 246 F.2d at 394. See also *Wolfe* v. *National Lead Co.*, 225 F.2d 427 (9th Cir.), *cert. denied*, 350 U.S. 915 (1955), in which the evidence in an antitrust case was held insufficient to establish any injury

where it rested on the fact that the plaintiffs "*assume* that they would have received larger quantities of titanium except for the alleged conspiracy; *but there is no evidence that they would have* * * *." 225 F.2d at 432 (emphasis added).

The Court of Appeals in the present case recognized that the award was based on assumption. It accepted "the *assumption* that TWA would have acted approximately as did Toolco * * * " and the "*assumption* that an independent TWA would and could have financed the full 63-jet fleet * * * " (449 F.2d at 73, 74, App. A-2781; emphasis added). But assumption is not proof, as the cases just discussed show.

The Special Master's third reason for finding causation was "the Connelly testimony" (App. A-1966 Brownell Report 56). This point hardly deserves rebuttal—except for its importance to the award—since Mr. J. B. Connelly, who was a *Boeing* Vice President, was obviously in no position to know what the *TWA* Board would have been able to finance. His testimony, like Rummel's, spoke only to what TWA *should* have done and had no probative value on the causation issue.

Finally, the Special Master pointed to the fact that the assumed fleets "were in fact ordered in the same type and quantity by a Hughes-dominated TWA, although at later dates * * *" (App. A-1966 Brownell Report 56). There are three reasons why this adds nothing. (1) A "Hughes-dominated TWA" did not order this fleet at all. The order was placed by Toolco. That Toolco, a wealthy corporation with interests far beyond the airline business, could order a 63-jet fleet is no proof that an independent TWA would

have had the resources to do so. (2) The Toolco order was cut back from 63 jets to 47. No evidence showed, or purported to show, that an independent TWA would have been able to finance more aircraft for itself than a "Hughes-dominated TWA" would have financed. (3) Finally, the Special Master's concession that the same type and quantity were ordered "although at later dates" is precisely the issue here. It is because the assumed 63-jet fleet—as well as the actual 47-jet fleet—would not have been ordered and financed at earlier dates that TWA's "damages" did not result from the alleged illegal conduct of Toolco.

TWA's only evidence of financing capability was the Drexel Harriman Ripley report, designed to provide evidence that financing would have been available for the reconstructed jet fleet. The Ripley firm assumed that an initial jet fleet "would have been ordered by an independent and competent management in the fall of 1955" (App. AX-353), rather than in the period December 1955 to early 1956, as actually happened. From that assumption the firm determined that it was necessary for TWA to have made in May 1955 a public offering of TWA common stock to provide net proceeds of $55.5 million, and thus ensure sufficient equity capitalization to sustain later and more substantial debt financings. The firm found this offering was an absolute prerequisite to all later financings (App. A-1966 Brownell Report 256) and stated that it would have advised the independent TWA board in early 1955 to make such a stock offering.

This evidence was positively and explicitly rejected by the Special Master (App. A-1966 Brownell Report 256-263). He said:

> I conclude that an independent prudent Board of TWA would not have accepted and acted upon the Drexel Harriman Ripley recommendations and that the sale in May 1955 of common stock of TWA for $58.5 million netting TWA $55.5 million would not have occurred.
>
> * * * * *
>
> I conclude that TWA has not proved that either of the 1955 financings could have been reasonably negotiated at the time, in the amount and according to the terms suggested, by an independent and prudent management.
>
> Since the May 1959 equity financing of $60 million and debt financing of $90-100 million assumed and were dependent upon the 1955 common stock and mortgage debt financings and since I have determined that the latter on their face as proposed by TWA's expert could not have taken place under the historical circumstances established in the record, I thus find a failure of proof with regard to these subsequent financings . [App. A-1966 Brownell Report 261, 263.]

Thus the Special Master completely rejected the only evidence presented that an independent TWA could or would have obtained the financing at the earlier times and in the greater amounts required to effect timely delivery of the reconstructed jet fleet.

But these findings of the Special Master in Part III of his report were inexplicably forgotten in Part I. In Part III he heeded and quoted the words of *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946), that "even where

the defendant by his own wrong has prevented a more precise computation, the [trier of fact] may not render a verdict based on speculation or guesswork" (App. A-1966 Brownell Report 257). But in Part I, in analyzing the acquisition of the reconstructed jet fleet, he said: "I have assumed that funds were available at the time of the delivery of each aircraft" (App. A-1966 Brownell Report 148). This assumed $200 million more than TWA borrowed historically, excluding the massive contributions by Toolco. The only evidence that could have sustained the assumption was actually rejected by the Special Master as too unreal to be accepted.[70]

The only possible explanation for the Special Master's failure to " 'look at the whole picture and not merely at the individual figures in it,' " *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962), is his mistaken view that plaintiff did not bear "the burden of introducing evidence to prove proximate cause, regardless of the default" (App. A-1966 Brownell Report 47). Thus his findings in Part I are irremediably tainted. Had he focused on the question whether Toolco caused TWA to have an inadequate fleet or whether an independent and prudent TWA board would have had an inadequate fleet anyway, he would undoubtedly have discussed his Part I findings in light of his Part III findings, and recognized TWA's failure

[70] To find that TWA would have made the stock offering in May 1955 "would in my opinion endow Drexel Harriman Ripley and an independent prudent Board of TWA in 1955 with a prescience, wisdom and perfection of timing that exceeds the natural capacity of the most experienced men acting without the benefit of hindsight" (App. 1966 Brownell Report 258).

to establish the causal nexus between Toolco's act and TWA's inadequate jet fleet.[71]

2. *Use of Leases.* The Special Master awarded TWA $5.3 million as damages ($15.9 when trebled) for Toolco's leasing planes to TWA rather than selling them to TWA outright. TWA made no such claim in its complaint. It never alleged, and the default did not admit, the acts for which the award was made.

Although a great deal was said in the complaint about other financing decisions that Toolco made that TWA claimed to be illegal and injurious (Complaint, ¶¶ 23-28, 52(c), (d), App. A-15-16, A-24-25), TWA never alleged that Toolco's 1959 and 1960 managerial decisions to lease airplanes to TWA pending final arrangements for sale con-

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[71] The Court of Appeals sought to fill this gap by saying that Toolco should not be heard to assert that TWA would not have financed a 63-jet fleet at the earlier dates because it was Toolco's own supposed "crippling TWA's financial posture and reducing it to a state of vassalage, dependent on Toolco's support," all in violation of the antitrust laws, that rendered TWA incapable of doing any better (449 F.2d at 74, App. A-2782). This argument totally ignores the fact that the Special Master and TWA's own financial experts accepted TWA's financial condition as being free of tainted Toolco impact at the very time at the close of 1954 and early 1955 when an independent and prudent TWA board was supposed to have taken necessary action to finance the 63-jet fleet.

> The damages claimed [under Part I] are confined to those said to stem from actions of the defendants in the period from early 1955 to the end of 1960 * * *. [App. A-1966 Brownell Report 45.]
>
> I must consider the actual Balance Sheet as of December 31, 1954 and the actual operating results for the year 1954 and the first two calendar quarters of 1955, as did TWA and its experts Drexel Harriman Ripley, and as must have an independent Board. [App. A-1966 Brownell Report 256.]

The point is further shown by the ten paragraphs of the complaint that the Court of Appeals cited for its "vassalage" statement. Not one of those paragraphs alleges any wrongful act of Toolco prior to 1955.

stituted antitrust violations. Nor did TWA allege that it was injured by the selection of a temporary rental mechanism rather than immediate sale.

The only paragraph of the complaint that offered any particulars regarding the lease arrangements makes it crystal clear that TWA was not complaining about the use of leases rather than sale but about an exclusive dealing arrangement with Toolco that purportedly ran concurrently with the leases. Paragraph 20 of the complaint alleged:

> During the period 1959 to 1960, defendants arranged for the lease to TWA by Toolco of certain jet-powered aircraft on a day-to-day basis. Such aircraft were the first and only jet-powered aircraft made available to TWA by the defendants during the years 1955 to 1960 and the number of aircraft so leased by Toolco to TWA was inadequate for the needs of TWA. Such leases were given on a continuing condition, agreement and understanding that TWA would not purchase or lease aircraft from any other potential supplier thereof. The effect of such continuing condition, agreement and understanding was to foreclose, to all potential suppliers of jet-powered aircraft to TWA other than defendants, the opportunity for *selling or leasing* jet-powered aircraft to TWA. [App. A-13-14; emphasis added.]

The phrase "selling or leasing" is the giveaway. TWA was concerned with *who* its suppliers were, not with the *manner* in which supplies were furnished. It would have had the same complaint about exclusive dealing even if Toolco had sold each jet to TWA as soon as it was available.

The Special Master recognized this. He said that "the singular thrust of the paragraph goes toward the claim that

the 1959-1960 leases did not provide a sufficient number of aircraft for TWA's needs and that the provisions of the lease agreements prohibited TWA from buying *or leasing* other jet aircraft from another potential supplier" (App. A-1966 Brownell Report 180; emphasis in original). But he was not deterred by what he termed "an omission in a specific allegation" (App. A-1966 Brownell Report 181) and thought that the general allegations of paragraphs 9(f) and 10(h) supported his award of damages for lease-related losses. They do not. Paragraph 10 is an allegation of intent, which says that the acts described in subsequent paragraphs were done in furtherance of the offenses charged in the preceding paragraph.[72] The only subsection of "the preceding paragraph" to mention leasing is 9(f). By its own terms, 9(f) is concerned only with the alleged Clayton § 3 offense of exclusive leasing *and selling*, and not with any offense relating to the relative merits of temporary rental vis-a-vis immediate purchase.[73] Nor is there anything

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[72] Paragraph 10(h) reads in full as follows:

> Each act of the defendants and Atlas hereinafter alleged was done in furtherance of the offenses charged in the preceding paragraph and was a part thereof and was done with the primary purpose of restraining and monopolizing the trade and commerce described above. It was the intent of the defendants and Atlas, *inter alia*:
>
> * * *
>
> (h) That the defendants and Atlas would obtain substantial profits for themselves, at the expense of TWA and other air carriers, as the result of restrictions upon competition in the trade and commerce hereinbefore alleged. [App. A-9-10.]

[73] Paragraph 9(f) reads in full as follows (emphasis added):

> Beginning in or about the year 1939 and continuing up to and including the date of the filing of this complaint, the defend-

whatever in the "injury" portion of the complaint (¶¶ 49-54, App. A-23-27) suggesting that TWA was injured because of Toolco's preference for leasing rather than selling.

By virtue of the default, TWA has the benefit of having the factual allegations of its complaint assumed to be true. At the same time, however, it is confined by the complaint and cannot recover what it did not claim. As this Court has said, a treble damage plaintiff not only must plead acts constituting a violation but must further plead "that plaintiff was damaged thereby." *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656, 660 (1961). Failure to allege "at least in general terms, the mode of injury, the nature and extent of loss" traceable to the leasing decision is fatal to TWA's case, even assuming that TWA properly pleaded that decision as an antitrust offense. *Sam S. Goldstein Industries* v. *Botany Industries, Inc.*, 301 F. Supp. 728, 734 (S.D.N.Y. 1969).

In addition, TWA never either pleaded or proved that the decisions to lease rather than purchase proximately caused any injury to it. As explained earlier, TWA failed to prove an essential element of proximate cause, i.e., that an independent TWA board either would or could have purchased the jets instead of renting them. No amount of *ex post facto* arithmetical calculation or recitations of opinions on the general desirability of purchasing as opposed to leasing can rectify plaintiff's failure of proof.

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ants, Atlas and other persons acting for each of them have been and are now engaged in

* * *

(f) *Sales and leases* of jet-powered aircraft on the condition, agreement and understanding that the purchaser or lessee shall not *buy or lease* the goods of a competitor or competitors of the vendor or lessor, in violation of Section 3 of the Clayton Act; and

* * *. [App. A-8-9.]

CONCLUSION

Because of the vast stakes involved, petitioners have felt obliged to discuss at length the various issues the Court has agreed to review. The comprehensiveness of our discussion may tend to suggest a complexity that the case does not have and give TWA's position a dignity it does not deserve. Stripped of the overtones of contumacy that the lower courts mistakenly thought were present and of the enthusiastic rhetoric with which plaintiff pleaded legal conclusions, the case is really quite simple. The new management of TWA disagrees with some of the decisions Toolco made for TWA during the last six years of Toolco control. Its resort to federal court to litigate these differences of view has been rewarded beyond its fondest dreams—indeed, beyond its prayer for relief—by a huge judgment in its favor though it has never shown, and the courts below have never decided, how Toolco violated the antitrust laws by making decisions, even erroneous decisions, for its subsidiary, or why any antitrust violations that might be found were not within the immunity conferred by CAB approval of Toolco's control of TWA, or what causal relation existed between the supposed antitrust violations and the damages it has been awarded. Toolco stands to lose a great deal if the decision below is affirmed but the federal courts stand to lose even more. The decision below does violence to sound and well-established principles of antitrust law, of the proper relation between the courts and administrative agencies, and of fair and orderly procedure.

For all of the reasons set out in this brief, the judgment of the Court of Appeals should be reversed.

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ANNEX

Statutory Provisions Involved

UNITED STATES CONSTITUTION AMENDMENT V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CODE, Title 15:

§ 1. [Sherman Act § 1] *Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty.* Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: PROVIDED, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District

of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: PROVIDED FURTHER, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

§ 2. [Sherman Act § 2] *Monopolizing trade a misdemeanor; penalty.* Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

§ 14. [Clayton Act § 3] *Sale, etc., on agreement not to use goods of competitor.* It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities,

whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

§ 15. [Clayton Act § 4] *Suits by persons injured; amount of recovery.* Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

§ 18. [Clayton Act § 7] *Acquisition by one corporation of stock of another.* No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such

acquisition may be substantially to lessen competition competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carirer from acquiring and owning all or any part of the stock of a

branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: PROVIDED, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

UNITED STATES CODE, Title 49:

§ 1302. [Section 102, Federal Aviation Act] *Declaration of Policy: The Board.*

In the exercise and performance of its powers and duties under this Act, the Board shall [illegible] the following,

among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil areonautics.

§ 1378. [Section 408, Federal Aviation Act] *Consolidation, merger, and acquisition of control.*

(a) *Prohibited acts.* It shall be unlawful unless approved by order of the Board as provided in this section—

* * * * *

(5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;

* * * * *

(b) *Application to Board; hearing; approval; disposal without hearing.* Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe:

* * * * *

(e) *Investigation of violations.* The Board is empowered, upon complaint or upon its own initiative, to investigate and, after notice and hearing, to determine whether any person is violating any provision of subsection (a) of this section. If the Board finds after such hearing that such

person is violating any provision of such subsection, it shall by order require such person to take such action, consistent with the provisions of this chapter, as may be necessary, in the opinion of the Board, to prevent further violation of such provision.

* * * * *

§ 1379. [Section 409, Federal Aviation Act] *Prohibited Interests: Interlocking Relationships.*

(a) It shall be unlawful, unless such relationship shall have been approved by order of the Board upon due showing, in the form and manner prescribed by the Board, that the public interest will not be adversely affected thereby—

(1) For any air carrier to have and retain an officer or director who is an officer, director, or member, or who as a stockholder holds a controlling interest, in any other person who is a common carrier or is engaged in any phase of aeronautics.

(2) For any air carrier, knowingly and willfully, to have and retain an officer or director who has a representative or nominee who represents such officer or director as an officer, director, or member, or as a stockholder holding a controlling interest, in any other person who is a common carrier or is engaged in any phase of aeronautics.

(3) For any person who is an officer or director of an air carrier to hold the position of officer, director, or member, or to be a stockholder holding a controlling interest, or to have a representative or nominee who represents such person as an officer, director, or member, or as a stockholder holding a controlling interest, in any other person who is a common carrier or is engaged in any phase of aeronautics.

(4) For any air carrier to have and retain an officer or director who is an officer, director, or member, or who as a stockholder holds a controlling interest, in any person whose principal business, in purpose or in

fact, is the holding of stock in, or control of, any other person engaged in any phase of aeronautics.

(5) For any air carrier, knowingly and willfully, to have and retain an officer or director who has a representative or nominee who represents such officer or director as an officer, director, or member, or as a stockholder holding a controlling interest, in any person whose principal business, in purpose or in fact, is the holding of stock in, or control of, any other person engaged in any phase of aeronautics.

(6) For any person who is an officer or director of an air carrier to hold the position of officer, director, or member, or to be a stockholder holding a controlling interest, or to have a representative or nominee who represents such person as an officer, director, or member, or as a stockholder holding a controlling interest, in any person whose principal business, in purpose or in fact, is the holding of stock in, or control of, any other person engaged in any phase of aeronautics.

* * * * *

§ 1381. [Section 411, Federal Aviation Act] *Methods of Competition.*

The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.

§ 1384. [Section 414, Federal Aviation Act] *Legal restraints.* Any person affected by any order made under sections 1378, 1379, or 1382 of this title shall be, and is hereby, relieved from the operations of the "antitrust laws", as designated in section 12 of Title 15, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order.

§ 1482. [Section 1002(b), Federal Aviation Act] *Investigations on Initiative of Administrator or Board.*

(b) The Administrator or Board, with respect to matters within their respective jurisdictions, is empowered at any time to institute an investigation, on their own initiatve, in any case and as to any matter or thing within their respective jurisdictions, concerning which complaint is authorized to be made to or before the Administrator or Board by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. The Administrator or the Board shall have the same power to proceed with any investigation instituted on their own motion as though it had been appealed to by complaint.

§ 1482. [Section 1002(c), Federal Aviation Act] *Entry of Orders for Compliance with Act.*

(c) If the Administrator or the Board finds, after notice and hearing, in any investigation instituted upon complaint or upon their own initiative, with respect to matters within their jurisdiction, that any person has failed to comply with

any provision of this Act or any requirement established pursuant thereto, the Administrator or the Board shall issue an appropriate order to compel such person to comply therewith.

§ 1485. [Section 1005(d), Federal Aviation Act] *Suspension or Modification of Order.*

(d) Except as otherwise provided in this Act, the Administrator or the Board is empowered to suspend or modify their orders upon such notice and in such manner as they shall deem proper.

UNITED STATES CODE, Title 28:

§ 1292. *Interlocutory decisions.*

* * * * *

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

* * * * *

RULES OF CIVIL PROCEDURE

Rule 16. *Pre-Trial Procedure: Formulating Issues.* In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

Rule 37. Refusal To Make Discovery: Consequences.

* * * * *

(b) *Failure to Comply With Order.*

(1) *Contempt.* If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in the district in which the deposition is being taken, the refusal may be considered a contempt of that court.

(2) *Other Consequences.* If any party or an officer or managing agent of a party refuses to obey an order

made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination.

* * * * *

(d) *Failure of Party To Attend or Serve Answers.* If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposi-

tion, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.[1]

Rule 54. *Judgment; Costs.*

* * * * *

---

[1] Rule 37 was amended March 30, 1970, effective July 1, 1970. The rule now provides, in pertinent part:

(d) *Failure of Party To Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b) (6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c). [(A), (B), and (C) of subdivision (b)(2), referred to above, are:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;]

(c) *Demand for judgment.* A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

Rule 55. *Default.*

(a) *Entry.* When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

(b) *Judgment.* Judgment by default may be entered as follows:

(1) *By the Clerk.*

* * * * *

(2) *By the Court.* In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount

of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

* * * * *

(d) *Plaintiffs, Counterclaimants, Cross-Claimants.* The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-827

HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,
Petitioners,

—v.—

TRANS WORLD AIRLINES, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT TRANS WORLD AIRLINES, INC.

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INDEX

PAGE

COUNTER-STATEMENT OF QUESTIONS PRESENTED 2

COUNTER-STATEMENT OF THE CASE 4

A. Summary review of proceedings 6

1. *Filing of complaint—rulings thereon* 6

2. *Answers and affirmative defenses—rulings thereon* 7

3. *Pretrial discovery—rulings thereon* 8

4. *The default judgment—rulings thereon* 10

5. *The damage award* 11

B. The complaint 12

C. The discovery proceedings 16

D. Defendants' refusal to proceed and the entry of the default judgment 29

E. Reasons given for the default 33

F. Evidence available to TWA at the time of default 39

1. *The role of Howard R. Hughes* 40

2. *The inferences which can be drawn from what is known about defendants' activities in aircraft manufacture and supply* 42

—The piston era 42

—Prevention of TWA financing 44

—The jet era 47

3. *The curtain of secrecy surrounding Hughes* 56

4. *Co-conspirators other than defendants* 57

SUMMARY OF ARGUMENT 60

ARGUMENT 68

I—The district court's pretrial orders were correct, and defendants' claim that those orders deprived them of due process under the Fifth Amendment is frivolous 68

PAGE

A. Defendants had no right, either constitutional or statutory, to an interlocutory appeal 70

B. Defendants' asserted right to indefinite priority 76

C. The district court properly managed the pre-trial proceedings 83

II—The entry of the default judgment and the effect given to it by the Special Master and the courts below were both proper and necessary; no due process question is presented 89

A. Entry of the default judgment was proper and necessary in light of defendants' refusal to proceed 91

B. The default judgment established that defendants' antitrust violations alleged in the complaint injured TWA 100

III—The courts below were correct in ruling that TWA should be permitted to recover the full amount of the damages to which it is legally entitled 111

A. The amendment of TWA's *ad damnum* clause was properly granted upon adequate notice prior to entry of the interlocutory default judgment 111

B. Whenever a defaulting defendant appears and defends at the damage hearing, the district court has discretion to enter judgment for the full amount of damages proved 117

IV—The orders of the CAB did not exempt the conduct complained of from antitrust attack 122

A. The conduct charged was such that the decisions below were compelled by this Court's rulings on the scope of similar statutory exemptions 123

B. The authority of the CAB to exempt from the antitrust laws is narrowly limited and does not reach this case 129

1. The legislative history 130

2. The Panagra *case* 133

PAGE

C. The orders issued by the CAB were not intended to, and did not, exempt the conduct of which TWA complains 138

1. The original control orders 140

2. Subsequent modification of the control orders 145

V—Damages were properly awarded for violation of the antitrust laws 149

A. Toolco's stock interest in TWA conferred no immunity from the antitrust laws 151

1. The alleged violations did not relate solely to TWA's purchases 151

2. Defendants' foreclosure of the TWA market was not beyond the reach of the antitrust laws 156

B. Defendants' factual defenses to the antitrust claims are inadequate 167

1. Absence of competition is no defense 168

2. The correct legal test was used by the court of appeals 171

VI—The Special Master and the courts below found that TWA, in proving the amount of its damages, demonstrated that each item recovered flowed from the allegations of unlawful conduct and resultant injuries admitted by defendants' default 173

A. TWA proved damages within the rule of "proximate cause" applicable in this defaulted case..... 173

B. Defendants' attack on the Special Master's findings of fact to TWA's damages is refuted by the record in the damage hearing, and those findings have been affirmed by the two lower courts 182

1. Size of TWA's jet fleet 185

PAGE

2. TWA's ability to finance the additional jets 187

3. The 1959-1960 leases 192

C. The Special Master and the courts below applied well-settled legal principles applicable to causation and damages in private antitrust suits 195

CONCLUSION 203

APPENDIX OF STATUTES AND RULES 1a

TABLE OF AUTHORITIES

Cases

Adkisson v. *Huffman*, 469 S.W. 2d 368 (Tenn. 1971) 102n, 108, 110, 196, 200n

Albrecht v. *Herald Co.*, 390 U.S. 145 (1968) 170

Aljassim v. *S.S. South Star*, 323 F.Supp. 918 (S.D.N.Y. 1971) 103, 115n

Allied Air Freight, Inc. v. *Pan American World Airways, Inc.*, 393 F.2d 441 (2d Cir.), *cert. denied*, 393 U.S. 846 (1968) 75n, 135n

Anderson v. *Gallman*, 99 A.2d 560 (D.C. Ct. App. 1953) 200n

Angel v. *Bullington*, 330 U.S. 183 (1947) 92n

Austin Burke, Inc. v. *Vigilant Ins. Co.*, 179 So. 2d 600 (Fla. App. 1965) 102n

Babcock & Wilcox Co. v. *North Carolina Pulp Co.*, 25 F.Supp. 596 (D. Del. 1938) 88n

Badenhausen v. *Guaranty Trust Co.*, 145 F.2d 40 (4th Cir. 1944), *cert. denied*, 323 U.S. 757 (1945) 184

Bail v. *Cunningham Bros., Inc.*, 452 F.2d 182 (7th Cir. 1971) 116

Bales v. *Kansas City Star Co.*, 336 F.2d 439 (8th Cir. 1964) 202n

Baltimore Transit Co. v. *Mezzanotti*, 227 Md. 8, 174 A.2d 768 (1961) 108, 109, 196, 200n

Barclay v. *Pickles*, 38 Mo. 143 (1866) 198n

PAGE

Batchelder v. *Bartholomew*, 44 Conn. 494 (1877) 199

Beall v. *Munson*, 204 Cal. App. 2d 396, 22 Cal. Rptr. 333 (1st Dist. 1962) 102n, 197n

Becker v. *Roothe*, 184 Kan. 830, 339 P.2d 292 (1959) 102n

Beckman v. *Walter Kidde & Co.*, 451 F.2d 593 (2d Cir. 1971), *cert. denied*, 40 U.S.L.W. 3610 (June 27, 1972) 79n

Bell v. *Hood*, 327 U.S. 678 (1946) 74

Berenyi v. *District Director, Immigration & Naturalization Service*, 385 U.S. 630 (1967) 183n

Berkley v. *Newman Realty Co.*, 33 F.R.D. 516 (W.D. Mo. 1963) 88n

Bernhard v. *Bank of America*, 19 Cal.2d 807, 122 P.2d 892 (1942) 92n

Bettcher v. *State*, 140 Colo. 428, 344 P.2d 969 (1959) 99, 102n

Bigelow v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946) 67, 180, 181, 202

Billy Baxter, Inc. v. *Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971) 80n, 201n

Blonder-Tongue Laboratories, Inc. v. *University of Illinois Foundation*, 402 U.S. 313 (1971) 92n

Blow v. *Joyner*, 156 N.C. 140, 72 S.E. 319 (1911) 197n

Bonazzi v. *Fortney*, 94 Vt. 263, 110 A. 439 (1920) 102n

Bond Distributing Co. v. *Carling Brewing Co.*, 325 F.2d 158 (4th Cir. 1963) 80n

Boucher v. *Paradis*, 244 A.2d 69 (Me. 1968) 102n

Boulter v. *Chesapeake & Ohio R.R.*, 442 F.2d 335 (6th Cir. 1971) 39n

Brown Shoe Co. v. *United States*, 370 U.S. 294 (1962) 159

Calderone Enterprises Corp. v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 92 S.Ct. 1776 (1972) 201n

California v. *Federal Power Comm'n*, 369 U.S. 482 (1962) 126

PAGE

California Shipping Co. v. *Pacific Far East Line, Inc.*, 453 F.2d 380 (9th Cir. 1971), *cert. denied*, 92 S.Ct. 1501 (1972) 79n

Carnation Co. v. *Pacific Westbound Conference*, 383 U.S. 213 (1966) 135

Case-Swayne Co. v. *Sunkist Growers, Inc.*, 389 U.S. 384 (1967) 158

Chapman v. *Rudd Paint & Varnish Co.*, 409 F.2d 635 (9th Cir. 1969) 80n

Cohen v. *Newsweek, Inc.*, 374 F.2d 470 (8th Cir.), *cert. denied*, 389 U.S. 878 (1967) 80n

Collins v. *New York Central System*, 327 F.2d 880 (D. C. Cir. 1963) 74

Commonwealth Edison Co. v. *Allis-Chalmers Mfg. Co.*, 315 F.2d 564 (7th Cir.), *cert. denied*, 375 U.S. 834 (1963) 201n

Conference of Studio Unions v. *Loew's Inc.*, 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952) 201n

Continental Ore Co. v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962) 127, 170, 194

Cosmopolitan Trust Co. v. *Golub*, 252 Mass. 574, 147 N.E. 847 (1925) 102n

Cowen v. *New York Stock Exchange*, 371 F.2d 661 (2d Cir. 1967) 80n

Cragin v. *Lovell*, 109 U.S. 194 (1883) 106, 111

Crane v. *Eastern Transportation Line*, 48 Conn. 361 (1880) 199

Crest Auto Supplies, Inc. v. *Ero Mfg. Co.*, 360 F.2d 896 (7th Cir. 1966) 80n

Cromwell v. *County of Sac*, 94 U.S. 351 (1876) 92n

Culetsu v. *Dix*, 149 Conn. 456, 181 A.2d 116 (1962) 103n

Dahl, Inc. v. *Roy Cooper Co.*, 448 F.2d 17 (9th Cir. 1971) 80n

De Hoff v. *Black*, 206 N.C. 687, 175 S.E. 179 (1934) 199-200

Diaz v. *Southern Drilling Corp.*, 427 F.2d 1118 (5th Cir.), *cert. denied sub nom. Trefina, A.G.* v. *United States*, 400 U.S. 878 (1970) 93

COPY BOUND

PAGE

D'Ippolito v. *Cities Service Co.*, 374 F.2d 643 (2d Cir. 1967) 72
Dr. Miles Medical Co. v. *Park & Sons Co.*, 220 U.S. 373 (1911) 53n
Douglas v. *Harris*, 35 N.J. 270, 173 A.2d 1 (1961) 103n
Durfee v. *Duke*, 375 U.S. 106 (1963) 92n

Ealy v. *McGahen*, 37 N.M. 246, 21 P.2d 84 (1933) 102n
Eastman Kodak Co. v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927) 202
Electrolytic Chlorine Co. v. *Wallace & Tiernan Co.*, 328 Mo. 782, 41 S.W.2d 1049 (1931) 197n
Evans v. *United States*, 319 F.2d 751 (1st Cir. 1963) 184
E. V. Prentice Machinery Co. v. *Associated Plywood Mills, Inc.*, 252 F.2d 473 (9th Cir.), *cert. denied*, 356 U.S. 951 (1958) 197n

Fanchon & Marco, Inc. v. *Paramount Pictures, Inc.* 202 F.2d 731 (2d Cir. 1953) 166
Federal Maritime Comm'n v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968) 126
Feingold v. *Walworth Bros., Inc.*, 238 N. Y. 446, 144 N.E. 675 (1924) 98n
Fields Productions, Inc. v. *United Artists Corp.*, 318 F.Supp. 87 (S.D.N.Y. 1969), *aff'd per curiam*, 432 F.2d 1010 (2d Cir. 1970), *cert. denied*, 401 U.S. 949 (1971) 201n
First National Bank of Arizona v. *Cities Service Co.*, 391 U.S. 253 (1968) 61, 78, 94
Flintkote Co. v. *Lysfjord*, 246 F.2d 368 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957) 188n
Foman v. *Davis*, 371 U.S. 178 (1962) 114-15
Fong v. *United States*, 300 F.2d 400 (9th Cir.), *cert. denied*, 370 U.S. 938 (1962), *affirming*, 182 F. Supp. 446 (N.D. Cal. 1959) 93, 103, 115n, 118, 119-20
Ford Motor Co. v. *United States*, 405 U.S. 562 (1972) 159, 161, 168
Fortner Enterprises, Inc. v. *United States Steel Corp.*, 394 U.S. 495 (1969) .. 94, 150, 154, 159-60, 162, 171

D CLOSE IN CENTER

PAGE

Fudim v. *Kane*, 48 R. I. 155, 136 A. 306 (1927) 102n
Funkhouser v. *Million*, 209 Va. 89, 161 S.E.2d 725 (1968) 102n, 108, 110, 196, 198, 200n

Georgia v. *Pennsylvania R.R.*, 324 U.S. 439 (1945) 126
Gibson v. *Elba Exchange Bank*, 266 Ala. 426, 96 So. 2d 756 (1957) 102n
Gottesman v. *General Motors Corp.*, 414 F.2d 956 (2d Cir. 1969) 166
Graver Tank & Mfg. Co. v. *Linde Air Products Co.*, 336 U.S. 271 (1949), *adhered to upon rehearing*, 339 U.S. 605 (1950) 173, 183n, 184, 185
Graves v. *Cameron*, 161 N.C. 549, 77 S.E. 841 (1913) 197n

Haller v. *Walczak*, 347 Mich. 292, 79 N.W.2d 622 (1956) 102n, 200n
Hallett Construction Co. v. *Iowa State Highway Comm'n*, 261 Iowa 290, 154 N.W.2d 71 (1967) 102n, 197n, 200n
Hammond Packing Co. v. *Arkansas*, 212 U.S. 322 (1909) 62, 76, 92, 95-97
Harshman v. *Knox County*, 122 U.S. 306 (1887) 109
Havens v. *Hartford & New Haven R.R.*, 28 Conn. 69 (1859) 199
Hawaii v. *Standard Oil Co. of California*, 405 U.S. 251 (1971) 201n
Hewitt-Robbins Inc. v. *Eastern Freight-Ways, Inc.*, 371 U.S. 84 (1962) 135
Hickman v. *Taylor*, 329 U.S. 495 (1947) 81
Hiland Dairy, Inc. v. *Kroger Co.*, 402 F.2d 968 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969) 155-56
House v. *Hewett Studios, Inc.*, 125 Ga. App. 127, 186 S.E.2d 584 (1971) 102n
Hovey v. *Elliott*, 167 U.S. 409 (1897) 96

International Boxing Club of New York, Inc. v. *United States*, 358 U.S. 242 (1959) 155n
International Salt Co. v. *United States*, 332 U.S. 392 (1947) 157, 158, 193

COPY BOU

PAGE

Japan Line, Ltd. v. *Sabre Shipping Corp.*, 407 F.2d 173 (2d Cir.), *cert. denied*, 395 U.S. 922 (1969) 72

Johanson v. *United Truck Lines*, 62 Wash.2d 437, 383 P.2d 512 (1963) 102n

Johnson v. *Illini Mutual Ins. Co.*, 18 Ill.App.2d 211, 151 N.E.2d 634 (1958) 196

Johnson v. *Ready Mix Concrete Co.*, 318 F.Supp. 930 (D.Neb. 1970) 201n

Jones v. *Uris Sales Corp.*, 373 F.2d 644 (2d Cir. 1967) ..... .92

Kiefer-Stewart Co. v. *Joseph E. Seagram & Sons*, 340 U.S. 211 (1951) 157-58, 163

Kirincich v. *Standard Dredging Co.*, 112 F.2d 163 (3d Cir. 1940) 187n

Klinger v. *Baltimore & Ohio R.R.*, 432 F.2d 506 (2d Cir. 1970) 187n

Klor's, Inc. v. *Broadway-Hale Stores*, 359 U.S. 207 (1959) 162, 169

Kogan v. *Schenley Industries, Inc.*, 20 F.R.D. 4 (D.Del. 1956) 166

Local Union No. 189 v. *Jewel Tea Co.*, 381 U.S. 676 (1965) 74

Link v. *Wabash R.R.*, 370 U.S. 626 (1962) 104

Lorain Journal Co. v. *United States*, 342 U.S. 143 (1951) 162

Ludka v. *Athana Corp.*, 25 Cal.App.3d 316, 101 Cal. Rptr. 615 (2d Dist. 1972) 121n

Mandeville Island Farms, Inc. v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948) 201n

Maywald Trailer Co. v. *Perry*, 238 S.W.2d 826 (Tex. Civ. Ct. App. 1951) 200n

McAllister v. *Kuhn*, 96 U.S. 87 (1877) 62, 107

McClelland v. *Climax Hosiery Mills*, 252 N.Y. 347, 169 N.E. 605 (1930) 187n, 199-200

McGinnis v. *Beatty*, 28 Wyo. 328, 204 P. 340 (1922) 102n

McGuire v. *Columbia Broadcasting System, Inc.*, 399 F.2d 902 (9th Cir. 1968) 80n

ND CLOSE IN CENTER

PAGE

McLean Trucking Co. v. *United States*, 321 U.S. 67 (1944) 126

Metric Investment, Inc. v. *Patterson*, 98 N.J. Super. 130, 236 A.2d 187 (1967), *aff'd*, 101 N.J. Super. 301, 244 A.2d 311 (App. Div. 1968) 103n

Michigan Window Cleaning Co. v. *Martino*, 173 F. 2d 466 (6th Cir. 1949) 93

Millison v. *Ades of Lexington, Inc.*, 262 Md. 319, 277 A.2d 579 (1971) 102n, 200n

Milwaukee Towne Corp. v. *Loew's Inc.*, 190 F.2d 561 (7th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952) 197n

Mitchell v. *Watson*, 58 Wash. 2d 206, 361 P.2d 744 (1961) 98n

Monson v. *Nelson*, 145 N.W.2d 892 (N.D. 1966) 102n

Nationwide Auto Appraiser Service Inc. v. *Association of Cas. & Sur. Cos.*, 382 F.2d 925 (10th Cir. 1967) 201n

Nelson Radio & Supply Co. v. *Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953) 170

New York Central R.R. v. *Grimstad*, 264 F.334 (2d Cir. 1920) 187n

Norfolk Monument Co. v. *Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700 (1969) 94

Norman v. *Young*, 422 F.2d 470 (10th Cir. 1970) 92

Northern Pacific Ry. v. *United States*, 356 U.S. 1 (1958) 158, 160, 162

Osborn v. *Gibson*, 309 S.W. 2d 15 (K.C. Ct. App. 1958) 196

Package Closure Corp. v. *Sealright Co.*, 141 F.2d 972 (2d Cir. 1944) 196

Pan American World Airways, Inc. v. *United States*, 371 U.S. 296 (1963) 64, 130, 133-34, 138n

Peitzman v. *City of Illmo*, 141 F.2d 956 (8th Cir.), *cert. denied*, 323 U.S. 718 (1944) 118

People v. *George Henriques & Co.*, 267 N.Y. 398, 196 N.E. 304 (1935) 98n

COPY BOUND

PAGE

Perkins v. *Standard Oil Co. of California*, 395 U.S. 642 (1969) 155n, 158, 201n

Perma Life Mufflers, Inc. v. *International Parts Corp.*, 392 U.S. 134 (1968) 80n, 110, 154, 158, 163, 170, 194

Pioche Mines Consolidated, Inc. v. *Dolman*, 333 F. 2d 257 (9th Cir. 1964), *cert. denied*, 380 U.S. 956 (1965) 93

Poller v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962) 61, 93, 170

Pope v. *United States*, 323 U.S. 1 (1944) 104-05

Postal Benefit Ins. Co. v. *Johnson*, 64 Ariz. 25, 165 P.2d 173 (1946) 102n

Potts v. *Howser*, 267 N.C. 484, 148 S.E. 2d 836 (1966) 197n

Putney v. *Du Bois Co.*, 240 Mo. App. 1075, 226 S.W. 2d 737 (1950) 102n, 197

Radovich v. *National Football League*, 352 U.S. 445 (1957) 110, 194

Ramsburg v. *American Investment Co. of Illinois*, 231 F.2d 333 (7th Cir. 1956) 166

Rayco Mfg. Co. v. *Dunn*, 234 F.Supp. 593 (N. D. Ill. 1964) 201n

Rice v. *Kuckenbecker*, 170 Minn. 110, 212 N.W. 23 (1927) 102n

Riggs, Ferris & Geer v. *Lillibridge*, 316 F.2d 60 (2d Cir. 1963) 118, 120

Rogers v. *American Can Co.*, 305 F.2d 297 (3d Cir. 1962) 166

Rosden v. *Leuthold*, 274 F.2d 747 (D.C. Cir. 1960) 120

Ross v. *Bernhard*, 396 U.S. 531 (1970) 166

Sagebiel's Inc. v. *Sumrall*, 358 S.W.2d 251 (Tex. Civ. Ct. App. 1962) 102n, 198n

Sanitary Farm Dairies, Inc. v. *Gammel*, 195 F.2d 106 (8th Cir. 1952) 184-85

Sarlie v. *E. L. Bruce Co.*, 265 F. Supp. 371 (S.D.N.Y. 1967) 103, 118

CLOSE IN CENTER

PAGE

Scheumann v. *Prudential Ins. Co. of America*, 146 Neb. 173, 19 N.W.2d 48 (1945) 102n

Schine Chain Theatres v. *United States*, 334 U.S. 110 (1948) 162

Schlagenhauf v. *Holder*, 379 U.S. 104 (1964) 81

Second National Bank of Robinson v. *Scudder*, 212 Ind. 283, 6 N.E.2d 955 (1937) 102n

Sibley v. *Weinberg*, 116 Wis. 1, 92 N. W. 427 (1902) 103n

Silver v. *New York Stock Exchange*, 373 U.S. 341 (1963) 64, 126-27

Smith v. *Concordia Parish School Bd.*, 445 F.2d 285 (5th Cir. 1971) 39n

Snow Crest Beverages, Inc. v. *Recipe Foods, Inc.*, 147 F. Supp. 907 (D. Mass. 1956) 201n

Speyer, Inc. v. *Humble Oil & Refining Co.*, 403 F.2d 766 (3d Cir. 1968), *cert. denied*, 394 U.S. 1015 (1969) 184

Societe Internationale v. *Rogers*, 357 U.S. 197 (1958) 97

Standard Oil Co. of California v. *United States*, 337 U.S. 293 (1949) 157, 159, 161, 163n, 194

State Automobile Mutual Ins. Co. v. *Leist*, 24 Ohio Op. 2d 7, 192 N.E.2d 512 (1962) 103n

State ex rel. Nilsen v. *Cushing*, 253 Ore. 262, 453 P.2d 945 (1969) 102n

Story Parchment Co. v. *Paterson Co.*, 282 U.S. 555 (1931) 195-96, 202

Sunkist Growers, Inc. v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962), *reversing* 284 F.2d 1 (9th Cir. 1960) 170, 197n

Surpitski v. *Hughes-Keenan Corp.*, 362 F.2d 254 (1st Cir. 1966) 74

Taylor v. *Johnson*, 262 A.2d 803 (D.C. Ct. App. 1970) 102n

Thomson v. *Wooster*, 114 U.S. 104 (1885) 62, 100-02, 105, 107-08, 110, 196

Thorpe v. *National City Bank of Tampa*, 274 F. 200 (5th Cir. 1921) 197n

COPY BOUND C

PAGE

Timken Roller Bearing Co. v. *United States*, 341 U.S. 593 (1951) 157, 163

Trans World Airlines, Inc. v. *Civil Aeronautics Board (Hughes Tool Co., Intervenor)*, 339 F.2d 56 (2d Cir. 1964), *cert. denied sub nom. Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 382 U.S. 842 (1965) 145

United States v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) 53n, 164n, 169

United States v. *Borden Co.*, 308 U.S. 188 (1939) 126

United States v. *Columbia Steel Co.*, 334 U.S. 495 (1948) 160-61, 163

United States v. *Crescent Amusement Co.*, 323 U.S. 173 (1944) 162

United States v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957) 165, 166, 168

United States v. *Employing Plasterers Ass'n*, 347 U.S. 186 (1954) 106

United States v. *First National Bank & Trust Co.*, 376 U.S. 665 (1964) 160

United States v. *General Motors Corp.*, 121 F.2d 376 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941) 155n

United States v. *Griffith*, 334 U.S. 100 (1948) 153, 162

United States v. *Grinnell Corp.*, 384 U.S. 563 (1966) 154, 168-69

United States v. *Klearflax Linen Looms, Inc.*, 63 F. Supp. 32 (D.Minn. 1945) 168

United States v. *National City Lines*, 186 F.2d 562 (7th Cir), *cert denied*, 341 U.S. 916 (1951) 152, 155n

United States v. *National Lead Co.*, 332 U.S. 319 (1947) 155n

United States v. *Owens-Illinois Glass Co.*, 25 FED. RULES SERV. 33.31, Case 1 (N.D.Ohio 1957) 88n

United States v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948) 155n, 162

United States v. *Parke, Davis & Co.*, 362 U.S. 29 (1960) 170

United States v. *Philadelphia National Bank*, 374 U.S. 321 (1963) 126

CLOSE IN CENTER

PAGE

United States v. *Procter & Gamble Co.*, 356 U.S. 677 (1958) 75

United States v. *Richfield Oil Corp.*, 99 F.Supp. 280 (S.D.Cal. 1951), *aff'd per curiam*, 343 U.S. 922 (1952) 167, 194

United States v. *Ryan*, 402 U.S. 530 (1971) 75

United States v. *Singer Mfg. Co.*, 374 U.S. 174 (1963) 183n

United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) 156n

United States v. *Topco Associates, Inc.*, 405 U.S. 596 (1972) 171

United States v. *United Mine Workers of America*, 330 U.S. 258 (1947) 74

United States v. *Wiseman*, 445 F.2d 792 (2d Cir.), *cert. denied*, 404 U.S. 967 (1971) 104

United States v. *Yellow Cab Co.*, 332 U.S. 218 (1947) 149-50, 152, 154-55, 158, 163, 164

United States v. *Yellow Cab Co.*, 80 F.Supp. 936 (N.D. Ill. 1948), *aff'd*, 338 U.S. 338 (1949) 164

Urquhart v. *American-LaFrance Foamite Corp.*, 144 F.2d 542 (D.C.Cir.), *cert. denied*, 323 U.S. 783 (1944) 74

Varveris v. *United States Lines Co.*, 141 F.Supp. 874 (S.D.N.Y. 1956) 116

Volasco Products Co. v. *Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963) 201n

White Motor Co. v. *United States*, 372 U.S. 253 (1963) 79n, 169

Winston v. *United States*, 342 F.2d 715 (9th Cir. 1965) 39n

Wolfe v. *National Lead Co.*, 225 F.2d 427 (9th Cir.), *cert. denied*, 350 U.S. 915 (1955) 188n

Zdanok v. *Glidden Co.*, 327 F.2d 944 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964) 92n

COPY BOU

PAGE

Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969) 166, 183-84, 202

Zinnel v. *United States Shipping Bd. E. F. Corp.*, 10 F.2d 47 (2d Cir. 1925) 187n

Statutes and Rules

UNITED STATES CONSTITUTION, FIFTH AMENDMENT 2, 68

Act of August 20, 1969, 83 STAT. 103 ..... 124n

CIVIL RULES FOR THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Rule 4 ..... 16n, 82n

CLAYTON ACT

Section 3, 15 U.S.C. §14 ..... 157, 159, 162, 171, 193, 194

Section 4, 15 U.S.C. §15 ..... 3, 77, 195, 201n

Section 7, 15 U.S.C. §18 ..... 159, 165

FEDERAL AVIATION ACT OF 1958

(formerly Civil Aeronautics Act of 1938)

Section 102, 49 U.S.C. §1302 136

Section 401(e)(4), 49 U.S.C. §1371(e)(4) 131

Section 407(c), 49 U.S.C. §1377(c) 136n, 138n

Section 408, 49 U.S.C. §1378 ..... 64, 123, 124n, 128, 131, 132, 136, 137, 139-40, 145&n, 146, 147

Section 408(a)(2), 49 U.S.C. §1378(a)(2) 138n

Section 408(a)(5), 49 U.S.C. §1378(a)(5) 140

Section 408(b), 49 U.S.C. §1378(b) 139-40

Section 408(e), 49 U.S.C. §1378(e) 140n

Section 409, 49 U.S.C. §1379 ..... 136&n, 140, 145

Section 411, 49 U.S.C. §1381 ..... 137-38, 138n

Section 412, 49 U.S.C. §1382 ..... 126, 135n, 140, 145

Section 414, 49 U.S.C. §1384 ..... 3, 8, 64, 123, 124, 126, 128, 140, 145&n

ND CLOSE IN CENTER

PAGE

Section 416, 49 U.S.C. §1386 ..... 145n, 148n
Section 1106, 49 U.S.C. §1506 ..... 132, 138

FEDERAL RULES OF CIVIL PROCEDURE

Rule 1 ..... 112n
Rule 8(a) 194
Rule 8(c) 74
Rule 9(b) 107
Rule 11 ..... 121n
Rule 12(c) 8
Rule 15 ..... 111, 112n
Rule 15(a) 63, 114, 115, 117, 120
Rule 15(b) 63, 120
Rule 16 ..... 9, 23, 59, 61, 76, 77, 86, 87
Rule 26(b)(1) 80-81
Rule 26(c) 16n, 35, 61
Rule 26(d) 82, 85
Rule 30(a) 16n
Rule 30(d) 35, 61
Rule 33(b) 88n
Rule 34 17
Rule 35 81
Rule 37 ..... 2, 94
Rule 43(c) 39n
Rule 52(a) 183, 184, 188
Rule 53(e)(2) 183, 184, 188
Rule 54(c) ..... 63, 111, 112n, 114, 115&n, 119, 120&n
Rule 55(c) 116
Rule 56(f) 79

COPY BOUN

PAGE

Rule 61 ..... 63, 77, 111, 120-21

Form 9 108

FEDERAL RULES OF CIVIL PROCEDURE
(in effect prior to July 1, 1963)

Rule 30(b) 35

GENERAL RULES FOR THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Rule 2 16

ILL. ANN. STAT. ch. 110, § 50(4) (Smith-Hurd 1968) 103n

JUDICIAL CODE

28 U.S.C. § 1292(b) 10, 71, 72, 73

28 U.S.C. § 2111 ..... 63, 111, 121

SHERMAN ACT

Section 1, 15 U.S.C. § 1 (1970) 156n, 157, 159, 160, 162, 168, 169, 193, 194

Section 2, 15 U.S.C. § 2 (1970) 156n, 159, 162, 168

Special Act of February 27, 1942, 56 STAT. 1122 104

Congressional and Administrative Materials

ANNUAL REPORT OF THE CIVIL AERONAUTICS BOARD—1942-47, 1949-50, 1953 ..... 131n

Application of Trans World Airlines Inc., Order 71-8-91, [1964-1971 Transfer Binder] CCH AvL.Rep. ¶ 22,015 (C.A.B. August 19, 1971) 125

83 CONG. REC. (1938) ..... 131&n, 132, 133n

115 CONG. REC. (1969) 125n

Federal Aviation Commission Report, S. DOC. No. 15, 74th Cong., 1st Sess. (1935) 130-31

Miscellaneous Authorities

Abuse of Process: Sewer Service, 3 COLUM. J.L. & SOC. PROB. 17 (1967) 103

D CLOSE IN CENTER

PAGE

ADVISORY COMMITTEE NOTES

Rule 37 (March 1938), 28 U.S.C., p. 7799 ..... 76, 94-95

Rule 26(d) (July 1970), 28 U.S.C., p. 7781 ..... 82&n

~~Rule 3(b) (July 1970), 28 U.S.C., p. 7792 ..... 88n~~

J. Alling, *The Law and Practice of Connecticut Concerning Hearing in Damages on Default, or Demurrer Overruled,* 6 YALE L.J. 121 (1897) 199

Annotation, 8 A.L.R. 3d 1070, § 6 (1966) 103n

47 AM. JUR. 2d *Judgments* § 1194 (1969) 103n

W. Brennan, *Pretrial Procedure in New Jersey—A Demonstration,* 28 N.Y.S. BAR BULL. 422 (1956) 87n

49 C.J.S. *Judgments* § 201 (1947) 103n

DAVIS, ADMINISTRATIVE LAW TREATISE (Supp. 1970) 137n

MANUAL FOR COMPLEX AND MULTI-DISTRICT LITIGATION (1970) 83, 84, 85, 86n

J. MOORE, FEDERAL PRACTICE RULES PAMPHLET (1971) 87n

2A J. MOORE, FEDERAL PRACTICE (2d ed. 1968) ¶8.12 ..... 105n

3 J. MOORE, FEDERAL PRACTICE (2d ed. 1968)

¶15.08[2] 115

¶15.13[2] 120

6 J. MOORE, FEDERAL PRACTICE (2d ed. 1971)

¶54.04[1] 71

¶54.61 (2d ed. 1953) 119

¶55.10[2] 116

9 J. MOORE, FEDERAL PRACTICE (2d ed. 1970)

¶110.06 71

¶110.22[3] 72

POMEROY, REMEDIES AND REMEDIAL RIGHTS (2d ed. 1883) 105

PAGE

W. PROSSER, HANDBOOK OF THE LAW OF TORTS (4th ed. 1971) 195

Symposium on The Practical Operation of Federal Discovery, 12 F.R.D. 131 (1951) 87n

Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U.L. REV. 20 (1968) 166

5 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL (1969)

§1218 ..... 105n, 106n

6 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL (1971)

§1471 115

§1473 115

§1474 115

§1528 87

8 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL (1970)

§2167 ..... 88n

J. Wright, *Pre-Trial on Trial*, 14 LA. L. REV. 391 (1954) 88n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-827

HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,
Petitioners,

—v.—

TRANS WORLD AIRLINES, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT TRANS WORLD AIRLINES, INC.

Respondent Trans World Airlines, Inc. ("TWA") cannot agree with the "Questions Presented" and "Statement of the Case" in defendants' brief. Both depend upon the acceptance as fact of defendants' view of controversies which were at issue when defendants chose to default, and thus forestalled a trial. Under these circumstances defendants' version of the facts is unacceptable—particularly when they admit that by the default they "gave up their right to challenge the factual allegations of the complaint" (Def. br. p. 50).

Counter-Statement of Questions Presented

1. When defendants have been allowed extensive discovery, the complaint has been held to state a claim for relief under the antitrust laws, and the pleaded affirmative defenses have been held insufficient to defeat plaintiff's claim, is the district court required by the Fifth Amendment to hold a pretrial conference at that stage for the purpose of defining the issues for trial or to permit defendants to complete further discovery, or both, before it can direct defendants to produce documents held to be relevant and not privileged and permit plaintiff to take an oral deposition?

2. (a) Is it a violation of defendants' Fifth Amendment rights for a court to enter a default judgment in favor of plaintiff as provided in FED.R.CIV.P. 37 when defendants wilfully and deliberately refuse to submit to discovery essential for the proper presentation of plaintiff's case and announce that they will not proceed further? (b) In these circumstances, is it a violation of defendants' constitutional rights for the court to rule that that default judgment conclusively establishes for the purpose of a subsequent damage hearing the truth of the material, traversable and well-pleaded allegations of plaintiff's complaint?

3. (a) May a court, upon actual notice to defendants who have appeared and are before it, grant a plaintiff's motion to amend its complaint by increasing the *ad damnum* prior to entering an interlocutory default judgment? (b) Thereafter, at the close of an evidentiary hearing in which defendants have availed themselves of full opportunity to contest the amount of plaintiff's damages, can the court enter judgment in the full amount to which plaintiff is entitled?

4. Does the immunity from the operations of the antitrust laws and other legal restraints provided in Section

414 of the Federal Aviation Act extend to a treble damage action under Section 4 of the Clayton Act brought by an air carrier against its former controlling stockholder for acts of that stockholder and others which violated the antitrust laws and gravely injured the carrier in its business and property, when none of such acts was approved by the Civil Aeronautics Board, and none was necessary to any acquisition of control which the Board did approve?

5. and 6.[1] (a) Under the antitrust laws are defendants exempt from liability in damages to a controlled corporation having over 13,000 (now 38,000) public stockholders for injuries inflicted upon that corporation by exploiting it as a captive backstop market for aircraft in furtherance of a combination and conspiracy to restrain and monopolize trade in aircraft and an attempt to monopolize a substantial segment of the market for commercial aircraft? (b) Are restraint of trade, monopolization and an attempt to monopolize beyond the reach of the antitrust laws because defendants, who are dealers in and suppliers of aircraft and joint venturers with aircraft manufacturers, contend they do not compete with manufacturers of aircraft? (c) Can either of these questions be determined adversely to plaintiff when its complaint concededly states a legally sufficient claim for relief and it has been deprived of meaningful discovery by defendants' refusal to comply with proper discovery orders?

7. Did the Special Master and the courts below commit clear error in finding that TWA in proving the amount of its damages demonstrated that each item recovered flowed

[1] The propositions covered by these two questions as set out in defendants' brief are so closely related that separate consideration is hardly practicable, as is shown by defendants' decision to cover both in their Point V (Def. br. p. 88 *et seq.*).

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from the well-pleaded allegations of unlawful conduct and resultant injuries admitted by defendants' default?

Counter-Statement of the Case

In 1964 Chief Judge Lumbard, speaking for a unanimous panel of the court of appeals, reviewed the course of this litigation since the filing of the complaint, and concluded that Howard R. Hughes and Hughes Tool Company ("Toolco") "seemed to look upon the entire discovery proceedings as some sort of a game, rather than as a means of securing the just and expeditious settlement of the important matters in dispute." Their tactics, the court believed, could "serve only to frustrate the implementation of the discovery machinery devised by the federal judiciary to expedite the handling of such complex litigation." (332 F.2d at 615, A-352)[2]

In the following year, 1965, this Court had before it on certiorari the basic issues of this case, save and except the quantum of damages. The Court had before it for review the final judgment which had dismissed Toolco's counterclaims against TWA and certain banks and insurance companies for wilful failure to make discovery, and thus the propriety of entering a sanction that deprived Toolco of a

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[2] Citations with the prefix "A-" are to pages of volumes A-I through A-VII of the printed Appendix and those with the prefix "AX-" are to pages of volumes AX-I through AX-VII of the printed Appendix of Exhibits filed with this Court in Nos. 71-827 and 71-830; citations to "Doc." are to documents in the original record certified to this Court in Nos. 71-827 and 71-830 and not otherwise reproduced; citations to "TWA Ex." are to TWA's exhibits and citations to "DX" are to defendants' exhibits in the damage hearing before Special Master Brownell which are not reproduced in the printed Appendix of Exhibits. Citations to "Brownell Report" are to the Report of the Special Master (Doc. 508), a copy of which is bound into volume A-V of the printed Appendix following p. A-1966. Citations to "Def. br." are to Brief for Petitioners herein.

trial on the merits. At the same time and for the same wilful failure the district court had entered the interlocutory default judgment in favor of TWA on its complaint. On that phase of the case, this Court had also before it for review the decisions on the legal sufficiency of TWA's complaint and the legal sufficiency of Toolco's affirmative defenses of primary jurisdiction and exemption by the CAB. At that time the Court had the benefit of full briefing and argument by the parties, and a brief *amicus* filed on behalf of the CAB which supported the decisions below that Toolco's affirmative defenses were legally insufficient. This Court dismissed the writs of certiorari as improvidently granted. It thus left standing the Second Circuit's 1964 judgment affirming (a) the final judgment of the district court dismissing Toolco's counterclaims, and (b) the interlocutory adjudications which underlay the interlocutory judgment of default in favor of TWA. The case then returned to the district court for the assessment of damages under the interlocutory judgment of default. The resulting award, confirmed by two lower courts, is now here for review.

In this counter-statement we will first review briefly the general course of the proceedings to date. Subsequent sections will be devoted to a more detailed treatment of matters particularly relevant to the questions here raised: the allegations of the complaint; the discovery proceedings during the year and a half following commencement of the action; the entry of the default judgment; an examination of the reasons given by defendants for refusing to proceed; and finally, a survey of the evidentiary material that satisfied the Special Master and the courts below that TWA's claims were well-founded, however urgently defendants might assert that they were sham.

A. Summary review of proceedings

1. Filing of complaint—rulings thereon

At the end of 1960 the stock of TWA[3] then owned by defendant Toolco, amounting to 78 per cent of TWA's outstanding stock, was placed in a voting trust. Two of the three voting trustees were independent of Toolco—Irving S. Olds, former Chairman of the Board of United States Steel Corporation, and Ernest R. Breech, former Chairman of the Board of Ford Motor Company. Defendant Raymond M. Holliday, a Toolco officer, was the third.

Olds and Breech caused enough of the Toolco-controlled directors of TWA to be replaced to obtain an independent majority. In addition to Breech, who became Chairman of the Board, the new directors were Clifford F. Hood, former President of United States Steel Corporation; Barry T. Leithead, President of Cluett, Peabody & Co., Inc.; Houston M. McBain, former Chairman of Marshall Field & Co.; and John A. McCone, former Chairman of the Atomic Energy Commission. The reconstituted Board brought in from outside TWA a new president, Charles C. Tillinghast, Jr., who also became a director. Independent counsel were retained by the Board (DX 39, p. 12), and on their recommendation this action was brought on June 30, 1961 against Toolco, Holliday and Hughes, who was Toolco's sole stockholder and controlling person. Atlas Corporation ("Atlas"), an investment company of which Hughes was the largest stockholder, and which controlled another air carrier, Northeast Airlines, Inc. ("Northeast"), was named as a co-conspirator.

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[3] TWA is the third largest domestic air carrier and the second largest U.S.-flag international air carrier. It is the only U.S.-flag carrier authorized by the CAB to provide regularly scheduled air transportation both within the United States and across the Atlantic.

Here, as in the courts below, defendants have intimated that this action was brought by the new management in bad faith, with the expectation that an advantageous settlement could be forced by seeking to take the deposition of Hughes (*e.g.*, Def. br. pp. 11, 12). This suggestion was considered and rejected by the court of appeals in 1971: "Nothing in the record would justify any such finding • • •" (449 F.2d at 62, A-2755).

The complaint charged a combination and conspiracy by defendants in restraint of trade and the monopolization and attempted monopolization by them of a substantial segment of the market in commercial aircraft, through conduct involving the exploitation by defendants of TWA as a captive market, all in violation of the antitrust laws. The complaint is detailed; its principal allegations are summarized at pp. 12-15 *infra*. On a motion to dismiss, the district court held it to be sufficient to state a claim against defendants under the antitrust laws (214 F. Supp. at 108, A-257-58), and on the prior interlocutory appeal this decision was affirmed by the court of appeals (332 F.2d at 610-11, A-343-44). That the complaint fails to state a claim was one of the arguments defendants made to this Court in 1965 before certiorari was dismissed as having been improvidently granted (Brief for Petitioners, No. 443, October Term, 1964, p. 89 *et seq.*). In their latest brief to this Court, however, defendants expressly "do not disagree" with the 1964 court of appeals determination that TWA's complaint is legally sufficient (Def. br. p. 32).

2. *Answers and affirmative defenses—rulings thereon*

Defendants' answers denied the principal allegations of the complaint, including the allegations of combination and conspiracy in restraint of trade and monopolization and

attempted monopolization, and the allegations that defendants acted with a specific motive and intent to restrain and monopolize. They asserted as affirmative defenses that all of the conduct charged in the complaint was within the primary jurisdiction of the CAB and had been exempted under Section 414 of the Federal Aviation Act (49 U.S.C. § 1384) from the operation of the antitrust laws, and all other restraints of law, by orders of the CAB. Toolco also filed counterclaims against TWA and a number of other corporations and individuals seeking trebled damages aggregating $366 million, including $135 million in damages, after trebling, for injuries it alleged had been suffered by TWA as a result of violations of the antitrust laws.[4]

The sufficiency of the affirmative defenses was presented to the district court by defendants' motion to dismiss, which was treated for this purpose as a motion for judgment on the pleadings pursuant to FED.R.CIV.P. 12(c). Each was held to be insufficient to defeat TWA's claim (214 F. Supp. at 108-12, A-258-66). This decision was unanimously affirmed by the court of appeals in 1964 (332 F.2d at 606-10, A-333-43). This Court dismissed certiorari as improvidently granted in 1965 (380 U.S. 248, A-2738).

3. Pretrial discovery—rulings thereon

Defendants were allowed "priority" of oral discovery by deposition under the then customary procedure in the Southern District of New York. The tortuous course of discovery during the first year and a half after the complaint was filed is reviewed at pp. 16-29 *infra*. At the end

[4] The additional defendants were The Equitable Life Assurance Society of the United States, Metropolitan Life Insurance Company, Irving Trust Company, Dillon, Read & Co. Inc., Tillinghast, Breech, Ben-Fleming Sessel, James F. Oates, Jr. and Harry C. Hagerty. Sessel, a Senior Vice President of Irving Trust Company, was also a director of TWA. Oates and Hagerty were officers and directors of the respective insurance company defendants.

of that time the district court directed that TWA and the counterclaim defendants should be allowed to take the oral deposition of Hughes beginning February 11, 1963, and again directed defendants to produce documents that they had been refusing to produce in disobedience of a series of orders dating from April 17, 1962.

Defendants objected to producing Hughes (a) before they were allowed to complete all of their proposed depositions, (b) before TWA was required to answer detailed interrogatories as to the evidence available to it, and (c) before a proceeding under FED.R.CIV.P.16 was held to define and limit issues, at which TWA would be required (among other things) to identify each of its proposed witnesses and the substance of the evidence expected to be obtained from each. The district court overruled these objections, (a) directing that the deposition of Hughes begin as scheduled, (b) directing TWA to answer the interrogatories within 60 days after the Hughes deposition, and (c) denying the motion for an immediate Rule 16 proceeding, without prejudice to renewal 30 days after the Hughes deposition (A-122 *et seq.*). Toolco's attempt to secure interlocutory review of these orders by mandamus, or alternatively by appeal, was denied by the court of appeals (A-xxiii-xxiv).

The propriety of the district court's pretrial discovery orders was considered in detail by the court of appeals on the 1963-1964 appeal. The court held not only that these orders were not an abuse of discretion, but that they were entirely correct because the Hughes deposition was "absolutely essential to the proper conduct of the litigation" (332 F.2d at 615, A-352).

The court of appeals in 1971 reviewed the record once more, and concluded unanimously that the pretrial orders were proper and that "the information sought [by TWA] was more than merely 'material.' It was essential" (449 F.2d at 62, A-2756).

4. The default judgment—rulings thereon

The manner in which defendants carried out their decision to default, announced on February 8, 1963, is described in detail in both opinions of the court of appeals. Certain of the special circumstances involved are set out at pp. 29-33 *infra*.

On February 16, 1963 TWA moved for the entry of an interlocutory default judgment, pending a hearing to determine the amount of its damages (A-2692 *et seq.*). In the same motion TWA asked leave to amend its complaint to increase its *ad damnum* claim, as it had announced it would at the outset of the February 8 hearing at which defendants' "business decision" to default was placed on the record. On May 3, 1963 the motion to amend the complaint was granted, and the default judgment was entered (32 F.R.D. at 607-08, A-321). At the same time, Toolco's counterclaims were dismissed for the same refusal to obey discovery orders (*ibid.*; A-323).

Defendants were permitted an interlocutory appeal under 28 U.S.C. § 1292(b) on the questions of jurisdiction and antitrust exemption pursuant to certification by the district court and leave granted by the court of appeals. Toolco also appealed from the final judgment dismissing its counterclaims. In 1964 the court of appeals affirmed Judge Metzner's decision on all matters which were before it, with an exception not now material. Chief Judge Lumbard wrote:

> "The sanction of judgment by default for failure to comply with discovery orders is the most severe sanction which the court may apply, and its use must be tempered by the careful exercise of judicial discretion to assure that its imposition is merited. However, where one party has acted in willful and deliberate disregard of reasonable and necessary court orders and the efficient administration of justice, the application of even so stringent a sanction is fully

justified and should not be disturbed." (332 F.2d at 614, A-351-52)

After reviewing the record once more, the panel that heard defendants' appeal in 1971 agreed that

> "* * * a clearer case for the necessity and propriety of such a [default] judgment could hardly be imagined." (449 F.2d at 60, A-2752)

5. The damage award

The hearing on damages before Special Master Herbert Brownell extended over a period of two and one-half years. The transcript of testimony at the damage hearing totalled almost 11,000 pages, substantially all of it cross-examination since direct testimony was presented in written form. Over 60,000 pages of documents were admitted in the record as exhibits. The Special Master's 323-page Report (A-1966) contains a comprehensive review of the evidence, together with a detailed consideration of the various arguments of the parties. His findings that TWA had proved damages of $137 million, after trebling, for injuries specifically alleged in the complaint to have been caused by defendants' conduct are meticulously spelled out and related to the evidence before him. Defendants' arguments on the merits, including their arguments as to "proximate cause," were considered in detail and rejected.

Defendants filed hundreds of objections with the district court, both to findings made by the Special Master and to his failure to make other findings based on evidence they had presented or arguments they had made (A-1967 *et seq.*). The objections were based largely on factual contentions, in many instances virtually indistinguishable from the version of the "facts" which defendants present to this Court with the claim that they "were never in dispute" (see chart at p. 90 *infra*). While defendants chose then, as now,

to describe these matters as indisputable, TWA disputed them vigorously, and it was TWA's view of the facts which Special Master Brownell accepted.

Defendants' objections were overruled in a detailed opinion by the district court (308 F. Supp. 679, A-2027 *et seq.*), and the Brownell Report was confirmed. On appeal the court of appeals concluded that the findings were amply supported (449 F.2d at 72-78, A-2778-91). The petition for certiorari did not in terms seek review of these findings which had been reviewed and affirmed in all respects by the district court and the court of appeals.

In the following sections of this counter-statement, certain matters of particular relevance to the questions presented here are set forth in greater detail.

B. The complaint

The complaint alleges that since approximately 1939 defendants and other persons acting for them (including Atlas) have engaged in a combination and conspiracy to restrain trade and monopolize and an attempt to monopolize with the intent and purpose that Toolco would take over the supply of aircraft to one or more substantial markets and that control over TWA and its business would be used in advancing this objective. Toolco was to become the sole supplier of aircraft to TWA, which would thereafter be used as a captive backstop market for aircraft ordered by Toolco; suppliers of aircraft other than defendants would be boycotted and foreclosed from furnishing aircraft directly to TWA. (Complaint, pars. 9, 10, A-8-10)

Among the acts alleged to have been committed by defendants pursuant to this conspiracy prior to December 1960 were:

> —an arrangement to develop with the Convair Division of General Dynamics Corporation ("Convair") a "Model 18" jet aircraft to be manufactured by Convair and to be supplied by defendants to air

carriers, including TWA, with the intention that TWA would be a captive market for such aircraft (Complaint, par. 14, A-11-12);

—the development of a plan under which Toolco would itself commence the manufacture of a "Golden Arrow" jet aircraft to be furnished to TWA and other carriers (Complaint, par. 15, A-12);

—taking action to prevent TWA from making any arrangements for the acquisition of jet aircraft from Boeing Company ("Boeing") and Douglas Aircraft Company, Inc. ("Douglas") at a time when other competing carriers were placing orders for such aircraft (Complaint, pars. 16, 17, A-12-13);

—after earlier plans for manufacture were abandoned as no longer in the immediate interest of defendants and Convair, placing orders for the purchase by Toolco of 33 Boeing 707 jet aircraft and 30 Convair Model 880 jet aircraft, but refusing to assign the rights to acquire any of such aircraft to TWA (Complaint, pars. 17, 18, A-13);

—preventing TWA from acquiring any jet aircraft itself until the period 1959 to 1960, when defendants arranged for Toolco to lease a limited and inadequate number of jet aircraft to TWA on a day-to-day basis, subject to the condition and understanding that TWA would not purchase or lease aircraft from any other potential supplier (Complaint, par. 20, A-13-14);

—by these means and for these purposes foreclosing all other potential suppliers of jet aircraft from the TWA market (Complaint, par. 49, A-23-24).

It is further alleged that, pursuant to the combination and conspiracy and attempt to monopolize, Toolco and the other defendants, after acquiring control of TWA, continuously refused to allow equity financing by TWA, except on terms which would increase Toolco's equity position in TWA, and instead caused TWA to obtain funds chiefly

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by means of debt financing (Complaint, par. 23, A-15) this policy had the purpose and effect of maintaining control by defendants of the financing of aircraft purchases by TWA and strengthening defendants' control over the acquisition of aircraft by TWA (Complaint, pars. 23, 24, A-15). By reason of this policy TWA was prevented from obtaining the financing necessary for its acquisition of jet aircraft until December 1960, when the prevailing interest rate for debt financing was approximately 6-6½ per cent, as compared to the 4-4¾ per cent interest rate at which other air carriers arranged to borrow in 1955 and 1956 (Complaint, pars. 26-28, A-16).

Defendants and Atlas sought to compel TWA to enter into a disadvantageous merger with Northeast for the purpose of enlarging TWA's requirements for new aircraft, and for the additional purpose of enabling Atlas and its stockholders, including Hughes, to obtain stock of TWA on advantageous terms (Complaint, pars. 21, 47, A-14, A-22-23). In November 1960 defendants arranged for the lease by Convair to Northeast of six of the jet aircraft that Toolco had ordered from Convair, including three which had already been assigned to TWA (Complaint, par. 22, A-15).

Defendants' attempts to prevent TWA from acquiring aircraft directly from manufacturers instead of through defendants are alleged to have continued after 1960 and examples are given (Complaint, pars. 36-48, A-19-23). Thus, during May and June 1961 defendants sought to stop TWA from purchasing jet aircraft from Boeing and to compel TWA instead to purchase Convair Model 990 aircraft from Toolco (Complaint, pars. 37-39, A-19-20). Defendants made threats against TWA, its directors, the voting trustees, and the financial institutions lending money to it, including a threat to institute suit; they sought to disrupt the contractual relationship between TWA and Boeing by asserting to Boeing that its contract with TWA

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was not binding because Toolco had not consented to it (Complaint, pars. 38, 39, A-19-20). During the same period defendants also sought to impede TWA's financing of the jet aircraft selected by it (Complaint, pars. 40-46, A-20-22).

The injuries caused TWA by this course of conduct are spelled out (Complaint, pars. 50-54, A-24-27). TWA was prevented from obtaining jet aircraft and was deprived of opportunity for adequate use of jet aircraft from 1958 on, with a resultant loss of profits (Complaint, par. 52(a), A-25). It was also foreclosed from obtaining financing at lower rates than it ultimately borrowed at in 1960 (Complaint, par. 52(c), A-25). Further specific examples of injuries alleged include defendants' diversion of six long-range Boeing jets to TWA's principal transatlantic competitor, Pan American World Airways, Inc. ("Pan American") (Complaint, par. 18, A-13), the assignment of Convair 880s to Northeast, and the day-to-day leases of jets in 1959 and 1960 on unlawful conditions. Other injuries alleged include TWA's inability to dispose of its used piston aircraft (because it did not have enough jets) until the market for such aircraft had dropped considerably, impairment of its ability to secure financing, loss of good will, and general disruption of its management and business (Complaint, pars. 52, 53, A-25-26). Damages were estimated as in excess of $35,000,000 (Complaint, par. 54, A-27).

Toolco's answer on February 14, 1962 put in issue substantially all of these averments (A-41 *et seq.*). It also included extensive counterclaims against TWA and nine others. Holliday's answer, filed March 26, 1962, adopted in substance Toolco's answer, and included averments incorporating the principal allegations of Toolco's counterclaims (A-99 *et seq.*).

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C. The discovery proceedings

The history of the year and a half of "discovery" whic followed the filing of the complaint is a chronicle of a grad ually developing filibuster by defendants which ultimatel brought the pretrial process to a complete standstill.

After the complaint was filed, both TWA and Toolc sought to obtain oral discovery by filing notices of depos tion. Toolco, however, secured the priority of discover normally available to a defendant under the practice the prevailing in the Southern District of New York (A-2077), a priority it was permitted to exploit without any interrup tion for depositions by other parties until February 1963

On August 31, 1961, two months after the complaint wa filed, the Chief Judge assigned the case "for all purposes" to District Judge Charles M. Metzner, pursuant to Genera Rules 2 of the Southern District (A-33).

Judge Metzner immediately took firm control of the case All matters then pending in the case were reviewed at a lengthy pretrial hearing on September 6, 1961 (A-2078 *et seq.*), the first of 19 formal pretrial hearings before him (not counting those in chambers of which no transcript was kept). Much of the hearing was devoted to discovery matters: there was a progress report about TWA's pro- duction of documents in response to a subpoena that had been served upon it by Toolco; TWA expressed its in- tention to seek documentary discovery from Toolco, and consideration was given to scheduling the depositions which both sides wished to pursue. Toolco on August 8, 1961 had filed a motion to dismiss the complaint and for summary judgment (A-2075-76), and that motion was considered. Judge Metzner pointed out that, since the motion included

[5] This practice has since been completely changed, by Civil Rule 4 of the Southern District of New York effective July 1, 1962 and for district courts generally by this Court's amendments to the Federal Rules of Civil Procedure effective July 1, 1970. *See* especially present Rules 26(d) and 30(a).

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a summary judgment branch, "* * * in view of our decisions here in this circuit, your opponent should have the opportunity of depositions before your motion is passed upon" (A-2103). Toolco's counsel replied: "No objection." (*Ibid.*)

A pretrial order entered the next day directed TWA to complete its response to Toolco's subpoena by October 13, 1961, scheduled another pretrial hearing to consider TWA's motion under FED.R.CIV.P. 34 and various discovery scheduling questions, and directed that Toolco's motion to dismiss and for summary judgment "be held in abeyance" until Toolco notified the court that it wanted the motion heard (A-2113).

TWA's motion seeking documents from Toolco was heard on October 2, 1961 (A-2115 *et seq.*). Toolco argued that it should be allowed to complete all its discovery before TWA could have any (A-2118-19) and objected particularly to being required to produce its tax returns and other financial data (A-2119-25). Judge Metzner granted TWA's motion on December 5, 1961 (A-34-35) and in a pretrial order on December 18 set out a discovery schedule to govern the case: Toolco's previously noticed depositions of TWA and various witnesses would begin January 5, 1962, Toolco's production of documents to TWA would begin March 15, and TWA's previously noticed depositions would begin with Hughes on April 3 (A-2138-39).

Toolco's oral discovery of TWA commenced as scheduled with the deposition of Tillinghast, TWA's new president (Doc. 53). After pretrial conferences on January 10 and January 23 (at which TWA objected that the Tillinghast deposition was being drawn out unduly), Judge Metzner by pretrial order dated February 7 appointed former Solicitor General J. Lee Rankin Special Master "to act in connection with the depositions and other discovery proceedings" (A-36-37). Judge Metzner also directed that the Tillinghast deposition be continued and the depositions of other

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witnesses "be commenced in accordance with the schedule annexed," a schedule that contemplated Toolco's finishing all its depositions prior to April 23 when the Hughes deposition was now to begin (A-36, A-39-40).

The case entered a new phase on February 14, 1962 when Toolco filed its answer and counterclaims against TWA and numerous new parties termed "additional defendants" (Toolco answer, par. 42 *et seq.*, A-51 *et seq.*; A-xv). The effect on the case of adding these new parties was considered at a pretrial conference on February 23, 1962 (A-2141 *et seq.*). TWA asked that the Tillinghast deposition be terminated because Toolco was using it simply to delay proceedings[6] and to discover information about its counterclaims (A-2157-58). The additional defendants asserted that they were entitled to priority of discovery as against Toolco on the counterclaims (A-2142).

In a pretrial order on March 5, 1962 (Doc. 81) Judge Metzner ordered Toolco to limit its depositions "to evidence which bears" on TWA's claims against it, but refused at that time either to terminate the Tillinghast deposition or to alter the order of depositions. He did warn, however, that what he described as the "normal rule of priority" was not

> "• • • rigid in [its] application and must yield in unusual circumstances to the ultimate goal of prompt, orderly and fair disposition of the litigation. Furthermore, the plaintiff who instituted the litigation must not be lost sight of in the maze that has resulted from the pleadings." (Doc. 81, pp. 3-4)

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[6] A minor but revealing episode occurred at the February 14 deposition session. Special Master Rankin suggested that it might be desirable to suspend the deposition of Tillinghast, who had been TWA's president for only about two months at the time the complaint was filed, to permit an early deposition of Charles Thomas, who had been TWA's president from July 1958 to July 1960 (Doc. 210, p. 1032). The suggestion was immediately and successfully resisted by Toolco, which filed a motion the next day objecting to any intrusion upon its discovery program (A-2140).

On March 15 Toolco began producing documents pursuant to the district court's December 18, 1961 order. The production took place at the same time in Houston and at two locations in Los Angeles; it was far from complete, however. Many documents were produced only after masking tape had been applied to screen out portions of them (*e.g.*, AX-676-77, AX-680-81, AX-708-11). In addition from what was produced it became apparent that other relevant documents had not been produced. The reason given was that they had been destroyed prior to service of TWA's demand (Doc. 215, pp. 3412-13, 3452-56; Doc. 306, pp. 2-5; Doc. 307, pp. 5-8). After examining the masked documents, the Special Master on April 6, 1962 directed defendants to reproduce the greater part with the masking removed (Doc. 217, pp. 4159-60). As it developed, this was the last discovery order that defendants would see fit to obey.

TWA was aware that defendants used attorneys as business agents and negotiators in all important matters. If Toolco were allowed to withhold documents dealing with what was done by attorneys acting in a business, not legal, capacity, some of the most significant documentary evidence of defendants' aircraft and financing activities would be unavailable. When Toolco's documentary production included nothing that touched upon the important areas in which these agents were known to have functioned, TWA and the additional defendants sought to obtain such documents. They asserted that Toolco had waived any possible attorney-client privilege with respect to the documents: Toolco had pleaded advice of counsel as a defense in this action (Toolco answer, par. 40, A-51) and had used affidavits of these attorneys as to matters of fact in an unrelated proceeding before the CAB involving Northeast (A-2177).

After extensive briefing and argument the Special Master on April 17, 1962 ruled that Toolco must produce the documents (A-2176 *et seq.*). Toolco appealed to Judge Metzner. Briefs were submitted and after oral argument on May 17

(A-2206 *et seq.*), Judge Metzner on July 24 affirmed the ruling that Toolco had waived its privilege (A-2268-69).

Toolco ignored this decision.

Meanwhile, since shortly after filing its complaint, TWA had been engaged in an international search in an unsuccessful effort to serve Hughes with process or a subpoena. After all efforts failed, TWA applied to the Special Master for permission to serve limited interrogatories asking Toolco where Hughes could be found (Doc. 283).

Toolco vigorously opposed TWA's right to serve the interrogatories, but on April 17 the Special Master granted TWA's application, directed that any appeal by Toolco be taken within 10 days and specified that the interogatories be served on May 2, 1962.[7] No appeal was taken by Toolco.

On May 2 TWA served its interrogatories, requesting Toolco to answer by May 17 (A-2197-205). Toolco then objected both to the form of the interrogatories and to TWA's right to serve them at all. The Special Master took further briefs and heard additional oral argument but on June 4 ordered Toolco to answer no later than June 20, 1962 (A-2233). Three days later Toolco appealed to Judge

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[7] "I will sustain the motions to propound and have answered the limited interrogatories about the location of Mr. Howard R. Hughes. In so doing I want to make it very clear that this interference with the right of the Tool Company to proceed with its discovery is not a precedent for any other such interference, but is granted in recognition, in the first place, that much of the documentary evidence that the Special Master has ruled is not privileged and must be produced by the Tool Company with relation to its outside counsel, demonstrates a very active participation by Mr. Hughes on behalf of the Tool Company, and it is not realistic to assume from such materials that there were not common interests between the Tool Company and Mr. Hughes throughout the period involved in this litigation—a common interest which went beyond that of the ordinary stockholder, and involved many important business decisions.

"I am unwilling to preside as Special Master and permit the day to come when the parties would be entitled to take the deposition of Mr. Hughes, and then be unable to do so because they have been unable to locate him." (A-2195-96)

Metzner, but placed no return date on its papers (Doc. 95). On June 11 it attempted to reargue the point before the Special Master (A-2299). On June 14 that attempt was rejected (A-2300).

Although not relieved by either the Special Master or Judge Metzner from meeting the June 20 deadline, Toolco neither answered the interrogatories nor took any other action with respect to them.

On June 25, 1962 TWA again moved to terminate the Tillinghast deposition, still in progress with no end yet in sight (A-2234 *et seq.*). On July 12 another hearing was held before Judge Metzner to determine whether the Tillinghast deposition should be terminated, whether depositions should be alternated so that TWA could commence its discovery without further delay while Toolco exhausted all its discovery possibilities, and whether Toolco had to answer the interrogatories asking the whereabouts of Hughes which it had previously been directed to answer no later than June 20, 1962 (A-2245 *et seq.*). Judge Metzner now ordered that the Tillinghast deposition be terminated no later than July 25. He also modified and affirmed the Special Master's ruling as to the interrogatories seeking the location of Hughes, directing that they be answered by July 26. But he rejected the proposal for alternating depositions, with leave to renew the application in September (A-116-17).

On July 18, 1962 Toolco moved to clarify and limit the order with respect to the interrogatories (Doc. 103). That motion was denied on July 23 (A-2267). On July 26 (the return date) Toolco applied to Judge Metzner for additional time to answer the interrogatories and was given until August 27 (Doc. 105).

Toolco never answered them. Instead, on September 6, pursuant to what Toolco stated was specific and adequate authorization from Hughes, its counsel accepted a subpoena

on Hughes's behalf, providing for his deposition to be taken in Los Angeles beginning September 24, 1962 (A-2309).

TWA promptly moved before the Special Master to confirm that date (Doc. 324). On September 15 the Special Master denied TWA's application to take Hughes's deposition beginning September 24, but said:

> "I feel that there is such a close connection between Mr. Hughes, as evidenced by some of the documents that I have seen, and the fact that he is the sole owner of the Hughes Tool Company, that the Hughes Tool Company is responsible for Mr. Hughes with regard to this subpoena • • •" (A-2384)
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> "• • • I am piercing the corporate veil as to the Hughes Tool Company, and I am bringing what I hope is clear notice of very substantial sanctions, not against Mr. Hughes, but against the Hughes Tool Company, in case there should be at some later date a claim of lack of authorization or failure to respond to the subpoena • • •." (A-2390)

Counsel for Toolco later stated with respect to this ruling of the Special Master:

> "• • • the Tool Company did not seek a review of those rulings of the Special Master by the Court and accepted in effect the responsibility placed upon it by that ruling." (A-274)

At the same time Toolco sought to reargue its position *vis-a-vis* the assertedly privileged documents (Doc. 323) —none of which had yet been produced despite the district court's July 24, 1962 pretrial order (A-2268-69). The Special Master on September 15 again ordered Toolco to produce them (Doc. 236, pp. 164-67). Toolco again appealed.

After a hearing on September 19 (A-2391 *et seq.*), Judge Metzner entered a pretrial order on September 21:

> "The Special Master stated for reasons set forth in the record that unless Howard R. Hughes communicated with him by today, Friday, September 21st, 1962 he would consider that Mr. Hughes has acquiesced in this interpretation and that if Mr. Hughes subsequently either attacked the validity of the subpoena or failed to appear pursuant to that subpoena on September 24th, 1962, or at any future time that the court might direct for the taking of the deposition of Mr. Hughes pursuant to that subpoena, he, the Special Master, would consider the imposition of sanctions upon the Tool Company, and that he would entertain a motion to strike the answer of the Tool Company and enter judgment against it.
>
> "Without passing upon the power of the Special Master to grant the entry of such judgment, the court adopts the interpretation and conditions expressed by the Special Master. Any determination by the Special Master on an application for a default judgment would, of course, be reviewable upon appeal to the court." (A-120)

In that order Judge Metzner also rescheduled the Hughes deposition to begin on October 29 (A-121).

Toolco's deposition proceedings, meanwhile, went ahead slowly, and two additional TWA officers and one former officer were partially examined. By the time discovery proceedings were halted by Toolco in February 1963, Toolco had spent an entire year in the process and 13,000 pages of deposition transcript had been compiled. The result was one deposition completed, one ordered halted after months of delay and two started but still unfinished.

On September 25, 1962 Toolco moved for a pretrial conference under FED.R.CIV.P. 16 to define and narrow the issues (Doc. 123)—a course which had been suggested by the Special Master in response to Toolco's repeated complaint that its deposition of Tillinghast had not produced

evidence supporting TWA's principal allegations.[8] Toolco's motion demanded that TWA be required to specify all facts which it contended would support the allegations of its complaint, to name each witness which it proposed to call to support each allegation, and to state the substance of the evidence which that witness was expected to give—all this at a time when TWA had yet to take a single deposition and when its documentary discovery was being frustrated by Toolco's non-compliance with court orders. Judge Metzner's refusal to grant this motion at that stage is a principal element of what defendants now claim to have been such an abuse of discretion as to have denied them due process of law. To set this claim in clearer perspective, the papers before Judge Metzner deserve some examination.

—TWA and all of the additional defendants resisted the motion, expressly stating that they had no objection to a "Rule 16 conference" *after* they had an opportunity to conduct their own discovery (A-2403-04, A-2421; Docs. 327, 412-14).

—TWA submitted a marked copy of the complaint, with the allegations admitted by defendants underlined in blue, those denied by defendants underlined in red, and those as to which defendants denied knowledge or information, thus

[8] This was manifestly not true with respect to allegations of the complaint as to defendants' conduct during the only period of which Tillinghast could have been expected to have had knowledge, that is, the events following his employment in April 1961. Tillinghast's testimony with respect to these allegations was comprehensive and detailed. For example, defendants' efforts in 1961 to prevent TWA from buying Boeing jets and their related efforts to interfere with TWA's public financing (Complaint, pars, 37, 39-42, A-19-21) were described by Tillinghast on several occasions, of which pp. A-2957-3000 are illustrative. The May 19, 1961 letter from Toolco's counsel to the SEC, referred to at the outset of this passage, appears at pp. A-3222-41. It is one of a substantial selection of letters and telegrams compiled and introduced into the record early in the Tillinghast deposition as examples of defendants' attempts to prevent the purchase of Boeings. (A-3220-96). *See also* narrative outlines of the Tillinghast deposition (Doc. 167A).

putting TWA to its proof, underlined in yellow. TWA pointed out that on all of the most critical issues the important evidence was in the control of defendants, and TWA could develop its proof only through the discovery process. (Doc. 327)

—A selection of telephone "call sheets," operating memoranda and correspondence obtained from the Los Angeles message center in Toolco's March production was supplied (A-2337-81) demonstrating that Hughes personally handled virtually every important business transaction involving the purchase, sale or financing of aircraft, and that the most critical information could be obtained only from him.

—A selection of papers was supplied which had been submitted by Toolco to the CAB in a proceeding involving Northeast, including memoranda to Hughes from Toolco's counsel reporting on their negotiations with Northeast and Atlas—vividly showing how important it was that Toolco's attempt to withhold similar documents from TWA on the ground of attorney-client privilege should not succeed (A-2327-36).

—Large portions of the transcript of the pretrial hearings to date were submitted; Judge Metzner, of course, had already held numerous pretrial conferences and was fully familiar with the posture of the litigation and the conflicting contentions of the parties.

While this "Rule 16" motion was *sub judice,* other developments occurred which required rulings.

On October 11, 1962 Toolco served on TWA its first massive set of interrogatories, consisting of thousands of interrelated questions. A second equally massive set was served on November 13. TWA objected, both on the ground of excessive burden, and on the ground that most of the important questions were unanswerable until TWA had had deposition discovery from defendants. (Docs. 329, 333, 334, 138)

On October 22 Toolco again moved to adjourn Hughes's deposition, then scheduled for October 29 (Doc. 328); on October 25 the Special Master set February 11, 1963 as the definitive date on which that deposition would begin (Judge Metzner having previously authorized such a postponement if the Special Master considered it warranted). In setting that date, the Special Master expressly noted that he was giving Toolco time to present whatever motions it wished to Judge Metzner (A-2434-35). Although Toolco was cautioned that any appeal from the Special Master's ruling should be taken within 10 days, Toolco did not appeal.

On December 4, 1962 Toolco moved to depose additional defendants Dillon Read, Sessel and Irving Trust Company prior to any deposition of Hughes (A-2461). The Special Master denied the motion on December 28 (A-2519), noting that he considered the February 11, 1963 date for Hughes's deposition a firm one and wished "that there may be no valid basis for misunderstanding it" (A-2517). Toolco appealed.

All of these pending matters were reviewed at a lengthy pretrial hearing on January 9, 1963 (A-2523 *et seq.*). The next day Judge Metzner entered a pretrial order that

> —affirmed the Special Master's decision denying Toolco's motion to depose Dillon Read, Sessel and Irving Trust Company prior to Hughes's deposition (A-122);
>
> —denied Toolco's Rule 16 motion, but with leave to renew 30 days after the deposition of Hughes (A-124);
>
> —directed that TWA answer Toolco's interogatories within 60 days after completion by TWA of the deposition of Hughes (A-126); and
>
> —affirmed (once more) the ruling of the Special Master as to the non-privileged lawyers' documents and ordered Toolco to produce them by noon, January 14, 1963 (A-124-26).

As to the Hughes deposition, Judge Metzner stated:

> "The deposition of Howard R. Hughes by the plaintiff and the additional defendants should now go forward. This deposition was originally scheduled for September 24th, 1962 and then adjourned to October 29th, 1962. It has now been adjourned to February 11th, 1963 and this date will be adhered to in the absence of extraordinary circumstances." (A-123)

None of this checked Toolco's efforts to escape discovery. The documents were *not produced.* When a formal demand for compliance was made at 12 noon on January 14, Toolco's counsel exhibited a package said to contain the documents, but refused to turn them over (A-2571-72).

On January 14, 1963 Toolco moved "in the alternative" to hold Hughes's deposition on written interrogatories or finally to bring on its motion (pending since August 8, 1961) to dismiss the complaint or for summary judgment (A-2574-75). After a pretrial hearing on January 17 (A-2576 *et seq.*) Judge Metzner in his January 19 order denied the motion to depose Hughes on written interrogatories (A-130) but agreed to hear Toolco's 1961 motion (A-131). He fixed a briefing schedule designed to afford Toolco the maximum possible time to prepare its papers without jeopardizing the February 11 date for the commencement of TWA's deposition discovery (*ibid.*). Toolco was also instructed to advise TWA and the additional defendants by January 22, 1963 if it wished them to conduct the Hughes deposition at a location other than the Federal Courthouse in Los Angeles as specified in TWA's notice (A-132). No such advice was given, and extensive preparations were made to conduct the examination in Los Angeles (Doc. 435).

On January 22 Toolco applied to the court of appeals for a writ of mandamus (or, alternatively, for leave to appeal) to review all the orders of the district court and for a stay

of proceedings (A-xxiii). On January 23, after the submission of papers and a hearing, the court denied Toolco's application (A-xxiv).

In preparation for the Hughes deposition TWA and the additional defendants sought discovery of additional documentary material, particularly accountants' work-sheets and similar back-up materials to clarify the bare-bones financial and tax records which Toolco had produced.[9] Although plainly included within the court order of December 18, 1961, such material had never been produced by Toolco. These documents fell into 23 classified categories, and Toolco's counsel later admitted that at least nine boxes of documents in those categories had been collected (A-2642-43).

The Special Master, after argument, ruled on January 22, 1963 that these documents should be produced (A-133-42). They were not produced. After a hearing on January 28 (A-2616 *et seq.*) Judge Metzner on February 1 affirmed the Special Master's ruling and ordered production to start immediately (A-254). Toolco still refused to produce both those documents and the non-privileged lawyers' documents notwithstanding the intervening refusal of the court of appeals to review earlier production orders on an extraordinary writ.

On February 1, 1963 Toolco served its papers on its motion to dismiss, withdrawing its summary judgment motion which had been pending for a year and a half (Doc. 162, p. 3). TWA served its answering papers the next day. On February 6 oral argument was had, and Toolco's motion was denied (A-2654), with a formal opinion issuing on February 7 (214 F. Supp. 106, A-255 *et seq.*). In response to Toolco's request at the close of the oral argument for a further opportunity to seek interim relief

[9] These documents came to be identified by counsel and the court by the shorthand label "tax documents," and they are often so alluded to in the record, although they are much broader in scope.

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by application to the court of appeals (A-2654), Judge Metzner stayed all discovery proceedings until 5 p.m. on February 8, 1963 (A-2655).

Toolco made no such application. It chose instead to default.

D. Defendants' refusal to proceed and the entry of the default judgment

After expiration of the stay of discovery proceedings it appeared that there could be no further excuse to avoid turning over the "tax documents" and non-privileged lawyers' documents which Toolco had been withholding. The Hughes deposition was to commence on Monday morning, February 11. Arrangements had been made with the Chief Judge of the Southern District of California for a courtroom, the Special Master had arranged to be present, court reporters had been hired, and TWA and the additional defendants had leased office space in Los Angeles and moved in the necessary personnel and files.

During the day on Friday, February 8, however, Toolco served on the parties and delivered to the district court a document entitled "Notice of Position." It declared that "Toolco hereby elects • • • to rest on the merits of its positions as heretofore taken so that it may avoid the burdens and expenses involved in further pre-trial and trial proceedings" (A-268-69).

At TWA's request, Judge Metzner, who was at trial on another matter, called a hearing at 5 p.m. that day to consider the resulting situation (A-270 *et seq.*). The function of the hearing was to clarify Toolco's election: if it was, as it appeared to be, a flat refusal to proceed further, the nature, extent and purpose of such a default had to be defined on the record and the legal consequences spelled out. In addition, as counsel for TWA stated at the very outset of the hearing, TWA's investigations had led it to the conclusion that its damages were not less than $45

million, as had been alleged by Toolco in its counterclaims. Before any proposal by Toolco to note a default was considered, TWA wanted to amend its complaint to increase its prayer for damages accordingly. (A-270-71)

Counsel for Toolco made it plain that Toolco's intention was to default, and that this decision had been reached after careful consideration and with full knowledge of the sanctions expected to be imposed. Toolco's responsibility for the appearance of Hughes as a witness was specifically acknowledged. (A-271-74) Production of the "tax documents" and the non-privileged lawyers' documents pursuant to prior discovery orders was explicitly refused (A-304-06). As to the expected consequences, Toolco's counsel said that Toolco realized that if defendants were proved to be wrong on "the legal questions which have been decided to date • • • as a consequence they may be deprived of further defending on the merits, other than on the question of damages" (A-276).

TWA expressed dissatisfaction with the developing situation because of its fear that, without an opportunity to develop the facts fully, its effort to establish and recover for the full extent of its injuries would be handicapped. TWA's counsel said:

> "This is, as TWA sees it, another stall or attempted stall. It is an attempt to bait us away from getting at the merits of the controversy by offering us some phony maneuver for a partial default judgment, unlimited [*sic—and* limited] damages. *The damages I think we will collect in this case are $135 million.* That is the amount that they alleged we were hurt, tripled, and we will prove it." (A-295) (Emphasis added.)

Defendants' counsel responded:

> "I do not understand what remedy it is that the TWA is seeking when *it has the opportunity to*

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prove these damages that you claim you can establish against the Tool Company, and I don't understand the statement and what the purpose is of TWA saying that it does not want to proceed in that manner.

"My purpose of course is to obtain something which will enable me to get a review on the law as to whether or not you are entitled to be here in the first place. And then I am prepared, if I am wrong in that regard, to pay the consequences *to the extent to which you are able to prove damages.*" (A-297) (Emphasis added.)

The district court summarized this aspect of the discussion as follows:

> "I think the plaintiff, in so far as his complaint is concerned, is amply protected by the record made here this afternoon, and you may then move for your default judgment." (A-299-300)

At the conclusion of this hearing held to record and define the default, defendants' counsel explicitly agreed that on the basis of this record a default judgment could and should be entered. Counsel for TWA had stated repeatedly throughout the hearing that, in the absence of a default judgment agreed to be effective to establish the merits of TWA's claim, TWA should still be allowed to depose Hughes (who had personally expressed no objection to testifying). This led the district court, at defendants' instance, to expressly stay TWA from taking that deposition (A-307). So that TWA would not suffer by this decision, the following formal statement of positions was made by the parties and the court:

> "The Court: • • • In other words, the understanding of the Court is that you have now an anticipatory default for failure to appear which will ripen at 10 o'clock Monday, February 11th, on consent of Hughes Tool Company, the only defendant here with the

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responsibility, I assume, to answer in [money] damages to your claim. And then you are free to move for a dismissal—I mean for a judgment on your claim.

"Mr. Sonnett: If Mr. Davis accepts what your Honor has just said, I have no problem about Monday [when the Hughes deposition was scheduled to begin in Los Angeles]. I wish he would say yes or no to that.

"The Court: Do you understand what I just said, Mr. Davis?

"Mr. Davis: I understood what you said, your Honor, a long time ago, and I thought I made myself quite clear on the record, and I don't understand how Mr. Sonnett wants to take testimony—

"The Court: Now, Mr. Davis, we have a simple question, yes or no?

"Mr. Davis: I understand everything you said, your Honor.

"The Court: And the answer is yes?

"Mr. Davis: That's correct, your Honor.

"Mr. Sonnett: Thank you.

"The Court: All right." (A-307-08)

With that established, the hearing ended.

On February 21, 1963 Holliday formally elected to associate himself with Toolco's position and abide by its consequences (A-2713).

On May 3, 1963 TWA's motion to amend its complaint was granted and the default judgment was entered (32 F.R.D. at 607-08, A-321). At the same time, Toolco's counterclaims were dismissed on the same grounds (A-323). Judge Metzner recounted the principal events of the litigation to that point, and made a number of express findings of fact, all of which were subsequently affirmed by the court of appeals. Those findings included the following:

> "Toolco owns 78% of the stock of TWA and Howard R. Hughes owns all of the stock of Toolco." (32 F.R.D. at 606, A-317)

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"It is clear that during all of the times covered by the complaint the management of TWA was controlled by Hughes personally." (*Ibid.*)

"It is clear that the deposition of Hughes is essential for the proper presentation of TWA's case." (32 F.RD. at 607, A-320-21)

"It is also clear that the failure of Hughes to appear on February 11th for his deposition was the result of a clear and studied determination by Toolco after all efforts to postpone the appearance of Hughes had failed. The default was deliberate and willful * * *." (*Ibid.*, A-321)

"Embraced within the refusal to proceed with the deposition of Hughes is the refusal to obey the orders of the court directing Toolco to produce the documents referred to above [*i.e.*, the non-privileged lawyers' documents and the 'tax documents']." (*Ibid.*, A-320)

The district court's opinion and orders of May 3 included the certifications necessary to permit immediate review of both branches of his decision (32 F.R.D. at 608, A-322; A-323). The court of appeals limited the scope of its review of the interlocutory judgment on TWA's complaint to jurisdictional matters (A-2736), but both appeals—from the interlocutory judgment on TWA's complaint and from the final judgment on Toolco's counterclaims—were briefed and argued together, and a single decision resulted (332 F.2d 602, A-328 *et seq.*).

E. Reasons given for the default

The extraordinary nature of defendants' decision "not to proceed any further with respect to discovery proceedings" (A-274) compelled the most careful attention from the courts below. Both the district court and the two panels of the court of appeals were careful to ascertain that there had been neither any misunderstanding by defendans of what was involved in their actions nor any element of per-

sonal oppression or injustice which might have made the decision something other than the free election described in the Notice of Position—or the voluntary "business decision" it was called by defendants' chief counsel at the hearing on February 8, 1963 (A-280).

At that hearing defendants' counsel explained that the decision had been made by Toolco after careful consideration of his advice as to the sanctions which defendants were inviting by their actions (A-274). The election was purportedly based on confidence in "the merits of [Toolco's] positions as heretofore taken" (A-268).

The risk that Toolco's positions would be held to be without any merit at all was obviously great, especially after TWA had stated in open court that it expected to be able to prove actual damages of not less than $45 million. Indeed, the overall amounts put at risk were even greater, since the refusal to proceed applied also to Toolco's own counterclaims asking damages of $366 million. Against the backdrop of these figures, Toolco's claim that, after it had already taken depositions for over a year, the burden and expense of submitting Hughes to a deposition would be too great from a business standpoint is inherently ridiculous. Not only has the $5 million figure that defendants now assert to be the cost of this single deposition quintupled between petitions for certiorari,[10] but the argument

[10] This $5 million figure, repeated no less than six times in defendants' brief (pp. 6, 15, 29, 40 & n. 12, 41), has the most dubious possible provenance. It was mentioned for the first and last time (until the petition for certiorari herein) at the February 8, 1963 hearing, when Toolco's counsel described it as an estimate arrived at by Toolco, which he most pointedly did not himself endorse, of "the amount of expenses that would be incurred, assuming that we continued with the trial on the merits, both in pretrial proceedings as contemplated and at the trial ***" (A-279-80). TWA's counsel said at the time that the argument that defendants' refusal to participate in discovery proceedings was justified because of the expenses of the litigation was made "with tongue in cheek" and was "obviously absurd" (A-293). This particular $5 million figure did not again surface until Decem-

based on that inflated and unexplained estimate also completely ignores the protection against undue expense always available under the Rules. If the deposition had commenced and had become unduly prolonged or otherwise improperly burdensome or oppressive, Toolco could have had relief under FED.R.CIV.P. 30(b) (now FED.R.CIV.P. 26(c) and 30(d)). When Toolco's examination of TWA's president Tillinghast, begun in January 1962, was still in progress in July, TWA sought such relief and obtained it; the Tillinghast deposition was terminated on July 30, 1962 pursuant to court order (Doc. 222, p. 6675A).

A more plausible explanation of defendants' behavior than the one they give is that they knew they could not prevail on the merits if TWA was permitted full discovery. They could not afford therefore to have the truth come out. This is the only hypothesis which can explain the persistent refusal to make *documentary* discovery.

There was, however, an alternative possibility that required consideration—that the default as to the Hughes deposition (although hardly as to the documents) was triggered by some inability of Hughes to testify or by his unwillingness, for some justifiable reason, to testify under the particular circumstances of a public hearing. Defendants' position as to these matters has been strikingly different at different stages of the action, obviously depending on which position appeared at the time most advantageous.

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ber 23, 1971; it played no part in the various proceedings before the district court or the court of appeals, or in the presentations made to this Court in connection with the prior appeal. On the contrary, the only figure ever mentioned by defendants' counsel at the time as one which he could support was much less—a figure of $1 million was estimated as covering not only Toolco's expenses but also 78% of those of TWA (Doc. 145, p. 10). In their 1964 petition for certiorari in No. 501, October Term, 1964, defendants similarly said the deposition was "estimated as costing over $1,000,000" (p. 44a), a formulation that had also been used in their June 14, 1964 petition for rehearing to the court of appeals (p. 14n).

The election to default, described on February 8, 1963 as the result of a business judgment that Toolco would be better off financially, is similarly described before this Court. Although there is some suggestion that the complaint was brought in bad faith for purposes of oppression (*e.g.*, Def. br. pp. 11, 12), the main thrust is a reiteration that Toolco's decision resulted from careful consideration of the odds—that it was a responsible decision which would not even have been influenced by the actual appearance of Hughes, in response to the subpoena he had accepted, on the day set for his deposition (Def. br. p. 29). The courts below are accused of having misunderstood this position (Def. br. pp. 28-29, 60, 146).

If there is confusion, it is defendants' own, for they argued exactly the contrary to the district court in 1965 and to the court of appeals on their latest appeal. On December 30, 1965 James V. Hayes, then defendants' lead counsel, was arguing a motion for, in effect, summary judgment in Toolco's favor based on affidavits of counsel and CAB records. Judge Metzner, who later denied the motion (A-422-23), asked the following question:

> "• • • Mr. Hayes, I am going to stop you because you have been going for forty-five minutes.
>
> "I have listened very carefully to you, and the only question going through my mind is why was there a default? Why didn't you go into court and get a judgment on the merits?" (A-416)

And received the following response:

> "Mr. Hayes: This is not in the record, but it is well known.
>
> "The default took place because of the failure of Mr. Hughes to appear for a deposition primarily.
>
> "The Court: As a result of a deliberate business judgment.
>
> "Mr. Hayes: Right, correct.

"Mr. Sonnett: With two other instances.

"Mr. Hayes: Yes, I know. I said primarily. Everybody knows Mr. Hughes' passion for privacy, whether we like it or not." (A-417)

A substantially similar argument was made in defendants' principal brief to the court of appeals in 1970.[11]

In 1963, however, when defendants were objecting to discovery and before they defaulted rather than submit to it, this possibility had been very much in Judge Metzner's mind and steps were then taken to make sure that there was no substance to it. A pretrial hearing was held in chambers on January 16, 1963. At defendants' request no transcript was made, and attendance was limited to chief counsel and a single associate for each party. An affidavit was filed by defendants of which the pertinent portions were, at their request, sealed (Doc. 145, pp. 6-8). While those papers have never been unsealed, when the matter arose before the court of appeals at oral argument in 1963 TWA's counsel, John F. Sonnett, who had been present, stated on the record —without denial from counsel for defendants—that at the conference in chambers the question was put to Mr. Davis, defendants' chief counsel:

"'Are you saying that there is any medical reason or any reason of that type why this man can't testify, because if you are the record before me is deficient.'

"Mr. Davis specifically and flatly answered the question by saying, 'No.' He was not making any such

[11] "If a settlement could be blackjacked by forcing Hughes to give a deposition at the cost of defaulting if he did not appear, why bother with Holliday, why bother with interrogatories? The essentiality of Hughes had only one basis that guided TWA's tactics. Exploit his passion for privacy, force him to testify and, at the same time, carefully refrain from identifying a single fact to support its sham complaint." (Defendants' brief to the court of appeals, November 16, 1970, pp. 182-83; *see also* pp. 186, 191.)

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contention." (Transcript of oral argument, November 13, 1963, pp. 122-23)

When two years later Mr. Hayes, in the passage quoted at pp. 36-37 *supra*, tried to ascribe the default to Hughes's "passion for privacy," Judge Metzner responded as follows:

> "The Court: Well, beyond that, Mr. Hayes, I offered in an off-the-record discussion to provide for protecting Mr. Hughes' passion for anonymity by having the deposition taken any place he wanted, as secret as he wanted it to be, and then I was asked not to publish it, so I never published it, but that is a fact.
>
> "Mr. Hayes: I am aware of this, your Honor." (A-417)

It was therefore to defendants' "blackjack" argument (see p. 37n. 11 *supra*) that the court of appeals had reference when it ruled:

> "Toolco intimates that throughout the litigation TWA sought in bad faith to win a fabricated case by exploiting Hughes's known craving for solitude. Nothing in the record would justify any such finding, and in any event the district court did offer to permit the deposition to be taken in as much privacy and under any other conditions that might suit Hughes's aversion to public appearance." (449 F.2d at 62, A-2755-56)

After February 8, 1963 there were several occassions on which, if defendants had desired to request an opportunity to remedy their default, to produce the evidence withheld and proceed with discovery and a trial on the merits, it was plainly incumbent upon them to do so. During the February 21, 1963 hearing on TWA's motion for entry of an interlocutory default judgment against Toolco, the court said to Toolco's counsel: "Mr. Davis, you are leading right back to directing Mr. Hughes to appear for examination. Is that where you want to go?"—to which Mr. Davis

responded: "No, your Honor" (A-2722). At the oral argument on November 13, 1963 Circuit Judge Kaufman several times directly asked counsel for defendants whether, if the case were remanded to permit reopening of the default, defendants would be prepared to go ahead with pretrial discovery—including the deposition of Hughes. Each time counsel for defendants responded that he was not. (Transcript of oral argument, November 13, 1963, pp. 41, 50-51, 136)

After the 1964 decision of the court of appeals affirming Judge Metzner's orders, and the dismissal by this Court of certiorari as having been improvidently granted, and following remand to the district court for the damage hearing, no application was made to reopen the default.

F. Evidence available to TWA at the time of default

Defendants' repeated charge that TWA's case—and the decisions of the Special Master, the district court and the court of appeals—were based on "mere assumptions," "possibilities" and "hypothetical events" (*e.g.*, Def. br. pp. 18, 21, 109, 111, 116, 117, 136, 138) ignores the critical fact of this case—that defendants, because of a "business decision" that they would be better off, deprived not only TWA, but the courts below, of access to the truth. Having been deprived of the information within defendants' sole control as to what they in fact did, and why, TWA could not be expected to prove definitively the truth of the allegations of its complaint.

At the damage hearing defendants did not offer a single fact witness.[12] Their attack on the complaint, below as

[12] Even if the Special Master would have been required to hear it, defendants cannot now claim that he, or the district court, erred in not considering testimony that defendants never proffered. *See Smith* v. *Concordia Parish School Bd.*, 445 F. 2d 285, 286 (5th Cir. 1971); *Winston* v. *United States*, 342 F. 2d 715, 724 (9th Cir. 1965). *Cf.* FED.R.CIV.P. 43(c); *Boulter* v. *Chesapeake & Ohio R.R.*, 442 F.2d 335, 336 (6th Cir. 1971).

here, was based alternately on innuendo and on flat assertions as fact of matters which are, at best, questionable inferences from the documentary record. The courts below held that those innuendoes and inferences were completely inadequate to establish the *untruth* of TWA's allegations.

On the contrary, the record, even in its truncated state, amply showed that TWA could have developed evidence to support its allegations, if it had been given the chance.

1. The role of Howard R. Hughes

In evaluating the evidence relating to the allegations of the complaint, it is necessary to keep in mind the effect of the unavailability of Hughes to testify.

Hughes was the central figure in the tapestry. He was never an officer or director of TWA, but he arrogated to himself all power of decision on TWA's aircraft procurement programs (A-699-700). He gave strict instructions to TWA's presidents Burgess and Thomas to stay out of equipment matters altogether (A-704, A-706-07, A-944). In the crucial period of jet exploration and ordering, Damon, then TWA's president, was left by Hughes's orders completely uninformed (A-733-35; *cf.* A-1049). Examples of Hughes's practice of imposing secrecy and keeping TWA's management ignorant of his actions can be found in his negotiations with AVRO (A-1807) and De Havilland (A-1814), in the YB-60 project (A-643), in the plan to manufacture Caravelles under license (A-1818-20) and in every aspect of the procurement of TWA's ultimate jet fleet. These are all matters on which TWA's witness, Robert W. Rummel, the only person in TWA's management that Hughes allowed to participate in procurement matters, had some information. What else went on, that Rummel was not told about, remains *terra incognita*.

One illuminating episode illustrates how difficult it is to ascertain from the outside what Hughes was trying to do.

Late in December 1954, to the dismay of TWA's management, Hughes decided that orders had to be placed at once for 25 Lockheed Constellation 1449A aircraft, which Toolco would buy and which TWA would buy from Toolco when Toolco required it to. At this time and for this particular generation of piston aircraft, TWA's management (including Rummel) preferred the Douglas DC-7C (A-1843-45, A-1848-49). It was, however, apparently one of the times when Hughes's orders were that "we did not work with Douglas" (A-1806).

Despite repeated protests that the proposed airplane was uneconomical, that its specifications were far from complete and indeed "not sufficiently complete to be suitable for use as a contractual instrument * * *," that the price would be excessive, and that TWA management believed the airplane as proposed to be "an unsound project," Hughes "flatly rejected" TWA's views "on the basis that he felt he must wind the deal up right away * * *" (A-213-18). And he did (A-218).

In the preceding month, Boeing had formally announced to the airline industry that it was ready to negotiate the commercial sale of its new jet transport (AX-1584 *et seq.*). The Boeing transport had been flying since July 1954 in a prototype version (*ibid.*), while the Lockheed 1449A (then conceived as a turboprop, and later regressed with the changed designation 1649A to one of the last and probably the least successful large piston aircraft ever built) had never flown. That Hughes and Lockheed had had secret negotiations from which TWA had been entirely excluded seems clear from Rummel's memorandum of the telephone conversation in which Hughes announced his decision (A-213-18).

2. *The inferences which can be drawn from what is known about defendants' activities in aircraft manufacture and supply*

Toolco was and is a substantial manufacturer of helicopter aircraft through its Aircraft Division, and a major supplier of aircraft parts and components. Defendants' brief discounts Toolco's activity on the grounds that helicopters and commercial jets are "vastly different products," and that there are "problems inherent in a changeover from defense-related production to commercial operations" (pp. 112-13). But the products are clearly related, and the changeover had been made by such manufacturers as Boeing and Convair.

In addition to Toolco's Aircraft Division, the Hughes Aircraft Corporation, an affiliated corporation also controlled by Hughes, is recognized as one of the largest aerospace manufacturers in the United States, specializing in sophisticated electronics and space vehicle development and production.

Hughes personally had specialized knowledge and status in the industry, apart from that inherent in his wealth. In the 1930's he set the then world speed record for land-based planes, in an aircraft of his own design (the Hughes Racer), built in his own facilities.

The court of appeals concluded that

> "• • • it is clear that Toolco throughout the relevant period had the technical capability and sophisticated 'know-how,' to enter the commercial market without untoward delay if it had so chosen." (449 F.2d at 67, A-2767-68)

The piston era—At least twice in the piston period Hughes and Toolco took steps toward establishing Toolco as a major supplier of commercial transport aircraft. As a result of Hughes's partnership with Lockheed in the development of the Constellation aircraft, Toolco acquired

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rights to the first 40 aircraft to be built (6 C.A.B. at 155, A-3300). In the much smaller market which existed before World War II, this constituted a large number of planes. TWA's total fleet as a relatively small domestic carrier in late 1940 consisted of 40 aircraft, only five of them with more than two engines, and it was expected that TWA would absorb 15 Constellations. The other 25 would be available for sale to other airlines. (*Ibid.*, A-3301; 449 F.2d at 67, A-2768). With TWA as a captive market and a technologically advanced product attractive to airlines generally, Hughes and Toolco could logically expect at a single jump to move through Lockheed into a very strong position in the field of commercial aircraft manufacture and supply.

This first, highly promising attempt with aircraft manufactured by Lockheed was frustrated by the outbreak of war when all aircraft output was taken over by the United States Government. By the end of the war, aircraft development had taken great steps forward, and the early Constellation, while still an effective airplane, no longer represented a significant technological advance over its competition.

During and after the war it appears that Hughes's principal interest was in the HK-1, the 700-passenger plywood flying boat which he was developing under Government contract (449 F.2d at 67, A-2768); TWA looked into the plane from a commercial viewpoint (A-1798). This extraordinarily ambitious undertaking, if it had been successful, would have antedated by over 20 years the development in the late 1960's of aircraft capable of carrying comparable numbers of passengers over very long distances. It was a direct manufacturing venture by Toolco, assisted in this instance by public funds under military contracts.

This attempt failed; technology of the period was insufficient for Hughes to produce a workable aircraft to the designed specifications, although work on the aircraft continued off and on for many years. A greater commercial

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opportunity was to come with the introduction of jet aircraft for commercial purposes, and Hughes's planning for this foreseeable development began in the 1940's (AX-5).

In the meantime, as one result of TWA's post-war success in obtaining transatlantic routes, TWA was very greatly enlarged as an aircraft market. Hughes and Toolco tightened and perfected their control over TWA's aircraft procurement. Orders were placed by Toolco or on its instructions, with consultations with TWA consisting primarily of studies made by TWA's technical staff for Hughes's use. Except for the personal association between Hughes and Rummel, in which Rummel worked directly under Hughes's instructions and transmitted Hughes's orders to others in TWA when told to do so, TWA's management had very little part in these activities (A-682-85, A-704, A-706-07, A-733-35, A-737, A-944, A-1807, A-1814, A-1818-20).

Rummel in this period thought that all of these activities were intended for TWA's benefit, and even in 1955, when he became convinced that TWA was being seriously, perhaps irretrievably, injured by Hughes's refusal to allow TWA to negotiate for or order jets, he still thought Hughes's motivation was to benefit TWA. It was not until later that it became obvious this charitable view was mistaken.[13]

Prevention of TWA financing—While other airlines in this period engaged in major public financing to establish the necessary equity base for the much larger scale of airline operations that was coming into being (*e.g.*, AX-889-90, AX-891-92), this formed no part of defendants' plans for TWA. If TWA were to establish itself as financially inde-

[13] Defendants point to Rummel's testimony as evidence of Hughes's and Toolco's benevolent motives (Def. br. p. 13), but it is plain that Rummel's answers were confined to what he then thought, and he expressly stated that he could not know what Hughes's motivations really were, nor did Hughes generally give him any explanations of his actions (*e.g.*, A-470, A-506, A-515, A-1802).

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pendent, able on its own account to deal with and meet its obligations to independent airplane manufacturers, it would have been difficult for defendants when the time came, to use TWA's aircraft needs as a lever to help in establishing a broad commercial position as suppliers of jet aircraft. In the late 1940's defendants took steps to prevent this by reducing TWA to financial impotence.

Until 1947 the president and a majority of the board of directors of TWA were independent. The finance committee established by the independent directors on September 12, 1945 formally recommended a public sale by TWA of common stock to raise $20 million and consideration of a sale of preferred stock to raise an additional $25 million (AX-925-29). In the course of the next nine months the market price of TWA common stock ranged between a low of $47 and a high of $79 per share (AX-930; TWA Ex. 296[14]). Both Pan American and American carried out major public stock financings in this favorable market (AX-889-92).

Hughes and Toolco, however, blocked TWA's every effort to carry out such a program. Finally, in desperation, TWA's board called a special stockholders' meeting in December 1946 to approve an increase in authorized stock which would permit the public sale by TWA of convertible preferred stock, the time for a successful issue of common stock having already passed (AX-931-34). By the device of withholding its proxies Toolco prevented a quo-

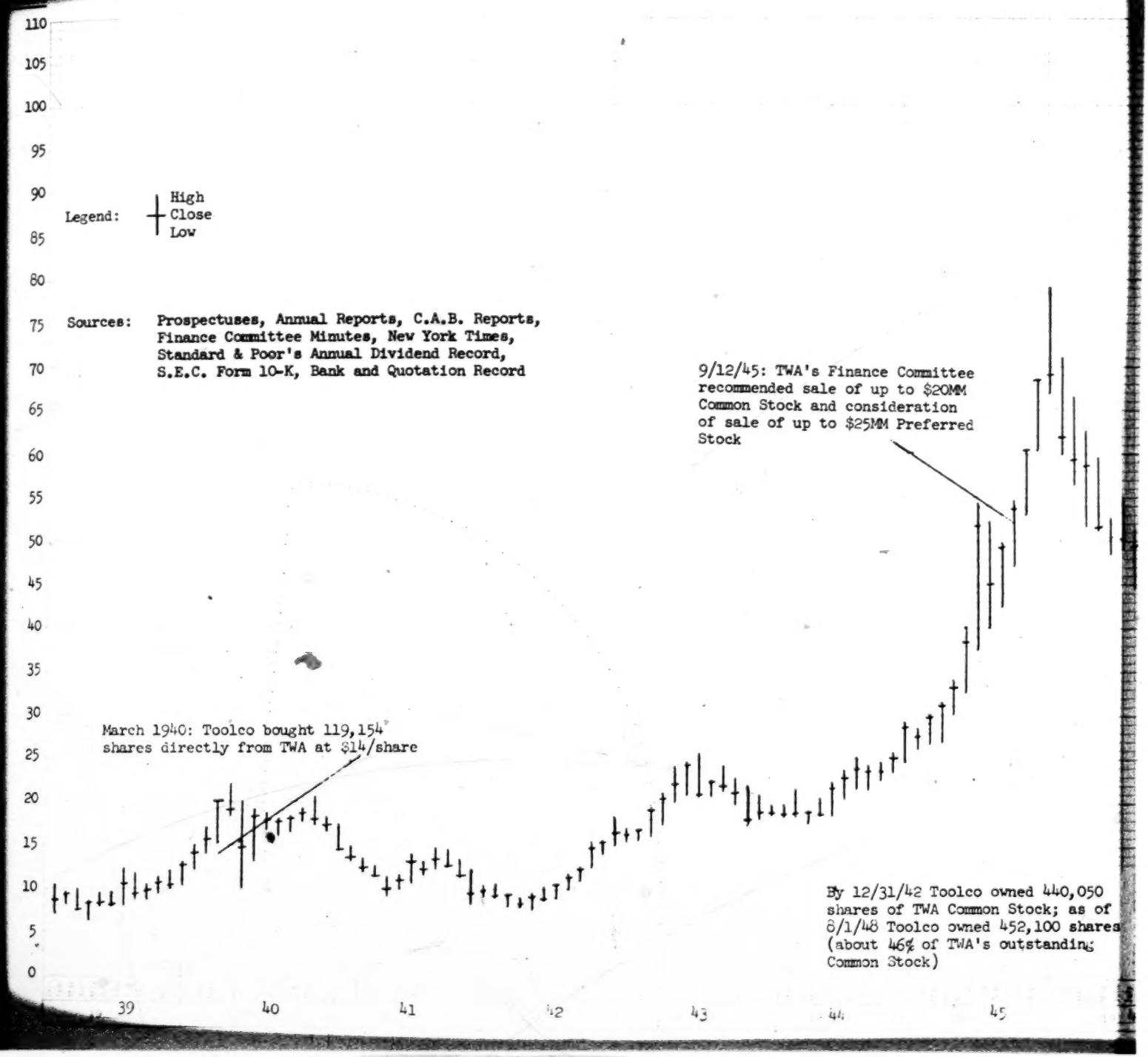
[14] TWA Ex. 296, which is reproduced following p. 46, is a chart showing monthly prices of TWA common stock during the period 1939 through 1966 on which are set out Toolco's various transactions in TWA's common stock and related securities. TWA Ex. 296 was admitted into evidence by Special Master Brownell at the damage hearing (Doc. 554, pp. 7379-80). It shows, *inter alia*, that Toolco was able to sell its stock interest in TWA in 1966 at the net price of $83 a share, for total net proceeds of $545,814,771. Toolco's cost basis for that stock was $94 million. Its capital gain was therefore approximately $452 million. (308 F. Supp. at 693, A-2052)

rum at that meeting, and at three successive adjournments of it, the last on January 6, 1947, so that no action could be taken (AX-935 *et seq.*). By thus preventing TWA from selling stock publicly when it could have done so at high prices, Toolco produced a situation in early 1947 in which TWA could meet its financial commitments only by accepting financing on Toolco's terms.

Those terms proved to be the dissolution of the independent finance committee, the appointment of enough Toolco nominees to the board to constitute a majority, and the issuance to Toolco of demand notes in the amount of $10 million, convertible at Toolco's option into common stock at the average of the closing market prices for the ten days preceding the day of Toolco's election to convert (AX-963-64). A year later Toolco required the new board to approve conversion of the notes at $10 per share, at a time when the price computed on the basis of actual market prices, as provided in the notes, would have been $15.80 per share (AX-991; TWA Ex. 296).

By this transaction Toolco acquired an additional 1,034,423 shares of TWA common stock (TWA Ex. 296)—more than the total amount of TWA common stock previously outstanding (986,018 shares)—and increased its stock interest in TWA from 46 per cent to 73.6 per cent (TWA Ex. 292, p. 2; TWA Ex. 296).[15] By this naked application of corporate and economic force defendants succeeded in making TWA completely dependent upon them for financing, and cemented their dominance over the supply of aircraft to TWA, precisely as charged in paragraphs 10, 23, 24 and 51 of the complaint (A-9-10, A-15, A-25). Such was the situation as the jet era approached.

[15] If the original conversion formula had been adhered to, Toolco would have received only 654,699 shares of TWA common stock upon conversion (TWA Ex. 296). Measured by the then market price, the additional 379,724 shares that Toolco acquired at no additional cost had a market value of some $6 million. After a 10% stock dividend in 1952, upon the sale of these shares in 1966 Toolco realized more than $34 million for the shares which it had obtained in excess of the contractual formula (*ibid.*).



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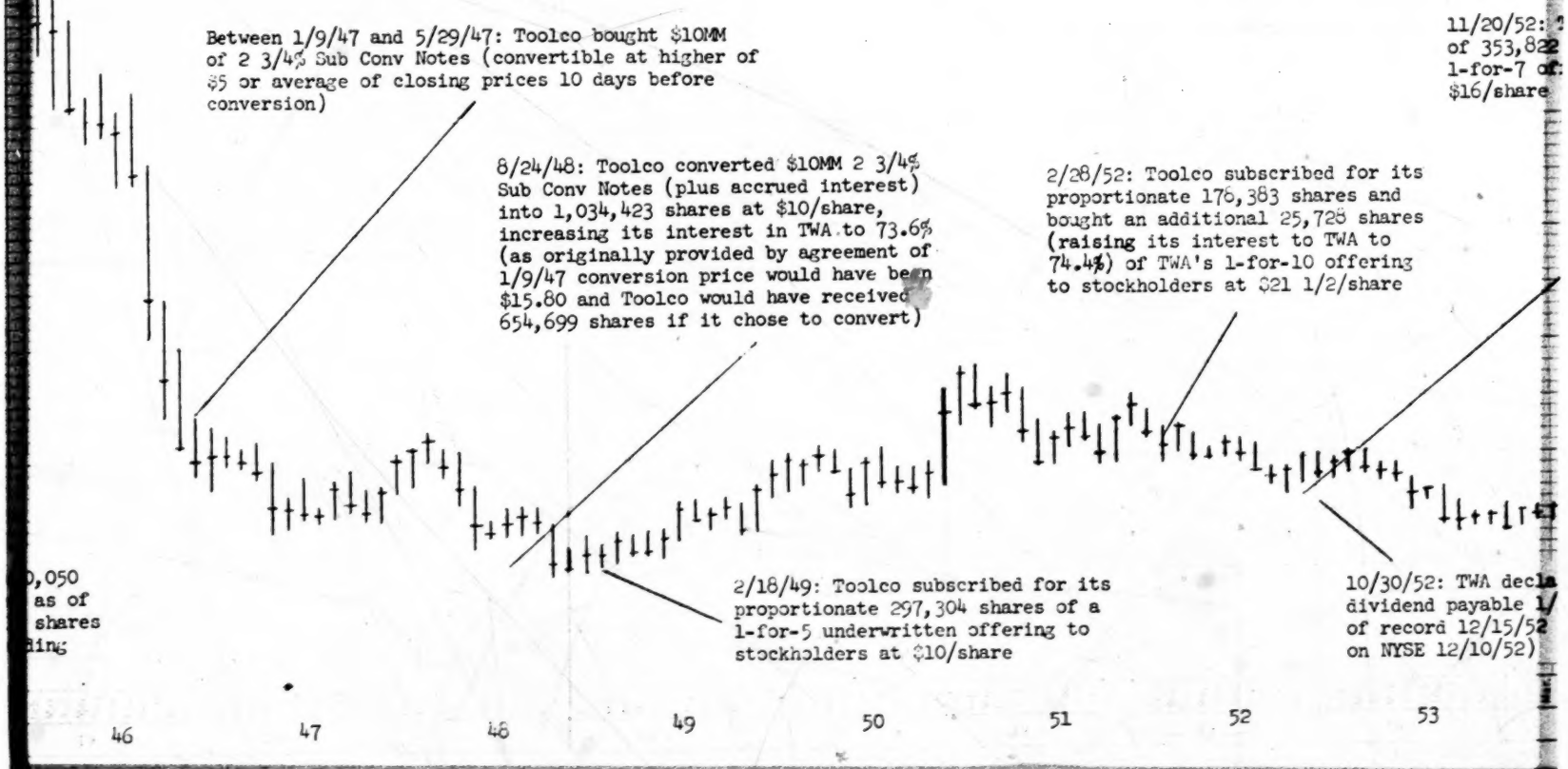

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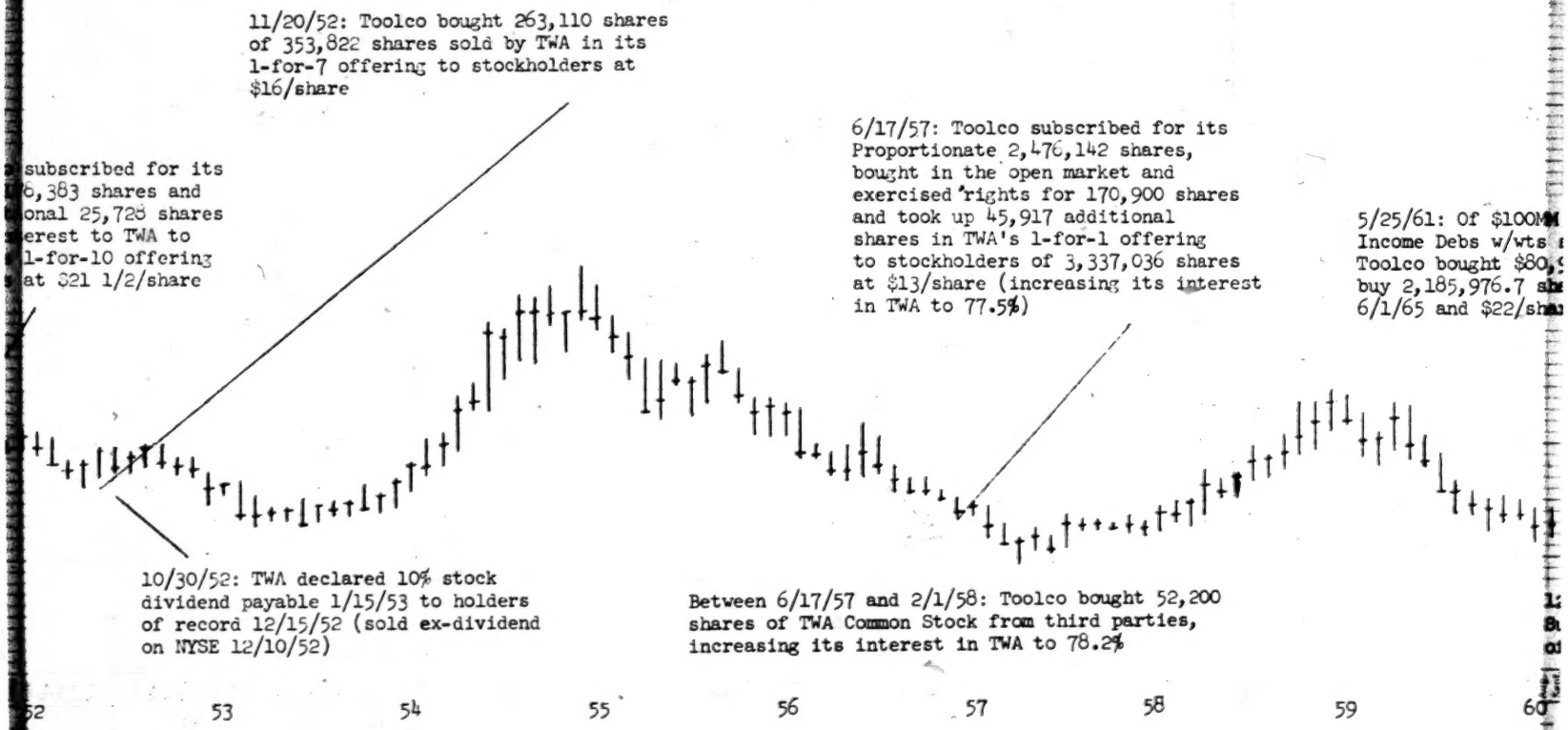

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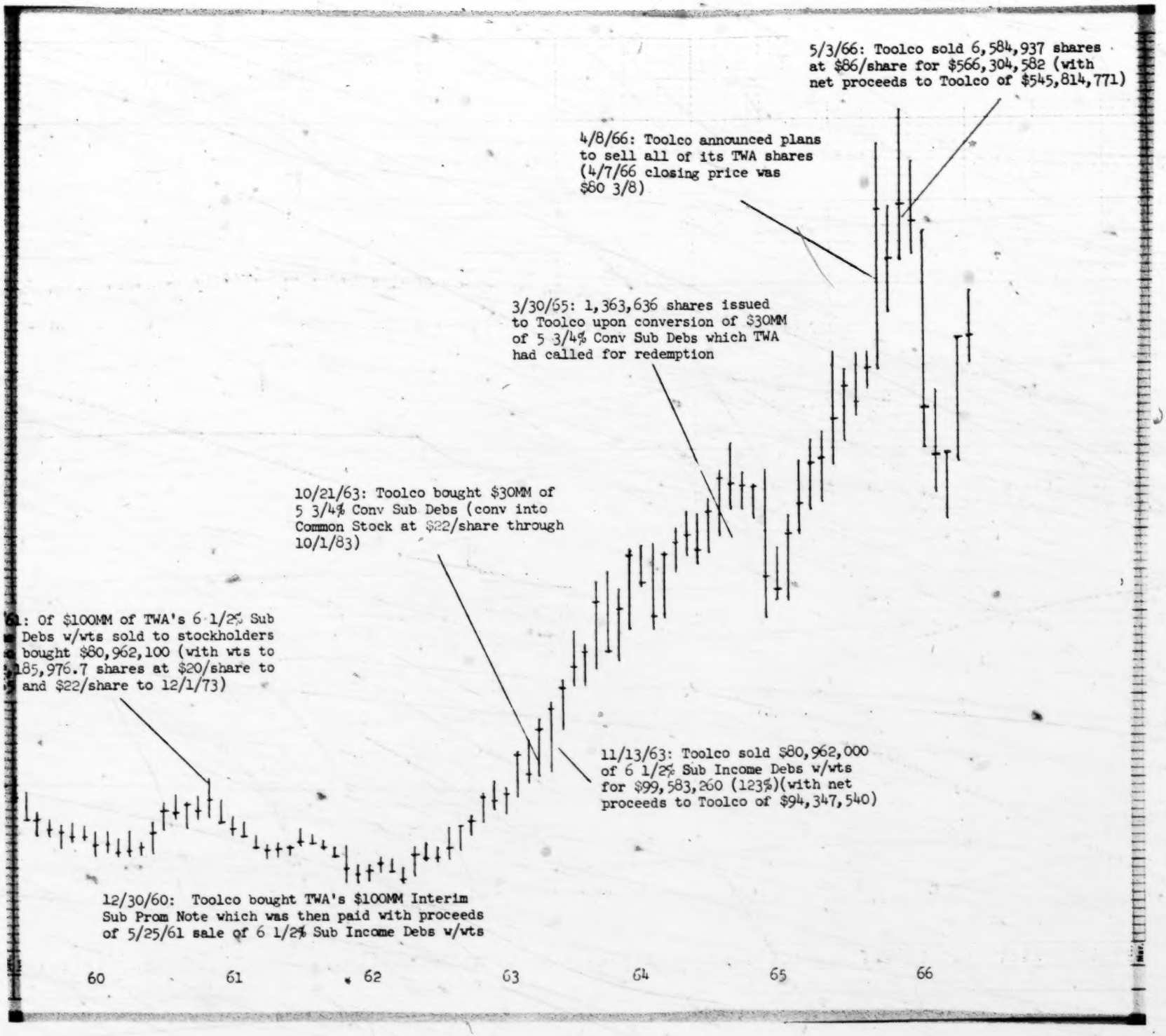
5/3/66: Toolco sold 6,584,937 shares at $86/share for $566,304,582 (with net proceeds to Toolco of $545,814,771)
4/8/66: Toolco announced plans to sell all of its TWA shares (4/7/66 closing price was $80 3/8)
3/30/65: 1,363,636 shares issued to Toolco upon conversion of $30MM of 5 3/4% Conv Sub Debs which TWA had called for redemption
10/21/63: Toolco bought $30MM of 5 3/4% Conv Sub Debs (conv into Common Stock at $22/share through 10/1/83)
11/13/63: Toolco sold $80,962,000 of 6 1/2% Sub Income Debs w/wts for $99,583,260 (123%)(with net proceeds to Toolco of $94,347,540)
61: Of $100MM of TWA's 6 1/2% Sub Debs w/wts sold to stockholders bought $80,962,100 (with wts to 185,976.7 shares at $20/share to and $22/share to 12/1/73)
12/30/60: Toolco bought TWA's $100MM Interim Sub Prom Note which was then paid with proceeds of 5/25/61 sale of 6 1/2% Sub Income Debs w/wts
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The jet era—The development of large military jet aircraft was quickly followed by the introduction of the British-made Comet, the first commercial jet aircraft (A-1809). As the time approached when American manufacturers would be prepared to produce jet transports for airlines, defendants resumed their active efforts to establish Toolco as a source of aircraft.

Hughes and Toolco had two principal approaches to consider. Toolco itself might assume responsibility for the assembly of aircraft (in which case a technological partnership with an established manufacturer would be useful), or it might make arrangements for the assembly to be carried out by an established manufacturer under circumstances in which it would have special rights to the output (in which case defendants' technological participation in the design stage might be of major importance in establishing their partnership position). Under either approach defendants could participate in the manufacture or supply of important components. What was important was the power to control the output.

Hughes moved along both roads.

Manufacture in association with AVRO of Canada was actively considered from 1954 to 1956 (A-471, A-1807, A-1839). Manufacture of Caravelles, as North American licensee for Sud Aviacion of France, was being actively and very secretly considered as late as 1957 (A-1818-22). Even after the failure of its earlier attempts and the rapid progress of Boeing and Douglas had compelled Toolco to place jet orders with Boeing, defendants were most reluctant to give up the hope of Toolco's engaging directly in manufacturing. Project "Greenland" appears to have been the code name given to some highly secret plans for direct manufacture of jet aircraft by Toolco about which Rummel was given very little information (A-475-6, A-1839). Other TWA officers were given none. TWA was caused to file an

application with the CAB in this connection in 1956, which was not abandoned until two years later (AX-2145-46, AX-2425-26). The project was far enough advanced before abandonment so that land acquisition had been commenced in Florida for the necessary facilities (A-476).

As the court of appeals points out (449 F.2d at 67-68, A-2768), the ordering by Toolco of no fewer than 300 Pratt & Whitney jet engines in 1956, at a time when such engines were in short supply, could well have been a preparatory step towards Toolco's manufacturing jet aircraft (A-470-72, A-178-90). By this purchase alone defendants acquired rights to enough jet engines for original installation in 75 commercial jet transports, far beyond any conceivable need of TWA for spare engines, and effectively cornered the jet engine market. Later, when direct manufacturing plans were suspended, Toolco exploited its corner by the sale of most of the engines to Boeing and to Pan American, in direct competition with Pratt & Whitney,[16] and at a substantial profit (A-178-79, A-189; Doc. 494, Exs. 5, 7, 8).

While direct manufacturing was explored, so also was the avenue of establishing a partnership position with an established manufacturer through joint development activities. Hughes's statement to Boeing in 1955 that he was only interested in Boeing jets if he could have the first

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[16] The President of United Aircraft (Pratt & Whitney's parent corporation) expressed his opinion vigorously in a letter to Toolco dated April 5, 1957:

> "It has, of course, been our practice when a customer has in his possession more Pratt & Whitney Aircraft engines than he requires, to do all possible in assisting such a customer in their sale. However, in your case, you do not now possess more engines than you need, but rather you have on order some 200 more engines than you require for TWA. There is no necessity of your taking delivery of these engines * * *.
>
> * * * * *
>
> "Now you apparently are contemplating going through with this rather large order and marketing these engines in competition to Pratt & Whitney Aircraft." (A-178-79)

50 produced indicates the type of control over output that he was hoping to get (A-1023, A-1051, A-1208). This was essentially the arrangement he had had with Lockheed in the case of the early Constellations. However, the major effort on this front consisted of extended work with Convair[17] which commenced at the very beginning of 1955 and continued (through the collapse of the Model 18 and the subsequent work on Models 19 and 20) until the end of November 1955, a period during which TWA—the captive backstop market on the availability of which much might depend—was forbidden to negotiate with other manufacturers for the jet aircraft which it would need (Complaint, pars. 14, 16, 17, A-11-13; A-1799-1800, A-1802-06).

In the piston period Toolco had dealt in aircraft to a not insignificant extent. Toolco purchased and sold to TWA 33 new and eight used Constellations, not counting a considerable number more as to which it held a security title for a substantial period, and it conceded in the court of appeals below that it purchased and rebuilt at least 14 C-47s, apparently for sale to other airlines (Defendants' brief of November 16, 1970, pp. 32-39). The jets now offered a more important opportunity—the 63-plane jet fleet that Toolco had ordered and that TWA had been allowed to hope and expect would ultimately be made available to it.

TWA soon discovered that defendants would not permit themselves to be bound to turn over any of the aircraft to TWA. As the complaint alleges, Toolco repeatedly refused to assign them (Complaint, par. 18, A-13). For instance, late in 1957 in answer to a letter from Burgess, Toolco explained:

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[17] It is possible that a similar arrangement was also explored in 1954-1955 with Lockheed, primarily in terms of turboprops in which Hughes was personally very interested, but little is known of the personal contacts which Hughes was making with manufacturers and financiers in that period. The indications in a memorandum of Rummel's telephone conversation with him about the L-1449A deal late in 1954 are suggestive (A-213 *et seq.*).

> "For various reasons Hughes Tool Company can not yet commit itself to TWA with respect to these aircraft, either as to type or number; but, on a basis to be determined later, it is expected that *some* jet aircraft will be made available to TWA." (A-194) (Emphasis added.)

About a year later Toolco representatives "pointed out that Hughes Tool has not yet agreed to furnish jet planes to TWA" (A-193) and that

> "• • • Hughes Tool Co. had NO intention of selling or leasing their stuff (jet planes implied) to TWA • • •." (*Ibid.*) (Emphasis and parenthetical phrase in original.)

TWA's annual reports and prospectuses of the period reflect this attitude on the part of defendants (*e.g.*, AX-887; AX-853, note 5 to financials; AX-840, note 7 to financials).[18]

The inescapable inference is that Toolco wished to become a supplier of jets to other airlines. The application which Toolco had caused TWA to file with the CAB in 1956, to amend the original control order to permit TWA to buy up to 25 jets to be manufactured by Toolco under a program that no one in TWA was allowed any knowledge of, was not withdrawn until 1958 (AX-2145-46, AX-2425-26). Toolco was plainly interested in establishing and maintaining a commercial presence for itself as a corporation to which—as a manufacturer, lessor or supplier—airlines might turn as a source of aircraft.

Selling or leasing jets to other airlines offered sufficient advantages so that opportunities to do so were actively pursued over an extended period—commencing before anyone in TWA was told that its fleet would be cut back.

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[18] While the jet engine purchases from Pratt & Whitney in 1956 were probably related to the proposed manufacturing programs, the fact that a larger number of spare engines would be useful if the 63-plane fleet were to be split among two or more airlines was also a consideration (A-1841-42).

—As early as March 1958 Hughes was negotiating to lease Viscount turboprops to Northeast through a "buyer" (A-146-47), perhaps the proposed subsidiary of Toolco known as "HACO" or "HALCO."[19]

—As early as January 1959 Toolco was attempting to sell some of its Convair 880s to Capital Airlines (Doc. 494, Ex. 2). This was well before anyone in TWA was told that TWA would not get all 30. Convair regarded these negotiations as being in direct competition with its own sales efforts (A-905-06; A-149).

—Toolco was attempting to sell Convair 880s to Northeast in July 1959—a full year before the 1960 merger proposals. The negotiations went right up to the contract stage. (A-150-57) Hughes was personally an important stockholder of Atlas, which the complaint charges was a co-conspirator. Atlas in turn controlled Northeast. (Complaint, par. 6, A-2-3) It seems probable that, without TWA's knowledge, discussions of one sort or another involving the supply of aircraft by Toolco to Northeast continued throughout 1959 and 1960.

—At one point Toolco was on record as trying to sell seven Convair 880s to National Airlines—and *another* seven to the United States Government (A-169-71).

—The diversion of six of TWA's B-331 long-range aircraft to its principal transatlantic competitor, Pan American, is charged in the complaint and is a major element of TWA's damage claims and award. The record is clear that this was regarded by all of

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[19] A subsidiary with the former acronym, Hughes Aircraft Company (not to be confused either with Hughes Aircraft Corporation or the Aircraft Division of Hughes Tool Company, both of which are manufacturers rather than operators), now owns and operates the regional carrier Air West, acquired shortly after Toolco sold the controlling interest in Northeast which it had purchased in 1962 from its co-conspirator Atlas.

the parties as a sale by Toolco.[20] Toolco made a substantial profit on the sale.[21]

—During 1960 Hughes discussed with the Bank of America plans to sell to American Airlines all 15 of the B-131s which Toolco was then leasing to TWA (A-203).

Defendants insist that they could not compete with other suppliers of aircraft because of contract clauses preventing assignment of "the right to receive the aircraft" without the consent of Boeing and Convair (Def. br. pp. 19, 96, 102n. 45, 115n. 62). But these clauses were in point of fact com-

[20] As Pan American's Annual Report for 1959 puts it:

"Six long-range Intercontinentals were *purchased from Hughes Tool Company* during the year at a cost of $40,000,000." (AX-868) (Emphasis added.)

Referring to the same transaction, John B. Connelly, Boeing's vice president, testified:

"Well, in particular I recall that when this question was asked—of course, as you know, this involved *the sale of six airplanes by Hughes Tool Company to Pan American.*" (A-1178) (Emphasis added.)

The ratification by TWA's then captive board of directors is found in the minutes under the heading "Consent to *Sale* of Six Boeing Model 707 Aircraft by Hughes Tool Company" (AX-1408) (emphasis added).

[21] Although TWA had no discovery by which it could inquire into Toolco's profits from the Pan American deal, a Toolco financial statement dated July 16, 1959 (Doc. 494, Ex. 5) indicates that its total cost basis for aircraft, engines and spares which went to Pan American was $8,367,325.90, or $1,143,303.38 less than Pan American paid Toolco to get the planes and engines (*id.*, Exs. 6, 7). Toolco's 1959 federal income tax return reflected an otherwise unexplained gain of $955,600.10 from disposition of interests in contracts (Doc. 495).

The arrangement by which Toolco diverted the six Convair 880s to Northeast (Complaint, par. 22, A-15) also resulted in a handsome profit to Toolco. Schedule D of Toolco's 1960 federal income tax return reports a capital gain of $1,208,424, and its 1960 financial statement audited by Haskins & Sells confirms that a gain in the net amount of $1,208,424 was realized in this transaction (Doc. 495).

pletely ineffective. Such aircraft contracts as Toolco chose to assign, it assigned, and Boeing's vice president Connelly testified that Boeing felt it had no choice but to consent (A-1181).[22] As to TWA's consent, its availability was so obvious that it was never a subject of concern. The documents involved in the Boeing sales were signed before the possibility was even communicated to TWA's board of directors, and in the Convair transaction in 1960, the formality of obtaining TWA's consent to the assignments was never even bothered with—in spite of the fact that three of the aircraft in question had already been specifically assigned by identification number to TWA, early in May 1960 (AX-10, AX-64 *et seq.*). Strikingly, the specific B-331s transferred to Pan American by Toolco included four of the first nine delivery positions for which Toolco had contracted (AX-51-52) — although the competitive importance of early delivery of such advanced aircraft was so great that it had led to the most vigorous efforts in the 1955-1956 period for the earliest possible delivery positions.

This does not complete by any means the story of Toolco's equipment ventures. Late in 1959, for example, when TWA's jet fleet (according to defendants' contentions then and now) had been completely provided for, Hughes was negotiating with Lockheed for the purchase of a large number of Electra turboprops. TWA, at least, did not want Electras, although it was very much afraid that they might be put to it if Toolco had no other customers. Thomas, nominal president of the captive market at the time, did not dare follow the advice he was given to tell Hughes personally that TWA would not take Electras (A-198). The Electras would have been replacements—at least until they

[22] There could not legally be any obstacle to the resale of the aircraft after purchase. *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365, 379 (1967); *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373, 408-09 (1911).

themselves were sold—for the B-131s on lease to TWA that Hughes tried to sell to American (A-203). The usefulness of a captive market for inventory purposes is apparent.

On May 13, 1960 Toolco contracted to purchase seven Convair 880Ms built to the specifications of Capital Airlines.[23] Hughes gave orders to Rummel and his assistants, then supervising the construction by Convair of the 20 CV-880s destined for TWA, to stay away from the CV-880Ms, and that TWA was to have nothing to do with them (A-162-63, A-715-17). As Hughes told Holliday:

> "• • • HTCO is approaching certain bankers immediately as to the possibility of obtaining financing for the purchase of these aircraft *independent of any possible disposition to TWA*." (AX-657) (Emphasis added.)

At about the same time, Toolco ordered Convair 990 aircraft (also designated as CV-600)—a total of 13 of them in 1960 and 1961 (Doc. 495, Toolco 1960 financial statement, note 3). All 13 were to be built in American Airlines' configuration. (AX-644 *et seq.*) American was a customer in which Hughes was very interested. Defendants themselves emphasize the significance of such a choice of configuration (Def. br. p. 102n. 45).

Defendants argue that these aircraft were ordered independently by Capital and American, and suggest that when Toolco acquired the right to purchase them they were intended by Toolco solely for TWA (Def. br. p. 115). While the CV-880Ms had been originally ordered by Capital, none of the 13 CV-990s ordered by Toolco had ever been

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[23] The CV-880Ms (also designated as CV-22Ms), are not to be confused with the CV-880s Toolco attempted to sell to Capital (p. 51 *supra*). The CV-880Ms contained "leading edge devices" (A-1829), the very change which Rummel wanted on TWA's CV-880s (Doc. 226, pp. 992-97) and which defendants refused to permit (Complaint, par. 19, A-13).

part of any American order, as defendants are well aware. The evidence is convincing that none of these Convair aircraft was originally intended for TWA. In addition to the Hughes statement to Holliday about the Convair 880Ms quoted *supra*, Rummel testified that Hughes personally ordered him to have nothing to do with the Convair 990:

> "The instructions were that I should not participate or allow the participation in either contract or specification development activities, that we should not inspect any 990 parts or components at the Convair facility, and that we should not discuss the 990 with Convair." (A-1802; *see also* A-715-17)

J. William Bew, the TWA employee who was Toolco's Special Representative at Convair, recalls:

> "• • • I received strict instructions not to inspect, discuss or even recognize the fact that they were on the production line." (A-252)

Hughes later tried to force the CV-990s upon TWA to keep it from buying Boeings on its own account, but that was after the captive market had escaped his control (Complaint, pars. 35, 37-39, 41-42, A-18-21).[24]

Sketchy as it necessarily is, the foregoing outline of events does show that defendants' involvement in the activities described in the complaint as the "development, manufacture and acquisition • • • and sale and lease" of aircraft (Complaint, par. 3, A-2) was extensive throughout the

[24] Hughes's point of view during the later period is illuminated by his blunt words to Holliday, to be repeated to Convair:

> "It is not up to Convair to decide whether TWA will accept the so-called 97% of the airplanes. This has never been a matter for discussion. However I obtain TWA's acceptance to this is my own problems; most likely HTCO will control TWA when that matter comes up." (A-199)

Hughes's confidence in February 1961 that he could regain control so quickly is particularly interesting since he had placed his stock in a ten-year voting trust less than two months before.

period covered by the complaint. And what is known is surely not all. It is impossible to guess what other activities might have been discovered if TWA had been able to proceed with the discovery guaranteed it under the Federal Rules of Civil Procedure.

3. The curtain of secrecy surrounding Hughes

There has probably never been an industrial or commercial operation as to which such total and totally effective secrecy has been maintained as is maintained over all of Hughes's affairs. As Rummel observed, it was routine "to deal quietly, so to speak, in dealing in matters in which Mr. Hughes was interested" (A-1815). There is no record known to exist of the great bulk of his personal contacts with financiers and industrialists.[25] Typically, indeed, those with whom he was in contact were instructed to maintain no written record (A-1832, A-1843). Since no such restriction was ever placed on Hughes himself, the existence at the time of the default of critically important documentary material under his personal control was very likely.

The extent of his holdings is equally mysterious. Fascinating indications appear in the public press from time to time—mining lands here, islands there, hundreds of thousands of acres elsewhere, hotels, airports, a television network, banks, factories. Secret agreements with manufacturers that TWA does not presently even suspect are not just possible—they are, given defendants' known methods of operation, a probability.[26]

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[25] The few "call sheets" preserved in Toolco's secret message center in Los Angeles and produced during pretrial discovery record only messages left with the telephone room; when direct telephone contact was made, the notation "They talked" or "Omit. They talked" is all that survives (AX-665-728 *passim: e.g.*, AX-669, AX-673, AX-691, AX-694).

[26] For example, Hughes at one time offered to Colonel Henry Crown, a major stockholder of General Dynamics Corporation, to purchase all his future aircraft from General Dynamics in return for financial assistance from Crown (A-174).

4. Co-conspirators other than defendants

TWA alleged in its complaint that "defendants, Atlas and other persons acting for each of them" had engaged in the combination and conspiracy to restrain and monopolize charged (Complaint, par. 9, A-8-9). Atlas was alleged to have joined the conspiracy prior to May 1960 (Complaint, par. 21, A-14). Defendants, in support of their contention that the "conspiracy charge also fails for want of the needed kinds of conspirators" (Def. br. p. 104), pretend that Atlas was connected to the combination and conspiracy alleged in the complaint only through the proposed Northeast merger (Def. br. p. 105). Yet the collaboration of Hughes and Atlas went far beyond this merger proposal—or even the provision by Toolco of aircraft to Northeast. (In addition to the six CV-880s referred to in paragraph 22 of the complaint (A-15), examples of the latter include both the Viscounts which were the subject of negotiations in 1958 (A-146-47) and the four CV-880s leased directly from Toolco in 1962.)

Evidence was available to TWA that the chief executive officer of Atlas, Floyd Odlum, was one of the central group of individuals who decided what defendants should do with respect to TWA during the critical period in early 1961 when they were still attempting to control TWA's aircraft acquisitions (Complaint, pars. 36-39, A-19-20) and were attempting to disrupt TWA's efforts to obtain financing in May of that year (Complaint, pars. 40-46, A-20-22). On March 9, 1961 Holliday reported to Hughes in an "operating memorandum" on a secret meeting which he had at Odlum's ranch (A-2370-71). This meeting had been arranged by Hughes, and it is apparent that Holliday had detailed instructions from Hughes as to matters to be discussed (A-2353). One subject was which of two CV-880 aircraft available for early delivery should be assigned to TWA to comply with Toolco's firm commitment made at the end of

1960 to assign a total of 20 such aircraft to TWA. By this date TWA had received only nine (AX-145). Odlum's advice was that both of the aircraft discussed should be assigned, or if not both, the earlier of the two, and he went on to advise Hughes that it would be a serious mistake to seek to use "the last 20 TWA planes as a 'quid pro quo' for • • • an indemnity" against a possible lawsuit (A-2370). The meeting at Odlum's ranch occurred before TWA retained independent counsel, but the directors had already authorized an investigation (DX 39, p. 12), and it is apparent from this and other documents that the defendants and Odlum were seriously concerned that this investigation would result in a major lawsuit.

Holliday's memorandum goes on to report Odlum's suggestion that Toolco make an offer to induce TWA "to have the investigation sufficiently thorough to prevent a derivitive suit [*sic*], but cursory enough so that only a small amount of money would be involved." Holliday recommended that Hughes call Odlum to "discuss the over-all problem." (*Ibid.*)

In May of the same year, when defendants were attempting to block TWA's efforts to issue and sell publicly $100 million of debentures (Complaint, pars. 40-45, A-20-22; AX-877), Holliday appears to have been the recipient of a steady stream of instructions on the subject from Hughes. A few cryptic notes were produced of the instructions given by telephone (A-2357-62). These "call sheets" refer to 19 "memos" during the period (*ibid.*). Hughes's instruction to Holliday at 7 a.m. on Wednesday, May 17, 1961 was "Please follow carefully the recommendations of Mr. Odlum and Mr. Davis" (A-2361). On May 30, 1961 at 10:15 p.m. Holliday was instructed to "Please tell Mr. Davis to be sure that Mr. Odlum, or any body, does not give to the N Y Stock Exchange any decision in this matter until I communicate with Mr. Davis" (A-2362). At 5:35 a.m. on June 5 Hughes

left a message for Holliday concerning a press release about the financing—"I want to put forth for Mr. Davis', Mr. Holliday's and Mr. Odlum's consideration my reasons for feeling as I do" (*ibid.*). Telephone conversations directly between Hughes and Odlum during this period are noted in other call sheets, plainly indicating Odlum's important participation in the activities then going on in an effort to block TWA's financing (A-2338-39). The conclusion is inescapable that the collaboration between Toolco and Atlas, Hughes and Odlum, was as close in this aspect of defendants' dealings concerning TWA as it was in connection with the proposed Northeast merger. In the damage hearing the extent of Atlas's and Odlum's participation was not relevant, but TWA furnished this material to Judge Metzner in September 1962 in connection with Toolco's motion for a Rule 16 conference, to show the need for further discovery before such a conference could be fruitful.

After its own review, the court of appeals summarized the evidence in the record; defendants chose to replace the underlined words with ellipses when quoting this passage as "illustrative" (Def. br. p. 106n. 48):

> "Moreover the documents described above, while (if their contents were accepted as true) showing that Toolco was not a major force as a supplier of aircraft other than to TWA, hardly negative the possibility that Toolco possessed independent economic significance, apart from its role as supplier to TWA sufficient to support proof of any or all the antitrust theories limned by TWA's complaint. There is evidence in the record of activities by Toolco or Hughes that suggest significant movement by Toolco and Hughes toward actual or potential commercial manufacture or dealership in airplanes, especially jets, and their parts. We cannot say that proof at a trial—prevented by Toolco's conduct—

that Toolco was more than a conduit for TWA but rather possessed independent competitive significance with respect to the commercial aircraft market, would be insufficient, if combined with appropriate related proof of the intent, attempt, collusion, tying arrangements, boycotts, and monopolization alleged in the complaint, to support an antitrust judgment for TWA." (449 F.2d at 67, A-2767)

SUMMARY OF ARGUMENT

This case was at issue when defendants chose to bar discovery and foreclose a trial of the facts. They have insisted ever since, however, that the issues should be decided without accepting the truth of the basic charges made by TWA in the complaint. Having successfully frustrated discovery, defendants lay claim to a judgment on the merits of "not proven."

The keystone to that claim is defendants' assertion of the right to refuse to make discovery. The information they withheld, the court of appeals found, "was more than merely 'material.' It was essential" (p. 9 *supra*). It went to every issue, since all inquiry into defendants' conduct was blocked. Whether defendants' actual conduct might be immunized from the antitrust laws because it came within the scope of CAB orders approving Toolco's acquisition of control over TWA; whether, as they insist, defendants were innocent of any intent to restrain trade and did nothing to injure competition; and whether their conduct did or did not directly injure TWA—all these were factual questions which would have been determined at trial except for defendants' refusal to proceed. Evidence available only from defendants was indispensable as to each.

I. **The discovery issue.** Defendants' due process claims are frivolous. They concede that the complaint is legally sufficient, and therefore TWA was entitled to discovery as a matter of law and to the process of the court in aid of discovery. Defendants' explanation for their refusal to comply with the orderly process established by the Federal Rules of Civil Procedure that it was necessary to avoid an expense of $5 million in taking Hughes's deposition is not only inherently ridiculous and five times the estimate made to this Court in 1964, but it ignores the fact that courts can and do issue protective orders under FED.R.CIV.P. 26(c) and 30(d) when abuse of discovery can be shown.

Defendants claim the prerogative to require answers to detailed interrogatories or the holding of a pretrial conference under FED.R.CIV.P. 16, to facilitate a motion for summary judgment, before they could be required to produce critical documents and before TWA was permitted to take the deposition which the court of appeals has since twice held essential. This turns the matter on its head. Both the district court and the court of appeals recognized that discovery was crucial to TWA's case. Judge Metzner held that the discovery which TWA was to be allowed would both facilitate consideration of answers to the interrogatories and the application for a Rule 16 conference, and advance the date when defendants' summary judgment motion could be meaningfully entertained (A-123). Under these circumstances, the order of discovery (always a matter for the discretion of the trial judge) could hardly have been determined differently, and the correctness of the district court's decision is plain. Defendants could not have prevailed on a motion for summary judgment before TWA had essential discovery. *First National City Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 (1968); *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464 (1962).

Defendants say they wished to test their legal position. But they did so. Their motion to dismiss, treated as one for judgment on the pleadings, was carefully considered and denied (214 F. Supp. 106, A-255 *et seq.*). They had no right under the Judicial Code, let alone under the Constitution, to an interlocutory appeal, although they ultimately succeeded in getting one by their tactic of default. They cannot complain about the procedure because the decisions went against them on the merits.

II. The default issue. Defendants' "business decision" was not simply to refuse specific information; it was to proceed no further in the case. All discovery was blocked, and not just TWA, but the courts below, were deprived of access to the facts. Under these circumstances, a default judgment was inevitable, and defendants plainly invited it.

The lower courts correctly ruled that TWA was not required to prove the well-pleaded allegations of the complaint, except with respect to damages. Defendants argue that the default does not admit "legal conclusions," and label as "conclusions" such allegations as that their conduct specified in the complaint was pursuant to a combination and conspiracy to restrain trade and monopolize a segment of the market, and that this conduct resulted in specific injuries to TWA. The contention that these are conclusions and not admitted misreads the rule of *Thomson* v. *Wooster*, 114 U.S. 104 (1885). The correct rule is that a default admits all well-pleaded allegations, including allegations of "ultimate facts," which are material and traversable and which would upon denial put the plaintiff to his proof. *McAllister* v. *Kuhn*, 96 U.S. 87 (1877). When the default judgment results from a deliberate and wilful refusal to comply with lawful discovery orders, giving that judgment its full effect of establishing the truth of plaintiff's allegations is particularly appropriate. *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322 (1909).

Defendants understood the consequences of the default. When they noted their default, they stated on the record that if they were wrong about whether TWA was entitled to be before the court, they were prepared to "pay the consequences to the extent to which you are able to prove damages" (p. 31 *supra*).

III. The amendment issue. In now seeking to confine TWA to less than the full amount of damages it proved, defendants rely on a provision of FED.R.CIV.P. 54(c) meant to apply to a different type of case. Before defendants formalized their business decision to default, they had notice that TWA intended to seek all damages to which it was legally entitled. The district court plainly had discretion to grant TWA's requested amendment before the interlocutory default judgment was entered since FED.R.CIV.P. 15(a) directs that leave to amend shall be freely given "if justice so requires."

Defendants made a business judgment that they risked less by restricting TWA to a trial on damages without meaningful discovery than in a trial on the merits after discovery. They had nearly three months during which they could have withdrawn their election not to proceed before the motion to amend was granted and before the interlocutory default judgment entered against them. They did not then nor thereafter before entry of final judgment seek to cure their default. They participated fully in the damage hearing before the Special Master and were permitted to contest the amount of TWA's damages. The further provision of Rule 54(c), applicable in contested proceedings, that relief shall be granted in accordance with the proof, and the amendment provisions in Rules 15(a) and 15(b), justified the exercise of the court's discretion to allow an amendment of the prayer to demand whatever relief plaintiff could show itself entitled to. None of defendants' substantial rights was prejudiced within the meaning of FED.R.CIV.P. 61 and 28 U.S.C. § 2111.

IV. The immunity issue. Defendants claim an exemption from the antitrust laws flowing from CAB orders and covering all of their conduct complained of in this lawsuit, which they describe as merely the natural and ordinary conduct of a controlling person. This argument has gained no additional force since it was first made to this Court in 1965. An illegal exercise of control is different from a lawful acquisition of control.

Approval of a status or relationship does not immunize from antitrust prosecution everything done in that status or relationship. *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963). The legislative history of the Federal Aviation Act makes it evident that the scope of CAB orders under Section 408 (and therefore the scope of any exemption under Section 414) is limited to acquisitions of control. Section 408 contemplates no approval of subsequent conduct, let alone any approval of anticompetitive effects of unlawful conduct in fields not subject to CAB regulation such as the supply of aircraft. The abuse of control charged in TWA's complaint was outside the Board's regulatory powers and the Board has no jurisdiction over aircraft dealers or manufacturers, as such.

Since this case was last before this Court in 1965, TWA's damages have been fixed and related to particular actions of defendants. None of these particular actions was approved by any CAB order. The particular CAB orders on which defendants rely related only to Toolco's acquisition of control over TWA. Under the Federal Aviation Act, the only relief provided from the antitrust laws in respect of such orders is the relief "necessary" to enable accomplishment of action approved by such an order. Even if it had wanted to do so, as it is plain it did not, the CAB had no statutory authority to exempt from the antitrust laws action other than the acquisition of control itself. *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963), holds only that the "narrow questions" of divi-

sion of territories and allocations of routes were at the heart of the Board's regulatory function and had been entrusted to the Board, so that all questions of injunctive relief with respect to them were intended to be left to the Board. Here there can be no interference whatever with the regulatory scheme. Toolco no longer controls TWA, and the relief granted is confined to damages for past injuries which the CAB is without power to grant. *Cf. Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213 (1966).

V. The antitrust issue. The court of appeals considered defendants' contentions that their conduct could not in any case violate the antitrust laws. It held that defendants, having refused discovery, could prevail only if they affirmatively demonstrated that no antitrust violation could possibly be proved under TWA's complaint. It found that defendants had not disproved a violation on one or more of six theories. Defendants now essentially repeat their argument below that Toolco's 78 per cent ownership of TWA made it *per se* lawful for them to dictate TWA's aircraft purchases in any way they chose.

Defendants' assertion that their stock control of TWA insulated their conduct from the antitrust laws ignores the complaint's allegations, *inter alia,* that they conspired to monopolize the supply of jet aircraft to other airlines besides TWA. That conspiracy was to be effected by using TWA's requirements to gain access to a supply of aircraft and to provide a captive backstop market. Toolco's control of TWA had no possible relevance to the legality of such conduct. Even with respect to monopolization and restraint of the TWA market, Toolco's stock ownership conferred no immunity. Defendants' suggestion that one who controls a market exceeding $100,000,000 because of stock acquisitions is privileged to exclude competitors from that market is inconsistent with established antitrust principles and contrary to public policy. The further argument that,

even though Toolco's conduct was illegal and injured TWA, a subsidiary having 13,000 public stockholders has no right to sue its parent under the antitrust laws is frivolous.

Defendants' contentions that they were not in fact in competition with other manufacturers or suppliers of aircraft, and for this reason could not have violated the antitrust laws, are not open to defendants in light of the default. Those contentions are also inconsistent with the available evidence of record (pp. 42-59 *supra*), as the lower courts correctly found. In any case, absence of competition does not itself negate antitrust violation; indeed, if brought about by agreement, the agreement itself could constitute such a violation.

The claim that the court of appeals imported Clayton Act concepts into a Sherman Act case rests on a plain misreading of the decision. The court did not decide whether evidence sufficient to make out a violation of the Clayton Act would have also made out a violation of the Sherman Act; it held only that the evidence and argument defendants put forward did not establish that TWA could not have proved, at trial, a violation of the Sherman or Clayton Acts. Because of the default, the court of appeals had no occasion to consider how much evidence TWA would have had to introduce at trial to prevail on any theory.

VI. The damages issue. In their closing attack on the damage award defendants assert that TWA was awarded damages without establishing causation. This assertion confuses the issues of liability and damages. Defendants have continuously argued that TWA was not injured at all by their conduct and the courts below properly held that this contention was not available to them after the default. They also objected that TWA had not proved that the specific items of damages claimed flowed from the injuries that were alleged in the complaint. This objection was cor-

rectly overruled because TWA did in fact prove a causal relationship between each item of damages and the injuries alleged.

The lower courts were extremely conservative in accepting TWA's proof of damages. The district court and court of appeals successively reviewed the record and each held it fully supported the Special Master's findings that, absent defendants' unlawful conduct, TWA would have received 16 additional jets, would not have leased jets from Toolco in 1959 and 1960 but would have purchased jets, and would have received aircraft earlier, and that its crew training would not have been disrupted. Defendants tried throughout the damage hearing to prove either that TWA's losses resulted from other causes or that TWA would not in any case have purchased 63 jets. They failed completely. Defendants' summation that "for all that this vast record shows, TWA would have suffered the same losses for which it has now recovered damages even though it had been controlled by an independent board of directors and no so-called 'antitrust violation' had even taken place" (Def. br. p. 27) is a striking example of the extent to which defendants have ignored the findings. While it is never possible to prove with certainty what would have happened under different circumstances, TWA's proof fully met the standards laid down by this Court. *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946).

ARGUMENT

I

The district court's pretrial orders were correct, and defendants' claim that those orders deprived them of due process under the Fifth Amendment is frivolous

None of defendants' rights was impaired in the slightest by the district court's conduct of pretrial discovery, and defendants' claim that they have been denied their constitutional rights is frivolous. Far from ignoring "[t]he plainest principles of fairness and due process, as well as orderly procedure" (Def. br. p. 28), the courts below have leaned over backward at every stage to give defendants' every argument, no matter how often repeated, a fair and full hearing, as the review of proceedings (pp. 6-9, 16-39 *supra*) has shown.

At the same time that they mount an unjustified attack on the conduct of the lower courts, defendants find themselves compelled by the record and findings below to make certain critical concessions:

Defendants "do not disagree," because they no longer can, with the decision of the court of appeals upholding the sufficiency of the complaint (Def. br. p. 32).

> —Yet, the complaint being sufficient, the rules clearly provide that plaintiff, as well as defendants, is entitled to discovery of evidence, and to the process of the court in aid of such discovery.

Defendants admit, because they must, that the effective administration of the Federal Rules of Civil Procedure requires "wide scope" to be given to the discretion of the district judge (Def. br. p. 28). "Ordinarily the *order* of discovery *is* and *must be* for the discretion of the trial

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court" (Def. br. p. 40) (emphasis added). And "the rules of procedure and orders of the courts made pursuant to them should be obeyed" (Def. br. p. 28).

—Yet, the pretrial order particularly complained of, that plaintiff should be permitted to proceed with the deposition of an essential witness, was strictly confined to an exercise of the trial court's discretion over the order of discovery, precise in application and limited in scope. The further discovery which defendants were demanding was expressly postponed, and not foreclosed.

Defendants insist that Toolco made "a responsible decision *to decline to proceed further*" (Def. br. p. 29) (emphasis added). It elected to stand on its legal position recognizing that a "decision of this kind carries risks" (Def. br. p. 30). Defendants concede that by their Notice of Position they "took their chances on whether they were right or wrong about the applicable law. They gave up their right to challenge the factual allegations of the complaint" (Def. br. p. 50).

—When defendants made their "responsible decision to decline to proceed further," they explicitly recognized that they were doing so in violation of specific court orders made pursuant to the Rules. The entry of an order of default was the contemplated result, as their counsel stated unequivocally in open court (A-307-08), and as they now admit. Its subsequent implementation has done no more than enforce their renunciation—voluntary and carefully considered—of their right to challenge the factual allegations of the complaint.

Defendants "took their chances," and they lost. At the same time they gained the benefits of shielding their conduct

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from further inquiry. It is not surprising that they would prefer to retain the benefits and avoid the consequences of this "business decision." The fundamental weakness of their position is apparent upon examining just what defendants contend the trial court should have done. Ultimately it is defendants' contention that (a) they should have been accorded as a matter of right an immediate interlocutory review, not provided for in the Judicial Code, of the district court's decision denying their motion to dismiss, and (b) they should have been allowed, again as a matter of right, to withhold from the plaintiff the discovery to which the Rules entitled it, except at their own time and on their own terms.

They contend that the contrary rulings of the district court amounted to a denial of due process, because they put defendants to the expense of the Hughes deposition "before it is known if there is anything to be tried" (Def. br. p. 41).

A. Defendants had no right, either constitutional or statutory, to an interlocutory appeal

Defendants' efforts to avoid full discovery were successful until early 1963. At that time it became clear that the only possibility of further delay was to precipitate decisions on questions of law. Accordingly, 18 months after the complaint was filed, Toolco brought on a motion to test the sufficiency of the complaint and the affirmative defenses. The principal grounds asserted were that the CAB had exempted the conduct alleged in TWA's complaint from the reach of the antitrust laws and that the antitrust violations alleged by TWA were within the CAB's primary jurisdiction.

Judge Metzner's denial of the motion was announced on February 6, 1963 (A-2654) and formalized in a written

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opinion filed the next day (214 F.Supp. 106, A-255 *et seq.*). That decision was correct (see Point IV, p. 122 *et seq. infra*). The court of appeals so held in its 1964 decision upon the interlocutory appeal which defendants were ultimately allowed (332 F.2d 602, A-328 *et seq.*), and this Court left that decision undisturbed in 1965 when it dismissed certiorari, after briefing and oral argument, as improvidently granted (380 U.S. 248, A-2738).

To defendants the denial of their motion to dismiss meant that they had no further means of avoiding discovery, unless they could appeal the ruling. As Judge Metzner had found no ground for granting the certification required by 28 U.S.C. §1292(b) for an interlocutory appeal, defendants embarked upon a last-ditch plan to obtain an appeal by other means.

There is *no* due process right to an appeal; where such a right has been made available in the federal system by statute, it has with narrow exceptions been limited to appeals from final judgments and orders. 6 J. Moore, Federal Practice ¶ 54.04[1] (2d ed. 1971); 9 *id.* ¶ 110.06 (2d ed. 1970). Defendants' arguments on the sufficiency of their affirmative defenses would of course be preserved for review after final judgment as the statute provides. Such a review would be upon a complete record, and if there were any merit to defendants' arguments they would be strengthened, not weakened, by a full inquiry into the facts (*see* 449 F. 2d at 61-62, A-2755). But deferring an appeal until after final judgment would not have served defendants' purpose of avoiding discovery.

If defendants thought they could show that any substantial rights were jeopardized by the denial of their motion to dismiss, they were free to request discretionary interlocutory relief from the court of appeals. While a district judge's refusal to grant the certification required by 28 U.S.C. § 1292(b) is not reviewable, "mandamus will lie in

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an appropriate case, not to review his refusal to certify, but to review the order for which certification was sought." 9 J. MOORE, FEDERAL PRACTICE ¶ 110.22[3], p. 262 (2d ed. 1970); *see Japan Line, Ltd.* v. *Sabre Shipping Corp.*, 407 F. 2d 173, 175 (2d Cir.), *cert. denied*, 395 U. S. 922 (1969); *D'Ippolito* v. *Cities Service Co.*, 374 F. 2d 643, 649 (2d Cir. 1967). The district court granted a further stay of all outstanding discovery orders, *at defendants' request*,[27] to permit them to make such an application, but none was made. Defendants elected instead to force the issue by refusing to proceed. This had the effect, plainly anticipated and indeed counted upon by defendants, of provoking the entry of a default judgment. This time defendants were successful in securing the interlocutory appeal which they sought.

Defendants present Judge Metzner's grant on May 3, 1963 of their request for a certification under Section 1292(b) as if it were virtually a confession of error in having refused such a certification on February 6 (Def. br. pp. 16, 23, 31). The suggestion is completely insupportable.

Events had changed significantly by May 3, 1963. Defendants' business decision not to proceed resulted not

[27] The record contradicts defendants' suggestion (Def. br. p. 15n. 7) that the possibility of their seeking review by writ of mandamus was but an afterthought of the district judge, in justification of his earlier denial of a permissive appeal. At the February 6, 1963 hearing at which Judge Metzner denied Toolco's motion to dismiss, defendants were well aware that they could seek review from the court of appeals:

> "Mr. Davis: May I respectfully request your Honor to stay all further discovery proceedings by the plaintiff until I have had an opportunity to seek a discretionary review by the Court of Appeals?
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> * * * * *
>
> "The Court: I will tell you what I will do. I will grant your application to the extent of staying all further discovery or deposition proceedings until 5 o'clock Friday. That will give you two days to make whatever application you wish to make to the Court of Appeals for a stay.
>
> "Mr. Davis: All right, your Honor." (A-2654-55)

only in entry of the default judgment on TWA's complaint but also in a final judgment dismissing Toolco's counterclaims against TWA and the additional defendants. That dismissal was plainly ripe for appellate review, and Judge Metzner was concerned, as he said several times, that all then reviewable aspects of this case be considered at one time by a single panel of the court of appeals (A-314-16, A-2728-29). Thus, when TWA urged that review should await final judgment as to its claims, Toolco, pressing for a Section 1292(b) certification, pointed out that the contemplated judgment on the counterclaims "will be appealable, anyway, and we might be able to get both things up together" (A-315-16). Judge Metzner was persuaded:

> "The Court: It doesn't make much sense for one to go up without the other.
>
> • • • • •
>
> "I will think about that overnight." (A-316)

Defendants, then as now, had presented their decision to default as if it were a proper—almost normal—procedure to secure interlocutory review not otherwise available, provided they were willing to accept liability in damages if they lost. As defendants' counsel explained:

> "My purpose of course is to obtain something which will enable me to get a review on the law as to whether or not you [TWA] are entitled to be here in the first place. And then I am prepared, if I am wrong in that regard, to pay the consequences to the extent to which you are able to prove damages." (A-297)

Judge Metzner's decision on May 3 simply gave defendants the opportunity for interlocutory review which they said they wanted.

It is important to note that defendants' wilful refusal to allow discovery to proceed prejudiced consideration of the

issues of antitrust exemption and primary jurisdiction as well as the other issues presented by the pleadings. Both are affirmative defenses under FED. R. CIV. P. 8(c), pleaded as such by defendants (Toolco answer, pars. 30-41, A-48-51; Holliday answer, pars. 30-31, A-106-07). Neither is "jurisdictional" in the sense of going to the power of the district court to hear and determine the questions presented to it. *Cf. Bell* v. *Hood,* 327 U.S. 678, 382-83 (1946). Even if the defenses had been in the full sense "jurisdictional," it is settled that a court has the power to issue orders and to apply sanctions even before its jurisdiction to proceed or to grant particular relief is finally established. *United States* v. *United Mine Workers of America,* 330 U.S. 258, 290 (1947). Thus jurisdiction plainly existed in the district court to enter an interlocutory default judgment for failure to make proper discovery and, after a hearing on damages, to render final judgment in TWA's favor. Discovery is appropriate to facilitate a court's determination whether it has jurisdiction to proceed. *See Surpitski* v. *Hughes-Keenan Corp.,* 362 F.2d 254, 256 (1st Cir. 1966); *Collins* v. *New York Central System,* 327 F.2d 880, 883 (D.C. Cir. 1963); *Urquhart* v. *American-La France Foamite Corp.,* 144 F.2d 542, 544 (D. C. Cir.), *cert. denied,* 323 U.S. 783 (1944).

Questions of antitrust exemption and primary jurisdiction are of a sort particularly likely to be illuminated by discovery, since they may be vitally affected by the evidence adduced in support of the antitrust claims asserted. *Cf. Local Union No. 189* v. *Jewel Tea Co.,* 381 U.S. 676, 686-87 (1965). In this case the discovery which TWA sought and defendants refused would have developed the substance, if any, behind defendants' claim that everything they did which injured TWA and violated the antitrust laws was a necessary concomitant of the acquisition of control which the CAB authorized. It was defendants' deliberate choice,

however, to force the consideration of these questions, in 1965 as in 1972, on an artificially truncated record.

To rationalize what they did, defendants depend upon cases like *United States* v. *Procter & Gamble Co.*, 356 U.S. 677 (1958), and *United States* v. *Ryan*, 402 U.S. 530 (1971), which presented very different circumstances. In both the review had was after final judgment and related to the particular order disobeyed. In *Procter & Gamble* the district court had entered a final order dismissing the Government's complaint upon its refusal to produce grand jury minutes. In *Ryan* the Court stated that the defendant could test the propriety of a grand jury subpoena by refusing to produce the documents called for, subjecting himself to contempt proceedings, and appealing from the resultant final judgment. Neither case suggests that the deliberate violation of a discovery order is a proper procedure to obtain review of a non-final order on unrelated issues. Both cases recognize that one who disobeys a lawful discovery order must bear the usual consequences of whatever proper sanction is imposed for that disobedience.[28]

Whether or not wilful and deliberate disobedience to lawful discovery orders ought to be available as a procedural avenue to interlocutory review of unrelated legal issues, Toolco in fact obtained the very "test [of] its legal rights"

[28] *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 393 F.2d 441 (2d Cir.), *cert. denied*, 393 U.S. 846 (1968), offers defendants no support at all. The district court there had stayed prosecution of an antitrust case on the mistaken ground that the CAB had primary jurisdiction of the claim. The plaintiff sought but could not obtain interlocutory review by the court of appeals. Thereafter the plaintiff did nothing further in the case, thus literally and fully complying with the stay order complained of, and the district court ultimately dismissed for failure to prosecute. Upon review of the final order of dismissal the court of appeals reversed, holding that there was no primary jurisdiction in the CAB after all, that the stay order was therefore incorrect, that non-prosecution thereafter was excused because in strict obedience to the stay order which—although erroneous—was lawfully entered and binding on the plaintiff, and that the plaintiff should now be permitted to proceed with prosecution of its claim. Only as to the conclusion that the CAB was without

which it sought (Def. br. p. 29). Although the result of the review was adverse to defendants' contentions, they cannot complain that they lost any constitutional rights in the process.

It was decided by this Court more than 60 years ago in *Hammond Packing Co.* v. *Arkansas,* 212 U.S. 322, 347 (1909), that asserted belief in the rightness of one's own cause, however sincere, does not excuse the withholding of evidence which a proper court order requires to be produced:

> "As the [defendant] absolutely declined to obey the order and stood upon what it deemed to be its lawful rights and privileges, even if that course of conduct was taken because of a contrary conception as to the meaning of the statute, it is not within our province to afford relief because of an error of judgment in this respect."

That decision is the source of FED.R.CIV.P. 37 (Original Advisory Committee Note to Rule 37 (March 1938), 28 U.S.C., p. 7799).

B. Defendants' asserted right to indefinite priority

Defendants now openly assert that their election to default was simply a device which they adopted to secure interlocutory review. The nature of the specific orders which they disobeyed was therefore hardly material, and their attack on the conduct of pretrial discovery below is revealed to be spurious. Yet they now also assert as an alternative excuse for their conduct that they could not constitutionally be subjected to deposition discovery until TWA was required—in a Rule 16 proceeding, by answering inter-

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primary jurisdiction of the antitrust claim were the issues presented in *Allied* "so similar to those in the present case" (Def. br. p. 30), and on that issue *Allied* is in full accord with the decisions below. See Point IV *infra,* esp. p. 135 n. 56.

rogatories, by surviving a summary judgment motion—to prove without discovery that it had claims which "must ultimately be tried" (Def. br. pp. 41 & n. 13, 42).

This argument cannot survive the findings made by the courts below. Judge Metzner said that "the deposition of Hughes is essential for the proper presentation of TWA's case" (32 F.R.D. at 607, A-320-21). Chief Judge Lumbard in 1964 said that it was "necessary" and again "absolutely essential" (332 F.2d at 14-15, A-351-52). Judge Kaufman called this ruling "manifestly correct," described Hughes as the "Prince of the drama," and said that the information sought from him was "more than merely 'material.' It was essential" (449 F.2d at 61-62, A-2754-56). No Rule 16 motion, no answers to interrogatories could have produced a compulsory limitation of the scope of TWA's claims when TWA had been deprived of the right to examine the one essential witness. No summary judgment motion brought when TWA had not had this discovery could have succeeded. These various procedures to which defendants lay a constitutional claim could thus have accomplished no more than further delay, and defendants could not be prejudiced by their postponement. FED.R.CIV.P. 61.

Defendants, however, assert their belief that Toolco's conduct "could not, as a matter of law, constitute a violation of the antitrust laws" (Def. br. p. 29), that they saw "no facts alleged • • • that would constitute a violation of the antitrust laws" (Def. br. p. 35), and that there were "no facts to be discovered" (Def. br. p. 36). Yet the allegations of the complaint were plain enough that defendants could answer it (A-41 *et seq.*, A-99 *et seq.*). The case was at issue when they made their unilateral decision to avoid "useless litigation on the facts" (Def. br. p. 30). They concede that TWA has stated a claim for relief under Section 4 of the Clayton Act. Their objection is not to the complaint, but to their being subjected to discovery with respect to it.

Defendants seem, indeed, to claim that they were entitled to have their summary judgment motion decided on the

basis of such facts as *defendants* would admit, with discovery prevented of any facts they would not admit (*see* Def. br. pp. 35-36). There is no other way to explain their statements that *they* saw "no facts to be discovered" (Def. br. p. 36), and that in *their* view it was not "necessary to probe motive or intent" (Def. br. p. 39). Only if defendants lost such a summary judgment motion, on a record so limited, would TWA be entitled to commence its own discovery.

In fact, defendants' long-pending motion for summary judgment was never brought on for determination.[29] The hopelessness of any such motion prior to the deposition of the witness twice stated by the court of appeals to be "essential" is demonstrated by the procedures followed in the case upon which defendants principally rely, *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 (1968) (Def. br. p. 38). In that case this Court upheld the grant of one defendant's motion for summary judgment. There, however, the facts were as follows:

> —Defendant Cities Service moved for summary judgment after extensive depositions of plaintiff on the basis of which the district judge, in considering the motion, concluded that Cities Service had been named on "mere 'suspicion'" and that plaintiff's claim was "insubstantial" (391 U. S. at 265).

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[29] Toolco withdrew its summary judgment motion from consideration when it brought on its motion to dismiss after it became apparent that the February 11, 1963 date for the Hughes deposition would not be changed (A-255-56). Defendants knew they could not deny that genuine issues as to material facts were present, and that discovery into these facts would be necessary. The evidentiary material outlined at pp. 39-59 *supra* of the counter-statement was largely before Judge Metzner at the time, having been covered by the deposition which defendants had taken of Rummel, or furnished to the court with the affidavits of John F. Sonnett dated September 14, 1962 (A-2316 *et seq.*) and February 1, 1963 (Doc. 165; A-143 *et seq.*, A-226 *et seq.*). TWA was also entitled to identical discovery on Toolco's then pending counterclaims, to which it was a party, seeking total damages of $366 million—of which $135 million were sought, derivatively, on behalf of TWA.

—The district judge nevertheless postponed determination of the motion and later entered an order pursuant to FED. R. CIV. P. 56(f) allowing plaintiff to take the deposition of one Hill, Cities Service's principal negotiator in the transaction complained of (*ibid.*).

—After completion of Hill's deposition, the district judge refused to grant Cities Service's renewed motion for summary judgment and entered a further order under Rule 56(f) permitting plaintiff to depose "all those members of Cities' executive staff then alive" who plaintiff *alleged* had participated in the relevant transactions (391 U. S. at 268).

—Cities Service "conclusively showed" that "the facts upon which [plaintiff] relied to support his allegation were not susceptible of the interpretation he sought to give them" (391 U. S. at 289).

The *Cities Service* case shows the foolishness of any suggestion that the district court here improperly deprived defendants of their rights by directing that Hughes's deposition commence and that Tooleo produce relevant, nonprivileged documents. It would have erred if it had done otherwise.[30]

[30] Not one of the cases cited by defendants as demonstrating the availability of summary judgment in antitrust cases (Def. br. pp. 38 & n. 11, 39) even hints that summary judgment can properly be employed in such cases to deprive a plaintiff of discovery. In *White Motor Co.* v. *United States*, 372 U.S. 253, 259 (1963), this Court *reversed* a summary judgment for *plaintiff* and remanded for further development of a record even though characterizing that case as one "the gist of [which] turns on documentary evidence." In those cases where summary judgment was granted and upheld there had been significant discovery by plaintiff, or none had been sought. *California Shipping Co.* v. *Pacific Far East Line, Inc.*, 453 F.2d 380 (9th Cir. 1971), *cert. denied*, 92 S. Ct. 1501 (1972) ("Discovery procedures, including interrogatories and depositions, were extensively employed * * *"); *Beckman* v. *Walter Kidde & Co.*, 451 F.2d 593

Discovery of the withheld documents and Hughes's oral testimony were inescapable prerequisites to any consideration of defendants' motion for summary judgment. The Federal Rules of Civil Procedure accord to all litigants—plaintiffs as well as defendants—the right to

> "* * * obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of per-

(2d Cir. 1971), *cert. denied*, 40 U.S.L.W. 3610 (June 27, 1972); ("[T]he ruling [granting summary judgment] was deferred until plaintiff had been given an opportunity to obtain additional evidence to support his claims"); *Dahl, Inc.* v. *Roy Cooper Co.*, 448 F.2d 17, 18 (9th Cir. 1971) ("After completion of discovery * * *"); *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F.2d 183, 189 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971) ("* * * the nature of [plaintiff's] injuries and the [defendants'] alleged activities were fully developed during two years of discovery and disclosure"); *Chapman* v. *Rudd Paint & Varnish Co.*, 409 F.2d 635, 643 (9th Cir. 1969) ("[P]laintiff * * * knows of no evidence supporting his allegations"); *McGuire* v. *Columbia Broadcasting System, Inc.*, 399 F.2d 902, 906-07 (9th Cir. 1968) (plaintiff sought no discovery against the moving defendant); *Cohen* v. *Newsweek, Inc.*, 374 F.2d 470 (8th Cir.), *cert. denied*, 389 U.S. 878 (1967) (*pro se* plaintiff had apparently not sought discovery); *Cowen* v. *New York Stock Exchange*, 371 F.2d 661 (2d Cir. 1967) (no claim by plaintiff that he was denied discovery); *Crest Auto Supplies, Inc.* v. *Ero Mfg. Co.*, 360 F.2d 896, 900 (7th Cir. 1966) ("Plaintiffs, in opposing the motion for summary judgment, relied solely on their amended complaint"; as to the holding that plaintiffs were *in pari delicto*, *see Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 137-41 (1968)); *Bond Distributing Co.* v. *Carling Brewing Co.*, 325 F.2d 158, 159 (4th Cir. 1963) ("* * * we are of the opinion that, rather than abusing its discretion, the Court extended to the plaintiffs more than reasonable opportunities to develop their case through the extensive use of authorized discovery procedures").

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sons having knowledge of any discoverable matter." (FED.R.CIV.P.26(b)(1))[31]

If the Rules ever left any doubt about the importance of discovery for *all* parties, this Court dispelled it in *Hickman* v. *Taylor*, 329 U.S. 495, 507 (1947):

> "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise."

Concurring in that case, Mr. Justice Jackson observed:

> "Discovery is a two-edged sword and we cannot decide this problem on any doctrine of extending help to one class of litigants." (329 U.S. at 515)

More recently in *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964), the Court expressly refused to differentiate between the discovery rights of plaintiffs and defendants, rejecting the contention that it would be an unconstitutional invasion of privacy to subject a defendant to a physical examination pursuant to FED.R.CIV.P. 35:

> "The chain of events leading to an ultimate determination on the merits begins with the injury of the plaintiff, an involuntary act on his part. Seeking court redress is just one step in this chain. If the plaintiff is prevented or deterred from this redress, the loss is thereby forced on him to the same extent as if the defendant were prevented or deterred from defending against the action." (379 U.S. at 114)

[31] Except as noted, citations to the Federal Rules of Civil Procedure are to the Rules as amended effective July 1, 1970. Although none of the defendants' arguments depends upon the language of the Rules as they existed in 1961-1963 when the various rulings under consideration were made, pertinent provisions of the Rules as they were in 1961-1963 are set out in the Appendix to this brief at p. 17a *et seq.*

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The 1970 amendments to FED.R.CIV.P. 26-37 make it clear that defendants are not favored over plaintiffs in the sequence and timing of discovery any more than in its scope. FED.R.CIV.P. 26(d) now provides:

> "SEQUENCE AND TIMING OF DISCOVERY. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery."

Explaining the new rule, the Advisory Committee said:

> "This new provision is concerned with the sequence in which parties may proceed with discovery and with related problems of timing. The principal effects of the new provision are first, to eliminate any fixed priority in the sequence of discovery, and second, to make clear and explicit the court's power to establish priority by an order issued in a particular case." (Notes of Advisory Committee on 1970 Amendment to Rules, 28 U.S.C., p. 7781)[32]

Defendants' position is that this is a special kind of case, requiring special treatment. If it were made as an appeal to the trial court's discretion, or in this Court to support a discretionary decision in their favor by the district court,

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[32] The Advisory Committee also pointed out that amended FED.R. CIV. P. 26(d)

> "* * * follows an approach adapted from Civil Rule 4 of the District Court for the Southern District of New York. That rule provides that starting 40 days after commencement of the action, unless otherwise ordered by the court, the fact that one party is taking a deposition shall not prevent another party from doing so 'concurrently.'" (*Ibid.*)

Civil Rule 4 became effective July 1, 1962 and was one of the grounds urged by TWA when it argued before Judge Metzner that it should be allowed to initiate deposition discovery by examining Hughes even though defendants had not completed all their discovery (A-117, A-121, A-123-24).

that argument would at least be intelligible, although, in TWA's view, such an unprecedented limitation of its discovery rights as defendants were demanding would still be unjustifiable. Here, however, the argument is made the basis for challenging as an *abuse* of discretion orders which, after all, accorded TWA no more than its ordinary rights under the Rules.

C. The district court properly managed the pretrial proceedings

It is surprising that defendants claim support from the suggestions for handling so-called "big cases" set out in the 1970 MANUAL FOR COMPLEX AND MULTI-DISTRICT LITIGATION (the "MANUAL"). Ignoring the direction that "flexibility should be the keynote in applying the suggestions contained in this *Manual*" (p. xix), defendants would read into it a sharp restriction on the power of federal judges to deal with litigation pending before them. The MANUAL was not intended to have any such disabling effect, and it simply does not contain provisions of the kind defendants purport to rely upon.

Defendants' chief rationale for barring TWA from deposing Hughes is a supposed requirement in the "big case" that the issues must be identified before a plaintiff can engage in discovery (Def. br. pp. 40, 41). The MANUAL expressly *disapproves* of that approach:

> "Therefore, the suggested procedures appearing in the *Manual* include some procedures suggested in the *Handbook* [*of Recommended Procedures for the Trial of Protracted Cases, 1960*], and some devised since publication of the *Handbook;* however, other practices developed in use of the *Handbook* are no longer recommended.[3]

[3] E.g., the use of general stay orders unaccompanied by a schedule for the early commencement and completion of discovery; *or the staying of discovery until the issues are formed.*" (p. 6) (Emphasis added.)

The MANUAL's recommendation as to priority of discovery is clear:

> "In the interests of fairness and efficiency, and in the absence of rare and exceptional circumstances, all parties should proceed simultaneously with discovery in the separate stages, namely the first wave, second wave and special issue discovery. Any other course will ordinarily prolong the discovery processes and may prejudice the party first to make discovery or the party whose discovery is deferred." (§ 0.5, p. 14)

It adds:

> *"The essence of the program suggested herein is the exercise of judicial control over complex litigation plus a positive plan for discovery and pretrial preparation.*
>
> • • • • •
>
> "The trial court has the undoubted power and inescapable duty to control the processing of a case from the time it is filed. In the complex case the court must assume an active role in managing all steps of the proceedings. Firm control must be exercised over a complex case from the time of its filing to its disposition." (§ 1.1, p. 16) (Footnote omitted; emphasis in original.)

Beginning on September 6, 1961 with the first of more than 19 pretrial hearings before him (A-2078 *et seq.*) Judge Metzner continuously exercised the firm control that the MANUAL recommends. See the review of the discovery proceedings at pp. 16-29 *supra*.

By February 7, 1962 Judge Metzner had considered and ruled with respect to substantially all of the matters that the MANUAL now suggests be dealt with at the second and third of the principal pretrial conferences which it recommends (*see* § 2.0 *et seq.*, § 3.0 *et seq.*). Documentary production by TWA was complete and a date for production by Toolco had been fixed. Toolco's deposition of TWA's

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president was in progress and a schedule set for the remainder of Toolco's depositions, subject to modification by a special master who was to supervise all discovery. TWA's deposition discovery was to commence on April 23 with the examination of Hughes. The only variation from the MANUAL's recommendations was the sequence and timing of discovery scheduled. In the MANUAL's view:

> "Prolonging time required for the pretrial processes by requiring or permitting one party to conduct or complete discovery before another party begins, should be avoided whenever possible." (§ 2.2, p. 30.1)

Judge Metzner instead followed the practice that then obtained in the Southern District, and permitted Toolco to retain for the time being priority of deposition discovery—an exercise of discretion that defendants would now raise to the level of an immutable right.

It was the plaintiff, TWA, and not defendants, whose case suffered from lack of the simultaneous or concurrent discovery now contemplated in the MANUAL and by FED.R.CIV.P.26(d). Ultimately, in January 1963, the district court was persuaded that it was time for TWA to have an opportunity to pursue its own discovery (A-122-24), a plainly proper exercise of discretion even had the much criticized, and by then discarded, rule of defendants' priority still been in effect. The district court had ruled in its July 12, 1962 pretrial order that it had "the power to vary any order heretofore entered fixing priority of deposition-discovery proceedings" should it appear that "further delay in the taking of the depositions of the defendant would be prejudicial to the plaintiff" (A-117), a ruling confirmed in its September 21, 1962 pretrial order (A-121).

Defendants apparently assert that the district court's ordinary discretion to control the course of discovery could

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not be exercised in this case because Special Master Rankin had recommended on September 15, 1962 that an elaborate program of issue definition and resolution be instituted, purportedly pursuant to FED.R.CIV.P. 16.[33]

Whether a program of the kind envisioned by the Special Master might ever be appropriate before a plaintiff has had any opportunity for discovery by deposition is at least dubious. As Professors Wright and Miller have pointed out:

> "Rule 16 and Rules 26 through 37 are aimed at a common goal—providing the parties with enough information so that they may fully prepare themselves for trial. Thus, frequently courts view Rule 16 as part of the general discovery process provided for in the rules and speak of the joint purpose to be achieved by the pretrial conference and discovery. Although this is true in a general sense, the pretrial conference should not be thought of as a substitute for discovery. Each of these aspects of the litigation

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[33] In the Special Master's view, all discovery should have ceased immediately in favor of a program under which he would be authorized "to make the following inquiries of the plaintiff and the defendants regarding the complaint and answer * * *.

> "a. A statement by counsel for plaintiff, either orally or in writing at the option of the Special Master, of each and all ultimate facts and the witness or witnesses who they expect to testify thereto, as to each paragraph of the complaint.
>
> "b. Agreements or disagreements by defendants with each of such claimed ultimate facts.
>
> "c. The same procedure to be followed as to each paragraph of the answer and later, as indicated, as to the counterclaims and the answers thereto.
>
> "d. Any proposed findings of fact that the Special Master may require from the parties, and comments on opposing parties findings." (A-2387)

And so on. Depositions were to cease pending completion of all this and to resume only after a pretrial order had been entered (A-2388). Compare the MANUAL's "Sample Pretrial Order No. 8 (Final pretrial order)" (Part II, § 4.0, pp. 177-78), recommended for entry by the court *after* all pretrial discovery has been completed as the last step in making the case ready for trial.

> cycle is designed to achieve a somewhat different objective and should be pursued with that in mind. Indeed, the success of the pretrial conference often depends upon the parties having completed their discovery proceedings beforehand." (6 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 1528, p. 615 (1971)) (Footnotes omitted.)

Other commentators are in accord.[34]

But even if the district court had the power to direct the Special Master to proceed in this fashion, it certainly had discretion to deny Toolco's application that it do so immediately, the denial being "without prejudice to a renewal 30 days after the completion of the deposition of Howard R. Hughes" (A-124), and based on the court's determination that Hughes's deposition would "facilitate an intelligent ruling upon Toolco's application pursuant to Rule 16 of the Federal Rules of Civil Procedure" and "advance

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[34] The relationship between adequate discovery and issue-limiting pretrial procedures is well recognized. Discussing the New Jersey state practice, Mr. Justice Brennan said in 1956:

> "It is our conviction, justified by experience, that the full benefit of pretrial conference procedure will not be realized unless each litigant is afforded in advance of the conference the fullest possible opportunity to find out all he can as to his own and his adversary's case." W. Brennan, *Pretrial Procedure in New Jersey—A Demonstration*, 28 N.Y.S. BAR BULL. 442, 445 (1956).

In a symposium held in 1951 on "The Practical Operation of Federal Discovery," United States District Judge Bard of the Eastern District of Pennsylvania said:

> "Pre-trials are valueless unless there has been liberal use of discovery, or unless there has been a free voluntary exchange of information which is frequently given now because of the discovery provisions in the federal rules. In other words, the discovery procedure has induced pre-trials and made pre-trials effective." (12 F.R.D. 131, 153)

Professor MOORE'S FEDERAL PRACTICE RULES PAMPHLET (1971) says at p. 641:

> "The deposition and discovery rules are particularly helpful in obtaining factual data as a basis in moving for and opposing

materially the date when the court could meaningfully entertain the various motions which Mr. Davis has indicated he would like to press for a dismissal of the complaint and for summary judgment"(A-123).[35]

As defendants say in concluding their argument on this subject, this case has occupied an immense amount of time in the federal courts for eleven years. They assert that the

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motions for summary judgment. * * * And in affording the parties and the court with a knowledge of the case *so that pre-trial Rule 16 may function properly*." (Emphasis added.)

See also J. Wright, *Pre-Trial on Trial*, 14 LA. L. REV. 391, 399-400 (1954) ("Much of the benefit from pre-trial is impossible without discovery").

[35] In his January 10 pretrial order Judge Metzner also pointed out that the Hughes deposition would facilitate an intelligent ruling upon "the sufficiency of TWA's compliance with [Toolco's] interrogatories" (A-123) and directed TWA to answer those interrogatories "within 60 days after the completion by TWA of its deposition of Howard R. Hughes" (A-126). Decisions deferring interrogatory answers pending discovery by the answering litigant, or the completion of other proceedings, are a common illustration of the exercise of discretion by a district court in supervising discovery. *Berkley* v. *Newman Realty Co.*, 33 F.R.D. 516, 517 (W. D. Mo. 1963); *United States* v. *Owens-Illinois Glass Co.*, 25 FED. RULES SERV. 33.31, Case 1 (N.D. Ohio 1957); *cf. Babcock & Wilcox Co.* v. *North Carolina Pulp Co.*, 25 F. Supp. 596, 598 (D. Del. 1938). FED.R. CIV.P. 33(b) was amended effective July 1, 1970 to provide expressly for such deferral:

> "An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed * * *."

The amendments are commented on in 8 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 2167, pp. 505-06 (1970). The authors in that passage point out that if an interrogatory were "submitted early in the litigation, before plaintiff had had a chance to find out what the facts were, it would be unfair to eliminate plaintiff's chance of establishing [the acts which the interrogatory required him to specify] until he had had an opportunity to ascertain if there were any such act." (*Id.* at 505)

fault lies in "the failure of the District Court to follow sound principles on the proper management of discovery and pretrial proceedings in complex litigation" (Def. br. p. 42).

Precisely the opposite conclusion as to where the fault lay was reached by the court of appeals. In 1964 it described defendants' conduct as serving "only to frustrate the implementation of the discovery machinery devised by the federal judiciary to expedite the handling of such complex litigation" (332 F.2d at 615, A-352). After a second review of the record, another panel of the court said in 1971 that its prior holding was "manifestly correct" (449 F.2d at 61, A-2754). As to Judge Metzner's conduct of the pretrial hearings, his orders "were not only within [his] discretion but quite obviously correct" (*ibid.*, A-7552).

II

The entry of the default judgment and the effect given to it by the Special Master and the courts below were both proper and necessary; no due process question is presented

The effect given to the default judgment in this case did not turn upon abstract legal theories or hypothetical circumstances. What happened below is a matter of record, and the findings of the Special Master and the two lower courts can only be overturned if they are without record support.

Yet, defendants' attack on the findings of the Special Master depends entirely upon their assertion of matters *dehors* the record which they claim to be undisputed. As the following table shows, defendants' principal list of purported "facts * * * never in dispute" (Def. br. pp. 18-20) is for the most part identical with specific objections they

made to the findings of the Brownell Report—objections that the district court expressly rejected:

"Facts" asserted in defendants' 1972 brief	Defendants' 1968 objections to Brownell Report	District court's rejection of objections in 1969
par. (a) (Def. br. p. 18)	Part I, No. 4 (A-1968)	308 F. Supp. at 686 (A-2037-38)
par. (b) (Def. br. p. 19)	Part I, Nos. 4 (c) (ii), 6 7, (A-1969-70, A-1973-74)	308 F. Supp. at 686-87 (A-2037-38)
	Part II, Nos. 2, 8 (A-1984, A-1985-86)	308 F. Supp. at 688 (A-2040)
par. (c) (*ibid.*)	Part I, No. 4 (c) (iii) (A-1970)	308 F. Supp. at 686 (A-2037-38)
	Part II, No. 2 (A-1984)	308 F. Supp. at 688 (A-2040)
par. (d) (*ibid.*)	Part I, Nos. 4 (c) (v) (vi) (A-1971-72)	308 F. Supp. at 686 (A-2037-38)
	Part II, Nos. 26, 27 (A-1990)	308 F. Supp. at 688-89 (A-2042)
par. (e) (Def. br. pp. 19-20)	Part I, Nos. 4 (c) (v) (vi) (A-1971-72)	308 F. Supp. at 686 (A-2037-38)
	Part II, No. 33 (A-1992)	308 F. Supp. at 689 (A-2042)
par. (f) (Def. br. p. 20)	Part I, Nos. 9, 13 (A-1975-76, A-1977)	308 F. Supp. at 686-87 (A-2037-38)
	Part III, Nos. 1, 2 (A-2004-05)	308 F. Supp. at 689 (A-2043-44)
par. (g) (*ibid.*)	*cf.* Part II, Nos. 60, 64, 73 (A-1998, A-1999, A-2000)	308 F. Supp. at 689 (A-2043)

Defendants also ignore the finding of each of the courts below that Hughes was the essential witness in this case

(32 F.R.D. at 607, A-320-21; 332 F.2d at 615, A-352; 449 F.2d at 61-62, A-2754-55). When the time came for TWA to depose him, Toolco refused to permit that deposition to occur although it had undertaken to produce Hughes for his deposition whenever it was to be held (A-271-74). That refusal was the result of a "business decision" not to participate further in pretrial or trial proceedings (A-268-69, A-280). Pursuant to that business decision, Toolco also refused to obey two other court orders requiring it to produce two separate categories of documents (A-304-06).

The discovery orders that defendants disobeyed were lawful, proper orders and the refusal to obey them was wilful and deliberate (32 F.R.D. at 607, A-320-21; 332 F.2d at 614-15, A-351-54; 449 F.2d at 61-62, A-2754-55). Since their refusal to proceed blocked discovery as to every issue in the case, the entry of a default judgment against defendants was inevitable.

A. Entry of the default judgment was proper and necessary in light of defendants' refusal to proceed

In its 1971 decision the court of appeals held that its prior decision dismissing the counterclaims because of Toolco's refusal to make discovery was not judicially binding as to like issues on the present appeal; it therefore found it necessary to re-examine on the merits those questions and the record of pretrial proceedings. It reached the same conclusions as the previous panel. Whether the principles of judicial finality are applied[36] or the merits re-examined, the end result is the same.

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[36] We have briefed in this Point and in Point I *supra*, as if they were new questions, the propriety of the discovery orders, defendants' claimed right to make a "business decision" not to obey them, and the correctness of the district court's conclusion that defendants'

Defendants' refusal on February 8, 1963 to make further discovery was total, and the evidence withheld was essential and went to every aspect of the litigation (32 F.R.D. at 607, A-320-21; 332 F.2d at 614, A-351; 308 F. Supp. at 683, A-2031; 449 F.2d at 62, A-2756). Such a refusal compelled the entry of a default judgment against defendants with all that that entails. Otherwise TWA would be deprived not just of its right to full and fair discovery under the Federal Rules of Civil Procedure but of its due process right to have its claims for relief heard and determined in the federal courts in accordance with established principles of law governing like cases. In this case, as in *Norman* v. *Young*, 422 F.2d 470, 474 (10th Cir. 1970), "[t]he entry of default judgment was not vindictive but was compelled by defendants' conduct, in order to protect the statutorily-created right of discovery and the constitutionally-guarded due process rights of plaintiff." *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322, 350-51 (1909), states the same principle. On the record before him, Judge Metzner had no alternative to entry of a default judgment. *See Norman* v. *Young, supra*; *Jones* v. *Uris Sales Corp.*, 373 F.2d 644, 647-

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refusal of discovery compelled the entry of the default judgment against them. Those issues, however, were fully adjudicated in the court of appeals' final (not interlocutory) judgment in 1964. That judgment affirmed the dismissal with prejudice of Toolco's counterclaims against TWA and others, and a writ of certiorari with respect to it (No. 501, October Term, 1964) was dismissed by this Court on March 8, 1965 as having been improvidently granted (380 U.S. 249, A-2738). All of the elements calling for application of established doctrines of judicial finality are here met and defendants should consequently be precluded from re-litigating any of them. *Cromwell* v. *County of Sac*, 94 U.S. 351, 353 (1876); *Zdanok* v. *Glidden Co.*, 327 F.2d 944, 955 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964); *Bernhard* v. *Bank of America*, 19 Cal.2d 807, 122 P.2d 892, 894-95 (1942) (Traynor, J.). This Court has consistently applied broad principles of judicial finality. *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 328-30 (1971); *Durfee* v. *Duke*, 375 U.S. 106, 113-14 (1963); *Angel* v. *Bullington*, 330 U.S. 183, 192-93 (1947).

48 (2d Cir. 1967); *Pioche Mines Consolidated, Inc.* v. *Dolman,* 333 F.2d 257, 269 (9th Cir. 1964), *cert. denied,* 380 U.S. 956 (1965); *Fong* v. *United States,* 300 F.2d 400, 407-08 (9th Cir.), *cert. denied,* 370 U.S. 938 (1962); *Michigan Window Cleaning Co.* v. *Martino,* 173 F.2d 466, 468 (6th Cir. 1949).

Without provision for sanctions appropriate to the circumstances of the individual case, the entire discovery process, which is the key to the effective functioning of the Federal Rules, would founder. As the court stated in *Diaz* v. *Southern Drilling Corp.,* 427 F.2d 1118, 1126 (5th Cir.), *cert. denied sub nom. Trefina, A.G.* v. *United States,* 400 U.S. 878 (1970):

> "Professor Wright observes that '[w]ithout adequate sanctions, the procedure for discovery would be ineffectual. Under Rule 37 a party who seeks to evade or thwart a full and candid discovery incurs the risk of serious consequences. • • •' C. Wright, Federal Courts § 90 (1963). While it is true that the courts should impose sanctions no more drastic than those actually required to protect the rights of other parties, the language of Rule 37(d) makes clear that the application of sanctions is entrusted to the discretion of the trial judge, and overleniency is to be avoided where it results in inadequate protection of discovery. *See* C. Wright, *supra,* at 346 & n. 14."

The private antitrust plaintiff's dependence upon discovery to develop the evidence he needs to prove his case is well recognized. This Court had reference to that when it warned in *Poller* v. *Columbia Broadcasting System, Inc.,* 368 U.S. 464, 473 (1962), that

> "• • • summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that

> their credibility and the weight to be given their testimony can be appraised."[37]

See also Fortner Enterprises, Inc. v. *United States Steel Corp.*, 394 U.S. 495, 499-500 (1969); *Norfolk Monument Co.* v. *Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 704 (1969); *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 290-99 (1968) (discussed at pp. 78-79 *supra*).

In this case TWA's need for discovery was especially acute, as the court of appeals pointed out:

> "Even if we are not bound in a strict legal sense by the previous ruling that Hughes's deposition was essential to TWA's claim, that holding was manifestly correct. As will be seen, many of TWA's asserted charges relied on interpretations of intent and of the significance of ambiguous projects quickly aborted, and of possible explanatory actions taken by Toolco that may or may not have been relevant to TWA's several antitrust theories. The reality behind the charges could hardly be tested without the testimony of the one man who personally directed Toolco's activities throughout the relevant period and whose singular penchant for secrecy was, after two years of frustrating delay in the conduct of the litigation, well known to the Master and the trial court." (449 F.2d at 61, A-2754)

Under FED. R. CIV. P. 37, the ultimate sanction available when a defendant refuses to submit to lawful discovery is entry of a default judgment against him. As the Advisory

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[37] Defendants assert that, in their "view" of the case, "it was not one in which it would have been necessary to probe motive or intent" (Def. br. p. 39). Their view on this point is relevant at all only if they mean that, for the purpose of testing their "legal position," they were willing to assume that TWA's factual allegations as to the motive and intent with which the acts alleged in the complaint were performed were in all respects true. That assumption defendants could only be willing to make because they either *knew* that they were true, or *hoped* it made no difference—or both.

Committee pointed out when the Federal Rules were first adopted (Original Advisory Committee Note to Rule 37 (March 1938), 28 U.S.C., p. 7799), that sanction is grounded upon the presumption recognized by this Court in *Hammond Packing Co.* v. *Arkansas,* 212 U.S. 322 (1909). The law attaches to a wilful refusal to produce evidence a presumption that the party who has refused to submit to discovery did so knowing that the resulting disclosure of the facts would destroy his case.[38]

The facts in *Hammond* were remarkably like those here. An Arkansas statute barred any corporation, domestic or foreign, from continuing to do business in that state if, *inter alia,* it participated in any scheme to regulate or fix prices or to engage in certain other specified anticompetitive conduct "in this State or elsewhere" (212 U.S. at 332n. 1). Arkansas brought an action against Hammond seeking forfeiture of its permit to do business in that state and money penalties, alleging that Hammond was doing business in Arkansas and at the same time had participated in "a pool or trust, agreement, combination or understanding * * * to regulate the prices of slaughtered livestock and to maintain such prices as so regulated and fixed" (212 U.S. at 334).

After its motion to have the complaint made more specific was denied and its demurrer was overruled, Hammond filed a general denial and asserted various specific defenses under the Constitution. Hammond requested that depositions of its officials outside Arkansas be taken upon written interrogatories; its request was denied. A commissioner was appointed to take testimony of some 16 Hammond officials in Chicago and to oversee the production and examination of books and papers. Hammond interposed various

[38]That presumption is especially compelling here where defendants' refusal is announced as a calculated "business decision" that they risked more by submitting to discovery than by disobeying the district court's orders and suffering a default.

motions.[39] Finally, an order was entered by the Arkansas trial court directing Hammond to have the named witnesses present for examination and to produce the books referred to.

> "The Hammond Company, through its attorneys, declined to comply and stated, in writing, that it could not concede the power of the court to make the order which it had made, and that 'on the contrary it was of the opinion that the request calls upon it [the Hammond Company] to surrender rights in which it is protected by the Constitution of the United States and of the State of Arkansas that are too valuable to be surrendered.'" (212 U.S. at 339)

The state moved to strike Hammond's pleadings and for entry of a default judgment against it. The motion was granted, a judgment for penalties was entered, and the state supreme court affirmed. Upon appeal, this Court first upheld the constitutionality of the statute, and then turned to Hammond's argument that entry of the default judgment was a denial of due process under *Hovey* v. *Elliott*, 167 U.S. 409 (1897). The Court rejected that argument:

> "*Hovey* v. *Elliott* involved a denial of all right to defend as a mere punishment. This case presents a failure by the defendant to produce what we must assume was material evidence in its possession and a resulting striking out of an answer and a default. The proceeding here taken may therefore find its sanction in the undoubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer begotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of

[39] *E.g.*, a motion that Arkansas "set out specifically what she expects to prove by each witness she desires produced, and also to set out specifically a particular description of any books she desires produced by any of said witnesses, together with the name of the witness who is to produce them, and that she be required to specifically state wherein any of said books so named are material to the issues in the case" (212 U.S. at 337-38).

the cause. In a sense, of course, the striking out of the answer and default was a punishment, but it was only remotely so, as the generating source of the power was the right to create a presumption flowing from the failure to produce. The difference between mere punishment, as illustrated in *Hovey* v. *Elliott*, and the power exerted in this, is as follows: In the former due process of law was denied by the refusal to hear. In this the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense. *The want of power in the one case and its existence in the other are essential to due process, to preserve in the one and to apply and enforce in the other.*" (212 U.S. at 350-51) (Emphasis added.)

In *Societe Internationale* v. *Rogers*, 357 U.S. 197, 209-10 (1958), this Court recognized that *Hammond* provides the constitutional foundation for FED.R.CIV.P. 37. In *Societe* the Court held that a failure to satisfy fully the requirements of an order to produce documents should not be construed to authorize dismissal of a complaint where the failure to comply was "due to inability, and not to wilfullness, bad faith or any fault" of the party who failed to produce the documents (357 U.S. at 212). Implicit in that decision, however, is a determination that it is constitutionally permissible to impose a sanction that deprives a disobedient party of the right to prosecute or defend on the merits when he wilfully and deliberately refuses to obey a lawful discovery order. In No. 501, October Term, 1964, Toolco's appeal from the dismissal with prejudice of its counterclaims presented this precise question on the circumstances of this case, and this Court dismissed certiorari.[40]

[40] TWA as a counterclaim defendant was a party to that proceeding and entitled to its benefits. See discussion at pp. 91-92n. 36 *supra* as to whether principles of collateral estoppel (or perhaps as to this point, "law of the case") should preclude reargument of such issues.

Defendants' "business decision" to default went beyond their refusal to produce Hughes and to obey outstanding orders to produce documents. Their decision was "not to proceed," to "rest on the merits" of positions previously taken, allegedly to "avoid the burdens and expenses involved in further pre-trial and trial proceedings" (A-268-69, A-274-75). TWA was to have no more discovery, whatever further orders the trial court might enter. The Notice of Position, as explained at the February 8, 1963 hearing, was not merely a refusal to make lawful discovery: it was a declaration of default.[41]

[41] On these facts, cases like *Feingold* v. *Walworth Bros., Inc.*, 238 N.Y. 446, 144 N.E. 675 (1924) and *Mitchell* v. *Watson*, 58 Wash.2d 206, 361 P.2d 744 (1961), cited at p. 49 of defendants' brief, are irrelevant. Defendants here did not simply disobey an order to produce evidence going to one of several issues: their election was to bar *all* discovery about every aspect of the case; they "refused to proceed further." In *Feingold* a preclusive order establishing the value of the securities at the maximum value contended for by plaintiff was obviously adequate to protect plaintiff's right to have its claim determined when the evidence withheld related solely to such value; the other pleaded defenses, which included the affirmative defenses of accord and satisfaction and general release under seal, were unaffected and should not have been stricken (see Certified Question Number 3 and answer of the court thereto, 238 N.Y. at 447-48, 456, 144 N.E. at 676, 678), and the order should have been confined to the corporate defendants since only they had violated the production order. In *Mitchell* the existence or identity of the purported informer was not necessarily dispositive of, for example, such a defense as truth of the statements complained of; the court, however, specifically directed that upon remand the trial court would be "free to reject any and all evidence of mitigation of damages or other proffered defenses which are relevant to or have any reasonable connection with the existence of the alleged informer," if the trial court indulged the presumption that the informer did not exist (361 P.2d at 750-51) (emphasis omitted).

People v. *George Henriques & Co.*, 267 N.Y. 398, 196 N.E. 304 (1935), is even further removed from the facts of this case. There the documents at issue had apparently been wilfully destroyed (evidencing a "consciousness of guilt"), but the destruction may well have preceded the order for their production, and the complaint was filed *after* the order had been disobeyed. The court's conclusion was that such disobedience of a production order before the action was commenced could not justify denial of a hearing upon charges subsequently formulated in the complaint (267 N.Y. at 406, 196 N.E. at 307).

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In this respect, what defendants elected to do cannot be distinguished from what the defendants did in *Bettcher* v. *State,* 140 Colo. 428, 344 P.2d 969 (1959). The defendants in that case, who had appeared and answered, filed a motion to dismiss at the beginning of trial. When their motion was denied, defendants there, like Toolco here, "elected to stand on [their] motion to dismiss" and declined to participate further (344 P.2d at 971). The Colorado Supreme Court affirmed the trial court's entry of a default judgment, stating that "[i]n its broadest modern sense a judgment goes by default whenever between the commencement of a suit and its anticipated decision in court, either of the parties omit or refuse to pursue, in the regular method, the ordinary measures of prosecution or defense" (*ibid.*). As to the effect of that default judgment, the court said:

> "A judgment so rendered 'is a conclusive adjudication as to the matters and allegations properly averred in the complaint,' Massachusetts Bonding & Ins. Co. v. Central Finance Corp., 124 Colo. 379, 237 P.2d 1079, 1081. It determines the plaintiff's right to recover and defendant's liability for the claim alleged, and 'cuts off the defendant from making any further opposition or objection to the relief which plaintiff's complaint shows he is entitled to demand.' Unless set aside, it precludes urging anything contrary to the complaint. Title Ins. & Trust Co. v. King Land, etc., Co., 162 Cal. 44, 120 P. 1066, 1067. See 49 C.J.S. Judgments § 200, p. 356, and 34 C.J. § 385, p. 172.
>
> "[Defendants], by asserting that the complaint failed to state a claim, raised an issue of law. By standing on such issue, they forewent issues of fact. When they advised the trial court that they would stand on such issue of law, and would make no contest of 'anything else,' they, in effect, precluded themselves from setting up any other matters which they might have urged in defense of the suit." (*Ibid.*)

Since defendants here, like those in *Bettcher*, have refused to pursue the "ordinary measures of • • • defense,"

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and have deprived TWA of any deposition discovery, thus denying it the ordinary measures of prosecuting its case, no lesser sanction than entry of a default judgment could have protected TWA's right to a determination of its claims. The court of appeals held in 1971 that "[t]he entry of the default judgment was inescapable and virtually invited" (449 F.2d at 63, A-2757), and defendants do not here suggest that the district court should have employed a different sanction. Nor did they—ever—make a timely application that the judgment be set aside (pp. 38-39 *supra*). Instead, they would deprive TWA of a determination of its claims by an alternative device—by obtaining from this Court a limitation upon the effect to be given a default judgment that would rob that sanction of meaning.

B. The default judgment established that defendants' antitrust violations alleged in the complaint injured TWA

The proper effect to be given to a default judgment has been well understood at least since this Court's decision in *Thomson* v. *Wooster*, 114 U.S. 104 (1885), as defendants —albeit grudgingly—concede (Def. br. p. 42).

Plaintiff in *Thomson* v. *Wooster* had sued for infringement of a patent, originally granted in 1858 and reissued in 1872. Defendants appeared but failed to answer, and a decree *pro confesso* was entered declaring, as the bill alleged, that the patent was valid and that defendants were infringing and must account for their profits and damages. The case was referred to a master whose award was confirmed in part by the court below. Defendants appealed, asserting that the reissued patent was invalid because it was for an invention other than that covered by the original patent and because an excessive amount of time had elapsed between the original issue and the reissue. This Court rejected these arguments.

> "The defendants are concluded by that decree, so far at least as it is supported by the allegations of

the bill, taking the same to be true. Being carefully based on these allegations, and not extending beyond them, it cannot now be questioned by the defendants unless it is shown to be erroneous by other statements contained in the bill itself. A confession of facts properly pleaded dispenses with proof of those facts, and is as effective for the purposes of the suit as if the facts were proved; and a decree *pro confesso* regards the statements of the bill as confessed." (114 U.S. at 110)

* * * * *

"* * * The attempt, on the hearing before the master, to show that the reissued patent was for a different invention from that described in the original patent, or to show that there was such unreasonable delay in applying for it as to render it void under the recent decisions of this court, was entirely inadmissible because repugnant to the decree. The defendants could not be allowed to question the validity of the patent which the decree had declared valid. The fact that the reissue was applied for and granted fourteen years after the date of the original patent would, undoubtedly, had the cause been defended and the validity of the reissued patent been controverted, been strongly presumptive of unreasonable delay; but it might possibly have been explained, and the court could not say as matter of law, and certainly, under the decree of the court, the master could not say, that it was insusceptible of explanation." (114 U.S. at 114)

The Court next considered defendants' argument that a showing of either invalidity or inoperativeness of the original patent was a condition precedent to reissuing it and that neither condition could exist since the bill of complaint itself alleged that successful infringement suits had been brought on the original patent.

"The answer to this assignment is obvious. The suits brought on the original patent may have been for infringements committed against particular parts of the invention, or modes of using it and putting

> it into operation, as to which the specification was clear, full and sufficient; whilst, at the same time, there may have been certain other parts of the invention, or modes of using it and putting it into operation, as to which the specification was defective or insufficient, and which were not noticed until the application for reissue was made; or, in the original patent the patentee may have claimed as his own invention more than he had a right to claim as new—a mistake which might be corrected at any time. At all events, the court cannot say, as mere matter of law, that this might not have been the case." (114 U.S. at 115)

The rule laid down in *Thomson* v. *Wooster* that a default judgment admits the well-pleaded allegations of the complaint is applied by the vast majority of state courts.[42]

[42] *See, e.g., Gibson* v. *Elba Exchange Bank*, 266 Ala. 426, 96 So. 2d 756, 759 (1957); *Postal Benefit Ins. Co.* v. *Johnson*, 64 Ariz. 25, 165 P.2d 173, 178 (1946); *Beall* v. *Munson*, 204 Cal. App. 2d 396, 22 Cal. Rptr. 333, 336 (1st Dist. 1962); *Bettcher* v. *State*, 140 Colo. 428, 344 P.2d 969, 971 (1959); *Austin Burke, Inc.* v. *Vigilant Ins. Co.*, 179 So.2d 600, 602 (Fla. App. 1965); *House* v. *Hewett Studios, Inc.*, 125 Ga. App. 127, 186 S.E.2d 584, 585 (1971); *Second National Bank of Robinson* v. *Scudder*, 212 Ind. 283, 6 N.E.2d 955, 958 (1937); *Hallett Construction Co.* v. *Iowa State Highway Comm'n*, 261 Iowa 290, 154 N.W.2d 71, 74 (1967); *Becker* v. *Roothe*, 184 Kan. 830, 339 P.2d 292, 295 (1959); *Boucher* v. *Paradis*, 244 A.2d 69, 70-71 (Me. 1968); *Millison* v. *Ades of Lexington, Inc.*, 262 Md. 319, 277 A.2d 579, 584 (1971); *Cosmopolitan Trust Co.* v. *Golub*, 252 Mass. 574, 147 N.E. 847 (1925); *Haller* v. *Walczak*, 347 Mich. 292, 79 N.W.2d 622, 625-26 (1956); *Rice* v. *Kuckenbecker*, 170 Minn. 110, 212 N.W. 23, 24 (1927); *Putney* v. *Du Bois Co.*, 240 Mo. App. 1075, 226 S.W.2d 737, 740 (1950); *Scheumann* v. *Prudential Ins. Co. of America*, 146 Neb. 173, 19 N.W.2d 48, 50 (1945); *Ealy* v. *McGahen*, 37 N.M. 246, 21 P.2d 84, 89-90 (1933); *Monson* v. *Nelson*, 145 N.W.2d 892, 896 (N.D. 1966); *State ex rel. Nilsen* v. *Cushing*, 253 Ore. 262, 453 P.2d 945, 947 (1969); *Fudim* v. *Kane*, 48 R.I. 155, 136 A. 306, 307 (1927); *Adkisson* v. *Huffman*, 469 S.W.2d 368, 375 (Tenn. 1971); *Sagebiel's Inc.* v. *Sumrall*, 358 S.W.2d 251, 252 (Tex. Civ. Ct. App. 1962), *writ ref., n.r.e.*; *Bonazzi* v. *Fortney*, 94 Vt. 263, 110 A. 439, 441 (1920); *Funkhouser* v. *Million*, 209 Va. 89, 161 S.E.2d 725, 729 (1968); *Johanson* v. *United Truck Lines*, 62 Wash.2d 437, 383 P.2d 512, 516n.6 (1963); *McGinnis* v. *Beatty*, 28 Wyo. 328, 204 P. 340, 343 (1922); *Taylor* v. *Johnson*, 262 A.2d 803, 804 (D.C.Ct. App.

Abandonment of it would constitute a fundamental change in American jurisprudence—a change peculiarly unwarranted where the default judgment has resulted from a wilful and deliberate refusal to submit to lawful discovery.

That the rule is as applicable to a default for refusal to comply with lawful discovery orders as it is to a default entered for failure to appear or answer is clear. *See, e.g., Fong* v. *United States,* 300 F.2d 400, 409 (9th Cir.), *cert. denied,* 370 U.S. 938 (1962); *Sarlie* v. *E. L. Bruce Co.,* 265 F. Supp. 371, 374 (S.D.N.Y. 1967); *Aljassim* v. *S.S. South Star,* 323 F. Supp. 918, 922 (S.D.N.Y. 1971). Indeed, if defendant has appeared and incurred the default judgment of his own choice and with eyes open, questions that might otherwise justify inquiry do not even arise.

If a default judgment is entered for failure to appear, there might be, for example, a disturbing possibility that the defendant's failure was not the result of a meaningful decision by him. Perhaps he was unaware of the consequences of his failure to act, or had failed to secure legal advice, or was badly represented; as a practical matter, he may not even have been adequately informed that suit had been instituted. *See Abuse of Process: Sewer Service,* 3 COLUM. J. L. & SOC. PROB. 17 (1967). Although a default judgment can be set aside upon a proper showing in such

1970). *See generally* 49 C.J.S. *Judgments* § 201 (1947); 47 AM. JUR.2d *Judgments* § 1194 (1969). Four states appear to apply a minority rule that permits the trial court in its discretion to require proof of some or all of plaintiff's allegations. *Metric Investment, Inc.* v. *Patterson,* 98 N.J.Super. 130, 236 A.2d 187, 188-89 (1967), *aff'd,* 101 N.J. Super. 301, 244 A.2d 311 (App. Div. 1968)) *but see Douglas* v. *Harris,* 35 N.J. 270, 173 A.2d 1, 8 (1961)); *State Automobile Mutual Ins. Co.* v. *Leist,* 24 Ohio Op. 2d 7, 192 N.E.2d 512, 515 (1962); *Sibley* v. *Weinberg,* 116 Wis. 1, 92 N.W. 427, 429 (1902); ILL. ANN. STAT. ch. 110, § 50(4) (Smith-Hurd 1968).

Only Louisiana requires proof of liability in all cases after a default is entered for failure to plead. 8 A.L.R.3d 1070 § 6 (1966). The unique Connecticut rule that permits a defaulting defendant in negligence cases to contest liability is discussed at p. 199 ***infra; but*** *see Culetsu* v. *Dix,* 149 Conn. 456, 181 A.2d 116, 117 (1962).

circumstances, the defaulting defendant might be no better equipped to secure relief from an improperly entered default judgment than he was to avoid its original entry. *See United States* v. *Wiseman,* 445 F.2d 792, 797 (2d Cir.), *cert. denied,* 404 U.S. 967 (1971). Special care in enforcing such a default judgment might well be justified.

No such considerations which might suggest giving a default judgment less than its customary effect apply to this default. Toolco was and is an extremely rich and powerful corporation, advised at all times by the ablest of lawyers. Its "business decision" to refuse to obey lawful discovery orders was wilful, deliberate and calculated—made in what Toolco believed was its and Hughes's economic interest. Neither ineptitude nor a lawyer's mistake played the slightest part in the very sophisticated calculation involved. Contrast *Link* v. *Wabash R.R.,* 370 U.S. 626, 648 (1962) (dissenting opinion).

Defendants seek to avoid the effect of their default by a demonstration of scholarly ingenuity—dependent, however, upon misread cases and long-rejected theories of code pleading. Citing *Pope* v. *United States,* 323 U.S. 1, 12 (1944), defendants contend:

> "Even after a default, it remains for the court to consider whether 'the unchallenged facts shown of record establish a legally binding obligation; it adjudicates the plaintiff's right of recovery and the extent of it, both of which are essential elements of the judgment.' " (Def. br. p. 46)

The quotation is drawn out of a most unusual context. That case involved a Special Act of Congress (February 27, 1942, 56 STAT. 1122) that directed the Court of Claims to compute the amount of a petitioner's claim upon the basis of certain data set out in the Act and to give judgment in the amount computed, even though the Court of Claims had rejected the same claim in an earlier suit. The

court declined to do so, asserting that the Act was an unconstitutional encroachment by Congress upon its judicial function. This Court reversed, pointing out, *inter alia*, that numerous judicial acts closely analogous to that required by Congress of the Court of Claims amounted to performance of a judicial function and a proper exercise of judicial power. Among these this Court included rendering judgment on consent, giving judgment on legal obligations established by stipulated facts, and fixing the amount of damages on a default judgment. With specific reference to defaults, the Court said:

> "It is a familiar practice and an exercise of judicial power for a court upon default, by taking evidence when necessary or by computation from facts of record, to fix the amount which the plaintiff is lawfully entitled to recover and to give judgment accordingly." (323 U. S. at 12)

The analogy drawn by this Court in *Pope* is used to support the propriety of rendering judgment without going behind the facts established by the Special Act; implicit in this reasoning is agreement with the rule of *Thomson* v. *Wooster* that a default conclusively establishes the truth of the well-pleaded allegations of the complaint.

As for the argument (Def. br. p. 44) that a default judgment admits only what Pomeroy would have categorized as "dry, naked, actual facts,"[43] it is rubbish.

[43] POMEROY, REMEDIES AND REMEDIAL RIGHTS 576 (2d ed. 1883). The quoted phrase is a favorite illustration of the treatise writers of the essential foolishness of the least successful aspect of the various state experiments in code pleading—the attempt to require a pleader to set forth facts and nothing else. One writer describes Pomeroy's pleading objective as "neither feasible nor desirable." 2A J. MOORE, FEDERAL PRACTICE ¶ 8.12, p. 1684 (2d ed. 1968). Others describe the compartmentalization Pomeroy championed as a "chimera." 5 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 1218, p. 133 (1969). Not only is Pomeroy's misguided phrase not a statement of the "rigorous rule" upon which defendants' argument depends (Def. br. p. 44), the truth is that, "as

Under prevailing procedure standards of the 19th century laid down in the controlling federal cases, on a default —as on a demurrer or on a motion to dismiss for failure to state a claim today—a legal theory would not be admitted. Hence, a default would also not admit a conclusion, derived from such a legal theory, that specific allegations resulted in liability. *Cragin* v. *Lovell,* 109 U.S. 194 (1883), stands for that and no more. The question before the Court, as the summarized argument of counsel makes plain, was one of law: whether a principal, having secured the benefit of an agent's actions, is liable on the agent's notes, there being no allegation of any promise by the defendant to the plaintiff. The "conclusion of law" which could not supply the critical missing allegation was solely a terminal allegation of liability, expressly predicated on the other allegations of the petition.

We believe that there is no case—certainly defendants have cited none—that holds allegations of motive and specific intent to restrain trade and monopolize a substantial part of a described market, of conspiracy with others for such purposes, or of actual injury to commerce resulting from such conduct, to be "conclusions of law" which cannot be admitted by a default. Indeed, in *United States* v. *Employing Plasterers Assn.,* 347 U.S. 186, 188 (1954), this Court expressly rejected the utilization of any such distinction between "facts" and "conclusions" in antitrust cases:

> "The complaint plainly charged several times that the effect of all these local restraints was to restrain interstate commerce. Whether these charges be called 'allegations of fact' or 'mere conclusions of the pleader,' we hold that they must be taken into account in deciding whether the Government is entitled to have its case tried."

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was amply demonstrated by years of frustrating experience [under code pleading] it was difficult, if not impossible, to draw meaningful and consistent distinctions among 'evidence,' 'facts,' and 'conclusions.'" 5 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 1218, p. 133 (1969).

FED.R.CIV.P. 9(b) expressly provides:

> "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. *Malice, intent, knowledge, and other condition of mind of a person may be averred generally.*" (Emphasis added.)

In the traditional terminology such allegations were called allegations of "ultimate fact." The cases in which this Court laid down the principles governing the effect of a default establish that this type of allegation is unquestionably admitted by a default. In *McAllister* v. *Kuhn,* 96 U. S. 87, 89 (1877), for example, this Court held that if "the declaration did not state facts sufficient to constitute a cause of action, [the default judgment] may be reversed." Since a cause of action was stated, however, the judgment was affirmed. The defendant's attempt in *McAllister* to challenge the allegation that defendant *converted* stock belonging to plaintiff was rejected:

> "If the statements contained in the petition are true, and McAllister had actually converted the stock to his own use, Kuhn was entitled to his damages. By his default, whatever had been properly pleaded was confessed. Had issue been joined upon the averment of conversion, it would have been necessary to show the existence of facts which in law constituted a conversion; but, for the purposes of pleading, the ultimate fact to be proven need only be stated. The circumstances which tend to prove the ultimate fact can be used for the purposes of evidence, but they have no place in the pleadings. We think the complaint does state all the facts necessary to constitute a cause of action." (96 U. S. at 89)

In *Thomson* v. *Wooster,* 114 U.S. 104, 105-06 (1885), the default established as true allegations of the *validity* of plaintiff's patent, *original invention* by plaintiff's assignor, and *infringement* by the defendant as well. All plainly are

ultimate facts, as the Court used the term in *McAllister*. According to defendants, *Thomson* held that a default admits "facts properly pleaded" (Def. br. p. 43). So it does; defendants are wrong, however, in seeking to infer that *Thomson* limited the admission to facts as opposed to "conclusions of law" (used as defendants use the phrase to cover allegations of ultimate fact). The phrase "facts properly pleaded" appears but once in *Thomson* (114 U.S. at 110), and it is obvious that the Court placed no special weight upon it, since for the most part during the Court's discussion of the principles involved the phrases used are either "the statements of the bill," which are said to be "confessed," or "taken to be true," or the "allegations of the bill," which are also taken "to be true," and which "it is surely irregular to question." Such phrases, which in context clearly include ultimate facts, appear no less than eight times in the course of the opinion (114 U.S. at 110-11, 113-14). When purely verbal distinctions are put aside, the heart of the Court's ruling is apparent from the nature of the principal issue on which the defaulting defendants based their appeal, and which they were flatly forbidden to contest: the *validity* of the plaintiff's patent in light of certain facts of which defendants asked the Court to take notice.

In their petition for a writ of certiorari (p. 21) defendants here conceded that a default to a complaint alleging that "on a particular day at a particular place defendant negligently drove a motor vehicle against plaintiff, as a result of which plaintiff was thrown down and had his leg broken and other injuries," admits facts giving rise to liability (*compare* Official Form 9, FED.R.CIV.P.). They could hardly contend otherwise for there are a host of cases recognizing that *negligence* is an allegation admitted by a default judgment. *E.g., Adkisson* v. *Huffman,* 469 S.W.2d 368, 375 (Tenn. 1971); *Funkhouser* v. *Million,*

209 Va. 89, 161 S.E.2d 725, 729 (1968); *Baltimore Transit Co.* v. *Mezzanotti*, 227 Md. 8, 174 A.2d 768, 775 (1961).

The true rule is most simply stated in *Harshman* v. *Knox County*, 122 U.S. 306, 316-17 (1887), where the Court said that "[t]he averment * * * in the petition in the action, if material and traversable, was confessed by the default." The averment in question, elsewhere referred to as a "fact," was that the bonds sued on had been issued under particular statutory authority. The inquiry which the Court directs is whether the allegation is material—*i.e.*, proper to be pleaded and relevant in establishing the cause of action on which the complaint is based—and whether it is traversable—*i.e.*, an allegation which defendant (whether under 19th century pleading or 20th century pleading) must deny and be prepared to contest at trial if he is not to have it accepted as established against him. The allegation of the amount of unliquidated damages, for example, need not be traversed, and is not admitted by a default. Allegations of specific intent to restrain trade, of an attempt to monopolize a substantial segment of the market in commercial aircraft, that specified actions were done with such intent and in furtherance of such an attempt, are most certainly traversable and were here traversed (pp. 7-8 *supra*). Once denied, the truth of the allegations is at issue and, absent a default, both plaintiff and defendant are put to their proof.

Still, defendants assert that the ordinary rule does not apply in antitrust cases like this where there may be "hard questions of liability even on an admitted state of facts" (Def. br. p. 46).

The argument does not follow. The effect to be given a default judgment is not a function of the relative difficulty of determining a defendant's liability in a lawsuit—whatever that may mean. Although defaults may occur in cases

where liability is plain, they may also occur in cases where liability is not plain. *Thomson* v. *Wooster* was such a case, and even in negligence cases liability may be a "hard question." *See Adkisson* v. *Huffman* and *Funkhouser* v. *Million.*

Moreover, defendants' implication (Def. br. p. 46) that antitrust cases should be treated differently because they present difficult and complex questions is wrong in present law and unsound as a suggestion for future policy. Antitrust cases do not necessarily present difficult or complex questions once the facts are established, and patent cases, like *Thomson* v. *Wooster,* may be much more complex. Nor are antitrust plaintiffs a disfavored class of litigants upon whom specially onerous burdens of pleading and proof are to be placed. *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 139 (1968); *Radovich* v. *National Football League,* 352 U.S. 445, 454 (1957) ("• • • this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in [the antitrust] laws").

Defendants argue that the court of appeals erred by treating the default judgment as having established not only that the acts cited in the complaint injured TWA but also that they violated the antitrust laws (Def. br. p. 43). This argument is a red herring. The conclusion that the acts alleged violated the antitrust laws is, of course, not the consequence of the default by itself, but the consequence of a default coupled with, and in this case preceded by, a litigated determination that the complaint stated a claim for relief under Section 4 of the Clayton Act. It does so because it alleges with sufficient specificity and detail that defendants engaged in particular conduct in restraint of trade which injured TWA. The default judgment established all of those allegations as true and precluded defendants from contesting any of them. Only if the conduct alleged *could not* constitute a violation of the anti-

trust laws would defendants be entitled to the belated dismissal they now ask—and that would be because the complaint was legally insufficient, as in *Cragin* v. *Lovell* (p. 106 *supra*).

III

The courts below were correct in ruling that TWA should be permitted to recover the full amount of the damages to which it is legally entitled

Defendants' argument that the first sentence of FED. R.CIV.P. 54(c) precluded the district court from granting an amendment to increase the *ad damnum* clause of the complaint from $105 million to $135 million, or whatever greater amount TWA could prove, fails to apply the rule to the sequence of events which led up to the entry of an interlocutory default judgment against them on May 3, 1963; it also ignores the liberal provisions for amendment in FED.R.CIV.P. 15 and the direction in FED.R.CIV.P. 61 and 28 U.S.C. § 2111 that this Court and others shall be concerned only with "substantial rights."

A. The amendment of TWA's *ad damnum* clause was properly granted upon adequate notice prior to entry of the interlocutory default judgment

TWA cannot know just when defendants reached their decision to refuse to continue with pretrial or trial of the case. Although Toolco had repeatedly disobeyed or ignored various discovery orders of the district court and the Special Master (pp. 19-29 *supra*), it was not until the hearing before Judge Metzner at the end of the day on February 8, 1963 (A-270 *et seq.*), requested by TWA's counsel (A-270-71), that the meaning and legal effect of Toolco's unprecedented procedural device—the so-called "Notice of Position" (A-268-69) served earlier that day—

was defined.[44] At the outset of the February 8 hearing, *before* Toolco formally disclosed its intention to disobey all outstanding discovery orders and otherwise refuse to proceed with the case (A-281, A-298-99, A-304-06), TWA's counsel stated:

> "If [Toolco's Notice of Position] is an application for the withdrawal of the answer and for leave to have a default noted by the Tool Company, TWA would move for the entry of a default judgment for the relief of the complaint.
>
> "I would have an application by way of amendment on the prayer for damages because of their counterclaims, which allege that the damage to TWA was $45 million, our complaint alleged we thought it was in excess of thirty-five. Our investigation to date satisfies us that the $45 million damage figure is correct, so we would move for leave to amend the damage prayer and for a default judgment with the relief sought in the complaint, if in fact what they are proposing to your Honor is that their default in this case be noted." (A-271)

In the discussion that followed these opening remarks, Toolco's counsel made it clear that his client fully understood the risk it faced if it did not prevail on its legal position:

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[44] Defendants' "Rubicon" theory as a justification for applying Rule 54(c) to forbid amendment of the *ad damnum* after service of their Notice of Position (Def. br. pp. 59-60) clothes their private decision with an authority and finality to which it is not entitled. Since TWA did not and could not know that defendants had decided to refuse to proceed before the Notice of Position was served on it, their argument would allow a defendant, by a unilateral procedural maneuver, to cut off plaintiff's substantial right under FED.R. CIV.P. 15 and 54(c) to obtain all of the relief to which it can prove it is entitled. Such an interpretation of Rule 54(c) is clearly contrary to the express purpose of the rules as set forth in FED.R.CIV. P. 1. Nor was defendants' "business decision" irrevocable. They had repeated opportunities to withdraw from their "position" once they were put on notice that TWA intended to seek the full amount of its damages, but they chose not to do so (pp. 113-14, 116 *infra*).

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> "• • • we are fully aware—my client is fully aware—that by insisting on a right to obtain a review on the legal questions which have been decided to date • • • they may be deprived of further defending on the merits, other than on the question of damages." (A-276)

The February 8 hearing concluded with an "anticipatory default" noted against Toolco with respect to Hughes's announced non-appearance at the deposition scheduled to begin on February 11, 1963 (A-307), but there was not at that point a "judgment by default" entered against defendants.[45]

On February 16, 1963 TWA filed its formal motion seeking leave to amend the *ad damnum* clause and for an interlocutory default judgment against defendants on the complaint, with the amount of TWA's damages to be subsequently determined (A-2692-95). At a hearing on February 21, 1963 defendants were asserting, as they have so frequently since, that they could still contest TWA's claims on the merits, arguing that TWA must prove its right to any recovery at all (A-2722-25). The result of the default, defendants argued, was to give the plaintiff an opportunity to present its case. Judge Metzner commented that this argument would lead "right back to directing Mr. Hughes to appear for examination." He inquired whether defendants desired that result. The categorical answer was "No, your Honor." (A-2722)

After TWA had filed its motion to increase the amount of its prayer, defendants had a clear opportunity to re-

[45] Defendants urged this very point on *April 29, 1963* in their brief opposing entry of a default judgment against them:

> "While Toolco may be said to have 'defaulted' in producing Mr. Hughes for examination or in producing certain documents, it has not defaulted in the sense which would justify the inference of an admission of the well pleaded facts so as to permit the entry of a judgment against it." (Doc. 190, p. 7n)

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consider their "business decision," ask that the pretrial proceedings be reopened and continue with the defense of the action in normal course. They expressly refused the opportunity.

Defendants asserted then, as they do now, that the district court lost all power to grant TWA leave to amend once they had filed their Notice of Position because of FED.R.CIV.P. 54(c) (Doc. 183, pp. 2-3)—an argument which the district court considered seriously before deciding to grant TWA leave to amend (A-2711). Finally, on May 3, 1963, the district court granted both branches of TWA's motion:

> "The default was deliberate and willful and justifies the court in entering a default judgment as provided in rule 37(b)(2)(iii) and 37(d). A judgment by default shall be entered in favor of TWA against Toolco, and the counterclaims asserted by Toolco against TWA shall be dismissed with prejudice.
>
> "That branch of the motion seeking to increase the *ad damnum* clause from $105,000,000 to $135,000,000 is granted. This is not a case where a party has defaulted in appearance. Here issue was joined and adversary proceedings continued in the pretrial stages of this litigation. The damages originally asserted were unliquidated and TWA is entitled to recover for whatever damage it can show it suffered. Furthermore, Toolco will be represented at the hearings necessary to assess damages under rule 55(b)(2)." (32 F.R.D. at 607-08, A-321)

Having correctly found that FED.R.CIV.P. 54(c) presented no bar to an amendment to the original complaint when made on actual notice after issue has been joined, Judge Metzner's decision was justified by the express mandate of FED.R.CIV.P. 15(a) that "leave [to amend a pleading] shall be freely given * * *." A different result would be contrary to this Court's direction that "this mandate is to

be heeded." *Foman* v. *Davis,* 371 U.S. 178, 182 (1962). *See* 3 J. MOORE, FEDERAL PRACTICE ¶15.08 [2] (2d ed. 1968); 6 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL §§ 1471, 1473 (1971).

Therefore, even if FED.R.CIV.P. 54(c) were to be read to preclude amendment after the interlocutory default judgment is entered, the "demand for judgment" which defendants assert limits the total amount of TWA's recovery can only be that recited in TWA's *amended* prayer for relief—*i.e.*, that defendants pay to TWA $135,000,000 in treble damages, together with its cost of suit and a reasonable attorney's fee.

Defendants cite no authority to the contrary.[46] Despite defendants' asserted mystification (Def. br. p. 53) the district court quite correctly referred to Rule 54(c) once it had exercised its discretion under Rule 15(a) to permit amendment of TWA's *ad damnum* clause.[47] *Cf.* 6 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 1474, pp. 385-86 (1971).

Defendants have never suggested that their determination to default the case rather than permit TWA discovery would have been altered if TWA's complaint had originally sought $135 million or even an unspecified amount as dam-

[46] *Fong* v. *United States,* 300 F.2d 400 (9th Cir.), *cert. denied,* 370 U.S. 938 (1962), does not support defndants' assertion that FED.R.CIV.P. 54(c) bars an amendment of the complaint *before* judgment by default is entered, since in that case the Government did not claim the right to recover actual damages under the single sufficient count of its complaint (which asked for liquidated damages only) until the damage hearing *after* entry of the interlocutory default judgment against Fong (300 F.2d at 414).

[47] A similar result was reached in *Aljassim* v. *S. S. South Star,* 67 Civ. 1525 (S.D.N.Y. June 28, 1968), where Judge Wyatt, in an unreported decision, granted plaintiffs' motion for leave to amend their complaint to increase the *ad damnum* from $150,000 to $381,660 and entered a default judgment against the defendant for failure to answer interrogatories. After trial on the damage issue, plaintiffs were awarded $255,657.06 (323 F. Supp. 918, 928 (S.D.N.Y. 1971)).

ages—nor do they so represent even now. The rationale advanced for this so-called "business decision" (*i.e.*, that whatever damages TWA might be able to prove would be less than the "$5 million"[48] defendants now claim TWA's deposition of Hughes would have cost Toolco) could not logically be affected by the overall size of TWA's claimed damages, as long as they were greater than $5 million. If TWA could not prove actual damages of $5 million, prayers for $35 million, $45 million, or any larger sum would be of no practical significance. *Cf. Bail* v. *Cunningham Bros., Inc.*, 452 F.2d 182, 189 (7th Cir. 1971); *Varveris* v. *United States Lines Co.*, 141 F. Supp. 874, 875 (S.D.N.Y. 1956).

If, on the other hand, the district court's grant of leave to amend TWA's *ad damnum* clause had affected defendants' calculation of the odds, tipping the balance of risks in their "business decision" toward continuing with the case instead of defaulting, they had a remedy under the orderly procedure set forth in the Federal Rules of Civil Procedure. They could have offered to proceed with discovery at any time between February 8, 1963 and May 3, 1963; and even after the latter date when the interlocutory default judgment was entered, they could have moved within a reasonable time for an order under FED.R.CIV.P. 55(c) setting that judgment aside. 6 J. MOORE, FEDERAL PRACTICE ¶55.10[2], p. 1830 (2d ed. 1971). Defendants' failure to cure their wilful disobedience either when the possibility was raised at the hearing on February 21, at which TWA's motions were formerly argued, or on or after May 3, 1963, when they were granted, has only one possible interpretation: that with the damage prayer increased to $45 million before trebling, defendants still calculated their monetary risk as less in a trial on the sole issue of damages without permitting TWA to have discovery than in a full trial on the merits after TWA had discovery.

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[48] Nor does TWA accept this absurd figure. *See* discussion at pp. 34-35 & n. 10 *supra*.

B. Whenever a defaulting defendant appears and defends at the damage hearing, the district court has discretion to enter judgment for the full amount of damages proved

Apart from its power under FED.R.CIV.P. 15(a) to allow any amendment to the complaint when justice so requires, there cannot be any real doubt that the district court also had the power, which it properly invoked in the exercise of sound judicial discretion (32 F.R.D. at 607-08, A-321), to permit TWA to recover the full amount of the damages which it was able to prove, where (1) the damage claim was unliquidated, (2) the default followed appearance and answer, (3) defendants were given notice of TWA's intention to seek the full amount of its provable damages prior to their default, (4) TWA was required to prove every dollar of the claimed damages, and (5) defendants were in a position to and did fully contest each element of TWA's damage case. The court of appeals held that on the basis of these five elements the district court had that power, which it properly exercised in this case (449 F.2d at 78-79, A-2791-92).[49]

[49] TWA's damage judgment exceeded the $135 million sought in its amended *ad damnum* clause by $2,611,435.95. Defendants, however, have never argued that under the amended *ad damnum* clause TWA was limited to a recovery of $135 million. Such an argument is not available to them because they did not object to the contrary ruling below. After determining that TWA had proved its right to recover treble damages of $137,611,435.95, the Special Master reviewed the record before him:

> "On April 9, 1968, TWA moved on the record to amend its complaint to ask damages in such amount as the Special Master should find to have been established by the evidence. TWA gave written notice on May 2, 1966 [the first day of the damage hearing], of intent to make such motion at the close of the hearing, and there is no suggestion of surprise." (Brownell Report, p. 323; A-1966)

He found it unnecessary to grant the motion, however, because he interpreted Judge Metzner's earlier order as comprehending the increase requested:

> "I have determined that no amendment of the complaint is required in order to award the plaintiffs the damages hereby

There is no contrary authority to the position taken by the courts below except *Fong* v. *United States*, 300 F.2d 400 (9th Cir.), *cert. denied*, 370 U.S. 938 (1962),[50] discussed at pp. 119-20 *infra*, and then only if the special facts in *Fong* are disregarded. In his opinion granting TWA's motion for leave to amend, Judge Metzner cites *Peitzman* v. *City of Illmo*, 141 F.2d 956, 962 (8th Cir.), *cert. denied*, 323 U.S. 718 (1944), which plainly stands for the proposition that if the defendant is in a position to contest the plaintiff's proof of damage, he is liable for the entire amount found to be proven. Both Judge Metzner and the court of appeals refer to *Riggs, Ferris & Geer* v. *Lillibridge*, 316 F.2d 60, 62-63 (2d Cir. 1963), which supports the basic principle that damages if unliquidated must be proven in their entirety, and that a plaintiff under the modern procedure can obtain all those damages (or other relief) to which he can prove he is entitled. In *Sarlie* v. *E. L. Bruce Co.*, 265 F. Supp. 371, 377-78 (S.D.N.Y. 1967), the district court, distinguishing between defaults for want of appearance and defaults for failure to plead or otherwise defend after appearance where the issue of damages is contested, permitted the defendant to amend its counterclaims at the damage hearing

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awarded because the previous motion of the plaintiffs to amend their complaint to increase the amount of damages sought to be recovered, as granted by Judge Metzner, was sufficiently broad to authorize the award hereby made." (*Ibid.*)

Defendants made no objection to this ruling, either to the Master or the district court, and they therefore have not preserved any right to have it reviewed in this Court.

TWA's motion to the Special Master, as to which defendants were on notice throughout the damage hearing, covered also such additional damages as are sought by TWA in its cross-petition in No. 71-830.

[50] The United States did not petition for certiorari, so the question was not before this Court when certiorari was denied. The petition which was filed and denied was by the defendant and based on an asserted right to dispute well-pleaded allegations of the complaint despite his default. On that point, *Fong* is in full accord with the decision below.

to increase the amount of damages sought from $400,000 to $500,000.

While FED.R.CIV.P. 54(c) does not in terms distinguish between a default for want of appearance and a default after appearance, if the defendant appears and is represented at the hearing on application for judgment, the court's power to permit amendments to the complaint in a proper case should prevail:

> "Where, however, the defendant appears at the hearing on the application for judgment, the court, in the exercise of sound discretion, may permit the claimant to amend his prayer for relief." 6 J. MOORE, FEDERAL PRACTICE ¶ 54.61, p. 1206 (2d ed. 1953) (Footnotes omitted.)

Fong v. *United States,* 300 F.2d 400 (9th Cir.), *cert. denied,* 370 U.S. 938 (1962), upon which defendants exclusively rely as legal authority for their argument, does not necessarily depend for its result on a contrary view. In *Fong* the Government's complaint contained several counts. Some of these claimed actual damages for such matters as conversion and wrongful sale of the vessels which were the subject matter of the action, but the district court expressed "grave doubt" as to their legal sufficiency. The court did uphold a different count asserting a contract claim for liquidated damages of $100 per day per ship for each day up to 180 days during which the vessels were not scrapped and $25,000 per ship for any period thereafter. The defendant, who had appeared in the action, was defaulted for refusing to appear for the resumption of his deposition. Judgment by default was entered against him after a damage hearing at which the Government for the first time announced that it would seek actual damages beyond the liquidated damages recoverable under the contract count. On defendant's motion, the district court amended its judgment to limit the damages recovered to liquidated damages,

rejecting the Government's argument that the demand for actual damages made in the other counts could be used to support the higher recovery. *United States* v. *Fong*, 182 F. Supp. 446, 454-56 (N.D. Cal. 1959). The Court of Appeals for the Ninth Circuit held that, since damages were awarded only as to the contract count, it would be unjust to import into that count the entirely different theories of damage computation embodied in the other three counts (300 F.2d at 413-14). Despite the language which defendants quote from the Ninth Circuit's opinion in *Fong* to support their contentions, there is no necessary conflict between the result in that case, where no notice of intention to amend was given prior to entry of the default, and the decision below. The Government recovered the full damages it had proven under the contract count.

If defendants' argument is correct, the result would be contrary to the principles embodied in the Federal Rules. FED.R.CIV.P. 54(c) must be read in conjunction not only with the provisions of FED.R.CIV.P. 15(a) that leave to amend a pleading "shall be freely given when justice so requires," but also with FED.R.CIV.P. 15(b) that if issues are actually litigated at trial, "they shall be treated in all respects as if they had been raised in the pleadings. • • • [F]ailure • • • to amend does not affect the result of the trial of these issues."

It was a basic goal of the Rules when adopted to avoid the "tyranny of formalism." *Rosden* v. *Leuthold*, 274 F.2d 747, 750 (D.C. Cir. 1960); *see Riggs, Ferris & Geer* v. *Lillibridge*, 316 F.2d 60, 62 (2d Cir. 1963); 3 J. MOORE, FEDERAL PRACTICE ¶ 15.13[2] (2d ed. 1968).[51] FED.R.CIV.P. 61 was

[51]Defendants' rigid and blinkered view of FED.R.CIV.P.54(c) raises its own serious formal difficulties. In what amount, if any, could plaintiffs in the following situations recover if the defendant defaults: (1) In a suit for violation of the Sherman Act demanding "three times the amount which plaintiff has been damaged by defendant"? (2) In a diversity suit for tortious interference with

specifically intended to prevent reversals when the decision below, whatever technical objections there might be, reached a result that does substantial justice between the parties. The same standard governs review in this Court (28 U.S.C. § 2111).

Substantial rights of defendants have not been prejudiced here because prior to the entry of the default judgment they were put on notice that TWA was claiming the full quantum of damages that it could prove; Toolco itself had alleged in its counterclaims that TWA had been damaged in an amount exceeding TWA's original claim; the amendment of the *ad damnum* clause did not affect in any way defendants' decision to act as they chose to act; and the consequence of permitting the amendment was nothing

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business, demanding "the amount by which defendant damaged plaintiff," where it is alleged in the body of the complaint that plaintiff's damages are "at least in excess of the jurisdictional amount"?

Were there any "due process" right in a defendant who has appeared in the action "to know what the consequences to him will be" before he chooses to default (Def. br. p. 65), each of those plaintiffs arguably would be barred from recovering his full, provable damages in the event of a default, even when defendant subsequently participates in the damage hearing and fully contests plaintiff's proof of damages. Plaintiff's recovery in no. 1 would be limited to nominal damages and in no. 2 to $10,000. No amount of careful pleading would permit a plaintiff who does not know the exact extent of his losses when he files his complaint to recover the full amount he has been damaged when the defendant pursues a "default strategy." Such a result would appear absurd, as well as unjust, *but see Ludka* v. *Athana Corp.*, 25 Cal. App. 3d 316, 101 Cal. Rptr. 615, 619 (2d Dist. 1972). Plaintiffs would therefore be encouraged either to vastly overestimate the amount of their possible injury (making of the *ad damnum* an absurd formalism and contrary to the spirit of FED. R. CIV. P. 11) or else repeatedly amend this non-traversable allegation of their complaints as better estimates of their losses become available. Both results are directly contrary to the purposes of the Federal Rules. On the other hand, if the plaintiffs in examples no. 1 and no. 2 should be found to have given a defendant who appears in the action sufficient notice to permit full recovery (since defendant plainly had notice that each was claiming whatever amount he could prove), simple justice would be done. And defendants have always had such notice in the case at bar. In paragraph 54 of its complaint, TWA alleged injury "in an amount estimated to be *in excess of* $35,000,000" (A-27) (emphasis added).

more than to require defendants to pay TWA the amount of the damages TWA proved at a hearing in which defendants fully participated.

IV

The orders of the CAB did not exempt the conduct complained of from antitrust attack

Toolco's refusal to make discovery and decision not to proceed with "useless litigation on the facts" (Def. br. p. 30) were as destructive to the building of a proper record with respect to its affirmative defenses as they were to every other issue presented by the pleadings. Had the case gone to trial, there would have been a full factual development of how defendants sought, through abuse of their power over TWA, to establish themselves as a major commercial factor in the field of aircraft manufacture and supply (an industry over which the CAB has no jurisdiction). In this posture of the case, however, the issue is whether the CAB's orders exempted from prosecution every set of facts which might have been proved under TWA's complaint as a basis for the damages awarded.

It is therefore necessary to bear in mind the nature of the conduct alleged in the complaint, which TWA claimed and the courts below held constituted a violation of the antitrust laws. The conduct that caused the injuries for which TWA was awarded damages was not the subject of any CAB order, let alone any order granting the statutory approval which alone can confer a legal immunity (pp. 138-49 *infra*).

It is also important to consider the remedy which the courts have provided to TWA. The long process of reducing TWA's claim to final judgment has made it even clearer than it was in 1965, when this case was last before this Court, that relief for TWA in this action cannot

impinge in any way upon the CAB's regulatory jurisdiction. TWA's final judgment provides no injunctive or other prospective relief, but only money damages for harm previously done, relief which the CAB is powerless to grant.

A. The conduct charged was such that the decisions below were compelled by this Court's rulings on the scope of similar statutory exemptions

The result reached by the courts below takes nothing away from Section 408 (49 U.S.C. § 1378), Section 414 (49 U.S.C. § 1384) or any other provision of the Federal Aviation Act ("the Act"). Indeed, that result is commanded by this Court's decisions in other cases.

Defendants carefully miss the point when they say that:

> "Sections 408 and 414 become meaningless if a court, taking a monocular view of only the effect on competition, can award huge damages for a transaction that the Board, after carefully weighing any injury to competition against the benefits that the transaction will provide, has found to be in the public interest." (Def. br. p. 83)

The point is that not one "transaction" for which the courts below awarded damages is a "transaction" which the Board approved. The courts below ruled that the Board-approved "transaction," *i.e.*, the acquisition itself, was immune from attack. What was *not* immune were the acts done pursuant to defendants' combination and conspiracy in restraint of trade in aircraft and their attempt to monopolize a substantial part of that market. This conduct, in which control over TWA was used as a weapon to secure broader aims outside the field of air transportation, was held to violate the antitrust laws (Point V *infra*). It was not, as defendants would have it, "because Toolco did exercise control" of TWA (Def. br. p. 67) that damages were

awarded, but because defendants performed acts pursuant to their unlawful scheme which injured TWA.

Defendants' hypothetical examples, by illuminating their case, destroy it. Thus, defendants postulate purchase by Lockheed of control of TWA and suggest:

> "On the theory of the court below, Lockheed would have been vulnerable to an antitrust action if, while it exercised control, TWA, with CAB approval, had purchased Lockheed planes." (Def. br. p. 84)

It does not, of course, follow from the decision of the court of appeals that any purchase by TWA of Lockheed planes in the circumstances postulated would constitute an antitrust violation. It does follow from that decision that if Lockheed used its position in TWA as a weapon in a conspiracy to restrain trade and monopolize commerce, and pursuant to that conspiracy injured TWA (or any other person), its conduct would not be immunized by the Board's approval of the acquisition. This, we submit, is an eminently sound result.

The contrary result would be insupportable. The exemption under Section 414 is from "all other restraints or prohibitions made by, or imposed under, authority of law * * *," as well as from the antitrust laws. Thus, if approval of an acquisition of control carries with it approval of every subsequent exercise of such control, the acquiring company has been freed from all legal restraints —as if a pistol permit carried with it permission to use the pistol for criminal purposes.[52]

[52] Congress has recently acted to expand the scope of Section 408 to require CAB approval of any acquisition of control of an air carrier, whether or not effected by one of the categories of persons originally enumerated in Section 408 (83 STAT. 103, August 20, 1969, amending 49 U.S.C. § 1378). Thus, the construction for which defendants argue could in the future extend a most extraordinary immunity from the regular application of antitrust principles to companies in many industries. The discussion in Congress of this amend-

Again, defendants state:

> "* * * it is possible to imagine acts that a controlling company might do, by virtue of its control of an air carrier, that would not be within the immunity conferred by a § 408 order. Suppose, for example, that Toolco refused to sell drill bits except to companies that agreed to patronize TWA whenever possible. Or that Toolco agreed to buy only Boeings for TWA in exchange for Boeing's agreement to buy all its drill bits from Toolco. Arrangements of this kind with third parties might well be outside the scope of the immunity. But that is not our case. We have here only the normal exercise of the controlling party's right to make important decisions for its subsidiary." (Def. br. p. 85)

If Toolco would not be immunized in using its control of TWA as a weapon to enable it to sell drill bits to Boeing, why is it immunized when it uses that control as a weapon in attempting to secure a dominant position as a supplier of aircraft? The CAB has no more right to grant Toolco an indulgence to restrain trade in the one commodity than in the other, and the Board did not purport to grant any such indulgence. Immunity attaches here, on defendants' theory, because what is has done here was merely "the normal exercise of the controlling party's right to make important decisions for its subsidiary." But that was precisely what was put in issue by the complaint and answers (see Point V, pp. 151-66 *infra*).

There is not the slightest inconsistency between the ruling here and the Board's action in *Application of Trans World Airlines Inc., et al.*, Order 71-8-91, [1964-1971 Transfer Binder] CCH Av. L. Rep. ¶22,015 (C.A.B. August 19, 1971), cited at p. 84 of defendants' brief. The multi-carrier agree-

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ment demonstrates a belief on the part of the supporters of the legislation that the antitrust exemptive effect of a CAB order would not be given so broad a reach. See colloquy among Representatives Staggers, Rogers and Dingell at 115 Cong. Rec. 19924-25 (1969).

ment which the Board approved in that proceeding was an agreement filed pursuant to Section 412 of the Act (49 U.S.C. § 1382). Section 412 requires the filing of various kinds of agreements between or among air carriers and other common carriers, but not agreements with non-carrier parties. Section 414 specifically exempts from the antitrust laws agreements filed and approved under Section 412. There can be no question that, when an agreement is required to be filed under Section 412, the Board may approve it even though it would otherwise violate the antitrust laws. *Cf. Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linien,* 390 U. S. 238, 245 (1968); *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 86 (1944). No such agreement, however, was or could be involved here, since Toolco is not a carrier, and has no right to obtain Section 414 immunity under Section 412. It does not, of course, follow from the fact that the CAB is specifically authorized to exempt some kinds of conduct that might otherwise violate the antitrust laws that it may also exempt other kinds of conduct not referred to in Section 414.

This Court has many times held that statutory provisions granting or authorizing exemptions from the antitrust laws are to be kept within the narrowest of limitations. *E.g., United States* v. *Borden Co.,* 308 U.S. 188, 206 (1939); *Georgia* v. *Pennsylvania R.R.,* 324 U.S. 439, 456-57 (1945); *California* v. *Federal Power Commission,* 369 U.S. 482, 485 (1962); *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 350-51 (1963).

Governmental approval of a status or relationship does not immunize from antitrust prosecution everything done in that status or pursuant to that relationship. In *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 356-57 (1963), this Court held that under the Securities Exchange Act the New York Stock Exchange had a general power to adopt rules governing its members' relations with non-members

so that the mere adoption of such rules could not be said to be in violation of the antitrust laws. The Court held, however, that

> "* * * it does not follow that the case can be disposed of * * * by holding that since the Exchange has a general power to adopt rules governing its members' relations with nonmembers, particular applications of such rules are therefore outside the purview of the antitrust laws." (373 U.S. at 357)

The Court went on to hold that, by reason of its anticompetitive consequences, the particular application of the Exchange's rules in that case violated the antitrust laws and was unlawful (*id.* at 361).

In another analogous decision, *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), the defendants had contended, successfully in the lower court, that certain conduct was beyond the reach of the antitrust laws because one of the alleged conspirators was at the time acting as an agent appointed by the Canadian government to allocate ore purchases. In reversing, the Court disposed of this argument as follows:

> "There is nothing to indicate that such [Canadian] law in any way *compelled* discriminatory purchasing, and it is well settled that acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme. *Swift & Co.* v. *United States*, 196 U.S. 375, 396; *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809; *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 287. See *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 457-458; *Slick Airways* v. *American Airlines*, 107 F.Supp. 199, 207 (D.C.N.J.)." (370 U.S. at 707) (Emphasis added.)

Nothing in the CAB's approval of Toolco's acquisition of control compelled Toolco to engage in the conspiratorial

activity charged in the complaint. That activity was not "necessary" to do anything "authorized, approved, or required" by the Board's orders, it was pursuant to an "unlawful scheme" and it was not exempt from the antitrust laws.

The courts below saw the matter clearly and applied these principles unexceptionably. Thus, Judge Metzner defined the scope of the exemption under Sections 408 and 414:

> "The orders of 1944 and 1950 relied on by Toolco merely approved the acquisition of control of TWA by Toolco. The antitrust violations that could possibly be present in such acquisition—that it was a contract in restraint of trade prohibited by section 1 of the Sherman Act, or was an attempt to monopolize prohibited by section 2 of the Sherman Act, or was an acquisition of stock prohibited by section 7 of the Clayton Act—were within the contemplation of the approval orders and protected by the exemption provided by section 414." (214 F. Supp. at 109, A-260-61).

He also set out the limits beyond which such an exemption would not reach:

> "These orders did not give Toolco a license to engage in other acts that normally may be forbidden by the antitrust laws. What has been approved and exempted is the fact of 'acquisition of control', not activities engaged in by the controlling party subsequent to acquisition, which may be illegal." (214 F. Supp. at 110, A-261).

The court of appeals defined the scope of the exemption in similar terms:

> "The Board is explicitly entrusted with the duty of considering for approval any potential acquisition of control over an air carrier by a person engaged in any phase of aeronautics; and to the extent of such approval—but only to that extent—

> the Act grants immunity from the operation of the antitrust laws. Surely Congress did not contemplate that CAB approval of an acquisition would be tantamount to approval of every transaction which might be entered into by the controlling party. The focus of the Board's powers in this sphere is the acquisition itself rather than the broad range of activities into which the controller may enter thereafter." (332 F.2d at 608, A-337)

The Civil Aeronautics Board, in the *amicus* brief filed by the Department of Justice when this case was previously before the Court, concurred in this definition of the scope of its exemptive power:

> "* * * orders authorizing control do not approve prospectively all things that may be done in the exercise of control; and the Board's orders did not permit Toolco to utilize its power as a means of violating the antitrust laws. As the court below summarized TWA's complaint, it charges 'the outlines of a tying arrangement, an economic boycott of the defendants' competitors, and an attempt to monopolize commerce' (332 F.2d at 611). Such conduct plainly did not constitute acts 'necessary to enable' Toolco to do 'anything authorized [or] approved' by the Board's order." (Memorandum for the Civil Aeronautics Board As Amicus Curiae, Nos. 443 and 501, October Term 1964, p. 15)

Nothing in defendants' brief demonstrates that the scope of the exemption was broader than the Board and the courts below conceived it to be.

B. The authority of the CAB to exempt from the antitrust laws is narrowly limited and does not reach this case

Defendants' effort to confer on the Board sweeping authority to oust the federal courts of jurisdiction to enforce the antitrust laws against restraints of trade in the supply-

ing of aircraft cannot be squared with the statute or its legislative history.

1. The legislative history

Defendants draw heavily on their own imaginations when they assert that the Federal Aviation Commission urged "that responsibility for protecting the public interest against anticompetitive practices in the industry should be *turned over* to a new regulatory agency" (Def. br. p. 73) (emphasis added), that Senators Truman and McCarran emphasized "the fullness and completeness of antitrust authority intended to be exercised by the new agency under the Act" (*id.* p. 74), and that "[b]oth the statutes and the legislative history teach that the Board was and is intended to control the relation of antitrust policies to other considerations of the public interest in a broad and meaningful way, without any fear of intrusion from any other governmental body"[53] (*ibid.*). The statutes and legislative history teach no such thing.

The *Report of the Federal Aviation Commission* (S. Doc. No. 15, 74th Cong., 1st Sess. (1935) (the "*Aviation Report*")), on which defendants place so much emphasis (Def. br. p. 73), in no way suggested that the Commission it proposed should have a broad power to regulate competition in the air transportation industry beyond that inherent in its proposed powers to regulate entry into the industry by the issuance of certificates of public convenience and necessity (pp. 54-56), to regulate rates (pp. 52-53), and to supervise financial structures and stock ownership for the purpose of avoiding undue concentration of control (pp. 52, 69-71). It certainly suggests no such power over the industries en-

[53] It is interesting to contrast this statement with the language of this Court in the *Panagra* case:

> "We, therefore, *refuse to hold* that there are no antitrust violations left to the Department of Justice to enforce." (*Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 305 (1963) (Emphasis added.)

gaged in aircraft manufacture and supply. Nowhere does it recommend that the responsibility "for protecting the public interest against anticompetitive practices in the industry" should be "turned over" to the new commission.

Recommendation number (102), concerning the establishment of an "Air Commerce Commission," sets out 21 separately defined functions of such a commission including the issuance of certificates of public convenience and necessity and the approval of rates. Only one refers specifically to competition, or its regulation, and it reads as follows:

> "The supervision of the financial structure of air lines and of their *ownership*, insofar as that may be necessary to preserve proper competition." (*Aviation Report*, p. 245) (Emphasis added.)

It is clearly ownership of the air carrier's stock that the *Aviation Report* is concerned with, not the conduct of the owners, let alone the effect of such conduct on competition in other industries. In Section 408, correspondingly, it is acquisition of a controlling interest, not the subsequent exercise of that control, which the CAB is authorized and required to approve. As to supervision of air carriers' financial structures, Congress decided to exclude that from the Board's jurisdiction (83 CONG. REC. 7104, 8869, 8961-63),[54] just as acquisition by carriers of aircraft and equipment was excluded (*see* Section 401(e)(4) of the Act, 49 U.S.C. §1371(e)(4)).

The rest of the legislative history confirms that Congress did not intend to give the CAB a wide-ranging power to

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[54] See comment of Senator Truman, 83 CONG. REC. 6728. From time to time after the enactment of the Civil Aeronautics Act of 1938, the CAB requested the power to regulate the financial structure and securities issues of air carriers, but it appears to have ceased asking for it. See ANNUAL REPORT OF THE CIVIL AERONAUTICS BOARD—1942, at 14;—1943, at 6;—1944, at 9;—1945, at 16;—1946, at 21;—1947, at 29-30;—1949, at 43;—1950, at 38;—1953, at 40.

forestall antitrust prosecution in the courts. In the congressional debate, contrary to the statement at p. 74 of defendants' brief, neither Senator Truman nor Senator McCarran referred to any "antitrust authority" of the Board, full and complete or not. They, like Senators McKellar and Borah, expressed concern lest the CAB approve any combination of carriers or acquisition that would result in restraining competition, and the proviso in Section 408 was strengthened to forbid the CAB to do so. (83 CONG. REC. 6728-32)

Senator McCarran repeatedly emphasized that the antitrust laws would continue to be enforced as in the past. At one point he commented that

> "* * * every precaution has been written into the bill so that the antitrust laws and all laws for the prevention of combinations and monopolies shall be enforced." (83 CONG. REC. 6729)

One of the ways in which this was done was inclusion in the Act of Section 1106, the saving clause:

> "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." (49 U.S.C. § 1506)

The effect of this clause is to assure that the remedies provided in the Sherman Act and Clayton Act, as well as other remedial laws, will continue to be available to those entitled to their benefits, unless clearly inconsistent with the Act.[55]

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[55] A comment by Senator Borah underlines the intent that the Board should not be given a broad power to encroach on antitrust enforcement:

> "We had the same thing come up when we had the N. R. A. We were going to revive and rehabilitate the earth by giving people discretion to do away with the antitrust laws whenever

The entire debate demonstrates that none of the Senators involved intended to give the Board any function beyond approving or vetoing proposed consolidations or acquisitions of control. The proviso about which the debate centered, for example, is addressed solely to consolidations, acquisitions of control and the like, and narrowly limits the Board's power to approve those which might have anticompetitive effects; had it been thought that the Board's power of approval should extend to all further conduct of the parties, surely this limiting proviso would have been similarly extended.

The very paucity of comment specifically addressed to Section 414 makes it inconceivable that Congress contemplated a broad supersession by Board order of the antitrust laws. Supersession of the antitrust laws extending, as defendants urge here, into the field of aircraft manufacture and supply, over which the Board was given no jurisdiction, would have been at the least cause for debate, particularly in the light of the strong views expressed by all those who participated that the protection of the antitrust laws should be preserved. It would be a perversion of their intent to convert the statute which they enacted into a shield for the would-be monopolist.

2. *The* Panagra *case*

This Court's construction of the relevant provisions of the Federal Aviation Act in *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963) (*"Panagra"*), far from lending any support to defendants' position, confirms that the area in which the CAB is empowered to intrude

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they thought in their judgment they should do so. We went through that experience. I myself do not want to be a party to writing into the law that which I think will aid in the destruction of competition." (83 CONG. REC. 6732)

into antitrust enforcement is a very narrow one. Thus, the Court's ultimate conclusion was:

> "We think *the narrow questions presented by this complaint* have been entrusted to the Board and that the complaint should have been dismissed." (371 U.S. at 313) (Emphasis added.)

The Court pointed out that "[t]he Board has no power to award damages or to bring criminal prosecutions" (371 U.S. at 311) and emphasized that it was holding only that *injunctive relief* with respect to the subject matter of that complaint was for the Board alone:

> "• • • the Act leaves to the Board under § 411 all questions of injunctive relief against the division of territories or the allocation of routes or against combinations between common carriers and air carriers." (*Id.* at 310)

The Court "refused" to hold that "there are no antitrust violations left to the Department of Justice to enforce" (371 U.S. at 305), and emphasized that the antitrust matters entrusted to the Board "encompass only a fraction of the total" (*ibid.*).

The particular issues raised by the complaint in *Panagra* were found to be committed to the Board because the acts charged were:

> "• • • precise ingredients of the Board's authority in granting, qualifying, or denying certificates to air carriers, in modifying, suspending, or revoking them, and in allowing or disallowing affiliations between common carriers and air carriers." (371 U.S. at 305)

Moreover, the relief ordered by the district court was that Pan American divest its interest in Panagra, a relationship of the precise kind which it is the duty of the Board to consider and approve or disapprove.

TWA, however, has been awarded no relief which might interfere with some carefully developed scheme of the Board. It has been awarded damages, and damages only. This Court has made clear the propriety of a court's awarding damages for injuries resulting from illegal conduct, even where that conduct is (as defendants' conduct herein was not) subject to administrative regulation. *E.g., Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213 (1966); *Hewitt-Robins Inc.* v. *Eastern Freight-Ways, Inc.,* 371 U.S. 84 (1962). As was emphasized in the *Hewitt-Robins* case, the question is not whether the agency has some relevant duty to perform, but "the effect of the exercise of the remedy [by way of damages] upon the statutory scheme of regulation" (371 U.S. at 89), and whether the damage action "hampers the efficient administration of the Act * * *" (*id.* at 88).[56]

There is no conceivable way in which affirmance of TWA's damage award will "hamper the efficient administration" of the Federal Aviation Act. The conduct attacked

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[56] The propriety of allowing the recovery of damages in circumstances like these was upheld in *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.,* 393 F.2d 441 (2d Cir.), *cert. denied,* 393 U.S. 846 (1968), where the court of appeals held that the district court had improperly stayed the antitrust suit pending an application to the Board. The court said:

> "We find that since plaintiffs only seek the remedy of damages, which the administrative agency is not empowered to give, and since determination of the issues in this action by the court will have no effect on the future conduct of the parties and will not impinge upon the agency's ability to promote a uniform scheme of regulation by approving or disapproving of similar agreements in the future, it was inappropriate and not in the interests of efficient administration of justice to compel plaintiffs to make the futile gesture of undertaking administrative proceedings." (393 F.2d at 445)

If a stay was improper in the *Allied Air Freight* case, it is *a fortiori* that a dismissal is inappropriate here. The agreement involved in *Allied Air Freight* affected air transportation and fell clearly within the Board's authority under Section 412 of the Act. Here, the conduct complained of does not even involve "air transportation."

by this suit did not lie at the heart of the Board's regulatory function, as did the conduct challenged in *Panagra*. It did not involve route structures or affiliations between competing or potentially competing carriers. It was not focused, indeed, on competition in air transportation at all, but on competition in the manufacture and supply of aircraft. The thrust of the Federal Aviation Act is toward the regulation and control of *air transportation*. The only provisions which refer to persons engaged in "any other phase of aeronautics," like the defendants here, are Section 408, relating to acquisitions of control, and Section 409, relating to interlocking relationships.[57] Even Section 102 of the Act (49 U.S.C. § 1302), outlining the factors to be considered by the Board in determining the requirements of the public interest, refers to no factor which has any relation to the activities of persons engaging in the manufacture or supply of aircraft.

In its *amicus* brief when this case was previously here, the Board described as being of controlling importance the facts that the abuse of control charged in the present case is outside its comprehensive regulatory powers, and that it has no jurisdiction over aircraft dealers or manufacturers as such:

> "In *Panagra*, the controversy related to routes and services, which only the Board could authorize and regulate (Secs. 401, 412, 49 U.S.C. 1371, 1382), and restraints 'in air transportation or the sale thereof' which were similarly subject to the Board's

[57] Section 407(c) (49 U.S.C. § 1377(c)), relating to certain reporting requirements for air carriers, contains the phrase "person engaged in any phase of aeronautics," but only to require officers and directors of *air carriers* to file reports as to their holdings in such entities. There is no converse provision requiring the filing of such reports by persons engaged in a phase of aeronautics, or by their officers or directors. Similarly, under Section 409 the specified interlocking relationships are unlawful (absent approval) for an air carrier and its officers and directors, but are *not* unlawful for a person engaged in another phase of aeronautics.

control (Section 411, 49 U.S.C. 1381). In contrast, the instant controversy concerns alleged improprieties in the management and control of an air carrier which resulted in injury to the carrier itself —a subject as to which the Board does not have similar comprehensive regulatory powers." (CAB Memorandum, pp. 10-11)

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"The Board has no jurisdiction over aircraft dealers or manufacturers as such, and is not generally empowered to regulate the issuance of a carrier's securities or its capital structure, or to specify the aircraft which a carrier can acquire. Indeed, the Board is specifically precluded from interfering with a carrier's choice of equipment (Section 401(e)(4), 49 U.S.C. 1371(e)(4)." (*Id.*, pp. 12-13)[58]

The Board does not even have the power to provide a remedy for the injury inflicted on TWA by Toolco. The Board cannot award damages. Since Toolco no longer controls TWA, the Board can no longer reach Toolco by virtue of any power or proceeding under Section 408. The only remaining source of authority is Section 411 (49 U.S.C.

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[58] Defendants' citation of Professor Davis's treatise as suggesting that "a proper accommodation of CAB regulation with the antitrust laws is to limit judicial action applying antitrust policies to proceedings on judicial review of Board orders" (Def. br. p. 83n. 27) is based on an inaccurate paraphrase of what Professor Davis actually says. The accurate quotation is as follows:

> "Perhaps the accommodation of CAB regulation with the antitrust laws may best be worked out if collisions between CAB orders and antitrust decrees are avoided by the system of limiting judicial action, *in those areas where such collisions are most probable,* to the application of antitrust policies in proceedings on judicial review of administrative action." DAVIS, ADMINISTRATIVE LAW TREATISE § 19.06, p. 634 (Supp. 1970) (Emphasis added.)

Nothing in the treatise suggests that the CAB's exemptive power should be extended to cover the facts of the instant case; indeed, Professor Davis cites the district court's decision herein without criticism. (*Id.*, pp. 637-38)

§ 1381), which empowers the Board to issue cease and desist orders against "unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof" by "any air carrier, foreign air carrier, or ticket agent." Toolco is none of these, and the practices of which TWA complains are not "in air transportation." The Board is thus not in a position to reach them.[59]

Congress intended, as Section 1106 of the Act makes explicit, that there should be plural remedies for legal injuries, not a remedial vacuum. The Act could not, without defeating this plain intent, be interpreted as withdrawing from the courts forever the power to give redress to an air carrier against antitrust injuries inflicted upon it by a controlling person, while leaving the Board itself equally powerless.

C. The orders issued by the CAB were not intended to, and did not, exempt the conduct of which TWA complains

Defendants assert that the CAB "issued nineteen modification orders, including orders approving the specific transactions that are the subject of this litigation" (Def. br. p. 9).

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[59] Defendants claim to find in *Panagra* an implication that the Board is free to utilize a broad definition of "air carrier" to extend its authority under Section 411 to reach anticompetitive practices generally by "persons exercising control over an air carrier" (Def. br. p. 70). The reference is apparently to the Court's statement in a footnote to the effect that it desires to "intimate no view" as to whether a controlliing person might be an "air carrier" (371 U.S. at 310n. 14). This is hardly the clear invitation that defendants suggest, and a cease and desist order against its former controlling person would be of little use to TWA. It would be difficult in any case to read "air carrier" in Section 411 as including a "person controlling an air carrier," in light of distinct meanings given those terms in related sections of the statute. *See, e.g.,* Sections 408(a)(2) and 407(c). The Court of course held in *Panagra* that the Board's authority under Section 411 is not limited to "air carriers," but that was with respect to its power to deal with matters within its special purview, such as division of territories, routes, and carrier affiliations (371 U.S. at 311-12).

No CAB order ever dealt at all with the particular conduct which caused injury to TWA. TWA was awarded damages for the following actions of defendants, each taken pursuant to the conspiracy and attempt to monopolize alleged in the complaint:

(1) Precluding TWA from ordering Boeings in 1955:—no CAB order approved that preclusion;

(2) Diverting six Boeings to Pan American:—no CAB order approved that diversion;

(3) Denying ten Convairs to TWA:—no CAB order approved that denial;

(4) Preventing timely delivery of 20 Convairs to TWA:—no CAB order approved that prevention;

(5) Conditioning the leasing of planes to TWA upon TWA's acquiring planes from no one else:—no CAB order approved that condition; and

(6) Disrupting the training of TWA's flight crews and ground personnel:—no CAB order approved that disruption.

That this course of conduct was part and parcel of a combination and conspiracy to restrain trade in aircraft and an attempt to monopolize a substantial part of the market for aircraft is established by the complaint and defendants' default. That combination and conspiracy and that attempt to monopolize were no more "approved" by the Board's orders than was the specific conduct which caused TWA injury. Nor could they be.

The only authority pursuant to which the Board purported to act in issuing any of the orders on which defendants rely was Section 408. The only relevant conduct which the Board is authorized to approve under Section 408 is an acquisition of control. In defining the kind of order the Board shall issue after its hearing on an application for approval under Section 408(b), the statute specifies that the

Board "shall by order approve such * * * acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe * * *."[60]

Section 414 carefully identifies the orders which can have an exemptive effect and carefully defines the scope of any such exemption. The only relief from the operation of the antitrust laws which Congress permitted was such relief as was "necessary" to enable a person to do "anything authorized, approved, or required" by an order under Section 408, Section 409, or Section 412. Neither Section 409, relating to interlocking relationships, nor Section 412, relating to agreements between air carriers, is pertinent to our present problem. For present purposes, then, Congress's mandated supersession extends only "insofar as may be necessary to enable" a person to do something authorized, approved or required by an order under Section 408. Even if it wanted to do so, the Board was without power to exempt anything other than the acquisition of control itself.

An examination of the action actually taken by the Board discloses that it had no intention at any time of stepping beyond that authority.

1. The original control orders

The question principally considered by the Board in ruling on TWA-Toolco's application for approval of the initial acquisition of control was whether Toolco was, in fact, a person engaged in a phase of aeronautics within the meaning of Section 408(a)(5) of the Civil Aeronautics Act (now the Federal Aviation Act). *Transcontinental &*

[60] Contrary to what defendants say, the CAB's authority to investigate pursuant to Section 408(e) of the Act does not relate to violations of "restrictions on control" (Def. br. pp. 71-72) but solely to violations of "any provision of [Section 408(a) of the Act]"—that is, conduct which may be an unapproved acquisition of control.

Western Air, Inc., Control by Hughes Tool Company, 6 C.A.B. 153 (1944) (A-3297 *et seq.*). The Board noted that among the requisites for its exercise of any jurisdiction in the matter was a finding that there was "an acquisition of control" and that the acquiring person was "engaged in a phase of aeronautics" (*id.* at 155-56, A-3301). The Board concluded that Toolco might, under existing contracts, become a dealer in aircraft, if it had not become one already and referred also to Toolco's "developmental and experimental work in aviation," which, however, was not expected to involve production for commercial use. Since it was conceded that there had been an actual acquisition of control, at least four years earlier, the Board found that it had jurisdiction (*id.* at 155-56, A-3301-02).

Finding that the likelihood of TWA's being forced, through the control exercised by Toolco, to purchase more aircraft than its economic operations required was remote in view of the "paternalistic attitude" which Toolco had exhibited up to that time, the Board concluded on the evidence before it that the continuation of the relationship between Toolco and TWA "would not be inconsistent with the public interest" (*id.* at 156, A-3302).

The Board imposed a condition providing that its approval would "be effective" so long as commercial transactions between TWA and Toolco were limited to transactions involving complete items of property, the price of which did not exceed $200 each, with a further limitation that the total annual expenditure involved in any such transactions should not exceed $10,000 (6 C.A.B. at 158, A-3306).

It is obvious that neither the Board nor its staff had the slightest thought that the order issued in this proceeding might possibly constitute an approval and exemption of Toolco's subsequent activities. Toolco's counsel

in that proceeding, in a letter written to the Hearing Examiner at the time, specifically stated:

> "* * * the approval sought by Hughes Tool Company in this case would not constitute a license to permit Hughes Tool Company or TWA to do whatever they desire in the future * * *." (Doc. 178, Ex. B-7, Letter of January 24, 1944, reproduced in Transcript of Record, Nos. 443 and 501, October Term, 1964, Vol. V, at 610)

At the beginning of 1947 TWA and Toolco entered into a Letter Agreement which resulted in a CAB order instituting an investigation. In an opinion reported as *Transcontinental & Western Air, Inc., Further Control by Hughes Tool Co.*, 9 C.A.B. 381 (1948) (A-3311 *et seq.*), the Board concluded that the Letter Agreement constituted an additional acquisition of control for which its approval under Section 408 would be required and that a hearing was necessary (*id.* at 391, A-3331).

Referring to its 1944 order, the Board noted that the opinion upon which the order was based had been "clearly couched in terms of factors then present" and related solely to the degree of control existing at that time (*id.* at 388, A-3325). The Board thought it clear that "we did not intend to, and did not, grant a blanket, unlimited, *in futuro* approval of the relationship between Toolco and TWA," and that an approval of anything other than the acquisition of the degree of control submitted in the first control proceeding "would have been made in clear, unmistakable language" (*id.* at 389, A-3327).

The further investigation culminated in a Board order issued on October 6, 1950, reported as *Trans World Airlines, Inc., Further Control by Hughes Tool Company*, 12 C.A.B. 192 (A-3333 *et seq.*). That opinion and order, only two pages long, did not discuss in detail the reasons for its approval. The Board did note the position taken by public

counsel that the control of TWA theretofore exercised by Toolco had been "detrimental to the interest of the carrier and the public interest," but that "disapproval of the additional stock acquisition would not adequately remedy or mitigate the existing situation," and that since the Board did not have adequate power to deal with the situation, it was left with "no alternative than to approve such additional stock acquisition" (*id.* at 193, A-3334). After setting out the position of public counsel, the Board concluded merely that:

> "The record in this proceeding does not permit us to reach any other conclusion than that reached by the examiner, viz, that the further acquisition of control should be approved as being consistent with the public interest and the requirements of the Act." (12 C.A.B. at 193, A-3334)

The Board accordingly agreed with and adopted the findings, conclusions, and recommended decision of the Examiner.

The Examiner had not considered what effect the acquisition of control might have on competition, either in the aircraft industry or in air transportation. He directed himself almost exclusively to TWA's financial history. In recounting this history, the Examiner noted that from February 1944 until the close of 1946 the management of TWA had made repeated requests of Toolco for approval of plans to finance the carrier's expansion (12 C.A.B. at 201, A-3351), that the principal officers of the carrier were convinced that the sale of equity securities was preferable to large borrowings (*ibid.*, A-3351-52), that there was no evidence that either Hughes or Toolco's chief financial officer, Noah Dietrich, disagreed with the position that additional financing would be necessary (*id.* at 202, A-3353), that Toolco and Hughes repeatedly refused to agree to equity financing (*id.* at 202-04, A-3353-59), that TWA's

financial condition deteriorated rapidly during 1946 (*id.* at 205, A-3359), and that in the closing months of 1946 TWA could not attract any capital and was facing bankruptcy (*id.* at 206, A-3360). Summing up, the Examiner said:

> "• • • whatever were TWA's problems in promoting equity financing to meet its postwar capital needs, the insistence of Mr. Hughes and Mr. Dietrich on debt as a matter of deliberate policy to meet TWA's capital requirements right after the war ended must be condemned." (12 C.A.B. at 222, A-3393)

The Examiner concluded, however, that the additional acquisition of control should nevertheless be approved, citing principally "the manner in which Mr. Hughes and his company rallied to the support of the carrier during the financial crisis of late 1946 and early 1947" (*id.* at 223, A-3395)—the same crisis which had been created by Hughes's refusal to agree to equity financing in the first place. For further details of this episode, see pp. 45-46 *supra*, and TWA Ex. 296, reproduced following p. 46.

The order issued by the Board in 1950 provided only that

> "• • • the additional acquisition of control of Trans World Airlines, Inc., (TWA) by Hughes Tool Company (Toolco), found to exist by the Board's opinion and order of June 30, 1948, (9 C.A.B. 381) be and it hereby is approved, *provided*, that such additional control shall be exercised in accordance with the terms and conditions of the Board's opinion and order, 6 C.A.B. 153, as amended, approving the original acquisition of control of TWA by Toolco." (12 C.A.B. at 193, A-3335)

The reference back to the earlier order and the similarity in language show that this order, like the 1944 order, did not grant a "blanket, unlimited, *in futuro* approval of the relationship between Toolco and TWA" and was not

intended "as an expression of blanket approval of the relationship under consideration."

2. *Subsequent modifications of the control orders*

Subsequent orders of the Board modifying the control order to permit specific transactions do not strengthen defendants' argument. Not only do they not purport to approve the particular transactions causing injury to TWA, for which TWA has been awarded damages (see p. 139 *supra*), they do not even purport to approve any transaction to which Section 408, 409 or 412 applies. It is only orders approving transactions otherwise prohibited by these sections that can give antitrust immunity under Section 414.

Although in most cases the orders were in form amendments to the original order issued under Section 408, this fact could not of itself confer antitrust immunity on transactions referred to in the amendments. Section 408 is specific that Board approval of a transaction to which Section 408 is applicable can only be granted after notice and hearing. *Trans World Airlines, Inc.* v. *Civil Aeronautics Board (Hughes Tool Co., Intervenor)*, 339 F.2d 56, 62 (2d Cir. 1964), *cert. denied sub nom. Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 382 U.S. 842 (1965). No hearing was held in connection with the orders amending the original order.[61] It is obvious on inspection that these subsequent orders merely relaxed the *conditions* which had been attached to the original order.

[61] The Board does have the power under Section 416 to exempt air carriers from the hearing requirements of Section 408. Although the Board acted under Section 416 with respect to three of TWA's equipment purchases from Toolco, Toolco is in no better position as to these orders. Section 416 is not one of the sections referred to in Section 414 and therefore no antitrust immunity could be conferred by any order under Section 416. In any event, Section 416 only permits the Board to grant an exemption to an air carrier and consistent with this these exemptions were granted only to TWA and not to Toolco.

Nor did the issuance of these orders constitute "a process of continuous and comprehensive supervision by the Board" (Def. br. p. 76). As the Board pointed out in its *amicus* brief on the previous review by this Court:

> "Section 408 requires the Board to approve only an 'acquisition of control'; it does not give the Board continuing responsibility for supervision of a controlling person's management of an air carrier." (CAB Memorandum, p. 12)
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> "• • • since the Act does not impose any duty on the Board affirmatively to monitor and supervise all aspects of the control relationship, the Board's limited authority over Section 408 relationships should not of itself serve to oust the courts from jurisdiction. Indeed, the availability of antitrust or other judicial remedies may be regarded as additional safeguards for the protection of the public interest." (*Id.*, pp. 13-14) (Footnote omitted.)

Each of the modification orders was issued in response to an application describing a discrete transaction. In only one instance does the record show any action by the Board with respect to the application other than the order granting it. That one exception relates to TWA's application on May 10, 1956 for a modification to permit TWA to purchase certain jet aircraft to be manufactured by Toolco. On June 8, 1956 the Board ordered an investigation to determine whether the entry of Toolco into the business of manufacturing jet aircraft would affect the control relationship so significantly as to require a new proceeding under Section 408 (Order E-10360, AX-2149-50). The investigation was ultimately terminated when TWA withdrew the motion for permission to buy the planes (Order E-12604, AX-2425-26).

In every other instance, Toolco or TWA acting under the control of Toolco submitted a brief application, and the

application was granted. Each of the orders was issued in a non-adversary administrative proceeding, without the hearing required by the statute for an order of approval under Section 408.

With the exception of Orders No. E-11432 (June 11, 1957) (AX-2173-74) and No. E-13334 (December 30, 1958) (AX-2188-90), both of which involved transactions in TWA securities potentially increasing Toolco's control,[62] none of these orders used language of approval.[63] As modifications to an order under Section 408, the only conduct which they could approve was an acquisition of control.

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[62] E-11432 involved a sale of additional TWA stock to Toolco which is commented on at p. 192n.77 *infra*. E-13334 involved several transactions, including a guaranty of certain TWA obligations on terms involving possible payment by TWA to Toolco of amounts due to third parties. In both orders, it was only the additional control which was accorded the language of "approval."

[63] The language used by the Board in modifying or amending the original 1944 *Control Order* took different forms. In the earlier orders—No. 4437 (A-3307-08), No. E-922 (A-3309-10), No. E-2404 (AX-2031-32), No. E-4160 (AX-2048-49), No. E-5324 (AX-2076-77), No. E-8214 (AX-2094-95) and No. E-10300 (AX-2147-48)—the modification or amendment was achieved by ordering the addition to the 1944 *Control Order* of a paragraph reading substantially:

> "That the terms of this order shall not restrict or affect the right [of Toolco or TWA to carry out the transactions described in the motion requesting modification]."

In subsequent orders—No. E-10871 (AX-2157-58), No. E-11432 (AX-2173-74), No. E-13334 (AX-2188-90), No. E-13542 (AX-2202-03), No. E-13873 (AX-2226-27), No. E-14169 (AX-2237-38), No. E-14504 (AX-2245-46) and No. E-14877 (AX-2260-61)—the Board's language, with slight immaterial variation, was

> "That Order 3210, issued October 17, 1944, as amended by subsequent orders, be and it hereby is further amended to permit [the transactions between TWA and Toolco set forth in the motion for modification]."

In Orders No. E-15430 (AX-2287-89), No. E-15561 (AX-2303-05), and No. E-16195 (32 C.A.B. 1363, A-3403 *et seq.*), the modifying language, with slight immaterial variation, read:

> "That the restrictions imposed on transactions between Toolco and TWA by Order 3210, as modified, are further modified to permit TWA to consummate the transactions described * * *."

Except for Order No. E-922 (October 29, 1947) (A-3309-10), which modified the 1944 control order in respect of TWA's purchase of certain Toolco-manufactured radar units at cost, each order involving any acquisition of aircraft or other flight equipment by TWA from Toolco contains a specific provision, as the court of appeals commented (332 F.2d at 610, A-342), that it "shall not be deemed a determination for rate-making purposes of the reasonableness of any of the transactions specified therein," language which is obviously inconsistent with defendants' contention that the terms and conditions of each transaction received full Board approval. The reasonableness or unreasonableness of the terms, it is clear, was not something the Board was required to consider with respect to any of these transactions.

When dealing with the issue of a possible further acquisition of control of TWA by Toolco, the Board adopted a quite different approach. Thus, in Order No. E-11432 the Board ordered that:

> "Any additional acquisition of control of TWA by Toolco as may result from the agreement presented herein, be and is hereby approved, provided that such additional control, if any, shall be exercised in accordance with the terms and conditions of [the original *Control Order*]." (AX-2174)

The slight variation in Order No. E-13334 ("That any additional control of TWA by Hughes as may result from the transactions * * *") (AX-2189) does not seem to have intended any different effect.

The one remaining significant variation is found in Orders No. E-15430, No. E-15561, and No. E-16195 wherein the Board specifically ordered:

> "That TWA be and it hereby is exempted pursuant to Section 416 from the requirement[s] of section 408 to the extent necessary to enable it ['to purchase the instant aircraft and equipment from Toolco, a person engaged in a phase of aeronautics' (No. E-15430, AX-2289), 'to purchase two additional jet aircraft and five engines from Toolco, a person engaged in a phase of aeronautics' (No. E-15561, AX-2304), and 'to consummate the jet aircraft equipment purchases described and set forth in the motion herein' (No. E-16195, 32 C.A.B. at 1366, A-3412)]."

Such explicit exemptions pursuant to Section 416 (49 U.S.C. § 1386) were given to TWA as an "air carrier," not to Toolco.

The statute is plain, and the record could hardly be clearer. Toolco's acquisition of control over TWA was, indeed, approved by the Board, and "insofar as may be necessary to enable" it to consummate that acquisition, Toolco was relieved from the operation of the antitrust laws, and all other restraints of law.

But no part of the conduct held by the courts below to have been in violation of the antitrust laws, no act by which TWA was injured and for which TWA has been awarded damages, was "necessary" to consummate the acquisition. The manner in which Toolco exercised the control it had acquired has had no approval whatsoever, as the CAB clearly and properly stated to this Court in 1965. Defendants neither have been, nor could they be, immunized by the Board from antitrust prosecution for that conduct.

V

Damages were properly awarded for violation of the antitrust laws

Despite the lower courts' rulings, their own wilful default and their own concession as to the sufficiency of the complaint (Def. br. p. 32), defendants have continued to place their principal reliance on legal and factual contentions undercutting the complaint.

The court of appeals considered the evidence and arguments relied on by defendants, and concluded that they did not foreclose the possibility that if TWA had gone to trial, it would have been able to prove an antitrust violation under one or more of six hypotheses consistent with the complaint:

> 1. *The Yellow Cab theory.* This refers to *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947), described by the court of appeals as sustaining a complaint alleging "that a company engaged in the

business of manufacturing taxis had established control of a substantial segment of cab operations in four cities and had exploited its control by extracting exclusive purchasing agreements from its owned cabs and taxi companies" (449 F.2d at 66, A-2765). The court of appeals noted specifically that "Toolco has not established to our satisfaction that TWA could not possibly have proven violations analogous to those alleged in *Yellow Cab*. Even if it had, additional specific allegations of antitrust violations in the complaint other than the one which rests on the holding in *Yellow Cab* are not conclusively disproved by Toolco's evidence" (*ibid.*).

2. *Attempting, with unlawful intent, to monopolize a substantial portion of the commercial aircraft market.*

3. *Conspiring to do so.*

4. *Enforcing an illegal boycott.*

5. *Tying adequate financing of TWA to its purchase or lease of jets from Toolco, and vice-versa.* The court of appeals referred on this point to a sentence at pp. 502 and 503 of this Court's opinion in *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495 (1969), that the economic power required to impose an illegal tie need exist "only with respect to some of the buyers in the market."

6. *Leasing aircraft to TWA on condition that TWA not purchase or lease aircraft from other suppliers.* The cases cited by the court of appeals with respect to this theory were decided under the Clayton Act; and the cases cited with respect to other theories arose under the Sherman Act or the Federal Trade Commission Act (449 F.2d at 68-69, A-2770-71).

The court of appeals did not state that the listed theories of antitrust violation were the only ones open to TWA under the complaint. The complaint contained other theories as well; there were, for example, allegations of an unlawful combination and conspiracy in restraint of trade,

and allegations of an unlawful combination to monopolize (Complaint, par. 9, A-8-9). However, since defendants have concentrated their fire on the theories set forth by the court of appeals, TWA's response deals primarily with these points.

Defendants' attack on the court of appeals decision is grounded on their assertion that all six theories fail because Toolco had acquired a 78 per cent stock interest in TWA with the approval of the CAB (Def. br. p. 89) and because Toolco, according to defendants, was not in competition with manufacturers or suppliers of commercial aircraft (Def. br. p. 100). The latter contention is a disputed question of fact. The former asserts a legal immunity, and is answered first.[64]

A. Toolco's stock interest in TWA conferred no immunity from the antitrust laws

1. The alleged violations did not relate solely to TWA's purchases

Defendants seek to lead the Court to construe the complaint as alleging simply that they violated the antitrust laws by preventing suppliers of aircraft other than Toolco from supplying TWA. The complaint was not so confined and was not so read by the court of appeals.

Accompanying the allegations of unlawful exclusive dealing, boycotting, and tying with respect to TWA's aircraft purchases were allegations concerning the supply of aircraft to others. The allegations of combination, conspiracy and attempt to monopolize and restrain trade related to a number of alternative markets or submarkets or both. These

[64] The contention that the conduct complained of was or could be exempted by the CAB from application of the antitrust laws is disposed of in Point IV *supra*. In their Point V, however, defendants are contending that the very fact of ownership by Toolco of a controlling stock interest in TWA, not unlawfully acquired, renders ordinary antitrust principles inapplicable to Toolco's conduct.

included, in addition to the submarket represented by TWA's purchases, the all-carrier market for all aircraft, the all-carrier market for jet aircraft and the all-carrier market for aircraft for use on certain routes (Complaint, par. 7, A-3-4). These market allegations find support in the decisions in *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 225-26 (1947), and *United States* v. *National City Lines*, 186 F.2d 562, 567-68 (7th Cir.), *cert. denied*, 341 U.S. 916 (1951), holding as possible subjects of monopolization sales of taxicabs to the principal taxi operating companies in certain cities and sales of buses and related products used in public transportation systems in some 45 cities.

In the normal course TWA would have sought to prove that defendants' dictation of TWA's aircraft purchases —in addition to being illegal by itself—was undertaken in implementation of the alleged conspiracies, attempts and combinations affecting the non-TWA markets as well as the TWA market. The proof would have included Toolco's joint program with Convair for development of a jet to be sold to all carriers, and Toolco's own plans to manufacture a jet for sale to all carriers. It would also have embraced defendants' other dealings with Convair, Boeing and Lockheed, and with AVRO and Sud Aviacion, all of which plainly indicated that defendants' interest was not confined to looking after TWA's needs. It would have included the policies of Convair and Boeing against "speculative" orders, which Hughes and Toolco were permitted to circumvent. There would have been little question that Toolco ordered aircraft ostensibly for TWA but kept open the possibility of marketing them to other airlines, in light of Hughes's position in early 1955 that he would buy Boeing 707s only if he could have the first 50 produced (pp. 48-49 *supra*) and of such evidence as Toolco's letter of November 1, 1957, quoted at pp. 49-50 *supra*, in which Toolco advised TWA that it had "ordered a number of Boeing Model 707-

131, Boeing Model 707-331 and Convair Model 880 jet aircraft," but "can not yet commit itself to TWA with respect to these aircraft" (A-194). The Special Master, like the court of appeals, comments on other evidence supporting this conclusion (Brownell Report, pp. 29-32; A-1966; 449 F.2d at 68, A-2768-69). Other episodes as to which TWA had some information before the default are listed at pp. 53-56 *supra.*

The ability to place orders ostensibly for TWA but not necessarily for use by TWA enabled Toolco to establish a unique position as a source of jet aircraft to other airlines on short notice. Through discovery TWA would have had opportunity to prove whether this unique position was acquired pursuant to an unlawful conspiracy or combination to restrain trade by establishing Toolco as a favored intermediary with exclusive privileges. Taking advantage of their lawfully-acquired exclusive control over TWA's aircraft purchases in order to obtain an advantage over others in the competitive business of supplying aircraft would have been illegal under the rule of *United States* v. *Griffith,* 334 U.S. 100, 107 (1948). Alternatively, Toolco's position as an intermediary might have been established in furtherance of an unlawful conspiracy, combination or attempt to monopolize with the specific intent, as alleged, "[t]hat Toolco would become a dominant source of supply of jet-powered aircraft to air carriers" (Complaint, par. 10, A-9). Such an intent was far from unrealistic. Desire to avoid long term commitments based on necessarily uncertain traffic estimates could cause airlines to prefer Toolco over manufacturers as a source of supply of aircraft. And as Special Master Brownell observed, long lead-times for delivery from manufacturers could easily give Toolco substantial competitive advantages in dealing with airlines temporarily short of aircraft (Brownell Report, p. 31; A-1966). Indeed, Toolco made more than two million dollars

from supplying jets to Pan American and Northeast (p. 52n. 21 *supra*) and might have reaped still larger gains from the Convairs it ordered if demand had not slackened and TWA had not refused to play any further part as a captive backstop market for Toolco's aircraft after it passed out of Toolco's control at the end of 1960.

Defendants have no basis whatever for claiming—if in fact they do claim—that their use of a controlled corporation in a conspiracy or combination to monopolize or restrain trade deprives such an undertaking of its unlawful character.

This Court has often considered cases in which a controlled company was used to implement an illegal conspiracy or combination to monopolize or restrain trade. In *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966), a parent corporation was held to have obtained monopoly power over a relevant market through its acquired companies. In *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 141-42 (1968), the Court rejected a contention that a parent corporation and two subsidiaries, as part of a single business entity, were "entitled to cooperate without creating an illegal conspiracy" under the Sherman Act. The Court stated that since the defendants "availed themselves of the privilege of doing business through separate corporations" the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities (*id.* at 141). In *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 496-97, 498 (1969), a manufacturer was alleged to have used its wholly-owned subsidiary's ability to extend credit as a means to force purchase of its products, and the allegations were sufficient to entitle plaintiff to go to trial. In *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947), the complaint upheld alleged in part a combination and conspiracy among related

corporations to restrain and monopolize commerce in the sale of motor vehicles for use as taxicabs to the principal operating companies in certain cities. In all these cases, subsidiaries were used as instruments of carrying out the violations alleged or proven. No exoneration was found by virtue of the use of a subsidiary, rather than an independent corporation, as such an instrument.[65]

Because the complaint alleged in substance that defendants used TWA's purchases to implement an unlawful plan directed at markets embracing more than TWA, and TWA was injured in the course of carrying out this plan, the existence of Toolco's control over TWA was not of legal significance so far as these allegations were concerned. The issues for trial with respect to this part of the complaint were rather the true character of defendants' purposes and goals, the success achieved, probability of future success if TWA had not become emancipated, and the full details of the dealings they kept secret from TWA. Defendants, having elected to default, cannot now be heard to claim that they did not intend to effect, did not do anything to further, and could not have successfully carried out, any unlawful combination, conspiracy and attempt directed at the all-carrier market or some submarket not confined to TWA.

Defendants' references to *Hiland Dairy, Inc.* v. *Kroger Co.*, 402 F.2d 968, 974-75 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969) (Def. br. pp. 45, 103, 108, 110), a case refusing to permit a trial when an insufficient probability of success of monopolization was shown, are inapposite in this

[65] *See also Perkins* v. *Standard Oil Co. of California*, 395 U.S. 642, 647-48, 650-51 (1969); *International Boxing Club of New York, Inc.* v. *United States*, 358 U.S. 242, 247-48 (1959); *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 140 (1948); *United States* v. *National Lead Co.*, 332 U.S. 319, 325-26 (1947); *United States* v. *National City Lines, Inc.*, 186 F.2d 562, 567-68 (7th Cir.), *cert. denied*, 341 U.S. 916 (1951); *United States* v. *General Motors Corp.*, 121 F.2d 376, 397-98 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941).

case where discovery was not completed, and have no pertinence to the allegations of the complaint concerning restraints of trade short of monopolization. Plaintiffs in *Hiland* were seeking to enjoin the defendant grocery chain from entering their market and competing with them by building its own dairy; no actual injury was claimed or damages sought.[66]

2. *Defendants' foreclosure of the TWA market was not beyond the reach of the antitrust laws*

Although TWA's damage award may stand entirely upon the injuries alleged and proved to have occurred as a result of the alleged combination, conspiracy and attempt directed at markets not confined to TWA, the award may also stand on the basis of the narrower allegations which relate to the TWA market.

These allegations include the alleged combination and conspiracy to boycott, that is, to restrain others from access to TWA, as illustrated by Hughes's instructions: "• • • [do] not work with Douglas" (A-1806). The boycott allegations are supplemented by allegations of exclusive dealing, unlawful tying, and other unreasonable restraints of trade. The specific conduct challenged is epitomized by the day-to-day leases described in paragraph 20 of the complaint (A-13-14). Nineteen TWA jets in 1959 and 1960

[66] Defendants contend that they cannot be said to have achieved a "dangerous probability" of successfully monopolizing a market not confined to TWA because they had not even entered such a market (Def. br. p. 103). Paragraph 3 of the complaint alleges that they did enter the market (A-2), and paragraph 10 charges they intended to achieve dominance (A-9-10). The question of probability of success in the absence of TWA's emancipation was for determination at trial after full discovery. It related only to the charge of attempted monopolization under Section 2 of the Sherman Act, and not to the charges of unlawful combination and conspiracy to restrain trade under Section 1. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224n. 59 *et seq.* (1940).

were subject to these leases. The leases are alleged to have been made on the condition that TWA would not deal with other suppliers of aircraft. The leases were a means of implementing the alleged combination and conspiracy to boycott other aircraft suppliers in violation of Section 1 of the Sherman Act (Complaint, pars. 9-10, A-8-10). At the same time they were exclusive dealing agreements in violation of Section 3 of the Clayton Act, because of the amount of commerce involved, and the relative importance of TWA as a market for aircraft suppliers. *Standard Oil Co. of California* v. *United States*, 337 U.S. 293, 295-97 (1949), and *International Salt Co.* v. *United States*, 332 U.S. 392, 394-96 (1947), found violations of Section 3 of the Clayton Act in similar situations affecting a considerably smaller volume of commerce.

If, as alleged (Complaint, par. 8, A-4-8), the TWA market was large or distinct enough to constitute a separate submarket, the same conduct also constituted attempted and actual monopolization as well as a conspiracy to monopolize. On this aspect of the case there can be no question whether the alleged attempt at monopoly had a sufficient probability of success. It was totally successful.

Defendants seek to justify their successful monopolization on the ground that a "parent" is entitled to control the purchases of its "subsidiary." The phraseology in which this argument is cast tends to obscure the true relationship between TWA and Toolco. TWA was not a subsidiary corporation in the sense of being a creature of Toolco established as a separate corporation to conduct one aspect of Toolco's business. Like the controlled corporations involved in *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 595 (1951), TWA was not even wholly-owned by defendants. Like the controlled corporations involved in *Kiefer-Stewart Co.* v. *Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951), TWA was an independent business entity, sepa-

rately engaged in its own business, and held out to the public as a separate business. Like a number of the controlled companies involved in *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 221-22 (1947), TWA came under Toolco's control as a result of stock acquisition, Toolco having acquired 78 per cent of TWA's common stock between 1939 and 1960; the remaining 22 per cent being held by approximately 13,000 public stockholders. Even if the relationship between a parent corporation and a wholly-owned subsidiary established for reasons of convenience were immune from antitrust inquiry, the presence of other substantial interests would draw such immunity into question. *Cf. Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 389 U.S. 384, 395-96 (1967). Where an effect on third parties is present, transactions between such affiliates are by no means outside the scope of the antitrust laws. *Perkins* v. *Standard Oil Co.*, 395 U.S. 642, 648 (1969). Accordingly, on whatever basis defendants urge treating parent and subsidiary corporations as a single entity for antitrust purposes, despite the rule of *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 141-42 (1968), they should be obliged to frame their contention in light of the actual relationship between Toolco and TWA.

It follows that on this aspect of the case the question of law posed by defendants boils down to whether, after acquiring a controlling interest, but not sole ownership, in a regulated airline, the acquiring company is privileged to foreclose from other suppliers substantial markets represented by the acquired company's needs.

Foreclosure of substantial markets from competition is one of the most anticompetitive practices possible. Such foreclosure is described as "unreasonable, *per se*." *International Salt Co.* v. *United States*, 332 U.S. 392, 396 (1947); *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 6 (1958); *Fortner Enterprises, Inc.* v. *United States Steel Corp.*,

394 U.S. 495, 501 (1969). It is so inconsistent with the purposes of the antitrust laws that the mere probability of foreclosure of a substantial share of a relevant market suffices to ban an acquisition under Section 7 of the Clayton Act. *Ford Motor Co.* v. *United States,* 405 U.S. 562, 567n. 4 (1972); *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 323 & n. 39 (1962). Indeed, when Congress decided in 1914 to supplement the Sherman Act with specific prohibitions, and to define practices which should be arrested in their incipiency, before becoming full-blown violations of the Sherman Act, it outlawed sales or leases of goods on condition that the purchaser or lessee not deal with a competitor of the seller or lessor, where the effect "*may be* to substantially lessen competition or *tend to* create a monopoly," Clayton Act, Section 3 (15 U.S.C. § 14) (emphasis added). In *Standard Oil Co. of California* v. *United States,* 337 U.S. 293, 305, 314 (1949), requirements contracts covering 6.7 per cent of gasoline sales in a seven-state area were held illegal under this standard without proof of actual or probable diminishment of competitive activity.

Where, as here, foreclosure of competitive activity from substantial markets has actually been accomplished, there is little doubt that the antitrust laws have been violated. In *Fortner Enterprises, Inc.* v. *United States Steel Corp.* a subsidiary sold its credit only on the condition that borrowers purchase a certain number of prefabricated houses from its parent. This practice was attacked under Sections 1 and 2 of the Sherman Act. The dollar volume of commerce which the Court noted had been allegedly foreclosed by this practice in three years was about $9.1 million (394 U.S. at 502). The Court held that if the borrower could prove that the subsidiary had a competitive advantage over suppliers of credit, thus indicating that the housing sales were not made on their merits but as a result of an extraneous influence, he was entitled to

judgment on the ground that the foreclosure was *per se* illegal. If he could not do so, he was still entitled to further examination of his more general allegations that parent and subsidiary conspired for the purpose of restraining competition and acquiring a monopoly in the market for prefabricated houses. (*Id.* at 499-500) The only difference between *Fortner* and this case is that in *Fortner* the borrower was initially kept from protesting against its exploitation by financial need while TWA was initially kept in line by Toolco's voting power. Defendants first used Toolco's voting power to block financing of aircraft from sources other than Toolco, and then conditioned such financing on the purchase or leasing of aircraft solely from Toolco.

The voting power made available to Toolco by virtue of CAB approval can be regarded as analogous to the land grants made available by congressional grant to the Northern Pacific Railway. When the railroad later obliged purchasers or lessees of granted land to favor the railroad over other carriers, it was held to have used its lawfully acquired real estate rights to unlawfully foreclose competition for the transportation needs of purchasers and lessees, and to have violated Section 1 of the Sherman Act. *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 7-8 (1958).

United States v. *Columbia Steel Co.*, 334 U.S. 495 (1948), relied on by defendants though later confined to its special facts by *United States* v. *First National Bank & Trust Co.*, 376 U.S. 665, 672 (1964), confirms, contrary to defendants' argument (*e.g.*, Def. br. pp. 91, 97-98, 99) that acquiring corporations do *not* have a privilege to foreclose markets representing the needs of companies they lawfully acquired. The Court in *Columbia Steel* held the acquisition lawful noting that the degree of foreclosure which would be effected by exclusive dealings between the acquiring and acquired companies—three per cent or less of

the relevant competitive market—was not enough to warrant invalidating the acquisition (334 U.S. at 526-27). But it left open the possibility that exclusive dealings between parent and subsidiary could later become illegal despite the lawfulness of the acquisition. In holding that the use of stock control to force exclusive dealing was lawful in the circumstances, the Court added an important qualification: "at any rate until the effect of such control is to unreasonably restrict the opportunities of competitors to market their product" (*id.* at 524).

Thus *Columbia Steel* recognizes that foreclosure of a controlled company's purchases may be illegal where the effects are serious enough, and this is precisely the position TWA has taken throughout these proceedings.

The outcome of most foreclosure cases (excepting cases of predatory intent and *per se* illegality) turns on the relative and absolute size of the foreclosure. It would be absurd to contend that every exclusive dealing arrangement between parent and subsidiary is illegal, and TWA does not do so. No such contention is necessary to TWA's case in view of the enormous size of the market its aircraft requirements represented. Paragraph 8(f) of the complaint alleges that during the years 1958-1960, when defendants regulated its supply of jets with day-to-day leases, the TWA market for jets exceeded $100,000,000 (A-6). This degree of foreclosure far exceeds in absolute amount that shown in any of the foreclosure cases decided by this Court. In share of relevant market, the foreclosure is well in excess of the ten per cent share represented by a single customer in *Ford Motor Co.* v. *United States,* 405 U.S. 562, 568 (1972), and the 6.7 per cent share represented by numerous customers in *Standard Oil Co. of California* v. *United States,* 337 U.S. 293, 295 (1949). The exact market share foreclosed obviously depends upon which definition of the market and which statistical data would have been

adopted at trial, but on the basis of the data contained in paragraph 8 of the complaint, it is likely that the evidence would have shown TWA's requirements represented no less than 15 per cent of the all-carrier market, and could have been anywhere up to 100 per cent of a more specialized submarket.

Unlawful foreclosure need not be accomplished by abuse of a lawfully acquired competitive advantage, as in *Fortner* and *Northern Pacific*. It may come about from predatory conduct designed to eliminate competition, as in *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 154 (1951), and *Schine Chain Theatres, Inc.* v. *United States*, 334 U.S. 110, 117 (1948); from bargaining to achieve exclusive or preferential rights, as in *United States* v. *Griffith*, 334 U.S. 100, 109 (1948), and *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 210 (1959), or from consolidating buying power, as in *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 154-55 (1948), and *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 181 (1944). Regardless of the method employed, and certainly where an intent to suppress or prevent competition by third parties is alleged, foreclosing a substantial market presents an issue for trial under the antitrust laws. The method used for foreclosure affects only the choice among the statutory provisions which may be invoked and the degree of proof required to prevail at trial. The cases cited above indicate that a plaintiff's burden of proof with respect to adverse effect on competition is reduced or removed if he can prove a predatory conspiracy in violation of Section 1 of the Sherman Act, an exclusive dealing agreement within Section 3 of the Clayton Act, a boycott, tying arrangement or other practice subject to the *per se* rules developed under Section 1 of the Sherman Act, or monopolization subject to Section 2 of the Sherman Act. The allegations in the complaint herein were broad enough to embrace all the methods of foreclosure described, and invoked all the statutes cited.

Defendants' position that Toolco acquired the legal right to foreclose a substantial market from competition by making a stock acquisition with CAB approval falls of its own weight in light of these precedents.

Defendants argue, however, that this Court has read *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947), to mean that parent-subsidiary dealings cannot be unlawful if the acquisition of the subsidiary by the parent was lawful. Cited for this novel proposition—which may be described as one of *per se* legality, not subject to challenge—is *United States* v. *Columbia Steel Co.*, 334 U.S. 495 (1948), discussed at pp. 160-61 *supra* (Def. br. pp. 98-99). Nowhere in *Columbia Steel* is there any such proposition. Indeed, the Court emphasizes its prior holding that "the fact that the conspirators were integrated did not insulate them from the act" (334 U.S. at 522). It repeats the same thought a few lines later, quoting from *Yellow Cab:* "the common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy from the impact of the Act" (*id.* at 523). This principle has been reasserted in subsequent decisions of the Court. *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons*, 340 U.S. 211, 215 (1951); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 598 (1951); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 141-42 (1968). No foundation whatever appears in any of these cases for defendants' proposition that this Court has "recognized repeatedly" that affiliation can immunize otherwise unlawful foreclosure (Def. br. p. 91). Particularly inconsistent with this proposition is the holding in *Timken* permitting affiliation to continue but enjoining unlawful agreements between the affiliates.[67]

[67] *Standard Oil Co. of California* v. *United States*, 337 U.S. 293 (1949), is said by defendants to recognize "that an exclusive dealing arrangement * * * could have been imposed on company agents" (Def. br. p. 91). This case challenged only exclusive supply contracts with independent dealers, and did *not* recognize that such an arrangement

The only other authority cited by defendants to support their contention that post-acquisition foreclosure is privileged is the judgment for defendants after trial in the *Yellow Cab* case. This judgment, according to defendants, is "based on findings that the acquisition of the operating companies had not been illegal" (Def. br. p. 99n. 38). Quite another impression is gained from the decision of the district court. After making the findings referred to, the court proceeds at length to consider the question whether any unreasonable restraint was shown in using operating subsidiaries as captive markets after their acquisition. The court concluded that the evidence showed that the business judgment of the subsidiaries had been that the parent's cabs were built differently and suited their purposes better than other cabs, and the cabs had not been bought under compulsion (80 F.Supp. at 943-44). Accordingly, the findings pertinent here were to the effect that no foreclosure had been proved. The decision cannot in any sense be regarded as holding that foreclosure subsequent to a lawful acquisition actually occurred but was privileged.

It must be noted that if defendants were correct in their novel view that exclusive dealing between parent and subsidiary is *per se* lawful, and privileged against attack on antitrust grounds regardless of the effect on commerce, a number of unfortunate consequences would follow. One would be that conglomerate and other large diversified

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could have been imposed on company agents. The Court stated instead that insofar as use of company agents or acquisition of dealers might result "in a tendency to monopoly they might encounter the anti-monopoly provisions of the Sherman Act" (337 U.S. at 310). Similarly, *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), said by defendants to distinguish between independent distributors and agents in determining the propriety of restrictions on resale (Def. br. pp. 91-92), holds territorial and customer restrictions illegal *per se* where independent distributors have purchased the goods concerned, and otherwise subject to attack if unreasonable (388 U.S. at 379-80). Neither case supports the rule of *per se* legality that defendants, by virtue of their decision to forestall inquiry into reasonableness, are compelled to espouse here.

integrated companies would no longer find it necessary to permit outsiders to bid against their affiliates as suppliers to their operating companies. Another would be that enforcement agencies, in order to open up substantial markets foreclosed to outsiders as a result of acquisition, would have to proceed against the acquisition, instead of directly against the foreclosure. It is true that *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 596-98 (1957), permits invocation of Section 7 of the Clayton Act for this purpose, even though the acquisition has taken place many years previously. However, it is rarely as practicable to proceed against an old acquisition as against a current restraint. Not only are there difficulties in securing witnesses and documentary evidence relating to long-past transactions, but issues and remedies are more complex, and possibilities for delay correspondingly greater. These factors may explain the fact that practically no cases have been brought by the Department of Justice to challenge old acquisitions under the *du Pont* case. The Department has in practice evidently preferred to proceed against current restraints, which it would be severely handicapped in doing under the rule of law proposed by defendants.

Defendants' ultimate position is that a subsidiary, injured by its parent's intentional violations of the antitrust laws may not, when emancipated, sue its parent for those wrongs (Def. br. pp. 93-94 & n. 31). They admit that a subsidiary may challenge its parent as to the legality of its acquisition, but assert that the subsidiary's voice must be thereafter stilled. These assertions, although categorically put, are not based either on authority or on any legitimate public policy.[68]

Contrary to defendants' suggestions, it is generally settled that minority shareholders in a less-than-wholly-

[68] Defendants do suggest (Def. br. p. 94n. 33) that the volume of litigation would be limited if their views prevailed. No proper purpose is served, however, by diminishing the amount of meritorious litigation.

owned subsidiary may bring a derivative antitrust action against a controlling company for anticompetitive practices, engaged in subsequent to an acquisition, which have injured the subsidiary. *Gottesman* v. *General Motors Corp.*, 414 F.2d 956 (2d Cir. 1969); *Rogers* v. *American Can Co.*, 305 F.2d 297, 307-08 (3d Cir. 1962); *Ramsburg* v. *American Investment Co. of Illinois*, 231 F.2d 333, 339 (7th Cir. 1956); *Fanchon & Marco, Inc.* v. *Paramount Pictures, Inc.*, 202 F.2d 731 (2d Cir. 1953); *Kogan* v. *Schenley Industries, Inc.*, 20 F.R.D. 4 (D. Del. 1956); *cf. Ross* v. *Bernhard*, 396 U.S. 531, 539-40 (1970). Any other result would be logically inconsistent with the right of minority stockholders to assert other derivative rights of action, and would deprive them of an important weapon against exploitation. It would also deprive the public of the protection conferred by the private right of action to enforce the antitrust laws. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969). The hollowness of defendants' position is illustrated by their primary reliance on a law review article which expressly confines its discussion to wholly-owned subsidiaries and subsidiaries, unlike TWA, in which no more than 5 per cent of the stock is held by outside interests. Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U.L. Rev. 20, 22 (1968). The authors particularly note that "[a]dditional and considerably different antitrust considerations are brought into play by the existence of more substantial minority interests [citing *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957) (involving an acquisition of stock resulting in preferential treatment of the acquiring company as a supplier)], but these problems are beyond the scope of this article" (*ibid.*).

B. Defendants' factual defenses to the antitrust claims are inadequate

Defendants assert that any of the six antitrust theories which the court of appeals found they had not disproved (449 F.2d at 68-69, A-2770-71), which are not undercut by the CAB's approval of Toolco's acquisition of control of TWA, are destroyed by the "fact" that Toolco was not in competition with manufacturers or suppliers of commercial aircraft (Def. br. p. 89). Defendants first expressly concede for this purpose that Toolco was engaged in the supply of aircraft to air carriers (Def. br. p. 100) but then urge that the complaint can be read as alleging that it was supplying only aircraft ordered for TWA and that it was not engaged "in competition with manufacturers or suppliers" (*ibid.*).

Defendants are attempting to draw too fine a line. No one would read the complaint as alleging that Toolco was engaged in such supply except for profit, or would assume that aircraft manufacturers are not similarly engaged. Convair believed Toolco had gone into competition with it by attempting to sell Convair 880s to Capital Airlines (see p. 51 *supra*) and other aircraft manufacturers would have been justified in drawing similar conclusions. *Cf. United States* v. *Richfield Oil Corp.*, 99 F. Supp. 280, 285, 297 (S.D. Cal. 1951), *aff'd*, 343 U.S. 922 (1952), in which an oil company was in competition with manufacturers of tires and other products purchased by it.

But the short answer to defendants' contention in the present posture is that the complaint, despite defendants' attempt to construe it narrowly, plainly alleges not only that they were engaged in supplying aircraft to "air carriers," in the plural, but also that they sought to restrain and monopolize one or more aircraft markets (Complaint, pars. 7-10, A-3-10); inherent in this allegation is the allegation that they were doing so in competition with other

suppliers. The available evidence of record that Toolco was engaged in supplying aircraft to other airlines besides TWA is fully consistent with these allegations. This evidence is developed more fully at pp. 49-56 *supra* and will not be repeated here.

1. Absence of competition is no defense

It is appropriate to note, however, the legal gap in defendants' argument. If Toolco were entitled to assert that it was a supplier of aircraft only to TWA, and did not compete with other suppliers, it would not follow that "the Sherman Act charges must fail" (Def. br. p. 103). The Sherman Act charges arise under Section 1 and Section 2. Violation of Section 2 would have been plainly made out, if, at trial, the TWA market had been established as a separate submarket or as a sufficiently large proportion of a relevant submarket so that control over the TWA segment constituted monopolization of the entire submarket. Defendants are consequently in no position to state at this point that they could not have violated Section 2. If Toolco had chosen not to compete for other markets or Toolco's domination over its market was so complete that no other supplier dared to compete with it, this could hardly vindicate Toolco of Section 2 charges. The business of a single important customer may be a subject of monopolization, and refusing to permit others to bid for the business has been held unlawful. *United States* v. *Klearflax Linen Looms, Inc.*, 63 F. Supp. 32, 39-40 (D. Minn. 1945). This court has twice found foreclosure of the business of a single substantial customer to be a ground for invalidating stock acquisitions under the Clayton Act. *Ford Motor Co.* v. *United States*, 405 U.S. 562, 568-69 (1972); *United States* v. *E. I. duPont de Nemours & Co.*, 353 U.S. 586, 607 (1957). It has also been held that there is "no reason to differentiate between 'line' of commerce in the context of the Clayton Act and 'part' of commerce for purposes of the Sherman

Act." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 573 (1966). The reasons for holding the business of a carrier such as TWA to be an appropriate subject of monopolization are all the stronger in light of the fact that entry into TWA's business is regulated by the CAB, thus tending to limit the number of alternative outlets for large jet aircraft.

With respect to Section 1 of the Sherman Act, the absence of competition between manufacturer and distributor does not make a violation impossible. An agreement between a manufacturer and a distributor that allocates customers between them may violate the Sherman Act. In *White Motor Company* v. *United States*, 372 U.S. 253, 264 (1963), this Court directed a trial in such a case, and in *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 379-80 (1967), the Court held that such a practice was *per se* unlawful if distributors took title to the goods involved, and in other situations was to be examined under the "rule of reason."

Therefore, even if defendants' version of the facts were correct, they could hardly argue that by avoiding competition with manufacturers through arrangements by which manufacturers would deal with them, to the exclusion of TWA, for aircraft which in many instances were to be resold to other carriers, defendants necessarily avoided any violation of the Sherman Act. As the arrangement resulted in injuring TWA in its competitive race with other airlines, the situation is more analogous to that presented in *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), in which the Court upheld the validity of the complaint by a department store that another department store had induced suppliers to refuse to sell directly to it.

Defendants have repeated here their oft-rejected claim that the charge of conspiracy to monopolize fails because of a shortage of alleged conspirators (Def. br. pp. 104-06). The claim is pointless because the allegations include unlaw-

ful monopolization and attempted monopolization, neither of which require more than one party, *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 708-09 (1962), as well as unlawful combination, not necesarily rising to the level of a conspiracy. *See United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44, 49 (1960). Moreover, the claim that Atlas, charged with being a co-conspirator, had so little to do with the case that it could not have been made a defendant is nonsense in light of the available evidence of broad and close collaboration between Atlas, Toolco, Odlum and Hughes (pp. 57-59 *supra*).

In any event, the claim is plainly untenable in light of *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 141-42 (1968), and *Albrecht* v. *Herald Co.*, 390 U.S. 145, 150n. 6 (1968). Hughes, one of the world's richest and most powerful men whose holdings in Toolco were and are only part of a broad empire, could certainly have been found upon a trial to be more than a mere agent of Toolco. *See Nelson Radio & Supply Co.* v. *Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953). It appears plain that Hughes had "independent economic significance," the test of capacity to be a conspirator propounded in *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29 (1962). Moreover, factual issues as to the roles played by antitrust conspirators are not to be resolved merely on the assertions of the accused conspirators alone. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 468-73 (1962). As the court of appeals observed in the instant case:

> "Whether TWA might have proven such a conspiracy would have turned on the nature and weight of technical and secretive evidence bearing on the independent economic significance of each of the parties and also on subjective questions of intent and attempt. Toolco's conduct barred even initial exploration of these crucial factual issues." (449 F.2d at 69, A-2771)

2. *The correct legal test was used by the court of appeals*

As a postscript to their contention that Toolco in fact did not compete with aircraft manufacturers and suppliers, defendants assert that the court of appeals used a Clayton Act test rather than a Sherman Act test in upholding TWA's claim (Def. br. pp. 106-12). It is contended that the court erred in attaching relevance, for Sherman Act purposes, to the possibility that Toolco possessed "independent competitive significance" and was "a potential commercial manufacturer" of aircraft.

If standards of proof to be applied upon trial were relevant here, Clayton Act standards would be the only appropriate standards as to those allegations of the complaint arising under Section 3 of the Clayton Act. In fact, the court of appeals cites Clayton Act authorities in conjunction with these allegations in the passage cited at p. 150 *supra*. It cites Sherman Act authorities with respect to the remaining allegations. Some of these happen to be allegations of *per se* violations of the Sherman Act, and as to such violations the requirements of proof are even less onerous than under the Clayton Act. *See United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 606-10 (1972); *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 501-04 (1969). There is accordingly no substance to defendants' argument that the court of appeals misconceived the applicable requirements of proof. Since, however, the question presented was not whether TWA had proved these violations, but whether defendants had sustained the burden of establishing that no such violations could possibly be proved, defendants are attacking a straw man.

For the rest, defendants are merely carping at language which they have chosen to misread. The courts of appeals refers to "independent economic significance" in two contexts, both correct, and both clear to any reader willing to

understand the opinion. The likelihood that Hughes and Toolco each had "independent economic significance," and hence the capacity to conspire with one another, was significant in disposing of defendants' argument that the allegations of conspiracy failed for want of conspirators (449 F.2d at 69, A-2771). See pp. 169-70 *supra*. Toolco's "independent economic significance" from TWA, and its potential for entering manufacturing, was also significant in disposing of defendants' principal argument to the court of appeals (see, *e.g.*, Defendants' brief of November 16, 1970, pp. 66-67, 82, 92, Annex A *passim*) that Toolco could *not* be regarded as of competitive significance in the commercial aircraft market, because it was never more than a conduit for TWA (449 F.2d at 67-68, A-2767-70).

The court rightly concluded that proof at a trial—prevented by Toolco's conduct—might well not have supported defendants' position (449 F.2d at 67, A-2767). It did not hold that Toolco's "independent economic significance"—independent, that is, from TWA—and its capacity to become a manufacturer, in and of themselves, would suffice to enable TWA to establish a Sherman Act violation. Instead, the court held that TWA might have proved these facts, along with others, in support of the complaint, and that if TWA had done so, the court could not conclude that it would have been unable to prevail on at least one of the six theories listed (*ibid.*, A-2767).

When the court of appeals' opinion is read as a whole, therefore, it is plain that it did not import into the law any dangerous doctrine, as defendants suggest. It merely determined on a review of the record that defendants had not affirmatively disproven TWA's allegations in such manner, as the court noted, to require grant of summary judgment for Toolco "when its own default barred even initial exploration of the crucial factual issues" (449 F.2d at 69, A-2772).

VI

The special master and the courts below found that TWA, in proving the amount of its damages, demonstrated that each item recovered flowed from the allegations of unlawful conduct and resultant injuries admitted by defendants' default

Under the heading "proximate cause" defendants are seeking to circumvent the record in this case.

Defendants tried and lost before Special Master Brownell the factual issue whether TWA's losses resulted from causes independent of their admitted wrongful conduct. Both the district court and the court of appeals held that the evidence fully supported the Special Master's findings as to damages (pp. 181-82 *infra*). The court of appeals said:

> " • • • TWA did not rely only on its default judgment but introduced evidence linking each component of the damages claimed to the pleaded illegal acts of Toolco and injuries to TWA." (449 F.2d at 72, A-2778)

Under this Court's two-court rule, factual determinations below do not require review here. "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

A. TWA proved damages within the rule of "proximate cause" applicable in this defaulted case

The possibility that Toolco's default might deprive TWA of necessary evidence not only on the issue of whether defendants violated the antitrust laws but also on the issue of

the extent of TWA's injuries drew this Court's attention in 1965. The answer to Mr. Justice White's question—"How can you prove how much you have been damaged without showing what you have been damaged from?" (Def. br. p. 117)—is that sufficient evidence was available to TWA to prove some of its damages—those related to being deprived of timely delivery of an adequate number of jets on direct purchase from the manufacturers—but not all. The evidence of Rummel, vice president of TWA, and Connelly, vice president of Boeing, established to the Special Master's satisfaction the number and kind of aircraft TWA would have obtained and when they would have been received from the manufacturers, absent defendants' unlawful conduct, and hence the extent of TWA's equipment deprivation. On the other hand, while the Special Master agreed that TWA had suffered losses from inadequate and unsound financing, motivated as charged in paragraphs 9 and 10 of the complaint (A-8-10), TWA was not able to establish by evidence satisfactory to him what specific financing program it would have followed, absent Toolco's interference, and it was unable therefore to prove how much it had been damaged by the conduct alleged in the complaint.[69] The actual damages proven to the Special Master's satisfaction were therefore somewhat under $46 million, while TWA had sought to prove over $100 million.

The detailed answer to Mr. Justice White's question, which he asked before the damage hearing had been held, is now to be found in the record of the two-year damage hearing, extracts from which occupy most of Volume A-II and Volumes A-III and A-IV of the Appendix, and Vol-

[69] While accepting Special Master Brownell's findings, TWA has argued on its cross-petition in No. 71-830 that the actual award was incorrectly reduced by an excessive deduction for the additional capital costs TWA would have incurred. The modification for which TWA argues in the companion case would, as a practical matter, provide some relief for TWA's financing injuries as well.

umes AX-I through AX-VII of the Appendix of Exhibits. The care with which the Special Master examined the conflicting evidence is plain throughout the Report that contains his findings and conclusions (A-1966), and the two courts below upheld them in every respect, overruling objections by TWA as well as by defendants.

Defendants' objections to the Brownell Report (A-1967 *et seq.*) rested heavily on the claim that TWA had failed to establish the truth of the allegations of the complaint. The district court, however, held that "TWA did not have to present any evidence to support the well-pleaded allegations of the complaint * * *" (308 F.Supp. at 683, A-2030). The court of appeals also concluded that "TWA had no obligation to introduce any evidence whatever in support of the allegations of its complaint" (449 F.2d at 63, A-2759). These holdings are supported by the finding of Judge Metzner, who supervised the entire course of the discovery proceedings, that defendants' default had "stymied TWA in the acquisition and presentation of evidence in support of its claim" (308 F.Supp. at 683, A-2031). The court of appeals specifically concurred in this finding (449 F.2d at 69, A-2772) ("[Toolco's] own default barred even initial exploration of the crucial factual issues"). These findings were plainly correct.

TWA did prove at the damage hearing, as the Special Master and the courts below held, that the items of damage for which it recovered flowed from the injuries that were alleged in the complaint to have been caused by defendants' violations. To that extent "proximate cause" of the items of damages by the defendants' conduct was part of TWA's burden of proof. But the default relieved TWA of proving that the specific injuries alleged were caused by conduct that violates the antitrust laws—*i.e.*, the allegations of "fact of injury." This is the distinction made by the court of

appeals which defendants pretend to find contradictory (Def. br. pp. 128-29). The full text of what the court of appeals wrote makes this clear:

> "The default had the effect of admitting or establishing that the acts pleaded in the complaint violated the antitrust laws and that those acts caused injury to TWA in the respects there alleged. Because, however, the damages were unliquidated and uncertain, F.R.Civ.P. 55(b), it was necessary for TWA at the hearing to establish the *extent* of the injuries established by the default. The outer bounds of the recovery allowable are of course measured by the principle of proximate cause. The default judgment did not give TWA a blank check to recover from Toolco any losses it had ever suffered from whatever source. It could only recover those damages arising from the acts and injuries pleaded and in this sense it was TWA's burden to show 'proximate cause.' On the other hand, there was no burden on TWA to show that any of Toolco's acts pleaded in the complaint violated the antitrust laws nor to show that those acts caused the well-pleaded injuries, except as we have indicated that it had to for the purpose of establishing the extent of the injury caused TWA, in dollars and cents." (449 F.2d at 70, A-2772-73)

The validity of this distinction is discussed further at pp. 195-203 *infra;* for present purposes it is sufficient to note that the court of appeals held that the Special Master understood this distinction (449 F.2d at 70, A-2774). Mr. Brownell stated quite correctly that

> "• • • the plaintiff (as is customary) has the burden of establishing proximate cause, but that this burden is satisfied *as to liability* if proximate cause is adequately alleged in the complaint, unless the defendants are able to show that such allegations are not well-pleaded. It does not mean that the plaintiff must always prove proximate cause with

evidence, regardless of a default." (Brownell Report, p. 36; A-1966) (Emphasis added.)[70]

Thus, the Special Master correctly applied the legally binding determination that the default admitted the well-pleaded allegations that defendants' unlawful conduct had resulted in the injuries to TWA averred in the complaint. At the same time he required TWA to prove the amount of its damages flowing from and "proximately caused" by the admitted injuries. TWA was damaged, *inter alia,* by the specifically pleaded deprivations it suffered in its jet fleet —inadequate in number, received too late, initially available only through day-to-day leases from Tooleo—and the disruption of certain training operations, as a result of defendants' unlawful scheme, *inter alia,* to establish themselves as suppliers of aircraft to air carriers generally (Complaint, pars. 9-10, 14, 17-20, 22-24, 26, 28, 49-53, A-8-

[70] In this passage Special Master Brownell was applying to the issues before him (which defendants contend included the root question whether they had violated the antitrust laws by their conduct) an opinion by Judge Metzner laying down guidelines as to the burden of proof if defendants sought to contest liability in the damage hearing. Insofar as here relevant, those guidelines were the following:

"Liability is not an issue for the Special Master except in a very limited sense. The sufficiency of the complaint has already been established by the denial of defendant's motion to dismiss. 214 F. Supp. 106 (S.D.N.Y. 1963), *aff'd,* 332 F.2d 602 (2d Cir. 1964), *writ of cert. dismissed,* 380 U.S. 248 (1965). By virtue of the default the defendant has admitted the truth of the well-pleaded allegations of the complaint. *Thomson* v. *Wooster,* 114 U.S. 104 (1885).

* * * * *

"Attempts by defendant to escape the effects of its default should be strictly circumscribed. It should not be afforded an opportunity to litigate what has already been deemed admitted in law. In the absence of an exceedingly strong showing that an allegation is untrue under the rules set forth above, the allegation stands as admitted." (38 F.R.D. at 501, A-397-98).

The rules to which Judge Metzner referred had to do with defective allegations, uncontroverted matters of record in the case, and facts of which judicial notice could be taken (*ibid.*).

26). The amount of the losses which TWA suffered from these fleet deprivations and the training disruption was proven in the course of the bitterly contested two-year damage hearing. The Special Master's findings were expressly related to the allegations of the complaint (Brownell Report, pp. 38, 45, 100-01, 112-13, 168-69, 186-87, 194, 224-26, 265, 296, 302-03; A-1966).

Nor was the district court misled, in ruling upon defendants' objections to the Special Master's Report, by their failure to distinguish between what they admitted by their default as a matter of law and the sufficiency of the evidence to support the factual findings and the damages awarded to TWA by the Special Master:

> "Defendants argue that TWA has failed to establish that it received late or inadequate deliveries of jet aircraft as a proximate result of the conduct of the defendants in violation of the antitrust laws. They assert that the claim 'is defective for the further reason that the plaintiff has failed to establish by a preponderance of the evidence that, but for defendants' conduct, it would and could have accomplished the results now asserted.'
>
> • • • • •
>
> "The question of proximate cause involved in this case arises out of a distinction between the *fact* of damage and the *amount* of damage. The Supreme Court explained this distinction recently in Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n. 9, 89 S.Ct. 1562, 1571, 23 L.Ed.2d 129 (1969):
>
> > "'Zenith's burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by its proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage.'

"Basically defendants seek to deny that they caused *any* injury to TWA, i.e., to deny the *fact* of damages. The fact of damages, however, is an element of liability. The complaint alleges that the defendants committed certain acts which caused injury to TWA. The allegations are admitted by the default and the fact of injury is thereby established. The only question remaining is the amount of damages defendants should pay TWA." (308 F. Supp. at 684-85, A-2033-34) (Emphasis in original.)

Proof that TWA did indeed suffer extensive damages was overwhelming. Following p. 136 of the Brownell Report (A-1966), the Special Master inserted two tables and three graphs comparing TWA's operations during the years 1959-1964 with the results recorded by other domestic trunk carriers in the same period on each of three bases—revenue passenger miles, passenger originations, and passenger enplanements. The comparison in each case is striking.

As the Special Master commented:

"The statistics * * * show that TWA fared far worse during this period than the other trunks. It is clear that during 1960, 1961 and 1962, when plaintiff claims it was short of jets, TWA fell significantly behind the other carriers, and that beginning in 1962 and in 1963 and 1964, when TWA was catching up in terms of jet equipment, it also significantly improved its performance in relation to the other trunk carriers." (Brownell Report, p. 135; A-1966)

* * * * *

"In view of TWA's excellent route structure and its strong performance in 1959, the inference is strong that its failure to maintain its position in 1960 and the subsequent years was due to its shortage of jet equipment, which affected its ability to compete for the available passenger traffic." (*Id.*, p. 140; A-1966)

The Special Master's graphs are reproduced following this page.

References such as this to the relative results of competitors during the damage period, as compared to the relative results of such competitors in a base period, were expressly approved by this Court for use by the trier of fact in measuring the amount of damages in *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 266 (1946). TWA therefore presented such a comparison as the basis of an alternate theory of damage computation. This study, designated as "Comparative Profit Study—1959-1963, 1964-1965" (AX-80 *et seq.*), was introduced into evidence through TWA's expert witness Edward L. Wemple. It demonstrated that TWA's operating profits during the damage period had suffered by comparison with its two principal competitors in the aggregate amount of $169.8 million. The charts summarizing those results (AX-88-90) are reproduced following p. 182 *infra*.

That study is a clear indication that the impact on TWA of defendants' having deprived it of aircraft during these crucial years was great indeed. TWA urged that it was sufficient evidence to support an award of damages in the full amount indicated, $169.8 million before trebling. Although, as the Special Master's charts and graphs referred to above show, appropriate comparisons of TWA's results with those of its competitors were accepted as valid confirmation that TWA had been substantially injured, he did not consider the comparison of operating profits developed in the Comparative Profit Study to be "an acceptable measure of damages in this proceeding" (Brownell Report, p. 307; A-1966). He thought that it overlooked additional factors required to make the comparison valid and failed to take into account that improved TWA results might have adversely affected results of its competitors, while

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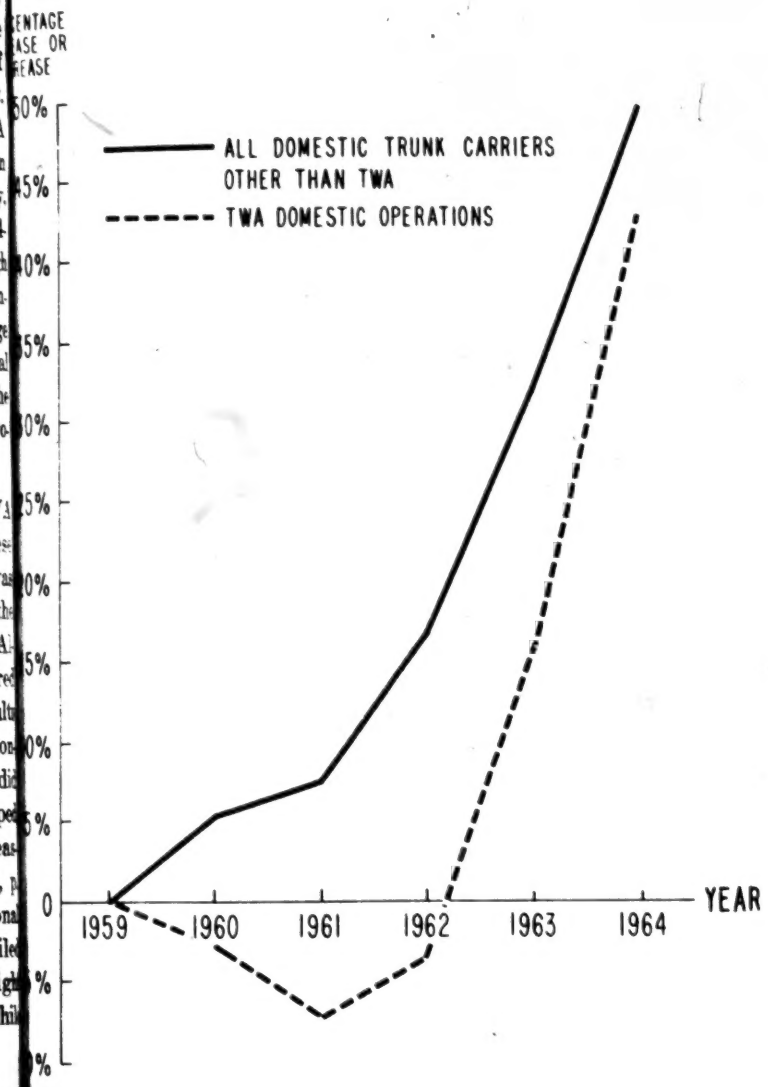

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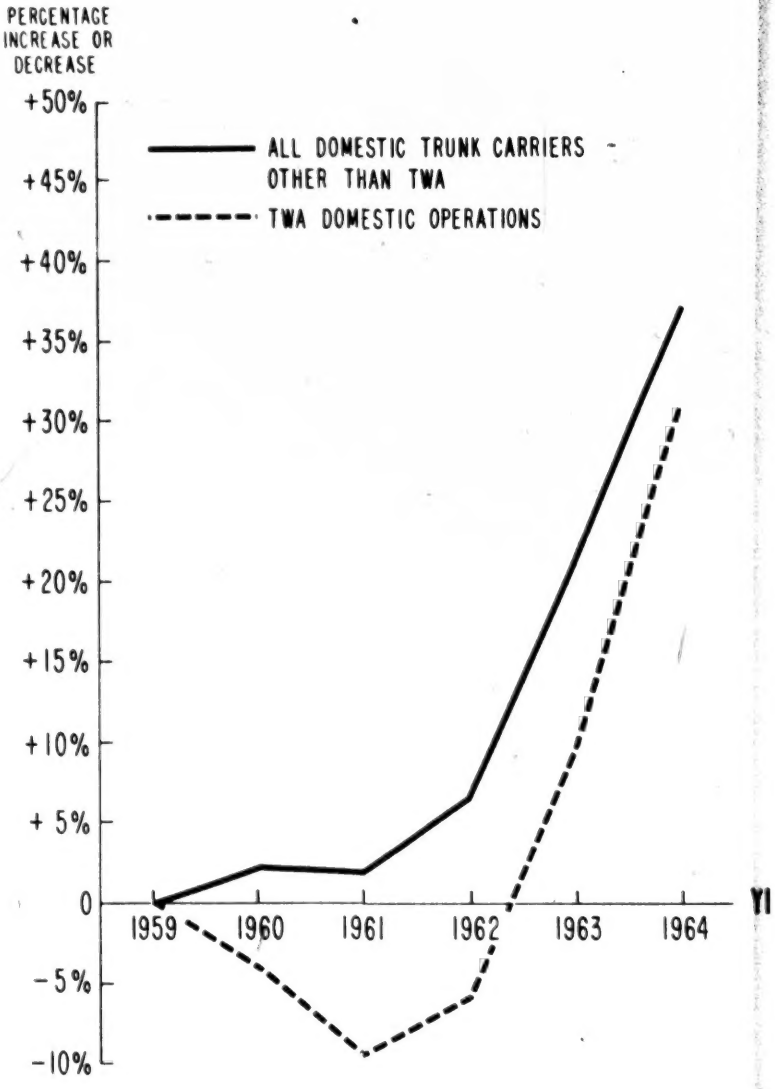

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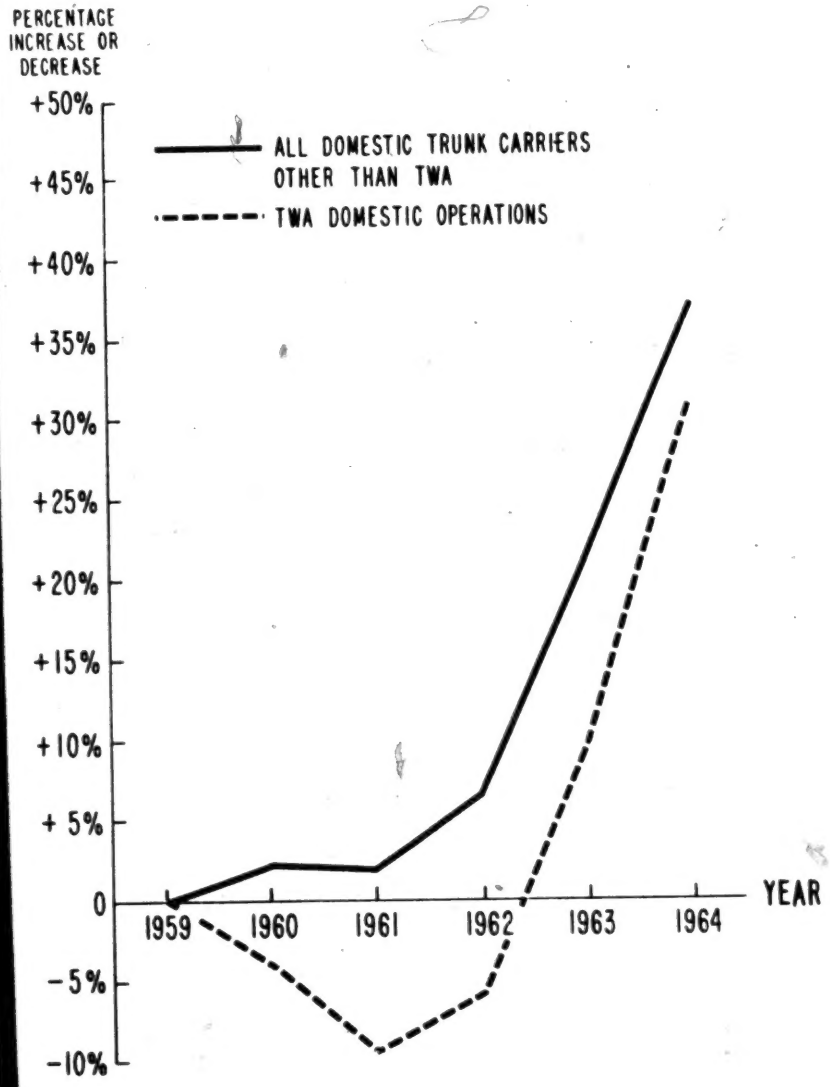

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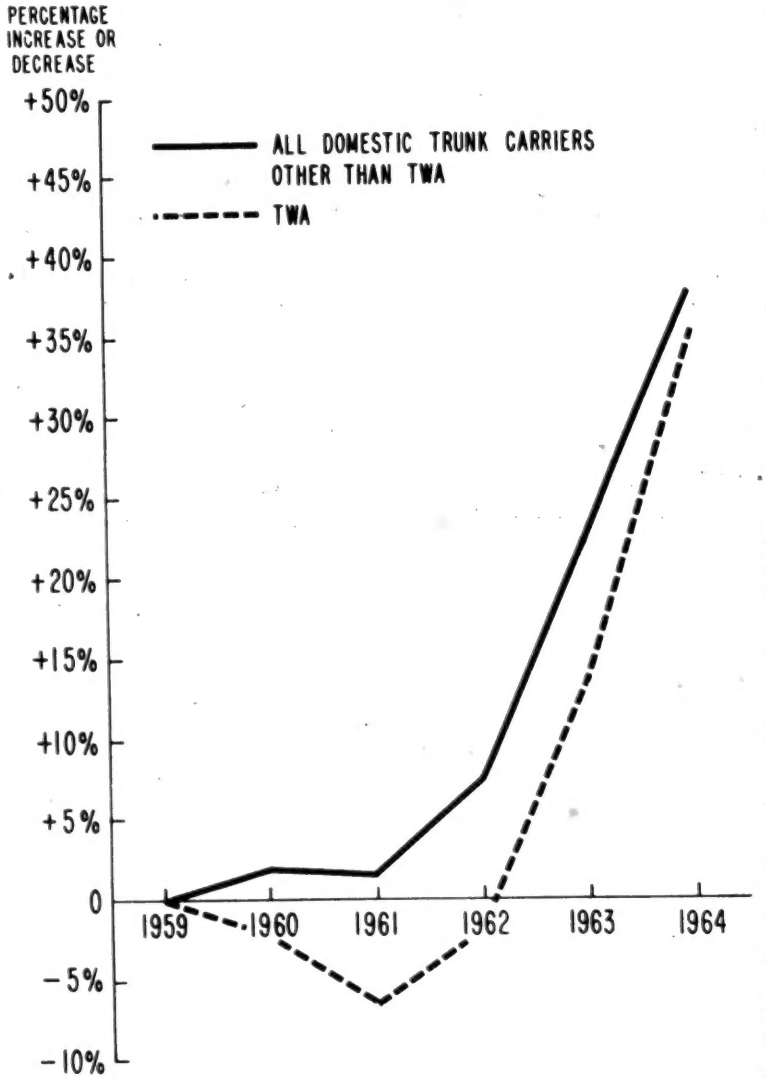


"the methodology used [in TWA's more detailed damage studies] is more precise and realistic than that shown in its comparative profitability study" (Brownell Report, p. 308; A-1966). Similarly, Judge Metzner, to whom TWA urged that the simple and direct approach taken in the Comparative Profit Study was based on the theories approved by this Court in *Bigelow,* upheld the Special Master's ruling, not because the Comparative Profit Study lacked probative value, but because "there was a more precise method of ascertaining damages, which was the method [the Special Master] used" (308 F. Supp. at 694, A-2054). Elsewhere Judge Metzner observed that the Comparative Profit Study had "a reasonable basis" * * * even though the court ultimately ruled against plaintiff on this theory" (312 F. Supp. at 483, A-2068).

The total effort of defendants' witnesses at the damage hearing was directed to an attempt to show that TWA's losses were not "proximately caused" by the matters alleged in the complaint, but were the result of independent factors. The massive nature of that attempt to prove defendants' contentions is only partially indicated by the exhibits contained in Volumes AX-V through AX-VII of the Appendix of Exhibits and the excerpts from the transcript of testimony of defendants' witnesses on cross-examination which are contained in Volume A-IV of the Appendix. This issue was tried to the hilt before the Special Master, and defendants lost on it. They filed hundreds of objections with the district court, charging that the Special Master's findings were in error because not supported by the evidence, and that he should have made different findings accepting their contentions as supported by the evidence of their witnesses (A-1967 *et seq.*). Those objections were in every case overruled (308 F. Supp. 679, A-2027 *et seq.*).

The court of appeals held that the Special Master's "application of the proper principles [was] unexcep-

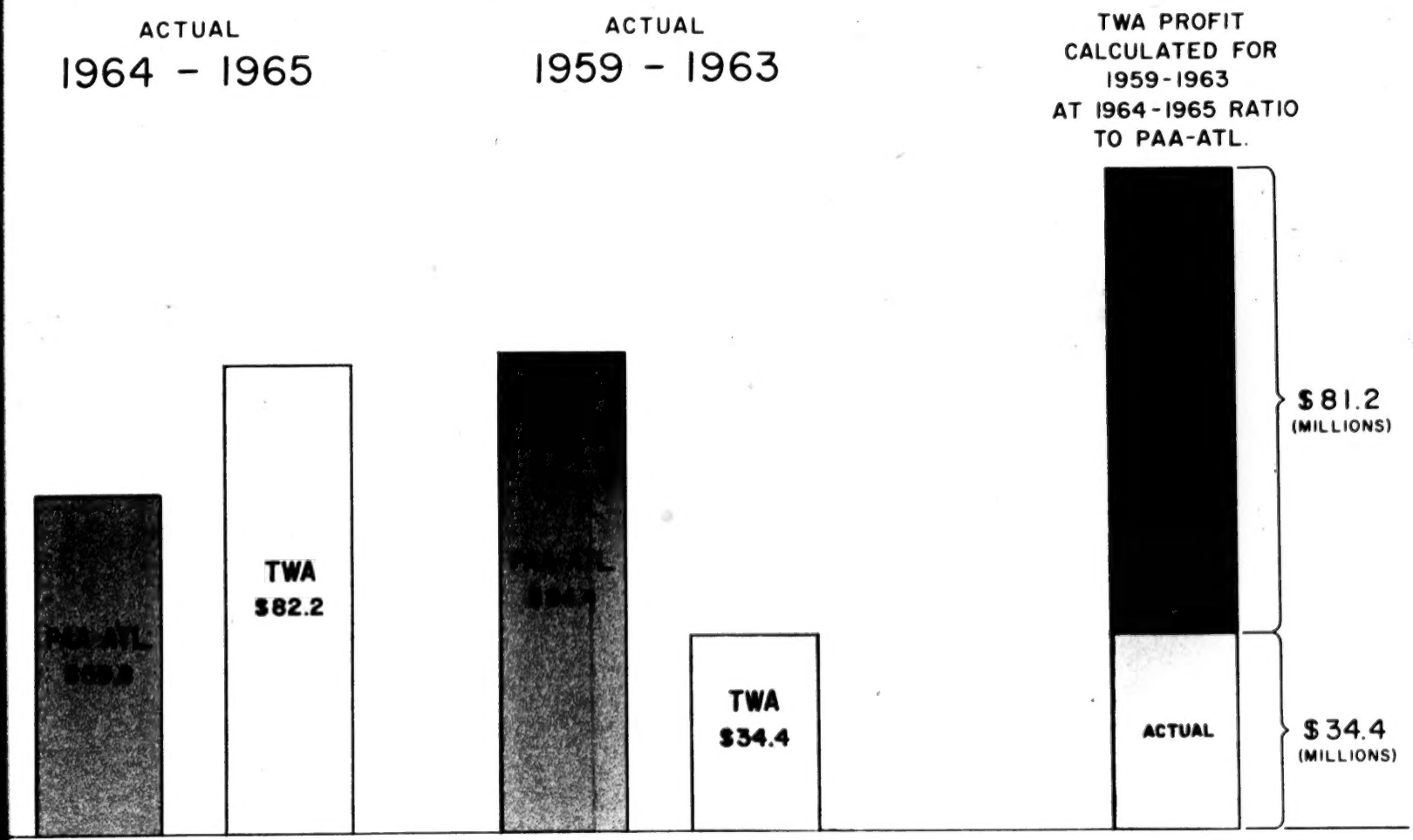
tionable" (449 F.2d at 70, A-2774). The court did not, as the defendants assert, "rely on what it recognized to be 'assumption' only" (Def. br. p. 129) but considered at length "the evidentiary foundation of TWA's damage award" (449 F.2d at 71, A-2775). It referred specifically to the substance of the testimony of TWA's fact witnesses and experts (449 F.2d at 71-72, A-2775-77) and that of the experts presented by defendants (449 F.2d at 72, A-2777-78) and concluded that "TWA did not rely only on its default judgment but introduced evidence linking each component of the damages claimed to the pleaded illegal acts of Toolco and injuries to TWA" (449 F.2d at 72, A-2778).

The court of appeals also recognized that the heart of defendants' "proximate cause" argument was an attack on the sufficiency of TWA's damage proof. On that issue the court said that "because of the huge sums involved in this litigation [it was not] content to rest on Judge Metzner's appraisal of the Master's findings" (*ibid.*), and went on itself to consider the evidence presented at the damage hearing (449 F.2d at 73-75, A-2780-84). It concluded that "each of the challenged findings is amply supported by evidence introduced during the hearing and * * * none is 'clearly erroneous' " (449 F.2d at 73, A-2780).

B. Defendants' attack on the Special Master's findings of fact as to TWA's damages is refuted by the record in the damage hearing, and those findings have been affirmed by the two lower courts

Findings as to the amount of TWA's damages resulting from defendants' conduct were purportedly not challenged by defendants' petition for certiorari. In defendants' brief, however, the testimony of defendants' experts, rejected below, that TWA's earnings would not have been improved by having more jets in 1959-1963 (Def. br. p. 18; Brownell Report, pp. 112, 124-25, 127, 130; A-1966), the arguments, rejected below, as to TWA's financial in-

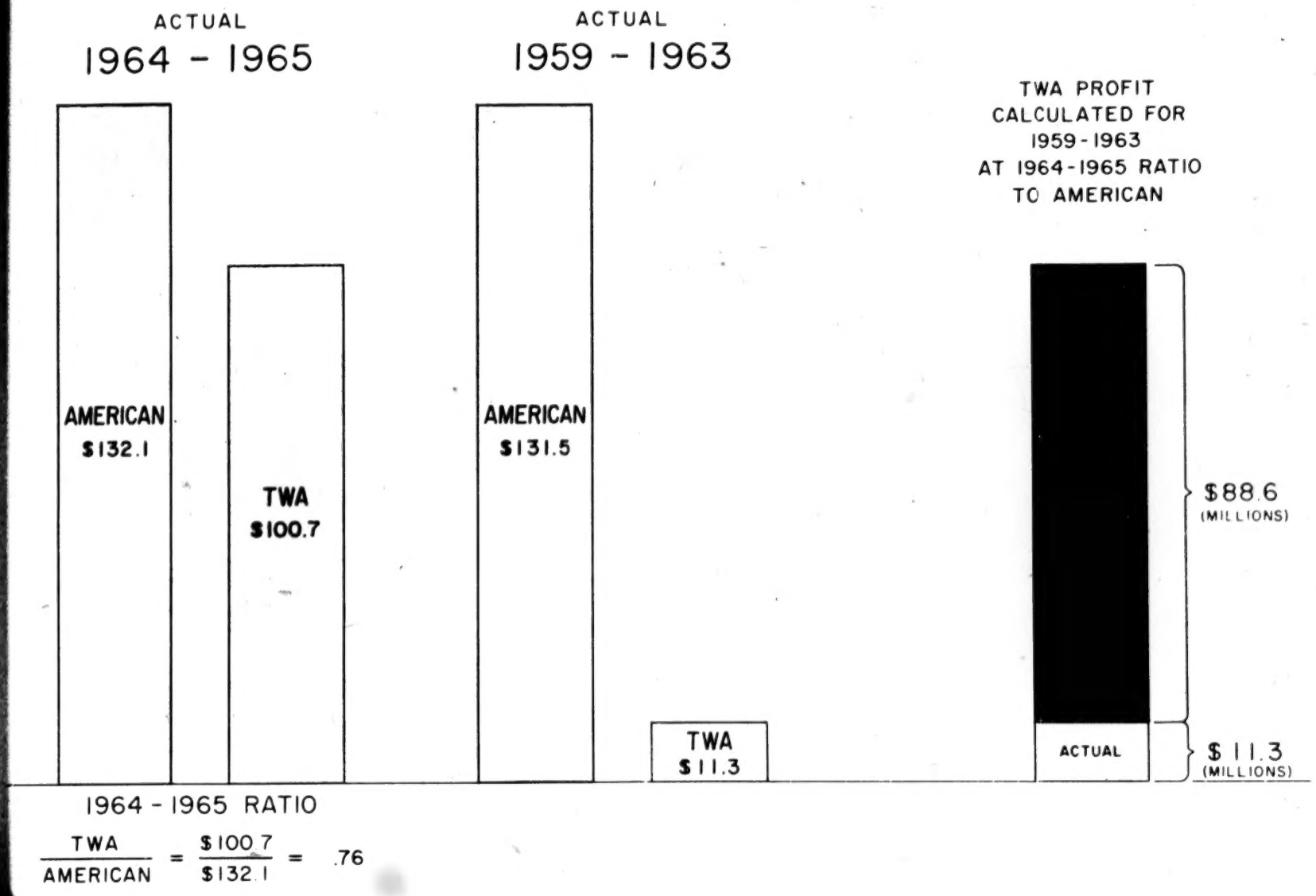
OPERATING PROFIT — INTERNATIONAL



1964 - 1965 RATIO

$$\frac{\text{TWA}}{\text{PAA - ATL.}} = \frac{\$82.2}{\$59.8} = 1.37$$

OPERATING PROFIT — DOMESTIC



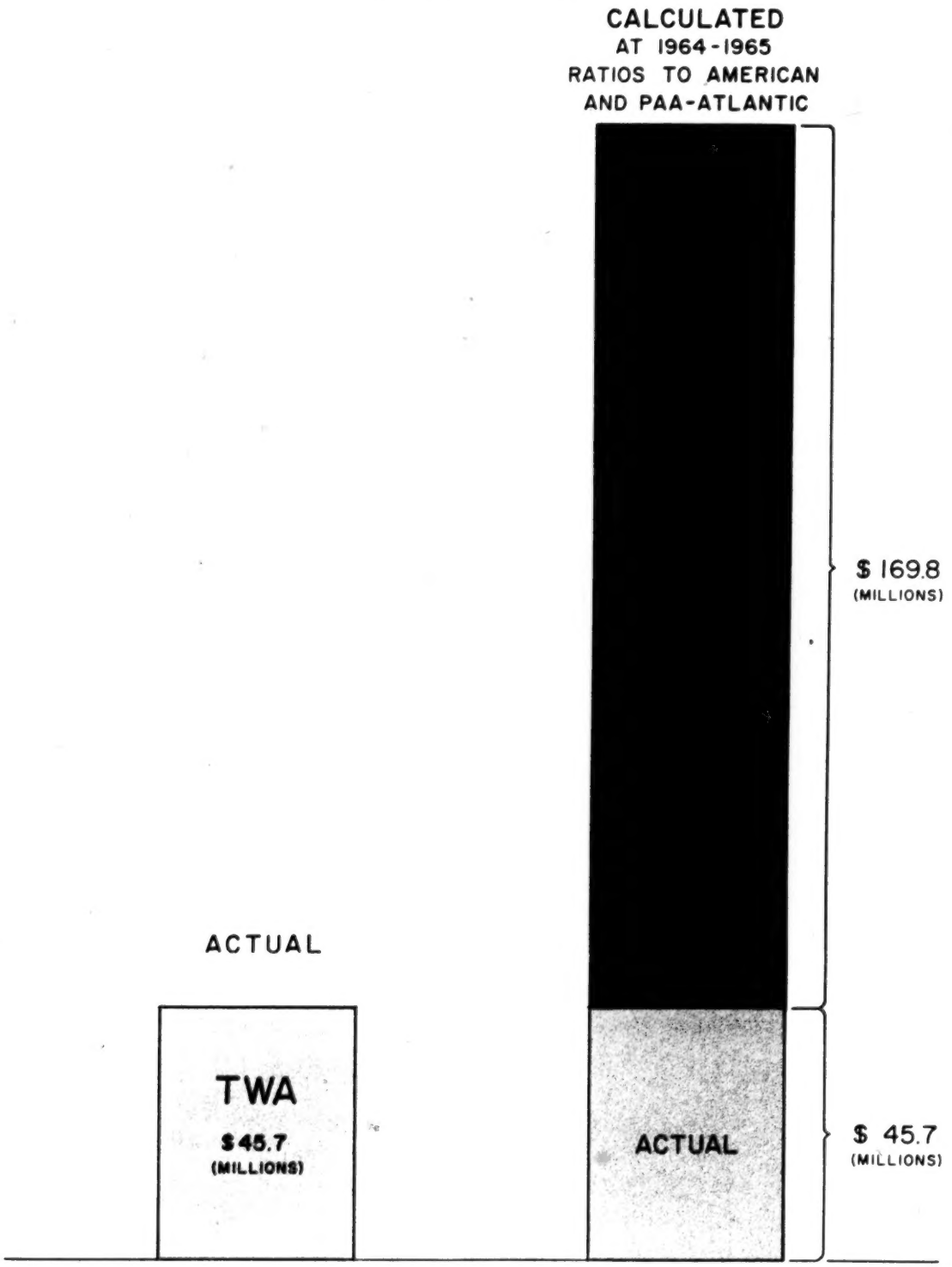
1964 - 1965 RATIO

$$\frac{\text{TWA}}{\text{AMERICAN}} = \frac{\$100.7}{\$132.1} = .76$$

Exhibit C-3

TWA SYSTEM OPERATING PROFIT

1959 - 1963



capacity to acquire additional jets had it been free from defendants' unlawful interference (Def. br. pp. 131-32, 139-41; Brownell Report, pp. 148-49; A-1966), and the pretense that defendants' bare-faced looting of TWA was "financial assistance" (Def. br. pp. 12, 20, 78, 87-88, 141; Brownell Report, pp. 254-55; A-1966; *cf.* pp. 45-46 *supra*) —all are trotted out again as arguments that TWA is not entitled to any recovery. These factual determinations have been previously reviewed by two other courts, and it is unlikely that this Court has agreed to review them further.[71]

Defendants also ignore the mandate of FED.R.CIV.P. 52 (a) that

> "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court." (*See also* FED. R.CIV.P. 53(e)(2))

This Court re-emphasized the importance of this principle in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969):

> "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence.

[71] The Court has traditionally viewed such a function as unwarranted and unnecessarily burdensome, even when imposed by law. *See United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 175n. 1 (1963). *See also Berenyi* v. *District Director, Immigration & Naturalization Service*, 385 U.S. 630, 635 (1967); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949), *adhered to upon rehearing*, 339 U.S. 605, 609-10 (1950).

> The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether 'on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed.' *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948). See also *United States* v. *National Assn. of Real Estate Boards*, 339 U.S. 485, 495-496 (1950); *Commissioner* v. *Duberstein*, 363 U.S. 278, 289-291 (1960)."

The principle is peculiarly applicable to a case like this where proof was largely the testimony of experts and where the findings of fact defendants challenge were made by a Special Master who presided at the damage hearing for over two years, accepted and confirmed by a district judge who himself lived with this case for nine years, and then again affirmed by the court of appeals. *Badenhausen* v. *Guaranty Trust Co.*, 145 F.2d 40, 53 (4th Cir. 1944), *cert. denied*, 323 U.S. 797 (1945) (The obligation to accept a special master's findings pursuant to FED.R.CIV.P. 52(a) and 53(e)(2) is "[e]specially imperative" when "• • • the master has lived with the case for four years, has patiently studied the complex questions involved and has listened with painstaking care in extended hearings to the arguments and proposals of all the parties • • • "). *See also Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 274 (1949), *adhered to upon rehearing*, 339 U.S. 605 (1950) ("To no type of case is [the 'unless clearly erroneous' rule] more appropriately applicable than • • • where the evidence is largely the testimony of experts• • • "); *Speyer, Inc.* v. *Humble Oil & Refining Co.*, 403 F.2d 766, 770 (3d Cir. 1968), *cert. denied*, 394 U.S. 1015 (1969) ("The matter of weighing the credibility and persuasiveness of expert opinion is the unique function of the trier of fact"); *Evans* v. *United States*, 319 F.2d 751, 755 (1st Cir. 1963) (" • • • the trial court has the right to decide which set of experts—plaintiff's or defendant's—will be credited"); *Sanitary*

Farm Dairies, Inc. v. *Gammel,* 195 F.2d 106, 115, 118 (8th Cir. 1952).

Reached and tested, moreover, defendants' assertions about the evidence in the record of the damage hearing are demonstrably wrong.

1. Size of TWA's jet fleet

By a brief and extremely inaccurate summary of a portion of the testimony of two of TWA's witnesses (Def. br. pp. 130-31) defendants suggest that TWA did not offer any evidence that it would have acquired the 63-plane jet fleet which was found by Special Master Brownell to "constitute a proper basis for computing damages" (Brownell Report, p. 56; A-1966). Following this passage, and without a single reference to the documentary evidence, defendants flatly assert: "That is all that TWA proved" (Def. br. pp. 130-31). This is false.

TWA historically received and paid for 47 jets. TWA presented evidence that, except for defendants' unlawful scheme, it would have received six additional Boeing B-331 jets and ten additional Convair jets (*see, e.g.,* AX-11-14, AX-14-23, AX-43-55, AX-75, AX-78-79; A-1070, A-1075-76). Defendants' facile dismissal of the testimony of Rummel (Def. br. pp. 130-31, 136) and Connelly (*id.* p. 138) on the ground that they could only testify to what TWA "should" have done, rather than what it "would" have done absent defendants' unlawful conduct, raises exactly the type of question as to sufficiency of proof which, having been consecutively reviewed by two courts below, this Court has stated to be inappropriate for review, barring "a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.,* 336 U.S. 271, 275 (1949). Not only does the record demonstrate that the Special Master did not err in relying on the evidence of these witnesses (in addition to the other evidence discussed *infra*), but it shows

that his reliance was entirely proper. Rummel was the only TWA officer qualified to testify on TWA's acquisition of aircraft and related equipment during the Hughes-Toolco regime—and he was plainly better qualified to testify on such matters than any non-TWA officer except Hughes.[72] Connelly specifically confirmed that Rummel's estimate and reallocation of the delivery positions of long-range jets from Boeing (AX-43-55) would have been obtainable had an independent TWA engaged in negotiations with Boeing at about the same time as TWA's principal competitors did (AX-75, AX-78-79; A-1070, A-1075-76). No witness could have been more qualified to testify on these matters than Connelly.[73] Therefore, the Special Master was entirely correct in accepting this evidence as "a proper basis for computing damages * * *" (Brownell Report,

[72] Rummel joined TWA in 1943 as Senior Engineer in charge of new aircraft studies and future fleet planning, becoming Chief Engineer in 1949—a position he occupied until March 1956 when he became Vice President, Engineering. In 1958 he became Chairman of TWA's Jet Planning Committee, which was responsible for planning for the introduction and efficient use of jet aircraft by TWA. In addition, from 1956-1960, he was employed by Toolco as a consultant and special representative in connection with the acquisition of Boeing 707 and Convair 880 aircraft. He reported directly to Hughes and acted as contract administrator for Toolco on these contracts. (AX-4-5) Rummel was Hughes's closest associate in aircraft procurement matters (A-701-03) and was TWA's man in charge of equipment development (AX-4). When Hughes decided that he wanted TWA to know something, he would instruct Rummel to pass the information on (A-702-03). Because of the way Hughes ran TWA's affairs, no one but Hughes had the power and authority to say what TWA would have done during that period (A-699-704), and Rummel reported directly to him.

[73] Connelly, as Director of Contract Administration, was a member of Boeing's "headquarters group" during the period of negotiations on the early jets in 1955. When in 1956 he became Vice President and General Manager in charge of Boeing's Commercial Airplane Division, all responsibility with respect to commercial airplane programs was centralized in that department (AX-74-75; A-977-79). In preparation for his testimony, Connelly held extensive discussions with others at Boeing (A-988, A-992, A-995-96, A-999-1002). Finally, as the Special Master noted, "[t]he Connelly testimony was not seriously controverted" (Brownell Report, p. 55; A-1966).

p. 56; A-1966). The courts below so found (308 F.Supp. at 689-90, A-2042-43; 449 F.2d at 73-74, A-2780-82).

2. *TWA's ability to finance the additional jets*

The largest part of defendants' "proximate cause" argument is devoted to an attempt to demonstrate that TWA failed to prove it could have paid for the additional jets.[74]

As to the amount needed, the Special Master found that (a) "the full purchase price of [the six additional Boeings] and related spare parts and equipment [would have amounted] to a capital expenditure of $43.1 million" (Brownell Report, p. 149; A-1966), and (b) "the full purchase price for [the ten additional Convairs] and related spare parts and equipment would have amounted to $48.1 million" (*id.* p. 150; A-1966). Thus, a total of $91.2 million would have been needed to acquire the 16 jets that defendants' unlawful conduct kept TWA from acquiring. The Special Master, for purposes of his "cost of capital" com-

[74] In light of the allegations of the complaint as to defendants' deliberate impoverishment of TWA, TWA's actual capability in 1959-1960 to pay for the jets of which defendants deprived it was not properly an issue in the damage hearing. If there had been no default and ability to pay had become an issue, defendants would have had the burden of persuading the Special Master that TWA could not do so. *Klinger* v. *Baltimore & Ohio R.R.*, 432 F.2d 506, 516 (2d Cir. 1970). *McClelland* v. *Climax Hosiery Mills*, 252 N.Y. 347, 169 N.E. 605 (1930), in which defendants claim to find support, expressly holds that the burden in such a case rests with the defendant, as well as stating, and enforcing, the rule that "defendant, by failing to answer, admits all traversable allegations contained in the complaint" (252 N.Y. at 351, 169 N.E. at 606). As is shown at pp. 188-90 *infra*, there was ample evidence in the record before the Special Master to permit him to find affirmatively, as he did, that TWA would have been able to finance the additional jets but for defendants' wrongdoing, and TWA would not have "drowned anyhow," despite defendants' felicitous summation of *New York Central R.R.* v. *Grimstad*, 264 F. 334 (2d Cir. 1920) (Def. br. pp. 133-34n. 68) —an outrage to the modern conscience. *Compare Kirincich* v. *Standard Dredging Co.*, 112 F.2d 163, 164 (3d Cir. 1940), and *Zinnel* v. *United States Shipping Board E. F. Corp.*, 10 F. 2d 47, 49 (2d Cir. 1925).

putations, treated all of these funds as borrowed. In light of the default and his rulings on the evidence, he made what he described as the "fair and reasonable" assumption that "funds were available at the time of the delivery of each aircraft" that TWA did not receive because of defendants' unlawful conduct, stating that the record was "sufficiently complete to allow these assumptions to be taken" (Brownell Report, p. 148; A-1966). That is, of course, a finding as to the sufficiency of evidence presented to him on this subject, and a challenge to that finding must fail unless the record is so devoid of supporting evidence that the finding is "clearly erroneous." FED.R.CIV.P. 52(a) and 53(e)(2).

The Special Master had before him not just some, but a whole body of information relevant to TWA's capability to have arranged for the additional funds if it had not been the victim of defendants' unlawful combination and conspiracy to restrain and monopolize and attempt to monopolize in violation of the antitrust laws.[75] Among other things, the record includes:

> (a) The well-pleaded allegations of TWA's complaint—accepted by the Special Master and entitled to controlling weight in any consideration of what TWA could have done if defendants had not violated the law and injured it (see Brownell Report, p. 254; A-1966).
>
> (b) Evidence that each of TWA's principal competitors—United, American, and Pan American—

[75] Therefore, defendants' reliance upon *Flintkote Co.* v. *Lysfjord*, 246 F.2d 368 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957) (evidence of lost profits insufficient to sustain recovery) and *Wolfe* v. *National Lead Co.*, 225 F.2d 427 (9th Cir.), *cert. denied*, 350 U.S. 915 (1955) (evidence insufficient to prove that plaintiffs sustained any damages), is misplaced. As for the specific proof thought necessary in *Flintkote* and *Wolfe*, a full scale trial was had in the damage hearing of whether TWA would have "obtained more business," and the state of the industry was extensively analyzed (Brownell Report, pp. 69-75; A-1966), while the availability from the manufacturers of the specific additional aircraft was fully established by Rummel and Connelly (*id.* pp. 46-51; A-1966).

successfully financed a fleet larger than the 63-plane fleet (TWA Exs. 223, 226, 232, 241 id., 249-52, 260; AX-336 *et seq.*, AX-1712 *et seq.*); during 1955-1960, for example, United made arrangements for additional financing totalling $370 million, American for additional financing totalling $265 million, and Pan American for financing totalling $360 million (AX-1776-80). Substantial amounts were also raised by each of these airlines both earlier and later. The court of appeals considered that the evidence on this subject, alone, would have been enough to support the Special Master's finding (449 F.2d at 74, A-2781).

(c) Traffic and accounting studies which demonstrate that availability of the earlier and larger jet fleet would have produced a large increase in funds internally generated from operations. The increase in 1959 and 1960 alone would have provided $62.9 million, or about 70 per cent of the necessary funds (AX-479). Thus the additional amounts needed would have been on the order of $30 million.

(d) Evidence of TWA's actual financing and the various possibilities available to it to have raised any additional money needed (AX-861, AX-865; TWA Ex. 296, reproduced following p. 46 *supra*); in the year following defendants' surrender of control of TWA, while it was still suffering the immediate adverse effects of defendants' unlawful schemes, TWA was able to arrange borrowing from banks and insurance companies totalling $312 million—$165 million at the end of 1960 (AX-861, note 4 to financials) and $147 million in 1961 (AX-865). In May 1961 it sold to the public more than $19 million Subordinated Income Debentures with warrants, with the balance of the $100 million offering going to Toolco (TWA Ex. 296). A little more than two years later Toolco sold these securities for a profit of more than $13 million (*ibid.*).

(e) Expert testimony by the investment banking firm of Drexel Harriman Ripley, Inc., prepared by

> senior officers of that firm who had personally and throughout the crucial period advised United Airlines on that airline's financing programs (AX-347, AX-349), that an independent TWA could also have financed the acquisition of an adequate jet fleet, including the additional 16 jets (AX-353, AX-429; A-1232).[76]

In light of these matters of record before the Special Master, defendants' assertion that the award to TWA on its claim for losses in operating profits due to an inadequate jet fleet "was based on sheer speculation and guesswork" (Def. br. p. 130) is completely without foundation. The court of appeals so found:

> "We find untenable Toolco's characterization as insufficient to support the Special Master's contrary assumption that an independent TWA would and could have financed the full 63-jet fleet, the evidence that United, American, and Pan American Airlines each were in fact able to finance comparable ventures during the same period. Toolco directs our attention to financial reversals experienced by TWA during the period preceding the time Brownell assumed TWA would have financed the fleet (1958-59). But the well-pleaded allegations of the complaint demon-

[76] Defendants make much of the Special Master's rejection of TWA's claim for damages due to late financing, which was based on the same expert testimony (Def. br. pp. 130, 139-40). The Special Master found TWA's proof of the *specific* financing program proposed by its experts to be insufficient to support the award of additional damages to TWA for its financing injuries because TWA would have needed "the benefit of hindsight" to have adopted the plan in 1955 (Brownell Report, p. 258; A-1966). That, however, does not negative the significance of the testimony that TWA could have obtained such financing as was necessary in other ways. TWA's financing experts explicitly stated in their report that they did not wish it to be interpreted as meaning that the financing program they recommended "is the only program by which TWA might have been successfully financed * * *" (AX-429; *see also* testimony to same effect at A-1214, A-1231-32). Their answer to the "Question Posed" —whether an independent TWA could have financed its 1955-1960 capital requirements—was a categorical yes (AX-353).

> strate conclusively that crippling TWA's financial posture and reducing it to a state of vassalage, dependent on Toolco's support, was part of defendants' overall antitrust violation. See Complaint ¶¶ 17, 18, 19, 22, 23, 24, 26, 50, 51, and 52(a). To the extent of negating Toolco's attempted reliance on TWA's asserted financial weakness, these allegations must be given effect. Any inferences other than that an independent TWA would have fared neither better nor worse than competing airlines in financing its jet fleet would have been unwarranted." (449 F.2d at 74, A-2781-82)

On December 29, 1960 the CAB had pointed out that:

> "TWA has arranged for the acquisition of 47 jet aircraft. Comparable carriers have acquired, or are in process of acquiring, jet fleets in the neighborhood of twice this size." (Order No. E-16195, 32 C.A.B. at 1364n. 16, A-3408n. 16)

The Board said that "we have not been unaware of TWA's problems," and commented that the impact of TWA's not having arranged financing as early as its major competitors might be "indeed far-reaching" (32 C.A.B. at 1364-65, A-3408). It suggested that TWA's equipment deficiencies had played a substantial part in its "recent inability to maintain its traffic position relative to its principal competitors" (32 C.A.B. at 1365, A-3408).

Defendants' manipulation of TWA's financings for their own unlawful purposes is best illustrated by TWA Ex. 296 (following p. 46 *supra*). In the period of Toolco's control, TWA on two occasions (1948 and 1957) sold substantial amounts of newly issued stock. Both sales were dictated by defendants for the purposes and with the precise results alleged in paragraph 23 of the complaint (A-15). Both were disastrous for TWA, and extremely profitable for Toolco, as TWA Ex. 296 plainly shows. Even defendants'

financial expert testified at the damage hearing that he would have preferred not to make the financing in 1957 and characterized the offering as an "unhappy financing" (A-1568-69, A-1571-72).[77] The almost unbelievable story of how Toolco blocked TWA from securing public financing in 1945-1947, which resulted in defendants' complete take-over of TWA as a condition for the 1948 financing, is discussed at pp. 45-46 *supra*.

3. The 1959-1960 leases

Defendants' attack on the award of damages to TWA for being forced to lease jets from Toolco rather than purchase them directly from manufacturers in 1959-1960 is equally without basis. Paragraph 20 of the complaint alleges:

> "20. During the period 1959 to 1960, defendants arranged for the lease to TWA by Toolco of certain jet-powered aircraft on a day-to-day basis. Such aircraft were the first and only jet-powered aircraft made available to TWA by the defendants during the years 1955 to 1960 and the number of aircraft so leased by Toolco to TWA was inadequate for the needs of TWA. Such leases were given on a continuing condition, agreement and understanding that TWA would not purchase or lease aircraft from any other potential supplier thereof. The effect of such continuing condition, agreement and understanding was to foreclose, to all potential suppliers of jet-powered aircraft to TWA other than defendants, the opportunity for selling or leasing jet-powered aircraft to TWA." (A-13-14)

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[77] It was not unhappy for Toolco. Defendants arranged that Toolco should have unlimited oversubscription rights, while no other stockholder was allowed any oversubscription rights at all (AX-883 *et seq.*). Its activities in the market in attempting to buy up rights of other stockholders were such as to necessitate an application to the Securities and Exchange Commission for exemption from the Commission's anti-manipulation rules (AX-923 *et seq.*). By these methods it was able to buy a total of 2,692,959 shares of TWA stock at the depressed price of $13 a share (AX-919-20). This stock was sold at $83 a share in 1966, for a total profit on these transactions of $188 million (TWA Ex. 296).

Although defendants' claim to find a "failure of proof" (Def. br. p. 145), their objection is that the allegations of TWA's complaint are insufficient to support the award for the leasing damages because they were measured by the amount TWA would have saved if it had been able to buy aircraft directly from the suppliers so foreclosed. The argument is that paragraph 20 of the complaint does not contain an adequate legal statement of the accounting fact, fully proved in the damage hearings, that an additional cost to TWA of millions of dollars (to be exact $5.3 million, net of capital costs and depreciation charges) resulted directly from having to lease jets owned by Toolco, instead of being allowed to buy those jets from their manufacturers.

Defendants fail to recognize that the allegation in paragraph 20 that *all other* potential suppliers of jets were foreclosed from the opportunity for selling to TWA necessarily comprehends an allegation that TWA was by the same conduct foreclosed from buying from those manufacturers. Reading this paragraph together with the other relevant allegations of the complaint, it is plain that this specific unlawful conduct, like the conduct specified in other paragraphs of the complaint, caused TWA hard cash losses.

The Special Master so found (Brownell Report, pp. 168-69, 180-81; A-1966), and both the district court (308 F. Supp. at 689-90, A-2044) and the court of appeals (449 F.2d at 74-75, A-2782-84) held that his ruling was correct: defendants' profits were "at the expense of TWA" (Complaint, par. 10(h), A-10).

The condition that TWA not deal with others was unlawful—and violated Section 1 of the Sherman Act as well as Section 3 of the Clayton Act—because that condition restrained competition among manufacturers and suppliers of jet aircraft for TWA's jet acquisitions. *International Salt Co.* v. *United States*, 332 U.S. 392, 396 (1947);

Standard Oil Co. of California v. *United States,* 337 U.S. 293, 314 (1949); *United States* v. *Richfield Oil Corp.,* 99 F. Supp. 280, 297 (S.D. Cal. 1951), *aff'd per curiam,* 343 U.S. 922 (1952). Although paragraph 20 may not be read outside the context of the whole complaint, *Continental Ore Co.* v. *Union Carbide & Carbon Corp.,* 370 U.S. 690, 699 (1962), even standing alone the specific unlawful conduct alleged in that paragraph plainly violated Section 3 of the Clayton Act and Section 1 of the Sherman Act (see discussion at pp. 156-57 *supra*). When read in context with the other allegations of the complaint, it is also plain that the requirement that TWA lease upon an unlawful condition was part and parcel of the larger combination and conspiracy to restrain and monopolize and the attempt to monopolize. TWA was not required to plead these facts with any greater specificity. FED.R.CIV.P. 8(a); *Perma Life Mufflers, Inc.* v. *International Parts Corp.,* 392 U.S. 134, 142 (1968); *Radovich* v. *National Football League,* 352 U.S. 445, 453 (1957).

Finally, the Special Master's application of the law as to proof of damages to TWA's evidence was correct with respect to this claim. It was undisputed, as the Special Master found, that it cost TWA a total of $24.2 million in 1959-1960 to lease its jet fleet, an arrangement that even defendants' financial expert admitted was unsatisfactory (Brownell Report, p. 181; A-1966). On the basis of the unchallenged evidence, the Special Master found that $12.7 million of this total was extra expense incurred by TWA solely because it was forced to lease this fleet rather than purchase jets directly from manufacturers (Brownell Report, p. 182; A-1966). After adjustments for depreciation and deduction of the interest cost of the funds necessary to purchase rather than lease, the Special Master held that TWA had proven an actual net loss of $5.3 million on its leasing claim, which it would not have suffered except

for defendants' conduct (Brownell Report, p. 185; A-1966). Except for rejected testimony that a greater "cost of capital" should have been deducted, defendants did not challenge these figures (Brownell Report, pp. 182-84; A-1966).[78]

C. The Special Master and the courts below applied well-settled legal principles applicable to causation and damages in private antitrust suits

Causation is of course legally a "fact," like any other fact, proper to be alleged, traversable and, when traversed, subject to evidentiary proof. For reasons which are physical as well as metaphysical, to a greater or lesser extent proof of causation must inevitably depend upon inference. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 237-38, 241-42 (4th ed. 1971). When a defendant defaults rather than produce evidence material to the drawing of such an inference, the alleged fact of causation must be held to be admitted like any other alleged fact under similar circumstances, if the fundamental principle that a civil plaintiff is entitled to compulsory process to obtain discovery is not to be gutted.

Injury to the plaintiff caused by conduct of defendants in violation of the antitrust laws is a necessary element of any private action for treble damages under Section 4 of the Clayton Act. Except for the default, which denied TWA discovery on the merits of its complaint, TWA would have had to prove the *fact* of causal connection just as it would have had to prove any other necessary allegation that defendants chose to put in issue. This Court so held in *Story Parchment Co.* v. *Paterson Co.*, 282 U.S. 555 (1931). In that case, the First Circuit

[78] Defendants' profits were considerably greater than the damages awarded for TWA's injuries from leasing since they realized, in addition to the rentals charged, a very large capital gain through the ultimate sale of the depreciated aircraft to TWA at far above their book value (Doc. 495).

had vacated a private antitrust plaintiff's treble damage judgment on the ground that plaintiff had not met its burden of proving that the depreciation in value of its plant was due to defendants' antitrust violations; the court had done so after deciding that plaintiff's insufficient capital and inefficient management made its business failure inevitable even if there had been no conspiracy of the kind proved. This Court reversed, saying:

> "Whether the unlawful acts of respondents or conditions apart from them constituted the proximate cause of the depreciation in value, was a question, upon the evidence in this record, for the jury 'to be determined as a fact, in view of the circumstances of fact attending it.' *Milwaukee & St. Paul Ry. Co.* v. *Kellogg*, 94 U.S. 469, 474. And the finding of the jury upon that question must be allowed to stand unless all reasonable men, exercising an unprejudiced judgment, would draw an opposite conclusion from the facts." (282 U.S. at 566)

In this case defendants' default had the legal effect of determining the *fact* of proximate cause against them, just as the jury's verdict determined that fact in *Story Parchment*. *See also Package Closure Corp.* v. *Sealright Co.*, 141 F.2d 972, 976-77 (2d Cir. 1944).

Since "proximate cause" is as much a triable issue as any other fact issue, like any other triable issue it can be established by admission or by default. *Thomson* v. *Wooster*, 114 U.S. 104, 109-10, 114 (1885). *See also Adkisson* v. *Huffman*, 469 S.W.2d 368, 375 (Tenn. 1971); *Funkhouser* v. *Million*, 209 Va. 89, 161 S.E.2d 725, 729 (1968); *Baltimore Transit Co.* v. *Mezzanotti*, 227 Md. 8, 174 A.2d 768, 775 (1961); *Osborn* v. *Gibson*, 309 S.W.2d 15, 19 (K.C. Ct. App. 1958); *Johnson* v. *Illini Mutual Ins. Co.*, 18 Ill. App. 2d 211,

151 N.E.2d 634, 637-38 (1958); *Putney* v. *Du Bois Co.*, 240 Mo. App. 1075, 226 S.W.2d 737, 740 (1950).[79]

[79] Many of the cases which defendants cite on this point do not deal with the effect of a default at all. Thus *E.V. Prentice Machinery Co.* v. *Associated Plywood Mills, Inc.*, 252 F.2d 473 (9th Cir.), *cert. denied*, 356 U.S. 951 (1958) (Def. br. pp. 118-19, 123), stands only for the proposition, irrelevant here, that a treble damage plaintiff cannot recover for monetary losses caused by a general downturn in the economy or from customer dissatisfaction with its product for reasons not attributable to defendant's conduct. Defendants here were permitted to attempt to prove such unrelated causes for certain of TWA's losses despite the default, but failed to sustain their burden of proof (*e.g.*, Brownell Report, pp. 131-33; A-1966). *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 284 F.2d 1 (9th Cir. 1960), *rev'd on other grounds*, 370 U.S. 19 (1962) (Def. br. p. 119), deals with the nature of a plaintiff's burden of proof on a disputed point as to which conflicting evidence was offered; and *Milwaukee Towne Corp.* v. *Loew's Inc.*, 190 F.2d 561 (7th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952) (Def. br. p. 119), involved a situation where evidence was viewed as demonstrating conclusively that an antitrust plaintiff could not have used the product from which defendants had allegedly foreclosed it—a disputed issue of fact which those defendants were fully entitled to dispute, not having defaulted.

Nor do the cases involving a default which defendants cite support the proposition that TWA had to prove the allegations of its complaint to support the award of actual damages. *See, e.g., Thorpe* v. *National City Bank of Tampa*, 274 F. 200 (5th Cir. 1921) (question of reasonableness of attorney's fee raised issue of fact which had to be tried by jury); *Beall* v. *Munson*, 204 Cal. App. 2d 396, 22 Cal. Rptr. 333, 336, (1st Dist. 1962) ("The defendant by his default has admitted all facts well pleaded in the complaint. * * * The issue of liability is thus foreclosed and defendant is in no position to object to a judgment awarding plaintiff any damages which her evidence will support"); *Hallett Construction Co.* v. *Iowa State Highway Comm'n*, 261 Iowa 290, 154 N.W. 2d 71, 74-75 (1967) (defaulted defendant *cannot* under guise of contesting amount of damages assert a legal defense which could have been raised prior to the default); *Potts* v. *Howser*, 267 N.C. 484, 148 S.E.2d 836 (1966) (defaulted defendant entitled to present evidence in mitigation of plaintiff's damages); *Graves* v. *Cameron*, 161 N.C. 549, 77 S.E. 841 (1913) (defendant should have been permitted to show that in return for good consideration he had been given a release from liability by the plaintiff prior to trial on damages); *Blow* v. *Joyner*, 156 N.C. 140, 72 S.E. 319 (1911) (court erred in instructing jury that default *entitled* plaintiff to "some actual damages" rather than "nominal damages" without further evidence as to amount of his damages); *Electrolytic Chlorine Co.* v. *Wallace & Tiernan Co.*, 328 Mo. 782, 41 S.W.2d 1049 (1931) (plaintiff apparently failed to prove that he was

Thus in *Funkhouser* v. *Million* the Supreme Court of Appeals of Virginia reversed a refusal to enter judgment for plaintiff upon defendant's default for failure to answer. Plaintiff, in addition to presenting evidence on the amount of his damages, offered testimony about how the accident occurred and the trial court held that his testimony had conclusively proved that plaintiff was contributorily negligent. The court, in directing that judgment be entered in such amount as plaintiff's evidence showed he was entitled to, stated:

> "The failure of Million to plead responsively to the plaintiff's motion for judgment was an admission that the plaintiff was entitled to recover some damages from him. Inherent in that admission was the acknowledgment by Million of the negligence charged against him as proximately causing the collision and the concession that the deceased was free of contributory negligence.
>
> "Thus, under the circumstances of this case, the only issue before the trial court when it acted upon the plaintiff's motion for default was the amount of damages to be awarded for the death of the deceased; and it was the court's duty, sitting without a jury, to fix such damages. With Million's failure to plead given its full effect, any evidence as to the manner in which the accident occurred was irrelevant and immaterial to the situation with which the court was ultimately confronted." (161 S.E.2d at 729)

To support their contrary contention that at the damage hearing TWA had the burden of proving that the antitrust violations alleged in the complaint in fact caused the in-

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entitled to any actual damages); *Barclay* v. *Pickles*, 38 Mo. 143 (1866) (defendant after default is entitled to present evidence that land for which plaintiffs sought to recover rent had been taken by eminent domain prior to time when rent began to accrue and that plaintiffs therefore had sustained no actual damages); *Sagebiel's Inc.* v. *Sumrall*, 358 S.W.2d 251, 252 (Tex. Civ. Ct. App. 1962) ("Appellant's default admitted all the facts alleged except the amount of damages, which was shown by competent evidence").

juries specifically alleged to have resulted therefrom, defendants primarily rely upon three state court cases. The first case, *Havens* v. *Hartford & New Haven R.R.*, 28 Conn. 69 (1859), cited for the proposition that "at that inquest plaintiff must show, among other things, that any substantial damages he seeks to recover were caused by the acts of the defendant" (Def. br. p. 124) represents a historic peculiarity of Connecticut practice. Under the *Havens* rule, a defaulting defendant in a Connecticut negligence action is permitted to prove he was not negligent. *See, e.g., Batchelder* v. *Bartholomew*, 44 Conn. 494 (1877).

This unusual rule (not applicable in contract cases) was characterized by a leading member of the Connecticut bar as "arbitrary and constitut[ing] a system of judicial procedure peculiar to this State • • •." J. Alling, *The Law and Practice of Connecticut Concerning Hearing in Damages on Default, or Demurrer Overruled*, 6 YALE L.J. 121, 128 (1897). The rule provided corporate defendants such as railroads, regularly sued for negligence, a technical device by which to avoid jury trial of the negligence issue (6 YALE L.J. at 130-31). This technique is little used today, probably because the burden of proof is on the defaulting defendant taking advantage of the Connecticut rule. *Crane* v. *Eastern Transportation Line*, 48 Conn. 361 (1880).[80]

The other two cases relied on by defendants are *DeHoff* v. *Black*, 206 N.C. 687, 175 S.E. 179 (1934), and *McClelland* v. *Climax Hosiery Mills*, 252 N.Y. 347, 169 N.E. 605 (1930). Neither supports defendants' contention that TWA had to prove causation in fact at the damage hearing. *DeHoff* per-

[80] Toolco tried—and failed—to persuade Special Master Brownell and the courts below that the evidence it offered was sufficient to prove it had not, as alleged in the complaint, engaged in a combination and conspiracy in restraint of trade in aircraft and the monopolization and attempted monopolization of a substantial segment of the market therein (Brownell Report pp. 25-34; A-1966; 308 F. Supp. at 686, 687-88, A-2037, A-2040; 449 F.2d at 63-69, A-2757-72).

mitted a defaulted defendant to prove the affirmative defense of contributory negligence, and is contrary to the great weight of modern authority (outside of Connecticut) on the effect of a default.[81] In *McClelland* the court ruled that a defaulted defendant could try to prove that plaintiff's loss of income resulted from his refusal to accept other employment, and not from his discharge by defendant; the burden of proof was placed squarely on defendant, however, and the lower court's judgment in defendant's favor was reversed by the New York Court of Appeals because he had failed to meet that burden. The allegations of the complaint, other than as to amount of plaintiff's damages, were expressly held to be established beyond challenge by the default (252 N.Y. at 353, 169 N.E. at 607). In the damage hearing in this case defendants were given every opportunity to try to prove just such matters as were involved in *McClelland,* and the Special Master found that they too had failed to sustain their burden of proof (*e.g.,* Brownell Report, pp. 146-47; A-1966).

Defendants also argue that even if the causal connection between violation and injury is taken as established, the injury to TWA was too remote to be cognizable under the antitrust laws, because TWA was outside the "target area" of the alleged antitrust violation (Def.br.pp.120-21). This argument is of course addressed to sufficiency of the com-

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[81] *See, e.g., Millison* v. *Ades of Lexington, Inc.,* 262 Md. 319, 277 A.2d 579, 584 (1971); *Adkisson* v. *Huffman,* 469 S.W.2d 368, 375 (Tenn. 1971); *Funkhouser* v. *Million,* 209 Va. 89, 161 S.E.2d 725, 729 (1968); *Baltimore Transit Co.* v. *Mezzanotti,* 227 Md. 8, 174 A.2d 768, 775 (1961); *Haller* v. *Walczak,* 347 Mich. 292, 79 N.W.2d 622, 625-26 (1956); *Anderson* v. *Gallman,* 99 A.2d 560, 561 (D.C.Ct. App. 1953). Thus the court in *Maywald Trailer Co.* v. *Perry,* 238 S.W. 2d 826 (Tex.Civ.Ct.App. 1951), cited in defendants' brief at p. 123, held that the defendant should have been permitted to put in evidence on the extent of plaintiff's injuries after the default, but that he could not put in evidence on issues of negligence. *Hallett Construction Co.* v. *Iowa State Highway Commission,* 261 Iowa 290, 154 N.W.2d 71 (1967), cited on the same page of defendants' brief, is similarly squarely contrary to their basic contentions.

plaint, and is inconsistent with defendants' concession that the court of appeals was correct in 1964 in upholding the sufficiency of the complaint (Def. br. p. 32). Once damages satisfying the test of proximate cause have been proven, the objection that plaintiff's injury is too remote can hardly be well-founded.[82] In fact the objection is specious. Para-

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[82] In each case which defendants cite on these pages, the complaint was dismissed on the pleadings or on undisputed facts or the claim was otherwise held to be legally insufficient. *See, e.g., Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 92 S.Ct. 1776 (1972) (dismissed on pleadings); *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971) (summary judgment); *Nationwide Auto Appraiser Service, Inc.* v. *Association of Cas. & Sur. Cos.*, 382 F.2d 925 (10th Cir. 1967) (summary judgment on undisputed facts as to nature of plaintiffs' business); *Conference of Studio Unions* v. *Loew's Inc.*, 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952) (dismissed on pleadings); *Rayco Mfg. Co.* v. *Dunn*, 234 F. Supp. 593 (N.D. Ill. 1964) (summary judgment); *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963) (directed verdict, at close of plaintiff's case, against supplier of victim of violations); *Snow Crest Beverages, Inc.* v. *Recipe Foods, Inc.*, 147 F.Supp. 907 (D. Mass. 1956) (summary judgment); *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 315 F.2d 564 (7th Cir.), *cert. denied*, 375 U.S. 834 (1963) (denying state attorney general's motion to intervene on behalf of consumers); *Fields Productions, Inc.* v. *United Artists Corp.*, 318 F.Supp. 87 (S.D.N.Y. 1969), *aff'd per curiam*, 432 F.2d 1010 (2d Cir. 1970), *cert. denied*, 401 U.S. 949 (1971) (dismissed on pleadings). This Court has expressly refused to accept such an "artificial limitation" of injuries for which damages are recoverable in a case in which "there is sufficient evidence in the record to support an inference of causation * * *." *Perkins* v. *Standard Oil Co. of California*, 395 U.S. 642, 648-49 (1969). Since TWA sufficiently alleged the causal connection between the violations and the injuries alleged, dismissal on that ground was properly denied. *See Johnson* v. *Ready Mix Concrete Co.*, 318 F.Supp. 930, 932 (D. Neb. 1970).

None of the cases applying a "target area" or "standing-to-sue" limitation has held that the *customer* of a supplier subjected to a boycott or other illegal restraint in violation of the antitrust laws is barred from suing under Section 4 of the Clayton Act to recover for the damage caused him by the unlawful boycott. On the contrary, if the injured customer is able to prove it was damaged, it is clearly entitled to recover. *Cf. Hawaii* v. *Standard Oil Co. of California*, 405 U.S. 251, 262-64 (1972); *Mandeville Island Farms, Inc.* v.

graph 10(h) of the complaint alleged that defendants intended to "obtain substantial profits for themselves, at the expense of TWA and other air carriers, as the result of restrictions upon competition in the trade and commerce hereinbefore alleged" (A-10). Thus TWA was plainly an intended victim of the alleged conspiracy. Indeed, TWA was not only in the "target area," it was the beachhead, occupation of which was the first step toward domination of a larger market.

Defendants' assertion that the Special Master applied an "improper legal standard" to TWA's proof of its damage claims (Def. br. p. 129) is unsupportable. The basic guidelines for determining the amount of damages to be awarded a plaintiff injured by violations of the antitrust laws were laid down in *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), following *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927), and *Story Parchment Co.* v. *Paterson Co.*, 282 U.S. 555 (1931). These are the principles on which Special Master Brownell relied (Brownell Report, pp. 56-57, 257; A-1966). The Court has never departed from the rules set forth in those three cases, but has reaffirmed them again and again—most recently in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123-24 (1969), on which Judge Metzner also relied in his opinion confirming the findings and conclusions of the Brownell Report (308 F.Supp. at 685, A-2034-35).

After reviewing the record, and citing *Bigelow* and *Zenith*, the court of appeals observed:

> "Toolco must bear the responsibility for any lack of preciseness of proof, and there is good reason that this should be so. The default itself by Toolco rendered precise proof of damages even more diffi-

American Crystal Sugar Co., 334 U.S. 219, 236 (1948); *Bales* v. *Kansas City Star Co.*, 336 F.2d 439, 444 (8th Cir. 1964).

> cult than in the usual antitrust case, where the plaintiff may avail itself of the full battery of discovery procedures to prove damages as well as to prove liability. Toolco cannot be permitted to block the discovery of precise, clear and direct evidence and then be heard to complain that the evidence should have been more convincing." (449 F.2d at 73, A-2779-80)

Conclusion

Defendants address this Court as if they have been inexplicably punished by the lower courts, and with the harshest possible penalties, for offenses either purely imaginary, or technical only.

This posture is pretense.

Whether or not anything that defendants have done in the course of this litigation deserved punishment, they have had no punishment from the courts. The default judgment against them, entered as they so insistently state as a "sanction," was as Judge Kaufman for the court of appeals points out "inevitable" and "inescapable." It was not just proper but necessary. The reason for this was neither anger at Hughes nor a desire to punish contumacious conduct by Toolco. It was purely and simply remedial; the necessity was to do justice to TWA by protecting it from having its claim for relief, properly brought before the federal courts, frustrated by tactics which were deliberately calculated to prevent proof of that claim on the merits from ever being discovered.

The courts below have taken throughout only that action necessary to preserve TWA's right to justice, evenly administered. The default judgment was "virtually invited." Since its foundation was defendant's decision to deprive TWA of the opportunity to prove its case on the

merits, it could only be interpreted as it has been interpreted below—as relieving TWA of the necessity for producing such proof.

The amount of TWA's recovery is that amount in which TWA proved itself to have been damaged, in a lengthy evidentiary hearing in which defendants were permitted to produce whatever evidence on damages—including the proximate cause of those damages—they could find. TWA's case was held by the trier of the facts to be overwhelmingly proved, and his decision has been confirmed by the district court and the court of appeals.

Far from being an excessively punished minor offender, Toolco is instead the wealthy debtor that—having profited by more than $450 million on its sale of TWA stock alone—is seeking by intransigence and legal stratagem to avoid financial responsibility to others for its acts.

On all issues raised by the petition in No. 71-827, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX OF STATUTES AND RULES

JUDICIAL CODE

§ 2111. Harmless error.

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties. (28 U.S.C., p. 7640)

FEDERAL AVIATION ACT OF 1958 (formerly CIVIL AERONAUTICS ACT OF 1938)

§ 1378. [Section 408] Consolidation, merger, and acquisition of control.

(a) Prohibited acts.

It shall be unlawful unless approved by order of the Board as provided in this section—

• • • • •

(5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;†

• • • • •

(b) Application to Board; hearing; approval; disposal without hearing.

Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger,

† Section 408 of the Federal Aviation Act is set out in this Appendix as that Section read prior to the amendment that became effective in 1969. 83 STAT. 103.

purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided,* That the Board shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control: *Provided further,* That if the applicant is a carrier other than an air carrier, or a person controlled by a carrier other than an air carrier or affiliated therewith within the meaning of section 5(8) of this title, such applicant shall for the purposes of this section be considered an air carrier and the Board shall not enter such an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition: *Provided further,* That, in any case in which the Board determines that the transaction which is the subject of the application does not affect the control of an air carrier directly engaged in the operation of aircraft in air transportation, does not result in creating a monopoly, and does not tend to restrain competition, and determines that no person disclosing a substantial interest then currently is requesting a hearing, the Board, after pub-

lication in the Federal Register of notice of the Board's intention to dispose of such application without a hearing (a copy of which notice shall be furnished by the Board to the Attorney General not later than the day following the date of such publication), may determine that the public interest does not require a hearing and by order approve or disapprove such transaction.

* * * * *

(e) Investigation of violations.

The Board is empowered, upon complaint or upon its own initiative, to investigate and, after notice and hearing, to determine whether any person is violating any provision of subsection (a) of this section. If the Board finds after such hearing that such person is violating any provision of such subsection, it shall by order require such person to take such action, consistent with the provisions of this chapter, as may be necessary, in the opinion of the Board, to prevent further violation of such provision. (72 STAT. 767, *as amended,* 74 STAT. 901)

§ 1381. [Section 411] Methods of competition.

The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition. (49 U.S.C., p. 12052)

§ 1382. [Section 412] Pooling and other agreements; filing; approval by Board.

(a) Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this chapter, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this chapter; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it. (49 U.S.C., p. 12052)

§ 1384. [Section 414] Legal restraints.

Any person affected by any order made under sections 1378, 1379, or 1382 of this title shall be, and is hereby, relieved from the operations of the "antitrust laws", as designated in section 12 of Title 15, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order. (49 U.S.C., p. 12053)

§ 1386. [Section 416] Classification and exemption of carriers.

• • • • •

(b)(1) The Board, from time to time and to the extent necessary, may (except as provided in paragraph (2) of this subsection) exempt from the requirements of this subchapter or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this subchapter or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.

• • • • •

(49 U.S.C., p. 12053)

§ 1506. [Section 1106] Remedies not exclusive.

Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies. (49 U.S.C., p. 12082)

Federal Rules of Civil Procedure

Rule 1.

Scope of Rules

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action. (28 U.S.C., p. 7733)

Rule 8.

General Rules of Pleading

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

• • • • •

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative

defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

* * * * *

(28 U.S.C., p. 7743)

Rule 15.

Amended and Supplemental Pleadings

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the

objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

• • • • •

(28 U.S.C., p. 7754)

Rule 16.

PRE-TRIAL PROCEDURE; FORMULATING ISSUES

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its dis-

cretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions. (28 U.S.C., p. 7755)

Rule 26.

General Provisions Governing Discovery

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

• • • • •

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good case shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a) (4) apply to the award of expenses incurred in relation to the motion.

(d) Sequence and Timing of Discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

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(28 U.S.C., pp. 7774-75)

Rule 30.

Depositions Upon Oral Examination

(a) When Depositions May be Taken. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subdivision (b) (2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

• • • • •

(d) Motion to Terminate or Limit Examination. At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of

the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a) (4) apply to the award of expenses incurred in relation to the motion.

• • • • •

(28 U.S.C., pp. 7785-86)

Rule 37.

FAILURE TO MAKE DISCOVERY: SANCTIONS

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(b) Failure to Comply with Order.

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(2) *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b) (6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

• • • • •

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b) (6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b) (2) of this

rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

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(28 U.S.C., pp. 7798-99)

Rule 52.

FINDINGS BY THE COURT

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

• • • • •

(28 U.S.C., pp. 7814-15)

Rule 53.

Masters

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(e) Report.

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(2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

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(28 U.S.C., p. 7817)

Rule 54.

Judgments; Costs

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

• • • • •

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

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(28 U.S.C., p. 7817)

Rule 55.

DEFAULT

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(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

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(28 U.S.C., p. 7821)

Rule 61.

HARMLESS ERROR

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties. (28 U.S.C., p. 7827)

CIVIL RULES FOR THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Rule 4. Order of Taking Depositions.

From and after the fortieth day after commencement of an action, unless otherwise ordered by the court for good cause shown, neither the service of a notice to take the deposition upon oral examination of party or witness, nor the pendency of any such deposition, shall prevent another party, adverse or otherwise, from noticing or taking the deposition upon oral examination of party or witness concurrently with the taking of such deposition noticed or commenced earlier.

It shall be the duty of all attorneys to make every reasonable effort to stipulate as to the exact places, dates and times for the commencement and resumption of the taking of all such concurrent depositions. In the event that attorneys are unable to so stipulate, any party may apply to the court for an order fixing the same and other terms and conditions to govern such depositions, as well as for any other order or relief relating thereto. (FED. RULES SERV., FEDERAL LOCAL COURT RULES, N.Y.—p. 35 (1971))

FEDERAL RULES OF CIVIL PROCEDURE (prior to July 1, 1963)

Rule 1.

SCOPE OF RULES

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action. (28 U.S.C., p. 6079 (1964))

Rule 26.

Depositions Pending Action

(a) When depositions may be taken.

Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. After commencement of the action the deposition may be taken without leave of court, except that leave, granted with or without notice, must be obtained if notice of the taking is served by the plaintiff within 20 days after commencement of the action. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. Depositions shall be taken only in accordance with these rules. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) Scope of examination.

Unless otherwise ordered by the court as provided by Rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

* * * * *

(28 U.S.C., pp. 6106-07 (1964))

Rule 30.

Depositions Upon Oral Examination

* * * * *

(b) Orders for the protection of parties and deponents.

After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.

* * * * *

(d) Motion to terminate or limit examination.

At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being

taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in subdivision (b). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. In granting or refusing such order the court may impose upon either party or upon the witness the requirement to pay such costs or expenses as the court may deem reasonable.

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(28 U.S.C., pp. 6111-12 (1964))

Rule 37.

REFUSAL TO MAKE DISCOVERY: CONSEQUENCES

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(b) Failure to comply with order.

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(2) *Other Consequences.* If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the

thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination.

• • • • •

(d) Failure of party to attend or serve answers.

If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.

• • • • •

(28 U.S.C., pp. 6116-17 (1964))

TABLE OF CONTENTS

	PAGE
Statement of the Case	1
Summary of Argument	2
Argument	4
I. The Courts Below Correctly Refused to Allow Interest Prior to Judgment in this Treble Damage Action	4
II. The Determination Below of the Cost of Capital Was Proper	12
III. TWA Was Properly Denied Recovery for the Expenses It Incurred for Experts	14
CONCLUSION	18

TABLE OF AUTHORITIES

Cases:

Board of Commissioners of Jackson County v. *United States*, 308 U.S. 343 (1939)	5
Brent v. *Thornton*, 106 F. 35 (5th Cir. 1901)	6
Brooklyn Savings Bank v. *O'Neil*, 324 U.S. 697 (1945)	2, 5, 9, 10
Brookside Theatre Corp. v. *Twentieth Century Fox-Film Corp.*, 11 F.R.D. 259 (W.D. Mo. 1951)	16n
Cape Cod Food Products, Inc. v. *National Cranberry Assn.*, 119 F.Supp. 900 (D. Mass. 1954)	8n
Carter Products, Inc. v. *Colgate-Palmolive Co.*, 214 F.Supp. 383 (D. Md. 1963)	8n
Crosby Steam Gage & Valve Co. v. *Consolidated Safety Valve Co.*, 141 U.S. 441 (1891)	11n
Eddy v. *Lafayette*, 163 U.S. 456 (1896)	6

PAGE

Farmington Dowel Products Co. v. *Forster Mfg. Co.*, 297 F.Supp. 924 (D. Maine 1969) 16n

Hanover Shoe, Inc. v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968) 9n, 12, 16n

Hanover Shoe, Inc. v. *United Shoe Machinery Corp.*, 245 F.Supp. 258 (M.D. Pa. 1965) 9n

Lincoln v. *Claflin*, 7 Wall. (74 U.S.) 132 (1868) .. 6

Locklin v. *Day-Glo Color Corp.*, 429 F.2d 873 (7th Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971) 8n

Miller v. *Robertson*, 266 U.S. 243 (1924) 2, 6, 8

Mills v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970) 17

New Dunderberg Mining Co. v. *Old*, 97 F. 150 (8th Cir. 1899) 6

Newman v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) 16

Rayonier, Inc. v. *Polson*, 400 F.2d 909 (9th Cir. 1968) 8n

Rodgers v. *United States*, 332 U.S. 371 (1947) .. 3, 9-10

Rogers v. *Douglas Tobacco Board of Trade*, 244 F.2d 471 (5th Cir. 1957) 10

Straus v. *Victor Talking Machine Co.*, 297 F. 791 (2d Cir. 1924) 3, 15

Sun Theatre Corp. v. *RKO Radio Pictures*, 213 F.2d 284 (7th Cir. 1954) 10

Thomsen v. *Cayser*, 243 U.S. 66 (1917) 8

Trans World Airlines, Inc. v. *Hughes, et al.*, 32 F.R.D. 604 (S.D.N.Y. 1963) 4

Trans World Airlines, Inc. v. *Hughes, et al.*, 308 F.Supp. 679 (S.D.N.Y. 1969) 8, 13

Trans World Airlines, Inc. v. *Hughes, et al.*, 419 F.2d 51 (2d Cir. 1971) 10n, 13, 13n

Twentieth Century Fox Film Corp. v. *Goldwyn*, 328 F.2d 190 (9th Cir. 1964) 16n

PAGE

United Mine Workers v. *Coronado Coal Co.*, 258 F. 829 (8th Cir. 1919), *reversed on other grounds*, 259 U.S. 344 (1922) 9
United States v. *Globe Remodeling Co., Inc.*, 196 F.Supp. 652 (D. Vt. 1960) 8n
United States v. *United Drill & Tool Corp.*, 183 F.2d 998 (D.C. Cir. 1950) 8n

STATUTES AND RULES:

Civil Rights Act, 42 U.S.C. § 2000a-3(b) 17
Clayton Act, Section 4 (15 U.S.C. § 15) 14
Federal Rules of Civil Procedure
Rule 54(c) 4
Rule 58 12
Judicial Code, 28 U.S.C. § 1961 ..... 5, 12

MISCELLANEOUS AUTHORITIES

McCormick, *Damages* § 56 (1935) 7
1 Sedgwick, *Damages* § 655 (5th ed. Sedgwick & Beale 1913) 8n
1 Sutherland, *Damages* § 330 (4th ed. Berryman, 1916) 10
Official Form 31, Federal Rules of Civil Procedure 4
Official Form 32, Federal Rules of Civil Procedure 4

IN THE

Supreme Court of the United States

October Term, 1972

No. 71-830

TRANS WORLD AIRLINES, INC.,
Cross-Petitioner,

v.

HUGHES TOOL COMPANY and
RAYMOND M. HOLLIDAY,
Cross-Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR CROSS-RESPONDENTS HUGHES TOOL COMPANY AND RAYMOND M. HOLLIDAY

Statement of the Case

The Statement of the Case in the Brief for Cross-Petitioner gives an adequate account of the circumstances that raise the issues tendered on the cross-petition, but the cross-respondents, Toolco and Holliday, do not accept conclusory statements set out there that are unnecessary to consideration of the issues thus raised. In particular, Toolco and Holliday do not agree that it is "now undisputed that TWA suffered losses of at least $45,870,478.65 from the specific injuries alleged in the complaint" (Cross-Petitioner's Brief 7-8) or similar statements suggesting

an admission that defendants are liable to TWA or that acts of defendants caused damage in any amount to TWA.[1] The question of liability is discussed throughout defendants' brief in No. 71-827 and the damages claimed are vigorously disputed at pp. 117-145 of that brief.

Summary of Argument

I. The general federal rule is that interest is not allowed upon unliquidated damages but that the court has discretion to "include interest or its equivalent" if this is necessary to arrive at "fair compensation." *Miller* v. *Robertson*, 266 U.S. 243, 258 (1924). At best TWA's claim for prejudgment interest, measured either from the date of the wrong or from the filing of the master's report, would have been addressed to the discretion of the trier of fact, and this case, in which the damages awarded are an arbitrary sum based on imaginative assumptions, would not be an appealing one for the exercise of discretion. But the usual discretion does not apply in a case, like this one, in which the statute provides treble damages as a penalty. An award of double or treble damages gives the plaintiff more than ample recovery for the delay in payment of sums due, *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697 (1945), and, unless a statute expressly provides to the contrary—

[1] The suggestion in note 2 at p. 8 of Cross-Petitioner's Brief that Toolco asserted in its counterclaims that TWA had suffered losses of this magnitude from late deliveries of jets and borrowings at too high interest rates is unfounded. The counterclaim alleged a conspiracy by the lending institutions and others to seize control of TWA for their own purposes and stated that in furtherance of that conspiracy TWA was forced to order more jets than it needed or could afford (Answer ¶ 97(e), App. A-88). A claim that TWA has been injured by ordering too many jets is not an admission that it was injured by having too few jets.

which is not the case here—interest prior to judgment cannot be had on a statutory penalty. *Rodgers* v. *United States*, 332 U.S. 371 (1947).

II. The finding of the Special Master of the interest rate at which TWA could have borrowed capital to acquire jet aircraft has been accepted by the District Court and the Court of Appeals and presents no issue for this Court. TWA claims that it could have acquired the capital at an earlier time and a lower rate, but its evidence offered in support of this contention was specifically rejected by the Special Master, and there is no allegation in the complaint that would have required the Master to make a finding more favorable to TWA.

III. TWA's claim that the authorization in § 4 of the Clayton Act for recovery of "cost of suit" is not limited to taxable costs but allows recovery of expenses incurred for experts has been rejected in a long and uniform line of circuit and district court decisions stemming from *Straus* v. *Victor Talking Machine Co.*, 297 F. 791 (2d Cir. 1924). TWA's construction of the statute would make the further provision for "a reasonable attorney's fee" surplusage, since if "cost of suit" includes a plaintiff's full expenses it necessarily must include his attorney's fee. The main burden of TWA's argument on this point is that the nature of litigation has changed and that this Court should broaden the category of things recoverable as "cost of suit" in order to take account of this. Rewriting statutes is a task entrusted to Congress and not to this Court.

Argument

The issues raised in No. 71-830 are, as TWA admitted in its cross-petition, "peripheral to the basic controversy" (Cross Petition 24). If Toolco and Holliday are successful on the merits in No. 71-827, the issues raised in No. 71-830 pass out of the case. Even if Toolco and Holliday should be unsuccessful on every other issue presented in No. 71-827, there will be no need to consider the issues posed on the cross-petition unless defendants' position on the effect of the *ad damnum*, set out at pp. 52-65 of our brief in 71-827, is rejected in its entirety.

TWA originally prayed for recovery of $105 million together with costs and attorneys' fees (App. A-31). After defendants had refused to proceed further in the case, TWA was permitted to amend to increase the *ad damnum* from $105 million to $135 million (32 F.R.D. at 607, App. A-321). The judgment actually entered, exclusive of attorneys' fees and costs, was for $137,611,435.95 (App. A-2073). Thus TWA, which has already been awarded some $2.6 million more than even its amended *ad damnum* prayed for, now asks on its cross-petition that it be awarded an additional $75,994,596.06. If Rule 54(c) means even remotely what it says, the cross-petition can be disposed of on the basis of that rule without more.

I. The Courts Below Correctly Refused to Allow Interest Prior to Judgment in this Treble Damage Action.

"Interest" is used in two different senses with regard to judgments and these should be clearly differentiated. When a money judgment is entered it is for a stated sum with interest on that sum at a specified rate. See Official Forms 31, 32, Federal Rules of Civil Procedure. In some cases the

judgment itself may include, as a part of the damages, interest for part or all of the time from the occurrence of the wrong until the entry of judgment. The latter is commonly referred to as "moratory interest."

In federal court, there is a statutory right to interest on any money judgment in a civil case. This interest is calculated from the date of the entry of the judgment at the rate allowed by state law. 28 U.S.C. § 1961. There is no issue here about interest of this kind. The judgment of the District Court provided for it, the Court of Appeals increased the rate at which it is payable, and already the interest on this judgment, which is running at a rate of roughly $30,000 a day, has increased the size of the judgment by some $24 million over the principal sum awarded to TWA.

TWA now contends that, as a part of its damages, it should have been given interest from the date of the wrong, or, when trebled, additional damages of $38.9 million. Alternatively it claims that it should have had interest from the date of the master's report, rather than from the entry of judgment, or an additional $15.9 million. Neither claim is tenable.

In an action on a federal statute, such as the present one, whether to include moratory interest as a part of the damages is wholly a question of federal law. *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 715 (1945); *Board of Commissioners of Jackson County* v. *United States*, 308 U.S. 343, 349-350 (1939). TWA cites four cases in support of its statement that "[a]t the time the Clayton Act was passed, the general federal rule, permitting the award of interest on a sum found due (even though unliquidated) from the time a plaintiff should have had the sum as an

element of his actual damages, was already well established" (Cross-Petitioner's Brief 17). As the cases it cites show, that statement is misleading if not, indeed, incorrect. The rule that damages included interest applied only if the amount in question was either liquidated or "clearly ascertainable." Thus in *Eddy* v. *Lafayette*, 163 U.S. 456, 467 (1896), this Court held that it was error to charge the jury that interest was to be included in an award of damages, but found the error harmless because the jury had not awarded the plaintiff interest. *New Dunderberg Mining Co.* v. *Old*, 97 F. 150, 153-155 (8th Cir. 1899), held that interest could be awarded on a claim that was unliquidated but was "clear, definite, and exact." *Brent* v. *Thornton*, 106 F. 35, 38 (5th Cir. 1901), held that it was error to charge a jury to add interest to plaintiff's damages, saying that the award of interest was discretionary. *Lincoln* v. *Claflin*, 7 *Wall.* (74 U.S.) 132, 139 (1868), held that a charge requiring the jury to allow interest in a tort case was erroneous but affirmed because defendant had not objected to the charge.

The most that could be said of the federal cases at the time that the Clayton Act was passed was that interest was *not* generally regarded as an element of damages in tort cases for unliquidated damages though in appropriate cases it might be awarded at the discretion of the finder of fact. This is still the law. The statement most often quoted in subseqent cases is that of Justice Butler for the Court in *Miller* v. *Robertson*, 266 U.S. 243, 258 (1924):

> Generally, interest is not allowed upon unliquidated damages. * * * But when necessary in order to arrive at fair compensation, the court in the exercise of a sound discretion may include interest or its equivalent as an element of damages.

TWA rightly turns to a truly distinguished authority, the late Charles T. McCormick, for his statement that there is a tendency toward the allowance of interest in cases for unliquidated damages (Cross-Petitioner's Brief 15), but it neglects to include the next sentence, following the portion that it quotes, in which Dean McCormick said that "the courts have in the main gone only so far as to permit the jury (or the judge where he is sitting without jury) to grant interest in their discretion, in cases of this type." McCormick, *Damages* § 56, at 222 (1935).

Wholly aside from the fact that TWA was awarded a huge penalty by virtue of the treble damage provisions of the statute, this would have been an inappropriate case for the finder of fact to exercise his discretion in favor of allowing interest on TWA's unliquidated claim. This is not a case in which a plaintiff has suffered an identifiable loss from an identified restraint—as it might have been, for example, if a price-fixing conspiracy had required TWA to pay a million dollars per plane more than it should have. As is more fully developed in Point VI of our main brief (Petitioners' Brief 117-145), the damages here assessed were wholly speculative, with regard both to their amount and to their causal relation to any supposed antitrust violation by defendants. At the damage hearing TWA stated how many planes it thought it should have had and compared that with the number of planes it actually had. Damages were then computed on the bold assumption that it could have sold seats in additional planes to the same extent as it did in the planes it actually had. All of this was done without any showing that, absent a restraint of trade, TWA would have or could have acquired 47 jets or 63 jets or any other number of jets. Since the entire damage proof was based on imaginative assumptions about what

might have happened, a trier of fact would hardly be inclined to exercise its discretion in favor of allowing interest on the purely arbitrary sum thus computed.

But whatever discretion the trier of fact might ordinarily have had, this case is different because the statute does provide for treble damages. In *Miller* v. *Robertson*, 266 U.S. 243, 258 (1924), a discretion was recognized to "include interest or its equivalent" when necessary to arrive at "fair compensation." A plaintiff who has received treble damages has already received far more than fair compensation. The trebling of damages gives him far more than the "equivalent" of interest. As the District Court said in the present case, "[t]reble damages compensate a plaintiff handsomely for all his losses, including loss of the use of money rightfully his" (308 F. Supp. at 696, App. A-2059). That ruling was in accord with the general rule that interest cannot be recovered on a penalty nor where double or treble damages are allowed by statute.[2] That principle has specific application to antitrust cases.[3]

To rebut this rule, and to attempt to establish a right to recover interest in a treble damage action, TWA is able to produce only two early and inconclusive decisions (Cross-Petitioner's Brief 18-19). In *Thomsen* v. *Cayser*, 243 U.S. 66 (1917), the jury had added interest to the damages sustained by the plaintiff in an antitrust case. Although this

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[2] 1 Sedgwick, *Damages* § 655 (5th ed. Sedgwick & Beale 1913); *Rayonier, Inc.* v. *Polson*, 400 F.2d 909, 922 (9th Cir. 1968); *United States* v. *Globe Remodeling Co., Inc.*, 196 F.Supp. 652, 658 (D. Vt. 1960); see *United States* v. *United Drill & Tool Corp.*, 183 F.2d 998, 1000 (D.C. Cir. 1950); cf. *Carter Products, Inc.* v. *Colgate-Palmolive Co.*, 214 F.Supp. 383, 418 (D. Md. 1963).

[3] *Locklin* v. *Day-Glo Color Corp.*, 429 F.2d 873, 877 (7th Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971); *Cape Cod Food Products, Inc.* v. *National Cranberry Assn.*, 119 F.Supp. 900, 911 (D. Mass. 1954).

Court mentioned that fact, 243 U.S. at 89, the inclusion of interest was not one of the issues in dispute and this Court did not pass on its propriety.[4] In *United Mine Workers* v. *Coronado Coal Co.*, 258 F. 829, 846-847 (8th Cir. 1919), *reversed on other grounds*, 259 U.S. 344 (1922), it was held to be error for the court to add interest to a jury's award of damages in an antitrust case, on the ground that interest in tort actions is a matter for the discretion of the jury. Whatever authority these decisions might have on this point has been dissipated by intervening decisions from this Court.

In *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697 (1945), one of the issues was whether an employee recovering double damages under § 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), was also entitled to interest on the sums so recovered. The Court held unanimously that he was not. Since Congress has provided double damages as compensation for delay in payment of sums due, interest would be a second compensation for the same delay and could not be allowed. 324 U.S. at 714-716.

The issue in *Rodgers* v. *United States*, 332 U.S. 371 (1947), was whether interest could be awarded on statutory penalties for exceeding cotton allotments. The Court held that it could not. It said that penalties are intended to have a deterrent effect and are similar to a criminal fine.

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[4] TWA quite properly does not cite *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968). Although the Court there said that the judgment "awarded trebled damages, including interest," 392 U.S. at 483, it was misled by an inept choice of language by the District Court. When that court spoke of the "interest to be included in the damage calculations" it was describing a sum that was deducted from the damages because it represented interest costs that the plaintiff would have incurred. 245 F.Supp. at 302. Examination of the briefs and records in that case in this Court confirms that no prejudgment interest was allowed to the plaintiff.

"We are unable to say that it would be consistent with the congressional purpose for the courts to add interest to these very substantial penalties already imposed upon non-cooperating farmers." 332 U.S. at 376. The Court also cited 1 Sutherland, *Damages* § 330 (4th ed. Berryman, 1916), for the proposition that interest cannot be recovered on statutory penalties. 332 U.S. at 376 n. 7.

As the Court of Appeals pointed out, "trebled damages will more than adequately compensate TWA for its injuries" (449 F.2d at 80, App. A-2795). Thus the rationale of the *Brooklyn Savings* case precludes interest. The provision for treble damages in antitrust actions is "in the nature of a penalty for the public wrong * * *." *Rogers* v. *Douglas Tobacco Board of Trade*, 244 F.2d 471, 483 (5th Cir. 1957). Since the remedy is "penal in nature and susceptible therefore to all restrictions surrounding an action of such nature," *Sun Theatre Corp.* v. *RKO Radio Pictures*, 213 F.2d 284, 287 (7th Cir. 1954), prejudgment interest is foreclosed also on the rationale of *Rodgers* v. *United States*.[5]

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[5] The Court of Appeals made the further point that to allow moratory interest would present "difficult questions of proof—including highly abstruse inquiries as to proper rates and the time from which interest should run. Since the trebled damage device in any event adequately serves the penal and remedial purposes of the antitrust laws, we believe it is sounder, absent contrary express Congressional intent, to consider that these difficult and time-consuming inquiries are intended to be avoided." [449 F.2d at 80, App. A-2795.]

To this TWA offers an interesting plea of confession and avoidance. Without denying that inclusion of interest would lead to the kinds of problems foreseen by the Court of Appeals, TWA says that it is prepared to avoid them by accepting a computation from the latest possible date and at the lowest arguably compensatory figure (Cross-Petitioner's Brief 21-22). It is easy enough for a plaintiff with an already immense judgment generously to forbear from asking more than a minimal $38.9 million extra on this account. But if—contrary to the authorities we have discussed—there is a statutory right to interest from the time of the wrong, the extent of that right cannot be cut back by the forbearance of a particular lavishly-endowed plaintiff and future cases would present precisely the abstruse inquiries that the Second Circuit thought difficult and unnecessary.

If, as we have seen, the fact that this is a treble damage action bars an award of interest from the time of the wrong as damages, it equally bars a claim for interest from the date of the master's report. The cases relied on by TWA in which interest has been allowed from the date of the master's report (Cross-Petitioner's Brief 24-25) have done so on the theory that this interest was a part of the damages.[6] They stem from a time when interest was ordinarily refused on unliquidated claims and they held that the claim became liquidated, and interest ran as part of the damages, from the date of the master's report. Congress has changed the rule in patent cases and has provided by statute for interest from the date of infringement. See Cross-Petitioner's Brief 25 n. 12. Since the cases denying moratory interest in antitrust cases do not deny interest because the damages are unliquidated, but rather because treble damages are in lieu of interest, the patent cases are not in point.[7]

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[6] This point was clearly recognized by the Second Circuit:

Tilghman v. Proctor, 125 U.S. 136, 8 S.Ct. 894, 31 L. Ed. 664 (1888), and other patent cases relied on by TWA do not involve the question of when interest begins to run on a judgment, but rather from when interest as an element of damages should be measured. The holding of the cases cited is that interest should run from the date that the fact and amount of damages cease to be "in earnest controversy and of uncertain issue . . ." at [illegible] 8 S. Ct. at 907, an event marked by the filing of the Master's report. Since we determine that moratory interest is inappropriate here, these cases are inapposite.

v. Wm. Wrigley, Jr. [illegible] trademark and unfair competition [illegible] also the time from which interest should be computed on an element of damages." *Id.* at 85[illegible] Colgate-Palmolive Co. [illegible] [449 F.2d at 80 n. 5.

[7] Despite the contrary suggestion [illegible] Brief 26 n. 13), no difference [illegible] *Gage & Valve Co.* [illegible] 441 (1891). It too rests on the distinction between liquidated and unliquidated damages [illegible] distinction that is in issue here.

Interest from the date of the master's report cannot be recovered as damages because this is a treble damage action. It cannot be recovered as interest on a judgment because the statute, 28 U.S.C. § 1961, allows interest of that kind only from "the date of the entry of the judgment," and the judgment is not the master's report but rather the document signed by the court on April 14, 1970 (App. A-2073). See Civil Rule 58.

II. The Determination Below of the Cost of Capital Was Proper.

The Special Master deducted $29 million in computing TWA's supposed "damages" to represent the cost TWA would have incurred to borrow the capital necessary to acquire more jets, to acquire them earlier, and to buy them rather than lease them. TWA concedes the logic and propriety of such a deduction (Cross-Petitioner's Brief 30), as it must in view of *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 504 (1968). TWA accepts also the Master's determination that the rates he used in this computation, 6% and 6.3%, are the rates that TWA would have had to pay in 1958-1960, the years in which it would have been acquiring the planes (Cross-Petitioner's Brief 33). Nevertheless TWA says that it should receive an additional $19.5 million in damages because it could have acquired the needed funds in 1955 and 1956 at a rate of at most 4¾%.

At the damage hearing TWA undertook to show through its financial expert, Edward J. Morehouse of Drexel Harriman Ripley, that an independent TWA would have arranged financing for a jet fleet earlier and on more advantageous terms. Morehouse's testimony was that an

independent TWA would have sold a substantial amount of common stock in May 1955 and that it would then have been able to borrow money between October 1955 and May 1959 at rates ranging from 4% to 6% (App. AX-353-354). As is discussed more fully in our principal brief (Petitioner's Brief 139-141), this testimony about financing was positively and explicitly rejected by the Special Master (App. A-1966 Brownell Report 256-263).

Since TWA's only evidence of what it might have done failed, the Special Master had no choice but to make his own calculation of the cost of capital. As he said: "Since I have not accepted the Drexel Harriman Ripley financial plan (see pages 257-264) on which the Price Waterhouse computation relied, I have independently calculated the appropriate cost of interest" (App. A-1966 Brownell Report 148). His finding that an independent TWA would have paid 6% and 6.3% to finance jets was expressly accepted by the District Court (308 F.Supp. at 694, App. A-2055) and by the Court of Appeals (449 F.2d at 79-80, App. A-2793-2794). The Court of Appeals said:

> In the absence of a viable alternative offered by TWA (and TWA does not contest the rejection of the Morehouse and Comparative Profits studies) the Master properly based his deduction for interest charges on the price of money at the time when financing would normally have been arranged for the 63-jet fleet. [449 F.2d at 79-80, App. A-2794.][8]

[8] TWA reproduces once more (Cross-Petitioner's Brief 33-34) its Exhibit 314, showing weighted average interest rates it and its competitors had in particular years. As the Court of Appeals pointed out, that exhibit is "without regard to the times that the debts were incurred or the purposes for which they were incurred * * *" (449 F. 2d at 79, App. A-2794), and is not a measure of the interest rate TWA or any other airline would have had to pay in any of the years from 1955 through 1960.

Finally TWA says that the fact that it would have paid 4 to 4¾% is "established by the complaint * * *" (Cross-Petitioner's Brief 33). Even read in a vacuum the complaint "establishes" no such thing. The only relevant allegation is the second sentence of ¶ 27 of the complaint, where it is alleged that: "In 1955 and 1956 various United States air carriers were able to obtain funds at a cost (or interest rate per annum) in 1955 of 4% and in 1956 at costs ranging from 4¼% to 4¾%" (App. A-16). This does not say that TWA would have been able to obtain funds at those rates nor does it speak to the size of the loans that were made at those rates. The Special Master found that "a $150-$170 million loan to TWA on October 1, 1955, [as hypothesized in the rejected testimony of TWA's financial expert] would have been almost three times as large as any long-term commitment that had been made to that date to any airline for any purpose" (App. A-1966 Brownell Report 183). Since the Special Master rejected TWA's evidence that it would have arranged long-term financing beginning in 1955—and this testimony itself would have produced an average rate on borrowing in excess of that alleged in the complaint—he quite properly refused to make a finding even more favorable to TWA on the basis of a single sentence in the complaint that says nothing about how much TWA would have had to pay for sums of this magnitude.

III. TWA Was Properly Denied Recovery for the Expenses It Incurred for Experts.

Section 4 of the Clayton Act provides that a successful plaintiff shall recover treble damages "and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15. TWA now claims that it should have received an

additional $1.6 million, as a part of "the cost of suit," as reimbursement for the expenses it incurred for experts. The leading case on this point is *Straus* v. *Victor Talking Machine Co.*, 297 F. 791 (2d Cir. 1924). The court there rejected a claim for sums spent for stenographer's minutes, saying:

> These expenditures were not taxed, as not being "costs of suit." It will be noted that under section 7 of the Sherman Act the words used are "the *costs* of suit," while under section 4 of the Clayton Act the words used are "the *cost* of suit." No explanation is found in the report of any congressional committee for the use of the singular "cost" in the Clayton Act, instead of the plural "costs" in the Sherman Act. We do not regard this difference as significant, for, in our view, if it had been intended that "cost of suit" should mean anything different from "costs of suit," that intention would, in some manner, have been made clear. Each of these phrases is followed by the words "including a reasonable attorney's fee," and this we think makes clear that the difference between "cost" and "costs" in these statutes is probably merely accidental, because if, under the Clayton Act, it had been intended to include the expenses "of suit," there would hardly seem to be any reason for adding the words "including a reasonable attorney's fee," in view of the fact that an attorney's fee would necessarily be a part of the expense incurred in conducting such a litigation. [297 F. at 806-807; emphasis in original.]

TWA cites no case to the contrary. Indeed when it was seeking review here it conceded that the *Straus* case has been followed in "a long and uniform line of circuit and district court decisions * * *" (Cross-Petition 20). That

concession was well justified. Courts have refused to allow claims for reimbursement for a variety of expenses beyond taxable costs in antitrust suits.[9]

TWA's argument on this point is supported, as it concedes, by no direct authority. It cites *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), for the proposition that "provisions allowing recovery of the expense of suit" are to be liberally construed. The case will not support the reading TWA gives it. *Newman* involved allowance of attorneys' fees in a class action under the 1964 Civil Rights Act. In holding that attorneys' fees should ordinarily be awarded a successful plaintiff in those actions, the court noted that the statute in question did not provide for damages so that allowance of attorneys' fees was necessary in order to avoid hardship to litigants. The case speaks only of attorneys' fees and says nothing about recovery of "expense of suit" other than attorneys' fees.

TWA makes the following argument, each part contingent upon the other: (1) taxable "costs" never include an attorney's fee; (2) the statute speaks of "cost of suit," including a reasonable attorney's fee; (3) therefore "cost of suit" must refer to something more than taxable "costs" (Cross-Petitioner's Brief 41-42). The argument fails with its major premise. The rule is not that attorneys' fees are *never* recoverable as costs, but only that they are not *ordinarily* recoverable as costs.

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[9] See, *e.g.*, *Twentieth Century Fox Film Corp.* v. *Goldwyn*, 328 F.2d 190, 224 (9th Cir. 1964) (accounting fees); *Farmington Dowel Products Co.* v. *Forster Mfg. Co.*, 297 F.Supp. 924, 930 (D. Maine 1969) (long distance calls; travel expenses; cost of experts); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 245 F.Supp. 258, 305 (M.D.Pa. 1965) (travel expenses); *Brookside Theatre Corp.* v. *Twentieth Century Fox-Film Corp.*, 11 F.R.D. 259, 265 (W.D.Mo. 1951) (long distance calls).

> While the general American rule is that attorneys' fees are not ordinarily recoverable as costs, both the courts and Congress have developed exceptions to this rule for situations in which overriding considerations indicate the need for such a recovery. [*Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 391-392 (1970).]

See, *e.g.*, 42 U.S.C. § 2000a-3(b), providing that in certain civil rights cases the court may allow the prevailing party "a reasonable attorney's fee as part of the costs * * *."

The statute as it stands, and as it has been uniformly construed for nearly half a century, is a coherent provision specifying that antitrust actions are among the exceptional cases in which Congress has determined that an attorney's fee is to be included in the taxable costs. The construction advanced by TWA would make the reference to an attorney's fee surplusage, since the expense of conducting a suit, which TWA would interpret "cost" to mean, would always include attorneys' fees.

The real thrust of TWA's argument is not that Congress in 1914 authorized the recovery of the fees of experts—or the variety of other kinds of expenses that antitrust plaintiffs have claimed—but that this Court should rewrite the statute to conform to changing realities of litigation. Thus TWA says that proving damages in a major antitrust case "has become" complex and costly (Cross-Petitioner's Brief 35). The Court is invited to interpret the statute "in light of the realities of today's private antitrust suit" (Cross-Petitioner's Brief 38), and to "give recognition to the present-day importance of such expert witnesses in private antitrust suits * * *" (Cross-Petitioner's Brief 39). Whether the statute requires revision so that a successful plaintiff, who will already have been awarded three times

the damage he has suffered, should also be reimbursed by defendant for the full expense he has incurred in prosecuting the suit, is a question of policy appropriately addressed to the Congress rather than to this Court.

CONCLUSION

On the issues raised by the cross-petition, the judgment of the courts below should be affirmed if the positions advanced by petitioners in No. 71-827 are rejected. If the positions advanced in that case are accepted, however, the Court need not reach the issues raised by the cross-petition.

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INDEX

	Page
Interest of the Civil Aeronautics Board	1
Statement	3
1. The Board's orders	3
2. The pleadings	5
3. The decisions below	7
Discussion	9
A. The Board's orders authorizing Toolco's control of TWA and permitting certain intercompany transactions did not immunize the conduct alleged in the complaint and admitted by the default	9
B. The application of antitrust remedies in this case does not conflict with the Board's exercise of its powers and responsibilities under the Federal Aviation Act	15

CITATIONS

Cases:	
California v. *Federal Power Commission*, 369 U.S. 482	9
Hughes Tool Co. v. *Trans World Airlines, Inc.*, (Nos. 443 and 501), 380 U.S. 248	2
Pan American World Airways, Inc. v. *United States*, 371 U.S. 296	15
Transcontinental & W. A., Control by Hughes Tool Co., 6 C.A.B. 153	3
Transcontinental & W. A., Further Control by Hughes Tool Co., 9 C.A.B. 381; 12 C.A.B. 192	4

475-126—72——1

Cases—Continued

	Page
United States v. *Philadelphia National Bank*, 374 U.S. 321	9
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150	9

Statutes:

Clayton Act, 38 Stat. 730 *et seq.*, as amended, 15 U.S.C. 12 *et seq.*:	
Section 3, 15 U.S.C. 14	5
Section 7, 15 U.S.C. 18	5
Federal Aviation Act of 1958, 72 Stat. 731 et *seq.*, as amended, 49 U.S.C. 1301 *et seq.*:	
Section 401(e)(4), 49 U.S.C. 1371(e)(4)	17
Section 408, 49 U.S.C. 1378	3, 5, 9, 11, 14, 16, 18
Section 408(a)(5), 49 U.S.C. 1378(a)(5)	16
Section 408(b), 49 U.S.C. 1378(b)	16
Section 409, 49 U.S.C. 1379	18
Section 411, 49 U.S.C. 1381	17
Section 412, 49 U.S.C. 1382	18
Section 414, 49 U.S.C. 1384	9, 11, 14, 16, 18
Section 1005(d), 49 U.S.C. 1485(d)	17–18
Sherman Act, 26 Stat. 209, *et seq.*, as amended, 15 U.S.C. 1 *et seq.*:	
Section 1, 15 U.S.C. 1	5
Section 2, 15 U.S.C. 2	5

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-827

HUGHES TOOL COMPANY AND RAYMOND M. HOLLIDAY, PETITIONERS

v.

TRANS WORLD AIRLINES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE CIVIL AERONAUTICS BOARD AS AMICUS CURIAE

INTERESTS OF THE CIVIL AERONAUTICS BOARD

The Civil Aeronautics Board has an interest in this litigation to the extent that it involves the scope of the antitrust immunity conferred by the Board's orders permitting Hughes Tool Company ("Toolco") to acquire control of Trans World Airlines, Inc. ("TWA") and permitting certain transactions between Toolco and TWA.[1] The Board's position is that those orders did not provide any antitrust or other immunity for the acts alleged as the basis for TWA's complaint.

[1] We are thus addressing ourselves in this submission to the issues raised in Part IV of Toolco's brief (Br. 65-88).

When this case was before the Court during the 1964 Term,[2] the Board, as *amicus curiae,* submitted its views in a memorandum stating that TWA's complaint and Toolco's counterclaims (with one exception) did not raise any issues which lie within the Board's exclusive jurisdiction or which should be referred to the Board for initial consideration under the primary jurisdiction doctrine. The Board also stated that, in its view, the Board orders authorizing Toolco to acquire control of TWA and permitting certain transactions between Toolco and TWA conferred no antitrust or other immunity for the acts upon which TWA's complaint is based. The Board adheres to these views. The purpose of this *amicus* memorandum is to resubmit the Board's prior position on the question of immunity and any remaining question of exclusive jurisdiction. We believe that the proceedings below which followed the Court's dismissal of the writs of certiorari have not affected the validity of that position.[3] We take no position on any other issues in the case.[4]

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[2] The Court, after argument, dismissed the writs of certiorari as improvidently granted. *Hughes Tool Co.* v. *Trans World Airlines, Inc.* (Nos. 443 and 501), 380 U.S. 248, 249.

[3] For the convenience of the Court we have repeated substantial portions of our prior submission in this memorandum.

[4] We have not commented on the antitrust questions discussed in the Toolco brief because they do not directly pertain to the powers and responsibilities of the Board, or to its interest in this proceeding. Moreover, any substantive antitrust issues in this case appear to be intertwined with the question of the effect of the default judgment entered against Toolco.

STATEMENT

Since the facts have been set forth at some length in the several opinions of the courts below, and since the parties have presented the facts fully in their briefs, we limit this Statement to a brief description of the relevant Board orders, the initial pleadings, and the decisions below.

1. THE BOARD'S ORDERS

In 1944, the Board, acting under Section 408 of the Federal Aviation Act, approved the acquisition of control of TWA by Toolco through ownership of approximately 45 percent of the carrier's stock (*Transcontinental & W. A., Control by Hughes Tool Co.*, 6 C.A.B. 153). The Board ruled that the stock acquisition gave Toolco control over TWA and that Toolco was engaged in a phase of aeronautics because it had the right to purchase a substantial fleet of aircraft, at least a part of which might be held for resale (*id.* at 155–156). The Board also found that Toolco's control of TWA would have no adverse effect upon the public interest. It expressed concern, however, that "TWA might be forced, through the control exercised by Hughes Tool, to purchase more [aircraft] than the economic operations of TWA require" (*id.* at 156). While stating that this possibility was remote (*ibid.*), the Board conditioned its approval of control by limiting transactions between the companies to those "involving complete items of property, the price of which does not exceed $200 each, with the further limitation that the total annual expenditure involved in such commercial transactions by either party shall not ex-

ceed $10,000" (*id.* at 158). In 1950, the Board approved an arrangement under which Toolco increased its holdings of TWA stock to approximately 73 percent (*Transcontinental & W. A., Further Control by Hughes Tool Co.,* 9 C.A.B. 381; 12 C.A.B. 192), subject to the 1944 limitation upon intercompany transactions (12 C.A.B. at 193).

Since 1944 the Board, upon application by TWA and Toolco, has entered various orders modifying the conditions imposed in the basic orders of approval to permit intercompany transactions in excess of the dollar limitations.[5] These orders permitted Toolco to sell or lease aircraft and related equipment to TWA and to participate in the financing of TWA's acquisition of equipment. No hearings were held or adversary pleadings filed when such orders were entered. The Board found that modification of the condition to permit each transaction was in the public interest and, in each order since the end of 1956, that the proposed transaction or transactions did "not violate the original intent of the restriction imposed upon transactions between TWA and Toolco."[6] Nearly all of the orders state further that the allowance of the transaction is not a determination of its reasonable-

[5] A-3307-3308, 3309-3310, AX-2031-2032, 2048-2049, 2076-2077, 2094-2095, 2147-2148, 2157-2158, 2173-2174, 2188-2190, 2202-2203, 2226-2227, 2237-2238, 2245-2246, 2260-2261, 2287-2289, 2303-2305, A-3403-3412.

[6] The quoted language, or variants thereof, is found at AX-2158, 2174, 2189, 2202, 2226-2227, 2238, 2246, 2261, 2288. One order, in June 1960, specifically stated that the Board's finding to that effect was made on "the basis of the application and the representations contained therein" (AX-2288).

ness for rate-making purposes.[7] The last modification order, entered in December 1960 (A–3403–3412), authorized a financing arrangement under which two lending institutions assumed actual control over TWA's management by means of a voting trust imposed on Toolco's stock.[8]

2. THE PLEADINGS

In 1961, TWA filed a complaint against Toolco, Howard Hughes (Toolco's sole stockholder) and Raymond M. Holliday (a Toolco officer) (A–1–32), charging that the defendants had violated Sections 1 and 2 of the Sherman Act and Sections 3 and 7 of the Clayton Act and had maliciously and willfully injured the business of TWA. The antitrust claims are based upon the defendants' alleged misuse of their power to control TWA's acquisition of aircraft, including particularly jet-powered aircraft, with the aim of making Toolco the sole supplier of aircraft to TWA. The complaint alleges that in effectuating this purpose the defendants prevented TWA from acquiring any jet-powered aircraft for a substantial period (A–13–14),

[7] AX–2032, 2049, 2077, 2095, 2148, 2158, 2174, 2189, 2203, 2227, 2238, 2246, 2261, 2289, 2305, A–3412.

[8] In addition to those orders dealing with specific transactions, the Board entered an order in 1956 instituting an investigation to determine whether a "proposed change in Toolco's activities in the field of aeronautics"—entry into the business of manufacturing and selling jet aircraft—required further Board approval under Section 408 (AX–2149–2150). This investigation was terminated in 1958 after Toolco abandoned the proposed manufacturing project and TWA withdrew its request that the Board approve purchase of Toolco aircraft (AX–2425–2426).

and that from 1955 to 1960 they barred TWA from obtaining the financing necessary for acquisition of such aircraft and allowed only debt financing or such equity financing as would increase Toolco's equity position in the carrier (A–15–16). TWA alleged that it was damaged by its failure to acquire necessary aircraft at the appropriate time and was particularly damaged by its failure to acquire jet-powered aircraft in 1958–1960; and that it was also damaged by its failure to obtain financing on more advantageous terms than were available when it finally was permitted to do so (A–16, 25–26).

Defendants Toolco and Holliday filed answers denying the allegations against them, alleging that the complaint did not state a cause of action, and challenging the court's jurisdiction on the ground that the orders of the Civil Aeronautics Board dealing with Toolco's control of TWA immunized the challenged transactions (A–41–51, 99–115).[9] (Defendant Hughes was not served and did not file an answer.)

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[9] Toolco also asserted six counterclaims against TWA and additional defendants (A–51–94). These counterclaims, no longer pertinent, were dismissed by the district court with prejudice as a result of Hughes' failure to appear for his deposition (A–317–323, 32 F.R.D. 604), with the exception of one counterclaim as to which the district court granted summary judgment for TWA. The court of appeals affirmed the district court's disposition of the counterclaims, except for one which it held the district court should have dismissed for lack of jurisdiction because the Board had exclusive jurisdiction (A–344–356, 332 F.2d 602, 611–616). This Court's grant of a writ of certiorari to review the dismissal with prejudice of Toolco's four counterclaims was subsequently dismissed as improvidently granted (380 U.S. 249).

3. THE DECISIONS BELOW

As a result of the failure of Hughes to appear for the taking of his deposition, the district court (1) entered a default judgment in favor of TWA against Toolco and Holliday on the issue of liability; and (2) referred the question of damages to a special master and retained for further consideration the issues of divestiture of Toolco's stock interest in TWA and injunctive relief [10] (A–317–322, 32 F.R.D. 604, 607–608). The court of appeals authorized Toolco and Holliday to appeal from the interlocutory order granting judgment to TWA on two questions: (1) whether the district court "lacked jurisdiction" of the treble damage action by reason of primary jurisdiction over these matters "residing in the Civil Aeronautics Board"; and (2) whether the Board's orders with respect to Toolco's control of TWA and the various intercompany transactions constituted a defense to TWA's antitrust claim (A–330, 332 F.2d 602, 605).

The court of appeals held that the Federal Aviation Act had not superseded the antitrust laws with respect to TWA's claims, that those claims were not within the Board's primary jurisdiction, and that the Board's orders had not given Toolco and Holliday immunity for their alleged violations of the antitrust laws (A–333–343, 332 F.2d at 606–610).

This Court granted certiorari to review the decision of the court of appeals, but, following argument, dis-

[10] Toolco's sale of its TWA stock in May 1966 mooted TWA's prayers for equitable relief (A–2743, 449 F.2d 51, 56, n. 2).

missed the writ as improvidently granted (380 U.S. 248).

Thereafter, Special Master Brownell conducted a hearing to determine damages. He awarded TWA damages of $45,870,478.65 trebled to $137,611,435.95 (Brownell Report, following A–1966). The damages were awarded to compensate TWA for Toolco actions resulting in late delivery and non-delivery of jets, requiring TWA to lease jets instead of permitting TWA to purchase them, and disrupting TWA's business. More specifically, as the court of appeals summarized the damage award, the damages "consisted primarily of profits [TWA] lost as a result of (1) diversion of the six Convairs to Northeast; (2) temporary retention by Toolco of four additional of the ordered Convairs and the ultimate lease of those jets to Northeast; (3) diversion of the six Boeings to Pan Am; (4) the lease, instead of outright sale, of jets in 1959–60; and (5) late delivery of 47 of the 63 jets ordered in 1956 which would have been avoided if, by the allegations of the complaint, Toolco had not unlawfully constricted TWA's financing and acquisition of its own jet fleet" (A–2763–2764, 449 F.2d 51, 65–66).

Other damage claims were rejected by the Special Master, and TWA did not seek damages for the continuing antitrust violations alleged to have occurred after Toolco put its TWA stock in a voting trust in December 1960 (*ibid.*). The district court adopted and confirmed the Special Master's Report over the objections of both sides (A–2027–2059, 308 F.Supp. 679), and later awarded TWA attorneys fees and costs (A–

2060–2072, 312 F.Supp. 478). The district court entered judgment in April 1970 for a total of $145,448,-141.07, plus interest (A–2073).

On cross appeals, the court of appeals affirmed the judgment in all respects except the rate of interest (A–2739–2798, 449 F.2d 51). The court of appeals did not reconsider its previous ruling rejecting defendants' primary jurisdiction and immunity contentions.

DISCUSSION

A. THE BOARD'S ORDERS AUTHORIZING TOOLCO'S CONTROL OF TWA AND PERMITTING CERTAIN INTERCOMPANY TRANSACTIONS DID NOT IMMUNIZE THE CONDUCT ALLEGED IN THE COMPLAINT AND ADMITTED BY THE DEFAULT

Since immunity from the antitrust laws is not "lightly implied," a statutory immunity for specified transactions does not extend to "other types of agreements or restraints." *California* v. *Federal Power Commission*, 369 U.S. 482, 485; *United States* v. *Philadelphia National Bank*, 374 U.S. 321; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 226–227. The Federal Aviation Act reflects this policy, since the immunity that Section 414 (49 U.S.C. 1384) grants for acts done pursuant to Board orders under Section 408 (49 U.S.C. 1378) is applicable only "insofar as may be necessary to enable such persons to do anything authorized, approved or required by [the Board's] order."

We submit that neither the Board's orders authorizing Toolco's control over TWA nor its subsequent

orders with respect to various intercompany transactions provide any immunity for the antitrust violations that TWA has alleged. The 1944 and 1950 orders approved the acquisition and the enlargement of Toolco's control over TWA. But orders authorizing control do not approve prospectively all things that may be done in the exercise of control, and the Board's orders did not permit Toolco to utilize its power as a means of violating the antitrust laws. The Board's orders did confer antitrust immunity, but that immunity was confined to the acquisition of control itself, and did not extend to the manner in which control was thereafter exercised. As the court below summarized TWA's complaint, it charged "the outlines of a tying arrangement, an economic boycott of the defendants' competitors, and an attempt to monopolize commerce" (A–343, 332 F.2d at 611). Such conduct plainly did not constitute acts "necessary to enable" Toolco to do "anything authorized [or] approved" by the Board's order.

Toolco now contends that the damage award has "narrowed the terms of reference from the limitless realm of the possible to a contained set of facts" (Br. 67) and that this contained set of facts shows that the Toolco acts upon which TWA relied to establish damages were simply normal and natural incidents of the control relationship that the Board approved. We do not believe, however, that the specific acts which served as a basis for the damage award can be examined without reference to the allegations of the complaint alleging that those acts were performed in

furtherance of violations of the antitrust laws. The damage computations were based upon the assumptions that defendants admitted by their default that the underlying antitrust violations did occur and that the specific acts which damaged TWA were caused by those violations. Those assumptions must be deemed correct for purposes of determining the immunity questions. Under those assumptions, the specific acts which damaged TWA were not the normal and natural exercise of the control relationship approved by the Board, and consequently they were not given antitrust immunity.

In any event, we do not believe that an order approving an acquisition immunizes post-acquisition managerial decisions under the antitrust or other laws. The legality of such decisions must be determined on their own merits.

Similiarly, assuming *arguendo* that orders modifying the basic order of approval may confer antitrust immunity in appropriate circumstances,[11] no immunity was conferred by the various modification orders

[11] TWA argues (Br. 145-147) that the Board's subsequent orders could not have conferred Section 414 antitrust immunity on Toolco for several reasons: They were not issued after notice and hearing, which is required for Section 408 approvals; they did not employ language of approval; and, as modifications of a Section 408 order, the only conduct that they could approve with concomitant immunity would be an acquisition of control. The Court need not reach the questions which TWA raises of the Board's power to confer antitrust immunity through modification orders, because none of the modification orders in this case purported to sanction the antitrust violations found to have damaged TWA.

in this case. The orders approving Toolco's control of TWA had prohibited intercompany transactions that involved more than $200 each or that exceeded an annual total of $10,000. These limitations were imposed because of the Board's concern that Toolco might force TWA to purchase more aircraft than its operations required. In waiving this condition for a number of specific purchases and leases of aircraft, the Board considered only such matters as the carrier's need for the particular equipment and the reasonableness of the terms of the various financing arrangements as disclosed by the applications. The Board stressed the limited nature of these modification orders by observing that it was appraising the transactions in light of the original purpose of the restriction. The modification orders were entered solely on the basis of motions, without hearings or adversary pleadings, and did not purport to sanction anything other than the specific transactions involved. The misconduct alleged in the complaint was no more necessary to the consummation of those specific transactions than it was to the original acquisition of control.

Moreover, the TWA charges which Toolco describes as the "crux" of the complaint involve Toolco's use of its control over TWA to prevent TWA from acquiring aircraft from other suppliers and from obtaining the financing necessary to acquire jets (see A–2762–2763, 449 F.2d at 65). The complaint states that these acts were "performed in furtherance of the offenses charged and for the improper purposes alleged" (*ibid.*) and were the cause of the injuries to TWA.

This restraint upon TWA's activities was, of course, neither submitted to nor approved by the Board, and it was certainly not necessary to carry out any of the Board's orders.

Most of the specific items for which damages were awarded to TWA are unrelated to the various modification orders. The bulk of the damages was awarded for Toolco's delay in ordering jets from Boeing, Toolco's diversion of Boeing jets to Pan American, Toolco's diversion to Northeast of 10 out of 30 Convair jets, and Toolco's actions which interfered with and delayed the delivery of the other 20 Convair jets (Brownell Report, Part I). The delay in ordering Boeing jets, the interference with Convair deliveries, and the diversions of aircraft to other airlines are not remotely connected with the subject matter of any of the modification orders.

The Master did award some damages for profits which TWA lost by reason of Toolco's decision to lease jets to TWA during 1959 and 1960 instead of permitting TWA to purchase them (Brownell Report, Part II). That award was, of course, based upon the assumption that this decision was made in furtherance of the underlying antitrust violations, which were never disclosed to or approved by the Board.

Although the Board did enter modification orders permitting TWA and Toolco to enter into short-term leases of the jets and permitting various limited extensions of those leases, the Board's consideration was limited to a determination that the leases did not constitute transactions independently requiring Section

munity under Section 414 of the Federal Aviation Act implies that such immunity must be broadly construed, thereby precluding relief in this case, in order to avoid an intrusion into matters within the Board's jurisdiction. This is not the case. The Board's powers and responsibilities are only incidentally related to the subject matter of this antitrust case.

Section 408 of the Federal Aviation Act does require Board approval before control of an air carrier may be acquired by another air carrier, by a "person engaged in any other phase of aeronautics," by persons having other specified transportation interests, or, since 1969, by "any other person." [12] It was pursuant to this Section that the Board entered its orders approving control of TWA by Toolco, which the Board found to be a "person engaged in any other phase of aeronautics" as a present or potential dealer in aircraft.

But the Board's power under Section 408 to regulate acquisitions of control of air carriers does not oust the courts of jurisdiction under the antitrust laws to adjudicate controversies that grow out of or relate to the exercise of such control. Section 408 requires the Board to approve only an "acquisition of control;" it does not give the Board continuing responsibility for supervision of a controlling person's management of an air carrier. The Board, to be sure, is empowered by Section 408(b) to impose conditions

[12] Section 408(a)(5) was amended in 1969 to require Board approval of an acquisition of control of an air carrier by "any other person." 83 Stat. 103, 49 U.S.C. 1378(a)(5).

upon its approval, and it may bar dealings between the parties or, as it did here, reserve Board supervision over designated future transactions. Such conditions are ordinarily limited, as they were here, to specific classes of transactions, and, indeed, the Board may approve unqualifiedly, without imposing any conditions.

Moreover, the Board has no jurisdiction over aircraft dealers or manufacturers as such, and it is not generally empowered to regulate the issuance of a carrier's securities or its capital structure, or to specify the aircraft which a carrier can acquire, the timing of such acquisitions, or any decisions to defer or refrain from aircraft acquisitions. Indeed, the Board is specifically precluded from interfering with a carrier's choice of equipment (Section 401(e)(4), 49 U.S.C. 1371(e)(4)).

Finally, the Board's remedial powers do not effectively cover the conduct alleged in the complaint. Its authority to enter cease-and-desist orders (Section 411, 49 U.S.C. 1381) is limited to unfair practices committed by an "air carrier * * * in air transportation or the sale thereof," while the complaint sought relief against a person controlling an air carrier, and asserts unlawful action affecting the sale of aircraft, not air transportation. Toolco contends (Br. 71–72) that the Board may reexamine a prior order approving control and cancel it or otherwise remedy undesirable consequences of the relationship if, upon inquiry, it finds abuses of control which require such corrective action in the public interest (cf. Section 1005(d), 49

U.S.C. 1485(d)). We assume for present purposes that the Board has this power and that it may also consider a party's past conduct in the exercise of control when passing upon further requests for Section 408 approval. But since the Act does not impose any duty on the Board affirmatively to monitor and supervise all aspects of the control relationship, the Board's limited authority over Section 408 relationships should not of itself serve to insulate the controlling party from antitrust liability or oust the courts from jurisdiction. Indeed, the availability of antitrust or other judicial remedies may be regarded as additional safeguards for the protection of the public interest.

All of this is not to suggest, as Toolco implies, that Section 414 is to become an empty assurance to those who obtain approval of transactions subject to Sections 408, 409, and 412 of the Federal Aviation Act. It is rather to support the salutary principle that Section 414 is not to be construed by recipients of such approvals as a blanket authorization to conduct their subsequent affairs with reckless disregard of the antitrust laws. Here, indeed, Toolco is not being subjected to penalties because of its acquisition of control of TWA, nor, we believe, could it be. The sanctions relate to subsequent actions, the antitrust aspects of which were never brought to the attention of or considered by the Board.

Under such circumstances, the mere existence of Board jurisdiction with respect to some aspects of aviation neither supersedes the courts' power to award relief in this case nor requires that the scope

of immunity be interpreted in a manner which would have that effect.

Respectfully submitted.

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Supreme Court
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MICHAEL RODAK,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-827

HUGHES TOOL COMPANY and
RAYMOND M. HOLLIDAY,

Petitioners,

v.

TRANS WORLD AIRLINES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
1. Supposed antitrust violations	4
2. CAB approval	18
3. The ad damnum	25
CONCLUSION	26

TABLE OF AUTHORITIES

Cases:

Allied Air Freight, Inc. v. *Pan American World Airways, Inc.*, 393 F.2d 441 (2d Cir.), *cert. denied*, 393 U.S. 846 (1968)	3n, 23n
Conley v. *Gibson*, 355 U.S. 41 (1957)	15
Fanchon & Marco, Inc. v. *Paramount Pictures, Inc.*, 202 F.2d 731 (2d Cir. 1953)	5n
Fong v. *United States*, 300 F.2d 400 (9th Cir.), *cert. denied*, 370 U.S. 938 (1962)	25
Fortner Enterprises, Inc. v. *United States Steel Corp.*, 394 U.S. 495 (1969)	6n
GAF Corp. v. *Circle Floor Co.*, 329 F.Supp. 823 (S.D.N.Y. 1971)	16
Hawaii v. *Standard Oil Co.*, 405 U.S. 251 (1972)	12, 18
Hughes Tool Co. v. *Trans World Airlines, Inc.*, 380 U.S. 248 (1965)	23
Ludka v. *Athana Corp.*, 25 Cal. App. 2d 316, 101 Cal. Rptr. 615 (2d Dist. 1972)	26

PAGE

Ohio Central R. Co. v. *Central Trust Co.*, 133 U.S. 83 (1890) 7

Pan American World Airways, Inc. v. *United States*, 371 U.S. 296 (1963) 22, 23

Perma Life Mufflers, Inc. v. *International Parts Corp.*, 392 U.S. 134 (1968) 6n

Ross v. *Bernhard*, 396 U.S. 531 (1970) 5n

San Diego Building Trades Council v. *Garmon*, 359 U.S. 236 (1959) 23

Thomson v. *Wooster*, 114 U.S. 104 (1885) 8

Trans World Airlines, Inc. v. *Hughes, et al.*, 332 F.2d 602 (2d Cir. 1964) 15

Trans World Airlines, Inc. v. *Hughes, et al.*, 449 F.2d 51 (2d Cir. 1971) 5, 6, 10, 13, 19

United States v. *Grinnell Corp.*, 384 U.S. 563 (1966) 6n

United States v. *Yellow Cab Co.*, 332 U.S. 218 (1947) 5, 6n

Statutes and Rules:

Clayton Act

Section 3 (15 U.S.C. § 14) 10

Section 4 (15 U.S.C. § 15) 18

Section 7 (15 U.S.C. § 18) 4, 5, 9, 15, 16, 19, 19n

Federal Aviation Act

Section 408 (49 U.S.C. § 1378) 4, 18, 21, 23, 24

Section 412 (49 U.S.C. § 1382) 22, 23n

Section 414 (49 U.S.C. § 1384) 4, 18, 19n, 21, 23

PAGE

Federal Rules of Civil Procedure

Rule 15 25

Rule 15(a) 25

Rule 15(b) 25

Rule 54(c) 25, 26

Sherman Act

Section 1 (15 U.S.C. § 1) 13, 16

Section 2 (15 U.S.C. § 2) 10, 16

Civil Aeronautics Board Opinions and Orders:

Application of Trans World Airlines, Inc., et al., Order 71-8-91 (August 19, 1971) 23

Transcontinental & Western Air., Inc., Control by Hughes Tool Co., 6 C.A.B. 153 (1944) 3, 20

Transcontinental & Western Air., Inc., Further Control by Hughes Tool Co., 9 C.A.B. 381 (1948) 20

Trans World Airlines, Inc., Further Control by Hughes Tool Co., 12 C.A.B. 192 (1950) 3, 20

Miscellaneous Authorities:

2A Moore, *Federal Practice* (2d ed. 1962) 26

5 Wright & Miller, *Federal Practice and Procedure: Civil* (1969) 26

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

Because the submissions in this case are already voluminous, we endeavor to hold this reply to a minimum and to confine it to the central issues that remain unresolved.* Save for what is set out below we are content to stand on what we have already said to the Court, confident that a rereading of our brief—or even, in view of its length, a rereading of the Summary of Argument previously presented (Petitioners' Brief 22-27)—is an effective antidote to what TWA now says. We consign to the margin a demon-

* We do add a few words, at pp. 25-26, *infra*, on an issue that, in the context of this extraordinary case, must be regarded as comparatively minor.

stration of the care with which statements of "fact" in the TWA brief must be approached.*

* When this case was before the Court in 1965, petitioners devoted 18 pages in their Reply Brief to correcting misstatements of fact by TWA in its brief. Rather than burden the Court to a similar extent again, we set out here only a few illustrations of TWA's ways with a record. See also notes pp. 7 and 13, *infra*. These illustrations have been chosen from many that are available because these go to matters that can be disposed of in a few lines.

1. TWA says that the motion by Toolco for a Rule 16 conference was "a course which had been suggested by the Special Master in response to Toolco's repeated complaint that its deposition of Tillinghast had not produced evidence supporting TWA's principal allegations" (Respondent's Brief 23-24). In fact Toolco's complaint was not that TWA had not produced evidence but that it had not stated what its factual contentions were. It was this failure to make known the ultimate facts on which TWA was relying that had led the Special Master to make his suggestions in this regard. His statement (App. A-2385-2386) is quoted at pages 36-37 of our initial brief.

2. TWA says that the so-called "tax documents" "had never been produced by Toolco" though they were "plainly included within the court order of December 18, 1961" (Respondent's Brief 28). The fact is that the Special Master specifically recognized on March 22, 1962 that this material was not called for by the order of Judge Metzner (Doc. 216, Tillinghast Tr. p. 3710). He ordered that the material be kept in the custody of Andrews, Kurth, Campbell & Jones. He said: "I want to be very clear that I am not indicating in any way that I would order the production of them * * *" (*Id.* at 3714). This was the genesis of the nine boxes, which were shipped to New York for examination by the Master (App. A-2645-2646).

3. TWA is quite unhappy with the fact that the record shows that a deposition of Hughes was expected to cost more than $5 million (App. A-280). It says that Toolco's counsel "pointedly did not himself endorse" that figure and endeavors to suggest that "at the time" counsel himself supported an estimate of $1 million (Respondent's Brief 34 n. 10). The document cited for the $1 million estimate is Document 145. This was filed on January 14, 1963, nearly four weeks before the later, more comprehensive, estimate, and says that the expense "could well exceed

In our initial submission we pointed out that once the procedural underbrush is cleared away, the substantive issue in this case is starkly simple: is it a violation of the federal antitrust laws for a parent corporation, whose control of an air carrier subsidiary has been approved by the Civil Aeronautics Board, to make normal business decisions about the acquisition and financing of capital equipment for the subsidiary? (Petitioners' Brief 22-23). This breaks

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$1,000,000 apart from counsel fees." When counsel subsequently gave the court the $5 million figure he said that he had resisted the figure "but I have been assured, upon checking and double checking, that that is the minimum that would be involved, and before attempting to address itself as to the probable amount that TWA would be spending" (App. A-280).

4. TWA describes the ordering of Constellations and the building of the plywood flying boat as "steps toward establishing Toolco as a major supplier of commercial transport aircraft" (Respondent's Brief 42). There are specific and explicit findings to the contrary by the CAB. As to the Constellations, see 6 C.A.B. 153, 155 (1944) (App. A-3300-3301). As to the flying boat, see 12 C.A.B. 192, 198 n. 13 (1950) (App. A-3346).

5. TWA says: "Such aircraft contracts as Toolco chose to assign, it assigned, and Boeing's vice president Connelly testified that Boeing felt it had no choice but to consent (A-1181)" (Respondent's Brief 53). Literally this is true—but presented, as it is, in support of the proposition that contractual limitations on assignment were "completely ineffective," it is wholly misleading. In fact Connelly testified that Hughes Tool Co. would have been unable to finance the acquisition of the six Boeings so that Boeing was not really giving up anything by consenting to the assignment to Pan American (App. A-1181).

6. TWA is as free with the facts of other cases discussed in its brief as it is with the facts of the present case. See, for example, its discussion of *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 393 F.2d 441 (2d Cir.), *cert. denied*, 393 U.S. 846 (1968) (Respondent's Brief 75 n. 28). If, as in that case, prosecution of an action is stayed "until the plaintiff exhausts its available remedies before the Civil Aeronautics Board," 393 F.2d at 443, but plaintiff does nothing and does not resort to the CAB, statements that plaintiff was "literally and fully complying with the stay order" and that its conduct was "in strict obedience to the stay order" are surely Pickwickian.

down into two sub-questions. What relation, if any, do the acts for which TWA was awarded astronomical damages have to do with any putative violations of the antitrust laws? What effect does CAB approval have, under §§ 408 and 414 of the Federal Aviation Act? The court below and our opponents have written hundreds of pages about this case, in opinions and in briefs, but they have not yet seen fit to provide an answer to either of these questions.

1. Supposed antitrust violations

TWA's brief makes it clear that this Court is being asked to uphold a judgment of more than $145 million for a violation of the antitrust laws without anybody, whether a court or the plaintiff, being able to say what antitrust law was violated, how it was violated, or what the connection was between the damages awarded and the conduct that violated the antitrust laws. TWA does not contend that it was awarded damages because any supplier was excluded from the TWA market nor because of any restraint on trade of suppliers. The award is based solely on the fact that Toolco made decisions for TWA about the acquisition of jets and on the claim of TWA that these decisions resulted in it receiving too few jets, receiving them too late, and having to lease them for a time rather than purchase them (Respondent's Brief 139, 177; CAB's Brief 8).

As we have previously developed at length, antitrust claims are based on the concept that the offending party has wrongfully exercised, or sought to exercise, control over the economic and competitive decisions of an independent business entity. Since TWA was lawfully acquired by Toolco, it had no claim to economic independence. It cannot claim that Toolco controlled what it had no right

to control but only that it did not exercise that control as TWA now wishes it had. The fact that the legality of Toolco's acquisition of control cannot now be challenged and that TWA had no right to economic independence disposes of the claim in the complaint of an acquisition in violation of § 7 of the Clayton Act as well as of the boycott, tie-in, and exclusive dealing theories adverted to by the Court of Appeals (Petitioners' Brief 89-100).* The fact that Toolco was not a manufacturer of aircraft nor was it a supplier of aircraft to airlines generally in competition with other manufacturers or suppliers disposes of the three other theories mentioned by the court below (449 F.2d at 68, App. A-2770), those of an unlawful intent to monopolize, an unlawful conspiracy to do so, and the "*Yellow Cab*" theory (Petitioners' Brief 100-117).** TWA, which ad-

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* In an endeavor to meet our argument that a subsidiary may challenge the legality of its acquisition by its parent but that, if lawfully acquired, it cannot thereafter make an antitrust claim concerning the mere exercise of parental control (Petitioners' Brief 93-94), TWA says: "It is generally settled that minority shareholders in a less-than-wholly-owned subsidiary may bring a derivative antitrust action against a controlling company for anticompetitive practices, engaged in subsequent to an acquisition, which have injured the subsidiary" (Respondent's Brief 165-166). For this statement it cites six cases. The citation of one of these, *Ross* v. *Bernhard*, 396 U.S. 531, 539-540 (1970), is prefaced with a "*cf.*," apparently in recognition that the case involved no antitrust claim. Of the other five cases cited, in four the minority stockholders were clearly challenging the legality of the acquisition of their company by its parent. They are thus consistent with the view we have taken and inconsistent with TWA's view. This is probably also true, though the facts are less clearly stated and in any event the court did not focus on the present issue, in the fifth case, *Fanchon & Marco, Inc.* v. *Paramount Pictures, Inc.*, 202 F.2d 731 (2d Cir. 1953).

** The cases cited by TWA for a contrary position (Respondent's Brief 154) are inapposite. In each of those cases defendants were participants in the market in which they were alleged to have unlawfully restrained trade or created a monopoly, as Tool-

mitted in the Second Circuit that Toolco was not a manufacturer of aircraft (Petitioners' Brief 101 n. 40), makes no claim to the contrary in this Court. It does argue that in its description of Toolco in paragraph 3 of the complaint it used the plural in saying that Toolco was engaged in supplying aircraft to "air carriers," and it finds "inherent in this allegation the allegation that they were doing so in competition with other suppliers" (Respondent's Brief 168-169). But TWA, which has the immense benefit of having all factual allegations of its complaint deemed admitted by virtue of the default, cannot claim an admission of things it might have alleged but did not. And with regard to the use of the plural, "air carriers," in the complaint, the rule, as the court below recognized, is that to the extent allegations of the complaint are indefinite they must be read in the light of what the record shows (449 F.2d at 63, App. A-2758). This is in accord with the long-settled rule that after default distinct and positive allegations of fact may be taken as true, "but if they are indefinite * * * the

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co was not. There are other important differences. In *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966), and in *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947), the corporate affiliations were the means by which unlawful restraint of trade or monopoly power was achieved. The results were the primary objective of the acquisitions and combination, and were thus unlawful. Here the acquisition was admittedly lawful. *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968), and *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495 (1969), involved agreements between parents and subsidiaries that injured independent third parties. Here the independent third parties that could be targeted by the claimed misconduct were aircraft manufacturers who, allegedly, would be foreclosed from supplying TWA. All that happened is that Toolco rather than TWA purchased the aircraft. Sales lost to TWA were replaced by sales to Toolco. No independent third party could have been injured or has claimed to have been injured.

requisite certainty must be afforded by proof." *Ohio Central R. Co.* v. *Central Trust Co.*, 133 U.S. 83, 91 (1890). The record here shows beyond dispute that the only instances in which Toolco supplied commercial aircraft to any carrier other than TWA were when it assigned its contractual rights to some of the Boeings and some of the Convairs that it had ordered for TWA, and Pan American and Northeast then acquired those planes from the manufacturers.* It is in that sense, and only in that sense, that the reference to "air carriers" in the complaint must be understood.

It is apparent that if there were any coherent or logical basis, in fact or in law, for the judgment in this case, TWA would have described it to this Court. If it were possible to support the judgment in terms of conduct that violated the antitrust laws and had an anticompetitive effect that caused injury for which TWA was awarded damages, TWA would specify what that was. Instead, TWA repudiates even the attempts of the Second Circuit to explain the judgment in antitrust terms. The theory of "potential competition," which the Court of Appeals invented without any help from the parties (Petitioners' Brief 111 n. 53) and

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* The statement that "Toolco made more than two million dollars from supplying jets to Pan American and Northeast" (Respondent's Brief 153-154) is not true. What TWA regards as a "profit" on the transaction with Pan American (Respondent's Brief 52 n. 21) was a payment, as the agreement with Pan American provided, of interest on the installment payments Toolco had already made "at the same rates you would have capitalized under your standard accounting procedures if you had made each of such installment payments at the dates they were made by [Toolco]" (App. AX-729). This was in accord with Toolco's usual practice (App. A-151-152, AX-1549-1550). The supposed "profit" with regard to the Convairs was purely the result of a credit resulting from the reduction from 30 to 24 of the number of 880s to be purchased by Toolco (App. AX-1525).

the inapplicability of which we had felt obliged to discuss at length (Petitioners' Brief 106-117), is now disowned by TWA (Respondent's Brief 172). What is left is the single proposition that the defendants have not "affirmatively disproven" TWA's claim that had it taken the deposition of Hughes it could have discovered some conduct that "on at least one of the six theories" could be found to be a violation of the antitrust laws (Respondent's Brief 172).

This wholly misconceives the effect of the default. At earlier points in their brief TWA had seemed to concede that the effect of a default is as we have urged (Petitioners' Brief 42-51). Thus it quotes with apparent approval our statement that by default we gave up the right "to challenge the factual allegations of the complaint" (Respondent's Brief 69). It agrees that *Thomson* v. *Wooster*, 114 U.S. 104, 110 (1885), held that a default admits "facts properly pleaded" (Respondent's Brief 108). It says that on default "a legal theory would not be admitted" and that it would "not admit a conclusion, derived from such a legal theory, that specific allegations resulted in liability" (Respondent's Brief 106). At other places, however, TWA suggests that the default has admitted "a combination and conspiracy to restrain trade in aircraft" and "an attempt to monopolize" (Respondent's Brief 139). Again it says that the default has admitted an "unlawful combination, conspiracy and attempt" (Respondent's Brief 155).

TWA was right in its earlier concessions, wrong in its later claims of what was admitted and what the scope of inquiry was after default. The default admitted every positive factual allegation of the complaint. It did not admit legal theories, legal conclusions, or liability. The question

open after default is whether, as a matter of law, the admitted facts establish liability (and, if so, what damages flow from that liability). That is a question of law, on which there is no room to talk about a burden on defendant of affirmative disproof. Nor can the factual allegations of the complaint be shored up by resort to speculation about facts that have not been alleged.

An example no longer at issue between the parties illustrates the point. The complaint alleges that Toolco acquired more than 78% of TWA's stock (¶ 11, App. A-10). It charges that the acquisition of the stock was in violation of § 7 of the Clayton Act (¶ 9(g), App. A-9). Finally, it alleges that "TWA has been immediately injured in its business by Toolco's acquisition of TWA's stock * * *" (¶ 50, App. A-24). Despite all of this, TWA now recognizes that, because of CAB approval, Toolco's acquisition of the TWA stock was lawful (Respondent's Brief 149). The default did not admit the conclusion that the stock acquisition was unlawful or that Toolco was liable under § 7 because, as a matter of law, CAB approval, at a minimum, takes the stock acquisition out of the reach of the antitrust laws.

A similar analysis is available for the other claims by TWA that the default has admitted its legal conclusions. If, as a matter of law, a corporation cannot conspire with its own officers, a default does not admit that an alleged conspiracy between Toolco, Hughes, and Holliday is an unlawful conspiracy. If, as a matter of law, an alleged conspiracy in 1960 and 1961 does not permit the award of damages for actions by one of the "conspirators" in 1955 and 1956, a default does not admit that Toolco is liable for these damages because of what it may have done with Atlas in the

latter years. If, as a matter of law, an attempt to monopolize charge under § 2 of the Sherman Act requires a "dangerous probability" of success, a default does not admit an unlawful attempt to monopolize when there is not even a conclusory allegation of dangerous probability and the facts presented by plaintiff show that it could not exist. If, as a matter of law, a parent is free to decide with whom its lawfully acquired subsidiary may deal, a default does not admit violation of § 3 of the Clayton Act.

This is why the court below was in error when it held that "the default had the effect of admitting or establishing that the acts pleaded in the complaint violated the antitrust laws and that those acts caused injury to TWA in the respects there alleged" (449 F.2d at 70, App. A-2772), and when it said that the illegality of Toolco's acts was "conclusively established by the default judgment" (449 F.2d at 71, App. A-2776). This is why TWA is in error when it makes no attempt to establish that the facts alleged in the complaint and the acts for which it was awarded damages had any relation to any identifiable violation of the antitrust laws and claims that the burden is on defendant to prove that other facts, neither alleged by or known to TWA, would not have made out a viable antitrust claim (Respondent's Brief 65, 171, 172).

TWA's brief makes it plain that neither at the time it filed the complaint nor today does TWA know of conduct violating the antitrust laws. For example, TWA recites what it claims is known about defendants' activities in aircraft manufacture and supply (Respondent's Brief 42-56). This lengthy recital is in itself a curious amalgam of plans that came to naught, orders for planes that were never

delivered, and discussions of deals that were never consummated, in no way showing Toolco to have been in competition with those who did manufacture and supply airplanes to airlines. TWA concludes this discussion with the even more curious statement that

> [I]t is impossible to guess what other activities might have been discovered if TWA had been able to proceed with the discovery guaranteed it under the Federal Rules of Civil Procedure. (Respondent's Brief 56.)

It is shocking that a judgment of any amount, let alone one for the astronomical sums involved here, could be based on the possible existence of activities of a defendant about which the plaintiff has so little knowledge that it cannot even guess what they might be. Yet TWA's inability to guess what illegal activities might have occurred is understandable when it is remembered that the airlines report to the CAB from whom they acquire aircraft and these reports show that only TWA bought or leased aircraft from Toolco. Moreover, other than the Convair and Boeing aircraft that the complaint alleges Toolco ordered, and that the manufacturers subsequently sold or leased to other carriers, no jet plane ordered by Toolco has ever been delivered to any air carrier.*

TWA attempts, however, to guess even about the unguessable. Perhaps realizing that manufacturing and supplying jet planes is not an activity that can be carried out without detection in some lonely hollow in the dark of

* The only exception is four Convairs that TWA refused and that Toolco leased to Northeast in 1962 or 1963. See note, p. 13 *infra*.

the moon, TWA suggests that maybe it was not Toolco that was the manufacturer and supplier but somebody else pursuant to an agreement with Hughes. From "fascinating indications * * * in the public press" about Hughes' holdings, TWA divines that "[s]ecret agreements with manufacturers that TWA does not presently even suspect are not just possible—they are, given defendants' known methods of operations, a probability" (Respondent's Brief 56). One difficulty with this excursion into fantasy is that it overlooks the fact that the complaint does not allege any agreements, secret or otherwise, with any manufacturer other than "an arrangement for the joint development of a jet-powered aircraft to be manufactured by Convair," an arrangement that the complaint itself recognizes was abandoned (¶ 14, App. A-11-12). More important, the existence or nonexistence of an agreement with a manufacturer TWA cannot even "suspect" has nothing to do with the damages TWA has been awarded.

TWA ignores the first of these points. The second is of no concern to it. It claims that "the default relieved TWA of proving that the specific injuries alleged were caused by conduct that violates the antitrust laws" (Respondent's Brief 175). This view is unsound, as we have already developed at length (Petitioners' Brief 117-127). This Court has recently noted the virtually unanimous view of the lower courts that "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 263 n. 14 (1972). The reach of the damage remedy for antitrust violations is patently a question of law, fully open after a default.

Take, for example, the allegation in the complaint of "a combination and conspiracy to restrain interstate and foreign commerce of the United States in violation of Section 1 of the Sherman Act" (§ 9(a), App. A-8). On its face this is a conclusion of law, not admitted by the default. TWA apparently recognizes, as it must (Petitioners' Brief 104-106), that, as a matter of law, a conspiracy among Toolco, Holliday, and Hughes leaves a great deal to be desired. Thus it seeks to buoy up the claim of conspiracy by relying on Atlas, though the Court of Appeals properly saw fit to ignore the claim that Atlas was a coconspirator (449 F.2d at 69, App. A-271). TWA no longer places any weight on the allegation that in 1960 Northeast Airlines, which Atlas controlled, submitted a merger proposal to TWA (Complaint ¶ 21, App. A-14), a merger that was never consummated and could not have been without CAB approval. It chides defendants for "pretend[ing] that Atlas was connected to the combination and the conspiracy alleged in the complaint only through the proposed Northeast merger," and asserts that defendants should have known that the collaboration of Hughes and Atlas went far beyond the merger and far beyond even the provision by Toolco of aircraft to Northeast, "including both the Viscounts which were the subject of negotiations in 1958 (A-146-147) and the four CV-880s leased directly from Toolco in 1962" (Respondent's Brief 57).* TWA spends

* The statement about furnishing aircraft to Northeast is a striking example of TWA's imaginative approach to a record. See also note p. 11, *supra*. TWA's witness, Rummel, gave the facts about the Viscounts (which are never referred to in the complaint). He stated that Hughes committed to buy 15 Vickers Viscounts for TWA, that TWA decided it did not want the aircraft, that Hughes felt he had a moral commitment to Vickers, that he had one of Toolco's executives help Vickers in their at-

several pages elaborating on its thesis that "the chief executive officer of Atlas, Floyd Odlum, was one of the central group of individuals who decided what defendants should do with respect to TWA during the critical period in early 1961 when they were still attempting to control TWA's aircraft acquisitions" (Respondent's Brief 57-59). Suppose that what TWA says was true. Suppose that Odlum really was "the chief executive officer of Atlas"* and that in their "secret meeting" (Respondent's Brief 57) at Odlum's ranch in March, 1961, he and Holliday had plotted that Toolco would force TWA to buy Convairs ordered by it instead of Boeings ordered by the new management. This has literally nothing to do with damages awarded because back in 1956 Toolco ordered Boeing aircraft less promptly than TWA now thinks that they should have been ordered or because in 1958 Toolco decided to cut back on the size of TWA's initial jet fleet. TWA's speculation about secret agreements with manufacturers and its reliance on 1961 events only emphasize the lack of connection between supposed anticompetitive conduct of the defendants—conduct that is unsuspected and unguess-

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tempt to sell or lease the planes, and that eventually Northeast bought 10 of these aircraft from Vickers (Rummel Dep. 368-398, 424-428). As for the four CV-880s leased directly from Toolco to Northeast in 1962 or 1963, these of course were four of the 880s that had been ordered by Toolco back in 1956, that were offered to TWA in 1961 (App. AX-1545, AX-1551), turned down by TWA (App. AX-1228), and that were parked on the ground until Northeast leased them (App. A-861-863). They were leased to Northeast after Atlas had sold its interest in Northeast to Toolco, with CAB approval under § 408, and the lease of the planes was approved by the CAB. As a "backstop captive market," TWA was remarkably ineffective.

* It was announced in the press in May, 1960, that Odlum had left Atlas and was considering an association with Hughes.

able but that defendants, so it is said, have not conclusively disproven—and the damages it was awarded. If, as § 4 of the Clayton Act says, damages may be awarded only because of injury sustained "by reason of anything forbidden in the antitrust laws," TWA's entire case collapses.

Events in 1961 were of significance in 1964 when the Court of Appeals upheld the sufficiency of the complaint (332 F.2d 602, App. A-328). At that time much of the complaint dealt with supposed injuries inflicted in 1961 and subsequent years. Thus in applying the relaxed modern rule that a complaint is not to be dismissed on motion "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957), the Court of Appeals could properly take into account all of the allegations of the complaint. But at the damage hearing TWA abandoned any claim for damages based on acts after the voting trust took control in December, 1960. Its case must now be measured by what it established in the damage hearing and it cannot rely on post-1960 acts to retroactively make illegal events that had occurred years before.

Even if it were possible to find antitrust liability in this case, either because a default admits liability—and we have shown that it does not—or because the facts alleged in the complaint and established at the damage hearing are enough to make out liability on some antitrust theory—and we have shown that they are not—the award here cannot be sustained. Here there is no connection between whatever antitrust violation is assumed and the injuries for which TWA

has been awarded damages.* Moreover, even the fact that a defendant has violated the antitrust laws by doing something with a monopolistic intent or pursuant to a conspiracy and in the process has injured a plaintiff does not in itself establish the right of the plaintiff to collect damages under the antitrust laws for that injury. Plaintiff can collect only if the damages result from "the anti-competitive impact" of the defendants' activities.

A recent decision of the Second Circuit, *GAF Corp.* v. *Circle Floor Co., Inc.*, No. 71-1956 (2d Cir., July 5, 1972), is instructive. The Second Circuit there upheld dismissal of a complaint—even without full discovery, 329 F.Supp. 823, 829 (S.D.N.Y. 1971)—that charged violations of §§ 1 and 2 of the Sherman Act and § 7 of the Clayton Act because it found, as a matter of law, that the damages alleged were not "the economic result of the anticompetitive effects of the alleged violations." Slip opinion, at 3912. Circle Floor, the largest installer of floor tile in the New York area, and two individuals sought to acquire working control of GAF, the largest supplier of floor tile in the area, in order to establish a vertically integrated corporation that would have competitive advantages over other manufacturers and contract installers of floor tile. *Id.* at 3904-3905. The complaint alleged that "in furtherance of the combination and conspiracy and attempt to acquire control of GAF" Circle Floor did not make its usual purchases from GAF,

* None of the damage items make any sense in terms of the supposed antitrust violation. Millions of dollars were awarded because Toolco was dilatory in ordering Boeings and because it disrupted production and thus delayed delivery of the Convairs. The last thing that one seeking to monopolize the supplying of aircraft would do would be to take steps so that he has no planes with which to drive out other suppliers from the market.

hoping thus to depress the price of GAF stock and facilitate acquisition of control. GAF claimed that as a consequence of defendants' conduct it had suffered lost profits of $730,000 on the business it would otherwise have had from Circle Floor. The Second Circuit held that the claim for damages was not sufficiently related to the antitrust violations alleged.

> Assuming that GAF could establish that the partial withdrawal of business by Circle Floor resulted in some lost profits, that loss, and the expenses of conducting the proxy contest, would not be the result of diminution in competition produced by the substantive violations of the Sherman and Clayton Acts alleged in the complaint. GAF does not allege facts sufficient to state a claim for relief under the antitrust laws for damage to *its* business by reason of a restraint of trade. GAF is in effect contending that because appellees' alleged activities threatened the competitive position of others, it can maintain a suit under § 4 of the Clayton Act, 15 U.S.C. § 15 (1970), merely by alleging some loss. But this is not the law. Even assuming that GAF has suffered some damage, GAF has not, within the meaning of § 4, been "injured . . . by reason of" the alleged violations of the antitrust laws set forth in the complaint.
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> * * * GAF has not alleged that its position in the floor tile market has or would be affected by the conspiracy and attempt to control GAF. The complaint merely alleges, under three different theories, a plan for the vertical integration of GAF and Circle Floor that would amount to an unreasonable restraint of trade. The anticompetitive effects of such a restraint would be felt not by GAF but by the competitors of GAF and Circle Floor. The damages alleged by GAF do not represent the diminution of

> GAF's competitive position; the anticompetitive acts alleged in the complaint have not lessened GAF's ability to compete, and GAF has not therefore alleged that it has suffered any *antitrust* damages. [*Id.* at 3909-3910, 3912-3913; emphasis in original.]*

A similar analysis is available here. Even if defendants could be found liable for attempting to monopolize or seeking to restrain the trade of supplying airplanes either to TWA or to all air carriers—and *non constat* that no supplier was foreclosed from the TWA market or from the airline market generally—the losses for which TWA has been allowed recovery, that it received too few jets too late, have no relation to any diminution of competition among the suppliers of jets.

2. CAB approval.

Even if it could be shown to violate the anti-trust laws for a parent to make decisions for its subsidiary, the courts below have failed to give proper weight to the effect of CAB approval of acquisition control. Presumably § 408 of the FAA, requiring CAB approval, and § 414, giving immunity from the antitrust laws for anything necessary to enable a controlling party to do anything authorized,

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* The *GAF* case cannot be distinguished on the ground that it was decided on a motion challenging the sufficiency of the complaint while here the sufficiency of the complaint was upheld in 1964 and is no longer in issue (*cf.* Respondent's Brief 201 n. 82). When the complaint in this case was upheld TWA was also seeking equitable relief and it was not necessary to pass on the claims of damage. Section 4 of the Clayton Act, allowing for recovery of damages, "is notably different from § 16 of the Clayton Act, 15 U.S.C. § 26, which provides for injunctive relief * * *." *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 260 (1972). In addition, at that point the specifics of the damage claims were not before the Court of Appeals.

approved, or required by the order allowing acquisition of control, mean something. Toolco must have acquired some antitrust immunity from the 1944 and 1950 orders of the CAB and the 19 modifying orders. Unfortunately the Second Circuit, TWA, and the CAB have neglected to remove this immunity from the realm of the abstract, to define its terms, or to endow it with substantive content.

TWA now agrees that Toolco's acquisition of a 78% interest in TWA cannot itself be regarded as an antitrust violation (Respondent's Brief 149). Even this is a belated concession on TWA's part. The complaint, which studiously avoided any mention of the CAB or its approval, charged that the acquisition of the stock was in violation of § 7 of the Clayton Act (¶¶ 1, 9(g), App. A-1, A-9).*

The CAB says that "Toolco is not being subjected to penalties because of its acquisition of control of TWA, nor, we believe, could it be" (CAB's Brief 18). This statement does not provide much comfort to a party asked to pay $145 million in damages because of "the illegality of Toolco's arrogation of all authority for buying aircraft * * *" (449 F.2d at 71, App. A-2776).** No amount of rhetoric in the complaint about Toolco's motive and intent can hide the fact that the damages are wholly based on Toolco's making decisions for TWA about the acquisition and financing of

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* By virtue of the final paragraph of § 7, 15 U.S.C. § 18, CAB approval gave a complete defense to a § 7 charge even if § 414 of F.A.A were not on the books.

** See also TWA's description of the "crux" of the case as Toolco's efforts "to control and dictate the manner and method by which TWA acquired aircraft and the necessary financing therefor" (Doc. 18, p. 5), and Mr. Tillinghast's statement that the case is based on "the fact that Mr. Hughes had pre-empted to himself the procurement of planes and the financing of TWA's operations" (App. A-1885).

jet aircraft. The Board was fully aware when it entered its orders that Toolco would make decisions of this kind for TWA if control were approved. The Board was perfectly conscious of the fact that Toolco would "manage and direct the usual day-to-day business and financial affairs of the airline" (9 C.A.B. at 387, App. A-3323) and that Toolco would contract with manufacturers for planes for TWA (12 C.A.B. at 208, App. A-3365). It was precisely because of the possibility that Toolco might use TWA as a "captive market" (*cf.* Complaint § 10(d), App. A-10) that the Board imposed the conditions it did on Toolco's control (6 C.A.B. at 156-158, App. A-3302-3305).

TWA and the CAB have created a false dilemma with regard to this issue. They view it as if the alternatives are to hold that CAB approval immunizes only the acquisition of an interest in the carrier or that it immunizes "everything done" in the course of the control relationship (Respondent's Brief 126; see also Respondent's Brief 124; CAB's Brief 10, 18).

If these were the only choices, there might be something to be said for the position TWA and the CAB take. We agree that a pistol permit does not carry with it permission to use the pistol for criminal purposes (*cf.* Respondent's Brief 124). At the same time, however, a pistol permit does more than merely allow the holder to acquire a pistol. It furnishes a complete defense to a charge of unlawful possession of a pistol.

We endeavored to suggest what we believe to be the correct rule by the examples put in our initial brief (Petitioners' Brief 85). CAB approval confers immunity on the controlled carrier and on the controlling party, in their

relations with each other and with third parties, to the extent that they would be free from antitrust liability if they were a single entity.* The mere fact that the parent makes decisions for its subsidiary is immunized, because it is exactly this that the Board approves and expects when it allows control. If Toolco and TWA had been a single entity, no one would contend that it would be a violation of the antitrust laws for that entity to decide that it will buy 47 jets rather than 63, or that it will place its order a few weeks later than its competitors, or that it will lease jets temporarily rather than buy them outright. The CAB may be mistaken in its expectation that the public interest will be served by the control relation and it may subsequently conclude that the parent is hurting the carrier by its exercise of control. If this happens, however, the remedy is for the Board to terminate the control relation rather than for a court to make these judgments after the fact and with an eye only to antitrust considerations.

On this analysis, there would be no immunity if the parent, by virtue of its relation to the carrier, engages in acts that would violate the antitrust laws if done by a single entity. As the examples we gave before illustrate, it is conceivable that Toolco, by virtue of its control of TWA, might have made tie-in sales or a reciprocal dealing arrangement that would have been actionable even if Toolco and TWA had been a single entity. Arrangements of this kind with third parties would not be within the scope of immunity under §§ 408 and 414.

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* The CAB may, as in this case, condition its approval by limiting transactions between the carrier and the controlling party. To the extent that approval is so conditioned, the parties are not free to act as a single entity would be and must have specific CAB approval for a transaction that would be barred by the condition on the original approval.

The distinction we have suggested here would carry out the purpose of Congress in providing for immunity. The acquiring company would not be "freed from all legal restraints" (Respondent's Brief 124). It would be free to make those decisions for the carrier that the carrier, if independent, would have made for itself. If Board approval of control does not mean at least this, it means nothing.

It is, of course, a weighty circumstance that the Board has filed a memorandum with this Court expressing views on this issue contrary to those that we have put forward. The Board perceived a false dilemma and it relied on false assumptions. It says that "the assumptions that defendants admitted by their default that the underlying antitrust violations did occur and that the specific acts which damaged TWA were caused by those violations * * * must be deemed correct for purposes of determining the immunity question" (CAB's Brief 11). Whether those assumptions are sound is in serious dispute among the parties. In any event, this would not be the first time that the Board has taken an unduly timid view of its function. In the *Panagra* case itself, *Pan American World Airways, Inc.*, v. *United States*, 371 U.S. 296 (1963), it was the United States, acting at the request of the Board, that contended that the courts were the proper forum for the antitrust violations claimed to exist there, while this Court held that questions of that kind were "peculiarly" for the Board, 371 U.S. at 309, and that "[i]f the courts were to intrude independently with their construction of the antitrust laws, two regimes might collide." *Id.* at 310.

TWA expressly concedes that under § 412 of the FAA the CAB may approve agreements among carriers, if the

public interest so dictates, even though the agreement would violate the antitrust laws (Respondent's Brief 126). *E.g., Application of Trans World Airlines, Inc., et al.*, Order 71-8-91, at 5 (August 19, 1971) (quoted in Petitioners' Brief 84). The *Panagra* case teaches that the same thing is true of orders under § 408. 371 U.S. at 309. Nor is there any merit in TWA's suggestion that an award limited to damages does not interfere with the Board's exercise of its responsibilities (Respondent's Brief 135).* When this case was here before, TWA conceded that immunity under § 414, to the extent that it exists, bars relief in damages as well as injunctive relief. Memorandum in Response to Reply Brief for Petitioners at 9, *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 380 U.S. 248 (1965). That concession could hardly be avoided. See *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 246-247 (1959).

We revert to the example we posed in our initial submission (Petitioners' Brief 84). Suppose that when TWA was on the verge of bankruptcy in 1946, the only company with sufficient resources and interest to enable TWA to survive had been Lockheed. Suppose further that the CAB ap-

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* The statement that "[t]he propriety of allowing the recovery of damages in circumstances like these was upheld in *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 393 F.2d 441 (2d Cir.) *cert. denied*, 393 U.S. 846 (1968)" (Respondent's Brief 135 n. 56) is quite astonishing. The grievance in the *Allied Air Freight* case was that the defendants had made an agreement for which Board approval was required under § 412 and they had not submitted it to the Board for approval. Whatever the merits may be of the holding on those facts, they are not our facts. The court there recognized that the result would be different and that the action would not lie if the CAB had approved the agreement in question. 393 F.2d at 446. That is the situation that would be analogous to our case.

proved acquisition of control by Lockheed, recognizing the obvious restriction on competition from such a vertical integration but finding that this was outweighed by the public interest in having a strong and solvent TWA. On the theories put forward by TWA and accepted by the Second Circuit, this would violate the antitrust laws in a variety of ways. Lockheed would then monopolize the TWA market and have a substantial share of the overall market for commercial airliners. TWA would be a "captive market." Lockheed's refusal to provide financing to TWA except in connection with acquisition of control and subsequent sale of planes would be a "tie-in." There would be "exclusive dealing" and a "boycott" of other manufacturers. If Lockheed had a principal stockholder with "independent economic significance," a conspiracy could be charged.

If § 408 were not on the books, an acquisition of TWA by Lockheed would raise the most serious kinds of antitrust questions, but § 408 is a mandate to the CAB to weigh the harm to competition from acquisition of a carrier by a major manufacturer against other considerations of the public interest. The CAB does not address itself in its memorandum here to the Lockheed example. TWA does, and says that it follows from the decision below in the present case that "if Lockheed used its position in TWA as a weapon in a conspiracy to restrain trade and monopolize commerce, and pursuant to that conspiracy injured TWA (or any other person), its conduct would not be immunized by the Board's approval of the acquisition" (Respondent's Brief 124). That response shows how the Board's powers would be crippled, and the statutory immunity for § 408 orders in effect written off of the books, if TWA's views were to prevail.

3. The ad damnum

In the whole context of this case the limiting effect of the *ad damnum*, discussed at pages 52-65 of our initial brief and at pages 111-122 of TWA's brief, is a minor issue,* to which we wish to make only two comments.

First, TWA now seems to place its principal reliance on the fact that it did move for leave to amend the *ad damnum* clause, saying that "the court's power to permit amendments to the complaint in a proper case should prevail" (Respondent's Brief 119). The contrary decision in the *Fong* case is distinguished on this ground, and we are told that Rule 54(c) "must be read in conjunction" with Rules 15(a) and 15(b) (Respondent's Brief 120). Indeed in the 12 pages in which TWA discusses this issue there are no fewer than seven references to Rule 15. The short answer is that if Rule 54(c) is not controlling an amendment is unnecessary. Rule 15(b), on amendments to conform to the evidence, would be fully as effective as Rule 15(a), on amendments expressly made.

Second, in a lengthy note TWA purports to find serious difficulties in our position, as applied to a case in which no specific demand is made (Respondent's Brief 120 n. 51). These supposed "difficulties" are apparently thought to be a matter of commonsense obviousness, since the only au-

* If this issue is resolved as we think it clearly must be, by holding that the first sentence of Rule 54(c) means what it says, it would, in itself, reduce TWA's judgment by $32.6 million, plus some $5.5 million in accrued interest. It would also dispose of TWA's cross-petition, in which an additional $76 million plus interest is asked. It is a commentary on this case that an issue dispositive of such amounts must be regarded as a minor issue, and that TWA can suggest that an error of this magnitude can be brushed aside under the "harmless error" rule (Respondent's Brief 63, 111, 120-121).

thority referred to in the note, *Ludka* v. *Athana Corp.*, 25 Cal. App. 2d 316, 101 Cal. Rptr. 615 (2d Dist. 1972), holds squarely that on default nothing can be awarded, in view of a statute similar to Rule 54(c), on a count demanding "damages according to proof." There *is* other authority—but it is contrary to TWA's view. "A complaint that is indefinite as to the relief demanded is insufficient." 2A Moore, Federal Practice ¶ 8.18, at 1801-1802 (2d ed. 1962). "A contrary approach would deprive the statement in the first sentence of Rule 54(c) concerning judgments by default of much of its validity." 5 Wright & Miller, *Federal Practice and Procedure: Civil* § 1259, at 260 (1969).

CONCLUSION

For the reasons set out here and in our initial brief, the judgment of the Court of Appeals should be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-830

TRANS WORLD AIRLINES, INC.,

Cross-Petitioner,

—v.—

HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR CROSS-PETITIONER TRANS WORLD AIRLINES, INC.

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INDEX

PAGE

A. Preliminary—Effect of TWA's *ad damnum* clause .. 1

B. Interest as damages (Cross-Respondents' Brief, pp. 4-10) 3

C. Interest on award by Special Master (Cross-Respondents' Brief, pp. 11-12) 4

D. Cost of capital (Cross-Respondents' Brief, pp. 12-14) 5

E. Cost of suit (Cross-Respondents' Brief, pp. 14-18) 6

F. Defendants' allegations of injury to TWA 7

TABLE OF AUTHORITIES

Cases:

Brooklyn Savings Bank v. *O'Neil*, 324 U.S. 697 (1945) 4

Crosby Steam Gage & Valve Co. v. *Consolidated Safety Valve Co.*, 141 U.S. 441 (1891) 5

Hawaii v. *Standard Oil Co. of California*, 405 U.S. 251 (1972) 7

Lincoln v. *Claflin*, 7 Wall. 132 (1868) 3

Miller v. *Robertson*, 266 U.S. 243 (1924) 3

Mills v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970) 7

Rodgers v. *United States*, 332 U.S. 371 (1947) 4

PAGE

Straus v. *Victor Talking Machine Co.*, 297 F. 791 (2d Cir. 1924) 7

Thomsen v. *Cayser*, 243 U.S. 66 (1917) 3
Tilghman v. *Proctor*, 125 U.S. 136 (1888) 5

Statutes:

Agricultural Adjustment Act of 1938, 52 STAT. 31 (1938), 7 U.S.C. § 1281 (1970) 4

Clayton Act
Section 4, 38 STAT. 731 (1914), 15 U.S.C. § 15 (1970) .. 3, 4

Fair Labor Standards Act of 1938
Section 16(b), 52 STAT. 1069 (1938), 29 U.S.C. § 216(b) (1970) 4

IN THE

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REPLY BRIEF FOR CROSS-PETITIONER TRANS WORLD AIRLINES, INC.

A. Preliminary—Effect of TWA's *ad damnum* clause

Defendants hopefully assert that, since TWA's cross-petition seeks damages in excess of the $135 million of its amended prayer, the cross-petition fails "[i]f Rule 54(c) means even remotely what it says" (Cross-Respondents' Brief, p. 4). Nothing could be further from the truth.

Judge Metzner's ruling on TWA's motion to amend the *ad damnum* clause of its complaint was not confined to an increase in the prayer to $135 million:

> "The damages originally asserted were unliquidated and TWA is entitled to recover for whatever damage it can show it suffered." (32 F.R.D. at 607, A-321)

The correctness of that ruling is supported at pp. 117-22 of TWA's brief in No. 71-827, and we will not repeat that discussion here.

So that the record would be clear that it was asserting the right under this ruling to recover all its damages, TWA gave written notice on May 2, 1966 that it would move at the close of the damage hearing to amend its prayer to ask damages in such amount as the Special Master should find to have been established (Doc. 556-14, p. 65). At the damage hearing TWA presented evidence in support of a damage claim in excess of $300 million. On April 9, 1968, pursuant to the notice given almost two years earlier, TWA moved on the record for the appropriate change in the prayer of its complaint (Doc. 554, p. 10829).

In response to this motion the Special Master ruled that Judge Metzner's prior decision encompassed the grant of additional damages (Brownell Report, p. 323; A-1966). Defendants did not object to this ruling when they filed objections to the Brownell Report (A-1967-2026). Their argument as to the effect of the *ad damnum* claim on this cross-petition must therefore stand or fall with their argument that on May 3, 1963, when the interlocutory default judgment was entered, Judge Metzner was without the power to allow an amendment to the complaint to increase the damages sought, although TWA had given oral notice of its motion to amend three months earlier on February 8, 1963 in open court, at the outset of the hearing during which defendants announced their intention to default. See TWA's brief in No. 71-827, Point III, p. 111 *et seq.*

In any case, the prayer of the complaint could be relevant only to TWA's argument that the "cost of capital" was erroneously computed below. TWA's claims (1) that its expert fees are recoverable as part of the "cost of suit"

(TWA brief in No. 71-830, pp. 35-42) and (2) that, if interest as damages is not awarded from an earlier date in the discretion of the trier of fact, TWA is entitled to interest from the filing of the Brownell Report to entry of judgment (*id.*, pp. 23-29), are not claims which are comprehended within the *ad damnum* clause of TWA's complaint. The first is a statutory right under Section 4 of the Clayton Act, 15 U.S.C. § 15, and the second is awarded as a matter of law, after the trier of fact has determined the amount of damages (see pp. 4-5, *infra*). Nor is TWA's claim for prejudgment interest the sort of claim that can be expected to be included in the plaintiff's initial estimate of the extent of its injuries. TWA did not and could not know in June 1961 that the amount of its damages would not be initially determined until September 21, 1968 nor reduced to final judgment until April 14, 1970.

B. Interest as damages (Cross-Respondents' Brief, pp. 4-10)

The principal point which defendants make in trying to distinguish the unbroken line of authority by which this Court has held to be proper the award of interest *as damages* on an unliquidated tort claim is that the award of such interest is not mandatory. There is no disagreement whatever between TWA and the defendants on this point. The general federal rule was well established by the time the Sherman and Clayton Acts were passed. It did not require but did permit allowance of interest as damages. *Lincoln* v. *Claflin*, 7 Wall. 132, 139 (1868); *Miller* v. *Robertson*, 266 U.S. 243, 258 (1924).

The applicability of this rule to treble damage cases under the Sherman or Clayton Acts has been before this Court only once. In *Thomsen* v. *Cayser*, 243 U.S. 66 (1917), the defendant was contesting the entire verdict as speculative and unsupported by the proof, and this Court, in upholding

the jury verdict, cited with approval the jury's discretionary inclusion of interest (243 U.S. at 89).

In the instant case the Special Master and the courts below held that there was no discretion to allow interest as damages in this case because it involves a statute providing for multiple damages. Those decisions below relied upon this Court's reading of the very different language of the Fair Labor Standards Act in *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 707, 714-15 (1945), and of the Agricultural Adjustment Act in *Rodgers* v. *United States*, 332 U.S. 371, 374 (1947), discussed in TWA's main brief on this cross-petition (pp. 19-21). Both cases confine their analysis to the particular statutes before them; indeed, *Rodgers* specifically cites *Brooklyn Bank* for the proposition that silence as to interest in an Act of Congress does *not* establish a congressional purpose that such interest should not be allowed (332 U.S. at 373).

The Clayton Act provides for recovery by the plaintiff of "the damages by him sustained," which figure is to be trebled. There is no reference to liquidated damages as in the Fair Labor Standards Act, or to penalties imposed by the sovereign, as in the Agricultural Adjustment Act. Since the federal law governing the computation of tort damages was well established when the Clayton Act was enacted, the natural assumption is that Congress intended the same principles to govern the computation of "the damages • • • sustained" under the Sherman and Clayton Acts.

C. Interest on award by Special Master (Cross-Respondents' Brief, pp. 11-12)

Contrary to defendants' statement (Cross-Respondents' Brief, p. 11), the allowance of interest on the award of a special master from the date his report is filed has nothing to do with the federal practice of permitting the discretion-

ary allowance of interest as damages. Interest as damages is awarded by the trier of the fact.

Conversely, the allowance of interest from the date of a special master's award is made by the judge as a matter of law upon entry of judgment. The cases cited in TWA's main brief on this cross-petition show that this had been regarded for very many years as the usual practice. *Tilghman* v. *Proctor,* 125 U.S. 136, 160-61 (1888), refers to "a uniform current of decisions of this court, beginning thirty years ago," establishing a "general rule," which the Court applied by directing that interest should commence on the day of submission of the master's report, not sooner or later. The reason for the rule, most clearly stated in *Crosby Steam Gage & Valve Co.* v. *Consolidated Safety Valve Co.,* 141 U.S. 441, 458 (1891), is that it would be unjust if a plaintiff, solely because of the trial court's reliance on a master to perform the initial part of the judicial function of determining the amount of recovery, were to be deprived of interest upon the amount found by the master for the period until entry of judgment.

D. Cost of capital (Cross-Respondents' Brief, pp. 12-14)

Defendants make only the most perfunctory attempt to justify the charge to TWA of an assumed interest rate of 6.0-6.3 per cent, when the complaint plainly alleges that they had earlier prevented TWA from borrowing money at lower rates. They assert that the complaint does not in fact contain appropriate allegations to this effect, but it is simple enough to examine the complaint, and paragraphs 26, 27, 28 and paragraph 52(c) speak for themselves.* They

* The full text of these critical paragraphs is as follows:

"26. In 1955 and continuously thereafter until December, 1960, the defendants, pursuant to and in furtherance of their plan to control TWA in a manner advantageous to them-

were accepted as proved by the Special Master (Brownell Report, pp. 254-255; A-1966).

To limit TWA's damages by computing its cost of borrowing at high current rates, when the default established that defendants had prevented TWA from borrowing earlier at much lower rates, results in allowing defendants to profit by their own wrongdoing.

E. Cost of suit (Cross-Respondents' Brief, pp. 14-18)

The question presented by TWA's claim with respect to its cost of suit is simply and solely one of statutory interpretation of a phrase that has yet to be construed by this Court.

---

selves, directed TWA to make no efforts itself to obtain financing necessary for the acquisition of jet-powered aircraft required for the needs of TWA.

"27. Commencing in the year 1955 and continuing thereafter, various other air carriers, including competitors of TWA, made appropriate arrangements for the financing of jet-powered aircraft. In 1955 and 1956 various United States air carriers were able to obtain funds at a cost (or interest rate per annum) in 1955 of 4%, and in 1956 at costs ranging from 4¼% to 4¾%.

"28. In 1955 and thereafter for a period of several years, the defendants discussed with others various proposals for the financing of jet-powered aircraft, but the defendants did not make arrangements for such financing nor allow TWA to make such arrangements until December 1960, at which time the prevailing cost of funds (or interest rates) for debt financing was approximately 6-6½%." (A-16)

• • •

"52. TWA has further been injured in the following manner:

• • •

"(c) TWA was foreclosed from obtaining financing on more advantageous terms than those available to it in December 1960 and thereby suffered a loss by virtue of the greater cost of borrowing it ultimately experienced." (A-25)

The only lower court which has addressed itself to the wording of the phrase is the Second Circuit in *Straus* v. *Victor Talking Machine Co.*, 297 F. 791, 806-07 (1924). We believe that the analysis put forward in *Straus* is incorrect, for the reasons given in our main brief on this cross-petition (pp. 40-42). Defendants' reliance upon *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), to show that attorneys' fees can be included in "costs" is misplaced. That case was an action in which the result obtained by the plaintiffs would also benefit other members of a class of which plaintiffs were members. This fact led the Court to consider "whether the special circumstances exist that would justify an award of attorneys' fees, including reasonable expenses of litigation other than statutory costs" and to conclude that such special circumstances did exist (396 U.S. at 391-92). If the *Mills* case is pertinent at all, its pertinence is in demonstrating that the kind of litigation costs which typically include an award of attorneys' fees are not "statutory costs" of the kind to which TWA was restricted below but a recovery of all "reasonable expenses of litigation." *See also Hawaii* v. *Standard Oil Co. of California*, 405 U.S. 251, 266 (1972).

F. Defendants' allegations of injury to TWA

It is a record fact that Toolco in February 1962 itself alleged that TWA's losses from late deliveries of jets and disadvantageous financing already amounted to $45 million, in addition to threatened future injuries. Plainly recognizing that this allegation now amounts to an admission of the fact of injury suffered by TWA, defendants attempt to explain the allegation away (Cross-Respondents' Brief, p. 2n. 1). Their explanation does not wash.

The realized loss of $45 million is alleged in paragraph 99 of Toolco's third counterclaim (A-90). It is clearly

based on paragraph 98, where that precise adverse financial change is in turn related to five items, of which only (a) and (b) are specific:

> "(a) TWA's jet equipment program was disrupted and the delivery of jet aircraft which had been ordered by Toolco from General Dynamics for the benefit of TWA was delayed;
>
> (b) TWA has been compelled to obtain financing upon unfavorable terms and at higher interest rates than it would have otherwise had to pay." (A-89-90)

Defendants' suggestion that paragraph 96(e) (A-88) is involved (the reference to 97(e) is of course a misprint) is demonstrably incorrect. The allegedly unneeded jets referred to in 96(e) are TWA's B-131B and B-331B fleets, none of which had yet been delivered. Those aircraft were put into service during the period from late April 1962 through March 1963 (AX-95, AX-175). No losses attributable to them could yet have been experienced when paragraph 99 was sworn to. The assertion in paragraph 96(e) that TWA was buying unneeded jets presumably relates to the clause of paragraph 99 about threatened future losses; it could not relate to the $45 million of losses already realized (A-90). Paragraph 96(e), unlike paragraphs 98 and 99, is realleged in Toolco's fourth and fifth counterclaims (A-91), which are not derivative at all but claim damage to Toolco of $77 million (A-91, A-93).

Defendant Holliday, in addition to swearing to Toolco's counterclaims, included similar allegations as to TWA's in-

juries in his own answer (pars. 35, 37, first sentence, and 38, last sentence; A-108, A-110).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-827

HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,

Petitioners,

—v.—

TRANS WORLD AIRLINES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR RESPONDENT IN RESPONSE TO REPLY BRIEF

TWA submits this short rejoinder with the hope that it will assist this Court in considering the reformulation of issues contained in defendants' Reply Brief.

A. It is central to this case that the only facts which have been judicially established in the usual manner are (a) the procedural facts, as to which there is a complete record supporting the findings of the courts below, and (b) the facts as to TWA's damages, which have been established by findings made on the basis of a full, contested evidentiary hearing.

The remaining facts, those on which liability depends, are those which were alleged in TWA's complaint. With respect to them the customary apparatus of findings based on record evidence tested by cross-examination is missing.

It is missing because (as the lower courts found—a procedural fact) defendants prevented, deliberately and with knowledge of the consequences, trial as well as pretrial of the disputed fact issues. Having so found, the lower courts held that TWA's contentions as to these disputed fact issues, set forth in the complaint, must be taken as true. (TWA's main brief in No. 71-827, p. 75).

Speculation as to the facts which might have been established at a trial is permissible only to the extent that it is consistent with the framework established by the factual allegations of the complaint. As long as the possibility is demonstrably present that TWA could have proved a state of facts under and consistent with the complaint which would have established liability, defendants cannot secure a disguised and belated summary judgment in their favor by requiring TWA without discovery to prove, as a condition of recovery, those details which at a trial would have established defendants' unlawful conduct. A contrary rule would make a mockery of the system of pleading and discovery which this Court has established for civil actions.

Yet defendants' entire posture before this Court depends upon the unsound assumption that the effect of the default is to preserve and protect their factual contentions, while putting TWA to its proof.*

---

* Defendants largely ignore the record except for an extended footnote (Reply Brief, pp. 2n.-3n.) purporting to correct "illustrations" of TWA's "misstatements" of fact. The "illustrations" themselves refute the charges made.

1. It is a fact that the "Rule 16" proceeding suggested by Special Master Rankin would have required TWA to specify all the facts it contended support its allegations in the complaint, to name each witness it proposed to call in support of each allegation and to state the substance of each witness's testimony—all before TWA had taken a single deposition (A-2387-88).

2. It is a fact that defendants never produced the so-called "tax documents" despite repeated orders in January and February of

Thus, when they state the "starkly simple substantive issue," the core of the statement—assumed throughout the remainder of the argument—is that nothing defendants did involved anything more than "normal business decisions" by a parent buying equipment for its subsidiary (Reply Brief, p. 3). That view of defendants' conduct is contrary to the allegations of the complaint, and to the evidence available in the record in this defaulted case (see TWA's main brief, pp. 40-56, *esp.* pp. 49-50).

1963 to do so (A-133-42, A-254, A-304-06). A reservation of ruling the previous spring is strikingly irrelevant.

3. The extent of the personal reservations of counsel for Toolco as to the $5 million estimate of the cost of the Hughes deposition is apparent not only from his comment at the time that "I resisted the figure that they came up with, and I am trying to get a further idea of how they arrived at that figure * * *" (A-280), but also from his reversion two years later in the submissions to this Court on the last appeal to the original lower, but equally unexplained, figure of $1 million (see Petition for Certiorari in No. 501, October Term 1964, p. 44). The $5 million figure was never mentioned again, from February 8, 1963 until defendants' latest petition was filed.

4. The court of appeals below expressly rejected defendants' position after defendants in that court made the same argument they now make that TWA had misstated the evidence with respect to the significance of defendants' interests in the Constellations and the HK-1 plywood flying boat (449 F.2d at 62, A-2768). The CAB "findings" are actually recitals based on information provided by defendants in non-adversary proceedings.

5. The comment on Connelly's testimony fails to mention that Connelly was testifying to what Boeing had been "given to understand" by defendants (A-1181). The important point is that defendants, as a practical matter, were able to control the disposition of the aircraft.

6. As to *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 393 F.2d 441 (2d Cir. 1968), we find defendants' comments pointless. The case does not support the rather ambiguous reasoning which defendants base on it at pp. 30-31 of their principal brief, for the precise reason given in our statement. Unlike defendants, Allied at no time disobeyed orders of the court. The case in fact directly supports the decision of the court below that the asserted affirmative defenses in the instant case were insufficient to justify either a dismissal or a stay.

At p. 4 they deny that any supplier was excluded from the TWA market, or that there was any restraint on trade of suppliers, an assertion repeated at p. 18 and elucidated in a footnote on p. 6 by the statement: "Sales lost to TWA were replaced by sales to Toolco." But the specific preclusion of TWA from buying aircraft directly from non-Toolco suppliers resulted in TWA actually getting not only later but fewer aircraft than it would have obtained if it had placed its own orders with the manufacturers; the result of this restraint on the trade of suppliers was that they sold fewer aircraft in the aggregate. Pan American, for example, would certainly have purchased other aircraft from Boeing or Douglas if it had not acquired from Toolco six of the Boeings TWA had counted on, and TWA's damage case was expressly based on that premise. (See, *e.g.*, AX-118; Brownell Report, p. 64; A-1966). Toolco is known to have paid several million dollars to Convair in settlement of Convair's claim that Toolco's tactics disrupted Convair's business (DX 145; Doc. 554, p. 2946).

At p. 5 defendants state as a fact that Toolco was neither a manufacturer of aircraft nor a supplier of aircraft to airlines generally. The fact is that it was certainly such a supplier, actively engaged in the business for many years. And it took so many known steps toward manufacture (see TWA's main brief at pp. 42-44, 47-49), that if it was not technically a manufacturer during the years in question, it was plainly holding itself poised and ready to commence manufacture whenever a favorable opportunity developed.

At p. 7, in a footnote, defendants deny having profited from supplying jets to Pan American and Northeast. They do not cite, or refer to, or explain the profits of over $2 million from these transactions set out in their tax returns,

reported as capital gains and presumably taxed as such. Toolco's 1960 audited financial statement and tax return (Doc. 495) are clear, for example, that a *capital gain* (not a "credit" or refund of moneys previously paid) in the amount of $1,208,424 was realized from the Convair transaction (see TWA's main brief, p. 52 n. 21). These papers were sealed, at defendants' request, and defendants thereafter explicitly refused to make further discovery with respect to them (A-304-05).

The body of facts established by the allegations of the complaint and as the legal consequence of their default is what defendants dismiss as "procedural underbrush." They therefore concede nothing as established by the complaint alone; in their view, TWA, to recover, must depend on facts "established at the damage hearing" (Reply Brief, p. 15). These arguments were, of course, rejected below, Judge Metzner observing that "the shoe is on the other foot" (A-423), and Judge Kaufman that "this argument stands the matter on its head" (449 F.2d at 63, A-2759). As the court of appeals has pointed out, defendants never once offered to remedy their default in any respect (449 F.2d at 62, 78-79, A-2756, A-2792).

B. The legal propositions defendants advance as "substantive" defenses are extraordinary, by any standard. For the most part, the "substantive" defense is simply that Toolco owned a controlling interest in TWA's stock (46% in the early years, enhanced to 73% in 1955 and 1956 when TWA was prevented from ordering jets elsewhere and from arranging for their financing, and to 78% when this suit was brought). Defendants assert that the mere existence of this "parent-subsidiary relationship" necessarily means that TWA had "no claim to economic independence" (p. 4) and "no right to economic independence" (p. 5), and that Toolco and TWA must be treated for all

purposes as if the two were a "single entity" (p. 21), so that TWA's 13,000 independent shareholders are, as a matter of law, precluded from derivative actions based on antitrust claims (p. 5n).* But TWA is not only a technically distinct corporation; it is a major enterprise of independent origin, engaged in a public service business. Indeed, as one of the nation's great airlines it constitutes in its own right a separate and distinct market for flight equipment. There is no authority whatever to sustain defendants' proposition that tie-in arrangements, exclusive dealing arrangements and attempts to monopolize of the kind alleged in the complaint and recognized by the courts below could be licensed by the prior purchase of a majority of TWA's stock.

Defendants' assertion that antitrust immunity resulted from various CAB orders is also now reduced to a restatement of their parent-subsidiary immunity claim—that orders approving acquisitions of control of TWA by Toolco necessarily made the two corporations a "single entity" for all purposes under the antitrust laws. Defendants' own hypothetical example of a Lockheed acquisition, now elaborately restated (pp. 23-24), is its own *reductio ad absurdum*. They postulate an investment in TWA by Lockheed that the CAB approves as an acquisition of control, solely to save TWA from bankruptcy. From that defendants argue that the CAB's powers "would be crippled, and the statutory immunity for § 408 orders in effect written off of the books" (p. 24), unless thereafter Lockheed was free to monopolize the TWA market for aircraft, deal with TWA as a captive market and subject TWA to tie-in sales, exclusive dealing and forced boycotting of all

* It may not be without pertinence that, if the defendants' argument had any validity, it would be equally applicable to preclude an action for an injunction brought by the United States.

other aircraft manufacturers. Neither Congress in adopting the Act nor any court has ever suggested that such a result would or ought to follow an acquisition of control. The CAB will have no part of any such argument (see Amicus Brief, pp. 10, 11, 12-13, 18). The suggestion that a license to monopolize aircraft supply is necessary to attract investment in airlines is an economic travesty, disproved by Toolco's own experience in selling its 78% interest in TWA to the public at a profit of $450 million.

C. Defendants put forward as a new argument that any injury suffered by TWA as a result of defendants' activities did not arise from "the anticompetitive impact" of these activities. This argument depends upon an out-of-context use of the language in the recent decision of the Second Circuit in *GAF Corp. v. Circle Floor Co., Inc.*, —— F.2d ——, CCH 1972 Trade Cas. ¶ 74,075 (2d Cir. 1972). The argument is that an antitrust plaintiff cannot recover unless his damages were "the economic result of the anticompetitive effects of the alleged violations," and that TWA's damages were not the result of such anticompetitive effects.

The *GAF* case—the latest of a number of Second Circuit decisions on "standing to sue" (see TWA's main brief, pp. 200-02)—in no way conflicts with that Circuit's decision in the instant case. It would be surprising if it did, since Judge Hays, who wrote the opinion in *GAF*, was a member of each of the two unanimous panels that have decided against defendants' arguments in this case, per Chief Judge Lumbard in 1964, and per Judge Kaufman in 1971. Plaintiff GAF had complained of commercial pressures brought on it in an attempt to acquire control over it, which acquisition would violate the law. The anticompetitive effects of such an acquisition would have been felt, according to the court, not by GAF, whose ability to

compete would not be lessened, but by competitors. Hence the damages sought were not the result of an "anticompetitive impact" of the allegedly unlawful activities.

But there is no way in which defendants can pretend that TWA did not suffer anticompetitive impacts. TWA alleged and proved diminution of its competitive position resulting directly from defendants' antitrust violations (*e.g.*, Complaint, pars. 49(f), 50, 51, 52(a)(e), 53(h), A-23-26).

When, for example, defendants refused to deal at all with Boeing at the beginning of 1955 unless Boeing would sell Toolco the first 50 jets it produced (A-1023, A-1051, A-1208), Boeing was of course affected competitively. Had it acceded, it would have been worse affected, since that would have established Toolco as the exclusive supplier of such jets to the industry for nearly the first two years of the jet era. The impact on TWA, however, was disastrous. The boycott of Boeing was imposed during most of 1955, and it was a direct cause of the delay in TWA's receiving even those jets which it was ultimately allotted by Toolco. The diversion of jets from TWA to its competitors resulted in lost sales by the manufacturers (p. 4 *supra*); it also meant that TWA was directly deprived of the equipment which it needed in order to compete for traffic (see, *e.g.*, Brownell Report, p. 80, A-1966). The damages awarded to TWA consisted of the amount of its net losses of operating revenue resulting from this equipment deprivation, together with the extra cost imposed on it for the Boeings it did receive but was required to lease on a day-to-day basis from Toolco.

Aircraft manufacturers and other suppliers foreclosed from the TWA market were thus injured by defendants' conduct, but TWA, like the plaintiff in *Perkins* v. *Standard*

Oil Co., 395 U.S. 642, 649-50 (1969), was "no mere innocent bystander; [it] was the principal victim * * *." Defendants' argument that recovery for their antitrust violations was available only to the other suppliers of jets which were foreclosed from the TWA market, no matter what injury TWA suffered, is untenable against this background. Were defendants correct, the plaintiff builder in *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495 (1969), would have been automatically out of court since—under defendants' approach—the "anticompetitive impact" of the unlawful tying agreement there would fall only upon competing sellers of pre-fabricated houses. Similarly, the news dealer plaintiffs in *Bales* v. *Kansas City Star Co.*, 336 F.2d 439 (8th Cir. 1964), would have had no damage claim for being foreclosed from selling any publication except defendant's newspapers; only competing publishers of excluded newspapers and magazines would be hurt. *See also Osborn* v. *Sinclair Refining Co.*, 286 F.2d 832 (4th Cir. 1960), *cert. denied*, 366 U.S. 963 (1961).

After the 2-year damage hearing, the courts below were satisfied that but for the anticompetitive conduct alleged TWA would have acquired a 63-plane jet fleet at the times specified, and that it was fully entitled to recover for the ascertainable effects on its revenues, as reflected in the damage award.

Respectfully submitted,

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(Slip Opinion)

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

HUGHES TOOL CO. ET AL. *v.* TRANS WORLD AIRLINES, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 71–827. Argued October 10, 1972—Decided January 10, 1973*

Trans World Airlines (TWA) brought this antitrust action against the Hughes Tool Co. (Toolco) and others for treble damages as a result of the manner in which Toolco had exercised its controlling interest in TWA, with particular reference to Toolco's asserted acts to control and dictate the acquisition and financing of aircraft by TWA. As an organization engaged in phases of aeronautics, Toolco could not acquire control of an air carrier such as TWA without consent of the Civil Aeronautics Board (CAB). In 1944 the CAB approved *de facto* control of TWA by Toolco as comporting with the provisions of § 408 of the Federal Aviation Act. That provision permits acquisitions of control that the CAB finds are not inconsistent with the public interest and that will not result in monopoly. Section 414 immunizes from antitrust liability any conduct approved by a CAB order issued under § 408. The approval narrowly limited intercompany sales transactions without specific CAB approval, and required annual reporting. A few years later, Toolco and TWA made an agreement permitting Toolco to obtain full legal control of TWA. The CAB, after full hearings into the Toolco-TWA relationship, found that Toolco's financial and other support was of great importance to TWA and concluded that "the continued interest of Toolco and TWA appears essential to the best interests of the carrier and the public." The CAB's approval was made subject to the conditions of the 1944 order. As a result, from 1944 to 1960, every acquisition and lease of aircraft by TWA from Toolco and each financing by TWA from Toolco received CAB approval pursuant to § 408. In 1960,

*Together with No. 71–830, *Trans World Airlines, Inc.* v. *Hughes Tool Co. et al.*, on certiorari to the same court.

Syllabus

Toolco's stock in TWA was placed in a voting trust in connection with a program for financing TWA's acquisition of jet equipment. Shortly thereafter, TWA brought this suit. As a defense, Toolco relied on *Pan American World Airways, Inc.* v. *United States*, 371 U. S. 296. The District Court entered a default judgment against Toolco. The Court of Appeals affirmed, concluding that *Pan American* was inapplicable because, unlike the situation in that case, the conduct challenged in TWA's complaint was "unrelated to any specific function of the CAB" and not within the CAB's exclusive competence. *Held:* The transactions that TWA challenged as violative of the antitrust laws were under the CAB's control and surveillance, and, by virtue of §§ 408 and 414 of the Federal Aviation Act, had immunity under the antitrust laws. The Court of Appeals, therefore, erred in holding that *Pan American, supra*, is not controlling on the facts involved here. Pp. 2–25.

449 F. 2d 51, reversed.

DOUGLAS, J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, POWELL, and REHNQUIST, JJ., joined. BURGER, C. J., filed a dissenting opinion, in which BLACKMUN, J., joined. MARSHALL, J., took no part in the consideration or decision of the cases.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 71–827 AND 71–830

Hughes Tool Company et al., Petitioners,
71–827 *v.*
Trans World Airlines, Inc.

Trans World Airlines, Inc., Petitioner,
71–830 *v.*
Hughes Tool Company et al.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit.

[January 10, 1973]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The complaint in this case alleged antitrust violations and damages suffered by Trans World Airlines (TWA) while under control of Hughes Tool Company (Toolco). A default judgment was entered for over $145 million dollars with interest at the rate of 7½%. The District Court's opinion confirming the damage award is reported at 308 F. Supp. 679, 312 F. Supp. 478. The Court of Appeals affirmed, 449 F. 2d 51. The case is here on a petition for certiorari [1] and on a cross petition. 405 U. S. 915.

[1] The District Court's judgment on entry of a default and certifying a controlling question of law is reported at 32 F. R. D. 604. The Court of Appeals affirmed, 332 F. 2d 602. We granted certiorari, 379 U. S. 912, but after argument dismissed the writ as improvidently granted. 380 U. S. 248. Moreover, our dismissal as improvidently granted was in 1965 and involved the 1964 judgment of the Court of Appeals. In 1971 a different panel of the Court of Appeals ruled that its 1964 decision was not binding. It noted that prior to its 1971 decision there had been no "final judgment" with

The crux of TWA's complaint was the use by Toolco of its control over TWA to control and dictate the manner and method by which TWA acquired aircraft and the necessary financing thereof.[2]

Whether or not that complaint states a cause of action under the antitrust laws is a question we do not reach. Another defense of Toolco was that those transactions

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respect to the merits of TWA's cause of action against Toolco and therefore *res judicata* did not apply. 449 F. 2d, at 58. It went on to say that collateral estoppel likewise did not apply, since the only relevant issue that was actually litigated and determined in the 1964 appeal was that the District Court "properly entered the default on Toolco's counter claims." *Ibid.* That issue, it said, was "a sharply distinguishable issue from the propriety of a different default judgment in favor of Toolco's adversary." *Id.*, at 58.

No party has suggested that our prior dismissal forecloses us from reaching the issue now presented.

The prior dismissal did not establish the law of the case nor amount to *res judicata* on the points raised. *Indianapolis* v. *Chase National Bank*, 314 U. S. 63 (1941), was a diversity action in which the District Court, after realigning the parties dismissed the action for want of jurisdiction. The Court of Appeals reversed and this Court denied certiorari. Two years later, after the Court of Appeals sustained plaintiff's claims on the merits, certiorari was granted and this Court reversed, holding that proper realignment "precludes assumption of jurisdiction based upon diversity of citizenship." 314 U. S., at 74. Similarly, in *Mercer* v. *Theriot*, 377 U. S. 152 (1964), a diversity action for wrongful death, certiorari was initially denied after the Court of Appeals had set aside a jury verdict on the grounds of various trial errors and insufficiency of the evidence. On remand, the District Court denied a motion for a new trial and the Court of Appeals affirmed. We then granted certiorari and reversed because the trial errors did not affect substantial rights and the evidence at the trial was sufficient to sustain a verdict in petitioner's favor. See also *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481, 488 n. 6 (1968).

For the well-settled view that denial of certiorari imparts no implication or inference concerning the Court's view of the merits, see *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U. S. 912, 919 (Frankfurter, J.).

[2] See 449 F. 2d 51, 71.

were under the control and surveillance of the Civil Aeronautics Board and by virtue of Federal Aviation Act these transactions have immunity from the antitrust laws.

It is our view that the Court of Appeals erroneously rejected that defense. This result, we think, is required by §§ 408 and 414 of the Federal Aviation Act and by our prior decision in *Pan American World Airways, Inc.* v. *United States*, 371 U. S. 296 (1963).

Section 408 of the Act makes illegal certain mergers, consolidations, and other transactions without the approval of the Civil Aeronautics Board.[3] Specifically,

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[3] Section 408, 49 U. S. C. § 1378, reads in pertinent part as follows:

"(a) Prohibited acts.

"It shall be unlawful unless approved by order of the Board as provided in this section—

. . . . .

"(2) For any air carrier, any person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any air carrier;

. . . . .

"(5) For any air carrier or person controlling an air carrier, any other common carrier, any person engaged in any other phase of aeronautics, or any other person to acquire control of any air carrier in any manner whatsoever: *Provided*, That the Board may by order exempt any such acquisition of a noncertificated air carrier from this requirement to the extent and for such periods as may be in the public interest;

. . . . .

"(b) Application to Board; hearing; approval; disposal without hearing.

"Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control

§ 408 (a)(5) requires the approval of the Board when "any person engaged in any other phase of aeronautics" seeks to acquire control of any air carrier in any manner whatsoever. Section 408 (b) authorizes and directs the Board to approve such transactions, including acquisitions of control, that are in the "public interest" and prohibits approval of any transaction "which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier" not a party to the transaction. Section 2 of the Act requires that in assessing the public interest and the public convenience and necessity, the Board should consider, among other things, "competition to the extent necessary to assure the sound development of an air transportation system properly adapted to the needs of the foreign and domestic commerce of the United States . . . ."[4] Sec-

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will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided*, That the Board shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control. . . ." In 1969, § 408 (a)(5) was amended to include "any other person" acquiring control of an air carrier.

[4] Section 2, 49 U. S. C. § 1302, reads:

"In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

"(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest

tion 408 (e) empowers the Board, upon complaint or its own initiative, to investigate and determine whether any person is violating any provision of subsection (a) and if such violation is found to "require such person to take such action, consistent with the revisions of this chapter, as may be necessary, in the opinion of the Board, to prevent further violation of such provision." Under § 408 (d), the Board has broad control over the accounts, records, and reports of anyone controlling an air carrier, and their inspection. The Board is further granted power to control the designation of officers or directors of an air carrier who are an officer, director, member or the controlling stockholder of any person who is engaged "in any phase of aeronautics." § 409 (a), 49 U. S. C. § 1379 (a). Section 414 relieves from the operation of the antitrust laws any person affected by any order under § 408 "insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order." [5]

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degree of safety in, and foster sound economic conditions in, such transportaton, and to improve the relations between, and coordinate transportation by, air carriers;

"(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

"(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(e) The promotion of safety in air commerce; and

"(f) The promotion, encouragement, and development of civil aeronautics."

[5] Section 414, 49 U. S. C. § 1384, reads:

"Any person affected by any order made under sections 1378, 1379, or 1382 of this title shall be, and is hereby, relieved from the operations of the 'antitrust laws,' as designated in section 12 of Title 15, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such

It was against this statutory backdrop that the Civil Aeronautics Board issued a series of decisions and orders with respect to the control of TWA by Toolco, the major decisions being issued in 1944, 1948, 1950, and 1960. The first decision, 6 C. A. B. 153 (1944), authorized control of approximately 45.6% of the outstanding stock of TWA. From the Board's opinion issued at that time, it appears that Howard Hughes first became interested in TWA at the invitation of his friend, Jack Frye, the president of TWA. Hughes began acquiring TWA stock through Hughes Tool Company, which he solely owned. By 1942, Toolco had acquired 42.1% of TWA's outstanding stock and for all practical purposes was in position to control the day-to-day affairs of the carrier. Meanwhile, Hughes and Frye had jointly designed a four-engine transport, later known as the Constellation, which Lookheed agreed to manufacture under contract with Toolco. The contract was assigned by Toolco to TWA in 1942, Toolco reserving the right to purchase a sizeable number of such aircraft through TWA. It was this arrangement by which Toolco might actually acquire for resale a number of commercial aircraft that, together with its experimental work in aviation and its manufacture of aircraft parts for the military, characterized Toolco as an organization engaged in any phase of aeronautics and therefore forbidden to acquire control of an air carrier such as TWA without the consent of the Board. Toolco's control of TWA, by virtue of its stock ownership which had by that time increased to 45.6%, was approved by the Board as being in the public interest and consistent with the provisions of § 408, including the prohibition against monopoly. In order to insure that Toolco would not abuse its power

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person to do anything authorized, approved, or required by such order."

See also § 1002 (b), (c), of the Act, 49 U. S. C. § 1482 (b), (c).

over TWA, "to its own profit and to the detriment of the public interest," 6 C. A. B., at 156, the approval was to continue only so long as intercompany purchases did not exceed $200 per item and did not amount to more than $10,000 in any one calendar year. Annual reports were required in this respect.[6] 6 C. A. B., at 158.

The 1948 and 1950 decisions of the Board originated in a letter agreement presented by Toolco to TWA on January 8, 1947, and accepted by TWA the following day. By this agreement, Toolco agreed to loan $10 million to TWA in return for the latter's interest-bearing notes which were convertible into common stock of the company. On its own initiative the Board opened an investigation into the matter. At the threshold was the question of Board jurisdiction, which was hotly contested. The Board's June 1948 opinion sustained its jurisdiction, 9 C. A. B. 381 (1948). The opinion took

[6] The Board's public counsel had opposed such a condition on approval as "imposing far too great a burden upon the Board to ask it to pass upon the wisdom and propriety in both a technical and business way, of every bargain made by a carrier for the purchase of equipment from a particular manufacturer." Brief to Examiner, at 25 (Filed Apr. 22, 1944). Public counsel's alternative proposed condition required Toolco to forfeit control in the event Toolco should manufacture or sell certain commercial aircraft or Hughes "should attempt to influence TWA with regard to the purchase, acceptance, or use by it of any aircraft or aircraft parts in the development or design of which he himself may have participated to a substantial degree." 6 C. A. B., at 157. The Board rejected this proposal, reasoning as follows (*Ibid.*):

"The conditions proposed by public counsel are complicated and seem to be somewhat indefinite and difficult of enforcement. The object of any condition . . . should be to protect the public interest from any improper coercion of the air carrier by a controlling company on account of any interest which that controlling company may have in some other phase of aeronautics. This can be accomplished by a reasonable limit upon commercial transactions between the acquirer and the acquired which may be had without further consideration in this proceeding by the Board."

a dual approach to the jurisdictional question. It first inquired whether "any change in the activities of Toolco in the field of aeronautics since October 17, 1944, had affected or altered the character of the control approved in Docket No. 1182. It is clear that a substantial change in the activities of Toolco in the field of aeronautics would result in a transaction subject to the Board's jurisdiction under § 408 by reason of the fact that the character and propriety of control originally approved might be altered or changed as a result thereof." 9 C. A. B., at 382.

After reviewing the aeronautical activities of Toolco, it was concluded that the aircraft division of the company was chiefly a large-scale experimental plant for the military and had not substantially changed its status with respect to its participation in any phase of aeronautics.

The Board's second approach to the jurisdictional question was to inquire whether the letter agreement, which would permit Toolco to increase its shareholdings up to 80% of the outstanding shares of TWA, represented such a change in extent or effectiveness of control as to give the Board jurisdiction and require its consent. Its conclusion was that although Toolco's 45% was obviously enough to dominate the Board and control the day-to-day affairs of the company, the 1947 letter agreement would permit Toolco to translate its *de facto* control into full legal control of the company, which would "obviously imply power to dictate the complete corporate activities of the corporation." 9 C. A. B., at 387. This was sufficient to require a further order of the Board in addition to the 1944 order.

With its jurisdiction established, the Board proceeded with hearings and inquiry into whether the additional control was consistent with the public interest. This matter was also contested. Toolco thought that only

a narrowly focused inquiry was appropriate, but the Board's public counsel not only insisted that the hearings be far-ranging but urged, as a possible solution, that the additional control be disapproved and that the original 1944 proceedings, Docket No. 1182, be reopened to determine whether all control of TWA by Toolco should be terminated. The Board[7] opted for an investigation sufficiently broad to inquire "into the actions and the policies of the controlling company with respect to TWA for the period during which the prior approved control existed . . . [f]or inevitably the controlling company, by virtue of its investment in the acquired carrier, will endeavor to make itself accountable—as indeed the acquirer here under scrutiny had—for the managerial efficiency, the operating economy, and the financial integrity of the controlled carrier." 12 C. A. B. 192, 196 (1950). Before approving the additional acquisition, which would make certain "complete actual and legal control," *id.*, at 197, the Board determined not only to examine the future plans of Toolco but also its past conduct with respect to TWA.

Accordingly, the Toolco-Hughes-TWA relationship from 1939 to the date the decision was examined in detail, including the events transpiring since the letter agreement of January 1947. The major focus of the inquiry were the differences between TWA management and Toolco with respect to the acquisition of new flight equipment—the quantity, the type, the timing and the financing thereof. Unquestionably, TWA had been and was in need of additional financing to make possible the purchase of new equipment, particularly that needed to operate its expanded routes. TWA proposed and pre-

[7] References to the "Board's" 1950 opinion are actually to the opinion of the Trial Examiner. But the Board adopted as its own "the findings, conclusions, and recommended decision of the examiner," without modification. 12 C. A. B., at 193.

ferred equity financing in large measure, but Toolco most often insisted on financing new equipment through credit arrangements. Disagreement caused delay, and this, in combination with other factors, brought TWA to the verge of bankruptcy or reorganization in late 1946. It was at this juncture that the January 1947 letter agreement eventuated. Financial failure was averted; but urgent needs for new equipment continued, and substantial additions were made in the years from 1947 to 1950, most of it with the aid of Toolco and some of it by purchase from Toolco itself.[8] By the time the hearings concluded and the case was under submission, TWA's financial condition had considerably improved, measurably aided by better operating results, better expense control and stock offering to stockholders with the unsubscribed amount being underwritten by investment bankers. 12 C. A. B. 208–209.

In considering whether the additional control by Toolco would be in the public interest, the Board observed that there was no conflict of interest between Toolco's present or contemplated aeronautical activities and its control of an air carrier and that enhanced control presented no problems under the anti-monopoly provisions of § 408 (b). *Id.*, at 216. The Board then noted that Toolco's contributions to the science of aeronautics by way of aircraft design, instrumental aids to aviation for both the armed services and civil aviation have been substantial and found that "of specific importance to TWA, have been the contributions of Toolco and Mr. Hughes in the way of financial support to the carrier, in

[8] The Examiner found that it was "necessary" for Toolco to acquire aircraft initially and then resell them to TWA on a conditional sales basis because TWA "could not have purchased [the aircraft] directly without the specific consent of its principal creditors." 12 C. A. B. 218.

the selection and purchase of its equipment, and their advice and guidance to the engineering and operation departments of the carrier." *Id.*, at 216.[9] Most important, however, in the Board's opinion, were the efforts of Toolco to improve the financial position of TWA during the last few years. Although criticizing Toolco, along with others in the aircraft transportation industry, for relying too heavily on debt financing which, in the case of TWA had resulted in the very difficult, lopsided capital structure, the Board concluded that the record would not support a finding that the additional control would be inconsistent with the public interest. Indeed, the Board concluded that "the continued interest of Toolco and TWA appears essential to the best interests of the carrier and the public." *Id.*, at 224.

The Board's approval in 1950 of the complete control of TWA by Toolco was made "subject to the terms and conditions" imposed by the 1944 order with respect to inter-company purchases and annual reporting. See —, *supra*. As a result, from 1944 to 1960, every acquisition or lease of aircraft by TWA from Toolco and each financing of TWA by Toolco required Board approval. Applications by Toolco were made to the Board in each instance, with the terms and conditions of the transac-

[9] For example, the Examiner found that:

"Even before TWA's financial crisis of late 1946, the financial resources of Toolco were used to provide credit for the carrier. For instance, the credit arrangements provided by Toolco made possible the placing of the original order for the Constellation airplane with the Lockheed Aircraft Corporation. There is little doubt that the Constellation would not have been developed as early as it had without the aid of Mr. Hughes and his company. In addition to the technical assistance from Mr. Hughes and his engineers in Toolco, the financial commitment which was necessary to undertake and continue the project could never have been made and met by TWA." 12 C. A. B., at 216.

tions being described.[10] Each was approved by the Board and each was regarded as a modification or interpretation of its antecedent control orders under § 408. Each of these transactional orders recited a finding of the Board that the transaction was "just and reasonable and in the public interest." Then, in December 1960, the Board issued an order approving a major proposal by TWA for the acquisition of jet equipment, which among other things involved fundamental changes in relationship between TWA and Toolco in that the stock of the latter, at the insistence of the financial institutions involved in the program, was to be placed in a voting trust and the company's Board of Directors reconstituted. 32 C. A. B. 1363. The dominant position of Toolco thus ended for the period of the trusteeship. In

[10] For example: On May 15, 1959, the Board authorized Toolco to lease 11 Boeing Jets to TWA and 30 spare jet engines. The Board required that a separate lease be executed for each aircraft and modified the previous order under § 408 to permit aircraft lease transaction between TWA and Toolco and to authorize an agreement covering $3½ million worth of spare parts.

On July 1, 1959, Toolco asked that 10 leases of Boeing Aircraft to TWA be codified so as to permit the extension of the 10 leases under the same rental until no later than September 30, 1959, and to permit the lease under identical terms of four additional Boeing Jets and to permit the purchase from Toolco at actual cost of additional spare parts necessary for the operation of the leased jet airlines. This order of the Board also constitute a modification of the original order of control granted under § 408.

On September 30, 1959, Toolco asked permission to extend the leases of 10 Boeing Jets. The extension was to be under the identical terms of the original leases, the new leases to be terminated by either party within 24 hours on written notice. Here again the Board modified the original transaction under § 408.

On January 29, 1959, Toolco asked permission to lease to TWA on a day-to-day basis up to eight Boeing Aircraft and up to eight Convairs and to purchase from Toolco at actual cost such spare parts as were necessary and such other provisions as might be required. Here again the Board entered an order that qualified its original "control" order under § 408.

the course of its opinion accompanying the order, the Board stated that although it had not been officially informed of the reasons for the bank's insistence on the voting trust, it "was not unaware of TWA's problems." *Id.*, at 1364. The Board knew, because it was a matter of public record, that TWA had been delayed in financing its jet fleet and the Board's opinion was that TWA had probably suffered because more attractive financing terms were no longer available and because the unavailability of equipment may have contributed to the company's failure to maintain its normal share of the transportation market. "Under these circumstances" the Board said, "we think it clear that Board action to facilitate TWA's acquisition of jet equipment is in the public interest. At the same time, however, it is evident that Toolco's control of TWA, as exercised through Hughes, has presented substantial problems reqiring the Board's attention." *Id.*, at 1365. The Board went on to make clear that its approval would be required before Toolco would be permitted to reassume control over TWA and that any such approval would be forthcoming only after a most "searching inquiry" into the public interest factors involved.[11] *Ibid.*

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[11] In a footnote, the Board amplified what it meant by public interest factors through reference to the following excerpt from its 1950 decision (12 C. A. B., at 196):

"Aside from any undesirable influence on an air carrier which might arise because of the acquirer's interest in a given phase of aeronautics, an acquirer of an air carrier is not without responsibility in other respects for an air carrier's general capacity to perform its public responsibilities. For inevitably the controlling company, by virtue of its investment in the acquired carrier, will endeavor to make itself accountable [. . .] for the managerial efficiency, the operating economy, and the financial integrity of the controlled carrier. Accordingly, in determining whether or not a particular acquisition should be approved, it is necessary to consider the over-all impact of the acquirer's plans and policies with respect to the controlled carrier."

It was six months later that TWA, now no longer under control of Toolco, filed suit against the latter alleging violations of the antitrust laws to the injury of TWA's business. As analyzed by the Court of Appeals in its opinions filed in this case, the complaint rested principally on Toolco's conduct as controlling stockholder during the years 1955–1960. The assertions were that in 1955 the commercial air industry was converting to jet aircraft, and that TWA's competitors began in that year "to aid in the development of and to purchase jet planes. 332 F. 2d, at 605. Toolco and General Dynamics Corporation (Convair) had entered into an arrangement for the joint development of a suitable aircraft but the plan proved abortive, whereupon Toolco considered but ultimately abandoned a plan for itself to enter aircraft production. Meanwhile, Toolco had arranged for the purchase of jet aircraft from Convair and Boeing, the arrangements providing that Toolco could assign its rights to such aircraft to TWA.

As respects its defense that CAB control and surveillance gave it immunity from the antitrust suit, Toolco relies on *Pan American World Airways, Inc.* v. *United States, supra.* The Court of Appeals distinguished that case, saying that there the unlawful division of territories and allocation of routes were directly "within the ambit of powers explicitly granted the Board by the Congress." 332 F. 2d 602, 608. The Court of Appeals said that the present case was different because, in its view, the continuing supervision of the Board over the Toolco-TWA relationship was general and not related to a specific conduct that gave rise to violations of the antitrust laws.

The transactions on the basis of which damages were awarded were based primarily on profits lost as a result of five transactions relating to orders placed by Toolco

for a fleet of 63 jet aircraft destined for use by TWA. 449 F. 2d 51, 65–66:

(1) The diversion of six Convairs by Toolco to Northeast Airlines.

(2) The temporary retention by Toolco of four other Convairs and their ultimate lease of them to Northeast Airlines.

(3) The diversion of six Boeing jets out of 33 ordered to Pan American Airways.

(4) The lease, instead of outright sales, of jets in 1959–1960.

(5) The late delivery of 47 of the 63 jets.

One difficulty with the conclusion of the Court of Appeals that these transactions, unlike those involved in the *Pan American* case, were transactions on which the Board might take action but did not do so is that it miscontrues the record. As noted from 1944 to 1960 every acquisition or lease of aircraft by TWA from Toolco and each financing of TWA by Toolco required Board approval. Each transaction was approved by the Board and each approval was an order under § 408, for the Board regarded its transactional orders as modifications or interpretations of its antecedent control order. Each of the modification orders recited a finding of the Board that the transactions were "just and reasonable and in the public interest."

It is said, however, that while the Board modified its original "control" order under § 408 so as to permit sale or lease of the aircraft out of which the alleged antitrust violations occurred, the approval of the Board did not sanction or approve the precise way in which Toolco allegedly used the power to the disadvantage of TWA. But that is not an answer to the problem of exemption.

The Federal Aviation Act as construed and applied by this Court and the Civil Aeronautics Board dictates a contrary result.

In *Pan American World Airways, Inc.* v. *United States, supra*, the United States brought a civil antitrust action under §§ 1, 2, and 3 of the Sherman Act challenging the joint control of Panagra, an air carrier, by Pan American Airways and W. R. Grace & Company. The allegations were that Pan American, Grace, and Panagra and divided territories, that Pan American and Grace had conspired to monopolize air transportation on the west coast of South America and that Pan American had used its power to prevent Panagra from extending its routes from the Canal Zone to the United States. The District Court found no division of territories, no conspiracy between Grace and Pan American but concluded that Pan American had violated the Sherman Act in interfering with Panagra's possible route extension. On cross appeals by Pan American and United States, this Court held that the complaint should have been dismissed because of § 411 of the Act gave the CAB broad power to investigate and bring to a halt unfair practices and unfair methods of competition, including those alleged in the complaint, and because if the courts were to intrude independently with their own construction of the antitrust laws the two regimes might collide. Hence, relief against the alleged division of territories, allocation of routes and conspiracy to monopolize was a matter exclusively for the Board. The court also pointed out that under § 414 of the Act Board orders carried antitrust immunity for any conduct authorized, approved or required by the order and that it would be odd to hold that an affilation between an air carrier and others that would pass muster under § 408 could nevertheless run afoul of the antitrust laws—"Whether or not transactions of that character met the standards of competition and monopoly provided by the Act is peculiarly a question for the Board, subject of course to judicial review as provided by 49 U. S. C. 1489." 371 U. S., at 309.

The Court of Appeals did not consider *Pan American* to be relevant or controlling because, different from the situation there, the conduct challenged in TWA's complaint against Toolco was "unrelated to any specific function of the CAB" and hence was not within the exclusive competence of that body. 332 F. 2d, at 608. This view is difficult to square with the statute and the several opinions and orders issued by the Board with respect to the relationship between Toolco and TWA.

The Act expressly forbade Toolco from acquiring control of TWA without approval of the Board. Section 408, however, directed the Board to approve the acquisition if consistent with the public interest and empowered it to remedy any acquisition of control by Toolco obtained otherwise than in accordance with the Act. It is also perfectly clear that in 1944 the Board approved the acquisition of control of TWA by Toolco by virtue of a 45% stock ownership and that in 1948 and 1950 the Board approved a transaction that could have increased Toolco's holdings to 80% and transform its *de facto* control into full legal, as well as practical control.

In reaching this conclusion, the Board inquired broadly into all phases of the exercise of Toolco's control over TWA during the years 1944–1947. It was not only proper but necessary in determining whether further acquisition of control was consistent with the public interest to examine "into the actions and policies of the controlling company . . . for inevitably the controlling company, by virtue of its investment in the acquired corporation, will endeavor to make itself accountable . . . for the managerial efficiency, the operating economy and the financial integrity of the company." 12 C. A. B., at 196. Hence, of major interest to the Board were the decisions of Toolco with respect to the type, quantity, timing, and financing of new equipment acquisition by TWA. It examined and dealt with in great detail the assertions

that Toolco had improperly delayed the arrival of new equipment, had insisted on debt rather than equity financing and had itself sold or leased aircraft to TWA. All of these matters, the Board concluded, were central to proper determination of the issue of the additional control and, indeed, to the additional question before the board as to whether the existing relationship should have been completely terminated.

The point is that the conduct of Toolco with which the Board so extensively dealt in 1950 is the same kind of conduct charged to Toolco in the 1950's and alleged by TWA in its complaint to violate the antitrust laws. It is, therefore, difficult to understand how the Court of Appeals could conclude that the acts of Toolco in controlling, allegedly to the injury of TWA, the timing, the financing and the flow of new equipment to TWA was unrelated to any function of the Board under the Act. Clearly, such considerations were in the mainstream of the Board's § 408 responsibilities to insure that only those acquisitions of control that are in the public interest are approved.

Nor is it tenable to argue that however relevant Toolco's new equipment decisions might have been to the public interest standard mandated for Board approval of the additional control obtained in 1947, the Board's authority nevertheless terminated with that approval and that the Board, having issued its approval, was powerless to control or oversee its exercise in the years to come. Section 408 permits only those acquisitions of control that are not inconsistent with the public interest and that will not result in a monopoly. It also authorizes the Board to approve acquisitions subject to such conditions as it may deem desirable. Section 408 (e) empowers the Board to investigate and remedy violations of § 408 (a)—if a carrier has acquired control "in any manner whatsoever" other than that approved by the

Board, the Board is authorized either on complaint or its own initiative to investigate and if a violation is discovered it is ordered to remedy that situation. Section 204 (a) authorizes the Board to issue and amend such orders as it shall deem necessary to carry out the provisions of and to exercise and perform its powers and duties under this chapter.[12]

It seems sufficiently apparent, therefore, that the Board did not exhaust its powers with respect to Toolco's control of TWA when it issued its order of approval in Docket No. 1182 in 1944. Obviously, the Board remained competent to enforce or to waive the conditions attached to that order. It did so many times. See n. 10, *supra*. It also is clear from the 1948 and 1950 proceedings, where the Board's jurisdiction was challenged, that its jurisdiction was triggered not only by substantial additional acquisitions of stock but by any change in the extent or effectiveness of Toolco's control or in Toolco's position in the aeronautics industry. The Board also implied that had Toolco's exercise of control over TWA from 1942 to 1947 been sufficiently unacceptable to foreclose the additional acquisition of control, reopening Docket No. 1182 and re-examination of the initial approval would have been justified.

We have little doubt that the authority of the Board, either on complaint or its own initiative, extended to forbidding any exercise of control by Toolco which was not authorized or contemplated by the initial or subse-

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[12] See also § 415 of the Act, 49 U. S. C. § 1386, which provides that:

"For the purpose of exercising and performing its powers and duties under this Act, the Board is empowered to inquire into the management of the business of any air carrier, and, to the extent reasonably necessary for any such inquiry, to obtain from such carrier and *from any person controlling . . . such air carrier*, full and complete reports and other information. [Emphasis added.]"

quent approval. This seems the clear import of the Act and of the Board's 1948–1950 proceedings.

Also instructive is the Board's response when asked in 1956 to modify its original order so as to permit TWA's purchase of up to 25 jet-powered aircraft from Toolco. Reciting that its prior approvals of Toolco's control of TWA had been premised upon the assumption that Toolco was not engaged in the manufacture or sale of aircraft for commercial use, the Board forthwith opened an investigation to determine whether Toolco's position in the aeronautics industry had so changed as to result in a transaction subject to the Board's jurisdiction under § 408. The motion for waiver of the 1944 condition was consolidated with this new proceeding. The proceeding was later cancelled when the motion to waive the 1944 condition was withdrawn, but clearly the Board thought, and rightly so, that it had continuing power to audit the ongoing relationship between TWA and Toolco.

It is also difficult to read in any other manner the recital by the CAB, in the course of approval the 1960 voting trust arrangement, of Toolco's alleged conduct in delaying the delivery of new equipment and dictating the financing of same, all to TWA's alleged injury, followed by its assertion that such conduct "presented substantial problems requiring the Board's attention." 32 C. A. B., at 1365.

It is therefore no answer to say that our *Pan American* decision does not cover the alleged antitrust violations involved in the Toolco-TWA transactions for which treble damages were sought. As noted, § 408 (b) states that the Board shall not approve any "acquisition of control" which would result "in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier." Moreover, the Board in granting permission to "control" an air carrier must consider the

standards of the public interest as defined in § 102 of the Act. Subsection (c) of § 102 provides:

> "The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices."

Competition and monopoly [13]—two ingredients of the antitrust laws—are thus standards governing the CAB's exercise of authority in granting, allowing, or expanding or contracting the control which Toolco had over TWA by reason of the various orders issued by the CAB under § 408. In this context, the authority of the Board to grant the power to "control" and to investigate and alter the manner in which that "control" is exercised leads us to conclude that this phase of CAB jurisdiction, like the one in the *Pan American* case, pre-empts the antitrust field.[14] It should be noted in that connection that in

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[13] The Board in an early decision refused to approve a joint agreement among carriers because of its antitrust aspects:

". . . Agreements of this nature, whereby a carrier operating in a particular territory obtains from a prospective competitor an undertaking, express or implied, not to attempt competitive operations, are likely to tend to impede the development of competition to the extent required by the present and future needs of the nation. Accordingly, we are of the opinion that such agreements thwart the purposes of the Act, and that their formation should in general be discouraged." *Pan American Airways, Inc.*, 3 C. A. B. 540, 546–547.

[14] The *Pan American* case is consistent with the view expressed in *Silver* v. *New York Stock Exchange*, 373 U. S. 341, 360–361, that while a statutory scheme that does not create a total exception from antitrust laws may, nonetheless, in particular and discrete instances by implication grant immunity from an antitrust claim.

To the same effect is *United States* v. *Borden Co.*, 308 U. S. 188, 200, where the Court said:

"That the field covered by the Agricultural Act is not coterminous with that covered by the Sherman Act is manifest from the fact

the *Pan American* case, Pan American, which owned 50% of the stock of the air carrier Panagra, was charged with using its control to prevent Panagra from receiving the authority of the CAB to extend its route from the Canal Zone to the United States. That restraint was held beyond the reach of the antitrust laws even though the CAB had taken no action to investigate, let alone, act on the alleged misfeasance as the Board has done here for over 16 years.

We think the Court of Appeals erred also in construing and applying § 414, which immunizes from antitrust liability any conduct approved, authorized or required by any Board order issued under § 408. As we read this record the Board not only approved Toolco's ownership of TWA stock but it also contemplated actual and legal control of TWA by Toolco. The Board made it as plain as possible that Toolco's stock ownership would inevitably result in Toolco's exercising authority over the day-to-day affairs of TWA, including the acquisition and financing of equipment. It was precisely this kind of control the Board approved. Toolco's power of decision with respect to these matters was central to the public interest issue. What is more, the Board not only concluded that Toolco's stewardship, although faulty in some respects, had been a great benefit to TWA and to the public in years gone by but also determined that the additional control sought by Toolco and continuation of TWA-Toolco relationships were essential to the public interest.

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that the former is thus delimited by the prescribed action participated in and directed by an officer of government proceeding under the authority specifically conferred by Congress. As to agreements and arrangements not thus agreed upon or directed by the Secretary, the Agricultural Act in no way impinges upon the prohibitions and penalties of the Sherman Act, and its condemnation of private action in entering into combinations and conspiracies which impose the prohibited restraint upon interstate commerce remains untouched."

It is too clear for argument that in entering the 1950 order the Board fully realized that Toolco had determined and would determine when and how much new equipment would be purchased, from whom it would be acquired and how it would be financed. It was precisely this type of association that it contemplated when it approved the additional control obtained by Toolco in 1947. And it was precisely this same conclusion that the Board was implementing each time during the 1950's that it approved a sale or a lease of an airplane from Toolco to TWA which, without its approval, would have violated the Board's ongoing limitation on the size of intercompany transactions.

We repeat, however, what we said in the *Pan American* case that the Federal Aviation Act does not completely displace the antitrust laws.

> "While the Board is empowered to deal with numerous aspects of what are normally thought of as antitrust problems, those expressly entrusted to it encompass only a fraction of the total." 371 U. S., at 305.

One of the most conspicuous exceptions would be the combination or agreement between two air carriers involving trade restraints. See *Timken Co.* v. *United States*, 341 U. S. 593, 598.

There may be other exceptions. But where, as here, the CAB authorizes control of an air carrier to be acquired by another person or corporation and where it specifically authorizes as in the public interest specific transactions between the parent and the subsidiary, the way in which that control is exercised in those precise situations is under the surveillance of CAB, not in the hands of those who can invoke the sanctions of the antitrust laws. As noted, the parent company which controls an air carrier is subject to pervasive control by the CAB. The control which CAB is authorized to grant or to deny under § 408 involves an appraisal of the impact of that

control in terms of monopoly and competition; and the ongoing supervision entrusted to the CAB by § 415 is broad enough to put all transactions between parent and subsidiary—as originally conceived or subsequently exercised—under CAB supervision.

We cannot believe that if the day after the Board's order of 1950, a minority stockholder had instituted a derivative antitrust suit against Toolco, alleging that Toolco had monopolized the TWA market from 1944 to 1950, delayed deliveries of aircraft and insisted on improvident financing arrangements, such a suit could have survived a motion to dismiss based on § 414. Such an action would seek to negate what the Board, after full investigation, had found consistent with the § 408's anti-monopoly provision, consistent with § 2's competition standard and consistent with the public interest.

TWA's suit in 1960 carries no better credentials, for it sought to terminate a relationship the continuation of which the Board had found essential to both TWA and the public interest and to penalize the type of conduct which the Board expressly contemplated and preferred would continue unless and until a different order from the Board was forthcoming.

It adds nothing to the analysis to characterize Toolco's exercise of power over TWA as monopolization of the TWA market, for it was precisely such control that the Board opted for in 1944 and 1950. Moreover, a condition of the order was that Toolco's sales to TWA could not assume more than negligible proportions without in every instance the Board approving the transaction as being consistent with the public interest. Nor does it add to the argument to describe Toolco's conduct as furthering a tying or exclusive dealing arrangement or as a conspiracy to restrain trade in that market represented by TWA.

The short of it is that in our view § 408 and § 414 of the Act, as construed in *Pan American* require reversal of the Court of Appeals and dismissal of this action. What TWA charged in its complaint was no more than the kind of conduct the CAB in 1950 had approved and authorized for the future; and, in any event, such conduct was within the power of the Board to control and was central to the mandate of § 408 to permit control of TWA by Toolco only if consistent with the public interest.

We by no means hold that the Federal Aviation Act completely displaces the antitrust laws. *Pan American*, 371 U. S., at 305. But where, as here, the CAB authorizes control of an air carrier to be acquired by another person or corporation and where the CAB specifically authorizes as in the public interest specific transactions between the parent and the subsidiary, the way in which that control is exercised in those precise situations is under the surveillance of CAB, not in the hands of those who can invoke the sanctions of the antitrust laws. The control which CAB is authorized to grant or to deny under § 408 involves an appraisal of the impact of that control in terms of monopoly and competition; and the ongoing supervision entrusted to the CAB by § 415 is broad enough to put all transactions between parent and subsidiary—as originally conceived or subsequently exercised—under CAB supervision.

This conclusion necessitates a dismissal of the cross-petition and a reversal of the judgment below and a remand with directions to dismiss the complaint, as the numerous other points briefed and argued become irrelevant in that posture of the case.

Reversed.

MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

SUPREME COURT OF THE UNITED STATES

Nos. 71–827 AND 71–830

Hughes Tool Company et al., Petitioners, 71–827 *v.* Trans World Airlines, Inc.	On Writs of Certiorari to the United States Court of Appeals for the Second Circuit.
Trans World Airlines, Inc., Petitioner, 71–830 *v.* Hughes Tool Company et al.	

[January 10, 1973]

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE BLACKMUN joins, dissenting.

The history of this case is so remarkable—indeed unique in the annals of modern federal jurisprudence, so far as I am aware—that I must preface my dissent on the merits with a recital of the course of this litigation over nearly a dozen years. This protracted litigation, conducted at enormous cost, now comes to an abrupt end on an issue directly presented to this Court nearly eight years ago but not decided. As the strange history will demonstrate, resolution of the issue when it was first before the Court, as now decided, would have terminated this litigation without having the parties invest untold efforts and vast expense in a now wholly irrelevant contest over the proper measure of damages.

On June 30, 1961, TWA filed a complaint against the Hughes Tool Company in the United States District Court for the Southern District of New York, charging violations of the antitrust laws. On February 7, 1962, the District Court filed a pretrial order, appointing a Special Master to act in discovery and

deposition proceedings. After discovery proceeded to an impasse, on February 1, 1963, the District Court ordered Howard Hughes to appear for a deposition and ordered the defendant Toolco to produce certain documents which it had previously refused to produce. Shortly thereafter, on February 7, 1963, the District Court entered a memorandum opinion and order denying a motion to dismiss TWA's complaint.[1] In response to the order to produce Hughes for examination along with the contested documents, Toolco filed a "notice of position," on February 8, 1963, advising the District Court and TWA that it had chosen to rest on the merits of its positions in order to "avoid the burdens and expenses involved in further pretrial and trial proceedings prior to the time that an appellate court has had the opportunity to rule on the decisions and orders heretofore made herein."

This "notice of position" constituted a default and accordingly judgment was entered against Toolco, on May 3, 1963. The District Court then certified to the United States Court of Appeals, Second Circuit the question of the sufficiency of the complaint on which the default judgment was based. The issue of damages was referred to the Special Master. On July 10, 1964 the Second Circuit issued an opinion in which it decided that the District Court had jurisdiction of the action and that the orders of the Civil Aeronautics Board affecting the relationship between the parties did not constitute a good defense to the antitrust claims of TWA.[2] On November 16, 1964, this Court granted certiorari to review the judgment of the Court of Appeals.[3] After full argument and briefing, but without

[1] 32 F. R. D. 604.
[2] 332 F. 2d 602.
[3] 379 U. S. 912.

opinion, the writ was dismissed as improvidently granted on April 5, 1965,[4] and the case returned to the District Court for further proceedings to determine the amount of TWA's damages.

For nearly three years, proceedings were held before the Special Master [5] to determine the appropriate amount of damages. On December 23, 1969, the District Court filed a new opinion confirming a report of the Special Master awarding damages amounting to $137,611,435.95.[6] On April 14, 1970, the District Court filed a superseding order in which he added to the TWA award $7,500,000 as a reasonable attorney's fee (representing some 56,000 hours of work at a "mixed rate" of $128 per hour) and $336,705.12 in costs, for a total of $145,448,141.07 plus interest thereon of 6%. The judgment was stayed pending a renewed appeal to the Court of Appeals, which, on September 1, 1971, affirmed the judgment of the District Court, with only slight modification.[7]

This Court again granted certiorari on February 28, 1972,[8] and today—more than 11 years after it all began and more than seven years after the now determinative issue was brushed aside by this Court—the Court discovers that the actions alleged in TWA's complaint were immunized from the antitrust laws by the Civil Aeronautics Board's role in the Toolco-TWA relationship. This, of course, was the precise issue tendered to this Court for decision in 1964 in order to

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[4] 380 U. S. 248.

[5] Herbert Brownell replaced J. Lee Rankin as Special Master when Rankin resigned in December 1965 to become Corporation Counsel for New York City.

[6] 308 F. Supp. 679.

[7] 440 F. 2d 51.

[8] 405 U. S. 915.

secure an early decision that might end the contest before enormous additional sums were expended in proving damages resulting from the actions alleged in TWA's complaint.[9]

This capsule chronicle of the present litigation barely suggests its factual complexity. To describe this litigation as a 20th-century sequel to *Bleak House* is only a slight exaggeration. Dickens himself could scarcely have imagined that 56,000 hours of lawyering at a cost of $7,500,000 would represent the visible expenses of only one party to a modern intercorporate conflict, to say nothing of the time of corporate and management personnel diverted from their daily tasks.[10] Indeed, today's "ending" is quite a surprise—as great

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[9] Toolco's 1964 petition for certiorari posed three questions, the first being as follows:

"1. Where the Civil Aeronautics Board has approved the acquisition of a controlling stock interest in an air carrier by a person engaged in a phase of aeronautics and has further approved or has jurisdiction to approve all relevant transactions between them under an Act which immunizes the approved transactions from the antitrust laws, does the district court have jurisdiction to entertain a complaint by such air carrier alleging that the transactions between the subsidiary air carrier and its parent violated the antitrust laws in that they constituted a conspiracy, an attempt to monopolize and an acquisition in violation of the antitrust laws?"

Toolco's petition in the present case posed seven questions, the fourth of which was as follows:

"4. When the Civil Aeronautics Board has approved an acquisition of control over an air carrier by a person engaged in a phase of aeronautics and has further approved all relevant transactions between them, is the exercise of that control to determine how the air carrier acquires aircraft and the necessary financing thereof immunized from the operation of the antitrust laws under Section 414 of the Federal Aviation Act?"

[10] It is not unreasonable to assume that the battalions of lawyers for these adversaries devoted substantially the same effort and time, thus bringing counsel fees in the aggregate to the sum of $15 million.

a surprise for some of us as it must be for the parties. I suggest it will even surprise the victors, for in the oral argument to this Court only a few fleeting comments were devoted to the point that now becomes the dispositive issue in the case. Of course, this was a sound allocation by counsel of the limited time allowed for argument since the Court had not considered the point worthy of notice in 1964 when the case was first here.

To be sure, all this is secondary to the correctness of today's decision. I am unable to join the Court's disposition because I believe it departs markedly from our prior decisions uniformly holding that repeal of the antitrust laws to accommodate other federal regulatory statutes "is to be regarded as implied only if necessary to make the [regulatory scheme] work, and even then only to the minimum extent possible." *Silver* v. *New York Stock Exchange*, 373 U. S. 341, 357. In particular, the Court today substantially enlarges the scope of *Pan American Airways* v. *United States*, 371 U. S. 296 (1963), a case which the Court says "requires" the result it reaches today—notwithstanding that *Pan American*'s teaching was available in Volume 371 of the United States Reports when the Court dismissed the writ in this case as improvidently granted.

I

Passing to the merits of the Court's holding, I find it necessary at the outset to supplement the Court's description of the statutory framework from which this case arises. Section 408 of the Civil Aeronautics Act, 49 U. S. C. § 1378,[11] requires the approval of the CAB

[11] Section 408, 49 U. S. C. § 1378, reads in pertinent part as follows:
"(a) Prohibited acts.

[*Footnote 11 continued on page 6*]

when any person [12] seeks to acquire a controlling interest in any air carrier. The Board may approve such acquisition only if it finds that the acquisition

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"It shall be unlawful unless approved by order of the Board as provided in this section—

. . . . . .

"(2) For any air carrier, any person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any air carrier;

. . . . . .

"(5) For any air carrier or person controlling an air carrier, any other common carrier, any person engaged in any other phase of aeronautics, or any other person to acquire control of any air carrier in any manner whatsoever: *Provided*, That the Board may by order exempt any such acquisition of a noncertificated air carrier from this requirement to the extent and for such periods as may be in the public interest;

. . . . . .

"(b) Application to Board; hearing; approval; disposal without hearing.

"Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided*, That the Board shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control. . . ."

[12] Section 408 (a)(5) was amended in 1969 to require Board ap-

will be consistent with the public interest. Section 408 (b), 49 U. S. C. § 1378 (b). Specifically, the Board "shall not approve any . . . acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the . . . acquisition of control." *Ibid.*

The Act fails to elaborate on the scope of its command to the CAB not to approve any acquisition that would create a monopoly and thereby restrain competition. In other words, the Act fails to specify the relevant market or markets to which the Board must look in determining whether a particular acquisition or exercise of control is forbidden. Section 2 of the Act,[13]

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proval of an acquisition of control of an air carrier by "any other person." 83 Stat. 103, 49 U. S. C. § 1378 (a)(5). Prior to 1969, the Act required Board approval only for acquisition of control of an air carrier by another air carrier, by persons having other specified transportation interests, or by a "person engaged in any other phase of aeronautics."

[13] Section 2, 49 U. S. C. § 1302, reads:

"In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

"(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

"(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences, or advantages, or unfair or destructive competitive practices;

"(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the

enumerating the general policies which are to guide the Board, is similarly ambiguous. It includes among those factors to be weighed in evaluating the "public interest" factor under the Act "[c]ompetition to the extent necessary to assure the sound development of an air transportation system properly adapted to the needs of the . . . commerce of the United States . . . ." Again, though, the question is: competition by whom? In which market or markets?

There can be no doubt the Board is responsible for promoting competition in some sense; our inquiry is whether the Board is charged with fostering competition both within the air transportation market and without, in other markets essentially unrelated to air transportation and alien to the purposes for which the Board was created. Resolution of this ambiguity is critical to proper interpretation of § 14 of the Act,[14] which confers antitrust immunity upon "any person affected by any order made under [§ 408, *inter alia*] . . . insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order." What is "authorized, approved, or required" by the CAB must surely be determined, at least to a very large extent, by the scope of the Board's mandate to evaluate potentially anticompetitive conduct.

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needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(e) The promotion of safety in air commerce; and

"(f) The promotion, encouragement, and development of civil aeronautics."

[14] Section 414, 49 U. S. C. § 1384, reads:

"Any person affected by any order made under sections 1378, 1379, or 1382 of this title shall be, and is hereby, relieved from the operations of the 'antitrust laws,' as designated in section 12 of Title 15, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order."

II

The Court today neglects to resolve, or indeed even mention, this problem, and well it might, for the legislative history of the Act demonstrates that the competitive concerns which troubled the framers of the Aviation Act related exclusively to competition by and among air carriers. A major impetus to federal regulations of air transportation was the failure of the preceding era of freely competitive price and route warfare to bring stability to the Nation's air transport industry. In his statement accompanying the report of the Committee on Commerce on the Civil Aeronautics Act of 1938, Senator Copeland stated:

> "Competition among air carriers is being carried to an extreme, which tends to jeopardize and render unsafe a transportation service appropriate to the needs of commerce and required in the public interest, in the interests of the Postal Service, and of the national defense. Aviation in America today is unsatisfactory to investors, labor, and the air carriers themselves. . . . The committee feels that this bill will not only promote an orderly development of our Nation's civil aeronautics, but by its immediate enactment prevent the spread of bad practices and of destructive and wasteful tactics resulting from the intense competition now existing within the air-carrier industry." S. Rep. No. 1661, to acc. S. 3845, 75th Cong., 3d Sess., p. 2.

Similar views were voiced by the Chairman of the House Committee on Interstate and Foreign Commerce, Congressman Clarence Lea:

> "Under existing law, there is little economic regulation of air carriers. Routes are awarded not upon the basis of the ability of the particular air carrier to perform the service or the requirements

> of the public convenience and necessity, but upon the letting of air mail contracts to the lowest responsible bidders. This system has completely broken down in recent months, because the air carriers, in their desire to secure the right to carry the mail over a new route, have made absurdly low bids, have virtually evinced a willingness to pay for the privilege of carrying the mail over a particular route. A route once secured, however, under the existing system of air mail-contracts does not protect the air carrier operating that route from possible cutthroat competition, for air carriers are not required to secure a certificate or other authorization from the Government before beginning operations, other than one based upon safety requirements. Nor is there any authority in the Federal Government under existing law to prevent competing carriers from engaging in rate wars which would be disastrous to all concerned.
>
> "The result of this chaotic situation of the air carriers has been to shake the faith of the investing public in their financial stability and to prevent the flow of funds into the industry." H. R. Rep. No. 2254 to acc. H. R. 9738, 75th Cong., 3d Sess., p. 2.

A key aim of the new legislation, then, was to eliminate "cutthroat competition" among air carriers. From the beginning, the air carriers pushed for a scheme of regulation to control entry and regulate price competition in the air transportation market. Yet equally soon after serious consideration of an air regulation bill began, the prospect of regulation gave rise to concern that the new system of regulation might be used to foster the development of an "airline trust" or similar overconcentration in the air transportation market. In 1937, Commissioner Eastman of the ICC, who supported full federal regulation of air transportation re-

minded the members of the Senate Commerce Committee that the proposed legislation would give the Commission unlimited authority to consolidate the Nation's airlines and possibly, to do away with competition altogether. Eastman suggested that language be drafted to preclude undue consolidation among carriers.[15] As one commentator has stated, "Eastman's suggestion appears to have been heeded, for when the [1937] bill was reported, the merger clause contained [the language which became the anti-monopoly restriction of section 408]." Comment, Merger and Monopoly in Domestic Aviation, 62 Col. L. Rev. 851, 856–857. Final consideration of the aviation bill was postponed until the next session of Congress, but when Senator McCarran and Representative Lea introduced legislation at the 1938 session to create an independent air regulatory agency, both bills "contained a monopoly proviso virtually identical to the one that had been added to the 1937 bills, as reported." *Id.*, at 857.

To implement § 408's scheme for balancing stability with competition in the air transportation market, the bill provided explicit antitrust immunity in § 414.[16]

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[15] Testimony of Joseph B. Eastman, Member, Interstate Commerce Commission, on S. 2 and S. 1760 before a Subcommittee of the Senate Committee on Interstate Commerce, 75th Cong., 1st Sess., 334–335 (1937).

[16] At the House hearings, Colonel Edgar Gorrell, President of the Air Transport Assn. of America, testified that a major element of uncertainty that kept money from flowing into commercial aviation was "cutthroat competition, . . . where one company went out to make warfare against another and would be destroying the capital of both. . . . That is a fact. It has happened and the only agency or agent in America today that can stop it is myself; and the moment I stick my neck out to stop it, if I did, I would face a jail sentence and a fine for violating the antitrust laws. Our companies today cannot lawfully agree on prices." Hearings on H. R. 9738, 75th Cong., 3d Sess., at 309.

See *Silver* v. *New York Stock Exchange*, 373 U. S. 341, 347, where we noted that the relevant "collective action . . . would, had it oc-

The debates over § 414—like the origins of § 408—reflect congressional concern with competition in the air transportation market. Senator McKellar asked Senator Truman, a major supporter of the aviation bill, if it were true that the proposed legislation would repeal the antitrust provisions of the existing airmail laws. When Senator Truman answered in the affirmative, Sen. McKellar complained that

> ". . . such a provision is very inadequate and very bad legislation, and ought never to be agreed to. As everyone knows, at the present time the air companies are complaining that they are not allowed to consolidate. Some years ago we allowed them to consolidate and the result was the greatest ill that ever befell the air companies. The same ill will befall them again if such combinations are permitted.
>
> ". . . I desire to state that I cannot vote for any bill which proposes that a commission shall give air companies the right to combine and confederate into a huge monopoly. I regret very much that I shall have to vote against the bill."

Senator McCarran disagreed. He told Sen. McKellar that the bill "contain[ed] every protection against the very thing which the Senator from Tennessee fears." Senator Truman reminded his colleagues of § 408's proviso requiring that the Board approve no acquisition of control which would "result in creating a monopoly or monopolies and thereby unduly restrain competition or unreasonably jeopardize another air carrier not a party to the consolidation . . . ." Senator McCarran agreed that "every precaution has been written into the bill so that the antitrust laws and all laws for the prevention of combinations and monopolies shall

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curred in a context free from other federal regulation, constitute a *per se* violation of § 1 of the Sherman Act."

be enforced . . . . Protection has been written into the bill against combinations and monopolies in restraint of commerce, and in restraint of everything which would constitute a monopoly." Senator Copeland recited five different provisions of the bill "where the question of monopoly is dealt with in one way or another with the view to its control and prevention." When the debate turned from the discussion of general principles to application of those principles to a particular fact situation, again the Senators spoke of consolidation and competition by air carriers.[17]

Thus, the debates, as well as the remainder of the legislative history of the 1938 Act, reflect that the Congress which enacted the 1938 legislation was concerned only with problems of competition and monopoly in the air carrier market. Moreover, the debates show that there was considerable concern over even the limited grant of antitrust immunity deemed necessary to provide the proposed authority with sufficient flexibility to administer the air carrier market in the public interest. It is most unlikely that the concerns expressed would have been put to rest by extending the new authority's pre-emptive antitrust responsibilities under § 408 beyond the air transportation market into every market which might happen to be touched by transactions with an air carrier.

III

Our holding in *Pan American v. United States*, *supra*, becomes important in this setting. There, the Government filed an antitrust complaint alleging, *inter alia*, anticompetitive interference by Pan American with the route acquisitions of Panagra, a joint venture of Pan American World Airways and Grace Co. This Court held that the complaint should be dismissed. The Court stood

[17] 83 Cong. Rec. 6730–6731 (1938).

behind the presumption against implied antitrust immunity, 371 U. S., at 304–305, n. 9: however, for two interdependent reasons, the Court held that the conduct alleged in Panagra's complaint was immunized from the antitrust laws. First, the conduct specified in the complaint fell within the Board's basic mission and competency—the regulation of entry into and competition within the air transportation market:

> "Limitations of routes and divisions of territories and the relation of common carriers to air carriers are basic in this regulatory scheme." *Id.*, at 305.

Second, and equally important, we held that § 411 of the Act gave the Board a specific substantive mandate to investigate and regulate unfair practices and unfair methods of competition among air carriers in the air transportation market, 371 U. S., at 302, 308.

In *Pan American* the Board had not only the statutory power to supervise the relevant transactions but also the statutory responsibility to remedy the abusive features of those transactions specified in the Panagra complaint. Consequently, "If the courts were to intrude independently with their construction of the antitrust laws, two regimes might collide." *Id.*, at 310. Even this narrow holding provoked the dissent of MR. JUSTICE BRENNAN, in which Mr. Chief Justice Warren joined.

The present case is different from *Pan American* in a critical respect. Here, we may assume the Board possesses full authority under the Act to supervise § 408 transactions between a controlling person and an air carrier—just as in *Pan American*, the allocation of routes and division of territories comprised the basic stuff of the Board's day-to-day business. Yet, unlike the acts specified by Panagra in *Pan American*, the acts charged in TWA's complaint are components of an antitrust

conspiracy to restrain trade in the aircraft supply and manufacture market. Section 411 does not command Board responsibility for preventing such a conspiracy, since § 411 is in terms restricted to unfair methods of competition "in air transportation or the sale thereof." Thus, to sustain its result in this case, the Court must fall back on one (or both) of two propositions: it must either find some specific authority in the Aeronautics Act other than § 411 for its conclusion that the Board's mandate to police anticompetitive practices extends to the subject matter of TWA's complaint; or it must consider such statutory authority irrelevant to a finding of antitrust immunity. Neither approach is, in my view, sound.

IV

A. Improbable as it seems, there is much in the Court's opinion to suggest that its judgment rests upon the assumption that antitrust immunity is conferred here simply by virtue of a rather extensive grant of procedural authority for the Board to intervene in the control-person-air carrier relationship. The Court recounts, in detail the history of the Board's involvement in the Toolco-TWA relationship—though the Court does not suggest, as it cannot, that the Board specifically considered the actions by Toolco alleged in TWA's complaint to violate the antitrust laws.[18] The Court tells

[18] Between 1956 and 1960, the Board entered various modification orders permitting Toolco and TWA to enter into short-term leases of jets and permitting various limited extensions of those leases. Specifically, the record shows that the Board approved 12 transactions between Toolco and TWA from 1956 to 1960:

—on May 17, 1956, the Board approved sale of some 33 Lockheed aircraft, and spare parts, by Toolco to TWA.

—on Dec. 18, 1956, the Board approved a proposal for TWA to borrow some $10 million in operating capital from Toolco.

—on June 11, 1957, the Board approved a proposal whereby Toolco

us that in 1950, the Board embarked upon a wide-ranging evaluation of the treatment afforded TWA by Toolco as controlling person—though the Court does not sug-

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would refinance TWA's May 17, 1956, purchase of Lockheed aircraft.

—on Dec. 30, 1958, the Board again approved a transaction relating to the nonjet Lockheed aircraft.

—on Feb. 26, 1959, the Board approved a proposal whereby TWA would lease one Boeing 707–131 aircraft from Toolco, plus spare parts, for the purpose of training its crews to fly jet aircraft.

—on May 15, 1959, the Board approved the lease by Toolco to TWA of 11 Boeing 707–131 jet aircraft, with provision for obtaining spare parts from Toolco and leasing spare jet engines.

—on July 1, 1959, the Board approved the lease of four additional aircraft by Toolco to TWA, and the extension of the leases on the previous jet aircraft. The leases were prolonged pending the working out of "definitive financing arrangements" which, presumably, would enable TWA to acquire ownership of the aircraft.

—on Sept. 30, 1959, the Board again approved extension of the jet leases upon the representation of Toolco and TWA that financing arrangements had not yet been finalized

—on Jan. 29, 1960, the Board approved the lease by Toolco to TWA of eight 707–131's and eight Convair 880's (all jet aircraft), on a day-to-day basis, and again with provision for spare parts. This approval was again premised on completion in the near future of "definitive financing arrangements permitting [TWA] to operate these aircraft on a permanent basis."

—on June 23, 1960, the Board approved acquisition—*i. e.*, purchase—by TWA of 25 Boeing 707 and 20 Convair 880 jet aircraft, with $260 million to be raised by an offering of bonds and junior securities. Toolco was to guarantee the subscription and would lend $50 million to TWA to enable it to make the offering.

—on July 21, 1960, the Board approved acquisition of title to two additional jet aircraft by TWA from Toolco.

—Finally, on December 29, 1960, the Board approved creation of a voting trust for the placement of Toolco's holdings in TWA.

As the Court's opinion observes, damages were awarded for those allegations of the TWA complaint which charged that TWA had been damaged by the diversion of six Convairs by Toolco to Northeast Airlines; by the temporary retention by Toolco of four Convairs and the ultimate lease of these aircraft to Northeast; by the diversion

gest, as again it cannot, that the 1950 proceeding of the Board even remotely considered Toolco's actions as components of an antitrust conspiracy directed toward the aircraft supply and manufacturing market.[19] Finally,

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of six Boeing jet aircraft, of 33 ordered, to Pan American Airways, TWA's principal trans-Atlantic competitor; by the lease of planes to TWA, in lieu of sales which would have been more to TWA's financial interest; and by the late delivery of 47 of the 63 jets procured for TWA by Toolco.

With the exception of the decision to lease planes to TWA rather than sell them, the actions alleged to have damaged TWA related not to the documented structure of Toolco's transactions with TWA, as presented to and approved in fact by the Board, but rather to the manner in which Toolco executed the paper transactions, without Board approval or knowledge. The leases were never considered in relation to other means of aircraft acquisition, as the complaint required they be viewed. The Court dismisses these discrepancies by observing that the restraint alleged in *Pan American* was held to be immune "even though the CAB had taken no action to investigate, let alone, act on the alleged misfeasance as the Board has done here for over sixteen years." In other words, if the Board were responsible for complete supervision of the Toolco-TWA transactions, immunity would not be undermined by the Board's failure to undertake such supervision in fact.

At best, though, the Court's historical recitation is irrelevant since it in no way explains why it was the Board's statutory responsibility to consider the transactions between Toolco and TWA as components of an antitrust conspiracy allegedly pointed towards the aircraft supply and manufacture market.

[19] The Board's 1950 proceeding undertook "to consider the overall impact of the acquirer's plans and policies with respect to the controlled carrier." 12 C. A. B., at 196. The Board reviewed the past transactions involving the financing of aircraft. In particular, the Board considered whether Toolco had properly resolved, in favor of debt financing, a longstanding dispute between the Toolco and TWA managements over the relative merits of debt or equity financing of new aircraft. The Board concluded that TWA's financial and technical contributions to TWA had been of considerable benefit to the carrier. On the other hand, the Board viewed TWA's capitalization as "neither reasonable nor sound" since "[t]he proportion of

the Court makes much of the powers of investigation and continuing supervision provided by § 415 of the Act—though the Court does not acknowledge that those powers are explicitly limited by Congress to Board actions "[f]or the purpose of performing [the Board's] powers and duties under this Act," and are therefore no indication of the scope of Board substantive responsibility.

The weakness inherent in the Court's recitation of "procedural underbrush" is that it leaps from the premise of the Board's acknowledged procedural power to intervene in § 408 "control" transactions to the conclusion that the Board's substantive statutory duty to consider the anticompetitive impact of such transactions is or, for some reason of policy, ought to be equally unlimited. Yet, inescapably, it is the Board's substantive mandate upon which antitrust immunity properly turns; as our prior decisions teach, the potential of colliding substantive judgments forces the carving out of antitrust immunity, not simply the overlapping of jurisdiction to intervene in a particular type of transaction.

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debt to total capitalization is far too large." 12 C. A. B., at 218. Yet "the extent to which Toolco and its principal officers can be held directly responsible for TWA's present capital structure poses a most difficult problem," since "numerous factors . . . operate to complicate and often delay agreement on a financial plan." On balance, the Board concluded that Toolco control of TWA had been in the public interest, and it approved the additional acquisition by Toolco of TWA stock.

While it is true that the Board's evaluation of Toolco's "stewardship" over TWA involved decisions regarding the acquisition of aircraft, including the method of financing and the timing of purchase and lease decisions, there is nothing in the Board's decision to indicate that the Board's 1950 proceeding undertook to analyze Toolco's control of TWA from the perspective of Toolco's own market position. Consequently, the 1950 proceeding in no way suggests that the Board has deviated from its consistent position that Congress did not entrust it with the exclusive responsibility for policing anticompetitive effects of § 408 transactions.

We have uniformly insisted upon a substantive mandate to the regulatory agency to consider fully and remedy the relevant anticompetitive conduct. See, in addition to *Pan American, supra, United States* v. *Borden Co., supra,* at 206 (relevant provision of Capper-Volstead Act "does not cover the entire field of the Sherman Act"); *Georgia* v. *Pennsylvania R. Co., supra,* at 456–459 ("no warrant in the Interstate Commerce Act and the Sherman Act for saying that the authority to fix joint through rates clothes with legality a conspiracy to discriminate against a State or a region, to use coercion in the fixing of rates, or to put in the hands of a combination of carriers a veto power over rates proposed by a single carrier"); *Milk Producers Assn.* v. *United States, supra,* at 469–470 (§ 7 of Clayton Act immunized "transactions duly consummated pursuant to authority given by the . . . Secretary of Agriculture" under statutory authority, but this included only marketing agreements and not agreements or restraints of wider scope typically covered by the antitrust laws); *California* v. *Federal Power Comm'n, supra,* at 485 ("Here while 'antitrust considerations' are relevant to the issue of 'public interest, convenience, and necessity' . . . there is no 'pervasive regulatory scheme' . . . including the antitrust laws that has been entrusted to the Commission"); *United States* v. *Philadelphia National Bank, supra,* at 351–352 (though Comptroller of Currency was required to consider effect on competition in passing on bank merger, not required to give the factor any particular weight, to hold a hearing, or to subject his determination to judicial review).

B. The major premise of the Court's decision must, then, be that the Aeronautics Act imposes on the Board full responsibility for evaluating and preventing anticompetitive impact, of whatever variety, flowing from a control transaction touching an air carrier. As the

Court puts it, "Competition and monopoly—two ingredients of the antitrust laws—are standards governing the CAB's exercise of authority in granting, allowing or expanding or contracting the control which Toolco had over TWA by reason of the various orders issued by the CAB under § 408."

I cannot agree with the Court's reading of the provisions of the Act which require the Board to maintain competition. The Court offers no support for its reading of those provisions; and, as I have already indicated, the legislative history surely provides none. Moreover, the Board itself has consistently interpreted the Act not to impose on it the expansive role the Court now perceives for the first time. In a brief *amicus curiae* filed in 1964 and again in 1972, the Board disclaims the mandate or the competency to police the aircraft supply market or any non-air carrier market which may be threatened by anticompetitive acts involving control of an air carrier. We have only recently reaffirmed the well-established doctrine that the consistent administrative construction of federal legislation "is entitled to great weight." *Trafficante* v. *Metropolitan Life Insurance Co.*, *ante*, p. —; *Udall* v. *Tollman*, 380 U. S. 1, 16; *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 433–434. As for the Board's competence to do the job assigned it by the Court, we are not tied to the Board's self-appraisal, but "it is entitled to some weight," particularly when the legal issues surrounding Toolco's alleged behavior in the aircraft supply market "are typical antitrust problems and not at all typical airlines problems . . . . The search for a practical accommodation of court and agency is not advanced by our ignoring the agency's own considered sense of self-limitation." *Pan American*, supra, at 328–330 (dissenting opinion of MR. JUSTICE BRENNAN).

If the Board's basic function, the Act's legislative history, and the Board's view of its own mandate and

competence were not enough to convince me that the Court's reading of the Act is erroneous, these factors are at least enough to raise substantial doubts. Such doubts, as our prior cases teach, are enough to secure the continuing availability of antitrust or other judicial remedies as additional safeguards for protection of the public interest. "Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored." *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 350 (1963), *United States* v. *Borden Co.*, *supra*, at 198 ("a cardinal principle of construction that repeals by implication are not favored"). See *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 226–228; *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 456–457; *California* v. *Federal Power Comm'n*, 369 U. S. 482, 485, and 15 additional cases cited in MR. JUSTICE BRENNAN's opinion for the Court in *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 350 n. 28. The traditional aversion to implied repeal of the antitrust laws should have particular force in the context of the Aeronautics Act, which explicitly states that "Nothing contained in this chapter shall in any way abridge nor alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 49 U. S. C. § 1506; and see *Pan American World Airways* v. *United States*, *supra*, at 321 (dissenting opinion).

Nor does the Court's result seem justifiable for practical reasons of regulatory accommodation. Indeed, I find the Court's expansive reading of the Board's antitrust responsibilities inconsistent with our duty "to make the regulatory scheme work." *Silver* v. *New York Stock Exchange*, *supra*. Section 408 of the Act has now been amended to require Board approval when any person, whether or not engaged in any aspect of aeronautics, acquires a controlling interest in an air car-

rier. In this age of conglomerate mergers, the time may soon arrive when another industrial corporation seeks to acquire control of an air carrier. It may well be that some similar future acquisition may be in the best interests of American air transportation. It may likewise pose serious anticompetitive dangers. The Court's decision today will, I think, provide a serious obstacle to proper consideration of any such transaction that may be proposed in future years, since the Board will be faced with a difficult dilemma. If it approves the control acquisition, under the terms of the Court's decision the Board engages itself to exercise (a) continuing supervision over (b) all aspects of the control relationship, including the anticompetitive impact of the relationship in the computer market, the hotel market, the insurance market, the credit market, or whatever market happens to be affected by the control transaction. Quite understandably, the Board's response may be to play it safe, in keeping with its own advice to this Court that it cannot effectively function as the ombudsman of the American economy whenever that economy touches air transportation in any way. On the other hand, the Board may feel obliged to heed the Court's yawning interpretation of § 408. This course of action poses the threat that the Board will have extended itself so far beyond its competence and manpower that it is diverted from those central tasks of regulation imposed on it by § 408 of the Act. In either event, I cannot imagine that the Court's new reading of § 408 will contribute to the effective enforcement of the congressional scheme for promoting a sound national system of air transportation.

Returning to the 1964 efforts of Toolco to have the Court resolve the issue of the Board's authority with respect to the antitrust issue, it is elementary, of course, that a denial of a petition for certiorari decides nothing. It is also true that dismissal of a petition as improvidently

granted after full oral argument and briefing, is not a judgment on the merits in any sense. But when parties to litigation reach that stage and the Court fails to respond with a decision on the merits, lawyers read that as a signal that the case should proceed. These parties did so—for nine years and more than 15 million dollars in legal expense—only to be told by the Court now that on the facts there is no legal liability—the very issue that could as well have been decided in 1964 as today. All of the litigation since 1964 has been confined to the massive task of determining damages and it will not do to say that the Court could not resolve the legal issues until damages were ascertained. Precisely the contrary is true.

For these reasons, I respectfully dissent from the Court's judgment. I would hold that actions permitted by the Board under § 408 of the Aeronautics Act are "authorized, approved or required" by the Board's action (and thereby immunized by § 414 from antitrust liability) only to the extent that the antitrust claim falls within the core of the Board's statutory responsibility to regulate air transportation while maintaining, in that market, the maximum degree of competition consistent with the public interest. In view of the Court's disposition, it would not be fruitful for me to express at length my views on the other issues presented to the Court, other than to note that, with modifications not relevant to the overriding issue, I would affirm the judgment of the Court of Appeals. At the very least, I would set the case for reargument so the dispositive issue might be fully explored by the Court.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Nos. 71-827 and 71-830

Supreme Court, U. S.
FILED
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HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,
Petitioners,

—v.—

TRANS WORLD AIRLINES, INC.,
Respondent.

TRANS WORLD AIRLINES, INC.,
Cross-Petitioner,

—v.—

HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

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INDEX

PAGE

A. Pre-emption of the Antitrust Laws 2

B. Antitrust Immunity Beyond the Regulated Field 7

C. The Immunity Conferred Is Inconsistent with the CAB's Expressed Intent 10

D. TWA Should Have the Opportunity to Show That the CAB Was Misled 12

CERTIFICATE 14

APPENDIX A-1

TABLE OF AUTHORITIES

Cases

California v. *FPC*, 369 U.S. 482 (1962) 5

California Motor Transport Co. v. *Trucking Unlimited*, 404 U.S. 508 (1972) 13n

Carnation Co. v. *Pacific Westbound Conf.*, 383 U.S. 213 (1966) 5, 11

Maryland and Virginia Milk Producers Ass'n v. *United States*, 362 U.S. 458 (1960) 7

Pan American World Airways, Inc. v. *United States*, 371 U.S. 296 (1963) 5, 7, 10

Parker v. *Brown*, 317 U.S. 341 (1943) 13n

Silver v. *New York Stock Exchange*, 373 U.S. 341 (1963) 5

Slick Airways, Inc. v. *American Airlines, Inc.*, 107 F.Supp. 199 (D.N.J. 1951), *app. dismissed*, 204 F.2d 230 (3d Cir.), *cert. denied*, 346 U.S. 806 (1953) 13n

PAGE

United States v. *Borden Co.*, 308 U.S. 188 (1939) 5
United States v. *Radio Corporation of America*, 358 U.S. 334 (1959) 6

Walker Process Equipment, Inc. v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965) 2, 12
Woods Exploration & Producing Co. v. *Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) 13n

Statutes

Federal Aviation Act of 1958
(Formerly Civil Aeronautics Act of 1938)

Section 408, 49 U.S.C. § 1378 ..... 3, 4n, 5
Section 409, 49 U.S.C. § 1379 5
Section 412, 49 U.S.C. § 1382 ..... 5, 7
Section 414, 49 U.S.C. § 1384 ..... 4n, 5, 7
Section 415, 49 U.S.C. § 1385 3

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PETITION FOR REHEARING

Findings below, concurred in by every judge who has studied the record, untouched by this Court, establish that TWA was injured by defendants' conduct in an amount exceeding $45 million. The immediate money impact of the Court's decision denying TWA a remedy under the Clayton Act for these injuries is equivalent to an average loss of over $4,000 for each of TWA's more than 35,000 shareholders.

Yet the decision now announced reverses the unanimous courts below on an issue not even directly presented by defendants' latest petition for certiorari and not here briefed or argued: an issue originally considered by the Court in 1965 but not then thought worth acting upon. By substituting a broad *pre-emption* for the narrow antitrust *exemption* which the statute provides, a major change in the balance between antitrust policies and other regulatory standards has been effected—almost, it would seem, by inadvertence, and certainly with no opportunity for TWA to present arguments either of general policy or of special application to the facts of this case on the issue now announced to be dispositive.

The disposition of the case chosen by the majority, moreover, is to direct a summary dismissal without permitting any further proceedings. TWA is thus deprived of even the opportunity to prove (if the default is not to be regarded as establishing this surely pertinent fact) that the CAB orders of which judicial notice has been taken are ineffective to support the affirmative defense which this Court now upholds—ineffective because they were entered in proceedings in which critically important information had been knowingly withheld from the Board. *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965).

We submit that a Court of ultimate review should not reach so startling and unexpected a result without giving TWA opportunity to present the reasons why that result does not do justice in this case. We think a question of due process is presented.

A. Pre-emption of the Antitrust Laws

This case has been decided by applying the doctrine of *pre-emption*—that is, that the grant to the CAB of the

power to authorize an acquisition of control under § 408 of the Federal Aviation Act had the effect of removing the entire subject matter of TWA's complaint from the jurisdiction of the antitrust laws. Mr. Justice Douglas explains the applicable rule of decision as follows:

> "In this context, the authority of the Board to grant the power to 'control' and to investigate and alter the manner in which that 'control' is exercised leads us to conclude that this phase of CAB jurisdiction, like the one in the *Pan American* case, pre-empts the antitrust field." (Slipsheet opinion, p. 21)

The defense which is expressly upheld at p. 3 of the slipsheet opinion is stated by the Court in these words:

> "Another defense of Toolco was that those transactions were under the control and surveillance of the Civil Aeronautics Board and by virtue of the Federal Aviation Act these transactions have immunity from the antitrust laws." (Slipsheet opinion, pp. 2-3)

Section 415, giving broad powers of *inquiry* to the CAB (Slipsheet opinion, p. 19 n. 12), is pointed to as a measure of the extent of the CAB's power to supervise and control and to preclude antitrust enforcement (Slipsheet opinion, p. 25; *infra,* p. 6).

Pre-emption, however, was not a question presented by the petition for certiorari, and it has not been briefed or argued (except incidentally in developing other points) since 1965 when it was the central issue before the Court in No. 443, October 1964 Term. The CAB commented on this fact in its 1972 Amicus Brief:

> "During the first round of appeals in this case, Toolco contended that the court was precluded from

granting any remedy for the conduct described in the TWA complaint because the Board had exclusive jurisdiction over the subject matter. No such contention has been included among the 'questions presented' in Toolco's current petition. Therefore, we assume that Toolco is no longer relying upon a 'supersession' theory and that it is unnecessary to repeat all of the Board's reasons for concluding that this case is not analogous to *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296. It appears to be conceded that the treble damage award in this case is within the jurisdiction of the courts." (at p. 15)[1]

Application of the doctrine of pre-emption to the facts of this case requires a very great departure from well established principles. When antitrust violations have occurred in areas where regulatory agencies have jurisdiction, the Court until this time has considered pre-emption or supersession a rule to be applied out of necessity, only

[1] The "fleeting comments" at oral argument referred to by Mr. Chief Justice Burger (Slipsheet dissenting opinion, p. 5) were addressed to the question of exemption: whether a specific immunity attached under § 414 because the actions complained of were "necessary" to enable defendants to do something approved by a specific § 408 order.

Defendants claimed that exemption was conferred by supposedly specific Board orders covering particular transactions, but the simple fact is that the only specific orders on particular transactions had nothing at all to do with anything TWA complained of with the single arguable exception of the exclusive day-to-day leases of certain Boeings. While the CAB may have mistaken the law, it knew what specific transactions were brought before it, and its comment as to the relationship of the damage items to the specific "modification orders" which it entered is authoritative:

> "Most of the specific items for which damages were awarded to TWA are unrelated to the various modification orders. • • • The delay in ordering Boeing jets, the interference with Convair deliveries, and the diversions of aircraft to other airlines are not remotely connected with the subject matter of any of the modification orders." (1972 Amicus Brief, p. 13)

when there is no other path to accommodation of the antitrust and regulatory regimes. *Silver* v. *New York Stock Exchange* calls this "the guiding principle to reconciliation of the two statutory schemes." 373 U.S. 341, 357 (1963). But where an express exemption from the antitrust laws has been specifically carved out by the statute, the statute itself has always been accepted as the authoritative definition of the boundary line. So this Court said through Mr. Chief Justice Hughes in *United States* v. *Borden Co.*, 308 U.S. 188, 201 (1939). So it said still, and still unanimously, through Mr. Chief Justice Warren in *Carnation Co.* v. *Pacific Westbound Conf.*, 383 U.S. 213, 217-18 (1966). The Court itself has accurately summarized this substantial line of cases in a sentence: "We could not assume that Congress, having granted only a limited exemption from the antitrust laws, nonetheless granted an overall inclusive one." *California* v. *FPC*, 369 U.S. 482, 485 (1962).

The Court's decision in *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963), was not such a case, because it was not concerned with the effect of orders of the CAB which give rise to an exemption defined by statute—that is, orders under §§ 408, 409 and 412. In *Pan American* pre-emption was considered necessary because the subject matter—allocation of routes and territories—was at the heart of the CAB's regulatory role (as aircraft supply plainly is not) and had a kind of coherence which sporadic judicial intervention by injunctive relief would disrupt; no specific exemption was otherwise available to secure the CAB's performance of a role basic in the regulatory scheme. 371 U.S. at 305, 310.

Congress has spoken in favor of a specific and narrow exemption for the acquisition and exercise of control. It is granted in § 414—but only *"insofar as may be necessary"* to carry out the acts authorized by the § 408 order. If not

necessary, no exemption attaches. No more limiting language could have been selected by the legislative draftsmen. If this issue had been explored in argument before the Court, the question of what was "necessary" to carry out the Board's order would have been critical, and would have been reflected in the Court's decision. This point was not argued, and the Court's opinion has defined and applied an immunity plainly not limited to action "necessary" to carry out the order. Indeed, everything relating to a control relationship, "all transactions between parent and subsidiary—as originally conceived or subsequently exercised," has been pre-empted (Slipsheet opinion, p. 25). The transactions complained of, and held sanctioned through pre-emption, were not only between parent and subsidiary but affected others as well.

Thus it is not only the air carrier which is deprived of a remedy. It is all "those who can invoke the sanctions of the antitrust laws" (*ibid.*). The government itself is included in the ban. The baring of the public interest to threats normally protected against by the Sherman and Clayton Acts could not be more complete.

An examination of the factual situations and the actual agency involvement in previous cases before this Court can only reinforce the conclusion that the majority has departed from principles upon which the antitrust laws have previously been accommodated to regulatory schemes. To take one example, in *United States* v. *Radio Corporation of America,* 358 U.S. 334, 350-51 (1959), the Court refused to hold that the FCC's finding, in the exercise of its responsibilities under the statute, that the transaction at issue would serve the "public interest, convenience and necessity" had the effect of pre-empting the antitrust laws. Yet it was *stipulated* in *RCA* that the FCC had before it

and considered all of the facts which were present in the subsequently filed antitrust suit (358 U.S. at 338).[2]

The *Pan American* case (371 U.S. at 340-05 n. 9) left room for the doctrines of the *RCA* case and of *Maryland and Virginia Milk Producers Ass'n* v. *United States,* 362 U.S. 458, 468, 469-70, 472 (1960), but none is left by the present decision, in spite of the repetition in the majority opinion of the words from *Pan American* that "the Federal Aviation Act does not completely displace the antitrust laws" (Slipsheet opinion, p. 23). Indeed, the one "most conspicuous exception" cited by the opinion—a "combination or agreement between two air carriers involving trade restraints"—falls flatly within the provisions of §§ 412 and 414 and is one of the things that the CAB can most clearly exempt from antitrust attack.

We submit that the questions involved are of sufficient importance to justify full consideration, and we would welcome the opportunity to develop the policy considerations more fully. We believe that, upon further analysis of the relationship between pre-emption and statutory exemption, the Court will find the rationale of its decision unsatisfactory.

B. Antitrust Immunity Beyond the Regulated Field

The Court appears to have accepted defendants' characterizations of TWA's complaint—characterizations which

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[2] That the FCC is without an express statutory power to exempt conduct from the antitrust laws does not serve to reconcile the decisions, since the decision herein does not turn upon the statutory exemption expressly provided in the Federal Aviation Act, but upon the broad pre-emption of antitrust jurisdiction which was rejected in *RCA*.

do not give effect to the default as admitting the truth of the complaint's allegations.

The majority opinion says the "crux" of TWA's complaint was "the use by Toolco of its control over TWA to control and dictate the manner and method by which TWA acquired aircraft and the necessary financing thereof" (Slipsheet opinion, p. 2). That view mistakes the events by which TWA's damages were measured for its charges of violation of law. Those charges establish the existence of a broad conspiracy that ultimately caused the damages.

What defendants did to TWA in the equipment and financing fields caused TWA loss (although no damages were awarded as to financing), but the violation of law charged by TWA involved a conspiracy to restrain and attempt to monopolize larger markets, of which TWA was but a part. Toolco's conduct with respect to TWA was an integral part of this broader course of conduct. This decision therefore now stands for the proposition that persons may admit by default, without fear of antitrust liability, that they have conspired to restrain and monopolize and have attempted to monopolize the sale of aircraft to air carriers, provided only that in furtherance of their scheme they have obtained control of an air carrier with CAB approval, whether or not the CAB was informed of their intentions. We do not believe that such a reach to the present decision could have been intended.

Even though surveillance by the CAB plainly did not extend to defendants' operations in the larger market, nor its inquiry reach the purposes which defendants had with respect to that market, the Court has nonetheless viewed TWA's allegations of antitrust violations as confined to defendants' domination of TWA itself. TWA, however, has no doubt of its ability to support the broader

charge if defendants' default had not deprived it of the opportunity to do so.[3]

It is pertinent in considering the relationship of these charges to the losses which TWA suffered that those losses were not the result of TWA's being compelled to purchase too many aircraft, or even the wrong aircraft, from defendants. That was the risk to the public interest foreseen by the CAB, against which its continuing surveillance was directed. What actually developed was the result of defendants' broader goals: their desire to penetrate the market of other carriers. TWA suffered from getting too few aircraft too late, the result of a conspiracy directed towards a broader market which the CAB did not have either authority or facilities to supervise.

In *Pan American* the anticompetitive actions complained of involved nothing beyond the defendants' alleged actions in controlling the route aspirations of the controlled carrier. Here it is alleged and admitted that the anticompetitive actions extended far beyond TWA. If pre-emption or exemption applies to anti-competitive conduct affecting markets of which the controlled carrier is only a part, the scope of the commerce to which the antitrust laws apply has been further and sharply narrowed. The rule is not one that can be confined to the Federal Aviation Act; other industries are subject to similar regulation.

On reconsideration, the Court could consider whether whatever pre-emption there is should extend to the broad trade restraints actually alleged in the complaint and admitted by the default.

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[3] Special Master Herbert Brownell reviews the allegations and emphasizes the existence of evidence to support the charges that defendants were engaging in anticompetitive conduct in a market much broader than the TWA market (Brownell Report, pp. 28-34; A-1966; *see also* the Court of Appeals opinion, 449 F.2d at 67-68, A-2767-70).

C. The Immunity Conferred Is Inconsistent with the CAB's Expressed Intent

To ascribe retroactively to past CAB orders an immunizing effect which the CAB did not know those orders would have and did not intend them to have is unnecessary, and we believe both inappropriate and unjust.

The Board's own position on the extent of its powers and the effect of the orders it entered has been explicit and consistent. The Board has said to this Court: we do not have the power to immunize Toolco's conduct here from the operation of the antitrust laws; we do not have the competence to exercise such a power; we did not intend to immunize such conduct when we entered the orders that are now said to have done so; when we entered the orders we were not told nor did we have knowledge of the anti-competitive purposes and restraints on trade that Toolco has conceded by its default in this case.[4]

The Court's decision in this case informs the Board that its powers were far greater than it knew, and its orders might have a far broader effect than it intended. A supervisory role is defined which the Board had not realized was part of its assignment. If these rulings stand, the Board will attempt in the future, because it must, to carry out these greater duties and use its powers with knowledge of the responsibilities that attach to their use.

But to give the same effect to past orders is to defeat the Board's real intent.[5] The consequences attributed to

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[4] There is annexed in the Appendix a selection of excerpts from and citations to the briefs *amicus* filed on behalf of the CAB on this and on the prior appeal in this case.

[5] In this respect the instant case is very different from *Pan American*. There the Court differed with the Board as to what its powers were, but the case was such that the Board, after that decision, could still exercise its powers to deal with the Grace-Pan

the actions of the Board are irretrievable and disastrous to TWA, yet they are the product of pure inadvertence. Surely the Board's *failure* during the 1950's to take additional action, in the exercise of this power only now revealed to it, does not support an extension of whatever license was granted to specific transactions never formally acted on by the Board at all (Slipsheet opinion, pp. 19-20).

Some passages in the majority's opinion suggest that it believes the Board at the time it acted intended to do more than it now says it did. A full examination of the record of the Board proceedings would clearly demonstrate the contrary. If the Board's present representations are not to be accepted as dispositive, TWA should be entitled—if not here, then before the lower court—to establish the facts. The partial selection of materials by defendants which is all that the Court has had available to it is no substitute for a more detailed review—and judicial notice is not appropriate as to a contested matter of this complexity.

This would appear at the very least an appropriate situation for the application of the principles of primary jurisdiction rather than pre-emption. A referral to the Board would make it possible for the Board to determine the matters the Court says are within its jurisdiction. This course, like that followed by this Court in *Carnation Co.* v. *Pacific Westbound Conf.*, 383 U.S. 213, 224 (1966), would permit a considered judgment by the Board as to whether or not it should approve the actions alleged in the complaint—a determination the Court now says the Board should have made, but which the Board expressly states it did not. Any other course allows a

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American-Panagra situation. That is not true here. Moreover, in *Pan American* no issue was presented as to what the Board had intended by its prior action.

monopolist to retain the fruits of his monopolistic conduct solely as a result of error on the part of the administrative agency, both as to its statutory authority and as to the factual context of the matters brought before it for decision.

D. TWA Should Have the Opportunity to Show That the CAB Was Misled

In any event, dismissal of the complaint is unwarranted if there are facts TWA could prove which would entitle it to relief despite the Court's holding that defendants' CAB defense is valid.

TWA has contended throughout this proceeding that the Board's orders—from which antitrust immunity is held to be derived—were entered in proceedings in which Toolco had knowingly withheld from the Board information of the utmost materiality. The Board itself has told this Court that it did not know that Toolco was trying to establish itself as a supplier of aircraft to air carriers, or that it intended to prevent TWA from dealing with others for aircraft, as part of this larger scheme.

Surely this Court did not mean to hold that where immunity from the antitrust laws is obtained by fraud an antitrust claimant is not entitled to prove that fraud. In *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), the Court held—unanimously—that an antitrust claimant challenging the validity of a patent monopoly was entitled to prove charges of fraud in obtaining the patent, if he could. A patent that had been granted in proceedings in which the patent office had been deceived would not protect the patentee from antitrust charges based on the exercise of the otherwise lawful monopoly. "Fairness requires," the Court said, "that on remand Walker have the opportunity [to prove its claims]." 382 U.S. at 178.

Issuance of a patent is plainly the intentional exercise of statutory power to immunize certain conduct—within the scope of the grant—from the application of the Sherman and Clayton Acts. The *Walker* rule should apply *a fortiori* when reliance is placed on an inferred antitrust immunity which the agency did not realize would occur, and has said it did not intend.[6]

To deprive TWA of all opportunity to prove such fraud as would vitiate that immunity is to deprive it of rights which our judicial system has guaranteed it.

Although it is now clear that this Court's 1965 dismissal of certiorari as improvidently granted did not establish the 1964 Court of Appeals decision on defendants' CAB affirmative defense as the law of this case, the fact of that dismissal coupled with defendants' decision not to tender in their latest petition the issue now held dispositive requires, as a matter of fair and proper judicial administration, that TWA be granted its day in court on that issue.

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[6] As this Court observed last term in *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 513 (1972), after citing *Walker*:

> "There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations. Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process."

In *Woods Exploration & Producing Co.* v. *Aluminum Co. of America*, 438 F.2d 1286, 1295 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972), the Court of Appeals applied the *Walker* rule in refusing to find that rulings of the Texas Railroad Commission pre-empted the antitrust laws (as these rulings otherwise would have under the doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943)), because the rulings were obtained on the basis of false information filed by the defendant producers pursuant to a conspiracy to restrain trade and to monopolize. *See also Slick Airways, Inc.* v. *American Airlines, Inc.*, 107 F.Supp. 199, 213-14 (D.N.J. 1951), *app. dismissed*, 204 F.2d 230 (3d Cir.), *cert. denied*, 346 U.S. 806 (1953).

Alternatively, this Court should remand to the district court for further proceedings, or as appropriate for reference to the CAB, to determine what effect the CAB intended its orders to have and whether those orders were obtained by misrepresentations of defendants.

Respectfully submitted,

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CERTIFICATE

I hereby certify that this Petition for Rehearing is presented in good faith and not for delay.

.....

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APPENDIX

Both when this case was before the Court during its 1964 Term and in the current Term the CAB stated in detail its own understanding of its powers under § 408, what it thought it was doing when it entered orders under that section, and what it did not intend to do, and what the scope of its actual inquiry into the TWA-Toolco relationship was.

As to the CAB's understanding of its powers:

> "Section 408 requires the Board to approve only an 'acquisition of control'; it does not give the Board continuing responsibility for supervision of a controlling person's management of an air carrier.
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> • • •
>
> "Moreover, the Board has no jurisdiction over aircraft dealers or manufacturers as such, and it is not generally empowered to regulate the issuance of a carrier's securities or its capital structure, or to specify the aircraft which a carrier can acquire, the timing of such acquisitions, or any decisions to defer or refrain from aircraft acquisitions. Indeed, the Board is specifically precluded from interfering with a carrier's choice of equipment • • •.
>
> "Finally, the Board's remedial powers do not effectively cover the conduct alleged in the complaint." (1972 Amicus Brief, pp. 16-17; *cf.* the CAB's 1965 Amicus Brief in No. 443, October 1964 Term, pp. 12-13)

As to what the Board thought it was doing when its orders were entered:

> "The Board's [1944 and 1950] orders did confer antitrust immunity, but that immunity • • • did not ex-

tend to the manner in which control was thereafter exercised." (1972 Amicus Brief, p. 10; *cf.* 1965 Amicus Brief, p. 15)

Thus,

"* * * the Board's orders did not permit Toolco to utilize its power as a means of violating the antitrust laws." (1972 Amicus Brief, p. 10; *cf.* 1965 Amicus Brief, p. 15)

Assuming the truth of the allegations of TWA's complaint,

"* * * the specific acts which damaged TWA were not the normal and natural exercise of the control relationship approved by the Board, and consequently they were not given antitrust immunity." (1972 Amicus Brief, p. 11)

As to the subsequent modification orders,

"[t]he modification orders * * * did not purport to sanction anything other than the specific transactions involved." (1972 Amicus Brief, p. 12; *cf.* 1965 Amicus Brief, p. 16)

* * *

"Most of the specific items for which damages were awarded to TWA are unrelated to the various modification orders. * * * The delay in ordering Boeing jets, the interference with Convair deliveries, and the diversions of aircraft to other airlines are not remotely connected with the subject matter of any of the modification orders." (1972 Amicus Brief, p. 13)

As to the scope of the Board's inquiry,

"* * * the TWA charges * * * involve Toolco's use of its control over TWA to prevent TWA from

acquiring aircraft from other suppliers and from obtaining the financing necessary to acquire jets. * * * This restraint upon TWA's activities was, of course, neither submitted to nor approved by the Board, and it was certainly not necessary to carry out any of the Board's orders." (1972 Amicus Brief, pp. 12-13, *cf.* 1965 Amicus Brief, pp. 16-17)

* * *

"The sanctions [of the damage award] relate to subsequent actions, the antitrust aspects of which were never brought to the attention of or considered by the Board." (1972 Amicus Brief, p. 18)

The modification orders were entered:

"* * * upon application. * * * No hearings were held or adversary pleadings filed when such orders were entered." (1972 Amicus Brief, p. 4; *cf.* 1965 Amicus Brief, p. 4)

With respect to the extent of its surveillance, the Board's view is that:

"* * * the Act does not impose any duty on the Board affirmatively to monitor and supervise all aspects of the control relationship." (1972 Amicus Brief, p. 18; *cf.* 1965 Amicus Brief, pp. 11, 13)

Almost at the outset of the Board's involvement with Toolco's control over TWA, it was represented to the Board by Toolco's counsel, through a letter addressed to the Hearing Examiner in the first control proceeding, that "the approval sought by Hughes Tool Company in this case would not constitute a license to permit Hughes Tool

Company or TWA to do whatever they desire in the future * * *" (Doc. 178, Ex. B-7, Letter of January 24, 1944, reproduced in Transcript of Record, Nos. 443 and 501, October Term, 1964, Vol. V, at 610). The Board's contemporary view of what it was doing is set forth with complete clarity in the second control proceeding, in which it said, referring to its earlier control order, that "we did not intend to, and did not, grant a blanket, unlimited, *in futuro* approval of the relationship between Toolco and TWA" (9 C.A.B. 381, 389 (1948); A-3327).

As its two *amicus* briefs show, the Board has never changed its mind on this proposition.